Federal Court of Appeal  Cour d'appel fédérale

Date: 20131120

Docket: A-530-12

Citation: 2013 FCA 270

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

BETWEEN:

CANADIAN NATIONAL RAILWAY COMPANY

Appellant

and

CANADIAN TRANSPORTATION AGENCY AND WILKINSON STEEL AND METALS INC.

Respondents

Heard at Ottawa, Ontario, on November 13, 2013.

Judgment delivered at Ottawa, Ontario, on November 20, 2013.

REASONS FOR JUDGMENT BY: SHARLOW J.A.

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

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REASONS FOR JUDGMENT

SHARLOW J.A.

[1] Canadian National Railway Company (CN) is appealing with leave the decision of the Canadian Transportation Agency dated July 17, 2012 (Decision No. 285-R-2012). In that decision, the Agency granted a remedy to the respondent Wilkinson Steel and Metals Inc. for what the Agency found to be CN's failure to fulfil its statutory service obligations to Wilkinson. For the following reasons, I would allow the appeal and refer this matter back to the Agency for reconsideration.

Preliminary matter

[2] Wilkinson was properly named as a respondent in this appeal and filed a notice of appearance and a memorandum of fact and law. However, shortly before the hearing of the appeal, Wilkinson withdrew from participation in the appeal, leaving no one to defend the merits of the Agency's decision. The only participating respondent is the Agency itself, which filed a memorandum of fact and law addressing its statutory jurisdiction and the standard of review.

Standard of review

[3] Generally, this Court reviews the Agency's decisions, including its interpretation of the governing statute, the *Canada Transportation Act*, S.C. 1996, c. 10, on the standard of reasonableness (*Council of Canadians with Disabilities* v. *VIA Rail Canada Inc.*, 2007 SCC 15, [2007] 1 S.C.R. 650).

[4] In applying the reasonableness standard of review, the Court is guided by paragraph 47 of *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, which reads as follows:

> A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[5] CN argues that the standard of review in this case should be correctness because CN is challenging the Agency's decision with respect to "jurisdiction limiting issues". I do not accept that

characterization of the issues in this appeal. In substance, CN is challenging the Agency's interpretation of the statutory provisions defining its mandate.

Factual background

[6] There is an industrial park in Saskatoon serviced by a CN railway line running north-south. That railway line is connected to the lots within the industrial park by a series of short railway lines running east-west through the park. One of those short lines, which the parties have referred to as a "spur", is the subject of this case. It was built by CN in 1960 pursuant to an agreement between CN and the City of Saskatoon, on land then owned by the City.

[7] Pursuant to the 1960 agreement, the City granted CN a right of way over the strip of land on which the spur was located for a term of 20 years, with the right of renewal for a further period of 20 years "if the then circumstances and conditions of use of the Industrial Area for industrial purposes so justify". The agreement between CN and the City was renewed in 1980. In 2000, it became an agreement that would continue from year to year until terminated by either party on six months notice.

[8] In 1961, the City sold to Federated Co-Operatives Limited some property within the industrial park, including lots 25, 26, 27 and 28 which are located side by side and adjacent to the spur right of way, on its south side. At that time Federated also owned 4 lots (lots 1, 2, 3 and 4) located side by side and adjacent to the spur right of way on its north side, directly across from lots 25, 26, 27 and 28.

[9] It is not clear whether Federated owned lots 1, 2, 3 and 4 before 1961 or whether it acquired them in 1961 with lots 25, 26, 27 and 28, but nothing turns on that. What is important is that in the 1961 transaction, the land the City sold to Federated included 600 feet of the east-west strip of land between lots 25, 26, 27 and 28 to the south and lots 1, 2, 3 and 4 to the north. That is part of the land over which the City had granted CN a right of way in the 1960 agreement. After 1961, therefore, 600 feet of the spur was located on land owned by Federated, not the City.

[10] I digress at this point to discuss a matter of nomenclature. The parties and the Agency sometimes refer to the entire east-west railway line in issue in this case as a "spur" (which simply means a short rail line branching from a more important rail line). However, CN sometimes refers to the 600 feet of railway line on the property sold to Federated as a "private siding" of Federated. In these reasons I refer to that 600 feet of railway line as a "spur", to differentiate it from the Wilkinson private siding described later in these reasons.

[11] In 1965, Wilkinson acquired lots 22, 23 and 24 of the industrial park. Those lots are located side by side, adjacent to the spur right of way along its southern side. The eastern boundary of Federated's lot 25 is adjacent to the western boundary of Wilkinson's lot 24. Wilkinson has operated a manufacturing facility on its property in the industrial park since 1965.

[12] On April 27, 1965, Wilkinson entered into a private siding agreement under which CN agreed to provide rail service to Wilkinson on a private siding constructed on Wilkinson's property and at Wilkinson's expense, which would be connected to the spur. From that date and for a period

of approximately 45 years, CN provided Wilkinson with inbound freight service via the spur and the Wilkinson private siding.

[13] The initial location of the Wilkinson private siding was the result of negotiations (or, as the Agency characterized it, a collaboration) between CN and Wilkinson. Because of the orientation of the Wilkinson private siding as finally constructed, it could be accessed only by a train moving from west to east along the spur. It was necessary for CN to move a train along the spur onto Federated property so that the train could enter the Wilkinson private siding from the west.

[14] In 2001, CN and Wilkinson entered into an agreement under which the Wilkinson private siding was relocated at Wilkinson's expense. However, the new location of the Wilkinson private siding still required CN to access the portion of the spur that was west of Wilkinson's property.

[15] In 2010, Federated informed CN that the portion of the spur located on its property had to be removed for the purpose of an expansion of its warehouse. It is undisputed that this made it impossible for CN to continue to service Wilkinson as it had been doing.

[16] On June 24, 2011, CN informed Wilkinson that Federated would be removing the portion of the spur that was on its property. CN suggested at that time that Wilkinson could either build a new private siding from the east (which could include a costly crossing protection and redesign of part of Wilkinson's plant), or transship its product from another location. CN later proposed two further options. One was that Wilkinson could unload freight from the spur directly, as it was the only user.

Alternatively, Wilkinson could construct a new private siding connected to the spur in a different location east of Wilkinson's property.

[17] None of the options proposed by CN was acceptable to Wilkinson because they all involved significant costs to be incurred by Wilkinson. It was Wilkinson's position that, because CN had the legal obligation to provide Wilkinson with rail service, CN alone should bear the cost of the solution to the problem caused by the actions of Federated.

[18] No agreement was reached by CN and Wilkinson to resolve the dispute. That led Wilkinson to submit a complaint to the Agency that CN had discontinued its rail service to Wilkinson contrary to its statutory service obligations.

Statutory framework and relevant jurisprudence

[19] Sections 113 to 115 of the *Canada Transportation Act* describe a railway company's service obligations. They read in relevant part as follows.

113. (1) A railway company shall, according to its powers, in respect of a railway owned or operated by it,	**113.** (1) Chaque compagnie de chemin de fer, dans le cadre de ses attributions, relativement au chemin de fer qui lui appartient ou qu'elle exploite :
(*a*) furnish, at the point of origin, at the point of junction of the railway with another railway, and at all points of stopping established for that purpose, adequate and suitable accommodation for the receiving and loading of all traffic offered for carriage on the railway;	*a*) fournit, au point d'origine de son chemin de fer et au point de raccordement avec d'autres, et à tous les points d'arrêt établis à cette fin, des installations convenables pour la réception et le chargement des marchandises à transporter par chemin de fer;
(*b*) furnish adequate and suitable accommodation for the carriage,	*b*) fournit les installations convenables pour le transport, le déchargement et la

unloading and delivering of the traffic;

(*c*) without delay, and with due care and diligence, receive, carry and deliver the traffic;

(*d*) furnish and use all proper appliances, accommodation and means necessary for receiving, loading, carrying, unloading and delivering the traffic; and

(*e*) furnish any other service incidental to transportation that is customary or usual in connection with the business of a railway company.

(2) Traffic must be taken, carried to and from, and delivered at the points referred to in paragraph (1)(*a*) on the payment of the lawfully payable rate.

(3) Where a shipper provides rolling stock for the carriage by the railway company of the shipper's traffic, the company shall, at the request of the shipper, establish specific reasonable compensation to the shipper in a tariff for the provision of the rolling stock.

(4) 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.

…

115. For the purposes of subsection 113(1) or 114(1), adequate and suitable accommodation includes reasonable facilities

(*a*) for the junction of private sidings or private spurs with a railway owned or operated by a company referred to in

livraison des marchandises;

c) reçoit, transporte et livre ces marchandises sans délai et avec le soin et la diligence voulus;

d) fournit et utilise tous les appareils, toutes les installations et tous les moyens nécessaires à la réception, au chargement, au transport, au déchargement et à la livraison de ces marchandises;

e) fournit les autres services normalement liés à l'exploitation d'un service de transport par une compagnie de chemin de fer.

(2) Les marchandises sont reçues, transportées et livrées aux points visés à l'alinéa (1)*a*) sur paiement du prix licitement exigible pour ces services.

(3) Dans les cas où l'expéditeur fournit du matériel roulant pour le transport des marchandises par la compagnie, celle-ci prévoit dans un tarif, sur demande de l'expéditeur, une compensation spécifique raisonnable en faveur de celui-ci pour la fourniture de ce matériel.

(4) 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.

[…]

115. Pour l'application des paragraphes 113(1) ou 114(1), des installations convenables comprennent des installations :

a) pour le raccordement de voies latérales ou d'épis privés avec un chemin de fer possédé ou exploité par

that subsection; and	une compagnie visée à ces paragraphes;
(*b*) for receiving, carrying and delivering traffic on and from private sidings or private spurs and placing cars and moving them on and from those private sidings or private spurs.	*b*) pour la réception, le transport et la livraison de marchandises sur des voies latérales ou épis privés, ou en provenance de ceux-ci, ainsi que le placement de wagons et leur traction dans un sens ou dans un autre sur ces voies ou épis.

[20] The statutory authority of the Agency to deal with service complaints is found in section 116 of the Act, which reads in relevant part as follows:

116. (1) On receipt of a complaint made by any person that a railway company is not fulfilling any of its service obligations, the Agency shall	**116.** (1) Sur réception d'une plainte selon laquelle une compagnie de chemin de fer ne s'acquitte pas de ses obligations prévues par les articles 113 ou 114, l'Office mène, aussi rapidement que possible, l'enquête qu'il estime indiquée et décide, dans les cent vingt jours suivant la réception de la plainte, si la compagnie s'acquitte de ses obligations.
(*a*) conduct, as expeditiously as possible, an investigation of the complaint that, in its opinion, is warranted; and	
(*b*) within one hundred and twenty days after receipt of the complaint, determine whether the company is fulfilling that obligation.	
…	[…]
(4) If the Agency determines that a company is not fulfilling any of its service obligations, the Agency may	(4) L'Office, ayant décidé qu'une compagnie ne s'acquitte pas de ses obligations prévues par les articles 113 ou 114, peut :
(*a*) order that	*a*) ordonner la prise de l'une ou l'autre des mesures suivantes :
(i) specific works be constructed or carried out,	(i) la construction ou l'exécution d'ouvrages spécifiques,
(ii) property be acquired,	(ii) l'acquisition de biens,

(iii) cars, motive power or other equipment be allotted, distributed, used or moved as specified by the Agency, or	(iii) l'attribution, la distribution, l'usage ou le déplacement de wagons, de moteurs ou d'autre matériel selon ses instructions,
(iv) any specified steps, systems or methods be taken or followed by the company;	(iv) la prise de mesures ou l'application de systèmes ou de méthodes par la compagnie;
(*b*) specify in the order the maximum charges that may be made by the company in respect of the matter so ordered;	*b*) préciser le prix maximal que la compagnie peut exiger pour mettre en oeuvre les mesures qu'il impose;
(*c*) order the company to fulfil that obligation in any manner and within any time or during any period that the Agency deems expedient, having regard to all proper interests, and specify the particulars of the obligation to be fulfilled….	*c*) ordonner à la compagnie de remplir ses obligations selon les modalités de forme et de temps qu'il estime indiquées, eu égard aux intérêts légitimes, et préciser les détails de l'obligation à respecter […].

[21] The leading case on the service obligations of a railway company is *Patchett & Sons Ltd. v. Pacific Great Eastern Railway Co.*, [1959] S.C.R. 271. That case is authority for the general proposition that a railway company's service obligations are no more than what is reasonable in the circumstances, and that the customer has a correlative obligation that must be taken into account. The key passages from *Patchett* are reproduced below (my emphasis):

> Apart from statute, undertaking a public carrier service as an economic enterprise by a private agency is done on the assumption that, with no fault on the agency's part, normal means will be available to the performance of its duty. That duty is permeated with reasonableness in all aspects of what is undertaken except the special responsibility, of historical origin, as an insurer of goods; and it is that duty which furnishes the background for the general language of the statute. The qualification of reasonableness is exhibited in one aspect of the matter of the present complaint, the furnishing of facilities: a railway, for example, is not bound to furnish cars at all times sufficient to meet all demands; its financial necessities are of the first order of concern and play an essential part in its operation, bound up, as they

> are, with its obligation to give transportation for reasonable charges. Individuals have placed their capital at the risk of the operations; they cannot be compelled to bankrupt themselves by doing more than what they have embraced within their public profession, a reasonable service. Saving any express or special statutory obligation, that characteristic extends to the carrier's entire activity. Under that scope of duty a carrier subject to the Act is placed. (Page 274-5)
>
> […]
>
> To the duty of the railway to furnish services there is a correlative obligation on the customer to furnish reasonable means of access to his premises. (Page 277)

[22] The issue in *Patchett* was whether a railway company was in breach of its obligations to a customer whose access to the main railway line was by means of a private siding on the customer's property. A union picket line had been placed on the customer's property near the switch on the main railway line that was used to give the train access to the private siding. The pickets were not on the property of the railway company. The picket line was illegal because it involved a labour dispute to which the customer was not a party. Nevertheless, while the picket line was in place, the railway company's employees refused to pull cars onto the private siding, or accept or sign bills of lading. The Court held that in the circumstances, only the customer was in a position to take legal action to have the pickets removed because they were trespassing on the customer's property. Having failed to take that action, the customer failed in its obligation to furnish a reasonable means of access to its property, and consequently the railway company was held not to have breached its service obligation to the customer.

[23] Before the Agency, CN primarily relied upon *Decision No. 668-R-1999 (December 10, 1999 – R.D. Koeneman Lumber)*. In that case, the Agency concluded that a railway company has no statutory obligation to provide service to a property to which it had no lawful access. The property

in issue in that case was not connected directly to a railway line, and the only possible access was through property owned by a third party over which the railway company had no right of way.

The decision under appeal

[24] CN's essential position before the Agency was that Wilkinson's complaint should have been dismissed for the same reason that the complaint in *Koeneman Lumber* (cited above) was dismissed. CN argued that once Federated removed the portion of the spur line that was on its property, it was impossible for CN to continue to access Wilkinson's private siding because the only means of access was through property belonging to a third party.

[25] The Agency distinguished *Koeneman Lumber* on the basis that in this case, CN was best placed to avoid the impossibility, because it could have disclosed to Wilkinson, in 1965 or in 2001, that CN's access to the spur line west of Wilkinson's property could be lost because of the lawful acts of Federated.

[26] The Agency found the complaint of Wilkinson to be well founded. Its analysis appears in paragraphs 40 to 44 of its reasons, which read as follows:

> [40] In the operation of a railway company, there is information related to the management, handling, and movement of traffic that is not shared with related parties due to the commercial or irrelevant nature of the information; this is well within normal business practices. In this case, however, the Agency finds that the information related to the sale of the right of way from the City to Federated and CN's requirement to access Federated's private siding to provide rail service to Wilkinson, which was not shared with Wilkinson, is directly material to the operability of Wilkinson's private siding and its ability to receive rail shipments.
>
> [41] According to *Patchett*, the railway company has a duty to provide service, but that duty is not absolute, it is tempered with the concept of reasonableness and should take into consideration the circumstances. The customer also has a duty to

provide reasonable means to access its premises. However, Wilkinson's duty is not an issue; the Agency is of the opinion that Wilkinson met its duty by constructing its private siding such that it connects with CN's track. In this case, CN's ability to provide Wilkinson with service is affected by the removal of Federated's private siding. Wilkinson, however, could not ensure the continuity of access to its facilities given its dependence on CN's access to Federated's private siding. It is only with this information that Wilkinson could have reasonably resolved or avoided the current situation.

[42] The Agency is of the opinion that the design, approval and construction of Wilkinson's private siding and switch in 1965 and the relocation of a section of the private siding in 2001 were done collaboratively between Wilkinson and CN. Therefore, CN had an opportunity on both of these occasions to communicate the information related to Wilkinson. On both of those occasions, Wilkinson could have used the information to locate its private siding so that CN would not need to access a third party's property in order to provide Wilkinson with rail service. Wilkinson assumed the cost of the construction in 2001 and CN sold it the required materials, replacing the previous Agreement in which CN had leased the siding materials for an annual fee.

[43] As in *Patchett*, the actions of a third party affect the railway company's ability to provide service. The SCC found that because it was in Patchett's power to remove the trespassers (and not the responsibility of the railway company), the railway company did not breach its level of service obligations. In the current case, however, it is CN that had the power to ameliorate the situation. While it is not reasonable to hold CN accountable for Federated's decision to remove its siding, it is reasonable for CN to have shared the information with Wilkinson in 1965 and 2001 when they worked collaboratively to construct Wilkinson's private siding.

[44] The Agency finds that the fact that CN is now unable to provide rail service to Wilkinson at the junction of its track with Wilkinson's private siding, as it has done for 46 years, constitutes a breach of its level of service obligations. While CN's inability to serve Wilkinson at the junction of CN's track and Wilkinson's private siding results from the actions of a third party, Wilkinson may have been better able to anticipate and plan for Federated's decision to remove its siding had CN informed Wilkinson of the transfer of ownership from the City to Federated. Wilkinson and CN could have worked to better identify solutions that could have prevented the interruption of the rail service, through, for example, a reconfiguration of its private siding.

[27] The Agency ordered the following remedy:

- For a period not exceeding two years from the date of this Decision, CN shall authorize Wilkinson to use the transloading facilities located in Saskatoon and CN shall pay any incremental costs associated with the transloading.
- During this two-year period, Wilkinson may choose to relocate its private siding such that CN can provide a junction from Wilkinson's private siding to CN's track.
- Should Wilkinson choose this option, the Agency, pursuant to paragraph 28(1)(*b*) of the CTA, orders CN to provide adequate and suitable accommodation for the receiving, loading, carrying, unloading and delivery of traffic at Wilkinson's Saskatoon facility.

Discussion

(1) Nature of the complaint

[28] CN argues that Wilkinson's complaint is a private dispute engaging only the laws of contract or tort, and therefore it is a matter of property and civil rights within provincial jurisdiction, and outside the jurisdiction of the Agency. In my view, this ground of appeal essentially is a challenge to the Agency's interpretation of the subject matter of Wilkinson's complaint.

[29] It is for the Agency to determine whether a complaint is about service obligations or something else. In this case, the Agency understood Wilkinson's complaint as relating to CN's service obligations. In my view it was reasonably open to the Agency to view the complaint as it did. Even if Wilkinson has a private cause of action against CN under the applicable provincial law, it may also have a service complaint that warrants the attention of the Agency.

(2) Impossible access

[30] CN argues that a railway company's only statutory service obligation with respect to private sidings is found in section 115 (quoted above). According to CN, a railway company's statutory

obligation with respect to private sidings is limited to providing reasonable facilities for connecting a private siding to the railway company's own line (paragraph 115(*a*)), and for receiving, carrying and delivering traffic on and from the private siding, and placing cars and moving them on and from the private siding (paragraph 115(*b*)). It is axiomatic, according to CN, that if a private siding is located in a place that makes access by the railway company impossible, the railway company cannot be held to be in breach of its service obligations, and the Wilkinson complaint should have been dismissed for that reason alone.

[31] Section 115 says that "adequate and suitable accommodation" with respect to private sidings includes the provision of the reasonable facilities as described. The use of the word "includes" in a statute immediately before a list generally indicates that the list is not intended to be exhaustive. The decision of the Agency, while not explicit on this point, is consistent with an interpretation of section 115 that recognizes that a railway company's service obligations in relation to private sidings is not necessarily limited to what is described in paragraphs 115(*a*) and (*b*). In my view, the Agency's implicit interpretation of section 115 is reasonable.

(3) Information about CN's access to Federated property

[32] It must have been apparent to both CN and Wilkinson in 1965 when the Wilkinson private siding was built, and in 2001 when it was moved, that CN's access to the Wilkinson private siding depended critically on CN having and maintaining a legal right to use the portion of the spur that was west of Wilkinson's property. There can be no doubt of that, given the evidence in the record.

[33] It is equally obvious that any reasonable railway company faced with a request from a customer, in this case Wilkinson, for service via a private siding would inform itself about its legal right to access a spur on property it does not own. The Agency found that this information was "directly material to the operability of Wilkinson's private siding and its ability to receive rail shipments". CN does not dispute that finding.

[34] The Agency went on to conclude that CN breached its statutory service obligation by failing to inform Wilkinson in 1965 and 2001 that CN's access to the portion of the spur located on Federated's property could be lost if, as in fact happened, Federated decided to remove the track located on its property.

[35] In my view, once the Agency found as a fact that the access problem was caused by the unfortunate location of the Wilkinson private siding, which in turn was caused by a lack of information in 1965 and 2001, the Agency should have considered whether Wilkinson ought reasonably to have informed itself in 1965 or 2001 as to the legal basis of CN's access to the spur west of the Wilkinson property. The answer to that question is critical to the correct application of *Patchett* which, as explained above, has two aspects, the second being the correlative obligation of the customer of a railway company to provide reasonable access to its private siding. In my view, the failure of the Agency to consider that second aspect of *Patchett* was an error of law.

[36] Because the Agency did not consider the second *Patchett* question at all, it did not consider whether the record is sufficient to determine whether Wilkinson fulfilled that duty, or could reasonably have done so at the relevant times given the information then available to it, either from

CN or from publicly available records. I am not inclined to attempt to answer those questions in the absence of the considered opinion of the Agency.

[37] I note as well that, if the Agency had considered the second *Patchett* question in light of the record before it, it would have found a paucity of evidence to inform the answer. The evidentiary gaps fall into at least five categories:

(a) There is no evidence as to whether the 1960 agreement between CN and the City, or any of its renewals, were treated by CN and the City as confidential when they were entered into, or at any subsequent time. Nor is there evidence as to whether, in 1960, the existence of the right of way for the spur was or could have been registered against title to land within the industrial park, or whether it could have otherwise been made known to the public. For that reason, it is not possible to determine from the record whether a third party, such as Wilkinson, could have discovered that information in 1965 by any means except asking CN or the City to produce it.

(b) It is reasonable to infer that both parties must have known or had the means of knowing whether Wilkinson could, by searching publicly available records, have discovered the existence and terms of the right of way granted to CN in 1960, but neither party presented evidence on that point.

(c) There is no evidence as to whether CN informed Wilkinson in 1965 or in 2001 as to the terms of the 1960 right of way, and if not, why not. On the other hand, there is no

evidence as to whether Wilkinson asked CN for that information in 1965 or in 2001, and if not, why not.

(d) There is no evidence as to whether any contractual arrangements were made between CN and Federated, or would have been required, to give CN the legal right after 1961 and again after 2001 to continue to use the portion of the spur that was located on the property of Federated. In fact, CN did continue to use that portion of the spur until 2010, but it is not clear whether that was because it had the legal right to do so, because Federated consented, or because Federated acquiesced. CN adduced no evidence as to why it was able to access the spur until 2010. On the other hand, Wilkinson also should have known of its interest in understanding CN's legal right in 1965 and 2001 to access that portion of the spur, but there is no evidence as to whether Wilkinson ever asked CN or Federated to provide that information, and if not, why not.

(e) CN argued that Wilkinson should have known that the spur was located on Federated's property because there was a locked gate across the spur at the eastern border of Federated's property. However, there is no evidence as to when the gate was built, and so its existence is not capable of supporting an inference as to what Wilkinson should have known in 1965 or 2001.

(4) Remedy

[38] CN also argues that the remedy granted by CN exceeds its statutory jurisdiction because it is not, in CN's words, "a railway solution". CN's position is that even if CN was in breach of its

service obligations by failing to provide service to Wilkinson, it is beyond the statutory authority of the Agency to order a remedy that involves CN paying any costs associated with the transportation of freight by truck, even for a short distance and for a short period of time, because the regulation of the trucking and transshipment industries are outside the statutory authority of the Agency.

[39] I observe that the Agency's remedial powers are broad and highly discretionary. They are described in subsection 116(4) (quoted above). Paragraph 116(4)(*c*) in particular is worth noting. It reads as follows (my emphasis):

116. (4) If the Agency determines that a company is not fulfilling any of its service obligations, the Agency may	**116.** (4) L'Office, ayant décidé qu'une compagnie ne s'acquitte pas de ses obligations prévues par les articles 113 ou 114, peut :
…	[…]
(*c*) order the company to fulfil that obligation in any manner and within any time or during any period that the Agency deems expedient, having regard to all proper interests, and specify the particulars of the obligation to be fulfilled….	*c*) ordonner à la compagnie de remplir ses obligations selon les modalités de forme et de temps qu'il estime indiquées, eu égard aux intérêts légitimes, et préciser les détails de l'obligation à respecter […].

[40] I have significant doubt that the Agency, in ordering the remedy it did, was regulating the trucking or transshipment industries, or purporting to do so. However, given my conclusions on the other grounds of appeal, I do not consider it necessary to reach a conclusion on this point. In any event, I would hesitate to do so without the benefit of the Agency's considered opinion after receiving legal submissions from the parties as to the scope of paragraph 116(4)(*c*).

Conclusion

[41] CN has submitted that the Court should direct the Agency to dismiss the Wilkinson complaint. In my view such a direction would not be appropriate in this case. As stated above, it is for the Agency and not this Court to determine whether the record as it now stands is sufficient to determine whether Wilkinson should bear some responsibility for its lack of knowledge. It is also for the Agency to determine whether the parties should be permitted to provide additional evidence, if they wish to do so.

[42] CN has also asked for its costs of this appeal. Although the successful party in an appeal is usually entitled to its costs, in this case I would not make such an award in CN's favour. This matter remains unresolved, in large part because of the paucity of evidence. That is due at least in part to the litigation strategy adopted by CN.

[43] For these reasons, I would allow the appeal, set aside the decision of the Agency, and refer this matter back to the Agency for reconsideration in accordance with these reasons.

"K. Sharlow"

J.A.

"I agree
Wyman W. Webb J.A."

"I agree
D. G. Near J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-530-12

(APPEAL FROM DECISION NO. 285-R-2012 OF THE CANADIAN TRANSPORTATION AGENCY DATED JULY 17, 2012 (FILE NUMBER T7375-3/11-2)

DOCKET:	A-530-12
STYLE OF CAUSE:	CANADIAN NATIONAL RAILWAY COMPANY v. CANADIAN TRANSPORTATION AGENCY AND WILKINSON STEEL AND METALS INC.
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	NOVEMBER 13, 2013
REASONS FOR JUDGMENT BY:	SHARLOW J.A.
CONCURRED IN BY:	(WEBB, NEAR JJ.A.)
DATED:	NOVEMBER 20, 2013

APPEARANCES:

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JOHN DODSWORTH	FOR THE RESPONDENT, CANADIAN TRANSPORTATION AGENCY
N/A	FOR THE RESPONDENT, WILKINSON STEEL AND METALS INC.

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