Federal Court of Appeal  Cour d'appel fédérale

Date: 20150102

Docket: A-310-13

Citation: 2015 FCA 1

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

BETWEEN:

CANADIAN PACIFIC RAILWAY COMPANY

Appellant

and

CANADIAN TRANSPORTATION AGENCY
AND PARRISH & HEIMBECKER, LIMITED

Respondents

Heard at Ottawa, Ontario, on December 11, 2014.

Judgment delivered at Ottawa, Ontario, on January 2, 2015.

REASONS FOR JUDGMENT BY: PELLETIER J.A.

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

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REASONS FOR JUDGMENT

PELLETIER J.A.

I. Introduction

[1] Canadian Pacific Railway Company (CP) and Parrish & Heimbecker (P&H) were unable to agree on a price for the transportation of P&H's grain cars from the latter's terminal at Milk River, Alberta to the Burlington Northern and Santa Fe Railway (BNSF) at the Canada-United States (US) border at Coutts, Alberta. In light of this impasse, P&H applied to the Canadian

Transportation Agency (the Agency) for an interswitching order which, if granted, would require CP to haul P&H's cars from Milk River to Coutts for the statutory rate of $315 per car instead of CP's commercial rate of $1,373 per car, a substantial difference.

[2] The Agency considered the matter and, in Decision No. 165-R-2013 (the Decision), made the interswitching order. CP was given leave to appeal the Agency's decision to this Court pursuant to section 41 of the *Canada Transportation Act*, S.C. 1996, c.10 (the Act), which limits appeals to questions of law and jurisdiction.

[3] CP argued that the Agency erred in making an interswitching order because one of the conditions for the making of such an order, the presence of an interchange, was not satisfied. CP argued that there was no interchange at Coutts, Alberta because BNSF did not have a line of railway there which connected with CP's railway in Canada so as to be subject to the Agency's jurisdiction.

[4] For the reasons which follow, I would dismiss the appeal with costs to P&H.

II. The background

[5] P&H has a terminal at Milk River, Alberta, from which it exports grains to the US. Its terminal is served by a siding which connects (at mileage 12.61) to CP's Montana Subdivision. A subdivision, in this context, simply refers to a portion of a rail line. For example, the Montana Subdivision runs north from the US border to a point southeast of Lethbridge, Alberta where it connects with CP's Taber Subdivision (Decision at paragraph 5).

[6] CP's Montana Subdivision connects with BNSF's track at the US border. The nature of that connection is in issue in these proceedings.

[7] Each railway company has storage tracks on its side of the border. CP operates three storage tracks (the Coutts Yard), which connect with the Montana subdivision approximately 350 yards from the border . BNSF's storage tracks are known as the Sweet Grass Yard.

[8] CP and BNSF have exchanged traffic at this location for many years. In 2012, they exchanged 90,945 cars. The mechanics of this transfer of traffic were described by the Agency as follows:

> -Northbound traffic destined for Canada is parked in the Sweet Grass Yard for pick up by CP. CP enters into the United States, hooks onto the northbound rail cars and brings them across the international boundary into the Coutts Yard for delivery.
>
> -Southbound traffic destined for the United States is parked on a CP track in the Coutts Yard for pick up by BNSF. BNSF enters into Canada, hooks onto the southbound rail cars and brings them across the international boundary into the Sweet Grass Yard for delivery.
>
> (Decision at paragraph 9).

[9] The conduct of business between CP and BNSF at this location has been governed by agreement since 1928. The original agreement was revised in 2005 and is now known as the Interchange Agreement, the material portions of which provide as follows:

> [BNSF has] the right to use, for purposes contemplated within this Agreement, subject to CPR's safety and operating rules, regulations and supervision the CPR Lead tracks identified between points "A" and "C" on Exhibit #1 [...] In addition to the CPR Lead, CPR grants to BNSF the right to place and pull Interchange Cars at locations designated from time to time by local CPR operating officers at CPR's Coutts Yard, collectively referred to as CPR owned trackage.

> …
>
> The parties when conducting contemplated interchange shall operate over trackage owned by CPR (CPR Lead) between BNSF/CPR connection at the international border and the CPR connection with their yard located in Coutts, Alberta [...]
>
> CPR grants to BNSF the right to use, for purposes contemplated within this Agreement, subject to CPR's safety and operating rules, regulations and supervision the CPR Lead tracks [...] In addition to the CPR Lead, CPR grants to BNSF the right to place and pull Interchange Cars at locations designated from time to time by local CPR operating officers at CPR's Coutts Yard, collectively referred to as CPR owned trackage.
>
> (Decision at paragraphs 13-14).

[10] In an earlier decision, Decision No. 35-R-2009, the Agency explained that interswitching of rail traffic between railway companies has existed in Canada since the early 1900s. Interswitching was introduced to limit the proliferation of railway lines in urban areas serving manufacturing-based industries where each railway constructed its own lines to its own customer's door. These customers then became captives of that railway, which created an opportunity for monopolistic service and rate situations.

[11] Parliament introduced a number of measures to deal with these issues, including interswitching (s. 127 of the Act), competitive line rates (s. 129) and orders granting running rights (s. 138). All of these measures were intended to provide shippers with access to competitive alternatives.

[12] Interswitching is defined at section 111 of the Act:

"interswitch" means to transfer traffic from the lines of one railway company to the lines of another railway	« interconnexion » Le transfert du trafic des lignes d'une compagnie de chemin de fer à celles d'une autre

company in accordance with regulations made under section 128;	compagnie de chemin de fer conformément aux règlements d'application de l'article 128.

[13] Section 128 authorizes the Agency to make regulations with respect to interswitching.

[14] The Agency's power to make interswitching orders is found in section 127 of the Act:

127. (1) If a railway line of one railway company connects with a railway line of another railway company, an application for an interswitching order may be made to the Agency by either company, by a municipal government or by any other interested person.	127. (1) Si une ligne d'une compagnie de chemin de fer est raccordée à la ligne d'une autre compagnie de chemin de fer, l'une ou l'autre de ces compagnies, une administration municipale ou tout intéressé peut demander à l'Office d'ordonner l'interconnexion.
(2) The Agency may order the railway companies to provide reasonable facilities for the convenient interswitching of traffic in both directions at an interchange between the lines of either railway and those of other railway companies connecting with them.	(2) L'Office peut ordonner aux compagnies de fournir les installations convenables pour permettre l'interconnexion, d'une manière commode et dans les deux directions, à un lieu de correspondance, du trafic, entre les lignes de l'un ou l'autre chemin de fer et celles des autres compagnies de chemins de fer qui y sont raccordées.
(3) If the point of origin or destination of a continuous movement of traffic is within a radius of 30 km, or a prescribed greater distance, of an interchange, a railway company shall not transfer the traffic at the interchange except in accordance with the regulations.	(3) Si le point d'origine ou de destination d'un transport continu est situé dans un rayon de 30 kilomètres d'un lieu de correspondance, ou à la distance supérieure prévue par règlement, le transfert de trafic par une compagnie de chemin de fer à ce lieu de correspondance est subordonné au respect des règlements.

[15] As set out in subsections 127(2) and (3), the existence of an interchange is an important factor in the interswitching scheme. An interchange is defined at section 111 of the Act:

"interchange" means a place where the line of one railway company connects with the line of another railway company and where loaded or empty cars may be stored until delivered or received by the other railway company;	« lieu de correspondance » Lieu où la ligne d'une compagnie de chemin de fer est raccordée avec celle d'une autre compagnie de chemin de fer et où des wagons chargés ou vides peuvent être garés jusqu'à livraison ou réception par cette autre compagnie.

[16] To summarize, interswitching involves the transfer of traffic from one line of railway to another which requires that there be two lines of railway which connect with the each other. In addition, that connection must include an interchange, that is a place where the cars of one railway company can be stored until they are picked up by the other railway company. Finally, if the point of origin (or destination) of a continuous movement of traffic is within the prescribed distance from an interchange, a railway shall not exchange traffic at that interchange except at the prescribed rates.

[17] Since Milk River is within the prescribed distance from the Coutts Yard, the only issue before the Agency and now, before this Court, is whether the configuration at the Canada-US border is an interchange.

III. The decision under appeal

[18] After disposing of a preliminary question, the Agency examined the question of whether BNSF had a line of railway at Coutts. The Agency decided that it did, for two reasons. The first of these reasons had to do with the nature of the connection between CP's and BNSF's lines at the international border. CP's position was that it owned all the land on the Canadian side of the border so that it, and not BNSF, owned any installation on that land. Beyond that, CP

characterized the connection itself as a simple end to end connection of its track with BNSF's track at the international border so that there was simply a single continuous track running from the Canadian side of the border to the American side.

[19] The Agency dealt with this issue in five short paragraphs. It focused on the nature of a railway track's physical connection. It quoted a passage from an earlier decision (Decision No. 35-R-2009) in which it noted an intervener's description of a railway line connection:

> The actual connection point of rail lines occurs in a two to four metre space and it is unreasonable to interpret Section 111 to literally define the interchange as having to occur within these actual two to four metres.
>
> (Decision at paragraph 61).

[20] The Agency then held that "connecting railway lines do not abut; each railway track joins together with the other track to form a continuous line" (Decision paragraph 62). This led the Agency to conclude that:

> …the physical connection of the lines of railway of BNSF and CP is wider than, and extends beyond, the international boundary into Canada at Coutts. Therefore, BNSF has a line of railway which extends beyond the international boundary into Canada. The Agency therefore finds that BNSF has a line of railway for the purpose of the interswitching provision of the CTA.
>
> (Decision at paragraph 63).

[21] The Agency then turned to its second reason for holding that BNSF has a line of railway in Canada, namely that its rights under its Interchange Agreement with CP give it a sufficient interest in CP's tracks at the Coutts Yard for BNSF to have a line of railway in Canada.

[22] The Agency noted that the Interchange Agreement authorized BNSF to use CP's infrastructure for the specific purpose of interchange activities between the two. The rights conferred by the Interchange Agreement include the right to use CP's tracks and to "place and pull rail cars interchanged with CP" (Decision at paragraph 65). Furthermore, the Interchange Agreement provides that terminal management decisions must be made in a non-discriminatory manner so that "... BNSF and CP have equal status with respect to the dispatching of traffic interchanged on CP's premises at Coutts" (Decision at paragraph 66).

[23] The Agency found that the rights acquired by BNSF pursuant to the Interchange Agreement were more than running rights which would simply enable the latter to travel over CP's tracks. BNSF's contractual rights allowed it to perform all necessary operations in order to interchange traffic with CP (Decision at paragraph 69).

[24] As a result, the Agency concluded that BNSF had a sufficient rights ;in CP's tracks at the Coutts Yard for BNSF to have a railway line within the meaning of the Act in relation to those tracks.

[25] The Agency then considered whether the Coutts Yard was a place "where loaded or empty cars may be stored until delivered or received by the other railway company" within the meaning of section 111 of the Act. The Agency observed that since it had already concluded that the CP's and BNSF's lines of railway connected, the only element left to be satisfied in the definition of an interchange was the issue of storage tracks.

[26] The Agency reviewed the evidence which showed that the Coutts Yard was a place where CP could place cars until they were picked up by BNSF. The fact that facilities for the interswitching of traffic in the other direction existed on the other side of the international boundary did not remove the Coutts Yard from the definition of an interchange.

[27] The Agency concluded that, in this case, the "place" referred to in the definition of interchange "includes the entire area from the railway line connection to the end of the Coutts Yard storage tracks to which BNSF has access under the Interchange Agreement, all of which is entirely in Canada" (Decision at paragraph 82). This last comment was directed to CP's argument that the Agency was giving the Act extra-territorial application.

[28] Finally, the Agency concluded that the Milk River Siding, the point of origin of P&H's southbound traffic, was within the statutory radius for interswitching at statutory rates since it was 20 kilometres from the Coutts Yard. It will be recalled that subsection 127(3) of the Act imposes mandatory interswitching at statutory rates where the point of origin of the traffic is within 30 kilometres (or prescribed greater distance) of an interchange.

[29] As a result, P&H was successful in its application and CP was required to interswitch P&H's grain cars at the statutory rate. CP now seeks to set this decision aside.

IV. The issues

[30] The following issues are raised by this appeal:

A. *The standard of review of the Agency's decision*;

B. Whether the Agency erred in law or exceeded its jurisdiction in finding that BNSF's line of railway extended into Canada?

C. *Whether the Agency erred in law in finding that BNSF had a sufficient interest in CP's Coutts Yard for it to be treated as part of BNSF's line of railway?*

A. *The standard of review of the Agency's decision*

[31] Both parties are agreed that the general rule is that the Agency's interpretation of the Act, its home statute, is to be reviewed on a standard of reasonableness: *Canadian National Railway Company v. Canadian Transportation Agency*, 2010 FCA 65, [2011] 3 F.C.R. 264, at paragraphs 27-29, *Canadian National Railway Company v. Transportation Agency*, 2010 FCA 166, [2010] F.C.J. No. 815 [*Fort Rouge*], at paragraphs 19-21.

[32] CP argues, however, that the Agency's determination that BNSF has a line of railway which extends into Canada such that the Agency has authority over BNSF is a true question of jurisdiction, in respect of which the standard of review is correctness. Putting the argument another way, CP says that the Agency has no jurisdiction to apply the Act extra-territorially.

[33] There is no issue of extra-territoriality in this case. The Agency's order requires CP, not BNSF, to interswitch P&H's cars at the regulated rate. The question of whether BNSF required a certificate of fitness for its operations in Alberta, the preliminary issue referred to earlier was deferred to another decision. To the extent that the Agency asserts jurisdiction over BNSF, it does so with respect to its operations at the Coutts Yard.

[34] As a result, there is no question of jurisdiction to which the correctness standard could apply.

B. *Whether the Agency erred unreasonably in law or exceeded its jurisdiction in finding that BNSF's line of railway extended into Canada?*

[35] CP attacked the Agency's finding that a connection between railway lines cannot take place on an international boundary which was described as an "impossibly thin membrane, phenomenal in length and height but with no width" (Decision at paragraph 60). As a result, the Agency found that BNSF's line of railway necessarily extended into Canada at the point of connection.

[36] CP pointed out that it owned all the land on the Canadian side of the international boundary so that if anything supplied by BNSF extended beyond the boundary, it would be CP's property as opposed to BNSF's.

[37] Furthermore, all the material provided to the Agency by CP showed the railway line at the point where it crossed the international boundary as a "single and seamless line of track" (CP's Memorandum of Fact and Law at paragraph 65).

[38] Finally, CP was particularly critical of the Agency's apparent reliance on a passage taken from an intervener's brief in another proceeding, which I quoted earlier in these reasons, describing the intervener's view of a connection between railway lines.

[39] Since this passage is immediately followed by the Agency's affirmation that "connecting railway lines do not abut", CP infers that the citation is the evidentiary foundation for the Agency's statement. CP alleges that this is factually incorrect and an error in law to the extent that it purports to describe all railway line connections.

[40] The Agency's conclusion on this point is a finding of fact. It is a finding as to the physical layout of the tracks, a pure question of fact. The wide berth which this Court must give to such findings is illustrated by subsections 41(1) and (3) of the Act:

41 (1) An appeal lies from the Agency to the Federal Court of Appeal on a question of law or a question of jurisdiction on leave to appeal being obtained from that Court ….	41 (1) Tout acte — décision, arrêté, règle ou règlement — de l'Office est susceptible d'appel devant la Cour d'appel fédérale sur une question de droit ou de compétence, avec l'autorisation de la cour…
…	[…]
3) An appeal shall be heard as quickly as is practicable and, on the hearing of the appeal, the Court may draw any inferences that are not inconsistent with the facts expressly found by the Agency and that are necessary for determining the question of law or jurisdiction, as the case may be.	(3) L'appel est mené aussi rapidement que possible; la cour peut l'entendre en faisant toutes inférences non incompatibles avec les faits formellement établis par l'Office et nécessaires pour décider de la question de droit ou de compétence, selon le cas.
[my emphasis.]	[mon soulignement.]

[41] There is no right of appeal from a finding of fact.

[42] At the hearing of the appeal, the question was asked whether a conclusion of fact for which there was no evidentiary basis was an error of law. Such an error would necessarily be unreasonable - how could it be reasonable to draw conclusions of fact on no evidence? - and

therefore reviewable. If the only evidence in support of the Agency's conclusion was the passage it quoted from Decision 35-R-2009, I would be inclined to the view that there was no evidence to support its conclusion. The response from counsel for P&H was that the Agency was entitled to rely on its institutional knowledge in concluding as it did as to the nature of the connection between the two railways.

[43] It is true that the Supreme Court has upheld the right of labour relations boards to rely on their expert knowledge of the field of labour relations (see *Royal Oak Mines Inc. v. Canada (Labour Relations Board)*, [1996] 1 S.C.R. 369 at paragraph 57, *International Longshoremen's and Warehousemen's Union, Ship and Dock Foremen, Local 514 v. Prince Rupert Grain Ltd.*, [1996] 2 S.C.R. 432, at paragraph 37. However, I am unaware of any case in which the Supreme Court has held that a tribunal may resolve disputed questions of fact solely on the basis of its institutional knowledge of relevant facts.

[44] Because of the view which I have of the second ground on which the Agency relied in coming to the conclusion it did, it is not necessary, in this case, to determine the extent to which an administrative tribunal can rely on its own knowledge to resolve disputed questions of fact if indeed that is what happened here. If such a right exists, then one would expect a tribunal to exercise a certain reserve in invoking its institutional knowledge to supply facts which are in dispute between the parties and that, when it did invoke such knowledge, it would do so in as transparent a way as possible.

C. *Whether the Agency erred in law in finding that BNSF had a sufficient interest in CP's Coutts Yard for it to be treated as part of BNSF's line of railway?*

[45] CP's position is that the Agency departed from its own jurisprudence and misinterpreted this Court's decision in *Fort Rouge* when it held that the mere contractual rights, including the right to "use the tracks of the other party and to deliver and to pull rail cars from the other railway company" (see Decision at paragraph 66) gave BNSF a sufficient interest in the Coutts Yard to allow it to treat the Coutts Yard as part of its line of railway.

[46] According to CP, in Decision No. 439-R-1989 [*Celgar*] the Agency decided that mere running rights were an insufficient basis for one railway company to treat another railway company's tracks and facilities as part of its line of railway. In that case, there was an agreement between CP and another railway company, BN, which allowed BN to travel over CP's track from Troup Junction, the point at which the BN line connected with CP's, to a storage yard at Nelson, B.C., some 9 kilometres away, and to joint usage of CP's track and facilities at Nelson for interswitching traffic. The Agency found that this was insufficient to support the contention that BN had a line of railway at Nelson. CP relies on the following passage from *Celgar*:

> In this case, the Agency finds that there is only one railway line from Troup Junction to Nelson, that of CP. BN does not have a "line of railway" at Nelson merely by virtue of its agreement with CP. Therefore, Nelson does not meet the definition of an interchange as described in the NTA, 1987.
>
> *Celgar*, available at https://www.otc-cta.gc.ca/eng/ruling/439-r-1989.

[47] It is implicit in the Agency's decision in *Celgar* that it treated "having" a line of railway as meaning "owning" a line of railway.

[48] CP argues that the requirement that a railway company own a line of railway was confirmed in a subsequent decision of the Agency, Decision 798-R-1993 [*Ottawa Valley Partnership*]. In that case, CN and CP consolidated rail services in the Ottawa valley into a single railway line (the Partnership Line). A question arose as to whether the interchanges which had existed at various points along the pre-existing line and which were now integrated into the Partnership Line continued to be interchanges as there was now only one line of railway into and out of those storage yards. The Agency found that CN and CP each had a line of railway into the storage yards even though there was only a single physical line of railway. It held that:

> The Agency is satisfied that the ownership interest that each Partner has in the Partnership Line is sufficient to conclude that each Partner has a "line of railway" for the purposes of the definition of "interchange".
>
> As each Partner has a "line of railway", it is the opinion of the Agency that interchanges will exist wherever a storage facility for cars exists on the Partnership Line. Even though there is physically only one line of railway, it is the ownership interest which, in the Agency's view, is determinative of the existence of an interchange in this case. The present application is different from that related to the Celgar Pulp Company in which the second railway company had only joint trackage usage and running rights over a line of railway and not an ownership interest in the line of railway.
>
> *Ottawa Valley Partnership*, available at https://www.otc-cta.gc.ca/eng/ruling/798-r-1993.

[49] CP argues, on the basis of this jurisprudence that the Agency misinterpreted this Court's decision in *Fort Rouge* as establishing a new test for determining when a railway company has a line of railway for the purposes of the definition of an interchange.

[50] The facts in *Fort Rouge* are somewhat convoluted but can be summarized for the purposes of this appeal as follows. CN and BNSF (or their predecessors) have exchanged traffic

at CN's F Yard since 1913 pursuant to an agreement whose material terms were set out in this Court's decision in *Fort Rouge* and which I reproduce below for ease of reference.

> …the Agreement contemplated the construction of two lines of track at CN's F Yard, one for the delivery of CN traffic to BNSF, and one for the delivery of BNSF traffic to CN. The Agreement provides that, upon completion of construction of the two tracks, BNSF would pay CN one half the cost of construction. BNSF also agreed to reimburse CN for one half the cost of the maintenance of the two lines. In addition, BNSF agreed to pay CN annually a sum equal to one half of the rental value of the land on which the tracks were constructed. Upon the termination of the Agreement, BNSF was entitled to one half of the material used in the construction of the tracks or to an amount equal to the depreciated value of those materials.
>
> The Agreement also provided that CN could, at any time, change or alter the location or construction of the transfer tracks providing it did so at its own expense and that the new facilities were equally convenient for BNSF.
>
> (*Fort Rouge* at paragraphs 10-11).

[51] In 2003, CN reconfigured its tracks in the Winnipeg area and relocated the joint facilities which had previously been located at the F Yard to the new Fort Rouge Yard. This raised a number of issues but, for the purposes of this appeal, the relevant issue was whether there was interswitching at the Fort Rouge Yard since all the track at that location was owned by CN. As a result, there could be no transfer of traffic from one line of railway to another at that location and therefore no interswitching.

[52] The Agency examined the contract between CN and BNSF and, in light of BNSF's rights and obligations under that agreement, concluded that "BNSF has a sufficient ownership interest in the transfer track at Fort Rouge Yard to have a line of railway for the purposes of the interswitching provisions of the CTA" (Decision No. 35-R-2009). The Agency supported its

decision by reference to the prominence given to ownership of property in the *Ottawa Valley Partnership* decision.

[53] On appeal, this Court upheld the Agency's decision. In doing so, it restated the issue to be decided by the Agency in the following terms:

> The CTA did not have to decide the status of those rights [under the 1913 Agreement] under Manitoba's land law so that its use of the expression ownership interest is perhaps gratuitous. What the CTA did have to decide was whether BNSF's rights with respect to the F Yard and, by extension, the Fort Rouge Yard pursuant to the Transfer Track Agreement were such as to allow it to treat portions of those yards as part of BNSF's line of railway.
>
> (*Fort Rouge* at paragraph 28).

[54] After referring to the passages from the Ottawa Valley Partnership on which the Agency relied, this Court articulated the substance of the Agency's decision as follows:

> In this case, the Transfer Track Agreement clearly gave BNSF something more than running rights on CN's track. It had a right to the use of certain facilities for the purpose of transferring traffic back and forth with CN. That right was not bound to a particular piece of land but it was bound to BNSF's convenience in doing business with CN. The CTA found that these rights were sufficient to find that BNSF had a line of railway in the Fort Rouge Yard.
>
> (*Fort Rouge* at paragraph 30).

[55] CP cites both of these passages in support of its position that, for the purposes of the interswitching provisions of the Act, a railway company has a line of railway when it has an ownership interest in that line. It finds support for its position in this Court's assertion that the question to be decided in the *Fort Rouge* case was whether BNSF's rights with respect to the F

Yard, and by extension, the Fort Rouge Yard, were such as to allow BNSF to treat portions of those yards as part of its own line of railway.

[56] With respect, this is a misreading of this Court's position. The question before the Agency was whether BNSF's rights under the Transfer Track Agreement were such as to allow the Agency to treat portions of those yards as parts of BNSF's line of railway.

[57] In this case, the Agency explicitly adopted the reasoning which flowed from this Court's decision in *Fort Rouge*.

[58] CP, not unreasonably, points out the differences in BNSF's rights and obligations under the Transfer Track Agreement with respect to the Fort Rouge Yards and its rights and obligations under the Interchange Agreement with respect to the Coutts Yard. BNSF has no financial obligations under the Interchange Agreement. It says that this distinguishes the Interchange Agreement from the Transfer Track Agreement. CP says that BNSF's rights under the Interchange Agreement are more like BN's rights under the agreement in issue in *Celgar*. CP also points out that BN had more than "mere" running rights under that agreement. It had the right, in perpetuity, to run its trains over the rail line from Troup Junction to Nelson and the right to joint usage of the trackage and facilities at Nelson. CP argues that if these rights were not sufficient to support a finding that BN had a line of railway in *Celgar*, then they should not be sufficient to support the conclusion that BNSF has a line of railway in this case.

[59] It is true that it is difficult to reconcile the Agency's decision in *Celgar* with its decision in this case. While the doctrine of stare *decisis* does not apply to tribunal decisions (see *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929, at paragraph 14), the Supreme Court has recently held "that arbitral precedents *in previous cases* shape the contours of what qualifies as a reasonable decision *in this case*": see *Communication, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp and Paper*, [2013] 2 S.C.R. 458 at paragraph 75 [emphasis in the original]. The dissenting judges in that case (MacLachlan CJC, Rothstein and Moldaver JJ.) did not disagree on this point and held that where an arbitration panel departs from prior arbitral jurisprudence, it must set out a reasonable basis for doing so (see paragraph 75). For present purposes, there is no distinction between arbitration panels and administrative tribunals.

[60] The reasonable basis, in this case, was the Agency's reliance on this Court's decision in *Fort Rouge*. In that case, the Agency cast its decision in the same terms as it had implied in *Celgar* and used in *Ottawa Valley Partnership*, namely a property interest. This Court recognized that while the factors referred to by the Agency fell short of creating an ownership interest, they were nonetheless capable of supporting the Agency's conclusion that BNSF had a sufficient interest in the Fort Rouge Yard to justify the Agency in treating those Yards as part of BNSF's line of railway.

[61] In the present case, the Agency recognized that the critical factor was the right "to perform all necessary operations in order to interchange traffic" (see Decision at paragraph 69), a position consistent with this Court's decision in *Fort Rouge*. The rights which it identified allowed the Agency to consider that BNSF had a sufficient interest in the Coutts Yard for it to be

treated as part of BNSF's line of railway. The Agency has thus refined its view of when a railway company "has" a line of railway, moving away from a strictly ownership position, as in *Celgar*, to a more nuanced position based on functional integration. This refinement is in keeping with the Canada's national transportation policy which favours competition and market forces, and discourages rates and conditions which are an undue obstacle to the movement of traffic. It is entirely within the Agency's mandate to refine its approach to the issue of what constitutes an interchange.

[62] As a result, I find that the Agency's decision on this issue is reasonable. Once the Agency concluded that BNSF had a line of railway at the Coutts Yard, then the issues of the existence of an interchange and the availability of interswitching resolved themselves in P&H's favour.

V. Conclusion

[63] For the reasons set out above, I would dismiss the appeal with costs to P&H.

"J.D. Denis Pelletier"

J.A.

"I agree
M. Nadon J.A."

"I agree
Johanne Trudel J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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