Federal Court of Appeal | Cour d'appel fédérale

Date: 20150817

Docket: A-127-14

Citation: 2015 FCA 180

CORAM: **DAWSON J.A.**
STRATAS J.A.
SCOTT J.A.

BETWEEN:

CANADIAN NATIONAL RAILWAY COMPANY

Appellant

and

RICHARDSON INTERNATIONAL LIMITED and CANADIAN TRANSPORTATION AGENCY

Respondents

Heard at Toronto, Ontario, on March 4, 2015.

Judgment delivered at Ottawa, Ontario, on August 17, 2015.

REASONS FOR JUDGMENT BY: DAWSON J.A.

CONCURRED IN BY: STRATAS J.A.
SCOTT J.A.

Federal Court of Appeal  Cour d'appel fédérale

Date: 20150817

Docket: A-127-14

Citation: 2015 FCA 180

CORAM: **DAWSON J.A.**
STRATAS J.A.
SCOTT J.A.

BETWEEN:

CANADIAN NATIONAL RAILWAY COMPANY

Appellant

and

RICHARDSON INTERNATIONAL LIMITED and CANADIAN TRANSPORTATION AGENCY

Respondents

REASONS FOR JUDGMENT

DAWSON J.A.

[1] Richardson International Limited operates a grain elevator at Letellier, Manitoba. The elevator is approximately 20 km north of the Canada-United States border and is located on a railway line owned by the Canadian National Railway Company. Richardson applied to the Canadian Transportation Agency for an order requiring CN to interswitch Richardson's rail

traffic with the American carrier BNSF Railway Company. The Agency allowed the application (Decision No. 466-R-2013).

[2] The effect of the Decision is that CN is now required to pick up empty railcars delivered to Emerson, Manitoba by BNSF and move them to Richardson's elevator at Letellier; after the railcars are loaded CN must then return them to Emerson so they may be picked up by BNSF to be moved to destinations in the United States (Richardson's memorandum of fact and law at paragraph 3). The services are to be performed at prescribed interswitching rates.

[3] This is an appeal of the Decision.

I. Applicable Legislation

[4] Interswitching is governed by section 127 of the *Canada Transportation Act*, S.C. 1996, c. 10 (Act). Of relevance to this appeal are subsections 127(1) and (3):

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.
[…]	[. . .]
(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	(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

interchange except in accordance with the regulations. [Emphasis added.]	compagnie de chemin de fer à ce lieu de correspondance est subordonné au respect des règlements. [Je souligne.]

[5] Section 111 defines "interchange" and "interswitch":

"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; "interswitch" means to transfer traffic from the lines of one railway company to the lines of another railway company in accordance with regulations made under section 128. [Emphasis added.]	« 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. « interconnexion » Le transfert du trafic des lignes d'une compagnie de chemin de fer à celles d'une autre compagnie de chemin de fer conformément aux règlements d'application de l'article 128. [Je souligne.]

[6] The effect of the legislation is that three criteria must be met in order for an application to interswitch to succeed:

i) a railway line of one railway company must connect with a railway line of another railway company;

ii) there must be a place where loaded or empty railcars may be stored; and,

iii) the interchange must be located within the prescribed geographic radius.

II. The Decision

[7] The Agency found that all three criteria were met. On this appeal, CN puts in issue only the Agency's finding that BNSF had a line of railway that connects with CN's line of railway.

[8] The Agency found BNSF had a "line of railway" in Canada for the purpose of interswitching, for three distinct reasons.

[9] First, the Agency found that under what the Agency referred to as the "1912 Agreement" BNSF had acquired sufficient rights in respect of the CN owned trackage in Emerson that it had a line of railway at this location for the purpose of interswitching.

[10] Second, because of the physical characteristics of a connection between two railway lines, BNSF's physical trackage extended beyond the "thin membrane" of the Canada-United States border.

[11] Third, the Agency found the parties had a long-standing practice of interchanging railcars both at Emerson and at Noyes, Minnesota.

[12] The Agency then found that the requisite "connection" between two railway lines existed for two distinct reasons.

[13] First, the Agency found that the physical connection between the two railway lines occurs over a physical distance that exceeds the width of an international boundary so that there was a connection in Canada between the two railway lines.

[14] Second, the Agency found that BNSF's rights in the CN owned trackage in Manitoba "effectively permit BNSF to connect at points along the entire railway line".

III. The Issues

[15] CN frames the issues raised on this appeal to be:

1. Did the Agency err by finding BNSF has a "line of railway" in Canada within the meaning of section 127 of the Act? More specifically:
    a) Did the Agency err in its interpretation of the 1912 Agreement?
    b) Did the Agency err by excluding evidence about BNSF's conduct?
    c) Did the Agency err by finding that BNSF had the right to interchange traffic with CN in Emerson, Manitoba?
    d) Did the Agency err by amending the terms of the 1912 Agreement?

2. Did the Agency err by finding there is a "connection" in Canada between the CN line and the BNSF line within the meaning of section 127 of the Act? More specifically:
    a) Did the Agency err by concluding that the BNSF line physically extends across the Canada-United States border?

b) Did the Agency deny CN natural justice and procedural fairness by relying on *ex parte* evidence from another proceeding?

c) Did the Agency exceed its jurisdiction by applying the Act beyond the Canadian border?

d) Did the Agency err by finding a connection between the two railway lines based upon the 1912 Agreement?

3. Did the Agency err by permitting interswitching when Richardson had access to two competitive carriers?

[16] I will comment below on the way CN frames the issues in the context of the standard of review.

IV. Standard of Review

[17] The parties agree that the general rule is that the Agency's interpretation of the Act is to be reviewed on the standard of reasonableness.

[18] In my view, the parties' agreement is consistent with the jurisprudence of this Court. See, for example, *Canadian Pacific Railway Company v. Canada (Canadian Transportation Agency)*, 2015 FCA 1, [2015] F.C.J. No. 9, at paragraph 31 (*Parrish & Heimbecker*) and the authorities cited therein.

[19] While CN did not press the point, in oral argument it submitted that one issue should arguably be reviewed on the standard of correctness: the issue of the extraterritorial application of the Act by the Agency.

[20] This argument was addressed and rejected by this Court in *Parrish & Heimbecker* at paragraph 33. As in that case, there is no issue of extra-territoriality in this case. The Agency's decision requires CN, not BNSF, to interswitch Richardson's railcars at the prescribed rates. To the extent the Agency asserts any jurisdiction over BNSF, it does so on the basis of its operations in Canada.

[21] Having determined that the issues raised by CN all go to the reasonableness of the Agency's decision, it follows that in every case the proper inquiry is not whether the Agency erred. This inquiry is whether the Agency's findings are unreasonable. Below, I will reframe the issues accordingly.

[22] Before addressing CN's arguments, it is important to consider the context in which the Agency made its decision. This is so because the Supreme Court has emphasized that, while reasonableness is a single standard, it "takes its colour from the context" (*Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at paragraph 59.

[23] As Justices Rothstein and Moldaver explained in *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34, [2013] 2 S.C.R. 458, at paragraph 74, the "factual and legal context in which a decision is made is

critical to assessing its reasonableness for the simple reason that '[r]easonableness is not a quality that exists in isolation' [citation omitted]." Therefore, the context "shapes" the range of reasonable outcomes.

[24] In the present case, the context is informed by the nature of the decision: the Agency decided that BNSF had a line of railway in Canada that connects with CN's line of railway. To state the issue is to recognize that the nature of the decision was highly fact-based, drawing significantly on the expertise of the Agency.

[25] Flowing directly from this is the margin of appreciation to be afforded to the Agency in rendering its decision. Put another way, the required inquiry is whether the Agency's decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at paragraph 47).

[26] Here, a number of factors point to the Agency having a wide margin of appreciation.

[27] To begin, the Agency's decision is protected by a privative clause. An appeal may be brought in this Court only with leave and only in respect of "a question of law or a question of jurisdiction" (section 41 of the Act).

[28] The question is fact-based, and the Agency's appreciation of the evidence must be seen in the context of a tribunal with specialized expertise in the railway industry including specialized knowledge about railway practices and operations, railway engineering, the pricing of railway

services, the economics of rail operations, the history of rail operations, and industry contracts and nomenclature. Its assessment of these things is also informed by its understanding of transportation policy.

[29] As will be seen below, in the course of deciding this matter, the Agency had to interpret an agreement among railway companies. Such an agreement, to be properly understood and applied, must be seen within its specific industrial, historical, economic and regulatory contexts. These contexts lie at the heart of the specialized jurisdiction that Parliament has given to this expert tribunal.

[30] Finally, as explained above, interswitching is governed by section 127 of the Act. Tribunals sometimes receive a wide margin of appreciation when interpreting their home statute. In this case, granting the Agency a wide margin of appreciation is most appropriate. The word "connects" in subsection 127(1) is a word of imprecise definition, with a potentially broad range of acceptable and defensible meanings. Settling upon its meaning and applying that meaning in a particular case draws heavily upon the expertise and specialization of the Agency, specifically its technical knowledge, its knowledge of the railway industry and its economics, how it has handled other cases where interconnection has been sought, and its appreciation of the purposes underlying interconnection and, more broadly, the purposes of the Act. Thus, whether a railway line in a particular place "connects" with another within the meaning of this Act is the sort of matter that it outside of the expertise of the courts and justifies a broader margin of appreciation being granted: see, for example, *Boogaard v. Canada (Attorney General)*, 2015 FCA 150, [2015] F.C.J. No. 775 at paragraph 62.

[31] For all these reasons, in applying the reasonableness standard, the Agency should be given a broad margin of appreciation over matters drawing upon its expertise, specialization, policy appreciation and fact-finding.

[32] I now apply this standard to the Decision.

V. Was it unreasonable for the Agency to find that BNSF has a "line of railway" in Canada within the meaning of section 127 of the Act?

A. *Was the Agency's interpretation of the 1912 Agreement unreasonable?*

[33] In 1912, the Canadian Northern Railway Company, a predecessor of CN, entered into an agreement with the Midland Railway Company of Manitoba, a predecessor of a wholly-owned subsidiary of BNSF [Decision at paragraph 18]. The parties dispute the nature of the rights conferred on BNSF under this agreement.

[34] CN argued that the 1912 Agreement did not grant a sufficient interest in the CN line between the Canada-United States border and Emerson for BNSF to have a line of railway in Canada. The Agency rejected CN's argument for reasons set out at paragraphs 44 to 68 of the Decision.

[35] Briefly, relying on the decision of this Court in *Canadian National Railway Co. v. Canada (Transportation Agency)*, 2010 FCA 166, 405 N.R. 240, the Agency reasoned that a railway company may have a line of railway in relation to a line that it owns, or in relation to a line owned by another railway company over which it has sufficient rights to operate traffic and

perform interchange activities. The Agency then considered the nature of the rights conferred by the 1912 Agreement to determine whether BNSF was entitled to more than mere running rights as CN argued.

[36] Based upon its examination of the agreement, the Agency found that:

- the wording of the 1912 Agreement clearly demonstrates that much more is conferred than mere running rights;
- while CN has "general control, management and administration of the Joint Section" the 1912 Agreement allows BNSF "full joint and equal possession and use" of the Joint Section;
- the agreement requires CN's agents and employees to transact the business of BNSF without discrimination,
- BNSF's full possession and use apply to the operation of the trains and the use of telegraph and telephone lines and provide BNSF with the right to make and maintain connections near Emerson, West Lynn and Portage Junction. In full, the 1912 Agreement refers to granting Midland the right to make and "maintain connections between the tracks of said Joint Section and the tracks of the Great Northern Railway Company and of the Northern Pacific Railway Company near" the three specified locations; and,
- BNSF may also perform, with its own employees and equipment, all business of a Railway Company and a common carrier, with the exception of "local business".

[37] The Agency went on to refer to an additional provision of the agreement that provided that if, under an order of the Board of Railway Commissioners, or with the consent of CN, or

otherwise, the BNSF shall transact any such local business it shall account for and pay CN 80% of all gross receipts therefrom. The Agency found this provision "clearly" allows BNSF to choose to transact any local business by order of the Agency, or with the permission of CN, or otherwise. The Agency interpreted the phrase "or otherwise" to mean that this business may be transacted by BNSF without any order or permission.

[38] The Agency rejected CN's submission that because BNSF had not transacted local business on the line for more than 100 years, this equated to a mutual understanding prohibiting the activity. In the Board's view, the right to conduct local traffic was not extinguished solely because it was not exercised. Put another way, the fact that BNSF has not availed itself of the option did not negate the existence of the right.

[39] The Agency went on to note that in referring to BNSF's conduct CN was offering extrinsic evidence to interpret the 1912 Agreement. The Agency found it unnecessary to consider extrinsic evidence because it found no ambiguity in the language used in the 1912 Agreement.

[40] CN argues that the Agency's interpretation of the 1912 Agreement was flawed. In its submission:

- the Agency ignored the preamble of the agreement which set out the purpose of the agreement: Midland "desired to obtain running rights" over the CN line from the international boundary to the Portage Junction;

- "running rights" was and remains a well-known concept in the context of railway rights and the Agency's interpretation was contrary to that concept; and,
- in the 1912 Agreement the parties restricted the breadth of the rights conferred on BNSF because the agreement stated "Midland shall not do or transact any local business". Notwithstanding, the Agency turned the penalty provision in the agreement "on its head" in order to conclude that Midland was expressly allowed to transact local business.

[41] In oral argument CN agreed that the Agency's interpretation of the 1912 Agreement was reviewable on the standard of reasonableness.

[42] Without doubt that is correct. This said, in substance CN's submissions invites us to review the Agency's interpretation on the standard of correctness.

[43] It is important to remember that contractual interpretation requires that regard be had for the circumstance surrounding the contract. The Agency was required to "read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract." (*Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, at paragraph 47).

[44] The Agency was well-situated with its particular expertise and specialization to interpret the 1912 Agreement.

[45] I am satisfied the Agency did not ignore CN's reliance on the wording of the preamble as it referred to the preamble in its reasons. However, the Agency was required to look to the operative terms of the agreement in order to assess the nature of the rights conferred on BNSF, as it did.

[46] CN did not argue before the Agency that the term "running rights" was a term of art denoting a well-known concept that equates to mere transit rights. I accept Richardson's submission that no evidence was provided of any industry accepted usage of the phrase. Moreover, the Agency is familiar with transportation nomenclature. In any event, the Agency cannot be faulted when this argument was not addressed to it.

[47] In my view, it is not necessary to consider whether the Agency's conclusion that BNSF had a right to transact local business was unreasonable because this conclusion was not material to its decision. The Agency had already concluded that the 1912 Agreement conferred more than mere running rights for the reasons set out at paragraph 36 above.

[48] As explained in more detail above, the Agency is an expert tribunal, possessing expert and specialized knowledge of such things as railway operations and railway agreements. CN has failed to show that the Agency's interpretation of the nature of the rights conferred on BNSF in the 1912 Agreement was unreasonable.

B. *Was it unreasonable for the Agency to exclude evidence about BNSF's conduct?*

[49] As explained above, the Agency declined to accept extrinsic evidence to establish BNSF had not exercised any right to transact local business. Given my conclusion that the Agency's finding that BNSF was entitled to transact local business was not material to its decision, nothing flows from its refusal to accept extrinsic evidence about BNSF's apparent practice of not conducting local traffic.

[50] In any event, I do not find the Agency's conclusion on this point to be unreasonable for the following reasons. First, the Agency proceeded on the basis that BNSF had not availed itself of the right to conduct local traffic. Evidence was unnecessary. Second, the Agency concluded that the failure to exercise a right did not negate the existence of the right. This conclusion has not been shown to be unreasonable and it too rendered extrinsic evidence irrelevant.

C. *Was it unreasonable for the Agency to find that BNSF had the right to interchange traffic with CN in Emerson, Manitoba?*

[51] It is not necessary to consider this issue: the Agency's finding that the 1912 Agreement conferred sufficient rights to operate traffic and perform interchange activities in the Joint Section is sufficient to support its finding that BNSF had a line of railway in Canada. I will, however, consider this issue in the event I am wrong with respect to the reasonableness of the Agency's interpretation of the 1912 Agreement.

[52] In Richardson's application for interswitching, it asserted that, in practice, "interchange operations between CN and BNSF at Emerson-Noyes have generally involved both railways crossing the Canada-US border" as described in more detail in the application. Richardson also asserted that because of limited track capacity in Noyes "unit train traffic has typically been interchanged on CN's tracks at Emerson". Appended to its submission was an excerpt from the OPSL 6000-AH. OPSL is the Official Railroad Station List. It shows BNSF to interchange with CN at both Emerson and Noyes.

[53] In its response, CN did not deny that rail traffic was exchanged at Emerson. Instead, it relied on the terms of the 1977 Interchange Agreement between it and BNSF, which provides that the parties can undertake interchange activities in Noyes. The 1977 Interchange Agreement is silent with respect to any interchange activity in Emerson. CN also argued that Emerson was listed in the OPSL in error.

[54] The Agency dealt with this issue at paragraph 70 of its reasons:

> Whether interchange activities are strictly performed pursuant to the Interchange Agreement or whether the practice has arisen based on pragmatic operational considerations, the Agency notes that there is an uncontested history of interchanging between CN and BNSF with interchange activities occurring on both sides of the Canada-United States border. As a result, the Agency finds that BNSF has sufficient rights to CN's trackage from the border into Emerson to allow that trackage to be treated as part of BNSF's line of railway for the purpose of performing interchange activities at Emerson. The Agency also notes that both Emerson and Noyes are listed in the OPSL, despite CN's assertion that this is an error. Even if Emerson were not listed in the OPSL, it would not change the fact that interchanging activities occur at Emerson. [Emphasis added.]

[55] CN argues that there was no basis to determine that BNSF has the right to interchange traffic with CN in Emerson. It says that just because it has permitted BNSF to interchange traffic

in Emerson this does not mean that BNSF is entitled to do so. CN therefore submits that the Agency erred by finding that interchange activities in Emerson gave BNSF rights to the CN line.

[56] Again, in my view CN invites review on the correctness standard, without affording the Agency the broad margin of appreciation to which it is entitled.

[57] Given that CN did not dispute Richardson's statement that interchange activities have and do occur on both sides of the border, and given that CN did not adduce evidence as to why that takes place or evidence that it had withdrawn any permission for BNSF to use its trackage, it was not unreasonable for the Agency to infer that BNSF was authorized to conduct interchange activity in Emerson. In turn, it was not unreasonable for the Agency to find that this was sufficient to give BNSF a line of railway in Canada.

D. *Did the Agency amend the terms of the 1912 Agreement?*

[58] The 1912 Agreement contained a term that provided that it did not create any right in any third party:

> Nothing herein contained shall be taken as creating or increasing any right in any third person to recover by way of damages or otherwise against any of the parties hereto.

[59] CN argues that the effect of the Agency's decision was to confer rights on Richardson, a third party, contrary to the express terms of the agreement. CN further argues that the Agency lacked any authority to amend a private commercial agreement.

[60] The Agency rejected this argument at paragraph 66 of its reasons, stating that it was well within its powers to examine the 1912 Agreement in order to determine the extent of the rights it conferred. This is unquestionably so. There is nothing unreasonable in this aspect of the Agency's decision.

VI. Was it unreasonable for the Agency to find that there is a "connection" in Canada between the CN line and the BNSF line within the meaning of section 127 of the Act?

A. *Was it unreasonable for the Agency to find that the BNSF line physically extends across the Canada-United States border?*

[61] CN argues that it presented uncontradicted evidence that the line owned by BNSF does not cross the international border into Canada. Specifically, it adduced evidence that:

- the CN railway line stops at the international border;
- at the international border, the CN line touches and connects with the BNSF line;
- the BNSF line does not cross into Canada;
- the part of the rails and other track material that is on the northern side of the international border is maintained by CN in accordance with CN and Canadian standards; and,
- CN is not authorized to perform any construction or maintenance work in the United States and the United States border patrol immediately intervenes should CN crews cross the international border in error.

[62] CN further argues that the Agency acknowledged that the BNSF line was not on the Canadian side of the border and that it touches and connects with the CN line at the border. Thus,

it was unreasonable for the Agency to conclude that the BNSF line extends across the international border.

[63] The Agency was well aware of CN's evidence and its position that the two railway lines meet at the border without either one crossing the border (Decision at paragraphs 81-87). The Agency's analysis and findings on this point are found at paragraphs 88 to 91 of its reasons. The ratio of its decision is found at paragraphs 90 and 91:

> While each case must be considered on its own merits, the Agency is of the opinion that the situation in this case is comparable to the situation in the case that led to Decision No. 165-R-2013, in the sense that the Canada-United States border is being crossed by a single railway line owned by two different railway companies on each side of the Canada-United States border. The Agency considers that the same principle that was used in Decision No. 165-R-2013 should apply, that is, the physical characteristics of a railway company's track connection at an international border.
>
> As noted above, in Decision No. 165-R-2013, more specifically in paragraph 62, the Agency indicated that while it can be said that two countries' territories touch or abut an international border without overlapping, the same cannot be said of connecting railway lines. Connecting railway lines do not abut; each railway track joins together with the other track to form a continuous line. They are physically linked together. This means that it is impossible that a railway line's connecting point be a thin membrane as would be the case of an international border. The physical connection of two railway lines necessarily happens over a physical distance which exceeds the width of an international border.

[64] This is a finding that touches the core expertise of the Agency: its knowledge of railway operations and railway engineering. I am unable to find that its characterization of the nature of connecting railway lines was unreasonable.

B. *Did the Agency deny CN natural justice and procedural fairness by relying upon ex parte evidence from another proceeding?*

[65] As seen above, in arriving at its conclusion that the BNSF line extended over a physical distance that exceeded the width of the international border, the Agency relied upon its prior Decision No. 165-R-2013.

[66] In this decision, at paragraph 61, the Agency in turn referred to its analysis in Decision No. 35-R-2009:

> The Agency considers that this may very well be an accurate description of the characteristics of an international boundary, but it does not necessarily reflect the characteristics of a railway track's physical connection. In its analysis in the Decision No. 35-R-2009, the Agency noted the 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.

[67] CN argues that in relying upon this description of the connection supplied by an intervener in another case the Agency breached natural justice or procedural fairness because:

- the Agency did not disclose the description of the connection by the intervener, or any of its details to the parties in the present case;
- the Agency did not permit the parties to make submissions in connection with the description of the intervener; and,
- the Agency did not advise the parties that it was considering relying upon the intervener's description.

[68] CN submits that in essence the Agency ignored the evidence before it in favour of evidence unknown to CN.

[69] In my view, CN's submission must fail for the following reasons.

[70] CN was well aware of Richardson's reliance upon Decision No. 165-R-2013. Richardson relied upon this decision at paragraph 46 of its application to the Agency where it quoted paragraphs 60 to 63 of the decision. CN did not object to Richardson's reliance on these passages. Rather, it argued that the intervener's submission on the earlier case was only an opinion: "an interested opinion proffered by a party with no special knowledge of railway operations or railway engineering matters, but by a party who was to benefit from the application of regulated interswitching". Further, CN was well aware of the nature of the intervener in Decision No. 35-R-2009, because CN was the applicant in that proceeding.

[71] Contrary to CN's submissions, there was nothing unfair in the Agency's reliance upon a principle it articulated in Decision No. 165-R-2013.

C. *Did the Agency exceed its jurisdiction by applying the Act beyond the Canadian border?*

[72] As noted above, CN argues that applying the Act to a railway line outside Canada for the purpose of making interswitching available improperly requires the Act to be given extra-territorial effect. I disagree for the reasons set out at paragraphs 19 and 20 above.

D. *Was it unreasonable for the Agency to find a connection between two railway lines based upon the 1912 Agreement?*

[73] At paragraphs 92 to 95 of the Decision, the Agency gave an alternate basis for its conclusion that there was a connection between two railways: the rights conferred by the 1912 Agreement which "effectively permit BNSF to connect at points along the entire railway line". For the reasons given above, CN has not satisfied me that the Agency's construction of the 1912 Agreement was unreasonable.

VII. Was it unreasonable for the Agency to order interswitching when Richardson had access to two competitive carriers?

[74] In oral argument CN argued that the effect of the Agency's decision was to superimpose a line of railway owned by BNSF upon CN's line. The result is that two carriers operate on the same line such that there is perfect competition. In this circumstance, CN argues it was an error or was unreasonable for the Agency to order that CN interswitch traffic because interswitching presumes insufficient competition.

[75] This was an argument previously rejected by the Agency in Decision No. 35-R-2009, at paragraphs 115 to 119. This holding was affirmed by this Court in *Canadian National Railway Co. v. Canada (Transportation Agency)*, 2010 FCA 166, [2010] F.C.J. No. 815, at paragraphs 32 to 33. CN has not shown any error in this Court's analysis upholding the reasonableness of the Agency's decision.

[76] To the reasons previously given by the Agency in Decision No. 35-R-2009, I would only observe that when Parliament wishes to limit a remedy to a captive shipper, or otherwise wishes to make competition a relevant consideration, it does so expressly: see, for example sections 129 and 120.1 and subsections 164(2) and 169.37(*g*) of the Act. No similar language is found in section 127 of the Act.

VIII. Conclusion

[77] For these reasons, I would dismiss the appeal with costs.

"Eleanor R. Dawson"

J.A.

"I agree.
David Stratas J.A."

"I agree.
A.F. Scott J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-127-14
STYLE OF CAUSE:	CANADIAN NATIONAL RAILWAY COMPANY v. RICHARDSON INTERNATIONAL LIMITED and CANADIAN TRANSPORTATION AGENCY
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	MARCH 4, 2015
REASONS FOR JUDGMENT BY:	DAWSON J.A.
CONCURRED IN BY:	STRATAS J.A. SCOTT J.A.
DATED:	AUGUST 17, 2015

APPEARANCES:

Guy J. Pratte Nadia Effendi Duncan Ault	FOR THE APPELLANT
Allan Foran Lucia Stuhldreier	FOR THE RESPONDENT RICHARDSON INTERNATIONAL LIMITED
Andray Renaud	FOR THE RESPONDENT CANADIAN TRANSPORTATION AGENCY

SOLICITORS OF RECORD:

Borden Ladner Gervais LLP Ottawa, Ontario	FOR THE APPELLANT
Aikins, MacAulay & Thorvaldson LLP	FOR THE RESPONDENT

Winnipeg, Manitoba	RICHARDSON INTERNATIONAL LIMITED
William F. Pentney Deputy Attorney General of Canada	FOR THE RESPONDENT CANADIAN TRANSPORTATION AGENCY