Federal Court of Appeal  Cour d'appel fédérale

Date: 20180717

Docket: A-203-17

Citation: 2018 FCA 135

CORAM: **NEAR J.A.**
BOIVIN J.A.
DE MONTIGNY J.A.

BETWEEN:

CANADIAN NATIONAL RAILWAY COMPANY

Appellant

and

BNSF RAILWAY COMPANY
and
CANADIAN TRANSPORTATION AGENCY

Respondents

Heard at Ottawa, Ontario, on May 24, 2018.

Judgment delivered at Ottawa, Ontario, on July 17, 2018.

REASONS FOR JUDGMENT BY: NEAR J.A.

CONCURRED IN BY: BOIVIN J.A.
DE MONTIGNY J.A.

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REASONS FOR JUDGMENT

NEAR J.A.

I. Overview

[1] The appellant, Canadian National Railway Company, appealed two decisions of the Canadian Transportation Agency (CTA) regarding its dispute with the respondent, BNSF

Railway Company, about the interpretation of the term ‘car block’. The appellant appeals decisions of the CTA finding that it has jurisdiction to interpret car block and interpreting car block.

II. Background

[2] The appellant and the respondent are railway companies that engage in ‘interswitching’ between the two railways at the Emerson, Manitoba interchange. According to the Railway Interswitching Regulations, S.O.R./88-41 (Interswitching Regulations), the appellant can charge more for interswitching groups of fewer than 60 cars than it can for car blocks of 60 cars or more. The respondent shipped a group of more than 60 cars that were interswitched at the Emerson interchange and the appellant sent an invoice to the respondent at the higher rate. The respondent, taking the position that the cars were a car block of 60 cars or more, paid the invoice at the lower rate. The respondent then filed an application with the CTA pursuant to sections 127 and 128 of the *Canada Transportation Act*, S.C. 1996, c. 10 (Act) asking it to interpret the term car block.

III. Jurisdiction Decision

[3] In a decision dated September 2, 2016, LET-R-43-2016, Case No. 16-01380, (Jurisdiction Decision), the CTA found that it had jurisdiction to interpret car block. It explained that it has jurisdiction pursuant to section 127 of the Act which states that the CTA may make an “interswitching order” and that section 127 does not limit what type of order may be made under the section and so must be interpreted broadly. Further, section 111 of the Act, at the time,

defined ‘interswitch’ as “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]. (Although section 111 and paragraph 128(1)(*b*) of the Act have since been amended, the amendments do not have any impact on this matter.) Thus, the CTA, by necessary implication, has the power to determine if a railway company is transferring traffic in accordance with the regulations. “To do so, it may examine whether the railway company is applying the appropriate interswitching rate, and interpret the various terms used in the Regulations” (Jurisdiction Decision at para. 29).

IV. Interpretation Decision

[4] In a decision dated March 9, 2017, CONF-6-2017, Case No. 16-01380, (Interpretation Decision), the CTA found “that the definition of car block in section 2 of the Interswitching Regulations must be read as 60 or more cars that, as a block, could be interswitched with a reasonable number of hook-and-haul movements at an interchange and are destined to, or originate from a single shipper at a siding” (Interpretation Decision at para. 78). It indicated that “[t]he reasonable number of hook-and-haul movements inevitably falls to be determined on a case by case basis in light of the factual circumstances of each case” (Interpretation Decision at para. 78). The CTA found that the interswitching in this case qualified for the lower car block rate (Interpretation Decision at para. 112).

[5] The CTA added that “the necessity to break a car block for placement in the interchange tracks is not, in and of itself, a relevant consideration in determining eligibility of the car block rate” but “that it is rather the manner and extent of handling of the traffic at the interchange that

determines whether the car block rate is available. Entitlement to the car block rate is lost if there is a requirement to marshall and/or classify cars at the interchange" (Interpretation Decision at para. 109). In this case, the CTA found that the interchange did not require marshalling and/or classification of cars and so the car block rate applies (Interpretation Decision at para. 112).

[6] The appellant filed a Notice of Appeal in this Court on July 4, 2017.

V. Issues

[7] I would characterize the issues under judicial review as follows:

1. Was it reasonable for the CTA to find that it had jurisdiction to interpret the term car block?
2. Was the CTA's interpretation of car block reasonable?

VI. Standard of Review

[8] The standard of review for decisions where the CTA interprets its home statute is reasonableness (*Canadian National Railway Company v. Emerson Milling Inc.*, 2017 FCA 79 at paras. 59–61; *Canadian National Railway v. Canadian Transportation Agency*, 2010 FCA 65 at paras. 27–29; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 at para. 30). This extends to the delineation of its own jurisdiction in applying its home statute (*Bell Canada v. Canada (Attorney General*), 2017 FCA 249 at para. 9). This is not a true question of jurisdiction and so does not attract correctness review. As the

Supreme Court explained in *West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 SCC 22 (*West Fraser Mills*):

> Where the statute confers a broad power on a board to determine what regulations are necessary or advisable to accomplish the statute's goals, the question the court must answer is not one of vires in the traditional sense, but whether the regulation at issue represents a reasonable exercise of the delegated power, having regard to those goals…
>
> West Fraser Mills at para. 23; see also Canada (Canadian Human Rights Commission) v. Canada (Attorney General), 2018 SCC 31.

As long as the CTA's decision demonstrates "justification, transparency and intelligibility within the decision making process" and "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law", the Court will not intervene (*Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 47, [2008] 1 S.C.R. 190.

VII. Analysis

A. *Was it reasonable for the CTA to find that it had jurisdiction to interpret the term car block?*

[9] The appellant argues that the dispute is essentially a claim for damages and that the CTA does not have jurisdiction to hear or enforce this claim and, in particular, that the CTA conflated its adjudicative and legislative powers. I disagree.

[10] The respondent's application to the CTA asked it to interpret the term car block—an exercise of statutory interpretation that it was entitled to conduct within the scope of its mandate to set interswitching rates. In my view, the CTA has jurisdiction to interpret terms in the Interswitching Regulations as part of its jurisdiction to make interswitching orders in accordance

with the Interswitching Regulations. As the CTA explained, its jurisdiction is determined by the Act and not by the respondent's application.

[11] Section 127 of the Act gives the CTA the power to make an interswitching order. Subsection 127(3) in particular requires a company to transfer rail traffic in accordance with the Interswitching Regulations:

Interswitching	**Interconnexion**
Application to interswitch traffic between connecting lines	**Demande d'interconnexion**
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.
Order	**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.
Interswitching limits	**Limites**
(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	(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

the traffic at the interchange except in accordance with the regulations.	une compagnie de chemin de fer à ce lieu de correspondance est subordonné au respect des règlements.

[12] Section 111 of the Act defines interswitch as meaning "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" (Jurisdiction Decision at para. 29, emphasis in original) and 'interswitching rate' as "a rate established by, or determined in accordance with, regulations made under paragraph 128(1)(b)".

[13] Paragraph 128(1)(*b*), as in force at the time, then gave the CTA the power to make regulations determining interswitching rates:

Regulations	**Règlement**
128 (1) The Agency may make regulations	128 (1) L'Office peut, par règlement :
(b) determining the rate per car to be charged for interswitching traffic, or prescribing the manner of determining that rate, including the adjustments to be made to that rate as a result of changes in costs, and establishing distance zones for those purposes; and	b) fixer le prix par wagon ou la manière de le déterminer, de même que les modifications de ce prix découlant de la variation des coûts, à exiger pour l'interconnexion du trafic et, à ces fins, établir des zones tarifaires;

[14] In my view, it was reasonable for the CTA to find that it had jurisdiction to interpret a term found in regulations made pursuant to its enabling statute.

[15] The appellant cites *Canadian National Railway Co. v. Brocklehurst*, [2001] 2 F.C. 141, 195 D.L.R. (4th) 589 and *Canadian National Railway Co. v. Moffatt*, 2001 FCA 327, [2002] 2

F.C. 249 in support of its submission that the CTA only has jurisdiction over matters that have been specifically assigned to it under the Act. Both of these cases are readily distinguishable from this matter on the facts of each case. As a general proposition, however, I have no difficulty accepting that the CTA must find its jurisdiction within the scope of the Act.

[16] In this case, it was reasonable for the CTA to determine that, because section 127 of the Act authorized the CTA to make an interswitching order and section 111 defines interswitch in accordance with the regulations made under paragraph 128(1)(*b*) of the Act, the Agency has jurisdiction to interpret terms found within those regulations.

[17] Any impact on the rate dispute that flows from this interpretation is merely the result of this exercise of statutory interpretation that was within the CTA's jurisdiction. The appellant argues that the CTA cannot have jurisdiction because the Act does not contain provisions that would allow it to enforce the payment of a debt resulting from an interswitching dispute. In my view, however, these are overlapping but distinct claims and there is no reason that they must be mutually exclusive. Indeed, this understanding is supported by the Manitoba Court of Queen's Bench decision declining to stay a related proceeding in that court (*Canadian National Railway Company v. BNSF Railway Company*, MCQB CI-16-01-99908 (Manitoba Court of Queen's Bench Decision)). As that court explained, it is possible that the CTA decision could determine certain, although potentially not all, issues in that proceeding:

> Without question, the Agency is a highly specialized tribunal best suited to resolve many disputes involving rail transportation issues. Additionally, the Agency has not expressed a final determination as to whether it will accept jurisdiction in this matter. Resolution by the Agency could be expedient as well as determinative of the issues with respect to the statutory interpretation of the necessary terms that exist in this case.

> (Manitoba Court of Queen's Bench Decision at p. 11, emphasis added)
>
> It is possible that the Agency may find it has jurisdiction and rule on the application brought by BNSF. Such a ruling could be of assistance to the parties in resolving this dispute, albeit it might not result in a conclusion of all the outstanding issues between these parties.
>
> (Manitoba Court of Queen's Bench Decision at p. 13)

Ultimately, the Manitoba Court of Queen's Bench retained jurisdiction because it was not satisfied that the CTA could resolve the entirety of the dispute but did not exclude the possibility that the CTA decision could be relevant:

> …it would be inadvisable for the Superior Court to decline jurisdiction in favour of the Agency when the latter considers that it does not have jurisdiction to award part of the respondents' claim (para. 71).
>
> (Manitoba Court of Queen's Bench Decision at pages 12–13 citing *Chabot v. Westjet,* 2016 QCCA 584 at para. 71, 2016 CarswellQue 6587).

[18] In this way, the Manitoba Court of Queen's Bench found that the CTA does not have jurisdiction to enforce an award but considered that it may have jurisdiction over part of the dispute. Overall, I see no reason why the CTA cannot interpret a term in one of its home regulations and then a court could enforce the payment of a debt—if indeed that is required.

B. *Was the CTA's interpretation of car block reasonable?*

[19] In the Interpretation Decision, the CTA interpreted section 2 of the Interswitching Regulations, which defines car block as "60 or more cars that, as a block, are interswitched at an interchange and are destined to, or originate from a single shipper at a siding". In that decision, the CTA interpreted car block as "60 or more cars that, as a block, could be interswitched with a

reasonable number of hook-and-haul movements at an interchange and are destined to, or originate from a single shipper at a siding" (Interpretation Decision at para. 78).

[20] The appellant argues that this interpretation was unreasonable because it is an implicit legislative amendment that amends "are interswitched" to "could be interswitched with a reasonable number of hook-and-haul movements" and that this is an unreasonable interpretation. Again, I disagree.

[21] The Interpretation Decision found, and I agree, that the text of section 2 is silent as to whether an interswitching operation must occur in a single movement. Importantly, however, there is nothing in the text of section 2 that precludes an interpretation that allows for interswitching to occur in multiple movements. In this case, then, the context and purpose will be determinative.

[22] The CTA found that the context and purpose of the Interswitching Regulations—namely to provide shippers with relief in the context of a near monopoly—militates against a definition of car block that bestows all power to determine what rate to charge on the appellant:

> It would frustrate the very purpose underlying interswitching if the definition in section 2 were interpreted as CN contends … Only the terminal carrier can ultimately decide whether it will actually interswitch the car block as a car block in practice. If this narrow interpretation were accepted, it would give the railway company sole discretion to determine whether the car block rate applied. Simply put, it would be illogical if the availability of a statutory competitive access provision of the CTA, such as interswitching, designed to relieve against near monopolistic situations, were left to the discretion of the very railway company that benefits from the near monopoly.
>
> (Interpretation Decision at para. 74)

[23] In my view, it was reasonable for the CTA to look to the text, context, and purpose of the Interswitching Regulations and, in doing so, the CTA's interpretation considered the interests of both railway companies involved in an interswitching operation. It arrived at the above interpretation based on its expertise in this area and consistently with its previous decision in Cominco Fertilizer-AgPro where it found that car blocks can consist of a reasonable number of sub-blocks (*Cominco Fertilizer* Order No. 1992-R-207):

> …the Agency finds that the car block rate is available if the following conditions are met: a single shipper offers a car block of 60 or more cars for interswitching, and the car block can be interswitched as a block with a reasonable number of hook-and-haul movements, which is determined on a case by case basis.
>
> (Interpretation Decision at para. 84)

The CTA decided that the car block rate would apply "if only a reasonable number of hook-and-haul movements are required during the interswitching" (Interpretation Decision at para. 77) and that "[t]he reasonable number of hook-and-haul movements inevitably falls to be determined on a case by case basis in light of the factual circumstances in each case" (Interpretation Decision at para. 78). In this way, the CTA's interpretation is consistent with the text, context, and purpose of the Act and the Interswitching Regulations and with its previous decision. Further, to interpret car block as proposed by the appellant leads to an absurd result by which, as explained in the Interpretation Decision, a dominant railway company can determine whether or not to break a group of cars into groups of fewer than 60 and therefore charge more for interswitching services. In my view, the CTA's Interpretation Decision was justified, transparent, and intelligible and this result was open to it on the facts and law before it. I see no reason to interfere in the CTA's decision.

VIII. Conclusion

[24] I would dismiss the appeal with costs.

"David G. Near"
J.A.

“I agree.
Richard Boivin J.A.”

“I agree.
Yves de Montigny J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

AN APPEAL FROM A PREVIOUS DECISION OF THE CANADIAN TRANSPORTATION AGENCY DATED SEPTEMBER 2, 2016, DECISION NUMBER (LET-R-43-2016, Case No. 16-01380) and CONFIDENTIAL DECISION OF THE CANADIAN TRANSPORTATION AGENCY DATED MARCH 9, 2017, DECISION NUMBER (CONF-6-2017, Case No. 16-01380)

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CONCURRED IN BY:	BOIVIN J.A. DE MONTIGNY J.A.
DATED:	JULY 17, 2018

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