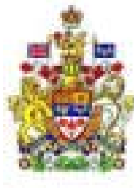
Federal Court of Appeal



Cour d'appel fédérale

Date: 20100621

Docket: A-199-09

Citation: 2010 FCA 166

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

BETWEEN:

CANADIAN NATIONAL RAILWAY COMPANY

Appellant

and

CANADIAN TRANSPORTATION AGENCY,
BURLINGTON NORTHERN SANTA FE RAILWAY COMPANY
PATERSON GRAIN, CANADIAN WHEAT BOARD and
MINISTER OF INFRASTRUCTURE AND TRANSPORTATION
FOR THE GOVERNMENT OF MANITOBA and
ATTORNEY GENERAL OF CANADA

Respondents

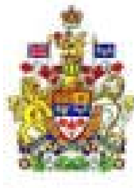
Heard at Ottawa, Ontario, on May 11, 2010.

Judgment delivered at Ottawa, Ontario, on June 21, 2010.

REASONS FOR JUDGMENT BY: PELLETIER J.A.

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

Federal Court of Appeal



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REASONS FOR JUDGMENT

PELLETIER J.A.

INTRODUCTION

[1] Canadian National Railway Company (CN) brings this appeal of a decision of the Canadian Transportation Agency (the CTA) dated February 6, 2009, reported as Decision no. 35-R-2009, (the Decision) which held that CN's Fort Rouge yards constituted an interchange within the meaning of section 111 of the *Canada Transportation Act*, S.C. 1996 c. 10, (the Act). The effect of that designation is that the exchange of traffic between CN and Burlington Northern Santa Fe Railway

Company (BNSF) at that location constitutes interswitching within the meaning of section 111 of the Act. As a result, BNSF is entitled to have CN haul BNSF'S traffic to its (BNSF's) customer Patterson Grain at regulated rates rather than at the commercial rate which would otherwise apply.

[2] The dispute between the two railway companies arises because of changes which CN made to its facilities in the Winnipeg area. Pursuant to agreements negotiated between their predecessors in 1912 (the Running Rights Agreement) and in 1913 (the Transfer Track Agreement) (collectively, the Agreements), CN and BNSF exchanged traffic on two tracks located in CN's F Yard. In 2003, CN reconfigured its tracks in the Winnipeg area with the result that the traffic which had formerly been exchanged at F Yard was now exchanged at CN's Fort Rouge yard, located 560 metres further down the line. This means that BNSF must travel 1.91 miles over CN's track (via running rights) to access the Fort Rouge Yards.

[3] While BNSF had previously paid CN at regulated rates for hauling its traffic to its customers (including Patterson Grain) located within 30 km of F Yard at the regulated rate, CN attempted to negotiate a commercial rate with BNSF for hauling its traffic from the Fort Rouge Yard. When the parties were unable to agree, CN applied to the CTA for a determination that the exchange of traffic between the two companies at the Fort Rouge Yard did *not* constitute interswitching, within the meaning of section 127 of the Act, a determination which required a prior decision as to whether an interchange exists at the Fort Rouge Yard. The CTA held that there is an interchange and that the exchange of traffic at the Fort Rouge Yard constitutes interswitching. CN appeals that decision on the ground that the CTA erred in law by misinterpreting the statutory definition of interchange,

erred in law in finding that BNSF had an ownership interest in CN's Fort Rouge Yard and, lastly, erred in law in finding that CN was a "local carrier" for the purposes of section 127 of the Act.

THE CTA'S DECISION

[4] After reviewing the facts and the various parties' submissions, the CTA set out the applicable statutory provisions, which I reproduce below:

"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.
"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;	« 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.
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.

[5] After referring to the national transportation policy, as enunciated at section 5 of the Act, the CTA reviewed the factual and legislative context of the interswitching provisions of the Act. It concluded that review as follows:

> [63] Interswitching of traffic between railway companies has existed in Canada since the early 1900's. The concept of interswitching was introduced to limit the proliferation of railway lines in urban areas serving manufacturing-based industries. However, limiting the number of railway lines in an area could create a monopolistic service and rate situation. The ability to exchange or interswitch traffic with another railway company or companies within certain limits was seen as a means to reduce exclusive control over traffic.
>
> [64] The interswitching provisions of the CTA today are meant to provide shippers with greater access to competitive services at known prices to alternate rail carriers within interswitching limits. An interpretation of the relevant legislation should support this objective.
>
> Decision 35-R-2009 at paragraphs 63 and 64.

[6] The CTA then considered the threshold question of whether there was an interchange at the Fort Rouge Yards. It noted CN's argument that the definition of interchange had two criteria which must exist at the same place, that is, there must be an interconnection of two railway lines and there must be a capacity to receive and store cars of either line until they are picked up by the other railway. Since the place where CN's and BNSF's lines interconnected was 1.9 miles from the place where cars were stored until picked up by the other railway, CN argued that there was no interchange.

[7] The CTA rejected CN's argument, finding that the word "place" is a broad term which may cover an area which includes a place where the lines of two railways interconnect and a place where cars may be stored until retrieved. The CTA found that both elements did not have to exist at exactly the same point on the map. It noted that no two yards or track configurations are precisely

the same so that "it may be virtually impossible to have facilities in place for the storage of rail cars at the connecting point of two railway lines.": Decision 35-R-2009 at paragraph 77.

[8] The CTA noted that the change in circumstances giving rise to the application, that is, the fact that BNSF must now travel a greater distance over CN's track to reach the storage yard, was the result of CN's decision to move the location of the storage yard.

[9] On the issue of interswitching, the CTA noted that the statutory definition requires that traffic be transferred from the lines of one railway to the lines of the other. Since the Fort Rouge Yards are, on the face of it, entirely CN track, the issue was whether there was in fact a transfer to the lines of another railway.

[10] The CTA addressed this question by referring to the terms of the 1913 Transfer Track Agreement which is binding on both CN and BNSF. [While the Agreement, drafted before either CN or BNSF came into existence, refers to their predecessor companies, for the sake of simplicity, I will treat the Agreement as referring to the parties to the dispute before us.] The CTA noted that 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.

[11] 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.

[12] The CTA concluded that the “operating environment” which existed at CN’s F Yard was maintained at CN’s Fort Rouge Yard. It held that the Transfer Track Agreement gave BNSF an ownership interest in the transfer track. The CTA referred to one of its prior decisions, the CNCP Ottawa Valley partnership decision (Decision no 798-R-1993) as authority for the proposition that where a jointly owned railway line crossed any other line, including the lines of one of the joint owners, and a place for the storage of cars existed at that location, the requirements for an interchange were met. This decision supported the CTA in its conclusion that, in the present case, BNSF had a sufficient ownership interest in the transfer track at the Fort Rouge Yard to have a line of railway for the purposes of the interswitching provisions of the Act.

[13] The CTA also referred to another of its prior decisions on which CN relied in support of its position, the *Celgar* case, Decision no. 439-R-1989, in which a shipper asked for a determination that its facilities at Kraft, B.C., be deemed to be within the interswitching radius of the interchange at Nelson, B.C, located 45.1 track miles away. BNSF’s line connected with Canadian Pacific Railway’s (CP) line at Troup Junction, some 8.9 miles from Nelson. BNSF accessed Nelson over

CP's track pursuant to a running rights agreement. BNSF and CP had exchanged cars at Nelson for a considerable period; in fact, CP publications had listed Nelson as an interchange point.

[14] The CTA found that there was no interchange at Nelson because there was no connection of the lines to two railways at that location. The connection was at Troup Junction but there were no facilities for the storage and exchange of cars at that location and while there were such facilities at Nelson, there was no connection of the lines of one railway with those of another. In the result, there was no interchange at Nelson, and therefore, no possibility of deeming the shipper's facilities within the statutory radius.

[15] The CTA distinguished the *Celgar* case on the basis of the proximity of the connection point and the yards in this case (1.9 miles) as opposed to the greater distance in issue in *Celgar*, namely 8.9 miles. It noted, as it had earlier, that the legislation did not require the connecting lines and the storage yard to be in exactly the same place.

[16] CN raised a final argument before the CTA, namely that in order for interswitching to occur, it (CN) must be a local carrier as defined in the Act. CN took the position that it was not a local carrier because it could not access Patterson Grain by operating exclusively on its own lines. It had to use CP's line for a part of the trip which meant that it did not have a "continuous route" to the Patterson facility. The CTA disposed of this argument by pointing out that while the definition of local carrier is significant for the competitive line rate provisions of the Act, it has no application to the interswitching provisions which deal with a different problem.

[17] In the end, the CTA found that there is an interchange between CN and BNSF since there is a place where the two railway lines connect and where loaded or empty railway cars may be stored until delivered or received. In addition, the CTA found that the provisions of the 1913 Transfer Track Agreement establish that BNSF has a line of railway for the purposes of the interswitching provisions of the Act. As a result, the CTA held that the activities between BNSF and CN in the area of Portage Junction (initially F Yard, now Fort Rouge Yard) constitutes interswitching for the purposes of section 127 of the Act.

STATEMENT OF ISSUES

[18] As indicated earlier, CN challenges the CTA's determination with respect to the presence of an interchange. It also challenges the CTA's determination that BNSF has a line of railway at the Fort Rouge Yards so that interswitching can take place between lines of railway. Finally, it challenges the CTA's conclusion that the fact that CN is not a local carrier with respect to the Patterson Grain is irrelevant for purposes of determining if interswitching occurs at the Fort Rouge Yards.

ANALYSIS

The standard of review

[19] CN argued that this statutory appeal raises issues of law and jurisdiction which must be decided on a standard of correctness. It relied upon a passage in the Decision which described the interpretation of section 127 of the Act as a "process of statutory interpretation of a jurisdictional provision in the Agency's constituting statute…": see Decision at paragraph 51. I do not agree.

[20] It is generally accepted that a specialized tribunal interpreting its home legislation is entitled to a degree of deference: *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, at paragraph 54. With respect to the CTA, the Supreme Court has held that it is entitled to deference when applying the provisions of the Act, even when the issue is one which is not limited to the field of transportation, such as human rights.

> 98 …The Canada Transportation Act is highly specialized regulatory legislation with a strong policy focus. The scheme and object of the Act are the oxygen the Agency breathes. When interpreting the Act, including its human rights components, the Agency is expected to bring its transportation policy knowledge and experience to bear on its interpretations of its assigned statutory mandate: Pushpanathan, at para. 26
>
> ….
>
> 100 The Agency is responsible for interpreting its own legislation, including what that statutory responsibility includes. The Agency made a decision with many component parts, each of which fell squarely and inextricably within its expertise and mandate. It was therefore entitled to a single, deferential standard of review.
>
> *Council of Canadians with disabilities v. Via Rail Canada Inc*., 2007 SCC 15, [2007] 1 S.C.R. 650, at paragraph 98 and 100

[21] While questions of *vires* continue to attract the correctness standard (see *Dunsmuir*, supra, at paragraph 59), there is nothing in this problem which raises an issue of *vires*. The CTA is entitled to interpret and apply the definitions of interchange and interswitching, and so long as its interpretation is reasonable, this Court will not intervene. The CTA's characterization of the issue as jurisdictional is no more binding on this Court than would be its refusal to recognize as such an issue of *vires*. The appropriate standard of review is reasonableness.

Is there an interchange?

[22] CN argued that there could only be an interchange if the connection between two railway lines and the storage area where cars could be stored until delivered or retrieved were at the same place. In this case, the two places were some 1.9 miles apart.

[23] In CN's view, an interchange exists where the storage area is accessible by each railway on its own track and the connection between the lines is at the storage area itself. While this may well be one type of interchange, perhaps the ideal type, it is by no means exhaustive of the possibilities. The CTA recognized this when it wrote of the variety of railway yard configurations. As the CTA noted, all that the Act requires is that the two elements be found at a place. How that place is defined is a matter for the CTA.

[24] CN argues that the CTA's decision in this case is inconsistent with its decision in the *Celgar* case discussed above. I agree that there is no difference in kind between the two decisions, but only differences in degree. Two elements separated by a distance of 1.9 miles may be considered as one place while two elements separated by 8.9 miles may not be considered as one place. These are precisely the kinds of distinctions which the CTA is in the best position to make and it is not for this Court to interfere.

[25] CN argues that this is not the only issue with the *Celgar* decision. CN says that the *Celgar* case decided that running rights could not create a connection between two lines of railway. That issue arose because the connection between CP and BNSF was at Troup Junction. In order to get to

Nelson, BNSF had to invoke running rights on CP's track. The CTA's reference to running rights was in the context of pointing out that there was no place of connection at Nelson, only at Troup Junction. In this case, the place of connection and the place of storage are located at a place in which the two elements are separated by 1.9 miles. The fact that, within that place, BNSF exercises running rights over CN's track is immaterial.

<u>Does BNSF have a line of railway at the Fort Rouge Yards?</u>

[26] CN challenges the CTA's conclusion that BNSF has a sufficient ownership interest in the Fort Rouge Yard by virtue of the 1913 Transfer Track Agreement to have a line of railway at that place so that interswitching can take place. Interswitching, it will be recalled, consists in the transfer of traffic from one line of railway to another. If BNSF has no line of railway at the Fort Rouge Yards, interswitching cannot take place.

[27] CN criticizes the CTA's conclusion that an agreement drafted in 1913, before the Fort Rouge Yard existed, is capable of creating an ownership interest in that land. According to CN, the Transfer Track Agreement is nothing more than a cost sharing agreement and did not, either directly or indirectly, confer upon BNSF an interest in the land owned by CN.

[28] I agree with CN that the Transfer Track Agreement did not create any ownership interest in land in the nature of an estate in fee simple. But it is clear that the Agreement did recognize BNSF's right to the use of designated land for designated purposes and stipulated that CN could only alter those rights by providing a place where those rights could continue to be exercised. The CTA did

not have to decide the status of those rights 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. It decided that it did.

[29] In coming to that conclusion, the CTA referred to its earlier decision in the *CNCP Ottawa Valley Partnership* case. CN argues that the CTA was bound to find that BNSF had an ownership interest in the Fort Rouge Yard so as to satisfy the test it had set out in that case. But when one reads the extracts of that decision upon which the CTA relied, it is clear that the decision was not meant to be exhaustive of all possibilities. In particular, the following passage is instructive:

> 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" …
>
> 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…
> Decision at paragraph 101.

[30] CN reads this passage as saying that only an ownership interest will do, and as a result, the CTA searched to find an ownership interest where there was none in order to support the conclusion it sought. In my view, it is possible to read this passage as simply indicating that there can be different lines of railway even where there is only one physical track, depending upon the interests which the parties have in that track. 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. I cannot say that such a conclusion cannot be supported or that it is outside the range of possible, acceptable outcomes: *Dunsmuir*, at paragraph 47.

[31] This is precisely the kind of determinations which the CTA is equipped to make by virtue of its institutional expertise in railways and railway operations. We ought not to substitute our view for the CTA's in a matter which is so close to its core expertise.

Is CN a local carrier with respect to traffic to Patterson Grain?

[32] CN argued that the scheme of the Act contemplated that before interswitching could take place, CN would have to be in a position to deliver traffic to Patterson entirely over its own lines. As CN could only get to Patterson's facilities by exercising running rights over track belonging to CP, it argued that interswitching could not occur.

[33] In my view, the Board dealt fully with this argument in its reasons and I have nothing to add to what the Board said.

CONCLUSION

[34] In my view, the CTA's reasoning in disposing of the application before it satisfied the Supreme Court's test of justification, transparency and intelligibility: *Dunsmuir*, paragraph 47. As a result, I would not intervene. I would dismiss the appeal with costs to BNSF and one set of costs to Paterson Grain and the Canadian Wheat Board.

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

"I agree.
J. Edgar Sexton J.A."

"I agree.
Johanne Trudel J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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