Federal Court of Appeal | Cour d'appel fédérale

Date: 20170426

Dockets: A-286-16
A-461-16
A-113-17

Citation: 2017 FCA 86

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

BETWEEN:

CANADIAN NATIONAL RAILWAY COMPANY

Appellant

and

EMERSON MILLING INC. AND CANADIAN TRANSPORTATION AGENCY

Respondents

Heard at Edmonton, Alberta, on April 24, 2017.

Judgment delivered at Edmonton, Alberta, on April 26, 2017.

REASONS FOR JUDGMENT BY: STRATAS J.A.

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

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REASONS FOR JUDGMENT

STRATAS J.A.

[1] Canadian National Railway Company appeals from three decisions of the Canadian Transportation Agency dated March 4, 2016 (decision CONF-1-2016), August 26, 2016

(decision CONF-11-2016), and January 20, 2017 (decision CONF-2-2017), all in Case No. 15-03518. The appeals are court files A-286-16, A-461-16 and A-113-17 respectively.

[2] These matters were set down to be heard together. At the outset of the hearing before us, in response to the Court's suggestion, the parties agreed that the three appeals should be consolidated. I so order. The style of cause for the consolidated appeals appears on this document. These reasons shall be filed in each court file.

[3] Of the consolidated appeals, the first one, A-286-16, is the key one. The Agency determined that Agency decided that Canadian National owed Emerson service at four locations under the *Canada Transportation Act*, S.C. 1996, c. 10. Canadian National submits that the Agency committed procedural unfairness and otherwise rendered an unreasonable decision. The unreasonableness is said to stem from the Agency's failure to give effect to the doctrine of *res judicata* and its unacceptable interpretation of the relevant provisions of the Act.

[4] For the reasons that follow, I would dismiss the appeal in A-286-16. As Canadian National properly concedes, as a result of the dismissal of the appeal in A-286-16, the other appeals must also be dismissed.

A. Background facts

[5] Emerson ships oats on Canadian National's rail network. Its facility does not connect to any portion of the network. It is located eight kilometers from Canadian National's track, known as RD-47.

[6] For a quarter of a century, Emerson moved its shipments to the RD-47 track and Canadian National accepted Emerson's shipments there—all without any formal agreement with Canadian National regarding the use of RD-47. Then, in March 2013, Emerson and Canadian National entered into a temporary licence agreement for the use of RD-47. It was to expire in July 2015. A new agreement was not reached.

[7] Just before the agreement expired, Emerson filed with the Agency an application complaining that Canadian National was refusing to provide it with service after July 2015, contrary to sections 113-116 and 127 of the Act. Emerson alleged that Canadian National's refusal to provide adequate and suitable accommodation for the receiving and loading of Emerson's traffic at the expiry of the temporary licence agreement was a breach of Canadian National's level of service obligations under the Act.

[8] Broadly speaking, sections 113-116 provide that when Emerson has "traffic offered for carriage," Canadian National has a number of obligations. In particular, and of relevance to this case, is paragraph 113(1)(*a*). It provides that "a railway company shall…furnish…at all points of

stopping established for that purpose, adequate and suitable accommodation for the receiving and loading of all traffic offered for carriage on the railway."

[9] In the decision giving rise to the appeal in A-286-16, the Agency held that Canadian National was improperly denying service to Emerson. The Agency identified four points of stopping at which a level of service obligation could be owed to Emerson.

[10] At the conclusion of its decision, the Agency called for submissions on whether it was reasonable and practical for Canadian National to provide adequate and suitable accommodation for the receiving and loading of Emerson's traffic at the four points of stopping and what Emerson's correlative obligations would be at each location. The Agency identified the following factors as relevant to its determination (at paragraph 81):

- Can adequate and suitable accommodation for the receiving and loading of Emerson's traffic be furnished at the point of stopping?
- Is it reasonable, considering the operational constraints that may exist, for Canadian National to furnish adequate and suitable accommodation for the receiving and loading of Emerson's traffic at the point of stopping?
- What, if any, is Emerson's correlative obligation with respect to its traffic at the point of stopping?

[11] In the end, after considering the parties' submissions on these factors, the Agency found that accommodation could reasonably be provided at two of the four points of stopping and that Canadian National had breached its level of service obligations by refusing to load Emerson's traffic at these points of stopping. This decision has given rise to appeal A-461-16.

[12] Finally, the Agency called for further submissions on the issue whether Emerson was entitled to the reimbursement of expenses arising from the breach. After receiving those submissions, the Agency awarded Emerson compensation for its expenses caused by Canadian National's improper denial of service. This decision has given rise to appeal A-113-17.

[13] As mentioned above, Canadian National properly concedes that the main appeal is file A-286-16 and that if it is dismissed, the other appeals must also be dismissed.

B. Analysis

[14] In its notice of appeal, Canadian National raises three grounds of appeal:

> 1. The Agency breached its duty of procedural fairness by expanding the scope of the application filed by [Emerson] by finding that four additional locations were "stopping points" at which [Emerson] is potentially owed service.
>
> 2. The Agency erred by failing to apply the doctrine of *res judicata* and dismiss [Emerson's] application as an abuse of process accordingly; and
>
> 3. The Agency erred by determining that [Canadian National] owed service level obligations to [Emerson] under the Act, despite the expiry of [Emerson's] commercial right to access [Canadian National's] rail infrastructure.

[15] This Court can only consider "questions of law" and "questions of jurisdiction" in appeals under the Act: subsection 41(1) of the Act; *Canadian National Railway Company v. Emerson Milling Inc.*, 2017 FCA 79.

[16] The first ground of appeal, procedural fairness, can be entertained by this Court. In *Canadian National*, this Court determined that procedural fairness falls under "questions of jurisdiction" under subsection 41(1) of the Act.

[17] The second ground of appeal is more problematic. As stated in the notice of appeal, the issue was stated as one of mixed fact and law involving the application of settled law/legal standards to the facts. As explained in *Canadian National*, above, this is not a "question of law" within the meaning of subsection 41(1) of the Act. However, the memorandum of fact and law can be used to construe the notice of appeal and gain "a realistic appreciation" of the appeal's "essential character": *Canadian National*, above, at para. 29. From Canadian National's memorandum, we can see that it is questioning whether the Agency properly stated the law concerning *res judicata*. Thus, I am satisfied that there is a question of law here that this Court can entertain.

[18] The third ground of appeal resolves itself into a question of statutory interpretation, which is a question of law that this Court can consider.

[19] I turn now to Canadian National's three grounds of appeal.

(1) Procedural fairness

[20] Canadian National submits that the Agency committed procedural unfairness by making an order that was broader than the scope of the application Emerson placed before it. Canadian

National alleges that Emerson's application was restricted to the RD-47 track. It says that other means of access to its network—the other three points of stopped on Canadian National's network that the Agency ended up identifying—were not in play during the proceedings.

[21] I disagree. First, the application was not restricted to the RD-47 track. Among other things, Emerson sought access to Canadian National's network "in any manner…that the Agency deems expedient." Canadian National was on notice regarding the scope of the proceedings.

[22] Further, during an application by Emerson for interim relief, other means of access to Canadian National's network were discussed. Canadian National did not object that Emerson's arguments were going beyond the scope of the application. Other submissions made to the Agency during the course of proceedings before it show that the application was not restricted to the RD-47 track. Further, if during the proceedings Canadian National felt that matters were going beyond the scope of the application, it should have made an objection at the earliest opportunity: *Irving Shipbuilding Inc. v. Canada* (*A.G.*), 2009 FCA 116, [2010] 2 F.C.R. 488; *Re the Human Rights Tribunal and Atomic Energy Canada*, [1986] 1 F.C. 103 at pages 107, 110-11 (C.A.).

[23] In these circumstances, Canadian National cannot be said to have been taken by surprise by the Agency's decision which examined possibilities other than the RD-47 track.

[24] In the end, the Agency asked for submissions concerning the practical feasibility of the four points of stopping it identified and the parties' obligations that would apply if the Agency

formalized, in an order, a particular point of stopping: see paragraphs 82-83 of the decision. Specifically, it identified three factors on this (see paragraph 10, above, where they are quoted), and it asked the parties to comment. This was an opportunity for Canadian National to adduce evidence and make submissions to the effect that one or more of the points of stopping could not or should not be used for Emerson's traffic, was otherwise unreasonable for that use or should be subject to conditions. Canadian National availed itself of that opportunity.

(2) *Res judicata*

[25] As mentioned above, in the proceedings giving rise to appeal A-286-16, Emerson sought an order from the Agency that Canadian National provide service to it at the RD-47 track or "in any manner…that the Agency deems expedient." The Agency granted this relief to Emerson.

[26] Canadian National submits that the Agency was barred from doing so by the doctrine of *res judicata*, one of the doctrines that forbids relitigation. Canadian National submits that in earlier proceedings before the Agency, Emerson asked for this same relief and the Agency refused it: see the Agency's decision in *Emerson Milling*, dated July 10, 2015 (Letter Decision No. 2015-01-10, Case No. 14-06408).

[27] In the decision now under appeal, the Agency acknowledged that Emerson had indeed raised this issue in the earlier proceeding but the Agency did not decide it. Therefore, in its view, the doctrine of *res judicata* did not apply. *Res judicata* applies to bar relitigation of proceedings that have been decided.

[28] Canadian National takes particular issue with the Agency's statement in its decision (at paragraph 26) that "[*r*]*es judicata* applies to prevent the re-litigation of causes of action or issues previously decided; it does not prevent an applicant from requesting the same remedy in the context of a different complaint, even against the same respondent." It submits that this is an error of law.

[29] The wording used by the Agency is somewhat loose. Viewed in context, what the Agency was trying to say was that a genuinely fresh cause of action against the same party can give rise to a remedy and is not barred by *res judicata*. This is a correct statement of law.

[30] In my view, the determinative question is the reasonableness of the Agency's conclusion that it had not dealt with this issue in the earlier proceedings. If it is reasonable, then there can be no *res judicata*: the matter has not already been decided.

[31] I see no grounds for setting aside the Agency's conclusion. Its construction of those earlier proceedings and its assessment of what the earlier decision dealt with—a question of fact—is a matter on which it is entitled to deference under the reasonableness standard. Even if the standard were correctness, I would agree with the Agency's construction of the earlier proceedings. Although the issue was placed before the Agency, the Agency did not deal with the issue in any way. Its reasons are entirely silent on the issue. Further, the Agency's determination of the issues in the earlier proceedings did not decide the issue in any way, impliedly or necessarily. The Agency was correct in deciding that the doctrine of *res judicata* does not apply.

(3) The statutory interpretation issue

[32] Canadian National submits that "[t]he Agency erred by determining that [Canadian National] owed service level obligations to [Emerson] under the Act, despite the expiry of [Emerson's] commercial right to access [Canadian National's] rail infrastructure." Essentially, Canadian National submits that the Agency went beyond the proper scope of its powers under paragraph 113(1)(*a*), properly construed. In doing so, it made an unreasonable decision.

[33] The parties agree that the standard of review on this issue is reasonableness. I agree. This Court so held in *Canadian National*, above at paragraphs 59-62. Reasonableness is presumed to be the standard of review of administrative decision-makers' interpretations of provisions in "[their] own [legislation] or [legislation] closely connected to [their] function, with which [they have] particular familiarity," *i.e.*, their home statute: *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654 at para. 34; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at para. 54. This presumption applies even where Parliament has enacted full, unrestricted rights of appeal: *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, [2016] 2 S.C.R. 293.

[34] Overall, I find that the Agency's decision was reasonable.

[35] First, the Agency proceeded upon an acceptable methodology. It asked itself whether Canadian National has level of service obligations concerning Emerson's traffic. This particular

question was not overly contentious before the Agency and, to some extent, is answered by previous decisions of the Agency.

[36] Then the Agency asked itself at what locations level of service obligations are owed. This required it to interpret paragraph 113(1)(*a*). As mentioned above, this paragraph provides that "a railway company shall…furnish…at all points of stopping established for that purpose, adequate and suitable accommodation for the receiving and loading of all traffic offered for carriage on the railway."

[37] Then the Agency appropriately cited *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601 in support of the proposition that it must look at the text, context and purpose of this statutory provision. In looking at the context of this statutory provision, it took note of its broad remedial powers, powers that, in its view, shed light on the meaning of "points of stopping established for that purpose." These powers, found in subsection 116(4) of the Act, are the ability to order that "specific works be constructed or carried out," "property be acquired," "cars, motive power or other equipment be allotted, distributed, used or moved as specified by the Agency," and "any specified steps, systems or methods be taken or followed by the company." The Agency concluded, appropriately, that in suitable circumstances, where reasonable, "the railway company's property and equipment may be used to discharge its level of service obligations" (at paragraphs 66 and 76-81).

[38] The Agency continued its analysis, noting the competing considerations that influence the interpretation of paragraph 113(1)(*a*) (at paragraphs 67-68):

> It is [Canadian National's] position that it establishes, with respect to its own property, a point of stopping. This implies that, with respect to points of stopping on a railway company's property, there are no level of service obligations except the ones accepted by that company and that the company could unilaterally decide to no longer provide service at a point of stopping on its property, regardless of the traffic being offered or established patterns of service.
>
> While a railway company must have the option to reconfigure its infrastructure and service offerings from time to time, the level of service provisions allow recourse to shippers who might be unduly affected by such a change or who may feel that it is arbitrary or unbalanced. The entire logic of sections 113 to 116 of the [*Canada Transportation Act*] rests on the ability of an interested party to question the railway company's actions and its rationale for not meeting its obligations, which is, more often than not, expressed in logistical terms such as congestion, infrastructural changes or constraints and efficiency of service. As an expert tribunal, the Agency will reflect on the claims made by both parties.

[39] The Agency's reasons must be seen in light of the record before it: *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708. As a regulatory agency that deals over time with a limited set of regulatees, its record often extends to "past proceedings and regulatory experience" and this "can form part of the data the administrative decision-maker can draw upon in making a decision": *Bell Canada v. 7262591 Canada Ltd. (Gusto TV)*, 2016 FCA 123 at para. 15. Thus, some of the rationales for a regulator's decision can be seen in other relevant decisions it has made.

[40] In the decision under appeal, the Agency referred (at paragraph 68) to "[t]he entire logic of sections 113 to 116 of the [*Canada Transportation Act*]" as part of the basis for its decision. It did not expand on this, though it is rather evident in paragraphs 67-68 of its decision, quoted above, and its enumeration of its remedial powers in paragraph 66 of its decision. But the Agency has discussed this "entire logic" at length in another recent decision, one that elaborates upon the purposes of sections 113-116 of the Act: see the Agency's decision in *Dreyfus*, dated

October 3, 2014 (Letter Decision No. 2014-10-03, Case No. 14-02100). This Court has found this decision to be reasonable: *Canadian National Railway Company v. Dreyfus*, 2016 FCA 232.

[41] At paragraph 10 of *Dreyfus*, the Agency noted that one of the purposes of sections 113-116 "is to enable the Agency to establish the level of service, which, in a normal competitive environment, would be expected to be set naturally by market forces." Thus, "the provisions are intended to ensure that the level of service is not established solely on the basis of a railway company's interests and preferences, especially where railway companies can exercise monopoly power over captive shippers." The Agency concluded that "an overly restrictive interpretation that does not attain [these] objectives must be rejected."

[42] In *Dreyfus*, the Agency added (at paras. 14-15):

> As a shipper remedy, one of the purposes of section 113 of the [*Canada Transportation Act*] is to counterbalance the monopoly or near monopoly power that a railway company may exert with respect to certain shippers in some circumstances. To the extent that monopoly power can be exerted, the railway company's preferences will overwhelm shippers' preferences in terms of the overall car supply, supply of motive power, delays, deployment of crews and other level of service issues. In other words, it allows the railway company to impose its operational preferences on shippers to meet its operational efficiency objectives and maximize its own profit, even if this produces a suboptimal economic outcome with respect to the industry it serves.
>
> …
>
> …[T]he level of service provisions have been a robust part of the [*Canada Transportation Act*] and its predecessors since before Confederation. They have been retained with little alteration through numerous legislation reviews by Parliament. Many shippers are captive to a single railway company and therefore lack bargaining power either on pricing or on level of service or both. As Class 1 railway companies rationalize their rail systems through discontinuance and abandonment, more shippers become captive. The level of service provisions exist

> to ensure suitable and adequate conditions for shippers, especially those who are captive or do not have other viable economic alternatives due to the volumes and distances involved.

According to the Agency, this is the primary ill against which sections 113-116 of the Act exists to address.

[43] In the case before us, the Agency concluded (at paragraph 69):

> The Agency finds that a point of stopping [under paragraph 113(1)(*a*) of the Act], even on a railway company's property, is not established by the railway company when it enters into an agreement that grants a party the right to access the railway company's property. That is to say the obligation is not contractual in nature. When infrastructure exists on which trains can stop and have stopped, that location is a point of stopping pursuant to paragraph 113(1)(*a*) of the [*Canada Transportation Act*].

[44] Canadian National submits that the requirement that trains "have stopped" at a place does not necessarily mean that, following the exact words of paragraph 113(1)(*a*), there is a point of stopping "established for that purpose." Trains might have stopped at a place decades ago, but not in the recent past.

[45] I take Canadian National's point that there may be a case where the Agency will have to consider further the meaning of "have stopped" and ensure that its interpretation sufficiently accords with the statutory requirement that the point of stopping is "established for that purpose." But this case does not attract Canadian National's concern. All four of the places that the Agency identified as points of stopping are being used as points of stopping at present. This

is not a case where the Agency has identified a point of stopping that has not been used for a long time.

[46] Canadian National also submits that the words quoted above (from paragraph 69 of the Agency's decision) give a meaning to paragraph 113(1)(*a*) that is far too broad. In its view, if the Agency is correct, just about any place a train has ever stopped qualifies as a point of stopping. It says that this imposes too great an obligation on Canadian National to accommodate traffic offered for carriage.

[47] I reject this submission. The submission fails because Canadian National is viewing the Agency's words, quoted above, in isolation and is viewing them as the Agency's comprehensive interpretation of when to order that a carrier has improperly denied service. The Agency made clear that its words should not to be taken in isolation. Just because there is a "point of stopping" in accordance with this definition does not mean that a carrier like Canadian National must accept traffic for carriage at that place.

[48] Instead, the Agency recognized that the words, quoted above, are just the first step of its determination whether a carrier must accommodate traffic at a particular place. The Agency made it clear that the next step in its determination is to "consider where (if anywhere) service should be provided, taking into account the level of service obligations, in light of reasonableness, and the shipper's correlative obligation" (at paragraph 80).

[49] The Agency's reference to "reasonableness" is key. The Agency recognizes that the obligations of the parties under sections 113-116 of the Act are not absolute but rather are "permeated with reasonableness": *A.L. Patchett & Sons Ltd. v. Pacific Great Eastern Railway Co.*, [1959] S.C.R. 271, 17 D.L.R. (2d) 449. For good measure, the Agency specifically references *Patchett* at other places in its decision: see paras. 44 and 76-79. As this Court noted in *Canadian National*, above at paragraph 71, a decision of the Agency under sections 113-116 must reflect this concept in order to be reasonable. In other words, as this Court put it in *Canadian National* at paragraph 71, "[i]n developing acceptable and defensible jurisprudence concerning subsection 113(1) of the Act, the Agency must work within the standards set by *Patchett*."

[50] In the next step of its determination whether a carrier must accommodate traffic at a particular place, the Agency (at paragraphs 81-83) called for submissions on the three factors mentioned above at paragraph 10.

[51] Canadian National does not take issue with these factors. Nor could it. The factors allow the Agency to look at a broad range of considerations concerning the appropriateness, practicality and fairness of various possible points of stopping. They are an on-the-ground, practical expression of the sorts of things that the Agency must consider in order to follow the reasonableness standards set by the Supreme Court in *Patchett*. The Agency has not committed itself to using these factors in all cases. Rather, the three factors it identified in this case are those that, in its view, were relevant to the particular circumstances of this case.

[52] In assessing whether the Agency's decision passes muster under reasonableness review, I reiterate what this Court said in *Canadian National*, above, at paragraphs 72-73:

> Another context colouring reasonableness review in this case is the nature of the Agency's decision and the nature of the Act. The Agency's decision lies at the very bullseye of its regulatory know-how and mandate, the very reason why Parliament has vested the Agency with jurisdiction over the merits of cases like this and has left us with just a reviewing role.
>
> When the Agency interprets subsection 113(1), it legitimately draws upon its regulatory experience, its knowledge of the industry and its expertise in the transportation sector, guided by the standards set by *Patchett*, above. Provided the Agency adopts a defensible interpretation of subsection 113(1) and a defensible methodology or test for determining reasonable conduct, and provided it applies these things in a manner that is alert and responsive to the evidence before it, this Court must refrain from second-guessing. The reasonableness of the parties' conduct based on the particular facts disclosed by the evidentiary record—the factually suffused merits of the case—is a matter very much within the ken of the Agency, not us. See, by way of illustration and analogy, *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324 at pp. 1347-48, 74 D.L.R. (4th) 449 and *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, [2007] 1 S.C.R. 650 at para. 104.

[53] Overall, I conclude that the Agency's decision represents an acceptable and defensible interpretation of paragraph 113(1)(*a*) of the Act in the context of the framework of sections 113-116 of the Act. Based on a defensible assessment of the text, context and purpose of this statutory provision, it suitably embodies the Supreme Court's standards of reasonableness in *Patchett*.

[54] Canadian National emphasizes what it considers to be the serious ramifications of the Agency's decision. It says that the Agency's decision constitutes an expropriation of its property and part of its business. In my view, this submission is overly extreme. The Agency's order has been made as part of the overall purpose of sections 113-116, discussed above—to ensure that

rail carriers do not use their ownership over their network and their monopoly commercial power to harm shippers unduly, but to ensure that the result accords with the reasonableness standards set out by the Supreme Court in *Patchett*.

[55] Emerson correctly points out that for decades under this Act and its predecessors, level of service orders have been made against carriers even though there is no lease, license or private siding arrangements between the shippers and the carriers: *Quebec City v. C.P.R.* (1942), 54 CRTC 342; *Re M. Lorne Sheppard*, [1991] NTAR 122; *Re Louis Hebert*, [1992] NTAR 183; *Re Terry Shewchuk et al.*, [1992] NTAR 191. The Agency's decision would also appear to be consistent with judicial interpretations of the predecessors of these provisions: see, *e.g., Grand Trunk Ry. Co. v. Department of Agriculture of the Province of Ontario* (1910), 42 S.C.R. 557 *per* Davies J. Further, as mentioned above, subsection 116(4) gives the Agency broad remedial powers to interfere with the private interests, commercial interests and property of carriers. The Agency can order "specific works [to] be constructed or carried out," "property [to] be acquired," "cars, motive power or other equipment [to] be allotted, distributed, used or moved as specified by the Agency," and "any specified steps, systems or methods [to] be taken or followed by the company." The Agency concluded, appropriately, that "the railway company's property and equipment may be used to discharge its level of service obligations" (at paragraph 66), as long as that is consistent with the reasonableness standards in *Patchett*.

[56] Canadian National says that no other shipper will now enter into contracts with Canadian National to use its facilities. Each will act the way Emerson has here. In my view, this is an

in terrorem argument not borne out by reality. Emerson correctly points out that there are many commercial reasons why shippers and Canadian National may enter into contracts.

[57] As well, in its assessment of reasonableness under *Patchett*, the Agency may find in a carrier's favour and require that a commercial arrangement be entered into as one of the terms of recognizing a point of stopping or it may find that the shipper must engage in other acts as part of its "correlative obligation with respect to its traffic at the point of stopping." Similarly, it may find that existing commercial arrangements between the carrier and third parties render use of a particular point of stopping unreasonable in the circumstances. This very thing appears to have happened before: *Stenen*, dated November 7, 2000 (Decision No. 103-R-2000, file no. T7375-3/99-11). In this case, the Agency found a point of stopping to be unreasonable due to, in part, an existing private agreement between the carrier and a third party. Acceptance of traffic at a neighbouring location was, in the circumstances, reasonable.

[58] As mentioned above, Canadian National fairly conceded that the other two appeals stood with this appeal (A-286-16). In other words, the dismissal of the appeal in A-286-16 results in the dismissal of the appeals in A-461-16 and A-113-17.

[59] In any event, for completeness, I would add that the Agency's decisions giving rise to those appeals were subject to reasonableness review owing to their discretionary, fact-based nature. I would add that I am not persuaded that any grounds exist to cast into doubt the reasonableness of those decisions.

C. Proposed disposition

[60] Therefore, I would dismiss the appeals with costs to Emerson. The parties have agreed that costs for all the appeals, taken together, should be fixed in the amount of $3,000, all inclusive. To give effect to this, I shall award the costs in A-286-16 and there shall be no costs in A-461-16 and A-113-17. I would like to thank counsel for their able submissions.

"David Stratas"
J.A.

“I agree.

D. G. Near J.A.”

“I agree.

Yves de Montigny J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKETS:	A-286-16, A-461-16, and A-113-17

A-286-16: APPEAL FROM A DECISION OF THE CANADIAN TRANSPORTATION AGENCY, DATED MARCH 4, 2016, CASE NO. 15-03518, CONF-1-2016.

A-461-16: APPEAL FROM A DECISION OF THE CANADIAN TRANSPORTATION AGENCY, DATED AUGUST 26, 2016, CASE NO. 15-03518, CONF-11-2016.

A-113-17: APPEAL FROM A DECISION OF THE CANADIAN TRANSPORTATION AGENCY, DATED JANUARY 20, 2017, CASE NO. 15-03518, CONF-2-2017.

STYLE OF CAUSE:	CANADIAN NATIONAL RAILWAY COMPANY v. EMERSON MILLING INC. AND CANADIAN TRANSPORTATION AGENCY
PLACE OF HEARING:	EDMONTON, ALBERTA
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CONCURRED IN BY:	NEAR J.A. DE MONTIGNY J.A.
DATED:	APRIL 26, 2017

APPEARANCES:

Douglas C. Hodson, Q.C.	FOR THE APPELLANT
Forrest C. Hume Monique Evans	FOR THE RESPONDENT EMERSON MILLING INC.
Kevin Shaar	FOR THE RESPONDENT CANADIAN TRANSPORTATION AGENCY

SOLICITORS OF RECORD:

MacPherson Leslie & Tyerman LLP Barristers and Solicitors Saskatoon, Saskatchewan	FOR THE APPELLANT
DLA Piper (Canada) LLP Barristers and Solicitors Vancouver, British Columbia	FOR THE RESPONDENT EMERSON MILLING INC.
William F. Pentney Deputy Attorney General of Canada Gatineau, Quebec	FOR THE RESPONDENT CANADIAN TRANSPORTATION AGENCY