

Federal Court
of Appeal



Cour d'appel
fédérale

Date: 20100909

**Dockets: A-281-08
A-282-08
A-283-08
A-284-08
A-285-08
A-286-08**

Citation: 2010 FCA 225

**CORAM: BLAIS C.J.
NADON J.A.
SHARLOW J.A.**

Docket: A-281-08

BETWEEN:

CANADIAN NATIONAL RAILWAY CO.

Appellant

and

**PATERSON GRAIN, GOVERNMENT OF THE
PROVINCE OF MANITOBA, JAMES RICHARDSON
INTERNATIONAL LIMITED and
CANADIAN TRANSPORTATION AGENCY**

Respondents

Docket: A-282-08

BETWEEN:

CANADIAN NATIONAL RAILWAY CO.

Appellant

and

**CANADIAN WHEAT BOARD, GOVERNMENT
OF THE PROVINCE OF SASKATCHEWAN,
GOVERNMENT OF THE PROVINCE OF
MANITOBA, JAMES RICHARDSON
INTERNATIONAL LIMITED and
CANADIAN TRANSPORTATION AGENCY**

Respondents

Docket: A-283-08

BETWEEN:

CANADIAN NATIONAL RAILWAY CO.

Appellant

and

**PARRISH AND HEIMBECKER, LIMITED,
GOVERNMENT OF THE PROVINCE OF
ALBERTA, GOVERNMENT OF THE PROVINCE
OF MANITOBA, JAMES RICHARDSON
INTERNATIONAL LIMITED and
CANADIAN TRANSPORTATION AGENCY**

Respondents

Docket: A-284-08

BETWEEN:

CANADIAN NATIONAL RAILWAY CO.

Appellant

and

**PROVIDENCE GRAIN GROUP INC.,
GOVERNMENT OF THE PROVINCE OF
ALBERTA, JAMES RICHARDSON
INTERNATIONAL and
CANADIAN TRANSPORTATION AGENCY**

Respondents

Docket: A-285-08

BETWEEN:

CANADIAN NATIONAL RAILWAY CO.

Appellant

and

**NORTH WEST TERMINAL LTD.,
GOVERNMENT OF THE PROVINCE OF
SASKATCHEWAN, JAMES RICHARDSON
INTERNATIONAL LIMITED and
CANADIAN TRANSPORTATION AGENCY**

Respondents

Docket: A-286-09

BETWEEN:

CANADIAN NATIONAL RAILWAY CO.

Appellant

and

**NORTH EAST TERMINAL LTD.,
GOVERNMENT OF THE PROVINCE OF
SASKATCHEWAN, GOVERNMENT OF THE
PROVINCE OF MANITOBA, JAMES
RICHARDSON INTERNATIONAL LIMITED and
CANADIAN TRANSPORTATION AGENCY**

Respondents

Heard at Vancouver, British Columbia, on April 19, 2010.

Judgment delivered at Ottawa, Ontario, on September 9, 2010.

REASONS FOR JUDGMENT BY:

NADON J.A.

CONCURRED IN BY:

BLAIS C.J.
SHARLOW J.A.

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Respondents

REASONS FOR JUDGMENT

NADON J.A.

[1] On August 27, 2008, my colleague Sexton J.A. made an Order consolidating these six appeals. He ordered that the appeal in Court file A-281-08 (Patterson Grain) would be the lead appeal, that the appeals would be heard together, that the Order made in the lead appeal would apply to the other appeals and that a copy of the Reasons for Judgment in the lead appeal would be filed in the other appeals as Reasons therein. Thus, these Reasons shall dispose of all the appeals.

[2] These are appeals of the Canadian Transportation Agency's (the "Agency") decisions dated January 18, 2008, wherein the Agency held that the Canadian National Railway Company (the "appellant") had failed to meet its level of service obligations to the respondents with respect to services provided during the 2006-2007 crop year.

[3] The Agency further held that with respect to the 2007-2008 crop year, the evidence was insufficient for it to find that the appellant had breached its common carrier obligations. As a result, the Agency made an Order pursuant to which the appellant and the respondents were to provide it with service information for the period of August 2007 to April 2008 (grain weeks nos. 1 to 36 of crop year 2007-2008). The Agency concluded that part of its decision by indicating that following the receipt of the requested information, it would determine whether the appellant had failed to provide adequate rail service during crop year 2007-2008.

[4] For the reasons that follow, I have concluded that these appeals should be allowed.

THE FACTS

[5] On September 5, 2007, the respondents Canadian Wheat Board (“CWB”) and North East Terminal Ltd. (“NET”) filed complaints with the Agency pursuant to sections 26, 37 and 113 to 116 of the *Canada Transportation Act*, S.C. 1996, c. 10 (the “Act”). These complaints sought an order requiring the appellant to fulfill its level of service obligations for the receiving, carrying and delivery of grain in Western Canada. In its complaint, CWB further requested an interim order pursuant to subsection 28(2) of the Act, suspending the appellant’s advance product programs for the 2007-2008 crop year until further order from the Agency.

[6] On September 7, 2007, the respondents Paterson Grain (“PG”), North West Terminal Ltd. (“NWT”), Parrish and Heimbecker Ltd. (“P&H”) and Providence Grain Group Inc. (“PGG”) also filed service complaints with the Agency.

[7] All of the respondents are members of the “CARS” group of grain shippers (the “CARS group”). The CARS group was formed after the introduction of certain advance product offerings by the appellant for the purpose of trading cars among themselves in order to supplement their car supply.

[8] The submissions made by the respondents to the Agency were essentially the same. They alleged that the appellant had failed and continued to fail to provide adequate and suitable rail service to them through the supply of general distribution rail cars. They further submitted that the advance product programs being implemented by the appellant, at the time of the complaints,

discriminated against them in the distribution of rail cars and hindered their ability to move their grain efficiently to market, causing damage to their reputation in the markets which they served.

[9] On October 3, 2007, the Agency issued its decision LET-R-180-2007, pursuant to which it determined that, in the interest of efficiency, routine procedural matters pertaining to all complaints would be dealt with as a group. However, the Agency indicated that the merits of each complaint would be dealt with separately.

[10] In order to properly understand the context in which the complaints were made, it is important to say a few words about the Agency's decision 344-R-2007, dated July 6, 2007 (the "GNG decision"). That decision dealt with a complaint filed by Great Northern Grain Terminal Ltd. ("GNG"), a member of the CARS group, with regard to the appellant's service obligations for the receiving, carrying and delivery of grain to and from the GNG facility at Nampa, Alberta, for crop year 2006-2007. The respondents herein were among the parties who intervened in the GNG complaint. Each of the respondents filed an intervention in support of GNG's complaint.

[11] In its GNG decision, the Agency found that the rail car policy adopted by the appellant for the 2006-2007 crop year resulted in an unsuitable and inadequate level of service, constituting a breach of its common carrier obligations to GNG. The Agency directed the appellant to: (i) allow GNG to reserve railway capacity for a contract period; (ii) not prohibit GNG from trading cars or to restrict it in the manner in which it did so; (iii) advise GNG of the methodology it was using in

its determination of allocating car supply; and (iv) implement the above directions by the beginning of the 2007-2008 crop year, commencing on August 1, 2007.

[12] Between August 2007 and the respondents' initiation of the complaints at issue in these appeals, the appellant made a number of significant changes to its advance grain product programs for the 2007-2008 crop year. The appellant further modified its advance product programs following the release of the GNG decision. The appellant maintained that these modifications brought it into full compliance with the directions issued by the Agency in its GNG decision.

[13] The appellant and the CARS group representatives met to discuss service proposals, but were unable to come to terms. As a result, the respondents filed their complaints with the Agency.

[14] On October 3, 2007, the Agency issued its decision LET-R-80-2007, wherein it indicated that because the parties could not reach an agreement through mediation, the statutory deadline for disposition of the complaints was extended to January 19, 2008.

[15] In a further decision, namely LET-R-185-2007, dated October 19, 2007, the Agency denied the respondents' request for an interim order suspending the appellant's advance product programs for the 2007-2008 crop year. The Agency concluded that it could not on the material before it make a finding of irreparable harm which would have allowed it to suspend the appellant's advance product programs.

[16] On October 26, 2007, the appellant filed its answers to the respondents' complaints, in which it put forward the following grounds of defence:

- (1) The complaints were premature and unfounded since they were based on a "single week of allocation".
- (2) The very basis of the complaints had been rendered moot since it had made amendments to its advance product programs following the GNG decision.
- (3) The respondents' inflated car order requests could not be accepted as a true indication of shipper demand.
- (4) It had fully complied with the GNG decision and the complaints were simply a "second attempt" by the respondents to obtain relief from the appellant, the Agency having already refused to give this relief to GNG.

[17] On November 5, 2007, the respondents filed their replies to the appellant's answers.

[18] On January 18, 2008, the Agency issued its decisions 25-R-2008, 20-R-2008, 23-R-2008, 24-R-2008, 22-R-2008 and 21-R-2008. These are the decisions which the appellant now appeals before us.

THE AGENCY'S DECISIONS

[19] In its decisions, the Agency examined the circumstances of the complaints and considered a variety of factors, including the programs the appellant had in place for the transportation of grain during crop year 2006-2007 and the changes implemented by the appellant for crop year 2007-

2008. The Agency acknowledged that the appellant's revisions to its advance grain product programs for 2007-2008 reflected an effort to improve service levels.

[20] The Agency held that the appellant had failed to meet its level of service obligations to the respondents for services provided for various periods during the 2006-2007 crop year. The Agency also found that the respondents would suffer substantial commercial harm if the situation was to continue. As a result, the Agency found that it could provide a remedy to the respondents. In its view, subsection 116(4)(c) of the Act gave it broad powers to order whatever relief it deemed necessary if it found that there had been a breach of service obligations.

[21] With respect to crop year 2007-2008, the Agency recognized that the appellant had made efforts to revise its programs to meet the needs of all shippers. Although the respondents were requesting that the Agency fix these changes by an Order, the Agency found that there was insufficient information before it with respect to the service provided for crop year 2007-2008 under the appellant's revised programs. Consequently, the Agency held that it was unable "to rule on a final remedy at this point in time" (paragraph 95 of the Agency's decision appealed in Court file A-283-08 (the "PG decision")).

[22] Thus, the Agency made that part of its decision conditional. It ordered the parties to file service information pertaining to grain weeks numbers 1 through 36 of crop year 2007-2008, following the receipt of which it would make a final determination with regard to whether the appellant was in breach of its common carrier obligations for crop year 2007-2008.

THE ISSUES

[23] Although a number of issues are raised in these appeals, I am of the view that we need only consider three issues to dispose of the appeals:

(i) What is the applicable standard of review?

(ii) Did the Agency err in law or exceed its jurisdiction by failing or refusing to dismiss the complaints as they relate to the 2007-2008 crop year once it had determined that the evidence was not sufficient for it to find a breach of the appellant's common carrier obligations?

(iii) Did the Agency err in law or exceed its jurisdiction by expanding the scope of the complaints to include a review of service provided by the appellant for the 2006-2007 crop year?

RELEVANT LEGISLATION

[24] The following provisions of the Act are relevant to the determination of these appeals:

26. The Agency may require a person to do or refrain from doing any thing that the person is or may be required to do or is prohibited from doing under any Act of Parliament that is administered in whole or in part by the Agency.

27. (1) On an application made to the Agency, the Agency may grant the whole or part of the application, or may make any order or grant any further or other relief that to the Agency seems just and proper.

(2) Where an application is made to the Agency by a shipper in respect of a transportation rate or service, the Agency may grant the relief sought, in whole or in part, but in making its decision the Agency must be satisfied, after considering the circumstances of the particular case, that the applicant would suffer substantial

26. L'Office peut ordonner à quiconque d'accomplir un acte ou de s'en abstenir lorsque l'accomplissement ou l'abstention sont prévus par une loi fédérale qu'il est chargé d'appliquer en tout ou en partie.

27. (1) L'Office peut acquiescer à tout ou partie d'une demande ou prendre un arrêté, ou, s'il l'estime indiqué, accorder une réparation supplémentaire ou substitutive.

(2) L'Office n'acquiesce à tout ou partie de la demande d'un expéditeur relative au prix ou au service d'un envoi que s'il estime, compte tenu des circonstances, que celui-ci subirait autrement un préjudice commercial important.

commercial harm if the relief were not granted.

28. (1) The Agency may in any order direct that the order or a portion or provision of it shall come into force

- (a) at a future time,
- (b) on the happening of any contingency, event or condition specified in the order, or
- (c) on the performance, to the satisfaction of the Agency or a person named by it, of any terms that the Agency may impose on an interested party,

and the Agency may direct that the whole or any portion of the order shall have force for a limited time or until the happening of a specified event.

(2) The Agency may, instead of making an order final in the first instance, make an interim order and reserve further directions either for an adjourned hearing of the matter or for further application.

...

113. (1) A railway company shall, according to its powers, in respect of a railway owned or operated by it,

- (a) furnish, at the point of origin, at the point of junction of the railway with another railway, and 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;
- (b) furnish adequate and suitable accommodation for the carriage, unloading and delivering of the traffic;
- (c) without delay, and with due care and diligence, receive, carry and deliver the traffic;
- (d) furnish and use all proper appliances, accommodation and means necessary for receiving, loading, carrying, unloading and delivering the traffic; and

28. (1) L'Office peut, dans ses arrêtés, prévoir une date déterminée pour leur entrée en vigueur totale ou partielle ou subordonner celle-ci à la survenance d'un événement, à la réalisation d'une condition ou à la bonne exécution, appréciée par lui-même ou son délégué, d'obligations qu'il aura imposées à l'intéressé; il peut en outre y prévoir une date déterminée pour leur cessation d'effet totale ou partielle ou subordonner celle-ci à la survenance d'un événement.

(2) L'Office peut prendre un arrêté provisoire et se réserver le droit de compléter sa décision lors d'une audience ultérieure ou d'une nouvelle demande.

...

113. (1) Chaque compagnie de chemin de fer, dans le cadre de ses attributions, relativement au chemin de fer qui lui appartient ou qu'elle exploite :

- a) fournit, au point d'origine de son chemin de fer et au point de raccordement avec d'autres, et à tous les points d'arrêt établis à cette fin, des installations convenables pour la réception et le chargement des marchandises à transporter par chemin de fer;
- b) fournit les installations convenables pour le transport, le déchargement et la livraison des marchandises;
- c) reçoit, transporte et livre ces marchandises sans délai et avec le soin et la diligence voulus;
- d) fournit et utilise tous les appareils, toutes les installations et tous les moyens

(e) furnish any other service incidental to transportation that is customary or usual in connection with the business of a railway company.

(2) Traffic must be taken, carried to and from, and delivered at the points referred to in paragraph (1)(a) on the payment of the lawfully payable rate.

(3) Where a shipper provides rolling stock for the carriage by the railway company of the shipper's traffic, the company shall, at the request of the shipper, establish specific reasonable compensation to the shipper in a tariff for the provision of the rolling stock.

(4) A shipper and a railway company may, by means of a confidential contract or other written agreement, agree on the manner in which the obligations under this section are to be fulfilled by the company.

114. (1) A railway company shall, according to its powers, afford to all persons and other companies all adequate and suitable accommodation for receiving, carrying and delivering traffic on and from its railway, for the transfer of traffic between its railway and other railways and for the return of rolling stock.

(2) For the purposes of subsection (1), adequate and suitable accommodation includes reasonable facilities for the receiving, carriage and delivery by the company

(a) at the request of any other company, of through traffic and, in the case of goods shipped by carload, of the car with the goods shipped in it, to and from the railway of the other company, at a through rate; and (b) at the request of any person interested in through traffic, of such traffic at through rates.

(3) Every railway company that has or

nécessaires à la réception, au chargement, au transport, au déchargement et à la livraison de ces marchandises;

e) fournit les autres services normalement liés à l'exploitation d'un service de transport par une compagnie de chemin de fer.

(2) Les marchandises sont reçues, transportées et livrées aux points visés à l'alinéa (1)a sur paiement du prix licitement exigible pour ces services.

Indemnité de matériel roulant

(3) Dans les cas où l'expéditeur fournit du matériel roulant pour le transport des marchandises par la compagnie, celle-ci prévoit dans un tarif, sur demande de l'expéditeur, une compensation spécifique raisonnable en faveur de celui-ci pour la fourniture de ce matériel.

Contrat confidentiel

(4) Un expéditeur et une compagnie peuvent s'entendre, par contrat confidentiel ou autre accord écrit, sur les moyens à prendre par la compagnie pour s'acquitter de ses obligations.

114. (1) Chaque compagnie de chemin de fer doit, dans le cadre de ses attributions, fournir aux personnes et compagnies les aménagements convenables pour la réception, le transport et la livraison de marchandises sur son chemin de fer et en provenance de celui-ci, pour le transfert des marchandises entre son chemin de fer et d'autres chemins de fer ainsi que pour le renvoi du matériel roulant.

(2) Pour l'application du paragraphe (1), les aménagements convenables comprennent des installations de réception, de transport et de livraison par la compagnie :

a) à la demande d'une autre compagnie, de trafic d'entier parcours et, dans le cas de marchandises expédiées par wagons complets, du wagon et de son contenu à destination et en provenance du chemin de fer de cette autre compagnie, à un tarif

operates a railway forming part of a continuous line of railway with or that intersects any other railway, or that has any terminus, station or wharf near to any terminus, station or wharf of another railway, shall afford all reasonable facilities for delivering to that other railway, or for receiving from or carrying by its railway, all the traffic arriving by that other railway without any unreasonable delay, so that (a) no obstruction is offered to the public desirous of using those railways as a continuous line of communication; and (b) all reasonable accommodation, by means of the railways of those companies, is at all times afforded to the public for that purpose.

(4) If a railway company provides facilities for the transportation by rail of motor vehicles or trailers operated by any company under its control for the conveyance of goods for hire or reward, (a) the railway company shall offer to all companies operating motor vehicles or trailers for the conveyance of goods for hire or reward similar facilities at the same rates and on the same terms and conditions as those applicable to the motor vehicles or trailers operated by the company under its control; and

(b) the Agency may disallow any rate or tariff that is not in compliance with this subsection and direct the company to substitute a rate or tariff that complies with this subsection.

...

d'entier parcours;

b) à la demande de tout intéressé au trafic d'entier parcours, de ce trafic à des tarifs d'entier parcours.

(3) Toute compagnie de chemin de fer possédant ou exploitant un chemin de fer qui, en se reliant à un autre chemin de fer, ou en le croisant, fait partie d'un parcours ininterrompu de chemin de fer, ou qui possède une tête de ligne, une gare ou un quai à proximité d'une tête de ligne, d'une gare ou d'un quai d'un autre chemin de fer, doit accorder toutes les installations raisonnables et voulues pour livrer à cet autre chemin de fer, ou pour en recevoir et expédier par sa propre voie, tout le trafic venant par cet autre chemin de fer, sans retard déraisonnable, et elle doit faire en sorte que le public désirant se servir de ces chemins de fer comme voie ininterrompue de communication n'y trouve pas d'obstacles à la circulation et puisse ainsi s'en servir en bénéficiant à tout moment de toutes les installations raisonnables de transport par les chemins de fer de ces diverses compagnies.

(4) Si elle fournit des installations de transport par rail de véhicules automobiles ou de remorques exploités pour le transport de marchandises à titre onéreux par une compagnie dont elle a le contrôle, la compagnie de chemin de fer doit offrir à toutes les compagnies qui exploitent des véhicules automobiles ou des remorques pour le transport de marchandises à titre onéreux des installations semblables à celles qu'elle fournit pour les véhicules automobiles ou remorques exploités par la compagnie dont elle a le contrôle, aux mêmes prix et aux mêmes conditions; l'Office peut rejeter tout prix ou tarif qui n'est pas conforme au présent paragraphe et ordonner à la compagnie de chemin de fer d'y substituer un prix ou tarif conforme au présent paragraphe.

...

116. (1) On receipt of a complaint made by any person that a railway company is not fulfilling any of its service obligations, the Agency shall

(a) conduct, as expeditiously as possible, an investigation of the complaint that, in its opinion, is warranted; and

(b) within one hundred and twenty days after receipt of the complaint, determine whether the company is fulfilling that obligation.

(2) If a company and a shipper agree, by means of a confidential contract, on the manner in which service obligations under section 113 are to be fulfilled by the company, the terms of that agreement are binding on the Agency in making its determination.

(3) If a shipper and a company agree under subsection 136(4) on the manner in which the service obligations are to be fulfilled by the local carrier, the terms of the agreement are binding on the Agency in making its determination.

(4) If the Agency determines that a company is not fulfilling any of its service obligations, the Agency may

(a) order that

(i) specific works be constructed or carried out,

(ii) property be acquired,

(iii) cars, motive power or other equipment be allotted, distributed, used or moved as specified by the Agency, or

(iv) any specified steps, systems or methods be taken or followed by the company;

(b) specify in the order the maximum charges that may be made by the company in respect of the matter so ordered;

(c) order the company to fulfil that obligation in any manner and within any time or during any period that the Agency deems expedient, having regard to all proper interests, and specify the particulars of the obligation to be fulfilled;

(d) if the service obligation is in respect of

116. (1) Sur réception d'une plainte selon laquelle une compagnie de chemin de fer ne s'acquitte pas de ses obligations prévues par les articles 113 ou 114, l'Office mène, aussi rapidement que possible, l'enquête qu'il estime indiquée et décide, dans les cent vingt jours suivant la réception de la plainte, si la compagnie s'acquitte de ses obligations.

(2) Dans les cas où une compagnie et un expéditeur conviennent, par contrat confidentiel, de la manière dont la compagnie s'acquittera de ses obligations prévues par l'article 113, les clauses du contrat lient l'Office dans sa décision.

(3) Lorsque, en application du paragraphe 136(4), un expéditeur et une compagnie s'entendent sur les moyens à prendre par le transporteur local pour s'acquitter de ses obligations prévues par les articles 113 et 114, les modalités de l'accord lient l'Office dans sa décision.

(4) L'Office, ayant décidé qu'une compagnie ne s'acquitte pas de ses obligations prévues par les articles 113 ou 114, peut :

a) ordonner la prise de l'une ou l'autre des mesures suivantes :

(i) la construction ou l'exécution d'ouvrages spécifiques,

(ii) l'acquisition de biens,

(iii) l'attribution, la distribution, l'usage ou le déplacement de wagons, de moteurs ou d'autre matériel selon ses instructions,

(iv) la prise de mesures ou l'application de systèmes ou de méthodes par la compagnie;

b) préciser le prix maximal que la compagnie peut exiger pour mettre en oeuvre les mesures qu'il impose;

c) ordonner à la compagnie de remplir ses obligations selon les modalités de forme et de temps qu'il estime indiquées, eu égard aux intérêts légitimes, et préciser les détails de l'obligation à respecter;

a grain-dependent branch line listed in Schedule I, order the company to add to the plan it is required to prepare under subsection 141(1) an indication that it intends to take steps to discontinue operating the line; or

(e) if the service obligation is in respect of a grain-dependent branch line listed in Schedule I, order the company, on the terms and conditions that the Agency considers appropriate, to grant to another railway company the right

(i) to run and operate its trains over and on any portion of the line, and

(ii) in so far as necessary to provide service to the line, to run and operate its trains over and on any portion of any other portion of the railway of the company against which the order is made but not to solicit traffic on that railway, to take possession of, use or occupy any land belonging to that company and to use the whole or any portion of that company's right-of-way, tracks, terminals, stations or station grounds.

(5) Every person aggrieved by any neglect or refusal of a company to fulfil its service obligations has, subject to this Act, an action for the neglect or refusal against the company.

(6) Subject to the terms of a confidential contract referred to in subsection 113(4) or a tariff setting out a competitive line rate referred to in subsection 136(4), a company is not relieved from an action taken under subsection (5) by any notice, condition or declaration if the damage claimed in the action arises from any negligence or omission of the company or any of its employees.

d) en cas de manquement à une obligation de service relative à un embranchement tributaire du transport du grain mentionné à l'annexe I, ordonner à la compagnie d'ajouter l'embranchement au plan visé au paragraphe 141(1) à titre de ligne dont elle entend cesser l'exploitation;

e) en cas de manquement à une obligation de service relative à un embranchement tributaire du transport du grain mentionné à l'annexe I, ordonner à la compagnie, selon les modalités qu'il estime indiquées, d'autoriser une autre compagnie :

(i) à faire circuler et à exploiter ses trains sur toute partie de l'embranchement,

(ii) dans la mesure nécessaire pour assurer le service sur l'embranchement, à faire circuler et à exploiter ses trains sur toute autre partie du chemin de fer de la compagnie, sans toutefois lui permettre d'offrir des services de transport sur cette partie du chemin de fer, de même qu'à utiliser ou à occuper des terres lui appartenant, ou à prendre possession de telles terres, ou à utiliser tout ou partie de l'emprise, des rails, des têtes de lignes, des gares ou des terrains lui appartenant.

(5) Quiconque souffre préjudice de la négligence ou du refus d'une compagnie de s'acquitter de ses obligations prévues par les articles 113 ou 114 possède, sous réserve de la présente loi, un droit d'action contre la compagnie.

(6) Sous réserve des stipulations d'un contrat confidentiel visé au paragraphe 113(4) ou d'un tarif établissant un prix de ligne concurrentiel visé au paragraphe 136(4), une compagnie n'est pas soustraite à une action intentée en vertu du paragraphe (5) par un avis, une condition ou une déclaration, si les dommages-intérêts réclamés sont causés par la négligence ou les omissions de la compagnie ou d'un de ses employés.

ANALYSIS

A. What is the applicable standard of review?

[25] I begin with the applicable standard of review.

[26] The appellant submits that the standard of review in this case must be correctness because the issues in the appeals concern errors of jurisdiction, errors of law affecting jurisdiction and issues of procedural fairness or natural justice.

[27] The respondents submit that the appropriate standard of review applicable to all the questions other than those relating to breaches of natural justice is reasonableness, and concede that with respect to those issues, the appropriate standard is correctness. The respondents submit that determinations of the Agency with respect to level of service obligations are, at the very least, questions of mixed fact and law and therefore subject to the reasonableness standard.

[28] For the reasons that follow, I conclude that whether the standard be correctness or reasonableness, the Agency's decisions cannot stand. More particularly, I conclude that the appellant's submissions with respect to issues (ii) and (iii) are well founded.

B. Did the Agency err in law or exceed its jurisdiction by failing or refusing to dismiss the complaints as they relate to the 2007-2008 crop year once it had determined that the evidence was not sufficient for it to find a breach of the appellant's common carrier obligations?

[29] I now turn to issue (ii), which requires us to determine whether the Agency could proceed as it did once it had held that there was insufficient evidence before it to find that the appellant had breached its common carrier service obligations for crop year 2007-2008.

[30] At paragraphs 95, 96 and 97 of its PG decision, the Agency dealt with crop year 2007-2008 in the following terms:

95. Certainly, new CN grain products programs have been designed to address some of the earlier deficiencies which caused the Agency to find a breach in crop year 2006-2007. The Agency is prepared to accept that these new programs, which at least in design, represent an effort on the part of CN to provide reasonable and adequate accommodation for the traffic of PG. However, there is insufficient information before the Agency on the record of service provided for crop year 2007-2008 under these revised programs for the Agency to rule on a final remedy at this point in time.

96. As referenced previously, the Agency has broad powers to order a railway company to fulfill its level of service obligations in a manner deemed expedient. The Agency also has the authority to issue conditional orders.

97. This is a conditional ruling whereby the Agency finds that the new tariffs reflect an effort on the part of CN to address past service shortfall issues. However, prior to a final determination on this, CN and PG shall file with the Agency service information, electronically and in hard copy, in the format prescribed below, for the period of 2007-2008 crop year beginning with grain week 1 through to and including grain week 36, that is, approximately, the first week of August 2007 up to and including the first week of April 2008.

[Emphasis added]

[31] In my view, the Agency, in so holding, erred in two ways. First, having found that the evidence before it was insufficient for it to make a determination with respect to the question of whether the appellant had breached its level of service obligations for crop year 2007-2008, the Agency had no option but to dismiss the complaints.

[32] I am unable to understand on what basis the Agency believed that it could keep the complaints “alive” so as to allow the respondents an additional six months to provide further evidence which might lead to a finding that there was a breach of the appellant’s common carrier obligations for crop year 2007-2008. The fact that the Agency has the power to issue conditional orders is of no help to the respondents. In my view, what the Agency did does not constitute a conditional order pursuant to the legislation and, in particular, pursuant to section 28 of the Act. The plain fact is that the evidence before the Agency was not sufficient for it to provide the respondents with the remedy which they sought. Hence, in those circumstances, the only possible conclusion was the dismissal of the complaints. As the Agency could not find that the appellant had breached its obligations, it could not provide a remedy to the respondents.

[33] Second, the legislation and, in particular section 116 of the Act, does not allow the Agency, in the face of an incomplete or insufficient evidentiary record, to simply “extend” a complaint for a period of six month in order to ascertain, following the receipt of additional information during that period, whether there is a breach of level of service obligations for the crop year at issue. In my opinion, the Agency’s decisions, as they pertain to crop year 2007-2008, constitute unreasonable decisions which require us to intervene.

[34] To conclude my analysis with regard to issue (ii), I would make a further point. Both subsection 29(1) and paragraphs 116(1)(a) and (b) of the Act require the Agency to determine complaints such as those filed by the respondents herein “as expeditiously as possible” and “within

120 days after receipt of the complaint”. Thus, it is clear that Parliament intended that the Agency deal with complaints as quickly as possible so as to remedy, if necessary, the situation where a railway company is not fulfilling its service obligations. Consequently, in that context, the Agency cannot avoid making a determination as it did in the present matter by, in effect, adjourning the matter for six months in order to gather additional information.

[35] At paragraph 79 of its Memorandum of Fact and Law, the appellant argued that in “converting a complaint application into a monitoring and evidence-gathering process, the Agency has exceeded its grant of authority under which it is purporting to act”. I have no difficulty agreeing with this argument.

C. Did the Agency err in law or exceed its jurisdiction by expanding the scope of the complaints to include a review of services provided by the appellant for the 2006-2007 crop year?

[36] I now turn to issue (iii), which requires us to determine whether the Agency could provide a remedy to the respondents in regard to the 2006-2007 crop year. In my view, it clearly could not provide such a remedy. The Agency’s decisions, as they pertain to issue (iii), are also unreasonable and therefore our intervention is required.

[37] I begin this part of my analysis by turning to the complaints and, more particularly, to that of the respondent PG which is, in all material respects, identical to the complaints filed by the other respondents.

[38] First, the covering letter sent by PG's lawyers, dated September 7, 2007, ends with the following remarks:

Given CN's implementation of its advance products program, and the harm that such implementation will cause to the members of the CARS group, PG has reluctantly come to the conclusion that it has no alternative but to launch a level of service complaint to the Agency for redress. Further level of service complaints are being filed by the other members of the CARS group that shipped via CN"

[Emphasis added]

[39] Attached to the aforesaid letter is PG's complaint, which seeks the following determination on the part of the Agency:

... that Canadian National Railway Company ("CN") is failing to fulfill its level of service obligations for the receiving, carrying and delivering of grain to and from the Canadian origins and destinations served by CN, from and to which PG's grain is shipped. Specifically, PG submits that CN has failed and is continuing to fail to provide adequate rail service through the supply of general distribution rail cars to PG. The applicant submits that the advance products programs currently being unilaterally implemented by CN discriminate against PG in the distribution of rail cars, causing damage to PG's reputation in the markets it serves, and hindering PG's ability to move the grain efficiently to market.

[Emphasis added]

[40] At page 7 of its complaint, PG sets out as a heading what appears to be the real basis of the complaint: "**CN's latest proposal does not provide adequate and suitable accommodation for PG's traffic**". Further, at page 12, paragraph 18(g) of PG's complaint, the following assertion is found:

18. ...

- g. While CN delayed the introduction of their programs to permit dialogue with the CARS group, the dialogue was not meaningful. CN is implementing its programs

on the same shipping week as they did for the last crop year, and without having developed a plan to satisfy the car supply requirements of the CARS group. CN's implementation of its programs at this time has necessitated this application and our request for interim relief (see the interim relief requested by PG below).

[Emphasis added]

[41] In the same light, at paragraph 73 of its reply to CN's answer, PG makes the following point:

73. ... The point is that CN continues to fail to provide PG with adequate and suitable accommodation for its traffic in general rail car distribution notwithstanding the changes that CN has made to its advance products programs for the current crop year.

[42] A similar assertion is found at paragraph 29 of PG's reply to CN's answer:

29. As CN was planning on moving ahead with its advance programs and as those programs in PG's view were not consistent with the principles set out in the GNG Decision, PG was forced to file its level of service application and did so on September 7, 2007.

[Emphasis added]

[43] What the above passages show, in my respectful view, is that PG and the other respondents took the position that CN had not complied with the Agency's GNG Decision. Furthermore, PG's complaint and those of the other respondents leave no doubt in my mind that they were complaining about the current situation, i.e. the services provided to them by the appellant during the early weeks of the 2007-2008 crop year. The complaints are not, in effect, directed at the level of service provided by the appellant during the 2006-2007 crop year.

[44] The appellant argues, and I agree entirely with that argument, that the gravamen of the respondents' complaints was that the changes made by the appellant to its advance products programs, following the complaint made by GNG in respect of the 2006-2007 crop year, were insufficient to provide them with suitable and adequate accommodation for the 2007-2008 crop year. As the complaints clearly state, it was the appellant's implementation of the revised programs which rendered the complaints necessary.

[45] It is striking that the complaints filed by the respondents are almost silent with regard to the level of service provided by the appellant during the 2006-2007 crop year. Any mention or reference to the appellant's service during the previous crop year appears to be explanatory only, providing history and context to the current situation of the appellant's inadequate service. Thus, on the wording of the complaints, there would appear to be no basis for a finding by the Agency that the appellant failed to provide adequate services during the 2006-2007 crop year. However, in fairness to the respondents, they adopted in their complaints and incorporated by reference the evidence that they had adduced by way of their interventions in support of GNG's level of service complaint against the appellant. It is clear that it is on the basis of that evidence that the Agency determined that the appellant had breached its statutory service obligations to the respondents in 2006-2007. At paragraph 41 of its PG decision, the Agency opined as follows:

[41] The Agency finds that based on the general distribution cars allocated in the Vancouver corridor for the first 32 grain weeks of crop year 2006-2007, CN is not providing reasonable and adequate accommodation. Specifically, over this period of time, CN seriously failed to meet PG's stated general car allocation needs. The records in this respect point to a chronic service failure where approximately only 14 percent of the

shippers orders were met. In the absence of any justification by CN that mitigates this failure, the Agency finds that over this period, CN breached its statutory obligations to PG.

[46] The 32-week period relied on by the Agency for its determination and the allocation percentage used by it for its finding of breach clearly corresponds with the information contained in the PG intervention. Similar findings based on evidence adduced through interventions in the GNG decision were made by the Agency in regard to the complaints made by the other respondents.

[47] The appellant took objection to the Agency's way of determining that it had breached its level of service obligations to the respondents during the 2006-2007 crop year. The thrust of the appellant's arguments on this point is found at paragraphs 56 to 60 of its Memorandum of Fact and Law:

56. It is incongruous that a party can extend the potential scope of an application in this way. CN should be entitled to know which exact weeks in the crop year the shipper is complaining about, and to which corridors the complaint relates. Without clarity in that regard, CN cannot properly know the case being made against it.

57. While the Agency can properly look at the evidence initially filed by the Complainants in relation to the GNG Decision (and resubmitted as an Appendix by the Complainants in the proceeding) in order to give context and flavour to the within Applications, it is not open for the Agency to consider such submissions as actual evidence of a service breach, particularly in the absence of allegations in relation to this period in the Applications. It is fundamental to the litigation process that a proceeding be decided within the boundaries of the pleadings. The parties to a legal dispute are entitled to have a resolution of their differences on the basis of the issues joined in the pleadings. The scope of an Application is defined by the framework of the Applications themselves, it is not set out by the evidence that is adduced to support that Application. The scope of an application is not a moving target or a work in progress, rather, the scope is set by the content of the pleadings crystallized as of the date they are filed. The Complainant is limited to what is alleged in the Application itself, and if the Complainant initiates an Application a time

when it has no case, the claim must necessarily fail. Its stated case cannot be expanded beyond what was alleged in the Application simply by the filing of additional “evidence” that may have been filed in another action.

58. CN was compelled to respond to the complaints as relating to service received during the current crop year because the Act (section 116) references prospective remedial relief from an existing service condition. In this case, the Applications referenced alleged level of service breaches that resulted from CN’s implementation of a revised advance products program, for the 2007-2008 crop year, following the Agency’s order in the GNG Decision. This interpretation accorded with the legislative framework of the Act and the requirement on a shipper to demonstrate continuing commercial harm in the future.

59. Put simply, a shipper should not be permitted, by simply attaching an intervention filed in a different proceeding, involving a different menu of CN advance product offerings, in a different crop year, to somehow allege that its Application includes a complaint about service received more than a year prior during the first week of the previous crop year. If the Complainants had intended to expand the scope of their Application in this way (which they are not legally capable of doing), a much more specific and direct allegation as to this previous service and the exact length of the complaint period would have been required.

60. By expanding the scope of the application and making a determination as to the adequacy of service received by the Complainants in the 2006-2007 crop year, the Agency exceeded its jurisdiction and breached the rules of natural justice.

[48] In my view, there is considerable merit to these arguments. I am satisfied that the complaints were not directed at the 2006-2007 crop year. Rather, they allege a failure on the part of the appellant to provide adequate levels of service to the respondents for the crop year 2007-2008 and, in particular, that the appellant’s advanced products programs failed to implement the principles set out in the Agency’s GNG decision.

[49] It is significant in my view that the respondents, who clearly had the opportunity of filing complaints with the Agency for the 2006-2007 crop year, chose not to do so, preferring instead to intervene in support of GNG’s complaint for that crop year.

DISPOSITION

[50] For these reasons, I would allow the appeals with costs in Court file A-381-08 only, I would quash the Agency's decisions and I would return these matters to the Agency with a direction to dismiss the respondents' complaints.

“M. Nadon”

J.A.

“I agree.

Pierre Blais C.J.”

“I agree.

K. Sharlow J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-281-08

STYLE OF CAUSE: CANADIAN NATIONAL RAILWAY v.
PATERSON GRAIN et al.

PLACE OF HEARING: Vancouver, British Columbia

DATE OF HEARING: April 19, 2010

REASONS FOR JUDGMENT BY: Nadon J.A.

CONCURRED IN BY: Blais C.J.
Sharlow J.A.

DATED: September 9, 2010

APPEARANCES:

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FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-282-08

STYLE OF CAUSE: CANADIAN NATIONAL RAILWAY v.
CANADIAN WHEAT BOARD et al.

PLACE OF HEARING: Vancouver, British Columbia

DATE OF HEARING: April 19, 2010

REASONS FOR JUDGMENT BY: Nadon J.A.

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FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-283-08

STYLE OF CAUSE: CANADIAN NATIONAL RAILWAY v.
PARISH AND HEIMBECKER LTD. et al

PLACE OF HEARING: Vancouver, British Columbia

DATE OF HEARING: April 19, 2010

REASONS FOR JUDGMENT BY: Nadon J.A.

CONCURRED IN BY: Blais C.J.
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FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-284-08

STYLE OF CAUSE: CANADIAN NATIONAL RAILWAY v.
PROVIDENCE GRAIN GROUP INC. et al

PLACE OF HEARING: Vancouver, British Columbia

DATE OF HEARING: April 19, 2010

REASONS FOR JUDGMENT BY: Nadon J.A.

CONCURRED IN BY: Blais C.J.
Sharlow J.A.

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RICHARDSON INTERNATIONAL LTD.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-285-08

STYLE OF CAUSE: CANADIAN NATIONAL RAILWAY v.
NORTH WEST TERMINALS LTD. et al

PLACE OF HEARING: Vancouver, British Columbia

DATE OF HEARING: April 19, 2010

REASONS FOR JUDGMENT BY: Nadon J.A.

CONCURRED IN BY: Blais C.J.
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FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-286-08

STYLE OF CAUSE: CANADIAN NATIONAL RAILWAY v.
NORTH EAST TERMINAL LTD. et al

PLACE OF HEARING: Vancouver, British Columbia

DATE OF HEARING: April 19, 2010

REASONS FOR JUDGMENT BY: Nadon J.A.

CONCURRED IN BY: Blais C.J.
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