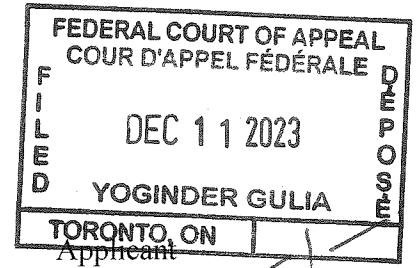


Court File No. A-343-23

FEDERAL COURT OF APPEAL

BETWEEN:

CANADIAN NATIONAL RAILWAY COMPANY



- and -

ALBERTA FOREST PACIFIC INDUSTRIES INC.

Respondent

NOTICE OF APPLICATION

TO THE RESPONDENT:

A PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Applicant. The relief claimed by the Applicant appears below.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the Applicant. The Applicant requests that this application be heard at Toronto, Ontario.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must file a notice of appearance in Form 305 prescribed by the *Federal Courts Rules* and serve it on the Applicant's solicitor or, if the Applicant is self-represented, on the Applicant, **WITHIN 10 DAYS** after being served with this notice of application.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

**YOGINDER GULIA
REGISTRY OFFICER
AGENT DU GREFFE**

Date DEC 11 2003

Issued by _____
(Registry Officer)

Address of 180 Queen Street W
local office: Toronto, ON M5V 1Z4

TO: ALBERTA FOREST PACIFIC INDUSTRIES
1 Tache Street, Suite 600
St. Albert, Alberta T8N 1B4

Respondent

AND TO: CANADA TRANSPORTATION AGENCY
60 Laval Street, Unit 01
Gatineau, QC J8X 3G9

APPLICATION

This is an Application for judicial review made by the Applicant, Canadian National Railway Company (CN), pursuant to sections 18.1 and 28(1)(k) of the *Federal Courts Act*, R.S.C. 1985, c. F-7 concerning the decision of the Canadian Transportation Agency (**Agency**) dated November 9, 2023 bearing decision number CONF-R-12-2023 (**Decision**).

THE APPLICANT MAKES AN APPLICATION FOR:

1. A Declaration that the Decision is unreasonable;
2. An Order quashing the Decision;
3. An Order dismissing Alberta Pacific Forest Industries Inc.'s (**Al-Pac**) complaint against CN, or alternatively, an Order remitting the complaint back to the Agency for reconsideration;
4. An Order permitting the parties to file confidentially certain information to be sealed in the court record pursuant to Rules 151 and 152 of the *Federal Courts Rules*, S.O.R./98-106;
5. An interim Order under sections 18.2 and 50 of the *Federal Courts Act*, R.S.C. 1985, c. F-7 staying the proceeding before the Agency relating to Al-Pac's requested compensation for expenses pending determination of the within Application;
6. Costs of this Application; and
7. Such further and other relief as the Applicant may request and this Honourable Court deems just.

THE GROUNDS FOR THE APPLICATION ARE:**A. The Parties**

8. The Applicant, CN, is a Canadian Class 1 railway headquartered in Montréal, Québec. CN's network of approximately 19,500 route miles of track spans Canada and mid-America, uniquely connecting three coasts: the Atlantic, the Pacific, and the Gulf of Mexico. CN transports approximately 300 million tonnes of natural resources, manufactured products, and finished goods throughout North America every year.

9. The Respondent, Al-Pac, is a company headquartered in St. Albert, Alberta. Al-Pac operates a kraft pulp mill north of Boyle, Alberta (190 km Northeast of Edmonton) where it produces approximately 620,000 air-dried metric tonnes of elemental-chlorine-free pulp annually.

B. Background**i. CN provides rail services to Al-Pac**

10. CN owns railroad freight cars known as "boxcars". Boxcars are used to transport oriented strand board, panel, paper, aluminium, some metals, some minerals, automotive parts, and consumer goods. CN's boxcars are shared assets used by multiple CN shippers to transport various goods across CN's network.

11. Al-Pac ships its wood pulp (**pulp**) traffic in CN's boxcars. Al-Pac receives rail service from CN at CN's O'Morrow Station which is located at the north end of CN's Alberta Pacific Subdivision. Between December 21, 2021 and July 9, 2022 (**Complaint Period**), Al-Pac received 43% of its boxcar orders as compared to 40% for all western shippers.

12. During the Complaint Period, Al-Pac shipped most of its traffic to U.S. destinations located on U.S. railways. CN was required to interchange this traffic with U.S. carriers who take control of the shipments for delivery to destinations determined by Al-Pac based on their sales, and this meant that CN's equipment remained under the control of U.S. railways until it was returned to CN at an interchange point. Between

the moment the loaded boxcars were interchanged with U.S. carriers and the moment the equipment was returned to CN, CN had no control or influence over the rapidity of the service provided by the U.S. railway carriers. Where the U.S. railway carriers took longer than usual to return the boxcars to CN, CN had correspondingly fewer cars available for placement in Canada.

ii. Al-Pac's Complaint to the Agency

13. Pursuant to the *Canadian Transportation Agency Rules (Dispute Proceedings and Certain Rules Applicable to All Proceedings)*, SOR/2014-104 (**CTA Rules**), proceedings before the Agency typically proceed by way of written argument without evidence in the form of live witnesses or affidavit evidence and that is the process that was followed in the present case. There were no affidavits filed by either party.

14. On August 24, 2022, Al-Pac filed a level of service complaint against CN with the Agency (**Complaint**). In its Complaint, Al-Pac sought an order requiring CN to fulfill its level of service obligations for the receiving, carrying and delivering of pulp traffic, and to reimburse Al-Pac for the expenses it incurred as a result of CN's alleged failure to meet its level of service obligations.

15. In particular, Al-Pac claimed that between December 21, 2021 to August 24, 2022, CN failed to provide a sufficient number of boxcars to transport Al-Pac's pulp traffic, and as such, breached its level of service obligations under sections 113-115 of the *Canada Transportation Act*, S.C. 1996, c. 10 (**CTA**) by failing to provide:

- i. adequate and suitable accommodation for the carriage, unloading and delivering of Al-Pac's pulp traffic; and
- ii. all proper means, including locomotive power and crews, for receiving, carrying and delivering pulp traffic to its destinations.

16. Al-Pac sought an order requiring CN to:

- i. supply and deliver a minimum of 159 boxcars or 95% of Al-Pac's weekly boxcar orders, whichever is less, to Al-Pac's mill in

O'Morrow, Alberta (**Mill**), each week for which Al-Pac orders boxcars;

- ii. provide "spot and pull service" at the Mill at least four scheduled days per week (Monday, Wednesday, Friday and Saturday); and
- iii. pay compensation for Al-Pac's expenses incurred as a result of CN's alleged breach, including trucking expenses and warehousing expenses that it would not have otherwise incurred.

17. On November 29, 2022, Al-Pac sought and obtained a confidentiality order from the Agency ordering that certain information be treated as confidential and not placed on the Agency's public record.

18. Between December 6, 2022 and January 24, 2023, the parties exchanged responses to written questions pursuant to section 24 of the CTA Rules. On December 22, 2022, CN filed its answer in response to the Complaint, and on February 6, 2023, CN filed its sur-reply.

iii. The Bifurcation Decision

19. On November 29, 2022, the Agency issued Decision LET-R-50-2022 in which the Agency bifurcated the proceeding into two phases. The first phase would address Al-Pac's claims that CN breached its level of service obligations to Al-Pac during the Complaint Period, and Al-Pac's claim for relief in the form of an order requiring CN to fulfill its level of service obligations for the receiving, carrying, and delivering of pulp traffic. The second phase would address the mitigation compensation which Al-Pac says it is entitled to as a result of CN's alleged failure to fulfill its level of service obligations.

iv. The Decision

20. On November 9, 2023, the Agency issued the Decision. The Decision deals only with the first phase, as contemplated in the Bifurcation Decision. The second phase has yet to be decided by the Agency.

21. The Agency concluded in the Decision that CN breached its level of service obligations by failing to provide an adequate number of boxcars to transport Al-Pac's pulp traffic, and thus failing to furnish adequate and suitable accommodation for the carriage, unloading and delivering of the pulp traffic. The Agency found that CN had not provided the highest level of service to Al-Pac that it could reasonably provide in the circumstances, as required by the CTA.

22. The Agency ordered that CN deliver 159 boxcars or 95% of boxcars ordered by Al-Pac, whichever is less, on a four-week rolling average, with CN delivering no fewer than 80% of such boxcars in the week in which they were ordered.

23. The Agency further directed the parties to provide submissions on the compensation to which Al-Pac may be entitled as part of second phase of the proceeding.

C. The Decision is Unreasonable

24. The Decision is unreasonable and fails to provide a transparent and intelligible justification for the result. In particular, as set out in further detail below:

- i. the Decision is not based on an internally coherent reasoning; and
- ii. the Decision is unjustified in light of the factual constraints bearing on it, including the evidence and facts before the Agency and the submissions made by CN.

25. First, the Decision unreasonably concludes that CN failed to reasonably anticipate the surge in boxcar demand. In particular:

- i. The Agency imputed knowledge to CN that it could not have rationally discovered in July 2021 and is only evident with the benefit of hindsight. The 38% surge in boxcar demand in 2022 would not have been known to CN in July 2021, especially since shippers themselves did not anticipate or forecast for such an increase in demand; and

- ii. The Agency did not take into account that CN could not have anticipated and responded to such increasing and unprecedented boxcar demand any sooner than it did in Q4 2021, particularly in light of the uncertainty brought on by the COVID-19 pandemic.

26. Second, the Decision is unreasonable because it fails to properly take into account individually and cumulatively the facts put before the Agency which established that:

- i. CN began sourcing additional boxcar supply in Q4 of 2021 (prior to the Complaint Period). This initial effort was focused on leasing boxcars but CN was unsuccessful in its efforts as demand for this equipment exceeded available supply. CN then shifted its efforts to purchasing boxcars to be manufactured. CN ordered an additional 1,600 boxcars in Q1 of 2022, but because of the lead time required to build new equipment, those boxcars were not expected to be delivered until Q1 of 2023 (800 cars) and Q1 of 2024 (800 cars). The Agency did not take this evidence into account at all;
- ii. CN does not have substantial control over the average boxcar cycle. CN provided evidence that from December 2021 through July 2022, the boxcar cycle was on average 30 days, of which CN was responsible for 14.8 days while customers and U.S. carriers accounted for a combined 15.2 days (being 51% of the car cycle). During the Complaint Period, shippers were demanding nearly double the number of cars that CN was able to supply. It was obviously impossible for CN to reduce the cycle time for all boxcars by 50% when it only controls 49% of the cycle time. This should have been obvious to the Agency, an expert body in railway matters. The Agency did not take this evidence into account at all;
- iii. The market shift from export to North American destinations meant that boxcars were travelling through harsher climates and spending more time offline with slow US carriers. Decreased offline velocity, unpredictable record cold and snowfall contributed to longer cycle times for boxcars;

- iv. Al-Pac received a higher percentage of boxcars during the Complaint Period than other shippers during the same period; and
- v. CN had a commercial incentive to serve the boxcar demand if it possibly could have.

27. The cumulative effect of these factors created a physical impossibility to satisfy the demand of all of the shippers using boxcars which could only have been met had CN doubled its fleet or cut the cycle time by 50% -- a physical and commercial impossibility -- which should have been obvious to the Agency given its expertise.

28. CN is directly affected by the Decision and has the right to make an application for judicial review pursuant to section 18.1 of the *Federal Courts Act*.

29. Pursuant to section 28(1)(k) of the *Federal Courts Act*, the Federal Court of Appeal has jurisdiction to hear and determine an application for judicial review made in respect of a decision of the Agency.

30. This Application does not raise questions of law or jurisdiction from which an appeal lies to the Federal Court of Appeal pursuant to section 41 of the CTA.

31. Sections 18.1 and 28(1)(k) of the *Federal Courts Act*, R.S.C. 1985, c. F-7 recognize the constitutional right of a person affected by a decision of the Agency to seek its judicial review before a judicial court based on a presumptive standard of reasonableness.

32. The Governor in Council's discretionary power to vary or rescind a decision of the Agency pursuant to section 40 of the CTA is not an "appeal" within the meaning of section 18.5 of the *Federal Courts Act*.

33. This Application for judicial review raises questions of fact and falls within the jurisdiction of the Federal Court of Appeal.

THE APPLICANT RELIES ON THE FOLLOWING STATUTES AND RULES:

1. Sections 18.1, 18.2, 18.5, 28(1)(k) and 50 of the *Federal Courts Act*, R.S.C. 1985 c. F-7;
2. Rules 300, 301 and 317 of the *Federal Courts Rules*, SOR/98-106;
3. Sections 24, 40, 41, 113, 114 and 115 of the *Canada Transportation Act*, S.C. 1996, c. 10; and
4. Such other statutes and regulations as counsel may advise and this Honourable Court may permit.

THIS APPLICATION WILL BE SUPPORTED BY THE FOLLOWING MATERIAL:

1. Any information filed with the Court in respect of the request below; and
2. Such further and other material as counsel may advise and this Honourable Court may permit.

REQUEST FOR MATERIAL IN THE POSSESSION OF THE AGENCY:

THE APPLICANT HEREBY REQUESTS that pursuant to Rule 317 of the *Federal Courts Rules*, the Agency transmit to the Applicant and to the Registry certified copies of all materials that were before or considered by the Agency in respect of the Decision.

December 11, 2023



BORDEN LADNER GERVAIS LLP

Barristers and Solicitors

Bay Adelaide Centre, East Tower

22 Adelaide Street West, Suite 3400

Toronto ON M5H 4E3

F: 416.367.6749

Guy Pratte (LSO# 23846L)

gpratte@blg.com / 416.350.2638

Nadia Effendi (LSO# 49004T)

neffendi@blg.com / 416.367.6728

Veronica Sjolín (LSO# 73352O)

vsjolin@blg.com / 416.367.6654

Teagan Markin (LSO# 74337R)

tmarkin@blg.com/T: 416.367.6379

Lawyers for the Applicant, Canadian
National Railway Company