Federal Court  Cour fédérale

Date: 20140912

Docket: T-1323-13

Citation: 2014 FC 869

Ottawa, Ontario, September 12, 2014

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

NATIONAL GYPSUM (CANADA) LTD

Applicant

and

CANADIAN NATIONAL RAILWAY COMPANY

Respondent

PUBLIC JUDGMENT AND REASONS

[Confidential Judgment and Reasons issued on September 12, 2014]

[1] This is an application for judicial review brought by National Gypsum (Canada) Ltd. (NGL) concerning the decision of an arbitrator, Murray A. Clemens, Q.C. (Arbitrator), dated July 5, 2013, made in a final offer arbitration (FOA) held pursuant to Part IV of the *Canada Transportation Act*, SC 1996, c 10 (CTA), in which the Arbitrator selected the final offer of Canadian National Railway Company (CN). These public reasons are an edited form of the

confidential reasons and reflect the parties' expectation of confidentially arising from s. 167 of the CTA.

Factual Background

[2] NGL operates a quarry in East Milford, Nova Scotia. For sixty years it has shipped gypsum rock from there to its port facility in Wrights Cove, Dartmouth, by CN rail.

[3] As defined by s. 6 of the CTA, NGL is a shipper of goods and CN is a carrier of goods. The CTA permits a shipper who is dissatisfied with the rates charged or proposed to be charged by a carrier for the movement of goods, or with any associated conditions, to submit the matter in writing to the Canadian Transportation Agency (Agency) to be determined by a FOA. In essence, this process requires the shipper to serve its final offer, excluding any dollar amounts, on the carrier. Within ten days after service, the shipper and the carrier must submit their respective final offers to the Agency, including dollar amounts. The Agency then provides each party with a copy of the other's submission and refers the matter to an arbitrator who must select one of the two offers.

[4] On April 29, 2013, NGL filed with the Agency and served on CN a FOA submission, comprised of its final offer without dollar amounts. This final offer was comprised of two sections, rate and conditions. The rate (Rate) was left blank.

[5] The listed "Conditions Associated with the Movement of the Goods" (Conditions) included an "Incorporation by Reference" clause which excluded any fuel surcharge.

[6] On May 9, 2013, NGL submitted its final offer, which differed from its initial submission only by the addition of a specified dollar figure in the Rate space.

[7] On May 9, 2013, CN also submitted its final offer. This followed the format of NGL's final offer and also included a specified Rate. The conditions were substantively the same as those proposed by NGL except for the wording of the Incorporation by Reference clause. There was also a further condition being a Fuel Surcharge.

[8] The Agency exchanged the parties' final offers and on May 14, 2013 it referred the matter to the Arbitrator. Pre-hearing teleconferences were held and, by letter dated May 24, 2013, the Arbitrator wrote to the parties to record the procedural matters agreed to and directed during the teleconferences. This included that no court reporter was required for the hearing.

[9] On May 29, 2013, the parties exchanged the information that they intended to submit to the Arbitrator in support of their final offers (Information). In its Information NGL submitted, amongst other things, that CN's inclusion of a variable fuel surcharge rendered CN's offer uncertain and unascertainable because it was based on a formula which was dependant upon unpredictable future events and was unilaterally changeable by CN; that CN's final offer contravened s. 161.1(1) of the CTA because it did not include a "dollar amount"; and, that CN's final offer was unreasonable because it proposed an uncompetitive rate contrary to the National Transportation Policy. CN's Information, amongst other things, addressed the negotiation and FOA history between the parties; why its proposed Rate was reasonable; and, the fuel surcharge

as a component of its rate. Each party made substantive submissions in support of its position by way of its Information.

[10] By letter dated May 31, 2013, CN advised the Arbitrator that it sought to lead rebuttal evidence to respond to NGL's allegation that CN's final offer was non-compliant with the CTA as a result of its incorporation of a specified CN Fuel Surcharge Tariff. CN submitted that this issue was not foreseeable as it was the first time NGL had raised such an argument even though the surcharge had been incorporated in prior contracts between the parties. On June 17, 2013, CN wrote to the Arbitrator formally requesting permission to file the rebuttal evidence, to which NGL objected the next day. Ultimately, by letter of June 19, 2013, the Arbitrator advised the parties that he would determine the issue at the hearing unless they required a decision in advance.

[11] The parties exchanged interrogatories on June 20, 2013. On the same day, CN advised the Arbitrator that in preparing its answers to the NGL interrogatories, CN had noticed a discrepancy in the actual distance of the movement of NGL's traffic, 31 miles, and the distance that had been used to calculate the mileage-based fuel surcharge under a specified CN Tariff, which was 36 miles. The discrepancy resulted from an erroneous calculation of the mileage by the third party software, PC*Miler (ALK Technologies), used to calculate NGL's fuel surcharge. CN advised that it had received confirmation from ALK Technologies that the error would be corrected and that the next version of PC*Miler would calculate the correct mileage. Also, CN said that it would reimburse NGL for the overpayments made as a result of the error, inclusive of HST and interest at 5%. Further, that the impact of this recalculation of the proper amount of

fuel surcharge payable by NGC in previous years and on a go-forward basis impacted certain of the figures referenced in CN's Information, although only negligibly.

[12] The Arbitrator ultimately determined that CN's June 20, 2013 letter did not form a part of the record.

[13] This issue was also addressed by CN in response to NGL Interrogatory #8.

[14] The hearing was held in Halifax, Nova Scotia on June 24, 25 and 26, 2013 during which time witnesses were heard. On July 5, 2013 the Arbitrator selected CN's final offer.

Decision Under Review

[15] Pursuant to s. 165(1) of the CTA, the arbitrator is required to select the final offer of either the shipper or the carrier. The decision must be in writing (s. 165(4)) but the arbitrator is not to give reasons unless every party requests them within 30 days of the decision (s. 165(5)).

[16] Accordingly, the Arbitrator's decision in this instance is brief, containing only background information, then concluding:

> **Award Final Offer Selection**
>
> 9. The final offer of the carrier, Canadian National Railway Company, is selected. Pursuant to ss.165(1)(c) of the Canadian Transportation Act, this final offer selection is binding on the parties for a period of one year from […]

[17] Neither party requested written reasons and none were given.

[18] By letter of August 7, 2013, the Arbitrator confirmed that. given the expiration of the deadlines for written reasons set out in s. 165(5) of the CTA, and, pursuant to Rule 27 of the Procedures for the Conduct of Final Offer Arbitration, he had destroyed all information, notes or documents including agendas or minutes of pre-hearing conferences filed, deposited prepared or taken during the arbitration.

Legislative Background

[19] FOAs are addressed in Part IV of the CTA.

[20] A shipper who is dissatisfied with the rate or rates charged or proposed to be charged by a carrier for the movement of goods, or with any of the conditions associated with the movement of goods, may submit the matter in writing to the Agency for final offer arbitration to be conducted by one arbitrator, or if the shipper and carrier agree, by a panel of three arbitrators (s. 161(1)).

[21] A copy of that submission must be served on the carrier by the shipper and must contain, amongst other things, the final offer of the shipper to the carrier, excluding any dollar amounts (s. 161(2)(a)). Within ten days after service of a shipper's submission, the shipper and the carrier must submit to the Agency their final offers, including dollar amounts (s. 161.1(1)). The Agency then provides each party with a copy of the other's final offer (s. 161.1(2)). If one party does not submit a final offer in accordance with s. 161.1(1), the final offer submitted by the other party is deemed to be the one selected by the arbitrator (s. 161.1(3)).

[22] Within five days of the final offers being received, the Agency must refer the matter to arbitration (s. 162(1)). On request by the arbitrator, the Agency may provide administrative, technical and legal assistance to the arbitrator (s. 162(2)).

[23] In the absence of an agreement between the arbitrator and the parties as to the procedure to be followed, a FAO shall be governed by the rules of procedure made by the Agency (s. 163(1)). Subject to that procedure, the arbitrator shall conduct the arbitration proceedings as expeditiously as possible and in a manner the arbitrator considers appropriate in the circumstances (s. 163(2)).

[24] Within fifteen days after the Agency refers the matter for FOA, the parties are required to exchange the information that they intend to submit to the arbitrator in support of their final offers (s. 163(4)). Seven days after that information has been received, each party may direct interrogatories to the other which must be answered within fifteen days of receipt (s. 163(4)). If a party unreasonably withholds information that the arbitrator subsequently deems to be relevant, that withholding shall be taken into account by the arbitrator in making a decision (s. 163(5)).

[25] The arbitrator is required to have regard to the information so provided and, unless the parties agree to limit the amount of information to be provided, to any additional information that is provided by the parties at the arbitrator's request (s. 164(1)). Further, unless the parties agree otherwise, in rendering a decision the arbitrator shall have regard to whether there is available to the shipper an alternative, effective, adequate and competitive means of transporting the goods to

which the matter relates and to all considerations that appear to the arbitrator to be relevant to the matter (s. 164(2)).

[26] The decision of the arbitrator in conducting a FOA shall be the selection by the arbitrator of the final offer of either the shipper or the carrier (s. 165(1)) in writing (s. 165(2)(a)) and applicable for a period of one year or less if appropriate, unless otherwise agreed by the parties (s. 165(2)(c)). As stated above, no reasons shall be included in the decision (s. 165(4)), however, if requested by all of the parties to the arbitration within thirty days of the decision, the arbitrator shall give written reason for the decision (s. 165(5)). Unless the parties both otherwise agree, the decision shall be final and binding (s. 165(6)(a)).

[27] A complete copy of Part IV of the CTA is attached as a schedule to this decision.

Issues

[28] I would frame the issues in this matter as follows:

1. What is the standard of review?
2. Did CN amend its final offer?
3. Was CN's final offer compliant with s. 161.1(1) of the CTA?
4. Was CN's final offer uncertain or void for uncertainty?
5. Is this an appropriate case for a directed verdict or mandamus?

[29] NGL had also originally objected to the admissibility of paragraphs 25(b), 25(c) and 29 of the Affidavit of Lon Labrash, Director in Financial Planning for CN, dated October 2, 2013,

which was filed in response to NGL's application for judicial review (Labrash Affidavit). However, that objection was withdrawn at the hearing, it being left to the Court to determine what weight to afford that evidence.

[30] In support of its judicial review application, NGL submitted the affidavit of Sharon Schmitz, legal administrative assistant with Davis LLP, dated September 3, 2013 (Schmitz Affidavit), which attached as exhibits many of the documents relevant to this application. The Labrash Affidavit similarly attached such documentation as exhibits.

ISSUE 1: What is the standard of review?

NGL's Position

[31] NGL submits that the issues raise questions of law and jurisdiction and relate to the interpretation of the CTA. An arbitrator in a FOA does not have specialized expertise nor can the CTA be considered the Arbitrator's home statute. The decision is therefore reviewable on the standard of correctness (*Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 59-60 [*Dunsmuir*]).

[32] NGL submits that the Arbitrator acted without jurisdiction by allowing CN to amend its final offer, which is not permitted by the CTA. Alternatively, that the Arbitrator erred in law as he acted contrary to ss. 161.1(1) and 165(1) of the CTA. At the hearing before me, NGL elaborated on its position as to the standard of review and submitted that on a contextual analysis the correctness standard would apply: as to the expertise of the Arbitrator, regardless of s. 169(1)

of the CTA, it is the Agency and not the Arbitrator who has expertise; as the issues are statutory interpretation and jurisdiction they are more suited to be heard by the Court; while issues on the merits reside with the Arbitrator, the question of the validity of the final offer is better addressed by the Court; the scheme of the CTA does not contemplate arbitrators addressing questions of law or home statutes as demonstrated by s. 162(2) which permits the arbitrators to request the Agency to provide legal assistance; s. 165(6)(a) is not a true privative clause; and, the issue is of central importance to the FOA scheme.

CN's Position

[33] CN submits that the standard of review is reasonableness. It characterizes the nature of the questions that were before the Arbitrator as questions of fact or mixed fact and law, being whether CN's final offer was uncertain, failed to include dollar amounts, and, was amended. Questions where the legal and factual issues are inextricably intertwined also attract a standard of reasonableness (*Dunsmuir*, above, at para 59).

[34] The existence of a privative or preclusive clause, such as s. 165(6)(a) of the CTA, is a statutory direction from Parliament giving rise to a strong indication of a deferential standard of review (*Dunsmuir*, above, at paras 52 and 55). Nor are any of the issues raised matters of central importance to the legal system as a whole thereby attracting a correctness standard.

[35] This is not a jurisdictional issue and the Courts should not brand as jurisdictional issues that are doubtfully so. Here the Arbitrator was not required to determine whether his grant of authority gave him the ability to decide a particular matter, and there is no question that the CTA

gave him the authority to decide the FOA. NGL takes issue with the manner in which the Arbitrator exercised his authority which is not a question of jurisdiction.

Analysis

[36] The first step in determining the appropriate standard of review is to ascertain whether existing jurisprudence has already resolved, in a satisfactory manner, the degree of deference to be afforded a particular category of question. If it has not, then the Court must engage the second step, which is to determine the appropriate standard having regard to the nature of the question, the expertise of the tribunal, the presence or absence of a privative clause, and the purpose of the tribunal (*Dunsmuir*, above, at paras 51-64; *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 48 [*Agraira*]).

[37] In this matter the parties have not referred the Court to any cases where the standard of review has been determined in the context of FOA arbitration decisions conducted pursuant to the CTA. Thus, the second step must be engaged.

[38] In *Dunsmuir*, above, the Supreme Court identified factors that will assist in determining whether the decision-maker should be given deference and a reasonableness test applied (para 55):

- A privative clause: this is a statutory direction from Parliament or a legislature indicating the need for deference.
- A discrete and special administrative regime in which the decision maker has special expertise (labour relations for instance).

> - The nature of the question of law. A question of law that is of "central importance to the legal system . . . and outside the . . . specialized area of expertise" of the administrative decision maker will always attract a correctness standard (*Toronto (City) v. C.U.P.E.*, at para. 62). On the other hand, a question of law that does not rise to this level may be compatible with a reasonableness standard where the two above factors so indicate.

[39] The Court also found that there is nothing unprincipled in the fact that some questions of law will be decided on the basis of reasonableness. It simply means giving the adjudicator's decision appropriate deference in deciding whether a decision should be upheld, bearing in mind the factors indicated.

[40] The Supreme Court of Canada restated this finding in *Smith v Alliance Pipeline Ltd*, 2011 SCC 7, [2011] 1 SCR 160, as follows:

> [26] Under *Dunsmuir*, the identified categories are subject to review for either correctness or reasonableness. The standard of correctness governs: (1) a constitutional issue; (2) a question of "general law 'that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise'" (*Dunsmuir*, at para. 60 citing *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, at para. 62); (3) the drawing of jurisdictional lines between two or more competing specialized tribunals; and (4) a "true question of jurisdiction or *vires*" (paras. 58-61). On the other hand, reasonableness is normally the governing standard where the question: (1) relates to the interpretation of the tribunal's enabling (or "home") statute or "statutes closely connected to its function, with which it will have particular familiarity" (para. 54); (2) raises issues of fact, discretion or policy; or (3) involves inextricably intertwined legal and factual issues (paras. 51 and 53-54).

(See also: *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2011 SCC 53, [2011] 3 SCR 471 at para 18; *Dunsmuir*, above, at paras 58, 60-61).

[41] And, in *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 SCR 654, the Supreme Court indicated that true questions of jurisdiction are exceptional. There Justice Rothstein stated:

> [39] What I propose is, I believe, a natural extension of the approach to simplification set out in *Dunsmuir* and follows directly from *Alliance* (para. 26). True questions of jurisdiction are narrow and will be exceptional. When considering a decision of an administrative tribunal interpreting or applying its home statute, it should be presumed that the appropriate standard of review is reasonableness. As long as the true question of jurisdiction category remains, the party seeking to invoke it must be required to demonstrate why the court should not review a tribunal's interpretation of its home statute on the deferential standard of reasonableness.

[42] Recently, *in McLean v British Columbia (Securities Commission)*, 2013 SCC 67, the Supreme Court of Canada addressed the standard of review on judicial review (at paras 21-27) and stated:

> [21] Since *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, this Court has repeatedly underscored that "[d]eference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity" (para. 54).[2] Recently, in an attempt to further simplify matters, this Court held that an administrative decision maker's interpretation of its home or closely-connected statutes "should be presumed to be a question of statutory interpretation subject to deference on judicial review" (*Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, at para. 34).
>
> [22] The presumption endorsed in Alberta Teachers, however, is not carved in stone. First, this Court has long recognized that certain categories of questions - even when they involve the interpretation of a home statute - warrant review on a correctness standard (*Dunsmuir*, at paras. 58-61). Second, we have also said that a contextual analysis may "rebut the presumption of reasonableness review for questions involving the interpretation of the home statute" (*Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC

> 35, [2012] 2 S.C.R. 283, at para. 16). The appellant follows both these routes in urging us to accept a correctness standard. I propose to deal with her second argument first as it can be dispensed with quickly.
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> […]
>
> [25] Post-*Dunsmuir*, it has become fashionable for counsel to argue that the question before an administrative decision maker falls into one of the few recognized exceptional categories. One wave of cases focuses on whether the question raised is a "true" question of vires or jurisdiction; see *Alberta Teachers*, at paras. 37-38 (citing various cases). In that case, the Court expressed serious reservations about whether such questions can be distinguished as a separate category of questions of law, but ultimately left the door open to the possibility (para. 34).[3]
>
> [26] A second wave - the one which the appellant now rides - focuses on "general questions of law that are both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise" (*Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471 ("*Mowat*"), at para. 22, referring to *Dunsmuir*, at para. 60); see also *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, 2011 SCC 59, [2011] 3 S.C.R. 616; *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34, [2013] 2 S.C.R. 458. In each of these cases, this Court unanimously found that the question presented did not fall into this exceptional category - and I would do so again here.
>
> [27] The logic underlying the "general question" exception is simple. As Bastarache and LeBel JJ. explained in *Dunsmuir*, "[b]ecause of their impact on the administration of justice as a whole, such questions require uniform and consistent answers" (para. 60). Or, as LeBel and Cromwell JJ. put it in *Mowat*, correctness review for such questions "safeguard[s] a basic consistency in the fundamental legal order of our country" (para. 22).

[43] In my view this matter does not fall within either of the categories identified and described by *Dunsmuir* and the subsequent jurisprudence as attracting the correctness standard.

It is not a constitutional issue nor a question of general law that is both of central importance to the legal system as a whole and outside the Adjudicator's specialized area of expertise. It does not involve the drawing of jurisdictional lines between two or more competing specialized tribunals nor is it a true question of jurisdiction or vires.

[44] While NGL argued that the decision is of central importance to the FOA scheme, that is not the test to be met. None of the issues pertaining to the Arbitrator's decision concerning the FOA as between NGL and CN amount to a question of general law that is of central importance to the legal system as a whole and outside the Arbitrator's specialized area of knowledge. As Justice Kelen said in *Canadian National Railway Company v Western Canadian Coal Corporation*, 2007 FC 371 [*Western Canadian*], the issues to be decided do not transcend the interests of the parties involved:

> [49] In this case, at issue is a form of interest arbitration operating under a statutory framework that expressly states that no reasons are to be provided except where both parties consent. At stake are purely commercial interests, rather than fundamental personal liberties. There is no right of appeal from the arbitrator's decision. It is final and binding. Moreover, time is of the essence. The arbitrator is not bound by precedent, and accordingly the issues to be decided by the arbitrator do not transcend the interests of the parties involved…

Although that decision pre-dated *Dunsmuir* and dealt with a different issue, the reasoning on this point is relevant.

[45] As noted above, jurisdictional issues are exceptional and only arise "…where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter" (*Dunsmuir*, above, at para 59). That is not the case here. There is no doubt

that the Arbitrator had the authority to select a final offer, the issues are concerned with the decision itself.

[46] NGL also submits that this matter raises questions of statutory interpretation which are best suited for determination by the Court. Further, that in this instance the Arbitrator is not a member of the Agency, lacks expertise and is not interpreting his home statute. As noted above, where the question relates to the interpretation of the tribunal's enabling or home statute or statutes closely connected to its function, with which it will have particular familiarity, the reasonableness standard will normally apply.

[47] I do not think that the fact that an arbitrator is not an employee of the Agency precludes him from having the experience and expertise to effect his role under the CTA, including the interpretation of the CTA as a statute closely connected to his function and with which he will have particular familiarity. Nor do I agree that the fact that the Agency may, at the request of the arbitrator, provide administrative, technical and legal assistance to the arbitrator pursuant to s. 162(2) suggests that the FOA statutory scheme does not envision the arbitrator addressing questions of law or mixed fact and law in the execution of his role.

[48] While s.169 does not explicitly require that every arbitrator have expertise that may assist them in conducting FOAs, there is no evidence that the Arbitrator who presided in this matter lacked such expertise. In my view, if an arbitrator has been selected by the Agency and is fulfilling the role described within that scheme, then it must be assumed that he has acquired special expertise.

[49] Other factors leading towards the reasonableness standard are that Part IV of the CTA is a discrete and special administrative regime. Further, s. 165(6)(a) states that unless the parties agree otherwise, which they did not in this case, the decision of the arbitrator on FOA will be final and binding and enforceable as if it were an order of the Agency, which provision resembles a privative clause.

[50] In conclusion, the issues in this matter all raise issues of fact or mixed fact and law. Whether or not CN amended its final offer is a question of fact as is the question of whether the Arbitrator permitted CN to do so. Similarly, whether CN's final offer was uncertain or void for uncertainty is a question of mixed fact and law. And, to the extent that the Arbitrator may have been required to interpret provisions of the CTA, he is interpreting his home statute. As the presumption of its application has not been rebutted, the standard of review is reasonableness.

ISSUE 2: Did CN amend its final offer?

NGL's Position

[51] NGL submits that the CTA does not allow the parties to amend their final offers once submitted to the Agency nor does it allow an arbitrator to permit an amendment once a final offer is submitted. The Arbitrator, therefore, acted without jurisdiction in allowing CN to amend its final offer. Alternatively, the Arbitrator erred in law by acting contrary to ss. 161.1(1) and 165(1) of the CTA.

[52] Although CN may submit that it did not revise its final offer, but rather corrected the calculation of its fuel charge, this ignores the fact that CN can only correct the distance for NGL's rail movement by calculating the fuel surcharge on something other than the specified CN Tariff, which requires calculation using PC*Miller. In the alternative, by revising its fuel surcharge, CN revised the rate payable under its final offer. This is because the application of the fuel surcharge is a component of the rate to be charged to NGL under CN's final offer. This was an improvement of CN's final offer after NGL had tendered its own offer which rendered it incapable of acceptance as it was an amendment.

[53] Even though the Arbitrator ruled that the June 20, 2013 letter from CN concerning the fuel surcharge error did not form a part of the record at the hearing, he accepted the evidence of CN's witnesses regarding the error as evidenced by the fact that the decision specifically states that he "considered the evidence of the witnesses". He thereby allowed CN to revise its final offer.

CN's Position

[54] CN submits that at no time during the FOA process did it attempt to revise, amend or to otherwise alter or modify its final offer. The final offer, including dollar amounts, that CN initially provided to the Agency pursuant to s. 161.1 of the CTA is the exact same final offer that was considered and ultimately accepted by the Arbitrator. Nor has CN ever requested that its final offer be amended or revised. While CN's June 20, 2013 letter requested minor changes to CN's Information, the wording of the final offer did not change.

[55] Further, at no time did the Arbitrator permit CN to amend its final offer. Rather, the uncontradicted evidence is that the Arbitrator expressly ruled that the June 20, 2013 letter did not form a part of the record at the hearing. Nor is there any evidence to support NGL's assertion that the Arbitrator accepted CN's witnesses' submissions as to the mileage error. The decision simply states that he considered the information, evidence and related materials provided by the parties and the evidence of the witnesses. In any event, the practical effect of the mileage error was negligible in comparison to the base rate differential between the two final offers. The Arbitrator could easily have rejected the evidence of CN's witnesses as to the mileage error yet still have accepted CN's final offer as being the most commercially reasonable.

Analysis

[56] As a starting point it is useful to refer to *Western Canadian*, above. That case was a judicial review of an arbitrator's decision which required the Court to determine if procedural fairness imposed by paragraph 29(e) of the *Canadian Bill of Rights*, S.C. 1960, c.44 applied to the FOA regime. There Justice Kelen summarized prior findings of the Federal Court of Appeal concerning FOAs, described the FOA process and noted that:

> [8] Since FOA forecloses the option of the arbitrator choosing a compromise position between the two offers, the design of FOA encourages the parties to settle the dispute through their own negotiations.
>
> [9] The FOA process disciplines the parties to advance tempered offers because the more far reaching a party's position, the greater likelihood that the other party's final offer will be selected by the arbitrator…
>
> […]
>
> [35] Final offer arbitration has been described as "an intentionally high risk form of arbitration" that encourages

> settlement and tempers final positions. The arbitration resolves isolated disputes over rates to be charged by a carrier for a period of one year when the parties are unable to agree. The arbitrator's task is to select the more reasonable of the two offers submitted. As is indicated in paragraph 165(6)(a) of the Act, the arbitrator's decision is intended to bring finality to the dispute. The limited duration of the decision's binding effect on the parties is closely linked to the limited timeframe within which the arbitration process occurs…
>
> […]

[57] While NGL devotes much of its effort in its submissions to establishing that final offers were intended and are to be exchanged simultaneously, in my view that is clear from the CTA provisions and is not at issue in this case.

[58] The only question is whether CN amended its final offer and, in my view, it did not.

[59] As indicated in the background facts, both parties were required to and did submit their final offers to the Agency on May 9, 2013. NGL's final offer included an Incorporation by Reference clause which excluded any fuel surcharge and proposed a specified Rate. CN's final offer included a different specified Rate, an Incorporation by Reference clause and a Fuel Surcharge clause that stated that the Rate was subject to a specified CN Fuel Surcharge Tariff supplements thereto and reissues thereof during the Term.

[60] In the June 20, 2013 letter from CN to the Arbitrator, CN advised that in preparing its answers to the NGL interrogatories it had noticed a discrepancy in the actual distance of the movement of NGL's traffic and the distance that had been used to calculate the mileage based fuel surcharge under the specified CN Tariff. The discrepancy resulted from an erroneous

calculation of the mileage by the third party software, PC*Miler, used to calculate NGL's fuel surcharge. It went on to explain that the error had an impact on certain of the numbers "referenced in CN's Information, although only negligibly" and provided an example of this.

[61] It is important to note that CN's final offer contains only one figure, the stated Rate. Further, nowhere in the June 20, 2013 letter does CN request or suggest that the stated Rate contained in its final offer is to be revised. CN clearly stated that, although it viewed the adjustments to the comparative rates not to be material, that it sought to bring the discrepancy to the Arbitrator's attention in advance of the hearing to avoid any confusion or inconsistency in the rate history or comparison. In that regard I would note s.163(5) of the CTA which states that if a party unreasonably withholds information that the arbitrator subsequently deems to be relevant, the withholding shall be taken into account by the arbitrator in making a decision. Thus, in my view, once it discovered the mileage error which had an impact on the fuel surcharge, CN was obliged to disclose this.

[62] It is also of note that it is only in CN's Information, and not the final offer, that CN makes its analysis which concludes that its final offer is commercially more reasonable than that of NGL. Thus, when CN updated those figures, in its letter of June 20, 2013, it was referring to the submissions contained in its Information, not to the final offer.

[63] More significantly, the parties agree in their submissions that the June 20, 2013 letter did not form part of the record at the hearing. Thus, even if CN's letter was construed as an effort to

improve its final offer, the letter was not evidence that was considered by the Arbitrator at the hearing and in forming his decision.

[64] NGL submits that its Information raised the issue of the fuel surcharge and alleged that CN's final offer would overcharge NGL for fuel. It is correct that NGL's Information raised the fuel surcharge noting that its final offer excluded it while CN's final offer was subject to a specified CN Fuel Charge Tariff. The history of the fuel surcharge is also addressed and NGL took issue with CN's proposal as being uncertain and unascertainable as well as contrary to s. 161.1(1) of the CTA. Further, because the base rate proposed by CN included a fuel cost component that covered CN's full cost of diesel fuel for the movement of NGL's traffic to Wrights Cove, that charging an additional fuel surcharge as set out in the specified Tariff would result in CN grossly over-recovering its actual fuel costs.

[65] NGL further submits that its Interrogatory #8 "clearly suggested" that CN had historically overcharged NGL for fuel based both on fuel costs and distance and, as a result of NGL's position, CN revised its final offer to more accurately reflect the distance for Milford Quarry to Wrights Cove. However, Interrogatory #8 makes no such suggestion. Rather, it refers to CN's Information and requests details of CN's calculation of the specified fuel surcharge, including the distance and fuel cost associated with the calculation and the source of the numbers for both the distance and fuel cost. There is no evidence to suggest that it was anything other than as a result of CN's efforts to respond to Interrogatory #8, and the resultant discovery of the mileage discrepancy, that prompted CN's June 20, 2013 letter. This was confirmed by affidavit evidence as well as testimony to that effect at the hearing.

[66] Although the answer to Interrogation #8 does refer to "[t]he fuel surcharge of […] shown in CN's Final Offer", there was affidavit evidence stating that this was amended, with the consent of NGL's counsel, at the hearing when the answers were being read in the record to "… CN's Information …".

[67] It is apparent from the affidavit evidence, reviewed in more detail in the confidential reasons, that not only did the Arbitrator refuse to accept the June 20, 2013 letter into evidence, but that he was aware of CN's position that it was not seeking to amend its final offer. Ultimately, the Arbitrator accepted CN's final offer, the text of which was not amended. There is no evidence that the Rate contained in the final offer was amended.

[68] NGL also submits that because the Fuel Surcharge clause in the CN final offer stated that CN's rate was subject to the specified CN Tariff, which in turn states that the fuel surcharge is calculated on the basis of rail mileage provided by PC*Miler which had not been corrected from 36 to 31 miles at the time of the hearing, CN could only correct the mileage by revising its final offer which it did by way of the revised calculations. The specified Tariff does not contemplate PC*Miler being manually overridden, thus by applying 31 rather than 36 miles, CN revised its offer. However, for the reasons I have set out above, this submission cannot succeed.

[69] I would also note, however, that CN's final offer stated that the Rate was subject to the specified Fuel Surcharge Tariff series, supplements thereto and reissues thereof during the Term. That CN Tariff is attached as Exhibit D of an affidavit file in support of CN's submissions and was Appendix 3 to CN's Information. It states, in part:

- To ensure consistency and fairness, rail mileage is calculated using the latest version of the third party software PC*Miler (ALK Technologies) on each linehaul movement. A mileage table of all Origin/Destination/Route combinations shipped in the last 12 months will be available when you login to Velocity eBusiness and select the Get Rail Miles tool. To get the mileage for any new Origin/Destination/Route combination, the customer will need to purchase the ALK Technologies software. The mileage table will be updated daily with any new moves.

  NOTE: In rare cases where rail miles for an Origin/Destination/Route combination are not available through ALK Technologies' PC*Miler software, CN will calculate and publish these miles in out Get Rail Miles mileage table.

[70] Another Tariff similarly states that "Rail mileage is calculated using the latest version of the third party software PC*Miler (ALK Technologies) on each linehaul movement. Where the rail miles are not available through PC*Miler, CN will calculate and publish the mileage independently".

[71] There is no evidence to suggest that CN intended to calculate the Fuel Surcharge on anything other than the latest version of PC*Miler. However, the specified Tariff also appears to contemplate CN calculating mileage outside the PC*Miler software when the software is unable to do so. Therefore, it would have been reasonable for the Arbitrator to decide that the manual calculation of the variable fuel surcharge rate would be permitted under the Tariff language.

[72] But what is most significant is that the Rate proposed in CN's final offer was stated to be subject to the Fuel Surcharge. The surcharge was estimated only in CN's Information and was based on the calculation for June 2013. This was a variable representing an estimated amount

for the purposes of the arbitration. The impact on that figure as a result of the mileage discrepancy was only addressed in the letter of June 20, 2013. The Arbitrator did not accept the June 20, 2013 letter with the revised Information calculations into evidence and there is no evidence that the Arbitrator accepted that testimony as amending CN's final offer.

[73] Having reviewed both Informations, I agree with CN that there were a number of reasons why the Arbitrator could have selected the CN final offer over the NGL final offer. It is entirely possible that the Arbitrator could have selected the CN final offer as being the most commercially reasonable knowing that the fuel surcharge component was calculated with an erroneous mileage which would resulting a short term overcharge until PC*Miler was updated.

[74] As it is not apparent on the face of the record that CN amended its final offer and that the Arbitrator accepted a revised final offer, no issue of the Arbitrator having exceeded his jurisdiction or erred by contravening ss. 161.1(1) and 165(1) of the CTA arises.

[75] As stated in *Western Canada*, above, the arbitrator's role in a FOA is to select the more reasonable of the two offers submitted. There is nothing to suggest that the Arbitrator erred by selecting the CN final offer in making that determination.

ISSUE 3: Was CN's final offer compliant with section 161.1(1) of the CTA?

NGL's Position

[76] NGL submits that the CTA requires final offers to include dollar amounts. Where a party fails to submit a final offer in accordance with the CTA, the Arbitrator must select the compliant offer. CN's final offer did not comply with s. 161.1(1) because it did not contain a dollar amount representing the total rate. The Arbitrator therefore acted without jurisdiction in selecting CN's final offer. Alternatively, he erred in law in doing so.

[77] NGL submits that because s. 161(2)(a) of the CTA requires the shipper to initially submit its final offer "excluding any dollar amounts", s. 161.1(1) must therefore be understood as requiring the parties to submit their final offers including all dollar amounts. The final offers must include dollar amounts representing all charges, or the total rate, the shipper would be required to pay under the offer. Otherwise, it is impossible for an arbitrator to select the most commercially reasonable of the offers as he does not know the total rate payable under one of them (*Western Canadian*, above, at paras 31, 35 and 45).

[78] CN's rate was only a base rate because it was subject to the specified CN Tariff, a variable fuel surcharge that fluctuated monthly. A variable fuel surcharge is not a dollar amount. CN acknowledged in its Information that the structure of its final offer made it impossible to determine the total rate payable for any month other than June 2013.

CN's Position

[79] CN submits that the stated rate per car was clearly inserted in its final offer. Therefore, NGL cannot in good faith argue that CN did not include "dollar amounts" as required by s. 161.1(1) simply because it includes the application of a standard fuel charge. NGL appears to be reading in the words "total price" or "total rate payable" into s 161.1(1) when those words are simply not there. This was not Parliament's intent.

[80] Further, NGL itself incorporated by reference other CN Tariffs which could possibly increase the rates paid and gave an example of this.

[81] Section 161.1(1) requires each party to submit to the Agency their final offers "including dollar amounts", it does not require that the parties' final offers include "all" potential dollar amounts that could be payable over the course of the award term. To make such a finding requires the reading in of the word "all". Statutory interpretation presumes against adding words unless the addition gives voice to Parliament's implicit intention (*Murphy v Walsh*, [1993] 2 SCR 1069 at 1078-1079, 106 DLR (4th) 404 [*Murphy*]; *Cuthbertson v Rasouli,* 2013 SCC 53 at para 32, [2013] 3 SCR 341 [*Cuthbertson*]). Considering s. 161.1(1) in its grammatical and ordinary sense (*Re Sound and Motion Picture Theatre Associations of Canada*, 2012 SCC 38 at para 33, [2012] 2 SCR 376), it is not necessary or reasonable to read in the word "all", particularly as Parliament inserted the word "including" before the phrase "dollar amounts". This suggests that it was not Parliament's intention to impose a requirement that "all" dollar amounts be stipulated in the parties' final offers. Rather, the definition suggests that Parliament

intended to simply differentiate the final offers contemplated by s. 161.1(1), for which the parties may include dollar amounts, from the shipper's preliminary offer which must exclude dollar amounts.

Analysis

[82] Section 161(2), which concerns a shipper's preliminary final offer submission, states:

> 161. […] (2) A copy of a submission under subsection (1) shall be served on the carrier by the shipper and the submission shall contain
>
> > (a) the final offer of the shipper to the carrier in the matter, *excluding any dollar amounts*;
>
> [emphasis added]

[83] Section 161.1(1), which concerns submission of the final offers by both parties, states:

> 161.1(1) Within 10 days after a submission is served under subsection 161(2), the shipper and the carrier shall submit to the Agency their final offers, *including dollar amounts*.
>
> [emphasis added]

[84] I do not agree with NGL's submission that because a shipper's s.161(2)(a) preliminary offer excludes "any" dollar amounts, then s. 161.1(1) must be understood as requiring the parties to submit their final offers including "all" dollar amounts. NGL's reasoning is that the word "any" is synonymous with "all" (*Aerlinte Eireann Teoranta v Canada (Minister of Transport)* (1990), 68 DLR (4th) 220 at 225, 107 NR 129 (FCA)). Because s. 161(2)(a) refers to "any" dollar amounts, this can be read as "all" dollar amounts and it therefore follows that s 161.1(1) must be read to include "all' dollar amounts.

[85] This is, at best, a tortured interpretation and does not arise from a plain reading of either provision. The Supreme Court has said that it is problematic to rely on "an unnatural and strained interpretation" of a phrase (*British Columbia (Forests) v Teal Cedar Products Ltd*, 2013 SCC 51 at para 26, [2013] 3 SCR 301). It also confirmed in *Cuthbertson*, above, at para 32 that:

> The basic rule of statutory interpretation is that "the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": R. Sullivan, Sullivan on the Construction of Statutes (5th ed. 2008), at p. 1.

[86] NGL's interpretation also requires reading in the word "all" when interpreting s. 161.1(1), however, "[c]ourts should normally avoid an interpretation of legislation that requires words to be read into it" (*Febles v Canada (Citizenship and Immigration)*, 2012 FCA 324 at para 51, 357 DLR (4th) 343; *R v McIntosh*, [1995] 1 SCR 686 at para 26, 178 NR 161 [*McIntosh*]). I am not convinced that to do so here would express what Parliament clearly implied (*Murphy*, above, at 1078-1079; *R v McIntosh)*.

[87] Further, while NGL submits that it is impossible for an arbitrator to select the most reasonable offer when he does not know what the total rate payable is under one of the offers, this would appear to overstate the situation. As is set out in more detail below, it appears that final offers including fuel surcharges and other terms that may contain variable rates are not exceptional. Further, each party may submit an Information which can explain such figures, including their variables, and provide an estimate of what that additional cost will be. The arbitrator can take this into consideration when comparing and selecting the final offer.

[88] In this case a related CN Tariff explains how the fuel surcharge is calculated:

> CN will apply a fuel surcharge to the linehaul freight charge(s) based on the monthly average price of U.S. No. 2 Diesel Retail Sales by All Sellers (Cents per Gallon) On-Highway Diesel Fuel (HDF).
>
> The source for the price of HDF is the U.S. Department of Energy's EIA Retail On-Highway Diesel Prices Report, whose monthly average price is available under "2-M Diesel Prices – All Types" at http://tonto.eia.doe.gov/oog/ftparea/wogirs/xls/psw18vwall.xls.
>
> When the monthly average price of HDF equals or exceeds $1.25 in the second calendar month prior to the month in which the fuel surcharge is applied, the fuel surcharge rate per mile as shown in the HDF Fuel Surcharge Table will be applied to the linehaul freight charge. For example, the surcharge amount in December will be calculated from the monthly average HDF price during October. Rail mileage is calculated using the latest version of the third party software PC*Miler (ALK Technologies) on each linehaul movement. When the rail miles are not available through PC*Miler, CN will calculate and publish the mileage independently.
>
> For example:
>
> When HDF rate is $2.60, the fuel surcharge for a carload linehaul movement of 1,500 miles would be $0.2760 x1500 = $414.00

[89] That Tariff then goes on to describe and give examples of how the U.S. On-Highway Diesel surcharge will be converted to Canadian currency for customers who are invoiced in Canadian dollars, to provide a table showing how the date of surcharge will be applied and a HDF fuel surcharge table from which the HDF value can be extracted and applied.

[90] Thus, while the Fuel Surcharge calculation is dependant on mileage, this is not a variable for a known route, the only variable is the HDF which is figure determined by an independent source and over which CN has no control. While the Arbitrator could not know exactly what the

fuel surcharge will be from month to month, CN estimated this at a specified dollar rate per car and provided the surcharge from prior years. In my view, the Arbitrator in determining which of the final offers was most commercially reasonable, could consider the CN Information when making an informed determination of the total amount payable under CN's final offer.

[91] NGL cites and relies on a portion of *Western Canadian*, above, at para 31. When viewed in whole this reads:

> [31] The applicant argues that various aspects of the FOA regime have the effect of denying it the opportunity to prepare adequately its case and to know the case it has to meet. In particular, the applicant challenges the following features of the arbitration regime, which it argues are unfairly prejudicial and constitute a violation of paragraph 2(e) of the Canadian Bill of Rights:
>
> > 1. Paragraph 161(2)(a) excludes for 10 days from the shipper's final offer the dollar price it is willing to pay for the rail service contained in the offer. Accordingly, the carrier must respond to the shipper's final offer without knowing the dollar price the shipper is willing to pay;

[92] NGL submits that in *Western Canadian*, CN equated "dollar amounts", which is what s. 161(2)(a) excludes, with "total price" which is what CN wanted to know before crafting its offer. I fail to see how this paragraph stands for the proposition for which it is being advanced by NGL. It is a recitation of the arguments of CN in that case, and merely states the fact that when drafting a final offer, the carrier must do so without knowing how much the shipper is willing to pay. It makes no reference to a total price nor does it exclude the ability of a carrier to incorporate terms by reference or to use a variable rate that is able to be calculated based on objective information.

[93] In conclusion, I do not agree that s. 161.1(1), and in particular the phrase "dollar amounts" must be interpreted and understood as requiring the parties to submit final offers that contain amounts in dollars which represent the total rate payable by the shipper. I see no reason why, as in this case, a stated dollar rate cannot be stated to be made subject to another provision of the final offer, such as a fuel surplus clause or an incorporated by reference clause. Should a party choose to proceed in this manner, then it is incumbent upon them to explain in their Information the basis for the additional charge and to convince the arbitrator that enough information concerning that charge has been provided so that he or she can undertake a comparison of the two final offers and make a determination as to which of them is commercially the most reasonable. This can include, as it did in this case, the history of the development and application of the charge, historic rates for the charge as well as the method by which it is calculated. If the party fails to satisfy the arbitrator of the necessity and relative predictability of the additional charge, then this will be to the party's detriment.

[94] As I do not agree that CN's final offer failed to specify a "dollar amount" nor that its stated rate was required to include the Fuel Surcharge or other tariffs incorporated by reference, I cannot conclude that CN's final offer did not comply with s. 161.1(1) nor, therefore, that the Arbitrator was obliged by s. 161.3 to select NGL's final offer. And, for the reasons set out above, it was reasonable for the Arbitrator to find that CN's final offer contained dollar amounts.

ISSUE 4: Was CN's final offer uncertain or void for uncertainty?

NGL's Position

[95] NGL submits that CN's offer was uncertain and unascertainable, or void for uncertainty, and therefore that the Arbitrator erred in jurisdiction and law by selecting CN's final offer. This is because a reasonable comparison of the two offers is not possible when one of them incorporates a fuel surcharge dependant on uncertain future events. Further, because CN can unilaterally alter the tariff at any time. Because the Fuel Surcharge can be revised by CN during the term of the award, the Arbitrator's selection of CN's final offer amounts to an impermissible sub-delegation to CN of his adjudicative powers, being the authority to determine the rate payable (*Therrien (Re),* 2001 SCC 35 at para 93, [2001] 2 SCR 3; *Murphy v Canada (National Revenue),* 2009 FC 1226 at paras 40-47, 314 DLR (4th) 540).

[96] The selection is also contrary to s. 165(6)(a) of the CTA as it is not final and binding and, contrary to the scheme of the CTA, it does not provide certainty (*Western Canadian*, above, at para 9). The issuance of supplements and reissuances of the specified CN Tariff could materially alter the terms of the final offer within as little time as one month. Because the material terms of a contract must be certain, the offer is void for uncertainty (*Ko v Hillview Homes Ltd*, 2012 ABCA 245 at para 81, 90-91 and 103, 536 AR 93 [*Ko*]).

CN's Position

[97] CN submits that both final offers are dependant upon what NGL describes as unpredictable future events or the parties' future acts or omissions. For example, depending on how NGL handles rail cars during the FOA term, the "total rate" may fluctuate greatly in accordance with a referenced CN Tariff. Just because the total rate payable may fluctuate does not render the final offers unascertainable or uncertain. An arbitrator can still conduct a comprehensive comparison of the reasonableness of the parties' final offers.

[98] CN suggests that it may have been the lack of variability in NGL's offer caused it not to be selected by the Arbitrator. It is a well-established practice within the transportation industry to adjust price in line with fuel fluctuations. This is a fair practice as it removes the uncertainty of volatile input costs while being neutral for both shippers and carriers. Thus, NGL's approach was out of step with industry practice while CN's approach, including a Fuel Surcharge clause, was inherently more reasonable and open to acceptance by the Arbitrator on that basis. It did not render CN's final offer invalid for uncertainty.

[99] Further, the practical consequence of NGL's argument is that any rail shipper could avoid a fuel surcharge tariff by merely initiating a FOA. Railways would then be required to submit an all inclusive rate in their final offer thereby removing what is accepted in industry as the most efficient method of addressing fluctuations in fuel prices and leading to higher rail rates. This would defeat the purpose of the FOA scheme. In essence, CN submits that fuel surcharges are a commercial reality, being the economic and commercial context prevailing in Canada, and are

required to make the transportation system more economical (*Canadian National Railway Company v Canada (National Transportation Agency)* (1995), 129 DLR (4th) 163 at 170-171, [1996] 1 FCR 355 (FCA)). By filing an FOA, NGL should not be permitted to extricate itself from the commercial market and a fuel surcharge that virtually every other shipper is required to pay and that NGL has previously paid.

[100] As for unilaterally changing the tariff, CN made clear at the hearing that this is standard wording used of all of its tariffs. NGL cannot point to a single instance of CN abusing this power to unilaterally change its fuel tariff to the detriment of shippers. This concern is a theoretical construct, as demonstrated by the testimony.

[101] CN submits that the Arbitrator did not delegate his authority. Further, his decision was final and binding and that, in a FOA decision where no reasons are given, the arbitrator's decision must stand unless it can be shown that it was patently perverse, patently unlawful or explicable only on the assumption of bad faith (*Western Canadian*, above, at paras 52, 55; *Quebec North Shore & Labrador Railway Co v New Millennium Capital Corp*, 2011 FC 765 at para 81, 392 FTR 167).

[102] Further, even if the final offers were required to meet a contractual level of certainty, the terms of CN's final offer were sufficiently certain. The specified CN Tariff provided a specific means of ascertaining the Fuel Surcharge to be paid by NGL. It is also clear from the authorities that neither the fact that the fuel surcharge amounts may fluctuate over time, nor the possibility that the fuel surcharge amounts might unilaterally be changed by CN render it, and therefore

CN's final offer, uncertain (see *Royal Bank of Canada v Stonehocker*, [1985] BCJ No 2340 (QL) at para 17 (CA), leave to appeal refused [1985] SCCA No 65 (QL); *Capital City Savings and Credit Union Ltd v Elliot* (1988), 91 AR 226 at 10 (QB, Master); *Alberta Treasury Branches v Smith*, [1989] 5 WWR 633 at para 41, 67 Alta LR (2d) 357 (QB)).

Analysis

[103] In my view, CN's final offer was not uncertain or unascertainable, nor was it void for uncertainty.

[104] The Arbitrator had before him CN's Information. This documented the fuel surcharge previously paid by NGLand also describes the prior agreements between the parties.

[105] The CN Information also sets out the history of industry fuel surcharges stating that traditionally fuel was included in the base transportation rate charged for the movement of traffic as fuel prices were relatively stable and predictable. Beginning around 2001, fuel surcharges in all modes of the transportation industry were implemented in response to the increasing volatility in fuel prices which were fluctuating significantly on a week by week basis. As it was not commercially reasonable for carriers to re-price their contract on such short term intervals, fuel surcharges were implemented. These are an amount added to the freight invoice to reflect the variability in fuel costs above the starting point of the freight base rate.

[106] CN's Information further states that CN implemented its first fuel surcharge tariff, CN 7400, in 2001. A new tariff, CN 7401, was introduced in 2005. In 2006, the shipper community

expressed concerns to the U.S. regulator of the rail transportation industry, the Surface Transportation Board (STB), about the application of fuel surcharges. At issue was the methodology of applying the fuel surcharges. Ultimately, the STB determined that computing rail fuel surcharges as a percentage of a shipper's base rate was an unreasonable practice. Consistent with this finding CN and all major railways in North America implemented mileage based fuel surcharges. CN did so by way of CN Tariff 7402 in April 2007. The use of the HDF index, also endorsed by the STB decision, meant that the fuel surcharges more closely tracked fluctuations in the actual prices being paid by railways for their locomotive fuel. And, as a result of the STB decision, railways began to submit quarterly reports to "better enable the STB to monitor industry-wide fuel surcharge practices" and to provide a "useful and reliable regulatory tool for monitoring the relationship between changes in revenue and costs".

[107] More detailed information pertaining to the fuel surcharge is found in the attachments to CN's Information. This includes affidavit evidence which provides a detailed history of rate based and mileage based fuel surcharges as well as summary of the application of each to NGL.

[108] The affidavit evidence also states that following submissions from counsel for CN and NGL, the Arbitrator ruled that he would admit of CN's rebuttal evidence in its entirety, subject to NGL's ability to object to specific elements of the rebuttal evidence as it was being introduced by CN's witnesses at the hearing. CN's rebuttal evidence describes the past application of the fuel surcharge between the parties and notes that there have only been adjustments a total of three times, all to the benefit of shippers.

[109] What is clear from this evidence is that fuel surcharges have been a part of the arrangements between CN and NGL for an extended period. This is set out in detail in the NGL Information.

[110] NGL's Information also confirmed that it has been charged a fuel surcharge on its shipments, originally rate based but subsequently mileage based, as a result of the STB decision. NGL estimated the prior rate based surcharge, the prior mileage based surcharge and estimated that if CN's final offer was accepted what it would pay in fuel surcharges. However, it still took the position that that CN's rate was uncertain and unascertainable, contrary to s. 161.1(1) and permitted a gross over recovery by CN.

[111] In my view, based on the record before him, the Arbitrator could ascertain with reasonable certainty the amount of the Fuel Surcharge based on the formula set out in the specified CN Tariff. Further, an estimated dollar amount per rail car was provided by CN in its Information which was based on distance of 36 miles and a monthly calculation for June. The Arbitrator also had before him the past history of the fuel surcharge as between the parties including actual cost per car. Accordingly, CN's final offer was not uncertain or unascertainable nor void for uncertainty, the Arbitrator did not err in law or jurisdiction by selecting CN's final offer.

[112] Further, the surcharge will rise or fall based on the cost of diesel, making it fair to both parties. The HDF is an objective standard and mileage, despite the discrepancy discovered in this instance, is not a true variable when calculating the surcharge. I can see nothing

unreasonable in accepting the Fuel Surcharge clause as a term of the final offer to which CN's stated rate was subject. This was, in fact, consistent with past practice between the parties.

[113] As to the contractual argument, even if valid, any uncertainty would be cured as there is a specific means of ascertaining the value in the contract (*Ko*, above, at para 120; *Mitsui & Co (Point Aconi) Ltd v Jones Power Co*, 2000 NSCA 95 at para 52, 74).

ISSUE 5: Is this an appropriate case for a directed verdict or mandamus?

[114] For the reasons above I have determined that the Arbitrator committed no error of law, did not act outside his jurisdiction, and could reasonably have come to the decision that he did based on the record before him. As the application will be dismissed, there is no need to decide whether this would have been an appropriate case for a directed verdict or mandamus.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. This application for judicial review is dismissed; and

2. CN shall have its costs.

"Cecily Y. Strickland"

Judge

SCHEDULE "A"

Canada Transportation Act, SC 1996, c 10

PART IV

ARBITRATIONS

Division I

Final Offer Arbitration

Application of sections 161 to 169

159. (1) Sections 161 to 169 apply only in respect of matters arising between shippers and carriers that involve

(a) the carriage of goods by air to which Part II applies, other than their carriage internationally;

(b) the carriage of goods by railways to which this Act applies, other than the carriage of goods in trailers or containers on flat cars unless the containers arrive by water at a port in Canada, served by only one railway company, for further movement by rail or arrive by rail at such a port in Canada for further movement by water; or

(c) the carriage by water, for hire or reward, of goods required for the maintenance or development of a municipality or any permanent settlement for northern marine resupply purposes, other than goods required in relation to national defence or in relation to the exploration for or the development, extraction or processing of oil, gas or any mineral.

Scope of paragraph (1)(c)

(2) Paragraph (1)(c) applies only to resupply services on

(a) the rivers, streams, lakes and other waters within the watershed of the Mackenzie River;

PARTIE IV

ARBITRAGES

Section I

Arbitrage sur l'offre finale

Application des articles 161 à 169

159. (1) Les articles 161 à 169 s'appliquent exclusivement aux différends survenant entre expéditeurs et transporteurs dans les domaines suivants :

a) le transport des marchandises sous le régime de la partie II, à l'exception du transport international de marchandises par air;

b) le transport des marchandises par chemin de fer sous le régime de la présente loi, à l'exception de leur transport par remorques ou conteneurs posés sur wagons plats, sauf si les conteneurs arrivent par eau à un port du Canada desservi par une seule compagnie de chemin de fer en vue du transport ultérieur par rail ou arrivent par rail à ce port du Canada en vue du transport ultérieur par eau;

c) le transport par eau, à titre onéreux, de marchandises nécessaires à l'entretien ou au développement d'une municipalité ou d'un établissement humain permanent aux fins de l'approvisionnement par eau dans le nord, à l'exclusion de celles destinées à la défense nationale ou à la recherche, l'exploitation, l'extraction ou la transformation du pétrole, du gaz ou de minéraux.

Application de l'alinéa (1)c)

(2) L'alinéa (1)c) ne s'applique qu'aux services d'approvisionnement assurés dans :

(b) the territorial sea and internal waters of Canada that are adjacent to the coast of the mainland and islands of the Canadian Arctic and situated within the area bounded by the meridians of longitude 95° West and 141° West and the parallels of latitude 66° 00′30″ North and 74°00′20″ North; and

(c) the internal waters of Canada comprised in Spence Bay and Shepherd Bay and situated east of the meridian of longitude 95° West.

Application

(3) Paragraph (1)(c) applies only if

(a) the total register tonnage of all ships used to provide the resupply service exceeds fifty register tons; or

(b) the resupply service originates from a point situated on the waters described in subsection (2).

Rail passenger services

160. Sections 161 to 169 also apply, with any modifications that the circumstances require, in respect of the rates charged or proposed to be charged by, and in respect of any of the conditions associated with the provision of services by, a railway company to any other railway company engaged in passenger rail services, except a public passenger service provider as defined in section 87.

Submission for final offer arbitration

161. (1) A shipper who is dissatisfied with the rate or rates charged or proposed to be charged by a carrier for the movement of goods, or with any of the conditions associated with the movement of goods, may, if the matter cannot be resolved between the shipper and the

a) les eaux du bassin hydrographique du fleuve Mackenzie;

b) la mer territoriale et les eaux intérieures du Canada contiguës à la côte du continent et aux îles de l'Arctique canadien, situées à l'intérieur de la région bornée par 95° et 141° de longitude ouest et 66°00′30″ et 74°00′20″ de latitude nord;

c) les eaux intérieures du Canada comprises entre Spence Bay et la baie Shepherd et situées à l'est de 95° de longitude ouest.

Non-application de l'alinéa (1)c)

(3) L'alinéa (1)c) ne s'applique :

a) à l'exploitation d'un service d'approvisionnement que si le tonnage au registre total des navires utilisés pour celui-ci dépasse cinquante tonneaux;

b) qu'aux services d'approvisionnement assurés en provenance d'un lieu situé dans les eaux visées au paragraphe (2).

Compagnies de chemin de fer

160. Les articles 161 à 169 s'appliquent également, avec les adaptations nécessaires, aux prix appliqués ou proposés par une compagnie de chemin de fer et aux conditions qu'elle impose pour la fourniture de services à une autre compagnie de chemin de fer se livrant au transport de passagers qui n'est pas une société de transport publique au sens de l'article 87.

Recours à l'arbitrage

161. (1) L'expéditeur insatisfait des prix appliqués ou proposés par un transporteur pour le transport de marchandises ou des conditions imposées à cet égard peut, lorsque le transporteur et lui ne sont pas en mesure de régler eux-mêmes la question, la soumettre par

carrier, submit the matter in writing to the Agency for a final offer arbitration to be conducted by one arbitrator or, if the shipper and the carrier agree, by a panel of three arbitrators.

Contents of submission

(2) A copy of a submission under subsection (1) shall be served on the carrier by the shipper and the submission shall contain

(a) the final offer of the shipper to the carrier in the matter, excluding any dollar amounts;

(b) [Repealed, 2000, c. 16, s. 11]

(c) an undertaking by the shipper to ship the goods to which the arbitration relates in accordance with the decision of the arbitrator;

(d) an undertaking by the shipper to the Agency whereby the shipper agrees to pay to the arbitrator the fee for which the shipper is liable under section 166 as a party to the arbitration; and

(e) the name of the arbitrator, if any, that the shipper and the carrier agreed should conduct the arbitration or, if they agreed that the arbitration should be conducted by a panel of three arbitrators, the name of an arbitrator chosen by the shipper and the name of an arbitrator chosen by the carrier.

Arbitration precluded in certain cases

(3) The Agency shall not have any matter submitted to it by a shipper under subsection (1) arbitrated if the shipper has not, at least five days before making the submission, served on the carrier a written notice indicating that the shipper intends to submit the matter to the Agency for a final offer arbitration.

Final offer arbitration not a proceeding

(4) A final offer arbitration is not a proceeding

écrit à l'Office pour arbitrage soit par un arbitre seul soit, si le transporteur et lui y consentent, par une formation de trois arbitres.

Contenu de la demande

(2) Un exemplaire de la demande d'arbitrage est signifié au transporteur par l'expéditeur; la demande contient :

a) la dernière offre faite par l'expéditeur au transporteur, sans mention de sommes d'argent;

b) [Abrogé, 2000, ch. 16, art. 11]

c) l'engagement par l'expéditeur d'expédier les marchandises visées par l'arbitrage selon les termes de la décision de l'arbitre;

d) l'engagement par l'expéditeur envers l'Office de payer à l'arbitre les honoraires auxquels il est tenu en application de l'article 166 à titre de partie à l'arbitrage;

e) le cas échéant, le nom de l'arbitre sur lequel l'expéditeur et le transporteur se sont entendus ou, s'ils ont convenu que la question soit soumise à une formation de trois arbitres, le nom de l'arbitre choisi par l'expéditeur et le nom de celui choisi par le transporteur.

Arbitrage écarté

(3) L'arbitrage prévu au paragraphe (1) est écarté en cas de défaut par l'expéditeur de signifier, dans les cinq jours précédant la demande, un avis écrit au transporteur annonçant son intention de soumettre la question à l'Office pour arbitrage.

Soumission d'une question pour arbitrage

(4) La soumission d'une question à l'Office pour arbitrage ne constitue pas une procédure devant l'Office.

before the Agency.

Submission of final offers

161.1 (1) Within 10 days after a submission is served under subsection 161(2), the shipper and the carrier shall submit to the Agency their final offers, including dollar amounts.

Copies to the parties

(2) Without delay after final offers are submitted under subsection (1) by both the shipper and the carrier, the Agency shall provide the shipper and the carrier with copies of each other's final offer.

If no final offer from a party

(3) If one party does not submit a final offer in accordance with subsection (1), the final offer submitted by the other party is deemed to be the final offer selected by the arbitrator under subsection 165(1).

Arbitration

162. (1) Notwithstanding any application filed with the Agency by a carrier in respect of a matter, within five days after final offers are received under subsection 161.1(1), the Agency shall refer the matter for arbitration

(a) if the parties did not agree that the arbitration should be conducted by a panel of three arbitrators, to the arbitrator, if any, named under paragraph 161(2)(e) or, if that arbitrator is not, in the opinion of the Agency, available to conduct the arbitration or no arbitrator is named, to an arbitrator on the list of arbitrators referred to in section 169 who the Agency chooses and determines is appropriate and available to conduct the arbitration; and

(b) if the parties agreed that the arbitration should be conducted by a panel of three arbitrators,

Délai de présentation

161.1 (1) L'expéditeur et le transporteur, dans les dix jours suivant la signification de la demande au titre du paragraphe 161(2), présentent chacun à l'Office leur dernière offre, en y incluant la mention de sommes d'argent.

Communication des offres

(2) Dès réception des offres présentées par l'expéditeur et le transporteur conformément au paragraphe (1), l'Office communique à chacun l'offre de la partie adverse.

Non-observation du paragraphe (1)

(3) Si une partie ne se conforme pas au paragraphe (1), la dernière offre de l'autre partie est réputée celle que l'arbitre choisit au titre du paragraphe 165(1).

Arbitrage

162. (1) Malgré la présentation par le transporteur de toute demande relative à la question, l'Office, dans les cinq jours suivant la réception des deux offres présentées conformément au paragraphe 161.1(1), renvoie la question :

a) à défaut de choix par les parties de soumettre la question à une formation de trois arbitres, à l'arbitre unique visé à l'alinéa 161(2)e), s'il est disponible pour mener l'arbitrage ou, en l'absence de choix d'arbitre ou cas de non-disponibilité, selon l'Office, de l'arbitre choisi, à un arbitre que l'Office estime disponible et compétent et qui est inscrit sur la liste établie en vertu de l'article 169;

b) en cas de choix par les parties de soumettre la question à une formation de trois arbitres :

(i) aux arbitres visés à l'alinéa 161(2)e) et, soit

(i) to the arbitrators named by the parties under paragraph 161(2)(e) and to any arbitrator who those arbitrators have, within 10 days after the submission was served under subsection 161(2), notified the Agency that they have agreed on, or if those arbitrators did not so notify the Agency, to an arbitrator on the list of arbitrators referred to in section 169 who the Agency chooses and determines is appropriate and available to conduct the arbitration, or

(ii) if an arbitrator referred to in subparagraph (i) is not, in the opinion of the Agency, available to conduct the arbitration, to the arbitrators named in that subparagraph who are available and to an arbitrator chosen by the Agency from the list of arbitrators referred to in section 169 who the Agency determines is appropriate and available to conduct the arbitration.

Interpretation

(1.1) If a matter was referred to a panel of arbitrators, every reference in subsections (1.2) and (2) and sections 163 to 169 to an arbitrator or the arbitrator shall be construed as a reference to a panel of arbitrators or the panel of arbitrators, as the case may be.

Delay in referral

(1.2) If the shipper consents to an application referred to in subsection (1) being heard before the matter is referred to an arbitrator, the Agency shall defer referring the matter until the application is dealt with.

Assistance by Agency

(2) The Agency may, at the request of the arbitrator, provide administrative, technical and legal assistance to the arbitrator on a cost recovery basis.

à celui dont ils ont conjointement soumis le nom à l'Office dans les dix jours suivant la signification de la demande visée au paragraphe 161(2), soit, dans le cas où ils ne soumettent aucun nom à l'Office dans ce délai, à l'arbitre que l'Office estime disponible et compétent et qui est inscrit sur la liste établie en vertu de l'article 169,

(ii) si l'un des arbitres visés au sous-alinéa (i) n'est pas, selon l'Office, disponible, à ceux qui le sont et à celui que l'Office estime disponible et compétent et qui est inscrit sur la liste établie en vertu de l'article 169.

Assimilation

(1.1) Aux paragraphes (1.2) et (2) et aux articles 163 à 169, la mention de l'arbitre vaut mention, le cas échéant, de la formation de trois arbitres.

Différé du renvoi à l'arbitrage

(1.2) Si l'expéditeur consent à ce que la demande visée au paragraphe (1) soit entendue avant le renvoi de l'affaire à l'arbitre, l'Office diffère le renvoi jusqu'au prononcé de la décision sur la demande.

Soutien

(2) À la demande de l'arbitre, l'Office lui offre, moyennant remboursement des frais, le soutien administratif, technique et juridique voulu.

Decision or order affecting a matter being arbitrated

162.1 The Agency may, in addition to any other decision or order it may make, order that an arbitration be discontinued, that it be continued subject to the terms and conditions that the Agency may fix or that the decision of the arbitrator be set aside if

(a) the Agency makes a decision or an order arising out of an application that is in respect of a matter submitted to the Agency for a final offer arbitration and that is filed by a carrier before the matter is referred to arbitration; and

(b) the decision or order affects the arbitration.

Décision portant atteinte à l'arbitrage

162.1 S'il rend une décision ou prend un arrêté sur une demande présentée par un transporteur relativement à une affaire soumise à l'Office pour arbitrage avant que l'arbitre en soit saisi et que la décision ou l'arrêté porte atteinte à l'arbitrage, l'Office peut, par arrêté, en plus de tout autre arrêté qu'il peut prendre ou de toute autre décision qu'il peut rendre, mettre fin à l'arbitrage, l'assujettir aux conditions qu'il fixe ou annuler la décision de l'arbitre.

Procedure

163. (1) In the absence of an agreement by the arbitrator and the parties as to the procedure to be followed, a final offer arbitration shall be governed by the rules of procedure made by the Agency.

Procédure

163. (1) L'Office peut établir les règles de procédure applicables à l'arbitrage dans les cas où les parties et l'arbitre ne peuvent s'entendre sur la procédure.

Procedure generally

(2) The arbitrator shall conduct the arbitration proceedings as expeditiously as possible and, subject to the procedure referred to in subsection (1), in the manner the arbitrator considers appropriate having regard to the circumstances of the matter.

Disposition générale

(2) L'arbitre mène l'arbitrage aussi rapidement que possible et, sous réserve des règles visées au paragraphe (1), de la manière qu'il estime la plus indiquée dans les circonstances.

Exchange of information

(3) Within fifteen days after the Agency refers a matter for arbitration, the parties shall exchange the information that they intend to submit to the arbitrator in support of their final offers.

Échange de renseignements

(3) Dans les quinze jours suivant le renvoi de l'affaire à un arbitre, les parties s'échangent les renseignements qu'elles ont l'intention de présenter à l'arbitre à l'appui de leurs dernières offres.

Interrogatories

(4) Within seven days after receipt of the information referred to in subsection (3), each

Interrogatoires

(4) Dans les sept jours suivant réception des renseignements visés au paragraphe (3), chaque partie peut adresser à l'autre des interrogatoires écrits auxquels il doit être répondu dans les quinze jours suivant leur

party may direct interrogatories to the other, which shall be answered within fifteen days after their receipt.

réception.

Withholding of information

(5) If a party unreasonably withholds information that the arbitrator subsequently deems to be relevant, that withholding shall be taken into account by the arbitrator in making a decision.

Information dissimulée

(5) Si une partie dissimule de façon déraisonnable des renseignements que l'arbitre juge ultérieurement pertinents, l'arbitre tient compte de cette dissimulation dans sa décision.

Arbitration information

164. (1) The arbitrator shall, in conducting a final offer arbitration between a shipper and a carrier, have regard to the information provided to the arbitrator by the parties in support of their final offers and, unless the parties agree to limit the amount of information to be provided, to any additional information that is provided by the parties at the arbitrator's request.

Renseignements à prendre en considération

164. (1) Dans un cas d'arbitrage entre un expéditeur et un transporteur, l'arbitre tient compte des renseignements que lui fournissent les parties à l'appui de leurs dernières offres et, sauf accord entre les parties à l'effet de restreindre la quantité des renseignements à fournir à l'arbitre, des renseignements supplémentaires que celles-ci lui ont fournis à sa demande.

Arbitration considerations

(2) Unless the parties agree otherwise, in rendering a decision the arbitrator shall have regard to whether there is available to the shipper an alternative, effective, adequate and competitive means of transporting the goods to which the matter relates and to all considerations that appear to the arbitrator to be relevant to the matter.

Éléments à prendre en considération

(2) Sauf accord entre les parties à l'effet contraire, l'arbitre tient également compte de la possibilité pour l'expéditeur de faire appel à un autre mode de transport efficace, bien adapté et concurrentiel, des marchandises en question ainsi que de tout autre élément utile.

Summary process

164.1 If the Agency determines that a shipper's final offer submitted under subsection 161.1(1) involves freight charges in an amount of not more than $750,000 and the shipper did not indicate a contrary intention when submitting the offer, sections 163 and 164 do not apply and the arbitration shall proceed as follows:

(a) within seven days after a matter is referred to an arbitrator, the shipper and the carrier may file with the arbitrator a response to the final

Procédure sommaire

164.1 Si l'Office établit que la valeur des frais de transport de marchandises visés par la dernière offre d'un expéditeur présentée conformément au paragraphe 161.1(1) est d'au plus 750 000 $, les articles 163 et 164 ne s'appliquent pas et l'affaire soumise à l'arbitrage est entendue selon la procédure sommaire ci-après, sauf si l'expéditeur a indiqué à l'Office son intention contraire lors de la présentation de l'offre :

offer of the other party;

(b) subject to paragraph (c), the arbitrator shall decide the matter on the basis of the final offers and any response filed under paragraph (a); and

(c) if the arbitrator considers it necessary, the arbitrator may invite the parties to make oral representations or may ask the parties to appear before him or her to provide further information.

Decision of arbitrator

165. (1) The decision of the arbitrator in conducting a final offer arbitration shall be the selection by the arbitrator of the final offer of either the shipper or the carrier.

Requirements re decision

(2) The decision of the arbitrator shall

(a) be in writing;

(b) unless the parties agree otherwise, be rendered within 60 days or, in the case of an arbitration conducted in accordance with section 164.1, 30 days after the date on which the submission for the final offer arbitration was received by the Agency; and

(c) unless the parties agree otherwise, be rendered so as to apply to the parties for a period of one year or any lesser period that may be appropriate, having regard to the negotiations between the parties that preceded the arbitration.

Incorporation in tariff

(3) The carrier shall, without delay after the arbitrator's decision, set out the rate or rates or the conditions associated with the movement of goods that have been selected by the arbitrator in a tariff of the carrier, unless,

a) l'expéditeur et le transporteur disposent de sept jours à compter du renvoi de l'affaire à l'arbitrage pour déposer une réponse à la dernière offre de l'autre partie;

b) sous réserve de l'alinéa c), l'arbitre rend sa décision sur le fondement des dernières offres et des réponses des parties;

c) s'il l'estime nécessaire, l'arbitre peut inviter les parties à lui présenter oralement des observations ou à comparaître devant lui pour lui fournir des renseignements.

Décision de l'arbitre

165. (1) L'arbitre rend sa décision en choisissant la dernière offre de l'expéditeur ou celle du transporteur.

Décision de l'arbitre

(2) La décision de l'arbitre est rendue :

a) par écrit;

b) sauf accord entre les parties à l'effet contraire, dans les soixante jours suivant la date de réception par l'Office de la demande d'arbitrage ou, dans le cas de la demande entendue conformément à l'article 164.1, dans les trente jours suivant cette date;

c) sauf accord entre les parties à l'effet contraire, de manière à être applicable à celles-ci pendant un an, ou le délai inférieur indiqué, eu égard aux négociations ayant eu lieu entre les parties avant l'arbitrage.

Insertion dans le tarif

(3) Le transporteur inscrit, sans délai après la décision de l'arbitre, les prix ou conditions liés à l'acheminement des marchandises choisis par l'arbitre dans un tarif du transporteur, sauf si, dans les cas où celui-ci a droit de ne pas dévoiler les prix ou conditions, les parties à

where the carrier is entitled to keep the rate or rates or conditions confidential, the parties to the arbitration agree to include the rate or rates or conditions in a contract that the parties agree to keep confidential.

Reasons not required

(4) No reasons shall be set out in the decision of the arbitrator.

Reasons may be requested

(5) The arbitrator shall, if requested by all of the parties to the arbitration within 30 days or, in the case of an arbitration conducted in accordance with section 164.1, seven days after the decision of the arbitrator, give written reasons for the decision.

Application of decision

(6) Except where both parties agree otherwise,

(a) the decision of the arbitrator on a final offer arbitration shall be final and binding and be applicable to the parties as of the date on which the submission for the arbitration was received by the Agency from the shipper, and is enforceable as if it were an order of the Agency; and

(b) the arbitrator shall direct in the decision that interest at a reasonable rate specified by the arbitrator shall be paid to one of the parties by the other on moneys that, as a result of the application of paragraph (a), are owed by a party for the period between the date referred to in that paragraph and the date of the payment.

Payment by party

(7) Moneys and interest referred to in paragraph (6)(b) that are owed by a party pursuant to a decision of the arbitrator shall be paid without delay to the other party.

l'arbitrage conviennent de les inclure dans un contrat confidentiel conclu entre les parties.

Motivation de la décision

(4) La décision de l'arbitre n'énonce pas les motifs.

Motivation de la décision

(5) Sur demande de toutes les parties à l'arbitrage présentée dans les trente jours suivant la décision de l'arbitre ou, dans le cas de la demande entendue conformément à l'article 164.1, dans les sept jours suivant la décision, l'arbitre donne par écrit les motifs de sa décision.

Application de la décision

(6) Sauf accord entre les parties à l'effet contraire :

a) la décision de l'arbitre est définitive et obligatoire, s'applique aux parties à compter de la date de la réception par l'Office de la demande d'arbitrage présentée par l'expéditeur et, aux fins de son exécution, est assimilée à un arrêté de l'Office;

b) l'arbitre indique dans la décision les intérêts, au taux raisonnable qu'il fixe, à payer sur les sommes qui, par application de l'alinéa a), sont en souffrance depuis la date de la demande jusqu'à celle du paiement.

Paiement

(7) Les montants exigibles visés à l'alinéa (6)b) sont payables sans délai à qui y a droit.

Arbitration fees

166. (1) The Agency may fix the fee to be paid to an arbitrator for the costs of, and the services provided by, the arbitrator in final offer arbitration proceedings.

Payment of fees and costs

(2) The shipper and the carrier shall share equally, whether or not the proceedings are terminated pursuant to section 168, in the payment of the fee fixed under subsection (1) and in the cost

(a) borne by the Agency for administrative, technical and legal services provided to the arbitrator pursuant to subsection 162(2); and

(b) of the preparation of any reasons requested pursuant to subsection 165(5).

Honoraires de l'arbitre

166. (1) L'Office peut fixer les honoraires à verser à l'arbitre pour l'arbitrage et les frais afférents.

Paiement des frais et honoraires

(2) Les honoraires fixés en vertu du paragraphe (1), les frais de préparation des motifs demandés en application du paragraphe 165(5) et ceux relatifs au soutien administratif, technique et juridique offert à l'arbitre par l'Office au titre du paragraphe 162(2) sont à la charge de l'expéditeur et du transporteur en parts égales, même dans les cas d'abandon des procédures prévus par l'article 168.

Confidentiality of information

167. Where the Agency is advised that a party to a final offer arbitration wishes to keep matters relating to the arbitration confidential,

(a) the Agency and the arbitrator shall take all reasonably necessary measures to ensure that the matters are not disclosed by the Agency or the arbitrator or during the arbitration proceedings to any person other than the parties; and

(b) no reasons for the decision given pursuant to subsection 165(5) shall contain those matters or any information included in a contract that the parties agreed to keep confidential.

Caractère confidentiel

167. La partie à un arbitrage qui désire que des renseignements relatifs à celui-ci demeurent confidentiels en avise l'Office et :

a) l'Office et l'arbitre prennent toutes mesures justifiables pour éviter que les renseignements soient divulgués soit de leur fait, soit au cours des procédures d'arbitrage à quiconque autre que les parties;

b) les motifs des décisions donnés en application du paragraphe 165(5) ne peuvent faire état des renseignements que les parties à un contrat sont convenues de garder confidentiels.

Termination of proceedings

168. Where, before the arbitrator renders a decision on a final offer arbitration, the parties advise the Agency or the arbitrator that they agree that the matter being arbitrated should be

Abandon des procédures

168. Dans les cas où, avant la décision de l'arbitre, les parties avisent l'Office ou l'arbitre qu'elles s'accordent pour renoncer à l'arbitrage, les procédures sont abandonnées

withdrawn from arbitration, the arbitration proceedings in respect of the matter shall be immediately terminated.

List of arbitrators

169. (1) The Agency shall, from time to time, in consultation with representatives of shippers and carriers, establish a list of persons who agree to act as arbitrators in final offer arbitrations. The list must state which of the persons have indicated that they have expertise that may assist them in conducting final offer arbitrations and the nature of that expertise.

List per mode

(2) A separate list of persons may be established under subsection (1) in respect of each or any mode of transportation, as the Agency considers appropriate.

Publication of list

(3) The Agency shall have the list of persons made known to representatives of shippers and carriers throughout Canada.

Mediation

169.1 (1) The parties to a final offer arbitration may, by agreement, refer to a mediator, which may be the Agency, a matter that has been submitted for a final offer arbitration under section 161.

Establishment of roster

(2) The Agency may establish a roster of persons, which may include members and staff of the Agency, to act as mediators in any matter referred to it under subsection (1).

Confidentiality of mediation

(3) All matters relating to the mediation shall be kept confidential, unless the parties otherwise agree, and information provided by a

sur-le-champ.

Liste d'arbitres

169. (1) L'Office établit, en consultation avec les représentants des expéditeurs et des transporteurs, une liste de personnes qui acceptent d'agir à titre d'arbitres. La liste indique celles de ces personnes qui ont déclaré avoir des compétences susceptibles de les aider dans le cadre de l'arbitrage et la nature de celles-ci.

Listes distinctes

(2) L'Office peut établir, s'il l'estime indiqué, une liste d'arbitres pour chaque mode de transport.

Publication de la liste

(3) L'Office fait porter la liste d'arbitres à la connaissance des représentants des expéditeurs et des transporteurs dans tout le pays.

Médiation

169.1 (1) Les parties à un arbitrage peuvent d'un commun accord faire appel à un médiateur, notamment l'Office, pour que celui-ci règle la question qui lui est soumise pour arbitrage au titre de l'article 161.

Liste

(2) L'Office peut établir une liste de personnes, choisies ou non parmi ses membres ou son personnel, pour agir comme médiateur dans les cas où il est retenu à ce titre aux termes du paragraphe (1).

Caractère confidentiel

(3) Sauf accord entre les parties à l'effet contraire, tout ce qui se rapporte à la médiation

party for the purposes of the mediation shall not be used for any other purpose without the consent of that party.

Time limit for completion of mediation

(4) Unless the parties otherwise agree, the mediation shall be completed within 30 days after the matter is referred for mediation.

Effect of mediation on final offer arbitration

(5) The mediation has the effect of

(a) staying the conduct of the final offer arbitration for the period of the mediation; and

(b) extending the time within which the arbitrator must make a decision in the matter of the final offer arbitration by the period of the mediation.

Mediator not to act in other proceedings

(6) The person who acts as mediator may not act in any other proceedings in relation to any matter that was at issue in the mediation.

Joint offer of several shippers

169.2 (1) In the case where more than one shipper is dissatisfied with the rate or rates charged or proposed to be charged by a carrier for the movement of goods, or with any conditions associated with the movement of goods, those shippers may, if the matter cannot be resolved between them and the carrier, submit the matter jointly to the Agency for a final offer arbitration, in which case sections 161 to 169 apply, with any modifications that the circumstances require.

Common matter and application of the offer

(2) A matter submitted jointly to the Agency for a final offer arbitration shall be common to

du différend est confidentiel et les renseignements fournis par une partie dans le cadre de la médiation ne peuvent servir à d'autres fins à moins qu'elle n'y consente.

Délai

(4) Sauf accord entre les parties à l'effet contraire, la médiation doit se terminer dans les trente jours suivant le renvoi de la question au médiateur.

Effets de la médiation

(5) La médiation a pour effet :

a) de suspendre, jusqu'à ce qu'elle prenne fin, la procédure d'arbitrage;

b) de prolonger, d'une période égale à sa durée initiale, le délai dont dispose l'arbitre pour rendre sa décision.

Impossibilité d'agir

(6) La personne qui agit à titre de médiateur ne peut agir dans le cadre d'autres procédures à l'égard d'aucune question ayant fait l'objet de la médiation.

Offre conjointe - expéditeurs

169.2 (1) Dans le cas où plusieurs expéditeurs sont insatisfaits des prix appliqués ou proposés par un transporteur pour le transport de marchandises, ou des conditions imposées à l'égard de ce transport, et que les expéditeurs et le transporteur ne sont pas en mesure de régler eux-mêmes la question, ils peuvent la soumettre conjointement à l'Office pour arbitrage, auquel cas les articles 161 à 169 s'appliquent à eux avec les adaptations nécessaires.

Conditions

(2) La question soumise conjointement doit être commune à tous les expéditeurs, qui

all the shippers and the shippers shall make a joint offer in respect of the matter, the terms of which apply to all of them.

Arbitration precluded in certain cases

(3) The Agency shall not have any matter submitted to it for a final offer arbitration under subsection (1) arbitrated unless the shippers demonstrate, to the satisfaction of the Agency, that an attempt has been made to mediate the matter.

Confidentiality of mediation

(4) All matters relating to a mediation shall be kept confidential, unless the parties otherwise agree, and information provided by a party for the purposes of the mediation shall not be used for any other purpose without the consent of that party.

Mediator not to act in other proceedings

(5) The person who acts as mediator may not act in any other proceedings in relation to any matter that was at issue in the mediation.

Matter submitted by more than one shipper

(6) In the case of a matter that is submitted jointly under subsection (1),

(a) the period referred to in subsection 161.1(1) is 20 days;

(b) the arbitrator may, if he or she considers it necessary, extend any of the periods referred to in subsections 163(3) and (4) and paragraph 164.1(a); and

(c) the decision of the arbitrator shall, despite paragraph 165(2)(b), be rendered within 120 days or, in the case of an arbitration conducted in accordance with section 164.1, 90 days after the day on which the submission for the final offer arbitration is received by the Agency

doivent présenter une seule et même offre dont les conditions s'appliquent à tous.

Arbitrage écarté

(3) L'Office écarte l'arbitrage prévu au paragraphe (1) lorsque les expéditeurs ne peuvent le convaincre que des efforts ont été déployés pour régler la question par médiation.

Caractère confidentiel

(4) Sauf accord entre les parties à l'effet contraire, tout ce qui se rapporte à une médiation du différend est confidentiel et les renseignements fournis par une partie dans le cadre de la médiation ne peuvent servir à d'autres fins à moins qu'elle n'y consente.

Impossibilité d'agir

(5) La personne qui agit à titre de médiateur ne peut agir dans le cadre d'autres procédures à l'égard d'aucune question ayant fait l'objet de la médiation.

Question soumise par plusieurs expéditeurs

(6) En cas de soumission conjointe d'une question en vertu du paragraphe (1) :

a) le délai est de vingt jours pour l'application du paragraphe 161.1(1);

b) l'arbitre peut proroger les délais prévus aux paragraphes 163(3) et (4) et à l'alinéa 164.1a) s'il l'estime indiqué;

c) la décision de l'arbitre est, par dérogation à l'alinéa 165(2)b), rendue dans les cent vingt jours suivant la date de réception par l'Office de la demande d'arbitrage ou, dans le cas de la demande entendue conformément à l'article 164.1, dans les quatre-vingt-dix jours suivant cette date, sauf accord entre les parties à l'effet contraire.

unless the parties agree otherwise.

Time limit - preliminary applications

169.3 (1) Despite sections 162 and 162.1, any application filed with the Agency by a carrier in respect of a matter submitted jointly to the Agency under subsection 169.2(1) shall be filed with the Agency no later than seven days after the day on which the joint submission is made.

Service of copy

(2) A copy of the application shall be served on each of the shippers making the joint submission no later than the day on which the application is required to be filed under subsection (1).

Joint answer

(3) The shippers, no later than five days after the day on which the last shipper was served under subsection (2), shall file with the Agency a joint answer to the application and serve a copy of it on the carrier.

Reply

(4) The carrier, no later than two days after the day on which it was served under subsection (3), shall file with the Agency a reply to the joint answer and serve a copy of it on each of the shippers.

Decision of Agency

(5) The Agency shall issue its decision on the application no later than the day on which the matter is required to be referred to arbitration under subsection 162(1).

Deemed conformity

(6) If no application referred to in subsection (1) is filed within the limit set out in that subsection, the matter submitted jointly is

Délai - demande préliminaire

169.3 (1) Malgré les articles 162 et 162.1, toute demande présentée par le transporteur relativement à une question soumise à l'Office pour arbitrage au titre du paragraphe 169.2(1) est présentée à ce dernier au plus tard sept jours après la soumission de cette question à l'arbitrage.

Signification

(2) Le transporteur signifie copie de la demande à chacun des expéditeurs qui ont soumis la question à l'arbitrage au plus tard le dernier jour prévu pour la présentation de la demande.

Réponse des expéditeurs

(3) Au plus tard cinq jours après la signification au dernier expéditeur au titre du paragraphe (2), les expéditeurs présentent à l'Office une réponse commune et en signifie copie au transporteur.

Réplique du transporteur

(4) Au plus tard deux jours après la signification au transporteur au titre du paragraphe (3), celui-ci présente à l'Office sa réplique et en signifie copie à chacun des expéditeurs.

Décision de l'Office

(5) L'Office décide de la demande au plus tard le jour où la question doit être soumise à l'arbitrage au titre du paragraphe 162(1).

Présomption

(6) Si aucune demande n'est présentée par le transporteur dans le délai prévu au paragraphe (1), les conditions visées au paragraphe 169.2(2) sont réputées remplies.

deemed to conform to the requirements of subsection 169.2(2).

Division II

Arbitration on Level of Services

Submission for arbitration - confidential contract

169.31 (1) If a shipper and a railway company are unable to agree and enter into a contract under subsection 126(1) respecting the manner in which the railway company must fulfil its service obligations under section 113, the shipper may submit any of the following matters, in writing, to the Agency for arbitration:

(a) the operational terms that the railway company must comply with in respect of receiving, loading, carrying, unloading and delivering the traffic, including performance standards and communication protocols;

(b) the operational terms that the railway company must comply with if it fails to comply with an operational term described in paragraph (a);

(c) any operational term that the shipper must comply with that is related to an operational term described in paragraph (a) or (b);

(d) any service provided by the railway company incidental to transportation that is customary or usual in connection with the business of a railway company; or

(e) the question of whether the railway company may apply a charge with respect to an operational term described in paragraph (a) or (b) or for a service described in paragraph (d).

Regulations

(1.1) The Agency may make regulations

Section II

Arbitrage sur le niveau de services

Demande d'arbitrage - contrat confidentiel

169.31 (1) Dans le cas où un expéditeur et une compagnie de chemin de fer ne parviennent pas à s'entendre pour conclure un contrat en application du paragraphe 126(1) concernant les moyens que celle-ci doit prendre pour s'acquitter de ses obligations en application de l'article 113, l'expéditeur peut soumettre par écrit à l'Office une ou plusieurs des questions ci-après pour arbitrage :

a) les conditions d'exploitation auxquelles la compagnie de chemin de fer est assujettie relativement à la réception, au chargement, au transport, au déchargement et à la livraison des marchandises en cause, y compris les normes de rendement et les protocoles de communication;

b) les conditions d'exploitation auxquelles la compagnie de chemin de fer est assujettie en cas de non-respect d'une condition d'exploitation visée à l'alinéa a);

c) les conditions d'exploitation auxquelles l'expéditeur est assujetti et qui sont liées aux conditions d'exploitation visées aux alinéas a) ou b);

d) les services fournis par la compagnie de chemin de fer qui sont normalement liés à l'exploitation d'un service de transport par une compagnie de chemin de fer;

e) la question de savoir si des frais peuvent être imposés par la compagnie de chemin de fer relativement aux conditions d'exploitation visées aux alinéas a) ou b) ou pour les services visés à l'alinéa d).

specifying what constitutes operational terms for the purposes of paragraphs (1)(a) to (c).

Matter excluded from arbitration

(2) The shipper is not entitled to submit to the Agency for arbitration a matter that

(a) is governed by a written agreement, including a confidential contract, to which the shipper and the railway company are parties; or

(b) is the subject of an order, other than an interim order, made under subsection 116(4).

Excluded matter - traffic

(3) The shipper is not entitled to submit to the Agency for arbitration a matter that is in respect of traffic that is the subject of

(a) a confidential contract between the shipper and the railway company that is in force immediately before the day on which this section comes into force;

(b) a tariff, or a contract, referred to in subsection 165(3);

(c) a competitive line rate; or

(d) an arbitrator's decision made under section 169.37.

Clarification

(4) For greater certainty, neither a rate for the movement of the traffic nor the amount of a charge for that movement or for the provision of incidental services is to be subject to arbitration.

Contents of submission

169.32 (1) The submission must contain

Règlement

(1.1) L'Office peut, par règlement, préciser ce qui constitue des conditions d'exploitation pour l'application des alinéas (1)a) à c).

Exclusions

(2) L'expéditeur ne peut soumettre à l'Office pour arbitrage une question qui, selon le cas :

a) fait l'objet d'un accord écrit, notamment d'un contrat confidentiel, auquel l'expéditeur et la compagnie de chemin de fer sont parties;

b) est visée par un arrêté, autre qu'un arrêté provisoire, pris en vertu du paragraphe 116(4).

Exclusions - transport

(3) L'expéditeur ne peut soumettre à l'Office pour arbitrage une question qui concerne le transport faisant l'objet, selon le cas :

a) d'un contrat confidentiel conclu entre l'expéditeur et la compagnie de chemin de fer qui est en vigueur à l'entrée en vigueur du présent article;

b) d'un contrat ou d'un tarif visés au paragraphe 165(3);

c) d'un prix de ligne concurrentiel;

d) d'une décision arbitrale rendue en vertu de l'article 169.37.

Précision

(4) Il est entendu que l'arbitrage ne peut porter sur les prix relatifs au transport, ni sur le montant des frais relatifs au transport ou aux services connexes.

Contenu de la demande

169.32 (1) La demande d'arbitrage contient :

(a) a detailed description of the matters submitted to the Agency for arbitration;

(b) a description of the traffic to which the service obligations relate;

(c) an undertaking with respect to the traffic, if any, given by the shipper to the railway company that must be complied with for the period during which the arbitrator's decision applies to the parties, other than an undertaking given by the shipper to the railway company with respect to an operational term described in paragraph 169.31(1)(c);

(d) an undertaking given by the shipper to the railway company to ship the goods to which the service obligations relate in accordance with the arbitrator's decision; and

(e) an undertaking given by the shipper to the Agency to pay the fee and costs for which the shipper is liable under subsection 169.39(3) as a party to the arbitration.

Copy of submission served

(2) The shipper must serve a copy of the submission on the railway company on the day on which it submits the matters to the Agency for arbitration.

Arbitration precluded in certain cases

169.33 (1) The Agency must dismiss the submission if

(a) the shipper has not, at least 15 days before making it, served on the railway company and the Agency a written notice indicating that the shipper intends to make a submission to the Agency for arbitration; or

(b) the shipper does not demonstrate, to the Agency's satisfaction, that an attempt has been made to resolve the matters contained in it.

a) l'énoncé détaillé des questions soumises à l'Office pour arbitrage;

b) la description du transport en cause;

c) le cas échéant, l'engagement qui est pris par l'expéditeur envers la compagnie de chemin de fer relativement au transport et qui doit être respecté pendant la durée d'application de la décision de l'arbitre, autre que l'engagement pris relativement aux conditions d'exploitation visées à l'alinéa 169.31(1)c);

d) l'engagement pris par l'expéditeur envers la compagnie de chemin de fer d'expédier les marchandises en cause conformément à la décision de l'arbitre;

e) l'engagement pris par l'expéditeur envers l'Office de payer les honoraires et les frais qui sont à sa charge en application du paragraphe 169.39(3) à titre de partie à l'arbitrage.

Signification

(2) L'expéditeur signifie un exemplaire de la demande d'arbitrage à la compagnie de chemin de fer le jour où il la soumet à l'Office.

Arbitrage écarté

169.33 (1) L'Office rejette la demande d'arbitrage dans les cas suivants :

a) l'expéditeur n'a pas signifié, dans les quinze jours précédant la demande d'arbitrage, un avis écrit à la compagnie de chemin de fer et à l'Office annonçant son intention de soumettre une demande d'arbitrage à ce dernier;

b) l'expéditeur ne le convainc pas que des efforts ont été déployés pour régler les questions contenues dans la demande.

Content of notice

(2) The notice must contain the descriptions referred to in paragraphs 169.32(1)(a) and (b) and, if the shipper's submission will contain an undertaking described in paragraph 169.32(1)(c), a description of that undertaking.

Submission of proposals

169.34 (1) Despite any application filed under section 169.43, the shipper and the railway company must each submit, within 10 days after the day on which a copy of a submission is served under subsection 169.32(2), to the Agency, in order to resolve the matters that are submitted to it for arbitration by the shipper, a proposal that contains any of the following terms:

(a) any operational term described in paragraph 169.31(1)(a), (b) or (c);

(b) any term for the provision of a service described in paragraph 169.31(1)(d); or

(c) any term with respect to the application of a charge described in paragraph 169.31(1)(e).

Proposals provided to parties

(2) The Agency must provide the shipper and the railway company with a copy of the other party's proposal immediately after the day on which it receives the last of the two proposals.

Exchange of information

(3) The parties must exchange the information that they intend to submit to the arbitrator in support of their proposals within 20 days after the day on which a copy of a submission is served under subsection 169.32(2) or within a period agreed to by the parties or fixed by the arbitrator.

Contenu de l'avis

(2) L'avis contient l'énoncé prévu à l'alinéa 169.32(1)a), la description prévue à l'alinéa 169.32(1)b) et, si l'engagement prévu à l'alinéa 169.32(1)c) sera contenu dans la demande d'arbitrage, une description de celui-ci.

Délai de présentation

169.34 (1) Malgré la présentation d'une demande en vertu de l'article 169.43, l'expéditeur et la compagnie de chemin de fer, dans les dix jours suivant la signification d'un exemplaire de la demande d'arbitrage en application du paragraphe 169.32(2), présentent chacun à l'Office leur proposition en vue du règlement des questions que l'expéditeur a soumises à l'Office pour arbitrage. La proposition contient une ou plusieurs des conditions ou modalités suivantes :

a) les conditions d'exploitation visées aux alinéas 169.31(1)a), b) ou c);

b) les modalités de fourniture des services visés à l'alinéa 169.31(1)d);

c) les modalités concernant l'imposition des frais visés à l'alinéa 169.31(1)e).

Communication des propositions

(2) Dès réception des deux propositions, l'Office communique à l'expéditeur et à la compagnie de chemin de fer la proposition de la partie adverse.

Échange de renseignements

(3) Dans les vingt jours suivant la signification d'un exemplaire de la demande d'arbitrage en application du paragraphe 169.32(2), ou dans le délai fixé par l'arbitre ou convenu entre elles, les parties s'échangent les renseignements qu'elles ont l'intention de

Exception

(4) Unless the parties agree otherwise, a party to the arbitration is not, in support of the proposal it submits under subsection (1), to refer to any offer, or any part of an offer, that was made to it — before a copy of the submission is served under subsection 169.32(2) — by the other party to the arbitration for the purpose of entering into a confidential contract.

If no proposal from party

(5) If one party does not submit a proposal in accordance with subsection (1), the proposal submitted by the other party is the arbitrator's decision made under section 169.37.

Arbitration

169.35 (1) Despite any application filed under section 169.43, the Agency must refer, within two business days after the day on which it receives the last of the two proposals, the matters for arbitration to be conducted by an arbitrator that it chooses.

Arbitrator not to act in other proceedings

(2) The arbitrator is not to act in any other proceedings in relation to a matter that is referred to him or her for arbitration.

Assistance by Agency

(3) The Agency may, at the arbitrator's request, provide administrative, technical and legal assistance to the arbitrator.

Arbitration not proceeding

(4) The arbitration is not a proceeding before the Agency.

présenter à l'arbitre à l'appui de leur proposition.

Exception

(4) Sauf accord entre les parties à l'effet contraire, aucune d'elles ne peut, au soutien de sa proposition présentée en application du paragraphe (1), faire mention de tout ou partie des offres présentées par l'autre partie avant la signification d'un exemplaire de la demande d'arbitrage en application du paragraphe 169.32(2) en vue de conclure un contrat confidentiel.

Une seule proposition

(5) Si une partie ne se conforme pas au paragraphe (1), la proposition de l'autre partie constitue la décision de l'arbitre au titre de l'article 169.37.

Arbitrage

169.35 (1) Malgré la présentation d'une demande en application de l'article 169.43, l'Office, dans les deux jours ouvrables suivant la réception des deux propositions, renvoie à l'arbitre qu'il choisit les questions qui lui sont soumises pour arbitrage.

Impossibilité d'agir

(2) L'arbitre ne peut agir dans le cadre d'autres procédures à l'égard des questions qui lui sont renvoyées pour arbitrage.

Soutien de l'Office

(3) À la demande de l'arbitre, l'Office peut lui offrir le soutien administratif, technique et juridique voulu.

Nature de l'arbitrage

(4) L'arbitrage ne constitue pas une procédure devant l'Office.

Agency's rules of procedure

169.36 (1) The Agency may make rules of procedure for an arbitration.

Procedure generally

(2) Subject to any rule of procedure made by the Agency and in the absence of an agreement between the arbitrator and the parties as to the procedure to be followed, the arbitrator must conduct the arbitration as quickly as possible and in the manner that he or she considers appropriate having regard to the circumstances of the matter.

Questions

(3) Each party may direct questions to the other in the manner that the arbitrator considers appropriate.

Arbitrator's decision

169.37 The arbitrator's decision must establish any operational term described in paragraph 169.31(1)(a), (b) or (c), any term for the provision of a service described in paragraph 169.31(1)(d) or any term with respect to the application of a charge described in paragraph 169.31(1)(e), or any combination of those terms, that the arbitrator considers necessary to resolve the matters that are referred to him or her for arbitration. In making his or her decision, the arbitrator must have regard to the following:

(a) the traffic to which the service obligations relate;

(b) the service that the shipper requires with respect to the traffic;

(c) any undertaking described in paragraph 169.32(1)(c) that is contained in the shipper's submission;

Procédure

169.36 (1) L'Office peut établir les règles de procédure applicables à l'arbitrage.

Disposition générale

(2) Sous réserve des règles de procédure établies par l'Office et à défaut d'un accord entre les parties et l'arbitre sur la procédure à suivre, ce dernier mène l'arbitrage aussi rapidement que possible et de la manière qu'il estime indiquée dans les circonstances.

Questions

(3) Chaque partie peut poser des questions à l'autre de la manière que l'arbitre estime indiquée dans les circonstances.

Décision de l'arbitre

169.37 Dans sa décision, l'arbitre établit les conditions d'exploitation visées aux alinéas 169.31(1)a), b) ou c), les modalités de fourniture des services visés à l'alinéa 169.31(1)d) ou les modalités concernant l'imposition des frais visés à l'alinéa 169.31(1)e), ou prend n'importe lesquelles de ces mesures, selon ce qu'il estime nécessaire pour régler les questions qui lui sont renvoyées. Pour rendre sa décision, il tient compte :

a) du transport en cause;

b) des services dont l'expéditeur a besoin pour le transport en cause;

c) de tout engagement visé à l'alinéa 169.32(1)c) qui est contenu dans la demande d'arbitrage;

d) des obligations qu'a la compagnie de chemin de fer envers d'autres expéditeurs aux

(d) the railway company's service obligations under section 113 to other shippers and the railway company's obligations to persons and other companies under section 114;

(e) the railway company's obligations, if any, with respect to a public passenger service provider;

(f) the railway company's and the shipper's operational requirements and restrictions;

(g) the question of whether there is available to the shipper an alternative, effective, adequate and competitive means of transporting the goods to which the service obligations relate; and

(h) any information that the arbitrator considers relevant.

Requirements of decision

169.38 (1) The arbitrator's decision must

(a) be made in writing;

(b) be made so as to apply to the parties for a period of one year as of the date of his or her decision, unless the parties agree otherwise; and

(c) be commercially fair and reasonable to the parties.

Decision binding

(2) The arbitrator's decision is final and binding on the parties and is deemed, for the purposes of Division IV of Part III and its enforceability between the parties, to be a confidential contract.

Period for making decision

(3) The arbitrator's decision must be made within 45 days after the day on which the matters are submitted to the Agency for

termes de l'article 113, et de celles qu'elle a envers les personnes et autres compagnies aux termes de l'article 114;

e) des obligations que peut avoir la compagnie de chemin de fer envers une société de transport publique;

f) des besoins et des contraintes de l'expéditeur et de la compagnie de chemin de fer en matière d'exploitation;

g) de la possibilité pour l'expéditeur de faire appel à un autre mode de transport efficace, bien adapté et concurrentiel des marchandises en cause;

h) de tout renseignement qu'il estime pertinent.

Caractéristiques de la décision

169.38 (1) La décision de l'arbitre est :

a) rendue par écrit;

b) rendue de manière à être applicable aux parties pendant un an à compter de sa date, sauf accord entre elles à l'effet contraire;

c) commercialement équitable et raisonnable pour les parties.

Décision définitive

(2) La décision de l'arbitre est définitive et obligatoire. Elle est réputée, aux fins d'exécution et pour l'application de la section IV de la partie III, être un contrat confidentiel conclu entre les parties.

Délai pour rendre la décision

(3) La décision est rendue dans les quarante-cinq jours suivant la date à laquelle la demande d'arbitrage a été soumise à l'Office en vertu du paragraphe 169.31(1). Toutefois, si l'arbitre est

arbitration under subsection 169.31(1) unless in the arbitrator's opinion making a decision within that period is not practical, in which case the arbitrator must make his or her decision within 65 days after that day.

Period - agreement of parties

(4) Despite subsection (3), the arbitrator may, with the agreement of the parties, make his or her decision within a period that is longer than 65 days after the day on which the matters are submitted to the Agency for arbitration.

Copy of decision to Agency

(5) The arbitrator must provide the Agency with a copy of his or her decision.

Arbitration fees

169.39 (1) The Agency may fix the fee to be paid to it or, if the arbitrator is not a member or on the staff of the Agency, to the arbitrator for the arbitrator's services in arbitration proceedings.

Arbitration fees - not member

(2) An arbitrator who is not a member or on the staff of the Agency may fix a fee for his or her services if the Agency does not do so under subsection (1).

Payment of fees and costs

(3) The shipper and the railway company are to share equally, whether or not the proceedings are terminated under section 169.41, in the payment of the fee for the arbitrator's services and in the payment of the costs related to the arbitration, including those borne by the Agency in providing administrative, technical and legal assistance to the arbitrator under subsection 169.35(3).

d'avis qu'il est difficile de rendre une décision dans ce délai, la décision est rendue dans les soixante-cinq jours suivant cette date.

Délai - accord des parties

(4) Malgré le paragraphe (3), l'arbitre peut, avec l'accord des parties, rendre sa décision dans un délai supérieur à soixante-cinq jours.

Copie de la décision

(5) L'arbitre fournit à l'Office une copie de sa décision.

Honoraires de l'arbitre

169.39 (1) L'Office peut fixer les honoraires à lui verser, ou à verser à l'arbitre dans le cas où celui-ci n'est pas un de ses membres ou ne fait pas partie de son personnel, pour l'arbitrage.

Honoraires de l'arbitre - non membre

(2) L'arbitre qui n'est pas un membre de l'Office ou qui ne fait pas partie de son personnel peut fixer ses honoraires pour l'arbitrage dans le cas où l'Office ne les fixe pas au titre du paragraphe (1).

Paiement des honoraires et frais

(3) Les honoraires et les frais liés à l'arbitrage - y compris ceux relatifs au soutien administratif, technique et juridique offert à l'arbitre par l'Office au titre du paragraphe 169.35(3) - sont à la charge de l'expéditeur et de la compagnie de chemin de fer en parts égales, même dans les cas d'abandon des procédures prévus par l'article 169.41.

Cost related to arbitration

(4) Costs related to the arbitration also include the cost to the Agency when a member or a person on the staff of the Agency acts as an arbitrator and the Agency does not fix a fee for that arbitrator under subsection (1).

Frais liés à l'arbitrage

(4) Les frais liés à l'arbitrage comprennent également ceux supportés par l'Office lorsque l'un de ses membres ou une personne faisant partie de son personnel agit à titre d'arbitre et qu'il ne fixe pas ses honoraires au titre du paragraphe (1).

Confidentiality of information

169.4 (1) If the Agency and the arbitrator are advised that a party to an arbitration wishes to keep information relating to the arbitration confidential, the Agency and the arbitrator must take all reasonably necessary measures to ensure that the information is not disclosed by the Agency or the arbitrator or during the arbitration to any person other than the parties.

Caractère confidentiel

169.4 (1) La partie qui souhaite que des renseignements relatifs à l'arbitrage demeurent confidentiels en avise l'Office et l'arbitre. Ceux-ci prennent alors toutes les mesures justifiables pour éviter que les renseignements ne soient communiqués soit de leur fait, soit au cours de l'arbitrage à quiconque autre que les parties.

Limited disclosure

(2) Despite subsection (1), the Agency may, in the exercise of its powers or in the performance of its duties and functions under this Act, disclose any information that a party advised the Agency and the arbitrator it wishes to keep confidential.

Divulguation restreinte

(2) Malgré le paragraphe (1), l'Office peut, dans l'exercice de ses attributions sous le régime de la présente loi, communiquer les renseignements visés par l'avis.

Termination of proceedings

169.41 If, before the arbitrator makes his or her decision, the parties advise the Agency or the arbitrator that they agree that the matters being arbitrated should be withdrawn from arbitration, any proceedings in respect of those matters are immediately terminated.

Abandon des procédures

169.41 Dans le cas où, avant la décision de l'arbitre, les parties avisent l'Office ou l'arbitre qu'elles s'accordent pour renoncer à l'arbitrage, les procédures sont abandonnées sur-le-champ.

List of arbitrators

169.42 (1) The Agency, in consultation with representatives of shippers and railway companies, must establish a list of persons, including persons who are members or on the staff of the Agency, who agree to act as

Liste d'arbitres

169.42 (1) En consultation avec les représentants des expéditeurs et des compagnies de chemin de fer, l'Office établit une liste de personnes qui sont choisies notamment parmi ses membres ou son

arbitrators in arbitrations.

Expertise required

(2) Only persons who, in the Agency's opinion, have sufficient expertise to act as arbitrators are to be named in the list.

Publication of list

(3) The Agency must publish the list on its Internet site.

Application for order

169.43 (1) A railway company may apply to the Agency, within 10 days after the day on which it is served with a copy of a submission under subsection 169.32(2), for an order declaring that the shipper is not entitled to submit to the Agency for arbitration a matter contained in the shipper's submission.

Content of order

(2) If the Agency makes the order, it may also

(a) dismiss the submission for arbitration, if the matter contained in it has not been referred to arbitration;

(b) discontinue the arbitration;

(c) subject the arbitration to any terms that it specifies; or

(d) set aside the arbitrator's decision or any part of it.

Period for making decision

(3) The Agency must make a decision on the railway company's application made under subsection (1) as soon as feasible but not later than 35 days after the day on which it receives the application.

personnel et qui acceptent d'agir à titre d'arbitres.

Compétences nécessaires

(2) Ne peuvent figurer sur la liste que les personnes qui, de l'avis de l'Office, possèdent les compétences nécessaires pour agir à titre d'arbitres.

Publication de la liste

(3) L'Office publie la liste sur son site Internet.

Demande d'arrêté

169.43 (1) La compagnie de chemin de fer peut, dans les dix jours suivant la signification d'un exemplaire de la demande d'arbitrage en application du paragraphe 169.32(2), demander à l'Office de prendre un arrêté déclarant qu'une question contenue dans la demande d'arbitrage de l'expéditeur ne peut lui être soumise pour arbitrage.

Contenu de l'arrêté

(2) S'il prend l'arrêté, l'Office peut en outre :

a) rejeter la demande d'arbitrage, dans le cas où l'arbitre n'en a pas encore été saisi;

b) mettre fin à l'arbitrage;

c) assujettir l'arbitrage aux conditions qu'il fixe;

d) annuler tout ou partie de la décision arbitrale.

Délai pour statuer

(3) L'Office statue sur la demande présentée en vertu du paragraphe (1) aussi rapidement que possible et en tout état de cause dans les trente-cinq jours suivant sa réception.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1323-13
STYLE OF CAUSE:	NATIONAL GYPSUM (CANADA) LTD v CANADIAN NATIONAL RAILWAY COMPANY
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	MAY 5, 2014
PUBLIC JUDGMENT AND REASONS:	STRICKLAND J.
DATED:	SEPTEMBER 12, 2014

APPEARANCES:

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WJ Kenny / Darin J Hannaford	FOR THE RESPONDENT

SOLICITORS OF RECORD:

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