

Federal Court



Cour fédérale

Date: 20191223

Docket: T-279-19

Citation: 2019 FC 1650

Ottawa, Ontario, December 23, 2019

PRESENT: Madam Justice McDonald

BETWEEN:

**CANADIAN NATIONAL RAILWAY
COMPANY**

Applicant

and

GIBRALTAR MINES LTD.

Respondent

JUDGMENT AND REASONS

Introduction

[1] The Respondent, Gibraltar Mines Ltd. (Gibraltar) operates a mine in South Central British Columbia and uses the Applicant's, Canadian National Railway Company (CN), rail services to ship its copper concentrate to the Vancouver Wharves Terminal.

[2] In late 2018, CN and Gibraltar underwent final offer arbitration (FOA) under the *Canada Transportation Act*, SC 1996, c 10 (CTA or the *Act*). On this judicial review, CN argues that it was procedurally unfair to proceed through FOA when it did not have reasons for the dismissal of a preliminary application it filed with the Canada Transport Agency (the Agency) in advance of the FOA.

[3] For the reasons that follow, I have concluded that CN has not established a breach of procedural fairness. Further, I have found that any procedural fairness issues that CN may have with the process followed by the Agency cannot be addressed in the context of this judicial review of the FOA Adjudicator's decision.

Background

[4] In June 2016, Gibraltar and CN entered into a Transportation Agreement (2016 Contract) addressing shipping rates and shipping conditions. The 2016 Contract was due to expire in June 2018 and in advance, in May 2018, the parties started renewal discussions. What followed was a series of communications and offers and counter offers between Gibraltar and CN.

[5] On September 26, 2018, as required by s. 161(3) of the *Act*, Gibraltar advised CN of its intention to request FOA. On October 10, 2018, Gibraltar made a request to the Agency for FOA pursuant to s. 161(1) of the CTA stating it was "dissatisfied with the conditions associated with the movement of copper concentrate by CN". Gibraltar advised the Agency that it was seeking FOA on "the matter of the conditions".

[6] On October 12, 2018, CN filed a preliminary application pursuant to s. 162(1) of the *Act* to strike Gibraltar's submission to FOA on the ground "that the matter included in the submission is governed by a confidential contract between Gibraltar and CN, and CN has not consented to the matter being submitted for FOA." CN argued in its preliminary application to the Agency that the matter should not proceed by way of FOA as the parties had already agreed to the terms of a renewal contract. In its submissions to the Agency, CN stated in part as follows:

[o]n July 4, 2018, CN and Gibraltar entered into the Renewed Contract. The Renewed Contract is a valid and enforceable confidential contract and the matters submitted to the Agency for FOA is governed by that contract....Mr. McManus' subsequent refusal to sign the Renewed Contract ***is not relevant***. There is no requirement at common law that a contract must be signed to be enforceable. Similarly, there is no requirement in the *CTA* that a confidential contract must be signed to be enforceable.
[emphasis in original]

[7] CN requested that the Agency refuse to refer to the matter for FOA pursuant to sections 126(2) and 162(1) of the *Act*. CN also requested that their application be determined in an expedited manner.

[8] On November 2, 2018, the Agency dismissed CN's preliminary application stating that reasons would follow. Reasons were not provided by the Agency until March 29, 2019, which was 3 months after the FOA concluded.

[9] In the meantime, the FOA process, with the statutorily mandated timelines, proceeded as follows:

- On October 10, 2018, Gibraltar requested FOA.

- On October 20, 2019, both CN and Gibraltar submitted their final offers to the Agency.
- On October 23, 2018, the matter was referred to FOA.
- On November 7, 2018, CN and Gibraltar exchanged information in support of their final offers.
- The FOA hearing took place on December 3-6, 2018.

[10] During the FOA hearing, in addition to written submissions, the CN and Gibraltar relied upon evidence from various witnesses, including experts. The evidence included evidence on the costing of rail services, incentives and penalties.

[11] On December 13, 2018, the FOA Arbitrator selected Gibraltar's final offer. The Arbitrator's decision was effective for one year only – October 10, 2018 to October 10, 2019. Pursuant to s. 165 of the *Act*, the Arbitrator did not provide any reasons in support of the final offer selected.

[12] CN seeks judicial review of the Arbitrator's December 13, 2018 FOA decision.

Legislation

[13] The relevant provisions of the CTA are reproduced at Appendix A.

Issues

[14] In oral submissions on this judicial review, CN confirmed that procedural fairness was the only issue being pursued. Based upon the submissions of the parties, I would frame the issues as follows:

- Can CN raise a procedural fairness issue?
- Was the FOA hearing procedurally unfair to CN?
- Should documents filed continue to be confidential?

Standard of Review

[15] The parties agree that the standard of review for procedural fairness issues is correctness (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 34 (CPR)).

Analysis

Can CN raise a procedural fairness issue?

[16] Gibraltar argues that CN's failure to raise a procedural fairness issue regarding receipt of reasons from the Agency during the FOA process means it cannot now raise procedural fairness issues. It is a well-established principle that a party must raise an issue of procedural fairness at the first opportunity (*Muskego v Norway House Cree Nation Appeal Committee*, 2011 FC 732 at para 42).

[17] CN argues that it did not waive its right to raise procedural fairness issues, and points to references in the transcript where it raised this issue during the FOA hearing, but acknowledged that the FOA process had to proceed. Further as CN points out, the FOA Arbitrator had no authority to provide a remedy or delay the Arbitration.

[18] CN argues that it had no opportunity to raise the procedural fairness issue in the context of the FOA, as it did not know the reasons for the dismissal of its preliminary application at the time of the FOA proceeding.

[19] Considering the FOA statutory scheme, and the fact that CN did not have reasons from the Agency at the time of the FOA proceeding, I agree that CN did not realistically have an opportunity to raise this issue within the FOA process. Accordingly, in my view, CN is not now precluded from raising procedural fairness arguments.

[20] I now turn to consideration of the procedural fairness issue raised by CN.

Was the FOA hearing procedurally unfair to CN?

[21] CN argues that without the benefit of the Agency's reasons for dismissing its preliminary application it did not know the case it had to meet within the FOA process. CN also argues that Gibraltar took different positions in the submissions it made in response to the preliminary application to the Agency and within the FOA process.

[22] CN notes that there were three possible outcomes of their preliminary application, namely: (1) dismissal on procedural grounds; (2) a finding of an agreement on rates only; or, (3) a finding of no agreement on any terms. CN says it would have proceeded differently with the FOA had it known the reasons for the dismissal of its preliminary application.

[23] CN argues that the importance of knowing the case to meet was confirmed in *Ruby v Canada (Solicitor General)*, 2002 SCC 75, at para 40 (*Ruby*), where the Supreme Court of Canada notes that:

[a]s a general rule, a fair hearing must include an opportunity for the parties to know the opposing party's case so that they may address evidence prejudicial to their case and bring evidence to prove their position.

[24] The rule referenced in *Ruby* speaks to a “fair hearing”. Here however, the parties were engaged in two “hearings” or two processes under the CTA – one being the referral to FOA and the second being the preliminary application filed by CN. Section 161(4) of the *Act* specifically states that “final offer arbitration is not a proceeding before the Agency.” Accordingly to the *Act* then there were two processes, albeit, arguably relating to the same issues. The question is was CN disadvantaged in having to go through the FOA process without knowing why its preliminary application to the Agency was dismissed.

[25] Despite the arguments of CN that it was disadvantaged in the FOA process for not having reasons from the Agency, CN knew the arguments being put forward by Gibraltar, as both parties exchanged documents on November 7, 2018 in advance of the FOA. As well, I would note that there is no suggestion that the Arbitrator had access to the reasons for the Agency’s

decision. In fact, no one involved in the FOA had the Agency's reasons. Therefore, all parties were working from what CN calls an "incomplete record."

[26] The fairness requirements in any particular circumstance are "highly variable and contextual" (*CPR* at para 40). Here, the context is particularly important because of the nature of the highly circumscribed FOA process.

[27] The comments of Justice Kellan in *Canadian National Railway Company v Western Canadian Coal Corporation*, 2007 FC 371 (*CNRC*) are helpful in assessing context:

[27]... My view is that the unique nature of the FOA scheme imposed by law distinguishes it from ordinary commercial arbitration. This is not a situation in which the parties freely consent to settling their dispute by arbitration or to have the terms of their contract determined by the arbitrator. Instead, I would characterize the process as one in which a contract is, in effect, formed as soon as the matter is submitted by the shipper to the Agency for referral to FOA. At that point, the carrier is bound to the terms of whichever offer is selected by the arbitrator — an obligation imposed on it by statute.

...

[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... 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.

[emphasis added]

[28] Prior to the FOA process unfolding, CN knew its preliminary application was dismissed. The narrow issue is was it procedurally unfair for CN to be required to proceed with FOA without knowing why its application to the Agency was dismissed.

[29] In *CPR*, the Federal Court of Appeal held, at para 40, that the content and degree of fairness required is informed by the five non-exhaustive contextual factors identified in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 (*Baker*). In *Baker*, at paras 23-26 the factors include: (1) the nature of the decision being made, (2) the nature of the statutory scheme, (3) the importance of the decision to the individuals affected, (4) the legitimate expectations of the parties, and, (5) the choice of procedures.

[30] In considering the *Baker* factors in the FOA context and considering the mandated statutory scheme, it is clear that the Arbitrator is acting in a judicial-like role. The Arbitrator is making a determination about which contract will be binding between the parties. As noted by Justice Kellan at para 35 of *CNRC*, FOA is intended to bring finality to disputes. These factors weigh in favour of a heightened level of procedural fairness.

[31] However, in my view, the second *Baker* factor, the statutory scheme, is a full answer to the procedural fairness issues raised by CN. The *Act* does not require the Agency to give reasons for dismissing a preliminary application in advance of the FOA process. In fact, the *Act* states:

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

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

Agency shall refer the matter for arbitration. conformément au paragraphe 161.1(1), renvoie la question :

[32] Considering the use of the phrase “notwithstanding any application filed with the Agency” and mandatory language used in s. 162(1), it appears that Parliament contemplated that applications might be filed but that the FOA process would continue regardless. This demonstrates that it was Parliament’s specific intention that any preliminary applications to the Agency would not otherwise affect the FOA process. Further, I note section 162.1 gives the Agency the power to order “that an arbitration be discontinued” or “continue subject to terms and conditions.” The Agency did not do so in this case.

[33] In light of the clear wording of the legislation, and in spite of the preliminary application by CN, the FOA had to proceed. Knowing this, CN could not have had a legitimate expectation that the Agency would provide reasons in advance of the FOA given the short time frames dictated by the *Act*.

[34] Although CN argues that it was not fair for them to have been required to proceed with the FOA in the absence of reasons from the Agency, this argument needs to be considered in the fuller context of the purpose and intent of the FOA process. In its preliminary application, CN’s argument was that the FOA process was not appropriate as the parties had reached an agreement. However, given the dismissal of its application, the Agency obviously did not agree with the position taken by CN.

[35] Although CN invites the court to speculate about what impact the Agency's reasons would have had on the FOA, in my view, that is an irrelevant consideration. Despite its preliminary application, CN knew that the FOA, which has been described as "an intentionally high risk form of arbitration" (*CNRC* at para 35), was proceeding. Considering this, and the *Baker* factors, I am not convinced any unfairness ensued. CN knew the case it had to meet even in the absence of the Agency's reasons for dismissing its preliminary application.

[36] The other important contextual factor in assessing fairness is that the outcome of the FOA process has a relatively short-term impact on the parties. This tempers the otherwise "high risk" nature of FOA, (*CNRC* at para 9). Here, the contract chosen by the FOA Arbitrator was for a one-year term only.

[37] Overall, I do not find that CN had established any procedural unfairness with the FOA process despite not having the reasons for the dismissal of its preliminary application to the Agency.

[38] Additionally, I would highlight that CN's application to the Agency and the FOA process are two separate processes that are distinct. Parliament saw fit to create a tightly controlled legislative scheme for the FOA. Had it been Parliament's intention to allow a preliminary application to delay the FOA, the legislation would have provided this option. The absence of such provisions in an *Act* that is otherwise fully prescriptive is telling.

[39] Finally, on this judicial review, CN seeks review of the FOA Arbitration decision only. In that context, it is my view that it is not appropriate for the Court to also consider the impact of the failure of the Agency to provide its reasons under a separate process under the *Act*.

[40] Overall, I am not satisfied that there has been a breach of CN's procedural fairness rights in the FOA process.

Should documents filed continue to be kept confidential?

[41] By Order dated July 22, 2019, Justice Fothergill ordered that certain documents filed by the parties be kept confidential until the hearing. Following the hearing, the parties provided submissions on continuing to maintain the confidentiality of these documents.

[42] Section 167 of the *Act* states that when the Agency is advised that a party to an FOA wishes to keep matters relating to the arbitration confidential, the Agency and Arbitrator "shall take all reasonably necessary measures to ensure that the matters are not disclosed". CN made such a request prior to the FOA and clearly marked the information it wishes to remain confidential when it filed its materials with this Court. This complies with Rule 152(1) of the *Federal Courts Rules SOR/98-106*. CN's intention to keep the information confidential has been clear since the beginning.

[43] CN argues that its request meets the two-part test for confidentially orders as outlined in *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41 at para 53 (*Sierra Club*).

[44] The first part of the *Sierra Club* test is whether the confidentiality order is “necessary in order to prevent a serious risk to an important interest” (*Sierra Club* at para 53). CN argues that its competitors, Gibraltar’s competitors, and other interested third parties could use this information to their detriment. I am satisfied that CN has met the first branch of the test.

[45] CN also argues that its request satisfies the balancing part of the test (*Sierra Club* at para 69) between the benefit of open court proceedings against the harm of disclosure. CN argues that disclosure would put their commercial interests at risk. Additionally, the FOA provides that information disclosed during the process will remain confidential if requested. In my view, it is appropriate that this confidentiality be maintained in the judicial review process.

[46] In the circumstances, I agree that it is appropriate to keep the documents confidential. Accordingly, the documents listed at para 20 of Justice Fothergill’s July 22, 2019 Confidentiality Order shall remain confidential.

Costs

[47] In post-hearing submissions, the parties agreed on the amount of damages to be awarded to the successful party. Accordingly, Gibraltar is entitled to costs in the fixed amount of \$8,000.00.

JUDGMENT in T-279-19

THIS COURT'S JUDGMENT is that:

1. The judicial review is dismissed;
2. The following documents will remain confidential:
 - (a) Hearing Transcript;
 - (b) CN's Summary of Information and Argument;
 - (c) Gibraltar's Summary of Information and Argument;
 - (d) CN's Final Argument;
 - (e) CN's Application to Strike;
 - (f) Gibraltar's Answer to Application to Strike;
 - (g) CN's Reply to Gibraltar's Answer to Application to Strike;
 - (h) CN's Memorandum of Fact and Law Re: Judicial Review; and
 - (i) All remaining documents withheld from CN's public application record that are not specifically listed in these Reasons; and
3. The Applicant will pay the Respondent \$8,000.00 in costs.

"Ann Marie McDonald"

Judge

Appendix A

Canada Transportation Act (S.C. 1996, c. 10)

Loi sur les transports au Canada (L.C. 1996, ch. 10)

Appendix A

Canada Transportation Act (S.C. 1996, c. 10)

Loi sur les transports au Canada (L.C. 1996, ch. 10)

Confidential contracts

126 (1) A railway company may enter into a contract with a shipper that the parties agree to keep confidential respecting

- (a) the rates to be charged by the company to the shipper;
- (b) reductions or allowances pertaining to rates in tariffs that have been issued and published in accordance with this Division;
- (c) rebates or allowances pertaining to rates in tariffs or confidential contracts that have previously been lawfully charged;
- (d) the manner in which the company is to fulfil its service obligations under section 113; and
- (e) any conditions relating to the traffic to be moved by the company, including any amount to be paid by the company or the shipper in relation to a failure to comply with any condition related to the service obligations referred to in paragraph (d).

Request for confidential contract

(1.1) A shipper may request that a railway company make it an offer to enter into a contract under subsection (1) with the railway company respecting

- (a) the manner in which the company is to fulfil its service obligations under section 113; or
- (b) any amount to be paid in relation to the company's or the shipper's failure to

Contrats confidentiels

126 (1) Les compagnies de chemin de fer peuvent conclure avec les expéditeurs un contrat, que les parties conviennent de garder confidentiel, en ce qui concerne :

- a) les prix exigés de l'expéditeur par la compagnie;
- b) les baisses de prix, ou allocations afférentes à ceux-ci, indiquées dans les tarifs établis et publiés conformément à la présente section;
- c) les rabais sur les prix, ou allocations afférentes à ceux-ci, établis dans les tarifs ou dans les contrats confidentiels, qui ont antérieurement été exigés licitement;
- d) les moyens pris par la compagnie pour s'acquitter de ses obligations en application de l'article 113;
- e) les conditions relatives au transport à effectuer par la compagnie, notamment les sommes à payer par la compagnie ou l'expéditeur en cas de non-respect de toute condition liée aux obligations visées à l'alinéa d).

Demande de contrat confidentiel

(1.1) L'expéditeur peut demander à une compagnie de chemin de fer de lui présenter une offre en vue de la conclusion d'un contrat, en application du paragraphe (1), concernant :

- a) les moyens que celle-ci doit prendre pour s'acquitter de ses obligations en application de l'article 113;
- b) les sommes à payer, pour encourager l'efficacité du transport des marchandises

comply with a term related to those service obligations, the purpose of which is to encourage the efficient movement of the shipper's traffic and the performance of the railway system.

Restriction

(1.11) The shipper may only make a request in respect of an amount described in paragraph (1.1)(b) if the amount relates to a term that is included in the request under subsection (1.1).

Content of request

(1.2) The request must describe the traffic to which it relates, the services requested by the shipper with respect to the traffic and any undertaking that the shipper is prepared to give to the railway company with respect to the traffic or services.

Offer

(1.3) The railway company must make its offer within 30 days after the day on which it receives the request.

Exception to offer

(1.4) Subject to subsection (1.5), the railway company is not required to include in its offer terms with respect to a matter that

- (a) is governed by a written agreement to which the shipper and the railway company are parties;
- (b) is the subject of an order, other than an interim order, made under subsection 116(4);
- (c) is set out in a tariff referred to in subsection 136.4(1) or 165(3); or
- (d) is the subject of an arbitration decision made under section 169.37.

de l'expéditeur et l'amélioration du rendement du système de chemin de fer, en cas de non-respect, par la compagnie ou l'expéditeur, des conditions liées à ces obligations.

Restriction

(1.11) L'expéditeur ne peut présenter une demande au titre du paragraphe (1.1) concernant les sommes à payer en cas de non-respect par la compagnie ou l'expéditeur des conditions liées aux obligations prévues par l'article 113 qu'à l'égard de celles de ces conditions qui sont elles aussi visées par la demande.

Contenu de la demande

(1.2) La demande mentionne le transport en cause, les services exigés par l'expéditeur à l'égard de celui-ci et tout engagement que l'expéditeur est disposé à prendre envers la compagnie de chemin de fer relativement au transport ou aux services.

Offre

(1.3) La compagnie de chemin de fer est tenue de présenter l'offre dans les trente jours suivant la date de réception de la demande.

Exception

(1.4) Sous réserve du paragraphe (1.5), la compagnie de chemin de fer n'est toutefois pas tenue d'inclure dans son offre une stipulation portant sur une question qui, selon le cas :

- a) fait l'objet d'un accord écrit 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);
- c) figure dans un tarif visé aux paragraphes 136.4(1) ou 165(3);
- d) fait l'objet d'une décision arbitrale rendue en vertu de l'article 169.37.

Clarification

(1.5) The railway company must include in its offer terms with respect to a matter that is governed by an agreement, the subject of an order or decision or set out in a tariff, referred to in subsection (1.4) if the agreement, order, decision or tariff expires within two months after the day on which the railway company receives the request referred to in subsection (1.1). The terms must apply to a period that begins after the agreement, order, decision or tariff expires.

No investigation or arbitration of confidential contracts

(2) No party to a confidential contract is entitled to submit a matter governed by the contract to the Agency for final offer arbitration under section 161, without the consent of all the parties to the contract.

1996, c. 10, s. 126

2013, c. 31, s. 8

2018, c. 10, s. 25

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 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

Précision

(1.5) La compagnie de chemin de fer est toutefois tenue d'inclure dans son offre une telle stipulation si l'accord, l'arrêté, le tarif ou la décision arbitrale visés au paragraphe (1.4) expirent dans les deux mois suivant la date de réception de la demande prévue au paragraphe (1.1). La stipulation s'applique alors à la période postérieure à l'expiration.

Arbitrage

(2) Toute demande d'arbitrage au titre de l'article 161 sur une question faisant l'objet d'un contrat confidentiel est subordonnée à l'assentiment de toutes les parties au contrat.

1996, ch. 10, art. 126;

2013, ch. 31, art. 8;

2018, ch. 10, art. 25.

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 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) the final offer of the shipper to the carrier in the matter, excluding any dollar amounts;
- (b) the period requested by the shipper, not exceeding two years, for which the decision of the arbitrator is to apply;
- (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.

- a) la dernière offre faite par l'expéditeur au transporteur, sans mention de sommes d'argent;
- b) la mention de la période d'au plus deux ans durant laquelle l'expéditeur souhaite que la décision de l'arbitre s'applique;
- 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.

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 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

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.

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),

Agency their final offers, including dollar amounts.

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 ...

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.

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

présentent chacun à l'Office leur dernière offre, en y incluant la mention de sommes d'argent.

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 : ...

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.

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) be rendered so as to apply for the period that is agreed to by the parties or, if no period has been agreed to by the parties, for the period, not exceeding two years, that the shipper requested in its submission.

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, 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

c) de manière à être applicable pendant la période convenue entre les parties ou, à défaut de période convenue, pendant la période d'au plus deux ans que l'expéditeur a demandée dans la demande d'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 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

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.

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.

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.

FEDERAL COURT

SOLICITORS OF RECORD

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