

CN Failure to Meet Service Obligations under the Canada Transportation Act Results in Multimillion Damages for Lost Profits and Vessel Demurrage

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In the recent decision of the Federal Court of Canada in *Louis Dreyfus Company Canada ULC v. Canadian National Railway Company*, 2025 FC 1868, the court was asked to determine the damages resulting from CN's breach of its service obligations pursuant to section 116(5) of the *Canada Transportation Act*, S.C. 1996, c 10 (the "Act").

A railway company owes a statutory level of service obligations to shippers as stipulated in subsection 113(1) of the Act. Due to this statute, CN was under an obligation to supply railcars to Louis Dreyfus Company ("LDC"), and to transport its goods without delay.

Section 113(1) of the Act provides:

A railway company shall, according to its powers, in respect of a railway owned or operated by it,

- (a) furnish, at the point of origin, at the point of junction of the railway with another railway, and at all points of stopping established for that purpose, adequate and suitable accommodation for the receiving and loading of all traffic offered for carriage on the railway;
- (b) furnish adequate and suitable accommodation for the carriage, unloading and delivering of the traffic;
- (c) without delay, and with due care and diligence, receive, carry and deliver the traffic;
- (d) furnish and use all proper appliances, accommodation and means necessary for receiving, loading, carrying, unloading and delivering the traffic; and
- (e) furnish any other service incidental to transportation that is customary or usual in connection with the business of a railway company.

The Act also allows shippers to enter into private contracts with railway companies which can set out the manner in which the railway company is to fulfil its statutory obligations. In any investigation into a statutory breach, the Canadian Transportation Agency ("Agency") is bound by the terms of the contract in any determination it must make as to whether a railway has fulfilled its service obligations.

In a decision rendered on 3 October 2014, the Agency determined that CN failed to fulfil the statutory service obligations it owed to LDC for weeks 13-35 of the 2013-2014 crop year. The Federal Court of Canada was asked to determine what, if any, damages LDC incurred as a result of CN's breach of its statutory level of service obligations to LDC.

In the Federal Court action, LDC claimed damages in the amount of (1) CAD \$21,641,943 for lost profit or opportunity, (2) USD \$3,715,726.60 and CAD \$335,978.90 for vessel demurrage charges, and (3) CAD \$3,500,000 for reputational harm.

The 2013-2014 crop year was the largest crop in Canadian history, with grain being harvested in abundance. CN asserted that two factors led to the service breach: the (i) unprecedented demand due to the record harvest; and (ii) extremely harsh winter. The Court set out CN's position in paragraphs 12 and 13:

[12] On the first factor, CN notes that the unprecedented 2013-2014 crop year strained the entire grain handling and transportation system. When CN recognized that the yearly crop would be significantly larger than had been previously forecasted, it pre-positioned railcars at elevator facilities, including LDC's, to prepare for the predicted large harvest. CN reported that it performed at a record pace in late September through November 2013 when demand spiked, having "spotted" (meaning, delivered) over 5,000 cars a week. Nonetheless, its capacity did not satisfy the large demand surge.

[13] As to the second factor, CN asserts that the Prairies experienced the worst Winter in decades during the 2013-2014 crop year, which it stated had a "devastating impact" on its operations. In the second trimester, CN emphasizes that the extremely cold weather in the Prairies slowed down the performance of CN's network, causing an inability to spot all of the planned 4,000 weekly cars for January, February, and March. In its slowest month of February, CN spotted approximately 2,700 cars weekly, explaining that in extreme cold weather, operational constraints that occurred included corridor restrictions, speed limitations, infrastructure and switch failures, and train length reductions, which collectively resulted in fewer empty cars than planned for spotting at shippers, including grain transportation companies.

The court heard a number of witnesses and a number of experts including Mr. John De Pape, a grain industry expert who estimated the profit lost by LDC due to the service failures of CN. CN countered with Mr. Dean Das, a loss valuation expert. The court found both experts to be even-handed and impartial in their approach to the evidence, "albeit firmly anchored in their own positions" (paragraph 48). The court found Mr. De Pape's evidence highly persuasive.

CN set out the steps it took to increase capacity. It argued that despite the significant challenges in the relevant period, it nonetheless provided exceptional performance over the course of the full 2013-2014 crop year: CN set new records for grain movement, including record grain throughput levels during that year.

The court noted however, that as pointed out in the Agency decision, there was a shortfall of 3,376 railcars that LDC was supposed to receive during the relevant period, and which CN did not provide, while providing these railcars to other customers.

The court reviewed the procedural history of the dispute:

- a. CN's appeal of the Agency decision to the Federal Court of Appeal – which was denied.
- b. CN's contested jurisdiction that the Federal Court lacked jurisdiction to hear LDC's action for damages – which was denied.
- c. CN's appeal to the Federal Court of Canada on the contested jurisdiction – which was denied.

The issues before the court in this action were: (i) objections by CN to the content of opening statements; (ii) CN's objection to LDC's written submissions; (iii) adverse inference in LDC's failure to call witnesses; and (iv) breach of the rule in *Brown v. Dunn* (i.e., failure to put assertions to witnesses).

The court noted that the key evaluation was the quantification of damages under the three heads of damages:

- a. LDC's lost profit and opportunity
- b. LDC's claim for vessel demurrage
- c. LDC's claim for reputational harm.

The court found that the statutory scheme set out in section 116 of Act required the court to take a tort approach to the analysis of damages, rather than a contract law approach (paragraph 126). The court noted that [s]ubsection 116(5) stipulates that every person aggrieved by a railway company's "neglect or refusal" to fulfil its service obligations – which in these circumstances was CN's failure to supply railcars – has an action for the neglect or refusal against the company" (paragraph 131).

The court also noted that there was little precedent to guide the court about how to assess damages under the jurisprudence that considers section 116 of the Act, and indeed, the parties both acknowledged that the jurisprudence on the assessment of damages for sections 113-116 of the Act was scant.



The court summarized the applicable test at paragraph 153 (citations omitted):

To warrant damages, a plaintiff holds the burden of proving, on a balance of probabilities, what would have happened without the breach... However, if a defendant posits an alternative “but for” world, the defendant must prove its version of the “but for” world on a balance of probabilities...

The test for assessing the remoteness of damages under a tort law test rather than a contract law approach is whether the plaintiff’s injury or loss, at the time that the wrong took place, was the reasonably foreseeable result of the defendant’s wrongful conduct. The loss would only need to reach the threshold of being a “real risk” that would occur in the mind of a reasonable person in the position of the defendant.

The court found that it was reasonably foreseeable that LDC would lose profits due to CN’s neglect or refusal to provide additional railcars – a real risk that would occur in the mind of a reasonable person in CN’s position. The court also found that a lost profits approach should be taken to the damages assessment as opposed to a loss opportunity approach.

The court found that in a “but for” world where CN supplied an additional 3,376 railcars to LDC on a hypothetical basis, LDC could and would have sold an additional 3,376 railcars of grain for a profit. The court accepted a calculation of damages for lost profit by CN’s expert, Mr. De Pape, of \$21,641,943 using a lost profits analysis.

LDC’s claim for vessel demurrage resulting from CN’s level of service breach was discussed by the court commencing at paragraph 335 stating:

“Vessel demurrage” is a penalty fee accumulated on vessels for breaching laytime. “Laytime” is the time normally required to load the vessel at the terminal. Generally, when vessels arrive at the port terminal, their contract provides for a specific amount of time at the terminal for loading, during which no extra charges are assessed. If the stipulated loading times are exceeded, additional charges are incurred, known as vessel demurrage fees. For every hour vessels are delayed in loading beyond their permitted time, vessel demurrage fees are charged to the company responsible for providing the grain to load them. In this case, the responsible party was LDC.

In the 2013–2014 crop year, vessel demurrage fees were approximately USD \$20,000 per day. There was no dispute that LDC incurred USD \$5,308,180.85 and CAD \$479,969.85 in total vessel demurrage fees during the 2013–2014 crop year. Of that, LDC claims USD \$3,715,726.60 and CAD \$335,978.90 in damages from CN, representing 70% of the total vessel demurrage costs incurred. LDC estimated that 70% to 80% of these fees were incurred because of the shortfall. According to LDC, had CN provided timely delivery of the 3,376 railcars, vessel demurrage charges paid by LDC in the relevant period would have been significantly reduced.

CN maintained that LDC (1) failed to prove causation with respect to the majority of the charges claimed, which is premised on unproven assumptions, (2) ignored evidence of delays at the four elevators which were not caused by CN’s service failures, and (3) does not have a sound basis for validating the quantum for the vessel demurrage damages claimed.

The court agreed with CN that the evidence showed that there were multiple factors that led to delays in the very unusual 2013–2014 crop year and the claim for these charges was not justified by the record. While some demurrage fees were attributable to the railcar shortfall during the relevant period of the claim, other events and circumstances during those weeks, as well as the remainder of the crop year, contributed significantly to the loading delays and resulting demurrage fees. The court awarded demurrage fees representing 35% of the total vessel demurrage fees claimed by LDC, in the amount of USD \$1,857,863.30 and CAD \$167,893.90.

Finally, the court dealt with LDC’s claims for reputational harm with its producers (farmers) and purchasers (customers) in the amount of \$3.5 million. The court did not award any damages for reputational harm noting:

[392] To recover damages for reputational harm, LDC must establish that CN’s service failures caused harm to LDC’s reputation that resulted in a tangible and quantifiable loss. At common law, it is not sufficient for a plaintiff to assert that its reputation was damaged (*Nolar Industries Ltd v Freight Transportation Association*, [2005] OJ No 4495 (Ont SCJ) at para 32.

The court agreed with CN that LDC failed to substantiate a tangible and quantifiable loss resulting from the impact on its reputation that would be attributed to CN’s breach. The evidence showed that the industry as a whole was impacted and affected by delays during the relevant period, and that LDC’s issues with CN were not isolated cases between a shipper and its customers. All of CN’s customers were impacted by the issues it was facing. LDC ultimately received railcars that its competitors did not receive. It would not be justified to award damages to LDC for reputational harm when it was clear that its competitors were



impacted just as much, if not more, than LDC. The court was not convinced that LDC's customers were reluctant to conduct business with LDC during and after CN's service failures. The court was also not convinced by LDC's argument that it would have received even more future business from its existing customers had its reputation not been harmed by CN's service failures.

In summary, the court awarded damages to LDC for CN's service breach during weeks 13 to 35 of the 2013-2014 crop year. Those damages amounted to CAD \$21,641,943 for lost profit, and USD \$1,857,863.30 and CAD \$167,893.90 for vessel demurrage. No damages are awarded for the third head of reputational harm. A PDF version is available for download [here](#).

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