Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2014-028

Southern Pacific Resource Corp.

v.

President of the Canada Border Services Agency

Decision issued
Friday, September 18, 2015

Reasons issued
Friday, October 2, 2015

Canada

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IN THE MATTER OF an appeal heard on June 2, 2015, pursuant to section 67 of the *Customs Act*, R.S.C., 1985, c. 1 (2nd Supp.);

AND IN THE MATTER OF various decisions of the President of the Canada Border Services Agency, dated November 20, 2014, pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

SOUTHERN PACIFIC RESOURCE CORP. **Appellant**

AND

THE PRESIDENT OF THE CANADA BORDER SERVICES AGENCY **Respondent**

DECISION

The appeal is allowed. Amounts paid by Southern Pacific Resource Corp., in order to pursue this appeal, are to be refunded by the Canada Border Services Agency.

Jason W. Downey
Jason W. Downey
Presiding Member

The statement of reasons will be issued at a later date.

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	June 2, 2015
Tribunal Member:	Jason W. Downey, Presiding Member
Counsel for the Tribunal:	Eric Wildhaber Rebecca Marshall-Pritchard Courtney Fitzpatrick
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PARTICIPANTS:

Appellant	**Counsel/Representative**
Southern Pacific Resource Corp.	Peter Kirby

Respondent	**Counsel/Representative**
President of the Canada Border Services Agency	Orlagh O'Kelly

WITNESSES:

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STATEMENT OF REASONS

CONTEXT AND DISCUSSION

1. This is an appeal filed by Southern Pacific Resource Corp. (Southern Pacific) with the Canadian International Trade Tribunal (the Tribunal) on December 3, 2014, pursuant to subsection 67(1) of the *Customs Act*.[1]

2. A public hearing was held in Ottawa, Ontario, on June 2, 2015. This decision and statement of reasons are being issued concurrently with those in *Bri-Chem Supply Ltd. v. President of the Canada Border Services Agency*[2] and *Ever Green Ecological Services Inc. v. President of the Canada Border Services Agency*;[3] those appeals were heard together on May 7 and 8, 2015. All three appeals concern the taxpayer's ability to make corrections to erroneous customs declarations.

3. The appeals were filed with the Tribunal as a result of the refusal by the President of the Canada Border Services Agency (CBSA) to apply the Tribunal's decision in *Frito-Lay Canada, Inc. v. President of the Canada Border Services Agency*.[4]

4. Southern Pacific is appealing the CBSA's claim that it owes duties on the goods in issue. The Tribunal finds that Southern Pacific owes none.

5. During 2011 and 2012, Southern Pacific imported turbines (the goods in issue), classified them under tariff item No. 8502.39.90 of the schedule to the *Customs Tariff*[5] (that information is entered in box No. 27 on customs forms), declared them to be of U.S. origin (box No. 12, specifically, it indicated "UCA", meaning "United States, California") and indicated code 2 for tariff treatment (box No. 14, code 2 corresponds to Most-Favoured-Nation [MFN] tariff treatment). The applicable rate of duty was zero.[6]

6. As was the case in *Bri-Chem*, and *Ever Green*, the goods in issue would have entered Canada duty-free no matter where they originated in the world[7] and irrespective of the tariff treatment code that Southern Pacific had entered on its forms, because the goods in issue were also duty-free under *all other* preferential tariff treatments, whether under a free trade agreement or not. In other words, the goods in issue were duty-free "across the board".

7. On June 3, 2013, the CBSA informed Southern Pacific that it would conduct a trade compliance verification for the period covering the dates of the importations of the goods in issue.[8]

8. On January 30, 2014, the CBSA informed Southern Pacific that the goods in issue should have been classified under tariff item No. 8502.39.10 instead of tariff item No. 8502.39.90.[9] Unlike goods imported under tariff item No. 8502.39.90 (duty-free "across the board"), goods imported under tariff item

1. R.S.C., 1985, c. 1 (2nd Supp.) [*Act*].
2. (18 September 2015), AP-2014-017 (CITT) [*Bri-Chem*].
3. (18 September 2015), AP-2014-027 (CITT) [*Ever Green*].
4. (21 December 2012), AP-2010-002 (CITT) [*Frito-Lay*].
5. S.C. 1997, c. 36.
6. Exhibit AP-2014-28-7C (protected), tab 6, Vol. 2; Exhibit AP-2014-028-7B, tab 7, Vol. 1.
7. The only exception is if the goods originated in the People's Republic of Korea, which is the only country that is subject to the General Tariff.
8. Exhibit AP-2014-28-7C (protected), tab 8, Vol. 2; Exhibit AP-2014-28-7B, tab 9, Vol. 1.
9. Southern Pacific did not dispute the revised tariff classification.

No. 8502.39.10 are dutiable at 4 percent *ad valorem* under MFN tariff treatment, but are duty-free under the United States Tariff (UST/NAFTA).

9. On March 10, 2014, to reflect its newfound understanding of what the goods actually were in terms of tariff classification, Southern Pacific filed corrections pursuant to subsection 32.2(2) of the *Act*, changing the tariff classification of the goods in issue to tariff item No. 8502.39.10 and indicating code 10 (for "UST") in box No. 14 (used for tariff treatment). As was the case initially, Southern Pacific reiterated that the goods were of U.S. origin (box No. 12, specifically the goods originated in "UCA", meaning "United States, California").[10]

10. In addition, between March 10 and March 31, 2014, Southern Pacific filed additional corrections to tariff classification of the same nature to remedy the same mistake that it had made in respect of a number of other transactions that were not the subject of the CBSA's verification audit. The CBSA rejected Southern Pacific's filings, claiming that it owed duties at the MFN rate. Those decisions are the subject of this appeal.

11. Essentially, the CBSA takes the same position as described in *Bri-Chem*.[11]

12. At the hearing, the witness for the CBSA recognized that, where goods are duty-free under *both* MFN tariff treatment and UST/NAFTA tariff treatment, indicating "UST" on customs documents could constitute an invitation for CBSA officials to audit for UST/NAFTA compliance.[12] The witness acknowledged that the CBSA does not audit MFN declarations because the goods declared as MFN could originate in any country other than the People's Republic of Korea.[13]

13. However, if an importer declares a tariff treatment other than MFN (e.g. UST/NAFTA), the witness explained that auditors will likely investigate for origin and tariff treatment compliance.

14. The witness also proposed that importers should "hedge" against potential accounting mistakes by always claiming UST/NAFTA treatment where available, "just in case", notwithstanding the reality that both MFN and UST/NAFTA both command a rate of duty of zero on particular goods.[14]

15. That type of behaviour is by definition counter-intuitive to the proper administration of the customs regime. In a world where all importers would adopt the practice of claiming UST/NAFTA tariff treatment on all imports from the United States, even when the MFN rate of duty is also zero, the CBSA would, by dilution, lose sight of which transactions should rightfully be audited. This approach would become financially and administratively burdensome for both importers and the CBSA.[15] This is not what the free trade agreements intended.

16. For the same reasons given in *Bri-Chem*, the Tribunal finds that Southern Pacific made revenue-neutral changes in tariff classification where the previously claimed duty-free status now required a code 10

10. Tribunal Exhibit AP-2014-028-7C (protected), tab 13, Vol. 2.
11. *Bri-Chem* at para. 12.
12. *Transcript of Public Hearing*, 2 June 2015, at 104.
13. *Ibid.* at 71, 104.
14. *Ibid.* at 97.
15. The witness for the CBSA stated as follows: "But if the goods are zero duty both under MFN and under NAFTA, there is no financial sense for them to make that filing, because it [costs] brokerage fees to file that. And the CBSA obviously doesn't want [to] process things that aren't necessary, for one reason or another", *ibid.* at 96. In addition, the CBSA devised what it calls an administrative solution where it proposes recourse to the refund provisions of section 74 of the *Act* for "revenue neutral". The witness for the CBSA states as follows: ". . . [the] CBSA will allow that change under section 74 if an importer wants to. *There is no reason for [the importer] to want to do it, but if they want to do it and pay the money to file it, by all means go ahead*" [emphasis added], *ibid.* at 99. Such reasoning is absurd.

(for "UST") in order to be maintained. The goods in issue were always duty-free admissible importations originating in the United States and eligible, from the beginning, for UST/NAFTA tariff treatment. As examined in *Frito-Lay*, this never placed Southern Pacific in a refund situation, as synthesized by the CBSA; section 74 of the *Act* is not applicable.

17. For the same reasons given in *Bri-Chem*, the Tribunal also finds that the CBSA's actions in this matter constitute an abuse of process..

DECISION

18. The appeal is allowed. Amounts paid by Southern Pacific, in order to pursue this appeal, are to be refunded by the CBSA.

Jason W. Downey
Jason W. Downey
Presiding Member