TRANSPORTATION

Appeal from confidential decision of Canadian Transportation Agency wherein Agency holding there is an “interchange” at Scotford, Alberta within meaning of *Canada Transportation Act*, S.C. 1996, c.10, s. 111 — As result of this determination, Agency ordered appellant to interswitch at Scotford interchange traffic belonging to respondent originating from its Lamont elevator — Respondent, privately owned agri-food business, owning, operating 54 primary grain elevators in Western Canada of which 25 served solely by appellant, 28 served solely by Canadian Pacific Railway Company (CP) — Grain going through respondent’s elevators mostly transported by rail to end-use producers or to port terminals for carriage by ship — Appellant’s railway network connecting with that of CP at Scotford — Appellant, CP using infrastructure at Scotford to interswitch as many as 150 railcars per day between their respective networks — Respondent filing application before Agency, pursuant to Act, s. 127 seeking order for regulated, extended interswitching with respect to its Lamont, Westmor elevators — Appeal pertaining only to Agency’s decision regarding respondent’s Lamont elevator — Issues whether Agency: erring in making order of interswitching without naming CP as party to proceedings; erring in its interpretation of Act, ss. 111, 127; breaching its duty of procedural fairness to appellant in its assessment of parties’ respective evidence, submissions — Appellant arguing in particular that because Agency failing to name CP as party to proceedings, Agency made error of law, of jurisdiction in granting Interswitching Order for respondent’s Lamont traffic at Scotford interchange [20] — No provisions in either Act or *Canadian Transportation Agency Rules (Dispute Proceedings and Certain Rules Applicable to All Proceedings)* SOR/2014-104 requiring shipper seeking order of interswitching, such as respondent in present matter, to name both railway companies at interchange as respondents — To contrary, Act, s. 127(2)(a) providing that Agency may order one of railway companies at interchange to interswitch traffic of shipper — Furthermore, appellant not raising issue of jurisdiction before Agency, only raised participation of CP as matter of fairness to CP, arguing that CP should be given opportunity of making submissions — Ultimately, appellant neither objected to manner in which Agency sought submissions from CP nor asked Agency for order that CP be made a party to proceedings — Therefore, appellant could not now take up CP’s case concerning Interswitching Order made by Agency — Thus, ground of appeal without merit — As to second issue, appellant claimed Agency made reviewable error in interpreting words of definition of “interchange” found at Act, s. 111; more particularly, that words “the line of one railway company connects with the line of another railway company” interpreted too broadly by Agency; that Agency failed to consider purpose of interswitching provisions of Act, legislative scheme as whole — Further to decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1, applicable standard in present matter that of correctness since issue pertaining to interpretation of Act, ss. 111, 127 is question of law — Agency dealt with question of interpretation in summary manner concluding that because Act, s. 111, contrary to s. 140(1), not excluding spur lines, other auxiliary lines from words “railway line”, such lines therefore included in words “railway line” found in s. 111 definition of “interchange” — Agency failed to observe fundamental principles of statutory interpretation referred to by Supreme Court; adopted “implied exclusion rule” which Supreme Court of Canada previously rejected — Even under more deferential reasonableness standard, Agency’s failure to properly inquire into legislative intent behind provision in question would have been fatal to its decision — Correct interpretation of Act, ss. 111, 127 having to be determined — After serious consideration, determined that matter had to be returned to Agency for reconsideration; that Agency must determine correct interpretation — Matter returned to Agency since Court would benefit greatly from Agency’s fuller analysis as to why it believes one interpretation is better than other — Agency having considerable expertise not only with regard to its home statute but also to all matters pertaining to railways, including interswitching of traffic — With respect to

third issue as to whether Agency breached duty of procedural fairness to appellant in assessment of parties' respective evidence, submissions, [heading C, p. 18] in relying on procedural fairness, appellant mischaracterized issues it raised — Would be error of law, on part of Agency, to make adverse finding against appellant because it failed to file sur-reply evidence when it had no such right — Similarly, if appellant correct in assertion that Agency treated respondent's submissions as evidence, it followed that Agency made error of law — Agency cannot make findings of fact where there is no evidence to support those findings — Because of conclusion reached regarding interpretation issue, not necessary to dispose of final issue — Appeal allowed.

CANADIAN NATIONAL RAILWAY V. RICHARDSON INTERNATIONAL LIMITED (A-125-19, 2020 FCA 20, Nadon J.A., reasons for judgment dated January 23, 2020, 20 pp.)