

FINAL REPORT



Comparison of Canadian and United States Rail Economic Regulations

Prepared for:

The Railway Association of Canada

Prepared by:

CPCS

Table of Contents

- Acronyms / Abbreviations 1**
- Executive Summary 2**
 - 1 Purpose of the Report 2
 - 2 Scope of Rail Economic Regulation 2
 - 3 National Transportation Policy Statements 3
 - 4 Market Entry and Exit 4
 - 5 Level of Services 5
 - 6 Pricing of Services 5
 - 7 Competitive Access Provisions 7
 - 8 Mediation and Arbitration 8
 - 9 Cost of Capital and Revenue Adequacy 9
 - 10 Conclusion 9
- 1 Introduction 14**
 - 1.1 Background 14
 - 1.2 Purpose of this Report 14
 - 1.3 Structure of this Report 15
- 2 Canada and US National Transportation Policy Statements 16**
 - 2.1 Introduction 17
 - 2.2 Canada Transportation Policy Statement 17
 - 2.2.1 Canada Transportation Policy Statement 17
 - 2.2.2 Transportation Policy Statement Characteristics 18
 - 2.2.3 Creation and Evolution of the Transportation Policy Statement 19
 - 2.2.4 Role of the Policy Statement in Interpreting the CTA 20
 - 2.3 United States Transportation Policy Statement 21
 - 2.3.1 United States Transportation Policy Statement 21
 - 2.3.2 Adoption of the Transportation Policy Statement 23
 - 2.3.3 Transportation Policy Statement Characteristics 23
 - 2.3.4 Role of the Policy Statement in Interpreting 49 U.S.C. 24
 - 2.4 Summary and Key Findings 27

3 Market Entry and Exit	29
3.1 Canada	30
3.1.1 Certificate of Fitness	30
3.1.2 Construction of a Railway Line.....	32
3.1.3 Running Rights	32
3.1.4 Discontinuance.....	33
3.2 United States	37
3.2.1 Certificate to Construct and Operate	37
3.2.2 Exemption from the Need to Obtain a Certificate.....	38
3.2.3 Environmental Analysis.....	40
3.2.4 Abandonment and Discontinuance	40
3.3 Summary and Key Findings	43
4 Level of Services	46
4.1 Canada	47
4.1.1 Accommodation for Traffic – Section 113	48
4.1.2 Facilities for Traffic – Section 114.....	57
4.1.3 Adequate and Suitable Accommodation – Section 115	60
4.1.4 Complaint and Investigation Concerning Company’s Obligations – Section 116.....	61
4.1.5 Arbitration on Level of Services	67
4.2 United States	67
4.2.1 Common Carrier Transportation, Service and Rates – 49 U.S.C. 11101.....	68
4.2.2 Facilities for Interchange of Traffic – 49 U.S.C. 10742.....	71
4.2.3 Switch Connections and Tracks – 49 U.S.C. 11103	74
4.2.4 Car Service – 49 U.S.C. 11121 and 11122	74
4.2.5 Railroad Development – 49 U.S.C. 10907	76
4.2.6 Remedies.....	77
4.2.7 Statutory Limitations on the Jurisdiction of the Board.....	79
4.3 Summary and Key Findings	82
4.3.1 LOS Obligations of Canadian Federal Railway Companies	82
4.3.2 Canadian Rail LOS Complaint Mechanism	83
4.3.3 New CTA Amendments	84
4.3.4 LOS Obligations of U.S. Federal Rail Carriers.....	85

4.3.5	Mechanisms for Resolving Rail Service Issues in the U.S.....	85
4.3.6	Exempt Commodities.....	85
5	Pricing of Services.....	87
5.1	Canada.....	88
5.1.1	Where Are Rates and Charges Set Out?	88
5.1.2	Rates.....	91
5.1.3	The Notion of Reasonable Rate and Final Offer Arbitration.....	92
5.1.4	Revenue Cap for the Movement of Western Grain.....	94
5.1.5	Charges.....	100
5.2	United States	103
5.2.1	Where are rates and charges set out?.....	103
5.2.2	Rates.....	107
5.3	Summary and Key Findings	110
5.3.1	Tariffs	110
5.3.2	Confidential Contracts	111
5.3.3	Rates.....	112
5.3.4	Charges.....	115
6	Competitive Access Provisions	116
6.1	Canada.....	117
6.1.1	Joint Rates.....	118
6.1.2	Interswitching	118
6.1.3	Competitive Line Rates	119
6.1.4	Running Rights	120
6.2	United States	121
6.2.1	Through Routes.....	122
6.2.2	Terminal Trackage Rights and Reciprocal Switching	123
6.3	Summary and Key Findings	125
6.3.1	Joint Rates (Canada) and Through Routes (U.S.).....	126
6.3.2	Interswitching (Canada) and the Use of Terminal Facilities (U.S.)	126
6.3.3	Competitive Line Rates	127
6.3.4	Running Rights	128
7	Mediation and Arbitration.....	129

- 7.1 Canada 130
 - 7.1.1 Mediation..... 130
 - 7.1.2 Arbitration..... 132
- 7.2 United States 133
 - 7.2.1 Mediation..... 133
 - 7.2.2 Arbitration..... 134
- 7.3 Summary and Key Findings 135
- 8 Cost of Capital and Revenue Adequacy 137**
- 8.1 Canada 138
 - 8.1.1 Agency Cost of Capital Determination..... 138
 - 8.1.2 Calculation of the Cost of Capital..... 139
- 8.2 United States 141
 - 8.2.1 Board Cost of Capital Determination..... 141
 - 8.2.2 Calculation of the Cost of Capital..... 141
 - 8.2.3 Revenue Adequacy..... 141
- 8.3 Summary and Key Findings 143
- 9 Conclusion..... 146**
- 9.1 National Transportation Policy Statements 146
- 9.2 Rail Economic Regulatory Provisions 148
- 9.3 Opportunities for Reform..... 151

Acronyms / Abbreviations

Agency	Canadian Transportation Agency
Board	U.S. Surface Transportation Board (In its decisions the Board refers to itself as “the Board” or “the agency”)
CN	Canadian National Railway Company
CP	Canadian Pacific Railway Company
CTA	<u><i>Canada Transportation Act</i></u> S.C. 1996, c. 10, came into force on July 1, 1996 (except for subsection 142(2) which came into force on July 21, 1996), see SI/96-53.
FCA	Federal Court of Appeal
FOA	Final Offer Arbitration
ICC	U.S. Interstate Commerce Commission
NTA	<i>National Transportation Act</i>
NTA, 1987	<i>National Transportation Act, 1987</i>
RAC	Railway Association of Canada
U.S.	United States
49 CFR	Title 49 of the U.S. Code of Federal Regulations <u>Volume 8 (Parts 1000 - 1199)</u> <u>Volume 9 (Parts 1200 - 1332)</u>
49 U.S.C.	Title 49 of the United States Code The last major revisions to <u>Part A (Rail)</u> (sections 10101 to 11908) of Subtitle IV (Interstate Transportation) of 49 U.S.C. (Transportation) were carried out by way of <u>Pub. L. 104–88, title I, §102(a), Dec. 29, 1995, 109 Stat. 805</u> (<i>An Act to abolish the Interstate Commerce Commission, to amend subtitle IV of title 49, United States Code, to reform economic regulation of transportation, and for other purposes</i>) – the short title being the <i>ICC Termination Act of 1995</i>). Except as otherwise provided therein, the <i>ICC Termination Act of 1995</i> took effect on January 1, 1996.

Executive Summary

1 Purpose of the Report

The purpose of this Report is to characterize and compare the economic regulation of railways in Canada and the United States, and in particular to:

- Describe and highlight the similarities and differences in the respective statements of national transportation policy that underpin rail freight regulation;
- Describe and highlight the similarities and differences in the specific provisions relating to the principal objects of rail economic regulation in the two countries, including market entry and exit, level of services, pricing of services, competitive access, mediation and arbitration, and regulatory cost of capital; and
- Determine whether these comparisons suggest possible useful opportunities for change in how rail freight services are regulated in Canada.

2 Scope of Rail Economic Regulation

Canada and the U.S. have both enacted formal statements of national transportation policy which provide basic objectives and principles applicable to rail freight economic regulation. In addition, the principal objects of rail economic regulation in the two countries are generally similar in that both regulate entry and exit, level of services, pricing of services, competitive access, mediation and arbitration, have a regulatory cost of capital and permit confidential contracts.

At the same time there are significant, and sometimes fundamental, differences in how certain matters are regulated (i.e. pricing of services, confidential contracts, competitive access and cost of capital), and in the fact that certain matters are principal objects of regulation in Canada but not in the U.S. (i.e. the revenues that railways in Canada may earn from moving western grain) and vice versa (i.e. the provisions in the U.S. pertaining to railway revenue adequacy and the regulator's authority to exempt rail carrier activity from regulation).

The figure below highlights the principal matters covered by rail economic regulation in both countries.¹

Object of Regulation	Covered by Regulation	
	Canada	U.S.
National Transportation Policy Statement	Yes	Yes
Market Entry and Exit	Yes	Yes
Level of Services	Yes	Yes
Pricing of Services	Yes	Yes
Confidential Contracts	Yes	Yes
Competitive Access	Yes	Yes
Mediation and Arbitration	Yes	Yes
Cost of Capital	Yes	Yes
Revenues Earned from Transporting Grain	Yes	No
Railway Revenue Adequacy	No	Yes
Authority to Exempt Activity from Regulation	No	Yes

3 National Transportation Policy Statements

Canada and the U.S. have both enacted formal statements of national transportation policy intended to guide the regulation of transportation under federal jurisdiction. The statements are similar in their overall intent that competition and market forces should be relied on as the primary guide determining the provision of rail services and in their encouragement of deregulation.

Canada's statement, found in section 5 of the *Canada Transportation Act* (CTA) and first introduced in 1967, applies to transportation in general but subsumes railways. Since 1967, there have been several variants of the statement but the concepts that Canada is best served by an economically efficient transportation system, and that the best way to achieve this is to rely as far as possible on market competition, have remained constants.

Unlike in Canada, the U.S. policy statement, found in section 10101 of Title 49 of the United States Code, is specific to railways. It is also more direct and emphatic in its emphasis on deregulation. In the U.S., the policy is to allow *to the maximum extent possible* competition and demand for services to establish reasonable rates, and *to minimize the need for regulation* over the rail system. In Canada, it is instead stated that the objectives of policy *are most likely to be achieved* when competition and market forces are the prime agents in providing transportation services.

¹ Canada and the U.S. both have provisions relating to railway mergers and acquisitions, although these are not discussed in this Report.

In the U.S., the policy statement is also explicit about *allowing rail carriers to earn adequate revenues* in order to promote a safe and efficient rail transportation system. Canada's policy declaration includes no statement concerning revenue adequacy.

In both countries, the role of competition and market forces is not treated as absolute. Canada's policy statement, however, is again more encompassing and general while the U.S. statement is limited and focused on circumstances where the question of an imbalance of market power between railways and shippers arises.

4 Market Entry and Exit

The most salient point to be made with respect to market entry is that the regulatory barriers are low in both Canada and the U.S. Entry is relatively easy reflecting both countries' reliance on competition and market forces as the prime agent to direct the industry. However, the issuance of a railway operating certificate by the regulator is a pre-condition to operating or maintaining a railway.

For operation in Canada today, the requirement is a certificate of fitness from the Canadian Transportation Agency (the Agency) and, since January 2015, also a railway operating certificate of safety from the Minister of Transport. To obtain a certificate of fitness, an applicant needs to prove that there is adequate liability insurance coverage according to the regulations. If that is the case, the Agency must grant the certificate of fitness.

With respect to the construction of a railway line, the applicant must obtain a certificate of fitness and the proposed construction must be approved by the Agency, based on it considering the location of the line to be reasonable. In addition, regulations made under the *Canadian Environmental Assessment Act, 2012*, designate railway projects exceeding specified lengths as being subject to environmental assessment.

In the U.S., the requirement for construction or operation is a certificate from the Surface Transportation Board (the Board), which must be granted unless the Board finds the proposed activities to be inconsistent with public convenience and necessity. Under the Board's statutory exemption authority, authorization for the activities may also be obtained by applying for an exemption from the need for the required certificate.

With respect to discontinuance of railway lines, Canadian regulations were greatly liberalized under the CTA, while the process for discontinuance is geared to retain, when possible, operation of the line in question through sale, lease or other transfer to a private party, government, or urban transit authority. In the U.S. a rail carrier must satisfy the Board that public convenience and necessity require or permit the abandonment or discontinuance.

5 Level of Services

With their basis in the railways' historic common carrier obligations, the Canadian and U.S. railway statutory level of service (LOS) obligations have much in common. In both countries, these obligations are not considered absolute but are judged according to a long accepted standard of "reasonableness" taking into account all the circumstances surrounding the provision of service in a given situation. In Canada, this stems from the 1959 Supreme Court decision in the *Patchett* case, which still continues to be relied upon by the Agency. Both countries also have statutory mechanisms for resolving rail LOS issues through the lodging of a complaint and subsequent investigation by the regulator. And in both countries the regulator has very wide powers to order a railway company to remedy a situation.

In a recent case the Agency introduced what it calls an Evaluation Approach to LOS applications. There are at least two major questions with this approach and the resulting decision, which has been disputed and is currently before the courts. Is the Evaluation Approach something new and at variance with the wording of sections 113 to 115 of the CTA (and the *Patchett* decision) or is it rather just the streamlining in a logical order of existing precedents? If the latter, was the Evaluation Approach nonetheless correctly applied to the facts of the case before the Agency?

In Canada, there has been no change in the basic railway LOS obligations as a result of the move towards rail deregulation in recent decades. In contrast, the U.S. LOS provisions have been greatly narrowed in terms of the scope of their application. In the U.S., a shipper who chooses to enter into a confidential contract with one or more rail carriers loses his various statutory protections, including those relating to level of services. In addition, the Board has used its authority to exempt many commodities and forms of rail transportation from the shipper protections normally afforded by the LOS provisions. (Under U.S. legislation, the Board can exempt traffic from regulation if it determines that the market for the traffic is sufficiently competitive that regulation of the traffic is not necessary.)

Also recently, new provisions have been introduced in Canada that relate to the railway LOS obligations. Since 2013, a shipper has the right to request that a railway company make it an offer to enter into a confidential contract respecting the manner in which the railway company is to fulfil its LOS obligations, and a recourse in the form of an arbitration proceeding if a shipper is unable to negotiate such a contract. In 2014, amendments to the CTA also imposed new service obligations on CN and CP in the form of minimum shipment levels with respect to western grain movements.

6 Pricing of Services

Railway pricing today in both Canada and the U.S. is largely market determined. While subject to certain statutory provisions, the regulations provide far more commercial freedom than

prior to the *National Transportation Act* of 1967 in Canada and the *Staggers Act* of 1980 in the U.S. In both countries, the restrictive tariff regimes that governed rates before the era of deregulation have been effectively abolished. Still, there are fundamental differences, most profoundly in how rates in general are assured to be reasonable. In addition, in the U.S., much traffic is exempted from rate regulation altogether, again under the Board's exemption authority.

Regulatory mechanisms in Canada and the U.S. differ fundamentally in how they attempt to ensure rates are reasonable and protect shippers from potential abuse of railway market power. In Canada, there are no longer any regulated rates *per se*, including maximums or minimums (except for regulated interswitching and Competitive Line Rates). Instead there are a number of recourses, most important of which for limiting rates in general is final offer arbitration (FOA). In Canada, FOA is a key vehicle for resolving shipper rate and service disputes with railways. Only shippers may invoke the process, and its use is open to all shippers that are not party to a confidential contract (as described below) and not conditioned on the absence of competition. The mechanism for limiting rates in the U.S. is totally different. There is a statutory threshold above which rates may be held to be unreasonable (180% of variable costs). This, however, can only be considered if the Board first makes a determination of market dominance by the rail carrier.

One of the most significant changes in both countries was to introduce in the 1980s permission for confidential contracts covering the rates and conditions for rail services. Legally, however, the treatment of confidential contracts is different. In the U.S., where there is a confidential contract, the rail carrier simply ceases to be a common carrier with respect to the contracted services. In Canada, the railway company remains subject to the statutory LOS obligations, although the terms of the contract are binding on the Agency in the event of a LOS complaint and investigation. Confidential contracts in Canada are also effectively immunized from FOA since the submission to FOA of any matter governed by a confidential contract must have the consent of all parties to the contract. As already noted, the CTA was amended in 2013 to oblige railway companies to enter into confidential contracts with any shipper who requests one, and to establish an arbitration process to settle disputes regarding a railway's offer.

In Canada, the CTA was amended in 2008 to also provide shippers with a remedy aimed at protecting them against unreasonable ancillary charges or associated terms and conditions for the movement of traffic.

Grain transportation in Canada has historically had special regulatory treatment. In 2000, the Maximum Revenue Entitlement or "revenue cap" replaced maximum freight rates regulation for western grain. Nothing analogous exists in the U.S. where grain is, for the most part, treated like any other commodity. Under the grain revenue cap, the railways are able to offer rate and service packages that promote efficiencies. Grain producers are by virtue of the

revenue cap intended to be protected from excessive rail freight prices, but there is no definition of what constitutes such prices. The program has also lent itself to disputes and appeals, does not account for cost differences in how grain may be shipped (such as bulk versus containers) and can act as an investment disincentive.

7 Competitive Access Provisions

Both the Canadian and U.S. statutes contain “competitive access” provisions, meant to provide shippers with competitive alternatives from which they might not otherwise be able to benefit. These provisions include:

- joint rates (Canada) and through routes (U.S.);
- interswitching (Canada), and terminal trackage rights and reciprocal switching (U.S.);
- Competitive Line Rates (Canada); and
- running rights (Canada).

Joint rates and through routes guarantee that shippers will be able to effectively move traffic over a continuous route operated by two or more carriers.

Interswitching guarantees that a shipper with direct access to only one railway at the origin or destination of a move can have the shipment transferred to another carrier at a rate prescribed by regulation if the origin or destination is within a certain radius of an interchange point. Interswitching is available unconditionally to all shippers having direct access to one railway.

In 1987, the interswitching radius was extended from its original 4 miles to 30 km. In 2014, the CTA was amended to provide the Agency with authority to extend the radius to 160 km in the Prairie Provinces, which it has done. The prescribed rate is solely cost-based. It takes no account of the revenue adequacy of the terminal carrier, of any forgone contribution to fixed costs that might otherwise have been earned by the terminal carrier, nor of the quality or competitiveness of the terminal carrier’s service.

Interswitching naturally requires the local railway and the competing railway to each have a line that connects with the other. Ownership, however, is not required for a railway company to be considered as having a line and for the Agency to order interswitching. Having only operating rights over a line may be sufficient. As a result, one US railway has through two recent decisions of the Agency gained access through interswitching to two locations in Canada where it has only operating rights and no actual line into Canada. Both decisions have been contested (by CN and CP, respectively) and are before the Federal Court of Appeal.

In the U.S., the Board can require terminal facilities owned by one carrier to be used by another carrier (terminal trackage rights), or the railroad owning the terminal facilities to transport the traffic on behalf of the other carrier (reciprocal switching), if it finds this to be practicable and in the public interest. Since 1985, the meaning of "public interest" in this context has been greatly narrowed to mean determining whether the incumbent carrier has acted in an anticompetitive manner.

In Canada, CLRs allow a shipper served directly by only one railway, and located beyond the regulated interswitching distance, to ask the Agency to set a rate for transporting the goods over the originating railway to an interchange for transfer to a connecting carrier. The CLR is based on the interswitching rate plus, for the additional distance, the system average revenue per tonne-km for moving similar traffic over similar distances.

In Canada, if a railway company wishes to run over the lines of another railway, and the two cannot reach an agreement, the "guest" railway company can ask the Agency to approve such rights and set the terms. In decisions in 2001 and 2002, the Agency determined that it does not have authority to grant running rights for the purpose of soliciting as well as carrying the traffic of shippers served by a "host" railway (the rights are limited solely to transit rights). The Agency also found that granting statutory running rights first requires evidence of actual market abuse or failure.

8 Mediation and Arbitration

Canadian and U.S. legislation both provide rail-related dispute resolution through mediation or arbitration. There are, however, some significant differences.

In Canada, mediation is strictly voluntary and requires the agreement of both sides. The Agency has no powers to compel mediation. Mediation can take place either before or after a formal complaint or application is filed. Similar to Canada, parties in the U.S. can voluntarily request mediation, including those involved in a formal proceeding before the Board. However, unlike Canada, the Board can compel parties in a formal proceeding to mediate. Furthermore, the Board requires the parties to a rate dispute to engage in mediation at the start of the case.

In Canada, the Agency may, if all parties request it, arbitrate a dispute over any railway matter covered by the Railway Transportation or Final Offer Arbitration parts of the CTA, or over any rate or charge for the movement of goods by rail or provision of incidental services. Parties in the U.S. can also voluntarily decide to use arbitration procedures provided by the Board. However, unlike in the U.S., a shipper in Canada can unilaterally take a railway to arbitration for some disputes, i.e. under FOA or under the new recourse for shippers who are unable to reach agreement on an LOS contract.

9 Cost of Capital and Revenue Adequacy

The cost of capital plays a role in rail regulation in both Canada and the U.S. Typically, regulatory agencies estimate the cost of capital by calculating some variant of the weighted average cost of capital (WACC).

In Canada, the cost of capital is used principally as a factor in determining the annual revenue cap for transportation of western grain and in determining interswitching rates, thereby affecting railway revenue. Cost of capital rates are also determined on a case-by-case basis as required for other proceedings, such as LOS complaints. In the U.S., the cost of capital is used as the benchmark in assessing railway revenue adequacy, and also in prescribing maximum rate levels, rail line abandonment proceedings, and in setting compensation for use of another carrier's lines.

The basic elements involved in estimating the cost of capital are similar in Canada and the U.S. (capital structure, cost of debt and cost of equity), but due to the different methodologies used, the resulting estimates differ widely, for example 11.32% on an after-tax basis for U.S. railways in 2013, versus estimates in the neighborhood of 6%-7% on a pre-tax basis for CN and CP. In particular, the allowable cost of equity has differed sharply between Canada and the U.S., with the Canadian methodology tending to yield significantly lower estimates, and estimates that have been eroding over time while remaining stable in the U.S.

10 Conclusion

Canada's National Transportation Policy Statement

Both Canada and the U.S. have adopted formal statements of national transportation policy intended to guide the regulation of transportation. These, as explained in this Report, are similar in their overall intent that competition and market forces are meant to be the primary guide in regulating rail transportation services and in encouraging deregulation, yet there are major differences between the two statements.

From a review of the Agency's decisions it is fair to conclude that Canada's policy statement – even in its latest, fairly short version, adopted in 2007 – is too general to dictate to the Agency a particular result in any particular case. While the CTA covers mostly air and rail transportation (and in the latter case the focus is overwhelmingly on freight), the policy statement purports to cover the whole of the “national transportation system”. This is in sharp contrast not only to the U.S. rail-specific statement, but also to the equally focused Purpose Clause, at section 4, of the *Canada Marine Act*² which limits itself to marine transportation. Furthermore, besides being general, the CTA statement espouses what are

² S.C. 1998, c. 10.

often competing considerations. Hence it provides very little direction to the Agency (or to anybody else).

Nonetheless, the main objective of the policy (at least based on the frequency to which the Agency refers to that objective in its decisions) is that competition and market forces are to be, whenever possible, the prime agents in providing viable and effective transportation services, and to make this possible section 5 of the CTA is understood as encouraging deregulation. Ironically enough, however, it is Parliament itself which has recently been undercutting its own avowed policy of deregulation. As noted by the Supreme Court of Canada in [*Canadian National Railway Co. v. Canada \(Attorney General\)*](#) there has been a "move towards partial re-regulation in the rail sector after two decades of deregulation."³ The [*Fair Rail for Grain Farmers Act*](#)⁴ is the latest example of this trend.⁵

Canadian Rail Economic Regulatory Provisions

As highlighted above, the principal objects of rail economic regulation in Canada and the U.S. are mostly similar, but there are also significant, and sometimes fundamental, differences in how certain matters are regulated. Overall, however, and consistent with the tenor of the respective policy statements, government in Canada clearly intervenes far more extensively in the rail marketplace than does government in the U.S.

Specifically:

- While the respective LOS provisions have many similarities, their scope of application has been sharply narrowed in the U.S. mainly because of the different treatment of confidential contracts in the two countries and the statutory authority of the Board to exempt traffic from regulation.
- The manner in which rates are regulated differs fundamentally. U.S. legislation provides a specific ceiling (180% of variable costs) for a rate to even be considered unreasonable while Canada instead has final offer arbitration. Moreover, in the U.S. a great deal of traffic is exempted from rate regulation by virtue of the Board's exemption authority, or because the Board must first make a finding of market dominance by the rail carrier before it can review the rate in question. In Canada, the situation is the reverse in that FOA is not conditioned on the absence of competition or other market factors; it is available unconditionally to any shipper (that is not party to a confidential contract) that chooses to make use of it.

³ 2014 SCC 40, at paragraph 23.

⁴ S.C. 2014, c. 8.

⁵ For further details on this trend towards re-regulation, see CPCS, *Evolution of Canadian Railway Economic Regulation and Industry Performance Under Commercial Freedom* (November 28, 2014).

- Confidential contracts are also treated very differently. In the U.S., where there is a confidential contract, the rail carrier simply ceases to be a common carrier with respect to the contracted services. In Canada, the rail carrier remains subject to the statutory LOS obligations, although the terms of the contract are binding on the Agency in the event of a complaint and investigation. In addition, the CTA now obliges a railway company to enter into a confidential contract with any shipper who requests one, and provides an arbitration process to settle disputes regarding the railway's offer.
- Canadian and U.S. legislation both contain competitive access provisions. Canada's, however, are more numerous. In one key case, Canadian regulated interswitching, this is available unconditionally to any shipper having direct access to one railway, whereas the closest corresponding U.S. provisions require the Board to first determine whether the local rail carrier has acted in an anticompetitive manner. Additionally, the prescribed interswitching distance limit has been extended (provisionally) from 30km to 160km in the Prairie Provinces.
- In Canada, a railway company that wishes to run over the lines of another railway can ask the Agency to approve such rights and set the terms, although the Agency in this case has set clear pre-conditions and limits on its use. Provisions similar to Canadian running rights, however, do not exist in the U.S.
- Both Canada and the U.S. provide mechanisms for resolving rail-related disputes voluntarily through mediation or arbitration. However, unlike the U.S., a shipper in Canada can unilaterally take a railway to arbitration for some disputes, i.e. under FOA or under the new recourse for shippers who are not able to reach agreement on a confidential contract.
- In Canada, grain transportation has historically had special regulatory treatment including, for decades, the setting of rates by statute. In 2000, the revenue cap replaced the maximum freight rate regulation for western grain. Nothing analogous exists in the U.S. where grain is, for the most part, treated like any other commodity.

Lastly, and as also noted above, a major difference between Canada and the U.S. is that U.S. policy has an explicit objective of allowing rail carriers to earn adequate revenues. In the U.S., the cost of capital is used as the benchmark in assessing railway revenue adequacy. The only provision in Canada that might be regarded as having a bearing on revenue adequacy is section 112 of the CTA which requires that: "A rate or condition of service established by the Agency...must be commercially fair and reasonable to all parties."

Opportunities for Reform in Canada

The review and comparison of Canadian and U.S. rail economic regulation presented in this Report suggests the following opportunities for change in the Canadian regulatory regime:

- First, the current *Canada Transportation Act* Review presents an opportunity to revisit Canada's statement of National Transportation Policy. Although the statement seeks –

appropriately – to balance the requirements for economic efficiency and reliance on market competition with appropriate public interest considerations, it does so in such a way that the statement is too vague to be of practical value.

Under section 53 of the CTA, giving consideration to the policy statement and possibly recommending changes to it are an explicit part of the CTA Review process. Admittedly, it was reviewed in depth by the CTA Review in 2000-2001, and as a result streamlined and updated in 2007. Nevertheless, the statement remains amorphous.

Another issue that should be mentioned in this regard is that the policy statement, in its current form, no longer makes reference to reliance on user charging, a principle that had been embedded in all the previous versions until 2007.⁶

- Second, an important question is whether users of rail services should have recourse to regulatory remedies in markets for services where sufficient competition exists? As may be seen in this Report, the ability of shippers in Canada to access key provisions – including LOS complaints, FOA, interswitching, CLRs and the right to a confidential contract – is not conditioned on the absence of competition or abuse of market power by railways. Yet it is only when one party is abusing monopoly power that such regulation is called for. The various regulatory remedies should be re-examined in light of whether they should be accessible irrespective of market conditions.
- Third, regulated interswitching is a key provision in Canada that has recently been changed radically. Both the specific changes, including the extension of the distance limit to 160 km in the Prairie Provinces, and the process by which this has been done, are questionable. The extension to 160km increases significantly the rail traffic base subject to fixed regulated rates, a large step back towards a regulatory approach that Canada abandoned over thirty years ago. Furthermore, no analysis of: (i) the changes introduced; (ii) the conditions requiring them; (iii) how these changes fit into the larger picture of available shipper remedies; or (iv) alternative options was provided in support of the decisions. In addition, the changes were implemented by regulatory change rather than legislative amendment, something the Agency itself commented upon in 2004:

The Agency considers that extending the interswitching distance limits from 30 to 150 kilometres would constitute a policy amendment that would have substantial repercussions in the rail transportation industry and the magnitude of these

⁶ Beginning with the first policy statement in 1967, the acceptance of reliance on user charging as a principle was expressed in terms similar to the following: “each carrier or mode of transportation, as far as practicable, bears a fair proportion of the real costs of the resources, facilities and services provided to that carrier or mode of transportation at public expense.” See, e.g., *Canada Transportation Act Review, Vision and Balance* (June 2001), p. 308.

repercussions would be so significant that such an amendment cannot be contemplated by way of a regulatory change.⁷

These new interswitching provisions should be allowed to expire on August 1, 2016, as per the sunset clause under which they have been put into effect.

- Finally, there is the matter of the unique treatment accorded to western grain. The CTA Review should consider whether grain should continue to have special treatment or instead be treated as any other commodity. There is no well-established economic reason for continuing to treat grain differently, and as noted in this Report, there are questions regarding the justification and effect of the Maximum Revenue Entitlement. Furthermore, as noted by the *Canada Transportation Act Review Panel* in 2001, the legislation that introduced the cap on grain rates in 1995, and which was replaced by the Maximum Revenue Entitlement in 2000, contemplated the eventual sunseting of any special regulatory regime for grain rates.⁸

⁷ Canadian Transportation Agency, *Regulatory Impact Analysis Statement* (September 23, 2004).

⁸ *Canada Transportation Act Review, Vision and Balance*, op. cit., p. 73.

1 Introduction

1.1 Background

On June 25, 2014, the Government of Canada launched the Review of the *Canada Transportation Act* (CTA) as required under section 53 of the CTA, including the appointment of a Chair of the Review and five Advisors.⁹ Under the current legislation, a report is to be provided to the Minister eighteen months after the appointment of the persons mandated to conduct the Review. As in the past, engagement and advice is being sought from all interested parties. Also as in the past, rail transportation is a key subject of the Review.¹⁰ Accordingly, the Railway Association of Canada (RAC) has, for purposes of its participation in the Review, engaged CPCS to prepare this report comparing rail economic regulation in Canada and the United States.

1.2 Purpose of this Report

The purpose of this Report is to characterize and compare the economic regulation of railways in Canada and the United States, and in particular to:

- Describe and highlight the similarities and differences in the respective statements of national transportation policy that underpin rail freight regulation;
- Describe and highlight the similarities and differences in the provisions relating to the principal objects of rail economic regulation in the two countries, including market entry and exit, level of services, pricing of services, competitive access, mediation and arbitration, and regulatory cost of capital;
- Determine whether these comparisons suggest possible useful opportunities for change in how rail freight services are regulated in Canada.

⁹Government of Canada, [Canada Transportation Act Review](#).

¹⁰Government of Canada, [Mandate](#).

1.3 Structure of this Report

This Report consists of the following chapters:

- Chapter 1 – Introduction
- Chapter 2 – Canada and United States National Transportation Policy Statements
- Chapter 3 – Market Entry and Exit
- Chapter 4 – Level of Services
- Chapter 5 – Pricing of Services
- Chapter 6 – Competitive Access Provisions
- Chapter 7 – Mediation and Arbitration
- Chapter 8 – Cost of Capital and Revenue Adequacy
- Chapter 9 – Conclusion

2 Canada and US National Transportation Policy Statements

Key Messages

- This chapter describes, and highlights the similarities and differences in, the Canadian and U.S. governments' formal statements of national transportation policy, contained in their principal statutes governing economic regulation of railways.
- The Canadian and U.S. policy statements are similar in their overall intent that competition and market forces should be relied on as the primary guide determining the provision of rail transportation services, and in their encouragement of deregulation.
- Canada's statement of National Transportation Policy, first introduced in 1967, applies to transportation in general. It subsumes railways but is not directed specifically at the railways.
- Since 1967, there have been several variants of the policy statement but the concepts that Canada is best served by an economically efficient transportation system, and that the best way to achieve this is to rely as far as possible on market competition, have remained constants.
- Case law in Canada supports both the idea that the main principle is to rely on competition and market forces as the prime agent in providing transportation services, and that the policy encourages deregulation.
- Unlike Canada, the U.S. policy statement is directed specifically at railways. It is strongly deregulatory and more direct and emphatic in this respect than Canada's, including the objective of minimizing the need for rail regulation.
- Unlike in Canada, U.S. government policy is also explicit in recognizing the value of and allowing rail carriers to earn adequate revenues to promote a safe and efficient rail transportation system.
- In both countries, the role of competition and market forces is not treated as absolute. Canada's policy statement, however, is again more encompassing and general while the U.S. statement is limited and focused on circumstances where the question of an imbalance of market power between railways and shippers arises.

2.1 Introduction

In Canada, Parliament is responsible for establishing federal transportation policy. In the U.S., it is Congress that establishes federal transportation policy. In both countries, the principal statutes governing the economic regulation of railways each contain a formal statement of the basic objectives and underlying principles of their policy. For Canada, these policy statements are set out in section 5 (“National Transportation Policy”) of the CTA. For the U.S., they are set out in sections 10101 (“Rail transportation policy”) and 101 (“Purpose”) of Title 49 of the United States Code (49 U.S.C.).

In this chapter we describe and compare the Canadian and U.S. statements of transportation policy that today underpin the economic regulation of railways by the federal governments in the two countries.

Because the two policy statements are basically, from a legal point of view, preambles to the other provisions of the respective statutes, we also indicate here and in later chapters how the regulatory authorities – the Canadian Transportation Agency (Agency) and U.S. Surface Transportation Board (Board) – make use, respectively, of section 5 of the CTA and 49 U.S.C. 10101 in deciding matters brought before them.

2.2 Canada Transportation Policy Statement

2.2.1 Canada Transportation Policy Statement

Canada’s statement of National Transportation Policy reads:

It is declared that a competitive, economic and efficient national transportation system that meets the highest practicable safety and security standards and contributes to a sustainable environment and makes the best use of all modes of transportation at the lowest total cost is essential to serve the needs of its users, advance the well-being of Canadians and enable competitiveness and economic growth in both urban and rural areas throughout Canada. Those objectives are most likely to be achieved when

- (a) competition and market forces, both within and among the various modes of transportation, are the prime agents in providing viable and effective transportation services;
- (b) regulation and strategic public intervention are used to achieve economic, safety, security, environmental or social outcomes that cannot be achieved satisfactorily by competition and market forces and do not unduly favour, or reduce the inherent advantages of, any particular mode of transportation;

- (c) rates and conditions do not constitute an undue obstacle to the movement of traffic within Canada or to the export of goods from Canada;
- (d) the transportation system is accessible without undue obstacle to the mobility of persons, including persons with disabilities; and
- (e) governments and the private sector work together for an integrated transportation system.

2.2.2 Transportation Policy Statement Characteristics

Canada's statement of national transportation policy is a general statement applicable to the transportation system as a whole.

The National Transportation Policy statement subsumes railways but is not directed specifically at the railways, nor does Canada have any policy statement specific to railway transport. In this, Canada differs from the U.S., as may be seen in Chapter 2.3 below.

Canada's transportation policy statement opens by invoking that, in order to effectively serve its intended purposes, the transportation system must:

- Be competitive, economic and efficient;
- Meet the highest practicable safety and security standards;
- Contribute to a sustainable environment; and
- Make the best use of all modes at the lowest total cost.

The statement sees the purposes of the transportation system as serving the needs of its users, advancing the well-being of Canadians and enabling competitiveness and economic growth in both urban and rural areas. Underpinning the policy is the principle that competition and market forces should be relied upon as the prime agents (CTA, section 5(a)), and that regulatory interventions are appropriate only where competition and market forces cannot achieving satisfactory results (CTA, section 5(b)).

Other underling principles of the Canadian national transportation policy are:

- Public interventions should not unduly favour, or reduce the inherent advantages of, any particular mode;
- Rates and conditions should not constitute an undue obstacle to the movement of traffic;
- Transportation should be accessible without undue obstacle to the mobility of persons, including those with disabilities;
- Governments and the private sector should work together for an integrated system.

2.2.3 Creation and Evolution of the Transportation Policy Statement

Until 1967, Canada had no explicit, legislated national transportation policy statement. It was the *National Transportation Act (NTA)* of 1967 that first included such a statement. The intent was a new unified approach encompassing all modes under federal jurisdiction derived from basic principles and assumptions about transportation. Underpinning this first statement were the recommendations of the seminal MacPherson Royal Commission (1959-1961). A key reason for creating the MacPherson Commission was to find a way of adjusting Canadian rail freight transportation to the post-War reality of trucking. Allowing competition between rail and truck on comparatively equal terms was seen, not necessarily as the preferred solution, but as the only practicable direction for regulation.¹¹ As explained by one of Canada's most eminent transportation policy authorities:

The perceived need for a statement of policy direction emerged from the MacPherson Royal Commission of 1959-61. Many of us have forgotten what a different era it was pre-1960. This was an era when rail dominance of both freight and passenger transport was only just passing. Transport policy meant "railway policy." To an extent, rail rates were regarded as an instrument of public policy, although the desires of proponents of rail rate regulation could not be satisfied. Darling (1974) christened this a time of "railway age ideology."¹²

Starting with the NTA in 1967, there have been several variants of the policy statement. While these grew over time in length and complexity, certain basic principles stayed constant and have, as noted by the *Canada Transportation Act Review Panel*, since 1967 guided the evolution of federal transportation legislation and policy, although more slowly for some modes than others. These principles are that Canada is best served by an economically efficient transportation system, and the best way to achieve an efficient system is to rely on market competition as far as possible.¹³

The current version of the statement of National Transportation Policy was adopted in 2007 with the passage of Bill C-11. As may be seen above, the fundamental objective of an economically efficient transportation system with reliance on competitive market forces as the prime agent, remain as part of the statement. However, Bill C-11 simplified what over time had become an unwieldy statement, and also updated it by adding the references to security and protection of the environment.

¹¹John Gratwick, *The Evolution of Canadian Transportation Policy*, research conducted for the *Canada Transportation Act Review* (March 2001), p. 1 and p. 3. A detailed discussion of the far-reaching MacPherson Commission recommendations and the extent of their reflection in the 1967 NTA, including the National Transportation Policy statement, may be found in W.G. Scott, *Canadian Railway Freight Pricing*, (Queen's University, 1985), Chapter 8.

¹²W.G. Waters II, *Canada's Statement on National Transportation Policy*, Canadian Transportation Research Forum, Proceedings of the 41st Annual Conference (May 28-31, 2006), p. 794.

¹³*Canada Transportation Act Review Panel, Vision and Balance* (June 2001), pp. 19-20 and pp. 310-312.

2.2.4 Role of the Policy Statement in Interpreting the CTA

The Canadian Transportation Agency, Canada's authority responsible for the economic regulation of rail transportation, has mentioned on a number of occasions that:

The cornerstone of the CTA is the statement of the national transportation policy in section 5. While essentially a preamble to the statute, it nevertheless directs that the CTA is enacted in order to attain the stated objectives of the policy to the extent that they fall within the purview of the subject matters under the legislative authority of Parliament relating to transportation.¹⁴

This perhaps overstates the role of section 5 in the application of the CTA. The stated objectives of the national transportation policy are implemented by the specific regulatory provisions of the CTA and, in the currently largely "deregulated" environment, by the absence of regulatory provisions.¹⁵ Additionally there are clear limits as to what section 5 can achieve as a preamble to the CTA.¹⁶

¹⁴ Agency Decision [No. 35-R-2009](#), dated February 6, 2009, in re: *Application by the Canadian National Railway Company for a determination as to whether certain rail activities with the BNSF Railway Company in the Winnipeg area constitute interswitching for the purpose of section 127 of the Canada Transportation Act*. To the same effect, see: Agency [Decision No. 212-R-2001](#), dated May 3, 2001, in re: *Application by the Hudson Bay Railway Company pursuant to sections 93 and 138 of the Canada Transportation Act, for, inter alia, an order granting it the right to run and operate trains on and over specified lines of the Canadian National Railway Company, and to use the whole or any portion of the right of way, tracks, terminals, stations or station grounds, interchanges and facilities located on or used in conjunction with the said railway lines for the express purpose of soliciting and carrying the freight of shippers served by these lines*.

¹⁵ Rothstein J.A. in [Canadian National Railway Co. v. Moffatt](#), 2001 FCA 327 (FCA), at paragraph 27.

¹⁶ A review of the decisions of the Agency and of the Federal Court of Appeal indicates the following practical limitations with respect to section 5:

(1) Section 5 does not confer on the Agency jurisdiction when none is expressly provided for in the CTA or in other relevant Acts of Parliament. As explained by Rothstein J.A. in [Canadian National Railway Co. v. Moffatt](#), 2001 FCA 327 (FCA), at paragraph 27: "[S]ection 5 is not a jurisdiction-conferring provision."

(2) Section 5 is only one of a number of interpretation aids to assist the Agency in interpreting a disputed provision of the CTA. These are: the wording of the disputed provision, its context or "fit" within the statute, the overall regulatory framework in the industry, the policy behind the provision, the national transportation policy (where appropriate) and any precedents that may be relevant. See Agency [Decision No. 212-R-2001](#), dated May 3, 2001, in re: *Application by the Hudson Bay Railway Company pursuant to sections 93 and 138 of the Canada Transportation Act*, etc.

(3) In some cases, section 5 is not used as a tool of analysis but merely to provide supplementary justification for a decision already made on other grounds. e.g. Agency [Decision No. 206-R-1988](#), dated August 2, 1988, re: *Application by the Canadian National Railway Company, dated November 24, 1987, for the rescission of certain Railway Transport Committee Orders applicable on special interswitching at Montreal East, Quebec; and Hamilton, North Bay and Toronto, Ontario*. A mere reference to section 5 is sometime deemed sufficient. See [Canadian National Railway Co. v. Eagle Forest Products Ltd. Partnership](#), [2000] 3 FC 46 (FCA), at paragraph 26.

(4) The National Transportation Policy, as set out in section 5 of the CTA, "both informs and, because of its statutory base, imposes a legal limitation on, the Agency's exercise of discretion" when such discretion is required

2.3 United States Transportation Policy Statement

2.3.1 United States Transportation Policy Statement

U.S. legislation contains, at 49 U.S.C. 101, a statement of purpose for the Department of Transportation that, "... national objectives...require the development of transportation policies and programs that contribute to providing fast, safe, efficient, and convenient transportation at the lowest cost consistent with those and other national objectives, including the efficient use and conservation of the resources of the United States."¹⁷

U.S. legislation also sets out, at 49 U.S.C. 10101, the policy of the federal government specifically respecting railways. Actually adopted two years before the momentous *Staggers Act* reforms of 1980, by way of section 10101 of the *Revised Interstate Commerce Act* of 1978¹⁸, it now reads:

In regulating the railroad industry, it is the policy of the United States Government—

(e.g. when the Agency needs to take into account "the public interest" or what is "reasonable") "However, since the Policy expresses the often competing considerations that the Agency must balance when making a particular decision, it inevitably operates at a level of some generality and does no more than guide and structure the Agency's exercise of discretion in any given fact situation. Thus, it imposes a relatively soft legal limit on the Agency's exercise of power, in the sense that it will rarely dictate a particular result in any particular case." (*Ferroequus Railway Co. v. Canadian National Railway Co.*, 2003 FCA 454 (FCA), at paragraphs 21 and 22.)

(5) Finally it should be noted that, while the national transportation policy is used to interpret other provisions of the CTA, there are almost no decisions where words or expressions in section 5 are actually interpreted, save for the words "undue", "obstacle" and "disability" as they appear in section 5(d) ("the transportation system is accessible without undue obstacle to the mobility of persons, including persons with disabilities"). See *VIA Rail Canada Inc. v. National Transportation Agency*, [2001] 2 FC 25 (FCA); Agency [Decision No. 125-AT-R-2002](#), dated March 19, 2002, in re: *Application by Peter Tongepursuant to subsection 172(1) of the Canada Transportation Act, S.C., 1996, c. 10, with respect to the statements made by a VIA Rail Canada Inc. personnel member regarding his right to self-determination and the requirement to have an attendant, during train travel provided by VIA Rail Canada Inc. from Toronto to Ottawa on August 19, 2001*; and [Council of Canadians with Disabilities v. VIA Rail Canada Inc.](#), 2007 SCC 15 (SCC).

¹⁷ Introduced originally as section 2(a) of the Department of Transportation Act (1966), Pub. L. 89-670, 80 Stat. 931.

¹⁸ Pub. L. 95-473, 92 Stat. 1337. In 1976 the U.S. Congress had already introduced an embryonic statement of policy, at section 101(b) of the Railroad Revitalization and Regulatory Reform Act, which provided as follows: "Policy – It is declared to be the policy of the Congress in this Act to - (1) balance the needs of carriers, shippers, and the public; (2) foster competition among all carriers by railroad and other modes of transportation, to promote more adequate and efficient transportation services, and to increase the attractiveness of investing in railroads and rail-service-related enterprises; (3) permit railroads greater freedom to raise or lower rates for rail services in competitive markets; (4) promote the establishment of railroad rate structures which are more sensitive to changes in the level of seasonal, regional, and shipper demand; (5) promote separate pricing of distinct rail and rail-related services; (6) formulate standards and guidelines for determining adequate revenue levels for railroads; and (7) modernize and clarify the functions of railroad rate bureaus."

- (1) to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail;
- (2) to minimize the need for Federal regulatory control over the rail transportation system and to require fair and expeditious regulatory decisions when regulation is required;
- (3) to promote a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues, as determined by the Board;
- (4) to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense;
- (5) to foster sound economic conditions in transportation and to ensure effective competition and coordination between rail carriers and other modes;
- (6) to maintain reasonable rates where there is an absence of effective competition and where rail rates provide revenues which exceed the amount necessary to maintain the rail system and to attract capital;
- (7) to reduce regulatory barriers to entry into and exit from the industry;
- (8) to operate transportation facilities and equipment without detriment to the public health and safety;
- (9) to encourage honest and efficient management of railroads;
- (10) to require rail carriers, to the maximum extent practicable, to rely on individual rate increases, and to limit the use of increases of general applicability;
- (11) to encourage fair wages and safe and suitable working conditions in the railroad industry;
- (12) to prohibit predatory pricing and practices, to avoid undue concentrations of market power, and to prohibit unlawful discrimination;
- (13) to ensure the availability of accurate cost information in regulatory proceedings, while minimizing the burden on rail carriers of developing and maintaining the capability of providing such information;
- (14) to encourage and promote energy conservation; and
- (15) to provide for the expeditious handling and resolution of all proceedings required or permitted to be brought under this part.

2.3.2 Adoption of the Transportation Policy Statement

The adoption of the above policy and the market oriented reform of regulation that came into effect with the *Staggers Act* were in fact an experiment aimed at rescuing the industry from literal collapse:

Between 1947 and 1970, the railroad industry had barely managed to stay afloat financially—substituting massive amounts of capital for labor while [due to the new competition from roads in both freight and passenger markets] real output and demand stagnated. Then in June 1970 the nation’s largest railroad, Penn Central, declared bankruptcy and carried half a dozen other northeastern railroads with it to Chapter 11.

Within two years it was apparent that Penn Central could not be reorganized conventionally; federal planning and takeover of the northeastern properties and then establishment and subsidy of the successor Consolidated Rail Corp. (Conrail) would cost taxpayers some \$8 billion over the next decade. After Penn Central’s collapse, granger railroads including the Chicago, Rock Island and Pacific, extending as far as Texas and New Mexico, and the Milwaukee Road, extending to the Puget Sound, fell into bankruptcy. Pundits talked of how the government might have to undertake a “Conrail West” bailout. Instead, policy leaders in the Department of Transportation and elsewhere in the Carter administration, the rail industry, and on Capitol Hill mounted a campaign to loosen the Interstate Commerce Commission’s economic regulatory grip on railroads. Success came with passage of the Staggers Rail Act of 1980.

Less than a quarter of a century after America’s railroads passed through the profound shocks of the 1970s and into the brave new world of deregulation in the early 1980s, they have achieved an industry renaissance without precedent in the nation’s economic history.¹⁹ [footnotes omitted]

2.3.3 Transportation Policy Statement Characteristics

Not unlike Canada, U.S. policy towards transportation in general, as expressed in 49 U.S.C. section 101, prioritizes efficiency. More specifically, it is U.S. government policy to require that federal Department of Transportation policies and programs attain objectives at the least cost consistent with objectives.

Unlike Canada, however, the U.S. has a policy statement directed specifically at railways, comprised of fifteen individual statements.

Overall, this policy is strongly deregulatory, as indicated by the following objectives:

¹⁹Gallamore, Robert E., *Regulation and Innovation: Lessons from the American Railroad Industry*, in Gomez-Ibanez et. al., *Essays in Transportation Economics and Policy* (Brookings Institution, 1999), pp. 493-494.

- to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates...;
- to minimize the need for Federal regulatory control over the rail transportation system...;
- to ensure the development and continuation of a sound rail transportation system with effective [intramodal and intermodal] competition...;
- ...to ensure effective competition and coordination between rail carriers and other modes;
- to reduce regulatory barriers to entry into and exit from the industry;
- to encourage honest and efficient management of railroads;
- to ensure the availability of accurate cost information in regulatory proceedings, while minimizing the [information] burden on rail carriers...;
- to provide for the expeditious handling and resolution of all proceedings....

Responding to the bankruptcies that befell the industry in the 1970s, and the subsequent costs of the federal government takeover and establishment of Conrail, the policy makes revenue adequacy an explicit objective, stated as follows:

- to promote a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues, as determined by the Board;

The policy also contains a number of statements identifying circumstances where there remains a need for regulation:

- to maintain reasonable rates where there is an absence of effective competition and where rail rates provide revenues which exceed the amount necessary to maintain the rail system and to attract capital;
- to require rail carriers, to the maximum extent practicable, to rely on individual rate increases, and to limit the use of increases of general applicability;
- to prohibit predatory pricing and practices, to avoid undue concentrations of market power, and to prohibit unlawful discrimination;

The remaining statements (three) deal with public health and safety, wages and working conditions, and energy conservation.

2.3.4 Role of the Policy Statement in Interpreting 49 U.S.C.

Rail Transportation Policy as a Reflection of Ongoing Legislative Changes

U.S. courts have not failed to note that section 10101 of 49 U.S.C. reflects the deregulatory trend going on since 1980 in the federal rail industry.

As explained by Justice White of the U.S. Supreme Court in [*Interstate Commerce Commission v. Brae Corporation*](#):²⁰

In the Staggers Rail Act of 1980, 49 U.S.C. 10101 et seq., Congress took a significant step away from the traditionally pervasive federal regulation of railroads. Displaying evident distrust of the regulatory model, the Act includes a 15-point National Rail Transportation Policy. 10101a. Among the policies identified are "(1) to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail; [and] (2) to minimize the need for Federal regulatory control over the rail transportation system."

In [*Re Consolidated Freightways Corporation*](#), the United States Court of Appeals for the Ninth Circuit also explained that:²¹

The most recent comprehensive Congressional action concerning interstate transportation, the enactment of the Interstate Transportation Act ("Transportation Act") in 1996, 49 U.S.C. §§ 10101-16106, reduced the federal regulatory role. The [Staggers Rail Act of 1980] added as a policy objective the need to "to minimize the need for Federal regulatory control over the rail transportation system," 49 U.S.C. § 10101, a provision that did not exist under the Interstate Commerce Act in the late 1970s. See Interstate Commerce Act, Pub. L. No. 95-473, 92 Stat. 1337 (1978) (codified at 49 U.S.C. §§ 10101-11915).

Aid to Interpretation

Sections 101 and 10101 of 49 U.S.C. can assist in the interpretation of other provisions found in 49 U.S.C. The overriding objective of statutory construction is to effectuate statutory purpose.²² As Justice Jackson of the U.S. Supreme Court explained:²³

However well these rules [i.e. traditional canons of interpretation] may serve at times to decipher legislative intent, they long have been subordinated to the doctrine that courts will construe the details of an act in conformity with its dominating general purpose, will read text in the light of context and will interpret the text so far as the meaning of the words fairly permits so as to carry out in particular cases the generally expressed legislative policy.

²⁰ 471 U.S. 1069 (1985). (Dissenting reasons.)

²¹ 443 F. 3d 1160 (2005).

²² Congressional Research Service, [Statutory Interpretation: General Principles and Recent Trends](#) (Updated August 31, 2008), at p.3.

²³ [*SEC v. Joiner*](#), 320 U.S. 344, 350-51 (1943).

This obviously is facilitated when the statutory enactment itself explains, as is the case with Title 49, what its purpose is or when, as is the case with Part A of Subtitle IV of Title 49, it expressly sets out the general legislative policy behind those provisions.

Authority to Exempt Rail Carrier Transportation

Reference to 49 U.S.C. 10101 by the U.S. Surface Transportation Board is done mostly in conjunction with 49 U.S.C. 10502(a). Section 10502(a) reads as follows:

- (a) In a matter related to a rail carrier providing transportation subject to the jurisdiction of the Board under this part, the Board, to the maximum extent consistent with this part, shall exempt a person, class of persons, or a transaction or service whenever the Board finds that the application in whole or in part of a provision of this part—
 - (1) is not necessary to carry out the transportation policy of section 10101 of this title; and
 - (2) either—
 - (A) the transaction or service is of limited scope; or
 - (B) the application in whole or in part of the provision is not needed to protect shippers from the abuse of market power.

A review of the Board's decisions since 1996 (when the Board replaced the Interstate Commerce Commission) show that section 10502(a) has been used mostly to exempt rail carriers from the provisions of section 10903 (which forbid a rail carrier to discontinue operations without the prior approval of the Board).²⁴ It has also been used to exempt other types of transactions and a range of services and traffic from regulation.²⁵ In these exemption

²⁴ E.g. Board Decision, dated December 5, 1996, in re: [Wheeling and Lake Erie Railway Company – Abandonment Exemption – In Huron County, OH](#): “Under 49 U.S.C. 10903, a rail line may not be abandoned without prior approval. Under 49 U.S.C. 10502, however, we must exempt a transaction or service from regulation when we find that: (1) continued regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101; and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not necessary to protect shippers from the abuse of market power. Detailed scrutiny of this transaction under 49 U.S.C. 10903 is not necessary to carry out the rail transportation policy. By minimizing the administrative time and expense of filing an abandonment application, an exemption will expedite regulatory decisions and reduce regulatory barriers to exit [49 U.S.C. 10101(2) and (7)]. By allowing W&LE to avoid costly rehabilitation expenses on this low-volume line, and to apply its assets more productively elsewhere on its system, an exemption will promote safe and efficient rail transportation, foster sound economic conditions, and encourage efficient management [49 U.S.C. 10101(3), (5), and (9)]. Other aspects of the rail transportation policy will not be affected adversely.” See also Chapter 3.2.4 below (end of chapter).

²⁵ Examples of other exemptions under section 10502(a): Acquisition and operation, construction and operation, discontinuance of service, lease and operation, and temporary trackage rights.

cases, however, the Board does no more than cite and quote the relevant policy provisions of section 10101 and does not discuss their wording or meaning.²⁶

2.4 Summary and Key Findings

In Canada, the legislation governing the economic regulation of railways is the CTA. In the United States, it is 49 U.S.C. (section 10101 et seq.). In both cases, the statutes incorporate formal statements of national transportation policy intended to guide the regulation of transportation operations under federal jurisdiction. These policy statements are contained, respectively, in section 5 of the CTA and 49 U.S.C. 10101.

In Canada, the statement is a general one, applicable to the transportation system as a whole. In the U.S., the statement is specific to the rail industry.

The Canadian and U.S. policy statements are clearly similar in their overall intent that competition and market forces should be relied on as the primary guide determining the provision of rail transportation services, and in their encouragement of deregulation.

The statements in both countries clearly reflect the trend of the last decades of the 20th century in North America towards deregulation. In the case of railways this saw governments turn away from their long standing reliance on intrusive and detailed regulation predicated on a concept of market dominance that no longer applied.

In Canada, rail regulatory reform was a gradual process that began in 1967 with the passage of the *National Transportation Act*, and was continued in the NTA, 1987 and the CTA in 1996. In the U.S., it was the *Staggers Rail Act* of 1980 that, basically in a single move, radically altered how the industry was to be regulated. In both countries, the deregulatory regimes resulted in vastly improved rail industry performance as reflected in their greater productivity, improved financial performance and generally lower rates for shippers.²⁷

While similar in intent, the U.S. policy statement is more direct and emphatic in its emphasis on deregulation. In the U.S., the policy is to allow *to the maximum extent possible* competition and demand for services to establish reasonable rates, and *to minimize the need for regulation* over the rail system. In Canada, it is instead stated that the objectives of policy *are most likely to be achieved* when competition and market forces are the prime agents in providing transportation services.

²⁶ The STB's decision cited in endnote 23 is typical in that regard.

²⁷ Andrew Shea and Joseph Schulman, *Lower Rates and Improved Performance, Regulatory Reform of Freight Railways* (The Conference Board of Canada, 2000).

In the U.S., the policy statement is also explicit about *allowing rail carriers to earn adequate revenues* to promote a safe and efficient rail transportation system. Canada's policy declaration includes no statement concerning revenue adequacy.

Finally in both countries, the role of competition and market forces is not treated as absolute. Again, however, Canada's policy is broader and more general, stating that regulatory intervention *is used where results cannot be satisfactorily achieved by competition and market forces*. In contrast, the U.S. statement is limited and *focused on specifying situations where the question of an imbalance of market power arises between railways and shippers*.

3 Market Entry and Exit

Key Messages

- In both Canada and the U.S., regulatory barriers to entry are low, reflecting the regulatory regimes' reliance on market forces as the prime agent to direct the industry.
- Laws besides the CTA or 49 U.S.C. govern market entry or exit. Except for one, these will not be discussed here. Our focus here is on the CTA and 49 U.S.C.
- In Canada, entry through the operation of an existing railway line requires a certificate of fitness, which must be granted upon satisfying the Agency that there is adequate third party liability insurance coverage, and a railway safety certificate from the Minister of Transport. Construction of a railway line requires additional Agency approval.
- In the U.S., the requirement for construction or operation is a certificate from the Board which must be granted unless the Board finds the proposed activities to be inconsistent with public convenience and necessity. Authorization for the activities may also be obtained by applying for an exemption from the need to obtain the required certificate.
- With respect to discontinuance of railway lines, Canadian regulations were greatly liberalized under the CTA, while the process for discontinuance is geared to retain, when possible, operation through sale, lease or other transfer to a private party, government, or urban transit authority.
- In the U.S. a rail carrier must satisfy the Board that public convenience and necessity require or permit the abandonment or discontinuance.

3.1 Canada

3.1.1 Certificate of Fitness

In order to become a federal railway company, and hence enter into the rail transportation market under federal jurisdiction (be it for the carriage of goods or passengers), one needs only to be a company,²⁸ hold a certificate of fitness from the Agency and now, since November 2014, a railway safety certificate from the Minister of Transport.²⁹

Such certificate is required for a person to (a) construct a railway line or (b) operate a railway either over and on its own railway or over and on the railway of another railway company, including operating over and on a portion of the railway of another railway company.³⁰

Section 92(1) of the CTA provides that:

The Agency shall issue a certificate of fitness for the proposed construction or operation of a railway if the Agency is satisfied that there will be adequate liability insurance coverage for the proposed construction or operation, as determined in accordance with the regulations. [The regulations in question are the [Railway Third Party Liability Insurance Coverage Regulations](#).³¹]

As explained more fully by the Agency:³²

²⁸ While sections 90(1) and 91(1) of the CTA speak in terms of “person,” no natural person has been issued such a certificate: see [List of Federal Railway Companies](#). A different result would be very odd given that being the holder of such a certificate is what makes one a railway company. See the definition of railway company at section 87 of the CTA: “‘railway company’ means a person who holds a certificate of fitness under section 92, a partnership of such persons or a person who is mentioned in subsection 90(2)”.

²⁹ This to ensure that baseline safety standards are in place prior to companies beginning operation. See section 17.1(1) of the [Railway Safety Act](#), R.S.C. R.S.C., 1985, c. 32 (4th Supp.) and the [Railway Operating Certificate Regulations](#), SOR/2014-258.

³⁰ No certificate of fitness is necessary in those temporary and limited cases contemplated under section 90(2) of the CTA or for railways not falling within the jurisdiction of Parliament (see Agency [Decision No. 405-R-2002](#), dated July 22, 2002, in re: *Application by Train Touristique L'Express de La Matapédia, pursuant to section 91 of the Canada Transportation Act, for a certificate of fitness*).

³¹ In August 2013 the CTA initiated a [Review of Railway Third Party Liability Insurance Coverage Regulations](#). See also [Consultations on Third Party Liability Insurance Coverage Regulations for Federal Railways](#) (closing date April 25, 2014), and [Consultation on the Review of Railway Third Party Liability Insurance Coverage Regulations: What We Heard Report](#).

³² Agency [Decision No. 213-R-2001](#), dated May 3, 2001, in re: *Application by Ferroequus Railway Company, pursuant to section 138 of the Canada Transportation Act, for an order of the Canadian Transportation Agency to grant it the right to run and operate on and over specified lines of the Canadian National Railway Company; to pick up and deliver traffic from North Battleford, Saskatchewan to Prince Rupert, British Columbia, on and over the specified lines, and to use, possess, or occupy lands, terminals, sidings and other railway infrastructure as required for the operation along the lines specified in the application*.

The Agency's jurisdiction to issue a certificate of fitness lies in Part III, Division II of the CTA entitled "Construction and Operation of Railways". The new market entry provisions for federal railway companies are limited, requiring only a determination by the Agency that an applicant has sufficient third party liability insurance coverage (section 92) for a proposed railway operation or construction.³³

Prior to a determination of adequate insurance, the Agency must first be convinced that the applicant proposes to operate a railway. Section 87 of the CTA defines both the terms "operate" and "railway". The term "operate", with respect to a railway, is defined, in part, as, "... (including) any act necessary for the maintenance of the railway or the operation of a train", while the term "railway" is defined in part as "meaning a railway within the legislative authority of Parliament and includes...".

The term "propose" is not, however, defined under the statute. In the decisions issued to date by the Agency whereby a certificate of fitness is issued as a result of an application for a proposed operation, the Agency has relied upon statements of intention filed by the applicant. Evidence in support of a proposal has varied from case to case, yet the Agency in each case has been convinced, based upon the information before it, that there is a *bona fide* proposal to operate a federal railway.

The procedure to obtain the certificate is outlined on the Agency's webpage [Guide to Certificates of Fitness](#). The granting or refusal to grant the certificate based on the adequacy of the proposed liability insurance coverage is never discussed in any detail by the Agency.³⁴ However refusal to grant a certificate of fitness is rare.

³³ In Agency Interlocutory [Decision No. LET-R-99-2013](#), dated August 21, 2013, in re: *Application by Montreal, Maine & Atlantic Canada Co. and Montreal, Maine & Atlantic Railway, Ltd. (MMA) the Canadian Transportation Agency (Agency) to order the immediate lifting of the embargo issued by the Canadian Pacific Railway Company (CP) against MMA traffic and resume the CP level of service prior to the imposition by CP of the embargo and to order that this request be expedited given the urgent circumstances*, the Agency re-iterated its narrow mandate when issuing a certificate of fitness: "... as CP is well aware the Agency's mandate is limited to determining the adequacy of insurance when issuing certificates of fitness under section 92 of the CTA."

³⁴The following two decisions are typical: "The Agency has reviewed the material filed and is satisfied that there will be adequate third party liability insurance coverage, including self-insurance, for the proposed railway operation of the Essex Terminal Railway Company line of railway and for operation over the lines of railway of the Canadian Pacific Railway Company and the Canadian National Railway Company." (Agency [Decision No. 218-R-1997](#), dated April 21, 1997, in re: *Application by the Essex Terminal Railway Company pursuant to section 91 of the Canada Transportation Act, for a certificate of fitness*); "The Agency notes that there is not sufficient information on file to make a determination on the adequacy of the insurance coverage for the proposed passenger operations on the subject lines of railway. As such, the Agency will not issue a certificate of fitness for the proposed passenger operations." (Agency [Decision No. 690-R-2002](#), dated December 24, 2002, in re: *Application by Montreal, Maine & Atlantic Railway, Ltd. and the Montreal, Maine & Atlantic Canada Company, pursuant to section 91 of the Canada Transportation Act, for a certificate of fitness.*)

While a certificate of fitness is sufficient to allow a person to operate a railway line owned or leased by it, it is not enough to construct a new railway line or, when there is no agreement between the parties, to be able to operate a railway over and on the railway of another railway company.³⁵ In both situations additional approvals from the Agency are required, respectively under section 98 and section 138. Only a railway company (not a person) can file an application under either of those two provisions.³⁶

3.1.2 Construction of a Railway Line

With respect to the construction of a railway line, section 98 of the CTA provides that a railway company shall not construct a railway line without the approval of the Agency and that the Agency may grant the approval if it considers that the location of the railway line is reasonable, taking into consideration requirements for railway operations and services and the interests of the localities that will be affected by the line. In addition, regulations made under the *Canadian Environmental Assessment Act, 2012*, designate railway projects exceeding specified lengths as being subject to environmental assessment.³⁷

Section 4.1 (1) of the *Expropriation Act* provides that if a railway company requires an interest in land or immovable real right for the purposes of its railway and has unsuccessfully attempted to purchase the interest or right, the railway company may request the Minister of Transport to have the Minister of Public Works have the interest or right expropriated by the Crown in accordance with Part I of the *Expropriation Act*.

3.1.3 Running Rights

Running rights bear on the issue of market entry by a railway company (in Canada, but not in the United States) inasmuch as section 91(2) of the CTA provides that: “If a person proposes to operate in Canada primarily on the railway of another railway company, the application must indicate the termini and route of every line of railway proposed to be operated.”

Until 2001 it was possible to contend that this could be done without the consent of the other railway company by way of a running right application under section 138 of the CTA.³⁸

³⁵ For a case when the parties involved have reached agreement, see: Agency [Decision No. 218-R-1997](#), dated April 21, 1997, in re: *Application by the Essex Terminal Railway Company pursuant to section 91 of the Canada Transportation Act, for a certificate of fitness authorizing it to operate its line of railway of 19.5 miles in the city of Windsor, Ontario, and, by virtue of running rights agreements, to operate over a segment of approximately 910 feet of a Canadian Pacific Railway Company main line and over a segment of approximately 0.33 miles of a Canadian National Railway Company siding, in order to access the Canadian National Railway Company Van de Water Yard, as well as over approximately 4.3 miles of trackage in the yard itself.*

³⁶ As it will be recalled (see note 1 above) a “railway company” is a person who holds a certificate of fitness under section 92.

³⁷ [Regulations Designating Physical Activities](#), SOR/2012-147.

³⁸ Under section 138(1) a railway company may apply to the Agency for the right to (a) take possession of, use or occupy any land belonging to any other railway company; (b) use the whole or any portion of the right-of-way,

However that year the Agency ruled that section 138 did not empower it to grant a railway company the right to run and operate on and over specified lines of another railway company for the express purpose of soliciting as well as carrying the freight of shippers served by the said railway lines.³⁹

3.1.4 Discontinuance

General Scheme

Section 146(1) of the CTA provides in part that:

If a railway company has complied with the process set out in sections 143 to 145, but an agreement for the sale, lease or other transfer of the railway line or an interest in it is not entered into through that process, the railway company may discontinue operating the line on providing notice of the discontinuance to the Agency.

The process set out in sections 143 to 145 of the CTA⁴⁰ is not one which is especially easy to follow.⁴¹ In essence, as explained by the Federal Court of Appeal in [Canadian National Railway Company v. Canadian Transportation Agency](#).⁴²

tracks, terminals, stations or station grounds of any other railway company; and (c) run and operate its trains over and on any portion of the railway of any other railway company.

³⁹ Agency [Decision No. 213-R-2001](#), dated May 3, 2001, in re: *Application by Ferroequus Railway Company, pursuant to section 138 of the Canada Transportation Act, for an order of the Canadian Transportation Agency to grant it the right to run and operate on and over specified lines of the Canadian National Railway Company; to pick up and deliver traffic from North Battleford, Saskatchewan to Prince Rupert, British Columbia, on and over the specified lines, and to use, possess, or occupy lands, terminals, sidings and other railway infrastructure as required for the operation along the lines specified in the application*. See to the same effect Agency [Decision No. 212-R-2001](#), dated May 3, 2001, in re: *Application by the Hudson Bay Railway Company, etc.* These two decisions are noteworthy inasmuch as neither the Agency nor its predecessors had ever ruled before on the issue of statutory running rights and, in addition to the parties themselves, the Agency invited various industry participants to file submissions.

⁴⁰ A railway line for the purpose of section 146(1) is defined (at section 140(1) of the CTA) as not to include: (a) a yard track, siding or spur; or (b) other track auxiliary to a railway line. Since 2007, the CTA (at section 146.2 and following) sets out a distinct process that must be followed by federal railway companies before certain urban railway sidings and spurs located in a metropolitan area or within the territory served by any urban transit authority can be dismantled. This process for metropolitan sidings and spurs is not discussed in this Report.

⁴¹ See the following [diagram](#) prepared by the Agency.

⁴² 2008 FCA 199. More generally see Agency [Decision No. 381-R-2014](#), dated October 16, 2014, in re: *Application by the Sept-Îles Port Authority for a determination pursuant to subsection 140(2) of the Canada Transportation Act*, at paragraph 15: “The transfer and discontinuance process under sections 141 to 146 of the CTA applies to all railway lines under the legislative authority of Parliament. Under this process, a federal railway company must take steps before transferring or discontinuing operations: 1. provide notice in the company’s three-year plan for at least 12 months of its intention to discontinue operating the line; 2. publicly advertise the railway line’s availability or any operating interest that the railway company has in the line; 3. negotiate with interested

Division V provides a railway company, which follows the prescribed process, the right to abandon the operation of a railway line. This process takes place in accordance with a precise time line.

The steps which must take place within this time line are geared towards achieving the continued operation of the line through alternative means. The preferred option is for the railway company to identify on its own a purchaser who will continue the operation of the line (subsection 141(3)). Failing this, the railway must seek out interested buyers who wish to continue operating the line by way of a public notice, and engage in negotiations for the sale of the line to that person.

These negotiations are not open ended. Once a person has expressed an interest, subsection 144(4) of the CTA provides that the railway company “has six months to reach an agreement with the interested person”. This period runs from the last day on which the interested person had to make its interest known according to the public notice.

The Agency can impact on those negotiations in two ways. First, the negotiating parties may ask the Agency to determine the net salvage value of the railway line (subsection 144(3.1)). Second, either party to a negotiation may complain to the Agency that the other party is not negotiating in good faith.

Although, a net salvage value determination can assist in the negotiations, it is not binding on the parties. A finding of bad faith however gives rise to binding remedies. Where a finding of bad faith is made against the interested person, the Agency may relieve the railway company from its obligation to negotiate (subsection 144(7)). Where the railway company is found to be at fault, the Agency may order the conclusion of an agreement on its own terms and set the price at which the line will be sold (subsection 144(6)).

Absent any such intervention, subsection 145(1) of the CTA provides that “if ... no agreement with ... an interested person is reached, within the required time;” the railway company must (i.e., “shall”) offer the line for sale to the governments and relevant transit authorities for no more than its net salvage value (subsection 145(1) of the CTA). Alternatively, the railway company may decide at that juncture to continue to operate the line, a decision which if taken, effectively brings the process governed by Division V to an end (subsection 144(5)).

Legal Effects of the Notice of the Discontinuance

Section 146(1) of the CTA provides, in addition to what we saw above, that:

After providing the notice [of the discontinuance to the Agency], the railway company has no obligations under this Act in respect of the operation of the railway line and has no

parties; 4. offer to transfer all of its interest in the railway line to the applicable federal provincial and municipal governments and urban transit authorities; and 5. notify the Agency if the line will be discontinued.”

obligations with respect to any operations by any public passenger service provider over the railway line.

The Agency places a great deal of importance on the effect of a notice under section 146 of the CTA. Section 146 is a truly substantive provision as it puts an end to a railway company's obligations in respect of the operation of a railway line.⁴³

With respect to grain-dependent branch lines however the matter does not end there, since section 146.1(1) (introduced in 2000) requires that:

A railway company that discontinues operating a grain-dependent branch line listed in Schedule I, or a portion of one, that is in a municipality or district shall, commencing on the date on which notice was provided under subsection 146(1), make three annual payments to the municipality or district in the amount equal to \$10,000 for each mile of the line or portion in the municipality or district.⁴⁴

⁴³ Agency [Decision No. 644-R-2000](#), dated October 17, 2000, in re: *Complaint filed by the Village of Ethelbert concerning the requirements of Division V of Part III of the Canada Transportation Act with respect to the sale and transfer by the Canadian National Railway Company of the Cowan Subdivision from North Junction at mileage 0.00 to a point near Minitonas at mileage 83.51, in the province of Manitoba*. Another way for the railway company to achieve the same result without having to provide a notice of discontinuance to the Agency is found at section 146(2) of the CTA which provides as follows: "If the railway line, or any interest of the railway company in it, is sold, leased or otherwise transferred by an agreement entered into through the process set out in sections 143 to 145 or otherwise, the railway company that conveyed the railway line has no obligations under this Act in respect of the operation of the railway line as and from the date the sale, lease or other transfer was completed and has no obligations with respect to any operations by any public passenger service provider over the railway line as and from that date."

⁴⁴ In Agency Interlocutory [Decision No. LET-R-75-2008](#), dated April 30, 2008, in re: *Application by the Rural Municipality of Souris Valley No. 7, Saskatchewan pursuant to section 146.3 of the Canada Transportation Act*, the Agency had to rule on a request made by the municipality of Souris Valley to the effect that the legislative liability defined in section 146.1 of the CTA should be included as a cost in the determination of net salvage value being undertaken by the Agency. The Agency refused to do so and explained, at paragraphs 94 to 95: "Section 146.1 is a special provision dealing with line discontinuances where the line is identified in Schedule I of the CTA as a grain-dependent branch line. It stipulates that following the railway company providing a notice (of discontinuance) under subsection 146(1), it shall make three annual payments to the affected municipal government in the amount of \$10,000 for each mile of the line located within the municipality's boundaries. Under the CTA, if the railway company has complied with the prescribed discontinuance steps but an agreement for transfer is not reached, the company may discontinue operating the line. Discontinuance at this point is possible but only if the company first files a notice of discontinuance with the Agency [subsection 146(1)]. The \$10,000 per mile compensation requirement is then triggered. No discontinuance notice is required if the assets/line are successfully transferred through the process set out under the CTA. That is, if the line is sold for ongoing rail operations (section 143) or for any purpose (section 145) then no notice of discontinuance is required - and the per mile payment does not arise."

Net Salvage Value

The expression "net salvage value" refers to the market value of an asset less the costs associated with its disposal. These costs can include, but are not limited to, sales commissions, excavation, disposal, and environmental remediation. In essence, net salvage value is the realizable value of the assets - the track, land and other structures - less the costs associated with their disposal.⁴⁵

Interested parties can apply to the Agency for a determination of net salvage value under a number of provisions of the CTA, namely sections 144(3.1), 146.3(1) and 145(5).

Irrespective under what provision of the CTA it is carried out, the way net salvage value is determined remains the same.⁴⁶ This involves consideration of several elements.⁴⁷ The usual process followed by the Agency is described in its [Guidelines Respecting Net Salvage Value Determination Applications](#).

In brief, to determine the net salvage value of a railway line the Agency identifies and assesses the quantity and quality of the track materials and determines their gross market value, then determines and deducts the cost of removal and disposal of the track materials to arrive at the net salvage value of the track materials. To this the Agency adds the value of the corridor lands, which it determines with input from an independent accredited land appraiser as the circumstances require. The Agency may take additional factors into consideration with respect to its valuation of the land, such as any costs associated with the environmental condition of the railway line that the Agency determines should be included, and any benefit that may accrue from leases or agreements expected to survive the transfer.⁴⁸

⁴⁵ Agency [Decision No. 360-R-2013](#), dated September 13, 2013, in re: *Application by Windsor & Hantsport Railway Company Limited, pursuant to subsection 144(3.1) of the Canada Transportation Act for a determination of net salvage value*, at paragraph 8.

⁴⁶ Agency [Decision No. 360-R-2013](#), dated September 13, 2013, in re: *Application by Windsor & Hantsport Railway Company Limited, pursuant to subsection 144(3.1) of the Canada Transportation Act for a determination of net salvage value*, at paragraph 9: "the Agency is of the opinion that net salvage value is meant to represent the market value achievable from the orderly liquidation of defunct assets, regardless of the purpose for which the assets are or must be offered for sale, whether net salvage value is assessed pursuant to subsections 144(3.1) or 145(5) of the CTA."

⁴⁷ Agency [Decision No. 43-R-2013](#), dated February 8, 2013, in re: *Application by the Rural Municipality of Gravelbourg No. 104, the Rural Municipality of Lawtonia No. 135, the Village of Hodgeville, and the Town of Gravelbourg, pursuant to subsection 146.3(1) of the Canada Transportation Act for a determination of the net salvage value of the Canadian Pacific Railway Company's Gravelbourg Subdivision between mileages 0.1 and 53.9, in the province of Saskatchewan*, at paragraph 7.

⁴⁸ Agency [Decision No. 360-R-2013](#), dated September 13, 2013, in re: *Application by Windsor & Hantsport Railway Company Limited, pursuant to subsection 144(3.1) of the Canada Transportation Act for a determination of net salvage value*, at paragraph 11.

3.2 United States

3.2.1 Certificate to Construct and Operate

A certificate by the Board is required under section 10901 of 49 U.S.C. before a person⁴⁹ may:

- construct an extension to any of its railroad lines⁵⁰;
- construct an additional railroad line;
- provide transportation over, or by means of, an extended or additional railroad line; or
- in the case of a person other than a rail carrier, acquire a railroad line or acquire or operate an extended or additional railroad line.⁵¹

While the process to obtain a certificate under section 10901 of 49 U.S.C. is subject to public notice and open to challenge by third parties, the threshold for obtaining it is set at a fairly low level. Section 10901(c) provides in effect that:

The Board shall issue a certificate authorizing activities for which such authority is requested in an application filed under subsection (b) unless the Board finds that such activities are inconsistent with the public convenience and necessity. Such certificate may approve the application as filed, or with modifications, and may require compliance with

⁴⁹ A person is defined, at section 10102(4) of 49 USC, as follows: “‘person’, in addition to its meaning under section 1 of title 1, includes a trustee, receiver, assignee, or personal representative of a person”. Section 1 of 1 USC state that “the words ‘person’ and ‘whoever’ include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals”.

⁵⁰ “Railroad line” is not a defined expression. For the purposes of section 10901 the Board uses an “intended use” test to decide if the infrastructure in question is a railroad line: “While it is well established that a rail carrier must seek Board authority under 49 U.S.C. § 10901 to construct a new rail line or to extend an existing rail line into a new market, it is equally well established that an existing carrier’s construction of ancillary railroad facilities and yard track is excepted from these prior approval requirements pursuant to 49 U.S.C. § 10906. In distinguishing between ancillary track and track used for line haul service, the Board and its predecessor, the Interstate Commerce Commission, have primarily looked to the “intended use” of the track. (...) Ancillary track is excepted from the Board’s approval requirements because it does not penetrate or invade a new market but simply augments the capacity of existing main-line operations that are already authorized.” Board Decision, dated February 19, 2014, in re: [Brazos River Bottom Alliance – Petition for Declaratory Order](#).

⁵¹ This is not applicable when a person acquires a railroad line without becoming itself a rail carrier. As explained by the Board: “In *State of Maine*, we held that a state’s acquisition of an ownership interest in track, right-of-way, and related physical assets would not constitute the acquisition of a railroad line under 49 U.S.C. § 10901(a)(4), and would not result in the state agency becoming a rail carrier under 49 U.S.C. § 10102(5), provided that the arrangement guaranteed that: (i) the selling freight rail carrier would retain a permanent, exclusive freight rail operating easement, together with the common carrier obligation on the line; and (ii) the terms of the sale would protect the carrier from undue interference with the provision of common carrier freight rail service.” Board Decision, dated June 23, 2011, in re: [San Benito Railroad LLC - Acquisition Exemption – Certain Assets of Union Pacific Railroad Company](#).

conditions (other than labor protection conditions) the Board finds necessary in the public interest.⁵²

Unlike the Agency, the Board does not, for the most part, require or review liability insurance coverage of the applicant railway companies.⁵³

3.2.2 Exemption from the Need to Obtain a Certificate

49 U.S.C. 10502(a) provides as follows:

- (a) In a matter related to a rail carrier providing transportation subject to the jurisdiction of the Board under this part, the Board, to the maximum extent consistent with this part, shall exempt a person, class of persons, or a transaction or service whenever the Board finds that the application in whole or in part of a provision of this part—
- (1) is not necessary to carry out the transportation policy of section 10101 of this title; and
 - (2) either— (A) the transaction or service is of limited scope; or (B) the application in whole or in part of the provision is not needed to protect shippers from the abuse of market power.

As explained by the Board:⁵⁴

The construction of new railroad lines requires prior Board authorization, either through issuance of a certificate under 49 U.S.C. § 10901 or, as requested here, through an exemption under 49 U.S.C. § 10502 from the formal application procedures of § 10901. (...)

⁵² As explained by the Board: “Section 10901(c) is a permissive licensing standard that directs us to grant rail construction proposals unless we find the proposal “inconsistent with the public convenience and necessity.” Thus, Congress has established a presumption that rail construction projects are in the public interest unless shown otherwise.” Board Decision, dated May 21, 2012, in re: [R.J. Corman Railroad Company/Pennsylvania Lines Inc. – Construction and Operation Exemption in Clearfield County, PA.](#)

⁵³ As explained by the Agency in its document entitled [Review of Railway Third Party Liability Insurance Coverage Regulations](#) : “While new applicants and operating railway companies do not have to satisfy the Board in respect of meeting a third party liability insurance requirement (as in Canada), the Board becomes involved when negotiations between the railway companies are stalled or when Amtrak appeals to the Board to resolve disputes on its liability and indemnification arrangements with the host freight railway companies.”

⁵⁴ Board Decision, dated May 21, 2012, in re: [R.J. Corman Railroad Company/Pennsylvania Lines Inc. – Construction and Operation Exemption in Clearfield County, PA.](#) See also Board’s Decision, dated November 21, 2011, in re: [Alaska Railroad Corporation – Construction and Operation – A Rail Line Extension to Port Mackenzie, Alaska.](#)

Under § 10502(a), we must exempt a proposed rail line construction from the prior approval requirements of § 10901 when we find that: (1) those procedures are not necessary to carry out the rail transportation policy of 49 U.S.C. § 10101; and (2) either (a) the proposal is of limited scope, or (b) the full application procedures are not necessary to protect shippers from an abuse of market power. Based on the record before us, we conclude that the proposed construction of the Western Segment qualifies for an exemption under § 10502 from the § 10901 prior approval requirements.

Detailed scrutiny of the proposed construction under 49 U.S.C. § 10901 is not necessary in this case to carry out the rail transportation policy. The requested exemption (which was unopposed on the transportation merits) will promote that policy, and the proposed construction is therefore appropriate for handling under the exemption process. The record here shows that the proposed rail line will provide rail service to RRLLC's proposed development site (which includes a waste-to-ethanol facility, a quarry, and an industrial park) and to other shippers in the area. Currently, there is no rail service to RRLLC's proposed development site, and the site does not cross the line of any other railroad. Without rail service, trucks on local roads and highways would be used to provide the transportation at issue. Thus, the proposed rail line will enhance intermodal competition by providing shippers in the area with a freight rail option that does not currently exist, consistent with 49 U.S.C. §§ 10101(4) & (5). Exempting the proposed construction from the requirements of § 10901 will also minimize the need for federal regulation and reduce regulatory barriers to entry in furtherance of 49 U.S.C. §§ 10101(2) & (7).

Consideration of the proposed rail line under § 10901 here is not necessary to protect shippers from an abuse of market power. Rather, as explained above, the proposed rail line will enhance competition by providing rail service where it does not currently exist, and thereby create an alternative to truck shipment of materials.

In short, there is no evidence on the transportation-related aspects of this case to suggest that the proposed construction and operation of the Western Segment does not qualify for our exemption procedures or is otherwise improper. Given the statutory presumption favoring rail construction and the evidence presented, the requested exemption from § 10901 has met the standards of § 10502.

When an exception is sought under section 10502, whether from section 10901 or from any other provision found in Part A (Rail) of Subtitle IV (Interstate Transportation) of 49 U.S.C., the Board in its reasons does no more than cite and quote the relevant policy provisions of section 10101 (Rail Transportation Policy); it does not discuss the wording or meaning of these policy provisions.

3.2.3 Environmental Analysis

Notwithstanding an exemption under section 10502 of 49 U.S.C., the Board must, if the construction or operation of a rail project has the potential to result in significant environmental impacts, conduct an environmental review:

[The National Environmental Policy Act] requires federal agencies to examine the environmental effects of proposed federal actions and to inform the public concerning those effects. Under NEPA and related environmental laws, we must consider significant potential adverse environmental impacts in deciding whether to authorize a railroad construction as proposed, deny the proposal, or grant it with conditions (including environmental mitigation conditions). The purpose of NEPA is to focus the attention of the government and the public on the likely environmental consequences of a proposed action before it is implemented, in order to minimize or avoid potential adverse environmental impacts. While NEPA prescribes the process that must be followed, it does not mandate a particular result. Thus, once the adverse environmental effects have been adequately identified and evaluated, we may conclude that other values outweigh the environmental costs. (Citations omitted.)⁵⁵

3.2.4 Abandonment and Discontinuance

General

49 U.S.C. 10903 provides that:

(a)(1) A rail carrier providing transportation subject to the jurisdiction of the Board under this part who intends to—

(A) abandon any part of its railroad lines; or

(B) discontinue the operation of all rail transportation over any part of its railroad lines,

must file an application relating thereto with the Board. An abandonment or discontinuance may be carried out only as authorized under this chapter.

⁵⁵ For more details on these environmental reviews under section 10901 applications see: Board Decision, dated May 21, 2012, in re: [R.J. Corman Railroad Company/Pennsylvania Lines Inc. – Construction and Operation Exemption in Clearfield County, PA](#). See also the Board Decision, dated November 21, 2011, in re: [Alaska Railroad Corporation – Construction and Operation – A Rail Line Extension to Port Mackenzie, Alaska](#).

Railroad Lines

Section 10903 speaks in terms of railroad lines. Section 49 U.S.C. 10102, which contains a number of statutory definitions, does not define what those are.⁵⁶ This said, section 10906 provides that: “The Board does not have authority under this chapter over construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks.”

The test to differentiate “spur, industrial, team, switching, or side tracks” from a “railroad line” is a functional one.⁵⁷

Distinction Between Abandonment and Discontinuance

Unlike in Canada, where the terms abandonment and discontinuance are used interchangeably by the Agency and the Federal Court of Appeal, but not in the CTA itself (which nowhere uses the term “abandonment”), under 49 U.S.C. there is a distinction between abandonment and discontinuance.⁵⁸

As explained by the United States Court of Appeals, First Circuit:⁵⁹

⁵⁶However section 10102(6) defines “railroad” to include—(A) a bridge, car float, lighter, ferry, and intermodal equipment used by or in connection with a railroad;(B) the road used by a rail carrier and owned by it or operated under an agreement; and(C) a switch, spur, track, terminal, terminal facility, and a freight depot, yard, and ground, used or necessary for transportation.

⁵⁷ As explained by the Board in Board Decision, dated February 19, 2014, in re: [Brazos River Bottom Alliance – Petition for Declaratory Order](#): “In distinguishing between ancillary track and track used for line haul service, the Board and its predecessor, the Interstate Commerce Commission, have primarily looked to the “intended use” of the track. Ancillary track is typically used for loading, unloading, switching, and other purposes that are incidental to main-line operations.”

⁵⁸ None of these two terms are defined either in 49 U.S.C. or 49 C.F.R.

⁵⁹ [James E. Howard v. Surface Transportation Board](#), 389 F.3d 259 (1st Cir. 2004). The Court went on to discuss additionally the distinction between “direct” abandonment or discontinuance and “adverse” abandonment or discontinuance: “Under 49 U.S.C. § 10903, this application can be brought to the STB by the rail carrier itself or, in a more unusual circumstance, by a third party. See *Consolidated Rail Corp. v. I.C.C.*, 29 F.3d 706, 708-09 (D.C.Cir.1994). If the rail carrier applies to abandon or discontinue its own lines or service, the application is for an “abandonment” or “discontinuance” (what we will call a “direct” abandonment or discontinuance for purposes of clarity). By contrast, if a third party applies to abandon or discontinue the lines or services of another rail carrier in an STB proceeding, it is called an “adverse” abandonment or discontinuance. *Id.* The STB can grant an adverse abandonment or discontinuance on a third party’s petition even if the owner of the line or the trackage rights objects. The text of section 10903 itself does not distinguish between adverse and direct abandonments, but the case law makes it clear that the STB has authority to hear both types of applications.” There is no reason to discuss any further “adverse” abandonment or discontinuance here in this chapter concerning market entry and exit. We will note however here that in a recent case involving adverse abandonment one of the Board’s commissioners dissented on the basis of its understanding of the U.S. rail transportation policy: “I do not read, nor can I interpret, the rail transportation policy in 49 U.S.C. § 10101 or any other parts of the Board’s governing statute to allow it to force a rail line abandonment over the clear objections of the carrier, local government officials, potential shippers, and other interested parties when there isn’t an

A discussion of some of the parlance of federal railroad regulation is helpful. Generally, when a rail carrier or a third party wishes to "abandon" its own rail line, it must seek permission from the STB. 49 U.S.C. § 10903. If a rail carrier is operating rail transportation over its own line or over the line of another by the grant of independent trackage rights, it must seek permission from the STB to "discontinue" the service. *Id.* The STB's authority and the standards governing its decisions are the same regardless of whether it is granting an abandonment or a discontinuance. *See Id.* § 10903(d).

Procedure for Abandonment and Discontinuance

The procedure which a rail carrier must follow in its application for abandonment or discontinuance is set out in 49 U.S.C. 10903. The Board has issued additional rules governing abandonments and discontinuance and these are found at 49 C.F.R. Part 1152. The whole procedure before the Board was summarised by the U.S. Court of Appeals, DC Circuit in [National Association of Reversionary Property Owners v. Surface Transportation Board](#) (1999).

While the procedure for abandonment and discontinuance is the same, there are incidental legal matters which are applicable to abandonment but not discontinuance.⁶⁰

Present or Future Public Convenience and Necessity

Abandonment or discontinuance is not however only a procedural exercise. The applicant rail carrier will need to satisfy the Board "that the present or future public convenience and necessity require or permit the abandonment or discontinuance."⁶¹ This requires weighting various interests.⁶²

overriding and compelling public purpose for which the line in question is needed. Yet this adverse abandonment has little to do with the public good, but instead serves only private interests." (Board Decision, dated November 16, 2012, in re: [Stewartstown Railroad Company – Adverse Abandonment – In York County, PA.](#))

⁶⁰ See Board Decision, dated July 7, 2014, in re: [Norfolk Southern Railway Company –Discontinuance of Service Exemption – In Isle of Wight County and the City of Suffolk, VA.](#): "Because this is a discontinuance of service and not an abandonment, the Board need not consider offers of financial assistance (OFAs) under 49 U.S.C. § 10904 to acquire the Line for continued rail service, trail use requests under 16 U.S.C. § 1247(d), or requests to negotiate for public use of the Line under 49 U.S.C. § 10905. However, the OFA provisions under 49 U.S.C. § 10904 for a subsidy to provide continued rail service do apply to discontinuances. Environmental reporting requirements under 49 C.F.R. § 1105.7 and historic reporting requirements under 49 C.F.R. § 1105.8 do not apply. *See* 49 C.F.R. §§ 1105.6(c) and 1105.8(b)."

⁶¹ See 49 U.S.C. [10903\(d\)](#) which reads as follows: "(d) A rail carrier providing transportation subject to the jurisdiction of the Board under this part may- (1) abandon any part of its railroad lines; or (2) discontinue the operation of all rail transportation over any part of its railroad lines; only if the Board finds that the present or future public convenience and necessity require or permit the abandonment or discontinuance. In making the finding, the Board shall consider whether the abandonment or discontinuance will have a serious, adverse impact on rural and community development."

⁶² [New York Cross Harbor Railroad v. Surface Transportation Board](#), 374 F.3d 1177(U.S. Court of Appeals, DC Circuit).

Offering Abandoned Rail Properties for Sale for Public Purposes

49 U.S.C. 10905 provides that:

When the Board approves an application to abandon or discontinue under section 10903, the Board shall find whether the rail properties that are involved in the proposed abandonment or discontinuance are appropriate for use for public purposes, including highways, other forms of mass transportation, conservation, energy production or transmission, or recreation. If the Board finds that the rail properties proposed to be abandoned are appropriate for public purposes and not required for continued rail operations, the properties may be sold, leased, exchanged, or otherwise disposed of only under conditions provided in the order of the Board. The conditions may include a prohibition on any such disposal for a period of not more than 180 days after the effective date of the order, unless the properties have first been offered, on reasonable terms, for sale for public purposes.⁶³

Exemption Under 49 U.S.C. 10502

Unlike the cases which we reviewed under chapter 3.2.2 above, which are decided on a case by case basis, albeit one based on Board's precedents, the Board has issued rules setting out in advance (49 C.F.R. Part 1152, sub-Part F) when exemptions under section 10502 for the purpose of abandonment or discontinuance can be entertained.⁶⁴

Most abandonments or discontinuances are filed with the Board under the Board's exemptions procedures.⁶⁵

3.3 Summary and Key Findings

The most salient point to be made with respect to market entry is that the regulatory barriers to entry are low in both Canada and the U.S. From a regulatory perspective, entry is relatively easy in both countries reflecting the reliance of the respective regulatory regimes on market forces as the prime agent to direct the industry. The main barrier to entry is economic, namely the large capital requirements needed to enter into and operate in the industry due to the

⁶³ Additional details can be found at 49 C.F.R. [1152.28](#). A request containing the requisite 4-part showing for imposition of a public use condition must be filed with the Board and served on the rail carrier within the time specified in section [1152.28\(a\)\(3\)](#). See Board Decision, dated August 18, 2014, in re: [Iowa Interstate Railroad, Ltd. – Abandonment Exemption – In Polk, Jasper and Marion Counties, Iowa](#) for an overview of how a public use request under section 10905 fits within the overall scheme of an abandonment or discontinuance proceeding.

⁶⁴ As provided in 49 C.F.R. section 1152.50 (a)(1): "A proposed abandonment or discontinuance of service or trackage rights over a railroad line is exempt from the provisions of 49 U.S.C. 10903 if the criteria in this section are satisfied."

⁶⁵ Surface Transportation Board, Office of Public Assistance, Governmental Affairs, and Compliance, [Overview Abandonments and Alternatives to Abandonment](#), Washington, 2008 edition.

inherent capital intensity of railways. The issuance of a railway operating certificate is a condition precedent to a railway company operating or maintaining a railway.

In Canada, market entry through the construction or operation of a railway line has a low barrier. Much higher barriers, requiring the application of a “public convenience and necessity” test, were dropped with enactment of the NTA, 1987. For operation in Canada today, the requirement is a certificate of fitness from the Canadian Transportation Agency (the Agency) and, since January 2015, also a railway operating certificate of safety from the Minister of Transport. To obtain a certificate of fitness, an applicant needs to prove that there is adequate liability insurance coverage according to the regulations. If that is the case, the Agency must grant the certificate of fitness.

With respect to construction of a railway line, the applicant must obtain a certificate of fitness and the proposed construction must be approved by the Agency. The Agency may grant the approval if it considers the the location of the line to be reasonable, taking into consideration requirements for railway operations and services and the interests of the localities that will be affected. In addition, regulations made under the *Canadian Environmental Assessment Act, 2012*, designate railway projects exceeding specified lengths as being subject to environmental assessment.

In the U.S., the requirement is a certificate from the Board in order to construct a line extension, an additional line, operate over an extended or additional line, or, if the person is not already a rail carrier, acquire a line or acquire or operate an extended or additional line. The presumption is in favour of the construction or operation. That is, the Board must issue the certificate unless unless it finds that the proposed activities are inconsistent with the public convenience and necessity. Significantly, under the Board’s statutory exemption authority, authorization for the activities may also be obtained by applying for an exemption from the need to obtain the required certificate.

One further requirement is that the Board must, in deciding whether to authorize the proposed project, deny it, or grant it with conditions, conduct an environmental review if the project has the potential to result in significant environmental impacts. The same applies notwithstanding an exemption from the need to obtain the required certificate.

With respect to the abandonment/discontinuance of railway company lines, the generally applicable provisions in Canada were made much less onerous under the CTA and have had a major impact on improving CN and CP financial viability while also enabling the continued operation of low density or uneconomic lines. Provisions in the CTA concerning the process for discontinuance are designed to retain operation through alternative means, i.e. the sale, lease or transfer for continued operation to a private party (such as a shortline railway), government, or urban transit authority.

In the U.S., broadly similar provisions to those in Canada exist with respect to abandonment and discontinuance. A main difference between Canada and the U.S. is that a Canadian

railway company can discontinue operating any of its lines without having to provide any rationale for doing so.⁶⁶ In the U.S., however, a rail carrier must satisfy the Board “that the present or future public convenience and necessity require or permit the abandonment or discontinuance.”

⁶⁶ Under the NTA, 1987 the railway company was required at the very least, when the abandonment was contested, to satisfy that the line it wished to abandon was uneconomic and in some cases the public interest needed to be considered as well.

4 Level of Services

Key Messages

- Canadian and U.S. railway statutory LOS obligations have many similarities. In both countries these obligations are not considered absolute but are judged by what constitutes “reasonable” service and whether a company is fulfilling its obligations in a “reasonable” manner under the circumstances.
- Both in Canada and the U.S., there are statutory mechanisms for resolving rail LOS issues through the lodging of a complaint and subsequent investigation by the regulatory authority. In both countries the authority has broad powers to order the railway company to remedy the situation.
- In Canada, railway LOS obligations have changed little, even under the impetus of rail deregulation in recent decades. The U.S. provisions, by contrast, have been greatly narrowed in terms of their scope of application:
 - A shipper in the U.S. who enters into a confidential contract with one or more rail carriers loses his various statutory protections;
 - The Board has used its exemption authority to exempt many commodities and forms of rail transportation from the shipper protections normally afforded by the LOS provisions.
- Since 2013, Canadian shippers have the right to a LOS or confidential contract with a railway company, and a recourse in the form of an arbitration proceeding if a shipper is unable to negotiate such a contract.
- In 2014, amendments to the CTA imposed new service obligations on CN and CP in the form of minimum shipment levels with respect to western grain movements.

4.1 Canada

There are four sections (113 to 116) under the title "Level of Services" in the CTA.⁶⁷

- Sections 113 and 114 impose specific obligations on railway companies in terms of the level of service (LOS) that they must provide and are specifically defined in the CTA as "service obligations"⁶⁸;
- Section 115 defines the scope of certain phrases found in sections 113 and 114;
- Finally, section 116 creates the mechanism by which a person may file a complaint that a railway company is not fulfilling its obligations under sections 113 and 114. This provision also provides for remedies that the Agency may order in case it finds a breach.

An embargo of service will temporarily suspend the operation of sections 113-115.⁶⁹ However the validity of the embargo is subject to review by the Agency.⁷⁰ The level of services end completely only once the railway company ceases to operate a railway.⁷¹

A railway company is not bound by these level of service obligations in perpetuity. If a railway company wishes to be relieved of these obligations, the CTA provides such a mechanism with the transfer and discontinuance provisions under Division V of the CTA. Once the railway company has complied with all steps of this process, the railway company may discontinue operating the line upon providing notice of discontinuance to

⁶⁷ A detailed description of the level of service obligations of Canadian federal railways and the associated statutory remedies as found in sections 113-116 of the *Canada Transportation Act*, and their legal history, may be found in CPCS (August 31, 2009), *Service Issues in Regulated Industries Other than Canadian Rail Freight Industry*, Appendix A, prepared for Transport Canada as part of the federal government Rail Freight Service Review.

⁶⁸ See Section 111 of the CTA ("In this Division, (...) "service obligations" means obligations under section 113 or 114.") Until the enactment of the CTA in 1996 these "service obligations" were referred to as common carrier obligations and are still sometimes referred to as such by the Agency. See, for e.g., Agency [Decision No. 166-R-2009](#), dated April 23, 2009, in re: *Complaint by Northgate Terminals Ltd., pursuant to sections 26, 37 and 113 to 116 inclusive of the Canada Transportation Act seeking an order directing the Canadian National Railway Company to fulfil its level of service obligations to deliver traffic to Northgate's facility in North Vancouver, British Columbia*, at paragraph 7: "The primary issue to be addressed in this proceeding is whether CN has breached its common carrier obligations, as set out in sections 113 to 115 of the CTA..."

⁶⁹ See CN's webpage [Customer Service Contact](#) for the following definition of "embargo": "An embargo is a method of controlling traffic when, in the judgment of the serving railroad, temporary circumstances, such as congestion, track conditions or acts of God, warrant restrictions against such movements." See also chapter 4.2.1 for embargoes in the U.S.

⁷⁰ Agency Interlocutory [Decision No. LET-R-99-2013](#), dated August 21, 2013, in re: *Application by Montreal, Maine & Atlantic Canada Co. and Montreal, Maine & Atlantic Railway, Ltd. (MMA) the Canadian Transportation Agency (Agency) to order the immediate lifting of the embargo issued by the Canadian Pacific Railway Company (CP) against MMA traffic and resume the CP level of service prior to the imposition by CP of the embargo and to order that this request be expedited given the urgent circumstances.*

⁷¹ Agency [Decision No. 268-R-2013](#), dated July 12, 2013, in re: *Complaints by F. Ménard Inc. and Meunerie Côté-Paquette Inc. pursuant to Part III, Division V and section 116 of the Canada Transportation Act*, at paragraph 41.

the Agency. The railway company then has no further obligations under the CTA with respect to the operation of the railway line.

4.1.1 Accommodation for Traffic – Section 113

Under section 113 a railway company must provide, according to its powers, adequate and suitable accommodation for the receiving, loading, carrying, unloading and delivering of all traffic offered for carriage on its railway. More specifically, paragraph 113(1)(c) of the CTA provides that a railway company shall without delay and with due care and diligence receive, carry and deliver the traffic.

Main Obligation – Subsection 113(1)

The expression “according to its powers” in subsection 113(1) (and also in section 114(1)) has been interpreted as referring to the powers granted to the company by its enabling statute and does not mean “according to its abilities.”⁷²

The expression “traffic offered for carriage on the railway” has been interpreted by the Agency and its predecessors to mean *actual* traffic as opposed to *potential* traffic.⁷³ The expression “traffic” itself is defined in the CTA (at section 87) and is said to mean “the traffic of goods, including equipment required for their movement.” Dangerous goods are also included.⁷⁴

The Patchett Case

Where the difficulty lies with respect to subsection 113(1) is as to the exact meaning of the word “shall,” as in “[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, etc.”

The leading case on the interpretation of the word “shall” in the present context is the 1959 *Patchett* case, where the Supreme Court of Canada held that the statutory duty imposed upon a railway company by virtue of section 203 of British Columbia's *Railway Act* (analogous to section 113 of the CTA), was not an absolute one. In other words “shall” should only be interpreted as meaning “shall reasonably”.

Rand J., for the majority of the Court, held that:⁷⁵

⁷² *Patchett & Sons Ltd. v. Pacific Great Eastern Ry. Co.*, [1959] S.C.R. 271, at p. 293 (Locke J., dissenting).

⁷³ See Agency [Decision No. 442-R-2008](#), dated August 28, 2008, in re: *Complaint by Trackside Holdings Ltd. pursuant to section 116 of the Canada Transportation Act for an order requiring the Canadian National Railway Company to fulfill its common carrier obligations.*

⁷⁴ The carriage of dangerous goods by rail is governed by [Part 10](#) of the *Transportation of Dangerous Goods Regulations*, SOR/2001-286.

⁷⁵ *Patchett* case, *supra*, at p. 274-275.

Apart from statute, undertaking a public carrier service as an economic enterprise by a private agency is done in the assumption that, with no fault on the agency's part, normal means will be available to the performance of its duty. That duty is permeated with reasonableness in all aspects of what is undertaken except the special responsibility of historical origin, as an insurer of goods...

....The duty being one of reasonableness how each situation is to be met depends upon its total circumstances. The carrier must, in all respects, take reasonable steps to maintain its public function; and its liability to any person damaged by such a cessation or refusal of services must be determined by what the railway, in the light of its knowledge of the facts, as, in other words, they reasonably appear to it, has effectively done or can effectively do to meet and resolve the situation.

Two out of the five judges who decided the case dissented on the basis that the statutory duties set out in section 203 of the B.C. *Railway Act* were absolute and hence could not be qualified by a standard of reasonableness. However the majority interpretation has never been challenged since 1959.

The *Patchett* case is still referred to on a regular basis in Agency proceedings with respect to LOS complaints.⁷⁶ In [Decision No. 285-R-2012](#), dated July 17, 2012,⁷⁷ the Agency relied heavily on the *Patchett* case to reach its decision and so did the Federal Court of Appeal in overturning that decision.⁷⁸

Basic Level of Service

Applying the *Patchett* case, the Agency in *Prairie Malt Limited v. CN* made a distinction between a basic level of service sufficient to satisfy the statutory service obligations of the railway company and “deluxe” services provided by the railway company as a result of competitive pressures from other railway companies or other modes of transport:⁷⁹

What is made available to one statutory grain shipper in terms of service in the discharge of a statutory service obligation, must be made available to all such shippers who request the same service.

⁷⁶ E.g. Agency [Decision No. 360-R-2014](#), dated October 1, 2014, in re: *Complaint filed by Canadian Canola Growers Association against Canadian National Railway Company and the Canadian Pacific Railway Company pursuant to sections 26, 37 and 116 of the Canada Transportation Act*.

⁷⁷ Agency [Decision No. 285-R-2012](#), dated July 17, 2012, in re: *Application by Wilkinson Steel and Metals Inc. pursuant to sections 26, 37, and 113 to 116 of the Canada Transportation Act*.

⁷⁸ [Canadian National Railway Company v. Canadian Transportation Agency](#), 2013 FCA 270.

⁷⁹ See NTA [Decision No. 411-R-1989](#), dated August 11, 1989, in re: *Complaint respecting the provision of container on flat car services at Biggar, in the Province of Saskatchewan*. See also to the same effect Agency [Decision No. 59-R-1997](#), dated February 12, 1997, in re: *Complaint by the Lethbridge Chamber of Commerce regarding the closure of the Canadian Pacific Railway Company's Lethbridge Intermodal Terminal*.

However, not every service provided by a railway is done so merely to discharge an imposed legal duty. A railway company can and does compete with other railway companies and with motor carriers in respect of some of its services. What is required to be provided by a railway company in the discharge of a statutory common carrier obligation as set out in the NTA, 1987, in respect of statutory grain traffic, is a basic level of service. We are of the view that the basic level of service owed to the grain industry is met through the provision of hopper boxcar services available to all grain shippers, wherever located. That is a "reasonable service" which Justice Rand defined as a railway's obligation in the *Patchett* case.

Intermodal services, however, are not a basic utility type of service provided by a railway. It is, rather, a specific service, which is designed to meet the exigencies of competitive challenges posed by the motor carrier industry. In order to effectively react to that competition, market forces have dictated centralization of intermodal services at certain locations with trucks operating over the short-haul to and from a customer's facility. While the carrier service obligations of the NTA, 1987 protect the public from arbitrary or discriminatory treatment by a rail carrier, in the provision of intermodal services, they do not, conversely, require the extension of intermodal rail services to locations not currently possessed of them. To impose such a requirement i.e. container on flat car services, to every location where demand for such specialized service may exist, would inevitably result in an inefficient intermodal transport system.

In our view, to define the respondent's obligations under the service provisions of the NTA, 1987 in such a manner would not result in the constitution of a reasonable obligation, under which, as Justice Rand stated in the *Patchett* case, a carrier alone is subjected to by the law.

Seasonal Shortages of Cars

The most difficult issue under subsection 113(1) is how to deal with the supply of cars to shippers during a period of seasonal shortage. This problem is neither a recent one,⁸⁰ nor one limited to Canada.⁸¹

A railway company is under the statutory obligation "to provide sufficient and adequate railway cars."⁸² This obligation is once again one which is pervaded with the notion of reasonableness.

This issue of reasonableness in car supply was dealt with early on in *Harris v. Quebec Central Railway Company*,⁸³ when the Board of Railway Commissioners, an early predecessor of the

⁸⁰ See the 1921 *Harris* case discussed below.

⁸¹ See *DeBruce Grain, Inc. v. Union Pacific Railroad Company*, 149 F.3d 787 (8th Cir. 1998).

⁸² See *Kiist v. Canadian Pacific Railway Co.* (1980) 2 F.C. 650 at p. 659 (Federal Court of Canada, Trial Division)

Agency, dealt with a complaint from a shipper that it was not being allocated sufficient cars by the railway. The Board held that the cars had been distributed fairly, and stated that the railway's obligation to supply cars was an obligation to maintain enough cars to, on the average, reasonably supply adequate and suitable accommodation for the carriage of traffic. In other words, the railway did not have to have enough cars to handle peak volume. The Board stated:⁸⁴

The burden placed upon the railway in respect of the carrying of traffic is an average one; that is to say, it does not mean that if the railway cannot at once, on a peak load movement, supply a car that therefore it is acting in contravention of Section 312 [of the *Railway Act*; now Section 113 of the CTA]. As the matter appears to me, what is involved is that the railway shall on the average reasonably supply adequate and suitable accommodation for the carrying of the traffic. It is not called upon to perform the unreasonable or the impossible... In time of shortage, it is what is, on the average, reasonable that must be looked at from the standpoint of car supply.

Similarly in *Kiist v. Canadian Pacific Railway Co.*,⁸⁵ the Federal Court of Appeal held that, in respect of allocation and use of railway cars, the test of reasonableness laid down in *Patchett* was one to be applied by the Canadian Transport Commission (predecessor to the Agency) having regard to the total demand on the railway system during the period in question:

The statement of claim in the present case sets forth a comprehensive complaint concerning the provision, allocation and use of railway cars for the carriage of grain during two entire crop years. It is one to which the test of reasonableness laid down in *Patchett* could only be properly applied by the Commission, having regard to the total demand on the railway system during the period in question.

⁸³ (1921) 27 CRC 447. See also Agency [Decision No. 475-R-1998](#), dated September 30, 1998, in re: *Complaint filed by the Canadian Wheat Board pursuant to sections 113 to 116 and sections 26 and 37 of the Canada Transportation Act against the Canadian National Railway Company and the Canadian Pacific Railway Company regarding their service obligations for the receiving, carrying and delivering of wheat and barley*: "With respect to the particular submission that the CTA requires all traffic to be treated equally, the Agency, while it agrees that one of the purposes of the level of service obligations is to protect shippers from arbitrary or discriminatory treatment by a railway company, is of the opinion that what constitutes discriminatory treatment in a particular case depends on the facts and on whether that treatment is unreasonable in the circumstances. The Agency does not accept the view that this necessarily means that all traffic must be treated equally at all times. As was stated in the case *Harris v. Quebec Central Railway Co. et al.*, the question is rather whether a particular shipper is afforded unreasonable treatment or granted undue preference; this is a question which can only be answered after reviewing all of the circumstances surrounding the particular situation."

⁸⁴ (1921) 27 C.R.C. 447, at page 450.

⁸⁵ (1982) 1 F.C. 361 (F.C.A.).

In *Canadian Wheat Board et al. v. CN*,⁸⁶ the Agency explained as follows:

The service obligations of a railway company are set out in section 113 of the CTA. Paragraphs 113(1)(a) through (c) of the CTA require a railway company to furnish adequate and suitable accommodation for the receiving, loading and delivering of all traffic offered for carriage on the railway without delay and with due care and diligence.

The Agency recognizes that it is not the obligation of the railway company to furnish cars at all times sufficient to meet all demands. Any level of service that is provided must be sustainable and to require the railway company to meet all demands, especially at peak periods, would not be reasonable. However, the Agency also recognizes that a "basic service" is a service that provides cars available to all grain shippers, regardless of size, wherever located and in acceptable quantities at acceptable times.

This was not new. Nor entirely new was the Agency's finding "that a certain level of predictability must also be incorporated into the parameters of what is to be an adequate and reasonable level of service".⁸⁷

It is clear from the evidence that the Complainants have received varying levels of service from CN with respect to the number and timing of cars delivered. While there is no doubt that the grain transportation system is complex and that there are many factors that must be considered, the Agency finds that a certain level of predictability must also be incorporated into the parameters of what is to be an adequate and reasonable level of service. The Complainants have asked the Agency to order CN to reinstitute its old car ordering system as it provided a greater level of certainty as to when rail cars would be delivered. The Agency does not find it necessary to direct CN as to how rail cars should be ordered. Rather, to provide the predictability by which an adequate and reasonable level of service can be expected and measured, the Agency finds it more appropriate to set a performance benchmark.

The Agency then identified three components for a performance-based benchmark for car supply as follows:⁸⁸

⁸⁶ Agency [Decision No. 488-R-2008](#), dated September 25, 2008, in re: *Complaints filed by the Canadian Wheat Board, North East Terminal Ltd., North West Terminal Ltd., Paterson Grain, Parrish and Heimbecker, Limited, and Providence Grain Group Inc. pursuant to sections 26, 37 and sections 113 to 116 of the Canada Transportation Act, S.C., 1996, c. 10, as amended, for an order requiring the Canadian National Railway Company to fulfill its level of service obligations. - Final ruling*, at paragraphs 99-100.

⁸⁷ *Ibid.*, at paragraph 109. See NTA [Decision No. 209-R-1990](#), dated April 11, 1990, in re: *Application by Rochevert Inc., located in Lindsay, Ontario, pursuant to section 147 of the National Transportation Act, 1987 alleging non-compliance of common carrier obligations by the Canadian National Railway Company*, where the Agency also emphasized the fact that service must be predictable: "fulfillment of common carrier obligations entails provision of a suitable and adequate level of service, a service on which a shipper may rely."

Based on the pleadings of the parties and all information submitted, the Agency determines that a performance benchmark should be comprised of three components; the first component is the number of rail cars confirmed for delivery; the second component is the timeliness and predictability of the delivery of the confirmed rail cars; and the third component recognizes factors that affect performance such as weather, terminal unloads, excessive demand for rail cars in peak periods, operational restrictions and derailments.

With respect to the first component, it is essential for shippers to receive an adequate and reasonable number of rail cars to transport grain to plan their operations. This is a basic and fundamental requirement.

The second component deals with the timeliness of the confirmed orders. It is not only important that shippers receive an adequate and reasonable number of rail cars, it is also necessary that they receive them in a timely and predictable fashion.

The final component recognizes that while a shipper needs to have some certainty, the ability of the railway company to provide this level of service may be compromised for short periods by factors beyond its control.

This introduction of a performance-based benchmark to define adequate and reasonable service did set a clear precedent. Furthermore, the Agency noted that, although “the remedy ordered is applicable only to NET, NWT, P&H and PG.”⁸⁹

The Agency is of the opinion that the utilization of a performance-based benchmark to establish adequate and reasonable service levels would benefit the western grain industry as a whole. The Agency encourages the railway companies and the grain shippers to enter into a dialogue with the goal of setting performance based standard levels. The Canadian Transportation Agency is prepared to assist in facilitating such a dialogue if the parties would find this helpful.

⁸⁸ *Ibid.*, at paragraphs 111-114. This is a new notion on the Agency’s part concerning sections 113 and 114 of the CTA. It explained the logic and benefits of performance-based benchmarking thus (*ibid.*, at paragraph 110): “Performance-based benchmarking is used increasingly in regulatory regimes. For example, Transport Canada and the National Energy Board use performance-based approaches. Performance-based approaches specify a required outcome but leave the means of achieving that outcome to the discretion of the industry and/or corporate entity being regulated. Performance-based approaches are not prescriptive as to how the outcome is to be achieved, rather it provides flexibility to industry and/or corporate entities to choose their own means to achieve the desired goals while selecting the most effective and efficient options. Performance benchmarks can also encourage innovation and continuous improvement. Therefore, the Agency has decided to use a performance-based approach in dealing with these level of service complaints.”

⁸⁹ *Ibid.*, at paragraphs 184-185.

Evaluation Approach

Finally, in a recent decision⁹⁰ the Agency stated that it would apply an Evaluation Approach in cases where the level of service application is with respect to the statutory obligations set out in sections 113 to 115 of the CTA. As explained by the Agency:

Unless the Agency determines that an applicant is not eligible to apply under the level service provisions of the CTA, the Agency will consider three questions in evaluating a level of service application, namely:

Is the shipper's request for service reasonable?

Did the railway company fulfill this request?

If not, are there reasons that could justify the service failure?

(a) If there is a reasonable justification, then the Agency will find that the railway company has not breached its level of service obligations;

(b) If there is no reasonable justification, then the Agency will find that there has been a breach of the railway company's level of service obligations and will look to the question of remedy.

New Sections 116.1 to 116.3 of the CTA

This year Parliament passed the [Fair Rail for Grain Farmers Act](#),⁹¹ which amended the CTA and the [Canada Grain Act](#),⁹² intending to ensure that Canada's rail transportation network moves grain to markets as quickly and efficiently as possible, following a record crop year for Canadian farmers in 2013.

In the context of the current discussion it is worth noting that the new sections 116.1 to 116.3 ("Traffic of Grain") were added to the CTA to impose new service obligations on CN and CP respecting the transportation of grain. Subject to demand and rail corridor capacity, these companies each had to move at least 500,000 metric tonnes of grain per week until 3 August 2014 (section 116.2(1)). The Governor in Council may, by order, specify the minimum amount of grain that CN and CP must move during subsequent crop years – the period that begins on 1 August in one year and ends on 31 July in the next year (sections 116.1, 116.2(2) and

⁹⁰ Agency [Interlocutory Decision 2014-10-03](#), dated October 3, 2014, in re: *Application by Louis Dreyfus Commodities Canada Ltd. against the Canadian National Railway Company, pursuant to section 116 of the Canada Transportation Act*, at paragraph 36 and following.

⁹¹ S.C. 2014, c. 8. See also Library of Parliament Research Publications, [Legislative Summary of Bill C-30: An Act to amend the Canada Grain Act and the Canada Transportation Act and to provide for other measures](#).

⁹² R.S.C., 1985, c. G-10.

116.2(4)). The Governor in Council can also, by order, vary the minimum amount during a crop year (sections 116.2(3) and 116.2(4)).

In the most recent such order,⁹³ effective November 30, 2014, CN and CP must each move the amounts of grain shown in Figure 4-1 below:⁹⁴

Figure 4-1: Minimum Tonnages of Grain Required to be Moved by Each of CN and CP, November 30, 2014-March 28, 2015

Time period	Metric tonnes per week
Nov. 30, 2014 to Dec. 20, 2014	345,000
Dec. 21, 2014 to Jan. 3, 2015	200,000
Jan. 4, 2015 to Feb. 21, 2015	325,000
Feb. 22, 2015 to Mar. 21, 2015	345,000
Mar. 22, 2015 to Mar. 28, 2015	465,000

The Agency is responsible for providing the Minister of Agriculture and Agri-Food with advice on the minimum amount of grain that CN and CP must move in a crop year. Before giving its advice, the Agency must consult with these companies as well as with grain handling operators (sections 116.2(5) to 116.2(7)). On the Minister's request, the Agency is also responsible for inquiring into whether CN and CP are complying with the new requirements respecting the movement of grain (section 116.3).

New section 177(3) provides for a maximum fine of \$100,000 per violation for CP or CN for violating the requirements to move the required minimum amount of grain.

Sections 116.1 to 116.3 and section 177(3) will be repealed on August 1, 2016 unless both Houses of Parliament postpone their repeal to an ulterior date.⁹⁵

Carriage on Payment of Rates – Subsection 113(2)

This subsection provides that:

Traffic must be taken, carried to and from, and delivered at the points referred to in paragraph (1)(a) on the payment of the lawfully payable rate.

⁹³ [Order Specifying the Minimum Amount of Grain to Be Moved, No. 2](#), SOR/2014-0276.

⁹⁴ Government of Canada, News Release, [Government of Canada to maintain minimum grain volume requirements for railways](#).

⁹⁵ See section 15(1) of the [Fair Rail for Grain Farmers Act](#).

Section 113(2) merely makes it clear that the service obligations of a railway company with respect to the carriage of traffic do not come for free and are consequently contingent upon “payment of the lawfully payable rate.”⁹⁶

Compensation for Provision of Rolling Stock – Subsection 113(3)

This subsection provides that:

Where a shipper provides rolling stock for the carriage by the railway company of the shipper’s traffic, the company shall, at the request of the shipper, establish specific reasonable compensation to the shipper in a tariff for the provision of the rolling stock.

There is of course nothing preventing a shipper and a railway company from agreeing to such compensation in a confidential contract instead of a tariff.⁹⁷

Confidential Contract Between Company and Shipper – Subsection 113(4)

This subsection provides that:

A shipper and a railway company may, by means of a confidential contract⁹⁸ or other written agreement, agree on the manner in which the obligations under this section are to be fulfilled by the company.

This provision is repeated in section 126(1)(e) of the CTA which similarly provides that: “A railway company may enter into a contract with a shipper that the parties agree to keep confidential respecting (...) (e) the manner in which the company shall fulfill its service obligations under section 113.”

A reference to confidential contracts also appears at section 116(2), where it is provided that:

If a company and a shipper agree, by means of a confidential contract, on the manner in which service obligations under section 113 are to be fulfilled by the company, the terms of that agreement are binding on the Agency in making its determination.⁹⁹

⁹⁶ Agency Interlocutory [Decision LET-R-248-2004](#), dated 7 September 2004, in re: *Level of service complaint filed by Wabush Mines Inc. for an order directing Quebec North Shore and Labrador Railway Company to issue a tariff pursuant to section 118 of the Canada Transportation Act and to maintain an adequate level of service between Wabush Lake and Arnaud Junction pursuant to section 116 of the Canada Transportation Act*, at paragraph 31: “One of the statutory service obligations imposed on railway companies is the obligation to receive, carry and deliver the traffic that is tendered by a shipper (113(1)(c) of the CTA). While railway companies are compelled to provide service when requested, subsection 113(2) of the CTA provides that such service only need be provided upon payment of the lawfully payable rate.”

⁹⁷ See section 126(1)(e) of the CTA, discussed below.

⁹⁸ Section 111 of the CTA defines a “confidential contract” to mean a contract entered into under subsection 126(1).

4.1.2 Facilities for Traffic – Section 114

The provisions now contained in section 114 of the CTA stood apart from those now contained in section 113 until 1987,¹⁰⁰ when they became respectively sections 145 and 144 of the NTA, 1987. Since then the two provisions are intermingled as one in most applications before the Agency.¹⁰¹ The only decision where section 114 (or more correctly its predecessor, section 145 of the NTA, 1987) was considered separately is *Cargill Ltd. v. CP*.¹⁰²

Main Obligation – Subsection 114(1)

This subsection provides that:

A railway company shall, according to its powers, afford to all persons and other companies all adequate and suitable accommodation for receiving, carrying and delivering traffic on and from its railway, for the transfer of traffic between its railway and other railways and for the return of rolling stock.

There is much similarity between the wording of section 114(1) and that of section 113(1)(b). It is not easy to ascertain exactly what section 114(1) adds to section 113(1)(b), except for the obvious difference that section 114(1) contemplates the existence of two or more railway companies while in general section 113 imposes obligations on an individual railway company irrespective of the existence of other such companies.¹⁰³

⁹⁹ Agency Interlocutory [Decision LET-R-248-2004](#), dated 7 September 2004, in re: *Level of service complaint filed by Wabush Mines Inc. for an order directing Quebec North Shore and Labrador Railway Company to issue a tariff pursuant to section 118 of the Canada Transportation Act and to maintain an adequate level of service between Wabush Lake and Arnaud Junction pursuant to section 116 of the Canada Transportation Act*, at paragraph 13: “Similarly, subsection 116(2) of the CTA provides that if a railway company and a shipper agree, by means of a confidential contract, on the manner in which service obligations under section 113 of the CTA are to be fulfilled by the company, the terms of that agreement are binding on the Agency in making its determination. Therefore, upon application by a shipper that a railway company has breached its level of service obligations as provided for in section 113 of the CTA, the Agency’s authority to determine what is a reasonable and adequate level of service would clearly be restricted by the terms and conditions of the existing and valid confidential contract entered into between the parties.”

¹⁰⁰ From 1985 to 1987 these provisions were section 271 [accommodation for traffic] and section 275 [facilities for traffic] of the *Railway Act*, R.S.C. 1985, chap. R-3.

¹⁰¹ E.g. Agency [Decision No. 59-R-1997](#), dated February 12, 1997, in re: *Complaint by the Lethbridge Chamber of Commerce regarding the closure of the Canadian Pacific Railway Company’s Lethbridge Intermodal Terminal*: “On October 25, 1996, a complaint was filed with the Canadian Transportation Agency by the Lethbridge Chamber of Commerce pursuant to section 116 of the *Canada Transportation Act*, S.C., 1996, c. 10 alleging the Canadian Pacific Railway Company to be in violation of sections 113 and 114 of the CTA with respect to the proposed closure of CP’s Lethbridge Intermodal Terminal.”

¹⁰² NTA [Decision No. 135-R-1988](#), dated June 1, 1988, in re: *Request, dated February 2, 1988, for a National Transportation Agency Ruling on a rail routing dispute between Cargill Ltd. and Canadian Pacific Limited*.

¹⁰³ There is however a reference to more than one railway company in section 113(1)(a).

Furthermore, unlike its counterpart provision under U.S. legislation which clearly deals with interchange points and interchange agreements,¹⁰⁴ subsection 114(1)'s usefulness in that regard is diluted by other provisions in the CTA dealing specifically with the interswitching of traffic between railway companies.¹⁰⁵

Through Traffic – Subsection 114(2)

This subsection provides that:

For the purposes of subsection (1), adequate and suitable accommodation includes reasonable facilities for the receiving, carriage and delivery by the company

- (a) at the request of any other company, of through traffic and, in the case of goods shipped by carload, of the car with the goods shipped in it, to and from the railway of the other company, at a through rate; and
- (b) at the request of any person interested in through traffic, of such traffic at through rates.

Subsection 114(2), in addition to being a specific example of subsection 114(1), must be read in conjunction with the joint rates provisions of section 121 of the CTA.

Connecting Railway to Reasonable Facilities – Subsection 114(3)

This subsection provides that:

Every railway company that has or operates a railway forming part of a continuous line of railway with or that intersects any other railway, or that has any terminus, station or wharf near to any terminus, station or wharf of another railway, shall afford all reasonable facilities for delivering to that other railway, or for receiving from or carrying by its railway, all the traffic arriving by that other railway without any unreasonable delay, so that

- (a) no obstruction is offered to the public desirous of using those railways as a continuous line of communication;¹⁰⁶ and
- (b) all reasonable accommodation, by means of the railways of those companies, is at all times afforded to the public for that purpose.

In [Decision No. 135-R-1988](#), dated June 1, 1988,¹⁰⁷ the Agency after quoting what are now subsections 114(1) and (3) explained that:

¹⁰⁴ 49 U.S.C. 10742. See chapter 4.2.2 below.

¹⁰⁵ See section 127 of the CTA.

¹⁰⁶ See also section 125(1) of the CTA which reads as follows: “No railway company shall, by any combination, contract or agreement, express or implied, or by any other means, prevent traffic from being moved on a continuous route from the point of origin to the point of destination.”

What is really at issue is whether Canadian Pacific is required to carry traffic as offered and directed by Cargill from Canadian Pacific local origins to a Canadian National destination, be it local or competitive, by furnishing adequate accommodation for the traffic's carriage including the turning over of Canadian Pacific cars to Canadian National for furtherance to destination. While Canadian Pacific submitted that the normal interchange point for feed grain traffic originating on Canadian Pacific lines in the prairies and terminating on Canadian National lines in the east is located at North Bay, the shipper, Cargill, had requested that the interchange take place at Thunder Bay. Evidence indicates that interchange of equipment can and does occur at Thunder Bay.

More simply put, then, the problem is defined as the obligations of a common carrier when confronted by a bill of lading (contract of carriage) containing routing instructions provided by the shipper. (...)

Historically, shippers have had the alternative to direct, within reason, what routing their traffic will follow in order to effect the lowest available rate. Nothing has changed in this regard as a result of the new NTA, 1987. This is all that Cargill has requested.

In conclusion, the National Transportation Agency finds that the refusal to route traffic in the manner requested by Cargill Ltd. is a breach of Canadian Pacific Limited's common carrier obligations.

Similar Facilities for Truckers – Subsection 114(4)

This subsection provides that:

If a railway company provides facilities for the transportation by rail of motor vehicles or trailers operated by any company under its control for the conveyance of goods for hire or reward,

(a) the railway company shall offer to all companies operating motor vehicles or trailers for the conveyance of goods for hire or reward similar facilities at the same rates and on the same terms and conditions as those applicable to the motor vehicles or trailers operated by the company under its control; and

(b) the Agency may disallow any rate or tariff that is not in compliance with this subsection and direct the company to substitute a rate or tariff that complies with this subsection.

This subsection was obviously of greater consequence when federally-regulated railway companies, such as CP with CP Trucks for example, owned and operated their own trucking companies.

¹⁰⁷ NTA [Decision No. 135-R-1988](#), dated June 1, 1988, in re: *Request, dated February 2, 1988, for a National Transportation Agency Ruling on a rail routing dispute between Cargill Ltd. and Canadian Pacific Limited.*

However one should note that pursuant to section 113(1) of the CTA a railway company is required to carry truckers' motor vehicles and trailers when asked to do so, irrespective of whether or not it controls a separate company in the trucking business.¹⁰⁸ What subsection 114(4) does is simply to add to the main obligation under section 113(1) an additional obligation of equality ("similar facilities at the same rates and on the same terms and conditions as those applicable to the motor vehicles or trailers operated by the company under its control").

4.1.3 Adequate and Suitable Accommodation – Section 115

Section 115 reads as follows:

115. For the purposes of subsection 113(1) or 114(1), adequate and suitable accommodation includes reasonable facilities

- (a) for the junction of private sidings or private spurs with a railway owned or operated by a company referred to in that subsection; and
- (b) for receiving, carrying and delivering traffic on and from private sidings or private spurs and placing cars and moving them on and from those private sidings or private spurs.

Although presented as a mere interpretation aid with respect to section 113(1) and 114(1) of the CTA, this provision, as explained by H. E. B. Coyne in *The Railway Law of Canada*:¹⁰⁹

requires a railway company to furnish reasonable facilities for the junction of its railway with a private siding. That is to say, it must (where reasonable) construct a spur leading from its track to the limit of its right of way and there connect the spur with the private siding. It must also, of course, furnish reasonable facilities for receiving, forwarding and delivering traffic from and to the private siding as set out in the subsection.

There are few decisions by the Agency (or its immediate predecessors) on this section, and the little which is available either states the obvious or sheds more light on the interpretation of section 113(1) than it does on section 115.¹¹⁰

¹⁰⁸ See definition of "traffic" at section 87 of the CTA: "'traffic' means the traffic of goods, including equipment required for their movement."

¹⁰⁹ See *supra*, at pp. 400-401. Then section 312(2) of the *Railway Act*, R.S.C. 1927, c. 170.

¹¹⁰ See NTA [Decision No. 411-R-1989](#), dated August 11, 1989, in re: *Complaint respecting the provision of container on flat car services at Biggar, in the Province of Saskatchewan* and see NTA [Decision No. 347-R-1991](#), dated June 28, 1991, in re: *Complaint filed by Mr. Lorne Sheppard pursuant to section 144 of the National Transportation Act, 1987 regarding an alleged failure by the Canadian National Railway Company to provide suitable and adequate accommodation for receiving and loading traffic*. Section 115 was recently referred to and discussed by the Federal Court of Appeal in [Canadian National Railway Company v. Canadian Transportation Agency](#), 2013 FCA 270, at paragraphs 30 and 31.

4.1.4 Complaint and Investigation Concerning Company's Obligations – Section 116

Section 116 of the CTA requires the Agency to investigate a complaint with respect to the LOS offered and if the Agency determines that a railway company is not fulfilling its LOS obligations it has remedial powers which are set out under subsection 116(4). If a railway company is found not to have fulfilled its LOS obligations, the Agency may order remedies that are relevant to the nature of the breach that has been identified.¹¹¹

A section 116 complaint will not be entertained however if there is no reasonable cause of action.¹¹²

Main Obligation – Subsection 116(1)

This subsection provides that:

On receipt of a complaint made by any person that a railway company is not fulfilling any of its service obligations, the Agency shall

- (a) conduct, as expeditiously as possible, an investigation of the complaint that, in its opinion, is warranted; and
- (b) within one hundred and twenty days after receipt of the complaint, determine whether the company is fulfilling that obligation.

Given that no particular procedure is specifically provided for to hear and determine the complaint referred to at section 116(1) of the CTA, the complaint will be subject to section 18 and following of the [Canadian Transportation Agency Rules \(Dispute Proceedings and Certain Rules Applicable to All Proceedings\)](#).¹¹³ These provisions prescribe the form and content of every application filed with the Agency.

Section 116(1)(b) provides that a complaint shall be investigated and a determination issued by the Agency “within one hundred and twenty days after receipt of the complaint.” This is really a specific application of the general rule found at section 29(1) of the CTA¹¹⁴ (minus the right to extend the 120-days deadline by mutual consent). Two cases have been heard by the

¹¹¹ Agency [Decision No. 360-R-2014](#), dated October 1, 2014, in re: *Complaint filed by Canadian Canola Growers Association against Canadian National Railway Company and the Canadian Pacific Railway Company pursuant to sections 26, 37 and 116 of the Canada Transportation Act*, at paragraph 35.

¹¹² *Ibid.*, at paragraph 40: “The jurisprudence dictates that the applicant bears the burden of enunciating in the pleadings the facts upon which they rely for each cause of action alleged. In other words, the applicant’s legal conclusion that the respondents failed to meet their statutory obligations must be supported by the necessary factual basis. The allegation must be more than bare allegations of wrongdoing.”

¹¹³ SOR/2014-104. See also the Agency’s [Annotated Dispute Adjudication Rules](#).

¹¹⁴ Section 29(1) reads as follows: “(1) The Agency shall make its decision in any proceedings before it as expeditiously as possible, but no later than one hundred and twenty days after the originating documents are received, unless the parties agree to an extension of this Act or a regulation made under subsection (2) provides otherwise.”

Federal Court of Appeal on whether the statutory time delays set in the former NTA, 1987 and in the current CTA are imperative or merely directory. In both cases they were found to be directory. As explained by Décarý J.A.:¹¹⁵

The wording of subsection 29(1) of the Act is different from that of subsection 165(1) of the former statute [i.e. the NTA, 1987], but in my view the same principle of interpretation applies with equal force. In the case at bar, Ferroequus had no control over the Agency's process and the Agency could not predict the number of interlocutory applications that were filed by CN and, also, by a third party, Canadian Pacific Railway Company. To use the words in [*Montreal Street Railway Co. v. Normandin*, [1917] A.C. 170 (P.C.),] (at pp. 174-75) and in [*McCain Foods Ltd. v. Canada (National Transportation Agency)*, [1993] 1 F.C. 583 (F.C.A.)](at p. 592), Ferroequus would be at a serious general disadvantage if the Agency could no longer proceed with the application. Like Desjardins J.A. in *McCain*, I see no benefit in requiring the parties and the Agency, in the circumstances, to start anew, and I see no public interest served in doing so.

Confidential Contract Binding on Agency – Subsection 116(2)

This subsection provides that:

If a company and a shipper agree, by means of a confidential contract, on the manner in which service obligations under section 113 are to be fulfilled by the company, the terms of that agreement are binding on the Agency in making its determination.

Subsection 116(2) is a mirror provision to section 113(4) of the CTA, previously discussed above.

Competitive Line Rate Provisions Binding on Agency – Subsection 116(3)

This subsection provides that:

If a shipper and a company agree under subsection 136(4) on the manner in which the service obligations are to be fulfilled by the local carrier, the terms of the agreement are binding on the Agency in making its determination.

Section 136(4) reads as follows:

The tariff setting out a competitive line rate must set out the manner in which the local carrier issuing the tariff shall, subject to subsection (1), fulfil its service obligations

(a) as agreed on by the shipper and the local carrier, if they agree on the amount of the competitive line rate; or

¹¹⁵ [CN v. Ferroequus Railway Company Limited](#), 2002 FCA 193, at paragraph 5.

(b) as determined by the Agency, if the amount of the competitive line rate is established by the Agency under section 132.

Reference to section 136(4) is repeated also in section 116(6). Subsection 136(4) is part of the competitive line rate provisions (sections 129-136) of the CTA.

Orders of Agency – Subsection 116(4)

The Agency is given at subsection 116(4) broad and highly discretionary remedial powers.¹¹⁶

This subsection provides that:

If the Agency determines that a company is not fulfilling any of its service obligations, the Agency may

(a) order that

(i) specific works be constructed or carried out,¹¹⁷

(ii) property be acquired,

(iii) cars, motive power or other equipment be allotted, distributed, used or moved as specified by the Agency, or

(iv) any specified steps, systems or methods be taken or followed by the company;

(b) specify in the order the maximum charges that may be made by the company in respect of the matter so ordered;

(c) order the company to fulfil that obligation in any manner and within any time or during any period that the Agency deems expedient, having regard to all proper interests, and specify the particulars of the obligation to be fulfilled;

(c.1) order the company to compensate any person adversely affected for any expenses that they incurred as a result of the company's failure to fulfil its service obligations or, if the company is a party to a confidential contract with a shipper that requires the company to pay an amount of compensation for expenses incurred by the shipper as a

¹¹⁶ Sharlow J.A. for the Federal Court of Appeal in [Canadian National Railway Company v. Canadian Transportation Agency](#), 2013 FCA 270, at paragraph 39: "I observe that the Agency's remedial powers are broad and highly discretionary. They are described in subsection 116(4)."

¹¹⁷ See, for e.g., NTA [Decision No. 123-R-1990](#), dated March 2, 1990, in re: *Complaint filed by Lecours Lumber Company Ltd. located in Calstock, Ontario pursuant to section 147 of the National Transportation Act, 1987, alleging non-compliance of common carrier obligations by the Canadian National Railway Company.*

result of the company's failure to fulfill its service obligations, order the company to pay that amount to the shipper;¹¹⁸

(d) if the service obligation is in respect of a grain-dependent branch line listed in Schedule I, order the company to add to the plan it is required to prepare under subsection 141(1) an indication that it intends to take steps to discontinue operating the line; or

(e) if the service obligation is in respect of a grain-dependent branch line listed in Schedule I, order the company, on the terms and conditions that the Agency considers appropriate, to grant to another railway company the right

(i) to run and operate its trains over and on any portion of the line, and

(ii) in so far as necessary to provide service to the line, to run and operate its trains over and on any portion of any other portion of the railway of the company against which the order is made but not to solicit traffic on that railway, to take possession of, use or occupy any land belonging to that company and to use the whole or any portion of that company's right-of-way, tracks, terminals, stations or station grounds.¹¹⁹

CN in 2002 tried to argue that the jurisdiction of the Agency pursuant to subsection 116(4) of the CTA is prospective (i.e. that the breach must be current with its determination for an order to be issued under these provisions) and that consequently only complaints for on-going breaches could be entertained. The Agency rejected that argument and said:¹²⁰

The Agency is of the view that the provisions in question create a coherent system where the Agency is the ultimate arbitrator. It would not be consistent with this system if a railway company could breach its legal obligations but escape any sanction by simply deciding, after an application is filed, to respect them.

¹¹⁸ Added by section 5.1 (1) of the [Fair Rail for Grain Farmers Act](#). This new paragraph c.1 will be repealed on August 1, 2016 unless both Houses of Parliament postpone their repeal to an ulterior date: see section 15(1) of the [Fair Rail for Grain Farmers Act](#).

¹¹⁹ For an in-depth discussion of section 116(4)(e), see Agency [Decision No. 212-R-2001](#), dated May 3, 2001, in re: *Application by the Hudson Bay Railway Company pursuant to sections 93 and 138 of the Canada Transportation Act, for, inter alia, an order granting it the right to run and operate trains on and over specified lines of the Canadian National Railway Company, and to use the whole or any portion of the right of way, tracks, terminals, stations or station grounds, interchanges and facilities located on or used in conjunction with the said railway lines for the express purpose of soliciting and carrying the freight of shippers served by these lines*, under the sub-heading "(F) Intention of Parliament - Similar legislative wording in the CTA."

¹²⁰ Agency [Decision No. 323-R-2002](#), dated June 11, 2002, in re: *Complaints filed by Naber Seed & Grain Co. Ltd., pursuant to section 116 of the Canada Transportation Act, alleging that the Canadian National Railway Company has failed to provide adequate and suitable accommodation for the carriage of bulk products from its facilities at Melfort and Star City, Saskatchewan and Kathryn, Alberta to the Ports of Vancouver and Prince Rupert during Grain Shipping Weeks 6 to 17 and 18 to 38 of the crop year 2000-2001*.

The Agency can also issue interim relief. This additional power derives from section 28(2) of the CTA, which reads as follows:

The Agency may, instead of making an order final in the first instance, make an interim order and reserve further directions either for an adjourned hearing of the matter or for further application.

An application for an interim order under section 28(2) of the CTA is subject to a three-part test. The Agency summarized this three-part test as follows:¹²¹

The onus to show that an interim order should be granted rests on the applicant. Briefly stated, at the first stage, the applicant must demonstrate that there is a serious question to be tried. At the second stage, the applicant is required to demonstrate that irreparable harm will result if the relief is not granted. The third part of the test requires an assessment of the balance of inconvenience to the parties; in other words, which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction.

Section 25.1 of the CTA also grants the Agency the power to award costs in any proceeding before it. The Agency has discretion regarding the award or denial of costs and each application is decided on its own merits.¹²² Maliciousness on the part of one of the litigants entails usually the award of costs in favour of the innocent party.¹²³

Right of Action on Default – Subsection 116(5)

This subsection provides that:

Every person aggrieved¹²⁴ by any neglect or refusal of a company to fulfil its service obligations has, subject to this Act, an action¹²⁵ for the neglect or refusal against the company.

¹²¹ Agency Interlocutory [Decision No. 2014-05-02](#), dated May 2, 2014, in re: *Application by Louis Dreyfus Commodities Canada Ltd. against the Canadian National Railway Company, pursuant to sections 26 and subsection 28(2) of the Canada Transportation Act*.

¹²² See Agency [Decision No. 227-R-1998](#), dated May 19, 1998, in re: *Application by Eagle Forest Products Limited Partnership for an award of costs, pursuant to section 25.1 of the Canada Transportation Act*.

¹²³ See Agency [Decision No. 457-R-1997](#), dated July 17, 1997, in re: *Complaint by Eagle Forest Products Limited Partnership, pursuant to subsection 116(1) of the Canada Transportation Act alleging that the Canadian National Railway Company has failed to fulfil its common carrier obligations to provide adequate and suitable accommodation for delivering traffic originating from its mill located in Miramichi, in the province of New Brunswick*.

¹²⁴ See *Kiist v. Canadian Pacific Railway Co.*, (1980) 2 F.C. 650 at p. 663 (Federal Court of Canada, Trial Division): “A person usually is not considered “aggrieved” within that subsection (as is also the case where similar words are employed in other statutes) unless he himself can establish he suffered particular loss and not merely because he has a grievance.”.

The proper forum for a claim in damages is not the Agency but a court of law. In [Decision No. 209-R-1990](#), dated April 11, 1990, the Agency stated that:

The Agency is of the view that subsection 147(5) of the NTA, 1987 [now subsection 116(5) of the CTA] permits any aggrieved party a right of action in the Courts against a carrier who has failed to fulfil its common carrier obligations pursuant to sections 144 and 145 of the NTA, 1987 [now sections 113 and 114 of the CTA]. The Agency has not been given any statutory powers by Parliament to award damages upon proof of a railway company failing to carry out its common carrier obligations under section 144 or 145 of the NTA, 1987. Therefore, the Agency has no jurisdiction to pursue this part of Rochevert's application.¹²⁶

In a recent decision the Agency's lack of jurisdiction to award damages was once again made clear:¹²⁷

Where the Agency finds that a railway company is not fulfilling its level of service obligations, it has broad powers under subsection 116(4) of the CTA to order the railway company to remedy the situation. In respect of the relief sought by the complainants, pursuant to sections 27 and 116 of the CTA, to require MMA to pay all incremental costs resulting from replacement trucking service, the Agency does not have any authority to award damages in respect of any failure by a carrier to fulfil the level of service obligations set out in the CTA. This relief would need to be sought through the appropriate forum.

However, this fairly clear cut rule will be partially undermined by the introduction of new section 116(4)(c.1) which provides that the Agency can now:

order the company to compensate any person adversely affected for any expenses that they incurred as a result of the company's failure to fulfill its service obligations or, if the company is a party to a confidential contract with a shipper that requires the company to pay an amount of compensation for expenses incurred by the shipper as a result of the

¹²⁵ See *Kiist v. Canadian Pacific Railway Co.*, (1982) 1 F.C. 361 at p. 373 (F.C.A.): "Subsection 262(7) of the *Railway Act* gives an aggrieved person an 'action' for damages for neglect or refusal to comply with the requirements of the section. The word 'action' connotes a proceeding in the courts. It is to be contrasted with the use of the words 'application' and 'complaint' with reference to proceedings before the Commission under the *Railway Act*."

¹²⁶ See also Agency [Decision No. 103-R-2000](#), dated February 15, 2000, in re: *Complaint filed by the Mayor of Stenen, Saskatchewan, pursuant to section 116 of the Canada Transportation Act* alleging that the Canadian National Railway Company failed to fulfil its common carrier obligations to provide adequate and suitable accommodation for the receiving and delivery of traffic by dismantling its siding in the village of Stenen: "With respect to the request that general damages and punitive damages be awarded, the Agency has no jurisdiction to award such damages."

¹²⁷ Agency [Decision No. 268-R-2013](#), dated July 12, 2013, in re: *Complaints by F. Ménard Inc. and Meunerie Côté-Paquette Inc. pursuant to Part III, Division V and section 116 of the Canada Transportation Act*, at paragraph 64.

company's failure to fulfill its service obligations, order the company to pay that amount to the shipper.

Company Not Relieved – Subsection 116(6)

This subsection provides that:

Subject to the terms of a confidential contract referred to in subsection 113(4) or a tariff setting out a competitive line rate referred to in subsection 136(4), a company is not relieved from an action taken under subsection (5) by any notice, condition or declaration if the damage claimed in the action arises from any negligence or omission of the company or any of its employees.

In other words, a railway company can limit or restrict its liability for any neglect or refusal to fulfil its service obligations, but if such liability results from any negligence or omission of the company or any of its employees, notices, conditions or declarations by the railway company are not enough. What is needed is that such notices, conditions or declarations be embodied in:

- the terms of confidential contract referred to in section 113(4);¹²⁸ or
- a tariff setting out a competitive line rate referred to in subsection 136(4).

Given that subsection 116(6) provides for a discrete scheme in relation to the liability of a railway company for any neglect or refusal to fulfil its service obligations, the general rule set out in section 137 (“Limiting carrier liability”) is not relevant.¹²⁹

4.1.5 Arbitration on Level of Services

Since 2013, a shipper has an additional remedy for certain kind of LOS disputes in the form of an arbitration proceeding under section 169.31 of the CTA. This remedy is discussed separately in chapter 7.1.2 of this Report.

4.2 United States

The level of service obligations of U.S. federal rail carriers (usually referred to as “common carrier obligations”) are set out at 49 U.S.C. 11101, 10742, 11103, 11121, 11122 and 10907.

¹²⁸ See also section 126(1)(e) of the CTA.

¹²⁹ Section 137 of the CTA was discussed in some detail in *CP v. Boutique Jacob Inc.*, 2008 FCA 85. Subsection 137(1) reads as follows: “A railway company shall not limit or restrict its liability to a shipper for the movement of traffic except by means of a written agreement signed by the shipper or by an association or other body representing shippers.”

These obligations require a rail carrier to:

- provide transportation or service on reasonable request (49 U.S.C. 11101);
- provide reasonable, proper, and equal facilities for the interchange of traffic between its respective line and a connecting line of another rail carrier or of a federally-regulated water carrier (49 U.S.C. 10742);
- construct, maintain, and operate, on reasonable conditions, a switch connection to connect a shipper’s lateral branch line or private side track with its railroad (49 U.S.C. 11103);
- furnish safe and adequate car service and establish, observe, and enforce reasonable rules and practices on car service (49 U.S.C. 11121 and 11122); and
- sell a railroad line to a financially responsible person when it provides inadequate service to shippers on that line (49 U.S.C. 10907).

4.2.1 Common Carrier Transportation, Service and Rates – 49 U.S.C. 11101

General Obligation to Carry

49 U.S.C 11101(a) reads in part as follow:

A rail carrier providing transportation or service subject to the jurisdiction of the Board under this part shall provide the transportation or service on reasonable request.¹³⁰

This obligation is subject to a double test of reasonableness.

“Upon Reasonable Request”

As explained by the Board:¹³¹

¹³⁰ 49 U.S.C. 11101(a) goes beyond mere carriage. Transportation as defined for the purpose of the rail provisions of Title 49 of the United States Code encompasses not only carriage per se (i.e. the movement of property), but also all the rolling stock, equipment and other facilities needed to effect such a movement. See 49 U.S.C. [10102](#): “In this part – (9) “transportation” includes – (A) a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use; and (B) services related to that movement, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property.”

¹³¹ See Board Decision, dated July 27, 2005, in re: [Groome & Associates, Inc. and Lee K. Groome v. Greenville County Economic Development Corporation](#). See also Board Decision, dated July 27, 2005, in re: [Michael H. Meyer, Trustee in Bankruptcy for California Western Railroad, Inc. v. North Coast Railroad Authority, d/b/a Northwestern Pacific Railroad](#): “In order to be found to have violated the common carrier obligation at 49 U.S.C. 11101(a), a carrier must have failed to provide service upon reasonable request. It has been held that a reasonable request is one that is specific as to the volume, commodity, and time of shipment. [Citations omitted.]”).

Under the common carrier obligation set forth in 49 U.S.C. 11101(a), transportation must be provided “upon reasonable request.” In various cases, the Board has required that a shipper must specifically request transportation of a particular type and quantity of goods between specific points – which Complainants did not do here – to trigger the common carrier obligation. Those cases, however, involved established railroads that had mechanisms for receiving requests for service. This line, by contrast, was bought by an entity that had no intention of actually operating the railroad itself, even if the line had been repaired. Because there was no operator available to provide service, it would be pointless for us to hold here that G&A should have made a formal request to GCEDC specifying those sorts of details. Of course, a shipper may not “lie low” when a rail line is damaged and out-of-service and then, much later, file a complaint seeking damages for failure to serve. (.....) Under the circumstances, the record provides sufficient evidence to show that Complainants made a reasonable request for service, thus triggering GCEDC’s common carrier obligation.

The reasonableness of the request under 49 U.S.C. 11101 is not, however, a kind of threshold question which must be addressed in every case separately from the adequacy of the service.¹³²

Reasonable Limitations and Conditions

The obligation of a common carrier by rail, both at common law and under 49 U.S.C 11101(a), to accept for carriage and to carry property tendered to it is not absolute, but is one subject to reasonable limitations and conditions.¹³³

As the Board explained:¹³⁴

Complainants cite various pre-1980 precedents that suggest that GCEDC is subject to a standard approaching strict liability for failing to provide service. In the Staggers Rail Act of 1980, however, Congress directed that railroads be treated more like ordinary businesses than like public utilities. Thus, under more recent cases, the Board has conducted a fact-specific balancing test to determine whether the actions of the carrier

¹³² See *Granite State Concrete Co. v. Surface Transp. Bd.*, 417 F. 3d 85 (1st Cir. 2005).

¹³³ See *Miller Engineering Co. v. Louisiana Ry. & Nav. Co.*, 81 So. 314 (La. Sup. Ct., 1919): “Unquestionably the general rule is that a common carrier, if it can reasonably do so, must receive and transport all freight tendered to it, with legal charges; but this is not an absolute rule, and necessarily, like all other rules, must have its exception.” See also *MidAmerican Energy Company v. Surface Transportation Board*, 169 F. 3d 1099 (8th Cir. 1999), at p. 1106 (“As the Board and the railroads assert, however, there are significant limitations to the common carrier duties. It is usually at the discretion of the carrier how it wishes to satisfy its duty to provide rates and service.”)

¹³⁴ See Board Decision, dated July 27, 2005, in re: [Groome & Associates, Inc. and Lee K. Groome v. Greenville County Economic Development Corporation](#) (citations omitted from the quote).

were reasonable, and the Board has found that if the actions were not unreasonable, the carrier was not liable for damages even though it failed to provide requested service.

Hazardous Materials

The fact that a material is hazardous does not excuse a rail carrier from performance of its common carrier obligations.¹³⁵

Temporary Suspension of Obligation to Carry – Embargo

As explained by the Board:¹³⁶

Under 49 U.S.C. 11101(a), railroads have a duty to provide service on reasonable request. An embargo of service is permitted as an emergency measure when for some reason a railroad is unable to perform its duty as a common carrier. Although a valid embargo temporarily excuses the duty to provide service on reasonable request, it does not permanently eliminate the common carrier obligation under 49 U.S.C. 11101(a). To be relieved of its common carrier obligation, a railroad must seek discontinuance or abandonment authorization under 49 U.S.C. 10903. Thus, a valid embargo is an appropriate defense to an action for a breach of the common carrier's duty, but an embargo cannot be used by a railroad to unilaterally abandon or discontinue service on a line at its own election.

What constitutes a valid embargo is a fact-specific inquiry to be determined on a case-by-case basis. Embargoes are typically valid if justified by physical conditions affecting safety such as weather and flood damage, and tunnel deterioration, or operating restrictions such as congestion. But to be valid, an embargo must at all times be reasonable. Whether an embargo is reasonable is determined by balancing a number of factors, including the

¹³⁵ See Board Decision, dated June 11, 2009, in re: [Union Pacific Railroad Company – Petition for Declaratory Order](#).

¹³⁶ See Board Decision, dated July 20, 2001, in re: [Bar Ale, Inc. v. California Northern Railroad Co. and Southern Pacific Transportation Company](#). Normally, rail carriers have to follow procedures set by the Association of American Railroads (AAR) before establishing embargoes. These are not controlling however. See Board Decision, dated July 27, 2005, in re: [Groome & Associates, Inc. and Lee K. Groome v. Greenville County Economic Development Corporation](#): “Here, the parties dispute whether the embargo that GCEDC claims it imposed could protect GCEDC from liability, given that GCEDC did not follow AAR’s procedures for establishing embargoes. In our view, however, whether the embargo was perfected or not under AAR rules should not be controlling here. Even where the proper embargo procedures are followed, a carrier may be found to be in violation of the common carrier obligation if the embargo is premised on damage that can be readily and inexpensively fixed, or if the embargo remains in effect too long. Indeed, an embargo that extends beyond a reasonable time can be construed as an unlawful abandonment; that is why we require that, at some point, if a carrier is not going to fix a line over which service is requested, it must take steps to obtain abandonment or discontinuance authority. Thus, even though GCEDC may not have issued an AAR-compliant embargo, we will review all of the evidence submitted to determine whether GCEDC acted reasonably under the circumstances. [Citations omitted.]”). Finally for an in-depth discussion of embargoes by an appellate court, see [Decatur County Commissioners v. STB](#), 308 F.3d 710 (7th Cir. 2002).

length of the service cessation, the intent of the railroad, the cost of repairs, the amount of traffic on the line, and the financial condition of the carrier. Thus, for example, if the disability that prevented the carrier from performing its duty is eliminated, the carrier is financially able to remedy the disability, and there is no apparent reason why the disability should not be remedied, an embargo may become unreasonable and no longer valid. If an embargo becomes unreasonable, the carrier is no longer excused from its duty to provide service and may be liable to shippers for damages.

Carrier's Rates on Request

49 U.S.C. 11101(b) provides in part that:

A rail carrier shall also provide to any person, on request, the carrier's rates and other service terms.

Carrier's rates are discussed in some detail in chapter 5.2 below. We only wish here to establish the link which exists between section 11101(b) and 11101(a). As explained by the Board:¹³⁷

Railroads have a statutory common carrier obligation under 49 U.S.C. 11101 to provide transportation for commodities that have not been exempted from regulation pursuant to 49 U.S.C. 10502. This obligation creates two interrelated requirements. Railroads must provide, in writing, common carrier rates to any person requesting them. 49 U.S.C. 11101(b). And, they must provide rail service pursuant to those rates upon reasonable request. 49 U.S.C. 11101(a). These requirements are linked, because a rate is a necessary predicate to providing requested service. What constitutes a reasonable request for service is not statutorily defined but depends on all the relevant facts and circumstances. Regardless, a rail carrier may not avoid its common carrier obligation to provide service by evading the requirement to establish rates upon request.

4.2.2 Facilities for Interchange of Traffic – 49 U.S.C. 10742

49 U.S.C. 10742 requires a rail carrier to provide reasonable, proper, and equal facilities that are within its power to provide for the interchange of traffic between, and for the receiving, forwarding, and delivering of passengers and property to and from, its respective line and a connecting line of another rail carrier or of a federally-regulated water carrier.¹³⁸ As both the

¹³⁷ See Board Decision, dated June 11, 2009, in re: [Union Pacific Railroad Company – Petition for Declaratory Order](#).

¹³⁸ The obligations set out in this section were held to apply in favour of water carriers even before there was an explicit reference to such carriers. See [United States v. Pennsylvania R. Co.](#), 323 U.S. 612, at pp. 616-618 (U.S. Supreme Court, 1945): "There is no language in the present Act which specifically commands that railroads must interchange their cars with connecting water lines. We cannot agree with the contention that the absence of specific language indicates a purpose of Congress not to require such an interchange. (...) The 1940 [Transportation] Act was intended, together with the old law, to provide a completely integrated interstate

title and text of this provision indicate, section 10742 focuses on whether the physical facilities made available for interchanging traffic at particular points within a narrow geographic area are sufficient.¹³⁹

As explained by a U.S. Federal Court of Appeals:¹⁴⁰

[M]andatory interchange.... has characterized American railroading for nearly a century. Railroads must permit their cars to be used by other carriers to carry freight on other lines, as well as accept the cars of other carriers onto their lines. Mandatory interchange allows freight to travel from point A to point B in one car (obviating the need to move freight between cars) even where no one railroad's lines connect points A and B.

There are relatively few reported cases on 49 U.S.C 10742 since in most instances rail carriers negotiate interchange agreements with other rail carriers without requiring the assistance of the Board.¹⁴¹

The exact interchange point is chosen by the rail carriers themselves.¹⁴² It need not be where the lines of the two rail carriers first intersect,¹⁴³ and as matter of fact there can be an

regulatory system over motor, railroad, and water carriers. In the light of its declared policy, and because of its provisions hereafter noted, we think railroads are under a duty to provide interchange of cars with water carriers to the end that interstate commerce may move without interruption or delay.”

¹³⁹ Board Decision, dated February 8, 2012, in re: [Canexus Chemicals Canada L.P. v. BNSF Railway Company](#).

¹⁴⁰ See [Southern Pacific Transportation Company, et al. v. Interstate Commerce Commission](#), 69 F.3d 583 at p. 585 (D.C. Cir., 1995).

¹⁴¹ See, for e.g., Board Decision, dated March 18, 2005, in re: [Minnesota Northern Railroad, Inc. v. Canadian National Railway Company](#): “[I]nterchange disputes are rarely brought before us. Interchange arrangements are not matters that require, nor are furthered by, regulation, but are better handled through private negotiations and agreements.”) As to these agreements once they are entered into, see Board Decision, dated February 23, 2005, in re: [Ohio Valley Railroad Company—Petition to Restore Switch Connection and Other Relief](#): “Petitioners have also requested that we confirm OVR’s contractual right to a direct interchange with CSXT. We usually defer to the courts in matters of contract interpretation. Therefore, we decline OVR’s request to confirm its disputed contractual right to interchange directly with CSXT. [Citations omitted.]”.

¹⁴² [Jack O. BLACK and Patrick W. Simmons v. Interstate Commerce Commission](#), 837 F.2d 1175 at p. 1178 (D.C. Cir., 1988): “The law is well settled that the selection of an interchange point is made by the carriers and that operation over another carrier's line to effect an interchange does not require Commission approval.”) See also Board Decision, dated April 29, 2003, in re: [Norfolk Southern Railway Company – Petition for Declaratory Order – Interchange with Reading Blue Mountain & Northern Railroad Company](#): “Custom requires the receiving railroad in a direct physical interchange to designate a point on its own line where it will receive traffic and to provide a free route over its tracks to that point for the delivering carrier.”

¹⁴³ [Jack O. BLACK and Patrick W. Simmons v. Interstate Commerce Commission](#), *supra*, at p. 1178: “While the preferred point of interchange normally is the intersection of the two carriers' lines, practical considerations may dictate otherwise. In most cases, interchange necessitates some movement over another railroad's tracks. [Citations omitted.]” Once selected, the interchange point need not always be the same forever. See Board Decision, dated April 29, 2003, in re: [Norfolk Southern Railway Company – Petition for Declaratory Order – Interchange with Reading Blue Mountain & Northern Railroad Company](#): “NSR’s petition rests on the proposition that “once connecting carriers have agreed upon and established a point of interchange, neither carrier has the

interchange point between the lines of two rail carriers even when these lines do not intersect.¹⁴⁴ An existing interchange does not cease to be one because of non-use.¹⁴⁵

As we have seen 49 U.S.C. 10742 states that a carrier shall provide “reasonable, proper, and equal facilities” for interchange. When a carrier has the power to provide two or more options for interchanging traffic, each of which is independently reasonable, proper, and equal, it need not provide all such options to connecting lines but may instead offer only that option which best serves its own business interests.¹⁴⁶

While historically, interchange cases under section 10742 have mainly concerned discrimination between carriers, i.e. whether, under section 10742, a rail carrier has failed to provide a complaining rail carrier with interchange facilities ‘equal’ to those offered to other railroads,¹⁴⁷ sometimes cases under this section raise other kind of issues, such as routing and rate issues between carriers and shippers.¹⁴⁸

right unilaterally to change the point of interchange or to dictate a new interchange point to the other carrier unless the other carrier agrees or the Board finds reason to prescribe a new interchange point and new interchange terms.” This is a misstatement of the law. (...) Here, RBMN has notified NSR that it will discontinue interchange at Leighton pursuant to the terms of the parties’ agreement, and has designated a point on its own line where it will receive traffic, i.e., Penobscot... RBMN has offered to allow NSR to use its tracks for this purpose, and no further Board authority is needed for one carrier to use another carrier’s track solely in connection with interchange. These actions are fully consistent with the law. [Citations omitted.]”

¹⁴⁴ See [Burlington Northern Railroad Company v. Interstate Commerce Commission](#), 731 F.2d 33 at p. 40 (D.C. Cir., 1984): “We have already seen under the *Grand Trunk Western* holding discussed above that it is entirely reasonable and proper for two noncontiguous railroads to interchange traffic through an intermediate switching carrier rather than by direct connection, even though one of the railroads involved has complete ownership of the intermediate carrier.”

¹⁴⁵ Board Decision, dated March 18, 2005, in re: [Minnesota Northern Railroad, Inc. v. Canadian National Railway Company](#): “MNN is correct that a railroad’s common carrier duties, including those under this statutory provision, are not extinguished simply because of non-use. Thus, under certain circumstances, we might find that a carrier could be required to reinstall a switch that it has removed.”

¹⁴⁶ See [Burlington Northern Railroad Company v. Interstate Commerce Commission](#), 731 F.2d 33 at p. 40 (D.C. Cir., 1984, at p. 40: “Although the predecessor of section 10742 required a carrier to furnish “all reasonable, proper and equal facilities” that were within its power to provide for interchanging traffic, and no substantive change was intended when Congress deleted the word “all” from its 1978 restatement of the section, courts have long recognized that when a carrier has the power to provide two or more options for interchanging traffic, each of which is independently reasonable, proper, and equal, it need not provide all such options to connecting lines but may instead offer only that option which best serves its own business interests. [Citations omitted.]”

¹⁴⁷ Board Decision, dated March 18, 2005, in re: [Minnesota Northern Railroad, Inc. v. Canadian National Railway Company](#). See also [Burlington Northern Railroad Company v. Interstate Commerce Commission](#), 731 F.2d 33 at p. 40 (D.C. Cir., 1984), at footnote 15: “In discussing the original section on the Senate floor, Senator Cullom explained that its purpose was “to require railroads to furnish to connecting roads all reasonable and proper facilities for the interchange of traffic that may be necessary for the convenience of the public, and to prevent one road, or a combination of roads, from ‘freezing out’ a connecting line by refusing to accept traffic from it or deliver traffic to it upon any terms, as has been done.” 17 Cong. Rec. 3470, 3472 (1886) (remarks of Sen. Cullom). In the present case, there is no allegation that direct interchange facilities are necessary to the public convenience

4.2.3 Switch Connections and Tracks – 49 U.S.C. 11103

Pursuant to 49 U.S.C. 11103 switch connections may be ordered by the Board to be constructed and operated in order to provide access to a railroad's main-line tracks from a "lateral branch line" or from a private siding.¹⁴⁹

This obligation of U.S. rail carriers to provide switch connections is really a subsidiary element in the larger obligation by a common carrier to carry a shipper's traffic from origin to destination and, if necessary to complete movements, by providing switch connections to one's railroad.

This obligation is subject however to two sets of limitations:

- The Board must, as prescribed by 49 U.S.C. 11103(a), find that the new connection will be safe, practicable, and will provide sufficient business to justify the cost of construction and maintenance; and
- The Board must be satisfied that the rail carrier to which the obligation would apply has a prior record of anticompetitive conduct.¹⁵⁰

4.2.4 Car Service – 49 U.S.C. 11121 and 11122

Section 11121

49 U.S.C. 11121(a) requires a rail carrier to:

furnish safe and adequate car service¹⁵¹ and establish, observe, and enforce reasonable rules and practices on car service.

or that the B & O has attempted to freeze out petitioner from interchanging traffic at Chicago. This observation, combined with the fact that petitioner currently has available to it reasonable, proper, and equal facilities for interchanging traffic, is dispositive of its charge under section 10742."

¹⁴⁸ See Board Decision, dated April 30, 1997, in re: [Central Power & Light Co. v. Southern Pacific Transp. Co., et al.](#), at footnote 9.

¹⁴⁹ See Board Decision, dated March 18, 2005, in re: [Minnesota Northern Railroad, Inc. v. Canadian National Railway Company](#): "[49 U.S.C. 11103(a)] historically has been applied only to situations involving shipper-owned track. Specifically, a lateral branch line has been defined as a line that is tributary to and dependent on another line for an outlet, not an independent and competing line. MNN's line here is not shipper-owned; rather, it is an independent and competing line of railroad. Thus, 49 U.S.C. 11103(a) is inapplicable. [Citations omitted.]"

¹⁵⁰ This second limitation is an administrative one. See House of Representatives' Subcommittee on Railroads, [The Status of Railroad Economic Regulation](#) (April 2, 2004), at p. 7. See also Board Decision, dated December 27, 1996, in re: [Central Power & Light Co. v. Southern Pacific Transp. Co., et al.](#): "As first interpreted in *Midtec Paper Corp. v. Chicago & N.W. Transp. Co.*, to obtain access relief shippers must show that a carrier "has used its market power to extract unreasonable terms on through movements, or, because of its monopoly position, has shown a disregard for the shipper's needs by rendering inadequate service. [Citations omitted.]"

Railroads may satisfy their obligations to furnish cars in several ways. They may own their own cars, they may borrow cars from another railroad, or they may lease privately-owned cars,¹⁵² often but not always from the shippers themselves.

If they do fail to provide cars however owned, then 49 U.S.C. 11121(a) empowers the Board to:

require a rail carrier to provide facilities and equipment that are reasonably necessary to furnish safe and adequate car service if the Board decides that the rail carrier has materially failed to furnish that service.

As cogently explained by the Board:¹⁵³

All carriers have a duty to provide adequate car service under 49 U.S.C. 11121. The Board does not micromanage the method by which carriers meet that obligation, and any shipper that believes that a carrier's car service is inadequate may bring a claim to the Board.

It should be noted however that an aggrieved shipper can – “assuming that the conditions are normal and the demand reasonable” – ignore the Board, and seek redress directly before a State court or a United States district court to compel a rail carrier to fulfil its obligations under 49 U.S.C. 11121 (or seek damages as result of such failure).¹⁵⁴ On the other hand, during periods of general shortage of cars, the reasonableness of a railroad's response to such

¹⁵¹ Car service is specifically defined at 49 U.S.C. 10102(2) to include – (A) the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, other vehicles, and special types of equipment used in the transportation of property by a rail carrier, and (B) the supply of trains by a rail carrier.

¹⁵² See Board Decision, dated August 13, 2004, in re: [North America Freight Car Association – Protest and Petition for Investigation – Tariff Publications of the Burlington Northern and Santa Fe Railway Company](#): “Railroads have a common carrier obligation to provide equipment needed to transport commodities they hold themselves out to carry. 49 U.S.C. 11121. Railroads can meet this obligation by supplying their own cars to move the freight, using cars of another railroad, or using private cars supplied by shippers or other owners. When railroads use private cars, they must compensate the lessor or owner for their use. The compensation must reflect the cost of owning and maintaining that type of freight car, including a fair return on its cost. 49 U.S.C. 11122(b). [Citations omitted.]” See also [General American Transportation Corp. et al. v. Louisiana Tax Commission et al.](#), 680 F.2d 400 (5th Cir. 1982) and [Gen. Amer. Transp. Corp. v. ICC](#), 872 F.2d 1048 (D.C. Cir. 1989).

¹⁵³ Board Decision, dated September 30, 2008, in re: [Canadian Pacific Railway Company et al. – Control – Dakota, Minnesota & Eastern Railroad Corp. et al.](#), at footnote 23.

¹⁵⁴ [Pennsylvania R. Co. v. Sonman Shaft Coal Co.](#), 242 U.S. 120 at p. 126 (U.S. Supr. Ct. 1916): “Assuming that the conditions were normal and the demand reasonable, it was the duty of the carrier to have furnished the cars. That duty arose from the common law up to the date of the amendatory statute of 1906, known as the Hepburn Act, and thereafter from a provision in that act which, for present purposes, may be regarded as merely adopting the common-law rule. There was evidence tending to show, and the jury found, that the conditions in the coal trade were normal and the demand for the cars reasonable. (...) Thus far it is apparent that no administrative question was involved,—nothing which the act intends shall be passed upon by the [Interstate Commerce] Commission either to the exclusion of the courts or as a necessary condition to judicial action.”

shortage has been recognized as one best left for Board resolution due to the need for specialized expertise and uniform national treatment.¹⁵⁵

Section 11122

Under 49 U.S.C. 11122(a) the Board is mandated to make regulations that “encourage the purchase, acquisition, and efficient use of freight cars.” Some such regulations exist at 49 C.F.R. 1033 in the form of Car Hire Rates and Car Service Orders. Regulations under 49 U.S.C. 11122(a) can also provide for “the compensation to be paid for the use of a locomotive, freight car, or other vehicle.” The compensation as per 49 U.S.C. 11122(b) must reflect the cost of owning and maintaining that type of freight car, including a fair return on its cost.¹⁵⁶

4.2.5 Railroad Development – 49 U.S.C. 10907

Pursuant to 49 U.S.C. 10907(c), the Board can force the sale of a rail line to shippers or communities if the Board finds, among other things, that the rail carrier owning the line is not providing adequate service on it. This section is called the “feeder line provision” because Congress expected that it would be needed on branch lines or feeder lines where lower traffic volumes sometimes resulted in poor service or proposed abandonments.

In a recent case, the Board summarized the whole scheme embodied in 49 U.S.C. 10907(c) thus:¹⁵⁷

The feeder line provision was enacted to enable shippers and communities to acquire rail lines that are proposed to be abandoned or over which rail service is inadequate. The

¹⁵⁵ See *Spence v. Baltimore & Ohio Railroad Co.*, 360 F.2d 887 (7th Cir. 1966) and *DeBruce Grain, Inc. v. Union Pacific Railroad Company*, 149 F.3d 787 (8th Cir. 1998).

¹⁵⁶ See Board Decision, dated August 13, 2004, in re: [North America Freight Car Association – Protest and Petition for Investigation – Tariff Publications of the Burlington Northern and Santa Fe Railway Company](#): “In 1986, the Board’s predecessor, the Interstate Commerce Commission (ICC), determined that a negotiated agreement to govern the railroads’ use of private tanks cars was consistent with the requirements of 49 U.S.C. 11122(b) and adopted the agreement — thereby giving it regulatory effect. The Ex Parte No. 328 Agreement contains a formula for calculating mileage allowances for tank cars (the “allowance system”) that is used to determine the compensation that a railroad must pay when it utilizes private tank cars. Under 49 U.S.C. 11122(b), the compensation paid by a carrier for use of a private car must reflect the expense of owning and maintaining that type of freight car. The ICC found that the Agreement was consistent with section 11122(b) because it took into account the various services provided by the railroads and the car owners and the expenses incurred by each in connection with the use of private tank cars. [Citations omitted.]”

¹⁵⁷ Board Decision, dated October 31, 2008, in re: [Oregon International Port of Coos Bay—Feeder Line Application—Coos Bay Line of the Central Oregon & Pacific Railroad, Inc.](#), See also Board Decision, dated October 28, 2004, in re: [Keokuk Junction Railway Company—Feeder Line Acquisition—Line of Toledo Peoria and Western Railway Corporation Between La Harpe and Hollis, IL](#), affirmed in *Toledo, Peoria & W. Ry. v. STB*, 462 F.3d 734 (7th Cir. 2006), and Board Decision, dated August 31, 2007, in re: [Pyc Industries, Inc. — Feeder Line Application — Lines of South Plains Switching, Ltd. Co.](#)

Board may order the forced sale of a rail line to a financially responsible person¹⁵⁸ in two situations. The first is when the line has been identified by the owning carrier on its “system diagram map” (filed at the Board as required by 49 CFR 1152 Subpart B) as a candidate for abandonment, but the carrier has not yet sought authority to abandon the line. The other is when inadequate service is alleged and the applicant shows that the public convenience and necessity require or permit the sale.¹⁵⁹ In the latter category of cases, we must determine whether it is appropriate to force a carrier to sell a line so that rail service can be restored, improved, or simply maintained. If we find that a forced sale is warranted, we must also set the terms for the sale¹⁶⁰ and ensure that the potential purchaser is financially responsible.

4.2.6 Remedies

Complaints

Under 49 U.S.C. 11701(a) the Board can, if it finds that a rail carrier is not complying with its common carrier’s obligations take appropriate action to compel compliance with them. Any such investigation needs to begin by way of a complaint.

The key provision in that respect is 49 U.S.C. 11701(b), which reads in part as follows:

A person, including a governmental authority, may file with the Board a complaint about a violation of this part by a rail carrier providing transportation or service subject to the jurisdiction of the Board under this part. The complaint must state the facts that are the subject of the violation.

¹⁵⁸ See 49 U.S.C. 10907(a): “In this section, the term “financially responsible person” means a person who – (1) is capable of paying the constitutional minimum value of the railroad line proposed to be acquired; and (2) is able to assure that adequate transportation will be provided over such line for a period of not less than 3 years. Such term includes a governmental authority but does not include a Class I or Class II rail carrier.”).

¹⁵⁹ To find that the public convenience and necessity require or permit the sale of a rail line, the Board must find that the five criteria set forth in 49 U.S.C. 10907(c)(1) are met, namely that: (1) the rail carrier operating the line has refused to make the necessary efforts within a reasonable time to provide adequate service to shippers who transport traffic over the line; (2) the transportation is inadequate for the majority of shippers who use the line; (3) the sale will not have a significantly adverse financial effect on the rail carrier operating it; (4) the sale will not have an adverse effect on the overall operational performance of the rail carrier operating it; and (5) the sale will likely result in improved rail transportation for shippers that use the line.

¹⁶⁰ The price of the line is statutorily set under 49 U.S.C. 10907(a)(2) as follows: “For purposes of this subsection, the constitutional minimum value of a particular railroad line shall be presumed to be not less than the net liquidation value of such line or the going concern value of such line, whichever is greater.” See [Toledo, Peoria & W. Ry. v. STB](#), 462 F.3d 734 (7th Cir. 2006) for a detailed discussion by the Court of Appeals for the 7th Circuit of the Board’s methodology in valuing a rail line’s net salvage value.

The Board may dismiss a complaint that does not state reasonable grounds for investigation and action.¹⁶¹

The exact modalities governing the filing of a complaint with the Board and its investigation by it are set out in 49 C.F.R. Part 1111 (“Complaint and Investigation Procedures”). Aggrieved shippers can also apply in exceptional circumstances to the Board under 49 U.S.C. 11721(b)(4) for emergency orders.¹⁶²

Finally, under 5 U.S.C. 554(e) and 49 U.S.C. 721, the Board may issue a declaratory order to terminate a controversy or remove uncertainty. It has broad discretion in determining whether to issue a declaratory order.¹⁶³

Damages

Shippers can sue U.S. rail carriers in damages for statutory breaches of their common carrier service obligations.¹⁶⁴

The aggrieved shipper may proceed by way of civil action before a State court or a United States district court or claim damages against the rail carrier by filing a complaint with the Board.¹⁶⁵ A person who files a complaint with the Board to recover damages under 49 U.S.C. 11704(b) must do so within two years after the claim accrues.¹⁶⁶

¹⁶¹ Board Decision, dated July 27, 2005, in re: [Groome & Associates, Inc. and Lee K. Groome v. Greenville County Economic Development Corporation](#).

¹⁶² 49 U.S.C. 11721(b)(4) provides that: “(b) The Board may – (...) (4) when necessary to prevent irreparable harm, issue an appropriate order without regard to subchapter II of chapter 5 of title 5.” See also [DeBruce Grain, Inc. v. Union Pacific Railroad Company](#), 149 F.3d 787 (8th Cir. 1998).

¹⁶³ See Board Decision, dated January 19, 2005, in re: [SMS Rail Service, Inc. – Petition for Declaratory Order](#). However, as explained in Board Decision, dated December 20, 2007, in re: [North America Freight Car Association – Petition for Declaratory Order](#): “A declaratory order proceeding is not intended to deal with the level of discovery and evidence needed to build a record upon which the Board could base a decision. Accordingly, the petition for declaratory order will be denied. Should Petitioners want a Board determination on their case that could entertain a request for damages or for an order that the rail carrier take specific actions, they may file a formal complaint, addressing their concerns and requesting relief.”

¹⁶⁴ See 49 U.S.C. 11704(b): “A rail carrier . . . is liable for damages sustained by a person as a result of an act or omission of that carrier in violation of this part [A].” See also Board Decision, dated July 27, 2005, in re: [Groome & Associates, Inc. and Lee K. Groome v. Greenville County Economic Development Corporation](#): “The only remaining question is the amount of damages. Under [49 U.S.C.], the Board has authority to award damages sustained by a party as a result of a statutory violation, but it may award damages only where a party shows it is clearly entitled to them. (...) The agency has historically awarded as damages costs directly attributable to the violation at issue. [Citations omitted.]”.

¹⁶⁵ See 49 U.S.C. 11704(b).

¹⁶⁶ 49 U.S.C. 11705(c). See also Board Decision, dated July 27, 2005, in re: [Groome & Associates, Inc. and Lee K. Groome v. Greenville County Economic Development Corporation](#): “Most statutes of limitations are triggered by some sort of action by one party to a case. [49 U.S.C.] generally defines “accrual” of a cause of action as the result of an affirmative act: “delivery or tender of delivery by the rail carrier.” 49 U.S.C. 11705(g). That statutory

The Board does not award legal costs in proceedings before it.¹⁶⁷

4.2.7 Statutory Limitations on the Jurisdiction of the Board¹⁶⁸

Limitations Imposed Under Section 10709

49 U.S.C. 10709(a) provides in part that:

One or more rail carriers providing transportation subject to the jurisdiction of the Board under this part may enter into a contract with one or more purchasers of rail services to provide specified services under specified rates and conditions.

A contract that is authorized by this section, and transportation under such contract, shall not be subject to this part, and may not be subsequently challenged before the Board or in any court on the grounds that such contract violates a provision of this part.

A shipper who enters into a transportation contract with a rail carrier under 49 U.S.C. 10709(a) therefore loses his statutory rights under Part A of Subtitle IV of 49 U.S.C. and has, if the circumstances warrant it, only a recourse for breach of contract before the appropriate State court or United States district court (unless the parties have agreed otherwise).¹⁶⁹

Rail transportation contracts covered by 49 U.S.C. 10709 and the legal effects of section 10709 are discussed more fully in chapter 5.2.1 below.

Limitations Imposed Under Section 10502

General

Pursuant to 49 U.S.C. 10502(a):

... the Board, to the maximum extent consistent with this part, shall exempt a person, class of persons, or a transaction or service whenever the Board finds that the application in whole or in part of a provision of this part –

definition makes it relatively easy in many rail cases to determine when a complaint is timely and when it is not. (...) The statute of limitations issue here is not so simple, however, because the complaint is not based on anything that GCEDC affirmatively did, but rather is based on an omission that allegedly violated the statute, i.e., GCEDC's failure to repair the line and obtain an operator to provide rail service."

¹⁶⁷ See Board Decision, dated July 27, 2005, in re: [Groome & Associates, Inc. and Lee K. Groome v. Greenville County Economic Development Corporation](#): "Finally, Complainants ask the Board to award them attorney fees. There is, however, no statutory authority suggesting that we have the power to award legal fees, and thus we have not done so in the past. Although we sympathize with Mr. Groome's financial circumstances, we see no basis on which we could order the County to pay his legal expenses. [Citations omitted.]"

¹⁶⁸ See also CPCS, *Service Issues in Regulated Industries Other than Canadian Rail Freight Industry*, Rail Freight Service Review Project #4, Final Report (September 2, 2009), p. 23 and Appendix C.

¹⁶⁹ See 49 U.S.C. 10709(c)(2).

- (1) is not necessary to carry out the transportation policy of section 10101 of this title; and
- (2) either –
 - (A) the transaction or service is of limited scope; or
 - (B) the application in whole or in part of the provision is not needed to protect shippers from the abuse of market power.

We have already encountered section 10502(a) in relation to the interpretation of section 10101 (chapter 2.3.3 above) and in relation to exemptions under section 10901 (see chapter 3.2.2 above) and under section 10903 (see chapter 3.2.4 above).

The Board is also entitled pursuant to 49 U.S.C. to more generally exempt by regulation persons, classes of persons, or transactions or services.

A number of such exemptions exist with regard to transactions or services, including type of commodities, under 49 C.F.R. Part 1039 and 49 C.F.R. Part 1090.

Commodity exemptions

The commodity exemptions under 49 U.S.C. 10502(a) are set out more specifically at 49 C.F.R. 1039.10 – *Exemption of agricultural commodities except grain, soybeans, and sunflower seeds* – and at 49 C.F.R. 1039.11 – *Miscellaneous commodities exemptions*.

The effect of those exemptions is to excuse rail carriers from their common carrier obligations under 49 U.S.C. 11101 to provide transportation for those commodities.¹⁷⁰ However, a shipper of an exempt commodity can petition the Board pursuant to 49 U.S.C. 10502(d) to have the exemption revoked.¹⁷¹

The policy reasons behind the commodity exemptions were explained by Board as follows:¹⁷²

The exemption provisions pertaining to railroads first adopted in the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. 94-210, 90 Stat. 31 (1976) (4R Act), and later modified in the Staggers Act of 1980, Pub. L. 96-448, 94 Stat. 1895 (1980) (Staggers Act), fundamentally changed the economic regulation of the railroad industry

¹⁷⁰ Board Decision, dated June 11, 2009, in re: [Union Pacific Railroad Company – Petition for Declaratory Order](#): “Railroads have a statutory common carrier obligation under 49 U.S.C. 11101 to provide transportation for commodities that have not been exempted from regulation pursuant to 49 U.S.C. 10502.”

¹⁷¹ See, for example, Board Decision, dated July 27, 2005, in re: [Michael H. Meyer, Trustee in Bankruptcy for California Western Railroad, Inc. v. North Coast Railroad Authority, d/b/a Northwestern Pacific Railroad](#): “Mr. Meyer notes that the lumber traffic at issue here has been exempted from regulation pursuant to 49 U.S.C. 10502 and he asks for partial revocation of that exemption so that the Board can institute a proceeding and set a procedural schedule to consider his complaint.”

¹⁷² Board Decision, dated October 21, 2010, in re: [Review of Commodity, Boxcar and TOFC/COFC Exemptions](#).

by the Board's predecessor, the Interstate Commerce Commission (the Commission). Prior to 1976, the Commission heavily regulated the industry. The Commission focused its regulation on ensuring equal treatment of shippers, which in some instances, led to railroad pricing decisions based on factors other than market considerations.

By the early 1970s, the railroads were in financial decline. In an effort to revitalize the struggling railroad industry, Congress enacted the 4R Act and, 4 years later, the Staggers Act. In both statutes, Congress reduced the Commission's oversight of railroads through various means, including the statutory exemption provisions of 49 U.S.C. § 10505. Under § 10505, which was enacted in the 4R Act and modified in the Staggers Act, Congress directed the Commission to exempt railroad activities when it found that regulation was not necessary to carry out the national rail transportation policy (RTP) of 49 U.S.C. § 10101, and either: (1) the exemption was of limited scope; or (2) regulation was not necessary to protect shippers from abuse of market power. (These exemption provisions are now contained in 49 U.S.C. § 10502.) In the Staggers Act, Congress directed the Commission to pursue exemptions aggressively, and to correct any problems arising as a result of the exemption through its revocation authority.

Consistent with that Congressional directive, the Commission exempted numerous commodities, services, and types of transactions from regulation. In its first "commodity" exemption, in Rail General Exemption Authority—Fresh Fruits & Vegetables, 361 I.C.C. 211 (1979), the Commission exempted certain fresh fruits and vegetables from its regulations, based largely on its conclusion that the rail market share of movements of these goods, which were subject to strong competitive forces, was minimal and declining. Since then, the agency has exempted numerous other individual commodities, listed in 49 C.F.R. §§ 1039.10 and 1039.11, after finding that traffic for these individual commodities was sufficiently competitive and that railroads lacked sufficient market power such that abuse of shippers was not a substantial threat. The Commission also exempted rail (and truck) operations provided in connection with intermodal (TOFC/COFC) services, under 49 C.F.R. pt. 1090, and the rail transportation of all commodities in single-line boxcar service, under 49 C.F.R. § 1039.14.

These agency exemption decisions were instrumental in the U.S. rail system's transition from a heavily regulated, financially weak component of the economy into a mature, relatively healthy industry that operates with only minimal oversight. The transition, however, was not without challenges, sometimes because an exemption under § 10502 excuses carriers from virtually all aspects of regulation, even though the Board's continuing jurisdiction over exempted movements also extinguishes any common law cause of action regarding common carrier duties. Thus, for exempted movements, rail customers could pursue legal remedies under the Interstate Commerce Act only if they successfully petitioned the agency to revoke the exemption under 49 U.S.C. § 10502(d).

4.3 Summary and Key Findings

Statutory LOS obligations for rail carriers were introduced early in the 19th century in both Canada and the United States. These were a codification of the existing common law with respect to common carriers, and are still often referred to in both countries as “common carrier obligations.” Given this origin it is not surprising that there are many similar elements between the Canadian and corresponding U.S. statutory provisions respecting LOS. Importantly, both in Canada and the U.S., a railway company's LOS obligations are not considered absolute but are judged on the basis what constitutes “reasonable” service and whether a railway company is fulfilling its service obligations in a “reasonable” manner given the circumstances.

While the general legislative scheme in Canada, set out today in sections 113 to 116 of the CTA, has changed very little even in the last 30 years or so, when rail deregulation in North America began in earnest, the U.S. provisions have by contrast been greatly narrowed in scope with regard to their application. Significantly in the U.S.:

- A shipper who enters into a confidential contract with one or more rail carriers loses his various statutory protections;
- The Board can exempt particular commodities as well as forms of rail transportation from the protections normally afforded a shipper under the LOS provisions; and
- Some LOS remedies or rights are available to a shipper only if there is lack of sufficient competition or if anti-competitive behaviour of the rail carrier can be established.

4.3.1 LOS Obligations of Canadian Federal Railway Companies

Sections 113 and 114 of the CTA impose specific LOS obligations on Canadian federal railway companies. Section 113 in particular states that a railway company shall provide adequate and suitable accommodation for the receiving, loading, carrying, unloading and delivering of all traffic offered for carriage on its railway. Section 115 defines the scope of certain phrases found in sections 113 and 114.

4.3.2 Canadian Rail LOS Complaint Mechanism

Section 116 creates the mechanism by which a complaint may be lodged that a railway company is not fulfilling its obligations under sections 113 and 114. Significantly, “any person” can file such a complaint; it need not be a shipper. On receipt of the complaint, the Agency is required to carry out an investigation and issue a determination within 120 days, although this deadline is not imperative. Where the Agency finds that a railway company is not fulfilling its service obligations, it has extremely broad powers to order the railway company to remedy the situation. However, the Agency cannot award damages to a section 116 complainant.

The leading case on the interpretation of the word “shall” under section 113 is *Patchett & Sons Ltd. v. Pacific Great Eastern Ry. Co.*, [1959] S.C.R. 271, where the Supreme Court of Canada held that a railway company’s statutory duty in this context was not absolute but rather one that is “permeated with reasonableness.” Therefore “the duty being one of reasonableness how each situation is to be met depends upon its total circumstances.” The *Patchett* case continues to be relied upon to this day.

In *Canadian Wheat Board et al. v. CN*, a 2008 decision of the Agency, the issue of what is reasonable in the context of a case involving seasonal shortage of railway cars was explained as follows:

[I]t is not the obligation of the railway company to furnish cars at all times sufficient to meet all demands. Any level of service that is provided must be sustainable and to require the railway company to meet all demands, especially at peak periods, would not be reasonable. However, the Agency also recognizes that a “basic service” is a service that provides cars available to all grain shippers, regardless of size, wherever located and in acceptable quantities at acceptable times.

Based on these principles, the Agency then ordered CN to provide a level of service based on quantitative service performance benchmarks established by it. This introduction of performance-based benchmarks was, at the time, precedent setting.

In a recent case the Agency introduced what it calls an Evaluation Approach to LOS applications.¹⁷³ There are at least two major questions with this approach and the resulting decision, which has been disputed and is currently before the courts. Is the Evaluation Approach something new and at variance with the wording of sections 113 to 115 of the CTA (and the *Patchett* decision) or is it rather just the streamlining in a logical order of existing

¹⁷³ Agency [Interlocutory Decision 2014-10-03](#), dated October 3, 2014, in re: *Application by Louis Dreyfus Commodities Canada Ltd. against the Canadian National Railway Company, pursuant to section 116 of the Canada Transportation Act*, at paragraph 36 and following.

precedents? If the latter, was the Evaluation Approach nonetheless correctly applied to the facts of the case before the Agency?¹⁷⁴

4.3.3 New CTA Amendments

Since 2013, a shipper has an additional remedy in the form of an arbitration proceeding under [section 169.31](#) of the CTA. This remedy, which provides recourse to arbitration for shippers who are unable to agree on and enter into a level of service contract with a railway company, is discussed in Chapter 7.1.2. of this Report.

In 2014, Parliament passed the [Fair Rail for Grain Farmers Act](#),¹⁷⁵ which amended the CTA and the [Canada Grain Act](#),¹⁷⁶ ostensibly to ensure that Canada's rail transportation network moves grain to markets as quickly and efficiently as possible, following a record crop year for Canadian farmers in 2013 and the severe 2014 winter. New sections 116.1 to 116.3 (“Traffic of Grain”) were added to the CTA to impose new service obligations, in the form of quotas, on CN and CP respecting grain transportation. Subject to demand and rail corridor capacity, CN and CP were each required to move at least 500,000 metric tonnes of grain per week until 3 August 2014. As well, the GIC may, by order, specify the minimum amount of grain that CN and CP must move during subsequent crop years. The GIC can also, by order, vary the minimum amount during a crop year. It has done so most recently on November 27, 2014.¹⁷⁷

Also under these new sections, the Agency is responsible for providing the Minister of Agriculture and Agri-Food with advice on the minimum amount of grain that CN and CP must each move in a crop year. Before giving its advice, the Agency must consult with these companies as well as with grain handling operators. On the Minister’s request, the Agency is also responsible for inquiring into whether CN and CP are complying with the new requirements respecting the movement of grain.

New section 177(3) provides for a maximum fine of \$100,000 per violation for CP or CN for violating the requirements to move the required minimum amounts of grain.

Rather unusually, sections 116.1 to 116.3 and section 177(3) are subject to a sunset clause and will be repealed on August 1, 2016 unless both Houses of Parliament postpone their repeal to an ulterior date.¹⁷⁸

¹⁷⁴ The answer to both questions may come soon enough if the Federal Court of Appeal grants CN’s motion for leave to appeal Agency [Interlocutory Decision 2014-10-03](#) (see Court File: 14-A-64).

¹⁷⁵ S.C. 2014, c. 8. See also Library of Parliament Research Publications, [Legislative Summary of Bill C-30: An Act to amend the Canada Grain Act and the Canada Transportation Act and to provide for other measures](#).

¹⁷⁶ R.S.C., 1985, c. G-10.

¹⁷⁷ See Chapter 4.1.1 above (“New Sections 116.1 to 116.3 of the CTA”)

¹⁷⁸ See section 15(1) of the [Fair Rail for Grain Farmers Act](#).

4.3.4 LOS Obligations of U.S. Federal Rail Carriers

In this chapter we have also described in some detail the LOS obligations of U.S. rail freight carriers, focusing on those U.S. statutory obligations which correspond – in some form or another – to the existing Canadian obligations found at sections 113-116 of the CTA. These U.S. obligations are found at Title 49 of the United States Code.

Briefly, the U.S. LOS obligations require a rail carrier to: provide transportation or service on reasonable request; provide reasonable, proper, and equal facilities for the interchange of traffic; construct, maintain, and operate, on reasonable conditions, a switch connection to connect a shipper's lateral branch line or private side track with its railroad; furnish safe and adequate car service and establish, observe, and enforce reasonable rules and practices on car service; and sell a line to a financially responsible person when it provides inadequate service on that line.

The key U.S. provision is 49 U.S.C. 11101. Under paragraph (a) thereof, a rail carrier is required to provide transportation or service "on reasonable request." This obligation is subject to a double test of reasonableness:

- Firstly, it requires that a shipper must specifically request transportation of a particular type and quantity of goods between specific points to trigger the common carrier obligation. This is the "reasonable request". However, this is not a kind of threshold question which must be addressed in every case separately from the adequacy of the service.
- Secondly, the obligation of the rail carrier to accept and carry traffic is not absolute, but is one subject to reasonable limitations and conditions.

A rail carrier must also provide, on request, its rates and other service terms.

4.3.5 Mechanisms for Resolving Rail Service Issues in the U.S.

As in Canada, there are statutory mechanisms for resolving rail service issues in the U.S. Under 49 U.S.C. 11701(a), the Board can, if it finds that a rail carrier is not complying with its common carrier obligations, take action to compel compliance. Any such determination must begin by way of a complaint, the key provision in that respect being 49 U.S.C. 11701(b). Procedural matters are set out in 49 C.F.R. Part 1111.

4.3.6 Exempt Commodities¹⁷⁹

Under U.S. legislation the Board can exempt certain traffic from statutory provisions if it believes this serves the public interest. Pursuant to 49 U.S.C. 10502(a), the Board (and its predecessor, the ICC) determined that the transportation market for certain commodities and

¹⁷⁹ CPCS, *Service Issues in Regulated Industries Other than Canadian Rail Freight Industry*, op. cit., p. 21.

types of transportation was sufficiently competitive that no oversight or regulation of that traffic was necessary.

The commodities that are exempt include, for example, rail intermodal movements (COFC/TOFC), boxcar transportation, an array of agricultural products except grain, soybeans and sunflower seeds and various non-agricultural commodities such as aggregates, food products, textile mill products, forest products, primary and fabricated metals, machinery, and motor vehicles and parts. Accordingly, rail carriers transporting these commodities are not subject to Board oversight and regulation (with a few exceptions), including service requirements. However, as noted, a shipper of an exempt commodity can petition the Board to revoke the exemption, and the exemption can be revoked in whole or in part (i.e. it can be requested and revoked in respect of the specific traffic of the shipper). The shipper must demonstrate why the exemption status should be removed in the particular instance.

In the case of exempt commodities, service issues would presumably be handled through typical commercial mechanisms, possibly provided for in contracts. Shippers of exempt commodities could also utilize the informal complaint resolution assistance provided by the Board.

The merits of the commodity exemption are, of course, that government regulation is removed from situations where it is not needed allowing market forces to determine outcomes, along with the elimination of the costs associated with regulation. The challenges include making sure that the exemption can be expeditiously revoked in those cases where it is shown to be detrimental to shippers requesting a revocation. Clearly, the ability of the Board to remove the exemption not only completely but also in individual cases is critical to the effectiveness of the exemption provision. Other challenges are to determine those markets where competition is sufficiently vigorous, and the costs associated with this exercise. The basis on which the Board makes this determination includes examining measures such as revenue/variable cost ratios, determining if the traffic is susceptible to other modes such as trucking, and the ability of shippers to access alternative origins or destinations. The Board's inquiry includes input from stakeholders.

5 Pricing of Services

Key Messages

- In both Canada and the U.S., railway pricing today is largely market determined but subject to certain statutory shipper protections. The restrictive tariff regimes that governed rates prior to era of deregulation have been effectively abolished. In the U.S., much traffic is exempted or removed from rate regulation altogether.
- One of the most significant changes in both the U.S. and Canada in the 1980s was to allow confidential contracts between shippers and carriers covering the rates and conditions for rail services. Today it appears that most traffic is moving under confidential contracts.
- In Canada, the traffic subject to a confidential contract is in some measure removed from the operation of the CTA. In the U.S., the legal effect is more pronounced: where there is a confidential contract, the rail carrier ceases to be a common carrier with respect to the contracted services.
- In Canada, the CTA was amended in 2013 to oblige railway companies to enter into a confidential contract with any shipper who requests one, and to establish an arbitration process to settle disputes regarding a railway's offer.
- Regulatory mechanisms in Canada and the U.S. differ fundamentally in how they ensure rates are reasonable and protect shippers from potential abuse of railway market power:
 - In Canada, there are no longer any regulated rates *per se*, including maximums or minimums (except for interswitching and CLRs). Instead there are a variety of recourses, most important of which for limiting rates in general is FOA.
 - In the U.S., there is a statutory threshold above which rates may be held to be unreasonable (180% of variable costs). This, however, can only be considered if the Board first makes a determination of market dominance by the rail carrier.
- In Canada, FOA is a key vehicle for resolving shipper rate and service disputes with railways. Only shippers may invoke the process, and its use is available to all shippers and not conditioned on the absence of competition.
- In Canada, the CTA was amended in 2008 to provide shippers with a new remedy aimed at protecting them against unreasonable ancillary charges or associated terms and conditions for the movement of traffic.
- In Canada, grain has historically had special regulatory treatment. In 2000, the “revenue cap” replaced maximum freight rates regulation for western grain. Nothing analogous exists in the U.S., where grain is, for the most part, treated like any other commodity.
- Under the grain revenue cap, the railways are able to negotiate rate and service packages that encourage efficiencies. Ostensibly, grain producers are protected from excessive rail freight rates, but there is no definition of what might constitute such rates. The program has lent itself to disputes and appeals, does not account for cost differences in the means by which grain may be shipped, and can also act as an investment disincentive.

5.1 Canada

5.1.1 Where Are Rates and Charges Set Out?

Railway companies must set out their rates in a tariff or in a confidential contract.¹⁸⁰ Charges are laid out in tariffs only.¹⁸¹ Although confidential contracts were designed to be exceptions to tariffs, as reflected in the wording of section 117,¹⁸² today most freight traffic in Canada moves under confidential contracts.¹⁸³

Tariffs

The term “tariffs” is defined in the CTA to mean “a schedule of rates, charges, terms and conditions applicable to the movement of traffic and incidental services”.¹⁸⁴

None of the terms set out in that definition are themselves defined. However in two recent, related decisions¹⁸⁵ the Agency provided a number of useful explanations. The Agency’s definitions for “rates” and “charges” is discussed below. Here we can note that “the term ‘movement of traffic’ should be read to mean the whole process by which goods, including equipment required for their movement, are transported from origin to destination.”¹⁸⁶ Also:

With respect to “terms and conditions” related to the movement of traffic, the Agency [found] that this phrase captures the obligations to be fulfilled by the shipper for the railway company to execute its obligations under subsection 113(2) of the CTA to move the shipper’s traffic. For instance, in CP’s Tariff, the shipper has the obligation to properly mark and label its shipments. This obligation would constitute an obligation to be fulfilled

¹⁸⁰ The Agency has identified a hybrid of the two: the limited distribution tariff. See the Agency’s [Discussion Paper](#) on limited distribution tariffs.

¹⁸¹ Section 126 of the CTA (*Confidential contracts*) which lists what can be included in a confidential contract makes no reference to charges. However, as the Supreme Court of Canada noted in [Canadian National Railway Co. v. Canada \(Attorney General\)](#), 2014 SCC 40, at paragraph 28: “it is common railway industry practice to include a term in confidential contracts which incorporates by reference all of the railway’s tariffs covering ancillary and incidental charges.”

¹⁸² Section 117(1) of the CTA reads: “Subject to section 126 [*Confidential contracts*], a railway company shall not charge a rate in respect of the movement of traffic or passengers unless the rate is set out in a tariff that has been issued and published in accordance with this Division and is in effect.”

¹⁸³ Library of Parliament Research Publications, [Legislative Summary of Bill C-52: An Act to amend the Canada Transportation Act](#): “[A]pproximately 75% of the business of Canadian Pacific Railway, for example, is covered by such contracts.”

¹⁸⁴ Section 87 of the CTA.

¹⁸⁵ Agency [Decision No. 202-R-2013](#), dated May 24, 2013, in re: *Application by Canexus Chemicals Canada et al. pursuant to sections 26, 120.1 and 137 of the Canada Transportation Act*; Agency [Decision No. 388-R-2013](#), dated October 7, 2013, in re: *Decision No. 202-R-2013 in response to the application by Canexus Chemicals Canada et al.*

¹⁸⁶ Agency [Decision No. 202-R-2013](#), dated May 24, 2013, in re: *Application by Canexus Chemicals Canada, LP, et al. pursuant to sections 26, 120.1 and 137 of the Canada Transportation Act*, at paragraph 63.

by the shipper for the railway company to move the shipper's traffic under the applicable rate. As such, it is a term and condition for the movement of the traffic.¹⁸⁷

The general scheme embodied by the CTA with respect to tariffs is set out in section 117 and provides that tariffs:

- are obligatory, in that a railway company cannot charge a rate in respect of the movement of traffic unless it is set out in a tariff (or unless it appears in a confidential contract);
- must include any information required by regulation;¹⁸⁸ and
- must be published and publicly displayed or made available for public inspection.

Some additional rules are provided in sections 118 and 119 of the CTA for freight tariffs, and in section 149 for tariffs for the movement of western grain.

Confidential Contracts

General

Section 111 of the CTA defines a "confidential contract" simply as "a contract entered into under subsection 126(1)". As summarised by the Supreme Court of Canada in [Canadian National Railway Co. v. Canada \(Attorney General\)](#):¹⁸⁹

Under s. 126 of the CTA, carriers and shippers may enter into confidential contracts. A confidential contract may pertain to the rates to be charged by the railway company to the shipper, reductions or allowances pertaining to rates in tariffs, rebates or allowances pertaining to rates in tariffs or confidential contracts, any conditions relating to the traffic to be moved by the railway company and the manner in which the railway company shall fulfill its service obligations.

Confidential contracts were introduced in 1987 amendments to railway legislation (*National Transportation Act, 1987*, S.C. 1987, c. 34, s. 120). Parliament provided for confidential contracts in order to promote flexibility in negotiations between railway companies and shippers for rates and services (*Freedom to Move: The Legislation: Overview of National Transportation Legislation 1986* (1986), at p. 8). Confidential contracts provide an alternative to the historic requirement that a railway company could only charge a rate in respect of the movement of traffic if the rate was set out in a tariff that had been issued and published by the railway company.

¹⁸⁷ [Decision No. 388-R-2013](#), dated October 7, 2013, in re: *Decision No. 202-R-2013 in response to the application by Canexus Chemicals Canada, LP; et al.*, at paragraphs 92 and 93.

¹⁸⁸ The relevant regulations are the [Railway Traffic and Passenger Tariffs Regulations](#), SOR/96-338.

¹⁸⁹ 2014 SCC 40, at paragraphs 25 and 26

2013 Amendments (Bill C-52)

In 2013, section 126 of the CTA was amended by inserting a number of additional paragraphs that oblige a railway company to enter into a confidential agreement with any shipper who requests one.¹⁹⁰

Legal implications of setting rates in a confidential contract instead of a tariff

The clearest legal effect of setting a rate in a confidential contract instead of a tariff is that matters governed by confidential contracts are prohibited from being submitted for final offer arbitration under section 161 of the CTA, without the consent of all the parties to the contract.¹⁹¹

However, as we saw in chapter 2, all federal railway companies in Canada are common carriers. The fact that a railway company enters into a confidential contract and decides to call itself a “contract carrier”,¹⁹² does not make it so – the railway company remains at all times a common carrier and continues to be subject to the level of service obligations set out in sections 113 to 116 of the CTA.¹⁹³ This is in marked contrast with the legal situation in the United States where upon entering into a contract authorised by 49 U.S.C. 10709 a railway company becomes a genuine contract carrier with respect to the shipper to which the contract applies.¹⁹⁴

¹⁹⁰ As more fully explained in Library of Parliament Research Publications, [Legislative Summary of Bill C-52: An Act to amend the Canada Transportation Act](#): “Section 8 of the bill adds sections 126(1.1) to 126(1.5) to the Act to give shippers the right to enter into a confidential contract with a railway company. In this way, new section 126(1.1) allows a shipper to request that a railway company make it an offer to enter into a confidential contract. New section 126(1.2) sets out the elements that must be included in the shipper’s request, including the services it requires and any undertaking it is prepared to give to the railway company. Under new section 126(1.3), the railway company must respond to the request and make an offer within 30 days following receipt of the request.” If the offer is not acceptable to the shipper, recourse may be had to arbitration pursuant to section 169.31 of the CTA. The decision of the arbitrator is deemed the equivalent of a confidential contract (see section 169.38(2) of the CTA).

¹⁹¹ Section 126(2) of the CTA provides that: “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.” See also [Canadian National Railway Co. v. Canada \(National Transportation Agency\)](#) (C.A.), [1996] 1 F.C. 355 where the Federal Court of Appeal ruled that: “The final offer arbitration provisions are available not only when there is no confidential contract between the parties, but also when the confidential contract entered into by them is silent or indefinite as to a term or condition of its execution.”

¹⁹² As was done by CN in the confidential contract at issue in [Canadian National Railway Co. v. Canada \(National Transportation Agency\)](#) (C.A.), [1996] 1 F.C. 355.

¹⁹³ See for e.g. Agency [Interlocutory Decision No. 2014-05-02](#), dated May 2, 2014, in re: *Application by Louis Dreyfus Commodities Canada Ltd. against the Canadian National Railway Company, pursuant to sections 26 and subsection 28(2) of the Canada Transportation Act*.

¹⁹⁴ See 49 USC 10709, especially paragraphs (b) and (c).

5.1.2 Rates

Lawful Rate

Section 113(2) of the CTA provides that:

Traffic must be taken, carried to and from, and delivered at the points referred to in paragraph (1)(a) on the payment of the lawfully payable rate.

Section 113(2) makes it clear that the service obligations of a railway company with respect to the carriage of traffic do not come for free and are consequently contingent upon “payment of the lawfully payable rate.”¹⁹⁵ As explained earlier, railway companies can set their lawfully payable rate either in a tariff or in a confidential contract.

The term “rates” [is] not defined in the CTA. However, subsection 113(2) of the CTA sets out a railway company’s obligations associated with the payment of the rate by a shipper as follows: “[t]raffic must be taken, carried to and from, and delivered at the points referred to in paragraph (1)(a) [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] on the payment of the lawfully payable rate.” The term “rate”, as it is used in Part III of the CTA, is therefore an amount paid by the shipper in exchange for the movement of the shipper’s traffic by the railway company. The obligation to pay the rate is therefore associated not with an incidental or ancillary service, but with the rate for the whole movement.

Rates Defined

In a recent decision, the Agency explained:¹⁹⁶

The term “rates” [is] not defined in the CTA. However, subsection 113(2) of the CTA sets out a railway company’s obligations associated with the payment of the rate by a shipper as follows: “[t]raffic must be taken, carried to and from, and delivered at the points referred to in paragraph (1)(a) [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] on the payment of the lawfully payable rate.” The term “rate”, as it is used in Part III of the CTA, is therefore an amount paid by the shipper in exchange for the movement of the shipper’s traffic by the railway company. The obligation to pay the rate is therefore

¹⁹⁵ Agency [Interlocutory Decision LET-R-248-2004](#), dated 7 September 2004, in re: *Level of service complaint filed by Wabush Mines Inc. etc.*, at paragraph 31: “One of the statutory service obligations imposed on railway companies is the obligation to receive, carry and deliver the traffic that is tendered by a shipper (113(1)(c) of the CTA). While railway companies are compelled to provide service when requested, subsection 113(2) of the CTA provides that such service only need be provided upon payment of the lawfully payable rate.”

¹⁹⁶ Agency [Decision No. 388-R-2013](#), dated October 7, 2013, in re: *Decision No. 202-R-2013 in response to the application by Canexus Chemicals Canada, LP, etc.*, at paragraph 91.

associated not with an incidental or ancillary service, but with the rate for the whole movement.

Minimum Rates

There is no requirement under the CTA that rates charged by a railway company be above a certain level.¹⁹⁷

Maximum Rates

There is likewise no obligation under the CTA for a railway company to charge rates below a certain level. However – leaving aside the obvious commercial realities identified at section 5(a) of the CTA to the effect that “competition and market forces, both within and among the various modes of transportation, are the prime agents in providing viable and effective transportation services” – one can make the argument that there is still within the overall scheme of the CTA a ceiling (albeit imprecisely set) above which railway rates cannot go. This ceiling is discussed next. It has a component which applies to all rates, and one which applies only to rates for the movement of western grain.

5.1.3 The Notion of Reasonable Rate and Final Offer Arbitration

The Notion of Reasonable Rate

Section 112 of the CTA provides that:

A rate or condition of service established by the Agency under this Division must be commercially fair and reasonable to all parties.

However, no such obligation is imposed on the railway companies themselves. At common law, a common carrier was required to charge only reasonable rates.¹⁹⁸ This was reflected for a long time in Canadian railway legislation.¹⁹⁹ For example, under section 325 of the 1927

¹⁹⁷ It is only the Agency which is obliged to set rates for regulated interswitching and competitive line rates at a compensatory level, that is, at no less than the variable costs of moving the traffic by the railway company, as determined by it. See section 128(3) and section 133(4) respectively.

¹⁹⁸ Blackburn, J., in *Great Western Ry. v. Sutton*, L.R. 4 H.L. 226 at 237, quoted in H. E. B. Coyne, *The Railway Law of Canada*, Toronto, 1947, at p. 405: “The obligation which the common law imposed upon [a common carrier of goods] was to accept and carry all goods delivered to him for carriage according to his profession (unless he had some reasonable excuse for not doing so) on being paid a *reasonable* compensation for so doing... The law required... that he should not charge any more than was reasonable.”

¹⁹⁹ For the obvious reason that many provisions contained in railway legislation enacted by Parliament were but the codification of common law principles. See NTA Decision No. 411-R-1989, dated August 11, 1989, in re: [Complaint respecting the provision of container on flat car services at Biggar, in the Province of Saskatchewan](#): “The purpose of enacting such statutory obligations was not to impose onerous duties on an industrial undertaking, but rather to codify, in respect to railways, the obligations imposed upon common carriers by the common law.”

*Railway Act*²⁰⁰ the Board of Transport Commissioners had the power to disallow tariffs of rates that were unjust or unreasonable and to require the railway company to substitute a tariff satisfactory to the Board.²⁰¹ As recently as 1987, the *Railway Act* still provided for the disallowance by the Canadian Transport Commission of unreasonable tolls charged by a railway company which took “undue advantage of a monopoly situation.”²⁰² This later provision was repealed with the enactment of the NTA, 1987. One reason seems to be that shippers were given under the NTA, 1987 the right to challenge a railway company’s rates through final offer arbitration – a remedy which has been continued under the CTA. This said, it must be noted that while FOA may help keep railway companies’ rates reasonable, this does not mean however that all rates set by way of FOA will necessarily be reasonable.

Final Offer Arbitration

As explained by the Agency on its webpage [Final Offer Arbitration: A Resource Tool](#):

The Canada Transportation Act contains several provisions designed to facilitate the resolution of rate and service disputes between carriers and shippers or transit authorities. Final offer arbitration (FOA), described in Part IV of the Act, provides one means of resolving such impasses through the use of an arbitrator or a panel of three arbitrators. Unless the parties agree to a different time frame, arbitration must be completed within 60 days, or 30 days for disputes involving freight charges of less than \$750,000.

Under these confidential processes, parties may choose their arbitrators and can benefit from procedural flexibility. The arbitrator's decision is enforceable as if it were an order of the Agency.

Or as explained differently by the Supreme Court of Canada in [Canadian National Railway Co. v. Canada \(Attorney General\)](#):

Where a rate is not contained in a confidential contract, typically when a confidential contract expires, a shipper dissatisfied with the rate proposed by the railway company may submit the matter to the Agency for final offer arbitration (CTA, s. 161). The Agency itself does not conduct the final offer arbitration. Rather, if the parties do not agree upon the arbitrator or if no arbitrator is chosen, the arbitrator will be appointed by the Agency (CTA, s. 162(1)(a)). However, a party to a confidential contract cannot submit a matter governed by the confidential contract to the Agency for final offer arbitration unless the parties consent (CTA, s. 126(2)).²⁰³

²⁰⁰ R.S.C. 1927, c. 170.

²⁰¹ See [Canadian National Railway Co. v. Moffatt](#) (C.A.), 2001 FCA 327, at paragraph 36.

²⁰² A similar provision still exists in the United States. See chapter 5.2.2 below.

²⁰³ 2014 SCC 40, at paragraph 27.

FOA and the Setting of Reasonable Rates

A key element in section 161 of the CTA is a shipper's dissatisfaction with the rate or rates charged or proposed to be charged by a railway company for the movement of goods. The obvious, although perhaps not the only, reason why a shipper would be dissatisfied with any given rate and then seek final offer arbitration is a belief that the proposed rate is unreasonable. The final offer arbitration established by the CTA requires that the arbitrator choose either the final offer of the shipper or the final offer of the railway company.²⁰⁴

While it is possible that the rates proposed in the two offers will both be unreasonable, albeit from the opposite spectrum, the intent behind final offer arbitration is that the most reasonable rate will be selected by the arbitrator, hence incentivizing both the railway company and the shipper to submit what they believe to be a reasonable rate.

FOA and the National Transportation Policy

Commenting on the final offer arbitration provisions as they then appeared in the NTA, 1987 the Federal Court of Appeal explained that:²⁰⁵

The quick, simple and out-of-court settlement of those disputes, with indirect involvement of the Agency, is no doubt a means, and an important one, to achieve the object and purpose of the new *National Transportation Act, 1987* which, as stated in more detail in section 3 [now section 5 of the CTA] thereof, is aimed, in effect, at rendering the railway industry, in particular, more efficient and more competitive, and the transportation system, generally, more economical.

5.1.4 Revenue Cap for the Movement of Western Grain

General

The "revenue cap" program, established on August 1, 2000 for the movement of western grain²⁰⁶ by prescribed railway companies,²⁰⁷ requires the Agency to annually determine a

²⁰⁴ Section 165(1) of the CTA clearly states: "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."

²⁰⁵ *Canadian National Railway Co. v. Canada (National Transportation Agency)* (C.A.), [1996] 1 F.C. 355.

²⁰⁶ The terms "movement", "grain" and "Western Division", as they apply to Division VI of the CTA ("Transportation of Western Grain") are all defined at section 147 of the CTA.

²⁰⁷ Section 147 of the CTA defines "prescribed railway company" to mean "the Canadian National Railway Company, the Canadian Pacific Railway Company and any railway company that may be specified in the regulations." Section 152 of the CTA provides that: "The Governor in Council may make regulations (a) specifying railway companies for the purposes of the definition "prescribed railway company" in section 147". No such regulations have been issued: therefore at present only CN and CP are deemed to be "prescribed railways". See also Agency's [Decision No. 150-R-2014](#), dated April 25, 2014, in re: *Determination by the Canadian Transportation Agency of the 2014-2015 volume-related composite price index required for Western Grain Revenue Caps pursuant to Part III, Division VI of the Canada Transportation Act*, at paragraph 6.

revenue cap, or maximum revenue entitlement, for CN and CP and to subsequently determine whether those railway companies have exceeded their revenue caps.²⁰⁸

The key provision is [section 150](#) which provides as follows:

(1) A prescribed railway company's revenues, as determined by the Agency, for the movement of grain in a crop year may not exceed the company's maximum revenue entitlement for that year as determined under subsection 151(1).

(2) If a prescribed railway company's revenues, as determined by the Agency, for the movement of grain in a crop year exceed the company's maximum revenue entitlement for that year as determined under subsection 151(1), the company shall pay out the excess amount, and any penalty that may be specified in the regulations, in accordance with the regulations.

This revenue cap program replaced maximum freight rates regulation for the movement of western grain. Parliament agreed to let the railway companies set individual rates for shipping western grain, but required them to stay within a total revenue limit based on all western grain movements calculated by the Agency in an effort to provide some shipping price protection.²⁰⁹

As explained by the Federal Court of Appeal in [Canadian National Railway Company v. Canada \(Canadian Transportation Agency\)](#):²¹⁰

In order to allow more flexibility in pricing and to give market forces a greater role, rate setting was replaced by a cap on the revenue that a railway company could earn in a crop year for shipping western grain by rail. Thus, the freight charged by a railway company to a producer is not directly regulated. However, if the CTA determines that a railway company's revenue has exceeded its cap in a crop year, the company must disgorge the amount by which its revenue exceeds its cap, and pay any penalty specified in the regulations (subsection 150(2)).

The general purpose of the revenue cap program is nonetheless similar to more traditional maximum rates regulation, namely to protect grain producers and, ultimately, consumers, from excessively high rail freight rates.²¹¹

²⁰⁸ See also Agency's [Decision No. 150-R-2014](#), dated April 25, 2014, in re: *Determination by the Canadian Transportation Agency of the 2014-2015 volume-related composite price index required for Western Grain Revenue Caps pursuant to Part III, Division VI of the Canada Transportation Act*, at paragraph 3.

²⁰⁹ See Agency's webpage: [Backgrounder – Western Grain Revenue Cap Program](#). For the complicated history of pre-2000 legislation, see Joseph Monteiro and Gerald Robertson, [Grain Transportation in Canada – Deregulation](#).

²¹⁰ 2010 FCA 65, at paragraph 6.

²¹¹ 2010 FCA 65, at paragraph 7.

Under section 150 there are two distinct set of tasks which the Agency is required to perform in order to give effect to the program set out in the CTA – the first is to establish CN’s and CP’s maximum revenue entitlements for the relevant crop year and the second is to determine if CN or CP have exceeded their maximum revenue entitlements for that crop year. A crop year is “the period beginning on August 1 in any year and ending on July 31 in the next year”.²¹²

Yearly Setting of the Revenue Cap

(a) General

The revenue cap is calculated on the basis of a statutory formula, base year statistics, and the volume-related composite price index.²¹³ Section 151(1) of the CTA provides the exact formula that the Agency is to use in determining the cap:

A prescribed railway company’s maximum revenue entitlement for the movement of grain in a crop year is the amount determined by the Agency in accordance with the formula

$$[A/B + ((C - D) \times \$0.022)] \times E \times F$$

where

- A is the company’s revenues for the movement of grain in the base year;
- B is the number of tonnes of grain involved in the company’s movement of grain in the base year;
- C is the number of miles of the company’s average length of haul for the movement of grain in that crop year as determined by the Agency;
- D is the number of miles of the company’s average length of haul for the movement of grain in the base year;
- E is the number of tonnes of grain involved in the company’s movement of grain in the crop year as determined by the Agency; and
- F is the volume-related composite price index as determined by the Agency.

The actual figures for items A, B and D are set out in section 151(2) and are different for CN and CP. Items C and E are fairly straightforward computation exercises.²¹⁴ More problematic is item F, the volume-related composite price index.

²¹² See section 147 of the CTA.

²¹³ 2010 FCA 65, at paragraph 7.

²¹⁴ See Agency [Decision No. 461-R-2013](#), dated December 13, 2013, in re: Determination by the Canadian Transportation Agency of the Western Grain Revenue Caps for the movement of western grain by prescribed railway companies for crop year 2012-2013, etc., at paragraph 5: “The Agency’s determinations of CN’s and CP’s tonnage and length of haul statistics for western grain movements for crop year 2012-2013 are shown in Table 1 below. These determinations were based on detailed traffic submissions by CN and CP, which were verified to ensure that the traffic qualified as western grain movements and that the related revenue, tonnage and mileage

(b) The volume-related composite price index (VRCPI)

Section 151(4) of the CTA provides that:

The following rules are applicable to the volume-related composite price index:

- a) in the crop year 2000-2001, the index is deemed to be 1.0;
- b) the index applies in respect of all of the prescribed railway companies; and
- c) the Agency shall make adjustments to the index to reflect the costs incurred by the prescribed railway companies for the purpose of obtaining cars as a result of the sale, lease or other disposal or withdrawal from service of government hopper cars and the costs incurred by the prescribed railway companies for the maintenance of cars that have been so obtained.

Each year by April 30 at the latest, the Agency must set the VRCPI for the following crop year.²¹⁵

As explained by the Agency in [Decision No. 8-R-2013](#):²¹⁶

The VRCPI is a factor included in the revenue cap formula which purpose is to adjust the revenue cap annually to reflect railway inflation. It is essentially an index that captures price variation in railway costs associated with the movement of grain from a reference year to subsequent years. As it is meant to capture price variation, as a general principle, the cost base used in developing the VRCPI must therefore remain constant in time.

The CTA does not provide for a general mechanism to adjust the base costs which means that the VRCPI is designed such that any productivity gains that CN and CP may have made by improving their operations overtime cannot be reflected in the VRCPI. It also means that the Agency's power to make cost adjustments pursuant to paragraph 151(4)(c) of the CTA is an exception to the principle that the initial cost base embedded in the VRCPI must remain constant over time. Consequently, the Agency must only adjust the cost base to the extent expressly permitted under paragraph 151(4)(c) of the CTA.

The Agency considers that the adjustment called for under paragraph 151(4)(c) is meant to make CN and CP whole – no worse off nor better off with respect to the VRCPI determinations, as compared to what the situation would have been had

statistics were accurate. This verification led to the addition, rejection or modification of a small portion of the traffic. The net result of these adjustments from CN's and CP's submitted traffic was to increase CP's reported tonnage by about 4,100 tonnes and to decrease CN's reported tonnage by about 180 tonnes."

²¹⁵ Section 151(5) of the CTA.

²¹⁶ Agency [Decision No. 8-R-2013](#), dated January 10, 2013, in re: *Applications by the Canadian National Railway Company and the Canadian Pacific Railway Company to adjust the volume-related composite price index pursuant to paragraph 151(4)(c) of the Canada Transportation Act*, at paragraphs 22, 24 and 25.

railway companies not have had to incur these costs if the previous arrangement for government hopper cars had been maintained.

The development of the VRCPI for each crop year involves detailed submissions of historical price information of railway inputs (labour, fuel, material and capital) from CN and CP. The submitted information is then reviewed and verified by Agency staff. In addition, Agency staff develops forecasts for future changes in the price of railway inputs.²¹⁷

As summarised by the Agency:²¹⁸

The VRCPI has tracked up and down since the beginning of the Revenue Cap Program. In recent years, exceptional fluctuations have reflected the volatility of fuel prices, the hopper car adjustment in 2007-2008 and, as outlined within Agency [Decision No. 149-R-2012](#), the methodologies to better recognize the cost of capital and the effect on the labour price index of the substantial payments made by CN and CP to their pension funds. The VRCPI has grown at an average annual rate of 2.0 percent over the 2000-2001 to 2014-2015 period.

Calculation of Railway Company's Revenues

The Agency must determine CN's and CP's revenues for the movement of western grain in a crop year on or before December 31 of the following crop year.²¹⁹ (As mentioned earlier, a crop year ends on July 31.) Section 150(3), read in conjunction with sections 150(4) and 150(5), specifies what is to be included in and excluded from a railway company's revenues:

- incentives, rebates or any similar reductions paid or allowed by the company;
- any amount that is earned by the company and that the Agency determines is reasonable to characterize as a performance penalty or as being in respect of demurrage or for the storage of railway cars loaded with grain; or
- compensation for running rights.

The determination of a prescribed railway company's grain revenue requires many assessments by the Agency as to what is to be included as revenue or as an allowable reduction to revenue. While a partial list of such matters appears in subsections 150(3), (4) and (5) of the CTA, a more comprehensive list was established, following consultation with the

²¹⁷ Agency [Decision No. 150-R-2014](#), dated April 25, 2014, in re: *Determination by the Canadian Transportation Agency of the 2014-2015 volume-related composite price index required for Western Grain Revenue Caps pursuant to Part III, Division VI of the Canada Transportation Act*, at paragraph 6.

²¹⁸ *Ibid.*, at paragraph 37.

²¹⁹ Section 150(6) of the CTA.

grain industry, in [Decision No. 114-R-2001](#), dated March 16, 2001, in re: *Western Grain Revenue Cap established pursuant to Division VI, Part III of the Canada Transportation Act*.²²⁰

Needless to say, CN and CP are not always in agreement with what the Agency decides to include under section 150(3). The reason for this is not difficult to understand since “the inclusion of an item in a railway company’s revenue pushes it closer to the cap.”²²¹

Penalties for Exceeding the Revenue Cap

If at the end of the whole process the Agency determines that a prescribed railway company’s revenues for the movement of grain in a crop year exceed the company’s maximum revenue entitlement for that year, the railway company must pay out the amount by which its revenue exceeds its cap, and additionally pay the prescribed penalty set out in the [Railway Company Pay Out of Excess Revenue for the Movement of Grain Regulations](#),²²² namely:

- five per cent of the excess amount, if that excess amount is one per cent or less of the railway company’s maximum revenue entitlement; or
- 15 per cent of the excess amount, if that excess amount is more than one per cent of the railway company’s maximum revenue entitlement.

The same regulations require that the excess amount and the penalty be paid to the [Western Grains Research Foundation](#).²²³

²²⁰ Agency [Decision No. 477-R-2012](#), dated December 19, 2012, in re: *Determination by the Canadian Transportation Agency of the Western Grain Revenue Caps for the movement of western grain by prescribed railway companies for crop year 2011-2012*, at paragraph 19.

²²¹ [Canadian National Railway Company v. Canada \(Transportation Agency\)](#), 2010 FCA 65, at paragraph 1. In that decision CN was contesting the inclusion by the Agency of the following items: a. earnings from carrying American-grown grain from the U.S.–Canada border to ports in British Columbia for export to third countries, without entering the Canadian market; b. earnings from lifting grain-carrying containers from a truck onto a flat-bed rail car and vice versa.; and c. a sum paid by (a shipper) to CN under a penalty clause in their contract of carriage for failing to ship the promised amount of grain. In [Canadian National Railway Company v. Canadian Transportation Agency](#), 2012 FCA 240: “Over the course of a number of years and many decisions, the Agency has developed a process for administering the revenue cap scheme set out at s. 150 of the Act. In the course of doing so, it has adopted certain criteria for determining the allocation of revenue, tonnage and mileage between prescribed railways in a number of contexts, including interswitching and exchange switching (collectively “interswitching”), both of which have to do with the movement of one railway’s cars by the other for a fee. In response to the Agency’s request for submissions, CN proposed that the latter reconsider its treatment of interswitching revenues, tonnage and mileage on the basis that, contrary to the Agency’s expectations at the time it adopted these procedures in its Decision No.114-R-2001 (the 2001 decision), the revenue from interswitching is not evenly balanced between the railways, thus disadvantaging CN in the determination of its revenue entitlement.”

²²² SOR/2001-207. The regulations were issued by the Governor in Council pursuant to section 152(c).

²²³ See Agency [Decision No. 477-R-2012](#), dated December 19, 2012, in re: *Determination by the Canadian Transportation Agency of the Western Grain Revenue Caps for the movement of western grain by prescribed*

5.1.5 Charges

Section 120.1

In 2008 Parliament amended the CTA to introduce section 120.1 (*Unreasonable charges or terms*), which reads in part as follows:

If, on complaint in writing to the Agency by a shipper who is subject to any charges and associated terms and conditions for the movement of traffic or for the provision of incidental services that are found in a tariff that applies to more than one shipper other than a tariff referred to in subsection 165(3), the Agency finds that the charges or associated terms and conditions are unreasonable, the Agency may, by order, establish new charges or associated terms and conditions.

Charges Defined

As mentioned earlier in chapter 5.1.1, the term “charges” is not defined in the CTA. The distinction between “charges” and “rates” is an important one for the purposes of section 120.1 since subsection (7) specifically provides that: “For greater certainty, this section [120.1] does not apply to rates for the movement of traffic.”

The Supreme Court of Canada in [*Canadian National Railway Co. v. Canada \(Attorney General\)*](#) noted in passing that: “Examples of such charges include those imposed for cleaning cars, storing cars, weighing product and demurrage, a charge imposed for taking longer than the permitted free time to load or unload a car.”²²⁴

In a recent 2013 decision the Agency discussed the matter at length and concluded that:²²⁵

[T]he term “charge” must capture obligations other than the obligation of the shipper to pay the rate or the obligations to be fulfilled by the shipper as a condition for the movement of traffic by a railway company.

CP argues that “charges and associated terms and conditions” are “monetary payment obligations relating to a specific service activity.” Essentially, the Agency agrees with CP’s position that a “charge”, as the term is used in section 120.1 of the CTA, is an obligation on a shipper in return for a specific service to be performed, or specific goods to be supplied, by the railway company. This is distinct from the railway company’s primary obligation to take, carry and deliver the shipper’s traffic, which is compensated for by the

railway companies for crop year 2011-2012, at paragraphs 36-39 for an example of CN and CP statutory grain revenues exceeding their revenue cap for a given year.

²²⁴ 2014 SCC 40, at paragraph 22.

²²⁵ Agency [Decision No. 388-R-2013](#), dated October 7, 2013, in re: *Decision No. 202-R-2013 in response to the application by Canexus Chemicals Canada*, paragraphs 94-96 and 103

payment of the rate and the fulfillment of the applicable terms and conditions by the shipper.

Mechanics of Section 120.1

A statutory requirement for bringing a complaint under section 120.1 is that the challenged charges be found in a tariff that applies to more than one shipper. In the Peace River Coal case the Agency had dismissed the complaint because, while the challenged charges were found in a tariff which did apply to more than one shipper, it was of the opinion that the complainant could not challenge the charges at issue. The Agency held that given that the challenged charges were contained in a tariff which had been incorporated by reference into a confidential contract between Peace River Coal and CN, what Peace River Coal was really asking the Agency to do was to amend the confidential contract, something the Agency said it could not do.²²⁶

In [Order in Council 2010-0749](#) the Governor in Council rescinded the Agency's decision.²²⁷ The OIC stated that the GIC was of the opinion that, while the existence and terms and conditions of a confidential contract were relevant to whether Peace River Coal could benefit from an order made by the Agency under section 120.1, the confidential contract had no bearing on the reasonableness of a charge in a tariff that applies to more than one shipper. Section 120.1 is aimed at benefiting all shippers subject to the charges in the challenged tariff rather than only benefiting the complainant.

On judicial review the matter ended up before the Supreme Court of Canada which upheld the decision of the Governor in Council.

Based on other decisions by the Agency we can add that the burden of proof to show that the charge is unreasonable on a section 120.1 complaint rests with the complainant²²⁸ and what is

²²⁶ Agency [Decision No. 392-R-2008](#), dated July 31, 2010, in re: *Application by Peace River Coal Inc. pursuant to section 120.1 of the Canada Transportation Act*.

²²⁷ Peace River Coal did not seek leave to appeal to the Federal Court of Appeal, despite having the option to do so pursuant to section 41 of the CTA. Six months after the Agency's decision, the Canadian Industrial Transportation Association, a trade association of which Peace River Coal is a member, filed a petition with the Governor in Council requesting a variance of the Agency's decision pursuant to [section 40](#) of the CTA. As explained by the Supreme Court of Canada in [Canadian National Railway Co. v. Canada \(Attorney General\)](#), at paragraphs 48 and 49: "I accept that it is unusual for the Governor in Council to determine a question of law and agree that the Governor in Council is generally concerned with issues of policy and fact. Although it is rare for the Governor in Council to determine a question of law, this does not mean that the Governor in Council has no authority under the statute to do so...This authority is properly supervised by the courts in the course of judicial review."

²²⁸ Agency [Decision No. 273-R-2012](#), dated July 5, 2012, in re: *Complaint by Russel Metals Inc. pursuant to section 120.1 of the Canada Transportation Act*, at paragraph 9: "Section 120.1 of the CTA has been designed to allow one or more shippers to challenge a charge and associated term or condition imposed by a railway company, which they believe is unreasonable. The CTA does not stipulate who bears the burden of proof. As the CTA is

unreasonable must be decided on a case by case basis.²²⁹ Finally, once the Agency finds that a charge is unreasonable – which it has not yet done²³⁰ – it must when replacing the unreasonable charges or associated terms ensure that any charges or associated terms and conditions established by it “be commercially fair and reasonable to the shippers who are subject to them as well as to the railway company that issued the tariff containing them”.²³¹ This is the counterpart of section 112 for rates.

Section 120.1 and Partial Re-Regulation

The Supreme Court of Canada (which rarely hears matters pertaining to the CTA) looked, in the course of its decision in *Canadian National Railway Co. v. Canada (Attorney General)*, to the background of the regulatory scheme embodied by section 120.1 of the CTA. While some of what it had to say on this matter applies to section 120.1 only, much of it is of general application.²³²

Section 120.1 was added to the legislation following a 2001 statutory review of the Act and as part of amendments aimed at updating the legislative framework (Parliamentary Information and Research Service, Legislative Summary LS-569E “Bill C-8: An Act to Amend the Canada Transportation Act (Railway Transportation)”, revised June 27, 2008, at p. 1). [...]

The amendments came as part of a move towards partial re-regulation in the rail sector after two decades of deregulation. Beginning with legislative reform in 1987 and continuing with further amendments in 1996, the goals of deregulation were to increase efficiency and improve service in the rail industry in Canada (Standing Committee on Transport, Infrastructure and Communities, Evidence, No. 3, 2nd Sess., 39th Parl., November 27, 2007, at pp. 1-2). Although deregulation was seen to achieve these aims, rail services were and are not provided in a perfectly competitive marketplace. In certain

silent, the common law principle prevails and the ultimate burden of proof rests, on a balance of probabilities, with the applicant. In this case, the legal burden of proof rests with Russel.”

²²⁹ Agency [Interlocutory Decision No. LET-R-144-2012](#), dated September 26, 2012, in re: *Complaint by Russel Metals Inc. pursuant to section 120.1 of the Canada Transportation Act*: “There is no established test for determining when a charge and associated terms or conditions reaches a level of unreasonableness. Therefore, reasonableness is determined on a case-by-case basis and relates to an objective sense of what is just and proper in a given circumstance. What is reasonable in some circumstances may not be reasonable in other circumstances. The Agency is of the opinion that “reasonableness” is a factual question, which can only be answered objectively on a case-by-case basis.”

²³⁰ The nearest it got was in Agency [Interlocutory Decision No. LET-R-144-2012](#), dated September 26, 2012, in re: *Complaint by Russel Metals Inc. pursuant to section 120.1 of the Canada Transportation Act*: “the Agency [was] of the preliminary opinion that the amount charged for the movement of both cars and blocks of cars on to and off an SHT after 120 hours is excessive and unreasonable and therefore should be disallowed.” But no final determination was made on the complaint.

²³¹ Section 120.1(4) of the CTA.

²³² 2014 SCC 40, at paragraphs 22, 23 and 24.

circumstances, the railway companies were seen to have superior market power to shippers. This superior market power of the railway companies, combined with the complaints of shippers over railway service and rates, led to Parliament's efforts to respond to these concerns (Standing Committee on Transport, Infrastructure and Communities, November 22, 2007, at p. 1). As the Honourable Lawrence Cannon, Minister of Transport, Infrastructure and Communities explained: "I believe the time has come to rebalance the legislative framework in favour of shippers" (*ibid.*, at p. 2).

In the context of this "rebalancing" in favour of shippers, s. 120.1 was introduced

5.2 United States

5.2.1 Where are rates and charges set out?

Rail carriers in the U.S. can set their rates and charges in rail transportation contracts. However, when not in a contract, there is no requirement that rates and charges be set instead in a tariff.²³³ All which is required under 49 U.S.C. 11101(b) is that a rail carrier provides to any person, on request, its rates and other service terms, either in writing or in electronic form. This absence of clear opposition between tariffs and rail transportation contracts is not without its own problems.²³⁴

Also one should note that, since 49 U.S.C. 10102(7) defines "rate" to mean "a rate or charge for transportation," there is no separate regulatory regime for charges as opposed to rates (narrowly defined) as is the case in Canada.

Tariffs

The term "tariff" is not defined anywhere in 49 U.S.C.,²³⁵ although reference is still made to tariffs in 49 U.S.C. 10101-11091. As explained by the Board:²³⁶

²³³ Exceptionally 49 U.S.C. 11101(d) provides that: "With respect to transportation of agricultural products, in addition to the requirements of subsections (a), (b), and (c), a rail carrier shall publish, make available, and retain for public inspection its common carrier rates, schedules of rates, and other service terms, and any proposed and actual changes to such rates and service terms." The term "tariff" is not expressly used; but basically this is what seems to be involved.

²³⁴ As explained in Board Decision, dated January 22, 2010, in re: [Rail Transportation Contracts Under 49 U.S.C. 10709](#): "the Board has been concerned about uncertainty as to whether an agreement between a rail carrier and a shipper is a rail transportation contract governed by section 10709 (and thus generally outside the Board's jurisdiction) or a common carriage arrangement." However after consultations with interested parties the Board failed to come up with a satisfactory solution and decided to "refrain from creating a bright line rule" and "instead continue [its] current practice of deciding whether a disputed rail rate is a section 10709 rail transportation contract or a common carriage rate on a case-by-case basis."

²³⁵ The term "tariff" is however defined in some of the regulations found at 49 C.F.R., e.g. section 1312.1.

²³⁶ Board Decision, dated May 7, 2012, in re: [Demurrage Liability](#), at footnote 8.

Historically, carriers gave public notice of their rates and general service terms in tariffs that were publicly filed with the [Interstate Commerce Commission] and that had the force of law under the so-called “filed rate doctrine.” See Maislin Indus., Inc. v. Primary Steel, Inc., 497 U.S. 116, 127 (1990). The requirement that rail carriers file rate tariffs at the agency²³⁷ was repealed in ICCTA [the *ICC Termination Act of 1995*]. Nevertheless, although tariffs are no longer filed with the agency, rail carriers may still use them to establish and announce the terms of the services they hold out.

Rail Transportation Contracts

General

The key provision on rail transportation contracts is 49 U.S.C. 10709 which provides, at subsection (a), that:

One or more rail carriers providing transportation subject to the jurisdiction of the Board under this part may enter into a contract with one or more purchasers of rail services to provide specified services under specified rates and conditions.

The major difference between the U.S. and Canada as far as rail transportation confidential contracts are concerned is the fact that a U.S. rail carrier which has entered into such a contract ceases to be a common carrier with respect to the services provided under that contract. This is made clear in section 10709.²³⁸ However it is still worth quoting at length the Board which, in one of its decisions, explained not only the legal effects of section 10709 but also why that particular provision was enacted in the first place:²³⁹

The [1980] Staggers Act was designed to revitalize the rail transportation industry. It sought to promote the development and continuation of a safe, sound, competitive, and efficient national rail system by: (1) allowing rail carriers to earn adequate revenues; (2) relying on competition and the demand for service, to the maximum extent possible, to establish reasonable rates; and (3) minimizing Federal regulatory control wherever

²³⁷ The Surface Transportation Board refers to itself in its decisions either as the “Board” or as “the agency”.

²³⁸ See 49 U.S.C. 10709: “(b) A party to a contract entered into under this section shall have no duty in connection with services provided under such contract other than those duties specified by the terms of the contract. (c)(1) A contract that is authorized by this section, and transportation under such contract, shall not be subject to this part, and may not be subsequently challenged before the Board or in any court on the grounds that such contract violates a provision of this part. (2) The exclusive remedy for any alleged breach of a contract entered into under this section shall be an action in an appropriate State court or United States district court, unless the parties otherwise agree.” Note, however, the possibility that a rail carrier can act with respect to a single shipper both as a contract carrier (for rail transportation covered by contract) and as a common carrier (for rail transportation which is not covered by any contract). This is expressly provided under 49 U.S.C. 10709 (f): “A rail carrier that enters into a contract as authorized by this section remains subject to the common carrier obligation set forth in section 11101, with respect to rail transportation not provided under such a contract.”

²³⁹ Board Decision, dated May 26, 2000, in re: [Parrish & Heimbecker, Inc. – Petition for Declaratory Order](#).

possible. See former 49 U.S.C. 10101a(1)-(5) (the rail transportation policy); see also Report of the Committee on Conference on S. 1946, H.R. Rep. No. 96-1430, 96th Cong., 2d Sess. 80-87, 111-12 (1980) (Conference Report).

Rail carriers were authorized and, along with shippers, encouraged by the Staggers Act to enter into contracts for the delivery of specified transportation services under specified rates and conditions, as provided under former 49 U.S.C. 10713 (now 49 U.S.C. 10709). See Conference Report at 80 and 98-101. The authority to contract was one of the more significant aspects of the new freedoms granted by the Staggers Act because it allowed rail carriers to tailor rail service more individually and thereby market transportation services more effectively. *Id.* at 100. Congress deemed contract service "a separate and distinct class of service," former 49 U.S.C. 10713(l), with the contracting carrier's obligations governed by the terms of its contract, former 49 U.S.C. 10713(h), rather than common carrier obligations, 49 U.S.C. 11101(a). To reinforce this distinction, Congress removed contracts, once effective, and the underlying contract service from the regulatory authority of our predecessor, the Interstate Commerce Commission (ICC), and the ICA, former 49 U.S.C. 10713(h) and (i) (now 49 U.S.C. 10709(b) and (c)), and placed exclusive authority for the interpretation and enforcement of contracts in the courts, 49 U.S.C. 10713(i) (now 49 U.S.C. 10709(c)).

The Staggers Act thus effectively created two separate classes of rail service – common and contract carriage. Carriers that entered into rail transportation contracts functioned as contract carriers with respect to their contract services and as common carriers with respect to their other services. See Conference Report at 100; *Texas v. United States*, 730 F.2d 409, 417 (5th Cir. 1984) (Texas), *reh'g denied per curiam*, 749 F.2d 1144 (5th Cir. 1985), *cert. denied sub nom. ICC v. Texas*, 472 U.S. 1032 (1985) ("railroads are common carriers when they serve all comers at a general publicly disclosed rate, and contract carriers when they enter into private contracts authorized by the Act").

As is the case in Canada, tariff provisions that are incorporated into a transportation contract become contract terms, and, as such, are in the U.S. no longer subject to Board authority to the extent that they relate to contract matters.²⁴⁰

Contracts for the Transportation of Agricultural Products

The Board is given some jurisdiction under 49 U.S.C. 10709 to hear complaints pertaining to rail transportation contracts but these involve complaints by parties that are not subject to them and are limited to contracts for the transportation of agricultural products

Subsection (d)(1) of section 10709 provides that:

²⁴⁰ *Ibid.*, at footnote 14.

A summary of each contract for the transportation of agricultural products (including grain, as defined in section 3 of the United States Grain Standards Act (7 U.S.C. 75) and products thereof) entered into under this section shall be filed with the Board, containing such nonconfidential information as the Board prescribes. The Board shall publish special rules for such contracts in order to ensure that the essential terms of the contract are available to the general public.

After enactment of the ICCTA, the Board adopted regulations that govern the filing of the agricultural contract summaries, including the information that must be included in the summaries.²⁴¹ These requirements are now codified at 49 C.F.R. Part 1313. After the filings are received by the Board, they are posted on the Board's website.²⁴²

The purpose for this requirement to file agricultural transportation contract summaries is to allow shippers and ports to file certain kinds of complaints with the Board under 49 U.S.C. 10709(g). Subsection (g) reads as follows:

- (1) No later than 30 days after the date of filing of a summary of a contract under this section, the Board may, on complaint, begin a proceeding to review such contract on the grounds described in this subsection.
- (2)(A) A complaint may be filed under this subsection-
 - (i) by a shipper on the grounds that such shipper individually will be harmed because the proposed contract unduly impairs the ability of the contracting rail carrier or carriers to meet their common carrier obligations to the complainant under section 11101 of this title; or
 - (ii) by a port only on the grounds that such port individually will be harmed because the proposed contract will result in unreasonable discrimination against such port.

²⁴¹ See Board Decision, dated December 30, 1996, in re: [Railroads Contracts](#).

²⁴² At: < <http://www.stb.dot.gov/stb/index.html> > (under the drop-down menu titled "Industry Data."). In a recent case, Norfolk Southern Railway Company and CSX Transportation, Inc. petitioned the Board to exempt railroads as a class from the requirement at 49 U.S.C. 10709(d)(1) to file agricultural transportation contract summaries. The two petitioners argued that they had met the requirements for an exemption under 49 U.S.C. 10502. Specifically, they claimed that contract summaries are rarely if ever reviewed or used and thus are not needed to carry out the rail transportation policy or protect shippers from the abuse of market power. The petition was denied by the Board, which noted in particular that: "the evidence of record does not support Petitioners' claim that contract summaries are rarely, if ever, reviewed or used. The Petitioners assert that the summaries of only two railroads have been accessed more than 1,200 times in a period of less than six years. This cannot fairly be characterized as 'rarely if ever.'" See Board Decision, dated August 11, 2014, in re: [Petition of Norfolk Southern Railway Company and CSX Transportation, Inc., to Institute a Rulemaking Proceeding to Exempt Railroads from Filing Agricultural Transportation Contract Summaries](#).

- (B) In addition to the grounds for a complaint described in subparagraph (A) of this paragraph, a complaint may be filed by a shipper of agricultural commodities on the grounds that such shipper individually will be harmed because-
- (i) the rail carrier has unreasonably discriminated by refusing to enter into a contract with such shipper for rates and services for the transportation of the same type of commodity under similar conditions to the contract at issue, and that shipper was ready, willing, and able to enter into such a contract at a time essentially contemporaneous with the period during which the contract at issue was offered; or
 - (ii) the proposed contract constitutes a destructive competitive practice under this part.

5.2.2 Rates

Rates Defined

As mentioned earlier, the term “rate” is defined at 49 U.S.C. 10102(7) to mean “a rate or charge for transportation.”

Minimum Rates

Nowhere in 49 U.S.C. is it required that a rate charged by a rail carrier be above a certain level.²⁴³

Maximum Rates in the Form of Reasonable Rates

At common law, a common carrier’s rates were required to be reasonable.²⁴⁴ 49 U.S.C. 10702(1),²⁴⁵ read together with section 10707 and section 10701(d), restricts that common law rule to those sole situations where the rail carrier proposing the rate has market dominance over the transportation to which the rate applies.

²⁴³ Anti-competitive rates may be subject to U.S. anti-trust laws however. Board Decision, dated August 11, 2014, in re: [Petition of Norfolk Southern Railway Company and CSX Transportation, Inc., to Institute a Rulemaking Proceeding to Exempt Railroads from Filing Agricultural Transportation Contract Summaries](#): “Congress also explained that, if someone believes that a contract is anticompetitive, “the antitrust laws are the appropriate and only remedy available.”

²⁴⁴ See [American Trucking Associations, Inc. v. Atchison, Topeka & Santa Fe Railway Co.](#), 387 U.S. 397 at p. 406: “From the earliest days, common carriers have had a duty to carry all goods offered for transportation. *Refusal to carry the goods of some shippers was unlawful. Rates were required to be reasonable...*”

²⁴⁵ 49 U.S.C. 10702 provides that: “A rail carrier providing transportation or service subject to the jurisdiction of the Board under this part shall establish reasonable— (1) rates, to the extent required by section 10707....”

Market Dominance

As explained by the Board:²⁴⁶

Where a railroad has market dominance—i.e., a shipper is captive to a single railroad—its transportation rates for common carrier service must be reasonable. 49 U.S.C. §§ 10701(d)(1), 10702. Market dominance is defined as an absence of effective competition from other rail carriers or modes of transportation for the transportation to which a rate applies. 49 U.S.C. § 10707(a). The Board is precluded, however, from finding market dominance if the revenues produced by a challenged rate are less than 180% of the carrier’s “variable costs” of providing the service. 49 U.S.C. § 10707(d)(1)(A). Variable costs vary with the level of traffic, and are developed in rates proceedings by using the Board’s Uniform Rail Costing System (URCS). See Adoption of the Unif. R.R. Costing Sys. as a Gen. Purpose Costing Sys. for all Regulatory Costing Purposes, 5 I.C.C. 2d 894 (1989).²⁴⁷

When a complaint is filed, the Board may investigate the reasonableness of the challenged rate, 49 U.S.C. §§ 10704(b), 11701(a), or dismiss the complaint if it does not state reasonable grounds for investigation and action, 49 U.S.C. § 11701(b). If the Board finds a challenged rate unreasonable, it will order the railroad to pay reparations to the complainant for past movements and may prescribe the maximum rate the carrier is permitted to charge for a defined period. 49 U.S.C. §§ 10704(a)(1), 11704(b). However, the Board may not set the maximum reasonable rate below the level at which the carrier would recover 180% of its variable costs of providing the service. W. Tex. Util. Co. v. Burlington N. R.R., 1 S.T.B. 638, 677-78 (1996), aff’d sub nom. Burlington N. R.R. v. STB, 114 F.3d 206, 210 (D.C. Cir. 1997).

In examining the reasonableness of a rate, the Board is guided by the rail transportation policy set forth at 49 U.S.C. § 10101. It must also give due consideration to the “Long-Cannon” factors contained in 49 U.S.C. § 10701(d)(2)(A)-(C). And the Board must recognize that rail carriers should have an opportunity to earn “adequate

²⁴⁶ Board Decision, dated July 18, 2013, in re: [Rate Regulation Reforms](#).

²⁴⁷ Actually this is only one of two components necessary to establish market dominance. As explained by the Board (Board Decision, dated April 5, 2011, in re: [Total Petrochemicals & Refining USA, Inc. v. CSX Transportation, Inc.](#)): “There are two components to the Board’s market dominance inquiry. The first component is quantitative. The statute establishes a conclusive presumption that a railroad does not have market dominance if the rate it charges produces revenues that are less than 180% of its variable costs of providing the service. 49 U.S.C. § 10707(d)(1)(A). Thus, the 180% revenue-to-variable cost (R/VC) ratio is the floor for regulatory scrutiny of rail rates. That statutory 180% R/VC level is also the floor for any rate relief. Burlington N. R.R. v. STB, 114 F.3d 206, 210 (D.C. Cir. 1997). If the quantitative threshold is met, the Board moves to the second component, a qualitative analysis. Wis. Power & Light Co. v. Union Pac. R.R., 5 S.T.B. 955, 960-1 (2001). In this analysis, the Board determines whether there are any feasible transportation alternatives that could be used for the issue traffic, considering both intramodal (from other railroads) and intermodal (from other modes of transportation such as trucks, transload arrangements, barges or pipelines) competition. E.I. du Pont de Nemours & Co. v. CSX Transp., Inc., NOR 42099, slip op. at 2 (STB served June 30, 2008).”

revenues.” 49 U.S.C. § 10701(d)(2). Adequate revenues are defined as those that are sufficient—under honest, economical, and efficient management—to cover operating expenses, support prudent capital outlays, repay a reasonable debt level, raise needed equity capital, and otherwise attract and retain capital in amounts adequate to provide a sound rail transportation system. 49 U.S.C. § 10704(a)(2).

From a procedural point of view, the Board usually hears the market dominance and rate reasonableness phases of a rate case in one proceeding. Exceptionally it permits bifurcation of the market dominance and rate reasonableness determinations so that the case is heard sequentially.²⁴⁸

The whole scheme set out in sections 10702(1) and 10707 is a complicated one and effectively only available to very large shippers.²⁴⁹

Simplified Standards for Rail Rate Cases

In 1995, Congress directed the Board to “establish a simplified and expedited method for determining the reasonableness of challenged rail rates in those cases in which a full stand-alone cost presentation is too costly, given the value of the case.” (49 U.S.C. 10701(d)(3)). In an effort to respond to this directive, the Board adopted the guidelines set forth in the 1996 [Rate Guidelines – Non-Coal Proceedings \(Simplified Guidelines\)](#).

Eventually the Board concluded that significant changes to the Simplified Guidelines were necessary.²⁵⁰ Therefore, in 2006, the Board proposed to (1) create a simplified stand-alone cost (Simplified-SAC) procedure to use in medium-size rate disputes for which a full stand-alone cost (Full-SAC) presentation is too costly, given the value of the case; (2) retain the “Three-Benchmark” method of Simplified Guidelines, with certain modifications and refinements, for small rate disputes for which even a Simplified-SAC presentation would be

²⁴⁸ As explained by the Board (Board Decision, dated April 5, 2011, in re: [Total Petrochemicals & Refining USA, Inc. v. CSX Transportation, Inc.](#)): “Many years ago, the agency routinely handled the market dominance and rate reasonableness phases of a rate case sequentially. Beginning in 1996, the agency established a practice of requiring simultaneous filing of market dominance and merits pleadings. See [Expedited Procedures for Processing Rail Rate Reasonableness, Exemption & Revocation Proceedings](#), 1 S.T.B. 754, 760 (1996). In certain limited circumstances, however, the Board has permitted bifurcation of the market dominance and rate reasonableness determinations when the defendant railroad has provided evidence raising considerable doubts as to the shipper’s ability to satisfy the Board’s market dominance standard. See [Sierra Pac. Power Co. v. Union Pac. R.R.](#), NOR 42012, slip op. at 4-5 (STB served Jan. 26, 1998).”

²⁴⁹ As noted by the Board: “we heard from a number of parties that our rate reasonableness proceedings were effectively only available to very large shippers and that smaller shippers had no viable means of challenging freight rail rates.” (Board Decision, dated July 18, 2013, in re: [Rate Regulation Reforms](#).) See Board Decision, February 18, 2009, in re: [Western Fuels Association, Inc. and Basin Electric Power Cooperative v. BNSF Railway Company](#) for an example of just how complicated such cases can be.

²⁵⁰ In part as a result of the simple fact that: “A decade has passed.... without any shipper presenting a case that has been decided under [Simplified Guidelines](#)”. (Board Decision, dated September 5, 2007, in re: [Simplified Standards for Rail Rate Cases](#).)

too costly, given the value of the case; and (3) establish eligibility presumptions to distinguish between large, medium-size, and small rail rate disputes.

In 2007 the Board issued its new Simplified Standards for Rail Rate Cases.²⁵¹ From time to time elements of the Simplified Standards are modified as needed.²⁵²

5.3 Summary and Key Findings

Comparing the regulatory provisions relating to pricing of railway services in Canada and the U.S., both regimes are today market-oriented and provide far more commercial freedom than was the case before the NTA of 1967 in Canada and the *Staggers Act* of 1980 in the U.S. There are, however, fundamental differences between the two regimes, the most significant being in how the regulation of rates is carried out.

5.3.1 Tariffs

In both Canada and the U.S., the former regimes under which all rates had to be set out in tariffs that had been issued, published and filed with the regulator, and under which no rates could be charged other than those set out in such tariffs have been effectively abolished.

In Canada, tariff means a schedule of rates, charges and terms and conditions applicable to the movement of traffic and ancillary services performed. It remains the case that a railway company can not charge a rate in respect of the movement of traffic unless the rate is set out in a tariff that has been issued and published in accordance with the CTA and is in effect. That provision, however, is subject to an exception – a rate set out in a confidential contract – and the exception has become the rule, since the bulk of traffic now moves under contract rates. Tariffs are also no longer required to be filed with the regulator; they are only required to be published and either publicly displayed or available for inspection.

In the U.S., rail carriers may set their rates and charges in confidential contracts, but when not in a contract, there is no requirement that they be set instead in a tariff. Although tariffs are still used, all that is required is that a rail carrier make available, on request, its rates and other service terms either in writing or electronically. Agricultural products, however, are an exception. Rail carriers are required to publish, make available, and retain for public inspection their common carrier rates, schedules of rates, and other service terms, and any proposed and actual changes to such rates and service terms.

²⁵¹ *Ibid.*

²⁵² E.g. Board Decision, dated April 21, 2014, in re: [Simplified Standards for Rail Rate Cases – 2012 RSAM and R/VC>180 Calculations](#).

5.3.2 Confidential Contracts

One of the most significant changes introduced in both the U.S. and Canada in the 1980s was to allow confidential contracts between shippers and carriers covering the rates and conditions for providing rail transportation services. By allowing such contracts, shippers and carriers are able to effectively tailor rail transportation services to their own particular needs, and keep the terms and conditions confidential. Allowing confidential contracts has been very successful in that most rail traffic now moves under such contracts.

In Canada, the CTA authorizes a railway company to enter into a confidential contract with a shipper respecting the rates to be charged to the shipper, reductions or allowances from tariff rates, rebates or allowances in respect of rates in tariffs or confidential contracts, conditions relating to the traffic, and the manner in which the railway company's service obligations are to be fulfilled.

Once a confidential contract has been entered into, the traffic subject to that contract is to some measure removed from the operation of the CTA. Although the railway company remains subject to the statutory level of service obligations as set out in the CTA, the parties may specify the manner in those obligations are to be fulfilled, and the terms of the contract are binding on the Agency in the event of any complaint and investigation of the railway's service obligations. Confidential contracts are also effectively immunized from submission to final offer arbitration since the submission of any matter governed by a confidential contract to final offer arbitration must have the consent of all parties to the contract.

In 2013, Parliament introduced a significant new regulatory restriction, amending the CTA to give any shipper the right to an offer of a confidential contract irrespective of the business which the shipper is prepared to offer in exchange. These amendments oblige a railway company to enter into a confidential contract with any shipper who requests one, and also establish an arbitration process to settle disputes regarding the railway's offer.

In the U.S., a rail carrier that has entered into a confidential contract ceases to be a common carrier with respect to the services provided under that contract. Legally, this is the major difference between the U.S. and Canada in respect of confidential contracts. The reasoning behind this treatment in the U.S. is that the authority to contract was seen from the beginning as one of the more significant freedoms granted by the *Staggers Act* because it allowed rail carriers to tailor rail service more individually and thereby market transportation services more effectively. Congress deemed contract service to be a distinct class that should not be subject to regulatory authority, placing exclusive authority for the interpretation and enforcement of contracts with the courts. Agricultural products, however, are accorded special status in that summaries of these contacts must be filed, and parties not subject to these contracts may file complaints requesting a review by the Board.

5.3.3 Rates

Among the provisions examined in this chapter, those pertaining to rates are perhaps the most difficult to compare between Canada and the U.S. In both countries the common law rule that rates have to be “reasonable” survives in some limited form. However, the approaches taken differ fundamentally in how the two regulatory regimes protect shippers against potential abuse of railway market power in the setting of rates and ensuring rates are reasonable.

In Canada, Parliament has chosen for the most part not to regulate rates *per se*. Specifically, there are no longer regulated rate maximums or minimums, except for the statutory rates which include the interswitching rates and the competitive line rates or CLRs (see Chapter 6). This means there is no maximum to what can be charged in published tariffs, or in the rates established in confidential contracts.

Instead of regulated rate maximums and minimums, Canadian regulation provides a variety of other recourses. Most important for limiting rates in general is final offer arbitration. For grain, there is the revenue cap or maximum revenue entitlement. (There are also the “competitive access” provisions, discussed in Chapter 6 below, which are intended to simulate the effects of intra-modal competition and enhance the bargaining power of shippers, especially those served by only one railway.

In the U.S., Congress has chosen a more direct form of rate regulation, while at the same time relying more heavily on the workings of competition and market forces. The statutory formulation is that rates are to be reasonable, and there is a statutory threshold above which rates may be held to be unreasonable (i.e., if the rate yields revenues that are more than 180% of the variable costs of providing the service). However, a great deal of traffic has been exempted from rate regulation altogether under the various commodity exemptions (see Chapter 3), and much of the remainder is effectively excluded because the Board may review the rate in question only if it first makes a finding of market dominance by the rail carrier in respect of the traffic to which the rate applies.

A difficulty with respect to U.S. legislation with respect to unreasonable rates is that, in practice, only large shippers are able to use the remedy given the complexity of any proceedings launched in attempting to use it.

Final Offer Arbitration

FOA is a vehicle in the CTA for resolving railway-shipper disputes. Only shippers may invoke the process and it is one of the key provisions shippers can rely on in rate negotiations to balance the market power of railways. It has no analogue in the U.S. regulatory scheme.

FOA is an intentionally high-risk form of arbitration where the arbitrator must select one of the two final offers put forward by the parties. By foreclosing any type of compromise, the

process encourages the parties to settle the dispute through their own negotiations rather than resort to a third-party decision maker. Should they nonetheless proceed to arbitration, the process disciplines the parties to advance tempered final offers. The more far reaching a party's position, the greater the likelihood that the other party's offer will be the one selected.

The use of FOA is not conditioned on the absence of intramodal or intermodal competition or other market factors, permitting a shipper who enjoys competitive alternatives to still access the recourse. However, the arbitrator must, in rendering a decision, 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." This however, is not a threshold or bar from the use of the FOA.

Revenue Cap for the Movement of Western Grain

Grain has historically been singled out for special treatment in Canadian rail freight regulation. In 2000, the Maximum Revenue Entitlement or "revenue cap" program replaced maximum freight rates regulation for the movement of western grain. Nothing analogous exists in U.S. rail regulation where grain is, for the most part, treated like any other commodity.

In 2000, Parliament agreed to let the railway companies set rates for shipping western grain but required them to stay within a total revenue limit. Proponents praised this as a move towards a more commercialized market in Canada.

"The establishment of a revenue cap would represent an end to over 100 years of controls on grain freight rates, and would therefore be a very significant step. Moving to an annual cap on average railway revenues as Justice Estey had recommended would permit clearer market signals to be sent by railway tariffs, and would provide more scope for innovative service offerings."²⁵³

Yet the revenue cap system, while affording flexibility to the railways to negotiate rates and service packages that encourage efficiencies, can have other implications. As the courts have stated, the general purpose of the program is similar to the more traditional maximum rates regulation, namely to protect grain producers from excessively high rail freight rates. However, there is no definition in the revenue cap regime as to what might constitute such rates.

As noted above, the revenue cap is calculated on the basis of a statutory formula that includes a base year revenue per tonne amount and a price index to adjust the base amount in subsequent years. The base year amount was determined by taking the estimated effective

²⁵³Kroeger, Arthur. Letter to the Honourable David M. Collenette, dated September 29, 1999. <http://data.tc.gc.ca/archive/eng/policy/acg-acgb-grain-1999-collenetteletterse29-collenetteletterse29-784.htm>

rate per tonne for 2000-2001 and then adjusting it down by 18 per cent, setting it at \$27.00 per tonne for CN and CP combined.²⁵⁴

The revenue cap system is backwards looking, reviewing amounts of grain moved and distances travelled after the fact in order to review whether railways abided by regulation. This has lent itself to disputes as parties disagree over what constitutes “revenue” after the fact. These reviews can be expensive, and also create uncertainty for the railways.

When railways exceed the cap, they must pay any amounts exceeding the determined revenue cap, plus a penalty, to the Western Grains Research Foundation. Repayments plus penalties assessed by the Agency and paid to the Western Grains Research Foundation for exceeding the revenue cap have been irregular and have varied significantly with a low of \$0 in 2009/10 and a high of over \$66 million in repayments plus penalties in 2007/08.²⁵⁵

Repayments and Penalties Paid by Railway Companies Under the Revenue Cap Regime²⁵⁶

Crop Year	Railway	Penalty (\$ CDN)
2003/04	CN	338,007
2004/05	CN	124,650
2005/06	CP + CN	3,412,780
2006/07	CP	3,352,820
2007/08	CP + CN	66,620,585
2008/09	CN	717,432
2009/10	-	0
2010/11	CP	1,314,636
2011/12	CP + CN	672,332
2012/13	CP	186,859

Source: Western Grains Research Foundation

The revenue cap formula does not take into account the cost differences in how grains are shipped. Trends towards containerization, either for logistical reasons or due to the increase in high value and specialty crops, are not considered in the formula. This may also lead to

²⁵⁴Transport Canada, *Government of Canada Announces Measures to Improve Western Grain Handling and Transportation System*, News Release (May 10, 2000).

²⁵⁵During the 2007/08 crop year, a retroactive reduction was made by the CTA to the VRCPI part way through the crop year with respect to charges allowed for maintenance of hopper cars as per Decision No. 67-R-2008. This decision was appealed by the railways, who continued to charge as per the original VRCPI that was determined by the Agency prior to the retroactive adjustment while waiting for a decision by the Federal Court (railways continued to charge it because had they been successful at the federal court, they would have had no means to get the money back as they could not have recovered it in a future year). The appeal from the railways was eventually dismissed by the Federal Court of Appeal (see 2008 FCA 363).

²⁵⁶Western Grains Research Foundation. <http://westerngrains.com/endowment-fund/rail-cap-revenue>

disincentives, in particular to use containers to ship grains by rail to ports since these costs are not considered in the revenue cap.

As noted by The Conference Board of Canada:

...regulatory barriers may still be hampering performance [in the grain supply chain], in particular the annual grain revenue cap set by the Canadian Transportation Agency (CTA). As the railways reach the revenue cap each year, no further incentive exists for them to make investments or divert resources to grain logistics in order to reduce the costs faced by other grain supply chain participants.²⁵⁷

5.3.4 Charges

In 2008, Parliament amended the CTA by providing shippers with a new remedy aimed at protecting them against unreasonable ancillary charges or associated terms and conditions for the movement of traffic. The Supreme Court of Canada observed this to be “...part of a move towards partial re-regulation in the rail sector after two decades of deregulation.” The amendment gave the Agency new authority to investigate and order changes, but in doing so it must ensure that any charges or associated terms and conditions it establishes are commercially fair and reasonable to all parties, a stipulation that also applies to any rate or condition of service established by the Agency.

²⁵⁷The Conference Board of Canada, *From Earth to Berth—Improving the Efficiency of Canada’s Grain Supply Chain*, (February 2011), p.8.

6 Competitive Access Provisions

Key Messages

- Both the Canadian and U.S. statutes contain “competitive access” provisions, meant to provide shippers with competitive alternatives they might not otherwise be able to benefit from.
- These provisions include: joint rates (Canada) and through routes (U.S.); interswitching (Canada) and terminal trackage rights/reciprocal switching (U.S.); CLRs (Canada); and running rights (Canada).
- Joint rates and through routes guarantee that shippers will be able to effectively move traffic over a continuous route operated by two or more carriers.
- Interswitching guarantees that a shipper with direct access to only one railway at the origin or destination of a move can have the shipment transferred to another carrier at a set rate if the origin or destination is within a certain radius of an interchange point:
 - In 1987, the radius was extended from its original 4 miles to 30 km. In 2014, the CTA was amended to provide the Agency with authority to extend the radius to 160 km in the Prairie provinces, which it has done.
 - The prescribed rate is solely cost-based. It takes no account of the revenue adequacy of the terminal carrier, of any forgone contribution to fixed costs that might otherwise have been earned by the terminal carrier, nor of the quality or competitiveness of the terminal carrier’s service.
- In the U.S., the Board can require terminal facilities owned by one carrier to be used by another carrier, or the railroad owning the terminal facilities to transport the traffic on behalf of the other carrier, if it finds this to be practicable and in the public interest:
 - Since 1985, the meaning of “public interest” with respect to terminal trackage rights or reciprocal switching has been greatly narrowed to determining whether the incumbent carrier has acted in an anticompetitive manner.
- CLRs allow a shipper served directly by only one railway, and located beyond the interswitching distance, to ask the Agency to set a rate for transporting goods over the originating railway to an interchange for transfer to a connecting railway:
 - The CLR is based on the interswitching rate plus, for the additional distance, the system average revenue per tonne-km for moving similar traffic over similar distances.
- If a railway company in Canada wishes to run over the lines of another railway, and the two cannot reach an agreement, the railway company can ask the Agency to approve such rights and set the terms:
 - In 2001 and 2002, the Agency determined that it does not have authority to grant running rights for the purpose of soliciting as well as carrying the traffic of shippers served by a host railway (the rights are limited solely to transit rights). The Agency also found that granting statutory running rights first requires evidence of actual market abuse or failure.

6.1 Canada

Competitive access provisions under the CTA include:²⁵⁸

- Section 121 which allows a shipper, who intends to move traffic over a continuous route where portions of it are operated by two or more railway companies, to request that those companies agree on a joint tariff or enter into a confidential contract;
- Section 127 which allows the Agency to order interswitching when a railway line of a railway company connects with a railway line of another railway company within a prescribed radius of the point of origin or destination;
- Section 129 which allows a shipper, who only has access to the lines of a railway company at the point of origin or destination and where a continuous route between those two points is operated by two or more railway companies, to request that the local carrier establish a competitive line rate; and
- Section 138 which provides that a railway company may apply to the Agency for a running rights order against another railway company.

As explained by the Agency:²⁵⁹

Basically, what these and related provisions have in common is that they provide specific statutory remedies to shippers or impose obligations on federal railway companies as part of an effort to redress instances where there is alleged to be a lack of competition in the marketplace. As such, these represent a surrogate for or alternative to free market competition in the Canadian railway industry.

Essentially, the underlying policy premise of these provisions is to provide shippers with competitive alternatives.²⁶⁰ The above four competitive access provisions are briefly discussed below individually.

²⁵⁸ See Agency [Decision No. 213-R-2001](#), dated May 3, 2001, in re: *Application by Ferroequus Railway Company, pursuant to section 138 of the Canada Transportation Act, for an order of the Canadian Transportation Agency to grant it the right to run and operate on and over specified lines of the Canadian National Railway Company; to pick up and deliver traffic from North Battleford, Saskatchewan to Prince Rupert, British Columbia, on and over the specified lines, and to use, possess, or occupy lands, terminals, sidings and other railway infrastructure as required for the operation along the lines specified in the application.*

²⁵⁹ *Ibid.*

²⁶⁰ Agency [Decision No. 35-R-2009](#), dated February 6, 2009, in re: *Application by the Canadian National Railway Company for a determination as to whether certain rail activities with the BNSF Railway Company in the Winnipeg area constitute interswitching for the purpose of section 127 of the Canada Transportation Act.*

6.1.1 Joint Rates

Joint rates are governed by sections 121 to 125 of the CTA. If a shipper wishes to move traffic over a continuous route in Canada over lines operated by two or more railway companies, it may ask the companies to agree on a joint tariff for the route and the apportionment of the rate in the joint tariff. The shipper may also enter into a confidential contract for the continuous route. If the companies cannot agree on the joint tariff and rate apportionment, the Agency can direct them to come to an agreement or it can make the determination.²⁶¹

6.1.2 Interswitching

Regulated interswitching is governed by section 127 of the CTA and is the transfer of traffic between two railway companies at a regulated rate. A shipper can have its cars interswitched from one carrier to another at prescribed rates if the origin or destination of the traffic is within a certain distance of an interchange point.²⁶² Interswitching is designed to allow access to more than one carrier when direct competition does not exist but it is not designed to replace or prevent direct competition from more than one carrier.²⁶³

The Agency is responsible pursuant to section 128 of the CTA for setting by regulation the terms and conditions for interswitching, determining the rate charged per car and establishing distance zones. The relevant regulations are contained in the [Railway Interswitching Regulations](#).²⁶⁴

In 2014, the [Fair Rail for Grain Farmers Act](#)²⁶⁵ amended section 128 of the CTA to add new subsection 128(1.1) which specifies that the Agency can prescribe different interswitching distances based on specific regions or goods. As a result this amendment, the *Railway Interswitching Regulations* were amended to add interswitching distance zone 5, “being a zone that includes sidings located: (i) within Manitoba, Saskatchewan or Alberta, (ii) wholly or partly within a radius of 160 km of an interchange located in Manitoba, Saskatchewan or Alberta, and (iii) wholly outside interswitching distance zones 1, 2, 3 and 4.”

In order for interswitching to be ordered by the Agency, three specific criteria must be met:²⁶⁶

²⁶¹ See Agency’s webpage [Disputes about rail rates](#).

²⁶² See Agency’s webpage [Disputes about Interswitching](#). The term “interchange” is defined at [section 111](#) of the CTA to mean “a place where the line of one railway company connects with the line of another railway company and where loaded or empty cars may be stored until delivered or received by the other railway company.”

²⁶³ Agency [Decision No. 178-R-1998](#), dated April 21, 1998, in re: *Application by the Canadian Pacific Railway Company, pursuant to subsection 98(2) of the Canada Transportation Act, etc.*

²⁶⁴ SOR/88-41.

²⁶⁵ S.C. 2014, c. 8.

²⁶⁶ Agency [Decision No. 466-R-2013](#), dated December 19, 2013, in re: *Application by Richardson International Limited pursuant to sections 127 and 128 of the Canada Transportation Act concerning the interswitching of traffic between the Canadian National Railway Company and the BNSF Railway Company at Emerson, Manitoba.*

- The line of one railway company must connect with the line of another railway company. This requires that: there must be two railway companies within the meaning of the CTA; the two railway companies must each have a line of railway within the meaning of the CTA; and, there must be a connection of the lines of the railway companies. Note, however, that actual ownership is not necessary for a railway company to be considered as having a line. Having only operating rights over a line may be sufficient.²⁶⁷
- There is a place where rail cars may be stored; and
- The interchange location is within the prescribed interswitching zone.

6.1.3 Competitive Line Rates

CLRs are governed by sections 129 to 136 of the CTA. A shipper located beyond the prescribed interswitching limit²⁶⁸ may ask the Agency to set a CLR for moving goods over the originating railway to the interchange point for transfer to another railway. The shipper must first make arrangements with the connecting railway company for the balance of the freight movement.²⁶⁹

See also Agency [Decision No. 165-R-2013](#), dated May 1, 2013, in re: *Application by Parrish & Heimbecker, Limited pursuant to sections 127 and 128 of the Canada Transportation Act concerning the interswitching of traffic between the Canadian Pacific Railway Company and the BNSF Railway Company at Coutts, Alberta*.

²⁶⁷ As explained in Agency [Decision No. 165-R-2013](#), dated May 1, 2013, in re: *Application by Parrish & Heimbecker, Limited pursuant to sections 127 and 128 of the Canada Transportation Act concerning the interswitching of traffic between the Canadian Pacific Railway Company and the BNSF Railway Company at Coutts, Alberta*, at paragraph 57: "... the Agency considers that a railway company may "have a line of railway" in relation to a line that it owns, or in relation to a line of railway owned by another railway company but over which it has sufficient rights to operate traffic and perform interchange activities." Both Agency [Decision No. 466-R-2013](#) and [Decision No. 165-R-2013](#) have been contested by CN and CP, respectively, and are currently before the Federal Court of Appeal.

²⁶⁸ See section 127(3) of the CTA: "If the point of origin or destination of a continuous movement of traffic is within a radius of 30 km, or a prescribed greater distance, of an interchange, a railway company shall not transfer the traffic at the interchange except in accordance with the regulations."

²⁶⁹ See Agency's webpage [Disputes about rail rates](#). No application by a shipper under section 129 of the CTA has been made since the CTA came into force in 1996 (or at least none which has given rise to a decision by the Agency). Under the *National Transportation Act, 1987* the Agency did have, however, the opportunity to set a few competitive line rates. See Agency [Order No. 1988-R-798](#), dated September 8, 1988, in re: *Application by Alberta Gas Chemicals Inc. pursuant to Section 136 of the National Transportation Act 1987 for the establishment of a Competitive Line Rate for the movement of methanol in shipper-supplied tank cars from the AGCL plant at Medicine Hat, Alberta to Coutts, Alberta by Canadian Pacific Limited for transfer to the Burlington Northern Railroad*, where the Agency explained: "The establishment of a CLR by the Agency is in essence a two stage procedure. The Agency must first determine whether the movement of traffic is one for which the Agency has authority to establish a CLR and whether the shipper has complied with the requirements of the Act and then it must calculate the amount of the CLR using one of a number of methods set out or authorized in the Act. If the movement of traffic is eligible for a CLR, the Agency must establish the CLR within 45 days of receipt of the shipper's application. The main conditions which the Act sets out for a shipper and the movement of traffic to be

The Agency would base the competitive line rate on a combination of the applicable interswitching rates and the revenue the railway generates in moving the same or substantially similar commodities over similar distances. The exact formula to be used by the Agency in setting a CLR in respect of the movement of traffic of a shipper is set out at section 133(1) of the CTA. The relevant figures for items A and E of that formula are prescribed under section 10 of the [Railway Interswitching Regulations](#).

6.1.4 Running Rights

Section 138 of the CTA governs running rights. It reads partly as follows:

- (1) A railway company may apply to the Agency for the right to (...) (c) run and operate its trains over and on any portion of the railway of any other railway company.
- (2) The Agency may grant the right and may make any order and impose any conditions on either railway company respecting the exercise or restriction of the rights as appear just or desirable to the Agency, having regard to the public interest.

Although the applicant under section 138 has to be a railway company, the Agency views section 138 as one of the “competitive access” provisions of the CTA since the ultimate beneficiaries are shippers.²⁷⁰

There had been no decisions on section 138 of the CTA, or its equivalent in earlier legislation, before a set of three decisions were issued by the Agency, two in 2001 and one in 2002.²⁷¹

eligible to receive a CLR are as follows: 1. The shipper must have access to the lines of only one railway company at the point of origin or the point of destination of the traffic. 2. The point of origin and the point of destination must be connected by a continuous route operated by two or more companies. 3. The shipper designates the continuous route for the movement of traffic from the point of origin to the point of destination. 4. The shipper must reach agreement with all connecting carriers for the movement of traffic over that portion of the continuous route for which the CLR will not apply. 5. No other CLR is applicable to the movement over the continuous route. Once the Agency has confirmed that it can establish the CLR, it calculates the CLR...”

²⁷⁰ See Agency [Decision No. 213-R-2001](#), dated May 3, 2001, in re: *Application by Ferroequus Railway Company, pursuant to section 138 of the Canada Transportation Act, etc.*: “[S]ection 138 of the CTA is one of the “competitive access” provisions of the CTA. It enables the entry of one railway company, the guest railway company, onto the infrastructure of another railway company, the host railway company, so that instead of there being only one carrier on a given railway track or system, there are two. Whether the rights which this provision supports are transit only or are broader and encompass traffic solicitation, it provides a regulatory remedy that ultimately offers affected shippers the ability to use two railway companies rather than one.” (To the same effect, see Agency [Decision No. 212-R-2001](#), dated May 3, 2001, in re: *Application by the Hudson Bay Railway Company, etc.*)

²⁷¹ Agency [Decision No. 213-R-2001](#), dated May 3, 2001, in re: *Application by Ferroequus Railway Company, pursuant to section 138 of the Canada Transportation Act, etc.*, Agency [Decision No. 212-R-2001](#), dated May 3, 2001, in re: *Application by the Hudson Bay Railway Company, etc.* and Agency [Decision No. 505-R-2002](#), dated September 10, 2002, in re: *Application filed by Ferroequus Railway Company Limited, pursuant to subsections 138(1) and (2) of the Canada Transportation Act seeking the right to run and operate its trains on and over*

Writing in 2003, Evans J.A. of the Federal Court of Appeal explained that: “Although a statutory power to grant running rights has existed for over 80 years, it has never been exercised.”²⁷² Since 2002 there has been no new decision on section 138 by the Agency.

In two similar decisions issued in 2001²⁷³ the Agency concluded that subsections 138(1) and 138(2) of the CTA did not empower the Agency to grant a railway company the right to run and operate on and over specified lines of another railway company for the express purpose of soliciting as well as carrying the freight of shippers served by the said railway lines. The rights granted pursuant to section 138 are limited solely to transit rights.

In the subsequent decision from 2002,²⁷⁴ the Agency – basing itself on the reference to the “public interest” in section 138(2) and indirectly on the National Transportation Policy²⁷⁵ – denied the application before it on the grounds that there was no convincing evidence that there was any prevailing public interest need in terms of existing railway rates or services for the imposition of running rights, based on its conclusion: “that a statutory running right is an exceptional remedy that requires actual evidence of market abuse or failure before an application under section 138 of the CTA may be granted.”

6.2 United States

Competitive access in the U.S. generally refers to the ability of a shipper or a competitor railroad to use the facilities or services of an incumbent railroad to extend the reach of the services provided by the competitor railroad.²⁷⁶

As explained by the Board:²⁷⁷

The Interstate Commerce Act makes three competitive access remedies available to shippers and carriers: through routes, terminal trackage rights and reciprocal switching. Under 49 U.S.C. § 10705(a), the Board may require a carrier to interchange

specified lines of the Canadian National Railway Company between Lloydminster, Saskatchewan and Prince Rupert, British Columbia and between Camrose, Alberta and Prince Rupert, British Columbia.

²⁷² [Ferroequus Railway Co. v. Canadian National Railway Co.](#), 2003 FCA 454 (FCA).

²⁷³ Agency [Decision No. 213-R-2001](#), dated May 3, 2001, in re: *Application by Ferroequus Railway Company, pursuant to section 138 of the Canada Transportation Act, etc.*, and Agency [Decision No. 212-R-2001](#), dated May 3, 2001, in re: *Application by the Hudson Bay Railway Company, etc.*

²⁷⁴ Agency [Decision No. 505-R-2002](#), dated September 10, 2002, in re: *Application filed by Ferroequus Railway Company Limited, pursuant to subsections 138(1) and (2) of the Canada Transportation Act, etc.*

²⁷⁵ As explained in *ibid.*: “While the term “public interest” is not defined in the federal transportation legislation, it is conventionally regarded as being the National Transportation Policy. This policy, appears at the beginning of the CTA, in section 5.”

²⁷⁶ Board Decision, dated July 25, 2012, in re: [Petition for Rulemaking to Adopt Revised Competitive Switching Rules.](#)

²⁷⁷ *Ibid.*

traffic with another railroad and provide a through route and a through rate for that traffic. Under 49 U.S.C. § 11102(a), the Board may require an incumbent carrier to grant physical access over its lines so that the trains and crews of a competing carrier can serve shippers located in the incumbent carrier's terminal facilities. Under 49 U.S.C. § 11102(c) the Board may require an incumbent carrier to transport the cars of a competing carrier and to switch those cars between the two lines for a fee. (...) The Board's current policy is that all of the competitive access remedies require a showing that the "the prescription or establishment is necessary to remedy or prevent an act that is contrary to the competition policies of 49 U.S.C. 10101 or is otherwise anticompetitive, and otherwise satisfies, the criteria of either 49 U.S.C. 10705 or 11102."

6.2.1 Through Routes

General

Under 49 U.S.C. [10705\(a\)](#), the Board may, and shall when it considers it desirable in the public interest, prescribe through routes, joint classifications, joint rates, the division of joint rates, and the conditions under which those routes must be operated by a rail carrier.

Public interest

In determining the public interest under section 10705, the Board will consider the interests of the general public, including shippers, affected by the movements, as well as the carriers participating in the routes. A broad variety of public interest factors will be considered, including: the economy, efficiency (particularly, if it adds to the number of interchanges), and feasibility of the route; the practicality of the movement (particularly, when the traffic has a special characteristic that should be considered); the impact the route has on all the parties involved; and whether the route represents a departure from a well-established routing for the traffic.²⁷⁸

Interchange

Additionally, any shipper faced with a situation where a rail carrier refuses to interchange the shipper's traffic with another carrier may seek a Board order under 49 U.S.C. 10705 to compel the creation of a new interchange and through route. As a general matter, a railroad has a right to rationalize its system and to provide service over its most efficient routes. But a carrier may not defeat legitimate competitive efforts of other rail carriers and shippers by foreclosing more efficient service. Thus, the Board may exercise its authority under section 10705 to order a carrier to open another route if a party demonstrates that the bottleneck

²⁷⁸ Board Decision, dated February 8, 2012, in re: [Canexus Chemicals Canada L.P. v. BNSF Railway Company](#).

railroad has exploited its market power by (1) providing inadequate service over its lines or (2) foreclosing more efficient service over another carrier's line.²⁷⁹

6.2.2 Terminal Trackage Rights and Reciprocal Switching

General

The second and third of the three competitive access remedies available to shippers and rail carriers in the U.S. are terminal trackage rights and reciprocal switching. They are both found in 49 U.S.C. 11102 ("Use of terminal facilities").

49 U.S.C. 11102(a) empowers the Board to:

require terminal facilities, including main-line tracks for a reasonable distance outside of a terminal ... to be used by another rail carrier if the Board finds that use to be practicable and in the public interest without substantially impairing the ability of the rail carrier owning the facilities or entitled to use the facilities to handle its own business.

49 U.S.C. 11102(c) provides that the Board:

may require rail carriers to enter into reciprocal switching agreements... where it finds such agreements to be practicable and in the public interest, or where such agreements are necessary to provide competitive rail service.

Forced terminal arrangements (including some forms of trackage rights) involve the physical presence of a competing carrier on a host carrier's facilities owned by the incumbent railroad. Under terminal agreements, an incumbent railroad grants access to its terminal facilities or tracks to another carrier's trains for a fee so that the non-incumbent can serve traffic it would otherwise be unable to access. Reciprocal switching (or as it is more generally termed "competitive switching" because it is not always a reciprocal arrangement between carriers²⁸⁰) involves the incumbent railroad transporting traffic, usually for a short distance, over its own track on behalf of a competing railroad for a fee. Reciprocal switching thus enables the competing railroad to offer its own single-line rate, even though it cannot physically serve the shipper's facility, to compete with the incumbent's single-line rate.²⁸¹

²⁷⁹ Board Decision, dated June 26, 2009, in re: [Entergy Arkansas, Inc. and Entergy Services, Inc. v. Union Pacific Railroad Company and Missouri & Northern Arkansas Railroad Company, Inc.](#)

²⁸⁰ Board Decision, dated July 25, 2012, in re: [Petition for Rulemaking to Adopt Revised Competitive Switching Rules.](#)

²⁸¹ Board Decision, dated January 11, 2011, in re: [Competition in the Railroad Industry.](#)

Public Interest

The interpretation by the Board of what "public interest" means under either subsection (a) or subsection (c) of 49 U.S.C. has changed considerably since the mid-1980s. As explained by Mullins and Brown:²⁸²

Prior to the mid-1980s, the ICC engaged in an inquiry into the broad public interest considerations underlying a grant of terminal trackage rights or reciprocal switching. To determine what was in the public interest in a given case, the ICC examined not only the interests of the particular shippers located at or near the terminal involved, but also the interests of the carriers and of the general public. (...) Beginning in 1985, however, the Commission undertook to alter its broad public interest analysis. (...) [Now,] the essential questions on this point are: (1) whether the railroad has used its market power to extract unreasonable terms on through movements; or (2) whether because of its monopoly position, the carrier has shown a disregard for the shipper's needs by rendering inadequate service. Since its adoption, the *Midtec* anticompetitive conduct standard has been applied consistently to section 11102(a) and section 11102(c) applications.²⁸³

Compensation

Rail carriers under both 49 U.S.C. 11102(a) and 11102(c) are responsible for establishing the conditions and compensation applicable to the use of the terminal facilities or to the reciprocal switching agreements but, if they cannot agree upon these matters, the Board may establish the applicable conditions and compensation.

As explained by the Board:²⁸⁴

²⁸² William A. Mullins and Sandra L. Brown, "Section 11102: Is it the Answer to Competitive Access? – Examining the Varying Standards Applied by the Surface Transportation Board When it is Determining Whether to Grant Terminal Trackage Rights Access", (1999) *Journal of Transportation Law, Logistics and Policy*, 333 at pp. 334-335.

²⁸³ See, for example, for 49 U.S.C. 11102(a) Board Decision, dated May 9, 2003, in re: [San Jacinto Rail Limited Construction Exemption and the Burlington Northern and Santa Fe Railway Company Operation Exemption – Build-out to the Bayport Loop Near Houston, Harris County, TX](#): "Some comments on the Draft EIS argued that we could use our terminal trackage rights authority in 49 U.S.C. 11102 to force UP to allow BNSF access to the Bayport Loop over UP's Strang Subdivision and Bayport Loop Industrial Lead. However, the EIS correctly explained that terminal trackage rights under section 11102 is a remedy only for anticompetitive practices. See *Midtec Paper Corp. v. United States*, 857 F.2d 1487 (D.C. Cir. 1988)" and for 49 U.S.C. 11102(c) Board Decision, dated January 11, 2011, in re: [Competition in the Railroad Industry](#): "The agency has in the past held that reciprocal switching should not be ordered absent a showing of competitive abuse. More specifically, the complaining party must show that the incumbent railroad has used its market power to extract unreasonable terms or, because of its monopoly position, has disregarded the shipper's needs by rendering inadequate service. *Midtec*, 3 I.C.C. 2d at 181." Additionally for 49 U.S.C. 11102(c) the "anticompetitive conduct standard" is embodied in Board's regulations. See 49 C.F.R. [1144](#) – Intramodal Rail Competition.

²⁸⁴ Board Decision, dated January 11, 2008, in re: [Pyco Industries, Inc. – Alternative Rail Service – South Plains Switching, Ltd. Co.](#) Unlike 49 U.S.C. 11102(c), section 11102(a) requires that: "The compensation shall be paid or

Under [section 11102(a)], we employ a formula similar to the one used to determine compensation under section 11123(a) [Situations requiring immediate action to serve the public]. And, as with an emergency alternative service order, the carrier ordered to make its facilities available is not entitled to lost profits. (...)

In determining what constitutes fair compensation, we do not start from a blank slate. Our predecessor, the Interstate Commerce Commission (ICC), established a formula for determining compensation for the use of a rail line under 49 U.S.C. 11123. As it stated in *Dardanelle*, slip op. at 3-4, compensation should consist of three components: (1) the variable cost incurred by the owning carrier as a result of the tenant carrier's operations over the owning carrier's tracks; (2) the tenant carrier's proportionate share of the track's maintenance and operation expenses; and (3) an interest or rental component designed to compensate the owning carrier for the tenant carrier's use of its capital dedicated to the track.

Temporary Alternative Service

Under 49 C.F.R. 1147.1(a),²⁸⁵ temporary alternative rail service with respect to 49 U.S.C. 11102 will be authorized if the Board determines that, over an identified period of time, there has been a substantial, measurable deterioration or other demonstrated inadequacy in rail service provided by the incumbent carrier.

6.3 Summary and Key Findings

Both the Canadian and U.S. rail regulatory regimes contain what they refer to as “competitive access” provisions, which are similar in their intent to provide shippers with competitive alternatives that they might not otherwise be able to access or benefit from. As described in Canada by the Agency, these provide specific statutory remedies to shippers or impose obligations on railways as part of an effort to redress instances where there is an alleged lack of competition in the market. As described in the U.S. by the Board, competitive access refers generally to the ability of a shipper or a competitor railroad to use the facilities or services of an incumbent railroad to extend the reach of the services provided by the competitor railroad.

adequately secured before a rail carrier may begin to use the facilities of another rail carrier under this section.” The Board in *Pyco Industries, Inc., supra*, ruled that: “Compensation is “adequately secured” within the meaning of section 11102(a) when the Board makes it known that it will establish the terms of compensation if the parties are unable to agree.”

²⁸⁵ Full background discussion of 49 C.F.R. 1147 in Board Decision, dated December 21, 1998, in re: [Expedited Relief for Service Inadequacies](#). For an example of such an application see Board Decision, dated November 20, 2006, in re: [Pyco Industries, Inc.- Alternative Rail Service – South Plains Switching, Ltd. Co.](#)

In Canada, competitive access provisions include joint rates, interswitching, competitive line rates, and running rights. In the U.S. they include through routes, and terminal trackage rights and reciprocal switching.

6.3.1 Joint Rates (Canada) and Through Routes (U.S.)

In Canada, if a shipper wishes to move traffic over a continuous route using lines operated by two or more railway companies, it can ask the companies to agree on a joint tariff and the apportionment of the rate. The shipper may also enter into a confidential contract for the route. If the companies cannot agree on the joint tariff and rate apportionment, the Agency can direct them to come to an agreement or it can make the determination.

In the U.S., the Board may, and shall when it considers it to be in the public interest, prescribe through routes, joint classifications, joint rates, the division of joint rates, and the conditions under which those routes must be operated.

6.3.2 Interswitching (Canada) and the Use of Terminal Facilities (U.S.)

In Canada, a shipper with access to only one railway at the origin or destination of a haul can have the shipment interswitched (transferred to another carrier) at a prescribed rate if the origin or destination is within a prescribed radius of an interchange point. Such interswitching has been an accepted feature of the railway environment since it was introduced at the beginning of the 20th century. Originally intended to avoid overbuilding of railway lines in urban centres, interswitching was mandated within 4 miles of an interchange. However, its scope has been significantly extended both literally and conceptually. In the latter sense, interswitching is now regarded as a competitive access provision rather than as an anti-congestion measure. Literally, the interswitching limit was extended from 4 miles to 30 kilometres with enactment of the NTA, 1987. Then in 2014, the CTA was amended to provide the Agency with authority to extend the radius to 160 kilometres in Saskatchewan, Manitoba and Alberta.

Pursuant to its authority, the Agency has adopted a rate matrix of car block sizes and distance zones that determine what interswitching charge is to apply. The rate, however, must be “compensatory,” i.e. not be less than the variable costs of moving the traffic as determined by the Agency. In establishing the rate, there is no requirement for the Agency to consider either the revenue adequacy position of the terminal carrier, nor the question of any forgone contribution to fixed costs that might have been earned if the terminal carrier had carried the traffic over the entire distance or for a greater proportion of it. Nor does the rate factor in the quality or competitiveness of the service that the terminal carrier actually provides or would be prepared to provide to the shipper. These omissions are particularly important considering that the interswitching limit in the Prairie provinces has been extended from 30 to 160 kilometres.

Interswitching naturally requires the local railway and the competing railway to each have a line that connects with the other. Ownership, however, is not required for a railway company to be

considered as having a line and for the Agency to order interswitching. Having only operating rights over a line may be sufficient. As a result, one US railway has through two recent decisions of the Agency gained access through interswitching to two locations in Canada where it has only operating rights and no actual line into Canada. Both decisions have been contested (by CN and CP, respectively) and are before the Federal Court of Appeal.

In the U.S., the Board may require terminal facilities owned by one carrier, and which may include main-line tracks for a reasonable distance, to be used by another carrier if the Board finds such terminal running or trackage rights to be practicable and in the public interest without substantially impairing the ability of the owning carrier to use the facilities for its own business. The Board also has authority to require rail carriers to enter into so-called reciprocal switching agreements where it finds them to be practicable and in the public interest or necessary to provide competitive rail service. In contrast to terminal running rights, reciprocal switching entails the incumbent railroad transporting the traffic on behalf of the competing railroad. In both cases, if the rail carriers cannot agree upon the conditions and compensation, the Board may establish them.

Significantly, the interpretation by the Board, or more precisely its predecessor the ICC, of what "public interest" means with respect to terminal trackage rights or reciprocal switching has been considerably changed. Beginning in 1985, the ICC, exercising its discretion on policy grounds, undertook to alter its broad public interest analysis by adopting an anticompetitive conduct standard. Under this approach, it would, before ordering terminal running rights or reciprocal switching, determine whether the incumbent rail carrier has used its market powers to extract unreasonable terms on through movements or whether because of its monopoly position it has shown a disregard for the shipper's needs by rendering inadequate service.

6.3.3 Competitive Line Rates

CLRs allow a shipper served directly by only one railway and located outside the interswitching limit to ask the Agency to establish a rate for transporting goods over the originating railway to an interchange point for transfer to a connecting railway. In this way a shipper with access to only one railway and located beyond the interswitching limit can access the lines of another railway. CLRs, first introduced in the NTA, 1987 were by far the most controversial feature of that legislation. No provisions comparable to Canadian CLRs exist in the U.S., except the reciprocal switching provisions applicable within terminal areas.

As a condition to having the Agency establish a CLR, the shipper must already have arrived at an agreement with the connecting carrier(s) for a rate applicable over the balance of the move. When a request for a CLR has been made, the Agency must establish the rate, the routing and specify the interchange and the local carrier's service obligations. The CLR is

calculated based on a combination of the current interswitching rate, plus the system average revenue per tonne-kilometre for moving similar traffic over similar distances, if possible.

CLRs have been the object of much controversy. They have hardly been used, and the Agency has very limited experience in establishing CLRs. Shippers allege that connecting carriers are reluctant to enter into agreements with shippers, thereby making it impossible to satisfy the preconditions for obtaining a regulated CLR. Nevertheless, it is apparent that the very existence of the provision reduces the relative bargaining power of railways vis-à-vis shippers and consequently tends to contribute to reducing rates.

Whether the statutory formula for calculating a CLR yields a reasonable result, and the effects of such pricing on a carrier's long term financial viability, were matters that concerned the CTA Review Panel in 2000-2001.²⁸⁶ The Panel understood the necessity for the railways to use price differentiation in setting rates and disagreed with basing CLRs on average revenues, which risks opening the regulatory process to any shipper paying more than average no matter what the reason. Variation in rates are to be expected in efficiently functioning markets, and it is the object of regulation to protect shippers against market abuse, not price differentiation.

6.3.4 Running Rights

In Canada, railway companies may enter into agreements, known as running rights, to share usage of track or facilities. Running rights may be voluntary agreements between carriers, and there are many consensual running rights agreements in place. However, if a railway company wishes to obtain running rights from another railway and the two cannot reach an acceptable agreement, the railway company may apply to the Agency for approval to use the tracks, land or terminal facilities of the second railway. The Agency may, having regard to the public interest, impose conditions on the railways to allow one to enjoy running rights over the other, and may set the compensation to be paid if such compensation has not been mutually agreed upon by both parties. No provisions comparable to Canadian running rights exist in the U.S., except for those applicable within terminal areas.

In Canada, the Agency has in fact very limited experience in imposing running rights, but issued three important decisions in 2001 and 2002. In these the Agency concluded that it does not have authority to grant running rights to a railway company for the purpose of soliciting as well as carrying the freight of shippers served by the host railway. The rights granted are limited solely to transit rights. Second, it found that statutory running rights are an exceptional remedy requiring actual evidence of market abuse or failure before an application may be granted.

²⁸⁶Canada Transportation Act Review Panel, *Vision and Balance* (June 2001), p. 67.

7 Mediation and Arbitration

Key Messages

- Both Canadian and U.S. legislation provide for resolving rail-related disputes through mediation or arbitration. There are, however, some significant differences.
- In Canada, mediation is strictly voluntary and requires the agreement of both sides. The Agency has no powers to compel mediation. Mediation can take place either before or after a formal complaint or application is filed.
- Similar to Canada, parties in the U.S. can voluntarily request mediation, including those involved in a formal proceeding before the Board. However, unlike Canada, the Board can order parties in a formal proceeding to mediate. Furthermore, the Board requires the parties to a rate dispute to engage in mediation at the start of the case.
- In Canada, the Agency may, if all parties request it, arbitrate a dispute over any railway matter covered by the Railway Transportation or Final offer Arbitration parts of the CTA, or over any rate or charge for the movement of goods by rail or provision of incidental services.
- Parties in the U.S. can also voluntarily decide to use arbitration procedures provided by the Board. However, unlike in the U.S., a shipper in Canada can unilaterally take a railway to arbitration for some disputes, i.e. under FOA or under the new recourse for shippers who are unable to reach agreement on a LOS contract.

7.1 Canada

Rail-related disputes can be decided by the Agency by: facilitation,²⁸⁷ mediation, arbitration and adjudication.²⁸⁸ The focus in this chapter is on mediation and arbitration.

7.1.1 Mediation

As explained by the Agency on its webpage [Resolution of Disputes through Mediation - A Resource Tool](#):

Mediation is an informal, voluntary and confidential process that promotes open and respectful communication. A neutral and impartial Mediator will assist the parties in negotiating a mutually satisfactory settlement themselves – the mediators have no decision making powers. Agency employees who are qualified Mediators and experienced in the transportation sector are appointed by the Chair of the Agency to manage the mediation process.

Mediation allows the parties in a dispute to express their views on the dispute, examine their interests and concerns, explore a variety of creative options, and develop their own solutions in a timely and cost-effective manner.

Mediation is an informal alternative to the Agency's formal decision making process. However, it is still a structured process with requirements that the parties must follow. For instance, it must be completed within a 30-day statutory deadline after the dispute is referred for mediation, unless the parties to a dispute agree otherwise.

The mediation process is confidential and parties must agree in writing to maintain confidentiality, even if the mediation does not result in the resolution of all issues.

Mediation Under Section 36.1 of the CTA

Section 36.1 of the CTA governs mediation. This provision was added to the CTA in 2007. Subsection 36.1(1) gives the Agency the authority to refer a matter within its jurisdiction to mediation if all the parties to the dispute, by agreement, make a request for mediation. Subsection 36.1(2) and the following provisions prescribe the essential aspects of the mediation process such as the appointment of a mediator, confidentiality, and the 30-day time limit to complete the mediation process.

Mediation can take place either before an actual complaint or application is filed (e.g. under section 116(1) of the CTA) or after such a complaint has been filed. In the latter eventuality

²⁸⁷ See Agency's webpage on [Facilitation](#).

²⁸⁸ See Agency's webpage on [Adjudication](#).

the statutory deadline for the Agency to decide the case is suspended for the duration of the mediation.²⁸⁹

More generally, however, the Federal Court of Appeal made it clear that adjudicative procedures, such as complaints or applications, and mediation are alternate mechanisms for reaching the same result.²⁹⁰

Read as a whole, these provisions reflect Parliament's intent that the collaborative and adjudicative procedures are alternate mechanisms for reaching the same result: the final resolution of a complaint. Both mechanisms result in a document that can be filed with the Federal Court or a superior court for enforcement. There is nothing in the legislative scheme to support the Agency's conclusion that the successful resolution of a complaint in whole or in part through collaborative measures does not replace the adjudicative process with respect to those issues which the parties have finally resolved.

Where the parties have finally resolved a complaint in a settlement agreement, the practical effect of a decision of the Agency to ignore the settlement agreement and adjudicate issues previously resolved would be to denude the collaborative measures of any effect. No properly advised litigant would agree to enter mediation if the litigant understood that the time and resources devoted to reaching a mediated result would be wasted if the other side later regretted its bargain and simply decided that the mediated solution was no longer desirable.

Finally, section 36.1(7) provides that: "An agreement that is reached as a result of mediation may be filed with the Agency and, after filing, is enforceable as if it were an order of the Agency." It is up to the parties to the agreement to file the agreement with the Agency as soon as possible to allow for enforcement in the event of any breach. One of the logical consequences of an agreement being enforceable after filing is that it is enforceable from that

²⁸⁹ See subsection 36.1(6): "The mediation has the effect of – (a) staying for the period of the mediation any proceedings before the Agency in so far as they relate to a matter that is the subject of the mediation; and (b) extending the time within which the Agency may make a decision or determination under this Act with regard to those proceedings by the period of the mediation." Agency [Decision No. 20-R-2008](#), dated January 18, 2008, in re: *Complaint filed by the Canadian Wheat Board pursuant to sections 26, 37 and sections 113 to 116 of the Canada Transportation Act*, the Agency explained: "By letters dated September 5 and 10, 2007, respectively, the CARS Group and CN made a request to the Agency for mediation to resolve their differences. By letter dated September 13, 2007, the Agency referred the dispute for mediation. Pursuant to subsection 36.1(6) of the Canada Transportation Act, the mediation has the effect of staying for the period of the mediation any proceedings before the Agency insofar as they relate to a matter that is the subject of the mediation, and extending the time within which the Agency may make a decision or determination under the CTA with respect to those proceedings by the period of the mediation. In a letter dated September 27, 2007, CN advised the Agency that the parties were unable to reach a mediated settlement. As the parties could not agree on a settlement through mediation, by virtue of paragraph 36.1(6)(b) of the CTA, the statutory deadline for disposition of this complaint is January 19, 2008."

²⁹⁰ [BNSF Railway Company v. Canadian Transportation Agency](#), 2011 FCA 269, at paragraphs 29 and 30.

point on and, while the Agency can consider evidence of an ongoing breach, it cannot issue orders to remedy breaches in periods prior to the filing.²⁹¹

Mediation Under Section 169.1 of the CTA

Section 169.1 of the CTA reads in part as follows:

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.

The remainder of section 169.1 is similar to section 36.1, minus what is provided for in section 36.1(7).

7.1.2 Arbitration

Final Offer Arbitration

Final offer arbitration has been referred to and discussed in previous chapters of this Report.²⁹²

Rail Level of Service Arbitration

Section 169.31 of the CTA provides recourse to arbitration for shippers who are unable to agree on and enter into a level of service contract with a railway company as provided for under section 126(1). Matters that can be submitted for arbitration include various “operational terms” and incidental services that the railway company must comply with.²⁹³

Section 169.31 was added to the CTA in 2013, and amended in 2014 to allow the Agency to make regulations specifying what constitutes operational terms for the purposes of paragraphs (1)(a) to (c).

²⁹¹Agency [Decision No. 350-R-2013](#), dated September 5, 2013, in re: *Application by the Quayside Community Board, related to the mediated settlement agreement filed with the Canadian Transportation Agency pursuant to subsection 36.1(7) of the Canada Transportation Act*, at paragraphs 37 and 39. See generally the Agency’s webpage on [Arbitration](#).

²⁹²See chapters 5.1.3 and 5.3.3.

²⁹³[Decision No. 388-R-2013](#), dated October 7, 2013, in re: *Decision No. 202-R-2013 in response to the application by Canexus Chemicals Canada, LP; Olin Canada ULC, doing business as Olin Chlor Alkali Products; ERCO Worldwide, a division of Superior Plus LP; and Chemtrade Logistics Inc. and Chemtrade West Limited Partnership*, at paragraph 102.

Regulations to that effect are now found in the [Regulations on Operational Terms for Rail Level of Services Arbitration](#).²⁹⁴ The Agency has also issued [Rules of Procedure for Rail Level of Service Arbitration](#).²⁹⁵

Rail Arbitration

Finally the CTA provides yet another alternate mechanism to adjudicative procedures in the form of section 36.2 which reads in part as follows:

If sections 36.1 and 169.1 do not apply, the Agency may mediate or arbitrate a dispute relating to any railway matter covered under Part III or IV, or to the application of any rate or charge for the movement of goods by railways or for the provision of incidental services, if requested to do so by all parties to the dispute.

The Agency has prepared [Proposed Sample Rules of Procedure for Arbitrations under Section 36.2](#). These however these are not in force.

7.2 United States

7.2.1 Mediation

Mediation is explained as follows in the Board webpage on [Mediation](#):

Mediation is a process in which parties attempt to negotiate an agreement that resolves some or all of the issues in dispute, with the assistance of a trained, neutral, third-party mediator. Mediation is only binding if the parties reach an agreement; the mediator cannot impose an agreement or solution on the parties.

The Board offers formal and informal mediation services in an effort to find common ground between shippers and transportation providers. These services have resulted in the resolution of a number of disputes that otherwise would have had to be adjudicated, saving those parties involved time and money.

Mediations are conducted by a member of the STB staff that has had mediation training (though an outside mediator can be used if the parties agree and pay the costs associated with doing so). If mediation is unsuccessful, the STB staff that served as the mediator (or mediators) is recused from working on the formal proceeding.

²⁹⁴ SOR/2014-192. These Regulations will be repealed on August 1, 2016 unless both Houses of Parliament postpone their repeal to an ulterior date: see section 15(1) of the [Fair Rail for Grain Farmers Act](#) and section 7(2) of the [Regulations on Operational Terms for Rail Level of Services Arbitration](#).

²⁹⁵ SOR/2014-94.

Parties involved in a formal proceeding before the Board always have the option of voluntarily requesting mediation. In addition, the Board has the authority to direct parties in a formal proceeding to mediate – with or without the consent of the parties. The Board also requires that the parties involved in a dispute over the level of a railroad’s rates must engage in mediation at the beginning of the case. (Mediation is not available in those Board proceedings in which the agency is required to grant or deny a license or other regulatory approval or exemption, and those that involve labor protection.)

The mediation process is governed by a strict confidentiality policy, which is set forth in the Alternative Dispute Resolution Act (5 U.S.C. 574(a)-(b)) and the Board’s rules (49 C.F.R. 1109.3(d) and 1109.4(e)). At the beginning of mediation, the parties are required to sign an Agreement to Mediate, in which they agree to adhere to the Board’s confidentiality rules.

Mediation is not specifically covered under 49 U.S.C. The legal basis for it is found at Subchapter IV—Alternative Means of Dispute Resolution in the Administrative Process (sections 571 to 574) of Chapter 5—Administrative Procedure—of Title 5—Government Organization And Employees.

The relevant procedural rules in matters involving disputes under the Interstate Commerce Act are to be found in 49 C.F.R. Part 1109.

7.2.2 Arbitration

Arbitration is explained as follows in the Board webpage on [Arbitration](#):

Arbitration is a process in which parties to a dispute agree to present their case to a trained, neutral, third-party with expertise in the subject matter of the dispute (the arbitrator), and then let the arbitrator issue a final, binding decision.

Shippers and railroads can agree in advance to arbitrate certain types of disputes by “opting in” to the STB’s arbitration program at any time. When a party opts into the program, it may specify which types of arbitration-eligible matters it is willing to arbitrate. The STB has approved the following four types of matters that parties can choose to arbitrate under the program:

- Demurrage
- Accessorial charges
- Misrouting or mishandling of rail cars
- Disputes over a carrier’s published rules and practices applied to particular rail transportation.

Parties may agree to arbitrate additional matters on a case-by-case basis, so long as the dispute involves a matter within the STB's statutory jurisdiction, the matter is not expressly prohibited by the arbitration rules, and the Board gives its consent. Parties may also utilize the STB's arbitration program even if one or both have not opted in prior to a dispute arising. The program sets a monetary award cap of \$200,000 for each arbitration, although the parties may choose to establish a different award cap amount (either higher or lower).

Arbitrations will be conducted by a panel of three arbitrators (unless the parties agree to the use of a single-neutral arbitrator), with each party (or side) choosing one person to serve as a party-appointed arbitrator. There are no restrictions on who this person may be – parties may appoint an employee to serve as an arbitrator. The third arbitrator will be neutral, chosen by the parties from a list of arbitrators compiled by the STB. The list of arbitrators will be drawn from professional arbitration associations such as the American Arbitration Association, Judicial Arbitration and Mediation Services, or the Federal Mediation and Conciliation Service. The STB will pay the cost of obtaining this list, although the parties must pay for the arbitrators that they have chosen and split the costs of the neutral arbitrator.

The arbitrator must issue a decision no later than 30 days after the end of the evidentiary phase of arbitration. Parties can appeal the arbitration decision to the STB or to a court of appropriate jurisdiction under the Federal Arbitration Act. The STB will modify or vacate an arbitration award only on grounds that the arbitration decision reflects a clear abuse of arbitral authority or discretion or directly contravenes the STB's statutory authority.

Like mediation, arbitration is not specifically covered under 49 U.S.C. The legal basis for it is found at Subchapter IV—Alternative Means of Dispute Resolution in the Administrative Process (sections 573 to 583) of Chapter 5—Administrative Procedure—of Title 5—Government Organization and Employees.

The relevant procedural rules in matters involving disputes under the Interstate Commerce Act are to be found in 49 C.F.R. Part 1108.

7.3 Summary and Key Findings

Canadian and U.S. legislation both contain provisions that provide for resolving rail-related disputes through mediation or arbitration. There are, however, some significant differences.

In mediation, a qualified, independent mediator attempts to assist the parties to negotiate a mutually satisfactory settlement themselves. Mediators have no power to impose an agreement. If successful, mediation resolves some or all of the issues in a dispute that would otherwise have had to be resolved through more time-consuming and expensive adjudication.

In Canada, the use of mediation is strictly voluntary and requires the agreement of both sides. The Agency has no powers to compel the parties to attempt mediation. Mediation in Canada can take place either before an actual complaint or application is filed (e.g. under the level of service or FOA provisions of the CTA), or after such a complaint or application has been filed. In the latter situation, the statutory deadline for the Agency to decide the case is extended. Except for mediation related to an FOA, an agreement reached through mediation may be filed with the Agency and would then be enforceable as if it were an order of the Agency.

Similar to Canada, parties in the U.S. have the option of voluntarily requesting mediation, including parties involved in a formal proceeding before the Surface Transportation Board. However, unlike Canada, the Board has the authority to direct parties in a formal proceeding to mediate, with or without their consent. Furthermore, the Board also requires that the parties involved in a rate dispute engage in mediation at the beginning of a case.

In arbitration, the parties to a dispute present their case to a qualified, independent third party that issues a final, binding decision. Under section 36.2 of the CTA, the Agency may, if requested by all parties, arbitrate a dispute relating to any railway matter covered by Part III (Railway Transportation) or Part IV (Final offer Arbitration) of the CTA, or to the application of any rate or charge for the movement of goods by railways or for the provision of incidental services. Parties (shippers or railways) in the U.S. can also voluntarily decide to avail themselves of arbitration procedures provided by the Surface Transportation Board. However, unlike in the U.S., a shipper in Canada can unilaterally decide to take a railway to arbitration for some disputes, i.e. under FOA or under CTA section 169.31, the recourse for shippers who are unable to reach agreement on a level of service contract with a railway company.

8 Cost of Capital and Revenue Adequacy

Key Messages

- The cost of capital plays a role in the rail regulatory regimes in both Canada and the U.S.
- In Canada, the cost of capital is used principally as a factor in determining the revenue cap for transportation of western grain and in determining interswitching rates, thereby affecting railway revenue.
- In the U.S., the cost of capital is used as the benchmark in assessing railway revenue adequacy. It is also used in prescribing maximum rate levels, rail line abandonment proceedings, and in setting compensation for using another carrier's lines.
- Due to the different methodologies used, the resulting estimates differ widely, for example 11.32% on an after-tax basis for U.S. railways in 2013, versus estimates in the neighborhood of 6%-7% on a pre-tax basis for CN and CP.
- In particular, the estimated cost of equity has differed sharply between Canada and the U.S., with the Canadian methodology tending to yield significantly lower estimates, and estimates that have been eroding over time while remaining stable in the U.S.

The cost of capital plays a role in rail regulation in both Canada and the U.S. Typically, regulatory agencies estimate the cost of capital by calculating some variant of the weighted average cost of capital (WACC), a weighted average of the costs of debt and equity. While the cost of debt is observable and relatively straightforward to determine, determining the cost of equity involves estimating a reasonable rate of return required on the shareholders' investment. This is generally estimated using the capital asset pricing model (CAPM), a discounted cash flow (DCF) methodology, or some combination of these.

8.1 Canada

8.1.1 Agency Cost of Capital Determination

Under section 157 of the CTA, the Agency may make regulations regarding the determination of costs for regulatory purposes, including the cost of capital. This section of the CTA also goes on to say that the Agency may consider the principles of costing adopted by the Royal Commission on Transportation appointed by the Order in Council dated May 13, 1959, as well as any later developments in railway costing or the current conditions of railway operations. Costs of future operations of a railway company are to be made "in accordance with estimates made on any basis that, in the opinion of the Agency, is reasonable in the circumstances". A determination of costs by the Agency is final and binding.

The Agency calculates the cost of capital for federally-regulated railway companies for three main purposes: (1) the transportation of western grain; (2) the development of interswitching costs and rates; and (3) other specified regulatory purposes.²⁹⁶

For the purposes of the transportation of grain, the cost of capital is used in determining the volume-related composite price index, which is a component in the calculation of the maximum revenue entitlement for the movement of western Canadian grain.

In terms of interswitching, the cost of capital is used to develop interswitching costs and rates, and is used to determine the cost of interswitching activities or related investments in infrastructure or rolling stock.

Finally, cost of capital is also used as required as an input to develop costs of railway services or improvements. These are in turn used in order to estimate charges for access to rail network and facilities by another railway company (such as a passenger railway company or for running rights to use another railway's network).

²⁹⁶ Agency [Decision No. 425-R-2011](#), dated December 9, 2011, in re: *Review of the methodology used by the Canadian Transportation Agency to determine the cost of capital for federally-regulated railway companies*, at Appendix A..

8.1.2 Calculation of the Cost of Capital

According to the Agency, four steps are involved in determining the cost of capital.²⁹⁷

1. Determination of net rail investment;
 - Gross book value of all railway assets less accumulated depreciation
 - Based on submissions from CP and CN from book values with certain approved adjustments
2. Determination of capital structure;
 - Determination of the combination of various sources of capital used to finance investment
 - Based on submissions from book values contained in financial statements
3. Determination of capital structure cost rates, which includes the cost rates of debt, deferred taxes and common equity; and
 - Cost of debt as per actual costs (interest paid to financial institutions or bond holders)
 - Cost of equity as per railway submissions, revised by the Agency as per approved methodology including the Capital Asset Pricing Model (CAPM), Discounted Cash Flow Model (DCF) and the Equity Risk Premium Model (ERP), based on which model best reflects state of capital markets in that year. Since 1997 the Agency has considered the CAPM model to best reflect the state of the capital markets (although the railways disagree).²⁹⁸
 - Income tax allowance based on federal and provincial income tax rates added to establish the pre-tax value of shareholders' return
 - A consideration is also made in particular to the cost of capital with respect to the transportation of western grain, with the possibility of making an adjustment based on risks to grain transport. Since 1997, no grain risk adjustment has been made, though it is reviewed annually.
4. Calculation of the cost of capital rate.
 - Calculate the weighted average cost of capital (WACC) based on the cost of each source of funding multiplied by the share of that source in the overall capital structure.

²⁹⁷ Canadian Transportation Agency, [Cost of Capital Methodology Review-Consultation Document](#) (November 4, 2010).

²⁹⁸ See Agency [Decision No. 425-R-2011](#), dated December 9, 2011, in re: *Review of the methodology used by the Canadian Transportation Agency to determine the cost of capital for federally-regulated railway companies*, at paragraph 22.

The most recent estimates of the cost of capital, as determined on a pre-tax basis by the Agency for purposes of the volume-related composite price index for the transportation of western grain, are 6.34% for CN and 7.54% for CP (Figure 8-1). For regulatory purposes other than grain and interswitching rates, the most recent estimates as determined on a pre-tax basis by the Agency are 6.25% for CN and 7.37% for CP (Figure 8-2)

Figure 8-1: VRCPI Pre-Tax Cost of Capital for CN and CP, Crop Year 2014-2015

Type of Capital	CN	CP
Long-Term Debt	4.72%	5.40%
Common Equity	9.55%	11.32%
Deferred Taxes	0.00%	0.00%
Pre-Tax Weighted Cost of Capital	6.34%	7.54%

Source: Canadian Transportation Agency, Agency-approved Cost of Capital Rates for the Volume-Related Composite Price Index.

Figure 8-2: Pre-Tax Cost of Capital for CN and CP for Other Regulatory Purposes, 2013

Type of Capital	CN	CP
Long-Term Debt	4.72%	5.40%
Common Equity	9.36%	11.02%
Deferred Taxes	0.00%	0.00%
Pre-Tax Weighted Cost of Capital	6.25%	7.37%

Source: Canadian Transportation Agency, Agency-approved Cost of Capital Rates for Other Regulatory Purposes

The methodology used to estimate the cost rates in step three above was reviewed by the Agency in 2011.²⁹⁹ As part of this review, submissions from industry stakeholders were considered, and a review of methodologies was commissioned.³⁰⁰ In particular, the determination of the cost of equity, which is the least easy to observe directly, was commented upon by stakeholders. The commissioned study also noted this as one of the most difficult elements to determine. Testimony from CP noted that the cost of equity rates set by the Agency have been consistently below those as set by the Surface Transportation Board in the U.S., and also stated that "...the current methodology used by the [Agency] has produced cost of equity estimates that are so low they are essentially no different than the cost of debt, which is an illogical result from an economic standpoint..."³⁰¹

²⁹⁹See Agency [Decision No. 425-R-2011](#), dated December 9, 2011, in re: *Review of the methodology used by the Canadian Transportation Agency to determine the cost of capital for federally-regulated railway companies*.

³⁰⁰The Brattle Group, *Review of Regulatory Cost of Capital Methodologies* (September 2010).

³⁰¹Analysis Group Inc., On Behalf of Canadian Pacific Railway, *Review of the Railway Cost of Capital Methodology—reply Report* (April 27, 2011), p. 2.

8.2 United States

8.2.1 Board Cost of Capital Determination

In the U.S., the Board determines annually the railroad industry’s cost of capital. Its most recent decision on the matter is dated July 30, 2014.³⁰² This determination is one of the components used in evaluating the adequacy of a railroad’s revenue each year pursuant to 49 U.S.C. 10704(a)(2) and (3) (see chapter 8.2.3 below). The cost of capital finding may also be used in other regulatory proceedings, including (but not limited to) those involving the prescription of maximum reasonable rate levels (see chapter 5.2 above), the proposed abandonment of rail lines (see chapter 3.2 above), and the setting of compensation for use of another carrier’s lines (see chapter 6.2 above).³⁰³

8.2.2 Calculation of the Cost of Capital

The cost of capital as determined by the Board in 2013 was 11.32%, on an after tax basis (Figure 8-3). This is calculated by examining the cost of debt, the cost of common equity, the cost of preferred equity and the capital structure of the railways. While preferred equity is considered separately, its share of the overall capital structure of railways is so low that it is currently weighted at 0%, effectively making preferred equity irrelevant in the cost of capital at current levels.

Figure 8-3:After Tax Cost of Capital for US Railways, 2013

Type of Capital	Cost	Weight	Weighted Average
Long-Term Debt	3.68%	17.69%	0.65%
Common Equity	12.96%	82.31%	10.66%
Preferred Equity	3.87%	0.004%	0.00%
Composite Cost of Capital		100.00%	11.32%

Source: Surface Transportation Board Decision, Docket No. EP 558 (Sub-No 17), Table 16

8.2.3 Revenue Adequacy

As seen earlier in Chapter 2 of this Report, one of the stated objects of the rail transportation policy set out in 49 U.S.C. 10101 is to “to promote a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues, as determined by the Board.”

³⁰²Board Decision, dated July 30, 2014, in re: [Railroad Cost of Capital – 2013](#).

³⁰³*Ibid.*

Specifically the Board is required under 49 U.S.C. 10704(a)(3) to “annually determine which rail carriers are earning adequate revenues,” “on the basis of the standards and procedures described in paragraph (2).” This requirement dates from 1976.³⁰⁴

What paragraph (2) of section 10704(a) provides is as follows:

(2) The Board shall maintain and revise as necessary standards and procedures for establishing revenue levels for rail carriers providing transportation subject to its jurisdiction under this part that are adequate, under honest, economical, and efficient management, to cover total operating expenses, including depreciation and obsolescence, plus a reasonable and economic profit or return (or both) on capital employed in the business. The Board shall make an adequate and continuing effort to assist those carriers in attaining revenue levels prescribed under this paragraph. Revenue levels established under this paragraph should –

(A) provide a flow of net income plus depreciation adequate to support prudent capital outlays, assure the repayment of a reasonable level of debt, permit the raising of needed equity capital, and cover the effects of inflation; and

(B) attract and retain capital in amounts adequate to provide a sound transportation system in the United States.

To make the annual revenue adequacy determination, the Board compares a carrier’s return on net investment (ROI) with the rail industry’s after-tax cost of capital for that year. The Board calculates the carrier’s ROI by dividing net railway operating income (an after-tax, before-interest figure) by an investment base that consists of the firm’s net investment in railroad property, plus working capital, less accumulated deferred income tax credits. If its ROI is equal to or exceeds the cost of capital, the railroad is considered to have been revenue adequate for that year; if its ROI is less than the cost of capital, the railroad is considered to be revenue inadequate for that year.³⁰⁵

In its latest decision on the matter,³⁰⁶ the Board found five carriers (BNSF Railway Company, Grand Trunk Corporation, Norfolk Southern Combined Railroad Subsidiaries, Soo Line Corporation and Union Pacific Railroad Company) to be revenue adequate for 2013 and two (CSX Transportation, Inc. and Kansas City Southern Railway Company) to not be so.

³⁰⁴As explained in Board Decision, dated July 25, 2013, in re: [Western Coal Traffic League – Petition for Declaratory Order](#): “Since enactment of the Railroad Revitalization and Regulatory Reform Act of 1976 (4R Act), Pub. L. No. 94-210, 90 Stat. 127 (1976), Congress has required the ICC and the Board to maintain, and revise as necessary, standards and procedures for establishing railroad revenue adequacy and to determine annually which of the Class I rail carriers are earning adequate revenues. 49 U.S.C. §§ 10704(a)(2)-(3).”

³⁰⁵ Board Decision, dated July 25, 2013, in re: [Western Coal Traffic League – Petition for Declaratory Order](#).

³⁰⁶ Board Decision, dated August 29, 2014, in re: [Railroad Revenue Adequacy – 2013 Determination](#).

Finally one should note that when the requirement for a rail carrier to earn adequate revenues under the rail transportation policy clashes with the requirement of the same policy for it “to maintain reasonable rates where there is an absence of effective competition,” the obligation to maintain reasonable rates will be deemed to prevail.³⁰⁷

8.3 Summary and Key Findings

While the basic elements involved in estimating the cost of capital in Canada and the U.S. are similar (capital structure, cost of debt, cost of equity), the methodologies used to calculate the cost components differ. This leads to different allowable end costs, for example 11.32% on an after-tax basis for U.S. railways in 2013, versus estimates in the neighborhood of 6%-7% on a pre-tax basis for CN and CP. Of particular note, the allowable cost of equity has differed considerably between Canada and the U.S.

In the U.S., the cost of equity was estimated using a single-stage DCF model until 2008, when it was reviewed by the Board following complaints from shippers. Now the Board uses a simple arithmetic average of the cost of equity estimated using the CAPM and the Morningstar/Ibbotson multi-stage DCF model. The use of averages of two methodologies mitigates the variances that the models can experience in times of fluctuation in the financial markets. Both models have their strengths and weaknesses:

The Capital Asset Pricing Model (CAPM), for example, has a transparent and well-explored economic theory underlying it. Its results can be replicated easily, since the data required are widely available from many public sources. Implementing the CAPM, however, requires a number of subjective decisions – decisions which can be hotly contested and can lead to significantly different results. Conversely, the Discounted Cash Flow (DCF) model can be relatively objective to implement in its simplest form, although required data on growth rates may be difficult to cross-check in publicly available datasets. Moreover, the DCF model is highly sensitive to growth rate estimates, which can vary widely among analysts – and that variation may increase in times of greater economic uncertainty. As such, the reliability of DCF methods can be questionable in times of economic turmoil or when an industry is in transition.³⁰⁸

In the U.S., a key use of the cost of capital is to determine which rail carriers are earning adequate revenues, in line with the stated national policy objective of promoting a safe and

³⁰⁷ Board Decision, dated July 25, 2013, in re: [Western Coal Traffic League – Petition for Declaratory Order](#): “Revenue inadequacy, however, is not a defense to a complaint demonstrating that the carrier’s challenged rates exceed the SAC constraint. *BNSF Ry. v. STB*, 453 F.3d 473, 480 (D.C. Cir. 2006) (citing *Coal Rate Guidelines*, 1 I.C.C. 2d at 536 (“a rate may be unreasonable even if the carrier is far short of revenue adequacy”)). Consequently, shippers have used the SAC constraint to obtain refunds and rate relief from revenue inadequate railroads.”

³⁰⁸ The Brattle Group, op.cit., p. 4.

efficient rail transportation system by allowing rail carriers to earn adequate revenues. In its latest determination, for 2013, the Board found five carriers to be revenue adequate and two to not be so.

Uses of the cost of capital estimates in the U.S. also include their use in other regulatory proceedings, including those involving the prescription of maximum rate levels, the proposed abandonment of rail lines, and the setting of compensation for use of another carrier's lines.

In Canada, the Agency calculates the cost of capital for federally-regulated railway companies for two main purposes: the transportation of western grain; and the development of interswitching costs and rates. Cost of capital rates are also determined on a case-by-case basis as required for other proceedings, such as LOS complaints.

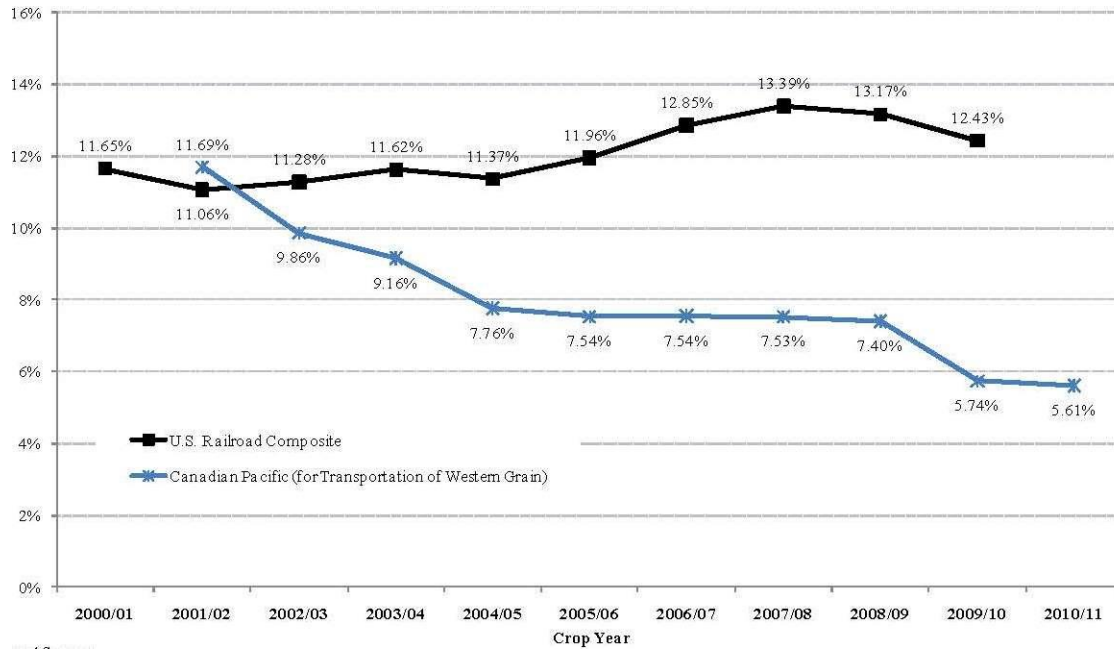
In calculating the cost of equity, the Agency in Canada uses the CAPM model alone, which has tended to yield considerably lower cost of equity estimates as compared to the U.S. In a submission made to the Agency on behalf of CP, it was proposed that the approach used, including restricting the estimation of the market risk premium (MRP) to data from the last 45 years, which avoids some periods of volatility, led to lower estimates. In the U.S., the MRP is estimated using data going back as far as is available, and was determined by the Board to be 6.96% for 2013.³⁰⁹,³¹⁰ In comparing Canada to the U.S. (Figure 8-4), it can be seen that the after tax cost of equity has been eroding in Canada while remaining quite stable in the U.S.

The low cost of equity estimates in Canada may have an impact on the railways' ability to attract capital necessary for capital expenditures, to the extent that the cost of capital determination impacts railway revenues. The key areas where the cost of capital affects revenues are in establishing the price index used to calculate the grain revenue cap and in the setting of rates for interswitching.

³⁰⁹ See Board Decision, dated July 31, 2014, in re: [Railroad Cost of Capital – 2013](#), Table 10.

³¹⁰ In the *Review of Regulatory Cost of Capital Methodologies* report prepared by the Brattle Group, the Brattle Group noted that estimation of the MRP is a particularly large source of debate and can lead to divergences in the cost of capital estimates produced by the CAPM model (p. 47). This is reflected in the divergences between the cost of capital estimated through the CAPM model in Canada and the US and the large differences in the Market Risk Premium assumed by the two countries.

Figure 8-4: After Tax Equity Cost of Equity Allowed for CP versus US Railroads



Source: Expert Report of Bruce E. Stangle and George Kosicki, Analysis Group Inc on Behalf of Canadian Pacific Railway. March 24, 2011

9 Conclusion

The purpose of this study has been to characterize and compare the economic regulation of railways in Canada and the United States and in particular to:

- Describe and highlight the similarities and differences in the respective statements of national transportation policy that underpin rail freight regulation;
- Describe and highlight the similarities and differences in the provisions relating to the principal objects of rail economic regulation in the two countries, including market entry and exit, level of services, pricing of services, competitive access, mediation and arbitration, and regulatory cost of capital;
- Determine whether these comparisons suggest possible useful opportunities for change in how rail freight services are regulated in Canada.

9.1 National Transportation Policy Statements

Canada and the U.S. have both enacted formal statements of national transportation policy intended to guide the regulation of transportation under federal jurisdiction. However, while Canada's statement applies to transportation in general, subsuming railways, the U.S. policy statement is specific to railways.

The two policy statements are similar in their overall intent, which is that competition and market forces should be relied on as the primary guide determining the provision of rail services, and in their encouragement of deregulation. But the U.S. statement is clearer and more emphatic in this respect.

Another major difference is that, in the U.S., the policy statement has an explicit objective of allowing rail carriers to earn adequate revenues. Canada's policy declaration contains no statement concerning revenue adequacy.

Lastly, in both countries, the role of competition and market forces is not treated as absolute but is balanced against other public interest considerations. Canada's policy statement, however, is again more encompassing and general in this respect while the U.S. statement is limited and focused.

Canada's statement, found in section 5 of the CTA, was first introduced in 1967. Since then there have been several variants but the concepts that Canada is best served by an economically efficient transportation system, and that the best way to achieve this is to rely as far as possible on market competition, have remained constants. Nevertheless, it is fair to conclude from a review of the Agency's decisions that Canada's policy statement is too general to dictate to the Agency a particular result in any particular case, even in its latest, fairly short version, adopted in 2007.

While the CTA covers mostly air transportation and rail transportation (and in the latter case the focus is overwhelmingly on freight), the policy statement purports however to cover the whole of the "national transportation system". This is in sharp contrast not only to the U.S. rail-focused statement, but also to the equally focused Purpose Clause, at section 4, of the *Canada Marine Act*³¹¹ which limits itself to marine transportation. Furthermore, besides being general, the CTA policy statement espouses what are often competing considerations.³¹² Hence it provides very little direction to the Agency (or to anybody else).³¹³

Nonetheless, the main objective of the policy (at least based on the frequency to which the Agency refers to that objective in its decisions) is that competition and market forces are to be, whenever possible, the prime agents in providing viable and effective transportation services.³¹⁴ To make this possible section 5 is understood as encouraging deregulation.³¹⁵

³¹¹ S.C. 1998, c. 10.

³¹² See Agency [Decision No. 212-R-2001](#), dated May 3, 2001, in re: *Application by the Hudson Bay Railway Company pursuant to sections 93 and 138 of the Canada Transportation Act, etc.*: "The policy, therefore, balances what are often two conflicting or competing objectives. That is, on the one hand it espouses a transportation network in which each mode is economically viable and operating in a market with limited regulatory interference. On the other hand, it envisages a transportation network subject to regulatory protection in order to best achieve the other objectives of the national transportation policy such as serving shippers' needs or regional economic development. What is apparent from this policy statement is that it does not represent a unidimensional pursuit of competition at all costs. It advocates a balancing of various objectives among which competition is but one. This balancing is reinforced within the policy statement itself when it proclaims that competition and market forces are to be "... whenever possible, the prime agents in providing viable and effective transportation services" (paragraph 5(b))."

³¹³ See *Ferroequus Railway Co. v. Canadian National Railway Co.*, 2003 FCA 454 (FCA), at paragraph 22: "[S]ince the Policy expresses the often competing considerations that the Agency must balance when making a particular decision, it inevitably operates at a level of some generality and does no more than guide and structure the Agency's exercise of discretion in any given fact situation. Thus, it imposes a relatively soft legal limit on the Agency's exercise of power, in the sense that it will rarely dictate a particular result in any particular case."

³¹⁴ "The national transportation policy set out in section 3 of the NTA, 1987 requires that competition and market forces be, whenever possible, the prime agents in providing viable and effective transportation services." (Agency [Decision No. 538-R-1990](#), dated October 29, 1990, re: *Regulation of VIA Rail Canada Inc. by the National Transportation Agency*); "As the Agency itself noted, section 5 of the Act contains a number of policy objectives which "are most likely to be achieved when all carriers are able to compete, both within and among various modes of transportation," under conditions ensuring that "competition and market forces are, whenever possible, the prime agents in providing viable and effective transportation services." ([Canadian National Railway](#)

Ironically enough, however, it is Parliament itself which is undercutting its own avowed policy of deregulation. As recently noted by the Supreme Court of Canada in [Canadian National Railway Co. v. Canada \(Attorney General\)](#) there has been a “move towards partial re-regulation in the rail sector after two decades of deregulation.”³¹⁶ The [Fair Rail for Grain Farmers Act](#)³¹⁷ is the latest example of this trend.³¹⁸

9.2 Rail Economic Regulatory Provisions

The principal objects of rail economic regulation in Canada and the U.S. are mostly similar. Besides having statements of national transportation policy, both countries regulate market entry and exit, level of services, pricing of services, competitive access, mediation and arbitration, have a regulatory cost of capital, and permit confidential contracts.

At the same time there are significant, and sometimes fundamental, differences in how certain matters are regulated (pricing of services, confidential contracts, competitive access and cost of capital), and in the fact that certain matters are objects of regulation in Canada

[Co. v. Eagle Forest Products Ltd. Partnership](#), [2000] 3 FC 46 (FCA), at paragraph 22); “The national transportation policy in paragraph 5(a) of the CTA provides that competition and market forces are the prime agents in providing viable and effective transportation services. Paragraph 5(b) allows for regulation and strategic public intervention to be used to achieve economic outcomes that cannot be achieved satisfactorily by competition and market forces alone.” (Agency Interlocutory [Decision No. 2014-05-02](#), dated May 2, 2014, in re: *Application by Louis Dreyfus Commodities Canada Ltd. against the Canadian National Railway Company, pursuant to sections 26 and subsection 28(2) of the Canada Transportation Act*, at paragraph 11.)

³¹⁵ “Furthermore, the Agency is cognizant of the current economic environment surrounding this dispute. The new regulatory regime for the federal transportation network contained in the CTA was based on a desire to reduce the regulation of this industry and encourage competitive forces to play a larger role. The National Transportation Policy, as set out in section 5 of the CTA, states, in part.....” (See Agency [Decision No. 457-R-1997](#), dated July 17, 1997, in re: *Complaint by Eagle Forest Products Limited Partnership, pursuant to subsection 116(1) of the Canada Transportation Act alleging that the Canadian National Railway Company has failed to fulfil its common carrier obligations to provide adequate and suitable accommodation for delivering traffic originating from its mill located in Miramichi, in the province of New Brunswick*); “An interpretation of paragraph 150(3)(b) that would confer on the Agency intensive regulatory control over the reasonableness of a railway company's demurrage revenues is not in keeping with Parliament's intent to minimize regulation as expressed in paragraph 5(c) of the Canada Transportation Act (National Transportation Policy) (....) I am of the opinion that member Penner viewed the Agency's regulatory mandate correctly when he stated in his dissenting reasons: “Overall, I find that this kind of assessment by the Agency is consistent with the view that as a regulator, the Agency's role under the revenue entitlement provisions is one of broad oversight rather than attempting to regulate the day-to-day commercial practices or policies of the railway company.” ([Canadian Pacific Railway Co. v. Canada \(Transportation Agency\)](#), 2003 FCA 271 (FCA) at paragraph 28.)

³¹⁶ 2014 SCC 40, at paragraph 23.

³¹⁷ S.C. 2014, c. 8.

³¹⁸ For further details on this trend towards re-regulation, see CPCS, *Evolution of Canadian Railway Economic Regulation and Industry Performance Under Commercial Freedom* (November 28, 2014).

but not in the U.S. (the revenues that railways in Canada may earn from moving western grain) and vice versa (the provisions in the U.S. pertaining to railway revenue adequacy and the regulator’s authority to exempt traffic from regulation).

Figure 9-1 below highlights the matters covered by rail economic regulation in the two countries.³¹⁹

Figure 9-1: Matters Covered by Rail Economic Regulation in Canada and the U.S.

Object of Regulation	Covered by Regulation	
	Canada	U.S.
National Transportation Policy Statement	Yes	Yes
Market Entry and Exit	Yes	Yes
Level of Services	Yes	Yes
Pricing of Services	Yes	Yes
Confidential Contracts	Yes	Yes
Competitive Access	Yes	Yes
Mediation and Arbitration	Yes	Yes
Cost of Capital	Yes	Yes
Revenues Earned from Transporting Grain	Yes	No
Railway Revenue Adequacy	No	Yes
Authority to Exempt Traffic from Regulation	No	Yes

Overall, and consistent with the tenor of their respective policy statements, it is clear that government in Canada intervenes far more extensively in the rail marketplace than does government in the U.S. Specifically:

- While the respective LOS provisions have many similarities, their scope of application has been sharply narrowed in the U.S. mainly because of the different treatment of confidential contracts in the two countries and the statutory authority of the Board to exempt traffic from regulation.
- The manner in which rates are regulated differs fundamentally. U.S. legislation provides a specific ceiling (180% of variable costs) for a rate to even be considered unreasonable while Canada instead has final offer arbitration. Moreover, in the U.S. a great deal of traffic is exempted from rate regulation by virtue of the Board’s exemption authority, or because the Board must first make a finding of market dominance by the rail carrier before it can review the rate in question. In Canada, the situation is the reverse in that FOA is not

³¹⁹ Both Canada and the U.S. have provisions relating to railway consolidations (mergers and acquisitions), although these are not discussed in this Report.

conditioned on the absence of competition or other market factors; it is available unconditionally to any shipper that chooses to make use of it.

- Confidential contracts are also treated very differently. In the U.S., where there is a confidential contract, the rail carrier simply ceases to be a common carrier with respect to the contracted services. In Canada, the rail carrier remains subject to the statutory LOS obligations, although the terms of the contract are binding on the Agency in the event of a complaint and investigation. In addition, the CTA now obliges a railway company to enter into a confidential contract with any shipper who requests one, and provides an arbitration process to settle disputes regarding the railway's offer.
- Canadian and U.S. legislation both contain competitive access provisions. Canada's, however, are more numerous. In one critical case, Canadian regulated interswitching, this is available unconditionally to any shipper having direct access to one railway, whereas the closest corresponding U.S. provisions require the Board to first determine whether the local rail carrier has acted in an anticompetitive manner. Additionally, the prescribed interswitching distance limit has been extended (provisionally) from 30km to 160km in the Prairie Provinces.
- In Canada, a railway company that wishes to run over the lines of another railway can ask the Agency to approve such rights and set the terms, although the Agency in this case has set clear pre-conditions and limits on its use. Provisions similar to Canadian running rights, however, do not exist in the U.S.
- Both Canada and the U.S. provide mechanisms for resolving rail-related disputes voluntarily through mediation or arbitration. However, unlike the U.S., a shipper in Canada can unilaterally take a railway to arbitration for some disputes, i.e. under FOA or under the new recourse for shippers who are not able to reach agreement on a confidential contract.
- In Canada, grain transportation has historically had special regulatory treatment including, for decades, the setting of rates by statute. In 2000, the "revenue cap" replaced the maximum freight rate regulation for western grain. Nothing analogous exists in the U.S. where grain is, for the most part, treated like any other commodity.

As noted above, a major difference between the Canadian and U.S. policy statements is that U.S. policy has an explicit objective of allowing rail carriers to earn adequate revenues. In the U.S., the cost of capital is used as the benchmark in assessing railway revenue adequacy. The only provision in Canada that might be regarded as having a bearing on revenue adequacy is section 112 of the CTA which requires that: "A rate or condition of service established by the Agency...must be commercially fair and reasonable to all parties."

9.3 Opportunities for Reform

The review and comparison of Canadian and U.S. rail economic regulation presented in this Report suggests the following opportunities for change in the Canadian regulatory regime:

- First, the current *Canada Transportation Act Review* presents an opportunity to revisit Canada's statement of National Transportation Policy. Although the statement seeks – appropriately – to balance the requirements for economic efficiency and reliance on market competition with appropriate public interest considerations, it does so in such a way that the statement is too vague to be of practical value.

Under section 53 of the CTA, giving consideration to the policy statement and possibly recommending changes to it are an explicit part of the CTA Review process. Admittedly, it was reviewed in depth by the CTA Review in 2000-2001, and as a result streamlined and updated in 2007. Nevertheless, the statement remains amorphous.

Another issue that can be mentioned in this regard is that the policy statement, in its current form, no longer makes reference to reliance on user charging, a principle that had been embedded in all the previous statements until 2007.³²⁰

- Second, an important question is whether users of rail services should have recourse to regulatory remedies in markets for transportation services where sufficient competition exists? As may be seen in this Report, the ability of shippers in Canada to access key provisions including LOS, FOA, interswitching, CLRs and the right to a confidential contract is not conditioned on the absence of competition or abuse of market power by railways. Yet it is only when one party is abusing monopoly power that such regulation is called for. The various regulatory remedies should be re-examined in light of whether they should be accessible irrespective of market conditions.
- Third, regulated interswitching is a key provision in Canada that has recently been changed radically. Both the specific changes, including the extension of the distance limit to 160 km in the Prairie Provinces, and the process by which this has been done, are questionable. The extension to 160km increases significantly the rail traffic base subject to fixed regulated rates, a large step back towards a regulatory approach that Canada abandoned over thirty years ago. Furthermore, no analysis of: (i) the changes introduced; (ii) the conditions requiring them; (iii) how these changes fit into the larger picture of available shipper remedies; or (iv) alternative options was provided in support of the decisions. In

³²⁰ Beginning with the first policy statement in 1967, the acceptance of reliance on user charging as a principle was expressed in terms similar to the following: "each carrier or mode of transportation, as far as practicable, bears a fair proportion of the real costs of the resources, facilities and services provided to that carrier or mode of transportation at public expense." See, e.g., *Canada Transportation Act Review, Vision and Balance* (June 2001), p. 308.

addition, the changes were implemented by regulatory change rather than legislative amendment, something the Agency itself commented upon in 2004:

The Agency considers that extending the interswitching distance limits from 30 to 150 kilometres would constitute a policy amendment that would have substantial repercussions in the rail transportation industry and the magnitude of these repercussions would be so significant that such an amendment cannot be contemplated by way of a regulatory change.³²¹

These new interswitching provisions should be allowed to expire on August 1, 2016, as per the sunset clause under which they have been put into effect.

- Finally, there is the matter of the unique treatment accorded to western grain. The current CTA Review should consider whether grain should continue to have special treatment or instead be treated as any other commodity. There is no well-established economic reason for continuing to treat grain differently, and as noted in this Report, there are questions regarding the justification and effect of the Maximum Revenue Entitlement. Furthermore, as noted by the *Canada Transportation Act* Review Panel in 2001, the legislation that introduced the cap on grain rates in 1995, and which was replaced by the Maximum Revenue Entitlement in 2000, contemplated the eventual sunseting of any special regulatory regime for grain rates.³²²

³²¹ Canadian Transportation Agency, *Regulatory Impact Analysis Statement* (September 23, 2004).

³²² *Canada Transportation Act* Review, *Vision and Balance*, op. cit., p. 73.