Rail Competitive Access and Shipper Protections

Rail competition in Canada is contentious. This report explains in non-legal terms some of the competitive access and shipper protection issues relating to rail freight service.

Information on positions was obtained from transcripts of Standing Committee on Transport (SCOT) hearings on Bill C-26 in 2003. Organizations appearing before the Committee included: CN, CP, Forest Products Association, Canadian Industrial Transportation Association, Railway Association of Canada, Canadian Wheat Board, Canadian Chemical Producers' Association, Government of Saskatchewan. As well, information was obtained from a submission prepared by the Western Canadian Shippers' Coalition.

"Contentiousness"

Each issue was rated by WESTAC on its **level of contentiousness**:
+ no/low contention ++ medium contention +++ high contention

1. Competitive Access Provisions
   - \+ Interswitching
   - +++ Competitive Line Rate (CLR) / Competitive Connection Rate (CCR)
   - +++ Running Rights

2. Shipper Protections
   - \+ Level of Service
   - \+ Mediation
   - ++ Final Offer Arbitration (FOA)

3. Other Provisions
   - ++ "Substantial Commercial Harm" test
   - \+ "Commercially Fair and Reasonable" test

Terms used in this paper:

Agency ..... The Canadian Transportation Agency (one function is to resolve disputes between railways and shippers).
CTA ..... *Canada Transportation Act*, 1996 (existing legislation).
C-26 ..... Bill C-26 would have amended the *Canada Transportation Act*. Introduced in Parliament in 2003; not passed. No new legislation has been tabled.
CTAR ..... Canada Transportation Act Review Panel. Submitted report on recommendations to the Canada Transportation Act in June, 2001.
Railway..... Federally-regulated railways (primarily CN and CPR).

COMPETITIVE ACCESS PROVISIONS

+ Interswitching

- Allows shippers within a set distance of an interchange with another railway to have their traffic transferred from one railway to another at a regulated rate (set annually by the Agency).

Existing rules	CTAR Recommendation	C-26 Provisions	Positions
• interswitching available within 30 km of interchange • Agency may determine a fixed rate per car to be charged for interswitching traffic	• 30 km interswitching limit should be kept • Agency should prescribe maximum rather than fixed interswitching rates to enable shippers and railways to negotiate lower rates	• no change to current 30 km interswitching limit • CTAR recommendation accepted to allow Agency to set maximum rates	*Shippers:* • works well – important that provision is retained *Railways:* ---

COMPETITIVE ACCESS PROVISIONS

+++ Competitive Line Rate (CLR) / Competitive Connection Rate (CCR)

- A mechanism designed to enhance competition among railways
- Allows a shipper served directly by only one railway and who is located beyond the 30 km interswitching limit to ask the Agency to determine a rate for the local railway to carry traffic from the shipper's location to an interchange with a connecting carrier
- Limited use – most railway traffic (approx. 80%) is within 30 km interswitching limit

Existing rules	CTAR Recommendation	C-26 Provisions	Positions
• rate is based on the current interswitching rate, plus system average revenue per tonne-kilometre for moving similar traffic over similar distances	• recommended transforming CLR into a CCR	• replaces CLR with a CCR	*Shippers:* • do not want new CCR system as it would reduce competition • CCR requirements are too onerous – high rate will result
• only available to shippers that demonstrate substantial commercial harm	• would remove substantial commercial harm requirement (see page #7)	• removes substantial commercial harm requirement	• current CLR not working – since 1987 has only been one successful application
• before obtaining a CLR a shipper must have an agreement with the connecting carrier to move the traffic	• remove requirement that shippers must have a prior agreement with a connecting carrier before requesting a rate	• shipper no longer required to have an agreement with a connecting carrier	• CLR should be kept with some changes: o no requirement for a shipper to have prior agreement with a connecting carrier o no captivity test o no substantial commercial harm test
• restrictions: o only one CLR is available per movement (ie not available at both origin and destination) o can't apply to more than 50% of the distance traffic moves or 1200 km (whichever is greater)	• remedy should only be available to shippers with no "alternative, effective, adequate and competitive" means of transporting the goods • should set new formula for calculating CCR – rate set must fall in range of 75th to 90th percentile of revenue per tonne-kilometre for the movement by the local railway of similar traffic under similar conditions • CCR should be 'commercially fair and reasonable' (see page #7) • should ensure shippers do not have access to both final offer arbitration (see below) and CCR	• only available if there is "no alternative, effective, adequate, and competitive" means of moving traffic • new rate formula for calculating CCR – rate set must fall in range of 75th to 90th percentile of revenue per tonne-kilometre for the movement by the local railway of similar traffic under similar conditions • final offer arbitration is not available for a CCR • maintains restrictions / distance limits	*Railways:* • CCR would allow US railways operating in Canada to benefit • CCR should only apply if US railway is required to provide same advantage to a Canadian railway operating in the US

COMPETITIVE ACCESS PROVISIONS

+++ Running Rights*

- Most contentious issue – sometimes referred to as "open access", "forced access", "regulated access" or "shared access"
- Running rights allow one railway to use another railway's track
- Application to Agency for running rights is rarely made – in many cases railways negotiate commercial agreements to access one another's track

Existing rules	CTAR Recommendation	C-26 Provisions	Positions

• any federally regulated railway may apply to the Agency for running rights
 	
• running rights will be granted if the applicant proves it is in the public interest
 	
• does not allow a railway to solicit traffic on the other railway's line
	• running rights should be available to any railway operator, whether under federal or provincial jurisdiction
	• applicant must demonstrate that running rights are in the public interest
	  o set out criteria Agency should consider in determining 'public interest'
	• traffic solicitation could be allowed
	
	• any railway seeking running rights must first notify the infrastructure owner at least 60 days before applying to the Agency (purpose is to encourage negotiations between the railways)
	• compensation for running rights should be negotiated between the parties; if agreement can not be made then the railway could apply to the Agency to set compensation
	  o different considerations should be used as a guide in determining compensation for track access depending on whether traffic solicitation is allowed
		• no changes	*Shippers:*
			• provision should be extended to include provincial short-line railways and qualified shippers
			• argue for enhanced running rights as the most effective way to have competition
			• one of prime reasons shippers want enhanced running rights is to use as a lever in negotiations
			• should have "reverse onus" running rights on a case-by-case basis where the host railway must demonstrate that access is not in the public interest
			• issues around the implementation of running rights are not insurmountable
			• 'reasonable and pro-competitive' compensation should be payable to host railway
			
			Railways:
			• regulated access will not increase competition – on certain lines if you add another railway, the investment on that line will be reduced
			• maintain status quo and let railways negotiate commercially for access
			• access would reduce capacity
			• would be harmful to short-lines
			• lower rates may result initially but service would be reduced

* for a more in-depth analysis of the underlying issues see the CTAR Report *Vision and Balance*, available at www.tc.gc.ca/aboutus/straightahead/ctareview.htm

SHIPPER PROTECTIONS

The CTA contains several areas for which shippers can seek a remedy from the Agency.

+ Level of Service provisions

- Legislation sets out railway's obligations regarding level of service

Existing rules	CTAR Recommendation	C-26 Provisions	Positions
• puts certain service obligations on railways regarding items such as: furnishing adequate accommodation for traffic, and providing incidental services	• level of service is not properly defined • railway should be required to include in its tariffs the level of service it will provide in conjunction with its published rates • Agency should continue to have authority to determine whether railway has met level of service commitments and in the event of a breach, to order the railway to take specific steps to meet the commitment	• no changes	*Shippers:* • support decision to make no changes *Railways:* ---

+ Mediation

- The Agency has used mediation to resolve disputes in a pilot program without specific legislative authority

Existing rules	CTAR Recommendation	C-26 Provisions	Positions
• none	• the Agency should have the statutory authority to do mediation and to establish rules for when mediation may be required	• new provision sets out that the Agency may mediate disputes if all parties to the dispute agree or if the Agency refers a dispute	*Shippers:* • support formalizing mediation in legislation • caution Agency's use of referring a dispute to mediation *Railways:* ---

SHIPPER PROTECTIONS

++ Final Offer Arbitration (FOA)

- A dispute resolution process generally available to a shipper (though not one with a confidential contract unless both parties agree) who is dissatisfied with rates or conditions of service proposed by a railway
- Process requires an arbitrator to review the final offers made by the shipper and the railway and to select one or the other

Existing rules	CTAR Recommendation	C-26 Provisions	Positions
• available for disputes between shippers and railways, including public passenger service providers • process differs based on value of dispute: o under $750,000 – simplified process o over $750,000 – arbitrator must consider whether shipper has 'alternative, effective, adequate and competitive means to transport the goods'	• should require arbitrators to consider <u>in all cases</u> (regardless of the value of the dispute) whether a shipper has alternative, effective, adequate and competitive means to transport the goods that are the subject of the arbitration	• no longer available to "public passenger service providers" – new dispute resolution process is created for this group • expands requirement for arbitrator to consider whether a shipper has 'alternative, effective, adequate and competitive means of transporting the goods', regardless of the value of the dispute • makes explicit that FOA applies to any <u>incidental services</u> in addition to those applicable to the movement of goods • new provision allows multiple shippers to join in one arbitration with a common complaint provided that the terms of the offer submitted by the shippers will apply to all of them equally • expands remedy to "other persons" (such as port terminal operators) who are charged by a railway for the movement of goods or for any incidental services	*Shippers:* • support extension of FOA to incidental services • support extension of FOA to a group of shippers and to non-shippers • do not support requirement that the terms of the offer submitted by all the shippers must apply to all of them equally *Railways:* • do not support changes to FOA

OTHER PROVISIONS

+ Substantial Commercial Harm Test

- Designed to ensure that only shippers who suffer substantial commercial harm would be entitled to relief
- Real impact is on rail shippers for certain remedies: competitive line rates (CLRs), level of service, right to a rate, and extended interswitching limits

Existing rules	CTAR Recommendation	C-26 Provisions	Positions
• require that the Agency be satisfied that the applicant would suffer substantial commercial harm if the relief were not granted • test does not apply to final offer arbitration	• recommended that the substantial commercial harm test be removed	• removed substantial commercial harm test	*Shippers:* • support removal of substantial commercial harm as it was impediment to obtaining a remedy from the Agency *Railways:* • should remove the word 'substantial' and have a test of commercial harm

+ Commercially Fair and Reasonable Test

- Intended to ensure that rail rates or conditions of service established by the Agency are commercially fair and reasonable to all

Existing rules	CTAR Recommendation	C-26 Provisions	Positions
• mandate that "a rate or condition of service established by the Agency under this Division must be commercially fair and reasonable to all parties"	• test should be kept because "a reasonable process of establishing a rate may yield an unreasonable result in some circumstances"	• test kept	*Shippers:* • do not support this test as it is a subjective consideration in determining the relief • test not needed as Agency sets rates based on railway data which is presumably commercially fair and reasonable *Railways:* ---

Western Transportation Advisory Council
1140 – 800 West Pender Street, Vancouver, BC V6C 2V6
Tel: 604 687 8691 Fax: 604 687 8751

December 2004