RAILWAYS IN CANADA AND THE EXPERIENCE WITH REGULATORY REFORM - WITH EMPHASIS ON THE COMPETITIVE PROVISIONS

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I. Introduction

Railways in Canada have played a particularly important role in Canadian history. It laid the foundation for economic growth and prosperity and its contributions extend deeply into the social fabric of Canadian tradition, linking people and communities from coast to coast and providing essential transportation services to remote areas. A hundred and twenty five years ago it was the glamour industry of the day. It still forms the backbone of transportation services in Canada and accounts for as much as eighteen percent of the transportation sector.

In this brief paper we shall examine: first, the structure of the railways in Canada; second, regulation of the railways in Canada both before the deregulation era and after regulatory reforms were introduced and third, the experience of regulatory reforms in Canada with particular emphasis on competition. Finally, a few concluding remarks are made.

II. Structure of the Railways in Canada

Rail transportation services in Canada are categorized into freight and passenger services. The railways providing these services are classified into: Class I railways: CN, CP and VIA Rail; Class II railways: regional and shortline railways; and Class III: terminal railway operations (for example subsidiaries of US carriers operating in Canada).

CN and CP basically provide transcontinental services; regional and shortline carriers (fifty+) provide service in their respective provinces; terminal railways provide terminal services; and VIA, GO Transit, AMTRAK, Agence métropolitaine de Transport, and BC Transit provide passenger or commuter services. Some sightseeing passenger services are provided by Ontario Northland, Algoma Central, Rocky Mountaineer and Québec North Shore & Labrador Railway. These carriers are often classified according to whether they are federal railways or provincial railways.

** The views expressed here are those of the author and are not purported to be those of the Commissioner or the Competition Bureau, Industry Canada.*

In terms of trackage, of the total 46,688 kilometres in Canada in 2008, CN owns 22,345 kilometres (47.9%), CP owns 12,463 kilometres (26.7%), regional and shortlines own 11,024 kilometres (23.6%) and all others (i.e., the terminal and switching railways, Canadian subsidiaries of US railroads and passenger and commuter railways) own 856 kilometres (1.8%).

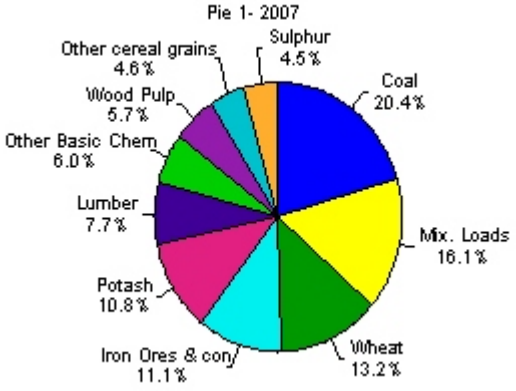
In terms of output from Canadian operations, CN's and CP's share was 338.3 billion revenue tonne-kilometres(94.5%), and Class II carrier's share was 19.5 billion revenue tonne kilometres in 2007 (5.4%).

TABLE 1_ Composition of Canadian Non-Intermodal Freight Loaded on Rails in Canada in 2002-8
(Top 10 Commodities) (000,000)

Com.	1	2	3	4	5	6	7	8	9	10
2002	36.6	35.1	30.3	18.0	15.2	15.2	14.8	11.5	9.9	7.0
2008	26.4	34.2	34.3	21.1	13.2	16.1	17.7	13.7	10.0	12.5

1. Wood & Pr. 2. Coal. 3. Iron Ores & Con. 4. Potash & Other Fert. 5. Non-metallic minerals. 6. Petroleum & Coal Pr. 7. Wheat. 8. Other metallic ores & Con & Alumina. 9. Chemicals & Pr. 10. Other grains and Cereals.

Source: Compiled from Railway Carloadings, Statistics Canada, Catalogue 52-001-XIE Monthly.



As far as passenger services are concerned, VIA Rail carried 4.2 million passengers and the other Class II railways carried .15 million passengers in 2007. In terms of passenger kilometres, it was 1.4 billion and 46 million, respectively. From the financial perspective, the Class I railways earned $9.4 billion from freight services and VIA earned $475 million from passenger services. Of the total railway revenue (Class I and II), CN and CP accounted for 89.9% of the total.

The freight of the railways can also be examined in terms of its composition and in terms of origin and destination. The composition of Canadian freight is shown in the pie-chart above. The bulk of the non-intermodal freight moved in 2008 consists of iron ores and concentrates, coal, wood and wood products, wheat, non-metallic minerals including salt, and potash plus fertilizers. It indicates shifts away from wood and products. This is shown in Table 1. The origin and destination of freight to other provinces, US and Mexico is shown in the Table 2 below.

TABLE 2 - Railway Commodity Freight Origin and Destination 2007 (000 tonnes)

Destination	Atlantic	Québec	Ontario	Manitoba	Saskatchewan	Alberta	B.C	US by Rail	Mexico	Total
Origin										
Atlantic	**4,722**	19,385	1, 032	29	9	143	52	2,222	5	27,599
Québec	2,029	**4,967**	5,678	375	136	948	1,675	12,252	242	28,303
Ontario	1,395	5,800	**5,717**	936	391	3,500	2,625	14,801	455	35,620
Manitoba	65	617	3,125	**242**	227	171	1,199	3.975	201	9,823
Saskatchewan	124	1,204	7,208	1,383	**192**	838	15,747	14,553	245	41,494
Alberta	90	962	2,125	1,039	919	**3,180**	26,877	13,825	193	49,210
B.C.	187	2,985	5,541	350	153	2,635	**32,677**	11,922	82	56,533
US by Rail	986	6,394	7,728	872	1,502	5,615	1,960	**7,463**	3	32,525
Mexico	3	36	81			2	16	0		138
Total	**9,600**	**42,352**	**38,328**	**5,226**	**3,530**	**17,033**	**82,827**	**81,012**	**1,427**	**281,246**

Source: Rail in Canada, Statistics Canada, Catalogue 52-216.

III. Regulation of the Railways in Canada

The history of regulation in rail goes back to the mid 1850s. In 1851, the first general law on rail transportation, the *Railway Act*, was enacted. Rail regulation played an important role in consolidating Canada in the Confederation scheme of 1867. Since then, up until the mid 1980s, the railways were regulated by several federal acts - the *Railway Act*, the *Transport Act*, the *Canadian Transportation Act 1996*, the *Railway Relocation and Crossing Act*, the *Canadian National Railway Act*, the *Western Grain Transportation Act*, the *Government Railways Act*, the *Maritime Freight Rates Act*, and the *National Energy Board Act*. In addition, the railways were also subject to their respective provincial Acts and regulations.

1. Regulations before the deregulation era of 1987

Before deregulation in 1987, there were two major facets of economic regulation, apart from technical regulations. The first involved ensuring adequate quality of service to users and embodied: 1) monitoring of passenger services; 2) applying for branch line abandonments; 3) approving of new track construction; 4) examining applications for the consolidation of local stations; and 5) dealing with complaints from various groups. The second related to costing and rate matters and encompassed: 1) auditing the accounts of Canadian railways under federal jurisdiction; 2) analyzing and developing railway costing methodologies; 3) determining subsidy payments; and 4) reviewing matters related to rates and traffic. The major aspects of regulation pertaining to competition were contained in the *Railway Act* and the *National Transportation Act 1967*. The important ones were: 1) publishing freight rates and filing of prospective rate increases at least 30 days prior to the increases (s. 275 of the Railway Act (i.e., RA)), with actual rates being determined by the carrier; 2) appealing freight rates which may be prejudicial to the public interest with remedial powers to change rates viewed

as 'uniform', 'too high' or 'discriminatory' (s. 23 of the *National Transportation Act 1967* (i.e., NTA)); 3) establishing rate minima - compensatory rates that exceed variable cost to prevent loss-leader pricing (ss. 276 and 277 RA); 4) establishing rate maxima regulation (captive shipper assistance clause - s. 278 RA); 5) protecting a small shipper by adjustment of rates to shippers of small loads facing a railway (s. 264 RA); 6) filing of agreed and joint tariffs on traffic passing over a continuous route in Canada operated by two or more railway companies (s. 284 RA) ; 7) allowing collaboration by the railways to establish common rates and to exchange cost information with an exemption from the provisions of the *Combines Investigation Act* (now the *Competition Act*) (s. 279 RA); 8) allowing agreed charges to meet intermodal competition for most or all of a shipper's traffic. The agreed charges are not restricted to the parties initially signing the agreement (ss. 32-35 of the *Transport Act* i.e., TA) and protection against unjust discrimination (s. 33 TA); 9) granting subsidy payments under the *Maritime Freight Rate Act* and *Atlantic Region Freight Assistance Act*; 10) reviewing of adequacy of service (s. 262 RA) and suitability of traffic accommodation(ss. 265-266 RA); 11) considering abandonment or rationalization of lines and services and related matters of compensation (s. 256 RA); 12) determining infrastructure, location and construction (s. 101 RA); and 13) reviewing acquisition of an interest in a transport enterprise by another transport enterprise (s. 27 NTA).

2. Regulatory reforms introduced between 1987 and 1995

During the period 1987 and 1995 one major package of regulatory reforms was introduced.

i) The reforms of 1987

The first major impetus for reforms in Canadian railways came from the regulatory reforms introduced in the U.S. as a result of the *Railroad Revitalization and Regulatory Reform Act* and the *Staggers Rail Act*. The offering of rebates made possible by the *Staggers Rail Act* which were prohibited in Canada led to substantial loss of traffic to American railroads.

General and specific proposals to introduce reforms were reflected in the July 1985 Discussion Paper *Freedom to Move* of the Minister of Transport. These proposals were later embodied in the *National Transportation Act, 1987* which in the words of the Agency "signals a new era in Canada's transportation history - an era of greater competition, less regulatory intervention and more innovative transportation services. There will be more choices and greater competition in rail transportation." Reforms were introduced in four basic areas: 1) Access to alternative rail service; 2) New tariff provisions; 3) Rail network rationalization; and 4) Dispute resolution services.

The access provisions have been expanded to provide shippers greater choices to alternative rail services in a number of ways. First, the interswitching limits

have been expanded to a radius of 30 kilometres from the previous limit of 6.4 kilometres (section 153(3) of the NTA now sections 127 and 128). These limits may be expanded in some cases on application to the Agency, if within close proximity to the prescribed limits (subsection 127(4) of the CTA). In other words, it is an application to have its facility be deemed to be within the thirty kilometre radius. Further, the interswitching rates can be adjusted to reflect differences in distances, efficiencies and costs. Furthermore, the new rates will be periodically adjusted compared to the old interswitching rates which were not adjusted for over thirty years. Second, for shippers beyond the 30 kilometre radius, the shipper can agree with the carrier or ask the Agency to set a competitive line rate (i.e., CLR) (sections 134-144 of the NTA now sections 129-139 of the CTA) to the interchange point of a competing carrier. The shipper, however, must first obtain a rate from the competing carrier. The CLR will be based on the regulated interswitching rates and competitive line haul rates from the interswitching limit to the competing carrier's connection. The competing carrier is responsible for car supply and other common carrier obligations, and must share interchange maintenance cost.

The tariff provisions were designed to encourage competition in several ways. First, the railways right to discuss and set rates collectively has been abolished. Second, shippers can negotiate confidential contracts, an agreement which provides shippers flexibility in negotiating rates and conditions of services. These contracts must be filed with the Agency. Third, a streamlined approach has been adopted for tariffs and agreed charges. Electronic filing will be permitted and filing of tariffs is required when rates affect subsidy payment. Further, all tariffs must be published and it is no longer necessary for all railways serving competing points to consent to agreed charges between these points before they are established.

The rail network rationalization provisions enable the railways to become more cost efficient through improvements in productivity while preserving rail lines when required in the public interest. The streamlined abandonment procedures include the transfer of lines to independent operators and the funding of improvements for alternative transportation facilities.

The dispute resolution service provisions provide a new framework for conflict management. They include: mediation; final offer arbitration; and public interest investigations.

3. Regulatory reforms introduced between 1996 and 2004

Between 1996 and 2004 two sets of regulatory reforms were introduced.

i) The reforms introduced between 1996 and 1997

On July 1, 1996, the *Canada Transportation Act* (i.e., CTA) the successor to the *National Transportation Act, 1987* was enacted to modernize and streamline transportation and to enhance the viability of Canada's major rail carriers. A

number of new provisions were added to the previous act, the *National Transportation Act, 1987*. The focus of the new provisions were on development of a healthy short line industry, cost reduction of the major Class I carriers through rationalization, and provision of opportunities for retaining rail services.

First, the Act eases the entry of smaller, lower cost rail carriers into operations in concert with CN and CP. The basic intent of this section is to encourage the development of shortline railways as they complement the mainline carriers as feeders of traffic. Lines must be offered for sale before they are abandoned and the legislation affords governments ample opportunity to acquire such lines when no interested party is found. Second, to provide for rail rationalization along more commercial lines and to make it a less adversarial process and more conducive to the sale or lease to new operators, revisions were made to the old act. Third, the new Act introduces a new statutory requirement for federal railways to issue a three-year network plan. This is intended to protect the public interest by providing an opportunity to interested parties to purchase lines to be discontinued or sold.

In addition to the above, a number of other changes were made. The provisions pertaining to non-compensatory rates were repealed; a substantial harm test was added to section 27(2); the public interest test was removed for: CLRs, level of service and interswitching but retained for the grant of running rights; the Agency's review of transport acquisition was dropped; a new subsection 4(2) was specifically added to the Act indicating that nothing in or done under the authority of the Act affects the operation of the *Competition Act*; and, the Governor-in-Council may take steps, in the event of an extraordinary disruption, notwithstanding subsection 4(2) and it will prevail over the *Competition Act.*

In 1997, the Agency reviewed the interswitching regulations, including a review of the rate levels and section 112 of the Act. A new feature stipulated that rates established by the Agency shall be "commercially fair and reasonable to all parties."

ii) The reforms introduced between 1998 and 2004

An Act to Amend the Canada Transportation Act went into effect on July 26, 2000. The amendments deal with a revenue cap, the final offer arbitration and the abandonment of a branch line. First, the revenue cap will result in a reduction of estimated revenue from freight rates by $178m. This is approximately an 18 percent reduction in grain freight rates from the 2000-2001 levels. Second, the final offer arbitration provision will provide for: a summary process for disputes of less than $750,000, an exchange of offers after ten days, a faster process for dealing with disputes (i.e., 30 days for disputes of less than $750,000 and 60 days for disputes of more than $750,000) and a three person arbitration panel. Third, the branch line amendments facilitate branch line rationalization and the measures to achieve this include the following: compensation (transitional) of $10,000 per

mile for three years to affected municipalities or districts when a grain line is closed, operation of the remaining part of the branch line for three years, discouraging de-marketing (i.e., purposefully deferring maintenance to make operations uneconomic) of grain lines by ordering improvement of services and identification of lines for discontinuance in the three year plan. Fourth, section 116 was amended to provide for running rights to protect grain shippers in the event a railway breaches its level of service obligations.

In 2002, the Agency began a review of the interswitching regulations again as required after every 5 years and on Feb. 1, 2004 new interswitching regulations came into force. The rates in the four zones for blocks of less than 60 cars decreased on an average of 13% to reflect the decline in variable costs of interswitching of the two major carriers. In 2005 and 2006, the Agency determined that no changes were necessary to the existing rates. In 2007, it began reviewing the regulations again.

4. Regulatory reforms proposed after 2004

Bill C-44 - An Act to Amend the *Canada Transportation Act* (formerly Bill C-26) contained several reforms pertaining to rail. The reforms were largely based on the recommendations of the Canada Transportation Act Review Panel.

The reforms deal with: 1) the review of mergers under section 15. A merger that involves a transportation undertaking that must be notified under the *Competition Act* may be subject to the merger review provisions of the *Canada Transportation Act*. A special merger review process is now applicable to **all** modes of transportation under federal jurisdiction not just air transportation as was previously the case. It involves a dual approval process: a public interest process and a process under the *Competition Act*; 2) the substantial commercial harm test (s. 7(1) and s. 40)) was deleted from the interswitching, the extended interswitching and the CLR provisions. This test was perceived by shippers to be time consuming and costly and likely contributed to the fact that no applications were made under the extended interswitching or competitive line rate provisions since 1996, when the *substantial commercial harm* test was introduced; 3) the interswitching provision (s. 40) has been modified so that interswitching rates determined by the Agency will be maximum rates to encourage negotiations between shippers and railways; 4) the regulated connection rate (s. 42) will replace the CLR provision due to the lack of success with this provision in providing competitive access; 5) the regulated connection rate now has a number of new tests to be satisfied (s.44); and 6) the final offer arbitration provision (s. 60) has been clarified to allow groups of shippers to join in one proceeding and submit one offer for arbitration that seeks a common relief in disputes under $750,000. The section numbers indicated above refer to the sections in the Bill.

The new amendments were a positive initiative, however the bill died when the

minority Conservative Government was elected in early 2006. On October 29, 2007, Bill C 8 on the Canada Transportation Act (dealing with railways) was tabled in the House of Commons and received Royal Assent on February 29, 2008. The new bill does not contain any substantial new amendments with regard to the competitive access provisions, with the exception that the *substantial commercial harm* test has been removed. This is an improvement compared to the existing provisions, however, whether this will result in increased used of the extended interswitching and CLR provisions has yet to be determined. The other amendments were permitting the Agency, upon complaint by a shipper, to conduct its investigation on charges and to establish new charges; ensuring that the discontinuance process applies to railway lines that are leased to local railway operators and subsequently revert to a federal railway; requiring railways to publish a list of rail sidings available for grain producer car loadings together with a 60 days' notice before removing such sidings from operation; extending the final offer arbitration to groups of shippers; and allowing for the suspension of any final offer arbitration process, if agreed to by the parties.

IV. Experience with Regulatory Reforms in Canada

In reviewing the experience with regulatory reforms in Canada - structural changes, performance; and use of competitive provisions - will be examined. In addition, concerns about service levels and US developments is briefly mentioned

1. Structural changes

The major industry developments that occurred after 1988 relating to structure were: privatization of CNR; rationalization of Class I freight carriers; formation of shortline railways; formation of alliances and networks in the US. These developments will be briefly described first with regard to freight services and then with regard to passenger services.

Railway freight services

Privatization of CNR: The Nault Task Force on the Commercialization of the Canadian National was charged in September 1994 with studying the commercialization of CN. After conducting hearings across Canada, the Task Force made its recommendations in 1995. The basic recommendation was "that the Minister of Transport commit to a process leading to the full commercialization of the Canadian National Railways as a coast-to-coast main-line operation." The Minister accepted the recommendation and in 1995 CN was officially offered for sale.

Rationalization of Class I freight carriers - CN and CPR: Ten years ago approximately 90 percent of trackage in Canada was owned by the above two carriers. In 2008, this was 74.6 percent. Two factors have been responsible for this rationalization: abandonment or discontinuance and sale or transfer. Transfers were more popular after the amendments and discontinuance before.

The principal motivation behind the rationalization has been the consideration to reduce costs.

Development of shortline railways: Forty new shortline carriers were formed after 1996, bringing the total number of shortline carriers in Canada to over fifty. One noticeable aspect of this development was the concentration of the ownership of these shortlines in the hands of five companies: Rail America, OmniTRAX, SCFQ, Genesee Rail-One and Iron Road. Four of these companies are owned by US corporations. Recently, some major regional and short lines have been sold to Class I carriers.

Alliance and development of networks in Canada and the US: Apart from the changes on the domestic front, changes have also occurred on the transborder front. The two major developments were: mergers and alliances or agreements.[1] The former was the strategic tool of development used by CN whereas the later was the strategic tool used by CP. This strategy has enabled the Canadian railroads to make major inroads into the US offering service to the US Gulf ports.

Railway passenger services

Rail passenger services have played a less prominent role than freight services in Canada. Passenger services accounts for less than three percent of total rail revenues. Most rail passengers are commuter travellers rather than intercity. Intercity passenger services are provided basically by VIA Rail with services by other carriers to a lesser extent.

Legislation governing VIA Rail: Initially there was no legislative basis for VIA Rail. On February 24, 1986, the *VIA Rail Act* (contained in Bill C-91) was introduced in the House of Commons. Its features were: a national passenger policy, a scheduling priority, a compensation regime by VIA to CN and CP; a standard for service determination; and a provision for commuter rail service.

Restructuring of VIA services: The restructuring of services of VIA in 1990 led to its reduction by half. The cut in services was to reduce the subsidy payment and to improve operating efficiencies and productivity.

Royal Commission on National Passenger Transportation: In 1992, the Royal Commission on National Passenger Transportation recommended that VIA Rail be given a corporate mandate and that subsidies by the government be further reduced. Bills C-26 and C-44 were introduced in 2003 and 2005 giving VIA Rail legislative corporate mandate. Before the bill was passed, a new minority conservative government was elected and it died. On May 4, 2006, a new Bill C-11was introduced but it did not contain those provisions.

Apart from these legislative developments, the former Transport Minister David Collenette announced Renaissance I and II which provided funding of more than $1 billion in April 2000 and October 2003 to ensure the revitalization of passenger rail services in Canada. On October 11, 2007, the government provided a new funding package of $691.9 million for passenger services.

2. Performance of the railways

In everyday language, performance is often used to mean productivity, operating ratio or the difference between price and cost. These indicators are examined. Total factor productivity of the two major carriers increased on average by 3.5 percent over the entire period 1991-1998 and for the period 1998-2007 it increased 3.97 percent. Labour productivity of Class I railways was 7.18 percent over the period **1998-2007**. This has declined from the double digit productivity gains achieved during the 1996-1998 period. These gains were attributable to both strong output growth and workforce reductions.[2] As indicated by Transport Canada "CN and CP have achieved these impressive results through workforce adjustments and some streamlining of their operations over the past decade."[3] Since 1990, employment in their Canadian operations has fallen by 35,945 employees or 54 percent of their workforce most of these employment reductions were achieved in the mid-1990s.

The operating ratio (expenses/revenues) of the two carriers, a measure of their financial performance, indicates that these carriers have succeeded in reducing this ratio over the past ten years (declining to 77.2 in 2004 from 92 in 1991) reflecting their major cost reduction efforts. In 2008, CN and CP reported ratios of: 65.9 and 78.6. This improvement in the operating ratio is largely attributable to a reduction in the railway work force.

Price/cost gap, a measure of performance, is often used by economists to measure performance. Average freight rates (or prices) declined an estimated 0.9 percent and 1.4 per cent over the period 1991-1998 and 1998-2003. This means a reduction 11.3% over the period **1991-2003**. This has allowed rail freight costs of shippers to be reduced by an estimated **$1.1 billion,** a reduction of about **17 percent** from their freight bills in 1991. More recently (2004-7) prices have increased by 16.6% and units costs by 6.5%. The indices indicate that cost has been declining much more sharply than price since 1990. It is this difference that has raised concern among shippers as they would like to see price declining more sharply, so that the gains from reforms and productivity efforts are spread more fairly. This gap between price and cost, a measure of performance, is often used to indicate the extent to which effective competition exists. Not surprisingly, the two major railways have been able to substantially increase their profitability.

The role that technological developments played in the improvement of performance should also be stressed - such as containerization, double stack trains, electronic tracking, information communications technology, in addition to investments in tunnel expansion and trackage - as it was not only the result of a reduction in the workforce of the railways.

3. The competitive provisions

Competition between the railways can be examined not only through prices and new innovative services but also through the use of other competitive provisions.

Here attention will be concentrated on the use of the competitive provisions that were introduced in the legislation (i.e., confidential contracts, interswitching, extended interswitching, competitive line rates, and running rights). To date, confidential contracts and interswitching were the two basic ways in which railways competed and will be examined first.

Confidential contracting: A confidential contract is a binding agreement between a shipper and a carrier or carriers establishing the rates and conditions of moving goods, which is to be kept confidential between the parties. The contracts must be filed with the Agency and the Agency can provide summaries of the essential terms of the confidential contract. Confidential contracts were introduced in Canada in response to reforms brought about by the *Staggers Rail Act of 1980* which was introduced in the US. Canadian railways began losing traffic to the US railroads which led to changes in the Canadian legislation to permit such contracts in Canada. Since its introduction, confidential contracts have been a successful way of maintaining competition. The National Transportation Agency (i.e., NTA) surveys from 1988-1993 indicated that shippers ranked confidential contracts as the principle factor in achieving competitive rates. In 1993, the number of confidential contracts increased to 6,183 from 223 in 1988. This was about 75 % of all traffic moving according to the NTA. In 2001, the CTARP stated that 'most rail traffic now moves under confidential contracts'.

Interswitching: In 2001, CN and CP interswitched 188,757 cars. Shippers reported to the National Transportation Agency that increasing the interswitching limits to 30 kilometres increased their bargaining position with the railways.[4] It is also worthwhile nothing that one fifth of all shippers surveyed have facilities served by one railway and are beyond the interswitching limits of any other railway. This suggests that extending the interswitching limits maybe beneficial to the above shippers especially as the competitive line rate provisions have not been successful as a competitive access provision. Nearly half of the interswitching that occurs at the present time takes place within a distance of 6.4 kilometres from the nearest interchange and that extending the limits beyond 30 kilometres may have a limited effect in serving these captive shippers.

Extended interswitching: Between January 1, 1988 and June 30, 1996, there were ten extended interswitching applications, of these, the Agency decided three. Between July 1, 1996 and December 31, 1999, there were 0 extended interswitching applications. In 2003, the Agency issued decisions on two applications for interswitching rates and in 2008-9 there were 3 applications for interswitching or extended interswitching.

Competitive line rates: Between January 1, 1988 and June 30, 1996, there were six CLR applications. Of the six CLRs, the Agency decided five, four of which were made by one carrier. Between July 1, 1996 and December 31, 2005, there were: 0 CLR applications. To date, CLRs have not been very successful in

providing competition as very few CLRs have been granted and most have been with US carriers on trans-border movements. As a result, this competitive provision has not been successful in bringing about the competition originally envisioned and captive shippers (i.e., those shippers served by no alternative) have not gained the benefit of any envisioned competition.[5] A number of problems have been cited in the implementation of this provision besides the railways reluctance to use it.[6]

First, the railways usually do not wish to bid on each others traffic by providing a CLR. They have been strong opponents of this provision.[7] Shippers on the other hand have indicated their strong support for this provision, as it has given them negotiating power to obtain better rates and improved service conditions. The need for a prior agreement with a second federal railway, the line haul carrier, is seen as discouraging the usage of the CLR.[8] Second, the CLRs are made subject to the substantial harm test (i.e., suffer substantial harm if the relief was not granted) in 1996. It has been pointed out by objectors that the test maybe too intrusive, into their private financial matters, legalistic, adversarial and costly. This has added to the difficulties in making this provision viable.[9] Finally, a CLR is only for a year unless the shipper and carrier agrees otherwise. Since obtaining a CLR is not only time consuming and costly, it is to the advantage of carriers not to provide a CLR beyond the period of a year. In light of this, the NTARC recommended that an initial application for a CLR be set for a period of up to 3 years.[10] The CTAR recommendation to replace the CLR by a CAR was introduced in Bill 26 but finally dropped in Bill C11 .

Running Rights [11]: From 1987 to 2008 only eight applications for RR were made to the Agency. Two were denied by the Agency on grounds that the applicants were not federal companies and two were withdrawn as they were subsequently obtained by negotiations. In light of this, the Grain Handling and Transportation Review recommended that the provisions of the CTA relating to various methods of seeking access to other connecting rail lines be simplified and clarified so as to better serve the national interest in obtaining competitive and efficient transportation by rail. The was followed up by the Working Group (Arthur Kroeger) proposal that "a 'reverse-onus' public interest test be used for 'running rights' applications. Subsequently, the application by Hudson Bay Railway Co. was denied as it was beyond what could be legally granted; then the application by Ferroequus Railway Company Limited was denied as no public interest would be served; and finally the application by Bangor and Aroostook System was denied due to lack of information. The application in 2008 was for a clarification of the section rather an application for running rights. Notwithstanding the lack of success in the use of this provision, Bill C-44 (March 24, 2004) or Bill C11 (May 4, 2006) did not provide any relief. The decision of the CTA (2002) on the *Ferroequus Railway Company Limited* will

severely limit the use of this provision as evidence of market abuse or failure will be required before an application may be granted. This tends to suggest that as in the last half of the twentieth century the regulator is unlikely to mandate running rights. As a result, the effect that this provision has had or will have on enhancing competition has been or will be rather limited.

Final Offer Arbitration: Besides the above competitive access provisions another provision used by shippers to obtain lower rates was the Final Offer Arbitration (FOA) provision, a dispute resolution mechanism. FOA is one type of dispute resolution technique. Under the CTA (sections 129-139, formerly sections 48 to 57 of the NTA), parties to a dispute agree or are required to submit confidential offers of terms to settle the dispute to an arbitrator. The arbitrator is required to choose one of the offers and is not allowed to develop any alternative compromise solution. This dispute settlement route was extended to grain shippers when the amendments to the CTA went into effect. Between January 1, 1988 and June 30, 1996, there were: nine FOA applications, of these, the Agency decided two. Between July 1,1996 and December 31, 2005, the Agency received more than 26 notices from shippers of their intention to submit their disputes to FOA. About half of these were withdrawn or settled before arbitration. In 2006 and 2007, 5 and 3 cases were referred to the CTA for an FOA.

In sum, shippers have succeeded in the use of one competitive access provision, interswitching. Two other competitive access provisions have not worked - CLRs and running rights. Besides the competitive access provisions, two other provisions: confidential contracting and FOA, have also helped shippers in obtaining lower rates and better services.

4. Concerns about level of service and Current developments in the US.

Service of level complaints (sections 113-6) provide an indication how well the railways are serving its shippers. In terms of statistics, the CTA Annual Report states "The Agency received six new level of service complaints from shippers against railways in 2007-08 and four in 2008-09, compared to only one in 2006-07." Overall it indicated that "In 2008-2009, 36% more disputes and applications involving shippers were brought to the Agency's attention than in 2007-08." This suggests that over the more recent period, at least, shippers level of service complaints and overall rail complaints have increased. In reviewing the 2007-08 complaints, "The Agency expressed concerns over continuing service shortfalls but found that it had insufficient information to rule on crop year 2007-2008.." However, a year later based on its newly created benchmark, the CTA ruled that in four cases of the six, inadequate level of service was being provided. A matter of concern, is its impact on competition as stated in the Agency Report and decision "The ... restrictive distribution of rail cars rendered Great Northern Grain Terminals Ltd. (GNG) and other small companies uncompetitive."

Current developments in the US also indicate concerns with level of service,

especially to captive shippers. A study released by the Consumer Federation of America in May 2009 claims that US railroads overcharge consumers $3 billion a year as a result of monopoly pricing power. Many rail customers have access to just one railroad and are, therefore, 'captive' to that railroad," the study said. "This enables the railroads to set prices well above costs." Not surprisingly, the matter has attracted the attention of Congress and two separate bills have been proposed to deal with the matter. Senator H. Kohl's bill is concerned with antitrust and Senator J. Rockefeller's bill is concerned with railway reform. The Senate Judiciary Committee approved the Kohl bill on March 5, 2009 to repeal limited antitrust exemptions for U.S. railroads. It would remove obsolete provisions that protect railroads from competition and do not provide protection to captive shippers. This prompted one top rail trade group to warn that this could help produce a regulatory structure that would threaten the transportation system due to overlapping regulation. The rail industry opposes the antitrust enforcement bill and is urging Congress to develop an overall rail policy rather than legislate measures separately. The senators are working to resolve the matter.

The above suggests that 'some' of these level of service concerns can be attributed to the absence of competition and that its impact can reduce competition.

V. Concluding Remarks

The last twenty years were an exciting period in the history of rail transportation reforms as the impact of regulatory changes in the mid 1980s began to unfold. It was a period that witnessed a major restructuring of government management of transportation through privatization of CN. The new transportation acts and amendments of several transportation acts were a major achievement of the federal government.

Apart from the regulatory front, dramatic changes occurred in the rail industry. CN and CP restructured their operations through rationalization, mergers, acquisitions, cooperative agreements and alliances. In addition, there was a dramatic growth in the shortline industry. Many of these changes were driven by technological developments - such as containerization and intermodal rail, double stack trains, electronic tracking and information communications technology - and some by international developments such as globalization and liberalization of trade.

What is important, however, is whether the industry, consumers, shippers and the economy in general benefited. The answer is Yes! All of the above stakeholders may not have gained in the same proportion. But they were certainly better off than before regulatory reforms were introduced.

Notwithstanding these major achievements, the task is not yet over. A number of reforms that were introduced did not produce the effect that was intended.

Captive shippers concerns continue to arise together with level of service concerns. In addition, the distribution of the gains achieved continue to be an issue. Shippers are of the opinion that a greater portion of the efficiency gains should flow to them in the form of lower prices, especially as lower prices lead to increased exports.

Overall, it was a period of progress in which major achievements in rail transportation were accomplished. It laid the foundation for significant progress and advancement in the new millennium.

Endnotes

1. CN merged with Illinois Central Corporation giving it access to New Orleans and Mobile in the Gulf of Mexico and Sioux City and Omaha in the West, in mid 1998. In 1991, CN entered into separate agreements with Union Pacific, Burlington Northern and Norfolk Southern. Further, it formed alliance agreements to provide service to Mexico through Burlington Northern Railroad, Ferrocarriles Nacionales de Mexico and Protexa Burlington International. In July 2003, CN acquired BC Rail obtaining 2,300 kilometres of track. CP on the other hand in 1989 increased its ownership in SOO Line to 100 percent and in 1991 it finalized its purchase of Delaware and Hudson Railway and entered into agreements with Conrail. It also entered marketing agreements with Norfolk Southern and COX Transportation, in 1998.
2. Freight output of CN and CP increased by two percent over the period 1991-1998 and for the period 1998-2003 it decreased 1.4 percent.
3. See Transport Canada, Annual Report 1998, p. 291.
4. See Competition in Canada, *National Transportation Act* Review Commission, Volume 1, 1993, p. 129. The statistic above overstates the extent of interswitching, the average is between 130,000 and 150,000 cars.
5. Submissions to the NTARC indicated strong support for this provision, however "CN and CP rail have avoided using the CLR provision to compete with each other, making the provision largely inoperative for traffic within Canada."
6. Annual Review 1992, National Transportation Agency of Canada, p. 81. This observation was also made recently in the Canadian Transportation Agency, Annual Report 1997: "To date, major Canadian carriers have not attempted to capture each other's traffic by offering attractive line haul rates to be used in conjunction with CLRs. This condition is seen as discouraging the usage of CLRs and is, arguably, one reason why there have only been six CLR applications - four by one shipper - to the Agency in ten years, five of which involved an American railway as the line haul carrier." 1998, p. 66.
7. The "railways carriers expressed their opposition to the CLR provision because it does not take into consideration the effective intermodal competition, it is anti-competitive and it constitutes a regulated rate. The railways stated that the CLR provision was not needed since there are other provisions in the NTA, 1987 such as confidential contracts and final offer arbitration. Also, Canadian railways indicated that CLRs were unfair because no reciprocal rights exist in the United States." Id., p. 66.
8. Id., p. 66.
9. According to a survey report some shippers and provincial governments stated that "even if a second carrier quoted a rate, the `substantial harm' provision of the *Act* (subsection 27(2)) was a further obstacle to using the CLR provision." Canadian Transportation Agency, Annual Report 1998, 1999, p. 58.
10. See Competition in Transportation, Volume I. p. 133.
11. Running Rights (RR) are rights obtained by a railway, either through agreement or through application to the Agency, to operate its trains over the tracks and to use the facilities of another railway. Section 138 provides for application of RR by a railway company; the imposition of any conditions the Agency may deem appropriate having regard to the public interest; and payment of compensation by the applicant for the RR by agreement of the companies or to be determined by the Agency in case of non-agreement. Section 139 empowers the Governor-in-Council to order RR in the 'interest of efficiencies and cost savings' fixing compensation where voluntary agreement cannot be reached. These sections were formerly sections 148 and 149 of the NTA, 1987. The only difference between the two *Act*s is that under the NTA to be a railway company required a Special Act of Parliament or meeting the requirements to obtain letters patent of incorporation whereas under the CTA becoming a railway company one had to obtain a certificate of fitness which was much easier than the former. These RR provisions were previously contained in *Railway Act* (section 134) and the *National Transportation Act* of 1967. The provisions in the older legislation are not significantly different from those in the NTA, 1987 or CTA except that these latter *Act*s reflect a pro-competitive intent. They have been in the legislation since at least 1888.