A Critique of CCR and CDR

François Tougas, LL.B., Partner, Lang Michener LLP

At a time when the market power of federal freight railways is allowing record profits[1], and the aims of national transportation policy have once again reached the point of imbalance, it is time to strengthen or enhance remedies that work[2], or have a hope of working (such as running rights), rather than those that either have little hope of doing so or that undermine the existing remedies.

In this critique, the author addresses the competitive connection rate concept that has come at a time when the focus should be on strengthening the salutary effects of final offer arbitration and resisting efforts to erode what has variously been described as elegant, workable and acceptable, by either shippers or carriers. Further, those devoted to making the rail freight transportation system work should be focusing on getting the most out of that system in terms of wealth generation in the way we expect from the rest of industry, relying on the optimization of the economy through competition, or where it is not available, something akin to it. It is probably time for running rights, where we can attempt to approximate the benefits to the economy that have occurred in other network industries, minimizing the impact of natural monopolies in large segments of the systems of the federal freight railways.

Similarly, the attempt by carriers to use their power to erode final offer arbitration and compel the use of CDR should be resisted on several grounds, if only because its implementation is likely to

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[1] "Responding To The Market Power Of Federal Freight Railways," in Competition as a driver of change; Proceedings of the 41st Annual Conference of the Canadian Transportation Research Forum, May 2006, p. 344

[2] "Shippers and Railroads: A Canadian Perspective" (reproducing "Qualitative Aspects of Price and Output Regulation of Federal Freight Railways in Canada"), Journal of Transportation Law, Logistics and Policy, June 2006, Vol. 73, p. 220

increase market power. CDR in particular is an illusion, in the experience of the author, to avoid, particularly for captive shippers who will be compelled to deal on terms set by the carrier, when so little runs in favour of the shipper in those circumstances, both in terms of the law and the fact of carrier dominance.

CCR – an idea that is premature and founded on a false premise

1. CLRs do not work. NTARC found as much in its 1993 report when it said:

   > "CN and CP Rail have effectively declined to compete with each other through CLRs, and as a result the provision largely inoperative in Canada."

2. Not much has changed since the statement was made. The remedy is rarely used because it is subject to far too much uncertainty (as to rate outcome), cost (legal and management costs are prohibitive for most shippers) and time (a minimum 120 day determination, likely exacerbated by interlocutory motions, all for a one-year rate). It does not merit serious consideration by shippers in an environment of planning and projection that is based on much longer investment horizons.

3. Attempts to replace it have been vain. The focus of the fixers has been on toying with a basically flawed concept, namely, pricing by reference to necessarily inflated revenues over subjectively-determined "similar" movements that must, by their nature, be comprised of captive traffic, mitigated only by interswitching rate levels.

4. The main attempt to fix CLRs, namely CCRs, is also seriously flawed. It is an unnecessary distraction from the need to bring rate, output and innovation pressure on carriers in monopoly environments.

5. There remains an overarching concern that CCRs would actually reduce competition, rather than increase it. Whether or not that

is the case, there is legitimate concern that the proposed CCR requirements are too onerous and could result in higher rates than shippers presently experience.

6. Rather than introducing another hollow remedy, CLRs probably should be kept with some changes for those few shippers who can benefit, as follows:

   (a) Eliminate need for prior agreement between shipper and connecting carrier;

   (b) Do not introduce a captivity test;

   (c) Eliminate need to prove substantial commercial harm to shipper;

   (d) Codify irrelevance of availability of statutory remedies;

   (e) Codify availability of this and all remedies for traffic to and from United States.

7. More importantly, however, is the need to repair and introduce remedies that will bring discipline to rail services that would simulate what would happen in a competitive environment: optimal output to the most efficient users at the lowest marginal cost. Instead, we have, in captive markets, the antithesis of market discipline.

CDR – an idea that should be resisted because it is inefficient and imbalanced

8. The hallmark of efficient negotiations (in the economic sense) is equal bargaining power. That must be the object of all statutory remedies to overcome the innate excess bargaining power by an entity functioning in a natural monopoly.

9. The quantum of bargaining power that exceeds that necessary to achieve efficiency in any single relationship is normally addressed by an efficient market, where that market operates. In the case of a natural monopoly, the market by definition does not function. Accordingly, the market structure itself confers the excess bargaining power. How then to take away the excess or constrain it sufficiently to curtail abuse of that power? That is the concern of statutory remedies where the market fails, or where there is no market, as in the case of a natural monopoly.

10. When statutory remedies do not exist to constrain that abuse of market power, as in the case of unregulated tariff-issuing power, abuse occupies the vacuum created by the absence of the market forces and statutory remedies.

11. Even more egregious, however, is the situation where statutory remedies are rendered ineffectual by virtue of the use of market power. This is the nature of CDR. It is nothing more than the use by the two large carriers of their market power to demand shippers, without recourse, to contract out of their statutory rights to enhance, if only slightly, their bargaining power in negotiations with shippers.

12. Why is it being introduced by the two main carriers? That is the question that all shippers should ask themselves. Carriers are now seeking to impose CDR provisions in contracts (see carriers' respective websites), which means negotiations will be further imbalanced by increase in carrier market power. It is a horrible idea.

13. CDR is a "voluntary" (contractual right) giving up of one's statutory right to level a playing field. There is a reason that final offer arbitration was introduced. Despite its many, many flaws, including reading down by adjudicative bodies, it enhances carrier-shipper negotiations to achieve more efficient results than could be achieved in their absence.

14. CDR should not be incorporated into any confidential contracts or imposed unilaterally in any non-rate tariff, either by shippers or carriers, if only because it results in economic inefficiency. Thus, it is a bad substantive idea for shippers and carriers.

15. Additionally, it is harmful to shippers in future negotiations as it necessarily involves a disclosure of substantially all of a shipper's case in advance of its presentation and determination, if that should become necessary, in an final offer arbitration, or any other remedy sought by that shipper. Thus, it is a bad procedural idea for shippers.

In conclusion, it would be a shame, at a time when the need exists for the strengthening of final offer arbitration and for the implementation of running rights in at least the captive shipper environments, to be focusing on two things that distract policymakers from the objectives of national transportation policy as they are presently set out.[3] Achieving the optimal use of the rail carriers' otherwise unconstrained monopolies, as well as the very valuable assets into which Canadians, for over a century, have invested heavily, should be met with the kind of rigour we expect of all industry: efficiency, optimal prices and output, innovation, and circumstances such that they strive for the best for the economy.

[3] *Canada Transportation Act*, c.10, s.5