A COMPARISON OF CANADIAN AND US TRANSPORTATION REGULATION

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ABSTRACT: *This paper compares the regulatory environments faced by both Canadian and American railways. It is meant for the reader who has not had a detailed involvement with either country's rail transportation system. The main features of each country's regulatory framework are highlighted from a historical, present and future perspective.*

In addition to seeing each system in its own context, this paper attempts to show some of the difficulties which result concerning international rail traffic involving both countries. As will be seen in the paper, there are many areas such as collective rate making, publication of tariffs, contract making and claims which require railways of one country to follow two conflicting sets of laws. This creates a unique situation in two ways: Firstly, it undermines the assumption that a national legislature must create transport laws which concern only its own citizens. Secondly, it brings into question the principle of comity between nations, ie, that one government does not have the right to impose its own regulations on citizens of another country who are properly respecting the laws of their own governments.

Finally, this paper draws into question the need to establish a joint international regulatory agency, which would have jurisdiction over matters related to transportation by rail between Canada and the United States. This presupposes that each government will accept rail carriers and shippers following a different regulatory policy on international traffic than on domestic movements.

Canada and the United States have historically had much in common as far as each country's legislative development concerning railways. (1) Prior to the legislation which deregulated rail transportation in recent times, both countries had railway laws which were primarily intended to protect the public i.e., rail shippers, against the oligopolistic powers of railways. For example, in both countries it was contrary to the law for a railway to set a rate which was not "just and reasonable". Similarly, freight rates could not be "discriminatory", abandonments as well as long and short haul differences were strictly regulated, and pooling traffic was historically prohibited in each country. In both Canada and the U.S., it was illegal for a railway to give a rebate or for a shipper to receive one. Tariffs were required to be published, and shippers were given frequent opportunity to contest freight rate increases before the American and Canadian regulatory commissions. There were no confidential contracts between railways and shippers in either country. There were statutory uniform bills of lading containing similar liability provisions for both countries, and competing railways collectively discussed rate levels with immunity from the competition laws of their respective countries (2). The predecessor to the Canadian Transport Commission (3) and Interstate Commerce Commission (4) respectively provided the mechanisms for regulatory control and their power to interpret the acceptability of freight rate levels prevented the railways from pricing in a free market environment.

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1. The laws which regulate railways in Canada are the Railway Act (R. C 234), the Maritime Freight Rates Act R.S. C.174), The Transport Act (1966-67, C.69). In the United States, the Staggers Rail Act of 1980 amended the Interstate Commerce Act (U.S. Code, Title 49, Public Law 94-473). Prior to Staggers, there were the Elkins Act of 1966, the Hepburn Act of 1906, the Carmack Act of 1906, The Mann-Elkins Act of 1910, the Transportation Acts of 1920 and 1940, and the Reed-Bullwinkle Act of 1948.

2. Although the Canadian railways only received specific legislative authority to price collectively in 1967 (Sec. 279 Railway Act) and the U.S. railroads in 1948 (Reed-Bullwinkle Act), railways had been discussing rates among themselves for many years prior to the abov dates.

3. The Canadian Transport Commission was created in 1967 by the National Transportation Act. It replaced the Board of Transport Commissioners for Canada. The CTC has jurisdiction over rail, air, water and commodity pipelines modes.

4. The Interstate Commerce Commission was created in 1887 by the Interstate Commerce Act. The U.S. President appoints the eleven commissioners, with senate approval, to serve seven-year terms. Only six commissioners may be from the same political party.

In Canada this situation changed in 1967 with the enactment of the National Transportation Act (5). This legislation recognized that the monopoly era of the railways had vanished and that competition between modes had come to characterize the Canadian transportation scene. For example, in the 1950's, the St. Lawrence Seaway had been built, enabling large foreign and domestic ships to move freely between the Atlantic Ocean and central Canada. The Trans-Canada Highway had also been constructed, allowing trucks to cut deeply into Canadian East/West rail traffic, particularly in high rated manufactured products. The airline industry was taking passenger as well as express and mail traffic away from the rail mode, and gas and oil pipelines were diminishing the railway's domestic coal market. These competitive developments made it exceedingly difficult for the Canadian railways to earn their previously adequate share of available transportation revenues.

The National Transportation Act deregulated the Canadian railways, on the premise that competition, not regulation, should be the main determinant of the level of freight rates. The NTA defines a Canadian "National Transportation Policy" as making the best use of all available modes, minimizing transportation costs and not using carriers as instruments of national social policy. (6) Canadian railways were no longer required to go before a government agency in order to have their rate increases approved. (7) The railways could increase any of their rates effective 30 days after filing with the CTC. (8) Rates to one shipper could be different from rates for the same commodity to another shipper. Providing their freight rates were compensatory, the railways were given the freedom to price their transportation services according to market forces.

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5. The NTA reproduced many of the recommendations of the MacPherson Royal Commission (Queen's Printer Ottawa 1961, Cat. No. Z1-1960/3-1, 1959/3-2). MacPherson had recommended that competition and not regulation should determine the allocation of transport resources. The Commission also suggested that the removal of rate restrictions as they applied to railways would lead to a more effective transportation system in Canada.

6. Section 3 of NTA.

7. The Canadian railways were previously required to apply for across-the-board rate increases to the Board of Transport Commissioners. These public hearings would generally take 1-2 years before a decision was rendered, at which time the railways were obliged to immediately apply for yet another increase.

8. Section 275(2) Railway Act.

Today, Canadian railways can adjust their rates rapidly to meet competitive changes, and may vary rate levels so as to give incentives recognizing volume, seasonality, use of full train sets, and backhaul. They no longer have the obligation to make rates "just and reasonable".

In this way it was thought that traffic would seek out the carrier that best served the shipper's price and service needs. Carrie would become more selective and, freed of most rate restrictions, railways would concentrate their efforts on where they were best able to maximize their inherent rail mode advantages.

The United States deregulation of railways occurred fifteen yea later and in some respects went further than the Canadian effort. The Staggers Rail Act of 1980 recognized that competition and demand for service, not regulation, should determine the level of freight rates. The U.S. legislation was intended to enable American railways to earn adequate revenues. The United States government restricted the powers and involvement of the Interstate Commerce Commission by this legislati For example, shippers presently have no recourse against a railway unles the rate charged is above a "jurisdictional threshhold" of somewhere between 170% and 180% of variable costs, provided that the shipper can also prove market dominance and the unreasonableness of that rate. In other words, the ICC has no jurisdiction to examine whether a rate leve is excessive, unless the rate is above the 170%-180% "threshhold" and market dominance has been proven. Similarly, contracts between railway and shippers cannot be contested by competitors unless they show (for non-agricultural commodity movements) that the railway in question has impaired its common carrier's obligation by tying up too much of its equipment on the contract(s). (9) The ever increasing number of contracts (10) between railways and shippers in the U.S. is characteri by a significant amount of confidentiality. For example, on non-agricultural commodity movements, the only elements of a contract which mus be divulged to the public are the identity of the carriers, the commodi the duration and car type. (11) It is not necessary to release the base rate, the origin and destination stations nor any information on volume or escalation provisions. Furthermore competing shippers are only given 18 days to protest a contract based on the above limited information. One can see that regulatory control in the U.S. is now meant to be the exception and not the rule.

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9. ICC decision dated October 8, 1982, Railroad Transportation Contracts, page 13.

10. Over 2,500 since enactment of Staggers.

11. Infra (9), page 29.

In the United States, surcharges, mergers, route cancellations have recently been permitted by the Interstate Commerce Commission as a consequence of the minimization of regulatory intervention and the importance placed on competition.

If one compares the National Transportation Act and related Canadian railway legislation to the United States Staggers Act, one can see much similarity. For example, the "national transportation policy" which is defined in Staggers is surprisingly similar to the goals described in the NTA. Both countries have provisions which prohibit railways from setting a freight rate below the variable costs of the movement. (12) Both countries have limited procedures for shippers to contest what they perceive to be an unconscionably high rate. (13) Both countries still require railways to provide common carriage for all shippers and to furnish proper equipment (14).

There are, at the same time, substantial differences between the railway legislation of Canada and of the United States, and these are particularly noteworthy in the areas of collective ratemaking, contracts, rebates, public filing of tariffs, and limitation of liability. Each category will be analyzed with emphasis placed on the difficulties which result in maintaining joint international rail traffic between the two countries.

Section 279 of the Canadian Railway Act states that railways may exchange cost information and may charge common rates; railways in Canada may price collectively even on movements where they compete (15). This section was enacted in 1967 and, when taken in the context of the other concurrent legislative amendments which included the enactment of the NTA, one can see that the Canadian government was primarily concerned with competition between modes, not intramodal competition. Another explanation for the immunity given to collective pricing by railways in Canada is perhaps the recognition that the railways were obliged to provide a public service of national importance

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12. Section 276 of Railway Act and 49 U.S.C. 10701A(2). In the U.S. variable cost is equated to the term "going concern value". The "national transportation policy" of both countries specify that rates be compensatory. See Section 3(c) NTA and 49 U.S.C. 10101A(6).

13. Section 278 of Railway Act and 49 U.S.C. 10707A.

14. Section 262 of Railway Act and 49 U.S.C. 11101(A).

15. Section 279 is permissive, not mandatory. Canadian Pacific and Canadian National railways have on many occasions established different rates on competing routes. Also, joint discussions on rates are not limited to rate bureaux in Canada, but may occur any place and at any time.

with certain related obligations and therefore should have this remaining regulation offset by the ability to price collectively. In other words, despite the deregulatory influence of the 1967 legislative changes, the Canadian railways were still required to publish all rates and to charge only the amount described in the published tariff (16). Also, Section 23 of the National Transportation Act enables shippers to protest a rate level because it constitutes an unfair disadvantage, or undue obstacle to the interchange of commodities between points in Canada, or an unreasonable discouragement to the development of primary or secondary industries or to export trade.

These and other regulations distinguish Canadian railways from other industries to which the anti-combines law does apply. Yet another reason why competition between Canadian railways was not made compulsory might have been the existence of only two transcontinental railways in Canada, one of which, Canadian National Railway, is a Crown corporation not responsible to private shareholders and investors in the same way as Canadian Pacific Railway (17).

The statutory permission allowing collective ratemaking in Canada was not intended nor has it in fact ever extended beyond Canadian territory. In the few instances where Canadian railways own trackage running over the border into the U.S., the requirement to respect American law is unquestioned, as is the obligation of Canadian-owned rail subsidiaries in the U.S., such as the Soo Line (CP owned) and the Grand Trunk Railway (CN owned). Conversely, when U.S. railways physically run into Canada, either directly or via their subsidiaries, they are required to conform to the requirements of the Canadian railway legislation (18).

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16. Section 275 of the Railway Act of Canada.

17. Since its formation in 1922, the Canadian National Railway has been relieved of $7.1 billion of debt and interest costs by Canadian Government recapitalization. CN-CP Act of 1933 ($1.23 billion deficit), Capital Revision Act of 1937 ($1.8 billion deficit), Capital Revision Act of 1952 ($1.5 billion deficit), Capital Revision Act of 1978 ($808 million). CN is presently requesting the Government to convert a further $400 million of consolidated debt into equity.

18. Four American railways own trackage in Canada - ConRail, Norfolk and Western, Chessie, Burlington Northern. Prior to 1980, all four railways were members of the Canadian Freight Association, an organization wherein joint discussion and publication of rates involving Canadian and Canada-U.S. rail movements occurs.

In direct contrast to the Canadian situation, the Staggers Act diminished the ability of U.S. carriers to jointly discuss rates. (19) Collective ratemaking among railways in the U.S. had previously benefitted from immunity from the Sherman Act, provided that the ICC approved the agreements of the U.S. rate bureaux on a regular basis. At present, railways in the U.S. cannot discuss a rate collectively unless they are end-to-end direct connectors in that particular movement. There can be no joint discussion of single line rates. Independent actions by individual carriers need not be processed nor published through a rate bureau (20).

The results from the above restriction have been significant. U.S. rate bureaux activity has been reduced substantially due to the diminished immunity from the anti-trust laws and the confidentiality allowed by contract rates. By contrast, in 1982, there were 725,864 independent announcements which were not docketed in the rate bureaux (21). During the first 9 months of 1982, the number of independent notices increased by 300%. (22) Many U.S. railways are publishing their own tariffs, rather than have the rate bureaux publish them. Certain lines, such as ConRail have withdrawn from all U.S. rate bureaux membership, which means that any joint through rate between another railway and ConRail must necessarily involve an independent announcement.

We have established that there exist in Canada and the U.S. conflicting statutory provisions governing collective ratemaking. However, it is not possible to have a complete understanding of the ramifications which this conflict of laws has on maintaining international rail traffic without explaining an additional factor which has exacerbated the above situation considerably - the extra-territorial reach of the U.S. anti-trust laws.

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19. 49 U.S.C. 10707(A).

20. ICC 5(B)2 decision dated January 14, 1981, page 33, stated that each carrier has the absolute right to decide whether and/or when the rate bureau will docket its independent actions. If a carrier chooses to file an independent action in its own tariff, there is no prior notice required to other carriers or shippers.

21. Speech to CITT by Reese H. Taylor, Jr., Chairman of ICC on January 28, 1983 in Montreal.

22. Ibid.

There have been several legal decisions in the U.S. which have confirmed that non-American companies collectively price-fixing outside of the U.S. are subject to the U.S. anti-trust laws, provided that they actually did have an effect upon U.S. imports or exports. (23) In other words, even if Canadian railways are allowed by virtue of Canadian law to make rates collectively on Canadian southbound movements to the U.S. border, they still risk contravening the U.S. anti-trust laws since the latter have been interpreted as applying anywhere in the world if the "conspiracy' impacts upon U.S. citizens (24).

The dilemma which Canadian railways face due to this conflict between Canadian and American transportation law, plus the doctrine of extraterritorial anti-trust reach, is as follows: Approximately one quarter of the freight revenues of Canadian railways are derived from traffic destined to the United States. On much of this traffic, the Canadian railways price collectively to the border, so that irrespective of the specific route used, the Canadian railways set a common rate. The freight is interchanged at the border with various U.S. railways, Canadian Pacific and Canadian National usually interchange with different U.S. carriers. If CP and CN continue to set one price for competing southbound movements, this may well be interpreted by the U.S. courts as contravening the Sherman Act, since the conspiracy on the part of the Canadian railways has an "effect" on the price paid by American shippers and consumers. Both Canadian railways own substantial assets in the U.S., and hire hundreds of American citizens directly and through their U.S. subsidiaries. Therefore, by doing in Canada what is legal in virtue of Section 279 of the Canadian Railway Act, the Canadian railways are rendering their own U.S. employees and U.S. assets susceptible to the penalties foreseen in the Sherman Act. Since the Canadian railways often negotiate their collectively-set rates with groups of Canadian shippers, these latter companies would also be subject to U.S. anti-trust indictments. Similarly, the U.S. railway dealing with one Canadian railway, but knowing that the rate is identical for both Canadian railways, is subject as well to being named a co-conspirator.

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23. U.S. versus Aluminum Company of America et al. (148F (2nd) 416 (second circ. 1945),
Continental Ore Co. et al. versus Union Carbide and Carbon Corp. et al. (370 U.S. 690 (1962),
U.S. versus The Watchmakers of Switzerland Information Center Inc. (1963 trade cas 77,414 (s.d.n.y. 1962) order modified 1965 trade cas 80,490 (s.d.n.y. 1975),
In Re Uranium Anti-Trust Litigation-Westinghouse (480F, supp. 1138 (1979 n.d. Ill).

24. The Sherman Act envisages criminal indictments carrying fines of up to $1 million per count to companies, and $100,000 personal fines plus a maximum of 3 years in prison to corporate officers. More frequent, however, are the civil anti-trust suits which entitle complainants who have successfully proven that they have lost business due to the collusion of their competitors, to "treble damages'

The Canadian railways and shippers have attempted to enlist support from both Governments in order to obtain immunity from the U.S. anti-trust laws for international rail traffic. In 1980, the U.S. Congressional Record (25) instructed the ICC to consider the principle of international comity when deliberating the request of the Canadian railroads for U.S. anti-trust immunity. The Record also instructed the ICC to recognize the 1978 decision of the U.S. Civil Aeronautics Board which held that non-American air carriers (fare-setting collectively in IAIA) were to be given U.S. anti-trust immunity.

The Canadian government sent a formal diplomatic note to the U.S. Secretary of State explaining that it would be harmful to international relations if Canadian industry was made subject to the extraterritorial reach of certain American laws. (26)

In 1981, the ICC agreed to treat all Canadian railways as "one integrated enterprise", thereby giving them the requested immunity from the U.S. anti-trust law (27). The ICC also gave like immunity to Canadian shippers and U.S. rail carriers negotiating with Canadian railways (28).

Since the 1981 ICC decision was temporary in scope, the Canadian railways submitted a CN/CP Agreement (29) for ICC approval which requested permanent immunity from the U.S. anti-trust laws for all Canadian railways and shippers. The Agreement also describes the process by which U.S. rail carriers would be restricted from collectively discussing rates in Canada at meetings of the Canadian Freight Association. The U.S. Department of Justice has objected to the Canadian application, claiming that the ICC did not have jurisdiction to grant U.S. anti-trust immunity in areas which have been totally deregulated, such as trailer on flat car/container on flat car traffic and exempt commodities such as fresh fruits and vegetables (30).

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25. Congressional Record S14002 and HR 10083 (daily ed. Sept. 30/80). Joint statements were made by Senator Howard Cannon and Representative Edward Madigan, chairmen of the respective House Subcommittees on Transportation.

26. Note no. 630 dated November 21, 1980 from Canadian Embassy, Washington, D.C. to U.S. Department of State.

27. Infra (20), page 42.

28. Infra (20), page 42.

29. Dated April 6, 1981.

30. <u>Rail General Exemption Authority - Fresh Fruits and Vegetables</u> ICC Ex Parte 346 (Sub.-No. 2) dated March 22, 1979, and TOFC/COFC ICC Ex Parte 230 (Sub.-Nos. 5 and 6).

Until such time as the CN/CP Agreement is approved by the ICC, the two Canadian railways have adopted a policy of not jointly discussing most southbound international rates, even though Canadian legislation would allow them to do so (31).

Another impediment to the free flow of goods between Canada and the U.S. arises when we consider railway filing requirements. Sections 286(1) and 287 of the Canadian Railway Act require that international tariffs be filed whenever a rate is set involving the movement of traffic from Canada to a foreign country. However, in the United States exempt commodities such as fresh fruits and vegetables, as well as trailer on flat car/container on flat car traffic have been entirely deregulated, so that no tariffs are published with regard to these movements. Therefore, on international traffic involving such commodities, we see once again that the railway companies of each country are being required to conform to conflicting sets of laws.

A more prominent difficulty lies in the area of contracts. In the United States, confidential contracts are now allowed between rail carriers and shippers (32). These contracts must be filed with the ICC but only a skeletal summary of their basic elements is given to the public. Contracts in the United Slates often contain rebates. Due to the general economic recession, there has been a proportionately greater supply of transportation service competing for a lesser demand. In the auction-like environment which has resulted, U.S. rail carriers have made use of their country's newly deregulated legal framework by competing among themselves and offering larger and larger rebates to customers. The amount of the rebate, although filed with the ICC as part of the full contract, is not available to competing railways nor shippers.

In Canada, there is no legislative provision which allows confidential contracts between Canadian railways and shippers. On the contrary, section 275 of the Railway Act requires that all rates be published. Moreover, section 380 of the Railway Act prohibits rebates.

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31. However, Canadian Pacific and Canadian National do discuss international rates which are intended to be processed through U.S. rate bureaux (of which they are members) since the latter organizations still possess certain residual anti-trust immunity. (ICC Ex Parte No. 297 (Sub.-No. 1) dated May 21, 1981 and Western Railroads - Agreement 365 ICC 918 decided July 23, 1982)

32. Infra (9), page 13.

Therefore, on a joint international thru rail movement between Canada and the U.S. (33), a U.S. railway can enter into an unpublished contract with a U.S. shipper, in conformity with U.S. law. However, the U.S. railway is also required to publish the full rate with the Canadian Transport Commission in virtue of sections 286(1) and 287 of the Canadian Railway Act, which would automatically deprive it of the benefits of confidentiality which it derived from the contract. The U.S. railways have generally not filed copies of the rate information contained in their contracts on international traffic with the CTC and to this extent have not complied with the requirements of section 287 (34).

These U.S. railways would argue that they are not subject to the jurisdiction of the CTC since the goods were interchanged at the border and their control over the merchandise took place exclusively within the United States. In other words, they would claim that sections 286(1) and 287 of the Canadian Railway Act should not have an extraterritorial reach.

Those wishing to enforce the Canadian legislation would counter the above argument by saying that since there exists one thru rate between Canada and the U.S., the Canadian shipper is paying a price for transportation which must be published, as are all domestic rates. By refusing to file the U.S. contract on an international movement, the U.S. line is using an argument which presupposes that the rate is divisable, which a thru rate by definition is not (35).

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33. Most Canada-U.S. rail traffic is quoted in thru rates, as opposed to proportional or combination rates. A thru rate involves two or more railways giving the shipper one rate from origin to destination; this necessitates the railways agreeing on divisional percentages among themselves. By contrast, a combination rate is where each railway charges the shipper a rate for his portion of the movement, the shipper paying the combination of these rates. Historically, thru rates have been less expensive than combination rates between the same origin/destination pairs due to the tendency among railways in the latter instance to require a greater profit from their individual portion, instead of concentrating on the modal or market competitiveness of the complete o/d rate.

34. The contravention is even clearer against U.S. carriers which physically operate in both Canada and the U.S. For example, if a U.S. carrier took possession of the merchandise within Canadian territory and carried the goods on its own trackage into the U.S., the Canadian railway legislation would have to be respected.

35. Section 286(1) explicitly requires U.S. rail companies to file southbound international tariffs ("the several companies shall file") whereas section 287 does not mention who should file the joint tariff on northbound traffic ("a joint tariff shall be filed").

By analogy, the ICC have on several occasions judged the reasonableness of joint international thru rates in reparations cases and have thus extended their jurisdiction over Canadian railways, whose actual control of the goods was limited to Canadian territory (36).

Having analyzed the legal quandary in which U S. railways find themselves, in that they are being required to respect two sets of contradictory legislation, the dilemma faced by Canadian railways is no less sensitive.

Canadian railways recognize that since the 1980 U.S. deregulation, the trend has been for U.S. rail traffic to be given to those carriers offering confidential contracts which contain rebates. Yet Canadian railways are prohibited from agreeing to any rebate or unpublished rate in virtue of sections 380 and 275 respectively of the Canadian Railway Act. In the absence of any uniform regulation over international traffic, the greater portion of Canada-U.S. thru rail traffic has continued to move between the two countries, with the following accomodation to the new U.S. law: the U.S. railways agree to contracts with shippers on international traffic, but the Canadian railways cannot co-sign these contracts nor can they participate in the rebates which are contained therein. The U.S. railways file these confidential contracts and summaries with the ICC, in accordance with the U.S. law, but the actual amount of the rate and rebate is not available to the public. The Canadian railways file the joint thru rate with the CTC in conformity with the Canadian law. However, the rate filed with the CTC is not the true rate, but the Canadian roads not having been a party to the contract, in many cases do not know what the shipper is actually paying. The Canadian railways only know the division of the published thru rate which they will receive.

The above situation has created many inequities. Firstly, it discourages Canadian railways from exploiting market opportunities which they discover. For example, if a U.S. district sales office of a Canadian railway found out about a future international shipment, they would ordinarily wish to approach the prospective customer and the U.S. connecting carriers in order to take a primary role in coming up with the best transportation package. Under the present circumstances, the Canadian railway must leave the negotiating to its U.S. counterpart(s), since the former cannot participate in the contract or rebate. The U.S. line may agree to rate-related service or routing clauses, such as turnaround penalties, volume committments, which the Canadian railway is unaware of, but would never have agreed to.

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36. News Syndicate Co. versus NYC, 275 U.S. 197; Canada Packers versus A.T.&S.F., 385 U.S. 182; Thermoid Company versus B&O RR Co., 288 ICC 793; Consolidated Mining and Smelting Co. versus B&O RR Co., 286 ICC 313; Porter Co. versus Central Vermont RR Co., 366 U.S. 272

Canadian railways which request a copy of the U.S. contracts involving movements to which they are a party have been told that the rebate provisions are confidential as between the U.S. carrier(s) and the shipper. Certainly, the U.S. anti-trust laws make it impossible for a carrier to know the contractual rebate provisions of a competing movement.

Canadian rail carriers have suggested that they could participate in contract discussions provided the rate-related sections of the document were published with the CIC in accordance with Canadian law (37). To date, there has been a unanimous refusal to consider this option, since shippers and U.S. carriers are preferring the use of contracts rather than open tariffs or independent announcements precisely because their respective competitors cannot know the actual rate which is being charged.

Secondly, Canadian railways are having their preferred routings shorthauled by U.S. carriers offering unpublished rebates. For example, a Canadian railway has two alternate routes to move a given commodity from a point in Canada to a point in the U.S. These two routes are shared with the same U.S. carrier. One route involves substantially more Canadian mileage than the other, and therefore is the preferred routing of the Canadian carrier, since the latter obtains a greater share of rail divisions from its longhaul. Prior to U.S. deregulation, the thru rates on these two routes would probably have been the same, and so there would have been no rate advantage for the shipper to prefer one routing over the other (38). The traffic would, in all likelihood have moved over the Canadian railway's preferred routing, because the originating carrier has traditionally taken a predominant role in determining the choice of route. In any event, the Canadian carrier would at least have been involved in the negotiation with the shipper, with routing being one of the major considerations in exchange for the rate concessions.

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37. It is the contention of the author that an allowance or rebate which is filed with the CTC is not in contravention to section 380 of the Railway Act, since that section prohibits secret, unpublished concessions to shippers which varies to some degree the published rate, in accordance with section 275. However, once a "rebate" is published, there is no material difference between the resulting rate and a volume incentive or "step-ladder" rate, of which there are many.

38. If one of the routes was circuitous, there might have been a routing preference based on turnaround time. Similarly, there might have been a service preference if the U.S. connecting carriers were different for each route.

Since Staggers, it is commonplace for U.S. carriers to offer a larger rebate over their longhaul routing. Moreover, the U.S. carriers are the ones to negotiate the contractual arrangements with shippers since they can offer rebates and confidentiality, which the Canadian roads cannot. Furthermore, the rates on both routes are now different, and the Canadian railways do not know what the U.S. longhaul routing is costing the shipper, because of the unwillingness of U.S. lines to respect sections 286(1) and 287 of the Canadian Railway Act (39). Lastly, many Canadian shippers have started accepting rebates from U.S. carriers, since they believe that the Canadian Transport Commission is unwilling to take legal action against rail carriers of another nation which are acting in accordance with the laws of their own country (40). The results of the above conflict of laws is that Canadian railways have been forced to passively observe the erosion of their longhaul.

A final example of the dilemma which Canadian railways face due to the absence in Canadian law of unpublished contract and rebate provisions is in the area of overhead traffic. This involves traffic which originates and terminates in the U.S. at Canadian railway-owned points, and is transported by the Canadian railway from the U.S. origin through Canadian territory to a U.S. destination (41). Given that the origin and destination points are situated in the United States, the Canadian railways are in direct competition with U.S. railways who have domestic U.S. routes for the same o/d pair.

However, section 287 of the Canadian Railway Act stipulates that with respect to overhead traffic involving a thru movement by two or more railways, a joint tariff must be filed with the Canadian Transport Commission.

The Canadian railway and its U.S. rail connections are thus put in the unenviable position of being required to respect Canadian law and at the same time compete with U.S. carriers, who are not so required. For example, a U.S. shipper receives two offers, for a

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39. Therefore the Canadian lines cannot strategically match or outdo the rate reductions which characterize the U.S. longhaul contracts, with any exactitude.

40. Section 380 of the Railway Act prohibits any person from receiving a rebate related to railway transportation. Therefore, these shippers risk a fine of $1000 for each offence.

41. The ultimate rail points of origin and destination need not be on the Canadian railway's track, although they must be located in the U.S. For example, a U.S. railway might interchange with the Canadian railway in the U.S. to take the commodity to a further U.S. destination.

U.S. domestic rail movement. One bid is from a group of U.S. railroads which offer a confidential contract, including various rate-related conditions. These conditions will never be known to the shipper's competitors or to other railways, who might some day compete for future business. The other bid is from another group of railways which includes a Canadian rail carrier. They offer a slightly longer route since it climbs into Canada, traverses Canadian territory and descends back into the U.S. This second group of railways cannot offer rate-related terms which will be confidential. In the above example, most U.S. shippers would opt away from the group which included the Canadian overhead movement, since it was longer and not confidential.

It is the view of the author that this overhead segment of section 287 of the Canadian Railway Act should be eliminated so as to allow Canadian railways to compete with their U.S. counterparts for domestic U.S. movements.

Another example of legislative disharmony involving Canadian and American rail transportation lies in the area of claims. Whereas previously the statutory rules governing a rail carrier's liability for lost or damaged merchandise were similar for both Canada and the U.S., the situation changed with the enactment of Staggers.

At present U.S. rail carriers have the freedom to limit their liability for loss, damage or delay to whatever value the shipper agrees upon, providing the shipper's declaration or agreement be in writing (42). Previously, the Carmack Amendment (43) and Cummins Amendments (44) had prohibited U.S. common carriers from contracting out of liability, as well as from offering limited liability rates unless the latter were filed and approved by the ICC (45). The Staggers Act has eliminated the duty of U.S. railroads to obtain prior ICC approval before filing tariffs containing limited liability rates. Also Staggers has allowed confidential contracts, which may contain limited liability provisions.

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42. 49 U.S.C. 10730(c) and 49 U.S.C. 11707

43. Hepburn Act of 1906, ch. 3591, 7, 34 Stat 593.

44. Act of March 4, 1915, 38 Stat. 1196, and Act of August 9, 1916, ch. 301, 39 Stat. 441.

45. The first Cummins Amendment also extended the application of the Carmack Amendment to export movements to adjacent foreign countries on a thru bill of lading.

By contrast, the Canadian legislation specifically prohibits railways from limiting their liability, unless this has been approved by the CTC (46). Moreover, the CTC has prescribed mandatory terms and conditions for the carriage of freight which specify the amount of damage for which a railway is liable and the delays in which claim must be submitted (47).

In order to demonstrate how this difference in regulatory frameworks has impeded joint international rail traffic, consider the following example. A U.S. shipper sends merchandise from a U.S. point of origin to a Canadian point of destination. This rail movement involves a U.S. rail carrier for the American portion, and a Canadian railway for the Canadian portion, the traffic being interchanged at the border. The traffic moves at a thru rate, but the U.S. shipper has signed a contract with the U.S. carrier agreeing not to sue for damage less than $200 per unit, and to submit notice of damage within thirty days.

On arrival of the merchandise at the Canadian destination point damage to several units is discovered, the latter being less than $200 per unit. The U.S. shipper cannot sue the U.S. carrier because of the contractual limitation of liability. Yet the shipper retains his recourse against the Canadian railway (which could not be a party to the U.S. contract) in virtue of Canadian law. Section 4 of General Order stipulates that rail carriers in Canada are liable for the full value of the goods at the time and place of shipment.

Furthermore, if the U.S. shipper would have wanted to sue the U.S. carrier, he is proscribed from doing so after one month. The Canadian bill of lading gives the shipper four months to send his notice of damage (48).

One can see from the above, that Canadian railways are left "holding the bag", after U.S. connecting carriers have extricated the liability under the 1980 U.S. legislation (49).

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46. Section 294 of Canadian Railway Act.

47. CTC General Order No. T-5 (ch. 1218).

48. Section 4, General Order T-5.

49. It has been suggested that if the contract specified that U.S. la would govern, the Canadian Courts might accept the limitation of liability for the Canadian portion of northbound movements. The Conflict of Laws, Dicey and Morris, 8th ed. 1967, page 697.

In conclusion, the unequitable situations which have been described above are due to fundamental differences between the transportation policies of Canada and of the United States. They also reflect a lack of joint governmental planning as to the international ramifications of national legislation.

The Canadian Government resolved a would-be conflict concerning the statutory delays required to file rate increases before they become effective. The CTC reduced the Canadian delay from 30 to 20 days for joint international traffic, so as to achieve uniformity with the Staggers Act (50). Similarly, the ICC has defined Canadian railways as "one integrated enterprise" so as to extend the latter immunity from the U.S. anti-trust laws (51).

In the absence of a joint international authority which would establish a uniform regulatory framework in both countries, the CTC and ICC must offset the negative impact which their own country's transportation legislation may have on future international rail traffic.

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50. CTC Special Permission nos. 5519 and 5520, dated January 29, 1982.

51. ICC 5(b)2 Decision dated January 14, 1981, page 42.