BRIEF

addressed to

The Senate
Standing Committee on Transport and Communications
Regarding Division 22 of Part 4
Bill C-47, the *Budget Implementation Act*

by

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(The recommendations, analyses and views expressed in this Brief are our own and not necessarily those of any client)

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SUMMARY OF RECOMMENDATIONS

In this Brief, we recommend to the Senate Standing Committee on Transport and Communications) several amendments to Division 22 (*Canada Transportation Act*) of Bill C-47, the *Budget Implementation Act, 2023, No. 1*, and we address two other remedies in the *Canada Transportation Act* ("Act"). We have considered this matter for many years, have analyzed the National Supply Chain Task Force Final Report to government[1], and have taken into account the positions of the many shippers we represent, as well as the associations that represent them when dealing with Canadian National Railway and Canadian Pacific Railway.

In principle, our recommended amendments are meant to extend the applicable distance zones and avoid the discrimination caused by the government's proposed amendments to the longstanding regulated interswitching mechanism in Division 22, repeal a harmful unused provision, and address concerns over the dispute resolution mechanism found in the Act. They can be summarized as follows:

1. With respect to regulated interswitching
    a. Maintain the proposed 160 kilometre radial distance zone,
    b. Add an additional distance zone of 1200 kilometres to address captive and outlying shipper facilities that are most prone to the exercise of CN and CP market power,
    c. Eliminate the proposed geographic discrimination so that the zones apply across Canada rather than just the Prairie Provinces,
    d. Change the terms of the government's proposed study.
2. Repeal the long haul interswitching provisions set out at sections 129 to 136.8 of the Act.
3. Repair the final offer arbitration mechanism to make it feasible for shippers to use to address the effects of captivity to federal railway companies.

Our legislative drafting recommendations are attached at Appendix A.

[1] https://tc.canada.ca/sites/default/files/2022-10/supply-chain-task-force-report_2022.pdf

SHIPPER CAPTIVITY

There have been numerous government commissions, panels, and expert reports regarding shipper captivity to CN and CP, its impact on rail rates and service, and longstanding legislative acknowledgement that remedies are required to address the otherwise unbridled market power of railways. The most recent acknowledgement comes from the final report of the National Supply Chain Task Force:

> *"railways are the only source of transport for many shippers, giving rail companies pricing and service discretion that is not balanced by normal market forces."*

Liberal and Conservative governments have repeatedly acknowledged that captivity and felt compelled to address it, sometimes declaring remedies as long term solutions. Those that have lasted have become increasingly obstructed, expensive or too daunting to use. Those with short shelf lives seem to be those with the most words; they find their way to the dust pile after going unused because CN and CP refused to cooperate or because they failed to achieve their lofty ambitions.

Canadian shippers, particularly those producing bulk commodities, deal with the many difficulties of operating in remote locations, yet manage to make a large contribution to their communities, to employment and Canada's economic well-being. Many are fortunate to maintain their viability, to endure the pricing challenges of commodity cycles and intense competition for their products. CN and CP, too, operate in those locations and make similar contributions.

The main difference between shippers and the two railways is that the railways are shielded from these pricing challenges and face no effective competition when servicing most of these shippers. Further, their viability is not in question; further, see CN's Q1 2023 earnings report where CN says: "CN assumes continued pricing above rail inflation upon contract renewals."[2] The pendulum has swung so far in favour of CN and CP that they are earning about three times their cost of equity. They have been investment darlings but their returns have come off the backs of captive shippers. Because of the market power they enjoy on those parts of their rail systems where CN and CP serve captive shippers, their monopolies ensure they do not have to share their productivity gains, as they would in a normally functioning, competitive market. That is why there are shipper remedies and why those remedies have to work like a normally functioning market.

[2] Found at https://www.cn.ca/en/news/2023/04/cn-updating-2023-guidance-following-strong-first-quarter-perform/

RECOMMENDATIONS

Regulated Interswitching

Regulated interswitching allows a shipper or receiver located on one railway (say CP) that is within a 30 kilometre radius of another railways (say CN) to get CP in this case to take the shipper's traffic to CN. As long as both railways can reach both the origin and the destination, and the connecting railway is willing to compete, provide equipment and the like, the shipper gets the benefit of a duopoly consisting of CN and CP, instead of exposure to a monopoly.

The reason it is pro-competitive is because it gives some rail shippers the right to negotiate with a second rail carrier and to access that carrier. It lessens the local carrier's ability to engage in behaviour that blocks competition, such as preventing its customers from securing needed railcar supply from another railway and imposing monopoly rates to the interchange that unfairly impair the connecting railway's ability to compete for the traffic.

The mere existence of regulated interswitching induces CN and CP to make their rate and service offering a bit more competitive to keep the traffic on their own networks. It results in a bit more balanced commercial negotiations.

On its own and in its current limited form, however, regulated interswitching is insufficient to address uncompetitive rail rates and service levels for many shippers, including those who are unable to use regulated interswitching for some or all of their traffic.

Extended Distance

The government proposes to ***re-introduce the 160 kilometre radial distance zone*** that existed from 2014 to 2017, but which it allowed to sunset. We think that is a good and laudable idea. It will help a few shippers. Unfortunately, it will help no one outside those limits where most captive rail shippers are located. These shippers are reliant on rail. If they could truck they would. That is because trucking is reliable, there is little concern about overcharging, and it's flexible. Unfortunately, trucking does not work due to the often large volumes involved and remote locations of mines, mills, and other shipping facilities. In addition to requiring transportation over long distances, the remoteness limits the availability of trucks in those locations.

That is why we are proposing Parliament ***add another zone of 1200 kilometres***. In keeping with the current but unused long haul interswitching ("LHI") mechanism, we recommend that this extended zone would not apply to any interchange, but be ***limited to CN's and CP's nearest competitive interchanges in the reasonable direction of the shipper's traffic and destination***. At that distance, competition could be available to many more shippers. Even if not all of them can reach their customers or destinations on more than one railway, for those that can, this extended zone would move Canada from a very monopolized rail market to a duopoly. Not just one of CN or CP, but both.

Geographic Discrimination

Unfortunately, the government's current proposal is limited, like the 2014 to 2017 legislation, to the Prairie Provinces. There is no principled reason for this discrimination. It hurts shippers outside the 160km zone who would benefit from regulated interswitching. There have already been suggestions that CN and CP will increase rates for those outside the zone to make up lost revenues. They can do that because they exert monopoly power. A railway exposed to competition – that is, the fear of losing the customer when overcharging or providing inadequate service – could not do that and certainly would fear saying it out loud. But, there is no fear at CN or CP about what they can or will do. And, shippers fear that retribution. It alters how much they decide to produce, how much they invest in their facilities, whether they will use the statutory remedies, and whether they will oblige CN and CP when they demand that shippers contract out of those remedies (which is common), as the Agency has already reported.[3] Thus, ***a shipper must have access to extended interswitching, regardless of its location, in each province, not just the Prairie Provinces***.

The Study

In the Division 22 amendments, the government proposes to revert to a 160km radial zone in the Provinces for 18 months to study its effects. We have had an opportunity to discuss the matter with Transport Canada, with shippers and with shipper associations.

[3] The Canadian Transportation Agency's 2020-21 Annual Report (available at: https://otc-cta.gc.ca/eng/publication/annual-report-2020-2021) states: "Multiple shippers have indicated to the CTA that they are pressured to waive their rights to access remedies otherwise available under the legislation as a condition for entering into contracts with railway companies. Others have noted concerns about potential retaliation they might face from railways if they advance a complaint. If true, this practice undermines the legislative intent of including shipper remedies in the Act, particularly given the fact that there is often an asymmetry in bargaining power between railway companies and the shippers that depend on their services."

We have already had a three year experiment from 2014 to 2017 regarding the effects of the extension to 160 km in the Prairie Provinces. We also have the experience from 2018 to the present of what happened after it was repealed and of the unused LHI remedy.

The effect of a further 18 month study would be to exclude shippers who have multi-year transportation contracts and will not be entering any new negotiations until after the proposed pilot program expires. The quantitative metrics to assess success should not be focused on shippers. They're already asking for the remedy to be fixed.

If the government is to study anything, it should assess whether CN's or CP's financial viability is seriously affected by the operation of the extension provision we are recommending. The government need only add the same suspension provision to the 1200km extension we are recommending here that they added to the LHI remedy in 2018's Bill C-49. That would allow the "Governor in Council, if it is of the opinion that the financial viability of a railway company is seriously affected by the operation of [the extension provision, to], by order, suspend the operation of [that provision] during the period specified in the order." Any serious effect on railway viability could form part of the Minister's annual report to Parliament.

Railway Arguments against the Expansion of Regulated Interswitching

At Appendix B, we address claims about the effects of an expansion of interswitching in Canada. Their claims include inadequate compensation, loss of traffic, loss of jobs, increased congestion, loss of investment, and railway claims about the competitiveness of their rate levels. These complaints made by CN and CP, as well as their external mouthpieces, are unfounded or unsupported by evidence, to the point of being misleading.

The arguments against those claims are that (i) the Agency must set commercially fair and reasonable compensation, which currently provides a markup of 83.35%, (ii) only a very small percentage of the railcars originated in Canada were physically interswitched within the 30 to 160 km zone in 2014-2017 (less than 1% of relevant traffic), (iii) there is no evidence of job losses due to interswitching, but CN and CP regularly cut thousands of jobs for other reasons, (iv) there is no evidence of congestion – how could there by with such paltry levels of interswitching? – and, in any event, there's a simple solution, (v) CN and CP regularly threaten to reduce investment, but that is not an interswitching problem, that is a monopoly problem, and (vi) CN and CP enjoy returns on equity several times above their cost of equity.

In the end, if CN and CP are worried about losing traffic to each other or to other rail carriers, all they need to do is provide competitive rates and service. By doing so, Canadian firms and workers responsible for our nation's economic prosperity and innovation can share the benefits of a reliable, efficient, and competitive freight rail system.

Long Haul Interswitching

Given that the LHI remedy has gone unused for five years and does not nothing but entrench CN's and CP's monopolistic pricing, ***we recommend the repeal of the long haul interswitching provisions set out at sections 129 to 136.8 of the Act***. Transport Canada is aware of its disuse and the Agency reports the same. While we were not consulted on LHI before its introduction in the house as Bill C-49, we explained to Transport Canada and the House Standing Committee on Transport, Infrastructure and Communities during the passage of the bill in 2017-18 that it would not work. There were more than a dozen reasons we could identify.

Today, LHI's only use is as evidence by CN and CP to say that shippers have a remedy but just don't want to use it. In that sense, it damages shippers, rather than helps them. CN and CP have had their way, the pendulum has swung far in their favour, and now it is time to undo that damage.

A far superior approach is the extension of regulated interswitching in the manner we have described in this Brief.

Final Offer Arbitration

Many rail shipments in Canada cannot benefit from regulated interswitching, regardless of the distance. The most common reason is that the connecting railway cannot reach the destination. It's true for traffic that terminates in Canada and the United States, whether inland or at export terminals. Even where both railways can reach the destination on their own systems, interswitching does not work if the connecting railway does not want the traffic, or is unwilling to provide railcars, power or crews. We even have examples of an originating railway compelling shippers to pay to transport the traffic hundreds of miles out of the way rather than interchange their traffic to the painfully obvious direct routing of a connecting carrier.

For those shipments, the only other remedy is final offer arbitration. That is the remedy that needs the most attention. ***We are recommending that the government undertake to fix final offer arbitration.*** Doing it right would allow shippers to (i) get their

Canadian products to their customers at home and abroad (ii) get the inputs they need to operate their facilities and (iii) maintain the viability of their businesses, at rates and service levels that would prevail under conditions of effective competition.

It is no secret that bulk commodity and other shippers experience fierce global competition for their products, significant price swings, long periods of low demand and short spikes of high demand, having to ship at a loss just to keep customer relationships, high costs of capital, and that many of these businesses have been forced to shut down over the past many decades.

There are many reasons for these hardships. One reason, that shippers should not face, is monopolized rail rates and service levels. It is one thing for a shipper to face fierce competition from other suppliers, but it is quite another to have to compete when the rail service provider uses their monopoly to exert market power. Bargaining with a sole service provider is a common experience for many Canadians, whether it's for electricity, gas, sometimes telecom, air travel, car insurance, etc. That is why we regulate those activities. Shippers face threats to viability routinely. That is not the experience of the large Class I railways.

Final offer arbitration was enacted in the *National Transportation Act, 1987* to address the problem of captivity quickly and inexpensively, even if it is not available to everyone or every shipment or even every destination. It has become unacceptably expensive and time-consuming. It takes a lot of preparation and management resources, and there are many barriers to its use. Railways naturally oppose its use every step of the way, with motions and appeals, refusals to provide information and refusals to negotiate. Virtually all of this occurs away from the glare of the Agency's oversight.

We have many recommendations to improve final offer arbitration, but that is for another day. We highlight it here to say that the extension of regulated interswitching, in the way we have recommended, is not available to everyone or all shipments, whether logistically or because of obstacles to its use, regardless of distance and geography.

APPENDIX A

Revised Division 22

443 (1) Section 127 of the Act is amended by adding the following after subsection (2):

Order ~~— Prairies~~

(2.1) If the point of origin or destination of a continuous movement of traffic is ***~~in whole or in part in Manitoba, Saskatchewan or Alberta and is located~~*** within a radius of 160 km of an interchange ~~that is in whole or in part in Manitoba, Saskatchewan or Alberta~~ but outside a radius of 30 km of the interchange, ***or within a track distance of 1200 km but outside a radius of 160 km of an interchange that is in the reasonable direction of the traffic and its destination,*** the Agency may order

(a) one of the companies to interswitch the traffic; and

(b) the railway companies to provide reasonable facilities for the convenient interswitching of traffic in both directions at an interchange between the lines of either railway and those of other railway companies connecting with them.

(2) Section 127 of the Act is amended by adding the following after subsection (4):

Interswitching limits ~~— Prairies~~

(5) If the point of origin or destination of a continuous movement of traffic is ***~~in whole or in part in Manitoba, Saskatchewan or Alberta and is located~~*** within a radius of 160 km of an interchange ***~~that is in whole or in part in Manitoba, Saskatchewan or Alberta~~*** but outside a radius of 30 km of the interchange, ***or within a track distance of 1200 km but outside a radius of 160 km of an interchange that is in the reasonable direction of the traffic and its destination,*** a railway company must not transfer the traffic at the interchange except in accordance with the regulations and the interswitching rate.

Information — traffic

(6) When providing the Minister with information under regulations made under paragraph 50(1.01)(a), the Canadian National Railway Company and the Canadian Pacific Railway Company are also required to provide the Minister, in the same form and manner, with the following information with respect to any traffic that is moved by a railway car in order to permit the Minister to assess the effects of the application of subsections (2.1) and (5):

(a) an indication as to whether the point of origin or destination of the movement of the railway car was located within a radius of 30 km of an interchange ***~~that is in whole or in part in Manitoba, Saskatchewan or Alberta~~***;

(b) an indication as to whether the point of origin or destination of the movement of the railway car was within a radius of 160 km of an interchange ***~~that is in whole or in part in Manitoba, Saskatchewan or Alberta~~*** but outside a radius of 30 km of the interchange;

(c) an indication as to whether the point of origin or destination of the movement of the railway car was within a track distance of 1200 km of an interchange that is in the reasonable direction of traffic and its destination,

~~***(c)***~~***(d)*** an indication as to whether the railway car was moved by the railway company at the interswitching rate; and

~~***(d)***~~***(e)*** if possible, an indication as to whether the railway car was moved by another railway company at the interswitching rate.

Additional information

(7) On request, a railway company must provide to the Minister, in the form and manner specified by the Minister, any of the information or documents that have been provided to the Agency under section 128.1 in order to permit the Minister to assess the effects of the application of subsections (2.1) and (5).

444 (1) Section 127.1 of the Act is amended by adding the following after subsection (1):

Interswitching rate ~~***— Prairies***~~

(1.1) The Agency shall, no later than 90 days after the day on which this subsection comes into force, determine ***for the calendar year in which this subsection comes into force (a)*** the rate per car to be charged for interswitching traffic within a zone that includes a point of origin or destination of a continuous movement of traffic that is ~~***located in whole or in part in Manitoba, Saskatchewan or Alberta and is***~~ within a radius of 160 km of an interchange ~~***that is in whole or in part in Manitoba, Saskatchewan or Alberta***~~ but outside a radius of 30 km of the interchange, ***and (b) the rate per car to be charged for interswitching of traffic that is within a track distance of 1200 km but outside a radius of 160 km of an interchange that is in the reasonable direction of traffic and its destination*** ~~***for the calendar year in which this subsection comes into force***~~.

(2) Subsection 127.1(4) of the French version of the Act is replaced by the following:

Publication de la méthode

(4) L'Office publie, quand il fixe le prix au titre du paragraphe (1, la méthode qu'il a suivie pour le faire.

(3) Section 127.1 of the Act is amended by adding the following after subsection (4):

Publication of method — subsection (1.1)

(4.1) The Agency shall, when it makes its determination under subsection (1.1), publish the method that it followed for determining the rate***s***.

(4) Section 127.1 of the Act is amended by adding the following after subsection (5):

Publication — subsection (1.1)

(6) The Agency shall, no later than 90 days after the day on which this subsection comes into force, publish the rate***s*** determined under subsection (1.1) on its Internet site.

445 The Act is amended by adding the following after section 127.1:

~~*Repeal*~~*Suspension*

127.2 ***Where as a result of a report under section 52 that includes an assessment conducted under subsections 127(6) and (7), the Governor in Council is of the opinion that the financial viability of Canadian railway companies has been seriously affected by the operation of*** ~~***This section and***~~ subsections 127(2.1) and (5) to (7) and 127.1(1.1), (4.1) and (6)***, the Governor in Council may, by order, suspend the operation of those sections, either entirely or with respect to such kinds of traffic as are specified in the order whereupon those sections cease to be in force, entirely or with respect to the specified kinds of traffic, during such period as is specified in the order or until the order is revoked.*** ~~***are repealed on the day that, in the 18th month after the month in which subsection 127(2.1) comes into force, has the same calendar number as the day on which that subsection 127(2.1) comes into force or, if that 18th month has no day with that number, the last day of that 18th month.***~~

445.1 Sections 129 to136.9 of the Act are repealed.

APPENDIX B

Railway Complaints Regarding Interswitching

Compensation

a. CN and CP complain about inadequate compensation for the transport within the 30 kilometre zone and the proposed 160 kilometre zone. They use expressions like "at cost", "non-compensatory" and "below market" rates. They go astray, however. The Canadian Transportation Agency is required to ensure that the rates set within the radial zones are "commercially fair and reasonable" to all parties (section 112 of the Act) and must also consider "any long-term investment needed in the railways" (section 127.1). CN and CP know this.

b. Their current complaint is that the Agency only gives them a markup of 83.35% above their variable costs.[4] This is an abnormal complaint; CN and CP seek to maintain the ability to impose monopoly rates; the "market rates" they advance are the rates that prevail with one service provider in the market; they want to preserve monopoly rates.

c. The Agency is the expert body that can assess the rates required. The rates they set for this traffic are generous. They cover the railways' total economic costs for the service they provide. In a normally functioning, competitive market, we would not hear such a complaint. That markup covers all of their fuel, their rolling stock and tradespeople and, remarkably, includes all of their cost of capital – their returns to shareholders, elements of accounting profit and then some. That 83.35% is the same amount they need from all of their traffic throughout Canada in order to cover all of their variable and fixed costs; that is, their total costs.

d. There is also no reason why that same markup cannot be applied to a new 1200 kilometre zone, particularly to replace one the 1200 kilometre zone in the LHI remedy that remains unused in large measure because of the compensation scheme.

Loss of traffic

a. CN and CP engage in fear-mongering to say that the 160km zone will result in loss of traffic. However, as Transport Canada has already found, very little traffic moved under the Zone 5 interswitching distance (160km, Prairies only) in the period from 2014 to 2017 before the current government repealed it. As reported in this bulletin, in 2015 less than 0.1% of total carloads and less than 0.6% of grain traffic moved under the Zone 5 rates.

[4] Canadian Transportation Agency Determination No. R-2022-164 (https://otc-cta.gc.ca/eng/ruling/r-2022-164), Appendix A, section 5.0 (Contribution to fixed costs): "For 2023, the average contribution to fixed costs is 83.35%..."

b. Contrary to CN's and CP's assertions that they will lose traffic to the BNSF Railway, the government's own Grain Monitor found that, *after* the repeal of Zone 5 in 2017, grain shipments to the United States actually *increased*:

Three-Year Average of Rail Shipments of Grain to US Destinations Per Crop Year (tonnes)		
	from Western Canada to the US	**from Western Canada to US West***
Aug 2014 - July 2017 (with regulated interswitching to 160km)	7,047,836	2,552,699
Aug 2018 - July 2020 (with regulated interswitching to 30km)	7,381,789	2,857,248
*(comprising the states of AK, AZ, CA, CO, HI, ID, MT, NM, NV, OR, UT, WA and WY)		
Source: Annual Report of the Monitor - Canadian Grain handling and Transportation System - Crop Year 2021-2022		

c. Similarly, CN's and CP's detailed traffic data submissions to the Agency for the purposes of the Maximum Revenue Entitlement for the Movement of Grain, confirm that the previous expansion of regulated interswitching did *not* coincide with a reduction in the volumes of grain transported by CN and CP to Canadian ports or processing facilities in Canada:

Western Grain Movements* by Crop Year (tonnes)					
Interswitching Limit	**30 km**	**160 km**			**30 km**
Crop Year	**2013-14**	**2014-15**	**2015-16**	**2016-17**	**2017-18**
CN	19,209,590	20,347,455	19,784,579	22,322,614	20,983,547
CP	19,252,363	20,958,736	20,608,823	20,874,001	19,634,738
Total	**38,461,953**	**41,306,191**	**40,393,402**	**43,196,615**	**40,618,285**
*includes grain grown in the Western Division (or grown outside Canada and imported into Canada) and moved to Thunder Bay, to Churchill or ports in British Columbia for export, or to processing facilities in Canada; *excludes grain shipped by rail to the United States*					
Source: Canadian Transportation Agency, annual determinations of Maximum Revenue Entitlement					

Loss of jobs

a. On a more general level, there has always been – and will likely always be – an imbalance in rail movements between Canada and the United States. Historically, southbound rail volumes have consistently been more than twice as high as northbound rail volumes.[5] South of the international boundary *all* Class 1 rail carriers (including CN's U.S. Subsidiary and CP's U.S. Subsidiary) use U.S. employees to dispatch and crew their trains and to perform track maintenance and switching in rail yards. The suggestion that any expansion of regulated interswitching must exclude U.S. based rail carriers in order to preserve *Canadian* jobs is misleading. Finally, when the United States Surface Transportation Board proposed certain rule changes that would have created a US version of regulated interswitching (i.e., created the "reciprocity" CN and CP claim they want), both of them vociferously opposed, and continue to oppose, that initiative. Then as now, they are more concerned with *preventing* competition than in reciprocity.

b. To the extent that CN and CP reduced their respective employee headcount during the previous period of expanded interswitching, the notion that these reductions were occasioned in whole or in part by the loss of traffic to U.S. carriers is unsupported by any actual evidence. Other factors provide a far more plausible explanation.

c. For example, during the period 2014 to 2016, when the previous government introduced the 160km interswitching zone, CN and CP increased their respective average train productivity and train length, all contributing to reduced crew requirements.

d. Also, from 2014 to 2016, *all* Class 1 rail carriers across North America saw a reduction in revenue-ton-miles, a common industry measure of workload.[6]

Congestion

a. CN's and CP's mouthpiece, the Railway Association of Canada, claims that extended interswitching will slow down supply chains. On the contrary, CN's and CP's respective 2019 Investor Fact Books show that through all or most of the period from 2014 through 2017, while Zone 5 interswitching was in force, system average train speeds, car velocity and yard productivity (measured in cars handled per yard switching hour) increased while dwell times decreased. Performance in all of these categories worsened in 2018, the first full year after the repeal of Zone 5 interswitching:

[5] See Statistics Canada. Table 23-10-0062-01 – Rail industry origin and destination of transported commodities.
[6] Source: CN 2019 Investor Fact Book, p. 27; BNSF Railroad Annual Reports (2014-2016) to the United States Surface Transportation Board.

STATISTICAL HIGHLIGHTS [CP]	2014	2015	2016	2017	2018
Average terminal dwell (hours)	8.7	7.2	6.7	6.6	6.8
Average train speed (miles per hour, or "mph")	18 .0	21.4	23.5	22.6	21.5
Source: CP 2019 INVESTOR FACT BOOK, p. 1.					

OPERATING METRICS [CN]	2014	2015	2016	2017	2018
Car velocity (car miles per day)	199	224	236	211	188
Yard productivity (cars per yard switching hour)	44	48	51	51	49
Through dwell (hours)	8.3	7.3	6.9	7.7	8.3
Through network train speed (miles per hour)	20.3	21.5	22.5	20.3	18.0
Source: CN 2019 Investor Fact Book, p. 21					

b. If actual data exists to confirm any adverse effect on efficiency, capacity or reliability, it has not been made available.

c. However, the fact is that there doesn't have to be much or any regulated interswitching. As the Canadian Transportation Agency recognizes,[7] all CN and CP have to do to dissuade shippers from availing themselves of interswitching options is to make their rate and service offerings more appealing than their one competitor. Where rate and service offerings are equal or even slightly worse, a shipper will prefer the more efficient and direct routing for its traffic, and avoid routes susceptible to congestion if at all possible.

Loss of Investment

As it regularly does when the government consults on any initiatives that could reduce the market power imbalance between shippers and rail carriers, the railway industry alleges that expanding regulated interswitching, even on the very limited scale contemplated by Bill C-47, will be a disincentive to private investment. However, a basic benefit of competition leads to the opposite conclusion. By providing competitive rates and service levels, CN and CP would send the correct price signals to rail shippers to allow them to make better investment decisions. As it stands, CN and CP decide whether or not to invest in their infrastructure in a way that maximizes their systems, not the entire supply chain. If CN and CP management are not willing to invest in the Canadian rail system because they only earn three times their cost of equity, there are plenty of business owners and managers who would love to earn those returns.

[7] Decision No. 62-R-2021, at paragraph 64.

Rate Levels Generally

a. Parliament should also not be swayed by claims that rail freight rates in Canada are "among the lowest in the world" or that a recent study commissioned by the Railway Association of Canada evidences "robust competition" between railways. The conclusions drawn in or based on the CPCS Study entitled "International Comparison of Railway Freight Rates" are misleading in a number of respects. For example, there are significant differences between the various countries in terms of the distances over which goods are transported by rail. As noted in the 2001 report of the *Canada Transportation Act* Review Panel, "…because of rate taper, revenue per tonne-kilometre would be lower for longer movements than for shorter ones." The report explains:

> In general, the two most costly components of any rail movement, on a per tonne-kilometre basis, are picking up traffic from a shipper's siding and delivering it to the consignee's siding or an interchange with a connecting carrier. By contrast, the line haul costs, on a per tonne-kilometre basis, are much lower. Because origin and destination switching costs are spread over more kilometres for longer movements, cost (and revenue) per tonne-kilometre decline as the length of movement increases. The above provides an illustration of rate taper.[8]

b. It should come as no surprise that, on a revenue per ton-mile basis, European shorter haul rates are higher than Canadian rates for much longer average hauls, or that Russian rail freight rates – which cover distances even greater than the average length of haul in Canada – are lower than rates in Canada. A similar relationship can be observed between short-haul and long-haul rates within Canada.

c. Other flaws in that CPCS study include a complete lack of consideration of differences between jurisdictions relating to (i) traffic mix (*e.g.*, the proportion of traffic consisting of containers vs. bulk vs. automotive vs. refined products and the different handling requirements and rate levels associated with different traffic categories), (ii) the length and weight of freight trains, which are much shorter and lighter in Europe, resulting in higher railway costs per revenue ton mile (iii) the prevalence of shipper-supplied rather than railway-supplied railcars, also affecting the railways' cost of transporting the traffic, (iv) subsidization of passenger operations and priorities afforded to passenger trains, and (v) a myriad of other critical factors.

[8] See *Vision and Balance*, Report of the *Canada Transportation Act* Review Panel, June 2001 (https://publications.gc.ca/collections/Collection/T22-107-2001E.pdf), page 68 and footnote 5 on page 98.