THE REGULATION OF INTERSWITCHING IN CANADA: A DIFFERENT PERSPECTIVE ON THE CASE FOR DITCHING THE SWITCH

By Lucia Stuhldreier[1]

I. INTRODUCTION

The *Canada Transportation Act* (the Act or CTA) requires every federally regulated railway company to "afford to all persons and other companies all adequate and suitable accommodation for . . . the transfer of traffic between its railway and other railways . . . ."[2] The term "interswitching" is most commonly used to refer to those transfers that are subject to rates and conditions set by the Canadian Transportation Agency (Agency), the economic regulator of rail transportation in Canada.

The use of railway interswitching, its purpose under Canadian rail transportation policy, and its effect on rail transportation in Canada have drawn intense debate over the years, typically involving strongly held positions and a limited audience. After the federal government introduced legislative amendments in late March 2023 to expand interswitching limits in three Canadian Provinces from 30 km to 160 km, however, that debate spilled onto the opinion pages of Canadian daily newspapers,[3] social media, and billboards on the streets of Canada's national capital.

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[2] *Canada Transportation Act*, S.C. 1996, c. 10, s. 114(1).

[3] See, for example, Daniel Dufour, *Opinion: Ottawa's extension of forced interswitching is no way to run the railways*, Financial Post, May 31, 2023 and Barry Prentice, *Regulatory changes for railways are a bad idea*, Winnipeg Free Press (June 19, 2023).

Critics of interswitching generally, and of the recent expansion of interswitching limits in particular, claim interswitching results in operational inefficiencies and undermines the financial viability of railway companies. Proponents of retaining interswitching or expanding its reach highlight the important role this mechanism plays in facilitating intramodal rail competition that would not otherwise exist for many Canadian shippers. Given that at least one Canadian Class I carrier has publicly stated that "Happily, we have found that [it] is possible to compete, invest and grow"[4] under the Canadian regulatory regime, calls for dismantling the interswitching regime in Canada seem premature, to say the least.

This paper addresses the role of interswitching in the context of Canadian transportation policy, provides an overview of the different types of interswitching that currently exist under Canadian legislation, and discusses recent developments surrounding interswitching. Throughout, the paper attempts to address common criticisms of and misconceptions about interswitching in Canada, including some of the criticisms put forward in a paper by Mary-Jane Bennett, published in a recent issue of this *Journal*.[5]

II. INTERSWITCHING AND CANADIAN TRANSPORTATION POLICY

The first instances of interswitching pursuant to *ad hoc* orders in the early 1900s are frequently portrayed as driven by a desire to limit the proliferation of railway lines in urban areas. Early on, however, faced with a multitude of complaints,[6] the regulator recognized that a broader approach was necessary. By 1918, the Board of Railway Commissioners (Board), after reviewing then-current carrier practices, found that the principal effect of

[4] Written Comments of Canadian Pacific, U.S. Surface Transportation Board (STB) proceeding EP 711, at 1-2 (Feb. 14, 2022) [hereinafter Canadian Pacific EP 711 Comments].
[5] Mary-Jane Bennett, *Should Canada Ditch the Switch? Interswitching and Canadian Rail Policy*, 89 J. TRANSP. L. LOGISTICS & POL'Y [2], 37-76 (2022).
[6] In Order No. 4988, issued on July 8, 1908, for example, the Board of Railway Commissioners for Canada dealt with no fewer than thirteen complaints regarding charges imposed by a combined total of six different railway companies.

leaving railway companies free to charge their full tariffs for these movements resulted in *de facto* embargoes. The Board concluded that "interswitching should be no longer carried on as a matter of grace, but as a matter of right."[7]

Decades later, when Parliament enacted legislation that embraced competition, initially among different transportation modes[8] and subsequently also within modes,[9] as a cornerstone of Canadian transportation policy, interswitching took on heightened significance as a pro-competitive mechanism. The NTA 87 reduced regulation and freed rail carriers to enter into confidential contracts with their customers. At the same time, the government was acutely aware that these reforms alone were unlikely to extend the benefits of competition to shippers served by a single rail carrier. Rather than de-regulating interswitching, the NTA 87 codified regulated interswitching as of right and expanded the applicable limit from fourmiles to 30 kilometres (approximately 18.6 miles).

Speaking in the House of Commons to what was then Bill C-18, the Honourable John Crosbie, then Minister of Transport, stated:

> The Bill also has three competitive access provisions: extended interswitching limits, terminal running rights, and competitive line rates. All those provisions will assist captive shippers, that is, shippers which have access to only one railway. Those shippers will now have far greater bargaining power on rates and services, and railways will, in the future have to compete with one another for traffic from the captive shippers.[10]

These sentiments were echoed by the National Transportation Act

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[7] Reasons for General Order No. 230, *In the matter of the Interswitching of Freight Traffic*, File No. 6713, Case No. 2846 (May 15, 1918).
[8] *National Transportation Act, 1967.*
[9] *National Transportation Act, 1987* (NTA 87).
[10] Canada, Parliament, House of Commons Debates, 33rd Parliament, 2nd Session, Vol II, at 2323 (Dec. 19, 1986).

Review Commission appointed in 1992 to review the operation of the NTA 87. In its report, the Commission described the regulatory reforms introduced in 1987 as follows:

> Where there is little or no real competition to a single railway, the Act also sought to encourage competitive behavior. For instance, shippers of bulk commodities such as lumber, coal and potash are often served by only one rail line, and either have no access to other modes of transport or these modes are not economical for them. In such cases, the Act sought to encourage competitive behaviours with two main provisions. First, it extended the limit of interswitching – the maximum distance within which a railway must switch the freight cars of its competitors – from 6.4 kilometres (four miles) to 30 kilometres. Second, it introduced the provision of competitive line rates by which a railway, at the request of a shipper, must quote a rate to transport goods to a competitor's line. . . . [11]

More recently, the Federal Court of Appeal of Canada has aptly described interswitching as one of "a series of remedies designed to reduce *any* shipper's reliance on a single railway company . . . ."[12]

It is an essential feature of regulated interswitching that it does not necessarily require an actual transfer of traffic in order to further this legislative intent. Regulated interswitching encourages competitive behaviour by precluding the local carrier with direct access to a shipper's facility from designating that facility as "closed" to potential competitors within the prescribed limit as well as from adopting exclusionary pricing that forecloses competition. Where it creates a credible risk of losing the line haul to another carrier, regulated interswitching provides the local carrier with added incentive to offer a rate and service package that will retain the traffic on its own line.

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[11] *Competition in Transportation: Policy and Legislation in Review*, Report of the National Transportation Act Review Commission, Vol. 1, at 127 (1993).

[12] *Can. Pac. Ry. Co. v. Canexus Chems. Can. LP*, 2015 FCA 283, ¶ 139 (emphasis added).

All other things being equal, a shipper has every reason to prefer a direct, single-carrier routing to more complex routing involving two or more carriers. Claims that Canadian shippers rarely use interswitching as a rate remedy[13] completely ignore this dynamic. Regulated interswitching works best as a pro-competitive mechanism when it injects a measure of competitive tension into the shipper's relationship with its local carrier.

The notion, advocated by some, that regulated interswitching should be limited to specific circumstances where market abuse, price gouging, or substandard service is proven, rests on a misunderstanding of Canadian law and policy. The statement of Canada's national transportation policy in section 5 of the Act[14] recognizes that "competition and market forces, both within and among the various modes of transportation" should be the "prime agents in providing viable and effective transportation services."[15] At the same time, the policy explicitly endorses the use of regulation and strategic public intervention to achieve economic and other outcomes that cannot be achieved satisfactorily by competition and market forces.[16] Neither the plain wording of the statute, nor its legislative history, nor the jurisprudence that has considered the policy over the years justifies reading into the policy statement that regulatory measures should only be available in specific cases involving demonstrated abusive behaviour.

III. TYPES OF INTERSWITCHING IN CANADIAN LAW

The Act uses the term "interswitching" in connection with three mechanisms: regulated interswitching within a prescribed distance of an interchange, extended interswitching pursuant to an Agency order, and so-called long-haul interswitching. While extended interswitching allows for a case-by-case extension of regulated interswitching for relatively short distances

[13] Canadian Pacific EP 711 Comments at 5.
[14] S.C. 1996, c. 10.
[15] The policy does not speak of "competitive market pressures . . . in one form or another," *pace* Bennett, *supra* note 5, at 62, but of actual *transportation* competition, both intra- and intermodal.
[16] See clauses (a) and (b) of section 5.

outside the 30 km limit, long-haul interswitching is a fundamentally different remedy.

A. Regulated or "Zone" Interswitching

Where the point of origin or destination is within the prescribed limit (currently 160 km in the three Prairie Provinces and 30 km everywhere else)[17] of an interchange, the Act prohibits a railway company from transferring the traffic at the interchange "except in accordance with the regulations and the interswitching rate."[18] In other words, regulated interswitching is available as of right.

The *Railway Interswitching Regulations* establish several zones within the 30 km radial limit, based on track distance. In addition, they provide for a separate "car block" category where 60 or more cars are interswitched as a block. The local carrier performing the interswitching movement must not favour its own line haul traffic over interswitched traffic in terms of service levels. The responsibility for supplying railcars for interswitched traffic, however, rests with the connecting or line haul carrier.

While the Agency has the power to grant interswitching orders on application by a railway company, a municipal government or any other interested person,[19] the vast majority of interswitching in Canada takes place without any involvement of the Agency. Since 1988, the Agency and its predecessor have issued a total of fourteen decisions[20] in contested proceedings, dealing with such issues as whether a particular location qualified as an interchange for the purposes of regulated interswitching and which

[17] Since 1988, the prescribed limit has been a radial distance of 30 km, with two notable exceptions: (1) a temporary expansion to 160 km in Prairie Provinces of Alberta, Saskatchewan and Manitoba, that was in effect from August 2014 through July 2017 and (2) a more recent expansion, also to 160 km and again limited to the three Prairie Provinces, that took effect in September 2023 and is set to automatically expire in March 2025. Both temporary expansions are discussed below.

[18] Subsections 127(3) and (5).

[19] Subsection 127(1).

[20] Based on decisions published on the Agency's website.

interswitching rate applied to the traffic at issue. Six of these decisions arose from applications by shippers;[21] the remaining eight were initiated by rail carriers.[22] In dealing with these applications, the Agency has generally adopted a broad interpretation of the interswitching provisions in order to give effect to the legislative purpose of interswitching. The Agency has rejected railway arguments that would leave the availability of a remedy "designed to relieve against near monopolistic situations . . . to the discretion of the very railway company that benefits from that near monopoly."[23]

The regulated interswitching regime leaves railways free to agree on how they will handle the actual transfer of interswitched traffic[24] and has not impeded the development or implementation of operating protocols that reduce congestion and improve efficiency in busy terminal areas.[25] While the Agency has the power to order one or both railway companies to provide reasonable facilities for interswitching at an interchange,[26] it has never done so. Despite railway protestations in contested cases and elsewhere that regulated interswitching puts an unreasonable onus on the local carrier to expand existing infrastructure, there have been no reported applications by any local carrier to compel the connecting carrier who stands to benefit from interswitching to contribute "reasonable facilities" for interswitching.

The operational flexibility afforded to railways under the regulated interswitching regime and the absence of direct intervention by the regulator in most cases has prompted some to describe transfers that are in effect

[21] Order 1992-R-207; Decision CONF-4-2016; Decision 466-R-2013; Decision 62-R-2021, Decision 165-R-2013; Decision CONF-11-2016.
[22] Decision No. 35-R-2009; Decision No. 514-R-2007; Decision No. CONF-6-2017; Decision No. 472-R-2003; Decision No. 329-R-2001; Decision No. 298-R-1993; Decision No. 206-R-1988; Decision No. 631-R-1989.
[23] See, for example, Decision No. CONF-6-2017, ¶ 74.
[24] As the Agency noted in Decision No. 165-R-2013, ¶¶ 83 to 85, railways may decide "for purely operational reasons" to use a different location for the actual transfer, but by doing so cannot "circumvent the application of the interswitching provisions" or deny shippers "the benefit of interswitching that Parliament created to increase competitive access for shippers."
[25] Canadian Pacific EP 711 Comments at 3.
[26] Section 127(2).

backstopped by a statutory obligation and subject to regulated rates as "voluntary"[27] or "not truly Regulated (with a capital 'R')."[28] A more apt characterization is that interswitching has proven to be a form of economic regulation that is effective without being unduly intrusive.

B. Extended Interswitching Orders

On application, the Agency may grant an order for extended interswitching by deeming a point of origin or destination that is outside the prescribed 30 km radius to be within 30 km of an interchange.[29] Given the statutory prerequisite that it consider the facility to be "reasonably close" to the interchange, the Agency has indicated that it will treat distance as the main factor in adjudicating applications for extended interswitching.

Since 1988, there have been only six such applications, all of them by shippers.[30] Of these, only four resulted in the Agency granting an interswitching order. None of the successful applications involved radial distances exceeding 40 km or track distances exceeding 50 km. The provisions allowing for extended interswitching on application can hardly be said to pose a threat to railway viability.

C. Long-Haul Interswitching

In 2016, the government introduced Bill C-49 – *The Transportation Modernization Act*, which, among other things, amended the Act to provide for Long-Haul Interswitching (LHI). Then Minister of Transport Marc Garneau, speaking to the bill in the House of Commons stated:

> We would also create a new mechanism called long-haul interswitching. This would be available to all captive

[27] Bennett, *supra* note 5, at 41.
[28] Canadian Pacific EP 711 Comments at 4.
[29] Subsection 127(4).
[30] Decision No. 269-R-1988; Decision No. 439-R-1989; Decision No. 165-R-1990; Decision No. CONF-15-2018; Decision No. CONF-18-2018; Decision No. 85-R-2020.

> shippers in all regions of the country and all sectors. It would introduce competitive alternatives for their traffic and better position them in negotiations for service options and rates."[31]

In reality, LHI was hardly new, it explicitly *excludes* captive shippers in certain regions of Canada and in certain sectors, and it has proven to be utterly ineffective at introducing competitive alternatives for captive shippers.

For the most part, LHI mirrors the Competitive Line Rate (CLR) remedy that was first introduced in 1988[32] and that has not been used since the early 1990s.[33] Like CLR, LHI allows a shipper served by only one railway to apply to the Agency to set the rate and conditions for a movement from the shipper's facility to the nearest interchange with a connecting carrier, up to a distance of 1200 km or 50 percent of the total haul distance in Canada, whichever is greater. To the extent the parties cannot agree, the Agency determines the rate, the overall routing for the traffic, the nearest interchange and any service conditions.[34] Unlike rates for regulated interswitching, LHI rates must be set primarily on the basis of the average *revenue* that the local carrier receives from comparable traffic.

LHI differs from the previous CLR remedy, however, in a number of respects that make it even less effective than CLR and have doomed it to similar fate. To name only three of these:

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[31] Canada, Parliament, House of Commons Debates, 42nd Parliament, 1st Session, vol. 148, No. 187, at 12062 (June 5, 2017).

[32] NTA 87 §§ 134 to 143.

[33] While there were a handful of CLR applications in the late 1980s and early 1990s, a commission appointed by the Minister of Transport to review the operation of the NTA 87 concluded in 1992 that the CLR remedy had been rendered "inoperative" because CN and CP had effectively "declined to compete" through CLRs.

[34] The Agency's Long-Haul Interswitching; A guide for freight rail shippers and federal railway companies, published in 2019, outlines a two-stage process with the first stage devoted to all non-rate issues. It also leaves no doubt that *both* parties will be afforded an opportunity to make submissions on these issues, including the routing (*pace* Bennett).

First, the remedy is subject to significant new eligibility restrictions that exclude MANY captive rail shippers to whom CLR was, at least in principle, available.

Secondly, in order to avail itself of LHI (and before knowing what rate, routing or other parameters the Agency will determine), a shipper must commit to ship its traffic in accordance with the LHI order. In other words, rather than opening up the possibility of negotiating with two rail carriers, as CLR did and as regulated interswitching does, LHI effectively requires the shipper to exchange one form of captivity (to its local carrier) for another (to the connecting carrier and the LHI routing).

Thirdly, LHI suffers from built-in procedural unfairness in that the Act explicitly prohibits the Agency from disclosing to the applicant the main evidence that it must use in determining the LHI rate. Unlike in regulated interswitching rates, costs play no role in the Agency's determination of LHI rates. Instead, the Agency must take into account the revenue the local carrier receives for transporting comparable traffic based on a comprehensive set of detailed waybill data the railways file with Transport Canada on a monthly basis. A shipper will of course know the rates it is paying but will be completely blind with respect to the rates its rail carrier is charging for comparable traffic and will not have the same opportunity as the respondent railway to assess or comment on the rates or, for that matter, the comparable traffic on which the Agency must base its LHI rate determination.

Given these and other inherent flaws in the remedy, it is not surprising that the Agency has not received a single application for LHI since the provisions came into force in May 2018. LHI is accordingly not to blame for the congestion experienced in and around Vancouver, British Columbia, in December 2018 and January 2019[35] or for any other traffic backlogs or delays. LHI is not interfering with the fiscal health of Canadian National Railway (CN) or CPKC and is not being used to divert Canadian rail traffic to U.S. Class I carriers. LHI has not been used to regulate the rate on a single Canadian

[35] The Act explicitly *excludes* interchanges in the Vancouver area from the application of LHI.

carload, let alone a significant percentage of Canadian rail traffic (*pace* Bennett). There are indeed valid reasons for repealing or fundamentally overhauling LHI, but those reasons have absolutely nothing to do with harmful impacts on railway operations, network fluidity or financial viability of Canadian railways.

IV. INTERSWITCHING RATES

Interswitching rates are determined annually by the Agency. For each interswitching zone, the Agency sets a single car rate that applies per railcar in shipments of less than 60 railcars and a car block rate that applies per railcar in shipments of 60 or more railcars. Pursuant to its statutory mandate, the Agency estimates the average variable costs of all regulated interswitching movements[36] and applies a contribution to fixed costs equal to what the Agency determines the railways require on a system-wide basis to cover their total economic costs. For 2023 the Agency determined that contribution to be 83.35 percent of system variable costs. Put another way, the 2023 interswitching rates are designed to generate an overall revenue to variable cost ratio on all interswitched traffic of 183.35 percent.[37]

During a review of the Act conducted in 2014-2015, a number of concerns were raised with respect to regulated interswitching rates. In his final report, David Emerson recommended a comprehensive review of the Agency's interswitching rate methodology which would "determine whether they are truly compensatory in all or most instances"[38] and further recommended that the Agency be permitted to set rates annually without requiring amendments to regulations in order to make rate-setting more responsive to changes in railway

[36] Variable costs are volume-weighted for each interchange, each zone, each shipment size and each railway.
[37] Determination No. R-2022-164, App. A.
[38] *Pathways: Connecting Canada's Transportation System to the World*, Report of the Canada Transportation Act Review, at 164 (2015).

costs.[39] Concerns raised in 2015, however, are of limited relevance or application today.

First, the Act was amended in 2018 to require the Agency to make annual determinations of interswitching rates and to permit the Agency to require railway companies to provide any information or documents it considers necessary to exercise its rate setting mandate. Prior to these amendments, the Agency could only revise the rates by amending the *Railway Interswitching Regulations.* In practice, the formal requirements associated with making amendments to regulations typically resulted in a considerable time lag between when the Agency reviewed the rates and when new rates took effect.[40] The rates in effect when stakeholders were making submissions to the 2015 CTA Review, for example, had been established by regulation in 2013, after a consultation period that began in 2012, and were developed on the basis of 2009 interswitching variable cost estimates.

The 2018 changes to the Act have eliminated much of the lag time by allowing the Agency to issue rate determinations without going through the formal process for amending regulations. In addition, the Agency has used its new power to compel the production of additional information it requires to determine the rates.[41]

Secondly, since the publication of the Final Report of the 2015 CTA Review, the Agency has conducted extensive and multifaceted reviews aimed

[39] *Id.*

[40] Federal regulatory amendments generally follow a process whereby the proposed text is published in Part I of the *Canada Gazette*, followed by a comment period, before the final text is registered and takes effect. In the case of regulations made by the Agency, however, there are added requirements of prior notice to the Minister of Transport and approval from the Governor in Council (i.e., effectively, the federal cabinet).

[41] Agency staff also continue to conduct annual site visits to various interchange locations to verify each step involved in providing interswitching at those locations, and railways have the option of requesting that specific interchanges or a specific shipper's traffic be included in the visits. *See* Determination R-2019-230, ¶ 47.

at updating both its regulatory costing model and its methodology for setting regulated interswitching rates.[42]

Claims that despite these developments regulated interswitching rates continue to be "below market" or turn interswitching into "money-losing" transfers should be approached with caution. Since the 2015 CTA Review, rates have increased substantially. Depending on the zone, the 2023 rates for single railcars and blocks of up to 59 railcars that are transferred within 30 km of an interchange, range from CAD 410 to 515 (USD 300 to 400, approximately) per railcar,[43] representing cumulative increases since 2015 of between 79 and 161 percent. For movements in Zone 5 (i.e., in the Prairie Provinces and beyond the 30 km radius but within 160 km of an interchange), the rates for shipments of this size range from CAD 849 to 1,387[44] (USD 630 to 1,029, approximately) per railcar, depending on track distance, representing cumulative increases ranging from 140 to 161 percent since 2015.

By comparison, published tariff rates for switching by CN and CPKC in the United States range from USD 105 to 1,150 per railcar for CPKC[45] and from USD 300 to 1,600 per railcar for CN.[46] Even if one excludes the Zone 5 rates, it is accordingly not immediately apparent that Canadian interswitching rates, while perhaps at the low end of unregulated rates, are "below market."

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[42] These include: *Consultation on the Agency's Regulatory Costing Model* (2016-17), *Consultation on the CTA Approach to Setting Regulated Interswitching Rates* (2019), *Regulated Interswitching: Proposed Changes to Rate-Setting and Billing* (2020); *Consultation on Cost of Capital Rates* (2020); *Consultation on General Purpose Debt* (2021). In these consultations, neither of Canada's two Class I carriers supported the adoption of rate categories based on Ramsey pricing principles, geographic factors or commodity.

[43] Determination No. R-2022-164, converted to USD using the average Bank of Canada exchange rate (January through October 2023).

[44] Determination No. R-2023-178, rates converted to USD using the average Bank of Canada exchange rate (January through October 2023).

[45] CP Tariff 7, Revision 2023.2, effective November 1, 2023, Item 30.

[46] CN Tariff 9001 U.S. T, effective July 1, 2023, Items 5040 to 5930.

V. RECENT DEVELOPMENTS

A. The 2022 National Supply Chain Task Force

In March 2022, the federal Minister of Transport, noting that global supply chains continued to be disrupted by the COVID-19 pandemic, impacts of climate change, and recent sanctions against Russia, announced that ensuring resiliency and fluidity in Canadian supply chains was a government priority. The Minister appointed a National Supply Chain Task Force to make recommendations on "actions that could be taken by all levels of government and industry to improve Canada's supply chain."

Following extensive consultations with a broad range of transportation organizations, stakeholders, and industry experts across Canada, the Task Force issued its Final Report on October 6, 2022. Among other things, the Task Force recommended that the 30 km interswitching limited be expanded across Canada "to give shippers more rail options and to address shipper-railway power balance issues."[47] Explaining its rationale for this recommendation the Task Force noted:

> 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. An expanded interswitch distance option provides increased competition by offering shippers more choices.[48]

B. 2023 Amendments

In partial response to the recommendations contained in the Final Report of the Task Force, the federal government introduced legislative amendments in March 2023 (as part of a bill to implement its 2023 budget) to expand the radial distance for regulated interswitching from 30 km to 160 km

[47] Canada, *Action. Collaboration. Transformation: Final Report of the National Supply Chain Task Force*, at 18 (2022).
[48] *Id.*

in the three Prairie Provinces. Providing for what is essentially a repeat of the expanded limits that were put in place under a Conservative government in 2014 and remained in effect for 36 months from August 2014 through July 2017, the recent amendments introduced by the current Liberal government took effect in September 2023. Barring any further legislative amendments, the provisions will automatically be repealed after eighteen months.

Predictably, the Railway Association of Canada (RAC) and its two largest members, CN and CPKC, launched an aggressive lobbying and public relations campaign against the amendments. In social media as well as submissions to parliamentary committees tasked with studying the amendments, the railway industry claimed that expanding interswitching limits would lead to increased network congestion and reduced railway efficiency, and cause job losses in the Canadian rail industry and at Canadian ports by diverting Canadian traffic to U.S. carriers and U.S. ports. Claims that these predictions are supported by actual experience during the 2014-2017 expansion have, to date, not been borne out by the publicly available evidence.

Transport Canada has indicated that very little traffic moved under expanded interswitching in 2014 to 2017. According to information the Agency provided to the House of Commons Standing Committee on Transport, Infrastructure and Communities in 2016,[49] only 600 carloads were interchanged beyond the 30 km radius in the latter part of 2014, and that number grew to only 2900 carloads for the full year 2015. Consistent with these statistics, CN's submissions to the STB in 2022 indicated that expanded interswitching during 2014 to 2017 accounted for less than 2 percent of CN interswitching.[50] CPKC, similarly, told the STB in the same proceeding that the "access of certain

[49] Evidence before the Standing Committee on Transport, Infrastructure and Communities, 42nd Parliament, 1st Session, at 4, 8 (Sept. 20, 2016).
[50] Post-Hearing Supplemental Comments of CN, STB EP 711 (Sub-No. 1), *Reciprocal Switching*, at 3 (Apr. 4, 2022).

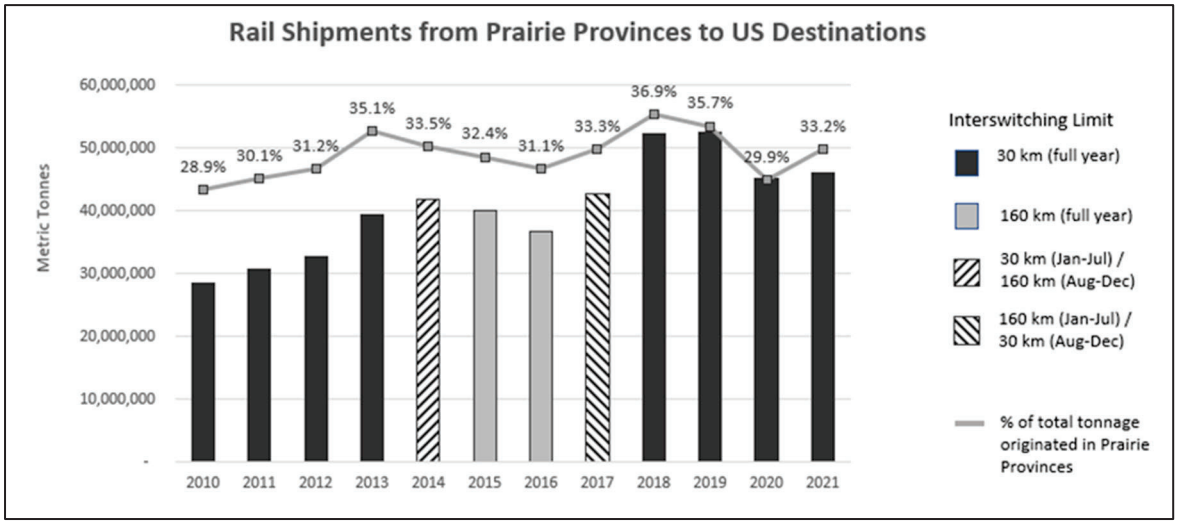
shippers to Regulated Interswitching over longer distances . . . did not significantly alter transportation shipping patterns. . . . "[51]

In any event, the criticism that broadening the availability of regulated interswitching to 160 km will necessarily lead to a corresponding increase in the volume of traffic that is physically transferred at competitive interchanges ignores a fundamental reality, recognized by the Agency. Railways can dissuade shippers on their networks from availing themselves of interswitching options by making their own rate and service offering more appealing than those of the competing carriers.

With respect to claims that, as a result of expanded interswitching limits in 2014 to 2017, "U.S. [railways] took business away from Canada,"[52] rail traffic volumes from the three Prairie Provinces to destinations in the United States did not increase during the 2014-2017 expansion, either in absolute terms or as a percentage of overall rail traffic originated in those Provinces, as illustrated below:

[51] Further Supplemental Comments of CP in STB EP 711 (Sub-No. 1) *Reciprocal Switching*, at 4 (Apr. 4, 2022).

[52] Railway Association of Canada, *Expanding Regulated Interswitching?*, at 2 https://tinyurl.com/mr2jub2t (last visited Nov. 30, 2023).



Source: Statistics Canada[53]

These statistics tend to support the Canadian railways' submissions to the U.S. regulator rather than the contradictory claims the Canadian rail industry has more recently advanced in Canada. While the publicly available data does not indicate the extent to which U.S.-bound traffic was handled by BNSF[54] rather than by a U.S. subsidiary of CN or CPKC, it fails to support current claims that expanded interswitching diverts traffic to U.S. ports or jeopardizes railway jobs in Canada.[55]

In addition to making speculative predictions regarding the detrimental effects of expanded interswitching limits, RAC has touted the results of a study by consulting firm CPCS[56] as establishing that Canadian rail freight rates are "among the lowest in the world" due to "robust competition" among Canadian

[53] Statistics Canada, Table 23-10-0062-01, Rail industry origin and destination of transported commodities.
[54] BNSF is the only U.S. Class I carrier with access to interchanges in the Prairie Provinces.
[55] As distinct from jobs at CN's and CPKC's U.S. subsidiaries.
[56] CPCS, *International Comparison of Rail Freight Rates* (Jan. 31, 2023).

railways.[57] The CPCS study, commissioned by RAC and released three months after the Final Report of the National Supply Chain Task Force, calculates average revenue-per-revenue-ton-mile (CRTM) values from all rail traffic for several international jurisdictions.[58] While noting that actual rail freight rates are influenced by many different factors, CPCS fails to acknowledge the extent to which these factors drive average CRTM values. For example, CPCS compares the average CRTM for rail movements in Canada with average CRTMs for rail movements in European jurisdictions, without any mention of the significant differences in the average distance over which rail traffic moves in these countries. In fact, the CRTM differences are largely driven by significant differences in distance: the average length of haul for the traffic included in the report was 1,469 km in Canada and between 232 km and 417 km in the European jurisdictions. Rather than providing any meaningful insight into relative rail freight rate levels, CPCS' comparison does little more than illustrate the well-known "rate taper" effect, of which anyone routinely engaged in analyzing rail freight rates is or should be aware.[59]

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[57] *See generally id.*

[58] A more fulsome critique of the CPCS Report and the conclusions that RAC and its members have attempted to draw from it can be found at: FairRail, www.fairrail.ca (last visited Nov. 30, 2023).

[59] A 2017 publication, sponsored by the World Bank, that studied international rail freight rates, specifically cautions against indiscriminately benchmarking rates for traffic with different lengths of haul against each other, noting:

> Average distance per journey can raise or lower unit price [i.e., CRTM] because railways incur costs not only during hauling freight or passengers, but also at the start and the end of each journey. Thus, average freight tariffs and passenger fares are lower in large countries such as China, Russia, and the U.S.A. where starting and ending costs are a smaller proportion of much longer average journeys than, for example, in smaller countries such as Belgium. Without complete data on tariffs and fare schedules for both subject and benchmark railways, adjusting for this type of unit price differential is impossible.

See World Bank Group, *Railway Reform: Toolkit for Improving Rail Sector Performance*, at 234 (Sept. 2017), https://tinyurl.com/4f4fv65f.

VI. CONCLUSION

As both of Canada's Class I railways have stressed in their comments to the STB in EP No. 711 (Sub-No. 1), the long-standing availability of regulated interswitching has shaped the Canadian rail network,[60] influencing investment decisions of both railways and shippers. In that proceeding, CPKC noted that "88% of all customer shipping origins on CP's network are currently sole-served by one railroad . . . "[61] and that in many locations in Canada shippers would continue to require physical transfers between railways to reach their intended destination. While there are no doubt some areas of the Canadian rail network where CN and CPKC compete vigorously with each other for some traffic, advocates of removing all regulatory constraints on the railways' freedom to choose where and at what price to interswitch traffic tend to gloss over the fact that such competition is absent from large sections of the Canadian rail system.

In the absence of clear evidence that regulated interswitching undermines the financial viability of Canadian railways, there is no valid basis in Canadian transportation policy for abandoning regulated interswitching or for dismissing out of hand the possibility of expanding the availability of this mechanism.

[60] Comments and Written Testimony of CN, STB Docket No. EP 711 (Sub-No. 1), at 11 (Feb. 14, 2014); Canadian Pacific EP 711 Comments at 2-3.
[61] Canadian Pacific EP 711 Comments at 3.