# YOURS OR MINE: A HISTORY OF INTERSWITCHING IN CANADA

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## Introduction

> *Many complaints have from time to time been made both by the railways and by shippers as to the interswitching rules and service as now practised by the railways. The general issue is one of long standing and is probably, indeed, one which will never be finally determined.*
>
> Sir Henry L. Drayton, K.C., Chief Commissioner, Board of Railway Commissioners for Canada
> **May 15, 1918**

Followers of Canadian rail policy will likely find that Sir Henry's words continue to ring true over a century later. Canada recently extended interswitching limits in the three Prairie Provinces from 30 km to 160 km. This recent extension sparked debate about the role of competitive access in modern Canadian rail policy, with some commentators suggesting that regulated interswitching is damaging to Canada's supply chains.[1] Regulated interswitching in Canada has even featured south of the border, where the U.S. Surface Transportation Board recently solicited testimony regarding the Canadian experience in reviewing its own reciprocal switching policies.[2]

In discussing the role and future of regulated interswitching, it is common for commentators and stakeholders to portray the history of regulated interswitching in a manner that supports their position on modern policy.[3] The malleability of this history is not a reflection of a vigorous academic dialogue on the history of regulated interswitching, but of the dearth of substantive analytical sources of this history.

In this paper, we analyse the significant judgments, orders, legislation, and regulations that shaped the history of regulated interswitching in order to examine the historical development of the practice. While there might be value in a systematic review of archive material relating to the historical legislative and regulatory scheme governing Canadian railways, this is beyond the scope of this paper.[4] Rather, we survey the history of the origins of interswitching, and discuss how that history relates to its modern function as a competitive access tool under the current regulatory regime.

## Initial Development of Regulated Interswitching

On May 15, 1918, the Board of Railway Commissioners for Canada (the "Board") issued a judgment, attaching General Order No. 230 (together, the "1918 Order"), that set out in substance what would later that year become the first rules for universal compulsory regulated interswitching in Canada. As the author of the judgment, the Chief Commissioner prefaced those rules with a summary discussion of the history of interswitching in Canada.

The Chief Commissioner describes the initial practice of interswitching as mutually beneficial for the participating railways. Canadian Pacific Railway Company ("CPR") and Grand Trunk Railway Company ("GTR"), a predecessor to the modern day Canadian National Railway, each maintained sidings in different

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parts of Toronto, and the two railways conducted regular interswitching operations as "[e]ach company was desirous of obtaining access to the sidings of the other, so that the interests of both were reciprocal."[5] This brief era of uncontroversial interswitching came to an end in 1905 when the Board issued an order on CPR's application, requiring GTR to afford proper facilities for the interchange of traffic with CPR in London, Ontario (the "London Interswitching Case"). The Board prescribed the rates that could be charged for switching services in London. For the movement of traffic from the interchange to its final destination, the local carrier was permitted to charge 20 cents per ton, with a minimum charge of $5, and no extra charge for switching the empty car in the opposite direction. Where GTR provided intermediate switching services between CPR and the Pere Marquette Railway, GTR was permitted to charge $3 per car in either direction, regardless of weight, with no charge for the empty car.[6]

At the time, CPR's terminal facilities in London were less extensive than those of GTR, and the Board acknowledged that CPR would obtain greater benefit from the order.[7] Nonetheless, the Board assessed that the order was in the public interest, and that "the joint rates for traffic thus interchanged should be made upon the principle of giving reasonable compensation for the services and facilities furnished by the respective companies" rather than any assessment of how the business of either railway might be impacted by the obligation to interswitch traffic.[8] GTR subsequently appealed to the Supreme Court of Canada, arguing that the Board did not have the authority to regulate interswitching services and rates by order. However, Parliament headed off the appeal and endorsed the Board's decision by passing amendments to the *Railway Act, 1903* (the "Railway Act") that explicitly permitted the Board to issue orders in this manner.[9]

The London Interswitching Case was the first of many Board efforts, both specific and general, to create rules for the interchange of traffic between rail carriers. In the period that followed this initial order, the Board received a deluge of complaints against various railway companies with respect to the charges they imposed for interswitching service at other locations.[10] In 1908, the Board sought to deal with the matter of interswitching "in a general manner as far as possible with the view of establishing some fixed basis for payment for interswitching services".[11] The resulting Order No. 4988 (the "1908 Order") set out a general tariff for interswitching movements within a 4-mile (6.4 kilometre) track distance of the interchange. For movements that required interswitching, the local carrier was permitted to charge a rate of 20 cents per ton, with a minimum charge of $3 and a maximum charge of $8, and the return of empty cars was to be completed free of charge.

The 1908 Order also allowed the connecting carrier to absorb the toll charged by the local carrier for the interswitching of traffic, rather than passing on the cost to the shipper.[12] This rule was important in a system where carriers were otherwise prohibited from discriminating between shippers. The Railway Act required that all tolls "under substantially similar circumstances and conditions be charged equally to all persons, and at the same rate, whether by weight, mileage or otherwise, in respect of all traffic of the same description and carried in or upon a like kind of cars, passing over the same portion of the line of railway[; and] no reduction or advance in any such tolls shall be made, either directly or indirectly, in favour of or against any particular person or company travelling upon or using the railway."[13] Given this statutory restriction, a connecting carrier would otherwise be required to pass on the cost of interswitching to shippers. This would unduly disadvantage a connecting carrier in offering a comparable rate to that offered by the local carrier, and, in turn, reduce the attractiveness of an interswitched movement that may have otherwise been in the best interest of the public.

Importantly, the 1908 Order did not generally compel railways to make terminal facilities, including team tracks,[14] available for interswitching service. Except where specific orders otherwise compelled local carriers to provide such service, interswitching service to team tracks was only available where local carriers believed it to be to their benefit. Prior to the existence of a general interswitching obligation, specific orders to provide terminal facilities for interswitching service were obtained with respect to interswitching services

in Lindsay, Ontario, New Westminster, British Columbia, and Rossland, British Columbia, in addition to London, Ontario.[15]

In the 1918 Order, the Chief Commissioner addressed carrier concerns regarding the use of terminal facilities for regulated interswitching. After highlighting that instances where carriers refused to provide interswitching service to team tracks were becoming increasingly common, the Chief Commissioner observed that "[i]t would appear that the underlying reason is that the Canadian Northern is now operating in the eastern part of Canada and, speaking generally, it is without proper terminal facilities."[16] Railways pointed to the money they had spent on their terminal facilities and did not believe that they were sufficiently compensated for interswitching service. Where a connecting carrier was not able to provide a reciprocal interswitching service of value, local carriers were unwilling to accept the regulated fee as an adequate *quid pro quo*. The Chief Commissioner further acknowledged that "over and above the question of property rights of companies owning proper and sufficient terminals is that of public interests, in that no company will make any investment not absolutely required for the necessities of its own business of the time, if it is always subject to the peril of having such facilities taken over for the use of a competing line making no similar investment."[17] However, the Chief Commissioner nonetheless prioritized the public interest in interswitching, noting that it is a "question of vital concern".[18]

As local railways were still permitted to charge their full tariff rate for interswitched movements destined for their own team tracks prior to the 1918 Order, the Chief Commissioner identified that "the principal effect of this is to form an embargo, and to shut off the movements of freight against the interests of at least certain portions of the territory served by Canadian railways."[19] On this basis, the 1918 Order compelled local carriers to provide interswitching services at all times, at the service level equal to that provided to the local carriers' own line-haul traffic, at all present or future interchange points. The toll remained identical to the 1908 Order with respect to service to private and industrial sidings, but the maximum charge was eliminated, and the minimum charge raised to $5 per car for certain classes of commodities. For team tracks, the toll was doubled to 40 cents per ton, with a minimum charge of $6 per car.

Under the 1918 Order, prescribed rates were unavailable if they deprived the local carrier of the line haul business, so long as the local carrier, alone or by interswitching, could provide the same delivery and facilities at an equal or lesser charge.[20] Further, if a local carrier failed to provide a car within 48 hours after a request, or otherwise embargoed any portion of the relevant route, the shipper could obtain an interswitched car from a connecting carrier at the prescribed interswitching rates.

An important historical factor in the initial development of regulated interswitching was the role of cartage as a functional alternative. Simply put, cartage is the transportation of cargo to or from the relevant rail tracks, from the initial place of shipment or to final destination, as applicable. Railways in the 19th and early 20th centuries might arrange or provide this service to shippers or consignees.[21] In fact, cartage services provided by carriers were explicitly included in the definition of the word "toll" in the Railway Act.[22] Therefore, where carriers provided cartage services, they were required to publish and file details of such services as part of all applicable tariffs. The Chief Commissioner discussed the use of cartage as a competitive tool in the 1918 Order:

> The cartage in question is not general in its nature. It is not a privilege or a reduction open to all shippers or consignees at any given point. It is a service which some companies in some instances have put in for the purpose of competition and with the object of overcoming the advantages which the terminal facilities of a competing line give it. It has not been put in for the purpose of meeting the advantages which a better located system of team tracks gives a competing line. So far as I know, no company has yet gone this length, but it has been made effective in connection with the shipments of merchants located upon or adjacent to private sidings of a competing line.

The Chief Commissioner notes that railways have effectively used free cartage to compete for shippers who otherwise have access to private sidings on competing railways. This makes sense. If a shipper has immediate access to a railway line, access they have likely expended money and allocated land to obtain, significant incentives would be required for an alternative carrier to win their business. By providing complimentary cartage services and picking up the freight from wherever it is located on the shipper's property, the competing railway lowers costs for the shipper who is no longer required to pay for labour to load railcars at their siding or move goods from various places around the plant to a spotted car.

In strict terms, the legality of free or assisted cartage was questionable. The practice likely constituted discrimination between shippers and was therefore prohibited under the Railway Act. This is because, where services that were considered part of a railway rate were in fact performed for free or otherwise discounted, the railway was in effect providing a discount for the line haul. Cartage allowances were a frequent target for complaints, but the Board permitted the practice in the absence of any mandatory interswitching order.[23]

While the matter was never officially addressed in Canada, the U.S. Interstate Commerce Commission ("ICC") considered whether or not cartage practices violated shipper discrimination rules in the 1897 case of *Wright v United States.*[24] The case concerned a pair of shippers, W and B, who were making similar shipments of beer from Cincinnati to Pittsburgh. Carriers X and Y both provided rail service between the two cities, and both carriers charged 15 cents per 100 pounds. B regularly shipped with carrier X because B's warehouse in Pittsburgh was located along a siding connected to the track of that carrier. W shipped with carrier Y even though W's Pittsburgh warehouse was not directly served by any track. To solicit B's business, carrier Y paid B 3.5 cents per 100 pounds to transport B's shipments to B's warehouse from carrier Y's depot. Though this was a fair market rate for B's cartage services, this payment was determined by the ICC to be a rebate that effectively discounted B's service allowing B to obtain rail service for 11.5 cents per 100 pounds, while W paid the full rate. Thus, the ICC concluded that such cartage practices violated the prohibition against discriminating amongst shippers.

Nonetheless, cartage was not explicitly curtailed in the 1918 Order. This was less a question of policy, than a question of temporary circumstance. The Chief Commissioner explicitly noted that railways had "suffered from the unusual and aggravated conditions brought about by the war," and it was not then appropriate to weigh in on the practice. The effective date of the 1918 Order was subsequently postponed by World War I, before it was replaced by General Order No. 252, which went into effect January 1, 1919, and was substantially identical to the 1918 Order, but included a ban on cartage: "In view of the services and tolls herein provided for,"[25] all cartage that served to equalize the facilities of different railways in the same locality was banned. This obligated carriers to interswitch traffic if shippers wished to obtain service from carriers other than those which immediately served their facilities. Though there were small rate adjustments over time, the interswitching regime as established by General Order No. 252 remained in force until the introduction of the *National Transportation Act, 1987* ("NTA, 1987").

**Competition and the National Transportation Act**

While there was evidently some government interest in exploring revisions to the interswitching system in the years immediately preceding the introduction of the NTA, 1987,[26] the new legislation fundamentally transformed the regulation of railways in Canada. Strictly speaking, the practice of regulated interswitching continued unabated. Shippers were still able to have their freight switched to a second rail carrier at interchanges within prescribed distances of the origin or destination, while paying regulated rates. However, the structural changes brought to Canada's railways by the NTA, 1987 dramatically increased the significance and recognition of interswitching as a pro-competitive mechanism. In fact, regulated interswitching was expanded to further that function.

The NTA, 1987 was explicitly designed to, among other policy goals, ensure that "competition and market forces are, whenever possible, the prime agents in providing viable and effective transportation services."[27] To help achieve this goal, the NTA, 1987 included a basket of remedies to address situations where competition and market forces were lacking. To quote the Canadian Transportation Agency, regulated interswitching furthers the NTA, 1987's pro-competition policy goal by providing "shippers with greater access to competitive services at known prices to alternate rail carriers within interswitching limits."[28]

To function effectively under the new statute, regulated interswitching rules were modernized. Two key changes were integral in shaping regulated interswitching's role as a pro-competitive mechanism. First, shippers were able to access regulated interswitching if they were within a 30-kilometre (18.6 mile) radius[29] of an interchange, exceeding the old maximum distance track distance of 4 miles (6.4 kilometres). Secondly, regulated interswitching rates were made universal, and at a system-wide compensatory level.[30] After the introduction of the NTA, 1987, regulated interswitching rates consistent across Canada replaced any remaining orders that provided interswitching rates for specific locations.[31]

Prior to the NTA, 1987, shippers generally paid tariff rates for their shipments as they had no ability to negotiate an individual rate. The introduction of confidential contracting under the NTA, 1987, and the elimination of the prohibition on rate discrimination, allowed shippers with access to regulated interswitching to benefit from competition between carriers to seek more favourable terms for their shipments. In practice, a carrier did not need to actually interswitch traffic for a shipper to obtain benefits from intramodal competition in those locations where it was feasible for a shipper. Where regulated interswitching allows a shipper to access a connecting carrier to compete for the line haul business with the local carrier, the local carrier may be incented to provide competitive service and rates to retain the shipper's business. In this way, regulated interswitching helps to further the purpose of the NTA, 1987, through the beneficial effects of competition to remedy, in part, the ability of a local carrier to charge monopoly rates, or provide inadequate service for shipments captive to that local carrier, or both.

**Proliferation of Railway Lines**

It is occasionally suggested that a major reason for the original introduction of the concept of interswitching was to limit the proliferation of railway lines in urban areas.[32] While difficult to disprove a causal connection, there is little evidence to support the view that policy makers were heavily influenced by this concern. Discussion of problems related to overdevelopment is conspicuously absent from early key orders and decisions that created and developed regulated interswitching. If overdevelopment was a meaningful evil that regulated interswitching was intended to rectify, it would not make sense for the Chief Commissioner to omit any discussion of the topic from the sweeping history of interswitching regulation that preceded the text of the 1918 Order. The 1918 Order contains no discussion of the inefficient doubling of lines, or the impact that tracks have on the local population. Instead, the 1918 Order contains a pointed mention that railways first conducted interswitching operations to further their own and reciprocal interests in greater access to shippers, and extensive discussion of cartage in the context of pricing discrimination.[33]

In the 1918 Order, the Chief Commissioner describes the historical urban rail map of Toronto in general terms that mention no concern about overdevelopment: "the Canadian Pacific had sidings tributary to its tracks to the north and west of the city, and the Grand Trunk had sidings adjacent to its tracks along the Esplanade to the south." If the Chief Commissioner was worried about further rail lines, one would reasonably expect him to have included some statement to that effect.

This is further underscored by the Chief Commissioner's discussion of cartage in the 1918 Order. As mentioned above, the Chief Commissioner explicitly noted that to the best of his knowledge, Canadian railways did not use cartage to compete for shippers who used the team tracks of another railway. If there

was insufficient economic incentive for railways to utilize existing cartage facilities to compete for shippers who used the team tracks of another railway, it is difficult to imagine that those same railways would consider constructing rail lines to compete for those same shippers.

If the proliferation of railway lines was a concern for the carriers that engaged in interswitching, the historical record shows that this matter is separate and apart from the public interest that guided the development of regulated interswitching policy. Given the fundamental shift in policy that occurred with the introduction of the NTA, 1987, and the function explicitly assigned to regulated interswitching under that policy, any historical motivations to limit the railway lines in urban areas are irrelevant to the modern discourse on regulated interswitching.

**Conclusion**

The regulatory acts that created, justified, and advanced regulated interswitching policy show that the practice has developed to further the public interest notwithstanding the business interests of the railways. Given the monumental shift in transportation policy brought about by the NTA, 1987, the role of regulated interswitching regulations and policy has substantially changed from the period before the NTA, 1987 to the period after. The early regulated interswitching decisions were primarily concerned with the rates and terms under which carriers would interswitch traffic. Carriers initially undertook interswitching operations absent specific regulation, but for the mutual benefit of the carriers involved. Early decisions highlighted that access to different rail networks was in the public interest, and that high rates that effectively blocked access to certain networks could not be permitted. In its present incarnation, regulated interswitching provides some shippers with a tool in some limited circumstances to mitigate in part the lack of effective competition in the provision of rail services.

Regulated interswitching under the NTA, 1987, and its successor legislation, the *Canada Transportation Act*, allows some shippers who are able to use regulated interswitching to enjoy some of the benefits of railway competition. Its legislative and regulatory structure has remained substantially similar to how it appeared in 1987. As mentioned earlier, Canada has recently extended regulated interswitching to limits from 30 km to 160 km in the three Prairie Provinces, which may provide some further, though limited, railway competition in Canada.

Railways are not independent value generators in the context of a domestic economy. They are a necessary cost of commerce to account for the realities of geography. Regulated interswitching rates already cover the variable cost of providing rail service, plus a reasonable return on investment, including cost of capital. Excessive returns benefit railway shareholders to the detriment of the Canadian economy, communities, and employees. Though the role of regulated interswitching as a pro-competitive mechanism increased significantly following the introduction of the NTA, 1987, regulated interswitching has always existed to protect shippers from monopoly rates and otherwise protect the public interest.

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[1] See for example Daniel Dufort, "Opinion: Ottawa's extension of forced interswitching is no way to run the railways," *Financial Post* (May 31, 2023) (https://financialpost.com/opinion/ottawa-extension-forced-interswitching-no-way-run-railways), Barry Prentice, "Regulatory changes for railways are a bad idea," *Winnipeg Free Press* (June 19, 2023) (https://www.winnipegfreepress.com/opinion/analysis/2023/06/19/regulatory-changes-for-railways-are-a-bad-idea), and Mary-Jane Bennett, "Should Canada Ditch the Switch? Interswitching and Canadian Rail Policy," 89 *J. Transp. L. Logistics & Pol'y* [2] (2022), pp.37-76.

[2] See Canadian National Railway Company, Comments and Written Testimony of CN, STB Docket No. EP 711 (Sub-No. 1) *Reciprocal Switching* (February 14, 2022), and Canadian Pacific, Written Comments of Canadian Pacific, STB Docket No. EP 711 (Sub-No. 1) *Reciprocal Switching* (February 14, 2022).

[3] See for example Bennett (2022), and Canadian National Railway Company (2022).

[4] However, given the significance of modern developments in the historiography of Canada, particular as it relates to indigenous groups, and the significance of railways to Canada's history, such a systematic review would constitute a great contribution to Canadian historical scholarship.
[5] Board of Railway Commissioners for Canada, Reasons for General Order No. 230, *In the matter of the Interswitching of Freight Traffic*, File No. 6713, Case No. 2846 (May 15, 1918).
[6] Note, this rate was originally described as one cent per hundred pounds. It is converted here to maintain consistency with more recent rate prescriptions.
[7] The London Interswitching Case, (1905) 6 C.R.C. 327.
[8] The London Interswitching Case, (1905).
[9] *Railway Act*, RSC 1906, c 37, s 285: "Where a branch line of one railway joins or connects the line or lines of such railway with another, the Board may, upon application of one of the companies, or of a municipal corporation or other public body, order that the railway company which constructed such branch line shall afford all reasonable and proper facilities for interchange, by means of such branch, of freight and live stock traffic, and the empty cars incidental thereto, between the lines of the said railway and those of the railway with which the said branch is so joined or connected, in both directions, and also between the lines of the said first-mentioned railway and those of other railways connecting with the lines of the first-mentioned railway, and all tracks and sidings used by such first-mentioned railway for the purpose of loading and unloading cars, and owned or controlled by, or connecting with the lines of, the company owning or controlling the first-mentioned railway, and such other tracks and sidings as the Board from time to time directs; and the Board may, in and by such order, or by other orders, from time to time determine as questions of facts and direct the price per car which shall be charged by and paid to the company owning or controlling the first-mentioned railway for such traffic."
[10] Board of Railway Commissioners for Canada, Order No. 4988 (July 8, 1908).
[11] Order No. 4988 (July 8, 1908).
[12] Reasons for General Order No. 230, (May 15, 1918).
[13] *Railway Act*, s 315.
[14] Team tracks were sidings or spur tracks, typically on railway-owned property, provided for the use of small-volume shippers to load and unload commodities.
[15] Reasons for General Order No. 230, (May 15, 1918).
[16] Reasons for General Order No. 230, (May 15, 1918).
[17] Reasons for General Order No. 230, (May 15, 1918).
[18] Reasons for General Order No. 230, (May 15, 1918).
[19] Reasons for General Order No. 230, (May 15, 1918).
[20] Reasons for General Order No. 230, (May 15, 1918).
[21] Issues related to the widespread proliferation of exclusive free-cartage services are beyond the scope of this paper.
[22] *Railway Act*, s 2(30): "The expression "toll" or "rate" means and includes any toll, rate or charge made for the carriage of any traffic, or for the collection, loading, unloading or delivery of goods, or for warehousing or wharfage, or other services incidental to the business of a carrier,".
[23] Reasons for General Order No. 230, (May 15, 1918).
[24] 167 U.S. 512, 17 Sup. Ct. R. 822, 42, L. Ed. 258.
[25] Board of Railway Commissioners for Canada, General Order No. 252, *In the matter of the Interswitching of Freight Traffic*, File No. 6713, Case No. 2846 (Oct 26, 1918).
[26] See *Enquiry into Freight Traffic Interswitching Regulations*, Staff Report, Railway Transport Committee, Canadian Transport Commission (April 1985).
[27] *National Transportation Act, 1987*, SC 1987, c 34, s 3(1)(a).
[28] Canadian Transportation Agency, Decision No. 35-R-2009 (Feb 6, 2009).
[29] As mentioned above, this limit was recently raised to 160 km (99.4 miles) for movements originating in, or destined for, Manitoba, Saskatchewan, or Alberta.
[30] See Canadian Transportation Agency, Decision No. 631-R-1989 (Dec 12, 1989): "In reaching this conclusion, the Agency is supported by the underlying philosophy of establishing interswitching terms, conditions, and rates to apply on a system wide basis. In providing the services of a terminal carrier when delivering traffic to or from a siding, it is understood that the service will involve varied levels of complexity in a carrier's operations. The rates as prescribed reflect such a range in operational requirements."
[31] See for example, Canadian Transportation Agency, Decision No. 206-R-1988 (Aug 2, 1988).
[32] See for example Railway Association of Canada, "Expanding Regulated Interswitching?" (March 2023) (https://www.railcan.ca/wp-content/uploads/2023/03/Interswitching-Leave-Behind-EN.pdf), and Canadian National Railway Company (2022).
[33] Reasons for General Order No. 230, (May 15, 1918).