negotiated car-rental agreements in which car users could insist on charges commensurate with the benefit of using the car. Neither owners nor using carriers would be at an unfair advantage in such negotiations--both would be constrained by their interest in revenues from interline movements. Deregulated car hire would also tend to increase the total efficiency of the railroad network. Where costs are fairly allocated through the process of negotiation, both parties would have an incentive to increase efficiency by eliminating unnecessary empty mileage and, to the extent the market for transportation would support the acquisition of additional cars, those cars would be acquired because owners would be assured of payment by shippers or using carriers.

Short of total elimination of mandatory car hire, substantial efficiencies could still be achieved by eliminating prescribed per diem for the period when cars are not under load. This would provide a strong incentive for owning railroads to minimize empty mileage and would relieve using carriers of the unjust burden of paying for cars when they have no value to them. (Fairness and sound economics also dictate that user carriers have the opportunity to recover any per diem charges that continue to be mandatory in their joint rate divisions and to vary their division in accordance with changes in per diem levels.)

Establishment of Empty Mileage Charges

If per diem is deregulated, empty mileage charges should be allowed. If per diem is not deregulated, they should be prescribed. Charges to owning carriers for costs associated with empty mileage would both (a) discourage owners from insisting on unnecessary hauling of empty cars and (b) compensate users for the real cost of empty movements that provide them no direct benefit. Although these charges should ultimately be established by agreement under a deregulated system, the ICC, as an initial step, could prescribe the $0.31/car-mile rate that has been agreed on voluntarily by users of Trailer Train cars. If car hire is permitted to fluctuate, this rate should also be permitted to fluctuate.

The elimination of mandatory per diem and use of empty mileage charges would promote a sound, competitive environment in which car-hire rates could be expected to fluctuate with variations in supply and demand. (The result of a fully deregulated car-hire environment might well be the expanded reliance on pooling agreements. The successes with existing pooling agreements are compelling evidence of the industry's ability to manage interline use of freight cars on a consensual basis.) In such a system, car owners would assume no greater risk than is fairly associated with any other business investment in a free market.

Authorization of Bilateral Agreements

Apart from (or in addition to) any other measures, carriers should be permitted to enter into bilateral agreements at any level of per diem. Bilateral agreements are the mechanism whereby buyers and sellers in a free market voluntarily match price to demand. The ICC has already authorized carriers to enter into bilateral agreements for car hire below the prescribed levels [Ex Parte 334 (Sub. No. 4)]. If, due to particular supply and demand conditions on other lines, particular carriers are willing and able to agree on fair per diem charges above the prescribed Ex Parte 334 levels, there is no rational basis to preclude them from doing so.

SUMMARY

The regulatory structure that determines how using railroads compensate owning railroads for the use of their freight cars has been described. These rules encourage individual railroads to use cars inefficiently, which results in both unnecessary empty-car miles and excessive investment in the fleet as a whole.

More market-oriented solutions can be implemented to replace the existing set of car-hire regulations. In such an environment appropriate incentives will naturally evolve to ensure that (a) the minimum necessary fleet investment is made by car owners and (b) this asset will be employed in the most efficient manner by car users.

REFERENCES

1. Managing Freight Cars in a Period of Surplus: Does Utilization Matter? Freight Car Utilization Program, Association of American Railroads, Chicago, Dec. 1, 1980.
2. Proposal for Change in the Railroad Industry-Wide Car Management System. Freight Car Utilization Program, Association of American Railroads, Chicago, Rept. R-379, June 1979.
3. J.R. Felton. The Economics of Freight Car Supply. Univ. of Nebraska Press, Lincoln, 1978.

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Extraterritorial Impact of U.S. Deregulation on Canadian Railways and Shippers

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The attempt on the part of the Canadian railway industry to obtain immunity from the extraterritorial reach of U.S. antitrust laws is described. This paper outlines various areas where conflict between Canadian and U.S. transportation law exists. Examples are given in such areas as contract rates, surcharges, limitation of liability, rebates, route cancellations, and Section 229 appeals to the Interstate Commerce Commission and the special considerations that must

be given to the corresponding Canadian law in order to implement such ratemaking practices on international movements. A detailed description of the January 21, 1981, Interstate Commerce Commission decision on Canadian and American international through routes is given, as well as the contents of the recent Canadian National Railway and Canadian Pacific Agreement, which attempts to achieve antitrust immunity for Canadian railways and shippers in virture of Section 5-B of the Interstate Commerce Act. A selection of U.S. antitrust cases that have been applied to foreign jurisdictions is also described.

This paper shows the extraterritorial impact of railroad deregulation in the United States and its impact on Canadian railways and shippers. It outlines areas where problems exist between Canadian and U.S. transportation law and gives examples of many such areas of conflict. Also given is a description of the Interstate Commerce Commission (ICC) decision on Canadian and American international through routes.

STATUS REPORT ON U.S. ANTITRUST IMMUNITY FOR CANADIAN RAILWAYS AND SHIPPERS

Background

On October 1, 1980, the enactment of the U.S. Staggers Rail Act brought with it consequences that deeply affected both Canadian railways and shippers. Up to that time, the two largest Canadian railroads, Canadian National Railways (CN) and Canadian Pacific (CP), were indirectly protected by a shield from U.S. antitrust laws created by the Reed-Bullwinkle Act of 1948. This latter legislation stated that all members of the U.S. rate bureaus would enjoy protection from U.S. antitrust laws, provided that the rate bureaus' agreements would be approved from time to time by the ICC as being in conformity with the national transportation policy of the United States. CN and CP are members of both the eastern and western rate bureaus' agreements.

The Staggers Act, by significantly changing the rules that govern ratemaking activities in U.S. rate bureaus, left the Canadian railways without the indirect protection from which they had benefited as members of these associations. Prior to the passage of the 1980 U.S. rail-deregulation law, Canadian railways became aware that rate negotiation in Canada on international movements could make both Canadian railways and shippers susceptible to multimillion dollar law suits in virtue of the extraterritorial reach of the U.S. Sherman Antitrust Act. In brief, this extraterritorial doctrine asserts the following.

Non-American companies that jointly discuss the price of their commodities, even outside of the United States, can be liable to U.S. antitrust laws if the consequences of the discussion have an effect on the U.S. consumer. For example, when the deregulation of the air industry in the United States took place a few years ago, the protection from U.S. antitrust laws that had been enjoyed by the airlines was severely limited. The airlines meet in the International Air Transport Association (IATA), which can be considered analogous to a rail rate bureau, in order to set international fare structure. Therefore, if Air France, in the IATA setting, would have agreed on a fare from Paris to Tokyo that was identical to the fare charged by other international carriers, the fact that U.S. citizens would have to pay this jointly set price for air transportation would be sufficient to make Air France and the other airlines subject to a U.S. antitrust indictment.

These indictments are of two kinds. Criminal indictments can mean fines of $1 million per count to the companies involved in the conspiracy, as well as three years in prison and $100 000 personal fines to the corporate officers who are party to the collusion. More common, however, are the civil antitrust suits of which there were more than 2000 last year, where those complainants who have lost business due to the collusive activity of competitors can claim treble damages for what they prove to have been the amount of money that they lost in consequence. Recently, in the BBD Transport case, a group of U.S. railways and shippers was taken to court by a trucking company that had lost business due to the agreement reached among the co-defendants on rates for transporting steel products. It is remarkable that American Telephone and Telegraph (AT&T), which has a battery of 250 full-time antitrust lawyers, should have been ordered to pay a quarter of a billion dollars in a recent antitrust suit.

The antitrust danger perceived by the Canadian railways was the following. If CN and CP were to meet collectively, in conformity with Canadian legislation, in order to determine international rates destined for the United States, then CN and CP, as well as those shippers involved, would be susceptible to a multimillion dollar U.S. antitrust suit.

For those who are skeptical of the possible application of a U.S. law against Canadian companies who are meeting in Canada in accordance with their own legislation, I would like to cite the following jurisprudence. The American Banana case in 1909 held that the principle of international "comity" should apply; in other words, an act should be determined according to the law of the place where it occurs. This principle, however, was expressly repudiated by the U.S. Supreme Court in 1962.

In 1945, in the case of the U.S. v. The Aluminum Company of America et al., it was held that a cartel scheme entirely among non-American firms and that occurs in Europe would fall within the jurisdiction of the U.S. Sherman Act if the scheme's intent were to restrain trade in the United States. Here, an agreement between foreign corporations that was intended to and did affect the price of aluminum imports into the United States was deemed illegal under the Sherman Act.

It was held that the Sherman Act had jurisdiction over the various foreign corporations, irrespective of whether these actions were contrary to their own government's commerce legislation. Furthermore, it was decided that when the intent to affect imports by the organization of a foreign cartel was proven, the burden of proof shifts to the defendants.

Judge Hand concluded that although Congress did not intend the Sherman Act to prohibit conduct that had no effect in the United States, it did intend the Act to apply to conduct that had consequences within the country--even where the parties concerned had no allegiance to the United States--if the conduct is intended to and actually does have an effect on U.S. imports or exports. This wide-reaching "intended effects" test has been cited subsequently with approval by the U.S. Supreme Court.

In Continental Ore Co. et al. v. Union Carbide and Carbon Corp. et al. (1962, U.S. Court of Appeal, 9th Circuit), the court found that there was evidence in violation of the Sherman Act due to a conspiracy to restrain trade and commerce in ferrovanadium. Justice White states that the fact that a subsidiary company of the defendant was acting as an arm of the Canadian government was not pertinent, since Canadian law did not compel discriminatory purchasing. The court also held that a conspiracy to monopolize or restrain commerce of the United States is not outside the reach of the Sherman Act just because part of the conduct complained of occurs in foreign countries. Since the activities of the defendants, one of whom was the exclusive selling agent of the Canadian government, had an impact within the United States, the court held that there was extraterritorial jurisdiction.

The U.S. v. The Watchmakers of Switzerland Information Center, Inc. (1962 U.S. District Court, NY) case involved the allegation of conspiracy between the Swiss watch manufacturing industry and its subsidiaries in the United States, as well as the Bulova Watch Company of Canada (a wholly owned Swiss subsidiary), whose joint actions had allegedly resulted in restraint of competition for the manufacture and sale of watch parts in the United States. It was held that these corporations, even though some of them were not American, even though their discussions might have taken place outside of the United States, and even though their actions might not have been contrary to their own respective government's legislation, were guilty of imposing unreasonable restrictions on the manufacture of watches in the United States and, therefore, the penalties of the Sherman Act applied.

On a more positive note, in the Timberlane Lumber case of 1976, the U.S. Court of Appeal instructed the lower court to be aware of "foreign policy implications" that involve extraterritorial issues. It was suggested that the degree of conflict with the foreign law, the nationality of the parties, the purpose of the collusive activity, and its significance in the United States should all be considered in order to determine whether there is extraterritorial U.S. jurisdiction.

In the recent Canadian Uranium case, a U.S. subpoena for documents was not respected by Canadian uranium companies, as to do so would have been in direct contravention of the Canadian Official Secrets Act.

Canadian Legislation

The Canadian legislation that regulates collective ratemaking is quite different from the Staggers Act. In virtue of Section 279 of the Canadian Railway Act, Canadian railways can meet together in order to jointly set rates, without being in contravention of Canadian anticombines legislation. Canada has what is known as an "agreed charge", which is a contract that obliges the shipper to send a certain percentage of its traffic by a given rail route. Section 32 of the Canadian Transport Act of 1938 states that one railway in Canada cannot sign an agreed charge from a competitive point without the concurrence of other competing Canadian carriers. Therefore, by respecting the Canadian law, CN and CP would be disrespecting U.S. rail legislation that prevents competitors from discussing competing routes.

As CP did not wish to risk being indicted by a U.S. court for having respected Canadian legislation, the Canadian railways presented the case to its government as well as to the U.S. Senate Subcommittee on Transportation and the Subcommittee of the U.S. House of Representatives that were considering the Staggers Act. CP was able to receive a statement in the Congressional Record by Senator Howard Cannon and Representative Edward Madigan, the chairmen of the above two subcommittees, directing the ICC to consider international comity when it was deliberating on the request of the Canadian railroads for U.S. antitrust immunity. Furthermore, the ICC was instructed to recognize the 1978 decision of the U.S. Civil Aeronautics Board to the effect that non-American air carriers were given antitrust immunity for collective fare setting. The Canadian government sent a formal diplomatic note to the U.S. Secretary of State explaining that it felt that it would be harmful to international relations if Canadian industry was made subject to the extraterritorial reach of certain American laws. There had already been U.S. antitrust action against several Canadian uranium companies that had created tension between the two governments over the extraterritorial intention of the U.S. government in this matter. The position taken by the Canadian railways was also supported by major Canadian shipper associations, industry, as well as the U.S. Department of Transportation.

Faced with such heightened awareness of the dangers of extraterritorial U.S. antitrust liability, the ICC extended immunity to both Canadian railways and Canadian shippers in its 5(b) decision of January 21, 1981. More particularly, the ICC asserted that Canadian railways were to be considered as "one integrated enterprise". This would mean that CP and CN could not be held to have contravened U.S. antitrust laws, since you cannot have a conspiracy that involves only one enterprise. In addition, the ICC stated that U.S. rail carriers that negotiate with one Canadian railroad need not fear the antitrust implications that arise from the fact that the Canadian railroad has talked the same issue over with competing Canadian railroads. Last, the ICC stated that Canadian shippers did not have to fear the U.S. antitrust penalties when they were negotiating the Canadian portion of international through routes with Canadian railways. The ICC extended this immunity for a period of 90 days from the date of the decision. Unfortunately, the ICC was under the impression that international through-route agreements existed in the past, which had protected the Canadian railways in the same way as the U.S. rate bureaus' agreements had assured antitrust immunity for its members. In fact, no such agreement that specifically involved American and Canadian through routes existed.

CN/CP Agreement

It was for reasons such as those stated above that the Canadian railways submitted a CN/CP Agreement to the ICC that implemented the ICC's January 21, 5(b) decision. The CN/CP Agreement should not be seen as constituting a separate rate bureau agreement, since the Interstate Commerce Act obliges rate bureaus to take transcripts of the discussions that transpire at these meetings and submit them for ICC scrutiny. Canadian legislation specifically prevents documents from being transported from Canada in such a situation. The Quebec Business Concerns Records Act and the Ontario Business Records Protection Act state that no document is to be sent in virtue of an order from a foreign government without the permission of the Canadian courts. Moreover, the Canadian draft bill C-41 makes it a criminal offense for any Canadian to send such documents in virtue of an order from a foreign authority.

The CN/CP Agreement, although it is signed only by the two major Canadian railways, requests immunity from U.S. antitrust laws for all other Canadian railways as well as all shippers, both Canadian and American, and groups of shippers who negotiate rates with Canadian rail lines. The agreement explains the function of the Canadian Freight Association (CFA) in Canada but does not restrict discussions on international rate matters to CFA meetings. In the event that competing American lines should wish to discuss international movements of merchandise with the Canadian roads, they are required to meet separately with the Canadian railways so that the ICC definition of "practicable participation" is met. Therefore, the U.S. roads cannot use the immunity granted to the Canadian railways and shippers as an indirect means of evading U.S. transportation law. It is felt that without ICC approval of this agreement, collective negotiations between groups of shippers and the Canadian railways will be seriously hindered, as well as the maintenance of international through rates and the equalization of gateways in Canada.

Following the submission of the CN/CP Agreement to the ICC in April 1981, the U.S. Department of Justice, as well as the ICC's Office of Special Counsel, requested severance of the Canadian agreement from the western rate bureau agreement on grounds that the ICC did not have the jurisdiction to grant U.S. antitrust immunity to the railways in such deregulated areas as contract rates, trailer on flatcar (TOFC) and container on flatcar (COFC), and exempt commodities. CP believes that these representations made by the U.S. Department of Justice were incorrect since the ICC has extended antitrust immunity that concerns Canadian and American international through-route negotiations since the inception of the U.S. rate bureaus in 1949. Similarly, the ICC has extended antitrust immunity in the past to the trucking industry. The immunity from the U.S. antitrust laws from which the Canadian railways benefited in virtue of the January 21 ICC f(b) decision expired on April 21, 1981.

IMPACT OF U.S. DEREGULATION ON CANADIAN RAIL TRANSPORTATION

Several people have asked whether the new U.S. legislation to date has proved advantageous to Canadian railways and shippers. Because of uncertainty on various sections of the Staggers Rail Act, it is still premature to comment in a definitive fashion on the pros and cons of U.S. deregulation for the Canadian rail industry. What I propose to do is select a few areas where new developments have occurred subsequent to the U.S. legislation and evaluate the impact that these developments have already had on Canadian railways.

Immunity from Antitrust Suits

First, neither the Canadian railways nor the Canadian shippers are certain that they have immunity from the U.S. antitrust laws at this time. CP does benefit from the immunity derived from its membership in the eastern and western U.S. rate bureaus. However, this special immunity creates definite limitations for the Canadian railways and its customers since many items are no longer covered in the U.S. rate bureaus. For example, TOFC and COFC traffic as well as fresh fruits and vegetables have been completely deregulated in the United States and, as a consequence, CP cannot talk with CN on any movements related to this traffic. Similarly, independent announcements that are outside the scope of U.S. rate bureau discussions can no longer form the subject matter of joint discussions between the railways in Canada or discussions between shippers and both Canadian railways. CP has received telephone calls from shippers that are displeased with the lengthy delays that rate bureaus proceedings take compared with independent actions, and CP has been obliged to explain to its customers that once CP and CN commence processing a docket through the CFA, it cannot switch over to the independent announcement course so as to shorten the tariff publication delays that would assist their customers.

In other words, once CP has jointly discussed a matter intending that it be processed through the U.S. rate bureaus, the risks of U.S. antitrust penalties prevent CP from switching to the independent announcement channel. Certain U.S. rail carriers have approached CP legal representatives with the intention of canceling the international through rates on deregulated traffic. For example, TOFC and COFC tariffs are no longer published in the United States, given that this traffic has been completely deregulated. On the other hand, Section 289 of the Canadian Railway Act obliges CP to publish the full international tariff, even though it only transports the merchandise to the border in most cases. Some of CP's U.S. counterparts felt that it would be less risky for them merely to publish proportional rates to the border on deregulated traffic.

Contract Rates

Another antitrust impediment that Canadian railways are experiencing relates to contract rates. Contract rates are considered to have "single-line status", which means that there is to be no discussion of them between those carriers that are not practicable participants in U.S. rate bureau meetings. Therefore, if CP and CN wished to propose a joint contract with one or several U.S. carriers, the Canadian railways could not meet together to discuss the contractual conditions, even though it would be legal for them to do so in virtue of Canadian law. The question of contracts is made more complex for two reasons. First, there is no specific legislation in Canada that talks about the guidelines for a Canadian contract. In regard to the first element, an open tariff in Canada could contain most of the elements of what is generally envisaged as a contract rate in the United States. CP has agreed to open tariffs that specify a rate dependent on volume-to-specific geographic pairs that contain most of the elements of a U.S. contract.

Many U.S. railways have been agreeing to contract rates recently, some of which include elements that are surprisingly similar to rebates. Certain U.S. carriers have approached Canadian shippers with the idea of arranging an international contract. With respect to rebates, Section 380 of the Canadian Railway Act states quite explicitly that rebates are illegal in Canada since railways cannot receive and shippers cannot pay anything other than the published tariff. Furthermore, Section 286 and the following provisions of the Canadian Railway Act state that a joint international tariff must be filed in its entirety with the Canadian Transport Commission (CTC). Therefore, strictly speaking, any international contract rates might cause the following difficulties:

1. U.S. contracts, especially those that involve nonagricultural commodities, are kept confidential, other than a tariff that briefly describes the items in the contract, as well as a summary of nonconfidential information, which is given out to interested parties. In Canada, both agreed charges as well as open tariffs can be inspected by any person at the offices of the railways or the CTC. Therefore, any U.S. carrier contemplating an international contract could not have the conditions of that contract kept confidential.
2. Any international contract that involves a rebate would subject the Canadian carriers that were party to it to penalties foreseen in the Canadian Railway Act. Therefore, it would not be possible for a Canadian railway to participate in an international contract unless the inducement would be filed with the CTC and form part of the tariff.

In the past, CP has made arrangements with American railways so that the latter agree to a contract to the border and CP files an open proportional rate for the Canadian portion of the movement. With this framework in mind, it would be possible for U.S. railways to give rebates to shippers, presuming that this was legal in virtue of U.S. law, since the Canadian railways would not be party to the rebate. Furthermore, the Canadian railways could not pay a rebate to shippers indirectly through their divisional arrangements with the U.S. carriers since this would be contrary to Section 380 of the Canadian Railway Act.

However, nothing would prevent a Canadian railway from adjusting its proportional rate from the border to service the particular shipper's needs. Therefore, the Canadian railway might give an incentive rate independent on volume that would complement the U.S. carriers' contract. This Canadian incentive rate would, of course, be published with the CTC in conformity with Canadian legislation.

Although it is not legally advisable for Canadian railways to give rebates to shippers, be they Canadian or American, this does not seem to be the case for Canadian shippers that receive rebates from U.S. carriers. The CTC, as well as its predecessor boards, have been most reluctant to enforce technical provisions of Canadian railway law against U.S. railroads. Some Canadian shippers believe that it is unlikely that Canadian law would be invoked so as to prevent U.S. railroads from entering into rebate contracts with Canadian shippers.

CP is interested in pursuing the topic of joining a Canadian open tariff with a U.S. contract, provided that they can gain some additional truck tonnage or increased market share by doing so. If the U.S. roads offer rebates to shippers, CP cannot encourage the solicitation of this traffic and cannot pay, either directly or indirectly, any part of the rebate.

Cancellations

Another way in which U.S. deregulation has had an impact on Canadian railways and shippers is through the cancellations of allegedly unprofitable routes that the Staggers Act has now made possible. Recently, the Consolidated Rail Corporation (Conrail) canceled hundreds of international routes on grounds that they did not give a sufficient revenue return. This cancellation program, which has since been expanded by Conrail to include certain grain products traffic, has obviously had a constraining effect on shippers, since its choice of routes has automatically diminished. Where Conrail had more than one route between a given geographic pair, it has generally eliminated its participation in those gateway routing guides other than its long haul. CP has been hurt by these cancellations since it was often the Canadian rail connector on the routes that were canceled. CP has contested the Conrail cancellation program before the ICC, as has CN, and they hope to prove that Conrail did not have the right to cancel out on many of these routes since it was already receiving more than 110 percent of variable costs for the portion of these routes that it served.

There is also the question of whether Conrail could legally cancel some of its international through routes where it originates traffic on Canadian territory. Section 23 of the Canadian National Transportation Act states that railways may not take rate action that impedes the growth of primary or secondary industry, and it is conceivable that a Canadian shipper that has had its transportation potential diminished by the Conrail cancellations will take Conrail to task before the CTC in virtue of this section. Many American shippers and rail carriers are also contesting the Conrail cancellation program to the ICC. The ICC investigation of the Conrail cancellation program is expected to take several months and the cancellations are effective in the interim period. By so limiting a shipper's transportation options, the Staggers Act has certainly not encouraged competition between carriers.

Section 229 Complaints

The U.S. deregulation has also had an impact on Canadian railways in the Section 229 complaints that have been registered by various U.S. shippers that cite one or both of the major Canadian railways as co-defendants in its legal proceedings before the ICC. Section 229 complaints are related to rail rates that were in effect prior to the enactment of the Staggers Rail Act on October 1, 1980. The petitioning shippers must prove that these rates were in excess of the jurisdictional threshold of 160 percent of variable costs and that there existed market dominance. The Canadian railways have to date submitted a motion to dismiss these complaints on the grounds that the ICC does not have jurisdiction to regulate the Canadian railways for ratemaking activities that take place in Canada.

Surcharges

Another example of a conflict of laws that arises from American rail deregulation has shown itself in the area of surcharges. The Staggers Rail Act allows U.S. rail carriers to surcharge those joint movements where they do not obtain sufficient revenues for their portion of the movement. These surcharges are made on the portion of the joint route that the surcharging carrier serves and they do not require the concurrence of the other interconnecting rail carriers. When a U.S. carrier surcharges its portion of a joint international route, the Canadian Railway Act would require that the surcharge be filed with the CTC, since this affects international tariff. Furthermore, Canadian legislation allows a carrier to collect only those rates that have been filed with the CTC. Subsequent to the enactment of the Staggers Act, CP noticed that many U.S. carriers were surcharging their portion of the international movements but were neither notifying the other carriers nor filing the surcharges with CTC. This led to some dissatisfaction from shippers that were not aware of their increased transportation costs on cash-on-delivery (COD) movements until they received the merchandise. Conversely, the Canadian roads were put in a difficult position since they were obliged to collect the full transportation costs, including the surcharge, even though Canadian law did not permit them to collect a rate that had not been filed with the CTC. The Canadian railways subsequently notified their U.S. counterparts that they were unwilling and unable to collect their surcharges and suggested that they collect these surcharges at their own stations.

Voting Rights

Another difficulty that the Canadian roads encountered due to the Staggers Act was whether or not CP would have one or two votes in U.S. rate bureaus' meetings. The ICC in its January 21, 5(b) decision stated that all Canadian railways were to be deemed "one integrated enterprise". CP and CN were asked at the eastern and western U.S. rate bureaus' meetings how they could be expected to have two votes if they were to be considered one integrated enterprise. Needless to say, both Canadian railways wanted to have a separate vote as CP and CN are not always in agreement on rate matters. CP has informed the U.S. eastern and western rate bureaus that the term "one integrated enterprise" was meant to ensure antitrust immunity for all Canadian railways, but that CN and CP are separate members of the rate bureaus' associations and those rate bureaus' agreements grant each member a separate vote.

A corollary question that arose was whether CP and its U.S. affiliate, the Soo Line, should have separate votes given that the ICC has decided that all affiliates are to be treated as "single-line" status. It is for this reason that the Soo Line recently made a petition for disaffiliation. In its petition, the Soo Line argued that it should not be constrained to single-line status with CP since the management of the two companies is entirely independent from the other. The ICC has recently granted this request.

Limitation of Liability

Another difficulty that Canadian rail carriers have had to face due to the U.S. Staggers Act is in the area of limitation of liability. The Staggers Act allows individual rail carriers to negotiate specific limitations of liability with shippers as part of the overall transportation rate agreement. There is no longer the necessity of having uniform liability requirements, and it is conceivable that a U.S. rail carrier will agree to a higher liability with a larger shipper than it would with a smaller one. In Canada, however, liability requirements are still uniform, subject to General Order T-5 of the CTC regulations. This means that there is a uniform bill of lading for all Canadian rail transportation that states that damaged or lost merchandise will be the value at the time and place of shipment unless another value is specified on the bill of lading. The Canadian bill of lading contains a section that states that all claims must be made in writing to the rail carrier three months following the delivery of the goods and that any legal action must be taken within a year.

After the ICC had exempted fresh fruits and vegetables from regulation in 1980, CP became aware of the following inequitable consequences of this aspect of U.S. deregulation. A U.S. carrier was setting its own liability with certain shippers on international movements that were much more stringent than the uniform bill of lading liability imposed by Canadian law. Therefore, the shipper was allowed to notify CP of its lost or damaged merchandise within three months of the delivery, whereas it was prescribed from going against the U.S. carrier after a few weeks. Similarly, the U.S. shipper could claim the value of the merchandise at the time and place of shipment from the Canadian carrier, whereas it could only claim a much lower amount from the U.S. connecting line. CP appealed to CTC to rectify this situation and, in the interim, CP was obliged to stop paying out U.S. freight claims.

CONCLUSION

In conclusion, CP believes that the Canadian National Transportation Act has provided a model for certain pricing freedom elements to be found in the Staggers Act. The Canadian experience has been that railways are not often involved in prolonged regulatory hearings in order to obtain rate increases and that they can adjust quickly to changes in the competitive market. Like U.S. railroads, CP must establish its rates above variable costs. Similarly, shippers that are dissatisfied with a rate that they feel is excessive may apply to the CTC for a roll-back. The important dissimiliarity between the Staggers Act and Canadian legislation is subjecting collective rate making to U.S. antitrust laws. CP feels that the ICC is ill-advised in its belief that the restriction on collective ratemaking in the United States will cause the lowering of rate levels. The Canadian railways were able to introduce selective ratemaking with the advent of the National Transportation Act in 1967. They have used pricing freedom so as to introduce seasonal rates, unit train rates, and other rate innovations tailor-made to the shippers they serve. The Canadian railways are in a financially capable position today because of this pricing freedom and CP hopes that the U.S. government respects the Canadian legislation that has made this financial stability possible.

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