Railway Legislation and Rate Contracts in Canada and Australia

Information Paper

This Paper provides information about recent changes in the regulatory approach to the railway industry in Canada and about the approach taken by Australian governments. The Paper also provides specific information on the components of shipper-carrier contracts, detailing their form and the range of factors a shipper would need to consider when negotiating such an agreement. Case studies illustrate the range of purposes these contracts may serve and the variety of approaches available to the solution of a rail transport problem.

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FOREWORD

This Information Paper was prepared for the Bureau of Transport and Communications Economics under its Research Fellowship Scheme. The Fellowships are offered to qualified and experienced people in the private or public sector or in academic institutions who are interested in undertaking a period of research on a specific issue or issues falling within the Bureau's general charter.

The information presented in the Paper was compiled by Mr Richard Lande, Associate Professor, Department of Management, Concordia University, Montreal, Canada. Mr Lande undertook the work during a two-month visit to the Bureau in 1986.

The information presented and the analysis and conclusions drawn in the Paper are entirely the work or views of the author and do not necessarily reflect the position or views of the Bureau.

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SUMMARY

This Paper provides information about recent changes in the regulatory approach to the railway industry in Canada and about the approach taken by Australian governments.

The Canadian National Transportation Act and the 1980 Staggers Rail Act in the United States provide a new regulatory context for the way in which North American railways and shippers do business. The developments in the Canadian legislation in particular may be relevant to the Australian railway industry due to the similar geography, politics and history of the two countries.

Government involvement in railways is accepted in both Canada and Australia. However, there are significant differences in the form of this involvement. In Canada the railways are largely left free to set freight rates and pursue commercial objectives, whilst in Australia governments have often taken an active role in the determination of freight rates and have set social as well as economic objectives for their transport authorities.

The role played by shipper organisations and the protection afforded to shippers in transport legislation is another significant difference between the two countries. Shipper lobby groups, which are common in Canada, are not well established in Australia. In addition, whilst the Canadian legislation provides rights of appeal to shippers and third parties against railway freight practices, Australian shippers do not appear to have any similar recourse.

One of the main features of the new National Transport Act of Canada is the creation of a National Transportation Agency to supervise and arbitrate on disputes between shippers and railways and to undertake investigations on behalf of the Prime Minister and Cabinet. Other features of the new legislation include the allowance of public interest appeals and confidential contracts, removal of market dominance tests, provision for joint and competitive line rates (the latter for cases where the shipper is captive to one railway), common carrier obligations and no limited liability.

The railway legislation of each of the Australian States diverges from the Canadian legislation in many respects. Notable differences include: the absence of common carrier obligations on some Australian railways, the significant degree of ministerial or government control over freight rates, and the absence of specific appeal mechanisms for shippers. Australian legislation has a number of other interesting provisions, including those dealing with pricing practices, the use of motor transport, employment and the closure of rail lines.

The contracts between shippers and railways in North America which have evolved recently as a result of regulatory change offer significant benefits to both railways and shippers. Some of the advantages include: predictability of long term capital requirements, tailoring of transport services to shipper needs, flexibility and lower rates for large volume shipments. The basic form of a shipper contract is also outlined in the Paper.

Contracts between shippers and railways also exist in Australia and serve a variety of purposes. The Paper contains a description of various actual contracts, which highlight a number of common features such as rate escalation clauses and the offering of discounts to volume shippers.

The Paper also provides specific information on the components of shipper-carrier contracts, detailing their form and the range of factors a shipper would need to consider when negotiating such an agreement. Case studies illustrate the range of purposes these contracts may serve and the variety of approaches available to the solution of a rail transport problem.

CHAPTER 1 INTRODUCTION

BACKGROUND

On the face of it, Canada and Australia have much in common. They have a similar population size, geographic expanse and cultural heritage. They have approximately the same number of large urban centres, although in Canada urban location is due to proximity to the US border (the US being Canada's largest trading partner) whereas in Australia location is determined by proximity to the ocean. The role of railways in both countries originated from common reasons of settlement, trade and communications.

Under the Australian Federal system, railways are mainly a responsibility of the State governments. Of the State systems, those in New South Wales and Queensland are the largest, while the smallest is that owned by South Australia, which operates only in the Adelaide metropolitan area. In 1983-84 Australian government railways had a total route length of 38 636 km of which approximately three-quarters were operated by the five State-owned systems. The Australian National Railways Commission is owned by the Federal Government and operates all non-metropolitan railways in South Australia and Tasmania. There are also private railways in Australia, most of them being used exclusively for the carrying of minerals from mines to ports.

Collectively, in 1981, Australia's government rail systems employed over 100 000 people.

The State railway systems were largely constructed before Australian Federation in 1901 and were designed to connect the hinterland with major export ports, generally the capital cities. As such, little consideration was given to connection with other railway systems. Initial problems of incompatibility relating to gauge, equipment and operating practices have, however, been partly overcome in a variety of ways, for example through the construction of new track, track conversion and the provision of bogie exchange and cargo transfer facilities.

The creation of the Canadian Pacific Railway (CP Rail) in the 1870s derived from the political desire of having a transcontinental railway linking the east and the west of Canada. This requirement of establishing a railway to confirm the political boundaries of a new nation was not necessary for Australia, given that the ocean constituted a natural barrier to foreign intervention.

If one excludes Canadian Pacific, however, the evolution of rail line development in Canada was similar to that in Australia in that each regional industrial centre had an unco-ordinated multiplicity of rail lines radiating into it from the countryside. It was only in the 1930s that the Canadian Government amalgamated six of these railways into another transcontinental system to be known as the Canadian National Railway. Were it not for the fortuitous historical fact that these six railways had the same gauge, amalgamation might not have been possible and a situation might have resulted similar to that which has existed until quite recently in Australia.

REGULATION AND GOVERNMENT INVOLVEMENT

The mixed economy in Canada, whereby Crown transport corporations exist side by side with privately-owned transportation enterprises, is yet another element which ties the Canadian and the Australian transport sectors together (as distinct from the United States where Government-owned businesses are not as acceptable).

Canada is similar to Australia in yet another key dimension. The Canadian constitution gave the provinces significant areas over which they had pre-eminent jurisdiction over the central government. This structure of federalism whereby the Transport Minister of the central government has little, if any, sway over provincial counterparts on many aspects of transportation policy (such as intraprovincial/intrastate trucking in Canada/Australia or intrastate rail movements in Australia) is notable in its difference from most European models. There are, of course, many other examples of similarities between the two countries, such as parliamentary tradition, as well as legal, linguistic and religious heritage.

Despite the above similarities, the extent of government intervention in freight rate negotiations constitutes an important difference between the two countries. The Canadian railways, even Canadian National Railway (CN Rail) which is a Crown corporation, keep an arms-length distance from Government intervention in freight rate practices. Both railways are compelled by statute to charge rates which are compensatory (that is, meet variable costs). The Canadian Transport Minister has never requested that the CN Rail lower its

freight rates to satisfy a particular commodity group or region. The 1967 *Railway Act* of Canada permitted collective rate making between CN Rail and CP Rail which resulted in an identical rate being set for most commodities, similar to Australia's two-airline policy. This meant that CP Rail was perceived as the 'yardstick railway' and that the jointly set freight rates would be compensatory for both, even though the respective costs might be different. Since 1967, the Canadian railways have been expected to price their rail services at what the market would bear.

Although the freight rate would usually never go below variable costs, the only recourse which a shipper had to an excessive freight rate would be to submit a section 23 appeal to the Canadian Transport Commission (CTC) on the grounds that the level of rate was contrary to the public interest. The CTC was quite independent of the Minister and never received instructions from the latter as to how they were to decide on any of these section 23 appeals.[1]

The Australian railway systems are characterised by governments requiring them to perform both economic as well as social roles. The influence of the Transport Ministers on the respective State-owned railways is pervasive, especially in intrastate movements, and often Ministers have taken an active role in the determination of freight rate levels to various commodity groups. In Victoria, for example, the country railways (operated by V/Line) and the Victorian Farmers' and Graziers' Association negotiated a rate increase for 1985-86 which was subsequently overruled and actually substantially increased by the Ministry without further negotiation (Hussey 1986).

It would be overly simplistic and inaccurate to suggest that, due to this lack of government intervention in Canada, their railways are therefore profitable enterprises. The Canadian government conveniently allowed both transcontinental railways to separate their passenger and freight functions. A new Crown corporation, Via Rail, was formed which leased the trackage and running rights from CN and CP and has consistently lost money, with the most recent estimates being of the magnitude of Can$600m a year. Similarly, since its formation in 1922, CN Rail has been relieved of Can$7.1 billion of debt and

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1. In the rapeseed appeal, the Governor in Council did in fact overrule the decision of the Railway Transport Committee (RTC) of the CTC by establishing a minimum compensatory rate for both rapeseed meal as well as rapeseed oil. This, however, was a subsequent appeal to the RTC decision, not a direct Ministerial intervention.

interest costs by Canadian government recapitalisation.[2] CN has justified these recapitalisations on the grounds that they were required to act as an instrument of public policy in their unprofitable service to the province of Newfoundland and on their past obligation to ship export grain at unremunerative rates. (The 1897 crown rate of one-half cent per ton mile was only recently replaced by higher charges under the *Western Grain Transportation Act* 1983.)

In Canada, there is also, naturally, direct government involvement in the government railway. CN Rail cannot borrow money without Federal Government approval and must report to the Federal Government annually. Its board of directors, as well as most senior executives, are appointed by the Federal Government and, irrespective of capabilities, they are generally of the same political party as the government which appointed them.

These qualifications having been made, the fact remains that in Australia there is a far greater extent of government intervention into freight rate formulation than in Canada.

ORGANISATION OF SHIPPERS

The way in which the users of freight transportation are organised in both countries is also strikingly different. There are several lobby groups used by Canadian industrial transportation managers which regularly make their views known to the Department of Transport and the Minister. The arguments of these lobby groups would not be directed at a specific freight rate level, as that is recognised as being within the exclusive purview of the railways (or, on appeal, of the CTC). Their position is for change in transportation policy so that the legislation, be it Provincial or Federal, continues to meet the needs of the transportation users. There exist over 50 of these transportation lobby groups in Canada, many of which are the traffic committees of their particular product association.

As a result of the pressure put on the Government to modify freight rate legislation so as to give the shippers in Canada more power, new legislation was introduced into the House of Commons on 16 June 1986 (Bill C-126, which, in September 1986, was reintroduced into the House as Bill C-18). This bill gives shippers several additional rights if they are not satisfied with the railway freight rate offered to them.

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2. *CN-CP Act* of 1933 (Can$1.2 billion deficit), *Capital Revision Act of 1937 (Can$1.8 billion deficit), Capital Revision Act* of 1952 (Can$1.5 billion deficit), *Capital Revision Act* of 1978 (Can$808 million).

They can ask for 'final offer arbitration'; they can appeal the rate on the grounds that it is prejudicial to the public interest; and they can require that the railways to which they are local give the produce to a competing railway through an extension of the interswitching parameters, joint running rights, or government-mandated joint line rates. Canadian railways are still required to fulfil the common carrier obligation and are still prohibited from abandoning branch lines without Government approval. (These aspects of the legislation are described in Chapter 2.)

By contrast, the Australian shipper who is dissatisfied with freight rates does not appear to have any similar recourse. Of course, in some instances, a competing motor carrier could be used. But there remains a surprising dearth of statutory resources or options for the Australian shipper to take. Nor does there appear to be a similar level of shipper organisation or lobbying effort in Australia.

SCOPE OF STUDY

This Paper does not purport to suggest to Australian readers that the Canadian model is better or should be adopted in the Australian context. Rather, it provides information about areas where there have been significant developments in recent years for shipper and railway freight rate negotiations. Chapter 2 is concerned with the new Canadian Transport Legislation while Chapter 3 provides a comparison of the freight rate related laws governing the various State railways in Australia. Chapter 4 outlines the form of confidential contracts in North America, while a description of these contracts in Australia is given in Chapter 5. Chapter 6 provides some concluding comments.

CHAPTER 2 THE NEW CANADIAN RAILWAY LEGISLATION

BACKGROUND

On 26 June 1986, the Honourable Don Mazankowski, then Minister for Transport, introduced Bill C-126 into the Canadian House of Commons. The Bill described the contents of a new National Transportation Act (NTA) which encompasses not only regulations for railways but also for air, water, pipeline, extra-provincial motor carriage and bus transport.

The National Transportation Policy for Canada states that competition and market forces are, whenever possible, the prime agents in providing transportation services. Economic regulation of carriers occurs only when necessary. Each carrier is to bear a fair proportion of the real costs of the services provided. Whenever the Government imposes public duties on a carrier, the latter is to receive compensation. Whereas in the policy of the previous 1967 legislation, the precept of competition between modes was encouraged, this Act favours both intermodal and intramodal competition.

The aforementioned subsections of the National Transportation Policy which stress competition and market forces are offset by two elements. First, transportation is recognized as a key element to regional economic development. Second, carriers are instructed to set rates which are not unreasonable discouragement to the development of primary or secondary industry or export trade in Canada.

The more important features of the new legislation as it relates to railways and railway freight rates are described below.

CREATION OF THE NATIONAL TRANSPORTATION AGENCY

The Act creates a new agency which will replace the CTC. The agency will consist of not more than nine members appointed by the Governor in Council (the Prime Minister and Cabinet). In addition, a maximum of six temporary members may be appointed at any one time. The Governor in Council may issue policy directions to the agency on any

matter that comes within the agency's jurisdiction. Direction to the agency is done by the Transport Minister filing policy instructions before both the House of Commons and the Senate. The directions become effective 30 days after Parliament has been in Session after the date of filing.

This aspect is quite different from the 1967 legislation in which the CTC was given more autonomy. Under the new legislation, the Governor in Council may revise or revoke any decision of the agency.

The agency has the same rights and powers as a provincial superior court to require attendance of witnesses, production of documents and enforcement of its orders. This latter point creates a difference between the Canadian agency and the US Interstate Commerce Commission, the latter not having the power to enforce its decision as if it were a court.

In addition, the agency may award more than requested in the claim (section 39). Finally, mediation through the agency is available for disputes between carriers or between a carrier and a shipper.

FINAL OFFER ARBITRATION

The concept of final offer arbitration was developed by Professor Carl Stephens in his article 'Is compulsory arbitration compatible with bargaining?' (Stephens 1966). Final offer arbitration has been widely accepted as a method of resolving public employee disputes in the US, particularly with regard to fire fighters and policemen.

Final offer arbitration attempts to increase the cost of not settling a dispute by forgoing the arbitrator's ability to compromise on issues. This 'winner-take-all' outcome is intended to make each party favour more reasonable proposals. In other words, the parties will hopefully narrow the differences between them because of their mutual fear that the arbitrator will select the other side's last offer.

A shipper dissatified with the rate proposed by a carrier or with any of the proposed conditions associated with the movement of freight, may apply in writing to the agency for a final offer arbitration. This recourse can also apply to actual published rates which are being proposed for future movements. The submission to the agency must contain only three items: the final offer of the shipper, the last offer received from the carrier and an undertaking by the shipper to pay the arbitrator's fee.

Fifteen days prior to the submission, the shipper must have served a written notice on the carrier indicating that a submission will be

made. The last offer which is described in the shipper's submission may be corrected by the carrier within ten days of its being received (Section 52). The carrier may, prior to the commencement of the proceedings, request that the shipper agree in writing to ship the goods to which the arbitration relates in accordance with the future decision of the arbitrator (Section 48).

The agency may refuse to submit the case to arbitration if it is of the opinion that the matter raises issues of general public interest and that interests other than those of the shipper and carrier may be materially prejudiced by the matter submitted. In other words, if the agency is of the opinion that the matter which the shipper wishes to bring to arbitration should be dealt with by a more general section 59 on public interest appeals (previously section 23 NTA) then they may refuse to proceed further with arbitration. There is no appeal of agency decisions which preclude arbitration.

If the parties cannot agree on an arbitrator, the agency will choose one. The agency will also provide administrative, technical and legal assistance to the arbitrator.

In the absence of the parties and the arbitrator agreeing on the procedure to be followed, the arbitration shall be governed by whatever rules of procedure the agency may prescribe which have been approved by the Governor in Council.

Before rendering a decision, the arbitrator must take into account whether the shipper had adequate alternate means of transporting the freight, as well as any additional information which is provided by the parties or any requested on his or her own volition.

The decision of the arbitrator shall be in writing and, unless the parties otherwise agree, be rendered 90 days after the date on which the submission was received by the agency from the shipper. The decision shall be rendered to be applicable for a period of one year or less. No reason need be set out in the decision of the arbitrator.

However, where requested by both parties to the arbitration process, the arbitrator must give reasons in writing within 30 days. Where the agency is advised that either party wishes to keep matters relating to the arbitration confidental, the arbitrator shall take reasonable measures to ensure that the matters which have arisen are not disclosed.

The arbitrator can award reparations in the decision, so that the party who has won will have had their rate, in effect, retro-active as

of the date of the submission. Both parties share in the costs of the arbitration proceeding.

Final offer arbitration cannot be used in addition to a public interest appeal by virtue of section 59 (previously section 23 NTA recourse). It applies not only to disputes between a shipper and railway carrier, but also to disputes between a shipper and an extra-provincial motor carrier. It could also be used in a dispute between a shipper of air freight and an airline (Section 47).

Contrary to what had been anticipated before the Act was introduced before Parliament, the arbitrator is not restricted by law from considering evidence which was presented by the parties to one another during the actual rate negotiations. Therefore, the arbitrator can accept any expert report from transportation consultants, if he or she so wishes. Even if the parties had initially attempted to negotiate a confidential contract, but had arrived at an impasse, this may be brought before the arbitrator.

The decision of the arbitrator is final, other than the appeals which could be made on 'principles of natural justice' to the Courts.

Unlike the situation which exists in the United States for final offer arbitration for professional baseball players, the parties cannot agree among themselves to offers or counter offers which are different from the ones which they presented to the arbitrator.[1]

It is unclear what penalties are foreseen in the event that one of the parties does not respect the arbitrator's decision, as there appears to be no specific enforcement clause relating to Part I of the Act. Thus the parties could agree to modify the decision or to not respect it. There is no recourse available to a third-party. The decision of the arbitrator will result in the changed tariff being published and thus available to competitors. There might also be an initial conflict between the shipper and the carrier over the jurisdiction of the arbitrator.

The mechanism of final offer arbitration was used by the Canadian railways and one prominent shipper, Ontario Hydro, even before the Act

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1. As these arbitration proceedings were not triggered by any statute, the rules which were followed by the parties were unrelated to any of the provisions which have been described as part of Bill C-126. In the Ontario Hydro cases, there were panels of three arbitrators, rather than a single arbitrator.

was introduced into the Canadian House of Commons. A 15-year contract had been signed in 1976 for the movement of thermal coal from the Luscar mine at Coal Valley Alberta to Thunder Bay Terminals for on-carriage to Ontario Hydro's generating station at Nanticoke, Ontario. There was a base rate which was subject to an escalation formula. Ontario Hydro separately took CN Rail and CP Rail to arbitration as foreseen in the contracts. As these proceedings were confidential, only two aspects have been divulged. First, much of the argument centred around the objection by the railways that the shipper have access to the formers' costs. Second, the proceedings took much longer than the 90 days which has been foreseen in the Act.

For an analysis of final offer arbitration see Lande and Wecksteing (1986). Of the weaknesses noted regarding final offer arbitration, the introduction of multiple issues, the problem of disparity between settlements and the tendency to overuse third-party procedures rather than reaching negotiated settlements have been among the most prominent.

PUBLIC INTEREST APPEALS

The new National Transportation Act modifies what constituted, since the 1967 legislation, the major mechanism for shipper appeals of rate levels (by the previous section 23 NTA). Where a person believes that the effect of any freight rate, or the act or omission of any carrier may prejudicially effect the public interest, he or she may request the agency to investigate (Section 59). The agency, in conducting the investigation, has no limitation as to the criteria it must choose. However, some of the considerations which it may examine are:

- whether the rates or conditions create some unfair disadvantage or undue obstacle to the interchange of commodities between points in Canada;
- whether the rates or conditions constitute an unreasonable discouragement to the development of primary or secondary industry or to export trade;
- whether the rates or conditions create an undue obstacle to the movement of commodities through Canadian ports;
- whether the control by the carrier of some other form of transportation service is creating an unfair disadvantage;
- whether the rate is permitting the carrier to exploit a shipper who has no alternative competitive transportation service; or

- whether an existing confidential contract between the carrier and another shipper on a substantially similar product creates an unfair disadvantage by providing an unjustified lower freight rate or better shipping conditions to the latter.

In other words, this new public interest appeal will serve not only to examine any complaints by shippers that rates which they have been offered are prejudicial to the public interest, but also whether any confidental contract of which a shipper had received the summary, was unreasonably discriminatory. After the investigation, which can take place by either public hearings or solely by receiving written submission (Section 62), the agency shall render its decision not later than 120 days after it has received the request for the investigation, unless the parties agree to an extension.

If the agency decides that a prejudicially high rate level exists, it may order the rates to be reduced or the disadvantageous conditions to be removed. However, if the agency is investigating a complaint by a shipper that some competitor has obtained a better rate through a confidental contract, the agency does not have the power to revise the rate contained in that confidential contract (Section 61(2)). The agency may look at the contents of the confidental contract without disclosing its substance to the complainant of the public interest appeal. In the event that the agency finds the confidental contract unreasonably discriminatory, it may only order the carrier to lower the appellant shipper's published rate or remove the prejudical conditions.

Therefore, a shipper who enters into a confidental contract with a carrier cannot use this section 59 public interest appeal to limit the application of the contract if it is too onerous. It is only the competitor of that shipper who may attempt to get similar conditions and rates for this contract by using it (through its public summary) as a comparison with the conditions and rates which the railway have offered to him or her. Similar to the *Staggers Act* in the United States, the shipper who claims to want the same rate to that in a confidential contract will only have the information included in a published summary of that contract to base a claim and is, therefore, never sure of the exact differences between what he or she has been offered and what the railway has given to the competitor confidentially.

The burden on the shipper is reduced when he uses the Section 59 public interest appeal to contest his competitor's contract. When challenging based upon the confidential contract, the shipper states

that a comparison between his published rates and his competitor's confidential contracts puts him at an unfair disadvantage. The shipper must show that the published rates provided by the railway are predjudicial to the public interest when he uses the public interest appeal.

This new public interest appeal differs from the previous section 23 NTA mechanism in three ways. First, there is no prima facie case to be proven by the shipper or group of shippers claiming that the rates or conditions are prejudicial. Second, the agency will arrange refund of an amount equal to any overcharges made from the date of the shipper's request for an investigation, if it finds in favour of the shipper (Section 62(2)). Previously, reparations were not included in the legislation. Third, the duration of these public interest cases are to be limited to 120 days, unless the parties agree to an extension. In the past, certain section 23 cases took several years to complete.

Any decision of the agency may be overruled or modified by the Federal Cabinet, either on appeal by any party to the latter or by the latter's own motion. Furthermore, an appeal may be made to the Federal Court of Appeal on a question of law or jurisdiction. The Federal Court may refuse to hear the appeal if it finds that the agency has sufficient grounds for consideration (Section 65).

If the alternative recourses open to a shipper are either final offer arbitration or public interest appeal, the following distinctions may be noted. Whereas the public interest appeal is subject to review by the Federal Cabinet, the arbitrator's decision is final and is not subject to being overturned due to political pressure. Only the public interest appeal mechanism may be used when a shipper is dissatisfied with a confidential contract of his or her competitor. The arbitration option appears to be available to individual shippers with a specific freight problem with a carrier. The public interest appeal is concerned with issues of general public interest such as rate levels of groups of shippers within a region. The shipper choosing the arbitration option will have to share in the expenses of the proceedings, whereas the public interest appeal mechanism is paid for by the Canadian taxpayer. Lastly, the public interest appeal mechanism is a more formal proceeding, allowing for public hearings and interventions from provincial governments; in consequence section 59 decisions will be public. By contrast, if confidentiality is requested, the evidence presented at the final offer arbitration will remain private, and no written reason will be given for the arbitrator's decision if both parties so wish.

RATES

The National Transportation Act states that all freight rates must be compensatory (Section 112). This means that the price for the transportation service must exceed the variable costs of the particular movement of traffic concerned.

In computing the variable costs, the agency is directed to compute the costs of capital by using those methods approved as appropriate for the Canadian rail division of Canadian Pacific Limited.

If the agency receives a complaint that a rate is not compensatory, it shall conduct an investigation and issue a decision within 90 days. It appears from the wording of section 113 (1) that a trucking company could submit a complaint to the agency about suspected rail rates being non-compensatory, as the wording used for prospective appellants is 'person' not 'carrier'. A railway can litigate against another railway for establishing non-compensatory rates to capture traffic. While a confidential contract is not subject to agency modification, there is an appeal for non-compensatory rates (Section 113).

If the agency determines that the rate in question was not compensatory, it will disallow the rate unless the carrier establishes that the rate does not have the effect of substantially lessening competition.

The National Transportation Act allows for three main kinds of rates: agreed charges, tariffs and confidential contracts. (There are also statutory rates, such as rapeseed meal and oil, the *Maritimes Freight Rates Assistance Act* and the *Western Grain Transportation Act*.) Section 115 of the Act obliges railway companies to issue a published tariff only if it is requested by a shipper. If no shipper so requests, the railway company has the option of not publishing its tariffs. This section was perhaps meant to give a partial confidentiality to freight rates which the railways were not anxious to distribute to all their customers or to US interests. This is somewhat similar to the limited freight tariff (LFT) which, under the previous legislation, was not generally distributed by the Canadian railways until the formal amendment to the tariff took place some months later.

Where a railway wishes to amend a tariff by increasing the rate, this shall be published at least 30 days before it becomes effective, unless the agency authorises a shorter period.

Whenever a tariff is amended by reducing a rate, the reduced rate may be made effective immediately on the publication of the amendment.[2]

The rate set out in the tariff shall be the actual transportation charges, with no secret rebates, discounts or allowances being permitted. Any railway contravening this section is subject to a fine of up to Can$25 000 (as well as any officer of the railway company who knew of this offence being committed) and any shipper is liable to a fine of up to Can$5000 (section 182).[3]

In the past, railways have contravened the section obliging them to charge only the published rate by 'forgetting' that the price which the shipper is charged can be affected by such elements as credit terms, loading and unloading or even long term volume commitments. The ability, provided by the present Act, to engage in confidential contracts will perhaps eliminate the former practice of having a published rate and a 'side agreement' as between the railway and the shipper; the latter agreement describing all of the conditions of the movement other than rate and volume (some of which could effect the price).

Important features of the new Act which affect the setting of railway freight rates are described below.

Confidential contracts

Section 120 of the new Canadian National Transportation Act allows for a confidential contract to be agreed to between a railway and a shipper respecting the rates, reductions, rebates, level of service, equipment to be used and any other conditions relating to the traffic. The full confidential contract must be in writing and filed with the agency within 15 days after the date on which it has been entered into. At the same time, a summary must be filed containing such non-confidential information as will in the future be prescribed by the agency. This summary of non-confidential information must be published by the railway within 15 days after the contact has been

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2. The words 'on the publication of the amendment' in section 117 (2) are inconsistent with section 115 (1) of the Act as the latter only obliged the railway to issue a tariff on the request of a shipper. If no shipper had requested the issuing of the tariff at the outset, what logic is there in requiring publication only if the tariff is subsequently reduced?
3. This is the successor to section 380 of the *Railway Act*, which to the author's knowledge was never used.

entered into. It is unclear as to whether this means 15 days from the date upon which the contract became effective or the date on which it was first filed (as parties can enter into a contract which will only be effective several months subsequently).

Any party to a confidential contract is prevented from requesting a public interest appeal or a final offer arbitration of any matter that is governed by the contract unless all of the parties to the contract consent. It is most unlikely that a railway would consent to having its own contract (which, according to the shipper, was giving it some undue advantage) investigated by an arbitrator or the agency. This section therefore means that once the contract has been entered into, the only recourse which a shipper has is to the courts for interpretation of matters of provincial contractual law, such as consent, interpretation of clauses, consideration and non-compliance.

Canadian and US confidential contracts are different in a number of ways. First, the US has exempted a number of commodities and equipment types from regulation by the ICC. Therefore, on exempt commodities, such as fresh fruits and vegetables, and TOFC/COFC, boxcar traffic, no summary need be filed with the ICC. In Canada a non-confidential summary is still required. Second, the opportunity to appeal confidential contracts by third-party competitors is much more limited by virtue of the *Staggers Act* for those commodities which are still regulated by the ICC. For example, on agricultural commodities, a shipper could request the review of a competitor's confidential contract only if the former could prove that there was unreasonable discrimination or that the carrier had tied up more than 40 per cent of its equipment by specific car type used on the contract. In Canada, section 60(d) of the National Transportation Act does not restrict the criteria which the agency will use to determine whether an existing confidential contract with another shipper creates an unfair disadvantage to the appellant by providing a lower freight rate or better shipping conditions. However, the important restriction for Canadian shippers appears to be that the appeal of the confidential contract must be proven to have a prejudicial effect upon the public interest, as opposed to the individual shipper's interest alone.

Lastly, the new section 59 public interest appeal will not be able to consider comparisons of international rate levels, parity or traditional rate relationships with the US because of the rate confidentiality allowed by the *Staggers Act*. In this regard, it will be a far cry from the previous section 23 appeal mechanism.

Market dominance

The Act eliminates the former section 278 of the Canadian *Railway Act*, which prescribed a maximum rate ceiling beyond which railways could not price freight rates for captive shippers. This provision was only used once during the almost 20-year duration of this legislation, by Domtar Limited. It was found that the key weight necessary to calculate the maximum rate ceiling was too low, thereby permitting the railways to have seemingly unlimited freedom to price their rates.

The US legislation on maximum rates is described here because of its importance for cross-border rail operations. This aspect will be apparent from discussion in the following sections.

The maximum rate level which is foreseen by the US *Staggers Act* prescribed a 'jurisdicitional threshold' of somewhere between 170 and 180 per cent greater than the variable costs of the movement. However, in addition to being above that threshold, a US railway is only susceptible to a shipper's appeal if the latter has 'market dominance' over the transportation to which the rate applies. The rate must also be determined as 'unreasonable' by the ICC.

The concept of market dominance has been defined as an absence of effective competition from other carriers or modes of transportation. The ICC had, prior to the *Staggers Act*, developed what were known as 'Rebuttable Presumptions' to determine whether market dominance existed.

If a certain condition (such as the revenue to variable cost ratio exceeding 260 per cent) was met, then market dominance was presumed. The carrier could then rebut the presumption even though the burden of proof was upon it. Shippers who had made a substantial investment in rail-related equipment or those who had signed long-term contracts and were presumed to be captive were among the cases where a (rebuttable) presumption of market dominance was made. Similarly, where a carrier handled 70 per cent or more of the traffic within the previous year, this constituted a rebuttable presumption of market dominance.

In July of 1981, the ICC issued its final market dominance rules in Ex Parte 320 (Sub 2). The ICC decided to terminate all of its rebuttable presumptions and replace them with evidentiary guidelines. It expanded the definition of competition to include both geographic and product competition.

As the ICC recognised that it would be difficult to prove the absence of such competition in the 90-day period which the *Staggers Act*

allowed for such proceedings, these evidentiary guidelines were to help shippers in determining the requirements of what to submit in a particular case.

In determining geographic competition, the ICC would consider the number of alternative geographical sources of supply as well as the number of alternative sources or destinations served by different carriers. The concept of product competition was the substitutability and availability of substitute products, as well as the relative costs of using substitute products. In addition there were the possibilities of showing either intramodal or intermodal competition.

In the US there have been more than 100 cases where market dominance has been found to exist since the enactment of the *Staggers Act*. The ICC advises, however, that it has taken substantially longer than 90 days for a decision. In fact, the average is approximately 18 months.

Recently the ICC decided to use 'stand-alone' costs in order to determine maximum railway rates. In February 1983, the ICC proposed Ramsey pricing, whereby a higher proportion of common costs was allocated to services with lower demand elasticities. Under the new proposal, rate increases of 15 per cent per year were allowed until a rate of return equal to the cost of capital was acheived, the only long-term constraint on individual rates being that they not exceed 'stand-alone costs'. The definition given by the ICC to a stand-alone cost was as follows:

> The 'stand-alone cost' to any given shipper (or shipper group) is the cost of serving that shipper alone, as if it were isolated from the railroads' other customers. It represents that level at which the shipper could provide the service itself. No shipper would reasonably agree to pay more to a railroad for transportation than it would cost to produce in isolation itself, or more than it would cost a competitor or the railroad to provide the service to it. Thus, the stand-alone cost serves as a surrogate for competition; it enforces a competitive standard on rail rates in the absence of any real competition.[4]

4. Recourse to the civil courts as opposed to the agency is similar to the situation which exists with US confidential contracts by virtue of the *Staggers Act*.

Agreed charges

Agreed charges were defined in the Canadian *Transport Act* of 1939 as being the commitment of a shipper to transport a given percentage of his or her product by the rail mode over a period of time. Although it is presumed that this definition is still appropriate, there is no confirmation of this in the new Act.[5] Assuming that the previous legislative definition of agreed charges is the same, once such a charge has been finalised between a railway company and a shipper for a domestic movement, any other railway is entitled to become a party to the agreement, provided all the railway companies over whose lines the second through-route applies concur.

Railway companies incorporated in the United States and operating railway lines in Canada may also participate in these agreed charges. However, this is extremely unlikely to occur given the policy of US railways to avoid any collective activity which might incur either criminal or civil legal suits by virtue of a contravention of the US anti-trust laws.[6] The agreed charge shall be filed with the agency within seven days after the agreement has been concluded. It would take effect 20 days after the filing.

Similarly, any other shipper may become a party to the agreement by filing with the agency a notice to that effect. It seems that, as with the *Transport Act* of 1939, this shipper would have to commit the same percentage of his or her product to the rail mode (even if the volume were different than that of the first shipper) in order to benefit from the agreed charge. However, this is not specifically mentioned in the new Act.

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5. In fact, section 121(1) of the Act simply says that a railway may charge such rates from one point in Canada to another point in Canada as are agreed upon by the company and the shipper. At section 122 it is stated that an agreed charge shall be expressed in cents per 100 pounds and that the carload rate for one car shall not exceed the carload rate for any greater number of cars. This description would just as easily fit a class rate as it would an agreed charge.
6. There is a further sub-section in the Act which allows for concurrence on agreed charges by US railways involving international routes, provided that all the railway companies over whose lines the continuous route is established concur. In the opinion of the author, the probability of one US railway asking for the concurrence of another US railway to participate in an international agreed charge is remote due to the US anti-trust laws.

Any shipper who considers that his or her business will be unjustly discriminated against by an agreed charge of another shipper may apply to the agency for a fixed rate in respect of traffic (Section 125). Where the agency agrees that the shipper's business has been unjustly discriminated against, it may fix a rate to be charged by the railway for that shipper's traffic.

This appeal recourse appears to be available to those competitors whose origin or destination would differ from that in the agreed charge. Otherwise, a shipper of the same designated product under the same circumstances and conditions would merely have to file a notice of intention to become a party to the agreement if he were prepared to commit the same percentage.

If an agreed charge has been in effect for at least one year, either the railway or the shipper may withdraw by giving written notice at least 90 days in advance.

Where an agreed charge has been in effect for at least three months, any carrier or association of carriers, of shippers, or of motor vehicle operators may complain to the Minister that the agreed charge is unjustly discriminatory (Section 127). If the Minister is satisfied that it is within the public interest for the complaint to be investigated, he or she may then refer the matter to the agency. If the agency determines that the agreed charge is undesirable in the public interest on the grounds that it is either unjustly discriminatory or places any other form of transportation service at an unfair advantage (or other criteria), it may make an order varying or cancelling the agreed charge.[7]

Given that agreed charges constitute less than 5 per cent of the traffic of Canadian railways at the present time, it is unlikely that the above sub-sections will be used very frequently.

Joint rates

Where traffic can move over any continuous route in Canada, portions of which are operated by two or more railways, shippers have the right

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7. Where the agency had fixed a rate in response to a shipper's appeal that the agreed charge was discrminatory in virtue of section 127(3), the subsequent decision by the agency to vary or cancel an agreed charge pursuant to a complaint by a carrier or association in virtue of section 125(2) will subject the fixed rate to the corresponding modification.

to request those railways to either agree on a joint tariff, enter into a confidential contract, or enter into an agreed charge (Section 129). If the railway companies fail to agree, the agency, on an application by the shipper intending to move traffic over that continuous Canadian route, may require the railway companies to agree on a joint tariff at a rate satisfactory to the agency, or fix the rate for the railways itself.

The agency must make its determination on whether to fix a rate within 90 days following the application from the shipper. Furthermore, reparations are to be paid to the shipper from the date on which the application was made if the shipper had moved traffic over the route at a higher rate in the interim.

Where two companies move traffic over a continuous route from Canada into the US, the originating carrier has the obligation of filing the joint tariff, agreed charge, or confidential contract with the new agency. Conversely, where two or more railways move traffic over a continuous route from the US into Canada, the filing responsibility falls upon the railway on whose line the traffic is first moved in Canada (Section 132).

This means that US railways giving confidential contracts to Canadian shippers must have those contracts filed with the new transportation agency, even though Canadian transportation legislation would not strictly apply to a US railway operating exclusively in the US. Whether these US railways will comply with this provision remains to be seen.

For those US railways such as the Burlington Northern, Conrail, the Delaware and Hudson or the Norfolk and Southern which operate a part of their systems within Canadian territory, these provisions carry more weight. However, it should be noted that these provisions only apply when two or more railways are operating internationally over a continuous route. The words 'continuous route' appear to mean a joint through movement, as opposed to a combination of proportional rates. However, there is no definition in the Act. If a US rail carrier accepts traffic by virtue of any Canadian contract jointly with a Canadian railway and a shipper (Section 120) the filing with the agency would have to take place, irrespective of whether the commodity had been exempted from regulation in the US by the ICC. This filing would have to take place irrespective of whether the commodity had been exempted from regulation in the US by the ICC.

The abovementioned section on joint rates obliges Canadian railways to agree on through rates if a shipper so requests. This may benefit

some shippers who prefer to have one rate from origin to destination rather than a combination of segments each with a separate billing and a separate tariff to compute. In the US, where there are a much greater number of possible railway combinations involved in a transcontinental movement, this kind of legislative provision would carry more weight. It derives historically from the confusion which beset many shippers in the early part of the century, when there were hundreds of possible routing combinations, especially on international traffic.[8]

It should be noted that, in two very important ways, the section on joint rates in the Act does not assist the shipper. First, it does not oblige the Canadian railways who are entering into a joint through rate to give a new price which is lower than the combination of their respective proportional rates. Second, it does not compel any US railway to enter into joint through rates, if that railway is operating exclusively within US territory.

Section 133(3) of the Act states that the agency may require to be informed by a US railway of its proportion of any joint international through tariff. It is not clear what authority (if any) the new agency can call upon to oblige US railways to submit to their jurisdiction.

Competitive line rates

Shippers who are captive to only one railway at either the point of origin or the point of destination, may request the local railway to establish a competitive line rate to or from the point served exclusively by the local railway and the nearest interchange with another railway. Even if the local carrier could have carried the traffic over the entire route or the majority of the route, the local carrier is still required to establish the competitive line rate to or from the nearest interchange with the other railway. It is up to the shipper to designate the route for which he or she wishes the local carrier to set the competitive line rate. The Act defines the nearest interchange as being one in the direction of the movement of the traffic (Section 134(7)). This legislative provision was designed to put pressure on railways who were in a previously dominant position, to be more reasonable in their rate offerings.

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8. One of the main purposes for the creation of the Railway Association of Canada was to help clarify the unruly numbers of routings available to the shipper.

Furthermore, the other railways which carry the traffic to or from the interchange point may be a US carrier operating through the US. The exception to this rule is that, where the ultimate point of destination is in Canada and there is available to the shipper more than one continuous route wholly within Canada that is cost effective, the shipper must designate a route that is wholly within Canada, for the competitive line rate provision to apply (Section 134(5)). Where the destination is a port in Canada for export, it shall be considered that the ultimate destination is in Canada. Where the point of origin is a port in Canada for import into Canada, the traffic shall be deemed to move on a continuous routing that is wholly within Canada.

However, once it is recognized that most of the international rail traffic between Canada and the US flows from Canada to US destinations, the Canadian railways will, in most cases, be required to establish competitive line rates over interchange points with US railways, with the latter operating within the US to destination points.

In other words, this section of the new Act demonstrates the intention of the Government to widen the transportation options of those Canadian shippers who were captive to one railway, even though it might ultimately mean the loss of rail revenue to Canada.

A competitive line rate would not be established unless the shipper had previously negotiated with all the connecting railways who would be involved to or from the interchange point over the balance of the through route (Section 135). A competitive line rate would not be established for the movement of intermodal traffic except if the traffic were imported from overseas for subsequent movement by rail.

Another important qualification is that the portion of the movement to or from the interchange point shall not exceed 50 per cent of the total number of miles over which the traffic is moved by rail or 750 miles, whichever is greater (Section 135(4)).

If the shipper and the local carrier have not reached agreement, the former may apply to the agency. Within 45 days of receipt of this application, the agency shall establish the amount of the competitive line rate and the designation of the continuous route or of the nearest interchange point or the level of service which must be given to the shipper.

Where a competitive line rate is established by the agency, it shall remain in force during a period of one year, unless some other period is agreed upon between the shipper and the local carrier. Where such

a rate is established, the railway over whose lines the major portion of the movement of the traffic occurs shall provide the shipper with an adequate supply of cars (Section 140). The connecting carriers are responsible for a pro-rated share of the operation and maintenance of the interchange as well as the capital cost of making any modifications thereto during the period in which the competitive line rate is in effect. Furthermore, once a competitive line rate is established by the agency, the shipper is not entitled to request final offer arbitration or a public interest appeal of that rate.

The agency will determine the competitive line rate on application from the shipper by adding three amounts:

- an amount equal to the interswitching rate prescribed according to a mileage zone;
- an amount equal to the revenue received by the connecting carrier for the balance of the movement in respect of which the competitive line rate does not apply, divided by the total number of miles over which the traffic is to be transported by the connecting carrier;[9] and
- the amount by which the number of miles over which the competitive line rate applies exceeds the mileage zone.

Prior to introducing competitive joint line rates into the proposed legislation, Transport Canada engaged the Trade and Transportation Group (TTG) to examine the concept (TTG 19). Consultant Frank Trotter estimated in the TTG Report that more than Can$2 billion of freight revenue was associated with traffic to which competitive joint line rates would apply. Of this amount, nearly half would be subject to competitive joint line rates in conjunction with a US carrier, with two-thirds of that being CP Rail traffic.

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9. The revenue mentioned is calculated from either the tariff or agreed charge of the connecting carrier. Where the connecting carrier has agreed to a confidential contract, the amount is calculated by using the revenue of the local carrier if the traffic is transported under substantially similar conditions. If the conditions are not similar, the calculation is computed from the total amount of revenue received by the local carrier over a designated period for all movements of traffic that are considered by the agency to be substantially similar, divided by the total number of miles over which such traffic moved. As the agency does not set the rate over which the competitive line rate does not apply, it is unclear why this component is included in the calculation.

The report defined the word 'captive' as meaning that the location was outside the interswitching limits and not served directly by another Federally-regulated railway. Surprisingly, the availability of other modal alternatives was not deemed to influence the determination of captivity to the railway mode.

The report disagreed with the contention of CP Rail that the Burlington Northern's operating expenses per unit of revenue producing output were 29 per cent lower than CP. Trotter stated that although labour and material costs as well as the taxation framework were in fact lower in the US, the currency exchange rate differential, as well as the cost deregulation factors in the proposed Canadian legislation, would make competitive advantages to US railways negligible.

The TTG Report also disagreed with the arguments of the Canadian railways to the effect that competitive joint line rates were not necessary once amendments to interswitching and terminal running rights were implemented in the new legislation.

A survey conducted by the Canadian Manufacturers' Association in 1985 revealed that, if the interswitching limits were augmented from four miles to 20 miles, 79 per cent of all sidings would be competitive.

However, the regional distribution of these results was strikingly divergent. For example, augmenting the interswitching limits to 20 miles would make 14 per cent of sidings in the Province of Ontario competitive. By contrast it would only make 13 per cent of sidings in Atlantic Canada competitive. Trotter concluded that since certain industries such as coal were characterised by the average distance to interchange from mine origin of more than 300 miles, the introduction of interswitching and terminal running rights would not be a reasonable substitute for competitive joint line rates.

The TTG conclusions are puzzling in two ways. First, the report estimated that the revenue loss to both CN Rail and CP Rail derived from the introduction of competitive joint line rates would be less than Can$100 million with the majority of this negative impact being related to transborder traffic. How, therefore, can the TTG Report concurrently claim that the introduction of competitive joint line rates would induce greater exports and prompt the railways to respond to new competitive circumstances?

Second, the results of a survey conducted by the Canadian Industrial Transportation League revealed that almost 50 per cent of the shippers surveyed responded that they would use the competitive joint line rate process 'seldom' or 'never'. Why then had the shippers' concern that

the proposal for joint line rates not be implemented been so strong that a 'Shipper Coalition on Mandated Joint Line Rates' was created from 14 major Canadian shipper associations?

LEVEL OF SERVICES

Railways are obligated to furnish suitable equipment to carry freight provided by the shipper. In the past, the Canadian Transport Commission had determined that the definition of 'suitable equipment' did not necessarily mean the most expensive equipment which the railway owned but rather rail cars which were adequate for the task at hand.[10]

The new Act also obligates the railways to deliver any traffic offerred to them without delay and with due care, and to furnish any other service incidental to the transportation as is customary. These provisions constitute what are generally referred to as common carrier's obligations.

Where a shipper provides equipment to the carrier for movement of the former's freight, the railway shall establish reasonable compensation for the usage of these rail cars (Section 143(3)).

The railways are also obliged to transfer traffic and return the rolling stock of other railways. On through traffic, railways must provide reasonable facilities for the receiving of the freight and provide suitable accommodation within reasonable delays (Section 144).

One of the elements foreseen in the common carrier's obligations by the proposed legislation is that every railway which provides facilities to any express company (that is, a company providing an expedited parcel service) must give equal accommodation to all other express companies which would request the usage of those facilities (Section 145(4)).

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10. In one particular case, Les Benjamin, MP, had questioned the CTC as to whether the railways were not obligated to move rapeseed in covered hoppers. This type of equipment is much more expensive than box cars, and shippers prefer it because the loading can be done automatically through a hole in the top of the hopper, which avoids them additional costs of one employee. The railways argued successfully that this equipment should be used to service the potash industry which provides them with higher-rated merchandise.

These common carrier obligations are so important that the Act prohibits the agreement by the railway and any other company of provisions which would modify them. The legislative provisions are of public order, that is, they cannot be changed even by the consent of the parties.

If a shipper applies to the agency on the grounds that any common carrier's obligation regarding the level of service is not being met, the agency must decide within 45 days whether suitable equipment, reasonable car hire rates, or customary ancillary services are being satisfactorily provided by the railway.[11]

Where the agency determines that a railway company is not fulfilling its common carrier obligations, it may order that specific works be constructed, property be acquired, or railway cars be distributed, within such period as it deems appropriate. However, where a railway and a shipper have agreed by confidential contract that a certain car type would be provided in certain quantities, the agency will respect these contractual terms in its deliberations over whether common carrier obligations are being met with regard to another shipper.[12]

RUNNING RIGHTS AND JOINT TRACK USAGE

Where one railway company wishes to use the trackage and terminal belonging to another railway company in order to operate its own trains over a portion of the other railway's right of way, the former can apply to the agency to allow this and set the compensation to be paid for these running rights, if the railways have not agreed on the

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11. There seems to be some inconsistency between section 136(d) and section 146(1) of the Act in that the latter gives the agency 120 days to determine whether the railway is fulfilling its common carrier obligations. This latter section however is not limited to the local carrier and therefore extends to other railways which are involved in the shipper's movement. Furthermore section 146(1) enables 'any person' to request that the agency conduct an investigation, whereas section 136(d) only refers to a request from the shipper.
12. This matter is covered in section 146(2). This section is inconsistent with the provisions of section 62(2) of the Act which provides the shipper with a recourse where the latter is being discriminated against due to an existing confidential contract with another shipper for a substantially similar product (section 60(d)). In the US legislation, one of the appeal mechanisms relating to confidential contracts is that the railway has tied up too much of its equipment in one contract.

rate among themselves (Section 147). In order to reach its decision the agency may hold public hearings and may set such conditions with respect to the exercise or restrictions of such running rights for both parties, having regard to the public interest.

The Governor in Council may, on the application of any railway, municipality, interested person, or of its own motion, direct the agency to conduct an inquiry as to whether it is within the public interest to avoid the construction of a new railway if it is in close proximity to an existing railway (Section 149). Upon receipt of the agency's report, the Governor in Council may order that the existing railway be used jointly as a common right of way, and fix the amount of compensation.[13]

CONNECTIONS

Where the lines of two different railways run through or into the same industrial area, the agency may on application of one of the railways or of any person interested, order that the lines of such railways be connected in or near such industrial areas so as to permit the convenient transfer of traffic between the lines. The agency would determine how the costs of making and maintaining such connections would be borne (Section 150).

Where the lines of two or more railways intersect, the agency additionally may require that such connection be maintained and available for use if such a request has been made. A municipal corporation or other public body is allowed by the Act to request such an order by the agency.

Where one of the railway lines is a provincially regulated railway, the above application must be made to both the agency as well as a provincial board to jointly determine the application (Section 151).

INTERSWITCHING

When two railways connect with one another, the agency, on application from one of them or from a municipality or interested person, may order the companies to allow their facilities to be used for interswitching of traffic between either railway or any connecting railway (Section 152).

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13. It is unclear to the author what the difference is between sections 148(3) and 148(7) in that the Governor in Council in both instance may make an order or direction for the joint or common usage of the right of way.

The agency may prescribe rates whenever the point of origin or destination is within a radius of 30 kilometres of an interchange, or such greater distance as the agency determines.

The agency, with the approval of the Governor in Council, may make an additional prescription of the maximum percentage of the interswitching rate which may be passed along to the shipper by the railway.

LIMITING CARRIERS' LIABILITY

Railways may not limit their liability unless they have signed a written agreement with the shipper or a shipper's association. The agency may determine the extent to which the liability of a railway may be limited on application by the railway. It is unclear whether the written agreement according to Section 120 signed as between the railway and shippers would constitute a confidential contract according to section 120 of the Act. If this were not the case, it is an open question as to whether these agreements must be filed publicly with the agency. There does not appear to be the recognition in the Act that changes to a carrier's liability constitute a part of the freight rate.

ABANDONMENT OF RAILWAY LINES

Section 159 of the Act states that no Canadian railway company has the right to abandon the operation of a railway line unless pursuant to an order of the agency. However, this does not include sidings or spurs that are not branch lines, or any trackage auxiliary to a railway line.

When a railway wishes to abandon the operation of a branch line, it must provide advance notice to the agency at least 90 days before making an application. This notice should be accompanied by a statement of the railway's costs and revenues attributable to the branch line for the number of financial years which the agency has prescribed in its regulations. This notice, with the accompanying costs and revenues, is also to be served upon a list of persons which the agency by regulation will also determine.

Any person opposing the application must file reasons within 60 days.

If an application is not opposed and no offer to acquire the branch line has been made by another railway, the agency shall order the operation of the branch line abandoned.

Where the application is opposed the agency shall, after reviewing the statement of costs and revenues, make a determination of the amount of actual loss which it decides is attributable to the branch line. The agency will then publish this notice and after holding public hearings, if required, will determine whether the branch line or a segment thereof is economic or uneconomic and in the latter case whether there is a reasonable probability that the branch line could become economic in the foreseeable future.

Where the agency has determined that the branch line or segment thereof is uneconomic and that there is no reasonable probability of its becoming economic in the foreseeable future, the agency shall order the operation of the branch line or segment to be abandoned.

However, the Governor in Council may vary the date fixed by this order upon application by a shipper, if it considers that the abandonment would be contrary to the public interest. The Governor in Council has the power to postpone the date of abandonment for up to five years in successive intervals if it is persuaded that it will have a significant impact on a large region of Canada, on shippers, and that there is a lack of adequate alternative transportation facilities in the area.

When the Governor in Council has decided to delay the date of abandonment, the agency will prepare another report prior to the postponement elapsing, which will review the actual and potential traffic on the line or segment thereof. If the Governor in Council then determines that the line is economic or that there is a reasonable probability of its becoming economic in the foreseeable future, it may remit the application once again to the agency.

Where the agency determines that the branch line is economic or has a reasonable probability of becoming economic, the agency will still order the branch line or segment thereof to be abandoned unless it determines that the continued operation of the branch line or segment is required in the public interest. The determination of 'public interest' involves the agency considering:

- the actual loss incurred by the railway;
- the alternative transportation facilities available and the ability of those facilities to meet the needs of shippers located in the area;
- the probable effect of the abandonment on other lines and on the transportation system generally;
- the economic impact on communities in the area;

- the feasibility of maintaining the branch line jointly with another railway company; and
- the probable future transportation needs of the area.

If the agency decides that operation of the branch line is required in the public interest, it will dismiss the application but reconsider it at least once every three years.[14]

The agency may vary the date fixed in its order for the abandonment of the operation of the branch line or segment thereof if a provincial government or municipality or some other interested party has undertaken to pay the actual loss attributable to the line or segment.

Furthermore, the agency may make recommendations to any railway company as to the transfer of branch lines between companies, the operating or running rights over railway lines or the connection of branch lines of different railways. The Minister may subsequently require the railway company to implement the above recommendations by the agency.

In other words, a shipper who is opposed to the abandonment of a railway branch line may apply to both the agency as well as the Governor in Council with arguments that the line should be preserved in the public interest. Ironically, the Governor in Council has the power to postpone and postpone again an order by the agency that a branch line be abandoned on the grounds that it is uneconomic and has no reasonable probability of becoming economic in the future. On the other hand, where the agency determines that the branch line is economic or has a probability of becoming economic in the future, the agency has the authority to order the abandonment of the branch line if its preservation is not within the public interest.

On this latter decision, there does not appear to be an appeal possible to the Governor in Council other than the general appeal under section 64. It is unclear to the author why the Governor in Council's power to postpone decisions of the agency to abandon branch lines should be limited to when the branch lines are uneconomic.

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14. The agency may require any company that operates more than one railway line in an area in which a branch line abandonment application has been filed, to furnish it with revenue and cost data of the traffic moving over their lines. This will be treated confidentially.

Another railway company may offer to acquire the branch line which has been proposed for abandonment (Section 174). The agency, after holding public hearings on this matter, may make an order directing the transfer of the branch line or segment thereof to the applicant railway. Furthermore, the agency may determine what price is to be paid by the applicant railway company where an amount has not been agreed to between the parties.[15]

The Minister for Transport may enter into an agreement with a provincial government, municipality, shipper or shippers' association to improve alternative transportation facilities in the area served by the branch line or segment thereof out of money appropriated by Parliament (Section 175). This agreement would then enable the agency to authorise the branch line's abandonment as it would no longer be required in the public interest. The Act provides for recommendations to be made by the agency to the Minister that such an agreement be entered into if it would be more cost effective to improve alternative transportation facilities in the area served by a branch line, than for the Government to pay subsidies for the operation of the branch line.

Where the agency has ordered that a branch line or segment thereof may be abandoned, the Minister of Transport may enter into an agreement with a provincial government, municipality, shippers' association or shippers who regularly use the branch line to the effect that money appropriated by Parliament be paid to the above in order to assist in the transition to improved transportation facilities in the area, if one or more shippers would suffer significant economic harm as a result of the abandonment. However the monies given must not exceed the cumulative loss which would be incurred by the railway company during a period of five years following the date of the abandonment.[16]

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15. Where such an order has been made, the line or segment must continue to be a branch line, even though it is not a subsidiary, secondary, local or feeder line of the company to which it is transferred.
16. This provision represents another inconsistency in the Act. Although section 175(1) and 175(6) both would give funds to improve alternate transportation facilities in the area of the branch line abandonment, the latter is more restrictive in that it limits the amount of funding and requires that shipper would suffer economic harm. Why then would a party wish to make use of the latter section if one could accomplish the same end by employing the former section without any of the restrictions of the latter?

The railway company may file a claim with the agency for payment of the amount of the actual loss attributable to the branch line from the date of the application to abandon a branch line. The agency after examining the claim will certify the amount of actual loss (if any) and recommend to the Minister to pay the railway company out of the Consolidated Revenue Fund. Furthermore, where a Canadian railway company has complied with an order of the Minister to implement a recommendation of the agency that its branch lines be transferred or connected with that of another company, a claim for the former's costs or losses incurred may also be made.

It would, therefore, appear to be in the best interests of any Canadian railway which is losing money on any branch line to apply for its abandonment when it is confident that the application will be contested on public interest grounds. From the date of the application, the loss derived from the line will be reimbursed by the Government until the branch line is ultimately approved for abandonment. If the abandonment application is postponed due to opposition, the railway may continue to receive reimbursement of its losses for years. As long as the railway is being reimbursed for its losses, what reason does it really have to insist on abandonment?

Although this chapter of the Act was entitled 'applications for abandonment of operation of railway lines', no procedural mechanisms are given for the abandonment of any line other than a branch line. Since the initial provision states that no railway company shall abandon a railway line unless persuant to an order from the agency, the only conclusion left is that Canadian railways are not to be permitted to abandon any main line. The abandonment of railway lines should not be confused with the cancellation of routings.

ENFORCEMENT

The Act states that any individual who contravenes a provision under the railway transportation division of the Act would be liable to a maximum fine of Can$5000.

A railway company would be liable to a maximum fine of Can$25 000. Furthermore, every director or officer of the railway company would be guilty of the same offence unless it occurred without their knowledge or they had exercised all due diligence to prevent the contravention occurring.

Every person who contravenes any provision or order or regulation made under the Railway provisions of this Act is guilty of an offense punishable on summary conviction. It is, therefore, theoretically

possible that the person who disobeys one of the Act's provisions would be sent to prison or obtain a criminal record.

The obligations outlined in the above provisions of the Act are concerned more with railways than with the users of railway services. Therefore, the duties to file the complete rate, fulfil the common carrier's obligations, and to provide the agency with accurate cost information concerning traffic when so requested, falls upon railway management not the shippers.

No definition is given of the words 'offense', 'person' or 'individual'. Therefore it is unknown whether filing inaccurate tariff information would render the railway susceptible of a Can$25 000 fine per route, per shipper, or per train load. As section 182(2) describes a Can$5000 fine for individuals, it seems reasonable to conclude that it would be the shipper's company rather than the traffic manager who would be obliged to pay the Can$5000 maximum fine.[17]

With such general enforcement provisions, it seems unlikely that the agency will act in any more of a 'policeman's' capacity than did the CTC. The CTC traditionally waited for complaints to be brought to it before any investigative action was taken to enforce the legislation.[18]

GENERAL PROVISIONS

Annual reviews will be produced by the agency as of 1988, examining changes in the tariffs of carriers as well as the level of service provided to shippers. The Minister, with the approval of the Governor in Council, may also request the carriers to provide any other information which he or she requires, other than confidential contracts.

Surprisingly, the agency is also prohibited from providing any confidential contract to the Minister (perhaps due to the freedom of information legislation).

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17. This is confirmed by section 182(5) referring to directors and officers of railway companies. No such specification is given for shipping companies in the enforcement provisions.
18. CN Rail and CP Rail berated the CTC for not having enforced the provisions of the previous legislation which required international rates to be filed, secret rebates not to be accepted by Canadian shippers, and US railways whose trackage extended into Canada to be prohibited from giving confidential contracts on that traffic.

ACQUISITION OF CANADIAN TRANSPORTATION UNDERTAKINGS

Whenever anyone wishes to acquire a Federally regulated transportation company, notice of the proposed acquisition must be sent to the agency (Section 252(11)). However, this requirement does not apply to any transportation company which is exclusively engaged in the movement of goods between Canada and another country. Nor does it apply to any person whose principal place of business is outside of Canada. Also, it does not apply to the proposed acquisition of any transportation company which has less than Can$10 million in assets or annual sales.

When the proposed acquisition is through the purchase of the transportation company's shares, the above requirement of notification would only apply if 10 per cent or more of the voting shares would be held as a consequence by the person wishing to make the acquisition or the latter's partners, subsidiaries, or companies in which the former is a director or officer.

The agency, upon receipt of the notice of proposed acquisition, will publish the notice in the Canada Gazette and inform the Minister of Transport. Any person who is of the opinion that the proposed acquisition is against the public interest may file an objection with the agency. When an objection has been received, the agency may deem it necessary to hold public hearings. If no objection is received by the agency within the prescribed time, the agency shall inform the person who sent the notice that the proposed acquisition is not subject to review.

Whenever a proposed acquisition is to be reviewed by the agency, it will have 120 days to determine whether it is against the public interest and whether it should be disallowed. If the agency has not made its decision within the 120 day period, the proposed acquisition is considered to be within the public interest (although there are provisions for an extension of this period if the person proposing to make the acquisition agrees).

The Governor in Council, on application from any person or of its own motion, may rescind the decision to disallow the proposed acquisition within 30 days after the agency's decision.

The agency may, with the approval of the Governor in Council, make regulations prescribing the form and contents of the notice of proposed acquisition as well as the delays applicable to any party wishing to oppose acquisition. Where the agency believes that any third-party possesses information relating to a proposed acquisition under review, the former may demand that this information be provided. This information will be treated as confidential.

Persons who fail to comply with the above provisions but proceed with the acquisition without awaiting the agency's approval, may be required to divest themselves of the interest acquired in the transportation company. Execution of this decision by the agency is made by the latter's application for an order of a superior court.[19]

REVIEW AND APPEAL OF AGENCY DECISIONS

It is important to note that the Governor in Council may at any time, either on petition from any party or from its own motion, vary or disallow any decision of the agency. Such an order from the Governor in Council is binding on the agency and on all parties.

This means, in effect, that any decision of the agency may be overruled by the Federal Cabinet. The agency is thus constrained in two ways. First, the Cabinet may issue policy directions to the agency by virtue of section 23 of the Act. Second, if the Cabinet disagrees with any of the agency's decisions, it may overrule them by virtue of section 64 of the Act.

An appeal mechanism also lies from any decision or regulation of the agency to the Federal Court of Appeal over a question of law or jurisdiction. This appeal is initiated by requesting permission from the court within one month of the agency's decision that the former give permission to consider the appeal. After such leave has been obtained, the appeal itself must be made within 60 days.

GENERAL AND TRANSITIONAL PROVISIONS

The Governor in Council will, in 1992, appoint a task force to carry out a comprehensive review of the new legislation. At that time the question of whether it is still necessary to have a compensatory rate requirement for rail transportation will be considered.

Any decision or orders which were rendered by the CTC prior to the coming into force of the new legislation will have the same effect as if they had been rendered by the agency. Any proceedings which were ongoing before the CTC at the time of the enactment of the new legislation will be continued by the agency, unless the hearing or

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19. The court may vest the interest in a trustee who will exercise voting rights. The application to the court may also be made by the agency where the latter believes that a person is not likely to comply with a demand for divestment from the agency.

investigation has been completed but no decision has yet been made.[20]

However, every decision or regulation made by a former regulatory authority such as the CTC only continues in force if it is consistent with the new legislation.

All books, records and documents held by the CTC are to be transferred to the agency immediately before coming into force under the new Act.

The *Maritime Freight Rates Act* is continued, with the agency being authorised to approve or maintain the discounted tariffs. However, it is modified to include the concepts of confidential contracts and rebates.

The *Transport Act* of 1939, which introduced the concept of agreed charges will be repealed.

The new Act or any provision thereof would come into force on a day which would be fixed by proclamation. It is not uncommon for there to be a delay of a few months between the date when Parliament approves a new law and the date it comes into effect. This would allow for the agency to staff and prepare itself for the new mechanisms forseen in the law. It is currently being forecast that this legislation will be approved by Parliament in June 1987, effective 1 January 1988.

Finally, many of the sections of the *National Transportation Act* of 1967 and the *Railway Act* which were consistent with the new legislation will continue to apply.

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20. The Governor in Council may request that, even in this case, the agency replace the CTC on such terms and conditions as are specified to protect the rights of the parties.

CHAPTER 3 AUSTRALIAN RAILWAY FREIGHT RATE LEGISLATION

Early regulation of railways in Australia was similar to that of Canada and the US in that it was aimed at preventing abuse of a monopoly position. Legislation was passed in each of the Australian colonies requiring railways to fulfil their common carrier obligations. Some of the State legislation also restricted price discrimination. For example, in the New South Wales and Queensland legislation, the railway commissioners were specifically prevented from discriminating between persons demanding the same service.

FREIGHT RATE STRUCTURE IN AUSTRALIA

Freight rates in Australia are divided into the following categories.

Special rates

These are special contracts which are given to individual customers and are generally not published nor available to third parties. They are often offered to those clients with large volumes moving over long periods. They are sometimes offered to shippers who require special equipment.

A variation of these special rates often involves a rate escalation formula.

By-law rates

These rates are also referred to as book rates, tariff rates or gazetted rates. They cover every type of commodity which might be carried by rail and constitute what in North America is referred to as class rates, that is, the maximum or ceiling rate which common carriers are allowed by law to charge irrespective of the volume of traffic offered. It has been estimated that approximately 20 per cent of total intrastate freight is moved under by-law rates.[1] Only in

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1. By-law rates still apply to a number of primary products moved in large quantities by rail such as wheat and grain. Contract rates apply to large scale bulk movement of minerals. An exception to this latter rule occurs in Victoria where by-law rates still apply to a large proportion of the mineral concentrate traffic.

Victoria do by-law rates still apply to a large proportion of traffic (Affleck 1981, p. 60).

According to the report by Dr Affleck (Affleck 1981), the influence of State governments is greatest on by-law rates. These rates are raised at irregular intervals, generally 'across-the-board' in response to State budgetary requirements, rather than to any 'commercial' objectives of railway managements. During most of the 1970s they rose less quickly than railway costs. While this may have been consistent with the governments' anti-inflationary policies, it is acknowledged to be a very important factor in the dramatic increase in railway deficits during this period.

> The practice common to all government railways of raising all by-law rates 'across-the-board' has without doubt aggravated the effect of the lag between rate rises and railway cost increases. For some classes of traffic in all States the real level of rates charged has fallen significantly below what the market will bear, with the result that revenue is being foregone. Most rates have also fallen significantly below corresponding handling and transport costs (Affleck 1981, p. 60).

Contract rates

These apply when a given number of wagons are hired under contract for a given period (for example for 6-12 months). Certain incentives are usually built into the contract whereby the rates are reduced as the number of wagons hired is increased. These rates are not published and are thus not available to third parties. They usually involve the railway charging less than the by-law rate.

Railways of Australia rates

Intersystem rail freight in Australia is carried subject to the rates and conditions given in the Railways of Australia Goods Rate Book. These rates, which are also referred to as intersystem distance rates are graded progressively in levels in accordance with the type of merchandise as well as the distance involved.[2]

2. The charge also varies according to the number of railway systems through which the consignment passes, with charges being levied on traffic passing through prescribed border or transfer stations. Each consignment is also subject to a terminal charge, a maximum of $2 per tonne.

In other words, freight rates may be divided into intrastate and interstate movements. For intrastate movements, the principle types of rates are by-law rates and contract rates. The former are published and represent the maximum charges for the carriage of goods, which the railway systems are obliged to move the commodities under their common carrier's obligations. The latter account for approximately 80 per cent of the traffic moved by State and Federal government railways. These rates often give concessions to large shippers who are prepared to move volumes over long periods or by special equipment. Contract rates are confidential. Most long-term contracts include a rate escalation formula.

By-law rates represent the maximum rate which could be charged for a commodity and are usually applied to general goods and less-than carload traffic, the latter of which tends to have the greatest labour requirements for loading, unloading and clerical tasks.

Interstate rates are divided into two major categories as well. The first comprises Railways of Australia rates which are contained in a published booklet which also describes the terms and conditions under which these commodities would be carried. These rates are published and apply generally to the casual customer.

The second kind of interstate rate is the contract rate. These are also referred to as special rates, escalation rates or incentive rates. These rates are often negotiated between the railway systems collectively and individual customers. They are not published or available to third parties.

One interesting illustration of an interstate contract rate is the one negotiated with the freight forwarding agents. What is somewhat unusual about these special contract rates is that a negotiated agreement is circulated to all freight forwarders who transport at least 2500 tonnes per year. Yet, if one forwarder is able to negotiate rate concessions below the standard agreement this is sometimes permitted.

NEGOTIATION OF FREIGHT RATES

Interstate freight rates prescribed in the Railways of Australia Goods Rates Book are reviewed by the marketing representatives of each railway system under the auspices of the National Freight Group (NFG).

The NFG was established in 1984 and comprises the marketing manager of each of the five Australian railway systems plus the full time staff of the NFG.

It negotiates freight rates with Australian shipper associations, negotiates on behalf of all the railway systems with Australia Post and participates in such collective endeavours as annual negotiations over rates with Express Freight and Thomas Nationwide Transport (TNT) and with the automotive industry on rates for unit trains. Also, there exists intrastate grain rate negotiating committees within certain States.

The NFG provides a regular opportunity for railway system managers to review certain rates and co-ordinate marketing strategies. Where only a couple of railways interline with one another, only those carriers involved make the relevant joint rate decisions.

The NFG in some respects acts in a very similar capacity to the rate bureaux which existed in the past in North America. The activities of these rate bureaux have recently been rendered illegal due to the conflict which exists between collective rate making and the provisions of the competition laws of Canada and the US. The situation is somewhat different, however, in that the railway systems in Australia are not able to compete with one another.

AUSTRALIAN SHIPPER ASSOCIATIONS

The shipper associations with which the NFG maintains an ongoing contact are, primarily, the Australian Chamber of Shipping and the National Freight Forwarders Association.

The Australian Chamber of Shipping

This body was formed in 1964 and is the voice of the Australian maritime freight industry.

The Chamber has four sections, representing shipping line owners, tankers, overseas operators and agencies. Additionally, there are State committees which negotiate freight rates with individual State railways. For example, in 1985 a number of meetings took place between the New South Wales committee and the State Rail Authority of New South Wales concerning tariff matters. The same committee participated in an investigation of road transport delays at one of the port terminals.

The NFG and the Australian Chamber of Shipping recently negotiated some new refrigerated freight traffic in overseas shipping containers on the Melbourne-Brisbane corridor. Also, some empty ACTA Pty Ltd shipping containers were successfully matched by the NFG to Tasmanian fruit and vegetable traffic.

National Freight Forwarders Association

The role which freight forwarders play in the Australian transport structure is unique in industrialised countries since they replace the sales and marketing functions often assumed by the carriers themselves.

Interstate traffic experienced a steady increase from 1954 to 1961 and subsequently enjoyed a tremendous boost following the completion of the standard gauge line between Victoria and New South Wales as well as the institution of a bogie exchange at Melbourne in 1962.

Freight forwarding agents can choose between the rail or the road modes when determining how to transport their traffic.

VICTORIA TRANSPORT ACT 1983

The Transport Act of the State of Victoria (*Transport Act* 1983, No. 9921) has been described as the model which other State railway legislation should follow. The following is a summary of some of the more important provisions which pertain to the carriage of freight by the railway system in Victoria (V/Line).

The legislation provides for the appointment of a Director-General and Deputy Director-General of Transport who were to be appointed by the Governor in Council (the State Cabinet) and not subject to the provisions of the *Public Service Act* of Victoria, 1974.

The Minister of Transport would appoint a Victorian Transport Directorate which consisted of the Minister, the Director-General of Transport, as well as the Deputy Director-General of Transport and the managing directors of each of the Authorities (including the State Transport Authority, the Metropolitan Transit Authority, the Road Construction Authority and the Road Traffic Authority). This directorate would provide advice on transport policy when requested by the Minister.

Additionally, a Victorian Transport Borrowing Agency was foreseen in the legislation. This agency would include the Director-General of Transport, the Deputy Director-General of Transport and the managing directors of each of the authorities. It was to borrow money for transport purposes in Victoria and to lend such money to the authorities in order to assist them with their planning and management.

The legislation also provided for the establishment of a State Transport Authority. The members of the Authority would be the

Director-General of Transport as well as nine other members appointed by the State Cabinet. The members would include the managing director and an officer of the Authority nominated by the managing director, two persons who would be elected by all of the officers of the Authority, a person having knowledge of public transport passenger facilities, a person having knowledge and experience in the tourist industry and a person representing the Victorian Farmers and Graziers' Association.

The State Transport Authority would operate the railway both within and outside the Melbourne metropolitan area. One of its objectives was to develop integrated freight handling systems and improve and develop standards of services for freight. Another objective was to effectively market those integrated freight services and to develop transport facilities. A third objective was to operate freight services at a profit so as to phase out freight subsidies and to provide funds for capital works.

However, there were also several socially oriented objectives, including the identification of the transport needs of disadvantaged groups. Other objectives include the maintaining of harmonious relations between employee organisations and making use of the available transport resources in ways which were most beneficial to the community.

There was also provision for the establishment of the Metropolitan Transit Authority which would operate transport services for passengers and freight inside the Melbourne metropolitan area (and also outside if so determined by the Minister). The Director-General of Transport was a member of this authority as well as of the Road Construction Authority, and of the Road Traffic Authority.

Each authority would have a standing committee whose purpose would be to review all significant planning activities and changes within the authority. These standing committees would be formed from five representatives from management, one representative from each of the five unions with the largest membership of the officers of the authority and five representatives from those groups of persons who used the services of facilities provided by the authority.

A provision of considerable importance is found in section 49 of the Victorian *Transport Act* 1983. It states that neither the State Transport Authority nor the Metropolitan Transit Authority is a common carrier. This means that either railway authority could refuse to carry traffic for any shipper which the carrier, for whatever reason, did not wish to service. This provision is different from the

Canadian railway legislation, which, to the knowledge of the author, has always given the railways such common carriers' obligations. In more recent times, with pricing freedom in Canada, the railways could discourage certain shippers by offering them higher rates than they might otherwise get with another mode of transport. However, if the Canadian railways were to offer exorbitant rates there have always been appeal mechanisms which shippers could use to contest those high rate levels. It would therefore appear that V/Line is given substantially more power to determine its clientele than the Canadian railways and that it is deemed more of a private business than a provider of essential public services in this regard.

The railway authorities were to use the Courts as the mechanism to recover any freight charges which had not been paid. However, if the merchandise were still within the possession of the railway, section 51 allows it to be sold in order to pay the freight rate.

The Governor in Council could make regulations regarding the conditions upon which freight should be carried as well as concerning the carriage of dangerous goods.

Each year the Minister would make a written determination of the financial target to be obtained by each authority. Each authority would also submit a budget to the Minister who could approve or request ammendments. Each authority would operate within the limitations of the budget which the Minister approved (although provision exists for the budget to be revised in the event of a change in the budgetary situation). Prior to the Minister's approving any budget it would be submitted to the State Treasurer for approval.

Furthermore, each authority would prepare a statement of financial accounts every year which would be audited by the Auditor-General. Each authority would pay into the consolidated fund an amount to defray the costs of such audit.

Each authority and the Victorian Transport Borrowing Agency could borrow money on recommendation of the Minister by issuing bonds and stock as collateral. The bonds and stock would be issued by the Agency and secured upon the revenues of the relevant authority. The issuance of bonds and stock must have the consent of the State Treasurer and the approval of the Governor in Council. Furthermore, the Treasurer could act as a guarantor of the loan.

Any person falsifying the accounts of the security-owners was subject to imprisonment for 15 years.

The legislation also provided for the establishment of a Victorian Transport Service. This included senior management employees hired on a contractual basis for employment within an authority.[3]

When any authority hires an individual, that person does not become a member of the public service. For example employees of the State Rail Authority would not be subject to the *Public Service Act 1974*, nor would they be able to transfer into the public service at an equivalent classification. The Victorian Transport Service therefore was an analogous executive management category in the Victorian Public Service Commission.

The legislation also provided for the requirement of all commercial goods vehicles to be licensed for the particular class of merchandise which they could carry as well as the radius from the place of consignment.[4] The granting of a permit by the Road Traffic Authority is subject to their assessment of the public interest as well as those persons providing facilities for the transport of goods. No permit would be granted, however, unless it was consistent with a policy determination made by the Minister or had been approved specifically by the Minister.

These policy determinations would be made from time to time by the Minister in virtue of section 39 of the *Transport Act* 1983 and published in the Government Gazette.

The Authority may grant a permit to the owner of a commercial goods vehicle registered in another State under the same conditions as if the vehicle were licensed within Victoria (section 191).

A transfer of licences and permits is allowed unless the Authority determines that in a particular case the licence or permit first granted should cease to have any affect.

When a vehicle is operating on a highway and does not have the appropriate licence or permit, the driver and the owner would be

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3. At the present time the entry level is approximately $48 000 and the contracts are for 5-year terms.
4. This requirement is covered in parts A and B of schedule 8. For example, for bulk barley, any carriage beyond the radius of 60 kilometres would require a special permit. Commercial goods vehicles, however, did not include any motorcar whose carrying capacity did not exceed 2 tonnes which was owned by a primary producer and used solely in connection with the farm business.

jointly and severally guilty of an offence. However, drivers may defend themselves by stating that they did not know that the vehicle was not appropriately authorised (section 194). Surprisingly, it would appear to be a good defence for any defendant, including the owner, to state that the vehicle had operated in contravention of the law without the latter's knowledge.

Any authorised officer of the State Transport Authority or the Metropolitan Transit Authority was given the right to stop any vehicle or person upon the premises of the Authority's property, or premises where goods were either received or dispatched, and search the vehicle or demand the production of consignment notes. The Authority's officer could also detain any person believed to have committed an offence against the Act.[5]

The Governor in Council could make regulations prescribing fees to be charged for the supply of rail equipment as well as for any service by the railway authorities (section 256(1)(a)).

In the schedules following the *Transport Act* 1983 there were two provisions that concern freight rates. The first was that the State Transport Authority and the Metropolitan Transit Authority has the right to declare by notice published in the Government Gazette that any class of goods would be deemed dangerous and therefore only be delivered to the Authority with their consent (schedule 3).

Second, a permit was obligatory for vehicles transporting those commodities listed in part A of schedule 8 and carried beyond the radius as was specified in column 2. For those commodities found in column 1 of part B of schedule 8, a permit was required for the origin and destination pairs which were found in column 2. These schedules are reproduced in Table 3.1.

In conclusion, the Victorian *Transport Act* 1983 does not contain any provisions regarding abandonment of railway lines, nor a minimum compensatory rate for freight charges, nor any shippers' appeal

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5. An interesting evidentiary provision is found in section 229, sub paragraph (4) in which it is stated that any statement, certificate or document signed by the managing director of an authority would be admissable evidence in any proceedings and, in the absence of evidence to the contrary, would be proof of the matters therein stated. This would seem to imply that if the managing director or a designated officer were to sign a statement concerning the freight charges of a given shipper, this might put the onus of the burden of proof on the shipper.

TABLE 3.1 SCHEDULE 8 OF THE VICTORIA TRANSPORT ACT

Column one	*Column two*
	Part A
Bulk barley	60 kilometres
Bulk briquettes	80 kilometres
Bulk limestone	80 kilometres
Bulk oats	60 kilometres
Bulk petroleum products	80 kilometres
Bulk wheat	60 kilometres
	Part B
Aviation turbine fuel	From any place in Victoria to Melbourne Airport at Tullamarine
Bulk cement	From the townships of Fyansford or Waurn Ponds to any other place in Victoria
Bulk superphosphate	From the place of manufacture to any place outside a radius of 160 kilometres from the place of manufacture
Undressed sawn hardwood	From any sawmill situated to the east of a north-south line drawn through the centre of the town of Cowwarr to any place within a radius of 72 kilometres from the post office situated at the corner of Bourke and Elizabeth Streets in the City of Melbourne

mechanism if they are dissatisfied with their rate, nor any rate ceiling beyond which railways could not charge their customers. The conclusion is that not only do the railways in Victoria not have any common carrier's obligations, but the assessment of freight rates does not have any statutory checks and balances other than direct political

intervention. In other words, this railway legislation is notable for the absence of any provision discussing the rights of the users of transport services as opposed to the rights of those providing the services.

GOVERNMENT RAILWAYS ACT OF WESTERN AUSTRALIA 1904-1982

This legislation constitutes the up-to-date consolidation of over 30 laws which have amended the *Government Railways Act* since 1907.

The *Government Railways Act* established the Western Australian Government Railways Commission. The Commission would consist of one person, the Commissioner, appointed by the State Governor. The Commissioner would be responsible for the administration of this Act.

The Commissioner's office shall become vacant if the Commissioner is absent from duties for a period of one month without the consent of the Minister, attains the age of 65, or accepts any benefit arising directly or indirectly from any contract made by the Government except with the consent in writing of the Minister. Provisions also exist for the Commissioner to be restored to office by a vote of each House of Parliament.

The Commission may dispose of any railway property subject to the approval of the Minister and borrow money subject to the approval of the State Treasurer (section 8(b) para. (3) and (6)).

A Commissioner who participated in any profit arising directly or indirectly from a Government contract would also be guilty of a misdemeanour and liable to imprisonment for three years.

The Commission would have the responsibility of managing, maintaining and controlling every Western Australian Government railway.

Section 22 of the Act states that the Commission may, with the approval of the Minister, fix freight rates for goods carried on a railway, as well as demurrage on the use of rolling stock or car hire. Additionally, section 22(2) states that the Commission, with the approval of the Minister, may fix special charges for the conveyance of specific goods or merchandise. Special charges may also be fixed in accordance with the risk inherent in the carriage of certain commodities as well as for those goods above a certain value. With this section, the legislation seems to give the railway the ability for some differential pricing, providing the Minister approves.

These freight rates, be they special or otherwise, were to be published in the Government Gazette.

Section 22 of the Act also gives the Commission the ability to fix special freight rates for 'special occasions or for such times and in respect of such railways as it thinks fit'.

This would mean that the Railways Commission could determine sets of conditions which would justify giving preferential freight rates to some shippers and not to others.[6]

Section 22 ends with a unique provision. It states that the ability to confer special freight rates may be exercised by the Governor and that any such freight rates would supercede the freight rate of the Commission. Therefore, the State Cabinet has the power to overrule the railway management in the latter's determination of special freight rates. It would therefore appear that freight rates in Western Australia can be susceptible to political influence.

This latter provision would have no corollary in either the US or Canadian railway freight legislation.

This raises the question of how Westrail can be expected to operate as efficiently as a normal commercial enterprise with such powers having been given to the political representatives of the State in the determination of the price of their services.[7]

The Commission could make by-laws regulating the terms on which private sidings may be used as well as their rent, and the regulation of car hire for railway rolling stock. In addition the Commission could regulate the terms of employment of personnel of the Government railway, provided that the by-laws were not inconsistent with the terms of any award of the Western Australia Industrial Commission or any industrial agreement that might be in force.[8] All by-laws must be

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6. Interestingly, this paragraph in section 22 does not carry the qualification that the Commission could establish these special freight rates only if the Minister approved.
7. In recent years the provision which superimposes the powers of the Governor over those of the Commission has not been used. Furthermore, the power given to the Commission to determine special freight rates is a reflection of the deregulation which occurred in Western Australia for those commodities other than the ones which are by statute reserved to the rail mode, such as grain, fertilizer and wool (for which truck licences are not granted).
8. The employees of Westrail are therefore somewhat autonomous from the State public service of Western Australia. Although both Westrail employees and employees of the Department of Transport have the same superannuation plan and the recent ability to compete for certain common job classifications, the two groups are not structurally interchangeable, as would be the respective staffs of different State Government departments.

approved by the State Governor and published in the Government Gazette.

Section 26(a) of the Act states that the Commission may enter into special contracts with any person in relation to the freight rates for the carriage of merchandise. As this section begins with the words '... notwithstanding the provision of section 22 ...' it therefore appears that the Commission does not need the approval of the Minister to make these special contracts. Furthermore, since section 22 would not apply, these special contracts could not be overruled by the State's Governor.

The Commission was empowered to enter into contracts for the shipment of goods to be collected or delivered outside of the limits of the railway (for example, by a trucking firm), provided that any such contract extending more than five years would have to be ratified by the Minister. (In the event the contract were for more than 20 years, it would have to be filed with each House of Parliament).

Section 28(a) of the Act is of considerable interest. It states that the Railways Commission may not use its own road transport service when other road transport is available at reasonable cost. The Western Australian Government Railways Commission had entered into a joint venture with the Gascoyne Transport Company to form a company known as Total Western Transport. However, the Road Transport Association of Western Australia had predictably lobbied the railways to be restricted in their usage of this joint venture. Therefore, this provision of the Act guarantees that the traffic which the railways wish to consign to the road industry will not be to their own joint venture, unless the road transport industry is not able to provide the service at an adequate standard and at reasonable cost.[9]

Where a service is being provided by Total Western Transport the Commissioner must be informed within 14 days and may wish to make recommendations to the Minister in respect of this traffic. Furthermore, the Railways Commission cannot increase, downgrade or withdraw from a service provided by the joint venture unless the Minister approves (section 28(a)(8)).

The Railways Commission is not considered to have common carriers' obligations in respect to a service provided under the joint venture.

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9. Gasgoyne Transport had agreed with the Railways Commission that the latter would not actively market the small consignment less-than-car-load (LCL) traffic.

Therefore, it may refuse traffic if it does not wish Total Western Transport to pursue a particular shipper's traffic (section 28(a)(9)).

The Act provided that if the nature or quantity of any merchandise is understated in a waybill, the shipment would be charged a penalty rate not to exceed twice the ordinary rate. In addition, the person who made the false statement would be liable to a maximum penalty of $100.

Section 37(3) of the Act states that Westrail is to be deemed a common carrier. Therefore, the obligations which have historically been attributed to public carriers such as their duty to accept all merchandise offered to them, and their inability to discriminate between customers on unreasonable grounds, are imposed on the Commission. As has been previously noted, this is not the case for V/Line.

The Commission could borrow monies with the approval of the Minister and the State Treasurer (section 54(B)).

Where the Railways Commission proposed to borrow money from outside sources for the purposes of performing its functions under this Act, the Treasurer could guarantee the loan upon such security as the latter required from the Commission.

The Commission could borrow both from the Western Australian Government Public Account on such conditions as the Treasurer imposed. The Commission could issue stock or debentures for the monies borrowed, with the approval of the Governor (section 54(D)). The Minister must approve the proposed guarantee beforehand as must the State Governor.

The Commission was obliged to use the monies borrowed with the issue of stock for those purposes approved by the Governor. Such stock would have the status of Government securities.

The Railways Commission would prepare a quarterly 'working account' showing total growth, receipts and revenues. This account would be published in the Government Gazette (section 54(F)).

The Railways Commission also could lease any portion of a railway and rolling stock by public tender, upon the approval of the Governor.

The Act also enabled the Commission to enter into an agreement with persons wishing to construct a railways siding, provided that these agreements would be of a maximum seven years duration and that the Commission could give three months notice if the latter wished to close or remove the siding (section 59).

Any permanent employee of the Government railway who was dismissed or demoted could appeal to an appeal board, which shall consist of a magistrate, a person appointed by the Commission and a person appointed by the union (section 68).

Section 86 formally prohibited any officer or servant of the Department from engaging in any employment outside their office duties except with the approval of the Commission, nor were they allowed to participate in any benefit arising directly or indirectly from a contract made with the Government, except with the Minister's permission.

In the first month of each quarter of every year the Commission was obliged to report to the Minister upon the state of the traffic returns. These reports were to be filed before Parliament.

NEW SOUTH WALES GOVERNMENT RAILWAYS ACT 1912

This legislation has been amended a great many times since 1912 and should be read in conjunction with the New South Wales *Transport Authorities Act 1980*. The *Government Railways Act* was reprinted in July 1979.[10]

The authority appointed to carry out the *Railways Act* was the Commissioner. The State Governor would appoint a chief railway commissioner for New South Wales and two assistant railway commissioners. Any commissioner could be suspended by the State Governor for 'misbehaviour', subject to each House of Parliament declaring that the removal from office was justified.

A commissioner was prohibited from engaging in any employment outside office duties and from becoming in any way financially interested in a railway contract.

Surprisingly, if the Chief Commissioner disapproved of any decision of other commissioners the former was authorised to overrule the latter (section 10(C)).

No tax was to be made upon any railway property except if it was expressly provided for in this railway legislation.[11]

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10. New South Wales *Government Railways Act* 1912, No. 30.
11. This is different than the Canadian and American situation wherein railway property was subject to municipal and provincial or State Government taxes. The New South Wales *Government Railways Act* does include the taxation of certain lands by the Sydney *Corporation Act*.

The Act stated that where the State Parliament made any alternation in the law which causes the increase of expenditure by the Commissioner, or where the Governor directs the Commissioner to carry out any matter of policy which results in such increase, the annual amount of increase would be notified to the Auditor-General who would then certify an additional credit to the Government Railway Fund (section 14(a)). This provision is of particular interest in that it appears to enable some calculation of what are generally termed 'imposed public duties', that is, those responsibilities which a carrier would be asked to fulfil for social and equity reasons rather than profit and business ones.

The Public Transport Commission of New South Wales was authorised to determine whether goods which were presented to the railway should be carried wholly or partly by road (section 16(1)(g)). In addition, the Commission was authorised to hire or purchase motor vehicles for the carriage by road to or from a railway. Furthermore, the Commission could contract with motor vehicle companies for carriage by road in addition to or in substitution of 'any railway service operating in between any place'.

The *Railways Act* authorised the Commissioners to acquire and develop coal mines within New South Wales as well as to operate saw mills and to sell the coal and timber produced.

The Commissioners could refuse to take any merchandise which they judged to be of a dangerous nature.

Section 24 of the Act is of importance in terms of its enabling the Commissioners to establish freight rates. The section states that the Commissioners may request those freight rates which are determined in accordance with the relevant orders in force under section 71 of the *Transport Authorities Act* 1980.

Section 71 of that legislation states that the freight rates will be determined by the State Rail Authority of New South Wales by order made by the Authority with the concurence of the Minister. Furthermore, the Authority would submit to the Minister at least once every year proposals regarding the adjustments to these freight rates for the Minister's concurence. These adjustments were to take into account the changes in wage and price indices as well as the Authority's pricing policies, the latter being approved from time to time by the Minister.

The Authority's orders with regard to freight rates could make provision for concessions and rebates. Furthermore, it could apply

certain freight rates based on different factors of a specified kind. The order of the State Rail Authority would be published in the Government Gazette.

Therefore, section 24 of the *Railways Act,* as combined with section 71 of the *Transport Authorities Act* 1980 gives the Minister very significant powers with regard to the establishment and modifications to freight rates.

The above section 71 in the *Transport Authorities Act* 1980 replaced the previous section 24(2) of the *Government Railways Act* which had stated that all freight rates 'at all times must be charged equally to all persons in respect of goods of the same description'. This section, which was repealed, also stated that there would not be any reductions on any freight rates either directly or indirectly in favour of a particular company.

Section 24(3) of the *Government Railways Act*, which is still in effect, states that the Commissioners may charge freight rates which are lower than the existing ones and give concessions in particular cases.

Furthermore, the Commissioner, where modal competition exists, may enter into a contract for a shipper's merchandise at a special rate, including concessions. Such a contract can also encompass movements which are partially by rail and partially by road. These contracts would ordinarily remove liability on the part of the Commissioner from any damage or loss which would otherwise be attributed to the railway under the common carrier's obligations (section 24(4)).[12]

In the event that there is a breach of these special contracts, the Commissioners may direct that an additional charge not being in excess of half of the rate will be paid by the shipper, providing that the Governor approves.

The Commissioner is also authorised to enter into freight rate agreements with shippers outside New South Wales for interstate movements. However, the consent by the Minister of these freight

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12. There is a question as to how section 71 of the *Transport Authorities Act* 1980, which gives the State Rail Authority the ability to determine freight rates, can exist concurrently with section 24(4) of the *Government Railways Act*, which allows the Commissioner to enter into such contracts. On the one hand section 71 requires the Minister's concurrence. On the other hand section 24(4) does not require such approval.

rates is required (section 24(a)), and these interstate freight rates are published in the Railways of Australia Rate Book.

If any dispute were to arise concerning the exact amount of the freight rate or the demurrage charges, it would be settled by a magistrate of the Court (section 29).

The Commissioner could also formulate a special scale of freight rates for specific classes of merchandise, provided that the same charges would apply alike to all persons using the railway. Similarly, these special freight rates could encompass rebates in respect of any particular class of shipper, particular to a location or a direction or particular to the volume of the merchandise involved (section 32(2)).

Section 35 of the *Railways Act* typifies the type of provision which has been common in the United Kingdom and North America during an era when railways were deemed to constitute monopolies. This section states that the Commissioners shall not give any undue or unreasonable preference or advantage to any person or any particular type of freight in any respect whatsoever. This anti-discrimination provision would seem to have been overruled by section 24 of the Act which allows for special contracts containing rebates. Furthermore, section 71 of the *Transport Authorities Act* 1980 also provides for concessions and rebates. Therefore, it can be concluded that this provision prohibiting undue preference is only to be used as a general rule of interpretation, when no other specific clause takes precedence.

Section 36 of the *Railways Act* gives another basic directive to common carriers. It states that the Commissioners shall give equal facilities for the interchange of traffic between the respective lines of railway within their jurisdiction for the receiving or delivery of freight.

In the first month of each quarter of every year, the Commissioners must report to the Minister any special rates which they have made, with an explanation as to why these concessions were made. Furthermore, the Commissioners must report on any inter-modal contracts which they have made. These reports on special contracts are to be filed before the Houses of Parliament and either House may disallow these special rates. It would therefore appear that, although concessions may be given by the Commissioners in virtue of section 24 of the Act, these special contracts are not confidential, as are the North American counterparts. If a rebate is to be publicised to a shipper's competition, it puts the railway in a

somewhat ambiguous position when defending the concession to the traffic managers of the competitors. Therefore, as long as these special freight rates are filed before Parliament, the shippers will not be subjected to active competitive forces affecting the price of transportation services.

The ability of one shipper to negotiate a special consideration from the railway will not allow that shipper to benefit from a gain in market share if competitors are be able to discover and lobby for similar concessions by looking at the Parliamentary reports made by the Commissioners.

The financial provisions foreseen in the *Railways Act* are similar to the ones already discussed above in the other jurisdictions in the sense that the Commissioners may, with the approval of the Governor, borrow money. However, one notable difference is the creation of a Government Railways Reserve Account which would extract a part of the railway's net profit (this sum to be determined by the Auditor General). This reserve account would be available not only to meet any future losses by the Commissioners but also for the reduction of freight rates (section 41F).

In any financial year where the Commissioners are of the opinion that the revenue to be derived from the operation of a Country Developmental Railway would be insufficient to meet that line's costs of maintenance and interest on the capital invested, the Commissioners would estimate the anticipated loss, which would be paid for by Parliament (section 41R).

The Commissioners were also authorised to make by-laws for the circumstances and conditions under which they would offer special freight rates, as well as the regulation of the conditions upon which goods were to be carried (section 64). In addition, the Commissioners were empowered to make by-laws for the regulation of trucking vehicles for the delivery of freight, as was necessary for the purposes of the *Railways Act*.

The above by-laws were required to be approved by the Governor before being published in the Gazette. Either House of Parliament could disallow any by-law of the Commissioners (section 65).

All persons employed by the railway are deemed to be employed permanently. If any vacancy occurred in any branch of the railway, it would be open for competitive examination and if possible filled by the promotion of some officer next in rank. No such officer would be

passed over unless the head of the branch advised the Commissioners in writing (section 76).

The Commissioners were not empowered to contract with any of the railway employees in such a manner that an employee agreed to forego any of the provisions of the *Railways Act*.

Also, section 16(4) seems to indicate that the Commission may not hire any trucking services which are owned by itself.

In conclusion, the *Government Railways Act* contains many examples of provisions which may have been reasonable in the early 1900s but can no longer be considered realistic in 1986. For example, section 82 of the Act states that whenever an officer of the railway is guilty of breaking any rules, the head of the branch may impose a fine not exceeding $10.00. Similarly, section 130A states that any person who does not pay an amount which is owing to the Commissioner in virtue of this Act shall be liable to a penalty not exceeding $40.00. This clearly demonstrates that the legislation needs updating.[13]

NEW SOUTH WALES TRANSPORT AUTHORITIES ACT 1980, NO. 103

This legislation created the State Rail Authority of New South Wales. The Authority would consist of seven members including the chief executive of the State Rail Authority, two deputy chief executives, the managing director of the Urban Transit Authority and a person appointed by the Labour Council of New South Wales, as well as another person elected in a manner prescribed by the regulations.

Section 11 of the Act states that the State Rail Authority shall in the exercise of its functions be subject to the control and direction of the Minister.

A notable provision of the *Transport Authorities Act* 1980 is found in that section regarding the financial duties of the Authority.

Section 67 of the Act states that it is the duty of the State Rail Authority to operate as efficiently and economically as possible in the exercise of its functions. It is to manage its financial affairs in such a manner as not to incur expenses which would be beyond the levels which could be met from expected resources. Furthermore, the

13. Section 130 was in fact amended by the *Government Railways (further amendment) Act* 1980, No 138, so that the amount of $40.00 was replaced by $200.00.

State Rail Authority is to take all reasonable steps to ensure that its revenue is produced at such a level so as to minimise the amount of supplements which the State Treasurer might pay to assist the Authority.

This section is currently being used by the management of the State Rail Authority to justify the attempts to put it on a normal commercial basis in its dealings with shippers.

QUEENSLAND RAILWAYS ACT 1914-1982

This legislation, which has subsequently been amended in certain parts by the *Railways Act Amendment Act* 1985, No. 19, begins by giving the State Governor the authority to appoint a Commissioner for Railways for a term not to exceed seven years. As with the other railway legislation previously examined, the Commissioner representing the Crown would be considered a corporation having an official seal with perpetual succession. The Commissioner was prohibited from owning any stock in public companies or other financial institutions. Also, similar to the other railway legislation previously analysed, the Commissioner could be suspended by the Governor in Council, but only removed from office by Parliament.

The Commissioner would appoint a deputy commissioner as well as a secretary, the deputy commissioner under direction of the Minister to replace the Commissioner in the event of his illness, absence or suspension (section 15).

The Queensland legislation contains almost identical provisions relating to employment to those of the New South Wales *Government Railways Act;* in that vacancies are to be filled, in general, by the promotion of the senior applicant next in rank, no employee shall engage in any employment outside of office duties, and the maximum probation period was six months (sections 17, 20 and 21).

However, the *Railways Act Amendment Act* 1985 stated that in the filling of any vacancy which was not open for competitive examination, consideration should first be given to the qualifications required to be possessed by the holder of the vacant office, and only in the event of equality in this criterion, would the relative seniority of the applicants be considered (section 9 of the *Railways Act Amendment Act* 1985, no. 19).

The Act of 1914-1982 also created an appeal board for the determination of difficulties between Queensland railway employees and management. This board would consist of a magistrate as well as five

representatives of the employees (who would be elected) and one officer appointed by the Commissioner. However, the board, when sitting for any particular appeal, would only be composed of the magistrate, the officer appointed by the Commissioner and that employee's representative who was employed in the branch in which the appellant was working.

The decision of the board would be final except in the case of an appeal against dismissal, in which the aggrieved person would have the additional right to appeal to the Commissioner.

Of interest is the section which requires every employee to provide information when called upon to do so by the Commissioner or be liable to the charge of misconduct under the Act (section 32E). This could conceivably lead to the dismissed or suspended employee's work colleagues being required to testify against him or her.

If the Governor in Council was satisfied that it is no longer necessary to continue a part of a railway to meet the requirements of the public, the former may authorise the Commissioner to cease maintaining that part of the railway.

If this provision is compared to the new Canadian legislation in the previous chapter, it is apparent how sizeable the differences are between the regulatory protection offered as between the two sets of legislation. The Canadian law gives any interested party the right to appeal such a decision to abandon a railway line, even though the decision of the regulatory agency to allow the abandonment may be subsequently postponed by the Minister. If the Canadian railway is not allowed to abandon its uneconomic lines, it is compensated for these losses by the Government. In contrast, the abandonment of Queensland rail lines appears to be sole decision of the State Cabinet. There is no reimbursement to the railway for it being obliged to maintain uneconomic branch lines.

The Act states that no tax shall be charged upon any railway property (section 98).

The Commissioner may contract with any shipper for the carriage of merchandise as well as with any trucking firm, provided that the Commissioner invites the latter to submit public tenders and that the contract be for a maximum of three years.

Section 101 of the Queensland *Railways Act 1985* is of particular importance with regard to the determination of freight rates. It states that the Commissioner may make special contracts to carry

freight from any place to or from Queensland and that these freight rates may be higher or lower than the general rates in force for the same description of traffic. Furthermore, in these contracts the Commissioner and the shipper may limit the railway's liability to any extent which they determine. This latter section had been amended by the *Railways Act Amendment Act* 1985. The previous provision, which is now repealed, had stated that the Commissioner could not make his liability greater than that of a common carrier. The Act also states that the Commissioner's liability under this section involving special contracts is limited to that portion of the route which is controlled. Therefore on interstate movements, the liability provisions made by the other carriers would not apply to Queensland Railways, unless the latter had also agreed in advance.[14]

The authority which was given to the Commissioner to agree to these special contracts was dependent upon the consent of the Minister when the movement involved interstate carriage (section 101B). It therefore appears that the Commissioner does not require the consent of the Minister for intrastate special contracts.

The Act provides that the Commissioner may enter into contracts with the Postmaster General with respect to the carriage of postal matter.

Section 105 of the Act provides for the connection of a private branch railway or siding with the Queensland railway, in the event the Commissioner so agrees. The Commissioner may close or remove the connection upon giving three months notice. There does not appear to be a recourse for which the owner of the private branch railway can apply. Furthermore, the Commissioner may refuse to run trains over the branch or siding if he or she is of the opinion that it is not in a satisfactory condition.

Section 106 of the Act authorises the Commissioner to hire or purchase trucking vehicles in order to employ them for the carriage of railway freight. This section is much more permissive than the other State railway laws which have previously been analysed. It would appear that in Queensland the railway could use its own trucking firm to transport rail freight intermodally, in direct competition to the privately owned trucking industry.

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14. The question which then arises is whether the shipper would have to negotiate different liability provisions for each State through which the freight moved. In North American terminology, this would then resemble a proportional or combination rate rather than a joint through rate.

Furthermore, the *Railways Act Amendment Act* 1985 has stated that the Commissioner was authorised to prescribe freight rates for the carriage of goods by a trucking firm or by any other mode of transport (section 15). Therefore, the Commissioner could hire or purchase trucking vehicles and employ them for the carriage wholly by road. In other words, the route would no longer have to originate from or be destined to the railway.

The *Railways Act Amendment Act* 1985 also gives the Commissioner the authority to set freight rates other than the prescribed rates for the carriage of goods and determine liability limitation and other conditions 'in particular cases'. This section replaces a previous provision, dating from 1863, which stated that all freight rates must be charged equally to all persons in respect of traffic of the same description and that the Commissioner could not give any undue or unreasonable preference or advantage to any shipper. This anti-discriminatory clause has now been repealed.[15]

If there were any dispute as to the amount of the freight rate the matter is to be referred to a magistrate of the Court.

The Commissioner was required to submit to the Minister every month a statement of accounts showing the revenues and expenditures of the railway during the preceding month.

Section 120 of the Act states that the Commission is not a common carrier.

As with the New South Wales legislation, the *Queensland Railways Act* is in need of some updating. For example, section 114 contains reference to dangerous goods as being exemplified by aquafortis, oil of vitreol and gun powder. Similarly, Section 122 limits the liability of the railway to $6 for any sheep which have been lost during rail carriage.

The Commissioner is authorised to make by-laws involving the publication of freight rates as well as the transport of dangerous commodities. Each by-law must be approved by the Governor in Council and be published in the Gazette (section 133 and Schedule 2, sections 7 and 22).

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15. The previous section 108 of the Act did however enable the Commissioner to set freight rates for the performance of special services and accord volume incentive rates.

AUSTRALIAN NATIONAL RAILWAYS COMMISSION ACT 1983

This Act states that the main functions of the Commission are to provide railway services over its system as well as related technical and engineering services to the Federal Government of Australia. However, it was also to provide such technical and engineering services to persons other than the Commonwealth authorities when its resources were not being used in the performance of functions requested by the Federal Government (section 5, *Australian National Railways Commission Act 1983*, No. 140).

The Commission had the authority to enter into a contract involving less than $2m without the approval of the Federal Minister for Transport (section 7). A greater amount than $2m could be prescribed by the regulations in which the Commission would not require the Minister's approval.

The Commission required the approval of the Minister whenever it wished to purchase shares in a company, form any company, enter into a partnership or participate in any arrangement for the sharing of receipts or profits.[16]

The Minister was instructed by the Act not to give approval to the Commission's participation in the formation of any company or even acquiring shares in any company, the functions of which the Commission itself was not empowered to do. In other words, the Commission was prohibited from entering into businesses which were unrelated to a land transport service. An exception would be made if the Minister felt that the participation in these other companies would be 'conducive' to the performance of a function of the Commission.[17]

The Commission may provide services for the carriage of goods using the motor carriage industry between 'prescribed places', when these

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16. This section is not found in the *Australian National Railway Act* of 1917. There are several other examples of the 1983 Act giving the Federal Government a greater control over the finances of the Australian National Railway than did the former legislation.
17. Interestingly, one of the reasons for the financial success of the privatised National Freight Corporation (NFC), which comprised the previously nationalised UK road transport companies (British Road Services, Pickfords, and the road freight interests of British Railways) has been its involvement in the travel agency business. NFC is now the second largest travel agent in the United Kingdom through its subsidiary Pickfords Travel. (See Mayo 1985, 26).

trucking services were incidental, supplementary or in association with the provision of railway services (section 9).[18]

The Commission was authorised to make joint agreements with other railways or trucking companies for the carriage of freight between 'prescribed places' (section 9). However, when intrastate movements were involved, the non-rail service could only be exercised if it were incidental to the exercise of another power of the Commission.

The Commission may additionally run its trains over the railway of another jurisdiction and permit the same to be done in the reverse. It may also permit its own railway line to be connected with another. These powers do not appear to require the approval of the Minister.

Section 19 of the Act concerns the possible intervention of the Minister in the policy decisions of the railway. It states that the Minister may give written direction to the Commission with respect to the performance of the latter's functions or exercise of its powers. The Commission is instructed by the legislation to comply with any direction given to it by the Minister. When the Minister gives such a direction, the written instructions and the reasons for them must be filed before each House of Parliament.[19]

Where the Commission has suffered financial loss as a result of complying with such a Ministerial directive, the former is entitled to be reimbursed by the Commonwealth. The amount of reimbursement is determined by the Minister and may be from: foregoing revenue, suffering a loss or incurring costs which were greater than the Commission would have otherwise have had.

Section 21 of the Act defines the way in which freight rates are to be determined. The Commission must determine the principles on which it proposes to charge freight rates and inform the Minister thereof. The Minister must, within 60 days, approve or modify these principles. Where the Commission wishes to make an alteration to these principles, it must receive the approval of the Minister in like fashion.

The principles which were in fact given by the Commission to the Minister were encompassed in a one page letter which stated that the rates would be determined in a commercially oriented fashion and with

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18. Although the word 'prescribed' is not defined in the legislation, this same provision existed in section 31 of the *Australian National Railways Act* 1917.
19. If the Minister does not respond within 60 days, approval of the changes in freight rate principles is deemed.

the objective of attaining as a high a level of cost recovery as possible. These very general principles have not been altered. Therefore, the ability of the Australian National Railways Commission to set freight rates as it determines appears to be relatively free from Ministerial intervention, as long as the general principles for freight rate determination are commercially oriented.

Therefore, the Australian National Railways seems to be less regulated in its management's ability to determine the price of its services than the Government State railway systems.

Section 22 of the Act is a new provision which was not incorporated in the 1917 legislation. It states that the Commission shall develop corporate objectives and strategies on a long term basis and furnish written reports to the Minister concerning these proposed policies with the present agreement.[20]

The Australian National Railways Commission consists of seven commissioners, all of whom would be appointed by the Governor-General. The Commissioners, other than the Chairman, are appointed on a part time basis and hold office on such terms and conditions as would be determined by the Minister.

The Commission appoints a general manager, who is the chief general officer.

A promotions appeal board was established as a mechanism to which employees could protest if they considered that another employee had been promoted unjustly to a vacant position in the railway service.

A disciplinary appeal board was also created by the legislation to hear appeals involving charges of misconduct.

The Commission is obliged each year to determine its financial target which could be revised by the Minister. The Commission was to pursue a policy directed at ensuring that it attained that financial target.[21]

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20. This clause is not worded clearly and might have led to interpretative difficulties.
21. Section 55. The Commission could also review the financial results of its operations during a part of the financial year which had elapsed and considers specific measures which would be adopted to attain the financial target. The Minister would have to be informed of the respects in which the Commission's progress that attaining financial target had not been met and of the remedial measures adopted.

When the Commission did not attain its financial target, it was required to inform the Minister of the measures which it proposed to adopt in order to meet the shortfall. One of the measures which could not be proposed was that the shortfall be met from monies appropriated by Parliament (section 56).

The Commission could pay dividends to the Commonwealth Government, having regard to the need to ensure that the latter receive a resonable return on the capital which was employed for the Commission's operations (section 57). The Commission would choose in its recommendations whether to pay or not to pay a dividend. The Minister can then approve or countermand the recommendation.

The Commission could borrow money from Parliament on such terms and conditions as the Minister for Finance determined, or from outside sources with the approval of the Federal Treasurer. Additionally, the Treasurer could act as guarantor for the repayment of the loan by the Commission.

The Minister has the authority in virtue of the legislation to authorise the Commission to close any railway operated by the latter (section 68).

Section 72 of the Act states that the Commission was not a common carrier.[22]

The *Australian National Railways Commission Act* 1983 is subject to the two transfer agreements whereby the railways of South Australia and Tasmania had been acquired by Australian National.[23]

Section 8 (1) of the South Australia Railways Transfer Agreement states that the Australian National Railways Commission will ensure that freight rates for those non-metropolitan railway services within South Australia are to be maintained at levels which provide the shippers with the same advantages which they enjoyed before the transfer. Section 9 requires that the Federal Minister not implement

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22. The provisions concerning measures to be taken where the financial target was not attained as well as the provision that the Commission was not a common carrier were not found in the *Australian National Railways Act* 1917.
23. *Railways Agreement (South Australia) Act 1975* and *Railways (Tasmania) Act* 1975.

any railway line closure of a non-metropolitan South Australian railway without obtaining prior agreement from the State Minister.[24]

Similarly, in the Tasmanian Railway Transfer Agreement, it is stated that concessional rates which were being provided by the Tasmanian Railway prior to the transfer would continue. If the State were subsidising the railway for some of these concessions, it obliged itself to continue to do so after the transfer.[25]

It is an open question as to the legally binding effect of such general principles.

Professor Rosengren (Rosengren 1968) concludes that the Australian Railways should be made more accountable to the public.

> It is inexcusable that government bodies requiring a subsidy of over $500 million a year are not required to provide a public breakdown of what is causing the enormous deficit. If the public was aware of the substantial costs of many of the deficit-causing services, the public is likely to accept a reduction in those services. The argument that the information can not be made available for competition reasons is unacceptable. Conversations with railway personnel indicates that much of the information that is critical for pricing and investment decisions is not even available to railway management. If nothing else, public disclosure of deficit causing services, and pricing and investment figures would force the railways to obtain information that they should be using anyway. If public disclosure of the costing and pricing of a service means that road operators can undercut the rail rate, then the freight should be going by road anyway. However, this is unlikely to occur because large shippers certainly check competitive road rates before sending freight by rail. The only major effect of publicly publishing pricing and costing information is that the railways will need to justify instances where prices do not reflect costs. This type of public accountability should have been instituted long ago.

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24. Railways Agreement (South Australia) 1975, No 105, The Schedule. There also appears to be some question as to whether Australian National can renegotiate the long-term coal contracts which were agreed to by the South Australian railway before 1975 until the terms of these contracts have expired.
25. Section 4 of *Principles to Govern the Transfer of the Tasmanian Government Railway System to the Australian Government.*

Professor Rosengren stated that the lack of cost recovery on rail has in the past increased its modal share. In other words, shippers could be choosing rail because the Government had given greater subsidies (Rosengren 1968).

Australian National Railways Principles for Determining Freight Rates Pursuant to Section 21 of the Act

This letter was dated July 1984 from the Chairman of Australian National Railways, Mr L. E. Marks. It stated the following:

> Rates and fares will be determined in a manner which accords with commercial practice, taking into account relevant factors including the cost of providing services, projected future revenues, rates and fares and levels of service which are or could be provided by competitiors, and any financial assistance provided to the Commission by the Commonwealth or by the State of South Australia and/or Tasmania.
>
> Unless the Commission considers it desirable for commercial reasons or other reasonable cause, rates should in general be sufficient to cover:
>
> - Costs incurred for the continuing operation of a service, including the cost of operation, maintenance of rolling stock, permanent way, buildings and structures, interest and depreciation on capital employed, and for the management and administrative services of the Commission.
>
> - An allowance to meet the financial targets of the Commission, including any dividend to the Commonwealth determined in accordance with Section 57 of the *Australian National Railways Commission Act* 1983.

CHAPTER 4 CONFIDENTIAL RATE CONTRACTS IN NORTH AMERICA

USE OF CONTRACTS

Background

One of the most striking changes which has occurred in the way shippers and railways negotiate freight rates in the United States is their recent ability to agree to confidential contracts. This freedom was encompassed in the *Staggers Rail Act* of 1980, which deregulated the United States (US) railway industry as a means of putting US railways upon a sounder commercial footing and allowing them to operate in a manner similar to private enterprise. It was also incorporated into Bill C-126, the Canadian blue-print for legislative change in transport introduced before Parliament in June 1986.

Although contractual commitments have been formulated between shippers and carriers in the form of long-term volume guarantees in the US for some time, the ability of an individual shipper to negotiate a confidential, tailor-made transportation package with one or several jointly connecting rail carriers was a radical change from the past. Such contracts would never have been acceptable previously because they would have been found by the Interstate Commerce Commission to have been discriminatory and secretive, as well as contrary to the obligations of a common carrier to file rates publicly and to provide

statutory limitations of liability.[1]

Surprisingly, neither shippers nor rail carriers were quick to use this newly found freedom. During the first 15 months following the enactment of *Staggers Rail Act*, only 768 contracts were signed. Many shippers felt that contracts would only be given to large shippers; the US railways were reticent about contract rate making as it was perceived as being synonomous with discounting. This situation may have reflected a lack of recognition that for a contract to be attractive to both parties, it had to provide benefits to both of them.

However, shippers and carriers are now using this newly found freedom in record numbers. As of 14 March 1986, 36 125 contracts had been filed with the ICC. The Commission now receives approximately 1150 new contracts per month.

The most common types of contracts are those which either offer a rebate dependent on a specific routing, or provide a specified rate structure and guaranteed car supply to shippers who agree to send a specified percentage of their cargo with the railroad. The versatility of contracts has allowed railroads to claim premiums for better than average service, but has obligated them to pay refunds for delays (Mullen 1983).

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1. An example of the Interstate Commerce Commission (ICC) considering contract rates to be unlawful 'per se' can be found in the *Amsterdam Rug Case* (1961, 313 ICC 247, affirmed 194 F. Supp. 947). In this case the New York Central Railroad filed a tariff providing for a contract rate on rugs and carpets moving in carloads from Amsterdam, New York to Chicago. A lower contract rate was offered to carpet shippers willing to contract to move at least 80 per cent of their Amsterdam-Chicago traffic over the New York Central for a one-year period. The ICC found the contract rate unjust and unreasonable under Section 1 of the Interstate Commerce Act in that it constituted a destructive, competitive practice within the meaning of the US national transportation policy.
   Similarly, in the *Soo Line Pipe Case* (315 ICC 311), which involved the proposed establishment of contract rates for gas and oil drilling pipes produces in Sault Ste. Marie, Ontario and shipped to points in the United States, the ICC expressed the fear that similar guaranteed percentage contract rates would destroy the very fabric of an otherwise just and reasonable rate structure. The Commission stated, 'thus, carriers which require our approval of their rates should be on notice that, in the absence of a statutory amendment, contract rates and agreed charges are deemed unlawful per se'.
   In 1978 the ICC reversed this position by stating that contract rates were not unlawful 'per se' (ex Parts No. 358-F). (Bernstein 1982a, Coudal 1982a and Miller 1980).

There was a similar initial reluctance on the part of shippers to make use of agreed charges in Canada. Agreed charges constitute a predecessor of today's confidential contract in that they enabled a shipper to obtain a lower rate if the shipper agreed to ship a certain percentage of his or her product by rail over a one-year period. They were distinct from present day contracts in that they were not confidential, they required collective signatures of the Canadian railways, and any shipper was entitled to benefit from the same percentage/rate formula irrespective of that shipper's volume. A 1973 study by R. L. Banks and Associates (Banks and Associates 1973, 148) showed that it was several years before shippers started making use of agreed charges, but once they did, in 1955 through 1960, the number skyrocketed.

Advantages

In order to explain the popularity of contract rate making, some analysis must be made of the advantages which shippers and carriers both claim are derived from these agreements.

By utilising contractual agreements, carriers and shippers are able to better predict their long-term capital budgeting needs for both equipment and railroad property. Many contracts call for a guaranteed car supply as well as a fixed volume of traffic over a specified period of time. When the railroad knows these factors, it is in a far better position to determine its future needs for both locomotives and rail cars. Moreover, it is able to anticipate future maintenance and upgrading needs on that track (Domonkos 1981). The long term duration of contracts also enables the shipper to better predict future transportation costs.

With contracting, the carrier has the ability to 'lock in' traffic and guaranteed volumes. It also provides carriers with the opportunity of stabilising and increasing traffic levels, if they are prepared to improve upon their service. Other advantages to the carrier include; the ability to reduce the number of claims received for damages, and to include rate escalation clauses which may protect their inflationary cost recovery. Contracting also encourages railways to experiment with market segmentation strategies.

From the shipper's perspective there are also advantages in contract transportation. Many shippers have been able to negotiate reduced rates. The ability to formulate a tailor-made arrangement with a carrier which conforms to their specific transportation needs has been regarded as one of the primary advantages to shippers. In addition, the aspect of confidentiality has benefitted many shippers who do not wish their competitors to know what they are being charged by the

carrier. Large shippers have been able to negotiate lower rates as well as equipment and service concessions from the railways in exchange for volume commitments. Confidential contracts also encourage experimentation, since new ideas can be tested away from public knowledge.

Short-term contracts can be arranged to fill special needs. This can assist marketing managers plan a new product introduction or a special incentive program.

Service guarantees will also have a positive effect on inventories because a strong service agreement assists with ensuring that inventories remain manageable.

Both carriers and shippers have benefitted from the ability of contracts to be effective on one day's notice, since this pricing flexibility enables them to quickly meet current market conditions and competition. In the past there were often substantial delays in rate notifications due to rate action often taking place under the auspices of a collective rail rate bureau. US rail carriers are now able to focus on market segmentation to an extent not permitted under the previous regulatory era. Many shippers also report an increased responsiveness by railroads to the individual needs of the shipper. Also, there has been some indication that the ability of railways to engage in contracts has enabled them to attract traffic away from other modes to rail (Andrews 1984, 30).

Some features of recent transportation contracts in the United States
In a 1984 ICC survey of contract rates requested by Senator Andrews (Andrews 1984), the US railways listed the following innovative features which they had implemented in some of their confidential contracts:

- tailor-made unit train/trainload operations
- special credit and late payment terms
- specialized demurrage/loading provisions
- use of idle cars for temporary warehousing
- elimination of claims below designated amounts
- reload provisions to increase car utilization
- special private car mileage payments
- backhaul and triangular reload provisions
- variable rates to respond to changing grain markets

- preservation of abandoned service through intermodal contracts and volume commitments
- two-way hauls to meet truck backhaul competition
- investment risk-sharing
- rail-truck through movements
- guaranteed service/equipment
- equipment use provisions to reduce cross-hauling of empties
- short-term market testing contracts
- short-term 'economy specials' to stimulate movements of certain commodities
- allocation and better utilization of pier berthing space
- demurrage waivers
- market share incentives
- rebates.

The ICC Survey also indicated that of the contract terms sought by shippers, the following were the most prominent:

- reduced rates and rebates
- guaranteed car supply
- individual service requirements
- demurrage relief
- extended credit
- favoured national clauses
- confidentiality
- storage arrangements
- short-term and limited volume commitments.

By contrast the most common contract terms sought by the railroads were:

- guaranteed volumes and revenue
- cost recovery protection, that is, escalation clauses
- elimination of transit privileges
- loss or damage and liability clauses
- maximum haul and routing commitments
- long-term and maximum volume commitments.

It is noticeable that the components sought respectively by shippers and carriers were completely different.

Survey of contract use

The 1984 ICC report (Andrews 1984) concluded that the revenue which US Railways were deriving from 'regulated' contracts averages more than 25 per cent of their total revenue, with growth in this kind of traffic anticipated to be from 5 to 10 per cent per year.

An approximate breakdown of contracts by major commodity groups on file with the ICC as of 1 January 1984 is shown in Table 4.1.

It was found from the ICC survey that contracting was especially useful to railways in weathering the economic recession, since carriers were able to obtain volume commitments in return for their rate concessions. Most of the shippers who were interviewed felt that the greatest benefits of contracting were realised by those with competitive transportation alternatives. The intense competition for shrinking volumes of traffic caused by the then economic recession

TABLE 4.1 CONTRACTS BY MAJOR COMMODITY GROUPS ON FILE WITH ICC, JANUARY 1984

Commodity group	*No. of Contracts*	*Per cent*
Bulk products, chemicals, minerals etc.	3 021	24.6
Forest products, lumber, paper	2 220	18.0
Grain/grain products	1 792	14.6
Foodstuffs	1 586	12.9
Iron and steel, metals, scrap	1 376	11.2
Coal[a]	541	4.4
Auto parts, machinery implements	394	3.2
Other - service and miscellaneous commodities	1 371	11.1
Total	12 301	100.0

a. Effective September 12, 1983, export coal was exempted from ICC regulation. As a result new export coal contracts have not been filed with the Commission. [Ex Parte No. 346 (Sub-No. 7)].

Note Total includes all re-issued, expired and cancelled contracts.

Source Andrews (1984).

meant that those shippers with an alternative transportation choice were often able to negotiate significant rate concessions from certain railroads in exchange for guaranteed traffic volumes.

Therefore, contracting afforded both railroads and shippers pricing and service arrangements that were not readily available under a published tariff system. The ICC survey also concluded that the size of an individual shipper was less important to the carrier than the shipper's transportation alternatives and the profitability of the traffic.

BASIC FORM OF A SHIPPER-CARRIER CONTRACT

Contracts must obviously cover such basic elements as rates, commodities, origin and destination, equipment type and liability conditions for damaged or lost freight. However, they have evolved to encompass many more aspects of the transportation relationship between carrier and shipper. For example, some US rail contracts are now featuring what is known as the 'most favoured nation' clause in which the railroad states that the shipper will not in the future be charged more than any of the railroad's other customers.

Although a contract dealing with the transportation of freight is a specialized subject, it is merely one example of the myriad of contracts to which parties can agree. Contracts are subject to the laws of the Province or State in which they occur or in which jurisdiction is designated. Therefore, a knowledge of the general law of contract is required in addition to the specific laws applicable to transportation. For example, any contract must constitute a meeting of the minds for it to be valid. There must be a bilateral exchange of promises which are to be performed so that each party has certain specified rights and obligations.

In Appendix I a model transportation contract has been constructed. It contains many of the items which shippers and carriers must address in their agreement. It also poses several 'what if' scenarios to ensure that the parties are aware of potential situations which may arise and could change their rights and obligations. Armed with this 'laundry list' of items to check in any transportation contract, the shipper will be forewarned of any major eventuality which could come about, based on the experience of many contracts which have been signed recently in the United States.

Contract characteristics

Also in Appendix I is a section by section analysis of the basic

components of any transportation contract. These components include:

- assignability (provisions regarding the parties ability to sell 'their interest' in the contract);
- product characteristics (the description of the goods to be transported);
- routing;
- service and performance standards (lead times for delivery of equipment, transit times, damage provisions and so on);
- operational standards;
- equipment (provisions for adequate car supply and so on)
- terms of payment (the procedure of billing and paying and for calculating rates)
- claims and liability procedures;
- terms of contract (duration etc);
- applicable law (the State law which will be applied in interpreting or enforcing the contract); and
- confidentiality.

Rate escalation clauses

An important element of many confidential contracts is the rate escalation clause. Since contracts extend over several years in many cases, they must address the question of changes in economic conditions and fluctuations such as inflation. The general purpose of the rate escalation clause is to maintain the relationship of the freight rate to railroad costs over time without having to resort to frequent renegotiations of the rate.

The rate escalation clause has the potential for substantial financial impact on both shipper and carrier over the life of the contract. For example, for a five-year contract with a yearly freight bill of $5 million, a 1 per cent unanticipated change in the average annual rate increase would cause a compounded loss or gain to one of the parties of over $0.5 million.

In the US, rail contract rate escalators generally fall into three categories. The index used for a rate escalator may vary between a Rail Cost Recovery (RCR) formula which is published quarterly by the Association of American Railroads (AAR) and includes ten railroad cost components such as labour, fuel and materials, and the Producer Price Index (PPI) which is produced by the US Bureau of Labour Statistics

(BLS) and computes the average price of commodities. Also, the Uniform Rail Costing System (URCS) cost model has been used to generate variable costs associated with specific movements.[2]

The indices have important differences. The PPI does not necessarily correspond to underlying movements in railroad cost inflation. On the other hand, the RCR index, although it will represent changes to overall railroad cost escalation, may not adequately represent changes in the actual costs associated with a specific movement.[3] Another weakness is that the RCR escalator is often employed indirectly to escalate costs of purchased services (such as car hire), general expenses (such as depreciation and property tax) and the cost of capital, which may not vary over time to the same degree as railroad costs. In other words, the base rate to which the railroad agrees is assumed in many cases, to provide revenue sufficient not only to cover total carrier operating expenses, but also to cover interest expense on long-term debt and return on equity investment. Whatever amount is built into the base rate to cover the cost of capital is, by the RCR formula, escalated in proportion to increases in wages and material prices, which may not be fair to the shipper. The cost of capital may not have risen as rapidly as labour or fuel prices, nor would have the depreciation expense, which is a component of general expense.

The PPI formula does not reflect changes in the cost of capital. Since the cost of capital is believed to account for as much as 20 per cent of all costs, this oversight may constitute a serious weakness. For example, Southern Pacific Railway in 1981 reported that through the company's continuing fuel conservation program, it had trimmed its use of locomotive fuel by 6 per cent over the previous year. This shows the possible differences between an index measuring input costs and one measuring output prices.

Appendix II includes several Australian and international examples of rate escalation clauses and provides guidance for shippers needing to negotiate such provisions in their contracts.

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2. In an article comparing URCS to its predecessor, Rail Form A, Robert Keyes of Santa Fe Industries gives the following regression equation: $E/T = 20 + 0.8\ G/T$,
where E/T is defined as maintenance expenses per mile of track, and G/T is defined as gross tonne-miles per mile of track (Keyes 1982).
3. Another concern with the RCR index is the lack of possible correction for shipper or carrier productivity improvements.

NEGOTIATING PROCEDURES

The model contract outlined in Appendix I has well over 100 features which can be separately negotiated. The shipper can gain valuable service concessions on many of these items which cumulatively may be worth more than a single rate reduction.

Successful negotiation requires a tremendous amount of advance strategic planning. The shipper must have the company's objectives and goals clearly identified, the range of possible demands and compromises readily available and a quantified assessment of how much various factors are worth to the company *before* meeting with the carrier. One major failing of some traffic managers has been that they are still suffering from the 'regulation mentality'. In other words, they over-emphasise the importance of the freight rate and under-emphasize possible service commitments from the carrier.

Under deregulation, the only limitation to the formulation of a transportation contract is one's own imagination. By having a wide repertory of options to discuss, the shipper can subsequently evaluate what each combined transportation package of rate, equipment, delivery times, credit and liability will mean to the company budget.

Appendix III outlines some ways of quantifying service factors and thereby guides shippers in their negotiations with carriers.

CONCLUSIONS

Contracts constitute an important marketing tool, but one which must be suitable for the particular requirements of the movement. For individual movements via specific lines which are repeat shipments, it may be possible to determine the actual cost of the movement and thereby forego a standard escalation clause. Similarly, some shippers would be justified in not wishing to tie up their business with one carrier for a long period of time since this obviously reduces future negotiating flexibility. Some shippers may be too small to gain any leverage in contractual negotiations. Furthermore, complex contract provisions often create monitoring and accounting responsibilities. Smaller shippers would perhaps view confidentiality with considerable reserve as they can reasonably expect not to benefit from discounted rates to the same extent as their large competitors.

Confidential contracts cannot solve such common transportation inequities as advantages which large shippers have over small shippers, the desire of railways to use their preferred routing or their own equipment, branch line abandonments or a shipper's advantages of competitive rail location.

If individual shippers are not large enough to bargain for volume guarantees and price concessions, one solution may be to develop a buying co-operation which would have more leverage. Such a group might be able to afford to hire an individual to keep track of transportation developments and monitor the time-consuming legal aspects which an individual shipper could not justify.

Nonetheless, contracting constitutes a valuable marketing instrument and one useful for advance planning. The only other constraint to achieving one's preferred transportation package other than one's size and location are the negotiating skills of the bargaining teams.

CHAPTER 5 RAILWAY RATE CONTRACTS IN AUSTRALIA

This chapter describes various contracts which have been negotiated with Australian railway systems.

CONTRACTS WITH QUEENSLAND RAILWAYS INVOLVING RAILWAY CONSTRUCTION

Contract with Thiess Peabody Mitsui Coal

This contract between the Queensland Government and the Thiess Peabody Coal Company was made into an Act of the Legislative Assembly of Queensland, assented to in 1962 and amended by another Act in 1965. The provisions of the agreement, therefore, have the force of law.

This agreement gave the coal company the exclusive right to prospect for coal in a pre-defined area, with the company agreeing to spend at least $700 000 in prospecting for coal over a 12-year period. The company would select certain areas of land within the coal field upon which the Government would grant a special coal mining lease for a renewable term of 21 years. The company would pay rent for all land held under such a lease, as well as royalties for all the coal extracted from this land.

The coal was envisaged as being for export purposes only, unless the Minister allowed or required the company to supply coal to a domestic consumer.

The agreement also required the company to transport not less than 3 million tons of coal from its Moura coal mines to the port of Gladstone over a short-line railway every year for a ten-year period commencing in 1968. The company at first agreed to construct the railway within seven years from the signing of the agreement in 1962.

The Queensland Government would have had the right to purchase the railway after 42 years from the date of the agreement at a price not to exceed 110 per cent of the cost. The company had the obligation to purchase whatever privately owned land it needed for the railway and to construct substitute roads when it had to cut through any public throughway.

As the railway was intended to be primarily used for the haulage of coal, the company was prohibited from using it for other freight or passengers, except with the approval of the Government.

The Government was bound to constitute a tribunal consisting of either a judge or an experienced lawyer. In case of any difference of opinion between the company and the State concerning any clause or any matter connected with the agreement, it was required that this be referred to the tribunal.

However, in a subsequent agreement, the State agreed to construct and maintain the short-line railway itself.[1] This agreement stated that the company would deposit certain monies which would be refunded upon the company offering certain annual tonnages of coal.

Under this revised agreement, the company would obtain a coal supply contract for Mitsui and Company Limited of Tokyo. As soon as this coal supply contract was confirmed, the State would then proceed with the construction of the short-line railway commencing at the company's Moura coal mine and proceeding to the company's property at Barny's Point in Gladstone.

As the amount of new capital required for the construction and equipping of this short-line railway was estimated at being approximately $A275 million, the company agreed to pay for half of this expense. However, a half portion of this amount would be refunded to the company during the period of ten years from 1968, provided the company shipped more than 2 million tons of coal every year. If the company shipped less than 1 500 000 tons of coal in any year it would not receive a refund.

In other words, the $138 million which the company undertook to pay the State as part of the expense of constructing the railway was really a security deposit for the performance by the company of its obligations.

The State obliged itself to transport coal from the company's Moura coal mines to the port of Gladstone at set rates which were graduated so that they diminished with increased volumes. For example, in 1967, for 1 million tons to 1 375 000 tons the freight rate was $2.90 per ton. If there was a demand for a volume above 1 650 000 tons, the rate was reduced to $2.75 per ton.

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1. Agreement made May 13 1965, published Gazette 1965, 528, varied by Orders in Council published Gazette 6, July 1974, 1392-1393 and 15 November 1975, 1084.

From April 1968 the freight rates to be paid by the company for the transportation of coal during the next ten-year period were according to the slide scale given in Table 5.1.

The rates shown in Table 5.1 were subject to escalation by negotiation. If mutual agreement could not be reached as to the amount of escalation, then it would be based upon variations in the basic wage for males, as determined by the Industrial Conciliation and

TABLE 5.1 CONTRACT BETWEEN QUEENSLAND GOVERNMENT AND THIESS PEABODY MITSUI COAL: TONNAGE OF CONTRACT COAL AND CORRESPONDING RATES

Contract tonnage (tons per annum)			*Overall rates per ton applicable to contract coal ($)*
1 000 000	to	1 499 999	3.00
1 500 000	to	1 599 999	2.98
1 600 000	to	1 699 999	2.93
1 700 000	to	1 799 999	2.87
1 800 000	to	1 899 999	2.79
1 900 000	to	1 999 999	2.72
2 000 000	to	2 099 999	2.64
2 100 000	to	2 199 999	2.55
2 200 000	to	2 299 999	2.46
2 300 000	to	2 399 999	2.37
2 400 000	to	2 499 999	2.28
2 500 000	to	2 599 999	2.20
2 600 000	to	2 699 999	2.15
2 700 000	to	2 799 999	2.10
2 800 000	to	2 899 999	2.05
2 900 000	to	2 999 999	1.98

Notes 1. Under 1 000 000 tons per annum the company shall pay the applicable freight rates as prescribed by the *Railways Acts*, 1914 to 1964, and the by-laws gazetted thereunder.

2. At or exceeding 3 000 000 tons per annum the freight rates to be paid by the company shall be as mutually agreed between the State and the company at a rate not exceeding $1.94 per ton.

Source Based on information provided to the Author in confidence.

Arbitration Commission of Queensland, and the percentage by which such freight rates were to be varied should be one-quarter of the percentage increase or decrease in the said basic wage.

The Railways Commissioner of the State had the option to transport the coal by any alternative route, providing that the rate per ton would not exceed the abovementioned rates.

These rates were based upon rail transportation services being supplied on a 6-day week basis and a reasonably regular flow of coal shipments being offered by the company. Rates would be increased if shipments of coal were required by the company on a holiday or Sunday, or if the company failed to maintain a regular flow.

As of 1968, a rebate of 9.1 cents per ton would be given by the State to the company in any year where the tonnage was more than 1.5 million tons, up to a maximum of 3 million tons.

If the company shipped more than 3 million tons in any year, the State would give an additional rebate (Order in Council, 6 July 1974, 1392).

The State obliged itself to give all shipments of coal which the company offered to the short-line railway priority over any other shipment. Furthermore, the freight rates for shipments other than coal (used in connection with the company's coal mining operations) were to be charged the same freight rates as applicable for coal.

The State Railways Commissioner was at liberty to fix the freight rates on any commodity other than coal over the short-line railway provided that it did not prevent the fulfilment of the State's obligations to the company. However, whenever coal or coal by-products would be transported by any other person over the short-line railway, the latter's freight rate would always be greater than that given to the company.[2]

The State accepted liability for the shipments of coal from the company and agreed to reimburse the company for loss calculated upon

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2. The formula used was one-half of the difference between the distance hauled for such other person and the distance hauled by Thiess Peabody Mitsui, which was to be multiplied by the applicable per ton mile rate for contract coal and then added to the distance hauled for such other person. This additional surcharge was not to apply for the transportation of coal from the Callidee mine of Thiess Brothers (for use at the allumina refinery at Gladstone) up to an aggregate of 1 million tonnes per year.

the actual cost of the mining production and preparation of the coal at the mine site.

The company agreed to deliver 100 Japanese manufactured coal wagons, each of 62 tons capacity. In exchange, the State agreed to rebate the company 10 cents per ton on each ton of coal transported for the company from the Moura mines to the port of Gladstone. When the cost of such equipment had been completely amortized, the company agreed to sell it to the State for $2000 per wagon.

After the termination of the ten-year period commencing in 1968, the State obliged itself to continue to provide the company with rail transportation for its shipments of contract coal over the short-line railway for an additional period of ten years. The rates would be as mentioned above, but reduced by 20 per cent.

The State agreed that it could not be excused for failure to complete and place in operation the short-line railway by March 1968 because of strikes, lock outs, shortage of transport power or esssential materials, break down of plant or any other cause whatsoever.

Contract with Central Queensland Coal Associates (CQCA)

This agreement was entered into in 1968 between the Premier of Queensland on behalf of the State and the Utah Development Company and the Mitsubishi Development Pty Ltd for the purpose of the latter companies bringing coal deposits into large scale production for export purposes.

The companies agreed to take all necessary action to obtain coal sale contracts to be utilised by Japanese steel and/or chemical industries. In return, the State agreed to construct and maintain a railway primarily for the transportation of this coal.

The companies were given authority to prospect for coal over certain designated franchise lands and the companies could apply to the Minister for special coal mining leases over parts of these lands. The companies could mine from the lands covered by the special coal mining leases up to 150 million tonnes of export coking coal, as well as an additional 150 million tonnes, provided that this additional quantity did not exceed 30 per cent of the recoverable reserves of coking coal in the franchise lands. The Government retained the right to allow the companies to mine more than the above quantity of export coal.

The companies agreed to pay rent for all land held by them under a

special coal mining lease at the rate of $1 per acre per year until the year 2010. Special coal mining leases could be renewed for a further 42-year period after the year 2010, providing the companies had continually satisfied the provisions of the agreement.

Additionally, the companies agreed to pay a royalty on all the coal from land subject to a special coal mining lease which would be shipped over the specially constructed railway at the rate of five cents per tonne.

As soon as the companies would be able to obtain contracts for coal from the Japanese steel and/or chemical industries and binding commitments could be shown to the Minister, the State would proceed with the construction of the railway. This railway would commence at the companies' Goonyella coal mine and proceed to a port of the companies' choosing. The aforementioned railway would be approximately 142 miles in length and would be designed to handle locomotives and rolling stock capable of transporting at least 5 million tonnes of coal per year.

The State promised to use its 'best endeavours' to have the said railway line completed by the end of March 1971.

It was anticipated that during the first year of operations, the companies would only ship 2 million tonnes of contract coal, whereas the volume would be increased to 4 million tonnes during the second year and beyond. The State and the companies agreed that it would cost approximately $A36 million to construct the railway, including the locomotives, rolling stock and other necessary facilities. The companies agreed to make available to the State security deposits which would defray the above capital expenditure in carrying out the construction of the railway and providing for the purchase of rolling stock.

These security deposit monies would be refunded to the companies over a 12.5 year period, provided certain volumes of contract coal were shipped. For example, if a total tonnage of more than 2.5 million tonnes were shipped during any year, the State would refund the full amounts of the security deposit monies for that year to the companies. A formula was agreed to for calculating the refund payable for various annual volumes. However, if the companies shipped less than 500 000 tonnes in the first year, 1 million tonnes in the second year, or 1 500 000 tonnes during any subsequent year of the 12.5 year period, they would forfeit the amounts of security deposit monies for that year.

The freight rates which the companies would pay for movement of such contract coal on the railway line are outlined in Table 5.2. These freight rates would be in effect for the 12.5 year period.

On annual tonnages of 4 million tonnes or more, the freight rates to be paid by the companies would be $1.80 per tonne for tonnages up to 4 249 999 tonnes. For tonnages in excess of that figure, the freight rate would be as mutually agreed between the State and the companies, but failing such agreement would be determined by the Minister (provided that in either case the rate did not exceed $1.80 per tonne).

In the agreement it was stated that the above rates were based upon the assessment of total capital cost for the construction and equipping of the railway line of $A36 million. If the actual capital cost would be higher or lower than that amount, the rates were to be varied so as to reflect the greater or lesser cost. Similarly, the freight rates were based upon the premise that the mileage of the said railway line would be 142 miles. If the actual mileage was greater or less than this estimation, the freight rates would be varied accordingly.

Furthermore, the freight rates would be subject to escalation, to cover such factors as changes in wage rates, material and supply costs and the profitability and overall economics of the railway's operation. In the event that the companies and the Minister had not

TABLE 5.2 FREIGHT RATES PAYABLE BY CQCA FOR VARIOUS TONNAGES OF CONTRACT COAL

Annual tonnages	*Overall rate per tonne applicable to contract coal (dollars)*
Under 1 500 000	2.58
1 500 000 to 2 749 999	2.45
2 750 000 to 2 999 999	2.31
3 000 000 to 3 249 999	2.16
3 250 000 to 3 499 999	2.07
3 500 000 to 3 749 999	1.98
3 750 000 to 3 999 999	1.90

Source Based on information provided to the Author in confidence.

been able to agree on an escalated rate, a formula would be applied for escalation of freight rates. This formula is similar to that outlined in Example 1, Appendix II.

The above freight rates were based on rail transportation services being supplied on a six-day week and a reasonably regular flow of coal shipments being offered by the companies. If shipments of coal would be required on a holiday or Sunday for the convenience of the companies, or if the companies failed to maintain a reasonably regular flow, the companies would pay for the actual increases in cost.

Furthermore, if a train was delayed due to the companies' fault, they would pay to the State Rail Commissioner a demurrage charge of $A28.95 per hour where the delay occurred at the companies' mines or $A17.25 where the delay occurred at the port.

These demurrage charges would also be subject to escalation and if mutual agreement could not be obtained as to the amount of escalation, then they would be based upon the following formula:

$$C = \frac{4W + D}{5}$$

where:

C = the percentage increase to be applied to the demurrage charge

W = the percentage increase in hourly wages in the rate escalation formula from the first day of July, 1968, or since the previous adjustment was made to the demurrage charge as the case may be

D = the percentage increase in distillate prices in the rate escalation formula from the first day of July, 1968, or since the previous adjustment was made to the demurrage charge as the case may be.

Furthermore, if the tonnage shipped by the companies in any year over the 12.5 year period was greater than 1.5 million tonnes, the State would give the companies a rebate of 12 cents per tonne, up to a total of 4 million tonnes. The rebate also applied during the first and second years if the companies shipped volumes in excess of 500,000 and 1 million tonnes respectively.

If the companies in any year of the 12.5 year period shipped more than 4 million tonnes of volume, they would be entitled to an additional rebate which would be determined by the Minister.

The State agreed not to transport coal or coal by-products for any person other than the companies over the said railway line for freight rates which would be less than 1.25 times the freight rates applicable to the companies. The State Railways Commissioner was however free to fix the freight rates to be charged for any other commodity provided that the traffic would not prevent the State from fulfilling its obligations to transport coal for the companies.

If another company would request the State to transport coal or coal by-products in tonnages in excess of 500 000 tonnes annually, then the State and the companies would renegotiate the above freight rates.

The contract also provided that, inter alia:

- the State assumed the ordinary liability of a common carrier in the event there was loss or damage to the merchandise;
- the freight rates would be reduced by 20 per cent after 12.5 years from the date of the first shipment until the expiry of the 42nd year;and
- neither the State nor the companies would be excused from any failure to operate the railway or offer contract coal for transport due to strikes, lock-outs, break-down of plant or any other cause whatsoever.

The Governor in Council was required to constitute a tribunal consisting of either a judge or an experienced barrister. This tribunal would determine all matters related to the interpretation of this agreement. Each party to proceedings before the tribunal would pay their own costs, unless the tribunal otherwise directed.

Subsequent to this 1968 agreement, the parties amended on more than one occasion various conditions including the freight rates, the rate escalation clause and minimum quantity of contract coal tonnage to be shipped per year. Utah Development Company has transferred some of its interest in the agreement to several other mining and investment companies.

The Greenvale Agreement - 1970

In 1970 the Premier of Queensland on behalf of the State contracted with Metals Exploration Queensland Pty Ltd and Freeport Queensland Nickel for the transportation of lateritic nickel ore from the companies' mine at Greenvale to the companies' treatment plant near Townsville. This contract, as well as subsequent amendments, was approved by the State Legislative Assembly and therefore the agreement's provisions have the force of law.

The companies obliged themselves to procure long-term contracts for the sale of nickel and cobalt products and to secure the necessary monies to finance the development project. The State agreed to act as a guarantor to the companies of a maximum of $43 million to be borrowed for the purposes of the project.

The companies would apply to the Minister for Mines and Main Roads for special mineral leases which would be granted for a period of 35 years, with a possible renewal of an additional 21 years on the same conditions. The companies would pay a rent for all the land held by them under such special mineral leases at the rate of $1 per acre per year. In addition, they would pay a royalty on all ore mined and shipped over the railway at the rate of 10 cents per tonne during the first ten-year period and 15 cents per tonne during the following ten-year period. The Crown reserved the right to all gold, coal or petroleum found on the land covered by these special mineral leases.

The companies obliged themselves to install such machinery and other works as were necessary for them to mine not less than 1 million tonnes of ore per year within a period of four years from the granting of the first special mineral lease. They would spend at least $3 million in the development of the mines during the first three years and not less than $500 000 annually thereafter.

The companies were obliged to design and contruct a railway line commencing at their mine at Greenvale and proceeding to their treatment plant near Townsville, a distance of approximately 140 miles. When the State Railways Commissioner was satisfied that the line had been completed in accordance with the plans approved by him, the former would accept the said line on behalf of the State and the Companies would then be relieved of any further obligation or liability, other than a deposit of $100 000 to be used by the Commissioner for any defects in construction.

Furthermore, the companies were obliged to reimburse the State Railways Commissioner for all of the latter's costs in reviewing the location of the route, the design, the contract tenders, etc. The companies were expected to have the railway line completed and placed in operation by 1973.

The State Railways Commissioner would equip the said railway with the necessary rolling stock to transport an annual tonnage of 2.7 million tonnes of ore per year; the estimated cost of equipping the railway was approximately $6.1 million. The companies agreed to deposit all of this money with the State. The State agreed to give all shipments

offered by the companies to the said railway line priority over any other shipment. The freight per tonne was calculated by combining a cost per tonne figure, which varied from 98 cents for 2 million tonnes per annum down to 88.4 cents for 3 million tonnes, with a rate per tonne for any one year of the period of 20 years following the date of first shipment determined by the sum of:

- during the period of ten years commencing on the date of first shipment, an amount calculated by dividing $1.5 million by the tonnage carried during the year in question or $2.3 million, whichever is the greater, and subtracting 10 cents from the resulting rate; or
- after the termination of the period of ten years commencing on the date on first shipment, an amount calculated by dividing $3 million by the tonnage carried during the year in question or $2 million, whichever is the greater, and subtracting 15 cents from the resulting rate.

Furthermore, the parties agreed that the freight rates would be subject to an escalation clause which they would negotiate. In the event they could not agree, the following formulae would apply:

$$X1 = X + X \left(\frac{N1 - N}{N}\right)$$

where:

X1 = the amount to be ascertained inclusive of escalation;
X = the amount per tonne for the first and second ten-year period as discussed above;
N = nickel price at the fifth day of November, 1970, viz. the ruling price per tonne of nickel metal on the world market, which price is, for the time being, agreed to the price per ton calculated from the price from time to time quoted by International Nickel Company Limited for four inch square electrolytic nickel cathods, FOB, Port Colvorne, Canada, at fifth day of November, 1970;
N1 = corresponding nickel price at the date the formula is to be applied;

Provided that, where N1 - N is a negative factor, no escalation shall be taken into account.

$$Y1 = Y + (Y - 20.5) \text{ cents} \left(0.75 \left(\frac{w1 - w}{w}\right) + 0.17 \left(\frac{s1 - s}{s}\right) + 0.08 \left(\frac{d1 - d}{d}\right)\right.$$

where:

Y1 = the amount to be ascertained inclusive of escalation;
Y = the varying cents per tonne rate with tonnage as discussed above;
w = average hourly wage at first day of August, 1970;
w1 = average hourly wage at date formula is to be applied;
s = price of heavy steel rail per ton C.I.F.E. Brisbane at first day of August, 1970;
s1 = corresponding price at date formula is to be applied;
d = price paid by Commissioner for distillate at first day of August, 1970;
d1 = corresponding price at date formula is to be applied.

When the deposit which had been lodged with the State Treasurer for the equipping of the railway had been completely offset against the freight which was payable by the companies, the freight rate per tonne would then be decreased by 20.5 cents.[3]

Furthermore, if the actual mileage of the railway line was greater or less than the 140 estimated miles because of a change of route or extension, then the freight rates would be varied to take into account the effect of the longer or shorter haul.

The companies obliged themselves to pay to the State any additional costs which would be incurred if they failed to maintain a reasonably regular flow of ore shipments and the State Railways Commissioner was required to pay employees overtime as a consequence.

The companies also agreed to install loading equipment at the mine and unloading equipment at the treatment plant capable of a rate of 1000 tonnes and 2000 tonnes per hour respectively. When the companies were at fault for a delay due to loading or unloading a train, they would pay a demurrage charge of $28.95 per hour. The demurrage charge was also subject to an escalation clause.

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3. Out of the deposit which had been lodged with the State for the equipping of the railway, an amount of 20.5 cents per tonne would be offset against the freight payable by the companies until such time as the whole of the freight deposit had been offset. The companies would not be entitled to any refund of the freight deposit other than by way of these offsets.

The State reserved the right to set freight rates over the railway for other freight as well as passengers, but in the event another company was shipping more than 100 000 tonnes annually, the companies would have the right to renegotiate the freight charges.

The State accepted liability for all the shipments of ore and other cargo from the companies which would be transported over the said railway lines. Neither the State nor the companies would be excused from any failure to meet their commitments by reason of strike, lock-out, break-down of plant or any other cause.

As in the previous Queensland agreements, a tribunal was set up which would determine questions regarding the interpretation of the contract which were in doubt. There were also provisions covering the usage of water in connection with the mining, as well as the acquisition of land by the companies from private owners for the purposes of the agreement.

CONTRACTS WITH WESTRAIL INVOLVING MINERALS AND COAL

Mineral Sands

The provisions of this agreement were ratified by the Legislative Assembly of Western Australia and therefore have the force of law. The agreement was made by the Premier on behalf of the State and Western Titanium Ltd with respect to the latter mining and concentrating heavy mineral sands ore at Eneabba and transporting the minerals for further treatment at a plant in Western Australia.

The company agreed to submit to the Minister, in 1975, detailed proposals for a mining and treatment project with a capacity to produce not less than 240 000 tonnes per year of heavy minerals which would be exported through the port of Geraldton. In addition, the company had to demonstrate its ability to profitably sell or use a substantial proportion of the heavy minerals, as well as the availability of supporting financial institutions.

The Minister would consider the above proposals made by the company and either approve them or require modification thereto. In the latter event, the company had the right to appeal this decision to arbitration.

The company would then implement the proposals by commencing construction of the concentration plant, mining facilities and private roads to be used in the operations.

The company also agreed to give all of its production of heavy mineral concentrates and bulk minerals to the State railway at the mining site at Capel for transportation to Geraldton. The company could opt between road and rail for commodities other than bulk minerals, with the provision that if other commodities were given to the railway, the freight would be in full wagon loads.

The company also obliged itself to maintain loading and unloading facilities sufficient to meet train operating requirements and terminal equipment, including sidings, spurs and other connections, at its own expense. The Railways Commission agreed to maintain and service all the locomotives and rolling stock necessary for the purposes of the agreement. The rail equipment was to be of a design and specification approved by the Commission.

The company would provide the Railways Commission with advance notice of anticipated tonnages and would give at least 18 months notice of any change to their requirements.

All commodities carried would be at the company's risk, not that of the Railways Commission. The State would construct and operate the railway to the mining areas.

The freight rates for the haulage of heavy minerals by rail from the separation plant to the company's rail siding at Capel would be either a rate of $A9.17 per tonne in Western Australian Government Railway (WGR) wagons, or $A8.38 per tonne in company wagons, or the freight rate gazetted from time to time under a Railways Commission By-law. The company would give notice of its selection of either the above rate or the gazetted rate not less than 3 months prior to commencement of rail haulage.

Furthermore, the freight rate for the haulage of heavy minerals from the separation plant to the Geraldton wharf would be as shown in Table 5.3.

The freight rates would be subject to the following additional conditions:

- Trains would operate a maximum of 6 days per week, based, as far as practicable, on the utilisation of the maximum number of wagons possible per train and the least number of trains per week required to meet the haulage program of the company.
- The trains would be scheduled at the times most convenient to the operational requirements of the Railways Commission.

TABLE 5.3 FREIGHT RATE FOR HAULAGE OF HEAVY MINERALS PRODUCED BY WESTERN TITANIUM FROM SEPARATION PLANT TO GERALDTON WHARF

	Rate per tonne	
Tonnes per annum	*In WGR wagons ($)*	*In company wagons ($)*
Up to and including 100 000[a]	Freight rate gazetted under By-law 55	Freight rate gazetted under By-law 55
Over 100 000 and up to 200 000	3.20	2.95
Over 200 000 and up to 300 000	2.90	2.70
Over 300 000 and up to 400 000	2.70	2.53
Over 400 000 and up to 500 000	2.60	2.47
Over 500 000 and up to 600 000	2.50	2.40
Over 600 000	2.46	2.37

a. There were also additional formulae for minimum freight of 50 000 tonnes.

Source Western Titanium Contract (1975).

- The company would reimburse the Railways Commission for any additional expenses due to the former's requiring operation on Sunday or any other needs which were not caused by a failure of the Railways Commission.
- The company would ensure that all railway wagons were loaded within the authorised axle load capacity and were subject to such minimum load per wagon and per train requirements as defined by the Railways Commission.
- The company would ensure that the loading and unloading rates were not less than 1000 tonnes per hour respectively.
- The freight rates would be escalated according to a formula similar to that outlined in Example 3, Appendix II.

The Western Titanium Company would develop the heavy mineral sands in those areas which it had designated and for which the State had given a mineral lease. The term of the lease would be for 21 years with the

possibility of successive renewals each for the same period upon the same terms and conditions. The State agreed not to grant any other claim or lease in those areas for any other resource product (other than petroleum) to any other party during the duration of the agreement.

Also in the agreement were provisions covering the usage of water, the development of a town with adequate housing accommodation and the expansion of the company's existing ilmenite upgrading plant at Capel, and the establishment of a new plant for secondary processing.

The company agreed to ship through the port of Geraldton its heavy mineral products which were produced near Eneabba and destined for shipment in bulk overseas. The company would pay the cost to the State of all necessary storage, reclaiming equipment and other facilities required at the port in this regard.

Uranium

This agreement was between the State of Western Australia and Western Mining Corporation Limited for the mining, treatment and transportation of uranium ore reserves. The provisions of the agreement were voted upon and assented to by the Legislative Assembly and therefore have the force of law as of the date of their publication in the Gazette.

The corporation had established the existence of an ore body containing in excess of 20 million tonnes of commercial grade uranium ore. It wished to establish a metallurigcal research plant at Kalgoorlie at a cost in excess of $7 million and a further program which would cost approximately $6 million to test the ore.

The company had at first investigated the economic feasibility of constructing a uranium and vanadium treatment plant at Yeelirrie to produce uranium oxide and vanadium oxide for export from Western Australia.

The initial obligations of the company were to continue these engineering and metallurgical processing studies as well as to pursue marketing and financial investment investigations in order to submit detailed proposals to the Minister before the end of 1982. These proposals involved the establishment of a mining and treatment project with a capacity to treat 1.21 million tonnes of ore per year. The Minister would either approve the proposals or require their modification, in which case the company would have the right to take the matter to arbitration. If the arbitration award was in favour of

the company then the proposals would be deemed to be approved by the Minister immediately. However, if the arbitration went against the company it would then have three months to decide whether it wished to accept the decision and proceed according to the modified terms.

The company would implement the approved proposals and have the treatment plant in operation within four years time. The company agreed to construct and be responsible for the maintenance of all private roads used in its operations. The State agreed to construct new public roads from Leonora to the turn off to the Agnew mine site. The company would pay one-sixth of the cost of this road construction and sealing. In addition, the State would construct a sealed road connecting the turn off with the town site. The company agreed to pay one-half of the cost for this. Similarly, the company agreed to pay for one-half of the construction of an unsealed road connecting the townsite with Mt Magnet.

The State agreed to complete the upgrading of the existing railway line between Leonora and Kalgoorlie at least three months before the date which the treatment plant would come into operation. The load capacity of the upgraded railway would be not less than 53 000 tonnes of caustic soda and 71 000 of fuel oil per year. The company agreed to consign to the Railways Commission all of its fuel oil and caustic soda requirements to be transported from the port of Esperance to Leonora.

The company was responsible for the maintenance of sidings, shunting, loops and spurs as were required solely for its operations, as well as the maintenance of loading and unloading facilities sufficient to meet the train operating requirements. The company also agreed to provide sufficient rail wagons to carry all caustic soda and fuel oil from the port of Esperance to Leonora.

The Railways Commission agreed to maintain and service all the rail equipment at its own cost. The company would give the Railways Commission adequate notice in advance of its anticipated tonnages and change those requirements only after a notice of at least 18 months. The liability provisions were covered by the *Government Railways Act* of 1904.

The company would pay freight rates for caustic soda and fuel oil carried on unit trains between Esperance and Leonora at the following level:

- up to 75 000 tonnes per year at rate of 3 cents per tonne-kilometre;

- between 75 000 and 100 000 tonnes, 2.75 cents per tonne-kilometre; and
- over 100 000 tonnes, 2.5 cents per tonne-kilometre.

The rate per tonne-kilometre for all other bulk commodities carried in general purpose wagons from Kewdale to Leonora or Mullewa would be 4 cents. In addition, the rates would be adjusted half-yearly according to a rate escalation formula. The formula used is similar to that outlined in Example 1, Appendix II.

The formula would be subject to review by either the company or the Railways Commission in September of 1988 and thereafter at five-year intervals. In the event of the parties failing to reach agreement on a new formula, the matter would be referred to arbitration. Also, the formula would be automatically renegotiable if at any time, for any reason, information needed to ascertain any of the factors was no longer available.

Caustic soda and fuel oil carried on other than unit trains, as well as any other commodity, would be carried at gazetted rates.

Furthermore, the freight rates would be subject to the following additional conditions:

- Trains would operate up to a maximum of 6 days per week.
- The train operating pattern would be based, as far as was practicable, on the utilisation of the maximum number of wagons possible per train and the least number of trains per week required to meet the haulage program of the company.
- Such trains would be scheduled at times convenient to the operational requirements of the Railways Commission.
- Any additional costs involved due to work on Sundays would be met by the company.
- The company would ensure that all wagons were loaded within the authorised axle load capacity and would be subject to the minimum load per wagon and per train requirements set by the Railways Commission.
- The freight rates had been set according to a calculation on the basis of the turnaround time at the port of Esperance being 180 minutes and at the Leonora rail head being 120 minutes. If such times were not regularly adhered to by the company, the Railways Commission had the right to review the freight rate in order to take these changes into account.

- If the yearly working programs were not adhered to through no fault of the Railways Commission, the latter reserved the right to review the freight rates.
- Wagons being loaded with caustic soda would be subject to the minimum load being not less than 52.5 tonnes per wagon. Similarly, wagons loaded with fuel oil would have a minimum load of 56.5 tonnes per wagon. Where less was carried than either of the above in any wagon, freight would be charged as though the minimum load had been carried.
- Freight charges would be paid monthly in the month following the haulage.
- If the Railways Commission in reviewing the freight rates in order to take into account additional Sunday work (para. 4) or turnaround times (para. 6) were to arrive at a new freight rate which was disputed by the company, the matter would be referred to arbitration.

The company was required, however, to transport its products by road from the treatment plant to the port of Fremantle. The Commissioner of Transport would issue licenses for road carriage upon request by the company in this regard.

The company could request permission to transport caustic soda and fuel oil from the port of Geraldton and all other bulk commodities by rail from Kewdale to the railhead at Mullewa and then by road to the treatment plant by alternative route, if the latter routing would be more economic to the company.

If the Minister did not agree to the company's request for such alternative routing, the company could take the matter to arbitration. The usage of an alternative route required the company's maintenance of sidings and facilities with regard to the rail mode and the sharing of the construction of public road costs when it involved motor carriage.

The company agreed to ship fuel oil and caustic soda through the ports of Esperance or Geraldton and to ship its products from the treatment plant to the port of Fremantle or such other ports as the Minister might approve. The company would provide all the necessary port facilities at no cost to the State.

The State would extend a mineral lease to the company over those mining areas which the latter specified at a rental determined by the *Mining Act*. The term of the mineral lease would be for a period of 21

years, with the possibility for successive renewals under the same terms and conditions.

During the mineral lease, the State would not register any other claim or lease for mining (other than for petroleum) to any person other than the company or its subsidiaries or partners. In addition, the State would ensure that the company would not be required to comply with the labour conditions imposed under the *Mining Act*.

The company agreed to pay a royalty to the State for all uranium oxide produced from the mineral lease at a rate of 3.5 per cent of the FOB value.[4]

If the Minister and the company disagreed on the company's assessment of the FOB value, the question would go to arbitration.

The royalty rate would be reviewed and fixed by the Minister every five years.[5]

If ever the State enacted legislation which increased the obligations of the company, the latter could terminate the agreement after having given the State 12 months to remedy the modification.

There was a force majeure clause which excused either party from circumstances beyond their control such as strikes, work stoppages, delays of contractors and inability to sell the products of the treatment plant profitably.[6]

The State had the right to terminate the agreement if the company were to default on the performance or observance of any of the provisions in the agreement. Alternatively, the State could decide to remedy the default and charge the company for the costs incurred.

Any dispute between the parties arising out of or in connection with this agreement was to be decided by arbitration. Each party would appoint an arbitrator and the arbitrators would appoint an umpire.

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4. A definition of FOB value was provided which deducted export duties as well as marine insurance, port and handling charges at the port of discharge, warehousing costs, as well as demurrage and import taxes.
5. The exception to this rule was the first period, which would be seven years after the date which the treatment plant came into operation.
6. This force majeure clause was the exact opposite of the one seen in the three Queensland contracts.

There were other clauses in the agreement relating to the development of a town site, electricity and sewage, as well as usage of water facilities.

Copper and zinc

This agreement was signed in September of 1980 and has since been terminated. It was between the Western Australian Government Railways Commission and Seltrust Mining Corporation Pty Ltd and Mount Isa Mines Limited for the transport by the Commission of wet copper and zinc concentrates, extracted from the Teutonic bore deposit, between a loading point at Leonora and an unloading point at Esperance. The Commission agreed to haul all the companies' concentrates from the loading point to the unloading point.

The freight rate which the companies agreed to pay was calculated as follows:

Factors used:
a = $21.70 adjustable
b = $16.00 adjustable
c = $0.25 fixed
d = 80 000
n = days concentrates not hauled.

During each financial year, the first 80 000 tonnes hauled for $(a-c) per tonne; for each tonne hauled in excess of 80 000 tonnes, $(b-c) per tonne.

Where, in any financial year, less than 80 000 tonnes is hauled the minimum amount of freight payable by the companies in respect of that period would be:

$ (a x d) - (c x d)

Where a delay or temporary suspension takes place during any complete financial year of operation caused by circumstances beyond the power or control of either party the amount was calculated by:

$$\$ \frac{(a \times d \times (300-n))}{300} - \frac{(c \times d \times (300-n))}{300}$$

Should the total tonnage of wet concentrates hauled pursuant to this agreement at any date exceed 616 000 tonnes then, after that date, the above formulae would apply with the omission therefrom of the factor c.

In addition to the freight payable pursuant to the above, the companies would pay:

Until the total amount paid had reached $4 x 616 000,

(i) $320 000 for the period from 1 April 1981 to 30 June 1982, with an additional $4 for every tonne of wet concentrates in excess of 80 000 tonnes hauled during that period

(ii) $320 000 for each one of the financial years from 1 July 1982, with an additional $4 for every tonne of wet concentrates in excess of 80 000 tonnes hauled in each financial year.

Once the total freight paid exceeded $4 x 616 000 the companies would pay the fixed amount of $0.25 for every tonne of wet concentrate hauled thereafter.

The minimum tonnage of wet concentrates to be hauled per train trip would be 600 tonnes.[7]

Whenever a volume constituting less than the minimum tonnage were loaded, the above minimum would still apply in the calculation of the freight rate, except when this was caused by the negligence or inefficiency of the railway.

The companies agreed to maintain the loading and unloading facilities at their own cost, including all necessary sidings, shunting loops and spurs. The companies would give to the railway each year the estimated tonnage which they planned to ship, as well as notify the railway of any decision to add to their plant or to introduce new technology which would increase their production.

The companies also agreed to pay all freight charges in the month following that in which the service was performed and to provide containers of a design and construction approved by the railway in sufficient numbers to allow rail shipment. The companies agreed to compensate the Railways Commission for only those wagons which had been provided by the Commission which were not fully utilised. Also, the companies agreed to work out a weekly and monthly schedule of dispatches with the railway.

The Railways Commission agreed to provide rail wagons and the necessary labour for the haulage of wet concentrates to meet the

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7. Where all rail wagons had an increased capacity of 19 tonnes per maximum axle load, the minimum tonnage would be increased.

anticipated requirements of the companies. Whenever the Railways Commission was unable to make available additional wagons needed to carry increased tonnages, it agreed to the companies' employing alternative transport modes. The railway also agreed to permit the companies to use an alternative transport mode on occasions to meet urgent unexpected circumstances.

The railway reserved the right to modify the freight rates if loading and unloading was not completed in sufficient time to permit adherance to the train operating patterns, or if future industrial award conditions precluded regular operations on Saturdays. Furthermore, the companies would reimburse the railway for any additional expenses incurred if additional trains were provided on Sundays.

This contract provides a useful example of a train operating pattern negotiated between the parties which was based on estimated tonnages from 1980 onwards. The contract specified three consists which would operate three times per day Monday to Saturday inclusive and the make up of the consists.

The Commission also agreeed to provide 53 WQCX wagons to meet the train operating pattern. This number include provision for spares.

The companies would indemnify the railway for all legal actions of third parties arising out of the negligence of the company and the railway would indemnify the companies in the reverse situation. However, the wet concentrates transported by the railway were to be carried at the owners' risk.

Should any dispute or difference arise as to the meaning of the agreement or the rates and obligations of the parties thereunder, it would be referred to arbitration. Also, there was agreement that the freight rates would be subject to an escalation clause. This formula for escalation is shown in Example 1, Appendix II.

This formula would be reviewed by the railway in 1985 and thereafter at five-year intervals.

Coal

This was an agreement between the Western Australian Railways Commission and Cockburn Cement Limited for the transport of coal between Collie, Western Australia and Soundcem. The agreement was signed in May 1981 and was in effect for a period of not more than four years.

The freight rate to be paid was a base rate of $5.05 per tonne,

provided that the volume transported was between 200 000 and 300 000 tonnes in any year.[8]

Where the quantity of coal transported in any year was less than 200 000 tonnes, the company would pay the Railways Commission the gazetted rate. Furthermore, when the quantity was less than 150 000 tonnes, the company would also pay liquidated damages for surplus wagons at the sum of $11 000 per wagon.[9]

This contract included a unique force majeure clause.

Wherever an unforeseen event which would constitute force majeure resulted in less coal being transported, the following procedure was agreed:

- The actual tonnes transported during the last thirty working days prior to the force majeure taking effect and during which period no force majeure applied shall be ascertained and the quantity transported during that period shall be divided by thirty to obtain an average daily figure.
- For the period the force majeure applied the Commission shall be deemed to have transported the tonnage which results from applying to the days in that period that would have been working days if the force majeure had not applied the average daily figure so obtained and the company shall be deemed to have paid the Commission the amount the company would have paid for the tonnage if such quantity had actually been transported.

The company agreed to maintain and operate a loading and unloading facility, the latter being capable of a rate of 1000 tonnes per hour.

The company also agreed to provide adequate staff at the terminals to meet the train turnaround requirements, which were described in the contract as five trains per week, with a round-trip cycle time of 24 hours each and with a minimum load per train consist of 980 tonnes.

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8. In the event the gazetted rate pursuant to section 22 of the *Government Railways Act 1904* was at any time less than the agreement rate, the latter would then be reduced to the former's level.
9. If the railway used any of the surplus wagons in its general operations, the sum of $11 000 liquidated damages would be adjusted.

The Railways Commission bound itself to provide and operate suitable equipment to convey the company's coal requirements. If the railway were unable to provide a sufficient number of covered wagons, it was agreed that it be allowed to supply wagons which were subsequently covered by tarpaulin.

The company agreed to consign to the railway not less than 90 per cent of the coal which it purchased from the supplier, unless the Railways Commission were unable to carry this volume.

The freight rates were calculated on the basis that, for each train, the average load of each rail wagon was not less than the minimum specified by the railway for that class of wagon (this minimum being 2.5 per cent less than the maximum capacity). Furthermore, they were calculated on the basis of a turnaround time at terminals not exceeding 2.25 hours at Collie and 2 hours at Soundcem. If such times were not regularly adhered to by the company, the Railways Commission could increase the freight rate (and charge demurrage).

The parties agreed to a rate escalation formula which was identical to that already described in the Seltrust mining contract.

If the parties failed to select an arbitrator, this could be done by the President of the Institute of Chartered Accountants or the Institute of Engineers or the Law Society. The arbitrator would direct by whom and to what proportion costs would be paid.

CONTRACTS INVOLVING AGRICULTURAL PRODUCTS

Australian National Railway Grain Contract

This agreement was between Australian National Railways Commission, the United Farmers and Stock Owners of South Australia Incorporated, the South Australian Co-operative Bulk Handling Limited, the Australian Wheat Board and the Australian Barley Board. The agreement was made in November 1985 between all of the above parties and covered the transportation of wheat, barley and oats to and from points served by the railway within the South Australia.

The railway agreed to transport grain consigned to it by the South Australian Cooperative Bulk Handling Limited according to a schedule of freight rates which commenced at $2.58 per tonne for a distance of five miles and increased a few cents per additional mile until a maximum rate of $23.53 per tonne for a distance of 605 miles. This constituted an increase of 7 per cent over the 1984-85 season rates.

A rebate of 15 per cent would be paid to the Barley Board or the Wheat Board for growers who delivered more than 80 per cent of their total deliveries to a point served by rail. This was to discourage growers from trucking their product directly to port. The 15 per cent rebate would be paid as well for the 1986-87 and 1987-88 seasons.

Attached to the agreement were some demonstration comparisons of the savings which growers could obtain by delivering the majority of their product to rail points. For example, if a grower's base rate was $16.40 per tonne in 1985, the effective marginal rate for those deliveries which exceeded 80 per cent of that grower's total would be $13.94 per tonne.

If growers delivered 90 per cent of their wheat and barley to rail-served points, the overall average rate would be $16.13. If growers delivered 100 per cent to inland rail points, the overall average rate would be only $15.91 per tonne.

The rates given for the 1985-86 year would be escalated in the two subsequent years. The formula used is shown in Example 4, Appendix II.

In the event that the rate of escalation derived from the formula exceeded increases in the Consumer Price Index, the Railways Commission agreed to renegotiate with the industry in order to achieve an alternate, more equitable basis for escalation.

The Railways Commission had the right to renegotiate the agreement or any part thereof at any time in which it believed that the Co-operative Bulk Handling Limited, the United Farmers and Stock Owners Company and the Wheat Board were not encouraging growers to deliver their grain to inland rail-served points.

Conversely, the industry could renegotiate part of the agreement at any time at which they were of the opinion that the railway was not respecting its obligations; to transport grain in the most direct and efficient manner, to organise such road movements from the inland rail-served points to destination, and to invest in rail operations for the grain industry from the operating surplus it received from its own road transport service.

The parties to the agreement would appoint two members to a Grain Freight Review Committee, whose tasks would include monitoring the operation of the agreement and annually reporting their findings.

The carriage of grain by the railway would be subject to the terms and conditions specified in the Australian National Goods Rate Book.[10]

Another clause stated that the *Australian National Railways Commission Act* of 1983, as amended, would operate in respect of the agreement.

The Railways Commission also agreed to certain selective base rates which were subject to the following special cost saving operating conditions:

- Grain conveyed on a once weekly scheduled train.
- Orders for empty wagons to be received by the Commission's transport co-ordinator, by 10 am on the day the said train departed from Dry Creek.
- Wagons to be loaded on the day of being placed in the appropriate rail sidings, that is, empty wagons placed in the morning are to be attached and loaded in the afternoon on the return of the same train.
- A minimum of four empty bogie wagons to be placed for loading at any one station at any one time.

Where grain was conveyed by road other than by the Railways Commission's road service from inland rail-served grain points, surcharges would be applied by the railway. The surcharges varied from 47 cents per tonne if the grain was conveyed by truck for local consumption, to $2.50 per tonne when the destination could have been served by rail or when the road journey was in excess of 80 kilometres.

A similar agreement had been signed by Australian National Railways and the South Australian grain industry in 1982. This was also a three-year agreement which was meant to give grain producers a sound basis for budgeting their rail transportation costs. The average rail rate for 1982-83 season was reduced by 3.8 per cent. Rates were based on road distances, not rail distances as had been the case in the past. Rate concessions were made to producers on circuitous routes.

In order for the railway to continue this concessionary agreement they required a minimum 5 per cent increase in the share of the harvest carried by rail compared to the former season.

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10. This book describes the general conditions of contract for the carriage of goods, such as liability, labelling, weighing, demurrage, as well as rules specific to dangerous commodities and livestock.

Provided these increases were achieved, the freight rates would escalate according to a formula based on increases in rail costs which incorporated a reduction factor to allow for improved productivity. This escalation formula was identical to the one included in the 1985-86 agreement.

1981 Westrail Grain Contract

This agreement was made in 1981 between the Western Australian Government Railways Commission, the Co-operative Bulk Handling Company Limited, the Australian Wheat Board, the Grain Pool of Western Australia, the Pastoralists and Graziers Association of Western Australia and the Primary Industry Association of Western Australia.[11]

Similar to the 1985-86 Australian National grain contract, this agreement obliged the Co-operative Bulk Handling Company to use only the rail services of Westrail for the movement of grain delivered to rail-served country receival bins for further transport to any of the port grain terminals located in Western Australia.

The Bulk Handling Company also agreed to provide the railway with written estimates of the anticipated grain tonnage. The freight rates were listed in an accompanying schedule and depended upon the location of the receival bin and the specific port grain terminal destination. Furthermore, the freight rates would be modified during the succeeding grain season according to a rate escalation formula. The type of escalation formula used is similar to that shown in Example 3, Appendix II. The indices used, however, differ from the example. They are, in this case, average hourly wage rates, the price of distillate and the price of heavy steel rails.

The railway agreed to give the bulk handling company a discount which varied from 1.25 per cent when total grain receivals for rail carriage reached 3 million tonnes, to 3.25 per cent when total grain receivals reached 4 million tonnes. However, if the railway felt that the industry was not encouraging the use of rail services for the transport of grain as being in the best interest of grain producers, the discount would not be given. The railway's decision not to give such discounts could be reviewed by arbitration.

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11. This clause was not worded clearly and would have been susceptible to causing interpretative difficulties.

The railway would be relieved from all liability in respect of any loss or damage to the grain unless such damage arose from the wilful misconduct of the railway's employees.

The agreement was to operate for three years, subject to renewal.

Lastly all grain would be accepted by the railway subject to the terms and conditions of any other previous agreement between the former and the bulk handling company, except where there was a conflict with the present agreement.

1985 Westrail Grain Contract

In 1985, Westrail negotiated a grain contract with the Grain Freight Rate Steering Committee. The Co-operative Bulk Handling Authority, the Pastoralists and Graziers Association and the Primary Industry Association were all signatories to the contract. The contract provided for reductions to the freight rate if the previous season's modal share for rail exceeded 78 per cent of the total receivals of the Co-operative Bulk Handling Authority. Conversely, increases to the freight rate were included in the contract if the modal share was less than 76 per cent.

The freight rates were to be indexed annually by the amount of the Consumer Price Index increase. However, future productivity improvements were included in the rates for future years.

An incentive scheme was introduced whereby growers who delivered in excess of 90 per cent of their produce to rail points would receive a rebate of up to 2.5 per cent of their total grain freight bill in 1985-86. This reduction was 25 per cent off the scheduled rate for all tonnes in excess of 90 per cent.

Wool

An interesting example of rebates which are not subject to a long-term rail contract is found in the freight rates offered by Queensland Railways to the State's wool growers for conveyance of their product to Brisbane. In the summer of 1984, Queensland Railways restructured their wool freight rates to encourage growers to deliver their product to the nearest rail point, rather than truck their commodities to destination.

A series of rebates per bale of wool were offered, dependent upon the distance of the haul from the wool growers property to the railhead. For example, from 25 to 49 kilometres, the rebate per bale was 25

cents; when over 175 kilometres distance, the rebate would be $1.75 per bale.[12]

In addition to published rates, the Queensland Railways also arranged special concessional freight agreements with certain shippers using the low rate scale as a ceiling from which discounts could be offered. For example, there was a contract with the cattle/sheep producers which originated in 1982 and was renewed for a further three year period until December 1988. Freight rates would be charged in accordance with the scale of rates for livestock traffic provided for in the Railway Goods Traffic By-Law in force at the time, minus a rebate of 20 per cent.

Similarly, although general freight rates were increased by 6 per cent by Queensland Railways from August of 1985, the reduced rates for wool introduced in June 1984 were to remain unaltered.

The agreement between Queensland Railways and the cattle/sheep producers stated that the latter would restrict their transportation of livestock to the railway. There were only two exceptions foreseen. First, if the distance of haul was 200 kilometres or less and road transport was required either from or to the railhead. The second exception was when the direct distance by road was less than half the total distance by road and rail, or when the distance to be transported by rail was less than half the total distance to be transported.

SELECTED CONFIDENTIAL CONTRACTS

In addition to the above, the author examined a number of contracts which were not published. It is not possible to divulge the exact rates given to the shippers because of their commercial sensitivity. What follows then is a brief analysis of some of these contracts, with particular emphasis on any contractual stipulations which are

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12. The details are given in Queensland Railways, Goods and Livestock Rates Book - Part 7, By-Law 1109.
In Queensland, the railway would notify a shippers' association such as the United Grazier's Association that, effective from a certain date, the freight rates had been increased by a certain percentage. In addition, the railway would enclose a copy of the Queensland Government Gazette which included the increases to the Goods and Livestock Rates Book. This rates book covered lumber rates and sugar rates, as well as a general scale of rates for 'goods traffic'.

innovative or denote a compromise which has been reached between the service needs of the shipper and the volume requirements of the carrier.

Crude oil and naphtha

A proposed contract between a railway and a shipper for the carriage of crude oil and naphtha to a refinery at a port is currently being renegotiated. The agreement was to be effective for a period of seven years. If, during the course of the agreement, the shipper wished to transport the product by pipeline, it could terminate the agreement by giving not less than six months notice to the railway and pay compensation to the railway for its non-amortised capital expenditure in accordance with the following:

. In respect of each tank wagon,

$$79942\ [1-(1.016667)^{-K}]$$

. In respect to the installation at port,

$$932652\ [1-(1.016667)^{-K}]$$

where:

K = number of months the contract is determined prior to the end of the contract period.

The railway obliged itself to provide tank cars which, to the best of its knowledge, were completely lead free. Also, the railway stipulated that its timetable would be sufficient to ensure satisfactory operational performance.

The shipper agreed to notify the carrier in writing of any alterations to the chemical composition of the crude oil and naphtha. Their respective compositions were outlined in some detail in accompanying schedules to the agreement.

The subcontractor hired by the shipper to arrange for the carriage of the product was required not to load any tank wagons in excess of the mass carrying capacity or below the minimum loading limit advised by the railway. Furthermore the shipper and his subcontractor would be responsible to employ metering devices to accurately measure the volume of product loaded into each tank car and record this upon the consignment note.

A penalty clause was foreseen in which the railway could unload any excess product from any tank wagon and carry the excess to storage facilities at the shipper's expense.

The railway obliged itself to ensure that if any other product were carried in the tank cars, the cars would be adequately cleaned so that no pollution would occur to the crude oil or naphtha.

The shipper and subcontractor would maintain a policy of insurance for themselves and for the carrier, sufficient to cover any legal actions for damages which could be brought in respect of death, injury, loss or damage howsoever caused.

The subcontractor would notify the carrier of any precautions necessary or desirable to be observed in the transport, storage or handling of the crude oil and naphtha.

The railway was to invoice the subcontractor at 14 day intervals for freight charges. The latter would pay the carrier within 14 days. Payment of an invoice would not prejudice the right of the subcontractor to challenge the correctness of an invoice however, provided that the challenge were made no later than two years after payment.

A single arbitrator was to be appointed by the parties to settle any dispute arising as to any of the provisions of the agreement. In the event the parties did not agree on the choice of the arbitrator, the provisions of the arbitration legislation of the State would apply.

Freight charges were to be escalated in accordance with a formula similar in type to that shown in Example 2, Appendix II. The indices listed in this formula were to be; average weekly earnings, building materials prices, the import parity price of crude oil and the Consumer Price Index.

If either party wished to change the formula after the expiration of two years on the basis that it was unreasonable as compared with a charge which might have been payable for the same service by the public in general, they could propose an alternative formula. If the other party did not agree to this alternative formula it would be referred to arbitration.

Iron and steel

This confidential contract was to be effective for a period of five years starting in 1982. It involved the movement of steel products from various origin stations to several destinations in four different

States. The shipper agreed to consign the latter's annual tonnage to the railway with both guaranteed tonnages as well as anticipated tonnages being described. The railway did not guarantee any particular type of rail equipment other than to say that no wagon would be provided which was completely unsuitable for the carriage of the shipper's products.

The parties agreed to various freight rates all of which were subject to a rate escalation formula which was similar to that shown in Example 2, Appendix II.

One interesting feature of the contract was that the escalation clause has a factor of .937 attached to the labour component. If all costs were to increase at the same rate, the railway would receive increases amounting to only 93.7 per cent of cost increases under this formula. The reason for this was that the shipper had insisted on such a factor due to the productivity improvements which it believed the railway would achieve over the five-year period.

To preserve the confidentiality of railway fuel contracts the shippers were prepared to accept a certificate from the railway's internal auditor verifying the percentage movement in fuel prices, which were part of the formula.

If, after 2.5 years, either party wished to propose an alternative formula, this would be put into effect if the other party agreed. In the event that there was no agreement, however, the question would be referred to arbitration. There was another clause relating to the escalation formula which said that if the formula produced a rate which was greater than the rate applicable for the six-month period after the review date, the greater rate would apply.

A penalty clause was foreseen in the event the shipper, who was responsible for loading and unloading the goods, had loaded a mass onto a rail wagon which was in excess of that wagon's carrying capacity. The freight charges for the excess tonnage would be assessed at special freight rates and a 100 per cent surcharge would be incurred by the shipper.

Furthermore, if the railway was of the opinion that any rail wagon was unsafely or insecurely loaded, it could oblige the shipper to reload the equipment, or do it themselves at the shipper's expense.

Overseas containers

This confidential contract was for the movement of both loaded and empty general cargo and refrigerated/insulated overseas containers.

The shipper agreed to use rail transport for all the containers over which his authority extended. However, where the railways were unable to provide the shipper with the transport services required after a 24-hour notice, then the latter would be free to employ any other means of transportation. The shipper also agreed to indemnify the carrier against any claims which would be made for loss due to damage, theft or breakage of goods when such goods were carried 'under bond'.

The freight rates which had been set in consideration of the commitment by the shipper to move all his containers by rail was, all the same, subject to renegotiation if there would be any significant changes in the handling techniques utilised by the railway.

Similarly, renegotiation could occur if there were a significant change in the volume of traffic. However, definitions of such 'significant' changes were not specified. The rate escalation formula which was used is at Example 3, Appendix II.

Of some interest is the fact that this contract was breached by the shipper when he refused to pay increases resulting from the escalation arrangements. Therefore, at the present time, this agreement would be regarded as inoperable.

Coal

The following is a description of a confidential contract between a coal company and a rail authority for the transportation of coal from the company's mine to a port for export.

The agreement would be in effect for three years from January 1986, with possibility of renewal. The coal would be carried at the owner's risk.

The freight rates would be escalated according to a formula similar in form to that outlined in Example 2, Appendix II. The indices used in this case were; average weekly earnings, prices of building materials, prices of locomotives, rolling stock and repairs, and the price of distillate.

However, the variation derived from the escalation formula could not be contrary or inconsistent with any reduction or limitation or freeze imposed or endorsed by the Government of the State.

In consideration of the railway granting the discounted freight rates, the company agreed to offer a minimum number of tonnes per year. In the event that the company failed to offer this minimum volume, it would become liable to pay the railway a penalty of 35 per cent of the freight rate on the shortfall.

Another penalty was foreseen in the event a rail wagon was loaded in excess of the maximum allowable capacity. In this case, the excess tonnage would be surchaged at either 100 per cent or 200 per cent of the freight rate, depending on the location of the loading point.

In the event that a rail wagon conveying coal had not been weighed for freight assessment purposes, the average tonnage for the immediately preceding accounting period would apply.

The company also agreed to indemnify the railway for any legal liability to third persons for loss or damage, even when the latter was due to the negligence of the railway.

The contract could be terminated if either party defaulted on the performance of any of the provisions, providing that a six-week period of notice had been given to remedy the default. This, however, did not apply to unforeseeable developments included in the force majeure clause.

Any disputes or differences arising out of the agreement would be referred to a court within the State, in accordance with State law.

Of particular interest is a supplemental agreement which provided for a 'rapid loading facility bonus' payment. The railway would pay the company a bonus based upon the tonnage which had been handled through a rapid loading facility. In order to benefit from the 'Super Category A' bonus, the company had to satisfy the following requirements:

- The coal loading terminal had to have a balloon loop and overhead loading bin.
- Rail wagons would not be loaded in excess of 5 tonnes over the agreed wagon limit.
- The percentage of rail wagons loaded in excess of 2 tonnes over the agreed limit would not exceed 0.5 per cent in any four-week period.
- The capacity of the terminal balloon loading loop would be an 84 wagon unit train.
- The loading system had to be capable of loading a standard unit train within 60 minutes.
- Overhead coal loading facilities were required.
- The ability to load four consecutive trains with headway of 70 minutes between trains was required.

- Terminals were required to be available 24 hours per day, 7 days per week.
- The export coal had to be transported by rail from the loading terminal to the coal receiving terminal at which the unloading of trains was carried out as one continuous operation and each track hopper was capable of releasing a train of up to 3200 tonnes in 75 minutes.[13]

In addition, there were 'Category B' and 'Category C' bonuses each with their respective requirements.

Explosives

This confidential agreement was signed for a period of three years beginning in 1985. The company agreed to consign to the railway 90 per cent of its product from their premises to various destinations. The rates were negotiated per container and varied according to the destination. The agreement involved movement of explosives to destinations outside the State and, as a consequence, the contract had been approved by the other rail systems involved.

The obligations of each party could be suspended due to 'force majeure' developments such as strikes or any other circumstances which could not have reasonably been avoided. In the event of either party being unable to carry out its obligations due to 'force majeure', the obligation of the shipper to consign at least 90 per cent of its product to the railway would be ignored for the duration of the unforeseen event.

In the event the shipper loaded any wagon with goods other than the ones designated in this contract, or loaded them beyond the full mass carrying capacity, the railway could unload the goods at the company's expense and reload them onto another wagon for forwarding to destination at the owner's risk and at the current by-law rates.

The shipper agreed to indemnify the railway for any legal liability due to injury caused by the explosives carried. However, this did not

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13. The term 'headway' refers to the lapsed time between the arrival of one train and the arrival of the next. A period of 90 minutes terminal recovery time between completion of every 4th train and the arrival of the 5th train was allowed. Furthermore, a period of 90 minutes was also allowed when there was a scheduled change in coal type.

include any claims for which the railway would be responsible under certain terms of the owner's risk conditions.

The freight rates would be escalated every six months according the escalation formula outlined in Example 2, Appendix II.

Milk products

In many instances, a simple letter will constitute the contractual agreement between the railway and a shipper, generally for a small volume to be transported intrastate. The duration of these contracts would ordinarily be for no more than 12 months, although there do exist several examples of possible extensions for an additional 1 year or 2 year period.

An example of this simplified contractual agreement, which had been sent to the shipper by letter and subsequently countersigned on behalf of the railway, involved milk products. The railway agreed to give special freight rates, based on a minimum traffic of 100 tonnes per year. The container rates varied depending upon the destination. Carriage was at the owner's risk and there were additional charges when the railway's co-ordinated carrier collected the product from the shipper's premises, as well as when the railway was obligated to incur lifting charges.

In the event that any increase in rates was not acceptable to the shipper, the agreement could be cancelled within 30 days.

In the event that the shipper did not consign the minimum annual volume to the railway, the latter had the right to cancel the agreement immediately, or to renegotiate the rates and minimum annual volume for the unexpired term of the agreement.

This letter, with an attached rate schedule, therefore constituted the entire agreement.

Cement

An example of an agreement between a railway and a company with substantially larger minimum volumes involved the movement of bagged cement products intrastate. The shipper agreed to provide a water pipe-line for fire protection purposes to its company premises, to the satisfaction of the railway's chief civil engineer as well as the appropriate municipality. When this was done, the railway would reduce the rate by 50 cents per tonne for the first 18 000 tonnes of cement carried under the agreement.

The railway agreed to give discounted rates to the shipper upon the following conditions:

- The company would load rail vans with a minimum of 33 tonnes and consign them in blocks of five or more.
- A minimum movement of 5000 tonnes annually to each location.
- The loading and unloading would be performed by the consignor and consignee within designated loading and unloading times.
- The consignor and consignee would take due care with the railway's wagons during these loading and unloading periods and recognise the railway's right to seek reimbursement for any damages caused, except by normal wear and tear.

The rates were to be escalated according to a formula similar to that shown in Example 3, Appendix II.

When applying the increase or decrease to rates the percentage variation were to be calculated to three decimal places.

The escalation formula could be reviewed at the request of either party after two years from the commencement of the agreement. The rates being based on a projected tonnage of 10 000 per annum could also be reviewed if the actual tonnage was significantly at variance with the above figure. If these above requests for review could not be agreed upon between the parties, the matter would be referred to a mutually agreed arbitrator.

If the matter had not been resolved within 90 days from receipt of the written request for review, the higher rates due to the escalation formula or to the railway's request would apply until a resolution was achieved. Subsequently there would be a retroactive adjustment.

Interstate general goods

This confidential contract was for a period of five years commencing in 1985, but subject to cancellation by either party on one month's notice after the first year. The freight would be carried subject to respective railway legislation of the different jurisdictions through which the merchandise travelled, it being agreed that, where there was any inconsistency between provisions of the contract and these Acts, the former would prevail.

The rates which had been specified in the contract were subject to variation by the railway commissioners involved, the commissioners being able to give one month's notice in writing.

The shipper agreed to consign a minimum of 2500 tonnes per year or the cubic equivalent of 50 rail vans to the railway. In the event that the shipper failed to offer the abovementioned minimum volume, the rates at the existing Railways Of Australia 'C' class rate would be applicable, up to a maximum amount of what the shipper would have paid had the minimum volume been met.

The provisions of this contract would apply irrespective of the contents of any consignment note, unless the shipper had indicated in that note that the particular shipment was outside the jurisdiction of the contract.

All goods carried under the contract would be at the shipper's risk and the latter would indemnify the railway, except if it were proven that the damages occurred due to the wilful misconduct of the railway's employees.

The volume loaded into the rail vans and wagons would be declared by the shipper on a consignment note. In the event that the shipper were to notify the railway that the volume had been understated within 14 days of the shipment, the former would be liable to pay additional charges at the incentive rates where the underdeclared volume was not greater than the carrying capacity of the van.

If the volume not declared was greater than the carrying capacity of the van, the underdeclared volume would be calculated at the base rates and a 100 per cent surcharge added or a rate treble the tonnage rate applicable for a 41 tonne capacity van or wagon.

In the event that the railway discovered the volume understatement before a notice had been given to them by the shipper, the understated volume would be calculated at the base rate plus 100 per cent. If the understated volume were greater than the carrying capacity, additional penalties were foreseen.

Crushed rock

A confidential contract which has caused some recent litigation between the parties due to a misunderstanding over when the arbitration mechanism may be used is this quarries contract.

A railway entered into a contract with a company for the carriage of crushed rock. Rock was to be freighted from the quarry site to three locations. The freight contract was for a long term and contained an escalation clause. The railway sought to increase the freight rate. The company disputed the rate of increase and the matter went to the State Supreme Court.

The Supreme Court decided that the matter should be resolved through private arbitration since the freight contract had a private arbitration clause.

This decision underlines the difficulties which are seen in many contracts when the provisions which triggers the arbitration mechanism are inadequate.

CONCLUSION

The above examples illustrate the range of purposes railway rate contracts serve in Australia; from facilitating the development of mineral resources, to helping preserve a railway's share of a certain commodity traffic. Despite this range, however, some commonality is evident between the contracts, especially in their escalation clauses and the offering of discounts for increased volumes. As a general comparison to North American rail rate contracts, shipper orientated clauses, such as those involving better turnaround times, equipment, terms of credit payment and so on, feature less in Australian contracts.

CHAPTER 6 CONCLUDING REMARKS

The information presented about Canadian and Australian railway regulation and rail contracts has hopefully provided readers with a better basis on which to view their own country's rail freight environment. The author has not attempted nor intended to represent any particular regulation as being better or worse than any other. Obviously, the Australian and Canadian railway laws are results of their respective countries' political histories and current policy priorities. Nevertheless, transportation professionals should be aware that there are often several ways of solving similar transportation environmental complexities. For example, the rate escalation clauses which are found in some of the Australian contracts outlined in this text may not prove to be suitable for the negotiating purposes of Canadian railways and shippers. Nonetheless, even if the duration of Canadian contracts would be for one or two years rather than several years, knowledge about ways to cover inflationary costs in a predictable and standardized fashion should be of assistance even when a shorter duration is envisaged for a contract.

At the time of the writing of this text, the Canadian legislation was not yet effective. There will undoubtedly be certain modifications in the regulations and orders in Council which will streamline some of the legislative provisions of the Canadian legislation. It may be that in a few years time, readers will wish to know how the Canadian experiment succeeded. Dispute resolving mechanisms such as final offer arbitration, competitive joint line rates and public interest appeals appear certain to have a significant impact on the way rail users and suppliers of rail service behave in the market place.

APPENDIX I COMPONENTS OF SHIPPER-CARRIER CONTRACTS FOR THE TRANSPORTATION OF FREIGHT

This appendix outlines the range of factors which shippers and railways need to consider when negotiating a transportation contract. To assist this outline a model contract or checklist is provided at the end of the appendix.

Before commencing a section by section analysis of the basic components to any transportation contract, a few things should be kept in mind. First, shippers should not rely on custom or tacit understanding during the negotiating period to take the place of a written statement in the contract. Remember that the parties are bound to perform only those duties specified by the terms of the contract. In other words, the first basic rule of contract negotiation is that *everything* must be described in writing. Beware of handshake promises.

Second, the contract should be clear and precise containing no contradiction in terms, and be enforceable. Intentions and unwritten conditions are extremely difficult to prove in court, where the friendly relationship between negotiating carriers and their customers will undoubtedly be replaced by the desire of both parties to win a formalized and generally acrimonious legal battle.

Third, the formulation and description of a transportation contract will take a great deal of time and energy. It takes real effort to anticipate instances where deviations from the agreement may occur and provide for them in the contract. A commitment must be made by the traffic department to guide their legal representatives every step of the way. There is not much sense in paying a lawyer to repair the damage done by a poorly drafted contract when a little effort would

have eliminated the problem at the outset.[1]

Fourth, one of the most important clauses in a contract is the definition of the arbitrator's jurisdiction. Recent disputes in Canada (between Hydro-Ontario and CN Rail, 1986) and in Australia (between a quarry and a state railroad) have involved unnecessary litigation concerning the question of whether the arbitrator is or is not empowered to consider escalated rate increases which the shipper felt was unduly high. In other words, the provision which gives the arbitrator his or her jurisdiction should perhaps include a general statement that any matter which arises during the course of the contract can be referred to the arbitrator, if the parties disagree.

Fifth, shippers should focus during their negotiations, on those aspects of the future contract which relate to service rather than volume and rate. By focussing on concessions to be obtained from non-traditional areas, such as performance, damage or billing the shipper will come away with service advantages which equate to dollars saved. If any generalization can be made about how shippers approach contracts, it is that they have tended to be too price and tariff oriented.

Assignability

Section 1(C) in the model contract refers to assignability. Over the course of time companies are bought and sold. It will probably be desirable to require the permission of the other contractual party for substitution of parties to a contract. In the event that a company is changed in form only through some sort of corporate reorganisation, it may be desirable to exclude such reorganisations from the applicability of this rule. All parties generally benefit from a provision which precludes either party from unilaterally selling 'its interest' in the contract.

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1. A lawyer will usually be involved in the formulation of contractual terms, so that the substance and wording will be in conformity with Provincial or State law. The lawyer should advise on such related matters as preferred legal jurisdiction of the contract, anti-combines and international concerns and possible discriminatory implications of a contract. For example, in the US, the liquidated damage provision must not be a penalty. Courts jealously guard the right to punish wrongdoing. A private justice retribution system is highly disfavored. The parties should label their provision as 'liquidated damages' and not as 'penalty' clause.

Product characteristics

Section II refers to product characteristics. It is very important that the contract recite a full and complete description of the goods to be transported. In the absence of notice as to the characteristics of the goods which it is transporting, a carrier may be able to avoid responsibility for damage to the goods. Of course there may also be a need to describe the goods for the purpose of applying the correct charges thereto. Also, disclosure of the goods to be transported is critical to a determination of the value of the goods, in the event of loss or damage (Heisley 1983).[2]

A volume requirement is generally an essential component of a transportation contract because it constitutes a portion of the 'consideration' or promise which one or both parties is bringing to the contract. The shipper will generally expect a lower rate in exchange for such volume commitments. The advantage to the carrier is that the volume requirements permit rail investment in equipment and other facilities with a degree of certainty not otherwise possible. In some cases carriers have successfully used volume requirements in contracts as a basis for borrowing funds from investment bankers. Some 'forward-thinking' lenders have been willing to capitalize the value of long-term volume commitments in contracts of this sort.

Routing

Section III refers to routing. It is essential that there be no confusion as to who is controlling the routing. Ordinarily it should be the contracting shipper. However, distribution patterns, commodity trading and sophisticated pricing methods often make the owner of the transported goods neither the receiver nor the shipper. For example, if material is priced FOB shipping point, the owner is not necessarily the receiver of the goods. Conversely, if priced FOB delivered, the shipper is not necessarily the owner. Therefore the question of

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2. There is nothing unique in the formulation of transportation contracts which renders the basics of contracts any less significant or important (Heisley 1983). Therefore, the basic components of any contract, such as offer, assent, exchange (a carrier's price quotation alone does not constitute a contract consideration), enforceability and performance, must be interpreted according to the contractual law in effect in the province or state in which the contract was signed, or, at times, in which the transportation service was performed or in which the breach (such as damages to merchandise) occurred, or by mutual designation of the parties (Bernstein 1982b and Cheshire and Fifoot 1974).

actual control or ability to effectively control routing must be considered in the contract.

Railroads are not restricted to entering into contracts with shippers or receivers; contracts can be with any purchasers of railroad services. When obligating oneself to route via a certain railroad, the purchaser of the service should be certain that the shipper will adhere to the routing instructions. It is important to remember that only contracting parties have contractual obligations. Therefore, all carriers on a route must be involved in a contract. Shippers desiring to move products from origin A to destination B, where A and B are served by two or more different railroads, are faced with either a joint-line contract, combinations of separate contracts, or a single contract where the contracting railroad obliges itself to accomplish pickup and delivery by means of subcontractors (that is, secondary railroads). When two carriers interline via a switching railroad, a contract must take that into account or parties may be faced with unexpected charges.

An example of one shipper entering into separate contracts with several rail carriers for one movement was Ford Motor Corporation's contracting with three railroads in 1980 for the movement of automobile parts and finished vehicles from Detroit, Michigan to San Jose, California. A single contract was impossible because Ford could not get the railroads to agree even on where and when to meet in order to begin negotiations. Therefore they started with the longest part of the run, which happened to be the termination part. Ford asked the Western Pacific Railroad (WP) and the Southern Pacific Railroad to bid on a contract in terms of service and rates for alternative hauls into San Jose. According to Aden Adams, Ford's manager of transportation analysis and procurement, both railroads offered the same service, but the WP bid was slightly lower in price.

In January of 1980 Ford completed an agreement with Western Pacific Railroad which covered a period of five years and required Ford to route 95 per cent of its traffic for both automobile parts and finished vehicles destined to San Jose via WP from Salt Lake City. For this commitment, the WP agreed to provide Ford with reduced transportation prices depending upon the size of the train each day. For example, trains of sixty cars would move at comparatively low rates, while trains under thirty cars in length moved at substantially higher rates.

The WP committed itself to move the train from Salt Lake City to San Jose in 25.5 hours in order to arrive at the Ford plant by 2.30am each morning, in time to place car parts in the plant by 6.00am, which

coincided with the Ford's start of production. The timing element was important to Ford because they kept a very low inventory of parts on hand at assembly plants, in accordance with their 'just-in-time' delivery policy.

Often parts were used in the manufacture of Ford vehicles on the same day they arrived at the plant. If certain key parts were not available at 6.00am at San Jose when production started, it might be necessary to use expensive premium transportation to fulfil the plant's requirements. Because of the importance which Ford placed on delivery time, their contract with WP included a clause which stated that increasing penalties would be paid by the railroad for every 15 minutes the train was late. (The Ford contract did include a 'grace period' of 30 minutes before the 15 minute penalties started). The penalty was that for every 15 minutes that the train was late beyond the agreed upon time, the WP paid to Ford 0.25 per cent of the earnings on the cars carrying Ford products. The Ford contract with WP included a provision for economic escalation to protect the railroad from inflation.

Once the WP contract was signed, Ford then proceeded to select two other railways, Missouri Pacific and the Denver Rio Grande Western, and to enter into two subsequent contracts which covered the Kansas City to Salt Lake City and Detroit to Kansas City segments respectively. Each of these subsequent contracts had identical provisions with regard to the above-described, increasing 15 minute penalties.

Contract rates also provided Ford with the assurance of a stable railcar supply during the life of the contract and more certain transportation prices than under the previous regime.[3]

One of the caveats in agreeing to a long-term volume commitment is that it can create a potential anti-trust or anti-combines problem arising from so much equipment being tied up in one contract; there is 'exclusive dealing' contract prohibition in the US.

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3. Ford's strategy has been to accumulate its traffic volumes, matching front and back haul where possible and then offering it on a bid basis to carriers. Initially their contractual agreements with motor carriers were for one year. However they are now extending their agreements to two or three years. Ford now has over 70 railroad contracts ranging in duration from one to five years.

Routing provisions may also restrict the shipper's options. For example, Conrail has announced reductions of up to 50 per cent in its interstate grain hauling rates. The carrier said that the reductions would be in effect from 20 June through 26 September 1981, and were meant to win business from trucking companies. However, these rate reductions would involve points served by Conrail only, not joint rates (Morton 1982).

More recently the MKT and the OKT Railways signed a contract providing a varying annual volume basis of rates for shipments of export corn, grain sorghums, soybeans and wheat in 25-car and 50-car multiples to the ports of Galveston and Houston, Texas. The grain shipments would move in shipper-owned or leased cars from Salina and Kansas City to either of the two ports. The shipments are subject to an aggregate minimum tender of 2375 net tons in 25-car shipments and 4750 net tons in 50-car shipments. These rates were also subject to an escalation agreement. (Morton 1982).

Service and performance standards

Section IV refers to one of the most important elements to the contract, that is service and performance standards. Generally these standards are related to time (such as lead time for the provision of equipment, transit time and lead time for pickups). However, creative contracts can include performance standards as to other matters as well, such as damage or billing. The standards should generally be phrased affirmatively and should be directly correlated to a remedy for failure to meet. In the event that liquidated damages are set forth for failure to comply with a performance standard, the contract should note whether those damages exclude the concurrent availability of some other remedy.

An example of such service-oriented provisions can be found in a two-year contract between the Illinois Central Gulf Railroad (ICG) and the Staley Manufacturing Company which covers the movement of grain products such as gluten feed and soya bean meal from Decatur, Illinois to Mount City, Illinois; a barge loading point (a 460-mile round trip). Staley supplied the cars from its own fleet, without mileage allowances, in 15-car multiples per shipment. The contract called for the movement of 2200 cars during the first year and 3200 cars the second year.

The uniqueness of the above contract is in its rate provisions, which vary depending on the level of service provided by the railroad. If the ICG delivers in an average of 7.5 days or less, the rate is US$522 per car. If it takes 7.5 to 10 days, the rate is US$476 per car, and

if the ICG goes over 10 days for the round trip, the rate falls to US$429 per car.

Mr R. Miller, Staley's director of transportation said, 'The real advantage is that the contract allows us to reduce the number of cars leased for the movement to barge loading points on the river'. While Staley is paying approximately 9 per cent more for the service than it did before the contract, Mr Miller feels that the difference in service had been extremely beneficial to his company (Miller 1980).

Another useful example of service provisions is demonstrated in a contract between Union Carbide and Conrail. The contract was based on a minimum schedule for delivery - 144 hours - from points in West Virginia to points in New Jersey and Pennsylvania. Conrail received a credit for delivery under the minimum time and a debit for exceeding it. There was a monthly settlement whereby Conrail received US$25 for each excess credit and Union Carbide received US$12.50 for each excess debit. The contract included annual volume rates for freight of all kinds.

A last example is a contract between General Foods and Santa Fe, which agreed to a service-oriented contract for trailer loads from Houston to Chicago. The railroad had to furnish enough trailers to meet the annual quantity of six million pounds. Santa Fe could charge an extra US$75 per trailer if 90 per cent of a month's loadings met a 96-hour schedule.

Equipment

Section V refers to equipment. Many shippers see a contractual provision for adequate car supply to be of paramount importance.

An interesting example can be seen in the contract between Conrail and Owens Corning. Owens guaranteed 500 car loads per year from Selkirk, New York to Chicago. Owens also agreed to pay an additional US$250 per car over what they had been paying. Conrail, on the other hand, agreed to complete its portion of the move in 70 hours. Conrail was required to guarantee the car supply; if a car was delivered late, Conrail must pay US$50. Conrail also was obliged to refund US$50 for each car ordered but not supplied (Domonkos 1981).

Another example related to equipment is a ten-year contract to haul bituminous coal by the Southern Railway and two of its affiliated railroads. Coal was moved under this contract to various destinations. Southern and its affiliates assessed for the shipper an annual charge, plus line haul rates based upon the distance of the

haul. A maximum number of 66 open-top hopper cars were anticipated for use in the contract hauls each month. The coal was to move in dedicated unit train service and in the contract are found such features as rate escalation, limited free time to load and unload, disability provisions and diversion provisions (Morton 1982).[4]

A different perspective on equipment was taken by Hunt-Wesson Foods and a joint carrier agreement including the Milwaukee Road, Illinois Central Gulf, Cotton Belt and Southern Pacific railway. This agreement gave the carriers a higher rate and transit charge for circuitous routing of sunflower seed oil from points in Minnesota through Chicago to Memphis, Tennesee and thence to California. The purpose of this circuitous routing was to allow for in-transit refining.

Yet another example of innovative equipment-oriented agreements was provided by a contract signed between a paper shipper in Green Bay, Wisconsin and the Chicago and North Western Railroad (C&NW). The paper shipper needed very clean, specialised boxcars that would qualify under incentive per diem rates at higher daily rental fees than most cars. The C&NW, if it were to move the cars to Green Bay, Wisconsin empty, under normal circumstances, would probably have taken a loss on the entire movement (empty fronthaul then loaded backhaul). But a contract was worked out between the shipper and the railroad which provided for a flat fee paid to the C&NW for delivery of the empties. As a result, the railroad made a profit on the business and the shipper received the special cars needed.

Terms of payment

Section VI refers to the terms of payment. According to US transportation lawyer, Stephen Heisley, there are more problems resulting from the procedure of billing and paying than any other single provision in a contract (Heisley 1983).

There are three components to this section in a contract. First, the contract must include the complete formula for calculating the rate and any related charges, and must also include either a definition of

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4. Other contracts relate to equipment in more general ways. For example, an agreement between the Southern Pacific Railroad and Anheuser Busch requires the shipper to make 'the best possible effort' to tender volumes in approximately even amounts throughout the year. Anheuser Busch must also give maximum advance notice for car needs. These are 'concessions' which many shippers might not mind giving away during the negotiation proceedings.

each factor in the calculation or a reference on the basis of which it can be calculated. For example, if a contract states that the rate is a certain dollar amount per pound per mile, there must be some additional provision stipulated for the determination of the weight as well as some mileage guide reference for the purpose of determining distance. Appendix II is devoted to one of the elements of the terms of payment - the rate escalation clause.

One potential problem area has involved open-ended references to 'the carrier's tariffs and supplements thereto' (Section VI(D)), which could allow a railroad to alter the rate without the shipper's approval.

The second component has to do with the method of making payment. For example, when will the bills be presented? When must the bills be paid and to whom? In what form must the bills be paid? In what currency? Can the payment be handled electronically? Can the shipper place the burden of payment on someone else?

Also, the required documentation to accompany the presentation of the bill must be stipulated.

One innovative example of a contract dealing with rates involves General Motors and five railroads. The five railroads with which General Motors jointly contracted were Southern Pacific, Missouri Pacific, Chicago and North Western, Illinois Central Gulf and Union Pacific. A control team of General Motors and Association of American Railroads representatives monitor the movements to determine the amount of loaded and empty miles moved. When the loaded car miles exceed the empty car miles, the carrier will pay General Motors a charge per car mile. On the other hand, when empty miles exceed loaded miles, General Motors pays the carrier a car mile charge (Domonkos 1981).

Claims and liability procedures

Section VII refers to claims and liability procedures. The multiplicity of theories of liability which can be found, particularly when dealing with an intermodal shipment, mean that the contract should specifically define the theory of liability for the goods being transported in the most explicit terms possible. Wherever possible, rules on both mitigation of damage and salvage should be explicitly detailed in the contract.

Each contract needs to have a dispute resolution mechanism. This should apply to both the assessment of erroneous charges and to claims

based on loss, damage or delay. The contract should indicate whether the shipper can 'offset'; for either loss, damage or delay, or billing errors; onto other shipments. Also, does the carrier have a lien against either goods encompassed within a particular shipment, or goods from other subsequent movements as a means of protection? (Heisley 1983).

An example of how railways and shippers can both benefit from a contractual provision on limitation of liability is found in a contract between Conrail, the Chicago and North Western Railroad and the Budd Company. This contract reduced the railroads' liability for damages by stating that they would be exempt from liability for glass breakage in railroad passenger cars manufactured by Budd.

Similarly, Canadian Pacific Railway and Honda Motors of the US entered into a contractual agreement which prevented the car company from claiming for small damages below a certain ceiling (for example, $500). This alleviated the railway from having to inspect and process claims for minor dents and scrapes which might have occurred during the railway movement.

Terms of the contract

Section VIII refers to the term of the contract, as well as the method of changing it. Even the most effectively drafted contracts occasionally require changes. One provision in this section should be that any changes to the contract must be in writing and signed by all the parties thereto.

As to the term of the contract, an example of how lengthy the duration of a contract can be is found in one between the Illinois Central Gulf Railroad (ICG), Hoosier Energy and Freeman United Coal Mining Company. This contract has a duration of 20 years and purports to handle the movement of 26 million tonnes of Illinois coal to a new generating station in Merom, Indiana, over a 203-mile stretch of track. The contract started in August 1981 and continues to August 2001. In this contract, track upgrading is a vital aspect, in addition to guaranteed delivery and a set price. The first phase of the contract calls for the capital expenditure of more than US$20 million on the right-of-way, including a US$9 million advance to the railroad by the utility which will be repaid by the ICG in the form of freight refunds during the early years of the contract. The second phase consists of the annual movement of 1.3 million tonnes of coal over that improved right-of-way.

The freight rate in the contract is US$5.62 per ton subject to escalation based on increases in the Association of American Railroads' indices of material prices, wage rates and supplements. This latter contract provides the assurance of capital to the railroad for line upgrading in order to support the service.

At the other extreme are short-term contracts for specific purposes. For example, the Norfolk & Western Railway has negotiated 30-day and 45-day contracts that require the shipper to load coal in a restricted time frame from a limited number of points and to guarantee equipment available to load. The railroad guarantees car supply, car movement and berthing. The intent of these contracts is to improve car utilization.

Force majeure

Section IX refers to force majeure. The purpose of this section is to eliminate the requirement of performance in the event of intervention of acts of God and related unforeseen catastrophic type events, such as hurricanes, earthquakes and public enemy. This provision should be as descriptive as possible of those eventualities which are to be included. For example, is cargo defect, shipper negligence or a strike included? There should also be some provision explaining what would happen, in the event of such a breach of performance on the basis of one of the included items, to the fulfilment of the remainder of the contract.

Notice

Section X refers to notice. This section simply indicates to whom any notice required under the contract is to be given. This prevents notices from being sent to the wrong address and provides the sense of security in terms of compliance with any notice requirement found within the contract.

Applicable law

Section XI refers to applicable law. Most contracts include a provision indicating which law will be applied in the interpreting and enforcing of the contract. It is important to remember that one's own home province or state is not necessarily the best location to put in such an item. There may well be some jurisprudence on liability, for example, which has been developed in another province which would be more favourable to either the shipper or the carrier. Some legal research should be gone into; exploring where the established body of law on a particular subject has been developed. Furthermore, if it is desired to have a lawsuit eventually brought in a particular

jurisdiction (which may be different from the jurisdiction whose law is to be applied), a separate provision to that effect should be included. In other words, a provision applying the law of a particular province or state to the contractual terms does not mean that a lawsuit must be brought in that jurisdiction.

Confidentiality considerations

Section XII refers to confidentiality considerations. Some contracts include an explicit prohibition that neither party will disclose the terms or shipment data to anyone other than their employees. One should not assume that the other party to the contract will not divulge some of its contents to one's competitors. Therefore, it is important to include contract provisions which require:

- that the terms of the contract be kept confidential; and
- that any proprietary information derived in the course of performance of the contract should not be divulged.

For example, a carrier should not be able to divulge a shipper's customers.

Lastly, there should be penalties designated for contravention of this provision, even though proof of the breach may be difficult to present before a court.

Policing procedure

Section XIII refers to policing procedure. The shipper should remember to delegate the responsibility of notifying the carrier of an investigation to an individual in the company.

Miscellaneous conditions

Section XIV(A) in the model contract refers to an area of potential danger. There have been conflicting provisions as between a railroad contract and the customer's sales agreement. For example, if a contract between the vendor and a carrier calls for a specified volume of freight by a particular route, but the buyer, exercising his rights under the sales contract, demands shipment by a different route, the vendor will have to violate either the transportation contract or the sales contract.

MODEL SHIPPER-CARRIER CONTRACT

I PARTIES TO THE CONTRACT

(A) Identify all parties with names and addresses, including the carrier, shipper, consignor, receiver and broker, as applicable
- who is the actual tenderer of the shipment?

(B) Glossary of terms

(C) Assignability

II PRODUCT CHARACTERISTICS

(A) What is it? How is it described?
- alpha and numeric STCC descriptions
- generic descriptions
- trade names
- a combination of the above.

(B) Solid, gas, liquid, dry?

(C) Bulk or packaged?
- packaging specifications
- permissive or mandatory
- who determines specifications.

(D) Special characteristics?
- hazardous
- susceptibility to damage
- overlength or overweight.

(E) Quantity or volume requirements
- per shipment
- per day, week, month, or year
- single or multiple car lots.

(F) Minimum volume required to be tendered by shipper
- in pounds, packages, cars, or trains
- period during which minimum is to be tendered (week, month, year, and so on)
- minimum per shipment.

(G) Consequences of shipper's failure to meet minimum tender per shipment or in specified period
- termination of contract (automatic or at carrier's option)
- railroad's alternate use of specifically designated equipment.

(H) Maximum volume (per shipment, per period, or both) required to be accepted and transported by railroad.
- freight to be tendered in steady flow throughout period.

(I) Consequences of railroad's failure to accept or transport maximum volume
- termination of contract (automatic or at shipper's option?)
- shipper's right to use alternative transportation and to reduce minimum tender
- shipper's right to supply cars, locomotives etc.

(J) Shipper's right to decrease minimum or increase maximum tender
- when and how?

(K) Carrier's right to increase or decrease tender
- when and how?

(L) Weight per package, car, shipment; agreed weights
- consequences of error
- freight left in cars
- calculations of weight over time.

(M) Cargo insurance
- What happens if...?
  : shipper does not meet specified contract volumes
  : contract termination or default by the carrier or shipper
  : liquidated or consequential damages quantified in advance
  : a grace period to meet the volume before penalties ensue
  : alternative use of carrier equipment by the carrier
  : carrier does not meet contracted equipment requirements
  : shipper's market dries up
  : an adjustment to minimum volume requirements.

III ROUTING

(A) Origin and destination?

(B) Specific point to point?

(C) Single origin to multiple destinations?

(D) Multiple origins to a single destination?

(E) Local or interline?

(F) Shipper ability to specify alternative routes?

(G) Out of line or backhaul movements?

(H) Diversion or stop-off privileges?

(I) Where more than one railroad is involved, consider rights and obligations of each throughout contract

(J) Bills of lading; receipts, notices, records of shipments; notations; certifications.

(K) Reconsignment
- What happens if...?
  - : shipping patterns change in mid-contract
  - : an origin cannot ship or a destination cannot receive caused by...
  - : abandonment implications
    - = an act of God, public enemy, strike or lockout
    - = shipper/receiver problems
    - = carrier problems
  - : the carrier cannot perform via the contract route
  - : move via a non-contract route
    - = carrier absorption of additional freight charges
    - = shipper absorption
  - : refuse to accept the shipment
  - : sales agreement different than shipping contract.

IV SERVICE AND PERFORMANCE STANDARDS

(A) Definition of the scope of the 'transportation'
- terminal and accessorial services
- transit
- demurrage and penalty demurrage
- switching privileges.

(B) When?
- on reasonable dispatch
- at specified times
  - : twice a day (hours of operation)
  - : three times a week
  - : continuous
  - : turn-around time.

(C) Notices from railroad to shipper and shipper to railroad in advance of arrival for loading, unloading
- by telephone or in writing.

(D) Shipper's (receiver's) obligation to load/unload in specified period; consequences of delay.

(E) Railroad's obligation to transport in particular trains.

(F) Service constraints
- carrier choice of trains
- specific train schedules
- minimum or maximum roundtrip times
- transit time guarantees
- any exceptions to service.

(G) Safety considerations
- train lengths and speed
- positioning of cars within a train
- hazardous materials
- inspection requirements.

(H) Operational standards
- waste disposal standards
- employee qualification standards
- union status of employees
- anti-discrimination policies.

(I) Railway to state standard of care

(J) Definition of non-compliance

V EQUIPMENT

(A) Car type

(B) Car ownership
- carrier or private

(C) Specialized or heavy duty

(D) Who supplies, maintains, repairs, cleans
- railroad or shipper?
- terms of responsibility for supplier.

(E) Dedication
- possible use of cars in connection with transportation other than contract (return haul for instance).

(F) Car supply
- quantities required
- when and where required
- capacity of existing fleet to fill requirements
- purchase or lease of additional capacity
- carrier/shipper cost sharing for equipment.

(G) Mileage allowances

(H) Demurrage or storage provisions

(I) Exclusive use

(J) Loading and unloading requirements
- where is it performed
- who does it and when
- whose facilities
- loading requirements of the equipment
  : blocking or dunnage specifications
  : damage prevention devices
  : who supplies them
  : return provisions.

(K) Consequences of breach of contract with respect to cost of facilities

(L) May equipment be used for shipper 'advertising?'

(M) Consequences of failure to supply or failure to supply adequately.

(N) Right or obligation of supplying party to sell or lease equipment to other party upon termination, expiration, suspension of contract
- terms, including price of purchase or lease.

(O) Patent indemnities

(P) Tracing
- what happens if...?
  : cars arrive early and are bunched
  : cars arrive late and operations are affected
    = service times consistently do not meet schedules
  : shipper requires carrier to accept assistance when unloading.

VI TERMS OF PAYMENT

(A) Statement of rates, charges for services;
- overtime provisions
- charges for additional crews, services, etc
- rate applicable to returned shipments
- return of empty private equipment
- unit of measure (¢/cwt.; $/car; $/train load; and so on).

(B) Allowances or rebates.

(C) Escalation and de-escalation procedures: right to terminate or revise contract;
- effective date of increase or decrease
- increases or decreases
  : by negotiation
  : rate escalation formula (Railroad Cost Recovery Index, Producer Price Index)
- incentives for increased productivity
- timing of indices, base and new
- mathematical accuracy (decimals)
- provision to revert to negotiation when formula leads to over or under pricing
- discount to eliminate profit portion of rate from denominator
  : ICC cost index
- sharing of railway productivity gains.

(D) Reference to tariffs
- 'frozen' (to prevent unilateral charges).

(E) Do tariff rates apply when lower than contract rate?

(F) Credit terms
- method of payment
- credit period
- net or discount basis
- penalty for late payments.

(G) Billing/invoicing procedures
- invoices when
- to whom
- where
- payment when
- by whom
- in what form
- discount for early payment
- penalty for late payment
- recourse to shipper/consignee
- can payment be handled electronically
- in what currency must the bills be paid
- C.O.D. shipments
- are shipper and consignee jointly liable
- required documentation.

(H) Volume and weight verification
- weight agreement
- shipper weights
- straight per car charge basis
- scale weights
  : scale tickets
  : carrier or shipper scales.

(I) Most favored nation clause

(J) Assumptions upon which freight rate calculations were based
- what happens if...?
  : there is a delay in the availability of escalation indices
  : the costs of the movement decline during contract
  : technological advances lead to productivity gains for carrier - are these shared by shipper?
  : one of the statistical references to the escalation formula index is not republished.

VII CLAIMS AND LIABILITY PROCEDURES

(A) Type of claim
- overcharge
- undercharge
- loss and damage
- breach of contract
- penalties foreseen within contract
- liquidated damages
- emergency shipments.

(B) Filing requirements
- time periods
- burden of proof
- documentation
  : notice of requirements
  : reports or inspections
  : audits.

(C) Measure of damages
- released values
- deductibles
- special, liquidated, or consequential damages
- risk sharing
- required insurance coverages, carrier and shipper
- mitigation.

(D) Claim settlement and the resolution of disputes
- contracted claim payment schedules
- compromise
- claim offsets
- mediation
- arbitration
- litigation
- reasonable attorney's fees
- interest on the claim amount.

(E) Arbitration
- definition of arbitrator's jurisdiction
- how appointed
- if parties don't agree on selection or if unavailable
- is decision confidential?

(F) Overcharge/undercharge procedures
- single shipment freight bills
- monthly statements
- itemized or summary statements
- documentation
  : bills of lading
  : trip slips
  : inspection certificates.

(G) Liability for employees of railroad, shipper, consignee

(H) Required insurance (public liability, contractual and so on)

(I) Freight damage
- agreed measure of damages (value per pound, ton, and so on; invoice value, and so on).

(J) Liabilities under siding agreements

(K) Liens on cargo

(L) Title to goods
- when does title pass
- what happens if ...?
  : on a US-Canadian movement, the liability provisions are different as between the American and Canadian Railways.

VIII TERM OF CONTRACT AND MODIFICATION PROCEDURE

(A) Length of term
- when does it start
- when does it end
- exact length of term
- is term 'keyed into' other contract (for example, purchase or sale of goods)
- renewal or extensions
  : automatic
  : negotiable
  : option (whose?) to renew or extend; number of extensions; length of extensions; contract terms during extension periods.

(B) Termination clause?
- automatic expiration at end of term
- carrier or shipper option to terminate at will
- when
- procedure
- consequences of early termination
  : notice requirement
  : procedures
  : damages
- termination for default or breach of contract
  : definition of default or breach for both parties
  : when
  : procedures
  : damages
  : remedies.

(C) Contract modification?
- how, when, and by whom
- effect on remainder of contract.

(D) Renegotiation

IX 'FORCE MAJEURE'
- definition: does it include rail accidents, fire, requisition or confiscation, 'bad order' cars, weather delays
- does it include third party negligence in the Province of Quebec
  : what is the English definition of 'cas fortuit', if the movement occurs in Quebec.

X NOTICE

XI APPLICABLE LAW

XII CONFIDENTIALITY CONSIDERATIONS

XIII POLICING AND VERIFICATION PROCEDURE

XIV MISCELLANEOUS CONDITIONS

(A) Conflicting provisions between rail contract and customer's sales agreement

(B) Special services or special handling? (example refrigeration)

(C) Incorporation of terms of "governing" tariffs?

(D) Do strikes of shipper excuse railroads and vice versa?

(E) Reports and inspections; examination, audit of books and records

(F) Guarantee by parent or affiliated corporation

(G) Environmental considerations; effect of Government regulations

(H) Competitive circumstances surrounding the traffic

(I) Anticipate instances where deviation from the agreement may occur

(J) Adequate provision to revert to negotiation where an escalation formula causes significant over or under pricing of rate

(K) US Anti-trust or Canadian competition legislation

(L) Electronic interchange of data

(M) Special circumstances of shipper or carrier agreeing to contract rate

(N) Creative financing arrangements
- What happens if...?
  : the carrier is not adequately insured
  : the carrier cannot gain access to shipper's records regarding volume
  : there is a strike which prevents contract from being fulfilled.

XV DATES AND AUTHORIZED SIGNATURES

- effective dates.

APPENDIX II RATE ESCALATION CLAUSES

There are many advantages to developing an escalation formula; it avoides time-consuming renegotiation, it provides some predictability of rate adjustment for both parties, and it reduces shipper aggravation arising from 'rate surcharge' impositions by railways.

The authors state that an escalation formula cannot substitute for marketing, pricing and negotiating skills and that there should be adequate provision in the contract to revert back to negotiation where an escalation formula causes significant over-pricing or under-pricing with reference to the market.

Unless the contract contains a freight rate renegotiation option, the rate escalation should be designed to encompass future changes in rail shipment characteristics that affect rates and charges. For example, if there is a reduction in train crew size or lighter rail equipment is used over the next five years thereby reducing fuel consumption, will the railroad and the shipper share in the consequent revenue gains due to improved efficiencies? If the costs of the movement actually decline during the life of the agreement, should the rate be reduced or held constant? What would happen if equipment rentals increase?

In estimating the rate escalation clause, the shipper should remember that the railroad industry has had a long-run upward trend in productivity throughout its history.[1] According to Caves and Christensen (1982) rail productivity has grown at 2.57 per cent per year from 1974 to 1983.[2]

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1. Studies by J. W. Kendrick and E. S. Grossman(1980) indicate that the railroad productivity grew at the rate of 2.64 per cent per year from 1889 to 1948.
2. Submission to ICC, October 25 1982 in Ex Parte No 290 (sub 4). G. W. Fauth confirmed these calculations in the same ICC proceeding on February 11 1983.

It is likely that with increased intermodalism, the introduction of new equipment and technological advancements these productivity gains will continue. Therefore, the shipper must ensure that these gains are shared.

One solution is for the shipper to insist on a lower initial freight rate, since the indexing formula will increase the value of the stream of payments over the life of the contract. Professor Borts of Boston University (Borts 1986) suggests the following ways of sharing the cost savings inherent in long-run improvements in rail productivity:

- discounting the degree of inflation;
- indexing only that fraction of the rate that covers variable operating cost; or
- limiting the permissible degree of variation in the revenue -variable cost relationship.[3]

Therefore, there are two major challenges to the shipper when negotiating a rate escalation formula. First, some mechanism must be found by which efficiencies in productivity can be shared by both carrier and shipper. It is important to remember that the standard rate escalation formula only measures the time-to-time increase in the price of diesel fuel. It does not take into account anything done to achieve more ton-miles with a gallon of fuel. Second, the shipper should make sure that the cost recovery is applied only to the cost portion of the rate, not the profit portion as well. Consultant Arthur Ribe suggests that a discount be calculated to the escalator which would eliminate the profit portion of the rate, on a year-to-year basis (Ribe 1982).

There must be a way of providing the carrier with an incentive to reduce unit costs as well.

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3. In exemplifying the third option, Prof. Borts uses the following example:
   Assume that the freight rate is $10 per tonne and the revenue variable cost ratio 160 per cent. Assume that five years later, the index of rail input costs has risen by 25 per cent, the freight rate (as indexed under the contract) has risen by 25 per cent, and the variable cost of the contract movement has risen by 15 per cent. Then the revenue-variable cost ratio will have been allowed to increase by a greater magnitude than variable cost. The variable cost will have risen by a smaller magnitude than the index of rail input prices because of productivity improvement.

Examples of freight escalation clauses

Chapter 5 describes various contracts which have been negotiated with Australian rail systems. Each contract employs a different method of computing annual increases in railway cost components over time, however, four main methods can be identified. Examples are presented below which illustrate these methods. Also described are the standard escalation formulae employed by the State Rail Authority of New South Wales (1986), V/Line and British Rail.

Example 1: Contract between Westrail Corporation and Seltrust Mining and Mount Isa Mines Limited for shipment of wet copper and zinc concentrates from Leonora to Esperance (1980-1985)

Freight rates would be escalated in accordance with the following formula:

$$FI = F + 0.7F \left[0.80 \frac{(HRI-HR)}{HR} + 0.05 \frac{(DI-D)}{D} + 0.15 \frac{(SRI-SR)}{SR}\right]$$

where: FI = the new adjustable part of the freight rate

F = the applicable, adjustable part freight rate which would be payable under clause 4 as at 1 May 1977

HR = the average hourly wage rate payable as at 1 May 1977

HRI = the average hourly wage rate payable as at the date of adjustment

D = the list price (duty free) of bulk distillate sold to commercial users in Perth by BP Australia Limited as at 1 May 1977

DI = the list price (duty free) of bulk distillate sold to commercial users in Perth by BP Australia Limited as at the date of adjustment

SR = the price of heavy steel rails per tonne CIF port of Fremantle as ascertained from the price schedule covering despatches from Broken Hill Proprietary Company Limited as at 1 May 1977

SRI = the price of heavy steel rails per tonne CIF port of Fremantle ascertained as aforementioned as at the date of adjustment

The functional form and the indices (but not the coefficients) used in this formula are similar to those used in other mineral transportation contracts involving Westrail outlined in Chapter 5. They are also similar to those found in the 1970 Greenvale agreement involving the

Queensland Government and Metal Exploration Queensland Pty Ltd and in the 1968 agreement between the Queensland Government and Central Queensland Coal Associates (see Chapter 5).

Example 2: Confidential contract for the shipment of explosives

Under this contract freight rates would be escalated every six months according to the following formula:

$$RI = R[1 + (0.73\ \frac{(W1 - W2)}{W2} + (0.19\ \frac{(M1 - M2)}{M2} + (0.08\ \frac{(F1 - F2)}{F2}))$$

where: R1 = the new rate to be charged for the coming six month period.

R = the rate prior to the relevant rate review data.

W(1), (W(2) = seasonally adjusted Average Weekly Earnings per Employed Male Unit in Australia as first published by the Australian Bureau of Statistics - curent publication being 'Average Weekly Earnings (Preliminary)', Cat. No. 6301.0 for the preceding period (1) or (2) relevant to the review data.

M(1), M(2) = the Price Index of Materials Used in Building Other Than House Building (All Groups Index) for the six State capital cities as first published by the Australian Bureau of Statistics - current publication being Cat. No. 6407, for the preceding period (1) or (2) relevant to the review date.

F(1), F(2) = fuel purchase price paid by the railway for the preceding period (1) or (2) relevant to the review date.

Period (1) = September for the 1 January review and March for the 1 July review.

Period (2) = March for the 1 January review and September for the 1 July review.

Other contracts outlined in Chapter 5 which employ a similar functional form and set of indices in their freight escalation formula include those for iron and steel, crude oil and naphtha and coal.

Example 3: Confidential contract for the shipment of overseas containers

The escalation clause in this contract employs yet another functional form and set of indices. A significant difference to the above two examples is the use of a ratio of current prices to original prices rather than a ratio of changes in prices to original prices. This methodology is also employed in the confidential contract for the shipment of cement outlined in Chapter 5.

The freight rate for the shipment of overseas containers is escalated according to the following formula:

$$R1 = R \times \left[(0.76 \times \frac{W1}{W}) + (0.24 \times \frac{M1}{M})\right]$$

where: R1 = the freight rate to be charged as from 1 April of the current year.

R = the freight rate applicable as at 1 October 1986.

W1 = the seasonally adjusted Average Weekly Earnings per Employed Male Unit for Victoria in respect of the September quarter of the current financial year as first published by the ABS in the 'Monthly Review of Business Statistics'.

W = the seasonally adjusted Average Weekly Earnings per Employed Male Unit for Victoria as described for W1 above, but in respect of the September quarter of the 1975-76 financial year.

M1 = the Wholesale Price Index of Materials Used in Building Other Than House Building (All Groups Index) for Melbourne in respect of September of the current financial year as first published by the ABS in the 'Monthly Review of Business Statistics'.

M = the Wholesale Price Index of Materials Used in Building Other Than House Building (All Groups Index) for Melbourne as described for M1 above, but in respect of September 1975.

Example 4: Australian National Railway's contract with the Australian Wheat and Barley Boards (1985-1988)

This contract was one of only two of the contracts outlined in Chapter 5 which included in its freight escalation clause a reduction factor to allow for improved productivity.

The rates given for the 1985-86 year would be escalated in the two subsequent years according to the following formula:

$$R1 = R1 + [P \times A \times \frac{W(1) - W(2)}{W(2)}] + [B \times \frac{M(1) - M(2)}{M(2)}] + [C \times \frac{F(1) - F(2)}{F(2)}]$$

where: R1 = the new rate to be charged for the coming twelve month period effective from 1 November.

R = the rate prior to the rate review date.

P = productivity factor (= 0.9)

A = labour component factor (= 0.73)

B = material component factor (= 0.19)

C = fuel component factor (= 0.08)

W(1),W(2) = index of the Average Weekly Total Earnings for All Males in South Australia as first published by the Australian Bureau of Statistics - current publication being 'Average Weekly Earnings Australia', Catalogue No.6302.0 - for the March quarter immediately preceding the review date (= W(1)) or the March quarter of the previous year (= W(2)).

M(1),M(2) = the Price Index of Materials Used in Building Other Than House Building (All Groups Index) for Adelaide as first published by the Australian Bureau of Statistics - current publication being 'Price Index of Materials Used in Building Other Than House Building', Catalogue No.6407.0 - for the month of March immediately preceding the review date (= M(1)) or the month of March of the previous year (= M(2)).

F(1),F(2) = fuel purchase price paid by the Commission for the month of March immediately preceding the review date (=F(1)) or the month of March of the previous year (=F(2)) as confirmed by the Commission's internal auditor.

Example 5: Standard escalation formula of State Railway Authority of New South Wales, Australia, 1986

$$R1 = R \times [1.0 + (L \times \frac{W1-W}{W}) + (N \times \frac{M1-M}{M})]$$

R = the rate to be charged

R1 = current freight rate

W,W1 = the weighted average minimum weekly wage rates for adult males in the Transport and storage sector, Australia - current ABS publication being Cat. No. 6312.0, in respect of September quarter 1985 (W1) or the March quarter 1985 (w)

M,M2 = the Price Index of Materials Used in Building Other Than House Building (All Groups Index) for six State capital cities as described above, but in respect of the September quarter 1985 (M1) or the March quarter 1985 (M)

L = labour component factor (=0.79)

N = wages component factor (=0.21).

Example 6: V/Line standard escalation formula

Increases or decreases in the special rate are computed by using the following formula:

$$R1 = R \times \left[(a \times \frac{W1}{W}) + (b \times \frac{M1}{M}) + (c \times \frac{F1}{F})\right]$$

where: R1 = the freight rate to be charged in the coming 6 months.

R = the freight rate applicable as at the date of commencement of the contract.

a = proportion of costs related to labour (decimal).

b = proportion of costs related to material (decimal).

c = proportion of costs related to fuel (decimal)

a+b+c = 1

W1 = the seasonally adjusted Weekly Earning per Employed Male Unit for Victoria in respect of that quarter as published by the ABS.

W = the seasonally adjusted Average Weekly Earning per Employed Male Unit for Victoria as described for W1 above but in respect of the quarter relevant to the date of commencement of the contract.

M1 = the Wholesale Price Index of Materials Used in Building Other Than House Building (All Groups Index) for Melbourne as published by the ABS.

M = the Wholesale Price Index of Materials Used in Building Other Than House Building (All Groups Index) for Melbourne as described for MI above, but in respect of the month relevant to the date of commencement of the contract.

F1 = price index of Vicrail diesel locomotive fuel in respect of that date.

F = price index of Vicrail diesel locomotive fuel in respect of the date relevant to the beginning of the contract.

Example 7: Standard British rail rate escalation clause

PRICE VARIATION

(A) On and from 1 November 1985 and on 1 May 1986 and on each succeeding 1 November and 1 May, thereinafter referred to as 'the adjustment date', the charges payable under this Agreement shall be adjusted in direct proportion to the sum of:

(a) 60 per cent of the percentage change between the average monthly value of the Index of Average Earnings of All Employees, Great Britain, not seasonally adjusted, whole economy (January 1980 = 100) for the six months ended 31 July 1984, and the average monthly value of the same index for the six months ending:

- for the November adjustment, 31 July
- for the May adjustment, 31 January

(b) Immediately preceding the adjustment date and 40 per cent of the percentage change between the average monthly value of the Index of Producer Prices, price index numbers of output wholesale products of manufacturing industries other than food, drink and tobacco (January 1980) for the six months ended 31 July 1984 and the average monthly value for the same Index for the six months ending:

- for the November adjustment - 31 July
- for the May adjustment - 31 January

immediately preceding the adjustment date

(B) These indices appear in the Monthly Digest of Statistics of the Central Statistical Office published by the Stationery Office.

APPENDIX III NEGOTIATING PROCEDURES FOR TRANSPORTATION CONTRACTS

This appendix provides some helpful ways of quantifying service factors such as rate, equipment, delivery times, credit and liability, by weighing different combinations of options and thereby attempting to balance the negotiating power of individual shippers and much larger carriers.

Transportation contracts do not of themselves represent a solution but rather a mechanism by which the parties may achieve a cost-effective transportation package. The following procedure is suggested so that the shipper's strategy can be implemented most efficiently.

The traffic manager should have the necessary backing within his or her own firm to negotiate the contract. Even if the power to sign the contract does not rest within the traffic department, the traffic manager should take the lead role in the negotiating process. In addition, there should be a preliminary agreement within the shipper's company that the affected departments such as sales, production, accounting and legal be in agreement that the negotiation of a contract be initiated and that full co-operation be given throughout the negotiations.

PREPARATION

The process of preparation involves quantifying the rail service to be provided

This includes an evaluation of whether or not contracting is correct for the traffic under consideration. In order for a shipper to determine the opportunity to be gained from contracts, it is necessary to reassess the role which railroads play in the company's business. Rail should be viewed as just another alternative mode available to move materials.

As has been previously stressed, with the advent of contract freedom, service has become an issue to be negotiated. Therefore the shipper has to understand what 'service' means to the company's budget. In

other words he or she must attempt to quantify it in dollars and cents. One method of quantifying transportation service was developed by consultants Bielenberg and Harris (1980). Some of the service considerations which the shipper must quantify would be:

- consistency of delivery
- rail equipment supply
- transit time
- dedicated train service
- load and unload responsibilities
- equipment conditions
- claims
- car locating services
- switching privileges.

They outline a hypothetical example involving the effects of one aspect of service, transit time, as shown in Table III.1

The Table indicates that, for a particular movement, a shipper would be as equally well-off paying $3.32/cwt if transit time were eight days, and a rate of $2.12 if transit time were 14 days. It also indicates that if transit time were 14 days and the rail rate is more than $2.12, the shipper should switch to an alternative mode.

TABLE III.1 HYPOTHETICAL EXAMPLE OF BREAK-EVEN COSTS AT VARIOUS LEVELS OF TRANSIT TIME

Break-even cost ($/cwt)	*Transit time (in days)*
3.50	6
3.32	8
2.80	10
2.40	12
2.12	14
1.75	16

Source Bielenberg and Harris (1980).

In other words, the shipper must evaluate the trade-off between service levels and inventory costs. Improvements in delivery speed or consistency will save a shipper hiring premium cost modes or holding large inventories (Bagby, Evans & Wood 1982).

In conclusion, the preparation stage involves this important process of the traffic manager analysing the available rail service options for the particular operation in comparison to the service costs which could be provided by alternative modes.

Identification of objectives

The pre-negotiation strategy should also include identification of the objectives to be gained by contracting versus tariff publication. The traffic manager must question what benefits are derived from a freight rate negotiation which produces confidential results. As noted previously, the basic principle of contracting is that all parties gain something. Therefore, contract negotiating must reflect the fact that there is a mutual exchange of advantages. There must be an acceptance on the part of both negotiating teams that each side will have to give up something. Successful negotiators will attempt to prepare a list of possible compromises and concessions in advance.

The shipper must try to envisage the mutual consideration and commitment derived from the contract *for both parties*. In order to do this it is necessary to know as much as possible about the carrier with which one is preparing to negotiate. Some of the essential aspects of a carrier's profile which should be taken into consideration by the shipper are:

- equipment supply (surplus or shortages)
- current market share of the traffic under consideration
- operating costs
- service versus that offered by the competition
- cash flow needs.

According to R. H. Hanson (Hanson 1982), successful railroads will generally use contracting as a tool to improve their own market share. Contracts can give railroads the opportunity to secure long-term commitments guaranteeing revenue. If the shipper realizes in advance what the carrier's objectives are, these items can strategically be 'conceded' in exchange for items on the shipper's laundry list.

Knowing the railroad's strengths and weaknesses with respect to the particular business is also desirable as these can be used to shippers' advantage during negotiations.

The shipper should have clearly outlined the specific benefits which are desired from the contract. These benefits might include:

- productivity improvements from loading larger rail cars
- simplified freight rates
- freight cost reduction
- stabilized rate environment
- simplified administrative functions
- service improvements
- quality rail cars
- elimination of administrative costs for transit privileges
- economic advantages of short-term pricing during periods of surplus rail capacity.

Formulation of initial terms

Once all of the terms and conditions have been identified which the shipper is prepared to demand, they should then be put into a narrative and given to the legal advisor assisting in the preparation of the contract. The narrative should also include a brief background of the traffic movement covered by the contract, an assessment of financial risk and a statement of expectations regarding the negotiations.

Possible strategies

The shipper should also outline the different possible strategies he or she would be prepared to follow during the negotiation period. An example of the 'menu' of different combinations of cost and service is given by consultants Bielenberg and Harris (1980) from a carrier's perspective:

Example A: Instead of only offering a rail service for steel coils in shipper-owned gondola cars, a carrier might offer an additional choice of:

- unspecified time service;
- 3 days plus 1 day for each 200 miles of service; or
- 3 days plus 2 days for each 200 miles of service.

Each service would, of course, be differently priced, and the shipper would then contract for the desired level of service.

Example B: A carrier might offer one price for twice-cleaned cars and another for those that are cleaned once (the service now provided).

Example C: A carrier could agree, in a contract, to reduce rates if a shipper filed a lower percentage of loss-and-damage claims than had historically been the case. This would reduce the costs to the carrier and provide an incentive to a shipper to load with greater care.

In each combination of strategic options, the shipper must be able to accurately estimate the value of the service as well as the cost and profit associated with each compromise.

Presentation

The next step in the negotiation process is the meeting of the parties. At this point the shipper begins to negotiate with the railroads directly and to solicit specific reactions to propositions for different levels of service and cost. In this way both parties can find some common ground in which they will eventually establish the business arrangement. It is extremely important at this stage that broad parameters be discussed so that the shipper can benefit from possible concessions from the railway which might be stated in an indirect fashion. Remember that potential improvements in a shipper's cost structure may lie in such diverse areas such as inventory, interest payments, or a computerised billing function which the carrier might be persuaded to assume.

An alternative would be to put the traffic out for competitive bid. This would involve the shipper describing the volume and origin/destination pairs of the traffic, as well as the initial service terms proposed for moving the freight. Bidding usually comes into play where the shipper is located at a competitive point. Several railroads may serve an origin or destination and thereby create such competitive bidding opportunities for the shipper. Bidding may also be appropriate when several routes are available utilizing different junctions and intermediate carriers. Knowing these situations exist, yet not knowing exactly what specific concessions to seek from the railroads, the distribution manager may wish to put the traffic out for bid. The manager should explain to all carrier competitors that the shipper will take the most attractive terms and that the winner will obtain the pre-designated volume.

Returning to the more traditional presentation format, the commodities are identified, origins are specified as well as the total facilities'

production of the shipper. If there are multiple origins or destinations, other carriers may have to become involved as negotiators in the process.

There are three elements which will generally determine whether there exists a basic functional agreement: the rate, volume and escalation. Once there is agreement upon these components as well as service standards, equipment, credit terms, liability and so on, the parties shake hands and agree that one group (customarily the carrier) will supply a first draft of the contract.

The shipper now knows what traffic will be dedicated to the carrier, what it will cost, and what objectives have been achieved.

Re-working of the terms

This stage is often characterised by initial shock. The document presented by the carrier is in a form unfamiliar to most transportation professionals. Moreover, it often contains clauses and obligations which were not originally discussed or even contemplated. It sometimes differs quite drastically from the agreement which the negotiators shook hands on at the end of the previous stage.

What may have happened is that the railway negotiator, charged with presenting the first draft of the contract, came back to the office with the business terms. The legal department drafted it, according to their standard form, the operating department then added various clauses to alleviate any difficulties (which they may have encountered with other past contracts), then the accounts receivable department has perhaps added some new remedial rules for payment. These additions, coupled with the legal jargon, often dwarf the actual business arrangement which the principle negotiators hammered out in the first place.

Mr Hanson of General Mills warns, 'You will hear that the conditions in this contract are standard and the contract committee (or the railway vice-president) won't deviate. Don't believe it!' (Hanson 1982).

At this point the shipper must carefully weed through the 'boiler plate' draft contract making sure that each section is acceptable. Every clause is negotiable.

Shippers must remember that 'standards and required provisions' are never cast in stone. If any provision is unacceptable to the shipper,

its modification must be demanded and, if necessary, these demands made to executives of higher authority.

One essential guideline to remember is that clauses should always carry an equality of protection. If a clause states 'shipper will indemnify carrier', it should be reworked so that it be replaced by 'each party will indemnify the other party'. Similarly, if there is no mention of carrier liability, the shipper should not assume that full liability for loss or damage will remain with the carrier, as though it were the statutory common carriage protection of the past. Moreover, the shipper should be wary of clauses which limit the liability of the railroad to the carrier's own negligence.

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ABBREVIATIONS

AAR	Association of American Railroads
BLS	Bureau of Labour Statistics
CN Rail	Canadian National Railway
C&NW	Chicago and North Western Railroad
COFC	Container on a Flat Car
CP Rail	Canadian Pacific Railway
CQCA	Central Queensland Coal Associates
CTC	Canadian Transport COmmission
ICC	Interstate Commerce Commission
ICG	Illinois Central Gulf Railroad
MKT	Missouri, Kansas and Texas Railroad
NFG	National Freight Group
NTA	National Transportation Act
OKT	Oklahoma, Kansas and Texas Railroad
PPI	Producer Price Index
RCR	Rail Cost Recovery
RTC	Railway Transport Committee
STCC	Standard Transport Commodities Classification
TNT	Thomas Nationwide Transport
TOFC	Trailer on a Flat Car
TTG	Trade and Transportation Group
URCS	Uniform Rail Costing System
WGR	Western Australian Government Railway
WP	Western Pacific Railroad