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Shortline Railway Industry In Canada

by Michael Loughman

Transport Canada as early as 1975 had concluded that "shortline operation in place of conventional branch line operations on the Canadian prairies is technically feasible..." and that "interested parties should be given the option to purchase at a fair price any line subject to an abandonment application before abandonment takes place."¹ The 1985 *Report of the Inquiry into Railway Branch Lines* recommended that "interested parties, including shippers, shortline operators, elevator companies, and trucking companies should be granted the right to apply for the diversion of subsidies, that would otherwise be paid to operate a conventional branch line, to an alternative transportation service that is lower in cost than the branch line operation."² For the purposes of the Inquiry, a shortline was described as:

... a company, under Federal or Provincial jurisdiction which owns or leases a branch line(s) connecting with one or more tracks owned or operated by one or more main line carriers and which operates trains on that branch line(s) as a feeder service to the main line carrier's track for furtherance by that main line carrier and/or as a feeder service from the main line carrier's track to points on the branch line(s), with the intent of yielding a direct or indirect economic benefit to the owner.

THE NATIONAL TRANSPORTATION ACT

Freedom to Move: A Framework for Transportation Reform was published in 1985, and was the foundation for the *National Transportation Act of 1987*, which now governs transportation activity in Canada. The following sections may be applicable to shortline railways: Sections 129-130 (Joint Rates); Sections 144-145 (Level of Service); Section 148 (Running Rights and Joint Track Usage); Section 150 (Connections); Section 152 (Interswitching); and Sections 158 and 174 (the sale and acquisition of rail lines).

Any new shortline railway will undoubtedly be forced to deal with a Class 1 carrier, particularly in areas such as the division of

rates. Given the disparity in size between a Class 1 and a shortline, the shortline could be at a disadvantage while trying to obtain an equitable and fair division. Section 129 of the *NTA* calls for the two (or more) carriers to "agree on a joint tariff for the continuous route and the apportionment of the rate set out in the joint tariff..."⁴ This applies to traffic which moves over any continuous route in Canada. Section 130 gives the National Transportation Agency the authority to determine the apportionment of the rate. Appeals to the Agency using these Sections can be initiated by the shippers.

Another potential problem facing shortline railways is poor service provided to them by the Class 1's. Although it has been shown that the Class 1's can benefit from such a relationship, there may still be a tendency on the part of the Class 1's to concentrate on their main line business, sometimes to the detriment of their less profitable branch lines or connecting shortlines. Sections 144 and 145 provide for an adequate level of service to be provided at all times.

While these sections are designed primarily for the benefit of shippers, it will also assist any shortline railway which must connect with another railway. In addition, Section 145 (3) calls for an adequate level of service to be provided to any connecting carrier such as a shortline railway. Section 147 instructs the Agency to investigate any complaints arising from Sections 144 and 145, and to come to a decision within 120 days of the filing of the application.

Upon application to the Agency, and if that application is approved, a railway company may use the facilities of another railway, according to Section 148(1). Similar to Section 134 of the *Railway Act*, this will theoretically allow a shortline railway, operated perhaps by a group of shippers located on a branch line, to operate their own railway on CN or CP track. Section 148 (2) gives the Agency the authority to set the conditions for the usage of the track, while Section 148(3) instructs the Agency to determine the compensation to be paid to the railway whose tracks are being used if the two parties cannot agree on compensation.

Shortline railways may also benefit from Section 150, which states that a connection between two railways "be maintained and available for use," if the Agency orders so upon application by one of the railways. If

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the applying railway is provincially incorporated the application must be approved by both the Agency and a Provincial board (Section 151).

Another important area for shortline railways will be interswitching, covered by Section 152. If the origin or destination of the traffic is within 30 kilometers of the interchange, the rate charged for interswitching will be prescribed by regulation. This is only applicable for federally regulated railways. At this time, it is uncertain whether these regulations will cover the relationship between a federally-regulated railway and a provincially-regulated railway. If provincially-regulated carriers are covered by this Section, then it will represent another potential advantage for shortline railways in their relationship with the Class 1 railways.

As in the U.S., shortline railways for the most part will operate on track either abandoned by or purchased from the Class 1's. One way a shortline can purchase a line is through Section 158. Abandonment of track is a long and difficult procedure in Canada, and the Class 1's will be able to avoid this by selling a line they would otherwise abandon to another company. Currently limited to abandoning 4% of their systems a year, a sale of this nature would not be considered an abandonment and thus allow the Class 1 to abandon another section of track.

A shortline operator can also make an application to purchase a line scheduled for abandonment under Section 174. The National Transportation Agency would then hold hearings on the proposal, and can then order the transfer of the branch line to the railway which applied to purchase the line, unless they feel the transfer would not be in the public interest. If the two parties cannot agree on the purchase price, the Agency will determine the price, based on the net salvage value of the line.

Because the National Transportation Act has just recently become law, few decisions have been made by the Agency on applications based on the above sections. Until a number of decisions are made, it will be difficult to determine precisely how the new Act. Nonetheless, it appears that the development of the shortline railway industry in Canada will be aided by this legislation.

THE CENTRAL WESTERN RAILWAY CORPORATION

In July of 1986, Thomas Payne and his Central Western Railway Corporation (CWR) obtained tentative government approval to operate a shortline railway on a CN branch line in Alberta, after two other groups, one based in Vancouver and the other in

Montana, lost interest in the project. When final government approval was given to Payne, the CWR became the first shortline railway to commence operations in Canada in thirty years.

The branch line in question was the 174 kilometer Stettler grain subdivision, which ran between the towns of Morrin and Edberg in the province of Alberta. The line was originally owned by the Canadian Northern Railway Company, which constructed the subdivision between 1909 and 1911. The Canadian Northern Railway became part of the CN system in 1919, and CN operated the line until it was sold to the CWR. In 1986, the federal government selected the Stettler subdivision for a three year project to evaluate the effectiveness of a shortline railway. CN was originally to lease the right-of-way to the selected operator, the CWR, but because of possible legal problems, CN insisted on selling, not leasing the line, for \$2.7 million. (CN was concerned that if the line failed they would be responsible for any debts incurred by the CWR and would have to resume operating the line.) The CWR was then incorporated under the Central Western Railway Corporation Act, an Alberta provincial statute (Chapter 71, 1984). Finally, in November of 1986, after several delays, the CWR made its maiden voyage, with its fleet of three used locomotives and several maintenance and crew cars.

The CWR is very similar to many of the shortline railways that began operations in the U.S. in the 1970's and early 1980's. Although it is considerably larger (174 kilometers) than the average American shortline, it relies on just one commodity - grain, although small shipments of other goods, such as feed, are brought to the nine stops on the line. Payne has stated that he would like to expand his commodity mix, and recently added a Car Repair Facility on the line which services both CN and CP rolling stock. Nonetheless, grain still accounts for virtually all of the CWR's revenues. The CWR also provides better service to the farmers and grain elevators along the line. CN operating policy, for instance, included the "40-70" rule, in which CN would not run a train with less than 40 cars or more than 70. The CWR, on the other hand, has a minimum of ten cars and no maximum. The CWR has also reduced the time it takes for a grain car to return empty to the elevator. Payne claims that the "average car cycle" for the CWR is thirty-six hours, while CN's "average car cycle" was 19 days.

The CWR supplies empty grain cars to the four grain companies which operate nine elevators along the line, then transports the full cars to CN at the end of the line. The CWR does not own the grain cars; the various levels of government own them, and the Grain

Transportation Agency determines how many grain cars are needed at each elevator. Critics of the CWR maintain that the CWR is handling more grain than CN did because there was in the beginning no shortage of grain cars, unlike other lines, and this ready supply was politically motivated. Once the allotment of cars has been determined, CN delivers the empty cars to the CN - CWR junction, where the CWR takes over. The CWR is paid by both the grain companies and the Minister of Transport through the *Western Grain Transportation Act*, which gives the CWR a monthly payment based on the total tonnage delivered. The rate the CWR receives from the grain companies is based on the division of the rate for the entire trip, as carried by both CN and CWR. This is a preset rate between CN and CWR decided upon by both parties, and after 120,000 metric tonnes of grain has been handled, a new division will be negotiated.

The CWR and CN also signed a Maintenance and Repair Services Agreement, which calls for CN to "repair and maintain all of the rolling stock passing through the two companies except that owned by CWRC," referring to the grain cars which the CWR utilizes. An Interchange Agreement was also signed by CN and CWR. This agreement contains cost provisions for the future maintenance, operations and construction of the interchange facilities.

The other advantage of shortline railways, in addition to providing better service, is the more efficient utilization of labour. Although this has been jeopardized by the recent ruling of the Canadian Labour Relations Board and the upholding of their decision by the Federal Court of Appeal (which will be examined later), the CWR as of August, 1990, had just twelve employees.

Early results indicate that the CWR has been successful. For the eight month period ending July, 1987, the CWR realized a profit of \$800,000. The CWR was paid \$1.8 million through the *Western Grain Transportation Act* to move the grain during these eight months, and this was offset by \$1 million in operating costs. Payne says that his operating costs are 60% lower than CN's costs were in all areas, due primarily to the multidisciplinary use of labour and lower overhead.

Another problem which shortline railways face is the need to rehabilitate the track. The previous owners, usually Class 1 railways, let many of their lines deteriorate, and the Stettler line was no exception. When CN was arguing to abandon the line, they claimed that \$38 million was required to repair that section of track. Payne, however, disagreed with that estimate, and declared that the line could be rehabilitated to the same standards as CN desired for \$16 million. Regardless, the CWR has not been able to borrow that

kind of money, so it is depending on its own cash reserves to finance rehabilitation. Of the \$800,000 in profits for the first eight months of operation, 90%, \$760,000, was spent on maintenance.¹⁰

It appears that the shippers along the Stettler line are also pleased with Payne and his shortline railway. For that initial eight-month period, the CWR moved more grain along the line than did CN while it operated the subdivision.¹¹ But others are less certain of the future of the CWR. The Alberta Wheat Pool, the CWR's largest customer, insists that if "less costly options are available, the pool will consider grain transportation alternatives which best serve its customers."¹² They are concerned that the CWR is only a three year project, and they are wary of making long-term commitments, such as constructing new grain elevators, based on a three year test period.

Obtaining financing for a shortline railway is often difficult in the United States. This problem also exists for the CWR. Although Payne was able to raise \$400,000 through family and friends, other private financing was difficult to obtain. One potential source, a bank, bowed out because of a clause in the *Railway Act* stipulating that revenue must first be used to cover operating costs, and then may be used to retire debt. The federal government then intervened, and agreed to give the CWR \$1.75 million to cover start-up costs and a downpayment of \$700,000 to CN for the purchase of the line (the total purchase price was \$2.7 million.) In return for this money, the CWR agreed to a rate of \$12.30 per tonne from the government for grain transported, as opposed to the regular rate of \$15.80 per tonne.

The CWR recently announced that it is expanding its rail network, as it reached an agreement with CP rail to purchase a 210 kilometre branch line in Central Alberta. One result of this expansion is that the CWR will now interline with both CN and CP.

While the early performance of the CWR has been encouraging, it faces an uncertain future. Most disturbing are the recent rulings by the CLRB and the Federal Court of Appeal, which state that the CWR must inherit the existing union contracts from CN. This will certainly have an adverse effect on their operations, as the CWR currently utilizes fewer employees than CN did while they operated the line, and the employees perform a variety of tasks, which is not permitted under the national labour contracts of the railway employees. The CWR has appealed the decision to the Supreme Court of Canada, which has heard the case, but has reserved judgement. Their judgement is expected before the end of 1990. A second issue is their reliance on just one commodity, despite their attempts to diversify. The CWR

will always be primarily a grain transporter and if external events causes the demand or the price of grain to fall, the CWR would be hurt.

OTHER SHORTLINE RAILWAYS IN CANADA

At present, there are several other well-publicized efforts underway to set up shortline railways in Canada, in addition to several other applications which CN and CP are considering. Both CN and CP report that they have received numerous inquiries concerning their branch lines. CN is currently attempting to sell the Goderich and Exeter subdivisions, a total of 112 kilometers of track. Both subdivisions are active freight lines in Southwestern Ontario; in CN's 1988-89 fiscal year, 6,000 carloads and 550,000 tonnes of freight moved on these subdivisions.¹⁵ CN is looking for a shortline operator to take over these lines, and there are currently three small U.S. railroad companies being considered by CN.

One of the initial bidders for the Goderich and Exeter subdivisions was the Ontario Midwestern Railway Company. Originally known as Project Rerail, they have been attempting to start a shortline railway in the area for years. Unfortunately for Ontario Midwestern and Peter Bowers, its leader, CN rejected their application because of financing problems.

Undaunted, Ontario Midwestern is still very interested in operating a shortline in the region, and has recently filed an application with the National Transportation Agency to operate the line between London, Ontario and Georgetown, Ontario. Another proposal involved the Boundary Division, approximately 100 kilometers of CP track located in the province of British Columbia. This proposed shortline railway would have had connections to both CP and Burlington Northern which would, at least in theory, improve its competitive position. John Meade, the entrepreneur behind the idea, insisted that the private financing he had already secured, in addition to the financing he hoped to receive from the shippers and municipalities located along the route would have been sufficient. Meade, however, recently gave up his plan to purchase the Boundary subdivision, citing government refusal to allow tax breaks.¹⁶

One of the newest shortline railways in Canada is the Southern Rail Cooperative, located in the province of Saskatchewan. Owned by 150 farmers, Southern Rail operates over 70 kilometers of former CN and CP track, hauling grain for its members.

Southern Rail is a three year demonstration project supported by the Saskatchewan

government, which provided technical assistance, helped in the negotiations with CN and CP, and guaranteed a loan of \$650,000. Since December 18, 1990, when Southern Rail began operating, it had moved 270 cars by August, 1990, on one of its two lines, which has exceeded their initial expectations.¹⁵

There has also been some activity in Atlantic Canada. NeC Corporation offered to buy more than 500 kilometers of CN and CP track in Nova Scotia in December, 1988. As with many U.S. shortlines, NeC felt that improved service would allow their operation to be viable. The proposal fell through, though, when CN declined to sell its track to NeC.

In 1988, CP Rail created the Canadian Atlantic Railway (CAR), a shortline with track primarily in Nova Scotia and New Brunswick. While CAR, which is operated separately from CP, has lost money in its first two years of operation, it did manage to increase its freight tonnage 25% from August, 1988 to August, 1989, and it expects to be in a profit position within a few years.

But several of the larger shippers served by CAR are openly critical and suspicious of CP's motives, claiming that CP spun off CAR in an attempt to circumvent abandonment procedures. Charging CP with "demarketing," they predict they will soon lose all rail service in the area as CP, through CAR, will abandon its rail network in the region.

A key to these, and other proposed shortlines will be financial assistance from the government. The federal government, through the *Western Grain Transportation Act*, has helped the CWR, and the Ontario and Saskatchewan provincial governments have assisted proposed shortline railways.

SHORTLINE RAILWAYS AND THE CLASS 1'S

As in the U.S., the future of the Canadian shortline railway industry will largely be decided by the actions of the Class 1 railways. Both major carriers wish to shed much of their systems, and if they are permitted to do so by the government, it is likely that some of these lines will be purchased by shortline railways.

Both CN and CP have frequently complained in the past that most of their traffic travels on a small portion of their respective systems. CP, for instance, claimed in a brief it submitted to the House of Commons transport committee studying various proposals to deregulate the transportation industry that 54% of their rail network carries just 3% of their traffic.¹⁸ For its part, CN claimed that one-third of CN's network carries 90% of its traffic; one-third carries nine percent; and the last third carries just

one percent.¹⁹ The Class 1 railways, particularly CN, were initially somewhat cool towards the idea of shortline railways operating in Canada. CN's 1985 *Submission to the CTC Inquiry Concerning Branch Lines* expressed these concerns: "We believe that the conditions for a successful shortline ... are sufficiently stringent that the shortline option will be a tool of limited rather than general applicability ... As an alternative to abandonment, we therefore question whether shortline railways are the best instrument to achieve the goal of an effective, efficient and reliable total transportation system."²⁰ CN later in this submission wrote that shortline railways may be of use in the short-term to help shippers; "... we are not confident that shortlines will serve a significant long term role but acknowledge their usefulness in easing transition for affected shippers in limited circumstances."²¹

Since that submission, however, CN has become more solidly in favour of the concept of shortline railways in Canada. R.E. Lawless, President and Chief Executive officer of that company, acknowledged in a July, 1987, speech that the role of CN was changing: "We see a smaller railway in the future. It will be mainline oriented, and served by feeder lines and intermodal trucking."²² Lawless' remarks were echoed by John Sturges, Senior Vice-President and Chief Operating Officer of CN. "I think that shortlines will work in this country," he said in an 1989 speech. "There's an immense interest...I think we'll find the fit, willing, and able operators and that we'll forge productive, long-term relationships with them. In most cases we expect to get something for the line and the benefit is to have somebody in business with us who will generate the feeder traffic that we built the line for in the first place."²³

Initially, CP was also wary of shortlines. In their submission to the *Railway Branch Lines Inquiry* they stated that as far as an agreement between the shortline and the Class 1 for the division of rates for the movement of grain under the *WGTA* there would be "no incentive ... for the large railway to support such an arrangement."²⁴ But since that time CP has become more enthusiastic about the future of shortline railways in Canada. "Under the right circumstances," wrote I.B. Scott, Chairman and Chief Executive Officer of CP Rail, "independent - or shipper-operated shortlines can make what was a weak link in a large rail system into a strong one - to everyone's benefit."²⁵

In a brief submitted a House of Commons transport committee, CP reiterated their belief in the future of shortline railways: "Shortline railways in combination with main-line carriers can often provide the least-cost all rail service from origin to destination. This

arrangement may be less costly for the federal government than subsidization of the line."²⁶ It is likely that both CN and CP will enter into agreements with any shortlines operating on their former branch lines that will call for the shortline to deliver all the traffic to either CN or CP. These agreements could take the form of confidential contracts.

Publicly, then, the two major Canadian railways appear to be enthusiastic about the prospects of shortline railways in Canada, believing that shortline railways will compliment their desired main-line service by acting as feeder lines; in effect the Class 1 and the shortline would become partners in the transportation of goods from origin to destination.

Public declarations aside, it is interesting to note how the Class 1's have acted in the past regarding shortlines. What follows is a summary of the more important facets of the relationship between CN and CWR.

The original plan called for CN to lease the line to the CWR, but the possibility of legal liability forced CWR to purchase the line. This, apparently, will be a feature of any shortline railway operating on CN track; CN insists that the line must be sold, not leased, to any prospective owner, although they will examine each case on its own merits.

CN and CWR also signed a Maintenance and Repair Services Agreement as well as an Interchange Agreement. One can also expect that any work relating to the upkeep of the line that is not covered by the Agreement will be performed by CN, as they possess the specialized equipment necessary for such work. The CWR is also likely to contract out work to CN, if allowed to do so under the union contracts.

Another feature common to some shortlines in the U.S. and the CWR is that they are captive to just one connecting carrier. (It was shown, however, that many U.S. shortlines have more than one carrier connecting with the line.) In Canada, it is very likely that most shortlines will be captive to just one of the major carriers; at best, a shortline will connect with both CN and CP. Being captive to just one carrier may result in poorer service afforded to the shortline and a less equitable division of rates. The new legislation, though, may protect the shortline in these areas. As for the relationship between CN and CWR, it appears to be free of any disputes of this nature. With the CWR attempting to purchase a CP line, it would then have access to both CN and CP.

THE LABOUR ISSUE

It has been emphasized throughout this paper that the better utilization of labour is one of the two principal reasons why a

shortline can succeed on a branch line that was unprofitable or marginally profitable while operated by a Class 1 carrier. By using fewer employees, having these employees do a variety of jobs and contracting out some work, the CWR felt it could operate the Stettler line more efficiently than CN. The CWR is not opposed to union labour according to Payne. "If our employees want to negotiate a collective agreement that's fine," said Payne. "But we don't want to adopt an agreement negotiated with a national railway."²⁷

But organized labour did not accept this. The unions were concerned that jobs would be lost if shortline railways took over lines previously operated by either CN or CP. B.J. Morgan, general chairman of the United Transportation Union, predicted that the CWR's proposed use of labour would be "a threat to all unionized people."²⁸ Larry Wilson, vice-chairman of the same union, felt that the CWR was the beginning of a "major union-busting campaign."²⁹ The unions were also concerned that the cross utilization of employees would cause safety and maintenance problems.

Thus, in late 1986 the United Transportation Union (UTU), the Brotherhood of Maintenance of Way Employees (BMWE), the Canadian Signal and Communications Union (CSCU) and the Brotherhood of Locomotive Engineers (BLE) asked the Canadian Labour Relations Board (CLRB) to rule whether these unions were entitled to the rights of succession, which would allow them to represent the employees of the CWR, and thus maintain the situation that existed while CN operated the line.

Briefly, the unions wanted the CLRB to rule that CWR and CN were to be considered a single employer, despite the change in ownership, and that Section 108 of the Canada Labour Code was still in effect. Also, the unions felt that the sale of the business was within the meaning of Section 144 of the Code, meaning that both seller and purchaser were federal undertakings and that the purchaser must inherit the existing contracts. The CWR, meanwhile, argued that because their line was incorporated in the province of Alberta and was wholly within that province's territory, they were not a federal work, undertaking, or business and thus the CLRB had no jurisdiction over the labour situation. Even if the CLRB were to rule that the CWR was a federal undertaking, the CWR argued that they and CN could not be considered a single employer.

There was no question that CN was a federal undertaking for the general advantage of Canada, although the CWR claimed it was not a federal undertaking because it was provincially incorporated. The CLRB ruled nonetheless that "federal authority can

override the rule of primary provincial competence over labour relations where the operations of an otherwise provincial work or undertaking are an integral part of a federal undertaking."³⁰ The CLRB determined that not only did the CWR's relationship with CN make them "an integral part of a federal undertaking," but so did the grain elevators along the line and the compensation offered through the *Western Grain Transportation Act* as the *Canada Grain Act* considered all grain elevators to be works for the general advantage of Canada. "All the foregoing control exercised by the federal government over the grain industry," concluded the CLRB, "leads us to believe that the western grain transportation network, as an essential and integral part of that control, is a federal undertaking ... The operational connection between CWRC, the CNR, and the grain elevators is not incidental or temporary, it is continuous and ongoing. The CWRC operation is a vital and essential link in this chain of federal activities."³¹ On February 27, 1987, the CLRB ruled that the unions were entitled to the right of succession. Their ruling was summarized as follows:

... we find that the CWRC is a federal work, undertaking or business within the meaning of Section 108 of the Code and as such it is an employer under the code ... As a consequence thereof, the UTU, the CSCU, the BLE and the BMWE continue to be the bargaining agents for the employees of CWRC.³²

The unions were understandably elated with the CLRB ruling, claiming the decision would stop further attempts by the railways to sell off track to shortline railways who in turn would operate the line with either non-union labour or union labour with different work rules than those that exist on the Class 1 railways. Realizing the importance that the decision would have on their operations, the CWR appealed the CLRB ruling to the Federal Court of Appeal.

On January 28, 1988, the Federal Court of Appeal, by a vote of two to one, dismissed the CWR appeal thus allowing the CLRB ruling to stand. Although Justice Hugesson felt that the "undertaking and business of Central Western are provincial and local in nature,"³³ Justices Marceau and Lacombe disagreed, with Lacombe concluding that "by way of exception to the general rule that labour relations are within provincial competence, federal competence over Central Western's labour relations is an essential element of Parliament's exclusive authority to make laws with respect to a work it has determined to be for the general advantage of Canada."³⁴

But Justice Marceau disagreed with the CLRB's reasoning for ruling that the CWR's

operations were enough to trigger federal jurisdiction. He also disagreed with the CLRB's decision to treat CN and CWR as one business. He felt that the Stettler line, according to the *Constitution Act of 1867*, remains a segment of a railway "connecting the province with other provinces" (Section 92 (10)(a)), and that the federal nature of the business should attract federal jurisdiction.

Justice Lacombe, however, disagreed with Justice Marceau over the interpretation of Section 92 (10)(a) of the *Constitution Act (1867)*, and he concluded that the CWR is a local work and undertaking. Both justices, however, determined that the Stettler subdivision was for the general advantage of Canada.

The ruling of the Federal Court of Appeal, despite upholding the CLRB decision, may nonetheless positively affect the future of shortline railways in Canada. If a line is considered not to be within the legislative authority of the federal government as Justice Lacombe implied, then the line can be "undeclared" as a line for the general advantage of Canada. Section 158 (4)(d) of the *National Transportation Act (1987)* reads:

Where the railway company to which the line or segment is conveyed is not within the legislative authority of Parliament ... any declaration that the line or segment is a work for the general advantage of Canada ceases to have effect.

Soon after this ruling, the Canadian Parliament passed Bill C-5 in March of 1990, which voided the general advantage clause, and made the Bill retroactive to 1986.

The decision of the Federal Court has been appealed to the Supreme Court, which has heard the case, but has reserved judgment. If the Supreme Court agrees with the CLRB and the Federal Court rulings it is possible that the existing unions on CN or CP branch lines will be granted rights of succession for any new shortline operations. (It is likely that CP will also be considered a federal undertaking for grain dependent lines for the same reasons as CN, despite CP being privately-owned.) If the new shortlines are forced to adopt the same labour costs as those on branch lines, the economic advantage of operating a shortline will be severely reduced, thus placing the future of the shortline railway industry in Canada in jeopardy. The only alternative seemingly available to CWR and other prospective shortlines would be to negotiate with the unions to gain concessions regarding branch line employees and their existing work rules.

If, on the other hand, the Supreme Court rules in favour of the CWR, then there may very well be a steady growth in the number

of shortline railways in Canada, as these railways will be able to more effectively utilize their labour.

THE FUTURE OF THE SHORTLINE RAILWAY INDUSTRY IN CANADA

What, then, is the future of the shortline railway industry in Canada? Notwithstanding the initial success of CWR, the outlook for other shortline railways is mixed. What is certain is that Canada will likely never experience the situation that occurred in the U.S. in the late 1970's and early 1980's, that is, a tremendous increase in the number of shortline railways in that country. This is partly because CN and CP are not in the dismal financial situation that the large American carriers experienced in the late 1960's and early 1970's. A more likely scenario is a few well-conceived and well-managed shortline railways operating in Canada within the next few years. The extent of the growth is dependent on three factors: the labour issue; the new legislation and how it is used and interpreted; and the issue of abandonment. The relationship between the Class 1 carrier and the shortline will also be a factor as will the availability of financing.

The recent ruling by the Canadian Labour Relations Board and the upholding of this ruling by the Federal Court of Appeal could have severe repercussions on the future of the shortline railway industry.

The hearing of the appeal of the CLRB decision by the Federal Court of Appeal, however, has changed the situation slightly as the two courts offered different reasons for concluding that the CWR must inherit the unions. Payne has asked the Supreme Court to hear his case. This, coupled with the passage of Bill C-5, may change the situation.

If the shortlines are required to retain the existing unions and their contracts, one of the major advantages of a shortline railway, the better utilization of labour, will be negated. The American experience has shown that considerable savings can be realized if the labour required to operate the line is used more efficiently than when the Class 1 carrier operated the line. It was not union labour that many American shortlines objected to using; rather, it was the outmoded and restricted work rules that existed in many union contracts.

Another factor of critical importance is the new legislation contained in the *National Transportation Act (1987)*. The following sections of this Act will probably be of importance to shortline railways: Sections 129-130, Joint Rates; Sections 144-145 and 147, Level of Service; Section 148, Running Rights and Joint Track Usage; Section 150,

Connections; Section 152, Interswitching; and Sections 158 and 174, which deal with the sale and acquisition of rail lines. In addition, Sections 159 to 177, which concern abandonment, will undoubtedly be of relevance to shortline railways.

For disputes between a Class 1 and a shortline railway concerning Sections 129-130, 144-145, 150, and 152, a shortline can appeal to the newly created National Transportation Agency to rule on an issue.

To date, few decisions have been made by the Agency involving any of the above Sections and until several are made, it will be difficult to determine if the protection provided to shortline railways by the new legislation will be beneficial.

For any disputes involving Section 148, Running Rights and Joint Track Usage, the Agency will base its decision on what they consider is in the "public interest." Applications to abandon track (Sections 158-177) must also be considered in the public interest if the application is to be granted.

As for the NTA's interpretation of "public interest," they have generally considered that the application must benefit more than the shippers located along the line; rather, the consumers of the product being shipped must also benefit. Shortline railways, if they wish to use the trackage of another railway, will likely be required to prove that both the shippers and consumers alike will benefit from their application.

The third factor is the issue of abandonment. A line must be maintained if it is considered to be in the public interest. Section 167 lists the six criteria to be used by the Agency to determine "public interest:" one, the loss incurred by the railway operating the line; two, the alternative transportation facilities available and whether the facilities effectively serve the shippers; three, the effect of the abandonment on other lines and on the transportation system in general; four, the economic impact on the community that would be affected by the abandonment; five, the feasibility of maintaining the branch line by operating it with another railway company; and six, the probable future transportation needs of the area.

The new legislation will allow the railways to abandon up to 4% of their total system each year. Although CN and CP would like to be able to abandon more track in a shorter period of time, this 4% is an improvement over the existing situation. In addition, the railways may sell trackage to another railway company, thus avoiding abandonment (Section 158), or a railway company may offer to purchase a line scheduled for abandonment and if a satisfactory purchase price cannot be reached, the Agency will decide on a price. These legislative aspects of abandonment, in addition to CN's and CP's well-known desire

to abandon track, would appear to offer numerous opportunities for shortline railways.

Another factor which will determine the future of shortline railways in Canada will be the relationship between the shortline and the previous owner, most likely CN or CP. One area of concern will be that the shortline will probably be captive to either CN or CP. In the absence of competition, that railway may be inclined to provide an inadequate level of service, or an inequitable division of rates. Although both level of service and joint rates are covered by the new legislation, it is not known how the Agency would respond to any appeals made by a shortline, and whether the decision would benefit the shortline.

CP Rail's Jacques Cote feels that a good working relationship between the shortline and the Class 1 carrier is essential, and that the shortline should not rely on the new legislation to protect them. It is also likely that the shortline will agree in advance to supply all its traffic to either CN or CP. Officials at CN agree with Mr. Cote's statement, saying that the relationship between the shortline and the Class 1 should be similar to a partnership.

Financing will also pose a problem in the future, particularly private financing. Canadian law requires that the dissolution of a Canadian railway can only be accomplished by petitioning the government, which would make it difficult for the lender to sell the assets of a shortline in default. Securing public financing will also be difficult. Unlike the U.S. in the 1970's, there are no formal programs available for shortline railways for financial assistance at either the provincial or federal levels. In addition, there appears to be considerable reluctance on the part of local governments to provide funds for the various proposed shortlines. Section 175 provides assistance for transportation alternatives in the case of branch line abandonment, but Transport Canada has interpreted this as meaning non-railway alternatives, resulting in shortlines being ineligible for assistance under this program. As for the Ontario and British Columbia provincial governments, both have indicated that they while they will support cost effective transportation alternatives, there are no existing programs established to assist shortline railways.

A distinction must be made between shortline railways that will operate on grain dependent branch lines and those that will operate on lines with a traffic mix consisting of products other than grain. Although those lines which carry grain are guaranteed a predetermined rate per tonne for transporting the grain, these shortlines are dependent on just one product. One of the leading causes of failure for American shortlines is depen-

dence on one commodity, and if a drastic drop in the price or demand for Canadian grain were to occur, the shortline would also suffer. Another problem associated with shortlines running on grain dependent lines are the recent rulings concerning labour, which have effectively negated much of the savings that shortlines in the U.S. have historically enjoyed. In addition, another negative factor is seasonality, as grain is not always shipped continuously throughout the year but in irregular movements. This would result in labour and equipment being underutilized for part of the year, as well as having an adverse effect on the firm's cashflow. Finally, grain cars are supplied to the various lines according to the needs of the entire system. Thus, a particular line might not receive all the cars it requires, which would effect both revenues and the level of service it can provide. Balancing these negative factors is the possibility of government subsidies, aside from the subsidy given to transport the grain. Although assistance available under Section 175 of the NTA (1987) is not available to grain-dependent lines designated by the *Western Grain Transportation Act*, and may not be available to other shortlines, other forms of assistance may be available, similar in nature to the aid that the CWR received. Despite these difficulties, it is likely that some grain dependent lines may offer volumes sufficient to support a shortline railway. It is a different situation for those lines which are not dependent on grain. If these new shortlines operate on lines which service manufacturing or processing industries, the operation will not be dependent on one commodity, which will reduce the risk of external factors having too great an impact on their operations. Shortline railways on lines such as these may also be able to increase traffic by improving the level of service to the shipper which, along with the labour savings, are the advantages that a shortline railway enjoys over the previous operator of the line. On the other hand, it is these types of lines which are most susceptible to competition, particularly from trucks. As well, traffic volumes on lines such as these are not nearly as high as the volumes on similar American branch lines which are currently being operated by shortline railways. For these reasons, it is likely that there will be a slow, but steady growth of shortline railways operating on lines of this nature.

There is a third type of branch line that must be considered, lines which carry just one commodity, but not grain. In addition to the problems faced by grain dependent lines - the dependence on one commodity, the demand and/or price for which can be influenced by external factors - the new legislation may work against the development of shortline

railways operating on branch lines such as these. The NTA (1987) is generally thought to be pro-shipper. A potash mining company, for example, which is unhappy with the rate being charged by CN, can enter into a confidential contract with CP and CP, and using CN's tracks and facilities by virtue of Section 148, Running Rights and Joint Track Usage, can transport the commodity. Alternatively, the company can request a Competitive Line Rate from CN to the nearest interchange point (Section 134). Section 134 was designed to assist those shippers who were captive to just one railway. Therefore, a commodity shipper, using Sections 148 and 134, as well as Confidential Contracts, should be able to obtain lower transportation costs. If this is the case, there will be less need for shortline operators, either operated by the shipper or by an independent railway company, to replace the existing carriers.

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