

The agreements also permit alternate uses of the cars. Specifically, the railway companies may use the government hopper cars to transport any grain not listed in Schedule II or for transporting other commodities. Also, the railway companies may use the cars to move grain into eastern Canada, through eastern Canada into the United States, and southbound for export into the United States. For any of these alternate uses, the railway companies must pay a fixed rate per day, the "alternate use" fee.

In addition to the government-owned hopper cars provided to the railway companies by the federal and provincial governments, the GOC also provided 1,675 leased hopper cars to the CP through the CWB during the POI. Specifically, in March 1981, the GOC entered into a contribution agreement with the CWB directing the CWB to lease, on behalf of the GOC, hopper cars designed for the transportation of grain, including subject merchandise. The agreement also directs the CWB to provide the leased hopper cars to the railway companies for the transportation of Western Division grain. Pursuant to the terms of the contribution agreement, the CWB is obliged to make lease payments for the leased hopper cars in a timely manner and to invoice the GOC for costs that the CWB incurs. The GOC, in turn, fully reimburses the CWB for the lease costs.

Similar to the various operating agreements for the government-owned hopper cars, the operating agreement between the CWB and the CP provides the CP with the day-to-day operation and use of the hopper cars. The CP, in turn, has to repair, maintain, and service the hopper cars and to transport grain as listed in Schedule II. The CP is also required to pay alternate use fees for transporting grain not listed in Schedule II or for transporting other commodities, and for transporting grain to destination ports other than Vancouver, Prince Rupert, Churchill, Thunder Bay, and Armstrong, including the transportation of grain to the United States. Under the alternate use agreement, the CP is required to pay a fixed alternate use fee to the CWB. The CWB reduces the reimbursement amount it requests from the GOC by the amount of alternate use fees it collected.

According to the GOC, it acquired hopper cars "to cover the railways' inability to make the investment with their own resources." The GOC also stated that the regulated railway rates in effect at the time "did not fully compensate the railways for all of their costs." The GOA and GOS stated that they acquired their hopper cars because,

at the time, the railway companies were not willing to invest in hopper cars because the regulated railway rates were not compensatory.

For these preliminary determinations, we are treating the railcars provided by the CWB to the CP as if they were provided directly by the government. This is because, with respect to these railcars, the CWB is acting as an agent of the GOC, leasing the cars on GOC's behalf and receiving full reimbursement of the lease fees. Therefore, for both the CWB- and government-provided railcars we have analyzed whether the railway companies have been entrusted or directed (within the meaning of section 771(5)(B)(iii) of the Act) to make a financial contribution (provision of services under section 771(5)(D)(iii) of the Act) by means of the provision of railway services to the CWB for less than adequate remuneration (within the meaning of section 771(5)(E)(iv) of the Act).

First, we preliminarily determine that the operating and alternate use agreements entered into between the governments (including the CWB) and railway companies, require the railway companies to transport Western Grain.<sup>2</sup> Through the operating and alternate use agreements, the governments are directing the railway companies to provide transport services for Western Grain. Therefore, we preliminarily determine that the CP and CN have been entrusted or directed to provide rail service for the movement of Western Division grain, including grain shipped by the CWB.

Second, we preliminarily determine that the provision of this rail service is a financial contribution within the meaning of section 771(5)(D)(iii) of the Act, that is, provision of services other than general infrastructure. Moreover, the services are being provided to a specific group, the CWB and other users of hopper car services, within the meaning of section 771(5A)(D)(iii)(I) of the Act.

Finally, we preliminarily determine that the CN and CP are providing these rail services for less than adequate remuneration within the meaning of section 771(5)(E)(iv) of the Act. Pursuant to the Canada Transportation Act, the railway companies determine the prices they charge for railway services by way of published tariffs, confidential contracts negotiated between the railway company and the shipper, or by a combination of the two.

<sup>2</sup> See Memorandum to Susan H. Kuhbach, dated March 3, 2003, "Analysis of Provision of Government-Owned and Leased Railcars as Indirect Subsidies," which is on file in the CRU.

The CWB negotiates with the railway companies with respect to the published tariffs and other factors affecting freight rates.

In determining whether adequate remuneration has been paid, § 351.511(a)(2)(i) of the Department's regulations states that the Department will normally compare the prices in question to market-determined prices in the country where the service is being provided. There is no information on the record of these investigations about prices charged by other railways in Canada for hopper car service. Section 351.511(a)(2)(ii) directs that where no market-determined prices are available in the country where the service is being provided, the Department should look to world market prices as a measure of adequate remuneration, if such prices are available to the purchasers of the service. There is no information about world market prices for hopper car service, or the availability of such prices to Canadian hopper car users. Therefore, to determine whether the CN and CP have received adequate remuneration for their provision of hopper car services, we have examined whether their prices are consistent with market principles. See section 351.511(a)(2)(iii).

In 2000, a study was prepared for Transport Canada, the government agency that administers the GOC-owned hopper cars, by the Sparks Company Inc. (the "Sparks Study"). This study concluded that disposal of the government-owned hopper cars and termination of the provision of these hopper cars by the federal and provincial governments to the railway companies would have the effect of adding ownership costs for these cars to the railway companies' and/or shippers' costs. The Sparks Study estimated the ownership costs for these cars to be between C\$2.00 and C\$3.00 per ton of grain transported.

Based on the conclusions of the Sparks Study, we preliminarily determine that the rates charged by the CN and CP for hopper car service do not reflect the ownership costs of these cars and, consequently, the rates are not consistent with market principles. As a result, we preliminarily determine that the CN and CP are providing these railcar services for less than adequate remuneration.

To calculate the benefit to the CWB, we multiplied the total volume of grain the CWB shipped during the POI by the added ownership costs (modified as described below) to arrive at the total benefit the CWB received from the subsidy. As a starting point, we used the mid-point (*i.e.*, C\$2.50 per tonne) of the Sparks Study's estimate of C\$2.00 to