CANADIAN INDUSTRIAL TRANSPORTATION ASSOCIATION
ASSOCIATION CANADIENNE DE TRANSPORT INDUSTRIEL

FREIGHT MANAGEMENT ASSOCIATION OF CANADA
ASSOCIATION CANADIENNE DE GESTION DU FRET

FMA (Formerly CITA) Response to:

Canadian Transportation Agency Consultation Questions

Consultation Questions for the Review of the *Third Party Liability Insurance Regulations*

Topic: Requirements specified in the Regulations

The Regulations currently state that the Agency will examine the risks associated with the proposed construction or operation of a railway based on these ten factors:

passenger ridership,
passenger and freight train miles,
volume of railway traffic,
class and volume of dangerous goods transported by rail,
types of population areas served,
number of level crossings,
speed of trains,
train crew training,
method of train control, and
overall safety record of the applicant.

Q1. Are those factors sufficient or should the Agency expand the list to better assess the risks and why?

Answer: The ten factors in the list are appropriate, but not complete. The additional factors that should be included are (1) a detailed assessment of the overall safety record of the applicant in the handling of dangerous commodities for the current and past 5 years (2) a detailed assessment of the overall safety record of the applicant in the relation to the severity of accidents involving dangerous commodities for the past 5 years (3) the sufficiency of, and the railway's adherence to rail operating rules over the past 5 years, and (4) the seasonality of the railways' overall safety record of the applicant over the past 5 years, especially of dangerous

goods. (5) the geographical area of operation relative to populated areas, including route miles, rail yards.

Q2. What factors, if any, should be removed and why?

Answer: No factors should be removed. All are relevant in evaluating risk. However the factors should be supplemented by the additional items set out in Q1 above, which need to be thoroughly evaluated and provide more detailed information than is currently available in statistics published and available from Transport Canada's records and other data.

Q3. Should there be additional and/or different third party liability insurance requirements related to the transportation of certain commodities, such as dangerous goods? If so, why?

Answer: As railway "common carrier" obligations require railways to handle all traffic offered, liability insurance requirements should cover all risks associated with all traffic carried. Assessing the different risks associated with different commodities would be both complex and controversial. In addition, administration would be difficult. The existing laws suffice to allocate all liabilities.

Q4. Should there be additional and/or different third party liability insurance requirements related to the transportation of passengers? If so, why?

Answer: No. The comments included in answers to questions 1 to 3 apply to this question.

Topic: Minimum requirements

Railway operations can vary a great deal in terms of the volume of traffic, commodity mix, scope of operations, whether in rural or urban areas, number of crossings, etc. Because of this, the current federal *Regulations* do not set definite amounts, neither minimum nor maximum.

Q5A. Should the Regulations be revised to establish minimum requirements? If so, why?

Answer: We believe that the regulations currently establish the

requirements. There are, for instance, additional safety requirements for the handling of dangerous commodities. Strict adherence to existing regulations should provide for safe railway operations. Parsing or qualifying requirements based on such terms would create different classes of railway safety, create unnecessary confusion among railway operations personnel and be difficult, if not impossible to enforce.

Q5B. If so, should there be a distinction made between general commodities and dangerous goods? Please provide your reasons.

See answer to Q5A above.

Q6. Should there be separate minimum requirements for Class I railway companies and for short-line railway companies? Please provide your reasons.

See answer to Q5A above.

Q7. If you think minimum requirements should apply, what should they be and what approach should the Agency use to establish a minimum requirement?

See answer to Q5A above.

Topic: Federal railway companies obligations to inform

Legislation places the onus on the railway company to notify the Agency in writing, without delay, whenever it cancels or alters its third party liability insurance coverage, or whenever a change in construction or operation may mean that its coverage is no longer adequate.

Q8. What mechanisms should be established in the Regulations to ensure that railway companies notify the Agency of all substantive changes on a timely basis?

Answer: There could be mandatory requirement for railways to report on periodic basis, say monthly, annually or biannually, whether or not there were significant changes, as established by the Agency. This would be in addition to the continuing requirement for railways to report on their own initiative when substantive changes occur as they occur.

Q9. In the case of non-compliance, would administrative monetary penalties be an appropriate mechanism? Are there better ones? Please provide your reasons.

Answer: In the case of non-compliance, administrative monetary penalties would be appropriate. Such penalties should be set high enough to strongly encourage compliance.

Q10. What, if any, mechanisms should be established in the Regulations to ensure that railway companies notify their insurer of all substantive changes on a timely basis?

Answer: As part of the requirement in our answer to question Q8, the railways should be required to include in their periodic report to the Agency, a copy of all reports of substantive changes sent to their insurer since the previous periodic report to the Agency. In addition the administrative monetary penalties should apply where the regulatory requirement to notify the insurer is breached. Any administrative penalties should be set high enough to strongly encourage compliance.

Topic: Assessment of financial capacity

The Regulations state that the Agency will assess the financial capability of the applicant to sustain any level of self-insurance, whether it is a deductible or self-insured amount. For this purpose, the Agency examines the railway company's audited financial statements for the three most recent complete fiscal years.

Q11. Should the Agency continue with this practice, or should the Agency establish additional requirements?☐If, for any reason, the Agency believes that the insurance company may not have the financial ability to pay its contractual level of insurance coverage, the railway company may be required to provide the Agency with the last three years of the insurance company's audited financial statements and/or the insurance company's solvency rating, as

determined by recognized rating agencies.

Answer: The Agency should continue with the current practice of examining the railway companies' financial statements for the three most recent fiscal years and, where the Agency has concerns, the Agency should evaluate the ability of the insurance provider to meet its contractual obligations. The examinations should be done of each railway, each year, even if this requires additional resources at the Agency.

Q12. Should the Agency continue to assess the financial strength of the insurance company to pay its contractual level of insurance coverage?

Answer: This question seems similar to question Q11. However, if the intent of this question relates to evaluating the ability of any or all insurance companies providing third-party liability insurance to federally regulated railway, then it would seem prudent for the Agency to carry out a periodic overview of each insurance provider, say yearly.

Topic: Confidentiality

Currently, all documents filed with the Agency become part of the public record and may be made available for public viewing. However, in accordance with the Agency's General Rules, a claim for confidentiality can be made. In practice, railway companies tend to claim as commercially confidential all its financial information, including information related to the amounts of insurance coverage.

Q13. What information submitted in an application for, or a variance to, a certificate of fitness should be made public and what should remain confidential? Please provide your reasons.

Answer: While some of the information, required to be submitted to the Agency for a Certificate of Fitness, may be reasonably considered commercially confidential, most of the information should be made public. For example, if the amount of coverage requested by a railway is turned down by an insurance company, it would be in the public interest

for this to be known, especially by shippers and municipal governments. All applications for certificates of fitness, or variances to existing certificates of fitness should be disclosed to the public, with as much information being made public as possible.

Q14. Should the amount of third party liability insurance and the self-insured retention amount be made public? Please provide your reasons.

Answer: Yes. This information is vital to the public interest. It would be of value to all levels of government, especially municipal governments to know what level of third party liability coverage exists. It is also of importance to shippers in determining routings and carriers for shipping their products, especially shippers of dangerous goods. As the Lac-Mégantic derailment has demonstrated, all levels of government can be called upon to fund recovery of accidents if the carrier does not have access to the appropriate resources.

Topic: Other Issues

If you wish to provide your views on other third party liability insurance coverage or accountability related issues, or express any opinions related to the Agency's current regulatory regime, please feel free to provide them.

Comments: In balancing off the various issues related to the *Third Party Liability Insurance Regulations,* the possible discontinuance of operation by short-line railways will need to be part of the Agency's evaluation. While appropriate third party losses must be protected, if changes in the regulations cause some short-lines to cease operations, the implications on shippers, communities, local road transportation and infrastructure, and the regional economies affected will need to be carefully evaluated by the Agency.

Consistent with this requirement, the agreements in place between railways relating to the interchange of traffic and provisions the railways have agreed upon when the short-line

railways were and are set up are essential to be disclosed. We believe that such agreements further define the liability and indemnity requirements and other provisions between the parties that the Agency and the public should be aware of in order to assess third party liability coverage or accountability related issues.

In addition, the underlying basic legal premise that the allocation of liability according to existing law must be maintained.

Canadian Industrial Transportation Association
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Note: In January 2014, CITA is transitioning to its new name: the Freight Management Association of Canada (FMA).