



**CANADIAN
PACIFIC**

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Third Party Liability Insurance Coverage Regulations Review
Dispute Resolution Branch
Canada Transportation Agency
Ottawa, Ontario K1A 0N9

Thank you for the opportunity to comment on the Canadian Transportation Agency's review of Railway Third Party Liability Insurance Regulations. The consultation is important especially in light of the tragic incident at Lac Megantic, Quebec in July of 2013.

The task undertaken by the Agency raises complex issues that have policy implications beyond the legislative mandate of the Agency, but the narrow issues of insurance and operational risk are unavoidably influenced by and linked to broader policy concerns. CP notes the Agency's suggestion that based on the input received, the Agency may propose revisions to the regulatory framework and consult again with stakeholders on any proposed regulatory changes and welcomes this approach.

CP will provide general comments on the issues raised and address, where it can, the specific questions raised by the Agency in the Discussion Paper.

General Comments

The movement of hazardous commodities by rail is initiated by shippers and driven by demand. Shippers make independent decisions related to the product they choose to ship. Those decisions directly impact risks associated with rail carriage, a matter that the Agency is charged with assessing under the current regulatory framework. A clear example of a decision by a shipper which affects the risk profile is the provision of shipper supplied rail tank cars which can be minimum standard (yet approved for use), or they can be a higher standard car that reduces the probability of lading loss, thereby reducing transportation risk and increasing public safety. This is a shipper choice. The railway is obligated to carry the minimum standard car and it is unlawful for a railway to refuse. Shippers load the product, determine the type of car, direct the destination (which controls route) and drive the volumes shipped.

Railways must move hazardous commodities as part of their level of service obligations, yet those products carry significant risk to the railway, employees, first responders and members of the public in communities that have been developed around rail infrastructure. A solution that does not recognize and deal with shipper controlled inputs to risk will have unintended consequences, increased social cost and higher public risk. It is within this broader framework that the narrow concepts of insurance and operational risk fit.

At the outset insurance should be recognized for what it is; an inadequate secondary layer of protection. Insurance comes into play only after fatalities occur, persons are injured, property damaged, business interrupted and/or the environment impacted. Insurance is necessary but must be kept in perspective. Broader safety initiatives, balanced commercial allocation of risk and the fundamental need to encourage shared responsibility in the supply chain must not be diluted by a false sense of security that insurance will somehow cover the risks and adequately compensate for tragic loss. All parties must share in the responsibility to reduce the risk.

Not only is insurance a secondary layer of protection, as the Agency has recognized in its discussion paper, “there are practical limits to what railway companies can obtain in the market for third party liability insurance”. CP agrees and can advise that this limitation applies to all North American railways. Furthermore, even where available, insurance is not designed to fully cover a railway for all liability. There are policy limits, limits in the scope of coverage and self-insured retention levels that limit insurance to only a portion of the risk. Loss over and above insurance limits can be catastrophic and sufficient to drive some railways out of business.

Commercially available coverage will vary between Class 1 and federally regulated Short line railways, yet the risks presented to the public will be essentially the same on either property. Both are railways subject to the jurisdiction of Parliament and both are required by shippers under level of service obligations to carry the product, accept shipper cars and interchange with other railways, yet the level of insurance commercially available can differ widely between Class 1 and Short line railways.

The term “risk” seems straight forward but there needs to be a common understanding and application of the term in order to truly assess the adequacy of third party liability insurance coverage. Traditional definitions of risk are tied to simplistic formulae often expressed as probability x loss. The traditional approach to risk understates risk. More probative methodologies which consider value at risk (VAR) and tail value at risk (TVAR) should be reviewed for suitability and use in Agency considerations of risk and ultimately the Agency’s determination that there is, “sufficient insurance, including self-insurance, to compensate for matters that may arise out of an applicant’s proposed construction or operation related to the issuance of certificates of fitness and third party liability insurance coverage”.

One risk factor examined by the Agency is the “class and volume of dangerous goods transported by rail” and the legislation purports to place the onus on the railway company to “notify the Agency in writing, without delay” where change in operation may mean that its coverage is no longer adequate. The difficulty is a railway may be presented with hazardous

commodities at any time, either directly from a shipper or indirectly on interchange with another carrier or series of carriers. A railway does not necessarily know in advance that this traffic is coming as timing, volumes, origin, destination and routing are determined by the shipper, but what is clear is the traffic cannot be refused under current applications of the common carrier obligation. At that point a single TIH car on a railway which has not carried this traffic before has created a change in operations that may mean coverage is no longer adequate and any notification to the Agency is necessarily after the fact.

Catastrophic incidents can arise without fault or negligence on the part of the railway and there is no accountability in the existing Railway Third Party Liability Insurance Regulations for those who create, own, and put high risk products into the supply chain. CP suggests that the federal government should require shippers to have appropriate insurance coverage.

Responses to Specific Questions:

Requirements specified in the Regulations:

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

Q1. Response: The factors that are currently considered by the Agency appear to be in order but the relative weighting is unclear and we do not have any insight as to how the factors are applied in practice. For example, it is reasonable to assume that a factor related to risks driven by the number of crossings on a railway, would lead to a consideration of sub factors, such as the type of protection in place at those crossings, but this is not clear. Similarly if track speed is relevant, those deliberations must also factor in the class of track under review as speed alone is not determinative of risk.

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

Q2. Response: CP does not see any items that need to be removed from the 10 factors listed but whether or not any one factor is applied or not applied will depend on the facts of the case under review and any relevant sub factors. The metrics cannot be seen as a ‘one size fits all’ review or worse a “checklist”.

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?

Q3. Response: CP and other North American Class 1 railways purchase what the insurance market offers commercially. The limits purchased are not specifically tied to the transportation of certain commodities, such as dangerous goods.

Shippers/Brokers must also ensure they have the financial capacity to address the risks associated with the commodities they ship.

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

Q4. Response: After the Metrolink incident in California, the cap of \$200M in the US for passenger liability is perhaps one that Canada should adopt as well. This will give certainty of exposure to all parties facing a passenger exposure and will provide clearly defined limits of insurance that must be maintained.

Minimum requirements

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

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

Q5. Response: After the Lac Megantic incident it would seem that there should be minimum insurance requirements placed on both the shipper and the carrier of hazardous commodities. This issue will be more acute when addressing the transportation of hazardous commodities on Shortline railways in terms of on how much insurance is actually available for purchase and at what cost. Setting unattainable minimum insurance coverage can potentially drive a Shortline out of business. Not imposing sufficient minimums levels will leave the potential for shortfall to be imposed on the public as the Lac Megantic incident has demonstrated. How much insurance is “adequate” in the face of the enormous risk presented by the transportation of hazardous commodities is an impossible question to answer because in the most tragic circumstances no amount of available insurance will be “adequate”.

***Q6.** Should there be separate minimum requirements for Class I railway companies and for shortline railway companies? Please provide your reasons.*

Q6. Response: CP’s position is set out in the answer to Q3 and as outlined in our general comments. The risks associated with movement of hazardous commodities for example, does not change when the traffic moves from a Class 1 to a Shortline railway, or from a Shortline to a Class 1 railway. It is the product shipped that presents the risk to the public.

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

Q7. Response: Arguably, Shortline operations not handling hazardous commodities could exist with some lower level of coverage, but this approach raises the scope of the common carrier obligation. It would require a Shortline to be able to refuse to carry certain hazardous commodities in order to stay within its limits. Consideration needs to be given to how shippers will be practically prevented from sending hazardous commodities to a shipper on a federal Shortline.

Federal railway companies obligations to inform

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?

Q8. Response: The Agency needs to define what is meant by ‘substantive changes’. It is not practical to inform of every change made to insurance coverage and as long as the minimum requirements are being met and evidenced with a certificate of insurance on an annual basis, there should be no other need to notify other than cancellation of coverage.

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

Q9. Response: Monetary penalties might be considered, but the value is limited. Again, Class 1 railways buy the commercially available insurance. At a minimum the process of determining non-compliance needs to be clearly defined and communicated to all parties who may be affected by the potential penalty. Currently there is no visibility in to determining how decisions are made with respect to compliance or non-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?

Q10. Response: Regulators should not be involved in the management of communication between railway companies and their insurers. There should not be any defined regulatory mechanisms in this regard. Railways are expected to be commercial enterprises under the *Canada Transportation Act*, with the freedom and expectation they will conduct their business as would any other business in Canada.

Assessment of financial capacity

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.

Q11. Response: The Agency should establish, that all stakeholders in the transportation of hazardous commodities including carrier, Shippers and Brokers have the financial capacity to address the risks associated with the commodities they ship.

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

Q12. Response: If the Agency wishes to assess financial statements of insurance companies, this should be undertaken directly by the Agency, or in conjunction with insurance companies and federal and provincial regulators responsible for those entities and who permit those entities to write and issue policies of insurance in Canada.

Confidentiality

***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.*

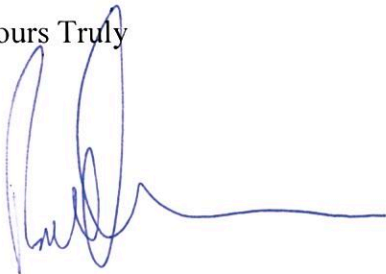
Q13. Response: All financial information (not otherwise publicly disclosed) and all insurance specific information of the applicant railway must be confidential.

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

Q14. Response: The amount of third party liability insurance and the SIR amount should not be made public. This is extremely confidential information as it is with most Canadian businesses.

CP would be happy to engage further in this review or answer any questions the Agency has related to the matters raised in the preliminary reply.

Yours Truly

A handwritten signature in blue ink, appearing to read 'Paul A. Guthrie', with a long horizontal flourish extending to the right.

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Chief Legal Officer & Corporate Secretary
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