



REDACTED VERSION

June 13, 2018

Case No. 17-04473

Dear Sirs:

Re: APPLICATION by Mark Rosner against the Hudson Bay Railway Company (HBR) pursuant to sections 116 and 146 of the *Canada Transportation Act*, S.C., 1996, c. 10, as amended (CTA).

SUMMARY

- [1] Mr. Rosner filed an application with the Canadian Transportation Agency (Agency) against HBR alleging that HBR is in violation of its level of service obligations under the CTA because of the cessation of rail service on an HBR-owned railway line between Gillam and Churchill, Manitoba (railway line). On May 23, 2017, the railway line was deemed unsafe and all train traffic was halted due to flooding.
- [2] Mr. Rosner seeks an order for compensation for the increased costs of goods and job losses, an economic development fund, and an order that HBR repair the line and restore service or follow the transfer and discontinuance process set out in the CTA. HBR responded by arguing that the high cost of repairs to the damaged line, considered in combination with its difficult financial circumstances, should act to exempt HBR from service obligations pursuant to the CTA.
- [3] This Decision addresses the following issues:
- Does HBR's financial position permanently relieve it of its level of service obligations?
 - If not, did HBR breach its level of service obligations?
 - If so, what remedies should be ordered?
- [4] For the reasons set out below, the Agency:
- Finds that since November 2017, HBR has been is in breach of its level of service obligations;
 - Orders HBR to initiate repair of the railway line by July 3, 2018 and resume its operation as expeditiously as possible; and

- Orders HBR to file a report on the progress of the repair on the railway line with the Agency's Chief Compliance Officer on the first day of each month, starting on August 1, 2018 until operation of the railway line has resumed.

BACKGROUND

- [5] HBR is a federally-regulated railway company. It holds a certificate of fitness issued by the Agency on April 29, 1997, and operates railway lines between Flin Flon Junction and Flin Flon, Manitoba; between Sherritt Junction and Lynn Lake, Manitoba; between The Pas and Churchill, Manitoba; and between Thompson Junction and Thompson, Manitoba.
- [6] In late May 2017, flooding due to heavy storm activity caused extensive damage to the railway line operated by HBR between Gillam and Churchill, Manitoba and as a result, operation of the railway line was immediately suspended and has not, to date, resumed.
- [7] On June 1, 2017, OmniTRAX Canada, the business name of Churchill Terminal Company, and the Hudson Bay Railway Company were amalgamated under the name Hudson Bay Railway Company. [REDACTED].
- [8] On June 9, 2017, OmniTRAX Inc. publicly announced that it had completed an initial assessment of the flood-related damage to the railway line, declared *force majeure* and stated that service would be suspended indefinitely. In addition, OmniTRAX Inc. stated that a more detailed inspection would be conducted after the water receded, at which time further information would be provided.
- [9] On October 27, 2017, the Agency opened pleadings on an application filed by Mr. Rosner, who indicated that he brought the application on behalf of the Manitoba New Democratic Party Caucus, alleging that the halt in the operation of the damaged railway line constituted a breach of HBR's level of service obligations under the CTA. On December 8, 2017, Mr. Rosner stated that he is the applicant in this case.
- [10] On November 20, 2017, HBR filed its answer to the application (answer).
- [11] On November 27, 2017, Mr. Rosner filed a notice pursuant to section 24 of the *Canadian Transportation Agency Rules (Dispute Proceedings and Certain Rules Applicable to All Proceedings)*, SOR/2014-104 (Dispute Adjudication Rules) requesting HBR to answer written questions and to provide documents (notice).
- [12] On November 29, 2017, HBR filed an objection to Mr. Rosner's notice. On November 30, 2017, pursuant to section 32 of the Dispute Adjudication Rules, Mr. Rosner filed a request with the Agency to require HBR to answer the written questions and provide documents (section 32 request).
- [13] On January 29, 2018, the Agency issued Decision No. LET-R-6-2018 (Decision), granting Mr. Rosner's section 32 request to require HBR to respond to some questions and notifying the parties

that it would convene an *in camera* oral hearing to hear arguments with respect to the remaining questions. In addition, the Agency granted HBR's request for confidentiality with respect to the financial documents filed in support of its answer.

- [14] On February 15, 2018, the Agency held a hearing by video conference. On April 17, 2018, the Agency issued Decision No. CONF-6-2018 requiring HBR to answer certain additional questions.
- [15] On April 11, 2018, the Agency accepted a position statement filed by Unifor - the bargaining agent representing HBR's railway car technicians, diesel engine mechanics, industrial electricians, training and servicemen - in support of Mr. Rosner's application and provided HBR an opportunity to file a response to this position statement. On April 18, 2018, HBR filed its response to the position statement.
- [16] On May 8, 2018, HBR filed its answers to Mr. Rosner's additional questions and a request for confidentiality.
- [17] On May 15, 2018, Mr. Rosner filed a reply to HBR's answer.

PRELIMINARY MATTER

HBR's request for confidentiality

- [18] HBR identifies as confidential information related to the corporate relationship between HBR and OmniTRAX Inc. and OmniTRAX Canada and its corporate structure chart. According to HBR, the information relates to private companies (and the interrelationship between those companies) that are not the subject of the application and that the information is not publicly shared by those companies. HBR submits that the financial information identified as confidential, and its balance sheet and statement of income is information that is covered by its request for confidentiality that was granted in the Decision.
- [19] With respect to Mr. Rosner's reply, HBR identifies as confidential information that is covered by its request for confidentiality that was granted in the Decision relating to its financial documents (i.e. unaudited balance sheet, statement of income and statement of cash flow). HBR also claims that Mr. Rosner quoted confidential information from its corporate structure chart.
- [20] Pursuant to section 31 of the Dispute Adjudication Rules, the first step in determining whether a confidentiality request should be granted is determining whether the document is relevant to the dispute proceeding. The second step is to determine whether specific direct harm would likely result from the disclosure of the information claimed as confidential. The third step is to determine whether the public interest in having the document disclosed outweighs the specific direct harm demonstrated.
- [21] The Agency has considered HBR's request for confidentiality and finds that the information HBR identified as confidential is relevant to the proceedings as it provides details on HBR's financial operations and corporate structure. The Agency also finds that the disclosure of this information would likely cause specific direct harm to HBR and the private companies identified in the

corporate structure chart, and that the public interest in its disclosure does not outweigh that potential harm.

- [22] The Agency therefore grants HBR's request for confidentiality. Accordingly, the public versions of HBR's answers to Mr. Rosner's questions and Mr. Rosner's reply as submitted by HBR, from which the confidential information has been redacted, will be placed on the Agency's public record, and the confidential versions of these documents will be placed on the Agency's confidential record.

THE LAW

- [23] Sections 113 to 115 of the CTA set out a railway company's level of service obligations. Specifically, paragraph 113(1)(b) of the CTA states that a railway company shall, according to its powers, in respect of a railway owned or operated by it, furnish adequate and suitable accommodation for the carriage, unloading and delivering of the traffic.
- [24] Part III, Division V of the CTA sets out a process through which a railway company may either transfer a railway line for continued operation or discontinue operation of that railway line.
- [25] In May 2014, the Agency received a temporary authority under the *Fair Rail for Grain Farmers Act*, S.C., 2014, c. 8 to order the payment of expenses incurred by any person adversely affected as a result of breaches of a railway company's level or service obligations. That authority ended on August 1, 2016, and was restored when the *Transportation Modernization Act* received Royal Assent on May 23, 2018.

POSITIONS OF THE PARTIES

Mr. Rosner's position

- [26] Mr. Rosner submits that HBR has breached its level of service obligations because it has not repaired and resumed operation of the railway line. Mr. Rosner argues that even if the flood is found to be a *force majeure* event, this would only entitle HBR to a reasonable pause period, not to discontinue service on the railway line.
- [27] Mr. Rosner submits that on June 16, 2017, the president of OmniTRAX Canada claimed that the company did not have the financial resources to repair the damage caused by the flooding to the railway line; Mr. Rosner notes that this claim was made in advance of an actual inspection of the damage to the railway line.
- [28] Mr. Rosner further submits that on July 18, 2017, "OmniTRAX" claimed that the damage to the railway line could be repaired by the end of October 2017 at a cost of between \$20 to \$60 million. According to Mr. Rosner, "an independent experienced operator in the region" estimated that the repairs could be completed in 45 days at a cost of \$2 million. Mr. Rosner alleges that, in addition, "OmniTRAX":

- refused to commit to repairing the railway line, stating that it is not “commercially viable” and thus, ought to be treated as a public utility, with different levels of government funding repairs; and
- stated that the elimination of the Canadian Wheat Board and the ending of the Churchill Gateway Development Corporation negatively impacted the commercial viability of the railway line.

[29] According to Mr. Rosner, the cessation of service has caused severe and ongoing economic losses to the Town of Churchill and surrounding communities, specifically, the “steep and sudden” rise in cost of all goods previously moved by rail, goods such as “foodstuffs, building supplies and materials, and basic household items such as diapers and blankets, as well as job losses.”

[30] Mr. Rosner maintains that “OmniTRAX” has made no attempt to negotiate with or compensate the people of Churchill for the various negative economic impacts.

[31] Mr. Rosner argues that HBR’s refusal to repair the line for economic reasons is not a “legitimate exception under the CTA.” Mr. Rosner further argues that, because of the corporate relationship between HBR and [REDACTED], the Agency should consider the financial contribution [REDACTED] could make when assessing HBR’s ability to repair the railway line.

[32] With respect to the estimate to repair the railway line put forth by HBR, Mr. Rosner acknowledges that there is no evidence to dispute this amount. Notwithstanding, he submits that HBR did not contact any contractor with respect to the immediate essential repairs to the railway line and that “a more fulsome investigation . . . may have generated a different cost estimate for the immediate essential repairs to the rail line.”

[33] Mr. Rosner submits that although a railway company’s level of service obligations are “permeated by a level of reasonableness,” the test of reasonableness goes beyond the consideration of financial circumstances.

[34] Mr. Rosner claims that HBR has discontinued operations on the railway line but that it has not followed the discontinuance process set out in section 146 of the CTA.

Unifor’s position

[35] In support of the applicant, Unifor submits that the level of service obligations set out in the CTA must be fulfilled until a railway company “ceases its operation” or a railway line is abandoned pursuant to the discontinuance provisions of the CTA.

[36] Unifor notes that the Agency has found that when a *force majeure* event damages railway infrastructure, it may be temporarily unreasonable for a railway company to provide direct service using that infrastructure (reasonable pause period). Unifor argues that such a pause period is to be distinguished from the discontinuance process under the CTA, which removes the railway company’s obligations in respect of the operation of the railway line. According to Unifor, unless and until the discontinuance process is complete, a railway company cannot be relieved of its level of service obligations in perpetuity.

- [37] Unifor submits that HBR's claim that the indefinite cessation of its service is justified given that the costs associated with the necessary repairs are unreasonable and contrary to the level of service provisions of the CTA, and that HBR cannot do indirectly what it is not allowed to do directly.
- [38] Finally, Unifor submits that the cessation of service "has caused and continues to cause severe and ongoing economic losses to the Town of Churchill and surrounding communities."

HBR's position

- [39] HBR claims that it "does not have a continuing obligation to provide service" over the railway line. HBR submits that, consistent with previous Agency Decisions, including Decision No. 268-R-2013 (*F. Ménard Inc. and Meunerie Côté-Paquette Inc.*) and Decision No. CONF-4-2017 (*Univar*), level of service obligations are not absolute, but are measured by what is reasonable in the circumstances. According to HBR, its financial incapacity to repair the railway line justifies exempting it from its statutory obligation to provide service.
- [40] HBR states that it retained AECOM, an engineering company, to assess the damage to the railway line. According to HBR, from June 23, 2017 to June 29, 2017 and July 6, 2017 to July 12, 2017, AECOM conducted an assessment of the railway line between Gillam and Churchill. HBR states that in its report dated August 13, 2017 (AECOM Report), AECOM identified essential and immediate repairs, essential but non-immediate repairs, as well as areas which require further inspection to fully assess the damage. HBR indicates that AECOM estimated the cost of repairs at \$43.5 million.
- [41] The AECOM Report set out a 60-day plan to restore service on the railway line, based on performing essential and immediate repairs over 60 days in 2017 and all essential but non-immediate repairs over 90 days in spring 2018. AECOM stated that, based on this plan, "safe passage for light loaded trains could begin in November 2017" while observing that the plan was "ambitious."
- [42] The essential and immediate repairs identified by AECOM are:
- repairs to and stabilization of structures and infrastructure that are needed immediately to make the track safe for passage of trains; for example, investigate the underlying strata and engineer the reinforcement of the embankments, and then conduct the repair; and
 - improving track surfacing to eliminate the "impassable track" surface defects that were caused by complete inundation and then rapidly receding waters.
- [43] The essential but non-immediate repairs identified are repairs to structures and infrastructure that do not require immediate repair or rehabilitation; for example, adding new or additional culverts to improve hydraulic flow capacity at a particular location, or to improve track profile at bridge "pile-jacking" locations.
- [44] AECOM states that these repairs are not required to be performed before the line is restored for traffic but need to be completed within a few months after the line is in operation.

- [45] AECOM also stated that, in some areas, additional investigation will be performed to fully determine the extent of the repairs required.
- [46] HBR also filed a Temporary Restricted Service Repair Plan prepared by AECOM, dated October 6, 2017. The repair plan outlines a 30-day plan to restore restricted service to the line; specifically, to open the railway line for work train type service to take emergency supplies/provisions to Churchill during the winter of 2017/2018. AECOM notes that regular train service or VIA rail service should not be contemplated until permanent repairs are carried out. AECOM sets out a “ballpark cost estimate” of \$5 to \$10 million for these repairs and notes that completing these repairs does not significantly impact its estimate of \$43.5 million for the full repairs.
- [47] HBR submits that in a letter dated November 20, 2017 (November 20 letter), AECOM advised HBR that the earliest the railway line could be repaired is November 2018 and that the cost of the repairs would be more than previously estimated.
- [48] HBR argues that given the cost of the repairs and its financial position, it does not have the means to repair the railway line, claiming that “it simply did not and does not have the funds.” HBR submits that its financial statements demonstrate that it is incapable of raising adequate funds.
- [49] HBR, relying on the Supreme Court of Canada’s decision in *Patchett & Sons Ltd v. Pacific Great Eastern Railway Co.*, (1959) S.C.R. 271 (*Patchett*), submits that a railway company’s financial circumstances are an essential consideration in determining what can be reasonably required of it with respect to its level of service obligations. Specifically, HBR submits that it cannot be compelled to bankrupt itself in order to provide reasonable service, and that notwithstanding the fact that its service obligations are “in the nature of a public duty,” they must be tempered by economic considerations.
- [50] HBR argues that the present case is distinguishable from *Univar* in that, unlike CP, HBR has limited financial resources and therefore it should be excused from its level of service obligations. In support, HBR notes that in *Univar*, the Agency stated:
- ... a railway company is generally expected to pay the costs necessary to maintain its railway line and discharge its statutory service obligations, except where the costs of doing so are so disproportionate that they justify exempting the railway company from its statutory duty to provide service.

[51] According to HBR:

This is one of those rare exceptional circumstances where due to a disaster, entirely outside the railway's control, the railway has to stop providing service before discontinuance, 'because costs are so disproportionate that they justify exempting [HBR] from its statutory obligation to provide service.'

[52] HBR argues that even if it had the financial capacity to repair the railway line, consistent with AECOM's repair timeline assessment, it should be excused from any level of service obligations until at least November 2018.

[53] Finally, HBR submits that it has not discontinued the line, and thus has not contravened the discontinuance provisions in the CTA.

FINDINGS OF FACT

[54] As the facts on the condition of the railway line set out in the AECOM Report are undisputed, the Agency find that the following essential and immediate repairs are required:

- 21 track washouts;
- 1 culvert washout;
- 2 bridges with washout damage;
- 2 bridges with other damage;
- 1 bridge with heaving; and
- 3 unstable areas.

[55] With respect to immediate but non-essential repairs, the Agency finds that the following are required:

- 11 CMP culvert locations with washout damage;
- 33 CMP culvert locations to be replaced or repaired;
- 46 wood box culverts to be replaced;
- 8 bridges that require repairs and/or further investigation; and
- 3 unstable areas.

ANALYSIS AND DETERMINATIONS

Does HBR's financial position permanently relieve it of its level of services obligations?

[56] The CTA's long-standing rail level of service provisions reflect the public duty of railway companies to provide service on the railway lines they own or operate.

[57] If a railway company no longer wishes to operate a railway line, the transfer and discontinuance provisions provide a process by which a railway company may be relieved of its service obligation on a go forward basis. Specifically, subsection 146(1) of the CTA states after completing the steps set out in sections 141 to 145, "the railway company may discontinue operating the line on

providing notice of the discontinuance to the Agency. After providing the notice, the railway company has no obligations under this Act in respect of the operation of the railway line.”

[58] Until it transfers or discontinues a railway line, the railway company is subject to the level of service provisions of the CTA in respect to that railway line.

[59] In the present case, operation of the railway ceased in May 2017 after major floods that constituted a *force majeure* event and has not resumed. HBR claims that the costs of the repairs combined with its financial position means that it cannot restore service.

[60] In *Univar*, the Agency considered a similar situation, in which a *force majeure* event prevented CP from being able to provide direct rail service to a shipper. The Agency accepted that a *force majeure* event could make it impossible for a railway company to provide service for a period of time it termed a reasonable pause. However, the Agency specifically rejected the notion that a railway company can be permanently relieved of its service obligations without following the transfer and discontinuance process. The Agency found that:

...when a *force majeure* event damages railway infrastructure, it may temporarily become unreasonable for a railway company to provide direct service using that infrastructure. The Agency notes that this approach is not only consistent with the law, but also with the language of *force majeure* clauses commonly written into commercial contracts and agreements.

[...]

Such a reasonable pause should be distinguished from the discontinuance process, which removes the railway company’s obligations in respect of the operation of the railway line. Until that process is complete, a railway company cannot be relieved of level of service obligations in perpetuity.

[61] The Agency agrees with HBR that when a railway company does not have the financial capacity to continue operating a line, it requires a mechanism through which it can stop doing so. However, HBR’s argument that a railway company should be permanently exempted from its service obligations in light of its financial situation, without following the transfer and discontinuance process, is not consistent with the statutory scheme. A railway company has the option of permanently relieving itself of its obligations in respect of any of its railway lines for any reason - which could include financial challenges – by following the transfer and discontinuance process. A company that does not avail itself of this option has ongoing obligations under Division IV of the CTA, including service obligations.

[62] Considerations of reasonableness may, however, mean that financial considerations play a role in the length of the reasonable pause after a *force majeure* event that damages infrastructure, during which a railway company is temporarily exempted from its statutory duty to provide service. For example, if repair costs are patently disproportionate, the railway company has initiated the transfer and discontinuance process, and if there is every reason to believe that process will be

completed within a relatively short period of time, the reasonable pause could, in certain circumstances, extend to the end of that process.

- [63] The Agency, therefore, finds that HBR is not permanently relieved from its level of service obligations with respect to the damaged railway line.

Did HBR breach its level of service obligations?

- [64] Given that the spring 2017 floods were clearly a *force majeure* event, HBR is, as the applicant himself acknowledges, entitled to a reasonable pause in its service obligations. The question of whether HBR has breached those obligations turns on the length of the reasonable pause. Failure to resume operation of a railway line after the end of the reasonable pause constitutes service breach.

- [65] In *Univar*, the Agency set out the general principles to consider in determining a reasonable pause period, specifically, it stated:

In general, this reasonable pause is the period of time that it would reasonably take to rehabilitate the damage to the infrastructure caused by a *force majeure* event, based on the specific facts of the case. This ensures that the railway company is not required to provide rail service where it would be unreasonable to require it to do so, while shippers are not deprived of the rail service any longer than necessary.

- [66] In the present case, it is necessary to assess when it was reasonable for HBR to have completed the repairs in order to resume operation of the damaged railway line.

- [67] Although Mr. Rosner claims that the repairs could be completed in 45 days, he does not provide any evidence to support this claim, referring to it as being an estimate from “an independent experienced operator in the regions.” Mr. Rosner later acknowledges that there is no evidence to dispute the estimate for repairs in the report but argues that a more fulsome investigation may have resulted in a difference estimate.

- [68] The record before the Agency - and notably, the AECOM Report which HBR itself commissioned - indicates that had HBR taken all reasonable steps to repair the line after the *force majeure* event, the railway line could have been returned to operations for the “safe passage of light loaded trains” in November 2017. While AECOM qualified its estimate as “ambitious”, it is noted that the report itself was completed three months after the flood occurred and that to this day, HBR has done nothing to restore the damaged infrastructure.

- [69] Based on the above, the Agency finds that the reasonable pause extended until November 2017 and that since that time, HBR has been in breach of its level of service obligations.

What remedies should be ordered?

- [70] Mr. Rosner requests that the Agency order:

- compensation for the increased costs of goods associated with alternative transportation and job losses, specifically, the incremental costs due the rise in food prices and essential consumer goods;
- an economic development fund in the amount of \$3 million to compensate for the approximately 50 jobs that have been lost – for lost wages and lost economic activity; and
- the railway line be repaired and the level of service be restored, as per HBR’s level of service obligations or follow the discontinuance process as set out in the CTA.

[71] With respect to the compensation-related remedies sought by Mr. Rosner, the Agency notes that it did not have authority to order payment for expenses at the time of the application; that some of the requested remedies (such as an economic development fund) would clearly go beyond the boundaries of its authority; and that Mr. Rosner did not adduce any evidence in support of the requested compensation. For these reasons, the Agency considers that exercising its discretion to order compensation for expenses is not warranted in the circumstances.

[72] However, the third remedy requested by Mr. Rosner, that is an order requiring HBR to repair and restore service on the railway line, is clearly warranted in the circumstances of an ongoing service breach.

ORDER

[73] The Agency orders HBR to initiate the repair of the railway line by July 3, 2018, and to complete the repair and resume operation of the railway line as expeditiously as possible.

[74] The Agency further orders HBR to file a report on the progress of the repairs to the railway line with the Agency’s Chief Compliance Officer on the first day of each month, starting on August 1, 2018 and concluding when operation of the railway line is resumed.

[75] The progress reports should be filed through the Agency’s Secretariat e-mail address: secretariat@otc-cta.gc.ca.

BY THE AGENCY:

(signed)

Scott Streiner
Member

(signed)

P. Paul Fitzgerald
Member

(signed)

William G. McMurray
Member