

Canadian
Transportation
Agency



Office
des transports
du Canada

Bill C-52

What it means for shippers

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About the Canadian Transportation Agency

- Canada's oldest federal administrative tribunal
- Renders decisions on rail disputes related to certain rates, charges, and level of service
- Handles market entry and exit of rail carriers (CoF)
- Administers the Western grain revenue cap program
- Deals with rail Noise and Vibration complaints
- Complaints related to the provision of incidental services
- Cost apportionment for a road or utility crossing
- Competitive access (interswitching, CLR, running rights)
- Other (marine, air and accessibility matters)

EXISTING DISPUTE RESOLUTION OPTIONS

Under the Canada Transportation Act, the Agency provides:

- Facilitation and Mediation of disputes
- Adjudication of disputes
- Final Offer Arbitration
- Arbitration of rail Level Of Service disputes

Fairness and Transparency in Dispute Resolution

- **Our vision** is a competitive and accessible national transportation system that fulfills the needs of Canadians.
- **Our mission** is to be a respected and trusted tribunal and economic regulator through efficient dispute resolution and essential economic regulation.
- **Our values** include integrity, fairness, transparency and quality of service.

- **Fairness** – follow the rules of natural justice.
- **Transparency** – committed to consultation with stakeholders, providing variety of business-critical information, making access to Agency dispute resolution services easy.
- **Efficiency** - decisions are reasonable and well balanced, issued within established timelines, committed to performance targets.

Rail Freight Service Review Process

- September 2009 - Transport Canada assembled a panel to conduct a review of Canada's rail-based logistics system, focusing on rail service provided to Canadian shippers and customers;
- October 2010 - the Panel released its Interim Report;
- March 2011 - the Panel released its Final Report and Recommendations;
- Fall, 2011 – Facilitator (Mr. Dinning) was appointed by the government to help stakeholders negotiate commercial approaches to railway level of service;
- Spring, 2012 - Following six-month facilitation process, the government tabled Bill C-52;
- June, 2013 – Bill C-52 was passed into law.

Bill C-52 – Key Features

Division II of the *Canada Transportation Act* – Arbitration on Level of Service

- Ss.169.31(1) – If a shipper and a railway are unable to agree and enter into contract under Ss.126(1) respecting the manner in which the railway must fulfill its service obligations, the shipper may submit the following matters in writing to the Agency for arbitration:
 - a) Operational terms with respect to receiving, loading, carrying, unloading and delivering traffic, incl. performance standards and communications protocols;
 - b) Operational terms that the railway must comply with if it fails to comply with terms described in (a);
 - c) Operational terms that the shipper must comply with as it relates to (a) and (b);
 - d) Service provided by the railway that is incidental to transportation;
 - e) Whether the railway may apply a charge with respect to operational terms;

Important Points:

- The process is triggered by the shipper;
- Service agreement is a confidential contract as in Ss.126(1)
- Arbitration can address broad range of service issues but not rates or charges

Bill C-52 – Excluded from LOS Arbitration

- Ss.169.31 (2) and (3) – a shipper is not entitled to submit the following matters to the Agency for arbitration that:
 - a) Is governed by a written agreement including confidential contract;
 - b) Is subject to an order made under Ss.116(4);
 - c) Subject of confidential contract in force immediately before the day on which this section comes into force;
 - d) Is a tariff or a contract resulting from Final Offer Arbitration (FOA);
 - e) Is a competitive line rate;
 - f) Is arbitrator's decision under Level of Service (LOS) arbitration.
- Neither a rate for the movement of traffic nor the amount of a charge for that movement or for provision of incidental services is to be subject of LOS arbitration
- Remedy for the rates remains FOA
- Remedy for charges associated with incidental services remains S.120.1

Bill C-52 – Shipper's Submission + Other Provisions

- S.169.32 – The shipper's submission must contain:
 - Detailed description of the traffic to which service obligations apply;
 - Undertaking with respect to the traffic by the shipper to the railway to ship the goods (like in FOA);
 - Undertaking by the shipper to the Agency to pay the costs (if applicable – like in FOA);

- 1. The shipper must serve a copy of its submission to the Agency on the railway at least 15 days before making it or the Agency must dismiss the application;
- 2. The Agency must also dismiss the application if the shipper doesn't demonstrate that an attempt has been made to resolve the matter;

- The shipper and the railway must each submit a proposal to the Agency within 10 days of the application for LOS arbitration;
- The proposal must contain operational terms listed in 169.31

- Ss.169.35(4) - LOS arbitration is not a proceeding before the Agency
- Ss.169.36(1) - the Agency may make rules of procedure for LOS arbitration
- Ss.169.4(1) – Either the shipper or the railway can advise the Agency and the arbitrator that they wish to keep information confidential.

Bill C-52 – Arbitrator’s Decision and Costs

- **Ss.169.38(1) – The arbitrator’s decision:**
 - Must be in writing;
 - Applies to the parties for one year;
 - Is final and binding;
 - Must be commercially fair and reasonable to the parties;
 - Must be made within 45 days unless, in the arbitrator’s opinion, it is not practical, allowing the arbitrator to make the decision within 65 days.
- The arbitrator must provide the decision to the Agency;
- Ss.169.42(1) - The Agency must establish a list of persons, including members or staff, who agree to act as arbitrators;
 - This was completed. The Agency intends to use members or staff initially.
- Ss.169.39(1) – The Agency may fix the fee to be paid if the arbitrator is not a member or staff of the Agency;
 - There is no fee if the arbitrator is Agency member or staff.
- Ss.169.39(3) – the railway and the shipper are to share equally the fees and Agency costs in providing assistance to the arbitrator;
 - The railway and the shipper are each responsible for their own costs.

Bill C-52 – Railway's Objection

- Ss.169.43(1) – A railway may apply to the Agency within 10 days after the shipper's submission for an order declaring that the shipper is not entitled to LOS arbitration:
 - The railway's application will be adjudicated on an expedited basis;
 - The Agency must make a decision no later than within 35 calendar days, which means 25 business days;
 - This decision must be issued before the conclusion of arbitration;
 - The arbitration and adjudication of an objection will run in parallel;
 - The member deciding on the railway's objection will be different than arbitrator (impartiality);
 - Staff dealing with objection will be different from staff dealing with arbitration (confidentiality);
 - If the objection is granted, the submission for arbitration will be dismissed and arbitration discontinued;

- Grounds for objection – refer to Ss.169.33; 169.31(2), (3) and (4)

- The Agency prepared a separate procedure for adjudication of an objection:
 - The pleadings will open right away, the shipper will have 3 business days to respond and railway 2 business days to reply.
 - The Agency decision will be in a form of an order if objection is granted.
 - The Agency decision will be in a form of a decision with reasons if objection is dismissed.
 - Confidentiality will be respected if requested.

Agency LOS Arbitration Rules

In response to the amendment of the *Canada Transportation Act* to include Rail LOS Arbitration, the Agency developed new Arbitration Rules:

- They are consistent with ADR Institute-recommended rules and arbitration best practices incl. FOA;
- Were prepared in consultation with shippers, railways, arbitrators, ADR experts and other interested parties;
- Reflect the timelines and requirements established in legislation;
- Designed to be easy to understand, accessible, efficient and cost-effective;
- Respect principles of fairness and impartiality;
- Will come into effect in 2014 as a Regulation – will be published in *Canada Gazette*;
- The Agency can apply them now, before the Rules are formally promulgated;
- Status – currently with the Department of Justice for review, which is part of a regular process.

NEW ARBITRATION RULES - HIGHLIGHTS

- The arbitrator is appointed within 2 days;
- Within 4 days of appointment – first pre-arbitration meeting
 - Used to clarify issues and scope, fix the dates, logistics
 - The pre-arb could be held by teleconference, if agreed
 - The arbitrator will provide summary after the meeting
- Following first pre-arb, the parties will exchange arbitration briefs incl. agreed statement of facts, evidence, expert reports, etc.
- After that, possibly second pre-arb meeting, if needed (optional)
 - The arbitrator will provide summary after the meeting
- The hearing will be held at Agency Headquarters or at a different, agreed-upon location
- Each party will be able to present final oral arguments
- Witnesses could be called and cross-examined
- The decision will be made within 7 days of the hearing (each party will get a copy)
- The arbitration has to be completed in 45 days or could be extended to 65 days if the arbitrator and both parties agree
- The arbitrator's decision will be the LOS Agreement, final and binding

Enforcement and AMPs

- S.177(1) – the Agency may by regulation designate a provision of this Act as a provision the contravention of which may be proceeded with as a violation;
 - Status: The draft Regulation amending current version is with DOJ
- The Agency may by regulation designate any requirement imposed on a railway company in an arbitrator's decision as a requirement the contravention of which may be proceeded with as a violation and prescribe the maximum amount payable for each violation
 - For LOS arbitration, the amount shall not be more than \$100,000
- The amount of an AMP is paid to the Receiver General;
- The Agency developed the AMPs strategy that will be released after the Arbitration Rules are finalized;
- According to the Act, the shipper must file with the Agency a request to enforce the LOS agreement established by arbitration if one or more conditions ordered by the arbitrator are not being met;
- The purpose of enforcement is compliance with arbitration decisions and ultimately – provisions of the Act;
- Consistent with the Agency's practice, the Agency will appoint a designated enforcement officer (DEO) to investigate the allegation of non-compliance;

Enforcement and AMPs – cont'd

- The DEO might seek additional information to determine whether an investigation is warranted. Shippers are encouraged to file evidence supporting allegation of non-compliance;
- A complete request for enforcement would result in a quick investigation;
- If investigation is deemed warranted – the DEO will conduct a fact finding investigation:
 - will contact both parties to confirm the facts
 - will determine if a violation has occurred
- If the breach of the LOS agreement is confirmed, (the railway is in violation of the condition(s) ordered by the arbitrator), the DEO will issue a Notice of Violation (NOV) including the amount of the fine (AMP);
- There will be no warning but the amount of the fine will depend on the severity of impact on the shipper – need to distinguish serious violations from minor errors or miscommunication;
- For repeated breaches, the AMP will be higher;
- AMPs could be appealed by the railway to TATC;
- Agency will post NOV's and provide summary reports as part of annual stats.

Questions

Thank you / Merci Beaucoup

Questions?

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