Railway Service Level Agreements

Preparing for railway service level negotiation and arbitration.

June 2014

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Disclaimer: The material in this document is intended to provide general information about the railway service level arbitration provisions of the Canada Transportation Act. While the author has made best efforts to ensure that the information in the document is accurate, readers should not, under any circumstances, rely on this document as legal advice. If shippers or others reading this document wish to take advantage of the service level arbitration provisions of the Canada Transportation Act they are encouraged to seek qualified legal advice and not rely solely on the information provided herein.

Railway service level arbitration in the Canada Transportation Act

Overview

Bill C-52 was passed by Parliament and its provisions were made effective on June 26, 2013. These amendments were met with skepticism by some shipper groups. A number of shipper organizations tried and failed to obtain amendments to the Bill before it was passed. In spite of some shipper's reservations about the Bill, C-52 introduced a new mechanism of shipper protection to the railway industry in Canada and shippers need to understand the impact that this legislation has on railway-shipper commercial relationships.[1]

The Bill amended the Canada Transportation Act (the Act) to give shippers the right to enter into service agreements with railway companies and established an arbitration process in the event of a dispute between a shipper and a railway company regarding such an agreement. Bill C-52 added new sections 126(1.1) through 126(1.5) to the Act to govern the process by which shippers may enter into confidential contracts regarding railway service.[2] Section 126.(1.1) identifies the first step in the process by which a shipper can request a confidential contract for service (service level agreement).

> 126(1.1) If a shipper wishes to enter into a contract under subsection (1) with a railway company respecting the manner in which the railway company must fulfil its service obligations under section 113, the shipper may request that the railway company make it an offer to enter into such a contract.

Note that this section indicates that a shipper "may" request that the railway make it an offer. This implies that the process outlined in articles 126(1.1) through (1.5) are not mandatory as evidence of good faith bargaining prior to a shipper resorting to the service level arbitration provisions of the Act, which are described later on in this overview. However, as these sections of the Act were introduced specifically to deal with service level contracts and as they were introduced at the same time as the amendments dealing with service level arbitration, it is possible that they may be viewed as a

[1] For background on Bill C-52 and the concerns of shippers with regards to its provision, see Appendix 1.

[2] Appendix 2 contains the new provisions of the Canada Transportation Act that resulted from Bill C-52 with respect to railway service level agreements and service level arbitration. The complete Act is available at www.laws-lois.justice.gc.ca

mandatory process for a shipper to demonstrate good faith bargaining prior to the use of the regulated service level arbitration process.

The next article in these new provisions sets out the elements that *must* be included in a shipper's request to a railway for a negotiated service level agreement (SLA):

> 126.(1.2) The request must describe the traffic to which it relates, the services requested by the shipper with respect to the traffic and any undertaking that the shipper is prepared to give to the railway company with respect to the traffic or services.

Following the shipper's request, ***the railway must make its offer within 30 days*** after the day on which it receives the request. It is important to note that the shipper identifies the traffic on which it is seeking a service level agreement – and this need not include all of the traffic handled by a railway for a shipper. The shipper also frames the nature of the request and the scope of the services to be covered by the agreement.

If the shipper and railway are unable to agree on service levels, the shipper has available at their sole discretion an arbitration process, which is governed by the new sections 169.31 through 169.43 (see Appendix 2). These new provisions allow the shipper to submit ***any*** of the following matters, in writing to the Canada Transportation Agency (the Agency) for arbitration:

> (***a***) the operational terms that the railway company must comply with in respect of receiving, loading, carrying, unloading and delivering the traffic, including performance standards and communication protocols;
>
> (***b***) the operational terms that the railway company must comply with if it fails to comply with an operational term described in paragraph (***a***);
>
> (***c***) any operational term that the shipper must comply with that is related to an operational term described in paragraph (***a***) or (***b***);
>
> (***d***) any service provided by the railway company incidental to transportation that is customary or usual in connection with the business of a railway company; or
>
> (***e***) the question of whether the railway company may apply a charge with respect to an operational term described in paragraph (***a***) or (***b***) or for a service described in paragraph (***d***).

It is important to note that the shipper frames the request and can include any scope of services, traffic or locations that it wishes. Also, the arbitration does not cover rates for the movement of traffic nor for incidental services. While the shipper's submission can deal with "the question of whether the railway company may apply a charge with respect to an operational term", this type of arbitration is not meant to deal with freight rate issues. Furthermore, a shipper does not need to be asking for or paying special charges for so-called premium service in order to seek arbitration on railway service levels. The railway's obligation to provide service is as defined in their common carrier obligations as described in Section 113 of the Act and with the amendments to the Act pursuant to C-52, shippers now have the right to a clear definition of the service levels they are entitled to, under open tariff rates and conditions, in a service level agreement.

With this new change in the Act, a shipper is now entitled to the *definition of the service levels* that they will receive from their railway service provider. In the event that a shipper is dissatisfied with the levels of service offered by a railway in response to the shipper's request for a service level agreement - they are entitled to an arbitrated service level agreement.

The service level arbitration process

The basic steps in the service level arbitration process under the Act are as follows:

- The parties must engage in good faith negotiations. The shipper may make a written request for an SLA and if they do so the railway must respond within 30 days to that request.
- The shipper must give the railway and the Agency 15 days written notice that it intends to submit a service level dispute to the Agency for arbitration.
- Following the notice period, the shipper makes a written submission to the Agency with a copy to the railway on the same day.
- As per section 169.32(1) of the Act, the shipper's submission must contain:

  (***a***) a detailed description of the matters submitted to the Agency for arbitration;

  (***b***) a description of the traffic to which the service obligations relate;

  (***c***) an undertaking with respect to the traffic, if any, given by the shipper to the railway company that must be complied with for the period during which the arbitrator's decision applies to the parties, other than an undertaking given by the shipper to the railway company with respect to an operational term described in paragraph 169.31(1)(***c***);

  (***d***) an undertaking given by the shipper to the railway company to ship the goods to which the service obligations relate in accordance with the arbitrator's decision; and

(***e***) an undertaking given by the shipper to the Agency to pay the fee and costs for which the shipper is liable under subsection 169.39(3) as a party to the arbitration.

- Within 10 days of the submission the shipper and railway must provide the arbitrator and each other with the detailed description of the operational terms and services that should apply to the services requested by the shipper (the proposals).
- Within 2 business days of the receipt of the last proposal, the Agency must refer the matter for arbitration to an arbitrator that it chooses.
- Within 20 days of the submission, the shipper and railway must exchange any information that they intend to submit to the arbitrator in support of their proposals.
- Subject to any rules that the Agency may make for the arbitration, the arbitrator must conduct the arbitration as quickly as possible and in the manner that he or she considers appropriate including the manner in which either party may direct questions to the other.
- The arbitrator's decision must be made within 45 days after the day on which the submission is made unless the arbitrator decides that this is not practical, in which case the time limit is extended to 65 days.

The arbitrator's decision will be: binding on the parties, in writing, effective for one year from the date of his/her decision (except by the consent of all parties) and is enforceable as a confidential contract. The Agency will receive a copy of the arbitrator's decision and may choose to publish summaries of service level arbitration decisions. Recently the Agency indicated that, until further notice, it will not be charging any fees for arbitration of railway service level agreements as long as the proceedings take place in Ottawa. However, any costs that are charged for meetings outside of Ottawa including the additional fees paid to an arbitrator will be split equally between the parties.

Weaknesses of the current service level arbitration provisions

Consequences for non-performance

Many shippers had hoped that the new railway service level arbitration process would provide for possible financial consequences to be payable by the railway to the shipper for failure to meet service standards in an agreement. However, during hearings on the legislation, legislators were told by legal staff engaged by Transport Canada that penalties in such confidential contracts would be unenforceable under Canadian law. As a result, the legislation does not specifically include the ability for shippers to include a schedule of penalties that would be payable to shippers for a breach of a service condition. However, the legislation does include provision for the Agency to make regulations to impose administrative monetary penalties on a railway company that contravenes any arbitration decision on railway service. Such regulations would prescribe the maximum amount payable to the government for each violation of an agreement up to $100,000 per violation.

Limitations with regards to railway service obligations

Many shippers would have preferred that the nature and level of railway service obligations to shippers be spelled out more clearly in the Act. The new provisions of the Act do allow a shipper to specify the operational terms that the railway must comply with including those in respect of:

- Receiving;
- Loading;
- Carrying;
- Unloading and delivering the traffic; including
- Performance standards and communication protocols.

However, under section 169.37 the Act requires the arbitrator to take into account:

> (a) the railway company's service obligations under section 113 to other shippers and the railway company's obligations to persons and other companies under section 114;
>
> (b) the railway company's obligations, if any, with respect to a public passenger service provider;
>
> (c) the railway company's and the shipper's operational requirements and restrictions;
>
> (d) the question of whether there is available to the shipper an alternative, effective, adequate and competitive means of transporting the goods to which the service obligations relate;

As a result, it can be said that the railway's service obligations to shippers are subject to many conditions beyond a shipper's need for service to meet their own commercial obligations. Many of these factors are within the competence of the railway to argue effectively in arbitration and the shipper may have limited information and/or expertise to challenge the assertions of a railway that service to the shipper should be conditioned by their obligations to others in their network.

Preparing for railway service level negotiations

The service level arbitration provisions of the Canada Transportation Act provide a shipper with leverage in their negotiation of service levels with a railway. Therefore, it is important for shippers to make the railway aware of their understanding of these provisions and of their willingness to use the arbitration provisions of the Act while negotiating with the railway. However, if a shipper believes that they may ultimately wish to take advantage of the provisions of the service level arbitration process it is essential that they can ***demonstrate good faith negotiations with their railway partner*** prior to triggering the arbitration process.

During the negotiation process and in preparation for the arbitration process shippers must ***keep and prepare detailed information*** about their current railway service, their service requirements and any communication from themselves and from railways with regards to railway service. The details of any service level proposal presented by either shipper or railway that are made prior to arbitration are not permitted to be part of a shipper's or railway's submissions in arbitration. However, the level of service that the shipper has received in the past may well be a factor in the determination by an arbitrator of what constitutes "adequate and reasonable" service levels. This is not to say that past service levels should be considered the determining factor in the level of service that a shipper should receive. If past service has been inconsistent and inadequate, and the shipper can demonstrate this fact before an arbitrator, it will help the shipper's case and support their argument for improved service. However, an arbitrator must make their decisions on service largely based on the information provided by the parties through their proposals so shippers should be prepared with detailed information that outlines both the historical levels of service and their expectations for future service levels.

In preparing their proposals shippers should be aware of and respond to the fact that the arbitrator must take into account sub-sections (a) through (d) of section 169.37 of the Act (see previous page) and the requirement that the arbitrator's decision be commercially fair and reasonable to both parties. Shippers should be prepared to defend their service proposals in the context of these provisions of the Act. Shippers should be prepared to directly counter railway arguments that their service demands will have detrimental effects on other shippers, that their own or their receivers facilities are inadequate to support increased traffic levels or that the service they are demanding is not commercially reasonable.

With respect to the first issue of the impact on other shippers; shippers should investigate the impact of their incremental service demands on the direct train service they receive. This may require engaging a railway operations expert to prepare arguments on their behalf. With respect to the shipper's and their receivers' unloading capacity and track capacity; shippers should expect the railway to argue that they have insufficient track capacity to handle higher volumes and/or that the railway's customers should absorb railway performance variability through increased investments in their own facilities. As regards commercial reasonability; the shipper may wish to engage a railway costing expert to demonstrate that the return to the railway from the proposed service levels is commercially fair

If a shipper is considering employing the service level arbitration provisions of the Act, they should ***retain experienced legal counsel*** and, as noted above, consider also identifying experienced railway operations and marketing experts who can assist with the preparation of and defense of their submission to the Agency. Shippers should ask their legal counsel for an estimate of the fees and charges that they will incur for the process and be aware that this amount could approach $100,000, not including any charges from the Agency for the arbitration itself.[3]

Shippers should have the necessary resources in their organization to support the very condensed and intense arbitration process. It is important to note, that any challenges made by the railway to the Agency on the admissibility of a shipper's submission, will be dealt with during the arbitration period outlined in the Act. It will not result in a delay in the arbitration and the Agency's deliberations on these issues will take place in parallel with the arbitration itself. This could result in a shipper and their counsel being involved in two parallel processes, both constrained by the timelines of the arbitration process.

Shippers should expect railways to aggressively dispute any and all issues/demands made by the shipper in the service level arbitration process. Shippers need to have reasonable expectations of the service level arbitration process. The new provisions of the Act dealing with service level arbitration were vigorously fought by the railways in the legislative process. Typically, the railways are willing to invest heavily in disputing shipper's arguments in regulatory proceedings, particularly in the case of new shipper protection measures. Shippers must be prepared for this and should be aware of the factors

[3] The Agency has indicated that, for the foreseeable future it will not be charging shippers for service level arbitration proceedings that are conducted under the Act, as long as the proceedings take place in Ottawa.

under the legislation that would preclude a shipper from accessing the arbitration process. These factors, which are laid out in sections 169.31(2)-(4) include:

- Traffic which is already governed by a written agreement
    - It is unclear how broadly this article will be interpreted but one might expect the railways to use this condition to exclude traffic already covered by rate agreements, rail infrastructure contribution agreements, etc.
- Traffic that is subject to a previous Section 116 order (level of service complaint)
- Traffic for which rates have been established through Final Offer Arbitration

The SLA Template - Core Elements of SLA

In consultation with a number of groups within the agricultural industry, the Building Capacity Sub-Committee of the Crop Logistics Working Group has prepared a template service level agreement that can serve as a model for shippers preparing for service level negotiation with Canadian Railways. The template was developed after extensive consultation within the industry and reflects general industry views with respect to the type of service offer that a railway should make to a shipper. Each shipper will have to make their own decisions on the use of the template based upon their unique commercial requirements. However, the template is meant to identify a comprehensive set of service elements such as those that were identified by the Rail Freight Service Review Panel in their report on Canadian railway service in 2011. Those core elements of an SLA, which were identified in section 6.4.2 of the review panel's report, included:

- *services and obligations of the railway and obligations of the other party;*
- *communication protocols and escalation;*
- *key performance metrics;*
- *performance standards;*
- *consequences of non-performance (including penalties);*
- *dispute resolution; and*
- *force majeure."* [4]

While shippers may not today receive any service definition from railways with regards to a number of these service elements, shippers generally agree that a shipper is entitled to clear service definition on all of these service elements and ***shippers are encouraged to include all of these service elements in their negotiations with railways, and should consider including all of them in any request for an arbitrated service level agreement.***

Service obligations and traffic volumes

This broad heading can encompass many elements of an SLA but from many shippers' perspectives, a primary concern is that the SLA clearly identifies the rail shipping capacity that will be provided to the shipper by the railway. For carload shippers this may be expressed in terms of the level of empty car supply that will be made available and the number of days per week, or times per day that switching services will be provided. For bulk trainload shippers, they may ask for commitments to a total number of trains or tonnes that will be moved in specific corridors during specific periods. Shipping lines

[4] Rail Freight Service Review Final Report. January 2011, page 56

moving international containers may wish to obtain commitments to a certain number of container platforms being made available in specific corridors during specific periods.

Communication protocols and escalation

The communication provisions of an SLA would be expected to require the Shipper or Railway to notify each other according to an agreed schedule if they will not be able to meet their obligations in any area specified in the agreement. Note that wherever possible it would be expected that this notification would be proactive – that is notification would take place before the failure occurred wherever possible. Notification is not measurement – it is meant to support the operational planning of the SLA partners.

Performance standards and metrics

It is critical that shippers and railways agree on the specific standards of performance that will be applied to any area of commitment. This includes specific measurement examples to clarify both performance requirements, and measurement processes and responsibilities. For carload shippers, standards will likely be required for empty car supply, switching times, transit times and notification processes. Bulk shippers may require standards and measurement processes for the determination of conformance to delivery in support of ocean shipping schedules, and conformance with train loading/unloading and staging processes. In all cases, the parties responsible for measurement should be identified in the contract and the process for disputing any data shared between the parties should be identified.

Consequences for non-performance

An SLA should clearly identify any financial consequences payable for breach of service obligations. In the identification of financial consequences, shippers should consider establishing such charges for failure to meet the service standards at levels representing a reasonable pre-estimate of the liquidated damages that a party will incur as a result of a specific type of breach of the agreement. The actual estimates of liquidated damages must be left to each shipper or group of shippers negotiating together to establish the specific financial consequences payable in an actual agreement.

Consequences for non-performance can also include specified recovery periods for a railway that fails to meet service standards within a given time period. This is particularly true for empty car supply standards that may allow for some variability of performance but specify the conditions under which a railway must recover if they fail to meet standards in any given period.

Dispute Resolution

There are many options for the development of commercial dispute resolution provisions in an SLA. In general, all systems of dispute resolution should require the parties to engage in good faith negotiation with respect to the matter in dispute before invoking a more formalized process. Shippers should consider whether the dispute resolution provisions being considered allow either party to unduly delay the resolution of disputes. In general, processes that require negotiation of issues such as: choice of arbitrator, terms of reference of the arbitrator, and timeframes for examination of issues introduce the opportunity for a party to abuse the dispute settlement process. In the boilerplate SLA attached in Schedule B, the dispute resolution process is based on an arbitration model. This particular model is a revised version of the commercial dispute resolution process that was proposed by the railways during the Dinning consultation process, for use in service level agreements.

Force Majeure

Force majeure provisions in contracts relieve a party of their obligations under the agreement in cases of events that are beyond their reasonable control. This type of provision is essential to protect both shippers and railways from a requirement to provide services when natural disasters occur that cannot be reasonably dealt with through the due diligence of the parties. Shippers should consider whether any proposed force majeure clause provides this reasonable protection to both parties while not being so vague as to allow either party to avoid their obligations due to minor disruptions and delays that normally occur in the railway business and that would be expected to have limited impact on the railway network as a whole.

Summary the SLA Template

The consultations with shippers that led to the development and refinement of the SLA template revealed that shippers' desire for an arbitrated service level process arise from the current imbalance in negotiating power between shippers and railways. Railway market power combined with the railways' regulatory power to make tariffs outlining shippers' obligations with respect to: the loading and unloading of rail cars; the ordering of empty railcars; and the billing processes for loaded cars, are currently weighted heavily in favour of railways. What shippers seek from SLAs is ***balanced accountability***.

As a result of the current imbalance, it is to be expected that an SLA between a railway and shipper will be heavily weighted in terms of the obligations that a railway owes to the shipper. Most provisions will

define what a railway must do and will be light on shipper obligations. Shippers must be prepared to argue effectively with arbitrators why this is so - or the SLA will not be seen as a reasonable balance between shipper and railway obligations. In particular, the shipper's submission to the arbitrator will fail a key test for an arbitrated SLA that is set out in section 169.38 of the Act that an arbitrator's decision must:

> "be commercially fair and reasonable to the parties."

Shippers are encouraged to explicitly address this notion of fair and reasonable in the context of railway market power and to reject the notion that shippers need to offer any extra financial or volume related inducements (other than those already provided for in railway tariffs) to common carrier railways in order to receive service that meets their commercial needs.

However, in developing proposed service standards, shippers are encouraged to take into account the fact that some service variability is to be expected in railway operations due to the competing needs of other shippers and the impact of weather on railway service. A proposed service agreement should allow for some service variability, put limits upon it which protect the shipper's commercial requirements and provide for consequences to the railway for a failure to meet reasonable service standards.

Appendix 1 Background to the introduction of Bill-C 52

In their January 2011 final report, the Rail Freight Service Review Panel recommended a number of steps that railways and shippers should take to improve rail service. One of their key recommendations was that railways should negotiate service agreements, "at the request of stakeholders that have an operational or commercial relationship with them."[5] The panel also recommended that:

> *"the railways work with groups such as small shippers to develop acceptable "boiler plate" service agreements that could be used as a basis for individual members of the group to negotiate respective service agreements reflective of their unique needs."*[6]

The elements of service that should be included in such agreements were identified in section 6.4.2 of the panel's report:

- *services and obligations of the railway and obligations of the other party;*
- *communication protocols and escalation;*
- *traffic volumes;*
- *key performance metrics;*
- *performance standards;*
- *consequences of non-performance (including penalties);*
- *dispute resolution; and*
- *force majeure."*[7]

In section 6.5.2 of their report, the panel recommended that the government consider that stakeholders who have an operational or commercial relationship with railways should have the statutory right to service level agreements with railways. On March 18, 2011, the Government of Canada responded to the panel's final report and amongst other measures they announced their intention to table a bill to give shippers the right to a service agreement.

In section 6.4.3 of the review panel's report, they encouraged railways and their stakeholders to engage in negotiations on a commercial dispute resolution process. The scope of the dispute resolution process was to include disputes related to changes in local service and disputes related to the failure to establish or renew SLAs. The panel recommended that a facilitator be appointed to conduct a six month process to assist railways and shippers to come to agreement on such a model. In section 6.5.3 the panel recommended that should railways and stakeholders fail to come to agreement on a satisfactory dispute resolution mechanism, that a regulated dispute resolution mechanism should be established in

[5] Rail Freight Service Review Final Report. January 2011 page 50
[6] Ibid page 51
[7] Ibid page 56

legislation that would be administered by the Canadian Transportation Agency. The regulated option would include:

- Mediation/Arbitration approach
- Final offer non-appealable arbitration
- Take into account existing confidential and tariff rate and service agreements
- Have a 45 day time frame for initial agreements and 21 days for renewals
- Arbitrator reasons to be provided only by mutual consent of parties
- No ability to aware damages by arbitrator
- Non-confidential summaries of arbitration decisions to be published

On October 31, 2011, the Honourable Denis Lebel, Minister of Transport, Infrastructure and Communities announced the appointment of Jim Dinning to lead a six-month facilitation process to develop a template for service agreements and a streamlined dispute resolution process. In his announcement of Mr. Dinning's appointment, Minister Lebel reiterated the Government's intention to table a bill to give shippers the statutory right to a service level agreement, once the facilitation process was completed.

The Crop Logistics Working Group (Working Group) was formed on November 7, 2011 by Agriculture Minister Gerry Ritz to be a forum to consider the performance of agriculture industry supply chains and to exchange views and information on issues arising from the introduction of the Marketing Freedom for Grain Farmers Act. A subcommittee of the Working Group, under the chairmanship of Rob Davies, Chief Executive Officer of Weyburn Inland Terminal Ltd., was established to allow for focused discussion on service level agreements. This Sub-Committee endorsed the boilerplate SLA first developed for carload shippers in the pulse and special crops industry. The concepts included in the boilerplate informed the positions of Joan Hardy of Richardson International and Greg Cherewyk of Pulse Canada as they participated in the Dinning facilitation process.

Outcomes of the Dinning facilitation process:

Customer Request: Customers requested that mandatory elements that capture the essential aspects of rail freight service be established and form part of a service level agreement. This would provide every customer with an opportunity to negotiate a reasonable level of service within each element given their specific and unique set of circumstances.

Railway Response: Railway representatives stated they did not have a mandate to establish mandatory elements. They stated that depending on the level of commitment a customer is prepared to make with respect to forecasts and volumes, they may qualify for a discussion on an element of service. The railways made it clear that these discussions would not necessarily result in an agreement and that they would not be bound by such discussions to enter an agreement.

Customer Request: Customers requested (as per the Rail Freight Service Review Panel's recommendation) the opportunity to establish a dispute resolution process to help close a negotiation, finalize an Agreement and/or renew an Agreement.

Railway Response: Railway representatives stated they did not have a mandate to discuss a process that would see an independent third party help them reach an agreement with a customer on an outstanding element, component or detail of service.

Dinning's Final Report:

The final report to the Honourable Denis Lebel, Minister of Transport, Infrastructure and Communities, was troubling to the shipping community for 2 major reasons. First, it characterized railway customer requests as unreasonable in that they clearly expected the process to recognize the imbalance in power in the negotiating relationship. Second, it recommended a template that was formally dismissed in writing by the railway customer participants. The Government released the report on June 22, 2012, and reiterated its intent to table a bill that gives shippers a right to an SLA and a process to establish one should negotiations fail.

Response to Dinning's Report:

The railway customer representatives on the Committee and the larger shipping community as represented by the Coalition of Rail Shippers dismissed the process and the recommendations including The Dinning template as irrelevant and focused on the next phase of the Government's commitment i.e. to introduce legislation that will provide shippers with a right to an SLA and a process to establish one should negotiations fail.

Post Dinning:

On June 27, 2012, the largest ever meeting of the Coalition of Rail Shippers was held in Montreal. The meeting featured a presentation from 4 leading transportation lawyers representing the forestry,

mining, fertilizer and agriculture sectors. The transportation lawyers presented a draft piece of legislation that will enable Service Level Agreements and streamlined dispute resolution processes. The principles and draft legislation were subsequently endorsed by the Coalition of Rail Shippers and a joint letter addressed to Minister Lebel was signed and also personally handed to Agriculture Minister Gerry Ritz.

Members of the Coalition of Rail Shippers and their legal counsel met with Transport Canada to provide input to the drafting of legislation. The consultation phase concluded at the end of July 2012.

Government Introduces Bill C-52 the Fair Rail Freight Service Act

On December 11th, 2012, the Honourable Denis Lebel, Minister of Transport, Infrastructure and Communities, along with the Honourable Gerry Ritz, Minister of Agriculture and Agri-Food, announced the introduction of the Fair Rail Freight Service Act bill to give companies that ship goods by rail the right to a service agreement with railways. It will also create an arbitration process to establish an agreement when commercial negotiations fail.

The new process is designed to create incentives for shippers and railways to negotiate service agreements commercially. If these negotiations are not successful, shippers will be able to trigger an arbitration process with the Canadian Transportation Agency.

The arbitrator will have the mandate to establish terms and conditions of service based on the shipper's needs, as well as the railways' requirement to provide adequate and suitable service to all the other customers. Enforcement mechanisms are designed to hold railways to account for obligations imposed by an arbitrator.

An administrative monetary penalty of up to $100,000 could be issued by the Canadian Transportation Agency for each violation of an arbitrated service level agreement. This is in addition to other existing remedies in the Act (e.g. Level of Service Complaint) to ensure railways meet their service obligations.

Coalition of Rail Shipper (CRS) Proposed Amendments

Four leading transportation lawyers representing the forestry, mining, fertilizer and agriculture sectors again came together to short list amendments they feel would not only strengthen Bill C-52, but remove

opportunities for the railways to frustrate the process and potentially even subvert the intent of the Bill. CRS representatives had the following specific concerns regarding C-52.

1. The bill contained no amendments to Level Of Service provisions
    - The CRS had proposed amendments to section 115 of the Act that provided a list of those elements of service that railways need to provide to all shippers under their common carrier obligations.
    - In the absence of this list of service elements, shippers were concerned that the lack of guidance to parties and arbitrators in how "adequate and suitable" service levels are defined will limit railway obligations for service in ways that do not meet shipper needs in a modern supply chain management context.
2. Use of the words "operational terms" to define elements of shipper submission raised concerns that the scope of issues that will be accepted by arbitrators may be limited.
    - In particular shippers worried that shippers may not be able to include contact terms covering items such as force majeure, dispute resolution processes and financial consequences for non-performance in arbitrated SLAs.
3. The bill contained no mechanism for shippers to identify and determine consequences for a breach of SLA conditions.
    - The shipper proposal would have allowed the shipper to submit identified breaches of SLA to Agency for their arbitration and determination of damages and remedies
4. Concern that RR could impose single shipper tariff in response to "unfavourable" SLA conditions.
    - Shippers worried that the railways could undo the "economic bargain" established by the SLA by raising rates or imposing other charges through their tariff making authority.
    - Shipper proposed that any such single shipper tariffs be subject to Agency review under section 120.1 of the Act. This amendment to C-52 was not adopted by the Government.
5. The wording of the proposed section 169.37 was such that shippers worried that an arbitrator may consider items raised by a railway company but not included in a shippers submission
    - This weakens the principle that it is the shipper who frames the matters in dispute.
6. The bill, in section 169.37 requires the arbitrator to consider the impact of a shipper's needs on the railway company's network.
    - Shippers will have limited ability to counter such claims and these considerations should be irrelevant to the consideration of the level of service to which a shipper is entitled.

The House Standing Committee on Transportation, Infrastructure and Communities Studies Bill C-52

The TRAN Committee studied Bill C-52, the Fair Rail Freight Service Act from February through to April with appearances from the Minister of Transport and Transport Canada, representatives from the Forestry, Agriculture, Mining, Chemicals, Fertilizer, Propane Gas, CN, CP and shortline industry. The shipping community, through the Coalition of Rail Shippers (CRS), stressed the importance of the 6 agreed upon amendments to the Committee.

Division within the Coalition

Despite best efforts, the Coalition of Rail Shippers did falter in its communication of priorities. Some members emphasized a top 2 or 3 amendments while others signaled that 1 particular amendment was a make or break concern for their membership. At minimum this sent a mixed signal to Parliament. One issue of importance to the grain industry was the desire to have a mechanism in place to assess damages for performance failures. Members of the Coalition had very different views on this point, with some preferring to take breach of contract to the courts and others simply preferring a dispute resolution mechanism that would help both parties resolve the problem.

Despite lack of consensus on how to communicate priorities, the Liberal Party and NDP worked hard to develop amendments that would address all 6 Coalition amendments.

Amendments proposed by Opposition parties

On April 26, 2013 Liberal and NDP members of the TRAN Committee put forward a series of amendments designed to reflect the intent of the amendments put forward by the Coalition of Rail Shippers. The Conservative members of the Committee rejected the amendment, sent the Bill back to the House for 3rd Reading and on May 30th, the House voted unanimously to pass the Bill. Bill C-52 was passed by the House and Senate and its provisions became effective on June 26, 2013.

Confidential Contracts

Confidential contracts

126. (1) A railway company may enter into a contract with a shipper that the parties agree to keep confidential respecting

(***a***) the rates to be charged by the company to the shipper;

(***b***) reductions or allowances pertaining to rates in tariffs that have been issued and published in accordance with this Division;

(***c***) rebates or allowances pertaining to rates in tariffs or confidential contracts that have previously been lawfully charged;

(***d***) any conditions relating to the traffic to be moved by the company; and

(***e***) the manner in which the company shall fulfill its service obligations under section 113.

Request for confidential contract

(1.1) If a shipper wishes to enter into a contract under subsection (1) with a railway company respecting the manner in which the railway company must fulfil its service obligations under section 113, the shipper may request that the railway company make it an offer to enter into such a contract.

Content of request

(1.2) The request must describe the traffic to which it relates, the services requested by the shipper with respect to the traffic and any undertaking that the shipper is prepared to give to the railway company with respect to the traffic or services.

Offer

(1.3) The railway company must make its offer within 30 days after the day on which it receives the request.

Exception to offer

(1.4) Subject to subsection (1.5), the railway company is not required to include in its offer terms with respect to a matter that

(***a***) is governed by a written agreement to which the shipper and the railway company are parties;

(***b***) is the subject of an order, other than an interim order, made under subsection 116(4);

(***c***) is set out in a tariff referred to in subsection 136(4) or 165(3); or

(***d***) is the subject of an arbitration decision made under section 169.37.

Clarification

(1.5) The railway company must include in its offer terms with respect to a matter that is governed by an agreement, the subject of an order or decision or set out in a tariff, referred to in subsection (1.4) if the agreement, order, decision or tariff expires within two months after the day on which the railway company receives the request referred to in subsection (1.1). The terms must apply to a period that begins after the agreement, order, decision or tariff expires.

No investigation or arbitration of confidential contracts

(2) No party to a confidential contract is entitled to submit a matter governed by the contract to the Agency for final offer arbitration under section 161, without the consent of all the parties to the contract.

1996, c. 10, s. 126;

2013, c. 31, s. 8.

DIVISION II ARBITRATION ON LEVEL OF SERVICES

Submission for arbitration — confidential contract

169.31 (1) If a shipper and a railway company are unable to agree and enter into a contract under subsection 126(1) respecting the manner in which the railway company must fulfil its service obligations under section 113, the shipper may submit any of the following matters, in writing, to the Agency for arbitration:

(***a***) the operational terms that the railway company must comply with in respect of receiving, loading, carrying, unloading and delivering the traffic, including performance standards and communication protocols;

(***b***) the operational terms that the railway company must comply with if it fails to comply with an operational term described in paragraph (***a***);

(***c***) any operational term that the shipper must comply with that is related to an operational term described in paragraph (***a***) or (***b***);

(***d***) any service provided by the railway company incidental to transportation that is customary or usual in connection with the business of a railway company; or

(***e***) the question of whether the railway company may apply a charge with respect to an operational term described in paragraph (***a***) or (***b***) or for a service described in paragraph (***d***).

Matter excluded from arbitration

(2) The shipper is not entitled to submit to the Agency for arbitration a matter that

(***a***) is governed by a written agreement, including a confidential contract, to which the shipper and the railway company are parties; or

(***b***) is the subject of an order, other than an interim order, made under subsection 116(4).

Excluded matter — traffic

(3) The shipper is not entitled to submit to the Agency for arbitration a matter that is in respect of traffic that is the subject of

(***a***) a confidential contract between the shipper and the railway company that is in force immediately before the day on which this section comes into force;

(***b***) a tariff, or a contract, referred to in subsection 165(3);

(***c***) a competitive line rate; or

(***d***) an arbitrator's decision made under section 169.37.

Clarification

(4) For greater certainty, neither a rate for the movement of the traffic nor the amount of a charge for that movement or for the provision of incidental services is to be subject to arbitration.

2013, c. 31, s. 11.

Contents of submission

169.32 (1) The submission must contain

(***a***) a detailed description of the matters submitted to the Agency for arbitration;

(***b***) a description of the traffic to which the service obligations relate;

(***c***) an undertaking with respect to the traffic, if any, given by the shipper to the railway company that must be complied with for the period during which the arbitrator's decision applies to the parties, other than an undertaking given by the shipper to the railway company with respect to an operational term described in paragraph 169.31(1)(***c***);

(***d***) an undertaking given by the shipper to the railway company to ship the goods to which the service obligations relate in accordance with the arbitrator's decision; and

(***e***) an undertaking given by the shipper to the Agency to pay the fee and costs for which the shipper is liable under subsection 169.39(3) as a party to the arbitration.

Copy of submission served

(2) The shipper must serve a copy of the submission on the railway company on the day on which it submits the matters to the Agency for arbitration.

2013, c. 31, s. 11.

Arbitration precluded in certain cases

169.33 (1) The Agency must dismiss the submission if

(*a*) the shipper has not, at least 15 days before making it, served on the railway company and the Agency a written notice indicating that the shipper intends to make a submission to the Agency for arbitration; or

(*b*) the shipper does not demonstrate, to the Agency's satisfaction, that an attempt has been made to resolve the matters contained in it.

Content of notice

(2) The notice must contain the descriptions referred to in paragraphs 169.32(1)(*a*) and (*b*) and, if the shipper's submission will contain an undertaking described in paragraph 169.32(1)(*c*), a description of that undertaking.

2013, c. 31, s. 11.

Submission of proposals

169.34 (1) Despite any application filed under section 169.43, the shipper and the railway company must each submit, within 10 days after the day on which a copy of a submission is served under subsection 169.32(2), to the Agency, in order to resolve the matters that are submitted to it for arbitration by the shipper, a proposal that contains any of the following terms:

(*a*) any operational term described in paragraph 169.31(1)(*a*), (*b*) or (*c*);

(*b*) any term for the provision of a service described in paragraph 169.31(1)(*d*); or

(*c*) any term with respect to the application of a charge described in paragraph 169.31(1)(*e*).

Proposals provided to parties

(2) The Agency must provide the shipper and the railway company with a copy of the other party's proposal immediately after the day on which it receives the last of the two proposals.

Exchange of information

(3) The parties must exchange the information that they intend to submit to the arbitrator in support of their proposals within 20 days after the day on which a copy of a submission is served under subsection 169.32(2) or within a period agreed to by the parties or fixed by the arbitrator.

Exception

(4) Unless the parties agree otherwise, a party to the arbitration is not, in support of the proposal it submits under subsection (1), to refer to any offer, or any part of an offer, that was made to it — before a copy of the submission is served under subsection 169.32(2) — by the other party to the arbitration for the purpose of entering into a confidential contract.

If no proposal from party

(5) If one party does not submit a proposal in accordance with subsection (1), the proposal submitted by the other party is the arbitrator's decision made under section 169.37.

2013, c. 31, s. 11.

Arbitration

169.35 (1) Despite any application filed under section 169.43, the Agency must refer, within two business days after the day on which it receives the last of the two proposals, the matters for arbitration to be conducted by an arbitrator that it chooses.

Arbitrator not to act in other proceedings

(2) The arbitrator is not to act in any other proceedings in relation to a matter that is referred to him or her for arbitration.

Assistance by Agency

(3) The Agency may, at the arbitrator's request, provide administrative, technical and legal assistance to the arbitrator.

Arbitration not proceeding

(4) The arbitration is not a proceeding before the Agency.

2013, c. 31, s. 11.

Agency's rules of procedure

169.36 (1) The Agency may make rules of procedure for an arbitration.

Procedure generally

(2) Subject to any rule of procedure made by the Agency and in the absence of an agreement between the arbitrator and the parties as to the procedure to be followed, the arbitrator must conduct the arbitration as quickly as possible and in the manner that he or she considers appropriate having regard to the circumstances of the matter.

Questions

(3) Each party may direct questions to the other in the manner that the arbitrator considers appropriate.

2013, c. 31, s. 11.

Arbitrator's decision

169.37 The arbitrator's decision must establish any operational term described in paragraph 169.31(1)(***a***), (***b***) or (***c***), any term for the provision of a service described in paragraph 169.31(1)(***d***) or any term with respect to the application of a charge described in paragraph 169.31(1)(***e***), or any combination of those terms, that the arbitrator considers necessary to resolve the matters that are referred to him or her for arbitration. In making his or her decision, the arbitrator must have regard to the following:

(***a***) the traffic to which the service obligations relate;

(***b***) the service that the shipper requires with respect to the traffic;

(***c***) any undertaking described in paragraph 169.32(1)(***c***) that is contained in the shipper's submission;

(***d***) the railway company's service obligations under section 113 to other shippers and the railway company's obligations to persons and other companies under section 114;

(***e***) the railway company's obligations, if any, with respect to a public passenger service provider;

(***f***) the railway company's and the shipper's operational requirements and restrictions;

(***g***) the question of whether there is available to the shipper an alternative, effective, adequate and competitive means of transporting the goods to which the service obligations relate; and

(***h***) any information that the arbitrator considers relevant.

2013, c. 31, s. 11.

Requirements of decision

169.38 (1) The arbitrator's decision must

(***a***) be made in writing;

(***b***) be made so as to apply to the parties for a period of one year as of the date of his or her decision, unless the parties agree otherwise; and

(***c***) be commercially fair and reasonable to the parties**.**

Decision binding

(2) The arbitrator's decision is final and binding on the parties and is deemed, for the purposes of Division IV of Part III and its enforceability between the parties, to be a confidential contract.

Period for making decision

(3) The arbitrator's decision must be made within 45 days after the day on which the matters are submitted to the Agency for arbitration under subsection 169.31(1) unless in the arbitrator's opinion making a decision within that period is not practical, in which case the arbitrator must make his or her decision within 65 days after that day.

Period — agreement of parties

(4) Despite subsection (3), the arbitrator may, with the agreement of the parties, make his or her decision within a period that is longer than 65 days after the day on which the matters are submitted to the Agency for arbitration.

Copy of decision to Agency

(5) The arbitrator must provide the Agency with a copy of his or her decision.

2013, c. 31, s. 11.

Arbitration fees

169.39 (1) The Agency may fix the fee to be paid to it or, if the arbitrator is not a member or on the staff of the Agency, to the arbitrator for the arbitrator's services in arbitration proceedings.

Arbitration fees — not member

(2) An arbitrator who is not a member or on the staff of the Agency may fix a fee for his or her services if the Agency does not do so under subsection (1).

Payment of fees and costs

(3) The shipper and the railway company are to share equally, whether or not the proceedings are terminated under section 169.41, in the payment of the fee for the arbitrator's services and in the payment of the costs related to the arbitration, including those borne by the Agency in providing administrative, technical and legal assistance to the arbitrator under subsection 169.35(3).

Cost related to arbitration

(4) Costs related to the arbitration also include the cost to the Agency when a member or a person on the staff of the Agency acts as an arbitrator and the Agency does not fix a fee for that arbitrator under subsection (1).

2013, c. 31, s. 11.

Confidentiality of information

169.4 (1) If the Agency and the arbitrator are advised that a party to an arbitration wishes to keep information relating to the arbitration confidential, the Agency and the arbitrator must take all reasonably necessary measures to ensure that the information

is not disclosed by the Agency or the arbitrator or during the arbitration to any person other than the parties.

Limited disclosure

(2) Despite subsection (1), the Agency may, in the exercise of its powers or in the performance of its duties and functions under this Act, disclose any information that a party advised the Agency and the arbitrator it wishes to keep confidential.

2013, c. 31, s. 11.

Termination of proceedings

169.41 If, before the arbitrator makes his or her decision, the parties advise the Agency or the arbitrator that they agree that the matters being arbitrated should be withdrawn from arbitration, any proceedings in respect of those matters are immediately terminated.

2013, c. 31, s. 11.

List of arbitrators

169.42 (1) The Agency, in consultation with representatives of shippers and railway companies, must establish a list of persons, including persons who are members or on the staff of the Agency, who agree to act as arbitrators in arbitrations.

Expertise required

(2) Only persons who, in the Agency's opinion, have sufficient expertise to act as arbitrators are to be named in the list.

Publication of list

(3) The Agency must publish the list on its Internet site.

2013, c. 31, s. 11.

Application for order

169.43 (1) A railway company may apply to the Agency, within 10 days after the day on which it is served with a copy of a submission under subsection 169.32(2), for an order declaring that the shipper is not entitled to submit to the Agency for arbitration a matter contained in the shipper's submission.

Content of order

(2) If the Agency makes the order, it may also

(***a***) dismiss the submission for arbitration, if the matter contained in it has not been referred to arbitration;

(***b***) discontinue the arbitration;

(***c***) subject the arbitration to any terms that it specifies; or

(***d***) set aside the arbitrator's decision or any part of it.

Period for making decision

(3) The Agency must make a decision on the railway company's application made under subsection (1) as soon as feasible but not later than 35 days after the day on which it receives the application.

2013, c. 31, s. 11.