DISCUSSION TOPICS

Rail Review

Transport Canada Transports Canada

Canada

Contents

Administrative Monetary Penalties

An Administrative Monetary Penalty (AMP) is an administrative penalty imposed by a regulator for a contravention of a provision of an Act or regulation. The primary objective of an AMP is to promote compliance with the relevant regulations, while not acting as a form of punishment for non-compliant activity. It achieves this by offsetting any potential economic gain from engaging in non-compliant activity, while offering flexibility to regulators to employ progressive enforcement tools such as cautionary notices or notices of violation that include AMPs.

The Canadian Transportation Agency (Agency) is provided the power to designate any provision within the *Canada Transportation Act* (CTA) to be subject to an AMP. Similarly, the Agency is empowered to consider contraventions of other key regulations made pursuant to the CTA as subject to an AMP, including the *Railway Third Party Liability Insurance Coverage Regulations* and the *Railway Interswitching Regulations*. Contraventions related to freight rail are primarily limited to compliance with requirements related to liability and insurance, certificates of fitness and operating authority, rate and tariff procedures, discontinuance, and adherence to Agency regulations related to interswitching. A listing of different obligations (Designated Provisions) that may be subject to an AMP are found on the Agency website.

Although the Agency may designate provisions subject to an AMP, enforcement will depend on the severity of the violation, the resources of the Agency to monitor compliance, and the type and nature of the provision. Currently, the provisions to which AMPs apply have little to no effect on interswitching, level of service, or confidential contracts. Additional Designated Provisions relating to rail service or confidential contracts could be identified, which may require legislative or regulatory changes.

Historically, there have been very few AMPs issued to freight rail carriers. Furthermore, most AMPs that are applicable to rail carriers have a maximum penalty of $25,000, a value that is set out within the CTA. The decision to impose an AMP and the amount of monetary penalty is at the discretion of the Designated Enforcement Officer in line with the Agency policy on enforcement.

In comparison to the operating income and revenues of the major rail carriers in Canada, these maximum penalties may not pose a significant deterrent to non-compliance with the CTA, or any regulation, order, or direction made under the CTA. Increasing the maximum penalties for AMPs may help to further incent compliance by rail carriers for both current Designated Provisions as well as any future provisions that could be identified as enforceable by AMPs.

Transport Canada is seeking stakeholder feedback on the following questions:

1. Given the objective and definition of an AMP, are there any additional provisions within the CTA that should be subject to an AMP, and why?

2. Are AMPs the right tool to enforce any provisions identified under Question 1, or are there better alternatives?

3. Should the maximum penalties for AMPs be increased?

4. Are there other specific comments, ideas or important considerations that you would like to share related to this topic?

Contracting Practices

Contracting out

The ability for parties to negotiate confidential agreements on fair and commercially reasonable terms is a cornerstone of Canada's approach to the regulation of freight rail. In recent years, a number of shipper associations have expressed concerns regarding the confidential contract negotiation process.

Specifically, shippers claimed that CN and CPKC are requiring a clause in confidential contracts precluding them from using remedies available under the *Canada Transportation Act* (CTA) (e.g., level of service complaints, regulated interswitching). This practise is referred to as "contracting out". This was raised by the Canadian Transportation Agency (Agency) in its 2020-2021 Annual Report, as well as in the National Supply Chain Task Force Final Report, which recommended prohibiting contracting out from provisions of the CTA.

Shippers have noted concern that, without a contract in place, the number of railcars available to them through general allocation will be insufficient to meet their transportation needs. They therefore feel pressured to sign a contract containing contracting out clauses.

Given the confidential nature of these contracts, Transport Canada is currently unaware of the exact nature, wording, and effect of the clauses in question. As shippers are unable to share copies of these contracts, it is uncertain whether and to what extent shippers are in fact foregoing the ability to use remedies in the CTA, what alternatives may be in place under these contracts, and whether there may be any benefits associated with these provisions. Additional information is therefore required before determining whether to act upon the Task Force's recommendation.

Transport Canada is seeking stakeholder feedback on the following questions regarding the nature and prevalence of these clauses, their potential benefits, and any concerns or noteworthy points related to these clauses:

1. In your view, what are the potential benefits or drawbacks of implementing the Task Force's recommendation to prohibit these clauses, as well as the most appropriate mechanism for doing so?

2. With respect to the contracting process, what is your experience with the timeliness of contract offers and responses on the part of railways and shippers (for example, how far in advance of the contract period do shippers initiate negotiations, and whether railways provide offers within 30 days of the request, as required by section 126 (1.3) of the CTA)?

3. In your view, do the confidential contract provisions of the CTA (in particular section 126), succeed in setting the right conditions for fostering commercially fair and reasonable negotiations?

4. Are there other specific comments, ideas or important considerations that you would like to share related to this topic?

Surcharges

We understand confidential contracts entered into between shippers and railways typically incorporate railway tariffs on a variety of issues. For example, they may incorporate tariffs relating to ancillary services, or other items like fuel surcharges. While the CTA does include oversight mechanisms for some charges, it is also possible that some gaps may exist. Transport Canada has heard concerns from stakeholders about the nature of some of these charges (e.g., fuel surcharges), and whether they have risen to an unreasonable level.

Subsection 120.1(1) of the CTA empowers the Agency to investigate, upon receipt of an application by a shipper, whether any charges and associated terms and conditions for the movement of traffic or for the provision of incidental services that are found in a tariff, are unreasonable. If the Agency finds that they are, it may establish new charges or associated terms and conditions. This review mechanism, however, does not apply to rates for the movement of traffic as noted in subsection 120.1 (7) since other mechanisms exist for that purpose, namely through final offer arbitration (FOA).

In considering what constitutes a charge versus a rate, the Agency has held that a charge is incidental, optional, or ancillary, and relates to specific activities or transactions that are debundled from the rate for the movement of goods (e.g., car cleaning services). This interpretation would not appear to capture charges like fuel surcharges. Even though they are debundled from the rate, they are not incidental, optional, nor ancillary.

A shipper or shippers seeking to challenge railways' application of fuel surcharges would appear therefore to be limited to making an application under FOA. This process may not be well suited, particularly as these surcharges represent only a small portion of the rate for a given movement, and also apply to virtually all traffic. This latter point means not only that the burden of challenging a surcharge that may apply to a broad cross section of traffic falls to an individual shipper, but also that any remedy would apply only to the shipper making the application for the duration of the FOA decision, making it an ineffective mechanism for addressing a systemic issue.

1. Given the above, do existing mechanisms provide adequate oversight of surcharges that are tied directly to the movement of traffic? Are additional oversight mechanisms (or changes to existing mechanisms) to allow for the review of these tariffs, outside of the FOA process, warranted? If so, what would those mechanisms be?

2. The ability to challenge the terms of a tariff under 120.1 is limited to shippers. Would it be reasonable to allow any person to file a challenge under 120.1?

3. Are there other specific comments, ideas or important considerations that you would like to share related to this topic?

Final Offer Arbitration (FOA)

Final Offer Arbitration (FOA) provides shippers a dispute resolution mechanism when they are unable to come to an agreement with a carrier on the rates to be charged and the conditions associated with the movement of goods. Although it is available to shippers for the domestic movement of goods by air, for the movement of goods for northern marine resupply purposes by water and the movement of goods by rail, it has exclusively been used by rail shippers. FOA is supported and facilitated by the Canadian Transportation Agency (Agency), and the arbitrator's decision is enforceable as if it were an order of the Agency. It is part of a suite of dispute resolution mechanisms set out in the *Canada Transportation Act* (CTA) to address the potential market imbalance between shippers and carriers which, for rail, also includes the remedies associated with level of service and the arbitration of service level agreements. FOA has been available in its current form since 1987 with minor changes to allow for joint FOA (FOA involving multiple shippers), summary FOA (expediated FOA for situations involving charges of $2 Million or less) and to extend the period of the arbitrator's decision to 2 years. The FOA process is set out in the CTA and is intended to be efficient and effective where the shipper and the carrier present their offers, and the arbitrator chooses one of the offers presented.

FOA has been consistently but infrequently used by shippers, however, its infrequent use is not necessarily an indication of its usefulness as shippers note that the option of going to FOA provides them leverage in their negotiations with railway companies. FOA for all intents and purposes is an effective tool for shippers. However, a review to ensure that it is as effective as possible is merited.

As part of its examination of Canada's supply chains, the Supply Chain Task Force set out several rail-specific recommendations, one of which is to permit FOA to include both service and rates. Although the provisions do not refer to service specifically and instead speak to conditions, specific service requirements have been addressed as part of an FOA in some cases.

- Would there be a benefit from amending the language to refer specifically to level of service?

- If so, how would this impact use of the current Arbitration on Level of Services provisions that provide shippers a mechanism to have a service level agreement with the carrier that covers how the carrier will fulfill its level of service obligations (as set out as operational terms) and any reciprocal penalties but cannot address the rate for the movement of traffic?

Another issue that has been raised by shippers is the arbitrator's use of the Agency's technical assistance to calculate the costs associated with the movement of traffic to which the rate will apply. The Agency maintains a sophisticated costing model, the Regulatory Costing Model, that uses specific costs, when known, unit costs based on system level data and the details of the rail movement to develop the total variable cost associated with a specific movement to which a contribution to constant costs is added. Other than the details of the specific movement, all the costing information is exclusively in the possession of the carrier. Railways can, and rightly so, set their rates based on any number of criteria, and it is well known that costs are not the principal driver for rate setting but instead more likely, among other things, a consideration of the Ramsey pricing model that is demand based.

- Would there be a benefit if, for all FOAs, the Agency provided the arbitrator costing information associated with the movement based on the Regulatory Costing Model?

Another element that may be worth examining is the criteria that the CTA sets out that the arbitrator must consider in selecting an offer. The CTA sets out that the arbitrator will consider anything that appears relevant to the arbitrator and specifically, unless the shipper and carrier agree otherwise, they will also consider whether the shipper has an alternative, effective, adequate, and competitive means of moving the goods. For the first, and broader criteria, this will likely be dictated by the arguments put

forward by the shipper and carrier during the arbitration proceedings that relate to the specific circumstances of the movement in question. However, the second appears to be aimed at the question of shipper captivity which will be influenced by not only the shipper's captivity to a single rail carrier but also its captivity to rail as the mode of moving the goods. The arbitrator is only required to provide reasons for their decision if both parties request it, therefore it may not be clear to the parties to what extent, if any, this question is considered.

- Is this consideration, as it is currently framed, helpful in the FOA process?

- Are there any other criteria that would merit being included as a consideration by the arbitrator in selecting between the shipper's and carrier's offers?

Both the Agency and the arbitrator are required to keep matters related to FOA confidential unless both parties agree otherwise. The Agency is required to report annually on applications to the Agency and the findings on them, but only publishes information on the number of arbitrations conducted each year. However, to better inform policy decisions to ensure that FOA is meeting its objectives and remains in line with the National Transportation Policy, Transport Canada may benefit from more visibility on the use of and outcomes from FOA.

Transport Canada is seeking stakeholder feedback on the following questions:

1. Should the Arbitrator, on a confidential basis, provide to the Agency for confidential reporting to TC the outcome of the FOA, that is, the names of the parties and which party's offer was selected?

2. Should the Agency, on a confidential basis, annually provide to TC information with respect to FOA, specifically:

    a. the number of FOAs conducted;

    b. the type of FOA, i.e., joint FOA and summary FOA;

    c. the names of the shipper(s) and carrier; and

    d. identify the party whose offer was selected by the arbitrator?

3. Are there other specific comments, ideas or important considerations that you would like to share related to this topic?

Grain and Winter Contingency Plans

Under the *Canada Transportation Act* (CTA), both CN and CPKC are required to each produce two plans on an annual basis: (1) a Grain Plan, which provides an assessment of each carrier's ability to move grain within the crop year as well as steps taken to enable these movements; and (2) a Winter Contingency Plan, which describes that carrier's contingency plan to move grain along with other traffic when faced with winter weather conditions.

These requirements were introduced as part of the *Transportation Modernization Act* in 2018, with the intention of demonstrating the government's ongoing commitment to ensuring adequate and suitable rail transportation for the grain sector. The objective of these plans was to encourage rail carriers to increase transparency around their annual planning efforts. By encouraging open communication on planned levels of service, these plans were envisioned to improve planned and anticipated levels of service iteratively in each successive year.

Railways have had strong winter performance in some years since the requirement was introduced, there have also been some challenging winter seasons where service and performance levels experienced a relative decline.

Many within the grain industry have also commented that the plans do not go far enough in providing enhanced visibility or value to grain shippers. Stakeholders have called for the plans to be expanded and include additional details, such as service and performance information, detailed analysis of past performance and mitigation steps, forecasting, planned weekly rail car capacity, asset utilization targets, and mandated monthly performance reporting. In their final report, the Supply Chain Task Force also called for a new requirement for railways to prepare annual capacity plans for major commodities that they haul, and report on their progress weekly. However, the 2023 *Budget Implementation Act* amended the CTA to enable TC to permit the sharing of information on the national transportation system to increase its efficiency, which could include real time operational data for rail carriers. As TC considers new regulations to establish a data sharing framework, these advancements are expected to increase joint planning initiatives across the supply chain, and therefore may reduce the need for rail carrier creation of annual capacity plans. Furthermore, the creation and updating of these capacity plans would be an administrative burden for carriers.

Transport Canada is seeking stakeholder feedback on the following questions regarding the Grain and Winter Contingency Plans:

1. What do you see as the primary objective of the Grain and Winter Contingency Plans, and how do you see them contributing to that objective?

2. How useful and valuable are the Grain and Winter Contingency Plans to your operations, in terms of planning your shipments? What elements of the Plans do you find most useful?

3. Are there any additions or enhancements you would like to see within future releases of the Grain and Winter Plans?

4. Would the introduction of annual capacity plans prepared by rail carriers for other major commodities, as recommended by the SCTF, benefit the supply chain? If so, what elements would they need to include, and how could these plans be used? Given the complex and dynamic nature of the supply chain, do you think that an annual capacity plan can be useful? Please explain.

5. Are there other specific comments, ideas or important considerations that you would like to share related to this topic?

Extended Interswitching

Background

In response to the recommendation of the Supply Chain Task Force, the 2023 *Budget Implementation Act* (Bill C-47), which received Royal Assent on June 22, 2023, includes an 18-month pilot project for extended interswitching in Alberta, Saskatchewan, and Manitoba. Once it enters into force in September 2023, shippers between 30km and 160 km of an interchange in the provinces of Alberta, Saskatchewan, and Manitoba will be eligible for extended interswitching to a competing railway at regulated rates set by the Agency. Transport Canada is continuing work to develop an approach for assessing the effectiveness of extended interswitching, which will help inform next steps when the pilot project concludes.

Canada's Rail System

Class I railways play a pivotal role in Canada. They support our urban and rural communities and are essential to the Canadian economy. Canada's Class I railways helped keep the economy moving early in the pandemic during a period of great uncertainty, reconnected the rest of Canada to the Port of Vancouver in record time after an atmospheric river in the fall of 2021, and helped relieve supply chain congestion during a period of significant global supply chain imbalance, which is to name just a few of the challenges Class I railways have helped Canada overcome in recent years.

However, while Canada benefits from two generally high performing railways, challenges remain. A defining characteristic of Canada's freight rail network is that its two dominant railways, Canadian National Railway (CN) and Canadian Pacific Kansas City Railway (CPKC), operate on geographically distinct networks, with many areas where shippers have realistic access to only one rail carrier, particularly for bulk shippers for whom trucking to another carrier is not a cost-effective option (nor one that is desirable from an efficiency or environmental perspective). Access to only one carrier means many shippers miss out on the benefits that would exist in a more competitive marketplace, such as greater competition on the basis of rates and service. This dynamic may be particularly pronounced for more isolated shippers who have fewer viable transportation alternatives.

Current Competitive Access Remedies

Canadian transportation policy has grappled for many years with how best to stimulate competition. At present, two such measures exist: Regulated interswitching and Long-Haul Interswitching (LHI). Originally introduced to prevent the proliferation of rail lines in urban areas, regulated interswitching has since become viewed as an important competitive access measure, providing access to a competing carrier at regulated rates, up to a distance of 30 km from an interchange. Interswitching is available automatically, without application, which makes it easy to use, provides cost-certainty, and enhances leverage in negotiations.

LHI provides shippers beyond the 30 km interswitching radius with the option to apply to the Agency for a rate to access a competing carrier at the nearest interchange, up to a distance of 1200 km or 50% of the total length of haul in Canada, whichever is greater. The rates are determined by the Agency based on rates charged by the railway for comparable traffic. Unlike regulated interswitching, LHI is an application-based process, which appears to have undermined its effectiveness. Unfortunately, since its introduction, the measure has not been used, with shippers fearing the uncertainty of the application process, the risk of committing to a movement without first knowing the rate, and the fear that comparable traffic means rates that similarly captive traffic receive. Shippers have also cited exemptions that preclude certain traffic and certain regions from using LHI as another reason it has not been used. The uncertainty of the outcome, coupled with the fact the remedy has not been used, means

that LHI may not have been leveraged by shippers as effectively in negotiations with railway companies.

Pilot Project

The limited geographic coverage of interswitching at a distance of 30 km coupled with LHI having not met its objectives, led to the Supply Chain Task Force's recommendation to reintroduce extended interswitching, which the government responded to with the inclusion of a pilot project in Bill C-47. These developments have intensified public dialogue over the scope, form, and manner of an ideal competitive access remedy. This public dialogue has made clear that railways and shippers have strongly held divergent views on the impacts of interswitching.

Railway views

According to Canadian Class I railways, extended interswitching has considerable risks, including that:

- Interswitching is inefficient because it increases dwell, transit, and overall cycle times, which reduce supply chain throughput and leads to congestion;
- It is being implemented in spite of Canada having among the lowest freight-rail rates in the world, as outlined in a CPCS report that was commissioned by the Railway Association of Canada;
- There is another competitive access remedy available – long-haul interswitching (LHI) – that is not being used, which railways argue is evidence of the low rates already being offered to shippers;
- CN and CPKC will be at a competitive disadvantage to U.S. railways that will be able to solicit Canadian traffic, but the reverse will not be true, and this diversion of traffic may lead to lost jobs in Canada;
- Extended interswitching will be available to all shippers within 160 km of an interchange, even shippers that already have access to more than one railway; and,
- Rates calculated for extended interswitching will not be compensatory, risk disincentivizing investment, and will be market distorting.

Shipper views

For their part, shippers have also expressed strong views about extended interswitching. Most of these views have so far been communicated via associations, which have generally expressed support for the pilot project. In communicating their support, shipper associations have suggested that:

- The primary benefit of extended interswitching is that it can be leveraged during negotiations to obtain better rates and service;
- Without competitive access, captive shippers are forced to accept "monopoly" rates, rather than market rates;
- Many of the inefficiencies associated with interswitching can be avoided by the railways competing to retain their customers;

- Shippers are aware that interswitching is generally less efficient than a continuous line-haul movement and, for this reason, would prefer to keep their business with the originating carrier, provided they receive competitive rates, and their service needs are met;

- Extended interswitching can actually create efficiencies if it permits a more direct routing to locations in the United States to which neither CN nor CPKC have physical access;

- LHI is not being used due to “flaws” with the remedy and not because the railways are already offering competitive rates and service; and,

- Regulated interswitching rates are fully compensatory insofar as they are commercially fair and reasonable to all parties.

While shipper associations appear to be generally supportive of extended interswitching, some question whether 160 km is a sufficient distance. They note that a considerable portion of shippers in Alberta, Saskatchewan, and Manitoba are not within 160 km of an interchange and are therefore not eligible for extended interswitching. Some shippers have suggested that the distance should be increased to 500 km while others have suggested 1200 km with caveat that traffic would have to interchange at the nearest competitor’s interchange. Finally, shipping associations have raised concerns about the length of the pilot project, suggesting that many shippers, given the lengths of some commercial agreements, might not be able to leverage extended interswitching during negotiations, as their commercial agreements will not be up for negotiation before the conclusion of the pilot project.

Evaluation Criteria

As Transport Canada proceeds with evaluating the interswitching pilot, we have identified a number of areas to explore that could potentially help to assess the net impacts of extended interswitching. These include (in no particular order):

1. Impacts on supply chain efficiency;

2. Impacts on investment;

3. Improvements to negotiating outcomes for shippers (on both service and rates);

4. Impacts on rates of shippers within 160 km interswitching zone;

5. Impacts on service; and,

6. Impacts, if any, on shippers that are not eligible for extended interswitching.

The above represents a preliminary list of areas that could be explored in order to evaluate the pilot project. Transport Canada is seeking feedback from stakeholders on:

1. Ways the above impacts could be evaluated; and,

2. Any other impacts or considerations that stakeholders feel would be relevant to evaluating the pilot project.

Maximum Revenue Entitlement (MRE)

The Maximum Revenue Entitlement (MRE) limits the total revenue per tonne mile for a given distance and quantity of grain that CN and CPKC can each earn from transporting regulated, non-U.S.-bound Western grain. The MRE adjusts the maximum revenue that railways can earn for grain transportation in line with a legislated formula that is administered by the Canada Transportation Agency (the Agency). This formula is calculated at the end of each crop year and takes into account railway revenues, volumes of grain moved, average length of haul, and a Volume-Related Composite Price Index (VRCPI) as per Section 151 of the *Canada Transportation Act* (CTA). The VRCPI is a rail-related inflation index that forecasts changes in costs related to labour, fuel, materials, and capital purchases. The MRE only applies to Western Canadian bulk grains listed in Schedule II of the CTA that are moved in Canada's Western Division (i.e., primarily export shipments from Western Canada handled through West Coast ports, as well as those exported through Thunder Bay). Should CN or CPKC's revenues exceed their MRE for that year, that carrier must pay the amount above their MRE cap, plus a penalty, to the Western Grains Research Foundation (WGRF). The WGRF research priorities, and the financial position of its research fund, are accessible by reviewing its 2022 annual report.

The MRE was introduced in 2000 to replace the Agency's maximum rate system, with the intention of providing a price protection mechanism for grain shippers, while also meeting the economic needs of railways by ensuring they are compensated fairly for the movement of grain based on volume and distance. However, the MRE has since been criticized as a specific price protection mechanism that is only available for a specific subset of Western grain products. The MRE does not apply to all commodities and is only used within limited circumstances, it does not include grain transported in containers, nor grain moving eastward beyond Thunder Bay or to the United States. Previous reviews of the CTA have cited feedback from stakeholders that the MRE can act as a barrier to carrier investments within their networks unless such investments are specifically accounted for under the VRCPI. The 2016 CTA Review Report recommended that the Government consider modernizing and eventually eliminating the MRE, and that doing so will ultimately enhance competition and improve railway service, since shipments of grain would not be disadvantageous to ship for revenue generation as compared to other commodities. However, many within the grain sector and in academia contend that the elimination of the MRE will ultimately only result in higher shipping rates with no improvement in service, since most grain shippers are generally captive to a single rail carrier.

With the passage of the *Transportation Modernization Act* in 2018, the Government adjusted the VRCPI – which is provided in advance of the crop year to allow all parties to make information decisions – to allow for individual adjustments to the MRE for each carrier for their individual costs, related to the purchase and maintenance of new hopper cars. Subsequently, both CN and CPKC announced major investments in revitalizing their hopper car fleets, which has resulted in significant efficiency gains as the new cars are shorter, lighter, and have higher capacity. There may be opportunities to provide incentives to investment in the supply chain network through further changes to the VRCPI.

Transport Canada is seeking stakeholder feedback on the following questions:

1. In your view, what is the primary objective of the MRE? Is the MRE policy currently achieving that objective? If possible, please provide data and/or point to evidence that supports your position.

2. In your view, what are the impacts of the MRE on broader freight rail network service and performance, for both the grain sector and across different commodities? Are there advantages and disadvantages to the current MRE policy? If possible, please provide data and/or point to evidence that supports your position.

3. What are your views on further adjusting the VRCPI in a manner to incentivize CN and CPKC to invest in new capacity enhancements, such as expanding or upgrading interchanges that would benefit the grain handling transportation system? Are there other changes to the VRCPI that could provide these incentives?

4. When revenues for CN and CPKC exceed their MRE in a crop year, the amounts exceeding the cap must be remitted to the WGRF for grain and crop research. For stakeholders within the grain sector, how does your organization benefit from research conducted through the WGRF? Are there different alternatives to deploy these amounts that would better enhance grain supply chain capacity?

5. Are there other specific comments, ideas or important considerations that you would like to share related to this topic?

Canadian Transportation Agency – Own Motion Powers

Certain provisions in the *Canada Transportation Act* (CTA) empower the Agency to investigate complaints directly when specific language is provided e.g., complaints regarding level of service obligations under section 116. The Agency can also investigate complaints indirectly through section 37 which allows the Agency to inquire into any matter under its jurisdiction following a complaint.

With the passing of the *Transportation Modernization Act* (TMA) in 2018, the Agency was empowered to initiate investigations to determine whether a railway company is fulfilling its service obligations. However, the Agency must first seek authorization from the Minister and must conclude its investigation within 90 days. Prior to the TMA, the Agency could only investigate whether a railway was meeting its level of service obligations if a complaint was filed with the Agency. This new power allows the Agency to pursue not only shipper specific service issues but also systemic ones impacting multiple shippers with similar or varied commodities, over entire regions, or multiple regions, without relying on a complaint.

As the Agency's own motion powers are limited to the level of service provisions, it cannot proactively address other issues that impact the freight rail network's ability to be competitive, economic, and efficient. Consistent with the National Transportation Policy, competition and markets forces must be the prime considerations to meet those objectives. When these forces fail to achieve those objectives, however, strategic public intervention by the Agency may be necessary.

Issues related to filing a complaint with the Agency have long been raised by shippers, including the costs associated with participating in a formal process and the time it takes for the Agency to decide the matter together with the unpredictability of the outcome. The most significant reason that shippers are hesitant to file a complaint is the impact it has on its relationship with the railway since these formal processes are adversarial in nature. Shippers consistently express fear of retaliation in the form of less favorable rates and/or service from the railway. This concern is of increased significance where the shipper is captive to only one railway company.

The CTA, in addition to the level of service obligations, has several other provisions that are intended to balance the relationship between shippers and railways. In addition to the work currently underway to pilot an extension of the interswitching limit from 30 km to 160 km in the prairie provinces, there are tools in the CTA that relate to regulated interswitching, allowing the Agency to deem a point of origin or destination as reasonably close to an interchange and resolve disputes on the question of whether certain traffic is entitled to regulated interswitching.

In January 2019, the Agency launched an own-motion rail service level investigation, which concluded within the prescribed 90 days. This investigation focused on freight rail service issues involving CN, CPKC and BNSF in the Vancouver area affecting shippers across a variety of commodities. There were mixed opinions on the relative success of this investigation (e.g., some saying it took too long, other saying the process was rushed). Furthermore, concerns were raised related to the Agency acting as "investigator", "judge", "jury" and "prosecutor". Despite these concerns, the results of the investigation demonstrated the benefits of a process that allows the Agency to investigate issues that are not limited to a single shipper. Through the use of its own-motion powers, the Agency was able to examine issues that affected multiple shippers across various commodities and that were related to the operations of the three main railway companies operating in that area. As a result, the Agency was able to make findings and issue an order that addressed a systemic issue, namely the use and application of rail traffic embargoes.

As part of the recommendations made by the Supply Chain Task Force in its Final Report, several focused on the powers and tools available to the Agency to engage in own-motion investigations. Many of the recommendations were concrete (e.g., remove the requirement for Ministerial approval and empower the Agency to collect and use Key Performance Indicators (KPIs)). The advantage gained from empowering the Agency to collect KPIs is that the activity of monitoring the health of the freight rail network will no longer expose shippers to possible retaliation. KPIs would be collected from railways, rail network users, and rail partners and therefore not rely on information voluntarily provided by shippers. In addition, several recommendations were broader in nature, (e.g., support more robust and proactive use of own-motion investigations and enhance the investigative and dispute resolution authority of the Agency similar to the US Surface Transportation Board (STB)).

Although the STB and the CTA each have different legislative frameworks, the STB has a similar mandate and suite of responsibilities as the Agency. This includes the power to initiate own-motion investigations into any freight rail matter under its jurisdiction. However, the STB has more guidance in how it conducts an investigation. It may only investigate matters that are of national or regional significance and, to the extent possible, the investigative and decision-making functions of staff are kept separate.

The STB is required to provide written notice to the parties under investigation, explain the reason for and purpose of the investigation, and allow the parties to file a written statement setting out any or all facts concerning the matter. The STB must provide its recommendations and the summary of findings supporting those recommendations to the parties and STB Board members. Finally, an investigation must be dismissed if not concluded within 1 year, and no later than 90 days after receiving the recommendations and summary, the Board must either dismiss the investigation if no action is warranted or initiate a proceeding to determine if a provision has been violated.

Given how crucial and significant a role the Agency plays in regulating, monitoring, and resolving disputes related to complex freight rail matters, before implementing the Task Force's recommendations regarding the mandate and powers of the Agency, Transport Canada is seeking input from freight rail service providers and users. In order to focus any feedback you may have, we are posing the following questions:

1. Would removing the requirement of Ministerial approval affect the usefulness of the Agency's own motion powers?

2. Should the Agency be provided more time to investigate matters during an own motion process?

3. Are there specific criteria the Agency should use to determine when to launch an own-motion investigation on level of service issues? Should the power be used to proactively monitor and report on rail performance?

4. Should the Agency be able to initiate an own motion investigation into other freight rail matters currently under the Agency's authority? If so, what other matters?

5. In addition to the data recently made available through the *Transportation Information Regulations*, is there other information or data (e.g., KPIs) that the Agency should have access to or collect in support of monitoring the health of the freight rail network?

6. How should the investigative and decision-making functions be organized within the Agency?

7. How should parties implicated in freight service issues under investigation by the Agency be engaged to ensure an efficient and effective investigation?

8. Are there other specific comments, ideas or important considerations that you would like to share related to this topic?

Shortlines

Canada's shortlines – both those that are federally regulated, and those that are under provincial jurisdiction – are a critical part of Canada's supply chain transportation network and growing a strong and resilient economy. Shortlines originate approximately 20 percent of rail traffic bringing $36.5B in goods to market.[1] Across the country, and in a wide variety of sectors, there are small, medium and large companies (situated in urban centers, rural and remote communities across Canada) for whom shortlines are essential to deliver their goods to market. Without shortlines many companies would have far more expensive (and in some cases, cost-prohibitive) and less sustainable transportation alternatives to move their goods to their destinations.

Canada's shortline railways come in a variety of sizes, from large conglomerates to small independent organizations and serve as an important element of Canada's freight rail network. In general, they operate over short distances and serve a number of roles, including: first-mile and last-mile of rail movements; connecting shippers to Class I railways, other shortlines and ports; switching and car-storage service; passenger transport and resupply to remote communities; and supporting local and regional economies in places with limited transportation options by connecting into the broader international supply chain.

Beyond their economic impact, shortlines help Canada fight climate change and contribute to cleaner air by avoiding 1 to 3 MT of GHGs and $23M worth of air pollution a year by diverting trucks off Canada's roads and highways. Shortlines also support inclusive communities as a key social and economic generator in rural and remote regions where they provide access to other parts of the country and well-paying local jobs.

Although they can access federal programs such as the National Trade Corridors Fund, Rail Safety Improvement Program and the Rail Climate Change Adaptation Program, Canada's shortlines face some key challenges, including the following:

- Infrastructure investment, adapting to more frequent, extreme weather events.
- Shortlines are usually dependent on a few key shippers to generate revenue, and struggle with poor financial health as a result.
- Many shortlines inherited infrastructure deficits when they purchased rail lines from Class I railways and have been unable to invest in capital expenditures.
- Integration into the national rail network.
- Given the challenges with upgrading their infrastructure, and the relative infrequency of their operations, many shortlines continue to be less well integrated into the national rail system (physically and operationally).
- Rising insurance costs.
- Shortline railways have identified both a general lack of availability of insurance and high premiums as an irritant – both to continuing operations and to growing their business and serving new markets.

[1] "The Critical Role of Canada's Shortline Railways in Canadian Supply Chains." *Railway Association of Canada*. 2022.

- Regulatory requirements.

- Shortline railways have noted that federal requirements, including those set under the *Canada Transportation Act* (CTA), seem designed for high-frequency and high-volume operations.

- For example, Final Offer Arbitration (FOA) is a rate remedy available to shippers on application, intended to be quick and efficient, where the sole consideration set out in the CTA that the arbitrator must consider is whether a shipper has access to alternative, effective means of transporting their goods.

- Many shortline railways are smaller organizations and face power imbalances when dealing with larger organizations, which could lead to hesitation in using available remedies, or a disparity in their capacity to present their arguments.

Beyond the issues noted above, there may be other areas that the federal government can assist shortlines, such as issue facilitation and information sharing across all shortlines, business development, and exploring ways shortlines can assist in making Canada's supply chain more efficient and resilient.

Transport Canada is seeking stakeholder feedback on the following questions:

1. How is the global insurance market impacting shortlines? What potential options should Transport Canada consider to assist?

2. What are the regulatory challenges faced by shortlines and what potential options could be considered by Transport Canada to foster a more efficient and effective shortline sector?

3. How can the remedies available under the CTA, such as Level of Service or FOA, be better adapted to address the context of shortline railways, including power imbalances?

4. What other measures or considerations should Transport Canada or the federal government undertake to improve shortlines' better integration into the national rail network to increase rail shipping capacity? Examples could include fostering collaboration opportunities, identification of barriers, etc.

5. What unique challenges do Indigenously owned shortlines face, either on the business side, attracting customers and increasing their competitiveness, or on the regulatory side?

6. Any comments or views on the recent round of federal funding programs administered by TC e.g., NTCF, RSIP, RCCAP? How effective have these programs been in addressing issues within the shortline sector?