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Western Grain Elevator Association

Submission to
Rail Freight Service Review Panel

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Introduction

Thank you for inviting the Western Grain Elevator Association's (WGEA's) views on rail service for the grain industry as part of the Rail Freight Service Review. The WGEA is an association of seven farmer-owned, public and private grain businesses operating in Canada, which collectively handle in excess of 90% of western Canada's bulk grain exports. Members represented by the WGEA account for approximately 20% of railway revenues and pay annual total rail freight of over one billion dollars. Our members are listed on the bottom of our letterhead.

Our submission will provide a brief background and reasons why reform in the rail industry is necessary. We will explain why lack of balanced accountability is the root cause for the service problems being experienced, explain how this imbalance manifests itself to shippers, and identify the measures the WGEA believes will re-establish the balance in power between shippers and railways to allow the system to function in a manner that simulates the commercial marketplace to the extent possible.

It is important to note that, while all Canadian shippers have common issues, the grain industry is unique for various reasons. There are many different classes and grades of grain and there is very little homogeneity in the product; grain has a high number of shipping points; it is a seasonal business; and grain is treated differently under legislation (revenue cap). In addition, the role of the Canadian Wheat Board cannot be understated given its involvement in logistics (car allocation and vessel assignment).

Background

In the mid 1990's, in order to bring more efficiency into the transportation system, the railways began closing some inefficient branch lines while others became short lines, and offered incentives to the industry for loading multiple car blocks. Grain companies responded by replacing traditional wood crib elevators with high throughput elevators. By 1999, thousands of elevators became just over 1000 and today there are approximately 370 elevators, handling the same volume of grain.

Farmers and grain companies (shippers) have invested heavily in the western Canadian grain handling system in the last 20 years. In recent years we have severely struggled to meet contractual commitments due to railway shortfalls, inefficiencies, and failures (see Table 1). The current federal legislation does very little to protect against these unnecessary deficiencies.

Reasons for Reform

Over recent years the railways and their shareholders have benefited from a reduction in the size of the railway car fleet, a reduction in the number of loading origins and the consequent reduction in operating costs. In addition to capturing these shipper efficiencies, the railways and their shareholders, by virtue of a monopoly position, have been able to transfer freight demand risk almost completely through to their shipper customers that have virtually no means to compel supply levels to meet the shape of that demand.

The rail freight market does not operate in a normal commercial manner because of the monopoly setting. As shippers we are captive. A grain company situated on a railway line can only ship product on that railway. Rail service is offered under terms that minimize railway costs, not under terms that meet the transportation needs of the grain industry. We find that the railways offer less car supply than the demand of the grain industry. In times of high demand (i.e. October, November & December) this creates an environment of fierce competition for these cars. They assume that the grain will move eventually and are not concerned with the negative effect that untimely movement may have on the operations of grain companies and farmers.

In a normal commercial setting, competition will respond to opportunity. The rail freight market does not function in a normal manner and is the root cause as to why the railways do not meet these performance requirements by grain shippers. Railways are not operating in an unpredictable manner. They are simply maximizing their returns under the current legislative environment. They cannot be expected to change their behavior until federal transportation law is amended. In the absence of significant and meaningful railway competition to allow the marketplace to facilitate service, the only option is to artificially re-establish balanced accountability through legislation to enforce the level of service that publicly traded monopolies do not naturally provide. Commercial solutions are born from a balanced system.

Lack of Balanced Accountability

Under the current Canada Transportation Act (CTA), there is a lack of a balance in accountability between a shipper and a railway and little obligation on a railway to provide adequate service. For example, companies are required to load 100 car unit trains within 24 hours or 10 hours for 50 car units to achieve incentives. In addition, once cars arrive at port position terminal operators must unload cars within 24 hours, or they are subject to rail car demurrage. However, there is no corresponding accountability on the railway side under the CTA for a failure to spot cars and deliver railcars within a specified time. There is no penalty for a railway if it fails to provide service.

The structure of the grain and railway industries in Canada lends itself to this imbalanced relationship. One of the most obvious ways in which this manifests itself is the general lack of written contracts between shippers and railways that are the norm for other grain freight relationships (i.e., commercial truckers and vessel operators), and help to define balanced duties and obligations. Essentially, the railways have no need to engage in contractual negotiation to supply service because they operate in a monopoly style environment. Any resulting contract that would emerge in these imbalanced circumstances would obviously favour the carrier.

The railways unilaterally establish tariffs that define the level of service they require from shippers. They hold the shipper financially accountable for 24 hour loading and unloading, electronic billing and a long array of other railway efficiency priorities. The benefits from these efficiencies have gone entirely to the railways in the form of lower costs. They have increased the efficiency of their fleets, improved their operating ratios and reduced the size of their fleets. At the same time, car availability for the shipper has fallen, service has decreased and shipper costs increased to staff on weekends to meet car spot requirements to increase the loading speed of elevators.

Shippers do not have a means available to force productivity changes from the railways that help their own business. They must be provided with recourse to offset the onerous one-sided tariffs of the railways.

Symptoms of Lack of Accountability

The problems that attribute to poor service are systemic. They manifest themselves to shippers as follows in two general categories, described below. Shippers require railway performance in both of these categories.

1. Cars Requested versus Cars Received

Cars requested versus cars received is an issue of the railways not providing sufficient car supply to meet the shipping needs of manufacturers, processors and grain marketers in servicing domestic and export markets. The railways have natural incentive to keep car supply to *their* level of optimal utilization (minimum cost, maximum revenue). With the relative inelastic nature of car supply and the variable nature of demand for railcars (a function of the variable demand and highly competitive environment of work commodity markets) the railways currently pass on the risk of car supply beyond a minimal level onto shippers. Historically, the level of this car supply tended to be at only a portion of the shipper demand given (a) the lack of competitive alternatives available to shippers, (b) the consequential reality that the railways will get the business sooner or later, (c) the accountability the railways have to shareholders to keep costs down and profits up in a system unencumbered by balanced legislation or effective competition, and (d) because they can – there are no effective legal or financial consequences.

The standard of performance for a railway that the CTA provides attempts to establish a definition that is all encompassing:

> [s. 113(1) "*A railway company shall, according to its powers, in respect of a railway owned or operated by it, (a) furnish, at the point of origin, at the point of junction of the railway with another railway, and at all points of stopping established for that purpose, adequate and suitable accommodation for the receiving and loading of all traffic offered for carriage on the railway; (b) furnish adequate and suitable accommodation for the carriage, unloading and delivering of the traffic; (c) without delay, and with due care and diligence, receive, carry and deliver the traffic;"*

"Adequate and suitable accommodation" of traffic is, in principle, a good standard of service definition. In practice however, its lack of specificity leads to a very large grey area that necessitates a broad based effort in a Level of Service complaint to define what is adequate and suitable accommodation in the mind of a shipper and in the mind of a railway. The process of "proving" or defending a shipper's point of view in the context of this broad definition costs large amounts of time, money and resources. The shipper must go through the initial complaint phase, the appeal process, and then if successful, the shipper must re-start the process through civil action if they wish to receive compensation. Achieving a victory in principle is extremely expensive, however, achieving an award of damages becomes more than double in terms of time and cost.

In effect, the railways size the fleet to smooth the utilization through the year to suit their cost model and ignore both the market's need for cars and the intent of the CTA clause requiring the railways to provide *"adequate and suitable accommodation"* of traffic. The profit model, the railway monopolistic industry position, and the lack of a clear definition of what *adequate and suitable* actually means in practice, together with the lack of financial disincentives to do otherwise, sends the railways a clear signal on how to manage their business. Any rational business in this advantaged position would operate in the same manner.

A review of the case precedence on file indicates clearly that "*adequate and suitable accommodation*" includes the supply of cars on demand. The number of cars that are demanded and supplied is ruled upon on a case-by-case basis on the merits of the situation.

In the CTA level of service decision no 488-R-2008, the Agency for the first time attempted to define what *adequate and suitable* meant in practical application. Their award for four of the six complainants required CN to maintain a level of cars requested versus cars supplied at 80%.

The crux of the decision is embodied in paragraph 122 of the decision, which is as follows:

> [122] *"The evidence shows that some car orders requested on a weekly basis were confirmed at rates below 60 percent. The Agency finds that this is not a reasonable level of performance and this is consistent with its previous findings. Having determined that 100 percent may be unachievable and 60 percent is unacceptable, the Agency finds that confirmation of at least 80 percent of the cars requested is an acceptable and reasonable level of service standard. Setting a minimum confirmation level of 80 percent will increase the predictability of car confirmations, which will allow shippers to plan their operations accordingly."*

The WGEA has concerns with the rationale for arriving at the 80% benchmark of minimum confirmation level. It appears to have been arrived at by splitting the difference between the service CN was near providing (60%) and the requirement of shippers (100%). By extension of

this logic, if CN was providing service just below 70%, would the decision have resulted in a base level performance established at 85%?

The railways are a derivative business and are only a carrier of product. They only exist because sellers have product to move to their customers. This has been established in the CTA level of service decision no 488-R-2008, which noted that:

> [108] *"Further, while the railway company is responsible for the transportation of grain, it is ultimately the shipper who starts the process through the commercial sales agreement. This sets in motion a logistics chain of events of which rail transportation is only one component. The demand for rail service is derived from the demand for grain at destination and not the opposite."*

Having established in paragraph 108 that railway service is a derivative business that is set in motion by the establishment of a commercial sales agreement by a shipper, service benchmarks should be solidly linked to shipper requirements on performance which are normally at 100%. It does not seem very reasonable to link the benchmark to how poorly the railway was performing. After all, in the above noted case, CN's poor performance was the entire reason the level of service complaint was initiated in the first place.

The WGEA appreciates the difficulty in arriving at a performance benchmark for car supply, but contends that, in any future establishment of a performance benchmark, there must be a strong linkage to the shippers' obligation to perform, as required by both its customers and the railways themselves.

The railways will argue forcefully that linking service benchmarks to shipper requirements on performance encumbers them with a greater level of risk. Indeed it does. In recent years, however, they have not had to incur any meaningful risk on car supply. They have passed the risk of inadequate car supply onto shippers. This is done through the minimization of car supply or through products that commit shippers to a car supply over an extended period of time which may be insufficient to meet demand without ever increasing overall car supply. The railways simply provide some guarantee on only that portion with which they are comfortable does not carry excessive risk. They treat any demand beyond that artificially set level as residual and to be provided only if there are some railcars left over.

Shippers have not been able to secure guaranteed car supply near the 80% level, let alone to meet 100% of their needs. It is difficult to identify another business example where freight supply performance at an 80% level is remotely acceptable. These levels of supply are not acceptable to the WGEA and are not acceptable in other industries such as manufacturing, hydro-electricity or telecommunications. Global competition does not allow a company to work to that low standard and survive.

Because the demand for cars is somewhat seasonal and variable and the supply of cars is not, there is risk and cost to the holder of the cars. Over recent years and since the last changes to the CTA, the railways and their shareholders have benefited from a reduction in the size of the railway car fleets, the reduction in the number of loading origins and the consequent reduction in operating costs. Market shares between railways have essentially remained static as both have engaged in similar processes. It would appear fundamental that the provision of monopolistic

market positions to the railways should be offset by clearly defined regulatory requirements on service. The railways and their shareholders have enjoyed the minimization of risk through its transfer to their customers and it is now time for acceptance of that risk as an offset to the monopoly position they enjoy.

2. Railway Service Performance

Railway service performance is an issue of the railways providing a substandard level of performance on empty spotting, pick up, setting estimated arrival times and achieving ETA's (loaded transit reliability). Among the most relevant measures of railway service quality to the WGEA is that of the reliability of the empty car spot plan. Railways establish and communicate a plan each week to deliver empty cars for loading at grain elevators to fulfill orders. Elevators plan operations according to these plans, buying in grain, arranging timing of deliveries, allocating time for cleaning and processing of grain, and scheduling staff. Grain producers similarly make plans to load and deliver grain to an elevator based upon the logistics plan as communicated to them by the grain companies (i.e. shippers).

Once weekly car supply is finalized with a railway, the issue then goes to the execution of that service. Railcar spotting performance at country elevator sidings is of extreme importance to grain shippers in this review. It was poor performance in spotting cars on the day they were expected that formed the basis of the WGEA's complaints to Transport Canada over 2006, 2007 and 2008. We also note that poor rail service to grain shippers ranked high on the list of reasons the government ultimately decided to proceed with the Review.

A high level of planning and efficiency is required to assemble a unit train. Normally, the elevator will shut off receiving to dedicate the staff to the train. For 100 cars a grain shipper has approximately 14 minutes to load and reposition each car. The reasons companies need to know the day the cars are coming are as follows:

- Staffing; When the train does not arrive, the grain company is faced with added costs for labour. This is more problematic on weekends due to overtime costs. If the train does not arrive on a weekend a grain shipper would have unnecessarily paid time and a half for labour and shut down truck deliveries for no reason. Inbound loads have to be re-scheduled again and there is the danger of congesting deliveries. If the train doesn't show up for several days, the elevator may have been shut down for that time period because the space is full with the product waiting to load into railcars. This may be further complicated by collective agreements some companies may have with unionized staff that include issues such as notice of shift, priority scheduling of overtime and other related matters.

- Scheduling Farmer Deliveries; In some cases an elevator is full and cannot accept any more deliveries until shipping occurs. For efficiency, companies might schedule deliveries to take place right after cars are scheduled to be loaded. When the cars do not arrive, these farmers are turned away, truckers charge for missed opportunities and, in the case of previously inspected cars, the CGC would have been paid for a service they could not provide.

- Pick-Up Delays; There are times a company goes through the above described process to load a car within the 24 hour window, only to see the train sit on the elevator siding for days before being picked up. This situation infers inefficient use of labour (i.e. overtime) to meet load time parameters that are in fact not required by the railways in some circumstances, and is frustrating. In addition, failure to pick-up cars when released can affect estimated time of arrival which impacts port terminal logistics.

- Terminal Issues; Like a pipeline, if something goes wrong at one end it had a direct affect on what happens at the other. At the terminal, the vessel has arrived but the grain has not. When the trains do arrive, deliveries can be congested, the commodity mix may be out of sync, and the terminal is handling the wrong product. We could easily end up with railcar bunching, railcar demurrage, added labour costs, vessel demurrage, contract extension penalties, and missing a vessel.

The poor spotting performance has caused inordinate problems in trying to plan the efficient movement of grain from the country to export terminal and has at times resulted in extra costs, either through additional country elevator staffing to meet loading requirements when cars finally arrive, to increased export terminal costs due to lack of reliability of arrival times of rail cars. Simply knowing the railway success rate in delivering cars sometime in a given week is not an acceptable metric for the reasons described above. The grain industry needs spotting performance measured to the day.

Table 1

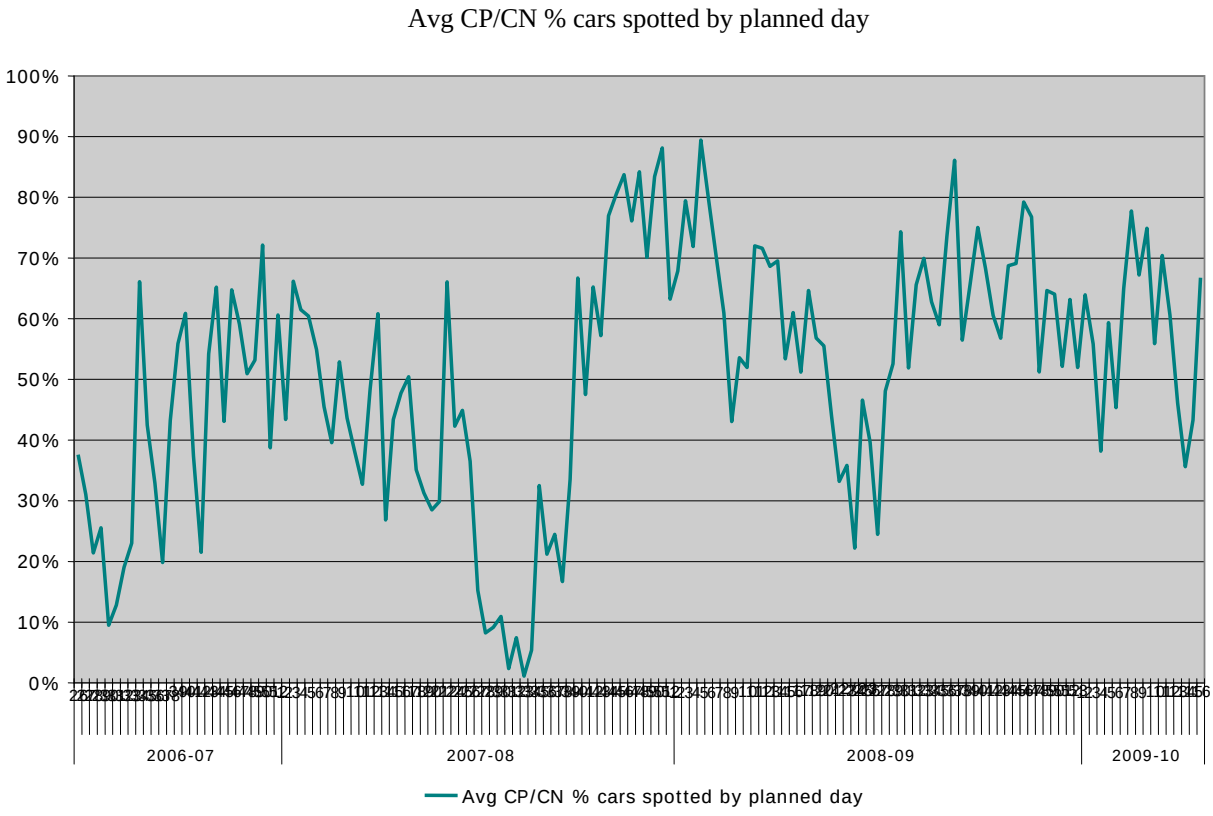

Table 1 represents spotting performance by both CN and CP from 2006 to 2009. This data has been collected by grain shippers themselves and is based on a large representative sample of grain movements during this period. To be clear, it does not represent performance relative to demand. It represents performance relative to the car spotting plans the railways themselves put out, which have already been rationed considerably relative to demand. The chart illustrates the very low level of performance and a high variability of performance from week to week. Grain shippers cannot even plan their businesses to account for poor service due to the high level of inconsistency.

It would appear that the same logic as for car order fulfillment in paragraph 122 of the CTA Level of Service decision no 488-R-2008 was also applied to the decision to order CN to deliver at least 90% of all of the confirmed cars ordered within the time slot requested by the shipper or within the subsequent two weeks;

> [129] and [130] excerpts "…..*Further, as the Complainants submitted that close to 20 percent of the rail cars were delivered three or more weeks after the want date for which they were ordered, it follows that 80 percent were being received within three weeks. While 20 percent delivery three or more weeks late was not adequate nor suitable according to the Complainants, the Agency determines that a standard of a minimum of 90 percent delivery on time or in the subsequent two weeks (three weeks total) should alleviate this concern of the Complainants. Therefore, the Agency finds that delivery of at least 90 percent of all the Complainants confirmed orders with three weeks is reasonable, acceptable and achievable…..Also, confirmed orders are orders CN selected for delivery. It seems reasonable that CN can deliver at least 90 percent of rail cars it has committed to deliver."*

Again, it appears the Agency has simply taken CN's performance level and the amount required by the shipper and split the difference to arrive at 90%. Spotting performance in the week ordered, the initial day indicated, car condition and transit times, are all highly variable in execution. The WGEA contends that the railway should be able to spot 100% of cars it has committed to deliver on the day they are supposed to be delivered. Doing otherwise completely misses the meaning of the word "committed".

Solutions

With respect to the general supply and allocation of rail cars, many observers of grain rail logistics in Canada conclude that because there is no competition and no commercial market for rail freight in the grain trade, it needs to be controlled by regulation or legislation. We agree that the reality is most primary elevators are captive to one rail service provider and are therefore beholden to the actions of a publicly traded monopolist, and that it is irrational to believe that rail infrastructure would ever be such in Western Canada to allow for anything approaching real competition. In the absence of significant and meaningful railway competition to allow the marketplace to facilitate service, the best option is to artificially re-establish balanced accountability through legislation/regulation. Commercial solutions are born from a balanced system.

There are two critical pieces to the puzzle of car supply. First, there must be sufficient base of cars offered in order to meet the ongoing demand that has been communicated in advance by shippers, and that can be accommodated by the other constraint factors in the system. Secondly, there must be a set of mechanisms by which to ration base car supply among shippers in periods of the year when overall demand exceeds supply.

In considering the overall system for securing car supply, the availability of a base car supply and the way cars are rationed in times of short supply are inextricably linked. Because car rationing deals with the system by which the car supply is divided up when base car supply is insufficient to meet demand, naturally, there are differing views among the WGEA membership as to the methodology for making rationing decisions. We envision a process by which a reasonable car rationing methodology can be determined, once the first four measures we propose in this paper are in place. Individual WGEA members will decide whether or not to make their views known on car rationing in separate submissions. For the grain industry, consideration should be given to reviewing these processes in more depth either as part of or in a secondary process to the review. Any review will require participation by grain shippers and railways.

At this point it is important to point out that car rationing solutions are not intended to replace any of the other proposed solutions from this paper.

For the purposes of this submission, we wish to focus on four important elements which we believe would dramatically improve rail service performance; 1) enhancements to the Level of Service provisions, 2) provisions related to penalties for failure to perform for both shippers and railways, 3) effective and timely fast-tracked arbitration when a matter arises where the parties cannot agree on a solution, and 4) proper notification or communication procedures for an event that might have an impact on the service, as well as ongoing monitoring of rail service.

1. Enhancements to Level of Service Provisions – Car Order Fulfillment

This is our proposed legislated solution to minimize the systemic lack of car order fulfillment relative to demand. As stated above, the first stream of rail service performance issues can be attributed to lack of balanced accountability. The WGEA believes that part of the solution toward addressing the general supply and allocation lies in making enhancements to the Level of Service provisions of the CTA.

Current legislation to a large extent addresses most of the typical concerns around preventing unwanted monopolistic behaviour such as price gouging or collusion. There is however, an effective gap in the legislative and regulatory framework insofar as it has not addressed the overarching question of whether or not the railways are providing an adequate supply of rail cars for the grain industry given the structure of its annual demand. As stated earlier, the definition of "*adequate and suitable accommodation"* is vague and needs to be tightened to leave little room for interpretation.

The WGEA proposes that the government, in the context of Level of Service complaints, empower the Canadian Transportation Agency (the Agency) to award damages, both those

directly related to costs incurred or lost opportunity and those that might be punitive in nature. These awards could be applied if the railways chose to ignore the spirit of any legislative or regulatory amendments aimed at encouraging market signals to resolve rail freight service issues in the grain industry. Thus, shippers would be able to address what they felt were systemic supply imbalances. The ability of the CTA to award damages should in most instances prevent the need for a dispute resolution in the first place. Nevertheless, this would give shippers a concrete process to seek financial compensation for the broader systemic issues that cannot be captured by the simple arbitration procedures recommended later in this submission.

The WGEA further proposes that the penalties for failure to meet performance standards, as well as any direct or punitive damages assessed by the CTA, would be applied in a manner that they directly reduced the effective revenue cap for the respective railway in the fiscal year in which they were applied (i.e. they could not be applied as "costs"). This would be a strong inducement for the railways to use demand signals for issues regarding the overall amount of equipment (cars and power) in the system. By doing so, the government would be ensuring that it is in the railway shareholders' interest for railway management to use the demand signals created through the above noted provisions. Interconnection of the penalties/damages with the revenue cap would, in our view, likely alter current railway service supply behaviour that uses primarily its operating ratios to determine car supply because there is no corresponding benefit or deterrent for them not to do so.

It will be necessary to ensure shipper orders are placed with certainty so that the railways may operate under the correct assumption that orders demanded are "real". To this end, shippers will have to be subject to penalties for car orders placed and then canceled, ensuring integrity in the car order system.

Finally, there are many deterrents from using the Level of Service provisions such as lack of human resource capacity and financial resources to launch a successful challenge. The potential return to companies when mounting a challenge against a railway is often negative, which prevents many companies from utilizing these provisions. To remedy this, the WGEA proposes to give the Agency investigative powers to conduct a Level of Service investigation of its own volition, based on complaints by shippers or observed behaviour by means of the monitoring provisions discussed in item 4 below. Shippers would retain the right to file Level of Service complaints as they see fit, but there may be circumstances where egregious and systemic service issues would prompt the Agency to use its investigative powers to undertake its own Level of Service process, on behalf of shippers.

2. Penalties – Railway Service Performance

The second stream of rail service performance can be described as those performance issues that take place after the railways have committed to spot cars. To ensure that railway service is and continues to be adequate, there must be financial penalties payable by the railways to shippers who have suffered from poor service.

As shippers, we respect the need for railway-established performance standards for loading and unloading of trains as we understand it has a large commercial impact on the efficiency of our

business partners, the railways, in addition to our own businesses. The penalties imposed by railways are therefore an extremely effective instrument in ensuring a very high level of performance by shippers to these service standards.

On the other hand, shippers do not have a means available to force the railways to pay reciprocal penalties where they have clearly failed to provide the shipper with reasonable service. This ties in to the central component of the WGEA's long-held position that there needs to be balanced accountability in rail freight service between the railways and shippers. From our perspective, there are several instances that are easily identified where a railway would, in a normal commercial environment, be considered as having failed to perform. For clarity, failure to perform can be narrowed down to two distinct scenarios: 1) once a railway has agreed to spot cars, penalties should apply if they fail to deliver on time (daily metric for spotting performance must apply), and 2) once the train has been loaded, the railway should be held accountable for arriving at destination within a specific timeframe.

In the first instance, railways have ***committed*** to deliver the cars to an origin on a certain day and fail to arrive as planned. This is the most egregious scenario where we believe penalties should be applied. Of course, there is nuance in what one might consider as being a "failure to deliver". For example, if the railway provides a shipper with early notification that the cars will not be delivered, one could reasonably assume that penalties should not apply. Thus, parameters would need to be established that outline the circumstances for a "failure to deliver".

In the second scenario, railways should be held accountable to arrive at destination within an agreed upon timeframe. Like the primary elevator scenario, terminal operators likewise need certainty on when trains will arrive to make arrangements for unload. More importantly, vessel load requirements must be met as demurrage and late arrival contract penalties are very punitive. Given that receipt of product at the terminal is just-in-time and that the average vessel is 40,000 tonnes, it takes roughly 5 one hundred car unit trains to fill the vessel. It is extremely important then that trains arrive at the terminal in a timely and orderly fashion in order for grain companies to meet their vessel load and customer contract requirements. It should, therefore, be considered a failure to perform and thus a penalty warranted when the train does not arrive by the agreed upon arrival deadline.

The WGEA is proposing that this be brought about by giving shippers through legislation/regulations the right to apply penalties against the railways in instances where the railways have failed to perform, just as the railways currently do against shippers that fail to meet load or unload performance criteria (i.e. it could be regulated that these penalties must be written into the railway tariffs). It is only with such penalties that the railways, which operate as effective monopolies, will be forced to be accountable to their customers for the service they are obligated to provide.

Under the proposed legislation/regulations, the WGEA proposes that railways establish a rolling service plan sent out each day to shippers indicating the plan for spotting country elevators and the associated scheduled load date for each elevator spot for the next seven days. The loading dates indicated on the service plan will form the basis of the performance measurement.

- Measure: Empty cars spotted at the elevator to meet the scheduled load date, with daily penalty for cars spotted late and tiered penalty for advance-booked origin-destination cars:
- Penalty: For cars that are spotted for loading after the scheduled load date specified on the 7-day advance plan, the following penalties will be applied on a daily basis:
    - For cars booked through the week-in-advance order process:
        - The daily loading demurrage rate, charged per car per day for each day of delay to the scheduled load date.
        - If the railway provides 96-hour advance notice of change in service, penalty will not apply provided cars are spotted for a load date within 5-days of the original load date. Only one 96-hour change is allowed.
    - For cars with origin-destination booked two or more weeks in advance of loading week:
        - The daily loading demurrage rate times 1.5, charged per car per day for each day of delay to the scheduled load date.
    - Should the allocation and planning system evolve to allow for significantly farther out advance booking of specific origin-destination orders with specific booked load dates, the penalty system will need to adjust to further reward such advance-booked orders with higher valued service penalties.

The WGEA further proposes that railways establish and communicate expected times of arrival (ETA) at destination when a load is released by a shipper. These ETAs will form the basis of the performance measurement:

- Measure: Cars arriving at destination within 24 hours of the ETA communicated upon release at origin.
- Penalty: For cars that arrive at destination beyond the required performance measurement, the following penalties will be applied on a daily basis:
    - For the first 48 hours (days 1 and 2), the daily demurrage rate for the destination in question;
    - For the proceeding 48 hours (days 3 and 4), 1.5 times the daily demurrage rate for the destination in question;
    - For beyond 96 hours (day 5 onwards), 2 times the daily demurrage rate for the destination in question.

While our preference would be to have ETA's established on the basis of the original planned spot date, this would be administratively burdensome to track. An increasing rate of demurrage recognizes both the shippers' liability with extended delays in arrival (e.g., potentially stiff vessel demurrage rates), as well as the flexibility that railways would have under our proposed spotting performance regime above, but is easier to implement administratively speaking.

The regulations could then be established to indicate that these performance standards would be a deemed contractual obligation within the railway tariff and would carry the above noted minimum standards of service with the associated penalties for failure to perform, unless otherwise agreed upon by the relevant parties. The ability for the parties to agree upon other arrangements (i.e. to not make the penalties so rigid that shippers do not have the right to waive

them) is a critical element to allow for railways and shippers to operate within normal commercial parameters that in many instances could result in reasonable leeway being provided to a business partner. As shippers, we would similarly expect the railways to provide leeway on load or unload penalties where we believe it may be warranted.

3. Fast-Tracked Arbitration

Level of Service Reviews are very costly, time consuming and extremely combative. There are always individual circumstances that arise where shippers and railways will disagree on the "rules of the game". The WGEA proposes that that every rail car shipment carry an implicit contractual obligation that would allow either the shipper or the railway to resolve a penalty-related dispute (whether a penalty happened to apply or not) by have a mandatory "fast-tracked" arbitration process. The parties would have 7 days to submit written arguments with a clear recommended solution. An arbitrator would be allowed 14 days in which to rule upon the dispute, but the arbitrator would be constrained by having to choose either the shipper's or the railway's recommended solution, insofar as that solution complies with existing regulation or legislation. This would force parties to recommend reasonable outcomes, and ensure timely awards by the arbitrator for minor disputes.

For clarity, the WGEA is still recommending that Level of Service and Final Offer Arbitration procedures be retained (and LOS provisions enhanced as described in point 1 above), and that either railways or shippers could pursue these options even if a commercial arbitrator has already heard a particular case either in part or in whole. Thus, the current barriers to the aforementioned procedures (costly, time-consuming, combative) would be effective deterrents for frivolous "appeals" of the proposed streamlined commercial arbitrations.

In terms of how the penalties and the arbitration concepts raised in the "solutions" section of this document (points #2 and #3 above) might be brought about, the WGEA believes there is a rather simple means to accomplish this goal. Legislation could be amended to outline that cars must be committed in writing for delivery by a railway to a shipper and that this written confirmation would be ***deemed*** to include contractual obligations related to both tariffs and service performance standards which would be set out in regulation. Again, the regulations could then be established to indicate that the deemed contractual obligation per the legislation would carry the above noted minimum standards of service with the associated penalties for failure to perform, unless otherwise agreed upon by the relevant parties. The last provision is extremely important, in that it sets out the ability for a shipper and a railway to negotiate alternative arrangements acceptable to both parties. This allows for normal commercial partnerships to be formed and for these business partners to allow for flexibility in their relationship. In addition to the service standards and penalties, the regulations could also provide for the aforementioned fast-tracked arbitration option.

4. Improved Monitoring, Measurement and Communication

Chronic and widespread service failures by the railways do not give confidence that these problems will disappear with a one-time fix, even if the changes we have proposed to the Act are made. Rail system logistics performance must be subject to ongoing measurement so that

regulators can monitor changes in performance. For this reason, the WGEA recommends the Agency or another federal department should establish an oversight body that measures performance of the railways and publishes these observations. The existing Grain Monitor could possibly provide some guidance and insight into how a Rail Service Monitor might be organized and operated.

Improved communication between railways and their customers is critical to ensuring trust exists and solutions to problems are found for rail service issues. One way proposed by shippers to improve communication is by increasing transparency in the statistical reporting of rail service performance and equipment availability.
The monitor would be responsible to:

a) Establish measurements for car order fulfillment (compared to targets as to the level of performance the railways should reasonably be expected to provide). Standards for measurement must be simple and rapid.
b) Have the authority to collect data from the railways and others in the supply chain (this may require the introduction of adequate regulation to both (i) require this monitoring and (ii) obtain data from the railways to do this monitoring),
c) Issue periodic public reports (perhaps annually), and
d) Give advice to the Canada Transportation Agency to launch and undertake investigations on its own initiative, after which the Agency could initiate its own Level of Service Complaint based on its findings. The independent monitoring activity could be formally reviewed every five years.
e) Do all of the above according to a timeline of days and weeks (versus months of waiting for data, analysis and advice – data well after the fact is not very helpful). Data should be provided on an ongoing basis.

The Monitor would also have the ability to make recommendations on an ongoing basis for improvements to items such as better railway contingency plans and better systems in place to communicate those plans with the railways' customers. In other words, a watchdog is necessary to ensure the railways pay the required attention to the service needs of shippers and receivers at their loading and unloading facilities in conjunction with their ongoing focus on scheduled line-haul operations.

Conclusion

Service to grain shippers has improved in 2009. However, the improvement is related to the state of the economy. Railways are moving less product for other industries and therefore are putting resources and priority on moving grain. They have shown that they are capable of providing highly improved levels of service. As the economy recovers, we are concerned that, without a re-balancing of the system to address the fundamental issues, service will deteriorate to the past levels or worse.

In summary we are recommending the following changes be enacted in legislation or regulation whichever is appropriate:

1. Enhancements to Level of Service Provisions to give the Agency investigative powers, the ability to launch a Level of Service action of its own volition, and the ability to award damages, both those directly related to costs incurred or lost opportunity and those that might be punitive in nature.

2. Giving shippers through legislation the right to apply penalties against the railways in instances where the railways have failed to perform against pre-established criteria, just as the railways currently do against shippers that fail to meet load or unload performance criteria.

3. Having a "fast-tracked" arbitration process to regulate an explicit contractual obligation for every rail car shipment that would allow either the shipper or the railway to resolve a penalty-related dispute (whether a penalty applied or not).

4. The CTA or other federal department should establish an oversight body that measures performance levels for the railways and publishes the results against actual performance in different regions of the country.

The above recommendations all fall under the theme establishing balanced accountability. The railways should be held accountable to the same level of performance to which they hold shippers. If the government fails to move forward with these amendments the grain industry will continue to be faced with the inability to address problems when they arise. The longer we wait for a re-balancing to address rail service issues, the more significant becomes the erosion of our competitive position in international markets.

Without the regulatory/legislative change that the WGEA is recommending, the Canadian grain industry will continue to suffer from:

- lost grain sales domestically and internationally;
- lost revenue because grain will be sold outside of peak price periods;
- large potential for significant vessel demurrage bills;
- lost confidence in Canada as a reliable supplier; and
- higher costs to farmers.

All of these costs make Canadian grain, oilseed and special crop production less viable. Without material changes to the legislation and increase in railway accountability, there is little that can be done to address service disruptions and almost no way for shippers to hold the railways accountable.

The reality of global exports is that the railways are only one piece in a very long chain. The chain begins with a customer, somewhere else in the world, that has in front of them a wide variety of options in the origins of the goods and services they wish to consume, The chain works back from them to a long array of manufacturers, importers, import terminals, vessels, export facilities, exporters, domestic manufacturers, producers and suppliers. If Canada is able to compete in this global marketplace, then Canada as a whole must be cost competitive and able to deliver on all levels on time, or another country will. All components in this chain either need

competitive options that ensure cost and service effectiveness or regulation that provides it when the marketplace does not. The railways are no exception.