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**Submission to the Rail Service Review Panel
In Response to
The Call Letter for Submissions Dated November 9, 2009.**

Ottawa, ON
April 28, 2010

Summary of Recommendations

In developing these recommendations, CITA has kept in mind the Panel's exhortation to make "*submissions for improving the rail-based logistics system*". The recommendations, all relate to "Rail Freight Service" and the following submission reports on the analysis and rationale that led to these recommendations.

1. CITA recommends that there should be reciprocal penalties for service failures by both railways and other parties in the rail based supply chain.
2. CITA recommends that a continuing rail service monitoring function be established within the Canadian Transportation Agency with the authority to set service standard ranges, collect car supply data, and administer penalty payment rates and their application.
3. CITA recommends that Transport Canada replace the Competitive Line Rates (CLR) provision in the *Canada Transportation Act* with a new provision that provides shippers with the same advantages as the regulated interswitching regulations that can be initiated solely on the shipper's initiative.
4. CITA recommends that the *Canada Transportation Act* be amended to require railways to consider the impact of local service changes on the shippers directly affected, to directly negotiate such changes, and to give 30 days advance notice of any reductions to switching service at the facilities of shippers, consignees or terminal operators.
5. CITA recommends that the government strongly encourage and facilitate discussions between the railways and shipper groups to negotiate a mutually acceptable framework to resolve disputes on service issues.
6. CITA recommends that federal and provincial infrastructure funds be made available to shippers and other stakeholders in the rail based supply chain for infrastructure improvements as non-carrier rail infrastructure has an impact on service efficiency.
7. CITA endorses all the QGI "proposed solutions" and includes these formally in its recommendations. The QGI Proposed Solutions are included as appendix 2.
8. CITA recommends that Transport Canada, in cooperation with Port Metro Vancouver (PMV), the railways, and other port stakeholders begin an investigation of the options for improving coordination and delivery of rail services to PMV.
9. As the effective functioning of Section 120.1 of the *Canada Transportation Act* will have a significant impact on service, CITA recommends that the *Act* be amended to specifically permit a shipper to file a complaint on an ancillary charge or penalty charge tariff applying to more than one shipper, even if the complainant is affected by such tariff charge through a confidential contract.
10. CITA recommends that *Division IV, Rates, Tariffs, and Services* of the *Canada Transportation Act* be subject to statutory review every five years.

CITA Submission to the Rail Freight Service Review Panel

1.0 Introduction

The Canadian Industrial Transportation Association (CITA) is pleased to have the opportunity to submit its comments and recommendations to the Freight Service Review Panel in response to the Chairman's letter of November 9, 2009.

CITA has been representing the interests of the Canadian Shipper Community to all levels of government, international agencies, carrier groups and other stakeholders continuously since 1916. The CITA membership includes 120 Canadian companies from all parts of Canada and the member companies are in the agriculture, food processing, mining, forest products, chemical, fertilizer, manufacturing, and retail industries. The CITA membership list is attached as appendix 1. CITA also works closely on rail related issues with other industry associations in the Coalition of Rail Shippers (CRS) and chairs the CRS.

At the time that Parliament was considering Bill C-8, amending the *Canada Transportation Act*, CITA and other members of the CRS strongly advocated that the government undertake an independent review of railway service. The members of the CRS were gratified that the government accepted this recommendation and agreed to undertake the independent review, to commence within 30 days of Bill C-8 becoming law. Bill C-8 received Royal Assent on February 28, 2008 and the government made its initial announcement commencing the review within that 30 day period.

2.0 Background

Railway Freight is not a normally functioning competitive market. The bargaining power between the buyers and sellers in this market is severely out of balance. This is the fundamental issue underlying all the price and service problems encountered by rail shippers. While shippers generally would prefer to solve problems with the carriers through direct negotiation, where the lack of competition prevents this, some form of regulatory constraint on railway freedom is needed as a surrogate for effective competition.

The widespread call for an independent service review and response of the government to undertake such a review is a strong indication that chronic problems do exist. It is important that the review be conducted in a thorough and unbiased manner and CITA is supportive of the structure of the review, the terms of reference, the scope of work, and the qualifications of the three panelists.

3.0 Market Dominance and Shipper Captivity:

3.1 Market Dominance

In section 2.0 above, we note that the rail freight market is not a normally functioning competitive market. It is dominated by the sellers. As noted in the QGI consulting report, 2(b), *Description of Canada's Rail Based Freight Logistics System*, the railway industry is essentially a dual monopoly, characterized by two major railways, CN and CPR augmented by 49 short line railways that handle traffic to and from the two main line carriers. We characterize this as a "dual monopoly" rather than a "duopoly" as both CN and CPR are the only significant rail carriers in some parts of the country and many shippers are served by only one carrier. This is discussed in more detail in section 3.2.

The behavior of monopoly businesses has been well understood since the 19th century, and many of the lessons learned were from the behavior of 19th century railways. In Canada,

railway law has acknowledged that rail freight is not a normally functioning competitive market for over a century and the revisions of Bill C-8 that became law on February 28, 2008 confirm that policy. The 21st century behavior of the freight railways in Canada and the United States indicates that the long dark night of heavy 20th century railway regulation has been lost on the current generation of railway managers. Monopoly behavior invites increased regulation, and there is pressure for increased constraint on railway behavior in both Canada and the United States. The position of senior railway managers, reinforced by the investment community, appears to be “short term gain for long term pain”.

The *Abuse of Dominance* provisions of the *Competition Act (Sections 78 and 79)* as used by the Competition Bureau are instructive. The Bureau’s Guidelines on this issue note as follows:

The Bureau’s general approach in evaluating allegations of abuse of dominance is as follows:

- *A market share of less than 35 percent will generally not give rise to concerns of market power.*
- *A market share of 35 percent or more will generally prompt further examination.*
- *In the case of a group of firms alleged to be jointly dominant, a combined market share equal to or exceeding 65 percent will generally prompt further examination.*

In the case of the rail freight market, CN and CPR together control 94% of the market by revenue. Based on 2008 annual reports of CN, CPR, and the Railway Association of Canada (RAC), total rail freight revenues in Canada were \$9.957 billion, CN’s Canadian freight revenues were \$5.632 billion and CPR’s Canadian freight revenues were \$3.814 billion. CN alone accounts for 57% of the market based on revenues and CPR for 38%.

The issue of competition from other modes is a factor to be considered and is often raised with regard to rail freight. While in some instances, there may be truck and marine competitive options, the reality of moving to other modes in most cases is not practical in any reasonable scenario. Truck equipment may not be available in the short to medium term and volumes may be too great to transfer to truck. Time constraints and inventory carrying costs may mitigate against the marine option where this theoretically exists such as in the Great Lakes St. Lawrence Seaway System. Concern for growing greenhouse gas (GHG) emissions from transportation is another public interest factor that may keep traffic on the railways in situations where shippers might otherwise wish to move traffic to a competing mode, but one that emits more GHG on a ton/mile basis. Over the past seven decades, the railways have lost significant market share to trucking and it is likely that most traffic that could take advantage of the trucking option, has moved to truck.

3.2 Captivity

Considering captivity in more detail, as noted above many parts of the country and several major ports are captive to one railway. East of Montreal, to the Port of Halifax, CN is the only class one railway now operating as CP withdrew and sold or leased its properties that used to connect through the state of Maine to New Brunswick. A similar situation exists in northern BC since CN purchased the operations of BC Rail and is also the only railway serving the Port of Prince Rupert. A similar situation exists in south eastern BC and southern Alberta, served only by CPR. In parts of northern Ontario, the CN and CPR main lines are enough separated that they are monopoly rail carriers in those areas as well.

The *interswitching regulations* and the *competitive line rate* provisions of the *Canada Transportation Act* were attempts by the Canadian Parliament to provide a surrogate for

competition for captive shippers. The interswitching regulations were designed to provide a competitive option to a shipper where traffic could be interchanged from the originating carrier to a second railway, if the interchange is within 30 km of the originating or terminating point of the traffic. The competitive line rate provisions (CLR) were enacted to provide a similar option to captive shippers where the first interchange point between the originating railway and a second railway is beyond the 30 km limit of regulated interswitching.

The regulated interswitching regulations generally work well for shippers; the CLR provisions have been a complete failure. Since this provision was introduced with the *National Transportation Act, 1987*, only three CLR applications have ever been brought to the Agency and only one was successful, and in this case only for one year. The CLR requirement for a shipper to have a pre-negotiated rate from the connecting carrier before asking the Agency for a “CLR rate” from the originating carrier has allowed the railways to render this provision inoperative (and thwart the will of Parliament). Neither of the Canadian Class 1 railways will quote a rate from the interchange point in such cases.

Railway attitude to captive shippers manifests itself in several ways including car supply, on-time delivery of both loads and empties, consistent transit times (pickup to delivery), and pricing. The NRG Research shipper survey in phase I of the Service Review notes in the graph on page 22 that while 16% of the total sample of shippers were dissatisfied with railway service, 25% of captive shippers were dissatisfied.

Clearly there needs to be a viable option for captive shippers to replace the inoperative CLR provision. This needs to be addressed urgently from both a shipper and railway perspective. The level of frustration in some of the captive areas, such as Atlantic Canada, has led to calls for radical and controversial fixes such as nationalization of all rail rights-of-way, or forced running rights with traffic solicitation rights. While these more controversial recommendations have largely disappeared from shipper advocacy, if the problems of captive shippers aren't solved by a more palatable replacement for the CLR provision, then there will likely be pressure for the more extreme remedies.

CITA makes a recommendation to address the captivity issue in section 7.

4.0 Scope of the Review

The review has been structured in two phases. Phase one is the data gathering and analysis phase, undertaken by consultants hired directly by Transport Canada. In phase two, a three person panel, will take the findings of phase one, will obtain direct input from various stakeholders, and then develop the recommendations and submit its findings to the Minister of State for Transport.

The four consulting assignments in phase 1 of the review have provided detailed assessments of various aspects of rail service. The quantification of service problems throughout the rail based supply chain, the independent survey of regulatory oversight of other industries and rail in other countries, the identification of “best practices”, and the independent survey of shippers and other stakeholders will all provide a strong analytical base for the development of recommendations by the panel in phase 2 of the review. The terms of reference of the review are well known and the CITA will not repeat them here. In making this submission, CITA is mindful of the exhortation in the Panel's *Call Letter for Submissions*, dated November 9, 2009, asking for “*submissions for improving the rail-based logistics system*”.

5.0 CITA Comments and Analysis

In this submission, we use the term “shipper” to generally describe those participants in the railway supply chain who originate or receive rail shipments, or other participants such as terminals that are serviced by rail. While “shipper”, “consignee”, and “terminal operator” are all well established terms, for brevity, we have settled on the term “shipper” as the most convenient.

5.1 The Elements of Railway Service:

Railway service generally includes the following elements:

1. An adequate supply of serviceable and clean cars for loading, delivered as requested and required by the shipper.
2. On-time delivery of empty cars for loading
3. Prompt pick-up when loaded.
4. Consistent, reliable transit times and a reliable and reasonable expected time of arrival (eta), whether the shipment is handled by a single railway or interchanged to one or more other railways.
5. On-time delivery of loaded cars to the consignee delivered with a frequency as requested and required by the consignee.
6. Prompt pick-up of cars once emptied.
7. Accurate billing of freight and accessorial charges. Prompt closure of disputed invoices.
8. Accurate assessment of demurrage based solely on shipper or consignee actions and not due to “bunching” of cars or other delays caused by the railway.
9. Attentive customer service and communication with customers on service problems.

There are some subtleties within the above-mentioned elements that need to be highlighted. The “staging” of delivery is very important to shippers. The issue that cars need to be “delivered at the frequency required by the shipper (or consignee)” is very important. If a shipper needs cars at the rate of three per day, five days per week; then 15 cars once per week, is not satisfactory. The shipper or consignee may not have trackage adequate for 15 cars, the staff to unload 15 cars within the free time allowed to avoid demurrage, and the manufacturing process may be disrupted. If delivery is not staged, “bunching” of cars may result which in turn induces demurrage charges. It is unreasonable that railways should be rewarded for service failures by charging demurrage as a result of improper staging of delivery.

Another issue within these elements is arbitrary changes to switching service with inadequate notice that the changes are being made. This can have a major impact on the manufacturing processes of shippers and consignees. In a normally functioning competitive market, this is something that would be negotiated between the buyer and seller and not arbitrarily imposed by the seller. This is one of the most common complaints from CITA members and other associations in the Coalition of Rail Shippers report the same complaints from their members.

In attempts to improve the relationship between the railways and CITA members, we arranged meetings with CN marketing executives to begin discussions on major points of conflict between the railway and its customers. At the request of CITA members, the lack of communication from CN to its customers when service changes are being contemplated was one of the first issues identified for CN – CITA discussions.

The NRG *Survey of Shippers* report, (page 38), notes some relevant shipper comments regarding communications improvements the railways should make. The comments are as follows:

Communications

- ☒ *Need to improve communication with customers. Allow direct communication with terminals rather than through customer service representatives.*
- ☒ *Communications within the company and their management of crews, we communicate to the railway the equipment required, and the equipment provided is often substituted, and/or direction is not followed.*
- ☒ *Provide contact person, better customer service through the availability of people to answer questions.*
- ☒ *We need some responsiveness from the CN rep, we can't get a response for a new line, rates and question on operations.*
- ☒ *The electronic releasing processes — the helpline takes too long and not very helpful.*
- ☒ *Better communications, more effective problem solving. A little more empathy*

The second report of NRG Consultants surveying “Other Stakeholders”, i.e. shipping lines, port authorities and terminals notes that these stakeholders are also calling for “*accurate and reliable information about railway operations*”, (page 1, “Other Stakeholders’ Survey Highlights”)

5.2 Issues and Chronic Problems with Rail Service

The NRG report, the CITA Benchmarking Survey, direct complaints to Transport Canada, and anecdotal comments and reports from other stakeholders and industry associations, all note a number of chronic and widespread service problems have been identified as summarized here.

1. The inability of railways to promptly recover from problems (be it weather, derailments, track maintenance delays, congestion, etc). The 2007 statement from the Grain Monitor Review comments on the impact of current railway “aggressive asset utilization” and balanced operations. The Grain Monitor notes that, while these policies have contributed to healthy financial results for the railways, this policy limits their capability to recover from service disruptions. This will also have an impact on consistently meeting shipper needs for rail cars and containers.
2. Ineffective car ordering systems (e.g. CN’s guaranteed Car Order System)
3. Quality of empty car supply (rate of rejection by shippers of dirty or damaged cars unfit for loading)
4. Demurrage and storage rules are not always reasonable. Demurrage and storage charges on empty cars have become an increasing concern to shippers and an additional cost of doing business. Regarding storage, railways are frequently downloading this function onto shippers. Railway suggested storage tracks are frequently out-of-route and create additional freight charges to move cars in and out of storage. The need for car storage can be caused by the actions of the railways, such as reduced train or switching service as well as by bunching and inconsistent transit times. Shippers should not be penalized either through demurrage or storage charges, or be required to invest capital in storage tracks, or in new equipment because of railway actions. There needs to be balanced accountability.
5. Related to item 4, private fleet owners are being subjected to ancillary charges for back-to-back empty moves of their cars, e.g. to and from maintenance shops, but are not being compensated for back-to-back loaded moves through mileage equalization as in the past.

6. Invoicing errors. Any dispute resolution process must result in an agreement that will have both parties honour the findings.
7. Chronic inconsistent on-time performance with no accountability for the railway when significant and chronic failures occur, especially “first and last mile”.
8. Arbitrary changes to switching service with little or no advance notice, or no willingness by the railway to negotiate the changes. There is often little or no attempt to make up missed switches.
9. Arbitrary embargos over the Christmas period regarding the handling of perishable food products. This is especially damaging to exporters of perishable products.
10. Periodic service disruptions due to labour disputes. This has been a problem at CN in particular. While causing major problems for all users of the rail system, as with item 9, shippers of perishable products are particularly vulnerable to even the threat of a labour dispute.
11. Service level commitments/agreements. With market dominance, arbitrary changes to service levels, a return to tariff pricing, and a law that allows railways to increase rates with a 30 day notice, shippers and consignees are often put in an untenable position as they generally are unable to adjust their processes as quickly or pass on the increased costs to their customers.
12. Poor communications with customers on service changes.
13. Unilateral imposition of ancillary and penalty charges that were previously part of the freight rate without any corresponding reduction in the freight rate. The term “optional services tariff” is misleading in that some charges are not “optional”.

5.3 CITA 2009 Benchmarking Survey: Comments on Rail Service

For the past five years, CITA has been canvassing its members on a variety of issues facing shippers with all modes of transportation. The survey is carried out by Dr. Alan Saipe, P.Eng. of Supply Chain Surveys Inc. Each year, questions on current issues are included in the questionnaire. In 2009, as part of our preparation for the Service Review, Dr. Saipe included several questions related to rail service. The Benchmarking report includes the following comments.

Rail freight service review

We asked the CORE Survey participants what issues the service review should address, and also what changes they would hope to see as a result of the review.

The issues that should be addressed included:

- Service quality issues, including:*
- Ancillary charges and error rates*
- Captive shipper issues*
- Inconsistent transit times and the need for better on time service*
- Service cuts without notice or compensation*
- The need for penalties to the railroad for service failures*
- Schedules and the need for more flexibility*
- The need for more railroad accountability*
- The need for better communications*
- The need for more infrastructure*
- The cost and time of the existing dispute settlement mechanism*
- The lack of competition*
- Escalating rates*

And the changes that they hope will result included:

- Shippers recover the costs of railroad service failures from the railroad*

- Service cuts require customer impact analysis
- Railroads to cost justify their ancillary charges, indexing them to inflation and to provide an avenue to dispute extra charges
- More consistent transit times, more timely shipments, more frequent service
- Automatic rail car placement when cars and space are available
- Better communications
- Create a competitive atmosphere
- Allow more rail companies

The problems and suggested changes that the survey participants identified in the CITA benchmarking survey are consistent with the results of the NRG report and comments from shippers generally.

In addition, each year, the participants are asked to rank service by the various modes of transport. The following table is particularly relevant to the service review in that it shows, in terms of on-time performance that the railways were consistently last in this category. To interpret the table, if a shipper's carrier picked up loads on-time, all the time and delivered on-time all the time, the rating in the "Score" column would be 200%. The table shows the service ranking of various modes based on shipper experience with on-time service.

Service Level Rating Table

	SCORE	2009	2008	2007	2006	2005
EXCELLENT	>= 191%	-	AIR FREIGHT	AIR FREIGHT	-	LTL AIR FREIGHT
GOOD	171% - 190%	LTL COURIER TL	COURIER	COURIER MARINE	AIR FREIGHT TL	COURIER TL
ACCEPTABLE	131% - 170%	AIR FREIGHT	TL LTL	TL INTERMODAL	LTL COURIER	MARINE
POOR	<= 130%	MARINE INTERMODAL RAIL	MARINE INTERMODAL RAIL	LTL RAIL	MARINE INTERMODAL RAIL	INTERMODAL RAIL

With regard to service quality, a look back 91 years is instructive. In 1919, three years after CITA was founded, as the *Canadian Traffic League*, minutes of a League meeting note that on February 5, 1919, the League passed a resolution asking members to "tabulate any excessive delays experienced to their traffic over" (a three week period) "the idea being to subsequently send a statement to the chief traffic and operating officials of the interested railways with the idea of bringing about an improved service". This is a further indication that the railways have not been responsive to direct discussion with their customers on service issues for a very long time. In 2004, at the request of their member companies, CITA and several other associations approached CN and CPR to discuss service issues and both companies refused to meet a de facto group of shippers with common service complaints.

6.0 Comments on Phase 1 Analysis and Assessments:

As expected by the shipper community, the phase 1 consultants' reports have confirmed that there are service problems and that these are wide-spread and chronic.

6.1 Project 1: Analysis of Transit Time and Fulfillment of Shipper Demand - QGI

This report by QGI uses railway provided data to evaluate railway performance in terms of car supply and transit time. It particularly looks at consistency in meeting shipper demand.

The results generally support shipper complaints of chronic inconsistency in service as found in the NRG shipper survey (Section 6.3), the CITA benchmarking survey as noted in the chart above, and as reported by the large number of complaints to Transport Canada from shippers in many industries. It should be noted in the car supply section of the QGI report, that intermodal car supply, shipper supplied cars, and cars supplied outside the electronic car ordering systems are excluded from this analysis. The exclusion of shipper supplied cars is particularly significant for the chemical industry.

While the report summarizes the success of the railways in meeting annual demand for cars in the 90% range, the need is for the right number of cars to be delivered on a daily basis. Section 5.1, above, provides additional comments on the need for consistent car supply on a daily basis. While the railways were unable to supply much data on daily fulfillment, The QGI report notes that even on a weekly basis, *“each railway provided grain shippers with at least 90% of the cars they had ordered at a specific location only half the time”*, (page 12). Similarly the QGI Report notes that CN was successful in delivering at least 90% of cars ordered on a weekly basis to only 68% of their merchandise customers and CP supplied at least 90% of cars ordered on a weekly basis to only 50% of their merchandise customers.

The transit time analysis confirms the lack of consistency that generally exists for most shippers and the tables on pages 20 and 21 of the QGI report provide a good summary of the high degree of variance. Unlike the Car Order analysis, the Transit Time Analysis includes the terminal to terminal time of intermodal movements. The table and chart report for CN includes the following information.

CN Carload Traffic

- Average Length of Haul - 1078 miles
- Typical Transit Time – 117 hours
- Maximum in range – 159 hours
- Minimum in range – 76 hours

The transit time range is defined as a range of times covering an estimated 75% of shipments in each of the three groupings, i.e. Bulk/Grain, Carload, and Intermodal.

The consultant calculates a *coefficient of variance (CV)* for these analyses and the above sample has a CV of 30.7. For Bulk/Grain traffic the CV is 24.6 and for intermodal traffic it is 18.5. The lower the CV, the more consistent is the transit time performance.

For CP, the CVs are as follows:

- Bulk/Grain – 29.9
- Carload – 33.9
- Intermodal – 19.9.

The report looks also at railway terminal time and loading and unloading times. There is considerable variability in these elements of the car cycle as well, with some of the responsibility with the shipper or consignee and some with the railway. It notes that loading and unloading times were shortest and most consistent for grain and coal within the bulk group and for finished vehicles within the merchandise group.

A significant gap in this analysis is any discussion of service quality related to shipper owned or leased cars.

6.2 Project 2:

6.2.1 Description of Canada's Rail Based Freight Logistics System - QGI Consultants

This consulting report provides a comprehensive overview of the rail based logistics system looking at the rail network, equipment, and overall operations, but also at car order and car distribution systems, and interchange between railways. It highlights the problems that can occur at origin, in-transit, and at destination and the impacts of these problems on the railways and their customers. It particularly notes the need for effective communications from shippers to the railways with regard to car orders and from the railways to shippers, consignees, and other stakeholders in the supply chain. It notes that shippers may suffer in the markets they serve if reliability of delivery is compromised by rail service problems.

The overview of the rail system provides useful background and context for stakeholders in understanding the elements of the railway system and the impacts of failures.

6.2.2 Analysis of Operating Practices by QGI Consultants

In this study, the consultants identify the "best practices" that they believe should exist in a supply chain, including communication between supply chain partners on demand and capacity, considering processes for effectively integrating supply chain partners' operations, and attempting to optimize the "output and profitability of the entire supply chain". The analysis identifies the existing practices that sub-optimize system efficiency and make a series of proposed solutions to improve operating practices across the entire supply chain. CITA endorses these "proposed solutions" as noted in CITA recommendation number 7 and the QGI proposed solutions are detailed in Appendix 2.

6.3 Project 3: Survey of Shippers & Other Stakeholders by NRG Research Group

The survey of 262 shippers by NRG Consultants states that: *"overall satisfaction is low"*. The NRG report quantifies the level of dissatisfaction. The seriousness of chronic service failures for shippers is highlighted by the NRG finding that *"62 percent (of rail shippers) said they suffered a serious financial impact as a result of poor rail freight service"*.

The findings of NRG are consistent with what CITA and the Government have heard directly from Canadian shippers. Other comments on the NRG report can be found in section 5.1.

6.4 Project 4: Service Issues in Other Regulated Industries by CPCS Transcom Ltd.

This study investigated railway regulation in the United States and in other regulated industries in Canada. It notes that *"the ways (in Canada) to address service issues in rail shipping are much better than those available to shippers of freight by water or pipeline"*. As rail freight is not a normally functioning competitive market, one would expect that there would be a need for *"better"* ways to address service problems in rail as compared to most other modes.

CITA supports the recommendation that policy makers should further investigate *"ways of addressing complaints related to confidential contracts"*. As the railway bargaining position is generally so strong in negotiations, the railways are able to include "optional service tariffs" by reference in confidential contracts which has the effect of eliminating the possibility of complaint to the Agency in such cases.

CITA does not support the recommendation to investigate the *"exemption of many commodities from regulation"*. The size, scope and nature of Canadian transportation and the options that are open to shippers, whether in urban or rural areas, is such that exemption by commodity would not be practical. There could be situations where a shipper

of a specific commodity might have a practical alternative to rail in one location, but a shipper of the same product in another location may not have a practical alternative.

7.0 Comments and Recommendations

The issues and chronic problems identified in section 5.2 above are complex and recommendations for change, and their implementation will have to be carried out with care to ensure that the railway based supply chain is improved for shippers, consignees, terminal operators, and other stakeholders. Based on the experiences identified by CITA members and by the Phase 1 consultants, CITA makes the following recommendations to the Rail Service Review Panel.

Recommendations:

1. **Reciprocal Penalties for non-compliance with commitments and for poor service**
The application of penalty charges by railways against shippers for delaying release of cars (demurrage), for over-loading, and for improper securement of loads and other matters is well established and is permitted by the *Canada Transportation Act*. There is no comparable provision that allows shippers or consignees to receive compensation from the railways for service failures on their part. To establish such a regime will require setting some criteria against which service performance can be measured and setting out penalties, probably by regulation administered by the Canadian Transportation Agency.

Of note is Bill S. 2889, currently before the U.S Senate. This Bill is focusing on rail service and regulatory issues in the United States, particularly shipper protection provisions. One of the provisions of this Bill states:

The Board (the Surface Transportation Board) shall, by regulation, require rail carriers to publish reasonable common carrier service expectation ranges. These may include ranges for normal car cycle times, transit times, switching frequency, and other service components as determined by the Board to be appropriate."

The issue of reciprocal financial penalties would provide an appropriate incentive for railways to improve their car supply and service consistency and reliability, given the lack of competitive pressures that the carriers enjoy.

CITA recommends that there should be reciprocal penalties for service failures by both railways and other parties in the rail based supply chain.

2. **Independent Monitoring of Railway Service**
Chronic and widespread service failures by the railways do not give confidence that these problems will disappear with a "one-time fix", even if changes to the *Act* result from the service review.

For this reason, CITA recommends that a continuing rail service monitoring function be established within the Canadian Transportation Agency. The existing Grain Monitor may be a model that could provide some guidance and insight into the organization and operation of a *Rail Service Monitor*. The monitor would have the authority and be responsible to:

- a) establish service standards based on objective analysis of data collected
- b) collect car supply and service data from the railways and others in the supply chain
- c) issue periodic public reports on a dedicated website (at least monthly)

- d) impose penalties, set and award compensation where appropriate
- e) have the authority to launch and undertake investigations on its own initiative.

The independent monitoring activity could be formally reviewed within five years.

3. Replace the Competitive line Rate (CLR) Provision

As noted in section 3.2 of this submission, captivity is a serious problem for shippers in many locations across the country in terms of both rates and service. The CLR provision is not working and should be replaced with a new surrogate for competition for captive shippers who are beyond the 30km limit where they can access the regulated interswitching rates to interchange to a connecting railway. CITA recommends that the new provision should have the same effect as the regulated interswitching provision, i.e. its use should be at the sole discretion of the shipper. The CLR provision requires that the “connecting railway” provide a rate to the shipper and only then can the shipper demand a rate, based on a formula established by the Agency, from the originating railway. This provision has been a failure as the railways refuse to quote a rate beyond the interchange point.

Several alternatives to the CLR have been put forward by various stakeholders in the past, with names such as *Competitive Access Rate (CAR)* or *Competitive Connection Rate (CCR)*, in an attempt to achieve what Parliament intended with the CLR. There are a number of ways that the desired result could be achieved, but a detailed replacement will need to be developed by the Transport Canada with input from stakeholders.

In summary, CITA recommends that Transport Canada replace the CLR provision in the *Canada Transportation Act* with a new provision that provides shippers with the same advantages as the regulated interswitching regulations that can be initiated solely on the shipper’s initiative. CITA recommends that that review of the CLR deficiencies, and the details of the new provision, be developed by Transport Canada with input from stakeholders, that this project begin as soon as possible, and that the *Act* be amended accordingly.

4. Notification, negotiation of service changes, and impact analysis on shippers

One of the chronic complaints among shippers has been the arbitrary changes that railways have been making to plant switching and branch line services without adequate advance notification. In most cases these are reductions in service.

In recent years, the railways have been extending the length of the Christmas embargo period at various ports affecting the servicing of refrigerated and heated containers in transit between rail and ship. This is particularly difficult for exporters of food products.

It is ironic that railways exhort their customers to operate on a 24 hour, 7 day per week basis, when the railways are cutting back on service and in many areas are not providing service to shippers on a 24/7 basis.

In a normally functioning competitive market, such proposed changes would be subject to negotiation between the buyer and the seller. In the rail freight market, railways are able to arbitrarily take such actions with little or no likelihood of losing the business. However, the impacts on shippers of such actions can have serious consequences and in extreme cases can lead to plant closures.

One suggestion put forward by some shippers is that service cuts should be subject to a customer impact analysis before implementation is allowed. While this may be difficult to implement, as a minimum, there should be a mandatory requirement for the railways to negotiate switching or branch line service changes with affected shippers. In addition, there is a need for improved advance notice to shippers when switching or branch line services are being changed. One model for improvement is section 119 (1) of the *Act* that now requires railways to give shippers 30 days advance notice of any rate increases.

CITA recommends that the *Canada Transportation Act* be amended to require railways to consider the impact of local service changes on the shippers directly affected, directly negotiate such changes, and to give at least 30 days advance notice of any reductions to switching service at the facilities of shippers, consignees or terminal operators.

5. Commercial Dispute Resolution

During the time that Bill C-8 was being considered by Parliament, CN and CPR attempted to head off amendments to the shipper protection provisions of the *Act* by offering a “commercial dispute resolution” process. This process was not negotiated, but was unilaterally prepared by the railways and posted on their respective websites. It was contingent on shippers giving up their advocacy for changes to the *Act*. Also CN and CPR were not prepared to implement it on their U.S. properties. As far as CITA is aware, no shippers have signed up to use the unilaterally designed CDRs posted on the CN and CPR websites.

By definition, a “commercial dispute resolution” (CDR) process is “commercial”, i.e. dispute resolution is a normal part of any contract between a buyer and a seller and is without any government involvement. The need to make a recommendation to a government appointed review panel regarding CDR is another strong indication that the rail freight market is not a normally functioning competitive market. CITA recommends that a CDR process should cover disputes on both service and pricing issues. An option that could be included for parties to a dispute, should the disputants both agree, is binding arbitration.

CITA recommends that the government strongly encourage and facilitate discussions between the railways and shipper groups to negotiate a mutually acceptable framework to resolve disputes on service issues.

6. Shipper Access to Government Infrastructure Funding

Shippers must frequently provide their own trackage for plant switching and increasingly for storage purposes. Car storage is becoming a more urgent issue as the railways are forcing shippers with private car fleets, or railway assigned fleets, to provide their own storage. All rail infrastructure is part of the national infrastructure inventory and all rail infrastructure contributes to the movement of freight by the lower polluting rail mode and to the reduction in highway and road congestion. Provision of non-carrier rail infrastructure will also assist both railways and other stakeholders to generally improve rail service.

For these reasons, CITA recommends that federal and provincial infrastructure funds be made available to shippers and other stakeholders in the rail based supply chain for infrastructure improvements.

7. QGI Proposed Solutions: Operating Practices

QGI Report 2(a), *Analysis of Operating Practices* examined the practices of “system stakeholders” including railways, shippers, short lines, marine terminal operators, port authorities and shipping lines and as a result, identified key issues and proposed solutions. These proposed solutions cover Balanced Accountability, Operational Cooperation and Communications, Customer Service, and Ancillary Service Charges. CITA endorses all the QGI “proposed solutions” and includes these formally in its recommendations. The QGI Proposed Solutions are included as appendix 2.

8. Rail Service to Port Metro Vancouver:

Port Metro Vancouver (PMV), Canada’s busiest and most diversified port, is served by five railways [CN, CPR, Southern Railway of British Columbia (SRY), BNSF, and BCR] and is of major importance to the Canadian economy. Cooperation and integration between the railways and port stakeholders, including terminal operators and shipping lines, needs to be improved. Efficient supply chains, in support of Canadian exporters and importers, require a high degree of cooperation among all supply chain participants, and especially at Canada’s ports. To better optimize the operation of the rail network in the lower mainland and better serve shipper needs, CITA strongly supports the railways’ current efforts on “co-production”, however we also believe there may be opportunities to expand and improve the existing arrangement. This will take good will and cooperation amongst the stakeholders to further study the possibilities and identify the benefits which are likely to be realized.

The Port of Montreal operates its own railway with its own motive power. CN and CPR interchange traffic to and from the Port of Montreal railway and this model appears to work well. While that may be one model that could be considered for Vancouver, another model could be based on the Toronto Terminals Railway (TTR). The TTR is a separate railway that was owned jointly by CN and CPR (until sold to the Government of Ontario) and which controls the trackage and passenger train operations within the TTR, and manages the Toronto Union Station. Each railway uses its own motive power to move trains in and out of the TTR. A third option would be to expand the co-production arrangement to involve all five railways and to have it serve the entire PMV area.

CITA recommends that Transport Canada, in cooperation with PMV, the railways, and other port stakeholders begin an investigation of the options for improving coordination and delivery of rail services to PMV, and identify the benefits that could result.

9. Complaints on Ancillary and Penalty Charges:

New Section 120.1(1) of the *Canada Transportation Act* now provides a vehicle for shippers to seek redress for unreasonable ancillary and penalty charges. This provision has an impact on service and we note that many of the ancillary and penalty charges are included by CN in their “*Optional Services*” tariff.

The complaint in the first case brought to the Agency under this new section by CITA member Peace River Coal, the Agency refused to render a decision on the merits of the complaint stating that as the ancillary charge tariff was incorporated by reference in the confidential contract, it was beyond the mandate of the Agency to render a decision. This was not the intent of Parliament in passing this provision.

As the effective functioning of Section 120.1 will have a significant impact on service, CITA recommends that the *Canada Transportation Act* be amended to specifically permit a shipper to file a complaint on an ancillary charge or penalty charge tariff applying to more than one shipper, even if the complainant is affected by such tariff charge through a confidential contract.

10. Statutory Review of the *Canada Transportation Act*

In 2007 and 2008, the *Canada Transportation Act* was amended by two Bills passed by Parliament. As noted above, Bill C-8 dealt directly with amendments to the protection provisions for railway shippers. Bill C-11 dealt with other issues in the *Act* and received Royal Assent on June 22, 2007. One of the provisions of Bill C-11 extended the period for a statutory review of the *Act* to eight years from five years.

The shipper community opposed that change and, as the *Act* is the enabling legislation for all commercial matters affecting the railway industry, and as technology, markets, and service needs evolve rapidly, it is the view of CITA that the oversight of railway service issues requires that the *Act* be subject to statutory review within a five year period. This would be consistent with ensuring that the *Act* is kept current for issues relating to service as well as for other commercial matters.

As a minimum, CITA recommends that *Division IV, Rates, Tariffs, and Services*, of the *Canada Transportation Act* be subject to statutory review every five years.

CITA also notes that rail freight is essential to the effective functioning and competitiveness of the Canadian economy and that service disruptions due to labour disputes are particularly damaging to large and important industries and their employees. While outside the scope of the panel's mandate, we would request that the panel flag this issue for the government and recommend that the government ask Labour Canada to investigate making all rail freight services under federal law "essential services", ban strikes and lockouts, and require that labour disputes be subject to mandatory binding arbitration where the parties are unable to reach a negotiated settlement.

8.0 Concluding Remarks

The Rail Service Review is an important initiative and the results may have a significant impact on the competitiveness of many important Canadian industries. As we note in the introductory remarks, Rail freight is not a normally functioning competitive market and **this is the fundamental issue underlying all the price and service problems encountered by rail shippers**. This fact has been recognized in Canadian railway law for over a century.

The recommendations included in the CITA submission have resulted from input from the CITA membership and are designed to address the near-monopoly characteristics of the freight rail industry and restore balance to the commercial relationship between the railways and their customers.

CITA appreciates the opportunity to submit these comments and recommendations and its members would be pleased to meet with the panel and the secretariat to discuss the recommendations in more detail. CITA looks forward to seeing the recommendations of the Panel and to further discussions with the government on actions resulting from the Review.

Appendix 1**CITA MEMBER COMPANIES**

Adcom Worldwide Canada
 Agrium Inc.
 APPS Transport Group
 Armour Transportation Services
 Avon Canada Inc.
 Belledune Port Authority
 BSI Canada
 Canadian Fishing Company Ltd.
 Canadian Salt Company Ltd.
 Canadian Tire Corporation
 Canadian Wheat Board
 Cancarb Limited
 Canexus Chemicals Canada Ltd.
 Canpotex Limited
 Carlton Cards Ltd.
 Casco
 Cepsa Quimica
 CertainTeed Gypsum
 Chamber of Maritime Commerce
 Chemtura Canada Co.
 Church & Dwight Canada
 CKF Inc.
 Clover Leaf Seafoods LP
 Colasphalt
 Cunningham Lindsey Canada
 E.J. Brooks Industries Ltd.
 Effem Foods
 Egg Farmers of Canada
 Energizer Canada Inc.
 ERCO Worldwide
 ESAB Group of Companies
 EVRAZ Inc. NA Canada (*formerly IPSCO*)
 Gowlings Lafleur Henderson LLP
 Grande Cache Coal Corporation
 Greenfield Ethanol
 Halifax Port Authority
 Hamilton Port Authority
 Hexion Specialty Chemicals, Inc.
 Holcim (Canada) Inc.
 Home Depot Canada
 Horton CBI Ltd
 Hudson's Bay Company
 Imperial Tobacco Canada Ltd.
 Innophos Canada Inc.
 JDI Logistics
 K Line Canada Ltd.
 Kayway Industries Inc.
 Kissner Milling Co. Ltd.
 Kruger Products
 La Coop Fédérée
 Lantic Inc.
 Lincoln Electric Co. Canada Ltd.
 Livingston International Inc.
 MacKay & Hughes
 Maple Leaf Foods
 McAsphalt Industries Ltd.
 McCormick Canada Inc.
 Mega Group Inc.
 Metro
 Monsanto
 Montreal Port Authority
 Moose Jaw Refinery Inc.
 Mosaic Canada ULC
 National Gypsum
 Nestle Canada Inc.
 Norman G. Jensen Inc.
 NSC Minerals
 Olin Chlor Alkali Products
 OmniTRAX
 OOCL (Canada) Inc.
 Orica USA Inc.
 Parrish & Heimbecker
 PCS Sales (Canada) Inc.
 Peace River Coal Inc.
 Pepsi - QTG Company
 Prairie Malt Ltd.
 Procor Limited
 Prommell / Servichem
 Protos Shipping Ltd.
 Q-Line Trucking Ltd.
 Quadra Chemicals Ltd.
 Ray-Mont Logistics
 Rio Tinto Alcan
 Saskatchewan Minerals
 Schenker Stinnes Logistics of Canada
 Scotia Investments Limited
 Sifto Canada Inc.
 Sivaco
 SLH Transport Inc.
 Smucker Foods of Canada Co.
 Solmax International Inc.
 Spin Master Ltd.
 Squamish Terminals Ltd.
 St. Lawrence Seaway Management Corp.
 Superior Gas Liquids (div. of Superior Propane
 Taseko Mines Limited
 Thunder Bay Port Authority
 TL Maville & Associates Inc.
 TMH Logistics Inc.
 Toronto Port Authority
 Total Logistics Control Inc.
 Transport Institute
 Transportwriter.com
 TransX Group of Companies
 U.S. Traffic
 UFMS Inc.
 Unilever
 Universal Forest Products of Canada
 Vancouver Fraser Port Authority
 Viterra
 Western Canadian Coal
 Western Grain Trade Limited
 Winners Merchants International L.P.
 Xstrata Canada
 Yara Belle Plaine (Saskferco Products Inc.)

**Appendix 2 QGI Report: *Analysis of Operating Practices*
Consultant's Proposed Solutions to Key Issues**

Issue 1. Balanced Accountability
Each supply chain participant should be responsible for the costs that its behaviour imposes on other participants.
Proposed solutions
<ol style="list-style-type: none">1. The Canadian Transportation Agency should develop ways to determine if a certain set of rail service conditions support the concept of balanced accountability.2. Transport Canada should measure rail system logistics performance in order to monitor changes.
Issue 2. Operational Cooperation and Communications
Railways should do a better job of communicating the status of rail traffic and the expected time of arrival (ETA) for local pick up and delivery.
Proposed solutions
<ol style="list-style-type: none">1. CN and CP should measure rail car ETA accuracy so that both railways and their customers have a clear picture of the accuracy of this important planning information.2. Both CN and CP should ensure that the terms of interchange service agreements they have with each of their shortline railway partners are subject to performance measurement – and share the results with their shortline partners.3. CN and CP should measure how well local switching performance conforms to the planned day and eight hour window for local service.4. Railways should review and improve how they communicate the ETA of loaded and empty trains at major facilities such as port terminals and bulk shipping facilities.
Issue 3. Customer service
Railways need improved processes for logging, escalating, responding to and resolving customers' complaints.
Proposed solutions
<ol style="list-style-type: none">1. Transport Canada should institute an on-going survey of railway stakeholders' satisfaction.2. CN should review how it responds to customer service complaints and develop a better system for recording, escalating and responding to customer service issues.

Issue 4. Ancillary service charges

Railways need to improve administrative effectiveness and ensure fairness in calculating allowable free time for demurrage.

Proposed solutions

1. Railways should implement processes to improve stakeholders' confidence in the accuracy of demurrage administration.
2. Railways should consider changes in their demurrage systems to allow for a more equitable calculation of free time for loading empty cars.