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*SARM's Submission to the  
Rail Freight Service Review  
April 28, 2010*

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**SARM has identified the following five interrelated points as crucial items which need to be addressed in the Federal Government's *Rail Freight Service Review (RFSR)*.**

- 1) ***Defining and establishing minimum standards of service.*** Transport Canada must define and establish acceptable minimum levels of service for our country's class one carriers. These levels would be arrived at through sector and region specific consultations.
- 2) ***Implement a performance-based system which centers on penalties and rewards.*** Performance incentives would reward class one carriers for performing above minimum levels of service and penalties would be assessed for performance which fell below established standards. Penalties and rewards would be assessed on a sliding scale. Like minimum standards of service, the nature of the penalties and incentives, and the scale or measurement by which they are levied, would be determined through sector and region specific consultations.
- 3) ***Amend or repeal sections 140 (1) and 151.1 (3) of the Canadian Transportation Act (CTA).*** SARM asks that section 140 (1) of the CTA be amended to include sidings in the definition of a railway. Additionally, section 151.1(3) should be repealed thus disallowing class one carriers the opportunity to eliminate a siding/producer car loading site at their sole discretion. These recommendations protect not only Saskatchewan's dwindling and declining rail line infrastructure but also the principles of competition and choice in Canada's GHTS.
- 4) ***Undertake a full assessment of Canada's hopper car fleet.*** By undertaking a thorough inventory and assessment of the grain industry's hopper car needs, consistently poor levels of service might be mitigated.
- 5) ***Institute a rigorous and effective audit system for Canada's hopper car fleet.*** It is estimated by shippers that five out of one hundred grain cars are in poor, derelict condition. SARM advocates the introduction of an audit process which regularly inspects hopper cars and promptly removes and repairs those in poor shape.

## **Introduction**

Since 2007, nine level of service complaints have been filed with the Canadian Transportation Agency (CTA).<sup>1</sup> A tenth complaint was registered in the closing months of 2009 when a Saskatchewan farmer took issue with CN's ill-considered decision to delist fifty three sidings in western Canada.<sup>2</sup> If we also consider the fact that an additional twenty "intervener submissions" were submitted in just one of those CTA complaints, then we see that a total of thirty formal level of service complaints have been levied against Canada's class one carriers in just three years.<sup>3</sup>

Canada's grain handling system is, as Quorum Group (QGI) analysts have observed, "an interdependent...deeply linked process" between railway and shipper.<sup>4</sup> But it is a process, or better yet a relationship, which is characterized by numerous institutionalized imbalances. Those imbalances and solutions to them will be explored in this submission to the Rail Freight Service Review (RFSR).

## **The Necessity of Minimum Levels of Service**

The most recent report on Canada's GHTS by the researchers at QGI revealed some compelling information about the nature of Canada's grain handling system.<sup>5</sup> When examining the year-on-year performance of the class one carriers, QGI found that CN and CP came very close to achieving a near perfect record. But since rail car orders are generally submitted on a week-to-week basis it stands to reason that the performance of the railways must also be judged on a week-to-week basis: all the year-on-year analysis reveals is that *eventually* the cars which shippers have ordered will arrive.

The week-to-week statistics reveal a GHTS in poor shape or what the QGI analysts delicately refer to as the railway's "significant variability in performance."<sup>6</sup> Based on 100% net order fulfillment the class one carriers record a dismal score. QGI analysts concluded that that "each railway provides grain shippers with all of the cars they have ordered only half of the time" on the week-by-week analysis.<sup>7</sup> And while QGI analysts caution that these statistics do not tell the whole story, they do tell an important part of it.

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<sup>1</sup> Please see the Canadian Transportation Agency website ([www.cta.gc.ca](http://www.cta.gc.ca)). Two complaints were ruled upon in 2009, six in 2008, and one in 2007.

<sup>2</sup> Press Release, "Farmer Submits Level of Service Complaint to CTA regarding Producer Car Loading Sites", December 14<sup>th</sup>, 2009.

<sup>3</sup> The level of service complaint referred to above was filed by Great Northern Grain Terminals of Nampa Alberta and was accompanied by twenty four intervener submissions (four were ultimately disallowed, including the Saskatchewan NDP government's submission which was filed too late). Please see Canada Transportation Agency, *Agency Rulings*, Decision No. 344-R-2007 pp. 1-2/20.

<sup>4</sup> QGI Consulting, "Description of Canada's Rail Based Freight Logistics System" November 2009, p. 74.

<sup>5</sup> Quorum Group, "Analysis of Railway Fulfillment of Shipper Demands and Transit Times", March 2010.

<sup>6</sup> *Ibid.*, pp. 48, 63

<sup>7</sup> *Ibid.*, p. 49. For CN the figure was 50, for CP it was 49%.

Alberta farmer Mr. Matt Enright confirmed the validity of QGI's findings when he wrote that "I personally cannot remember one time when a train came on the day that CN first said it would." Mr. Enright describes the service provided by the class one carriers as "random."<sup>8</sup> Mr. Howard Vincent would agree. Like Mr. Enright, Mr. Vincent is a farmer and he too calls rail service "very unpredictable" and adds that "if I run my farm...like this, I might not have any grain production to market."<sup>9</sup>

### **The Legitimacy of Minimum Levels of Service**

In 1959, the Supreme Court of Canada (SCC) ruled that when it comes to providing adequate levels of service, the actions of railways must be "permeated with reasonableness." The Justices tried to clarify this point by saying that "the statutory duty imposed upon the defendant [in this case it was *Pacific Great Eastern Railway*] was not an absolute duty but was only a relative one to *provide services so far as it was reasonably possible to do so.*"<sup>10</sup>

The SCC's very broad and roomy *Patchett* ruling has formed the conceptual and legal foundation for subsequent level of service complaints. Echoing the judgment of the SCC, the CTA has argued in various rulings that "it is not the obligation of the railway company to furnish cars at all times sufficient to meet all demands."<sup>11</sup> The railways have capitalized on this idea and extended its essential parameters by arguing that all they are required to do is provide "a basic level of service."<sup>12</sup> Precisely what is meant by "reasonable" or "basic" remains an unanswered question.

The CTA, however, has taken the first step toward the establishment of minimum standards. The authors of a study completed by CPCS Transcom noted that the CTA "set a clear precedent" in a recent ruling where performance benchmarks were determined and an exact and specific level of service decreed.<sup>13</sup> This, the authors note, has "important implications" for Canada's GHTS.

**The CTA demonstrated that it can impose minimum levels of service on the Canada's class one carriers and this suggests that the establishment of minimum levels of service are not only possible but perhaps also a preferred and even necessary option.**

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<sup>8</sup> See Enright, Matt, Canada Transportation Agency Rail Freight Service Review, Submissions received, dated February 4, 2010.

<sup>9</sup> Please see CTA Rail Freight Service Review, "Submissions Received", Vincent, Howard.

<sup>10</sup> Judgments of the Supreme Court of Canada, "Patchett and Sons Ltd. V Pacific Great Eastern Railway Co. 1959, SCR 271. Italics added.

<sup>11</sup> Canada Transportation Agency, Agency Rulings, Decision No. 488-R-2008, under heading *Agency Position*, p. 14/25

<sup>12</sup> 488-R-2008, "Measuring Service Performance and Service Obligations", p. 13/25.

<sup>13</sup> CPCS Transcom, "Service Issues in Regulated Industries Other Than Canadian Rail Freight Industry", August 31, 2009, p. 5.

### **Establishing Minimum Levels of Service**

The question now is how to establish minimum levels of service. Sector and region specific consultations should be held with an emphasis on those areas where service levels desperately need improvement, like the grain industry. SARM wishes to note here that the Saskatchewan government also favors the consultative approach in establishing minimum standards of service.<sup>14</sup> In addition, the Saskatchewan government makes two further recommendations which SARM supports: a) that any established minimums not remain static but continually increase and b) that annual reports are filed to determine how well the class one carriers are fulfilling their obligations thus obviating the necessity of decadal reviews.

**Sector and region specific consultations to establish minimum levels of service are the first necessary step toward making Canada's GHTS more competitive.**

### **Performance Encouragement**

Once minimum standards are in place, the next step is to enforce those standards. SARM envisions a performance-based system in which the class one carriers would be held to a minimum standard by a series of sliding penalties and rewards which would likewise be established through consultations. Factors such as distance from shipper and the number of cars requested versus the number of cars received would be necessary benchmarks against which a railway's performance would be measured.

Incentives would encourage class one carriers to voluntarily perform at a higher level. Penalties would be assessed if they fell below that level. This system is competitive in nature and encourages the class one carriers to engage in voluntary service improvements.

It is apparent from the excessive number of level of service complaints that one of the few remaining correctives is a competitive performance-based system. Market solutions and de-regulation have not worked as well as it was hoped and neither has censure from the CTA. Mr. Enright reasonably suggested that "if shippers are subject to penalty for poor performance, so should the railroads." SARM agrees but would additionally suggest that such a system be complemented by a competitive element which offers incentives for better performance.

**SARM believes that there must be a radical shift in Canada's GHTS. The performance-based system could rescue the GHTS from its poor service and the many and varied antagonisms by which it is characterized.**

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<sup>14</sup> Government of Saskatchewan, "Submission to the Federal Level of Service Review Panel", copy dated February, 2010.

### **Protecting Rural Railway Infrastructure**

Railway infrastructure is another equally crucial element to consider in any review of the level of rail service in this country: reduced infrastructure naturally results in poorer levels of service. Indeed, reducing and eliminating railway infrastructure is the same as reducing and eliminating competition and choice.

In early September 2009, CN announced it would de-list fifty three railway sidings in western Canada. Almost half of those sidings, twenty four, were located in Saskatchewan. CN formally announced the de-listings after the necessary sixty day notice had expired. This was in keeping with the statutory provisions of the CTA.

The problem was that very few people were aware of what CN was doing. SARM along with many other individuals, organizations and groups only learned of the de-listings toward the *end* of the sixty day public notice period. After much investigation, we later learned that fourteen letters of protest against CN were sent to the CTA but these were only submitted after the notice period had expired and the public became aware of the company's intentions.<sup>15</sup> In other words, no one knew about the siding closures until after the "public notice" period was over.

Leaving aside for the moment the way in which CN handled the delisting of these fifty three loading sites, tearing up sidings puts both producers and short-line railways at risk. Farmers are threatened by the elimination of a transportation option and Saskatchewan's short-line industry (one of the most vibrant in the country) is also put at risk because in order for a short-line to develop, the necessary infrastructure must be in place. In its rush to de-list the fifty three loading sites, CN not only eliminated a transportation option but is also in the process of removing the elements necessary for the development of competitive short-line railways in Saskatchewan.

**SARM is asking that that section 140 (1) of the Canadian Transportation Act (CTA) be amended to include sidings in the definition of a railway. We also ask that Section 151.1 (3) be repealed thus removing the opportunity for class one carriers to remove sidings/loading sites at their sole discretion.**

### **The Hopper Car Fleet**

The size of the hopper car fleet in Canada is creating problems of its own. The QGI authors note that "practical restrictions" hamper the effectiveness of the class one carriers in satisfying car order requests because railways only have access to a "rationed fleet."<sup>16</sup> Shippers understand this and as a consequence they often order more cars than are necessary in order to ensure that their commodities are shipped. Penalties for over-ordering have reduced this practice but the penalties haven't reduced the necessity which gave rise to the practice in the first place: inadequate service caused in part by a "rationed fleet."

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<sup>15</sup> The information on the number of letters submitted was provided by a CTA representative in a phone call during the week of September 14<sup>th</sup>, 2009.

<sup>16</sup> QGI, "Analysis of Railway Fulfillment of Shipper Demands", p. 38.

The QGI authors indicate that expanding the size of the hopper car fleet is not an option for the class one carriers, although this inability to expand reflects on the needs of the railways not the shippers. QGI observes that railways do in fact have the option (however limited it might be) of entering into short term lease agreements, or even using the stock of foreign fleets. The class one carriers do not pursue this option because it “may carry unacceptable costs to the railway.”<sup>17</sup> But what about the unacceptable costs which shippers face? We must remember that almost two thirds of shippers surveyed (62%) said they have “suffered serious financial cost...as a result of poor service from their rail freight provider.”<sup>18</sup>

**SARM asks Transport Canada to undertake an inventory, assessment and study of Canada's hopper car needs. This study should be based on historic averages and predicted trends.**

### **Hopper Car Maintenance**

Another distinct irritant for car loaders and shippers is the condition in which cars are received for loading. It is interesting to note the fairly wide gap in the level of importance which shippers and class one carriers attach to hopper car condition. The “condition of cars” was rated with an importance level of 71%. This contrasts sharply with the satisfaction rating of shippers as it relates to CN/CP addressing that concern which was 34%.<sup>19</sup>

SARM understands that 100% satisfaction with maintenance of hopper cars is impossible, but we do feel that there is definite room for improvement. The CTA found in its most recent publicly available annual report that “heavy bad order cars” (cars which require forty eight hours or more of maintenance) represent just 2% of the 10,366 cars currently available and on active service.<sup>20</sup> A terminal agent with whom SARM spoke pointed out that, as a rough rule of thumb, five out of every 100 cars is in poor, derelict condition.

It could be argued that these statistics are respectable and indeed a 95% success rate is commendable. But what is not commendable is the *consistency* of the number of cars in poor repair: the problem never gets better.

**SARM recommends an enhanced and regularly overseen audit process in which the cars are routinely assessed and those which are not suitable, which do not meet certain stringent criteria are taken out of the fleet, repaired, and put back into service. An expanded hopper car fleet would allow for this more rigorous system of checks and balances.**

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<sup>17</sup> Ibid.

<sup>18</sup> NRG Research, “Survey of Shippers: prepared for the rail freight service review”, November 30, 2009, p. 45

<sup>19</sup> Ibid., p. 24.

<sup>20</sup> Government of Canada, “Hopper Car Fleet Annual Report, 2007-2008” under heading *Bad Order Cars*, p.5/8.

**Summary**

**Shippers in the grain industry do not exist to serve the needs of the railways- the railways exist to serve the needs of the shippers. This frequently forgotten yet very basic principle forms the conceptual foundation of the five points contained in this submission. SARM believes that the adoption of these five points would provide Canada's GHTS with much needed, necessary improvements.**

**1) For both shippers and class one carriers, minimum and appropriate levels of service must be defined.**

**2) A competitive, performance-based system would ensure that those minimum standards are met.**

**3) Saskatchewan's railway infrastructure must be protected at all costs because of its vital importance to not only the ideal of competition but also to our province's short-line industry.**

**4 & 5) Combining both level of service and infrastructure elements, SARM believes that undertaking an inventory, assessment and, if necessary, possible expansion of the hopper car fleet is one definite way to ensure that enough rail cars are on hand to handle shippers' demands and those cars must be kept in a state of proper repair.**

**We thank Transport Canada for the opportunity to make this submission and we look forward to being a partner in any consultations regarding the future of Canada's Grain Handling and Transportation System.**

**Sincerely,**

A handwritten signature in cursive script that reads "David Marit".

**David Marit**

**President, SARM**