



# INLAND TERMINAL

## Association of Canada

April 29, 2010

Rail Freight Service Review  
Suite 808  
180 Elgin Street  
Ottawa, Ontario  
K1A 0N5

Dear Sirs:

The Inland Terminal Association of Canada (“ITAC”) appreciates the opportunity to provide its comments to the Freight Service Review Panel.

ITAC, founded in 1995, was organized to promote the common interests and goals of modern, efficient high throughput inland terminals in Canada. ITAC grain handling facilities are the realization of dreams for farmers, who through their own initiative, innovation and capital, sought to make grain handling on the prairies more competitive, reliable and cost effective.

The member terminals of ITAC handle approximately two million tonnes of grains, pulses, and oilseeds annually, with cleaning and drying capacity. Several terminals have crop input divisions, feed processing facilities, or ethanol projects. To be a member of ITAC, an inland terminal must have at least 50 percent farmer ownership. The current members of ITAC are:

CMI Terminal JV, Naicam, SK  
Gardiner Dam Terminal JV, Strongfield, SK  
Great Sandhills Marketing Centre Ltd., Leader, SK  
Lethbridge Inland Terminal Ltd., Lethbridge, AB  
North East Terminal Ltd., Wadena, SK  
Prairie West Terminal Ltd., Plenty, SK  
North West Terminal Ltd., Unity, SK  
Providence Grain Group Inc., Fort Saskatchewan, AB  
South West Terminal Ltd., Gull Lake, SK  
Westlock Terminals (NGC) Ltd., Westlock, AB  
Weyburn Inland Terminal Ltd., Weyburn, SK

In this submission, ITAC will address some of the difficulties that its members have encountered with the provision of rail service by our two national railways in recent years. The nature of these difficulties will be identified, and constructive proposals will be made to effectively address those difficulties for the consideration of the Rail Freight Service Review.

One way to illustrate the nature of the difficulties being faced by shippers is to briefly describe some of the level of service complaints that have been filed with the Canadian Transportation Agency (“Agency”), and to articulate some of the Agency’s findings with respect to those complaints.

In March of 2007, Great Northern Grain (“GNG”) filed a level of service complaint against Canadian National Railway Company (“CN”), alleging, among other things, that CN was discriminating against GNG in the distribution of rail cars, rendering GNG and other small grain handling companies uncompetitive in the marketing of grain. GNG’s complaint was focused on CN’s “Advance Products Program”, whereby CN unilaterally imposed a car allocation program on shippers in the form of various CN Tariffs.<sup>1</sup> A number of the members of ITAC intervened in support of GNG’s level of service complaint before the Agency.

The Agency’s Decision on GNG’s complaint was issued July 6, 2007 (Decision No. 344-R-2007). In its decision, the Agency found that CN had breached its level of service obligations to GNG, and stated, in part, that:

“[68] The Agency finds that CN’s current car distribution options constitute a significant deterioration in the service options previously enjoyed by GNG. Under normal competitive circumstances, a business experiencing such deterioration would be able to seek alternative service providers. However, GNG is a captive rail shipper, by both the nature of the product it ships and its dependence on CN as its only available carrier. It has no viable competitive alternative for its transportation requirements and is forced to accept the decisions CN implements

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<sup>1</sup> One of the issues raised by GNG in its level of service complaint related to the fact that CN had recently stored as many as 1,800 covered hopper cars that had previously been employed in the movement of grain. This reduction in the supply of rail cars for grain movements had the effect of creating an artificial demand for rail cars, which enhanced the railway’s ability to charge fees for “guaranteeing” a rail car supply to customers willing to pay extra, in a process akin to an auction. This was known as CN’s Advanced Products Program. This Program was published in tariff format, and was subsequently found by the Agency to be a breach of CN’s statutory level of service obligations. Shippers need legislative protection against the arbitrary reduction of car supply by a railway.

for movements from its Nampa facility. This lack of competitive option for a shipper lies at the heart of the statutory level of service provisions under the CTA.

[71] In general terms, CN has the statutory obligation to provide all grain shippers, whatever their size, with adequate and suitable accommodation for the carriage of their products to the extent that the service requested is reasonable in the circumstances. This encompasses the provision of railway equipment in acceptable quantities at acceptable times. The Agency finds that in establishing car supply policies that have restrictive terms and conditions like minimum order durations and exclude significant segments of the shipper community, CN unilaterally becomes the arbiter of which of its captive shippers are eligible for a competitive advantage. Through its virtually exclusive control of rail service in portions of the western Canadian grain market, CN creates an imbalance and, inevitably, as seen in this case, a failure in the marketplace. Providing a reasonable degree of certainty to shippers like GNG of both price and supply is not, contrary to CN's assertion, considered to be a level of service beyond a railway company's statutory common carrier obligations.

**[105] Overall, the Agency finds that although it is aware that CN has a business interest in achieving greater efficiency, CN's current rail car distribution practices have resulted in the replacement of a reasonably accessible, transparent, user-needs based car allocation process with a more restricted, less transparent regime that does not provide an adequate level of service for grain shippers. The consequence of this is a radical and detrimental transformation of the nature and operation of the marketplace within the grain handling and transportation system in western Canada.**

**[106] While the Agency has found in Decision No. LET-R-97-2007 dated May 24, 2007 that it is limited in this case in its jurisdictional scope to a finding specific to GNG's service problems, it also acknowledges that the systemic nature of CN's conduct has undoubtedly affected other grain shippers.** Ideally, this finding, as it relates to GNG and the industry overall, will encourage new open dialogue between CN and its shippers so that any car supply issues can be reasonably met without the need for a proliferation of service complaints before the Agency.”

[emphasis added]

Unfortunately, CN did not take the opportunity to open up a new dialogue as urged by the Agency (see comments below on “communications”). Instead, CN imposed a new car allocation program on shippers, again in the form of various CN Tariffs.

Being disadvantaged by this new car allocation program, several members of ITAC filed individual level of service complaints with the Agency,<sup>2</sup> as did others. The Agency issued interim decisions on the complaints on September 25, 2008, in which it found in each case that

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<sup>2</sup> North East Terminal Ltd., North West Terminal Ltd., and Providence Grain Group Inc.

CN had breached its statutory level of service obligations to the complainants for the crop year 2006-2007. Subsequently, the Agency issued a final decision on the six complaints, in which it found that CN had breached its statutory level of service obligations in the case of four of the six complainants. CN has appealed the interim decisions to the Federal Court of Appeal.

The experience of ITAC members with the railways mirrors the dissatisfaction expressed in the Survey of Shippers prepared by NRG Research Group for your Review Panel and released November 30, 2009. For a country like Canada, where we “drawers of water and hewers of wood” are required to deliver goods over vast distances and compete in highly competitive marketplaces, the existence of reliable rail service in this country is an absolute necessity. ITAC applauds Transport Canada and the Ministry for the vision to hold this review. We hope that the recommendations of this review will change behavior and lead to effective redress.

This submission will focus on four areas that we believe to be of immediate concern: Lack of Accountability; Inequity of Service; Failure of Communications and Oppression of Captives by Tariff.

### **Lack of Accountability**

#### **The Problem:**

The difficulty that ITAC members and other shippers are having with the rail service provided by CN and CP is exacerbated by the fact that there is a lack of accountability. Simply put, the railways can deteriorate their service to customers with effective impunity. The railways have the ability to issue and publish tariffs without regulatory oversight. The railways appreciate that encapsulating service conditions, charges, penalties, etc. in tariffs, makes them difficult if not impossible to challenge (see discussion below under the heading “Oppression of Captives by Tariff”). Shippers have no effective means of balancing these unilaterally-imposed conditions and charges with appropriate counter-measures. Shippers are penalized for contravention of these “tariff” items, or required to pay charges imposed by the railways, while the railways may deteriorate service without much fear that they will have to account for failing to provide adequate service or for frustrating the shippers’ legitimate requirements.

Shippers do have the ability to launch level of service complaints against the railways pursuant to the provisions of the Canada Transportation Act. However, there are very real factors mitigating against taking a level of service remedy, such as the excessive cost (prohibitive in most cases); the time required for a decision from the Agency; the difficulty with enforcement of Agency decisions, and the fear of retribution against shippers. The new remedy offered by section 120.1 of the Canada Transportation Act has also not been utilized to any great extent by shippers. In the one published case involving a railway's fuel surcharge tariff, the Agency declined to exercise jurisdiction on the section 120.1 complaint because of the existence of a confidential contract between the parties. In that case, the railway argued, among other things, that its fuel surcharge tariff was a "rate for the movement of traffic" and therefore not amenable to a section 120.1 complaint by virtue of subsection 120.1 (7).<sup>3</sup>

**The result is that the railways download costs and risks to shippers with impunity, while claiming to legislators and policy makers that they are "making the system more efficient".**

The solution:

Amend the *Canada Transportation Act* to:

- Create a Rail Service Ombudsman to oversee issues relating to rail service, such as the adequacy of the rail car fleet, rail car allocation, delivery performance, cycle times, ancillary charges, penalties, etc., including the establishment of the parameters of the decision-making process that guides the Rail Service Ombudsman's procedures so that matters are resolved publicly, quickly, and cost-effectively.
- Permit any interested person to refer a rail service matter to the Rail Service Ombudsman, and empower the Rail Service Ombudsman to prescribe a schedule of fees applicable to proceedings relating to rail service matters
- Empower the Rail Service Ombudsman to make final and binding decisions, with reasons; issue orders; and promulgate regulations as to the procedure to be followed in the resolution of disputes (consistent with the guidelines for procedure set out in the Act)

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<sup>3</sup> Agency Decision No. 392-R-2008 July 31, 2008.

- Permit shippers to issue and publish tariffs having the force of law with the Rail Service Ombudsman governing the shippers' requirements for rail service. Such tariffs to be subject to approval by the Rail Service Ombudsman, and include such fundamental measures as penalties for insufficient rail car allocation, non-performance of rail car delivery, delay in delivering traffic, excessive cycle times, etc.

### **Inequity of Service**

#### **The Problem:**

ITAC members have had extensive experience in litigating level of service issues before the Agency, and have first-hand knowledge of the difficulties encountered when rail service is inadequate. In previous cases, ITAC members have demonstrated to the Agency that the Advanced Products Program imposed by CN on grain shippers has discriminated against smaller shippers, and breached CN's level of service obligations.

The considerable time and money that ITAC members have spent in contesting CN's Advanced Products Programs before the Agency (including CN's appeals to the Federal Court of Appeal) have been trying. Following the Agency's determination that CN's Advance Products Program was a breach of the railway's statutory level of service obligations, CN changed its program to, among other things, eliminate the reporting of shortfalls. This puts both shippers and the Agency at a disadvantage in identifying and measuring the extent of the rail car shortfalls. The redesigned program is also not transparent in other respects. In addition to the absence of shortfall records, there are no longer any weekly plans. It is virtually impossible now for grain shippers using CN to assess whether they are being treated fairly compared to others in the industry.

This is not the behavior that one would expect of a railway that is conducting its business within the spirit and intent of our national transportation policy.

In summary, rail service to ITAC members continues to be inconsistent. Rail cars are not always delivered when promised. Transit times can be highly variable. In the case of CN, shortfall records have been eliminated, and Weekly Plans have been eliminated. Advance products cause congestion and other problems. The inconsistency of service forces shippers in

some cases to load rail cars with products that are not required to be loaded to meet the shippers' customers' needs. The railways have the ability to eliminate established interchanges at will without any regulatory oversight, further reducing the opportunities for competition for shippers.

### The Solution:

Amend the *Canada Transportation Act* to:

- Require the railways to file their rail car allocation program for any particular year at least 3 months in advance; make the railways' rail car allocation program subject to the approval of the Rail Service Ombudsman; set the parameters for rail car allocation to include the requirements that such allocation be fair, fully transparent and non-discriminatory
- Require the railways to file with the Rail Service Ombudsman the size of their rail car fleet for each industry.
- Require a railway, prior to reducing the size of its fleet for any one industry, to obtain the approval of the Rail Service Ombudsman.
- Empower the Rail Service Ombudsman to deny any reduction in the size of a railway's fleet if that reduction will result in the railway's inability to fulfill the railway's level of service obligations to that industry
- Require a railway to publish and maintain with the Rail Service Ombudsman a list of existing railway interchanges on their systems, which would include track configuration, track lengths and locations of such interchanges
- Require the railways to seek the approval of the Rail Service Ombudsman prior to eliminating any existing interchanges
- Empower the Rail Service Ombudsman to determine, on application by an interested person, whether an interchange should be ordered at any point to connect the lines of any two federally-regulated railways

## **Failure of Communications**

### **The Problem:**

The lack of effective regulation of rail service in Canada has resulted in a failure of communication between the federally-regulated railways and shippers. Rail car allocation programs are imposed by the railways without adequate notice and frequently without taking into account shippers' concerns. Ancillary charges are routinely added to the railways' tariffs without adequate notice and without taking into account shippers' concerns. Inquiries by shippers to railway representatives frequently go unanswered or are delayed. Complaints by shippers as to such things as incorrect billings, railway delays, unwarranted demurrage and storage charges, are not always handled satisfactorily. Decisions are made by the railways behind closed doors on fundamental issues that materially affect the businesses of shippers, without adequate notice and without adequately taking into account individual shippers' concerns.

### **The solution:**

The changes that ITAC is recommending to the *Canada Transportation Act* in the creation of the Office of the Rail Service Ombudsman, and empowering that person to resolve rail service disputes in an open, transparent and effective manner, will effectively eliminate the communication problems that are being encountered. The lack of an effective alternative has resulted in the communications failures; the provision of an effective alternative in the Office of the Rail Service Ombudsman will address the communications failure problem. Having the ability to refer disputes to the Rail Service Ombudsman will help enable shippers to ensure that changes that the railways wish to make to rail service will not impede the shippers' ability to conduct their businesses, and will be appropriate to meet the needs of individual shippers and their customers.

### **Oppression of Captives by Tariff**

#### **The Problem:**

In short, the problem is subsection 119(2) of the *Canada Transportation Act*. Subsection 119(2) reads as follows:

#### **“119(2) Effect of freight tariff**

If a railway company issues and publishes a tariff of rates for the movement of traffic in accordance with this Division and Division VI,

(a) the rates are the lawful rates of the railway company and, subject to subsection (1), they take effect on the date stated in the tariff;

(b) the tariff supersedes any preceding tariff or any portion of it in so far as any rate in the tariff is varied; and

(c) a railway company that owns or operates a railway line in respect of which the tariff is issued shall charge the rates in the tariff until they expire or until the tariff is superseded by a new tariff.”

(emphasis added)

Subsection 119(2)(a) makes rates in the tariffs of federally-regulated railways “lawful”. The only way that a shipper can challenge a rate for the movement of traffic in a tariff that is issued and published by a federally-regulated railway in Canada is by taking that railway to final offer arbitration under the provisions of the *Canada Transportation Act*.<sup>4</sup>

Subsection 119(2) was part of our railway legislation prior to July of 1996, before the *Canada Transportation Act* came into effect. At that time, there was a public-interest rate complaint mechanism in the legislation, whereby a person or organization that had reason to believe that the effect of any rate established by a carrier, or any act or omission of a carrier, may prejudicially affect the public interest in respect of rates for, or conditions of,

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<sup>4</sup> Canadian National Railway Co. v. Brocklehurst, [2001] 2 F.C. 141

the carriage of goods within, into or from Canada, the person could request the Agency to investigate the rate, act or omission. The Agency had powers to disallow a tariff if it found that the rate, act or omission was contrary to the public interest.<sup>5</sup> The public-interest rate complaint mechanism was an effective restraint, or check and balance, against the abuse of subsection 119(2).

The public-interest rate complaint mechanism has since been eliminated however, leaving only subsection 119(2). In other words, following the enactment of the Canada Transportation Act in 1996, the railways have had ability to impose rates on shippers without the shippers having the ability to seek redress from those rates before the Agency.

Although the *Brocklehurst* decision (*supra*) confirmed the inability of the Agency to regulate rates except only in restricted applications, shippers do have the ability to initiate final offer arbitration proceedings against a railway's rates and conditions associated with those rates, pursuant to the provisions of the *Canada Transportation Act*. You will not have to inquire very far to learn that this remedy, although highly effective, is very costly. ITAC members understand that it can take up to a million dollars to successfully prosecute a final offer arbitration case against a federally-regulated railway in Canada. The railways have a history of challenging final offer arbitration proceedings before the Agency and the ordinary courts, which adds to the cost of taking the remedy. CN even tried to have the final offer arbitration provisions of the *Canada Transportation Act* declared invalid by arguing that the final offer arbitration provisions violated CN's rights under the Canadian Bill of Rights, S.C. 1960, c. 44. That argument was rejected by the Court.<sup>6</sup>

The situation is exacerbated by the fact that shippers' captivity results in shippers being forced to sign the railways' standard form of confidential contracts, which have as part of the template, a provision usually entitled "incorporation by reference" whereby all of the railways' tariffs are incorporated automatically as part of the contracts. Captive shippers are unable to negotiate the elimination of this template provision. The stark choice is therefore presented: "take it or leave it".

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<sup>5</sup> *National Transportation Act, 1987*, R.S.C. 1985, c. 28 (3rd Supp.), subsection 59(2)

<sup>6</sup> *Canadian National Railway Company v. Western Canadian Coal Corporation*, 2007 FC 371

The Solution:

Amend the *Canada Transportation Act* to:

- Clarify that a decision of the Rail Service Ombudsman is valid notwithstanding subsection 119(2) of the Act
- Clarify that a decision of the Rail Service Ombudsman is valid notwithstanding the existence of a contract whereby a captive shipper has entered into a contract with the railway containing a requirement that a railway's tariff(s) apply, including a general incorporation by reference provision.

ITAC very much appreciates the opportunity to present its views and recommendations to the Freight Service Review Panel, and would be pleased to respond to any inquiries that the Panel might have in connection with this submission.

Respectfully submitted this 29th day of April, 2010,



Kevin Hursh  
Executive Director,  
**Inland Terminal Association of Canada**