



CANADIAN FERTILIZER INSTITUTE
INSTITUT CANADIEN DES ENGRAIS

SUBMISSION TO THE RAIL SERVICE REVIEW PANEL

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ROGER LARSON, PRESIDENT

EXECUTIVE SUMMARY

Our submission centres around the need for the establishment of a timely, effective and low cost *commercial dispute resolution* (“CDR”) system which can be used as a first step towards the resolution of future problems and disputes relating to both railway rates and services. When shippers were surveyed by NRG Research Group on how the railways should be held accountable for their customer performance, the most common approach mentioned was to use “*commercial dispute resolution mechanisms*”.

CFI recommendations relating to CDR include:

- that the Rail Freight Service Review Panel recommend that the Minister initiate and facilitate discussions between shipper associations, CN and CP to design and establish a truly commercial CDR system for the resolution of disputes involving railway line-haul rail rates and levels of services;
- that commercial mediation and arbitration be made the mandatory first step towards the resolution of disputes involving line-haul rail rates and levels of services, whether the CDR process is provided and administered by the Agency or by an outside private mediator or arbitrator;
- that the CDR model established and used outside of the Agency have application to any dispute respecting a line-haul rail rate and/or a level of service that is contained in any tariff or confidential contract issued by CN and CP in Canada, irrespective of the geographic scope and application of the subject tariff or confidential contract;
- that sections 36.1, 36.2, 169.1(1) and 169.2 (3) of the CTA be amended to enable the Agency to mediate and/or arbitrate rate and service complaints involving the movement of goods described in tariffs or confidential contracts that apply over all of CN’s and CP’s lines within North America, and;
- that any commercial CDR model that is ultimately established contain a mechanism of reciprocal rewards and penalties to hold railways, shippers and other parties in the rail-based supply chain accountable for railway service.

CFI also proposes that government prohibit national rail strikes for rail freight movements by CN and CP. Work stoppages in the rail sector are one of the most disruptive service problems for shippers, often taking weeks to recover. Rail transportation is an “*essential service*” largely because of the significant harm to Canada’s international reputation as a reliable supplier, each time there is even the threat of a work-stoppage. While government has been responsive to requests from shippers for a mandated return to work, it has not always been timely.

1. INTRODUCTION

The Canadian Fertilizer Institute (CFI) is pleased to have the opportunity to present its comments and recommendations to the Rail Freight Service Review Panel in response to the Panel Chairman's letters of November 9, 2009, January 28 and March 31 2010.

CFI represents the basic manufacturers of nitrogen, phosphate, potash, and sulphur fertilizers, as well as the major wholesale and retail distributors in Canada. Our members produce over 25 million metric tonnes of fertilizers annually, over 75 per cent of which is exported. We are a resource-based industry heavily dependent on the railways to move our goods to domestic, offshore and U.S. markets. Our ultimate customers are farmers; delivering our products to them in a timely and effective manner is critical to maintaining North America's and the world's food supply. Railway service disruptions including strikes, and even the threat of strikes, cause significant losses and layoffs throughout our industry, and disrupt the supply of fertilizer to both our North American and offshore markets.

Potash is the largest fertilizer by volume and sales produced in Canada. It accounts for two thirds of all fertilizer materials shipped within Canada, to the U.S. and offshore. There are eleven operating potash mines in Canada of which ten are concentrated in the Province of Saskatchewan. The Saskatchewan mines employ more than 4,900 workers, paying CDN \$554 million in wages and benefits annually. There is one mine in New Brunswick. Collectively these mines produce close to 20 million tonnes of potash annually, the vast majority of which is shipped over the lines of CP and CN to west coast ports for export offshore (up to 10 million tonnes annually), as well as to the important U.S. market (up to 7 million tonnes annually).

Approximately 8 million tonnes of sulphur is produced each year, mostly in Alberta, the majority of which moves from western Canada to west coast ports by rail for export offshore (approximately 5 million tonnes) and to the U.S. (approximately 2 million tonnes). The main use of sulphur is in the production of sulphuric acid for the acidulation of phosphate rock to make phosphoric acid for the production of phosphate fertilizers.

In addition to potash and sulphur approximately 4.5 million tonnes of ammonia, 3.6 million tonnes of urea, 0.7 million tonnes of phosphate rock and 0.6 million tonnes of other fertilizers are also shipped by rail – mostly from western Canada – to domestic and U.S. markets.

2. BACKGROUND

At the time that Parliament was considering Bill C-8, amending the *Canada Transportation Act*, (“CTA”), CFI and the CRS, which CFI is a member of, strongly advocated that the government undertake an independent review of railway freight service. CFI and our members were pleased 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.

The Freight Service Review was structured by Transport Canada to be comprehensive in nature – to examine and report on all parts of the transportation logistics chain involving railways in Canada with an emphasis on the services provided by CN and CP, to identify problems and issues regarding such services, as well as best practices and how they can be expanded, and finally, to make recommendations on how to address these problems and issues. We understand that all of this work is to be completed by the end of 2010. CFI supports the structure of the review, the terms of reference, the scope of work, and the qualifications of the three panelists.

CFI has had the opportunity to review the four reports, which have been prepared by the consultant’s engaged by Transport Canada. Two of those consultants - QGI and NRG - have had the opportunity to meet with and/or interview some of our member companies including representatives of our major producers and retail shippers of fertilizers. We understand that the Panel has also had further discussions with Canpotex, which exports offshore.

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.

In making this submission, CFI 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*”. We would immediately highlight that our submission is ‘*solution based*’, recognizing that even where railway service levels are being provided in a reasonable and timely manner, that service problems will arise from time to time and that they must be dealt with in a efficient, timely and reasonable balanced manner.

As detailed below, our submission, for the most part, centres around the need that we see for the establishment of a timely, effective and low cost *commercial dispute resolution* (“CDR”) system which can be used as a first step towards the resolution of all future problems and disputes relating to both railway rates and services.

We are mindful that the consultant’s reports confirm that there are rail service problems in Canada and that, in some areas, they are widespread and chronic. The findings of NRG Research Group¹, are, in fact, disturbing. On a scale of 1 to 7 (7 being very satisfied):

- only 17 per cent of shippers rated their satisfaction level a 6 or 7- most customer satisfaction research generates 50-70 per cent in the 6-7 range;
- 35 per cent of shippers gave dissatisfaction scores of 3 or lower;
- 45 per cent stated their satisfaction level had decreased over the past three years; and
- 62 per cent said they have suffered a serious financial impact as a result of poor rail freight service².

We are also aware, however, that there are pockets in the transportation logistics chain where rail services are being provided by the railways in a very efficient and timely manner - some of our members are very satisfied with the levels of rail service being provided to them. We would point out, however, that where such services are operating well it is due, in large measure, to the relationships and partnerships that have been established and nurtured over many years between our members and the railways.

It must be emphasized here that these successful relationships and partnerships have come about at significant cost and investment on the part of our members in the form of large private equipment purchases, extensive load-out infrastructure investments and extensive and on-going port terminal infrastructure initiatives combined with a keenly and extremely focussed attention to service monitoring, rail-port-vessel interface relationships and effective customer-carrier communication systems.

¹ NRG Research Group in collaboration with the University of Manitoba Transport Institute prepared the report entitled “*Survey of Shippers*” for the Rail Freight Service Review, November 30, 2009. 262 shippers were surveyed.

² NRG Research Group “*Shippers’ Survey Report Highlights*”

3. CFI SUPPORT FOR THE SUBMISSION OF THE COALITION OF RAIL SHIPPERS

We strongly support the submission of the Coalition of Rail Shippers to the Review Panel, of which CFI is a founding and prominent member. The recommendations of the CRS include:

- that performance standards focused on core elements of customer service be established 1) to ensure that expectations with respect to customer service are understood, 2) to ensure that railways allocate resources to improve their performance in areas that matter most to customers, and 3) to ensure that other members of the supply chain fulfill their obligations;
- that a continuing independent monitoring and performance measurement of the railways and other participants in the supply chain be carried out in order to measure service effectiveness as it relates to performance standards and form the basis for determining when consequences for non-performance apply, and;
- that the statutory review of the recently amended CTA be carried out within a five-year period, as opposed to every eight years as presently set out in the CTA. This we feel is consistent with ensuring that the CTA is kept current for issues relating to railway service as well as for other commercial matters.

The CRS submission further notes that, while the dispute resolution and other shipper protection provisions of the *Act* may be helpful in resolving service and other disputes, they can be expensive and time-consuming. In 2006, in an attempt to head off Bill C-8, the railways entered into discussions with shippers regarding the development of a CDR. These discussions were unsuccessful. Government intervention will be required in order to establish a truly neutral, effective and timely CDR process.

4. GUIDING PRINCIPALS RESPECTING THE PROVISION OF RAILWAY SERVICES

Effective competition and market forces should be the prime agents driving railway service performance and accountability

CFI believes strongly that competition and market forces are the preferred underpinnings to the provision of timely, cost-effective, efficient and reliable railway services. There should always be incentives for parties to resolve service disputes privately and commercially.

CFI members for the most part fall into two categories. Both view rail as the backbone of the supply chain. The first group of CFI members is very satisfied or somewhat satisfied with rail service. The key characteristic of this group is that they have the ability to use competition or the threat of competition to negotiate rates and services more favourably. This group includes the large volume shippers of potash moving in unit trains to the west coast of Canada for export offshore. As described previously, these shippers have invested heavily in transportation assets (e.g. private railcars, mine and port terminal infrastructure) to increase control and ensure reliability in shipping to customer requirements.

The second group of CFI members is somewhat to very dissatisfied with rail service, citing the need for service improvements particularly at loading and unloading points and at interchanges where cars must be transferred between the lines of CN and CP and their connecting U.S. railway partners on trans-border moves. This group cannot use competition or the threat of competition and includes both large/smaller volume and captive fertilizer shippers who have no viable economic transport alternatives. Simply stated, for these shippers, rail service levels can be dictated by the originating 'home' railway due to its market dominance over the traffic at issue, and the fact that there is little or no consequence to the carrier for inadequate and unreasonable services.

CFI members support a two-way commercial dispute-resolution ("CDR") system with the railways with sufficient financial rewards and penalties to encourage railway service performance and accountability at mutually satisfactory levels.

We agree that, as stated in the terms of reference for the Rail Freight Review "*Commercial solutions are preferable to increased regulation*"³. CFI strongly promotes a policy and operating environment that encourages parties to settle disputes privately and commercially before resorting to the more formal dispute-resolution remedies currently provided under the CTA, and proposed in this submission. This position is consistent with CFI's transportation mission statement which advocates CDR as the first step and preferred avenue for resolving disputes - whether they be rate or service-related - supported by a strong legislative and regulatory back-stop.

³ Backgrounder Terms Of Reference For A Review Of Rail Freight Service April 7, 2008

5. COMMERCIAL DISPUTE RESOLUTION (“CDR”)

CFI has been a consistent supporter and promoter of CDR since mid 2006. At that time CFI entered into discussions and negotiations with both CN and CP in an effort to develop an effective, balanced, timely and low-cost commercial dispute resolution model that could be used by CFI member companies and the railways to resolve problems respecting both line-haul freight rates and the freight services provided by the railways – without resorting to the more formal, legalistic and costly remedies available under the CTA.

One area in particular where CFI believes that there is an urgent need for the use of CDR is with respect to reciprocal service penalties. In 2006, as is the case today, there was and continues to be a significant imbalance with respect to the application of penalty charges for breakdowns and failures relating to railway services. Simply stated, when shippers use railway assets in an inefficient manner they are penalized by the railway for the inefficient use of the asset – service penalty rules and charges are imposed on the offending customer by the railway. When, on the other hand, the inefficient use of the asset (e.g. service delay or breakdown) is caused by events beyond the customer’s control, no penalties are imposed on the railway for the service failure. The CDR model that was developed by CFI in 2006 attempted to correct this inequity and to create a more level playing field with respect to the provision of railway services to the customers of the railways.

Appendix 1 to this submission details the preferred CDR model that CFI attempted to establish in 2006, the extent to which CFI’s preferred model was agreed to and adopted by the railways and/or by legislators by way of amendments that were made to the CTA in February 2008, and the gaps that remain in the CDR model today. Appendix 1 is summarized below along with our recommendations. CFI’s recommendations to improve Canada’s rail freight logistics system are centred around the establishment of a balanced, workable, low cost and effective CDR system that will be the mandatory first step towards resolving disputes between shippers and railways involving line-haul rates, charges and services. Our recommendations respecting CDR are outlined below.

6. WHAT CFI ATTEMPTED TO OBTAIN IN THE FORM OF CDR IN 2006

In mid-2006, as part of the consultations on possible changes to the CTA, the Minister of Transport, Infrastructure and Communities challenged CN and CP to develop a CDR process to complement the provisions in the CTA. CFI was the first shipper association to take up this challenge and commenced discussions with CN and CP in an effort to establish a commercial

dispute resolution (CDR) process that could pave the way to a better and more effective way of doing business between CFI members and the railways. This effort stemmed from a letter received by the Shippers' Council of Canada – of which CFI was a founding and prominent member - from the Minister of Transport dated June 27, 2006, wherein the Minister stated “*As you know, shippers have raised concerns with the government about railway service. I take these concerns seriously and continue to encourage railways and shippers to seek commercial solutions.*”

Between August and October 2006 CFI and the railways exchanged several ideas and concepts respecting their respective and preferred CDR models. CFI was, until that time, the only Canadian shipper association to enter into such discussions. We did so in good faith. In early October 2006 the talks between the railways and CFI broke down over a central issue to the fertilizer industry – the application of the CDR process to all traffic originated in Canada, including traffic originated in Canada and moved over CN's and CP's lines to markets in the United States. For CFI members, who export over 75 per cent of their total production – much of it to the U.S. - commercial mediation and arbitration that only covers some 20 per cent of our rail traffic is not truly 'commercial'. CFI stated at that time, and continues to hold that position today, that it is essential that the CDR process cover traffic over all of CN's and CP's lines, including their lines outside of Canada within the United States.

In CFI's view, '*commercial*' means '*business to business*' between contracting parties. Railway freight tariffs and confidential contracts commonly recognize these relationships on traffic moved between Canada and the U.S. It accordingly makes absolute sense to make CDR a better way of doing business for traffic moved to the U.S. as well as within Canada. CFI's CDR proposal was premised on the reality that in a global marketplace, commercial systems must transcend political boundaries. As an example, in the US the National Feed and Grain Association has established a commercial mediation and arbitration system with a number of major railways which covers transborder traffic (both Mexico-U.S. and Canada-U.S.) Both CN and CP are parties to the agreement. During the 2006 discussions CFI stated that any CDR system that failed to recognize this reality would be of little value to CFI members and, in our view, is not a commercial solution. It is here significant to note that Canada is a trading nation and the U.S. is our largest customer.

Until October 2006, CFI had regarded the discussions with CN and CP as being generally positive in tone. As a result of this perceived forward movement other shipper associations stated they were prepared to accompany CFI to future meetings, if the discussions had proceeded. Ironically, until that time CN had made a number of constructive proposals on how

they might apply a CDR system to U.S. bound traffic. CP, however, rejected any discussion on this matter.

CP's refusal to consider CDR on shipments to the U.S. was the primary reason for the breakdown in the 2006 discussions, although CP did later return with a proposal on transborder service, excluding rates. CN unfortunately was not willing to continue discussions without the participation of CP. Details respecting the components of the CDR model that were agreed to by all parties during the 2006 discussions are attached in Appendix 1.

7. PROGRESS TOWARDS ESTABLISHING AN EFFECTIVE CDR PROCESS

Although talks broke down between CFI and the railways in late 2006, significant progress has been made towards establishing a balanced and workable CDR process. Specifically, a modified CDR model was subsequently developed and agreed to in early 2007 by all members of the *Coalition of Rail Shippers Group*, based on the CFI model. The CRS is a coalition of close to 20 major Canadian industry associations, whose members represent over 80 per cent of the combined revenues of CN and CP.

In addition, following the work carried out by CFI and the railways in 2006, what we would categorize as a '*semi-commercial*' dispute-resolution system, was established through amendments to the CTA in February 2008. There are now both mediation and new arbitration processes available through the Agency, however they requires the consent of both parties to mediate and/or arbitrate and involve the active participation of the tribunal as the mediator, which brings into question the commercial nature of the processes. Three distinct CTA amendments now provide for mediation and commercial arbitration through the offices of the Agency, as follows:

1. Sections 36.1 of the CTA now permits parties to a dispute respecting any matter that falls within the jurisdiction of the Agency, by agreement, to have any dispute involving any rate, charge, line-haul service, or the provision of incidental services mediated by the Agency by appointment of a mediator who may be either an officer or Member of the Agency or a person outside of the Agency (private mediator).
2. Section 36.2 of the CTA now permits the Agency to arbitrate any dispute that involves a matter under its jurisdiction in PARTS III and IV of the Act. This includes disputes relating to line-haul rates, charges, levels of services and incidental services, by agreement of both parties to the dispute. The Agency may establish a roster of persons, which may include members and staff of the agency as well as private citizens to act as arbitrators.

Section 36.2 of the CTA now also permits the Agency to mediate any dispute that involves a matter under its jurisdiction in PARTS III and IV of the Act. This includes disputes relating to line-haul rates, charges, levels of services and incidental services, by agreement of both parties to the dispute. The Agency may establish a roster of persons, which may include Members and staff of the Agency as well as private citizens to act as mediators.

3. Section 169.1 (1) of the CTA now further enables parties to a final offer arbitration, by agreement, to refer their dispute to a mediator, which may be the Agency, on any matter that has been submitted to the Agency for a final offer arbitration under section 161. The FOA 'clock' is placed on hold while the mediation is carried out. Section 169.1 (4) requires that the mediation must be completed within thirty days after the matter has been referred to mediation.

Section 169.2 (3) of the CTA further mandates that mediation must be the mandatory first step towards resolving disputes from groups of shippers requesting Agency arbitration of line-haul rates and services of CN and CP.

In addition:

- Before negotiations broke down CN and CP agreed to commercially mediate and arbitrate both line-haul rates and line-haul conditions of service on disputes involving traffic moved over all 'local' and 'joint line' CN and CP routes only within Canada, including the Canadian portion of trans-border routes.
- Before negotiations broke down CN and CP agreed to mediate and/or arbitrate all goods described in their respective freight tariffs and confidential contracts.
- Before negotiations broke down CN and CP agreed that any person subject to a railway freight tariff or confidential contract (e.g., including port terminal operators and ports subject to a tariff or confidential contract) could unilaterally activate mediation or arbitration.

CN and CP did not agree to allow groups of shippers and non-shippers to commercially mediate and arbitrate disputes relating to the "facts" or "circumstances" surrounding the application of ancillary charges. Before negotiations broke down, however, the railways agreed to support a new CTA amendment empowering the Canadian Transportation Agency to undertake formal investigations of ancillary charges and rules and to issue binding orders and decisions. There is

accordingly no longer a need to commercially mediate and/or arbitrate disputes involving ancillary rules and charges because shippers were successful in obtaining the new s. 120 CTA dispute-resolution remedy for such disputes.

8. GAPS THAT REMAIN IN CDR TODAY

There continue to be major limitations in the mediation and arbitration processes available to shippers under the CTA today:

- The processes are ‘*legislative*’ in nature and application. The CTA mediation and arbitration processes - welcomed by many in the shipper community including CFI - are not ‘*commercial*’ in the true sense of the word; rather, they are semi-judicial from both a process and administrative perspective. There exists a continued need for a truly commercial CDR process between CFI member companies and the railways.
- The processes are not mandatory. In order to proceed with mediation and/or arbitration under either section 36.1 or 36.2 of the CTA all parties to the dispute must agree to activate and use the process; the processes are totally voluntary and any one party can defeat the CDR process by simply refusing to participate in it.

While the Agency can encourage mediation it cannot compel it. We note that the Final Report recently prepared for Transport Canada’s Rail Freight Service Review by CPCS Consulting entitled “*Service Issues in Regulated Industries Other than Canadian Rail Freight Industry*”, identifies a number of issues in the Executive Summary that warrant further consideration by the Panel. The first issue identified by the consultant is that the Agency “*should have the power to compel mediation as a means of resolving rail freight disputes in Canada*”⁴. The consultant further states:

*“Clearly, an effective commercial dispute resolution process could be an important tool. This would necessitate that shippers and railways agree on the terms and conditions of the CDR process and that it applies to a meaningful range of subject matters. A CDR process that applies to a more limited range of subject matters might be useful in setting a precedent for broader application, but again, would have to be accepted and its usefulness recognized by both shippers and railways.”*⁵

⁴ CPCS Report entitled “*Service Issues in Regulated Industries Other than Canadian Rail Freight Industry*”, Conclusions and Recommendations, Executive Summary p. XI

⁵ *Ibid*, p.10

- The application and scope of the processes are restricted under the Canada Transportation Act to the movement of goods over the lines of CN and CP wholly within Canada. CN and CP are both major Class 1 North American railways; CN's geographic reach extends directly to the Gulf of Mexico while CP's runs well into the U.S. Midwest and along the U.S. eastern seaboard. Both railways routinely issue tariffs and contracts, which encompass all of their lines across North America as well as those of their U.S. connecting partners.

When disputes arise respecting CN's or CP's international rates and/or service levels, they cannot be apportioned between movements within Canada and movements within the U.S. They must be resolved on a common playing field which, we suggest, can only be accomplished using the CDR model that we are proposing be facilitated and established with the help of Transport Canada, shippers and the railways.

The "*Shippers' Survey*" conducted by the NRG Research Group found that only 7 per cent of shippers feel strongly (rated a 6 or 7 where 7 is very satisfied), that there are currently adequate measures in place to hold the railways accountable for poor service. There is an imbalance in accountability when it comes to railway service standards. CFI believes that railways should be subject to penalties for failure to perform required service, as well as incentives for performing superior service, similar to the penalty payments to which shippers are subject for shippers' failure to load, unload or move railway equipment in a timely and efficient manner.

9. RECOMMENDATIONS FOR IMPROVING CANADA'S RAIL FREIGHT SYSTEM

CFI recommendations are:

- that the Rail Freight Service Review Panel recommend that the Minister initiate and facilitate discussions between all shipper associations (that wish to participate in the endeavour), CN and CP to design and establish a truly commercial CDR system for the resolution of disputes involving railway line-haul rail rates and levels of services;
- that commercial mediation and arbitration be made the mandatory first step towards the resolution of all disputes involving line-haul rail rates and levels of services regardless of whether the CDR process that is activated and used is provided and administered by the Agency or by an outside private mediator or arbitrator;
- that the CDR model established and used outside of the Agency have application to any dispute respecting a line-haul rail rate and/or a level of service that is contained in any

tariff or confidential contract issued by CN and CP in Canada, irrespective of the geographic scope and application of the subject tariff or confidential contract;

- that sections 36.1, 36.2, 169.1(1) and 169.2 (3) of the CTA be amended to enable the Agency to mediate and/or arbitrate, as the case may be, rate and service complaints involving the movement of goods described in tariffs or confidential contracts that apply over all of CN's and CP's lines within North America, and;
- that any 'truly' commercial CDR model that is ultimately agreed to and established contain a mechanism of reciprocal rewards and penalties to hold railways, shippers and other parties in the rail-based supply chain accountable for railway service. It is interesting to note that, when shippers were surveyed and asked by NRG Research Group how the railways should be held accountable for their customer performance, the most commonly mentioned approach⁶ was to use "*commercial dispute resolution mechanisms*"⁷.

CFI also recommends that government prohibit national rail strikes for rail freight movements by CN and CP. Work stoppages in the rail sector are one of the most disruptive service problems shippers face, often taking weeks to recover. Rail transportation is an "*essential service*" largely because of the significant harm to Canada's international reputation as a reliable supplier, each time there is even the threat of a work-stoppage. While government has been responsive to requests from shippers for a mandated return to work, it has not always been timely.

10. CONCLUSION

CFI's recommendations described in this submission respecting the proposed manner of dealing with service complaints in the future are consistent with CFI's transportation mission statement; which includes that service problems should be resolved through commercial negotiations combined with commercial dispute resolution and, as a last resort, minimal regulation.

CFI believes that this review is an important initiative and the results will have a significant impact on the competitiveness of our members as well as other important Canadian industries. We look forward to discussing solutions to the issues which we and other shippers have identified, in order to sustain global competitiveness and foster economic growth.

⁶ 22% of respondents surveyed by NRG Research Group

⁷ NRG Research Group "*Shippers' Survey*" Report, p. 50

APPENDIX 1**CFI'S COMMERCIAL DISPUTE RESOLUTION MODEL**

The Preferred CDR Model that CFI Attempted to Negotiate with CN and CP in 2006	The CDR Components that CN and CP Agreed to and/or Were Established through the February 2008 Amendments to the CTA	The CDR Components that Remain Missing Today
A CDR model which would be prefaced by an MOU between CFI and the railways agreeing to following actions and CDR principals:	The MOU was agreed to by CN and CP during the negotiations but was never officially formulated because the negotiations between CN, CP and CFI broke down.	There exists a continued need for a truly commercial CDR MOU between CFI member companies and the railways.
Minister of Transport, Infrastructure and Communities to be advised once MOU negotiations formally commence.	CFI formally engaged the services of experts in mediation, arbitration, and U.S. and Canadian rail transportation law and policy.	CFI is prepared to start discussions
<ul style="list-style-type: none"> • CDR model to be made available to other associations wishing to sign on. 	<p>Other associations, including the Mining Association of Canada ("MAC"), the Propane Gas Association of Canada ("PGAC") and the Chemistry Industry Association of Canada expressed an interest in participating in the CDR negotiations with the railways during 2006 and attended meetings with CFI and the railways.</p> <p>A modified CDR model was subsequently developed and agreed to in early 2007 by all members of the <i>Coalition of Rail Shippers Group</i> ("CRS"), based on the CFI model.</p>	No further action required
<ul style="list-style-type: none"> • CDR model to operate with no direct government involvement. 	A ' <i>semi-commercial</i> ' dispute-resolution system was subsequently established through amendments to the CTA in February 2008 providing for both mediation and commercial arbitration through the offices of the Canadian Transportation Agency using either Agency or private mediators and in-house Agency arbitrators	<p>It is up to the party requesting mediation or commercial arbitration whether they wish the Agency or a private outside mediator or arbitrator to be involved.</p> <p>Once the applicant makes the choice, however, agreement to proceed using CDR should be made mandatory.</p>
<ul style="list-style-type: none"> • CDR model to include use of following processes: mediation, med-arb and arbitration. 	<p>Agreed to by CN and CP during the negotiations but was never officially formulated because the negotiations between CN, CP and CFI broke down.</p> <p>Mediation and a form of commercial arbitration similar to that proposed by CFI is now available through offices of the Canadian Transportation Agency</p>	<p>All three processes are now available through the use of outside Agency mediators.</p> <p>Once the applicant makes the choice, however, agreement to proceed using CDR must be made mandatory.</p>

<ul style="list-style-type: none"> Process made available to <u>all persons</u> subject to rates, terms and conditions of a railway freight tariff or confidential contract. 	<p>Agreed to by CN and CP during the negotiations but was never officially formulated because the negotiations between CN, CP and CFI broke down.</p> <p>Mediation and a form of commercial arbitration similar to that proposed by CFI is now available through offices of the CTA.</p>	<p>No further action required</p>
<ul style="list-style-type: none"> Process applicable to any dispute respecting an existing or proposed tariff pertaining to line-haul rates, services and ancillary rules and charges. 	<p>Agreed to by CN and CP during the negotiations but was never officially formulated because the negotiations between CN, CP and CFI broke down.</p> <p>Mediation and a form of commercial arbitration similar to that proposed by CFI is now available through offices of the Canadian Transportation Agency</p>	<p>No further action required</p>
<ul style="list-style-type: none"> Use of CDR model shall be mandatory first step towards resolving dispute but not preclude person from using formal remedies under the CTA if attempt to resolve matter using CDR fails. 	<p>Agreed to by CN and CP during the negotiations but was never officially formulated because the negotiations between CN, CP and CFI broke down.</p> <p>Amendments to the CTA in February 2008 now require that mediation be the mandatory first step in disputes from groups of shippers requesting Agency arbitration of line-haul rates and services of CN and CP</p>	<p>Mediation and arbitration still need to be made the mandatory first step towards resolution of all disputes involving line-haul rates and levels of services</p>
<ul style="list-style-type: none"> MOU to remain in effect for two years following which model to be evaluated. 	<p>Agreed to by CN and CP during the negotiations but was never officially formulated.</p>	<p>No further action required until such time as a purely commercial MOU is established between the railways and CFI.</p>

The Preferred CDR Model that CFI Attempted to Negotiate with CN and CP in 2006	The CDR Components that CN and CP Agreed to and/or Were Established through the February 2008 Amendments to the CTA	The CDR Components that Remain Missing Today
<p><u>Types of Disputes to which CDR to Apply</u></p> <p>Disputes Respecting:</p> <ul style="list-style-type: none"> • Line-haul rates • Line-haul conditions of service • Ancillary rules (e.g., demurrage). CFI ultimately acceded to CN's and CP's proposal to use a legislated CTA complaint process in lieu of CDR. • Ancillary charges (e.g., demurrage). CFI ultimately acceded to CN's and CP's proposal to use a legislated CTA complaint process in lieu of CDR. 	<p>CN and CPR agreed to commercially mediate and arbitrate:</p> <ul style="list-style-type: none"> • line-haul rates • line-haul conditions of service <p>CN and CP would not agree to allow disputes respecting ancillary rules and charges to go to CDR however, agreed to support an amendment to the CTA allowing the Agency to investigate and rule upon alleged unreasonable ancillary rules and charges. The amendment was made at s. 120 to the CTA – see below.</p>	<p>No further action required as both line-haul rates and levels of services can now be mediated or arbitrated under new provisions of the CTA which were enacted in February 2008.</p> <p>There is no longer a need to commercially mediate or arbitrate disputes involving ancillary rules and charges because CFI was successful in obtaining the new s. 120 CTA dispute resolution remedy enabling “<i>a shipper... subject to any charges and associated terms and conditions for the movement of traffic or for the provision of incidental services that are found in a tariff that applies to more than one shipper.</i>” to appeal the tariff rules and/or charges to the Canadian Transportation Agency.</p>

The Preferred CDR Model that CFI Attempted to Negotiate with CN and CP in 2006	The CDR Components that CN and CP Agreed to and/or Were Established through the February 2008 Amendments to the CTA	The CDR Components that Remain Missing Today
<p><u>GOODS SUBJECT TO CDR</u></p> <p>All goods described in freight tariffs and confidential contracts of CN and CP</p>	<p>All goods described in freight tariffs and confidential contracts of CN and CP</p>	<p>No further action required - all goods can be mediated under the new mediation processes set out at s. 36.1, 36.2, 169.1(1) and 169.2 (3) of the CTA [per Feb. 28th 2008 CTA amendments] or arbitrated by the Agency under the new arbitration process set out at s. 36.2 [per Feb. 28th 2008 CTA amendment].</p> <p>All goods can also be arbitrated under the new arbitration process set out at s. 169.2 (1).</p>

The Preferred CDR Model that CFI Attempted to Negotiate with CN and CP in 2006	The CDR Components that CN and CP Agreed to and/or Were Established through the February 2008 Amendments to the CTA	The CDR Components that Remain Missing Today
<p style="text-align: center;">WHO CAN COMPLAIN AND ACTIVATE CDR</p> <p>Any person subject to a railway freight tariff or confidential contract including both shippers and non-shippers (e.g., port terminal operators and ports) can unilaterally activate mediation or arbitration – once activated the railway is obligated to participate in the mediation and arbitration.</p> <p>Groups of shippers and non-shippers to commercially mediate and arbitrate disputes relating to the “facts” or “circumstances” surrounding the application of ancillary charges.</p>	<p>Agreed to by CN and CP</p> <p>CN and CP did not agree to this proposal but agreed to support a new CTA amendment empowering the Canadian Transportation Agency to undertake formal investigations of ancillary charges and rules and to issue binding orders and decisions.</p> <p>The Canada Transportation Act was subsequently amended February 28, 2008 and a new complaint provision was added at s. 120 enabling “a <i>shipper... subject to any charges and associated terms and conditions for the movement of traffic or for the provision of incidental services that are found in a tariff that applies to more than one shipper.</i>” to appeal the tariff rules and/or charges to the Canadian Transportation Agency.</p> <p>Under s. 120, if the Agency, following its investigation, finds that the tariff rule and/or charge are unreasonable it may, by order, establish new rules and /or charges. The Agency order remains in effect for up to one</p>	<p>Any person impacted by a freight tariff or contract can request Agency mediation or arbitration under the new mediation and arbitration processes set out at s. 36.1 (mediation), 36.2 (mediation and arbitration), 169.1 [1] (mediation) and 169.2 [3] (mediation) [per Feb. 28th 2008 CTA amendments].</p> <p>Mediation and arbitration, however, is voluntary and must be agreed to by both parties. There is therefore a continuing need to obligate the railway to participate in Agency-sponsored mediation or arbitration</p> <p>No action required as the new formal complaint remedy established at s. 120 of the CTA allows multiple shippers to dispute the “facts” or “circumstances” surrounding the application of ancillary charges as well as the actual rules and charges applicable to the ancillary service.</p>

	<p>year.</p> <p>In deciding whether any charges or associated terms and conditions are unreasonable, the Agency shall take into account the following factors:</p> <ul style="list-style-type: none"> • the objective of the charges or associated terms and conditions; • the industry practice in setting the charges or associated terms and conditions; • in the case of a complaint relating to the provision of any incidental service, the existence of an effective, adequate and competitive alternative to the provision of that service; and • any other factor that the Agency considers relevant. 	
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<p>The Preferred CDR Model that CFI Attempted to Negotiate with CN and CP in 2006</p>	<p>The CDR Components that CN and CP Agreed to and/or Were Established Through the February 2008 Amendments to the CTA</p>	<p>The CDR Components that Remain Missing Today</p>
<p><u>WHERE CDR TO APPLY</u> [Geographic Reach]</p> <p>Traffic moved over all of CN's and CP's local and trans-border lines within North America including trans-border routes and routes wholly over CN's and CP's lines within the U.S.</p>	<p>Agreement by CN & CP to apply CDR to all traffic moved over all 'local' and 'joint line' CN and CPR routes only within Canada, including the Canadian portion of trans-border routes.</p> <p>Note:</p> <ul style="list-style-type: none"> • CP Initially agreed to apply CDR to <u>service disputes</u> on movements over CP lines between Canada and the U.S. Agreement ceased with collapse of negotiations. • CP refused to apply CDR to <u>rates</u> on movements over CP lines between Canada and the U.S. 	<p>The CTA currently empowers the Agency to investigate and rule upon service complaints or disputes only over CN's and CP's lines within Canada – not into the U.S.</p> <p>It is proposed that the Review Panel recommend that the CTA be amended to enable the Agency to rule on service complaints involving the movement of goods over all of CN's and CP's lines within North America.</p> <p>It is further proposed that a truly commercial dispute resolution model be developed without Agency involvement and made applicable to the movement of</p>

	<ul style="list-style-type: none"> • CN initially agreed to allow CDR of line-haul rates over all CN local and joint lines within Canada and over local CN lines within the U.S. Agreement ceased with collapse of negotiations. • CN refused to apply CDR to <u>service disputes</u> on movements over CN lines between Canada and the U.S. <p>CTA Feb. 28th 2008 amendments enable Agency to formally mediate and arbitrate disputes respecting line-haul rates and service conditions on all traffic moved over CN's and CP's lines wholly within Canada as well as on the portion of movements within Canada on trans-border movements.</p>	<p>goods over all of CN's and CP's lines within North America.</p>
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<p>The Preferred CDR Model that CFI Attempted to Negotiate with CN and CP in 2006</p>	<p>The CDR Components that CN and CP Agreed to and/or Established Through the February 2008 Amendments to the CTA</p>	<p>The CDR Components that Remain Missing Today</p>
<p><u>MEDIATION PROCESS</u></p> <p><u>Step #1: Mandatory Mediation</u></p> <p>Any dispute between a railway and CFI member company signing on to the CDR model would have to be mediated as a first step in the dispute resolution process.</p> <p>The parties would be required to set out expedited procedures for mediation in the MOU.</p> <p>The mediator would be a private party if agreed to by the railway and the shipper party to the dispute, or an employee of the Canadian Transportation Agency if the parties could not agree on a private mediator, and the fees and costs of Agency mediators would be charged to the parties on a cost-recovery basis.</p>	<p><u>“Agency Mediation”</u></p> <p>The recent amendment to the CTA (Feb. 28th 2008) at s. 36.1 and 36.2 CTA now enables parties to a dispute respecting any matter that falls within the jurisdiction of the Agency, <u>by agreement</u>, to have the dispute mediated by the Agency by appointment of a mediator who may be either an officer or Member of the Agency or a person outside of the Agency (private mediator).</p> <p>The Agency is empowered under the amended CTA to establish a roster of persons who may mediate the disputes.</p> <p>The mediation may, by agreement of all parties to the dispute, be carried out with respect to line-</p>	<p>.</p> <p>The new Agency mediation processes set out at s. 36.1 and 36.2 of the Act are by agreement only by both parties to the dispute – they are not mandatory as CFI recommended.</p> <p>CFI submits that the Review Panel should recommend that mediation be a required first step in the resolution of disputes respecting both line-haul rates and conditions of service through either the appointment of a mediator who is an officer or member of the Agency or a private citizen outside the Agency. The choice should be that of the person requesting the mediation.</p>

<p>The parties would develop a list of private mediators, although the parties to a dispute could utilize any person as mediator if they both agreed.</p>	<p>haul rates, conditions of service pertaining to line-haul rates as well as with respect to ancillary rules and charges.</p>	
	<p><u>Agency Arbitration-Mediation</u></p> <p>CTA Feb. 28th 2008 amendments (s. 169 [1] CTA) further enable parties to a final offer arbitration, <u>by agreement</u>, to refer their dispute to a mediator, which may be the Agency, on any matter that has been submitted to the Agency for a final offer arbitration under section 161.</p> <p>The FOA 'clock' is placed on hold while the mediation is carried out.</p>	<p>It is proposed that any party should be permitted to unilaterally activate the mediation process.</p>

<p>The Preferred CDR Model that CFI Attempted to Negotiate with CN and CP in 2006</p>	<p>The CDR Components that CN and CP Agreed to and/or Established Through the February 2008 Amendments to the CTA</p>	<p>The CDR Components that Remain Missing Today</p>
<p><u>OPTIONAL BINDING COMMERCIAL ARBITRATION</u></p> <p>If mediation fails in full or in part, a complainant would have the option of deciding the dispute either by binding arbitration or by filing a complaint with the Agency under the CTA.</p> <p>FOA (pursuant to s. 161 of the CTA) would not, however, be available to a complainant where the dispute involved the southbound movement of traffic from a point in Canada to a point in the U.S.</p> <p>The MOU shall provide that the parties agree on a list of approximately 15 neutral arbitrators, who shall be subject to qualifications and training agreed upon by the Parties.</p> <p>The MOU shall provide for the selection of a list of neutral arbitrators if the parties cannot agree on a list.</p>	<p>The February 28th, 2008 amendments to the CTA offer two new arbitration processes for parties to disputes involving line-haul rates and freight services.</p> <p>One is commercial in nature, building upon the CFI proposed arbitration model. The second is regulatory in nature, building upon the existing '<i>final offer arbitration</i>' process which has been set out in the CTA and previous legislation since 1988 at sections 161-169 of the Act.</p> <p>They are described as follows under (A) and (B) below.</p> <p><u>(A) "Agency In-House Arbitration"</u> The Feb. 28th 2008 CTA amendment at s. 36.2 CTA now enables parties to a dispute respecting any matter that falls within the jurisdiction of the</p>	<p>The Feb. 28th 2008 CTA amendment providing in-house Agency arbitration provides a degree of commercial arbitration within the Agency using Agency</p>

<p>The MOU shall detail how the arbitrator in a specific dispute shall be chosen from the list, except that the parties to a dispute may agree to an arbitrator not on the list.</p> <p>The MOU shall set forth expedited arbitration procedures as agreed on by the parties, including provisions to limit the costs of any such proceeding.</p> <p>An arbitration decision shall bind the parties to the dispute for a period of two years with respect to traffic moved wholly within Canada and one year with respect to traffic moved from Canada to the U.S.</p> <p>The arbitration model proposed by CFI was designed to be more responsive to the needs of both parties as opposed to the 'baseball' final offer model set out in the CTA; that is, following the commercial or Agency mediation phase. CFI's proposal was further structured to allow the arbitrator considerable flexibility in the selection process, going so far as to enable the arbitrator to craft his/her own final offer selection and, in addition, to permit the arbitrator to issue an interim report in an effort to bring the parties together before issuing a binding decision.</p> <p>The arbitration model proposed by CFI was further designed to apply only to the portion of the total trans-border movement over which CN and CPR's revenues are received and to exclude the portion of the revenues that are received by U.S. participating carriers.</p>	<p>Agency, by agreement, to have the dispute <u>arbitrated by the Agency</u> (as oppose to by an outside arbitrator through the process set out at s. 161-169 of the CTA) through the appointment of an arbitrator who may be either an officer or Member of the Agency or a person outside of the Agency.</p> <p>The Agency is empowered under the amended CTA to establish a roster of persons located inside (Agency Members or officers) and outside (private) the Agency who may arbitrate the disputes.</p> <p>The arbitration may, <u>by agreement of all parties</u> to the dispute, be carried out with respect to line-haul rates, conditions of service pertaining to line-haul rates as well as with respect to ancillary rules and charges.</p>	<p>Members and staff. The process is, however, voluntary requiring consent of both parties to the arbitration.</p> <p>It is proposed that the Review Panel recommend that the CTA be amended to require the Agency to arbitrate disputes that come before it pursuant to s. 36.2 of the Act where only one party requests it and only after an attempt has been made by the parties to mediate the dispute under s. 36.2 of the Act or by purely commercial means.</p>
	<p><u>(B) Agency Group Arbitration</u></p> <p>The February 2008 amendment to the CTA at s. 169.2 (1) now further enables <u>groups</u> of shippers to request final offer arbitration of line haul rates and associated conditions of service for goods moved over the lines of CN and CP within Canada as well as over the Canadian portion of their lines on trans-border Canada-U.S.</p>	<p>It is recommended that section 169.2 (3) be amended to enable parties to the dispute to mediate disputes involving the movement of goods described in tariffs or confidential contracts that apply over all of CN's and CP's lines within North America.</p>

	<p>movements.</p> <p>Group arbitrations, however, cannot be carried out on disputes respecting ancillary rules or charges.</p> <p>A matter submitted to group arbitration must be common to all members of the group and the shippers must make a joint offer in respect of the matter, the terms of which apply to all of them.</p> <p>Before submitting a matter to group arbitration the group must also demonstrate that an attempt has been made to mediate the matter.</p>	
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<p>The Preferred CDR Model that CFI Attempted to Negotiate with CN and CP in 2006</p>	<p>The CDR Components that CN and CP Agreed to and/or Established Through the February 2008 Amendments to the CTA</p>	<p>The CDR Components that Remain Missing Today</p>
<p><u>FREIGHT SERVICE REWARDS AND PENALTIES</u></p> <p>CFI believes that railways should be subject to penalties for failure to perform required service, as well as incentives for performing superior service, similar to the penalty payments to which shippers are subject for shippers' failure to load, unload or move railway equipment in a timely and efficient manner.</p> <p>CFI agreed to provide a list of rail services that could be subject to penalties and/or incentives to which railways would be subject. As follows:</p> <ul style="list-style-type: none"> • Car supply by railway at origin • Time for loading cars at origin • Car cycle time • Time for unloading cars at destination 	<p>CN and CP initially agreed to develop a list of rail services and to negotiate a system of reciprocal rewards and penalties respecting those services but then withdrew their agreement when negotiations collapsed in late 2006.</p>	<p>There continues to be a need for both a) a list of specific railway services that can be made subject to CDR</p> <p>and b) a system of reciprocal monetary rewards and penalties respecting railway those services and it is recommended that the Review Panel make such a recommendation.</p>

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

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

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

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.

