

# **Western Canadian Wheat Growers Association**

**Submission to the**

**Rail Freight Service Review Panel**

**April 30, 2010**

The Western Canadian Wheat Growers Association welcomes this opportunity to put forward our views to the Rail Freight Service Review Panel.

The Wheat Growers support free market solutions wherever possible, recognizing that vigorous competition in an open marketplace is the best means to achieving good service at good prices. In the absence of competitive markets, as is the case in the western Canadian rail industry, we require regulatory mechanisms to ensure adequate service is provided at a reasonable price.

The current regulatory environment has failed to ensure that grain shippers, and the farmers who rely on them, are provided with reliable and timely service. This is due to the imbalance in market power between shippers and railways and the consequent lack of accountability that the railways encounter when they fail to provide adequate service.

In western Canada, the existence of the railway duopoly means that market disciplines that exist in normal competitive markets are not in play. For the most part, grain farmers and shippers are dependent on one or at most, two railways in shipping our grain and grain products to export markets or to markets in central and eastern Canada. In addition, most of the fertilizer used on prairie farms is shipped in by rail with few competitive alternatives.

In this submission, we will first provide comment on railway service issues and our recommended solutions. We will then provide comment on two general rail transportation issues, followed by a summary of our recommendations.

## **Service problems to be addressed:**

There are five main areas of railway service deficiencies that are apparent to farmers:

- 1) Failing to provide an adequate number of cars to shippers when requested.
- 2) Failing to ensure cars are spotted at loading points on a timely basis.
- 3) Failing to pick up and deliver loaded cars on a timely basis.
- 4) Service disruptions due to labour disputes.
- 5) The closure of rail sidings.

## 1) Car order fulfillment

Both CN and CP are doing a poor job in meeting rail car demand from shippers. According to QGI Consulting, over a two year time period (2006 to 2008) CN provided grain shippers with at least 75% of their car orders only 61% of the time and CP provided at least 75% of their car orders only 53% of the time. On average, grain shippers received their full requested car supply (i.e. 100% of their car orders) only 50% of the time, with wide variations on a week-to-week basis.<sup>1</sup>

The Canada Transportation Act currently incorporates level of service provisions requiring the railways to provide “adequate and suitable accommodation for the receiving and loading of all traffic offered for carriage”.

The phrase “adequate and suitable accommodation” is vague and open to interpretation. Several level of service complaints have been filed with the Canadian Transportation Agency (CTA) with mixed success. In a 1998 ruling, the CTA arbitrarily suggested that providing 80% of requested cars was an “acceptable and reasonable level of service”.

While we appreciate that the Agency established a benchmark for car order fulfillment, in our view, this standard is far too low, especially when you consider that companies are required to get grain in position to meet sales commitments and vessel arrivals. In the CTA ruling, it appears that the 80% benchmark was a saw-off between the railway’s actual level of service (less than 60% of cars ordered) and the shippers’ needs (100% of cars ordered).

While we recognize there may be times when extenuating circumstances will prevent 100% of requested cars being provided, we believe the acceptable level of car order fulfillment in any level of service complaint should be determined on a case-by-case basis, taking into account the sales commitments of the shipper and the overall demand for cars, as well as any complicating factors, such as port congestion, adverse weather or rail line washouts. Certainly, car order fulfillment near 100% should be the standard under normal operating conditions. We note that farmers are obliged to meet 100% of their contract obligations with grain companies except in those cases where Act of God provisions apply.

### ***CTA to be given authority to award damages***

The poor record of railcar order fulfillment points to the need to strengthen the level of service provisions in the Canada Transportation Act.

The Wheat Growers propose that the Canadian Transportation Agency be given the authority to award damages to shippers in those cases where the Agency has determined that the railways have not provided an adequate level of service. We recommend that the awarding of damages

---

<sup>1</sup> QGI Consulting, *Analysis of Railway Fulfillment of Shipper Demand and Transit Times*, March, 2010, page 49

include compensation for costs relating to the inadequate service, including the loss of business, plus reasonable legal costs incurred by the complainant in the level of service action.

In the spirit of reciprocity, we also recommend the awarding of reasonable legal costs to the railways in those cases where a level of service complaint is dismissed.

### ***Expedited dispute resolution process***

The filing of level of service complaints are often prohibitively expensive, particularly for small shippers. As well, it often takes several months for a decision to be reached by the CTA and for all appeals to be exhausted.

The Wheat Growers recommend an expedited dispute resolution process be implemented, under the auspices of the CTA, to deal with relatively minor disputes. We propose that the process be structured so that the dispute is settled by an arbitrator within one month of application, through binding arbitration in cases where a negotiated settlement cannot be reached within an initial two week period. The costs of arbitration are to be shared under a negotiated settlement and paid for by the losing party in the case of an arbitrated settlement.

### ***Discrimination against small shippers***

We note that small shippers are discriminated against in terms of rail car allocation. As noted by QGI Consulting, small shippers (i.e. those averaging less than 10 car orders per week) received at least 90% of their car order only 32% of the time from CP whereas larger shippers received at least 90% of their car order 50% of their time.<sup>2</sup> (note: small versus large shipper information was not provided for CN, but our experience suggests that it also discriminates against small shippers). This discrimination is particularly harmful to shippers of pulses and other special crops, meaning that their ability to make and meet customer sales is often compromised.

We recognize and appreciate that moving more grain from large volume shipping points can lead to greater railway efficiencies and system velocity, however such benefits are properly reflected in the rate discounts for multiple car shipments. By giving incentive rates **and** preferential access to railcars to large volume shipping points, the railways are undermining competition in the grain sector and adversely affecting sales of small volume crops. We believe a Railway Service Monitor and strengthened level of service provisions will go some distance to alleviating the discrimination against small volume shipping points.

The Wheat Growers recommend the establishment of a Railway Service Monitor to monitor car order fulfillment and to track whether any shipper or class of shippers is being discriminated against in terms of either car order fulfillment or pickup. Such information would give individual shippers the ability to better assess whether they have a legitimate level of service complaint, or whether the Canadian Transportation Agency itself should step in and order remedial action. The Wheat Growers believe the mere publication of such information would

---

<sup>2</sup> QGI Consulting, *Analysis of Railway Fulfillment of Shipper Demand and Transit Times*, March, 2010, page 51

by itself lead to improved levels of railway service, as the railways would be mindful that a watchdog is monitoring their car order fulfillment, pickup and transit performance.

### ***Two-tier revenue cap proposal***

To encourage the railways to better meet shipper demand for rail cars during peak demand, the Wheat Growers are proposing to replace the existing revenue cap with a two-tier revenue cap.

Under the existing grain revenue freight cap, the railways have little incentive to add extra shipping capacity during periods of peak grain demand – usually October through December. Under the revenue cap, CN and CP freight revenues on grain shipments are fixed in relation to the total volume of grain each hauls during the year to port destinations. Consequently, the railways strive to minimize their costs to move the given volume of grain. In effect, the railways have a built-in incentive to ship the exact same quantity of grain each month, save for that modest amount of grain that one railway might be able to capture from the other.

To provide the railways with an incentive to add capacity during the October to December shipping period, we propose that the railway revenue cap be increased during this time period – in effect, allowing the railways to capture higher revenues per tonne. During the rest of the year, we propose that the revenue cap be lowered, such that the total freight bill paid by farmers is roughly equivalent to the amount they would otherwise pay. Such an approach would enable railway shipping capacity to better match shipping needs, as would be the case in a competitive market, where prices adjust to meet market demand.

To draw an analogy, the canola basis that farmers face varies considerably throughout the year, depending on the demand for canola and shipping constraints. However the total volume of canola that is shipped to market each year is largely unaffected by these changes in basis levels. The market signals that are transmitted to farmers (through changing basis levels) help ensure that canola deliveries match market demand and the available shipping capacity. A two-tier revenue cap, while admittedly far more rigid than the canola basis, would at least allow shipping capacity to expand when it is most needed.

The Wheat Growers have given consideration to ending the rail revenue cap altogether, however given the railways duopoly position, and our captivity to both the railways and the CWB monopoly, we believe the removal of the revenue cap would allow the railways to simply increase freight rates without any material improvement in service. For this reason we do not support removal of the revenue cap until such time as the CWB monopoly is ended and rail shipments of unprocessed grain are less than one-third of total prairie grain production.

### ***Revenue cap review***

The Wheat Growers note that the existing revenue cap is based on a railway costing review that was conducted in 1992. In our view, 18 years is much too long a period without any assessment as to whether the compensation provided to the railways is fair and reasonable. The current formula for adjusting the revenue cap on an annual basis merely considers changes in the price of

inputs (fuel, labor, etc.) without making any adjustment for productivity gains. In effect, the railways have been able to capture productivity gains for the past 18 years without being required to share any of those gains with shippers and farmers, as would be the case in a competitive market. Productivity gains include cost savings resulting from the addition of more fuel-efficient locomotives, higher capacity rail cars, fewer shipping origins (as a result of grain elevator closures) and advances in train scheduling and billing technology. The net effect is that the returns the railways generate from grain shipments are likely well above the rates of return on capital earned in competitive marketplaces, including farming, and are particularly unacceptable when viewed in light of the quality of service provided.

The Wheat Growers recommend a review of the revenue cap be conducted as soon as possible so that the revenue cap can be adjusted to better reflect a rate of return that would occur in a competitive marketplace.

## **2) Timely spotting of rail cars**

The fulfillment of car order requests is just one aspect of railway performance. Another critical element is the spotting of rail cars on a timely basis. Time and again, farmers and grain companies gear up for the promised arrival of railcars only to see the arrival of cars delayed for days or even weeks. This imposes a tremendous burden on grain companies who incur significant labour costs in anticipation of the railcars. It also disrupts the planned delivery of grain to an elevator, and increases the risk that grain will not be in place to meet sales commitments at port position, resulting in costly demurrage charges.

Often grain companies and/or farmers arrange trucking to meet the expected arrival of a train, only to have these plans derailed by the late arrival of cars. These delays can significantly disrupt farm operations, particularly during harvest time when farmers are making decisions regarding the allocation of available bin space. Unexpected delivery delays can also have a myriad of negative effects throughout the year, including impacts on cashflow planning, labour utilization, snow removal, and the utilization of trucks, especially during spring seeding operations. In short, any delays in train arrivals can have significant adverse consequences for farm operations.

To address this problem, the Wheat Growers propose that railways be subject to penalties for late spotting of cars, in a manner similar to the penalties grain companies now face for failing to load or unload cars within a prescribed time. Currently grain companies risk losing incentive rate discounts if they fail to load cars within 24 hours (for 100 car shipments) and 10 hours (for 50 car shipments). Demurrage penalties are also assessed against terminal operators if they fail to unload cars within 24 hours of placement.

The Wheat Growers propose that legislation be implemented that would allow shippers to assess penalties against the railways for the late arrival of railcars, with penalties escalating for each day late.

### **3) Timely pick-up and delivery of rail cars**

Grain companies often load railcars within the prescribed time allotment (frequently incurring overtime labour costs) and yet the loaded cars will sometimes remain at the elevator siding for days waiting for pickup.

Again, the Wheat Growers propose that penalties be assessed against railways for the late pickup of railcars, with penalties escalating for each day late.

The Wheat Growers also propose that performance standards be established for the delivery of grain shipments to port terminals and domestic customers once the cars have been loaded and released to the railways. Again, penalties are to be assessed on an escalating basis for delays in delivery.

The Wheat Growers believe that the introduction of these reciprocal penalties will go some distance to improving rail performance, to reducing unnecessary shipping delay costs (for grain companies and farmers) and improve railcar turnaround times.

### **4) Service disruptions due to labour disputes**

One of the most debilitating disruptions to the grain industry occurs when work stoppages are incurred at either railway. It results in severe system congestion, vessel demurrage, and lost sale opportunities if the work stoppage is prolonged. It often takes weeks for the grain industry to recover. In our view, in a trade-dependent nation like Canada, it is unconscionable that such a vast swath of the Canadian economy can be devastated by a labour dispute at one or both of the main rail carriers.

Invariably whenever a work stoppage occurs, the grain trade, farm organizations and other shippers from a wide spectrum of affected industries demand back-to-work legislation. While governments have generally been responsive to such requests for action, the response has not always been timely, and grain shippers and farmers have suffered adverse financial consequences as a result.

To avoid the hassle and political uncertainty of back-to-work legislation the Wheat Growers recommend that the provision of railway service, in western Canada at least, be deemed an essential service, with labour strikes and lockouts prohibited.

### **5) Closure of rail sidings**

Under the Canada Transportation Act, the railways are only required to provide 60 days notice of their intent to discontinue rail sidings that are used by prairie farmers to load producer cars. Producer cars are used by many farmers as an effective, low-cost alternative to shipping their grain through elevators. The discontinuance of rail sidings threatens to remove this as a viable shipping option for farmers.

The Wheat Growers recommend that the existing notice provisions be replaced by discontinuance provisions that are similar to those now in place for the discontinuance of rail sidings in urban areas (see section 146.2 of the Canada Transportation Act). These provisions require that any railway that wishes to discontinue a rail siding in an urban area is required to provide notice to the federal transport Minister, the Canadian Transportation Agency, the provincial transport minister and municipal officials. Further, the line cannot be dismantled without first offering it for sale to governments at its net salvage value.

The Wheat Growers recommend that these discontinuance provisions be instituted for rail sidings in rural areas, subject to the further proviso that railways make the sidings available for sale or lease to private (i.e. non-government) parties for continued operation as a rail siding.

Such provision will help to ensure that viable rail siding remain in place as a competitive delivery option for prairie farmers.

## **Further recommendations**

The Wheat Growers also wish to make the following further recommendations for consideration by the review panel.

### **1) An examination of the role of the Canadian Wheat Board in grain transportation**

While a detailed examination of the impact of the CWB on grain transportation may be beyond the scope of the review panel, the Wheat Growers would like to see the Panel recommend a separate enquiry be established that would review the CWB's role in transportation. In our view, the CWB should concentrate on marketing grain and should not have any regulatory role in the allocation of rail cars among shippers. This view was shared by the late Justice Estey in his 1998 review of grain handling and transportation which, among other positive recommendations, led to the adoption of the grain revenue cap to replace the statutory freight rates.

The recommendation of Justice Estey to remove the CWB from its role in grain transportation was not adopted. As a result, the CWB continues to interfere in the allocation of rail cars among shippers and in the delivery of those railcars to terminal operators. Justice Estey recommended a tendering system, whereby the CWB would acquire its grain at port. While the CWB currently tenders for a small portion of its supplies at port, its ongoing role in transportation logistics prevents market forces from dictating the best use of shipping and handling capacity.

The CWB has been known to backtrack grain from in-store positions in Churchill and Montreal to meet sales commitments in Vancouver. Such examples of gross inefficiency only serve to illustrate the need for an examination of the CWB's overall role in grain transportation.

### **2) Statutory review of the Canada Transportation Act**

In 2007, the Canada Transportation Act was amended to require a review of the Act every 8 years, rather than every 5 years as was the previous case. Given the importance of rail transportation legislation and the impact it has on the ability of farmers and shippers to access

reliable and reasonably-priced rail service, the Wheat Growers recommend that a statutory review be restored to five year intervals.

## **Summary of Recommendations**

Throughout this submission the Wheat Growers have put forward a number of recommendations to improve rail service and the transportation regulatory environment under which grain is shipped. We provide the following summary of our recommendations:

- 1) Strengthen the level of service provisions by giving the Canadian Transportation Agency the authority to award damages in cases where the railways have not provided an adequate level of service in terms of meeting requested car orders or providing timely service. Damages to include compensation for costs of the service failure, lost business and the legal costs incurred. In the spirit of reciprocity, the Agency should also be able to award legal costs to the railways in those cases where a level of service complaint is dismissed.
- 2) The establishment of an Expedited Dispute Resolution process under the auspices of the CTA to handle level of service complaints that are of a relatively minor nature.
- 3) The establishment of a Railway Service Monitor to monitor car order fulfillment, loading, pickup, transit and unloading times. This information would be useful to shippers in assessing whether they have grounds for launching a level of service complaint. The tracking of railway performance and the public release of this information should help improve rail service.
- 4) The introduction of a two-tier revenue cap, allowing for higher revenues to be earned by the railways during peak shipping periods and lower revenues during slack periods. This should help to add system capacity when it is most needed.
- 5) A review of the revenue cap. It has been 18 years since a railway costing review established the base revenue cap. While adjustments have been made for inflation in input costs, no adjustment has been made for productivity gains. As such, the compensation paid to railways for hauling grain provides a rate of return that is likely well in excess of the return that would prevail in a competitive marketplace.
- 6) The introduction of penalties for the late spotting of empty cars and the late pickup and delivery of rail cars from shippers. The penalties should escalate for every day late. The introduction of these penalties would bring greater accountability and provide balance to the performance penalties now imposed on grain shippers.
- 7) Provision of railway service to be deemed an essential service, with railway strikes and lockouts prohibited, at least in western Canada.

- 8) Replace the existing notice provisions relating to producer car sidings with discontinuance provisions similar to those now in place for urban sidings.
- 9) That a review of the Canadian Wheat Board's role in grain transportation be undertaken, with a view to revisiting the recommendations of Justice Estey.
- 10) Restoring a statutory review every 5 years in the Canada Transportation Act, instead of the existing 8 year review period.

## **Conclusion**

The Wheat Growers consider the Rail Freight Service Review to be an excellent opportunity to introduce measures that will improve railway service to shippers and farmers. Key to a successful outcome will be measures that balance performance accountability between shippers and carriers. The objective should be to adopt a regulatory regime that incorporates mechanisms that simulate, to the greatest extent possible, the market disciplines that are evident in an open, competitive market. Indeed the goal should be to create a regulatory environment that gives shippers and carriers the incentive to reach commercial solutions without having to resort to regulatory remedies.

The Wheat Growers wish the Panel members well in their deliberations. Thank you for your consideration of our views.

Respectfully submitted,  
Western Canadian Wheat Growers Association

April 30, 2010