



MINISTER OF INFRASTRUCTURE
AND TRANSPORTATION

Room 203
Legislative Building
Winnipeg, Manitoba, CANADA
R3C 0V8

MAY 06 2010

Messrs Paszkowski, Edison and LeGrow
Rail Freight Service Review Secretariat
Suite 808 – 180 Elgin Street
Ottawa ON K1A 0N5

Dear Paszkowski, Edison and LeGrow:

RE: Government of Manitoba's Submission to the Federal Rail Freight Service Review

I am pleased to submit Manitoba's submission to the Rail Freight Service Review. Manitoba is supportive of this important initiative and we are keenly interested in finding ways to improve service and strengthen competition in the rail transportation system. Manitoba was the first jurisdiction to request a review of the rail freight system and we hope that our recommendations are reflected in your report.

We also look forward to providing input and assisting the Panel through the next stage, which consists of bilateral consultations with individual rail stakeholders. Given the important role of rail transportation in Manitoba and the varied interests and issues among our shipping community, I request that the Panel travel to Manitoba for consultations with Manitoba's stakeholders. As well, I extend the services of my departmental staff, to provide assistance with planning and/or identifying key stakeholders who could provide valuable insight to the review process.

Sincerely,

A handwritten signature in black ink, appearing to read "Steve Ashton".

Steve Ashton
Minister

Attachment

Submission

To the

Rail Freight Service Review Panel

**Manitoba
Infrastructure and Transportation**

Honourable Steve Ashton, Minister

April 2010

Manitoba 

Introduction:

Manitoba welcomes the opportunity to share with the Rail Freight Service Review Panel our concerns and recommendations for improving rail freight service in Canada.

With two-way international trade valued at more than \$23 billion, the economic success of Manitoba depends on accessing external markets. As Manitoba is located in the middle of the continent and far from key markets, a wide array of effective transportation options is critical for Manitoba's shippers and receivers and for our overall economic development.

Manitoba is also positioned to develop as a key transportation and trade gateway to the benefit of Canada. We are centrally located in the heart of the North American continent. We have well-developed and unique transportation service offerings, including three Class 1 railways connecting our Winnipeg Capital Region to the U.S. Further, as witnessed by the province having the busiest border crossing in the west by trade value, there is a convergence of significant trade flows occurring through our jurisdiction. Manitoba and Canada recently launched a unique inland port initiative—called CentrePort Canada—to serve as a basis for locating further global supply chain activity here. The vision for CentrePort also includes developing as a locus for Asia-North American supply chains with a major reliance on rail.

Within these contexts, a competitive and cost effective rail transportation system is critical for the continued success and economic growth of Manitoba. Manitoba is keenly interested in achieving levels of railway service that meet the needs of all stakeholders. Poor rail service to Manitoba shippers results in lost export sales and reduced competitiveness, which affects the entire economy and all Manitobans. In some cases, Manitoba shippers have expressed a hesitancy to grow their business or find new customers because they may not obtain reliable rail service. International companies no longer base their locational decisions on nations of interest, but on optimizing overall supply chain performance. The quality and availability of rail service affects location decisions in a broad North American context, not just between or among regions within Canada. Manitoba believes that our shippers require a rail transportation system that is flexible, predictable and service oriented.

Specific Rail Context:

Large economic sectors in Manitoba are dependent on rail freight transportation services to access the global marketplace.

Typically, Manitoba's shippers and receivers generate about 15 million tonnes of rail-based freight traffic annually. About two-thirds of this volume is shipped to destinations outside Manitoba, with more than half being rail exports of bulk agricultural products, like grains and oilseeds. A wide range of products are also imported to Manitoba by rail. In addition to significant volumes of rail-based imports and exports, Manitoba's rail network carries 25-30 million tonnes of freight traffic that traverses through the province as "in-transit" traffic to destinations east or west of Manitoba.

The carrier make-up of Manitoba's freight rail system is profiled in Table 1. Geographically, Manitoba has unique rail service and access needs in our remote, northern regions, where the rail mode is the only year-round surface transportation option for both local passengers and shippers, and with respect to service to the Port of Churchill Gateway. Canadian Pacific Railway (CPR) is the dominant rail carrier in the south-central and south-western regions of the province. Canadian National Railway (CN) is the dominant carrier in the central-west and—by virtue of its control of the marketing and rate franchise for interlined movements involving the Hudson Bay Railway—in Northern Manitoba.

Table 1 – Manitoba Rail System	Route	Percent
	<u>Miles</u>	<u>of Total</u>
Class 1 Carriers		
Canadian National Railway	871	29.5%
Canadian Pacific Railway	1,097	37.1%
Regional Carriers (Short Lines)		
Burlington Northern (Manitoba) Ltd	4	0.1%
Hudson Bay Railway Company	647	21.9%
Keewatin Railway Company	185	6.3%
Boundary Trails Railroad	23	0.8%
TOTAL	2,957	100.0%

Background Research & Consultations:

In preparation of this submission, Manitoba Infrastructure and Transportation (MIT) commissioned an independent survey of small, medium and large rail shippers in this province to gather information on shipper experiences, perceptions and expectations. As well, MIT held direct consultations with several shippers, trade associations and transportation intermediaries to gather detailed feedback on specific experiences and to gauge stakeholder reaction to numerous proposed solutions. The recommendations that follow are a result of this robust stakeholder engagement process.

In addition to generating awareness of the scope and impact of rail service failures, our consultations process has validated a strong role for the Government of Manitoba to advocate on behalf of, and to protect, small shipper and community interests in particular.

As a general observation from our consultations, it should come as no surprise that many shippers (and shortlines) are reluctant to come forward openly with their concerns regarding railway service, owing to the market power of the two national railways. In this fashion, Manitoba can only raise issues in a general sense that have been brought to us in confidence variously over the years. We are hopeful the Panel will be mindful of this as it develops its report, and err strongly on the side of trusting the spirit of the concerns brought to its attention by shippers, including through their representative governments.

Manitoba is aware that much of the raw information supporting the work of the Panel was provided by the railways. Going forward, it will be incumbent on the Panel, Transport Canada (TC) and other federal partners such as the Canadian Transportation Agency (Agency) to develop better tools and processes to assess railway service concerns of shippers on a more balanced evidentiary basis.

Policy Principles:

Manitoba's approach to the national transportation system is predicated on several principles, which are also largely reflected in the *Canada Transportation Act* (CTA) national policy statement in Section 5. Manitoba strongly recommends that any Panel conclusions be measured against these principles.

- **Serve Shippers and Travelers and Economic Growth:** The primary objectives of the national transportation system and therefore its policy and legislative basis should be to serve the needs of travelers and shippers, and to maintain the economic well-being and growth of Canada and its regions.
- **Competition as the Mechanism:** Manitoba believes the objectives of serving the needs of shippers and travelers and the well-being of our regions is best achieved where the national policy and legislative framework provides for as open and fair competition amongst carriers as reasonably possible. Competition, on an intra and inter modal basis, and domestically and internationally will produce the best systemic results at any point in time and over time.
- **Government Role to Foster Competitive Behaviour:** Manitoba also believes that governments have the responsibility via legislation, policy and regulation, to address any structural issues that limit competition, whenever transportation markets are not functioning in a competitive manner to maximize benefits to shippers and travelers. Measures that reasonably induce vigorous competition and competitive behaviour between transportation companies are valued in this respect. Measures that simulate the working of market forces to arrive at competitive outcomes are also particularly important.

Manitoba asserts that these principles should be consistently in mind when the Panel is assessing the national freight railway system and its service levels. Without re-iterating the legacy of research on the matter, the Panel must consider that the two national railways function as a duopoly (or dual monopoly depending on the geographic location of shippers). Within this system, the national railways are able to exert strong market power on rail freight transportation system users. The national railways are able to convert this market power into imbalanced contractual, commercial and service dealings with shippers. This is at the heart of the problems that shippers have raised and that the Panel has been asked to address.

Competition as the Basis

Manitoba has long held that poor railway service occurs because there is a lack of competition in rail transportation. When competition is diminished, railways can exert market power over system participants and refuse their participation in activities designed to create a balanced power dynamic based on principles of mutual accountability. Manitoba notes that industries which exhibit competitive market structures do not suffer from the same service concerns.

In many regions of the province, shippers whose traffic is dependent on rail transport are limited to one carrier. A railway which is the only provider of rail service to a shipper has a tremendous advantage in negotiating rates and conditions of service. The shipper must accept the service offered by the railway, or not ship by rail. If a shipper has to make the choice not to ship by rail due to poor rail service, it results in a loss of competitive market opportunities.

Within our submissions to varying legislative review panels and parliamentary committees over the past 20 years, Manitoba has consistently posited that the railway legislative and regulatory framework — and by extension any oversight mechanisms on railways — must singularly focus on creating competitive behaviours and ethics of the two national railways.

Manitoba supported the recent amendments to the CTA on the basis that they restored some balance to the shipper-railway relationship by providing a more flexible basis for shippers to seek relief from the Agency. That being said, at the time, Manitoba noted the amendments omitted direct measures to increase the genuine competitive behaviour of the national railways. Therefore, it is imperative that the Panel should treat within its report measures to improve the competitive behaviour of the national railways. Ultimately, Manitoba believes that unless the issue of railway competition is specifically addressed, any specific process recommendations are unlikely to result in sustained improvements to railway service.

Federal Research Reports (Phase 1 of the Rail Freight Service Review):

The federal research reports and stakeholder surveys that have been commissioned by TC to support the work of the Panel have painted a bleak picture of poor rail service and overall lack of accountability by CN and CPR in the total transportation supply chain. The research reveals the Class 1 railroads have been able to exercise market power on shippers with limited effective transportation alternatives that have resulted in direct financial losses and abandoned economic opportunities.

The Phase 1 reports have generally called for more balanced accountability by the Class 1 railroads in the total transportation supply chain. In whole, they directionally call for current government regulations to be strengthened and to include clear benchmarks for railway service. Communication is critical and needs significant improvement to ensure that the impact of rail service on the total supply chain is properly reflected in the Class 1 railway's operating decisions.

Manitoba's shipper survey and consultations effectively mirror the conclusions of the Phase 1 research reports, both in their portrayal of rail service levels and in the general focus of possible solutions.

Macro and Micro Elements Affecting Railway Service:

The Review panel will hear directly from shippers and their associations about very detailed elements of railway service—respecting the timely supply of cars, the shipper-railway operational interface, customer service, communications, and other intricate service parameters. It is not Manitoba's intention to be exhaustive on all facets of railway service, but speak to some

of the macro and micro elements of the railway system that through our research, consultations and experience, we consider have relevancy on service levels.

Manitoba considers that the Panel's report should address the concept of "service" on two fundamental levels. At the macro-level, service is related to the basic ability of shippers to "access" the rail network, and relies on adequate provisions of basic infrastructures, equipment, and other structural elements that support shipper "reach" into the system for competitive service offerings. The other element of service—the one that many of our shippers specifically raised and live with from day to day—is more micro-oriented, and is related to achieving balance in the shipper-railway contractual and commercial relationship.

The two are symbiotic. Systemic measures to ensure adequate shipper access to the system and that encourage competitive behavior among railways, coupled with measures at the railway-shipper commercial level to foster an environment of mutual accountability, will ultimately result in consistent, long-term improved service to shippers. Manitoba will treat each of these two fundamental levels in this submission.

Systemic Measures to Support Service Improvements:

Railway Infrastructure

Branch-Line Preservation

Basic physical access to the rail network is a minimum requirement for shippers to be able to obtain any rail service at all. At an elemental level, the line rationalization initiatives of the mainline carriers since the passage of the CTA have geographically reduced rail service options for Manitoba shippers, while also negatively impacting local competitiveness and economic dynamics in a number of industries. Like other provinces, Manitoba has undergone significant rail network rationalization over the last 15 years, with a loss of 668 miles of track, or 18% of the network. As a result, rail network preservation is a fundamental issue that was consistently raised by Manitoba's rail user stakeholders and rural communities as an elemental "service" issue requiring attention by the Panel.

The legislated rail abandonment regime has a dual purpose: i) to allow the railways to exit markets that are not viable, but also to, ii) optimize ways for infrastructure to be reasonably preserved in the public interest. The abandonment process in the CTA can take 16 to 22 months for completion and requires railways to actively seek to convey such lines to shortline operators. Failing that, railways offer the lines to governments at net salvage value.

Manitoba considers the process has succeeded from the railways' perspective, as they have been able to shed lower-density trackage to concentrate on high-volume lines, much to their corporate bottom-line benefit. From the perspective of optimizing the public interest ability to preserve infrastructure on a reasonable basis, however, Manitoba considers the process has not been balanced enough.

Manitoba's experiences indicate that this process has left too much discretion in the hands of the railways to manage and control the rationalization process to their exclusive strategic benefit, and has given less balance than intended to the public interest requirement. Our communities' experiences indicate several means by which the national railways have undermined the public interest dimension of the legislated process:

- “demarketing” lines long before placing them for offer under the federal process, thereby assuring they are not viable for shortline possibilities;
- “mothballing” lines, achieved by demarketing and then leaving them inoperative, but not actually placed for sale offer under the legislated process;
- “segmenting” lines for abandonment, achieved by divesting the line in small or isolated segments that have little commercial value or chance of being viable as a stand-alone operation;
- “skeletonizing” lines, which occurs when Class 1 carriers remove auxiliary tracks and sidings and other real property necessary to the working of the branch line before discontinuance; and,
- by setting artificially extreme process requirements, negotiation, financial and operating terms that discourage a sale.

All of these practices, in Manitoba's estimation, have impeded the potential start-up of many short line opportunities, and in effect curtailed many service possibilities to shippers in parts of rural Manitoba.

The privilege railways have to manage this process carries with it an obligation and responsibility that the intent of the process will not be subverted nor abused. Given our experiences with the process over the past 15 years, Manitoba believes that government is fully justified in taking a more interventionist approach to prevent the loss of infrastructure that could have been maintained on a commercial or public interest basis.

As an initial step, Manitoba asserts the Panel, in its report, should review the abandonment provisions in the CTA and offer specific recommendations to ensure that these provisions offer balance between the national railways' legitimate rights to independently manage their networks, and the right of the public to reasonably demonstrate their interests and pursue economic opportunities through infrastructure preservation.

At minimum, Manitoba supports empowering the Agency to more closely manage the process in the public interest. For example, in cases of intentional demarketing, forcing a railway to dispose of a line before it is made unattractive for potential buyers is not an extraordinary measure — rather, it should be perceived as a compliance provision designed to ensure that the reasonable and balanced public policy put forth in the CTA is respected.

- 1. Manitoba recommends the Agency be empowered, within reasonable limits and at the requests of affected shippers and communities, to investigate demarketing and other such strategic de-facto abandonment activities of rail carriers that preclude reasonable opportunities for stakeholders to preserve infrastructure, and to compel***

a railway to undertake any steps necessary to ensure a reasonable opportunity is provided.

Manitoba understands that this is an extraordinary power we propose for the Agency and that it should be qualified to ensure that the viability of the mainline carrier is not impacted, however, the alternative of losing infrastructure that could have been maintained on a commercial or community basis demands that government retain these residual compliance abilities.

Improving Shortlines and Regional Railway Sustainability

Notwithstanding some of the aforementioned railway practices, a shortline and regional railway industry has nevertheless been established since the passage of the CTA in 1996. In Manitoba, shortlines or regional railways now operate 1/3rd of the track infrastructure. Notwithstanding, Manitoba is concerned about shortline and regional railway viability, and their sustainability. This problem was acknowledged by the Canada Transportation Act Review Panel in its Final Report, but interestingly, the Panel chose not to address it in the gamut of its recommendations.

Requests for governmental financial support from shortline and regional railways, and proposed shortline operators, is becoming more and more commonplace. Manitoba considers this could be related in part to a shortline's difficult structural setting. As we understand it, the mainline railway reserves the full decision over marketing, service, rate-setting, revenue-take and other conditions of contract for interlined traffic. Shortline freight revenues are basically derived by the granting of per car haulage fees set by the Class I carriers. Shortlines, and shippers located on them, are further typically precluded from accessing competitive growth and access options with other railways. In this structural situation, the Panel can appreciate there is not always a direct connection between revenues made available to shortlines by the mainlines, and their ongoing operating and longer-term investment needs. One shortline in Manitoba began abandonment proceedings not more than 3 years after a transfer was achieved from a Class 1 carrier!

Manitoba is concerned that the result of these structural issues is an industry facing infrastructure and equipment deficiencies, and high operating margins—basically putting into question the long-term sustainability of many of Canada's shortline rail systems, and by extension, the availability of rail services to shippers. This matter is critical insofar that non-Class 1 railways originate or destinate 30% of rail traffic volumes. We would like the Panel to explore these in greater detail in its report.

Like many captive shippers, shortline and regional railways have traditionally appeared reluctant to formally and openly discuss their specific situations, given their commercial dependency on the mainline carriers. This complicates an in-depth assessment of the matter. Key exploratory issues we wish the Panel to specifically examine involve overly inflexible revenue sharing and marketing agreements with the Class 1 carriers, and limited access for those shortlines that are provincially regulated (and their shippers) to competition inducing provisions of the CTA (such as rights to apply for trackage rights).

- 2. Manitoba recommends the Panel, in its report, should ensure a detailed assessment of the future health and service capabilities of the regional/shortline railway industry, as an integral part of rail service to shippers. Included should be an assessment of the impact of the Class 1 agreement frameworks under which regional/shortline railways operate, and as well, of the possible efficacy of enhancing shortline and shortline-located shipper access to competition enhancing provisions of the CTA.*

Manitoba further provides these insights insofar that over recent years, some provinces and municipalities, including our own, have provided significant public capital funds to shortlines and regional railways. It is incongruous that while public funds are being provided to shortlines, the mainlines would still enjoy full monopoly traffic rights, all revenue-take decisions from any interlined traffic, and still control all commercial dealings with shortlines that allows them to maximize revenues from these relationships to their benefit, and which precludes a more competitive basis for shippers and shortlines to operate.

Shipper Access to the Network

Producer Car Service Opportunities and Networks

Producer cars are a means for grain farmers to bypass the commercial elevator network and load rail cars directly. They are an important mechanism for farmers to exercise control over grain handling costs and they provide some farmers with greater value than the commercial elevator network. Producer cars are a fundamental right grain farmers that are enshrined in the *Canada Grain Act* and administered by the Canadian Grain Commission.

The process railways must follow to discontinue a producer car loading site—the basic infrastructure upon which the producer car model depends—is regulated in the CTA. Section 151.1 legislates that producer car sidings must be identified in a publically available list and can only be discontinued after a 60 day public notice period. By comparison, railways that wish to discontinue sidings in urban areas must advertise the discontinuance for one year, which is followed by an opportunity for stakeholders to purchase the siding for net salvage value. Grain producers correctly indicate that stakeholders in urban areas are afforded greater opportunity than rural stakeholders in demonstrating their interest to preserve vital infrastructure.

While producer car rights are enshrined in legislation, these rights are simply not upheld if the basic infrastructure needed to load cars is not offered and in place. Rural stakeholders have indicated that they require adequate time for meaningful consultation and analysis when faced with closure of rail sidings and loss of service. The situation is further aggravated when primary stakeholders are agricultural producers. The 60-day notification period can overlap with the seasonal demands of agriculture making it difficult for producers to develop initiatives to address the issue appropriately.

In the summer of 2009, CN surprised producers when they initiated the omnibus closure of 52 producer car loading sites across Western Canada. The site closures were delayed beyond the required 60-day notification period, but only after significant pressure from governments. The

timeline extension allowed Manitoba the opportunity to work with local stakeholders and assess the situation. During the review, Manitoba was surprised to discover that the infrastructure at some locations had long ago been removed. Regardless, these sites are now permanently closed and producers are left wondering whether the legislation designed to protect them is achieving its intent.

The number of producer cars shipped in Manitoba doubled from 1999-2000 to the 2007-2008 crop year. Market conditions are increasingly favoring the use of producer cars and this trend is anticipated to continue. It holds that a reasonable network of sites within a suitable geographic delivery distance is required to maintain producer car rights, and provide Manitoba and prairie grain farmers with competition for grain marketing. Removing one or more delivery options within a territory has significant impact on local pricing and market access. Producer cars cannot be a useful marketing tool without the necessary infrastructure within a reasonable distance and a commitment to spot cars at these sites.

3. *Manitoba recommends the CTA be amended to, at minimum, harmonize the closure process of producer car loadings sites with the process for metropolitan rail sidings and spurs (a one year notification period followed by an opportunity to purchase the asset at Net Salvage Value).*
4. *Manitoba recommends the Agency and other involved federal agencies (Canada Grains Commission) investigate and be empowered to require the railways to establish a network of producer car loading sites based on minimum distances and needed capacity standards, to ensure producers have adequate access to the rail network via producer car shipping.*

Railway Interswitching

Federal legislation has long attempted to provide a regulatory framework to engender railway competition. Without competition in the rail transportation sector, shippers are unable to hold carriers to account for poor performance. Shippers that don't have access to alternate non-local rail carriers are effectively captive, and are more likely to experience poor service and suffer a negative financial impact as a result of railway actions.

Almost two-thirds of our shippers surveyed say they have suffered a serious financial impact as a result of poor service from Canada's Class 1 railways. However, of those shippers that have access to only one railway, more than 80% claim to have suffered a serious financial impact as a result of poor rail service. This suggests that measures to improve access to alternative (non-local) railways are likely to produce better service outcomes.

Federal legislation has attempted to do so by offering shippers ease of access to non-local carriers. Within 30 kilometres of a shipper facility to an interchange, regulated interswitching rates are available. Beyond 30 kilometres (with some exceptions), shippers must avail themselves of another mechanism called Competitive Line Rates (CLRs). In total, Manitoba considers these provisions must be made more effective for shippers.

Canadian shippers view interswitching—as opposed to CLR—as the more useful and valued tool for encouraging competitive behaviour and providing additional shipping options. It stands that measures to make regulated interswitching accessible to more shippers (such as increasing the allowable distances at the basic level) will improve rates and service options to those shippers.

Having the interswitching regime in place is not enough. It must be monitored carefully. Shippers observe that railways have tried to undermine this shipper tool in ways that decrease its potential efficiency and increase costs to its users. For example, shippers complain that interswitched shipments are given low yard movement priority and poor service by the originating carrier, adding to the unpredictability of railway service and reducing the use of this competitive tool. These practices reduce the effectiveness of regulated interswitching and may reduce the likelihood of their use among shippers. As a result, the railway transportation system is made less efficient and less competitive than it should be.

Lastly, regulated interswitching as a competitive mechanism is reliant on there being available and suitable interchange locations and capacity between railways (track capacity to physically switch cars from one railway system to another). However, shippers indicate that railways frequently alter or remove, without any notification, the interchange locations. The interchange locations are critical to assuring the geographic availability of interswitching, and therefore should be given greater regulatory attention.

There is no strict mechanism in the CTA to specifically report on and monitor operations at railway interchange locations. Manitoba believes that reporting and monitoring of interchange locations and restricting the ability of railways to arbitrarily close interchange locations or reduce switching capacity would assist shippers in accessing competitive rail options and alternative export locations. As Manitoba supports the extension in principle of the interswitching distance requirements, the preservation and establishment of a minimum effective interchange network would be a critical supporting action.

- 5. Manitoba recommends that clear performance standards or operating benchmarks should be established for regulated interswitching to ensure effective and non-discriminatory service by participating rail carriers.***
- 6. Manitoba recommends the CTA be amended to empower the Agency to direct the national railways to establish interchanges at rail intersecting locations and to establish a suitable network of interchanges for rail interswitching, including capacity requirements.***
- 7. Manitoba recommends a study be undertaken by Transport Canada and the Agency to determine the best means to provide more shippers with access to regulated interswitching. The study should evaluate criteria such as the shipper's distance to an interchange, and related technical issues.***
- 8. Manitoba recommends the interswitching provisions of the CTA be amended to require railways to list and provide notification for intended closures of rail***

interchange locations. As well, Manitoba recommends the Agency be empowered to review, and approve, proposed interchange closures, within the context of their impact on competition.

Specific Shipper-Railway Measures to Support Service Improvements:

In the previous section, Manitoba spoke to some of the larger systemic issues that we feel need be treated to create a competitive environment for rail services to emerge. Once that is achieved, we consider it will help contribute to a better balanced dynamic within the specific railway-shipper interaction. We now turn our attention to measures that are required to ensure the actual commercial and contractual dealings between shippers and railways are balanced to the aim of better rail service.

Overall, this will require greater oversight and utilization of the expertise and judgment of the Agency. Currently, the Agency has little leeway to be proactive, and typically responds only at the request of actors in the system who consider they have been aggrieved. Manitoba considers that overall, the Agency must be given a more proactive role—in terms of voluntary investigations of issues, infrastructure and service performance benchmarking and measurement, monitoring, and mediation—to ensure balanced and reasonable service is instilled in the rail logistics system at the railway-shipper commercial level. This is consistent with our aforementioned principle that government has a legitimate right to utilize regulatory tools and instruments if a market is not functioning to the needs of its users.

At the shipper-railway commercial level, the key tenet to be achieved is accountability. This was a key theme of both the federal research reports and Manitoba's own consultations. From Manitoba's perspective, accountability in the total rail transportation supply chain is critical to ensure effective system performance, and is achieved when:

- There are appropriate administrative processes to facilitate account-giving behavior;
- There are operating and technical rules and standards common to all participants;
- Rules and standards are enforced;
- Performance is measured and communicated; and
- There is reciprocal and balanced rights and obligations for both sides (shipper and railway) contractually.

Standards of Service

Sections 113 and 114 of the CTA establish the broad principles for railway service. These principles specify that railways should provide “adequate and suitable accommodation” for all traffic offered to them. These legislated principles, while valid, result in unnecessarily wide targets for rail performance, making measurement difficult and subject to interpretation. The ambiguity increases the uncertainty and costs for those shippers that choose to dispute railway actions or to appeal to the Agency for relief.

In decision No. 488-R-2008, the Agency attempted to clarify this ambiguity by setting performance benchmarks. The Agency determined that if the railway in question confirms 80%

of cars requested and delivers 90% of those cars within three weeks of the date they are required, the railway service obligation has been met. Setting a service standard improves predictability and sets a common benchmark by which participants can measure their own, and others', performance. As well, this Agency-developed service standard set a precedent for future service-related railway disputes. This assists participants to make better use of legislative protections and tools because the outcomes are more predictable.

However, problems arise when performance standards do not meet the business needs of shippers, particularly those shippers who were not consulted in the development of the service standard. Shippers operate in competitive environments and claim that if they served customers only 80% of the time and were frequently up to 3 weeks late for deliveries, their customers would take their business elsewhere. Many shippers are unable to switch railway companies like they can switch trucking companies or their customers can switch suppliers. When rail shippers are commercially harmed because of poor and unpredictable railway service, they rarely initiate Level of Service (LOS) complaints with the Agency because the outcome is unpredictable and the complaint process extremely expensive and litigious.

Ultimately, railway service needs to be made more predictable. An Agency-developed service standard may improve the predictability of some railway activities, however such a standard should be developed in consultation with shippers. Manitoba recommends that the Agency set mandatory standards of service based on the business needs of shippers and communicate the standards widely to the shipping public. To ensure that all parties are operating with the same information, Manitoba recommends that the service standards be published in the railway tariffs. Finally, to ensure the standards remain relevant, they should be periodically reviewed and the Agency should monitor compliance with the service standards.

- 9. Manitoba recommends the Agency consult with shippers and railways jointly and establish standards of service that are predictable and meet the business needs of shippers. Subsequently, Manitoba recommends the CTA be amended so that railways are obligated to operate within the standards.***
- 10. Manitoba recommends the Agency be empowered to require railways to publish service standards in the common carrier rates and tariffs.***
- 11. Manitoba recommends that service standards should be monitored and periodically reviewed by the Agency to ensure they remain relevant to the changing business needs of shippers and the railways.***

Charges and Penalties

Ancillary charges are fees for railway services that are in addition to the movement of rail freight from origin to destination. Most ancillary charges are for the time spent by customers in loading and unloading of railway provided rail cars. This ancillary charge can sometimes be assessed to the shipper as demurrage and paid to the railway company in the form of a performance penalty. Ideally, ancillary charges create incentives for efficient use of railway assets in the transportation supply chain and are an effective tool to allocate system costs.

Canada's Class 1 railways have established strict time guidelines—measured by the hour—for loading and unloading rail cars. This is combined with a financial penalty and reward structure to facilitate the efficient use of railcars and the rail system. Research suggests that this financial penalty and reward system has been successful at encouraging shippers to consider their impact on other supply chain participants, making the shipper-controlled elements of the rail supply chain more efficient. This helps to reduce costs for all Canadians.

Manitoba shippers indicate a common rail service failure is the untimely and unpredictable placement of rail cars for loading and unloading. Shipper costs increase when railcars don't arrive as expected and planned and business is lost because sales are cancelled or delayed. However, while shippers pay penalties for behaviour that negatively impacts railway efficiencies, the railways do not always face financial penalties when their behaviour negatively impacts shipper's costs in the transportation supply chain. As a result, there is no incentive for railways to alter unwanted behaviors or to improve their performance, creating a situation of unbalanced accountability.

A system of balanced accountability requires that financial penalties are reciprocally applied to railways for untimely or unpredictable placement of rail cars and other service failures. Just as financial penalties incentivize shippers to perform at a high level for the benefit of the system, financial penalties applied to railways are likely to result in better railway service for shippers.

In a few specific cases—in some multi-car railway products for example—the railways do apply financial penalties to themselves. However, shippers have indicated that the performance penalties that are provided by railways are not in proportion to the costs and revenue losses faced by shippers when railways provide service outside of shipper expectations. Nor are they proportionate to the charges shippers pay to railways when shippers operate outside of expected timelines. Ultimately, the magnitude of penalties railways occasionally impose on themselves are not a deterrent for their own poor performance. Also, the measurement tolerances for railway performance are usually wide enough to allow the railways much greater discretion before charges are actually triggered.

For railways to have the incentive to provide adequate service to shippers, Manitoba recommends that a system of penalties for poor performance be applied against railways. As well, Manitoba recommends that the penalties be of sufficient magnitude so as to properly reflect the negative impact poor service has on shippers and that these penalties be specified in regulations administered by the Agency.

12. Manitoba recommends that performance penalty systems be specified in regulations administered and periodically reviewed by the Agency to ensure that the charges are adequate and effective as an incentive, and are applied in a balanced method for both shipper and railway performance.

In recent years, CN and CPR have escalated a variety of ancillary charges—for example, demurrage or car rental charges—and have made frequent changes to their conditions of service. Shippers indicate that many of these changes appear to have been made arbitrarily and without

any consultation. Given the ongoing increases in ancillary charges, they are becoming a significant cost item for shippers and new source of revenue for railways.

Recent amendments to the CTA have given the Agency some authority over ancillary charges, but only in a reactive way when complaints are brought to it. In principle, Manitoba supports a solution that will permit the Agency to be more proactive, and that would require the railways to justify their use. The intent would not be for oversight and approval of railway ancillary charge actions at the specific railway-shipper interaction level, but moreso with respect to their systemic application by railways. Shippers should be part of this exercise.

13. Manitoba recommends the federal government, in concert with shippers and railways, assess the efficacy of a regulatory process as it relates to railway ancillary charges, that would in principle require the Agency approve a classification of systemic ancillary charges that railways propose should apply to shippers, including criteria and process for their application and alteration.

Railway communication with shippers has been identified as a priority for improvement. Communication—as broadly defined—includes access to knowledgeable customer service representatives within the railways to assist with common issues, like billing inquiries.

Shippers observe that railway freight bills are prone to high rates of error, particularly in the calculation of ancillary charges and penalties. Given the poor communication and lack of knowledgeable staff to assist with billing inquiries, shippers incur significant costs because they must themselves validate and reconcile various railway charges. This reconciliation process is made more frustrating because railway systems are highly automated and prone to error. Manitoba recommends that the railways improve the accuracy of their billing systems and provide adequate information and tools to assist shippers in disputing unauthorized charges.

14. Manitoba recommends the railways should implement processes, as monitored by the Agency on a pilot basis, to improve the accuracy of ancillary billings and also provide clear supporting documentation in its billing statements that facilitate more effective audits by the customer.

Enhanced Agency Authority and Improved Access to Legislative Remedies

When a rail service failure or dispute has carried on for an extended period or the service failure is so severe that shippers are at imminent threat of significant commercial harm, shippers may turn to the Agency to access various remedies. Agency processes are highly litigious, expensive and time consuming, resulting in legislative remedies that are inaccessible, particularly for smaller shippers. As well, given the litigious nature of Agency services, the outcomes are highly unpredictable. As a result, very few shippers make use of Agency services.

Given the high rate of shipper dissatisfaction with railway service, it's remarkable that fewer than 1 in 5 dissatisfied Manitoba shippers have even "considered" initiating a service complaint with the Agency. The high cost of such actions is the primary reason for this low level of engagement by shippers. However, of great concern to Manitoba, is that some shippers have

claimed that they fear retribution by the railways, preventing shippers from engaging with rail companies and the Agency on service issues. This is a serious allegation and must be addressed.

When shippers are in dispute with rail carriers, an environment of hostility and mistrust is prevalent, preventing the parties from communicating. Such situations are not unique to the railway industry. The ability of commercial entities to communicate and negotiate with one another is an important element of many business transactions. When communication is hampered because hostile environments are present, third-party mediators can be brought to the table to assist the parties. In many cases, mediators are able to diffuse tense situations and create conditions that allow parties to communicate and understand one another. Unfortunately, under current legislation, the Agency cannot compel mediation in railway-shipper disputes, allowing hostile environments to perpetuate and go unresolved, until positions are hardened through formal Agency processes such as Final Offer Arbitration.

During 2006, and in response to a coordinated lobbying effort by shippers, CN and CPR began developing a Commercial Dispute Resolution (CDR) process for use by shippers in disputing railway actions. At the time, the nature of the shipper-railway relationship was not hospitable to conclusion of the CDR's development. To this day, an effective commercial tool for dispute resolution does not exist. A CDR process could provide some shippers with viable options to regulatory intervention.

Some shippers have called for a railway Ombudsman—an independent intermediary to monitor adherence to procedures and investigate the actions of rail companies. The Agency exists as a trusted, independent intermediary and is highly respected among shippers and carriers, but is not empowered to independently investigate problem areas or be a source for proactive change. Expanding their functions to include monitoring and investigations activities will better serve participants in the rail transportation system. As well, accountability is improved when an independent “watchdog” can scrutinize actions, assess their long and short term impacts and hold system participants to account.

Finally, most shippers do not have a sophisticated, working-level understanding of Canada's legislative and policy framework, including the CTA and the role and services of the Agency. Shippers express there exist ambiguity and risk regarding the use of Agency processes, which, from a public policy perspective, is a significant cost to shippers. Manitoba's research has identified the need to better educate rail transportation system participants on the type and availability of tools and services that could facilitate service outcomes. Ultimately, the costs to access legislative remedies in the event of clear service failures needs to be reduced, otherwise they are inaccessible and redundant.

15. Manitoba recommends the Panel assess the efficacy, within the current suite of dispute resolution processes within the Act, of empowering the Agency to compel mediation by parties involved in complaints actions before it.

16. Manitoba recommends the railway companies and shippers should resume discussions on an effective and balanced Commercial Dispute Resolution process.

- 17. Manitoba recommends the Agency be empowered to monitor and investigate railway service independently, without formal complaints being initiated by shippers. As well, the Agency should be empowered to propose both long-term and immediate solutions to common and/or urgent service failures.*
- 18. Manitoba recommends the Agency provide extension and educational services to educate the shipping public on the role and functions of the legislation and of Agency services, and to assist shippers in accessing legislative remedies.*

Port of Churchill Corridor and Gateway System

In its 2008 submission on Bill C-8 to the House of Commons Standing Committee on Transportation (SCOT), Manitoba asserted that the rail service review should assess equitable railway service treatment of all of our export and import rail corridors and gateways on the national rail grid. It is interesting to note that many interveners have expressed interest in service levels to the Lower BC mainland corridor and gateway. Manitoba has a specific interest in another key corridor to Canada—the Port of Churchill Corridor and Gateway. At the time of Bill C-8, Manitoba had asserted to SCOT:

that the scope of the review must include a special assessment of railway service levels as it impacts the Churchill port gateway. Churchill's situation is unique in that it is Canada's only major export/import rail and port corridor on the national rail grid not directly serviced by a Class 1 mainline railway, but by a regional railway (the Hudson Bay Railway). This presents unique challenges with regard to assuring that the mainline railway services toward shippers seeking to access Churchill are reasonable and appropriate. A review of service support to Churchill is also complementary to and consistent with the federal government's recently announced multi-million dollar support for the only port gateway/corridor to Atlantic trade markets physically located in western/northern Canada.

Manitoba stands behind this assertion, and would expect the Panel to treat the Churchill Corridor in its report. The Churchill Gateway System is composed of the various transportation assets and services provided by the Hudson Bay Railway, the Churchill Marine Tank Farm and the Port of Churchill. This system supports the mining, hydro-electric generation, forestry, fishing, Nunavut resupply, tourist and trapping industries and serves the personal mobility requirements of several remote, rail-only communities in the north—making it vital to the economic and social development of Manitoba.

The system's terminus, the Port of Churchill, provides the closest ocean access to a large part of Canada's primary grain growing region and is an important route for Canadian Wheat Board shipments to various international markets. Studies suggest that Manitoba's northern supply chain is the most cost effective route for movements to/from many points on the Canadian Prairies, making it of strategic importance to grain producers located in the port's catchment area.

In recognition of the social and economic impacts of the Churchill Gateway System, Manitoba, the federal government (through TC), and the Hudson Bay Railway announced in October 2007 a 10 year, \$60 million public-private partnership to improve the rail line between The Pas and Churchill and \$8 million to improve port facilities, to be paid by Manitoba and Canada (Western Economic Diversification). The key objectives of these contributions are to improve the reliability and efficiency of passenger and freight transportation on the rail line and diversify and expand traffic through the port. To date, over \$18 million has been spent on the Hudson Bay Railway resulting in noticeable improvements in transit times and predictability for northern rail services and reduced costs to users of the system.

The Port of Churchill faces unique challenges regarding rail service not faced by other destinations. The port operates in a national transport context; however the national carriers have an inherent business bias against using the Churchill Gateway System, despite its natural locational advantage for shippers. Unlike other port corridors, the Port of Churchill is not served directly by the Class 1 carriers, but by a regional railway that relies on an interchange with CN in The Pas, Manitoba to connect markets in Western Canada with the world. Given that revenues must be shared amongst carriers in this corridor, the Class 1 railways have little vested corporate interest in serving the Port of Churchill. Manitoba is concerned generally that rail shipments to Churchill receive a low priority for service, as the Class 1 railways in Canada focus their resources in supporting transportation corridors to Thunder Bay, Montreal, and other ports they serve directly where they can capture the full line revenue over the longer rail transportation route.

Manitoba is troubled by anecdotal accounts by shippers and users of the Churchill system of railway practices in pricing, car supply, and strategic control of infrastructure usage in the Churchill catchment, to effectively increase the barriers and costs to accessing Churchill. As a result, Manitoba strongly believes rail service to the Port of Churchill Gateway requires special attention and careful monitoring to ensure that this transportation corridor is utilized in a manner that optimizes and supports shipper corridor service choices.

Because of the unique circumstances facing the Churchill Gateway System, special attention need be given to better understand the needs and experiences of shippers that make use of this gateway. Overall, Manitoba recommends that a comprehensive review of the Churchill Gateway System be undertaken. The review should examine the level and type of services provided by the Class 1 railways to shippers that use the port, the role of various railway operational and infrastructure management practices, and assess the adequacy to shippers of the rail services offered and regulatory protections available. The federal government is best positioned to undertake this review owing to its ability to extract needed information from the railways, and its lead role in regulatory and information developing capacities in the grain transport and handling system.

Shippers and users of the system have identified several areas of service-impacting actions via Churchill over the past several years that should be investigated. They include concerns around pricing anomalies (i.e. discriminatory rate quotations and failure to provide timely rates); car supply (i.e. denial of railcars to shippers, discrimination against Churchill of multi-unit car allocation discount programs); and, discriminatory infrastructure management practices (i.e.

demarketing and mothballing of strategic branchlines in the catchment, removal of efficient interchange points).

- 19. Manitoba recommends that Transport Canada and the Agency undertake a special comprehensive review of the service provided to the Churchill Gateway System. The review should evaluate the railway services provided by Class 1 carriers, and the adequacy of regulatory protections to this unique corridor and gateway system.***

Other Issues

Sharing Transportation Information with Provincial Ministers

The old *National Transportation Act* (NTA)—the predecessor to the CTA—recognized the strong role of the provinces in national transportation policy and service deliberations, insofar that it permitted data collected by federal carriers to be provided to the provinces through the federal Transport Minister. For reasons not well articulated at the time, this provision was not carried over to the CTA when it was introduced in 1996.

With the recent federal withdrawal from the ownership and operation of transport sector enterprises in the public and regional interest, it is the provinces and territories who are now playing a bigger role with respect to transportation and regional economic development needs. For example, in the rail sector this is evidenced by the recent evolution of provincial capital funding support for shortlines.

In order to fulfil this role in Manitoba, there is a requirement for our jurisdiction to have access to national transportation data, to better plan the strategic economic development of our systems on an efficient multi-modal basis. In the context of a now largely deregulated transport sector, however, and that much of the data is within the realm of federally regulated transport undertakings, Manitoba's—and other provinces and territories—current ability to tap into crucial data for such use is restricted.

The old NTA allowed provincial Ministers to access the same confidential information used in transportation policy development at the national stage and enabled meaningful consultations and federal-provincial collaboration for transportation policy development. Manitoba recommends that such provisions be reinserted into national transportation legislation, as a critical foundation for better and more collaborative national transportation policy and planning development.

- 20. Manitoba recommends Section 51 of the CTA be amended to permit the Minister of Transport to request that national transportation carriers under federal jurisdiction provide confidential information provided to the Minister of Transport to provincial Transportation Ministers upon request.***

Review of the CTA

The CTA amendments passed in 2008 now only require a review of the legislation in seven years. Manitoba did not support this amendment, on the principle that seven years was simply too long to wait to re-open the legislation if indeed issues were to arise with its functioning before the required review period. To the extent that the railway service review should reveal further problems with the functioning of the CTA and its policy frameworks, Manitoba believes it critical that the federal government be open-minded with regard to pursuing follow-up legislative actions immediately after the railway service review is completed. We hope this too will be one of the Panel's specific recommendations.

Conclusion

The task you have before you is important, as your recommendations will help shape railway service to our shipping community for decades to come. We therefore trust that the recommendations and other general considerations in our submission will support the Panel's deliberations. We wish the Panel success in its report preparations.

Summary of Manitoba's Recommendations:

Systemic Measures to Support Service Improvements

Branch-Line Preservation

1. Manitoba recommends the Agency be empowered, within reasonable limits and at the requests of affected shippers and communities, to investigate demarketing and other such strategic de-facto abandonment activities of rail carriers that preclude reasonable opportunities for stakeholders to preserve infrastructure, and to compel a railway to undertake any steps necessary to ensure a reasonable opportunity is provided.

Improving Shortlines and Regional Railway Sustainability

2. Manitoba recommends the Panel, in its report, should ensure a detailed assessment of the future health and service capabilities of the regional/shortline railway industry, as an integral part of rail service to shippers. Included should be an assessment of the impact of the Class 1 agreement frameworks under which regional/shortline railways operate, and as well, of the possible efficacy of enhancing shortline and shortline-located shipper access to competition enhancing provisions of the CTA.

Producer Car Service Opportunities and Networks

3. Manitoba recommends the CTA be amended to, at minimum, harmonize the closure process of producer car loadings sites with the process for metropolitan rail sidings and spurs (a one year notification period followed by an opportunity to purchase the asset at Net Salvage Value).
4. Manitoba recommends the Agency and other involved federal agencies (Canada Grains Commission) investigate and be empowered to require the railways to establish a network of producer car loading sites based on minimum distances and needed capacity standards, to ensure producers have adequate access to the rail network via producer car shipping.

Railway Interswitching

5. Manitoba recommends that clear performance standards or operating benchmarks should be established for regulated interswitching to ensure effective and non-discriminatory service by participating rail carriers.
6. Manitoba recommends the CTA be amended to empower the Agency to direct the national railways to establish interchanges at rail intersecting locations and to establish a suitable network of interchanges for rail interswitching, including capacity requirements.
7. Manitoba recommends a study be undertaken by Transport Canada and the Agency to determine the best means to provide more shippers with access to regulated interswitching.

The study should evaluate criteria such as the shipper's distance to an interchange, and related technical issues.

8. Manitoba recommends the interswitching provisions of the CTA be amended to require railways to list and provide notification for intended closures of rail interchange locations. As well, Manitoba recommends the Agency be empowered to review, and approve, proposed interchange closures, within the context of their impact on competition.

Specific Shipper-Railway Measures to Support Service Improvements

Standards of Service

9. Manitoba recommends the Agency consult with shippers and railways jointly and establish standards of service that are predictable and meet the business needs of shippers. Subsequently, Manitoba recommends the CTA be amended so that railways are obligated to operate within the standards.
10. Manitoba recommends the Agency be empowered to require railways to publish service standards in the common carrier rates and tariffs.
11. Manitoba recommends that service standards should be monitored and periodically reviewed by the Agency to ensure they remain relevant to the changing business needs of shippers and the railways.

Charges and Penalties

12. Manitoba recommends that performance penalty systems be specified in regulations administered and periodically reviewed by the Agency to ensure that the charges are adequate and effective as an incentive, and are applied in a balanced method for both shipper and railway performance.
13. Manitoba recommends the federal government, in concert with shippers and railways, assess the efficacy of a regulatory process as it relates to railway ancillary charges, that would in principle require the Agency approve a classification of systemic ancillary charges that railways propose should apply to shippers, including criteria and process for their application and alteration.
14. Manitoba recommends the railways should implement processes, as monitored by the Agency on a pilot basis, to improve the accuracy of ancillary billings and also provide clear supporting documentation in its billing statements that facilitate more effective audits by the customer.

Enhanced Agency Authority and Improved Access to Legislative Remedies

15. Manitoba recommends the Panel assess the efficacy, within the current suite of dispute resolution processes within the Act, of empowering the Agency to compel mediation by parties involved in complaints actions before it.
16. Manitoba recommends the railway companies and shippers should resume discussions on an effective and balanced Commercial Dispute Resolution process.
17. Manitoba recommends the Agency be empowered to monitor and investigate railway service independently, without formal complaints being initiated by shippers. As well, the Agency should be empowered to propose both long-term and immediate solutions to common and/or urgent service failures.
18. Manitoba recommends the Agency provide extension and educational services to educate the shipping public on the role and functions of the legislation and of Agency services, and to assist shippers in accessing legislative remedies.

Port of Churchill and Gateway System

19. Manitoba recommends that Transport Canada and the Agency undertake a special comprehensive review of the service provided to the Churchill Gateway System. The review should evaluate the railway services provided by Class 1 carriers, and the adequacy of regulatory protections to this unique corridor and gateway system.

Other Issues

Sharing Transportation Information with Provincial Ministers

20. Manitoba recommends Section 51 of the CTA be amended to permit the Minister of Transport to request that national transportation carriers under federal jurisdiction provide confidential information provided to the Minister of Transport to provincial Transportation Ministers upon request.