



January 24, 2019

Case No. 19-00189

BY E-MAIL:

To the attached distribution list

Dear Madam and Sirs:

Re: The Canadian Transportation Agency (Agency)'s investigation into possible freight rail service issues in the Vancouver area, pursuant to subsection 116 (1.11) of the *Canada Transportation Act, S.C. 1996, c.10, as amended (CTA)*.

BACKGROUND

On January 14, 2019, the Agency issued individual letter decisions to the following: the Canadian National Railway Company (CN), the Canadian Pacific Railway Company (CP), BNSF Railway (BNSF), the Forest Products Association of Canada (FPAC), the Canadian Oilseed Processors Association (COPA), the Freight Management Association of Canada (FMA), the Western Canadian Shippers' Coalition (WCSC), and the Western Grain Elevator Association (WGEA). In those decisions, the Agency directed each participant to submit information and data related to its operations in order to provide the Agency with information required for its investigation.

Specifically, the Agency directed the railway companies to submit any information and data in its possession that are relevant to the issues identified in the letter, including but not limited to the following specific data: waybill levels, details related to permits, interswitching, and rerouted traffic.

In addition to directing the participants to file information with the Agency, the Agency informed the participants that if they believe that any of the information submitted is commercially sensitive and/or that the public release of any of the information being submitted would cause it harm, this should be indicated with a clear rationale.

On January 17, 2019, CN, CP, BNSF, WGEA, FPAC and WCSC submitted information in response to the Agency's direction. In addition, CN, CP, BNSF, WGEA, and FPAC filed requests for confidentiality.

Between January 18 and 22, 2019, CN provided additional data and information to the Agency, to which CN requests that its January 17, 2019 claim for confidentiality apply. On January 24, 2019, CP provided additional information to the Agency as well as a claim for confidentiality.

RELEASE OF THE INQUIRY OFFICER'S REPORT

The Inquiry Officer, Ms. Lidija Lebar, A/Senior Director, Analysis and Regulatory Affairs, prepared an Inquiry Officer's report based on the information and data that were filed by the participants. The Inquiry Officer's report is provided to the participants with this decision.

REQUESTS FOR CONFIDENTIALITY

CN's request for confidentiality

CN claims that all of the data it submitted are commercially sensitive information and therefore confidential. CN submits that this data should not be shared with its competitors who are also participating in the Agency's investigation. CN argues that the disclosure of the data would provide competitors and potential competitors with insight into its commercial arrangements with shippers as well as "invaluable operational, managerial and strategic insight" into CN's business.

CN further argues that the disclosure of the data would breach its confidentiality obligations to its customers, as CN cannot share information related to specific shippers with shippers generally, as many may be in direct competition.

CN submits that the data submitted are the same that CN are already required to provide to the Agency under the CTA, which Parliament has determined should be treated as confidential.

Finally, CN maintains that a balance can be achieved between the public interest and the parties' rights to protect "highly confidential and proprietary information," as CN does not object to the disclosure of aggregate or summary information as long as it is sufficiently anonymized and CN is provided an opportunity to comment prior to its publication.

CP's request for confidentiality

CP claims that all of the data it submitted are commercially sensitive and therefore confidential.

JANUARY 17, 2019 DATA

CP submits that the information could be used to determine CP's "service design, operating plan, business strategy, and market presence." CP argues that the data, in part, relate to rail traffic that is subject to confidential contracts with shippers, under which CP is obligated to protect against disclosure.

Finally, CP maintains that the waybill and train segment data and by extension, the train movement data associated with permits and reroutes, are the same data that are required to be submitted to the Minister and the Agency for determining the Long Haul Interswitching rate and that Parliament has put in place statutory safeguards to protect this data.

JANUARY 24, 2019 INFORMATION

CP submits that the January 24, 2019 information relates to CP's operating plan and should be treated as confidential. CP asserts that its operating plan details the "strategic and tactical manner

in which CP designs and delivers a competitive freight rail service given the unique customer demands and limited resources” and is developed internally by CP.

CP argues that public disclosure of its operating plan would harm CP’s commercial position as it would permit competitors to “potentially undercut CP’s competitive position and gain operations insight without consideration being given in exchange.”

BNSF’s request for confidentiality

BNSF claims that all of the data it submitted are commercially sensitive and therefore confidential. BNSF submits that the waybill data submitted to the Agency are the same information that it is required to be filed with the Minister and are subject to statutory confidentiality provisions under the CTA. BNSF further submits that it is subject to confidentiality obligations under Title 49 U.S.C. 11904, which prohibits the disclosure of information about “the nature, kind, quantity, destination, consignee or routing of property” or “about the contents of a contract” with only limited exceptions.”

Furthermore, BNSF argues that the disclosure of the data would cause direct harm to BNSF’s “standing in the marketplace” and would provide its competitors with information related to traffic origin, destination, volumes and year over year fluctuations. Finally BNSF maintains that the disclosure of the data would harm its customers and their competitive position.

WGEA’s request for confidentiality

WGEA claims as confidential all individual company data contained in the spreadsheet submitted to the Agency; specifically, the data in tabs: Rationed Orders and Out of Car Time. WGEA also claims as confidential the demurrage invoices submitted.

FPAC’s request for confidentiality

FPAC claims as confidential its entire submission as it states that it contains commercially sensitive information and that the public release of this information would cause harm to FPAC members.

THE LAW

Subsection 116(1.1) of the CTA empowers the Agency to initiate an investigation on its own motion to determine whether a railway company is fulfilling its service obligations, with the authorization of the Minister of Transport.

Section 25 of the CTA sets out the Agency’s powers, specifically:

The Agency has, with respect to all matters necessary or proper for the exercise of its jurisdiction, the attendance and examination of witnesses, the production and inspection of documents, the enforcement of its orders or regulations and the entry on and inspection of property, all the powers, rights and privileges that are vested in a superior court.

Furthermore, section 37 of the CTA grants the Agency to power to appoint an Inquiry Officer to make any inquiry that the Agency is authorized to conduct and report to the Agency. Section 39 of the CTA sets out the powers of the Inquiry Officer and states, among other things, that the Inquiry Officer may:

39(b) exercise the same powers as are vested in a superior court to summon witnesses, enforce their attendance and compel them to give evidence and produce any materials, books, papers, plans, specifications, drawings and other documents that the inquirer thinks necessary.

Although not directly applicable, section 51.2 of the CTA addresses information filed with the Minister or the Agency in accordance with regulations made under, among other provisions, paragraph 50(1.01)(a), which is in support of determining the Long-Haul Interswitching rate under paragraph 134(1)(a), and states:

Information that is required to be provided to the Agency in accordance with regulations made under paragraph 50(1.01)(a) is, when it is received by the Agency, confidential and shall not knowingly be disclosed or made available by any person without the authorization of the person who provided the information, except for the purpose of a prosecution of a contravention of section 173.

Within a dispute adjudication process, section 31 of the *Canadian Transportation Agency Rules (Dispute Proceedings and Certain Rules Applicable to All Proceedings)*, SOR/2014-104 (Dispute Adjudication Rules) addresses requests for confidentiality. In that context, the Agency has consistently applied the same test in considering a request for confidentiality during dispute proceedings, specifically:

...the first step in determining whether a confidentiality request should be granted is determining whether the document is relevant to the dispute proceeding. The second step is to determine whether specific direct harm would likely result from the disclosure of the information claimed as confidential. The third step is to determine whether the public interest in having the document disclosed outweighs the specific direct harm demonstrated.¹

The Agency has consistently held that the party seeking an order for confidentiality is the one that bears the burden of establishing that specific direct harm would likely result from the disclosure of the information.

ANALYSIS AND DETERMINATIONS

In this investigation, the Agency will rely on the same test as that used in the context of dispute adjudications to consider the parties' requests for confidentiality.

¹See for example: <https://otc-cta.gc.ca/eng/ruling/conf-11-2018>; <https://otc-cta.gc.ca/eng/ruling/54-at-a-2018>

With respect to the first step of the test, given that the Agency requested the specific information that the parties were directed to file, the Agency finds that, for all the requests for confidentiality, this first step of the test is met. That is to say, the Agency finds that the information identified as commercially sensitive, or in respect of which the public release of the information would cause harm, is relevant to its investigation.

The second and third steps of the test will be considered for each request.

CN, CP, and BNSF (railway companies) have all made requests for confidentiality in respect of similar data sets and presented similar rationales in support of these claims. As such, the Agency will address these requests collectively below.

Railway companies requests for confidentiality

JANUARY 17, 2019 DATA

The railway companies limited their submissions to the specific data requested by the Agency.

Furthermore, CN and CP submitted partial data related to the month of January 2019 and BNSF did not submit data related to the year 2015 or for the months of December 2018 and January 2019 nor did it file information related to traffic rerouting.

The Agency has considered the railway companies requests for confidentiality, and finds that the data claimed as confidential which was submitted on January 17, 2019 are commercially sensitive as they contain detailed information related to specific shippers, rail movements, and railway company operations, which, if disclosed, would likely cause the railway companies and the shippers identified in the data specific direct harm. That is to say, the disclosure of the data would likely negatively impact the railway companies' and the identified shippers' competitive position.

As noted by the railway companies, most of the data submitted are the same data that they are required to file with the Minister and the Agency in support of the Agency's determination of the Long Haul Interswitching rate under paragraph 134(1)(a) of the CTA, which is statutorily protected under section 51.2 of the CTA.

Furthermore, the Agency finds that, given this data, at an aggregate level, are described in the Inquiry Officer's report, the public interest in disclosure of this data does not outweigh the specific direct harm identified above.

Based on the above, the Agency grants the railway companies' requests for confidentiality with respect to the January 17, 2019 data. Accordingly, this data will not be made publicly available nor will they be provided to the other participants.

The Agency denies CN's request to comment on the Inquiry's Officer report prior to its publication.

ADDITIONAL INFORMATION

Additional information was filed by CN and CP on January 18 to 22, 2019 and January 24, 2019, respectively, related to crewing and locomotive availability.

The Agency finds that the additional information is commercially sensitive because it includes information related to CN's and CP's operations regarding freight rail service, which if disclosed, would likely cause specific direct harm to their respective competitive positions.

The Agency further finds that as the additional data, at an aggregate and summary level, are referred to in the Inquiry's Officer report, the public interest in their disclosure does not outweigh the specific direct harm.

Based on the above, the Agency grants CN's and CP's requests for confidentiality with respect to the additional information. Accordingly, it will not be made publicly available nor will it be provided to the other participants.

WGEA's request for confidentiality

The information identified as confidential by WGEA on the tabs titled, "Rationed Orders and Out of Car Time" consists of data identifying specific shippers, number of cars ordered, railway company serving that shipper, origin and destination, the port, the grain week, and number of hours. The demurrage invoices contain shipper specific information including the amount of demurrage charged and banking information.

The Agency finds that the information and data claimed as confidential by WGEA, if disclosed, would likely cause specific direct harm to the shippers named in the data; specifically, their disclosure would likely harm their competitive position. Further, the Agency finds that the demurrage invoices contain information that is commercially sensitive, and, if disclosed, would also likely cause harm to the shippers named on those invoices.

The specific direct harm that the shippers would likely suffer if the information and data were disclosed, outweighs the public interest in their disclosure, particularly given that the Inquiry Officer's report refers to them in an aggregate form.

Based on the above, the Agency grants WGEA's request for confidentiality. Accordingly, the individual company data provided by WGEA in a spreadsheet under tabs titled, "Rationed Orders and Out of Car Time" and the demurrage invoices will not be made publicly available nor will they be provided to other participants.

FPAC's request for confidentiality

In its response, FPAC set out a timeline of events related to CN's embargo, described impacts reported by its members, listed key considerations, and noted what it is seeking from the Agency. In addition, FPAC included a table setting out overall growth in rail demand by commodity from 2014 to 2027, citing Transport Canada as the data source.

Given that FPAC's response contains general information, and that FPAC did not include a clear rationale in support of its request for confidentiality, the Agency finds that FPAC has not established what, if any, harm would likely result from its disclosure. As FPAC has not met the second step of the test, the Agency does not need to consider the third step of the test.

Based on the above, the Agency denies FPAC's request for confidentiality.

BY THE AGENCY:

(signed)

Scott Streiner
Member

(signed)

Lenore Duff
Member

(signed)

Gerald Dickie
Member

DISTRIBUTION LIST

Canadian National Railway Company: Eric.Harvey@cn.ca

Cc: DHodson@mltaikins.com, sean.finn@cn.ca, RLepage@mltaikins.com

Canadian Pacific Railway Company: cassandra_quach@cpr.ca

Cc: Tyme_Wittebrood@cpr.ca

BNSF Railway Company: james.titsworth@bnsf.com

Cc: Dustin.Almaguer@BNSF.com, ian.mackay@rogers.com

Western Canadian Shippers' Coalition: dmontpetit@westshippers.com

Canadian Oilseed Processors Association: chris.vervaet@copacanada.com

Forest Products Association of Canada: DNighbor@fpac.ca

Cc: jneuheimer@fpac.ca, Lucia.Stuhldreier@mcmillan.ca

Freight Management Association of Canada: ballantyne@fma-agf.ca

Western Grain Elevator Association: wgea@mymts.net