



DLA Piper (Canada) LLP
Suite 2800, Park Place
666 Burrard St
Vancouver BC V6C 2Z7
www.dlapiper.com

Forrest C. Hume
forrest.hume@dlapiper.com
T +1 604.643.6405
F +1 604.605.3741

February 8, 2019

FILE NUMBER: 090590-00001

DELIVERED BY EMAIL

Ms. Lidija Lebar
Inquiry Officer
Vancouver Freight Rail Investigation
Canadian Transportation Agency / Government of Canada

Dear Ms. Lebar:

Re: Vancouver Freight Rail Investigation

This is further to the Oral Public Hearing relating to the Agency's investigation into possible freight rail service issues in the Vancouver Area, held at the Sutton Place Hotel in Vancouver, B.C., January 29th and 30th, 2019.

These are the submissions of the Freight Management Association of Canada (FMA) filed pursuant to the direction of the Chair of the Panel at the hearing January 30, 2019.

Criticisms of the Agency's procedure baseless and unwarranted

1. This proceeding is an inquiry pursuant to section 116 (1.11) of the *Canada Transportation Act*. The Agency has outlined the procedure that it will follow in the inquiry. The Report of the Inquiry Officer and the Oral Public Hearing are part of the initial phase of that procedure, whereby the Agency is gathering evidence and receiving submissions from interested parties. As Mr. Streiner put it in his concluding remarks at the hearing:

"All parties who have outstanding commitments to provide information evidence to the Agency stemming from this hearing are asked to do so by close of business on February the 8th. That information should be provided to the Agency through the inquiry officer assigned to this case. Once that's done, the Agency will consider all of the evidence that it has gathered through those various steps, through the initial work of the inquiry officer, this oral hearing, and any subsequent information and evidence that is provided to the Agency. We will then issue a decision.

We will endeavour to do so by the end of February, but it will depend in part upon the scope of the record before us. But we will then issue a decision that will identify in much more specific terms the particular issues that the Agency is looking into and the specific questions or issues to which we would like responses from the various participants. So that's the point at which we will zero in and make it clear exactly what the balance of the investigation will focus on. Parties will then have 20 days to respond to those questions, to those issues, and an additional 10 days to review and reply to the responses of other parties.

Once that's completed, the Agency will render a final decision in this investigation, and that decision, needless to say, like every other decision that this organization issues, will be informed by the law, meaning what's written in the statute and relevant jurisprudence, and by the record of this proceeding, by the evidence before us. And that's it. The law and the evidence."

(emphasis added)

2. At the hearing, comments made by CN's counsel suggest that CN either does not understand the Agency's procedure, or that it disagrees with the procedure. It seems clear that CN is choosing to treat the initial phase of the investigation as if it were a level of service complaint in and of itself, arguing that the investigation should be terminated on the basis that, at this stage, there is no evidence of a breach of the railway's level of service obligations. Inconsistent with that position, CN also complains that it has not been provided with answers to questions posed by the Agency to various stakeholders. For good measure, CN alleges that its rights are somehow being violated.
3. Furthermore, CN's attitude of aggressively questioning the Agency's jurisdiction and alleging that somehow CN's natural justice rights are being violated and procedural fairness is being denied – while at the same time acknowledging that the congestion did and does exist – is not only unhelpful, it is nothing more than a bullying tactic – an attempt to force the Agency and the affected stakeholders to back down. The Agency has a statutory right to carry out this investigation and it should do so with vigor.
4. There is no justification for CN to treat this proceeding as a *lis inter partes*. The investigation is a means of identifying and scoping out the problems in order to find solutions, not a means of preserving the *status quo ante* (such as preserving the railways' current *modus operandi* of negatively impacting selected shippers' traffic through the unilateral imposition of "embargoes", and "permits").
5. The criticisms of the procedure adopted by the Agency for the initial phase of its investigation are baseless and unwarranted. The Agency has not yet identified the particular issues that it is looking into. What the Agency is doing is exactly what Mr. Streiner has indicated, i.e. gathering information to scope out the issues that the Agency is looking into and identifying the specific questions or issues to which the Agency would like responses from the various participants. Once that's done, the Agency will "zero in and make it clear exactly what the balance of the investigation will focus on", at which time CN and other stakeholders will have an opportunity to respond.

6. It is important to keep in mind that this is an inquiry, not a specific level of service complaint. The inquiry has been called by the Agency on its own motion, not by individual shippers' level of service complaints under the Act. The Agency has initiated the inquiry in response to concerns being expressed about service issues at Vancouver. The service issues at Vancouver are real and are conceded by the railways themselves in their bulletins and communications imposing "permits" and "embargoes".

There are service problems in the Vancouver area that need to be understood granularly

7. During the Oral Public Hearing, there was information provided as to increases that had been made in the number of crews and locomotives to serve the traffic. This information was expressed in terms of percentages. Percentages can be misleading. FMA asks that the Agency obtain evidence from the railways as to the crew and locomotive resources serving Vancouver on both CN and CP over a significant period of time. That will enable the Agency to assess whether the actual numbers are significant. If crews were significantly cut, and locomotives significantly retired over time, then the percentage increases will need to be viewed in a different light.
8. Railway management decisions on crewing, locomotive power, car supply, infrastructure and operations generally reflect the railways' interests. In one celebrated case involving a level of service case brought by a grain shipper against CN, for instance (Agency Decision No. 2014-10-03 dated October 3, 2014), the Agency indicated the following:

"[12] The Agency recognizes that transportation is a derived demand. Freight railway companies do not operate except to carry goods that are produced by other economic actors and it is the financial health of these primary economic actors that is protected by sections 113 to 115 of the CTA. However, these actors have competing interests. Essentially, the interests of the shipping community are best served by a transportation system with high capacity and intense competition. The interest of the railway companies is embodied in the industry phrase "sweating the assets," which implies meeting the demand with the lowest possible costs in terms of infrastructure, car supply, crews and motive power. High efficiency operations with low operating ratios (typically measured by costs as a proportion of total revenues from operations) provide the best return to railway company shareholders. However, running a very lean operation has implications for the railway company's ability to manage surges in demand or operational challenges such as infrastructure outages or adverse weather.

[13] The Agency is of the opinion that where competitive pressures are low or absent and where there is a relatively low cost to the railway company for delaying traffic or otherwise reducing the level of service, the supply of cars and motive power will tend to be set at a level that favours railway company (producer) preferences over shipper (consumer) preferences."

9. It is essential that the Agency be able to determine whether such decisions made by the railways have contributed to the congestion in the Vancouver area, including decisions

made by the railways at the origins of the traffic and as the traffic has proceeded en route from the origins towards Vancouver.

10. In that regard it is important to point out that in this investigation the railways in the approach they have taken to the information filed have made it very difficult to comprehensively analyze the issues most relevant to all stakeholders. This is because the railways have claimed confidentiality for the information that they provided to the Agency. Notwithstanding that, during its Reply representations at the Oral Public Hearing, CN offered conclusions and made arguments based on a miniscule fraction of the 5.8 million records that it provided to the Agency. Shippers are unable to assist the Agency in analyzing the data that the railways have provided because the railways are keeping the data from them. It is curious that, at the same time as it is maintaining selective confidentiality with respect to the data that it has supplied to the Agency, CN is arguing strenuously that shippers must provide the railways with confidential data, and that CN's rights are somehow being violated if they do not.¹

Railways should not be permitted to divert the focus of the investigation from their own service failures by blaming other stakeholders and raising extenuating circumstances

11. During the course of the Oral Public Hearing, the suggestion was made that the service issues at Vancouver were contributed to by terminal operators not working "24/7", or perhaps by terminal operators not having sufficient infrastructure to accommodate railcars. These suggestions omit reference to terminal authorizations that railways require when cars are ordered by shippers. When terminal authorizations are given, they take into account the infrastructure limits of the terminal, and the terminal authorizations are evidence of the fact that the terminal has capacity. The determination as to why cars arrive at terminals in numbers that the terminals are unable to unload efficiently needs to be part of the Agency's investigation. The Agency is aware from level of service complaints that have been filed previously that there are many railway-caused factors that result in cars being delivered to terminals in Vancouver bunched and out of sequence.
12. During the course of the Oral Public Hearing, the suggestion was made that increase in traffic was a contributing cause of the congestion at Vancouver. Similar allegations have

¹ During the Oral Public Hearing, CN indicated that it had produced to the Agency some 5.8 million records. The Agency's Decision LET-R-20-2019 dated January 24, 2019 indicated that most of this comprised the same data that the railways have recently been required to provide to Transport Canada with the amendments to the *Canada Transportation Act* resulting from the enactment of Bill C-49. That data was readily available to CN. Shippers have not been provided with any of that data. Unlike the railways, FMA's members do not have the data that the Agency has requested of FMA readily available. Compiling such data would be time-consuming and costly, even if the data can be retrieved from shippers' records. There is also the reality that most shippers are extremely reluctant to provide data for fear of retribution by the railways. The arrogant and aggressive position taken by CN in this proceeding fuels those fears. Moreover, as indicated above, data that would demonstrate what has happened to shippers' traffic en route while in the custody and control of the railways, is unknown and unavailable to shippers in any event.

been also made in previous level of service complaints before the Agency. However, railways are expected to plan for such contingencies, and react to them. Despite protests about the abundant harvest in crop year 2013/14, for instance, the increased traffic was handled when the railways were faced with the prospect of having to pay a \$100,000/day fine if they didn't deliver 500,000 tonnes of grain each week for export. The increased traffic ceased to be a factor.

13. During the course of the Oral Public Hearing, the suggestion was made that the weather was a contributing cause of the congestion at Vancouver. Similar allegations have been also made in previous level of service complaints before the Agency. However, railways are expected to plan for such contingencies, and react to them. Despite protests about the weather in crop year 2013/14, for instance, the increased traffic was handled when the railways were faced with the prospect of having to pay a \$100,000/day fine if they didn't deliver 500,000 tonnes of grain each week for export. Weather ceased to be a factor.

Whether, and if so, how shippers could provide data

14. Providing data is difficult for shippers, as explained in footnote #1 to this submission. If shippers are given adequate time, and could be assured that supplying data would not result in retribution from the railways, it would be possible for the data to be provided. Aggregating the data would be essential of course. This could be done through the shipper organizations, but it would take time, and would be costly. Also, significant and effective measures would have to be put in place to ensure that the confidentiality of the data is protected and that the individual data sets are not disclosed among competitors.

Measures that are not a breach of the level of service obligations of the *Canada Transportation Act*

15. FMA reiterates the position taken by counsel at the Oral Public Hearing that the unilateral imposition of embargoes and permit regimes by the railways are a violation of the level of service provisions of the *Canada Transportation Act*.
16. There are measures that can be taken to address congestion issues that are not a breach of those provisions. Shippers do not take measures designed to cause delay or congestion to their traffic. It is essential to shippers and their customers that traffic moves as expeditiously as possible. The railways, by contrast, do take decisions that cause delay and congestion. Those measures include fleet sizing, setting of crew levels, recovery plans, winter operation plans, planning for contingencies, and infrastructure investments. These measures currently are driven by internal railway Authorization for Expenditure (AFE) decisions, taking into account the railway's interests. Regulatory oversight and the creation of mechanisms to influence those key decisions for the greater good not only of the railways, but also the public interest generally (e.g. the Canadian economy, GNP, balance of trade, competitiveness of Canadian industries, etc.) would help ensure that the decisions are made in conformity with National Transportation Policy and that the objects of that policy are achieved as intended.

FMA's submission as to what needs to be done in order to address the issues being investigated

17. FMA submits that the Agency needs to drill down granularly into what has happened to cause the congestion of shippers' traffic in Vancouver during the period in question at origin and en route. Shipper associations such as FMA do not have that information. Individual shippers do not have that information.
18. The Agency has articulated the problem in a previous case (Complaint by Normerica Inc. against the Canadian National Railway Company and the BNSF Railway Company, Letter Decision No. LET-R-171-2006 dated June 30, 2006). In that case, the Agency indicated:

“[7] In cases such as this one where traffic is moved over the lines of more than one railway company on a single through bill of lading it would be inappropriate to expect a shipper to know the timing, location of and responsibility for all of the railway service matters that it feels have contributed to its perceived delivery problems. The impossibility lies, in part, in the complexities of rail transportation as well as in the inability for the shipper to even obtain the information in the first place.

[8] Dealing with the former, shippers cannot be expected to have a detailed knowledge of the history of their rail car deliveries. Typically, all they know and can know is that they have a problem in their rail service and that it arises somewhere - at origin, destination or somewhere in between. It would be unfair for the Agency to expect them to know all of the details of the moves, such as exactly when and in what railway yard a particular car or group of cars was or were delayed. It would be untoward for the Agency to then expect a shipper to have enough operating expertise in railway matters for it to know whether the reason for any perceived delay in a particular yard at a particular time was due to labour rules, safety considerations, the weather, change in consist or diesel power or crew, inefficiency, bad management or some other reason.”
19. The way to obtain the information necessary to assess the service issues at Vancouver is to require the railways to provide detailed information as to cars ordered, cars picked up, cars delivered, and delays en route for shippers' traffic moving through Vancouver over the period in question. The railways are capable of providing this information.
20. If the time limit imposed by s. 116 (1.11) of the Act prevents the Agency from obtaining that information, or is insufficient for the Agency to analyze the information it obtains, the Agency should seek an extension of the time limit set out in s. 116(1.11) from the Minister of Transport.
21. If the Minister of Transport is unable to provide such an extension, then the Agency should recommend to the Governor in Council that a Commissioner be appointed pursuant to the provisions of the *Inquiries Act* (R.S.C., 1985, c. I-11) to inquire into and



report upon the specific circumstances, reasons and causes for the freight rail service issues in the Vancouver area, including whether there is evidence of discriminatory treatment of certain commodities by the railways, and how freight rail permits and/or embargoes are being used by the railways.

All of which is respectfully submitted.

A handwritten signature in blue ink, appearing to read 'Forrest C. Hume'.

Forrest C. Hume / Monique Evans
DLA Piper (Canada) LLP
666 Burrard Street, Suite 2800
Vancouver, B.C. V6C 2Z7
Counsel for the Freight Management Association of Canada