# DISPUTE RESOLUTION OPTIONS IN CANADIAN RAILWAY FREIGHT TRANSPORTATION

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## Introduction

As part of its response to the Rail Freight Service Review, the federal government announced on October 31, 2011, a 6-month consultation to develop a commercial dispute resolution (CDR) process.[1] The goal is to create an effective commercial option for resolving rail freight rate and service disputes that would complement the statutory recourses available under the *Canada Transportation Act* (CTA). This is the second time since 2006 that the federal government has attempted to establish a CDR process acceptable to both shippers and railways.

This paper discusses both the commercial and statutory options for addressing rail freight disputes. We highlight the previous attempt to negotiate a mutually acceptable CDR process, the CDR processes currently offered by the railways, what shippers desire a CDR process to encompass, and the issues that so far have made agreement difficult to reach. The Appendix provides a side-by-side list of the features of the shipper preferred CDR model and the one currently offered by the railways.

After this, we discuss the statutory recourses. It appears that many shippers know very little about these.[2] Correcting this is important, for its own sake and because effective use of any new CDR process requires potential users to understand the statutory recourses and see the CDR process in the context of all the available options.

## 1. What is "Commercial Dispute Resolution"?

"Commercial dispute resolution" is being used to refer to a form of dispute resolution commonly known as "alternative dispute resolution" or ADR. Simply put, ADR refers to the many methods for resolving disputes outside of courts or other tribunals, such as negotiation, mediation and arbitration, and is faster, less formalistic, less expensive and often less adversarial than litigation.[3] Thus, CDR in the present context may be defined as agreed procedures, other than litigation, for resolving disputes arising in connection with commercial relationships in the rail freight industry.[4]

Two principles are fundamental to a true CDR process[5]—

- Consensuality: CDR is based on the parties consenting to enter into an agreed procedure and, in certain cases (arbitration), to be bound by the result.
- Party autonomy: The parties invest the neutral with his or her powers; the nature and scope of this authority also derive from the parties' agreement.

These principles clearly distinguish CDR from the statutory recourses. A true commercial CDR process also has the following as essential defining features—

**Figure 1: CDR Process Essential Features**

1. Mutually agreed and voluntary process
2. Defined scope
3. Flexibility
4. Fairness and equality
5. Party selection of the neutral
6. Independence and impartiality
7. Privacy and confidentiality
8. Finality

Source: Stephen L. Drymer, *Commercial Dispute Resolution (CDR) in Canada's Transportation Industry: Have We Got it Right?*, Presented to the Chartered Institute of Logistics and Transport in North America (CILTNA), 29 November 2011.

Regarding Figure 1, it may be noted that "mutually agreed and voluntary process" derives from the principle of consensuality. "Defined scope" refers to the agreement specifying the nature and scope of the disputes that come under the process. "Flexibility" refers to the parties themselves establishing the procedures and timing, making it possible for CDR to be faster and less costly than litigation. However, flexibility is constrained by the need for "fairness and equality," i.e. the process must respect due process. "Party selection of the neutral" is also a key attraction and overlaps with the "independence and impartiality" requirement which the parties themselves assess. "Privacy and confidentiality" is another advantage for the parties. "Finality" means the process should be one that actually settles the dispute, with only limited possibilities for appeal.

As noted by the Rail Freight Service Review Panel, interest in CDR has been growing in Canada. In the rail industry, shippers and railways now have the option of using mediation and arbitration under the auspices of the Canadian Transportation Agency (the Agency), so that parties can utilize the Agency's expertise under CDR-type processes if they so desire.[6]

## 2. The 2006 Effort to Develop a Rail Freight CDR Process

In 2006, as part of ongoing government consultations on potential changes to the "shipper protection" provisions of the CTA, the Minister of Transport, Infrastructure and Communities asked that CN and CP develop a CDR process that could be used in addressing railway-shipper disputes. The intention was that the commercial process would complement the regulatory provisions. The railways did come up with a process which they proposed to shipper interests, but the parties were unable to come to final agreement and the discussions broke down. As noted by the Rail Freight Service Review Panel, the consultations broke down mainly because the parties could not agree on including the U.S. portion of traffic movements.[7]

## 3. The Railways' Current CDR Processes

Despite the failure of the 2006 effort, CN and CP have each established and maintained a CDR process as an option for customers choosing to sign an Agreement to use the process. The processes are nearly identical.

While only limited use has been made of the railways' processes,[8] it is still important to describe it. We use CP's to illustrate. Under CP's CDR process, shippers are able to take their issues to independent mediation by officials of the Agency, and to binding arbitration if necessary. In addition, shippers would still have at their disposal all existing CTA provisions. The CDR process is in addition to the provisions of the CTA. It involves mandatory mediation as the first step, with the option for the shipper to follow this with either: (a) commercial arbitration (i.e. not FOA type), triggered by application to the Agency or another agreed to process; or (b) the exercise of any legal recourse the shipper may have available, including the existing CTA remedies. The process applies only in respect of traffic within Canada. The Agreement is effective for an initial period of two years, during which both parties commit to using CDR as the initial process. The Agreement applies to: line haul rates that could be the subject of an FOA proceeding; level-of-service as contemplated by sections 113-115 of the CTA; and the application of charges for incidental services provided within Canada. As noted, the CN process is virtually the same.[9]

## 4. What Shippers Expect in a CDR Process

The Canadian Fertilizer Institute (CFI), in its submission to the Rail Freight Service Review, described in detail the CDR model that it, along with support from other shipper associations, proposed in 2006.[10] The features of this model are listed in the Appendix. The key features are that:

- It provides for a process that does not require any government involvement;

- It employs compulsory mediation as the first step, with the option of utilizing either commercial arbitration or formal CTA recourses if mediation fails;

- It covers disputes respecting line haul rates, line haul service and ancillary rules and charges;

- The shipper unilaterally activates the mediation or arbitration and the railway must participate;

- It covers traffic moved by CN and CP over all their lines, including domestic, transborder and U.S;

- It identifies specific railway services that would be subject to penalties or incentives.

The Appendix also compares the CFI model to the railways' current model (again using CP's as representative). Under the railways' process:

- The initial compulsory mediation is carried out by applying to the Agency, with the request made by both parties. In the CFI model, the mediation is triggered by the shipper, carried out privately, with the necessary pre-conditions set out in an MOU.

- The disputes covered include those respecting line haul rates, line haul service and the *application* of specified ancillary rules and charges. Unlike the proposed CFI model, the rules and charges themselves are not covered.[11]

- The Agreement applies only to traffic moved wholly within Canada and not traffic moved on the railways' lines in the U.S. The CFI model would include traffic moved over all of CP's and CN's lines.

- The arbitration is carried out privately if a list of potential arbitrators and a selection process have been agreed to.

Otherwise the arbitration commences by applying to the Agency. Under the CFI model, the arbitration is private with the necessary pre-conditions established in an MOU.

- A system of rail service rewards and penalties is not included in the railways' CDR Agreements, although this is part of the CFI model.

### 5. Statutory Based Dispute Resolution

Several sections of the CTA provide for dispute resolution in freight rail. These include sections 161-169, 116, 36.1, 36.2 and 120.1.

#### Sections 161-169 – Final Offer Arbitration

FOA has been described as follows.[12] It is an intentionally high-risk form of arbitration where the arbitrator can only select one of the final offers put forward by the parties. By precluding compromise, FOA is meant to encourage the parties to settle on their own. Should they nevertheless proceed to arbitration, FOA encourages putting forth tempered offers as the more far reaching a party's position, the more likely the other party's offer will be selected.

Only shippers may invoke FOA. A shipper dissatisfied with either the rate or conditions associated with a movement of goods may, if the parties cannot resolve the matter, submit it to the Agency for FOA. The notice must also be served on the carrier, and must include the shipper's final offer (excluding dollar amounts) and a commitment to ship the goods in accordance with arbitrator's decision. Within ten days of serving of the notice, the shipper and carrier must submit their final offers with dollar amounts. The Agency then refers the matter to an arbitrator (or panel of arbitrators) chosen from a public list maintained by the Agency. The arbitrator's decision is to be rendered within 60 days of the submission, and applies for up to one year. An accelerated procedure is provided when the freight charges at issue do not exceed $750,000.

FOA was introduced with the passage of the NTA, 1987, as one of the provisions designed to enhance shippers' bargaining power, in particular those served by only one railway. Nevertheless, the application of FOA is not limited to only "captive" shippers but applies generally (with one exception). While FOA is not conditioned on the absence of competition, the arbitrator must have regard to whether there is available to the shipper "an alternative, effective, adequate and competitive means of transporting the goods to which the matter relates." Thus, a shipper with competitive alternatives can utilize FOA, but the intent is to discourage that.

Amendments to the CTA passed in 2008 modified FOA in two ways.[13] First, the parties may, by agreement, refer a matter that has been submitted for FOA to a mediator, which may be the Agency (see below). In that event, the FOA timetable is suspended while the mediation is being carried out. Second, FOA now allows groups of shippers to apply on matters common to all of them when the shippers make a joint offer to the railway. In addition, the shippers must demonstrate that mediation has been attempted.

**Section 116 – Level of Service Complaint**

Section 116 has been described as follows.[14] It enables a person to file a complaint that a railway company is not fulfilling its statutory "level of service" obligations and seek to have the situation remedied. Significantly, "any person" can make such a complaint; it need not be a shipper. On receiving such a complaint, the Agency is required, if it is warranted, to expeditiously carry out an investigation. Section 116 also provides that a decision shall be issued within 120 days, although this is not imperative. If the Agency finds that a railway company has breached its service obligations, it has very broad powers in ordering remedies, but it cannot award damages. The Agency has ruled that FOA and section 116 are not mutually exclusive recourses. In addition, section 116 does not preclude the parties from seeking resolution through mediation (see below), either before or after a complaint is filed. In the latter case, the 120 day deadline is suspended for the duration of the mediation.

Figure 2 provides a summary analysis of all the level of service cases brought before the Agency and its predecessor, the National Transportation Agency (NTA). These may be found on the Agency's website. Figure 2 indicates the main subjects at issue in the various cases, along with the outcome of the investigations. Railways were found to have breached their obligations in about half of the cases.

**Figure 2:**
**Railway Level of Service Cases and Decisions Since 1988**

| | Number of Cases Where: | | |
|---|---|---|---|
| **Main Subjects at Issue in Cases** | **No Breach of Obligations Found** | **Obligations Found to be Breached** | **Total Cases** |
| Refusal to serve | 5 | 1 | 6 |
| Withdrawal of service | 4 | 2 | 6 |
| Rationing of empty car supply | 1 | 5 | 6 |
| Loaded cars not delivered as agreed | 2 | | 2 |
| Frequency of service | 1 | 1 | 2 |
| Claim of discrimination | | 2 | 2 |
| Refusal to route as requested | | 1 | 1 |
| Totals | 12 | 13 | 25 |

*Decision No. 475-R-1998 (CWB vs CN) counted three times and Decision No. 478-R-1992 (Terry Shewchuk et. al. vs CN) counted twice in this table as they raised more than one main issue.

**Sections 36.1 and 36.2 – Mediation and Arbitration**

In 2007, amendments were passed to the CTA empowering the Agency to mediate or arbitrate disputes upon consent of both parties,[15] and which, in the words of the CFI, have the effect of establishing a "semi-commercial" dispute resolution system because of the involvement of the Agency.[16] Section 36.1 enables the Agency, as an alternative to its formal processes, to mediate on request disputes on any matter falling within its jurisdiction. Section 36.2

enables the Agency to mediate or arbitrate on request disputes relating specifically to Parts III (Railway Transportation) and IV (FOA) of the CTA or the application of any rate or charge for the movement of goods by rail or for the provision of incidental services.

**Section 120.1 –** Adopted in 2008,[17] this section enables the Agency, upon complaint by a shipper, to investigate any charges and associated terms and conditions for the movement of traffic (other than rates) or for the provision of incidental services found in a tariff that applies to more than one shipper, and to make changes if these are found to be unreasonable. The CFI states that with the addition of this section, it is not necessary to provide for commercial mediation or arbitration of disputes over ancillary rules and charges.[18]

## 6. Conclusion

This paper has outlined the available options in Canada for resolving rail freight rate and service disputes. These include statutory mechanisms provided for in the CTA as well as commercial mechanisms.

The commercial options available for dispute resolution include private confidential contracts as permitted by the CTA and the CDR processes, discussed in this paper, which CN and CP currently offer to shippers but which have seen only limited use. Regarding contracts, because these are confidential it is very difficult to know how much traffic is covered by such contracts and how many of these contain dispute resolution provisions.[19]

As noted at the outset, there is a federally facilitated consultation underway to reach an accord on a CDR process acceptable to both shippers and railways. We, of course, cannot know what the outcome of these latest efforts will be, but this is something that we have previously argued for. As we have stated elsewhere: “Clearly, an effective commercial dispute resolution process could be an important tool. It would, however, necessitate that shippers and railways agree on the terms and conditions of the process and it would have to apply to a meaningful range of rail transportation

matters. A CDR process that applied to a more limited range of subject matters might be useful in setting a precedent for broader application, but again it would have to be accepted and its usefulness recognized by both shippers and railways."[20]

Regarding the statutory options under the CTA, these have also been described in this paper and include Final Offer Arbitration (sections 161-169), level-of service complaints (section 116), mediation and more traditional arbitration (sections 36.1 and 36.2), and complaints respecting ancillary charges and rules (section 120.1).

Section 126 is where the CTA permits railways and shippers to sign confidential contracts. Significantly, matters governed by a confidential contract cannot be submitted for FOA without the consent of all the parties. Also, while a shipper who is party to a confidential contract can file a section 116 complaint, the terms of the contract are binding on the Agency in rendering its determination.

Regarding mediation specifically, we have noted that requests may be made to the Agency for mediation. However, while the Agency can encourage mediation, and it must be provided if requested, the Agency cannot compel mediation. The parties must make this choice voluntarily. Elsewhere, we have argued that the Agency should be empowered to compel mediation.[21]

**Appendix: Shipper and Railway CDR Models**

| **Shipper (CFI) Preferred Model** | **Railway (CP) Current Model** |
|---|---|
| **Basic Principles of CDR Process** | |
| • To be set out in an MOU between railways and shipper associations.<br>• Available to all shipper associations wishing to sign on.<br>• Able to operate with no direct government involvement.<br>• Includes use of mediation, med-arb and arbitration.<br>• Available to all persons subject to rates, terms and conditions of a railway tariff or confidential contract.<br>• Applicable to any dispute respecting an existing or proposed tariff pertaining to line-haul rates, services and ancillary rules and charges.<br>• Mandatory first step, but does not preclude using the formal CTA recourses if CDR fails to resolve matter. | Agreement is between the railway and the "Customer."<br><br>PREAMBLE: Whereas the parties,<br>• wish to establish a process to resolve in a commercial fashion Disputes that may arise;<br>• wish to establish a preliminary mandatory mediation process for any Dispute;<br>• agree that, if the Dispute is not resolved through mandatory mediation, the Customer may submit it to binding arbitration or seek resolution using the formal CTA recourses;<br>• have agreed to set out the process for mediation and arbitration;<br>They therefore agree to the provisions of the Agreement. |
| **Disputes Covered** | |
| Disputes respecting:<br><br>• Line haul rates;<br>• Line haul conditions of service;<br>• Ancillary rules and charges | Disputes respecting:<br><br>• Line-haul rates that could be the subject of an FOA;<br>• Level of service obligations |

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| | as set out in the CTA;<br>• The *application* of the tariffs for providing the incidental services specified in the Agreement; and<br>• Traffic where the parties have not otherwise provided a dispute resolution mechanism. |
| **Goods Covered** | |
| • All goods described in freight tariffs and confidential contracts. | • No restrictions on "Customer." |
| **Who Can Activate Process** | |
| • Any person subject to a tariff or confidential contract can unilaterally activate mediation or arbitration and the railway is obligated to participate.<br>• Groups of shippers and non-shippers can activate process in relation to the "facts" or "circumstances" pertaining to ancillary charges. | • Does not state who initiates; appears that it is presumed to occur by mutual agreement.<br>• Customer elects arbitration or statutory option.<br>• Appears to presume "Customer" is an individual shipper. |
| **Geographic Coverage** | |
| • Covers traffic moved by CN and CP over all their lines, including Canadian, transborder and U.S. lines. | • Applies only in respect of traffic movements within Canada. |
| **Compulsory Mediation Process** | |
| • As the first step, the dispute would have to be mediated.<br>• Expedited procedures to be set out in the MOU.<br>• Private mediator would be agreed to; if parties unable to agree, mediator would be an employee of the Agency where costs would be | • Prior to initiating any other recourse, parties agree to attempt resolution through mediation.<br>• Mediation carried out pursuant to the process of the Agency.<br>• Timeline for completion 15 |

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| charged on a cost-recovery basis. | working days from date mediator appointed, with the mediation session not exceeding 5 days unless otherwise agreed.<br>• Each party responsible for its own costs, and share equally in the costs of mediation services. |
| **Optional Arbitration Process** | |
| • If mediation fails, complainant would have option of private arbitration or formal CTA recourses.<br>• MOU to list approx. 15 arbitrators on whom the parties agree. If the parties cannot agree on a list, MOU to provide for selection of a list.<br>• MOU to detail how arbitrator shall be selected, although parties may agree on an arbitrator not on the list.<br>• MOU to set out agreed upon expedited procedures, including provisions to limit costs.<br>• Decision shall bind parties for 2 years where the traffic is wholly within Canada, and 1 year where the traffic is moved from Canada to the U.S.<br>• Arbitrator to have ability to craft the final offer, and also to issue an interim report before issuing binding decision.<br>• On transborder movements, arbitration would apply only to the portion on which CN's or CP's revenues are received, excluding the revenues received by any | • If list of potential arbitrators and process for selection have been agreed to, then arbitration commences with an application in accordance with the agreed-to process, and takes place at agreed-to location.<br>• If the parties have not agreed to a list of potential arbitrators and a selection process, then arbitration commences by application to the Agency by the Customer. Arbitrator may be appointed from among the Agency members, staff or an Agency list of acceptable arbitrators. Arbitration is held at an agreed-to location or, failing agreement, one chosen by the Agency.<br>• Each party responsible for its own costs, and share equally in the costs of the arbitration services. |

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| participating U.S. carriers. | • Unless otherwise agreed, the arbitrator's award in respect of a Dispute concerning line haul rates and/or level of service becomes part of a confidential contract.<br>• The arbitration is subject to timelines for completion and is carried out in accordance with Rules that are set out in the Agreement. |
| **Rail Service Rewards and Penalties** | |
| CDR model should specify services for which railways could be subject to penalties and/or incentives including:<br>• Car supply at origin;<br>• Loading time at origin;<br>• Car cycle time;<br>• Unloading time at destination. | • Not incorporated in current Agreement. |

Sources: Canadian Fertilizer Institute, *Submission to the Rail Service Review Panel* (April 30, 2010); Canadian Pacific, *Agreement for the Commercial Resolution of Disputes ("CDR")*; Canadian National, *Agreement for the Commercial Resolution of Disputes ("CDR")*

## Endnotes

[1] Transport Canada (2011a), *Government of Canada appoints facilitator to lead rail freight service discussion process* (News release October 31, 2011) at http://www.tc.gc.ca/eng/mediaroom/releases-2011-h101e-6497.htm.
[2] Transport Canada (2011b), *Rail Freight Service Review Final Report*, January 2011, TP15042, p. 64.
[3] Nolo's Plain English Law Dictionary at http://www.nolo.com/dictionary/alternative-dispute-resolution-%28adr%29-term.html.
[4] Stephen L. Drymer (2011), *Commercial Dispute Resolution (CDR) in Canada's Transportation Industry: Have We Got it Right?*, Presented to the Chartered Institute of Logistics and Transport in North America (CILTNA), 29 November 2011.
[5] Ibid.

[6] Transport Canada (2011b), *Rail Freight Service Review Final Report*, op. cit., p. 28.
[7] Transport Canada (2011b), *Rail Freight Service Review Final Report*, op. cit., pp. 9 and 28.
[8] There has been some use made of CP's process and, as we understand it, no use made of CN's process. See Transport Canada (2011b), *Rail Freight Service Review Final Report*, January 2011, TP15042, Appendix N, p. 121.
[9] Canadian Pacific, *Agreement for the Commercial Resolution of Disputes ("CDR")* at http://www.cpr.ca/en/customer-centre/commercial-resolution/Pages/default.aspx, and Canadian National, *Agreement for the Commercial Resolution of Disputes ("CDR")*at http://www.cn.ca/documents/Customer-Service/commercial-dispute-resolution-agreement-2010-en.pdf.
[10] Canadian Fertilizer Institute (2010), *Submission to the Rail Service Review Panel* (April 30, 2010).
[11] As stated in its *Submission to the Rail Service Review Panel*, the CFI no longer sees the need to commercially mediate or arbitrate disputes over ancillary rules and charges as a result of the addition to the CTA of sec. 120.1 in 2008.
[12] David W. Flicker (2000), *Canada-United States Railway Economic Regulation Comparison*, research conducted for the *Canada Transportation Act* Review, November 2000, p. 16.
[13]Department of Justice (2008), *An Act to amend the Canada Transportation Act (railway transportation)*, S.C. 2008, c. 5 (assented to 2008-02-28) at http://laws.justice.gc.ca/eng/AnnualStatutes/2008_5/page-2.html
[14] CPCS Transcom Limited (2009), *Service Issues in Regulated Industries Other than Canadian Freight Rail Industry*, research conducted for the Rail Freight Service Review, August 31, 2009, p. 7and Appendix A, pp. 57-65. This study includes a full discussion of the railway statutory level of service obligations in Canada, including the relevant jurisprudence, and the means for resolving service-related disputes.
[15] Department of Justice (2007), *An Act to amend the Canada Transportation Act and the Railway Safety Act and to make consequential amendments to other acts*, S.C. 2007, c.19 (assented to 2007-06-22) at http://laws.justice.gc.ca/eng/AnnualStatutes/2007_19/page-1.html
[16] Canadian Fertilizer Institute (2010), *Submission to the Rail Service Review Panel*, op. cit., p. 10.
[17] Department of Justice (2008), *An Act to amend the Canada Transportation Act (railway transportation,)*op. cit.
[18] Canadian Fertilizer Institute (2010), *Submission to the Rail Service Review Panel*, op.cit., pp. 11-12.
[19] CPCS Transcom Limited (2009), *Service Issues in Regulated Industries Other than Canadian Freight Rail Industry*, op. cit., pp. 8-9. See also Transport Canada (2011b), *Rail Freight Service Review Final Report*,op. cit., pp. 9 and 32.
[20] Ibid., p. 40.
[21] CPCS Transcom Limited (2009), *Service Issues in Regulated Industries Other than Canadian Freight Rail Industry*, op. cit., p. 40.