COMMERCIAL DISPUTE RESOLUTION BETWEEN RAILWAYS AND SHIPPERS IN CANADA

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The economic regulation of freight railways in Canada has been in place for decades. More recently, the focus of such regulation has been on legislative remedies to provide a measure of protection to shippers – Final Offer Arbitration (FOA) of freight rates, Competitive Line Rates, Interswitching Regulations, and a review process by the Canadian Transportation Agency under Level of Service provisions to consider whether a railway is fulfilling its service obligations.

There has been a general shift in legislative circles towards alternative dispute resolution mechanisms such as mediation and arbitration as a means to avoid costly and lengthy legal cases. This paper will consider the development of a new Commercial Dispute Resolution mechanism to settle disputes between railways and shippers in Canada, as a means of developing a more effective and cooperative relationship between railways and shippers over the long term.

I VOLUNTARY MEDIATION

In response to a government-wide initiative supported by Justice Canada — the Canadian Transportation Agency (Agency) officially launched in 2000 a Mediation Pilot Project in their Rail and Marine Branches. Since that time, the Agency has provided mediation services to parties upon request. Mediation can be used to resolve

disputes in various transportation modes, for issues encompassing the Agency's formal mandate and its areas of expertise. The Agency's goal in offering mediation is to facilitate dispute resolution by providing parties with an effective alternative to the more formal processes.

Mediation is a voluntary, informal and collaborative process for solving problems. This process helps parties jointly make decisions about ways to address the issues in dispute, so that they can negotiate a mutually beneficial settlement. The parties to the mediation ultimately determine the outcome. Mediation is a flexible tool that enables parties to collaboratively develop a solution that meets their needs and that might not be available under the adjudicative process.

Mediation provides parties with a dispute resolution process that is:

1. inexpensive
2. quick
3. voluntary
4. collaborative
5. flexible
6. effective

Mediators are members or staff of the Agency trained in mediation and experienced in the transport sector. The mediator's role is to centre discussions on interests, not positions, so that parties may negotiate a mutually beneficial settlement. The mediator keeps the discussion focused and improves the lines of communication. The mediator also provides feedback on ideas generated and encourages parties to fully examine all options presented.

Note that the parties must agree in writing beforehand that all information disclosed will remain confidential; this allows parties to openly express their views. Measures are put in place to ensure that all material presented remains confidential. If there is no settlement and the matter is referred back to the Agency, the mediator cannot

discuss any part of the file with his or her colleagues and will be excluded from the case if it goes before the Agency.

Since 2000, requests for rail mediation have come from municipalities, shippers, producers, provincial ministries, provincial utilities, main-line, short-line and commuter railways, ship owners and private individuals. In 2004, a successfully mediated resolution to a level of service dispute between a shippers' group and a major carrier occurred, and the first request for mediation initiated by a major carrier was received. Telephone mediation was also used for the first time.

Issues mediated have included rail yard noise and disturbance, crossing and fencing issues, rates, level of service – such as product loss and delayed delivery – and commuter rail and rail infrastructure issues – such as crossing entitlements, maintenance, repair, construction, cost apportionment and funding agreements.

Overall, there have been some 60 requests for rail mediation between 2000 and 2005, and more than one-third have resulted in a successful settlement. Moreover, there is an increasing trend toward successful settlement, as the promotion of mediation by the Agency begins to reduce the number of parties refusing to participate at the outset.

The outlook for mediation is very good, as reported recently in *The Economist*[1]:

> *"According to the London-based Centre for Effective Dispute Resolution, one of Europe's biggest mediation bodies, of the 3,000 or so commercial disputes that are subjected to mediation in London every year around 70-80% reach a settlement within one or two days, with a further 10-15% settling a few weeks later…For those cynical lawyers whose income depends on stoking their clients' outraged intransigence, the growth in mediation may prove to be the*

[1] *The Economist*, February 3, 2007.

end of a lucrative era."

II COMMERCIAL DISPUTE RESOLUTION OF RAIL MATTERS IN THE US

A commercial dispute-resolution mechanism is already available in the US for disputes between railroads and members of the National Grain and Feed Association (NGFA). There are in fact two distinct NGFA processes, Rail Mediation and Rail Arbitration, and each will be summarized in turn

2.1 Rail Mediation

Rail Mediation Rules were adopted by the American Association of Railroads (AAR) and the NGFA in 1998 and may be summarized as follows:

- Railroads are voluntary participants and may withdraw on 90 days notice;
- Mediation covers disputes arising from the rail transportation of specifically designated agricultural commodities;
- The disputes at issue involve an allegation
    1. Of unreasonable discrimination by a railroad as to rates charged a shipper for rail transportation; or
    2. That switching rates, rules or practices of railroads unreasonably bar access of a shipper to markets.
- The usual rules regarding mediation apply: confidential, non-binding, no time limits, and mediators cannot be involved in any subsequent proceedings.

The over-riding observation regarding NGFA Mediation is that it applies only to a limited range of rail rates, and not to rail service.

2.2 Rail Arbitration

Rail Arbitration Rules were also adopted by the AAR and the NGFA in 1998. The Rules, that are enforceable under the Federal Arbitration Act, themselves state that:

> *"Rail Arbitration is not intended to replace the private negotiation and resolution of disputes by parties. In all cases, rail users and railroads are encouraged to make reasonable efforts to resolve matters before pursuing formal dispute resolution procedures"*

The Rules were developed from the more general Arbitration Rules of the NGFA, which have been in effect for decades and are applicable to disputes among its members, and cover the following rail disputes:

> *(1) disputes involving the application of a railroad's demurrage rule(s) or term(s);*
>
> *(2) disputes involving the misrouting of loaded rail cars or locomotives;*
>
> *(3) disputes arising under receipts and bills of lading governed by 49 U.S.C. § 11706 (e.g., Carmack disputes such as loss and damage claims, etc.);*
>
> *(4) except as otherwise mutually agreed, disputes arising from a contract between the parties for transportation between one or more rail carriers with one or more purchasers of rail services that has become effective under 49 U.S.C. § 10709 – confidential contracts;*

(5) disputes involving the application of a railroad's special car or equipment program rules (e.g., certificates of transportation, vouchers, pool contracts, etc.);

(6) disputes involving the application of a railroad's general car distribution rules;

(7) disputes involving the mishandling of private cars or locomotives;

(8) disputes involving a lease by a rail user of real property owned by a railroad or railroad affiliate;

(9) disputes involving property damage claims arising under or related to a rail sidetrack agreement;

10(A) Except as provided in (B), specific railroad-rail user disputes involving the reasonableness of a railroad's published rules and practices as applied in the particular circumstances of the dispute on matters related to transportation or service (including demurrage), that otherwise would be subject to the unreasonable practice jurisdiction of the STB under Title 49 U.S.C. § 10702(2);

(B) Disputes involving the following are not subject to arbitration hereunder: (i) a railroad's rates or charges, including rate levels and rate spreads, (ii) whether an industry or station is or should be open or closed to reciprocal switching, (iii) a railroad's credit terms, or (iv) a railroad's car allocation/distribution rules or practices.

The Rail Arbitration Rules cover disputes involving the same specifically designated agricultural commodities as in the case of Rail Mediation, and provide for compulsory arbitration between railroads and NGFA members who elect to be parties to the agreement between the AAR and the NGFA – currently all US Class 1 railroads and some shortlines are parties to the agreement.

Decisions of the Arbitrators are binding on the parties. To be clear, being a party to Rail Arbitration is voluntary, but once a railroad is a party to Rail Arbitration then arbitration is compulsory and any decisions are binding.

The process and administrative procedures are complicated but they can be briefly summarized as follows:

1. Both parties to the dispute must sign a "Contract for Arbitration" whereby they agree to adhere to the arbitration decision;

2. After the filing of a complaint by a plaintiff with the National Secretary of the NGFA requesting arbitration, a period totaling 85 days is allowed for the filing of evidence, rebuttals etc;

3. A defendant may file a counter-claim or cross-complaint to the complaint of the plaintiff, but the counter-claim or cross-complaint must be directly related to the original complaint;

4. After the written evidence has been assembled, the National Secretary assigns the dispute to a National Arbitration Committee (NAC);

5. A NAC consists of three persons drawn from firms eligible for membership in the NGFA;

6. A NAC may decide the case on the basis of the written evidence or hold a hearing (an oral hearing is mandatory if a party requests one);

7. The decision of a NAC is by majority vote;

8. A NAC "shall act promptly on all cases submitted", but there is not a prescribed time period for it to reach a decision;

9. Appeals from a decision of a NAC may be lodged with an Arbitration Appeals Committee consisting of five members; and

10. The National Secretary of the NGFA is the administrator of the arbitration procedure.

According to the NGFA website, there have been just five rail arbitrations in total since 1998.

At time of writing, it appears that the National Industrial Transportation League (NITL) may be attempting to negotiate a tri-partite agreement with the AAR and the American Shortline and Regional Railroad Association (ASLRRA) that would include, in part, alternative dispute resolution – mediation or arbitration – for selected service and rate disputes.

III DEVELOPMENTS IN CANADA

In 2001 the Canada Transportation Act Review Panel issued its final report, and it had many comments to make about rail shipper protections in Canada including:

> *"On balance, the Panel is satisfied that the FOA provisions, including the new simplified process for lower-value disputes, adequately address the problem of carrier dominance and potential abuse in a way that is fair to both shippers and carriers. Rail shippers have found FOA effective in obtaining relief, and the process is generally working well and as intended*
>
> *In the Panel's view, expanding the interswitching limits would worsen the market-distorting aspects of the interswitching*

rate regime and would be a step backward"

In addition, the government in 2003 in its transportation policy statement *StraightAhead* stated that:

> *"the current level of service provisions are working well and the government proposes to retain them"*

Despite these conclusions, shipper interests approached the government in early 2006, among other items, to expand the FOA provisions, extend the regulated interswitching limits, and amend the level of service provisions. The railways expressed serious concern about those proposals and subsequently the Minister of Transport wrote to the railways and the shipper interests indicating that the government is *"seeking ideas about commercial solutions that could achieve a compromise among all parties concerned"*.

In response, CP and CN developed jointly a commercial dispute resolution process, consulted with selected shippers and shipper associations, and have each made available a process that may be accessed through their respective websites. The two processes are nearly, but not quite identical, and so what follows refers to the commercial dispute resolution process (CDR) available at CP.

The process may be accessed by any customer by signing an "Agreement for the Commercial Resolution of Disputes" that may be seen at www.cpr.ca/English/Customers/Existing+Customers/CDR

The Agreement applies to disputes involving:

- The linehaul rates for the movement of goods by rail that could be the subject of a final offer arbitration proceeding pursuant to section 161 of the *Canada Transportation Act*;

- Whether CP has failed to provide the level of service to the customer as contemplated by sections 113 to 115 of the *Canada Transportation Act*;

- The interpretation and application of the terms of railway tariffs for the provision of the incidental services set out in an Appendix[2] to the Agreement.

In particular, the disputes apply only in respect of traffic that originates and terminates in Canada, and for which the parties have not otherwise provided a dispute resolution mechanism – such as specified in a confidential contract.

The CDR process set out in the Agreement is a two-step confidential process with the first step being mandatory mediation and the second step binding commercial arbitration.

3.1 Mandatory mediation

a) Prior to initiating any other recourse in connection with any dispute the parties agree to enter into mediation with the objective of reaching a consensual, voluntary resolution of their dispute;

b) The mediation shall be carried out in accordance with and pursuant to the mediation process established by the Canadian Transportation Agency;

c) The timeline for completion of the mediation will be fifteen (15) working days from the date of the appointment of the mediator by the Agency and the mediation session shall not exceed five (5) days unless otherwise agreed by the parties;

[2] The listed incidental services include items such as demurrage, CP guaranteed car order program, manual transaction fees, and intraplant switching at customer site. Note that the railways have proposed to the federal government that the rates and conditions relating to these incidental services be subject to a request for review and determination by the Agency.

d) The mediation shall be held at a location agreed to by the parties or, failing agreement, at a place designated by the Agency;

e) Each party will be responsible for its own costs and both parties will share equally in the costs of, and the services provided by, the mediator.

In the event that the dispute is not fully resolved at the end of the mediation process, the customer may elect to :

- Exercise any recourse the customer may have available to it at law, including recourse pursuant to the *Canada Transportation Act;* or

- Submit the matter to binding arbitration.

3.2 Binding arbitration

a) If a specific list of potential arbitrators and a process for appointing a person from that list has been agreed to between CP and the customer or designate of customer then the arbitration shall commence by filing a submission for arbitration in accordance with the agreed-to process. The application shall clearly define the dispute, the parties involved and the relief sought. In such case, the arbitration shall be held in a location agreed to by the parties;

b) If the parties have not agreed to a list of potential arbitrators and a process for selecting a person from that list then the arbitration shall commence by application to the Agency by the customer. The application shall clearly define the dispute, the parties involved and the relief sought. Upon application, the Agency may appoint an arbitrator from among the Agency members, staff or an Agency list of acceptable arbitrators. In such case, the arbitration shall be held at a location to be

agreed to by the parties or, failing agreement, at a location designated by the Agency;

c) Each party will be responsible for its own costs and both parties will share equally in the costs of, and the services provided by the arbitrator;

d) Unless otherwise agreed by the parties, the award of the arbitrator in respect of a dispute concerning linehaul rates or service shall become part of a confidential contract between the parties;

e) The arbitration will be subject to timelines for completion and be carried out in accordance with the Rules attached as an Appendix[3] to the Agreement.

The Agreement also specifies some directions and guidelines for arbitrators.

Linehaul Rate Disputes

- Prior to making a determination on linehaul rates, the arbitrator shall consider whether the customer has the choice of another railway, either through direct physical connection or through traffic solicitation rights by agreement between the railways or interswitching. In such event, the arbitrator shall select CP's proposed rates in respect of the dispute;

- The arbitrator may select the rate proposed by CP or by the customer or choose to establish a rate between the rate proposed by CP and the customer;

[3] The Rules for Arbitration were developed from Rules originally established by ADR Chambers, a Canadian alternative dispute resolution group.

- In choosing or establishing the rate, the arbitrator shall consider the reasonableness of the proposed rates in relation to the market conditions. For greater clarity the market conditions do not include the customer's manufacturing costs;

- The award shall apply for a one-year period from the date of the application unless the customer has specified in its application that it request the award to be applicable for a two-year period.

Level of Service Matters

- In determining a complaint regarding level of service, the arbitrator shall consider whether the customer is requesting a service covered by CP common carrier obligation, as provided for in sections 113 to 115 of the *Canada Transportation Act* or a service over and above such obligation. The jurisdiction of the arbitrator shall be limited to level of service disputes that would be covered by sections 113 to 115 of the *Canada Transportation Act*. The arbitrator, in resolving a level of service dispute may determine what is an adequate and suitable level of service and determine whether CP is providing an adequate and suitable level of service;

- The award shall apply for a period of one year from the date of the application.

Application of Tariff for Incidental Services

- In determining the correctness of the application of the various incidental service tariff items, the arbitrator shall base the award on the facts presented and be guided by the wording of the tariff items and cannot amend the tariff rates nor the tariff conditions;

- The award shall apply for the period under dispute.

IV COMMENTARY

It is too early to say whether the CDR process available at CP will become widely used by customers. However, alternative dispute resolution mechanisms are much more in vogue in legal circles, and the CDR process does offer the possibility of developing a more effective and cooperative relationship between railways and shippers over the long term.

In particular, the principles upon which the CDR process is based:

- Options sought that recognize business realities and include input from both parties;

- Prompt commencement and conclusion;

- Low cost option for customers who sign-up;

- Mandatory mediation with the option for the customer to follow with either binding Commercial Arbitration, or existing *CTA* remedies;

- Arbitration decisions can be a compromise; and

- A process that promotes understanding of respective points of view;

may be especially attractive to smaller customers.