UNDERSTANDING "REASONABLENESS" IN RAIL LEVEL-OF-SERVICE DISPUTES

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Introduction

This paper reports on work undertaken for the Canadian Transportation Agency (the Agency), to identify and synthesize the various factors and supporting information that are considered in rendering decisions in rail level-of-service (LOS) disputes.

Federally licensed railways have statutory LOS obligations, defined in sections 113-115 of the *Canada Transportation Act* (the CTA). They include providing "…adequate and suitable accommodation for…all traffic offered for carriage…." and stem from rail carriers' historic common carrier obligations. The CTA, in section 116, also allows a shipper dissatisfied with the level-of-service received to file a complaint, requesting the Agency to order the railway to fulfill its LOS obligations and how that is to be done.[1] In rendering these decisions, the Agency applies the long-accepted criterion of "reasonableness" as established by the Supreme Court of Canada in 1959.[2] This paper elucidates on how "reasonableness" has been applied in the context of rail LOS disputes.

The work reported here is based on carrying out a detailed examination of the past decisions rendered by the regulatory authorities and appellate courts in rail LOS dispute cases.

The paper proceeds as follows: the first section and the Appendix provide a summary of the decisions reviewed. The second section identifies and attempts to synthesize the numerous factors considered in assessing reasonableness. The information required to render a

LOS determination is discussed in the third (general information) and fourth sections (case specific information), followed by the Conclusion.

Agency Cases and Decisions Reviewed

For purposes of this study, we reviewed all decisions of the Agency, and its predecessor the National Transportation Agency (NTA), relating to railway LOS obligations that may be found on the Agency's website, as well as the decisions rendered by the appellate courts where these cases were appealed. These decisions date from 1988.

Appendix A contains a summary of the Agency/NTA decisions that we found to be relevant and important. (As the court cases happened to be about questions of law or jurisdiction rather than substantive issues we do not include them here.) The main subjects at issue are:

Table 1. Tabulation of Main Issues in Agency/NTA Rail LOS Cases*

Main Subjects at Issue in Cases Summarized in Appendix A	Number of Cases Where:		Total Cases
	No Breach of Obligations Found	Obligations Found to be Breached	
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	0	2
Frequency of service	1	1	2
Claim of discrimination	0	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.
Source: Appendix A, Table A-1

Factors Considered in Assessing Reasonableness

Based on our review of the decisions listed in Appendix A, we have identified the following as the factors that have been considered by the Agency/NTA in determining what constitutes reasonable service and whether a railway company is fulfilling its LOS obligations in a reasonable manner:

- the interests of the railway company and those of the complainant must be balanced;
- in seeking to improve its operating and/or financial performance, a railway company cannot impose burdens on a complainant; however, the effect a complainant's request will have on the railway company's operations cannot be ignored;
- each complainant has its own particular needs;
- a railway company is not permitted to discriminate against a shipper, notably on the basis of shipper's size or type of traffic;
- a railway company's service obligations entail the provision of suitable and adequate service on which a shipper may rely, both in terms of price and supply; however a railway company is not, for example, bound to furnish cars at all times sufficient to meet all demands, since the service must be sustainable;
- the notion of adequate service requires the railway company be proactive in working to enhance performance of the full logistics chain; that said, a railway company can be excused from providing what would normally be suitable and adequate service when there are extenuating factors preventing it from doing so;
- a railway company's breach of its service obligations will be analysed in terms of its impact on the complainant; the captivity of the complainant, if it is a shipper, makes the impact of any breach by the railway company all the more serious
- what, if any, alternatives have been offered by the railway company to the complainant to reduce the impact of a loss or diminution in services and whether these alternatives are

themselves reasonable; the exercise by a railway company of its legal rights under the CTA, such as delisting a siding, does not relieve it of its obligations to provide a complainant with a reasonable alternative; and

- is the complainant fulfilling its own obligations, including providing reasonable means of access to his premises, adequate facilities in relation to the service requested, and paying reasonable charges, if he is a shipper.

Information Required to Render a LOS Decision – General

We have also considered the matter of the information needed by the regulatory authorities to render a LOS determination. As provided in the Agency's *General Rules*, a complaint is required to contain:

- the full name, address, telephone number and any other telecommunications numbers of the complainant or its representative;
- a clear and concise statement of the relevant facts, the grounds for the complaint, the provisions of the CTA or any regulations made under the CTA under which the complaint is made, the nature of, and the justification for, the relief sought and any request for costs; and
- any other information or documentation relevant to explaining or supporting the complaint or that may be required by the Agency or under the CTA.

Clearly, a shipper has broad discretion to determine what information to provide in support of their complaint. At a minimum, the complainant must establish that the demand for carriage is required and explain how the railway fell short in meeting its service obligations.

As provided in the *General Rules*, a railway company, upon being served a copy of the complaint, may answer or oppose the complaint by filing with the Agency a written answer that includes an admission or denial of any facts alleged in the complaint and any documents that are relevant in explaining or supporting the answer. It is up to the railway company opposing the complaint, to explain and justify how

the service provided or offered was reasonable in the circumstances. On this issue, the burden of proof falls on the railway company.

Both the complainant and the railway company are responsible for presenting evidence to support their position before the Agency. Obviously, it is best if the information brought before the Agency is specific, substantiated and complete.

Information Required – Specific

In addition to the information requirements outlined in the *General Rules*, our review of decisions has highlighted specific information required by the regulator to render a LOS determination.

To begin with, two discrete matters clearly stand out. These are:

- ***Captivity*** – Captivity, as noted above, is an important factor in assessing reasonableness, and has grown more important as Canada's transportation policy has become more reliant on commercial negotiations and market forces. We note, however, that defining and assessing captivity is a challenging matter with a long history.
- ***Discrimination*** – Determining if a railway company is engaging in discrimination is also an important factor. It is therefore often necessary for the Agency to examine evidence as to whether a railway company has discriminated against a complainant by examining how parties in a similar position to the complainant are being treated.

We have also determined, from the cases reviewed, information requirements based on the type of complaint as shown in Table 1 above. These are as follows:

Refusal to serve **–** The alleged failures in these six cases cover a wide range including refusal to interswitch, to provide facilities for unloading, to serve the complainant's facility, to provide a rail spur connection, or to spot marine containers at the complainant's facility. The Agency in these cases was obliged to consider evidence relating to such matters as:

- whether regulated interswitching applied at the location;
- the circumstances and specifics of the particular unloading process and the roles of the railway and shipper;
- whether the complainant had standing to determine the routing;
- whether there was evidence of actual traffic being offered for carriage;
- whether the railway provided adequate service at an alternative location; and
- the competitive challenges faced, respectively, by the railway and the shipper.

Withdrawal of service – Of these six cases, five deal with eliminating service at grain producer car loading sites and one deals with closing an intermodal facility. Taken together, the Agency in these cases needed to examine evidence relating to:

- whether the alternatives offered or available were adequate;
- whether the railway was acting in the ordinary course of business or arbitrarily denying service;
- whether the railway was discriminating against one type of shipper;
- the impact on the railway of continuing service at the particular site(s); and
- whether the amount of traffic offered at the site(s) constituted a reasonable demand.

Rationing of car supply – The cases in these instances all deal with grain or specialty crops. Overall, the evidence required included a number of metrics as well as other information:

- the numbers of cars requested versus those supplied;
- the timeliness of the cars supplied;
- the predictability or variance in the numbers of cars supplied;
- the condition of the cars supplied;
- the numbers and dwell times of the cars sitting at the shipper's location; and

- whether extenuating circumstances (such as weather issues) necessitated the car rationing.

While the metrics above can be identified as having been required for deciding issues of car supply, we cannot specify *a priori* the acceptable benchmarks for these metrics (such as the appropriate percentage of cars supplied relative to those requested). That is something that can only be determined from the facts in each case.

In one case, the Agency found the railway failed to supply all the cars promised in a formal contract, and was therefore in breach of its LOS obligations.

***Loaded cars not delivered as agreed* –** Here, there were two cases. In both the role of extenuating circumstances as cited by the railway was a key consideration.

In one case, these circumstances included:

- delays due to customs clearance,
- the need to lower the gross weight of freight cars, and
- the lack of crew availability;

The other case, a major one involving grain, the railway blamed the "winter from hell." Here, the evidence examined included:

- the railway's deliveries relative to agreed upon targets,
- the railway's planning for winter,
- the weather itself, and
- the weather's impact on rail operations and the railway's response for managing this.

While the Agency found the severe weather to be a valid reason for the shortfall in deliveries, the railway was still found to have breached its obligations (specifically on deliveries to the West Coast) due to discrimination as outlined below.

***Frequency of service* –** In two cases the main issue is service frequency or change in frequency and its impact. Taken together, the information required included:

- the complainant's required traffic level,
- the complainant's capacity to receive cars,
- whether the complainant was forced to improve its receiving capacity,
- whether the complainant was forced to incur demurrage or supplemental freight charges and the effect of these,
- the complainant's past traffic levels and service frequency received, and
- the service received by the complainant's competitors.

***Claim of discrimination* –** Two of the cases in Appendix C explicitly allege discrimination. In one, where the railway withdrew its service to the complainants (grain producers) at the sites in question, the Agency noted that the railway continued to serve other commodities (woodpulp) at these locations.

In the other case, involving the "winter from hell," the railway was also found to have discriminated against grain in favour of other bulk commodities. Here, the data required included:

- the railway's performance both during the weeks affected by the extreme weather and during the recovery period,
- the performance by train type to determine if there was inconsistency of treatment, and
- whether any difference in treatment was due to the greater complexity of the grain logistics system versus other bulk commodities.

***Refusal to route as requested* –** Refusal to route traffic as requested and interchange with a second railway was the main issue in one case. The only quantitative evidence considered was whether interchange could and did occur at the requested location. Apart from this, the railway's actions were simply found to be in conflict with the provisions of the NTA, 1987, specifically:

- the declaration of National Transportation Policy,
- the intent of the legislation as provided for by the provisions designed to encourage competition, and
- the statutory LOS obligations relating specifically to the transfer of traffic between railways.

Conclusion

This paper has sought to clarify the idea of "reasonableness" as it has been applied in the context of rail LOS disputes brought under section 116 of the CTA. Through an extensive review of past decisions rendered, we have tried to identify and synthesize the various factors and supporting information considered in determining whether a railway company is providing service in a reasonable manner and is thus fulfilling, or is in breach of, its statutory LOS obligations. To the extent that we have succeeded, shippers and railways should be able to better understand, and perhaps be better able to predict, how the Agency will determine that in one case a railway has met its LOS obligations and in another that it has not.

Looking back, however, at the wide variety of factors necessarily considered and information required by the Agency in making rail LOS determinations, the main lesson appears to be that generalizing about what constitutes "reasonable" service is very difficult. Chances are, situations will arise that involve circumstances not previously encountered.

A good illustration is the Agency's decision of July 2011, in a complaint brought by Wilkinson Steel and Metals Inc. against CN,[3] and which is currently before the Federal Court of Appeal.[4] This is the one decision issued after our work had been completed and it is therefore not covered in our survey. In this instance, the Agency concluded that CN, by not continuing to provide service to Wilkinson, which it had been doing continuously since 1965, was in breach of its LOS obligations. The main consideration that tipped the scale had to do with the failure of CN to share certain non-confidential information. This is not a consideration that we encountered in any of the preceding cases reviewed for this study.

According to the Agency, CN should have shared this information with Wilkinson but did not, and it was only with this that Wilkinson could have reasonably resolved or avoided the situation leading to its complaint.

Appendix A: Summary of Agency/NTA Decisions in Rail LOS Complaints

For purposes of this study, we reviewed all decisions of the Agency, or its predecessor the National Transportation Agency, relating to the railways' LOS obligations that may be found on the Agency's website, as well as those decisions rendered by the courts where cases were appealed. These decisions date from 1988. Table A1 lists those decisions which we found to be relevant, for example we excluded cases dealing with passenger transportation.

In reviewing the decisions, we have been concerned only with the matters related to determining whether or not there was a breach by the railway in question of its LOS obligations. Other issues that might have been raised in a given case and their related matters were not of concern. This includes questions of law or jurisdiction, such as whether the complainant has standing to complain, as well as the "reasonableness" of any remedies that may have been ordered by the regulator in cases where a breach was found to exist.

The decisions are listed below in chronological order beginning with the most recent. The basic facts of the cases are also given.

Table A1. Agency/NTA Decisions Reviewed

Decision No./Date	Complainant(s) / Business	Rail-way	Main Complaint Issue(s)	Agency's Finding
331-R-2010 Aug. 4, 2010	Mr. Cameron Goff / grain producer	CN	Withdrawal of service (delisting of producer car loading site)	No breach of obliga-tions
42-R-2010 Feb. 9, 2010	Western Grain Trade Ltd./ specialty crop processor	CN	Rationing of car supply (fewer cars supplied than ordered)	No breach of obliga-tions

166-R-2009 Apr. 3, 2009	Northgate Terminals Ltd./ forest products transloader	CN	Frequency of service (reduction of deliveries to 1 per day at standard rates from 2 per day)	Obliga-tions breached
155-R-2009 Apr. 2, 2009	Central Alberta Transloading Terminals Ltd./ grain products transloader	CP	Frequency of service (complaint alleges service frequency is inadequate)	No breach of obliga-tions
488-R-2008 Sept. 5, 2008	CWB et al./ grain marketers; inland terminal operators	CN	Rationing of car supply (cars supplied fewer and later than ordered)	Obliga-tions breached
442-R-2008 Aug. 8, 2008	Trackside Holdings Ltd. / Industrial park developer	CN	Refusal to serve (refused to provide rail spur connection)	No breach of obliga-tions
344-R-2007 Jul. 6, 2007	Great Northern Grain Terminals Ltd. / inland terminal operator	CN	Rationing of car supply (new policies left GNG with insufficient cars)	Obliga-tions breached
97-R-2006 Feb. 21, 2006	Ville de Lévis, QC	CN	Refusal to serve (refused to provide suitable facilities for unloading)	No breach of obliga-tions
472-R-2003 Aug. 14, 2003	Montreal, Maine & Atlantic Railway Ltd. / short line operator	CN	Refusal to serve (refused to interswitch potash traffic)	No breach of obliga-tions
323-R-2002 Jun. 11, 2002	Naber Seed & Grain Co. Ltd./ specialty crop processor	CN	Rationing of car supply (fewer cars supplied than required, in part due to arbitrary deadline)	Obliga-tions breached

282-R-2001 May 9, 2001	Naber Seed & Grain Co. Ltd./ specialty crop processor	CN	Rationing of car supply (fewer cars supplied than required; irregular deliveries)	Obliga-tions breached
715-R-2000 Nov. 15, 2000	Scotia Terminals Ltd./ marine con-tainer terminal operator	CN	Refusal to serve (refused to provide service to complainant's facility)	No breach of obliga-tions
475-R-1998 Sept. 30, 1998	CWB / federal grain marketing agency	CP	(a) Loaded cars not delivered as agreed (failure to meet unload guidelines in CAPG regulated corridors; failure to meet Winter Rail Program targets); (b) Discrimination (grain treated differently from other bulk commo-dities in deliveries to West Coast); (c) Rationing of car supply (failure to supply cars as agreed for moving CWB grain to US)	Obliga-tions breached with respect to: (b) Discri-mination and (c) Rationing of car supply (breached formal contract)
59-R-1997 Feb. 12, 1997	Lethbridge Chamber of Commerce	CP	Withdrawal of service (closure of intermodal facility)	No breach of obliga-tions
489-R-1992 Aug. 3, 1992	Mr. Louis Hebert / grain producer	CN	Withdrawal of service (service eliminated at producer car loading site)	Obliga-tions breached

478-R-1992 Jul. 28, 1992	Terry Shewchuk et al./ grain producers	CN	(a) Withdrawal of service (producer car loading eliminated at two sites); (b) Discrimination (grain being treated differently from woodpulp at the locations)	Obligations breached
459-R-1992 Jul. 17, 1992	Mr. Walter Kolisnyk / grain producer	CN	Withdrawal of service (removal of producer car loading siding)	No breach of obligations
347-R-1991 Jun. 28, 1991	Mr. Lorne Sheppard / grain producer	CN	Withdrawal of service (producer car loading siding abandoned)	No breach of obligations
209-R-1990 Apr. 11, 1990	Rochevert Inc./ serves customers that supply supermarkets	CN	Loaded cars not delivered as agreed (Rochevert not receiving deliveries as per agreement)	No breach of obligations
411-R-1989 Aug. 11, 1989	Prairie Malt Ltd. / barley malt exporter	CN	Refusal to serve (refused to spot marine containers at complainant's facility)	No breach of obligations
213-R-1989 Apr. 28, 1989	Commonwealth Plywood Cie Ltée	CP	Refusal to serve (refused to provide service to complainant's facility)	No breach of obligations
135-R-1988 Jun. 1, 1988	Cargill Ltd. / grain marketer	CP	Refusal to route as requested (refused to interchange with CN at Thunder Bay)	Obligations breached

Endnotes

[1] A detailed description of the LOS obligations of Canadian federal railways and the associated statutory remedies as found in sections 113-116 of the *Canada Transportation Act,* and their legal history, may be found in CPCS (August 31, 2009), *Service Issues in Regulated Industries Other than Canadian Rail Freight Industry*, Appendix A, prepared for Transport Canada as part of the Rail Freight Service Review and available at http://www.cpcstrans.com/projects/CPCS Rail Review ENG.pdf.

[2] In 1959, the Supreme Court of Canada held that a railway company's level of service obligation is not absolute, that it is qualified by "a characteristic of reasonableness" and depends on all the circumstances. The decision was in respect of *A.L. Patchett & Sons Ltd. v. Pacific Great Eastern Railway Co*. (Patchett). While at issue in Patchett were the provisions of the *British Columbia Railway Act,* R.S.B.C., 1996, c. 36, its provisions regarding level of service are essentially the same as the obligations imposed under the CTA. The Agency continues to rely on Patchett to this day. See CPCS (August 31, 2009), Appendix B for some of the decisions of the Agency (and of its predecessors) with respect to the "reasonableness" of the obligations imposed upon a railway company under (what are now) sections 113-115 of the CTA and those bodies continuing reliance on the Patchett case.

[3] Canadian Transportation Agency (July 17, 2012), *Decision No. 285-R-2012, APPLICATION by Wilkinson Steel and Metals Inc. pursuant to sections 26, 37, and 113 to 116 of the* Canada Transportation Act*,* S.C., 1996, c. 10, *as amended*, at https://www.otc-cta.gc.ca/eng/ruling/285-r-2012

[4] Canadian Transportation Agency, *Cases in which an appeal or application for judicial review is before the Court* at https://www.otc-cta.gc.ca/eng/cases-which-appeal-or-application-judicial-review-courts (accessed February 28, 2013).