



Submission to
Rail Freight Service Review Panel

April 30, 2010

The Canadian Canola Growers Association is pleased to have the opportunity to offer the following comments for consideration by the Rail Freight Service Review Panel.

CCGA represents 52,000 canola farmers on national and international issues and policies that affect the profitability of canola growers. With the majority of canola grown in Canada being shipped to export market by rail, canola growers rely heavily on the service of Canada's railways to market their grain. Our industry's competitiveness in the global marketplace is dependent on the railways providing timely and efficient service to Canadian agriculture.

As was highlighted by several of the consultants' studies conducted in Phase I of the Rail Freight Service Review, the level of service currently received in Canada is a significant concern for shippers in general, but for grain shippers in particular. A lack of balanced accountability in the system is often noted as the root of these chronic service issues.

In a normal functioning market, competition facilitates accountability and is the remedy for service concerns. However, in the absence of significant and meaningful railway competition in Canada, CCGA proposes that the only option is to enforce balanced accountability through legislation, and to effectively enforce the level of service that a competitive market would provide.

Clearly Define the Service Standard

The first step in improving service is ensuring that the definition of the service standard to which the railways are to be accountable is written in manner that provides clarity to all stakeholders. In any business relationship, it is critical that the parties involved understand clearly what standards they are accountable to, and what standards they can hold the other party accountable to.

The Canada Transportation Act states that the railways must provide "*adequate and suitable accommodation*" of traffic. The vagueness of this definition makes it difficult for either side to prove or defend their case in a Level of Service complaint. As a result, this complaint process tends to be long and drawn-out, and requires extensive time and money to follow it through to completion as the parties must prove their case in the context of this loose definition of service. The investment required in

launching a Level of Service complaint is a significant deterrent for many shippers to utilize this tool provided for in the Act.

Improving the definition of the service standard definition in the CTA to provide clarity and leave little room for interpretation or debate would increase accountability in our rail system. A more specific and detailed definition should improve the accessibility and efficacy of the Level of Service complaint process by reducing the uncertainty involved in and costs barriers associated with launching a complaint.

In addition, CCGA proposes that the Canadian Transportation Agency be empowered to award financial damages (both cost-related and punitive in nature) in the context of Level of Service complaints. This provision would be used if the railways chose to ignore the spirit of any legislative or regulatory amendments aimed at encouraging market signals to resolve rail freight service issues in the grain industry. The ability of the Agency to award financial damages would provide shippers with a method to seek financial compensation for the broader systemic issues that would not be captured by the arbitration process proposed later in this submission.

CCGA further proposes that any financial damages assessed by the CTA should not be included in any calculations related to the grain revenue cap as that would significantly reduce the effectiveness of this provision.

Linking Penalties to Rail Service

In a functioning competitive market, balanced contracts and low enforcement costs are critical. Parties must be able to hold each other responsible for lack of performance, and have the situation remedied in a predictable and effective compensatory manner.

In the Canadian rail system, the railways have established loading and unloading performance benchmarks that grain shippers are financially accountable to through the use of penalties. These penalties have been quite effective in holding grain shippers accountable for their performance.

However, on the reciprocal side, the railways are not subject to the same types of penalties for providing poor service once they have committed to spot cars. This creates a very unbalanced system that does not provide the railways with adequate incentive to meet service obligations and promotes an adversarial environment between shippers and railways.

Performance measurements should be established for the railways that are as well-defined and measurable as they are for grain shippers. CCGA proposes that, through legislation/regulations, the railways be subject to performance penalties in circumstances where they have failed to perform.

Failure to perform can be defined as:

1. Failing to deliver cars on time as committed to; or,
2. Failing to arrive at destination within a specific period of time.

The specific circumstances under which penalties would apply would need to be clearly defined. Then these performance standards could be included as part of a contractual obligation within the railway tariff. Other agreed-upon terms could also be included with this type of contractual obligation, thereby providing both parties with a firm and binding commercial commitment as they would have in any other normal business relationship.

CCGA also proposes that any penalties assessed against the railways for failure to perform should not be included in any calculations related to the revenue cap. This would provide an un-muddled incentive for the railways to meet committed-to service levels.

Fast-Tracked Arbitration

As explained above, Level of Service complaints require significant financial and human resource commitments on the part of the shipper launching the complaint. This is often a significant deterrent to employing this process. In fact, the Survey of Shippers reported only 7% of shippers felt that there were strong measures in place to hold the railways accountable for their performance. Almost half (48%) of grain shippers felt there were no effective measures in place to hold the railways accountable.

CCGA proposes that when shippers and railways agree upon tariffs, a contractual obligation be associated with each shipping agreement outlining the terms of the service conditions, and providing the railway and shipper a method to resolve a penalty-related dispute with a “fast-tracked” arbitration process. Such a process would allow minor disputes to be resolved in a more timely fashion and with less expenditure of resources being required. CCGA envisions a fast-tracked process being designed to facilitate dispute resolutions in a few weeks using final offer arbitration to ensure that both parties offer reasonable solutions to the dispute.

This proposal would not replace Level of Service Final Offer Arbitration, but provide shippers with both the recourse for resolving macro-level and systemic complaints, and the option to resolve more specific, operational complaints. While Level of Service Final Offer Arbitration does carry some significant cost and time deterrents for shippers to launch a complaint, making it less than ideal in week-to-week incremental disputes, it still has an important role to play in providing a method to hold the railways accountable for macro level service issues not under the scope of contractual obligations covered by fast-tracked arbitration.

Improved Monitoring

In a normally functioning market, performance is measured by ongoing business relationships. If certain entities perform poorly, people and companies have the option to take their business elsewhere. In this case, only entities providing adequate or better service at a competitive price (where economic profits are approaching zero) will survive in the long run. However, due to the rail freight market resembling more of a monopoly than a competitive marketplace, companies don't have to provide adequate service at a competitive price to survive. Because there is no market check for performance and it is in the interest of Canada to have a functional rail freight system, ongoing monitoring and measurement of performance is required. Given the chronic and systemic issues that have plagued the system for years,

the establishment of an oversight body or monitor that would be responsible for providing ongoing service measurements and communicating its observations to the stakeholders would be an invaluable instrument for understanding and shaping a path forward on many of these service issues.

CCGA recommends that the role of this monitor not only include that of collecting and publishing data but also include the authority and obligation to:

- establish measurements;
- give advice to the Canadian Transportation Agency to launch and undertake investigations on the monitor's own initiative, after which the CTA could initiate its own Level of Service complaint based on its findings; and,
- make recommendations to the CTA on an ongoing basis to improve service, such as better systems that could be put in place, and communicate these plans with shippers.

This type of monitoring agency is required to provide more transparency in the system, improve communications between railways and shippers, and to ensure that chronic service issues receive the attention required to move towards a resolution.

Five-Year Statutory Review

In 2007, the Canada Transportation Act was amended to extend the period for a statutory review of the Act to eight years from five years. Shippers did not support this change and CCGA continues to advocate that the shipper community is better served by conducting a statutory review of the CTA every five years.

As with all industries, the continued rapid evolution of technology enables an accelerated rate of change in both the marketplace and the systems that serve it. Given that the CTA is the enabling legislation for all commercial matters affecting the railway industry, it is critical that this legislation remains relevant to the current technological and market situation. Therefore, CCGA recommends a statutory review of the CTA be conducted every five years.

Conclusion

The rail system plays a vital role in the competitiveness of Canadian agriculture, and the impacts of its performance should not be underestimated. Canadian farm exports are an important part of the Canadian economy, and export market access is a critical part of Canadian agriculture. An efficient and effective rail system plays a fundamental role in the marketing of the majority of Canadian crops, and canola is no exception.

Issues with rail service have affected the grain industry for years and directly impact the bottom line of Canadian farmers. While solutions have been proposed and even implemented in the past, they have not been able to resolve many of the ongoing issues associated with poor rail service.

The Rail Freight Service Review is an important initiative with the potential to make significant improvements to the rail system. By clarifying what standards the railways are accountable to, lowering

the barriers to resolving disputes, and by increasing the accountability of the system as a whole through monitoring and regular review, Canada's rail freight system could become more efficient, responsive, and reliable.

This type of change is critical to the future competitiveness of the Canadian industries that rely on rail service to generate value for the Canadian economy. However, if the Panel is not able to recommend moving forward with the changes as outlined in this submission, CCGA would encourage a thorough and detailed analysis of competitive access solutions such as enhanced interswitching provisions, joint running rights and/or common running rights as potential methods to increase competition in Canada's rail system. In the absence of other meaningful change in the system, such as what CCGA has proposed in this submission, we believe these and other competitive access solutions deserve further investigation and consideration.

We appreciate the opportunity to submit these comments and look forward to seeing your recommendations on improving the rail system in Canada.