

April 2019

Canadian Transportation Agency rules on Vancouver rail embargoes in first own motion investigation

The Canadian Transportation Agency (Agency) has issued a Determination (see the Agency's corresponding announcement [here](#)) following its investigation into freight rail service in the Vancouver area. The Agency found that certain unilateral traffic restrictions or "embargoes" that Canadian National Railway Company (CN) imposed on pulp traffic destined to the Vancouver area violated CN's statutory service obligations. While the Agency also investigated the actions of Canadian Pacific Railway Company and BNSF Railway Company, it found that on the evidence before it neither had breached their statutory service obligations.

Based on its findings, the Agency ordered CN to develop and file with the Agency a detailed plan for each of the next three years "to respond to surges in traffic that occur in the Vancouver area towards the end of the calendar year with a view to avoiding or minimizing the use of embargoes and maintaining the highest level of service reasonably possible." The Agency also placed restrictions on the circumstances in which CN may resort to embargoes in respect of its operations in the Vancouver area.

The investigation is the Agency's first use of the "own motion" power granted to it under the *Transportation Modernization Act* (TMA) enacted in May 2018. The TMA permits the Agency to initiate its own investigation, with the approval of the Minister of Transport, rather than requiring a formal application by a specific complainant. In this

case, shipper associations had raised concerns about freight service shortfalls and embargoes in the Vancouver area. The Determination provides insight into how the Agency intends to use its own motion power, how it interprets the TMA's amendments to the level of service provisions in the *Canada Transportation Act* (CTA), and how it assesses the lawfulness of railway embargoes.

Own-Motion Investigations (OMIs)

The Agency identified a number of key features of OMIs:

- OMIs are well suited to examinations of broad-based or systemic service issues and were specifically intended for this purpose.
- Subject to approval from the Minister of Transport, the Agency has wide discretion to determine whether to initiate an investigation, what to investigate and how the investigation will proceed.
- An OMI may include an Agency-directed "information gathering phase", particularly where information received before the Agency launches an OMI does not permit the Agency to make any preliminary findings or identify all of the specific issues to be addressed. This phase may be used to help crystallize the issues.
- Information provided to the Agency before it launches an OMI assists the Agency in determining whether to initiate an investigation but does not form part of the evidentiary record in the OMI.
- Evidence in an OMI is likely to be broader than in an application by a single complainant and offer less detail in respect of specific incidents.
- If the Agency finds a breach, any remedy is also likely to be broader in nature.
- Nevertheless, a failure on the part of those who request an OMI to provide evidence on the record of the resulting proceeding may limit the Agency's ability to intervene and fashion a remedy.

Level of Service Obligations

The Agency included in its Determination an expansive review of previous level of service jurisprudence, highlighting the following:

- The service obligations imposed on a railway by sections 113 through 115 of the CTA are neither absolute nor “soft” and can only be particularized in light of specific circumstances.
- Railways have an obligation to make “every effort” to provide service even in the face of challenges beyond their control, but are not required to “do the impossible”.
- Railways should anticipate recurring seasonal challenges and identify necessary measures short of embargoes in advance.
- The TMA did not change the railway service obligations in sections 113 to 115 of the CTA but offers interpretive guidance by specifying:
 - the “threshold” a railway must meet, i.e., the “highest” level of service it could reasonably be expected to provide in the circumstances; and
 - a non-exhaustive list of factors for assessing whether a railway has met this threshold.

Embargoes

The Agency found that an embargo amounts to a denial of rail service that one or more shippers have reasonably requested. An embargo may nevertheless be lawful when it is the only practical alternative left after all reasonable measures to deal with challenges beyond the railway’s control have been taken and have proven insufficient. To justify an embargo, a railway must demonstrate that the embargo:

- was imposed as a result of factors beyond the railway’s control;
- is an exceptional measure rather than routine or planned in advance;

- is targeted to address specific actual challenges rather than potential issues;
- is designed to minimize traffic restrictions while in place; and
- is temporary in nature and lifted at the first opportunity.

The Agency concluded that CN's embargoes on pulp traffic were unjustified because they did not meet all of these criteria.

CN has announced that it intends to appeal the Agency's Determination.

Please do not hesitate to contact us if you wish to set up a private briefing to discuss the implications of the Agency's Determination or any other matter relating to the TMA or the CTA.

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[a cautionary note](#)

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