

RAIL LEVEL OF SERVICE DECISIONS AND SHIPPER SERVICE REQUIREMENTS¹

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Introduction

Sections 113 – 116 (the “LOS Provisions”) of the *Canada Transportation Act* (the “Act”) set out a federal railway company’s level of service (“LOS”) obligations. These are commonly referred to as the common carrier obligations. They require rail carriers to provide “adequate and suitable accommodation” for shippers’ traffic. The LOS Provisions were not sufficient to prevent shippers from experiencing regular rail carrier service failures in the period leading up to 2007, following which the Government of Canada appointed the federal Rail Freight Service Review panel. The panel’s report recommended, and in 2013 the Government ultimately adopted, amendments to the Act that granted shippers a right to a service level agreement (“SLA”), failing which the shipper might refer the matter to arbitration to establish the terms of a SLA. During the winter of 2013-14, rail service deteriorated substantially. Many shippers remain dissatisfied with rail service levels and many express frustration at their inability to do anything about it.

The LOS Provisions and SLA Provisions

The LOS Provisions require rail carriers to provide adequate and suitable accommodation for a shipper’s traffic without much specificity. Decisions of the Canadian Transportation Agency (the “Agency”) under the LOS Provisions provide guidance to carriers and shippers, although in any given complaint it may hear, the Agency is not bound by its prior decisions.

The SLA provisions are found at subsections 126(1.1) – 126(1.5) and sections 169.31- 169.43 of the Act (together, the “SLA Provisions”), which require a rail carrier, upon request by a shipper, to provide an offer to enter into a SLA. If the shipper and rail carrier are unable to agree to a SLA, the shipper may refer the matter to the Agency, which then refers the matter to an arbitrator who is empowered to impose a SLA between the parties.

However, despite the LOS Provisions and the SLA Provisions, many shippers still are without an effective, efficient and readily accessible mechanism to address rail carrier service failures. In spite of the new SLA Provisions, during the winter of 2013-2014 many shippers, particularly grain shippers, brought applications to the Agency under the LOS Provisions. Further, the Governor in Council determined under section 47 of the Act that an “extraordinary disruption to the effective continued operation of the national transportation system” existed, leading to an order that required CN and CP to transport certain quantities of certain grain on a weekly basis.⁴ While some SLA processes occurred during that time, many more shippers found no solace in any remedy and those outside the grain sector found no relief in the Government’s direct action.

Analysis of LOS Decisions

We have conducted a review of the publicly available Agency decisions on the Agency’s website that were decided pursuant to the LOS Provisions (the “Agency LOS Decisions”), as modified by any

subsequent appellate decisions. Appendix “A” summarizes our approach, which, briefly, was to identify for each Agency LOS Decision, the main issues, the order sought, the order received, and to make an assessment as to whether the shipper received substantially the order that it requested.

We found that of the 35 Agency LOS Decisions, the Agency declined to issue an order in 21 of those decisions. Of the remaining 14 LOS Decisions, the complainant received substantially the order requested in 6 decisions and received some variation of its request in 8 decisions. An example of the latter is found in *Northgate Terminals Ltd. v. CN*, where CN had unilaterally decreased Northgate’s service from two deliveries per day Monday through Friday, to one per day, seven days per week. Northgate sought the reinstatement of its historical level of service, without incidental charges, at specific times of the day. The Agency declined, but instead ordered CN to provide two switches per weekday when requested, and if the second switch were for no fewer than 6 cars, exempted Northgate from the relevant provision of the CN tariff.⁵ The Agency declined to order CN to perform the switches within any specific time period each day.

Potential Benefits and Shortcomings of LOS and SLA

Both the LOS and SLA mechanisms have benefits and shortcomings. For those unconcerned about rail carrier retribution for taking regulatory action, the primary benefit is that some relief is possible. However, the remedies are insufficient to replicate service levels in a competitive environment.

First, the LOS Provisions are not sufficiently specific to allow a prospective LOS complainant to assess the level of service to which it is entitled; the shipper learns after the fact, as the prospective complainant must initiate a proceeding before the Agency to determine the carrier’s required level of service. Under the LOS mechanism, the shipper first suffers the service failure, then applies to the Agency for redress, where the resulting order may not to be time-limited. In contrast, the SLA mechanism only addresses future rail service requirements, but if the arbitrator orders an SLA, it applies for up to one year.

Second, while neither the SLA nor LOS mechanisms allow the adjudicator to award damages for LOS breaches, the LOS Provisions allow the Agency to order the rail carrier to compensate the shipper for the “expenses” suffered as a result of service failures.⁶ There is no monetary relief under SLA. In addition, the Act grants a statutory right of action to a person aggrieved by a rail carrier’s failure to fulfill its LOS Obligations, but, practically, this imposes an obstacle for shippers that is rarely overcome.⁷

Third, a SLA arbitrator must consider a rail carrier’s obligations to other shippers, persons and companies, among other things, which acts as a barrier to initiating proceedings.⁸ In LOS, the Agency is not required to consider any specific matters, and has determined that a rail carrier cannot rely on its service obligations to other shippers in order to justify a breach of its LOS Obligations to a complainant.⁹

Fourth, there is a perceived jurisdictional constraint respecting the LOS and SLA mechanisms. The Agency, and complainants, perceive that adjudicators are reticent to issue orders regarding cross-border rail traffic. We think the reticence is undue and harms Canadian productivity and investment. Such a constraint limits the usefulness of both remedies for cross-border traffic, which makes up such a significant proportion, the majority in the case of many products, of Canada’s rail traffic.

Conclusion

In the end, shippers still are without an effective, efficient and readily accessible mechanism to address rail carrier service failures, whether past or present. In a deregulated environment where there are two

dominant rail carriers who control the supply functions, and even moreso in those markets where there is insufficient intramodal or intermodal competition, those carriers should be required to fulfill their service obligations in a manner that meets the needs of the shipper in order to accommodate the natural growth of industry in Canada and to avoid decreasing national output.

Appendix “A”

Table 1 below summarizes, for each Agency LOS Decision, the main issues, the order sought and the order received, as well as our assessment as to whether the shipper received substantially the order that it requested. We have omitted interlocutory decisions that do not result in a determination as to a rail carrier’s compliance with its LOS Obligations. For cases where we are aware of an appeal result, Table 1 includes consideration of the ultimate result after completion of the appeals process.

Due to space restraints, the summaries below necessarily condense and paraphrase the issues and the orders sought and received. As a result, one should not place undue reliance on the summaries in Table 1.

Table 1 - Summary of Reported Agency LOS Decisions

Decision No. (Date)	Complainant / [Carrier]	Main Complaint Issue(s) / Result	Primary Order(s) and Determination(s) Sought	Order Granted	Complainant Received Substantially the Order Sought?
Letter Decision No. 2015-07-10 (July 10, 2015)	Emerson Milling Inc. / [CN]	Failure to fulfill railcar orders / [LOS breach]	1) CN to provide service in accordance with EMI’s present and future orders, 2) CN to acquire more hoppers cars/crews, and 3) determination that CN’s Maximum Car Order Request Threshold is contrary to CN’s LOS obligations.	CN to provide outstanding car orders from complaint period to satisfy remaining demand. Request for determination denied.	Partially.
Letter Decision No. 2015-06-18 (June 18, 2015)	Louis Dreyfus Commodities Canada Ltd. (“LDC”) / [CN]	Failure to fulfill railcar orders to Dawson Creek facility / [No LOS breach]	CN to 1) provide service to Dawson Creek facility in accordance with LDC’s orders, and 2) not reduce car supply to other LDC facilities due to any order regarding Dawson Creek.	None.	No.
Letter Decision No. 2015-03-12 (March 12, 2015)	LDC / [CN]	CN’s grain car allocation methodology – application was forward-looking / [Application dismissed]	Application under s. 25, 26, 28(2) and 33(4) of the Act for an order to prevent CN from applying new grain car allocation methodology. CN refers to LDC’s application as a “thinly veiled pre-emptive level of service complaint”.	None.	No.
Letter Decision No. 2014-12-18 (December 18, 2014)	Richardson International Limited (“RIL”) / [CN]	1) Failure to adhere to CN’s own rationing methodology, and 2) reducing RIL’s railcar allocation by 300 cars in certain weeks / [LOS breach]	CN to 1) comply with its own rationing methodology, 2) not draw from cars otherwise available to RIL to meet regulatory obligations, and 3) make up shortfall cars over 14 weeks.	CN to 1) deliver to RIL cars representing its market share based on shippers in general allocation pool, and 2) make up shortfall of 1,702 cars at a maximum rate of 100 cars per week. ¹⁰	Partially.

Decision No. (Date)	Complainant / [Carrier]	Main Complaint Issue(s) / Result	Primary Order(s) and Determination(s) Sought	Order Granted	Complainant Received Substantially the Order Sought?
Letter Decision No. 2014-12-18 (December 18, 2014)	Viterra Inc. / [CN]	1) Failure to adhere to CN's own rationing methodology and 2) reducing Viterra's railcar allocation by 300 cars in certain weeks / [LOS breach]	CN to 1) comply with its own rationing methodology, 2) not draw from cars otherwise available to Viterra to meet regulatory obligations, and 3) make up shortfall cars over 14 weeks.	CN to 1) deliver to Viterra cars representing its market share based on shippers in general allocation pool, and 2) make up the shortfall of 1,822 cars at a maximum rate of 100 cars per week. ¹¹	Partially.
Letter Decision No. 2014-10-03 (October 3, 2014)	LDC / [CN]	Failure to fulfill CN's service obligations under a confidential contract / [LOS breach as set out in contract]	CN to provide service to each of LDC's facilities in accordance with the terms of a confidential contract.	Redacted from decision because confidential contract binding on Agency.	Yes.
360-R-2014 (October 1, 2014)	Canadian Canola Growers Association / [CN and CP]	Failure to provide sufficient railcars and other railway services to grain elevators and producers / [No LOS breach]	CN and CP to 1) provide an adequate and suitable supply of power, personnel and railcars, 2) increase capacity in winter months and allocate sufficient resources to winter programs to allow timely recovery, and 3) move carry-over volumes.	None.	No.
LET-R-99-2013 (August 21, 2013)	Montreal Maine & Atlantic Railway ("MMA") / [CP]	Refusal to lift an embargo / [LOS breach]	CP to lift the embargo and resume prior level of service.	CP to lift the embargo and resume prior level of service.	Yes.
268-R-2013 (July 12, 2013)	F. Ménard Inc. and Meunerie Côté-Paquette Inc. / [MM&A]	Refusal to operate a railway line to the complainant's facility / [LOS breach]	Continue to operate the line and pay incremental costs of trucking.	Continue to operate until discontinuance process complete or provide an equivalent alternative.	Yes, but railway failed to implement.
285-R-2012 (July 17, 2012) / 474-R-2013 (December 31, 2013)	Wilkinson Steel and Metals Inc. / [CN]	Refusal to continue to provide service to facility / [LOS breach – appeal directed Agency reconsideration] ¹²	Not explicitly described in decision, but appears to be to provide service to Wilkinson's facility or provide an equivalent alternative.	CN to pay incremental costs of transloading for two years. On appeal - Agency must reconsider – Wilkinson did not participate and case was dismissed.	No.
331-R-2010 (Aug. 4, 2010)	Mr. Cameron Goff / [CN]	Withdrawal of service to a producer car loading site / [No LOS breach]	Moratorium on delisting of producer car sites.	None.	No.
42-R-2010 (Feb. 9, 2010)	Western Grain Trade Ltd. / [CN]	Inconsistent and unpredictable service, rationing of cars / [No LOS breach]	CN to provide delivery of 90% of cars ordered, 80% of orders accepted in Planned Service Report, 2 – 4 deliveries per week, 95% accuracy with PSR.	None.	No.
166-R-2009 (Apr. 23, 2009)	Northgate Terminals Ltd. / [CN]	Reduction of deliveries to 1 per day from 2 per day / [LOS breach – upheld on appeal]	CN to continue to provide two switches per day Monday through Friday, spotting up to 14 cars at or about 07:00 on the first switch and up to 10 cars at or about 16:00 later in the day, all without supplemental charge.	CN to provide a second switch each Monday through Friday when requested, with second switch to be exempt from supplemental charges when made for no fewer than 6 cars.	Partially.

Decision No. (Date)	Complainant / [Carrier]	Main Complaint Issue(s) / Result	Primary Order(s) and Determination(s) Sought	Order Granted	Complainant Received Substantially the Order Sought?
155-R-2009 (Apr. 2, 2009)	Central Alberta Transloading Terminals Ltd. / [CP]	Frequency of service / [No LOS breach]	More than twice per week service.	None.	No.
488-R-2008 (Sept. 5, 2008)	CWB et. al. / [CN]	Fewer cars supplied than ordered, delay in providing cars / [LOS breach for 4 of 6 shippers – all overturned on appeal] ¹³	CN to 1) maintain then applicable general car allocation practices, 2) not require minimum block sizes or order durations, 3) spot and lift cars in the week ordered, and 4) ration cars in a fair, equitable and transparent manner.	CN to accept at least 80% of cars requested, deliver 90% of confirmed orders within three weeks, measured on a 12-week rolling average – all overturned on appeal.	No.
442-R-2008 (Aug. 8, 2008)	Trackside Holdings Ltd. / [CN]	Refusal to provide rail connection / [No LOS breach]	Construction of a rail line to facility.	None.	No.
20-R-2008 (Jan. 18, 2008) ¹⁴	CWB v. CN	Inconsistent service, rationing / [LOS breach for 06/07 crop year, insufficient evidence of LOS breach for 07/08 crop year] – all overturned on appeal ¹⁵	CN to 1) implement a car distribution program that is fair, fully transparent and non-discriminatory, 2) size its fleet to enable CN to meet its LOS obligations, 3) make available at least 50% of fleet for ordering as general distribution, 4) set max car blocks of 50 cars for CN's advance products program, 5) discontinue auctioning cars to highest bidder, 6) permit shippers to trade all general distribution cars, and 7) others.	1) Both CN and CWB to provide weekly data re 07/08 crop year, 2) CN to modify its advance products programs in various ways to accommodate the complainants, 3) permit all shippers to trade all general distribution cars, 4) continue to publish weekly allocation decisions, and 5) others – all overturned on appeal.	No.
344-R-2007 (Jul. 6, 2007)	Great Northern Grain Terminals Ltd. / [CN]	Inconsistent and insufficient service, rationing of car supply / [LOS breach]	CN to 1) use a fair, fully transparent and non-discriminatory rationing process, 2) maintain its grain car fleet to meet its LOS obligations, 3) reserve 50% of CN's grain fleet for general distribution, 4) set the maximum car block size permitted for CN's advance products at 50 cars, 5) discontinue auctioning cars to the highest bidder, 6) permit shippers to trade all of CN's cars, and 7) report to the Agency regarding cars that are unavailable for grain service for certain reasons, and to notify the Agency before reducing its fleet of grain cars.	CN to 1) allow GNG to reserve railway capacity for a contract period, covering a minimum of 20 grain weeks for one or more contract units, each representing a block of 50 empty rail cars allocated and supplied from CN's fleet of grain cars, to be ordered for placement and loading at GNG's facility under the terms of its previous GT Secure Export program, 2) set tariff rates for 1) that are fair and non-discriminatory against GNG, 3) permit trading of cars, and 4) advise GNG of methodology for determination of car allocation.	Partially.

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97-R-2006 (Feb. 21, 2006)	Ville de Lévis, QC / [CN]	Refusal to provide suitable facilities for unloading / [No LOS breach]	Not articulated in decision.	None.	No.
472-R-2003 (Aug. 14, 2003)	Canadian American Railroad Company, MM&A / [CN]	Refusal to interswitch at prescribed rates / [No LOS breach]	CN to provide interswitching services at prescribed rates from the NBSR/CN connection to a potash terminal in Saint John.	None.	No.
323-R-2002 (Jun. 11, 2002)	Naber Seed & Grain Co. Ltd. ("NSG") / [CN]	Fewer cars supplied than required, in part due to arbitrary deadline / [LOS breach]	CN to 1) grant running rights to HBSR, Alternatively, CN to 1) deliver up to 34 hopper cars and 10 boxcars to Melfort twice per week and up to 20 and 23 hopper cars once per week to Star City and Kathryn, respectively, and 2) allow NSG to place railcar orders 9 days in advance of grain week	CN to 1) deliver up to 34 hopper cars and 10 boxcars (or 46 hopper cars) per week to Melfort in one or two switches, at NSG's option, and up to 20 and 23 hopper cars per week, respectively, to Star City and Kathryn once per week, and 2) allow NSG to place railcar orders 9 days in advance of grain week.	Partially.
282-R-2001 (May 29, 2001)	NSG / [CN]	CN failure to provide sufficient railcars in twelve grain weeks, erratic service / [LOS breach]	CN to 1) provide 72 hoppers and 20 box cars per week in the future, and 2) negotiate a service arrangement and communications procedures that are acceptable to CN and NSG.	CN to 1) negotiate a service arrangement and communications procedures that are acceptable to CN and NSG and file same with the Agency, and 2) report to the Agency the number of NSG car requests and justification for any shortfall.	Partially.
715-R-2000 (Nov. 15, 2000)	Scotia Terminals Ltd. / [CN]	Refusal to provide service to Scotia Terminals' facility / [No LOS breach]	CN to provide the same level of service and pricing that CN provided to all other piers and terminals in the Port of Halifax.	None.	No.
688-R-1999 (December 10, 1999)	R.D. Koeneman Lumber / [CN]	CN removal of switch to complainant's facility thereby cutting off rail access [No LOS breach]	CN to reinstall a switch to provide rail access to the facility.	None.	No.
132-R-1999 (March 24, 1999)	NSG / [CN]	Failure to provide sufficient railcars in three grain weeks / [LOS breach]	CN to provide train service twice per week, when requested by NSG, on an ongoing basis.	CN to negotiate a service and communications arrangement with NSG and file it with the Agency, advise NSG regarding potential disruptions in car supply system.	Partially.

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475-R-1998 (Sept. 30, 1998)	CWB / [CP]	(a) Failure to meet CAPG unload guidelines; / [No LOS breach] (b) Discrimination against grain relative to other commodities; / [LOS breach] (c) Failure to supply sufficient cars as agreed for moving grain to U.S. / [LOS breach]	CP to 1) deliver cars to meet CAPG unloads on Western corridors and Thunder Bay, 2) honour certain commercial arrangements, 3) not discriminate against the grain industry, and 4) develop recovery procedures in consultation with shippers and submit to the Agency.	None.	No.
59-R-1997 (Feb. 12, 1997)	Lethbridge Chamber of Commerce / [CP]	Closure of Lethbridge Intermodal Facility / [No LOS breach]	CP to maintain operation of the Lethbridge Intermodal Facility.	None.	No.
489-R-1992 (Aug. 3, 1992)	Louis Hebert / [CN]	Withdrawal of service to a producer car loading site / [LOS breach]	CN to provide service for producer cars at the site.	CN to provide service for producer cars at the site.	Yes.
478-R-1992 (Jul. 28, 1992)	Terry Shewchuk et al. / [CN]	Withdrawal of service to two producer car sidings, discrimination / [LOS breach]	CN to provide service to the two sidings.	CN to provide service to the two sidings.	Yes.
459-R-1992 (Jul. 17, 1992)	Walter Kolisnyk / [CN]	Removal of a switch that led to withdrawal of service to a producer car siding / [No LOS breach]	CN to provide service to the siding.	None.	No.
347-R-1991 (Jun. 28, 1991)	Lorne Sheppard / [CN]	Withdrawal of service to an abandoned producer car siding / [No LOS breach]	CN to provide service to the siding.	None.	No.
209-R-1990 (Apr. 11, 1990)	Rochevert Inc. / [CN]	CN failure to deliver loaded cars as agreed with Rochevert / [No LOS breach]	CN to (a) compensate Rochevert for damages, (b) deliver one to three loaded cars per week on a designated day, and (c) remove all empty cars on a designated day.	None.	No.
411-R-1989 (Aug. 11, 1989)	Prairie Malt Ltd. / [CN]	Refusal to spot flat cars at Biggar facility / [No LOS breach]	CN to provide flat cars at Biggar facility.	None.	No.
213-R-1989 (Apr. 28, 1989)	Commonwealth Plywood Cie Ltée / [CP]	Refusal to provide service to complainant's facility / [LOS breach]	Not stated in Agency decision – complainant appears to have sought a finding of LOS breach and service to its facility at Tee Lake.	None despite finding of a LOS breach – parties left to avoid a repeat of two missed deliveries.	No.
135-R-1988 (Jun. 1, 1988)	Cargill Ltd. / [CP]	Refusal to route as requested by the shipper / [LOS breach]	Originally, the shipper simply sought a ruling regarding routing obligations – following mediation, Agency turned into a LOS proceeding.	None, but Agency found that refusal to route as directed is a LOS breach.	Yes.

Endnotes

¹ This is a regular (full) paper.

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⁴ *Order Imposing Measures to Address the Extraordinary Disruption to the National Transportation System in Relation to Grain Movement*, PC 2014-274, (2014) C Gaz II, 797.

⁵ Canadian Transportation Agency Decision No. 166-R-2009 (Ottawa: CTA, April 23, 2009).

⁶ Act, s. 116(4)(c.1) and Canadian Transportation Agency Letter Decision No. 2015-07-10 (Ottawa: CTA, July 10, 2015).

⁷ Act, s.116(5).

⁸ Act, s.169.37.

⁹ Canadian Transportation Agency Letter Decision No. 2014-10-03 (Ottawa: CTA, October 3, 2014) at para 23: "The CTA is specific about the railway company's duty, which is to provide adequate and suitable accommodation for "all traffic offered for carriage..." That is to say the obligation of a railway company is owed to each individual shipper in respect of whatever traffic is tendered to the railway company by each shipper. It does not imply that a breach to one shipper is acceptable if there are breaches to others. It also does not imply that a superior level of service to one shipper excuses or justifies an inferior level of service to another shipper."

¹⁰ Canadian Transportation Agency Letter Decision 2014-12-18, Viterra (Ottawa: CTA, December 18, 2014) also ordered CN to show cause why the Agency should not order CN to make up shortfall of 2,891 cars. Canadian Transportation Agency, "Letter Decision No. 2015-05-20 RIL" (Ottawa: CTA, May 20, 2015) ultimately found a shortfall of 1,702 cars and ordered CN to make them up at a maximum rate of 100 cars per week.

¹¹ Canadian Transportation Agency Letter Decision 2014-12-18, Viterra (Ottawa: CTA, December 18, 2014) also ordered CN to show cause why the Agency should not order CN to make up shortfall of 1,374 cars. Canadian Transportation Agency "Letter Decision No. 2015-05-20 Viterra" (Ottawa: CTA, May 20, 2015) ultimately found a shortfall of 1,822 cars and ordered CN to make them up at a maximum rate of 100 cars per week.

¹² See *Canadian National Railway Company v. Canadian Transportation Agency and Wilkinson Steel and Metals Inc.*, 2013 FCA 270.

¹³ See *Paterson Grain et al v. Canadian National Railway Company*, 2010 FCA 225.

¹⁴ Canadian Transportation Agency Decision 20-R-2008 was one of six complaints brought by various grain industry participants in September of 2007 regarding CN's service. The Agency dealt with five other complaints in six largely similar decisions (21-R-2008, 22-R-2008, 23-R-2008, 24-R-2008 and 25-R-2008) because all were based on similar facts and raised similar issues. The Agency ultimately issued substantially the same order to all complainants. We have counted all six decisions once in this analysis.

¹⁵ *Supra*, note 13.