



The McMillan Rail Shippers' Guide

Remedies for Rates and Charges (Final Offer Arbitration and Unreasonable Charges)

The *Canada Transportation Act* (Act) provides certain other remedies if you believe that a railway company is failing to meet its obligations or imposing unreasonable rates or conditions.

Final Offer Arbitration

Final Offer Arbitration (FOA) is the most effective remedy when you are dissatisfied with the rates the railway company is charging or proposing to charge, the conditions of service associated with your traffic or both. However, rates in a confidential contract are not subject to FOA.

FOA is a confidential process involving the shipper and the railway company. The Canadian Transportation Agency's (Agency) role in the arbitration is limited; it will refer the matter to an independent arbitrator, deal with any preliminary objections by the railway company and provide "administrative, technical and legal assistance" to the arbitrator at the arbitrator's request.

You and the railway company will each file your final offer with the Agency, which then provides those offers to the other party and appoints an arbitrator. The shipper and the railway company each make submissions to the arbitrator who then selects the rates and conditions that will apply to your traffic for a fixed period of up to two years after the date of the submission. The arbitrator must select one of these offers (the arbitrator cannot strike a compromise) and does not give reasons for selection, unless all parties to the arbitration request reasons.

In coming to a decision, the arbitrator must consider whether the shipper has "an alternative, effective, adequate and competitive means of transporting" the freight, and "any other considerations that appear to the arbitrator to be relevant."

The arbitrator's decision is effective for up to two years from the date of the submission to FOA, as determined by the shipper at the start of the process. The arbitrator does not award costs. Instead, the shipper and the railway company are responsible for their own expenses and split the costs of the arbitrator evenly, regardless of which party is successful.

FOA typically takes 60 days from submission to resolution, unless the parties agree otherwise.

The Act sets certain timelines for the different steps in the FOA process. Apart from these, the rules for FOA are flexible in that the shipper, the railway company and the arbitrator can agree to any rules of

procedure. In the absence of such an agreement, the Agency's rules of procedure generally will govern, subject to any procedural directions from the arbitrator. The parties must exchange evidence in writing, and each party has the right to direct written questions to the other. FOA proceedings usually involve an oral hearing before the arbitrator.

Summary and Multi-Party FOA

Depending on your circumstances, you may be eligible for either summary or multi-party FOA procedures.

If your final offer involves freight charges of less than approximately \$2.1 million as of 2022, a streamlined summary FOA procedure applies, unless you indicate otherwise at the time of your submission for FOA. Summary FOA results in a determination within 30 days of your application to the Agency and proceeds based on written submissions alone, unless the arbitrator orders an oral hearing.

Multiple shippers who have a common issue with a railway company also can use FOA. In a multi-party FOA, you and your fellow shippers would make a joint submission and file a joint final offer. The arbitrator's final decision is binding on the railway company and the shippers who participated in the FOA.

Ancillary Charges/Associated Terms and Conditions

Railway companies use their tariff-making powers to set out charges over and above freight rates, such as demurrage, switching services, and various other incidental services. If you think the charges and associated terms in such a tariff are unreasonable, you can make a complaint to the Agency in a public proceeding. You cannot use this remedy to challenge freight rates and the tariff in issue must apply to more than one shipper. You can make your application alone or together with other shippers. When the Agency receives your complaint, it will assess the reasonableness of the charges and terms by considering the following:

- The objective of the charges or associated terms and conditions;





- The industry practice for setting charges and conditions, including whether other railway companies have similar terms;
- The existence of an effective, adequate and competitive alternative; and
- Any other relevant factors.

If the Agency finds the railway company's terms and conditions are unreasonable, it can order new terms and conditions so long as they are commercially fair and reasonable to all parties. This order will be in effect for up to one year.

To discuss the process, timeline, or any other question regarding FOA or ancillary charge complaints, send an email or telephone a member of McMillan's Rail.

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