



The McMillan Rail Shippers' Guide

Service (Level of Service Complaints, Agency Own Motion Powers, and Service Level Arbitration)

Under the *Canada Transportation Act* (Act), a railway company must provide you with “adequate and suitable” accommodation for your freight at the “highest level of service ... that it can reasonably provide in the circumstances.” This includes, among other things, providing all necessary means (such as cars and other equipment) to transport and deliver your freight, providing prompt and diligent service, facilitating any transfers to other railway companies’ lines and connecting to the private trackage or siding at your facility.

While the Act does not specify any particular actions a railway company must take to fulfill its obligations, you can enter into a confidential contract with the railway company that sets out specific terms regarding the manner in which the railway company will fulfill its service obligations to you. You can request that the railway company provide you with an offer respecting the terms of service; the railway company must provide this offer within 30 days after your request. Even in the absence of a confidential contract or offer that sets out specific service terms, a railway company must provide “adequate and suitable” accommodation for all traffic offered on its railway.

Level of Service Complaint

Any person may file a level of service complaint (LOS Complaint) if it perceives that the railway company has failed to meet its service obligations. When the Canadian Transportation Agency (Agency) receives a LOS Complaint, it must investigate the matter.

The Agency has 90 days following receipt of the complaint to investigate and issue a decision on whether the railway company is fulfilling its obligations.

The standard the Agency will use to assess the complaint is whether the railway company provided the highest level of service that is reasonable in the circumstances. In determining whether the railway company failed to meet its level of service obligations, the Agency must consider the following:

- The traffic to which the service obligations relate;
- The reasonableness of your requests;
- The service that you require;
- Any undertaking you gave to the railway company;
- Both the railway company's and your operational requirements and restrictions;

- The railway company's obligations, if any, with respect to a public passenger service provider;
- The railway company's operational obligations under the Act;
- The railway company's contingency plans when faced with foreseeable or cyclical events; and
- Any other information that the Agency considers relevant.

If the Agency finds that the railway company failed to meet its statutory service obligations, it has broad powers to order the railway company to provide service, build facilities, acquire assets or otherwise take any action to rectify the failure.

While the Agency can require the railway to compensate you for out-of-pocket expenses resulting from a service failure, it does not have the power to award other damages. Any person aggrieved by the railway company's refusal or failure to meet its service obligations can bring a civil lawsuit against the railway company and the court can award damages.

Agency Investigations of Rail Service

The Agency also has the power to launch an investigation into a railway company's service on its own motion. This gives the Agency broad discretion in determining whether to launch an investigation, including when the suspected service failures are widespread. So long as the Minister of Transport agrees, the Agency may choose to launch an investigation.

After the Agency launches an own-motion investigation, it will collect additional information and submissions from affected persons. The information that will be useful to the Agency varies depending on the investigation; however, it could include evidence such as emails and other evidence of discussions between the railway company and shippers, as well as evidence of factors beyond the railway's control.

The standard the Agency uses to assess the railway company's service level is the same as for shipper-initiated complaints, namely, whether the railway company provided the highest level of service that is reasonable in the circumstances.





If the Agency finds the railway company failed to meet this standard, the Agency may make any order requiring the railway company to rectify the failure.

Service Level Arbitration

Service level arbitration (SLA) is designed to set specific terms for service on which you have not been able to reach agreement with a railway company. To initiate SLA, you must provide both the railway company and the Agency with 15 days advance notice before requesting the arbitration; the railway company then has ten days to object to the arbitration.

If your submission is eligible for SLA, the assigned arbitrator (who may be a member of the Agency or the Agency's staff) will consider proposals, evidence and arguments from both you and the railway company before determining what service terms should govern your traffic. SLA takes approximately 45 to 65 days to complete from application to the decision date. It differs from FOA in that the arbitrator is not bound to select either your or the railway company's proposal; the arbitrator may design different terms to resolve the matters at issue.

To discuss any question regarding LOS complaints, Agency investigation or service level arbitration, send an email or telephone a member of McMillan's Rail Transportation Group at the contacts below.

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