



ENGLISH VERSION

To: Chair and Members of the House of Commons Standing Committee on Transport, Infrastructure and Communities

Date: September 12, 2017

Subject: Teck comments on Bill C-49, *An Act to amend the Canada Transportation Act and other Acts respecting transportation and to make related and consequential amendments to other Acts (the Transportation Modernization Act)*

Summary

Key points to consider

- Teck is Canada's single largest rail user.
- Perennial rail service challenges have impacted our competitiveness, our national supply chain's long-term economic sustainability and Canada's global reputation as a trading nation.
- A rail freight legislative regime that inspires commercial relations in a non-competitive market, while maintaining the railways' abilities to be profitable and operationally flexible, is the solution that would benefit railways, shippers and all Canadians in the long-term.
- While disappointed that the enabling of real competition by allowing new entrants into the rail market is not addressed in Bill C-49, the Bill's bold vision and many of its provisions are encouraging.
- However, minor adjustments will be required in order to meaningfully achieve the Bill's intent.
- The failures of past rail freight legislative reviews and the maintenance of the status quo have demonstrated that, despite good intentions, legislative design that acknowledges Canada's non-competitive rail market is critical.
- Getting Bill C-49 right is the opportunity to be bold and set a new course in building a truly world-class rail freight regime in Canada.

Summary of recommended amendments

- **Recommendation:** To amend s. 77 (2) to include the following addition: "A class I railway shall provide to the Minister [...] **provided that the information shall derive from and include all waybills, not just samples thereof**".
- **Recommendation:** To add the following to s. 161(2), part (f): "**any request that the Agency determine the variable costs of transporting the goods to which the arbitration relates, which, if so requested, the Agency shall determine forthwith and provide to the arbitrator, the shipper and the carrier within 5 days after the arbitrator is appointed by the Agency**".

- **Recommendation:** To either strike out provision (e) under s. 116 (1.2) or, make the restrictions themselves subject to review.
- **Recommendation:** To either strike out provision (e) under s. 169.37 or, make the restrictions themselves subject to review and to strike out s.160.31 (1) (c.1).

Background

Teck is a proudly Canadian diversified resource company. We employ over 7,000 people across the nation. As Canada's single largest rail user, Canadian Pacific Railway's biggest customer and with exports totaling close to \$5 billion annually, ensuring this Bill enables a transparent, fair, and safe rail freight regime and one that meets the needs of all users and Canadians – is of critical importance to us.

Perennial rail service challenges have impacted our competitiveness, our national supply chain's long-term economic sustainability and Canada's global reputation as a trading nation. To put this in perspective, the direct costs attributable to rail service failures incurred by Teck have amounted to as much as \$50 million to \$200 million over 18 month periods in the past decade.

Throughout the consultation process leading up to this Bill's development, and in past legislative reviews on rail freight matters, such as the most recent Rail Freight Service Review,¹ Teck has sought to advance balanced solutions to address the significant rail service issues that all sectors have regularly experienced. However, despite best intentions in some instances, the remedies generated through these processes have been inadequate – primarily because their designs do not acknowledge Canada's non-competitive rail market.

Foundationally, we believe a rail freight legislative regime that inspires commercial relations in a non-competitive market, while maintaining the railways' abilities to be profitable and operationally flexible, is the solution that would benefit railways, shippers and all Canadians in the long-term. At the heart of our recommendations has been the need for a meaningful, granular, and accessible rail freight data regime, as well as a definition of "adequate and suitable" service that acknowledges the monopoly context in which we operate. Teck has also offered, what we believe to be, the only long-term and sustainable solution to addressing the acute imbalance in the shipper-railway relationship – the introduction of real competition in Canada's rail freight market by extending running rights to "all persons" including shippers. In other words – this would allow new entrants, who meet specific criteria – to run a railway.

While we are disappointed that the introduction of real competition in the rail freight market is not addressed in the proposed legislation, we are highly supportive of the bold vision this Bill represents and a number of its provisions that, we believe, have the potential to be transformative, including:

- new reporting requirements for railways on rates, service and performance;
- a definition of "adequate and suitable" rail service that confirms railways should provide shippers with the highest level of service that can reasonably be provided in the circumstances;
- more accessible and timely remedies for shippers on both rates and service;
- prohibiting railways from unilaterally shifting liability onto shippers through tariff-making;
- enhancing railway safety by improving the information available in accident investigations; and

¹ Transport Canada: "[Rail Freight Service Review: Final Report](#)", January 2011.

- making changes to the *Canada Marine Act* that will allow ports to borrow from the new Infrastructure Bank.

We also believe the legislation achieves the right balance in reflecting the needs of the various stakeholders involved.

However, it is our view that, in order to meaningfully achieve what we believe the Bill's intent is in some areas, some minor adjustments will be required. The amendments we propose below are meant to:

- address challenges inherent in certain provisions' designs that will have unintended consequences and/or do not fulfill what we believe is the Bill's intent;
- address the reality that, due to captivity (having to rely on one railway) and/or geographical limitations, some of the major elements of the Bill aimed at re-balancing the shipper-railways relationship will not apply to certain shippers including Teck (e.g. Long-Haul Interswitching); and
- reflect Teck's actual experience with processes within the Act and in our interactions with railways.

We offer the following commentary and recommended amendments in areas of key importance to Teck.

Recommended amendments to Bill C-49

Transparency

The amendments proposed in Bill C-49 in s. 51(1-4) and s.76-77 go a long way in addressing the service level data deficiencies that are currently inherent in our national rail transportation system, and which have led to business and policy decisions being made in an evidence vacuum. However, we are concerned that, as written, certain transparency provisions will not achieve the objective of enabling meaningful data on supply chain performance to be made available.

Of specific concern is s. 77(2), which articulates the requirement of a class I railway to provide the Minister a report containing the same information specified in sections of the United States' Code of Federal Regulations.

As background, the US model that s. 77(2) relies on is not desirable in its entirety, as its design is flawed and does not provide the level of reliability, granularity or transparency required for the Canadian context. In short, the system under s. 77 (2) does not represent shipments accurately nor completely and reports on system-wide averages. For instance, rail carriers in the US are not required to have the information they report accurately represent the population by commodity, origin, destination or other criteria, nor do they provide consistent reporting from period to period. The data is also very dated. The solution, as outlined in Teck's original submission, is to require railway reporting by corridor rather than system-wide, and, similar to s. 76 – require the reporting of all Waybills and allow the receiving Agency of the government to aggregate and create reports as required.

Further, the US model upon which this Bill relies was created when the storage and transmittal of large amounts of data was not technologically possible. In 2017, with data storage capabilities that exist today, there is no need for such a restriction. In fact, railways are already collecting this data.

To ensure the right level of service level data granularity is struck within the rail freight reporting regime to make it meaningful, we recommend an amendment that ensures all waybills are provided by the railways rather than just a sample which will completely satisfy the data reporting requirements under 77 (2).

- **Recommendation:** To amend s. 77 (2) to include the following addition: “A class I railway shall provide to the Minister [...] **provided that the information shall derive from and include all waybills, not just samples thereof**”.

The extension of this provision to include all samples will not impact the confidentiality of data in all scenarios where this data would be used. For instance, the Final Offer Arbitration (FOA) is already a confidential process. The Canadian Transportation Agency can and has provided costing information to the arbitrator and the parties, so there is no change if data is to be mandated.

Meanwhile, in Agency proceedings, the Agency issues redacted decisions to protect the confidentiality of the parties. This practice can be maintained.

Further, in terms of publicly disclosed data coming out of a Service Level Agreement arbitration, redactions and no-names approaches can be utilized.

Access to remedies

It is Teck's view that Bill C-49 addresses several issues in the Canada Transportation Act (CTA) related to a shipper's ability to access current remedies when service failures have occurred. However, we recommend amendments that will further assist in achieving the goal of providing for a more balanced approach for stakeholders that includes remedy accessibility.

Ability of the Agency to collect and process railway costing data

Specifically, the TMA significantly improves the Agency's ability to collect and process railway costing data, whether through exercising its powers and responsibilities under Long-Haul Inter-switching or Inter-switching or under the Determination of Costs at s. 157 of the CTA. The proposed amendments to the CTA will compel the routine transmittal of railway costing elements from the railways to the Agency, thereby improving the ability of the Agency to arrive at current and accurate costing determinations to ensure the rates shippers pay are fair and justifiable.

The Agency's ability to arrive at these costing determinations is critical to maintaining the integrity of the FOA as a shipper remedy to deal with the railways' market power. Currently, the FOA model is flawed because of the Agency's inability to deliver costing determinations which defeats its purpose. Under the current FOA model, it is the practice of arbitrators to request an Agency costing determination only when the two parties to the arbitration agree to make the request to the Agency. However, we have witnessed the railway companies habitually declining to cooperate with the shippers in agreeing to make such a request of an arbitrator, thus frustrating the one remedy available to a shipper to deal with the market power of the rail carriers to which it is subject. Bill C-49 would limit a railway's ability to decline this request.

However, to ensure the right level of transparency and accessibility is struck so that remedies under the Act are meaningful and usable, under s. 161(2), it is critical that shippers also have access to an Agency costing determination that comes out of this process.

As a user of this remedy and given the significance of this challenge, since 2011, Teck has been active in Agency costing exercises including the Agency Regulatory Costing Methodology, the Capital Structure Methodology, the Cost of Capital Methodology and the Revisions to the Uniform Classification of Accounts. However, we have yet to see appropriate solutions be put in place but are hopeful that the TMA finally addresses this issue.

- **Recommendation:** To add to s. 161(2), part (f): **“any request that the Agency determine the variable costs of transporting the goods to which the arbitration relates, which, if so requested, the Agency shall determine forthwith and provide to the arbitrator, the shipper and the carrier within 5 days after the arbitrator is appointed by the Agency”**.

Long-Haul Interswitching as a remedy will not be an option for Teck

One of the main amendments proposed for the Act is Long-Haul Interswitching (LHI), which is positioned as a remedy for captive shippers. However, in reality, the specifics of this remedy outlined in the Bill will manifest in eliminating LHI as an option for Teck’s five steelmaking coal mines in south-eastern British Columbia.

In Teck’s view, the LHI provisions will result in these operations being confirmed as amongst the most captive shipper operations in the country. Had real competition been introduced in the Act through the extension of running rights, this in itself would not be problematic. However, currently, Teck is unsure as to how these LHI amendments will indirectly affect Teck. At best, they will have no effect whatsoever, and, at worst, it is unknown.

Level of services

Service obligations

We are concerned that the proposed language offered in the TMA for determining whether a railway has fulfilled its service obligations does not reflect the reality of the railway-shipper imbalance and the inherent extraordinary power of the class I railways given the monopoly context Canada operates within.

Specifically, under proposed Level of Services s. 116 (1.2) “The Agency shall determine that a company is fulfilling its service obligations...having regard to the following considerations: (e) the company’s and the shipper’s operational requirements and restrictions”.

This language does not reflect the reality that, in connection with the service that a railway company may offer its customers, it is the *railway company* that decides the resources that it will provide. Those decisions include purchasing (assets), hiring (labour) and construction (infrastructure), which could result in one or more “restrictions”. As those restrictions are unilaterally determined by the rail carrier, it is not appropriate for those restrictions to then become a goal post in an Agency determination.

- **Recommendation:** To either strike out provision (e) under s. 116 (1.2) or, make the restrictions themselves subject to review.

Arbitration on whether railways are fulfilling service obligations

Under proposed Arbitration on Level of Services s. 169.37(2) (e), identical language as discussed above is used in connection with s. 116(1.2). Teck has the same concern here.

Further, we are concerned that the proposed language offered regarding how an arbitrator establishes terms does not reflect the reality that the role of the arbitrator must be one that involves discretionary powers. Specifically, the language under proposed Arbitration on Level of Services s. 169.37 (3) poses some challenges: “The arbitrator shall establish a term with respect to an amount described in paragraph 169.31 (1) (c.1) that is balanced between the shipper and the railway company.”

The role of an arbitrator is to be the assessor of each party’s case and to make a decision based on the facts and arguments that have been presented. Discretion is critical. The appropriate outcome should be a right decision made by an arbitrator based on the facts of the case, not a balanced decision between the parties. The proposed language seeks to eliminate that discretion.

- **Recommendation:** To either strike out provision (e) under s. 169.37 or, make the restrictions themselves subject to review and to strike out s.160.31 (1) (c.1).

Conclusion

In conclusion, as the failures of past rail freight legislative reviews have demonstrated, despite good intentions, legislative design is critical to enabling those intentions to come to fruition.

Getting the design right will help Canada shift away from a status quo that has resulted in continued rail service failures, has damaged Canada’s global reputation as a trading nation, and led to the proliferation of ‘quick-fix’ policy solutions that have not been based on evidence and picked winners and losers across industries over the years.

This is the opportunity to be bold and set a new course in building a truly world-class rail freight regime in Canada to the benefit of all Canadians.