

**Speaking Notes for Joel Neuheimer (Vice President, International Trade, Transportation and Corporate Secretary) to the Standing Committee on Transport, Infrastructure and Communities (TRAN) on Bill C-49**

**September 13, 2017**

- Good morning members of the committee. Thank you very much for having me here on behalf of the members of the Forest Products Association of Canada (FPAC).

**Who We Are**

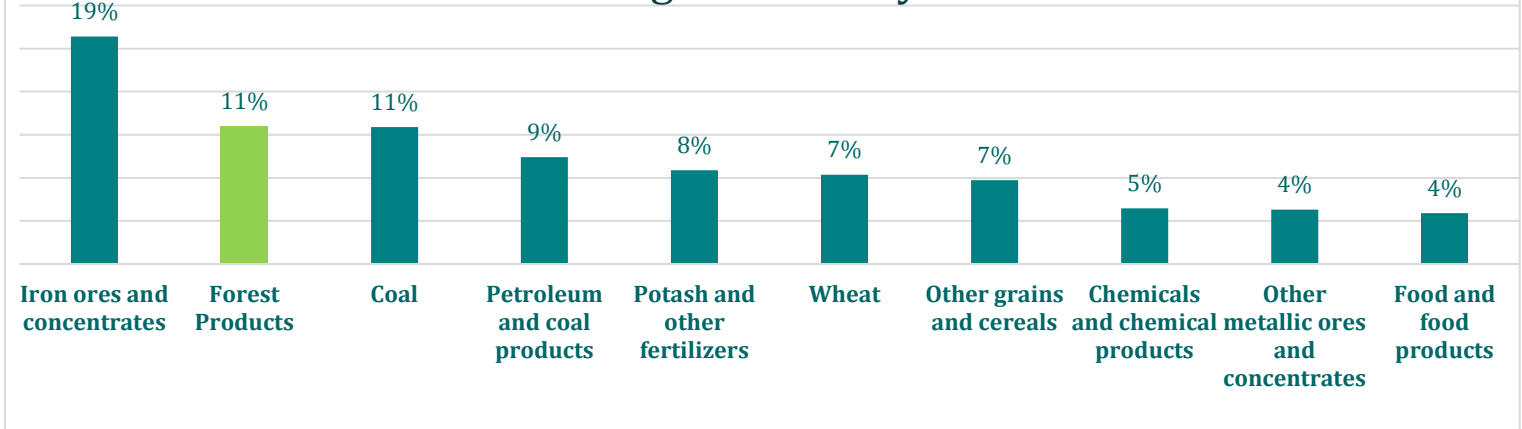
- FPAC is the voice of Canada's wood, pulp and paper producers, a 67 billion dollar a year industry.
- Our sector is one of the largest employers of Indigenous Peoples in Canada, including 1,400 indigenous-owned forest businesses.
- As the third largest manufacturing industry, it is a cornerstone of the Canadian economy, representing 12% of Canada's manufacturing GDP.
- We export over 33 billion dollars worth of goods to 180 countries.
- We are also the second largest user of the rail system, transporting over 31 million tons by rail in 2016.<sup>1</sup>

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<sup>1</sup> Source: Statistics Canada CANSIM table 404-0002



## Share of Tonnage Carried by Rail in 2016



### Our Vision

- As Minister Garneau said at his May 18, 2017 speech in Edmonton, **“The challenge of our time is to further enhance the utility, the efficiency and the fluidity of our rail system.”**
- FPAC believes that the primary goal for transportation policy is a freight system that is even more competitive, efficient, and transparent, to reliably move Canada’s goods to global markets. This is most likely to emerge if guided by commercial decisions in competitive markets.
- At the same time, there are some markets where competitive forces are limited or non-existent and where there is a legitimate and necessary role for regulation or other government action, including a number of the type of concepts being considered in Bill C-49.
- Forest industry mills are normally located in rural, remote communities and served by one single rail carrier, hundreds of kilometers away from the next competing railway, which causes an imbalance of power between these mills and railways.
- Poor service costs our members hundreds of millions of dollars every year, including the costs of: lost production, alternative transportation, additional storage, additional management and overhead costs, and long-term business impacts.

- While the railways are one of our most important partners, including on Canada's supply chain infrastructure needs, as well as reducing GHGs, FPAC members need Bill C-49 to help balance the playing field when it comes to their business dealings with railways.

### **Need Your Urgent Action**

- Bill C-49 needs more robust and workable measures than what is currently included. Without these changes Canada's economy and the jobs that our member companies and other industries provide across the country will continue to be threatened. Urgent action is needed.
- The economies of over 600 communities across Canada depend on their local forest products mills. Making Bill C-49 work the way it is intended to will enable our members and other industries to create more middle class jobs and to help prevent economic failures in communities such as but not limited to mill shutdowns resulting from poor rail service. In the case of a shutdown of a large pulp mill, for example, this would mean losses in the range of \$1.5 million per day.

### **Amendments Needed That Are Consistent With the Spirit of the Bill**

- FPAC supports Bill C-49's wording on "reciprocal financial penalties." However, to be truly effective there are some critically important amendments, which are consistent with the Minister's intent for this Bill, that should be made.
- FPAC urges the government to make changes in five key areas. The specific wording changes and the rationale behind them are all outlined in detail in the Annex to my remarks. I would like to focus today on a few of these important changes.
  - **"Improved access and timelines for Agency decisions"** – As is, the bill will weaken the Agency's ability to respond quickly to urgent rail service issues unless it is amended so that the Agency continues to control its own procedure.



- The U.S. equivalent to the Canadian Transportation Agency, the Surface Transportation Board or STB, recently began a service related investigation of one of the Class One railways in the United States. The STB did not have to wait for the U.S. Secretary of Transportation to instruct them to do this. They recognized there may be a problem and they began to investigate. Why can't we have the same set up here in Canada? Who wants to wait for the Minister of Justice to ask the police to investigate every time someone may not be following the law? Bill C-49 needs to be amended to make this so, to help ensure that Canada's supply chain is working well and delivering for the 600 forest communities and hundreds of other communities and millions of workers it supports across Canada.
- **Definition of "adequate and suitable"** – As currently written, the Bill tells the railways that if they provide the highest level of service they can reasonably provide in the circumstances, they cannot lose a service complaint. The objective of our proposed wording change is to make the intent absolutely clear without the need for protracted litigation about what this clause really means. The final outcome on this component of the Bill must prevent current failures such as the following that our members must live with. At a minimum, at least give the Canadian Transportation Agency the mandate to investigate, on its own, these types of matters.
  - When members ask why their traffic has again been left behind or why they have not received empty cars that have been sitting at the railway's serving yard, they hear it is because priority is being given to another commodity sector.
  - Another example that has been brought to our attention is members that have product to ship to current and potential



customers whose facilities are accessible by rail, cannot get enough rail cars, are not served frequently enough and are being discouraged via the rates that are quoted.

These types of service issues are not isolated and they cost our members hundreds of millions of dollars annually.

- **“Long-Haul Inter-switching”** – The Bill needs to be amended to eliminate the unnecessary pre-requisites for using this remedy as well as the many exclusions. Without important amendments, Long-Haul Inter-switching will not be a usable remedy for the majority of captive forest products traffic.
- **“Data disclosure”** - As currently worded, the interim provisions in the Bill dealing with rail performance data will provide supply chain participants with data that is too aggregated and too out of date to be of any real use in their planning. The time frames for reporting and publication need to be shortened (e.g. Bill says requirements will be set out in a regulation in a year – can we not do better than that with so much at stake?), and more granular detail needs to be published, such as but not limited to
  - Commodity specific (e.g. grain, coal, lumber, pulp/paper) results by rail car type on a weekly basis by region (e.g. east-west)
- **“Strengthening oversight of the railway discontinuance process”** – As currently worded, the Bill will prevent the creation of viable shortlines by allowing railways to suspend service before the process is completed thereby making it more difficult for an alternative railway to take over.
- Making these changes will mean Canadians in communities across the country will be served by a more reliable and competitive freight transportation system.



## **Over 600 Forest Dependent Communities Need A More Reliable Transportation System**

- FPAC members take great interest in transportation issues because they account for up to one-third of their input costs.
- The availability of an efficient, reliable and cost-competitive transportation system is essential for future investment in our sector – and to support the families that rely on our industry for their livelihoods across Canada.
- Members of the Committee, for the 230,000 Canadians directly employed by the forest sector across Canada, a more competitive freight transportation system as outlined here will ensure increased access to the rail system, more reliable service throughout the supply chain and, more competitive rates and a more competitive supply chain.
- I will now be happy to answer any questions you might have about our members' position on Bill C-49.



## ANNEX #1

***IMPROVED ACCESS AND TIMELINES FOR AGENCY DECISIONS*****A. Informal Resolution Process**

Bill C-49 aims to improve the Agency's ability to address issues that arise between shippers and railways by directing it to provide guidance on available remedies and to assist in resolving issues informally. This has the potential to benefit particularly those shippers who, whether due to a lack of resources or knowledge or, as is often the case, a fear of retribution from their rail service provider, do not file formal complaints. The measures in Bill C-49 lack two crucial components without which (a) no one is held accountable for implementing informal resolutions that are reached and (b) issues faced by a significant segment of the shipper community and any related systemic trends remain hidden from stakeholders and policy makers.

FPAC recommends the following changes to the provisions of Bill C-49 dealing with Agency powers generally:

**1. Amend Bill C-49 by adding the following after Section 3:**

**(x) The Act is amended by adding the following after Section 24:**

(24.1) The Agency may of its own motion inquire into, hear and determine any matter or thing that under this Act it may inquire into, hear and determine.

**2. Amend Section 6 of Bill C-49 to read as follows:**

**6 Section 42 of the Act is amended by adding the following after subsection (2):**

**Railway transportation**

**(2.1)** The report shall include the number and nature of the issues raised by interested persons under s. 36.11, and the applications, complaints and submissions for arbitration made under Parts III and IV, the manner they were dealt with and the systemic trends observed. The report shall also include the number of disputes that were mediated by the Agency and the number that were resolved through mediation by the Agency and the number and result of attempts at informal resolution.

The amendments to Bill C-49 outlined above would assist in ensuring that:

- a. informal resolutions are in fact implemented and effective; and
- b. policy makers have the benefit of the insights into broader trends and issues which the Agency will undoubtedly gain from this aspect of its mandate.



## B. Time for Pleadings and Decision in Service Complaints

Subsection 23(1) of Bill C-49 shortens the time within which the Agency is required to rule on a service complaint from 120 to 90 days. While this should assist in bringing about more timely decisions, a shipper who is experiencing an acute service shortfall or an all-out refusal of service can typically not afford to wait three months for relief. For a pulp mill dependent on rail transportation, for example, this would mean shutting down production [and laying off staff?]. Parliament has always recognized the need for flexibility in this regard by giving the Agency and its predecessors the ability to control their own procedure by, among other things, expediting urgent applications or granting interim relief pending the final outcome of the case.

Subsection 23(2) of Bill C-49 would dictate to the Agency certain minimum time frames for the preparation and filing of written documents that would apply in all service complaints regardless of urgency and regardless of whether the relief ordered is interim or final.

FPAC recommends the following amendment to the provisions of Bill C-49 dealing with complaints to the Agency under s. 116 of the Act in respect of railway service obligations:

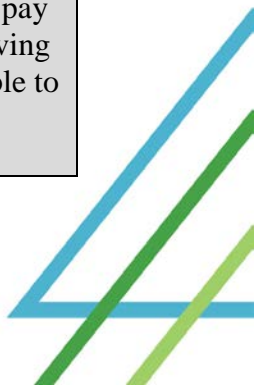
*Amend Subsection 23(2) of Bill C-49 by deleting the proposed subsection 116(1.1)*

Eliminating mandated timeframes for pleadings from Bill C-49 is necessary to ensure that the Agency remains able to deal with service issues on an expedited or interim basis where appropriate. In all other cases, there is no reason to believe that the Agency would unfairly shorten the time available to either party to make submissions.

## C. Final Offer Arbitration

Final offer arbitration (FOA) has functioned well as a remedy that promotes commercial resolution of disputes over rates and conditions for the movement of rail freight. The costs associated with this remedy are, however, prohibitive for many shippers. While the Act makes provision for a simpler “summary process” FOA, this process is limited to disputes involving total freight charges not exceeding \$750,000. Bill C-49 would raise this monetary cap to \$2 million, but would still preclude the use of the simpler, more affordable version of FOA by many smaller shippers. For example, at a rate of \$3,000 per railcar, a shipper shipping no more than one railcar per day (over a two year term) would be ineligible to use summary process FOA – even if the difference between its final offer and that of the railway amounted to less than \$500,000 in total.

The total amount of freight charges involved in an FOA is not a reliable indicator of (a) the total amount of freight charges *at issue* (i.e., the difference between what the shipper is willing to pay and what the railway is willing to accept) or (b) the overall complexity of the dispute. Removing the monetary limit on summary process FOA is necessary to make the FOA remedy accessible to smaller shippers and to ensure that the costs incurred by the parties are proportional to the complexity of the dispute.





FPAC recommends three amendments to Bill C-49 in relation to final offer arbitration:

**1. Amend Section 46 of Bill C-49 to read as follows**

**46 Subsection 161(2) of the Act is amended by adding the following after paragraph (a):**

(b) the period requested by the shipper, not exceeding two years, for which the decision of the arbitrator is to apply;

(b.1) if the shipper intends the arbitration to proceed under section 164.1, a statement to that effect;

**2. Amend Section 47 of Bill C-49 to read as follows:**

**47 The portion of section 164.1 of the Act before paragraph (a) is replaced by the following:**

**Summary process**

**164.1** ~~If the Agency determines that a shipper's submission under section 161 indicates that the shipper intends the arbitration to proceed under this section, final offer submitted under subsection 161.1(1) involves freight charges in an amount of not more than \$2,000,000, adjusted in accordance with section 164.2, and the shipper did not indicate a contrary intention when submitting the offer,~~ sections 163 and 164 do not apply and the arbitration shall proceed as follows:

**3. Delete Section 48 of Bill C-49**

These amendments are necessary to promote proportionality between the complexity and expense of the FOA process and the complexity of the dispute and the amount at issue and to make the FOA remedy more accessible to smaller shippers.



**“ADEQUATE AND SUITABLE”**

Bill C-49 is intended to clarify that in order to provide “adequate and suitable” service, a railway must provide the highest level of service that is reasonable in the circumstances. The proposed wording for the new subsection 116(1.2) fails to accomplish this. It does not preclude, for example, a finding that service which falls short of the highest reasonable level is nevertheless still reasonable and within a range of what is adequate and suitable.

FPAC recommends the following change to the provisions of Bill C-49 dealing with railway level of service complaints to address this shortfall:

- 1. Amend Subsection 23(2) of Bill C-49 by replacing the proposed preamble of subsection 116(1.2) with the following):**

**Considerations**

(1.2) The Agency shall not determine that a company is fulfilling its service obligations if unless it is satisfied that the company provides the highest level of service in respect of those obligations that it can reasonably provide in the circumstances, having regard to the following considerations:

FPAC’s recommended changes will make it clear that in order to be found to be providing adequate and suitable accommodation for a shipper’s traffic, a railway must provide, at a minimum, the highest level of service that it can reasonably provide in the circumstances.



## ***LONG-HAUL INTERSWITCHING***

The proposed Long-Haul Interswitching (LHI) remedy is to replace Zone 5 regulated interswitching (30km to 160km) as well as the current Competitive Line Rate (CLR) remedy. Both of these were designed to introduce the possibility of intramodal competition between railways in situations where potential competitors would ordinarily be excluded because they lack direct physical access to a shipper's facility and because the serving carrier is able to impose monopoly prices for the movement to the interchange that act as barrier to transferring traffic to a competitor. Competitive access remedies like CLR and regulated interswitching allow a shipper to require the serving carrier to transfer traffic to a second carrier at a regulated rate. By law, the Agency sets this rate to, at a minimum, fully compensate the serving carrier for the cost of providing this transfer.

Both in the way it is structured and in its approach to setting the applicable rate, LHI essentially mirrors the current CLR remedy. CLR has been largely inoperative for the past three decades because CN and CP have declined to compete for traffic using this remedy. There is no reason to believe that replacing CLR with LHI will alter this dynamic.

Even if the railways chose to compete using LHI, however, Bill C-49 includes a number of provisions that make LHI unusable or create unnecessary barriers for many captive shippers. These include:

- a. a long list of excluded traffic much of which would currently be eligible for CLR;

For example, the exclusion of the interchange between CN and CP at Kamloops means that captive shippers of forest products virtually anywhere in British Columbia will have no competitive access remedy that they can use to move their traffic to Vancouver for export to markets unaffected by adverse tariffs on Canadian forest products.

- b. the requirement for an undertaking by the shipper to ship its traffic by rail to the interchange in accordance with the LHI order;

Instead of using LHI to create a second option for moving its traffic, the shipper is required to agree to use *only* LHI. This defeats the purpose of competitive access. It also makes agreement with the connecting carrier a practical commercial necessity. The supposed benefit of removing the express prerequisite for such an agreement (as exists in CLR) is therefore largely illusory.

- c. the requirement for an attempt to resolve the terms of LHI prior to filing an application.

This prerequisite is both unnecessary and counterproductive. Past experience with shipper remedies clearly demonstrates that shippers initiate a formal complaint process only after their efforts at resolving the issue commercially have failed. Secondly, rail carriers generally prefer a single line routing over one involving multiple carriers and a joint routing that maximizes their share of the total distance one that involves transferring traffic at the nearest interchange. Requiring a shipper who has been unable to reach a commercial arrangement using the rail carrier's *preferred* routing to then put forward a proposal to move its traffic over the rail



carrier's *least preferred* routing is more likely to move the parties further apart than bring them closer to a commercial resolution.

FPAC recommends the following changes to the provisions of Bill C-49 dealing with Long-Haul Interswitching:

**1. Amend Section 29 of Bill C-49 by amending the proposed new subsection 129(3) as follows:**

**No entitlement**

- (3) A shipper is not entitled to apply to the Agency for a long-haul interswitching order
- (a) if the point of origin or destination that is served exclusively by the local carrier is within a radius of 30 km, or a prescribed greater distance, of an interchange in Canada;
- (b) if the point of origin or destination that is served exclusively by the local carrier ~~or the nearest interchange~~ is located within the Quebec–Windsor corridor or the Vancouver–Kamloops corridor;
- ~~(c) if the point of origin or destination that is served exclusively by the local carrier is located on a track that~~
- ~~(i) serves a reload or distribution compound, a container terminal or any other facility operated by the local carrier or for the local carrier's own purposes, or~~
- ~~(ii) is used by the local carrier for the transfer of traffic between cars or between a car and a warehouse owned by the local carrier;~~
- ~~(d) for the movement of vehicles, as defined in section 2 of the Motor Vehicle Safety Act, or of parts of those vehicles;~~
- ~~(e) for the movement of TIH (Toxic Inhalation Hazard) material;~~
- ~~(f) for the movement of radioactive material;~~
- (g) for the movement of oversized traffic on flat cars, if the dimensions of the traffic require exceptional measures be taken;
- (h) for the movement, on flat cars, of containers or trailers unless they arrive at a port in Canada by water for movement by rail or by rail for movement by water;
- (i) if the traffic to be moved is already the subject of a long-haul interswitching order;
- ~~(j) if an order or consent agreement made under Part VIII of the Competition Act, which followed an application made by the Commissioner of Competition, addresses the rate for the traffic to be moved; or~~



(k) in any other case specified in the regulations.

FPAC's recommended changes would align the exclusions more closely with those that apply to CLR's and would assist in making captive shippers across all commodities and regions of Canada eligible to use the remedy.

**2. Amend Section 29 of Bill C-49 by amending the proposed new Section 132 as follows:**

**Contents of application**

**132** The shipper shall, in its application for a long-haul interswitching order,

~~(a) provide an undertaking to the local carrier to move the traffic by rail with the local carrier between the point of origin or destination that is served exclusively by the local carrier and the nearest interchange in Canada with a connecting carrier in accordance with the long-haul interswitching order; and~~

~~(b) indicate the continuous route that the shipper has chosen for the movement of the shipper's traffic.~~

This amendment would assist in ensuring that LHI can be used to provide captive shippers with more than one means of moving their traffic .

**3. Amend Section 29 of Bill C-49 by deleting the proposed new Section 133**

This amendment would eliminate an unnecessary and counterproductive barrier to using the LHI remedy.



***RAILWAY LINE DISCONTINUANCE:***

Before discontinuing operations on a railway line, rail carriers must advertise the line to potential buyers for continued operations and ultimately offer to transfer the line to various levels of government or other public body “for any purpose”, with those entities having successive 30 day periods to accept the offer. Bill C-49 would allow the Minister of Transport to extend the period during which the federal government can accept the offer of transfer by up to 16 months, but would also allow the rail carrier to suspend rail service on the line during much of this time as well as during the entire time which other levels of government would have to negotiate a transfer. An extended period without rail service will force any remaining shippers on the line to find alternate ways of moving their traffic or to relocate their facilities – essentially demarketing the railway line.

In many instances in the past, local governments have acquired railway lines “for any purpose” with the intent of continuing operations through a shortline company. Allowing the railway company making the offer to suspend service during the discontinuance process will impair the potential viability of any shortline operations. Prohibiting the removal of infrastructure is not sufficient to prevent demarketing.

FPAC recommends that Bill C-49 be amended as follows:

***1. Amend Subsection 36(3) of Bill C-49 to read as follows:***

**36(3) Section 145 of the Act is amended by adding the following after subsection (3):**

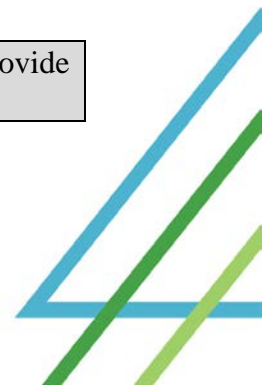
***Extension***

(3.1) If the Minister considers it appropriate to do so, the Minister may extend the period referred to in paragraph (3)(a) by 120 days. The Minister may further extend the period, but the total of those further extensions may not exceed 365 days. Each time the Minister extends the period, the Minister shall provide a notice to the railway company and the railway company shall notify the other governments and urban transit authorities.

***Service obligations***

~~(3.2) If the Minister extends the period referred to in paragraph (3)(a), the railway company has no service obligations in respect of the operation of the railway line commencing on the expiry of 150 days after the offer was received by the Minister and ending on the expiry of 280 days after the expiry of the extended period referred to in that paragraph. The railway company shall not remove any of the infrastructure associated with the line during the period for which it has no service obligations.~~

This amendment is necessary to prevent demarketing of railway lines that would otherwise provide viable opportunities for shortline operations.



## ***DATA COLLECTION AND DISCLOSURE***

The availability of detailed and timely data relating to the performance of the rail transportation system is essential to both policy makers and users of the system. Bill C-49 provides for weekly reporting by class 1 railways of data relating to railway operations and performance and for the publication of certain performance data and contemplates that specific requirements will ultimately be set by regulation. Until such time as regulations are in place, Bill C-49 adopts, with some modifications, the performance reporting requirements to which Canadian class 1 carriers are currently subject in respect of their US operations. However, none of these reporting obligations would take effect until one full year after Bill C-49 becomes law.

Bill C-49 modifies the US reporting requirements by, among other things:

- Extending the time periods for submission and publication of relevant data to two weeks and one week respectively, resulting in a total delay of three weeks between performance and publication (compared to one week in relation to US operations);
- Eliminating any commodity specific reporting (apart from grain).

The result of these modifications is that (a) by the time performance data becomes publicly available, it will no longer be of any meaningful use to shippers for the purpose of making decisions in relation to their traffic that affect the functioning of the national transportation system and (b) the data is likely to be so highly aggregated that it would be of limited practical usefulness in any event.

In order to make informed decisions, supply chain participants need to have access to information about the specific aspects of the national transportation system with which they interact – that means information that is sufficiently granular to allow them to distinguish between the performance of individual rail carriers and between performance issues that are likely to affect their traffic and those that are unlikely to do so.

FPAC recommends the following changes to the provisions of Bill C-49 related to the collection and publication of railway performance data:

1. ***Amend Section 13 of Bill C-49 by replacing the proposed subsection 51.4(1) with the following:***

### **Publication**

**51.4 (1)** If the Agency receives information from class 1 rail carriers or the Minister that is related to service and performance indicators provided in accordance with regulations made under paragraph 50(1.01)(b), the Agency shall publish the information on its Internet site within ~~seven~~ two days after it is received.



**2. Amend Subsection 77(2) of Bill C-49 as follows:**

**Information to be provided**

(2) A class 1 rail carrier shall provide to the Minister, in the form and manner that the Minister may specify, a report containing the information specified in paragraphs 1250.2(a)(1) to ~~(8)~~ (11) of Title 49 of the United States Code of Federal Regulations as amended from time to time.

**3. Amend Subsection 77(5) of Bill C-49 as follows:**

**Time limit**

(5) The class 1 rail carrier shall provide the report for each period of seven days commencing on Saturday and ending on Friday, no later than ~~14~~ 5 days after the last day of the period of seven days to which the information relates.

**4. Amend Section 98 of Bill C-49 by deleting Subsection (7).**

These amendments will assist in ensuring that the collection and publication of railway performance data contribute to the efficient operation of the national transportation system.

