

Brief

addressed to

The House of Commons,
Standing Committee on
Transport, Infrastructure and Communities

Regarding 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

Short Title: *Transportation Modernization Act*

by François Tougas

September 13, 2017

The Members should be commended for their efforts to address some of the deficiencies of the *Canada Transportation Act* (the “Act”), in a non-partisan way, for the benefit of the economy.

The rail freight industry needs direct competition between Class 1 rail carriers, with an effective running rights regime, which has been unsuccessful since inception. There are in fact a few remedies in the Act, some wholly ineffective, some that work in some circumstances, and some that show promise, but that are relatively weak. All shippers need an effective remedy to address rate and service conditions that only Parliament can provide to prevent rail carrier from inhibiting Canada’s productive capacity.¹

I have limited my comments on Bill C-49 to high priority items, even though I take issue with many aspects of C-49, including Transport Canada’s description of the Bill and its effects.

The data amendments proposed in C-49 are directed at two significant shortcomings in the Act; I have proposed relatively straightforward legislative fixes. Further below, I also have addressed a very few rail service provisions of C-49 to eliminate its most harmful aspects.

Regarding the data shortcomings, there currently are no means for rail customers or policymakers to collect, analyze and use rail data in their respective decision-making processes, either for assessing rate reasonableness or service level performance. In negotiations, proceedings and policy assessments, only the Class I rail carriers have the actual data; everyone else is left to hire experts or to make decisions in a data vacuum in a situation very unlike processes in the United States on which part of C-49 relies, even though the U.S. system is weak.

Costing Data

There is an attempt in C-49 to gather costing data somewhat similar to that available in the United States. However, data about CN and CP is much more readily available to US shippers than to shippers in Canada. This is unfair and unwarranted. CN and CP are hiding and the Act is protecting them. C-49 perpetuates this inequity but could easily address it.

US Cost Data Disclosure System: Rail freight financial and statistical data pertaining to rail freight shipments in the United States are readily available to the public. In particular, detailed costing data is available to, and allows, a shipper in the United States to determine a Class I rail carrier’s costs of transporting that shipper’s goods, without invoking a proceeding before the US Surface Transportation Board (“STB”). Information on shipments and rates are available for sample of freight movements. The rate data for these shipments may be “masked” in the public data file. After invoking a proceeding before the STB, that shipper can get additional, very detailed, rail carrier rate information about its shipments. None of these datasets are available to shippers in Canada.

In the United States, rail carriers are required to report and publicly disclose detailed financial and statistical data (disaggregated to individual accounts), which are made available on the STB

¹ http://www.tc.gc.ca/eng/ctareview2014/pdf/Francois_Tougas.pdf, p. 16 *et seq.*

website.² Notably, both CN and CP are required to provide these reports to the STB in respect of their United States operations, but Canada does not require it for their Canadian operations, leaving shippers in Canada at a considerable disadvantage to their US counterparts.

Furthermore, the STB has established a railroad general purpose costing system known as the Uniform Rail Costing System (“URCS”). URCS is used by the STB in connection with its statutory functions “to provide the railroad industry and shippers with a standardized costing model” and is “used by parties to submit cost evidence before the [Surface Transportation] Board”.³ The data supplied to URCS allows shippers to apply rail carrier unit costs to user-defined rail carrier shipments in the United States. This permits shippers to readily assess U.S. rail freight rate competitiveness, including CP’s and CN’s American operations, much to the credit of the URCS system.

Canadian System: There is no public disclosure in Canada of the information readily available in the United States. The one context in which such information might be disclosed at all is during final offer arbitration (FOA). FOA is only available in some limited circumstances for some types of shipments; even experts who testify for railway companies say it is designed for use when a Class I rail carrier exercises its market power.⁴

Few shippers have ever submitted the matter of their rates and conditions of service to FOA. Some shippers are entirely reliant on the remedy; that is, no other remedy is viable from origin to destination. Other shippers could use it, but the increasingly aggressive behaviour of Class I rail carriers has made those shippers wary of using FOA. As a consequence, there is significant harm to the economy in the form of lost output, earnings and employment.⁵

Unfortunately, FOA has become increasingly difficult to use, in large measure due to Class I rail carrier efforts. FOA is now much more expensive and time consuming than when it was introduced in 1987 and exposes shippers to retribution on their captive traffic. There are efforts to denigrate or diminish the work of Agency staff, shipper representatives and otherwise acknowledged experts. Statistics Canada used to report important data that is no longer available. It is not surprising, therefore, that shippers feel under siege and need regulatory relief.

Those who dare to use FOA face many hurdles in addition to those mentioned above. One such hurdle is the absence of costing data against which to gauge the reasonableness of the rates they are compelled to pay in order to get rail service. For the shippers who must use either CP or CN for all or part of their shipments, the lack of costing data makes the FOA dispute settlement mechanism a one-sided affair; the rail carrier knows its costs, the shipper does not and the arbitrator is asked to select an offer with evidence on only one side or no cost evidence at all.

² See 49 USC §11145 and 49 USC §11161. Various data can be found on the STB’s website at <https://www.stb.gov/econdata.nsf/AllData>

³ See <https://www.stb.gov/stb/industry/urcs.html>

⁴ An Examination of the STB’s Approach to Freight Rail Rate Regulation and Options for Simplification, Project FY14-STB-157, InterVISTAS Consulting Inc., September 14, 2016, p.75 *et seq.*

⁵ Gillen & Tougas, “Transportation Policy, Competition And Economic Growth” in Transportation and Innovation: the Roles of Governments, Industry and Academia, Proceedings of the 46th Annual Conference of the Canadian Transportation Research Forum, May - June, 2011, Gatineau, Québec

Proposal: Shippers in Canada should have access to the same quantity and quality of information available to shippers using CN and CP's services in the United States; that is not the case presently and C-49 as currently drafted does not change that. CN and CP hide behind a veil of secrecy in Canada that is not available to them in the United States. Keeping this information confidential only serves to preserve or enhance their market power in Canada, contrary to the most basic principles of a market economy.⁶ A simple answer to this problem, wholly within the FOA context, is to amend the Act as follows:

Priority 1: Recommendation Regarding Costing Data

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

(f) any request that the Agency determine the variable costs of transporting the goods to which the arbitration relates, which the Agency shall provide to the parties before the time set out in subsection 163(3).

This Committee is already amending subsection 161(2). Proposed paragraph 161(2)(f) would add one more item to the submissions required of a shipper submitting to final offer arbitration. No one else would have access to the results, as is presently the case. The disclosure of a Class I rail carrier's costing data would be limited to the shipper that dares to submit to FOA; again, no change. It is no more than what is currently available to an FOA arbitrator, if the Class I rail carrier consents. That is the problem. Up until a few years ago, a shipper needed only make the request of the arbitrator to ask the Agency to determine the costs of the shipment submitted to FOA. Unfortunately, CN and CP can simply refuse to consent, leaving the arbitrator in such cases without a critical piece of evidence to make a final offer selection. In this manner, CN and CP have neutered the FOA process, making it less available and less viable. With this amendment to the Act, the FOA process has a better chance of avoiding disputes, reaching good conclusions and satisfying the parties.

Performance Data

Railway performance data is not presently available in Canada. More of it is available in the United States. C-49 proposes to compel the disclosure, to the Minister only, of a subset of that information. Curiously, once again, shippers in the United States will have more data about CN's and CP's American operations than shippers in Canada about CN's and CP's Canadian operations.

Ideally, each Class I rail carrier would submit all data from every waybill as well as the information required by proposed s.76(2) of C-49. This information is readily accessible to the rail carriers, in real time, and is easily transferable. Requiring rail carriers to report that data would permit the creation of an accurate database of rail movements. It would not be burdensome to the Class I rail carriers, especially considering the claims they make about their IT capabilities. In this manner, any so-inclined shipper in Canada could assess for itself the extent to which, if any, a Class I rail carrier is or is not providing adequate and suitable accommodation for its traffic. No need for a legal process to investigate the matter. A shipper

⁶ Gallagher & Tougas, "The Disclosure of Rail Carrier Costing Information", North American Competitiveness in Global Trade: The Role of Transportation, Proceedings of the 48th Annual Conference of the Canadian Transportation Research Forum, Halifax, Nova Scotia, June 2013

could really only justify initiating an LOS process to obtain that level of service if the data supported a claim of inadequate and unsuitable service.

Present Situation: Currently, a shipper who believes it is not receiving adequate and suitable accommodation for its traffic must engage in a lengthy and costly assessment, without access to the Class I rail carrier's performance data. If it dares incur retribution, and only after suffering the damage associated with poor service, the shipper can then bring a complaint before the Agency. The Agency then must determine the case in the absence of all the performance data, as it is limited to the evidence the Class I rail carrier submits. The creation of a database and publication of all the waybill information and the information required by subsection 76(2) would eliminate many disputes and increase the likelihood that Class I rail carriers would conduct their operations in a way that reflects best on them. As it stands, they can hide behind the Act.

Proposal: Because C-49 is not oriented toward fulsome disclosure – not to customers, not to the Agency, not to the Minister – the proposal below is a simpler revision to the performance data provisions of C-49.

Priority 2: Recommended Performance Data Requirements

50 (1.01) The ~~Governor in Council may~~ **Agency shall** make regulations requiring any class 1 rail carrier or class of those carriers to provide information, other than *personal information* as defined in section 3 of the *Privacy Act*, ~~to the Minister or Agency~~, when and in the form and manner that the regulations may specify, for the purposes of

- (a) determining the long-haul interswitching rate referred to in paragraph 134(1)(a); and
- (b) communicating service and performance indicators **for each class 1 railway line** to the public.

77 (2) A class 1 rail carrier shall provide to the Minister, in the form and manner that the Minister may specify, a report **for each of its railway lines** 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.

Explanation of Priority 2: There are three main components to the Priority 2 Recommended Revisions to the TMA: (1) moving the regulation-making authority to the Agency, (2) requiring individual rail corridor reporting, and (3) harmonizing the commodity information to that required by the STB.

Authority: C-49 currently imposes on Cabinet the requirement for Class I rail carriers to provide the data sought by subsection 50 (1.01). By moving this obligation to the Agency as set out in Priority 2, the scope and depth of information can be revised from time to time on the basis of the Agency's authority, much as the Agency currently does for other aspects of the Act and other statutes it administers.

Rail Corridor Reporting: C-49 limits the rail service performance information required of Class I rail carriers to system-wide information. The STB requires and publishes this information for each railroad, including CN's and CP's American

subsidiaries, on a system wide basis. The STB ruled that its objective was to obtain “data that allows the agency to monitor the railroad industry’s current performance and to build a data set that will allow the Board to observe trends and make comparisons against past performance.”⁷ At the very least, the Canadian information should be broken down by railway. However, Canada should go further and address the criticisms made in representations to the STB when it established the data gathering rule, which the STB summarized as follows:

(1) the data the Board proposes to collect are too aggregated to provide meaningful insights into service quality; (2) system-wide performance data is less useful to shippers than data based on route, corridor, or commodity, which are important for identifying and rectifying service issues; and (3) variability in service, which tended to be greater in grain and coal units, can be more costly and problematic than absolute service levels. (Id. at 4-5.)⁸

Commodity Reporting: C-49 does not follow the STB rule that applies to US rail carriers, including CN’s and CP’s American subsidiaries. C-49 does not require weekly carload commodity group information (other than grain), rendering the data trends rather uninformative. The proposal in Priority 2, by adding paragraph (11) rather than stopping at paragraph (8), would require Class I railways to report their service performance data in respect of 23 commodity groups, just as is required by the STB of CN and CP.⁹ There is no juridical or regulatory reason why this small homage to granularity could not be afforded to the Agency and Canadian policymakers and shippers.

System-wide data may assist in demonstrating long term trends across entire rail systems, but do not help identify service failures in any region or corridor, much less those faced by any shipper.

LOS and SLA

The Level of Service (LOS) provisions found at sections 113 to 116 of the Act have a long history as the codified version of the common carrier obligations of rail carriers. The Service Level Arbitration (SLA) provisions found at sections 169.31 to 169.43 of the Act are relatively new. It is not surprising that contractual rail carrier performance obligations are rare. A rail carrier’s ability to unilaterally impose tariffs ensures they are void of self-imposed service obligations. With its famed market power, a rail carrier can blithely ignore shipper demands for service without fear of losing the business.

Both the LOS complaint remedy and the SLA process were designed, along with the statutory service obligations, to compel railways to do things they would not otherwise do, given the

⁷ STB Decision, Docket No. EP 724 (Sub-No. 4), United States Rail Service Issues – Performance Data Reporting, November, 29, 2016, p.7.

⁸ *Ibid.*, citing See Transp. Research Bd. of the National Academies, Modernizing Freight Rail Regulation, 48-56 (2015); Laurits R. Christensen Associates, A Study of Competition in the U.S. Freight Railroad Industry and Analysis of Proposals that Might Enhance Competition, ES-35 to ES-37 (2009), <https://www.stb.gov/stb/docs/competitionstudy/executive%20summary.pdf>.

⁹ See https://www.stb.gov/stb/railserviceissues/rail_service_reports.html#loaded

absence of competitive forces at the point where rail services are rendered to their customers. As a consequence, rail system users, particularly shippers, have been left to beg the Agency for relief from rail service failures that are so notorious they have led to significant shipper losses over multi-month and even multi-year periods, a federal rail freight service review, new legislative approaches and even Bill C-30, which has now led to Bill C-49 and to the work of this Committee.

C-49 sets out a number of criteria, many of which are familiar to the Agency, the rail carriers and shippers in the adjudication of service disputes. The Agency has done an admirable job of determining the circumstances in which it will determine a rail carrier has or has not fulfilled its statutory service obligations. Last year, in analysing the 35 LOS decisions the Agency had rendered from 1988 until early 2016 (as modified by any subsequent Federal Court of Appeal order), we found that the applicant did not receive an Agency order in 21 of those 35 decisions and, in the remaining 14 decisions, only 6 got substantially the order they sought.¹⁰ This is not a system that needs any further inclination toward rail carriers. Indeed, the Agency's decision-making process ensures only the most egregious rail carrier conduct gets attention. For that reason alone, I'd have left the LOS complaint remedy alone. And, if anything, the SLA process could have been improved to allow for greater ease of timely and forward-looking use.

Unfortunately, C-49 introduces concepts that are entirely foreign to the common carrier obligation in three ways: (1) in the case of the LOS complaint remedy, allowing substandard rail levels of service, (2) in the case of both the LOS complaint remedy and the SLA process, reduce the level of service to unilaterally imposed rail carrier restrictions and (3) in the case of the SLA process, seeking a balanced response where the very reason for the existence of the process is because the relationship is imbalanced.

Highest Level of Service: C-49 requires the Agency, when rendering a decision in an LOS complaint, to find that a railway company is meeting the highest level of service – if it is, essentially, trying hard. The opening words of proposed s.116(1.2) do not say what happens if a rail carrier does not provide the highest level of service it can provide. The Priority 3 revisions below reverse the finding requirement so that the level of service is no less than the highest that can be reasonably provided in the circumstances.

Reduction in Service Levels: In addition, ss.116(1.2)(e) and 169.37(2)(f) would require the Agency to look at both the rail carrier's requirements and restrictions, which are all outside the control of a shipper and well within the control of the rail carrier. For example, a rail carrier will decide whether to acquire locomotives and how many, whether to terminate, as both CN and CP have, the many thousands of employees that used to provide service that is no longer available, whether to limit infrastructure and whether to invest in technologies that increase service. It is entirely inappropriate for the Agency to have to determine whether, in light of railway companies' decisions to restrict their own capacity, a shipper should receive a portion of the unilaterally restricted capacity. The Priority 3 proposal is to strike the provision entirely.

¹⁰ Gallagher & Tougas, "Rail Level of Service Decisions and Shipper Service Requirements, Proceedings of the 51st Annual Conference of the Canadian Transportation Research Forum, Montréal, Québec, May 2016.

Balance between Shipper and Carrier: C-49 imposes an obligation in new s.169.37(3) on an arbitrator to render decisions in a balanced way. The Agency enjoys a reputation for fairness and impartiality and has enjoyed deference from the appellate courts. Arbitrators are rarely appealed. Why would such a provision be necessary? The SLA process exists precisely because a rail carrier will not provide what the shipper requires. If it turns out, upon examination, that a shipper does not require the service it seeks, the shipper won't get it. An arbitrator has discretion in such circumstances to make the judgement calls that arise upon the very infrequent submission to SLA by a shipper. Priority 3 proposal would strike the provision in its entirety.

Priority 3: Recommended Revisions to Service Level Proposals

23 (2) Section 116 of the Act is amended by adding the following after subsection (1):

116 (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:

- (a) the traffic to which the service obligations relate;
- (b) the reasonableness of the shipper's requests with respect to the traffic;
- (c) the service that the shipper requires with respect to the traffic;
- (d) any undertaking with respect to the traffic given by the shipper to the company;
- ~~(e) the company's and the shipper's operational requirements and restrictions;~~
- (f) the company's obligations, if any, with respect to a public passenger service provider;
- (g) the company's obligations in respect of the operation of the railway under this Act;
- (h) the company's contingency plans to allow it to fulfil its service obligations when faced with foreseeable or cyclical events; and
- (i) any information that the Agency considers relevant.

52 Section 169.37 of the Act is replaced by the following:

(2) In making the decision, the arbitrator must have regard to the following:

- (a) the traffic to which the service obligations relate;
- (b) the service that the shipper requires with respect to the traffic;
- (c) any undertaking described in paragraph 169.32(1)(c) that is contained in the shipper's submission;
- (d) the railway company's obligations under this Act in respect of the operation of the railway;
- (e) the railway company's obligations, if any, with respect to a public passenger service provider;
- ~~(f) the railway company's and the shipper's operational requirements and restrictions;~~
- (g) the question of whether there is available to the shipper an alternative, effective, adequate and competitive means of transporting the goods to which the service obligations relate; and
- (h) any information that the arbitrator considers relevant.

~~(3) The arbitrator shall establish a term with respect to an amount described in paragraph 169.31(1)(c.1) in a manner that encourages the efficient movement of the shipper's traffic and the performance of the railway system and that is balanced between the shipper and the railway company.~~

Lastly, the Act needs at least quadrennial review, rather than once in eight years as presently drafted, if only to determine the usefulness of remedies to overcome rail carrier decisions that limit Canada's industrial productive capacity.

Summary of Proposed Legislative Amendments

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

(f) any request that the Agency determine the variable costs of transporting the goods to which the arbitration relates, which the Agency shall provide to the parties before the time set out in subsection 163(3).

50 (1.01) The ~~Governor in Council may~~ **Agency shall** make regulations requiring any class 1 rail carrier or class of those carriers to provide information, other than *personal information* as defined in section 3 of the *Privacy Act*, ~~to the Minister or Agency~~, when and in the form and manner that the regulations may specify, for the purposes of

- (a) determining the long-haul interswitching rate referred to in paragraph 134(1)(a); and
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77 (2) A class 1 rail carrier shall provide to the Minister, in the form and manner that the Minister may specify, a report **for each of its railway lines** containing the information specified in paragraphs 1250.2(a)(1) to **(811)** of Title 49 of the United States *Code of Federal Regulations* as amended from time to time.

TMA: 23 (2) Section 116 of the Act is amended by adding the following after subsection (1):

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- (c) the service that the shipper requires with respect to the traffic;
- (d) any undertaking with respect to the traffic given by the shipper to the company;
- ~~(e) the company's and the shipper's operational requirements and restrictions;~~
- (f) the company's obligations, if any, with respect to a public passenger service provider;
- (g) the company's obligations in respect of the operation of the railway under this Act;
- (h) the company's contingency plans to allow it to fulfil its service obligations when faced with foreseeable or cyclical events; and
- (i) any information that the Agency considers relevant.

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- (c) any undertaking described in paragraph 169.32(1)(c) that is contained in the shipper's submission;
- (d) the railway company's obligations under this Act in respect of the operation of the railway;
- (e) the railway company's obligations, if any, with respect to a public passenger service provider;
- ~~(f) the railway company's and the shipper's operational requirements and restrictions;~~
- (g) the question of whether there is available to the shipper an alternative, effective, adequate and competitive means of transporting the goods to which the service obligations relate; and
- (h) any information that the arbitrator considers relevant.

~~**(3)** The arbitrator shall establish a term with respect to an amount described in paragraph 169.31(1)(c.1) in a manner that encourages the efficient movement of the shipper's traffic and the performance of the railway system and that is balanced between the shipper and the railway company.~~

CTA: 53 (1) The Minister shall, no later than ~~eight~~ **four** years after the day this subsection comes into force, appoint one or more persons to carry out a comprehensive review of the operation of this Act and any other Act of Parliament for which the Minister is responsible that pertains to the economic regulation of a mode of transportation or to transportation activities under the legislative authority of Parliament.

Biography of François Tougas

(<http://mcmillan.ca/FrancoisTougas>)

Partner: McMillan LLP, Lawyers

Arbitrator: Appointed by the Canadian Transportation Agency

Ratings: AV® Preeminent™ by Martindale-Hubbell since 1996; recognized in Chambers Global, Chambers Canada, LEXPERT and Best Lawyers for rail law, transportation law and competition law

Adjunct Professor: Competition and antitrust law and policy at Allard Hall School of Law at the University of British Columbia since 2006

Speaking: Lecturer in transportation regulation in MBA program at Sauder School of Business, University of British Columbia. Frequent speaker and writer on transportation and competition law and policy

Relevant Experience: Participated in several reviews of rail transportation law and policy, amendments to the Act, and engaged in numerous processes before the Canadian Transportation Agency, Transport Canada, Standing Committee on Transport and successors, other federal and provincial ministerial bodies.

Reviews and Amendments: 2000 and 2015 statutory reviews of the *Canada Transportation Act*, Federal Rail Freight Service Review and related processes, amendments to the Act in 2000, 2007, 2008 and 2013

Agency Consultations: Cost of Capital Methodology, Uniform Classification of Accounts Review, CN and CP Capital Structure Methodology, Regulatory Costing Model, Interswitching Review, General Rules, SLA Arbitration Rules

Negotiations and Legal Processes: More than 60 negotiations and processes in connection with CP, CN, BNSF and UP (among others) under the *Canada Transportation Act* and related matters

Client Base: Shippers, intermediaries, railways, governments, private investors