



February 2018

Teck Resources Limited: Brief to the Standing Senate Committee on Transport and Communications for 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)

Overview

Proudly Canadian, Teck is a diversified natural resource company and a major transportation stakeholder that employs nearly 8,000 people across the country. As Canada's single largest rail user, Canadian Pacific Railway's biggest customer and with nearly \$9 billion in exports to Asia and other markets last year, ensuring Bill C-49 enables a transparent, fair, efficient and safe rail freight regime, and one that meets the needs of all users, is of critical importance to us.

Perennial rail service challenges have impacted Teck's 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 alone 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 Rail Freight Service Review,¹ Teck has advanced balanced solutions to address the significant rail service issues that our sector regularly experiences. However, despite best intentions, the remedies generated through these processes have been inadequate, primarily because their designs do not acknowledge Canada's non-normally functioning rail market.

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 and shippers in the long-term. At the heart of our recommendations is the need for a meaningful, granular, and accessible rail freight data regime. We also see the need for a definition of "adequate and suitable" service that acknowledges the individual needs of shippers given the monopoly context in which we operate. Teck has also offered, what we believe to be, the only long-term solution to addressing the imbalance in the shipper-railway relationship. This is the introduction of real competition in Canada's rail freight market by extending running rights to "all persons" including shippers that meet specific criteria.

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

While we are disappointed that the introduction of real competition in the rail freight market is not addressed in the proposed legislation, we are supportive of this Bill's vision and a number of its provisions, 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
- making changes to the *Canada Marine Act* that will allow ports to borrow from the new forthcoming Infrastructure Bank.

Bill C-49 achieves the right balance in reflecting the needs of the various stakeholders involved, including railways and shippers. However, it is our view that, in order to meaningfully achieve the Bill's intent, some minor adjustments are 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; 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

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 provide a more balanced approach for stakeholders that include remedy accessibility.

Ability of the Agency to collect and process railway costing data

Specifically, Bill C-49 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 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.

The Agency's ability to arrive at these costing determinations is critical to maintaining the integrity of the FOA as a shipper remedy. Currently, the FOA model is flawed because of the Agency's inability to deliver costing determinations. 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 declining to cooperate with the shippers in agreeing to make such a request of an arbitrator. This frustrates the one remedy available to a shipper to deal with the market power of the rail carriers. Given the improvements in the collection and processing

of costing data that Bill C-49 would allow the Agency to undertake, there can be no legitimate reason for a railway to decline an Agency costing determination under FOA other than to frustrate the process.

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 the right to an Agency costing determination.

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 Bill finally addresses this issue.

- **Recommendation:** 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”**.

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. Currently as written, due to the geographic restrictions imposed on the remedy, LHI will not be a remedy available to Teck’s five steelmaking coal mines in southeast 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 Bill 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. Notwithstanding the unavailability of LHI as a remedy to Teck, as drafted, the revenue formula outlined in s.135(2) makes the remedy of doubtful utility to Teck even if it were available as an option.

Level of services

Service obligations

We are concerned that the proposed language offered in the Bill 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 within which Canada operates.

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 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) 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).

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 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 supply chain performance data.

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 (including service data outlined in rail waybill samples).

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 US Waybill Sample does represent shipments accurately nor completely. In fact, the sampling rate for non-unit train shipments is as low as 1/40. Meanwhile, the unit train sample rate is more robust at 1/2, but has other significant deficiencies. Among other things, rail carriers in the US are not required to have waybills accurately represent the sample population by commodity, origin, destination or other criteria, nor do they provide the same samples from period to period. The data is also very outdated.

Further, the US model was created when the storage and transmittal of large amounts of data was not technologically possible. In 2018, 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.

- **Recommendation:** Teck recommends s. 77 (2) be amended to include the following addition: “A class I railway shall provide to the Minister [...] **provided that the information shall 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.

Transport Canada staff have indicated that their interpretation of the draft of the legislation is consistent with Teck’s desire for data transparency. While this does ease Teck’s concern regarding data completeness, the amendments to the legislation offered by Teck and others will clarify and solidify this outstanding item.

Conclusion

In conclusion, based on Teck’s past experience, we believe that legislative design is critical to enabling a world-class rail freight regime in Canada to the benefit of all Canadians. The recommended amendments that we have outlined would improve transparency, competitiveness and correct some of the issues that have created challenges for Teck and others in the past.