

FACILITATOR'S FINAL REPORT

**SERVICE AGREEMENT TEMPLATE
AND COMMERCIAL DISPUTE RESOLUTION PROCESS**

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EXECUTIVE SUMMARY

The Facilitator was appointed on October 31, 2011 by the Honourable Denis Lebel, Minister of Transport, Infrastructure and Communities, to lead a six-month Facilitation process working with shippers, railways and other stakeholders to enhance rail freight service.

Specific objectives of the Facilitation process were to:

- develop a template service agreement for shippers and other stakeholders that could be used to establish terms and conditions of their relationship with railways taking into consideration the interdependencies and logistics of the rail freight supply chain; and
- establish a fair, balanced, timely and cost-effective commercial dispute resolution process that can be used by shippers and other stakeholders to address their service and logistical issues with Canadian National and Canadian Pacific.

The Stakeholder Facilitation Committee, comprising of 15 industry members, devoted five months working towards a solution that would result in deeper relationships to establish rail service parameters and to deal more effectively with disputes. While some progress was made, the Committee ultimately could not agree on a commercial package.

Shippers believed the government accepted the final report of the Rail Freight Service Review Panel in its entirety, including its comments about railway market power. Shippers expected the Facilitation process to impose solutions that would provide shippers with more leverage in shipper-carrier relationships. Shippers also linked the Facilitation process to the promised legislation and their expectations extended beyond the scope or ability of the Facilitation process intended to establish commercial tools. Shippers were united on this issue and some even suggested that the government clarify the Facilitator's mandate to correct the imbalance in commercial relationships through the Facilitation process.

Railways pointed to the positive improvements since the Rail Freight Service Review. These include becoming more customer-centric to better serve customers, changing operational practices to improve service such as the scheduled grain plan through the establishment of collaboration agreements aimed at achieving continuous service improvements. Railways took the position that the process should result in a high-level template to guide bi-lateral negotiations. The railways' perspective was that they were already required to meet common carrier obligations. They were not prepared to agree to a detailed template that would prescribe the outcome of bi-lateral negotiations. Nor would they agree to be bound by this template before the legislative processes commences.

The Committee made progress on a service agreement template by agreeing on the list of elements that might be included in a service agreement. There was general agreement on the details for a number of elements including: communications; internal escalation; protocols for local service changes; key performance indicators; performance standards; and recovery plans.

The unresolved template issues were around the accessibility to all the elements (and associated details) for all shippers, regardless of their traffic characteristics. These included: mandatory elements for all service agreements; automatic inclusion of cross-border traffic in all agreements; and performance standards and financial penalties regardless of the characteristics of the shippers' traffic.

The Committee reviewed the principle of reciprocity at length. It was acknowledged that all service agreements are unique and will be structured to reflect individual characteristics of the traffic offering and the services provided by the railway. As the service offering by shippers becomes more predictable and reliable, the rail service provided can be more precisely defined in a service agreement. It also recognizes the commercial reality that certain elements such as defined service levels (standards) and consequences (including financial penalties) can be negotiated when shippers commit traffic volumes.

This approach recognizes that without any reciprocal commitments, shippers will not be able to negotiate standards or financial penalties in their service agreements because the traffic offering is less predictable. The Facilitator believes the matrix approach maintains shippers' rights to obtain "adequate and suitable" accommodation as the railways' common carrier obligations defined in the *Canada Transportation Act* apply in all three tiers.

This principle of reciprocity and the tiered matrix proposed were not broadly endorsed by shipper representatives as they failed to "raise the bar" around service levels for all shippers.

The Facilitator acknowledges that some shippers are unable to make a binding commitment or even a forecast given the nature of their business. That's inevitable in an economy where shippers have different traffic characteristics. What is also acknowledged is that the world of business actually works better for those who make commitments. Invariably their service is more customized; it is more reliable and predictable.

The Committee also made progress on the development of a commercial dispute resolution process by agreeing on: voluntary mediation; establishment of a roster of arbitrators; standard arbitration rules; final and binding arbitration decisions; and sharing

of costs. The two unresolved key issues were to have the dispute resolution apply to the establishment of initial agreements and the timelines for resolving disputes.

The “unfinished business” at the end of the process was seen by shippers as weakening their bargaining power because: not all stakeholders could negotiate certain elements of service depending on the predictability of the traffic offering; railways have no obligation to include all elements of service in any agreement; and there was no commercial process to establish an agreement if negotiations were not successful. Shippers concluded that without these imperatives, the resulting service agreements would be meaningless and with limited accountability.

Railways took the position that the Facilitation discussions provided a “roadmap” that builds on existing collaboration agreements by improving commercial undertakings between railways and their customers. Railways support the development of mutual accountability in the context of reciprocal commitments.

The Facilitator believes the service agreement template along with the associated three-tiered matrix and the commercial dispute resolution process outlined in the report, represent workable solutions and an improvement over the status quo. The Facilitator is respectful of the stakeholders’ positions and mindful of the government’s commitment to introduce legislation granting shippers a right to a service agreement and a process to establish an agreement should parties be unsuccessful in achieving a negotiated one.

The Facilitator is of the view that the tiered template and dispute resolution process should be given a chance to succeed. Shipper customers and railways are encouraged to use the template as an “agenda” for negotiating service agreements. Experience and success will lead to regular upgrades and improvements in the template.

The Facilitator’s five recommendations, when considered as a package, provide additional “tools” for railways and their customers to build on recent progress at improving rail service. The recommendations are as follows:

Service Agreement Template

1. Transport Canada should make the service agreement template, described in the report, available to rail freight stakeholders as a guide to all parties (including small shippers), as they negotiate a service agreement.

Commercial Dispute Resolution Process

2. Transport Canada should make the commercial dispute resolution process publicly available for stakeholders to consider and use.
3. Railways should be encouraged to revise their current dispute resolution processes to address rail service issues to make them consistent with the process described in the report.

Periodic Review and Updates

4. Industry should be encouraged to review and update the service agreement template and commercial dispute resolution process as business conditions warrant. These updated tools should be available from industry or government sources.
5. Transport Canada should monitor the use of the service agreement template and commercial dispute resolution process. Transport Canada should encourage all parties to improve the process as required.

An effective rail freight transportation system is critical to the Canadian economy. As a trading nation with an abundance of products and resources to sell into international markets, Canada's rail freight shippers need an effective and reliable rail transportation system to move their products.

Railways and other stakeholders in the rail-based supply chain need to work together to innovate and make improvements in the functioning of the rail transportation system to keep ahead of our competitors. All the participants in the rail transportation system need to "up their game" to be successful in highly competitive world markets. Commercial tools such as service agreements with cost effective dispute resolution mechanisms have opened up the possibilities. Government can help create the environment to move forward but it is up to industry to implement the details to improve the framework for rail service.

In conclusion, the Facilitator's advice to industry stakeholders is: Try these tools; they just might work.

1. INTRODUCTION

The Facilitator was appointed by the Honourable Denis Lebel, Minister of Transport, Infrastructure and Communities on October 31, 2011 to lead a six-month Facilitation process working with shippers, railways and other stakeholders to enhance rail freight service (See Appendix A for the Facilitator's Terms of Reference).

The announcement of the Facilitation process was one of the measures announced by the government when it released the Panel's Final Report on Rail Freight Service Review in March 2011. Appendix B contains a brief background on the Rail Freight Service Review.

The specific objectives of the Facilitation process were to:

- develop a template service agreement for shippers and other stakeholders that could be used to establish terms and conditions of their relationship with railways taking into consideration the interdependencies and logistics of the rail freight supply chain;
- establish a fair, balanced, timely and cost-effective commercial dispute resolution process that can be used by shippers and other stakeholders to address their service and logistical issues with Canadian National and Canadian Pacific; and
- produce a final report that identifies outstanding issues and challenges to the two commercial instruments including recommendations on how these issues might be addressed.

In summary, the Facilitation process was to work with stakeholders to find common agreement to produce a template to be used by customers and the railways to negotiate a rail freight service agreement along with a dispute resolution process.

All of this was to be developed by stakeholders working together, coming to conclusions voluntarily, much like a commercial process. The Facilitator did not have the mandate to impose decisions on the parties when they were unable to find agreement or solutions. By its nature, a commercial process is bi-lateral with no influence from, or any pre-determined outcome set by a government body or legislative process.

The report contains eight chapters. Chapter 2 outlines the approach to the Facilitation process including establishment of the Stakeholder Facilitation Committee and members' expectations. The progress made along with key issues and solutions are discussed in Chapter 3. Chapters 4 to 6 present the products produced during the Facilitation process: the three-tiered matrix; the service agreement template; and the commercial dispute resolution process. The recommendations and conclusions are provided in Chapters 7 and 8.

2. APPROACH TO THE FACILITATION PROCESS

a. Initial Stakeholder Engagement

To start, the Facilitator contacted a cross-section of 11 industry stakeholder Presidents and Chief Executive Officers within the first week following his appointment to: introduce himself; become familiar with their perspectives on rail service issues; and seek their views and advice on how best to organize the process.

The Facilitator held five meetings on November 15 and 16 with various stakeholder groups including associations. The purpose of the meetings was to discuss the Facilitator's mandate and scope of the Facilitation process and to seek their input on the establishment of a Stakeholder Facilitation Committee.

b. Establishment of the Stakeholder Facilitation Committee

The Facilitator's objectives were to create a committee representative of freight sectors and comprised of stakeholders directly involved in shipper-carrier negotiations, while at the same time having a manageable number to function effectively.

Considering the input received, the Facilitator established a 15 member stakeholder committee with four representatives from railways (two members each from Canadian National and Canadian Pacific) and 11 shipper members representing the agriculture, natural resources, manufacturing and intermodal sectors (Appendix C).

Committee members were geographically dispersed from Montreal to Vancouver. Their companies have operations and facilities in all parts of the country. Two members were from Montreal, five from Ontario, three from Manitoba, one from Saskatchewan, three from Alberta and one from British Columbia.

The non-railway members of the Committee were encouraged to consult and seek input from their associations and their membership throughout the Facilitation process. This allowed organizations not directly participating at Committee meetings to contribute to the process. Similarly, the agriculture representatives provided a link to the work of the Crop Logistics Working Group¹.

¹ The Crop Logistics Working Group, established by the Minister of Agriculture and Agri-Food Canada to allow agriculture stakeholders to exchange views about issues in support of the Transport Canada Facilitation process flowing from the Rail Freight Service Review. The Working Group was also a forum for industry participants to consider the performance of the supply chain for all crops, and exchange views and information on issues arising from the transition to marketing freedom. For further information: http://www.agr.gc.ca/cb/index_e.php?s1=n&s2=2011&page=n111107

The Facilitator made arrangements to add terminal operator representation to the Committee during the process once sufficient progress had been made by shippers and railways. The Facilitator also had plans to provide an opportunity for other stakeholders (e.g. shipping lines and port authorities) to provide comments on the Committee's work, some of whom were consulted at the beginning of the process.

c. Summary of the Committee's Work

Shortly after being established, the Stakeholder Facilitation Committee held its first meeting on December 6, 2011 in Montreal. The meeting covered the following items:

- The Committee began by establishing ground rules to encourage full and open dialogue (discussions were without prejudice, in-camera, no attribution and no official minutes).
- The Committee discussed the inclusion of key principles (e.g. supply chain, commercial solutions preferred to legislative remedies and commercial measures complement existing legislative remedies) and business objectives (more reliable and predictable service, improve relationships and communications, improve accountability, sustain service improvements, and resolve disputes more effectively) to guide the process. Regrettably there was no agreement by the Committee so the Facilitator withdrew the draft principles and business objectives as guides to the Facilitation process.
- The Committee discussed whether to start work on the development of the service agreement template or the commercial dispute resolution process. With no clear consensus, work began with the service agreement template.
- The Committee agreed to use the Rail Freight Service Review Panel's list of elements² that may be included in a service agreement as a starting point. Committee members were tasked to "populate" the elements in advance of the next meeting.

The Committee held meetings on January 10, 2012 in Calgary, February 1 in Ottawa, February 21 in Toronto, March 8 in Calgary, March 27 in Ottawa and April 16 in Calgary. There was a conference call with the Committee on January 20. The Facilitator also met separately with shippers and their advisors and, with the railways on February 21 prior to the full Committee meeting.

The service agreement template was an agenda item at all meetings. Documents on the commercial dispute resolution process were shared as early as the second meeting and were an agenda item in early meetings. However, the service

² *Rail Freight Service Review, Final Report*, January 2011, Section 6.4.2 Implementation of Service Agreements, page 50.

agreement template consumed discussions and the Committee did not review the commercial dispute resolution proposals until the March 27 meeting. The Facilitator does not believe that the outcome would have been any different if the Committee discussed the commercial dispute resolution process earlier or if it was discussed ahead of the service agreement template. The contentious issues were so fundamental to the two parties that changes to the Facilitation process would not have altered the outcome of the discussion.

d. Committee Members' Expectations

It was evident at the first Committee meeting that shippers and railways had different expectations of the Facilitation process. These differences impacted discussions and progress in all meetings and ultimately affected the outcome of the process.

Shippers took the position that the government accepted the final report of the Rail Freight Service Review Panel in its entirety, including its comments about railway market power. Shippers expected the Facilitation process to impose solutions that would provide shippers with more leverage in shipper-carrier relationships. Shippers also linked the Facilitation process to the promised legislation and their expectations extended beyond the scope of the process intended to establish commercial mechanisms. Shippers were united on this issue and some even suggested that the government ought to clarify the Facilitator's mandate to empower him to correct the imbalance in commercial relationships during the process.

Railways approached the Facilitation process from the standpoint that bi-lateral negotiations with each customer would determine the terms and conditions of rail service and that the template would be the "agenda" for those negotiations, or represent a menu of options. Railways did not favour a detailed template. The railways pointed to the positive initiatives that have been implemented to improve railway service and the numerous agreements that have been established with their customers and supply chain partners (e.g. ports and terminals). The railways' perspective was that they were already required by law to meet common carrier obligations. They would not agree to a detailed template that prescribes the specific outcome of bi-lateral commercial negotiations. Nor would they agree to be bound by a "mandatory" template before the legislative process commences.

In summary, the differing expectations and linkages to future legislation presented a major challenge to the Facilitation process. The positions of railways and shippers are discussed in more detail in Appendix D.

e. Committee Participation

The Facilitator acknowledges—and is grateful for—the dedication and efforts of Committee members. Members of the Committee are senior executives of their organizations and their attention to this exercise underscores the importance they placed on improving the efficiency and effectiveness of the rail freight system in Canada.

Overall there was very good attendance at Committee meetings as members made every effort to participate. The Canadian Wheat Board made a decision to withdraw from the Committee prior to the February 21 meeting because of pressing internal priorities³.

With the ground rules established at the first meeting, discussions were frank and respectful and everyone participated fully in providing input, feedback and perspectives throughout the process.

³ These priorities were related to organizational changes and the implementation of an open market environment for wheat, durum and barley, effective August 1, 2012.

3. PROGRESS MADE BY THE STAKEHOLDER FACILITATION COMMITTEE

One of the major challenges throughout the Facilitation process was the shippers' reluctance to accept the Facilitator's commercial mandate. Shippers hold the view that railways possess market power over their customers as highlighted in the Panel's report. Their position was that the government accepted this assessment through its support for the Panel's commercial approach. Shippers took the position that the Facilitation process needed to impose solutions that would provide shippers more leverage to negotiate comprehensive service agreements and make railways accountable for rail service.

Railways claim that rail service has improved and customer-centric measures (e.g. scheduled grain service and various collaboration agreements with shippers, ports and terminals) have been adopted since the review. Collectively these represent meaningful improvements in rail service. While shippers acknowledge that rail service has improved they are concerned about its sustainability; they are also concerned railways will not be accountable for inadequate service in the future.

At the end of the day, the commercial nature of the Facilitation process could not achieve the outcomes that shippers were seeking. This was an important factor for the Committee in not reaching common ground on some key issues.

This Chapter provides a summary of progress made, the positions of each party and the Facilitator's assessment of key unresolved issues.

a. Progress on a Service Agreement Template

The structure and content of the service agreement template evolved over the course of the seven Committee meetings. All parties had the opportunity to discuss items to be included in a service agreement. The Facilitator encouraged discussion and debate of the tough issues around these elements of service. Participants often used examples to illustrate the importance of these issues and solutions were sought by the Committee. Even though consensus was not reached on all elements of service, the template under development at the Facilitation table was fully scrutinized by the Committee.

The Committee agreed that the 16 elements represented the essential items in a service agreement. While there was agreement on the "list", there was no agreement on the "mandatory" nature of these elements. These and other differences are discussed more fully in Appendix D.

The initial positions of railways and shippers and the progress made on service agreement issues (including the ones not resolved) are summarized in Appendix E.

There was general agreement on the details for a number of elements in the template. These included: communication protocols to discuss operational matters; internal escalation process to resolve service issues; protocols regarding changes to service schedules; a list of key performance indicators; performance standards (based on forecasts and traffic offering commitments); and recovery plans (communication and enactment of plans when there is a service failure).

b. Solutions to Key Unresolved Issues - Service Agreement Template

The key issues that remained unresolved at the conclusion of the Facilitation session concerning the service agreement template were: mandatory elements; cross-border traffic; performance standards; financial penalties and erosion of shipper rights.

i. Mandatory Elements

The shippers' position, maintained throughout the process, was that there must be a set of "mandatory" elements that apply to all shippers in all service agreements. They said this was essential to correcting the "market imbalance" and enable shippers to negotiate balanced service agreements on a more "level playing field". The railways' position was that while the template offered an agenda for negotiations, each element would in fact be negotiated and each shipper-railway agreement would be different depending on the characteristics of their business/ operations.

The solution is to characterize the 16 elements as "fundamental" to guide bi-lateral negotiations and that there would be a commitment by both parties to negotiate all of the elements in good faith.

Facilitator's Assessment:

The Committee was tasked with developing a template that would be used by two willing parties to negotiate a service agreement. Success in a negotiation means both parties voluntarily agree on issues and find solutions. No one outside the relationship can impose "mandatory" conditions.

By classifying the elements as "fundamental", the two parties can discuss each element and decide what should be in their bi-lateral agreement, considering the characteristics of the shipper's traffic and other factors that may impact what is realistically feasible. In practice, each and every service agreement is unique.

ii. Cross- Border Traffic

Both Canadian National and Canadian Pacific operate integrated networks in Canada and the United States either through direct ownership or through interchange agreements with other carriers.

Shippers who have traffic into the United States took the position that the terms and conditions of service agreements that apply to domestic freight should be automatically extended to include traffic on the railways' own network in the United States. Shippers see no differences between domestic and cross-border traffic to warrant exclusion.

The railways could not agree to the inclusion of United States traffic in the template citing regulatory differences and operational issues for certain movements (e.g. running rights are quite extensive for some rail network segments in the United States which are beyond their control).

The solution is that the geographic scope negotiated by the parties would not be limited to Canada.

Facilitator's Assessment:

The geographic scope in a commercial negotiation should not be limited to Canada. Shippers with traffic into the United States should be able to include these movements in a service agreement negotiation. Railways should be able to assess United States traffic on a case by case basis.

iii. Performance Standards

The shippers' position was that performance standards must be a mandatory element in the template. In other words, shippers should be entitled to a set of performance standards with actual levels (e.g. acceptable tolerances) negotiated with the railway.

Railways linked performance standards to the characteristics of each shipper's unique traffic. Railways agreed to performance standards providing there is traffic visibility: when shippers can provide a forecast or a volume commitment.

Facilitator's Assessment:

Performance standards can be negotiated when shippers provide railways a reciprocal commitment (e.g. indication of expected traffic volumes or a firm volume commitment). As the traffic offering becomes more predictable and reliable, the railways' performance standards become more defined. Performance standards in these instances clarify the service railways are expected to provide and the traffic offering shippers are expected to present.

Shippers who cannot provide an indication of traffic volumes would not have defined performance standards but railways would still be required to meet their common carrier obligations.

Such an incremental approach is consistent with commercial realities where two parties work together to achieve more reliable and predictable outcomes based on the principle of reciprocity.

iv. Financial Penalties

The shippers' position is that railways must be held accountable and the consequences of railway non-performance should be financial penalties paid to shipper customers. Shippers are already held to account by the railways through optional services charges and demurrage. The shippers' position is that when rail service fails, the railways should be subject to strong penalties designed to improve behaviour. Shippers indicate there are no "teeth" in current agreements to provide protection in the event of service failures.

The railways' position is that they will meet their common carrier obligations for all shippers and will negotiate financial consequences for railway non-performance with shippers who make a reciprocal commitment on traffic volumes. To the railways, freight service can be guaranteed and penalties agreed to if a shipper is willing to make the reciprocal commitment on its traffic offering. The railways argue that if there is no penalty applied when a shipper fails to present the expected traffic, then there can be no penalty to the railway that does not deliver on the expected service.

As a solution, all shippers would have access to a commercial dispute resolution process as well as existing shipper protection provisions under the *Canada Transportation Act*. Non-financial consequences (e.g. operational measures to address short falls) would be negotiated with shippers who provide

a forecast. Financial consequences would be negotiated with shippers who provide a forecast and a volume commitment. This incremental approach aims to recognize that railway accountability to meet specific performance standards should increase in line with the shipper's accountability to tender traffic.

Facilitator's Assessment:

Financial penalties are seen by shippers as a means to hold railways accountable and to provide an incentive to maintain acceptable rail service.

Progress was made at the Facilitation table because:

- railways agreed to negotiate financial penalties when a shipper can provide a commitment on the volume of traffic;
- shippers who provide a volume forecast can negotiate non-financial consequences, possibly including operational measures to recover a shortfall or other appropriate mitigation; and
- a service agreement should contain an internal escalation communication process to resolve disputes along with a dispute resolution process that is more timely and cost effective than regulatory processes. Railway performance should improve even more (i.e. railways would be more accountable) if a shipper has commercial mechanisms available to address service failures (including third party binding arbitration).

The Facilitator believes, that collectively, the incremental measures in this process have moved the "yardstick" for shippers to hold the railways more accountable for their performance.

v. Erosion of Shipper Rights

Shippers raised concerns that the tiered template structure may erode existing shipper rights, particularly for small shippers, by weakening the railways' common carrier obligations (as defined in sections 113-115 of the Canada Transportation Act).

These concerns stem from the legislation's oversight of the railways' behaviour. The shippers' only obligation is to pay the railways for services rendered. Obligations under sections 113-115 apply to all traffic irrespective of the shippers' characteristics (i.e. the railways cannot discriminate one shipper against

another). These obligations have no conditions and do not oblige a shipper to provide anything to have these obligations fulfilled.

Some shippers considered the tiered template to be contrary to the legislation because it requires shippers to meet conditions to obtain access to certain service elements (e.g. volume forecast in exchange for performance standards; volume commitments in exchange for penalties applied to railway's non-performance). Shippers said this approach limits the railways' common carrier obligations and, consequently, compromises the shippers' ability to obtain "adequate and suitable" service under the *Canada Transportation Act*. Shippers said that this approach would allow the railways to discriminate shippers based on certain categories, which is contrary to the "common" nature of their obligations.

Facilitator's Assessment:

The arrangement in the template requires railways to meet their existing common carrier obligations regardless of the type of service agreement and, shippers retain their rights to file a level of service complaint with the Canadian Transportation Agency.

Moving from one tier to another allows each party to define service levels more precisely and achieve greater reliability and predictability. This approach "raises the bar" on performance; it does not lower it.

The fact that some elements are available in return for the shippers' volume forecast or a volume commitment reflects common practice today. Railways can deliver elements (e.g. performance standards) in a more reliable and predictable manner if they know the volume of traffic a shipper intends to offer.

c. Progress on a Commercial Dispute Resolution Process

There was considerable support for the proposed commercial dispute resolution process to address issues arising from an established service agreement. Areas where there was general agreement included: mediation (encouraged but not mandatory); establishment of a roster of acceptable arbitrators; standard arbitration rules; acceptance of arbitrator's decision (final and binding and non-appealable); and sharing of arbitration costs by both parties.

The initial positions of railways and shippers and subsequent progress on commercial dispute resolution process issues are summarized in Appendix F. The members' final positions are discussed in Appendix D.

d. Solutions to Key Unresolved Issues - Dispute Resolution Process

Two issues that remained outstanding were the use of arbitration to establish initial agreements and the timelines for resolving disputes.

i. Arbitration to Establish Initial Agreements

The railways' position was that service agreements must be negotiated by both parties and if they cannot agree, there is no agreement. Railways opposed having a third party dictate the terms and conditions to establish initial service agreements in a commercial framework.

The shippers' position was that commercial dispute resolution, specifically arbitration, be available to establish a service agreement when negotiations fail. This was core to the shippers' demands because they said they do not have an even playing field in their negotiations with the railways. They saw this tool as leverage in negotiations with railways.

Participants agreed to mediation as a first step to achieve the establishment of an agreement. Some agreed to arbitration, following mediation, if both parties agreed.

Facilitator's Assessment:

Internal escalation and mediation are additional steps to negotiating an initial service agreement.

In a commercial process, a third party cannot impose the terms of an initial service agreement unless both parties agree.

The government announced that legislation will be enacted to assure the shippers' right to a service agreement and a process to establish such a service agreement if commercial negotiations fail.

ii. Timelines for Resolving Disputes

The dispute resolution processes posted on the railways' websites provide for a decision by the arbitrator within 60 days of their appointment. Their position is that sufficient time must be allowed for due diligence and natural justice in an arbitration process. Shippers called for a more timely process and suggested a 10-15 day window. To shippers, time always plays in favour of the railways: while a decision remains unrendered, service continues to be inappropriate. Shippers cannot tolerate inadequate service for a long time as it has serious implications for their businesses.

A solution was 45 days with the arbitrator having discretion to adjust the time frame if deemed necessary.

The Alternate Dispute Resolution Institute of Canada requires the arbitrator to issue an award within 60 days of the end of the hearing and the American Arbitration Association requires the arbitrator to issue an award 30 days following the end of the hearing. The draft arbitration rules of the Canadian Transportation Agency require a decision between 18 to 60 days from the start of the process including time for appointment of an arbitrator by the Agency.

Facilitator's Assessment:

A 45-day time limit for resolving disputes, with the arbitrator's discretion to extend the time appears reasonable.

4. THREE-TIERED SERVICE AGREEMENT MATRIX

The Committee reviewed the principle of reciprocity at length. It was acknowledged that all service agreements are unique and will be structured to reflect individual characteristics of the traffic offering and the services provided by the railway. As the traffic offering by shippers becomes more predictable and reliable, the rail service provided can be more precisely defined in a service agreement. It also recognizes the commercial reality that certain elements such as defined service levels (standards) and consequences (including financial penalties) can be negotiated when shippers commit traffic volumes.

This principle of reciprocity and the tiered matrix proposed were not broadly endorsed by shipper representatives as they failed to “raise the bar” around service levels for all shippers.

The Facilitator acknowledges that some shippers are unable to make a binding commitment or even a forecast given the nature of their business. That’s inevitable in an economy where shippers have different traffic characteristics. What is also acknowledged is that the world of business actually works better for those who make commitments. Invariably their service is more customized; it is more reliable and predictable.

The characteristics of a Tier 1 shipper are such that they would not provide the railways with any forecast of traffic volumes or a specific volume commitment that will be shipped. In such instances, Tier 1 shippers would not be in a position to negotiate performance standards or consequences for railway non-performance (both financial and non-financial). However, Tier 1 shippers can move to Tier 2 if they are able to provide a forecast of their traffic volumes and thereby expand their service agreement to include service standards and non-financial consequences for non-performance. Similarly, a shipper can move to Tier 3 and negotiate financial penalties as they provide more predictable traffic through a volume commitment.

This approach, shown in Table 1, recognizes that without any reciprocal commitments, shippers will not be able to negotiate standards or financial penalties in their service agreements because the traffic offering is less predictable.

The Facilitator believes the matrix approach maintains shippers’ rights to obtain “adequate and suitable” accommodation as the railways’ common carrier obligations defined in the *Canada Transportation Act* apply in all three tiers.

Table 1

**SERVICE AGREEMENT TEMPLATE MATRIX
COMPARISONS OF FUNDAMENTAL ELEMENTS WITH TIERED TRAFFIC CHARACTERISTICS**

More predictable, reliable and specific traffic offering →

FUNDAMENTAL ELEMENTS IN A TEMPLATE	TIERED TRAFFIC CHARACTERISTICS		
	TIER 1 (Base)	TIER 2 (Volume Forecasts)	TIER 3 (Volume Forecasts & Volume Commitments)
1. Common Carrier Obligations (s.113-115- adequate and suitable includes reasonableness)	P	D	D
2. Canada Transportation Act Remedies (s.116-level of service complaint) [1]	P	P	P
3. Defined Service Elements (e.g. local service schedules, switch windows, frequency of service)	P <i>As per railway schedule</i>	<i>As per railway schedule or</i> N	N
4. KPIs & Scorecard (tracking shipper and carrier metrics)	P <i>Web-based</i>	N	N
5. Forecasts (traffic offering, car supply, capacity)	X	N	N
6. Defined Service Levels (service standards, e.g. car order fulfillment, transit time, estimated time of arrival)	X	N	N
7. Consequences of Non-performance	X	N <i>Non-financial</i>	N <i>Financial & Non-financial</i>
8. Communication Protocols	N	N	N
9. Internal Escalation	N	N	N
10. Third Party Commercial Arbitration for Service Disputes [1]	P	N	N
11. Recovery Plans	P <i>Web-based service updates</i>	N	N
12. Force Majeure	N	N	N
13. Confidentiality	N	N	N
14. Incorporation by Reference	N	N	N
15. Term of Agreement	N	N	N
16. Scope of Agreement	N	N	N

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- P:** Provided to shippers
- D:** As defined in the service agreement
- N:** Commitment by both parties to negotiate in good faith
- X:** Not available

[1]: Shipper has the option to pursue remedies under the *Canada Transportation Act* or commercial dispute resolution to resolve disputes on a case by case basis.

5. SERVICE AGREEMENT TEMPLATE

While Committee members made progress on the development of a service agreement template, there was no agreement because divergent positions on a number of key issues could not be reconciled (as outlined in Chapter 3). The Facilitator believes the template presented in Table 2 can work in terms of helping parties enter into a service agreement that meets their respective business needs.

The template contains a complete list of items that can be negotiated in a service agreement. The service agreement template has the following features:

Context: The template is a guide for shippers and railways as they enter negotiations to establish an agreement on the terms and conditions of rail service.

Elements of an Agreement: The template contains a comprehensive list of 16 “fundamental” elements to guide parties in their negotiations. The specific elements that ultimately form a service agreement will be determined by individual circumstances and through negotiation between the parties.

Components of Each Element: The template provides the details that may be negotiated for each of the 16 elements. This list captures the details identified by members of the Committee.

Table 2

**COMMERCIAL SERVICE AGREEMENT TEMPLATE
BASED ON TIERED TRAFFIC CHARACTERISTICS**

CONTEXT

This service agreement template is meant to guide a bilateral negotiation that results in a binding agreement between a shipper and railway.

The outcome from the bilateral negotiations describes the relationship between the parties and may include service, volume and price accountabilities. A bi-laterally negotiated service agreement should aim at bringing clarity on terms and conditions of service obligations taking into consideration reciprocal commitments of the parties.

Where a shipper is subject to open tariff rates or where a confidential contract does not set out the conditions of service, the parties may negotiate a separate service agreement.

The service agreement template contains 16 fundamental elements to guide parties in their negotiations to establish service elements in a service agreement. The template recognizes that rail freight shippers have different characteristics and these are described as three separate tiers in Chapter 4. The matrix illustrates that the definition of rail service elements in the template increases with a corresponding increase in the predictability and reliability of traffic offerings. The specific elements that form a commercially negotiated service agreement will be determined by individual circumstances of the shipper (i.e. depending on the tier of the traffic offering) and within a tier, through negotiation with the railway.

Traffic Characteristics:

Tier 1: Base

Tier 2: Volume Forecast

Tier 3: Volume Forecast & Volume Commitments

FUNDAMENTAL ELEMENTS	COMPONENTS
1. Common Carrier Obligations (s.113-115 - adequate and suitable includes reasonableness)	<u>Tiers 1, 2 & 3</u> <ul style="list-style-type: none"> Railways to fulfill common carrier obligations by providing shippers with adequate and suitable transportation services as per s.113-115 of the <i>Canada Transportation Act</i>.
	<u>Tiers 2 & 3</u> <ul style="list-style-type: none"> Parties negotiate elements of service acceptable to both parties.
2. CTA Remedies (e.g. s.116 - level of service complaint)	<u>Tiers 1, 2 & 3</u> <ul style="list-style-type: none"> Shippers retain their regulatory rights to file a level of service complaint as per s.116 of the <i>Canada Transportation Act</i>. In the event of a rail service dispute, shippers have the option to file a level of service complaint with the Canadian Transportation Agency or trigger a third-party commercial dispute resolution process (including arbitration) but not both for the same matter under dispute (Element 10).
	<u>Tiers 2 & 3</u> <ul style="list-style-type: none"> If a service agreement contains specific terms and conditions on service, these provisions are binding on the Canadian Transportation Agency in making its determination [s116. (2) <i>Canada Transportation Act</i>].

<p>3. Defined Service Elements (local service schedules, switch windows, frequency of service)</p>	<p><u>Tier 1</u></p> <ul style="list-style-type: none"> • Service elements to be defined as per railway schedules. <p><u>Tier 2</u></p> <ul style="list-style-type: none"> • Service elements to be defined as per railway schedules; or • Depending on the nature of the shipper commitment, parties may negotiate increased and/or customized service elements. <p><u>Tier 3</u></p> <ul style="list-style-type: none"> • Commitment by both parties to negotiate in good faith around increased and/or customized service elements.
<p>4. KPIs & Scorecard (reporting, tracking shipper and carrier metrics)</p>	<p><u>Tier 1</u></p> <ul style="list-style-type: none"> • Shippers can track railway performance using railways' web-based reporting data based on railways' IT capabilities. <p><u>Tiers 2 & 3</u></p> <ul style="list-style-type: none"> • To be negotiated by the parties. KPI's could include: <p>Railway Performance Metrics:</p> <ul style="list-style-type: none"> • <u>Advance notification performance</u>: tracking changes to car/train plans. • <u>First mile performance (origin)</u>: switching performance, tracking cars ordered, railway confirmed orders and number of cars received according to plan. • <u>Car issues</u>: tracking incorrect car types provided and bad order cars delivered. • <u>Transit time performance</u>: transit times from origin to destination for shipper traffic including dwell time • <u>Last mile performance (destination)</u>: load placement and empty pull performance. • <u>Car cycle</u>: time for shipper's traffic and for their own fleet. • <u>Administration</u>: Tracking accuracy of freight and optional services invoices. <p>Shipper Performance Metrics:</p> <ul style="list-style-type: none"> • <u>First mile</u>: shipper performance in receiving, loading and releasing cars back to the railway at origin and variability in order changes, damage to railway's cars. • <u>Transit</u>: tracking diversions and holds. • <u>Last mile</u>: shipper performance in receiving, unloading, securing and releasing cars back to the railway at destination. • <u>Administration</u>: Tracking accuracy of use of railway car order systems/waybill information/terminal authorization.
<p>5. Forecasts (traffic offering, car supply, capacity)</p>	<p><u>Tier 1</u></p> <ul style="list-style-type: none"> • Not available as these shippers do not provide a shipper forecast for planning purposes. <p><u>Tiers 2 & 3</u></p> <ul style="list-style-type: none"> • Shipper to provide, as agreed to, (annual/quarterly/monthly /weekly) forecast of cars (cars/car blocks/trains) by commodity, by corridor or plant to permit carrier to plan asset requirements of shipments. • Railway to provide, as agreed to, car supply and capacity forecasts to permit shipper to plan their rail programs.
<p>6. Defined Service Levels (service standards)</p>	<p><u>Tier 1</u></p> <ul style="list-style-type: none"> • Is not available since service levels are not defined beyond railway obligations to meet common carrier obligations.

	<p><u>Tiers 2 & 3</u></p> <ul style="list-style-type: none"> Parties may agree to a specific set of service standards based on defined service levels (e.g. defined order fulfillment rates, defined transit times, estimated time of arrival, etc). These standards, based on key performance metrics (Element 4), may include reasonable tolerance levels around a service standard (+/-). A narrower range of tolerance levels may be negotiated based on traffic characteristics. Parties to work collaboratively towards service improvement, including steps to be taken if performance deviates materially from service standards.
7. Consequences of Non-performance	<p><u>Tier 1</u></p> <ul style="list-style-type: none"> Shipper has the option to trigger a commercial dispute resolution process or file a level of service complaint with the Canadian Transportation Agency if a shipper declares a railway is not meeting its common carrier obligations.
	<p><u>Tiers 2 & 3</u></p> <ul style="list-style-type: none"> Subject to what parties agree, non-financial consequences may include: <ul style="list-style-type: none"> ➤ <u>For railway non performance</u>: the right of shipper to ship via other means without being in breach of movement volume commitment; ability to trigger termination of agreement; and operational measures to make up for shortfalls. ➤ <u>For shipper non-performance</u>: extension of contract at railway option to secure shortfall in shipper committed volumes; and ability to trigger termination of agreement.
	<p><u>Tier 3</u></p> <ul style="list-style-type: none"> Subject to what parties agree, financial consequences could be applied to the railway and shipper for failure to meet agreed upon terms and conditions of the service agreement.
8. Communication Protocols	<p><u>Tiers 1, 2 & 3</u></p> <ul style="list-style-type: none"> Railway and customer to notify each other of primary contacts for matters contained in a service agreement. Each party to promptly notify each other of changes in their contact information as they occur. Railway and customer to establish regular communications processes to advise each other of operational rail service matters. Railway to provide advance notification of local service changes. Either party that anticipates that it cannot meet their agreed upon obligations (e.g. using cars ordered; delivering cars confirmed) to be prompt in notifying the other party of the issue.
	<p><u>Tiers 2 & 3</u></p> <ul style="list-style-type: none"> Railway to provide proactive notification of changes to car/train plans. Shipper to provide advance notification of facility changes and their ability to meet its commitments to the railway. Changes in service schedules that materially affect defined service levels (Element 6) to be discussed with the shipper and alternate terms and conditions to be agreed to by parties.
9. Internal Escalation	<p><u>Tier 1</u></p> <ul style="list-style-type: none"> Parties to establish a well-defined and timely escalation process between the railway and the customer. Primary contacts to serve as first point of contact to report and resolve disputes.
	<p><u>Tiers 2 & 3</u></p> <ul style="list-style-type: none"> Escalation process to contain clearly defined steps, including elevation to appropriate decision making authority and, time lines to resolve disputes. Parties may negotiate elevation of escalation process up to the CEO level.
10. Third Party Commercial Arbitration for Service Disputes.	<p><u>Tiers 1, 2 & 3</u></p> <ul style="list-style-type: none"> Good faith internal discussions and negotiations should be the first step in dispute resolution.

	<p><u>Tier 1</u></p> <ul style="list-style-type: none"> In the event of a dispute, the existing arbitration process (on the railway websites) could be used by the shipper at its discretion to determine whether railway is meeting its common carrier obligations. Alternatively, the shipper may file a complaint to the Agency.
	<p><u>Tiers 2 & 3</u></p> <ul style="list-style-type: none"> If a matter is not resolved through the internal escalation process, the dispute can be referred to a third party to resolve the matter. Alternatively, the shipper may file a complaint to the Agency Parties to agree to a third party commercial dispute resolution process (including arbitration) to resolve service disputes within a service agreement (as developed by the Stakeholder Facilitation Committee).
11. Recovery Plans	<p><u>Tier 1</u></p> <ul style="list-style-type: none"> Self-served (web-based) updated train plans when there are major service disruptions.
	<p><u>Tiers 2 & 3</u></p> <ul style="list-style-type: none"> In the event of a business disruption, railway to enact and communicate recovery plans to customers in timely manner. Similar commitment on the part of the shipper for business disruptions that affect traffic offering.
12. Force Majeure	<p><u>Tiers 1, 2 & 3</u></p> <ul style="list-style-type: none"> Parties to include a Force Majeure clause that relieves either party of their obligations under the agreement due to events that are beyond their reasonable control. Force Majeure includes acts of God, authority of law, fire, explosion, strikes, lock-out or other labour disruption, derailment, flood, avalanche, rockslide or other causes as may be agreed to by the parties. Notification to be provided on commencement of force majeure, regular updates where appropriate during Force Majeure and notification on end of Force Majeure.
13. Confidentiality	<p><u>Tier 1</u></p> <ul style="list-style-type: none"> Agreements under Tier 1 likely to contain standard clauses for all customers within a sector and may not need to be confidential.
	<p><u>Tiers 2 & 3</u></p> <ul style="list-style-type: none"> Agreement is confidential. All data and information are strictly confidential and subject to usual legal production requests for confidential information in a commercial dispute resolution process and in any proceeding under the Canada Transportation Act. If a service agreement includes a third party, confidentiality clauses extend to this third party.
14. Incorporation by Reference	<p><u>Tiers 1, 2 & 3</u></p> <ul style="list-style-type: none"> Parties may incorporate a public tariff into a service agreement by reference.
15. Term of Agreement	<p><u>Tiers 1, 2 & 3</u></p> <ul style="list-style-type: none"> Parties to determine the length of time the agreement will be in effect and whether to include other clauses associated with the term (e.g. renegotiation, extension, renewal, termination).
16. Scope of Agreement	<p><u>Tiers 1, 2 & 3</u></p> <ul style="list-style-type: none"> Parties to determine whether all or a portion of the shipper's traffic originating and terminating on the lines of CN, CP or another federally regulated carrier in Canada is to be included in a service agreement.
	<p><u>Tiers 2 & 3</u></p> <ul style="list-style-type: none"> Geographic scope to be negotiated by the parties. Not limited to Canada only.

6. COMMERCIAL DISPUTE RESOLUTION PROCESS

The commercial dispute resolution process is a non-legislative tool to resolve rail service disputes for parties with a service agreement. This process would not apply to shippers for other disputes (e.g. line-haul rates or application of optional services charges), unless both parties mutually agreed to have it apply.

The dispute resolution process matrix consists of 12 elements based on the current and proposed railway models and input from the Canadian Fertilizer Institute and Pulse Canada. Although there was progress in a number of areas, the Committee could not reach consensus on all issues (as discussed in Chapter 3).

The Facilitator believes the model described in Table 3 provides shippers and railways with a cost effective and efficient dispute resolution process to address rail service issues between shippers and railways. Shippers retain their current statutory rights to file a level of service complaint and all other existing remedies under the *Canada Transportation Act*.

Table 3

COMMERCIAL DISPUTE RESOLUTION PROCESS

CONTEXT

The objective of the commercial dispute resolution process is to provide a timely and effective commercial dispute resolution process to resolve disputes pertaining to terms and conditions of an established service agreement and, to resolve rail service disputes for parties who do not have a service agreement.

For parties who have an established service agreement, the mediator/arbitrator will be guided by the terms and conditions of the agreement. For service disputes where there is no service agreement in place, the mediator/arbitrator shall consider whether the railway is meeting its common carrier obligations.

If both parties agree, this process may apply to the establishment of an initial service agreement, to resolve line haul rates or to address disputes on the application of optional services.

ELEMENTS	COMPONENTS
1. Mediation	<p><u>Service Agreement Established</u></p> <ul style="list-style-type: none"> • Internal escalation as specified in the service agreement as the first step to resolving disputes. • Mediation is encouraged but is not mandatory (Canadian Transportation Agency process or alternate process as agreed to by both parties). <p><u>No Service Agreement</u></p> <ul style="list-style-type: none"> • Mandatory mediation using Agency process or private mediators. • Parties free to terminate mediation at any time and move to the next step or drop the dispute.
2. Arbitration	<p><u>Service Agreement Established</u></p> <ul style="list-style-type: none"> • Following step 1 above, either party may trigger third-party arbitration to interpret an agreement. • For rail service disputes, shipper has the option to file a level of service complaint with the Agency or trigger a third-party arbitration process but not both for the same dispute. • Arbitrator to resolve disputes in accordance with the terms and conditions of an agreement. • Arbitrator can choose the shipper's or the railway's offer or provide their own determination (i.e. interests-based arbitration). <p><u>No Service Agreement</u></p> <ul style="list-style-type: none"> • Following step 1 above, the shipper has the option to file a level of service complaint with the Agency or trigger a third-party arbitration process but not both for the same dispute. • Arbitrator can choose the shipper's or the railway's offer or provide their own determination (i.e. interests-based arbitration).
3. Roster	<p><u>All Cases (with or without an agreement)</u></p> <ul style="list-style-type: none"> • Parties agree to establish a roster of acceptable arbitrators.
4. Selection of Arbitrator	<p><u>Service Agreement Established</u></p> <ul style="list-style-type: none"> • Parties select arbitrator as per procedures outlined in the service agreement. <p><u>No Service Agreement</u></p> <ul style="list-style-type: none"> • If there is a roster and an established process to select an arbitrator, parties will follow steps to select an arbitrator. • If no roster, party initiating dispute provides name(s) of suggested arbitrator. Other party may agree or suggest another candidate.

	<ul style="list-style-type: none"> If no agreement on arbitrator to be used, or none available, arbitrator appointed by the province of the dispute location.
5. Guidelines to Arbitrator	<p><u>Service Agreement Established</u></p> <ul style="list-style-type: none"> Jurisdiction of arbitrator shall be limited to the terms and conditions of the service agreement. If the arbitrator finds that either party has not met its obligations under the agreement, the arbitrator may prescribe, in general terms, the manner in which those obligations should be met. <p><u>No Service Agreement</u></p> <ul style="list-style-type: none"> Arbitrator shall consider whether the railway is meeting its common carrier obligations as provided for in sections 113-115 of the <i>Canada Transportation Act</i>. If the arbitrator finds that the railway has not met its service obligations, the arbitrator is limited to directing the railway to meet its service obligations. If applicable, the arbitrator may prescribe, in general terms, the manner in which those obligations should be met.
6. Arbitration Rules (See Appendix G for detailed arbitration rules.)	<p><u>All Cases (with or without an agreement)</u></p> <ul style="list-style-type: none"> Includes generally accepted rules on matters such as initiating arbitration, pre-hearing conference, exchange of statements, privacy and confidentiality of process, powers and duties of arbitrator, rights of parties, conduct of hearing, contents of award, sharing of arbitrator's costs, amendments or corrections to the award and termination of arbitration.
7. Time Lines	<p><u>Service Agreement Established</u></p> <ul style="list-style-type: none"> Mediation- negotiable Arbitration- as set out in the agreement but arbitrator's decision/award to be provided within 45 days following pre-hearing conference. Arbitrator has the flexibility to modify the timeline on a case-by-case basis. <p><u>No Service Agreement</u></p> <ul style="list-style-type: none"> Mediation- no more than 15 days from the appointment of the mediator or as agreed by the parties. Mediation session not to exceed 2 days unless otherwise agreed. Arbitration— Arbitrator's decision/award to be provided within 60 days following pre-hearing conference.
8. Decisions	<p><u>All Cases (with or without an agreement)</u></p> <ul style="list-style-type: none"> The arbitrator's decision shall be final and binding on the parties and cannot be appealed.
9. Geographic Scope	<p><u>Service Agreement Established</u></p> <ul style="list-style-type: none"> Linked to scope of service agreement <p><u>No Service Agreement</u></p> <ul style="list-style-type: none"> Limited to the jurisdiction of the level of service disputes that would be covered by sections 113-115 of the <i>Canada Transportation Act</i>.
10. Confidentiality	<p><u>All Cases (with or without an agreement)</u></p> <ul style="list-style-type: none"> Process, including hearings, meetings, documents and arbitrator's decision, is strictly confidential.
11. Commercial Dispute Resolution to Complete Agreement (mediation and/or arbitration)	<p><u>All Railway Customers</u></p> <ul style="list-style-type: none"> Parties agree to mediation. Arbitration may be used following mediation, if both parties agree.
12. Costs	<p><u>All Cases (with or without an agreement)</u></p> <ul style="list-style-type: none"> Each party is responsible for its costs and the costs of the mediator/arbitrator to be shared equally between the parties.

7. RECOMMENDATIONS

The Facilitator recognizes that the Stakeholder Facilitation Committee made progress but in the end, full agreement on an acceptable service agreement template and a commercial dispute resolution process eluded the group. The Facilitator makes the following recommendations respectful of the stakeholder positions (described in Appendix D) and the Facilitator's assessment (described in Chapter 3).

The Facilitator is mindful of the government's commitment to introduce legislation granting shippers a right to a service agreement and a process to establish such an agreement if commercial negotiations fail. He asks the government to encourage railways and shippers to apply best efforts toward using the recommended template and commercial dispute resolution process.

All five recommendations, when considered as a package, provide another tool for railways and their customers and other stakeholders to build on recent rail service improvements.

a. Service Agreement Template

The service agreement template presented in Table 2 is a workable template that can be used as an agenda for negotiating a service agreement. While some railway stakeholders have already negotiated agreements similar to the model template, other shippers (including small shippers without an agreement) could use this template to negotiate a deal. Stakeholders with existing agreements can use the template to negotiate a renewal.

Recommendation 1

Transport Canada should make the service agreement template (in Table 2) available to rail freight stakeholders as a guide to all parties (including small shippers), as they negotiate a service agreement.

b. Commercial Dispute Resolution Process

The Stakeholder Facilitation Committee made considerable progress in developing a process to resolve disputes within a service agreement. The process described in Table 3 provides for a timelier and more cost effective alternative to shipper protection provisions (e.g. level of service complaint) under the *Canada Transportation Act*. This can be an effective commercial tool for stakeholders to

resolve disputes under a signed agreement. This tool can also be used by shippers to hold the railways accountable for adequate and suitable rail service.

Recommendation 2

Transport Canada should make the commercial dispute resolution process publicly available for stakeholders to use.

Recommendation 3

Railways should be encouraged to revise their current dispute resolution processes to address rail service issues, to make them consistent with the process described in Table 3.

c. Periodic Review and Updates

The railway freight industry is dynamic with continuous improvements and operational changes. Over time, change and industry experience will warrant revisions of these commercial instruments.

Recommendation 4

Industry should be encouraged to review and update the service agreement template and commercial dispute resolution process as business conditions warrant. These updated tools should be available from industry or government sources.

Recommendation 5

Transport Canada should monitor the use of the service agreement template and commercial dispute resolution process. Transport Canada should encourage all parties to improve the process as required.

8. CONCLUSIONS

The objective of the Facilitation process was to have parties work together to develop a service agreement template that could be used to establish terms and conditions of their relationships and a dispute resolution process that could be used to address their rail service and logistical issues. The government considered this a key step, among other measures, to enhance the effectiveness, efficiency and reliability of the entire rail freight supply chain.

Stakeholder Facilitation Committee members devoted five months working to build deeper commercial relationships to establish rail service parameters and to deal more effectively with disputes. While some progress was made, the Committee ultimately could not agree on a package. Fundamental differences prevailed.

Shipper members of the Committee insisted the process re-balance their relationship with railways by designating elements as “mandatory”, all this to provide a framework for meaningful consequences and balanced accountability. They said the railways possess market power and that the Facilitation process (including the promised legislation) must correct that imbalance.

The railways took the position that the process should result in a high-level template to guide bi-lateral negotiations. The railways pointed to the improvements to rail freight service since the Rail Freight Service Review including a more customer-centric focus to better serve customers and improve service through the establishment of collaboration agreements. The railways’ position is that these changes are meaningful and will be sustained.

The “unfinished business” at the end of the process was seen by shippers as weakening their collective bargaining power because not all stakeholders could negotiate certain elements of service. Nor would railways be obliged to include all elements of service in agreements. Another key concern was the lack of a process to establish an agreement in the event that both parties were unable to agree. Without these elements mandated in the template, shippers said the negotiated agreements would be meaningless and with limited accountability.

Railways said the Facilitation discussions provided a “roadmap” that builds on existing collaboration agreements by improving commercial undertakings between railways and their customers. The railways support the development of mutual accountability in the context of reciprocity.

The Facilitation report has tried to accurately characterize the positions of the parties. **The template and the dispute resolution process recommended by the Facilitator provide a “workable” commercial solution and should be given a chance to**

succeed. They should be made publicly available to all railway customers to guide them in their negotiations. The commercial dispute resolution process can be an effective tool to resolve disputes in a signed service agreement and to hold the railways accountable for rail service. Experience and success will lead to regular upgrades and improvements in the template and the dispute resolution process.

An effective rail freight transportation system is critical to the Canadian economy. As a trading nation with an abundance of products and resources to sell into international markets, Canada's rail freight shippers need an effective and reliable rail transportation system to move their products.

Throughout the Facilitation process, there was a considerable "trust deficit" between shippers and railways due to past service experiences. While railways have made some progress in delivering improved service in recent years, it is in their interests to continue this progress by executing on the commitments made at the Facilitation table. As outlined in this report, there were some gains made through the Facilitation process where the railways agreed to implement some components of the service agreement template and agreed to solutions on the commercial dispute resolution process. While this may take some time, rebuilding the trust and sustaining service improvements is essential if shippers and railways—dependent on each other for long term success—are to prosper and take advantage of the enormous opportunities ahead.

Railways and other stakeholders in the rail-based supply chain need to work together to innovate and make improvements in the functioning of the rail transportation system to keep ahead of our competitors. The participants in rail transportation system need to "up their game" to be successful in highly competitive world markets. Commercial tools such as service agreements with cost effective dispute resolution mechanisms have opened up the possibilities. Government can help create the environment to move forward but it is up to industry to take it to the next level.

In conclusion, the Facilitator's advice to industry stakeholders is: Try these tools; they just might work.

Appendix A

Executive Facilitator Terms of Reference

1.0 Title:

Executive Facilitator on Rail Freight Supply Chain Management

2.0 Background:

- 2.1 Following amendments to the shipper protection provisions of the *Canada Transportation Act* in 2008, the Government launched the Rail Freight Service Review. The purpose of the Review was to identify ways to improve the efficiency, effectiveness and reliability of the rail-based supply chain and recommend commercial, and if necessary, regulatory solutions.
- 2.2 Phase I of the Review consisted of quantitative analysis to achieve a better understanding of the nature and extent of problems within the logistics chain. A panel of three persons that led Phase II of the Review consulted extensively, and received 141 written submissions from 85 different stakeholders from across the rail-based logistics chain.
- 2.3 In its Final Report, the Panel recommended a package of commercial measures that includes: that railways provide 10-day advance notice of service changes; implementation of service agreements between stakeholders and railways; establishment of a fair and balanced commercial dispute resolution process with the help of a facilitator; and enhanced performance reporting, with a second facilitator to help negotiate specific metrics. The Panel recommended that the facilitators submit reports within six months that could recommend legislation.
- 2.4 On March 18, the Government announced its response to the Panel's recommendations that accepts the Panel's commercial approach. Therefore, the Department intends to proceed with the selection of an *Executive Facilitator on Rail Freight Supply Chain Management* (the "Contractor") to work with shippers, the railways and other stakeholders on rail freight supply chain management for the development of a template service agreement and a commercial dispute resolution (CDR) process.
- 2.5 To support these commercial measures, the Government intends to proceed with introducing a bill to give shippers the right to a service agreement with the railways, including a process to have such an agreement established if commercial negotiations fail.

- 2.6 The Contractor shall complete his/her work within six months of contract award. At which time, the Contractor will submit a final report that summarizes the outcome of the service rendered and identifies any unresolved issues with potential solutions.
- 2.7 The scope of the Contractor's services shall be primarily focused on leading negotiations among executive stakeholders for the development of a template service agreement and a CDR process. The Contractor will have access to a Transportation Expert and TC Secretariat in support of his/her focused scope of work.

3.0 Considerations:

- 3.1 The Contractor will be required to lead negotiations that have significant political sensitivities and a high public profile. The political sensitivities and stature of participants will require communication between the Minister and the Contractor throughout the facilitation process.
- 3.2 While recent service initiatives by the railways indicate possible positive momentum, the Contractor and Transportation Expert will need to remain aware of the divergent and sometimes entrenched positions presented by railways and stakeholders during the Review. In order for the facilitation process to be successful, the Contractor would need to excel at bringing parties together in a cooperative relationship working towards balanced negotiating positions.
- 3.3 The CDR process and template service agreement are two key elements of the approach that would be best implemented in a commercial manner. Indeed, shippers, railways and other stakeholders of the rail freight system are best positioned to determine what a service agreement should encompass. Furthermore, for a dispute resolution process to be timely and cost efficient, it should be developed in a commercial manner and be used outside the legislative framework. The facilitation process will be of great assistance to the parties in establishing a CDR process and a template service agreement.
- 3.4 The facilitation process will include a diverse group of stakeholders as shippers have a commercial relationship with the railways, whereas ports, terminal operators and other stakeholders have an operational relationship with the railways. Given the differences, there may need to be more than one template service agreement in order to adequately address concerns of the different stakeholder groups. Also, it may be necessary to consider whether smaller shippers would benefit from a different service agreement than larger shippers.

4.0 Objectives and Scope of Facilitation Process:

4.1 The objectives of the facilitation process are:

4.1.1 To establish a fair, balanced, timely and cost-effective commercial dispute resolution process that can be used by shippers and other stakeholders of the rail freight system to address their service and logistical issues with the two Class I railways;

4.1.2 To develop a template service agreement for shippers (and potentially separate template agreements for other kinds of stakeholders of the rail freight system, as required) that could be used to establish the terms and conditions of their relationship with the railways taking into consideration the interdependencies and logistics of the rail freight supply chain; and,

4.1.3 To provide a final report that identifies outstanding issues and challenges pertaining to the above commercial measures and recommends how to address these issues.

4.2 The Contractor with the support of the Transportation Expert will pursue each of these objectives while focusing participants' efforts on improving the efficiency, effectiveness and reliability of the rail-based supply chain.

4.3 As described in the Background Section, the development of a template service agreement and CDR process is the cornerstone of the Government's Response to the Rail Freight Service Review. This initiative is key to achieving a balanced marketplace where shippers and railways can negotiate fair terms and conditions for the movement of goods in the rail network as well as resolving disputes in an efficient manner when service failures occur.

5.0 Approach:

5.1 The Contractor will:

- a) Meet with TC Project Administrator upon the issuance of the contract to review all functions related to the role of executive facilitator, role of transportation expert, role of TC Secretariat and confirm milestone dates and deliverables;
- b) Review the cumulative sum of work completed for the Rail Freight Service Review;
- c) Provide direction to a Transportation Expert for the development and implementation of a detailed work plan to meet the above noted objectives, including a strategy to involve a representative group of shippers and other stakeholders along with CN and CP in the facilitation process;

- d) Facilitate goal-oriented discussions and negotiations among executive stakeholders, taking into consideration the political sensitivities, interdependencies of the rail freight supply chain and broader Canadian trade priorities;
- e) Solicit support from a Transportation Expert and TC Secretariat when needed (e.g. preparation of material for meetings with stakeholders, analysis and research), as established in a working arrangement in order for the Contractor to focus on leading goal-oriented negotiations among executive stakeholders;
- f) Be available if and when required, to hold discussions with TC Project Administrator and departmental officials with respect to strategy and objectives;
- g) Be available if and when required, to hold discussions with the Minister;
- h) Provide direction to the Transportation Expert for the preparation of a status report and final report; and,
- i) Submit the status report and final report with recommendations to the Minister.

6.0 Client Support:

- 6.1 The Contractor will be supported by a Transportation Expert who will provide knowledge and expertise in support of goal-oriented discussions on service agreements and the CDR process. The Transportation Expert will conduct in-depth information gathering and analysis by consulting with the Canadian Transportation Agency, especially regarding the CDR process given their expertise and potential role in administering such a process; soliciting comments from interested parties on issues, solutions, and best practices; and, following up on action items emanating from facilitated sessions. Under the direction of the Contractor, the Transportation Expert will be responsible for preparing all required documentation.
- 6.2 The Contractor will also be supported by a Secretariat comprised of existing resources within the Surface Policy Directorate of Transport Canada. The Secretariat will provide relevant support, knowledge and expertise. This will include recommendations on shippers and stakeholders who could be included in the facilitation process, guidance as needed on commercial dispute resolution and, access to legal support. As well, the Secretariat will assist in scheduling meetings, inviting stakeholders, making travel arrangements, distributing meeting agendas, etc. The Contractor, Transportation Expert and Secretariat will collaboratively establish a working arrangement to clarify roles and responsibilities.
- 6.3 The support provided by the Transportation Expert and Secretariat is intended to ensure that the Contractor can focus the scope of his/her services on leading

goal-oriented negotiations among executive stakeholders for the development of a template service agreement and a CDR process.

7.0 Milestones and Deliverables:

7.1 There is a relatively short time frame for Milestones and Deliverables given that the Contractor will be expected to complete his/her work within seven months of appointment.

Milestones and Deliverables	Deadline
Kick-off meeting with departmental officials, Transportation Expert and Secretariat	Within 2 weeks of contract award
Draft Workplan	Within 3 weeks of contract award
Initial meeting with railways and participating stakeholders (i.e. start of the six-month facilitation process)	Within 4 weeks of contract award
Final Workplan	Within 5 weeks of contract award
Submit status report to Minister of State (Transport)	Within 4 months of contract award
Submit draft final report to Project Administrator	Within 6 months of contract award
Submit final report to Minister of State (Transport)	A maximum of one month after the facilitation process ends

7.2 The status report will contain the following elements:

- a) Objectives and scope of the facilitation process;
- b) Approach taken by the Contractor to engage the stakeholders;
- c) Representation of different stakeholder groups and an assessment of “good faith” participation;
- d) Progress made so far on the development of a CDR process and a template service agreement; and,
- e) Key issues identified so far and likelihood of their resolution during the facilitation process.

7.3 The final report will contain the following elements:

- a) Executive Summary;
- b) Background on Rail Freight Service Review;
- c) Objectives and scope of the facilitation process;
- d) Approach of the facilitation process;

- e) Progress made on CDR and a template service agreement;
- f) Assessment of the “good faith” participation of the stakeholders in the development of CDR process and a template service agreement;
- g) Summary of key outstanding issues (including but not limited to supply chain logistics and legal considerations) for the development of CDR process and a template service agreement and an assessment of differences of opinion among stakeholders;
- h) Description of possible solutions to address these outstanding issues; and,
- i) Any other observations or recommendations the Contractor deems necessary based on the outcome of the facilitation process.

All deliverables will be provided electronically, compatible with Microsoft Office as requested by Transport Canada’s Project Authority.

Appendix B

BACKGROUND ON THE RAIL FREIGHT SERVICE REVIEW

Following amendments to the shipper protection provisions of the *Canada Transportation Act* in 2008, the government launched the Rail Freight Service Review to assess an increasing number of recurring complaints about rail service. The purpose of the Review was to identify ways to improve the efficiency, effectiveness and reliability of the rail-based supply chain and recommend commercial, and if necessary, regulatory solutions.

Phase I of the Review consisted of quantitative analysis to achieve a better understanding of the nature and extent of problems within the logistics chain. A Panel of three persons that led Phase II of the Review consulted extensively, received written submissions from stakeholders from across the rail-based logistics chain and assessed the Phase I research. The Panel's Final Report was released publicly on March 18, 2011 in conjunction with the announcement of the government's response to the Review.

a. Summary of the Panel's Recommendations

The Review Panel's recommendations provided a two-step strategy consisting of a commercial approach to address rail service issues with a legislative backstop if required⁴.

The Panel's main recommendation was to encourage railways and their customers to continue to develop commercial measures to improve rail service covering four key elements: notification of service changes; implementation of service agreements; establishment of a fair and balanced dispute resolution process; and enhanced performance reporting.

The specific commercial recommendations for each of the four elements were as follows:

- Notification of Service Changes: Railways to provide no less than a 10-day notification period prior to implementing changes to local train service. A dispute resolution mechanism be available to resolve disputes concerning local service changes.
- Implementation of Service Agreements: Railways to negotiate service agreements in good faith upon request from stakeholders who have an

⁴ Detailed recommendations including a discussion of issues and considerations are contained Chapters 4-6 of the Panel's *Final Report, Rail Freight Service Review, January 2011*.

- operational or commercial relationship with the railway including establishment of “boiler plate” agreements with small shippers or other groups. Dispute resolution should be available to resolve disputes related to the initial establishment or renewal of service agreements.
- Dispute Resolution Process: A facilitator be appointed to work with railways and their stakeholders to engage in negotiations on a fair and balanced commercial dispute resolution process to resolve rail service disputes including disputes related to changes in local service and disputes related to the failure to establish or renew service agreements. The facilitator should be given no more than six months to reach an agreement. The Panel’s recommendations for a regulated dispute resolution process should be used as a guide for the facilitated negotiations.
 - Enhanced Performance Reporting: The Panel provided two recommendations on enhanced reporting to improve supply-chain visibility. Railways and their stakeholders should develop acceptable and meaningful bi-lateral reporting that would remain confidential between the parties. The Panel also recommended the appointment of a facilitator to develop public reporting of non-commercially sensitive metrics at a sector level.

The Panel believed that the commercial recommendations if implemented as a package would over the long term provide sustainability in rail service providing all parties continued to work cooperatively in the interests of the overall system.

If it was determined the commercial approach did not work, the Panel provided a regulatory fallback to address dispute resolution (to be used to resolve rail service matters including disputes on local service changes and establishment and renewal of service agreements) and enhanced reporting.

The Panel’s final recommendation called for an assessment of the effectiveness of the rail freight service framework (regulatory and/or commercial) including an evaluation of unintended consequences as part of the 2015 statutory review of the *Canada Transportation Act*.

b. Government’s Response to the Panel Report

On March 18, 2011, the Government of Canada released the Review Panel’s Final Report and announced it accepted the Panel’s recommended commercial approach and its four key elements to enhance rail freight service:

- railways should provide a minimum of 10 days advance notice on service changes;

- railways and stakeholders should negotiate service agreements;
- a fair, timely and cost-effective commercial dispute resolution mechanism should be developed; and
- supply chain performance should be monitored through enhanced bi-lateral reporting and through public performance reporting.

While accepting the recommendation to initiate a six-month facilitation process, the government indicated that it would go further than what the Panel had outlined in its report. The Facilitation process was not only to establish a commercial dispute resolution process but also to develop a service agreement template. This was considered an important step to help parties guide their bilateral negotiations and improve commercial relationships.

The government also announced that it would table a bill giving shippers the right to a service agreement with the railways and provide a process to establish an agreement should commercial negotiations not be successful. In this regard, the government was proactive in indicating that shippers would obtain a legislative provision that could resolve disputes pertaining to the establishment of service agreements independent of the outcome of the Facilitation process.

Appendix C

STAKEHOLDER FACILITATION COMMITTEE MEMBERS

Railways

1. Shauntelle Paul, General Manager, Service Delivery, Canadian National, Edmonton
2. Sean Finn, Executive Vice-President, Corporate Services & Chief Legal Officer, Canadian National, Montreal
3. Ray Foot, Group Vice- President , Sales, Canadian Pacific, Calgary
4. Robert Taylor, Director, National Government Affairs, Canadian Pacific, Ottawa

Agriculture

5. Joan Hardy, Assistant Vice-President, Transportation and Logistics, Richardson International Limited, Winnipeg
6. Ward Weisensel, Chief Operating Officer, Canadian Wheat Board, Winnipeg (1)
7. Greg Cherewyk, Executive Director, Pulse Canada, Winnipeg

Natural Resources

8. Brad Johnston, General Manager Logistics, Teck Resources, Calgary
9. Kathy Jordison, Vice-President, Yara Belle Plain, Regina
10. Mark Thomson, General Manager, Transportation, West Fraser, Vancouver
11. Marc J. Leblanc, Corporate Manager Logistics, Tembec, Montreal

Manufacturing

12. Geoff Cowell, Director of Distribution, NorFalco (Xstrata Zinc), Mississauga
13. Diana L Speed, Director, Transportation Kinetic Resources (LPG), Sarnia
14. Steve Godsmark, Manager, Logistics at Volkswagen Group Canada, Ajax

Intermodal

15. Michael Tan, Divisional VP, Supply Chain and Transportation, Hudson's Bay Company, Rexdale

(1) The Canadian Wheat Board withdrew from the Committee prior to the February 21st meeting due to pressing priorities related to organizational changes and implementation of an open market environment for wheat, durum and barley effective August 1, 2012.

Appendix D

COMMITTEE MEMBERS' FINAL POSITIONS

The expectations of shippers and railways at the outset of the Facilitation process and the divergent positions stemming from these expectations resulted in a number of challenges for the Committee. While there was progress and agreement in several areas during the first six meetings, a number of fundamental issues remained. Unless there was some willingness to compromise by both parties, it became evident further progress by the Committee would be difficult to achieve.

Given the situation, the Committee used the April 16 meeting to have shippers and railways each outline their respective positions to determine if there was any scope for further progress to achieve a workable and acceptable service agreement template and commercial dispute resolution process.

a. Shippers' Position

The shippers' perspective was that there were several fundamental issues that were not being addressed to achieve the desired framework that provides for greater predictability and improved levels of service from the railways. Shippers indicated they were seeking a meaningful service level agreement rather than an agreement of "best intentions." The key shipper issues can be summarized as follows:

- Mandatory elements: rail service elements to a service agreement should be available to all shippers regardless of their characteristics (i.e. not subject to negotiation). The details around each element (i.e. levels of service) would be subject to negotiation.
- Reciprocity: shippers should not be required to provide a reciprocal commitment (e.g. forecast or volume commitment) to gain access to an element. Reciprocity should only apply to negotiation on the levels of service.
- Consequences: railways to be held accountable and face consequences in all instances. Meaningful commitments, standards and consequences (financial penalties) to apply for failure to perform. This was considered essential to modify railways' behaviour regarding non-performance.
- Dispute resolution: the commercial dispute resolution must apply to the resolution of disputes related to the establishment and renewal of service agreements.

Additionally, the shippers' final position included the following specific items:

- all railway customers to have a right to a service agreement that would include: services and obligations; communications protocols; performance standards; key performance metrics; consequences for non-performance and a dispute resolution mechanism;
- shippers may provide reciprocal commitments in cases where they may be used to negotiate enhanced levels of service (performance standards);
- traffic carried on the lines of Canadian National and Canadian Pacific flowing to and from the United States to be automatically covered in the scope of the service agreement; and
- the timeline for the dispute resolution process be 10-15 days.

In summary, shippers believed that the proposed service agreement template and the inability of having the commercial dispute resolution process apply to establishing initial agreements and renewals only serves to weaken the shipper's bargaining power. Shippers were willing to discuss an approach that establishes mandatory elements from which commercial negotiations would flow to establish appropriate levels of service.

b. Railways' Position

The railways took the position that railway service and collaboration over the past few years has improved markedly and the Facilitation process has provided a road-map on improving and sustaining commercial undertakings between railways and their customers.

The railways believe the service agreement template under development at the facilitation table will be a useful guide to bi-lateral negotiations and they intend to use this approach to establish future agreements.

The following summarizes the railways' position on specific unresolved issues that were before the Committee:

- Mandated Elements: there can be no mandated elements in a bi-laterally negotiated service agreement. Railways endorse the 16 fundamental elements in the template and will provide every customer an opportunity to discuss each of the elements in their negotiations to establish a service agreement.
- Tiered-approach: railways support the tiered approach as it allows for the development of mutual accountability built on the reciprocity of commitments. The railways confirm that none of the existing shipper

rights will be eroded and dispute resolution will be enhanced by providing customers with a commercial dispute resolution process.








- Eligibility for Agreements: railways have indicated that all shippers will be entitled to a service agreement as defined within the template. This includes having discussions and a signature process with all Tier 1 shippers that express the desire to have such an agreement.
- US Traffic: geographic scope will be negotiated and may be included in service agreements for Tier 2 and Tier 3 shippers.
- Timeline for Dispute Resolution: railways can support a 45-day timeline for resolving disputes with the arbitrator having the discretion to extend this timeframe if necessary.
- Arbitration to Establish Initial Agreement: railways could not accept giving shippers unilateral ability to trigger arbitration to resolve outstanding issues pertaining to the establishment of a service agreement. If arbitration was to be used for such a purpose it would have to be conditional on the acceptance of both parties on a case by case basis. They also indicated that outstanding issues preventing the establishment of an agreement would likely be significant and they would rarely accept using arbitration to address such issues.

The railways indicated that they had no flexibility to move any further on the key issues discussed above.

Appendix E

Comparative Table of Progress Made Service Agreement Template

I. Areas where progress was made

Railways' Status Quo Position	Accepted Solution	Shippers' Expectations
<p>There should be a number of guiding principles to service agreements (e.g. complex and inter-connected supply chain). These could be used as "where as" statements in the preamble of an agreement.</p> 	<p>No guiding principles in the service agreement template.</p>	<p>No guiding principles because they could be used by the railways as an excuse for poor performance. Shippers have their own supply chains as well.</p>
<p>Rail service, traffic volume and price must be considered in conjunction with one another.</p> 	<p>Service agreement <u>may</u> include service, volume and price accountabilities.</p> 	<p>The Act does not link these three elements together, therefore the template should not either.</p>
<p>No service agreement if a shipper already has a confidential contract.</p> 	<p>If a confidential contract does not set out the conditions of service, the parties may negotiate a separate service agreement.</p> 	<p>Shipper should be able to negotiate a service agreement even if there is a valid confidential contract.</p>
<p>Defined service (local service schedules, switch windows, frequency of service) can be negotiated only for Tier 3 shippers.</p> 	<p>Service will be defined in all service agreements (as per railway schedule for Tiers 1 and 2). Increased and/or customized service (e.g. frequency of service) can be negotiated for Tier 3 shippers and Tier 2 shippers (depending on the nature of the shipper commitment).</p> 	<p>Defined service should be indicated in all service agreements, and be negotiable for Tier 2 and 3 shippers.</p>

<p>Key performance metrics available only for Tier 2 and 3 shippers.</p>	<p>Key performance metrics available through railways' web-based reporting data based on railways' IT capabilities for Tier 1 shippers.</p> <p>Tiers 2 and 3 shippers can obtain customized scorecards based on bilateral negotiations.</p>	<p>Scorecards should be available to all shippers, irrespective of their Tier. All shippers should be able to monitor railway's service performance since they pay for this service.</p>
<p>No system wide metrics can be available in a bilateral service agreement. There are serious confidentiality issues associated with this.</p>	<p>No system wide metrics, but railways to provide car supply and capacity forecasts based on shippers' volume forecasts.</p>	<p>System wide metrics are important because supply chain issues are sometimes evoked by railways to explain service failures.</p>
<p>Railways have no statutory impediment to making service changes unilaterally, and need to be able to retain this to improve the efficiency and effectiveness of the supply chain. If every shipper could refuse service changes, the system would breakdown.</p> <p>Shippers have the right to challenge such service changes if they believe that they conflict with railways' common carrier obligation.</p>	<p>For Tier 2 and 3 shippers, changes in service schedules that materially affect agreed to defined service levels (standards), to be discussed with the shipper and alternate terms and conditions to be agreed to by parties.</p>	<p>Service changes cannot be made unilaterally by railways. These changes must always be negotiated.</p> <p>Terms and conditions of a service agreement must be fixed for the entire period of the agreement, irrespective of supply chain considerations (e.g. large increase/decrease in overall traffic demand).</p>

<p>Railways cannot commit to provide recovery plans given the complexity of the system and the nature of some service disruptions.</p> <p>When there is a service disruption, railways need to focus on resuming service as quickly as possible. Only once operations have resolved the problem, can recovery plans for individual shipments/customers be elaborated.</p>	<p>Web-based updated train plans for Tier 1 shippers.</p> <p>For Tier 2 and 3 shippers, railways to enact and communicate recovery plans in a timely manner.</p>	<p>For all service agreements, railways should negotiate recovery plans with shipper when there are service disruptions.</p>
<p>Railways cannot provide regular status updates during Force Majeure given the focus being on re-establishing service.</p>	<p>Railways to provide regular updates where appropriate during Force Majeure.</p>	<p>When Force Majeure is invoked by a railway, regular updates should be provided so that shippers can plan their business accordingly.</p>
<p>Service agreements shall be confidential, including all performance data provided (confidentiality clause of performance data could be extended in the context of a dispute resolution process).</p>	<p>Service agreements to be kept confidential, as well as performance data. However, all data and information subject to usual legal production requests in a dispute resolution process.</p>	<p>Shippers should be able to use the performance data obtained through a service agreement to file a complaint to the agency or trigger a “commercial” arbitration process.</p>
<p>While CP was fine with signing Tier 1 agreements, CN’s preference was to invite Tier 1 shippers to move to Tier 2 (i.e. provide volume forecast) to enter into an agreement with them. CN’s position was based on the fact that there are too many small merchandise shippers to negotiate meaningful service agreements with all of them.</p>	<p>Tier 1 shippers will be able to sign a service agreement with railways (CN & CP).</p>	<p>All shippers, irrespective of size and characteristics of traffic, should be able to obtain a service agreement with railways.</p>

Legend:

Compromise made by the railway
 Compromise made by the shipper



II. Outstanding Issues at the End of the Facilitation Process (April 16, 2012)




Railways' status quo position	Proposed solution that was not accepted	Shippers' expectations
<p>A "commercial" template cannot have mandatory elements. All elements must be optional and up to bilateral negotiations.</p>	<p>The template contains 16 fundamental elements to guide bilateral negotiations, along a continuum of 3 Tiers based on the shippers' traffic characteristics (no commitment, volume forecast, volume commitment).</p>	<p>There must be a set of mandatory elements, as recommended by the Panel to correct "railways market power" <u>that apply to all shippers</u>. Shippers should not be required to provide a reciprocal commitment to gain access to an element of service. Reciprocity should only apply during negotiations to achieve an improved level of service.</p> <p>This is very important to shippers, as they already have numerous mandatory reciprocal commitments in the railways' tariff and optional services schedules. Shippers' commitments in a service agreement should be optional.</p>
<p>The facilitation process is a commercial initiative and as such, it should be separate from the existing legislative provisions.</p>	<p>Template makes it clear that railways always have to fulfill their common carrier obligations and the remedies under the <i>Canada Transportation Act</i> always remain available to a shipper to resolve a dispute (unless an arbitration process has been initiated by the shipper).</p>	<p>Shippers obtained advice from their legal counsel that the proposed template of the facilitation process could erode the railways' common carrier obligations and shippers' legal remedies.</p>

<p>Performance standards are not possible for Tier 1 shippers because there is no reciprocal commitment on volume of traffic or forecasts of traffic offerings.</p>	<p>Performance standards for Tier 1 shippers not defined beyond common carrier obligation.</p> <p>Performance standards (e.g. first mile, transit, last mile) to be negotiated for Tier 2 and 3 shippers using the key performance metrics as a basis.</p>	<p>In a meaningful service level agreement, performance standards cannot be the railways' best intentions.</p> <p>All shippers should be entitled to railway's performance standards. Range of variability would be wider for Tier 1 shippers than Tiers 2 and 3 and would depend on reciprocal commitments.</p>
<p>Consequences for non-performance applicable only to Tier 3 shippers (because they provide a firm reciprocal commitment on the volume of traffic to be shipped).</p>	<p>Commercial dispute resolution or <i>Canada Transportation Act</i> remedies available to all shippers in the event of railway non-performance.</p> <p>Non-financial consequences for Tier 2 shippers (including operational measures to make up for shortfalls).</p> <p>Financial consequences for railways' non-performance in Tier 3 agreements.</p>	<p>Financial consequences for non-performance should apply to all service agreements (even Tier 1). This is necessary to hold railways accountable to meet the agreed upon performance standards</p>
<p>Railways refuse blanket statement in the template on the inclusion of U.S. traffic in service agreements. There are regulatory implications for U.S. movement of traffic (i.e. different legislative regime in the U.S.) and potential external factors (e.g. running rights with other American railroads).</p>	<p>Geographic scope of a service agreement to be negotiated by the parties, not limited to Canada only.</p>	<p>US traffic should be automatically covered in a service agreement, as long as it is on CN's or CP's own network (i.e. under the full control of the railway).</p>

Appendix F

Comparative Table of Progress Made Commercial Dispute Resolution Process

I. Areas Where Progress was Made

Railways' Status Quo Position	Solution	Shippers' Expectations
<p>Commercial dispute resolution cannot be used to impose service levels. This can only be the role of the Agency.</p> 	<p>Commercial dispute resolution can be used to determine whether or not the railway is meeting its common carrier obligations.</p>	<p>Arbitration should be used to determine common carrier obligations.</p>
<p>Mediation is mandatory to a commercial dispute resolution process. This is necessary to encourage good faith negotiations among parties.</p> 	<p>Mediation is mandatory only for Tier 1 shippers (but can be terminated at any time). For Tier 2 and 3 shippers, mediation is encouraged, but not mandatory.</p>	<p>Mediation cannot be mandatory because it can be used by the railways as a discovery phase that compromises the shipper's position in the subsequent step.</p> 

Legend:

Compromise made by the railway
Compromise made by the shipper



II. Outstanding Issues at the End of the Facilitation Process

Railways' status quo position	Proposed solution that was not accepted	Shippers' expectations
60-day timeframe maximum for commercial dispute resolution.	45-day maximum timeframe for commercial dispute resolution, which can be modified at the discretion of the arbitrator.	60-day maximum timeframe for resolving disputes is excessive. Shippers would like a process that can be concluded in 10-15 days.
Service agreements must be negotiated by both parties, or there is no "commercial agreement". A third party cannot dictate terms and conditions of service (other than the Canadian Transportation Agency).	Mediation could be an option to facilitate the establishment of a service agreement. If both parties agree subsequent to the failure of mediation, arbitration could be used to address outstanding elements of a service agreement.	Commercial arbitration to be available to establish a service agreement when commercial negotiations fail.

Appendix G

ARBITRATION RULES

1. Initiating Arbitration

- Party initiating arbitration files two copies of written and signed submission. One is presented to the other party and one to the agreed-upon arbitrator. If Agency process, copy is filed with Agency.
- If no agreed-upon arbitrator, submission is filed with superior court in province of dispute.
- Submission defines the dispute, parties involved and the relief sought.

2. Pre-Hearing Conference

- Arbitrator convenes a pre-hearing conference with parties within five business days of appointment.
- Pre-hearing conference confirms issues in dispute and establishes arbitration procedures to be followed, fees and costs, time lines and location of arbitration hearing.
- Arbitrator records agreements and orders made at pre-hearing conference and provides copies to both parties.

3. Exchange of Statements

- Each party to prepare an arbitration statement.
- Claimant to deliver simultaneously to respondent and the Arbitrator.
- Claimant's statement shall describe all matters and amounts being claimed, facts to support the claim, issues to be determined, relief or remedy to be sought and summary of legal principles and the key authorities to be relied upon.
- Upon receipt of claimant's statement, respondent shall deliver a written statement of defense.
- Claimant may deliver a written response to the respondent's statement.

4. Privacy and Confidentiality of Arbitration

- Arbitration is private and confidential.
- All hearings, meetings, communications and all documents and information filed shall be private and confidential between parties and the Arbitrator.

5. Powers and Duties of the Arbitrator

- May order an adjournment of proceedings.
- May make a partial award and interim order.
- May order inspection of documents, exhibits and property.

- May order parties to provide documents/evidence in a timely manner, as not to delay the overall arbitration process.
- May change pre-established time lines established by the arbitrator or provided for in the rules.

6. Rights of the Parties

- Full opportunity to present their case.
- Right to be treated equally and fairly in the arbitration.
- Right to a speedy and economic determination of the proceeding on its merits.

7. Conduct of the Hearing

- Set dates for the hearings.
- Each party responsible for providing facts in support of their submission in a timely manner.
- Parties responsible for providing Arbitrator with up-to-date copies of all relevant material in advance of the hearing.
- Arbitrator may direct the order of the proceeding (e.g. divide proceeding into stages, exclude repetitive and irrelevant testimony, refuse to receive evidence of fact or opinion and direct parties to address specific issues).

8. The Award

- Arbitrator to provide written and signed award outlining the nature of the claim, decision, facts, issues, the law and the relief awarded.

9. Costs

- The Arbitrator's fees, travel and other expenses in support of the arbitration will be shared equally by the parties.

10. Amendments or Corrections to the Award

- On application by either party within 15 days of the decision, an award can be amended to correct clerical, typographical or arithmetic errors and other accidental errors or omissions.

11. Termination of Arbitration

- Process can be terminated by agreement of parties or if a settlement is reached during the process.

Alternatively, parties may choose to use the National Arbitration Rules of the ADR Institute of Canada: <http://www.adrcanada.ca/rules/arbitration.cfm>