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To: CANADIAN TRANSPORTATION ACT REVIEW PANEL

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The Western Barley Growers Association (WBGA)
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There has been a lot of rhetoric flying back and forth in the media on the issue of Grain Transportation since this past winter's disastrous shipping season. As a long-standing farm organization, the Western Barley Growers Association (WBGA) was well aware of the problem, because our members lived it. Underperformance by Canada's Grain Transportation System left massive carryovers of farmers' grain stranded on the Prairies, leading to lower prices for that grain both last winter and this winter. That in turn has affected future sales and forward pricing opportunities, caused cash flow and financial challenges for farmers, lost export sales, and many other problems. Canada's reputation as a reliable supplier of grain was further tarnished, and it remains the most often-mentioned complaint of our customers – they like our quality, but are not pleased that we can't get it to them in a reliable timeframe, so they have to go elsewhere. Last winter has been estimated to have cost farmers alone in the billions of dollars.

It should be noted that the same complaints expressed by grain shippers have been echoed by every other shipper using Canada's duopoly Railway system operated by CN and CP Railways for at least a decade. This underperformance is a matter of national economic security for Canada and it must be solved now. It is critical that this Panel address things like power and capacity needs, infrastructure needs, what service and non-performance /underperformance specifically means. It needs to help to establish what must be in binding, commercial contracts, including proper penalties, for all participants in the Transportation System, from producers to shippers to the railways.

In response to last winter's disaster, Bill C-30 and a performance Order in Council (OIC) were instituted by the Federal Government. The OIC was to be a temporary measure to encourage grain shipment to the Thunder Bay and Vancouver ports, and it has now been extended by the Federal government into the New Year. The OIC has had the unfortunate effect of sharply decreasing the movement of grains on the North/South corridor, which has negatively impacted malt barley, oats, pulses, and grains to value-added domestic processors. Hopefully the corridor movement improvements that have been suggested in the latest announcement will improve the situation, but the WBGA was not in favor of extending the OIC for the very reasons stated previously.

The Bill itself addresses some of the issues that led to the underperformance, but there are additional changes required to fix the problem and move closer to the commercial transportation system Canada requires. We agree with some of the issues that the Railways have pointed out in the media and in their 16 visits this year lobbying the Minister of Transport as well as most of our Federal MP's. Yes, it seems ludicrous that grain shippers at the Port of Vancouver have not yet figured out how to load ships in the rain. Yes, port terminals are guilty at times of not having enough of the right grain in store for the ships that are waiting. No, they don't have terminals that will unload grain cars 24/7, but if there aren't enough grain hopper cars arriving to keep a terminal running at that pace (as has been the case in the

past), who can blame them? These items do add to the number of ships generating demurrage charges for grain companies (and we have no illusions - these costs are added to basis charges paid by farmers) but they are not the primary cause of the underperformance by the Railways and the Grain Transportation System.

The Railways have also suggested that they don't make enough money hauling grain and if the Maximum Revenue Entitlement (MRE) were removed they could afford to invest more to improve performance, but studies by the Federal Grain Monitoring Agency Quorum do not bear that out. The studies show that the "insufficient" $35/mt. the Railroads earn hauling grain is much more than they charge to haul most other commodities. The profit from moving grain has a better return than the oil tanker traffic that has multiplied in recent years and is expected to increase by 10x more this year according to a CP official at a meeting in Ottawa last week. While we do not believe increased petroleum traffic is the cause of the current under-performance problems we have seen, there will be a growing need for the Railways to increase crew and locomotive numbers to meet this new demand, and the increased traffic on existing rail corridors will not improve railcar movement unless substantial improvements are made to capacity. All of these points above, however, are minor problems compared to the main reasons for the underperformance seen for more than a decade in our Grain Transportation System. This does not explain the same complaints about service from every other shipper these two Rail Carriers transport commodities for. Moreover, many are probably outside the scope of this Panel's Review.

The main reasons for the underperformance we have seen this past decade begin with the ever-worsening "working relationship" between the grain companies shipping grain and the two Class 1 Carriers CN and CP. As reported by Quorum at the same aforementioned meeting last week, the dialogue required to schedule shipments of grain for loading grain cars inland and unloading them again at port is acrimonious at best. His description was "like two ships passing in the night"!

Part or maybe most of the reason for this acrimony is that while grain shippers are subject to penalty tariffs from the Railways when they fail to perform as contracted, the Railways are not subject to the same penalties when they do not spot cars when, where, and in the proper amounts as contracted or pick them up according to the contracted schedules. This makes planning for the movement of the right grain from farmers' bins to the grain handling facility and onto ships for export a matter of guesswork on the shipper's part. They have no idea when their grain cars will arrive, and they have no way to discipline the railways for their underperformance. The grain shippers are captive to the Railways when shipping the majority of their grain. They must use what amounts to a monopoly carrier in most locations to move their products. Bill C-30 does begin to lay the groundwork for such discipline with improvements to Service Level Agreements (SLA's) and by allowing the CTA to determine 'operational terms' that will be included in the SLA's, but the system is still clumsy and definitions especially regarding 'performance' and 'operational terms' are too vague to meet the system needs. We must have binding two-way commercial service delivery contacts between all shippers and the railways that include reciprocal financial penalties for all parties.

Some commodity shippers already have a system of Reciprocal Penalties with the Railways, so it makes sense that all shippers would benefit from the same system, but the Railways claim that the institution of a system of Reciprocal Penalties imposed on them would result in 'the financial death of the Rail system as we know it'. In fact, the simplest and only way to solve the chronic underperformance we are seeing is if everyone (in not just the Grain Transportation System but the transportation system for

all commodities moved by Rail) including the Railways, are subject to Reciprocal Penalties when they fail to perform as commercially contracted. These contracts must include commercial arbitration and prescribed penalties to be paid to the injured party. This solution requires no big bureaucracy, is self-regulating, and as we pointed out, is already working with some commodities the Railways presently service.

Without these equal, commercially contractual agreements in place, we have seen a steady reduction of surge capacity with both CN and CP Rail, especially over the past decade. There is no way for shippers to penalize the Railways for underperformance, and the Railways prefer to have a steady, even, year-round business that does not require any surge capacity. In the past, however, the Railways always planned for winter. Veteran Railway men have told us that they have always known it takes twice the locomotives and crew to haul the same freight in the winter in Canada compared to the summer. This is without taking breakdowns, frozen air lines and derailments into account. Snow and ice on cold steel equals the need for more locomotive and more crew resources.

What has changed is the new philosophy instituted by both Railways to reduce assets (locomotives, crews and railcars) to the bare minimum needed to get the job done on average in the summer. This satisfies shareholders expectations, keeping profits high (CN's annual report shows a net profit of 38% before tax last year), and has no risk for lost shipping revenue in the near to medium term. All their shippers are captive and have no recourse for penalizing them for underperformance. Not only do the Railways lack incentive to do better, but their customers can't do much about their performance either, no matter how unhappy they are. In fact, they have been afraid to complain for fear of retribution. Things last winter got so bad, however, that shippers are beginning to speak out and band together (for example with groups like the Coalition of Rail Shippers). There has also been some recognition of the problem recently thanks to Bill C-30. The CTA, in a recent decision in an application by Louis Dreyfus against CN, recognized that "running a very lean operation has implications for the railway company's ability to manage surges in demand or operational challenges such as infrastructure outages or adverse weather." And further "to allow a railway company to invoke the limited size of its fleet as a defense for an alleged breach of its level of service obligations would amount to allowing the railway company to refuse to transport traffic, or hold off providing service until it finds it convenient to do so." Binding commercial contracts with reciprocal penalties for all parties involved is the only way to reverse this policy of asset overutilization by the Railways.

To achieve the commercial grain transportation system our customers expect and demand will require proper commercial contracts, like the rest of the business world uses. These contracts:

1. Must be binding such that both parties in the contract are held commercially responsible and accountable for a specified level of performance.
2. They must have well-defined and specific terms and conditions of performance.
3. Costs / penalties for not meeting the specified performance criteria in the contract must be clearly stated, costly to the party concerned, and must be paid to the injured party.
4. There must be clearly defined dispute resolution procedures and timelines laid out, including imposed commercial arbitration within a specified time period should the parties not be able to reach agreement between themselves.

In summary, the Western Barley Growers Association believes that it is imperative that our Grain Transportation System become a commercial, transparent, market-driven one that can restore Canada's reputation with our customers as soon as possible. This issue has been studied to death, and for a long period of time could not be changed until the issue of the Monopoly of the Canadian Wheat Board was dealt with. We now have the challenge and opportunity to bring the existing system into the 21st Century, and the only way to do so is to make all those who use it accountable for their performance. We believe the following items must be part of this modernization:

1) All parties, be they farmers, grain shippers, or the Railways must be subject to binding, 2-way commercial contracts that specify:
   a) Exactly what performance is expected of each party,
   b) What the penalties for underperformance or non-performance will be (reciprocal penalties),
   c) The penalties must be paid to the injured party,
   d) The penalties must be high enough to matter to the underperforming party,
   e) The dispute resolution procedures and timelines for settling disagreements must be well laid out, and
   f) Those dispute resolution procedures must include imposed commercial arbitration if an agreement between contracted parties cannot be reached.

2) Minimum standards of Railway performance must be established, monitored and updated as technology improves. Quorum is doing a good job now, and their monitoring of the system needs to be increased into all facets that affect underperformance of the system.

3) Monthly performance results of cars moved (including identifying producer car numbers), cars requested, and cycle delivery times on each corridor must be monitored and published. You cannot improve what you do not measure and communicate to the industry.

4) The Railways should provide the CTA on an annual basis an inventory of resources (locomotive crews, locomotives and railcars) they have access to for both regular operations and for surge/emergency contingencies for all commodities, specific to each corridor. This would allow the CTA to judge whether they have the resources in place to satisfy the needs of their captive shipping customers.

5) Continued close monitoring and reporting of the performance of the entire Grain Transportation System as expanded under Bill 30 must be maintained as a minimum.

6) Normal market forces must be allowed to work within the system. A market cannot be legislated to work, but proper and equitable rules that are the same for all participants will allow it to function properly and smoothly.

The WBGA wishes to thank the CTA for the opportunity to contribute to their Panel deliberations. We must all work towards a market-driven, commercial system that demands and encourages a superior level of performance from all its participants. This is a national economic security issue for Canada.