WESTERN GRAIN ELEVATOR ASSOCIATION

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The Honourable David Emerson
Chair, Canada Transportation Act Review
350 Albert Street, Suite 330
Ottawa, ON
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Dear Mr. Emerson,

Thank you for meeting with the members of the Western Grain Elevator Association (WGEA) on March 11, 2015 in Vancouver. The WGEA provides the CTA Review Panel with this letter to supplement our submission of December 18, 2015. Our members' views and opinions as represented on December 18th have not changed, and this letter is designed to be taken in combination with our original submission.

Attached is a Frequently Asked Questions (FAQ) document we have prepared to address a number of myths, issues and complaints raised by various parties and service providers on why rail performance for grain transportation is often less than required to meet demand. We encourage you and the Panel members to review this FAQ and our answers to these questions.

Bill C-30

On August 1, 2014 the provisions of Bill C-30, amending both the *Canada Grain Act* and the *Canada Transportation Act*, came into effect. The *Canada Grain Act* amendments were permanent (producer penalties required in grain company contracts), while the *Canada Transportation Act* amendments expire on July 31, 2016.

Below are the material amendments Bill C-30 made to the *Canada Transportation Act*, and the WGEA's views on each.

<u>Operational Terms in Service Level Agreements</u>

Overall, the WGEA supports as broad and encompassing an approach as possible to defining "operational terms" in Service Level Agreements, as provided for in Bill C-30. While the WGEA does not agree that only "operational terms" should be eligible for SLA arbitration, we concur that the regulations on operational terms for arbitration are well defined.

We are of the view that this definition should remain in place permanently, and not expire in 2016. We are also of the view that "commercial terms" or some other such addition that includes both financial consequences and a dispute resolution process needs to be included along with operational terms as eligible for arbitration.

Agency to Award Expenses

Bill C-30 included a provision which would allow the Canadian Transportation Agency the ability to order a railway company to compensate any person adversely affected for any expenses they incurred as a result of the railway company's failure to fulfill its service obligations. This amendment was made in section 116 of the *Canada Transportation Act*, and therefore only applies to Level of Service complaints. It does not apply to a railway's failure to adhere to the terms of a Service Level Agreement. In addition, the term "expenses" may include items such as added labour costs. In reality, the legal community understands and operates on the term "damages", and the WGEA believes that the Agency should have the authority to award damages in the circumstances of a finding of inadequate service from a railway company.

The WGEA supports the retention of the above noted clause. The word "expenses" should be changed to "damages." The Agency should also be allowed to make this award not only regarding a decision from a Level of Service complaint, but also pertaining to a railway company's failure to adhere to the terms of a Service Level Agreement.

Expanded Interswitching

The extension of interswitching to 160 km is a positive change. Every grain elevator in western Canada should have practical access to an interchange. Interswitching can be a cumbersome process for both the railways and grain shippers. However, the avoidance of an interswitch and associated loss of line haul revenue could serve as a motivating factor for a railway to provide better service. Some shippers have been taking advantage of the extended interswitch limits and are seeing the carriers react with rate reductions and better service offerings.

Measuring success on the expanded interswitching provisions goes beyond monitoring the increase in the occurrence of interswitching. It includes measuring the increase in service levels or added capacity at a particular location, simply by virtue of the fact that the elevator now some degree of access to an alternative.

Volume Thresholds

Bill C-30 sets out a framework for railway volume thresholds to be set by the Governor in Council. While we agree that the setting of volume thresholds are not the ideal solution, it is important for the government to retain its ability to set volume thresholds should it become necessary in extreme situations, as experienced during the 2013-14 crop year.

In summary, the WGEA is of the view that the terms introduced in Bill C-30 should not terminate in 2016, after the two-year period expires. The provisions should be made permanent.

Abuse of Market Power in Contract Negotiations

Railway companies are increasingly using their market power to secure contract terms from shippers that prevent a shipper from accessing the full benefit of the *Canada Transportation Act* and some terms are contrary to the Act. For example, a railway might require a term in a shipping contract or even a simple siding agreement that states the shipper cannot use interswitching to access other railways within range. We know that the railways have, in the

past, required shippers to waive their rights under the common carrier obligations to enter into other agreements. A shipper would almost always have to agree to these terms in order to proceed with the contract.

The WGEA is of the view that the Canadian Transportation Agency be given the authority to oversee confidential contracts. The Agency should be given the power (on application by an affected party) to determine whether or not any contract contains such a provision, and if so, can be ruled to be a "null and void" provision. This amendment should be retroactive, and apply to existing contracts when the provision comes into force.

Timeliness of Agency Decisions in Level of Service Complaints

A number of grain shippers have recently used the Level of Service Complaint process. While the timelines for shippers and railways are identified, the timelines for the Agency to render decisions is not specified. Those of our members who used the process have experienced lengthy periods of time for Agency decisions to be rendered. In two recent situations, on matters that were narrow in scope, the final decisions from the Agency were made almost a full year from the initial complaint.

The value of a favourable decision is mainly in the correction of the behaviour that resulted in the poor service in the first place. Therefore, the value diminishes with time, meaning that the longer it takes for a decision to be provided, the less relevant or applicable the decision is to future service levels. The WGEA is of the view that the Canada Transportation Agency must be allocated proper resources to provide Level of Service decisions within some reasonable time parameters.

Foreign Flag Vessels

Currently only Canadian flag vessels are permitted to operate in the Great Lakes between Thunder Bay and the St. Lawrence Seaway. At times, there are shortages of available Great Lakes vessels for grain cargoes, as experienced in 2014. The *Coasting Trade Act* covers domestic marine activities, and it allows for foreign ships to be converted to Canadian flag, however, the process of meeting regulations takes time and is expensive and this process is not a practical solution to a sporadic problem.

In this Act there are exceptions where a foreign vessel could be used in place of the domestic fleet:

Issuance of license: foreign ship

4. *(1) Subject to section 7, on application therefor by a person resident in Canada acting on behalf of a foreign ship, the Minister of Public Safety and Emergency Preparedness shall issue a license in respect of the foreign ship, where the Minister is satisfied that*
(a) the Agency has determined that no Canadian ship or non-duty paid ship is suitable and available to provide the service or perform the activity described in the application;
(b) where the activity described in the application entails the carriage of passengers by ship, the Agency has determined that an identical or similar adequate marine service is not available from any person operating one or more Canadian ships;

(c) arrangements have been made for the payment of the duties and taxes under the Customs Tariff and the Excise Tax Act applicable to the foreign ship in relation to its temporary use in Canada;
(d) all certificates and documents relating to the foreign ship issued pursuant to shipping conventions to which Canada is a party are valid and in force; and
(e) the foreign ship meets all safety and pollution prevention requirements imposed by any law of Canada applicable to that foreign ship.

The exception above suggests that vessels would not be re-flagged but issued a license, which should be quicker than the process for re-flagging. Clarification on this exception and time required for implementation would be very helpful. The conditions upon which a foreign vessel would be allowed a license, and the process by which a license can be obtained expeditiously, should both be made clear. The process should be designed to minimize any bureaucratic delays.

It is important to note that the ocean freight market is much more volatile than the domestic market. Therefore even if this proves to be a viable option from a licensing perspective, market forces might make it uneconomical to shippers. However, the above proposed change/clarification would conceivably provide more options for exporters in times of short supply of vessel freight on the Great Lakes.

WGEA Central Amendments

Legislation ultimately needs to better define the goal lines for service to influence railway behaviour to provide adequate capacity on an ongoing basis and without a connection to the political process. We will take this opportunity to re-state the central amendments to the Canada Transportation Act that are required to address the fundamental issues of railway capacity and railway service.

1. Definition of "Adequate and Suitable Accommodation"

To address the ongoing capacity issues, the WGEA recommends a more specific definition of "adequate and suitable accommodation" within Section 115 of the *Canada Transportation Act*, as follows;

"115(2) For the purposes of section 113 and 114, a railway company shall fulfil its service obligations in a manner that meets the rail transportation needs of the shipper."

This definition would go a long way toward addressing capacity issues from a macro-perspective.

2. Service Level Agreement Arbitration Process to include Financial Consequences

Among other forms of regulation, grain shippers are subject to unilaterally imposed railway tariffs, which include penalties imposed upon shippers that must be paid to the railways for performance the railways deem to be poor. The WGEA members continue to seek the commensurate ability to negotiate, and if need be arbitrate, penalties against the railway companies for their poor performance in the same way. Today, shippers have no meaningful mechanisms to hold railways accountable for service levels. Shippers seek the tools to negotiate

balanced commercial contracts rather than having to rely on government to take extreme measures such as the setting and enforcing of weekly volume thresholds.

This can be provided by making an amendment to the Service Level Agreement (SLA) provisions to make it clear that performance penalties are eligible for arbitration into an SLA.

It is worth noting that, as an outcome of Bill C-30, grain companies are subject to penalties in producer contracts for their failure to accept farmer deliveries. This is the one component of Bill C-30 that was permanent, and will not expire in 2016.

3. Service Level Agreement Arbitration Process to include Dispute Resolution

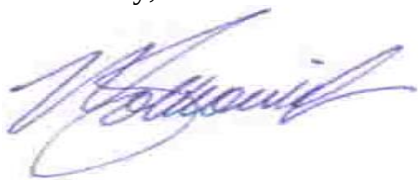
Similar to the above issue on financial consequences, the current SLA legislation does not permit a shipper to ask the arbitrator to include provisions in an SLA to govern the resolution of disputes under an SLA. The inability to secure access to an expeditious and cost effective process to recover from breaches of an arbitrated SLA limits the practical use of an SLA to shippers.

> ***169.31*** *(1) If a shipper and a railway company are unable to agree and enter into, a contract under subsection 126(1) respecting the manner in which the railway company must fulfil its service obligations under section 113, the shipper may submit any of the following matters, in writing, to the Agency for arbitration:*
>
> *(b) the terms that the railway company must comply with if it fails to comply with a term described in paragraph (a); which may include terms governing the determination of whether or not a service failure has occurred and the consequences resulting from such failure, such consequences including but not limited to those that are financial or punitive in nature;*

In the simplest of terms, the amendment would allow the arbitrator to establish a fair and reasonable dispute resolution process that would be included within the SLA itself.

Thank you for considering this supplemental submission. Should your schedule allow, we would be pleased to meet with you again to discuss these or any other concepts you may be considering.

Yours truly,



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