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Office des transports du Canada Canadian Transportation Agency
15, rue Eddy 15 Eddy Street
Gatineau (Québec) Gatineau, Quebec
K1A 0N9

N° DE FAC-SIMILÉ (819) 953-5564 FACSIMILE NO.

TRANSMETTRE À - TRANSMIT TO

Nom - Name: W.J. KENNY
Ministère - Department: CN
Endroit - Location:
N° de téléphone - Telephone No.:
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EXPÉDITEUR - ORIGINATOR

Nom - Name: NANCY VIAU
N° de téléphone - Telephone No.: 819/953-2236
Direction - Directorate: RAIL COMPLAINTS
Étage - Floor : 15TH

NOTA - NOTES

PLEASE SEE ATTACHED.
THANK YOU.



May 24, 2007

File No. T 7375-3/07-3

BY FACSIMILE: (780) 424-5866

BY FACSIMILE: (604) 488-1499

Canadian National Railway Company
Law Department
935 de la Gauchetière Street West
Montréal, Quebec
H3B 2M9

Mr. Forrest Hume
Barrister & Solicitor
1080 Howe Street, Suite 700
Vancouver, British Columbia
V6Z 2T1

Attention: W.J. Kenny

Counsel for Great Northern Grain
Terminals Ltd., North East Terminal
Ltd., Terminals Ltd., North East
Terminal Ltd., Providence Grain
Group Inc., North West Terminal Ltd.,
Canadian Wheat Board, Parrish &
Heimbecker, Limited, Prairie West
Terminal Ltd., South West Terminal
Ltd., Great Sandhills Terminal
Marketing Centre

Other Intervenors of Record
See Appendix 1

Dear Sirs:

Re: **Great Northern Grain Terminals Ltd. (GNG) and the Canadian National Railway Company (CN): level of service application filed pursuant to sections 113-116 of the Canada Transportation Act, S.C., 1996, c. 10 (CTA).**

The following is the Canadian Transportation Agency's (Agency) decision regarding the motions filed to date by the participants in the above-referenced proceeding.

1. Agency jurisdiction

In its answer dated April 10, 2007, CN raised the scope of the GNG application, stating, in part, that the only issue before the Agency in this proceeding is whether CN has fulfilled its common carrier level of service obligation to GNG from its facility at Nampa, Alberta. CN states that the references in the complaint to broader industry and tariff issues, as well as the interventions filed in support of GNG, do not expand the Agency's inquiry beyond one level of service complaint filed by one shipper.

Relative to the scope of the Agency's inquiry power, CN argues that sections 113-114 of the CTA only permit a fact-based examination that compares the service provided to GNG to that required pursuant to the statutory level of service obligation. Specifically, according to CN, the Agency has no mandate to conduct a general inquiry into the level of service being provided by CN to other grain customers or to inquire into the overall suitability of CN's Advance Products and their impact on other grain shippers in western Canada.

In support of this position CN asserts that the Canadian railway industry has been deregulated to the point where it is the railway company's "prerogative" to conduct its business as it sees fit. Basically, according to CN, its tariffs and program offerings are commercial matters where disputes arising therein are to be resolved only through final offer arbitration under the CTA or in the courts. Beyond this, there is no mandate given to the regulator to either inquire into or rule upon broader industry matters pursued by CN in the course of its business.

CN referred to earlier Agency and court decisions which circumscribed the Agency's jurisdiction regarding the issuance of declaratory judgments over general railway tariffs as well as in respect of the extent of regulatory discretion in assessing what is railway demurrage when the Agency determines a railway company's grain revenues pursuant to Part III, Division V of the CTA.

GNG responded arguing that the Agency has the statutory mandate under the CTA to inquire into CN's car distribution policies and practices when a complaint is filed relating to those policies and practices. Moreover, according to GNG, its complaint relates specifically to CN's Advance Products Program due to its discriminatory nature and its impacts upon service adequacy and suitability for GNG.

Agency finding

The parties here agree that this complaint is about the railway service provided to GNG by CN. The disagreement is over how the Agency examines this complaint, including what it can examine and, depending on the outcome of the inquiry, what the available remedies might be. An early resolution of this debate is critical as it has a bearing on the nature of the evidence which the Agency will deem as relevant in its inquiry.

The jurisdiction of the Agency in a level of service investigation is triggered by a complaint being filed by any person (subsection 116(1) CTA) that a railway company is not fulfilling any of its service obligations. There is no dispute here that GNG is a "person" within the meaning of the provision and, on its face, the complaint relates to the level of service it receives from CN.

Paragraph 116(1)(a) of the CTA then requires that the Agency conduct, as expeditiously as possible, an investigation of the complaint that, in its opinion is warranted. There are no other codified constraints on the nature of the Agency's investigation. Basically, the law gives the Agency a broad discretion to consider anything that it considers relevant. The Agency is,

therefore, mandated to obtain all necessary information that will assist it in understanding the complaint, its scope and, depending on whether a breach has been found, the appropriateness of any remedies.

The importance of this broader industry evidence in the case of the GNG complaint is acknowledged by CN in these proceedings when it asserts that the relevant legal standard for railway service is the 'basic service'. This is to be distinguished, according to CN, with a premium or specialized service which exceeds the statutory minimum and is only subject to the governing law of contract (rather than the relevant provisions of the CTA). CN has made this the cornerstone of its argument and as such, it is imperative here for the Agency to understand this distinction. Accordingly, the nature of services provided to other grain shippers by CN through its general and any special tariffs will be examined. More specifically, the evidence filed with the Agency by the various interveners in this case, all of whom are involved in the grain industry, is relevant as it sheds light on relevant service standards in the industry.

In this case, broader industry information is also critical if the Agency ultimately finds that there has been a breach of the level of service obligation. The statutory remedies are broad and are set out under subsection 116(4) of the CTA which provides that the Agency may, in part, order: that specific works be constructed or carried out; property be acquired; cars, motive power or other equipment be allotted, distributed, used or moved; or, any specified steps, systems or methods be taken or followed by the railway company.

The impact of any one of these remedies, that is, possible impacts beyond GNG and CN, are important in assessing the appropriateness of a remedy. The Agency's sensitivity to these impacts in this particular case is heightened when the industry that it is examining is the Canadian export grain industry where the interrelationships between shippers, producers, terminal operators, the Canadian Wheat Board, ports, governments and railway companies are so complex. Basically, any Agency ruling that affects one shipper can have repercussions throughout the system.

The CN Advance Products Program is at the heart of GNG's complaint here. It is important for the Agency to understand this Program and to identify whether or not it is responsible, either in whole or in part, for any of the purported service failures identified by GNG. If there are service failures and if the Program is responsible for them, then it will be up to the Agency to articulate why and to what extent this is so. It will then be up to the Agency to develop a remedy that will eliminate GNG's service problem. Just because the service problem, if it does exist, arises through the operation of a railway company's general or special tariff item does not pre-empt the Agency from ultimately directing as a possible solution that the tariff be changed. This approach is mandated by the law, as set out above, and for the Agency to do less would be doing only half of the job that Parliament has asked it to do. The economic deregulation of the Canadian railway industry and what CN has identified as its "commercial approach" to its business has not curtailed the scope of this statutory remedy.

2. Status of third party submissions

In its answer to the submissions filed by the various grain industry participants in this proceeding, CN cites section 43 of the *Canadian Transportation Agency General Rules* (General Rules) which allows a person who has an "interest" in an application to file an intervention to support or oppose the application. In referring to subsection 43(5) of the General Rules CN then asks the Agency to refuse these interventions as the person making the intervention has failed to demonstrate an interest in the application.

Agency finding

The submissions which are at issue in this motion have all been authored by participants in Canada's export grain handling and distribution industry. These include comments filed by the Canadian Wheat Board, Alberta Ministry of Agriculture and Food, grain terminals, grain companies, the Canadian Federation of Agriculture and farm unions. They all have direct experience in the industry.

For the reasons set out above under the Agency's ruling on the scope of its mandate, these interventions are accepted by the Agency. That is, they all shed some light on relevant railway service standards in the export grain industry.

3. Requests for public hearing

GNG and many of the interveners in this proceeding have asked that the Agency hold a public hearing as part of its investigation into the GNG complaint. The reasons cited in support of this claim vary, but basically the common theme is that a public hearing will assist the Agency in collecting all of the proper evidence, assessing it and ultimately in providing an appropriate relief. GNG as well as several of the interveners also assert that CN's approach to the complaint, as evidenced by its written pleadings, is one of avoidance of the issues and that the seriousness of the systemic service failures raised in the complaint merit a public hearing. They believe that such a hearing will assist the Agency's investigation by ensuring that all of the evidence it receives is tendered openly, fairly, and tested by cross-examination.

CN's position, as outlined above relative to its motions on Agency jurisdiction and intervener status, is that the Agency's inquiry here is discrete and limited. That is, according to CN the inquiry can relate only to the common carrier level of service obligations that CN owes to GNG. As such, CN believes that the proper investigation is a fact based one, that compares the service actually provided to GNG during the relevant period to the level of service statutorily required of common carriers by virtue of sections 113-114 of the CTA. Otherwise, according to CN, any inquiry into CN's Advance Products program or the railway company's tariff or commercial matters generally, will "obfuscate" the real issues in this particular complaint.

Agency finding

The mandate of the Agency in this proceeding is set out clearly under subsection 116(1) of the CTA which states:

- On receipt of a complaint made by any person that a railway company is not fulfilling any of its service obligations, the Agency shall
- (a) conduct as expeditiously as possible, an investigation of the complaint that, in its opinion, is warranted ; and
 - (b) within one hundred and twenty days after receipt of the complaint, determine whether the company is fulfilling that obligation.

There is nothing in this provision or in the surrounding provisions of the CTA that prescribe how the investigation is to be carried out. Rather, paragraph 116(1)(a) of the CTA leaves this up to the Agency. Notwithstanding this broad empowerment, it is clear though that the Agency's final decision on a complaint must be sustainable. That is, as a regulatory decision it must still meet the legal minimum of having been based upon an investigation that is full, fair and transparent.

Within such a framework, all of the relevant evidence ought to be collected, all of the proceeding participants should have an opportunity to view it and comment on it and an opportunity for such comment ought to be available to all participants.

In the present case, a substantial amount of evidence has been filed with the Agency by GNG and the interveners. It has all been accepted by the Agency as has that of CN. The argument filed in support of this evidence by all of the participants has also been accepted by the Agency, and this includes the arguments pertaining to evidence relevance, weight and credibility.

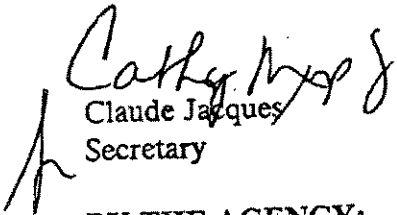
The Agency's decision, above, relative to the scope of its mandate in this case, shows that it will examine CN's car allocation methods including its Advance Car Ordering program. The Agency will also examine the evolution of car allocation programs, the reasons for implementation and the impacts including impacts on shippers and the railway company. This evidence is critical, for as said above, it provides important contextual evidence that will help the Agency understand the GNG complaint, assess it and evaluate the appropriateness of any remedies in the event that a breach of the statutory service obligation is ultimately found.

While paragraph 116(1)(a) of the CTA confers on the Agency considerable discretion in the conduct of its investigation, it is subject to one qualification, being that the investigation be conducted "... as expeditiously as possible". The importance of a timely determination is reinforced in paragraph (b) where Parliament directs that the matter be heard and determined within one hundred and twenty days after receipt of the complaint.

In this particular case, GNG has also asked that the Agency render its decision as expeditiously as possible and if changes to CN's car distribution practices are to be ordered by the Agency, then those changes ought to be in place for the 2007-2008 Crop Year. If the Agency is to attempt to meet this request, a decision must be issued in advance of August 1, 2007, being the start of the new crop year. In addition, the Agency notes that since the application was filed on March 8, 2007, the statutory deadline for a decision under paragraph 116(1)(b) CTA is, in any event, July 6, 2007.

In light of GNG's request for urgency relative to the coming crop year as well as the impending statutory deadline, the Agency will not hold an oral public hearing into this matter. In this case, the pleadings have canvassed the nature of the complaint, CN's reply and the position of many industry participants. The record is sufficiently full to enable the Agency to comprehend the evidence and the argument on the relevant issues and will enable it to issue a decision on a timely basis. The convening of an oral public hearing in this case, based upon the Agency's general experience with hearings, would likely delay the Agency's determination until well after the time frame requested by GNG.

Sincerely,


 Claude Jacques
 Secretary

BY THE AGENCY:

Geoffrey C. Hare
 Member

GILLES DUFAULT
 Member

RAYMON J. KADUCK
 Member

Appendix 1

Terry Boehm, Vice President
National Farmers Union
2717 Wentz Ave.,
Saskatoon, Saskatchewan
S7K 4 B6

Facsimile: (306) 664 -6226

Tim Coulter, Director
Briercrest Grain Limited
Box 157
Briercrest, Saskatchewan
S0H 0K0

Facsimile: (306) 779-4422

David Marit, President
The Saskatchewan Association of Rural
Municipalities
2075 Hamilton Street
Regina, Saskatchewan
S4P 2E1

Facsimile: (306) 565-2141

Lloyd Affleck, Chair
Pulse Canada
1212-220 Portage Avenue
Winnipeg, Manitoba
R3C 0A5

Facsimile: (204) 925-4454

Rudy Wiens
R&J Wiens Farms Ltd.
Box 10
Herschel, Saskatchewan
S0L 1L0

Facsimile: (306) 377-2070

Ken McBride, President
Agricultural Producers Association of
Saskatchewan
100-2400 College Avenue
Regina, Saskatchewan
S4P 1C8

Facsimile: (306) 789-7779

Reg Enright
Battle River Producer Car Group
Box 118
Rosalind, Alberta
T0B 3Y0

Facsimile: (708) 375-2129

Lanny Stevens, General Manager
Pulse Depot Rosetown Inc.
Box 790
Rosetown, Saskatchewan
S0L 2V0

Facsimile: (306) 882-4434

Bob Friesen
President
Canadian Federation of Agriculture
1101-75 Albert Street
Ottawa, Ontario
K1P 5E7

Facsimile: (613) 236-5749