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Chair

Mr. Larry Miller

Standing Committee on Transport, Infrastructure and Communities

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● (1535)

[*English*]

The Chair (Mr. Larry Miller (Bruce—Grey—Owen Sound, CPC)): We'll call our meeting to order.

I'd like to welcome and thank all of our witnesses for being here today.

I know we have a busy afternoon, so I want to get right to it. Without further ado, I'd like to....

Mr. Harris.

Mr. Jack Harris (St. John's East, NDP): I'm here replacing Mike Sullivan today.

There is a motion that was tabled the last time. Will there be time on the agenda to deal with that? I know you want to get down to business, but it's very important—

The Chair: It's not on the agenda today.

Just for the information of the committee, it's to deal with the minister. The minister will be coming, but he'll be appearing on March 19. That's the earliest his schedule would allow.

Without further ado, I'd like to call on either Mr. Paton or Ms. Cook from the Chemistry Industry Association of Canada.

You have 10 minutes or less, please.

Mr. Richard Paton (President and Chief Executive Officer, Chemistry Industry Association of Canada): Thank you very much, Mr. Chairman and members of the committee.

I'm going to give about half of this presentation, and then Fiona Cook will continue. She is our director of business and economics and has been involved in this issue for too many years.

We represent 45 chemical-producing companies across the country. It's a $47 billion industry. The reason we're here today and the reason this issue is so important to us is that 80% of our products are shipped by our very fine railways, CP and CN. So we have a very huge interest in this bill. We're also a member of the Coalition of Rail Shippers, and have been for the last seven years.

Why is rail so important to our industry? In a recent meeting with members of Parliament like yourselves, one of our members, a large petrochemical producer, was talking about investment and growth and job creation in this country. He said basically there are only two major issues that affect a big investment: you have to have feedstock, which in our case is natural gas liquids, and you have to have rail service—rail service that's not only available, but is price-competitive, because most of our product goes to the U.S. on very long-haul rail shipping. If we can't ship it efficiently and at a good price through Canada and to the United States, we can't build and we can't even maintain our plants. This is really important to our industry.

Our members do appreciate that we have two large and very good North American railways in this country. We do appreciate the efforts that have been made to improve the service of our railways. It's something that is very important to us, and it's the reason we support this bill.

We do believe, however, that the fundamental requirements for a good partnership between railways and our sector and shippers is to have service agreements that are clear and reciprocal, where both parties work together to achieve the best possible performance. We don't really want a system that is heavily regulated, nor do we want a system that requires a steady stream of appeals.

Our associations and members really appreciate the fact that this bill is a significant step forward in providing for those service agreements, something we've been looking for, for a long time, and we believe this will be a better foundation for our companies to work with railways, which do have market power that is not always equivalent to a fully competitive economy.

We also believe that a well-crafted act will benefit the railways in their working relationship with customers, such as our industry. Our association supports this bill, but we also believe that in order to make a difference and to achieve the objective of providing service agreements that are workable, the legislation needs to be improved. In fact, we believe there is a substantial risk that without a clearer definition of service agreements in the draft act, both our companies and the railways will be mired in some confusion as to what a service agreement is, and we'll end up with an endless number of appeals that will not be in the interest of our companies or of the railways.

To conclude, we will support this act, but we believe it could be made more workable with modest amendments that will define service agreements better and that will in turn help the government and Parliament achieve the aims of this act.

Fiona Cook will provide you with an example of the amendments we would like to see.

Ms. Fiona Cook (Director, Business and Economics, Chemistry Industry Association of Canada): Thank you, Richard.

As you noted, the key objective here is greater partnership between the railways and its customers. Close working relationships between our member companies and Canada's railways are not only key to our present-day competitiveness in international markets, but they are also crucial to future investment, jobs, and growth in our sector here in Canada.

We need more conversations and planning around demand and supply of rail. CIAC believes that with some key amendments the legislation we're contemplating here today will enable the building of those relationships.

I was here on Tuesday, and I believe members of the committee have received copies of the list of amendments that the CRS has put forward and that we stand behind.

Ultimately, the success of this legislation will be if arbitration is used only as a last resort. That's something we fundamentally believe in. There are two amendments that we believe are critical to setting the stage for that, and I will focus my comments on these.

Amendment 1, which sets out the basic elements that need to be discussed in a negotiation, is fundamental to the spirit of this bill. As members here today know, in its report the panel identified this type of framework as a key prerequisite to better commercial relationships, and frankly, we are a little surprised to see that the core elements of what a service-level agreement should contain are not set out in the bill.

This absolutely needs to be done to achieve the intent of the bill and to ensure that it works as an effective backstop. Without this definition and clarity, both parties will not be able to identify problems and workable solutions. Agreeing on the elements means more commercial settlements and less time before the agency, and I think we all want that. Again, setting out the framework for discussion and partnership is fundamental if successful agreements are to be achieved commercially—and that is the desired result.

Next, and in the same spirit of setting the table for greater collaboration and commercial agreements, we believe that removing the word “operational”, as specified in amendment 2, is critical; otherwise, you limit the conversation and end up with half measures and ineffective agreements that do not include standard clauses, such as dispute resolution—very key—and *force majeure*, which are found in most commercial agreements.

Removing the word “operational” will broaden the scope of discussion between railway and customers, and it will increase the workability of agreements. It will reduce the need to bring issues to an arbitrator or the courts that could be dealt with through standard and prearranged dispute resolution mechanisms—again, more commercial settlements and fewer occasions before the agency.

To summarize, as Richard stated in his earlier comments, we are pleased to see this bill. It represents many years of hard work, but it needs to be amended to be effective.

Even with the amendments, will it solve all the problems that shippers and railways currently face? No. Does it address all the issues that we identified as key in the service review process? No. Specifically, for our sector, it does not address cross-border service requirements and commitments. This is an important issue for our industry, as 80% of our shipments are destined for the U.S.

However, that being said, we are hopeful that with the amendments that have been tabled, this bill will provide the balance that is needed to work with our railway partners and develop service-level agreements that incorporate the entirety of what a railway offers to its customers, regardless of borders, such as we see in the marine, air, and trucking modes.

Bill C-52 is a necessary first step to greater understanding and partnership between Canada's railways and the multitude of industries that provide food, products, and jobs, and that support communities across Canada. The amendments that we propose will ensure that it delivers on that promise. At the end of the day, this is all about working together.

Thank you.

● (1540)

The Chair: Thank you very much.

We'll now move to the Mining Association of Canada.

Mr. Gratton.

Mr. Pierre Gratton (President and Chief Executive Officer, Mining Association of Canada): Thank you, Mr. Chair, members of the committee, and fellow attendees.

I am Pierre Gratton, president and CEO of the Mining Association of Canada. MAC is the national voice of Canada's mining and mineral processing industry. We represent both large shippers, such as Teck, CP's largest customer by far, and smaller shippers as well.

Accompanying me is François Tougas, our counsel in this matter. Thank you for the opportunity to appear today and to share our perspective on this important piece of legislation.

In 2011 the mining industry contributed $35.6 billion to Canada's GDP, employed 320,000 workers, paid $9 billion in taxes and royalties to federal and provincial governments, and accounted for 23% of Canada's overall export value. I would add, too, that our exports actually reached a record level in 2011, the most recent year for which we have statistics.

Operating from coast to coast to coast, the industry is very important to remote communities and generates prosperity in our major cities, notably, Toronto, Vancouver, Montreal, Edmonton, Calgary, and Saskatoon, each of which serves as a centre for global mining excellence for various types of mining.

Looking forward, proposed, planned, and in-place mining projects in Canada amount to upwards of $140 billion of investment over the next 5 to 10 years. Across the country, major projects are seen in mined oil sands, coal, copper, gold, iron ore, and diamonds, among other sectors, with large investments also occurring in environmental and processing areas.

To enable the industry to become an even stronger contributor to Canadian prosperity, industry needs government policy support to meet anticipated long-term demand for Canadian minerals. The efficiency of the logistical supply chain is a major determinant of industry's contribution to the economy, and rail freight service is a major determinant of the effectiveness of the logistics supply chain.

Although MAC appreciates the government's initiative through Bill C-52, it is our view that the bill, unless amended, will not deliver on the government's promise "...to enhance the effectiveness, efficiency and reliability of the entire rail freight supply chain."

The Canadian mining industry is the single largest industrial customer group of Canada's railways by far. We consistently account for over half of total rail freight revenue in Canada and the majority of total volume carried by Canadian railways annually. In 2011 the mining industry accounted for 54% of rail freight revenue and 48% of volume. As such, transportation legislation is, obviously, very important to us.

I'll give you another, more specific example. Consider one miner's economic input and the impact that the quality of rail freight service has on the success of the business model. This miner ships 24 million tonnes of coal to ports each year. At about 105 tonnes per rail car, that amounts to 225,000 rail cars annually. At 152 cars per unit train, that equates to 1,500 unit trains per year, or five unit trains per day. At, say, $150 per tonne, that translates to $15,750 per car, or $2.4 million per unit train, for a total of $12 million in coal shipped daily. When placed in context, it becomes clear how much rail freight service failures can cost miners, and, in turn, the Canadian economy as a whole. It becomes very difficult to ship other products if the mining industry is not able to ship theirs.

The biggest issue rail customers have is that they do not know what they are getting for the rail rates they pay. The remote locations of many mining operations often leave miners captive to one of the two railways and frequently stranded without alternative modes of transportation. Their captivity, coupled with railways' power to unilaterally impose rates, enables the railways to influence prices and reduce service quality without the risk of losing customers.

Shippers had anticipated that Bill C-52 would follow on the recommendations of the final report of the rail freight service review panel so that when contracting or otherwise dealing with railway companies for rail freight service, the playing field would become balanced. Although a number of the review's final recommendations are found in Bill C-52, it is the recommendations absent from the bill that present shippers with the greatest challenge.

Currently a railway is not required by the Canada Transportation Act to provide any particular elements of service to a shipper unless the railway so chooses. Furthermore, in instances where a carrier does choose to offer service elements to a shipper, the railway is not required to provide any particular level of service.

Despite the recommendation of the review to include elements of service in service agreements, and the broader shipping community's request for the same to be included in Bill C-52, the legislation before us today remains silent on this crucial issue.

● (1545)

Giving shippers a statutory right to a service-level agreement, as Bill C-52 has done, only goes halfway: it gives shippers a right to service without defining that service. Without including the specific elements of service a shipper needs, the bill, at best, subjects the quality of a shipper's rail service to the discretion of an arbitrator in a process that, unless amended, weighs heavily in the railway's favour.

The provisions on service in the act are sufficiently weak and vague that they have been unable to address the service failures that gave rise to the review in the first place. Given that these provisions remain unaddressed in the bill, it is our view that shippers will remain disproportionately and unreasonably subject to railway market power, and the service failures will continue into the future.

In the legislative consultation, shippers sought amendments that would establish, first, a base level of service by requiring the railways to provide specific elements of service; and second, a way to guide the Canadian Transportation Agency or an appointed arbitrator in its interpretation of the adequacy and suitability of the level of service provided by a railway company.

Bill C-52 falls short because these critical components of service remain absent. Consequently, neither the agency nor an arbitrator has guidance regarding the adequacy and suitability of a particular level of service, or even of whether an element of service must be provided by a rail carrier.

The government still has an opportunity to get this right and to achieve Bill C-52's stated objectives of economic growth, job creation, and expanded trade opportunities. The amendments we seek correspond to those of the broader shipping community as determined in consultation with the Coalition of Rail Shippers. Specifically, MAC endorses the six amendments detailed in the document tabled before the committee today, with a specific focus on recommendations one, two, and six, as described in our brief.

There is an opportunity to fix this problem. By implementing these recommendations, the government can allow for commercial negotiations, maintain Canada's export success, and deliver revenues and jobs across the country without incurring any cost. Miners want to be able to work in partnership with the railways in the movement of their products. To do so, however, requires a level playing field.

Thank you very much.

● (1550)

The Chair: Thank you very much, Mr. Gratton.

We now move to the Canadian Fertilizer Institute.

Mr. Larson.

Mr. Roger Larson (President, Canadian Fertilizer Institute): Thank you, Mr. Miller and members of the committee.

I'm the president of the Canadian Fertilizer Institute. With me today is Ian MacKay, our transportation legal counsel.

CFI represents the basic manufacturers of nitrogen, phosphate, potash, and sulphur fertilizers in Canada. Our members produce over 25 million metric tonnes of fertilizer annually. We export over 75% of this production to the United States and offshore to over 60 countries.

We are a resource-based industry heavily dependent on the railways to move our goods to domestic and offshore markets. Our ultimate customers are farmers. Delivering fertilizer products to them in a timely and effective manner is critical to the world's food supply.

I am pleased to see my colleagues from the railways here today. We have a partnership, one that is critical to the success of fertilizer companies and to the success of the railways.

Our growth in exports offshore and to the U.S. depends on our members' competitiveness. Our companies are investing in Canada's economic growth, with some $15 billion in potash expansions and about $3 billion to date in nitrogen fertilizer expansion. These investments will require the railways to invest in new rail infrastructure and stronger commitments to their customers.

Our member companies have invested in their transportation partnerships with the railways. One of our member companies has 5,500 railcars. It's the second largest railcar fleet in North America. Our other members have invested in tens of thousands of railcar long-term leases to move their potash and nitrogen fertilizers to the United States.

We are participating in research to build a new and safer rail tank car for the transportation of anhydrous ammonia. Our companies are spending hundreds of millions of dollars to build new port facilities in Vancouver and on proposals for Prince Rupert. At our manufacturing plants and mines, CFI members have built sophisticated load-out facilities with the capacity to load 80 to 140 railcars at a time. That's a train two and a half miles long.

The railways have not always met their service commitments, and it's not always just due to bad weather. While there have been significant improvements in service since the problems we experienced in 2007 and 2008, we need to recognize that recent capacity constraints have not been there due to the economic slowdown. What happens when the economy recovers to full level?

Our industry is investing in dramatic growth. Another 10 million to 15 million tonnes of potash and nitrogen fertilizer will need to be moved to our customers, and virtually 100% of this new product will need to be exported by rail.

Today, our members require sophisticated commercial service terms and agreements to meet their individual business needs. Specifically, they need to negotiate new railway commitments on the service obligations, over what I would categorize as the “generic”: a one-size-fits-all provision of adequate and suitable service as currently set out in the Canada Transportation Act. Today, generic, simply stated, will not work.

CFI is encouraged by Bill C-52, the Fair Rail Freight Service Act. We commend the government for bringing forward this important piece of legislation. We at CFI view this as a crucial step towards a better commercial balance between the railways and their freight customers.

That said, CFI has found areas in the bill that give us some cause for concern. The backstop requiring railways to commercially negotiate and deliver on service commitments with their customers, and enabling arbitrators to establish those agreements if negotiations fail to do so, is provided to some extent in Bill C-52, but it is incomplete. We can strengthen the backstop by ensuring that rail customers can ask for service agreements backstopped by commercial dispute resolution provisions.

Our members believe that railway service problems should be resolved by commercial processes. CFI has been a leading advocate of commercial dispute resolution since the beginning, since the federal debate regarding railway service started around 2006.

● (1555)

We were the first to develop and present a timely, effective, low-cost mediation and arbitration process to the rail freight service review panel. CFI supports commercial negotiations backstopped by mediation and arbitration. This panel cited CFI's efforts in their final report. We are pleased that the arbitration process contained in the bill mirrors many aspects of CFI's proposals.

The CFI supports all of the recommendations for changes made by the CRS earlier this week. However, today I want to emphasize two of the six recommendations that are of particular concern to the fertilizer industry.

We start with operational terms in the CRS document. This is known as recommended amendment number two. The scope of the service agreements should be extended beyond operational terms to cover all aspects of the commercial relationship between a railway and a customer. Limiting service agreements to operational terms excludes from consideration by the arbitrator a number of important terms and conditions that one routinely sees in commercial agreements. This makes little sense in practical terms and will result in shippers only being able to arbitrate some of the issues they might otherwise choose to negotiate on. The separation of operational terms from non-operational terms does not exist in commercial agreements, so we propose to the committee that the legislation be amended to strike the word “operational” from operational terms. This will allow the arbitrator to include clauses such as *force majeure*, dispute resolution, and other standard contractual terms found in commercial agreements.

Secondly, the bill needs to make it clear that service agreements may include dispute resolution terms to deal with service failures. This is CRS's recommended amendment number three. Shippers do not wish to undertake costly litigation to deal with a service failure or to wait for the CTA to conduct hearings. In our view, the most effective way to deal with service problems that arise after an agreement is established between a railway and their customer is under dispute resolution terms proposed by the parties themselves and settled by the arbitrator if need be. As presently drafted, the bill would not allow the arbitrator to include dispute resolution terms, meaning the bill is only treating half of the ailment.

In conclusion, the CFI notes that in Minister Lebel's testimony before this committee on February 12, service disputes relating to the Canadian portion of cross-border shipments will be subjected to arbitration under Bill C-52. Almost 50% of the fertilizer manufactured by our members is shipped to the United States. The transportation service challenges and the service issues that our members face on our exports on cross-border rail movements are the same as those faced on traffic movements within Canada domestically or to ports of export in Vancouver. Our policy and regulatory authorities need to work closely with their U.S. counterparts in an effort to establish and harmonize a commercial dispute resolution model that addresses the total shipment on cross-border moves.

It is imperative that this legislation support the new investment our industry is making in the growth, jobs, and future prosperity of our country.

Thank you for your attention, and I look forward to your questions.

The Chair: Thank you very much, Mr. Larson.

Now we'll move to Canadian Propane Association, Mr. Facette.

I hope I pronounced that right.

Mr. Jim Facette (President and Chief Executive Officer, Canadian Propane Association): It sounds fine to me.

The Chair: Okay.

We're going to have a PowerPoint here today.

Mr. Jim Facette: Mr. Chairman and committee members, thank you very much for the opportunity today to present in front of you.

We've been involved in this issue for quite a long time, and it's finally come to a head with this piece of legislation, so congratulations to all of you for getting us here.

I know there are an awful lot of people here and an awful lot of questions, so we're not going to take up the full 10 minutes.

Here's a bit about us and who we are.

● (1600)

[*Translation*]

Ms. Isabelle Morin (Notre-Dame-de-Grâce—Lachine, NDP): Is the documentation in English only?

Mr. Jim Facette: Yes.

Ms. Isabelle Morin: Since the documents are supposed to be provided in both languages, I would ask that you not go ahead with your PowerPoint presentation.

Mr. Jim Facette: We provided it ahead of time. You didn't get a copy?

Ms. Isabelle Morin: No.

[*English*]

The Chair: I guess we had it in both official languages and....

We've got it in hard copy, but I guess not on here. Is that...?

There are supposed to be both.

Ms. Morin, would you go along with...or not?

[*Translation*]

Ms. Isabelle Morin: I don't agree with having an English-only PowerPoint presentation.

Mr. Robert Aubin (Trois-Rivières, NDP): We could all follow along on the paper copy.

[*English*]

The Chair: I'm sorry, Mr. Facette, we'll have to use the paper copies.

Mr. Jim Facette: That's fine. I have paper in front of me. No problem.

They should be distributed.

The Chair: Oh, okay; they're coming.

Mr. Jim Facette: Sorry, Mr. Chair. We had given a copy to the clerk in advance. No problem.

[*Translation*]

Mr. Jim Facette: No big deal.

[*English*]

I'll talk a little bit about the industry in Canada and our involvement in the rail freight service review process, which was extensive. I'll also briefly touch on our views on the act.

The association has over 350 members across Canada. Our membership covers the entire spectrum of the industry—producers; wholesalers; retailers; transporters; manufacturers of appliances, cylinders, and equipment; and associate members of applied services.

Annually the propane industry contributes about $10 billion a year in terms of impact on the Canadian economy. It generates over $900 million in taxes and royalties and employs more than 30,000 Canadians. More than half of the propane in Canada is shipped to the United States. Approximately 3.5 billion litres of propane are shipped using Canada's railways.

Just to give you a little bit of insight—this slide is not in your deck—one propane railcar holds about 30,000 gallons of propane. That's 113,700 litres, to be exact. It takes about three trucks to unload a railcar. Again, about 3.5 billion to 4 billion litres a year find their way onto Canada's railways.

We have railways here in Ontario, with unloading racks in Sarnia. A new rack was just put in there; Sarnia was most recently affected by some work. Primarily in Canada the propane finds its way out of western Canada, comes into Sarnia, is offloaded onto trucks or rail, and finds its way east. It also finds its way on CN's lines out of the west, straight into the Toronto area, and then goes east from there.

We've been an active participant in this process since 2008. Recently, towards the end, we had a representative on Mr. Dinning's rail freight service process facilitation group.

Our stated positions were these. We support commercially based legislation that contains the right to a level of service agreement as a way to address the market imbalance between the railways and the shipping community. We support the right to access an appeal mechanism if a service-level agreement cannot be achieved. And legislation should provide for the rights of shippers to levy penalties in the same way as against the shippers.

We believe this piece of legislation hits all three marks. It provides a very good balance between railways and shippers. We're not coming today with any changes at all. Finding a balance is very, very difficult.

It provides a tool to improve freight service in Canada and it makes the level of services more predictable. It respects the commercial nature of the relationship between the railway and the shipper. We have members that use level of service agreements and we have some that do not. It strikes a balance. It's their choice.

This legislation, in our view, is an option to be exercised if you think the need is there. For us, it contains all the mechanisms and measures we requested some years ago: a right to a level of service agreement, an arbitration process, and administrative monetary penalties.

Mr. Chairman, we'll leave it right there. We'll stop and allow time for others.

Thank you.

The Chair: Everybody has it.

Continue, Mr. Facette.

● (1605)

The Chair: Thank you very much.

The last presenter is Mr. Claude Mongeau, president of Canadian National.

Mr. Claude Mongeau (President and Chief Executive Officer, Canadian National): Thank you, Mr. Chair.

[*Translation*]

Thank you for having me today.

[*English*]

I did not join the Coalition of Rail Shippers, but I'm pleased to be with my colleagues from a range of sectors.

I will take every minute that Mr. Facette has not used, if I could, Mr. Miller, and go through a quick presentation.

The Chair: I can't do that. You have a maximum of 10 minutes.

Mr. Claude Mongeau: I'm joking.

I run CN, which is the largest Canadian railroad, and I believe it is the true backbone of the Canadian economy. I believe the rail industry is absolutely essential to our country's prosperity. We have long distances in Canada to cover and rail is a very important part of the economic fabric of this country.

In fact, CN alone touches about $250 billion worth of goods every year. We helped Mr. Gratton this year hit a new record in terms of exports in the mining industry. Our potash movements are surging at 155%. As we speak, we are moving more propane to more markets than at any other time in our history.

If I look at 2012, every month in 2012 was a record in our history. We are well above any volume of shipping we've ever had in the history of the rail industry. That's because we are not only doing what we are supposed to do in terms of serving the Canadian economy, but we're also gaining market share against other modes of transportation at a very fast pace, which is indicative of pretty good service and a well-functioning rail industry.

It was not always like this. Twenty-five years ago, the railroad industry in North America was in dire straits. CN and CP were not different. We had two carriers in Canada that were heavily subsidized by taxpayers. We had railroads that were not profitable enough to reinvest in their equipment and infrastructure. We were lagging in safety and in innovation and service. In fact, CN was worse than CP in this regard at the time. We were a crown corporation, a heavy burden to the Canadian taxpayer, and not particularly innovative in any aspect of our operations. That was 25 years ago.

Fortunately, through successive good government policies, started under a Conservative government and continued with Liberal governments over many different leaders, we had a slow but gradual deregulation of the rail industry that allowed for a remarkable transformation of the industry, which leaves us in an enviable position today. I believe that Canada has one of the best rail systems in the world. We clearly have the lowest rates of any OECD country in terms of freight rail, which is important for Canadian shippers given the distances. We have, overall, very good service, and I will come back to that.

CP is the leader in the entire rail industry for safety. CN is the most profitable railroad of any rail carrier in North America. Both CN and CP are serving their customers and shareholders very well.

It took 25 years of good public policy and a lot of hard work by the two rail carriers, in partnership with their customers, to get to where we are. It would be very important for this government to give a lot of attention to maintaining the condition of that success and not turn the clock backward in the direction of re-regulation.

Personally, I believe that good public policy starts with evidence. I do regret that many of my colleagues and partners, customers and associations, are letting their advocacy get ahead of them and are not always following the facts.

I would ask you to turn to page 3 in the short document I submitted in both languages, and I will tell you a little about CN's service record.

We can measure this in many ways, but if you look at it in a few very important ways, perhaps the most important dimension of service in the rail industry is order fulfillment. I'm talking here about order fulfillment for merchandise traffic such as propane, chemicals, forest products, the concentrate or metal sector in the mining industry—things that move in one car. Our order fulfillment, which is measured in terms of unconstrained demand, has gone, over the last couple of years, from 88% to 95% on average.

The rail sector is not as flexible as trucking. To achieve 95% of unconstrained demand is world-scale performance. There is no question that we can always do better, but the hard facts, which I have for any of my customers in any one of the sectors in any one of the geographies, are that we achieve, on average, in excess of a 90% order fulfillment.

Meeting an order is one thing; bringing the car at the right time of the day is another important dimension, which is something we did not even measure three years ago. Today we actually measure it. We call it switch window performance or timely placement of cars. We were at 84% in placing the cars in the window we promised to customers last year.

● (1610)

Spotting, which is for the grain sector...in the countryside we are at 82% to the day. A few years ago, we were measuring ourselves to the week. Today, we have a scheduled grain plan and we actually have a fixed service every week. We come in every week at the same time during the day, and we meet that threshold within the day 82% of the time.

Some have said, and I heard some say yesterday in front of this committee, that our cars are not of good quality, that as much as 20% to 50%, depending on the day when they quote the statistics, of our cars are not functioning well. The reality is that our car reject last week was 2.1%. We had 64 cars in our entire network last week that were rejected by customers. We don't agree that every one of those cars needed to be rejected, but the total, if we take it at face value, is 2.1% of our cars that are rejected.

Mr. Chairman, the important point is that we have good service. It's not perfect. As we speak, we are going through a very difficult winter, and our service is very difficult. But service matters, because if we don't have good service we lose the business. The hard reality —and that's been another key element of the advocacy of the association, trying to portray railroads as monopolies or somehow that the market for rail services is not balanced. The reality does not at all follow those statements. Railroads in fact for decades have lost market share. I will give you one statistic. Forest products were a very prominent group advocating that railroads have an unfair advantage or abuse their position. More than half of forest products in this country don't even move by rail; 55% don't move by rail. Of the 45% that move by rail, about 40% are dual-served by two carriers. For the rest, which is less than 20% of all movement of forest products, you could argue whether it actually has a competitive option or not.

In fertilizer, close to 100% of potash shipments are served by two carriers. In chemicals, more than 65%, unlike in the U.S., actually have dual access, two railroads serving them. In coal, in distant mines where we are lucky to have one railroad, of course, there is one railroad, but it is a bit of an irony to say that when you're lucky to have a railroad serving your line, you are somehow becoming a captive shipper. We have mines all over this country at the moment that would like us to build rail lines to serve them. I sometimes tell them, how ironic would it be if I agreed to build a rail line and the next day you said “I am captive to you”?

The reality is, there are competitive options. When we serve Teck out of Quintette next year, or out of their mines in southern B.C., we're competing with Australia; we're competing with other countries. If we don't have a good mining product and a good service product with railroads, we simply don't ship the coal.

We are competing every day, Mr. Chairman. We have a well-functioning rail industry, and we have 25 years of gradual and slow deregulation that has made an industry in this country that should be the envy of the world.

You should beware of regulation, because it is a very fine balance. I would prefer that we protect the commercial framework. I would prefer that we avoid regulating and that we keep a watchful eye on the railroads and make sure they continue to improve. But if we are going to need a new regulation, I would ask you to be very wise, to follow the evidence, not the advocacy, to be mindful of unintended consequences, and to protect the network nature of the business.

I'll finish by saying that I was appalled yesterday to hear the Coalition of Rail Shippers say that we should exclude the word "network" from this legislation. Railroads are not a taxi service. We cannot switch every customer who is first on the rail line. If we don't take into account the operational and the network nature of our business, we might just create a very slippery slope that will not be good for Canada.

● (1615)

You should focus on those customers who actually have no choice. If a customer has no choice, maybe there's a need for regulation. If he or she already has choices, you should let the market play. You should start with mediation, and you should make sure that the arbitration is done by the CTA because they are the only ones who have the experience to do it right.

Thank you.

The Chair: Thank you very much.

We will now start questioning.

Ms. Minh-Thu Quach—I hope I've pronounced that right. My apologies if I didn't.

Ms. Anne Minh-Thu Quach (Beauharnois—Salaberry, NDP): It's okay, Mr. Chair.

[*Translation*]

Thank you very much.

I want to thank the witnesses for joining us today. It enables us to get a much clearer picture of the situation.

Although I'm not usually on this committee, I have a number of questions. I will start with Mr. Paton.

As we know, railway transport can give rise to delays. Are there transport services where that's not an issue? Are there services that would allow you to operate plants more safely, so you wouldn't have to store large quantities of chemicals in your facilities, for instance? Services that would allow for better production planning?

[*English*]

Mr. Richard Paton: We don't really store chemicals. We store chemicals...as in Roger's example, we have a lot of cars that our companies own, and the production goes right into the cars and then they are shipped. So there is very little tolerance...when we have a rail strike, for example, as soon as that car fleet comes back and can't get filled up, we have to close the plant.

The tolerance, just-in-time shipping, works exactly for us. There's a reason for that. Storage is not something you want to do in communities with large chemical products, and we're very cautious about endangering our communities. Storage is an issue that we just don't deal with. We don't have storage.

[*Translation*]

Ms. Anne Minh-Thu Quach: Very good.

Two companies control the network, so they have a virtual monopoly. You talked about the available services. In fact, a number of you talked about more competition. What would you recommend in terms of improving competition and thus the services?

That question is for everyone.

● (1620)

[*English*]

Mr. Richard Paton: It's a very big country, so I think it's unlikely that we will change the network structure dramatically in this country. We will be left with some competition and sites, especially if you think of Pierre's sites, mining sites that are going to be very remote, and even more remote if we do Plan Nord and the Ring of Fire.

I think competition is probably not going to increase dramatically, and not even among sectors, because most of our stuff can't be transported by truck. That's why we focus on service agreements, having a rationale, a framework.

Maybe I could just add a point here. Many of the things you mentioned, Mr. Mongeau, that you have used as a basis for saying that you have improved service, which is true, are the very things that we would just see as a normal part of a service agreement. For that reason we don't really understand what the problem is. Why don't we just include these things if these are the basis upon which we work? We don't call that regulation. We call that a framework for commercial agreements.

[*Translation*]

Ms. Anne Minh-Thu Quach: Very good.

This question is for Mr. Larson.

You said that most of your fertilizer goes to farmers. There's a lot of talk about the economy, job creation and exports to the U.S.

How do delays affect those farmers and the country's economy?

[*English*]

Mr. Roger Larson: The consequences for our members are the most severe. Obviously, there is no alternative but to move the volumes of product. I asked one of our VPs at transportation once why they didn't switch, and they had a mine that was actually quite close to the port in New Brunswick. I asked if they couldn't move some of it by truck, and he said to move the product by truck would require a semi-trailer every 34 seconds going down Main Street. That's not feasible.

We move 70% of our product to farmers in 70 days. We have a very compressed season and it started in January. For North America's farmers, we need to be able to deliver across North America something in the order of 50 million tonnes of fertilizer in order to grow the crop that is going to be produced this year, and that is critical to the world's food supply because half of the world's food supply comes from commercial fertilizers.

The consequences of not getting those products to farmers are that we would lose our food production capacity.

In terms of the consequences to our members, we do deal in a very competitive environment, and as Richard said, these plants operate pretty much with the cars having to be loaded as it's produced. We're exporting those products to the United States, by and large—we also sell to eastern Canadian farmers and Quebec farmers, but the bulk of our product goes to U.S. agriculture—and if we have to shut a plant down in Canada because we cannot get rail service and we can't move the products, the consequences would be that we would lose that business in Canada and it would be imported from other countries.

The Chair: Thank you. Your time has expired.

Mr. Goodale, seven minutes.

Hon. Ralph Goodale (Wascana, Lib.): Thank you very much, Mr. Chairman. I appreciate the opportunity to have another panel of witnesses before us on a very important topic.

When you listen to the testimony, particularly as we've heard today from some of the shipper organizations and from one of the railways, it's really a case of black versus white. You often wonder if the ships are just passing in the night.

The government obviously conducted a rail review process. The result of that process a couple of years ago was to agree largely with the shipper perspective that there was an imbalance, and that imbalance needed to be corrected. So we have before us Bill C-52, and we have six amendments to Bill C-52 proposed by the Coalition of Rail Shippers.

I have three questions in particular that I'd like to ask the shippers, perhaps the Mining Association, the fertilizer people, and the chemical people.

The coalition amendment number one talks about a better, clearer, more specific definition of what adequate and suitable accommodation and service obligations really mean in the language of the law. Those phrases, “adequate and suitable accommodation” and “service obligations”, have been in the legislation for a long time. There's still a great deal of ambiguity about what they mean, even after years and years of usage, so the shippers are suggesting an amendment to bring some precision to the use of that language.

If the amendment is adopted by the committee and by the government and by Parliament, you'll get the precision you're suggesting. What if the amendment is not adopted? Will the legislation fix the problem or will the ambiguity continue and the problem will not be solved? That's question number one. How vital is this amendment in providing greater definition of service obligations?

Secondly, what are the service levels you are experiencing now? When the rail review process was conducted a few years ago, they reported a pretty difficult situation. The information provided by Mr. Mongeau would suggest that some of those performance levels have improved, at least in the last two or three years. What is your experience right now with service from the railways? And when I say “right now”, I want to include specifically the period of time since the legislation was tabled. Have you noticed any change in the level of service that is being experienced right now?

My final question is on this issue of administrative monetary penalties versus liquidated damages. The legislation obviously provides for AMPs. It doesn't provide for an expedited way to proceed with actual practical damages.

If you have only the monetary penalties in the legislation and no access to liquidated damages, does that really fix the problem from the shippers' point of view? The AMPs money goes to the government; it doesn't go to you. So what's your preference in terms of remedy?

● (1625)

Mr. Pierre Gratton: I'll start with the last question and then ask François to speak to your first one.

On the administrative penalties, our own view—and maybe Mr. Mongeau would agree with us on this one—is that I don't think they do anything. I don't think they address the heart of the issue at all. If there is an administrative penalty, it would probably find its way back to the shippers through rate hikes, so the shippers would be paying the government for some service issue. You could call that an indirect tax. So I don't think that's a particular feature of the legislation that we think is of any use.

François.

Mr. François Tougas (Representative, Lawyer, McMillan LLP, Mining Association of Canada): On the first question, which I took to mean the six issues raised in the final report of the service review panel, those are the provisions that we were surprised not to see in the bill. They were very clear, stark recommendations.

Again, I'm not even sure the railways disagree with this point, and I would be interested to hear about that, but the definition in the act to address what is the suitability of the service provided for particular traffic has been there for a very long time. It is the same suite of provisions we had during the entire service failure period that gave rise to the service review in the first place.

That isn't being addressed either by the amendments to this bill or by any other change proposed to the act. You have a market structure that is not changing. It's no different today than it was then. You have no change to the statutory provisions that allowed those service failures to occur.

That's why we say if you can provide definition to “service obligations” and to what the phrase “adequate and suitable accommodation” for traffic means, we think you could alleviate the burden of having a bunch of processes appear in front of the agency. At least the parties would know when they're negotiating what is a legitimate point of commercial contracting and what is not.

Frankly, I'm in the business of disputes.

Hon. Ralph Goodale: Some would say so are we.

Voices: Oh, oh!

Mr. François Tougas: Right.

I foresee no shortage of business coming my way as a result of any purported change in service levels. Anything that's looked at episodically like that, such as talking about what's happened in the last two months, to me is not really an indication of what the larger problem is. We had a very long service failure period. The economy changes, so service levels change within that economic structure we have, and we can go back to a congestion period during which we had a lot of service failures. Any number of things can happen, as they do frequently in winter.

If we have these proposed changes to the act, our pretty strongly held view is that we could avoid a lot of disputes over what is a legitimate level of service and element of service that should be offered by the railways.

I tried to grab both your questions in that answer.

● (1630)

The Chair: Thank you.

Mr. Poilievre, you have seven minutes.

Mr. Pierre Poilievre (Nepean—Carleton, CPC): Well, the reason we can't define adequate and suitable service in every single incident within the legislation is that it's impossible for a bill to adapt itself alone to each circumstance. That's why we have regulation, and in this case it's why we have arbitrators who can look at the particulars of a given case and interpret what that service adequacy and suitability should be.

I want to come back to the debate over administrative monetary penalties versus liquidated damages. Are you suggesting, Mr. Gratton, that the administrative monetary penalties should be removed from the bill?

Mr. Pierre Gratton: I'm saying that they don't really do anything, so we're indifferent to them.

Mr. Pierre Poilievre: Earlier, you said it would be a cost to the shipper. Is that your view?

Mr. Pierre Gratton: Yes, so it's not really achieving the objectives that I think the government—

Mr. Pierre Poilievre: Presumably you just want it removed, then, from the bill?

Mr. Pierre Gratton: It would make no difference.

Mr. Pierre Poilievre: Okay.

Go ahead, sir.

Mr. Roger Larson: I would add, Mr. Poilievre, that we didn't ask for the AMPS. I'm not sure who did.

Also, we're not asking for the act to specify liquidated damages. What we're asking for is that a dispute resolution process be included in the act so that the customer and the railway can negotiate what the terms of their agreement should be, how they will meet the obligations they have committed to under the commercial contract, and what remedies they want to include.

Mr. Pierre Poilievre: Well, there's nothing that bans the railway and the shipper from doing that now.

Mr. Roger Larson: There's nothing that requires the railway to do it, and that's the issue.

Ms. Fiona Cook: The issue here is that we wanted consent—

Mr. Pierre Poilievre: All right. Well, that's different from what you said a moment ago. You used the verb “can” a moment ago, and they can do that right now.

Mr. Roger Larson: Yes, they can.

Mr. Pierre Poilievre: But can you name another arbitration process that requires a party to include a liquidated damage before any damage is done?

● (1635)

Mr. Roger Larson: We're not asking for an arbitration policy that requires liquidated damage. What we're asking for is a dispute resolution mechanism within the agreement that will allow a party to enforce the terms of their commercial agreement.

Mr. Pierre Poilievre: But how would the terms of that be determined? You said a moment ago that you don't want to leave it to the railway.

Mr. Roger Larson: They would be negotiated. If they can't agree on what those terms will be in the negotiation, then it will go to mediation. If they can't agree through mediation, then it will go to arbitration under the agency, which is specified in the legislation.

Mr. Pierre Poilievre: Which brings us right back to the point I said earlier. You said a moment ago you didn't want it, and you came around to saying you do, that is, an arbitrated, predetermined liquidated damage before the damage is done—

Mr. Roger Larson: No.

Mr. Pierre Poilievre: —and that is exactly where you've arrived after you went around the circle.

Mr. Roger Larson: No, that's not what we said. What we said was that we wanted a requirement that there will be the ability to negotiate, mediate, and arbitrate the performance of the contract terms that have been established.

Mr. Pierre Poilievre: Okay, the performance is one thing. We're now talking about damages.

Mr. Roger Larson: We're not asking for damages; we're asking—

Mr. Pierre Poilievre: So you don't believe that an arbitrator should determine or impose upon the two parties a predetermined liquidated damage?

Mr. Roger Larson: We believe the structure of the backstop should be one that will allow the parties to commercially negotiate the terms they need and to arrive at a contract through negotiation, mediation, and arbitration, if necessary, and that once the contract is set, either by negotiation or by arbitration, the parties be able to enforce the terms of that agreement. There's nothing asking for predetermined.... I'm not even sure if anybody knows what you mean by “liquidated damages”. I don't.

Mr. Pierre Poilievre: Well, it's pretty clear it can't be in the act, then, if you don't know what it means.

Mr. Roger Larson: We're not asking for liquidated damages to be in the act; we're asking for a commercial dispute resolution clause to be added to section 169.

Mr. Pierre Poilievre: Okay.

I'd like to hear from Mr. Facette on why the propane industry pulled out of the coalition.

Mr. Jim Facette: Sure, I'd be happy to, and we made everybody aware of that. We would never hide it.

The mere fact is this: legislation, by its nature, is prescriptive to some degree—the mere fact that it exists. In an ideal world, there's no legislation, the free market works everything, and everyone's happy. But we know that's not reality.

We felt that given the policy as set out by my board and our members, the path the coalition has chosen—they're free to do it, and it was fine—is to ask for a degree of prescriptiveness that has become too much. Our members recognized that they needed to have access to something if they chose to use it.

Just because it's there doesn't mean you have to use it. We will have members who will probably not use this legislation at all because what they're doing now is fine. That's okay. We have some who may try to use it. But we did not want a level of prescriptiveness that would get into the relationship...into the weeds between the railway and the shipper. That's between them. Let the free market take care of it. That's why we pulled out.

Mr. Pierre Poilievre: I don't think anybody wants to go back to the era of state-run industry. I think both Liberal and Conservative governments moved away from that over the last couple of decades, and that has been an unmitigated success.

Mr. Mongeau.

Mr. Claude Mongeau: Could I maybe just shed light on the issue? Parties in a commercial agreement are free to come to terms on all aspects of an agreement. The same way that all the shippers cannot have an arbitrated solution with trucking, or an arbitrated solution with airlines, or an arbitrated solution by the government with shipping, there shouldn't be an arbitrated solution for railroads.

We tend to refuse liquidated damages in commercial contracts for good reason. The railroad is a very network-based business: 55% of our traffic finishes or starts on another railroad, and more than another 30% finishes or touches a terminal.

You asked a question about our service, Mr. Goodale. Our service for the last six weeks has been very, very subpar. We have had tremendous difficulty, and a difficult winter.

In coal, for instance, for Teck and other coal miners in northern Alberta and northern B.C., we've had a lot of difficulty meeting shipping schedules. Part of the reason is that RTI, which is a government-owned unloading facility at the terminal, has had difficulty having the unloading performance it's supposed to have. They were targeting 400 unloads a day. They've achieved 260 unloads a day. If the terminal does 260 unloads a day, no railroad in the world can achieve the service that's required to meet the ship.

So if you get into a dispute where there are liquidated damages, and there's an arbitrator that can ding the railroad without due regard to what's happening to the network or what happened at the terminal, you just get into a rat's nest of problems. It's not conducive to mutual cooperation, visibility, and the things that commercially always work best.

● (1640)

The Chair: Thank you.

Mr. Watson, seven minutes.

Mr. Jeff Watson (Essex, CPC): Thank you, Mr. Chair.

Thank you to our witnesses for appearing today on Bill C-52.

You talked about the power disparity, I think, that the shippers face with respect to the rail lines. One of the positives, I would submit, with Bill C-52 is that it gives shippers, not the companies, a unilateral right to trigger an arbitration process, which effectively is a compulsion, at least to a reasonable degree, to negotiate a service-level agreement fairly.

Would anyone disagree with that?

Mr. François Tougas: As I said, I'm in that business. Right now the railways have, and have had for decades, the unilateral ability to impose rates and conditions of service. Parliament decided at some point to allow railways to impose penalties on shippers—had no concerns with that whatsoever. That power is exercised all the time.

Mr. Jeff Watson: Would you like the government to consider whether it removes demurrage, for example? Is that what you're asking the committee to consider at some point?

Mr. François Tougas: No. What I'm saying is that the ability of a party to respond to that unilateral statutory authority necessitates a system that allows the shipper to invoke it. That's what we have in the final offer arbitration mechanism. That's what this system proposes. That's what the government has decided to do.

It doesn't surprise me that it would be shipper-initiated, because it's a response to the power of the railway to do it now unilaterally.

Mr. Jeff Watson: It accords shippers a unilateral right that it doesn't give in the negotiating process with the rail company. I'm simply asking whether that is or is not an improvement over the status quo. It does compel, at least to some reasonable degree, that parties must negotiate fairly with respect to a service-level agreement or there will be some consequence.

You can disagree with whether you think it will succeed in terms of the outcome that it will force in the process. I'm simply asking whether that's an improvement over the status quo.

That was only the first opening question. That's why we're having difficulty understanding—

The Chair: Mr. Watson, Ms. Cook wanted to intervene, if that's okay with you.

Ms. Fiona Cook: I just want to clarify that in terms of the right to a service-level agreement, right now railway companies are offering service-level agreements on their websites, but they fall short of what shippers need. That's why we come back to the elements—

Mr. Jeff Watson: I'm not negotiating your service-level agreement.

Ms. Fiona Cook: No.

Mr. Jeff Watson: I'm simply asking whether Bill C-52 establishes a unilateral right for shippers to invoke a process in the event that negotiations are not proceeding the way that at least the shippers might perceive them to be moving.

That's what I'm trying to establish.

Ms. Fiona Cook: You are correct. It does invoke that right, but whether it will be successful in generating improved agreement, that's where we disagree.

Mr. Jeff Watson: Fair enough. Section 116, the CTA's ability to compel railroads to effectively build works or other remedies, is unchanged by Bill C-52. Is that correct? That still remains.

Mr. François Tougas: That's correct.

Mr. Jeff Watson: Even to the point of having to build rail lines, if you will, that is still unchanged.

I would argue that with respect to the elements of a service agreement, many of them are actually established in Bill C-52. The only point we're disagreeing with are the issues of dispute mechanism and penalty, which is what you want explicitly included.

This brings me to my colleague's point. It would be unprecedented to pre-establish or predetermine, with respect to agreements between commercial entities, what a penalty could be, for example, and who gets blame or responsibility within the supply chain. There are a lot of elements that would have to be tailored.

Typically, whether we're dealing with labour agreements or other issues that are non-commercial, they deal with retroactive situations, not sort of predetermined. I think you're asking the government to do something that is unprecedented, or can you point to a precedent with respect to agreements between commercial entities where this is predetermined?

● (1645)

Mr. François Tougas: Yes, it's in the tariff-making power that Parliament granted railways. That is unilateral and it's done legally. It's a penalty for failure to do something.

Mr. Jeff Watson: That's not an arbitrated situation.

Mr. François Tougas: No, it's not arbitrated; it's unilateral. It's even worse.

Mr. Jeff Watson: It's a separate issue from what we're dealing with, with respect to the mechanism of Bill C-52, which is to invoke an arbitration process. What I'm suggesting is that with respect to an arbitration process between commercial entities, what you're asking the government to do is unprecedented.

Can you point to another such situation that is analogous to this or where a precedent like that has been set? Everything deals with retroactivity, something that has occurred that is typically resolved by a court, if you will.

Mr. Roger Larson: I don't think we're looking for retroactive punitive measures. We are looking for—

Mr. Jeff Watson: The panel yesterday was.

Mr. Roger Larson: I don't think we asked for a penalty. We asked for a dispute resolution mechanism, not for a specified penalty, and I think—

Mr. Jeff Watson: Where has that been established with respect to confidential contracts, which is the substance of what would be established with the arbitration process?

Mr. Roger Larson: There are dispute resolution clauses in confidential contracts, in my understanding, and some shippers have been able to negotiate those.

Mr. Jeff Watson: Is there anything that wouldn't allow an arbitrator to include it, or do you want him to impose it by condition?

Mr. Roger Larson: Is there anything in this legislation that would allow the arbitrator to impose a dispute resolution clause in the service agreement?

Mr. Jeff Watson: I didn't say “to impose”; I said “to include”—

Mr. Roger Larson: To include it—

Mr. Jeff Watson: Government lawyers would say yes, I would think.

Mr. Roger Larson: If the railways were to say “Yes, we will agree to include dispute resolution clauses if the arbitrator asks us to”, that would be something. I'm not sure if the railways would be willing to consent—

Mr. Jeff Watson: You're asking for the right for the arbitrator to impose it, though.

Mr. Roger Larson: We're asking that if the shipper requests it, it will be one of the terms and conditions that the arbitrator will have the option of imposing in establishing the service-level agreement, but the arbitrator does not have to pick from one of the party's terms or the other. It is interest-based arbitration, and the arbitrator, who I understand will be someone from the agency, will have the power to include a dispute resolution clause. Right now the act does not include that because the act says “operating terms”, and our understanding of the definition of “operating terms” is that it does not include dispute resolution.

The Chair: Thank you. Your time has expired, Mr. Watson.

I'll move to Mr. Aubin for five minutes.

[*Translation*]

Mr. Robert Aubin: Thank you, Mr. Chair.

I want to thank all the witnesses for giving us insight into their daily realities. It helps us get a better sense of the issue.

My first question is for Mr. Mongeau.

I would ask that you keep your answer succinct, as I have only five minutes to speak with each of you.

The mere fact that we're studying Bill C-52 signals to me that it's meant as somewhat of an arbitration mechanism to rectify a situation that the market has not been able to correct on its own for a numbers of years now.

In a minute or less, could you give me your opinion on this inability to reach an agreement with shippers, an agreement that would have prevented the need for a bill like this?

Mr. Claude Mongeau: It's quite simple. All transportation contracts, in all sectors, are reached without government intervention and without arbitration. The fact that we still have some residual regulation in the railway sector has to do with history. The fact that associations are asking parliamentarians to consider adding legislation and to examine service, as well as the fact that shippers have been asked to voice their complaints about the railways, shows that, in the railway sector—unlike in other sectors—there is a tendency towards regulation.

Our view is that commercial forces are the best way to encourage innovation, improve efficiency and achieve better service quality.

● (1650)

Mr. Robert Aubin: Thank you.

I would now like to hear what the shipping groups think of the six proposed amendments.

What I'd like to know is, if none of the amendments are adopted, would you still consider this bill a step in the right direction.

Do you think it has the potential to lead to numerous arbitration cases? Do you think this arbitration formula is fair? It seems to me that, after a few arbitration cases, it would be pretty easy for a company with a virtual monopoly to have all the case law in their favour. The shippers would be on their own in defending themselves.

Is this a David versus Goliath situation, or am I misinterpreting things?

You can take turns responding. You may have the rest of my time.

[*English*]

Mr. Richard Paton: I can start. This comes back to Mr. Goodale's question as well

In our view, without specifying clearly what a service agreement is, we will end up with endless arbitration, and it won't be in the interests of commercial shippers and it will not be in the interest of the railways. Just to be clear, we don't regard this as regulation. That's not the appropriate word here.

We're looking for a framework within which commercial negotiations can take place successfully with the least amount of government involvement. Whether it's penalties and all the rest of it...my members would be quite happy—they've been very clear with me—to have service agreements and to never, ever have an arbitration, to never have an appeal, to never, ever have the federal agency involved. That is the perfect system for us because we can work with CN and we can work with CP.

This amendment number one, which is the one that we feel is totally essential, would set that playing field, and it would probably be to the benefit of shippers and of railways. It would enable the government to achieve the legislation, the aims they have specified.

Mr. François Tougas: As the minister said when he introduced his comments before this committee, this is not a normally functioning market. There are many, many parts of this market that do not work, so to suggest that normal commercial relations are going to prevail in the absence of a framework is, frankly, ridiculous.

When you have a bunch of competitors vying for a service—giving an opportunity to the receiver of that service to choose among them—all of the providers of the service try to be the winner. When you don't have that, when you have either a monopoly or a duopoly, you fall to the lowest level of service that is possible and that is still within the advantage of that supplier.

It's not to say that a monopoly will always provide bad service. That is not the case. In fact, they may provide the very best service. The problem is that we have a market structure that does not give direction to the suppliers of the service as to what they are supposed to do and for the receivers of that service to know what they might expect. There's not a normal negotiation going on. It's not a normally functioning market.

That's the problem we're trying to address. It's not the heavy hand of regulation. It's a way to establish a framework that gives parties on both sides of that negotiation an opportunity to know the things they might get, such as if they are allowed to get service five times a week as opposed to three times a week. It's those kinds of things.

All of those, even within the framework that the government has advanced in Bill C-52, are going to be imposed, so we shouldn't get stuck on the word “imposed”. Ultimately, every single provision is going to be imposed if the arbitrator thinks it makes sense. If that arbitrator doesn't think it makes sense, then it won't be imposed.

● (1655)

The Chair: Thank you.

Mr. Holder, you have five minutes.

Mr. Ed Holder (London West, CPC): Thank you, Chair.

I'd like to thank all of our guests for attending today.

It's interesting, because I'm juxtaposing some of the comments made today with the comments made at our last meeting.

If I may, I'd like to ask you a question, Mr. Mongeau. You said in your testimony that if you don't give good service, you lose the business. Who do you lose it to?

Mr. Claude Mongeau: We lose it to trucks. We lose it to pipelines. We lose it to a combination of trucks and railroads. We lose it to other railroads. We lose it because we compete in every business we deal with.

It only takes a regulatory lawyer like François to tell us that we are in a non-functioning market. The reality is there is no difference between two railroads and two coal terminals, or three grain elevators, or two airline carriers. The only difference between airline carriers, grain elevators, and the waterfront terminals is that the railroad is still regulated, and we have regulatory lawyers trying to convince you that it's a non-functioning market.

Mr. Ed Holder: I suspect that the air industry won't be the competition here.

Perhaps I could ask a question just based on that. To help my understanding, I'm going to ask you all, very briefly if you can, just based on that comment as well, what percentage of your members have competition in their locations to move their freight in whatever way. Let's take air out of it, but let's say there might be legitimate trucking or other options, or CP, for example.

Let me go through it quickly, and I'll give you a chance to think about it.

Ms. Cook, what percentage of your members would have competition to move your freight?

Ms. Fiona Cook: Two-thirds.

Mr. Ed Holder: About two-thirds.

Ms. Fiona Cook: But that's not competition in other modes; that's just whether we have CN or CP.

Mr. Ed Holder: Let's just take CN and CP; that's actually a very good—

Ms. Fiona Cook: But let me just clarify here that the two railways don't necessarily compete. Although we have interswitching regulations, they don't work all the time. So to say that we have the choice and one choice is better than the other, that would be—

Mr. Ed Holder: May I come back to that point with you, if you don't mind?

Ms. Fiona Cook: You may.

Mr. Ed Holder: Monsieur Gratton.

Mr. Pierre Gratton: I wouldn't have that number, and it really varies from place to place to place.

Mr. Ed Holder: Do you have a belly-button guess?

Mr. Pierre Gratton: You mentioned earlier that CP's largest customer has managed recently to put 15% of its product onto CN. That was one of the best things it's been able to do in recent years, because it is providing a little bit of competition.

Mr. Ed Holder: Respectfully, I'm actually a bit surprised you don't have a stronger sense of that. Forgive the use of my Cape Breton mother's reference to belly buttons; I apologize. But the reason I said that is as a representative of your membership, it would seem to me you'd have a strong feel for where that CN and CP crossover lies.

Mr. Larson, do you have a sense?

Mr. Roger Larson: I'm guessing that about 80% of our member company plants would have dual rail service, give or take....

Mr. Ed Holder: Thank you.

Mr. Facette, I need to ask you. You have a different one with pipelines, too, I suppose.

Mr. Jim Facette: Well, CN and CP face quite a bit of competition from other modes, both truck and pipelines. I would say that of the producer community and the shippers that actually ship propane, all of our members would have other options they could turn to if they needed to.

Mr. Ed Holder: Thank you all for that. I think I've covered everyone. Have I missed anyone? There are a lot of you here today. You all seem wise.

Ms. Cook, you said you want to elaborate a little bit on the CN and CP connection, that they're not necessarily competitors or linkups. Can you explain that a little bit to help us understand a bit better, please?

Ms. Fiona Cook: When you do have two options, whether it be because you're within an interswitching zone, which is if you're within 30 kilometres of another line...under the regulations the competing railway has to quote a rate so that you can use that line to get to the other railway. Often the railways will not do that, so you don't have a viable competitive option.

Mr. Ed Holder: Why don't they do that?

Mr. Claude Mongeau: [*Inaudible—Editor*]

Ms. Fiona Cook: I'm not going to speculate on that, but that's what our members tell us.

Mr. Ed Holder: Mr. Mongeau, just bear with me a second, but since you interrupted, I will ask you to respond, please.

Mr. Claude Mongeau: All of our chemical companies are sharing the business between CN and CP. That's true of Dow. That's true of NOVA. That's true of every chemical company. I don't know that we have one that has 100% with one carrier, and more than two-thirds are served by the two railroads, and we compete with pipelines.

Mr. Ed Holder: I'm not going to get into a debate. I'll let you do that offline, if you don't mind.

I'll give you a last comment, Ms. Cook. It's only fair.

Go ahead, Ms. Cook. Do you have a final comment on that?

Ms. Fiona Cook: That's fine, thank you.

Mr. Ed Holder: I appreciate the full engagement. I think you should all go into another room a little later on. If we'd done that a while ago, maybe we could have sorted this all out—

A voice: Not without an arbitrator.

Mr. Ed Holder: Oh, I don't know. They all seem—

● (1700)

Mr. Claude Mongeau: We almost joined the coalition.

Mr. Ed Holder: They all seem quite reasonable.

The Chair: You just have a few seconds left, Mr. Holder.

Mr. Ed Holder: I wanted to ask this, Chair. I have the order fulfillment information on page 3.

You may or may not have this document, but I see the fulfillment of weekly cars on forest products, and they say it's 95% fulfillment. Has that been your experience in your various industries, yes or no?

Just a yes or a no, Mr. Gratton.

Mr. Pierre Gratton: No.

Mr. Ed Holder: Mr. Larson.

Mr. Roger Larson: Since 2008 up until recently, yes.

Mr. Ed Holder: Thank you.

Mr. Facette?

Sorry, Ms. Cook. You have the wisdom, obviously.

Ms. Fiona Cook: I don't know whether it's 95%. I can say that service has improved, but again I qualify that. The economy is not doing very well. Conditions are very different from what they were between 2005 and 2008, when we were having to slow down plants.

Mr. Jim Facette: I don't have the exact number, Mr. Holder. I couldn't say if it was 95% or 90%. It's much better than it was five years ago, though.

The Chair: Okay.

Mr. Ed Holder: Thanks to all of you. I wish I had more time to ask questions.

The Chair: Thank you, Mr. Holder.

I thought I had heard just about every saying there was, but I now....

Voices: Oh, oh!

Mr. Ed Holder: A Cape Breton mother, sir.

The Chair: Mr. Harris, for five minutes.

Mr. Jack Harris: Thank you, Chair.

Thank you for your presentations. This is obviously pretty important work, with pretty high stakes in terms of the overall value of the product being shipped and the possibility and consequences of disagreement.

First of all, am I right in assuming that the first question of arbitration is to arbitrate the nature of the agreement or the service contract?

Second, you're calling it dispute resolution. I would call it an arbitration of the agreement, the enforceability of the agreement. If I'm right about that, shouldn't there, or couldn't there, be a model for that put in place, instead of having to negotiate each time with a dispute resolution mechanism? Wouldn't it make sense to put into either legislation or regulation a standard dispute resolution or method of resolving differences over the enforcement of an agreement once you have it?

Perhaps you can tell me first of all about the content of the agreement itself, the elements that can be included, and secondly, whether you can have a mechanism to enforce that agreement. Do I have that right?

Mr. Roger Larson: Yes. If I may, I'll take the first shot at answering that. The legislation includes the right to ask an arbitrator to establish an agreement. In that sense, Bill C-52 is an improvement and it needs to be passed. What it doesn't provide for is an ability to have the terms enforced, and that is exactly what you're describing, a mechanism to be able to.... There are commercial contracts, I've been told, that do include the ability to go to an arbitrator, and for a very low cost, within 30 days.

There's an internal escalation between the two companies, let's say. If they can't agree on how to interpret a particular clause in an agreement, then they move forward and go to a mediator or an arbitrator. They get it settled and they live with that decision for the term of the agreement.

This is not to be a punitive and retroactive penalty kind of system. This is a matter of someone saying they think the agreement says they need to have 150 cars delivered every week to their mine. In order to move their product to market, they're asking for that, and they've only had 80 cars per week for the last three months, so they're saying that they want this corrected and they want the terms to be enforced in the future.

Shippers are not interested in just penalizing—

Mr. Jack Harris: I don't want to interrupt you. I just wanted.... I guess I am right: you need a mechanism. This is not rocket science; they're all over the place. If you have an expropriation and can't agree on what something is worth, there's a mechanism to set the expropriation value. It's not something that's unreasonable to expect, so I agree with you on that.

I do have one question, though. I heard Monsieur Mongeau talk about his concern that they don't have control over what other people in the network do. It sounds like he's raising a sensible question: how can I be responsible for someone else's failure? I might end up with an agreement that makes me pay for the fact that somebody else screwed up. Is that a real problem for you guys that you should have to answer, or is it something that doesn't end up in the agreement anyway?

● (1705)

Mr. Roger Larson: Those are facts that the arbitrator would consider in an arbitration. Whose fault is it? Is it the fault of the—

Mr. Jack Harris: So you're satisfied that it has to be CN's fault, not the fact that a terminal or some third party in the network....

Mr. Roger Larson: That's right. It needs to be related to their commercial contract and what they've committed to.

Mr. François Tougas: That's right.

Mr. Jack Harris: All right. I was just trying to understand this.

I have a lot of sympathy for what you were saying, Mr. Mongeau, that you do have a network and you don't have control over all of these things.

There would be some value, by the sounds of this, in having perhaps the standard dispute resolution mechanism, as you've called it. I would just call it enforceability of the agreement. You have a contract, and you'd rather have it resolved in an efficient, reasonable, sensible way than leave it up for grabs and potentially have all different kinds of dispute resolution mechanisms on a one-off, and every time you go to an arbitration to get a service agreement, you have this whole argument of what kind of agreement you're going to do. It sounds like a waste of time.

I used to practise law a lot, so I might have some sympathy for Mr. Tougas over there. It seems to be unnecessary. Shouldn't there be a standard-form dispute resolution? Maybe the railways should agree with that.

Doesn't that make sense to you too?

Mr. Claude Mongeau: I would tell you that if life were simple, maybe you'd be right, but the reality of a network business is that the devil is in the details. That is actually why asking an arbitrator, whether he's named by the CTA or whether he's just a lawyer on a roster of arbitrators, to try to decide on such a complex issue, when normally this is done in a commercial market context, is not the right way to go.

Mr. Jack Harris: I'm talking about enforcement of an agreement now. I'm not talking about what the contents of the agreement are. I can see that might be different circumstances.

Surely for an enforcement mechanism, or a dispute resolution mechanism, there must be a model that you would agree with that would make sense to the shippers.

Mr. Claude Mongeau: Actually, we have a commercial dispute resolution that's available to all our customers. They can opt in for any issues we have with them. We've made a commitment, as part of the rail service review, to make it available. They can use it.

Some shippers would like it—

Mr. Jack Harris: You're saying that this is our agreement, and if you like it, fine; if you don't, too bad.

Mr. Claude Mongeau: No, it's a commercial dispute resolution to resolve issues—

Mr. Jack Harris: It's your version of it.

Mr. Claude Mongeau: It is, yes.

Mr. Jack Harris: Do the shippers agree with that dispute resolution, or do they want to form a new one?

The Chair: Mr. Harris, you're well over the time.

I'll let you answer that, Mr. Tougas.

Mr. François Tougas: Okay.

Surprisingly, no, shippers have not agreed to the railways' proposed mechanism. Frankly, though, here's a place where there is some agreement—namely, that a standard form, as Monsieur Mongeau said, may not be the best thing for every single situation. The devil is in the details. One shipper might like to see this particular kind of dispute resolution mechanism. Another shipper might want something entirely different. Another shipper might just want to go to court and not have one.

So what you hear is an association talking about trying to figure out a way to get to the resolution of disputes within the contract—quickly, cheaply, simply.

The Chair: Thank you.

Mr. Adler, five minutes.

Mr. Mark Adler (York Centre, CPC): Thank you, Mr. Chair.

Thank you all for being here this afternoon. I promise I won't ask anybody for any belly-button guesses.

Voices: Oh, oh!

Mr. Mark Adler: Mr. Tougas, you mentioned earlier that this is not a normally functioning market. You're absolutely right about that. There are a lot of variables that sort of skewer the normal operations of the marketplace in this instance.

Mr. Mongeau, I want to start with you. Minister Lebel, when he was here before committee, said:

> ...I'm confident this bill will pave the way for better commercial relationships between railways and shippers....

Could you just comment on that, first of all ?

Mr. Claude Mongeau: I am concerned it will do the reverse. I am concerned it will stifle the innovation and the strong push for supply chain collaboration that we've seen over the last few years.

Any time you create a mechanism that allows a shipper to have a commercial negotiation on the one hand, which they all have the option to do—they have more choice than they say they have—and then have a second kick at the can to go to an arbitrator to decide on it, you will find that many shippers will use it, and it will create a natural requirement for the railroad to play defensive.

So you can open up and be commercial or you can check your back because the other guy has a lever to hit you with. I'm concerned that this law, although you've tried to strike the right balance, is worse than just encouraging people to continue to improve.

● (1710)

Mr. Mark Adler: What would you have done?

Mr. Claude Mongeau: I would have told the railroads and the shippers that a good thing has been happening over the last three years and that we are making tremendous progress. We have agreements with ports, terminal operators, and several of our customers. We have service-level agreements. I would have said that we have a good thing going. I would have taken credit for it. I would have said that we will keep a watchful eye to make sure these railroads stay true to their commitment. I would stay away from imposing new regulations and turning back the clock on what is a remarkable success story in Canada.

Mr. Mark Adler: How would you have satisfied this group of people?

Mr. Claude Mongeau: I can't satisfy Mr. Tougas, and it's very difficult to satisfy associations. But I have a great relationship with Mr. Lindsay, a great relationship with Bill Doyle, and a great relationship with the new CEO of Dow. I have a great relationship with our customers.

Mr. Mark Adler: But a relationship is one thing. Business is not personal; it's business, right?

Mr. Claude Mongeau: Yes.

Mr. Mark Adler: How would you have spoken to their bottom line? How would you have made them happy campers here?

Mr. Claude Mongeau: As we do every year. I will tell you that last year we grew faster than the economy by about $300 million. That means we gained market share. We gained market share in intermodal. We gained market share in potash. We gained market share in coal. We gained market share in every one of our commodities because we provide good service. That's why CN is very efficient. We are winning the day in satisfying our customers and shareholders by finding new ways to innovate everything. What we're doing is working. You have a market at work.

I would have encouraged my customers and the regulator to have a wise approach to public policy and to stick with a tried and true system of commercial relationships.

Mr. Mark Adler: Do you feel the consultative process was sufficient?

Mr. Claude Mongeau: I feel it was biased. I can understand why there was a rail service review. I've said in other forums that CN has been perhaps the most important reason there was a service review in the first place. It started about eight years ago, in 2003. For three or four years we implemented dramatic change, too fast, not enough consultation. We created so much noise and discontent in our customer base that they convinced the government to do a rail service review.

Today I am the CEO of this company. I am running that railroad. It's the envy of the world. I think it's been a good change, maybe too difficult and too fast, but it doesn't require turning back the clock on a policy of gradual deregulation. What it requires is getting people around the table and coming forward with good sense, tried and true measures that help our customers win in the same fashion.

Mr. Mark Adler: Mr. Paton, was the consultative process sufficient from your perspective?

Mr. Richard Paton: It was badly needed and it was pretty good.

Mr. Mark Adler: Was it adequate?

Mr. Richard Paton: I would say it was, with some exceptions.

Ms. Fiona Cook: Are you talking about the review process, Mr. Adler, or about the writing of the legislation?

Mr. Mark Adler: The review process, and, if you want to answer, the writing of the legislation.

Ms. Fiona Cook: I think the review process was very well done. It came out with results that supported what we'd been saying for a while.

Again, I just want to re-emphasize that what we're looking for here is sustainable long-term improvements in service. Looking at two months, looking at a year is not enough. We don't want to go back to where we were. The economy is going to pick up again. The system will be under pressure. We don't want to go back to those days again, so we do need change.

I'll add that in the U.S., as Mr. Mongeau correctly notes, the Canadian railways are better functioning, and I would argue it's because of the regulation we have here. Actually in the U.S. right now they're working on new regulations to imitate what we have here.

The Chair: Thank you.

Was there somebody else who wanted to comment on the same point?

Mr. Richard Paton: Maybe I could just add one point. Oh, you're going to....

Mr. Jim Facette: Thank you, Mr. Chair.

On the process and the legislation, the process was fine. It allowed for a great deal of input. On the writing of the legislation itself, we found the department to be very open and accessible. They asked us specific questions and we gave them specific answers. In fact we actually shared those answers with many of the members of this committee. So we had no problem in how you got here.

● (1715)

The Chair: Mr. Paton, quickly, please.

Mr. Richard Paton: Just a point. Mr. Mongeau is making a strong argument that service is improving, etc., and that we don't really need this legislation. What I don't really understand in the railway argument.... If you look at proposed amendment one, all this does is say this is what a service agreement should look like. I would assume this would be of benefit to both the railways and the shippers, because now we at least have a common commercial framework. This is not regulatory; this is a framework. We don't want to be into arbitration and all these penalties. Basically this is what we're asking that this legislation say, that if the government is going to move forward and Parliament is going to move forward with the right to a service agreement—which I assume you will, as I can't imagine that's going to disappear from this draft act—then one would assume that you would want to be clear about what it is. I think that would actually further both the aims of the shippers and of the railways.

Assuming, Mr. Mongeau, you're going to end up in a situation where you're going to have this in the bill, I don't quite understand why you would object to that.

The Chair: Okay. You two can argue that another day. I'm going to have to move on.

Sorry, Mr. Gratton.

Ms. Morin, you have five minutes.

[*Translation*]

Ms. Isabelle Morin: Thank you, Mr. Chair.

I gather that Mr. Mongeau considers it normal to have commercial forces in control and doesn't think we should have gotten involved. To my mind, there's an imbalance of power. I'd like to hear from each of you what your relationship with CN is like now, before the bill is passed.

Mr. Mongeau said he had good relationships with a number of people. That might not be quite as true for you, Mr. Tougas.

I'd like each of you, in turn, to tell me how things are now. Do you think your ability to sway things is fairly considerable? What happens when you don't get what you want?

Mr. François Tougas: I will answer in English.

[*English*]

I have a couple of points. One is a point that I think has already been raised, which is that to look at the very short term is not helpful to the exercise before us today. This is a bill that is going to stay in the act for a long time, so we need to be able to go through the cycle and all the changes in the economy in order to deal with problems as they arise over time, and to try to stay out of dispute resolution processes that are managed by the agency and thus allow parties to deal with one another commercially within a framework that is guided by the legislation.

The second part is that now we have a situation where I think many shippers feel that their relations with the railways are much improved over what they were during the service failure period that lasted so long, which Monsieur Mongeau talked about. We don't want to go back to those days. I'm sure he doesn't want to go back to those days. The reality is, though, that nothing has really changed in the market structure we have. We still have two railways servicing the companies we have in Canada that use rail to transport goods.

In the mining industry, for example, almost all of them are in remote locations, so that's not going to change. As Monsieur Mongeau said, it's very unlikely that you're going to see a second line built into some mine.

All we're talking about is trying to have a mechanism to allow the parties, when conflicts arise, to be able to address matters that either the railway is unwilling to give or.... If the shipper is asking for too much, the arbitrator is going to be able to settle that, but right now there's an inability for many shippers to even have a commercial negotiation. That's the thing that I think we're trying to overcome.

Mr. Pierre Gratton: I'd like to add, too, that Mr. Mongeau has talked about his happy clients and service.

I think you said that it's 95% delivery.

I guess I would just make the point that if it is as good as he says it is, then I don't understand why there's a problem with providing access to a remedy. It presumably won't be used all that often because most of his clients are satisfied, so why not at least allow for that remedy, a proper remedy that can be used in those circumstances when it's needed?

● (1720)

[*Translation*]

Ms. Isabelle Morin: Mr. Mongeau, would you care to respond?

Mr. Claude Mongeau: I would say that, if Mr. Gratton wasn't always with Mr. Tougas and I were to speak with his customers, we could probably come to an agreement in most cases.

When you create legislation that allows not only for commercial negotiations, but also for the use of a regulatory tool to impose something the other party does not want to provide, you have an unprecedented situation on your hands. You don't see that in any other transportation sector. That happens only with railways because of this residual regulation that comes into play regularly.

Ms. Isabelle Morin: Very well.

I have another question. In an ideal world, if your amendments were included in the bill, you wouldn't be able to benefit from those measures now in the case of existing contracts. What is your take on that?

That question is for each of you.

[*English*]

Mr. François Tougas: This is a point that endured some debate before Transport. I think this is a legitimate point of contention between the parties: how wide should those gates be opened.

Most contracts, as has been mentioned already, are of short duration, so eventually that's going to come up. There are many long-term contracts, however. Nevertheless, what we're really talking about is being able to arbitrate things that are not in a contract, or are incapable of being put in a contract simply because one side will not agree to them. Once that happens, the shipper is left in a position of either accepting a high tariff rate with no service conditions or a contract that maybe has some things but not all the things you would normally see in a commercial contract. That's all we're talking about.

Monsieur Mongeau tries to characterize me as a regulatory lawyer. I'm not. I'm slightly offended by that.

Voices: Oh, oh!

Mr. Ed Holder: Which part?

Mr. François Tougas: The lawyer part.

Voices: Oh, oh!

The Chair: Very quickly, please.

Mr. François Tougas: I'm actually an antitrust economic lawyer.

In this domain, what you're looking for is to allow the optimal result to occur. What we're trying to achieve here is sufficient balance between the parties. It's never going to be perfectly balanced in that you're always going to have a dominant carrier, but sufficient balance to allow for a normal negotiation, a commercial negotiation.

The Chair: Thank you.

Mr. Toet, for five minutes.

Mr. Claude Mongeau: Mr. Miller, could I just say one more small thing?

The Chair: Very quickly. I don't want this....

Mr. Claude Mongeau: It's not further debate, but it is quite unprecedented that we would even consider opening contracts that have been negotiated in the past, and that we would do so in a way that separates the normal negotiation of price with that of service. In no other business in the world, in no country would you find that.

The Chair: Thank you.

Mr. Toet, for five minutes.

Mr. Lawrence Toet (Elmwood—Transcona, CPC): Thank you, Mr. Chair, and thank you to all our guests today.

Mr. Mongeau, I want to start with a question for you. It's in regard to the desire, under the arbitrated settlements the shippers are looking for, to give shippers.... If I go through the list of the things they want under the service obligations, and if there's absolutely.... What I also understand is being asked for is that the arbitrator is not to consider the effects on the complete network of each one of those individual requests and asks. Is it possible that the accumulation of all those different contracts, without the assessment of the network effect, could overwhelm the rail freight system?

Mr. Claude Mongeau: I think it's a very real risk. I was surprised. I think it's FPAC or the coalition yesterday that made this suggestion.

The railroad industry is like a bus service. You cannot pick up everybody first, and you cannot leave, get someone, and drop them off first. You have to have a run. If a customer decides he would like his switching at eight o'clock in the morning because that's after he comes back from Tim Hortons and he likes it at eight o'clock in the morning, and he goes to an arbitrator and makes the case, he has a fifty-fifty chance that the arbitrator will say, “You know what? That big, bad railroad. I'll go with you.” If every other shipper would like to have their service at eight o'clock...we just can't service everybody at once.

The network impact of railroad services is just the nature of our business. More than 60% of what we move either originates or terminates on another railroad. When we move grain—it's unfortunate Mr. Goodale has left—we cannot load in the countryside a car that has not been unloaded at the port. If there are problems with rain in the port, or if there's clogging in Vancouver and we don't have a flow of cars coming back, there is nothing any railroad CEO can do. Understanding the network nature of our service, understanding all of those details and how they come together, is the devil we have to deal with commercially.

I don't know that any arbitrator or antitrust lawyer can solve that. That's why there's a problem with the regulation you're considering.

● (1725)

Mr. Lawrence Toet: Quite often I've heard from the rest of our guests that the economic slowdown basically seems to be, in their mind, the only reason that CN's and CP's performance rates are up, or CN's specifically. You talked in your brief about how you hit record lows of shipping every month in 2012. I look at that and say that actually your shipping rates are up. You're shipping more product than you ever have before. How does the economic slowdown jive with your having better service levels over that period of time when actually you're shipping more product than ever? Maybe you can help me try to understand that.

Mr. Claude Mongeau: Actually, we have gained about $900 million of market share over the last three years while we're debating service, so we're doing something right. We have hit the export record in mining. We've hit the export record in grain. We're gaining market share against every mode, including pipeline. Last year CN, in every month consecutively, hit a record level of traffic. We've never in our history moved more traffic in basically all of our commodities, except forest products, steel, and a few construction areas, but we've made it up with crude oil and intermodal and potash and grain. Year to date, even with the difficult service we have had this winter, we have moved more of the crop since August 1 than we ever did in our history.

Mr. Lawrence Toet: I'd appreciate just a quick answer on this one.

Is CN in the business to deliver a service and to make a profit for your shareholders? Is that how you would characterize the bottom line of CN?

Mr. Claude Mongeau: Yes, that's our mantra, that we are the most efficient railroad. There is no way we can cut costs the way we did over the last 15 years. The only way we can satisfy our shareholders is if we grow faster than the economy. The only way we can do that, and I say it in every forum—in front of government, in front of shareholders, in front of customers—is by helping our customer win and growing faster than the economy. Service is absolutely central to our business agenda.

Mr. Lawrence Toet: I asked that question in light of the fact, obviously, and I think you sort of answered it already.... Would your shareholders be happy with you if you were essentially not moving the maximum capacity that CN is able to move at any given time with the infrastructure and investments that have been made by your shareholders in CN?

Mr. Claude Mongeau: If I don't provide good service for an extended period that's not excused by weather or network issues, I would lose my job, sir.

Mr. Lawrence Toet: That's pretty tough.

The Chair: You might have a few seconds if you want to close it out, but we're out of time.

Mr. Lawrence Toet: I was hoping to ask Mr. Larson something really quickly.

In response to Mr. Harris's question about the commercial contract and their obligations, you basically said they would only have to live up to the commercial contract and their obligations under it only, even if it was a third party's problem. You never really answered his question about what happens when there's a third party, another party, that really is the reason.... It doesn't change the fact that CN has signed an obligation to you. It kind of, to me, seemed like a roundabout way of not really addressing Mr. Harris's question about what happens when a third party is responsible and CN or CP, the rail company, really is not the one that caused the delay.

Mr. Roger Larson: I thought I did answer that. I thought I said the arbitrator would obviously consider the facts when they were dealing with any complaint from a customer regarding whether or not the terms of the contract had been met.

But I want to say that service has definitely improved since Mr. Mongeau has taken over as the CEO of CN. What his customers are asking for is that we can ensure that we have sustainable improvements of service that will survive whoever his successor might be at some point in time, and who may not have such a positive attitude towards his customers.

Mr. Lawrence Toet: Mr. Mongeau, you are not allowed to retire.

Voices: Oh, oh!

● (1730)

The Chair: We're almost out of time.

Mr. Poilievre.

Mr. Pierre Poilievre: You are customers of CN. All of you have your own customers, right?

Witnesses: Yes.

Mr. Pierre Poilievre: And you sign agreements with them.

A witness: Yes.

Mr. Pierre Poilievre: When there is a breach of those agreements, what do you do?

Mr. Roger Larson: You find a way to meet it.

I'll go back to a number of years ago. Kerry Hawkins, who was the CEO of Cargill at the time, said, "We have a contract with McDonald's, and every day we have to deliver *x* thousand pounds of beef to every restaurant across the country, and if we don't meet the terms of that contract, we lose that contract."

Mr. Pierre Poilievre: Right. Okay. If there's a further breach, you can go to court for a remedy, right?

Mr. Roger Larson: We can't be going to court on a service failure. If Cargill doesn't deliver to McDonald's their hamburger, they can go to another meat company. We can't go and get service from another mode of transportation.

Mr. Pierre Poilievre: But you can go to court, right?

Mr. Roger Larson: It's the railway, or our plants and mines get shut down.

Mr. Pierre Poilievre: But you can go to court, right?

Mr. Roger Larson: That's ineffective. You can't run a business on the basis of suing your business partner all the time.

Mr. Pierre Poilievre: Well, presumably, you wouldn't be suing them all the time. Presumably, when you have a service-level agreement, you would try to resolve it without a lawsuit.

All of you have been asking for this mechanism—very ill-defined, by the way—that you want the government to create a new, complicated government-controlled mechanism—

Mr. Roger Larson: Actually, we defined it very well in—

Mr. Pierre Poilievre: Excuse me. If I could just finish....

You haven't defined what this mechanism is. You don't seem willing to subject yourself to the same mechanisms that your customers would have in the event of a total breach, and that is the courts. That, ultimately, is the way contracts are enforced. Perhaps you can explain why we would create a mechanism just for you, completely separate from what everyone else uses.

Mr. François Tougas: The simple reason why that isn't the case is because shippers can't take the railways to court. They are dependent on the railway. You cannot sue them, because their remedy is not to service you. That whole idea is patently absurd. It arises very infrequently that a shipper will take on a railway. I have a very good idea how often that is: it's a very infrequent occurrence.

What you want to be able to do is go to a supplier who is going to provide the service or provide the good. That's what happens in a normally functioning market. This is not one of those...across the entire system. There are many parts of the system where it's fabulous. What we're trying to address is those parts of the system where it's not. That's what this is meant to address.

The Chair: I know there are a number of us, including myself, who have to catch an airplane.

Mr. Claude Mongeau: If it's there.

A voice: I'll take the train.

Mr. Pierre Gratton: We can debate open skies anytime you like.

The Chair: I want to thank all the witnesses for being here today. I think we shoved a lot into two hours, and I thank you for that.

I hope everyone has a great weekend.

The meeting is adjourned.