SUBMISSION TO THE
SENATE STANDING COMMITTEE ON TRANSPORT AND
COMMUNICATIONS

On

Bill C-49 the *Transportation Modernization Act*:

February 6, 2018
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1.0 INTRODUCTION

1.1 Freight Management Association of Canada
The Freight Management Association of Canada (FMA) has been representing the views of Canadian shippers to all levels of government and to international agencies since 1916 and focuses exclusively on freight transportation policies, legislation, and regulations as they impact the success of Canadian industry in domestic and export markets. Celebrating our centennial in 2016 was a significant milestone for the association.

The 90 companies that are members of the FMA are from all parts of Canada and from most industrial sectors including mining, forest products, agriculture, food processing, manufacturing and retailing. FMA members contribute over $100 billion to the Canadian economy and purchase more than $4 billion worth of freight transportation by air-freight, marine, rail, truck, and inter-modal.

1.2 Overview
This FMA submission provides comments and recommendations on those sections of Bill C-49 that address proposed amendments to the shipper protection provisions related to rail freight service in the Canada Transportation Act, the proposed changes to the Railway Safety Act related to locomotive voice and video recorders, and to the proposed revisions to the Coasting Trade Act related to the movement of empty containers between Canadian ports by foreign flagged carriers. The mandate of FMA is exclusively on freight transportation and we will not comment on those provisions of Bill C-49 relating to airline passenger rights.

1.3 General Support for Bill C-49
Following from the recent statutory review of the Canada Transportation Act, the government has responded with Bill C-49, the Transportation Modernization Act, that addresses the issues identified in the review.

FMA supports the passage of Bill C-49 and in the following sections identifies several areas where we think improvements can be made that will strengthen the bill to better achieve the government’s stated objectives.

2.0 CANADA TRANSPORTATION ACT

2.1 General Comments
In the following sections, FMA identifies sections of C-49 addressing rail service where revisions are needed to improve those provisions. FMA is not proposing specific wording to be included in Bill C-49, but providing a statement of the deficiency and an outline of the needed changes.

2.2 Service and Costing Data
Sections 9 to 13 of Bill C-49, provide amendments to the Transportation Information sections (50 – 51) of the Act. C-49 amends Subsection 50 (2) as follows:
Information to be provided
(2) Information that is required to be provided under this section may include the following:
(a) financial information;
(b) information respecting traffic and operations;

There needs to be an explicit requirement that appropriate “financial information” is to comprise relevant revenue and costing as determined by the Canadian Transportation Agency, and that data will be made available by the Agency to shippers in order to enhance access to shipper remedies under the Canada Transportation Act, such as Final Offer Arbitration (FOA) proceedings. In this connection, it is noted that in the past, the railways voluntarily provided aggregated data to Statistics Canada that was useful to shippers when accessing the FOA remedy, but several years ago the railways stopped providing this information. Amending subsection 50(2) of the Act in this manner will help restore balance and maintain the integrity of shipper remedies under the Act, such as FOA. FMA recommends that the Bill be amended accordingly.

2.3 Canadian Transportation Agency – Power to Investigate

Prior to the publication of Bill C-49 and during the public hearings by the Commons Transport Committee (TRAN), recommendations were made by various shipper stakeholders on the need for the Agency to have the power to undertake investigations of matters within its jurisdiction on its own initiative. The Agency chair, Scott Streiner, has made this recommendation to the government, as did the Hon. David Emerson in his report leading up to Bill C-49. Each of them has reiterated this recommendation in their presentations to TRAN. This recommendation was also supported by shipper groups appearing before TRAN.

As the Agency is the key organization that has specific information on systemic and emerging issues, it would be a reasonable extension of its mandate to have this power. The government continues to reject this proposal and we understand Transport Canada expresses concern that this could lead to the Agency establishing policy. It seems self-evident that Agency decisions or orders resulting from such investigations would have to be within the current law and if they identified possible changes in policy, these would be communicated to the Minister.

We understand that the Agency has this power in relation to commercial aviation. The recent Agency use of this power related to the unreasonable Air Transat tarmac delay at Ottawa airport last summer is an example of the value of such a power. A second example is the current ongoing investigation and oversight by the U.S. Surface Transportation Board (STB) of the chronic and wide-spread service problems on CSX railroad that have led, in some cases, to plant shutdowns.

In summary, FMA is of the view that the Canadian Transportation Agency should have the power to undertake investigations on its own initiatives covering rail and all other modes that it regulates. FMA recommends that the Senate amend the Bill accordingly.
2.4 Long Haul Interswitching (LHI)

Bill C-30, the *Fair Rail for Grain Farmers Act* provided for an extension of Regulated Interswitching from the usual 30 km limit to 160 km on the Prairie Provinces. This was a temporary provision and was repealed on August 1, 2017. Since 1988 the Act has contained another surrogate for real competition: Competitive Line Rates [CLRs] (sections 129-136). CLRs have not been able to be used by shippers because section 131 (1) requires the shipper to first obtain a rate with the connecting carrier and the class 1 railways have declined to quote acceptable connecting rates. The purpose of LHI is to replace the non-workable CLR provisions.

Further context for LHI requires comment on regulated interswitching in the Act, (sections 127-128). Where the first interchange is within 30 km from the shippers point of origin (or destination), the shipper can on its own initiative decide on which railway to ship and the rate from origin to the interchange point is set by the Agency and published on its website. These rates, while regulated, are compensatory to the originating railway.

LHI holds promise for shippers to obtain a competitive rate from a connecting carrier which could also improve the bargaining power between captive shippers and the one railway serving their facilities. While LHI would give shippers the right to interchange up to 1200 km to the first interchange, or 50% of the distance, there are, however, a number of barriers that will be encountered in its use.

First, unlike regulated interswitching, it is not automatic and if an acceptable rate cannot be negotiated with the originating carrier, the shipper will have recourse to the Agency, but this could lead to a 30 day delay.

Second, there are two major geographical exclusion zones, i.e. the Quebec-Windsor corridor and from a point just west of Kamloops to Vancouver. We understand that these exclusion zones were established to limit the ability of U.S. railroads to access traffic in these exclusion zones as there is no reciprocal provision in U.S. law. In presentations to TRAN, the class I railways noted they have “the lowest freight rates in the world” on a ton-mile basis. If this is the case, it is not clear why they need protection from the U.S. carriers at the border. In addition, CN and CP have extensive networks in the U.S. which means they do have a competitive position against the U.S. carriers.

Third, there are provisions to exclude some commodities. In some cases, TIH (Toxic Inhalation Hazard) and radioactive materials, the exclusions are said to be for safety reasons. If the interchange takes place within the 30 km interswitching zone, there is no such exclusion. Other commodities like motor vehicles, containers and trailers are excluded on the basis that they are said to have competitive options with other modes. If there are in fact competitive options for this traffic, it is not clear why this exclusion is necessary.

Fourth, the first interchange is within 30 km of the point of origin. Presumably this “no entitlement” is because regulated interswitching would normally apply. Bill C-49 stipulates in section 129(3) (a), that a shipper may not obtain a Long-Haul Inter-switch if any interchange
with another railway already exists within a distance of 30km. However, the interchange located within 30 km is of no value if; (a) it takes the traffic in the wrong direction of the shipment’s final destination; (b) it does not have the capacity to take on the size of the shipment; or (c) the nearest competing rail company does not have rail lines running the full distance to the shipment's final destination.

Sending a shipment in the wrong direction, or to the wrong rail line, renders the inter-switch useless. A shipper that happens to be within 30 km of an interchange that is of no use to them, is excluded from accessing the Long Haul Inter-switch option and is put at a competitive disadvantage. A similar problem exists for dual served facilities given a prohibition in 129(1) (a).

The solution to this problem is to add the wording "in the reasonable direction of the movement of traffic from the point of origin to the point destination on the continuous route" to section 129(1)(a) and to section 129(3)(a). This language is already included in Bill C-49 for proposed section 136.1 for other purposes, but needs to be replicated in 129. We believe that amending these two clauses would better reflect the spirit of creating competitive options.

**Determination of the Rate** The proposed method of determining the LHI interswitching rate in proposed sections 135 (1) (b) and 135 (2) will not lead to a rate that will be comparable to a competitive rate. If the rate is to be set based on “comparable traffic” of the local carrier, it will likely be based on traffic that is also captive, and thus not comparable to a competitive rate. It would seem reasonable that the rate should be based on traffic where there is competition, and the Agency is well placed to determine which of the “comparable traffic” has rates that are set in circumstances where competition exists. If no such competitive traffic is identified, the Agency could default to set the rate based on costs plus a contribution to overhead and profit.

FMA and the broad shipper community support the intent of the LHI provision, but note the above-mentioned deficiencies and recommends that the Senate amend the Bill to address these deficiencies accordingly.

### 3.0 THE **COASTING TRADE ACT**

#### 3.1 Repositioning of Empty Containers between Canadian Ports

Article 14.3 of the *Comprehensive Economic and Trade Agreement* (CETA) between Canada and the European Union provides for ships of either party to reposition owned or leased empty containers between ports of the other party.

Subsection 70(1) of Bill C-49 gives effect to this treaty provision in Canadian law by amending section 3 of the *Coasting Trade Act* to allow ships of any flag to reposition owned or leased containers between Canadian ports, as long as such movements are made on a non-revenue basis. It needs to be clarified that this provision would apply collectively to all shipping lines in any of the major alliances. For example if NYK Line, a member of THE Alliance had empty containers at Prince Rupert to be repositioned to the Port of Vancouver, Yang Ming Line, another member of THE Alliance could reposition the NYK empty containers as long as the movement was on a non-revenue basis.
The FMA supports this amendment and requests that Transport Canada clarify and communicate to relevant stakeholders that all shipping lines in each of the three major alliances may reposition empty containers of the other alliance members on a non-revenue basis.

4.0 **RAILWAY SAFETY ACT**

4.1 **The Need for Locomotive Voice and Video Recorders (LVVR)**
Following several rail accidents in Canada and the United States resulting in crew, passenger and public fatalities, the Transportation Safety Board (TSB) has recommended to Transport Canada that LVVRs be installed in the locomotives of major railways, primarily the Class I railways (CN, CP, and VIA).

The primary purpose for the recorders would be to provide important data:
- to the TSB for accident investigation,
- to Transport Canada for policy development,
- and to railway companies for analysis as part of their Safety Management Systems.
This last use would be under strict control and LVVR data sent to the railways would be randomly selected under regulations to be made pursuant to the C-49 amendments.

4.2 **Bill C-49 Proposed Amendments**
Sections 61 to 66 of Bill C-49 propose the amendments to the *Railway Safety Act* and Section 67 of Bill C-49 proposes the consequential amendments to the *Canadian Transportation Accident Investigation and Safety Board Act* governing TSB use of information it receives from the LVVRs.

4.3 **FMA Comments on the Proposed LVVR Provisions**
Sections 61 to 67, as drafted appear to provide the appropriate mandate and authority to the Railway Safety Directorate of Transport Canada and to the TSB to implement the installation and use of LVVRS on “prescribed” railways with appropriate safeguards surrounding the use of the recorded data especially with regard to the privacy rights of railway operating employees.

Section 62 of Bill C-49 provides for the Governor-in-Council to “make regulations (a) prescribing criteria” to determine which railways will be required to install LVVR equipment. This is an important provision as there are 32 railways listed as being under federal regulation and having a “Certificate of Fitness” to operate.

The three major Class I railways: CN, CP, and VIA, are the main targets of this provision and it is important that short line railways that operate at low speeds with very few trains on their lines at any one time, should not be required to install LVVR equipment, estimated to cost approximately $20,000 per locomotive. In this connection, the regulations will need to be drafted to allow both federally and provincially regulated short line railways, without LVVRs, to move short distances at low speeds on CN and CP trackage to interchange traffic with the Class I railways.
FMA acknowledges the need to balance the improvements in safety with the need to maintain a reasonable level of privacy rights for employees. Sections 61 to 67 of C-49 address the privacy issues and provide for constraints on access to the LVVR data by railway company management.

4.4 FMA POSITION ON SECTIONS 61-67
FMA supports Sections 61-67 of C-49 as written.

FMA requests that Transport Canada consult broadly with all stakeholders, particularly provincially and federally regulated short line railways when drafting the regulations. This will be necessary to ensure that the “criteria” do not unintentionally require short line railways to install LVVRs, and to prevent the Class I carriers from arbitrarily requiring short lines operating at low speed for short distances on Class I trackage to install LVVR equipment on locomotives undertaking such interchange switching operations.

5.0 CONCLUDING REMARKS
The Freight Management Association of Canada (FMA) appreciates the opportunity to provide input the Senate Transport and Communications Committee (TRCM) as the committee undertakes its review of this important legislation.

This is important legislation and FMA hopes that the legislative review can be completed and that Bill C-49 can become law as rapidly as possible.