HOUSE OF COMMONS
CHAMBRE DES COMMUNES
CANADA

Standing Committee on Transport, Infrastructure and Communities

TRAN • NUMBER 065 • 1st SESSION • 41st PARLIAMENT

EVIDENCE

Tuesday, March 26, 2013

Chair

Mr. Larry Miller

Standing Committee on Transport, Infrastructure and Communities

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● (1545)

[*English*]

The Chair (Mr. Larry Miller (Bruce—Grey—Owen Sound, CPC)): I'll call this meeting to order, pursuant to the order of reference of Friday, February 8 of 2013, Bill C-52, An Act to amend the Canada Transportation Act (administration, air and railway transportation and arbitration). We do have witnesses here, I believe just to answer questions if necessary: Ms. Crook, Ms. Gibbons, and Mr. Langlois.

With that, we're going to be going through clause-by-clause. I might as well note it now because it will come up: for a lot of the amendments, the same amendment wording was put forth by both the NDP and the Liberals. The order that they will be dealt with, of course, is the order that they came in. I know in a number of cases, the NDP had theirs in ahead of Mr. Goodale.

I understand, Mr. Goodale, you had a concern with that, but that's the way it is. I think you understand that.

Ms. Morin.

[*Translation*]

Ms. Isabelle Morin (Notre-Dame-de-Grâce—Lachine, NDP): Before we continue the meeting, I would like to introduce the following motion:

> That the committee meeting time, for the remainder of the current rotational committee schedule, be 3:30 p.m. to 5:30 p.m. as decided by a recorded vote by committee members.

We do not have to talk about it today, given that we have witnesses and I would not want them to wait. I simply wanted to introduce the motion.

[*English*]

The Chair: I take it that one hasn't had the 48 hours. Okay.

Mr. Pierre Poilievre (Nepean—Carleton, CPC): Mr. Chairman, we could debate it now. I think it would have unanimous consent to do that, if you want to get it over with.

The Chair: Okay, we have unanimous consent? Yes? No?

[*Translation*]

Ms. Isabelle Morin: No.

[*English*]

The Chair: Okay. It's not that important, then, I guess.

Ms. Isabelle Morin: It's up to them.

An hon. member: We said okay.

The Chair: It's okay to debate or not? Yes?

Mr. Holder.

Mr. Ed Holder (London West, CPC): Sorry, I just want to be clear. Madame Morin suggested that we should debate. She gave a notice of motion. We said we were good with it. Then you withdrew it, so what is the current status?

The Chair: Just to clarify, Mr. Poilievre indicated that we could discuss it right now. She indicated no, but now she has changed her mind, and we are going to discuss it.

Mr. Ed Holder: Fine.

The Chair: Did you want to speak to her motion, Mr. Holder?

Mr. Ed Holder: I will at the appropriate time, Chair, if you'll recognize me.

An hon. member: Do we have a copy of it?

An hon. member: What is the motion?

The Chair: Basically, it was agreed upon at meeting in the last three or four weeks that we start meetings at 3:45 p.m. instead of 3:30 p.m. because of question period and what have you and the fact that we're across the road. Most of our meetings were getting started past 3:30 p.m. anyway because members weren't able to get here.

So we decided to change it to 3:45, Mr. Goodale. Ms. Morin's motion would change it back to 3:30. It's pretty straightforward.

Hon. Ralph Goodale (Wascana, Lib.): How about 3:37 and a half?

An hon. member: I was looking for that compromise.

The Chair: Mr. Poilievre.

Mr. Pierre Poilievre: Thank you very much.

Mr. Chair, I'm opposed to the motion. In the aftermath of question period, there is a bottleneck at the bus station for those people who take the bus. I personally walk, but in any event, the reality of the nature of our work is such that we often get information throughout the day relating to committee proceedings, information on which we cannot confer with our colleagues prior to this meeting unless we have an extra 15 minutes between the end of question period and the commencement of this session.

When most people get out of question period, depending on the day, at around 3:10 p.m., the possibility of having a meeting prior to the beginning of this committee before 3:30 p.m. is limited on the best of days. I think it's reasonable to have half an hour between the time people leave the House of Commons from question period and the beginning of the session here. That's consistent with how we've done it before. In the previous time slot we had, we arranged to have the meeting acknowledge the travel time between this room and the House of Commons. I think it's fair to continue doing that.

I might also add that I don't see the problem with 3:45 p.m. I haven't found that any of our meetings have been short of time, and if ever they were, I'm sure colleagues would work together to accommodate demands for additional time on a given subject.

● (1550)

The Chair: On your point about previous time scheduling, those meetings were ending 15 minutes earlier—the same amount of time we are talking about now—in order for people to get to question period and question period practice. So you are correct on that.

Ms. Morin, go ahead, please.

[*Translation*]

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

The reason I am introducing this motion is that I think it is problematic to cut a two-hour meeting by 15 minutes. I feel it is important for us to listen to our witnesses and to have time to ask questions until the end of the meeting. If we shorten it by 15 minutes, the first witnesses will have one hour, including the 10 minutes for presentations, but we will not have as much time to ask other witnesses questions.

Travel time was brought up as an argument, but I really don't think it is a good one. Actually, there are about a dozen other committees that meet at the same time, either on Mondays or Wednesdays. In some cases, the meetings are held in buildings that are much farther away than ours, such as the Wellington Building. Getting there takes a lot longer than getting here. In our case, we are at most five minutes away from Parliament. In a word, I don't think it is a good argument.

We meet in the morning and we all have our BlackBerrys if we have any last-minute information to send to each other. Communication is very easy. The reason why we get those devices for work is precisely to be able to get in touch quickly. I find it very disrespectful that we do not take the time we need to ask questions of witnesses who travel to come here and who want to share their knowledge with us.

I would also like to add that, for some time now, there has been a tendency to call several witnesses to appear at the same time. Mr. Chair, before you came to the committee, we used to receive two witnesses. So each witness had one hour. That gave us enough time to ask the appropriate questions. Right now, we have to choose. It was your decision to conduct the meetings in this way and, one way or another, it is your choice, I suppose. But I see that there are some questions we cannot ask.

In terms of the time allocated for questions, based on the established speaking order, there is a final round of questions during which the NDP, the Liberal Party and the Conservative Party have five minutes each. And yet we rarely get to that point. On a number of occasions since I have been here, I have wanted to ask my questions and I have been told that there was not enough time left. I did not get my full five minutes.

If the Conservatives do not want to ask any questions, I will gladly take their place. At any rate, I think the work that we do in committee is important and I believe in the process. That is why I feel that, by devoting less attention to our work, we are botching it.

The reason for my motion is that I would like us to reconsider the new formula that you are proposing. First, I would like us to vote on it. Second, as I said, adopting the formula is like saying that we do not believe in the process. I for one do believe in it and I would like us to have the full two hours. All the other committees on the Hill do. I do not see why our committee would not follow the same rules.

[*English*]

The Chair: Just to clarify a point, I've never bumped you from your speaking slot. If anyone has bumped you it would be one of your own colleagues. It certainly wasn't me.

Mr. Aubin, go ahead, please.

[*Translation*]

Mr. Robert Aubin (Trois-Rivières, NDP): Thank you, Mr. Chair.

I am actually looking for a compromise. I completely agree with Ms. Morin on the importance of our two hours of sitting time. I was thinking that I would not object to starting the meeting at 3:45 p.m. instead of 3:30 p.m., as long as everyone agreed to finish 15 minutes later.

I even propose a friendly challenge to you: start the meeting, scheduled for 3:30 p.m., only when everyone has arrived. Then add one minute to the end of the meeting for every minute we have waited for people to arrive late. I can guarantee you that, after two meetings, everyone will get with the program and arrive at 3:30 p.m., because very few people around this table want to extend their work day past 5:30 p.m.

In any event, I do not think we ought to cut off our work. Some witnesses travel much farther than we do to come and meet with us. We just have to get here from the House of Commons. Some people travel from far away in Canada to come and meet with us. I feel that giving them the time allocated for our meetings is the least we can do for them, as a matter of common decency, especially since their expertise is often very useful for our studies.

I see no good reason for shortening our meetings by 15 minutes. However, I am ready to consider any number of other formulas that would allow us to get our full two hours of sitting time back.

● (1555)

[*English*]

The Chair: It appeared you were implying, Mr. Aubin, that I or somebody unilaterally shortened the meetings. This was done in consultation with Ms. Chow, who agreed with both the changes last fall, in the session before Christmas, and in the change here.

I just wanted to point that out.

Mr. Holder.

Mr. Ed Holder: Thank you, Chair. I want to refer to a couple of things. My friend Ms. Morin makes a point, and I think it's a fair point, that she wants it the way it was. But I'd like to remind all colleagues that the way it was and the way it has always been, for a number of meetings now, has been one hour and 45 minutes. If I recall, we had all-party agreement on that timeframe when this was done some time ago, so that there is no shortchanging of time for our guests or, I would hope, for the opportunity for our folks around the table to answer questions.

The second thing I get concerned about with respect to 3:30, and the reason I thought it was so thoughtful at the time that we move to 3:45 p.m., is that I wonder whether anyone around this table can remind me when we finished QP at three o'clock. In my lifetime, since this new....

Maybe it's that the class of 2011 are excited to be there, I'm not sure, but it strikes me... and there's a lot of ambitious response on all sides of the House. As a result, if I have some empathy for the Speaker—I'll remind you that I did run for Speaker once, but that's a different discussion, and I'm not bitter—

Some hon. members: Oh, oh!

Mr. Ed Holder: But the thing is, it always runs until five or seven minutes after 3:00, and colleagues, we all know that. So there's that consideration. After that, there tend to be points of privilege, and I think it's important for some of us that we hear some of this so that we have a sense of what's going on. I will tell you that we on the government side.... I have two committees, and all of their meetings are in the afternoon after question period. It becomes a struggle. Part of the reason it becomes a struggle is that QP does not end at 3:00 p.m.; there are points of privilege.

I want to give time for the media to interview Ms. Chow, because I think it's appropriate that she get her time, in case that ever happens after QP. That's just a thought.

That's being a little facetious, but the more significant thing is that sometimes—and I've seen this happen in committee over my many years—all of a sudden, at the very front of the meeting a motion will be put forward, and some of us, with our very best of intentions....

Now, we have more members on the government side, so it's a little more difficult for us to get through that channel than it may be for members opposite, but still, that aside, whether we walk or take the bus, the broader issue is that 3:45 p.m. was, I thought, a very thoughtful compromise to still give us our hour and 45 minutes, and we would finish at 5:30 p.m.

I think, for all of those reasons, it's the best balance of all.

So Chair, I respectfully oppose the motion, for the reasons I mentioned. I just think it makes sense to show respect and it allows us to....

Well, I'll make a brief point. I was interviewed by a reporter today —so this time it was me.

An hon. member: That's shameless.

Mr. Ed Holder: Well, it was shameless, but it was still a few minutes.

You want to be able to allow that kind of thing to happen, too, so this kind of tolerance just makes practical sense. And I am very concerned, Chair, about motions that might come forward right away that I wouldn't be able to participate in, if for any reason I wasn't able to make it on time.

So I will oppose the motion. I certainly understand the considerations, but I will oppose it.

The Chair: Thank you.

Mr. Toet.

Mr. Lawrence Toet (Elmwood—Transcona, CPC): Thank you, Mr. Chair.

I also would be opposed to the motion, especially because the change was made based on previous...we had changed it to one hour and 45 minutes. So it's not as though we have all of a sudden made a major, drastic change in our committee timeframe over the last period of time. Also, it was done in consultation with all parties. All parties were at the table and were very open to the decision to do this going forward, based on what was happening.

Mr. Holder said question period will go to seven minutes after 3:00; I think many times it's closer to a quarter after the hour, to deal with some last-minute issues that may have come up.

I think it is appropriate that we come here properly prepared. If we talk about consideration for our witnesses, I think coming in here unprepared is not very considerate of them. Ms. Morin and Mr. Aubin both talked about consideration and courtesy to witnesses. Well, I believe it's very inconsiderate to our witnesses when they, as is quite often the case, have been sitting here for 15 minutes before we are ready to proceed with a meeting.

It's much more considerate of us to acknowledge that quite often we are late in starting and to have our witnesses be prepared for a 3:45 p.m. start, rather than sit here in a timeframe such that, quite often.... They're also very busy people with lots of things to do, and have better things to do than to wait for us for 15 minutes, even though we may think differently at times.

Based on all those things, and especially based on history....

The other thing that bothered me a little in the comments that were made was the challenging of the chair, so to speak, on the number of witnesses we've had. I have not noticed a change from our previous chair to the new chair in the number of witnesses we have here. There are times when that's just the the way it works.

We try to have a balanced panel here. Part of having a balanced panel sometimes means you're going to have a few more witnesses. I very much enjoy having a broader perspective and a balanced panel. It allows us to ask questions of witnesses who are appropriate to what we feel is the testimony we desire to come out.

For those reasons, I would also have to stand in opposition to this.

We should also respect.... When as a group we come together and decide on something, we shouldn't be coming back three or four weeks later or whatever it was with a motion to change again. We should have consideration, when we have decided as a group to do something, going forward on that basis, unless we can prove that for some reason we've really gone wrong and have done something as a disservice....

I think that as a service to our witnesses, a 3:45 p.m. start is much better for them and much more considerate.

Thank you, Mr. Chair.

● (1600)

The Chair: Thanks, Mr. Toet, and thanks for the defence of the chair. But with 22 years of politics, I have alligator skin.

Mr. Watson.

Mr. Jeff Watson (Essex, CPC): Mr. Chair, it seems to me that there are two issues raised with respect to the motion. The first is the start time. I think there have been a lot of sound arguments for delaying the start time to 3:45 p.m. Typically, question period doesn't end on time—especially on Wednesdays, of course, with the anthem in the House and other things like that. By the time you work through, you're now at a quarter after the hour or something in that range.

Of course, we're also in a temporary construction situation. If we were within the parliamentary precinct, the start time would be less of an issue than it is when we are outside it and across the street because of construction with West Block, for example. This isn't going to be an ongoing irritant for many years into the future. We just have the reality of traffic on Wellington Street and some other things to try to negotiate.

I think the start time is fair.

The other issue raised or implicit in this is how much time is needed to proceed on this. I note that we have spent 18 minutes now debating a motion brought forward by the opposition. If it's about respect for witnesses and ample time for MPs to question, I would note that this isn't the first time the NDP has brought a motion forward that takes 15 or so minutes out of the questioning time of our committees. If they want a full two hours to question, then, I would also submit to them, don't bring forward any motions.

But it's not about that. I think that's a convenient argument to try to bring us back to a two-hour meeting period. They're more than happy to have 15 to 20 minutes of debate on any motion they want to bring forward. So it's not really about respect for the witnesses and ample time for questioning.

Secondly, I would submit that in the practice of questioning, already we have established that an hour and 45 minutes is sufficient. Perhaps they want the two hours back so that they can bring in more motions to take 15 minutes out of two hours and give us an hour and 45 minutes with the witnesses.

I'm going to oppose the motion for those reasons, Mr. Chair.

The Chair: Mr. Daniel.

Mr. Joe Daniel (Don Valley East, CPC): Thank you, Chair.

Like my colleagues, I would like to say that I will be opposing this motion for the very same reasons.

The reason we moved this whole thing was so that we could all get here on time and be able to do things properly. Clearly, QP rarely ends at 3 o'clock; it extends. The current inability to get transportation so that we can be here on time makes it even worse.

It was a reasonable compromise, that compromise is still the same, and we should continue with the 3:45 start.

● (1605)

The Chair: Thank you.

Mr. Sullivan.

Mr. Mike Sullivan (York South—Weston, NDP): As one of the individuals who in fact didn't get to ask questions last Tuesday, I am all too painfully aware of what happens when we only have an hour and three-quarters. I was cut off by the chair, who said we were out of time and that the meeting couldn't be extended, and so I was unable to ask my questions. This was the day the minister was here.

Essentially, by our making the meeting shorter, this becomes apparently a less important committee than other committees, which manage to get their full two hours in, even if they are meeting at 3:30 on a Tuesday afternoon or a Thursday afternoon—we're not talking about Wednesdays here.

We essentially lose a round of questioning and lose a portion of our ability to question witnesses. In the case of today, we're going to lose some time to do clause-by-clause consideration. We have an hour for witnesses and 45 minutes—which will now be only 30 minutes—for the clause-by-clause consideration of the—

The Chair: There is no witnesses' time today. They're here to answer questions only.

Mr. Mike Sullivan: They're listed as witnesses on the Order Paper. Whatever they are, we're going to ask people questions and they're going to give advice, they're going to give us counsel, they're going to suggest what they think of the bill and the amendments.

My point is that we shouldn't be the only committee.... This is an incredibly important and enormous responsibility: transportation, infrastructure, and communities constitute one of the biggest monetary files in this government. Because those three things are combined into one thing and we're charged with dealing with all three things, it would seem to me unfortunate that we can't spend the time we should be spending to discuss the matters that are before us.

I've heard enough from the government to know where they are going with this thing, but it's really unfortunate. I would prefer that there be a recorded vote, if I'm the last speaker.

The Chair: You have the right to ask for a recorded vote.

Mr. Holder.

Mr. Ed Holder: With great respect to my friend Mr. Sullivan, I have a few things to add.

Just as a point of clarification, he made the point that he didn't have a chance with his round to speak to the minister. That had nothing to do with an hour as distinct from an hour and 45 minutes or two hours. The minister was here for a pre-set amount of time, as we all know. As a result, anyone who wanted to ask a question of the minister would either share time or would work within the speaking order on their own side.

If anyone might have a complaint, it might be our friends from the Liberal Party, who frankly get one kick at this and have to be—

A voice: Hear, hear!

Mr. Ed Holder: That's why they sent their best in today, to be clear on this.

● (1610)

Hon. Ralph Goodale: It's about time you recognized that.

Some hon. members: Oh, oh!

Mr. Ed Holder: The point is that with a minister there's a limited amount of time, and we all know that. To suggest that there wasn't a fair time.... The allocated time is always the allocated time with ministers, and friends around this table all know that this is the case.

Second, our folks here are not giving testimony; they are here in an official support capacity. So while they might be called “witnesses”, their being here is not going to gobble up the time here, depending upon how much longer this all takes.

Third, I just feel as though we're somehow playing politics with this thing. We settled it. Ms. Chow respectfully agreed, and I think we all agreed, if I recall, on two different things: first, to make the meeting one hour and 45 minutes and then to change the meeting time to 3:45. We all knew that, we all agreed, there was no dissenting vote, and if some people were absent at that time, their colleagues would have made the determination in conjunction with those others present from their party when they voted. But as I recall, it was unanimous.

So I look at this, and...you know, you get to the point that it feels as though it's a case of playing politics.

If we don't get through all of this today, then it strikes me that we'll have an opportunity to do it again, because we want to do this right. That is the point. We've always taken that approach, and so if it takes a bit longer, we'll do it right and so be it. The agenda is full—a little fuller as a result of this dialogue—but this is not the time to play politics with it. I don't think so.

The Chair: Ms. Chow, you are the last speaker.

Ms. Olivia Chow (Trinity—Spadina, NDP): I wasn't going to speak, but having heard my name mentioned several times—

An hon. member: I'm sorry.

Ms. Olivia Chow: That's okay, I thought we could come to a compromise because originally I thought we could extend it to 5:45. I then later on found out that was not possible. Then I realized that one of our members was going to miss the round, and that wasn't fair, so at the last meeting I was trying to figure out some way of compromising. But that didn't quite work out, which is probably why the motion is in front of you.

The Chair: Okay. I just want to clarify, and I know the clerk can back me up on this. In the regular one-hour-and-45-minute round, I will guarantee you that not one of you has missed a round of questioning. We went to the end. A couple of times the last Conservative member didn't ask questions, but that was voluntary, so I can tell you nobody was missed.

Now, when you get meetings that are split, like when the minister was here for an hour, or what have you, yes, there may be some complications there, but the Liberal member of the day then gets two opportunities to ask, and maybe that's where the NDP lost some. Anyway, I just wanted to point that out.

Mr. Sullivan has asked for a recorded vote, Mr. Clerk.

Mr. Ed Holder: Can we just read the motion to be clear on what that is?

The Chair: You have the motion in front of you.

Mr. Ed Holder: All right, then I'll withdraw. Thank you.

(Motion negatived: nays 6, yeas 5)

The Chair: We'll now move into clause-by-clause.

Pursuant to Standing Order 75(1), as clause 1 only contains a short title, it is postponed. So I will call clause 2.

(Clause 2 agreed to)

The Chair: Yes, Mr. Poilievre.

Mr. Pierre Poilievre: Mr. Chairman, I understood that we were going to have a few moments for some clarifications from the public servants prior to the commencement of clause-by-clause.

The Chair: Okay, they're here at your discretion, so go ahead. What clarification were you wanting, Mr. Poilievre? Was it in regard to clause 2?

Mr. Pierre Poilievre: It's just the overall drafting of the bill, the impacts of amendments on the bill.

The Chair: Okay, who would like to comment?

Mr. Pierre Poilievre: Am I correct that we are allocating a period for that prior to clause-by-clause? That is how I understood the agenda.

The Chair: There is no official presentation from the witnesses, Mr. Poilievre. They're here if—

Mr. Pierre Poilievre: The agenda actually set aside an hour for that purpose.

The Chair: You're right, the agenda does say that, albeit that wasn't the intent. The witnesses didn't come here with that presentation.

Mr. Pierre Poilievre: The drafting of legislation likewise has to match intent with wording, so we might have questions to ensure it does.

The Chair: Yes, and that's why they're here. Do you have questions on clause 2?

Mr. Pierre Poilievre: No. I understood the questioning was going to be on the bill, in general, prior to clause-by-clause. That's how the agenda reads..."Witnesses", "Department of Transport", "3:45 p.m. to 4:45 p.m."...and then clause-by-clause was to commence at 4:45 through to 5:30.

The Chair: Okay, what exactly is it that...?

Mr. Ed Holder: May I bring some clarity to that, Mr. Chair?

● (1615)

The Chair: Yes, Mr. Holder.

Mr. Ed Holder: I think what might be useful is just to understand the context of it, because it's even going to tie into the amendments as we go through those as well. Perhaps it's appropriate at this point to ask the officials some questions—they don't have formal presentations—so we get a broad sense of the document. If the chair has no objections, that helps us—

The Chair: That would be probably, I think, a more valuable use of your time, because then the witnesses will concentrate on your questions.

Ms. Chow.

Ms. Olivia Chow: That was precisely what I was going to say, and I have some questions.

There's a group of recommendations that the shippers originally made before the drafting of the bill, and then later on they suggested amendments: that rather than starting with a service agreement with a blank slate, there would be a template that would assist both the shippers and the rail companies to come to a service agreement, with clear guidelines.

It seems to me that this is a faster, more efficient, and more effective approach. I believe the first group of recommendations in fact do that. Is there any logistical problem with that idea?

This is what we have always requested. When I submitted a private member's bill, it was one of the key areas. When I talked to legislative counsel, they seemed to see no problem with that approach, with having a template, as used in the first group of recommendations.

Are there any drawbacks to that approach?

Mrs. Annette Gibbons (Director General, Surface Transportation Policy, Department of Transport): The approach to drafting the request of a shipper to a railway for a service agreement and then the request to an arbitrator, if a shipper wasn't successful in the request for a commercial agreement, was using high-level language that very much mirrors the existing obligations on railways under what we call the "common carrier obligation", which is section 113 of the Canada Transportation Act.

So we use the same approach in the language on a service agreement as exists in the act already under the common carrier obligation.

Some of the thinking about providing a more detailed approach was that you could end up limiting the scope of what is covered, and we wanted to leave it broad. The language under the common carrier obligation is intentionally broad, and the language that we then use for the new provisions is broad. In fact, it covers all of the things that the shippers had asked for in the consultations held with them last summer, with the exception of the penalties issue, which was addressed in front of the committee the last time the department was here, and the commercial dispute resolution process.

Those are the only two items that had been raised in the shippers' list of what they wanted to see by way of what a service agreement could contain that are not covered in the language in the bill; everything else is covered. So having this broad approach that reflects the common carrier obligation in fact covers the wide variety of service elements that were raised by the shippers, with the exception of those two elements I mentioned.

Ms. Olivia Chow: Can I ask precisely about that element? One of my recommendations is that, if the shippers want to include the breach of the service agreement, consequences should be included in it. If there are no consequences to breaching the agreement, then you don't reward good behaviour, so to speak. When something goes wrong, there have to be consequences; that needs to be part of the service agreement.

Why not allow this to be there? If it is not, then the agreement becomes an empty shell. Is it really worth the paper it is written on, if you don't specify what kind of consequence should be in place if there is a violation of conditions?

Mrs. Annette Gibbons: The approach taken in the bill to ensure compliance is the use of an administrative monetary penalty mechanism, to ensure in that way that there is a strong incentive to comply with the agreement.

The specific issue of penalties raised by the shippers, as the department and the minister noted when we were here the last time, is that there were issues around asking what is effectively a regulatory agency to predetermine penalties before a breach takes place. There were problems with that particular mechanism.

In the end, as the minister stated when he was before the committee, the use of administrative monetary penalties was chosen as a mechanism that is very strong and that provides a very strong deterrent to non-performance or non-respect of a contract, without getting into the difficulties that the penalty approach raised by the shippers would have presented.

● (1620)

Ms. Olivia Chow: I don't quite get it. If there's no penalty....

Mrs. Annette Gibbons: There is. There's an administrative monetary penalty.

Ms. Olivia Chow: Can you explain what that means in plain language?

Mrs. Annette Gibbons: It's a mechanism whereby, if a shipper feels that an arbitrated service agreement that has been imposed under the auspices of the agency has been breached, then the shipper can come to the agency and the agency will investigate the alleged breach. If it finds that in fact there has been a breach, then the agency can impose an administrative monetary penalty of up to $100,000.

Ms. Olivia Chow: Right, but the $100,000 doesn't go to the shippers; it actually goes to the agency, doesn't it?

Mrs. Annette Gibbons: That's right.

Ms. Olivia Chow: As far as the shipper is concerned, really for non-performance they get nothing back. They want to build in at the beginning, right in the service agreement, a feature to say that if you do not perform, these are the consequences.

You have to do that. If you don't do it, if you allow the non-performance to take place and then say, “you can complain about it later, and by the way, even if you win the arbitration you're not going to get any money back”...well, why would anyone do that?

Why wouldn't we allow the agreement to define, if there is non-performance, what kind of penalty would be in place? When you write something, you want to know how, if something goes wrong, you are going to be punished or how much money you are going to pay. If not, then a service agreement really doesn't really have much force.

This is the crux of it. If you don't punish non-performance, why have an agreement?

Mrs. Annette Gibbons: Non-performance would in fact be penalized through the use of the administrative monetary penalty.

These penalties are used in various statutes. The fact that they go to the government is a feature of administrative monetary penalty regimes. The focus is not on earning revenues; the focus is on providing a deterrent to non-performance under the law. This is a feature of these regimes.

They are used in legislation, and in this case the mechanism was used to provide a strong deterrent in a way that is consistent with the role of regulatory agencies, rather than follow a proposed approach whereby anything may be proposed by way of penalties and then the regulatory agency would have to set up a scheme for future breaches without knowing what those breaches might be.

The complexity of establishing a scheme before breaches have taken place is something that is just not done by regulatory agencies.

As to the specific issue of shippers being compensated for any damages they suffer from a breach, they can in the end go to the courts, so there is a mechanism for shippers to seek damages. But there is also the deterrent on non-performance by a railway through the administrative monetary penalty regime.

Ms. Olivia Chow: But the deterrent is $100,000. How did you pick $100,000? Some of the shippers are telling me that if the grain doesn't show up on time, or if by the time it shows up the container ship has already left, it's too late, and there are millions of dollars of injury or loss. Really, how is $100,000 a deterrent?

Maybe that's a rhetorical question.

May I ask one other question? There is a Liberal amendment that I'm not clear on. Do you want me to come at it in the second round, or do you want me to ask it now? I don't want to hog all the time.

● (1625)

The Chair: The only question I would ask is whether asking about that amendment now, when we're not on it, is a valuable use of time or not. It's up to you.

Ms. Olivia Chow: Rather than going back and forth, I thought I would bring it out.

The Chair: Okay, then ask it now, Ms. Chow, and we'll move on to the next.

Ms. Olivia Chow: This is the amendment to give railway companies the right to make submissions before the proposal to arbitrators. The bill, as written now, doesn't allow that. This is really allowing CN and CP to submit more documents.

If we do this, will it not prejudice the shippers? They are not as financially well off in some cases. There could all of a sudden be a huge number of documents tabled.

The Chair: Ms. Chow, you're talking about Liberal amendment 5.

Ms. Olivia Chow: Yes; it's not in the original bill. The original bill said—

The Chair: It's at page 12 in the amendments package.

Mrs. Annette Gibbons: Mr. Chair, is this question directed to the department?

Ms. Olivia Chow: Yes.

Well, I could ask my Liberal friends this, but I wasn't sure why you didn't put it in. I don't quite support this amendment, but you didn't put it in for the reason that...?

It's to the department.

The Chair: Well, they're not going to put it in when it's a Liberal amendment.

Ms. Olivia Chow: Do you know what? I'll deal with this when the motion is.... I'll ask the Liberal....

Mr. Pierre Poilievre: Mr. Chair, I don't see any problem with examining some of these amendments prior to clause-by-clause study. They affect earlier decisions. For example, if Ms. Chow were to support this, she might reject another amendment based on her intended support of this one. So I think it's fair for us to pose questions about amendments before we get to clause-by-clause consideration.

The Chair: Yes, go ahead.

Ms. Olivia Chow: Let me rephrase that question.

In the bill that is in front of us, you didn't allow the shippers to submit documents prior to arbitration. Tell me why you drafted it that way.

Mr. Alain Langlois (Senior Legal Counsel, Team Leader Modal Transportation Law, Department of Transport): The way the legislation is drafted currently, the shipper files a submission on day one. Before filing a submission on day one, they have to advise the railway 15 days before that they are going to make a submission. The start of the process is the submission for arbitration on day one.

The second step in the process is 10 days later. Both parties at the same time have to file their proposal for how they propose to resolve the matters that have been referred to arbitration by the shippers. That's step two in the process.

Step three is the filing of documents to support their proposal, and that's day 20 in the process. At the same time, the railways and the shippers are expected to mutually file to each other and to the arbitrator the documents they intend to rely upon to support the offers they put on the table on day 10. After that, you get to the hearing of the matters before the arbitrator.

So other than the application itself, which is triggered obviously by the shipper, the entire process is geared to the railways and shippers acting simultaneously, through the arbitrator or before the agency.

The way I understand Liberal amendment 5, they would propose that if the railway intends to rely on anything that is captured in paragraphs (d), (e), or (f) of proposed section 169.37, on day five of the process they would have to advise the shippers, and on day 10 in the process, at the same time as the offer, they would have to file the material to the shippers.

Obviously I won't comment on the motion itself, but that's how I understand the motion to read.

● (1630)

The Chair: Mr. Goodale, do you have anything?

Hon. Ralph Goodale (Wascana, Lib.): Mr. Chairman, I have three questions that I'd like to ask the witnesses, along some of the same lines that Ms. Chow was discussing.

In answer to an earlier question about damages, Ms. Gibbons said, I think, words to the effect that providing damages is something that's just not done by regulatory agencies and that it's more typical to impose these penalties.

It may not be done frequently by regulatory agencies, but of course it is done: on occasion they do levy damages. But it is a regular feature of arbitration, and arbitration is what is being established here, if the negotiating process isn't successful.

So why wouldn't you let the parties agree on level of service agreements that provide—between them contractually—for a way by which they could identify and provide for damages, and then, if that fails and the thing goes to arbitration, there allow the arbitrator to do it?

It may not be something the CTA does on a frequent basis, but for an arbitrator it's fundamental to the process of arbitration. Why not allow it as an option for the contracts to be negotiated between the parties here?

Mrs. Annette Gibbons: I think the difference here is that even though this is an arbitration process, it is an imposed arbitration process. The idea of the parties agreeing to damages in a private arbitration, a commercial arbitration, is perfectly within their purview to do. In fact, we know that in commercial contracts there are often what are referred to as liquidated damages, whereby the parties agree that in the event of a breach, here is the amount one party will pay the other.

This is not a commercial arbitration. This is an imposed arbitration, imposed under legislation, and so we're setting out a—

Hon. Ralph Goodale: Isn't that the very problem Mr. Lebel identified in the very first meeting: that we're not dealing with normally commercial circumstances, so that you need some unusual provisions to bring about a level playing field?

Mrs. Annette Gibbons: We are still working within the confines of legislation and giving instructions to a regulatory body to carry out something. In constructing the scheme of arbitration within the act, we consider the normal function of a regulatory body. A regulatory body providing for an arbitration scheme whereby an arbitrator, case by case, can set out unique penalty schemes—damages schemes—for breaches that may occur in the future is just something we have not seen.

It was a question of finding a mechanism that would encourage compliance and be a deterrent against non-compliance with a contract, once imposed by an arbitrator, that is more consistent with the role of regulatory agencies and more consistent with the role of a legislatively imposed arbitration scheme.

Hon. Ralph Goodale: Quite frankly, it sounds a little bit like wishful thinking. You have provided for the AMPs, the administrative monetary penalties, to be there but I don't think it's going to change the behaviour, or the circumstances—that the shippers obviously feel aggrieved. I think it's just not sufficient to correct the behaviour that was the cause for creating the review panel in the first place.

I have the same concern about the high-level language you described earlier—using the common carrier obligations that have been in the act from time immemorial, which obviously the shippers think have not worked. It is too vague, too general, too high-level.

What would be wrong with including language in the legislation, using that high-level service obligation nomenclature but then saying, “Not limiting the generality of the foregoing, here are specific things that fall within this definition”? You could satisfy what the shippers were asking for, and that is some specificity about what the term “service obligations” really means. Obviously the definition that's there now has not achieved the level of service that they think is appropriate.

Could you not have both: use your general language, but then run in some specific examples of what that general language includes?

● (1635)

Mr. Alain Langlois: I'll answer part of the question.

From a legal perspective, any time you put a list in legislation, despite the fact that the heading may be open or closed.... If it's closed, it's obviously what's in the list. If it's open, if you put in language such as, “Notwithstanding the generality of the foregoing, this is the stuff that seems to be included within the broader concept”, any time you do it you indirectly get to shrinking down what that big bubble at the top means. The longer the list is, the more courts are likely to look at the greater concept as comprising only matters that are limited to what is “described below”. There's always a risk, from a legal perspective, to putting a list in legislation.

The question is, do you need the list? Why would you put the list in? If you look at the precedent that has been established by the transportation agency through the years, the issue before the agency is rarely whether or not something that a shipper wants is captured by the concept. The question is whether the shipper is entitled to get it in the circumstance. It's never a question whether a switch is captured by “level of service”? It's clearly captured. The question is: in the circumstance, is this shipper entitled to whatever it is that they want?

I'm not aware of a lot of cases before the agency in which the agency came out with a ruling and simply confirmed that something a shipper wanted from the list of the elements we've seen is not captured by the concept of common carriers; it is. The question is always: what is just and reasonable in the circumstance, and is this shipper in the circumstance entitled to get what they're actually getting?

From my perspective, it's a false debate to get into the question of whether these things in the list are covered or not. In my view, they are covered, if we're talking about the same list—switches and all the things we've seen or discussed in the past, other than the two elements that Annette referred to earlier. The question has always been: are the shippers in the circumstance entitled to get what they want?

Hon. Ralph Goodale: There's one final thing, then, on that same point about how if you sometimes try to be more specific, you limit the definition of what you mean. One point of concern of the shippers is the constant repetition in the legislation of the qualifier “operational” before the word “term”. Based on the logic you've just described, if the word “operational” is included, it must be intended as a limitation.

Could you describe for us what is the difference between “a term” of an agreement and “an operational term” of an agreement? How is the one less than the other?

Mr. Alain Langlois: Yes. I'll give you two very simple examples.

The terms of an agreement are anything. A confidentiality provision of an agreement is a term of an agreement. It's not an operational term.

I've heard shippers and shipping groups say repeatedly that the notion of “operational” is not defined in the act. With all due respect, it's not true. The act currently defines the word “operate”. If you go to the French version, you see that it defines specifically *exploitation*, which is the exact word that we're using in the law to reflect operational terms or *termes d'exploitation*. So the word “operate” is defined in legislation, and it's broadly defined: it's any act required for the operation of a train. It was meant to be very, very broad, and we intentionally, at least from a drafting perspective, didn't define it to further reduce the broad definition that was already in the legislation with respect to “operate”.

If people expect that the words “operational term” will encapsulate every term of an agreement, that's not what the legislation was meant to do. My drafting instruction was that you do not...the intent was not to capture every single term of agreement. The intention was to capture the obligation of the railway on how it will deliver its common carrier obligation to the shippers. The operation itself and how they deliver their common carrier obligations were specifically meant to be covered. That's the reason the term “operational” is used.

Terms and conditions that are normally found in agreements, such as “termination clause”, “confidentiality clause”, and all of these normal clauses that you would find in an agreement, were not meant to be captured by the term “operational”.

● (1640)

The Chair: Okay? We'll stop it there.

Mr. Watson.

Mr. Jeff Watson: I think I was on the list for previous debate, but having said that—

The Chair: You're next on the list—

Mr. Jeff Watson: That's fine. I'll defer for now, but I'll get on the list for later.

The Chair: Mr. Poilievre.

Mr. Pierre Poilievre: What would be the impact of removing “operational”?

Mr. Alain Langlois: From the policy standpoint, a decision can be made. It opens it up.

Mr. Pierre Poilievre: To...?

Mr. Alain Langlois: It's not for me to judge. From a legal standpoint, if you remove “operational”, everything gets included: price, although there is a specific exclusion for price, but the amount of the charge could be up for debate.

Any clause that we normally would find in a contract would be up for discussion. If I put myself in the shipper's position, it wouldn't be a good thing for a shipper. As I've said to the department time and time again, the shippers don't want the arbitrator to have the ability to force on them a volume commitment, for example. If you were to remove “operational” from proposed section 169.37 you essentially would allow an arbitrator, in response to a request from a shipper, to impose terms: an ability for the arbitrator to force the shipper to commit all the volume of a client to that railway.

From a legal standpoint, if you remove it, you open the legislation up to everything, everything that could be the subject of a contractual agreement between shippers and railways. I'll stop there.

Mr. Pierre Poilievre: Are prices regulated elsewhere?

Mr. Alain Langlois: Yes.

Mr. Pierre Poilievre: If you remove "operational" and see arbitration take responsibility for pricing, you would have a duplication of that role.

Mr. Alain Langlois: The only comment for prices.... The language of the legislation right now makes it clear. We've put in a section that says for "greater certainty" price is not to be captured within arbitration, so price would probably not get captured because of that clause, but everything else likely would.

Mr. Ed Holder: I'm sorry, but can you explain "everything else"? What does that mean?

Mr. Pierre Poilievre: He wants a list of everything else.

Mr. Ed Holder: I want to understand what that means.

Mr. Pierre Poilievre: For the list—

Ms. Carolyn Crook (Director, Rail Policy, Department of Transport): Of things that might be included if you were to remove it...? You could have items on which there were specific decisions not to include, such as, for example, a detailed penalty regime. If you were to remove the word "operational", that could be included in the arbitrator's decision.

There's the notion of an embedded dispute resolute process, the request that an arbitrator have the ability to impose a sort of second-tier dispute resolution process to deal with issues arising in the implementation of an imposed agreement in terms of determining whether there has been a failure in service, in terms of imposing different consequences or compensation.

All of those could be deemed as being now available and within the purview of what could be included in an arbitrated agreement, and the policy decision had been not to increase the scope to that breadth.

Mr. Pierre Poilievre: On the issue of penalties and awards, are there other arbitrated agreements imposed on parties that include predetermined penalties in any other sector?

Ms. Carolyn Crook: I think the only thing we've found is not directly comparable because it's a voluntary system. I believe one of the shippers, when they were here, mentioned the grain exchange. That provides a comparable model, although it is something that parties voluntarily enter into. When they choose to operate through this commodity exchange, they're basically signing on to all the rules and obligations that are laid out.

So something like that does have pre-established penalties or compensations that would be associated with various failures, for example, to deliver your grain at the prescribed time. But that was something that both parties had entered into voluntarily. It's not akin to what would be happening here in the legislation with an outside third party imposing and pre-establishing what the penalties would be.

● (1645)

Mr. Pierre Poilievre: So there's no example of where an arbitrator imposes a predetermined penalty in a contract.

Ms. Carolyn Crook: No, not that we've found.

Mr. Alain Langlois: I mean, the nuance, I would say, is that unless the party agrees that the arbitrator would actually be entitled to do that—

Mr. Pierre Poilievre: Which is impossible because of the verb I used: "imposed".

Mr. Alain Langlois: Yes.

Mr. Pierre Poilievre: And in this case, it is imposed.

Ms. Carolyn Crook: Yes.

Mr. Pierre Poilievre: So there is no parallel example of a predetermined penalty imposed by an arbitrator on parties to a forced agreement.

Mrs. Annette Gibbons: Not to our knowledge, no.

Mr. Pierre Poilievre: Thank you.

The Chair: Mr. Toet.

Mr. Lawrence Toet: I am looking for some overall clarification on a few things I see in here that seem to be at odds with each other.

I want to start with the creation of the bill, which was meant to drive commercial negotiations, from my understanding, and to be a backstop for that. Really what we're trying to do is drive both parties, the shippers and the rail companies, to commercial negotiations. This arbitration process is hopefully something that is not made use of, or, if it is, very rarely made use of.

Do I have that intent correct?

Mrs. Annette Gibbons: Definitely. In fact shippers have told us that they hope they don't have to use this and that the legislation was structured in a way that there's a right for a shipper to ask a railway for a surface agreement. Essentially that's a commercial agreement. In the event that's not successful, then the second step would be to go and ask for arbitration.

It's very much geared towards encouraging the commercial negotiation in the first instance.

Mr. Lawrence Toet: That being the case, then, I would say that the less prescriptive we are in the formal arbitration process as to what must be included in it—not what can be included but what must be included—the more we leave the door open to those commercial negotiations occurring.

If we have a very prescriptive set in there of exactly what has to be covered in this agreement, we're actually making it much more difficult for the commercial negotiations to conclude. We have this backstop that's not really a backstop anymore; it becomes a piece of legislation that actually says what has to occur.

Mrs. Annette Gibbons: At the same time, the bill does allow for a process and gives the arbitrator a very broad scope to resolve service issues that are not addressed in a commercial negotiation.

The way the bill is structured does ensure that when a shipper comes forward and says they can't get agreement on the three elements of service that are very important to them, the arbitrator will have scope to address those.

So it is designed as a backstop while still ensuring that there is power with the arbitrator to address a broad range of issues.

Mr. Lawrence Toet: Right, but that comes back to, I guess, what Mr. Langlois was talking about, the fact that the more prescriptive we are in that process, the less likely it is we can broaden the arbitrator's ability as he goes forward in the process.

We've said these things must be covered, and that makes it much more difficult for him to move outside of that. Everything that we put in that's a prescriptive item is....

Mr. Langlois referred to the operational aspect of it. I'm just asking this to get clarity in my own mind; with things like operational, basically the message I got was, to the shippers, be careful what you're asking for, because you may get something that you didn't really want in the first place. This may be a very deficient thing in this.

Again, that's why you've tried to keep this as broad and as open as possible, to allow the arbitrator, if it does come to that backstop position, to really be able to look at the overall picture as opposed to, "Here are the issues you must deal with as you go through the arbitration process".

If I were a shipper, I'd be looking at that and saying, well, actually, it's fairly advantageous to me, because it really does allow me to raise a lot of different things with the arbitrator going forward, and he is allowed to look at those.

Is that correct? Is that the whole intent here?

● (1650)

Mrs. Annette Gibbons: Yes.

Mr. Lawrence Toet: The last thing I want to talk about is the whole idea of including penalties for breaches. Again, if we have commercially negotiated contracts, it's wide open to having breaches negotiated within them. It works to everybody's favour not to get to the point of going to this arbitration but to have a normal commercial contract, so to speak, that may include penalties for breaches, which is very difficult to do in our legislative process.

As I go through some of these items, I see a lot of prescriptive things being asked for. Yet when I get further down, when we start to talk about some of the other clauses, we are trying to broaden it out again. We're basically saying that now all of a sudden we want to have everything included in it.

I seem to get this mixed message. I don't know whether that's a messaging that the department's been getting from the beginning, and if that's why you came to the conclusions you did as far as how you've formatted this bill, that you were getting these messages that we want to have this really tight in, but we also want to have this broad perspective.

Was that, through the whole process, something that you were dealing with and were trying to bring forward in the final wording of this legislation?

Mrs. Annette Gibbons: The department had issued some parameters for the intent of the bill before consultations began last summer. One of the things made clear in that document was that the new provision was not intended to alter existing provisions in the act.

Certainly some of the points raised by the shippers about changing the common carrier obligation fell outside the scope of what was intended for the bill. There definitely was that consideration of the desire for very prescriptive language versus consideration of how the rest of the act is drafted, the approach that's taken. Yes, it's very high-level, but we also know that there's quite a bit of jurisprudence from various court decisions and agency decisions that gives meaning to the common carrier obligation, and therefore will also inform this new service agreement provision.

Knowing what the common carrier obligation means, what service issues are faced by shippers, and then considering how the rest of the bill is drafted, there was a decision to make around the approach: whether to be very detailed or to go with that higher-level approach. In the end, the government took the decision to go with higher-level language consistent with the rest of the act, knowing that this is in fact a fairly broad approach to service.

Mr. Lawrence Toet: But the higher-level language was intentionally brought forward—

Mrs. Annette Gibbons: Absolutely.

Mr. Lawrence Toet: —to create within the act the ability to move it and to actually broaden the need for...in the arbitration process, if need be, so that it could include more items rather than defining them down to a small list saying these are the items that are going to be in the process.

I guess that's what I'm trying to get some clarity from the department on. It seems to me that the shippers are saying that we're not achieving that, the way the bill is formatted today, and yet you're saying, if we would be more prescriptive in it, we'd actually be working against what they're trying to achieve.

That's my sense from the feedback I'm getting today, that the department would say that the danger is that in doing some of these things, you're actually getting less than you thought you'd be getting in the bill today.

Mrs. Annette Gibbons: The removal of the term "operational" certainly could have very unintended consequences from a shipper perspective, because it does, as Alain pointed out, allow for the possibility of the railway asking for volume commitments to be imposed on the shipper, or infrastructure changes to be imposed on the shipper, as part of the contract that's imposed.

● (1655)

Mr. Lawrence Toet: Thank you.

The Chair: Ms. Chow.

Ms. Olivia Chow: Should we not restrict arbitration to matters submitted by the shippers, not by the rail companies? There's a complete imbalance of power. If everything can be solved through the commercial front by commercial agreement, then absolutely, you're right: the less restrictive the better and everything can be worked out in the commercial agreement.

The problem is that the shippers really don't have a lot of power since it's a monopoly. You either take it or leave it. It's hard to actually get a good agreement commercially, which is why we have this legislation. It's really a protection for the shippers.

Putting that as the cornerstone for why we need this bill in the first place, would it then not make sense to restrict the arbitration matters to ones that are submitted by the shippers, not by the rail companies? If not, then the rail companies can say "let's put volume on the table", and sometimes you get more grain and other times you get less. Putting volume on the table is very difficult for the shippers. One of my amendments actually restricts the arbitration just to matters raised by shippers.

Mr. Alain Langlois: The legislation already does that. I can walk you through it. The legislation already restricts arbitration to the issue that the shipper puts on the table. If you go to 169.39, you see that the arbitration gets triggered by the shippers. In their application, the shipper has to detail the matters that are to be arbitrated. That's proposed paragraph 169.32(1)(a). Everything is focused on that from that point on. On day 10, the shippers and the railway file their proposed terms to resolve the matters that have been raised by the shippers, not—

Ms. Olivia Chow: But in the bill you have a clause that allows the rail companies to say that "this should not be part of the arbitration". You have that clause in there that allows the rail companies to come in and say yes or no to different matters and bring up different matters.

Mr. Alain Langlois: Well, the legislation does allow the railway to come in with their own proposal—

Ms. Olivia Chow: Absolutely.

Mr. Alain Langlois: —but their proposal to resolve the matter that's been submitted by the shipper. The legislation is very clear on that. The shipper raises the matter. The offers that are put on the table have to be offers to resolve the matters raised by the shippers.

The matters raised by the shippers are referred to an arbitrator. If you go to proposed section 169.37, you see that the role of the arbitrator is to establish terms to resolve the matter that has been "referred to him or her", which is the matter that's been raised by the shippers. The process itself is to resolve the issue that has been raised by the shippers only, nothing else.... The railway can't come to the table and raise something that has nothing to do with the matter that has been raised by the shipper in regard to the arbitration.

Ms. Olivia Chow: I wasn't sure that was how I was reading it.

Let me just ask you this. You said in response to my earlier question, which my colleague Mr. Sullivan picked up on, that volume cannot be—

A voice: Operational—

Mr. Alain Langlois: Imposed. Enforced.

Ms. Olivia Chow: The term being operational.... Correct?

Mr. Alain Langlois: The arbitrator doesn't have the ability to force that term on the shippers in its decision.

The Chair: Thank you.

Mr. Watson.

Mr. Jeff Watson: Thank you, Mr. Chair.

With respect to a breach of a service level agreement, currently the situation is that the courts can, in a commercial-to-commercial agreement...right? You go to the courts for remedy and presumably they are to enforce penalties that are agreed upon, or a mechanism that is agreed upon, in an agreement. That right is not removed from the shipper, with Bill C-52, they can still do that. The addition is the administrative monetary penalty. That would be for breach per service level agreement of up to $100,000. There are obviously dozens and dozens or more service level agreements so multiple breaches, if you will, of up to $100,000 are a new feature that could be applied in the event that rail companies are not acting in good faith. Is that correct? So there is significant deterrent value to the addition of the administrative monetary penalty.

Returning to the Coalition of Rail Shippers presentation for just a moment, I want to probe a couple of things here.

The second issue they raised is around operational term instead of term and they said that the expression "operational term" eliminates the shipper's ability to address non-rated items in or missing from a confidential contract or tariff such as *force majeure*.

What is a *force majeure* clause, for my own understanding, first of all? Are the shippers accurate in saying these clauses could not be included unless the bill is amended?

● (1700)

Mr. Alain Langlois: A *force majeure* clause in very simple terms is usually if you have a contract a party can agree on what's going to be a *force majeure* and whether a party will be excused from performing if a *force majeure* occurs.

For example, I have to deliver cars and there's a tornado or an avalanche and the trains are stopped because the track is wiped out and the railway can't fulfill their obligation. The parties can agree in the contract that if there's a *force majeure* like that the railway is relieved of its obligation to perform.

Whether or not the concept of *force majeure* is captured by the existing legislation, the answer is yes, it is captured. Proposed paragraph (a) of proposed subsection 169.31(1) captures the notion of *force majeure*.

When we allow an arbitrator to establish the operational terms of the railway with respect to loading, unloading, and delivery of traffic it includes what they have to do and also includes under what conditions they are not obligated to do what the arbitrator will decide is going to be their obligation.

So it not only includes *force majeure* but it includes other issues that could be put on the table with the railway or the shippers. For example, a problem with the congestion at the port terminal that could affect both the railways and the shippers. Technically speaking that is not *force majeure* but that's something the arbitrator could look at and impose a term on under proposed paragraph (a) of proposed subsection 169.31(1).

Mr. Jeff Watson: I am looking at Liberal-1 and NDP-1 for a moment, which form the basis of the first issue raised by the Coalition of Rail Shippers, effectively defining adequate and suitable accommodation and service obligations.

I take particular note in the way that it's done, “a railway shall be considered to have fulfilled the service obligations referred to...if it has carried them out in a manner that meets the rail transportation needs of the shipper”. Does this effectively vault the right of the shipper, if you will, above network operations in the consideration of obligations?

Mrs. Annette Gibbons: This section is specific to the new service agreement provision—the right to ask a railway for one—but that provision makes a reference back to service obligations as being the service obligations in the common carrier obligations. So this would essentially be changing the definition.

In terms of what “adequate and suitable” means, there's a lot of jurisprudence regarding “adequate and suitable”, and certainly in practice, consideration has been given to providing service that meets the needs of the shippers and also reflects the railways' overall operations. There have been discussions with shippers on this concept of making shippers' needs paramount, so there would be a change in the current standard of service under the act.

● (1705)

Mr. Jeff Watson: The evolving jurisprudence defines “adequate service” and not necessarily “perfect service”.

What did the court say with regard to the common carrier obligations? It is my understanding that they've established that these obligations are not necessarily absolute either but that they're situational or circumstantial, if you will. I guess that's the effect service level agreements have on the network.

That would strike, I presume, at the heart of why we can't be prescriptive with respect to prejudging potential penalties or damages, because individual breaches would have to be investigated and penalties or damages would have to be determined considering the situation and conditions including network operation.

Thanks.

The Chair: Mr. Poilievre, go ahead, please.

Mr. Pierre Poilievre: Performance standards require performance metrics. There is a difference between the two and there's a difference in interpretation as to whether just one or both should be included. Some of the shippers believe that metrics are not included or provided for under the proposed statute. Others brief me that they are. Which answer is the right one?

Mrs. Annette Gibbons: The intention certainly was to include performance metrics. The specific reference to performance standards is a specific example of what an operational term might include. It certainly, of course, was not meant to be exhaustive. But in the case of performance standards in particular, the intent was definitely that if standards were going to be set, there would have to be a mechanism to measure adherence to the standards, and that, of course, would be the metrics.

So it has always been the intent and our interpretation of the draft of the bill that they would be included.

Mr. Pierre Poilievre: Mr. Langlois, on the question of consequences for non-compliance, in addition to the administrative monetary penalties set out in the bill, can either party take action in a court of law in the case of alleged non-compliance by the other?

Mr. Alain Langlois: Absolutely. There is no restriction that prevents a party from doing that. The legislation makes it clear that the decision of the arbitrator is to be deemed to have the same force as the contract and should be enforced as such. If there is a failure, it is expected that a party will go to court and seek whatever compensation it can obtain through the normal court process.

The Chair: Mr. Holder.

Mr. Ed Holder: Thank you, Chair.

I heard the member opposite say that it's hard to get a good agreement. I heard that several minutes ago.

It seems to me that this is why we started this whole process to begin with. This is not the first minister who's tried to tackle this issue, but is the first who's really brought it to this point, where it looks like we will have a bill in place.

I recall it being said at some meeting before—it might have been Mr. Watson—that when both sides are a little bit cranky, it's probably not a bad bill.

I'm not sure if you intended just to get people cranky, but it strikes me that there are some “gives and puts”. I recall asking at a prior meeting why it ever had to get to this point. That's almost immaterial at this stage, except I think that what we're trying to do is change mindsets, and perhaps change expectations, certainly of the players involved.

I apologize for putting it this way, but have you done any best guesses as to how often you think, as a result of this legislation, an arbitrator might have to be involved? We heard some comments earlier today that there's a hope that they don't have to be used. You hear that a lot, but I would presume, in your analysis of this, you have some sense of what you might imagine the reality of that to be. It's one thing to have best intentions, and then there's reality.

Have you put some thought as to how often an arbitrator might really have to get involved in these kinds of discussion? Or do you think—I guess as a corollary to this—you've put in sufficient legislation to compel both parties to not want to go to arbitration? I guess that's the real question when it's all done.

Do you have any thoughts about that, please?

● (1710)

Ms. Carolyn Crook: We certainly gave a lot of thought to what the volume might be. Generally we think that there would be a very limited use of the remedy, that because it creates the incentive for commercial negotiations, in most instances parties would reach agreements commercially. It certainly gives them the added incentive to do so.

In those few instances when there are issues that are outstanding and that they are not able to resolve, then they do have this backstop remedy.

Though we didn't come up with a specific number, we'll definitely be watching.

Mr. Ed Holder: I think we all will be, actually, when this is done.

The question of operational has come up a number of times throughout this discussion. Of course with the witnesses we had, particularly the shippers, feeling so strongly about it, if "operational" were removed from the bill, do you think that would force more arbitration interventions?

Mrs. Annette Gibbons: That's a good question. I think at the end of the day the use of the term "operational" was really intended to ensure that there was broad coverage of the vast range of service issues that a shipper may wish to have arbitrated, to ensure that the coverage was there while at the same time limiting the scope of arbitration to service issues and not broadening it out to include financial penalties, and also avoiding the inclusion of obligations on shippers in terms of volume commitments and those sorts of things.

The decision around it was really a policy decision around what the right scope is. The focus is very clearly on service and a broad range of service issues that we know shippers have raised in the level of service complaint mechanism under the legislation now, the Canada Transportation Act.

As to whether or not there would be an impact on the volume of arbitration requests if we changed the language, it's possible that there may be more. If penalties were covered, for example, and a shipper really wanted to address that issue, wanted to seek arbitration, then that may increase the number. It's a possibility, but it's very difficult to say.

At the end of the day, we do hear from shippers that they really don't like to use remedies under the act, because it's a process, and they just prefer to settle things commercially. That's the agreed approach of everybody. They've told us that they want to have it there in case they need it, but they really hope not to have to use it.

Mr. Alain Langlois: If I could add to that, we have to bear in mind the other concern, which is that the process in and of itself is pretty short. Legislation establishes the process: you come in and you come out in 45 days. If you remove "operational" and open it up to every possible contractual issue that could arise between the shippers and the railways—

● (1715)

Mr. Ed Holder: What's the potential extension of that? Can you help me understand what that would be? Let's say we included.... You've just said that there would be more factors brought into play. What would be the potential of delaying a decision beyond the 45 days? Any speculation on that?

Mr. Alain Langlois: Well, right now the legislation doesn't allow a lot of flexibility. It's 45 days. The arbitrator has an ability to extend to 60 days in circumstances, so at the tail end of the process it's 60 days, unless the parties agree otherwise. If you're asking an arbitrator to deal with potentially every aspect of a contractual relationship between the railways and the shippers, 60 days is pretty short—

Mr. Ed Holder: Mr. Langlois, when you were having this dialogue with all the parties as you were putting together your thoughts towards the bill—and I'm not sure if it was you directly or your colleagues at the table within your department—clearly you weren't moved, then, by the shippers' position as it relates to the reference to "operational". Why was that?

If I recall the clauses, and I do recall them, the word "operational" was I think in every one of them, maybe save one. It was really the issue that the shippers have hung on. That seemed to be their raison d'être with the amendments, but you weren't moved by that to suggest that you wanted to include it in the legislation. Why is that?

Mrs. Annette Gibbons: This never came up in the discussions with shippers because we weren't at the level of the actual language that would be in the bill; it was the concepts of what would be covered. There was a list given of "here's what we want to be covered" and, in the end, the government decided that "we're going to cover this much and we're not going to cover these items here".

That's what shaped the use of the term "operational". It was to set that framework to include most things shippers asked for but to deliberately not include other things. The use of the term was very much a technical part of the drafting process, if you will, to capture the policy intent.

Mr. Ed Holder: Just so we don't imagine that this is all one-sided, because we do have another party or a series of parties called "the railways" involved and when they provided some thoughts to you, they've been very candid. What we have heard in testimony is that they would have preferred that this not happen at all. I recall asking in one of my questions, "Why did we ever get to this point?" As I say, that's less critical than the fact that we are now at this point.

To what extent did the input you received from the railways affect the legislation that you put in place in support of them as well? Because you can't have one party without the other party; it's clear that a symbiotic relationship is necessary. You need products to ship and that's what the shipper does, and in good faith the railways should be doing what they do. What was your response to the railways in terms of the input they provided you, please?

Mrs. Annette Gibbons: Well, there certainly was a policy direction to reflect the fact that railways are required to provide service to all shippers and that they are operating in a network environment. Certainly, the decisions around "adequate and suitable"—the common carrier obligation—have always reflected that the railways have those obligations to all shippers and operate in a network environment. That was carried over to this new provision, if you will. That was certainly a position that the railways had put forward that is reflected in the bill.

There are other things that are not there. The railways had asked that there would be mediation as a mandatory first step. In the end, the requirement for the shipper prior to requesting arbitration is simply to demonstrate that an attempt was made to reach an agreement commercially. Some things are reflected and some things are not reflected.

Mr. Ed Holder: In that spirit, I wonder if you would be mindful, Chair, that I have a few moments?

The Chair: Yes. The bells haven't started yet, so we'll go ahead.

Mr. Ed Holder: Sure. I'm not trying to dominate, but I'm just trying to understand this dialogue here, because it always takes both parties to do a deal.

One might assume that because of the historic relationship that railways have and, if you will, a certain amount of extra influence over the process, do you think there's enough...? I say this in total good faith: is there sufficient protection for the railways in this balance back and forth? It's just so that we get that other perspective, because we've spoken at length about shippers and, of course, beyond the shippers are the people that actually have to produce the goods to be shipped.

We understand that we have an obligation and that the intent of this bill is to try to find that balance, but do you feel that there's sufficient here to protect the interests of the railways as well, as a result of this bill?

● (1720)

The Chair: That's your last question, Mr. Holder.

Mr. Ed Holder: You have been very generous. Thank you.

Mrs. Annette Gibbons: Railways have been increasingly making use of service agreements. It's something that seems to work well for them in better defining their relationships with shippers. In that respect, a regime that encourages the use of commercial agreements is very much in keeping with what has been happening commercially, and is therefore felt by the government to be something that is manageable for the railways. The provision is manageable.

The Chair: Thank you.

Everyone knows there will be no committee meeting Thursday afternoon. I want to take this opportunity to thank our witnesses. I also want to wish everybody a very happy Easter. We will see you in two weeks.

The meeting is adjourned.