

Risky business



Image courtesy of CN Rail

How rail reliability affects shipper liability

In a country like Canada, shipping by rail carries some inherent risks. Even with service improvements from the railways, derailments and delays are a matter of course. In these cases, shippers can often find themselves on the hook for the damage. **Deborah Aarts** learns how to stay protected.

You just can't beat rail for economies of scale.

For Canadian shippers, that's frequently what choosing ground transportation comes down to. Moving product by locomotive is cheap, especially compared to trucking. And according to the industry's own numbers, it also has a significantly smaller carbon footprint.

But in a country like Canada, rail is seldom the most reliable option. The two Class 1 rail providers—CN and CPR—crisscross vast stretches of land on what often amounts to a single band of track.

This makes the mode susceptible to—and uniquely restricted by—interruptions like nasty weather, derailments and whatever unforeseen disruptions the Canadian landscape can throw at it. Add a volatile labour situation to the mix and you have a transportation option that amounts to risky business.

Ask anyone who had cargo on the tracks in western Canada last winter. As adverse operating conditions hammered both CN and CPR, the number of backlogged containers sitting at Vancouver ports climbed into the thousands. This meant that shippers had to deal with delay after delay. And as climate conditions worsened, many railcars went off the tracks. This meant shippers had to deal with damage to cargo.

Tony Benincasa, general manager of transportation and imports with HBC, was one of them.

He understands that rail companies cannot change the weather. He also gets that labour disruptions and derailments are not always preventable. But as he tells *MM&D*, he's not certain that the railways are blame-free. He argues that aggressive acquisitions of new lines and services have stretched Canada's two main rail companies too thin in recent years, hampering their ability to react when something goes wrong.

"Have they kept pace with their asset management groups in ensuring that they have their assets deployed

in the right place at the right time? Have they put too big a strain on certain aspects of the lanes they operate?" he asks. "I'd have to say yes, that's the case."

Some service improvements

Representatives of the rail industry seem keen to dispel such perceptions. In fact, their figures reveal that Canada's freight trains are more reliable than ever.

"Canada's railways are world leaders in safety," says Bruce Burrows, vice-president of public and corporate affairs with the Railway Association of Canada. He adds that the industry "continues to make improvements in safety and productivity while handling more business, reducing highway congestion and introducing new technology and processes."

Numbers back him up. There were 1,109 rail-related accidents in Canada to the end of October of last year, down from 1,158 to the same time in 2006, and also down from the 1,177 average over the past five years. Overall, accidents per million train miles declined from 14.51 to 14.27 from 2006 to 2007, and from the five-year average of 15.25. So in terms of derailments and unscheduled disruptions, the railways do seem to be improving their game.

They also appear eager to improve their responsiveness to service interruptions. CPR spokesperson Brianne Feigel explains how her company performs triage when things go awry. (CN did not respond to *MM&D*'s request for comment on this matter).

Immediately after an incident occurs, Feigel says CPR's first priority is to make sure the people involved are safe, and that no environmental damage has occurred. From there, the company will post a bulletin on its website to let the public know what it is doing to move shipments, and what delays should be expected. And for those whose freight is actually on a derailed car? If a shipper's cargo is directly involved, "the customer is contacted directly."

After the tracks are clear and the trains restored, the full investigation into what went wrong begins. Shippers, government representatives and third-party contractors become involved in the process, which can be lengthy—in many cases, as long as a year.

"It is a long process," Feigel says. "We're not interested in making any mistakes. When an incident happens, obviously the end goal is to prevent similar incidents from happening in the future. We don't take it lightly."

This focus has motivated her company into taking extensive precautionary steps to keep trains moving after service interruptions. This includes strategically placing extra equipment along the rail line in case things go wrong. Going forward, this will also involve new crews and extra locomotive power to offset any delays.



Who's to blame?

No matter how well-oiled the rail companies become in their ability to respond to problems, the risk for rail shippers will never truly disappear. As long as trains continue to navigate Canada, there will be delays and disruptions—and resultant damage to cargo. To mitigate the negative effects, shippers need to learn how to protect themselves as much as possible.

It starts with figuring out who is to blame when a disruption occurs. The problem? It can be tremendously complicated.

In some instances, the railways are clearly and undeniably at fault. Eckart Russell, managing director and global rail transportation practice leader of Marsh Canada, looks after the insurance and risk management needs of both CN and CPR. In his experience, the carriers are almost always liable for any damage caused to cargo as a result of their own mismanagement, negligence or service interruptions.

"There's no question that the railroads are fully responsible for all the damage they do to those goods, whether it is through force majeure or other events," he says. "They cannot get out of that responsibility."

In fact, Russell says that such damages are so significant that Canadian freight railroads tend to self-insure rather than pay high premiums.

But damaged cargo is seldom attributable to simple rail misdeed. Rail traffic liability regulations are knotty, with plenty of grey areas.

Russell explains. "At the end of the day, it is a matter of establishing who is negligent. Much of the time the railroad is on the hook first. But it may fall on the shippers if they've done something wrong, like labelling the product wrong, or putting a defective railcar into the carrier's custody, or not properly filling or storing or packing the cargo—those kinds of things."

Know your rights

This is where things start to get complicated for shippers.

Marvin Huberman, a Toronto-based lawyer who has represented shippers in claims against both CN and CPR, says rail liability can be incredibly complex, involving contract law, common law and regulatory law, among others. His top piece of advice for shippers: do your homework.

"You must determine who is responsible to whom, and what damages flow from that liability," he explains. "Grafted onto the damage issue, you have to ask many things. Has anything been set off from those damages? How do you quantify those damages? Are there any limitations on the damages

claimed? What about contributory negligence? What about insurance?"

The answers to these questions can normally be found in a contract with a carrier. This, Huberman says, is where shippers must truly tread carefully. Often, carriers will include limitation or exculpatory clauses in their contracts that allow them to wriggle out of responsibility for cargo damage, even when their trains have malfunctioned, derailed or stopped—whatever the case may be.

Canadian railway traffic liability regulations outline several instances where a rail carrier is not responsible for loss or damage, including strikes, lockouts and acts of God. One of them is a defect in the goods being shipped. If a product has any inherent weakness that may react negatively to the conditions of rail travel, the carriers can build a case that the damage was actually the result of the product's inadequacy.

It is also common for carriers to argue that product damage is the result of shipper negligence—say, that the carton was packed incorrectly, or that inaccurate dimensions were provided. If the carrier can prove any such carelessness on the part of the shipper, the shipper will usually end up bearing responsibility.

If these rules seem unfair to shippers—well, in many cases, Huberman comments, they are.

"The prevailing atmosphere is very much in favour of the railways," he says. "Shippers have to beware, and also be aware. Knowledge is power."

The Canada Transportation Act is a good place to start. It outlines instances where carriers are not liable—but it also details many situations where they are. It details what kind of notices carriers must provide about damage or delay of goods, and what kinds of items—like dangerous goods, or goods of extraordinary value—may be exempt from traditional rules or obligations.

Huberman suggests studying up on these provisions before starting or renewing a contract with a carrier.

"Try to negotiate," he says. "The bargaining power that the shipper is able to bring is extremely important, especially in the negotiation period. Many of these provisions, especially when it comes to regulations, can be affected or modified by contract. If shippers are aware of the rules, they can at least attempt to negotiate arrangements more in their favour."

If all else fails, the Canada Transportation Act contains section 161, which affords shippers the right to final offer arbitration if they are dissatisfied with conditions of carriage. This brings the dispute before third-party arbitrators—a much cheaper and quicker means to solve a disagreement than litigation.

Rating the risks

This may all seem to be more trouble than it is worth. Of course, if shippers are truly dissatisfied, they can always switch to another railway, or perhaps to trucking companies. But given the economic and environmental rewards many find in rail, shippers tend not to make such a move lightly. Benincasa, for example, says that rail performance would have to be truly poor to make him reconsider his transportation options—but says that he would do it, if the situation became bad enough.

"For large shippers, the volumes make it difficult for us to just arbitrarily say 'okay, we're going to change our mode of transit,'" he says. "Now, if the problem is sustained in any way, we'd absolutely consider another option. We will all take steps to mitigate our own risk."

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