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May 15, 2019

Ms. Cynthia T. Brown  
Chief, Section of Administration  
Office of Proceedings  
U.S. Surface Transportation Board  
395 E Street, SW  
Washington, DC 20023

ENTERED  
Office of Proceedings  
May 15, 2019  
Part of  
Public Record

Re: Docket No. FD 35068, *Soo Line Railroad Company d/b/a Canadian Pacific Railway – Acquisition and Operation Exemption – BNSF Railway Company*

Dear Ms. Brown:

This letter is Soo Line Railroad Company d/b/a Canadian Pacific (“CP”) response to the Board’s April 22, 2019 decision (the “Decision”) in the above-referenced matter and to New Century Ag (NCA)’s letter filed April 26, 2019.

Alternative Avenues of Relief

In its Decision, the Board advised that a complaint for competitive access, breach of common carrier obligation, or unreasonable practices would be “more appropriate” avenues for NCA to pursue than a petition to revoke. The Board asked NCA to inform the Board if it intended to pursue any of these alternative avenues of relief. In its response, NCA informed the Board that it will not pursue these avenues of relief because “neither of those options are appropriate or reasonable under the circumstances.” NCA concedes that with regard to a competitive access claim, NCA would not be able to satisfy even the relaxed standards proposed in EP 711. CP agrees that pursuing such other avenues of relief would neither be appropriate nor reasonable under the circumstances here. Those circumstances include the following:

- CP faces effective competition for NCA traffic, including vigorous intramodal competition from BNSF pursuant to the Haulage Agreement;
- CP voluntarily renewed the Haulage Agreement, thereby voluntarily extending the 2007 transaction’s voluntary competition mitigation measure;
- CP is providing NCA with reliable and consistent rail service, timely satisfying NCA’s requests for rail service;

- NCA had, and continues to have, opportunities to secure additional CP shuttle trains which opportunities NCA has foregone; and
- NCA's core claims, *i.e.*, that CP restricts the number of BNSF cars on existing CP trains, refuses to handle BNSF unit trains in haulage, and sought to terminate the Haulage Agreement, are all actions that are provided for under the express terms and conditions of the Haulage Agreement. That Haulage Agreement was part of the 2007 public record of decision in which the Board approved CP's acquisition of the line.
- Prior to the 2007 transaction, the line serving NCA was poorly maintained, regularly subject to lengthy embargoes, and faced a loss of competitive rail service as BNSF contemplated abandonment of its ownership interest. The transaction resulted in rehabilitation of the line, improved rail service, more efficient rail operations, and preserved and revitalized competition – all of which NCA continues to benefit from today.

Notwithstanding these facts and NCA's concessions that it does not have sufficient bases for seeking alternative avenues of relief, NCA urges the Board to grant its Petition to Reopen or Revoke. The relief that NCA seeks -- the unwinding or the imposition of new terms and conditions on a minor transaction more than eleven years after the transaction was consummated -- is extraordinary. The fact that NCA, by its own admission, could not prevail on the "more appropriate" avenues of relief is all the more reason why the Board should reject NCA's petition seeking extraordinary relief.

In its letter, NCA makes several unfounded and misleading assertions regarding what "the undisputed record demonstrates" in this proceeding. CP believes that it is important to set the record straight as the "undisputed record" does not support NCA's many assertions. For example, NCA asserts that the record shows that CP "placed artificial limits on the number of cars BNSF can handle for the account of NCA." In fact, the record shows that, CP sought to limit BNSF volumes due to operational concerns. Those limits were based on availability on existing CP trains as expressly provided for in the Haulage Agreement. Further, the record shows that despite those limits which were established in 2008, for several years after the transaction BNSF moved the vast majority of traffic tendered by NCA. Likewise, while NCA is correct that CP has not agreed to handle BNSF unit trains in haulage, the record does not demonstrate that CP "cannot accommodate NCA's needs" as NCA asserts. To the contrary, CP provides reliable service to NCA consistently meeting their demand for rail service. To the extent that NCA "needs" additional shuttle train service, NCA has options to obtain such service from CP, but has opted not to avail itself of those options. Finally, NCA's assertion that BNSF's rights and obligations to serve NCA [under the Haulage Agreement] are subject to the Board's jurisdiction, is flatly inconsistent with well-established STB precedent and is an issue that is clearly disputed. Thus, NCA's claim that its assertions are supported by the "undisputed record" is simply wrong.

## Alternative Dispute Resolution

In its Decision, the Board also asked the Parties to inform the Board by May 22, 2019 whether each would consent to mediation. In response, NCA stated that it would participate in mediation that “should necessarily include having the railroads negotiate in good faith to (1) eliminate arbitrary restrictions on the volume of traffic NCA can tender, (2) permit BNSF to provide unit train service and (3) address any congestion or rail infrastructure issues that might interfere with the provision of adequate, competitive rail service to NCA.” NCA’s response presupposes the outcome and is neither reasonable nor a good faith basis on which to proceed with mediation. Moreover, CP and BNSF have already negotiated the terms of BNSF’s continued haulage access. CP has no interest in reopening such negotiations with BNSF. CP also notes that, under the Board’s rules, its “mediation procedures shall not be available in a regulatory proceeding to obtain the ... revocation of [an exemption related to the purchase of a rail line]. 49 CFR 1109.1.

That said, CP is always open to discussing with its customers, including NCA, how CP can best serve them. Topics can include rates and CP shuttle train access, and other CP service issues. CP is willing to engage with NCA either directly or using the existing dispute resolution services offered by the Board’s Rail Customer and Public Assistance Program and is willing to do so regardless of whether there is a proceeding pending at the Board.

Please let me know if you have any questions.

Respectfully Submitted,

/s/ David F. Rifkind

Counsel for Soo Line Railroad Company

cc: Parties of Record