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March 29, 2021

By E-Filing

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, DC 20423

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 submitted on behalf of New Century Ag (“NCA”) in response to the document styled “Response to BNSF’s Proposal” that Soo Line Railroad Company d/b/a Canadian Pacific Railway (“CP”) filed in this docket on March 22, 2021 with the request that it be accepted into the record of this proceeding. The Surface Transportation Board’s (“STB” or “Board”) permission is required because the Board’s December 29, 2020 decision in this proceeding (“Reopening Decision”) did not authorize such a response. For that matter, the Reopening Decision did not even ask or direct BNSF Railway Company (“BNSF”) and CP to submit separate proposals on March 1, 2021 on how to implement the findings and directive of the Reopening Decision, yet both carriers did so.

CP’s proffered “Response” marks the third time in this proceeding that CP has either ignored or abused the Board’s procedural rules and the fundamental rules of fairness in administrative litigation. Specifically, in its Petition for Reconsideration, Proposal, and now its “Response to BNSF’s Proposal,” CP has reargued rejected factual assertions and legal arguments

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and tried to introduce new evidence on disputed issues that have been well established since NCA filed its Petition to Reopen on December 20, 2018, and which CP had every opportunity to fully address in its Reply to NCA's Petition to Reopen ("Reply"). NCA notes in particular that the issue of alleged operational interference and congestion that would occur if BNSF and CP interchanged 100 car unit trains at Minot, ND was raised by CP in its Reply. NCA rebutted those allegations. CP then sought to introduce more "evidence" of such interference with unsworn statements by CP counsel and a CP business representative at the August 20, 2019 oral argument. BNSF representatives participating in that oral argument refuted CP's claims.

Additional allegations of such operational and other interference have now come in the aforementioned three filings submitted *after* the Reopening Decision.¹ These three filings have also (1) rehashed and recast the factual record; (2) reargued positions that were rejected by the Board in the Reopening Decision; and (3) raised new legal arguments and positions.² NCA objected to these actions by CP in NCA's Reply to CP's Petition for Reconsideration, and in NCA's Comments on the railroads' proposals. NCA objects again to CP's third attempt to reargue its case and expand the administrative record through its "Response."

NCA respectfully submits that the Board should either deny CP's request to accept its "Response" into the record or accept it solely for the purpose of evaluating its comments on the operational aspects of BNSF's Proposal and NCA's related plan of limiting the number of unit trains to two per month. Further, if the Board takes the latter approach, NCA requests that the Board direct BNSF to timely file a response to CP's allegations concerning interference and congestion caused by the interchange of unit trains at Minot.

Please do not hesitate to call me if you have any questions.

Sincerely,



Thomas W. Wilcox

Attorney for New Century Ag

¹ And yet, CP has still not provided any data or other specific evidence into the record of this proceeding as to the actual amount of traffic it transports over the affected lines, when such operations occur, and exactly how such alleged interference would occur.

² Indeed, CP has used its "Response" as a vehicle to untimely raise yet another a new legal argument, which is that it can unilaterally "terminate the 2007 transaction, returning conditions, including for BNSF access to the line, to the pre-2007 state of affairs" if the Board changes the status quo as seen by CP. Proffered Response at 2.

CERTIFICATE OF SERVICE

I hereby certify that, on this 29th day of March 2021, a copy of the foregoing Letter was served by email on all parties on the official Service List for Docket No. FD 35068.

A handwritten signature in blue ink that reads "Thomas W. Wilcox". The signature is written in a cursive style with a large initial 'T' and a stylized 'W'.

Thomas W. Wilcox