

REDACTED VERSION**EXPEDITED CONSIDERATION REQUESTED****BEFORE THE
SURFACE TRANSPORTATION BOARD**ENTERED
Office of Proceedings
December 21, 2018
Part of
Public Record

FINANCE DOCKET NO. 35068

**SOO LINE RAILROAD COMPANY D/B/A CANADIAN PACIFIC RAILWAY
– ACQUISITION AND OPERATION EXEMPTION –
BNSF RAILWAY COMPANY**

PETITION TO REOPEN

Pursuant to 49 C.F.R. §1115.4 New Century Ag (“NCA” or “New Century”) petitions the Surface Transportation Board to reopen this exemption proceeding or, in the alternative, revoke the exemption that was issued in the decision served September 7, 2007 (“2007 Exemption”).

The Board should reopen this proceeding and reexamine its 2007 decision granting the Joint Petition for Exemption of BNSF Railway (“BNSF”) and Soo Line Railroad Company d/b/a Canadian Pacific Railway (“CP”) (the “Joint Petition”).¹ Contrary to those carriers’ representations that grant of the exemption would preserve the competitive rail service available to affected shippers, that has not been true for at least the past four years. As described in the accompanying verified statement of Lynn Michelson, NCA’s general manager (the “Michelson V.S.”), CP’s actions, coupled with BNSF’s inability to provide the essential rail service NCA requires, have fundamentally undercut the basis for permitting the exemption to remain in effect. NCA requests that the Board reopen the proceeding either to (1) require that CP do what is

¹ As discussed below, NCA respectfully requests that this petition be given expedited consideration in view of the time sensitive nature of its needs for BNSF’s competitive rail service.

REDACTED VERSION

necessary to permit BNSF to provide the competitive service to NCA on which the STB based its 2007 decision or (2) revoke the exemption and require the railroads to unravel the 2007 transaction so as to restore BNSF's ownership interest in the line that was the subject of this proceeding.

I. IDENTITY AND INTEREST OF NEW CENTURY AG AND SUMMARY OF POSITION

NCA is a farmer owned cooperative that owns, maintains and operate grain elevators in northwestern North Dakota. On behalf of its farmer members, NCA purchases various types of grain produced in that region, arranges to have the grain trucked into its various facilities, stores the grain in large elevators designed for rail loading and markets the grain to both domestic and international consumers. Although it has three additional elevator facilities, the two that are specifically relevant to this petition are located at Noonan and Crosby, North Dakota. Those facilities are located on a line of railroad that has been solely owned by CP since 2007 but which previously had been jointly owned by CP and BNSF and over which both railroads provided service to NCA's facilities in direct competition with each other (the "Crosby Line").²

In 2007, CP and BNSF jointly sought and obtained an exemption permitting CP to acquire BNSF's interest in the Conveyed Lines based on representations made by the railroads

² The Crosby Line was referred to in the 2007 Exemption as the "Joint Line" and consists of (1) a 32.54-mile rail line located between BNSF milepost 89.5, at Crosby, and BNSF milepost 56.96, at Lignite Junction, ND; (2) the 1.16-mile connecting track located between CPR milepost 549.64, at Rival, and CPR milepost 550.8, at Lignite Junction; (3) the 1.07-mile connecting track located between BNSF milepost 64.5, at Kincaid, ND, and CPR milepost 558.28, at Columbus, ND; and (4) the 0.49-mile connecting track at Crosby extending from CPR milepost 582.35 to the original CPR main line extending west to Whitetail, MT. See 2007 Exemption, slip op. at 3. The 2007 Exemption also authorized CP to acquire from BNSF a 9.96-mile rail line located between milepost 56.96, at Lignite Junction, and milepost 47.0, near Lignite, which was solely owned and operated by BNSF. This Line was referred to in the 2007 Exemption as the "BNSF Line" and is referred to herein as the "Lignite Line." Collectively, the Crosby Line / Joint Line and the Lignite Line / BNSF Line are referred to in the 2007 Exemption and here as the "Conveyed Lines."

REDACTED VERSION

that BNSF would be able to continue to provide competitive rail service to NCA (and the other shippers on the line) through a haulage arrangement with CP. Since at least 2014, these representations have rung hollow, the result being that rail service to NCA has been seriously degraded by CP's refusal to let BNSF provide badly needed rail service to NCA. NCA has made numerous informal attempts to persuade CP to honor the representations made in 2007 in this proceeding (namely, that NCA would retain access to both CP and BNSF and that its rail options would be unaffected by the proposed transaction), including seeking the assistance of the Board's Rail Customer and Public Assistance Program. All of these efforts have been unsuccessful. NCA is now compelled to seek formal action by the Board to remedy serious service problems that threaten the viability of both the NCA and its farmer members.

II. STATEMENT OF RELEVANT FACTS

This proceeding involves the respective rights and obligations of CP and BNSF concerning the Conveyed Lines and decisions of the Interstate Commerce Commission ("ICC") and this Board concerning the competitive rail service both carriers pledged, and were required to provide, to shippers located along these lines. The attached Map delineates the Conveyed Lines, the connecting line of CP and BNSF and the locations of a number of NCA and other grain elevator facilities in this area. In addition to NCA's facilities, there are nearby grain elevators at Portal, Lignite, Bowbells, Ross, Ray, Northgate, Willison, ND and Plentywood, MT.

The 2007 Exemption describes the history of the Conveyed Lines. Pursuant to an agreement dated September 18, 1959 (the "1959 Agreement"), predecessors to BNSF and CP each obtained a one-half interest in and the right to operate over the Crosby Line. The 1959 Agreement also gave BNSF's predecessor the obligation to maintain the Crosby Line at its sole expense.

REDACTED VERSION

In 1990, the 1959 Agreement was amended to permit Dakota, Missouri Valley and Western Railroad, Inc. (“DMVW”) to operate over the Crosby Line via trackage rights and to lease and operate CP’s line that connected the east end of the Crosby Line at CPR milepost 549.64 at Rival with the main CP north-south line at Flaxton, ND (the “Flaxton-Rival Line”), as part of DMVW’s lease and operation of other CP-owned tracks in the region. *See Dakota, Mo. Valley & W. R.R., Inc.—Lease & Operation Exemption—Soo Line R.R. Co.*, FD 31720 (ICC served Sept. 19, 1990). DMVW accordingly took over for CP in serving CP’s shippers on the Crosby Line, using the Flaxton-Rival Line to connect with the main CP north-south line at Flaxton. The agreement between DMVW and CP was renewed and supplemented in 2006. *See Dakota, Mo. Valley & W. R.R., Inc.—Lease & Operation Exemption—Soo Line R.R. Co.*, FD 34904 (STB served July 28, 2006).

In 2007, BNSF and CP submitted the aforementioned Joint Petition in this docket seeking to be exempted from the prior review and approval requirements of 49 U.S.C. §§11323-25 for CP to acquire BNSF’s interests in and for CP to operate the Crosby Line and the Lignite Line. In exchange, BNSF retained “its ability to solicit rail transportation business on the Conveyed Lines” and serve those customers by way of a Haulage Agreement between BNSF and CP. Joint Petition at 4.

CP also entered into a contemporaneous agreement with DMVW whereby, after CP fully acquired the Crosby Line and the Lignite Line from BNSF, DMVW leased from CP and operated these lines. *See Dakota, Mo. Valley & W. R.R., Inc.—Lease & Operation Exemption—Soo Line R.R. Co. d/b/a Can. Pac. Ry.*, FD 35055 (STB served Aug. 10, 2007). In 2014, DMVW received Board authority to end its lease with CP and to discontinue DMVW service over the Lignite Line, the portions of the Crosby Line east of CPR milepost 558.0 near Stampede, ND,

REDACTED VERSION

and the Flaxton-Rival Line, but DMVW retained the right to operate over those lines “for the sole purpose of exchanging rail cars with CP at Flaxton, N.D.” *Dakota Mo. Valley & W. R.R., Inc.—Discontinuance of Service Exemption—In Burke County, N.D.*, AB 933 (Sub-No. 1X), slip op. at 2 n.5 (STB served Dec. 17, 2014).

As a result of these transactions, today:

- (1) CP owns the Crosby Line, the Lignite Line, and the Flaxton-Rival Line;
- (2) DMVW leases from CP and operates the segment of the Crosby Line west of CPR milepost 558.0 near Stampede, ND;
- (3) DMVW has the right to operate over the segments of the Crosby Line east of CPR milepost 558.0 near Stampede, ND, the Lignite Line, and the Flaxton-Rival Line solely to interchange traffic with CP at Flaxton, ND; and
- (4) BNSF has the ability to solicit rail transportation business on the Crosby Line and the Lignite Line and serve all customers located on those lines via a haulage agreement between BNSF and CP.

For BNSF service to NCA, BNSF currently turns cars over to CP at Minot, CP takes both CP and BNSF cars to Flaxton via its main north-south line, and DMVW uses its lease and interchange rights over the Crosby Line and the Flaxton-Rival Line to move the CP and BNSF cars from Flaxton to NCA’s Noonan and Crosby facilities.

CP and BNSF asserted in the Joint Petition that “BNSF traffic will be originated or terminated on the Conveyed Lines by DMVW and handled between Lignite Junction and Minot, ND in conjunction with CP pursuant to the Haulage Agreement. Because the BNSF traffic . . . can be handled in existing DMVW-CP trains to and from Minot, the proposed transaction will eliminate the redundant BNSF trains currently moving over the parallel BNSF line.” Joint

REDACTED VERSION

Petition at 11. As a result, DMVW took over providing service at Noonan and Crosby for BNSF as well as CP, and BNSF henceforth did not provide any direct service to any of its customers or other shippers along the Conveyed Lines.

In their Joint Petition, BNSF and CP made numerous representations to the STB that it should exempt the transaction from greater scrutiny because it would have no adverse effect on the railroads' current use of the line and the competitive options available to NCA and other rail shippers along the line, then and in the future. These included, but were not limited to, the following:

- That BNSF would retain its ability to solicit rail transportation business on the Conveyed Lines. Joint Petition at 4.
- That the “purpose of the proposed transaction is to foster more efficient and economical operations on the Conveyed Lines and in the region while, at the same time, preserving competitive options for the two active customers located on the Joint Line and enhancing competition for the two active customers located on the BNSF Line.” *Id.* at 4-5.
- That NCA “will retain access to CPR via the DMVW and retain its present access to BNSF via DMVW-CPR and the Haulage Operation. Consequently, New Century’s rail options will be unaffected by the proposed transaction.” *Id.* at 7.
- That “there are no anticompetitive effects that flow from the proposed transaction.” *Id.* at 11.
- That “the proposed transaction will not lead to higher rates or worsened service. To the contrary, the proposed transaction, in combination with the arrangement between CPR and DMVW, will improve rail service for all of the shippers located on the Conveyed Lines.” *Id.*
- That “the proposed transaction will create greater efficiency in the operations of BNSF, CPR and DMVW and improve service for the customers on the Conveyed Lines.” *Id.*
- That the proposed transaction “will ensure the continuation of a sound rail transportation system with effective competition among rail carriers [49 U.S.C. 10101(4)], foster sound economic conditions in transportation and ensure effective competition [49 U.S.C. 10101(5)]” and fulfill other aspects of the Rail Transportation Policy. *Id.* at 12.

REDACTED VERSION

- That the proposed transaction “will not affect traffic volumes on the Conveyed Lines or the routings available to the shippers other than shifting the BNSF traffic from a BNSF-owned rail line to the parallel CP rail line,” and “will not significantly increase CPR’s share of the transportation service market in the region.” *Id.* at 13.
- That “the proposed transaction represents merely a change in the ownership of the Conveyed Lines. There will be no loss of rail competition. CPR will continue to operate as it does today. Through the Haulage Agreement, BNSF retains the right to service all customers on the Conveyed Lines. Thus, BNSF will continue to provide common carrier service to all shippers on the Conveyed Lines at competitive rates and there will be no material change in the level or nature of service provided to those shippers. All of the shippers will be able to ship their products as they have previously and two of the customers will gain additional options.” *Id.* at 13-14.
- That “the proposed transaction, overall, will enhance intra-modal competition.” *Id.* at 14.
- That “as a practical matter, the proposed transaction will only result in a change of ownership, and not a change in service or adverse change in competition. Accordingly, regulation is not needed to protect shippers from an abuse of market power.” *Id.* at 14.

After receiving the assurances of the carriers that the loss of direct BNSF service would not adversely affect their transportation needs, NCA and the other shippers along the Joint Line “strongly encouraged” the STB to expeditiously approve the transaction. The shippers uniformly believed BNSF and CP service and rates and their competitive options would not change due to the transaction. See Joint Petition at 6-7, Exhibits 3-5. Insofar as NCA was concerned, it was vitally important to retain the rail service of both CP and BNSF in order to obtain reliable supplies of rail cars to move the grain from its terminals, to have competitively established rail rates so that it could compete with other grain marketers in the region, and to reach its various markets of the Pacific Northwest (“PNW”), California, the Gulf Coast and the Chicago and St. Louis gateways for destinations in the Midwest and east. (*Michelson V.S.*, at ¶ 7.)

For several years, there were no significant problems, and in reliance upon the carriers’ arrangement working as promised, NCA invested over \$40 million to expand its Crosby and Noonan facilities with significant rail infrastructure, including a 1.5-mile long loop track at

REDACTED VERSION

Noonan to accommodate the movement of outbound unit trains of grain and inbound unit trains of fertilizer. (*Id.*, at ¶ 17.)³ CP was well aware of this investment, even to the point of reviewing and approving the engineering plans for the new track. (*Id.*, at ¶ 18.)

In 2014, however, NCA began to experience significant rail service problems. For the first time, CP began to impose arbitrary limitations on the number of cars it would accept from BNSF for delivery to NCA. At the same time, CP's own service levels declined and issues developed with its car supply. Despite this, and despite the fact that CP does not itself serve many of NCA's markets, CP has continued the arbitrary limitation on the number of BNSF cars it will accept. And, despite CP's own inability to provide a second unit (or "shuttle") train for NCA's use, it has refused to accept any BNSF unit trains in interchange for the account of NCA (*Id.*, at ¶¶ 39, 52-53). This severely handicapped NCA's ability to ship grain or receive inbound unit trains of fertilizer.

Failing to persuade CP to voluntarily live up to its 2007 representations to the Board, NCA complained to the STB's Rail Customer and Public Assistance Program ("RCPA") in early 2014. Over much of that year, NCA and representatives of RCPA exchanged communications with each other and both CP and BNSF. Regrettably, those efforts produced no positive results. CP initiated no remedial steps to improve either the service it was willing to provide or the service it would let BNSF provide, other than for a short time increase the number of BNSF cars it would accept at one time. Even at that, CP left in place the arbitrary limit of 25 cars per interchange or 200 cars per month as the maximum it would accept from BNSF. (*Michelson V.S.*, at ¶ 27.)

³ NCA made an additional \$17 million investment in capital improvements for the Westby grain elevator and fertilizer facility, including associated improvements in rail loading and unloading tracks.

REDACTED VERSION

In response to NCA's complaints, at times, CP indicated that there were restrictions in the 2007 Haulage Agreement that limited the number of BNSF cars it was able to accept and bring into the NCA facilities. However, a review of that document reveals no such restriction.⁴ Accordingly, even though BNSF service was essential for NCA to remain both a participant and competitive in its grain purchasing and wholesale markets, CP seemed intent – despite its own inability to meet NCA's service needs and its obligation to ensure the continuation of BNSF competition – on gradually tightening the noose and reducing BNSF's participation in NCA's traffic.

The result, in terms of rail market share, has been striking. BNSF has gone from having an equal or even a majority of NCA's outbound grain traffic during the early part of the pre- and post-2007 exemption years to a minor role. For example, BNSF's share of NCA outbound grain traffic fell to [REDACTED] in 2017 and [REDACTED] for the first three quarters.⁵ (Michelson VS, at ¶¶ 29-32.) Yet, CP's dominant position with respect to NCA's traffic is not due to any pricing or service advantage it offers.

To the contrary, because CP does not directly serve many of NCA's markets and as CP has limited BNSF's service in violation of the 2007 Exemption, NCA has neither the quantity nor quality of service that is available to many of its competitors. To many of NCA's important markets, CP's rates on grain moving from NCA's Noonan and Crosby elevators are anywhere from \$330 to \$3,127 per car higher than those offered by BNSF. (*Id.*, at ¶ 41.) And notwithstanding NCA's need to compete with other grain marketers in the region, CP's refusal to

⁴ Michelson V.S. at ¶¶ 24, 52.

⁵ CP handled [REDACTED] in 2017 and 1,014 for the first three quarters of 2018, while BNSF had [REDACTED] and [REDACTED] for those same periods.

REDACTED VERSION

permit BNSF to provide a shuttle train to NCA places NCA at a significant disadvantage to local grain elevators that do have this service from BNSF.

Again, as just one example, BNSF's rates to NCA on canola moving to Warden, WA are over \$1,000 per car higher than the shuttle train rates BNSF offers other elevators a few miles away. And, although Warden cannot accept unit trains, BNSF offers its customers the benefit of unit train rates on smaller blocks of cars through the device of permitting its shippers to "explode" those trains so that they can be competitive in that market. (*Id.*, at ¶ 45.) Accordingly, NCA is at a severe competitive disadvantage due to CP's refusal to permit BNSF's unit train service into Noonan.

Completely aside from CP's non-competitive rates, its artificial limits on the quantity of BNSF cars it will accept and its total refusal to permit BNSF to provide unit train service to NCA are in direct breach of CP's representations to the Board and its obligations under the 2007 Exemption. Consequently, NCA often does not have sufficient numbers of cars to move grain out of the Noonan and Crosby elevators. And, as those elevators are often filled to capacity, NCA also cannot purchase the supplies of grain that are harvested by its local farmers, including those who are member owners of this cooperative. (*Id.*, at ¶¶ 26-30, 38-42, 51.) Nor can NCA utilize the newer, better conditioned, more efficient hopper cars BNSF has in its fleet. (*Id.*, at ¶ 51.) As such, the arbitrary limitations on BNSF cars and refusal to either provide or let BNSF provide the additional unit train service needed has substantially diminished the value of the capital investments NCA made to expand the rail infrastructure at the Noonan facility in reliance upon CP's implementation of the 2007 Exemption decision, and has severely challenged NCA's competitive position in its markets. (*Id.*, at ¶¶ 17, 21 & 59.)

REDACTED VERSION

NCA is uniquely disadvantaged by CP's refusal to abide by the competitive service obligations of the 2007 Exemption. The other shippers that actively supported the Joint Petition have either moved off the Crosby Line, because of their proximity to other nearby rail lines, can still enjoy competitive rail service. (*Id.*, at ¶ 56.)

Unless remedial action is mandated by the Board it is possible, if not likely, that the situation facing NCA will worsen. As the Haulage Agreement that was submitted to the Board with the Joint Petition had an initial 10-year term, CP gave NCA reason to question whether that railroad would agree to continue to provide any BNSF service at all after January 2017. Ultimately, CP did agree to extend the Haulage Agreement, but informed NCA that the extension was for only a five-year period. And, CP has refused to provide NCA with even a redacted copy of that extension (or totally new agreement), so that NCA has no way of knowing what if any other restrictions have been imposed that would further limit BNSF's service. For its part, BNSF has advised that it is unable to provide that information due to a confidentiality provision that CP will not waive. (*Id.*, at ¶¶ 46, 47.)

Accordingly, the Board should re-open the 2007 Exemption to require that CP and BNSF do what is necessary to ensure that the BNSF is able to provide competitive service to NCA in the same manner as when BNSF had joint ownership of the Crosby Line prior to the 2007 Exemption.

III. ARGUMENT

In order to obtain the exemption in this proceeding to approve the transaction described in the Joint Petition, CP and BNSF jointly made a series of representations to the Board. Among other things, and as set forth in greater detail above (at 6-7), the railroads warranted that the proposed transaction would promote more efficient and economical rail operations, that NCA's routing options would not be compromised, that the competitive options of the shippers would

not be adversely affected, and that there would be no artificial loss of access to BNSF service. Whatever may have been the case in 2007, the facts concerning the railroads' service to NCA no longer bear a resemblance to the rosy picture presented 11 years ago. Given the resulting injury to NCA caused by the changed circumstances, the exemption proceeding must be reopened to determine what remedial steps need to be taken to restore NCA's access to BNSF's competitive service or, alternatively, whether the 2007 Exemption should be revoked and the underlying transaction between BNSF and CP nullified.

A. Changed Circumstances Require that the 2007 Exemption Be Reopened

Under 49 CFR 1115.4, the Board has the authority to reopen an administratively final action at any time due to, *inter alia*, substantially changed circumstances.⁶ And, to warrant reopening, the materially changed circumstances must be of a kind that would have materially altered the Board's analysis and decision had they been known during the course of the proceeding.⁷ That is precisely the situation here. The CP and BNSF representations – that NCA's "rail options will be unaffected by the proposed transaction" (Petition, at 7) – which were key to the Board's 2007 Exemption decision are no longer accurate. Clearly, NCA's access to BNSF's competitive rail service (and the benefits of the significant rail infrastructure investments NCA made in reliance on that service) has been severely restricted.⁸ Had the STB

⁶ See also 49 USC 1322(c); *Allied Erecting and Dismantling, Inc., and Allied Inds. Development Corp.—Pet. for Declaratory Order—Rail Easements in Mahoning County, Ohio*, FD 35316 (STB served Sept. 15, 2015).

⁷ *Allegheny Valley R.R.—Pet. for Declaratory Order*, FD 35239, slip op. at 7 (STB served Apr. 19, 2013).

⁸ Parenthetically, it is perhaps worth reiterating that the Interstate Commerce Commission originally imposed joint ownership of the Joint Line serving NCA as key conditions in the merger cases described above, *infra* at 3-5. Just as competitive service was deemed essential then, it remains essential today and cannot be restricted without STB approval. See, for example, *Union Pacific Corporation, Union Pacific Railroad Company, and Missouri Pacific Railroad Company—Control And Merger—Southern Pacific Rail Corporation, Southern Pacific*

REDACTED VERSION

known CP would impose such restrictions in 2007 this most certainly would have materially altered the STB's analysis and decision.

The Board has not hesitated to reopen administratively final proceedings where there has been a showing that the circumstances on which the Board relied in a decision have changed. For example, in *Norfolk Southern Railway Co.—Adverse Abandonment—St. Joseph County, Ind.*, AB 290 (Sub-No. 286) (STB served April 16, 2012), the Board had initially denied an application for adverse abandonment of a line of railroad even though there had been no rail service or even a request for rail service for at least 10 years and sections of the line had been paved over and removed at numerous locations. The Board's denial was based on representations made by a short line, the Chicago, Lake Shore & South Bend Railway Company ("CLS&SB"), that it was willing to operate over the line and that at least one shipper was capable of receiving rail service. Four years later, the petitioners filed a petition to reopen and demonstrated that the CLS&SB was no longer interested in providing rail service. On the basis of those substantially changed circumstances, the Board reopened the proceeding and granted the adverse abandonment.

A particularly relevant case, given the situation that is the subject of this petition, is *Pioneer Industrial Railway Co.—Alternate Rail Service—Central Illinois Railroad Co.*, FD 34917 (STB served Jan. 12, 2007). In a decision issued in 2004, the Board granted a petition for adverse discontinuance of the operations of the Pioneer Industrial Railway (the "PIRY") over a line of railroad called the Kellar Branch over the objection of PIRY, with the understanding that rail service would nonetheless be provided by the Central Illinois Railroad Company ("CIRY").

Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver Rio Grande Western Railroad Company, [General Oversight], Decision No. 20 (STB served Dec. 20, 2001), at 11, where the Board held the merger conditions it imposed "trump any restrictions that BNSF and Union Pacific may have ... agreed upon."

REDACTED VERSION

The following year, the CIRY filed an exemption petition seeking to discontinue service over a portion of the Kellar Branch (the “CIRY Discontinuance”), representing that shippers would still be able to receive reliable service from other connections, and the Board granted the requested exemption in 2005. Subsequently, the sole remaining shipper on the Kellar Branch requested that the Board reopen and reconsider the discontinuance exemption because the resulting service was seriously inadequate. In its 2007 decision cited above, the Board reopened the CIRY Discontinuance, noting that the “circumstances have changed dramatically from what the Board believed them to be” when granting that exemption. (*Id.*, at 8.) In doing so, the Board pointed out that it had relied on “representations that the ...[proposal] would maintain ‘the level of rail service to the satisfaction of the users of that service.’...Central to that analysis was the fact that the evidence of record at that time did not demonstrate that shippers would lose routing options or receive inferior service should PIRY’s service be discontinued.” (*Id.*)

That is the exact situation faced by NCA. CP and BNSF both represented that the requested exemption would eliminate redundant track, enhance the efficiency of rail operations, while ensuring that NCA would retain access to both CP and BNSF so that “its rail options will be unaffected by the proposed transaction.” Joint Petition at 7. Relying on those representations, the Board granted the exemption, concluding that (1) “there will be no loss of rail competition,” (2) “BNSF will continue to provide rail service to all shippers on the Conveyed Lines at competitive rates and there will be no material change in the level or nature of service provided to those shippers,” (3) “[a]ll of the customers will be able to ship their products as they have previously,” and (4) the arrangements presented for approval “will enhance intramodal competition.” 2007 Exemption, at 4-5.

REDACTED VERSION

Subsequent to the 2007 Exemption decision CP has clearly taken actions to alter the Board's grounds for granting the exemption, to the detriment of NCA and BNSF, as CP has not been able to handle significant volumes of NCA's outbound grain or inbound fertilizer traffic. Since CP controls the rail operations to and from NCA since the 2007 Exemption was granted, CP has the ability to control what service both it and BNSF will provide. And CP has apparently determined that it need not ensure that NCA can in fact utilize BNSF as it did previously, and that it will instead control access to NCA as it sees fit without regard to NCA's service needs.

To be clear, this is not a matter of rail rates or car supply. Based upon the intramodal competitive situation that existed before the 2007 Exemption and as approved by the Board when that exemption was granted, NCA should have access to intramodal rail competition and is fully willing and able to work within that competitive environment. But the promised circumstances upon which NCA and the Board relied have materially changed, and NCA's access to BNSF service is compromised by the service spigot that CP apparently feels it can turn off at will. The service problems outlined above constitute a virtual indictment of CP's attitude toward NCA and, accordingly, the Board's 2007 Exemption decision. Without intending to reiterate the detailed recitation of the facts stated above and in the Michelson Verified Statement, CP has:

- Placed artificial limits on the number of BNSF cars it will accept;
- Refused to let NCA take advantage of BNSF unit trains, even when CP itself cannot provide such service;
- Failed to provide NCA with rates and privileges that are available to NCA's nearby competitors who still have direct BNSF service;
- Prevented NCA from shipping under BNSF rates that are lower than CP's and would permit NCA to ship to more destinations; and

REDACTED VERSION

- Contended that it could entirely cut off BNSF service by refusing to extend the haulage agreement between the parties.

And, CP has done this despite being fully aware that NCA made significant investments in rail infrastructure after the 2007 Exemption in part to accommodate unit trains, in reliance upon continuing to have unfettered access to both CP and BNSF as it had in the past. Yet, despite NCA's efforts to obtain relief by seeking the assistance of the Board's RCPA Program during 2014, which informal efforts came to naught, CP only tightened the spigot.

For its part, NCA understands that BNSF has not been able to persuade CP to loosen the constraints on service to NCA. Although NCA was not permitted to participate in discussions pertaining to any renewal of the Haulage Agreement, NCA understands that BNSF was able to negotiate either an extension of the haulage agreement that was submitted to the Board as part of the Joint Petition or a new agreement. But, NCA is not aware of the terms of that agreement and, in any event, has no reason to believe that things will change or that CP will now honor the commitments made in 2007.

But for the 2007 Exemption, NCA would now have direct BNSF service provided by BNSF, as well as direct service provided by CP. The joint commitments of CP and BNSF pledged that BNSF would still be able to provide its service to NCA, albeit using CP and DMVW locomotives for movements between Minot and Noonan and Crosby. Regrettably, BNSF and CP have not been able to work together to ensure that NCA receives the competitive service to which it is entitled. In the reopened proceeding, CP and BNSF should be held to their commitments and required to demonstrate their willingness and ability to honor their mutual obligation to ensure that NCA again receives the benefit of truly competitive rail service.

REDACTED VERSION

B. CP and BNSF Should Submit the Current Version of The Haulage Agreement To The Board and Serve A Copy on NCA

NCA recognizes that haulage agreements between rail carriers are typically private contracts that are not subject to Board approval.⁹ Nor do railroads typically provide them to shippers or other parties that may be subject to the services that may be covered by the agreement. But this is not the typical situation and CP and BNSF should be required to provide both the Board and NCA with a copy of whatever haulage agreement is in force now or in the future.

Initially, CP and BNSF submitted the 2007 Haulage Agreement as a key part of the materials provided to the Board in support of the Joint Petition. Indeed, the carriers specifically stated that “if authorized by the Board, CPR and BNSF will into an (sic) Haulage Service Agreement (“Haulage Agreement”) pursuant to which CPR will agree to haul loaded and empty rail cars tendered by BNSF in the revenue waybill and car hire account between Minot, North Dakota and BNSF customers on the Conveyed Lines....” (Joint Petition, at 4.) The Haulage Agreement was included as an exhibit to the Purchase and Sale Agreement attached as Exhibit 2 to the Joint Petition, with the Board getting a copy under seal while a redacted copy was part of the public record. The Haulage Agreement terms formed the underpinning of the Board’s decision to grant the Joint Petition. Specifically, in granting the requested exemption the Board reviewed the document and was satisfied that its terms would enable the parties to abide by their representations that BNSF’s competitive service would be maintained. (2007 Exemption, at 4.)

⁹ In their Joint Petition, the petitioners contended that “car haulage is a private arrangement between carriers that does not require prior Board approval,” citing F.D. 31293, *Burlington N.R.R. Co. – Exemption – Joint Project to Relocate a Line Railroad Between Tulsa and Muskogee* (ICC served July 19,1988) (“BN Joint Project”). As discussed below, that contention and the cited case are not relevant or controlling in this situation.

REDACTED VERSION

The Board's conclusion was appropriate at that time, as the Haulage Agreement stated, among other things:

It is the intent of CPR that it shall generally accord BNSF Haulage Cars the same level of service as CPR's own traffic of the same type; provided, however, that the foregoing shall not constitute a service guarantee. (Citing Haulage Agreement, at Section 4.01.)

In contending that the requested exemption should be granted, CP and BNSF represented that the proposed arrangements would not result in any abuse of market power. They stated:

The proposed transaction represents merely a change in the ownership of the Conveyed Lines. There will be no loss of rail competition.... BNSF will continue to provide common carrier service to all shippers on the Conveyed lines at competitive rates and there will be not material change in the level or nature of service provided to those shippers. All of the customers will be able to ship their products as they have previously....

Joint Petition, at 13-14. There was nothing in this language or elsewhere in the Joint Petition suggesting that this was to be a temporary arrangement, that the various representations assuring the shippers or the Board might end after 10 years. To the contrary, these representations were unlimited in time. Based on this and other representations in that agreement and the Joint Petition, the Board approved the requested exemption. Accordingly, as long as the 2007 Exemption is in effect, both the Board and affected shippers are entitled, if not required, to know whether the substantive terms of this "private" agreement have materially changed in a way that would or could affect rail service.

NCA is aware that private haulage agreements between railroads – which are normally arrangements by which a railroad can extend its service, albeit without operating, over the line of another railroad – typically do not require prior Board approval and similarly are normally of little concern to shippers. But that is not this situation. This Haulage Agreement involves and mandates public, not just private, rights and arrangements. This Haulage Agreement was an

REDACTED VERSION

essential part of a transaction by which BNSF sold its interest in the Joint Line to CP, a line over which it provided service to NCA, but nonetheless committed – with the agreement of CP – to be able to continue to provide fully competitive rail service to shippers. In that sense, this Haulage Agreement is more akin to a trackage rights agreement, which implicates public, not just private, rights and is subject to Board review of both the initial approval and of any discontinuance. This Haulage Agreement does not simply pertain to service that CP may voluntarily provide to BNSF, but rather relates to services that the Board required be provided to the shipping public.

The law is quite clear that agreements to provide trackage rights require Board approval for any termination even if they purport to be limited to a specified period due to the public rights that are implicated. As *Thompson v. Texas Mexican Railway, Co.*, 328 U.S. 134, 143-44 (1946), points out, trackage rights agreements involve not only the interests of the two railroad parties, but also the public interest, and cannot be terminated without agency approval specifically because of the need to ensure that important public rights are not adversely affected. See, also, e.g., *Grand Elk Railroad, Inc.—Acquisition of Incidental Trackage Rights Exemption—Norfolk Southern Railway Co.*, FD 35187 (Sub-No. 1) (STB served Nov. 20, 2017) (holding that a carrier cannot terminate trackage rights, even if the agreement has expired, without an agency finding that such termination is in the public interest). So it is here with respect to the Haulage Agreement. To argue otherwise is tantamount to contending that the CP could have refused to extend the initial term of the Haulage Agreement and unilaterally, without Board approval, terminate any BNSF service to NCA at all. That cannot be the case; BNSF has not obtained, let alone sought, authority to abandon or otherwise discontinue service to NCA.

Having submitted the Haulage Agreement to Board review as the critical basis for their Joint Petition, the carriers have essentially waived any right to now contend that it is a strictly

REDACTED VERSION

private agreement and not subject to any Board oversight just because the requested exemption was granted. Even if the haulage agreement was a private matter that would normally have been non-jurisdictional, having relied on the existence of that agreement to support the Joint Petition, they are bound to abide by its terms. The railroads cannot later be heard to argue that the commitments made to the Board and shippers was a private matter that need no longer be observed. And so, for example, the Supreme Court upheld an order of the Interstate Commerce Commission requiring a railroad to use funds earmarked for deferred maintenance in a request for approval of a rate increase for exactly that purpose, even though the agency would otherwise not have had that authority absent the carrier's representations. *U.S. v. Chesapeake & Ohio Railway Co. Et Al.*, 426 U.S. 500 (1976); *see also Delaware and Hudson Railway Co.—Lease and Trackage Rights Exemption—Springfield Terminal Railway Co.*, 8 I.C.C.2d 839 (1992). Similarly, a railroad was bound by its commitment to abide by certain municipal restrictions even though those restrictions would otherwise have been preempted by section 10501(b) of the Act. *The Township of Woodbridge, NJ, Et Al. v. Consolidated Rail Corp., Inc.*, Docket No. 42053 (STB served Dec. 1, 2000).

Accordingly, BNSF and CP should be directed to submit the current version of the Haulage Agreement to the Board and provide a copy, redacted if necessary, to NCA and to the public docket. Similarly, the carriers should be directed to file any future proposed changes to the agreement and, of course, to provide copies to NCA and the public docket.

C. If Necessary, The Exemption Should Be Revoked

In the event the Board determines that CP and BNSF are unable or unwilling to make the arrangements necessary to restore and maintain competitive rail service to NCA, the Board should revoke the 2007 Exemption. Under 49 U.S.C. § 10502(d), the Board may revoke an

REDACTED VERSION

exemption, in whole or in part, if it determines that it is necessary to carry out the Rail Transportation Policy (“RTP”) of 49 U.S.C. § 10101.

In obtaining approval of the exemption, CP and BNSF specifically represented that the proposed arrangements would not result in an abuse of market power. As noted above, they contended that all shippers on the affected line would continue to have unlimited access to both CP and BNSF rates and service. (Joint Petition, at 13-14.) Similarly, they contended that the change in ownership would not significantly increase CP’s “share of the transportation service in the region.” (*Id.*, at 13.)

Relying upon those representations, the Board found that regulation of the transaction presented was “not necessary to protect shippers from the abuse of market power. 2007 Exemption, at 4. The Board also cited a number of the provisions of section 10101 warranting its approval, viz., minimizing unnecessary regulatory control, promoting a safe and efficient rail system, fostering sound economic conditions, reducing regulatory barriers to entry and exit, encouraging efficient management of railroads and promoting energy conservation.

NCA agrees that those national transportation policies would be furthered if the railroads were living up to their obligations. But that has not been the case at least since 2014. Unless appropriate remedial steps can be taken to reopen NCA’s access to BNSF service, NCA will continue to be subject to CP’s abuse of its gatekeeper role that has been depriving NCA of the promised and essential competitive BNSF service. Accordingly, unless CP can demonstrate that it is willing and able to eliminate the artificial constraints it has imposed on BNSF service to NCA, the Board has the authority to and should revoke the 2007 Exemption. In doing so, the Board can, among other things, require the railroads to unwind the transaction that underlay the Joint Petition or otherwise require BNSF to resume direct service to NCA.

REDACTED VERSION

The Board has granted a petition to revoke when the Board finds that regulation is necessary due to abuse of market power. In *PYCO Industries, Inc.—Alternative Rail Service-South Plains Switching, Ltd. Co.*, FD 34802 (STB served June 21, 2006), the Board granted the shipper PYCO Industries, Inc.’s (“PYCO”) petition to revoke the exemption by which South Plains Switching Ltd. Co.’s (“SAW”) acquired the right to provide service to PYCO. The revocation was granted due to SAW’s rail service being “so inadequate as to amount to an abuse of its market power.”

In a situation very similar to that confronting NCA, SAW began to limit the number of cars it would provide. When PYCO asserted that it would run out of storage capacity for its cottonseed oil and related products, forcing it to either curtail or close operations, the Board granted the petition to revoke to the extent necessary to allow for alternative rail service.

Here, the Board granted the petition for exemption due to CP’s and BNSF’s representations that there would be no loss of rail competition and detailed scrutiny was not necessary to carry out the RTP. Their request asserted that the change in ownership would not affect traffic volumes, routings available to shippers or significantly increase CP’s share of the transportation service market in the region. The Joint Petition claimed that customers would still retain BNSF service and that regulation was not needed to protect shippers from the abuse of market power.

However, CP’s actions have resulted in diminished rail service and have placed NCA at a competitive disadvantage. Not unlike *PYCO*, CP’s unjustified application of the Haulage Agreement terms have repeatedly put NCA in a position where its grain elevators have become full, but it cannot ship the grain out due to the absence of BNSF service. Thus, CP’s

REDACTED VERSION

implementation of the Haulage Agreement has resulted in a significant loss of rail competition and inadequate service for NCA.

CP's behavior has limited BNSF's access to NCA and concomitantly restricted service for NCA. Unless CP and BNSF can live up to the commitments made in the Joint Petition, NCA asks that the Board revoke the petition for exemption, as regulation is needed to carry out the RTP and allow for the restoration of competitive service on the line.

IV. CONCLUSION

NCA is in the grain business; its owners are farmers trying to market the grain they grow. To do so, NCA needs access to reliable, competitive rail service so that it can reasonably plan for its service needs and secure market prices for their members' grain. The Board confirmed that NCA had such access in 2007. And NCA invested \$40 million to expand its services to its farmer members in reliance upon it. Regrettably, CP has either forgotten or is intentionally failing to honor commitments it made to NCA and the Board in 2007 promising that NCA's rail options – where it had been directly served by both CP and BNSF – would be unaffected by the transaction proposed in this docket by which CP purchased BNSF's interest in track the two carriers jointly owned and operated. In large measure, since at least 2014, those promises have rung hollow, as CP has inappropriately limited NCA's access to BNSF.

Having tried, unsuccessfully, to work with CP, NCA turned to the Board's Office of Consumer Assistance, whose efforts to persuade CP to stop restricting access to BNSF's service were similarly unsuccessful. NCA accordingly requests the Board to reopen the 2007 Exemption and order CP immediately to implement a plan that removes any restrictions on the number or type of cars it will accept in interchange with BNSF.¹⁰ Alternatively, if CP and BNSF are unable

¹⁰ NCA is aware of the Board's interest in using mediation in service related matters and is not opposed in principle to participating in that process here. However, and especially in view of

REDACTED VERSION

to develop and implement an appropriate operating procedure, which should in any event be presented to and approved by the Board, the Board should revoke the 2007 Exemption. In that event, the Board should nullify the transaction by which CP acquired both BNSF's 50% interest in the Joint Line and BNSF's ownership of the portion of the Lignite Line between BNSF MP 47.0 and Lignite and direct both railroads to re-install any connection that may be necessary at Lignite, ND or such other location as will permit BNSF to directly serve NCA's facilities at Noonan and Crosby, ND.

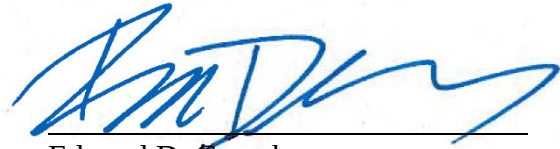
In addition, NCA requests that the Board order CP and BNSF immediately to produce the current version of the Haulage Agreement pertaining to operations pursuant to the 2007 Exemption and provide a copy to NCA. As NCA has no objection to having the railroads provide a redacted copy of that agreement, in the same manner as they did in the Joint Petition, there would not appear to be any need for the Board to issue a protective order at this time.

Finally, NCA urges the Board to set this matter for expeditious consideration. NCA urgently needs access to BNSF shuttle trains to be able to fill orders that have already been placed for grain for next summer and fall. Without BNSF service as promised in the Joint Petition and the 2017 Exemption, it will be difficult if not impossible to move the grain that will be available from the coming harvest.

NCA's unsuccessful effort to work with RCPA to resolve the same problem in 2014, the need to have these problems resolved in time for the August harvest, and the straight forward nature of enforcing the 2007 Exemption decision, NCA requests that any mediation that may be ordered be subject to a short deadline and that this proceeding go forward at the same time.

REDACTED VERSION

Respectfully submitted,

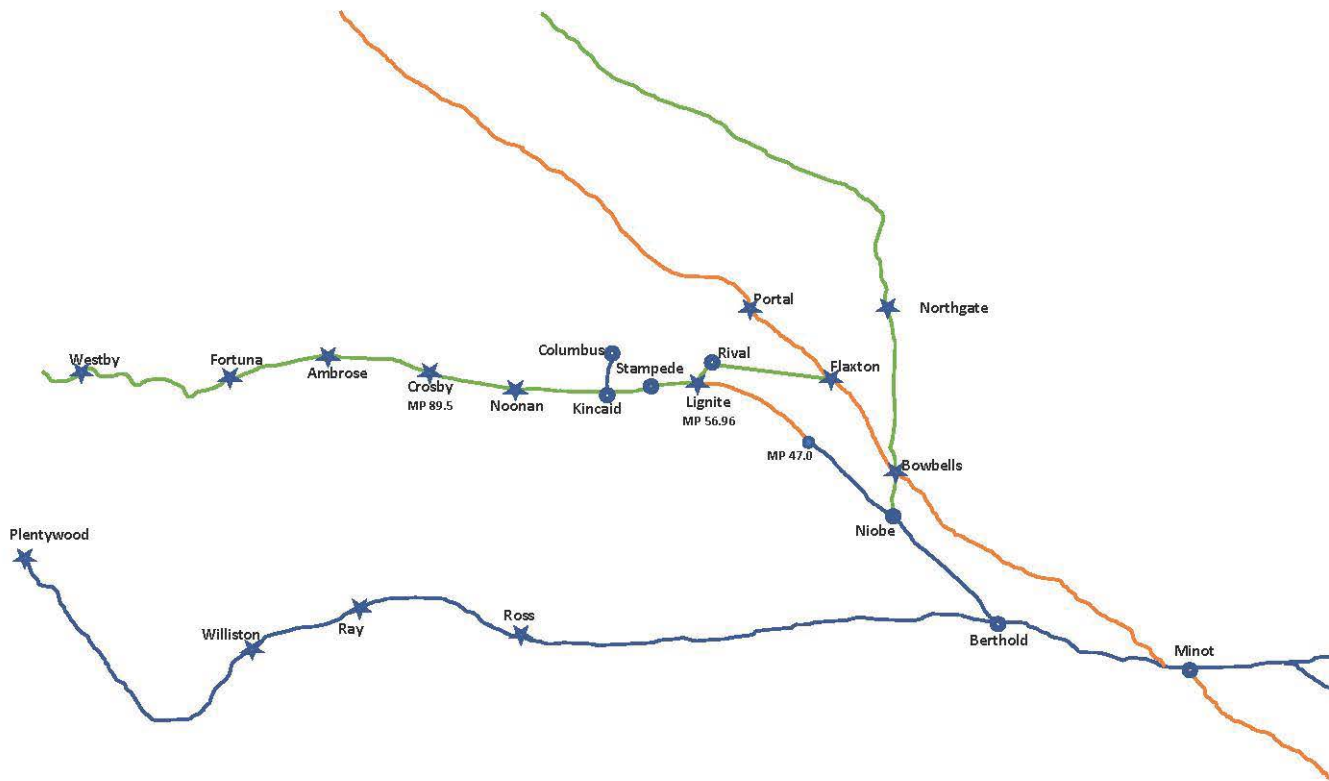


Edward D. Greenberg
Thomas W. Wilcox
Kristine O. Little
GKG Law, P.C.
1055 Thomas Jefferson Street, NW
Suite 500
Washington, DC 20007-4492
Phone: (202) 342-5277

Counsel for New Century Ag

December 20, 2018

MAP



REDACTED VERSION

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 35068

**SOO LINE RAILROAD COMPANY D/B/A CANADIAN PACIFIC RAILWAY –
ACQUISITION AND OPERATION EXEMPTION – BNSF RAILWAY COMPANY**

VERIFIED STATEMENT OF LYNN MICHELSON

1. My name is Lynn Michelson and I am the General Manager of New Century Ag (“NCA”). My office address is 10885 ND Highway 5 NW, Noonan, North Dakota, 58765. I am offering this statement in support of NCA’s Petition to Reopen or in the Alternative, Revoke the exemption issued in this docket in 2007. In support of this petition, I want to provide the Board with the following information:

2. NCA is a farmer-owned cooperative that, as relevant here, owns, maintains and operates, grain elevators at Noonan, Crosby, Ambrose, and Fortuna, North Dakota and Westby, Montana. In 2007, NCA was formed as a merger of two cooperatives that owned these grain elevators for the purpose of enhancing the marketing of grain raised by farmers located in this geographic region.

3. Prior to 2007, these elevators were directly and separately served, with respect to rail traffic, by both the BNSF Railway Company (“BNSF”) and the Soo Line Railroad Company d/b/a Canadian Pacific (“CP”). Dual service to these facilities was first created in 1959 by an agreement between the predecessors of the BNSF and CP. This dual service was later reinforced in 1967 through a condition placed by the ICC, on its approval of the merger of the Great

REDACTED VERSION

Northern Pacific & Burlington Lines, Inc. and Great Northern Railway Company. *See, Great Northern Pac.–Merger –Great Northern*, 331 I.C.C. 228, 355 (at condition 21(a)) (1967). Pursuant to this merger condition, BNSF's and CP's predecessors each obtained joint use of the line of railroad between Lignite and Crosby, North Dakota.

4. On July 16, 2007, BNSF and CP submitted a Joint Petition for Exemption in this docket ("Joint Petition") which sought and obtained an exemption from the Board in this docket by which BNSF sold to CP its 50% interest in the line on which the Noonan and Crosby facilities were situated. Importantly, those parties expressly preserved BNSF's right to provide competitive service to shippers along the line through a Haulage Agreement. The Board's approval was expressly conditioned on its acceptance of the railroads' unconditional representations that NCA – and the other shippers located on the line – would continue to have the same competitive rail service of both railroads. The carriers stated that the only change to prior service was that CP would henceforth do the physical movement of BNSF's cars into and out of these locations via a haulage agreement. Specifically, BNSF interchanges its cars with CP at Minot, North Dakota; in turn, CP takes both the BNSF cars and its own cars to Flaxton, at which point CP gives the cars to the Dakota, Missouri Valley and Western Railroad, Inc. ("DMVW"), which then moves all of the cars between Flaxton and the Noonan/Crosby facilities. (DMVW also takes CP cars to the NCA facilities west of Crosby.) Unfortunately, CP has limited BNSF's ability to provide competitive rail service to NCA, and BNSF has not been able to enforce its rights under the Board's approval of the railroads' transaction.

5. Although NCA has tried to work with CP and BNSF to address serious service issues in recent years caused by CP's refusal or inability to provide its own service and its unwillingness to allow BNSF to provide a competitive alternative to CP, our efforts have been

REDACTED VERSION

unavailing. NCA now comes to the Board because in recent years it has repeatedly been in the position that its grain elevators are full, yet it cannot ship out the grain on hand because of the absence of sufficient, competitive BNSF service. NCA is consequently not only unable to market the grain it has on hand but is unable to buy more grain from the farmers in this region. At the same time, NCA is at a serious price disadvantage to other competing grain elevators in the region that can deal freely with BNSF for service. NCA has accordingly been forced to take this formal action to request that the Board restore the competitive balance on these tracks that was originally created in 1959, confirmed in 1967, and preserved by the 2007 decision. NCA is advised that BNSF supports NCA's efforts and its petition and is willing to either work with CP or resume direct service to NCA without having to interchange cars with CP.

6. NCA owns and operates the grain elevators that I have listed, together with their capacities, in the following table:

Noonan, North Dakota	1.2 million bushels
Crosby, North Dakota	300,000 bushels
Ambrose, North Dakota	268,000 bushels
Fortuna, North Dakota	336,000 bushels
Westby, Montana	2.4 million bushels

In addition, NCA maintains significant fertilizer facilities at Noonan and Fortuna that receive inbound loaded railcars. The two facilities that are the focus of NCA's filing are Noonan and Crosby, which are located on the tracks that were the subject of the 2007 Joint Petition. While all of NCA's facilities are rail-served and are located on a line now owned by CP, the Noonan and Crosby facilities are supposed to have equal, competitive access to the BNSF.

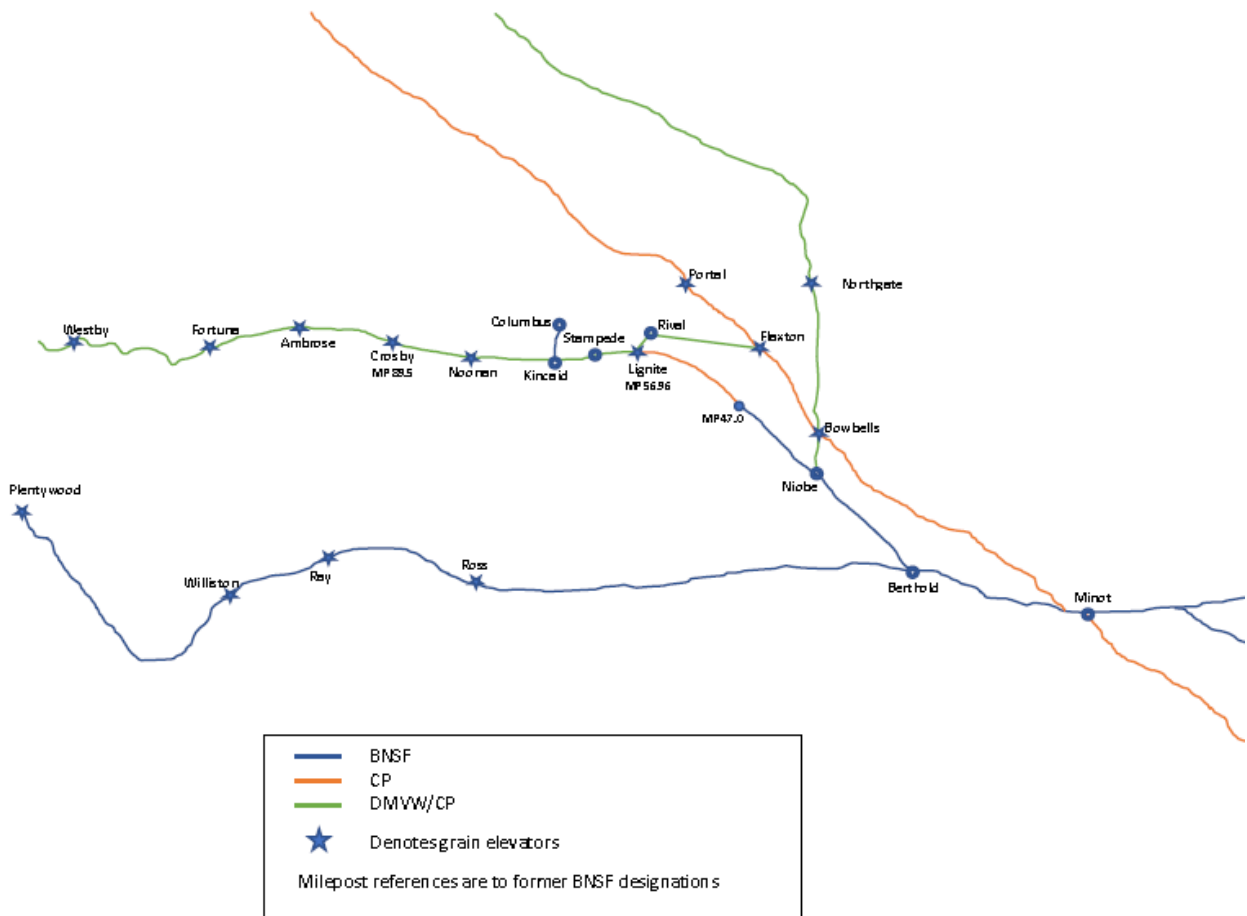
REDACTED VERSION

7. In marketing the grain, NCA purchases various commodities such as durum wheat, spring wheat, winter wheat, soybeans, flax, peas, lentils, corn and canola and then resells the grain through brokers to various domestic and foreign buyers. The ultimate markets for this grain are typically in the Pacific Northwest for domestic use or export, California, or through St. Louis to various markets in the U.S.

8. The marketing of grain is a highly competitive business and is extraordinarily price sensitive. As is the case with all grain elevator operators, the price NCA can pay farmers for their crops includes the cost of transporting their grain to market. In selling their grain, the farmers have a number of alternatives to NCA, so that the cost and availability of rail transportation from this area to the outlet markets are vitally important in determining whether NCA can (1) offer competitive prices for grain for market and (2) whether it can sell and have its farmer members' grain transported to those outlets. Every extra dollar NCA must pay for rail transportation means it has less ability to pay the farmers for their grain. For example, an increased rail cost of \$1,000 per car roughly translates as \$.30 less per bushel that NCA can pay for the grain it purchases. Without access to reliable, reasonably priced, and efficient rail transportation, NCA's ability to market the grain it has purchased is severely compromised.

9. To illustrate the situation, the following map shows the various terminals and rail lines that are relevant to both NCA's operations and the issues raised in this petition. The map shows, in addition to NCA's facilities, other grain elevators in the same area.

REDACTED VERSION



10. The Joint Petition sought authorization of (1) BNSF's sale of its 50% interest in the 32.5 miles of track between Crosby and Lignite, North Dakota (along with certain connecting track), and (2) BNSF's retention of its ability to solicit and handle business from NCA and other shippers through the use of a Haulage Agreement with CP. BNSF and CP submitted a slightly redacted version of that agreement to the Board and the public docket, along with the accompanying Purchase and Sale Agreement. The Joint Petition also covered the acquisition by CP of the BNSF/Lignite Line that was previously 100% owned by BNSF. The Haulage Agreement was a key part of the transaction presented to the Board and was attached to the Purchase and Sale Agreement between BNSF and CP (which was Exhibit 2 to the Joint Petition

REDACTED VERSION

as Exhibit G and was entitled North Dakota Haulage Service Agreement). For ease of reference, I have attached that Haulage Agreement as Exhibit 1 to this statement.

11. Under that Haulage Agreement, CP was to haul loaded and empty rail cars tendered by BNSF between Minot, North Dakota and any customers on the track that was being conveyed. CP then separately entered into another agreement with the Dakota, Missouri Valley and Western Railroad, Inc. (“DMVW”), under which DMVW leased certain portions of that trackage and moved both the CP and BNSF rail cars from Flaxton, North Dakota to and from NCA’s facilities at Crosby and Noonan.¹ (Under that arrangement, DMVW was also to provide service to NCA’s facilities at Ambrose, Fortuna and Westby by interchanging with CP at Flaxton, but that did not include any BNSF traffic, as I discussed above, because BNSF did not have an ownership interest in the line west of Crosby.)

12. The Joint Petition identified the four active rail shippers that were located on the track at issue, including NCA, and specifically represented that NCA “will retain access to CPR via the DMVW and its present access to BNSF via DMVW-CPR and the Haulage Operation. Consequently, *[NCA’s] rail operations will be unaffected by the proposed transaction.*” (Joint Petition at 6-7. My emphasis.) The Joint Petition then noted, correctly, that NCA supported the proposed transaction. (A copy of the NCA’s letter of support, which was Exhibit 5 to the Joint Petition, is attached for the Board’s convenience as Exhibit 2 to this statement.) Significantly, both BNSF and CP freely disclosed their plans to NCA in order to obtain NCA’s support for their Joint Petition.

¹ These operating arrangements are described in the CP/BNSF Joint Petition in this docket, at 3-4. The DMVW filed a Notice of Exemption to lease and operate over this track in Notice of Exemption in FD 35055, *Dakota, Mo. Valley and W.R.R., Inc. – Lease & Operation Exemption – Soo Line R.R. Co. d/b/a Can. Pac. Ry.* (STB served Aug. 10, 2007).

REDACTED VERSION

13. NCA supported this transaction in 2007 because it promised to both promote efficiency by reducing railroad operating costs and not interfere with the dual railroad service NCA had prior to the Joint Petition. Instead of both CP and BN separately operating along the line, rail operating costs would be reduced, which NCA expected would translate into receiving better service and lower rates. To be clear, NCA understood – and both CP and BNSF represented – that NCA would continue to receive competitive service both from CP and BNSF.

14. With respect to proposed service standards, the Haulage Agreement indicated that it was the intent of the parties for CP to provide BNSF with the same level of service as CP had for its own traffic. (See Exhibit 1, Section 4.01.)

15. In addition to NCA, the Joint Petition was supported by CHS, Inc., Bearpaw Energy and its marketer, Lodgepole Energy and Superior Grains, Inc. Both the CHS facility and Lodgepole were located at Lignite, North Dakota while Superior Grains had a facility in Crosby, North Dakota.

16. BNSF actually handled by far the large majority of the traffic out of Noonan during the early years following the STB's approval of the Joint Petition and the implementation of the Haulage Agreement. Their car counts for those years were:

REDACTED VERSION

<u>Year</u>	<u>CP Cars</u>	<u>BNSF Cars</u>
2007	■	■
2008	■	■
2009	■	■
2010	■	■
2011	■	■
2012	■	■
2013	■	■

17. Starting in 2011, in part in reliance upon the presence of competitive dual service from both BNSF and CP, NCA made substantial enhancements of the rail infrastructure to its grain elevators at Crosby and Noonan. Initially, NCA invested over \$4 million at Crosby in order to modernize the elevator and improve the railcar loading apparatus. Then, in 2014 NCA spent an additional \$37 million at the Noonan elevator and the fertilizer facility to make it a state-of-the-art facility that would accommodate unit train service. The two photos below show both a close-up of the grain elevator at Noonan and that NCA's construction included a significant amount of rail infrastructure, including a 1.5-mile long circle track that accommodate the movement of 110 car unit trains to the grain elevators and fertilizer facility.

18. The circle track at Noonan was constructed by an engineering firm which I understand was affiliated with the DMVW. The engineering plans were also shared with and approved by at least CP. I do not know whether CP in turn shared the plans with BNSF.

REDACTED VERSION



NOONAN CIRCLE TRACK

REDACTED VERSION



NOONAN ELEVATOR

Now that facility can handle 9 to 10 million bushels of grain per year, which equals approximately 2,800 cars.

19. Similarly, the Crosby grain elevator, while not able to accommodate 100-car trains at this point, due to the monies invested in 2011, can handle multi-railcar movements of up to 52 cars.



CROSBY ELEVATOR

20. Parenthetically, NCA also spent over \$17 million in making rail infrastructure and other improvements at its Westby grain elevator. While this facility has not received BNSF service and is not the subject of this proceeding, the capital improvements made there demonstrate NCA's commitment to efficient rail service.

21. The infrastructure improvements at Noonan resulted in an increase of carloads at that facility. However, this increase was far below expectations. First, in 2014, NCA began experiencing significant service issues with CP. The timing of this was particularly unfortunate, because the company had just completed the expansion of the rail facilities at Crosby and Noonan in order to enhance the service it could provide to farmers in this region. At that time,

REDACTED VERSION

CP was providing NCA with two “shuttle” trains. In our parlance, a shuttle train is considered to be a unit train consisting of at least 100 cars which is dedicated to NCA’s service, is expected to make two turns a month, and which NCA will take whether or not it has sufficient use for all of those cars. In NCA’s case, that has never been a problem, as the company has normally been able to utilize all cars that CP has brought into our facilities. Accordingly, in addition to the usual cars that CP and DMVW brought in that were handled in merchandise trains for both BNSF and CP service, NCA received two shuttle trains.

22. In 2014, we began experiencing a multitude of service issues with CP. At one point that year, we had [REDACTED] outstanding car orders that were not being filled. Then, CP announced that it had adopted a new car ordering system that would go into effect on September 1 of that year. We were advised that unless NCA agreed to cancel all outstanding car orders, CP would not permit NCA to order any cars at all, so we had no choice but to comply and completely restructure car orders.

23. While this created administrative difficulties, more troubling was the arbitrary limits on the number of BNSF cars that CP would agree to accept in interchange. In early 2014, CP determined that it would not accept more than 25 cars at one time from BNSF or permit BNSF to provide more than 200 cars in any one month.

24. As we understand it, CP contended that the Haulage Agreement contained a limitation of that nature. However, we found no such limitation in the Haulage Agreement. Regardless, that limited the ability to use the expanded rail facilities at both Noonan and Crosby to receive empty BNSF grain cars.

25. Similarly, CP’s arbitrary car restriction took away the possibility of receiving BNSF fertilizer unit trains at Noonan. The BNSF fertilizer unit trains consist of 65 cars, all of

REDACTED VERSION

which can be accommodated at Noonan. In view of CP's refusal to permit BNSF to provide unit trains, NCA cannot take advantage of the lower cost, efficient unit trains of fertilizer that BNSF can bring in.

26. In March 2014, NCA contacted the Board's Rail Customer and Public Assistance Program seeking help in addressing both the CP reduction in service as well as CP's refusal to honor its obligations to permit BNSF to provide the competitive service both carriers promised in 2007. At that time, NCA had a significant number of unfilled railcar orders, which left NCA in a situation where the company had a significant inventory that it was not able to move. At the same time, NCA had contracted for significant volumes of grain that it was unable to even bring into the facility, because the elevators were full and there was no place to keep additional inventory. Similarly, due to severe service failures on its system CP was unable to provide inbound fertilizer cars on anything approaching a timely basis. Regardless, in addition to not providing a sufficient volume of CP cars, CP was making it difficult for BNSF to provide cars or unit trains.

27. NCA exchanged a great deal of correspondence and phone calls over the next several months with various STB members of that program, including Tom Brugman, Gabriel Meyer, and Dave Kruschwitz. Although STB Staff's intervention did succeed in getting CP to bring in 48 cars on one occasion, CP still took the position that it was not required to accept more than 25 BNSF cars at a time. I suspect that STB staff was also frustrated by CP's lack of responsiveness, as they eventually suggested that NCA would need to file something more formal with the Board if the company wanted to obtain relief from the situation.

28. In retrospect, while we should have followed the advice of the STB's Office of Public Assistance and filed a formal action in 2014, we hoped the situation would be resolved by

REDACTED VERSION

CP and BNSF working cooperatively and honoring the terms of the 2007 Exemption to provide competitive service from both railroads. In addition, NCA had no need for the extra shuttle train during the 2015-2017 period in view of a reduction in grain production in this region due to adverse weather conditions and crop issues that year.

29. Although the Noonan grain elevators can accommodate [REDACTED] per year since NCA made the infrastructure investment, and our member farmers and other producers can provide the necessary volumes, we are not getting anything close to that volume of cars. The following table reflects the number of CP and BNSF cars that NCA have received and used at both Noonan and Crosby since 2014.

<u>Year</u>	<u>CP Cars</u>	<u>BNSF Cars</u>
2014	[REDACTED]	[REDACTED]
2015	[REDACTED]	[REDACTED]
2016	[REDACTED]	[REDACTED]
2017	[REDACTED]	[REDACTED]
2018 (Jan-Sept)	[REDACTED]	[REDACTED]

30. The limitations CP has imposed on BNSF's ability to provide service to NCA is also reflected in the relative market shares these railroads have of our outbound grain business. The previous table, showing the period of 2014 through the third quarter of 2018, demonstrates BNSF went from a market share of almost 50% in 2014 to approximately 10% in 2017 and 15% for the 2018 period.

31. The BNSF reduction in market share has been even more evident when one reviews the entire post-exemption approval period. For the pre-2014 time period, the numbers of

REDACTED VERSION

cars NCA was able to load out of its Noonan and Crosby facilities are reflected in the following table:

<u>Year</u>	<u>CP Cars</u>	<u>BNSF Cars</u>
2004	████	██████
2005	██████	████
2006	██████	████
2007	████	████
2008	████	████
2009	████	██████
2010	████	██████
2011	████	██████
2012	████	██████
2013	████	████

32. These car numbers show that BNSF had the dominant share of NCA’s outbound business for many years, but that it was reduced sharply beginning in 2015.

33. Some of this fluctuation in market shares can be explained by car supply considerations during busy periods. But the predominant reason for the diminishing role BNSF has with respect to NCA’s grain is the arbitrary and inappropriate limitation CP has imposed that limits our ability to access BNSF’s service and the uncertainty CP caused by claiming the Haulage Agreement would expire. Despite the reduction in grain production during the 2015-2017 period, there was still ample grain to be purchased and shipped. But we were hamstrung in requesting BNSF service, as CP was rather explicit that we might only be able to receive service

REDACTED VERSION

from them. For example, in an email dated December 13, 2016, Bruce Cibuzar, CP's commercial representative, stated: "But, per our discussion, the haulage agreement will be expiring at the end of 2016. Going forward, the elevator should request only CP equipment for placement at Crosby." From that point, we were in constant touch with both CP and BNSF in an attempt to find out what they were going to do about the Haulage Agreement and whether we continue to have BNSF service options. Nonetheless, in view of the uncertainty as to whether NCA would be able to rely on receiving BNSF service, BNSF's market share declined significantly.

34. Ultimately, we were advised by BNSF that CP first agreed that the agreement would last through the end of 2017, and then that they had agreed to a one-month extension of the term to permit them to determine whether it would be extended further and, if so, on what terms. Finally – in March of this year – we learned that they had agreed to a five-year extension of the Haulage Agreement. CP has refused to provide NCA with even a redacted copy of that extension. BNSF has advised that it is unable to provide that information due to a confidentiality provision that CP will not waive.

35. After our efforts in 2014 to get Board staff to solve our service problems ended, NCA again tried to work informally with CP, explaining the problems caused by CP's reduction of service, the imposition of the arbitrary car limits for BNSF cars and the refusal to permit BNSF to provide a shuttle train with the significant adverse impact on NCA's operations. NCA also approached BNSF to seek their direct intervention and, if possible, direct service.

36. I should add that there was an occasion when DMVW did manage to bring in 111 cars to Noonan at one time. This took place in September, 2014 at a time when CP was failing to accept multicar blocks that BNSF tried to interchange at the CP Minot yard. I believe that BNSF

REDACTED VERSION

subsequently took the cars to Bowbells, ND, at which point CP took them to Flaxton, so that DMVW could bring them to Noonan. Among other things, this demonstrates that unit train service from BNSF is operationally feasible.

37. Despite the change in market conditions, CP did not restore the second shuttle train, nor did it permit BNSF to provide NCA with shuttle train service. BNSF responded, essentially, that its hands were tied by its lack of ownership of the track.

38. Due to the expansion of the Noonan grain elevators to a 1.2 million bushel-capacity, CP's service limitation makes it impossible for NCA to clear the elevator and sell all of the grain. And, since we cannot empty the elevator, we are also unable to purchase anywhere near the volume of grain for which NCA's investment was made.

39. Moreover, aside from the regularly scheduled shuttle train I have discussed, there are times when other elevators in the region that do have such dedicated service are not able to use them. As the elevators that have shuttle service have to pay even if they have no use for the train, NCA could use these unused trains at reduced prices. Other elevators have that ability. But, due to CP's refusal to let BNSF unit trains into our Noonan facility, we cannot take advantage of these opportunities. Of course, if we still had direct BNSF service, this would not be a problem.

40. This has had and continues to have a significant adverse effect on NCA. Initially, and despite its significant investment in the Noonan rail infrastructure, starting in 2014 NCA was sustaining a huge reduction in the number of cars that were available for loading, which necessarily meant that we could not empty our grain elevators to market grain and similarly were limited in the amount of grain we could purchase from local farmers. The lack of promised competitive rail service has resulted in NCA losing a significant amount of business to local

REDACTED VERSION

grain marketers, as they were situated on track over which BNSF did operate and were able to obtain adequate car supply and service. And, given the nature of this year's harvest, NCA definitely needs the extra BNSF unit train service to clear its elevators and sell its grain. In addition, grain elevators served by BNSF have a significant price advantage to NCA, as BNSF rates to various destinations were significantly lower than the rates accorded by CP, showing BNSF's willingness to compete for this traffic.

41. In that regard, grain tends to move by tariff rates so that it is often possible to compare rates for CP vs. BNSF. As CP does not directly serve many of our destination markets, which are very important in the grain industry, CP is compelled to interchange with other railroads (usually, the Union Pacific) in order to reach some of the destinations. These factors help explain the significant rate differentials that are shown by the following rate comparisons on various grains that move from Noonan, using rate tariff information as of October 1, 2018:

<u>Destination</u>	<u>Commodity</u>²	<u>CP Rate/Car</u>	<u>BNSF Rate/Car</u>	<u>Differential/Car</u>
Pacific Northwest (PNW)	Flaxseed	\$6,001.55	\$4,831.00	\$1,170.55
PNW	Peas	\$6,751.55	\$5,772.00	\$979.55
Houston	Peas	\$9,010.48	\$7,349.00	\$1,711.48
Seattle	Soybeans	\$8,481.84	\$5,355.00	\$3,126.84
Los Angeles	Wheat	\$9,157.93	\$7,813.00	\$1,344.93
Seattle	Wheat	\$7,110.84	\$6,781.00	\$329.84
Portland	Wheat	\$7,073.34	\$6,406.00	\$667.34

I have performed similar analyses of the rate differentials for other recent periods (March 20, 2018, September 13, 2017, May 1, 2017 and May 1, 2015), and all show the same thing; namely, that the lack of competitive access to BNSF puts NCA at a tremendous cost disadvantage, while

² NCA cannot ship peas to Stockton via CP any longer, nor corn to Portland.

REDACTED VERSION

CP's efforts to prevent BNSF from competing prop up CP's revenues for traffic it otherwise would not have if CP competed with BNSF, as CP represented to the Board in 2007 it would do.

42. There are a number of other important markets that CP cannot serve by its own single line service. This includes [REDACTED] (for durum wheat), peas and flax to [REDACTED] spring wheat and peas to [REDACTED] and wheat and corn to [REDACTED]. And, given the ability BNSF shippers have to use its unit trains, NCA is at up to a 60 cents per bushel disadvantage in trying to purchase these grains from local farmers by not having the promised access to BNSF's competitive service.

43. To make matters worse, CP does not currently even offer a rate or routing by which NCA can use its service to certain points, such as the movement of peas to [REDACTED] or corn to [REDACTED], thus foreclosing us from those markets. Yet, the CP and BNSF representations to the Board assured both NCA and the Board that this would not be a problem and that we would have full access to BNSF service areas.

44. Similarly, using publicly available tariff data, I have provided the following analysis of CP vs. BNSF rates to the problem faced by NCA's grain elevator at Westby, Montana that is captive to CP as compared to NCA's competitors at nearby locations, all of which are served directly by BNSF:

<u>Origin</u>	<u>RR</u>	<u># Cars</u>	<u>Seattle Rate/Car</u>	<u>Chicago Rate/Car</u>
Westby	CP	1-100	\$7,223	\$5,536
Williston, ND	BNSF	24-48	\$5,571	\$5,039
Plentywood ³	BNSF	110	\$4,998	-
Plentywood	BNSF	24-48	\$5,024	\$5,091
Ross	BNSF	110	\$5,024	-
Ross	BNSF	24-48	\$5,678	\$5,005

³ Both Plentywood and Ross have BNSF shuttle train service.

REDACTED VERSION

This helps show the importance of actually receiving the promised access to full BNSF competitive service and, in particular, the BNSF shuttle trains.

45. The importance of competitive BNSF shuttle train service is also illustrated by the differential in rates via BNSF for Canola moving from our Noonan facility to [REDACTED], as compared to the shuttle train rates available to elevators served by BNSF.

<u>Origin</u>	<u># Cars</u>	<u>Rate/Car</u>
Noonan, ND (BNSF)	[REDACTED]	\$4,453
Northgate, SK (BNSF)	[REDACTED]	\$3,356
Bowbells, ND (BNSF)	[REDACTED]	\$3,085
Ross, ND (BNSF)	[REDACTED]	\$3,261

Although [REDACTED], which is an important destination for NCA, cannot accept unit trains, BNSF lets shippers “explode” a shuttle train so that a smaller number of cars being dropped at that destination can take advantage of the significantly lower unit train rate. Accordingly, if NCA cannot get access to the BNSF shuttle train, we are facing a rate disadvantage of approximately \$1,100 per car on this commodity as compared to our nearby competitors. This equate to approximately 60 cents per hundred weight, which is a huge price disadvantage for NCA and its farmer members.

46. Returning to the issue of the Haulage Agreement, CP’s current attitude stands in sharp contrast to 2007 when the railroads sought NCA’s support for the Joint Petition. Despite our requests, neither party has provided us with a copy of that agreement. NCA has been advised by BNSF that it has no objection to providing us with a copy of the renewed haulage agreement, but that CP has refused waive the confidentiality provision in the agreement. Accordingly, NCA does not know as of this date whether this is merely an extension of the

REDACTED VERSION

previous agreement, which was submitted to the Board in this docket, or whether it is a new haulage agreement with differing terms.

47. This lack of transparency at the present time is obviously quite different than the behavior of the railroads in 2007. At that time, both CP and BNSF were fully open about the operating terms and pledged their competitive service would be maintained. But their silence today neither satisfies our need to know whether the new agreement has restrictions that will limit NCA's access to the promised competitive service.

48. As I have stated above, CP does provide NCA with one shuttle train, which is very helpful in moving grain to markets served by CP. However, CP continues to refuse to provide NCA with a second shuttle train despite the significant infrastructure investments NCA made to accommodate unit trains and CP's own service limitations. In our view, this second train can be provided by BNSF pursuant to the 2007 exemption and the Haulage Agreement that was presented to the Board, which was entered into for just this purpose, *i.e.*, to permit BNSF to continue to provide service to NCA and continue to compete head-to-head with CP.

49. Similarly, although CP does provide NCA with blocks of cars that move in merchandise service, for reasons that are not clear, they have placed arbitrary limits on the number of BNSF cars CP will provide via the Haulage Agreement, which again limits the amount of grain NCA can buy and ship.

50. NCA has come to the Board because CP has reneged on its commitment and obligation to ensure that its ownership of the track and exercise of the Haulage Agreement would not result in the loss of rail competition, and that NCA would not suffer a material change in the level or nature of service provided by both railroads.

REDACTED VERSION

51. Through its actions, CP has placed NCA at a significant competitive disadvantage vis-à-vis other grain elevators in the region. By limiting the number of cars it is willing to let DMVW bring into and haul out of the NCA facilities, CP has limited the amount of grain NCA can purchase from the local farmers and the amount of grain it can sell. And, by wrongly limiting access to BNSF cars and routings, CP has restricted competition from BNSF that would enable NCA to transport its grain to numerous markets and at a lower cost. In addition, aside from cost considerations, many customers for NCA's grain much prefer BNSF cars to CP cars; they tend to be newer, in better condition and offer more efficient unloading. Again, while our competitors can take advantage of this BNSF service, NCA's access to this service is limited.

52. CP has never provided an explanation as to why it has limited the number of BNSF cars that it will agree to interchange for NCA or why it refuses to let NCA access a BNSF shuttle train. As far as we can see in reviewing the original 2007 Haulage Agreement that the Board reviewed in approving the transaction between these carriers at that time, that document does not support the notion for any limitation of BNSF's service.

53. Moreover, we are not aware that there is any operational problem that would preclude CP or DMVW from interchanging either additional BNSF cars moving in merchandise train service or the shuttle train that BNSF is willing to provide NCA. In that regard, we are not aware of any reason why BNSF cars or unit trains cannot be interchanged with CP either at the CP yard in Minot, or at BNSF's own yard at Gavin, which is slightly to the east of Minot. Similarly, we see no reason why BNSF could not interchange cars with CP at Bowbells, North Dakota.

54. While the 2007 proceeding specifically contemplated that the parties would be interchanging at Minot, if there is some operational reason why Minot is not the optimum place

REDACTED VERSION

for BN and CP to interchange cars, we believe an interchange between the two railroads at Bowbells would still be practicable and would implement the competitive conditions the parties voluntarily undertook in submitting the joint petition for STB approval. Regardless, both railroads have the obligation to honor the representations they both made to the Board in 2007 to ensure that NCA would continue to have the service of both CP and BNSF.

55. If CP is now contending that an interchange at Minot with BNSF is no longer practicable, the railroads should make an efficient interchange possible. In the alternative, the Board should revoke the exemption granted in this proceeding so that BNSF again has an ownership interest and a right to serve NCA on this track.

56. Although there were several other shippers that supported the joint petition in 2007, CP's inappropriate view of its obligations under the 2007 decision appears to have had a singular adverse effect on NCA. For example, Superior Grain, which had a grain elevator situated at Crosby, North Dakota at the time the joint petition was filed in 2007, moved its operations to Williston, North Dakota, and is now situated on a line served by BNSF. CHS also had a grain elevator, which was located at Lignite, North Dakota, but it sold that facility subsequent to 2007. That grain elevator is now owned by a company called Pipeline Foods, LLC and is directly served by both CP and BNSF at Lignite, North Dakota, and accordingly does not need the additional service and costs of having DMVW complete the rail service. Similarly, Bearpaw Energy's facility at Lignite also enjoys both BNSF and CP service without the need to use DMVW. Consequently, it is only the NCA facilities that are west of Lignite that are currently facing these service restrictions.

57. With respect to the NCA's competitors, there are other grain elevators in relatively close proximity to Crosby and Noonan that service the farmers in this region. The

REDACTED VERSION

following chart reflects the number of elevators, where they are located, and which railroad provides service:

<u>Number of Elevators</u>	<u>Location</u>	<u>Serving Railroad</u>
1	Bowbells	CP/BNSF (100)
2	Northgate	BNSF (100)
1	Plentywood	BNSF (100)
1	Williston	BNSF (100)
1	Ray	BNSF
1	Ross	BNSF (100)

The significance of the number 100 noted above is that at each of those locations, BNSF is able provide that elevator with at least 1 shuttle train, which means that shuttle train can make two turns each month. In that regard, see also my discussion of the rate differentials at some of these locations, above at ¶ 33.

58. On behalf of NCA, I respectfully urge the Board to take whatever immediate action it can to remedy the situation. It is the nature of this industry that NCA is required to offer grain for sale far in advance of when it will actually be harvested; often as far out as 10 months. For example, we are currently marketing grain that won't be available to ship until next August. If we don't, then NCA simply cannot participate in the industry to market grain from this region, as that is how contracts for the sale of grain work. We already know, based upon the projected harvest and grain in stock, that we will need multiple shuttle or unit trains next summer and fall. Without access to the promised BNSF service, it will be difficult if not impossible for NCA to move the grain that will be available.

59. As I have stated above, NCA spent \$37 million to improve the rail infrastructure at Noonan so that it would be able to handle shuttle trains comprised of 100-plus rail cars at a time. In addition to the ability to move grain out of the elevators much quicker than the various

REDACTED VERSION

smaller blocks of cars that move in merchandise traffic, these unit trains are significantly less expensive to each destination. In general, that cost differential means that NCA can pay farmers approximately \$.30 more per bushel for any traffic it can move out via these highly efficient, low-cost trains as compared to the 1-100 car rates that are otherwise applicable. But, just as NCA can pay more to the farmers for grain under those condition, so can its competitors. Accordingly, by not being able to access BNSF shuttle trains, NCA is at a significant competitive disadvantage to the grain elevators located at Williston, Bowbells, Northgate, Plentywood and Ross, North Dakota. Consequently, and contrary to the terms of the Board's 2007 decision in this docket, CP's implementation of the haulage agreement has resulted in a significant loss of rail competition for NCA.

VERIFICATION

I, Lynn Michelson, hereby certify that the foregoing is true and correct to the best of my knowledge, information and belief.

Dated: December 19, 2018



Lynn Michelson

Exhibit 1

EXHIBIT G

**NORTH DAKOTA HAULAGE
SERVICE AGREEMENT**

THIS AGREEMENT (the "North Dakota Haulage Service Agreement" or "Agreement") is entered into as of this ____ day of _____, 2007, by and between SOO LINE RAILROAD COMPANY, d/b/a Canadian Pacific Railway ("CPR") and BNSF Railway Company ("BNSF"), sometimes collectively referred to as the "Parties" or individually as a "Party."

WITNESSETH:

WHEREAS, the Parties interchange rail freight cars in Minot, ND under the terms and conditions of an agreement dated March 15, 1988 as supplemented September 16, 1993 hereinafter referred to as the "Interchange Agreement"; and

WHEREAS, CPR and BNSF are parties to a Purchase and Sale Agreement dated (date) for Rail Operations and Real and Personal Property between Crosby and a Point East of Lignite in Divide and Burke Counties, North Dakota ("Conveyed Lines"); and

WHEREAS, to affect the Purchase Agreement and continue to serve customers, ("Conveyed Line Industries") located on the Conveyed Lines, BNSF desires to purchase haulage services from CPR to move loaded and empty freight cars in BNSF's account in either direction between Minot, ND and Conveyed Line Industries; and

WHEREAS, CPR has agreed to provide or cause to provide to BNSF, and BNSF has agreed to purchase from CPR, haulage services; and

WHEREAS, the Parties desire to set forth the terms and conditions upon which CPR shall provide or cause to provide such haulage services to BNSF.

NOW, THEREFORE, in consideration of the premises and of the mutual covenants herein set forth, the Parties hereto, intending to be legally bound, Agree As Follows:

Section 1 - BNSF HAULAGE CARS

1.01 "BNSF Haulage Cars" shall include Railcars (as defined in Section 1.02) tendered by BNSF in the revenue waybill and car hire account of BNSF for handling on lines of railway owned or controlled by CPR (referred to hereinafter as the "Haulage Route") between the Parties exchange location in Minot, North Dakota and the Conveyed Line Industries.

1.02 "Railcars" shall include the loaded and empty freight rail cars to be moved in existing CPR train service under the provisions of this Agreement, and will be limited to those rail cars that are both (i) in the waybill and car hire accounts of BNSF (as determined under the Association of American Railroad Car Hire and Car Service Rules), and (ii) for BNSF destined to or originating from Conveyed Line Industries over lines owned or operated by CPR or its agent for exchange between CPR and BNSF at Minot, ND. The aforesaid Railcars to be handled by CPR under the provisions of this Agreement are hereinafter referred to as "BNSF Haulage Cars".

1.03 Subject to the clearance file maintained by CPR and prior to any dimensional load or excess clearance Railcar(s) being tendered by BNSF for movement under this North Dakota Haulage Service Agreement, BNSF shall first notify CPR in writing, giving all pertinent physical facts, and requesting verification. CPR shall respond promptly either confirming the physical facts related to the proposed dimensional load or excess clearance Railcar(s) or specifically identifying the physical facts which would interfere with a planned move. In no event shall CPR deny to BNSF the ability to tender a specific Railcar for movement over the Haulage Route and then subsequently grant approval for the same or similar movement over the same portion of

the Haulage Route in a CPR train unless BNSF receives timely notice that the limiting clearance or other reason for denial has been removed. The Parties shall cooperate to accommodate all dimensional loads and excess clearance Railcars, subject to compensation to CPR for any special services necessary or advisable for the movement thereof at the charge to be assessed by CPR to BNSF from time to time to recover all costs incurred by CPR associated with the movement of such dimensional load and/or excess clearance Railcars.

Section 2 - HAULAGE SERVICES

2.01 CPR hereby agrees to handle in existing train service ("Haulage Services"), BNSF Haulage Cars, pursuant to the terms and subject to the conditions set forth in this Agreement, with CPR and/or its designated agent's crews, locomotive power, end-of-train device ("EOT") and fuel. Such "Haulage Services" shall include, as applicable, (i) the transportation of Railcars between the points specified in Section 1.01; (ii) movement of bad order equipment to or from repair tracks, provided, that BNSF will be billed separately for repairs to such equipment performed by CPR pursuant to Section 3.06 of this Agreement; (iii) such mechanical or other inspection of BNSF Haulage Cars as may be prescribed by regulation or CPR's operating practices; and (iv) provision of supervision as required.

2.02 CPR shall afford BNSF Haulage Cars substantially the same type and levels of service for the protection of freight (such as inspections, load shifting and security) as CPR does for its own traffic.

2.03 The BNSF Haulage Cars tendered by BNSF at the Minot exchange tracks for handling by CPR under this Agreement shall be subject to compliance with operating practices applied to CPR's own trains.

2.04 BNSF's purchase of Haulage Services pursuant to this Agreement shall be subject to CPR's existing available train capacity.

2.05 If BNSF develops further business for the Conveyed Line Industries, such that additional volume exceeds available capacity on CPR's existing train service which necessitate the operation of additional CPR trains to accommodate the increase in BNSF Haulage Cars, BNSF may request that CPR permit the operation of an additional train start. CPR shall consider such a request in good faith and may at its discretion permit the operation of BNSF Haulage Cars in excess of the existing train service capacity as specified by CPR. If CPR determines, in its sole judgment reasonably exercised (having regard to CPR's own present and future requirements and CPR's required reserve capacity), that facility changes, additions and betterments to the Haulage Route are necessary to accommodate the operation of additional trains to solely handle BNSF Haulage Cars ("Capacity Improvements"), CPR shall advise BNSF of the required Capacity Improvements and the number of Additional Trains that would be permitted if the Capacity Improvements were constructed. If BNSF is in agreement with the Capacity Improvements to be made then it shall request in writing that the Capacity Improvements be made by CPR at the sole cost and expense of BNSF. CPR shall construct the Capacity Improvements and upon completion of the construction of the Capacity Improvements payment therefore will be made by BNSF.

2.06 Unless otherwise agreed in writing, the transition of rail operations on the Commencement Date specified in the Purchase and Sale Agreement will be in accordance with Appendix I attached hereto.

Section 3 – MANAGEMENT AND OPERATION

3.01 BNSF shall physically deliver westbound BNSF Haulage Cars to CPR at Minot, ND on such track(s) as shall be designated from time to time by CPR's local transportation officer or other designated representative in charge of such exchange tracks at Minot, ND. In the event CPR's operation over BNSF's tracks and yard

facilities in connection with the receipt of BNSF Haulage Cars is required, it shall at all times be subject to the direction and control of the BNSF local operating officer in charge of such tracks and yard facilities and to applicable provisions of BNSF's safety and operating rules. The operation of BNSF Railcars over CPR lines of railroad shall at all times be subject to the exclusive direction and control of CPR, and to applicable provisions of CPR's safety and operating rules. In the event the Haulage Route includes lines of railroad of another track owner over which CPR may perform haulage, those safety and operating rules provided by the track owner shall be of the same force and affect to BNSF Haulage Cars as they apply to CPR train movements.

3.02 BNSF shall provide, or cause to have provided via EDI 417 and 418 transmissions (or by such other means as may be mutually agreed by the Parties), information necessary for the further handling and movement of BNSF Haulage Cars. Such information shall include, for each car:

- (1) Car initial and number;
- (2) Loaded or empty;
- (3) Such other information as the Parties may agree to be necessary or convenient for the safe and efficient exchange and further movement of such cars;

3.03 BNSF Haulage Cars shall be considered physically delivered from one Party to the other Party upon the Minot exchange tracks when the train containing such BNSF Haulage Cars has been placed by the delivering Party on the designated track(s) and locomotive of the delivering Party has uncoupled from such train. BNSF Haulage Cars shall be preceded by the delivery of the car movement information specified in Section 3.02 of this Agreement.

3.04 CPR shall have exclusive management and control over the movement of trains containing BNSF Haulage Cars while on CPR's lines. CPR shall have the right to

transport rail cars or equipment in the revenue waybill or car hire account of any party other than BNSF in trains transporting BNSF Haulage Cars so long as it does not unreasonably adversely affect the BNSF traffic.

3.05 BNSF shall deliver, or cause to be so delivered, to CPR the Advance 418 train consist together with such other data to include, but not limited to, haulage waybills, concerning such BNSF Haulage Cars therein as CPR may reasonably require for the safe and efficient operation of such Railcars. BNSF shall deliver, or cause to be so delivered, to CPR, in the manner herein specified, upon exchange tracks at Minot, ND, all BNSF Haulage Cars to be moved by CPR to Conveyed Line Industries under the provisions of this Agreement. All such BNSF Railcars shall be pre-blocked by a carrier other than CPR to the extent and in such manner as desired by BNSF, and CPR shall assemble into its train on the Minot, ND exchange tracks blocked BNSF Railcars. Upon completion of assembling the train CPR shall perform the mechanical and air brake test and deliver, or cause to be so inspected and delivered, all such BNSF Railcars in train consists which may include BNSF Haulage Cars, CPR Railcars, CPR locomotives and CPR EOT. BNSF shall furnish CPR, at no cost or expense to CPR, such access to trackage as may be necessary for CPR to perform service to BNSF Haulage Cars contemplated by this Agreement.

3.06 CPR shall use its reasonably best efforts to deliver, or cause to be so delivered, to BNSF the Advance 418 train consist together with such other data concerning such BNSF Haulage Cars therein as BNSF may reasonably require for the safe and efficient operation of such Railcars. CPR shall deliver, or cause to be so delivered, to BNSF, in the manner herein specified, upon exchange tracks at Minot, ND, all BNSF Haulage Cars to be moved by CPR from Conveyed Line Industries under the provisions of this Agreement.

3.07 CPR may arrange for such repairs to BNSF Haulage Cars and perform adjustments to or transfers of lading from bad ordered, defective or overloaded BNSF Haulage Cars, as in CPR's judgment may be necessary to move such BNSF Haulage

Cars safely. BNSF shall reimburse CPR for the cost of such work at rates prescribed in, and submitted pursuant to, the Field and Office Manuals of the Interchange Rules of the Association of American Railroads ("AAR").

Section 4 - SERVICE STANDARDS

4.01 It is the intent of CPR that it shall generally accord BNSF Haulage Cars the same level of service as CPR's own traffic of the same type; provided, however, that the foregoing shall not constitute a service guarantee.

4.02 CPR and BNSF, as the case may be, in delivering or picking up of loaded and/or empty freight cars hereunder, shall do so in such a manner so as to not obstruct or interfere unreasonably with the operation or use of any other trackage.

Section 5 - CAR ACCOUNTING AND CAR HIRE

5.01 BNSF Haulage Cars shall at all times remain in the revenue waybill and car hire accounts of BNSF while moving in haulage service on CPR's lines. CPR shall not be entitled to any line haul revenue for the handling of BNSF Haulage Cars, nor shall CPR participate in the routing of, nor appear in tariffs, waybills or other shipping documents as a participating carrier in connection with the movement of BNSF Haulage Cars. As between CPR and BNSF, BNSF shall be responsible for all mileage and car hire charges accruing on Railcars moving in haulage service, and BNSF shall report and pay, or arrange to have reported and paid, all appropriate allowances and charges directly to the owner(s) of such Railcars.

Section 6 – COMPENSATION

6.01 In consideration of the haulage service being performed herein, BNSF agrees to pay CPR the compensation prescribed in Schedule A attached hereto.

6.02 BNSF shall prepare and deliver to CPR monthly on or about the fifteenth day of each calendar month during the term of this Agreement a statement of the number of cars delivered to and hauled by CPR in accordance with Section 1 hereof during the immediate preceding calendar month. The statement shall contain a detailed list in chronological order of the Railcars which shall include but not be limited to, car initial and number, and type. CPR will submit an invoice on a monthly basis. All payments called for under this Section shall be made by BNSF within thirty (30) calendar days after invoice date.

6.03 The amounts specified in this Section 6 shall be in addition to any and all other costs, expenses and charges that BNSF is required to bear and pay under the provisions of this Agreement.

6.04 The payment of bills shall not be delayed or payment refused or shorted on the face amount of bill rendered because of errors in supporting details which are not serious and important, but bill shall be paid as rendered and exception taken in writing addressed to the officer of CPR responsible for the issuance of the bill.

6.05 The records of each Party pertaining to this Agreement shall be open to inspection by representatives of the other Party upon reasonable notice, during regular office hours. No bill shall be rendered nor exception honored for charges incurred one (1) year after the service month in which the expense was incurred.

6.06 Waiver of a default in any given instance or many similar instances shall not be construed as a waiver in any other instance. Failure of a Party to enforce its remedies in any one instance or many similar instances shall not constitute a waiver of the right to enforce its remedies in any other instance.

6.07 It is expressly understood and agreed that the payments described in this Section 6 to be paid by BNSF do not in any case include any cost or expense which may be incurred by CPR on account of loss of or damage to property, or injury to or

death of any person or persons arising out of or in connection with the operation by CPR of its locomotives, trains, or cars, upon or over the CPR trackage on the route used to transport the BNSF Haulage Cars. It is agreed by and between the Parties that such items of cost or expense shall be borne and paid by the Parties according to the provision of Section 7 hereof.

Section 7 - LIABILITY

As between the Parties hereto, responsibility for any loss or destruction of, or damage to, any property whatsoever, and any injury to or death of any person or persons whomever (including employees of BNSF and CPR), resulting from, arising out of, incidental to or occurring in connection with this Agreement ("Loss or Damage"), shall be allocated as follows, without regard to considerations of fault or negligence (except as otherwise provided in Sections 7.08 hereof):

7.01 For purposes of this Section 7, the following words shall have the meanings set forth in this Section:

(a) "Cars" shall mean loaded and empty freight cars, trailers, containers, and Railcars (including lading). "CPR Cars" shall mean Cars in the revenue and/or car hire account of CPR. "BNSF Cars" shall mean Cars in the revenue and/or car hire account of BNSF.

(b) "Equipment" shall mean and be confined to locomotives, cabooses, hi-rail vehicles, track inspection equipment and other non-revenue vehicles and machinery capable of being operated on railroad tracks that, at the time of an occurrence, are (i) being operated on the trackage upon which such occurrence takes place, or (ii) are on the trackage upon which such occurrence takes place, or on the adjoining right-of-way, for the purpose of maintenance or repair thereof or the clearing of wrecks thereon. "CPR Equipment" shall mean Equipment operated by or in the

account of CPR and "BNSF Equipment" shall mean Equipment in the account of BNSF. For clarity all locomotive units regardless of ownership while operating in Haulage Services shall be considered in the account of CPR.

(c) CPR Cars and CPR Equipment shall be referred to collectively as "CPR Traffic". BNSF Cars and BNSF Equipment shall be referred to collectively as "BNSF Traffic". CPR Traffic and BNSF Traffic shall be referred to collectively as "Traffic".

(d) "Foreign Railroad" shall mean a railroad that is not a party to this Agreement.

7.02 Whenever Loss or Damage occurs with only one CPR train being involved, and that CPR train is handling BNSF Traffic, then BNSF shall assume and bear all liability for Loss or Damage to BNSF Traffic moving in such CPR train, and CPR shall assume and bear all liability for CPR Traffic moving in such CPR train. In such event, any other Loss or Damage, including without limitation Loss or Damage to employees of the Parties and any Loss or Damage to third party Cars and Equipment not otherwise allocated pursuant to Section 7.06, to the Haulage Route or to property, and any injury to or death of any other person or persons, so occurring shall be borne by each of CPR and BNSF in proportion to the amount of traffic tendered by each Party relative to the total Traffic in such CPR train that is moving in that Party's revenue waybill or car hire account for said train.

7.03 Whenever Loss or Damage occurs with more than one train, and one or more of such trains is handling BNSF Traffic, then BNSF shall assume and bear all liability for Loss or Damage to BNSF Traffic moving in such CPR train(s) moving over the Haulage Route, and CPR shall assume all liability for CPR Traffic moving in such CPR train(s). In such event, any other Loss or Damage, including without limitation Loss or Damage to employees of the Parties and any Loss or Damage to third party Cars and Equipment not otherwise allocated pursuant to Section 7.06, to the Haulage

Route or to property, and any injury to or death of any other person or persons, so occurring shall be allocated between the Parties in the following manner: (i) all such Loss or Damage arising from or caused by any train(s) which is (are) handling only CPR Traffic shall be borne solely by CPR, (ii) all such Loss or Damage arising from or caused by any train(s) which is (are) handling only BNSF Traffic shall be borne solely by BNSF, and (iii) all such Loss or Damage which arises from or is caused by any train(s) handling both BNSF Traffic and CPR Traffic shall be shared and borne by each of BNSF and CPR in proportion to the amount of traffic tendered by each Party relative to the total Traffic in such train that is moving in that Party's revenue waybill or car hire account for said train. The Parties shall share recovery or indemnification from any Foreign Railroad or third party who is at fault in proportion to that Party's respective Loss or Damage as set forth above.

7.04 Except as otherwise provided in Section 7.03, for the purposes of assigning responsibility for Loss and Damage under this Section 7 as between the Parties hereto, the trains of a Foreign Railroad shall be considered to be the trains of CPR handling only CPR Traffic.

7.05 Notwithstanding anything to the contrary in Sections 7.02 through 7.04 above, when any damage to or destruction of the environment, including without limitation land, air, water, wildlife, and vegetation, occurs with one or more CPR trains handling BNSF Traffic being involved, then, as between themselves, (i) CPR shall be solely responsible for any damage or destruction to the environment and to third parties which results solely from a substance transported in CPR Traffic and/or a CPR locomotive from which there was a release, (ii) BNSF shall be solely responsible for any damage or destruction to the environment and to third parties which results solely from a substance transported in BNSF Traffic from which there was a release, and (iii) responsibility for damage or destruction to the environment and to third parties which results from one or more substances which was (or were) being transported in Cars, Equipment or locomotives in the revenue waybill and car hire accounts of both BNSF and CPR from which there was a release shall be shared by the Parties in proportion to

the total number of such Cars, Equipment or locomotives in the revenue waybill and car hire account of each Party from which there was such a release.

7.06 For purposes of determining responsibility for Loss and Damage as between the Parties hereto pursuant to this Section 7, any Cars, Equipment or locomotives of any railroad not a party to this Agreement moving in a CPR train shall be deemed to be Cars, Equipment or locomotives in the revenue waybill or car hire account of CPR.

7.07 Whenever circumstances require wrecking service or wrecking train service in connection with the subject of this Agreement, CPR shall arrange for such services to be performed as promptly as reasonably possible, and the cost thereof shall be allocated as between the Parties in accordance with the terms of this Section 7.

7.08 If any suit or action shall be brought against any Party for Loss or Damage which under the provisions of this Agreement are in whole or in part the responsibility of the other Party, said responsible Party shall be notified in writing by the Party sued, and the Party so notified shall have the right and be obligated to take part in the defense of such suit and shall pay its share of the judgment and the costs and expense incurred in such suit in accordance with the terms of this Section 7.

7.09 In every case of death or injury suffered by an employee of BNSF or CPR, when compensation to such employee or employee's dependents is required to be paid under any present or future state or federal worker's compensation, occupational disease, employers' liability or other law, and one or more of the Parties under provisions of this Agreement is/are required to pay same or a portion of same in installments over a period of time, said Party or Parties shall not be released from paying any such future installment(s) by reason of the expiration or other termination of this North Dakota Haulage Service Agreement prior to any of the respective date(s) upon which any such future installments are to be paid.

7.10 Whenever any liability, cost or expense is assumed by or allocated to a Party under this Section 7, that Party shall (i) forever protect, defend, indemnify and save harmless the other Party and its parent corporation, subsidiaries and affiliates, and all of their respective directors, officers, agents, and employees from and against that liability, cost and expense, regardless of whether such liability, cost and expense was caused in whole or in part by the fault, failure, negligence, misconduct, malfeasance or misfeasance of the indemnitees or their directors, officers, agents or employees, and (ii) defend such indemnitees against such claims with counsel selected by the responsible Party and reasonably acceptable to the indemnified Party.

7.11 Each Party shall investigate, adjust and defend all cargo related claims filed with it in accordance with applicable statutes and regulations in Canada and the US.

7.12 All costs and expenses in connection with the investigation, adjustment and defense of any claim or suit (other than cargo-related claims made against a Party by a customer whose traffic was moving in the revenue and/or car hire account of such Party) under this North Dakota Haulage Service Agreement shall be included as costs and expenses in applying the liability provisions of this Section 7; provided, however, that salaries or wages of full-time agents, full-time attorneys and other full-time employees of any Party engaged directly or indirectly in such work shall be borne by such Party.

7.13 No Party shall settle or compromise any claim, demand, suit or cause of action (other than a cargo-related claim filed with it in accordance with applicable statutes and regulations in the United States of America and for which the other Party has any liability under this North Dakota Haulage Service Agreement without the concurrence of such other Party if the consideration for such settlement or compromise exceeds _____). The foregoing amount of _____ shall be adjusted annually in accordance with the provisions of Schedule A.

Section 8 – COMPLIANCE WITH LAW

8.01 Each Party hereto shall comply with all applicable federal, state and local laws, rules, regulations and orders promulgated by any government or governmental agency that relate to the provision of haulage services or the movement of BNSF Haulage Cars hereunder. If any fine, penalty, cost or charge is imposed or assessed on or against either Party hereto by reason of the other Party's non-compliance with any such laws, rules, regulations or orders, such non-complying Party shall reimburse and indemnify the other Party for or on account of any such fine, penalty, cost, or charge, and all expenses and attorney's fees incurred in connection therewith, and, to the extent feasible, such non-complying Party shall defend the interests of that other Party in any related legal proceeding free of cost, charge or expense to that other Party.

Section 9 - TERM

9.01 This North Dakota Haulage Agreement shall become effective ("Effective Date") as of the first date written above and shall remain in effect until January 1, 2017 ("Initial Term") and thereafter as mutually agreed between the Parties.

9.02 Either Party shall have the right to terminate this Agreement at any time after the Initial Term, upon giving the other Party at least twelve (12) months prior written notice of such termination; provided however, that in the event that CPR seeks approval or exemption for abandonment or discontinuance of service of any portion of the Conveyed Line from the federal Surface Transportation Board (STB) prior to January 1, 2010 (which BNSF will not to oppose or frustrate pursuant to Section 3.2(b) of the Purchase and Sale Agreement) this Agreement may be terminated by CPR upon ten (10) business days' notice; and provided further, that after January 1, 2010, this Agreement may be terminated by either party upon thirty (30) calendar days' notice in

the event the STB approves or exempts abandonment or discontinuance of service of any portion of the Covered Lines.

9.03 Termination of this North Dakota Haulage Services Agreement shall not relieve or release either Party hereto from any obligation assumed or from any liability which may have arisen or been incurred by such Party under the terms of this Agreement prior to termination hereof.

9.04 In the event of any substantial failure on the part of either Party to perform its obligations under this North Dakota Haulage Agreement, and its continuance in such default for a period of thirty (30) calendar days after written notice thereof by certified mail from the other Party, the non-defaulting Party shall have the right at its option, after first giving fifteen (15) days' written notice thereof by certified mail, and notwithstanding any waiver by such Party of any prior breach thereof, to refer such matter to arbitration pursuant to Section 12 and seek damages and/or specific performance of this Agreement from the defaulting Party. In the case of a substantial default by BNSF which continues after adjudication of such default through arbitration, CPR may terminate this North Dakota Haulage Service Agreement if BNSF fails to cure such substantial default within: (i) seven (7) business days of the receipt of notice of continued default in the case of such a default by BNSF in an obligation to pay CPR, and (ii) fifteen (15) days of the receipt of notice of continued default in the case of any other such default under this North Dakota Haulage Service Agreement.

Section 10 - FORCE MAJEURE

10.01 The obligations, other than payment obligations, of the Parties to this Agreement shall be subject to force majeure (including strikes, riots, floods, accidents, Acts of God, acts of terrorism, and other causes or circumstances beyond the control of the Party invoking such force majeure as an excuse for nonperformance), but only as long as, and to the extent that, such force majeure shall reasonably prevent

performance of such obligations by the affected Party. In the event that an event of force majeure impairs either Party's ability to fulfill its obligations to the other Party under this Agreement, said Party shall take all reasonable measures (including rerouting BNSF Haulage Cars over alternate rail lines to the extent practicable) to restore performance of its obligations in a timely manner; provided, that if a detour is over CPR's line, BNSF shall compensate CPR for the provision of service over such detour route at the rate prescribed by Section 6.01, and if such detour is over the lines of a carrier (or carriers) other than CPR, BNSF shall compensate CPR for its pro-rata share of the additional costs incurred by CPR in providing service via such detour routes.

10.2 The Party invoking force majeure shall immediately notify the other Party by telephone followed by written notice no later than five (5) days thereafter giving details of the force majeure event. Upon cessation of the force majeure event, the invoking Party shall immediately notify the other Party of its cessation as provided in the preceding sentence. Any dispute respecting the occurrence or cessation of the force majeure event shall be subject to arbitration pursuant to Section 12 of this Agreement."

Section 11 - SUCCESSORS AND ASSIGNS

11.01 This North Dakota Haulage Service Agreement shall inure to the benefit of and be binding upon each of the Parties and their respective successors and permitted assigns.

11.02 BNSF may, with the prior written consent of CPR, assign this Agreement to such firm or corporation acquiring substantially all of the assets or business of BNSF, or merging or consolidating with BNSF; provided, however, that such assignment shall not transfer or extinguish any liability or obligation of BNSF under this Agreement that existed prior to such assignment.

11.03 CPR may assign this Agreement to any person or corporation; provided, however, that such assignment shall not transfer or extinguish any liability or obligation of CPR under this Agreement that existed prior to such assignment.

Section 12 - ARBITRATION

12.01 Any dispute arising between the Parties with respect to this North Dakota Haulage Service Agreement shall be referred to the respective senior operating officers for resolution. In the event such officers are unable to resolve the dispute, either Party may submit the dispute for binding arbitration by a single arbitrator before the American Arbitration Association under the Commercial Arbitration Rules. The decision of the arbitrator shall be final and conclusive upon the Parties. Each Party to the arbitration shall pay the compensation, costs, fees and expenses of its own witnesses, experts and counsel. The compensation, costs and expenses of the arbitrator, if any, shall be borne by CPR and BNSF, with each paying 50 percent of such compensation, costs and expenses. The arbitrator shall not have the power to award consequential or punitive damages or to determine violations of criminal or antitrust laws. Pending the award of the arbitrator, there shall be no interruption in the transaction of business under this Agreement, and all payments in respect thereto shall be made in the same manner as prior to the arising of the dispute until the matter in dispute shall have been fully determined by arbitration, and thereupon such payment or restitution shall be made as required by the decision of the arbitrator.

Section 13 - NOTICE

13.01 Any notice required or permitted to be given by one Party to the other Party under this Agreement shall be deemed given on the date sent by certified mail, or by such other means as the Parties may mutually agree, and shall be addressed as follows:

(a) If to BNSF:

**Vice President – Network Development
BNSF Railway
2500 Lou Menk Drive
P.O. Box 961039
Ft Worth, TX 76131-2828
U.S.A.**

with a copy to:

**AVP Contracts & Joint Facilities
BNSF Railway
2600 Lou Menk Drive
P.O. Box 961034
Ft Worth, TX 76161-0034
U.S.A.**

(b) If to CPR:

**General Manager – Interline Management
Canadian Pacific Railway Company
Gulf Canada Square
401 9th Avenue SW
Calgary, Alberta, Canada T2P 4Z4**

with a copy to:

**Manager Interline Agreement Management
Canadian Pacific Railway Company
Gulf Canada Square
401 9th Avenue SW
Calgary, Alberta, Canada T2P 4Z4**

13.02 Either Party may provide notice of changes in the above addressees to the other Party by personal service or certified mail.

Section 14 - CONFIDENTIALITY

14.01 Except as provided by law or by rule, order, or regulation of any court or regulatory agency with jurisdiction over the subject matter of this Agreement, or as may be necessary or appropriate for a Party hereto to enforce its rights under this Agreement, during the Initial Term and any Additional Term(s), the terms and provisions of this Agreement and all information to which access is provided or which is obtained hereunder will be kept confidential and will not be disclosed by either Party to any person other than officers, employees, and attorneys, without the prior written approval of the other Party.

Section 15 - INDEMNITY COVERAGE

15.01 As a part of the consideration hereof, each Party hereby agrees that each and all of its indemnity commitments in this Agreement in favor of the other Party hereto shall extend to and indemnify the parent corporation, subsidiaries and affiliates of such other Party, and all of their respective directors, officers, agents and employees.

Section 16 - GENERAL PROVISIONS

16.01 This North Dakota Haulage Service Agreement and each and every provision hereof is for the exclusive benefit of the Parties hereto and not for the benefit of any third party. Nothing herein contained shall be taken as creating or increasing any right of any third party to recover by way of damages or otherwise against any of the Parties hereto.

16.02 This North Dakota Haulage Service Agreement contains the entire understanding of the Parties hereto with respect to the subject matter hereof and supersedes any and all oral understandings between the Parties.

16.03 No term or provision of this North Dakota Haulage Service Agreement may be changed, waived, discharged or terminated except by an instrument in writing and signed by all Parties.

16.04 Each definition in this Agreement includes the singular and the plural, and references in this Agreement to the neutral gender include the masculine and feminine where appropriate. References herein to any agreement or contract mean such agreement or contract as amended. As used in this Agreement, the word "including" means "without limitation", and the words "herein", "hereof" and "hereunder" refer to this Agreement as a whole. All dollar amounts stated herein are in United States currency.

16.05 All words, terms and phrases used in this North Dakota Haulage Service Agreement shall be construed in accordance with the generally applicable definition or meaning of such words, terms and phrases in the railroad industry.

16.06 The division of this Agreement into sections and subsections and the insertion of headings and references are for convenience of reference only, and shall not affect the construction or interpretation of this Agreement. Unless the context otherwise requires, all references to sections are to sections of this Agreement.

16.07 As used in this North Dakota Haulage Service Agreement, whenever reference is made to the trains, locomotives, cars or equipment of, or in the account of, one of the Parties hereto, such expression means the trains, locomotives, cars and equipment in the possession of or operated by such Party and includes such trains, locomotives, cars and equipment which are owned by, leased to, or in the account of such Party.

16.08 This North Dakota Haulage Service Agreement is the result of mutual negotiations between the Parties hereto, neither of whom shall be considered the drafter for purposes of contract construction.

16.09 No consent or waiver, expressed or implied, by a Party of any breach or default by the other Party in the performance by such other Party of its obligations hereunder shall be deemed or construed to be a consent to or waiver of any other breach or default in the performance hereunder by such other Party. Failure on the part of a Party to complain of any act or failure of the other Party or to declare the other Party in default, irrespective of how long such failure continues, shall not constitute a waiver by such first mentioned Party of its rights hereunder.

16.10 If any provision of this Agreement or the application thereof to any Party hereto or to any circumstance shall be determined by a court of competent jurisdiction to be invalid or unenforceable to any extent or for any reason, the remainder of this Agreement or the application of the provisions thereof to such Party or circumstance, other than those determined to be invalid or unenforceable, shall not be affected thereby and shall be enforced to the fullest extent permitted by law, and the Parties shall promptly enter into such other agreement(s) as their respective legal counsel may deem appropriate in order to replace such invalid or unenforceable provisions in a manner that produces a result which is substantially equivalent to the terms of this Agreement in all material respects.

16.11 Nothing herein shall be interpreted as creating an association, partnership, joint venture or other joint undertaking between CPR and BNSF. BNSF and CPR each shall indemnify and hold harmless the other against any and all costs and payments, including benefits, allowances, and arbitration, administrative and litigation expenses, arising out of claims or grievances made, or lawsuits brought, by or on behalf of its own employees or their collective bargaining representatives, either pursuant to employee protective conditions imposed by a governmental agency or pursuant to a collective bargaining agreement. It is the Parties' intention that BNSF and CPR each shall bear the full costs of protection of its own employees under employee protective conditions that may be imposed, and grievances filed by its own employees arising under its collective bargaining agreement with its employees.

16.12 This Agreement may be executed in any number of counterparts, each of which shall be deemed to be an original, but all such separate counterparts shall together constitute but one and the same instrument.

Section 17 – GOVERNING LAW

17.01 It is the intention of the parties hereto that the laws of the State of North Dakota, except for its conflict of laws rules, shall govern the validity of this Agreement, the construction of its terms, and the interpretation of the rights and duties of the parties' hereto.

IN WITNESS WHEREOF, the Parties hereto have caused this North Dakota Haulage Service Agreement to be duly executed as of the date first above written.

SOO LINE RAILROAD COMPANY
d/b/a Canadian Pacific Railway

BNSF RAILWAY COMPANY

By _____

By _____

Its _____

Its _____

Date _____

Date _____

APPENDIX I
TO
NORTH DAKOTA HAULAGE SERVICE AGREEMENT
TRANSITION OF RAIL OPERATIONS

Section 1 *Transition of Operations.* Unless otherwise agreed in writing, the transition of rail freight operations on the Commencement Date specified in the Purchase and Sale Agreement shall be governed by the terms of this Appendix I.

Section 2 *Inventory of Cars.* BNSF will make an inventory of all BNSF cars on the Conveyed Lines as of 12:01 am Central Time on the Commencement Date and provide instructions to CPR for the subsequent movement of the BNSF cars under the terms of this North Dakota Haulage Service Agreement. The inventory will show separately (a) loaded cars at Conveyed Lines Industries; (b) empty cars at Conveyed Lines Industries; (c) loaded cars en route (in a train consist or at an intermediate siding or yard) on the Conveyed Lines; and (d) empty cars en route (in a train consist or at an intermediate siding or yard) on the Conveyed Lines.

Section 3 *Haulage Fees.* Haulage fees in Schedule A attached to this agreement shall apply for the subsequent movement in CPR Haulage Services of BNSF cars located on the Conveyed Lines as of the Commencement Date.

**SCHEDULE A
TO
NORTH DAKOTA HAULAGE SERVICE AGREEMENT:
HAULAGE FEES**

HAULAGE FEES FOR SERVICES PERFORMED BY CPR

Haulage Fee _____ per loaded or empty car

REDACTED

REDACTED

Exhibit 2



100 North Main • P.O. Box 125 • Fortuna, North Dakota 58844-0125
Phone (701) 834-2311 • Fax (701) 834-2355
Ambrose (701) 982-3391 • Westby, MT (406) 385-2472
Crosby (701) 965-6371 • Crosby Oil Station (701) 965-6326
Noonan (701) 925-5783

Richard Larsen
General Manager

June 20, 2007

Hon. Charles Nottingham
Chairman
Surface Transportation Board
395 E Street SW
Washington, DC 20423

Dear Chairman Nottingham:

I write to express my support for the proposed sale to the Soo Line Railroad Company ("Soo Line") of BNSF Railway Company's ("BNSF") interest in the jointly-owned line between Crosby and Lignite Junction, ND and the BNSF-owned line between Lignite Junction and Milepost 47.

New Century Ag is a co-operative formed earlier this year in a merger between Farmers Elevator of Fortuna and Golden Plains Ag. Golden Plains Ag has facilities at Noonan and Crosby, ND which are joint BNSF and CPR stations. BNSF provides its own service and DMVW provides the local service for CPR. In aggregate, these facilities ship 16,000,000 to 22,000,000 bushels of rail car shipments of grain annually. Farmers Elevator of Fortuna has elevators located at Westby, MT, Fortuna, ND and Ambrose, ND. All three of these facilities are west of Crosby and are served by DMVW on behalf of CPR.

It is my understanding that following the sale, DMVW will maintain and operate the entire line pursuant to its lease and operating agreement with Soo Line and will handle existing BNSF traffic through a haulage agreement. Prior to the formation of New Century Ag, I managed Farmers Elevator of Fortuna. I found DMVW's service to be exemplary and I have no doubt that it will maintain this high level of customer service to their existing CPR customers and extend it to BNSF customers they will serve under the haulage agreement.

I strongly encourage the Surface Transportation Board to expedite its approval of the proposed transaction. Please contact me if you have any questions or require any additional information.

Sincerely,

Richard Larsen, General Manager

CERTIFICATE OF SERVICE

I do hereby certify that on this 20th day of December, 2018, I have served a copy of the foregoing Petition to Reopen by email on each of the following persons or entities:

Karl W. Hansen
Leonard Street and Deinard
150 South Fifth Street, Suite 2300
Minneapolis, MN 55402
Karl.Hansen@Leonard.Com

Peter W. Denton
Steptoe & Johnson LLP
1330 Connecticut Avenue, NW
Washington, DC 20036
pdenton@steptoe.com

Adrian L. Steel Jr.
Mayer Brown LLP
1999 K Street, N.W.
Washington, DC 20006-1101
asteel@mayerbrown.com

Edward Fishman
Nossaman LLP
1666 K Street, NW, Suite 500
Washington, DC 20006
efishman@nossaman.com

David F. Rifkind
Stinson Leonard Street LLP
1775 Pennsylvania Ave. NW, Suite 800
Washington, D.C. 20006
david.rifkind@stinson.com



Edward D. Greenberg