

SERVICE DATE – DECEMBER 29, 2020

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35068

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

Digest:¹ This decision grants New Century Ag's (NCA) petition to reopen an exemption proceeding that authorized Soo Line Railroad Company d/b/a Canadian Pacific Railway (CP) to acquire and operate certain rail lines in North Dakota that CP had previously jointly owned with BNSF Railway Company, and on which NCA is located.

Decided: December 28, 2020

On December 21, 2018, New Century Ag (NCA) filed a petition to reopen this proceeding or, in the alternative, to revoke under 49 U.S.C. § 10502 the 2007 exemption authorizing Soo Line Railroad Company d/b/a Canadian Pacific Railway (CP) to acquire and operate the property interests of BNSF Railway Company (BNSF) in 35.26 miles of rail lines jointly owned by CP and BNSF and a contiguous 9.96-mile rail line solely owned by BNSF. As discussed below, the allegations in NCA's petition raise serious concerns about the restrictions CP has placed on the type and level of service it provides as well as NCA's access to BNSF and, therefore, the Board will grant the petition to reopen.

BACKGROUND

By decision served on September 7, 2007, the Board granted the joint petition of CP and BNSF to allow CP to acquire full ownership of 35.26 miles of rail lines (the Joint Line) consisting of: (1) a 32.54-mile rail line located between BNSF milepost 89.5 at Crosby, N.D., and BNSF milepost 56.96 at Lignite Junction, N.D.; (2) the 1.16-mile connecting track located between CP milepost 549.64, at Rival, N.D., and CP milepost 550.8, at Lignite Junction; (3) the 1.07-mile connecting track located between BNSF milepost 64.5, at Kincaid, N.D., and CP milepost 558.28, at Columbus, N.D.; and (4) the 0.49-mile connecting track at Crosby extending from CP milepost 582.35 to the original CP main line extending west to Whitetail, Mont. Soo

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Pol'y Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

Line R.R.—Acquis. & Operation Exemption—BNSF Ry. (2007 Decision), FD 35068, slip op. at 3 (STB served Sept. 7, 2007). The 2007 Decision also authorized CP to acquire a 9.96-mile rail line located between milepost 56.96, at Lignite Junction, and milepost 47.0, near Lignite (the Joint Line and this 9.96-mile rail line are collectively referred to as the Conveyed Lines).

The 2007 Decision stated that CP would continue to operate as it had been operating at the time of the decision, and that BNSF, through a Haulage Service Agreement with CP (Haulage Agreement), would retain the right to serve all customers on the Conveyed Lines. Id. The 2007 Decision noted that there were four rail shippers located on the Conveyed Lines, one of which was NCA, a farmer-owned co-operative with grain elevator facilities located at Crosby and Noonan, N.D. As the decision explained, according to CP and BNSF, “[t]he rail options of [NCA] . . . will be unaffected by the proposed transaction. [NCA] will retain access to [CP] by way of [a shortline carrier] and will retain its present access to BNSF through [CP] (via [the shortline carrier]).” Id. at 2. The decision also explained that, according to CP and BNSF, the purpose of the proposed transaction was “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 active customers located on the Joint Line and enhancing competition for two active customers located on the [9.96-mile segment].” Id. at 3. The transaction was supported by NCA and the other shippers with facilities located on the Conveyed Lines. Id. at 2.

On December 21, 2018, NCA filed the instant petition to reopen, or in the alternative, to revoke under 49 U.S.C. § 10502 the exemption granted by the Board. NCA asserts that CP and BNSF made representations in their 2007 joint petition that the transaction would preserve competitive rail service on the Conveyed Lines, and that those representations have not been realized. (See NCA Pet. 6-8.) NCA claims that rail service to NCA has been “seriously degraded by CP’s refusal to let BNSF provide badly needed rail service to NCA,” and that these service problems “threaten the viability of both the NCA and its farmer members.” (Id. at 3.) According to NCA, access to BNSF to provide service to various markets is necessary and, without unit train service from BNSF, NCA often does not have access to enough cars to move grain out of the Noonan and Crosby elevators. (Id. at 7, 10, V.S. Michelson 3.) NCA states that, with the elevators filled to capacity, it cannot purchase the supplies of grain harvested by local farmers, including members of the co-operative. Moreover, NCA explains that the facilities at Noonan were expanded to accommodate unit train service and that, with insufficient cars to empty the elevator, NCA is unable to purchase the volume of grain for which the investment was made. (Id. at 10, V.S. Michelson 3, 17.)

On February 4, 2019, CP filed a reply in opposition to NCA’s petition. CP argues that reopening an administratively final decision involving a minor transaction 11 years after consummation would be unprecedented. (CP Reply 2.) CP states that the Haulage Agreement that accompanied the petition for exemption provided that CP would handle BNSF cars in manifest service, which was the level of service NCA was receiving at the time of the transaction in 2007. (Id. at 2, 8, V.S. Hubbard 6.) CP asserts that, because of capacity constraints at the Minot Interchange, it requested that BNSF limit its haulage traffic to a weekly maximum of

50 cars in each direction (i.e., a total of 100 loaded and empty cars) and a daily volume of no more than 15 cars. (*Id.* at 12, V.S. Hubbard 8 (citing Ex. E).) CP argues that NCA was informed, while the facility expansion at Noonan was still in the planning stage, that NCA would not have access to BNSF unit trains. (*Id.* at 15.) CP also disputes NCA's allegations concerning the availability of CP unit train service and describes its Dedicated Train Program, under which customers can contract with CP on a first-come, first-served basis to receive 100-car unit train service. (*Id.* at 15-16.) According to CP, NCA's goal is not "a return to the conditions that existed before the transaction," but rather to obtain "access to BNSF unit trains service." (*Id.* at 2.) Finally, CP states that existing customers continue to enjoy access to both CP and BNSF through the Haulage Agreement, despite the fact that it expressly provided that the railroads would have the right to terminate that arrangement at the beginning of 2017. (*Id.* at 8.)² CP explains that the Haulage Agreement was extended through a supplemental agreement executed by CP and BNSF on May 11, 2018. (*Id.* at 12.)

On February 21, 2019, NCA filed a rebuttal, and sought leave to do so. On March 7, 2019, CP filed its opposition to NCA's request.³

By decision served on March 19, 2019, a proceeding was instituted under 49 U.S.C. § 10502(d). By decision served on April 22, 2019, the Board held the proceeding in abeyance in order to allow NCA to consider options for relief under certain statutory provisions and asked the parties whether they were interested in participating in Board-sponsored mediation. The Board, noting the responses from the parties, removed the proceeding from abeyance and held an oral argument on August 20, 2019, where NCA, CP, and BNSF presented arguments. By decision

² The original Haulage Agreement (§§ 9.01, 9.02) provided that either CP or BNSF could terminate the agreement after January 1, 2017. (See Joint Pet., Ex. 2 at Ex. G, July 16, 2007.) The parties disagree, however, concerning the implications of the Haulage Agreement's terms. NCA contends that CP was not free to terminate the Haulage Agreement without Board approval and that NCA was, in any case, entitled to rely upon its interpretation of the representations concerning continued competition made in connection with the 2007 Decision. (NCA Rebuttal 4-7.) CP argues that NCA's position cannot be reconciled with the actual terms of the Haulage Agreement and precedent establishing that the Board does not regulate haulage agreements. (CP Reply 2, 22-23, 31.) Although the Board has considered the degree to which privately negotiated haulage agreements can resolve competitive concerns in licensing proceedings, the Board does not regulate haulage agreements. See, e.g., Norfolk S. Ry.—Acquis. & Operation—Certain Rail Lines of the Del. & Hudson Ry., FD 35873 et al., slip op. at 26 (STB served May 15, 2015) ("Because haulage agreements are not regulated by the Board, [the rail carriers in that proceeding] could voluntarily terminate such agreements at any time, irrespective of this acquisition transaction"). Such agreements do not and cannot negate Board decisions.

³ While the Board's regulations do not generally permit "replies to replies," see 49 C.F.R. § 1104.13(c), in the interest of having a more complete record, the Board will grant NCA's request to file a rebuttal.

served on November 27, 2019, the Board ordered the parties to participate in Board-sponsored mediation. By letter dated March 17, 2020, the mediators informed the Board that mediation ended without a resolution of the issues in the case.

Between July 24, 2020, and August 17, 2020, CP and NCA filed a series of letters relating to CP's current level of service and other issues. NCA states that it would be appropriate for the Board to ignore or strike all of these submissions. Although the Board is not striking these filings, it is not relying on them in this decision.

DISCUSSION AND CONCLUSIONS

Here, NCA argues that the Board should reopen or, in the alternative, revoke the exemption authorizing the transaction between CP and BNSF, in order to permit BNSF to provide the competitive service to NCA on which the Board based its 2007 Decision. (NCA Pet. 1-2, 12.) Under 49 U.S.C. § 1322(c) and 49 C.F.R. § 1115.4, the Board may reopen a proceeding because of “material error, new evidence, or substantially changed circumstances.” The alleged grounds must be sufficient to convince the Board that its prior decision in the case would be materially affected for reopening to be granted. See Montezuma Grain Co. v. STB, 339 F.3d 535, 541-42 (7th Cir. 2003); Canadian Nat’l Ry.—Control—EJ&E W. Co., FD 35087 (Sub-No. 8), slip op. at 4 (STB served Dec. 21, 2018). In addition, an exemption may be revoked, in whole or in part, if the Board finds that regulation of the transaction is necessary to carry out the rail transportation policy of 49 U.S.C. § 10101. When, as in this proceeding, an exemption has become effective, a revocation request is treated as a petition to reopen and revoke and will be granted only if the petition presents new evidence, substantially changed circumstances, or material error in the decision being challenged. 49 U.S.C. § 1322(c); 49 C.F.R. § 1115.3(b).

NCA argues that it relied on the 2007 Decision and the specific representations by CP and BNSF that there would be “no loss of rail competition” and that “BNSF will continue to provide common carrier service to all shippers on the Conveyed Lines...and there will be no material change in level or nature of service provided to those shippers.” (NCA Pet. 7); 2007 Decision, FD 35068, slip op. at 4; (Joint Pet. 13-14, July 16, 2007). NCA further argues that reopening is appropriate because, since the 2007 Decision, circumstances have changed and the service it receives has become inadequate. (NCA Pet. 23.) Thus, NCA argues that it is appropriate to reopen the 2007 Decision to implement an arrangement that restores competitive service. (Id. at 13, 16, 23.)

NCA asserts, specifically, that CP has limited its ability to access competitive service by placing restrictions on BNSF service which, according to NCA, have been in place since 2014. (NCA Pet. 3, 13, 21; Oral Argument Tr. 53:2 to 54:6.) In particular, NCA asserts that, in 2014, CP began to impose “arbitrary limitations” on the number of cars it would accept from BNSF for delivery to NCA and, despite CP's inability to provide a second unit train for NCA's use, CP has refused to accept any BNSF unit trains in interchange. (NCA Pet. 8-10, 15.) NCA asserts that

CP has refused to let NCA take advantage of BNSF unit train service for outbound unit trains of grains and inbound unit trains of fertilizer, despite the fact that CP is aware of the substantial investment NCA made in expanding its facilities to accommodate the movement of unit trains at Noonan. (*Id.* at 8, 15-16.) NCA states that neither the Noonan nor Crosby elevators were equipped to load unit trains prior to the exemption, but that BNSF was providing service in volumes and characteristics that NCA contends were akin to unit trains during that period, (NCA Rebuttal, V.S. Michelson 6, Feb. 21, 2019), and, therefore, the expectation of unit train service is consistent with NCA's historical usage. (*Id.* at 10.) NCA asserts that CP and BNSF should be held to their commitments and ordered to implement a plan that removes any "restrictions on the number and or type of cars it will accept in interchange with BNSF." (NCA Pet. 23.)

In response, CP asserts that there is no basis for reopening this transaction 11 years after consummation and that doing so would be unprecedented. (CP Reply 1-3, 17-20.) CP argues that NCA misconstrues the representations and Haulage Agreement as providing an obligation for "'unlimited' access" to BNSF. (CP Reply 20-21.) CP argues that NCA could not reasonably have expected to receive BNSF unit train service under the Haulage Agreement in light of its express terms and CP's communications with NCA on that subject. (CP Reply 2, 15, 22-23.) CP states that reopening is not appropriate because NCA's complaints regarding restrictions on BNSF haulage volumes, which CP states were based on capacity constraints, (*id.* at 11-12), do not constitute substantially changed circumstances or new evidence. (*Id.* at 20, 24.) CP further argues that NCA's investment in its Noonan facility does not constitute changed circumstances. (*Id.* at 26-27.) CP asserts that the time elapsed in this case is significant because the defense of laches is applicable and because reopening a proceeding involving a minor transaction raises concerns for administrative finality, repose, and detrimental reliance. (*Id.* at 18-19.)

After careful review and consideration of the evidence and arguments, the Board will grant NCA's petition to reopen this proceeding.⁴ The Board is concerned about limits to the competitive options available to NCA under CP's exceedingly narrow application of the Haulage Agreement and more importantly, its actions subsequent to the 2007 Decision. That ruling was made in light of broad representations in the joint petition that competitive options would be preserved for the two active customers on the Joint Line (including NCA) and that competition would be enhanced for the active customers on the 9.96-mile BNSF line. The joint petition also asserted that "BNSF will continue to provide common carrier service to all shippers on the Conveyed Lines . . . and there will be no material change in the level or nature of service Existing customers . . . will retain the services of both BNSF and [CP]" (Joint Pet. 13-14, July 16, 2007.) However, since the Board's grant of authority, the record indicates that CP has limited the quantity of BNSF cars it would accept and has entirely refused BNSF unit trains in interchange, which would enable NCA to reach markets not served by CP. (NCA Pet. 8, 10, 15; CP Reply 12-13, V.S. Hubbard 7-9; Oral Argument Tr. 27:15 to 28:3, Aug. 20, 2019.) As a

⁴ Because the Board is not making a determination on revocation at this time, the Board need not resolve many of the disputed factual issues and arguments presented by the parties.

result, competitive rail options have been limited far more than the Board or affected shippers could have expected based on those representations and Board findings in the 2007 Decision.⁵

Based upon the breadth of the representations made prior to the 2007 Decision, the Board could properly have expected that CP and BNSF would work to ensure shippers would continue to be served in an equitable manner as market conditions change. However, it appears that CP has interpreted the 2007 Decision and the Haulage Agreement not to maintain competition, but rather to restrict competitive service. Instead of preserving the ability of BNSF to compete on a reasonable basis, CP has restricted BNSF to carload service so that CP alone is able to offer unit train service, and has even limited the number of carloads available to BNSF in manifest service. When CP's service restrictions are combined with the normal developments in market conditions (i.e., increased demand, enhanced service options from railroads) that have led to NCA's request for a type of service that was not at issue at the time of the transaction, the result is a change in circumstances sufficient to justify reopening this proceeding.

Accordingly, this proceeding is reopened for consideration of further action. In order to address the Board's concerns, CP and BNSF will be directed to engage in negotiations and inform the Board how NCA will be provided with a level of service commensurate with the broad representations underlying the Board's 2007 Decision. Within 60 days of the service date of this decision, CP and BNSF shall either submit their proposal to the Board or notify the Board that no agreement could be reached. NCA shall have an opportunity to submit comments within 15 days after the proposal is filed with the Board. If CP and BNSF are unable to reach an agreement, or if the proposed revisions would not adequately address the Board's competitive concerns discussed above, the Board will consider further action in a future decision, including imposing a service order should it be found necessary.

⁵ According to NCA, it expanded its facilities "in part in reliance upon the presence of competitive dual service from both BNSF and CP." (NCA Pet., V.S. Michelson at 8; see also NCA Pet. 7 ("in reliance upon the carriers' arrangement working as promised, NCA invested over \$40 million to expand its [facilities] with significant rail infrastructure").)

It is ordered:

1. NCA's request to file rebuttal is granted.
2. NCA's petition to reopen the proceeding is granted.
3. CP and BNSF shall submit a proposal to fulfill the findings in 2007 Decision by March 1, 2021, for review.
4. NCA shall submit comments on the proposed revisions by March 15, 2021.
5. This decision is effective on its service date.

By the Board, Board Members Begeman, Fuchs, and Oberman. Board Member Fuchs dissented with a separate expression.

BOARD MEMBER FUCHS, dissenting:

With great respect for my colleagues' concerns, I disagree with the Decision because it offers inadequate grounds for reopening this thirteen-year-old proceeding and imposes an unclear, potentially problematic requirement. In 2007, the joint petition both relied on the Haulage Agreement in describing the transaction's general effects and included a copy of the agreement showing limits on BNSF's access to customers such as NCA. (Joint Pet. 4, 6, 7, 11, 13; *id.* Ex. 2, at Ex. G, Haulage Agreement, July 16, 2007.) Citing the Haulage Agreement in each of its key findings, the Board granted an exemption that authorized CP to acquire the Joint Line¹ without any competition-related conditions that could have curtailed the carrier's rights under the agreement. 2007 Decision, FD 35068, slip op. at 4, 6. More than a decade later, following rehabilitation of the Joint Line and years of improved maintenance, the Decision reopens the proceeding by asserting "substantially changed circumstances." The Decision argues that the Board could not have expected CP to apply the Haulage Agreement as it has because of the joint petition's "broad representations" on preserving competitive options.² But those purportedly broad representations are explicitly grounded in the Haulage Agreement and do not establish separate rights or conditions. The Decision then uses the joint petition's statements,

¹ As the Decision notes, the Board authorized CP to acquire the Joint Line as part of the Conveyed Lines. Decision 2.

² Specifically, after stating the majority's concern with CP's "exceedingly narrow application of the Haulage Agreement," the Decision explains that the 2007 Decision was made "in light of broad representations in the joint petition." Decision 5. The Decision then states that competitive rail options have been far more limited than the Board or affected shippers "could have expected," and it goes on to briefly discuss what the Board "could properly have expected" based "upon the breadth of the representations made prior to the 2007 Decision." Decision 6.

based on the Haulage Agreement, to assert that BNSF should receive competitive access rights that conflict with that very agreement, all while the transaction remains exempt and the agreement remains voluntary. As described further below, the Decision does not show substantially changed circumstances, address the extraordinary length of time elapsed since the 2007 Decision, or advance a clear and considered material alteration of that exemption decision.

Standard. As the Decision states, the Board may reopen a proceeding because of “material error, new evidence, or substantially changed circumstances.” 49 U.S.C. § 1322(c); 49 C.F.R. § 1115.4.³ In evaluating the alleged grounds for reopening, the Board considers, among other things, the time elapsed since the initial decision and related issues of administrative finality, repose, and detrimental reliance. See Ind. Hi-Rail Corp.—Lease & Operation Exemption—Norfolk & W. Ry. Line between Rochester & Argos, Ind.—Exemption from 49 U.S.C. 10761, 10762, & 11144, FD 32162, slip op. at 5 (STB served Jan. 30, 1998). The alleged grounds—in this case, the substantially changed circumstances—must be sufficient to lead the Board to materially alter its prior decision. See Montezuma Grain Co. v. STB, 339 F.3d 535, 541-42 (7th Cir. 2003); Can. Nat’l Ry.—Control—EJ&E W. Co., FD 35087 (Sub No. 8), slip op. at 4 (STB served Dec. 21, 2018). The Board has explained that a transaction’s failure to simply “live up to the expectations” of supporting parties does not constitute substantially changed circumstances, especially in an exemption proceeding. See Ind. Hi-Rail Corp., FD 32162, slip op. at 3, 5 (noting petitioners’ arguments that the Board’s “general findings” were not fulfilled and rejecting a petition to reopen and revoke an exemption). See also Grenada Ry.—Acquis. & Operation Exemption—Ill. Cent. R.R., FD 35247, slip op. at 7 (STB served Sept. 10, 2013) (noting shipper complaints about service levels and rejecting a petition to reopen and revoke an exemption).

Substantially Changed Circumstances. The Decision’s finding of substantially changed circumstances rests on the faulty premise that the joint petition’s broad representations rendered the Board unable to expect that CP might exercise, as it has, the Haulage Agreement’s key terms establishing train service, capacity, and time limits. Decision 6. However, the joint petition’s statements are not separate commitments extending beyond the terms of the Haulage Agreement. In the joint petition, CP and BNSF explicitly state in no fewer than eight different places—in the summary, in each of the four descriptions of customers’ service options, and in each of the three sections addressing the exemption criteria—that customers’ access to BNSF will be “via,” “through,” “pursuant to,” or “because of” the Haulage Agreement or the related Haulage Operations.⁴ (Joint Pet 4, 6, 7, 11, 13, July 16, 2007; see also id. Ex. 2, at Ex. G, Haulage Agreement.) Though the majority quotes the joint petition’s statements that BNSF will continue to provide common carrier service to all shippers, that there will be no material change in level or nature of service, and that existing customers will retain the services of both BNSF and CP,

³ As noted by the Decision, when an exemption has become effective, a revocation request is treated as a petition to reopen and revoke. Decision 4.

⁴ Haulage Operations are defined by, and inextricably linked to the terms of, the Haulage Agreement. (Joint Pet. 4, July 16, 2007.)

the Decision omits the preceding sentence providing the basis for those statements. Decision 5. The joint petition in fact states, “[t]hrough the Haulage Agreement, BNSF retains the right to service all customers on the Conveyed Lines. Thus, BNSF will continue to provide common carrier service” (Joint Pet. 13, July 16, 2007 (emphasis added, footnote omitted).)⁵ Moreover, in describing NCA’s service following the transaction, the joint petition similarly establishes a cause-and-effect relationship between the Haulage Operations, governed by the Haulage Agreement, and NCA’s rail options.⁶ (*Id.* at 7.) Thus, the joint petition’s broad representations are more properly described as general effects emanating from the Haulage Agreement, far from effectively modifying or nullifying any of its terms.

The 2007 Decision likewise reflects an expectation that the terms of the Haulage Agreement would govern BNSF’s access.⁷ The 2007 Decision specifically references the Haulage Agreement in each finding needed to grant an exemption under 49 U.S.C. § 10502(a). In its finding on market power, the 2007 Decision cites the Haulage Agreement to explain BNSF’s access. 2007 Decision, FD 35068, slip op. at 4 (“[t]hrough the Haulage Agreement, BNSF retains the right to service all customers on the Conveyed Lines. Thus, BNSF will continue to provide rail service to all shippers on the Conveyed Lines”). In its finding on whether regulation is necessary to carry out the rail transportation policy (RTP) at 49 U.S.C.

⁵ The Decision also notes that the joint petition represented that “competitive options would be preserved.” Decision 5. Similar to other statements, the joint petition’s mention of “preserving competitive options” comes just after the petition highlights that the parties will enter into a Haulage Agreement and CP will agree to the Haulage Operation. 2007 Decision, FD 35068, slip op. at 4-5.

⁶ Specifically, the joint petition states “[NCA] will retain access to [CP] via [Dakota, Missouri Valley and Western Railroad, Inc. (DMVW)] and retain its present access to BNSF *via DMVW-[CP] and the Haulage Operation*. Consequently, New Century’s rail options will be unaffected by the proposed transaction.” (Joint Pet. 7, July 16, 2007 (emphasis added).)

⁷ That is not to suggest that haulage agreements are regulated by the Board or confer rights that are involuntary or subject to Board approval. See, e.g., Del. & Hudson Ry. Co.—Discontinuance of Trackage Rights Exemption—in Susquehanna Cnty, Pa., AB 156 (Sub No. 25X), slip op. at 11 (STB served Jan. 19, 2005) (stating “such arrangements are entirely voluntary on the part of the carriers and no regulatory rights and responsibilities are created that would require the carriers to keep the arrangement in place”); Norfolk S. Ry.—Acquis. & Operation—Certain Rail Lines of the Del. & Hudson Ry. (NS/D&H), FD 35873 et al., slip op. at 26-27 (STB served May 15, 2015) (stating “haulage agreements are not regulated by the Board” but noting that “on rare occasions, [the Board has] imposed conditions to preserve haulage arrangements in major transactions having a significant effect on national or regional rail competition”) (citing Union Pac. Corp.—Control & Merger—S. Pac. Rail Corp., 1 S.T.B. 233 (1996); CSX Corp.—Control & Operating Leases/Agreements—Conrail, Inc., FD 33388 (STB served July 23, 1998)). I agree with the Decision’s observation that “the Board has considered the degree to which privately negotiated haulage agreements can resolve competitive concerns in licensing proceedings.” Decision 3 n.2.

§ 10101, the 2007 Decision specifically states BNSF traffic will be handled “pursuant to the Haulage Agreement.”⁸ 2007 Decision, FD 35068, slip op. at 4. Considering the prominence of the Haulage Agreement in the joint petition, the Board had a duty to read and understand the agreement’s terms.⁹ The 2007 Decision indicated no concern with any term and identified no potential conflict between a specific term and any other aspect of the joint petition. Like the joint petition, the 2007 Decision’s discussion of the transaction’s general effects flow from its references to the Haulage Agreement and do not establish that CP would provide BNSF access extending beyond the terms of the agreement.

Though the Haulage Agreement was essential to the Board’s understanding of the transaction, the Decision does not address any specific term of the agreement or any of CP’s related capacity claims before labeling CP’s application of the agreement as “exceedingly narrow” and suggesting the Board could not have expected the carrier’s actions. Decision 5. As the petitioners made clear in 2007, the Haulage Agreement limits BNSF cars to “existing train service,” (Joint Pet. Ex. 2, at Ex. G, Haulage Agreement § 2.01, July 16, 2007), and limits BNSF’s purchase of haulage services to “existing available train capacity,” (*id.* at Ex. 2, at Ex. G, Haulage Agreement § 2.04). Further, it provides that, if BNSF developed further business such that volumes exceeds available capacity on CP’s existing train service and necessitated the operation of additional CP trains, CP has discretion as to whether to handle that traffic, and it may require BNSF to pay for capacity improvements. (Joint Pet. Ex. 2, at Ex. G, Haulage Agreement § 2.05, July 16, 2007.) Given that NCA did not have unit train capability until about seven years after the transaction, CP claims the “existing train service” term means the manifest service that existed at the time of the transaction. (CP Reply 21-22; *id.* at V.S. Hubbard 6-9.) CP also presents evidence on car volumes and states BNSF’s volumes exceeded both its expectations and capacity, implicating the terms related to “existing available train capacity,” and CP emphasizes that its capacity does not allow for unit trains or high car volumes for

⁸ As explained further below, the Haulage Agreement includes terms such as “existing train service” and “existing available train capacity.” (Joint Pet. Ex. 2, at Ex. G, Haulage Agreement § 2.01, § 2.04, § 2.05, July 16, 2007.) Notably, the joint petition includes similar terms such as “existing DMWV-CP train capacity,” (*id.* at 11), and the 2007 Decision also discusses potential effects based on movement of BNSF traffic “in existing DMVW and [CP] trains to and from Minot.” 2007 Decision, FD 35068, slip op. at 4.

⁹ In a 2007 letter of support for the transaction, NCA, like other customers, evinced an understanding that operations would be governed by a haulage agreement. (See Joint Pet. Ex 5, July 16, 2007.) NCA twice referenced a haulage agreement in its one-page support letter. (*Id.*) However, it is unclear whether the signatory from NCA had specific knowledge of *the* Haulage Agreement (as opposed to the mere fact that operations would be governed by *a* haulage agreement). Contrastingly, the 2007 Decision clearly and specifically references *the* Haulage Agreement in making the requisite findings for an exemption. Ultimately, it is the responsibility of the Board, not NCA, to read and understand a petition prior to a decision.

interchange with BNSF in Minot without congesting its main line or blocking crossings.¹⁰ (CP Reply, V.S. Hubbard 6-9, Ex. D; Oral Arg. Tr. 110-11, 171.) Without addressing these claims, the Decision does not validate its premise for substantially changed circumstances—that the Board could not have expected CP to apply the Haulage Agreement as it has—because the Decision does not attempt to explain the circumstances in which the Board might have expected CP would apply the agreement’s train service and capacity terms.¹¹

Moreover, despite the Haulage Agreement’s express time limit, the Decision seems to assert CP should extend BNSF’s access rights indefinitely. The Haulage Agreement explicitly provided for a ten-year term ending January 1, 2017, and allowed either CP or BNSF to terminate the agreement thereafter. (Joint Pet. Ex. 2, at Ex. G, Haulage Agreement § 9.01, § 9.02, July 16, 2007; see also CP Reply 12 (noting a supplemental agreement extending the term of the Haulage Agreement for five years).) Not only was this time limit plain to see in 2007, the Board no doubt was and is aware that haulage agreements often contain time limits and can be terminated without prior agency approval. See, e.g., cases cited supra note 7. Nevertheless, even though the Board has conditioning authority,¹² the 2007 Decision imposed no condition that the agreement (or competitive access generally) extend beyond 10 years.¹³ Yet

¹⁰ Because CP’s own unit trains do not interchange in Minot, CP claims these trains do not trigger the same capacity issues. (Oral Arg. Tr. 183-84.)

¹¹ Instead, the Decision suggests that certain actions are unacceptable without tying those actions back to the Haulage Agreement or considering any capacity claim. Specifically, the Decision states, “[i]nstead of preserving the ability of BNSF to compete on a reasonable basis, CP has restricted BNSF to carload service so that CP alone is able to offer unit train service, and has even limited the number of carloads available to BNSF in manifest service.” Decision 6. The Board also takes issues with what it describes as CP’s actions to “restrict competitive service.” Id.

¹² Setting aside the Board’s conditioning authority, the Board—if it had thought CP and BNSF represented that CP could not opt-out of the Haulage Agreement after ten years—might have referenced the initial term and expressed a clear countervailing expectation that the agreement would instead extend into perpetuity, but it did not do so. See, e.g., Genesee & Wyoming Inc.—Control RailAmerica, Inc., FD 35654, slip op at 7 (STB served Dec. 20, 2012); Norfolk S. Ry.—Joint Control & Operating/Pooling Agreements—Pan Am S. LLC, FD 35147 et al., slip op. at 6, 13 (STB served Mar. 10, 2009).

¹³ That is not to imply that the Board should have granted a condition. It is only meant to observe that the Board has, before and after the transaction, imposed competition-related conditions relating to voluntary agreements, and—in unusual cases—in exemption proceedings. See, e.g., NS/D&H, FD 35873 et al., slip op. at 18-19 (requiring, as a condition to approval of the transaction, that applicant enter into the “Direct Short Line Agreement,” a voluntary commercial agreement to protect certain shippers by providing access via haulage rights); Union Pac. R.R.—Abandonment Exemption—in Riverside & San Bernardino Ctys., Cal., AB 33 (Sub No. 296X), slip op. at 1, 7 (STB served either June 21, 2011) (conditioning an abandonment

the Decision imposes its competitive access proposal requirement nearly four years after Haulage Agreement's initial term and makes no reference to any time limit. Decision 6. The Decision is premised on what the Board could have expected, and here too the Decision does not validate the premise for substantially changed circumstances because it does not explain the circumstances in which the Board could have expected CP to exercise its termination rights, or whether that Board silently viewed § 9.01 and § 9.02 as not applying to CP despite the terms' plain language.

For these reasons, the Decision does not demonstrate that the Board could not have expected CP might exercise the terms of the Haulage Agreement as it has, and therefore it does not substantiate its finding of substantially changed circumstances. However, that is not to say that the current Board—with the benefit of hindsight—ought to be pleased with the current situation, but rather only to say that the Decision does not offer adequate grounds for reopening. See Ind. Hi-Rail Corp., FD 32162, slip op. at 5 (“Subjecting exempted transactions to requests for reopening and reconsideration, with hindsight as the dominant consideration, would place an intolerable burden on the exemption process.”) (citing H.R. Conf. Rep. 96-1430, at 105 (1980)). See also Grenada Ry., FD 35247, slip op. at 7-8. In my view, the Decision's conclusion that this situation constitutes substantially changed circumstances represents a clear shift in policy by the majority to further promote competition in individual transactions. However, the Board has stated that, generally, an agency may not apply a change in policy to administratively final decisions, and the Board does not reopen final decisions merely because it might handle or decide them differently today. See Canadian Pac. Ltd.—Purchase & Trackage Rights—Del. & Hudson Ry., FD 31700, slip op. at 4 (STB served March 2, 2000) (decided on remand after the initial decision was vacated by D.C. Circuit, Canadian Pacific Ry. v. STB, 197 F.3d 1165 (1999)) (citing Bowen v. Georgetown Univ. Hosp., 488 U.S. 204 (1988)).

Time Elapsed. The Decision's grounds for reopening are especially unconvincing when balanced against the extraordinary length of time—13 years—since the Board granted the exemption. The Board has said the time elapsed since the initial decision is particularly important in an exemption proceeding, like this one, that “pertains to a transaction that cannot readily be undone.” Ind. Hi-Rail Corp., FD 32162, slip op. at 4. When significant time has passed, which in the case of Indiana Hi-Rail was under three years,¹⁴ “concerns for administrative finality, repose, and detrimental reliance must be balanced against any benefits to be derived from reopening and revocation of the exemption.” Id. at 5 (citing Greater Bos. Television Corp. v. FCC, 463 F.2d 268, 289 (D.C. Cir.1971); Chi. & N.W. Ry. v. United States,

exemption on the approval and execution of certain trackage rights related to an adjacent segment of rail line). In this dissent, I do not take a position as to the appropriateness of the competition-related conditions in those cases and in exemption proceedings generally.

¹⁴ The petition to reopen this proceeding was filed in 2018, about four years after NCA states it first experienced service issues with CP and more than ten years after the transaction (i.e., after the initial term of the Haulage Agreement), though NCA notes that in 2014 it first approached the Board on an informal basis via the Board's Rail Customer Public Assistance program. (NCA Pet., V.S. Michelson 13-14.)

311 F. Supp. 860, 863 (N.D. Ill.1970); S.R. Investors. Ltd.—Aban.—in Tuolumne Cnty., CA, AB 239X, slip op. at 9 (ICC served Jan. 26, 1988)).¹⁵ The agency has repeatedly identified a time period significantly shorter than 13 years as constituting a substantial burden for reopening. See, e.g., Union Pac. R.R.—Aba. Exemption—in Rio Grande & Mineral Cntys., Colo., AB 33 (Sub No. 132X), slip op. at 3 (STB served May 3, 2005) (stating that “concerns for administrative finality, repose, and detrimental reliance strongly counsel against reopening” a proceeding 5 years after OFA transaction was consummated); Canadian Pac. Ltd., FD 31700, slip op. at 4 (explaining that the agency “must be presented with a situation so compelling that the normal interests of reliance and repose (which ordinarily militate against revisiting prior actions) are overcome”). The Decision cites no supporting precedent, let alone any precedent showing a similar amount of time elapsed prior to reopening.¹⁶

In fact, the Decision does not address the time elapsed since the initial decision or CP’s reliance on the 2007 Decision to invest in the previously deteriorated Joint Line.¹⁷ Prior to the transaction, as the 2007 Decision notes, the Joint Line had a tendency to flood, and BNSF had embargoed the line until needed repairs could be made.¹⁸ 2007 Decision, FD 35068, slip op. at 4. CP submits evidence that the Joint Line was beset by deteriorated track, dilapidated grade crossings, damaged switches, and failed ties; the line experienced frequent outages and embargoes. (CP Reply, V.S. Hubbard 3-4.)¹⁹ As a result of the transaction, the Joint Line was rehabilitated, and—as NCA concedes—there were no significant problems on the line for several years. (CP Reply 7; NCA Pet. 7-8.) For more than a decade, the line has been maintained at a higher standard than before. (CP Reply, V.S. Hubbard 6.) The Decision does not seem to

¹⁵ The agency has made clear that in deciding whether a party has alleged sufficient grounds to support a reopening request, the Board weighs “the magnitude of the alleged bases for reopening against countervailing equitable concerns regarding administrative finality and repose and detrimental reliance by the applicant and the public.” Tongue River R.R.—Constr. & Operation—in Custer, Powder River & Rosebud Ctys., Mont., FD 30186 (Sub No. 3), slip op. at 7 (STB served June 15, 2011) (citing Ariz. Pub. Serv. Co. v. Atchison, Topeka & S.F. Ry., 3 S.T.B. 70, 75 (1998) (“we must approach petitions to reopen . . . cautiously, on a case-by-case basis, striving to achieve an appropriate balance between the interests of fairness to all parties and of administrative finality and repose.”)).

¹⁶ That is not to say the Board has set precise time limit for reopening, Ind. Hi-Rail Corp., FD 32162, slip op. at 4, but rather only to say the lack of similar cases shows the extraordinary nature of the Decision’s reopening.

¹⁷ CP contracted with DMVW to lease, maintain, and operate the Joint Line, and DMVW improved track infrastructure and replaced defective ties to address the line’s tendency to flood. (CP Reply 10.) BNSF agreed to replace rails and repair rail joints prior to closing. (Id. at 5.)

¹⁸ The 2007 Decision also stated that planned repairs should enhance service to existing customers. 2007 Decision, FD 35068, slip op. at 4.

¹⁹ CP asserts that BNSF did not want to own or maintain the line, and BNSF might have considered abandonment options. (CP Reply, V.S. Hubbard 3.)

consider these facts or conduct any meaningful balancing between the bases for reopening and issues of administrative finality, repose, and detrimental reliance. Though the exemption remains in place, CP's reliance is relevant because, as explained further below, the Decision imposes a new requirement designed to fundamentally alter CP's understanding of its rights under the transaction.

Of course, CP is not the only party that has committed resources over the past 13 years, and the facts surrounding NCA's \$37 million²⁰ investment in a 110-car unit train²¹ facility, completed in 2014, merit careful consideration.²² (NCA Pet., V.S. Michelson 8.) The record shows that, as early as 2008, CP invoked the terms of the Haulage Agreement and requested car volume limits.²³ In particular, in its June 2008 letter to BNSF, CP repeatedly cited the Haulage Agreement and asserted that BNSF's high car volumes deviated from the figures that BNSF provided prior to the transaction and that these "surprising" and "unexpected" volumes were causing "service failures and capacity related operational issues." (CP Reply, V.S. Hubbard, Ex. D.) BNSF has acknowledged that it has "gotten letters over the years" from CP regarding car volume limits, though BNSF states such limits have not been enforced.²⁴ (Oral Arg. Tr. 191.) In August 2013, BNSF sent NCA an email discussing drawings for the new unit train facility designed for car volumes exceeding those with which CP previously had taken issue. (NCA Oral Arg. Ex. 1-2, Aug. 20, 2019.) Neither BNSF nor NCA presents any documentary evidence showing CP agreed that BNSF unit train service was permitted under the Haulage Agreement. In February 2014, after the construction process had started and about four months

²⁰ In addition to this investment at the Noonan elevator, NCA also spent over \$4 million in Crosby in order to modernize an elevator and improve the rail car loading apparatus. (NCA Pet., V.S. Michelson 8.)

²¹ NCA describes the Noonan facility as being able to accommodate the movement of 110-car trains, (NCA Pet., V.S. Michelson 8), and also describes it as including 100 car loading facilities, (NCA Reply, V.S. Michelson 4). At bottom, as a result of the construction completed in 2014, the Noonan facility is now capable of handling unit train service.

²² That is not to say these facts would necessarily demonstrate whether the Board could have expected CP would exercise the terms of the Haulage Agreement as it has. However, they shed light on the parties' arguments on reopening, including issues of reliance.

²³ Noting the Haulage Agreement contains provisions to address capacity-related issues, a 2008 letter from CP to BNSF suggested a discussion as a first step towards evaluating the impact of the car volume limits. (CP Reply, V.S. Hubbard, Ex. D.) CP had requested BNSF to limit its traffic under the haulage agreement to 50 carloads in each direction per week, starting on September 1, 2008. (*Id.*)

²⁴ BNSF also states it did not seek to arbitrate CP's view of the Haulage Agreement as it pertains to car volume limits. (Oral Arg. Tr. 163-64.)

prior its completion,²⁵ CP sent NCA a letter stating that it had “come to [CP’s] attention” that NCA was “holding to an idea” that BNSF unit train service was an option and asserting that BNSF does not have the right to move unit trains under the Haulage Agreement. (CP Reply, V.S. Wood, Ex. B.) NCA and CP clearly have different views on who knew what and when.²⁶ I have serious concerns about the level of communication between the carriers and NCA, and form no conclusion as to whether NCA is entitled to relief on different grounds and under more appropriate processes, but I do not find the documentary evidence on this record undermines CP’s arguments on reopening.

Material Alteration. Not only does the Decision fail to demonstrate substantially changed circumstances or address the extraordinary length of time since the 2007 Decision, it also does not precisely explain the extent to which it would “materially alter,” or “mandate a different result” from, the initial exemption decision. See Montezuma Grain, 339 F.3d at 541-42; Can. Nat’l Ry., FD 35087 (Sub No. 8), slip op. at 4 (grounds for reopening “must be sufficient to lead the Board to materially alter its prior decision”). Under 49 U.S.C. § 10502(d), the Board may revoke the exemption²⁷ and impose regulation to the extent necessary to carry out the RTP, but the Decision makes no RTP findings.²⁸ The Decision keeps the exemption in place (i.e., unaltered), while imposing a new requirement and warning of further action. First, the

²⁵ CP states it approved the track design in June 2013. (CP Reply, V.S. Wangerin 1.) NCA states that the “grain facility was poured and slicked” and “the track was already laid and ready for operation” in September 2013, and the facility was “going to be up and running” in July 2014. (Oral Arg. Tr. 34-36; CP Reply, V.S. Wangerin 2.)

²⁶ CP asserts that, when the new unit train facility was in its planning stages, it informed members of NCA’s management team that the Haulage Agreement did not provide for service by BNSF unit trains. (CP Reply, V.S. Wood 4.) CP also states that NCA did not inquire, or otherwise seek assurance, that the Haulage Agreement would be extended beyond its initial term. (*Id.*) NCA asserts it would not have committed such substantial resources, or secured BNSF’s approval, if it did have reason to believe CP would not allow unit trains. (Oral Arg. Tr. 33-37.)

²⁷ Under 49 U.S.C. § 10502, the Board exempted the transaction from the prior approval requirements of 49 U.S.C. §§ 11323-25 and imposed no condition outside the standard employee protections. 2007 Decision, FD 35068, slip op. at 6. Section 10502(a) directs the Board to exempt from regulation a transaction whenever the Board finds that application of title 49, subtitle IV, part A is not necessary to carry out the RTP, and either is of limited scope or the transaction is limited in scope (as the 2007 Decision concluded) or application of a provision of part A is not needed to protect shippers from an abuse of market power.

²⁸ Specifically, the Board may revoke an exemption, to the extent it specifies, when it finds that application in whole or in part of a provision of title 49, subtitle IV, part A is necessary to carry out the RTP at 49 U.S.C. § 10101. In justifying a revocation, a petitioner must meet its burden by articulating reasonable, specific concerns under the revocation criteria. See Portland & W. R.R.—Lease & Operation Exemption—Lines of Burlington N. R.R., FD 32766, slip op. at 5 (STB served Oct. 15, 1997).

Board requires CP and BNSF to submit a proposal to “fulfill the findings” of the 2007 Decision such that NCA receives “a level of service commensurate with the broad representations underlying the Board’s 2007 Decision.” Decision 6. Then, the Decision warns the parties that, if the proposal would not “adequately address the Board’s competitive concerns,” they risk “further action in a future decision, including imposing a service order should it be found necessary.” Id. In its full context, the requirement is no simple information request or procedural action. Given the nature of this now reopened exemption proceeding, the implicit force of this warning is seemingly that, if the parties do not do as the Board orders, the Board may ultimately revoke the exemption and potentially force the divestiture of the Joint Line. The practical effect of this action resembles a competition-related condition, even though the transaction is still exempt from the Board’s competition-related conditioning authority.²⁹ The Decision cites no supporting precedent for its action, and it does not specify whether its competitive access proposal requirement constitutes the material alteration or different result from the 2007 Decision.

The requirement itself is unclear and raises potential problems. It appears to me that the Board is attempting, at a minimum, to drive CP to allow BNSF unit train service to NCA and to withdraw any car volume limits on NCA’s traffic. However, the Decision leaves much unaddressed. First, in light of the parties’ disagreement about the meaning of the statements in joint petition and the 2007 Decision, the Decision should do more to clarify how its competitive concerns would be adequately addressed, including whether the terms of the required competitive access proposal must last into perpetuity, whether the proposal may include any limits on BNSF’s access, and—if so—which limits are acceptable.³⁰ Second, given that the exemption nominally remains in effect, the Decision should more clearly tie its competitive access proposal requirement to statute or precedent. Third, though the requirement is focused on NCA, the Haulage Agreement is not exclusive to that shipper. The Decision should clarify whether the competitive access proposal would only be limited to NCA. Finally, as noted, CP suggests that certain competitive access changes, such as the addition of unit train service by BNSF, would result main line blockages, blocked crossings, and other effects. (CP Reply, V.S. Hubbard 6-9, Ex. D; Oral Arg. Tr. 110-11, 171.) The Decision should discuss the extent to which its evaluation of the competitive access proposal would also involve an assessment of the effects on other rail users and the surrounding community.

²⁹ If the Board were to revoke an exemption and then regulate the transaction by applying a provision of title 49, subtitle IV, part A, it would review the transaction under 49 U.S.C. § 11323-25, including the approval and conditioning standard in § 11324.

³⁰ Notwithstanding its issues with CP’s unit train and car volume limits, and suggestion that CP must not “restrict competitive service,” the Decision elsewhere appears to suggest that the Board could have expected NCA’s competitive options to be limited in some way. Decision 5-6 (NCA’s “competitive options have been *limited far more* than the Board or affected shippers could have expected . . .”) (emphasis added). However, it does not state what those limits might be.

I do not find the Decision has provided reason to deviate from the Board's initial assessment of the appropriateness of NCA's requested action in this proceeding. In 2019, the Board unanimously stated:

Although NCA has framed its request for relief as a petition to reopen (or, alternatively, to revoke), NCA appears to allege conduct by CP that may be more appropriately addressed under the Board's competitive access regulations, 49 C.F.R. § 1144.2. Alternatively, to the extent that NCA is concerned with its ability to obtain unit train service from CP, NCA's arguments may also raise common carrier or unreasonable practices issues under 49 U.S.C. §§ 11101, 10702.

Soo Line R.R.—Acquis. & Operation Exemption—BNSF Ry. (2019 Decision), FD 35068, slip op. at 4 (STB served April 22, 2019). NCA raises significant concerns with alternative avenues,³¹ but such concerns do not cure issues with the case for substantially changed circumstances or mean that the Decision's reopening and requirement constitute appropriate relief. I respectfully dissent.

³¹ NCA argues that the Board's suggested processes in its 2019 Decision would "at least double NCA's costs and significantly delay any resolution of these issues." (NCA Reply 2, April 26, 2019.) It further argues that the Board's precedent, particularly concerning competitive access, makes it difficult to obtain relief. (Id. at 3.)