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February 8, 2021

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

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

Dear Ms. Brown:

Please find enclosed for filing Soo Line Railroad Company d/b/a Canadian Pacific (“CP”)’s Petition for Reconsideration of the Board’s December 29, 2020 Decision in this proceeding. The filing fee of \$350 was paid using pay.gov.

CP’s filing includes both a Public Version and a Confidential Version and includes color maps.

Please do not hesitate to contact me with any questions.

Sincerely,

/s/ David F. Rifkind

Counsel for Soo Line Railroad Company

Enclosures

cc: Parties of Record

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 35068

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

PETITION FOR RECONSIDERATION

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Dated: February 8, 2021

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Soo Line Railroad Company d/b/a Canadian Pacific (“CP”) submits this Petition for Reconsideration of the Board’s Decision served on December 29, 2020 (the “Reopening Decision”) that grants New Century Ag’s (“NCA”) petition to reopen the 2007 exemption proceeding.

I. PREFACE AND SUMMARY OF THE ARGUMENT

CP asks the Board to reconsider its Reopening Decision. In the 2007 Joint Petition for Exemption,¹ CP (along with BNSF) pledged that the railroads’ transaction would preserve existing options and competition for shippers (like NCA) on the Conveyed Lines.² CP stands by its pledge, and in fact firmly believes that the transaction achieved those objectives, with NCA now having access to a rehabilitated rail line that was previously dilapidated and often embargoed. CP also understands, however, that the current situation—with the benefit of hindsight—may not be perfect. CP is therefore willing to do what it reasonably can—cognizant of operational constraints and the fundamentals of the 2007 transaction—to address concerns raised in the Reopening Decision.

But respectfully, the Reopening Decision’s findings and open-ended requirements do not comport with precedent on reopening of administratively final proceedings, and CP is concerned that – rather than merely requiring that the transaction described in 2007 be carried out – the decision could be applied to require the rewriting in BNSF’s favor of the 13-year old transaction between CP and BNSF.

In the 2007 transaction, BNSF chose to transfer ownership of the Conveyed Lines to CP

¹ Joint Petition for Exemption, *Soo Line R.R.—Acquis. & Operation Exemption—BNSF Ry.*, FD 35068, filed July 16, 2007 (the “Joint Petition” or “JP”).

² As defined most recently in the Reopening Decision.

and thereby extinguish its common carrier obligations to provide service as well as its maintenance obligations on the then dilapidated lines. In return, BNSF received CP's grant of limited haulage rights lasting for 10 years. Those are the fundamentals of the bargain that BNSF struck, the shippers on the Conveyed Lines (including NCA) strongly supported, and the Board authorized. Now, more than 13 years later, the Board has taken the unprecedented step of reopening an administratively final minor transaction exemption proceeding. And the Board has ordered CP and BNSF to negotiate and submit a proposal that, in the Board's view, fulfills the findings in the 2007 Decision,³ a directive that leaves considerable room for interpretation. Accordingly, the path forward to a hopefully satisfactory result for all stakeholders requires reconsideration and, at a minimum, clarification of the Reopening Decision.

Reconsideration is also appropriate for the reasons explained below and those in the dissenting opinion of Board Member Fuchs (the "Dissent"), which CP hereby adopts by reference. Notably, the Reopening Decision did not duly consider the circumstances that existed in 2007, when BNSF and CP jointly made the representations on which the 2007 Decision was based. Though the Reopening Decision calls for CP (and BNSF) only to "fulfill the findings in the 2007 Decision," CP is concerned that BNSF or NCA might seek to apply the Reopening Decision to require CP to grant rights to BNSF that put it (and thus NCA) in a *better position* than it was in when BNSF chose to walk away from the line in 2007. Prior to 2007, BNSF was solely responsible for maintaining the Conveyed Lines and those lines were chronically under-maintained and often out of service. In seeking an exemption, BNSF asked the Board to relieve it of its ownership rights and obligations including maintenance by transferring those rights and

³ *Soo Line R.R.—Acquis. & Operation Exemption—BNSF Ry.*, FD 35068 (STB served Sept. 7, 2007) (the "2007 Decision").

responsibilities to CP. While BNSF was eager to discontinue service entirely, CP was eager to improve service to shippers like NCA and its predecessors. As soon as it acquired sole ownership of the Conveyed Lines, CP poured millions into upgrading their condition, enabling far more reliable and efficient rail service. Far from reducing “rail competition,” the transaction unlocked the full potential of efficient rail service, fostering tremendous growth in NCA’s business. The transaction effectively increased NCA’s rail options from zero to one, and then added ten years of BNSF haulage on top of that. By any measure, even without the improved (but temporary) access to BNSF that was unlocked by the haulage rights BNSF received in 2007, competition for NCA traffic was not just preserved as represented, but was enhanced.

Nonetheless, CP understands NCA’s desire for continued access to both BNSF and CP, and new access for unit train traffic (which did not exist in 2007). Grain elevators directly served by BNSF have single-line access to markets in the Pacific Northwest that CP only reaches via joint-line service. BNSF’s service to those elevators provides strong geographic competition that benefits NCA in reaching the markets that CP serves, but CP acknowledges that it cannot *by itself* get NCA’s grain to BNSF-served destinations.

Accordingly, CP is prepared to take reasonable steps to enable NCA to have the option of BNSF service. But the burden must also rest upon BNSF, which received the benefit of its bargain when it walked away from the line in 2007. CP is prepared to do the following to ensure that NCA not only continues to enjoy better rail options than it would have had absent the transaction, but also retains the option of BNSF service:

- ***CP will continue hauling NCA’s manifest traffic in BNSF’s account by extending the haulage agreement entered in 2007.*** CP has already extended the 2007 haulage agreement with BNSF through 2023, and it will extend it further for a reasonable period if desired by NCA. While this would not solve the capacity issues in Minot that prevent the exchange of unit trains in Minot, nothing prevents BNSF from using its haulage rights to build unit trains from blocks of cars at its yard in Minot or

elsewhere, or otherwise offering NCA unit train rates.⁴ Whether BNSF chooses to compete directly for NCA's unit train traffic is thus up to BNSF.

- ***CP is willing to grant BNSF haulage rights between NCA's facilities and MP 47 on the Lignite – Niobe line.***⁵ Instead of exchanging haulage in Minot, CP is prepared to haul BNSF traffic, including unit trains (at the same haulage fee as set forth in the 2007 agreement), to a point of exchange at MP 47, where CP's branch from Lignite ends and BNSF's branch from Niobe begins.⁶ This arrangement (or similar other operationally efficient arrangement⁷), which would be consistent with representations that BNSF made to NCA contemporaneous with NCA's construction of the loop track,⁸ would require BNSF to fund the (potentially large) investments needed to make its new rights operational. Such investments include upgrades to the CP and BNSF lines between Lignite and Niobe, which connect at MP 47 and have not seen through train service for many years (which investments would be solely for BNSF's benefit and therefore at BNSF sole expense as expressly provided for in the Haulage Agreement). Additionally, as this arrangement would change the fundamental terms of the 2007 bargain, CP's willingness to extend these rights to BNSF is conditioned on BNSF contributing (in proportion to its share of traffic) to the investments CP made on the Conveyed Lines between 2007 and today, as well as further investments CP may make in the future. This option offers the quickest handoff to BNSF of haulage cars, which benefits NCA.

Either of these options would give NCA access to a BNSF option—assuming BNSF were

⁴ Combining car blocks into unit trains at BNSF's yard in Minot would be akin to the co-loading practice that BNSF previously allowed and which NCA views as akin to unit trains. See Petition of NCA to File Rebuttal to Reply of CP and Proposed Rebuttal (filed Feb. 21, 2019) ("NCA Rebuttal"), V.S. Michelson ¶ 14.

⁵ CP and BNSF are engaged in ongoing confidential discussions regarding a formal proposal as required by the Reopening Decision. Although the Reopening Decision appears to require CP and BNSF to present their agreement on steps to provide a level of service commensurate with the 2007 representations, CP believes that its unilateral willingness to provide BNSF with the rights summarized herein (conditioned on BNSF's investments to activate them) fully enables BNSF to provide competitive service, and that CP cannot be held responsible were BNSF to decline to accept and make use of those rights.

⁶ The maps set forth at Appendix A compare current conditions (including CP's proposal regarding new BNSF haulage rights) with the situation as it existed in 2007.

⁷ CP is exploring other alternatives to Minot for exchanging haulage traffic.

⁸ In a March 12, 2014 letter to the Board, NCA's General Manager, Lynn Michelson wrote that, "BNSF has stated that they would also like to supply the New Facility [at Noonan] with 100 car Shuttles along with continuing smaller 25-50 car orders for our other facilities...*BNSF has said that they could access the branch line that splits off at Niobe and runs northwest towards Lignite to deliver NCA's BNSF rail cars.*" NCA Rebuttal, V.S. Michelson, Ex. 3 (emphasis added).

prepared to invest to activate it. And either option would put NCA in a vastly superior position to that which it faced in 2007 had this transaction not been consummated—essentially without reliable rail service from a single railroad given the dilapidated track conditions. To the extent the Board’s Reopening Decision purports to impose any greater obligation on CP, CP respectfully asks the Board to, at a minimum, reconsider that Decision, if not vacate it altogether.

II. BACKGROUND

As a matter of brief background, in 2007 BNSF and CP submitted their Joint Petition for Exemption to allow BNSF to dispose of its interest in the Crosby-Lignite Line by conveying ownership to CP. As BNSF wrote in contemporaneous correspondence, its goals were clear; it wanted off of the line once and for all:

This will not be a lease, it will be a conveyance. We do not want Crosby-Lignite back. We do not want to own it anymore, much less maintain it, that’s why we will explore our abandonment options if we cannot come to some kind of accommodation here.

CP Reply to NCA’s Petition filed Feb. 4, 2019 (“CP Reply”), V.S. Hubbard at 3 (emphasis added). BNSF even served CP with a notice of intent to abandon the Conveyed Lines. *Id.*

The Joint Petition explained that, through BNSF’s sale of the Conveyed Lines to CP, its right to operate on them would go away. BNSF’s right to serve traffic would be provided by the haulage agreement entered into with CP and filed with the Joint Petition. JP at 11. A key rationale for the haulage arrangement was that the relatively small volumes of BNSF traffic⁹ (an average of between {{[REDACTED]}} cars per week) could be “handled in existing DMVW-CPR

⁹ BNSF told CP that its existing traffic on the Conveyed Lines totaled approximately {{[REDACTED]}} cars per week. See CP Reply, V.S. Hubbard 6. According to NCA, however, BNSF cars serving its Crosby and Noonan facilities between 2005 and 2007 were less than {{[REDACTED]}} cars per week. See Petition to Reopen, V.S. Michelson at 15. In either case, the volumes were relatively small.

trains” and therefore created greater operational efficiency. *Id.* Another key rationale for the haulage agreement was that it was a private, voluntary agreement that could be terminated after an initial 10-year term without any further requirement for BNSF to seek discontinuance of its service over the covered lines. As the Dissent observed, the termination provision “was plain to see in 2007,” and “the Board no doubt was and is aware that haulage agreements often contain time limits and can be terminated without prior agency approval.” Reopening Decision at 11.

“Prior to the transaction, as the 2007 Decision notes, the Joint Line¹⁰ had a tendency to flood, and BNSF had embargoed the line until needed repairs could be made.” *Id.* at 13 (citing 2007 Decision, slip op. at 4). “[T]he Joint Line was beset by deteriorated track, dilapidated grade crossings, damaged switches, and failed ties; the line experienced frequent outages and embargoes.” *Id.* (citing CP Reply, V.S. Hubbard 3-4). But immediately after the Board approved the transaction in 2007, CP rehabilitated the line, thereby restoring consistent and reliable service. Indeed, as noted by the Dissent, “[a]s 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.” *Id.* (citing CP Reply 7; NCA Pet. 7-8). “For more than a decade, the line has been maintained at a higher standard than before.” *Id.* (citing CP Reply, V.S. Hubbard 6). And as might be expected following CP’s investment to rehabilitate the Joint Line, volumes on the line increased dramatically, eventually supporting NCA’s investment in a loop track at Noonan.

This traffic growth highlighted the operational difficulties associated with the haulage rights BNSF had received in 2007. Under that agreement CP must operate BNSF’s haulage traffic over 73 miles of CP’s busy single-track mainline between Flaxton and Minot (one of CP’s main arteries between the U.S. and Canada), and then exchange cars with BNSF at Minot, where

¹⁰ As defined most recently in the Reopening Decision.

facility constraints (*i.e.*, CP's small yard and the location of the connecting track between CP and BNSF's mainlines) limit the volume of traffic that can be handled, preclude unit trains, and entail considerable congestion and disruption for both CP and the city of Minot. These were among the reasons that CP imposed volume and temporal limits on BNSF's Crosby/Lignite-Minot haulage rights and described the haulage arrangement in the Joint Petition as applying to existing BNSF traffic that could be accommodated on existing CP trains. *E.g.*, JP at 11. It is also among the reasons that the Haulage Agreement expressly states that BNSF haulage is subject to CP capacity in existing CP trains and that CP has the right to refuse traffic that requires new train starts or to require BNSF pay for new infrastructure to add capacity to handle new traffic. JP, Ex. G (Haulage Agreement), at §§ 2.02 and 2.05. And it is the reason that in 2008, when BNSF's surging haulage volumes disrupted CP's operations and its ability to serve its customers, CP sought to impose reasonable volume limits on BN haulage traffic. *See* Reopening Decision at 14.

In 2014, seven years after the transaction, and notwithstanding CP confirming that BNSF's haulage rights would not permit BNSF to move (or CP to move on BNSF's behalf) unit trains from NCA's facility in Noonan, North Dakota, NCA invested in a new loop track facility. Notably, BNSF supported NCA's investment in a loop track leading NCA to believe that BNSF could provide unit train service notwithstanding the undisputed capacity restrictions in Minot. Indeed, BNSF told NCA that in order to avoid those constraints, BNSF could instead "*access the branch line that splits off at Niobe and runs northwest towards Lignite to deliver NCA's BNSF railcars.*" NCA Rebuttal, V.S. Michelson, Ex. 3 (emphasis added).

Four years later and after CP had already extended the haulage agreement to 2023, in December 2018, NCA filed its petition to reopen or revoke the 2007 exemption. The crux of NCA's petition is the allegation that CP's refusal to allow BNSF unit train service to its loop track

facility via haulage did not comply with the railroads' "representations" in their 2007 Joint Petition to preserve competition. Initially, the Board indicated that NCA's petition was not the most appropriate vehicle for seeking relief and urged NCA to file for competitive access relief. *Soo Line R.R.—Acquis. & Operation Exemption—BNSF Ry.*, FD 35068, slip. op. at 4 (STB served Apr. 22, 2019). But NCA declined to avail itself of any of the alternative avenues of relief suggested by the Board, acknowledging that it could not satisfy the standards for such relief. See NCA's April 26, 2019 Response letter. Oral Argument before the Board followed on August 20, 2019.

On December 29, 2020, the Board served the Reopening Decision. Although it (correctly) left the exemption in place, CP and BNSF are required to submit a proposal by March 1, 2021 that in the Board's view will "fulfill the findings in [the] 2007 Decision," with the prospect of "further action in a future decision, including imposing a service order should it be found necessary," should the proposal not "adequately address the Board's competitive concerns." *Id.* at 6-7.

III. THE STANDARDS FOR RECONSIDERATION ARE MET.

A party may ask the Board to reconsider "an entire Board action" by submitting a petition that demonstrates "material error" in the prior Board action or because "the prior action will be affected materially because of new evidence or changed circumstances." 49 C.F.R. § 1115.3(a), (b). Reconsideration is encouraged where a party believes that the Board has erred, "as it is a more expeditious and efficient means of achieving corrections or adjustments than resort to the federal courts in the first instance." *Tex. Mun. Power Agency v. Burlington N. & Santa Fe Ry.*, NOR 42056, slip op. at 2 (STB served Sept. 27, 2004) (citing *Commonwealth of Pennsylvania v. ICC*, 590 F.2d 1187, 1194 (D.C. Cir. 1978)). As discussed below, and for reasons explained in the Dissent which CP adopts herein, the Reopening Decision contains material errors warranting reconsideration, including to the extent that the Reopening Decision compels CP to place BNSF or NCA in a better position than either would have been had the transaction not occurred.

IV. THE MAJORITY DECISION MATERIALLY ERRED IN REOPENING THIS PROCEEDING AND WOULD COMPOUND THAT ERROR IF APPLIED TO REQUIRE CP TO CREATE CONDITIONS THAT WOULD NOT HAVE EXISTED ABSENT THE EXEMPT TRANSACTION.

Congress authorized the Board to reopen an administratively final proceeding based on “material error, new evidence, or substantially changed circumstances.” 49 U.S.C. § 1322(c); 49 C.F.R. § 1115.4. As aptly summarized in the Dissent, “[i]n 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.” Reopening Decision at 8 (citations omitted). “The alleged grounds—in this case, the substantially changed circumstances—must be sufficient to lead the Board to materially alter its prior decision.” *Id.* “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.” *Id.* The presumption against reopening is particularly strong where, as here, the party seeking reopening delayed raising concerns for years while CP proceeded to make substantial investments in the Conveyed Lines based on its reasonable expectation that the fundamental economic terms of the 2007 transaction would not be disturbed.¹¹ *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 No. 32162, slip op. at 4-5 (STB served Jan. 30, 1998).

¹¹ Likewise, CP regularly makes substantial long-lived investments elsewhere, including on its mainline through Minot, intended to increase network fluidity and capacity. The value of those investments to CP and all of its customers would be substantially diminished if CP were obligated to take its mainline out of service for long stretches of time as would be required to effect a physical exchange of unit trains or block of cars of significant length with BNSF at Minot.

A. No “Changed Circumstances” Could Support a Reopening Untethered to the Fundamental Scope of the Transaction and the Context of the Representations on Which the Exemption Was Based.

1. The Fundamentals of the Proposed Transaction *Increased* Access to Effective Rail Transportation by Removing BNSF from the Line.

The Majority asserts that limitations on BNSF’s rights as set forth in the Haulage Agreement are inconsistent with “broad representations” made by BNSF and CP in the 2007 proceeding. Reopening Decision at 5. According to the Majority, the Board therefore “could properly have expected” that CP would allow BNSF to provide “a type of service that was not at issue at the time of the transaction,” *i.e.*, unit train service. *Id.* at 6.

Although CP is prepared to enable BNSF to offer unit train service, it is not willing to do so in a manner that disregards the economic fundamentals of the 2007 transaction—the benefits of which BNSF and NCA have already received—at CP’s sole expense. Nor is it willing to do so in a way that hamstring CP’s ability to fulfill its common carrier obligation to other customers. Far from addressing “changed circumstances,” any such requirement would itself impose a dramatic change in the fundamentals of the transaction and the reasonable expectations of all stakeholders. It would read the representations CP made (alongside BNSF) entirely out of context and ignore that the transaction (with or without the Haulage Agreement) actually expanded NCA’s rail options. That context is crucial:

- BNSF had ceased performing maintenance on the Conveyed Lines, resulting in the lines falling into a state of disrepair and frequent embargoes.
- BNSF wanted to exit the Conveyed Lines entirely, and would have considered abandoning it but for the transaction.
- CP desired to make significant investments to improve the condition of the Conveyed Lines and support traffic growth, but needed to have ownership rights and maintenance responsibilities to carry out that plan.
- Notwithstanding that CP’s mainline was single-tracked and busy, CP was willing to bear the temporary burden of accommodating BNSF’s relatively small volumes of

traffic in haulage service to Minot in light of the limitations on BNSF's rights (in terms of volume of traffic and duration).

With this context in mind, there ought to have been no confusion about how the proposed transaction would preserve and expand shippers' access to transportation. BNSF's ownership was inhibiting the maintenance necessary for either railroad to provide reliable rail service. The legal effect of BNSF's conveyance to CP of its interests in the line was also crystal clear. The sale of a rail line by its very nature extinguishes the seller's common carrier obligation to provide rail service.¹² Thus, absent the acquisition of Board approved or exempted trackage rights over the line, BNSF would no longer be a rail carrier serving the line under Board jurisdiction.

This fundamental feature of the transaction seems to have gotten lost in the debate about whether the haulage agreement gives BNSF sufficient rights to live up to the representations BNSF and CP made in 2007. Those representations can only be understood against the backdrop that BNSF was going to have *no rights at all to serve traffic* except those which the haulage agreement provided. But that did not mean that shippers' access to rail transportation would be diminished. To the contrary, it would be expanded through CP's investments to upgrade service—increasing the good rail options from zero to one, and then expanded again (but only for 10 years) with the option to have BNSF manifest traffic moved in haulage service on CP's manifest trains.

2. The 2007 Haulage Agreement Was a Net Expansion in the Rail Service Options Available Pre-Transaction and Could Not Have Given BNSF Any Long-Term Rights.

The Board asserts that, in restricting BNSF haulage volumes based on capacity, CP is

¹² See, e.g., *State of Wisconsin Dep't of Transp.—Petition for Declaratory Order*, FD No. 34181, slip. op. at 2 (STB served Aug. 1, 2002) (“In the typical sale of a non-abandoned rail line, the new owner is presumed to succeed the former owner in assuming the obligation to ensure that freight rail service continues over the line.”).

taking an “exceedingly narrow application of the Haulage Agreement.” Reopening Decision at 5. This perspective again ignores the fundamentals of the transaction. BNSF was departing the line, relinquishing ownership along with the common carrier obligations that go with it. It was receiving back only haulage rights, which by their nature are well understood as not entailing any underlying obligation to continue operations or respond to shipper demands for service.¹³ As a matter of the Board’s jurisprudence, then, it was apparent to all concerned that CP would be the only carrier with long term rights or obligations to serve shippers.

Given that CP was spending money to acquire the line, and then spending more to upgrade the line to stimulate growth in shipper demand, it should not be surprising that CP did not grant BNSF rights of any kind that would impose perpetual burdens on CP’s own operations (in Minot or along the Flaxton-Minot portion of its crucial mainline artery carrying domestic and international traffic) or give BNSF a windfall by allowing it to benefit from CP’s investments in the Conveyed Lines’ condition without making any contribution, either on the lines themselves or to BNSF’s own connecting lines. The limitations in the Haulage Agreement were merely the expression of the common sense fundamentals of the underlying transaction.

The express terms of the Haulage Agreement were critical to understanding BNSF’s ability to provide service. That Agreement was repeatedly referenced in, and filed with, the Joint Petition and available for all to see—and CP’s performance of the Haulage Agreement has actually exceeded the terms it agreed to in 2007. The Haulage Agreement provides that BNSF’s

¹³ As indicated in the Joint Petition, haulage agreements are not generally subject to STB regulation. JP at 4 n. 5. Rather, “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.” *Del. & Hudson Ry. Co., Inc.—Discontinuance of Trackage Rights Exemption—In Susquehanna Cnty, Pa.*, AB 156 (Sub-No. 25X), slip op. at 11 (STB served Jan. 19, 2005).

traffic would be handled in “existing” CP train service, Haulage Agreement at § 2.01, and “subject to CPR’s existing available train capacity.” *Id.* at § 2.04. It expressly gives CP discretion to refuse BNSF Haulage Cars in excess of the existing train service capacity, limit such traffic, and/or require BNSF to pay for new infrastructure to accommodate such traffic. *Id.* at § 2.05 (requiring BNSF to pay for new infrastructure that “CPR determines, in its sole judgment reasonably exercised (having regard to CPR’s own present and future requirements and CPR’s required reserve capacity) ... are necessary to accommodate the operation of additional trains to solely handle BNSF Haulage Cars”). Thus, CP’s interpretation to restrict large blocks of cars and unit trains moving in haulage based on capacity constraints is nothing more than the application of the plain language of the Haulage Agreement. Notably, BNSF has never invoked the Haulage Agreement’s dispute resolution provisions to challenge CP’s interpretation.

And the 2007 Joint Petition representations about the rights BNSF would have under the Haulage Agreement comported with the agreement’s limitations. They emphasized the small volumes of *existing* BNSF traffic that would be moved “pursuant to the Haulage Agreement ... *in existing DMVW-CPR trains* to and from Minot.” JP at 11 (emphasis added). The Joint Petition also explained that NCA would only “retain its *present* access to BNSF *via ... the Haulage Operation*,” that “customers will be able to ship their products *as they have previously*,” and that “there will be no material change in the level or nature of service.” *Id.* at 7, 13-14 (emphasis added). Even NCA expressed its understanding that haulage was for “*existing* BNSF traffic.” *Id.*, Ex. 5-NCA Letter of Support (CP “will handle *existing* BNSF traffic through a haulage agreement.”) (emphasis added). Thus, when read in context, the representations on which the Board’s decision relies specifically encompassed traffic or service that was “existing” or “present” in 2007, *i.e.*, it did not encompass unit train traffic—a service that did not then exist

on the line from a facility that also did not then exist. Nor is there any dispute that the limitations on BNSF's haulage rights were motivated by very real capacity and operational issues. *See, e.g.*, Reopening Decision at 2-3, 10-11, 14; Aug. 20, 2019 Oral Arg. Tr. at 72-73, 84-86, 110-11, 171, 180; CP Reply, V.S. Hubbard at 6-9. CP has limited capacity in and around Minot such that interchanging,¹⁴ or more properly exchanging, large blocks of BNSF haulage traffic there causes significant disruption to CP's mainline operations and unduly interferes with CP's ability to meet its common carrier obligation to other customers in and around Minot and beyond, and would also raise safety concerns. *Id.*¹⁵ These capacity issues make handling 100-plus car unit trains in haulage entirely impractical. As the Dissent notes, the Reopening Decision does not address these operational and physical limitations. *See* Reopening Decision at 10-11.

B. The Transaction Would Have Been Exempted (or Approved) in 2007 without Any Need for Expansion in BNSF Rights.

As explained in the 2007 Decision, "the Board must exempt a transaction or service from regulation when . . . (1) regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101; and (2) either (a) the transaction or service is of limited scope, or (b) regulation

¹⁴ "Interchange" as used herein refers to the physical exchange of BNSF haulage traffic.

¹⁵ As shown on the map appended hereto as Appendix B, CP holding track capacity in Minot is limited to two tracks that can accommodate up to 60 cars each and are used to serve multiple customers. If CP receives more than the available track capacity for interchange with BNSF, those cars must sit on CP's mainline until they can be interchanged. To interchange cars from NCA, CP must sit on its mainline east of the BNSF double mainline and wait for BNSF, which controls the diamond, to authorize CP to cross. Once across, the train must again sit on CP's single mainline in downtown Minot for a window from BNSF to shove, or if there is distributed power, pull back on to BNSF's mainline. A crew member must make his/her way (over a mile and a half in the case of a unit train) to the back end for the move on to BNSF's line. Based on CP's experience, it could take anywhere from an hour to four hours to complete the move on to the BNSF mainline. During this time, the train will block as many as six downtown grade crossings and CP's mainline operations. Shoving a train also raises heightened safety concerns. Once authority is received and the move completed, the CP crew member must then walk to the front of the train before the train can pull forward to BNSF's yard. *See, e.g.*, Aug. 20, 2019 Oral Arg. Tr. at 72-73, 84-86, 171, 180.

is not needed to protect shippers from the abuse of market power.” 2007 Decision at 3.

In evaluating whether these standards are met, the Board must consider the same context that underlay the scope of the representations made by BNSF and CP in 2007. Prior to the transaction, BNSF had ceased maintaining the Conveyed Lines and was in the process of exiting the lines altogether. Track conditions were abysmal with lengthy embargoes occurring with regularity; intra-modal competition was, to be generous, negligible and was likely to disappear altogether; and consequently rail service was suffering. The misalignment of maintenance responsibility for the line with the primary operator created an untenable situation. The sale of BNSF’s ownership interest to CP would allow CP to rehabilitate the line and restore rail service to acceptable levels, at a minimum. It would also allow BNSF to eliminate redundant service and cease maintaining and operating over a parallel line. Moreover, the Haulage Agreement introduced competition for two previously sole-served customers on the line and preserved, at least for the next ten years, BNSF’s ability to serve the other two customers on the line. Knowing that CP would impose restrictions on BNSF volumes, or might even terminate the Haulage Agreement after the initial term, does not change the fact that the proposed transaction clearly met the standard for proceeding under an exemption.

The Board of course now has the further benefit of actual experience since 2007, which shows that the transaction in fact generated tremendous public benefits. It supported CP’s millions of dollars in investments. It supported tremendous growth in online traffic, as CP was able to provide reliable service and competitive rates (*see* CP Reply, V.S. Wittebrood at 1-2), reflecting, among other things, intense geographic competition from nearby BNSF elevators.¹⁶

¹⁶ The Board has repeatedly emphasized the important role of geographic competition in grain transportation markets. *See Union Pac, Corp., Union Pac. R.R. & Missouri Pac. R.R.—*

CP's investment supported NCA's investment in a loop track.

And, with CP's continued commitment to offer options for BNSF service (including unit train service under conditions noted above), CP continues to support vibrant head-to-head rail competition, if BNSF chooses to make its own investments to activate that competition.¹⁷

Viewed through this lens, no "changed circumstances" could affect the conclusion in 2007 that regulation of the transaction was not necessary to carry out the rail transportation policy of 49 U.S.C. 10101. Nor could "changed circumstances" provide a basis for altering any of the Board's findings that the proposed transaction promoted the rail transportation policy.

Both of the other prongs of the exemption standard are amply satisfied. The sale of approximately 45 miles of rural branch lines was clearly of limited scope. *See, e.g., Ind. R.R. Co.—Acquis. & Operation—Ill. Cent. R.R. Co.*, 6 I.C.C.2d 1004, 1011 (1990) (finding acquisition and operation of rural rail lines 90.3 miles in length to be of limited scope). As to abuse of market power, then as now, the Board defined "market power as the ability of a carrier profitably to increase rates above competitive levels or to reduce the quality of service for a significant period of time without losing traffic to competing carriers or other sources." JP at 10 (citing *CSX Corp.—Control—Am. Comm. Lines*, 2 I.C.C. 2d 490, 515 (1984)). The transaction

Control—Chicago & North Western Transp. Co. & Chicago & North Western Ry., FD No. 32133, 1995 WL 141757 at *59 (I.C.C. served Mar. 7, 1995) (source competition is effective "[b]ecause grain grown on the farm must necessarily be trucked somewhere, and because grain grown in Iowa competes with grain grown elsewhere (both in the United States and throughout the world)"). BNSF recently submitted evidence on the continued existence of strong geographic competition in these markets. *See Comments of BNSF Ry Co., Review of Commodity, Boxcar and TOFC/COFC Exemptions*, Docket No. EP 704 (Sub No. 1), at 9 (filed Jan. 29, 2021) citing Verified Statement of John H. Miller attached to Reply Comments of BNSF Ry Co. at 5-10, *Market Dominance Streamlined Approach*, Docket No. EP 756 (filed Jan. 10, 2020).

¹⁷ Even under the manifest haulage CP agreed to in 2007, BNSF has at times received a majority of NCA's traffic. In 2010, {{ [REDACTED] }} of the combined Noonan and Crosby traffic moved in haulage. *See* Petition to Reopen, V.S. Michelson at 7-8.

gives neither CP nor BNSF such market power. Although the Haulage Agreement gives BNSF the ability to compete directly with CP notwithstanding capacity restrictions, CP and BNSF also compete indirectly for NCA's traffic. Because agricultural commodities originating and terminating on the line are trucked to and from the elevators, they can easily divert to BNSF-served elevators in the area.¹⁸ Thus, CP must remain competitive on rates and services or lose the NCA's traffic to other nearby elevators (not to mention BNSF's existing haulage option).¹⁹

C. Any Expansion in BNSF Rights Would Be Inequitable in Light of the Investments Made by CP in Reliance on the Effectiveness of the Exemption.

In evaluating a request for reopening, the Board must also consider the time elapsed since the initial decision and related equitable considerations of administrative finality, repose, and detrimental reliance. *See Ind. Hi-Rail Corp.*, FD 32162, slip op. at 5. But, as explained by the Dissent, "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." Reopening Decision at 13. The failure to address the time elapsed and CP's argument of laches is particularly troubling in an exemption proceeding as it "pertains to a transaction that cannot readily be undone." *Ind. Hi-Rail Corp.*, FD 32162, slip op. at 4. Here more than 13 years has passed since the Board granted the exemption. The Board 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) (explaining that "concerns for administrative finality, repose, and detrimental reliance strongly counsel against reopening" a proceeding five

¹⁸ *See* note 16, *supra*.

¹⁹ *See e.g.*, July 24, 2020 Letter from CP to the Board discussing CP actions to compete for NCA traffic on service and rates.

years after OFA transaction was consummated); *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)) (“For [the Board] to reopen a proceeding long after the time permitted for administrative reconsideration, we 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.”). As the Dissent correctly points out, the Majority “cites no supporting precedent, let alone any precedent showing a similar amount of time elapsed prior to reopening.” Reopening Decision at 13.

The Majority also overlooks the fact that CP made significant investments to improve the line in reliance on its understanding of the economic fundamentals of the transaction. As explained above, prior to the transaction, the Joint Line was in a dilapidated state, had a tendency to flood, and was often embargoed. But “[a]s 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.” *Id.* (citing CP Reply 7; NCA Pet. 7-8). CP made these improvements because it relied on the finality of approved exemptions. If a transaction from 13 years ago can be reopened on such insufficient grounds as those here, no railroad is going to have any comfort in the finality of decisions and will be hesitant to make significant investments in long-lived assets. Rather, they will be concerned that the Board will later “fundamentally alter” a railroad’s understanding of its rights under an approved transaction, to the detriment of the railroad. *See id.* at 14.

D. Were It to Compel an Expansion of the Rail Options Available Pre-Transaction, the Majority Decision Would Undermine the Rail Transportation Policy.

Under 49 U.S.C. § 10502(d), in order to revoke an exemption and impose regulations, the Board must make a finding that regulation is necessary to carry out the RTP. This same standard

applies to reopening. “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.” Reopening Decision at 15 n. 28. “In justifying a revocation, a petitioner must meet its burden by articulating reasonable, specific concerns under the revocation criteria.” *Id.* (citing *Portland & W. R.R.—Lease & Operation Exemption—Lines of Burlington N. R.R.*, FD 32766, slip op. at 5 (STB served Oct. 15, 1997)). But although such findings are required both to justify imposing a new requirement (*e.g.*, that CP and BNSF submit a proposal), and to further Board action if no proposal is submitted or the proposal proves unsatisfactory, the Majority completely ignores this statutory requirement. And, in fact, the Board’s action undermines the RTP.

Were the Reopening Decision to compel CP to put BNSF (and NCA) in a better position than they would have been had the transaction not been consummated, it would represent a major shift in Board policy without any legal basis. As correctly observed by the Dissent, the Reopening Decision would “represent[] a clear shift in policy by the majority to further promote competition in individual transactions.” Reopening Decision at 12. This is troubling because generally an agency may not apply a change in policy in individual proceedings, and certainly not through reopening administratively final decisions—indeed, “the Board does not reopen final decisions merely because it might handle or decide them differently today.” *Id.* (citing *Canadian Pac. Ltd.*, FD 31700, slip op. at 4; *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204 (1988)). Nor may the Board use its conditioning authority to address pre-existing conditions:

the harm caused by the transaction must be distinguished from pre-existing disadvantages that other railroads, shippers, or communities may have been experiencing . . . *i.e.*, pre-existing disadvantages that will neither be caused nor exacerbated by the transaction. Furthermore, the harm must be to competition, not to a particular competitor. The Board’s conditioning power is thus used to preserve competitive options (not to expand them).

Norfolk S. Ry.—Acquis. & Operation—Certain Rail Lines of the Del. & Hudson Ry., FD 35873, slip op. at 22-23 (STB served May 15, 2015) (internal citations omitted).

Further, as detailed in the 2007 Decision, the Board’s exemption process, as it did here, promotes the RTP. Specifically, in this proceeding, the Board found that,

an exemption will promote that policy by minimizing the need for Federal regulatory control over the proposed transaction [49 U.S.C. 10101(2)], promoting a safe and efficient rail transportation system [49 U.S.C. 10101(3)], fostering sound economic conditions in transportation [49 U.S.C. 10101(5)], reducing regulatory barriers to entry into and exit from the rail industry [49 U.S.C. 10101(7)], encouraging efficient management of railroads [49 U.S.C. 10101(9)], and promoting energy conservation [49 U.S.C. 10101(14)]. Other aspects of the rail transportation policy are not adversely affected.

2007 Decision at 4. Through the use of exemptions, railroads have been able to sell lines to other carriers who are better positioned to own, operate, and invest in the lines conveyed, as was the case with the 2007 transaction. But the exemption process depends on administrative finality; otherwise a railroad is unlikely to make subsequent investments if years later a transaction can be undone or subjected to new and unexpected conditions.

V. CONCLUSION

For the reasons stated above, the Board should vacate the Reopening Decision and deny NCA’s Petition, or in the alternative, revise the Reopening Decision to make clear that the Board is not requiring that CP and BNSF alter the fundamental economics of the transaction.

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I hereby certify that on the 8th day of February, 2021, copies of the foregoing were served by electronic mail and first-class mail, postage-prepaid, on the following:

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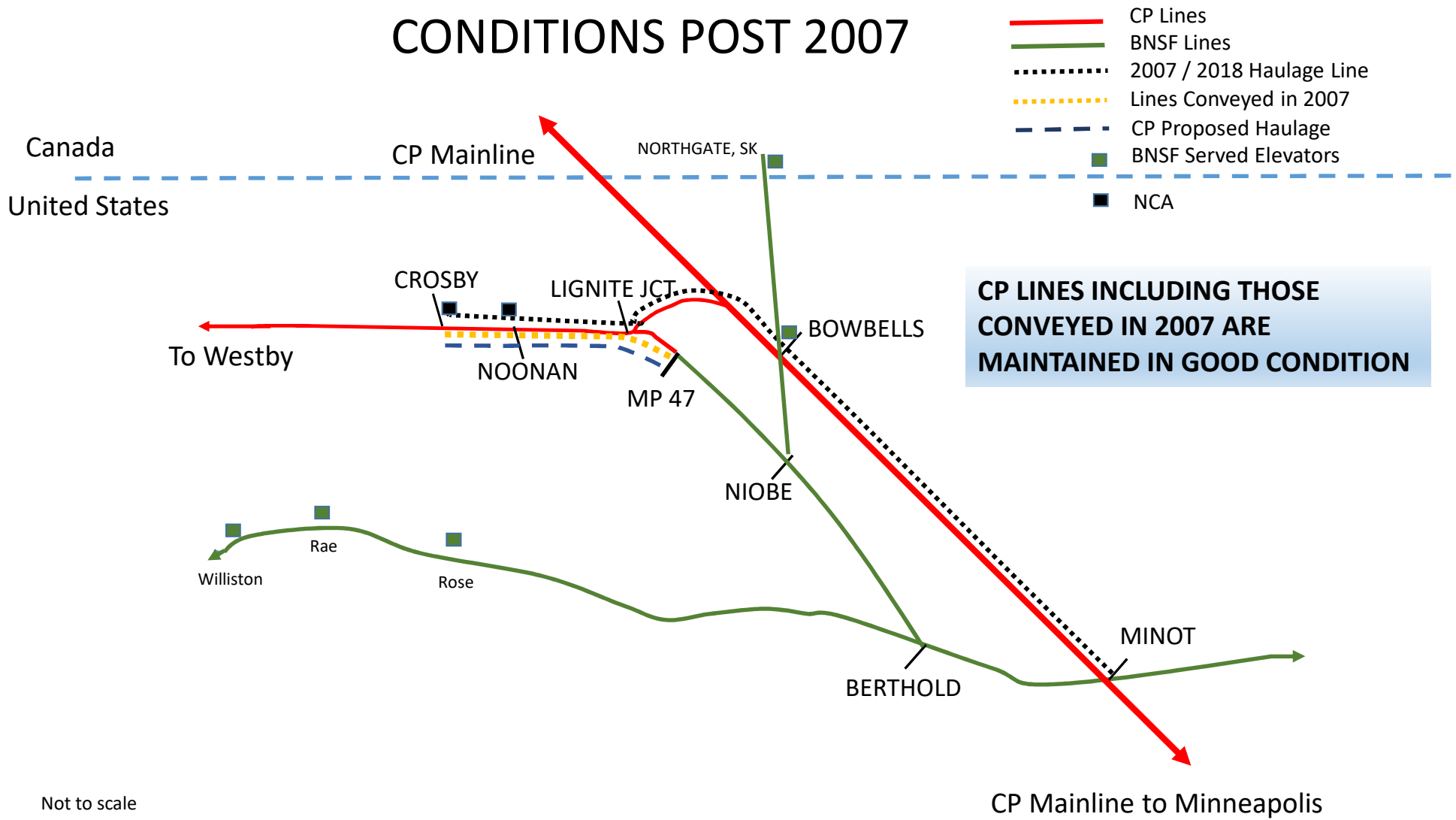
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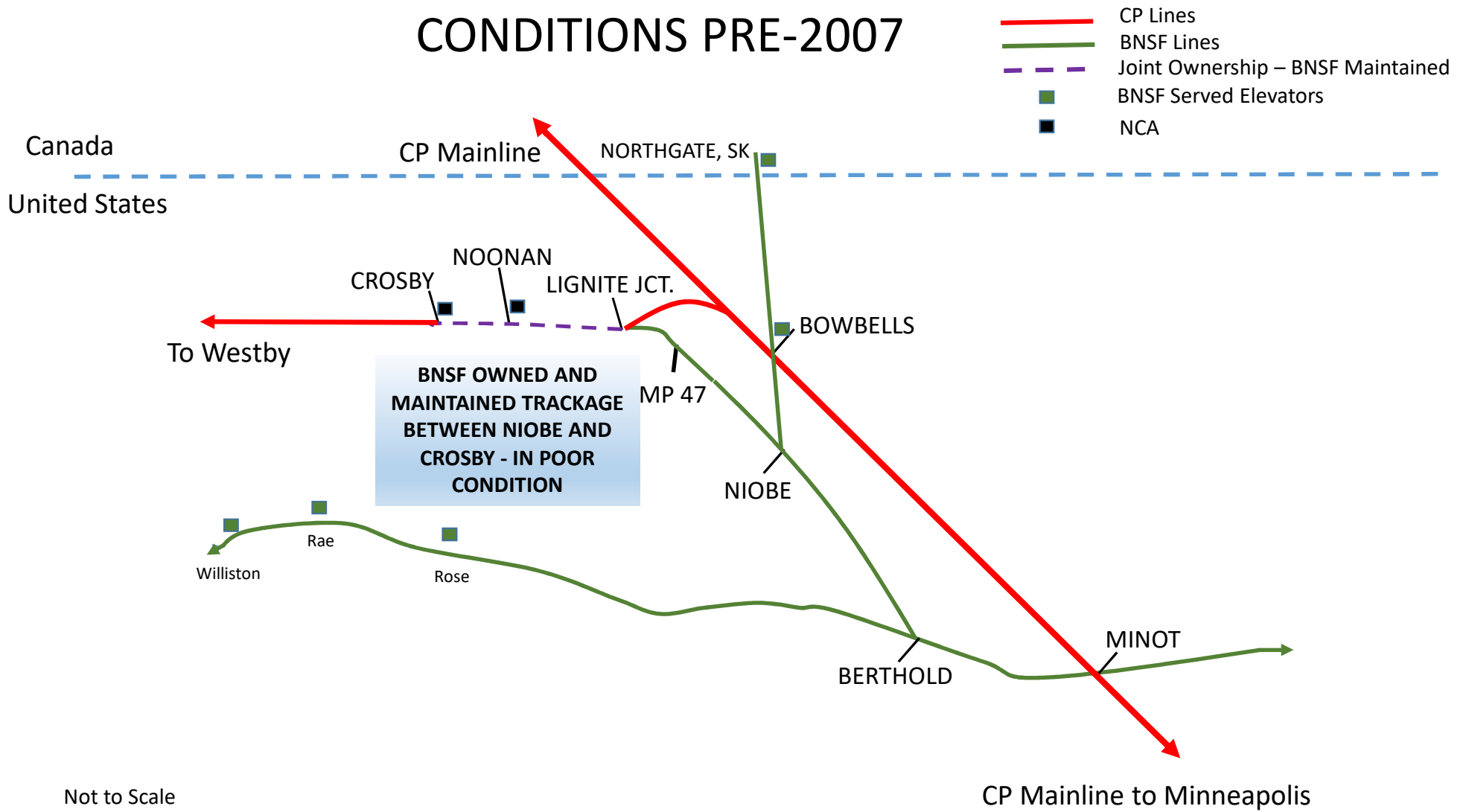
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APPENDIX A

CONDITIONS POST 2007



CONDITIONS PRE-2007



APPENDIX B

MINOT

