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March 1, 2021

By E-Filing

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

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

Dear Ms. Brown:

Accompanying this letter for filing in the referenced docket is the Reply to Petition for Reconsideration submitted on behalf of New Century Ag.

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

Sincerely,

Thomas W. Wilcox
Attorney for New Century Ag

Enclosure

**BEFORE THE UNITED STATES
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 35068

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

REPLY TO PETITION FOR RECONSIDERATION

Pursuant to the procedural rules of the Surface Transportation Board (“STB” or “Board”), New Century Ag (“NCA”) submits this Reply in opposition to the Petition for Reconsideration (“Petition”) filed by Soo Line Railroad Company d/b/a Canadian Pacific (“CP”) in this docket on February 8, 2021. For all the reasons set forth below, CP’s Petition should be denied.

PREFACE AND SUMMARY OF ARGUMENT

CP’s Petition claims the Board committed “material error”¹ by reopening this proceeding in its Decision served December 29, 2020 (“Reopening Decision”), but in direct contravention of the Board’s rules governing petitions for reconsideration CP (1) fails to identify, let alone substantiate, any specific material error that the Board purportedly committed; (2) merely repeats and reargues the factual record and legal arguments of CP that the Board rejected; (3) raises on reconsideration a new (and flawed) legal argument it obviously could have raised previously; and (4) attempts to introduce new, unsubstantiated material that it incorrectly asserts is undisputed information the Board should have considered. CP also advances the novel (and wrong) idea that

¹ CP has not alleged there are any new evidence or substantially changed circumstances that would materially affect the Decision, which are the only other bases for the Board to reconsider a decision. 49 C.F.R. §1115.3; 49 U.S.C. §1322(c).

the Board has committed “material error” because one Board member authored a dissenting opinion.

CP’s asserts a general claim that the Board erred because it did not “duly consider” the “context” of the 2007 transaction that resulted in the 2007 Decision, and consequently issued a Reopening Decision that potentially places NCA or BNSF in a better position that either would have been had the transaction not occurred. This is merely an argument that the Board did not reach the conclusions from the factual record that CP wanted. It is also an argument that is based largely on an attempt by CP to reargue and recast the factual record and arguments that the Board reviewed and considered, which is not a sufficient ground for granting reconsideration.

CP also improperly raises a new legal argument in its Petition, namely that BNSF Railway Company (“BNSF”) in 2007 specifically intended to surrender its common carrier obligations to provide service on the Joint Lines. This new theory is flawed in many respects, not the least of which is that there is no evidence of this specific intent anywhere in the Joint Petition, the 2007 Decision, or the record of this proceeding. In fact, the record in this proceeding clearly refutes this new theory.

The Reopening Decision is correct to conclude that the rights and obligations of CP and BNSF are not governed solely by the terms of the Haulage Agreement, that the railroads can and should be held to their representations of enhanced competition over the Joint Lines, and that the rights and obligations – including their duration – are also governed by the Board’s authority. It is also illogical and self-serving for CP to now claim that the intent of the parties (which necessarily included the supporting shippers) in 2007 was to limit BNSF’s service to only then-existing traffic levels.

CP's other contentions in its Petition are not offered as any alleged specific material errors but are merely the re-argument of positions that were rejected by the Reopening Decision. CP's attempt to bootstrap its failed arguments by extensively citing to the Dissent is unavailing.

Finally, NCA believes that the interchange of 100+ car trains between CP and BNSF at Minot, North Dakota is operationally and economically feasible, and that CP's claims to the contrary are overblown and self-serving. NCA has included in this Reply a suggested general framework for implementing the intent and purpose of the Reopening Decision.

REPLY TO PETITION

I. Applicable Standard of Review

The Board's rules on petitions for reconsideration based on allegations of "material error" are well-established. First and foremost, they require that "[i]n a petition alleging material error, a party must do more than simply make a general allegation; it must substantiate its claim of material error."² Moreover, a party cannot try to substantiate a claim of material error by "merely restat[ing] arguments previously made and cit[ing] evidence previously submitted."³ Additionally, the Board "generally does not consider new issues raised for the first time on reconsideration where those issues could have and should have been presented in the earlier stages of the proceeding."⁴ Significantly, in the context of CP's Petition, the Board has long held that a

² Docket No. FD 36347, *Bessemer and Lake Erie Railroad Co. – Acquisition and Operation – Certain Lines of CSX Transportation, Inc. in Onondaga, Oswego, Jefferson, Saint Lawrence and Franklin Counties, N.Y.* (served February 25, 2021) (citing FD 35081, *Canadian Pac. Ry.—Control—Dakota, Minn. & E. R.R.*, at 4 (served May 7, 2009); *See Consumers Energy, Inc. v. CSX Transp., Inc.*, NOR 42142, at 18 (STB served Aug. 2, 2018).

³ FD 35081, *Canadian Pac. Ry.—Control—Dakota, Minn. & E. R.R.*, at 4 (STB served May 7, 2009); *See* FD 33780, *Kansas City So. Ry. Co.—Trackage Rights Exemption—Gateway W. R. Co.*, STB (served June 5, 2000) at 2 (denying petition for reconsideration that "for the most part merely repeat[ed] arguments addressed in the prior decision").

⁴ Docket No. FD 35873, *Norfolk Southern Railway Co. – Acquisition and Operation – Certain Rail Lines of the Delaware and Hudson Railway Co., Inc.* (served October 18, 2016) at 7

party is not allowed to “try out a new theory” of its case on reconsideration.⁵ As explained below, CP’s Petition is contrary to all of these rules and therefore must be denied.

II. Argument

A. CP Fails to Allege any Specific Material Error the Board Committed

While alleging “the Reopening Decision contains material errors,”⁶ CP does not actually articulate any specific material error that the Board supposedly committed. Instead, CP makes a general allegation that the Board “did not duly consider the circumstances that existed in 2007,”⁷ so that there was allegedly material error because “the Reopening Decision compels CP to place BNSF or NCA in a better position than either would have been had the transaction not occurred.”⁸ CP also makes several arguments that reargue and recast its arguments in its prior filings that the Board declined to accept in the Reopening Decision, and relies heavily on the dissenting statement of Board Member Fuchs (“Dissent”) as if it were binding precedent or the law of the case.

The general allegation that the Board did not “duly consider” the “context” of the transaction in 2007 is not a valid claim of material error. CP cannot and does not argue that the

(citations omitted); *See also* Docket No. FD 35842, *New Eng. Cent. R.R.—Trackage Rights Order—Pan Am S. LLC*, at 5 (STB served Apr. 26, 2018) (“[T]he cases establishing that the Board will not consider arguments or evidence that should have been submitted at an earlier stage . . . apply to any materials that could and should have been presented prior to reconsideration, regardless of whether the petitioner alleges new evidence, changed circumstances, or material error.”).

⁵ Docket No FD 36188, et al, *Oakland Global Enterprise – Petition for Declaratory Order*, (STB Served June 20, 2019) at 4, citing *Tex. Mun. Power Agency v. Burlington N. & Santa Fe Ry.*, 7 S.T.B. 803, 804 (2004); (“Nothing in the statute or the Board’s regulations obliges the agency to rethink its decisions whenever a party wishes to try out a new theory or finds new information at a late stage in the process.”).

⁶ Petition at 8.

⁷ *Id.* at 2.

⁸ *Id.* at 8.

Board was not sufficiently apprised of the “context” of the transaction or did not have sufficient information to make a decision. Indeed, both NCA and CP submitted extensive evidence and discussion about the history of the lines at issue and the overall context of the 2007 transaction between CP and BNSF and its effect on the involved shippers. CP itself provided the Board with lengthy historical review of the lines of railroad in question and CP’s and BNSF’s relationship dating back to 1959.⁹ Moreover, the Board held an oral argument proceeding that was attended by counsel and business representatives with knowledge of the transaction’s “context.”¹⁰ Because the record in the proceeding indisputably provides ample information about the “context” of the transaction, CP’s generic claim that the Board did not “duly consider the circumstances that existed in 2007” is simply a general complaint that the Board, in exercising its expertise and discretion, did not reach the conclusions that CP wanted.¹¹ This is not “material error” warranting reconsideration. Instead, CP’s extensive restatement and self-serving recasting of the underlying facts in the “Background” section of its Petition provides no substantiation of any alleged “material error.”¹²

Another implicit claim of material error relates to CP’s flawed “context” argument. As stated above, this supposed error appears to be whether the Reopening Decision could put NCA

⁹ Reply to Petition to Reopen at 3-9.

¹⁰ This being said, none of the factual assertions or other claims made by the employees and in-house counsel of the three parties during the oral argument proceeding were made under oath, nor were any speaker’s qualifications, opinions or factual assertions allowed to be subject to cross-examination by counsel. For this reason, the Board’s primary reliance on the written evidentiary record to rule on the Petition to Reopen and its sparing references to the oral argument transcript was reasonable, prudent, and wholly consistent with the Administrative Procedure Act. In contrast, the Petition’s and the Dissent’s more extensive citations to the oral argument transcript necessarily entail reliance on allegations that were untested for accuracy under the usual rules applicable to evidence and hearing testimony.

¹¹ Petition at 10-11.

¹² *Id.* at 5-8.

and BNSF in a better position than either would have been had the transaction not occurred.¹³ In the first place, this is not an assertion of any specific material error the Board committed, but a vaguely worded complaint about the effect of the Reopening Decision.¹⁴ Second, to the extent this assertion that the Board failed to understand the context of the 2007 transaction might satisfy the material error requirement, CP falls far short of substantiating its contention. Instead, CP simply restates and recasts the facts and argument already before the Board and considered in rendering the Reopening Decision. And, to the extent CP's state of mind in 2007 for going forward - - *i.e.*, what it calls the "context" for the transaction - - was not in the record at that time, even assuming it was relevant (which is not the case), it can hardly be a basis for undoing representations that the carrier did make to its shippers and the Board now that CP wishes to be rid of BNSF's competition. Moreover, NCA is not now in a "better position"; NCA had service from both BNSF and CP prior to the transaction and now merely retains that position.

B. CP Improperly Attempts to Make a New Argument on Reconsideration that it Could Have Made Previously in Response to the Petition to Reopen

CP also improperly raises for the first time in its Petition a new legal argument that it could have raised previously but has decided to try out on reconsideration in clear violation of the rules governing such petitions. More specifically, in support of its erroneous claim that the Reopening Decision potentially puts NCA and BNSF in a better position than it was prior to 2007, CP asserts for the first time that "BNSF chose to transfer ownership of the Conveyed Lines to CP and thereby extinguish its common carrier obligations to provide service as well as its maintenance obligations

¹³ See also Petition at 1, the Reopening Decision "could be applied to require the rewriting in BNSF's favor of the 13-year old transaction between CP and BNSF."

¹⁴ Moreover, CP's contention about the potential respective positions of the parties had the transaction not gone forward is sheer speculation. Neither the Board nor the parties here have any way of knowing what the competitive situation would have been but for the 2007 transaction.

on the dilapidated lines.”¹⁵ This new assertion is offered to support an argument that by allegedly specifically intending to fully surrender its rights and obligations to provide common carrier service in 2007, “the bargain that BNSF struck”¹⁶ was to be henceforth subject solely to the limited terms and conditions of the Haulage Agreement (no doubt as interpreted by CP). And further, according to CP, NCA and the other shippers on the Conveyed Lines apparently understood this “bargain” at the time and “strongly supported” it, which is simply false.¹⁷

In addition to being impermissibly raised in CP’s Petition, CP’s newly minted legal theory is flawed in several other respects. In the first place, CP’s factual assertion that BNSF’s specific intention in 2007 was to surrender its common carrier rights and obligations to serve customers on the subject rail lines has absolutely no support anywhere in the Joint Petition or the 2007 Decision. Nowhere in those documents is this alleged specific intention expressed. On the contrary, BNSF and CP represented to NCA, other shippers, and this Board in unqualified terms “that there would be ‘no loss of 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 the level of nature of service provided to those shippers.”¹⁸ Far from “walking away” in 2007¹⁹ BNSF “retain[ed] its ability to solicit rail transportation business on the Conveyed Lines.”²⁰ Moreover, CP and BNSF

¹⁵ Petition at 1-2.

¹⁶ *Id.* at 2.

¹⁷ *Id.* There is no evidence in the record that the shippers understood that BNSF had struck the “bargain” CP now claims existed, or that they or the Board understood CP could unilaterally terminate BNSF’s service to this broad region after 10 years.

¹⁸ Reopening Decision at 4, *citing* NCA Petition for Reopening at 7, the 2007 Decision at 4, and the Joint Petition at 13-14 (emphasis supplied); *see also* Reopening Decision at 5.

¹⁹ Petition at 3.

²⁰ Joint Petition at 4.

represented that not only would the existing competition between them be preserved, the options for NCA and the other active customer on the BNSF lines at that time would be enhanced.²¹

As with the railroads' election to not mention the 10-year term of the Haulage Agreement anywhere in the Joint Petition (and CP's decision to not mention the Haulage Agreement at all in its letters to the shippers seeking their support²²), the fact that neither CP nor BNSF mentioned this now-alleged "bargain" anywhere in the Joint Petition is proof that there was no such "bargain."

²³ To the contrary, in asserting its new theory CP understandably ignores the representations it and BNSF made concerning the level of competition that would be preserved and expanded as a result of their transaction.²⁴ But it is these and other joint representations on which the 2007 Decision was specifically based on which the Board rightfully has held CP and BNSF responsible for honoring. Notwithstanding its new theory and accompanying hyperbole, CP's contentions that the Reopening Decision somehow improved BNSF's rights is simply wrong. The Reopening

²¹ *Id.* at 5.

²² *See, e.g.*, Letter from Judith A. Mitchell of CP to Lynn Michelson of NCA dated September 29, 2006, CP Reply to Petition to Reopen, V.S. Hubbard, Exhibit A.

²³ To the extent the term of the Haulage Agreement means anything, it is just as reasonable to conclude that it was meant only to permit CP and BNSF to renegotiate their financial arrangements, but not that either of these two railroads could unilaterally wipe out the competitive service that the Board was being asked to approve.

²⁴ CP's new legal argument also rests on the flawed assumption that, because the BNSF line had fallen into disrepair and might have been subject to an abandonment application, had it not been for the 2007 transaction the tracks would have been removed and NCA would have been left with no competitive alternative to CP. Petition at 10-11. This theory completely disregards the fact that, had BNSF sought to formally abandon the line NCA, a short line railroad or some other party could have preserved the existing rail-to-rail competition at this location by acquiring the line or financing its rehabilitation through an Offer of Financial Assistance pursuant to 49 U.S.C. §10904 and 49 C.F.R. Part 1152. Moreover, as noted above (*supra*, n. 12), given the importance of rail service in this region it is by no means clear that BNSF would have been granted abandonment authority. To the contrary, it is just as likely that the Board could have ordered BNSF to maintain this track in reasonable condition. As the Board recognized, the 2007 Joint Petition was intended to preserve that existing level of competition, and even enhance it over time.

Decision holds only that BNSF may still provide competitive rail service in accordance with the terms of the exemption that CP and BNSF jointly sought in 2007. That CP would prefer not to honor its representations does not mean that BNSF has unfairly profited by this proceeding.

C. BNSF's Rights Are not Exclusively Defined by the Terms of the Haulage Agreement

Much of the remainder of the Petition relies heavily on rearguing the point that, regardless of the representations made by CP and BNSF in the Joint Petition, BNSF's rights were and are defined solely by the Haulage Agreement as narrowly interpreted by CP. This is also the primary point articulated in the Dissent, which CP heavily relies on and even "adopts by reference" into its Petition.²⁵ It is not clear that CP is alleging any particular "material error" on this point or claiming that the Dissent substantiates it. As an initial point, the implication in the Petition that the Reopening Decision is somehow flawed because there was a dissenting opinion is simply wrong.²⁶ As with all agencies and courts "the Board acts as a unit, and a dissent no more reduces the legal effect of its findings and order than does a dissenting opinion of a member of a court detract from the legal effect of the court's judgment."²⁷ CP's heavy reliance on the Dissent, and the apparent implication that this establishes that the Board committed material error, is therefore misplaced. The views expressed in a dissenting opinion certainly provide no grounds for vacating a Board decision.

²⁵ Petition at 2.

²⁶ *Pub. Serv. Comm'n of State of N.Y. v. Fed. Power Comm'n*, 543 F.2d 757, 777 (D.C. Cir. 1974) ("It follows too, that the efficacy of action taken by majority vote is in no wise affected by the fact that there is also a minority. '[A] dissent no more reduces the legal effect of [an agency's] findings and order than does a dissenting opinion of a member of a court detract from the legal effect of the court's judgment.'").

²⁷ *Sperry Gyroscope Co. v. N.L.R.B.*, 129 F.2d 922, 924 (2d Cir. 1942) (case involving the National Labor Relations Board).

Regardless, the Board was correct to conclude that CP's and BNSF's rights and obligations are *not* defined solely by the four corners of the Haulage Agreement but also by the carriers' representations to the Board and the Board's exercise of jurisdiction over the transaction. To find otherwise would have been contrary to the well-established rule that regardless of the specific terms of an agreement between carriers, once the Board asserts jurisdiction over the transaction the terms of the private agreement, including provisions purporting to limit the term of the agreement, are applied subject to the public interest. As NCA discussed at pages 19-20 of its Petition to Reopen, this rule was articulated long ago by the United States Supreme Court in *Thompson v. Tex Mexican Railway Co.*²⁸, a case involving a trackage rights agreement. However, the Court's rationale in *Thompson* was not limited to trackage rights agreements²⁹ and it has also been applied to private leases. For example, in *Pinelawn Cemetery – Petition for Declaratory Order*,³⁰ the STB refused to permit a long-term lease with a railroad to expire because the rail tracks on the land in question had become an integral part of the railroad's system. The general rule has been long-established that even though railroads may expressly agree to the duration of an agreement, once the rights are authorized by the Board they "typically remain effective indefinitely, regardless of any contract provisions."³¹ Such rights are only permitted to expire if the carriers file a petition to revoke the authority granted by the Board.

In this case, the railroads did not utilize a trackage rights agreement to establish their respective rights and obligations. Nonetheless, as NCA has pointed out, their use of the Haulage

²⁸ 328 U.S. 134 (1946).

²⁹ *Id.* at 145 (the agency's authority "embraces operations under trackage contracts, *as well as other operations*"). (Emphasis supplied.)

³⁰ Docket No. FD 35468, (served April 21, 2015).

³¹ Docket No. FD 36377 (Sub-No. 3) *BNSF Railway Company – Trackage Rights Exemption – Union Pacific Railroad Company* (served February 23, 2021).

Agreement, combined with their broad and expansive representations in their Joint Petition concerning the continued provision of common carrier service by BNSF over the Conveyed Lines and the arrangement's indefinite duration, are conceptually the same as asking the Board for approval of a grant of trackage rights because it involves public, not private, rights.³² Moreover, even the Dissent acknowledges that the Board has in fact, albeit on rare occasions, regulated transactions involving haulage agreements and made their terms subject to the agency's jurisdiction.³³ There is, therefore, no rule that in *all* railroad transactions involving a haulage agreement the rights and responsibilities of the party railroads are immune to the public interest conditions approved or imposed by the Board.

Indeed, CP and BNSF strongly signaled to the Board in their Joint Petition that they believed the Board would have continuing jurisdiction over their Haulage Agreement and the overall transaction. Specifically, the Joint Petition's statement that "[t]hrough the Haulage Agreement, BNSF retains the right to service all customers on the Conveyed Lines"³⁴ was subject to a footnote stating that "car haulage can be an effective means of preserving competition." That footnote then cited for support the same two proceedings cited by the Dissent in which the Board *had* exercised jurisdiction over haulage agreements.³⁵ In the *UP/SP Merger* proceeding the Board

³² Petition to Reopen at 19-20.

³³ Reopening Decision at 9, footnote 7. The Dissent, despite asserting "[t]hat is not to suggest that haulage agreements are regulated by the Board or confer rights that are involuntary or subject to Board approval," cites to two proceedings that where such regulation and approval indisputably occurred. See *Union Pac. Corp. – Control & Merger – S. Pac. Rail Corp.*, 1 S.T.B. 233 (1996) ("*UP/SP Merger*"); and *CSX Corp. – Control & Operating Leases/Agreements – Conrail Inc.*, FD 33388 (STB served July 23, 1998).

³⁴ Joint Petition at 13. This is one of many other passages in the Joint Petition discussing BNSF's service where neither railroad mentioned or suggested that BNSF's rights to serve might be limited to a 10 year term.

³⁵ *Id.*, footnote 7.

imposed a merger condition that entailed potential use of haulage agreements which, if entered into, were subject to the Board's continuing merger oversight jurisdiction for compliance with the merger condition.³⁶ In the second, the Board directed CSX to enter into a haulage agreement with CP subject to Board oversight and approval, without any qualifications or limitations. This latter case was a direct example of the agency regulating the of terms and conditions of a haulage agreement – including presumably any term of duration CSX tried to include - for the purpose of fulfilling an agency-imposed condition on approval of a transaction.³⁷

The submission for approval of the Haulage Agreement between CP and BNSF in the 2007 Decision was closely analogous to these transactions, in that the two carriers reached an agreement on preserving competition at this location, utilized a haulage agreement for that purpose and then chose to seek Board authorization for the overall transaction.³⁸ To say the Board had jurisdiction over the haulage agreements in the prior cases – including any agreed upon duration term - but not over the Haulage Agreement in this proceeding would be arbitrary and capricious.³⁹

³⁶ *UP/SP Merger* at 248.

³⁷ *CSX Corp. – Control – Conrail, Inc.* 3 S.T.B. 196, 388-89 (1998).

³⁸ The railroads submitted their proposed arrangement to the Board in this fashion because they knew it was unlikely that the Board would otherwise have allowed BNSF to fully abandon service in this region.

³⁹ With due respect, the Board's citation (at 3, note 2) to *Norfolk Southern Ry – Aquis. & Operation – Certain Rail Lines of the Del. & Hudson Ry.*, FD 35873, et al (STB Served May 15, 2015) is not applicable to the facts in this proceeding because there – unlike here - no railroad had previously submitted a haulage agreement as part of a transaction subject to the Board's jurisdiction. Rather, that case involved the potential termination of pre-existing private haulage agreements as part of a subsequent transaction that required Board authorization. Since the challenged haulage agreements in that proceeding were not part of the original grant of operating authority, it made sense for the Board to conclude in that case that it did not have jurisdiction over their termination. Here, however, the haulage agreement is the fundamental linchpin to the 2007 transaction that the Board approved; without it, there could not have been a transaction.

The Petition's fundamentally flawed argument that BNSF and CP specifically intended in 2007 for service to NCA and other shippers would be governed solely by the terms of the Haulage Agreement is also merely a rehash of CP's rejected claim that the Joint Petition, the 2007 Decision, and the Haulage Agreement all limited BNSF service to only existing traffic in 2007, and that neither the railroads, shippers along the lines, nor the Board contemplated that changing market conditions would expand or contract BNSF's service over the lines.⁴⁰ This is simply not the case. First, the haulage agreement was not furnished to NCA and the other shippers as part of the railroads' solicitation of support. Rather, CP and BNSF represented in broad, unqualified terms that there would be no loss of competition and that the transaction would "enhance-intramodal competition."⁴¹ Second, it is illogical and self-serving for CP to continue to allege that any involved party expected in 2007 that NCA and the other shippers would continue to tender the precise same amount of traffic to both CP and BNSF as they had pre-2007;⁴² markets and needs change and railroads have a common carrier obligation to provide reasonable service responsive to those changing needs. Indeed, BNSF and CP specifically informed the Board that BNSF would continue to provide common carrier service to shippers along the lines after the 2007 transaction. As for CP's claim that BNSF's rights were constrained and limited to 2007 traffic and service because of CP's investment in the line,⁴³ that was a bargain CP made in order to get better access to NCA and the other shippers.⁴⁴ How this arrangement should now be interpreted by the Board to mean that

⁴⁰ Petition at 13-14.

⁴¹ NCA Rebuttal at 5.

⁴² Indeed, the other shippers that were affected by the transaction no longer are located on the CP, yet no one is arguing that they were required to remain on the line and continue to ship the same volume of traffic after the transaction.

⁴³ Petition at 12.

⁴⁴ Given the vast expansion of NCA's traffic, which is attributable to its own significant investment in rail infrastructure at NCA's Noonan Terminal Facility and elsewhere, CP has been

BNSF's market share of traffic *that CP cannot handle because it does not serve the same destinations or markets* should not be allowed to grow is not clear. That is especially the case since the terms of those negotiations between the railroads (i.e., CP's "context") were certainly not a part of their Joint Petition or otherwise made public.

D. Other CP Contentions

The Petition contains a variety of other points which are not specifically asserted as "material error" but which nonetheless seek to bootstrap its position by citing to the Dissent. For example, the Petition cites the Dissent to apparently assert that the Board committed material error because the Dissent asserted that the Board did not address the time elapsed from the 2007 Decision to the Reopening Decision or the Dissent's conclusions regarding CP's alleged "reliance on the 2007 Decision to invest in the previously deteriorated line."⁴⁵ Assuming this is actually a claim of material error, the notion of attempting to substantiate a claim of material error with passages from a dissenting opinion is categorially incorrect given that a dissenting opinion has no legal significance. Regardless, this claim is fundamentally flawed because the record clearly establishes NCA first raised these issues with CP in 2014, only seven years after the transaction was consummated, which was *as soon as CP for the first time commenced imposing artificial restrictions on the volume of BNSF traffic it would handle for NCA*. Moreover, CP's claims of detrimental reliance are self-serving and one sided, given that the record also shows that NCA invested nearly \$40 million to construct a loop track in anticipation of receiving competitive

amply rewarded for its own investment and the results of the 2007 Exemption. Moreover, the Haulage Agreement provides the mechanism, at section 2.05, by which CP could have required BNSF to add any additional trackage that would be required to provide the desired quantum of service to NCA. That it failed to do so strongly implies that CP's real goal is to prevent or significantly restrict competition, not just complain that BNSF supposedly got something for nothing.

⁴⁵ Petition at 17.

manifest and 100+ car unit train service. The Reopening Decision discussed all these facts in noting the timing issue, to which the Board stated it gave “careful review and consideration.” That the majority came to a different conclusion than the Dissent does not constitute material error.

Similarly, CP’s contention that there were no “substantially changed circumstances” that warranted reopening the exemption is just as wrong as was the Dissent on which CP relies. The record is clear that CP’s actions were not simply a failure by a party to live up to the expectations of supporting parties. To the contrary, CP’s actions that led to the Petition to Reopen were a fundamental breach of its representations to NCA, the other shippers and the Board, and of the Board’s order. This was not a case of failing to provide the modicum of service that had been promised but was clearly a decision by CP both to totally disallow BNSF unit train service and to actually terminate the very agreement by which BNSF could provide any service at all.

CP also contends (again without tying its contention to any specific allegation of material error) that the 2007 exemption would have been granted without any expansion of BNSF’s rights.⁴⁶ Completely aside from the fact that the exemption resulted in a *reduction*, not expansion, of BNSF’s rights (since it had the ability to serve NCA directly prior to the 2007 Decision), this contention is bewildering. Prior to the exemption, NCA had direct service by two carriers; afterwards, it had one. NCA is not aware of any ICC or STB decision, and CP cites to none, where the agency has blessed the elimination of two rail carrier service through the exemption process over the objection of affected shippers. What CP now says was mere puffing was the single most crucial aspect of the Joint Petition it filed with BNSF in 2007. Without the assurance that competitive rail service would be maintained and actually enhanced, the exemption would likely not have been granted; certainly, NCA at least would not have supported a transaction that

⁴⁶ *Id.* at 17.

eliminated BNSF as a serving carrier. And, although the exemption was styled as a minor transaction, and only 14 miles of track was specifically implicated, the result affected the transportation of grain and related commodities in the entire northern section of North Dakota; but for the support of all affected shippers, it is not clear this would have been granted. Consequently, without the continued assurance of two carrier competitive service, which was provided through a haulage agreement, it is most unlikely that the transaction would have been approved.

CP states it is important that there be finality to exemption decisions.⁴⁷ NCA does not question that point, although exemptions are obviously subject to reopening. On the other hand, it is also important that affected shippers and the Board can rely on the representations of the parties and the integrity of the pleadings filed in any matter. That is not the case here, as CP apparently decided that it did not wish BNSF to obtain more of the benefits of the transaction than CP felt was appropriate. It ill behooves CP to now defend anticompetitive actions it took, which commenced seven years after the issuance of the exemption, on the altar of the sacrosanct importance of finality.

Finally, the Petition relies on the Rail Transportation Policy, in part as viewed by the Dissent,⁴⁸ as justifying both the exemption and denying the Petition to Reopen, although again CP does not allege that the Board committed material error in any specific manner.⁴⁹ But that Policy is not the one-sided doctrine CP suggests. While it does require efforts to ensure the financial viability of railroads and lessen unnecessary administrative oversight, the Policy clearly also mandates that the agency's mission is to *foster, promote and ensure continued rail competition*.

⁴⁷ Petition at 19

⁴⁸ *Id.*

⁴⁹ *Id.* at 18.

(49 U.S.C. §10101 (1), (4), (9) and (12).) Much as CP might wish it was otherwise, it must live up to the representations it made that these policy requirements would be satisfied.

III. Interchanging 100+ Car Trains at Minot Would Appropriately Implement the Haulage Agreement, CP's and BNSF's Representations, and the 2007 Decision

CP's mere re-assertion of its previously rejected reasons for narrowly interpreting the Haulage Agreement in CP's favor, particularly as it is applied to 100+ car train service by BNSF, in no way substantiates any claim of material error.⁵⁰ Equally egregious are CP's statements concerning the feasibility of BNSF and CP interchanging 100+ car trains in Minot. CP's claim that there is no "dispute that the limitations on BNSF's haulage rights were motivated by very real capacity and operational issues"⁵¹ is simply not true. While there may be no dispute that CP has made general claims there are capacity and operational issues, whether such issues actually exist is very much in dispute.

The extensive discussion on Page 14 of the Petition that attempts to assert as fact that such operations are not feasible is highly improper and specious in several respects, starting with the fact that it rests largely on new generalized factual allegations that are unsupported statements in the Petition and references to oral statements made by CP representatives during the Oral Argument, where no participant who testified was under oath and/or subject to any cross examination. Moreover, despite being well aware of NCA's goal of receiving 100+ car unit train service from BNSF pursuant to the 2007 Decision and Haulage Agreement, CP produced *zero* evidence of any present-day capacity or operational hurdles to such service in its Reply to NCA's Petition to Reopen. Instead, its witness described the discussions between CP and NCA in *2014*,

⁵⁰ Petition at 13.

⁵¹ *Id.* at 14.

when there were systemwide capacity constraints and service failures primarily caused by a combination of increased crude oil traffic⁵² and CP's defective implementation of "precision scheduled railroading."⁵³ As just a few examples, CP provided no evidence or relevant data on, for example, (1) the volume of trains that move on the affected main line; (2) the times of day such trains move; (3) details about the alleged congestion in CP's Minot Yard; (4) why interchange with BNSF at its Minot Yard would not have reduced congestion on CP's tracks; or (5) why there could be no feasible operating window for BNSF unit train service. And, of course, although CP failed to produce any actual evidence of this supposed congestion, the unsupported and untested statements of its counsel at the oral argument were contested by counsel for BNSF.⁵⁴ CP's argument that the Board somehow erred by not addressing non-record and contested "operational and physical limitations" as set forth in the Petition is therefore ludicrous.

NCA believes CP's claims of the infeasibility of interchanging unit trains with BNSF at Minot are self-serving and overblown. This belief is in part due to conversations NCA has had with BNSF both before and after the issuance of the Reopening Decision, from which conversations NCA has concluded that (1) BNSF disputes CP's claims of operational and capacity issues regarding the ability of CP and BNSF to interchange unit trains at Minot, and (2) BNSF believes it would indeed be feasible for 100+ car unit trains to be interchanged there without undue interference with CP's existing operations.

⁵² Much of the rail crude oil traffic has now been replaced by pipelines.

⁵³ CP Reply to Petition to Reopen, V.S. Hubbard at 6-9. In Docket No. EP 724, *United States Rail Service Issues* (served April 1, 2014), the service failures of CP in particular in 2014 resulted in the Board soliciting written comments from industry stakeholders and taking the extraordinary step of holding an oversight hearing to take testimony from CP senior management officials and others on the causes of the severe service problems on CP's system.

⁵⁴ Transcript of Oral Argument at 157-159 (August 20, 2019).

It is NCA's hope that BNSF and CP have negotiated in good faith in response to the Reopening Decision and that they will report back to the Board with a plan that will adequately provide the level of service commensurate with their broad representations to the Board and NCA in the Joint Petition. NCA notes that CP's Petition includes two proposals that CP states will effectuate the Reopening Decision. However, neither of these proposals is consistent with the 2007 Decision and the railroads' representations in their Joint Petition. The first would entail BNSF "building" 100+ car unit trains in BNSF's Minot Yard, as opposed to BNSF transporting intact 100+ car unit trains in empty and loaded service to and from the Noonan Terminal Facility Loop Track.⁵⁵ This option is not consistent with CP's and BNSF's representations because it would entail CP and DMVW hauling blocks of 25 cars only twice per week. This means that it would take up to four weeks for one 100+ car train to be assembled. This is not only highly inefficient from a grain loading standpoint, the timeline is far too long in today's grain market, where 100+ car trains are typically shipped on a 10-day schedule to meet customer contracts. Removing grain from the elevator facilities at that slow a pace also adversely affects elevator capacity and grain quality.

The second option is even less desirable and less feasible than the first, as it would require BNSF to first invest millions of dollars to reactivate its track from Niobe, and then also pay unspecified amounts to CP as a "contribution" to CP's investment in the Conveyed Lines "as well as further investments in the future." NCA's understanding is that neither of these options is considered economically viable by BNSF.

NCA believes that a plan that complies with the railroads' representations, the 2007 Decision, and the Haulage Agreement should, at a minimum, involve CP and BNSF interchanging

⁵⁵ Petition at 3.

100+ car unit trains at Minot for both outbound grain and inbound fertilizer in addition to the continued provision of manifest service. NCA believes this would be the quickest and cheapest means for BNSF and CP to comply with the Board's Reopening Decision in the short term. More specifically, NCA proposes that the initial plan could entail a maximum of two 100+ car trains per month that would be allowed to interchange empty in Minot and be pulled to the Noonan Terminal Facility loop track for loading and return back to Minot. If an allocated 100+ car train was not tendered during the month, this allocation would not carry over to the next month. This initial program would place a cap of 24 on the 100+ car trains for the calendar year and would result in less than 24 trains if fewer than two are shipped in a given month. However, NCA would want the plan to clarify that if a 100+ car train is ordered for a month, and does not arrive until that calendar has changed to the next month, it would count as a train for the month it was intended to be used in.

In addition to the 100+ car unit train component of the plan, manifest grain car traffic and fertilizer car traffic would continue to also be provided to NCA by CP and/or BNSF. In regard to fertilizer, NCA believes the approved plan should provide that NCA could use its 100+ car unit monthly train allotments for fertilizer shuttle trains in lieu of grain as necessary and after providing appropriate notice to the railroads, despite the fact that fertilizer shuttle trains are typically smaller than 100+ cars. NCA believes that these arrangements would be operationally feasible and is confident that CP and BNSF could work out appropriate arrangements that would not unduly block the CP line. Simply stated, there is little reason to believe that this service cannot be provided if the railroads worked in good faith to make it happen. NCA believes the general foregoing plan would comply with the Board's directive to CP and BNSF in the short term, and that the Board should retain jurisdiction to review and approve, as necessary, additional options for fulfilling the

intent and purpose of the 2007 Decision and Haulage Agreement if they make sense operationally, such as adding sidings to existing Joint Line tracks, or other cost-effective measures.

If the Board's competitive concerns are not adequately addressed, NCA encourages the Board to take further action it deems appropriate under these circumstances, including imposing a service order.

CONCLUSION

In conclusion, for all the reasons set forth above, CP's Petition falls well short of the Board's well-established standards for granting petitions for reconsideration and vacating a Board decision. It should be denied.

Respectfully submitted, .



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CERTIFICATE OF SERVICE

I hereby certify that, on this 1st day of March, 2021, a copy of the foregoing Reply to Petition for Reconsideration was served by email on all parties on the official Service List for Docket No. FD 35068.



Thomas W. Wilcox