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**VIA ELECTRONIC FILING**

March 22, 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 Response to BNSF’s March 1, 2021 Proposal.

CP’s filing includes color images.

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**

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**STB Finance Docket No. 35068**

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

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**CP'S RESPONSE TO BNSF'S PROPOSAL**

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Dated: March 22, 2021

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Soo Line Railroad Company d/b/a Canadian Pacific (“CP”) submits this response to the Proposal submitted by BNSF on March 1 (“BNSF’s Proposal”) in response to the Board’s Decision served on December 29, 2020 (the “Reopening Decision”). BNSF’s Proposal for exchange of NCA’s haulage unit-trains in Minot would materially expand the limited haulage rights to which CP and BNSF agreed in 2007, and extended for an additional five years in 2018. Though CP has repeatedly raised concerns about a Minot exchange, BNSF’s Proposal includes new features and factual misstatements, and the arguments in favor of it by BNSF and New Century Ag (“NCA”) raise new issues that CP addresses herein. CP respectfully requests that the Board accept this Reply to BNSF’s Proposal in the interest of a more complete and accurate record.<sup>1</sup>

## **I. INTRODUCTION**

As CP has previously explained, it is eager to help find a workable solution that addresses NCA’s concern regarding the lack of access to BNSF unit train service. Unfortunately, BNSF’s proposed solution – the exchange of unit trains at Minot – is not acceptable to CP. CP has serious safety and operational concerns about the exchange of unit trains in Minot. Those concerns are magnified by the control BNSF would have over CP’s vital Twin Cities-Portal mainline whenever such an exchange occurs. CP’s single-track mainline is the critical artery used by CP to compete directly against BNSF in this region, yet the BNSF dispatchers controlling the interlocking at Minot would have hard-to-police discretion to avoid impacts from BNSF’s unit trains on BNSF operations through Minot by imposing those impacts on CP,

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<sup>1</sup> The Board expressly authorized New Century Ag to file a reply to both sets of proposals, and CP expects that that submission will in substance make further arguments on behalf of BNSF against CP’s proposals. In addition to serving the Board’s interest in a complete record, *see City of Alexandria, Va.—Pet. for Declaratory Order*, FD 35157, slip op. at 2 (STB served Nov. 6, 2008) (allowing a reply to a reply “[i]n the interest of compiling a full record”), CP’s reply to BNSF’s Proposal should be accepted as a matter of fundamental fairness.

extending the blockage of CP's mainline. BNSF's suggestions to expedite the exchange are unrealistic and do not begin to address CP's operational, safety, and competition concerns.

CP stands by its offer of two alternative options that would allow BNSF to provide unit train service to NCA's facilities on the Lignite-Crosby Line. There appears to be no dispute about the operational feasibility of CP's proposals. The only objection is economic, as providing such service would cost too much when viewed solely from BNSF's perspective. But that is not a valid objection. The economic burdens that BNSF would bear under CP's proposals are no greater than what BNSF would have borne to serve NCA had the 2007 transaction never been consummated, or that it would have to bear were the transaction unwound.

CP's proposals are the only proposals before the Board that generally preserve the fundamentals of the 2007 transaction, which allowed BNSF to relieve itself of the burdens of operating and maintaining the Lignite-Crosby Line while also relinquishing the opportunity to profit indefinitely from traffic growth opportunities that CP's post-2007 investments made possible. If BNSF's access to NCA is to be expanded beyond the terms of the 2007 transaction, BNSF – not CP – must bear the burdens of that expansion.

The Board should provide an opportunity for BNSF to accept or reject one of CP's offered alternatives and terminate this proceeding. The Board should be aware that, should it choose instead to revoke the exemption and/or impose a material condition, CP would be entitled to terminate the 2007 transaction, returning conditions, including for BNSF access to the line, to the pre-2007 state of affairs.

## **II. BNSF'S PROPOSAL WOULD NOT PRESERVE THE 2007 TRANSACTION.**

BNSF's Proposal, and its rejection of CP's proposals on economic grounds, proceeds from the flawed premise that the goal of this proceeding is to pick which option for NCA's unit train access to BNSF service should be imposed upon CP. That assumption underpins the

positions of both BNSF and NCA (in its reply to CP's Petition for Reconsideration). They act as if they were gamblers in a casino betting with someone else's (CP's) money (in the sense of the operational, safety, and economic costs of BNSF's Proposal, virtually all of which would fall on CP). However, BNSF and NCA's perspectives share a faulty premise.

In fact, though CP firmly believes that a revocation of the 2007 Exemption would be unwarranted,<sup>2</sup> whether or not the Board agrees with CP's position, imposing BNSF's proposal would have the same consequence: CP would be within its contractual rights to undo the 2007 transaction. That would return half-ownership of the Lignite-Crosby line to BNSF, and BNSF's ability to serve NCA directly would be via the same Niobe-Lignite route over which CP has already proposed to give BNSF extended haulage rights.

**A. Imposing BNSF's Proposal on CP Would Materially Expand BNSF's Rights and Entitle CP to Terminate the 2007 Transaction.**

There is no dispute that the unit train haulage rights proposed by BNSF would expand BNSF's rights materially beyond those agreed to between CP and BNSF in 2007. The 2007 Haulage Agreement plainly imposes limits on BNSF's rights, including in terms of duration, volume, and type of traffic, i.e., manifest service.<sup>3</sup> BNSF's Proposal would exceed those limits in every respect, overriding the requirement that BNSF traffic move in CP's existing trains, expanding the number of cars per shipment (via unit trains) beyond CP's capacity limits, and extending the term from the original 10 years to a (presumably) perpetual grant of rights. BNSF

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<sup>2</sup> NCA's Reply to CP's Petition for Reconsideration ("NCA March 1 Reply") highlights one of the many reasons why revocation is unwarranted: the 2007 transaction enabled a "vast expansion of NCA's traffic." NCA March 1 Reply at 13 n.44.

<sup>3</sup> Although the Board's Reopening Decision takes issue with CP's adherence to these limits as somehow inconsistent with the representations in the Joint Petition, there is no dispute that the Haulage Agreement as presented to the Board in 2007 established such limits, which as CP has repeatedly explained are predicated on very real operational constraints at Minot.

concedes this point, stating that its proposed unit train haulage via Minot could only occur with “an *expansion of the existing BNSF/CP haulage arrangement* to allow for the interchange of unit trains in Minot, in addition to the manifest traffic that the two carriers interchange there today.” BNSF Proposal at 3 (emphasis added).<sup>4</sup>

Further, BNSF’s Proposal is inconsistent with section 2.05 of the 2007 Haulage Agreement. That provision addresses BNSF’s request for haulage services that would require CP to operate additional trains. It gives CP sole discretion whether to provide such additional haulage service, taking into account its own current and future capacity needs, and gives CP the right to condition such additional service on the construction of new infrastructure to support such traffic at BNSF’s cost. Haulage Agreement at § 2.05 (*see* Exh. A hereto).

Were the Board to impose BNSF’s Proposal, or require that CP accept it as a condition of the 2007 Exemption, CP (or BNSF) would have the right to terminate the 2007 Purchase and Sale Agreement. Section 4.1(a) of the PSA, which survives closing, expressly provides: “In the event any Governmental Body shall impose additional material terms or conditions upon this conveyance or revoke the authority to enter into this Agreement, either party may terminate this Agreement without liability to the other.”<sup>5</sup> And because the Board’s authority as to transactions

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<sup>4</sup> Were there any disagreement about the limitations imposed by the 2007 Haulage Agreement, it would have to be resolved by arbitration (*see* 2007 Purchase and Sale Agreement (“PSA”), § 15.10; 2007 Haulage Agreement § 12), and the Board would not play a role in interpreting those limits. *E.g.*, *Petition of Union Pacific R.R. for Declaratory Order*, FD 35960, 2016 WL 5904751, at \*6 (STB served Sept. 30, 2016) (explaining that “disputes over the interpretation of private contracts typically involve questions of state contract law that are more appropriately decided by state courts”). The 2007 PSA and 2007 Haulage Agreement were Exhibits 2 and G to the 2007 Petition for Exemption, *Soo Line R.R.—Acquis. & Operation Exemption—BNSF Ry.*, FD 35068, filed July 16, 2007 (the “Joint Petition” or “JP”). Pertinent excerpts are attached as Exhibit A hereto.

<sup>5</sup> *See* PSA §4.1(a) (Exh. A).

governed by Section 11323 is “permissive rather than mandatory,”<sup>6</sup> the termination of CP’s contractual obligation to participate in the 2007 transaction would prompt the unwinding of the 2007 transaction.<sup>7</sup>

**B. An Unwinding of the 2007 Transaction Would Leave BNSF with No Access to NCA Other than Via the Niobe-Lignite Line.**

Were the 2007 Transaction unwound, BNSF’s ability to serve NCA would be no greater than that which existed pre-transaction in 2007 (augmented of course by CP’s considerable investments in the Lignite-Crosby Line since then). BNSF would have no right to demand that CP provide haulage of unit trains between NCA’s facility and Minot. Specifically, termination of the 2007 PSA would (a) restore BNSF half-ownership in the Lignite-Crosby Line; (b) restore BNSF full ownership of the MP 47-Lignite line; (c) return the capital and maintenance obligation to BNSF; (d) allow CP to terminate the Haulage Agreement (which is limited to traffic in CP’s existing trains) on six months’ notice,<sup>8</sup> and (e) thereby require that, if BNSF wished to serve NCA or any other shippers on the Lignite-Crosby Line, it would have to do so using its own trains, its own crews, and the same Niobe-Lignite line that it used to reach the line before 2007.

If the 2007 transaction is unwound, the two proposals that CP put on the table on March 1 would no longer be available to BNSF (or NCA). CP’s willingness in 2007 to grant BNSF limited rights for 10 years does not mean that it was prepared to have BNSF bootstrap permanent

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<sup>6</sup> *E.g., The Kansas City Southern Ry. — Trackage Rights Exemption — Gateway Western Ry. & Gateway Eastern Ry.*, FD 33780 (STB served Sept. 16, 1999), slip. op. at 2 (citing “longstanding precedent holding that authority granted by the Board is permissive, not mandatory”).

<sup>7</sup> There is no doubt that the PSA contemplates an unwinding of a consummated sale, as it expressly provides for the “refund[ ]” of “any part of the purchase price” that might already have been “paid by Buyer [CP] to Seller [BNSF] for the Premises.” PSA at § 4.1(a) (Exh. A).

<sup>8</sup> Supplemental Haulage Agreement, § 9.02 (attached as Ex. F to Hubbard V.S. to CP’s Feb. 4, 2019 Reply to Petition to Reopen); CP Feb. 4, 2019 Reply to Petition to Reopen, Hubbard V.S. at 9.

rights for unit trains without regard to the severe impacts on CP. And, absent the transfer of the Lignite-Crosby Line, there would be no basis – even under the incorrect theories espoused by NCA – for the Board to require that CP grant the rights that BNSF proposes. The predicate for NCA’s claim are the supposed representations made to obtain Board authority for the line sale transaction that, in this scenario, CP would be exercising its contractual right to unwind.<sup>9</sup> For this reason alone, CP submits the Board should reject BNSF’s proposal and accept CP’s proposal as the only one available consistent with preserving the 2007 Transaction.

**III. BNSF’S PROPOSAL PLACES ASYMMETRIC RISK ON CP AND ITS CUSTOMERS THAT CP CANNOT REASONABLY ACCEPT.**

**A. BNSF Acknowledges that CP’s Mainline Would be Plugged for a Bare Minimum of an Hour up to 48 Times a Year.**

BNSF’s Proposal acknowledges that under the best of circumstances exchanging unit trains in Minot would take “about an hour.” BNSF’s Proposal, Power V.S. at 2. Assuming BNSF’s rosy estimates were correct—they are in fact overly optimistic—given that NCA anticipates loading up to 24 BNSF unit trains a year, that would be 48 times a year<sup>10</sup> that CP’s critical mainline would be plugged by such exchange operations for “about an hour” if all goes precisely as planned according to BNSF. That would also be 48 times a year that several downtown crossings would be blocked—cutting off schools, museums, cafes, restaurants, and other businesses—for lengthy portions of time which raises significant safety and other community impact concerns.

BNSF’s estimate of “about an hour” in the best of circumstances fails to account for the time to perform various operational activities necessary to make the exchange. For example,

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<sup>9</sup> NCA March 1 Reply at 6.

<sup>10</sup> Each unit train would be exchanged in Minot in both the empty and loaded direction.

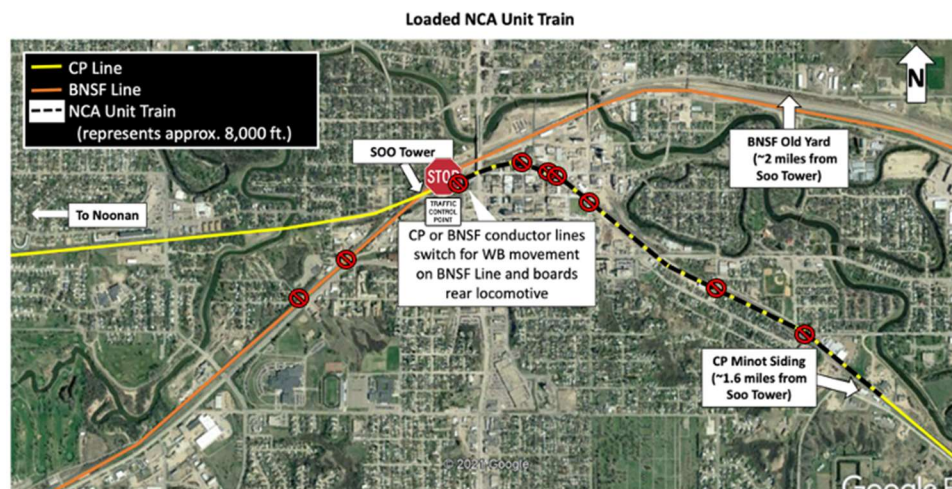
BNSF assumes no time at all for lining and relining switches, for the activities associated with reassigning the rear locomotive as the lead locomotive for the empty move into downtown Minot and then again for the move to NCA, or for crew transport from one end of the train to another. When these activities are properly accounted for, the minimum time to exchange a unit train in Minot is about 2 to 3 hours. *See* Bailey V.S., attached to CP's Proposal.

BNSF's rosy projections also ignore the risks, the majority of which are to CP's operations: it is CP's mainline that is plugged, which affects CP and its other shippers but does not concern BNSF or NCA. Consider that BNSF's "about an hour" estimate is premised on "efficient unit train practices, vans provided for crews, and advanced planning and prioritization of the interlocker, interchanges ... implemented ... under normal operating conditions." BNSF's Proposal, Power V.S. at 2 n.2. This means that CP operations would be reliant on BNSF's ability to provide additional crews, provide crew transportation, and block its main line operations—actions that BNSF would be taking to protect CP's operations and not for its own benefits. But what if BNSF's mainline is busy, if crews or crew transport are not immediately available, if operating conditions are not "normal" (e.g., there is ice or snow), if there are mechanical issues, or if BNSF does not have the yard capacity to receive a unit train?

These concerns are not merely theoretical, but are based on years of experience with exchange of cars between CP and BNSF in Minot. As CP Superintendent Matthew Bailey explains in his Supplemental Verified Statement, exchange of traffic with BNSF in Minot is frequently delayed by congestion on BNSF's main line, lack of yard capacity in BNSF's yards, and lack of crews. Bailey Supp. V.S. at 2-3. CP's records show that in 2019 (*i.e.*, before the pandemic became a factor in crew availability), BNSF delayed or missed pulling cars from CP's Minot Yard, or was unable to accept delivery of cars from CP on 156 occasions. In some

instances, upon receiving authority from BNSF dispatchers to cross the interlocker, CP dispatched trains from its Minot Yard, only to be stopped at the interlocker by BNSF dispatchers. *Id.* Since Minot Yard is capacity constrained, BNSF’s failure to timely pull or accept delivery of cars can cause congestion in the yard, and require CP to hold other Minot traffic at other yards until it can be accommodated in Minot. *Id.* Moreover, operating conditions in Minot can be among the most challenging in the country with below zero temperatures, snow and ice common for about half the year. BNSF’s claim to be able to grant priority movement is self-serving and, as experience demonstrates, impossible to rely upon or enforce in real time.

BNSF’s own diagrams show the potential for severe problems: in the diagram below (reproduced from BNSF’s Proposal, to which CP has added markers showing grade crossings on CP’s and BNSF’s lines), if BNSF’s dispatcher does not grant immediate authority to move onto BNSF’s mainline, CP’s mainline and as many as six downtown crossings would be blocked indefinitely.



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BNSF suggests that if there is a problem, CP could always chamber BNSF’s unit train on “CP’s Minot Yard 13,860-foot siding,” BNSF’s Proposal at 3, but no such yard siding exists. As Mr. Bailey explains, the siding that BNSF references is not a yard track; rather, it is a crucial and

active component of CP's single-tracked main line that is required to facilitate meets and passes of trains. Bailey Supp. V.S. at 3-5.

Over the years, there has been a steady trend toward longer trains which improves efficiency and cost effectiveness. Today, CP regularly operates line-haul trains on this corridor that are in the range of 10,000 to 12,000 feet in length with the majority of the line-haul trains exceeding 8,500 feet. This trend toward longer trains has required investment to extend the length of sidings in order to accommodate meets and passes including at Minot. In 2014, CP invested approximately US \$3 million to extend its siding in Minot 5,000 feet to its current length of 13,860 feet. This siding is now the longest siding on the Portal Subdivision. It is one of only two sidings on the Subdivision that exceeds 10,000 feet (the siding at Baden is 11,000 feet) and is capable of efficiently supporting a meet or pass of longer trains, an increasingly common occurrence. At other locations, the crew may need to cut the train to accommodate grade crossings, as is sometimes required at Drake which has a 9,850 foot siding, or to double-over the train on multiple tracks and then reassemble it, a process that is time consuming and inefficient, particularly in winter when recharging the air on the brakes takes much longer. The sidings at Baden and Drake are also located approximately 88 miles apart from each other and each is more than 40 miles from Minot. The other sidings between Baden and Drake are 8,090 feet or less. Further, due to its length and proximity to the Minot Yard, the Minot siding is currently used an average of 6 and 7 times a day, more than any other siding between Portal and the Twin Cities. If CP did not have use of this essential siding for meets and passes, its mainline operations would effectively be plugged. Accordingly, CP does not use this active siding to stage trains or park equipment except in emergencies. *Id.* at 4-5.

CP invested in extending the Minot siding in order to add much needed capacity to its mainline and improve efficient and fluid operations on its system and so it can better compete; not so BNSF, its chief competitor in the region, can stage its own trains.<sup>11</sup> Moreover, CP is quite confident that, were the tables turned and CP was proposing to handle unit trains this way *and CP controlled the interlocker*, BNSF would object and express concerns about operational interference on its own mainline through Minot.

#### **IV. CP'S PROPOSALS ARE MORE THAN REASONABLE.**

CP's March 1 Proposal fully described its two alternative proposals for unit train haulage of BNSF traffic to/from NCA's facilities: (1) unit train and manifest haulage via MP 47 (on the Niobe-Lignite line) or (2) unit train haulage via Bowbells (and manifest haulage via Minot). CP addresses below the stated objection by BNSF to CP's MP 47 proposal, which CP expects BNSF would also assert against the Bowbells proposal as well.<sup>12</sup>

##### **A. BNSF (and NCA) Express Only "Economic," Not Operational, Concerns.**

BNSF's only objection to CP's proposal for haulage service via MP 47 is a purely economic one: restoring service on the Niobe-Lignite line would cost too much given that "BNSF expects to serve NCA with a limited amount of unit train traffic." BNSF's Proposal at 6. BNSF asserts no operational objection,<sup>13</sup> nor realistically could it, since the MP 47 proposal would provide BNSF with access to NCA via the very same route that BNSF used with its own

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<sup>11</sup> This 2014 investment is a good example of the extensive expenditures by made in reliance on the administrative finality of the 2007 Decision, which authorized the transaction without conditions.

<sup>12</sup> Though BNSF's March 1 submission specifically addressed only CP's MP 47 proposal, BNSF was aware of the Bowbells proposal from discussions with CP.

<sup>13</sup> NCA's March 1 Reply addresses CP's MP 47 proposal by simply mimicking BNSF's economic objection. NCA March 1 Reply at 19 ("NCA's understanding is that neither of these options is considered economically viable by BNSF.").

trains prior to 2007 (albeit not unit trains, since NCA had no unit train capability prior to CP's acquisition of the line), and in 2014 it apparently proposed serving NCA using precisely this route (despite having no rights to do so).<sup>14</sup>

BNSF's (and NCA's) economic objection to CP's MP 47 proposal is not a valid basis for rejecting it. The economic burdens BNSF would bear under CP's proposal are still less than those it would have been obligated to bear had it decided to retain its ownership of the Lignite-Crosby Line. The Board cannot lose sight of the fact that in 2007 BNSF wanted to shed its rights and obligations for the Lignite-Crosby Line entirely. BNSF now asserts that the volume of traffic it might serve – even with NCA's "vast expansion" in traffic volumes since the 2007 transaction (NCA March 1 Reply at 13 n.44) – is insufficient to support its own investment in the only route BNSF ever had for accessing the Lignite-Crosby trackage – the Niobe-Lignite Junction Line. That assertion ought to tell the Board that, had the 2007 transaction not taken place, NCA would never have benefited from the degree of two-carrier service that CP has provided via the Haulage Agreement. If BNSF is unwilling to make investments in Niobe-Lignite to access this line today, then it is likely it would have made good on its plan to abandon the Conveyed Lines as it told CP it would prior to agreement on the 2007 transaction.<sup>15</sup>

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<sup>14</sup> See CP March 1 Proposal at 5 & n.7 (citing NCA's March 2014 letter to the Board recounting that "BNSF has said that they could access the branch line that splits off at Niobe"). For its part, NCA has always been very clear that it does not care how BNSF reaches its facilities. See, e.g., Aug. 20, 2019 Oral Arg. Tr. at 18:3-12 ("CHAIRMAN BEGEMAN: . . . So if the Board were to revoke the exemption, which it sounds not your primary ask, what would the expectation be for what your service would then result? MR. GREENBERG: We would expect BN to put tracks back in place. Or get trackage rights. Some way--it's up--our perspective is, it's up [to] the railroads who tore the tracks up. There was no abandonment. There was no Order from the Board permitting BN to terminate service.").

<sup>15</sup> See CP's Proposal at 8 n.9.

Furthermore, BNSF's proposal does not *avoid* economic burdens, it merely shifts them – along with other risks – entirely onto CP. There can be no doubt that any rights BNSF might have going forward will come at an economic cost to either BNSF or CP or both. CP is entitled to compensation for any “expansion” in BNSF rights,<sup>16</sup> and absent such compensation CP's motivation could well be to unwind the transaction entirely.<sup>17</sup> Indeed, had there been no transaction (or were the transaction unwound), BNSF's access to Noonan would be via the Niobe-Lignite Junction Line, such that BNSF would bear the costs of maintaining that route (as well as the Lignite-Crosby Line). Whether that cost is \$20 million (as BNSF suggests, *see* BNSF's Proposal, Power V.S. at 4) or something less, that is the real and unavoidable cost of BNSF unit train access to NCA.

**B. BNSF's (and NCA's) Objections to CP's Proposals Reflect a Fundamental Misunderstanding of this Proceeding.**

In pursuing a proposal for access to NCA that would require the Board to grant it contractual rights to CP haulage service – rights that BNSF knows it does not possess, BNSF (along with NCA) is fundamentally misconstruing the effect of the 2007 Decision in this proceeding. It is presupposing that the 2007 Decision somehow preserved BNSF's common carrier obligation to serve shippers on the line via the haulage arrangement, enabling the Board

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<sup>16</sup> Even NCA understands this point in supporting an expansion in BNSF's haulage rights: it pretends as if the haulage agreement had a perpetual term (it does not), but accepts that after 10 years BNSF and CP might renegotiate the financial terms: “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*.” NCA March 1 Reply at 8 n.23 (emphasis added).

<sup>17</sup> Compensation alone may not be sufficient if the expansion of rights comes at the cost of CP's ability to use and control its own main line.

to force upon CP continued BNSF operations as if the *Tex Mex* doctrine<sup>18</sup> applied to this matter.<sup>19</sup>

This view of the 2007 transaction and this proceeding is fundamentally incorrect as a legal and factual matter. It is revisionist history, pure and simple. The *Tex Mex* doctrine does not subject BNSF's haulage agreement to ongoing Board jurisdiction. That doctrine applies only where a carrier has taken on – or retained – an obligation to carry out *common carrier operations* on a line of railroad. *E.g., Arkansas & Missouri R.R. v. Missouri Pacific R.R.*, 6 I.C.C.2d 619, 621 (1990) (in *Tex Mex*, “[t]he Court found that we were required to determine whether there was a public interest in continued operation of the line”), *aff’d sub nom. Missouri Pacific R.R. v. I.C.C.*, 23 F.3d 531 (D.C. Cir 1994).<sup>20</sup> Here, the Board's 2007 Decision authorized a transaction whereby BNSF's operations over the Lignite-Crosby line would terminate. That is the unavoidable consequence of BNSF shedding its ownership rights and retaining no rights whatsoever to access or operate over the line.

In the *State of Maine* cases, the Board explained the circumstances in which a rail carrier might retain its common carrier obligation despite selling the underlying rail assets to a third party, and those circumstances are not present here. *Me. Dep't of Transp.—Acquis. & Operation*

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<sup>18</sup> The *Tex Mex* doctrine derives from *Thompson v. Texas Mexican R. Co.*, 328 U.S. 134, 147-50 (1946), and provides that “trackage rights agreements remain in effect and cannot be discontinued until [the Board] authorize[s] their discontinuance or approve[s] a new agreement.” *North Carolina R.R. — Petition to Set Trackage Compensation & Other Terms & Conditions — Norfolk Southern Ry., Norfolk & Western Ry., & Atlantic & East Carolina Ry.*, FD 33134, slip op. at 3, 1997 WL 283654 (STB served May 29, 1997) (“*North Carolina R.R.*”) at \*2.

<sup>19</sup> NCA has been explicit about the supposed application of the *Tex Mex* doctrine as a basis for rejecting CP's proposal. *See* NCA March 1 Reply at 10-12.

<sup>20</sup> NCA's assertion (March 1 Reply at 10) that *Tex Mex* applies to the lease context as well as the trackage rights context is of no moment, as both involve actual common carrier operations by a railroad over lines owned by a third party. *See North Carolina R.R., supra*, at \*2 (treating lease allowing NS to operate its trains over rail line as analogous to trackage rights).

*Exemption—Me. Cent. R.R. (“State of Maine”), 8 I.C.C.2d 835, 836-37 (1991).* The carrier must retain “a permanent, exclusive freight rail easement and sufficient control over its operation to carry out the common carrier obligation without undue interference.” *Massachusetts Department of Transportation—Acquisition Exemption—Certain Assets of Pan Am Southern LLC*, FD 35943, slip op. at 3, 2015 WL 8342001 (STB served Dec. 4, 2015) at \*2 (citing *State of Maine*, 8 I.C.C.2d at 836-37). And that can be so only where “the terms of the sale ... protect the selling carrier from undue interference by the purchaser or third-party designee with the carrier’s common carrier freight rail service.” *Id.*

In this case, BNSF retained *no rights to operate at all*, and its haulage rights (which involve CP handling BNSF traffic in CP’s own trains) are outside the Board’s regulatory authority.<sup>21</sup> Even had BNSF retained the right to operate on the line, the restrictions imposed in the Haulage Agreement were manifestly incompatible with BNSF’s retention of any common carrier obligation of the sort necessary to invoke the *Tex Mex* doctrine. In *Southern Pacific Transportation Co.—Abandonment Exemption—Los Angeles County, CA*, 8 I.C.C.2d 495, 507 (1992) (“*SPTC—LA County*”), the ICC distinguished the circumstances in *State of Maine* – where the carrier’s “permanent easement to continue common carrier freight operations over the line ... ensured that [the carrier] MEC . . . would have access to and the right to maintain,

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<sup>21</sup> Consistent with the realities of BNSF’s limited rights, the Joint Petition specifically noted that the Haulage Agreement was outside the Board’s regulatory jurisdiction (JP at 4, n.5), and the Board did not rule otherwise in the 2007 Decision. To constitute operations within the Board’s regulatory authority, “there must be some indicia of the trackage rights holder’s right to enter on another carrier’s track to perform the rail service.” *Simmons v. ICC*, 871 F.2d 702, 712 (7th Cir. 1989) (quoting *KNRECO, Inc., d/b/a Keokuk Junction Ry. Acquisition & Operation Exemption – The Atchison, Topeka & Santa Fe Ry.*, FD 30918, slip op. at 2, 1988 WL 224410 at \*2 (I.C.C. served Apr. 12, 1988)).

operate, and renew the line” – from the situation, as here, where the operative agreements “place substantial limitations on [the carrier’s] ability to provide rail service.” *Id.*

As in *SPTC—LA County*, limitations on BNSF’s 2007 haulage rights are fundamentally at odds with NCA’s notion that BNSF retained any common carrier obligation. BNSF had no right of access to the line under any circumstances, unlike in the *Pinelawn Cemetery* decision cited by NCA (March 1 Reply at 10), where the Board applied *Tex Mex* to protect the continued *use by a carrier* of essential yard facilities.<sup>22</sup> Under the Haulage Agreement, the movement of BNSF’s haulage traffic took place solely on trains operated by CP or its designee, and thus was inherently subject to CP’s sole control. The Haulage Agreement in fact places explicit limits on BNSF’s service. For example, BNSF rights were limited to the “existing available train capacity” (§ 2.04) on CP’s “existing train service” (§ 2.01), with no “service guarantee” afforded BNSF (§ 4.01), and they were subject to unilateral termination by CP after 2017 on 12 months’ notice (§ 9.02). *See* Exh. A. Though BNSF is free to hold itself out as offering service to all interested shippers to the extent the Haulage Agreement permits that service, the limitations on *its ability to provide those services* rule out its having retained any common carrier obligation potentially subject to the *Tex Mex* doctrine. *SPTC—LA County*, 8 I.C.C.2d at 506-07 (“the two elements of common carriage” are “the willingness *and the ability* to provide service”) (emphasis added).

Because BNSF lacks any right to operate on the Lignite-Crosby Line, the *Tex Mex* doctrine is inapplicable and there is thus no basis for the Board to impose BNSF’s operations

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<sup>22</sup> *Pinelawn Cemetery — Petition for Declaratory Order*, FD 35468 (STB served Apr. 21, 2015) slip. op. at 9.

(via haulage rights or otherwise) on CP, especially where BNSF's sole objection to CP's own proposals is purely economic.

**C. CP Is Not Seeking to Block BNSF Competition, as CP's Proposals Confirm.**

NCA's own assertions confirm that, from its perspective, CP's service does not compete with BNSF's service: it asserts that NCA's desire for BNSF access is *about reaching destinations CP does not serve*. NCA March 1 Reply at 13-14 (addressing "BNSF's market share of traffic *that CP cannot handle because it does not serve the same destinations or markets*").

In fact, CP is more than eager to serve those BNSF destinations via interline routings, and has active joint line rates and routings for movement from Noonan to Pacific Northwest destinations served by UP (reached via the Kingsgate/Eastport gateway). More fundamentally, CP's offer to provide BNSF with the ability to provide unit train service to NCA ought to put to rest any contention that CP has acted anti-competitively in this matter.

**V. CONCLUSION**

For the reasons stated above, the Board should reject BNSF's proposal and endorse CP's reasonable alternative proposals.

Dated: March 22, 2021

Respectfully submitted,

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*Attorneys for Soo Line Railroad Company d/b/a Canadian Pacific*

## CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of March, 2021, copies of the foregoing Response, and the Exhibit and Supplemental Verified Statement thereto, were served by electronic mail on the following:

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/s/ David F. Rifkind  
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# **EXHIBIT A**

**EXHIBIT 2**

**PURCHASE AND SALE AGREEMENT**  
**(REDACTED)**

**PRIVILEGED AND CONFIDENTIAL – June 29, 2007**

**PURCHASE AND SALE AGREEMENT FOR RAIL OPERATIONS  
AND REAL AND PERSONAL PROPERTY  
BETWEEN CROSBY AND A POINT EAST OF LIGNITE  
IN DIVIDE AND BURKE COUNTIES, NORTH DAKOTA**

**BY AND BETWEEN**

**BNSF RAILWAY COMPANY, SELLER**

**AND**

**SOO LINE RAILROAD COMPANY, dba Canadian Pacific Railway,  
BUYER**

**DATED JULY 10, 2007**

- (c) To pay in addition to the cash purchase price its own out-of-pocket costs of Closing. Closing costs shall include, but are not limited to, any service fees, real estate transfer taxes, recording fees and sales taxes associated with this Agreement or any of the conveyances governed by this Agreement. Each party shall bear its own attorneys' fees, accounting expenses, and consultants' and other professional service fees. The parties will split the cost of any closing or escrow fees charged by a title insurance company or other third party assisting with the Closing or administration of any escrow.
- (d) To support and not oppose or otherwise frustrate Seller's efforts, if any, to abandon its line of railroad located east of MP 47.0, near Lignite, North Dakota and west of MP 35.0, near Niobe, North Dakota, in the event Seller files for abandonment approval, or exemption from approval, prior to January 1, 2010. Buyer further agrees not to file an Offer of Financial Assistance in such abandonment proceeding without providing Seller 30 days' advance notice.
- (e) To support and not oppose or otherwise frustrate Seller's discontinuance of all or portions of Seller's trackage rights over the rail line located between Hankinson, North Dakota and Geneseo Junction, North Dakota, defined as the Geneseo Joint Section in the 1959 Agreement, provided that the common carrier rights of all of Seller's assignees, or others operating under such common carrier rights, operating over such rail line are simultaneously discontinued.

Section 3.2 *Seller Obligations.* In consideration for Buyer's purchase of Seller's interests in the Premises and acquisition of the other rights, interests and obligations described in Article II of this Agreement, Seller agrees to the following:

- (a) To pay its own out-of-pocket costs of Closing. Closing costs shall include, but are not limited to, attorneys' fees, accounting expenses, and consultants' and other professional service fees. The parties will split the cost of any closing or escrow fees charged by a title insurance company or other third party assisting with the Closing or administration of any escrow.
- (b) To support and not oppose or otherwise frustrate Buyer's efforts, if any, to abandon or discontinue operations on all or parts of the Premises, in the event Buyer files for abandonment or discontinuance approval, or exemption from approval, prior to January 1, 2010. Seller further agrees not to file an Offer of Financial Assistance in such abandonment proceeding without providing Buyer 30 days' advance notice.

#### **ARTICLE IV CLOSING**

Section 4.1 *Conditions of Closing.* The following shall be conditions to Seller's and Buyer's respective obligation to consummate the transaction. In the event any of these conditions are not satisfied by the Closing Date, Seller or Buyer respectively may in its sole discretion elect to extend the Closing Date (subject to the provisions of Article XVII, paragraph

(a)) or terminate this Agreement by written notice to the other party. In the event Seller and Buyer elect to proceed to Closing, the following terms and conditions, to the extent they may remain unfulfilled, shall survive Closing.

- (a) Buyer and Seller shall have obtained all Governmental Approvals required under Section 5.1. In the event any Governmental Body shall impose additional material terms or conditions upon this conveyance or revoke the authority to enter into this Agreement, either party may terminate this Agreement without liability to the other. In such event, neither Buyer nor Seller shall be entitled to any reimbursement for payment of any fees or costs of the transaction, provided that payment of any part of the purchase price paid by Buyer to Seller for the Premises shall be refunded to Buyer without interest.
- (b) Buyer and Seller shall have fulfilled any conditions required by any Governmental Body which may be imposed as a condition of consummation of this transaction.
- (c) Buyer and Seller shall have performed each of their respective pre-Closing obligations under this Agreement.
- (d) To the extent Buyer and Seller shall have identified any Claims they have against each other relating to the Premises, Buyer and Seller shall have agreed on a reasonable manner of settling such Claims at Closing. All such Claims and manner of settlement shall be set forth in Exhibit K, which shall be amended as required prior to Closing.
- (e) Buyer shall have made arrangements for the provision of rail transportation service over the Premises on terms acceptable to it in its sole discretion.
- (f) Buyer and Seller shall have completed the Phase I Assessment pursuant to the provisions of Section 2.13, and such further environmental assessments as are required pursuant to Article VIII, and shall have agreed upon any Action Plan that is required pursuant to Article VIII.
- (g) Seller shall have complied with Seller's maintenance and other obligations set forth in the 1959 Agreement with respect to the Joint Line. Buyer, at Buyer's sole cost and expense, shall have made an assessment of the track conditions on the Joint Line and Seller, at Seller's sole cost and expense, shall have remedied identified deficiencies. In addition, Buyer, at Buyer's sole cost and expense, shall have made an assessment of the track conditions on the BNSF Line and Seller, at Seller's sole cost and expense, shall have remedied identified deficiencies and complied with Federal Railroad Administration Class 1 track standards pursuant to 49 CFR Part 213 with respect to that portion of the BNSF Line Buyer will utilize for rail transportation service after Closing, including but not limited to that portion between Lignite Junction and customers

presumed to be construed against either party, regardless of which party drafted all or part of the terms of this Agreement.

Section 15.10 Dispute Resolution.

- (a) Except for Environmental Claims, questions or controversies pertaining to the construction, application, rights, obligations, remedies, or performance of this Agreement shall be resolved by neutral binding arbitration under the rules and regulations (but not the administration unless otherwise agreed) of the American Arbitration Association ("AAA").
- (b) Subject to written agreement to the contrary, arbitration shall be held in accordance with the Commercial Rules of the AAA in effect at the time of the arbitration; provided, however, that except to the extent that the AAA Rules are inconsistent with the terms of this Agreement or the terms of this Agreement are more specific than the AAA Rules, the terms of this Agreement will govern.
- (c) Unless otherwise agreed in writing, discovery and motion practice shall be permitted, and the Federal Rules of Civil Procedure and Federal Rules of Evidence shall govern all such motion practice and discovery, the exchange of exhibits, witness lists and work papers, and the presentation of evidence by expert witnesses.
- (d) The question or controversy shall be submitted for arbitration to a single competent, disinterested arbitrator, if the parties are able to agree upon such single arbitrator within thirty (30) days after the party requesting arbitration notifies the other party of such request. The party initiating the arbitration shall state in writing the question(s) to be submitted for decision in a written notice of arbitration served upon the other party. Within thirty (30) days thereafter, the receiving party shall serve a like notice on the initiating party stating the Claims or defenses it wishes to be adjudicated. If a single arbitrator cannot be agreed upon within such thirty (30) day period, a board of three (3) arbitrators shall be used, and the parties within ten (10) days thereafter shall each nominate a person to act as its party-appointed arbitrator. Thereafter, the first and second arbitrators shall select a third arbitrator, but if the arbitrators shall be unable to agree upon such a third arbitrator within a period of thirty (30) days from the day of appointment of the second arbitrator, the third arbitrator shall be appointed by the AAA or other neutral entity or process if mutually agreed upon in writing. Unless mutually agreed otherwise in writing, any arbitrator selected must have a minimum of ten (10) years' experience working in the railroad industry with railroad agreements and contracts.
- (e) Upon selection of the board or appointment of the single arbitrator, the arbitrator or board shall proceed with diligence to inquire into the questions or controversies. A hearing shall be held within one hundred eighty (180) days of appointment of the board or single arbitrator, and the arbitrator or board shall state

its decision and award, in writing, within thirty (30) days of the final submission by the parties, which decision and award, when delivered to both parties, shall be final and binding. Judgment may be entered upon such decision and award in any court of competent jurisdiction.

- (f) Each party shall bear its own expenses incurred in connection with arbitration under this Section, including any expenses associated with its appointed arbitrator in the case of arbitration before a three-member panel. The parties shall share equally the expenses associated with the services of the single, disinterested arbitrator in the case of a one-member panel and/or the third neutral member of the three-member panel, as the case may be.
- (g) In the event of any controversy, Claim or dispute between either party affecting or relating to the performance of the rights and obligations under this Agreement, the prevailing party shall be entitled to recover from the non-prevailing party all of the prevailing party's reasonable expenses, including, without limitation, attorneys fees, accountants' fees, consultants' fees, court costs, arbitration costs, and interest.
- (h) Interest computed annually, at a rate equal to the Prime Rate plus two (2) percentage points (or the maximum interest allowed by applicable law if lower), shall be applied to any and all arbitrator's awards requiring the payment of money and shall be calculated from thirty (30) days following the date of the applicable arbitration decision. The term "Prime Rate" shall mean the minimum commercial lending rate charged by banks to their most credit-worthy customers for short-term loans, as published daily in the *Wall Street Journal*.

Section 15.11 Confidentiality. Except to the extent that the terms of this Agreement are required to be disclosed by applicable Legal Requirements or by any Governmental Bodies, no party to this Agreement shall disclose the contents of this Agreement or any information produced in any arbitration proceedings to any other Person, without the prior written consent of the other parties to this Agreement. Independent consultants, attorneys and auditors may be provided certain terms of this Agreement as may be necessary in the ordinary course of business; provided, however, any such Person who is lawfully permitted access to any of the terms of this Agreement shall be required by the party to this Agreement who is disclosing the information not to disclose those terms to any other party without the prior written consent of both parties to this Agreement. It is understood and agreed that the terms of this Agreement shall not be placed of public record except to the limited extent as may be required by applicable Legal Requirements or Order or any Governmental Body.

Notwithstanding anything herein to the contrary, any party subject to confidentiality obligations hereunder or under any other related document (and any employee, representative or other agent of such party) may disclose to any and all Persons, without limitation of any kind, such party's U.S. federal income tax treatment and the U.S. federal income tax structure of the transactions contemplated by this Agreement and any other agreement related thereto and all

**EXHIBIT G**

**NORTH DAKOTA HAULAGE  
SERVICE AGREEMENT**

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

**WITNESSETH:**

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

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

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

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

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

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

## **Section 2 - HAULAGE SERVICES**

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

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

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

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

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

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

### **Section 3 – MANAGEMENT AND OPERATION**

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

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

#### **Section 4 - SERVICE STANDARDS**

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

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

#### **Section 5 - CAR ACCOUNTING AND CAR HIRE**

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

#### **Section 6 – COMPENSATION**

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

## **Section 8 – COMPLIANCE WITH LAW**

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

## **Section 9 - TERM**

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

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

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

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

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

## **Section 10 - FORCE MAJEURE**

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

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

## **Section 12 - ARBITRATION**

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

## **Section 13 - NOTICE**

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

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**Finance Docket No. 35068**

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

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**SUPPLEMENTAL VERIFIED STATEMENT OF MATTHEW BAILEY**

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My name is Matthew Bailey and I am employed by the Soo Line Railroad Company d/b/a as Canadian Pacific (“CP”) as Superintendent for Operations in North Dakota and have held this position since February 2019. I previously submitted a Verified Statement in this proceeding.

I am submitting this Supplemental Verified Statement in conjunction with CP’s Response to BNSF’s Proposal. The purpose of this Supplemental Verified Statement is to address the specific elements of BNSF’s Proposal and explain to the Board why BNSF’s projections for exchanging unit trains in Minot is not realistic as it fails to account for the time required to perform certain operations and fails to take into account real world conditions. I also explain why BNSF’s suggestion that CP has a yard siding in Minot that could be used to stage BNSF unit trains is wrong.

**A. BNSF’s Proposal Fails to Account for the Full Time Needed to Conduct the Exchange and Ignores Real World Conditions**

BNSF’s Proposal projects that with coordination between CP and BNSF, and BNSF’s provision of crew and other resources, the exchange of unit trains in Minot would take about an hour. While an hour would still negatively impact CP’s operations, it also not realistic. BNSF’s projection fails to account for the time associated with several of the activities associated with the hand off in Minot. For example, as I explained in my original Verified Statement, the switches to the connecting track must be unlocked and lined, and after the train moves through the switches,

relined and locked. This process must occur before and after the movement between the two mainlines and only after the train has cleared the switch points to the connecting track. There are two switches, and each is on a safety timer to ensure that there are no trains in the circuit before the switch is lined. BNSF also proposes that it would switch the lead locomotive to the other end of the train in order to avoid shoving the train through downtown Minot, but BNSF's Proposal fails to account for the time needed to reassign the locomotive, conduct necessary tests, and reinitialize Positive Train Control. Likewise, BNSF allocates no time for the crew to get from one end of the train to the other, quite a distance on a unit train. The time associated with these activities are detailed in my original Verified Statement and they are far from insignificant and collectively add up to well more than an hour. A more realistic projection would be approximately 2 hours, even under the best of circumstances, which as explained below, is often not the case.

Additionally, BNSF's projections are based on unrealistic assumptions regarding the availability of resources including crew, crew transport and mainline and yard capacity as well operating conditions. In my experience with railroading, few things go precisely as planned. Crew may be unavailable, delayed or run into hours of service issues. Yards and mainline may be congested due to expected and unexpected surges in volumes or due to other factors. Mechanical issues or inclement weather may also cause delays.

CP and BNSF regularly encounter all of these issues in their exchange of manifest traffic in Minot as reflected in CP's Transfer of Liability (TOL) records. As I previously noted in my original Verified Statement, CP and BNSF trade responsibility for conducting the exchange operations quarterly. If, during BNSF's quarter, BNSF fails to pull its cars from CP's Minot Yard timely, or during CP's quarter, BNSF refuses to timely receive the exchange, CP will initiate a TOL pursuant to AAR Rule 15 to transfer the liability for car hire to BNSF's account. Data from CP's Minot TOL records for 2019 are attached as Exhibit 1 to this statement. According to those records, in 2019,

CP initiated a TOL on 156 occasions. These included instances where exchange could not be performed due to BNSF mainline congestion, crew availability, yard capacity, maintenance work, severe weather, and other issues. On at least one occasion, when CP's road switcher (not a unit-train) left the yard to deliver to BNSF, it did so with authority to enter BNSF's mainline, only to be held on CP's mainline by BNSF's dispatchers for 2 hours. There have also been times when CP, despite the best of intentions, has been unable to deliver cars to BNSF due to its own crew issues (crew issues have been particularly challenging during the pandemic), weather, or mechanical issues that affect CP's own operations. Thus regardless of BNSF's level of commitment to coordinate with CP and to help expedite the exchange, BNSF's projections in its Proposal that exchange of unit trains in Minot would only take an hour are wholly unrealistic.

The consequence of BNSF's failure to timely pull or accept delivery of its cars moving in manifest service can create congestion in CP's Minot Yard which already has limited capacity. Such congestion interferes with CP's ability to serve other customers in Minot and can cause congestion in other yards. If Minot Yard is congested, cars may need to be held at other yards until they can be accommodated in Minot. Unit trains, of course, are too long to use CP's Minot Yard tracks.

**B. CP Does Not Have an Available Siding in Minot for Staging BNSF Unit Trains**

CP's mainline between Portal and the Twin Cities is single-tracked. Trains however operate in both directions. Such bi-directional operations require sidings that can be used for trains to meet and pass each other. In addition, trains operate at different speeds depending on the type and size of the train. A 1.5-mile unit train, for example, typically operates slower than a priority merchandise train. In order for a priority train to operate to schedule, it must also be able to pass slower moving trains traveling in the same direction utilizing sidings.

To facilitate fluid operations, sidings must be available at reasonable intervals to allow for trains to meet and to pass. Generally, CP tries to have siding every 20-25 miles on its mainline. In addition, sidings must be of sufficient length to accommodate trains clear of the main line.

Over the years, there has been a steady trend toward longer trains which improves efficiency and cost effectiveness. Today, CP regularly operates line-haul trains on this corridor that are in the range of 10,000 to 12,000 feet in length with the majority of the line-haul trains exceeding 8,500 feet. This trend toward longer trains has required investment to extend the length of sidings in order to accommodate meets and passes. Thus in 2014, CP invested approximately US \$3 million to extend its siding in Minot 5,000 feet to its current length of 13,860 feet. This siding is now the longest siding on the Portal Subdivision. It is one of only two sidings on the Subdivision that exceeds 10,000 feet (the siding at Baden is 11,000 feet) and is capable of efficiently supporting a meet or pass of longer trains, an increasingly common occurrence. At other locations, the crew may need to cut the train to accommodate grade crossings, as is sometimes required at Drake which has a 9,850 foot siding, or to double-over on multiple tracks and then reassemble the train, a process that is time consuming particular in winter when recharging the air on the brakes takes much longer. The 11,000 foot Baden siding and 9,850 Drake siding are also located approximately 88 miles apart from each other and each is more than 40 miles from Minot. The other sidings between Baden and Drake are 8,090 feet or less. Because of its length and its proximity to the Minot Yard, the Minot siding is also the most used siding between Portal and the Twin Cities and currently is used an average of 6 to 7 times each day. Consequently, the loss of use of the Minot siding would significantly disrupt mainline operations and sharply reduce capacity on the Subdivision.

I understand that in its Proposal, BNSF describes the Minot siding as “CP’s Minot Yard 13,860-foot siding” and suggests that BNSF unit trains could be staged on the siding. BNSF is wrong on both counts. The siding is not yard track, but is an active piece of railroad track and an

essential component of CP's mainline. CP does not use the siding for staging trains, switching, or for parking equipment, except in an emergency. If the siding were unavailable to CP because it was occupied by a BNSF unit train, this would have a significant negative impact on mainline operations, as trains would be unable to meet or pass in Minot. Trains that were scheduled to meet or pass in Minot may need to be held short or even reverse direction and return to the next available siding or yard capable of accommodating a meet or pass. For longer trains, this may require additional switching on yard tracks as trains may need to be divided into cuts if there is no yard track long enough. In short, staging BNSF's unit trains on the Minot siding is not a solution for the numerous issues that would be caused by a BNSF unit train sitting on CP's mainline facilities.

## VERIFICATION

I, Matthew Bailey, declare under penalty of perjury that I am authorized to make this verified statement on behalf of Soo Line Railroad Company, and that the information included in the foregoing statement is true and correct to the best of my knowledge and belief.

A handwritten signature in black ink, appearing to read 'Matthew Bailey', with a long horizontal flourish extending to the right.

Matthew Bailey  
Superintendent of Operations for North Dakota  
Soo Line Railroad Company

Dated: March 22, 2021

**EXHIBIT 1**  
**to Bailey Supplemental Verified Statement**

| I/C Location Name | Other Railway | Comments                                                                                 | Created         |
|-------------------|---------------|------------------------------------------------------------------------------------------|-----------------|
| MINOT             | BNSF          | BNSF MAINLINE CONGESTION                                                                 | 1/27/2019 17:57 |
| Minot             | BNSF          | BN DISPATCHING COULD NOT HANDLE TRANSFER                                                 | 2/13/2019 18:54 |
| MINOT             | BNSF          | BNSF DISPATCHING DELAYS, MINOT LOCAL UNABLE TO COMPLETE IN HOS                           | 2/16/2019 17:43 |
| MINOT             | BNSF          | CANNOT COMPLETE TRANSFER ACCOUNT BNSF TRAFFIC IN TRANSFER                                | 2/28/2019 18:27 |
| MINOT             | BNSF          | BNSF YARD CONGESTION, CANNOT TAKE INTERCHANGE                                            | 3/1/2019 17:48  |
| MINOT             | BNSF          | BNSF SWITCH FAILURE AT TRANSFER (9802) / UNABLE TO COMPLETE TRANSFER                     | 3/2/2019 20:40  |
| MINOT             | BNSF          | BNSF DISPATCHING DELAYS / COULD NOT COMPLETE TRANSFER HELD AT SOO TOWER FOR OVER 2 HOURS | 3/7/2019 19:15  |
| MINOT             | BNSF          | BNSF DISPATCHING DELAYS / CANT HANDLE UNTIL AFTER 1700                                   | 3/10/2019 15:34 |
| MINOT             | BNSF          | BNSF YARD UNABLE TO HANDLE UNTIL AFTER 1630/1700                                         | 3/17/2019 19:50 |
| MINOT             | BNSF          | BNSF MAINLINE SERVICE INTERRUPTION, CP UNABLE TO TRANSFER                                | 3/18/2019 18:46 |
| MINOT             | BNSF          | BNSF DISPATCHING DELAYS                                                                  | 3/27/2019 16:20 |
| MINOT             | BNSF          | BNSF DISPATCHER UNABLE TO GIVE AUTHORITY                                                 | 3/28/2019 17:40 |
| MINOT             | BNSF          | BNSF LATE WITH TRANSFER                                                                  | 4/7/2019 18:57  |
| MINOT             | BNSF          | BNSF LATE WITH TRANSFER                                                                  | 4/8/2019 21:03  |
| MINOT             | BNSF          | BNSF UNABLE TO TRANSFER TODAY CITED OTHER WORK PRIORITIZED                               | 4/9/2019 18:58  |
| MINOT             | BNSF          | BNSF LATE WITH TRANSFER                                                                  | 4/11/2019 17:53 |
| MINOT             | BNSF          | BNSF NOT PERFORMING TRANSFER TONIGHT                                                     | 4/12/2019 22:37 |
| MINOT             | BNSF          | BNSF NOT PERFORMING TRANSFER TONIGHT                                                     | 4/13/2019 20:24 |
| MINOT             | BNSF          | BNSF LATE WITH DAILY TRANSFER                                                            | 4/22/2019 19:30 |
| MINOT             | BNSF          | BNSF LATE WITH DAILY TRANSFER                                                            | 4/25/2019 19:14 |
| MINOT             | BNSF          | BNSF LATE WITH DAILY TRANSFER                                                            | 5/1/2019 18:57  |
| MINOT             | BNSF          | BNSF delivered / did not pull late with todays Xfer                                      | 5/6/2019 19:10  |
| BNSF              | BNSF          | BNSF LATE WITH DAILY TRANSFER                                                            | 5/23/2019 0:58  |
| BNSF              | BNSF          | BNSF LATE WITH DAILY TRANSFER                                                            | 5/24/2019 0:28  |
| BNSF              | BNSF          | Refused by BNSF for "congestion"                                                         | 5/24/2019 15:25 |

| I/C Location Name | Other Railway | Comments                                                                                                                                                                                                                                                                                     | Created         |
|-------------------|---------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------|
| BNSF              | BNSF          | BNSF UNABLE TO COMPLETE TRANSFER ACCOUNT NO JOB BULLETINED TO PROTECT 2300 +/- 2 HRS                                                                                                                                                                                                         | 5/26/2019 19:25 |
| BNSF              | BNSF          | BNSF UNABLE TO COMPLETE TRANSFER ACCOUNT HOLIDAY ANNULMENTS                                                                                                                                                                                                                                  | 5/27/2019 20:50 |
| MINOT             | CPR           | 206 crew is on days off and with the work events we have on hand, we will not have a crew to complete the transfer today. Will look to make current tomorrow.BNSF at Minot TOL is unable to be issued at this time. The comments appear to suggest a CPRS caused delay in pulling these cars | 6/2/2019 13:59  |
| MINOT             | BNSF          | The BNSF206 crew is on days off and with the work events we have on hand, we will not have a crew to complete the transfer today. The BNSF will look to make current tomorrow.                                                                                                               | 6/2/2019 15:01  |
| Minot             | BNSF          | BNSF LATE WITH DAILY TRANSFER                                                                                                                                                                                                                                                                | 6/5/2019 17:16  |
| MINOT             | BNSF          | BNSF UNABLE TO MAKE DAILY TRANSFER YESTERDAY/TODAY                                                                                                                                                                                                                                           | 6/10/2019 14:07 |
| MINOT             | BNSF          | BNSF LATE WITH DAILY TRANSFER                                                                                                                                                                                                                                                                | 6/11/2019 23:06 |
| MINOT             | BNSF          | BNSF FAILED TO MAKE TO DAILY TRANSFER.                                                                                                                                                                                                                                                       | 6/18/2019 3:37  |
| MINOT             | BNSF          | BNSF FAILED TO TRANSFER LAST NIGHT.                                                                                                                                                                                                                                                          | 6/22/2019 5:05  |
| MINOT             | BNSF          | BNSF FAILED TO TRANSFER LAST NIGHT.                                                                                                                                                                                                                                                          | 6/27/2019 9:08  |
| MINOT             | CPRS          | Per the BNSF Trainmaster and On Duty Yardmaster, they will not be sending a crew over this evening 6/28/2019                                                                                                                                                                                 | 6/28/2019 18:09 |
| MINOT             | BNSF          | BNSF DISPATCHING COULD NOT HANDLE TRANSFER TODAY, CITTING MAINLINE CONGESTION                                                                                                                                                                                                                | 7/11/2019 16:46 |
| MINOT             | BNSF          | MAINLINE CONGESTION PUSHING DAILY TRANSFER TO BEYOND CREWS HOS.                                                                                                                                                                                                                              | 7/14/2019 17:50 |
| Minot             | CPRS          | Main Line Conjestion pushed transfer to outside of crews HOS.                                                                                                                                                                                                                                | 7/17/2019 22:32 |
| Minot             | CPRS          | not avaiable to deliver and pull account of main line congestion in the area.                                                                                                                                                                                                                | 7/20/2019 17:39 |
| MINOT             | BNSF          | MAINLINE CONGESTION PUSHED TRANSFER OUTSIDE CREWS HOS                                                                                                                                                                                                                                        | 7/25/2019 22:08 |
| MINOT             | BNSF          | BNSF MAINLINE TRAFFIC PUSHED TRANSFER BEYOND CREWS HOS                                                                                                                                                                                                                                       | 8/1/2019 18:13  |

| I/C Location Name | Other Railway | Comments                                                                                               | Created         |
|-------------------|---------------|--------------------------------------------------------------------------------------------------------|-----------------|
| MINOT             | BNSF          | MAINLINE TRAFFIC PUSHED TRANSFER TO BEYOND CREWS HOS                                                   | 8/5/2019 16:19  |
| MINOT             | BNSF          | MAINLINE TRAFFIC PUSHED TRANSFER BEYOND CREWS HOS                                                      | 8/11/2019 19:22 |
| MINOT             | BNSF          | MAINLINE TRAFFIC PUSHED TRANSFER BEYOND CREWS HOS.                                                     | 8/14/2019 18:01 |
| MINOT             | BNSF          | MAINLINE CONGESTION PUSHED TRANSFER TO BEYOND CREWS HOS.                                               | 8/18/2019 15:40 |
| MINOT             | BNSF          | BNSF WOULD NOT GIVE AUTHORITY INTO THE YARD                                                            | 8/22/2019 20:00 |
| MINOT             | BNSF          | BNSF DISPATCHING WOULD NOT GIVE AUTHORITY TO TRANSFER JOB.                                             | 8/23/2019 17:39 |
| MINOT             | BNSF          | BNSF DS UNABLE TO HANDLE, PUSHING TRANSFER BEYOND CREWS HOS.                                           | 8/25/2019 19:04 |
| MINOT             | BNSF          | BNSF DS COULD NOT HANDLE THE MINOT TRANSFER.                                                           | 8/26/2019 19:00 |
| MINOT             | BNSF          | BNSF EXPERIENCED A SERVICE INTERRUPTION AND COULD NOT HANDLE THE TRANSFER.                             | 8/29/2019 15:45 |
| MINOT             | BNSF          | BNSF DISPATCHER COULD NOT HANDLE THE TRANSFER JOB TODAY                                                | 9/1/2019 16:01  |
| MINOT             | BNSF          | UNABLE TO TRANSFER ACCOUNT MAINLINE TRAFFIC WINDOWS.                                                   | 9/9/2019 16:49  |
| MINOT             | BNSF          | UNABLE TO TRANSFER ACCOUNT MAINLINE TRAFFIC / NO MAINLINE TIME OUT OF THE TRNASFER                     | 9/15/2019 17:16 |
|                   |               | not lifted                                                                                             |                 |
| BN                | BNSF          | *UNABLE TO TOL* CAR IS LOCATED IN WINONA; CANNOT TOL TO THE BNSF AT LA CROSSE.                         | 9/18/2019 11:57 |
| MINOT             | BNSF          | NOT ABLE TO ADVANCE TRAFFIC TO BNSF DUE TO EXCESSIVE TRAFFIC DUE TO SEVERE WEATHER ON THE SUB-DIVISION | 9/20/2019 14:42 |
| MINOT             | CPR           | DUE TO MAIN LINE CONGESTION ON THE BNSF NO INTERCHANGE TODAY                                           | 9/22/2019 13:00 |
| MINOT             | CP            | NO INTERCHANGE TODAY DUE TO MOW ON THE BNSF                                                            | 9/26/2019 13:00 |
| MINOT             | CP            | EXCESSIVE MAIN LINE TRAFFIC ON THE BNSF AND NO PULL READY                                              | 9/28/2019 13:17 |
| MInot             | BNSF          | BNSF late with daily transfer                                                                          | 10/2/2019 18:44 |
| MINOT             | CP            | BNSF NOT ABLE TO INTERCHANGE DUE TO CREW ISSUES ON THE BNSF                                            | 10/5/2019 14:30 |

| I/C Location Name | Other Railway | Comments                                                                                                      | Created          |
|-------------------|---------------|---------------------------------------------------------------------------------------------------------------|------------------|
| MINOT             | BNSF          | BNSF LATE WITH DAILY TRANSFER.                                                                                | 10/7/2019 4:49   |
| MINOT             | BNSF          | BNSF LATE WITH DAILY TRANSFER                                                                                 | 10/7/2019 21:22  |
| MINOT             | BNSF          | BNSF LATE WITH DAILY INTERCHANGE                                                                              | 10/8/2019 20:02  |
| MINOT             | BNSF          | BNSF LATE WITH DAILY TRANSFER                                                                                 | 10/9/2019 17:48  |
| MINOT             | BNSF          | BNSF LATE WITH DAILY TRANSFER                                                                                 | 10/10/2019 19:11 |
| MINOT             | CPR           | BNSF delivery outside the delivery window                                                                     | 10/11/2019 15:50 |
| BNSF              | BNSF          | Unable to recieve cars at this time.                                                                          | 10/12/2019 5:36  |
| BN                | BNSF          | Unable to accpet cars at this time.                                                                           | 10/12/2019 11:54 |
| MINOT             | CP            | BNSF delivery is outside of the delivery window.                                                              | 10/12/2019 11:59 |
| MINOT             | CP            | BNSF DELIVERY IS OUTSIDE OF THE DELIVERY WINDOW                                                               | 10/13/2019 13:33 |
| MINOT             | CP            | BNSF EXPERIENCING CREW SHORTAGES                                                                              | 10/14/2019 17:41 |
| Minot             | BNSF          | BN did not pick up cars ready for interchange.                                                                | 10/16/2019 9:21  |
| MINOT             | BNSF          | BNSF TRANSFER TIME IS AFTER DAILY TOL CUT OFF.                                                                | 10/16/2019 17:15 |
| BNSF              | BNSF          | Unable to accpet cars at this time. - ISSUED WITHOUT CP337256, CP355133 & UCRY6500 as they are not for the BN | 10/16/2019 17:28 |
| MINOT             | BNSF          | BNSF TRANSFER SCHEDULED FOR AFTER TOL CUT OFF.                                                                | 10/17/2019 17:41 |
| MINOT             | BNSF          | BNSF DAILY TRANSFER SCHEDULED FOR AFTER TOL CUT OFF TIME                                                      | 10/18/2019 18:18 |
| MINOT             | BNSF          | BNSF TRANSFER SCHEDULED FOR AFTER TOL CUT OFF TIME                                                            | 10/19/2019 16:20 |
| Minot             | BNSF          | Car available for transfer on MFEED track.                                                                    | 10/20/2019 12:01 |
| Minot             | BNSF          | Cars available for interchange.                                                                               | 10/21/2019 17:14 |
| MINOT             | BNSF          | BNSF TRANSFER IS SCHEDULED FOR AFTER TOL CUTOFF.                                                              | 10/22/2019 16:53 |
| MINOT             | BNSF          | BNSF TRANSFER SCHEDULED FOR AFTER TOLL CUTOFF                                                                 | 10/23/2019 21:34 |
| MINOT             | BNSF          | BNSF TRANSFER SCHEDULED FOR AFTER TOL CUTOFF                                                                  | 10/24/2019 20:49 |
| MINOT             | BNSF          | BNSF TRANSFER SCHEDULED FOR AFTER TOL CUTOFF.                                                                 | 10/25/2019 16:51 |
| MINOT             | BNSF          | BNSF TRANSFER SCHEDULED FOR AFTER TOL CUT OFF.                                                                | 10/26/2019 17:34 |
| Minot             | BNSF          | Cars available for interchange                                                                                | 10/27/2019 14:06 |

| I/C Location Name | Other Railway | Comments                                            | Created          |
|-------------------|---------------|-----------------------------------------------------|------------------|
| Minot             | BNSF          | Cars available for transfer                         | 10/28/2019 17:46 |
| Minot             | BNSF          | In position for interchange                         | 10/29/2019 19:57 |
| MINOT             | BNSF          | BNSF TRANSFER SCHEDULED FOR AFTER TOL CUTOFF.       | 10/30/2019 20:03 |
| Minot             | BNSF          | In position for interchange                         | 10/31/2019 9:58  |
| Minot             | BNSF          | Cars available for transfer                         | 10/31/2019 17:15 |
|                   |               | BNSF transfer scheduled for after TOL cut off       |                  |
| Minot             | BNSF          |                                                     | 11/1/2019 18:08  |
| MINOT             | BNSF          | BNSF TRANSFER SCHEDULED TO OCCURE AFTER TOLS CUTOFF | 11/2/2019 13:05  |
| Minot             | BNSF          | Cars available for interchange.                     | 11/3/2019 14:02  |
| Minot             | BNSF          | Cars available for transfer                         | 11/4/2019 18:23  |
| MINOT             | BNSF          | BNSF TRANSFER SCHEDULED FOR AFTER TOL CUT OFF.      | 11/5/2019 18:15  |
| MINOT             | BNSF          | BNSF TRANSFER SCHEDULED FOR AFTER TOL CUT OFF.      | 11/6/2019 18:21  |
| Minot             | BNSF          | Cars available for transfer                         | 11/7/2019 13:26  |
| Minot             | BNSF          | Cars available for transfer                         | 11/8/2019 12:09  |
| Minot             | BNSF          | Cars available for transfer.                        | 11/9/2019 13:17  |
| Minot             | BNSF          | Cars available for transfer.                        | 11/11/2019 19:11 |
| Minot             | BNSF          | Cars available for transfer.                        | 11/12/2019 15:33 |
| Minot             | BNSF          | BNSF TRANSFER SCHEDULED FOR AFTER TOL CUTOFF        | 11/13/2019 16:58 |
|                   |               | BNSF TRANSFER SCHEDULED FOR AFTER TOL CUTOFF.       |                  |
| Minot             | BNSF          |                                                     | 11/14/2019 18:28 |
| MINOT             | BNSF          | BNSF DID NOT TRANSFER                               | 11/15/2019 23:39 |
|                   |               | BNSF TRANSFER SCHEDULED FOR AFTER TOL CUT OFF       |                  |
| MINOT             | BNSF          |                                                     | 11/16/2019 19:06 |
| Minot             | BNSF          | Cars available for transfer                         | 11/17/2019 16:30 |
| Minot             | BNSF          | Cars available for transfer                         | 11/18/2019 14:12 |
| Minot             | BNSF          | In position for interchange.                        | 11/19/2019 15:32 |
|                   |               | BNSF TRANSFER SCHEDULED FOR AFTER TOL CUTOFF        |                  |
| MINOT             | BNSF          |                                                     | 11/20/2019 18:31 |
| MINOT             | BNSF          | TRANSFER SCHEDULED FOR AFTER TOL CUT OFF.           | 11/21/2019 16:15 |
|                   |               | BNSF TRANSFER SCHEULED FOR AFTER TOL CUT OFF.       |                  |
| MINOT             | BNSF          |                                                     | 11/22/2019 11:11 |
|                   |               | Unable to accpet cars at this time.                 |                  |
| BNSF              | BNSF          |                                                     | 11/23/2019 11:59 |
|                   |               | BNSF TRANSFER SCHEDULED FOR AFTER TOL CUT OFF.      |                  |
| MINOT             | BNSF          |                                                     | 11/23/2019 17:11 |
| Minot             | BNSF          | Cars available for transfer                         | 11/24/2019 22:14 |

| I/C Location Name | Other Railway | Comments                                                                                                   | Created          |
|-------------------|---------------|------------------------------------------------------------------------------------------------------------|------------------|
| Minot             | BNSF          | Cars available for interchange                                                                             | 11/25/2019 19:01 |
| MINOT             | BNSF          | BNSF TRANSFER SCHEDULED FOR AFTER CUT OFF. TOL was issued late due to not being completed on second shift. | 11/26/2019 20:29 |
| MINOT             | BNSF          | CAR IN PLACE FOR TRANSFER                                                                                  | 11/27/2019 18:53 |
| MINOT             | BNSF          | BNSF NOT TRANSFERING TODAY / HOLIDAY. Unable to issue earlier due to system issues.                        | 11/28/2019 18:43 |
| BNSF              | BNSF          | Unable to accept cars at this time.                                                                        | 11/29/2019 5:42  |
| BNSF              | BNSF          | Unable to accept cars at this time.                                                                        | 11/29/2019 5:44  |
| MINOT             | BNSF          | BNSF TRANSFER WILL OCCUR AFTER TOL CUTOFF                                                                  | 11/29/2019 17:13 |
| MINOT             | BNSF          | BNSF TRANSFER SCHEDULED FOR AFTER TOL CUT OFF.                                                             | 11/30/2019 16:49 |
| Minot             | BNSF          | Cars available for transfer                                                                                | 12/1/2019 20:17  |
| Minot             | BNSF          | Cars available for transfer                                                                                | 12/2/2019 18:37  |
| MINOT             | BNSF          | CARS READY FOR TRANSFER / BN SCHEDULED FOR AFTER TOL CUT OFF.                                              | 12/3/2019 19:22  |
| MINOT             | BNSF          | CARS AVAILABLE FOR TRANSFER                                                                                | 12/4/2019 18:53  |
| MINOT             | BNSF          | CARS IN PLACE FOR XFER / TRANSFER TO OCCUR AFTER CUTOFF.                                                   | 12/5/2019 16:42  |
| BNSF              | BNSF          | Unable to accept cars at this time.                                                                        | 12/6/2019 15:42  |
| MINOT             | BNSF          | BNSF TRANSFER SCHEDULED FOR AFTER TOL CUT OFF.                                                             | 12/6/2019 21:35  |
| BNSF              | BNSF          | Unable to accpet at this time.                                                                             | 12/7/2019 9:46   |
| BNSF              | BNSF          | Unable to accept cars at this time.                                                                        | 12/7/2019 11:10  |
| MINOT             | BNSF          | CARS READY FOR TRANSFER / TRANSFER PLANNED TO OCCUR AFTER TOL CUT                                          | 12/7/2019 16:17  |
| Minot             | BNSF          | Cars available for transfer                                                                                | 12/8/2019 13:27  |
| Minot             | BNSF          | Cars available for transfer                                                                                | 12/9/2019 18:40  |
| MINOT             | BNSF          | BNSF LATE WITH DAILY TRANSFER.                                                                             | 12/10/2019 17:24 |
| BNSF              | BNSF          | Unable to accpet cars at this time.                                                                        | 12/11/2019 15:16 |
| MINOT             | BNSF          | BN TRANSFER SCHEDULED TO OCCUR AFTER TOL CUTOFF.                                                           | 12/11/2019 18:49 |
| MINOT             | BNSF          | BNSF TRANSFER SCHEDULED FOR AFTER TOL WINDOW                                                               | 12/12/2019 19:43 |

| I/C Location Name | Other Railway | Comments                                                           | Created          |
|-------------------|---------------|--------------------------------------------------------------------|------------------|
| MT01              | BNSF          | BNSF LATE WITH TRANSFER / SCHEDULED FOR AFTER TOL CUTOFF.          | 12/13/2019 20:51 |
| MINOT             | BNSF          | BNSF TRANSFER SCHEDULED FOR AFTER TOL CUT OFF / CARS IN POSITION.  | 12/14/2019 20:28 |
| Minot             | BNSF          | Cars available for transfer                                        | 12/15/2019 11:53 |
| Minot             | BNSF          | Cars available for transfer                                        | 12/16/2019 11:59 |
| MINOT             | BNSF          | BNSF TRANSFER SCHEDULED FOR AFTER TOL CUT OFF.                     | 12/17/2019 18:23 |
| MINOT             | BNSF          | BNSF TRANSFER SCHEDULED FOR AFTER TOL CUT OFF.                     | 12/18/2019 17:37 |
| MINOT             | BNSF          | BNSF FAILED TO PULL TRANSFER 12/18 LATE WITH TODAYS TRANSFER 12/19 | 12/19/2019 17:51 |
| MINOT             | BNSF          | TRANSFER SCHEDULED FOR AFTER TOL CUT OFF                           | 12/20/2019 17:15 |
| MINOT             | BNSF          | BNSF TRANSFER SCHEDULED FOR AFTER TOL CUT OFF.                     | 12/21/2019 17:17 |
| Minot             | BNSF          | Cars available for transfer                                        | 12/22/2019 17:42 |
| Minot             | BNSF          | Cars available for transfer                                        | 12/23/2019 13:27 |
| MINOT             | BNSF          | BNSF TRANSFER SCHEDULED FOR AFTER TOL CUT OFF.                     | 12/26/2019 16:12 |
| MINOT             | BNSF          | BNSF TRANSFER SCHEDULED FOR AFTER TOL CUT OFF                      | 12/27/2019 22:37 |
| MINOT             | BNSF          | TRANSFER SCHEDULED FOR AFTER TOL CUT OFF.                          | 12/28/2019 19:27 |
| Minot             | BNSF          | Cars available for transfer                                        | 12/29/2019 17:30 |
| Minot             | BNSF          | Cars available for transfer.                                       | 12/30/2019 13:26 |
| MINOT             | BNSF          | BNSF TRANSFER SCHEDULED FOR AFTER TOL CUT OFF.                     | 12/31/2019 18:39 |