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VIA E-FILING

Cynthia T. Brown
Chief, Section of Administration
Surface Transportation Board
Office of Proceedings
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:

BNSF¹ hereby replies to CP's Supplemental Proposal, filed June 6, 2022 in the above-referenced proceeding. On December 29, 2020, the Board granted NCA's petition to reopen, expressing concern about a "record [that] indicates that CP has limited the quantity of BNSF cars it would accept and has entirely refused BNSF unit trains in interchange, which would enable NCA to reach markets not served by CP." *Soo Line R.R.—Acquis. & Operation Exemption—BNSF Ry. (Reopening Decision)*, FD 35068, slip op. at 5 (STB served Dec. 29, 2020). The Board ordered CP and BNSF to "engage in negotiations and inform the Board how NCA will be provided with a level of service commensurate with the broad representations underlying the Board's *2007 Decision*." *Id.*, slip op. at 6.

BNSF engaged in good-faith negotiations with CP in an attempt to provide a joint proposal to the Board, but the parties were unable to reach agreement. Instead, the parties each filed separate proposals on March 1, 2021. The principal issue dividing the parties was whether the current successful BNSF/CP interchange of car blocks at Minot could also handle a limited number of unit trains, or whether BNSF should be required to make an un-economic investment in infrastructure

¹ The defined terms used in this Reply are the same as those used in BNSF's New Century Ag Service Proposal filed in this proceeding on March 1, 2021.

(estimated by BNSF at more than \$20 million) solely designed to interchange limited NCA unit train traffic. In addition to the regular interchange of manifest traffic at Minot, BNSF and CP occasionally interchange unit trains at Minot as well – most recently approximately five months ago. BNSF established in its March 1 proposal that more regular interchange of approximately one-to-two unit trains per month at Minot is feasible, efficient, and cost-effective. NCA told the Board that NCA preferred BNSF's proposal to interchange unit trains in Minot for CP haulage to NCA, and that BNSF's proposal more closely complied with the Board's directive. *See Comments of New Century Ag on Railroad Proposals at 3-4, filed March 22, 2021.*

Nine months after the Board received those proposals, and in the wake of CP's proposal to merge with KCS, CP reached back out to NCA and BNSF in an apparent attempt to settle this matter. For the last five months, the Board has held this proceeding in abeyance while the three parties have participated in a series of shuttle diplomacy negotiations over a haulage agreement that would implement the basic premise of the BNSF proposal: the interchange of BNSF unit trains at Minot for CP haulage to NCA. BNSF offered significant concessions through the negotiation process to facilitate a comprehensive settlement that would address NCA's concerns and allow the proceeding to be dismissed. With the unsuccessful conclusion of those negotiations and CP's public filing of the draft Haulage Agreement attached to its "Supplemental Proposal," it is now apparent that CP never had a genuine interest in allowing BNSF to provide NCA with the service that NCA has requested.

As an initial matter, BNSF is seriously concerned about CP's effort to bring into the public domain the private and confidential settlement negotiations of the parties over the past several months. Since CP was unsuccessful in getting an agreement through those negotiations, it has now decided to make public its last proposal. CP disingenuously filed its last "take-it-or-leave-it" settlement proposal in the guise of an independent "private" and "market-based" solution to the parties' disagreement. BNSF never expected a document that evolved in strict confidentiality to be presented as a public proposal for STB action.

In any event, the draft of the Haulage Agreement contains multiple nonstandard terms and conditions that BNSF would not and will not agree to outside of a comprehensive settlement. Indeed, the draft continues to include a number of "poison pill" provisions that are characteristic of CP's lack of seriousness in reaching a mutually agreeable settlement and that run contrary to the Board's directives in *Reopening Decision*.

The most significant, but by no means only, of these "poison pills" is CP's proposal for a six-month term for unit train haulage service. Under CP's proposal,

CP must agree to any future BNSF unit train haulage service after six months and a minimum of six haulage trains, effectively allowing CP to unilaterally terminate the haulage agreement at the end of the trial period.² The Board, NCA, and BNSF would have no assurance that CP would continue the arrangement for the full 15-year term, even if the Minot interchange was as efficient as BNSF promised in the original BNSF proposal. A six-month temporary solution is wholly inconsistent with the Board's order in *Reopening Decision*.

Moreover, giving CP a unilateral right to decide whether to extend the haulage agreement beyond six months would set up BNSF unit train service to NCA for failure. As demonstrated throughout this proceeding, CP does not want the Minot interchange to work. Instead, BNSF believes that CP will be incentivized to disrupt the Minot unit train interchange and then use the trial period mechanism to cancel the haulage agreement and escape any responsibility for complying with the Board's directives in *Reopening Decision*. The draft contains no metrics or measurable factors that the parties could use to determine whether the interchange was working during an initial trial period, reflecting CP's apparent desire to keep its unilateral ability to cease the haulage arrangement after six months. CP claims that the Board, NCA, and BNSF should be mollified by CP's intention "to approach a trial period in good faith" and to "work with BNSF to fine tune the haulage arrangement" to address any issues identified during the trial period. Supplemental Proposal at 6. Instead of a six-month term that can only be extended upon mutual agreement, BNSF believes the better approach is for the two railroads to enter into a longer-term arrangement that still allows the parties to fine tune operations as needed. If BNSF and CP are committed to each other for the long haul, the parties will be aligned in working towards a successful interchange operation rather than using a trial period as an opportunity to demonstrate why the operation is flawed.

Another "poison pill" in the draft is the financial penalty scheme included at Section 3.02 of the draft Haulage Agreement. BNSF would incur significant penalties – calculated on a minute-by-minute basis and potentially totaling hundreds of thousands of dollars – if the interchange of a Haulage Train is delayed by more than ten minutes. The section further provides that CP can suspend the haulage service for six months if an interchange is delayed twice in any six-month period. These types of onerous penalties and remedies are extremely unusual for a haulage agreement between railroads, and BNSF has significant concerns with such terms' inclusion in the draft haulage agreement.

² See Section 9.01 of the draft Haulage Agreement ("The Term of this Agreement shall commence on the Effective Date and remain in effect for an initial trial period of six (6) months and a minimum of six (6) Haulage Trains. Subject to the Parties' mutual agreement at the conclusion of the initial trial period, the Term shall be extended until May 31, 2038.").

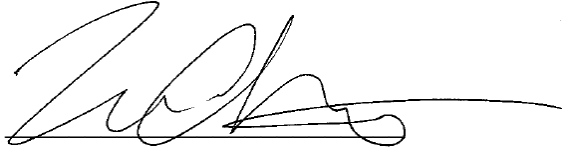
BNSF remains committed to prioritizing the movement of the unit trains through the interlocker at Minot, thereby reducing any wait times. BNSF expects this move to take approximately one hour in normal operating conditions. BNSF would even be willing to move the interchange location from CP's tracks to BNSF's tracks. The inclusion of extremely high one-sided penalties for only ten minutes of delay with no basis for measurement or apportionment of blame for that delay, along with the trial period proposed, is not acceptable to BNSF.

CP further claims that the Board should now terminate this proceeding because CP has made "private, market-based solutions" available to BNSF and NCA, including the Minot interchange trial period and the options that would require cost-prohibitive capital improvements. *See* Supplemental Proposal at 6-7. CP's proposals are neither "private" nor "market-based." The negotiations were not successful, and CP's proposed "solution" contains a number of provisions that are inappropriate and unacceptable. Indeed, CP wants to have it both ways – CP claims that no further action by the STB is needed because CP has proposed a "private" arrangement, but that arrangement is unacceptable to the parties and could only result from an STB decision. The arrangement would also be contrary to the STB's own objectives. Notwithstanding CP's claims, the contract itself would give CP the incentive and ability to continue to restrict competitive service to NCA after six months.

The Board should see through CP's self-serving attempt to stave off a decision from the Board regarding the March 1, 2021 proposals while CP seeks Board approval for its proposed merger with KCS. As NCA has acknowledged, the BNSF proposal for a long-term agreement to interchange unit trains at Minot for CP haulage to NCA most closely comports with the Board's direction in the *Reopening Decision* to provide NCA "with a level of service commensurate with the broad representations underlying the Board's *2007 Decision*." *Reopening Decision*, slip op. at 6.

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Respectfully submitted,

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

Peter W. Denton

Attorney for BNSF Railway Company

cc: David Rifkind
Tom Wilcox
All parties of record

CERTIFICATE OF SERVICE

I certify that I have, on June 27, 2022, served copies of this letter upon all parties of record in this proceeding, by electronic mail.

A handwritten signature in cursive script that reads "Sally Mordi". The signature is written in dark ink and is positioned above a horizontal line.

Sally Mordi

Attorney for BNSF Railway Company