

**BEFORE THE UNITED STATES
SURFACE TRANSPORTATION BOARD**

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

COMMENTS OF NEW CENTURY AG ON CP’S SUPPLEMENTAL PROPOSAL

Pursuant to the Surface Transportation Board’s (“Board” or “STB”) procedural rules and the Decision served in this proceeding on December 29, 2020 (“Reopening Decision”) New Century Ag (“NCA”) hereby files these comments on CP’s Supplemental Proposal filed in this docket by CP¹ on June 6, 2022. For the reasons set out herein, NCA continues to believe that BNSF’s March 1, 2021 New Century Ag Service Proposal (“BNSF Proposal”) best implements the Board’s findings in the Reopening Decision. It is also still NCA’s preference that BNSF and CP enter into a long-term arrangement that governs the interchange of BNSF unit trains at the railroads’ interchange tracks in Minot, North Dakota. However, to the extent the railroads and the Board elect to utilize a “trial period” as demanded by CP in its Supplemental Proposal, NCA points out in these Comments some considerations and issues that would have to be taken into account. Finally, NCA disagrees with CP that the submission of the Supplemental Proposal

¹ For convenience and brevity NCA uses in these Comments the same defined terms as the parties and the Board have used throughout this proceeding.

should result in termination of this proceeding, and NCA reaffirms that the Board must retain jurisdiction over this matter.

I. INTRODUCTION

The Reopening Decision directed BNSF and CP 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.”² As to “the broad representations” on which the commensurate level of service is to be based, the Board explained that it was referring to:

broad representations in the joint petition that competitive options would be preserved for the two active customers on the Joint Line (including NCA) and that competition would be enhanced for the active customers on the 9.96-mile BNSF line. The joint petition also asserted that ‘BNSF will continue to provide common carrier service to all shippers on the Conveyed Lines . . . and there will be no material change in the level or nature of service . . . Existing customers . . . will retain the services of both BNSF and [CP] . . .’ (Joint Pet. 13-14 July 16, 2007). However, since the Board’s grant of authority, the record indicates that CP has limited the quantity of BNSF cars it would accept and it has entirely refused BNSF unit trains in interchange, which would enable NCA to reach markets not served by CP.³

The Board further explained that “[b]ased on the breadth of the representations made prior to the 2007 Decision, the Board could properly have expected that CP and BNSF would work to ensure shippers would continue to be served in an equitable manner as market conditions change.”⁴ The Board clearly determined that this continuing service as market conditions changed specifically encompassed the preservation of BNSF’s ability to “compete on a reasonable basis” with CP by being able to offer NCA unit train service and manifest service without limitations on

² Reopening Decision at 6.

³ *Id.* at 5, citations omitted.

⁴ *Id.* at 6.

the number of carloads.⁵ The Board concluded that “[w]hen CP’s service restrictions are combined with the normal developments in market conditions . . . that have led to NCA’s request for a type of service that was not at issue at the time of the transaction [i.e. BNSF unit train service], the result is a change in circumstances sufficient to justify reopening this proceeding.”⁶

The Reopening Decision directed CP and BNSF, on or before March 1, 2021, to “either submit their proposal to the Board or notify the Board that no agreement could be reached.”⁷ The decision also provided NCA with an opportunity to submit comments on the joint proposal had the carriers submitted one. The Reopening Decision further stated that if the railroads were “unable to reach an agreement, or if the proposed revisions would not adequately address the Board’s competitive concerns . . . the Board will consider further action in a future decision, including imposing a service order should it be found necessary.”⁸

On March 1, 2021 the railroads neither jointly informed the Board of a joint plan they had negotiated to implement the Reopening Decision, nor did they jointly notify the Board that they could not reach agreement. Instead, each railroad separately informed the Board that they could not reach agreement, and each submitted its own proposal. NCA provided comments on the two proposals. NCA informed the Board that it believed the BNSF Proposal to utilize the haulage arrangement between CP and BNSF to include intact unit trains⁹ interchanged between the carriers in Minot, North Dakota more closely complied with the Board’s directive in the Reopening Decision to address “how NCA will be provided with a level of service commensurate with the broad representations underlying the Board’s 2007 Decision.”

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ NCA has defined “unit trains” to mean trains containing 100 or more railcars.

As the CP Supplemental Proposal describes, the issue of how CP and BNSF will comply with the Reopening Decision has remained unresolved since March of 2021. It also summarizes how CP approached NCA in December 2021, and then subsequently also included BNSF, to engage in further negotiations to attempt to reach a resolution of the dispute. Those discussions were not successful, and the submission of CP's Supplemental Proposal closely followed the termination of those discussions. The fact that the Supplemental Proposal was submitted by CP after the unsuccessful conclusion of settlement discussions means, by definition, that the issue of how CP and BNSF will comply with the Reopening Decision remains unresolved and squarely before the Board. Consistent with the Reopening Decision, NCA is providing its comments on CP's Supplemental Proposal.

II. COMMENTS

NCA continues to believe that the BNSF Proposal, as supplemented by NCA's individual traffic requirements discussed on Pages 5-6 of its comments on the railroads' proposals¹⁰ would best comply with the Reopening Decision's directive to CP and BNSF, and that the Board should

¹⁰ *E.g.*, CP and BNSF would interchange 100+ car unit trains for both outbound grain and inbound fertilizer, in addition to the continued provision of manifest service under the Haulage Agreement. NCA would initially limit its unit train requests to a maximum of two 100+ car trains per month that would be allowed to interchange empty in Minot and be pulled to the Noonan Terminal Facility loop track for loading and return to Minot. If an allocated train was not tendered during a month, the ability to request the train would not carry over to the following month. As such, the initial program would place a cap of 24 on the 100+ car trains for the calendar year and would result in less than 24 trains if fewer than two are shipped in a given month. However, NCA also stated that the plan should clarify that if a 100+ car train is ordered for delivery in a certain month but does not arrive until the following month, it would count as a unit train for the month in which it was intended to be used. Manifest grain car traffic and fertilizer car traffic would continue to also be provided to NCA by CP and/or BNSF. In regard to fertilizer, NCA requested that its monthly unit train allocation could be used to substitute a fertilizer shuttle train in lieu of grain as necessary and after providing appropriate notice to the railroads, despite the fact that fertilizer shuttle trains are typically smaller than 100+ cars.

require BNSF and CP to implement the BNSF Proposal with NCA's requested modifications and retain jurisdiction over its implementation for an indefinite period. This being said, NCA understands and appreciates CP's desire for a trial period before CP and BNSF enter into a long-term arrangement, and NCA is willing to participate to the maximum extent possible in such a trial, at reasonable cost to NCA, to ensure its success should one occur. But NCA also understands and appreciates why BNSF would prefer that the railroads enter into a long-term commitment from the start (as that is NCA's preference), and BNSF's wariness of CP's motives and willingness to conduct the trial period in good faith and to try to make the arrangement successful. It would not serve NCA's interests for the trial period to fail because of the inability of the railroads to cooperate and work with each other to provide the BNSF unit train service NCA desires on a sustained basis. NCA is therefore somewhat caught in the middle.

It appears to NCA to be highly unlikely that CP and BNSF will reach common ground on the terms and conditions for a trial period and a longer-term arrangement, as well as other contractual terms such as proposed monetary penalties ostensibly associated with CP's desire to keep its main line and yard tracks clear in Minot. However, if such agreement was made and/or the Board adopted a trial period in response to the Supplemental Proposal, the Board should be cognizant of the fact that a trial process would be complicated by the realities of the ways that NCA, BNSF, and CP conduct their respective businesses in the overall agricultural commodity markets.

More specifically, the long-term nature of marketing the agricultural commodities NCA receives from its members, combined with the long-term nature of CP's and BNSF's shuttle train programs, will require any trial period to be timed correctly and coordinated between all three parties. For example, because of the realities of the agricultural sales and rail transportation

markets, and because this dispute has not yet been resolved by the Board, NCA had to commit to the CP shuttle train program in May of 2022 to transport its expected volumes. This commitment runs from September 2022 to August 2023. Consequently, unless NCA (1) realized a large surplus of grain and (2) it made special arrangements with BNSF to transport the surplus by unit train – an extremely expensive proposition in normal market conditions - a trial period based on a certain amount of time might be difficult to execute. The trial period would also depend on the extent to which NCA shipped its members’ production to BNSF destinations. Because of the timing considerations and market uncertainties, NCA believes a trial could potentially be conducted in six months, but that a more realistic measure would be the number of trains in the trial, as it could take longer than six months to have six BNSF unit trains fully participate in the trial.

In any case, whether the Board adopts the BNSF Proposal or some version of the Supplemental Proposal, the Board must retain jurisdiction over this matter to oversee the implementation of the agreed upon arrangement. CP’s suggestion that the submittal of its Supplemental Proposal should result in the termination of this proceeding¹¹ misreads the Board’s Reopening Decision. In that decision, the Board granted NCA’s Petition to Reopen “for consideration of further action.”¹² It then directed the two railroads to engage in negotiations and inform the Board of how they intended to provide NCA “with a level of service commensurate with the broad representations underlying the Board’s 2007 Decision.” Over 18 months later the railroads have still not been able to fashion a mutually acceptable agreement on how to comply with the Reopening Decision, and so the Board’s statement that it “will consider further action in a future decision, including imposing a service order should it be found necessary” is still

¹¹ Supplemental Proposal at 3.

¹² Reopening Decision at 6.

operable.¹³ While CP states that its Supplemental Proposal is “based on BNSF’s own March 1, 2021 proposal,” CP’s submittal nevertheless contains numerous provisions, such as the trial period and penalty provisions, that are not in the BNSF Proposal and would significantly change it. Consequently, CP is not correct that “[t]here is nothing more for the Board to do in this proceeding.”¹⁴

Finally, NCA reiterates its prior point that, while the BNSF Proposal as supplemented by NCA’s requests is most consistent in the near term with the broad representations made by BNSF and CP underlying the 2007 Decision and the conclusions and findings of the Reopening Decision, there may be other ways in the future for BNSF and CP to achieve this result. It is for this additional reason that the Board should retain jurisdiction over this overall matter to review and approve, as necessary, additional options for fulfilling the intent and purpose of the 2007 Decision and the Reopening Decision if they make sense operationally, such as adding sidings to existing joint line tracks, or other cost-effective measures.

III. CONCLUSION

For all the reasons set forth above, the Board should (1) accept the BNSF Proposal as supplemented by NCA’s requests as complying with the Reopening Decision, (2) direct BNSF and CP to begin interchanging unit trains at Minot, and (3) require the parties (BNSF, CP, and NCA) to submit periodic status reports on the implementation of the interchange operations at Minot. If the Board considers accepting the CP Supplemental Proposal, NCA requests that the Board take into account the issues and concerns raised herein concerning a trial period. Finally, any final decision in this proceeding should clarify that, while interchanging unit trains at Minot is the most

¹³ *Id.*

¹⁴ Supplemental Proposal at 7.

cost efficient and operationally feasible way in the near term to implement the directives in the Reopening Decision based on current traffic levels and other current circumstances, there may be other ways in the future for BNSF and CP to comply with those directives. For this reason, the Board should retain jurisdiction over this matter to oversee the implementation of the plan eventually established, and to review and approve, as necessary, additional options for fulfilling the intent and purpose of the 2007 Decision, the railroads Haulage Agreement, and the Reopening Decision if they make sense operationally and are economically feasible.

Respectfully submitted, .



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CERTIFICATE OF SERVICE

I hereby certify that, on this 27th day of June 2022, a copy of the foregoing Comments of New Century Ag on CP's Supplemental Proposal was served by email on all parties on the official Service List for Finance Docket No. 35068.



Thomas W. Wilcox