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May 20, 2019

VIA E-FILING

Cynthia Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423-0001

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:

On April 26, 2019, New Century Ag (“NCA”) filed a letter responding to questions raised by the Board’s April 22, 2019 Decision (the “Decision”) in this proceeding. And, the Soo Line Railroad Company d/b/a Canadian Pacific (“CP”) submitted its response to the Decision on May 15, 2019 (the “May 15 letter”). Unfortunately, CP’s response contained a number of material factual misstatements that need to be addressed so that the Board is not left with an inaccurate record of the issues, and this letter is intended to correct those misstatements.

For example, CP wrongly states that the Board advised that other remedies “*would be* ‘more appropriate’” than reopening the 2007 Exemption. Of course, the Board said no such thing, instead only questioning whether the “serious concerns” raised by NCA might also raise issues under the competitive access, common carrier and/or unreasonable practice provisions of the Act and regulations.

Second, CP's assertion that it has been providing "reliable service to NCA consistently meeting their demand for rail service" is self-serving and belied by CP's witnesses' own verified statements. There, and as just one example, CP conceded that it was unable to provide service for certain cargo destined to the Pacific Northwest ("PNW") and that it was only able to provide competitive service for traffic moving to eastern destinations. *See* the verified statements of David Wood, at pp. 4-5 and Tyme Wittebrod.

Third, NCA's allegation that CP has refused to provide it with a second, badly needed shuttle train (*see* Michelson verified statement, at ¶48) was unrebutted by CP in its reply evidence, so its May 15 letter is not credible. Regardless, it was that refusal which was one of the reasons that compelled NCA to initiate this litigation in the first place, as it was no longer able to move all of the grain in its elevators or fully compete in its marketplace. CP now belatedly asserts that NCA can obtain additional shuttle train service from CP "but has opted not to avail itself of those options." That is simply incorrect, as is evidenced by the attached email from that same witness David Wood, dated July 27, 2018, responding to NCA's request for an additional shuttle train (referred to here as "DT"), by stating:

As discussed, the word we have been given is that we are unable to offer any additional DT capacity into the market-place beyond what we had for the previous program year (17/18).

(*See* Attachment 1.) Consequently, while refusing to let BNSF fill the void, CP now uses its May 15 letter to try to blame NCA for its own service failure with a flatly erroneous statement.

Fourth, in attempting to rebut NCA's complaint about the artificial car limits it imposed on BNSF cars, CP apparently now contends that the 2007 Haulage Agreement and limits established in 2008 restricted any service to NCA to the volume of trains that existed in 2007. But the word "existing" in sections 2.01 and 2.04 of the 2007 Haulage Agreement cannot fairly be read as official sanction for freezing NCA's service at 2007 levels in view of the more expansive service requirements of section 2.05 and 4.04, its commitments in the 2007 Joint Petition to provide competitive service and its acquiescence in NCA's \$40 million capital expansion.

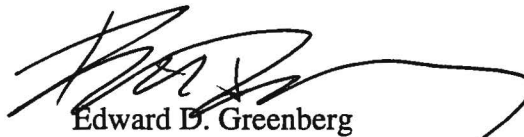
Fifth, CP's May 15 letter portrays its renewal of the 2007 Haulage Agreement as a "voluntary" action "extending the 2007 transaction's voluntary competition mitigation measure." Suffice it to say that there was nothing "voluntary" about this renewal, as flawed as it was. Neither shippers or the Board would have approved the transaction in 2007 but for the commitment that CP and BNSF made to continue to provide competitive rail service through a haulage arrangement in lieu of direct service by both carriers. If CP had refused to renew the arrangement, the entire basis for granting the 2007 exemption would have been removed.

Sixth, CP mischaracterizes the relief NCA requests here as seeking only to unwind the 2007 transaction or impose new conditions. To the contrary, NCA requests only the proceeding be reopened to enforce the competitive conditions the carriers originally proposed and that the Board imposed. New conditions or revocation of the exemption would be necessary only if CP refuses to honor the commitments it made in 2007.

Finally, NCA is confused about CP's response on the topic of Board-sponsored mediation. On the one hand, CP claims it has "no interest" in negotiating again with BNSF - - thus disregarding the fundamental point that the conditions imposed by the Board on both carriers were meant to protect competitive service to NCA - - and that mediation is not proper in any event in such a proceeding, while on the other it states a willingness to engage directly with NCA - - even though past discussions on these issues were so unproductive that NCA was compelled to file the petition initiating this matter.

NCA has already indicated its willingness to engage mediation if both CP and BNSF are willing to participate in good faith. If CP is unwilling to participate in a mediation process in good faith with BNSF at the table, it is unlikely that any mediation would resolve the basic issue of how both railroads will honor their dual obligations to provide competitive service to NCA. Without CP's willingness to include BNSF in mediation, NCA believes that there would be no reason for the Board to pursue that avenue, in which case the Board should instead decide the issues presented by the pleadings and verified statement on the current record.

Respectfully submitted,


Edward B. Greenberg
Attorney for New Century Ag

cc: All parties of record

ATTACHMENT 1

From: "David Wood" <David_Wood@cpr.ca>
Subject: RE: CP Shuttle Freight
Date: Fri, July 27, 2018 11:27 am
To: "cncoop@nccray.com" <cncoop@nccray.com>

Lynn,

Just following up on our conversation.

I took your request forward to our team and reiterated your need for additional DT freight for '18/19.

As discussed, the word we have been given is that we are unable to offer any additional DT capacity into the market-place beyond what we had for the previous program year ('17/18).

Thank you

Dave Wood

Regional Account Manager – Sales

T 701-492-2934

C 701-361-3532

E david_wood@cpr.ca



From: cncoop@nccray.com <cncoop@nccray.com>
Sent: Thursday, July 12, 2018 9:05 AM
To: David Wood <David_Wood@cpr.ca>
Subject: CP Shuttle Freight

This email did not originate from Canadian Pacific. Please exercise caution with any links or attachments.

Dave Wood,

I wanted to check back with you on our conversation from the morning of June 29, 2018 regarding New Century Ag's need for adding an extra shuttle for CP's 2018/2019 marketing year. 1 shuttle for NCA's 2018 harvest will restrict our bushel handle which will definitely affect NCA's market share along with DMVW RR's! We are coming off of the 2017 drought year where the need for just 1 shuttle between our 2 shuttle loading facilities was sufficient to handle that crop. However, it looks like an average to above average crop for the 2018/19 year is right around the corner and the need for more freight is a necessity for New Century Ag's livelihood by providing a competitive market for both our Westby and Noonan locations. Our farmers will not wait to market their grain and will find other facilities to deliver to, which are primarily BNSF locations in our trade area! I have been getting asked by the Board of Directors of NCA if we have enough shuttle freight booked for our 2018 harvest to move our patron's grain, and I would like to provide them with a response that is suitable to move what appears to be a good crop, as well as to provide an opportunity for the farmers and the elevator to be competitive with the rest of the industry. In closing, I would like the CP RR to further consider this matter and reply back so I can have an answer for NCA's Board of Directors and our Grain Staff.

Lynn Michelson
General Manager
New Century Ag

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Attachments:

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Size: 21 k
Type: image/png
Info: image002.png
