

BEFORE THE
SURFACE TRANSPORTATION BOARD

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STB Docket FD 35068

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

SOO LINE RAILROAD COMPANY’S
REPLY TO PETITION TO REOPEN

Pursuant to the 49 C.F.R. § 1104.13, Soo Line Railroad Company d/b/a Canadian Pacific (“CP”) submits this reply in opposition to New Century Ag’s (“NCA”) Petition to Reopen (“Petition”) filed December 20, 2018.¹

INTRODUCTION

Eleven years after the Board’s decision in this proceeding, New Century Ag (“NCA”) seeks to reopen or, in the alternative, to revoke the exemption under which CP acquired full ownership of the rail line between Crosby and Lignite Junction, ND (the “Joint Line”). Reopening a proceeding involving a minor transaction eleven years after consummation is an extraordinary request for relief. Even more so here because NCA enthusiastically supported the transaction in 2007 and has been one of the chief beneficiaries of that transaction through improved service and enhanced competition.

In making this request, NCA appears to have forgotten the conditions on the Joint Line in the years prior to 2007 that precipitated the transaction. Track maintenance issues plagued

¹ This Reply is supported by the verified statements of Chuck Hubbard (“Hubbard V.S.”), David Wood (“Wood V.S.”), Tyme Wittebrood (“Wittebrood V.S.”) and Will Wangerin (“Wangerin V.S.”).

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freight operations and resulted in frequent embargoes and poor service. Uneconomic and inefficient operations hamstrung competition. Indeed, BNSF initially wanted to abandon its interest in the line, which would have resulted in a total loss of intermodal competition. The 2007 transaction addressed both service and competition in a way that has been enormously positive for NCA and other customers on the lines conveyed. Since the Board approved the transaction, CP has better maintained the track and CP has handled BNSF cars in haulage service, allowing CP and BNSF to compete vigorously for the increased freight volumes on the line. NCA does not really wish for a return to the conditions that existed before the transaction. Instead, what it actually seeks are benefits from the transaction that were never promised and that NCA could have sought at the time.

Specifically, NCA wants the Board to alter or upend the 2007 transaction in order to gain access to BNSF unit trains service. NCA wants unit train service now because seven years after the transaction and four years before filing its petition, NCA invested in its facilities to accommodate unit train service. However, the haulage agreement (which was part of the public STB record), provides that CP will handle BNSF traffic in manifest service, which was the type of service that NCA was receiving in 2007. The haulage agreement also provides it could be terminated as early as 2017, which would have ended NCA's direct access to BNSF entirely. NCA knew of these facts when it supported the transaction in 2007 and made its investments in 2014. In any event, NCA's internal business decisions to expand its facilities are not a legitimate basis for reopening.

Reopening an administratively final decision involving a minor transaction consummated more than a decade ago is unprecedented. It would undermine the certainty and principles of fairness that are necessary for such transactions to occur and are critical to achieving the Rail

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Transportation Policy. Reopening this transaction would have a chilling effect on railroads' willingness to enter into future transactions as well as to invest capital in improving lines acquired in years past. Further, it would discourage use of haulage agreements, which are an important tool for preserving rail competition in line sales and other transactions. In short, reopening this proceeding would place an intolerable burden on the exemption process.

The time for certainty in this proceeding occurred 11 years ago. There is neither a legal nor a factual basis for undoing that certainty. Accordingly, the Board should deny the Petition in all respects.²

STATEMENT OF FACTS

Service to all customers on the Joint Line has improved dramatically since CP acquired full ownership. In September 1959, BNSF's predecessor took responsibility for maintenance of the Joint Line. Hubbard V.S. at 2. Over the years, BNSF moved only marginal volumes of traffic from the line and had decreasing economic incentive to invest in maintaining the infrastructure. Throughout this time, the line was plagued by frequent outages and embargoes caused by the poor condition of the 32 miles of track between Crosby and Lignite Jct. *Id.* at 3. By 2004, BNSF was ready to call it quits and informed CP that "We do not want Crosby-Lignite back. We do not want to own it anymore, much less maintain it, that's why we will explore our abandonment options if we cannot come to some kind of accommodation here." *Id.* In 2007, CP acquired BNSF's interests in the line. The transaction resulted in rehabilitation of the line, ensured that it would be properly maintained, and enabled more efficient rail operations. This in turn has resulted in enhanced competition and improved rail service to customers on the lines conveyed, including NCA.

² In its Petition, NCA asks the STB to order CP to disclose confidential supplemental haulage agreement recently executed between CP and BNSF. CP has attached a copy of that agreement as Hubbard V.S. Ex. F. Accordingly, NCA's request is moot.

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A. Prior to the 2007 Transaction, BNSF Lost Interest in Continuing to Maintain or Own the Joint Line.

In 1959, BNSF's and CP's predecessors owned parallel rail lines in northwestern and southeastern North Dakota. Hubbard V.S. at 2. To promote greater operating efficiency, the parties agreed that CP's predecessor would abandon its redundant rail line between Crosby and Rival, ND and BNSF's predecessor would abandon its redundant rail line between Hankinson and Geneseo, ND. CP's predecessor received a one-half undivided interest in the Crosby-Lignite line and BNSF's predecessor received a one-half undivided interest in the Hankinson-Geneseo line. Each railroad assumed dispatching and maintenance responsibilities for one of the lines. BNSF's predecessor was responsible for the Joint Line at its sole expense. *Id.* In 1990, the parties amended the 1959 Agreement to permit Dakota, Missouri Valley and Western Railroad, Inc. ("DMVW") to operate over the Joint Line pursuant to its lease of other CP lines, including CP's line between Crosby and Whitetail, Montana (the "Whitetail Line"). The Whitetail Line is only accessible via the Joint Line and provides service to NCA elevators at Ambrose and Fortuna, ND, and at Westby, MT. *Id.* at 2-3.

In the spring of 2004, BNSF approached CP concerning BNSF's intention to relinquish its one-half ownership interest in the Joint Line. Hubbard V.S. at 3. By then, BNSF was moving only a small amount of traffic on the Joint Line and had little incentive to continue to meet its maintenance obligations. As a result, the condition of the line deteriorated significantly and was subject to frequent and lengthy outages. The parties discussed several options, including a sale or lease of BNSF's interest to DMVW, a direct sale to CP, or BNSF's abandonment. *Id.*

While CP and BNSF discussed the terms of a potential sale, the line continued to be plagued with service issues caused by the deteriorated track conditions. Hubbard V.S. at 3. CP's inspection of the Joint Line in the spring of 2004 revealed the extent of its deteriorated condition.

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34 of the 41 grade crossings needed rebuilding, with four requiring complete replacement; more than 17 miles of track consisted of short segments of 80# jointed rail which caused extreme tie wear at the joints; and 28,803 failed ties. Hubbard V.S. at 3-4. In addition, because expansion of short unanchored rail segments made operations too dangerous, BNSF's timetable restricted operations on the Joint Line between 10 a.m. and 9 p.m. whenever the air temperature exceeded 85 degrees. *Id.* at 4.

In January 2006, a DMVW train derailed at the Crosby yard, which caused significant damage to both main line switches. Hubbard V.S. at 4. Instead of replacing the damaged switches, BNSF bypassed the switches by straight-railing the main line through Golden Plains Ag's elevator tracks and routing all Joint Line traffic over the elevator's unloading pit. Despite the unsustainable condition of the Joint Line and its maintenance obligation, BNSF advised that it intended to perform no additional maintenance of the line. *Id.* Then, in April 2006, BNSF again embargoed the Joint Line, completely preventing service to CP's customers on the Whitetail Line including Farmer's Elevator of Fortuna (Farmer's merged with Golden Plains Ag to become NCA). Reportedly, BNSF expected to have the Joint Line in operation by May 5, 2006. *Id.* On May 8, 2006, however, DMVW notified BNSF that approximately ten car-lengths of track in Noonan were being held together by just one or two bolts. Hubbard V.S. at 5. Instead of fixing the mainline track, BNSF lined and spiked the switches to the elevator track, diverting traffic from the main line through the customer's facility. *Id.*

Similar problems continued the following year. On March 16, 2007, BNSF issued another embargo on the Joint Line, which remained in effect until at least April 24, 2007. Hubbard V.S. at 5.

B. CP's Acquires the Joint Line, Resulting in More Efficient and Better Rail Service, and Enhanced Competition.

Against this backdrop, CP and BNSF negotiated CP's acquisition of BNSF's ownership interest in the Joint Line. CP and BNSF executed a purchase and sale agreement for the Joint Line on June 29, 2007, and filed a joint petition for exemption with the STB on July 16, 2007 ("Joint Petition"). NCA and other shippers on the lines filed letters supporting the transaction. NCA's General Manager Richard Larsen wrote, "I strongly encourage the Surface Transportation Board to expedite its approval of the proposed transaction." Joint Petition, Ex. 5. Likewise, the other affected shippers, CHS and Lodgepole, both of which gained competitive access to CP as a result of the transaction, urged the Board "to approve the proposed transaction as soon as possible." *Id.*, Exs. 3, 4.

The STB authorized the transaction by decision served on September 7, 2007. In doing so, the Board concluded that the exemption promoted the Rail Transportation Policy of 49 U.S.C. § 10101:

[A]n exemption will promote that policy by minimizing the need for Federal regulatory control over the proposed transaction [49 U.S.C. 10101(2)], promoting a safe and efficient rail transportation system [49 U.S.C. 10101(3)], fostering sound economic conditions in transportation [49 U.S.C. 10101(5)], reducing regulatory barriers to entry into and exit from the rail industry [49 U.S.C. 10101(7)], encouraging efficient management of railroads [49 U.S.C. 10101(9)], and promoting energy conservation [49 U.S.C. 10101(14)].

Soo Line R.R. Co. d/b/a Can. Pac. Ry.—Acquisition and Operation Exemption—BNSF Ry. Co., FD No. 35068, slip op. at 4 (STB served Sept. 7, 2007) ("2007 Decision"). Specifically, the Board cited the efficiency gains and service improvement that would result from handling BNSF traffic "in existing DMVW or CPR trains to and from Minot" which "will eliminate the redundant BNSF trains currently moving over the parallel BNSF line." *Id.* The Board also cited the efficiency and

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economic gains from having DMVW assume the maintenance responsibilities. *Id.* And the Board noted the enhanced service for existing customers and BNSF's and CP's improved ability to compete that would result from DMVW's plan to make repairs to address the Joint Line tendency to flood and resulting line embargoes. 2007 Decision, slip op. at 4.

The Board concluded that "regulation of the transaction was not necessary to protect shippers from the abuse of market power." As the Board explained,

The proposed transaction merely represents a change in the ownership of the rail lines that are being conveyed. There will be no loss of rail competition. CPR will continue to operate as it does today. Through the Haulage Agreement, BNSF retains the right to service all customers on the Conveyed Lines. Thus, BNSF will continue to provide rail service to all shippers on the Conveyed Lines at competitive rates and there will be no material change in the level or nature of service provided to those shippers. All of the customers will be able to ship their products as they have previously and two of the customers will gain additional options. The bridge traffic that currently moves over the Joint Line will continue to move as in the past. Existing customers on the Joint Line will retain the services of both BNSF and CPR, while two customers on the BNSF Line not only will retain BNSF service but will gain access to CPR, and thus will have an enhanced competitive position. As a result, the proposed transaction will enhance intramodal competition.

2007 Decision, slip op. at 4-5.

In fact, the 2007 transaction marked a turning point for rail service on the Joint Line. Since CP acquired full ownership, the Joint Line has only been out of service for unscheduled maintenance once. Hubbard V.S. at 6. That outage occurred in the spring of 2011 when unusually high snowfall and soft track conditions caused CP to issue an embargo. *Id.* And with the exception of system-wide service issues in 2014, service on the Joint Line has been dependable and consistent. Wood V.S. at 2. Given the improved track conditions, CP and BNSF have competed vigorously against each other and intramodal competition has been enhanced. Further, except to the extent that service improved, there has been "no material change in the level or nature of service

provided” to shippers due to the transaction. Existing customers continue to enjoy access to both CP and BNSF and the ability “to ship their products as they previously have,” *i.e.*, in manifest train service. And they continue to have this ability notwithstanding the fact that the transaction as presented to the STB in 2007, expressly provided the railroads the right to terminate their haulage arrangement at the beginning of 2017.

C. The Haulage Agreement Preserved Competition Subject to its Terms and Conditions.

During negotiation of the sale transaction, CP and BNSF initially considered handling traffic after the sale by joint linehaul divisions, *i.e.*, shippers on the line would have been sole-served by CP. Hubbard V.S. at 6. Ultimately, the parties decided that BNSF would retain its current access to customers via a haulage agreement. *Id.* BNSF shared with CP its July 2004 to June 2005 traffic volumes on the lines to be conveyed. According to BNSF’s data, its total volume on the lines for that period was ■■■ carloads, or an average of ■■■ carloads per month. *Id.* BNSF’s traffic for this period included ■■■ carloads for Golden Plains Ag facilities (now NCA) at Crosby and Noonan.³ *Id.*; Hubbard V.S. Ex. C. All traffic moving on the Joint Line at this time was manifest traffic. Hubbard V.S. at 6. Based on this information, the parties did not contemplate handling BNSF unit trains on the Joint Line. *Id.*

Accordingly, the Haulage Agreement provides for movement of BNSF cars only in *existing* CP train service, using CP and/or DMVW crews and equipment, and subject to available capacity:

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.

³ According to NCA, BNSF’s volumes during this period were higher, by a factor of 10, than those BNSF reported to CP. *See* Michelson V.S. ¶ 31. However, NCA has produced no support for its pre-2007 traffic data.

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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.

...

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

The Haulage Agreement states that CP would generally provide BNSF the same level of service as CP's own traffic of the same type.

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.

Haulage Agreement, § 4.01 (Emphasis in original).

The Haulage Agreement includes an express term and termination provisions. Those provisions provide that the agreement could be terminated by either party after January 1, 2017. Specifically,

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

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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 Conveyed Lines.

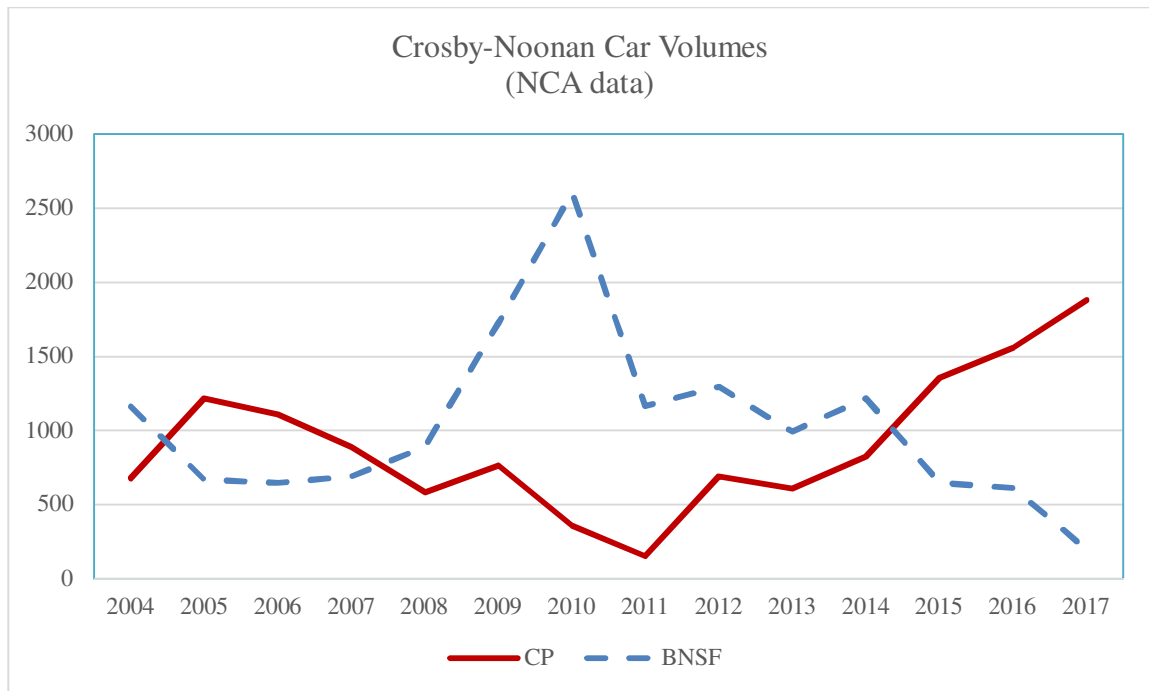
Under the Haulage Agreement, the parties exchange BNSF haulage traffic in Minot, ND. CP delivers the haulage traffic to and receives such traffic from DMVW at CP's interchange tracks at Flaxton, ND. Hubbard V.S. at 7. Pursuant to its lease with CP, DMVW provides local service to the Joint Line, the Lignite segment, and the Whitetail Line. CP's interchange facilities at Minot and Flaxton are limited and located on a capacity-constrained corridor. *Id.*

Following CP's acquisition of the Joint Line, CP contracted with DMVW to lease, maintain and operate the line. Consistent with the representations made in the Joint Petition, DMVW followed through on the plan to make repairs to address the Joint Line's "tendency to flood in the spring which has forced BNSF to embargo the track until repairs can be made." Joint Petition at 12; Hubbard V.S. at 5. DMVW and CP have continued to maintain the Joint Line.

Immediately following the transaction, NCA and BNSF took full advantage of the improved track conditions and the Haulage Agreement access. BNSF's haulage volumes quickly exceeded the volumes that CP expected based on BNSF's prior representations. Hubbard V.S. at 7. Instead of approximately ■ carloads a month, CP provided haulage for ■ BNSF carloads in October 2007 and ■ BNSF carloads in November 2007. *Id.* NCA quickly shifted much of its traffic from CP to BNSF. As illustrated in the chart below, following the transaction, NCA's Crosby and Noonan volumes, and BNSF's market share of those volumes⁴ soared.

⁴ See Michelson V.S. at ¶ 31. NCA's post transaction data appears to be generally consistent with CP's own data. However, its pre-transaction data for BNSF volumes is inconsistent with the 2004-2005 data BNSF provided CP during negotiations. NCA has not provided any support for its pre-transaction data.

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This surge in BNSF haulage traffic overwhelmed CP's capacity. In early December 2007, CP informed BNSF that the increased volumes were causing congestion at Flaxton and Minot and affecting service. Hubbard V.S. at 7. Nevertheless, the haulage volumes for Crosby and Noonan continued to rise through 2010. In June 2008, CP notified BNSF that due to "the unexpected high volume of traffic off of this line after purchase, CP encountered a high number of service failures and capacity related operational issues during Q4 2007 with your customers and CP operations." *Id.* Accordingly, CP requested that BNSF limit its haulage traffic to 50 cars in each direction (*i.e.*, a total of 100 loaded and empty cars) per week beginning September 1, 2008.⁵ *Id.* at 7-8; Hubbard V.S. Ex. D.

These capacity issues became particularly acute again in 2014. Following the system-wide, weather-related service failures that plagued the Chicago terminal during the winter of 2013-14 (affecting both CP and BNSF operations), BNSF continued to tender more cars for haulage service

⁵ NCA incorrectly alleges that CP has restricted BNSF traffic to 25 cars per week. Petition at 8; Michelson V.S. at 23, 27.

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than CP's existing service could accommodate. Hubbard V.S. at 8. In June 2014, CP again wrote to BNSF requesting that BNSF observe the limits on haulage service CP could provide:

The haulage traffic moving in this corridor on CP continues to be a concern. The Minot to Lignite Jct. corridor remains in a Canadian Pacific capacity constrained corridor. Recently BNSF tendered a ■ car single movement for haulage in this lane. The volume could not be accommodated for interchange at Minot and BNSF moved the cars to Bowbells and exchanged the cars to CP through a jointly served industry. This type of move is unacceptable and can't continue to move in this manner.

The exchange trackage at Minot can't accommodate movements of this size in addition to the other traffic interchanging at Minot. The 2007 North Dakota Haulage Service Agreement commits CP to handle BNSF Haulage Cars in *existing train service*. CP is unable to accommodate ■ cars of BNSF haulage on a single day destined between Lignite and Crosby in existing train service.

CP again requests that BNSF observe the weekly 50 car maximum and additionally requests that BNSF limit the daily haulage volume to no more than 15 cars per day. This restriction is based on CP's current available capacity. Observing this restriction will minimize CP-BNSF Minot Interchange capacity related operational issues. The restriction will also promote fluidity and minimize service failures to BNSF haulage business in this corridor.

(Emphasis in original.) *Id.*; Hubbard V.S. Ex. E.

On March 10, 2017, CP provided BNSF with written notice that it was exercising its right to terminate the Haulage Agreement effective March 10, 2018. Hubbard V.S. at 9. However, the parties eventually agreed to continue the haulage arrangement. On May 11, 2018, CP and BNSF executed a supplemental agreement extending the term of the haulage agreement for five years (the "Supplemental Agreement"). *Id.*; Hubbard V.S. Ex. F. The Supplemental Agreement is ■ and reiterates the terms of the original agreement. Haulage service continues to be limited to BNSF manifest traffic in existing CP train service. Hubbard V.S. at 9. In light of NCA's inaccurate statements, including to the STB's Office of Public Assistance, Government Affairs, and Compliance, the

Supplemental Agreement includes a statement of clarification that [REDACTED]

[REDACTED] Supplemental Agreement § 2.01, Hubbard V.S. Ex. F ([REDACTED]

[REDACTED]).

D. Shippers on the Line Enjoy Rail Service at Competitive Rates.

CP's freight rates are competitive with BNSF's for most traffic from the Joint Line and Whitetail Line with the exception of specialty crops, such as peas, lentils and other legumes, destined for the Pacific Northwest ("PNW"). Wood V.S. at 4-5. As NCA points out, BNSF can provide single line service to most PNW destinations, which gives it a competitive advantage over CP. Wood V.S. at 5. Unlike BNSF, CP must also factor in its interline partner's line haul division in setting rates to PNW destinations. For traffic moving to eastern destinations, CP's rates are competitive with BNSF's. *Id.*

From a revenue-to-variable cost ("R/VC") perspective, several of BNSF's rates are exceptionally low. BNSF's R/VCs for the single car rates identified in NCA's evidence range from approximately 87% to 126%.⁶ Four of BNSF's rates are below 100% of variable costs. By contrast, CP R/VCs are as low as 127% and, all but one of the rates are below 180%. Wittebrood V.S. at 2.

E. The 2014 Service Disruptions Affected Much of the North American Rail System.

While NCA argues generally that CP has had service issues, it identifies only one specific disruption: the 2014 service issues. As the Board is well aware, beginning in the winter of 2013-2014 much of the U.S. rail network was subject to widespread service disruptions. *See* U.S. Rail

⁶ There appears to be some discrepancies between the rates for traffic originating at Noonan as stated in NCA's evidence and actual rates. However, those discrepancies are not material for purposes of estimating R/VCs.

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Service Issues, STB Docket No. EP 724 (STB served Apr. 1, 2014). Sustained frigid temperatures and significant ice and snow accumulations made rail operations difficult. The extreme weather coupled with a bumper crop of farm products resulted in near gridlock. The critical Chicago terminal area, where six of the Class I railroads operate and interchange traffic, suffered severe congestion. Notably, while the disruption affected rail service across the nation, it particularly impacted CP and BNSF's service. Unfortunately, service to the Joint Line and Whitetail Line was not spared. Wood V.S. at 2.

As part of CP's effort to restore fluid operations, CP revamped its car order system. Wood V.S. at 2. CP's car order system had previously allowed customers to maintain car orders for more cars than the customer actually needed with little or no economic consequence. As service deteriorated, customers entered thousands of phantom car orders in an effort to ensure service. *Id.* These phantom car orders created a skewed picture of actual customer need and backlog making it difficult to allocate car supply fairly and efficiently in order to make progress toward recovery. *Id.* Accordingly, in August 2014, CP changed its car order program to ensure that the number of cars ordered reflected the number of cars that the customer actually needed. These changes affected all of CP's customers and not just NCA. *Id.*

Service on the Joint Line has long since returned to normal. Notwithstanding NCA's vague references to service issues, CP's own data show that it is dependable and consistent, with most cars being placed at NCA facilities on or very near to NCA's want date.⁷

⁷ CP attempts to place manifest car orders within a week of the want date, but because most CP equipment goes offline, CP cannot guaranty placement. Wood V.S. at 4. Nevertheless, CP regularly meets this goal. Wood V.S. Ex. A.

F. Seven Years After the Transaction, NCA Invests at Noonan Sparking Desire for Unit Train Service.

With service improved on the Joint Line, NCA sought to expand and upgrade its facilities including adding a new loop track and load out facilities at Noonan. Wood V.S. at 4. Those improvements were completed in July 2014 and made Noonan 100-car unit train capable. While the Noonan improvements were still in planning stages, CP advised NCA's management team, including Lynn Michelson, that NCA would not have access to BNSF unit trains. *Id.* In February 2014, CP again informed NCA that BNSF haulage service to Noonan was limited to manifest traffic. *Id.*; Wood V.S. Ex. B. Additionally, notwithstanding the termination provision in the Haulage Agreement, NCA did not inquire or otherwise seek assurance that the agreement would be extended upon expiration of the agreement's initial term on January 1, 2017. Wood V.S. at 4. CP's involvement with NCA's development of the new Noonan facility was otherwise limited to providing engineering review of the proposed loop track and executing a Private Siding Agreement with NCA to govern rail operations at the facility. Wangerin V.S. at 1-2.

As NCA points out, CP's market share of NCA's traffic at Noonan and Crosby has increased significantly in recent years, surpassing BNSF's share in 2014. Not surprisingly, much of this increase coincided with the improvements at Noonan as NCA shifted much of its traffic to CP's Dedicated Train Program ("DTP").

G. CP's Dedicated Train Program.

Under CP's DTP, customers can contract with CP to receive 100-car unit train service. Wood V.S. at 2. CP limits participation in the DTP to facilities capable of loading and unloading a minimum of 100 railcars within 24 hours of placement, such as NCA's elevators at Noonan and Westby. *Id.* On a limited basis, CP has allowed co-loading or "pooling" for less than 100-car capacity facilities to permit customers to combine blocks from separate facilities to make up a 100-

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car trainset. *Id.* The DTP provides a financial penalty if the shipper fails to complete the minimum two cycles a month during the term of the contract. *Id.* During the peak period for grain shipments between August and March, shippers cannot split the dedicated trainsets at destination. *Wood V.S. at 2-3.* From April through July, however, the program allows shippers to “explode” the dedicated trainset into 25-car blocks on arrival at a particular destination for further transportation. *Wood V.S. at 3.*

In light of its need to maintain car supply and capacity to meet the needs of all of its customers, CP has a limited number of trainsets available for the DTP. *Wood V.S. at 3.* Participation in the DTP is on a first-come, first-served basis. *Id.* Some customers either choose not to contract with CP or are foreclosed from doing so because of availability. *Id.* Those customers may be able to purchase CP DTP trainsets on the secondary market. *Id.*

Although equally available to all interested shippers, NCA has never chosen to contract directly with CP for participation in the DTP. *Wood V.S. at 3.* Rather, NCA has purchased a varying number of DTP trainsets each month from Agrex, who is a DTP contract holder. *Id.* In 2018, CP provided NCA with ■ DTP trainsets for its new facility at Noonan (■■■■ railcars) and ■ DTP trainsets for its facility at Westby (■■■■ railcars). *Id.* DTP trainsets provided to NCA in prior years are as follows:

Year	Noonan (DTP sets)	Noonan (cars)	Westby (DTP sets)	Westby (cars)
2017	■	■■■■	■	■■■■
2016	■	■■■■	■	■■■■
2015	■	■■■■	■	■■■■

Wood V.S. at 3.

Because forecasted grain harvests were higher than average, CP’s customers’ requests for trainsets for the 2018-19 crop year exceeded CP’s capacity for the U.S. market. *Wood V.S. at 3.*

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For the first time, NCA also attempted to contract directly with CP to secure an additional DTP trainset for its Noonan and Westby facilities. *Id.* However, by the time of NCA's request, CP had already allocated all additional DTP capacity to other customers. *Id.* NCA's Petition to Reopen appears to be driven by its failure to contract either directly or indirectly with CP for an additional DTP trainset.

H. CP Is Bringing Online New High-Capacity Grain Hopper Cars.

NCA also complains that BNSF's covered hopper fleet for grain service is more modern and in better condition than CP's. However, CP's current grain fleet complies with all industry regulations and standards. Additionally, in June 2018, CP announced its plans to invest more than a half-billion dollars to purchase 5,900 new high-capacity grain hopper cars as part of its commitment to the North American agricultural sector.⁸ CP has already placed more than 500 of these new cars in service and expects to add another 1,000 cars by April 2019. CP expects that the new fleet will help address NCA's concerns.

ARGUMENT

I. NO BASIS OR PRECEDENT EXISTS FOR REOPENING AN 11-YEAR OLD PROCEEDING INVOLVING A MINOR TRANSACTION.

A. Standard for Reopening.

The Board may only reopen a proceeding because of "material error, new evidence, or substantially changed circumstances." 49 U.S.C. § 1322(c); 49 C.F.R. § 1115.4. The threshold for reopening an STB proceeding is high. *Farmers Exp. Co. v. United States*, 758 F.2d 733, 737 (D.C. Cir. 1985) ("Petitions to reopen previously final agency decisions are to be granted only in the most extraordinary circumstances." *E.g., Mobil Oil Corp. v. ICC*, 685 F.2d 624, 631-32 (D.C. Cir.

⁸ Press Release, CP Announces Plans for Half Billion Dollar Investment in Future of Grain Supply Chain with Railcar Order (June 7, 2018) available at <https://www.cpr.ca/en/media/cp-announces-plans-for-half-billion-dollar-investment-in-future-of-grain-supply-chain-with-railcar-order>.

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1982); *RSR Corp. v. FTC*, 656 F.2d 718, 721 (D.C. Cir. 1981).) That threshold is higher still for reopening a proceeding several years after an administrative decision is final:

[W]e do not reopen administratively final decisions merely because we might handle or decide them differently today. For us to reopen a proceeding long after the time permitted for administrative reconsideration, we must be presented with a situation so compelling that the normal interests of reliance and repose (which ordinarily militate against revisiting prior actions) are overcome.

Can. Pac. Ltd., et al.—Purchase and Trackage Rights—Del. and Hudson Ry. Co., FD No. 31700, slip op. at 4 (STB served March 2, 2000) (decided on remand after the initial decision was vacated by D.C. Circuit, *Can. Pac. Ry. v. STB*, 197 F.3d 1165 (1999)). *See also Union Pac. R.R. Co.—Abandonment Exemption—In Rio Grande and Mineral Counties, CO*, Docket No. AB-33 (Sub-No. 132X), slip op. at 3 (STB served May 3, 2005) (stating that “concerns for administrative finality, repose, and detrimental reliance strongly counsel against reopening” an abandonment proceeding 5 years after OFA transaction was consummated). The STB’s discretion to reopen a proceeding “is limited by the otherwise strong statement by Congress that the Commission must act in a timely manner.” *Potomac Elec. Power Co. v. I.C.C.*, 702 F.2d 1026, 1034 (D.C. Cir. 1983), supplemented, 705 F.2d 1343 (D.C. Cir. 1983).

In order to meet this high standard, the party seeking reopening must allege grounds “sufficient to lead the Board to materially alter its prior decision.” *Can. Nat’l Ry. Co. and Grand Trunk Corp.—Control—EJ&E West Co.*, FD 35087 (Sub-No. 8) (“*EJ&E*”), slip op. at 3 (STB served May 15, 2015). If a party has presented no new evidence, changed circumstances, or material error that “would mandate a different result,” then the Board will not reopen the proceeding. *Id.*; *see also Montezuma Grain v. STB*, 339 F.3d 535, 541-42 (7th Cir. 2003); *DesertXpress Enters.—Pet. for Declaratory Order*, FD 34914, slip op. at 6-8 (STB served May 7, 2010). To be sufficient to warrant reconsideration, “new evidence” must be evidence that was not

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reasonably available to the party when the record was previously developed. *See Toledo, Peoria & W. Ry. v. STB*, 462 F.3d 734, 753 (7th Cir. 2006) (finding that evidence reasonably available before the Board issued its decision is not new evidence); *accord Friends of Sierra R.R. v. ICC*, 881 F.2d 663, 667 (9th Cir. 1989); *Can. Nat'l Ry.—Control—Ill. Cent. Corp.*, 6 S.T.B. 344, 350 (2002) (“‘[N]ew evidence’ is not newly presented evidence, but rather is evidence that could not have been foreseen or planned for at the time of the original proceeding.”); *see also EJ&E*, slip op. at 5 (STB served Oct. 30, 2017) (“The Board generally does not consider new issues raised for the first time on reconsideration where those issues could have and should have been presented in the earlier stages of the proceeding.”) (citing *Tex. Mun. Power Agency v. Burlington N. & Santa Fe Ry.*, 7 S.T.B. 803, 804 (2004)). Hindsight is not a valid basis for reopening:

Subjecting exempted transactions to requests for reopening and reconsideration, with hindsight as the dominant consideration, would place an intolerable burden on the exemption process. A burden of this nature would constitute a disincentive to the exemption process and, as such, would be inconsistent with the legislative intent to encourage the use of exemptions.

Ind. Hi-Rail Corp.—Lease & Operation Exemption—Norfolk & W. Ry. Co. Line Between Rochester & Argos, IN, And—Exemption from 49 U.S.C. 10761, 10762, & 11144 (“*Indiana Hi-Rail*”), FD No. 32162, slip op. at 5 (STB served Jan. 30, 1998). Thus, the Board has recognized that changes in traffic that are different from original expectations are not ordinarily a basis for reopening a transaction. *See, e.g., EJ&E*, FD 35087 (Sub-No. 8), slip op. at 7 (STB served May 15, 2015) (“[I]t is not realistic to expect a carrier’s traffic mix to remain static years after the approval of a transaction.”).

Finally, the Board has on numerous occasions recognized the important equitable principle and defense of laches—the “[f]ailure of a party to act in enforcement of its rights for such unreasonable time that equity will no longer give heed to its request for action.” *Peerless Transp.*

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Corp., Reopening on Petition (Pittsburgh, Pa.), 130 M.C.C. 434, 474 (I.C.C. 1976). “[T]he time elapsed is relevant . . . particularly when the exemption pertains to a transaction that cannot readily be undone. *Indiana Hi-Rail*, FD No. 32162, slip op. at 4 (STB served Jan. 30, 1998) (failing to object for 2-1/2 years after the exemption became effective and the transaction had been consummated raises concerns for administrative finality, repose, and detrimental reliance). See also *Grand Trunk W. R.R. Co.—Merger—Detroit & Toledo Shore Line R.R. Co.—Arbitration Review*, FD No. 28676 (Sub-No. 2), 1996 WL 77881, at *4 (STB served Feb. 26, 1996) (finding that seven years was an unreasonable delay for the exercise of petitioners’ rights).

B. NCA Fails to Present A Valid Basis to Reopen.

More than eleven years after the STB authorized and the parties consummated the transaction, NCA contends that the Board should reopen this proceeding due to alleged substantially changed circumstances. Petition at 12. Specifically, NCA alleges that BNSF and CP represented that BNSF would enjoy “unlimited” access via haulage. Petition at 21. And would do so forever. Petition at 18. NCA further contends that, instead of allowing BNSF “unlimited” access forever, CP has arbitrarily restricted the amount of cars that BNSF can move in haulage on a weekly and monthly basis, refused to move BNSF unit trains in haulage service, and threatened to terminate haulage access altogether. According to NCA, “had the STB known CP would impose such restrictions in 2007 this most certainly would have materially altered the STB’s analysis and decision.” Petition at 12. NCA is wrong and its arguments mischaracterize the representations in the Joint Petition and plain wording of the Haulage Agreement, as well as the Board’s decision. None of NCA’s complaints constitute substantially changed circumstances or warrant the extraordinary remedy of reopening a proceeding eleven years after the transaction was consummated.

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1. BNSF Access via Haulage Was Neither Represented, Nor Can it Reasonably Be Construed, As “Unlimited”.

NCA’s contention that CP and BNSF represented the haulage rights as giving BNSF “unlimited” access is simply false. No representation in the Joint Petition can reasonably be construed in this manner. Rather, the parties explained in the Joint Petition that the Haulage Agreement provided for haulage services that would enable BNSF to maintain the *existing* level and nature of service. Joint Petition at 13 (“BNSF will continue to provide common carrier service to all shippers on the Conveyed Lines at competitive rates and there will be no material change in the level or nature of service provided to those shippers.”). Notably, at the time of the transaction, the *existing* traffic moved in manifest trains. Thus, the Joint Petition indicated that BNSF’s haulage traffic would be handled in existing CP train service. Joint Petition at 11 (stating that the BNSF traffic originating or terminating on the Conveyed Lines could “be handled in existing DMVW-CPR trains to and from Minot”); Haulage Agreement §§ 1.02, 2.01.

Likewise, NCA’s argument that the Haulage Agreement does not contain any limitations on BNSF access is wrong. The Haulage Agreement, which was publicly disclosed as an exhibit to the Joint Petition, clearly circumscribes BNSF haulage access. It expressly limits BNSF to cars that move in *existing* CP train service (Haulage Agreement, §§ 1.02, 2.01) and “subject to CPR’s existing available train capacity.” *Id.*, § 2.04. The agreement provides that it is entirely at CP’s discretion whether to “operate additional CPR trains to accommodate BNSF’s volumes that exceed available capacity.” *Id.*, § 2.05.

At the time, NCA was satisfied with the scope of the Haulage Agreement. In fact, NCA expressed strong support for the transaction citing specifically its understanding that “*existing BNSF traffic*” would be handled through a haulage agreement. Letter from Richard Larsen to the Hon. Charles Nottingham dated June 20, 2007 attached to Petition to Reopen as Exhibit 2

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(emphasis added). Eleven years later, BNSF continues to have the ability to handle NCA traffic as it did in 2007. CP has not imposed any limits on BNSF access other than as expressly provided for in the Haulage Agreement.

To the extent that CP has sought to limit BNSF volumes, it has done so based on capacity issues as provided for in § 2.04 of the Haulage Agreement. Thus, when an increase in BNSF haulage traffic volume in June 2008 caused congestion and service issues on the Joint Line, CP asked that BNSF limit its volumes to 50 loaded cars per week or 2,600 loaded cars a year. Hubbard V.S. at 7-8. NCA did not object, likely because the limitations did not affect BNSF's ability to serve NCA. When BNSF sought to move a block of ■ cars in haulage which exceeded available capacity and caused operations issues in June 2014, CP again reminded BNSF of the limitations. *Id.* at 8. These limitations are not arbitrary nor were they unforeseeable. The limitations are based on CP's available capacity and fully consistent with the plain language of the Haulage Agreement. *Id.* at 9. Notwithstanding these limitations, CP has reasonably attempted to accommodate all BNSF manifest traffic tendered for haulage. *Id.*

In hindsight, NCA may wish that the Haulage Agreement was unlimited and an obligation of indefinite duration. However, that is not the transaction it supported or the transaction that the Board approved, in 2007. NCA's hindsight is not a basis for reopening. *Indiana Hi-Rail*, FD No. 32162, slip op. at 5.

2. BNSF Access via Haulage Was Neither Represented As, Nor Can it Reasonably Be Construed As, "Permanent".

The existence of the termination provision in the Haulage Agreement makes clear that the haulage arrangement was not an indefinite obligation. That termination provision, which was part of the public record, expressly provides that either CP or BNSF may terminate the agreement after January 1, 2017. Haulage Agreement, § 9.02. The presence of a provision that provides for

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termination after the initial term is wholly inconsistent with NCA's argument that the haulage arrangement was either represented as, or intended to be, permanent.

Additionally, the parties chose to provide BNSF access via a haulage agreement rather than a trackage rights agreement. Unlike trackage rights agreements which require STB authority both to initiate and to terminate, haulage agreements are voluntary private agreements where the ease of termination is an important feature. Indeed, as NCA acknowledges, the Joint Petition referenced the fact that haulage agreements are private agreements not subject to STB jurisdiction. Petition at 17. As such, interested parties and the STB would have understood that either CP or BNSF could terminate the agreement at the expiration of the initial ten-year term or as otherwise provided in the agreement. Nevertheless, NCA did not raise any issue regarding the parties' contractual right to terminate BNSF's haulage access before the transaction was approved by the STB. Instead, as discussed above, NCA submitted a letter in support that "strongly encourage[d]" the Board to approve the exemption. Joint Petition, Ex. 5.

Further, the statements cited by NCA to support its argument of "unlimited" access are general statements regarding access and competition. These statements speak to the immediate direct effects of the proposed transaction and are typical of the representations made in most Board proceedings involving line sale and other transactions. Under Board precedent, such statements regarding access and competition do not create an indefinite obligation. *See, e.g., Union Pac. Corp.—Control and Merger—S. Pac. Corp.*, FD No. 32760, Dec. No. 17, slip op. at 6 (STB served Dec. 30, 2014) (noting that general statements regarding the "benefits of competition" or "access" to service "cannot be construed as specific representations" that would forever bind a carrier). Accordingly, NCA's argument that certain representations in the Joint Petition somehow create

unlimited and perpetual obligations that are contrary to the express terms of the Haulage Agreement included with the Joint Petition, must be rejected.

Regardless, the issue is moot. Although CP did seek to terminate the 2007 Haulage Agreement at the end of the initial term, the parties ultimately renewed the haulage arrangement for another 5 years. Accordingly, NCA continues to enjoy access to BNSF rail service via haulage service as it did immediately following the transaction in 2007.

3. NCA's Issues Could Have Been Raised During the Proceeding in 2007.

NCA could have raised the issues and arguments in its Petition in the 2007 proceeding. It did not. As discussed in detail above, the Haulage Agreement clearly provides CP with the ability to restrict BNSF haulage volumes based on available capacity. Haulage Agreement § 2.04. Also, it clearly provides that BNSF traffic will move in existing train service, which by definition precludes unit trains. *Id.* at § 2.01. And it clearly provides that either party had the right to terminate the Haulage Agreement after the initial term. *Id.* at § 9.02. The fact that CP might exercise its contractual rights under the Haulage Agreement was certainly foreseeable in 2007 and, therefore, does not constitute substantially changed circumstances or new evidence. *See e.g., Can. Nat'l Ry.—Control—Ill. Cent. Corp.*, 6 S.T.B. 344, 350 (2002) (“‘[N]ew evidence’ is not newly presented evidence, but rather is evidence that could not have been foreseen or planned for at the time of the original proceeding”); *EJ&E*, FD No. 35087 (Sub-No. 8), slip op. at 5 (STB served Oct. 30, 2017) (“The Board generally does not consider new issues raised for the first time on reconsideration where those issues could have and should have been presented in the earlier stages

of the proceeding.”) (*citing Tex. Mun. Power Agency v. Burlington N. & Santa Fe Ry.*, 7 S.T.B. 803, 804 (2004)). Accordingly, there is no basis to reopen.

4. NCA Relies on Precedent that Is Not Relevant and Easily Distinguished.

The cases that NCA relies upon to support its Petition have no relevance to this proceeding and are clearly distinguishable. In *Norfolk S. Ry. Co.—Adverse Abandonment—St. Joseph County, Ind.*, Docket No. AB 290 (Sub-No. 286) (STB served Apr. 16, 2012), the Board denied an application for adverse abandonment because the facts at that time did not warrant such relief. When those facts changed, the Board granted a petition to reopen. However, the circumstances, standards and considerations in an adverse abandonment proceeding are markedly different from those at issue here. Further, NCA is not asking the Board to reopen a proceeding in which an application was denied. Rather, it is asking the Board to reopen a proceeding in which the Board granted transaction authority and parties consummated a transaction based on that authority. Reopening this proceeding, especially more than a decade after the transaction, raises issues of certainty and fairness that are not implicated by revisiting the denial of an adverse abandonment application.

Likewise, *Pioneer Indus. Ry. Co.—Alternate Rail Service—Cent. Ill. R.R. Co.*, FD No. 34917 (STB served Jan. 12, 2007) (“*Pioneer*”), involved an adverse discontinuance proceeding and has no bearing on the present matter. First, the reopening concerned discontinuance authority sought by the line owner to allow the line owner to evict the current operator under state law. Such a proceeding does not involve the same considerations or raise the same concerns for certainty and fairness associated with a line sale transaction. Second, the operator sought reopening within a few months of the Board’s decision and in the context of the Board’s reconsideration of the Board’s decision in a related proceeding in which the new operator on the line sought discontinuance

authority. By contrast, NCA seeks to reopen this line sale proceeding eleven years after the transaction. Finally, in that proceeding, the Board predicated its initial decision and analysis on the representation that line owner “would maintain the existing level of rail service to the satisfaction of the users of that service” and “the fact that the evidence of record at that time did not demonstrate that shippers would lose routing options or receive inferior service should the [original operator’s] service be discontinued.” *Pioneer*, slip op. at 8. The Board reopened the proceeding in light of a shipper’s “evidence that cast doubt on the representation we had previously relied on.” *Id.* In doing so, the Board cabined the import of its holding to the unique facts of the proceeding:

In granting PIRY’s petition to reopen, we are not suggesting that rail service must always continue at the same level as in the past. Here, however, the Board specifically predicated its August 2005 Decision on the Cities’ statement that they would maintain the existing level of service to the satisfaction of the users of that service. In these circumstances, it is appropriate to reconsider our August 2005 Decision now that Carver Lumber’s evidence has cast doubt on the representation we had previously relied on.

Id. Here, the Haulage Agreement includes no provision requiring CP or BNSF maintain its service to the satisfaction of rail customers. Further, NCA presents no evidence that casts doubt on any of the representations that the Board relied on in 2007. Far from it. The evidence here in fact corroborates the accuracy of the representations on which the Board relied when it approved the transaction.

5. NCA’s Investment In A New Facility Is Not Grounds For Reopening.

NCA’s desire to obtain access to BNSF unit train service is driving this Petition. That desire results from NCA’s investment in its facilities to enable unit train service, and not from any action by CP. NCA’s decision to improve its existing facilities long after the transaction does not amount to substantially changed circumstances of the type that would warrant reopening.

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Allowing a shipper's own future actions as a basis for reopening and changing the terms of prior transactions or possibly unwinding them altogether, would be patently unfair and create uncertainty, placing an intolerable burden on the exemption process. *See Indiana Hi-Rail*, FD No. 32162, slip op. at 5.

Moreover, NCA's contention that it believed it would have access to BNSF unit train service when it invested in its facilities in 2014 is not credible. Before making its investment, NCA knew that it did not have access to BNSF unit train service because CP told NCA that it did not have such access. *Wood V.S.* at 4. NCA also had the ability to review the terms of the Haulage Agreement, which set out the parameters of the haulage service and provided for the possibility of terminating the haulage arrangement in 2017. Yet NCA took no action to ensure that it would have access to BNSF unit train service or that any access to BNSF would continue beyond 2017 before investing in its facilities. It is far more likely that NCA's investment was not premised on BNSF unit train access. Indeed NCA waited more than four years after opening its loop track before formally seeking relief at the STB suggesting that this current Petition is driven by NCA's poor planning in securing DTP service for the upcoming crop season. Regardless, NCA's internal business decisions do not constitute substantial changed circumstances and do not warrant reopening.

Finally, it was undoubtedly foreseeable in 2007 that NCA might one day desire unit train service. NCA did not then raise the issue of access to BNSF unit train service and it is far, far too late for it to do so now. As such, NCA's Petition should be denied.

II. NO BASIS EXISTS FOR REVOKING THE EXEMPTION.

The Board may not force a line sale by revoking the exemption under which it was authorized and there is no basis for revoking the exemption under the applicable legal standards. Accordingly, the Board should also deny NCA's alternative request to revoke the 2007 exemption

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and “nullify the transaction by which CP acquired both BNSF’s 50% interest in the Joint Line and BNSF’s ownership of the portion of the Lignite Line.” Petition at 24.

A. The Board Does Not Have Statutory Authority to Revoke This Exemption.

Although a petition to revoke may be filed at any time, the statutory framework does not allow for the revocation of an exemption under 49 U.S.C. § 1322 in order to undo a transaction. *See CSX Transp., Inc.—Abandonment Exemption—In Laporte, Porter, and Starke Counties, Ind.*, Docket No. AB 55 (Sub-No. 643X), slip op. at 6 (STB served May 31, 2017). As the STB recently explained in a similar effort to reopen a proceeding and undo an eleven-year old line sale pursuant to an OFA, “the only statutory mechanism for seeking a forced sale of the Line is under the feeder line statute, 49 U.S.C. § 10907, where Congress has established the criteria that must be met to force the sale of a rail line.” *Id.*

B. Standard to Revoke.

Regardless, NCA fails to meet the standard to revoke. Under 49 U.S.C. § 10502(d), the Board may revoke an exemption, in whole or in part, if the Board finds that regulation is necessary to carry out the rail transportation policy of 49 U.S.C. § 10101. *See, e.g., Caldwell R.R. Comm’n—Exemption from 49 U.S.C. Subtitle IV*, FD No. 32659 (Sub-No. 1), slip op. at 1-2 (STB served Nov. 26, 2014); *Indiana Hi-Rail*, FD No. 32162, slip op. at 4. The party seeking revocation has the burden of proof, and petitions to revoke must be based on reasonable, specific concerns. *Grenada Ry.—Acquis. and Operation Exemption—Ill. Cent. R.R.*, FD No. 35247, slip op. at 6 (STB served Sept. 10, 2013); *see also Consol. Rail Corp.—Trackage Rights Exemption—Mo. Pac. R.R.*, FD No. 32662, slip op. at 2 (STB served June 18, 1998); *I&M Rail Link, LLC—Acquis. & Operation Exemption—Certain Lines of Soo Line R.R.*, FD No. 33326, slip op. at 7 (STB served Apr. 2, 1997), *aff’d sub nom. City of Ottumwa v. STB*, 153 F.3d 879 (8th Cir. 1998). For example, the Board will revoke an exemption if a petitioner has demonstrated conduct that frustrates the

RTP and the Board has determined that the reinstated regulatory provisions could ameliorate the alleged harms. *Entergy Ark. Inc. v. Union Pac. R.R.*, NOR 42104, slip op at 16 (STB served March 15, 2011); *Rail Gen. Exemption Auth.—Miscellaneous Agric. Commodities—Pet. of G. & T. Terminal Packaging Co. to Revoke Conrail Exemption*, 8 I.C.C. 2d 674, 676-77 (1992), *aff'd in pertinent part sub nom., Mr. Sprout, Inc. v. United States*, 8 F.3d 118 (2d Cir. 1993); *Minn. Commercial Ry.—Trackage Rights Exemption—Burlington N. R.R.*, 8 I.C.C. 2d 31, 35-36 (1991) (the Board's revocation analysis "focuses on the sections of the RTP related to the underlying statutory section from which an exemption is sought"). *Del. and Hudson Ry. Co, Inc.—Discontinuance of Trackage Rights Exemption—In Broome County, NY*, Docket No. AB 156 (Sub-No. 27X), slip op. at 3 (STB served July 10, 2015). NCA has not met and cannot meet, this standard.

1. Regulation of this Transaction is Not Necessary To Protect Shippers from Abuse of Market Power or Promote the RTP.

When considering the Joint Petition in 2007, the Board concluded that detailed scrutiny of the transaction was not necessary to carry out the RTP and that an exemption would promote the RTP. 2007 Decision, slip op. at 4. The Board also concluded that regulation of the transaction was "not necessary to protect shippers from the abuse of market power." *Id.* The Board correctly reasoned that the line sale was a minor transaction, which promoted efficiency, improved service, increased competition by allowing CP access to two BNSF shippers, and resulted in no loss of competition. In hindsight, the transaction delivered on expectations. Among other things, DMVW made repairs to the Joint Line to address the flooding issue and frequent outages, and DMVW continues to perform regular maintenance of the line. Hubbard V.S. at 5. Consequently, service on the Joint Line also improved significantly. Through haulage, BNSF continues to be able to serve customers on the line at the same level as before the transaction. Indeed, for several years

after the transaction, BNSF was NCA's primary carrier even though BNSF no longer owned the line and no longer had any responsibility for maintaining the condition of the line. In other words, the transaction has "ensure[d] the continuation of a sound rail transportation system with effective competition among rail carriers (49 U.S.C. 10101(4)), foster[ed] sound economic conditions in transportation and ensure[d] effective competition" (49 U.S.C. 10101(5)) and fulfill[ed] other aspects of the RTP, as represented in the Joint Petition. Joint Petition at 12. Although the original terms of the transaction as presented to the Board did not provide for unlimited or permanent BNSF access via haulage, and could conceivably frustrate BNSF's or NCA's aspirations for that service now, they certainly do not frustrate the RTP. The Petition provides no basis for the extraordinary step of revoking the exemption, especially eleven years after the transaction.

2. Reopening or Revoking the Exemption Would Undermine the RTP.

Reopening and/or revoking the exemption would dramatically undermine the RTP. The health and efficiency of the national rail system has improved dramatically since the Board's expanded use of exemptions. Railroads have been able to rationalize their systems by selling lines that are no longer economical to maintain and operate. Many of those line sales have been to other rail carriers who are better positioned to own, operate and invest in the lines conveyed. Those transactions and subsequent investments, like the transaction at issue here, "promote a safe and efficient rail transportation system" (49 U.S.C. § 10101(3)), "ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes" (49 U.S.C. § 10101 (4)), "foster sound economic conditions in transportation and ... ensure effective competition and coordination between rail carriers and other modes" (49 U.S.C. § 10101(5)), "encourage ... efficient management of railroads" (49 U.S.C. § 10101(9)) and "encourage and promote energy conservation" (49 U.S.C. § 10101(14)), as well as other aspects of the RTP. The exemption process itself fulfills the policies of "minimiz[ing] the

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need for regulatory control over the rail transportation system” (49 U.S.C. § 10101(2)) and “reduc[ing] regulatory barriers to entry into and exit from the industry.” (49 U.S.C. § 10101(7)). But such transactions and subsequent investments are likely only if there is a high degree of certainty that exempt transactions, past and future, cannot at any moment be undone or subjected to unexpected conditions. Indeed, the 2007 transaction here, which has been a good thing for all involved, including NCA, likely would not have happened absent the certainty that is generally provided when an agreement is reached and allowed to proceed under an exemption, with the benefit of stakeholder input.

Revoking the exemption or imposing a condition on the Haulage Agreement would be a dramatic departure from Board precedent with respect to haulage agreement and would have significant negative consequences. Haulage agreements are an important tool for preserving competition in line transactions. Their usefulness is due in no small part to the fact that they are not generally subject to STB regulation; rather, they are voluntary agreements that create no regulatory rights or responsibilities. *See Norfolk S. Ry. Co.—Acquisition and Operation—Certain Rail Lines of The Del. and Hudson Ry. Co., Inc.*, FD No. 35873, slip op. at 26 (STB served May 15, 2015); *Del. and Hudson Ry. Co., Inc.—Discontinuance of Trackage Rights—In Susquehanna County, Pa.*, AB No. 156, slip op. at 11 (STB served Jan. 19, 2005) (Board approval not required for the initiation or termination of haulage agreements “because such arrangements are entirely voluntary on the part of the carriers and no regulatory rights and responsibilities are created that would require the carriers to keep the arrangement in place.”). Changing how the STB regulates haulage agreements would not only undo the terms of the parties’ bargain here and upset settled expectations, it would create uncertainty for the myriad other transactions that include a haulage agreement, and discourage their use in future transactions.

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CONCLUSION

For the foregoing reasons, CP respectfully requests that the Board deny NCA's Petition to Reopen in its entirety.

Dated: February 4, 2019

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CERTIFICATE OF SERVICE

I do hereby certify that on this 4th day of February, 2019, I have served a copy of the foregoing Reply by electronic mail on each of the following persons or entities:

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 35068

**SOO LINE RAILROAD COMPANY DBA CANADIAN PACIFIC RAILWAY –
ACQUISITION AND OPERATION EXEMPTION – BNSF RAILWAY COMPANY
PETITION TO REOPEN**

VERIFIED STATEMENT OF CHARLES E. HUBBARD

My name is Charles Hubbard. In 1986, I began my employment with Soo Line Railroad Company, which together with affiliated operating rail companies in the United States and Canada, does business as Canadian Pacific ("CP"). During my tenure with CP, I have served in a variety of roles including planning, accounting, operational, commercial, and management positions and currently serve as Director Interline and Passenger-South. Since 1992, I have been involved in various aspects of joint facilities contracts between railroads. From 2001 to 2008, I was CP's Manager of Interline Agreements. From 2008 to 2012, I held the position of Specialist-US. In 2013, I held the position of CP's Manager of Joint Facilities-US and in 2014, I was promoted to my current position.

I am familiar with the history of CP's operations on the railway line between Crosby and Lignite Junction in North Dakota (the "Joint Line") and personally involved in the transaction where CP acquired BNSF Railway Company's ("BNSF") one-half interest in the Joint Line.

Purpose

The purpose of my statement is to describe the history of operations on the Joint Line, the relevant discussions and negotiations which led to CP's acquisition of the line and the genesis of

and rationale for the North Dakota Haulage Service Agreement, which is at issue in New Century Ag's petition to reopen.

Background to the 2007 transaction

In 1959, Great Northern Railway Company ("Great Northern"), predecessor to BNSF Railway Company ("BNSF"), and CP's predecessor, Minneapolis, St. Paul & Sault Ste. Marie Railroad Company ("Soo") owned parallel rail lines in northwestern North Dakota -- Soo between Crosby and Rival, ND and Great Northern between Crosby and Lignite -- and in southeastern North Dakota between Hankinson and Geneseo. To promote greater efficiency, Great Northern and Soo entered into an agreement (the "1959 Agreement") whereby Soo abandoned its redundant rail line between Crosby and Rival and Great Northern abandoned its redundant rail line between Hankinson and Geneseo. Soo received a one-half undivided interest in the Joint Line and Great Northern received a one-half undivided interest in the Hankinson-Geneseo line. BNSF had the obligation to dispatch and maintain the Joint Line at its sole expense and Soo had the obligation to dispatch and maintain the Hankinson-Geneseo line at its sole expense.

The 1959 Agreement provided each party the right to operate over the Joint Line. Initially, neither party could serve industries that had been exclusively served by the other party, but each could participate in serving new industries on the Joint Line. In 1967, as a condition imposed in the Great Northern-Northern Pacific merger, Soo gained access to all industries that were on the Joint Line in 1959. In 1990, the parties amended the 1959 Agreement to permit Dakota, Missouri Valley and Western Railroad, Inc. ("DMVW") to operate over the Joint Line pursuant to its lease of other CP lines, including the line between Crosby and Whitetail, Montana

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(the "Whitetail Line"). The Whitetail Line is only accessible via the Joint Line and provides service to NCA elevators at Ambrose and Fortuna, ND, and Westby, MT.

BNSF approached CP in the spring of 2004 concerning its intention to relinquish its one-half ownership interest in the Joint Line. By then BNSF's traffic on the line had dwindled significantly and the line was subject to frequent and lengthy outages due to deferred maintenance. The parties discussed several options, including a sale or lease of BNSF's interest to DMVW, a direct sale to CP, or BNSF's abandonment. The 1959 Agreement provided that in the event of BNSF's abandonment, CP could purchase BNSF's interest in the Joint Line for the net recoverable salvage value.

In e-mail correspondence to CP on November 30, 2004, BNSF firmly rejected the lease option to DMVW. "This will not be a lease, it will be a conveyance. We do not want Crosby-Lignite back. We do not want to own it anymore, much less maintain it, that's why we will explore our abandonment options if we cannot come to some kind of accommodation here."

On January 21, 2005, BNSF provided CP with a one-year notice of its intention to abandon the Joint Line. CP informed BNSF that it was willing to consider acquiring the Joint Line but could not accept the line in its present condition. At a minimum, a tie, ballast and surfacing program would be necessary before CP would acquire the line.

Joint Line track conditions and service issues

While the parties discussed the terms of a potential sale, the line continued to be plagued with service issues caused by the deteriorated track conditions. CP's inspection of the Joint Line in the spring of 2004 had revealed the extent of its deteriorated condition -- 34 of the 41 grade crossings needed rebuilding, with four requiring complete replacement; more than 17 miles of track consisted of short segments of 80# jointed rail which caused extreme tie wear at the joints;

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and 28,803 failed ties. In addition, BNSF's timetable restricted operations on the Joint Line between 10 a.m. and 9 p.m. whenever the air temperature exceeded 85 degrees because expansion of short unanchored rail segments made operations too dangerous. BNSF embargoed the Joint Line for nearly a month in August and September 2004, which also halted all service to and from the Whitetail Line.

In January 2006, a DMVW train derailed at the Crosby yard, damaging both main line switches. Because BNSF did not have replacement switches available, it bypassed the damaged switches by straight-railing the main line through Golden Plains Ag's elevator tracks. The bypass routed Joint Line traffic over the elevator's unloading pit. BNSF indicated it would take at least three weeks to order replacement switches. In response to CP's expressed concern over the track conditions in February 2006, BNSF stated that it did not intend to perform additional maintenance and that track conditions would not improve between then and disposition of the line.

In March 2006, DMVW reported to CP that

[T]he east end of the elevator track that's been being used as the main line thru Crosby, is now in as bad or worse shape than the main line it replaced after the derailment below. There are several broken ties; the elevators' track adjacent to the derailment site on the regular main line is anywhere between 2 and 6 inches into the ground. The train crews and our west end roadmaster tell me that it is useless to try to go west of our roundhouse (the most easterly switch in the Crosby yard) for fear of derailing. Elevator Mgr Lynn Michaelson agrees and advises he wouldn't try to run his track-mobile thru this area.

In April 2006, BNSF embargoed the Joint Line again, preventing service to CP's customers on the Whitetail Line including Farmer's Elevator of Fortuna. On May 1, 2006, a DMVW train was still stranded on Golden Plains Ag's private elevator track in Crosby. Golden Plains Ag's

General Manager, Lynn Michelson, requested the STB's assistance. As reported by DMVW, BNSF indicated it expected to have the Joint Line back in operation by May 5, 2006.

On May 8, 2006, DMVW notified BNSF that there were approximately ten car-lengths of track in Noonan with only one or two bolts holding the track together. Instead of fixing the mainline track, BNSF lined and spiked the switches to the elevator track, diverting traffic from the main line through the customer's facility. On March 16, 2007, BNSF issued another embargo on the Joint Line, which remained in effect until at least April 24, 2007.

CP acquires the Joint Line

By September 2006, CP and BNSF had resolved sufficient details regarding the sale transaction to issue a joint statement to rail customers served on or over the Joint Line. Attached as Exhibit A is a true and correct copy of this correspondence. On June 29, 2007, CP and BNSF executed a purchase and sale agreement for the Joint Line and filed a joint petition for exemption with the STB on July 16, 2007. The STB authorized the transaction by decision served on September 7, 2007. On September 11, 2007, CP notified customers that it would take over full ownership of the Joint Line on September 19, 2007 and explained that DMVW would provide local service for both CP and BNSF traffic. Attached as Exhibit B is a true and correct copy of this correspondence.

As part of the parties' negotiations, BNSF agreed to replace defective rails and repair rail joints prior to closing. Following CP's acquisition of the Joint Line, CP contracted with DMVW to lease, maintain and operate the line. In addition to other improvements to the track infrastructure, DMVW replaced defective ties to address the Joint Line's tendency to flood in the spring. DMVW has continued to maintain the line pursuant to its lease with CP.

Since CP acquired full ownership of the Joint Line in 2007, it has been out of service for unscheduled maintenance only once. That outage occurred in the spring of 2011 when unusually high snowfall and soft track conditions caused CP to issue an embargo.

The Haulage Agreement

CP and BNSF initially considered handling traffic after the sale by joint linehaul divisions, but decided that BNSF would retain its current access to those customers via a haulage agreement. The parties predicated the haulage agreement on CP handling BNSF's then rather minimal traffic on the Joint Line and the segment between Lignite Junction and Lignite, ND (the "Lignite segment") that CP also purchased. All the traffic moving on the Joint Line at this time was manifest traffic. BNSF had informed CP that its total volume on both the Joint Line and the Lignite segment for the period from July 2004 to June 2005 was [REDACTED] carloads, or an average of [REDACTED] carloads per month. BNSF's traffic for this period included [REDACTED] carloads for Golden Plains Ag facilities (now NCA) at Crosby and Noonan on the Joint Line and another [REDACTED] carloads for CHS and Lodgepole Energy Marketing at Lignite. Attached hereto as Exhibit C is a true and correct copy of the information BNSF provided to CP regarding its traffic volumes on the Joint Line for this period. Based on this information, the parties did not contemplate, nor did the haulage agreement provide for, handling BNSF unit trains on the Joint Line.

The haulage agreement the parties negotiated and which they included as an exhibit to their joint STB petition provided that BNSF haulage traffic would move in CP's existing train service. The agreement provided that CP would generally provide BNSF the same level of service as CP's own traffic of the type, but expressly stated that CP was not providing a service guarantee. The agreement further specifically limited haulage services to CP's existing available train capacity. The agreement commenced on September 18, 2007 for an initial term ending

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January 1, 2017. After the initial term, the agreement was terminable by either party on twelve months' written notice.

In Minot, ND, the parties exchange the haulage traffic, which CP delivers to and receives from DMVW at CP's interchange tracks at Flaxton, ND. Pursuant to its lease with CP, DMVW provides local service to the Joint Line, the Lignite segment, and the Whitetail Line. CP's interchange facilities at Minot and Flaxton are limited and located on a capacity-constrained corridor. Until 2016, CP's main line between Minot and Portal, ND had hand-thrown switches without centralized traffic control.

Almost immediately after the sale consummated, however, BNSF's haulage traffic increased dramatically. Instead of the 20-odd carloads CP was expecting each month, BNSF submitted [REDACTED] carloads for haulage in October 2007 and [REDACTED] carloads in November. In early December, CP informed BNSF that the surge in haulage traffic was causing congestion at Flaxton and Minot and affecting service.

We need a contact at BNSF to cover amount of covered hoppers we are receiving at Minot for spotting at Crosby ND. The customer at Crosby has more cars ordered than we can accommodate and we are getting congested. The customer only has a [REDACTED] car track and he is presently loading a [REDACTED] car BNSF train and we already have on hand [REDACTED] more of your covered hoppers ([REDACTED] at Flaxton and [REDACTED] at Minot). The cars are congesting our service which doesn't help you or us in getting the loads moving. We need to time this car supply issue to the service before we have to do something more drastic to keep ourselves fluid.

In June 2008, CP notified BNSF that due to "the unexpected high volume of traffic off of this line after purchase, CP encountered a high number of service failures and capacity related operational issues during Q4 2007 with your customers and CP operations." Accordingly, CP requested that BNSF limit its haulage traffic to 50 cars in each direction (*i.e.*, a total of 100

loaded and empty cars) per week beginning September 1, 2008. Attached as Exhibit D is a true and correct copy of CP's correspondence to BNSF's Vice president of Network Development.

Following the system-wide weather related service failures that plagued the Chicago terminal during the winter of 2013-14 and which both CP and BNSF experienced, BNSF continued to tender more cars for haulage service than CP's existing service could accommodate. In June 2014, CP again requested that BNSF observe the limits on haulage service CP could provide.

The haulage traffic moving in this corridor on CP continues to be a concern. The Minot to Lignite Jct. corridor remains in a Canadian Pacific capacity constrained corridor. Recently BNSF tendered a [REDACTED] car single movement for haulage in this lane. The volume could not be accommodated for interchange at Minot and BNSF moved the cars to Bowbells and exchanged the cars to CP through a jointly served industry. This type of move is unacceptable and can't continue to move in this manner.

The exchange trackage at Minot can't accommodate movements of this size in addition to the other traffic interchanging at Minot. The 2007 North Dakota Haulage Service Agreement commits CP to handle BNSF Haulage Cars in *existing train service*. CP is unable to accommodate [REDACTED] cars of BNSF haulage on a single day destined between Lignite and Crosby in existing train service.

CP again requests that BNSF observe the weekly 50 car maximum and additionally requests that BNSF limit the daily haulage volume to no more than 15 cars per day. This restriction is based on CP's current available capacity. Observing this restriction will minimize CP-BNSF Minot Interchange capacity related operational issues. The restriction will also promote fluidity and minimize service failures to BNSF haulage business in this corridor.

(Emphasis in original.) Attached as Exhibit E is a true and correct copy of CP's correspondence to BNSF's Director of Contracts and Joint Facilities. Nonetheless, only two months later on August 25, 2014, CP learned that a customer had [REDACTED] empty cars ordered from BNSF for grain loading on the haulage route. CP again informed BNSF that this volume of cars exceeded the available capacity for haulage service. Paying little apparent heed to CP's protestations, on

REDACTED VERSION

September 11, 2014, BNSF notified CP that it would tender [REDACTED] empty cars at Minot for haulage service to Lignite, Noonan, and Crosby and expected the return of [REDACTED] to [REDACTED] loaded cars.

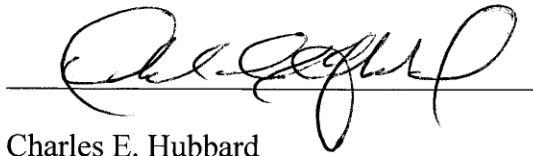
The limitations on BNSF haulage traffic are neither arbitrary nor unreasonable but are based on CP's available capacity and fully consistent with the terms of the Haulage Agreement. Despite these limitations, CP has reasonably attempted to accommodate all BNSF manifest traffic tendered for haulage.

On March 10, 2017, CP provided BNSF with written notice that it was exercising its right to terminate the haulage agreement effective March 10, 2018. On May 11, 2018, CP and BNSF agreed to extend the term of the haulage agreement for five years, terminable at any time during the term by either party on six months' prior notice. The supplemental agreement reiterates that the haulage service is limited to loaded and empty freight rail cars moved in existing CP train service and, for clarity, is expressly limited to manifest traffic and not transportation of rail cars in unit train service. Attached as Exhibit F is a true and correct copy of the Supplemental Agreement.

REDACTED VERSION

VERIFICATION

I, Charles E. Hubbard, 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 "C. E. Hubbard", is written over a horizontal line.

Charles E. Hubbard
Director Interline and Passenger-South
Soo Line Railroad Company

Dated: JAN. 31, 2019

REDACTED VERSION

Exhibit A

REDACTED VERSION

September 29, 2006

Mr. Dan Mack
Vice President, Transportation
CHS Inc.
P. O. Box 64089
St. Paul, MN 55164-0089

Dear Mr. Mack,

Canadian Pacific Railway, Dakota Missouri Valley & Western Railroad and BNSF Railway wish to inform you of pending changes in the ownership, operation and maintenance of the line of railroad that serves the CHS facility at Lignite, North Dakota.

Today, the line of railroad from Crosby, ND to the CPR/BNSF connection at Lignite Junction (see attached map) is jointly owned by CPR and BNSF. BNSF and CPR (in conjunction with DMVW) both serve the customers and BNSF maintains the track. CPR owns the track between Crosby and Whitetail and between Lignite Junction and Flaxton. BNSF owns, operates and maintains a branch line that continues southeasterly from Lignite Junction and through Lignite.

In January 2005, BNSF served notice on CPR of its intent to discontinue its operations between Crosby and Lignite Junction. This discontinuance would not have relieved BNSF of its obligation to maintain the track. BNSF and CPR recognized that this would create an awkward and potentially unworkable situation for CPR/DMVW to continue to serve that line.

We are pleased to announce that CPR, DMVW and BNSF have agreed on a plan for a new structure for ownership, operation and maintenance of these rail lines as follows:

Ownership & Maintenance

- CPR to become sole owner of the jointly owned track from Crosby to Lignite Jct. and the BNSF-owned track from MP 47.0 south of Lignite (see map) to Lignite Jct.
- CPR to in turn lease these tracks to DMVW and DMVW to maintain them.

Service

- Customers to be able to ship via either BNSF or CPR.
- DMVW to provide all the local train service, providing pick ups and set outs at your facility.
- All shipments to be routed via the DMVW/CPR exchange tracks at Flaxton, ND.
- To/from Flaxton, shipments to be routed either CPR direct or exchanged to/from BNSF at Minot, ND, depending on their billed origin or destination.
- The result will be no remaining rail activity between the last customer at Lignite and MP 47.0, and it will be CPR's intention to abandon and salvage that track.

This proposed transaction is intended to offer you more efficient and effective rail transportation services over the long term by consolidating ownership, maintenance and operations.

We would like to answer your questions and hear your concerns, if any, about this proposal. As a customer who will be directly impacted, you have certain rights under federal law. In order to implement these changes, Surface Transportation Board (STB) proceedings are required to

REDACTED VERSION

either exempt or approve the transaction. The STB's concern, simply put, is to ensure the on-going adequacy of your rail service.

There are a number of details of the agreements, as well as due diligence matters, to be resolved before agreements are executed. Then, our current intention is to ask the STB to exempt the change of control and other aspects of this transaction from their jurisdiction on the basis that the changes are minor and will have little impact on competition and service. This procedure, we believe, will expedite the proceeding.

We look forward to discussing this transaction and its impact with you. If you agree that these changes will benefit your operation, we may ask you to write a letter of support to the STB at the appropriate time. With a letter of support from you, the STB is more likely to expedite our request for an exemption.

In closing, we look forward to hearing from you. Please contact me at 612-904-5919 at your convenience to discuss these proposed changes and to express your views. Thank you.

Sincerely,

Judith A Mitchell
Director, Business Development

cc: Jerome M. Johnson
AVP Network Development
BNSF Railway
2500 Lou Menk Drive
Third Floor
Fort Worth, TX 76131

Mr. Jeff Wood
Executive Vice President
Dakota, Missouri Valley & Western Railroad
3501 East Rosser Avenue
Bismarck, ND 58501

REDACTED VERSION

September 29, 2006

Mr. Les Knudson
General Manager
Superior Grains Inc
11225 108th St NW
Crosby, ND 58730

Dear Mr. Knudson,

Canadian Pacific Railway, Dakota Missouri Valley & Western Railroad and BNSF Railway wish to inform you of pending changes in the ownership, operation and maintenance of the line of railroad that serves your facility.

Today, the line of railroad from Crosby, ND to the CPR/BNSF connection at Lignite Junction (see attached map) is jointly owned by CPR and BNSF. BNSF and CPR (in conjunction with DMVW) both serve the customers and BNSF maintains the track. CPR owns the track between Crosby and Whitetail and between Lignite Junction and Flaxton. BNSF owns, operates and maintains a branch line that continues southeasterly from Lignite Junction and through Lignite.

In January 2005, BNSF served notice on CPR of its intent to discontinue its operations between Crosby and Lignite Junction. This discontinuance would not have relieved BNSF of its obligation to maintain the track. BNSF and CPR recognized that this would create an awkward and potentially unworkable situation for CPR/DMVW to continue to serve the line.

We are pleased to announce that CPR, DMVW and BNSF have agreed on a plan for a new structure for ownership, operation and maintenance of these rail lines as follows:

Ownership & Maintenance

- CPR to become sole owner of the jointly owned track from Crosby to Lignite Jct. and the BNSF-owned track from MP 47.0 south of Lignite (see map) to Lignite Jct.
- CPR to in turn lease these tracks to DMVW and DMVW to maintain them.

Service

- Customers to be able to ship via either BNSF or CPR.
- DMVW to provide all the local train service, providing pick ups and set outs at your facility.
- All shipments to be routed via the DMVW/CPR exchange tracks at Flaxton, ND.
- To/from Flaxton, shipments to be routed either CPR direct or exchanged to/from BNSF at Minot, ND, depending on their billed origin or destination.
- The result will be no remaining rail activity between the last customer at Lignite and MP 47.0, and it will be CPR's intention to abandon and salvage that track.

This proposed transaction is intended to offer you more efficient and effective rail transportation services over the long term by consolidating ownership, maintenance and operations.

We would like to answer your questions and hear your concerns, if any, about this proposal. As a customer who will be directly impacted, you have certain rights under federal law. In order to implement these changes, Surface Transportation Board (STB) proceedings are required to

REDACTED VERSION

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We look forward to discussing this transaction and its impact with you. If you agree that these changes will benefit your operation, we may ask you to write a letter of support to the STB at the appropriate time. With a letter of support from you, the STB is more likely to expedite our request for an exemption.

In closing, we look forward to hearing from you. Please contact me at your convenience at 612-904-5919 to discuss these proposed changes and to express your views. Thank you.

Sincerely,

Judith A Mitchell
Director, Business Development

cc: Jerome M. Johnson
AVP Network Development
BNSF Railway
2500 Lou Menk Drive
Third Floor
Fort Worth, TX 76131

Mr. Jeff Wood
Executive Vice President
Dakota, Missouri Valley & Western Railroad
3501 East Rosser Avenue
Bismarck, ND 58501

REDACTED VERSION

September 29, 2006

Mr. Lynn Michelson
General Manager
Golden Plains AG
PO Box D
Crosby, ND 58730

Dear Mr. Michelson,

Canadian Pacific Railway, Dakota Missouri Valley & Western Railroad and BNSF Railway wish to inform you of pending changes in the ownership, operation and maintenance of the line of railroad that serves your facility.

Today, the line of railroad from Crosby, ND to the CPR/BNSF connection at Lignite Junction (see attached map) is jointly owned by CPR and BNSF. BNSF and CPR (in conjunction with DMVW) both serve the customers and BNSF maintains the track. CPR owns the track between Crosby and Whitetail and between Lignite Junction and Flaxton. BNSF owns, operates and maintains a branch line that continues southeasterly from Lignite Junction and through Lignite.

In January 2005, BNSF served notice on CPR of its intent to discontinue its operations between Crosby and Lignite Junction. This discontinuance would not have relieved BNSF of its obligation to maintain the track. BNSF and CPR recognized that this would create an awkward and potentially unworkable situation for CPR/DMVW to continue to serve the line.

We are pleased to announce that CPR, DMVW and BNSF have agreed on a plan for a new structure for ownership, operation and maintenance of these rail lines as follows:

Ownership & Maintenance

- CPR to become sole owner of the jointly owned track from Crosby to Lignite Jct. and the BNSF-owned track from MP 47.0 south of Lignite (see map) to Lignite Jct.
- CPR to in turn lease these tracks to DMVW and DMVW to maintain them.

Service

- Customers to be able to ship via either BNSF or CPR.
- DMVW to provide all the local train service, providing pick ups and set outs at your facility.
- All shipments to be routed via the DMVW/CPR exchange tracks at Flaxton, ND.
- To/from Flaxton, shipments to be routed either CPR direct or exchanged to/from BNSF at Minot, ND, depending on their billed origin or destination.
- The result will be no remaining rail activity between the last customer at Lignite and MP 47.0, and it will be CPR's intention to abandon and salvage that track.

This proposed transaction is intended to offer you more efficient and effective rail transportation services over the long term by consolidating ownership, maintenance and operations.

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REDACTED VERSION

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We look forward to discussing this transaction and its impact with you. If you agree that these changes will benefit your operation, we may ask you to write a letter of support to the STB at the appropriate time. With a letter of support from you, the STB is more likely to expedite our request for an exemption.

In closing, we look forward to hearing from you. Please contact me at your convenience at 612-904-5919 to discuss these proposed changes and to express your views. Thank you.

Sincerely,

Judith A Mitchell
Canadian Pacific Railway

cc: Jerome M. Johnson
AVP Network Development
BNSF Railway
2500 Lou Menk Drive
Third Floor
Fort Worth, TX 76131

Mr. Jeff Wood
Executive Vice President
Dakota, Missouri Valley & Western Railroad
3501 East Rosser Avenue
Bismarck, ND 58501

REDACTED VERSION

September 29, 2006

Mr. Richard Larson
General Manager
Farmers Elevator of Fortuna
Fortuna, ND 58844

Dear Mr. Larson,

Canadian Pacific Railway, Dakota Missouri Valley & Western Railroad and BNSF Railway wish to inform you of pending changes in the ownership, operation and maintenance of a portion of the CPR route to your facility.

A segment of track east of your facility between Crosby and Lignite Junction, ND (see attached map) is presently jointly owned by CPR and BNSF, and BNSF maintains it. In January 2005, BNSF served notice on CPR of its intent to discontinue its operations on that segment. This discontinuance would not have relieved BNSF of its obligation to maintain the track. BNSF and CPR recognized that this would create an awkward and potentially unworkable situation for CPR/DMVW to continue to serve the line.

We are pleased to announce that CPR, DMVW and BNSF have agreed on a plan for a new structure for ownership, operation and maintenance of these rail lines wherein CPR would become sole owner of the jointly owned track from Crosby to Lignite Jct. as well as a segment of BNSF-owned track between Lignite Jct. and a point south of Lignite (see map). CPR would in turn lease these tracks to DMVW and DMVW would maintain them and provide all the local train service.

This proposed transaction is intended to offer you more efficient and effective rail transportation services over the long term by consolidating ownership, maintenance and operations of this segment of the line.

We would like to answer your questions and hear your concerns, if any, about this proposal. In order to implement these changes, Surface Transportation Board (STB) proceedings are required to either exempt or approve the transaction. The STB's concern, simply put, is to ensure the on-going adequacy of rail service.

There are a number of details of the agreements, as well as due diligence matters, to be resolved before agreements are executed. Then, our current intention is to ask the STB to exempt the change of control and other aspects of this transaction from their jurisdiction on the basis that the changes are minor and will have little impact on competition and service. This procedure, we believe, will expedite the proceeding.

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In closing, we look forward to hearing from you. Please contact me at 612-904-5919 at your convenience to discuss these proposed changes and to express your views. Thank you.

Sincerely,

Judith A Mitchell
Canadian Pacific Railway

cc: Jerome M. Johnson
AVP Network Development
BNSF Railway
2500 Lou Menk Drive
Third Floor
Fort Worth, TX 76131

Mr. Jeff Wood
Executive Vice President
Dakota, Missouri Valley & Western Railroad
3501 East Rosser Avenue
Bismarck, ND 58501

REDACTED VERSION

September 29, 2006

Mr. Dan Treinen
Columbia Grain Inc
P. O. Box 1969
Great Falls, MT 59403

Dear Mr. Teinen,

Canadian Pacific Railway, Dakota Missouri Valley & Western Railroad and BNSF Railway wish to inform you of pending changes in the ownership, operation and maintenance of a portion of the CPR route to your facility at Whitetail, Montana.

A segment of track east of your facility between Crosby and Lignite Junction, ND (see attached map) is presently jointly owned by CPR and BNSF, and BNSF maintains it. In January 2005, BNSF served notice on CPR of its intent to discontinue its operations on that segment. This discontinuance would not have relieved BNSF of its obligation to maintain the track. BNSF and CPR recognized that this would create an awkward and potentially unworkable situation for CPR/DMVW to continue to serve the line.

We are pleased to announce that CPR, DMVW and BNSF have agreed on a plan for a new structure for ownership, operation and maintenance of these rail lines wherein CPR would become sole owner of the jointly owned track from Crosby to Lignite Jct. as well as a segment of BNSF-owned track between Lignite Jct. and a point south of Lignite (see map). CPR would in turn lease these tracks to DMVW and DMVW would maintain them and provide all the local train service.

This proposed transaction is intended to offer you more efficient and effective rail transportation services over the long term by consolidating ownership, maintenance and operations of this segment of the line.

We would like to answer your questions and hear your concerns, if any, about this proposal. In order to implement these changes, Surface Transportation Board (STB) proceedings are required to either exempt or approve the transaction. The STB's concern, simply put, is to ensure the on-going adequacy of rail service.

There are a number of details of the agreements, as well as due diligence matters, to be resolved before agreements are executed. Then, our current intention is to ask the STB to exempt the change of control and other aspects of this transaction from their jurisdiction on the basis that the changes are minor and will have little impact on competition and service. This procedure, we believe, will expedite the proceeding.

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REDACTED VERSION

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Sincerely,

Judith A Mitchell
Canadian Pacific Railway

cc: Jerome M. Johnson
AVP Network Development
BNSF Railway
2500 Lou Menk Drive
Third Floor
Fort Worth, TX 76131

Mr. Jeff Wood
Executive Vice President
Dakota, Missouri Valley & Western Railroad
3501 East Rosser Avenue
Bismarck, ND 58501

REDACTED VERSION

Exhibit B

REDACTED VERSION

September 11, 2007

Les Knudson
Superior Grains Inc
P.O. Box 109
Crosby, ND 58730-0109

Dear Customer

Effective September 19, Canadian Pacific will take over full ownership of the rail line through Lignite, Lignite Jct, Stampede, Larson, Noonan and Crosby ND.

What does this mean to you?

- All of you will receive your spotting and pulling service from the Dakota, Missouri Valley and Western Railroad (DMVW), our partner in providing service in this area since 1990. DMVW is a local company headquartered in Bismarck ND.
- You are now all considered to be industries of both BNSF and CP. To ship via BNSF, you should continue to use the same car ordering and bill of lading processes via BNSF web site as you use today. Those of you that already move traffic via CPR today should continue your usual practices for car ordering and car billing.
- There are no changes in rates or routes because of this change in ownership of the track. BNSF traffic will move via DMVW and CP between your siding and interchange with BNSF at Minot ND. If you trace your BNSF cars, they may show at CP stations between Flaxton and Minot as they pass AEI readers along the track.
- There are two changes you will need to follow
 - For all cars – CPR or BNSF – loads or empties. You will need to release these cars from your track for movement or return by sending a fax list of the car number and whether loaded or empty to CP Minneapolis Customer Service Center at 403-603-8219, phone 1-800-333-8111.
 - If you should receive a car of hazardous materials for unloading from either BNSF or CP, CP will require you to provide a bill of lading for the return movement of the empty car.
- Please note the following contacts if you have any issues

CP Tarsia Kalway	DMVW Jeff Ankenbauer or
Minot Industry Desk	Pat Wanner
1-888-333-8111-1-9-6-7767	(701) 223-9282

We believe this will result in better rail service for all of you.

Sincerely,

C. L. Pratt
Manager-Regional Carriers
Interline
Tel 612.904.5956
Email: cindy_pratt@cpr.ca

REDACTED VERSION

September 11, 2007

Lynn Michelson, General Manager
Golden Plains Ag
PO Box D
Crosby, ND 58730

Dear Customer

Effective September 19, Canadian Pacific will take over full ownership of the rail line through Lignite, Lignite Jct, Stampede, Larson, Noonan and Crosby ND.

What does this mean to you?

- All of you will receive your spotting and pulling service from the Dakota, Missouri Valley and Western Railroad (DMVW), our partner in providing service in this area since 1990. DMVW is a local company headquartered in Bismarck ND.
- You are now all considered to be industries of both BNSF and CP. To ship via BNSF, you should continue to use the same car ordering and bill of lading processes via BNSF web site as you use today. Those of you that already move traffic via CPR today should continue your usual practices for car ordering and car billing.
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CP Tarsia Kalway	DMVW Jeff Ankenbauer or
Minot Industry Desk	Pat Wanner
1-888-333-8111-1-9-6-7767	(701) 223-9282

Sincerely,

C. L. Pratt
Manager-Regional Carriers
Interline
Tel 612.904.5956
Email: cindy_pratt@cpr.ca

REDACTED VERSION

September 11, 2007

Dan Mack,
Vice President, Transportation
CHS Inc
P. O. Box 64089
Mail Stop 664
St. Paul, MN 55164-0089

Dear Customer

Effective September 19, Canadian Pacific will take over full ownership of the rail line through Lignite, Lignite Jct, Stampede, Larson, Noonan and Crosby ND.

What does this mean to you?

- All of you will receive your spotting and pulling service from the Dakota, Missouri Valley and Western Railroad (DMVW), our partner in providing service in this area since 1990. DMVW is a local company headquartered in Bismarck ND.
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- Please note the following contacts if you have any issues

CP	Tarsia Kalway	DMVW	Jeff Ankenbauer or
	Minot Industry Desk		Pat Wanner
	1-888-333-8111-1-9-6-7767		(701) 223-9282

Sincerely,

C. L. Pratt
Manager-Regional Carriers
Interline
Tel 612.904.5956
Email: cindy_pratt@cpr.ca

REDACTED VERSION

September 11, 2007

Bret Halvorson
Facility Manager
CHS Inc dba Sun Prairie Grain
P.O. Box 94
Lignite ND 58752

Dear Customer

Effective September 19, Canadian Pacific will take over full ownership of the rail line through Lignite, Lignite Jct, Stampede, Larson, Noonan and Crosby ND.

What does this mean to you?

- All of you will receive your spotting and pulling service from the Dakota, Missouri Valley and Western Railroad (DMVW), our partner in providing service in this area since 1990. DMVW is a local company headquartered in Bismarck ND.
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- Please note the following contacts if you have any issues

CP Tarsia Kalway	DMVW Jeff Ankenbauer or
Minot Industry Desk	Pat Wanner
1-888-333-8111-1-9-6-7767	(701) 223-9282

Sincerely,

C. L. Pratt
Manager-Regional Carriers
Interline
Tel 612.904.5956
Email: cindy_pratt@cpr.ca

REDACTED VERSION

September 11, 2007

Steve Knutson
Lignite Plant Superintendent
Bearpaw Energy Lignite Plant
Box 87 Rural Route 1
Lignite, ND 58752

Dear Customer

Effective September 19, Canadian Pacific will take over full ownership of the rail line through Lignite, Lignite Jct, Stampede, Larson, Noonan and Crosby ND.

What does this mean to you?

- All of you will receive your spotting and pulling service from the Dakota, Missouri Valley and Western Railroad (DMVW), our partner in providing service in this area since 1990. DMVW is a local company headquartered in Bismarck ND.
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CP Tarsia Kalway	DMVW Jeff Ankenbauer or
Minot Industry Desk	Pat Wanner
1-888-333-8111-1-9-6-7767	(701) 223-9282

Sincerely,

C. L. Pratt
Manager-Regional Carriers
Interline
Tel 612.904.5956
Email: cindy_pratt@cpr.ca

REDACTED VERSION

September 11, 2007

Mr. Chip Duval
President
Lodgepole Energy Marketing
216 Sixteenth Street, Suite 1000
Denver, CO 80202-5115

Dear Customer

Effective September 19, Canadian Pacific will take over full ownership of the rail line through Lignite, Lignite Jct, Stampede, Larson, Noonan and Crosby ND.

What does this mean to you?

- All of you will receive your spotting and pulling service from the Dakota, Missouri Valley and Western Railroad (DMVW), our partner in providing service in this area since 1990. DMVW is a local company headquartered in Bismarck ND.
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CP	Tarsia Kalway	DMVW	Jeff Ankenbauer or
	Minot Industry Desk		Pat Wanner
	1-888-333-8111-1-9-6-7767		(701) 223-9282

Sincerely,

C. L. Pratt
Manager-Regional Carriers
Interline
Tel 612.904.5956
Email: cindy_pratt@cpr.ca

REDACTED VERSION

Exhibit C

REDACTED VERSION

NIOBE, ND to CROSBY, ND

Business Analysis Reports

O/T Station Detail Report - 2.D

By Station, Customer, Forecast Group and Origin / Destination Pair

Jul. 2004 - Jun. 2005

[illegible]

REDACTED VERSION

Exhibit D

REDACTED VERSION

Peter Rickershauser
VP – Network Development
BNSF Railway
2500 Lou Menk Drive
P.O. Box 961039
Fort Worth TX 76131-2828

June 23,2008

Dear Mr.Rickershauser,

In September 2007, Canadian Pacific purchased the rail line between Crosby, N.D. and Lignite Jct., N.D. and the additional trackage to Lignite N.D. from BNSF. BNSF maintained their access to the line through a haulage agreement with Canadian Pacific entitled "North Dakota Haulage Service Agreement". Early in the negotiating process, CP received a letter, "Confidential Revised Offer of Compromise", on August 23, 2006 from Jerry Johnson which outlined the BNSF annual traffic volume off of this segment as being [REDACTED] carloads. Since CP and DMVW acting as CP agent assumed this service under this arrangement with BNSF, the line segment has averaged a surprising [REDACTED] carloads or [REDACTED] car volume in both directions per month .

The haulage service between Lignite/Crosby, N.D. and Minot, N.D., where we interchange with BNSF, falls within a constrained capacity corridor on Canadian Pacific. Because of the unexpected high volume of traffic off of this line after purchase, CP encountered a high number of service failures and capacity related operational issues during Q4 2007 with your customers and CP operations.

In review of the operations plan for this area for the remainder of 2008 and into 2009, CP has identified the high volume of haulage traffic off this line segment as being a repeat contributor to service failures and operational issues for this capacity constrained corridor. CP has also reviewed the train operations plan and track capacity for the traffic volume which could be handled under operations. Based on that review, CP is requesting BNSF to limit their traffic under this haulage arrangement to 50 cars in each direction per week beginning September 1, 2008. This is a reasonable request based on the traffic volumes that CP was led to expect off of the line at the time of purchase..

In summary, CP is requesting that BNSF limit their weekly traffic under the haulage agreement to 50 cars in each direction per week commencing September 1,2008. Although the haulage agreement in place between both party's contain provisions to address capacity related items, as the first step, I propose that a discussion should first take place in order to determine the size of the issue. Canadian Pacific would be amenable to participate.

Sincerely,

Larry J, Kissel
Director Interline Management
Canadian Pacific
630-990-6989 O
630-309-3686 C
Lawrence_Kissel@cpr.ca.

REDACTED VERSION

Cc: Sarah Bailiff, AVP Joint Facilities and Contracts, BNSF Railway, 2500 Lou Menk Drive, P.O. Box 961034, Fort Worth TX 76161-0034

REDACTED VERSION

Exhibit E



REDACTED VERSION

Steve Moerke
Director
Interline
Joint Facilities and Passenger – US

Suite 1000
120 South 6th Street
Minneapolis MN 55402
USA

T 612 904 5930
F 612 904 5982
steve_moerke@cpr.ca

Via E-Mail only
June 25, 2014

Brian Aman
Director Contracts and Joint Facilities
OOB Garden Level
2600 Lou Menk Dr
Fort Worth, TX 76131

Dear Mr. Aman,

This letter concerns the haulage service CP provides pursuant to the North Dakota Haulage Service Agreement for BNSF to and from Minot, ND for customers between Lignite and Crosby, ND. In June of 2008 a letter was sent from Mr. Kissel CP Director of Interline Management to Mr. Rickershauser BNSF VP – Network Development which outlined the problem of the high volume of haulage cars moving in this segment causing congestion on CP and requesting that BNSF limit the weekly traffic to a maximum of 50 cars in each direction.

The haulage traffic moving in this corridor on CP continues to be a concern. The Minot to Lignite Jct. corridor remains in a Canadian Pacific capacity constrained corridor. Recently BNSF tendered a [REDACTED] car single movement for haulage in this lane. The volume could not be accommodated for interchange at Minot and BNSF moved the cars to Bowbells and exchanged the cars to CP through a jointly served industry. This type of move is unacceptable and can't continue to move in this manner.

The exchange trackage at Minot can't accommodate movements of this size in addition to the other traffic interchanging at Minot. The 2007 North Dakota Haulage Service Agreement commits CP to handle BNSF Haulage Cars in *existing train service*. CP is unable to accommodate [REDACTED] cars of BNSF haulage on a single day destined between Lignite and Crosby in existing train service.

CP again requests that BNSF observe the weekly 50 car maximum and additionally requests that BNSF limit the daily haulage volume to no more than 15 cars per day. This restriction is based on CP's current available capacity. Observing this restriction will minimize CP-BNSF Minot Interchange capacity related operational issues. The restriction will also promote fluidity and minimize service failures to BNSF haulage business in this corridor.

The haulage agreement in Section 2.05 contains provisions to address capacity related issues; CP is open to further discussing options to resolve this problem.

Sincerely,

Steven A. Moerke
Director Interline - Joint Facilities & Passenger-US

cc: Sarah Bailiff, AVP Joint Facilities and Contracts
Adolph Gamiero, Director Interline Agreements
Chuck Hubbard, Manager Joint Facilities

REDACTED VERSION

Exhibit F

REDACTED

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 35068

**SOO LINE RAILROAD COMPANY DBA CANADIAN PACIFIC RAILWAY –
ACQUISITION AND OPERATION EXEMPTION – BNSF RAILWAY COMPANY
PETITION TO REOPEN**

VERIFIED STATEMENT OF DAVID WOOD

My name is David Wood. I have been employed since 1996 as Account Manager - US Grain Sales by Soo Line Railroad Company which, together with affiliated operating rail companies in the United States and Canada, does business as Canadian Pacific ("CP").

I am familiar with CP's rail operations on the railway line between Crosby and Lignite Junction in North Dakota (the "Joint Line") and on CP's line between Crosby and Whitetail, Montana (the "Whitetail Line"). I was personally involved with managing the accounts for Farmers Elevator of Fortuna ("Farmers Elevator") on the Whitetail Line and the Golden Plains Ag elevators in Crosby and Noonan, ND on the Joint Line prior to their merger into New Century Ag ("NCA") in 2007. I have managed the NCA account since then.

Purpose

The purpose of my statement is to describe CP's rail service for NCA's elevator facilities on the Joint Line and Whitetail Line since CP's acquisition of full ownership of the Joint Line.

CP's rail service to NCA

After CP acquired BNSF Railway Company's ("BNSF") one-half interest in the Joint Line in September 2007, service problems have been largely weather-related, rather than caused

by deferred maintenance as before. With the exception of 2014, service on the Joint Line has been dependable and consistent. The "polar vortex" in the winter of 2013-14 coupled with a bumper crop of agricultural products caused system-wide failures throughout the Midwest, not only for CP's service to the Joint Line and Whitetail Line.

As part of CP's effort to restore fluid operations, CP revamped its car order system. CP's car order system had allowed customers to maintain car orders for more cars than the customer actually needed with little or no consequence. As service deteriorated, customers entered thousands of phantom car orders in an effort to ensure service. These phantom car orders created a skewed picture of actual customer need, making it difficult to allocate car supply fairly and efficiently, as well as to measure the actual backlog and make progress toward recovery. Accordingly, in August 2014, CP revamped its car order program to ensure that the number of cars ordered reflected the number of cars that the customer actually needed. These changes affected all of CP's customers and not just NCA. Now customers order manifest traffic cars separately from 100 car unit trains provided through CP's Dedicated Train Program ("DTP").

Under CP's DTP, customers can contract with CP to receive 100-car unit train service. The customer must commit to completing two origin-to-destination cycles per month for each trainset ordered. CP limits participation in the DTP to facilities capable of loading and unloading a minimum of 100 railcars within 24 hours of placement, such as NCA's elevators at Noonan and Westby. On a limited basis, CP has allowed co-loading or "pooling" for less than 100-car capacity facilities to permit customers to combine blocks from separate facilities to make up a 100-car trainset. The DTP provides a financial penalty if the shipper fails to complete the minimum two cycles a month during the term of the contract. During the peak period for grain shipments between August and March, shippers cannot split the dedicated trainsets at

destination. From April through July, however, the program allows shippers to "explode" the dedicated trainset into 25-car blocks on arrival at a particular destination for further transportation.

In light of its need to maintain car supply and capacity to meet the needs of all of its customers, CP has a limited number of trainsets available for the program. Participation in the DTP is on a first-come, first-served basis. Some customers either choose not to contract with CP or are foreclosed from doing so because of availability. Those customers may be able to purchase CP DTP trainsets on the secondary market.

Such is the case with NCA, which has never contracted directly with CP for participation in the DTP, but has purchased a varying number of DTP trainsets each month from Agrex, the contract holder. In 2018, CP provided NCA with [REDACTED] DTP trainsets for its new facility at Noonan ([REDACTED] railcars) and [REDACTED] DTP trainsets for its facility at Westby ([REDACTED] railcars). DTP trainsets provided to NCA in prior years are as follows:

Year	Noonan (DTP sets)	Noonan (cars)	Westby (DTP sets)	Westby (cars)
2017	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
2016	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
2015	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

Last year, because forecasted grain harvests were higher than average, CP's customers sought to purchase additional DTP trainsets for the 2018-19 crop year. The requests, however, exceeded CP's capacity for the U.S. market. For the first time, NCA also attempted to contract directly with CP to secure an additional DTP trainset for its Noonan and Westby facilities. By the time of NCA's request, however, CP had allocated all additional DTP capacity to other customers.

To protect capacity for the DTP, CP limits orders for manifest traffic for 100-car capable facilities to 50 cars at a time. For facilities with less than 100-car capability, customers can order up to the facility's capacity. CP attempts to place manifest car orders within a week of the want date, but because most CP equipment goes offline, CP cannot guaranty placement.

For 2014 through 2018, CP provided railcars for NCA's manifest service at its Crosby, Noonan, and Westby facilities as below:

Year	Crosby	Noonan	Westby	Totals
2014				
2015				
2016				
2017				
2018				

Attached as Exhibit A is table of CP's fulfillment of manifest and DT cars ordered by NCA for Crosby, Noonan, and Westby for 2015-2018.

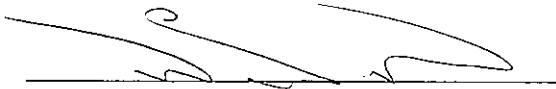
In July 2014, NCA completed work on its new loop track and load out facilities at Noonan, which made the facility capable of loading 100-car unit trains. NCA also did not inquire or otherwise seek assurance that the September 18, 2007 Haulage Agreement would be extended upon expiration of the agreement's initial term on January 1, 2017. In addition, prior to 2013, while NCA was still in planning stages for construction of the new facility at Noonan, I informed both members of NCA's management team, Rich Larsen and Lynn Michelson, that the haulage agreement did not provide for service by BNSF unit trains. In February 2014, I again informed NCA that BNSF haulage service to Noonan was limited to manifest traffic. Attached hereto as Exhibit B is a true and correct copy of my correspondence to Richard Larsen dated February 11, 2014.

CP's freight rates are competitive with BNSF's for most traffic from the Joint Line and Whitetail Line with the exception of specialty crops, such as peas, lentils and other legumes,

destined for the Pacific Northwest. Because BNSF can provide single line service to most PNW destinations, its rates do not include linehaul divisions with another carrier. CP's rates also include a fuel surcharge, which BNSF has chosen not to apply to this traffic. For traffic moving to eastern destinations, CP's rates are competitive with BNSF's.

VERIFICATION

I, David Wood, 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 'David Wood', is written over a horizontal line.

David Wood
Account Manager - US Grain Sales
Soo Line Railroad Company

Dated: February 1st, 2019

REDACTED VERSION

Exhibit A

REDACTED

Exhibit B

**CANADIAN
PACIFIC**

- Final - Sent to cust.

February 11th, 2014

Mr. Richard Larsen

General Manager – New Century Ag
100 Main St. / P.O. Box 125
Fortuna, ND 58844

Dear Mr. Larsen;

Canadian Pacific would like to express its appreciation for the business New Century Ag provides and for the opportunity to explore your plans for expansion at Noonan, which we have thoroughly reviewed. Canadian Pacific fully supports your efforts to increase operational efficiency and will continue to provide published rate reductions/loading incentives. Canadian Pacific respectfully declines, however, to provide any direct financial participation or additional developmental rebate program. Upon completion of the new Noonan facility, Canadian Pacific will discontinue the current practice of allowing New Century Ag to load 100 car unit trains across multiple stations (pooling) to meet 100 car rate requirements.

Additionally, it has come to our attention that New Century Ag is holding to an idea that BNSF Unit Train service from Minot, ND to Noonan may be an option. At this time BNSF does not enjoy the right to move unit trains to the newly constructed Noonan facility. Canadian Pacific will continue to handle BNSF manifest traffic to and from Crosby and Noonan via the CP/BNSF Minot interchange pursuant to the original line sale and haulage agreements between CP and BNSF.

Please contact me if you would like me to clarify any of the points within this letter.

Regards,

Dave Wood
Canadian Pacific Railway
Regional Account Manager – Sales
415 38th St. S.W. (B)
Fargo, ND 58103
PH: 701-492-2934
Email: david_wood@cpr

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 35068

**SOO LINE RAILROAD COMPANY DBA CANADIAN PACIFIC RAILWAY –
ACQUISITION AND OPERATION EXEMPTION – BNSF RAILWAY COMPANY
PETITION TO REOPEN**

VERIFIED STATEMENT OF TYME WITTEBROOD

My name is Tyme Wittebrood. I have been employed by Canadian Pacific Railway Company ("CPRC") since 2011, and as the Director of Regulatory Finance since 2017. Soo Line Railroad Company is an affiliated operating rail company of CPRC, and with CPRC, does business as Canadian Pacific ("CP").

I reviewed CP and BNSF's rates from Noonan, ND that Lynn Michelson provided in his verified statement in support of New Century Ag's ("NCA") petition filed with the Surface Transportation Board ("STB") on December 21, 2018.

I analyzed those rates pursuant to the STB's Uniform Rail Costing System ("URCS"). The URCS analysis is presented in the following tables:

BNSF
Noonan, ND
(Rates per NCA)

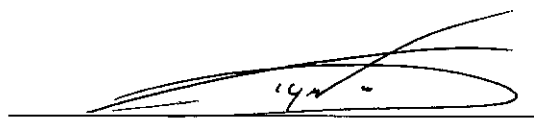
Destination	Loaded Miles	Commodity	Single Car Rate	URCS Cost	R/VC
Seattle	1573	Flaxseed	\$4,831	\$5,563	87%
Portland	1405	Flaxseed	\$4,831	\$5,070	95%
Seattle	1573	Peas	\$5,772	\$5,563	104%
Portland	1405	Peas	\$5,772	\$5,070	114%
Houston	1956	Peas	\$7,349	\$6,690	110%
Seattle	1573	Soybeans	\$5,355	\$5,563	96%
Los Angeles	2456	Wheat	\$7,813	\$8,286	94%
Seattle	1573	Wheat	\$6,781	\$5,563	122%
Portland	1405	Wheat	\$6,406	\$5,070	126%

CP
Noonan, ND
(Rates per NCA)

Destination	Loaded Miles (CP&UP)	Commodity	CP Single Car Rate	URCS Cost	R/VC
Seattle	1513	Flaxseed	\$7,209	\$4,518	160%
Portland	1330	Flaxseed	\$7,173	\$4,020	178%
Seattle	1513	Peas	\$6,727	\$4,518	149%
Portland	1330	Peas	\$6,691	\$4,020	166%
Houston	1956	Peas	\$10,007	\$6,690	150%
Seattle	1513	Soybeans	\$8,460	\$4,518	187%
Los Angeles	2409	Wheat	\$8,841	\$6,957	127%
Seattle	1513	Wheat	\$7,209	\$4,518	160%
Portland	1330	Wheat	\$7,173	\$4,020	178%

VERIFICATION

I, Tyme Wittebrood, declare under penalty of perjury that I am authorized to make this verified statement on behalf of Canadian Pacific Railway Company and its U.S. affiliate, 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 'Tyme Wittebrood', is written over a horizontal line.

Tyme Wittebrood
Director of Regulatory Finance
Canadian Pacific Railway Company

Dated: Feb 1, 2019

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 35068

**SOO LINE RAILROAD COMPANY DBA CANADIAN PACIFIC RAILWAY –
ACQUISITION AND OPERATION EXEMPTION – BNSF RAILWAY COMPANY
PETITION TO REOPEN**

VERIFIED STATEMENT OF WILL WANGERIN

My name is Will Wangerin. Since 2013, I have been employed as Manager Industrial Development - US by Soo Line Railroad Company, which, together with affiliated operating rail companies in the United States and Canada, does business as Canadian Pacific ("CP"). I have been employed in other capacities with CP since 1998.

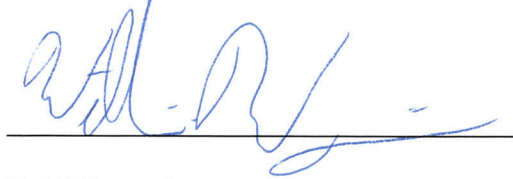
I am familiar with CP's rail operations on the railway line between Crosby and Lignite Junction in North Dakota (the "Joint Line") and on CP's line between Crosby and Whitetail, Montana (the "Whitetail Line"). I was personally involved with coordinating engineering review of construction plans for New Century Ag's ("NCA") new elevator facility and loop track at Noonan, ND. The purpose of my statement is to describe CP's limited involvement in 2013 and 2014 with NCA's planning and construction of its new elevator and loop track load-out facilities in Noonan, ND.

In May 2013, NCA's contractor's rail pit and loop track drawings for the Noonan facility were forwarded to CP for engineering review and approval. CP approved the track design in June 2013.

NCA completed work on its new loop track and load out facilities at Noonan in July 2014. CP and NCA executed CP's standard Private Siding Agreement on July 30, 2014, which governs maintenance and rail operations of the loop track.

VERIFICATION

I, Will Wangerin, 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.



Will Wangerin
Manager Industrial Development - US
Soo Line Railroad Company

Dated: January 31, 2019