

EXPEDITED CONSIDERATION REQUESTED

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 35068

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

PETITION OF NEW CENTURY AG TO FILE REBUTTAL TO THE
REPLY OF CP AND PROPOSED REBUTTAL

Pursuant to the provisions of 49 C.F.R. § 1117.1, New Century Ag (“NCA” or “New Century”) respectfully requests leave to file this Rebuttal, along with the Rebuttal Verified Statement of Lynn Michelson, in response to the Soo Line Railroad Company d/b/a Canadian Pacific (“CP”) Reply to the Petition to Reopen submitted on February 4, 2019 (the “CP Reply”).

Although its rules do not permit the submission of a reply to a reply as a matter of right, 49 C.F.R § 1104.13(c), the Surface Transportation Board (“Board”) has frequently waived this restriction in situations where good cause has been shown in the interest of completing a full record. *See, e.g.,* Ex Parte 558 (Sub-No. 21), *Railroad Cost of Capital—2017* (served Dec. 6, 2018); FD 35960, *Petition of Union Pac. R.R. Co. for Declaratory Order* (served Sept. 30, 2016).

The CP Reply and its supporting verified statements contain a number of inaccurate and misleading statements of purported fact that are material to the issues in this proceeding. Several examples of CP’s mischaracterizations demonstrate the need for NCA to correct the record. First, CP inaccurately represents that all parties and the Board understood in 2007 that the Haulage Agreement between it and the BNSF Railway Company (“BNSF”) was limited to a ten-year term

and that CP could unilaterally terminate or amend key terms of the arrangement at any time thereafter without Board approval. Similarly, CP incorrectly states that NCA was on notice, prior to and during the three-year period required to plan and construct the \$41 million rail improvement project at the Noonan and Crosby elevators, that BNSF would not be permitted to provide unit train service to NCA. And, CP has misrepresented the nature of rail service NCA's predecessor (Golden Plains Ag) received prior to CP's acquisition of BNSF's interest in the Joint Line and the railroads' submission of their Joint Petition.¹

These inaccuracies are directly relevant and material to the resolution to the matter NCA has raised in the proceeding – namely, whether CP and BNSF are providing the competitive rail service that was ordered by the Board, in its decision served September 7, 2007, *based on the railroads' representations*, as a condition for approving the transaction and exemption they sought. Good cause exists to accept this rebuttal in order to correct the record and so that the Board can have an accurate and more complete record on which to base its decision in this matter.

NCA could not have anticipated that the CP Reply would contain the various inaccurate and misleading statements and therefore had no previous opportunity to address the purported facts and argument CP submitted on these specific issues. The Board has routinely held that where a party could not reasonably have anticipated the contentions of an opponent that could be material to the resolution of a case, it has good cause for being granted leave to reply. *See, e.g., Delaware & Hudson Ry. Co. v. Consol. Rail Corp. – Reciprocal Switching Agreement*, 9 I.C.C. 2d 989, 990 (1993).

Neither this Petition nor the proposed Rebuttal raise any new legal issues or expand the nature of this proceeding. And, allowing this rebuttal statement into the record will not prejudice

¹ The CP and BNSF Joint Petition for Exemption was filed July 16, 2007.

any party because the Board has not yet issued any rulings on the merits of the issues raised in this proceeding.

Accordingly, and for the reasons stated above, NCA requests that the Board grant this Petition for Leave to file its rebuttal and the Rebuttal Verified Statement of Lynn Michelson in this proceeding.

PRELIMINARY MATTER

When NCA filed its Petition to Reopen on December 20, 2018, the filing contained competitively sensitive information pertaining to NCA's markets. NCA therefore separately submitted a motion for protective order on that same date and filed both a redacted public version and an unredacted confidential version of the Petition to Reopen. To enable NCA to provide CP and BNSF with the unredacted version of its Petition to Reopen that their counsel could share with their client as soon as possible, both CP and BNSF agreed to abide by the terms of the proposed confidentiality order. Nonetheless, it would be appropriate for the Board to now rule on NCA's motion and issue the requested protective order.

REBUTTAL²

Consistent with its attitude since NCA spent over \$41 million in rail infrastructure improvements for the purpose, among others, of being able to receive competitive and unit train

² For simplicity, NCA will refer to the Joint Petition for Exemption filed by CP and BNSF on July 16, 2007 as the "Joint Petition;" the Board's decision served September 7, 2007 granting the exemption as the "2007 Exemption;" the Petition to Reopen filed by NCA on December 20, 2018 as the "Petition;" the Verified Statement of Lynn Michelson filed with the Petition as the "Michelson Statement;" the Rebuttal Verified Statement of Lynn Michelson attached to this Petition for Leave to File Rebuttal as "Michelson Rebuttal" and the CP Reply to Petition to Reopen as the "CP Reply." The statements submitted by CP in support of its reply will be referred to as the "Hubbard Statement," the "Wood Statement," and the "Wittebrod Statement." And, the line between Crosby and Lignite Junction, ND which CP acquired through the 2007 Exemption when it took BNSF's 50% interest is called the "Joint Line."

service from both CP and BNSF, the CP Reply ignores the representations it made to the Board, the relief it requested and the exemption the Board granted in this proceeding in 2007. The Reply tries to recast CP's acquisition of BNSF's 50% interest in the Joint Line as a basic line sale, and after making the 2007 Haulage Agreement with BNSF a specific condition for the Board's approval, seeks now to call that agreement a routine, private arrangement between two railroads that is none of the Board's or NCA's concern. Starting from that (inaccurate) premise, CP now contends that the Haulage Agreement expired at the end of 2017, that the Haulage Agreement always limited BNSF's service to manifest train service at levels acceptable to CP, and that NCA (or its predecessor) was not receiving unit train service prior to 2007. Each of these contentions is wrong.

I. CP Cannot Terminate the Haulage Agreement Without Board Approval

In its Petition, NCA pointed out that the Interstate Commerce Commission ("ICC") had originally imposed joint ownership of the Joint Line as a key condition in the various merger cases that led to the current configuration of the rail lines serving NCA. (NCA Petition to Reopen, at 3-5, 12-13 and n. 8.) CP and BNSF clearly recognized they had to take this historical context into account when they sought Board approval of the method they worked out to reduce operating costs by having a single carrier (the Dakota, Missouri Valley and Western Railroad ("DMVW")) maintain and directly serve the NCA facilities while preserving the pre-existing dual competitive access through a haulage arrangement.

CP now claims that NCA was on notice the Haulage Agreement was not intended to last longer than a ten-year term and any decision to extend it was solely within the discretion of CP and BNSF. (CP Reply, at 22-23.) In support, CP notes that a redacted version of the Haulage Agreement was appended to the Joint Petition. However, as Mr. Michelson points out, when

soliciting the support of NCA's predecessor (Golden Plains Ag) for the transaction that was the subject of the Joint Petition, CP never intimated that BNSF's service might go away after ten years. To the contrary, CP continually represented that there would be no change in the competitive service available to NCA. On that basis, NCA supported the railroads' filing (Michelson Rebuttal, ¶¶ 3-5) and the Board approved. It ill behooves CP to argue that NCA should have disregarded the repeated representations that the transaction "*will not result in any abuse of market power by either BNSF or CPR*", "[t]here will be *no loss of rail competition*", "[t]hrough the Haulage Agreement, *BNSF retains the right to service*" NCA, "there will be *no material change* in the level or nature of serviced provided to those shippers," "[e]xisting customers ...*will retain the services of both BNSF and CPR*", the "proposed transaction, overall, *will enhance intra-modal competition*", and that "the proposed transaction will only result in a change of ownership and *not a change in service or adverse change in competition.*" (Joint Petition at 13-14; emphasis supplied.)

CP now contends that those representations were not binding commitments and should not have been taken seriously, claiming that its representations in 2007 "are general statements regarding access and competition...and are typical of the representations made in most Board proceedings involving line sale and other transactions." (CP Reply, at 23.) Purportedly relying on one of the Board's *UP/SP* merger decisions,³ CP argues that the specific representations it and BNSF made in the Joint Petition pledging to continue competitive service along the Joint Line are meaningless and do not "forever bind a carrier." (*Id.*) But Decision 107 does not support the unusual contention that specific commitments made by a party during any proceeding are

³ The correct citation to that decision is *Union Pac. Corp – Control and Merger – S. Pac. Corp.*, FD 32760, Dec. No. 107 (served Dec. 30, 2014) ("Decision 107").

meaningless. In denying that request by BNSF and an industry for new competitive service in that case, the Board made it clear, first, that the industry had not lost any competitive options as a result of the UP/SP merger and, second, that the petitioners there had mischaracterized UP's general statements about the benefits of the merger that had nothing to do with the new, unrelated request at issue there. (Decision 107, at 5-6.)⁴

In this case, by contrast, CP and BNSF made the repeated and specific representations cited above that NCA would continue to have unrestricted competitive service from BNSF, after BNSF sold its share of the joint Line, through a haulage arrangement. That the BNSF's service is provided through haulage rather than via trackage rights does not alter or diminish the significance of NCA's rights to continued, unrestricted competitive rail service. NCA supported the Joint Petition's haulage proposal in response to assurances from BNSF and CP that competitive service from both would be assured and that the arrangement would be more efficient and less costly. (Michelson Statement, at ¶¶ 4, 11-13.) And, the 2007 Exemption was accordingly based upon those very specific representations.

But CP argues that NCA and the Board should have read the small print of the Haulage Agreement and realized there was a time limit on the promised retention of competitive service. And, it does so even though it was well aware that NCA's proposed investment in the rail infrastructure at Noonan and Crosby was made in reliance on the continued status quo of competitive rail service. (Michelson Rebuttal, ¶ 9.)

That there was a term in the Haulage Agreement is of little relevance. Neither BNSF nor CP represented to the Board that a condition of their transaction and the requested exemption was

⁴ Despite suggesting that Decision 107 is but one example of the Board's supposed laissez-faire attitude on the subject, CP not surprisingly fails to provide a single case supporting the remarkable proposition that a carrier's specific representations are not meant to be believed nor binding.

that the arrangement would end in ten years. Had they done so, this would not only have drawn opposition from NCA but would have undercut the Joint Petition's contention that approval of the requested exemption would not result in an abuse of market power by either railroad. In granting the exemption the Board did not rule that either its authority or the Haulage Agreement had an expiration date. Instead, and as discussed further below, the mere expiration of an agreement of this nature is not the end of the matter, as the Board must determine whether the termination of the arrangement will result in an abuse of market power or is otherwise in the public interest.⁵

NCA suspects that not even CP takes this position seriously. When advised for the first time in 2017 that CP was considering taking steps to terminate the Haulage Agreement, NCA retained counsel and complained to both CP and BNSF. At that point, CP and BNSF then agreed first to a one-year, then a five-year extension of the agreement, albeit with no input from shippers or approval by the Board. (*Id.* ¶¶ 6-8.) Any material change to the terms of the Haulage Agreement that modified the basis for the Board's approval, and doing so without input from NCA and other parties, was unlawful. Although haulage agreements are ordinarily private agreements not subject to Board jurisdiction, that is not the case here since the arrangement was the single and specific key condition that underpinned the Board's approval of the Joint Petition in 2007.

It is not necessary for NCA to repeat its contention that Board approval is required for any modification or termination of the Haulage Agreement and instead adopts and incorporates the discussion at pages 18-20 of its Petition. Suffice it to say that CP's Reply does not even address, let alone rebut, the principles NCA laid out that: (1) *this* haulage arrangement was a specific

⁵ NCA is not contending that CP and BNSF are forever bound by the terms of the Haulage Agreement. They are free to propose other arrangements that maintain joint access and competition on the Joint Line. They simply are not free to terminate the arrangement or materially alter its terms without giving affected parties an opportunity to be heard and securing the Board's approval.

condition on which the grant of the 2007 Exemption was specifically predicated; (2) *this* haulage arrangement involves a public rather than private right akin to a trackage rights agreement that cannot expire or be terminated without Board approval; and (3) railroads are bound by the representations they make even if the subject matter would otherwise not have been jurisdictional for the agency. Nor has CP suggested how it can properly cancel the haulage arrangement at will, without Board approval, even though doing so would terminate BNSF's common carrier obligation to serve NCA.

Insofar as *UP/SP* merger decisions and haulage agreements similar to the one in this proceeding are concerned, a more relevant and pertinent decision is Decision No. 44 (served Aug. 6, 1996), where the Board approved the merger and discussed the conditions being imposed "to address competitive issues raised by the merger." (*Id.*, at 9.) The Board explained that because of the importance of BNSF's performance to remedy the loss of competition caused by the merger, it imposed a common carrier obligation on BNSF with respect to certain traffic, "*including traffic that is handled under haulage rights rather than trackage rights.*" (*Id.*, at 134; emphasis supplied.) Those haulage rights cannot be terminated without Board approval. Similarly, this haulage arrangement, involving public rights and obligations, cannot be abridged without Board approval.⁶

II. The 2007 Exemption Did Not Limit BNSF Service

The CP and BNSF committed that NCA would continue to receive common carrier service at competitive rates. (Joint Petition at 13.) And, the Joint Petition's statement that there was to be "no material change in the level or nature of service provided" was understood by all parties and the Board to mean that both BNSF and CP would have common carrier obligations and neither

⁶ Unlike the situation in the *UP/SP* Decision No. 44, there was no need for the Board to specifically impose any common carrier obligation on BNSF in this proceeding as BNSF already was a common carrier on the Joint Line and would be retaining that obligation.

would interfere with the operations of the other. (*Id.*) CP now contends that the “no material change” meant something far more limiting, that neither CP nor BNSF would alter whatever level of service was being provided as of September 7, 2007. CP Reply, at 20-21.) In other words, according to CP and unlike the real world where service needs ebb and flow in response to market realities, the number of switches, the number of cars, the volumes of cars, the types of commodities and cars, etc. provided by either railroad were forever fixed and could not be varied in the future.⁷ That position makes no sense in any industry but is particularly specious with respect to the grain industry, where shippers’ needs are dependent upon changes in harvests and markets.

Regardless, CP has mischaracterized the level of service NCA’s predecessor was receiving prior to 2007. Not surprisingly, given the changing nature of harvests, that traffic did ebb and flow, both as to the car volumes and market share of CP and BNSF. (Michelson Statement, ¶31.) Although BNSF was not providing classic unit train service (since neither the Noonan nor Crosby elevators were equipped at that time to load unit trains), BNSF was providing service in volumes and characteristics akin to unit trains during that period. (Michelson Rebuttal, at ¶ 14.)

Almost before the ink on the 2007 Exemption decision was dry, however, CP took the position that BNSF service was limited to 50 cars at a time on some occasions, 25 at a time on others and 2,600 cars per year regardless of NCA’s service needs. (Michelson Rebuttal, ¶¶ 15-16.) The CP Reply cites its Witness Charles Hubbard for the proposition that NCA agreed to this

⁷ CP claims that the Noonan and Crosby rail infrastructure improvements and expansion, that were completed in 2014, do not justify any NCA contention of detrimental reliance in this proceeding and that it specifically advised NCA that CP would not permit BNSF to provide unit train service despite that \$41 million investment by NCA. (CP Reply, at 14; Wood Statement at p. 4.) Although CP’s hostility to BNSF service was evident prior to 2014 (and caused NCA to complain to the Board’s Rail Consumer and Public Assistance Office), CP never advised NCA during the planning for this expansion that it would flatly permit the haulage arrangement to include BNSF unit train service. (Michelson Rebuttal, ¶¶ 9-13.)

limitation. (CP Reply, at 22.) However, Mr. Hubbard says no such thing. (Hubbard Statement, at p. 7-8.) Those limits were imposed by CP and were attributable to what Mr. Hubbard claims – without support – were CP’s capacity constraints and capacity related operational issues “with [BNSF] customers and CP operations.” (*Id.*, at 7.) Yet, NCA was ordering cars from CP and BNSF in accordance with its historical usage patterns and expected, consistent with the railroads’ representations, that its shipping needs would be satisfied. Although BNSF advised NCA that it could provide unit train service to NCA, in 2014 instead CP reduced BNSF’s ability to serve NCA to 15 cars per day. (Michelson Rebuttal, ¶¶ 12, 16; Exhibit E to Hubbard Statement.)

CP focusses on section 2.04 of the Haulage Agreement to justify the limitations it has imposed on BNSF service to NCA. (CP Reply, at 22.) This ignores both CP’s representations of competitive service in the Joint Petition as well as section 4.04 of the Haulage Agreement, where CP is to “generally accord BNSF Haulage Cars the same level of service as CPR’s own tariff of the same type.” NCA does receive unit train service from CP, although not as much as requested, but CP is unwilling to let BNSF provide that same “level of service.” Similarly, CP’s reply does not mention section 2.05 of the Haulage Agreement, where BNSF is entitled to request additional haulage service, including an additional train, if this is necessary to handle further business on the Joint Line. Instead, CP just says “no” despite NCA’s needs for consistent manifest service as well as the unit train service essential for NCA to ship so-called specialty crops to the Pacific Northwest markets. (Michelson Statement, ¶¶ 36-45, 56-57; Michelson Rebuttal, ¶ 13.) CP maintains this position of denying NCA access to essential BNSF unit train service on the important specialty

crops even while conceding that it will not provide this needed service to NCA. (Wood Statement, at p. 4-5.)⁸

CP apparently chafes at the significant amount of traffic NCA wishes to move via BNSF and complains – albeit without any support – that this unduly creates capacity constraints. Yet, while CP can handle NCA’s manifest and unit train needs, it nonetheless claims that it cannot permit BNSF to do the same. Nor does CP explain why, if some additional operating arrangements – such as changing the interchange location for BNSF – do need to be made, it has not worked with BNSF to do so.

III. Reopening Does Not Adversely Affect Future Transactions or the RTP

CP’s Reply raises two contentions that NCA could not reasonably have anticipated. It argues, first, that NCA’s issues could have been raised during the 2007 proceeding and it is accordingly too late to reopen the proceeding. Second, CP contends that reopening would undermine the Rail Transportation Policy (“RTP”) and jeopardize future transactions between carriers.

The first contention – that NCA should have known in advance that CP would not abide by its representations – is, for lack of a better word, ridiculous. NCA supported the Joint Petition because CP and BNSF specifically represented that the new arrangements would be more efficient, less costly to the carriers and would not eliminate the existing competitive rail service NCA was receiving then and into the future. There was no way NCA could have known that CP would

⁸ In corroborating the significant rate differentials between BNSF as compared to CP that NCA’s petition noted, CP’s Reply demonstrates the importance of unrestricted BNSF manifest and unit train service to NCA. (Compare Michelson Statement, ¶¶ 41-45, 56-57 and CP Reply at 13; Wittebrod Statement.) Left solely to CP, NCA is at a significant competitive disadvantage to its competitors, both as to rates and service, a situation that the Joint Petition assured the Board would not occur.

subsequently limit the quantum or quality of BNSF service available to NCA until CP commenced imposing restrictions. For several years, NCA attempted to work with CP to minimize the car service problems that commenced post-closing of the 2007 Exemption and sought the assistance of the Board's RCPA staff when the car limitations increased and the no-BNSF unit train service fiat was imposed. (Michelson Rebuttal, ¶12). CP only later took the position that the commitments in the Joint Petition had an expiration date that it could unilaterally determine. None of these actions by CP could reasonably have been foreseen when CP and BNSF sought and received the support of NCA or when the carriers submitted the Joint Petition.

Nor can it reasonably be contended that reopening this proceeding to devise a remedy for NCA would be inconsistent with the RTP or might jeopardize future haulage agreements or other intra-rail transactions. There is nothing in the RTP suggesting that railroads should not abide by their representations to their customers or the Board. While the 2007 Exemption transaction has reduced rail operating costs, that is only half of the equation. The Joint Petition pledged that the arrangements would be good for rail shippers, all of whom would continue to receive the benefits of competitive rail service. CP has whittled those benefits down for NCA and now threatens to cancel them entirely.

Similarly, the issues here have nothing to do with routine intra-railroad haulage arrangements, which are not subject to Board jurisdiction and can accordingly be initiated and terminated by the railroad parties at will. This Haulage Agreement, on the other hand, was and is a condition requested by BNSF and CP to cure the anti-competitive effects of their transaction, and was imposed by the Board as a condition in the same manner as were the various conditions that were imposed on the various carriers in the approval of the UP/SP merger. Contrary to the cases cited by CP (Reply, at 31), the haulage arrangements in this case are not "voluntary" without

any “regulatory rights and responsibilities.” Consequently, although railroads cannot properly renege on commitments made in regulatory proceedings, they can continue to enter into voluntary haulage arrangements without fear of inappropriate shipper or Board oversight.

CONCLUSION

NCA accordingly requests that the Board grant its petition for leave to file the rebuttal discussed above. Doing so would be consistent with numerous cases in which parties were permitted to address inaccurate or misleading statements or that address contentions made in a reply that could not reasonably have been anticipated, all of which enables the Board to have a more complete and accurate record on which its decision can be based.

NCA respectfully also reiterates its request that the Board give this matter expedited consideration. NCA has already made commitments to have grain that is to be harvested in the coming summer and fall delivered to destinations served by BNSF. In view of CP’s position in this matter, NCA may not be able honor those commitments notwithstanding the terms of the 2007 Exemption providing for continued competitive rail service. Consequently, a prompt decision by the Board as to whether CP must work with and permit BNSF to provide needed manifest and unit train service is of great importance to NCA and the farmers in North Dakota.

Respectfully submitted,



Edward D. Greenberg
Thomas W. Wilcox
Kristine O. Little
GKG Law, P.C.
1055 Thomas Jefferson Street, NW
Suite 500
Washington, DC 20007-4492
Phone: (202) 342-5277

Counsel for New Century Ag

February 21, 2019

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 35068

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

REBUTTAL VERIFIED STATEMENT OF LYNN MICHELSON

1. My name is Lynn Michelson and I previously submitted a verified statement in support of New Century Ag's Petition to Reopen this proceeding. I am submitting this rebuttal verified statement for the purpose of correcting several misstatements made by the Soo Line Railroad Company d/b/a Canadian Pacific ("CP") in its reply and in the supporting verified statements of its witnesses Charles E. Hubbard and David Wood.

2. First, CP erroneously claims that NCA was well aware that the Haulage Agreement provided to the Board as part of the joint Petition for Exemption filed by CP and the BNSF Railway Company ("BNSF") in this proceeding (the "Joint Petition") was never intended to last longer than ten years term and that it was clear to all shippers that the haulage arrangements might terminate in 2017. (CP Argument ("Argument")), at 22-23. That is categorically incorrect and is belied by both the documents CP submitted in its Reply as well as the formal representations to the Surface Transportation Board made by both CP and the BNSF in support of the Joint Petition.

3. In its September 29, 2006 letter to me, when I was employed as the general manager of Golden Plains Ag (which is now NCA) that is attached as part of Exhibit A to the Hubbard Statement, CP advised me (and other shippers) of the planned change of ownership. Among other

things, the letter specifically represented that “Customers to be able to ship via either BNSF or CPR” after the transaction closed, that the proposal would “offer you more efficient and effective rail transportation service over the long term by consolidating ownership, maintenance and operations, that the approval of the STB would be required and that the “STB’s concern, simply put, is to ensure the on-going adequacy of your rail service,” and that the effects of the changes will be “minor and will have little impact on competition and service.” The letter closed with a request that we support the planned transaction.

4. At that time, Golden Plains Ag and NCA understood the maintenance issues along what is called the Joint Line and the fact that having two railroads serving the grain elevators along the line along separate tracks was inefficient. NCA accordingly (after it acquired the Golden Plains Ag elevators) did what CP requested and supported the proposed transaction. (See Exhibit 2 to my initial verified statement, which document was attached to the Joint Petition.) Nowhere in that supporting letter is there any mention of a proposed 10-year term, which is not surprising because NCA believed that when CP represented that there would be no change in the continuation of competitive service, they meant what they said.

5. Neither CP nor BNSF provided NCA with a copy of the Haulage Agreement that was ultimately filed with the Board in support of the Joint Petition. Nor is it clear that we would have understood the significance of the language in section 9 of the agreement if we had received the document in 2007, as we are not lawyers and instead relied on the joint representations of CP and BNSF to the Board that the arrangements would merely result in a change in ownership, that BNSF would be able to continue to provide common carrier service and that there would be no material change in the level or nature of service. (See Joint Petition at 13-14.) Nothing in the communications from CP or the Joint Petition suggested that BNSF’s competitive service might

end after 10 years. Consequently, even today, now that CP has brought it to our attention, our understanding of the term provision (section 9) of the Haulage Agreement is that CP and BNSF might have to renegotiate the compensation and other provisions of the haulage arrangements, but not that CP might simply elect to eliminate BNSF's competitive service or that it could properly do so without consideration of the needs of the shippers on the line or Board approval. Contrary to CP's assertion, NCA had no reason in 2007 or 2016 to believe that CP could terminate the Haulage Agreement or materially modify the terms to reduce BNSF's ability to provide competitive rail service.

6. Regardless, when BNSF advised NCA in 2017 that CP was threatening to terminate the Haulage Agreement, NCA retained counsel to look into the situation given our needs both for continued BNSF service and to be able to intelligently plan on the amount of grain we could purchase and ship over the coming year. By that time, CP had apparently agreed with BNSF for a one-year extension of the arrangements but had not been in touch with NCA or given any assurance that the haulage arrangements would be renewed further. Our counsel contacted both railroads in early 2018 requesting that they immediately remedy both the issue of the continuation of the Haulage Agreement and CP's refusal to allow NCA to have unit train service from BNSF.

7. Although it never responded to our counsel or provided us with a copy of the Supplemental Agreement prior to its reply filing (even though we repeatedly asked both CP and BNSF for a copy), CP did enter into the five-year Supplemental Agreement that is attached to Mr. Hubbard's Statement (as his Exhibit F). That document notably differs from the Haulage Agreement that was presented to the Board in 2007 by specifically limiting the arrangement to "manifest traffic not in unit train service" and agreeing only to a five-year term.

8. While BNSF did sign onto the Supplemental Agreement, it had previously advised NCA that it was willing to provide the additional unit train service we needed. I assume that BNSF's decision to agree to the unit train restriction in the Supplemental Agreement was that CP would otherwise not permit BNSF to provide any service at all. So, rather than risk being precluded from working with NCA, BNSF essentially capitulated to CP's demand although it had indicated its willingness to provide the unit train service NCA needs.

9. A second material misstatement made by CP pertains to the issue of BNSF unit train service and what CP discussed with NCA at the time we were contemplating, planning, approving and constructing the expansion of the facilities at the Noonan elevator. As I discussed in my initial statement at ¶¶18-20, starting in 2011, in reliance upon the continued existence of competitive dual service from both CP and BNSF, service that would necessarily include unit trains, NCA began planning for the addition of significant additional rail infrastructure – including a 1.5 mile circle track and 100 car loading facilities – at Noonan and modernization of the rail facilities at Crosby and ultimately invested \$41 million in those projects. I further indicated that we did this planning and construction in coordination with the Dakota, Missouri Valley and Western Railroad (“DMVW”) and that the plans had been approved by CP. And, this work was completed in 2014.

10. However, CP's witness, David Wood, incorrectly asserts that at an unspecified time prior to 2013, while NCA's expansion was still in the planning stage, he advised me and Rich Larsen that “the haulage agreement did not provide for service by BNSF unit trains.” He then refers to a letter he sent to Mr. Larsen dated February 11, 2014, supposedly stating “that BNSF haulage service to Noonan was limited to manifest traffic.” (Wood Statement, at p. 4.)

11. During the planning for this expansion of rail facilities, I had many conversations with CP's representatives, including Mr. Wood. I do not recall either Mr. Wood or any other CP representative stating at that time that the haulage agreement precluded NCA from receiving unit train service from BNSF. I suspect, given the purpose of the expansion, I would have recalled such a conversation and have complained to both CP and BNSF at that time. But that was not necessary. Nor does Mr. Larsen's letter of February 11, 2014 (Mr. Wood's Exhibit B) support the contention that he told us that the haulage agreement restricts BNSF service to manifest trains. Instead, that letter states that BNSF would not be able to directly deliver unit trains to NCA:

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.* (Emphasis supplied.)

Accordingly, and as relevant here, Mr. Larsen's letter states only that BNSF could not directly serve the Noonan facility. But BNSF was not providing direct service to NCA after 2007, and instead interchanged all cars with CP and DMVW under the Haulage Agreement. Since BNSF was willing to provide unit train service through the interchange with CP and DMVW even though it could not serve NCA directly, NCA still believed it had the right to receive unit train service.

12. Nonetheless, shortly thereafter we came to understand CP's position with respect to BNSF unit trains and complained to the Board's Rail Consumer and Public Assistance ("RCPA") office about this. For example, in my letter of March 12, 2014 to Tom Brugman, I first outlined the problems we were having with CP's inability to fill long outstanding car orders for both 100 car and manifest train movements. The letter went on to complain that NCA needed BNSF unit train service in view of CP's inability to meet our car order needs, but that CP was unwilling to permit this even though BNSF had explained that this could be provided without

adding to any congestion at CP's yards. And, I noted that CP had also refused BNSF's request along this line. (My letter to Mr. Brugman is my Exhibit 3 and is attached to this Statement.)

13. But the point of this is that CP never explained to me, while NCA was planning and investing in the Noonan expansion, that the Haulage Agreement literally precluded what the expansion was seeking – unit train service from both CP and BNSF. To the contrary, we fully expected that we would be able to send 100 car trains out of Noonan via both CP and BNSF. In that regard, access to BNSF unit trains was and is particularly important for a number of reasons. As CP concedes (*see* Wood Statement, at 4-5), it does not provide competitive service for our so-called specialty crops moving to the Pacific Northwest; this includes peas, lentils, flax and canola, which we could ship along with other grains in 100 car volumes via BNSF if CP would permit that. Moreover, although Mr. Wood is correct that CP permits NCA to pool grains from one origin in order to get the benefit of volume rates (Wood, at p. 2), that is only possible to eastern destinations and, at that, only during the April through July time period each year. And, of course, CP is unwilling to let BNSF fill the void, which would permit NCA to purchase and market grain for our local farmers. These are just further examples of why true BNSF competitive rail service, as promised in the Joint Petition, is so important.

14. CP's reply makes another mischaracterization of the facts when stating that all traffic moving along the Joint Line prior to 2007 was manifest traffic, supposedly relying on Charles Hubbard's statement. (CP Reply, at 8.) But Mr. Hubbard's statement does not say that. Instead, his statement (at p.6) says only that, based on information provided by BNSF when the two carriers were discussing sale of the line, BNSF was not providing unit train service. However, at that time (before 2014), neither the Crosby nor Noonan elevators had the ability to individually load 100 car trains; nonetheless, both CP and BNSF were able to take larger volume trains (up to

100 cars) by letting NCA pool shipments from Crosby and Noonan (and, in CP's case, to also add volumes from Ambrose, Fortuna and Westby to these trains). So, while neither CP nor BNSF were technically providing "unit train" service, NCA's predecessor (Golden Plains Ag) was shipping volumes via both railroads that moved in service akin to unit trains (*i.e.*, volumes larger than traditional manifest trains that were pooled from multiple origins). It is accordingly grossly inaccurate for CP to contend that there was no unit train service, even by CP, prior to 2007, so that our need for BNSF's unit train service is somehow inconsistent with "the same level of service as CP's own traffic of the same type" (see CP Reply, at 9).

15. Although this may be a relatively minor issue, CP repeatedly errs when referring to the arbitrary 50 limitation it imposed on BNSF for serving NCA. Both in its argument (Reply, at 11) and Mr. Hubbard's statement (at p. 8), CP represents that it imposed a 50 per week limitation on the cars it would accept in interchange from BNSF. The fact is that, as applied, this limitation was actually 25 cars per interchange.

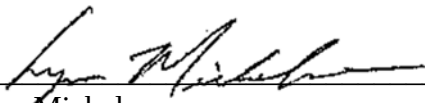
16. More importantly, CP quixotically tightened the BNSF car restriction once NCA completed its expansion of Noonan and Crosby in 2014 to 15 cars per day, as reflected in the CP letter of June 25, 2014 from Steven Moerke to CP (Exhibit E to Mr. Hubbard's Statement). However, there were no 15 cars per day, 25 cars per interchange or 25 or 50 cars per week limits on what service BNSF could provide NCA in 2007 or prior years and we certainly did not expect CP to impose car limits after we spent the money for the expansion given our service needs. And, of course, there is no reference to any restriction on the number of cars BNSF could provide or whether that would include unit train service in the Joint Petition or in the Haulage Agreement that supported the Joint Petition. Regardless, after NCA expended over \$41 million to be able to obtain

unit train service from both CP and BNSF, with the full knowledge and acquiescence of CP, CP reduced the level of service BNSF could provide.

VERIFICATION

I, Lynn Michelson, hereby certify that the foregoing is true and correct to the best of my knowledge, information and belief.

Dated: February 19, 2019



Lynn Michelson

Exhibit 3

March 12, 2014

DOT/Surface Transportation Board

Tom Brugman

Dear Mr.Brugman:

My name is Lynn Michelson I manage the Railcar freight for New Century Ag (NCA) which is a local coop in NW North Dakota. I have a few topics that I want to bring to your attention but first I'll give you a little information about NCA.

NCA is 100% Farmer owned Coop, we handle 18-22 million U.S. grown bushels of grain and 40,000 ton of dry Fertilizer. NCA is located in 5 towns (Westby MT, Fortuna ND, Ambrose ND, Crosby ND and Noonan ND). We have 7 Grain handling facilities, 2 Fertilizer plants, 4 Gas stations and 1 Truck Stop. We are in the process of building a 1.2 million bushel Grain Shuttle and 22,000 ton Fertilizer plant between Noonan and Crosby. NCA ships 98% of its Grain on the Rail, receives 90% of its Fertilizer tons on the Rail and receives 70% of its Fuel for resale at Gas stations on the Rail, so you can see NCA needs consistent rail service at all of its locations in order to service its customers.

NCA is served by (DMVW) Dakota Missouri Valley & Western RR which leases this rail line from the Canadian Pacific. NCA Crosby and Noonan locations can receive and load both BNSF and CP Railcars. Ambrose, Fortuna and Westby only receive and load CP Railcars. For reference STB-Finance Docket #35068 dated 09/07/2007 will give the history of this rail line.

Topic #1 CP Railcar orders and service

NCA's open CP railcar orders as of today 03/12/2014, 2716 Grain Hoppers. The oldest order is 16 cars to fill a 50 car order which has a want date of 12/02/2014.

Dec Orders-316

Jan orders-800

Feb orders-800

Mar orders-800

Previous months orders vs actual delivered empty Grain hoppers.

September orders-650 delivered 592

October orders-850 delivered 348

November orders-850 delivered 350

December orders-450 delivered 440

January orders-800 delivered 340

February orders-800 delivered 330

March orders-800 delivered 84 so far.

Demand for these orders are actual, we handle 13 commodities and went to no bid on 10 commodities on Jan 8 because CP said they would only be able to furnish 100 car orders to our Shuttle loader at Westby which left our other 6 locations without a car supply to move the other commodities in single car movement. As you can see we have gotten a few singles but not near enough. When all 7 locations are full we can load 625 cars so this leaves NCA with a lot of inventory that we haven't been able to move. NCA also has around 1200 cars of grain that has been contracted from farmers that is waiting to be delivered and at CP's current rate of delivering cars it will take till mid summer to get that grain delivered, also NCA has contracts of its own to fill. NCA is also worried that the Fertilizer we have purchased to be delivered this spring by rail will not be timely. This comes from the Spring deliveries of 2013, 70-80 cars of Fertilizer were delivered to NCA in June after seeding was completed.

This Rail line also has an Oil Loading facility located between Noonan and Flaxton Railcar yard which has put quite a block on getting our Grain Hoppers or Fertilizer cars delivered or even finding room in the yard to spot cars. There has been many of times that between the Flaxton yard and the Oil loader that up to 300-400 oil cars can be seen on the track or in the yard. Just recently NCA had Fertilizer cars loaded in Saskatchewan and the cars were taken past Flaxton yard into Minot, it took close to 30 days for those cars to get here. CP seems to be very selective on when we get our empty trains, in the past 2 months we were tracking 2 trains that were destined for Flaxton for NCA and within 15 hours of those trains getting to us, THEY disappeared into a different location in Alberta Canada and CP gave us no reason or contact person that would give us a reasonable answer as to why we lost those trains. This topic could go on and on.....ETC!!!!!!!!!!!!!!!!!!!!

Topic #2 BNSF equipment access to Crosby, Noonan and New Shuttle loader between Crosby and Noonan.

Tom you helped to track the last BNSF Railcars for us a few weeks ago during the interchange process. That went quicker than normal. Most of the time it took 30 days from the time the cars arrived into Minot for interchange till they get back to Minot loaded from Crosby or Noonan.

The problem I am having now is that CP wants to limit the amount of orders that I request from BNSF because they don't have enough room for interchange. I was hoping to put more BNSF orders in for Crosby and Noonan because of us getting fewer CP orders filled. BNSF has stated that they also would like to supply the New Facility with 100 car Shuttles along with continuing smaller 25-50 car orders for our other facilities and other commodities that need to be loaded into smaller car lots. BNSF has said that they could access the branch line that splits off at Niobe and runs northwest towards Lignite to deliver NCA's BNSF railcars, they would work something out with the DMVW to interchange at Lignite. This would provide relief on interchange congestion at CP Minot and Flaxton yards. CP has sent NCA a letter denying delivery of BNSF Shuttle moves from Minot to Flaxton. DMVW is more than willing to move CP or BNSF equipment for NCA.

So in closing, I hope you can see how frustrated NCA Management is about Rail Operations on this Line. CP has been very difficult to deal with the past 4-5 months and NCA feels like Railcar supply for our company will not be sufficient enough to create more volume thru our new Shuttle or even sustain current volumes. Please take a close look at STB Finance Docket #35068 and let NCA and or BNSF know if there is a way that BNSF can supply NCA with Shuttle moves to the New Shuttle facility thru the Niobe-Lignite branch.

Thank You!

Lynn Michelson

New Century Ag,

Crosby, ND

701-965-6371

CERTIFICATE OF SERVICE

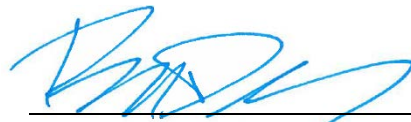
I do hereby certify that on this 21st day of February, 2019, I have served a copy of the foregoing Petition of New Century Ag to File Rebuttal to the Reply of CP and Proposed Rebuttal by email on each of the following persons or entities:

Karl W. Hansen
Leonard Street and Deinard
150 South Fifth Street, Suite 2300
Minneapolis, MN 55402
Karl.Hansen@Leonard.Com

Adrian L. Steel Jr.
Mayer Brown LLP
1999 K Street, N.W.
Washington, DC 20006-1101
asteel@mayerbrown.com

Peter W. Denton
Steptoe & Johnson LLP
1330 Connecticut Avenue, NW
Washington, DC 20036
pdenton@steptoe.com

David F. Rifkind
Stinson Leonard Street LLP
1775 Pennsylvania Ave. NW, Suite 800
Washington, D.C. 20006
david.rifkind@stinson.com



Edward D. Greenberg