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VIA E-FILING

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

**Re: Docket No. FD 35068, Soo Line Railroad Company d/b/a Canadian Pacific
Railway – Acquisition and Operation Exemption – BNSF Railway Company**

Dear Ms. Brown:

This letter is in response to the Board's decision in this Docket served April 22, 2019.

New Century Ag ("NCA") appreciates and agrees with the Board's conclusion that the Petition to Reopen or Revoke ("Petition to Reopen") in this matter raises serious concerns about the service NCA receives from BNSF and CP. It is beyond question that in order to obtain approval of their 2007 transaction through the Board's exemption process (and to secure NCA's support for it) CP and BNSF promised shippers and the Board that the exemption the carriers sought and obtained in 2007 was intended only to eliminate redundant track by shifting BNSF traffic to the parallel CP-owned line and that the haulage agreement arrangement they fashioned would not result in any loss of competitive options for NCA or other shippers.¹ It is similarly clear that the Board relied upon these representations and the numerous commitments both carriers made to that effect when granting the exemption.² Regrettably, the carriers' subsequent actions to purportedly

¹ See Joint Petition for Exemption filed July 16, 2007, at 10-14.

² *Soo Line Railroad Company d/b/a Canadian Pacific Railway - - Acquisition and Operation Exemption - - BNSF Railway Company*, FD No. 35068 (STB served Sept. 7, 2007) (the "2007 Exemption"), at 2-5.



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honor their commitments were short-lived. The undisputed record demonstrates that CP has, over the intervening years:

- Placed artificial limits on the number of cars BNSF can handle for the account of NCA;
- Refused to permit NCA to access BNSF unit trains, even when CP cannot accommodate NCA's needs;
- Failed to provide rates and privileges to NCA that BNSF provides to NCA's nearby competitors, thus eliminating that competitive option; and
- Threatened to terminate the haulage arrangement and thereby cut off service to NCA by BNSF, despite the fact that BNSF's rights and obligations to serve NCA are subject to the Board's jurisdiction.

As for BNSF, it has not taken necessary steps to ensure that it is able to honor its own obligations to provide the competitive service that it guaranteed in consideration for eliminating redundant tracks and significantly reducing its maintenance and operating costs.

Under the circumstances present here, NCA believes that the most appropriate process going forward, absent a mediated result, would be for the Board to reopen the 2007 Exemption as requested, decide the case on the papers already filed and hold both railroads to their commitments or, failing that, revoke the exemption and restore all parties to the status quo that existed prior to the carriers' Joint Petition. The passage of time has not mooted the importance of the matter or the significance of the carriers' commitments. Nor has it nullified the Board's ability to enforce the representations and conditions in the 2007 Exemption. To the contrary, the Board has retained jurisdiction over both the continued validity of the exemption as well as the nature and quality of the service provided by these carriers.³

Respectfully, notwithstanding the suggestion in the April 22 Decision that NCA's allegations might be handled more appropriately under the competitive access regulations or by NCA filing a new formal complaint against CP for unreasonable practices and/or a violation of 49 U.S.C. §11101, neither of those options are appropriate or reasonable under these circumstances. In the first place NCA, which is a farmer owned cooperative, has already invested significant time and expense in filing the Petition to Reopen that has now been fully briefed by NCA and CP. Initiating a new proceeding would at least double NCA's costs and significantly delay any resolution of these issues.

³ That the BNSF was to serve NCA via haulage rights using both the CP and DMVW does not minimize the Board's authority to enforce the terms of the exemption as both the track and the competitive service that was ordered remain subject to STB jurisdiction. See *Petition to Reopen*, at 17-20; see also *Ingredion Incorporated - - Petition for Declaratory Order*, FD No. 36014 (STB served Sept. 30, 2016) and cases cited therein.

Moreover, with respect to the alternatives suggested in the April 22 Decision, NCA is not aware that any party has successfully sustained the burden of satisfying the requirements of the competitive access regulations since they were promulgated over 34 years ago. Indeed, in 2016 a majority of the Board indicated its belief that the existing rules need to be changed, stating “[t]he sheer dearth of cases brought under [49 U.S.C.]§ 11102(c) in the three decades since Intramodal Rail Competition, despite continued shipper concerns about competitive options and quality of service, suggests that part 1144 and *Midtec Paper Corp.* have effectively operated as a bar to relief rather than as a standard under which relief could be granted.”⁴ In *Reciprocal Switching* the Board accordingly formally proposed to reverse prior agency precedent and to adopt new regulations governing certain competitive access requests. However, the rules proposed in *Reciprocal Switching* are not final, so that it is impossible to predict what the outcome of that proceeding - - already 8 years old - - will be.

The likelihood of obtaining relief under the current version of 49 CFR Part 1144 and existing precedent, which the Board has acknowledged are a “bar to relief,” would therefore seem dubious, even if CP was refusing to permit BNSF to provide any service at all to NCA (which is not the case). As CP has not cut off all BNSF service, it is accordingly unclear how the Intramodal Rail Competition regulations, even if they were to be modified by the proposed rules in *Reciprocal Switching*, would offer even a theoretical avenue for relief.

Even if the Board was to inform NCA, CP and BNSF that it is prepared to specifically overrule the *Midtec Paper Corp.*⁵ decision requiring a complainant to demonstrate anticompetitive conduct by a railroad, the application of the new standard applied to this case would likely be appealed, resulting in interminable delay for a final decision. There is also the risk that this case would be held in abeyance pending completion of the rulemaking in *Reciprocal Switching*. NCA needs relief now and has presented a record that is based upon requirements in the 2007 Exemption and therefore has no need to rely upon the Part 1144 regulations or any modification of those provisions.

Similarly, no purpose would be served by NCA starting a new formal complaint proceeding under §§11101 and/or 10702. The crux of CP’s opposition to the Petition to Reopen is that it has done nothing wrong under the Haulage Agreement so there is no reason to reopen or revoke the exemption. NCA anticipates that would be the same response CP would give in the event NCA filed a complaint alleging CP had refused a reasonable request for service made by NCA pursuant to §11101, or an allegation that CP otherwise was engaging in an unreasonable practice. In either case, the Board would have to decide whether CP was correct or whether CP’s actions in limiting BNSF service - - which CP has not denied - - contravened the letter and spirit of the 2007

⁴ EP 711 (Sub – No.1), *Reciprocal Switching* (Served July 27, 2016) at 8-9 (“*Reciprocal Switching*”).

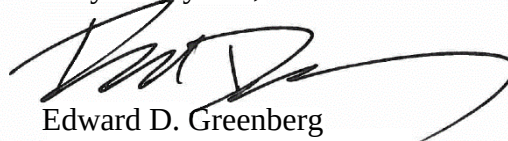
⁵ *Midtec Paper Corp. v. Chicago & N. W. Transp. Co.*, 1 I.C.C. 2d 362 (1985). Interestingly, the Soo Line (which is now owned by CP) was seeking competitive access to the shipper’s facility in that case, but now opposes BNSF’s service to NCA. Also, although Midtec and Soo Line received a favorable initial decision by the administrative law judge, the case was held in abeyance due to the pendency of the rulemaking that led to the Part 1144 rules that both reversed the initial decision and spelled the end of any practical relief to captive shippers notwithstanding the clear intent of the terminal trackage rights provisions of 49 U.S.C. §11102.

Exemption which was granted based on the representations that there would be no reduction in competition. And, while the 2007 Exemption puts the burden on both CP and BNSF to ensure the continuation of competitive service, BNSF would not seem to be an appropriate respondent in a §11101 case since it has not failed to provide any service of which it is presently capable.⁶ Accordingly, absent further guidance and clarification from the Board, a complaint alleging violations of §11101 and/or 10702 against CP would accordingly not be a likely avenue for restoring the competitive service to which NCA is entitled.

With respect to alternative dispute resolution, Board-sponsored mediation could very well be helpful in getting this matter resolved if the railroads commit in good faith to attempt to resolve the issues raised by NCA, and NCA agrees to participate in such an effort. NCA believes that the congestion concerns raised by CP in its Reply can be resolved so that both CP and BNSF can provide the full range of service for NCA to which they committed in 2007. And while NCA is not laying out preconditions for mediation, the topics to be covered should necessarily include having the railroads negotiate in good faith to (1) eliminate arbitrary restrictions on the volume of traffic NCA can tender, (2) permit BNSF to provide unit train service and (3) address any congestion or rail infrastructure issues that might interfere with the provision of adequate, competitive rail service to NCA.

Thank you for the opportunity to respond to the April 22 Decision, and please contact the undersigned if you have any questions or desire additional information.

Very truly yours,



Edward D. Greenberg
Attorney for New Century Ag

cc: All parties of record

⁶ Parenthetically, without the knowledge or consent of either NCA of the Board, CP added a provision to the Haulage Agreement that specifically precluded any unit train service by BNSF. See Soo Line's Railroad Company Reply to Petition to Reopen, filed Feb. 4, 2019, at Exhibit F to the Verified Statement of CP Witness Charles E. Hubbard, section 2.01:

For clarity and the avoidance of doubt, the Parties expressly agree that Haulage Services are limited to manifest traffic and *do not include the transportation of Railcars in unit train service.* (Emphasis Supplied.)

As such, unless the Board compels the railroads to eliminate this restriction, there would be no violation of section 10101 as the haulage agreement would then have foreclosed the very service that NCA needs. Compare *Utah Central Railway Company, LLC - - Petition for Declaratory Order - - Kenco Logistic Services, LLC, Kenco Group, and Specialized Rail Service*, FD No. 36131 (STB served March 20, 2019), at 11.