Date: August 20, 2019

Case: Oral Argument - Docket No. FD 35068
SURFACE TRANSPORTATION BOARD

DECISION

DOCKET NO. FD 35068

SOO LINE RAILROAD COMPANY --

ACQUISITION AND OPERATION EXEMPTION -- BNSF RAILWAY

ORAL ARGUMENT

Tuesday, August 20, 2019

10:00 a.m.

James Webb Memorial Auditorium

NASA Building

300 E Street, S.W.

Washington, DC
PARTICIPANTS:

SURFACE TRANSPORTATION BOARD

ANN BEGEMAN, CHAIRMAN

PATRICK FUCHS, VICE CHAIRMAN

MARTIN OBERMAN, BOARD MEMBER

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NEW CENTURY AG

EDWARD D. GREENBERG -- GKG LAW

TOM WILCOX -- GKG LAW

LYNN MICHELSON -- GENERAL MANAGER

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PETER DENTON -- STEPTOE & JOHNSON

COURTNEY ESTES -- ASSOCIATE GENERAL COUNSEL FOR BNSF
PROCEDINGS

(9:00 a.m.)

CHAIRMAN BEGEMAN: Good morning. Today we will hear oral argument in Docket Number FD 35068. This case involves the Petition filed by New Century Ag to reopen this proceeding or, in the alternative, to revoke the exemption authorizing Soo Line Railroad Company, doing business as Canadian Pacific, to acquire and operate BNSF Railway Company's property interest in 35.26 miles of rail lines jointly owned by CP and BNSF, and a 9.96 mile rail line that was solely owned by BNSF.

I will cover a few procedural matters before we get started.

Each party is asked to make a short statement of its argument, and counsel should be prepared to answer questions from the Board Members at any time during your allotted time. Any PowerPoint presentation or other document aides such as the map that you provided will be placed in the record and made part of today's transcript.

New Century Ag and CP will each have 20
minutes of argument time, and then BNSF will have 10
minutes of argument time. The lectern is equipped
with lights and a timer which will guide you
regarding your allotted time. Two minutes before
your allotted time expires, a yellow light will
appear. When you see the red light, your time has
expired and you will need to conclude your remarks.

As the party filing the Petition, New
Century Ag will open and has reserved five minutes of
its time for rebuttal. CP will then have its 20
minutes. And after that, we will hear from BNSF.

I ask everyone to please silence your
cellphones, and we will now begin with New Century
Ag.

And for those of you who are going to use
a microphone, when you turn it on you need to wait
for the light to turn from red to green for it to
work so that our recorder doesn't flee the room.
Thank you.

MR. GREENBERG: Thank you, Chairman
Begeman. And thank you, Vice Chairman Fuchs and
Member Oberman. I am pleased to be here
representing New Century Ag. My name is Ed Greenberg of the Law Firm of GKG Law, P.C. On the dais with me as well is my partner, Tom Wilcox, and also Lynn Michelson, who is General Manager of New Century Ag. Present also are two board members of New Century Ag. We have Grant Hoagland and Josh Bummer. So if you have any questions, everybody is available to respond.

Well everybody has read the briefs and all the papers, so I'm not going to belabor the record with a recitation of everything, except to say that this case presents a fundamental question of whether the Board is going to hold two railroads to their commitments and promises they made and the exemption they sought and obtained in 2007.

By getting the exemption, they were able to avoid seeking application under the formal requirements of 49 USC 11323, 11324, and 11325. They sought and obtained the support of the shippers on the lines, and so we're here today to find out whether or not there's a way of keeping them to those commitments.
By background, we're talking about New Century Ag. I presented this map and it's part of our filing, but it's also on the record today, but it's an attachment to their argument. I thought it would be helpful to show the lines of their roads and the location of the grain facilities we're talking about.

So we're talking about New Century Ag has two major grain terminals, elevators, at Noonan and Crosby. They also have three to the west of the line, to the west of Crosby, at Ambrose, Fortuna, and Westby. Once upon a time, BN had lines that served these facilities. And so did CP. And actually, I'm not sure--it's not true about BN didn't serve Ambrose, Fortuna, and Westby. They both served these lines, these facilities, directly, after--as a result of--these were the result of a series of merger decisions, and abandonments that took place. In and around 2007, the two railroads decided that they would be much more economical to get rid of one of the lines that were parallel, serving the line, and so--serving these facilities, and so--
CHAIRMAN BEGEMAN: Excuse me, Ed. Do you mind if I interrupt? I kind of just want to get to it.

MR. GREENBERG: Okay.

CHAIRMAN BEGEMAN: One of the things that the Board's decision that authorized the exemption, or permitted the exemption, it said that, quote, "competitive"--

"that BNSF will continue to provide rail service to all shippers on the conveyed line at competitive rates, and there will be no material change in the level or nature of service provided to those shippers."

Now it's not clear to me in the current record. Did BNSF provide unit train service to Noonan and to the facilities at question prior to the exemption becoming effective? Or is it that just now you want unit train service from BNSF?

MR. GREENBERG: There was no--I don't believe there was something called "unit train service" at that time. There was multi-car service, 25 car lots, that were assembled together to form a
train that were pulled out. But at that time, there
was no formal what you call unit trains.

CHAIRMAN BEGEMAN: So are you getting as
much service as you were, or less?

MR. GREENBERG: We're seeking as much
service as there was.

CHAIRMAN BEGEMAN: You're seeking that
because you don't get it currently?

MR. GREENBERG: We're not getting it
currently, that's correct.

CHAIRMAN BEGEMAN: And as a result, like
how much grain doesn't move because, I'm going to
say, because of CP's restrictions?

MR. GREENBERG: Well, you tell me how much
grain doesn't move--a lot. When we filed the
Petition, the grain elevators were full and they
couldn't move them out. They couldn't move the grain
out because CP wasn't able to provide a second unit
train. We had asked for a second unit train.

In addition, CP had imposed various car
limits on the amount of cars they would permit BN to
provide. Sometimes it was 15 cars at a time,
sometimes 25, sometimes 50. But the fact—the result—the reason why this Petition was filed is because there was grain sitting in the elevators that couldn't move, which meant there was more grain they couldn't buy from the farmer members. So it was a lot of grain that simply didn't move because they weren't getting—they weren't getting full BN service.

CHAIRMAN BEGEMAN: I'm curious. And your other witness may want to ask it—but for the most part, the grain market is not what farmers would hope for it to be. Certainly not moving a lot compared to other years, when you filed the Petition. So would it be even worse during a robust crop year, and when the markets were not constrained?

MR. GREENBERG: Well actually the market's turned around. So there's an enormous amount of grain that's moving right now.

CHAIRMAN BEGEMAN: Where's it going?

MR. GREENBERG: I'm sorry?

CHAIRMAN BEGEMAN: Is it going west? Or where's it going?
MR. GREENBERG: It's going--I think it's going everywhere.

UNIDENTIFIED SPEAKER: It's going west, over Chicago, and also to the Duluth-Superior area.

CHAIRMAN BEGEMAN: So it's moving and it's just not expensive, in terms of the bushel?

MR. GREENBERG: Well we're saying it's available to move. So there are orders for grain that can't be filled, and so right now there's a lot of grain that needs moved. So there's a lot of grain on the ground, and there's demand.

CHAIRMAN BEGEMAN: So if you could help us maybe when you come back for your rebuttal, like just give us a sense of more than "a lot." Like really kind of quantify it for us, if you can. You don't need to take your time away right now to do that.

MR. GREENBERG: So would you say in terms of number of cars you could move if you had them today?

MR. MICHELSON: Right now, we're handling 10 commodities. And primarily there's only two of the commodities that are moving right now with the
shuttles. We could possibly tag other commodities in
with what they call a dedicated train at the BN
access going to the PNW, which would allow soybeans,
you know, 25 cars of soybeans to go to a certain
market; 75 cars of wheat could go to a different
market; and also we handle a lot of lentils and peas
and pulse crops and that sort of thing, and they
could also be tagged on. Where right now, CP does
allow some co-loading of different commodities to go
to the PNW, but only at a certain time, possibly
April, May, June, July, where BNSF you can buy those
trains and get those commodities also to move to the
PNW.

CHAIRMAN BEGEMAN: The two facilities
received competitive service as a result of the
transaction. CNS was one of them. Are they
currently now in a--do they have a competitive
advantage over you because of the situation with the
car restriction?

MR. MICHELSON: To the south of us there's
a mainline BN locations and, yes, they can be a
little more competitive on some of the commodities
because they have a different way of moving the cars.

CHAIRMN BEGEMAN: But as a result of the transaction? Or they had it previously?

MR. MICHELSON: Previously.

BOARD MEMBER OBERMAN: Good morning. One just very preliminary factual matter on the map. There's reference in the pleadings to a parallel BN line no longer being needed. So I couldn't figure out which one you're calling parallel. The south line that goes to Williston and Ray? Or one of these two lines that go from southeast to northwest?

MR. GREENBERG: The line that has been limited is not on the map. This map only shows what's there today.

BOARD MEMBER OBERMAN: So where was it? What was it?

MR. GREENBERG: It would have run from Crosby over to--over to Lignite, I believe.

BOARD MEMBER OBERMAN: Oh, I see. So right up there--

MR. GREENBERG: Yes, it would have been
parallel to that.

BOARD MEMBER OBERMAN: Okay. Let me ask you, Mr. Greenberg, a few questions, if I could. You said--I want to go back to the pre-transaction period, prior to '07. The concept of unit trains was known at that time, was it not?

MR. GREENBERG: It was.

BOARD MEMBER OBERMAN: It wasn't a foreign idea.

MR. GREENBERG: Correct.

BOARD MEMBER OBERMAN: So did NCA and any of the railroads discuss the possibility of unit train service prior to this transaction? Mr. Michelson, can you share some insight on that? Prior to the acquisition that's at issue here.

MR. MICHELSON: Yes, we did. Between 2004 and 2006, New Century Ag was called Golden Plains Ag. And in 2007 we merged the companies to make Fortuna Farmers Elevator and then to make New Century Ag. We looked at--there was a vote in 2004 to merge back in 2004. And then we brought the vote back to merge again in 2006, and then it passed.
Between those times, Golden Plains Ag was looking at the possibility of adding more track and locating—having BN shuttle service to compete against the Fortuna Farmers Elevator, which is located at Ambrose, Fortuna, and Westby, because they were able to load. They were co-loading at those three locations, and they would gather the cars up and they would pull them to Flaxton, and that would be a shuttle.

So for competition, we were looking at becoming—building a facility and trying to be a shuttle loader on the BN.

BOARD MEMBER OBERMAN: When you say "building a facility," are you talking about the kind of loop you eventually did build?

MR. MICHELSON: Yes.

BOARD MEMBER OBERMAN: Did you talk to BN about their providing shuttle service, if you undertook to build the loop, prior to 2007?

MR. MICHELSON: Yes, I believe we had discussions with them at that point in time. Between all of our elevators, if we could have co-loaded, we
could only max out around 98 cars at that time. So we would have needed to get a facility put together to make a 110-car shuttle.

BOARD MEMBER OBERMAN: And was BN willing to provide the shuttle, if you built the loop? I'm talking about prior to 2007. Was there any reluctance on BN to provide you with shuttle service at that time?

MR. MICHELSON: At that time, I can't truthfully say if that discussion--but as the Board of Directors of Golden Plains Ag was looking at other options. So once we started the merger talks, again with Farmers Elevator, we kind of let it cool down. And then there was--because they were talking about building a shuttle facility at Westby, Montana. So then we just said, well, that's going to be enough on the plate. We'll see how that shuttle goes, and then we can continue talks about building the shuttle on our east end at Noonan.

BOARD MEMBER OBERMAN: Well was there any reason that you know of that prior to '07, if you had invested in the loop, you couldn't have gotten
shuttle trains there? Prior to this transaction, was there any obstacle of the kind we're facing now?

MR. MICHELSON: Probably not.

BOARD MEMBER OBERMAN: Mr. Greenberg, I wanted to make sure I understood with precision here, if we can, the relief that you're seeking. You've asked us to reopen the exemption, but you seem to be focused more--and I wonder if you could clear this up--on not undoing the sale, but rather just enforcing what you believe are conditions of the approval. Is that a fair understanding of the relief you're seeking?

MR. GREENBERG: That's a very good understanding of it. Yeah, they're not trying to undo this, unless it's necessary. There were commitments made. They were commitments made for the long term. It was the--the letter they sent to the various shippers said: For the long term.

That is what NCA understood. And so the idea here is, simply enforce the exemption as it was granted. CP has taken the position not only do they not need to provide BN shuttle trains, despite the
fact that they are clearly needed for NCA to reach
certain markets, they also say that they cancel it--

CHAIRMAN BEGEMAN: Excuse me. So if the
Board were to revoke the exemption, which it sounds
not your primary ask, what would the expectation be
for what your service would then result?

MR. GREENBERG: We would expect BN to put
tracks back in place. Or get trackage rights. Some
way--it's up--our perspective is, it's up the
railroads who tore the tracks up. There was no
abandonment. There was no Order from the Board
permitting BN to terminate service.

CHAIRMAN BEGEMAN: So BN would put in
another 35.9 miles of track, is your expectation?

MR. GREENBERG: I would think not. I
would think the Board has in many cases--no, I would
say that in many cases the Board has said it's not
necessary to create duplicate sets of tracks. The
Board would order, could order trackage rights over
CP.

Our perspective is the Board has the
authority to require them to live up to their
obligation. That's all we're asking. If it requires trackage rights, so be it. If it requires track instruction, that's okay, too. We're not asking for that. That's a waste of money. But if that needs to be done, I guess it can be done. The Board has that authority. They never gave an abandonment, and so the BN is required to provide service. I suspect that they want to provide the service, but they're not able. They would like to provide shuttle trains. They've been told they can't.

And to the contrary, they've said not only that but CP has threatened to cancel the Haulage Agreement so they would not be able to provide service at all.

Our view of that is clear, that they can't do that. Without the Haulage Agreement, in this case is much akin to trackage rights agreement, which cannot be terminated without Board approval.

BOARD MEMBER OBERMAN: Let me just on that particular point, I wanted to ask you this question. In footnote 5 of your Petition, you say that the
railroads can't terminate the arrangement or alter its terms, quote, "without giving affected parties an opportunity to be heard, and securing the Board's approval."

I assume you mean the terms of the Haulage Agreement, or the use of the tracks. What is the proceeding that you believe that either or both railroads would have had to come here for in order to alter the terms of the Haulage Agreement?

MR. GREENBERG: I think they would have to reopen. They could also reopen this docket. Cases get reopened all the time.

BOARD MEMBER OBERMAN: So are you saying that if C--in your view, if CP wanted to say we're going to not renew, or we're just going to end the haulage arrangements, they could not do that with coming back in this proceeding and asking the Board for permission to do that?

MR. GREENBERG: I think that would be the appropriate docket in which to have the case, yes.

BOARD MEMBER OBERMAN: So it's your view that--one of the things I'm confused about, how you
explain this--the original Haulage Agreement had a 10-year term. Is it your contention that that 10-year term didn't mean they could simply completely end haulage at the end of 10 years?

MR. GREENBERG: Yes.

BOARD MEMBER OBERMAN: So what's the basis of saying that?

MR. GREENBERG: Yes, because I think the 10-year term is intended to mean only that internally, between the two railroads, they can adjust compensation terms and operating terms. That's the private side of the arrangement.

The public side, the public rights deal with service. Railroads can't make that determination between themselves. I think the Tex Mex case is very clear that it's not restricted to--that decision is not restricted to trackage rights. It deals with any kinds of public rights that are in play.

Only the Board has the ability to alter or modify those. So they would have needed to come back to the Board on that. But not as to the compensation
terms, and anything other than that which could be--
those could be adjusted through the arbitration
provision, through an arbitration proceeding, or
through negotiations between the two of them.

BOARD MEMBER OBERMAN: Well I've been
trying to find the source of this contention, and it
may be the emphasis--is it your contention that the
emphasis in the Board's decision and in the papers at
the time was on the continuation of competition?
Where I do not find a time limitation on the concept
of competition will continue, but I must say, since
I've arrived at the Board I find a lot of unclear
writing on the part of everybody, including the
Board. So I'm having trouble understanding from
where this contention emanate.

MR. GREENBERG: Well so am I. I share
your confusion. Not a single word was set forth in
that petition for exemption and, not surprisingly,
not a single word in the Board's decision, either.
Instead, the representations made in their petition
are replete with references to continued competition
between the two railroads. Over and over again it
says that. I actually counted. We could go through them, but there are, I think it's like 9 or 10 times they made those representations--actually, 13 times, 13 separate representations, all of which said: This is it.

We're changing--all we're doing is changing from two railroads providing direct service to two railroads providing service through a Haulage Agreement. And it wasn't for 10 years. It was for the long term. "Long term" is not 10 years.

VICE CHAIRMAN FUCHS: Ed, if I could make sure that I'm tracking exactly kind of what you see as the order of operations. As I understand it, you want us to reopen the proceeding based on the changed circumstance. And the changed circumstance is the new service restriction.

And the thing I'm kind of struggling with is there's a number of cases that suggest that if the Board were to reopen based on changed circumstances, they'd have to materially alter its decision? I think the EJ&E case that CP cites said that. And for Montezuma Grain they use the term "mandated different
result."

And so it's not just that there needs to be a changed circumstance, that changed circumstance needs for us to revisit that decision and change something, or materially alter the result.

And so I'm kind of wondering what in the '07 decision you think needs to be materially altered? Or what is the different result that ought to be mandated?

MR. GREENBERG: Well, with respect, I don't agree that you are required to change circumstances. You are committed to enforce conditions that were imposed. You do it all the time. In the BN--excuse me, in the UPSP merger, I can't imagine the number of cases that have been brought where you are enforcing merger conditions.

All we're talking about is enforcing conditions that were imposed voluntarily, suggested by the railroads, and imposed by the Board pursuant to the exemption petition.

So I don't think those cases stand for the proposition that you have to change the status of the
railroads.

VICE CHAIRMAN FUCHS: But isn't it the case for merger conditions--and I think if you look at environmental conditions, for example, very common, those are a specific outline of conditions. Whereas, the things that you are referring to as "conditions" aren't necessarily the Board laying out specific conditions in an ordered list. It's your interpretation of the representation. And then you think your interpretation of the representation should be the condition.

And so I think there is a little bit of a difference between say a standard environmental condition, or a merger condition, and the use of the word "condition" that you're--as you are using it now, simply because it's not as though when the Board allowed this transaction it explicitly set conditions that things have to happen in perpetuity. And in fact, you know, it relied on the Haulage Agreement, but that Haulage Agreement had a pretty explicit 10-year term.

So I guess I'm wondering whether or not
the difference in condition matters. And whether or not the Board coming back and saying enforcing condition effectively overrides the 10-year term of the Haulage Agreement.

MR. GREENBERG: Well, again, I guess getting to the point, I don't think the Board conditioned—there's no word in the Board's decision that says this is going to be a 10-year deal. It's in the Haulage Agreement, but it is not in the Board's decision and it's not in the petition that led up to the Board's decision.

As I said, my view is this dealt only with the private right, it dealt only with private rights between the railroads. Insofar as enforcing the condition and the Board doing so, a recent example is Docket FD 32760, the BNSF trackage rights over Kansas City into Lake Charles just a couple of years ago.

The Board was enforcing the merger condition in that case—

VICE CHAIRMAN FUCHS: Now in that case, and in the UP—that's a UP-SP merger conditions—
MR. GREENBERG: It is.

VICE CHAIRMAN FUCHS: In that case, has the Board reopened the merger?

MR. GREENBERG: It did. It reopened the merger for the purpose of—and the case. The petition initiating that proceeding was initiated to reopen the proceeding. And then it got merged into—a—that's right. It's under the original UP-SP merger docket. That's FD 32760, sub 46.

BOARD MEMBER OBERMAN: Mr. Greenberg, I take it what you're saying is that the parties come in in '07 and said we're going to let BN have a haulage right for 10 years, and then we're going to cut them off, NCA wouldn't have sent that letter?

MR. GREENBERG: Oh, clearly. Clearly. That was competition—it wasn't just competition, it was access to markets. This is their lifeblood. We're shutting off access to the Pacific Northwest because they're simply not competitive. The rates are anywhere from $1,000 to $3,000 a car more expensive if you don't have unit-train service to the Pacific Northwest. They can't get to certain markets
the canola oil. They can't sell canola. CP can't handle it. CP admitted they can't get--they're not competitive in certain markets.

BOARD MEMBER OBERMAN: But why is it your understanding--or I could save this question for CP if you'd prefer--that CP doesn't take unit trains to the PNW? Do you understand that? Or should I just focus--

MR. GREENBERG: Well their tracks--I gather it's because their tracks don't go up in that area. So they've got to interchange with UP in order to get there. And I suspect they can't work out an appropriate arrangement with UP to make themselves competitive. I assume that's the point.

BOARD MEMBER OBERMAN: I wanted to shift a moment to the construction of the loop. Prior to the construction of the loop, did your clients have discussions with BN about providing shuttle service? This is in 2013 or '12--or when did the plan to construct the loop start? Let me start with that.

MR. GREENBERG: I believe that they began discussions in 2011. And then the planning got
underway in earnest in 2012. Plans were drawn up. They were--they were reviewed by, at least by CP, and also DMVW. I don't know whether--did BN review? Yes, of course, BN also reviewed the plans.

BOARD MEMBER OBERMAN: And did BN--was there any specific discussion with BN? And if so, who? I'd like to get some concrete facts, if the memory is there, where BN said, yes, we have shuttle trains. And if you build that loop, we'll bring them in? Who did you talk to, and when?

MR. MICHELSON: Stanley, the spelling is U-J-K-A, in an email, Wednesday, August 14th, 2013. He goes on to say: It was a pleasure talking to you this afternoon. Based on the drawings that I've seen from September 2012, I understand you are planning a loop track approximately 7,800 feet in length, with connections to the main track in both directions.

So then he goes on to talk about grade. So to be BNSF approved loop track, you need to get all the specs.

BOARD MEMBER OBERMAN: Can we get that letter put into the record?
MR. GREENBERG: Yes, of course.

BOARD MEMBER OBERMAN: And I guess it's implicit in the letter, BN doesn't say, by the way we can't deliver unit trains if you build a loop, right? So there was no discussion—and I want to separate this between NCA and BN in 2013 that under the Board's decision, or the Haulage Agreement, unit trains were prohibited. That topic didn't come up with BN.

MR. MICHELSOn: No.

BOARD MEMBER OBERMAN: Now Mr. Wood from CP has submitted a verified statement saying that prior to 2013, he informed you, quote, "that the Haulage Agreement did not provide for service by BN unit trains".

Did Mr. Wood say that to you prior to 2013, in apparently an oral statement? There was no writing?

MR. MICHELSOn: No.

BOARD MEMBER OBERMAN: Are you saying that did not happen?

MR. MICHELSOn: I do not recall him saying
that. At the time, Richard Larsen was the General Manager and CEO of New Century Ag, so he would have been in charge. I was on the sidelines helping out, but—so Richard would have been the one. So he was able to get the letter stating that, but prior to that we have no recollection or no record of it.

BOARD MEMBER OBERMAN: Well Mr. Wood says prior to 2013 he told both you and Larsen, quote, "the Haulage Agreement did not provide for service by unit fee and unit trains". You're saying that conversation did not take place?

MR. MICHELSON: If it did, I don't recall it.

BOARD MEMBER OBERMAN: Well—

MR. GREENBERG: Can I add one point to that?

BOARD MEMBER OBERMAN: Sure.

MR. GREENBERG: And that is, that his statement is inconsistent with the exhibit that they support—that they supplied. His statement says that they told—that they told NCA that there would not be BN service, direct service—
BOARD MEMBER OBERMAN: No, that's not what he says. There's two different things. There's his statement of an oral communication, and then later in February of 2014 a letter. So I'm just dealing with his oral statement first.

Are you saying the oral statement conflicts with the letter?

MR. GREENBERG: I am.

BOARD MEMBER OBERMAN: Okay, go ahead and explain that.

MR. GREENBERG: Because the letter, which I can't seem to find right now—I was looking for it—but the letter says that they wouldn't be able to provide direct service.

BOARD MEMBER OBERMAN: Now the word "direct" is not in the letter, but it's part of one of the questions I had, because you say that—and I admire the advocacy on that point—but the letter does not say "direct." What the letter says is, quote, "At this time, BNSF does not enjoy the right to move unit trains to the newly constructed facility."
MR. GREENBERG: You're correct. You're exactly correct.

BOARD MEMBER OBERMAN: So you say in your pleading that it implies direct service--

MR. GREENBERG: Yes.

BOARD MEMBER OBERMAN: --but the word "direct" doesn't appear in the letter.

MR. GREENBERG: You're exactly right. I apologize.

BOARD MEMBER OBERMAN: That's okay. There's a lot of words here. But I do appreciate, you know, as I said a couple of weeks ago, precision in the representations to us.

But I'm trying to understand the oral communication. Because as I gather, Mr. Larsen and Mr. Michelson in 2013, or '11, somewhere in there, were on the verge of committing their company to a $41 million expenditure.

Is that a fair statement, Mr. Michelson?

MR. MICHELSON: Yes.

BOARD MEMBER OBERMAN: And if CP had said, well, you can't use it if you build it, if that
conversation had taken place as Mr. Wood says, what
would your next step have been at that time? Would
you have said, to hell with you, we're going to build
it anyway?

      MR. MICHELSON:  You're using words I
probably would, but to that extent we would not have
contacted the BN to get their specs on the track and
allow them to look at the specs for building that
track. Because we wanted their okay because we
didn't know at that time whether or not they were
able to bring, or could possibly bring direct service
in with their engines or their locomotives. I mean,
it was unclear.

      BOARD MEMBER OBERMAN:  Well let's just go
ahead for a minute, Mr. Greenberg, to the February
11th, 2014 letter. Was the facility finished by the
time you received that letter from CP? Because it
says "recently constructed facility," and it implied
to me that it was actually done by that time. Is
that a fair statement?

      MR. MICHELSON:  The grain facility was
poured and slicked I believe the week of September
20th, 2013. And the track was already laid and ready for operation at that time.

BOARD MEMBER OBERMAN: In late 2013?

MR. MICHELSON: Yes.

BOARD MEMBER OBERMAN: So by the time you got the--do you know what precipitated CP to send you this letter in February 11th, 2014, saying, in its own language, that Mr. Greenberg and I were just discussing, they don't enjoy--I thought it was an odd way to say it--they don't enjoy the ability to deliver unit trains?

What prompted that? Had you called CP and said we're bringing in BN unit trains?

MR. MICHELSON: The process probably would have been, we work with different commission companies and we were at that time, early spring before planting, we always try to get a handle on what the markets are going to do, and offer our growers commodity prices for new crop which is harvested in August and September.

So at that time, we knew the facility was going to be up and running in July of 2014 and taking
grain, and we wanted to get a tariff in place for the shuttle rate on the BN. And I can remember talking to Fort Worth and different representatives from the BNSF trying to get that in place so we knew what the freight rates would be.

And I guess we were pushing to get that done. And then I suppose BNSF and CP were in talks, possibly, to see if that could possibly happen where we could get a shuttle rate.

BOARD MEMBER OBERMAN: So you're saying you were talking to BN about getting a shuttle rate. In those conversations in 2013-2014, BN didn't say, by the way life is different? We can't bring you a shuttle train, even though we approved your plans? Did they ever say that?

MR. MICHELSION: No.

BOARD MEMBER OBERMAN: And I take it by inference you assumed BN and CP talked, and then you get a letter from CP saying, just to be clear they don't enjoy the ability to deliver trains to you? Is that the way it happened?

MR. MICHELSION: Correct.
UNIDENTIFIED SPEAKER: I just want to clarify on the--there was no oral comment to us, as a board, going ahead with this project about not being allowed--BNSF before that letter, we'd of been told of it as a board, it never happened. If management would of relayed that to us, it would of affected our decision on building this project.

BOARD MEMBER OBERMAN: Did CP personnel ever directly visit a board meeting, or talk to you as a board chairman?

UNIDENTIFIED SPEAKER: Not--not personnel, no.

BOARD MEMBER OBERMAN: But you're saying that as a board, if Mr. Michelson had said, by the way, CP doesn't think we have a right to bring unit trains in here, you would have said let's hold up spending $41 million?

UNIDENTIFIED SPEAKER: Exactly. Exactly, yes.

BOARD MEMBER OBERMAN: And you never had any reason to believe from any communication with CP prior to 2014 that there would be a problem--
UNIDENTIFIED SPEAKER: Not at all. Not before that letter.

BOARD MEMBER OBERMAN: Thank you.

VICE CHAIRMAN FUCHS: I want to go back to the issue that we were talking about UPSP, because I think it's important, because that's the decision, or the issue with Lake Charles is what you kind of cite as the model for how we should go back and enforce.

I checked the filings to make sure that I had the proper understanding, because it's a case that's before us right now, and that is not—we did not reopen the merger. We were very clear that that was a terminal trackage rights application, and we thought it was necessary to effectuate the merger condition. But it was a merger reopening. It was—and so we laid out a public interest standard that had to be met, and we drew from the merger for that public interest standard, but it was not a reopening.

So if that's the basis for—if that's what you're holding up as the example for why we should reopen to enforce conditions, even if you set aside the fact that the conditions in the merger were very
clear and enumerated and the conditions here are representations, I'm not sure that that case is the best model. Because even in that instance, we didn't reopen the merger.

MR. GREENBERG: Well, you didn't reopen the merger, technically, but you effectuated the conditions that were imposed.

VICE CHAIRMAN FUCHS: How did we effectuate the conditions? How did we effectuate the conditions? We did it through terminal trackage rights. And we in our decision earlier this year, we offered you all the opportunity to go through our competitive access regulations, 49 CFR 1144.2, which include switching, which include trackage rights, and I think which--and, and so I guess if that was a proper mechanism to effectuate conditions, and they're using 1144.2, then wouldn't you also use 1144.2?

MR. GREENBERG: Well, we did not--I will say, I guess part of this personal history, I suspect, I was the lawyer who tried the Midtec case.
VICE CHAIRMAN FUCHS: Right.

MR. GREENBERG: And so--

VICE CHAIRMAN FUCHS: But we addressed Midtec in the BNSF trackage rights instance, and we said to effectuate the conditions we're going to have a different standard than Midtec.

MR. GREENBERG: Well, you said that but you also said that we had the real competition guidelines that were being reopened. And so from my perspective, trying to rely on the reopening of the rail competition guidelines means this case won't get tried---won't get decided for a number of years. It's going to through the court of appeals. That had very little appeal to me. And I still feel what we have is, we're simply asking you to enforce your Order. I just frankly can't---I don't---I've not found a case that says the Board has no authority to enforce its own Orders.

VICE CHAIRMAN FUCHS: The question is--I hear you. But the question is: How do we enforce it? And you want us to enforce it by reopening something. And the case that you cited, we actually didn't
enforce it by reopening. We enforced it by going through a terminal trackage rights process.

And then when we offered you all the terminal trackage rights process, you said you didn't want to do it. So I'm a little confused, because the basis that you all are using for us enforcing our Orders is completely inconsistent with what you're seeking from us here.

MR. GREENBERG: Well I don't think it's inconsistent at all. I mean, I've just cited—that's one single case, but I'm just talking about the same result was obtained.

BOARD MEMBER OBERMAN: So let me see if I can just shed a little light on this, Patrick. That's why I asked you the question about the relief. Maybe this is a semantic difference, but to me seeking to reopen the exemption implies that we would then have on the table whether the exemption should have been granted in the first place.

And as I understand it, Mr. Greenberg, at least one of your primary alternative requests for relief is not to reconsider whether the exemption
should have been granted; it's simply to enforce what
you believe were representations made by CP in order
to obtain the exemption.

Is that a distinction which you're trying
to make here?

MR. GREENBERG: Well, yeah, that's
certainly what we're saying. Exactly right.

BOARD MEMBER OBERMAN: So that I think the
confusion in my mind is what does "reopening" mean.
You'd be perfectly happy if the relief granted was
not to reopen the matter in order to examine whether
we revoked the exemption, but to consider the matter
only to say that you believe conditions, or terms, or
representations may live up to them? Is that what
you're saying?

MR. GREENBERG: That's right.

Procedurally I guess one could have taken a number of
different tacks to do this. One could have filed a
complaint, open a new docket. One could have filed a
petition for declaratory order. But we had an
exemption in which representations were made, and a
Board Order was issued.
And it just seemed to me there was no reason to file a brand-new complaint when we had an open docket. It was—if not open, but was subject to be reopened. It can be opened—proceedings can be reopened at any time.

And if you're asking, if you're saying as a predicate the only way you can enforce this is by requiring changed circumstances, which means build more track, or order our direct trackage rights, well so be it. It just seems to me this is the least--this is the least difficult approach, the least upsetting approach. It doesn't change the relationships of the parties.

VICE CHAIRMAN FUCHS: The thing that's difficult about it, though, is, so we have the three different reasons you can reopen something—changed circumstances, or a material error, or new evidence—and it's clear to me you all are using changed circumstances. And so I understand that.

But then the thing that's difficult about it is that we have all this precedent that says that not only can you point to something that's changed,
it's that changed circumstances have to mandate a different result. Or that it has to materially alter the decision. And that makes sense because, you know, circumstances change all the time when we approve something.

And so in order to reopen, you want us to reopen not to have a different result; it's that you want us to reopen to enforce something. But then a lot of the decisions you're citing, or at least UPSP, and I haven't heard a different one, that when you have to enforce something those people were not reopening. We're enforcing it through another mechanism. And that's the rub that I have.

MR. GREENBERG: I see the point. Okay, my point--my response to that is "changed circumstances" is certainly one big ground for reopening. New evidence is another ground. We've been talking about new evidence here.

VICE CHAIRMAN FUCHS: But how do you get past the mandating the different--the first step is one of those three things: new evidence, changed circumstances, or material error. Either you do
changed circumstances and new evidence, either way, I understand what you're putting forward. The second step is materially alter the decision, or mandate a different result.

And that's what we have to do in order to reopen it. And I'm not hearing from you all exactly what different result that you want from us, or how we would materially alter the decision because you're asking us to enforce the existing decision.

MR. GREENBERG: Well, again, I mean if it came to that, we could say order direct trackage rights for BN.

VICE CHAIRMAN FUCHS: But the way we've approached that is not by reopening it. The way we've approached that in UPSP is, we didn't reopen the merger, we just added terminal trackage rights.

MR. GREENBERG: Right.

VICE CHAIRMAN FUCHS: And that's exactly what we offered you earlier this year.

MR. GREENBERG: Okay.

BOARD MEMBER OBERMAN: There's a--with all due respect, I think there's a difference in that the
original decision in the merger said that BN has a right to access Lake Charles. And if you can't work it out, you can do it through trackage rights. That was part of the original merger decision.

This decision only talks about preserving competition, and it doesn't spell out a mechanism. So I think there is a distinction in those two precedents in that sense as to--I think all we're talking about is the procedural mechanism that NCA should follow if--whether there's a procedural mechanism to give them what they're asking.

VICE CHAIRMAN FUCHS: And my point is I think that procedural mechanism is extremely important because we get so many petitions to reopen. And I think that if we were to start violating the mandate the different result, or materially alter the decision, we are opening the Board up to reopening a number of things that we would have ordinarily rejected--because circumstances naturally change over time.

BOARD MEMBER OBERMAN: I think that the--just to see if I could paraphrase what they're asking
for here--one way of thinking about it is they're not asking for a different result. They're asking for the same result to be construed to prevent CP from doing what it's doing, which is not a different result, in your view of the situation. Is that a fair statement?

MR. GREENBERG: It's a very fair statement.

CHAIRMAN BEGEMAN: Going back to one of my first questions, and I was reciting what the exemption decision said, there will be no material change in the level or nature of service provided to those shippers--meaning New Century Ag and others. All the customers will be able to ship their products as they have previously.

And you haven't indicated that that has not been realized. You want different service options--

MR. GREENBERG: No, no--

CHAIRMAN BEGEMAN: You said you didn't have unit train service from BNSF at the time of the exemption.
MR. GREENBERG: No, you didn't say no unit train service. That wasn't even an issue. Nobody asked for unit train. We asked for "no material change in the level of service." There was a commitment in the Haulage Agreement that was presented to you that BNSF would get the same level of service CP provides.

CP provides unit train service--

CHAIRMAN BEGEMAN: It would provide the same level of service to the shipper. So my first question, maybe I misunderstood your answer, but I believe you said that at the time of the exemption BNSF was not providing unit train service to New Century Ag.

MR. GREENBERG: What I said was, they were providing something that's technically referred to "unit train" which is 100 cars at one time. They were bringing 25 car lots and then assembling them into a--for a train. But it wasn't technically "unit train." They couldn't do that because Noonan didn't have the facilities to accommodate 100 cars at a time. That didn't happen until later in 2013.
CHAIRMAN BEGEMAN: But what happened later wasn't what was said in the 2007 decision.

MR. GREENBERG: What was said in the—respectfully, what was said in the 2007 decision was that they would continue to receive exactly what they had before, which was competitive service by both railroads—

CHAIRMAN BEGEMAN: There would be no material change in the level or nature of service.

MR. GREENBERG: Correct.

CHAIRMAN BEGEMAN: So you just need—now you're getting 200 cars a month—again, limited by CP of 25 per interchange, instead of 100 per interchange?

MR. GREENBERG: There was no limitation in the Haulage Agreement. It didn't say that. And if you're saying the same level—

CHAIRMAN BEGEMAN: I'm not talking about the Haulage Agreement. I'm asking what happened before the exemption went into effect, before like the transaction went into effect, as far as your service? Were you getting—you said, no, it wasn't
called unit service at the time. I mean, unit trains existed, as was made clear and we all know to be the case. So you weren't getting unit train service, but you were getting 100 cars instead of 25?

MR. GREENBERG: They would pull 25 at a time, or they would pull whatever they had. But they couldn't--they assembled those into 100-car trains. But they weren't a "unit train" which is loading 100 at one time.

CHAIRMAN BEGEMAN: But you were getting how many cars, let's say per month or per week, at that point versus how many you get now?

VICE CHAIRMAN FUCHS: And just to quickly supplement the Chairman's point, I'm trying to make sure I understanding the data, and I could be misunderstanding what this table applies to, but in 2004 there were 680 CP cars at Noonan and Crosby, and at BNSF there was 1,162.

So to round up, I'll say that that is 1,900. And I could be misunderstanding the table, but in 2017--and '04 of course is before the transaction--on '17, just to show the difference
between after post-CP restriction, that's 1,081 CP and 199 BNSF, which is over 2,000 cars.

Am I understanding correctly that the number of cars, notwithstanding the capacity of those facilities, has actually gone up from '04 to '17?

MR. GREENBERG: Yes. Yes, they have.

VICE CHAIRMAN FUCHS: So understanding that your capacity has also gone up, and I'm not making any statement as to what's competition, is it fair to say that--I mean, you know, in summary, more cars are being hauled from these facilities than were before?

MR. GREENBERG: Yes.

VICE CHAIRMAN FUCHS: So how did that square with the level of service point that the Chairman was mentioning?

MR. GREENBERG: The level of service, if you take the position literally, the level of service had to be the same, it means that 2007 you could never go above what was in 2007.

VICE CHAIRMAN FUCHS: Right.

MR. GREENBERG: That can't be what anybody
really intended. That certainly was not a representation made--

CHAIRMAN BEGEMAN: But it could have meant you couldn't go below. I mean, we didn't write that unclear language.

MR. GREENBERG: Right. It didn't mean you had to move exactly that same number of cars.

BOARD MEMBER OBERMAN: But you're not getting--

MR. GREENBERG: Clearly it didn't mean that.

BOARD MEMBER OBERMAN: You're not getting the unit-train rates that you were getting before?

MR. GREENBERG: Correct.

BOARD MEMBER OBERMAN: So that's--

VICE CHAIRMAN FUCHS: You weren't getting unit-train rates in '04, either, though?

BOARD MEMBER OBERMAN: No, he said they were. They--

MR. GREENBERG: No, they weren't unit trains. I beg your pardon. They were not unit train rates. They were simply large blocks of cars that
were consolidated into a larger train.

BOARD MEMBER OBERMAN: Let me see if I can--I've been trying to parse through this, my esteemed predecessor's language here, in the '07 decision. You've said that prior to '07, as far as NCA was concerned when BN was a half-owner of the line, and as one of NCA's options it could approach BN to provide unit-train service. You've said that was considered prior to '07.

MR. GREENBERG: Yes, they certainly could have.

BOARD MEMBER OBERMAN: And what I'm reading in this decision, Chairman, is a line that says "the rail options of New Century will be unaffected by the proposed transaction".

So it is your contention that when CP sent you that letter in 2014, they removed an option which you had at the time of the exemption?

MR. GREENBERG: Yes, they had done that. And they did it--and not only did they do that, they also said: And by the way, even though you need it, we can't give you another unit train.
So at the same time they said, no, you can't have BNSF service, they said you also can't have any from us. No additional unit train.

BOARD MEMBER OBERMAN: So your competitive options were cut back from what they had been.

MR. GREENBERG: Squeezed considerably.

BOARD MEMBER OBERMAN: I have a couple of other points. There's a dispute in the record between your representations as the number of pre-'07 cars and Mr. Wood, I think, or Mr. Hubbard's statement saying BN's report to them about how many cars they were delivering to you is different from what you say.

Have you been able to straighten that up?

MR. GREENBERG: We've talked with our client, and those were car counts.

BOARD MEMBER OBERMAN: So you stick with the car count?

MR. GREENBERG: We do.

BOARD MEMBER OBERMAN: Okay. The other contention that's being made, and that's why I was trying to understand the map, and I'm going to ask
CP--I think we all will--some of these questions, but they contend that there's congestion. There are limited facilities at the Minot Interchange Facility, and I'm trying to figure out why they won't let the BN trains on the line.

Are you familiar? Can you enlighten us on whether their--what the physical limitations are bringing BN shuttle trains to your location?

MR. GREENBERG: That's a really good question. We've asked that question of BN and have not gotten an answer as to whether there is any constriction at the Minot Yard. The Haulage Agreement provides that if there is, they can build more facilities. We don't know of any reason why they can't. There has been no evidence.

I would also say there's not one shred of evidence in the record from CP explaining the nature of the congestion they say. So we have no idea about that.

We also do know that two miles down the road, just to the east of Minot, is the BN Gavin Yard. So cars could be--so unit trains could be
interchanged there. So we're having a great deal of
difficulty operationally just sitting as we are on
the shipper's side of the equation trying to
understand why we can't move a BN train up the line
to interchange with DMVW and bring it on. We don't
understand why--

BOARD MEMBER OBERMAN: That would be at
Flaxton, you mean?

MR. GREENBERG: Yes, right. So we don't
know why that can't--especially since CP is bringing
unit train up the line and then interchanging with
DMVW at Flaxton. So we don't understand why it is
that they can't pull a BN unit train, other than they
just don't want to do it.

BOARD MEMBER OBERMAN: Well BN sent us a
letter after your Petition was filed saying they're
happy to participate if they can provide unit trains.
So BN has never told you we physically can't get
there, even if CP would let us?

MR. GREENBERG: No, they have not said
that.

BOARD MEMBER OBERMAN: That was all I had.
CHAIRMAN BEGEMAN: Your 20 minutes has been concluded, and we will turn to CP.

MR. GREENBERG: Thank you.

CHAIRMAN BEGEMAN: Thank you.

MR. RIFKIND: Chair Begeman, Vice Chair Fuchs, Member Oberman, my name is David Rifkind. I represent Soo Line Railroad Company, doing business as Canadian Pacific.

Thank you for the opportunity to be here.

I want to introduce with me at counsel's table, at the far end is Bill Tuttle, General Counsel U.S. for CP. Next to him is Jarad Farmer, who is the Managing Director of Sales for Grain. And then my partner, Matt Smilowitz.

At issue here is the integrity of the Board's exemption procedures. Deregulation of the railroads in the late 1970s culminating in the Staggers Act in 1980 has been one of the great public policy successes of our time. One aspect of deregulation critical--

VICE CHAIR FUCHS: David, sorry to interrupt, but you said what's at issue here is the
integrity of our exemption procedures. And you make a point in your reply that the Board does not have statutory authority to revoke the exemption. And I just want to make sure I understand.

You say that the exemption is what is at issue here. The case that you cite to say that we don't have statutory authority to revoke this exemption is the CSX Abandonment Exemption in Laporte, right?

MR. RIFKIND: Right

VICE CHAIR FUCHS: And I took a look at that case and what it—and I might be mis— I want you to explain to me if I'm misreading—it seemed to—there was a CSX Abandonment Exemption that was being sought. And then there was an OFA transaction, basically the town swooped in and bought it, and the Board set the terms and conditions for the sale.

MR. RIFKIND: Right.

VICE CHAIR FUCHS: That OFA—and that's what you rely on to say that we can't, even if we wanted to revoke the exemption, we couldn't. But there the Board—the thing you cite on page 6, the
OFA wasn't an exemption, right?

MR. RIFKIND: Correct.

VICE CHAIR FUCHS: So I guess I'm wondering why should we interpret that case as saying that we can't revoke the exemption? Because what was at issue there was whether or not we could invalidate the OFA, which was not an exemption.

MR. RIFKIND: So I'd say on that, what is being asked here is to revoke an exemption, undo a transaction, which is essentially a forced sale of the rail line. And--

CHAIRMAN BEGEMAN: I think we revoked an exemption in Jackson County a week ago.

VICE CHAIR FUCHS: I was just going to say, just a couple of weeks ago we revoked an exemption.

CHAIRMAN BEGEMAN: And UP got its line back.

VICE CHAIR FUCHS: Yeah. And as far as I know, nobody's told us that we didn't have the statutory authority in that case, as of yet. So I guess it's not necessarily a forced sales. It's
unwinding an exemption that was involved in order to
allow for a sale. And so there is a difference here.
And that case wasn't about an exemption, it was about
an OFA.

So I guess I'm wondering if there is any
other case that suggests--and as Ann just pointed
out, we just revoked an exemption on a sale--is there
any other case where the Board has said we can't
revoke this exemption because it involved a line
sale?

MR. RIFKIND: Well I think there's a
significant difference between revoking an exemption
shortly after the preceding one. It became clear
that the intent of the exemption is being abused, and
the integrity of the exemption process is put at
risk.

VICE CHAIR FUCHS: But that's a different
question.

MR. RIFKIND: Right.

VICE CHAIR FUCHS: The question is whether
or not we can revoke an exemption. There's no
temporal limitation on that. Can we do it two years?
Can we do it 12 years? Jackson County was a few
years. This would be 12 years. But I'm sorry, I
guess I'm wondering where the temporal limitation
come in is? We have the statutory authority until
what time?

MR. RIFKIND: Well I would say there's no
case I'm aware of that establishes a temporal
authority, but, you know, in the past 12 years CP has
invested significant amounts of money both in this
line that was acquired in the transaction, as well as
in their mainline that serves Chicago and connects it
to the West Coast and Canada.

VICE CHAIR FUCHS: But you agree, just to
be clear, the case you cite that says we don't have
temporal authority to reopen an exemption, that was
not about revoking an exemption. That was about
revoking an OFA. Is that correct?

MR. RIFKIND: I believe that is correct.

VICE CHAIR FUCHS: And you're not aware of
any other case?

MR. RIFKIND: I'm not aware of any other
case. But my reading of that case says that you
cannot force a line sale except through the feeder.

BOARD MEMBER OBERMAN: Mr. Rifkind, but you heard Mr. Greenberg say that although that's in their Petition, they're not primarily seeking to unwind the sale. They're just trying to get you to live up to what you represented to the Board. That would not be revoking the exemption, would it?

MR. RIFKIND: Well it absolutely would be. You'd be changing the terms of the deal significantly. The terms of the deal were presented to the Board in a public record. And the terms of the deal are actually reflected in the Board's decision, that we entered into a Haulage Agreement to provide existing BN traffic haulage service on existing CP trains. And what's being asked for here is very different.

BOARD MEMBER OBERMAN: Well I'm going to ask you some questions about that. Let me ask you this: Prior to 2007 when BN was a 50 percent joint owner of this line, do you agree that there was no restriction on BN providing unit train service if the customer could handle it? Would you agree?
MR. RIFKIND: No, I wouldn't agree. There was a--

BOARD MEMBER OBERMAN: What was the restriction?

MR. RIFKIND: --physical restriction.

BOARD MEMBER OBERMAN: What was the physical restriction?

MR. RIFKIND: Well, the customer did not have the facilities--

BOARD MEMBER OBERMAN: I said, if in 2006 NCA had come in and said we're going to build a loop tomorrow, will you bring unit trains in. There was no legal or physical or any kind of restriction against BN bringing unit trains to a loop, had there been on, in 2006. Is that a fair statement? Do you agree?

MR. RIFKIND: That's a fair statement, with some caveats.

BOARD MEMBER OBERMAN: What's the caveat?

MR. RIFKIND: Well the caveat is that BN was not maintaining the line at the time. It was frequently embargoed for months at a time. And
during that time period, they would not have been
able to bring in unit trains.

BOARD MEMBER OBERMAN: Well when the
tracks--there was no legal impediment, was there,
contractual, or legal, or any kind to bring in unit
trains prior to '07?

MR. RIFKIND: Not that I'm aware of.

BOARD MEMBER OBERMAN: So it was an option
available to NCA and BN to work it out if it meant
fixing the tracks, building a loop, that was an
option that both of those parties had prior to the
transaction? Agreed?

MR. RIFKIND: I think that you're reading
of the word "option" is too broad. The option that's
discussed in the Joint Petition and in the Board's
decision is the option to ship via BN or via CP.

BOARD MEMBER OBERMAN: Well you read it
that way, but I don't see the restriction in there.
What I see is the word "competitive" and
"competition" modifying "option" repeatedly. I
think Mr. Greenberg said 13 times the word
"competition" appears in there. I didn't count them,
but it is certainly replete.

And so what I'm trying to comprehend here is what, you know, back in '07, given the imprecise writings on all concerned, including this Board, what competitive options was understood to be when the Board granted a reduction in a case where you had two Class Ones serving people to one line. That's what I'm trying to get at, the concept of competition.

And I don't see--but if there is one, I want you to tell me--any limitation on the options, and there's some other language I'm going to ask you to deal with on this point, prior to this transaction for BN to provide unit service. If there's one there, I want you to point it out to me, somewhere in the law or the terms of service prior to '07.

MR. RIFKIND: It's based on the physical limitations at the time, and the type of--the agreement was premised on the service that existed at the time.

BOARD MEMBER OBERMAN: Actually, that's not the case, is it? Because one of the
representations to the Board was that they were
going to fix the tracks so they wouldn't be
 embargoed. That was part of the representation so
there wouldn't be any physical limitation, as part of
your own representation. So it can't be that the
Board's view in '07 was to say the service that's
going to continue on here is one in which the tracks
are flooded several months out of the year. That's
not what we ordered, is it?

MR. RIFKIND: No, I think that confuses or
conflates two different issues--

BOARD MEMBER OBERMAN: Well I understand,
but you keep saying there were physical limitations.
So I don't think that was really a part of it.

MR. RIFKIND: And that is exactly why the
Board authorized the transaction, because we had a
line that was neglected. We had service that was
suffering. Customers that were suffering--

CHAIRMAN BEGEMAN: The Board's decision
says, "The rail options of New Century and Superior
Grains will be unaffected by the proposed
transaction."
So if that's the case, it sounds like you are affecting their options because you're not letting unit train service be provided to them.

MR. RIFKIND: So let me be very clear about why one--the primary reason that we don't allow unit train service via the Haulage--

CHAIRMAN BEGEMAN: Well actually I want to know about the sentence, of how you're not in violation of what the Board decision said that the rail options of New Century will be unaffected.

MR. RIFKIND: Well I think that has to be read in the context that we also say, and the Board quotes it, that the existing BN service will continue. And that service can be handled in CP existing trains. Unit trains can't be handled in existing CP trains--

CHAIRMAN BEGEMAN: One of the things I found interesting, and I'll ask BN as well, but the decision also says "BNSF is retaining, pursuant to Section 2.3 of the Agreement, its ability to solicit rail transportation business on the conveyed line."

So they can solicit it, but they can't
provide it?

MR. RIFKIND: They can--they can absolutely provide it, subject to the express conditions that are in the Haulage Agreement and--

CHAIRMAN BEGEMAN: It was expired.

MR. RIFKIND: Absolutely, the Haulage Agreement did--well it didn't expire. It had an option to terminate that was express, as of January 1st, 2017. CP initially exercised that option, but then the parties agreed on a renewal for five years--

CHAIRMAN BEGEMAN: Is the renewal document in the record?

MR. RIFKIND: Yes, it is. It was submitted with our reply brief.

CHAIRMAN BEGEMAN: And are there restrictions on unit train service to New Century Ag?

MR. RIFKIND: Absolutely, because if we didn't restrict unit train service, we would undermine our ability to serve our local customers in Minot. We would undermine our ability to serve customers from British Columbia to Chicago, because
it would require us to block our mainline for hours at a time.

CHAIRMAN BEGEMAN: But if the rail options of New Century will be unaffected, how are you living up to your common carrier obligations? If tons of grain is in a facility, in elevators or on the ground and can't move?

MR. RIFKIND: Well, CP disagrees that there are tons of grain in facilities they can't move. In fact, in the past--

CHAIRMAN BEGEMAN: Mr. Michelson is right next to you. I mean, he probably knows more about his grain than you do.

MR. RIFKIND: So he will be familiar with the level of service that NCA is receiving from CP right now. In the last 30 days alone--can I disclose the number of unit trains? So in the last 30 days alone, they've received 10 unit trains from CP, as well as--

(Comment being made off-microphone.)

BOARD MEMBER OBERMAN: (Off microphone) take that as a representation that they can continue
to get that unit train per month going forward, if we
don't rule in their favor? What assurance do they
have?

MR. RIFKIND: Well, NCA exists as one of
many grain customers in our constellation that we
have to serve. We have a common carrier obligation
to all our customers. We try to allocate our grain
service to meet that obligation. And so we have
various programs that NCA can avail itself of to
purchase train sets, but train sets are by definition
limited. So I cannot commit that in the future they
will get--

CHAIRMAN BEGEMAN: But you first have to
buy train sets.

MR. RIFKIND: They did not. Well, they
do--I believe they have a shuttle program--

CHAIRMAN BEGEMAN: But are they--

MR. RIFKIND: --but let me have Mr. Farmer
address that, please.

CHAIRMAN BEGEMAN: You know, I mean the
Canadian Government directs you to move a certain
tonnage of grain typically each year?
MR. FARMER: No, that mandate has ended. So we're not mandated to move any certain number of tons of grain in a grain year.

And just to clarify, we do, both in the U.S. and Canada, at the start of every grain year, make a certain number of unit trains available to the market free of charge. They're not for sale. So anyone can sign up for those. And it's open to all customers. So NCA would have the ability to sign up for those trains, as well.

CHAIRMAN BEGEMAN: And I think they tried to, but they--

MR. FARMER: No, we've not limited them. They do tend to take freight from other customers who have bought freight. So if, you know, other customers like grain buyers might buy freight, or buy grain and supply that freight to ship.

VICE CHAIR FUCHS: Can I ask, I think NCA says there's a 25-car limitation. Can you just kind of put forward, what is the current limitation on BNSF?

MR. RIFKIND: So the current limitation I
believe is 50 cars a week.

VICE CHAIR FUCHS: Fifty cars a week. And what is the limitation on CP?

MR. RIFKIND: Whatever our capacity can handle. We don't limit ourselves.

VICE CHAIR FUCHS: Why does BN have a set, fixed limit and CP is whatever capacity you can handle? Why wouldn't BN also be whatever capacity you can handle?

MR. RIFKIND: I'm glad you asked that question. If I can address kind of the operational issues here?

VICE CHAIR FUCHS: Yeah.

MR. RIFKIND: When we interchange, first of all the traffic goes to Flaxton on the DMVW. From Flaxton, where we have limited trackage, we take the traffic down in CP train service to Minot.

At Minot we pull across the mainline of BNSF, two tracks, there's a diamond. We cannot pull onto the mainline from the west. We actually have to pull through the mainline where we then have to pull back, shove back onto the BN mainline. We have to
wait for a clearance to get on the mainline.

With a unit train, we'd be waiting in downtown Minot for however long it takes to get BN clearance. We'd be blocking grade crossings at that point.

VICE CHAIR FUCHS: But you've dealt with 90 cars, right, for BN?

MR. RIFKIND: No.

VICE CHAIR FUCHS: There was no--what was the most cars that you have moved previously for BN and operating under that--

MR. RIFKIND: So there was one instance in 2014, I believe it was, when we ended up with a 92-car train. And because we don't have the facilities to do it safely in--or efficiently in Minot, we actually took that train to Bowbells, which is just below Flaxton, where there is a CHS loop track facility that has dual access. And we have to use our customer loop track, a competitor of NCA's by the way, in order to interchange that train.

That was hugely inefficient, and is not an option that we could pursue in the future, for
obvious reasons.

BOARD MEMBER OBERMAN: I want to get back, Mr. Rifkind, to the 2007 decision, because there are a number of statements that I want to draw your attention to.

One is a follow up to what Vice Chairman Fuchs was asking you about. The Haulage Agreement provided in 4.01 that it is the intent of CP that it shall generally accord BN the same level of service as CP's own traffic of the same type.

MR. RIFKIND: Right.

BOARD MEMBER OBERMAN: Right? So if CP started providing unit train service, why wouldn't, at least--and that paragraph has not been changed--why wouldn't BN be accorded the same level of service as CP's own traffic under that provision? Isn't that what you were trying to communicate to the Board at the time in '07?

MR. RIFKIND: Absolutely not. That was not our intent at all. And--

BOARD MEMBER OBERMAN: So the Board was not reasonable--it was not reasonable for the Board
to assume under the language "shall generally accord
BN the same level of service as CP's own traffic,"
that those words meant what they said?

MR. RIFKIND:  I think your understanding
of what you think they said, or what you're
suggesting they said, is not what they actually said.
What they say is, you know, or what's intended is
that we're not going to take a BN car and bash it
around, or stick it in a yard somewhere, stick it on
a siding, let it sit for five months.  We're going
to--we're going to treat it as if it's one of our
own.  We're going to move it efficiently--

BOARD MEMBER OBERMAN: But this same
level--

MR. RIFKIND: But also, to put that
language in context, you have to read the entire
agreement.  And the agreement says specifically that
the trains are--or the traffic that BN can move are
limited to exist--to moving an existing CP service,
subject to CP capacity.

BOARD MEMBER OBERMAN: Well, we're going
to--I'm going to get to the agreement as a whole, but
are we not entitled to read both the agreement and 
CP's representations in its Petition, together?
Wasn't it an overall package you were asking the 
Board to consider?

MR. RIFKIND: Absolutely.

BOARD MEMBER OBERMAN: Alright, so you--
MR. RIFKIND: And to that I would say that 
you have to consider the fact that there's a 10-year 
term--

BOARD MEMBER OBERMAN: Yeah, but we say--
you say--you say these things, at page 7: "NCA's 
rail options will be unaffected." You say at page 
13, "There will be no loss of rail competition". 
Quote, "BN will continue to provide common carrier 
services to all shippers on conveyed lines at 
competitive rates". You say in the agreement, you 
say at page 5 that the Haulage Agreement will 
preserve competitive options.

I don't see any limitations there. You 
also say, hold on one second, I want to get to some 
other--just bear with me for one moment here.

(Pause.)
You say in page 21 of your Reply, quote, 
"It is entirely at CP's discretion whether to operate 
additional CP trains." But the Agreement, at 205, 
says that whether BN requests an additional train 
will be handled by CP in good faith and CP's, quote, 
"judgment has to be reasonably exercised."

So I don't see that you have unbridled 
discretion to limit BN's trains, because you have to 
operate both in good faith and reasonably exercise, 
which neither term is defined or explained more fully 
by the Board.

And so what I'm trying to get at is what 
happened in 2007. I see nothing in your Petition. I 
see nothing in NCA's filings. And I see nothing in 
the Board Decision that preserving competition on 
this very fulsome rail line with a lot of grain being 
shipped, was either subject to CP's deciding to limit 
BN and/or to cut BN off entirely after some period of 
time--in this case, 10 years.

I am trying to figure out what the Board 
understood it was doing in '07 in terms of the 
discussion we had earlier of whether it can enforce
that now. And I invite you to comment on how we're
to read all of this language I just asked you about.

MR. RIFKIND: Yeah, I mean there are
several issues wrapped up there. So if I may, first
of all 205 does say "in good faith," but it also says
"may at its discretion" permit the operation of
BNSF--

BOARD MEMBER OBERMAN: But "reasonably
exercise."

MR. RIFKIND: --in excess of existing
train service capacity, right. So now let's talk
about "reasonably exercise."

If we were to allow unit train service,
what we would be doing would be undermining the
investments that we have made in our mainline,
including upgrading the CTC, upgrading the rail,
installing additional trackage, because those
investments were intended to increase capacity on
our mainline to serve Chicago, to serve British
Columbia, the West Coast, they were for NCA's benefit
and they were for all our customers' benefit. And
what allowing unit train service in Haulage would do
would be to block our mainline for two, three, four, five hours at a time in order to effect the unit train interchange. That would severely undermine the capacity that we've worked—we've invested, based on our confidence in administrative finality of Board exemption decisions, we've made investments.

BOARD MEMBER OBERMAN: Well, Mr. Rifkind, aren't you assuming the conclusion? You seem to be saying that once you got that exemption, CP was free to do things to its line which it could then use, as you are now doing, to justify limiting what BN could do. And if in fact the reasonable construction of what our 2007 Decision meant was that you had to keep BN equal with you, then isn't it reasonable for the Board to say if CP was going to invest in its line, as you say it had, it had to do that with the knowledge that BN was entitled to provide the same service, which is what exactly you say in 4.01? So I'm hearing what you're saying as saying you got that exemption in your pocket, and then you went off and privately decided to make some business decisions which would now justify your
coming back 12 years later and saying, you know, we could do what we wanted.

And the Board's decision clearly did not say you could do what you wanted.

MR. RIFKIND: Well, the Board's decision actually granted an exemption for the transaction without condition.

BOARD MEMBER OBERMAN: You think the Board was wasting its breath in its recitation of repeating all of your representations in its decision saying this is going to preserve rail competition? Do you think we were wasting our breath when we made those recitations? I mean, I can cite them to you, if you want.

MR. RIFKIND: That's not necessary. But what I will say is that this transaction has delivered on every single one of those representations. Right after the transaction--

VICE CHAIRMAN FUCHS: No, you said, in addition to the representations, you said because of the haulage operation, the post production will not significantly increase Canadian Pacific's share of
the transportation service market in the region.

MR. RIFKIND: Correct.

VICE CHAIRMAN FUCHS: And in fact--it's a little bit different than the representations Marty is referring to, of course, but CP's market share has increased dramatically.

MR. RIFKIND: Which has nothing to do with the transaction.

VICE CHAIRMAN FUCHS: So why--is CP providing a better price? Is it providing a better service? Or what other reason has its market share gone up?

MR. RIFKIND: Its market share has gone up because NCA has expanded its facilities. Now if I can just go off on a little divergent for a second, NCA also expanded its facilities in Westby, which it sole-served. So to your earlier line of questioning, you know, would NCA have made investments in Noonan had it not known, you know, would have been able to have both BN and CP provide unit train service, that is at least an open question. But I will say NCA--my understanding is, Noonan needed to be replaced
desperately. And not all of that investment was to the loop track. Large parts were to facilities that needed to be replaced, regardless.

But back to, you know, your question. You know, what did change initially, after the transaction, was that actually CP lost market share. Because BN came in. They were relieved of the ownership obligation, the obligation to maintain the track.

We restored the track with our nickels, and BN came roaring back and competition was fierce. And BN actually had the majority of the market share after that transaction for several years, up until the time NCA decided to expand the loop track.

There are other factors that may also affect the change in CP's market share. CP is competitive on many rates and provides reliable service. And those factors and how the market--you know, the dynamics in the grain market affect who gets used.

So it's not so easy to say, you know, any one thing influenced the market share today. But it
was not the transaction itself.

VICE CHAIRMAN FUCHS: That saying is because of the loop track? You're saying it's because NCA invested in the track, that's what gives you the higher market share? That's your point?

MR. RIFKIND: In part. In part. There may be other factors. And, you know, we've not done a thorough analysis of the market dynamics. And Mr. Farmer could probably speak more intelligently to the market dynamics than I can. But, you know, the loop track certainly marked a shift in how NCA sourced its rail service.

VICE CHAIRMAN FUCHS: And the car limitation? Do you think that was a contributing factor?

MR. RIFKIND: I--I--from the perspective that, would they have used more BN unit trains if we were able to--

VICE CHAIRMAN FUCHS: Let's say--here's a thought. What if they didn't run, but what if they didn't run unit trains but there was no car limitation? Would BN have the higher market share?
MR. RIFKIND: It's entirely speculative.

I don't--I will say, the car limitation has been
honored in the breach more often than as a rule--

VICE CHAIRMAN FUCHS: How did you arrive
at 50?

MR. RIFKIND: We looked at our existing
capacity. We have lots of interchange traffic and
local traffic in Minot. And we made a determination
that if, coming off the Crosby Lignite Line, you
know, would be around 50 a week, that that was
something that would not pose--

VICE CHAIRMAN FUCHS: Why would 60 cause
a--just to make sure. It would be helpful if I could
understand why would 60, a car limit of 60 create an
issue?

MR. RIFKIND: Well, among other things,
you know, we have limited trackage in Minot to hold
cars.

VICE CHAIRMAN FUCHS: Right.

MR. RIFKIND: We have two tracks that we
use that are--they're both about 60 cars apiece. And
in order to use those for say BN traffic, because
they're in constant use, we have to clear traffic
from those tracks. And the more cars you have coming
in, you know, obviously the more congested you are.

VICE CHAIRMAN FUCHS: So let me try and
understand you. In order to get cars off your
mainline, you have to use those tracks?

MR. RIFKIND: Correct.

VICE CHAIRMAN FUCHS: And those tracks can
only handle 60 cars?

MR. RIFKIND: Thereabouts.

VICE CHAIRMAN FUCHS: So if BN--sorry, in
BN service, if you were to handle any more than
roughly 60, then you would have to occupy your
mainline?

MR. RIFKIND: We'd have to occupy our
mainline regardless, but, yes--

VICE CHAIRMAN FUCHS: You'd can't use
those tracks, you'd have to occupy it longer?

MR. RIFKIND: Right. Right. Exactly.

VICE CHAIRMAN FUCHS: And how often were
block of cars exceeding 60 cars before your
limitation?
MR. RIFKIND: I don't have that data.

VICE CHAIRMAN FUCHS: Okay.

MR. RIFKIND: But I will say, the limitation initially was imposed in 2008, immediately after this transaction when CP was quickly overwhelmed by the amount of haulage cars that were moving on BN's behalf. And that was affecting our ability to serve all our customers in that area, as well as our mainline operations.

BOARD MEMBER OBERMAN: I just want to follow up on that point, Mr. Rifkind, before I move to another one.

There was no limitation prior to '07 on BN, not only on unit trains but there was no 25-car, 15-car day, 50-car week, there was no such limitation. Correct?

MR. RIFKIND: I can't speak for BN.

BOARD MEMBER OBERMAN: Well there was no legal limitation that you're aware of?

MR. RIFKIND: Not that I'm aware of, but I can't speak for whether BN had any of its own limitations.

BOARD MEMBER OBERMAN: So I want to get
back to trying to understand, because as you can see
I am trying to understand whether we're reopening
something, or enforcing something that the Board
already ordered in '07.

So I want to focus on what was going on in
'07, and we have to come to some other aspects to
understand it. I don't find the word "manifest" in
the original Haulage Agreement, do you?

MR. RIFKIND: Aw--

BOARD MEMBER OBERMAN: The word itself.

MR. RIFKIND: The word itself is not, but
there are numerous words that would--

BOARD MEMBER OBERMAN: Alright, and I
don't find any--I don't find any ban on unit trains
in the original Haulage Agreement. Would you agree?

MR. RIFKIND: No, I would not agree with
that.

BOARD MEMBER OBERMAN: The word "unit
trains" is not mentioned in there, is it?

MR. RIFKIND: Correct. The word itself is
not, but--

BOARD MEMBER OBERMAN: And it doesn't say
"no further"—what it says is that BN has the right to solicit business, as the Chairman brought out. But there's no explicit ban on unit trains in that agreement. I don't find that language in there.

MR. RIFKIND: I disagree with that. The reading specifically contemplates that traffic will move--

BOARD MEMBER OBERMAN: I didn't ask you whether it contemplated--

MR. RIFKIND: --service which--which--

BOARD MEMBER OBERMAN: I'm asking you for the words.

MR. RIFKIND: --which means, by definition, that it's not unit train service--

BOARD MEMBER OBERMAN: Show me the language you're talking about.

MR. RIFKIND: If I may, let's first begin with what a unit train is. A unit train is a complete train set that shuttles back and forth as one set: a locomotive, cars.

In one oh--Section one, we describe it.

In 102, the rail cars is defined as loaded and empty
freight rail cars to be moved in existing CPR train service under the provisions of this Agreement. That by definition precludes a unit train.

In Section 201, CPR hereby agrees to handle an existing train service BNSF haulage car.

In--

BOARD MEMBER OBERMAN: In 205 it says that you have to respond in good faith to requests for BN to provide additional trains. There's no limitation there or ban on BN asking you for unit trains that I find.

MR. RIFKIND: That would not be a unit train--

BOARD MEMBER OBERMAN: I'm not asking-- Pardon?

MR. RIFKIND: By definition, that would not be a unit train. What we are being--what our discretion is to do there is to provide haulage service for--in CP train service, to provide additional CP train service to handle additional BNSF cars. Not to provide unit train service and haulage.

VICE CHAIRMAN FUCHS: Stop me if I'm
getting us off track, but just on 205, you--it says CPR shall consider such requests in good faith, as Marty was saying, and may in its discretion permit the operation of BNSF haulage cars in excess of the existing train service capacity as specified by CPR.

Can you just explain that to me? What does it mean, "in excess of the existing train service capacity"?

MR. RIFKIND: Well, if we have, let's say, three existing local jobs that go out to Flaxton, pick up the trains coming off of DMVW, and return them to Minot for interchange, and those trains are now full with BNSF and CP cars and can't accommodate additional cars, that BNSF has, you know, for business BNSF has developed, they can come to us and say: You know, could you put on a fourth local switch job and provide service for these additional cars?

BOARD MEMBER OBERMAN: But that doesn't say exactly--all it says is, "in excess of the existing train service." It's not defined or limited in this language.

And here's what I want to address--ask you
to address, Mr. Rifkind. In 2017 when you entered
into a supplemental agreement--

MR. RIFKIND: Yes.

BOARD MEMBER OBERMAN: CP added the
language explicitly to say haulage services, quote,
"are limited to manifest traffic and do not include
the transportation of rail cars in unit train
service".

That language was added. Correct?

MR. RIFKIND: Correct.

BOARD MEMBER OBERMAN: It wasn't in the
original Haulage Agreement, that specific language?

MR. RIFKIND: That language was not, but
that's what the agreement was.

BOARD MEMBER OBERMAN: Well that's what
you say--

MR. RIFKIND: But to be clear, what that
language says is, "to clarify," is that correct? Or
some words to that effect.

BOARD MEMBER OBERMAN: It does say that.

MR. RIFKIND: Right.

BOARD MEMBER OBERMAN: But would you agree
that if the language wasn't in the original Agreement, and it was added to an agreement 10 years later, that it is reasonable for the Board to conclude that the ban was not in the original Agreement, a ban on unit trains. Otherwise, you wouldn't of had to add the language? Is that a reasonable conclusion on our part?

MR. RIFKIND: No, that would not be a reasonable conclusion on your part, because all that language does is simply clarify--

BOARD MEMBER OBERMAN: So you want us to--

MR. RIFKIND: --what the prior language said.

BOARD MEMBER OBERMAN: You're saying the only reasonable construction for the Board of what this arrangement was is to read into the original Agreement the language that wasn't there and that was added 10 years later? That's the only reasonable position for this Board to conclude? Is that your contention?

MR. RIFKIND: I'm sorry? I'm not
following that question.

BOARD MEMBER OBERMAN: I asked you this because I think I remember this as basic contract law, that if a language is changed, it's reasonable to construe that it wasn't in the first agreement. And I'm asking you, if it would be reasonable for the Board to conclude that the original Haulage Agreement did not ban unit trains because you found it necessary, whether you say it was for clarification or not, to explicitly say so 10 years later. Would that be reasonable for us?

MR. RIFKIND: We said it explicitly 10 years later because there was a party asserting that we should provide unit train service.

BOARD MEMBER OBERMAN: Would it--

MR. RIFKIND: And we did not want--we did not want there to be any--any--any confusion whatsoever, so we added the clarification language. But the language clarifies. It does not change the fact that this language in this Agreement, and in the Board's decision, and in the Joint Petition, all said existing train--existing
BN traffic would be handled in existing CP train service. That was the understanding at the time in 2007 when the Board approved, or let the exemption go into effect.

You also asked me about the language that the Board used, whether it had meaning and effect, or whether you just wrote it for the fun of it.

Well, the Board writes why it believes that a transaction does not require additional regulatory scrutiny. And once--and that's what that language supports. Once that language is in there, it doesn't create a condition. The Board has other ways to condition. But in an exemption proceeding the whole notion is that if the Board concludes the transaction doesn't require additional regulatory scrutiny, that transaction can go into effect and the parties can rely on that transaction as having administrative finality and certainty, and then they can proceed to make investments and conduct business in accordance with that transaction.

BOARD MEMBER OBERMAN: Well let me pick up on that. One of the things the Board said in its '07
Decision is that what you were representing to the Board was that you would be, quote, "preserving competitive options" at page 3.

MR. RIFKIND: Which we did.

BOARD MEMBER OBERMAN: You say the parties could then go forward. So everything you did after you got that exemption, presumably you kept in mind that one of the representations the Board was relying on was that you had to preserve competitive options.

MR. RIFKIND: Which we have done--

BOARD MEMBER OBERMAN: Well you say you did--

MR. RIFKIND: --in accordance--we say we did. We produced the data that shows that for the past 12 years BN has enjoyed access. And in fact for many years BN was the dominant carrier on this line. If that's not preserving competition--

BOARD MEMBER OBERMAN: NCA tells us that you don't take unit trains to the PNW. Is that correct?

MR. RIFKIND: We take them in joint line service. So we take them with the UP, but we provide
access from origin to destination.

BOARD MEMBER OBERMAN: Have you provided NCA with competitive unit train rates for their commodities that go to the PNW? They say you don't.

MR. RIFKIND: We disagree. We absolutely provide competitive rates. Sometimes BN beats us, and sometimes BN's rates are much lower because they are able to price by themselves, because they have a direct route. But we are constantly in the marketplace taking steps, some of them that might be visible to NCA, some of them that are not, to favor our shippers, including NCA, our originations and keep them competitive.

BOARD MEMBER OBERMAN: They say you have a fuel surcharge and BN doesn't. Is that true?

MR. RIFKIND: That's true.

BOARD MEMBER OBERMAN: So that you've charged them more, therefore you're not being competitive with the BN rates which you're not allowing BN to provide them. Is that a fair statement?

MR. RIFKIND: No, it's not a fair
statement because it doesn't take into account all
the other steps, some of which I can discuss, some of
which I don't feel comfortable discussing, that CP
takes to ensure that its origins and destinations are
favored.

BOARD MEMBER OBERMAN: A few other
questions--Do you want to--

VICE CHAIRMAN FUCHS: Yes, because I think
it's on this. I want to make sure I'm fully
understanding the dynamics of Section 2 of the
Haulage Agreement.

So I asked, you know, hauling cars in
excess of existing train service capacity. Can you
define for me "existing available train capacity" or
"existing train service"?

MR. RIFKIND: Well, existing train service
would say, you know, we have three trains in service
on that line.

VICE CHAIRMAN FUCHS: Right. So in excess
of capacity is something that necessitates an extra
train start?

MR. RIFKIND: Correct.
VICE CHAIRMAN FUCHS: Okay, but it's not--is train service capacity different than track capacity?

MR. RIFKIND: Yes, much different.

VICE CHAIRMAN FUCHS: Okay, so the language in 205 is CP's got all this discretion. It's got its sole judgment, "may in its discretion permit the operation of BNSF haulage cars in excess of existing train service capacity, and if CP determines sole judgment reasonably exercised ... necessary to accommodate the operation of additional trains," all that is talking about an additional train start, right?

MR. RIFKIND: Correct.

VICE CHAIRMAN FUCHS: Okay. And, contrastingly, in 203 it says "The BNSF haulage cars tendered by BNSF at the Minot Exchange Tracks for handling by CPR under this Agreement shall be subject to compliance with operating practices applied to Canadian Pacific's own trains."

MR. RIFKIND: Correct.

VICE CHAIRMAN FUCHS: So that doesn't--and
MR. RIFKIND: That's treating to how we handle their cars and service. We have operating rules. BN has their own operating rules.

VICE CHAIRMAN FUCHS: I guess I'm looking at Section 2, though, and I see that you all have put a restriction on BNSF for when they require an additional train start, right? Because you have all these capacities. If you ever go beyond capacity, then--and you need an additional train start, then that's where your judgment--I guess I'm missing the part of the agreement. I mean, you can help me understand where you put a limit on BNSF because of your track capacity.

MR. RIFKIND: Well, so first of all let me just point out that 2.04--and I know this doesn't go to your question, but--states clearly that the haulage services are subject to CPR's existing available train--

VICE CHAIRMAN FUCHS: But then in 2.05 you say "exceeds available capacity and CPR's existing train service, which necessitates the operation of
additional CPR trains to accommodate the increase."

MR. RIFKIND: Right.

VICE CHAIRMAN FUCHS: And that's a different concept. That says that exceeding available train capacity is an additional train start, right? But we just talked about that. That's a different concept than exceeding track capacity.

MR. RIFKIND: But it may also exceed track capacity.

VICE CHAIRMAN FUCHS: Where does it say that?

MR. RIFKIND: Well it talks about if there are required capacity improvements--

VICE CHAIRMAN FUCHS: You--2.05?

MR. RIFKIND: In 2.05.

VICE CHAIRMAN FUCHS: But capacity improvements necessary to accommodate the operation of additional trains.

It doesn't say necessary to accommodate additional cars. So capacity improvement has a specific definition. And that is, additions and betterments to the haulage route are necessary to
accommodate the operation of additional trains to
solely handle BNSF trackage cars.

So capacity improvements in this case, I
hear capacity improvements and I'm like oh, that must
mean track. But actually you mean additional trains?

MR. RIFKIND: No, I don't mean--

VICE CHAIRMAN FUCHS: Why?

MR. RIFKIND: It may also be, if we are
interchanging more volumes of BNSF cars, we will--

VICE CHAIRMAN FUCHS: It doesn't say
"cars." It says "trains."

MR. RIFKIND: Well, I think you have to
read the first lines--

VICE CHAIRMAN FUCHS: And the first line
says, "Additional train starts."

MR. RIFKIND: Right. Right.

VICE CHAIRMAN FUCHS: So that's--when I
hear "train start," I mean you need more power.

That's an additional locomotive.

MR. RIFKIND: So if we need more power, we
need more locomotives. We need more capacity--

VICE CHAIRMAN FUCHS: That has nothing to
do with the capacity of the trains you talk about in Minot, which was solely based on cars, not based on locomotives.

MR. RIFKIND: Well it's based on infrastructure, and locomotives also need room to operate on the--

VICE CHAIRMAN FUCHS: Right, but it's not the number of locomotives that was causing the issue in Minot, it was the number of cars.

MR. RIFKIND: It's all of it.

VICE CHAIRMAN FUCHS: Well--

MR. RIFKIND: I mean you can't separate it out.

VICE CHAIRMAN FUCHS: Well, the variability on locomotives is what, two to five, right, for these things? So it's the variability of cars that's creating the issue, right? That's all we talked about when you're talking about Minot. It's 60 cars. You didn't say 50 cars plus 5 locomotives, or 58--I mean, you know, it's a little bit parsing. The issue is that Minot can't accommodate more than 60 cars. And the standard
number of locomotives, right?

MR. RIFKIND: Right.

VICE CHAIRMAN FUCHS: And you're citing this X available train capacity, and that's only based on train starts.

MR. RIFKIND: Okay.

VICE CHAIRMAN FUCHS: So just help me understand where this track capacity limitation comes in.

MR. RIFKIND: First of all, I think it comes in just like common sense, that if you don't have the capacity, the track capacity to handle additional volumes--

VICE CHAIRMAN FUCHS: If it said capacity improvement and it wasn't capitalized, I would agree with you that my natural interpretation would be that's track capacity, right?

MR. RIFKIND: It's in 2.05.

VICE CHAIRMAN FUCHS: I agree, but it's capitalized, in quotes, which means--I think it means it has a specific definition. And the specific definition you give us "necessary to accommodate the
operation of additional trains." That's what "capacity improvement" that's solely handled BNSF haulage cars.

And so I say, alright, what is "capacity improvement'? That means more locomotive capacity, more power, and the reason I think that is not only because it's defines as that, because you referred me to the first sentence, and the first sentence says CPR's existing available capacity in CPR's existing train service, which necessitate the operation of additional CPR trains.

It doesn't say, for example, exceeds available capacity on CPR's existing train service or track capacity which necessitates the addition of CPR trains, or the addition of track capacity, or the addition of space to accommodate different cars.

This 2.05 is completely silent on the number of cars. It only speaks to the number of locomotives.

MR. RIFKIND: If I might?

VICE CHAIRMAN FUCHS: Yes.

MR. RIFKIND: What it talks about is
capacity improvements that need to be constructed.

If we're talking locomotives, we don't need to construct the locomotives. What is contemplated here is that, you know--and in the last two lines, for instance, "shall construct the capacity improvement, and upon completion of the construction of the capacity improvements, payment therefor will be made by the BNSF. So it is talking about adding track, whether it's siding or other--or connection at its mainline that would enable a different operation.

VICE CHAIRMAN FUCHS: Well it could be that because there are more trains you want fewer blockages, right, of your main line, and therefore you need construction to have fewer blockages based on the number of trains, right? And so you could have additional construction to accommodate more trains, right? But that's a little bit different than a natural reading which said this is for the construction to accommodate more cars, right?

There are different reasons for the construction. And so I guess when you don't mention track capacity anywhere, and you don't mention car
limitations anywhere, and you're using this to justify your sole discretion, I can understand why someone might be confused that there is a car limitation.

Because you don't say cars or track anywhere.

MR. RIFKIND: Okay, first of all this is new business--

VICE CHAIRMAN FUCHS: Right.

MR. RIFKIND: Right? This is new business BNSF developed, or further developed. I'm not sure this is, you know--well, setting aside that, it is purely in our discretion. In good faith, granted. But it's in our discretion.

But elsewhere in the Agreement, we say that our haulage services are subject to existing available train capacity. So to read that and say, well, CP has no discretion or can't limit the number of cars, you know, if CP's trains are full, for instance, or CP can't limit the cars, I--

VICE CHAIRMAN FUCHS: I hear you. I just think--
MR. RIFKIND: --as you can.

VICE CHAIRMAN FUCHS: I think 2.03 speaks to exchange tracks, and the limitations in 2.03 is that it has to be subject to compliance with operating practices applied to CPR's own trains.

MR. RIFKIND: Right. That's about how we handle cars.

VICE CHAIRMAN FUCHS: Right. I agree. But that's the only place I see, you know, a very clear indication of track capacity. Sorry.

MR. RIFKIND: Right. But the reality is, there is limitations on track capacity. There is--and there is limitations on our ability to interchange efficiently and safely trains in Minot. Minot is one of our biggest bottlenecks, as it is. It's a 10-mile-an-hour track through downtown Minot, and we interchange with BN right smack dab in--

CHAIRMAN BEGEMAN: You know, I want to be sympathetic to you, but I go back to two weeks ago where we heard that CN--and you're fighting against CN wanting to move the interchange in Spaulding in the Chicago region--CN wants to do it because of
their capacity constraints. They're like, no, no, no, we can't move.

So it's really hard for me to, to I guess swallow what you're trying to feed me here. It seems to be--

MR. RIFKIND: Those are apples and oranges in--

CHAIRMAN BEGEMAN: It's all fruit.

(Laughter.)

MR. RIFKIND: And as we said in that situation, we offered to compromise because we are sympathetic to CN's--

CHAIRMAN BEGEMAN: Actually I commend the fact that you attempted mediation. You've had discussions. And you--but yet here, you wouldn't do any type of mediation. You refused to do anything that BN would participate in as far as discussions with NCA.

So I find it really interesting, the approach that you're taking to this, because I can assure you this Board Member cares a whole lot about moving grain, and moving all goods across the
network at all parts of the country.

MR. RIFKIND: As do we. We are absolutely committed--

CHAIRMAN BEGEMAN: And your CEO, and I commend him, he's had quite a successful career at CP during these past years, and when he started like in 2014 in the service crisis and the meltdown, we all said it was because of winter. In hindsight, I think it probably was because Mr. Harrison was implementing PSR at the same time and no one was looking at PSR like people were looking at crew trains moving, and winter, and so maybe it made sense to limit cars to 25 in 2014.

But it's not 2014. There's not a service crisis. You're probably talking about your operations have never been more fluid. You've got record profits. So it would be good if you could provide service to your customers that had to fly all the way to Washington to try to get regulators to do what you won't agree to do.

MR. RIFKIND: CP makes money by moving traffic. And that's what we are committed to do.
And we make every effort to meet every customer's demand, including NCA's here.

We have, as I said, moved in the last 30 days alone 10 unit trains and 154--

CHAIRMAN BEGEMAN: And how much was it when they brought the Petition?

MR. RIFKIND: I don't--I don't know the specifics then, but at the time they brought the--I will say that in between that time and today, we did offer to sit down and talk about additional shuttle train service to give them special treatment, essentially, and NCA was not interested in availing itself of those discussions.

CHAIRMAN BEGEMAN: Well it's because you said BN can't be part of any of this.

MR. RIFKIND: Well--

(The Chairman and Mr. Rifkind speak simultaneously.)

MR. RIFKIND: So what we're being asked to do is undermine our ability to provide service to all the customers in the Minot area. We handle 30,000 units, car units in Minot on a local basis, in
addition to what we provide service to NCA on. And all those customers would suffer if we were to allow unit train interchange in Minot. As well as our ability to serve customers between here--between British Columbia and Chicago, because that would require us to jam up our mainline.

So it's really not an option. So after a year of negotiating with BNSF and coming to a satisfactory agreement on haulage, a renewal, it seemed--

CHAIRMAN BEGEMAN: I mean it's satisfactory to the carriers, but not satisfactory to your customers.

MR. RIFKIND: Well it's not satisfactory to one customer. But if we favor one customer over our ability to serve all our other customers, we're not going to be in business for very long. And we'll be back in front of you repeatedly.

I also want to address haulage agreements for a second in terms of Board jurisdiction. The Board has said repeatedly--

CHAIRMAN BEGEMAN: We know what it is.
VICE CHAIRMAN FUCHS: Yes. So let me--

let's say for example before this transaction took
place, and let's say it was '06 and New Century Ag
had just completed its loop track.

MR. RIFKIND: Right.

VICE CHAIRMAN FUCHS: And wanted unit
train service from BN. What would happen?

MR. RIFKIND: It would go to BN and
request unit train service--

VICE CHAIRMAN FUCHS: And then
operationally what would happen?

MR. RIFKIND: It would have--BN, I
presume, would have operated its own train service,
and on BN's--and would have come off the joint line
onto BN's mainline.

VICE CHAIRMAN FUCHS: Okay. And that is
something that can't happen today?

MR. RIFKIND: That's correct.

VICE CHAIRMAN FUCHS: Okay. And, you
know, in the Petition it said the proposed
transaction represents merely a change in ownership
of the conveyed lines, right? And it says there will
be no loss of rail competition. But it's not just a change in ownership. There are real operational changes here that can't take place.

MR. RIFKIND: Well, it--

VICE CHAIRMAN FUCHS: And I know there's a Haulage Agreement and all that sort of stuff, but it's not just mere—you know, it's not "merely" a change in ownership. It's that New Century Ag had optionality before the transaction. It could go to unit train service. It could get BN service. It could go straight to their mainline. And it can't do that post-transaction, right?

MR. RIFKIND: Correct.

VICE CHAIRMAN FUCHS: So it's not just a change in ownership. It's a decrease in optionality for New Century Ag.

MR. RIFKIND: It's actually an increase in optionality. It's an increase in optionality, because before--

VICE CHAIRMAN FUCHS: They could--sorry, go on.

MR. RIFKIND: Before CP acquired BN's
interests and the maintenance obligation--

VICE CHAIRMAN FUCHS: Right.

MR. RIFKIND: --that line was in terrible shape. And NCA was not being well served. It was being embargoed for months at a time on a yearly basis because of the flooding issues.

VICE CHAIRMAN FUCHS: Right.

MR. RIFKIND: Those issues, because of CP's investment, have all been addressed. So NCA's ability now to expand and grow its business and invest in its facilities are in no small part due to the service that CP has provided, and the investment CP has made.

BOARD MEMBER OBERMAN: But, Mr. Rifkind, there's no--the problem I'm having with all this language is that neither you nor anybody else tried to spell out what optionality meant at the time. It was unlimited. It just said "preserve options." You didn't say the options we're preserving for NCA is that we're going to fix the tracks so there won't be any embargoes. You didn't limit it to that. It's just open-ended.
VICE CHAIRMAN FUCHS: Well, and it says, you know, BN will not only retain BNSF service, but will gain access to CPR. So that suggests to me, okay, they're getting increased options for CPR, but it is not clear that there will be a decrease in option for BNSF.

When you say "retain BNSF service," it's like you're referring to, okay, there's that thing. But the truth is that New Century Ag has fewer options with respect to BNSF.

MR. RIFKIND: The option to ship by unit trains did not exist in 2006 and 2007 when we did this transaction.

VICE CHAIRMAN FUCHS: But the options for loop track--

MR. RIFKIND: And so as a result--

VICE CHAIRMAN FUCHS: --unit train service did exist.

MR. RIFKIND: And they invested in loop track, and they have unit train service.

VICE CHAIRMAN FUCHS: But you're taking away that potential option for them.
MR. RIFKIND: They still have the option to get BNSF service. They choose not to. Not unit train service.

VICE CHAIRMAN FUCHS: Before the transaction, they had the option to invest in loop track and get BNSF unit train service. That is an option that they had when they were surveying the whole suite of investment and business opportunities that they have. That is an option that is on the table. And--and now, post-transaction, if you imagine, they effectively don't have that option, right? Because they've invested in loop track, and now they don't have the option to get BNSF. So there has been a decrease in the option that was available to that business as a result of this transaction.

MR. RIFKIND: I don't follow that logic. I think there's been an increase. Now they have--not only do they have what they had before--

VICE CHAIRMAN FUCHS: That particular option is taken away, right?

MR. RIFKIND: No. What's taken--nothing's taken away. What they had before was access for
Manifest traffic, Manifest service. They still have that option. And now they have an additional option for CP unit train service.

VICE CHAIRMAN FUCHS: But you just told me that if this transaction never happened, they'd have the option to invest in--if this never existed, you told me that New Century Ag predecessor could have invested in loop track and could have gotten BN unit train service. That was an option, if this transaction never took place.

MR. RIFKIND: If I said that, let me correct, or clarify something. If this transaction had not taken place, NCA probably financially could not have made the investments in its facilities, because service was bad.

BOARD MEMBER OBERMAN: (A few words off-microphone) conclusion right now, you know, you're just asking us to guess, aren't you, as to whether NCA would have made the investment? BN might have seen the advantage of more shuttle train service to keep up the track? I mean, you're just asking us to speculate at this point, aren't you?
MR. RIFKIND: If there had been sufficient business to justify BN continuing to—or maintaining the line, or the prospect of BN getting sufficient business to maintain the line, then they wouldn't have done this transaction. They did this transaction because they wanted to exit the line altogether.

CHAIRMAN BEGEMAN: And we'll hear from BNSF, but they seem inclined, willing, wanting to provide unit train service to New Century Ag. You seem intent on preventing that from happening. How are your actions not anticompetitive?

MR. RIFKIND: We are not intent on preventing them from providing unit train service. If they want to—

CHAIRMAN BEGEMAN: Yes, you are.

MR. RIFKIND: No, if they want to build a line to make an investment like the investments we have made in our lines to access—to access the NCA Noonan facility, they're certainly free to do that. But what we're saying is, you can't come in and take—and undercut our ability to serve our other
customers. And you can't rewrite the economics of a deal 12 years after that deal has been done, 12 years after we've made all the investments in the line.

The reason they wanted to exit service was because it wasn't economic. We've now made it economic for them to serve. They're getting benefit without obligations of ownership. We've got the obligations of the ownership. And so--

CHAIRMAN BEGEMAN: And by "they," you're referring to BN?

MR. RIFKIND: Right. BN had the obligation of ownership, but they weren't maintaining the line. That is in the record in the 2007 proceeding. There was no question about the embargoes that were occurring.

BOARD MEMBER OBERMAN: Didn't you own half the line at that time?

MR. RIFKIND: We owned half the line at that time, but we didn't have the maintenance obligation. We have the maintenance obligation on a different line that had been part of the--

BOARD MEMBER OBERMAN: There was no--
MR. RIFKIND: --prior transaction.

BOARD MEMBER OBERMAN: --mutual obligation to keep the track repaired? The other half owner had a right to sink your service by not maintaining it?

MR. RIFKIND: Essentially, yes. That's what was happening.

BOARD MEMBER OBERMAN: Well that's what was happening, but did they have the right to do it? You had no rights to jointly say we've got to fix this up? I mean, you didn't invest in it, either, I guess is the point, before this transaction.

MR. RIFKIND: We were investing. We were doing our part on the line that we were responsible for maintaining.

BOARD MEMBER OBERMAN: Well you jointly owned the part that--

MR. RIFKIND: And when BN was not living up to its obligations, we took action. And that action was to acquire BN's interest in the line and take over the maintenance obligations. So, yes, we did take action.

BOARD MEMBER OBERMAN: Let me ask you this
question--

MR. RIFKIND: And we did invest in the line.

BOARD MEMBER OBERMAN: Under the 2.05 language in terms of your exercising your discretion, the Agreement talks about it being in good faith and using reasonable judgment.

Would you agree that you can't exercise your discretion in the way which decreases competition? As a general proposition, that that's a limitation on your discretion under that Agreement, and the Board's ruling?

MR. RIFKIND: What I would say is that if we were to allow unit train service, we would decrease competition.

BOARD MEMBER OBERMAN: That really didn't answer my question. I'm asking as a broad legal limitation on the exercise of your discretion, which I think you'll concede is not unbridled, is one of the limitations that you can't exercise that discretion in a way that decreases competition? Would you agree with that proposition?
MR. RIFKIND: No, I wouldn't agree with that.

BOARD MEMBER OBERMAN: You have a right--

MR. RIFKIND: What I would say, to clarify my answer, though, is we can't act with a purpose of being anticompetitive. We have to have a good business justification for doing it, or our reasons--

BOARD MEMBER OBERMAN: Do we have to probe the inner thoughts of the CP executives? Or can we just evaluate whether the actions you take are anticompetitive, objectively?

MR. RIFKIND: You shouldn't be looking at this at all in this proceeding. And that is a--what you've raised is a question that you look at in a competitive access rule case. And that's not what this is. You gave them the option to bring one, but they didn't because they can't bring one. They can't--

BOARD MEMBER OBERMAN: You've taken this way beyond my question. My question is:

Under the Haulage Agreement where you say
you have discretion, based on your submitting that Haulage Agreement, your representations to the Board in '07, and the Board's recitation of preserving competition and competitive options, would you agree that under 2.05 in this case as of '07 your discretion was limited in the sense that you couldn't exercise it in a way that was anticompetitive, whatever the secret intent of the CP executives was at the time. Would you agree with that, or not?

MR. RIFKIND: No, I wouldn't. There are lots of scenarios where we could exercise our discretion and--

BOARD MEMBER OBERMAN: And that it would be anticompetitive--

MR. RIFKIND: --it could be anticompetitive in the sense that we're not allowing a competitor unfettered access. But--

BOARD MEMBER OBERMAN: Well you've answered my question.

MR. RIFKIND: But that, in and of itself, just because the effect of the decision is anticompetitive, doesn't mean we can't exercise our
discretion. Because there are loads of other reasons, including our ability to serve other customers, why we may not agree to allow the changes that are asked for.

BOARD MEMBER OBERMAN: So--

MR. RIFKIND: Another reason, for example, is if the requirement here required additional capacity to be constructed. If that were the case and there wasn't the ability to construct the sufficient additional capacity, which is a problem in Minot--we are socked in--then that would be another reason. It would have an anticompetitive effect, but it would not be anticompetitive in the sense of that's why we did it.

BOARD MEMBER OBERMAN: Are you saying that even if BN and NCA or some benefactor wanted to build this extra track or sidings in Minot to accommodate these unit trains, which you say are necessary, it can't be done, physically?

MR. RIFKIND: I believe--I can't say it's impossible. I think--I think it would be very, very difficult to find the space in order to do that.
There are physical limitations in downtown Minot.

BOARD MEMBER OBERMAN: So in your position, it's not BN being too cheap to build the capacity? You're saying it can't be done?

MR. RIFKIND: I'm saying it can't be done, right.

BOARD MEMBER OBERMAN: There's no evidence in the record, beyond your assertion, of drawings, no--I haven't seen what this Minot Yard looks like, so I'm sort of having trouble with that.

MR. RIFKIND: And that may be yet another reason not to reopen a proceeding in this type of a proceeding.

BOARD MEMBER OBERMAN: Let me ask you this question. You say that you would harm all your other customers if BN was allowed to put unit trains on here. I haven't found in the time I've been at the Board a shyness on the part of North Dakota farmers--we've heard from them many times, and I don't see any of them here--saying please don't let BN put unit trains on these lines, it'll harm us.

So what's in the record to tell us that it
would hurt other shippers if NCA gets the relief it's asking for? I don't see it here.

MR. RIFKIND: In the record, we discuss the fact that we have operational constraints; that when BN exceeded the expected number of cars that that experience caused us to have problems serving our other customers. It's in the record repeatedly.

BOARD MEMBER OBERMAN: But we don't have the other customers telling us that, right?

MR. RIFKIND: Well, again, they're not a party to this proceeding, and this is why you should not be doing, or considering--

BOARD MEMBER OBERMAN: You know Bartlett wasn't a party to this--

MR. RIFKIND: --evidence in a proceeding which doesn't allow for this type of evidence to be appropriately developed. This would be appropriate for competitive access.

BOARD MEMBER OBERMAN: I don't think Bartlett was a party to that proceeding, but they had no trouble petitioning us and saying they wanted to be heard. So I don't hear it in this case.
I have a couple of other factual areas I wanted to just cover quickly. You--I asked Mr. Michelson this question about--Mr. Wood is not here, I take it?

MR. RIFKIND: He is not here.

BOARD MEMBER OBERMAN: Well perhaps you can address it. If not, we won't have an answer.

Mr. Wood filed a verified statement saying he told these folks at NCA prior to 2013, the quote in his affidavit is that the Haulage Agreement did not provide for service by BN unit trains.

Mr. Michelson said that conversation didn't happen. How are we supposed to decide whether it did or did not?

MR. RIFKIND: You're not supposed to decide. You don't need to decide--

BOARD MEMBER OBERMAN: Well why'd you put it in the affidavit, then? Why did you submit it to us?

MR. RIFKIND: To provide context.

BOARD MEMBER OBERMAN: Well, if I'm going to understand the context, don't I have to figure out
whether that conversation took place or not? Or why
didn't you just say it's irrelevant, we're not going
to address it?

MR. RIFKIND: I didn't say it was irrelevant. I said you don't need to decide it.

Because in order to decide this case, this
proceeding, whether to reopen it, the standard is: Is
there new evidence? Is there a change in
circumstance, or a material error that would have
mandated a different result?

BOARD MEMBER OBERMAN: Well here's what
I'm trying--

MR. RIFKIND: And there's no new evidence
because we hear that they were considering unit
trains at the time. So it was certainly foreseeable
in 2006-2007, but they didn't raise it at that time.

BOARD MEMBER OBERMAN: So the reason I'm
interested in this question--

MR. RIFKIND: Yep.

BOARD MEMBER OBERMAN: --is that I don't
think Mr. Greenberg is asking for a different result.
He's asking to enforce the result he thought he had
in '07. And what I'm trying to figure out is that, if in fact your contentions are the correct ones, that unit trains were not allowed under the Haulage Agreement, under this Board's 2007 Order, then it would be relevant to me if a CP person prior to this litigation actually said so in 2013. Because that would have given Mr. Greenberg an opportunity in 2013 to come in here and say we disagree. We want a declaratory judgment as to what the '07 Order meant.

So if that conversation never took place, then it seems to me it does lead to an inference that nobody, including CP, thought that unit trains were banned in '07 or else you would have told Mr. Michelson and this gentleman over here, I'm sorry whose name I've forgotten, don't spend your $41 million.

That's why I think the conversation is relevant. And I don't see Mr. Wood here to explain his assertion that Michelson says didn't happen. There's no writing. The first writing from CP happened after NCA spent their money.

MR. RIFKIND: Let's assume--
BOARD MEMBER OBERMAN: So that to me, I don't--I think if CP truly said, listen, we just can't--I don't think you wake up in the morning to be mean to people, and to mislead them into spending $41 million. I would have thought when CP was asked to approve the tracks, they would have sent a letter. If there was confusion at that time, by the way, if you're spending this money you told us you're talking to BN, don't do it. Because you won't get those trains. We can't exchange them in Minot. I don't see that in the record.

MR. RIFKIND: Let's assume that CP didn't--they did, but let's assume they didn't. There is still an issue here with the fact that in the record, and as you said the Haulage Agreement is part of the record and has to be read in context, in the record there's a clear possibility that come January 1, 2017, the Haulage Agreement will be terminated. So the question about whether the investment was made based on an expectation of BN unit train service to me seems a little beside the point.

BOARD MEMBER OBERMAN: I think the only
thing I would disagree with you, Mr. Rifkind, is the
word "clear." I think very little in this case so
far has been clear. I think it's up to this Board to
try to figure out what did happen, and what our own
Order meant, and whether CP is living up to it.
I have one other area that I wanted to--
MR. RIFKIND: But can I just address
your--
BOARD MEMBER OBERMAN: Sure.
MR. RIFKIND: --the clarity of the
termination provision. Section 9.02 says: Either
party shall have the right to terminate the agreement
at any time after the initial term. Section 9.01
says that the agreement will remain in effect until
January 1, 2017 ("initial term").
BOARD MEMBER OBERMAN: I see that
language, and I also heard Mr. Greenberg and Mr.
Michelson say that if you had come to this Board in
'07 and said on 2017 BN service will terminate, they
would have bitterly fought your exemption. And
there's no reason to know that the Board, which
emphasized competition, said we only care about
competition for 10 years, after that we don't want to
competition there.

So clarity in this context seems to me
lacking. I see the language in the agreement, and
there's a superficial appeal to what you say. But
we're here not just to decide contract disputes.
We're here to ensure, under the RTP, competition and
competitive rates for the industry, which includes
both sides.

So I'm having trouble seeing that somehow
this Board got boxed in about not being able to
ensure competition in an industry which everybody
agrees has a long-term existence, that was only for
10 years.

So that's why I think there's a lack of
clarity.

MR. RIFKIND: The Board understood at the
time, I think, that doing this transaction had
benefits. And, that the competition, if it was
preserved for 10 years, that was 10 years of
additional benefits.

Now when we did the transaction, we didn't
know whether on January 1st, 2017, we would move to terminate, or BN might move to terminate. Either one of us could have. But--so that decision is not because of the transaction. It is because--that decision gets taken in the context of the 2017 or 2019, or what have you. But when it subsequently comes up for renewal. Right now we have no reason to think we won't renew in three years when it's up for renewal again. But that decision will be made in the appropriate context, but that has to do with the circumstances of today and not the transaction of yesterday.

BOARD MEMBER OBERMAN: I have one other area I wanted to address just briefly. You assert Laches against NCA?

MR. RIFKIND: Absolutely.

BOARD MEMBER OBERMAN: When is it, if you can tell us, that by which time if NCA was going to seek the relief it's seeking here today--and I don't mean to unwind the transaction. I'm focusing on the relief that Mr. Greenberg focused on anyway of saying we think the original Agreement required you to give
us this option and you're not giving it to us.

That's really what they're asking us for.

At what point in time did they have to act before being barred by Laches?

MR. RIFKIND: I don't think there's a bright-line rule. There's certainly case law, you know, where the Board has found, you know, sitting on a claim for a couple of years to--

BOARD MEMBER OBERMAN: Well it's not just the passage of time, is it? There has to be more--Laches involves more than simply the passage of time. There's an equitable consideration.

MR. RIFKIND: Oh, absolutely, because we rely on the administrative finality of the Board's rules to make our investment decisions.

BOARD MEMBER OBERMAN: So when did you make those investment decisions?

MR. RIFKIND: We make investment decisions throughout this period of time. We have--initially, our initial investment was in buying the line itself. And then funding the upgrades to address the flooding issues.
BOARD MEMBER OBERMAN: When did you start funding those?

MR. RIFKIND: Those would have happened, you know, immediately. I mean, we addressed those--

BOARD MEMBER OBERMAN: Did you--

MR. RIFKIND: -- as soon as the transaction was closed.

BOARD MEMBER OBERMAN: And when was it that NCA was supposed to come to the conclusion that all this paperwork meant: by the way, no unit trains from BN? Was there some time prior to 2013 when Mr. Wood says it's disputed that he told them that? He should have figured this out?

MR. RIFKIND: The time for that was when we put into the public record, and when we were discussing this transaction. The time for those questions and those issues to be resolved was during the proceeding, or before the proceeding. They had ample time. If they knew they wanted unit train service possibly in the future and had discussed it before, the time to discuss the unit train service was then, not 10--14--well, 12 years after. Or even
in 2014.

And let me point to Laches again. Because let's say that you gave them a pass. You said, okay, 2014 is when you first learned you wanted to get unit train service. I don't believe that's true, but let's say that--

CHAIRMAN BEGEMAN: Did you say earlier that the 2007 Haulage Agreement did not use the word "unit train"?

MR. RIFKIND: It doesn't, but it--

CHAIRMAN BEGEMAN: Okay. Thank you.

MR. RIFKIND: --clearly, as--

CHAIRMAN BEGEMAN: It didn't.

MR. RIFKIND: It doesn't use the word "unit train," but let's say--

BOARD MEMBER OBERMAN: Okay--

MR. RIFKIND: --but let's say that all of this is true. So in 2014 they came to the Board and they asked for informal assistance, and then they dropped the issue altogether. So now we are five years beyond when they first--

BOARD MEMBER OBERMAN: Well today we are,
but they filed the Petition last year. So it's '14 to '18.

MR. RIFKIND: Okay, so three years. Three years they sat on it while we make investments in our line.

BOARD MEMBER OBERMAN: Were you still making new investments in the line between '14 and '18? What were you doing?

MR. RIFKIND: We're making new investments in--

BOARD MEMBER OBERMAN: What was new?

MR. RIFKIND: So on our Portal Subdivision, which is our mainline, which is used to serve NCA, we've upgraded to CTC signaling, for instance.

BOARD MEMBER OBERMAN: So in 2014, if they had filed this Petition with the Board and the Board acted with lightning speed and said allow BN unit trains on there, you would have stopped installing CTC and other things on that line?

MR. RIFKIND: I'm not sure what we would have done, but we would have had the information to
make the decision at that point.

BOARD MEMBER OBERMAN: Well, you're suggesting that you would have let the line deteriorate, or not done what you were required to do, just because unit train service—I'm trying to figure out what you would have done differently because there's no unit trains.

MR. RIFKIND: What we do every year is we have a pot of money for investing in capital improvements. And we have to see where are we going to have the most impact on adding capacity? Where will we get the most bang for our buck?

So if that bang for the buck doesn't exist because in Minot we're going to be socked in with interchange anyway, then we're not going to make the capacity investments in that area; we're going to make them somewhere else.

BOARD MEMBER OBERMAN: Well--

MR. RIFKIND: And so it's hard for me to sit here today and say, no, we wouldn't have made that investment, but I can't say we would have, either.
BOARD MEMBER OBERMAN: Well, Mr. Rifkind, two things. To me, detrimental reliance had to be a decision by CP to say: Because we are confident there will be no unit trains from BN in 2014 and thereafter, we're going to take certain actions. I don't hear that. All I hear is, possibly.

And I also, as I understand NCA's position, they sought the rail, RCPA's assistance. They didn't stop. They say they were hoping they would work something out with you short of litigation, which this Board repeatedly urges the industry to work things out amongst yourselves, and NCA says they tried repeatedly to do it and only brought this Petition as a last resort.

So I don't hear them sitting on their hands-- Maybe Mr. Greenberg can address this in rebuttal--after 2014. I haven't heard that.

MR. RIFKIND: Well I think what they wrote in their Petition was that they indeed did sit on their hands, because they no longer had a need for additional unit train service in 2015 and 2016 and 2017 because their crop years were not that good. So
they just dropped it.

BOARD MEMBER OBERMAN: You think that they just assumed that, I don't know, global warming was going to decrease the crops for the rest of their lifetime? I didn't hear that.

MR. RIFKIND: Well, exactly. So if in 2014 they have a need and they feel that it needs to be addressed, just because they have a bad crop year in the next year doesn't relieve them of the obligation at that point to act on their future need.

BOARD MEMBER OBERMAN: That's all I have for the moment.

VICE CHAIRMAN FUCHS: If I can just kind of circle back to a point that we were discussing with New Century Ag about the standard for reopening. And as I understand it, what's being asked here is for us to reopen in order to enforce.

And I just, you know, CP—you know, David, you cited Montezuma, which has mandated different results, then you cited our EJ&E, which I think has "materially affect."

MR. RIFKIND: Right.
VICE CHAIRMAN FUCHS: And I just think it's worth noting that this Board has voted three times on this type of issue. There was the Carver issue with NARPO where we said the alleged grounds must be sufficient to convince the Board that its prior decision in the case would be materially affected in order for a reopening to be granted.

We did the same in OGRE on that reconsideration, and we did the same for East Side Community Rail. And, you know, so I think the precedent is replete with a standard that something has to be--the decision has to be materially affected to reopen. You can have new evidence, changed circumstances, material error, and then you go to whether or not it's materially affected. And if there's no material effect, you don't reopen, I think.

And I think what New Century Ag is putting forward is not that something was materially affected, it's that they need to enforce something that already existed. There is no material effect. And so I think what I heard you say, David, is that
you think that this is a more appropriate case
(microphone goes out).

And so then the question becomes what
standard under competitive access and public
interest. And I just want to get your view. Do you
think, similar to how the Board viewed the Lake
Charles situation with UPSP, that the Board can
determine public interest in terms of enforcement of
a previous Petition?

MR. RIFKIND: I think that in a merger
context the Board can do that. Well, the Board
certainly can enforce the conditions that were
imposed. But in an exemption proceeding such as this
where there are no conditions imposed, the Board has
not, and I don't think can, reopen to enforce
something that was not a condition of the original
transaction.

VICE CHAIRMAN FUCHS: What if it was a
foundation to the transaction? In other words, the
Board had a clear demonstrated understanding and
would not have allowed the transaction or the
exemption to--or would not have granted the exemption
if this condition did not—if this fact pattern did not hold. In other words, would that be sufficient grounds for enforcement?

MR. RIFKIND: I don't believe so. First of all, you're talking about enforcement. And there's nothing to enforce. The representations that were made, but not conditions that were imposed, so the Board would be changing the transaction entirely 12 years, in this case, 12 years after the transaction was consummated.

BOARD MEMBER OBERMAN: Let me ask this question, Mr. Rifkind. By the way, what the April 22nd Decision of the Board said was that the allegations may be more appropriately addressed, or are more appropriately addressed. It was a suggestion. We never made a finding of that.

But I want to understand your position on the pleading that's in front of us and the request for relief, and the exemption decision. I want to pose this hypothetical:

If your Petition in '07 said we're going to preserve competition. We understand NCA's
negotiating with BN for unit train service, and this
will preserve their right to get unit train service
on that line if it ever comes to pass. And you made
that representation. And then the Board said, you
know, we're going to exempt this transaction because
CP tells us it will preserve competition, including
the option for unit train service.

And then a few years later, CP says, you
know what? No unit train service.

Under that hypothetical, under the kind of
Petition that Mr. Greenberg has filed here, could the
Board say, hey, listen, you told us you were going to
have unit train service. Do it. Could we have that
power under that hypothetical?

MR. RIFKIND: First of all, it's a
hypothetical, so--

BOARD MEMBER OBERMAN: That's why I asked
it.

MR. RIFKIND: --it makes it very difficult
to answer.

BOARD MEMBER OBERMAN: Can you answer the
question? If you can't answer it, just tell us.
MR. RIFKIND: Well, you know, I think it depends on a variety of factors, but I would say probably not.

BOARD MEMBER OBERMAN: Even--in other words, you don't think there's any circumstance under which this Board can require applicants here, for whatever relief they seek, to live--we've had this before in other cases where people come in and say, hey, they made representations and they're not living up to them. This isn't the only case.

So you're saying that's just out of the question? If it's just a representation, you're free to ignore it?

MR. RIFKIND: Look, I think that if it is fraudulent at the time it is made--

BOARD MEMBER OBERMAN: Alright, let's leave that out. Let's leave fraud out. You just change your mind.

MR. RIFKIND: But that's one of your standards, is you can--you can reopen if something is--

BOARD MEMBER OBERMAN: You think fraud is
the only standard?

MR. RIFKIND: I do, because I think that there has to be administrative finality and certainty for the exemption process to function appropriately and to be used. And the exemption process is critical to the health of the rail industry--

BOARD MEMBER OBERMAN: So in other words, that--

MR. RIFKIND: It's how we get lines like NCA's line to be transferred from a carrier that was not maintaining it to a carrier that is maintaining it.

CHAIRMAN BEGEMAN: The exemption process is really very important to the Board, as well. There's only so many hours in the day for the Board members and staff to try to do what they're trying to do.

But if what we're experiencing with this particular proceeding is--you know, I don't want future exemption proceedings to become overly complex, and for every exemption to have to have language similar to merger proceedings saying we hold
you to your representations. And so I'm just worried that this is a slippery slope that the industry is not going to appreciate at all as far as what the Board may have to do in future cases.

MR. RIFKIND: Well I think the industry takes their representations very seriously, and they understand that if we are making representations to you and we expect you to accept our representations, that we need to live up to them. So we don't--

CHAIRMAN BEGEMAN: I appreciate you saying that, and the Board's 2007 Decision on page 3--and it's talking about what the Petitioners say--it says: "Petitioners indicate that the purpose of the proposed transaction is to foster more efficient and economical operations on the conveyed lines and in the region, while at the same time preserving competitive options for the active customers located on the joint line, and enhancing competition for two active customers located on the BNSF line."

That was your representation. And you come back to "preserving competitive options" is not just happy talk.
MR. RIFKIND: It's not, and--

BOARD MEMBER OBERMAN: In order to make a railroad live up to its representations, they'd have to go take a deposition of somebody in Montreal, or wherever the office is, and find a secret memo saying, ha, ha, we told the Board we were going to provide unit trains and we have no intention of doing it.

And unless they can show that, the representations can't be required to be adhered to at some future date.

Is that really the standard you're setting--

MR. RIFKIND: I don't think I'm saying that at all, but what--

BOARD MEMBER OBERMAN: Well you said "fraud."

MR. RIFKIND: --what I am--yes, but I didn't spin out the scenario of secret memos in Montreal. We're in Calgary. Those are the other guys.

BOARD MEMBER OBERMAN: How else would you
prove the fraud? Really, I mean aren't you imposing an almost impossible standard on this Board trying to preserve competition?

Part of our job is to interpret what preserves competition, not to litigate civil fraud cases.

MR. RIFKIND: And as you correctly pointed out, there is a public record that includes the Haulage Agreement. At this point in time, the Board should have no expectation that CP is continuing to allow BNSF haulage traffic. And yet BNSF is—I mean CP is allowing that traffic.

So competition continues today. BNSF continues to move traffic in interchange with CP as a result of the transaction. Service was improved. Competition was enhanced. Other shippers got additional access, dual access. They went from sole-serve to BNSF, to dual-serve CP/BNSF. So it wasn't just New Century Ag.

New Century Ag has moved more grain today than it did back then. And for most of that time BNSF was a dominant competitor on the line.
BOARD MEMBER OBERMAN: So your contention is that the representations about preserving competition are met if some people get competition but others get less?

MR. RIFKIND: My representation--

BOARD MEMBER OBERMAN: Because that's not what the representation said. It actually spelled out how each shipper was going to have competitive options, and explicitly that New Century Ag was going to have its competitive options preserved. It didn't say in comparison to others.

MR. RIFKIND: Actually, what it said is New Century Ag would continue to have its present access to BNSF. Not new access. Present access.

BOARD MEMBER OBERMAN: What it says is: The rail options of New Century and Superior Grains will be unaffected by the proposed transaction.

That's what it says. Options.

MR. RIFKIND: It also says "present access."

BOARD MEMBER OBERMAN: It says both. One doesn't exclude the other. It says that present
access will be preserved, and its options will be
preserved.

MR. RIFKIND: And our understanding of
those options at that time were based on the existing
traffic that moved. And that is what is in NCA's
letter to the Board supporting this transaction. It
says we understand our existing traffic will be
handled in haulage. And I quote "existing".

(Pause.)

If I might read it into the record, it's--

BOARD MEMBER OBERMAN: Well, I'd just like
to find it--

MR. RIFKIND: I can provide you with a
copy.

BOARD MEMBER OBERMAN: No, I have it.

(Speaking off-microphone.)

MR. RIFKIND: It was Exhibit 5 to
something. I believe that's right.

(Pause.)

BOARD MEMBER OBERMAN: (Off-microphone).

MR. RIFKIND: Actually, if I could read
it, because I think you--
BOARD MEMBER OBERMAN: I--

MR. RIFKIND: So it is my understanding that following the sale, DMVW will maintain and operate the entire line pursuant to its lease and operating agreement with Soo Line and will handle existing BNSF traffic through a haulage agreement. Alright? So existing BNSF traffic.

BOARD MEMBER OBERMAN: It doesn't say, however, that they're excluding their options. And it doesn't say that they understand they'll be done in 10 years.

MR. RIFKIND: There's a lot that these letters and agreements don't say, and perhaps in hindsight we wished they did. But I think from the context, it's clear that what we were talking about was existing traffic. That's what it says in the letter. That's what it says in our Joint Petition. And that's what it says in the Board's Order.

BOARD MEMBER OBERMAN: Your Joint Petition goes beyond that. But as the Chairman pointed out, we relied on your representations and only NCA's lack of opposition, which they say they would have
vigorously asserted had they known what your plans were in the future.

MR. RIFKIND: They had an opportunity. That is why the Board has a public proceeding, so that there is an opportunity for the other stakeholders to participate in that proceeding at that time, so the railroads can proceed with transactions with certainty.

BOARD MEMBER OBERMAN: If you're really going to give NCA the ability to find out what their rights were, you would have had to not have an exemption, had a full proceeding, and let them take discovery and find out what really was going on here. None of which you wanted. You wanted it to be exempt. So we had a much more reduced kind of record, which this Board had to rely on. And as the applicant, your language was, in my view, fairly open-ended. That's why we've been asking these questions.

CHAIRMAN BEGEMAN: It also says that Petitioners have requested expedited action on the Petition for Exemption, which the Board of course
found reasonable for a number of reasons. So there
was a reason that the Board went lickety split.

MR. RIFKIND: Yes, there was. And that was
because the line was in terrible condition, and NCA
and other shippers on the line needed better service
and needed it quickly. All shippers on the line.
All shippers, period. We are always trying to get
better service.

CHAIRMAN BEGEMAN: That will conclude your
20 minutes, and we will now ask BNSF. Thank you.

MR. RIFKIND: Thank you.

CHAIRMAN BEGEMAN: Okay, we will resume.

Thank you.

MR. DENTON: Thank you. My notes say
"good morning," but I think I'll say good afternoon.

Thank you, Chairman Begeman, Vice Chairman
Fuchs, Commissioner Oberman. My name is Peter
Denton. I'm representing BNSF Railway Company in
this proceeding.

I am joined here today by Courtney Estes,
Associate General Counsel for BNSF, and we appreciate
the opportunity to appear here.
Given that our substantive filings in this proceeding have been minimal, my opening remarks will be brief. But Ms. Estes and I are happy to take questions from the Board.

We are proud of our commitment to our customers and to the competitive service and rates that we strive to provide them. We acknowledge that the issues before the Board in this proceeding are complex, and we understand the frustrations of New Century regarding limitations on BNSF's ability to serve New Century in the manner they would like.

If at some point BNSF has the ability to offer unit train or other additional services to New Century, we expect that we will continue to vigorously compete to win the customers' business. At the same time, we believe the Board's exemption of the 2007 transaction was, and remains lawful and appropriate.

As we've expressed in our filings in this proceeding, it's been our sincere desire to reach a commercial deal that meets the needs and expectations of all the stakeholders here. And we believe
Board-sponsored mediation would be helpful in resolving this matter.

With that, I would like to rejoin Ms. Estes at the counsel's table so that we can jointly take any questions that you may have. Thank you.

BOARD MEMBER OBERMAN: Thank you, Mr. Denton. Could you address the operational and logistic issues that were raised and discussed here about whether you're providing unit trains, what it would do to the Minot Yard interchange facility?
Can you explain, from BN's point of view, how you would--if you agree that there are limitations? And whether you agree or not how you would provide unit service to the NCA loop?

MS. ESTES: Sure. So today CP is not hauling unit trains for BNSF. And just to be clear, we're talking about a unit train for BNSF, we're talking about something--let's just for today say 100 cars or more. There have been limitations for less than unit trains that CP has placed on BNSF.

And from the record, and CP's counsel's comments, we understand that that's because of
congestion on their--in Minot, and on their on-Portal Sub.

BOARD MEMBER OBERMAN: And do you agree that there is? What's your understanding of the physical--we don't have anything in the record. There's no diagram of the yard. I'm not good at abstracts. I can't follow why there's congestion.

MS. ESTES: So our operating team would say that it's their position that the Minot Yard, which is owned by CP and Minot, can accommodate a BNSF unit train. There are two tracks there, as well as a siding which could accommodate a unit train.

In addition, BNSF has something known as the Old Yard, as well as the Gavin Yard, where we could also stage a unit train for CP to come on and take that train up to Flaxton.

BOARD MEMBER OBERMAN: So if you used the Gavin Yard to provide a unit train, are you saying you could take that unit train to Flaxton and give it to the DMVW to take to Noonan?

MS. ESTES: Yes.

BOARD MEMBER OBERMAN: And you wouldn't
have to stop and block the crossings in Minot?

MS. ESTES: So the blocking of the crossing in Minot relates specifically to issues that CP has in their Minot Yard. That's what Mr. Rifkind described as what would be a shove move past Soo Tower, waiting on the Main, et cetera.

To avoid that, if you staged the train in one of the BNSF yards, including in the Gavin Yard or the Old Yard, you could avoid that. The train would be waiting. CP crew could get onboard and pull it out onto the Portal Sub.

BOARD MEMBER OBERMAN: So you're saying that without any additional capital investment in Minot, you can perform the unit train movement blocking no crossings other than the time it takes the train to cross the crossing?

MS. ESTES: We haven't studied it in detail. We haven't done an engineering study to see what exactly would be needed. But just looking at what's on the ground, I do understand the issue with the--with the CP Minot Yard where it does block the Main. And you've got some bridges there, and so you
have to pull completely past the Soo Tower to clear the Diamond.

BOARD MEMBER OBERMAN: All of which would be avoided, though, if you leave at Gavin Yard with the unit train? Is that what you're saying?

MS. ESTES: It's my understanding—again, you know, we haven't looked at it in detail, but it's my understanding that would be an easier—an easier move, yes.

BOARD MEMBER OBERMAN: And you're willing to do that if CP would allow you to make that move with a unit train?

MS. ESTES: BNSF, if CP were willing to take unit trains, BNSF has offered to use BNSF's yards in Minot to stage that train.

BOARD MEMBER OBERMAN: And what has CP said? CP says what?

MS. ESTES: CP has declined that use.

BOARD MEMBER OBERMAN: Did they give you a reason?

MS. ESTES: Not to my knowledge.

BOARD MEMBER OBERMAN: NCA says that you
can provide them with unit trains I think for Beans,
to the--is it Beans that you need to take to the PNW?

MR. MICHELSON: Beans, Canola, and Spring Leak.

BOARD MEMBER OBERMAN: CP is not providing
them with competitive prices to take unit trains to
the PNW, and you can?

MS. ESTES: We do--those are destinations
that we serve.

BOARD MEMBER OBERMAN: And are your rates
lower than the combined CP/UP rate that Mr. Rifkind
referred to?

MS. ESTES: We've reviewed the rates that
were in the filings. We haven't done our own
independent analysis of whether our rates would be
less or not.

BOARD MEMBER OBERMAN: NCA thinks they
are. You're not rejecting that, are you?

MS. ESTES: No, I'm not rejecting it. We
just have not undertaken our own independent
analysis.

BOARD MEMBER OBERMAN: And do I understand
you don't add--if you had that unit train, you don't add a fuel surcharge to the PNW?

MS. ESTES: That's--you know, honestly, Commissioner, is outside the scope of what my understanding of that rate would be. Again, we haven't looked into that.

BOARD MEMBER OBERMAN: Alright, thank you.

CHAIRMAN BEGEMAN: I just have a couple of questions. The first one, the 2007 Decision which we've been quoting repeatedly, one of the items is that BNSF retains the right to service all customers on the conveyed lines. Actually, I was thinking of the part where you have the right to solicit additional customers and provide service.

Could you comment, to the extent that you have successfully found new customers? Have you been able to provide them service? Or, I mean, is this just one in a hundred examples where you're not actually able to provide the service you thought you were going to be able to when you were soliciting the customer? Or is this just a one-off?

MR. DENTON: Are you referring to Section
2.3 of the Sale Agreement?

CHAIRMAN BEGEMAN: I don't know.

MR. DENTON: You mentioned earlier that you would ask us about Section 2.3 of the Sale Agreement which contains the ability to--

CHAIRMAN BEGEMAN: To solicit additional--

MR. DENTON: Exactly. Exactly. And Section 2.3 is very explicitly bound by the terms of the Haulage Agreement. It says "pursuant to the Haulage Agreement, we will be able to solicit" you know, continue to solicit business.

And I think all of this needs to be kind of read in whole. We presented the transaction to you in 2007. We described the transaction to you. We have all the documents that we presented. And the Board made a decision in 2007.

The Section 2.3, we've lived up to. We've lived up to the representations we made regarding continued service.

CHAIRMAN BEGEMAN: Have you successfully solicited additional rail transportation?
MR. DENTON: I think we could probably supplement the record, but I'm not sure if we have the answer to that.

MS. ESTES: With respect to, I believe with respect to the Crosby to Lignite Section, the four customers, I believe New Century Ag may be the only customer that's remaining on that line.

BOARD MEMBER OBERMAN: You don't understand anybody to suggest that BN is not living up to its representations, do you? Because if you do, I want to make sure--

MR. DENTON: No.

BOARD MEMBER OBERMAN: No?

MR. DENTON: No.

VICE CHAIRMAN FUCHS: Did you understand the Haulage Agreement to allow for a limit on the number of cars?

MR. DENTON: Say that one more time?

VICE CHAIRMAN FUCHS: Did you understand the Haulage Agreement to allow for a limit on the number of cars that CP could accept?

MS. ESTES: No, we did not. The parties
have disputed that. We haven't arbitrated it. There is an arbitration provision. But we have had disputes over the years with CP as to whether they could limit us. And I'm not talking about unit trains right now, I'm just talking about a limit of 50 a week--

VICE CHAIRMAN FUCHS: Of--

MS. ESTES: --correct.

VICE CHAIRMAN FUCHS: Right.

MS. ESTES: Again, we have not arbitrated the issue. In reality, on the ground the railroads have tended to work these things out.

VICE CHAIRMAN FUCHS: Right.

MS. ESTES: So we haven't taken that to arbitration.

VICE CHAIRMAN FUCHS: And can you summarize your argument as to why you think the Haulage Agreement doesn't allow for the limit on cars?

MS. ESTES: Sure. So under Section 2.02, CP shall afford BNSF haulage cars the same type and levels of service--
VICE CHAIRMAN FUCHS: Yeah.

MS. ESTES: --as it does for its own traffic. And then if you continue on, in Section 2.04, and I believe also in Section 4.01 where CP will provide us haulage cars in their existing available train capacity.

VICE CHAIRMAN FUCHS: Right.

MS. ESTES: So we don't see any limitation on a 50-car per week, or per-day. If an existing CP train has say 40 spots available on it, then it would be our position that CP should take 40 BNSF haulage cars.

VICE CHAIRMAN FUCHS: So it's your position that existing available train capacity pertains to the locomotive, as opposed to if there is a locomotive you can have as many cars as that train can handle?

MS. ESTES: Right. We would say that it has to do with the train that day. We wouldn't require an additional train start.

VICE CHAIRMAN FUCHS: Right.

MS. ESTES: But if a CP train has room,
then you'd take our cars.

VICE CHAIRMAN FUCHS: If it is a CP train, and if it is taking cars, and if it can take more than 50 cars, it should take more than 50 cars?

MS. ESTES: Yes.

BOARD MEMBER OBERMAN: Has it happened, in your experience, that they've had the capacity and have still declined to take more, as many cars as they had room for?

MS. ESTES: We have. In 2008 and in 2014, our specific examples that are in the record where CP was upset with what they perceived to be too many cars and didn't take those cars. Then, as the week wore on, the backlog of cars, you know, was cleared out by CP in their capacity in the following days.

VICE CHAIRMAN FUCHS: You would think with a limitation on capacity and an agreement that addresses Minot Exchange Tracks, you would think that it would clearly spell out that if the Minot Exchange Tracks by definition could have a certain capacity of 50 or 60 cars, you would think that the agreement would spell that out?
MS. ESTES: It would probably have made this easier if it did. I would agree with you.

VICE CHAIRMAN FUCHS: Okay, so the other—the alternative interchange in Minot, your yard, the Gavin Yard, is about five miles away from where the CP-Minot Exchange Track is? Is that right?

MS. ESTES: Yes.

VICE CHAIRMAN FUCHS: Okay, and so what we're talking about here is CP coming down from Bowbells to Minot, and then right where it gets to Minot is there any operational issue that you're aware of for CP to just hop on—it can hop on your tracks for a little bit to get to Gavin, right?

MS. ESTES: Yes.

VICE CHAIRMAN FUCHS: So that's no problem?

MS. ESTES: Yes, it would, um-hmm. I mean there is a crossing there, you know. Again CP could probably speak better to that as to what the operational issues would be with getting off of their Portal Sub and onto the BNSF Main.

VICE CHAIRMAN FUCHS: Yeah, okay. And--
and--okay, kind of switching gears just a little bit, the whole concept of a reopening, you know, I think, Peter, you're on the Lake Charles case, I'm not going to get into any of the facts of that particular case other than previous decisions that are public and out there. Am I correct that it's your understanding that in that particular instance we are talking about a trackage rights application that did not involve the reopening in the merger?

MR. DENTON: That's exactly right. It's an enforcement of existing merger conditions. And the Board specifically stated in Decision 44 in '63 in that proceeding that the BNSF would be able to file an application for terminal trackage rights. They laid out the--

VICE CHAIRMAN FUCHS: And in that instance, you know, we--or it has been said that our competitive access regulations in precedent with Midtec, a certain volume of people think it's too high. Is it a fair summary to say that in that case what the Board said is for the public interest standard in terminal trackage rights we're not going
to do what's traditional because we have this previous case that we don't want to reopen, but instead we're going to use the enforcement of the general essence of the merger conditions as the public interest standard?

Is that a fair summary?

MR. DENTON: I think that's close to--yes. So without, you know, going back and relitigating all of this, the Board determined that Midtec would not apply, and that the public interest standard that the Board used under Decision Number 44 that approved the UPSP merger would in fact apply.

VICE CHAIRMAN FUCHS: So let me then think about this scenario as it pertains to the current matter. You know, if the--you know, what is your view on that type of mechanism working in this case in that the Board basically says, hey, listen, we don't want to reopen because it's not really materially affecting the result, or if you use Montezuma's language, mandating a different result. And instead what we're going to say is we're going to do something on competitive access, and the public
interest standard here is, you know, enforcing, you
know, kind of the general essence of the
representation.

MR. DENTON: Yeah, I think these are
really complicated kind of first-impression issues.
I don't think BNSF has a position on that.

CHAIRMAN BEGEMAN: I'm wondering if CP has
any comments with respect to some of the Minot—I
won't call it proposal, but the Yard using BNSF's--

MR. RIFKIND: Yeah, the Yard is an issue,
but it's not the issue. The issue for--

CHAIRMAN BEGEMAN: Do you mean your Yard?

MR. RIFKIND: Well, right. I mean if we--

CHAIRMAN BEGEMAN: --believe it really was
the issue.

MR. RIFKIND: It is an issue. The issue,
though, is when we come down off the Flaxton—off
Flaxton to Minot, we have to cross, first of all, the
BN Mainline completely. So we have to pull all the
way past the BN Mainline.

Then we have to put somebody, a conductor
on the end of the train, hanging on to the car, and
we have to shove that train back onto BN's Mainline.
And then we have to get the conductor off, get him to
the front--

CHAIRMAN BEGEMAN: And you would have to do
that even if you went to Gavin?

MR. RIFKIND: To get to Gavin, that's what
we're doing, yes. And the reverse is true. So when
that happens, there will be a period of time where
we--probably half an hour or so--where we're parked
without moving because of--just to get the conductor
to the front of the train, blocking about six
crossings in Minot and blocking our Mainline.

CHAIRMAN BEGEMAN: So if you actually
wanted to do it, you know, and work out some type of
agreement, it's not undoable?

MR. RIFKIND: Nothing is undoable. It
would undo our investments in our Mainline and our
ability to serve customers. Because during that
time, and it could take anywhere from an hour to five
hours, we're sitting on our Mainline. Our Mainline
is unusable at that point.

BOARD MEMBER OBERMAN: You're--let me see
if I understand this, though. If you were taking--if you were sending a locomotive to the Gavin Yard to pick up a unit train that BN assembled there--

MR. RIFKIND: Right. It still has to come back--

BOARD MEMBER OBERMAN: It doesn't have to do that back-and-forth motion to go northwest on your line to Flaxton, and then over to Noonan, right?

MR. RIFKIND: It does.

BOARD MEMBER OBERMAN: Pardon?

MR. RIFKIND: It does have to do that motion. It has to pull down past the CP Interchange, pull back to the east, blocking all the crossings--

BOARD MEMBER OBERMAN: As it's going westbound?

MR. RIFKIND: --and then pull west.

BOARD MEMBER OBERMAN: Wait a minute. I'm looking at the map here. The train that's coming out of the Gavin Yard east of Minot is going westbound, west of Minot. It can't just turn north on your Mainline and go up to Flaxton?

MR. RIFKIND: That's correct
BOARD MEMBER OBERMAN: Without back--where does it back? Thee's no--

MR. RIFKIND: There isn't a wye on that side to allow it to do so, and there's not the room in the vicinity to install one, either.

BOARD MEMBER OBERMAN: You couldn't--the kind of wye you told us you could put in at Spaulding, you can't put in there?

MR. RIFKIND: Not there. We're in downtown Minot there.

BOARD MEMBER OBERMAN: So you're saying that this train that comes from east of Minot has to stay on the BN Mainline towards Berthold and go past Minot, and then back up and go south on your Mainline before it can line up to then go north to Flaxton? Is that what you're saying?

MR. RIFKIND: I would call it east on our Mainline, but, yes, that's right.

BOARD MEMBER OBERMAN: East, yes. Is that what you're saying? That's the only way to go from the BN line north to Flaxton?

MR. RIFKIND: That's correct. And BN
BOARD MEMBER OBERMAN: Is that what happens now with all of the 15 cars a day, or whatever?

MR. RIFKIND: I believe that's exactly what happens now.

BOARD MEMBER OBERMAN: So that move is being made now. It's just not being made with 100 cars. Is that--

MR. RIFKIND: Right, which means it can be made much more quickly and without blocking our Mainline or intersections for a long period of time.

BOARD MEMBER OBERMAN: So over the last 12 years, right, is that always the way—however many cars, even when you weren't limiting them to 15 cars, you were making that move?

MR. RIFKIND: The only exception was the 92 cars that we have to take to a customer facility in order to interchange.

BOARD MEMBER OBERMAN: So let me just ask this question, though. Even after you make that move, when you get to Noonan and the train is loaded,
if it's going to the PNW it's just going to keep
going west, right? It's not coming back to Minot?
Or is it?

MR. RIFKIND: I'm--

BOARD MEMBER OBERMAN: If BN was taking a
shuttle train to the PNW from Noonan, after you
deliver it there, does it have to go back to Minot to
get to the PNW? Or can it just keep going on BN's
line?

MR. RIFKIND: No. We take it up to Noonan
where it loads, and then it has to come back down to
Minot to be interchanged with the BNSF. So we have
to go through the whole--

BOARD MEMBER OBERMAN: I see. It has to
come back. It can't meet up with the BN's line going
westbound.

MR. RIFKIND: Yes. And if we're handling
the unit train, if it's our train we take it north
and across.

BOARD MEMBER OBERMAN: So why can't you
take it on the DMVW--

MR. RIFKIND: Well DMVW takes it to
Flaxton. At Flaxton we pick it up and we take it to-
-north--

BOARD MEMBER OBERMAN: So there's no way
to connect with either your or BN's line going west
from Noonan? It's still got to come back east? Is
that what you're saying?

MR. RIFKIND: Yes.

VICE CHAIRMAN FUCHS: In Minot, there's no
way--and this is a question for both--there's no way
to interchange in Minot to take it west on the BN
without kind of going down further past Minot on the
CP Mainline, and (off-microphone). There's no way of
getting to Gavin Yard? It doesn't have all that--

MR. RIFKIND: That's correct.

MS. ESTES: We would agree that's correct.

BOARD MEMBER OBERMAN: What happens at
Berthold? You consider going up your line with this
so-called unit train, why can't you just keep going
west and then at Berthold go northwest to Lignite?

MR. RIFKIND: Is this for--

BOARD MEMBER OBERMAN: Anybody.

MS. ESTES: It's BNSF's track. So we
could go west out of Minot to Berthold. We would
then go north up to Niobe. The track between Niobe
and Lignite is not in service. And then if we were
to continue up north to try and connect with CP,
there is not a connection at Bowbells.

BOARD MEMBER OBERMAN: But you could--but
there's not a connection there? But you're--okay.
Is there track there between Niobe and Lignite? It's
just not being used?

MS. ESTES: So BNSF owns between Niobe and
Mile Post 47. That track, the first couple of miles
are used for car storage. The right-of-way is there,
but the track is not in great shape. There's about
15 public crossings, public and private crossings
along there.

BOARD MEMBER OBERMAN: Is it practical to
fix that track up to provide the shuttle service?

MS. ESTES: We haven't done a strategic
study to understand just how much that would cost,
but we have--mainly because it's not what the
customer is asking here--asking for here. But we
have just preliminarily looked at it. And I mean
we're talking significant investment in the, you
know, ten million dollars or more just to get to
Milepost 47.

But again, you know, there are crossings.
There's third parties that would be affected. It's
not something we've been asked to do here.

BOARD MEMBER OBERMAN: And do you--just
one final thing--do you agree that you can't
physically build a, I think it's a wye Mr. Rifkind
described at Minot so you don't have to do this
backing and forth movement to get your unit train up
to Flaxton?

MS. ESTES: Again, we haven't, you know,
done more than just a preliminary look at it, and
haven't seen an easy way to make that--to get rid of
what I would call that seesaw move.

BOARD MEMBER OBERMAN: Okay, thank you.

VICE CHAIRMAN FUCHS: If, let's say you
have 49 cars of New Century Ag and you're coming down
to Minot to go west on the BN, what is the blockage
in Minot for that? You just get it on the other
track and there's no blockage?
MR. RIFKIND: No, there is blockage. But it depends on a variety of factors. For instance, we have to wait for BN to allow us access to, first, to cross their Mainline. They have a double main there. That can take a while. Then we have to wait for access. Assuming they’re ready for interchange and we don’t have to yard it, we need to wait for them to allow us to come onto their Main.

VICE CHAIRMAN FUCHS: If you look at an average month, how much time did that interchange take in terms of blockage of your Mainline?

MR. RIFKIND: We haven’t done a study of that, so I’m not sure we could give you an accurate number. And it would vary from month to month. For instance, if the weather is bad, as it frequently is in that part of the country, it could take much longer.

VICE CHAIRMAN FUCHS: Can you ballpark it?

MR. FARMER: No, I wouldn’t ballpark it. We’d have to do an operational study. We know, just intuitively based on what our operations are telling us, that it can take hours. But it also
depends on how much traffic the BN would have coming
over their Mainline. There's all kinds of factors I
don't know right now.

VICE CHAIRMAN FUCHS: And how about the
blockage that would ensue not from interchanging at
Minot but from just backing and going out to Gavin?
I mean, what I'm trying to get at is what is the
practical difference in terms of blockage to your
Mainline between taking 49 cars and interchanging at
Minot to go westbound, or taking 110 cars and
interchanging in Gavin Yard but having to get to
Gavin Yard? What is the difference?

MR. FARMER: Well I think the
difference there would be--and it would be dependent
on the traffic in the yard--but we do have, as I
think David referenced earlier, the 60-car tracks,
two of them, in Minot.

VICE CHAIRMAN FUCHS: Right.

MR. FARMER: So if you had 49 cars, you
have at least one track full, you can pull that down
into the yard so you can still move your Mainline and
wait for the BN to be ready for the interchange.
With a train, you can't do that. You have to have the yard completely empty.

VICE CHAIRMAN FUCHS: How often do you pull into the yard? Is that with a typical movement, or not?

MR. FARMER: Based on what I've learned from operations, every time we do that interchange we pull it down in--

VICE CHAIRMAN FUCHS: Every time you pull it down into the yard?

MR. FARMER: Yes.

VICE CHAIRMAN FUCHS: And in that case, when you pull it into the yard there is not a blockage of your Mainline at all? You go straight to the yard, a very small blockage?

MR. FARMER: Right. Whatever time it takes to push back through that interchange down the track into the yard.

VICE CHAIRMAN FUCHS: Okay. Let me push back. Can you describe that a bit more? How does it--yeah, just describe it for me.

MR. FARMER: Okay, yeah, just coming
back, as David had described earlier, we have to come straight down our Mainline. So we would be pulling, then. Coming down we would pull across the BN Main down into the yard, and yard the cars.

VICE CHAIRMAN FUCHS: I see.

MR. FARMER: And then when we would go interchange to the BN, we would go up onto their Mainline and then push back into their yard.


BOARD MEMBER OBERMAN: The--what is going on on CP's line between Milepost 47 and Lignite? It seems to connect--

MR. RIFKIND: In a word--

BOARD MEMBER OBERMAN: --BN track that they say is not being used--

MR. RIFKIND: In a word, trees.

BOARD MEMBER OBERMAN: So you're not using that line, either?

MR. RIFKIND: Yeah, that line has not been used since the transaction. It has not been maintained, so it's--I don't know. I haven't gone out to see--
CHAIRMAN BEGEMAN: But it's not abandoned, 
technically?

MR. RIFKIND: Technically it is not 
abandoned. There is some talk about using at least 
some portion of it I think for storing cars for a 
customer, but that would be, I think, right at the--

BOARD MEMBER OBERMAN: So there's no 
traffic basically between Berthold and Lignite on 
that?

MR. RIFKIND: No, the transaction in 2007 
I believe was premised in part on eliminating BNSF's 
need to run trains on that line. That is part of the 
efficiency gap transaction that has been delivered 
on.

CHAIRMAN BEGEMAN: Could you just help me 
understand the--you'd meant the 10-unit trains that 
you're providing to New Century Ag now, is that also 
creating--help me understand. Contrast that with 
what happened with BN.

MR. RIFKIND: So we--I'm not sure which 
direction we're bringing in the unit trains, but when 
we exit loaded. So DMVW will pull the train to
Flaxton, where we will take the train north into Canada and bring it over to King's Gate, if it's going to the PNW, and deliver it there.

MR. FARMER: Yeah, if it's going east we would just pull onto our Main and keep going east. We wouldn't have to yard it. We don't have the seesaw move. It just proceeds on it.

BOARD MEMBER OBERMAN: You mean you're just crossing the BN line and going past Minot?

MR. FARMER: Yes.

BOARD MEMBER OBERMAN: And if you're bringing it from the east, is that the same thing?

MR. FARMER: The same thing, in reverse.

VICE CHAIRMAN FUCHS: BN, can I get your view on the reopening? Is it your view that we actually--that the Board can reopen, without kind of mandating a different result? Or can you maybe just provide your general views on the grounds for reopening?

MR. DENTON: BNSF thinks that both parties did an effective job of setting out the various legal
standards, and we don't have anything further to add on that.

VICE CHAIRMAN FUCHS: Okay. And turning to the Joint Petition that you all also signed, there is a few lines in there, some of which involve, you know, there will be no loss of rail competition; that it's merely a change in ownership. And then of course, you know, retain BNSF service.

Is it your view that these representations still hold today?

MR. DENTON: It's our view that the Petition for Exemption was accompanied by the transaction documents that would uphold and visciate the representations that we made. And that all parties here, the Board, BNSF, CP, all shippers, have access to those documents.

VICE CHAIRMAN FUCHS: So do you think that BN still has the right to service all customers on a conveyed line? And that there hasn't been a loss of real competition?

MR. DENTON: Consistent with the terms of the supplemented Haulage Agreement, yes, we do.
VICE CHAIRMAN FUCHS: But it says that there will be no loss of rail competition. You think that's true?

MR. DENTON: Today, yes, that's true.

VICE CHAIRMAN FUCHS: Okay. And you also think that the transaction was merely a change in ownership?

MR. DENTON: I think the transaction was set out in the various terms of the purchase and sale agreement, and the accompanying Haulage Agreement, which everyone had access to.

BOARD MEMBER OBERMAN: I'm sort of curious. Did you say that you thought the documents of the transaction visciated the representations in the Petition?

MR. DENTON: Yeah, it's probably not the exact right word. What I was saying is that the transaction was brought before the Board. The parties, CP had the obligation to get Board approval for this. Both BNSF and CP came to the Board together, because BNSF also wanted the transaction very much so to go through. And we explained the
reasoning behind the transaction and what we saw as
the going forward operations.

The Board took all this into account and
decided that the otherwise applicable prior review
and approval requirements would not be necessary in
this case.

BOARD MEMBER OBERMAN: Are you saying that
in a transaction of this nature it's the Board's job
to read the Petition, then read the underlying
documents, and discern whether there's any
contradictions? And if there is, only rely on the
underlying documents and ignore what's in the
Petition? Is that what you're saying?

MR. DENTON: I don't--I don't--I'm not
saying that. And I also don't believe that there are
contradictions between what we said in the documents.

BOARD MEMBER OBERMAN: Well that may be.
We're trying to--obviously we're struggling with
that. But aren't we entitled to rely on the
representations in the Petition that the parties are
telling us, as well as the underlying documents?

MR. DENTON: Yes. And I think the Board
did rely on that in 2007 in granting the exemption.

BOARD MEMBER OBERMAN: Well maybe so, but there seem to be an awful lot of examples in the railroad industry that I've discovered where we see documents saying two things, but everybody works it out. And there's a sentiment here, as we said earlier, for people to work things out regardless of parsing, which is I think a lot of what's been doing on here, by all of us, all of the words to try to figure out what's going on. So I'm having a little trouble with saying that somehow we are supposed to discern whether there's a contradiction.

I think there's a huge debate in this room whether there is a contradiction between the terms. And it's ultimately, we're the ones who have to make a decision. That's why I asked earlier if it was reasonable for us to rely, for example, on a change in the language in the Haulage Agreement to mean that the first one didn't ban unit trains. I'm having trouble saying, no, we should have intuitive that they meant it all along, they just didn't say it clearly. That's quite a burden, if the parties
aren't educating us on it. So that's why I'm having
trouble with what you're saying.

VICE CHAIRMAN FUCHS: But just kind of
piggybacking on that a little bit, I think the way I
heard you--and correct me if I'm wrong--the way I
heard you is, you know, you retain the right to
serve all customers. Just look at the Haulage
Agreement, right?

MR. DENTON: Right.

VICE CHAIRMAN FUCHS: But you two disagree
on what the limitations are on the Haulage Agreement.
In other words, you think the Haulage Agreement
allows you to serve those customers without a
limitation on cars. They think the Haulage Agreement
allows you to serve those customers with a limitation
on cars.

So if you all don't have a common
understanding of what the Haulage Agreement is, then
you don't have a common understanding of what it
means to retain the right to serve all customers.

MR. DENTON: I think there are always
going to be disputes over the terms of various
agreements. I think the real issue here is that there's a transaction that was exempted in 2007. The parties are doing their best to live up to the terms of those--of the transaction from 2007. And going back and, you know, reopening the exemption and potentially revoking or unwinding, we think those are all very extraordinary remedies that would be--could have a potential chilling effect--

VICE CHAIRMAN FUCHS: And I agree with you there, but I guess my question is: Do you think that there is no loss in competition under the Haulage Agreement that has no limit on cars? Or do you think it is also true that there's no loss in competition for a Haulage Agreement that has a limit on cars?

In other words, is there no loss in competition even though CP has a limit on cars?

MS. ESTES: So, I think, as I said earlier, in practice the limitation on the less-than-unit trains we've worked out. So I mean on the ground, operating folks have worked it out. So from that perspective, I would say there's no loss of
rail competition even with--because that limitation has not been enforced. We've gotten letters over the years. It hasn't been enforced. But when we--

VICE CHAIRMAN FUCHS: But if it were--
sorry. Go on.

MS. ESTES: Well, and when the Agreement is renewed and supplemented to have an additional five years, BNSF tried very hard to get unit train service explicitly in that agreement. Because that was an open question.

VICE CHAIRMAN FUCHS: So you're saying there's no loss in competition because the limit has not been enforced?

MS. ESTES: Well I think that's--

VICE CHAIRMAN FUCHS: If the limit was enforced, would there be a loss of competition?

MS. ESTES: That may be something we would be arguing. That's not the facts today. I mean the facts today are that--

VICE CHAIRMAN FUCHS: But that's your interpretation of the Haulage Agreement, that it doesn't allow for a limitation of cars, right? And
that's when you said--but if you did not work out the
fact that you could--and let's say for example that
CP made a hard-and-fast 50 limit. Would you say
then, in that circumstance, there would be a loss of
competition?

MS. ESTES: I think in that circumstance
we would be looking at the Haulage Agreement to see
whether we would be arbitrating over what existing
train capacity and "same level of service" means.

BOARD MEMBER OBERMAN: Can we infer from
what you just said that BN tried hard to get in the
supplemental agreement permission to use unit trains?
Can we infer that BN believes that it's practical to
provide unit train service through one of these moves
that you've described, as contrasted to what Mr.
Rifkind is saying?

MS. ESTES: Well, yes, we believe that we
should--you know, would like to have unit train
service via CP haulage. But I do understand the
concerns that CP has raised about this move from
going from the Portal Sub to the BNSF Sub. And I
think I earlier probably muddled that a little bit,
but that seesawing happens regardless of which yard is used. If there's a capacity constraint in a yard, we are willing to offer our yard.

BOARD MEMBER OBERMAN: But you weren't asking for something in a contract which you thought was impractical to implement. That's all I'm trying to figure out. You could implement it in a pragmatic fashion?

MS. ESTES: That's right, it--

BOARD MEMBER OBERMAN: You still do.

MS. ESTES: Yes. That move is being done today with Manifest cars, and we would say that move could be done with unit trains if the Board finds that that's a result that's needed here.

BOARD MEMBER OBERMAN: And do you think that's the only way to get the unit trains up there? Or are there alternatives?

MS. ESTES: That is, from our preliminary review that is--that is--the Minot interchange appears to be the only--the only alternative.

CHAIRMAN BEGEMAN: I just have one last question. So one sentence of the Board's 2007
Decision said the rail options of New Century and Superior Grain will be unaffected by the proposed transaction.

So given sort of the back-and-forth that you've had with my colleagues, do you think that sentence has lived up to reality?

MR. DENTON: I think that's right. I think that currently, and under the Haulage Agreement, BNSF has the ability to serve them just as BNSF had the ability to serve them before the transaction. And--

CHAIRMAN BEGEMAN: But it says the "rail options will be unaffected."

MR. DENTON: I can't speak to what exactly the meaning of the "rail options" was. But the way I think it's reasonable to interpret that is the ability to serve--BNSF having the ability to serve, and CP having the ability to serve.

BOARD MEMBER OBERMAN: They don't have the same ability to serve because they're bringing in unit trains and you're not. That's the problem.

CHAIRMAN BEGEMAN: The options are
constrained.

MR. DENTON: Yeah, I think we were not bringing in unit trains prior to 2007, either. I think the options are the same. We provide similar service via CP haulage.

BOARD MEMBER OBERMAN: CP wasn't bringing in unit trains, either. So now they have an option, and you don't. You know, we're dancing on the head of a pin here.

MS. ESTES: I mean, I think that's right. I think that is why this is so complex. But again, I mean we have to take into account the condition of the line at the time we sold it. And, you know, BNSF was looking at all options to divest of the line. And in this business, you know, the rail service was in jeopardy of going away because the line was in need of maintenance that BNSF didn't find was necessary and commensurate with the type of volume of traffic on that line.

So as we looked at--you know, our projections were that the traffic was going to away. And we're looking at, you know, 200 cars a year. And
when we divest of the line there was no—you know, there was no projection that there would be unit train service at this customer location.

BOARD MEMBER OBERMAN: Well you couldn't have abandoned that line without our permission, however. And if you were not providing service because it wasn't maintained, we had the power to order it.

So what I'm looking at is really not so much dancing on the head of the pin. I'm looking at the Board's emphasis on competition, and the RTP, which requires us, among other things, to ensure effective competition.

I think what the Board is required to do is to keep the broader economic mandates that we got from the Congress in mind in trying to figure out these things. And everything directs us to ensure that service, and rates, and so forth, are handled not by our saying what the service has to do, but by competitive forces sorting it out.

And when competition is cut off, then it seem to me that part of the statute is not being
fulfilled. So when the Board used these words, I have to assume that the Board was using the words mindful of its statutory mandate regardless of what the parties were negotiating in their private, poorly crafted agreements, quite frankly. So I don't know if you disagree with that. If you do, I'd like to hear it.

MS. ESTES: I don't have any comment on that.

VICE CHAIRMAN FUCHS: Just one more from me. You all have raised a couple of times just the fact that we would be reopening something 12 years later. And, you know, we've asked a number of questions about, you know, whether or not it meets the Board's reopening precedent, but I want, just as a practical matter: What is your view saying that the line was in poor condition before the transaction about CP's investments in the track? Do you think that it's a fair statement to say that CP has made investments in the track to provide a higher level of service that would not have been made otherwise for the transaction?
MS. ESTES: I think that is fair, yes. We would not disagree with that.

CHAIRMAN BEGEMAN: We will now return to New Century Ag for their five minutes of rebuttal. Thank you.

And, Mr. Greenberg, this was a little, I guess, free-flowing, and I don't want your table to feel excluded from that. So if you need to go over your five minutes to comment on any of the discussion, you're welcome to have six.

(Laughter.)

MR. GREENBERG: Thank you very much.

I'm sitting here and I'm thinking--and I don't mean to say this in a jocular fashion--but I'm listening to what appears to me to be a case of a reluctant bridegroom.

This case was brought, seriously, by NCA because it wasn't getting reliable car service from BN. There were arbitrary limits being brought. They believed, having talked to BN, that they would be able to get unit train service. And now we hear the railroads walking away.
There may be a different way of taking it, but I must say I am pretty upset. It's wrong. What's the shipper community going to think the next time the railroads file an exemption? It can't be enforced? If they violate the terms of the exemption, is nobody going to take them to task, because you can't reopen a proceeding because it can't be enforced, an exemption proceeding?

So when you're talking about how important exemptions are to the rail community, just think about how important they are to the shipper community. They are there for a reason. But it's not one-sided. And what I'm hearing today, it makes it seem very one-sided. I think it is really inappropriate.

So terminal trackage rights. You asked about the situation in the UPSP case, BNSF trackage rights in KCS, in a KCS case. Now in that case, you're correct, the Board did say that it could avoid the Midtec decision, the Midtec conditions, because the Board concluded that terminal trackage rights are in the public interest when they're essential to
effectuate merger conditions. This is not a merger case.

So if you're going to talk about competitive access, we're back to Midtec, aren't we? We're back to Midtec. And CP said the reason why we said no was because we couldn't win under Midtec and they're right.

VICE CHAIRMAN FUCHS: But in our first exchange, you equated the merger condition to the representations in the exemption.

MR. GREENBERG: Oh, that's right.

VICE CHAIRMAN FUCHS: So I guess what I'm asking is: Could there be an adaptation of the same reasoning that the Board used there in saying, not effectuate a merger condition, but to effectuate the findings that it had in the exemption. That's the public interest standard?

MR. GREENBERG: Perhaps. It would be unprecedented, though. So we'd be looking at--and we'd be looking at maybe you can, maybe you can't. That's why we said no. If I thought--if we had thought that when it was time to come back and say,
in response to your Order, that we could proceed and
not worry about Midtec, then fine. Because that's
where we are.

We're simply talking about getting
competitive conditions back, and making the railroads
live up to their commitments. But, you know, there
was no guarantee. There was no insurance that we're
going to have—that we would be able to avoid
Midtec. I know better than anybody else what
Midtec meant.

VICE CHAIRMAN FUCHS: And I don't doubt
that. I just think that when you talk about
unprecedented, what is the precedent for reopening an
exemption for enforcement purposes?

MR. GREENBERG: The Board has authority to
do anything it wants.

VICE CHAIRMAN FUCHS: But what's the
precedent for it?

MR. GREENBERG: Well I'm not sure that--
maybe it's been, it's hard to imagine, given what we
know about the railroads, but it's hard to imagine.
I don't have a case for you.
VICE CHAIRMAN FUCHS: Right.

MR. GREENBERG: I'll admit, I don't have a case for you. On the other hand, I also don't have a case where the railroads made commitments and just said, no.

We're hearing BN say, I thought I heard BN say today, that the supplemental agreement is enforceable; that as far as they're concerned, because they couldn't reach an agreement that says no unit trains, then it's fine.

Are they saying today, is BN saying today, are the railroads saying today that they could walk away from this Agreement in five years and having nothing more? There's been no abandonment filing.

VICE CHAIRMAN FUCHS: And I just--I totally hear you, and I take the point that someone who is reading our decision earlier in the year might not have been able to say, hey, the Board is inviting someone to sidestep Midtec--I use that in a very plain-language way--maybe that's not the right word, but not rely on Midtec for the purpose of some sort of competitive access provision. So I take that
At the same time, your primary criticism of adapting, you know, the UPSP situation with Lake Charles was to an exemption enforcement, even though that's for a merger enforcement, was that it was unprecedented.

But it strikes me that that same criticism applies to reopening, not to materially alter the result, but to enforce. So if you have the criticism that something is unprecedented even though there's a close comparison, it would strike me that that same criticism could be applied to your proposed approach.

MR. GREENBERG: Well, as I said, I don't have a case where the Board has been presented with an exemption case where the railroad said one thing in the Petition and another thing two years later, or five years later, or nineteen years later. It doesn't make any difference to me.

I don't have that case. But it seems to me that the Board has an interest in making sure that what it ordered is enforced. And it's hard for me to imagine the Board does not have that authority,
notwithstanding that there may not have been a decision in this exact scenario.

BOARD MEMBER OBERMAN: Is it fair to say you don't see anything in either the statutes or our precedent barring us from enforcing that?

MR. GREENBERG: I certainly do not.

VICE CHAIRMAN FUCHS: What do you say, then--let's say we come in and say we're reopening this, and we're enforcing something. What's to stop CP from coming back and saying, Seventh Circuit, you said it has to mandate a different result. There's no change in the exemption here. You know, EJ&E, Carver, all the way down the line, OGRE, you know, we have said over and over "materially affect." The decision's not materially affected. They want the same decision.

And so what do you say, then, when we're in court and we have to--and someone throws everything we've said about reopening back in our face about "material affect," and everything the Circuit Court said about mandating a different result?
MR. GREENBERG: You have a rational basis for making a new decision. You can change—as long as you have a rational basis for making a decision, you can change. You don't need—you don't have to keep on adhering to old precedent simply because it was old precedent.

This is a novel case. It's here today. And what happened 15 years ago, EJ&E, whatever it was, is not relevant if you have a rational basis to make that decision.

BOARD MEMBER OBERMAN: Does anybody from NCA have anything to add to the practicality of the unit train movements at Minot, the so-called seesaw?

MR. GREENBERG: I'd like to add one point, and then I can turn it over to the client. And that is, there was a 90-car train, I understand, a BNSF train that was interchanged, and we heard CP's counsel talk about it. It was difficult. It was interchanged at Bowbells, or Bow-bells, I'm not sure how we pronounce it, and they had to go on somebody else's track in order—the shipper's track, in order to handle that track.
If they've got to build an additional piece of track for a couple of million dollars, let them do it. I don't see a problem with that. We spent--my client has spent $41 million for just this--you know, for these tracks. And the railroads are benefitting from that. They're getting a lot of volume from our client. And so they can't spend money to build an interchange track? It seems strange to me.

And in any event, I think it is required.

BOARD MEMBER OBERMAN: So they're suggesting, though, that there's not enough land there to build whatever--

MR. GREENBERG: Well they said that that was the case in Minot. I don't know. All I know--I don't know what the situation at Bowbells is like. All I can tell you is, we've been asking this question since before we began this case: Is this operation, the unit-train operation, feasible? And I've been told over and over again, yes, we believe so.

BOARD MEMBER OBERMAN: By BN?
MR. GREENBERG: By BN.

BOARD MEMBER OBERMAN: So just to confirm it, I mean I agree with you about the tone of what we've sort of heard here, but as I understand Ms. Estes to say BN wouldn't have asked for the right to unit trains in the Supplemental Agreement if they didn't believe it was practical. And you're saying that's consistent with what your clients have heard from BN? Is that a fair statement?

MR. GREENBERG: Yes.

VICE CHAIRMAN FUCHS: Just on the build-out kind of scenario, for lack of a better term, there's kind of an ongoing issue where a number of the railroads that are transitioning or have transitioned to PSR are decreasing unit train service, or converting it to Manifest. And there are a number of ag shippers who have invested in loop track that no longer are receiving unit train service.

Just playing this out, suppose for example that something had to be worked out to allow for BN unit train service that involved the expenditure of
funds by CP. What's to happen if BN decides they
don't want to provide unit train service?

MR. GREENBERG: That would be a problem,
wouldn't it?

VICE CHAIRMAN FUCHS: Yeah.

MR. GREENBERG: Everybody's rates would go
up, no question.

VICE CHAIRMAN FUCHS: Right.

MR. GREENBERG: And U.S. grain shippers
would have less competitive options, and be less
competitive in the world marketplace. That would be
unfortunate.

VICE CHAIRMAN FUCHS: And would CP be in a
somewhat similar situation as a number of the ag
shippers where they made an investment, understanding
that unit train service was going to continue, and
now unit train service is not continuing?

MR. GREENBERG: Well, that's CP's problem.
I guess I don't understand your question. If we--I'm
not sure I'm following your question, I'm sorry.

VICE CHAIRMAN FUCHS: So in order to
mitigate the effects of unit train service, I thought
you were speaking about CP making additional investments.

MR. GREENBERG: No, I was actually talking about BN making investment.

VICE CHAIRMAN FUCHS: I see.

MR. GREENBERG: If we're talking about Bowbells, or Bow-bells, then--

VICE CHAIRMAN FUCHS: I see.

MR. GREENBERG: --then that's off the BN track.

VICE CHAIRMAN FUCHS: We're talking about Minot.

MR. GREENBERG: No, I don't know what's necessary at Minot.

VICE CHAIRMAN FUCHS: I see. I see.

BOARD MEMBER OBERMAN: I'm a little confused by this map. Maybe BN or CP can enlighten us, but, Mr. Greenberg, you may want to, as well.

Do I understand that the track between Berthold and Niobe is not deficient, Ms. Estes?

MS. ESTES: I'm not sure I heard you.

It's not "deficient"? It is in service, between
Berthold and Niobe, it's in service and it is used today.

BOARD MEMBER OBERMAN: It's in service?
MS. ESTES: It is used today, yes.

BOARD MEMBER OBERMAN: So it's only from Niobe up to Milepost 47 that's a problem?
MS. ESTES: For BN, yes.

BOARD MEMBER OBERMAN: So you could bring a train from the Gavin Yard through Minot to Berthold, not make the seesaw movement, turn north to Niobe, then go up to Bowbells? Or however you pronounce it. It's at Bowbells that I guess Mr. Rifkind said you had to use some customer's loop to interchange with CP there. Is that right?
MS. ESTES: That's correct.

BOARD MEMBER OBERMAN: And is that the only physical way to do it?
MS. ESTES: Yes.

BOARD MEMBER OBERMAN: You can't just turn onto the CP Mainline there?
MS. ESTES: There's no connection there.
I guess that's the southeast--did I get that wrong?
BOARD MEMBER OBERMAN: Southwest, probably.

MS. ESTES: The southwest quadrant, there's no connection between BNSF and the CP Subs.

BOARD MEMBER OBERMAN: But you could build just a so-called wye there, right, without having to use the customer's loop?

MS. ESTES: You could build a connection there, yes. I think it depends on—again, we only looked at it preliminarily and I think it would depend on the grade and the train there. And there is a crossing, a road crossing. I think there's two road crossings.

The other thing I would just point out is, I'm not sure where the train would hold, where you would actually park the train, because those are both active mainlines.

BOARD MEMBER OBERMAN: Oh, you mean on the DMVW line between Niobe and Bowbells?

MS. ESTES: No, on the BNSF line between Niobe and North Gate, that's an active BNSF main as is the Portal Sub, the CP Sub between Flaxton and Soo.
Junction.

BOARD MEMBER OBERMAN: Oh, I'm sorry, it's a BN line. I thought it was—so, okay. But anyway, the trains could make a movement there without the seesaw movement, but the holding might be a problem?

MS. ESTES: That's my understanding, yes.

MR. DENTON: With additional investment, right, on creating the--

BOARD MEMBER OBERMAN: (Off-microphone).

MS. ESTES: I don't know. Again, I mean--

BOARD MEMBER OBERMAN: --dollars to rebuild the whole line up to Milepost 47.

MS. ESTES: It would likely be less than rehabbing 21 miles between Niobe and Lignite, but as far as a connection I don't have a number on that. We'd have to do a study.

BOARD MEMBER OBERMAN: Alright.

(Off-microphone).

MR. GREENBERG: No, I don't think so. I think you guys have done a pretty thorough job of, say, plunging the information out. So I have nothing more. Thank you very much.
CHAIRMAN BEGEMAN: I'd like to thank everyone for your participation throughout the morning and early afternoon. It was very informative.

BOARD MEMBER OBERMAN: I'd like to just second that, and congratulate all counsel for your lengthy participation.

CHAIRMAN BEGEMAN: And I also want to thank the staff, those that are here helping with timers and preparing memos, and helping us understand the case, as well as other folks that helped us get this location.

(Whereupon, at 1:47 p.m., Tuesday, August 20, 2019, the hearing in the above-entitled matter was adjourned.)
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