

**Date:** August 20, 2019

**Case:** Oral Argument - Docket No. FD 35068



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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

1 PARTICIPANTS:

2 SURFACE TRANSPORTATION BOARD

3 ANN BEGEMAN, CHAIRMAN

4 PATRICK FUCHS, VICE CHAIRMAN

5 MARTIN OBERMAN, BOARD MEMBER

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15 EDWARD D. GREENBERG -- GKG LAW

16 TOM WILCOX -- GKG LAW

17 LYNN MICHELSON -- GENERAL MANAGER

18 GRANT HOAGLAND -- BOARD MEMBER

19 JOSH BUMMER -- BOARD MEMBER

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1 BNSF RAILWAY COMPANY

2 PETER DENTON -- STEPTOE & JOHNSON

3 COURTNEY ESTES -- ASSOCIATE GENERAL COUNSEL FOR BNSF

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1 P R O C E E D I N G S

2 (9:00 a.m.)

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

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

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

22 New Century Ag and CP will each have 20

1 minutes of argument time, and then BNSF will have 10  
2 minutes of argument time. The lectern is equipped  
3 with lights and a timer which will guide you  
4 regarding your allotted time. Two minutes before  
5 your allotted time expires, a yellow light will  
6 appear. When you see the red light, your time has  
7 expired and you will need to conclude your remarks.

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

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

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

20 MR. GREENBERG: Thank you, Chairman  
21 Begeman. And thank you, Vice Chairman Fuchs and  
22 Member Oberman. I am pleased to be here

1 representing New Century Ag. My name is Ed Greenberg  
2 of the Law Firm of GKG Law, P.C. On the dais with  
3 me as well is my partner, Tom Wilcox, and also Lynn  
4 Michelson, who is General Manager of New Century Ag.  
5 Present also are two board members of New Century Ag.  
6 We have Grant Hoagland and Josh Bummer. So if you  
7 have any questions, everybody is available to  
8 respond.

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

16 By getting the exemption, they were able  
17 to avoid seeking application under the formal  
18 requirements of 49 USC 11323, 11324, and 11325. They  
19 sought and obtained the support of the shippers on  
20 the lines, and so we're here today to find out  
21 whether or not there's a way of keeping them to those  
22 commitments.

1           By background, we're talking about New  
2 Century Ag. I presented this map and it's part of  
3 our filing, but it's also on the record today, but  
4 it's an attachment to their argument. I thought it  
5 would be helpful to show the lines of their roads and  
6 the location of the grain facilities we're talking  
7 about.

8           So we're talking about New Century Ag has  
9 two major grain terminals, elevators, at Noonan and  
10 Crosby. They also have three to the west of the  
11 line, to the west of Crosby, at Ambrose, Fortuna, and  
12 Westby. Once upon a time, BN had lines that served  
13 these facilities. And so did CP. And actually, I'm  
14 not sure--it's not true about BN didn't serve  
15 Ambrose, Fortuna, and Westby. They both served these  
16 lines, these facilities, directly, after--as a  
17 result of--these were the result of a series of  
18 merger decisions, and abandonments that took place.  
19 In and around 2007, the two railroads decided that  
20 they would be much more economical to get rid of one  
21 of the lines that were parallel, serving the line,  
22 and so--serving these facilities, and so--

1                   CHAIRMAN BEGEMAN: Excuse me, Ed. Do you  
2 mind if I interrupt? I kind of just want to get to  
3 it.

4                   MR. GREENBERG: Okay.

5                   CHAIRMAN BEGEMAN: One of the things that  
6 the Board's decision that authorized the exemption,  
7 or permitted the exemption, it said that, quote,  
8 "competitive"--  
9 "that BNSF will continue to provide rail service to  
10 all shippers on the conveyed line at competitive  
11 rates, and there will be no material change in the  
12 level or nature of service provided to those  
13 shippers."

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

19                   MR. GREENBERG: There was no--I don't  
20 believe there was something called "unit train  
21 service" at that time. There was multi-car service,  
22 25 car lots, that were assembled together to form a

1 train that were pulled out. But at that time, there  
2 was no formal what you call unit trains.

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

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

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

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

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

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

20 In addition, CP had imposed various car  
21 limits on the amount of cars they would permit BN to  
22 provide. Sometimes it was 15 cars at a time,

1 sometimes 25, sometimes 50. But the fact--the  
2 result--the reason why this Petition was filed is  
3 because there was grain sitting in the elevators that  
4 couldn't move, which meant there was more grain they  
5 couldn't buy from the farmer members. So it was a  
6 lot of grain that simply didn't move because they  
7 weren't getting--they weren't getting full BN  
8 service.

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

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

19 CHAIRMAN BEGEMAN: Where's it going?

20 MR. GREENBERG: I'm sorry?

21 CHAIRMAN BEGEMAN: Is it going west? Or  
22 where's it going?

1           MR. GREENBERG: It's going--I think it's  
2 going everywhere.

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

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

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

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

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

20          MR. MICHELSON: Right now, we're handling  
21 10 commodities. And primarily there's only two of  
22 the commodities that are moving right now with the

1 shuttles. We could possibly tag other commodities in  
2 with what they call a dedicated train at the BN  
3 access going to the PNW, which would allow soybeans,  
4 you know, 25 cars of soybeans to go to a certain  
5 market; 75 cars of wheat could go to a different  
6 market; and also we handle a lot of lentils and peas  
7 and pulse crops and that sort of thing, and they  
8 could also be tagged on. Where right now, CP does  
9 allow some co-loading of different commodities to go  
10 to the PNW, but only at a certain time, possibly  
11 April, May, June, July, where BNSF you can buy those  
12 trains and get those commodities also to move to the  
13 PNW.

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

20 MR. MICHELSON: To the south of us there's  
21 a mainline BN locations and, yes, they can be a  
22 little more competitive on some of the commodities

1 because they have a different way of moving the  
2 cars.

3 CHAIRMAN BEGEMAN: But as a result of the  
4 transaction? Or they had it previously?

5 MR. MICHELSON: Previously.

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

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

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

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

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

22 MR. GREENBERG: Yes, it would have been

1 parallel to that.

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

7 MR. GREENBERG: It was.

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

10 MR. GREENBERG: Correct.

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

16 MR. MICHELSON: Yes, we did. Between 2004  
17 and 2006, New Century Ag was called Golden Plains Ag.  
18 And in 2007 we merged the companies to make Fortuna  
19 Farmers Elevator and then to make New Century Ag.

20 We looked at--there was a vote in 2004 to  
21 merge back in 2004. And then we brought the vote  
22 back to merge again in 2006, and then it passed.

1           Between those times, Golden Plains Ag was  
2 looking at the possibility of adding more track and  
3 locating--having BN shuttle service to compete  
4 against the Fortuna Farmers Elevator, which is  
5 located at Ambrose, Fortuna, and Westby, because they  
6 were able to load. They were co-loading at those  
7 three locations, and they would gather the cars up  
8 and they would pull them to Flaxton, and that would  
9 be a shuttle.

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

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

16           MR. MICHELSON: Yes.

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

20           MR. MICHELSON: Yes, I believe we had  
21 discussions with them at that point in time. Between  
22 all of our elevators, if we could have co-loaded, we

1 could only max out around 98 cars at that time. So  
2 we would have needed to get a facility put together  
3 to make a 110-car shuttle.

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

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

20 BOARD MEMBER OBERMAN: Well was there any  
21 reason that you know of that prior to '07, if you had  
22 invested in the loop, you couldn't have gotten

1 shuttle trains there? Prior to this transaction, was  
2 there any obstacle of the kind we're facing now?

3 MR. MICHELSON: Probably not.

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

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

19 That is what NCA understood. And so the  
20 idea here is, simply enforce the exemption as it was  
21 granted. CP has taken the position not only do they  
22 not need to provide BN shuttle trains, despite the

1 fact that they are clearly needed for NCA to reach  
2 certain markets, they also say that they cancel it--

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

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

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

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

21 Our perspective is the Board has the  
22 authority to require them to live up to their

1 obligation. That's all we're asking. If it  
2 requires trackage rights, so be it. If it requires  
3 track instruction, that's okay, too. We're not  
4 asking for that. That's a waste of money. But if  
5 that needs to be done, I guess it can be done. The  
6 Board has that authority. They never gave an  
7 abandonment, and so the BN is required to provide  
8 service. I suspect that they want to provide the  
9 service, but they're not able. They would like to  
10 provide shuttle trains. They've been told they  
11 can't.

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

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

20           BOARD MEMBER OBERMAN: Let me just on that  
21 particular point, I wanted to ask you this question.  
22 In footnote 5 of your Petition, you say that the

1 railroads can't terminate the arrangement or alter  
2 its terms, quote, "without giving affected parties an  
3 opportunity to be heard, and securing the Board's  
4 approval."

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

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

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

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

21 BOARD MEMBER OBERMAN: So it's your view  
22 that--one of the things I'm confused about, how you

1 explain this--the original Haulage Agreement had a  
2 10-year term. Is it your contention that that  
3 10-year term didn't mean they could simply completely  
4 end haulage at the end of 10 years?

5 MR. GREENBERG: Yes.

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

8 MR. GREENBERG: Yes, because I think the  
9 10-year term is intended to mean only that  
10 internally, between the two railroads, they can  
11 adjust compensation terms and operating terms.  
12 That's the private side of the arrangement.

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

20 Only the Board has the ability to alter or  
21 modify those. So they would have needed to come back  
22 to the Board on that. But not as to the compensation

1 terms, and anything other than that which could be--  
2 those could be adjusted through the arbitration  
3 provision, through an arbitration proceeding, or  
4 through negotiations between the two of them.

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

16 MR. GREENBERG: Well so am I. I share  
17 your confusion. Not a single word was set forth in  
18 that petition for exemption and, not surprisingly,  
19 not a single word in the Board's decision, either.  
20 Instead, the representations made in their petition  
21 are replete with references to continued competition  
22 between the two railroads. Over and over again it

1 says that. I actually counted. We could go through  
2 them, but there are, I think it's like 9 or 10 times  
3 they made those representations--actually, 13 times,  
4 13 separate representations, all of which said: This  
5 is it.

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

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

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

1 result."

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

6           And so I'm kind of wondering what in the  
7 '07 decision you think needs to be materially  
8 altered? Or what is the different result that ought  
9 to be mandated?

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

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

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

1 railroads.

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

12           And so I think there is a little bit of a  
13 difference between say a standard environmental  
14 condition, or a merger condition, and the use of the  
15 word "condition" that you're--as you are using it  
16 now, simply because it's not as though when the Board  
17 allowed this transaction it explicitly set conditions  
18 that things have to happen in perpetuity. And in  
19 fact, you know, it relied on the Haulage Agreement,  
20 but that Haulage Agreement had a pretty explicit  
21 10-year term.

22           So I guess I'm wondering whether or not

1 the difference in condition matters. And whether or  
2 not the Board coming back and saying enforcing  
3 condition effectively overrides the 10-year term of  
4 the Haulage Agreement.

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

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

19 The Board was enforcing the merger  
20 condition in that case--

21 VICE CHAIRMAN FUCHS: Now in that case,  
22 and in the UP--that's a UP-SP merger conditions--

1 MR. GREENBERG: It is.

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

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

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

15 MR. GREENBERG: Oh, clearly. Clearly.  
16 That was competition--it wasn't just competition, it  
17 was access to markets. This is their lifeblood.  
18 We're shutting off access to the Pacific Northwest  
19 because they're simply not competitive. The rates  
20 are anywhere from \$1,000 to \$3,000 a car more  
21 expensive if you don't have unit-train service to the  
22 Pacific Northwest. They can't get to certain markets

1 the canola oil. They can't sell canola. CP can't  
2 handle it. CP admitted they can't get--they're not  
3 competitive in certain markets.

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

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

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

21 MR. GREENBERG: I believe that they began  
22 discussions in 2011. And then the planning got

1     underway in earnest in 2012. Plans were drawn up.  
2     They were--they were reviewed by, at least by CP, and  
3     also DMVW. I don't know whether--did BN review?  
4     Yes, of course, BN also reviewed the plans.

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

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

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

21                   BOARD MEMBER OBERMAN: Can we get that  
22    letter put into the record?

1 MR. GREENBERG: Yes, of course.

2 BOARD MEMBER OBERMAN: And I guess it's  
3 implicit in the letter, BN doesn't say, by the way we  
4 can't deliver unit trains if you build a loop, right?

5 So there was no discussion--and I want to separate  
6 this between NCA and BN in 2013 that under the  
7 Board's decision, or the Haulage Agreement, unit  
8 trains were prohibited. That topic didn't come up  
9 with BN.

10 MR. MICHELSON: No.

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

16 Did Mr. Wood say that to you prior to  
17 2013, in apparently an oral statement? There was no  
18 writing?

19 MR. MICHELSON: No.

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

22 MR. MICHELSON: I do not recall him saying

1 that. At the time, Richard Larsen was the General  
2 Manager and CEO of New Century Ag, so he would have  
3 been in charge. I was on the sidelines helping out,  
4 but--so Richard would have been the one. So he was  
5 able to get the letter stating that, but prior to  
6 that we have no recollection or no record of it.

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

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

14 BOARD MEMBER OBERMAN: Well--

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

17 BOARD MEMBER OBERMAN: Sure.

18 MR. GREENBERG: And that is, that his  
19 statement is inconsistent with the exhibit that they  
20 support--that they supplied. His statement says that  
21 they told--that they told NCA that there would not be  
22 BN service, direct service--

1           BOARD MEMBER OBERMAN: No, that's not what  
2 he says. There's two different things. There's his  
3 statement of an oral communication, and then later in  
4 February of 2014 a letter. So I'm just dealing with  
5 his oral statement first.

6           Are you saying the oral statement  
7 conflicts with the letter?

8           MR. GREENBERG: I am.

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

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

15          BOARD MEMBER OBERMAN: Now the word  
16 "direct" is not in the letter, but it's part of one  
17 of the questions I had, because you say that--and I  
18 admire the advocacy on that point--but the letter  
19 does not say "direct." What the letter says is,  
20 quote, "At this time, BNSF does not enjoy the right  
21 to move unit trains to the newly constructed  
22 facility."

1                   MR. GREENBERG: You're correct. You're  
2 exactly correct.

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

5                   MR. GREENBERG: Yes.

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

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

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

14                  But I'm trying to understand the oral  
15 communication. Because as I gather, Mr. Larsen and  
16 Mr. Michelson in 2013, or '11, somewhere in there,  
17 were on the verge of committing their company to a  
18 \$41 million expenditure.

19                  Is that a fair statement, Mr. Michelson?

20                  MR. MICHELSON: Yes.

21                  BOARD MEMBER OBERMAN: And if CP had said,  
22 well, you can't use it if you build it, if that

1 conversation had taken place as Mr. Wood says, what  
2 would your next step have been at that time? Would  
3 you have said, to hell with you, we're going to build  
4 it anyway?

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

14 BOARD MEMBER OBERMAN: Well let's just go  
15 ahead for a minute, Mr. Greenberg, to the February  
16 11th, 2014 letter. Was the facility finished by the  
17 time you received that letter from CP? Because it  
18 says "recently constructed facility," and it implied  
19 to me that it was actually done by that time. Is  
20 that a fair statement?

21 MR. MICHELSON: The grain facility was  
22 poured and slicked I believe the week of September

1 20th, 2013. And the track was already laid and ready  
2 for operation at that time.

3 BOARD MEMBER OBERMAN: In late 2013?

4 MR. MICHELSON: Yes.

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

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

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

21 So at that time, we knew the facility was  
22 going to be up and running in July of 2014 and taking

1 grain, and we wanted to get a tariff in place for the  
2 shuttle rate on the BN. And I can remember talking  
3 to Fort Worth and different representatives from the  
4 BNSF trying to get that in place so we knew what the  
5 freight rates would be.

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

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

16 MR. MICHELSON: No.

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

22 MR. MICHELSON: Correct.

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

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

11 UNIDENTIFIED SPEAKER: Not--not personnel,  
12 no.

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

18 UNIDENTIFIED SPEAKER: Exactly. Exactly,  
19 yes.

20 BOARD MEMBER OBERMAN: And you never had  
21 any reason to believe from any communication with CP  
22 prior to 2014 that there would be a problem--

1 UNIDENTIFIED SPEAKER: Not at all. Not  
2 before that letter.

3 BOARD MEMBER OBERMAN: Thank you.

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

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

19 So if that's the basis for--if that's what  
20 you're holding up as the example for why we should  
21 reopen to enforce conditions, even if you set aside  
22 the fact that the conditions in the merger were very

1 clear and enumerated and the conditions here are  
2 representations, I'm not sure that that case is the  
3 best model. Because even in that instance, we didn't  
4 reopen the merger.

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

8 VICE CHAIRMAN FUCHS: How did we  
9 effectuate the conditions? How did we effectuate  
10 the conditions? We did it through terminal trackage  
11 rights. And we in our decision earlier this year, we  
12 offered you all the opportunity to go through our  
13 competitive access regulations, 49 CFR 1144.2, which  
14 include switching, which include trackage rights, and  
15 I think which--and, and so I guess if that was a  
16 proper mechanism to effectuate conditions, and  
17 they're using 1144.2, then wouldn't you also use  
18 1144.2?

19 MR. GREENBERG: Well, we did not--I will  
20 say, I guess part of this personal history, I  
21 suspect, I was the lawyer who tried the Midtec  
22 case.

1 VICE CHAIRMAN FUCHS: Right.

2 MR. GREENBERG: And so--

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

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

19 VICE CHAIRMAN FUCHS: The question is--I  
20 hear you. But the question is: How do we enforce it?  
21 And you want us to enforce it by reopening something.  
22 And the case that you cited, we actually didn't

1 enforce it by reopening. We enforced it by going  
2 through a terminal trackage rights process.

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

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

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

20 And as I understand it, Mr. Greenberg, at  
21 least one of your primary alternative requests for  
22 relief is not to reconsider whether the exemption

1 should have been granted; it's simply to enforce what  
2 you believe were representations made by CP in order  
3 to obtain the exemption.

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

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

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

16 MR. GREENBERG: That's right.  
17 Procedurally I guess one could have taken a number of  
18 different tacks to do this. One could have filed a  
19 complaint, open a new docket. One could have filed a  
20 petition for declaratory order. But we had an  
21 exemption in which representations were made, and a  
22 Board Order was issued.

1           And it just seemed to me there was no  
2 reason to file a brand-new complaint when we had an  
3 open docket. It was--if not open, but was subject to  
4 be reopened. It can be opened--proceedings can be  
5 reopened at any time.

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

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

20           But then the thing that's difficult about  
21 it is that we have all this precedent that says that  
22 not only can you point to something that's changed,

1 it's that changed circumstances have to mandate a  
2 different result. Or that it has to materially alter  
3 the decision. And that makes sense because, you  
4 know, circumstances change all the time when we  
5 approve something.

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

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

19 VICE CHAIRMAN FUCHS: But how do you get  
20 past the mandating the different--the first step is  
21 one of those three things: new evidence, changed  
22 circumstances, or material error. Either you do

1 changed circumstances and new evidence, either way, I  
2 understand what you're putting forward. The second  
3 step is materially alter the decision, or mandate a  
4 different result.

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

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

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

17 MR. GREENBERG: Right.

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

20 MR. GREENBERG: Okay.

21 BOARD MEMBER OBERMAN: There's a--with all  
22 due respect, I think there's a difference in that the

1 original decision in the merger said that BN has a  
2 right to access Lake Charles. And if you can't work  
3 it out, you can do it through trackage rights. That  
4 was part of the original merger decision.

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

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

21 BOARD MEMBER OBERMAN: I think that the--  
22 just to see if I could paraphrase what they're asking

1 for here--one way of thinking about it is they're not  
2 asking for a different result. They're asking for  
3 the same result to be construed to prevent CP from  
4 doing what it's doing, which is not a different  
5 result, in your view of the situation. Is that a  
6 fair statement?

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

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

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

19 MR. GREENBERG: No, no--

20 CHAIRMAN BEGEMAN: You said you didn't  
21 have unit train service from BNSF at the time of the  
22 exemption.

1           MR. GREENBERG: No, you didn't say no unit  
2 train service. That wasn't even an issue. Nobody  
3 asked for unit train. We asked for "no material  
4 change in the level of service." There was a  
5 commitment in the Haulage Agreement that was  
6 presented to you that BNSF would get the same level  
7 of service CP provides.

8           CP provides unit train service--

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

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

1 CHAIRMAN BEGEMAN: But what happened later  
2 wasn't what was said in the 2007 decision.

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

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

10 MR. GREENBERG: Correct.

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

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

18 CHAIRMAN BEGEMAN: I'm not talking about  
19 the Haulage Agreement. I'm asking what happened  
20 before the exemption went into effect, before like  
21 the transaction went into effect, as far as your  
22 service? Were you getting--you said, no, it wasn't

1 called unit service at the time. I mean, unit trains  
2 existed, as was made clear and we all know to be the  
3 case. So you weren't getting unit train service, but  
4 you were getting 100 cars instead of 25?

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

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

13 VICE CHAIRMAN FUCHS: And just to quickly  
14 supplement the Chairman's point, I'm trying to make  
15 sure I understanding the data, and I could be  
16 misunderstanding what this table applies to, but in  
17 2004 there were 680 CP cars at Noonan and Crosby, and  
18 at BNSF there was 1,162.

19 So to round up, I'll say that that is  
20 1,900. And I could be misunderstanding the table,  
21 but in 2017--and '04 of course is before the  
22 transaction--on '17, just to show the difference

1 between after post-CP restriction, that's 1,081 CP  
2 and 199 BNSF, which is over 2,000 cars.

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

6 MR. GREENBERG: Yes. Yes, they have.

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

13 MR. GREENBERG: Yes.

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

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

21 VICE CHAIRMAN FUCHS: Right.

22 MR. GREENBERG: That can't be what anybody

1 really intended. That certainly was not a  
2 representation made--

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

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

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

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

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

14 MR. GREENBERG: Correct.

15 BOARD MEMBER OBERMAN: So that's--

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

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

20 MR. GREENBERG: No, they weren't unit  
21 trains. I beg your pardon. They were not unit train  
22 rates. They were simply large blocks of cars that

1 were consolidated into a larger train.

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

10 MR. GREENBERG: Yes, they certainly could  
11 have.

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

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

19 MR. GREENBERG: Yes, they had done that.  
20 And they did it--and not only did they do that, they  
21 also said: And by the way, even though you need it,  
22 we can't give you another unit train.

1                   So at the same time they said, no, you  
2                   can't have BNSF service, they said you also can't  
3                   have any from us. No additional unit train.

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

6                   MR. GREENBERG: Squeezed considerably.

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

14                  Have you been able to straighten that up?

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

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

19                  MR. GREENBERG: We do.

20                  BOARD MEMBER OBERMAN: Okay. The other  
21                  contention that's being made, and that's why I was  
22                  trying to understand the map, and I'm going to ask

1 CP--I think we all will--some of these questions,  
2 but they contend that there's congestion. There are  
3 limited facilities at the Minot Interchange Facility,  
4 and I'm trying to figure out why they won't let the  
5 BN trains on the line.

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

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

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

20 We also do know that two miles down the  
21 road, just to the east of Minot, is the BN Gavin  
22 Yard. So cars could be--so unit trains could be

1     interchanged there. So we're having a great deal of  
2     difficulty operationally just sitting as we are on  
3     the shipper's side of the equation trying to  
4     understand why we can't move a BN train up the line  
5     to interchange with DMVW and bring it on. We don't  
6     understand why--

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

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

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

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

22                   BOARD MEMBER OBERMAN: That was all I had.

1                   CHAIRMAN BEGEMAN: Your 20 minutes has  
2 been concluded, and we will turn to CP.

3                   MR. GREENBERG: Thank you.

4                   CHAIRMAN BEGEMAN: Thank you.

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

9                   Thank you for the opportunity to be here.  
10 I want to introduce with me at counsel's table, at  
11 the far end is Bill Tuttle, General Counsel U.S. for  
12 CP. Next to him is Jarad Farmer, who is the  
13 Managing Director of Sales for Grain. And then my  
14 partner, Matt Smilowitz.

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

21                   VICE CHAIR FUCHS: David, sorry to  
22 interrupt, but you said what's at issue here is the

1 integrity of our exemption procedures. And you make  
2 a point in your reply that the Board does not have  
3 statutory authority to revoke the exemption. And I  
4 just want to make sure I understand.

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

10           MR. RIFKIND: Right

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

18           MR. RIFKIND: Right.

19           VICE CHAIR FUCHS: That OFA--and that's  
20 what you rely on to say that we can't, even if we  
21 wanted to revoke the exemption, we couldn't. But  
22 there the Board--the thing you cite on page 6, the

1 OFA wasn't an exemption, right?

2 MR. RIFKIND: Correct.

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

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

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

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

17 CHAIRMAN BEGEMAN: And UP got its line  
18 back.

19 VICE CHAIR FUCHS: Yeah. And as far as I  
20 know, nobody's told us that we didn't have the  
21 statutory authority in that case, as of yet. So I  
22 guess it's not necessarily a forced sales. It's

1     unwinding an exemption that was involved in order to  
2     allow for a sale. And so there is a difference here.  
3     And that case wasn't about an exemption, it was about  
4     an OFA.

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

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

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

19                    MR. RIFKIND: Right.

20                    VICE CHAIR FUCHS: The question is whether  
21    or not we can revoke an exemption. There's no  
22    temporal limitation on that. Can we do it two years?

1 Can we do it 12 years? Jackson County was a few  
2 years. This would be 12 years. But I'm sorry, I  
3 guess I'm wondering where the temporal limitation  
4 come in is? We have the statutory authority until  
5 what time?

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

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

18 MR. RIFKIND: I believe that is correct.

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

21 MR. RIFKIND: I'm not aware of any other  
22 case. But my reading of that case says that you

1 cannot force a line sale except through the feeder.

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

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

17 BOARD MEMBER OBERMAN: Well I'm going to  
18 ask you some questions about that. Let me ask you  
19 this: Prior to 2007 when BN was a 50 percent joint  
20 owner of this line, do you agree that there was no  
21 restriction on BN providing unit train service if the  
22 customer could handle it? Would you agree?

1 MR. RIFKIND: No, I wouldn't agree. There  
2 was a--

3 BOARD MEMBER OBERMAN: What was the  
4 restriction?

5 MR. RIFKIND: --physical restriction.

6 BOARD MEMBER OBERMAN: What was the  
7 physical restriction?

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

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

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

19 BOARD MEMBER OBERMAN: What's the caveat?

20 MR. RIFKIND: Well the caveat is that BN  
21 was not maintaining the line at the time. It was  
22 frequently embargoed for months at a time. And

1 during that time period, they would not have been  
2 able to bring in unit trains.

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

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

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

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

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

1 but it is certainly replete.

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

9           And I don't see--but if there is one, I  
10 want you to tell me--any limitation on the options,  
11 and there's some other language I'm going to ask you  
12 to deal with on this point, prior to this  
13 transaction for BN to provide unit service. If  
14 there's one there, I want you to point it out to me,  
15 somewhere in the law or the terms of service prior to  
16 '07.

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

21           BOARD MEMBER OBERMAN: Actually, that's  
22 not the case, is it? Because one of the

1 representations to the Board was that they were  
2 going to fix the tracks so they wouldn't be  
3 embargoed. That was part of the representation so  
4 there wouldn't be any physical limitation, as part of  
5 your own representation. So it can't be that the  
6 Board's view in '07 was to say the service that's  
7 going to continue on here is one in which the tracks  
8 are flooded several months out of the year. That's  
9 not what we ordered, is it?

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

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

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

19 CHAIRMAN BEGEMAN: The Board's decision  
20 says, "The rail options of New Century and Superior  
21 Grains will be unaffected by the proposed  
22 transaction."

1           So if that's the case, it sounds like you  
2           are affecting their options because you're not  
3           letting unit train service be provided to them.

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

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

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

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

22                 So they can solicit it, but they can't

1 provide it?

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

5 CHAIRMAN BEGEMAN: It was expired.

6 MR. RIFKIND: Absolutely, the Haulage  
7 Agreement did--well it didn't expire. It had an  
8 option to terminate that was express, as of January  
9 1st, 2017. CP initially exercised that option, but  
10 then the parties agreed on a renewal for five years--

11

12 CHAIRMAN BEGEMAN: Is the renewal document  
13 in the record?

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

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

18 MR. RIFKIND: Absolutely, because if we  
19 didn't restrict unit train service, we would  
20 undermine our ability to serve our local customers in  
21 Minot. We would undermine our ability to serve  
22 customers from British Columbia to Chicago, because

1 it would require us to block our mainline for hours  
2 at a time.

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

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

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

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

20 (Comment being made off-microphone.)

21 BOARD MEMBER OBERMAN: (Off microphone)  
22 take that as a representation that they can continue

1 to get that unit train per month going forward, if we  
2 don't rule in their favor? What assurance do they  
3 have?

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

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

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

17 CHAIRMAN BEGEMAN: But are they--

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

20 CHAIRMAN BEGEMAN: You know, I mean the  
21 Canadian Government directs you to move a certain  
22 tonnage of grain typically each year?

1                   MR. FARMER: No, that mandate has ended.  
2                   So we're not mandated to move any certain number of  
3                   tons of grain in a grain year.

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

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

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

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

22                  MR. RIFKIND: So the current limitation I

1 believe is 50 cars a week.

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

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

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

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

13 VICE CHAIR FUCHS: Yeah.

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

18 At Minot we pull across the mainline of  
19 BNSF, two tracks, there's a diamond. We cannot pull  
20 onto the mainline from the west. We actually have to  
21 pull through the mainline where we then have to pull  
22 back, shove back onto the BN mainline. We have to

1 wait for a clearance to get on the mainline.

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

6 VICE CHAIR FUCHS: But you've dealt with  
7 90 cars, right, for BN?

8 MR. RIFKIND: No.

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

12 MR. RIFKIND: So there was one instance in  
13 2014, I believe it was, when we ended up with a  
14 92-car train. And because we don't have the  
15 facilities to do it safely in--or efficiently in  
16 Minot, we actually took that train to Bowbells, which  
17 is just below Flaxton, where there is a CHS loop  
18 track facility that has dual access. And we have to  
19 use our customer loop track, a competitor of NCA's by  
20 the way, in order to interchange that train.

21 That was hugely inefficient, and is not an  
22 option that we could pursue in the future, for

1 obvious reasons.

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

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

11 MR. RIFKIND: Right.

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

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

21 BOARD MEMBER OBERMAN: So the Board was  
22 not reasonable--it was not reasonable for the Board

1 to assume under the language "shall generally accord  
2 BN the same level of service as CP's own traffic,"  
3 that those words meant what they said?

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

13 BOARD MEMBER OBERMAN: But this same  
14 level--

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

21 BOARD MEMBER OBERMAN: Well, we're going  
22 to--I'm going to get to the agreement as a whole, but

1 are we not entitled to read both the agreement and  
2 CP's representations in its Petition, together?  
3 Wasn't it an overall package you were asking the  
4 Board to consider?

5 MR. RIFKIND: Absolutely.

6 BOARD MEMBER OBERMAN: Alright, so you--

7 MR. RIFKIND: And to that I would say that  
8 you have to consider the fact that there's a 10-year  
9 term--

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

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

22 (Pause.)

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

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

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

20           I am trying to figure out what the Board  
21 understood it was doing in '07 in terms of the  
22 discussion we had earlier of whether it can enforce

1 that now. And I invite you to comment on how we're  
2 to read all of this language I just asked you about.

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

8 BOARD MEMBER OBERMAN: But "reasonably  
9 exercise."

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

13 If we were to allow unit train service,  
14 what we would be doing would be undermining the  
15 investments that we have made in our mainline,  
16 including upgrading the CTC, upgrading the rail,  
17 installing additional trackage, because those  
18 investments were intended to increase capacity on  
19 our mainline to serve Chicago, to serve British  
20 Columbia, the West Coast, they were for NCA's benefit  
21 and they were for all our customers' benefit. And  
22 what allowing unit train service in Haulage would do

1 would be to block our mainline for two, three, four,  
2 five hours at a time in order to effect the unit  
3 train interchange. That would severely undermine  
4 the capacity that we've worked--we've invested, based  
5 on our confidence in administrative finality of Board  
6 exemption decisions, we've made investments.

7 BOARD MEMBER OBERMAN: Well, Mr. Rifkind,  
8 aren't you assuming the conclusion? You seem to be  
9 saying that once you got that exemption, CP was free  
10 to do things to its line which it could then use, as  
11 you are now doing, to justify limiting what BN could  
12 do. And if in fact the reasonable construction of  
13 what our 2007 Decision meant was that you had to keep  
14 BN equal with you, then isn't it reasonable for the  
15 Board to say if CP was going to invest in its line,  
16 as you say it had, it had to do that with the  
17 knowledge that BN was entitled to provide the same  
18 service, which is what exactly you say in 4.01?

19 So I'm hearing what you're saying as  
20 saying you got that exemption in your pocket, and  
21 then you went off and privately decided to make some  
22 business decisions which would now justify your

1 coming back 12 years later and saying, you know, we  
2 could do what we wanted.

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

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

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

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

19 VICE CHAIRMAN FUCHS: No, you said, in  
20 addition to the representations, you said because of  
21 the haulage operation, the post production will not  
22 significantly increase Canadian Pacific's share of

1 the transportation service market in the region.

2 MR. RIFKIND: Correct.

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

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

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

13 MR. RIFKIND: Its market share has gone up  
14 because NCA has expanded its facilities. Now if I  
15 can just go off on a little divergent for a second,  
16 NCA also expanded its facilities in Westby, which it  
17 sole-served. So to your earlier line of questioning,  
18 you know, would NCA have made investments in Noonan  
19 had it not known, you know, would have been able to  
20 have both BN and CP provide unit train service, that  
21 is at least an open question. But I will say NCA--my  
22 understanding is, Noonan needed to be replaced

1 desperately. And not all of that investment was to  
2 the loop track. Large parts were to facilities that  
3 needed to be replaced, regardless.

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

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

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

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

1 was not the transaction itself.

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

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

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

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

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

1           MR. RIFKIND:  It's entirely speculative.  
2    I don't--I will say, the car limitation has been  
3    honored in the breach more often than as a rule--

4           VICE CHAIRMAN FUCHS:  How did you arrive  
5    at 50?

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

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

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

19          VICE CHAIRMAN FUCHS:  Right.

20          MR. RIFKIND:  We have two tracks that we  
21   use that are--they're both about 60 cars apiece.  And  
22   in order to use those for say BN traffic, because

1 they're in constant use, we have to clear traffic  
2 from those tracks. And the more cars you have coming  
3 in, you know, obviously the more congested you are.

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

7 MR. RIFKIND: Correct.

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

10 MR. RIFKIND: Thereabouts.

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

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

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

19 MR. RIFKIND: Right. Right. Exactly.

20 VICE CHAIRMAN FUCHS: And how often were  
21 block of cars exceeding 60 cars before your  
22 limitation?

1 MR. RIFKIND: I don't have that data.

2 VICE CHAIRMAN FUCHS: Okay.

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

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

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

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

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

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

22 BOARD MEMBER OBERMAN: So I want to get

1 back to trying to understand, because as you can see  
2 I am trying to understand whether we're reopening  
3 something, or enforcing something that the Board  
4 already ordered in '07.

5 So I want to focus on what was going on in  
6 '07, and we have to come to some other aspects to  
7 understand it. I don't find the word "manifest" in  
8 the original Haulage Agreement, do you?

9 MR. RIFKIND: Aw--

10 BOARD MEMBER OBERMAN: The word itself.

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

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

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

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

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

22 BOARD MEMBER OBERMAN: And it doesn't say

1 "no further"--what it says is that BN has the right  
2 to solicit business, as the Chairman brought out.  
3 But there's no explicit ban on unit trains in that  
4 agreement. I don't find that language in there.

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

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

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

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

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

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

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

21 In one oh--Section one, we describe it.  
22 In 102, the rail cars is defined as loaded and empty

1 freight rail cars to be moved in existing CPR train  
2 service under the provisions of this Agreement.  
3 That by definition precludes a unit train.

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

6 In--

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

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

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

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

22 VICE CHAIRMAN FUCHS: Stop me if I'm

1 getting us off track, but just on 205, you--it says  
2 CPR shall consider such requests in good faith, as  
3 Marty was saying, and may in its discretion permit  
4 the operation of BNSF haulage cars in excess of the  
5 existing train service capacity as specified by CPR.

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

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

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

22 And here's what I want to address--ask you

1 to address, Mr. Rifkind. In 2017 when you entered  
2 into a supplemental agreement--

3 MR. RIFKIND: Yes.

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

9 That language was added. Correct?

10 MR. RIFKIND: Correct.

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

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

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

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

20 BOARD MEMBER OBERMAN: It does say that.

21 MR. RIFKIND: Right.

22 BOARD MEMBER OBERMAN: But would you agree

1 that if the language wasn't in the original  
2 Agreement, and it was added to an agreement 10 years  
3 later, that it is reasonable for the Board to  
4 conclude that the ban was not in the original  
5 Agreement, a ban on unit trains. Otherwise, you  
6 wouldn't of had to add the language? Is that a  
7 reasonable conclusion on our part?

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

11 BOARD MEMBER OBERMAN: So you want us to--

12  
13 MR. RIFKIND: --what the prior language  
14 said.

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

22 MR. RIFKIND: I'm sorry? I'm not

1 following that question.

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

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

15 BOARD MEMBER OBERMAN: Would it--

16 MR. RIFKIND: And we did not want--we did  
17 not want there to be any--any--any confusion  
18 whatsoever, so we added the clarification language.  
19 But the language clarifies.  
20 It does not change the fact that this language in  
21 this Agreement, and in the Board's decision, and in  
22 the Joint Petition, all said existing train--existing

1 BN traffic would be handled in existing CP train  
2 service. That was the understanding at the time in  
3 2007 when the Board approved, or let the exemption go  
4 into effect.

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

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

21 BOARD MEMBER OBERMAN: Well let me pick up  
22 on that. One of the things the Board said in its '07

1 Decision is that what you were representing to the  
2 Board was that you would be, quote, "preserving  
3 competitive options" at page 3.

4 MR. RIFKIND: Which we did.

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

10 MR. RIFKIND: Which we have done--

11 BOARD MEMBER OBERMAN: Well you say you  
12 did--

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

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

21 MR. RIFKIND: We take them in joint line  
22 service. So we take them with the UP, but we provide

1 access from origin to destination.

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

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

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

16 MR. RIFKIND: That's true.

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

22 MR. RIFKIND: No, it's not a fair

1 statement because it doesn't take into account all  
2 the other steps, some of which I can discuss, some of  
3 which I don't feel comfortable discussing, that CP  
4 takes to ensure that its origins and destinations are  
5 favored.

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

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

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

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

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

22 MR. RIFKIND: Correct.

1                   VICE CHAIRMAN FUCHS: Okay, but it's not--  
2 is train service capacity different than track  
3 capacity?

4                   MR. RIFKIND: Yes, much different.

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

14                  MR. RIFKIND: Correct.

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

21                  MR. RIFKIND: Correct.

22                  VICE CHAIRMAN FUCHS: So that doesn't--and

1 that's speaking to track capacity.

2 MR. RIFKIND: That's treating to how we  
3 handle their cars and service. We have operating  
4 rules. BN has their own operating rules.

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

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

20 VICE CHAIRMAN FUCHS: But then in 2.05 you  
21 say "exceeds available capacity and CPR's existing  
22 train service, which necessitates the operation of

1 additional CPR trains to accommodate the increase."

2 MR. RIFKIND: Right.

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

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

10 VICE CHAIRMAN FUCHS: Where does it say  
11 that?

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

14 VICE CHAIRMAN FUCHS: You--2.05?

15 MR. RIFKIND: In 2.05.

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

19 It doesn't say necessary to accommodate  
20 additional cars. So capacity improvement has a  
21 specific definition. And that is, additions and  
22 betterments to the haulage route are necessary to

1 accommodate the operation of additional trains to  
2 solely handle BNSF trackage cars.

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

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

7 VICE CHAIRMAN FUCHS: Why?

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

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

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

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

16 MR. RIFKIND: Right. Right.

17 VICE CHAIRMAN FUCHS: So that's--when I  
18 hear "train start," I mean you need more power.  
19 That's an additional locomotive.

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

22 VICE CHAIRMAN FUCHS: That has nothing to

1 do with the capacity of the trains you talk about in  
2 Minot, which was solely based on cars, not based on  
3 locomotives.

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

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

10 MR. RIFKIND: It's all of it.

11 VICE CHAIRMAN FUCHS: Well--

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

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

1 number of locomotives, right?

2 MR. RIFKIND: Right.

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

6 MR. RIFKIND: Okay.

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

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

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

18 MR. RIFKIND: It's in 2.05.

19 VICE CHAIRMAN FUCHS: I agree, but it's  
20 capitalized, in quotes, which means--I think it means  
21 it has a specific definition. And the specific  
22 definition you give us "necessary to accommodate the

1 operation of additional trains." That's what  
2 "capacity improvement" that's solely handled BNSF  
3 haulage cars.

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

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

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

20 MR. RIFKIND: If I might?

21 VICE CHAIRMAN FUCHS: Yes.

22 MR. RIFKIND: What it talks about is

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

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

20 There are different reasons for the  
21 construction. And so I guess when you don't mention  
22 track capacity anywhere, and you don't mention car

1 limitations anywhere, and you're using this to  
2 justify your sole discretion, I can understand why  
3 someone might be confused that there is a car  
4 limitation.

5           Because you don't say cars or track  
6 anywhere.

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

9           VICE CHAIRMAN FUCHS: Right.

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

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

21           VICE CHAIRMAN FUCHS: I hear you. I just  
22 think--

1 MR. RIFKIND: --as you can.

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

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

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

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

18 CHAIRMAN BEGEMAN: You know, I want to be  
19 sympathetic to you, but I go back to two weeks ago  
20 where we heard that CN--and you're fighting against  
21 CN wanting to move the interchange in Spaulding in  
22 the Chicago region--CN wants to do it because of

1 their capacity constraints. They're like, no, no,  
2 no, we can't move.

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

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

8 CHAIRMAN BEGEMAN: It's all fruit.

9 (Laughter.)

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

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

19 So I find it really interesting, the  
20 approach that you're taking to this, because I can  
21 assure you this Board Member cares a whole lot about  
22 moving grain, and moving all goods across the

1 network at all parts of the country.

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

4 CHAIRMAN BEGEMAN: And your CEO, and I  
5 commend him, he's had quite a successful career at CP  
6 during these past years, and when he started like in  
7 2014 in the service crisis and the meltdown, we all  
8 said it was because of winter. In hindsight, I think  
9 it probably was because Mr. Harrison was implementing  
10 PSR at the same time and no one was looking at PSR  
11 like people were looking at crew trains moving, and  
12 winter, and so maybe it made sense to limit cars to  
13 25 in 2014.

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

21 MR. RIFKIND: CP makes money by moving  
22 traffic. And that's what we are committed to do.

1 And we make every effort to meet every customer's  
2 demand, including NCA's here.

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

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

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

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

16 MR. RIFKIND: Well--

17 (The Chairman and Mr. Rifkind speak  
18 simultaneously.)

19 MR. RIFKIND: So what we're being asked to  
20 do is undermine our ability to provide service to all  
21 the customers in the Minot area. We handle 30,000  
22 units, car units in Minot on a local basis, in

1 addition to what we provide service to NCA on. And  
2 all those customers would suffer if we were to allow  
3 unit train interchange in Minot. As well as our  
4 ability to serve customers between here--between  
5 British Columbia and Chicago, because that would  
6 require us to jam up our mainline.

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

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

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

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

22 CHAIRMAN BEGEMAN: We know what it is.

1                   VICE CHAIRMAN FUCHS: Yes. So let me--  
2 let's say for example before this transaction took  
3 place, and let's say it was '06 and New Century Ag  
4 had just completed its loop track.

5                   MR. RIFKIND: Right.

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

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

10                  VICE CHAIRMAN FUCHS: And then  
11 operationally what would happen?

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

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

18                  MR. RIFKIND: That's correct.

19                  VICE CHAIRMAN FUCHS: Okay. And, you  
20 know, in the Petition it said the proposed  
21 transaction represents merely a change in ownership  
22 of the conveyed lines, right? And it says there will

1 be no loss of rail competition. But it's not just a  
2 change in ownership. There are real operational  
3 changes here that can't take place.

4 MR. RIFKIND: Well, it--

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

13 MR. RIFKIND: Correct.

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

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

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

22 MR. RIFKIND: Before CP acquired BN's

1 interests and the maintenance obligation--

2 VICE CHAIRMAN FUCHS: Right.

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

7 VICE CHAIRMAN FUCHS: Right.

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

14 BOARD MEMBER OBERMAN: But, Mr. Rifkind,  
15 there's no--the problem I'm having with all this  
16 language is that neither you nor anybody else tried  
17 to spell out what optionality meant at the time. It  
18 was unlimited. It just said "preserve options." You  
19 didn't say the options we're preserving for NCA is  
20 that we're going to fix the tracks so there won't be  
21 any embargoes. You didn't limit it to that. It's  
22 just open-ended.

1           VICE CHAIRMAN FUCHS: Well, and it says,  
2 you know, BN will not only retain BNSF service, but  
3 will gain access to CPR. So that suggests to me,  
4 okay, they're getting increased options for CPR, but  
5 it is not clear that there will be a decrease in  
6 option for BNSF.

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

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

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

16          MR. RIFKIND: And so as a result--

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

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

21          VICE CHAIRMAN FUCHS: But you're taking  
22 away that potential option for them.

1           MR. RIFKIND: They still have the option  
2 to get BNSF service. They choose not to. Not unit  
3 train service.

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

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

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

21           MR. RIFKIND: No. What's taken--nothing's  
22 taken away. What they had before was access for

1 Manifest traffic, Manifest service. They still have  
2 that option. And now they have an additional option  
3 for CP unit train service.

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

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

16 BOARD MEMBER OBERMAN: (A few words  
17 off-microphone) conclusion right now, you know,  
18 you're just asking us to guess, aren't you, as to  
19 whether NCA would have made the investment? BN might  
20 have seen the advantage of more shuttle train service  
21 to keep up the track? I mean, you're just asking us  
22 to speculate at this point, aren't you?

1           MR. RIFKIND:  If there had been sufficient  
2 business to justify BN continuing to--or maintaining  
3 the line, or the prospect of BN getting sufficient  
4 business to maintain the line, then they wouldn't  
5 have done this transaction.  They did this  
6 transaction because they wanted to exit the line  
7 altogether.

8           CHAIRMAN BEGEMAN:  And we'll hear from  
9 BNSF, but they seem inclined, willing, wanting to  
10 provide unit train service to New Century Ag.  You  
11 seem intent on preventing that from happening.

12                   How are your actions not anticompetitive?

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

16           CHAIRMAN BEGEMAN:  Yes, you are.

17           MR. RIFKIND:  No, if they want to build a  
18 line to make an investment like the investments we  
19 have made in our lines to access--to access the NCA  
20 Noonan facility, they're certainly free to do that.  
21 But what we're saying is, you can't come in and take-  
22 -and undercut our ability to serve our other

1 customers. And you can't rewrite the economics of a  
2 deal 12 years after that deal has been done, 12 years  
3 after we've made all the investments in the line.

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

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

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

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

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

22 BOARD MEMBER OBERMAN: There was no--

1 MR. RIFKIND: --prior transaction.

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

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

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

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

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

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

22 BOARD MEMBER OBERMAN: Let me ask you this

1 question--

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

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

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

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

16 BOARD MEMBER OBERMAN: That really didn't  
17 answer my question. I'm asking as a broad legal  
18 limitation on the exercise of your discretion, which  
19 I think you'll concede is not unbridled, is one of  
20 the limitations that you can't exercise that  
21 discretion in a way that decreases competition?  
22 Would you agree with that proposition?

1 MR. RIFKIND: No, I wouldn't agree with  
2 that.

3 BOARD MEMBER OBERMAN: You have a right--

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

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

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

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

22 Under the Haulage Agreement where you say

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

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

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

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

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

20 MR. RIFKIND: But that, in and of itself,  
21 just because the effect of the decision is  
22 anticompetitive, doesn't mean we can't exercise our

1 discretion. Because there are loads of other  
2 reasons, including our ability to serve other  
3 customers, why we may not agree to allow the changes  
4 that are asked for.

5 BOARD MEMBER OBERMAN: So--

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

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

20 MR. RIFKIND: I believe--I can't say it's  
21 impossible. I think--I think it would be very, very  
22 difficult to find the space in order to do that.

1 There are physical limitations in downtown Minot.

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

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

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

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

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

22 So what's in the record to tell us that it

1 would hurt other shippers if NCA gets the relief it's  
2 asking for? I don't see it here.

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

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

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

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

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

19 BOARD MEMBER OBERMAN: I don't think  
20 Bartlett was a party to that proceeding, but they had  
21 no trouble petitioning us and saying they wanted to  
22 be heard. So I don't hear it in this case.

1           I have a couple of other factual areas I  
2 wanted to just cover quickly. You--I asked Mr.  
3 Michelson this question about--Mr. Wood is not here,  
4 I take it?

5           MR. RIFKIND: He is not here.

6           BOARD MEMBER OBERMAN: Well perhaps you  
7 can address it. If not, we won't have an answer.  
8 Mr. Wood filed a verified statement saying he told  
9 these folks at NCA prior to 2013, the quote in his  
10 affidavit is that the Haulage Agreement did not  
11 provide for service by BN unit trains.

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

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

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

20           MR. RIFKIND: To provide context.

21           BOARD MEMBER OBERMAN: Well, if I'm going  
22 to understand the context, don't I have to figure out

1 whether that conversation took place or not? Or why  
2 didn't you just say it's irrelevant, we're not going  
3 to address it?

4 MR. RIFKIND: I didn't say it was  
5 irrelevant. I said you don't need to decide it.  
6 Because in order to decide this case, this  
7 proceeding, whether to reopen it, the standard is: Is  
8 there new evidence? Is there a change in  
9 circumstance, or a material error that would have  
10 mandated a different result?

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

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

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

19 MR. RIFKIND: Yep.

20 BOARD MEMBER OBERMAN: --is that I don't  
21 think Mr. Greenberg is asking for a different result.  
22 He's asking to enforce the result he thought he had

1 in '07. And what I'm trying to figure out is that,  
2 if in fact your contentions are the correct ones,  
3 that unit trains were not allowed under the Haulage  
4 Agreement, under this Board's 2007 Order, then it  
5 would be relevant to me if a CP person prior to this  
6 litigation actually said so in 2013. Because that  
7 would have given Mr. Greenberg an opportunity in 2013  
8 to come in here and say we disagree. We want a  
9 declaratory judgment as to what the '07 Order meant.

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

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

22 MR. RIFKIND: Let's assume--

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

12                   MR. RIFKIND: Let's assume that CP didn't-  
13 -they did, but let's assume they didn't. There is  
14 still an issue here with the fact that in the record,  
15 and as you said the Haulage Agreement is part of the  
16 record and has to be read in context, in the record  
17 there's a clear possibility that come January 1,  
18 2017, the Haulage Agreement will be terminated. So  
19 the question about whether the investment was made  
20 based on an expectation of BN unit train service to  
21 me seems a little beside the point.

22                   BOARD MEMBER OBERMAN: I think the only

1 thing I would disagree with you, Mr. Rifkind, is the  
2 word "clear." I think very little in this case so  
3 far has been clear. I think it's up to this Board to  
4 try to figure out what did happen, and what our own  
5 Order meant, and whether CP is living up to it.

6 I have one other area that I wanted to--

7 MR. RIFKIND: But can I just address  
8 your--

9 BOARD MEMBER OBERMAN: Sure.

10 MR. RIFKIND: --the clarity of the  
11 termination provision. Section 9.02 says: Either  
12 party shall have the right to terminate the agreement  
13 at any time after the initial term. Section 9.01  
14 says that the agreement will remain in effect until  
15 January 1, 2017 ("initial term").

16 BOARD MEMBER OBERMAN: I see that  
17 language, and I also heard Mr. Greenberg and Mr.  
18 Michelson say that if you had come to this Board in  
19 '07 and said on 2017 BN service will terminate, they  
20 would have bitterly fought your exemption. And  
21 there's no reason to know that the Board, which  
22 emphasized competition, said we only care about

1 competition for 10 years, after that we don't want to  
2 competition there.

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

10           So I'm having trouble seeing that somehow  
11 this Board got boxed in about not being able to  
12 ensure competition in an industry which everybody  
13 agrees has a long-term existence, that was only for  
14 10 years.

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

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

22           Now when we did the transaction, we didn't

1 know whether on January 1st, 2017, we would move to  
2 terminate, or BN might move to terminate. Either one  
3 of us could have. But--so that decision is not  
4 because of the transaction. It is because--that  
5 decision gets taken in the context of the 2017 or  
6 2019, or what have you. But when it subsequently  
7 comes up for renewal. Right now we have no reason to  
8 think we wouldn't renew in three years when it's up  
9 for renewal again. But that decision will be made in  
10 the appropriate context, but that has to do with the  
11 circumstances of today and not the transaction of  
12 yesterday.

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

16 MR. RIFKIND: Absolutely.

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

1 us this option and you're not giving it to us.

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

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

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

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

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

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

18 MR. RIFKIND: We make investment decisions  
19 throughout this period of time. We have--initially,  
20 our initial investment was in buying the line itself.  
21 And then funding the upgrades to address the flooding  
22 issues.

1                   BOARD MEMBER OBERMAN:   When did you start  
2 funding those?

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

5                   BOARD MEMBER OBERMAN:   Did you--

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

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

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

1 in 2014.

2 And let me point to Laches again. Because  
3 let's say that you gave them a pass. You said, okay,  
4 2014 is when you first learned you wanted to get unit  
5 train service. I don't believe that's true, but  
6 let's say that--

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

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

11 CHAIRMAN BEGEMAN: Okay. Thank you.

12 MR. RIFKIND: --clearly, as--

13 CHAIRMAN BEGEMAN: It didn't.

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

16 BOARD MEMBER OBERMAN: Okay--

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

22 BOARD MEMBER OBERMAN: Well today we are,

1 but they filed the Petition last year. So it's '14  
2 to '18.

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

6 BOARD MEMBER OBERMAN: Were you still  
7 making new investments in the line between '14 and  
8 '18? What were you doing?

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

11 BOARD MEMBER OBERMAN: What was new?

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

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

21 MR. RIFKIND: I'm not sure what we would  
22 have done, but we would have had the information to

1 make the decision at that point.

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

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

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

18 BOARD MEMBER OBERMAN: Well--

19 MR. RIFKIND: And so it's hard for me to  
20 sit here today and say, no, we wouldn't have made  
21 that investment, but I can't say we would have,  
22 either.

1                   BOARD MEMBER OBERMAN: Well, Mr. Rifkind,  
2 two things. To me, detrimental reliance had to be a  
3 decision by CP to say: Because we are confident there  
4 will be no unit trains from BN in 2014 and  
5 thereafter, we're going to take certain actions. I  
6 don't hear that. All I hear is, possibly.

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

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

18                   MR. RIFKIND: Well I think what they wrote  
19 in their Petition was that they indeed did sit on  
20 their hands, because they no longer had a need for  
21 additional unit train service in 2015 and 2016 and  
22 2017 because their crop years were not that good. So

1 they just dropped it.

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

6 MR. RIFKIND: Well, exactly. So if in  
7 2014 they have a need and they feel that it needs to  
8 be addressed, just because they have a bad crop year  
9 in the next year doesn't relieve them of the  
10 obligation at that point to act on their future need.

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

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

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

22 MR. RIFKIND: Right.

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

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

18                  And I think what New Century Ag is putting  
19   forward is not that something was materially  
20   affected, it's that they need to enforce something  
21   that already existed.  There is no material effect.  
22   And so I think what I heard you say, David, is that

1 you think that this is a more appropriate case  
2 (microphone goes out).

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

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

18 VICE CHAIRMAN FUCHS: What if it was a  
19 foundation to the transaction? In other words, the  
20 Board had a clear demonstrated understanding and  
21 would not have allowed the transaction or the  
22 exemption to--or would not have granted the exemption

1 if this condition did not--if this fact pattern did  
2 not hold. In other words, would that be sufficient  
3 grounds for enforcement?

4 MR. RIFKIND: I don't believe so. First  
5 of all, you're talking about enforcement. And  
6 there's nothing to enforce. The representations that  
7 were made, but not conditions that were imposed, so  
8 the Board would be changing the transaction entirely  
9 12 years, in this case, 12 years after the  
10 transaction was consummated.

11 BOARD MEMBER OBERMAN: Let me ask this  
12 question, Mr. Rifkind. By the way, what the April  
13 22nd Decision of the Board said was that the  
14 allegations may be more appropriately addressed, or  
15 are more appropriately addressed. It was a  
16 suggestion. We never made a finding of that.

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

21 If your Petition in '07 said we're going  
22 to preserve competition. We understand NCA's

1 negotiating with BN for unit train service, and this  
2 will preserve their right to get unit train service  
3 on that line if it ever comes to pass. And you made  
4 that representation. And then the Board said, you  
5 know, we're going to exempt this transaction because  
6 CP tells us it will preserve competition, including  
7 the option for unit train service.

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

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

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

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

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

21 BOARD MEMBER OBERMAN: Can you answer the  
22 question? If you can't answer it, just tell us.

1 MR. RIFKIND: Well, you know, I think it  
2 depends on a variety of factors, but I would say  
3 probably not.

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

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

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

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

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

22 BOARD MEMBER OBERMAN: You think fraud is

1 the only standard?

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

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

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

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

18 But if what we're experiencing with this  
19 particular proceeding is--you know, I don't want  
20 future exemption proceedings to become overly  
21 complex, and for every exemption to have to have  
22 language similar to merger proceedings saying we hold

1 you to your representations. And so I'm just worried  
2 that this is a slippery slope that the industry is  
3 not going to appreciate at all as far as what the  
4 Board may have to do in future cases.

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

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

20 That was your representation. And you  
21 come back to "preserving competitive options" is not  
22 just happy talk.

1 MR. RIFKIND: It's not, and--

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

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

12 Is that really the standard you're  
13 setting--

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

16 BOARD MEMBER OBERMAN: Well you said  
17 "fraud."

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

22 BOARD MEMBER OBERMAN: How else would you

1 prove the fraud? Really, I mean aren't you imposing  
2 an almost impossible standard on this Board trying to  
3 preserve competition?

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

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

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

20 New Century Ag has moved more grain today  
21 than it did back then. And for most of that time  
22 BNSF was a dominant competitor on the line.

1                   BOARD MEMBER OBERMAN: So your contention  
2 is that the representations about preserving  
3 competition are met if some people get competition  
4 but others get less?

5                   MR. RIFKIND: My representation--

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

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

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

18                  That's what it says. Options.

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

21                  BOARD MEMBER OBERMAN: It says both. One  
22 doesn't exclude the other. It says that present

1 access will be preserved, and its options will be  
2 preserved.

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

9 (Pause.)

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

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

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

15 BOARD MEMBER OBERMAN: No, I have it.

16 (Speaking off-microphone.)

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

19 (Pause.)

20 BOARD MEMBER OBERMAN: (Off-microphone).

21 MR. RIFKIND: Actually, if I could read  
22 it, because I think you--

1 BOARD MEMBER OBERMAN: I--

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

7 Alright? So existing BNSF traffic.

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

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

19 BOARD MEMBER OBERMAN: Your Joint Petition  
20 goes beyond that. But as the Chairman pointed out, we  
21 relied on your representations and only NCA's lack of  
22 opposition, which they say they would have

1 vigorously asserted had they known what your plans  
2 were in the future.

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

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

20 CHAIRMAN BEGEMAN: It also says that  
21 Petitioners have requested expedited action on the  
22 Petition for Exemption, which the Board of course

1 found reasonable for a number of reasons. So there  
2 was a reason that the Board went lickety split.

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

9 CHAIRMAN BEGEMAN: That will conclude your  
10 20 minutes, and we will now ask BNSF. Thank you.

11 MR. RIFKIND: Thank you.

12 CHAIRMAN BEGEMAN: Okay, we will resume.  
13 Thank you.

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

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

20 I am joined here today by Courtney Estes,  
21 Associate General Counsel for BNSF, and we appreciate  
22 the opportunity to appear here.

1           Given that our substantive filings in this  
2 proceeding have been minimal, my opening remarks will  
3 be brief. But Ms. Estes and I are happy to take  
4 questions from the Board.

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

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

19           As we've expressed in our filings in this  
20 proceeding, it's been our sincere desire to reach a  
21 commercial deal that meets the needs and expectations  
22 of all the stakeholders here. And we believe

1 Board-sponsored mediation would be helpful in  
2 resolving this matter.

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

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

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

21 And from the record, and CP's counsel's  
22 comments, we understand that that's because of

1 congestion on their--in Minot, and on their on-Portal  
2 Sub.

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

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

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

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

21 MS. ESTES: Yes.

22 BOARD MEMBER OBERMAN: And you wouldn't

1 have to stop and block the crossings in Minot?

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

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

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

17 MS. ESTES: We haven't studied it in  
18 detail. We haven't done an engineering study to see  
19 what exactly would be needed. But just looking at  
20 what's on the ground, I do understand the issue with  
21 the--with the CP Minot Yard where it does block the  
22 Main. And you've got some bridges there, and so you

1 have to pull completely past the Soo Tower to clear  
2 the Diamond.

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

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

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

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

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

18 MS. ESTES: CP has declined that use.

19 BOARD MEMBER OBERMAN: Did they give you a  
20 reason?

21 MS. ESTES: Not to my knowledge.

22 BOARD MEMBER OBERMAN: NCA says that you

1 can provide them with unit trains I think for Beans,  
2 to the--is it Beans that you need to take to the PNW?

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

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

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

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

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

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

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

22 BOARD MEMBER OBERMAN: And do I understand

1 you don't add--if you had that unit train, you don't  
2 add a fuel surcharge to the PNW?

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

7 BOARD MEMBER OBERMAN: Alright, thank you.

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

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

22 MR. DENTON: Are you referring to Section

1 2.3 of the Sale Agreement?

2 CHAIRMAN BEGEMAN: I don't know.

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

6 CHAIRMAN BEGEMAN: To solicit additional--

7

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

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

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

21 CHAIRMAN BEGEMAN: Have you successfully  
22 solicited additional rail transportation?

1           MR. DENTON: I think we could probably  
2 supplement the record, but I'm not sure if we have  
3 the answer to that.

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

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

12           MR. DENTON: No.

13           BOARD MEMBER OBERMAN: No?

14           MR. DENTON: No.

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

18           MR. DENTON: Say that one more time?

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

22           MS. ESTES: No, we did not. The parties

1 have disputed that. We haven't arbitrated it. There  
2 is an arbitration provision. But we have had  
3 disputes over the years with CP as to whether they  
4 could limit us. And I'm not talking about unit  
5 trains right now, I'm just talking about a limit of  
6 50 a week--

7 VICE CHAIRMAN FUCHS: Of--

8 MS. ESTES: --correct.

9 VICE CHAIRMAN FUCHS: Right.

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

13 VICE CHAIRMAN FUCHS: Right.

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

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

20 MS. ESTES: Sure. So under Section 2.02,  
21 CP shall afford BNSF haulage cars the same type and  
22 levels of service--

1 VICE CHAIRMAN FUCHS: Yeah.

2 MS. ESTES: --as it does for its own  
3 traffic. And then if you continue on, in Section  
4 2.04, and I believe also in Section 4.01 where CP  
5 will provide us haulage cars in their existing  
6 available train capacity.

7 VICE CHAIRMAN FUCHS: Right.

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

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

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

21 VICE CHAIRMAN FUCHS: Right.

22 MS. ESTES: But if a CP train has room,

1 then you'd take our cars.

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

5 MS. ESTES: Yes.

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

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

16 VICE CHAIRMAN FUCHS: You would think  
17 with a limitation on capacity and an agreement that  
18 addresses Minot Exchange Tracks, you would think that  
19 it would clearly spell out that if the Minot  
20 Exchange Tracks by definition could have a certain  
21 capacity of 50 or 60 cars, you would think that the  
22 agreement would spell that out?

1 MS. ESTES: It would probably have made  
2 this easier if it did. I would agree with you.

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

7 MS. ESTES: Yes.

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

14 MS. ESTES: Yes.

15 VICE CHAIRMAN FUCHS: So that's no  
16 problem?

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

22 VICE CHAIRMAN FUCHS: Yeah, okay. And--

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

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

16 VICE CHAIRMAN FUCHS: And in that  
17 instance, you know, we--or it has been said that our  
18 competitive access regulations in precedent with Midtec,  
19 a certain volume of people think it's too  
20 high. Is it a fair summary to say that in that case  
21 what the Board said is for the public interest  
22 standard in terminal trackage rights we're not going

1 to do what's traditional because we have this  
2 previous case that we don't want to reopen, but  
3 instead we're going to use the enforcement of the  
4 general essence of the merger conditions as the  
5 public interest standard?

6 Is that a fair summary?

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

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

1 interest standard here is, you know, enforcing, you  
2 know, kind of the general essence of the  
3 representation.

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

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

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

12 CHAIRMAN BEGEMAN: Do you mean your Yard?

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

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

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

21 Then we have to put somebody, a conductor  
22 on the end of the train, hanging on to the car, and

1 we have to shove that train back onto BN's Mainline.  
2 And then we have to get the conductor off, get him to  
3 the front--

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

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

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

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

22 BOARD MEMBER OBERMAN: You're--let me see

1 if I understand this, though. If you were taking--if  
2 you were sending a locomotive to the Gavin Yard to  
3 pick up a unit train that BN assembled there--

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

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

9 MR. RIFKIND: It does.

10 BOARD MEMBER OBERMAN: Pardon?

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

14 BOARD MEMBER OBERMAN: As it's going  
15 westbound?

16 MR. RIFKIND: --and then pull west.

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

22 MR. RIFKIND: That's correct

1                   BOARD MEMBER OBERMAN: Without back--where  
2 does it back? Thee's no--

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

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

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

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

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

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

22                   MR. RIFKIND: That's correct. And BN

1 has--

2 BOARD MEMBER OBERMAN: Is that what  
3 happens now with all of the 15 cars a day, or  
4 whatever?

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

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

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

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

17 MR. RIFKIND: The only exception was the  
18 92 cars that we have to take to a customer facility  
19 in order to interchange.

20 BOARD MEMBER OBERMAN: So let me just ask  
21 this question, though. Even after you make that  
22 move, when you get to Noonan and the train is loaded,

1 if it's going to the PNW it's just going to keep  
2 going west, right? It's not coming back to Minot?  
3 Or is it?

4 MR. RIFKIND: I'm--

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

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

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

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

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

22 MR. RIFKIND: Well DMVW takes it to

1 Flaxton. At Flaxton we pick it up and we take it to-  
2 -north--

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

7 MR. RIFKIND: Yes.

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

14 MR. RIFKIND: That's correct.

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

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

20 MR. RIFKIND: Is this for--

21 BOARD MEMBER OBERMAN: Anybody.

22 MS. ESTES: It's BNSF's track. So we

1 could go west out of Minot to Berthold. We would  
2 then go north up to Niobe. The track between Niobe  
3 and Lignite is not in service. And then if we were  
4 to continue up north to try and connect with CP,  
5 there is not a connection at Bowbells.

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

10 MS. ESTES: So BNSF owns between Niobe and  
11 Mile Post 47. That track, the first couple of miles  
12 are used for car storage. The right-of-way is there,  
13 but the track is not in great shape. There's about  
14 15 public crossings, public and private crossings  
15 along there.

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

18 MS. ESTES: We haven't done a strategic  
19 study to understand just how much that would cost,  
20 but we have--mainly because it's not what the  
21 customer is asking here--asking for here. But we  
22 have just preliminarily looked at it. And I mean

1 we're talking significant investment in the, you  
2 know, ten million dollars or more just to get to  
3 Milepost 47.

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

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

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

17 BOARD MEMBER OBERMAN: Okay, thank you.

18 VICE CHAIRMAN FUCHS: If, let's say you  
19 have 49 cars of New Century Ag and you're coming down  
20 to Minot to go west on the BN, what is the blockage  
21 in Minot for that? You just get it on the other  
22 track and there's no blockage?

1           MR. RIFKIND: No, there is blockage. But  
2 it depends on a variety of factors. For instance, we  
3 have to wait for BN to allow us access to, first, to  
4 cross their Mainline. They have a double main there.  
5 That can take a while. Then we have to wait for  
6 access. Assuming they're ready for interchange and  
7 we don't have to yard it, we need to wait for them to  
8 allow us to come onto their Main.

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

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

18           VICE CHAIRMAN FUCHS: Can you ballpark it?

19           MR. FARMER: No, I wouldn't ballpark  
20 it. We'd have to do an operational study. We know,  
21 just intuitively based on what our operations are  
22 telling us, that it can take hours. But it also

1 depends on how much traffic the BN would have coming  
2 over their Mainline. There's all kinds of factors I  
3 don't know right now.

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

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

18 VICE CHAIRMAN FUCHS: Right.

19 MR. FARMER: So if you had 49 cars, you  
20 have at least one track full, you can pull that down  
21 into the yard so you can still move your Mainline and  
22 wait for the BN to be ready for the interchange.

1 With a train, you can't do that. You have to have  
2 the yard completely empty.

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

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

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

11 MR. FARMER: Yes.

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

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

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

22 MR. FARMER: Okay, yeah, just coming

1 back, as David had described earlier, we have to come  
2 straight down our Mainline. So we would be pulling,  
3 then. Coming down we would pull across the BN Main  
4 down into the yard, and yard the cars.

5 VICE CHAIRMAN FUCHS: I see.

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

9 VICE CHAIRMAN FUCHS: Yep. Okay.

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

13 MR. RIFKIND: In a word--

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

16 MR. RIFKIND: In a word, trees.

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

19 MR. RIFKIND: Yeah, that line has not been  
20 used since the transaction. It has not been  
21 maintained, so it's--I don't know. I haven't gone  
22 out to see--

1                   CHAIRMAN BEGEMAN: But it's not abandoned,  
2 technically?

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

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

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

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

20                  MR. RIFKIND: So we--I'm not sure which  
21 direction we're bringing in the unit trains, but when  
22 we exit loaded. So DMVW will pull the train to

1 Flaxton, where we will take the train north into  
2 Canada and bring it over to King's Gate, if it's  
3 going to the PNW, and deliver it there.

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

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

10 MR. FARMER: Yes.

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

13 MR. FARMER: The same thing, in  
14 reverse.

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

21 MR. DENTON: BNSF thinks that both parties  
22 did an effective job of setting out the various legal

1 standards, and we don't have anything further to add  
2 on that.

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

9 Is it your view that these representations  
10 still hold today?

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

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

21 MR. DENTON: Consistent with the terms of  
22 the supplemented Haulage Agreement, yes, we do.

1                   VICE CHAIRMAN FUCHS: But it says that  
2 there will be no loss of rail competition. You think  
3 that's true?

4                   MR. DENTON: Today, yes, that's true.

5                   VICE CHAIRMAN FUCHS: Okay. And you also  
6 think that the transaction was merely a change in  
7 ownership?

8                   MR. DENTON: I think the transaction was  
9 set out in the various terms of the purchase and sale  
10 agreement, and the accompanying Haulage Agreement,  
11 which everyone had access to.

12                   BOARD MEMBER OBERMAN: I'm sort of  
13 curious. Did you say that you thought the documents  
14 of the transaction viciated the representations in  
15 the Petition?

16                   MR. DENTON: Yeah, it's probably not the  
17 exact right word. What I was saying is that the  
18 transaction was brought before the Board. The  
19 parties, CP had the obligation to get Board approval  
20 for this. Both BNSF and CP came to the Board  
21 together, because BNSF also wanted the transaction  
22 very much so to go through. And we explained the

1 reasoning behind the transaction and what we saw as  
2 the going forward operations.

3 The Board took all this into account and  
4 decided that the otherwise applicable prior review  
5 and approval requirements would not be necessary in  
6 this case.

7 BOARD MEMBER OBERMAN: Are you saying that  
8 in a transaction of this nature it's the Board's job  
9 to read the Petition, then read the underlying  
10 documents, and discern whether there's any  
11 contradictions? And if there is, only rely on the  
12 underlying documents and ignore what's in the  
13 Petition? Is that what you're saying?

14 MR. DENTON: I don't--I don't--I'm not  
15 saying that. And I also don't believe that there are  
16 contradictions between what we said in the documents.

17 BOARD MEMBER OBERMAN: Well that may be.  
18 We're trying to--obviously we're struggling with  
19 that. But aren't we entitled to rely on the  
20 representations in the Petition that the parties are  
21 telling us, as well as the underlying documents?

22 MR. DENTON: Yes. And I think the Board

1 did rely on that in 2007 in granting the exemption.

2 BOARD MEMBER OBERMAN: Well maybe so, but  
3 there seem to be an awful lot of examples in the  
4 railroad industry that I've discovered where we see  
5 documents saying two things, but everybody works it  
6 out. And there's a sentiment here, as we said  
7 earlier, for people to work things out regardless of  
8 parsing, which is I think a lot of what's been doing  
9 on here, by all of us, all of the words to try to  
10 figure out what's going on. So I'm having a little  
11 trouble with saying that somehow we are supposed to  
12 discern whether there's a contradiction.

13 I think there's a huge debate in this room  
14 whether there is a contradiction between the terms.  
15 And it's ultimately, we're the ones who have to make  
16 a decision. That's why I asked earlier if it was  
17 reasonable for us to rely, for example, on a change  
18 in the language in the Haulage Agreement to mean that  
19 the first one didn't ban unit trains. I'm having  
20 trouble saying, no, we should have intuitive that  
21 they meant it all along, they just didn't say it  
22 clearly. That's quite a burden, if the parties

1 aren't educating us on it. So that's why I'm having  
2 trouble with what you're saying.

3 VICE CHAIRMAN FUCHS: But just kind of  
4 piggybacking on that a little bit, I think the way I  
5 heard you--and correct me if I'm wrong--the way I  
6 heard you is, you know, you retain the right to  
7 serve all customers. Just look at the Haulage  
8 Agreement, right?

9 MR. DENTON: Right.

10 VICE CHAIRMAN FUCHS: But you two disagree  
11 on what the limitations are on the Haulage Agreement.  
12 In other words, you think the Haulage Agreement  
13 allows you to serve those customers without a  
14 limitation on cars. They think the Haulage Agreement  
15 allows you to serve those customers with a limitation  
16 on cars.

17 So if you all don't have a common  
18 understanding of what the Haulage Agreement is, then  
19 you don't have a common understanding of what it  
20 means to retain the right to serve all customers.

21 MR. DENTON: I think there are always  
22 going to be disputes over the terms of various

1 agreements. I think the real issue here is that  
2 there's a transaction that was exempted in 2007. The  
3 parties are doing their best to live up to the terms  
4 of those--of the transaction from 2007. And going  
5 back and, you know, reopening the exemption and  
6 potentially revoking or unwinding, we think those  
7 are all very extraordinary remedies that would be--  
8 could have a potential chilling effect--

9 VICE CHAIRMAN FUCHS: And I agree with you  
10 there, but I guess my question is: Do you think that  
11 there is no loss in competition under the Haulage  
12 Agreement that has no limit on cars? Or do you  
13 think it is also true that there's no loss in  
14 competition for a Haulage Agreement that has a limit  
15 on cars?

16 In other words, is there no loss in  
17 competition even though CP has a limit on cars?

18 MS. ESTES: So, I think, as I said  
19 earlier, in practice the limitation on the  
20 less-than-unit trains we've worked out. So I mean on  
21 the ground, operating folks have worked it out. So  
22 from that perspective, I would say there's no loss of

1 rail competition even with--because that limitation  
2 has not been enforced. We've gotten letters over the  
3 years. It hasn't been enforced. But when we--

4 VICE CHAIRMAN FUCHS: But if it were--  
5 sorry. Go on.

6 MS. ESTES: Well, and when the Agreement  
7 is renewed and supplemented to have an additional  
8 five years, BNSF tried very hard to get unit train  
9 service explicitly in that agreement. Because that  
10 was an open question.

11 VICE CHAIRMAN FUCHS: So you're saying  
12 there's no loss in competition because the limit has  
13 not been enforced?

14 MS. ESTES: Well I think that's--

15 VICE CHAIRMAN FUCHS: If the limit was  
16 enforced, would there be a loss of competition?

17 MS. ESTES: That may be something we would  
18 be arguing. That's not the facts today. I mean the  
19 facts today are that--

20 VICE CHAIRMAN FUCHS: But that's your  
21 interpretation of the Haulage Agreement, that it  
22 doesn't allow for a limitation of cars, right? And

1 that's when you said--but if you did not work out the  
2 fact that you could--and let's say for example that  
3 CP made a hard-and-fast 50 limit. Would you say  
4 then, in that circumstance, there would be a loss of  
5 competition?

6 MS. ESTES: I think in that circumstance  
7 we would be looking at the Haulage Agreement to see  
8 whether we would be arbitrating over what existing  
9 train capacity and "same level of service" means.

10 BOARD MEMBER OBERMAN: Can we infer from  
11 what you just said that BN tried hard to get in the  
12 supplemental agreement permission to use unit trains?  
13 Can we infer that BN believes that it's practical to  
14 provide unit train service through one of these moves  
15 that you've described, as contrasted to what Mr.  
16 Rifkind is saying?

17 MS. ESTES: Well, yes, we believe that we  
18 should--you know, would like to have unit train  
19 service via CP haulage. But I do understand the  
20 concerns that CP has raised about this move from  
21 getting from the Portal Sub to the BNSF Sub. And I  
22 think I earlier probably muddled that a little bit,

1 but that seesawing happens regardless of which yard  
2 is used. If there's a capacity constraint in a yard,  
3 we are willing to offer our yard.

4 BOARD MEMBER OBERMAN: But you weren't  
5 asking for something in a contract which you thought  
6 was impractical to implement. That's all I'm trying  
7 to figure out. You could implement it in a  
8 pragmatic fashion?

9 MS. ESTES: That's right, it--

10 BOARD MEMBER OBERMAN: You still do.

11 MS. ESTES: Yes. That move is being done  
12 today with Manifest cars, and we would say that move  
13 could be done with unit trains if the Board finds  
14 that that's a result that's needed here.

15 BOARD MEMBER OBERMAN: And do you think  
16 that's the only way to get the unit trains up there?  
17 Or are there alternatives?

18 MS. ESTES: That is, from our preliminary  
19 review that is--that is--the Minot interchange  
20 appears to be the only--the only alternative.

21 CHAIRMAN BEGEMAN: I just have one last  
22 question. So one sentence of the Board's 2007

1 Decision said the rail options of New Century and  
2 Superior Grain will be unaffected by the proposed  
3 transaction.

4 So given sort of the back-and-forth that  
5 you've had with my colleagues, do you think that  
6 sentence has lived up to reality?

7 MR. DENTON: I think that's right. I  
8 think that currently, and under the Haulage  
9 Agreement, BNSF has the ability to serve them just as  
10 BNSF had the ability to serve them before the  
11 transaction. And--

12 CHAIRMAN BEGEMAN: But it says the "rail  
13 options will be unaffected."

14 MR. DENTON: I can't speak to what exactly  
15 the meaning of the "rail options" was. But the way I  
16 think it's reasonable to interpret that is the  
17 ability to serve--BNSF having the ability to serve,  
18 and CP having the ability to serve.

19 BOARD MEMBER OBERMAN: They don't have the  
20 same ability to serve because they're bringing in  
21 unit trains and you're not. That's the problem.

22 CHAIRMAN BEGEMAN: The options are

1 constrained.

2 MR. DENTON: Yeah, I think we were not  
3 bringing in unit trains prior to 2007, either. I  
4 think the options are the same. We provide similar  
5 service via CP haulage.

6 BOARD MEMBER OBERMAN: CP wasn't bringing  
7 in unit trains, either. So now they have an option,  
8 and you don't. You know, we're dancing on the head  
9 of a pin here.

10 MS. ESTES: I mean, I think that's right.  
11 I think that is why this is so complex. But again, I  
12 mean we have to take into account the condition of  
13 the line at the time we sold it. And, you know,  
14 BNSF was looking at all options to divest of the  
15 line. And in this business, you know, the rail  
16 service was in jeopardy of going away because the  
17 line was in need of maintenance that BNSF didn't find  
18 was necessary and commensurate with the type of  
19 volume of traffic on that line.

20 So as we looked at--you know, our  
21 projections were that the traffic was going to away.  
22 And we're looking at, you know, 200 cars a year. And

1 when we divest of the line there was no--you know,  
2 there was no projection that there would be unit  
3 train service at this customer location.

4 BOARD MEMBER OBERMAN: Well you couldn't  
5 have abandoned that line without our permission,  
6 however. And if you were not providing service  
7 because it wasn't maintained, we had the power to  
8 order it.

9 So what I'm looking at is really not so  
10 much dancing on the head of the pin. I'm looking at  
11 the Board's emphasis on competition, and the RTP,  
12 which requires us, among other things, to ensure  
13 effective competition.

14 I think what the Board is required to do  
15 is to keep the broader economic mandates that we got  
16 from the Congress in mind in trying to figure out  
17 these things. And everything directs us to ensure  
18 that service, and rates, and so forth, are handled  
19 not by our saying what the service has to do, but by  
20 competitive forces sorting it out.

21 And when competition is cut off, then it  
22 seem to me that part of the statute is not being

1 fulfilled. So when the Board used these words, I  
2 have to assume that the Board was using the words  
3 mindful of its statutory mandate regardless of what  
4 the parties were negotiating in their private, poorly  
5 crafted agreements, quite frankly.

6 So I don't know if you disagree with that.  
7 If you do, I'd like to hear it.

8 MS. ESTES: I don't have any comment on  
9 that.

10 VICE CHAIRMAN FUCHS: Just one more from  
11 me. You all have raised a couple of times just the  
12 fact that we would be reopening something 12 years  
13 later. And, you know, we've asked a number of  
14 questions about, you know, whether or not it meets  
15 the Board's reopening precedent, but I want, just as  
16 a practical matter: What is your view saying that the  
17 line was in poor condition before the transaction  
18 about CP's investments in the track? Do you think  
19 that it's a fair statement to say that CP has made  
20 investments in the track to provide a higher level of  
21 service that would not have been made otherwise for  
22 the transaction?

1 MS. ESTES: I think that is fair, yes. We  
2 would not disagree with that.

3 CHAIRMAN BEGEMAN: We will now return to  
4 New Century Ag for their five minutes of rebuttal.  
5 Thank you.

6 And, Mr. Greenberg, this was a little, I  
7 guess, free-flowing, and I don't want your table to  
8 feel excluded from that. So if you need to go over  
9 your five minutes to comment on any of the  
10 discussion, you're welcome to have six.

11 (Laughter.)

12 MR. GREENBERG: Thank you very much.

13 I'm sitting here and I'm thinking--and I  
14 don't mean to say this in a jocular fashion--but I'm  
15 listening to what appears to me to be a case of a  
16 reluctant bridegroom.

17 This case was brought, seriously, by NCA  
18 because it wasn't getting reliable car service from  
19 BN. There were arbitrary limits being brought. They  
20 believed, having talked to BN, that they would be  
21 able to get unit train service. And now we hear the  
22 railroads walking away.

1           There may be a different way of taking it,  
2 but I must say I am pretty upset. It's wrong.  
3 What's the shipper community going to think the next  
4 time the railroads file an exemption? It can't be  
5 enforced? If they violate the terms of the  
6 exemption, is nobody going to take them to task,  
7 because you can't reopen a proceeding because it  
8 can't be enforced, an exemption proceeding?

9           So when you're talking about how important  
10 exemptions are to the rail community, just think  
11 about how important they are to the shipper  
12 community. They are there for a reason. But it's not  
13 one-sided. And what I'm hearing today, it makes it  
14 seem very one-sided. I think it is really  
15 inappropriate.

16           So terminal trackage rights. You asked  
17 about the situation in the UPSP case, BNSF trackage  
18 rights in KCS, in a KCS case. Now in that case,  
19 you're correct, the Board did say that it could avoid  
20 the Midtec decision, the Midtec conditions, because  
21 the Board concluded that terminal trackage rights are  
22 in the public interest when they're essential to

1     effectuate merger conditions. This is not a merger  
2     case.

3                     So if you're going to talk about  
4     competitive access, we're back to Midtec, aren't we?  
5     We're back to Midtec. And CP said the reason why we  
6     said no was because we couldn't win under Midtec  
7     and they're right.

8                     VICE CHAIRMAN FUCHS: But in our first  
9     exchange, you equated the merger condition to the  
10    representations in the exemption.

11                    MR. GREENBERG: Oh, that's right.

12                    VICE CHAIRMAN FUCHS: So I guess what I'm  
13    asking is: Could there be an adaptation of the same  
14    reasoning that the Board used there in saying, not  
15    effectuate a merger condition, but to effectuate the  
16    findings that it had in the exemption. That's the  
17    public interest standard?

18                    MR. GREENBERG: Perhaps. It would be  
19    unprecedented, though. So we'd be looking at--and  
20    we'd be looking at maybe you can, maybe you can't.  
21    That's why we said no. If I thought--if we had  
22    thought that when it was time to come back and say,

1 in response to your Order, that we could proceed and  
2 not worry about Midtec, then fine. Because that's  
3 where we are.

4 We're simply talking about getting  
5 competitive conditions back, and making the railroads  
6 live up to their commitments. But, you know, there  
7 was no guarantee. There was no insurance that we're  
8 going to have--that we would be able to avoid  
9 Midtec. I know better than anybody else what  
10 Midtec meant.

11 VICE CHAIRMAN FUCHS: And I don't doubt  
12 that. I just think that when you talk about  
13 unprecedented, what is the precedent for reopening an  
14 exemption for enforcement purposes?

15 MR. GREENBERG: The Board has authority to  
16 do anything it wants.

17 VICE CHAIRMAN FUCHS: But what's the  
18 precedent for it?

19 MR. GREENBERG: Well I'm not sure that--  
20 maybe it's been, it's hard to imagine, given what we  
21 know about the railroads, but it's hard to imagine.  
22 I don't have a case for you.

1                   VICE CHAIRMAN FUCHS: Right.

2                   MR. GREENBERG: I'll admit, I don't have a  
3 case for you. On the other hand, I also don't have a  
4 case where the railroads made commitments and just  
5 said, no.

6                   We're hearing BN say, I thought I heard BN  
7 say today, that the supplemental agreement is  
8 enforceable; that as far as they're concerned,  
9 because they couldn't reach an agreement that says no  
10 unit trains, then it's fine.

11                   Are they saying today, is BN saying today,  
12 are the railroads saying today that they could walk  
13 away from this Agreement in five years and having  
14 nothing more? There's been no abandonment filing.

15                   VICE CHAIRMAN FUCHS: And I just--I  
16 totally hear you, and I take the point that someone  
17 who is reading our decision earlier in the year might  
18 not have been able to say, hey, the Board is  
19 inviting someone to sidestep Midtec--I use that in a  
20 very plain-language way--maybe that's not the right  
21 word, but not rely on Midtec for the purpose of some  
22 sort of competitive access provision. So I take that

1 point.

2           At the same time, your primary criticism  
3 of adapting, you know, the UPSP situation with Lake  
4 Charles was to an exemption enforcement, even though  
5 that's for a merger enforcement, was that it was  
6 unprecedented.

7           But it strikes me that that same criticism  
8 applies to reopening, not to materially alter the  
9 result, but to enforce. So if you have the criticism  
10 that something is unprecedented even though there's a  
11 close comparison, it would strike me that that same  
12 criticism could be applied to your proposed approach.

13           MR. GREENBERG: Well, as I said, I don't  
14 have a case where the Board has been presented with  
15 an exemption case where the railroad said one thing  
16 in the Petition and another thing two years later,  
17 or five years later, or nineteen years later. It  
18 doesn't make any difference to me.

19           I don't have that case. But it seems to  
20 me that the Board has an interest in making sure that  
21 what it ordered is enforced. And it's hard for me to  
22 imagine the Board does not have that authority,

1 notwithstanding that there may not have been a  
2 decision in this exact scenario.

3 BOARD MEMBER OBERMAN: Is it fair to say  
4 you don't see anything in either the statutes or our  
5 precedent barring us from enforcing that?

6 MR. GREENBERG: I certainly do not.

7 VICE CHAIRMAN FUCHS: What do you say,  
8 then--let's say we come in and say we're reopening  
9 this, and we're enforcing something. What's to stop  
10 CP from coming back and saying, Seventh Circuit, you  
11 said it has to mandate a different result. There's  
12 no change in the exemption here. You know, EJ&E,  
13 Carver, all the way down the line, OGRE, you know, we  
14 have said over and over "materially affect." The  
15 decision's not materially affected. They want the  
16 same decision.

17 And so what do you say, then, when we're  
18 in court and we have to--and someone throws  
19 everything we've said about reopening back in our  
20 face about "material affect," and everything the  
21 Circuit Court said about mandating a different  
22 result?

1           MR. GREENBERG: You have a rational basis  
2 for making a new decision. You can change--as long  
3 as you have a rational basis for making a decision,  
4 you can change. You don't need--you don't have to  
5 keep on adhering to old precedent simply because it  
6 was old precedent.

7           This is a novel case. It's here today.  
8 And what happened 15 years ago, EJ&E, whatever it  
9 was, is not relevant if you have a rational basis to  
10 make that decision.

11           BOARD MEMBER OBERMAN: Does anybody from  
12 NCA have anything to add to the practicality of the  
13 unit train movements at Minot, the so-called seesaw?

14           MR. GREENBERG: I'd like to add one point,  
15 and then I can turn it over to the client. And that  
16 is, there was a 90-car train, I understand, a BNSF  
17 train that was interchanged, and we heard CP's  
18 counsel talk about it. It was difficult. It was  
19 interchanged at Bowbells, or Bow-bells, I'm not sure  
20 how we pronounce it, and they had to go on somebody  
21 else's track in order--the shipper's track, in order  
22 to handle that track.

1                   If they've got to build an additional  
2 piece of track for a couple of million dollars, let  
3 them do it. I don't see a problem with that. We  
4 spent--my client has spent \$41 million for just  
5 this--you know, for these tracks. And the railroads  
6 are benefitting from that. They're getting a lot of  
7 volume from our client. And so they can't spend  
8 money to build an interchange track? It seems  
9 strange to me.

10                   And in any event, I think it is required.

11                   BOARD MEMBER OBERMAN: So they're  
12 suggesting, though, that there's not enough land  
13 there to build whatever--

14                   MR. GREENBERG: Well they said that that  
15 was the case in Minot. I don't know. All I know--I  
16 don't know what the situation at Bowbells is like.  
17 All I can tell you is, we've been asking this  
18 question since before we began this case: Is this  
19 operation, the unit-train operation, feasible? And  
20 I've been told over and over again, yes, we believe  
21 so.

22                   BOARD MEMBER OBERMAN: By BN?

1 MR. GREENBERG: By BN.

2 BOARD MEMBER OBERMAN: So just to confirm  
3 it, I mean I agree with you about the tone of what  
4 we've sort of heard here, but as I understand Ms.  
5 Estes to say BN wouldn't have asked for the right to  
6 unit trains in the Supplemental Agreement if they  
7 didn't believe it was practical. And you're saying  
8 that's consistent with what your clients have heard  
9 from BN? Is that a fair statement?

10 MR. GREENBERG: Yes.

11 VICE CHAIRMAN FUCHS: Just on the  
12 build-out kind of scenario, for lack of a better  
13 term, there's kind of an ongoing issue where a number  
14 of the railroads that are transitioning or have  
15 transitioned to PSR are decreasing unit train  
16 service, or converting it to Manifest. And there are  
17 a number of ag shippers who have invested in loop  
18 track that no longer are receiving unit train  
19 service.

20 Just playing this out, suppose for example  
21 that something had to be worked out to allow for BN  
22 unit train service that involved the expenditure of

1 funds by CP. What's to happen if BN decides they  
2 don't want to provide unit train service?

3 MR. GREENBERG: That would be a problem,  
4 wouldn't it?

5 VICE CHAIRMAN FUCHS: Yeah.

6 MR. GREENBERG: Everybody's rates would go  
7 up, no question.

8 VICE CHAIRMAN FUCHS: Right.

9 MR. GREENBERG: And U.S. grain shippers  
10 would have less competitive options, and be less  
11 competitive in the world marketplace. That would be  
12 unfortunate.

13 VICE CHAIRMAN FUCHS: And would CP be in a  
14 somewhat similar situation as a number of the ag  
15 shippers where they made an investment, understanding  
16 that unit train service was going to continue, and  
17 now unit train service is not continuing?

18 MR. GREENBERG: Well, that's CP's problem.  
19 I guess I don't understand your question. If we--I'm  
20 not sure I'm following your question, I'm sorry.

21 VICE CHAIRMAN FUCHS: So in order to  
22 mitigate the effects of unit train service, I thought

1 you were speaking about CP making additional  
2 investments.

3 MR. GREENBERG: No, I was actually talking  
4 about BN making investment.

5 VICE CHAIRMAN FUCHS: I see.

6 MR. GREENBERG: If we're talking about  
7 Bowbells, or Bow-bells, then--

8 VICE CHAIRMAN FUCHS: I see.

9 MR. GREENBERG: --then that's off the BN  
10 track.

11 VICE CHAIRMAN FUCHS: We're talking about  
12 Minot.

13 MR. GREENBERG: No, I don't know what's  
14 necessary at Minot.

15 VICE CHAIRMAN FUCHS: I see. I see.

16 BOARD MEMBER OBERMAN: I'm a little  
17 confused by this map. Maybe BN or CP can enlighten  
18 us, but, Mr. Greenberg, you may want to, as well.

19 Do I understand that the track between  
20 Berthold and Niobe is not deficient, Ms. Estes?

21 MS. ESTES: I'm not sure I heard you.  
22 It's not "deficient"? It is in service, between

1 Berthold and Niobe, it's in service and it is used  
2 today.

3 BOARD MEMBER OBERMAN: It's in service?

4 MS. ESTES: It is used today, yes.

5 BOARD MEMBER OBERMAN: So it's only from  
6 Niobe up to Milepost 47 that's a problem?

7 MS. ESTES: For BN, yes.

8 BOARD MEMBER OBERMAN: So you could bring  
9 a train from the Gavin Yard through Minot to  
10 Berthold, not make the seesaw movement, turn north to  
11 Niobe, then go up to Bowbells? Or however you  
12 pronounce it. It's at Bowbells that I guess Mr.  
13 Rifkind said you had to use some customer's loop to  
14 interchange with CP there. Is that right?

15 MS. ESTES: That's correct.

16 BOARD MEMBER OBERMAN: And is that the  
17 only physical way to do it?

18 MS. ESTES: Yes.

19 BOARD MEMBER OBERMAN: You can't just turn  
20 onto the CP Mainline there?

21 MS. ESTES: There's no connection there.  
22 I guess that's the southeast--did I get that wrong?

1                   BOARD MEMBER OBERMAN:   Southwest,  
2   probably.

3                   MS. ESTES:   The southwest quadrant,  
4   there's no connection between BNSF and the CP Subs.

5                   BOARD MEMBER OBERMAN:   But you could build  
6   just a so-called wye there, right, without having to  
7   use the customer's loop?

8                   MS. ESTES:   You could build a connection  
9   there, yes.   I think it depends on--again, we only  
10   looked at it preliminarily and I think it would  
11   depend on the grade and the train there.   And there  
12   is a crossing, a road crossing.   I think there's two  
13   road crossings.

14                   The other thing I would just point out is,  
15   I'm not sure where the train would hold, where you  
16   would actually park the train, because those are both  
17   active mainlines.

18                   BOARD MEMBER OBERMAN:   Oh, you mean on the  
19   DMVW line between Niobe and Bowbells?

20                   MS. ESTES:   No, on the BNSF line between  
21   Niobe and North Gate, that's an active BNSF main as  
22   is the Portal Sub, the CP Sub between Flaxton and Soo

1 Junction.

2 BOARD MEMBER OBERMAN: Oh, I'm sorry, it's  
3 a BN line. I thought it was--so, okay. But anyway,  
4 the trains could make a movement there without the  
5 seesaw movement, but the holding might be a problem?

6 MS. ESTES: That's my understanding, yes.

7 MR. DENTON: With additional investment,  
8 right, on creating the--

9 BOARD MEMBER OBERMAN: (Off-microphone).

10 MS. ESTES: I don't know. Again, I mean--

11 BOARD MEMBER OBERMAN: --dollars to  
12 rebuild the whole line up to Milepost 47.

13 MS. ESTES: It would likely be less than  
14 rehabbing 21 miles between Niobe and Lignite, but as  
15 far as a connection I don't have a number on that.  
16 We'd have to do a study.

17 BOARD MEMBER OBERMAN: Alright.  
18 (Off-microphone).

19 MR. GREENBERG: No, I don't think so. I  
20 think you guys have done a pretty thorough job of,  
21 say, plunging the information out. So I have nothing  
22 more. Thank you very much.

1                   CHAIRMAN BEGEMAN: I'd like to thank  
2 everyone for your participation throughout the  
3 morning and early afternoon. It was very  
4 informative.

5                   BOARD MEMBER OBERMAN: I'd like to just  
6 second that, and congratulate all counsel for your  
7 lengthy participation.

8                   CHAIRMAN BEGEMAN: And I also want to  
9 thank the staff, those that are here helping with  
10 timers and preparing memos, and helping us understand  
11 the case, as well as other folks that helped us get  
12 this location.

13                   (Whereupon, at 1:47 p.m., Tuesday, August  
14 20, 2019, the hearing in the above-entitled matter  
15 was adjourned.)

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