

**IN THE MATTER OF AN APPLICATION BY
THE CANADIAN WHEAT BOARD
PURSUANT TO SECTIONS 26, 37 AND 113 TO 116 INCLUSIVE
OF THE *CANADA TRANSPORTATION ACT*, S.C. 1996, C. 10 FOR
A DETERMINATION THAT CANADIAN NATIONAL RAILWAY COMPANY
IS FAILING TO FULFIL ITS LEVEL OF SERVICE OBLIGATIONS
FOR THE RECEIVING, CARRYING AND DELIVERING OF GRAIN
TO AND FROM THE CANADIAN ORIGINS AND DESTINATIONS IN WESTERN
CANADA FROM AND TO WHICH CWB GRAIN IS SHIPPED**

**ANSWER OF
CANADIAN NATIONAL RAILWAY COMPANY**

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**Attention: W.J. Kenny, Q.C.
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I. INTRODUCTION

1. This is the Answer of Canadian National Railway Company (“CN”) to the application filed by the Canadian Wheat Board (“CWB”) on September 5, 2007 pursuant to sections 26, 37 and sections 113 to 116 inclusive of the *Canada Transportation Act*, S.C. 1996, c. 10, as amended (the “CTA”) for a determination that CN is failing to fulfil its level of service obligations to CWB for the receiving, carrying and delivering of grain to and from various origins and destinations throughout Western Canada (the “Application”).
2. Specifically, CWB claims that CN has failed, and is continuing to fail, to provide adequate rail service through the supply of general distribution rail cars to CWB. CWB submits that the advance product programs implemented by CN discriminate against CWB in the distribution of rail cars, thereby causing damage to CWB.
3. As CN will demonstrate, there is no service breach for the Agency to remedy here. With the various steps taken by CN over the past months and particularly with the amendments made to CN’s advance product programs, the very basis of CWB’s Application has been effectively rendered moot. CN has fully and properly complied with both the letter and intent of the Agency’s earlier decision involving Great Northern Grain Terminals Ltd. (“GNG”), and CWB cannot be permitted to maintain an Application which is no more than an attempt to have the Agency vary or reconsider what it has already decided in that Decision.
4. A railway’s level of service obligations are not absolute but are rather at all times pervaded by the test of reasonableness. CN will demonstrate that CWB’s inflated car order requests cannot be simply accepted as a true indication of shipper demand, and CN is not obliged to furnish all cars, at all times, sufficient to meet all demands, in any event.
5. Further, CWB’s Application, based as it is on a single week of allocation, is both premature, improper and unfounded.

II. CONTEXT OF CWB’S APPLICATION

6. In order to assess whether the allegations made in CWB’s Application have any merit, it is important to review the Application in its proper context, in light of the broader history and circumstances in which it is filed.

Previous Application of GNG

7. On March 8, 2007, GNG filed a complaint with the Agency that the advance product programs of CN discriminated against GNG in the distribution of rail cars. GNG also submitted that CN failed, and continued to fail, to provide adequate rail service through the use of its general rail car allocation program.
8. In support of the GNG application, CWB, North East Terminals Limited, North West Terminal Limited, Parrish & Heimbecker Limited, Paterson Grain, Providence Grain Group Inc., Southwest Terminal Ltd. and Weyburn Inland Terminal Ltd. (together with GNG, collectively referred to as “CARS”) filed interventions.

9. CWB in the present Application expressly adopts and incorporates by reference the evidence from the extensive intervention that it filed in support of GNG.
10. It is instructive to note that the relief that was requested by GNG in its application is, word for word, the exact same relief now being requested by CWB in its present Application, substituting the name "CWB" in the place of "GNG". The only variation is the additional request in the current Application that CN also be required to provide reports on its performance to shippers and the Agency. A detailed comparison of the identical relief sought by GNG and CWB in this Application can be found at **Appendix 1**.

Agency Decision on GNG Application

11. On July 6, 2007 the Agency issued Decision No. 344-R-2007 (the "Decision") with respect to the GNG case.
12. In the Decision, the Agency noted at paragraph 110 that GNG, as corroborated by CWB and several of the grain companies, "at numerous times throughout the pleadings" indicated that the level of service received prior to CN implementing its advance product programs for the 2006-07 crop year enabled them to order, in advance, a secure supply of rail cars at tariff rates through CN's GT Secure Export program and through its ability to trade cars with other qualified grain companies registered in the program. In other words, GNG, CWB and the grain companies felt that the earlier service was adequate and suitable.
13. As a result, the Agency structured the remedy it ordered in accordance with this reality. The Agency specifically refused to grant the type of sweeping regulatory intervention requested by GNG in its application and by CWB at paragraph 98 of its Intervention. The Agency refused to order CN to eliminate its 100 car block advance product offerings, or to require CN to discontinue the practice of auctioning cars to the highest bidder. Nor did the Agency agree to require CN to offer and deliver at least 50 per cent of its rail car fleet made available for grain service for "general distribution" to shippers by corridor on a weekly basis.
14. To the contrary, the Agency ordered CN to do the following:
 - (a) To allow GNG to reserve railway capacity for a contract period, covering a minimum of not less than 20 grain weeks for one or more contract units, each representing a block of 50 empty rail cars allocated and supplied from CN's controlled fleet of covered hopper cars, to be ordered for placement and loading at GNG's facility "under the terms and conditions of its previous GT Secure Export program, as they are applicable in this circumstance";
 - (b) To not prohibit GNG from trading cars or to restrict it in the manner it does so;
 - (c) To advise GNG of the methodology it uses in its determination of allocating this car supply and also publish this information on its website;

(d) To implement the above directions by the beginning of this crop year (August 1, 2007).

15. The Agency Decision was not appealed by either GNG or CN.

III. CN'S ACTIONS PRIOR AND SUBSEQUENT TO AGENCY DECISION AND ORDER

CN's Actions Prior to CTA Decision

CN's Car Supply Consultations with CWB

16. On June 26, 2007, prior to the Agency's determination of the GNG application, CN met with CWB in order to discuss a car supply proposal for its shipping requirements for the 2007-08 crop year. This car supply proposal was developed in response to several concerns that CWB had raised in its Intervention to the GNG level of service complaint.
17. The purpose of this meeting was to present CN's car supply proposal to CWB and to communicate that CN was flexible in addressing CWB's requirements.
18. There was considerable uncertainty in the marketplace at this time with respect to the marketing of barley and barley products. CWB had challenged the federal government's recent removal of barley from the "single desk" marketing authority of CWB, and the judicial review application to the Federal Court had yet to be finally determined.
19. Due to the resulting uncertainty, discussions respecting car supply focused only on wheat shipments. CN offered CWB a car supply capacity for wheat to Vancouver that matched its total shipments during the 2005-06 crop year.
20. Contrary to CWB's allegations in its Application, at no time during this meeting did CN insist that CWB participate in CN's advance product programs. In fact, CN stated it was prepared to develop a car supply proposal for CWB that was independent of CN's advance product programs. CN did state that it would be prepared to configure some of its available car supply for CWB in the form of advance products; however, whether or not this would ultimately be done would be at the sole discretion of CWB.
21. CN did not receive any feedback from CWB on this car supply proposal between this meeting and the time that CN received the July 11, 2007 letter from CARS requesting discussions with CN.

CN's Re-introduction of GT Secure Export Program

22. After the GNG Application was initiated, but prior to any Agency determination thereof, CN also consulted with several of its grain customers in Western Canada, including representatives of CARS, during the development of CN's 2007-08 advance product programs.
23. On June 29, 2007, CN published its new 2007-08 GT programs. These programs included, amongst other things, the re-introduction of CN's GT Secure Export ("GTSE")

program for the Vancouver and Thunder Bay corridors, which had been eliminated for the 2006-07 crop year. [See **Appendix 2**]

24. Importantly, CN introduced a new segment of the GTSE program, one specifically designed to accommodate those smaller shippers who were unable to participate in CN's GX 100 car program. This new product segment, GTSE "Series B", was designed to provide a level of advance car supply (an average of 75 cars/week) that would only be made available to shippers who had not bid on a GX 100 product.
25. CWB mistakenly alleges in paragraph 28(a) of its Application that the Agency's GNG Decision requires that 50 cars of CN's GTSE "Secure B" capacity be designated solely for GNG, thereby leaving only 25 cars for all other shippers in Western Canada who are incapable of bidding on the GX-100's.
26. This allegation is incorrect for two reasons. First, as has been discussed, CN has proposed a separate car supply agreement for CWB shipments to Vancouver. As such, the "Series B" GTSE was not intended for CWB's use, but rather was targeted at smaller shippers like the balance of CARS.
27. Further, the GTSE "Series B" capacity offering of 75 cars/week exceeds the historic shipping levels of those CN shippers at which it was targeted [**Appendix 3**]. As demonstrated in Appendix 3, the weekly average shipments from those shippers, including GNG, that would participate in the GTSE "Series B" contracts is only 51 cars, in contrast to the 75 car capacity offered for these same shippers through CN's GTSE "Series B" program.
28. CWB's allegation is also mistaken in that it is premised on a misinterpretation of the Agency's Decision in GNG. This is described more fully in paragraphs 85 to 96 of this Answer.

CN's Actions Subsequent to Agency Decision

29. Upon receipt of the GNG Decision, and as a result of CN's meetings with CARS, CN implemented further changes to comply with and exceed the Agency's directives.
30. It is instructive to review the impact of each of these modifications made by CN to its advance products in further detail below.

(a) **Altered previous GTSE program now with reduced 20 week minimum**

The re-introduction of the GTSE program with the "Series B" segment acts to benefit smaller shippers. Subsequent to the release of the Decision, however, CN further altered the terms and conditions of this product to make it even easier for shippers to participate. Consistent with the Agency's direction for GNG, CN relaxed the minimum GTSE contract offer requirements from 30 to 20 weeks. Importantly for smaller shippers, CN also removed the previous requirement for an offer to be for a consecutive number of grain weeks. This change allowed shippers that make an offer for 20, non-consecutive weeks to be eligible to receive

advance car supply from CN. This type of access was not previously available, even under CN's former GTSE program offered in 2005-06.

(b) Allowed trading of car allocation

CN has stated its concerns and past experience with "phantom ordering" from the general allocation car supply; that is, shippers will order more cars on a weekly basis than they actually require. CN maintains that the practice of trading cars acts to encourage and facilitate phantom ordering. Notwithstanding these concerns, CN has complied with the Agency Decision to "not prohibit GNG from trading cars or to restrict it in the manner it does so" and has gone further, acknowledging that it will enable all shippers to trade general allocation car supply.

(c) Informed as to Methodology for Rationing

As suggested by the Agency, in an attempt to enhance transparency and to benefit other grain shippers as well as GNG, CN published the methodology it uses for rationing its general car allocation requests on its website [**Appendix 4**].

When it becomes necessary to ration general car order requests, the foremost consideration for any railway company must be pipeline management. It would be inefficient and counterproductive for the western Canada grain handling and transportation system ("GHTS") as a whole to have CN allocate car supply to a pipeline or corridor that is unable to readily unload railcars.

When CN is unable to accept all car order requests, historic shipping percentage and an "off the top" allocation for small shippers with minimal historic shipping percentages is used. Historic shipping percentages are a non-biased means to ration excess car order requests.

Contrary to the positions advocated by CWB and CARS, there can be no universally-applied perfect "formula" that can be used to ration car order requests in all circumstances. Each situation must be reviewed individually and the proper allocation decisions made thereafter.

(d) Modified Rationing Procedures

On its own initiative following the GNG Decision, CN further modified the rationing procedures for its GT products so as to ensure that all shippers who submit offers for a product receive a level of advance car supply [see **Appendix 5**]. The criteria to be used if the number of contract units requested exceeded the number of available contract units in a corridor are:

- CN will allocate a portion of available contract units among all contract offers such that each registered member that submitted a valid contract offer will be awarded a portion of advance car supply

- CN will allocate the balance by giving preference to contract offers having the greatest number of grain weeks. CN will only consider the duration of a contract offer once the first criterion has been exhausted.

This change ensures all participants that submit valid offers receive some allocation of advance car supply, and eliminates the allegation that small shippers are disadvantaged or discriminated against.

(e) Implemented Railway Deficit Account

CN further amended the terms of its GT advanced product programs by implementing a “Railway Deficit Account” mechanism, designed to permit CN greater flexibility in offering general car supply during times when overall car supply is limited due to extreme, unforeseen supply chain conditions.

The catalyst for this product modification was the Agency’s comments in the GNG Decision at paragraph 76, where it found that CN, through its advance product programs, had “rendered all but a small percentage of its capacity as a premium service ...”.

CN responded by implementing a feature into its programs similar to a provision CP has in its advance products offering, whereby the railway may waive its service obligations on an advance product in a given grain week. By exercising this available option at a time when the overall car supply is restricted, CN is able to make available more car supply for general allocation, due to the relaxation of its GT advance product commitments. This will provide some level of car supply to shippers who were not able to participate in any of CN’s advance product programs.

Contrary to the assertions made by CWB in its Application, CN’s implementation of the Railway Deficit Account is not an admission of CN’s pessimism as to its ability to meet its car supply commitments during the current crop year. To the contrary, CN fully expects that this provision would only need to be exercised in exceptional circumstances. Its development was borne out of several meetings that CN had with CARS representatives since the release of the GNG Decision, and in specific response to a concern expressed during those meetings that smaller shippers were often “shut out” when advance product shippers were given their guaranteed allocations during times of extreme rationing.

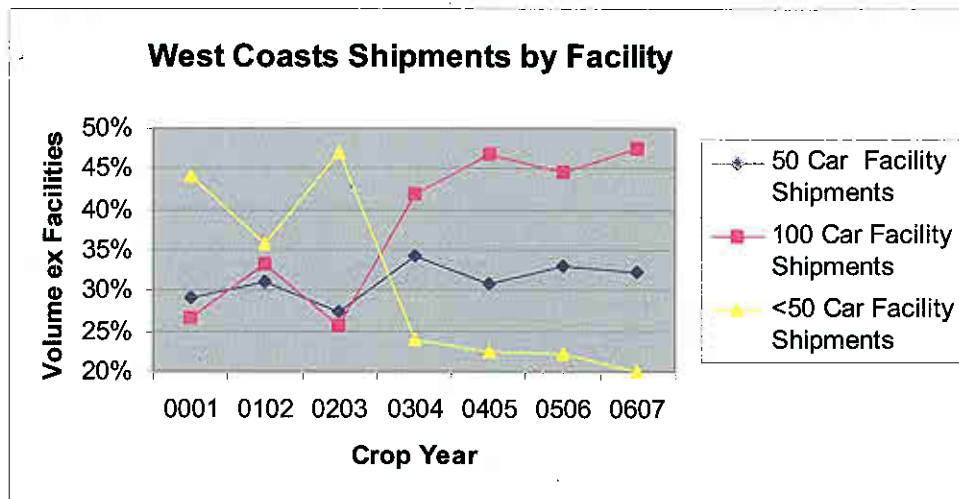
(f) Publication of Weekly Allocation Decisions

CN started publishing the results of its weekly allocation decisions on its website beginning in week 8 of the current crop year. The publication of CN’s weekly allocation results increases transparency and enables the entire grain industry to view the weekly outcome [see **Appendix 6**]. Shippers can now determine their proportion of allocation by corridor. CN also provides its grain shippers with a weekly planned service report for their facilities, enabling them to determine CN’s weekly spotting performance.

CN suspended its GX-100 program for the 2007-08 grain shipping season

- 31. As indicated in its October 5, 2007 Answer to CARS' application for interim relief, CN has voluntarily suspended its GX-100 program for the 2007-08 crop year.
- 32. Based on discussions it has had with the grain industry, CN has determined that it can attain the efficiencies and advantages of concentrated, larger block shipments without this program. Grain companies will continue to focus loading from their most efficient facilities and continue promoting the use of 100 car blocks, as it is fundamental to their marketing strategies.
- 33. As demonstrated in Figure 1, grain originations from 100 car elevators account for more than 45% of CN's shipments to the West Coast.

Figure 1



- 34. Figure 1 shows that the concentration of loading at the most efficient origination facilities in Western Canada has been consistent for the past three years. This has occurred without materially changing the proportion of grain originations from 50 car elevators. The decline in originations for the less than 50 car stations reflects the closure of these facilities in the 1999 to 2002 period. The trends exhibited in Figure 1 were well established and are independent of CN's advance product programs.
- 35. The facility loading trends evidenced above counter the mischaracterization of CWB wherein it fosters the simplistic conclusion that 100 car facilities account for only 22% of the grain originations in Western Canada. More accurately, 100-car facilities account for almost one half of all west coast export traffic originated on CN.
- 36. The suspension by CN of the GX-100 product for the 2007-08 crop year eliminates one of the founding assertions of CARS. The 400-car capacity that was previously allocated to the GX-100 program will now be transferred to CN's GT Secure Export "Series A" capacity.

CN is fulfilling GNG's 2007-08 car supply requirements

37. As demonstrated in detail above, CN has fully complied with both the directions and principles contained in the Agency's GNG Decision. The results of this compliance can be seen in CN's actual rail service provided to GNG subsequent to the Agency's Decision.
38. CN has fully complied with its car supply obligations to GNG this crop year to date. **Appendix 7** summarizes GNG's weekly car requests and CN's allocation of rail cars to GNG. It is important to note that of the 365 cars requested by GNG, 76 car requests should not be counted. In week 1, GNG requested 50 general cars, CN allocated 50 cars, GNG cancelled the 50 general cars and used a 50 car GT Pro obtained from JRI. In week 7, GNG requested 50 cars, CN supplied 29 cars, and GNG traded all of these away, signalling that it did not need the 50 cars. In week 9, GNG requested 50 cars, CN initially allocated 24 and then offered an additional 26, which GNG subsequently declined on account of no grain available. In addition, GNG's car requests include a double service in week 12, which exceeds the Agency Decision.
39. In summary, CN has fully complied with, and in fact exceeded, the directions contained in the Agency's GNG Decision: (1) CN has engaged in consultations with industry members in the development and modification of its Advance Product programs; (2) CN has modified its Advance Product programs to fully comply with and, in fact, exceed the directions of the Agency Decision; (3) CN has suspended its GX-100 car program; and (4) CN has fully met GNG's car demand requirements.

IV. CWB ACTION IS WITHOUT MERIT AND IS PREMATURE

CN's August 31st car supply proposal provided adequate and reasonable accommodation of CARS projected shipping needs

40. During its various meetings with CARS, CN requested specific information on CARS' shipping requirements for the 2007-08 crop year. CARS provided CN with a high level summary of its demand requirements on August 23, 2007. CARS represented to CN that this demand forecast included all the demand, for all the corridors, for all the CARS members on CN. In addition, CWB indicated that these demand figures included a "vast majority" of barley sales that had been made by the grain companies. CARS steadfastly refused CN's requests for additional commodity or shipper specific information pertaining to the demand requirements.
41. Because representatives of CARS refused to provide shipper-specific information, CN was unable to ascertain what the demand was for the individual CARS members. As a consequence, CN was compelled to make its calculations and projections on a global basis for the entire CARS group.
42. To address the information deficiency, CN used CARS' grain shipments for the 2005-06 crop year as a reference for its projected shipping requirements for the 2007-08 crop year. It was determined that this would provide a conservative assessment, as CWB had recently announced that they expected wheat and barley exports of 15.8 M Tonnes, a drop from the 2005-06 level of 17.0 M Tonnes. The projected decline in west coast

exports also followed this pattern, as CWB similarly anticipated a decline of 2.3 M Tonnes to 8.6 M Tonnes.

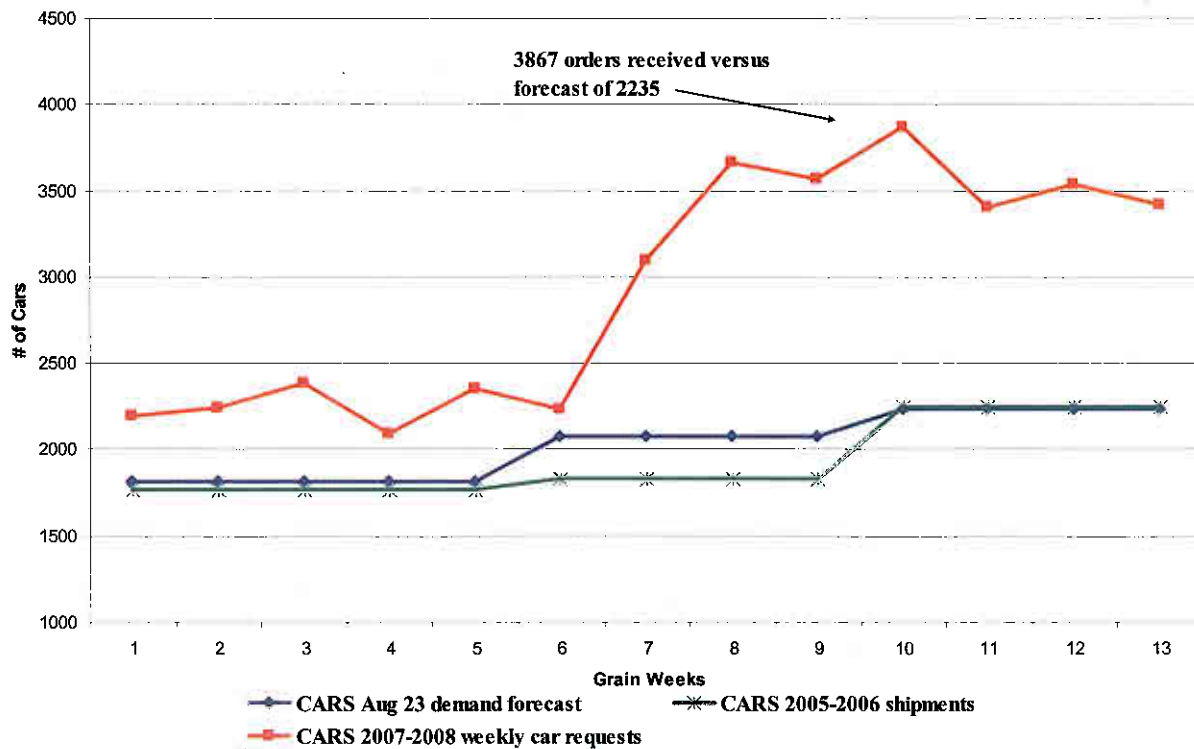
43. Relative to 2005-06, CARS' demand for Vancouver capacity was increasing by 1,000 cars during the October-March period, while their demand for Prince Rupert declined by 11,000 carloads in the same period. This demand appeared skewed, given that rail rates to Prince Rupert are lower than to Vancouver, and CWB had previously been a major participant using the Prince Rupert supply chain.
44. Notwithstanding the above, CN prepared and presented CARS with a car supply proposal on August 31, 2007 [**Appendix 8**].
45. In this proposal, CN offered CARS 1,475 cars per week to the west coast ports of Vancouver and Prince Rupert. The Vancouver supply of 475 cars was based on CARS average weekly Vancouver shipments of 478 cars during the 2005-06 crop year [**Appendix 9**]. CN's car supply proposal sought to maximize CARS' volumes into Vancouver, with due consideration given to other shippers' and railroads' volumes in this corridor, while also concurrently taking advantage of the efficiency and reliability of the Prince Rupert corridor and terminal.
46. Due to the efficiency of the Prince Rupert corridor, CN provides western Canadian grain shippers with an economic incentive to use this corridor. Grain shippers can save \$335/car in transportation costs by using Prince Rupert rather than Vancouver. This rate reduction would provide CARS members with \$13.6 M in transportation savings if CARS were to fully utilize the CN capacity offering for Prince Rupert.
47. CN's car supply proposal of August 31, 2007 fully met CARS' demand forecast for the North America corridor for the entire crop year. The only corridor for which CN did not commit to fully meet CARS demand forecast was Thunder Bay during the months of October and November. However, in all of CN's discussions with CARS, not once did they respond to this CN car supply proposal for Thunder Bay.
48. In total, CN's August 31, 2007 car supply proposal met 97.7% of the shipping requirements identified in CARS August 23, 2007 projected demand forecast.
49. CARS had expressed concern over the level of guarantee and assurance of service contained in CN's August 31, 2007 car supply proposal. To address the concern of service reliability, CN proposed increasing the supply of capacity to Prince Rupert. Prince Rupert is CN's most reliable corridor for shipping grain, as it has: (1) a lower traffic density than the Vancouver corridor; (2) the most efficient grain terminal in western Canada; and (3) the efficiencies associated with not having to interchange traffic between railways.
50. Additionally, CN's car supply proposal offered CARS the ability to convert up to 75% of the capacity into an Advance Product in response to CARS concern with level of guarantees. Any capacity (up to the threshold of 75% in each corridor) to which CARS decided to commit would then have similar supply commitments and penalties as CN's Advance Products. Importantly, CARS were provided this opportunity without being required to bid against other shippers in order to secure the capacity.

- 51. CN's proposal represented a reasonable and adequate accommodation of CARS demand requirements as it: (1) met 97.7% of CARS demand requirements; (2) provided CARS with improved reliability and reduced transportation costs through Prince Rupert; and (3) offered CARS the flexibility to obtain car supply commitments on up to 75% of CN's capacity offering for them.
- 52. CN presented its proposal to CARS on August 31, 2007. CARS filed its level of service complaint against CN on September 5, 2007. It took only 5 days for CARS to review CN's proposal, reject it without further questioning of CN, and prepare and file a level of service complaint.

CWB and CARS car order requests are an inappropriate measure of user-based needs

- 53. CWB and other members of CARS attempt to use car order requests as their primary evidence of user-based demand, and CN's allocation of cars against these weekly car order requests as support for the alleged service breach. This is a misleading and inappropriate measure.
- 54. It is an inappropriate comparison because CWB's and CARS' weekly car order requests are significantly inflated. Figure 2 provides a graphical summary of the CARS members' actual weekly car requests for the 2007-08 crop year, in relation to CARS August 23, 2007 demand forecast and CARS 2005-06 actual shipments.

Figure 2: CARS Weekly Car Requests



55. Since week 6, CARS' actual car requests have exceeded its August 23, 2007 demand forecast by 1,021 to 1,632 cars per week, or an inflation of 49% to 73% over its demand forecast. This is despite CARS stating that the demand forecast represented all of CARS demand for all corridors and all CARS' shippers on CN.
56. CARS weekly car requests have also been significantly higher than its level of shipments on CN for the same period in 2005-06, notwithstanding that the current crop year's exports are expected to be 1.2 M Tonnes lower than 2005-06.
57. A further example that challenges the appropriateness of using weekly car requests as a measure of "user-based needs" is CARS' requests for the Prince Rupert corridor. Since week 10 (first week of allocation for October), CWB has regularly asked for 1,500 to 1,600 railcars for this corridor, representing double their August 23, 2007 demand forecast [see **Appendix 10**]. CN has attempted to respond to this sudden surge in requests relative to the CARS demand forecast. However, this extreme variance in CARS' requests for Prince Rupert puts into question the veracity of these weekly car requests.
58. Further, it is also inappropriate to use the ratio of cars allocated to weekly car requests, as this measure does not include any indication of the utilization of the railcars utilized. As an example, in weeks 1-12 of this crop year, CN received car requests of 1,835 cars from CARS members for various corridors. CN allocated 1,619 cars against these requests, of which 601 cars, or 37%, were not used. **Appendix 11** provides the specific utilization of allocation by CARS member, corridor and grain week. This clearly demonstrates that there are no consequences for over-stating car order requests and that simply using the ratio of cars allocated against cars requested can lead to an incorrect conclusion.
59. Finally, using weekly rail car requests as a measure of user-based needs reinforces inflation of actual demand. Railways receive inflated car requests due to a lack of any consequence should a shipper request railcars from a railway but not use them. The shipper does not have to specify any origin for loading at the time of the request, and there is no penalty for cancellation of railcar orders. With the permitted trading of general allocation cars, there is also no risk with a company requesting cars in excess of its actual demand requirements. The lack of discipline or consequences in the current car order process inevitably leads to inflated car requests for which the railway cannot be held accountable.
60. **Appendix 12** provides a summary of weekly requests for rail cars from all western Canada grain shippers in all corridors. Since week 7, CN has been receiving weekly car requests of 7,000 cars or more.
61. The phenomenon of excess demand during the fall grain-shipping season in Western Canada is not uncommon. CWB itself acknowledged this in its Intervention in the GNG level of service Application. CWB stated in paragraph 25 of its Intervention

"The result of the above is that the GHTS cannot physically accommodate all of the grains and oilseeds that are produced on the Prairies in a typical year at one time. This means that for the peak shipping periods of October through March the demand for

access to the GHTS exceeds its capacity, particularly the demand for access to railcars. This in turn means that during this peak period the CWB and the grain companies are competing for railcars as the grain companies seek to move their Non-Board crops and the CWB seeks to move its many products.” [Emphasis added]

62. A conclusion from this assessment and the evidence of Appendix 12 is that shippers may attempt to seek an advantage to access car supply by inflating car order requests. Therefore, if the Agency were to simply utilize the CARS members weekly rail car requests to establish the actual demand, the result would be a level of service standard that is unreasonable and more importantly, unattainable for any railway to achieve.
63. Based on the above evidence, it is inappropriate to simply accept CWB and CARS requests for rail cars as an accurate indicator of “user-based needs”.

CN’s Advance Programs are being unjustifiably targeted

64. It is important to note that CP has several similar products with similar design features as the CN products that CWB, and other members of CARS, are challenging. In particular, the CP Advance Products have:
 - A trainload product with a requirement for shippers to load 112 cars from a single origin;
 - An auction product that can have positive bids;
 - Deficit provisions on their products to permit cancellation of spotting obligations to permit more car supply to general allocation;
 - Awarding of bids on the basis of duration or length of bids;
 - Rationing of awards that ensures all bidders receive some level of advance product allocation; and
 - An ability to receive bids and award advance product allocation on a non-consecutive week basis

A summary comparison of the Advance Product offerings of both CN and CP is provided in **Appendix 13**.

65. **Appendix 14** provides a snapshot of CP’s weekly allocation results for weeks 2 – 12 of the current crop year. This information demonstrates that CP has an average of 67.8% of its allocation segmented to advance products. This is a much higher percentage of allocation dedicated to advance products than what CWB is seeking as a remedy against CN.
66. CWB’s complaint against CN’s advance products is without merit, as CWB has accepted and participated in CP’s advance product offering which has very similar features as

CN's programs. CN's products are consistent with established industry standards. CN respectfully submits that the level of service provisions within the CTA were not intended for this type of discriminatory action designed to unfairly single out one carrier.

CN's GT Pro program is a well-established product

67. CN introduced its GT Pro product in January 2001 as part of the implementation of its family of advance products. The initial version of the GT Pro was a penalty bid, wherein grain shippers could bid a penalty that they were prepared to pay CN if they did not use an awarded GT Pro. It became evident very early in this program that a penalty bid mechanism was an ineffective bid selection criteria, as CN regularly received penalty bids of several thousands of dollars. If a shipper that was awarded a GT Pro had any difficulty in securing freight for the advance cars, they would simply cancel other, non-advance car supply with CN in order to avoid paying the large penalty bid. In other words, the bids were rendered meaningless.
68. Based on this experience, CN altered its GT Pro program in the 2002-03 crop year by moving towards a positive bid system, whereby shippers bid an amount to secure car supply and pay this bid irrespective of actual car use. All revenues earned from GT Pro Export bids accrue under CN's revenue cap and require CN to make rate adjustments in other areas in order to be compliant with its revenue cap entitlement. As a result, contrary to CARS' allegations, CN's GT Pro Export program is not a revenue stream for CN.
69. GT Pro provides grain companies with an option to obtain rail car capacity over and above their other car allocation. Grain companies can and do bid on GT Pro cars to build their market share, as well as support spot sales opportunities. The GT Pro program also enables a grain company to grow volumes and positively influence historic shipping percentages for future years' allocations.
70. This advance program now being challenged by CWB has been in place for several years prior to the 2006-07 crop year. CWB has previously indicated to CN that it has a philosophical concern with "bid cars". However, it is important to point out that CWB itself utilizes a form of auction/bid process with respect to its tendering of grain each week. It is inconsistent for CWB to express any philosophical concern over a bid process for cars when it utilizes a bid process of its own to allocate its product.
71. The current form of CN's GT Pro program was present in the 2005-06 crop year, during which the Agency has noted that CN was providing adequate and suitable service. Therefore, it is unreasonable and inappropriate to argue that the continued operation of GT Pro is somehow causing or contributing to any alleged level of service breach here. CWB and other members of CARS are simply philosophically against auction cars and are, for that reason alone, attempting to utilize the Agency and the CTA to eliminate an established and proven advance product program.

CWB is seeking remedies the Agency has already determined inappropriate

72. As discussed in paragraphs 9 and 10, CWB is now seeking the exact same relief in its Application as GNG previously sought in its complaint.

73. As part of the GNG Decision, the Agency performed its analysis and made a determination as to these same facts and issues arising from CN's advance product programs. CWB was an active participant and filed a substantive and lengthy written intervention in that GNG proceeding, that was used by the Agency in its Decision respecting the GNG application.
74. The Agency specifically refused to grant the type of sweeping regulatory intervention requested by GNG in its application and by CWB at paragraph 98 of its Intervention. The Agency refused to order CN to eliminate its 100 car block advance product offerings, or to require CN to discontinue the practice of auctioning cars to the highest bidder. Nor did the Agency agree to require CN to offer and deliver at least 50 per cent of its rail car fleet made available for grain service for "general distribution" to shippers by corridor on a weekly basis.
75. CWB has in its Application introduced no new facts or developments since the issuance of the GNG Decision which would in any way require the Agency to review or reconsider the relief granted in those circumstances. CWB cannot now attempt, through the filing of its own Application challenging the same elements of an improved CN advance product program, to in essence request the Agency to revise the GNG Decision and now grant the relief it declined to grant to GNG only three months earlier.

Using the results of a single week of allocation is premature

76. The filing of a Level of Service application on the basis of a single week of allocation is a clear indication of the frivolous and premature nature of this complaint.
77. Notwithstanding CN's concerns with using fulfillment of car requests as a measure of service, at the time of the filing of the CWB Application, CN had supplied 91% of CWB's week 1-7 car order requests for all corridors.
78. The only exception during this period was week 7, when CN did not fully meet CWB's demand requests. The week 7 allocation decisions were influenced by the widespread effect of the harvesting and lack of sufficient deliveries into the grain elevator system. The slow grain deliveries caused several grain companies to request late car spotting in Week 6 (totalling 650 cars) that generated a shortfall for week 7. This anticipated shortfall and the continued concern of availability of grain in the elevator system caused CN to reduce the car allocation in week 7. As a result, CN only offered 3,800 railcars for week 7 allocations.
79. In summary, CWB's level of service application against CN is without merit as: (1) CARS rejected a CN car supply proposal that met 97.7% of their demand requirements; (2) CWB's attempt to use the ratio of cars allocated to cars requested is an inappropriate measure of service performance; (3) CWB is discriminating against CN by unjustifiably challenging CN's Advance Products; (4) CWB is challenging the GT Pro Program which is an established product and was part of CN's Advance Products in 2005-06; (5) CWB is attempting to have the Agency re-decide an issue it has very clearly determined. In addition, CWB's application is premature as CN had met 91% of its car requests at the time CWB filed this level of service Application.

V. **CWB'S INTERPRETATION OF CN'S LEVEL OF SERVICE OBLIGATION IS INCORRECT AND UNREASONABLE**

80. As CN has described, and CWB itself acknowledged in its Intervention in the GNG case, the capacity in the GHTS is clearly over-subscribed during the peak October to March shipping period. One therefore cannot simply use the fulfillment rate of rail cars allocated during this period to rail cars requested and extrapolate to make any proper assessment of whether a reasonable level of service is being provided.

Test of Reasonableness

81. When considering whether a railway company has breached its service obligations, the proper approach for the Agency is to consider “whether the railway company, in the circumstances, did what was reasonable to meet its obligations”. This view is consistent with the approach taken by the Agency as well as the courts, namely that “the statutory obligations of a rail transport carrier are not absolute – they are in fact pervaded by the test of reasonableness in all the circumstances”: Agency Decision No. 475-R-1998, *CWB v. CNR and CPR* (the “CWB Decision”), as well as the GNG Decision, at paragraph 64. This qualification of reasonableness is explained by the Supreme Court of Canada in the *Patchett* decision:

“The qualification of reasonableness is exhibited in one aspect of the matter of the present complaint, the furnishing of facilities: a railway, for example, is not bound to furnish cars at all times sufficient to meet all demands...”

82. The burden placed upon the railway in respect of the carrying of traffic is an average one. It does not mean that if the railway cannot at once, on a peak load movement, supply a car, that therefore it is acting in contravention of Section 113 of the CTA. In times of shortage, it is what is, on average, reasonable that must be looked at from the standpoint of car supply: *Harris v. Quebec Central Railway* 27 C.R.C. 447 at p. 450.
83. In the American decision of *Shippers Committee, OT-5 (SCOT-5) v. The Ann Arbour Railway Company* (1989) 5 I.C.C. (2d) 856, the Commission stated the following at p. 857:

“It is well established that a railroad need not equip itself with sufficient cars to provide cars immediately in all circumstances whenever a shipper requests them; that would be financially impossible...This would be especially difficult in the context of the highly cyclical and seasonal grain industry. [Emphasis added]

84. What is required to be provided by a railway company in the discharge of its statutory common carrier obligation as set out in the Act, in respect of statutory grain traffic, is “a basic level of service”. Agency Decision No. 411-R-1989, *Prairie Malt Limited v. Canadian National Railway Company*.

Misinterpretation of Agency's GNG Decision

85. At various points throughout its Application, CWB makes a fundamental mischaracterization of the Agency's GNG Decision, which serves to taint its entire submission. CWB states at paragraph 28(a) of its Application:

CN's new Series B GT Secure product offers 75 cars per week to shippers who do not qualify or bid on the GX 100s. As per the Agency's order, 50 of these cars must be designated to GNG. This leaves 25 cars per week of advance products for all shippers in Western Canada who are incapable of bidding on the GX 100s. CWB believes that the Agency's order, in the case of GNG, correctly sets out the requirements that CN is to fulfill in the case of all of its grain shippers (like [CARS]). [Emphasis added]

86. The Agency's Decision and Order in GNG, however, does not support this basic underlying premise; i.e. that CN was ordered to allocate and guarantee to GNG a supply of 50 cars a week, for all weeks.

87. When the GNG decision is reviewed in its entirety, a dominant and overriding theme emerges – CN's previous level of service was adequate and it was the changes CN made to its advance product programs for the crop year 2006-07 that rendered the service provided to GNG unacceptable. The Agency perhaps most clearly expressed this sentiment at paragraph 110, which states:

At numerous times throughout the pleadings, GNG, and corroborated by CWB and several of the grain companies, indicated that the level of service it received prior to CN implementing its programs for this crop year enabled them to order, in advance, a secure supply of rail cars at tariff rates through CN's GT Secure Export program and through its ability to trade cars with other qualified grain companies registered in the program. In other words, GNG felt that the earlier service was adequate and suitable. [Emphasis added]

88. It is with this background in mind that one then is to read the Agency's direction of CN found in paragraph 111 of the GNG Decision, which states:

The Agency directs CN to allow GNG to reserve railway capacity for a contract period, covering a minimum of not less than 20 grain weeks for one or more contract units, each representing a block of 50 empty rail cars allocated and supplied from CN's controlled fleet of covered hopper cars, to be ordered for placement and loading at GNG's Nampa facility under the terms and conditions of its previous GT Secure Export program, as they are applicable in this circumstance. [Emphasis added]

89. Importantly, the Agency nowhere in the Decision or Order ever directs that CN must actually allocate to GNG 50 cars per week regardless of what else may be occurring in

the grain handling and transportation system. It is imperative to give effect to the qualifying words used by the Agency “under the terms and conditions of its previous GT Secure Export Program...”. These words qualify the Agency’s directions which precede immediately above.

90. By the terms of the Agency Order, CN is only required to “allow GNG to reserve railway capacity for a contract period “(which must cover a minimum 20 grain weeks) for a 50-car block “allocated and supplied from CN’s controlled fleet of covered hopper cars”.
91. By virtue of CN’s reintroduced GT Secure Export Program, companies such as GNG are now “allowed” to “reserve railway capacity” for a minimum 20 grain weeks for a block of 50 empty rail cars allocated and supplied from CN’s controlled fleet, just as was ordered by the Agency.
92. The Agency did not order that CN be prohibited from allocating its 50 car contract units among the offers received such that GNG would always receive a guaranteed block of 50 empty rail cars. To the contrary, if the number of Contract Units available becomes over-subscribed, it was intended that GNG would participate just as any other smaller shipper in the allocation proposed by CN.
93. This is consistent with the Agency’s caveat in the direction that CN allow GNG to reserve this 50 car block capacity “under the terms and conditions of its previous GT Secure Export program, as they are applicable in this circumstance”. CN’s “previous GT Secure Export program” Freight Tariff CNR 6145F [**Appendix 15**], at Clause 11 expressly addressed in detail the allocation process that was to govern in the event that the number of contract units was over-subscribed. That is exactly what the Agency intended CN to implement with respect to any reintroduction of a GT Secure-type program to allow GNG to advance book 50 car block units for a minimum of 20 weeks.
94. The interpretation of this direction of the Agency being urged by CARS would in effect insert a period after the words “for placement and loading at GNG’s Nampa facility” in paragraph 111, and ignore the rest of the sentence. CWB and CARS interpret the Agency’s Decision as directing that CN must supply GNG a reserved 50 cars per week if requested by GNG, giving no effect to the caveat “under the terms and conditions of its previous GT Secure Export program”, as applicable.
95. Further, the reference to a “contract period” by the Agency in paragraph 111 evinces an intention on behalf of the Agency that GNG would be required to enter into a commercial contract with CN consistent with CN’s GT Secure Export program for crop year 2005-06 in order for it to receive the car allocation contemplated in the Order.
96. CN’s reading of this aspect of the Agency’s Decision is also supported by the surrounding text of the Decision, and in particular paragraph 110 cited above. It makes no sense for the Agency to make the effort to expressly point out in paragraph 110 that GNG, CWB and other grain companies were satisfied with CN’s advance product programs offered in crop year 2005-06, and then turn around in the very next paragraph and order CN to provide a guaranteed level of service above and beyond any service ever received by GNG before. Paragraph 111 must be read in conjunction with, and take its meaning from, the explanatory, introductory comments contained in the immediately

preceding paragraph; i.e. that GNG was satisfied with the previous programs of CN prior to those changed products offered for the 2006-07 crop year. Because paragraph 110 does not specifically order CN to take any specific action, it must be reasonably presumed that the Agency included this paragraph in order to assist the parties in understanding both the intent and the extent of the directions which follow in the next paragraphs of the Decision.

VI. CTA CONSIDERATIONS IF A SERVICE BREACH IS FOUND

Substantial Commercial Harm

97. Even if the Agency were to determine that CN has failed to fulfill its common carrier obligations with respect to CWB, the Agency must go on to contemplate the request for relief made by CWB. In considering the matter of relief, the Agency is governed by subsection 27(2) of the CTA, which requires that the Agency must first be satisfied that the complainant would suffer substantial commercial harm if the relief were not granted. Subsection 27(2) of the CTA states that:

When an application is made to the Agency by a shipper in respect of a transportation rate or service, the Agency may grant the relief sought, in whole or in part, but in making its decision the Agency must be satisfied, after considering the circumstances of the particular case, that the applicant would suffer substantial commercial harm if the relief were not granted. [Emphasis added.]

98. The Agency's *Guidelines for the Interpretation of "Substantial Commercial Harm"* (the "Guidelines") provide that in a proceeding such as this, the Agency must be "satisfied on a balance of probabilities" that CWB "would suffer substantial commercial harm" if the Agency did not grant the relief requested.

99. At Section 5.2 of the Guidelines, the Agency confirms the "prospective nature of the test":

"The legislation speaks of likely future harm if relief is not granted. Therefore, the Agency must assess whether harm will happen and, if so, how extensive it will be. Such an assessment requires a certain amount of latitude since it is speculative. The Agency must be satisfied that substantial commercial harm would occur if the relief were not granted." [Emphasis added.]

100. The Agency offered in the Guidelines that an applicant such as CWB may prefer to provide proof that it has suffered past harm, and argue that it is "still incurring substantial commercial harm and will continue to do so if the Agency does not act to remedy the situation".

101. While in many situations a retrospective look to past service provided can sometimes be an accurate harbinger of what is to come, that certainly cannot be the case here. In other situations, the Agency has looked to the effect of a carrier's previous service to the

shipper and extrapolated that if such service is continued, the shipper would continue to incur substantial commercial harm unless relief was granted by the Agency.

102. Here, however, no such lineal reasoning can be made between past and future service. CWB cannot validly point to service received from CN in the previous crop year and claim that this could assist the Agency in evaluating potential future harm to CWB for the remainder of the current crop year. The reason for this, of course, is that in these circumstances, CN substantially changed the nature of its advance product programs between the 2006-07 and 2007-08 crop years, making any lineal extrapolation of past service to likely future service impossible.
103. Without the ability to rely on CN's past conduct to establish the likely future impact of CN's new advance product programs, CWB has the admittedly speculative and more difficult task of substantiating its claim that it would continue to suffer substantial commercial harm if CWB's relief sought were not granted.
104. It is also worthwhile to heed the Agency's express cautionary note in Section 8.0 of the Guidelines that CTA provisions such as the level of service provisions relied upon by CWB to ground its complaint here, are not intended to artificially create some form of "level playing field" as amongst all the carriers' shippers:

"...CTA provisions that may be subject to subsection 27(2) are not designed to alleviate any inherent disadvantages a shipper may suffer due, for example, to the shipper's scale of operations, or geographic location relative to destination to markets, or to general market downturns. The goal is to ensure that shippers receive relief when necessary and that carriers provide a commercially fair rate and adequate transportation service." [Emphasis added.]

105. In its Application, CWB does not provide any details of consequences arising out of CN's alleged service breach. Rather, CWB simply concludes as a fact that it will suffer substantial commercial harm as a result of CN's car distribution practices. This is not sufficient evidence to satisfy the Agency on a balance of probabilities that future substantial harm will be actually suffered by CWB if the Application is not granted by the Agency. The onus is on CWB to establish such future harm and it has failed to do so in its Application.
106. It is patently clear that Section 27(2) requires the Agency to be forward-looking. If CN has complied with the Agency's Decision prior to the Application being launched, and the Agency is of the opinion that such a breach will not recur, there can be no resulting commercial harm in the future and no remedy should be available to the shipper under Section 27(2).

Nature of Relief Requested

107. As stated at the outset, the relief being requested by CWB in its Application, and at paragraph 43(b) in particular, is both unnecessary and beyond the jurisdiction of the Agency.

108. First, as demonstrated above, there has been no breach by CN of its level of service obligations owed to CWB and, as a result, there is no need for the Agency to issue any order or grant any relief as against CN.
109. However, even if it were found that CN failed to meet its level of service owed to CWB, the remedies sought by CWB bear absolutely no proportion to the alleged breach.
110. It is well established in law that a remedy should be proportionate to the breach. The Agency has properly been very circumspect in past decisions to limit the breadth of its remedial orders so that they are specifically addressed at fixing the particular breach found to exist.
111. For example, in the CWB Decision, after finding that CP had unduly discriminated the movement of CWB grain to Vancouver, the Agency refused to order CP to “develop procedures to deal with outages and recovery of outages in the future and submit these procedures to the Agency for approval after appropriate consultation with all shippers which may be affected by the procedures”. The Agency importantly concluded that such relief requested “would constitute a detailed form of regulation over railway operations which the Agency does not consider warranted in the circumstances.”
112. Similarly, in Agency Decision No. 132-R-1999, *Naber Seed & Grain Co. Ltd. v. CNR* (the “1999 Naber Decision”), the shipper, in a level of service complaint, was requesting as relief an order to require CN to provide the shipper with train service twice per week, when requested by the shipper, on an ongoing basis in the future. The Agency determined that, notwithstanding the established service breach found there, the granting of this shipper-requested relief would “intrude on the overall grain delivery system”. In not granting the shipper’s requested relief, the Agency properly noted on the last page of that decision:

While it recognizes that shippers require regular, reliable train service for the conduct of their business, the Agency is also cognizant of the fact that there are numerous players in the grain delivery system. Each has its own rules, requirements and conditions, many of which are beyond the control of either the carrier or the shipper. CAPG policies, for example, affect the quantity of grain hopper cars which are available for allocation to non-Administered grains in a particular week. Weather problems and the fact that vessels do not always meet their ETAs can also affect the rate of unloads at ports, which in turn may affect the rate at which empty hopper cars are returned to the grain transportation system.

Therefore, the Agency does not grant the specific, second relief requested by NSG. [Emphasis added.]

113. Likewise, in Agency Decision No. 323-T-2002, *Naber Seed & Grain Co. Ltd. v. CNR* (the “Second Naber Decision”), the Agency correctly stated:

“The Agency must balance the implications of a remedy with the nature of the breach.”

114. As stated above, in the deregulated environment of the CTA, it is no longer the role of the Agency to interfere in the commercial operations of a railway and to dictate the way it must carry traffic. Rather, the Agency’s role is limited in these proceedings to ensuring that an aggrieved shipper has received an adequate level of service from the carrier. Any remedy contemplated by the Agency must be strictly limited to addressing that specific breach.
115. The remedies being sought by CWB, including forced changes to CN’s general car distribution system and policies, bear no relation or proportion to the alleged breach *vis-à-vis* the service provided to CWB. Even if the remedies being sought by CWB were within the Agency’s jurisdiction, it would be inappropriate for the Agency, in the context of a level of service complaint, to issue such intrusive and disproportionate regulatory relief that would have broad and deleterious implications for other grain shippers and the grain handling and transportation system as a whole.

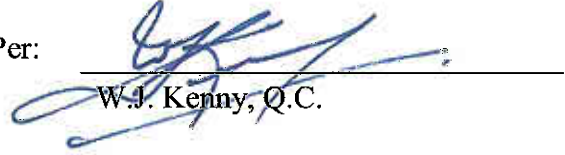
VII. SUMMARY

116. In its GNG Decision, the Agency used the expression “reasonably accessible, transparent, user-needs based car allocation system” as a reasonable expectation for western Canadian grain shippers. CWB in its Application and associated press releases uses this expression as a summary of what they are seeking from CN.
117. It is instructive to review CN’s actions and response from this perspective.
 - *Reasonably accessible* – the changes CN has undertaken to its advance products programs fully meets the test of reasonably accessible.
 - *Transparent* – CN has published the criteria with which it will be rationing requests for general allocation cars when there is excess demand. In addition, CN has begun publishing the results of its weekly rail car allocation decisions on its website. With this information, all shippers can determine the proportion of allocation they received and will be able to conclude whether they are receiving a “fair share” of CN’s general allocation of rail cars.
 - *User-needs based* – As CN has amply demonstrated, the Agency cannot reasonably use weekly requests for cars as an appropriate measure of user-needs demand. CWB as a member of CARS has provided its demand requirements to CN as identified in its August 23, 2007 memo to CN. To date, CN has fully met this demand requirement. Therefore, CN is fulfilling its reasonable level of service obligations to CWB and the other members of CARS.

118. For all the above reasons, CN respectfully requests that the Agency dismiss the Application of CWB.

MILLER THOMSON LLP

Per:



W.J. Kenny, Q.C.