

FORREST C. HUME, B.A., LL.B.*

*Barrister & Solicitor of the Bars of
British Columbia, Québec, New Brunswick & Nova Scotia
1080 Howe Street, Suite 700
Vancouver, B.C., Canada V6Z 2T1*

Tel : (604) 488-1499

e-mail: fchume@humelawcorp.com

Fax : (604) 488-1489

November 5, 2007

BY E-MAIL

Mr. Claude Jacques
Secretary
Canadian Transportation Agency
Ottawa, Ontario
K1A 0N9

Dear Mr. Jacques:

Re: Applications filed by the Canadian Wheat Board, North East Terminals Ltd., Paterson Grain, Parrish & Heimbecker, Limited, Providence Grain Group Inc. and North West Terminal Ltd. pursuant to sections 26, 37 and sections 113 to 116 of the *Canada Transportation Act*, S.C. 1996 c. 10 as amended, for an order requiring the Canadian National Railway Company to fulfill its level of service obligations for receiving, carrying, and delivering of grain. Agency file Nos. T7375-3/07-5; T7375-3/07-6; T7375-3/07-7; T7375-3/07-8; T7375-3/07-9 and T7375-3/07-10.

This is the Reply of Canadian Wheat Board ("CWB") to the Answer filed by Canadian National Railway Company ("CN") October 26, 2007 in the above matter.

In its Answer, CN has taken positions and made certain allegations that are simply wrong. CWB will deal with these positions and allegations in turn:

CN's Answer, paragraphs 9 -10 and 53-63 claiming that "CWB is seeking remedies the Agency has already determined inappropriate"

1. In these sections of its Answer, CN attempts to categorize CWB's application as a mere rehash of the GNG case, and CWB's Intervention in the GNG case. The inference is that there is nothing new, and that a variance of the Agency's decision is unwarranted.

2. In the GNG Decision the Agency had expressed the hope that its finding that CN's problems were systemic in nature in the GNG case would "encourage new open dialogue between CN and its shippers so that any car supply issues can be reasonably met without the need for a proliferation of service complaints before the Agency".

3. Later in the Decision, the Agency reiterated its desire that the parties would begin a new and open dialogue:

"[117] In conclusion, the Agency reiterates the expectation stated earlier in this Decision, that the findings and directions herein will help to encourage a new and open dialogue between CN and its shippers, so that they are able to reasonably deal with car supply issues independent of regulatory intervention to the greatest possible extent."

4. Despite the CARS group's best efforts, the discussions with CN that were initiated by the group following the Agency's decision were not meaningful. Upon delivering its proposal to the CARS group representatives Friday afternoon August 31, 2007, the CN representatives made it clear that CN was going to implement its advance products programs for the 2007-08 crop year the following Tuesday (the ensuing Monday was a statutory holiday).

5. The advance products regime CN intended to so introduce included CN's GX100 product, which was the subject of much consideration by the Agency in its Decision in the GNG case. In the GNG case, the Agency found that it was limited in its jurisdictional scope to a finding specific to GNG's service problems. (Decision No. LET-R-97 dated May 24, 2007). As a result, the CARS group decided that it had no alternative but to file individual complaints.

6. The CARS group had to act diligently to file the level of service complaints in a timely manner (including the level of service complaint filed by CWB). CWB and the other shippers that filed level of service complaints on that occasion repeated the relief requested in the GNG case, thinking that the Agency would want to reconsider the options for relief that were put to it in the GNG case in light of CN's disregard for the Agency's GNG decision.

7. In the ensuing weeks since the level of service applications were filed, CN has made a number of changes to its advance products programs, which it revealed piecemeal and without substantive consultation with the industry. The history of those changes, and the time periods when they were announced by CN, is contained in paragraphs 20-34 of this Reply. Despite these changes, the record is clear – CN is failing to provide adequate and suitable accommodation to CWB and other shippers in its general car distribution regime. Among the

fears of CWB is the very real prospect that CN will continue to make changes to its car distribution regime (including changes to its regime relating to distribution of general cars) unless the regime is fixed by Order of the Agency.

8. CN now argues that the relief requested by CWB is “inappropriate”. What that argument overlooks, among other things, is that the basic relief requested is a request that the Agency determine that CN has not fulfilled and is not fulfilling its level of service obligations to CWB, and that CN be required to provide reasonable and suitable accommodation for the transportation of CWB’s grain. That is the basic request for relief. The other parts of the relief requested are measures that the Agency may consider in remedying CN’s breach of its level of service obligations. CN’s claim that the relief requested is “inappropriate” because it replicates the relief requested in the GNG decision is as specious as CN’s claim that the relief requested is “inappropriate” because CN has made changes to its advance products programs. This argument is particularly disconcerting given that it is clear that CN would not have made the substantive changes to its programs in the absence of this level of service complaint. The fact is that CN failed to provide adequate and suitable accommodation in its supply of general cars to GNG, and CN has failed and is continuing to fail to provide adequate and suitable accommodation in its supply of general cars to CWB.

9. The Agency has broad powers under the *Canada Transportation Act* to remedy that breach, including ordering the railway company to fulfill its obligations “in any manner and within any time or during any period that the Agency deems expedient, having regard to all proper interests, and specify the particulars of the obligation to be fulfilled.” (*Canada Transportation Act*, paragraph 116(4) (c).)

CN’s Answer, paragraph 11-15 re: “Agency decision on GNG Application”

10. In this section of CN’s Answer, CN refers to the evidence in the GNG case, and the Agency’s statement (in paragraph 110 of the GNG Decision) that GNG, corroborated by CWB and several of the grain companies, indicated that the level of service it received prior to CN implementing its 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. CN concludes that GNG, and the other grain companies felt that the earlier service was adequate and suitable.

11. While the regime in effect for the crop year 2005-06 was an improvement on the regime implemented by CN for the crop year 2006-07, it was by no means a panacea.

12. GNG's application described CN's historical grain car allocation regime for a number of years prior to the 2005-06 crop year. This evidence was uncontested by CN and appears at paragraphs 12-14 of the GNG application:

"12. Prior to 2000, rail cars were distributed by CN in accordance with a car distribution system that was developed by industry stakeholders.

13. In the fall of 2000, CN unilaterally implemented its own grain car distribution process in Western Canada to replace the distribution policies and procedures that had been developed by industry stakeholders. This grain car distribution process included a number of new advance-booking program offerings in January 2001, for commercial and rate-regulated corridors. GNG did receive a few form letters from CN when these fundamental changes were implemented. However, GNG's input on the changes was not solicited, and CN made no effort to determine from GNG what impact the changes would have on GNG's operation or business.

14. Since January 2001, a portion of CN's car supply has been offered in the form of advance products that shippers can book as a guarantee for future capacity or service. CN has changed its advance product program every year since 2001."

13. The CWB intervention in the Great Northern Grain case also described CN's historical grain car allocation regime prior to 2005-06. This evidence was also uncontested by CN and appears at paragraphs 26 – 29 of the CWB intervention:

"26. As set out in GNG's application at paragraphs 12 and 13, prior to 2000, rail cars were distributed in accordance with a car distribution system that was developed by industry stakeholders, specifically the Car Allocation Policy Group (CAPG). This was a voluntary, non legislated, industry funded and industry led group with participants from each of the following: Western Grain Elevator Association (WGEA), CWB, railways and western Canadian producers.

27. One of the main responsibilities of CAPG was the division of the overall car supply for CWB, non Board and non administered grains by railway and corridor. The division was an industry

negotiated number based on seeded acres, average yield, historical grain sales volumes, estimated production and demand etc. The split was used for weekly car allocation during periods of car rationing.

28. In the fall of 2000, as GNG points out at paragraph 14 of its application, CN unilaterally implemented its own grain car distribution process in western Canada. The new system introduced the concept of advance rail car bookings. CWB voiced its opposition to this new process, and has raised concerns regarding this process ever since. However, CN implemented the programs in any event and has made changes to the programs each and every year since implementation.

29. Appendix 5 is a table that outlines CWB's analysis of the evolution of CN's programs since it was first instituted in 2000-01 to date, by corridor."

14. Appendix 5 from the CWB intervention, attached to this Answer as **Appendix 1**, describes the annual changes in CN's products since CN first introduced the product regime in the 2000-01 crop year. Looking specifically at the Vancouver corridor, CN slowly increased the number of cars available as part of its advance products regime, peaking with 1300 advance cars in 2004-05. CN made small, but incremental, changes each year to its advance products programs which, taken independently, were not significant enough to justify the expenditure of resources entailed in a level of service complaint. Now, looking back at the cumulative effect, CN had successfully increased the number of cars offered under their advance products regime from 750 cars in 2000-01 to 1300 cars in the 2004-05 crop year. It should be noted that in this corridor, CN rarely provides in excess of a 1500 cars in any week which implies a shrinking of the residual general distribution cars from 750 cars (50%) in 2000-01 to 200 cars (13.3%) in 2004-05.

15. At this point, CN finally received push back from the industry that was sufficient enough to justify taking a step back rather than risk a level of service complaint. This should not be surprising given that with 1300 cars tied up in advance products there would be little to no general distribution cars available in any given week. This step back made the 2005-06 crop year seem like a significant improvement to the CARS group of shippers compared to the 2004-05 crop year.

16. Now that CN had successfully reduced shippers' expectations of the number of general distribution cars that would be available in any given week from the level implied (50%) by CN's advance products programs for the 2000-01 and 2001-02 crop years, CN made the decision to attack the main 50 car product that the CARS group of shippers had come to rely on – its GT Secure

Export (GTSE). For the crop year 2006-07, CN eliminated the 500 car GTSE product and replaced that with 200 cars of general distribution, putting a further 2 GX 100's to bring the total to 6 GX 100's and 2 further GT Pro Export (bid cars) to bring the total to 4 GT Pro Exports. At this point in time, GNG decided that the slow annual progression by CN had finally reached a point whereby it had no choice but to expend the resources required to launch a level of service complaint. CWB, and the other CARS members, facing the same situation intervened in support of GNG.

17. The Agency recognized in the GNG decision that the history of car allocation programs in the grain industry stretches back further than the 2005-06 crop year. In fact, the agency included the period prior to 2000-01 as a guide to understanding previous service standards at Paragraph 64 and 65 of the GNG decision:

"[64]...In this context, the Agency examined the rail car allocation practices and policies implemented within the grain handling industry over the last decade to guide it in its understanding of previous service standards. From this review, the Agency observes that under the CAPG regime, guidelines for corridor priorities and for the segregation of car supply were established based on a system of fairness, reliability and uniformity of treatment for all grain movements in western Canada. Most importantly, they afforded shippers with an advanced knowledge of a secure car supply at specified rates.

[65] During the CAPG era, efficiency was not the only factor in deciding rail car allocation. Rail car supply was allocated on the basis of forecasted sales and rail car cycle times in order to determine the number of unloads available by month and by corridor. Through the development of yearly Capacity Working Plans and subsequent Four Month Plans, carriers, CWB and grain companies could forward plan their rail car supply requirements for CWB and non-CWB grains to meet industry demand and achieve system efficiencies."

18. The Agency found CN's advance Products regime to be lacking when compared to this historical standard: Paragraph 67 of Agency decision No. 344-R-2007 in the GNG case states:

"[67] Bearing this in mind, the Agency finds that CN's recently introduced product offerings, i.e. the GX 100 program and the GT Pro Export program, substantially deviate from what has become an expected standard of rail service for grain movements in western Canada. CN's present offerings and the elimination of CN's GT Secure Export program have created an environment whereby shippers no longer have the same flexibility, commercial certainty or reliability previously enjoyed by all participants within

the grain handling system. All but a few of the large shippers are now excluded from a secure advance car supply at tariff rates and are forced to operate without one or the other of these essential elements. GNG is among those excluded."

19. CN's Answer in this proceeding takes the position that the car supply regime in effect for the crop year 2005-06 was adequate and suitable accommodation for CWB's traffic. Certainly the regime in effect for the crop year 2005-06 was an improvement over that in effect for 2006-07 but (as described above) the regime in effect for the crop year 2005-06 represented substantial "creep" from the standard of rail service for grain movements in western Canada that grain shippers had experienced previously.

CN's Answer, paragraphs 16 – 31 re: "CN's actions prior and subsequent to the Agency decision and order"

20. CN has framed its Answer in a manner which attempts to portray CN as having made major concessions in its dealing with CWB and the CARS group. On the surface, CN is suggesting that it has been substantively responsive to the shipping needs of CWB and the CARS group. A closer examination of CN's actions reveals that in fact, CN did not take any meaningful steps to respond to the shipping needs of CWB and the CARS group in any material way, up and until the point where CN filed its Answer to the request for an interim order. At that time CN announced it would suspend its GX 100 car program. Prior to that time, a review of CN's actions indicates that it was not prepared to make anything other than minor adjustments to its programs to accommodate the needs of the shippers that have filed level of service complaints.

21. With respect to its dealings with CWB, CN in its Answer has attempted to paint CWB as being unreasonable in its demands and non responsive to the changes that CN has offered.

22. CN states in its reply that "CN offered the CWB a car supply capacity for wheat to Vancouver that matched its total shipments during the 2005-06 crop year." This statement is not correct.

23. CN offered CWB 200 cars per week +/- 25 cars.

CWB reviewed its wheat movement over the past number of years, and found that its wheat movement significantly exceeded CN's offer. For example, in 2005-06, the CWB moved the following CN cars to Vancouver:

CWB - CN Vancouver Wheat Shipping - 2005-06

Week	Total
0501	240
0502	407
0503	220
0504	213
0505	0
0506	164
0507	339
0508	179
0509	176
0510	140
0511	67
0512	50
0513	220
0514	0
0515	68
0516	50
0517	246
0518	314
0519	293
0520	90
0521	93
0522/23	243
0524	86
0525	214
0526	158
0527	300
0528	256
0529	252
0530	400
0531	362
0532	617
0533	411
0534	423
0535	381
0536	318
0537	137
0538	234
0539	156
0540	504
0541	304
0542	558
0543	441

0544	559
0545	469
0546	633
0547	463
0548	457
0549	339
0550	525
0551	480
0552	316
Total	14565

Total Wheat	14565
Average Per Week Wheat (51 weeks)	286

24. CWB did inform CN, that its offer of 200 +/- 25 cars was insufficient to meet the CWB's wheat movement requirements. Furthermore, CN's offer was not a firm guarantee of car supply, due to CN's ability to reduce the general allocation. As such, CWB determined that it would have to participate in CN's flawed advance products regime, to ensure car supply, rather than enter into this type of agreement that was certain to leave CWB with fewer cars than it had received in past years.

25. While CN's offer was clearly completely inadequate, what was particularly disconcerting was the fact that CN's offer (1) was based on the premise that the more advance products CWB booked the less general car supply CWB would get from CN and (2) the proposal would effectively eliminate the CWB's ability to get car supply to meet its barley marketing program. With respect to this latter point, as there was a legislative issue outstanding with respect to barley, CN did not want to discuss CWB car supply for barley. However, clearly it is the role of the shipper to indicate what its demand requirements are with the carrier indicating its capacity to offer. CN's approach in this regard is a prime example of its arrogance in its relationship with shippers as CN was effectively telling CWB what its demand would be. Notwithstanding the regulatory uncertainty, CN's response greatly concerned CWB as given CN's performance and the fact that CN was looking to lock in its rail car program, including advance cars, CWB was basically assured that it would have no Vancouver car supply to offer a barley program. This was unacceptable and unreasonable.

26. With respect to the former point, CN's advance car programs are based on the premise that the more cars a shipper books the greater their car supply will be in the corridor that the cars are booked. Furthermore, they are marketed on the premise that there is a one to one relationship between an increase in cars booked and an increase in total car supply in the corridor. However, CN's offer to CWB was based on the premise that each 50 car increment in advance

products booked would reduce the CWB's general car supply by 25 cars. CN's offer effectively meant that if CWB booked 50 cars of advance product CWB's total car supply in the Vancouver corridor would increase from 175 cars to 200 cars overall, but it had lost 25 of its general allocation. If the CWB booked 100 cars of advance products, the CWB's overall car supply would increase to 225, but it lost 50 cars in general allocation. Further, there were no performance guarantees on the general car supply at all. The bottom line is that CN was clearly discriminating against the CWB in this car supply offer based on how they have marketed these programs (i.e., on the basis that an increase in advance car supply will increase car supply overall to the shipper in the corridor) For CN to state now that these offers were reasonable is completely unsupported. Rather, what this does show is that there is a clear difference in approach and interpretation of programs for one set of shippers as opposed to others.

27. With respect to CN's assertion that it implemented other changes prior to the Agency Decision in GNG, and specifically it reintroduced the GT Secure program, CWB notes:

- CARS members asserted in their applications that 50 of the 75 cars in Series B were designated for GNG pursuant to the Agency decision. CN has indicated at paragraph 19 of its Answer that "CARS member mistakenly alleges....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...this allegation is incorrect."
- The fact is, whether or not GNG's 50 cars are included in the 75 allocated to Series B remains unclear based on CN's answer.
- Further, shippers in Series A could only order a 50 car GT Secure, if they also ordered GX100's. This again gives exclusivity to those shippers who have a 100 car spot and therefore does not remedy the discriminatory effect of CN's advance car programs.

28. CN's Answer then claims that subsequent to the Agency decision on July 6, 2007 CN made further changes to its programs as a result of the meetings with CARS representatives and it delayed implementation of the advance products.

29. CWB says that while CN did delay implementation of the advance products while it met with CARS representatives, the dialogue between CN and the CARS members was not meaningful and it was not substantive. As indicated in CWB Application at paragraph's 21 -22, the CARS group representatives met with CN on four occasions. On August 23, 2007, the CARS group provided CN with its car supply requirements. Despite the ruling of the Agency and despite the CARS group attempts to resolve the outstanding

issues, CN did not and would not make a commitment regarding car supply for the CARS group and it would not agree to substantively alter the advance products from its car supply offerings.

30. CN did present an offer to the CARS group on August 31, 2007; however, this offer again did not address the serious issues raised by the CARS group and did not provide a program that would ensure adequate and suitable accommodation to CWB and the CARS shippers.

31. CN pushed ahead with its plan to implement nearly the same advance products which were reviewed and criticized by the Agency, to the detriment of CWB and the CARS group. (See Paragraphs 66, 67, 71 and 105 of the Agency's decision.)

32. With respect to the other changes to the advance programs implemented by CN, CWB has reviewed these changes as set out in paragraphs 25-28 of CWB's Application. CWB demonstrates that these changes do not address the substantive issues raised by the Agency as the changes do not address the essential elements of a car supply program that is required by shippers, including the need for a reliable, flexible car allocation system that brings shippers commercial certainty.

33. CWB does note that directly in response to the GNG Decision, CN did introduce some changes which were positive, including, allowing trading of cars; minor modifications to the rationing process and publication of weekly allocation decisions. CWB also notes that these changes, which are critical to a shipper's ability to have transparency and understand CN's process, were only made as a result of pressure resulting from the level of service application.

34. As CN was planning on moving ahead with its advance programs and as those programs in CWB's view were not consistent with the principles set out in the GNG Decision, CWB was forced to file its level of service application and did so on September 5, 2007.

35. Up to this point in time, while CN had made some minor changes to its programs as noted above, CN had not addressed the fundamental problems identified by the Agency in paragraph 67 of the GNG Decision, namely the fact that:

“the GX100 Program and the GT Pro Export program, substantially deviate from what has become an expected standard of rail service for grain movements in western Canada. CN's present offerings and the elimination of CN's GT Secure Export program have created an environment whereby shippers no longer have the flexibility, commercial certainty or reliability previously enjoyed by all participants within the grain handling system. All but a few large shippers are now excluded from a secure advance car supply at tariff

rates and are forced to operate without one of the other of these essential elements....”

CN’s Answer, paragraphs 31-36 re: “CN suspended its GX-100 program for the 2007-08 grain shipping season”

36. In paragraph’s 31-36, CN speaks to the fact that it has suspended its GX100 program and also addresses the issue of grain originations by facility.

37. CWB is pleased to note that CN has finally conceded the validity of CWB’s evidence that its GX 100 program is unnecessary to provide efficiencies in the grain handling and transportation system, and has suspended its GX 100 program.

38. However, when addressing the issue of grain originations, in paragraph 35 of CN’s answer, CN claims that CWB has mischaracterized facility loading trends by concluding that 100 car facilities account for 22% of the grain originations in Western Canada. There is no mischaracterization. While CN’s statement that more than 45% of CN’s shipments are from 100 car elevators may be correct (this includes shipments in all block sizes) CN misses the point. The point is that only 22% of elevators in Western Canada can load 100 car trains. On the other hand however and to CWB’s point, those with 100 car facilities can still load two 50 car trains into a 100 car train while still allowing those with less than a 100 car spot to also benefit from the 50 car trains. This is clearly a more inclusive and less discriminatory approach to car supply.

CN’s Answer, paragraphs 37-39 claiming that “CN is fulfilling GNG’s 2007-08 car supply requirements”

39. In this section of its Answer, CN claims that it has fully complied with “both the directions and principles contained in the Agency’s GNG Decision”. (CN Answer, paragraph 30). That is not correct.

40. This section of CN’s Answer provides CWB with the opportunity of demonstrating not only that CN has failed to comply with the Agency’s Decision but also to provide insight as to the difficulties experienced by grain shippers when CN fails to provide adequate and suitable accommodation in the provision of grain cars through general distribution.

41. During the current crop year, there were 2 weeks when CN failed to provide 50 cars to GNG following GNG’s request. The first of these failures occurred during week 7 and second of these failures occurred during week 9.

42. In week 7, GNG requested 50 cars from CN in accordance with the Agency’s Decision. CN only provided 29 cars. CN’s answer says “GNG traded

all of these cars away, signalling that it did not need the 50 cars.” This is not correct. Had CN provided the 50 cars GNG would have used them; the move would have been efficient; GNG would have benefited from the incentive rate. Instead, GNG opted to trade the cars to PGG so that PGG could ship a 50 car incentive train, making up the shortage that PGG was experiencing in its 50 car request to CN that week. Shippers are frequently required to attempt these kinds of defensive measures to ameliorate the adverse effects of CN’s failure to adequately and suitably accommodate their traffic.

43. In week 9, GNG requested 50 cars from CN in accordance with the Agency’s Decision. CN only provided 24 cars. CN’s answer says “CN initially allocated 24 and then offered an additional 26, which GNG subsequently declined on account of no grain available.” This is not correct. Had CN provided the 50 cars GNG would have used them; the move would have been efficient; GNG would have benefited from the incentive rate. Instead, CN attempted to add the additional 26 cars on Wednesday, September 19, a full 8 days after GNG’s original request by asking the CWB to place 26 of its cars into GNG’s facility. The CWB informed CN that basis its current sales plan; it did not require the CWB grain instore at GNG’s facility. As CWB has continuously advised CN, it is inefficient and costly to move the wrong grain to port. Later that afternoon, after the CN week 9 car distribution had been finalized, and being in breach of the Agency’s order, CN phoned the elevator manager at GNG’s elevator at Nampa, AB and tried to add in 26 cars. The manager at Nampa correctly pointed out that at this late date GNG would not have sufficient time to reschedule deliveries to source and clean the grain. Had CN provided the 50 cars in accordance with the Agency’s Decision, GNG would have had the opportunity to put a full 50 car loads of the right grain through its facility.

44. The consequences of CN’s breach of the Agency’s Decision are very real, and were presaged by the Agency in its Decision:

“ [111] The nature and extent of the breach found in this case and the implications for GNG of a continuation of the status quo warrants a remedy that provides this shipper with what it reasonably needs in order to viably operate. That is, the Agency has found that the rail service GNG has received is sporadic and plagued by a shortfall in allocated cars. Certainty of grain deliveries to port and ultimately to its customers is crucial, particularly with the need for furtherance by water to export destinations. Unpredictable and erratic rail service jeopardizes any kind of coherent business strategy for GNG without which it will continue to lose customers and/or be forced to pay vessel demurrage charges at port. In order to accommodate what the Agency finds is a reasonable need for GNG, notably predictable delivery of rail cars and adequate supply, 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."

CN's Answer, paragraphs 40 – 52 claiming that "CN's August 31 car supply proposal provided adequate and reasonable accommodation of CARS projected shipping needs"

45. In this section of its Answer, CN makes the following allegations:
- CN complains that CARS refused to provide shipper specific information with respect to their August 23, 2007 demand;
 - CN's August 31 proposal provided reasonable and adequate accommodation;
 - The CARS demand fails to take into account CN's efficiencies inherent in shipping through Prince Rupert vis-à-vis Vancouver.
46. In paragraphs 40-41 of its answer, CN complains that the CARS group only provided aggregate information on car demand, implying that shipper-specific information would be required for CN to make a proposal. This is not correct. The CARS group provided specific information as to its group demand, which it undertook to honour on a take or pay basis and which car supply was tradable within the group. Specific shipper demand is simply not required for CN to adequately resource to meet the CARS group's requirements. Providing specific shipper demand would also compromise competitive issues for the shippers in question.
47. CWB fully set out at paragraphs 25-28 of its Application why CN's August 31 car supply proposal was deficient.
48. CN states that its proposal to the CARS Group "met 97.7% of the CARS demand requirements." That is not correct, as will be explained below. CN's proposal specifies a "target" for the CARS group to meet 97.7% of the CARS demand requirements. This difference between "target" and cars actually received is colossal in its importance.
49. CN's proposal also significantly shifted the CARS group's requests for Vancouver cars to Prince Rupert. CN's reserve capacity for Vancouver in CN's proposal was 475 cars which CN says is "based on CARS average weekly Vancouver shipments of 478 cars during the 2005-06 crop year." The Agency may wonder why CN is quoting average weekly Vancouver shipments for the crop year 2005-06 when CN was in possession of CARS demand requirements for the current crop year. The reason is, CARS average weekly Vancouver

shipment requirement for the current crop year is 568 cars per week. CN knew this, but CN was not satisfied with CARS' numbers, and presumed it knows the CARS groups' shipping requirements better than the shippers themselves. As a result, CN chose to quote statistics from 2 years ago to try to make its proposal look reasonable. CN's proposal of a 475 car reserve capacity for the Vancouver corridor is in fact only 84% of CARS current average crop year requirement for that corridor.

50. Further, CN's proposal allows CN to ration the CARS group down to 75% of 84% (or 63%) of its requirement, while the grain companies not in the CARS group (with whom the CARS group of shippers competes) would continue to get 100% of their GT Secure and GX 100 cars. In fact, the CN proposal does not even guarantee 75% as there are no performance penalties against CN payable to the CARS group for failure to meet the 75% threshold while CN would continue to pay out non-performance penalties on its GT Secure and GX 100 programs. Customers served by the CARS group of shippers should expect to receive more than 63% of the grain that they purchase. Being unable to assure those customers that they will receive no more than 63% of their grain at any given time guarantees that CARS members such as CWB will suffer substantial commercial harm.

51. As we have seen in the GNG case, CN very rarely hits its target of offering 1500 cars to Vancouver. The evidence is that the CARS group has experienced and has seen significant rationing of cars from CN. As such, the CARS Group did not have confidence in CN meeting even 63% (as calculated above) of its demand requirements with CN's proposal and the CARS group did not accept that it would have to ship its grain through Prince Rupert, as explained below.

52. CN's August 31 proposal and CN's Answer promotes the diversion of traffic from Vancouver to Prince Rupert. CN makes it very clear that it is both more efficient and more economical for CN to have traffic move through Prince Rupert. CN refers to the rate reductions that routing traffic through Prince Rupert would provide to CARS members to divert traffic through Prince Rupert. This denies the basic reality facing CARS shippers, namely that despite CN's referenced rate reduction it is still more economical for CARS shippers to ship grain through Vancouver. Ownership of elevator terminals, terminal rebate agreements, and the existence of more than one railway at port are other major factors causing grain shippers to prefer Vancouver over Prince Rupert. CN should not be permitted to dictate the routing of its shippers' traffic in any event, especially when doing so will result in substantial commercial harm.

53. With respect to CWB, in 2006-07, CWB shipped over 94% of the CN grain that moved through Prince Rupert. In comparison CWB shipped approximately 32% of the CN grain to Vancouver. In 2006-07, this equates to CWB shipping approximately 77% of its West Coast CN movement through the port of Prince Rupert. CWB is forced to move this volume of grain through

Prince Rupert, due to CN limiting the number of cars CWB receives in the Vancouver corridor.

54. There are benefits in shipping to Prince Rupert, which include \$335/car lower freight rate to Prince Rupert over Vancouver. However, there are also significant benefits in shipping to Vancouver, which can outweigh the benefits of shipping through Prince Rupert. CWB commonly loads multiple varieties of grain on vessels. To maximize efficiencies and economics for producers it is often beneficial and sometimes critical to blend grain found on CN and CP lines. This blending is possible at Vancouver, but is not economically viable at Prince Rupert (except under exceptional circumstances), as CP does not have track nor offer car supply to this port.

55. It is interesting to note that very little non-board grain moves to Prince Rupert. This is because there are economic incentives to ship through Vancouver and the 5 terminals in Vancouver compete for grain. As a result, the terminals offer a terminal rebate to grain companies in Vancouver. To CWB's knowledge, terminal rebates are not offered on non-board grain at Prince Rupert. As a result, grain companies prefer Vancouver shipping over Prince Rupert. This is evidenced in CN's own GT Pro bids being significantly higher to Vancouver than at Prince Rupert.

56. The law clearly establishes that the shipper has the right to choose its own routing for the movement of its traffic and to obtain the best price for the movement of the traffic in making that decision.

57. In Decision 457-R-1997 dated July 17, 1997 (in connection with a level of service complaint by Eagle Forest Products Limited Partnership against Canadian National Railway Company, alleging that CN had failed to fulfill its common carrier obligations to provide adequate and suitable accommodation for delivering traffic originating from its mill located in Miramichi, New Brunswick, the Agency affirmed that principle in saying:

"In addition, the Agency recognizes the fundamental rights of shippers to choose their own routings for the movement of their goods, to choose which carrier or combination of carriers will carry those goods and to obtain the best price for the movements in making those decisions."

CN's Answer, paragraphs 53-63 "CWB and CARS car order requests are an inappropriate measure of user-based needs"

58. CN Alleges at paragraph 54, that it is inappropriate to use car order requests as a measure of user based needs, as CWB and other CARS shippers weekly order requests are significantly inflated. CN refers to the CARS demand in support of its proposition. CWB disagrees with CN's assertion and says it

ignores the realities shippers face in planning a sales program and the consequences of CN shorting shippers on the car demands they request. In addition, it ignores what the Agency did in the GNG case.

59. The Agency, in the GNG case, rightly compared car order requests to cars received when it looked at the factors to be considered in determining adequate and suitable accommodation. This measure is the ultimate measure of whether a carrier is providing adequate and suitable accommodation for a shipper's traffic. It is the most basic measure. The shipper requests the cars, and the carrier supplies the cars. The extent to which the carrier doesn't supply the cars is the measure to assess.

60. When the CARS group provided CN with its demand for the current crop year on August 23, 2007, it was made abundantly clear that this demand was a preliminary estimate of CARS car requirements for the 2007-08 crop year. This is because harvest was only 18% complete for the 6 major grains in Western Canada as of August 20, 2007. The CARS group indicated to CN that a more accurate demand forecast would be provided when harvest was complete. The CARS group did however, indicate to CN that it was fully prepared to honour the demand provided to CN if an agreement had been reached, with penalties payable should the number of cars ordered be fewer than those in the demand. Unfortunately, no agreement was reached.

61. The August 23, 2007 demand forecast was based on the CARS group receiving their weekly car allocation requests. Grain companies, in the normal course of doing business, sell grain to other companies located at a significant distance from the point of origin of the grain. These sales normally include terms describing the quality of grain (grade, protein, moisture content, etc), payment terms, a delivery location and the timeframe for delivery. Grain companies request cars from the railway in order to meet the conditions of the sales contract. When the railway fails to provide sufficient cars to meet the sales commitments the grain company has made, the grain company still must meet the terms of the contract or face a financial penalty. This means that the grain company now must order cars to replace the shortage from the previous week plus the cars that the grain company had originally planned to order for that week. So long as the railway fails to provide sufficient cars to meet the grain companies commitments (including cars that were ordered to meet previous shortages), the grain company has to order more cars than originally planned in an attempt to mitigate financial damages they will face for missed sales commitments.

62. CWB says that CN's method of car ordering is incorrect and the allegation of phantom ordering is unfounded. If CWB asks for 1000 cars to Prince Rupert in a given a week, and only receives 700, the 300 cars it is shorted will roll into following weeks order. If demand is flat each week at 1000 CWB would ask for 1300 cars the following week to become current to its sales program. If CN continually gave CWB 1000 cars a week, CWB would continue

to request 1300 cars each week in an attempt to make up the shortfall that has never been satisfied. This is necessary so that CWB can attempt to become current in its sales program.

63. CN also accuses CWB of requesting twice double the amount of cars to Prince Rupert since week 10. However, CN fails to show that from week 10, CN has only given CWB 58% of its requests to Vancouver. CWB does as a result have to request more cars to Prince Rupert, because that is where CN is more likely to provide CWB cars and capacity. Further, prior to week 10, CN had been heavily rationing, forcing CWB to attempt to order sufficient cars in one week to become current at the West Coast.

64. In addition, CWB says that Prince Rupert orders should not be considered in isolation of Vancouver orders. For example, if the CWB's total demand to the West Coast is 1500 cars in a given week and we request 700 Vancouver, but, CN only provides 400 orders to Vancouver our Prince Rupert orders will need to rise by 300 cars to make up for CN's rationing.

65. While CN accuses the CWB of phantom ordering, the CWB has incurred over \$1.6 million dollars in vessel demurrage at the West Coast during the month of October, due in large part to insufficient rail capacity.

CN's Answer, paragraphs 64-66 claiming that "CN's Advance Programs are being unjustifiably targeted"

66. CN in its Answer claims that CP has several similar products to CN and that CWB and the CARS group are discriminating against CN by targeting its programs and not CP's. CN goes on to say that CN's programs are within established industry standards. CWB and the Cars group say that CN is mistaken. The Agency's Decision in the GNG case has clearly demonstrated that CN's programs are not within established industry standards and in fact they actually offend the level of service provisions in the CTA.

67. CWB and the CARS group are not discriminating against CN. The fact is, CWB and the CARS group have fundamental issues with CN's advance programs and have sought to resolve them directly with CN to no avail. To point to CP programs as an answer to CN's actions is non-responsive. The allegations before the Agency deal with CN not CP, and CWB and the CARS group take the position that it is inappropriate to raise CP programs in this application.

CN's Answer, paragraphs 67-71 "GT Pro program is a well-established product"

68. In this section of its Answer, CN argues that its GT Pro program is a "proven" product, and that CARS members are "simply philosophically against auction cars". CWB submits that any particular product in a car supply regime is only "proven" if the regime provides adequate and suitable accommodation for shippers' traffic. The GT Pro program is an auction, the cars being awarded to the highest bidder. It creates an artificial financial burden for shippers, and it rewards shippers according to their ability to fund the auction. It is far easier for large grain companies to participate in CN's GT Pro program than smaller grain companies. CWB has indicated in its Intervention in the GNG matter, at paragraph 34(a), that the average GT Pro minimum winning bid is \$413.39 per car or \$4.59 per tonne over tariff and has traded as high as \$829.00 per car or \$9.21 per tonne over tariff. CWB's opposition to the GT Pro program is anything but philosophical.

69. CN's answer claims that "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" This was not the intent of the Revenue Cap legislation when it was implemented in 2000. During the Kroeger process, both CN and Canadian Pacific Railway (CPR) attempted to have freight rates for Canadian grain entirely deregulated. Shippers and producers were rightfully concerned that total deregulation of the railway grain rates would lead to massive freight rate increases. Canadian Pacific Railway (CPR) developed the Revenue Cap and presented it to the Kroeger process as a mechanism to guarantee that the railways would not take advantage of captive shippers. During this process, the Revenue Cap was described as a safety valve to prevent the railways from overcharging grain shippers. This statement by CN shows that CN does not treat the Revenue Cap as a safety valve; rather CN views it as a Revenue target that they must manipulate their ancillary charges and freight rates in order to achieve thereby turning the GT PRO revenue into a revenue stream for CN.

70. CN also alleges at paragraph 70, that it is inappropriate for CWB to express a philosophical concern regarding bid cars, when CWB utilizes an auction/bid process. However, the programs and application of the programs are fundamentally different.

71. Tendering for grain was mandated to CWB by the federal government in 2000. CWB was instructed to tender 25% of its business to grain companies in the 2000-01 and 2001-02 crop years. CWB was also mandated to tender 50% of its business in 2002-03. CWB followed through on the federal government's requirement.

72. Through meaningful industry consultation with CWB and its suppliers based on the experience with tendering through the previous three crop years, it was resolved that CWB would tender 20% of its business requirements.

73. In the case of CWB tendering, grain companies originate grain supply from a market of 75,000 farmers. The CWB does not control the size or quality of the crop, nor does the CWB control a farmer's willingness to deliver. Finally, the CWB does not mandate that farmers deliver to one company or another. In other words, grain companies compete for tenders based on market conditions that are not determined by the CWB.

74. In the case of bid cars CN determines the supply and quality (i.e. service) of the product offering

75. Additionally, in the case of auctioning cars CN determines how many cars are available to the market. The lower the supply of cars and the lower the service standard, the higher the price of the bid cars. In other words, CN is the single supplier of the bid cars.

CN's Answer, paragraphs 76-77 claiming that using the results of a single week of allocation is premature

76. CN indicates that the level of service application is based on a single week of allocation. This is not correct. CWB has ably demonstrated that CN's advance programs have resulted in CWB not receiving adequate and suitable accommodation of its rail traffic for a significant period of time.

77. CN states at paragraph 77 of its Answer that it had supplied 91% of CWB's week 1-7 car order requests for all corridors. This is also incorrect.

78. CN has met the CWB's car supply requirements as follows for the 2007-08 crop year:

Week	% of Requests Rec'd
1	100%
2	100%
3	100%
4	100%
5	100%
6	88%
7	63%
8	68%
9	70%
1	
0	71%
1	
1	67%
1	
2	70%
1	
3	68%
1	
4	77%

79. CN states in paragraph 78, that "the only exception during this period is week 7, when CN did not fully meet the CWB's demand requests." That is incorrect, as CN rationed CWB in week 6 to Thunder Bay, Churchill and the United States (See **Appendix 2**). Note that CN gave CWB a late add of 100 car to meet CWB Vancouver demand.

CN's 91% claim is an average of performance in week 1-7 when total demand for car supply was low and as a result there was no rationing by CN in weeks 1-5. It is important to recognize that weeks 1-5 are all prior to the harvesting another season's crop. As a result, overall system demand is lower than weeks 6-14 which more closely simulate the operating conditions that the CWB will likely face through shipping week 44. The CWB filed its level of service application following week 7, in which CWB received 63% of its requested car supply, and CN's advance program product launch was imminent.

Further CN claims that an unexpected shortfall in week 6 resulted in rationing week 7. However, basis CN's published CWB shortfall, the CWB saw no significant change in the shortfall of board grain over this period. (see **Appendix 3**)

CN's Answer, paragraphs 80-84 claiming "CWB's interpretation CN's level of service obligation is incorrect and unreasonable"

80. In this section, CN argues that 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". The test CN says is one of reasonableness. CWB does not disagree with the test as stated by CN in this regard.

81. The Agency in the GNG decision at paragraph 64 stated the following:

"It has been established in a number of Agency decisions outlining the nature of a railway company's common carrier obligations that the statutory service obligations of a rail carrier are not absolute, but in fact tempered by the test of reasonableness". In this context the Agency examined the rail car allocation practices and policies implemented within the grain handling industry over the last decade to guide it in its understanding of previous service standards. From this review, the Agency observes that under the CAPG regime, guidelines for corridor priorities and for the segregation of car supply were based on a system of fairness, reliability and uniformity of treatment for all grain movements in western Canada. Most importantly, they afforded shippers with an advanced knowledge of a secure car supply at specified rates."

82. The Agency after looking specifically at CN's programs went on to say at paragraph 67:

"Bearing this in mind, the Agency finds that CN's recently introduced product offerings, i.e. the GX 100 and the GT Pro Export program, substantially deviate from what has become an expected standard of rail service for grain movements in western Canada. CN's present offerings and the elimination of CN's GT Secure Export program have created an environment where shippers no longer have the same flexibility, commercial certainty or reliability previously enjoyed by all participants within the grain handling system. All but a few large shippers are now excluded from a secure advance car supply at tariff rates and are forced to operate without one or the other of these essential elements. GNG is among those excluded."

83. CN goes on to argue at paragraph 84, that 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 traffic is "a basic level of

service". CN had raised this argument in the GNG case and the Agency dealt with it directly at paragraph's 70 and 71:

[70] "While the Agency acknowledges that legislative and regulatory changes have placed a greater emphasis on shippers and carriers conducting their business through commercial negotiations, it also recognizes that it was not the intent of Parliament, in allowing greater freedoms through deregulation, for the railway companies to avoid their common carrier obligations pursuant to the CTA. Simply put, throughout the legislative and regulatory changes of the last 20 years-basically deregulation- the level of service obligations have remained virtually intact. They remain as one of the remedies available to shippers who feel that the service they are receiving from a railway company is not adequate.

[71] In general terms, CN has the statutory obligation to provide all grain shippers, whatever their size, with adequate and suitable accommodation for the carriage of their products to the extent that the service requested is reasonable in the circumstances. This encompasses the provision of railway equipment in acceptable quantities at acceptable times. The Agency finds that in establishing car supply policies that have restrictive terms and conditions like minimum order durations and exclude significant segments of the shipper community, CN unilaterally becomes the arbiter of which of its captive shippers are eligible for a competitive advantage. Through its virtually exclusive control of rail service in the western Canadian grain market, CN creates an imbalance and, inevitably, as seen in this case, a failure in the marketplace, Providing a reasonable degree of certainty to shippers like GNG of both price and supply is not, contrary to CN's assertion, considered to be a level of service beyond a railway company's statutory common carrier obligations."

84. CWB says, that CN continues to apply to its programs a regime whereby restrictive minimum order durations apply, bid cars exist and general car allocation is uncertain and unreliable. CN still has virtual control of roughly half of the western Canadian grain market and the vast majority of shippers are captive on CN lines captive to CN. This situation remains despite the fact that CN now has suspended the GX100's.

85. CWB says that CN is not providing a reasonable degree of certainty to shippers like CWB of price and supply and as such, and in keeping with the language in the Agency decision above, CWB says CN is not fulfilling its statutory common carrier obligations.

CN's Answer, paragraphs 85-96 claiming a "Misinterpretation of Agency's GNG Decision"

86. In this section of its Answer, CN provides its interpretation of the Agency's GNG Decision, and comes to the conclusion that it was not ordered to allocate and guarantee to GNG a supply of 50 cars a week, for all weeks. (CN Answer, paragraph 86).

87. CN's Answer then provides an artful interpretation of the Agency's Order, presuming to categorize the Agency's intention as requiring GNG 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". In CN's interpretation, this doesn't mean that CN must provide the cars to GNG that the Agency had specified; merely that GNG would get whatever cars CN decides to provide based on its tariff conditions and the status quo ante.

88. To demonstrate that this artful interpretation is incorrect, CWB believes that it is instructive to repeat the relevant part of the Agency's Order in the GNG case:

"111. ... 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."

89. The excerpt from the Agency's Order in the preceding paragraph was prefaced by the following language:

"[111] The nature and extent of the breach found in this case and the implications for GNG of a continuation of the status quo warrants a remedy that provides this shipper with what it reasonably needs in order to viably operate. That is, the Agency has found that the rail service GNG has received is sporadic and plagued by a shortfall in allocated cars. Certainty of grain deliveries to port and ultimately to its customers is crucial, particularly with the need for furtherance by water to export destinations. Unpredictable and erratic rail service jeopardizes any kind of coherent business strategy for GNG without which it will continue to lose customers and/or be forced to pay vessel demurrage charges at port. In order to accommodate what the

Agency finds is a reasonable need for GNG, notably predictable delivery of rail cars and adequate supply, ...”

90. CN’s interpretation of the Agency’s Order in the GNG case disregards completely the prefatory language cited above, and seeks to avoid the very reason why the Agency issued the order in the first place, i.e. that GNG had received sporadic rail service from CN that was plagued by a shortfall in allocated cars; that GNG had the crucial need for certainty of grain deliveries to port and ultimately to its customers; that this was particularly so with the need for furtherance by water to export destinations; that unpredictable and erratic rail service jeopardizes any kind of coherent business strategy for GNG without which it will continue to lose customers and/or be forced to pay vessel demurrage charges at port. The same applies directly to CWB. CN’s erroneous interpretation of the Agency’s Order serves only to permit CN to rob the Order of its effectiveness.

91. CWB submits that the intent of the Agency’s Order in the GNG case is obvious, and it is expressly stated. The Agency put the matter directly in categorizing the integrity of its Order by stating:

“[115] In carrying out the Agency’s direction to put in place a program whereby GNG can advance order 50-car units, the applicable tariff rates set for these movements will be fair and non-discriminatory against GNG. To not require this would otherwise diminish the integrity of the Agency’s order, which again is to ensure a predictable and adequate supply of rail cars to GNG.”

CN’s Answer, paragraphs 97-106 “Substantial Commercial Harm”

92. In this section of its Answer, CN argues that subsection 27(2) speaks only of future harm, and it quotes the Agency’s Guidelines for the Interpretation of “Substantial Commercial Harm” in support. (CN Answer, paragraphs 98-100). Clearly the Agency has the right to take into account past harm suffered by a shipper in considering subsection 27(2). The Agency did that very thing in the GNG level of service case, as evidenced by paragraphs 95 and 96 of that Decision:

“[95] Having determined that CN has failed to fulfill its common carrier obligations with respect to GNG, the Agency must now contemplate the request for relief made by GNG. In this respect, the Agency is governed by subsection 27(2) of the CTA, which requires that the Agency be satisfied that the complainant would suffer substantial commercial harm if the relief were not granted. Subsection 27(2) of the CTA states that:

Where 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 first be satisfied, after considering the circumstances of the particular case, that the applicant would suffer substantial commercial harm if the relief were not granted.

[96] In making its determination with respect to this matter, the Agency considered all relevant factors including the past and present standards of service established within the grain industry, CN's rail car distribution practices and the impact that CN's policies have had on GNG. In previous cases, the Agency has, in examining the level of harm to a shipper, as it is required to under subsection 27(2) of the CTA, noted the difficulties in substantiating harm that will occur in the future and found that the assessment of past harm assisted it in evaluating potential future harm."

93. CN then claims that the Agency may not look to past harm suffered by CWB because "CN has 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." (CN Answer, paragraph 112). This conclusion completely misses the point. The point is that CN continues to fail to provide CWB with adequate and suitable accommodation for its traffic in general rail car distribution notwithstanding the changes that CN has made to its advance products programs for the current crop year. CWB has set out at paragraph 73 herein, its car order requests versus cars received information, which indicates the shortfall experienced.

94. CARS group members have experienced substantial shortages in general car supply during the current crop year, even with CN's voluntary suspension of its GX 100 product, as the Agency is well aware from the many level of service complaints that have recently been filed.

95. CWB has provided the Agency with evidence of substantial commercial harm in its Application at paragraph 42. In addition, CWB has shown herein the shortfall in car allocation and has set out the substantial amount of demurrage it has incurred as a result of insufficient rail capacity at the West Coast.

96. The Agency is also aware of the evidence filed in this proceeding by Intervener James Richardson International Limited, that has advised the Agency that:

"From grain week 7 through 14 of the 2007-2008 crop year, the post-harvest period, the number of rail cars allocated to JRI for the movement of grain was 30% below 2006-2007 levels and 2,496 cars below that requested from CN through its General Allocation program. JRI has suffered financial and commercial harm as a result of CN's failure to provide an adequate supply of rail cars."

97. CN's Answer exhorts the Agency to heed its "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".

98. The quotation cited by CN refers to 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. CWB is not attempting to artificially create some form of level playing field. The failure of CN to provide adequate and suitable general cars for distribution to CWB is not due to its scale of operations, or geographic location relative to destination markets, or to general market downturns.

99. CN's allegations in this regard are belied by the fact that James Richardson International Limited is experiencing the very same problems with CN's general car distribution regime, notwithstanding that shipper's size and geographic locations, and notwithstanding the changes CN has introduced to its advance products. CN is simply not living up to its level of service obligations to its shippers in general rail car distribution, and is trying to deflect the focus from that breach to a focus on changes it has made to its advance products. Those changes have not remedied the breach, which is the same breach that the agency found to exist in the GNG case.

CN's Answer, paragraphs 100 - 108 re: "Nature of Relief Requested"

100. In this section of its Answer, CN claims that the relief being requested in CWB's application is beyond the jurisdiction of the Agency. That position ignores the broad powers that Parliament has granted to the Agency to grant appropriate relief when it finds that a railway company is failing to provide adequate and suitable accommodation for the carriage of traffic. It represents a vision of railway law and policy that CN wishes were in effect, not the railway law and policy that currently exists.

101. This section of CN's Answer also contains CN's standard lecture to the Agency, that "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." (CN's Answer, paragraph 114).

102. The Agency addressed this matter directly in its Decision in the GNG case:

"While the Agency acknowledges that legislative and regulatory changes have placed a greater emphasis on shippers and carriers conducting their business through commercial negotiations, it also recognizes that it was not the intent of Parliament, in allowing

greater freedoms through deregulation, for the railway companies to avoid their common carrier obligations pursuant to the CTA. Simply put, throughout the legislative and regulatory changes of the last 20 years – basically deregulation – the level of service obligations have remained virtually intact. They remain as one of the remedies available to shippers who feel that the service they are receiving from a railway company is not adequate.”

103. CN's Answer continues to state that the Agency must balance the implications of a remedy with the "nature of the breach", and cautions that 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." (CN Answer, paragraph 110).

104. CN announced in its Answer to the request for interim relief that it was suspending its GX100 car program for the balance of this crop year. This is the first substantive change CN has made in response to the concerns that have been raised by the CARS group of shippers. CWB submits that it is apparent from a review of the nature and timing of CN's actions that CN has only made changes to its programs when it has been faced with either an order of the Agency as in the GNG case, or the threat of an order, as a result of the filing of the current level of service complaints. Clearly, the fact that CN has implemented these changes demonstrates that it is aware that the service it is providing is not adequate and suitable. Furthermore it is also clear that the manner in which CN has made these changes is not consistent with the open dialogue that the Agency strongly recommended in the GNG Decision.

105. CN's Answer claims that the changes it has recently made for the current crop year will provide adequate and suitable accommodation for the traffic offered to CN by CWB and the rest of the CARS group. These arbitrary changes made without consultation and prior notice to the industry have resulted in CN's car supply programs being a constantly moving target. It is impossible for CWB and the rest of the CARS group to plan business strategies to satisfy customers' expectations and requirements on that basis.

106. While CN may believe that the level of service complaints are a means to attack CN, the fact is CWB and the CARS groups ultimate objective is to obtain reliable, flexible and commercially reasonable car supply that it can base its business strategies on and serve its customers. This, in the language of the Canada Transportation Act and the Agency's Decision in the GNG case, is appropriately described as "adequate and suitable accommodation".

107. The current crop year is in week 15. If this matter proceeds to a hearing there will continue to be no certainty or reliability in car supply for CWB and other shippers in the same position as CWB for the remainder of the crop year

and in particular for the peak season. CWB will be required to expend even further substantial monies and resources, and incur the real risk that CN's car distribution regime will be subject to even further change.

108. CWB submits that there is now ample evidence on the record of this proceeding supported by CN's own actions as a result of the filing of this application to warrant a finding and Order from the Agency:

- (a) Determining that CN has breached, and continues to breach its level of service obligations to CWB;
- (b) Ordering that CN fulfil its level of service obligations to CWB; and
- (c) Ordering that CN be required to provide the Agency and CWB with a weekly report of cars requested by CWB v. cars allocated by CN.

109. CWB requests that the Agency make the above finding and Orders at this time. CWB submits that such finding and Order should include, in addition to any other terms that the Agency may deem expedient pursuant to paragraph 116 (4)(c) of the Act, the changes that CN has represented at various times during this proceeding that it has made or is willing to make:

- That CN allocate 75 cars per week to its GT Secure program for the CARS group in Series B (reference paragraph 24 of CN's Answer);
- That CN's minimum GTSE contract requirement is reduced from 30 weeks to 20 weeks. (reference paragraph 30(a) of CN's Answer);
- That shippers be permitted to make offers on CN's products for non consecutive weeks. (reference paragraph 30 (a) of CN's Answer);
- That all shippers be permitted to trade both products and general allocation cars (reference paragraph 30(b) of CN's Answer);
- That CN continue to publish the methodology it uses for rationing general allocation car supply (reference paragraph 30(c) of CN's Answer);
- That CN continue to implement the modified rationing process to ensure all shippers who submit offers for a product receive a level of advance car supply (reference paragraph 30(d) of CN's Answer);
- That CN continue to apply its Railway Deficit account criteria to ration car supply in a manner that will not "shut out" CARS shippers from general car supply distribution (reference paragraph 30(e) of CN's Answer);
- That CN continue to publish the results of its weekly allocation decision on its website (reference paragraph 30(f) of CN's Answer);

- That CN's GX 100 Program be suspended for the balance of the 2007-08 crop year (reference paragraph 31 of CN's Answer);
- That the 400 cars previously allocated to CN's GX100 car program be transferred to CN's Secure Export "Series A" capacity (reference paragraph 36 of CN's Answer);

All of which is respectfully submitted this 5th day of November, 2007.

Very truly yours,



Forrest C. Hume
Counsel for the Canadian Wheat Board

c.c. Respondent and Interveners

APPENDIX 1

APPENDIX 5

Vancouver	2000-01	2001-02	2002-03	2003-04	2004-05	2005-06	2006-07
GTShuttle	550*	300	300	400	600		
GT100						400	
GX100							600
GTSecure Export	550*	400	600	600	500	500	0
GTPro Export	200		100	100	100	100	200
WestCoast Stage					100		
GT Transload						50	50
Total Products	750	700	1000	1100	1300	1050	850
General (Planned)	NA	NA	NA	NA	NA	450	650

Prince Rupert	2000-01	2001-02	2002-03	2003-04	2004-05	2005-06	2006-07
GTShuttle	300*		100	300	300*		600
GT100						100	
GTSecure Export	300*		200	300	300*	150	0
GTPro Export			50			50	100
Total Products	300	0	350	600	300	350	700
General (Planned)	NA	NA		NA	NA	350	500

Thunder Bay	2000-01	2001-02	2002-03	2003-04	2004-05	2005-06	2006-07
GTShuttle	100*	200	100	200			
GT100						100	
GTSecure Export	100*	200	300	400	200	150	0
GTPro Export	100		100	100	200	100	100
Total Products	200	400	500	700	400	350	100
General (Planned)	NA	NA	NA	NA	NA	350	600

North America	2000-01	2001-02	2002-03	2003-04	2004-05	2005-06	2006-07
GTPro BC Dom						50	50
GTSecure N.A.	250	400	300	400	200	475	250
GTPro N.A.			100	100	50	50	100
GTSecure Mexico					50	50	25
GTPro Mexico					50	25	25
GTGulf						50	50
Total Products	250	400	400	500	350	700	500
General (Planned)	NA	NA	NA	NA	NA	NA	550

*CN indicated GT Shuttle or GT Secure Export

APPENDIX 2

Canadian Wheat Board

	<input type="text" value="Y_CWB"/>
<i>Vancouver Request</i>	<input type="text" value="200"/>
<i>Vancouver Allocated</i>	<input type="text" value="100"/>
<i>Prince Rupert Requested</i>	<input type="text" value="700"/>
<i>Prince Rupert Allocated</i>	<input type="text" value="700"/>
<i>Thunder Bay Requested</i>	<input type="text" value="150"/>
<i>Thunder Bay Allocated</i>	<input type="text" value="75"/>
<i>Churchill Requested</i>	<input type="text" value="425"/>
<i>Churchill Allocated</i>	<input type="text" value="325"/>
<i>CDN Domestic West Requested</i>	<input type="text" value="0"/>
<i>CDN Domestic West Allocated</i>	<input type="text" value="0"/>
<i>CDN Domestic East Requested</i>	<input type="text" value="0"/>
<i>CDN Domestic East Allocated</i>	<input type="text" value="0"/>
<i>USA Requested</i>	<input type="text" value="126"/>
<i>USA Allocation</i>	<input type="text" value="100"/>
<i>Mexico Requested</i>	<input type="text" value="0"/>
<i>Mexico Allocation</i>	<input type="text" value="0"/>

Messages: No Msgs.

Grain Week: 6

Fax Number 204-983-2822

Fax Number 204-984-7218

APPENDIX 3

Appendix 3

CN Shortfall 2007-08 Weeks 5 - 7

	Week 5	Week 6	Week 7
VC	192	56	29
PR	15	45	227
LH	61	25	57
CH	279	232	185
US/MX	0	0	0
Total	547	358	498