

CANADIAN TRANSPORTATION AGENCY

IN THE MATTER OF the Application of the Canadian Wheat Board. pursuant to sections 26, subsection 28(2), section 37 and sections 113 to 116 inclusive of the *Canada Transportation Act*, S.C. 1996, c. 10 as amended.

BETWEEN:

CANADIAN WHEAT BOARD

Applicant

- and -

CANADIAN NATIONAL RAILWAY COMPANY

Respondent

APPLICATION

The Canadian Wheat Board ("CWB") hereby applies to the Canadian Transportation Agency (the "Agency") pursuant to section 26, section 37 and sections 113 to 116 inclusive of the *Canada Transportation Act*, S.C. 1996, c. 10 as amended (the "Act") for a determination that Canadian National Railway Company ("CN") 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. Specifically, CWB submits that CN has failed and is continuing to fail to provide adequate rail service through the supply of general distribution rail cars to CWB. The applicant submits that the advance products programs currently being unilaterally implemented by CN discriminate against CWB in the distribution of rail cars,

causing damage to CWB's reputation in world markets and hindering the CWB's ability to move its grain efficiently to market.

Background information

1. The CWB is a producer-controlled marketing organization. A 15-member Board of Directors governs the CWB. Grain producers from the CWB designated area (the Provinces of Manitoba, Saskatchewan, and Alberta, and the Peace River district of British Columbia) elect 10 of the Directors and the Government of Canada appoints the remaining five (including the President and Chief Executive Officer). The Board of Directors is responsible for the overall governance of the corporation and its strategic direction.

2. The CWB is a corporation incorporated pursuant to the provisions of the *Canadian Wheat Board Act*, R.S., and c. C-12 (the *CWB Act*). The statutory object of the corporation is to market grain grown in Western Canada in an orderly manner in interprovincial and export trade. Its mission is to market quality products and services in order to maximize returns to western Canadian grain producers.

3. The *CWB Act* and the regulations passed under it give the CWB exclusive jurisdiction over the purchase and sale of wheat, durum and barley grown in Western Canada and intended for export or domestic human consumption ("CWB grains").

4. Approximately 75,000 farmers in Western Canada, produce between 22 and 24 million tonnes of wheat and barley every year. This grain is consumed in Canada and in more than 70 other countries around the world.

5. Producers deliver their CWB grains over the course of the crop year to primary elevator companies in the country. Primary elevator operators can only purchase grain

on behalf of CWB as its agent. CWB takes title to the grain once it is delivered to the primary elevator.

6. Pursuant to an operating agreement between primary elevators and CWB, when the producer delivers the grain, the primary elevator pays the producer the "initial payment" on behalf of CWB for the grain that each producer delivers. This payment reflects the CWB's initial price for the particular grain in question delivered in store Vancouver or St. Lawrence, less deductions made by the elevator agent for transportation related charges and handling charges (e.g., cleaning, primary elevation, weighing and inspection etc. The initial payment represents a substantial portion of the total payment that producers will receive for their grain. The balance is distributed through "adjustment" and "interim" payments as sales are made with a "final" payment being made generally within five or six months of the end of the crop year. The Canadian crop year runs from August 1st to July 31st. All payments are based on the particular tonnage, class, grade, and protein of the grain that the producer delivers.

7. To facilitate the movement of the grain from the farm to the primary elevator, CWB enters into delivery contracts with the producers. The CWB then calls the grain into the primary elevator system through a series of "contract calls".

8. The primary elevator advises CWB as to how much grain it has to ship to port each week. The CWB then allocates orders to the grain companies for the particular grain and grade required to meet CWB sales commitments. The CWB does this through one of two processes, "tendering" or "car awards", both of which will be explained in further detail in this application.

9. Once grain is delivered by the producers to the primary elevators and once CWB has ordered the grain from the grain company, the grain is shipped to port where it is either unloaded into a terminal elevator or (occasionally) loaded directly onto a vessel.

10. Pursuant to the operating agreement between CWB and the primary elevators, the grain companies are paid for the grain once it is delivered to port position.

11. All of the money received from the sale of all CWB grain is pooled into one of four "pool accounts" (wheat, durum, barley, and designated or malt barley). After deducting the CWB's operating costs, all of the sales revenue earned by the CWB is returned to producers. This results in roughly 96 to 98 per cent or more of all sales proceeds being returned to producers. The amount that each producer ultimately receives for its CWB grain is the pooled price that the CWB is able to obtain during the year on sales of the particular class, grade and protein of the grain that the producer delivered, net of operating expenses.

12. Increases in the operating costs of the CWB results in a reduction in the return to producers. In addition, any impediment to moving and marketing grain creates additional obstacles to farmers which result in additional costs and risked sales opportunities.

13. CWB is one of a number of grain shippers that comprises the CARS group. The members of the CARS group are the Canadian Wheat Board, Great Northern Grain Terminals Ltd., North East Terminal Ltd., North West Terminal Ltd., Parrish & Heimbecker Ltd., Paterson Grain, Prairie West Terminal Ltd., Providence Grain Group Inc., Southwest Terminal Ltd. and Weyburn Inland Terminal Ltd.

14. The CARS group was established as a response to the lack of flexibility, commercial certainty or reliability of rail service that arose as a result of CN's car distribution policies, specifically the introduction of advance products such as the GX 100 program and the GT Pro Export program.

The Agency's Decision No. 344-R-2007 dated July 6, 2007

15. As a member of the CARS group, CWB intervened in support of the level of service complaint filed by Great Northern Grain Terminals Ltd. ("GNG") against CN. (copy of intervention attached, **Appendix 1**). The CWB adopts and incorporates by reference in this application the evidence that was filed in that intervention. The Agency's decision in the GNG case (Decision No. 344-R-2007) was issued July 6, 2007.

16. In its decision, the Agency described the standard of rail service that should be expected for grain movements in Western Canada:

"[66] For the period post-CAPG, while the railway companies were given the overall responsibility of managing car allocation, the ability to secure rail car supply in advance was retained in the introductory program offerings of the railway companies. In particular, CP's MaxTrax products and CN's GT Secure Export product permitted the building of car block shipments in the Vancouver, Prince Rupert and Thunder Bay corridors through advance ordering at tariff rates. Block incentives were structured in increments suitable for accommodating the needs of grain shippers like GNG and indeed the majority of other industry participants. A degree of flexibility and reliability was retained within these product offerings giving shippers the continued ability to forward plan their rail car supply needs, to forecast with some certainty the costs associated with moving their products to port position over a given crop year, and to enjoy an adequate reliable car supply.

[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."

17. In its decision, the Agency clarified CN's statutory obligation to grain shippers, and the consequences of CN's failure to comply with them:

"[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 required 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 portions of 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.

[105] Overall, the Agency finds that although it is aware that CN has a business interest in achieving a greater efficiency, CN's current rail car distribution practices have resulted in the replacement of a reasonably accessible, transparent, user-needs based car allocation process with a more restricted, less transparent regime that does not provide an adequate level of service for grain shippers. The consequence of this is a radical and detrimental transformation of the nature and operation of the marketplace within the grain handling and transportation system in western Canada."

18. In its decision, the Agency found that the difficulties GNG has had in obtaining an adequate and suitable car supply since the introduction of CN's rail car distribution programs are not isolated instances, but are systemic in nature. In that regard, the Agency stated:

"[106] While the Agency has found in Decision No. LET-R-97-2007 dated May 24, 2007 that it is limited in this case in its jurisdictional scope to a finding specific to GNG's service problems, it also acknowledges that the systemic nature of CN's conduct has undoubtedly affected other grain shippers. Ideally, this finding, as it relates to GNG and the industry overall, will 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."

Events subsequent to the Agency's Decision No. 344-R-2007

19. On July 11, 2007, a letter was written on behalf of CWB and other members of the CARS group to Mr. James M. Foote, Executive Vice President of CN, requesting a

meeting to resolve car supply issues following the issuance of the Agency's decision (copy of letter attached, **Appendix 2**). Mr. Foote replied by letter dated July 19, 2007 (postmarked July 30, 2007) indicating that CN was communicating with GNG in an effort to set up a meeting to outline CN's plans in response to the Agency's decision (copy of letter attached, **Appendix 3**).

20. Four meetings between CARS and CN representatives have taken place since the issuance of the Agency's decision, each of which was held in Winnipeg. The dates of the meetings were July 27th, August 9th, August 24th and August 31st.

21. During the meetings, the CN representatives advised of certain proposed changes to CN's advance products programs, most of which are unacceptable to the CARS group. The changes proposed by CN did not adequately address the deficiencies in CN's car distribution regime that the Agency identified in its Decision No. 344-R-2007. Throughout the meetings the CN representatives insisted on continuing with their advance products programs, as described on CN's website. CN attempted to focus the meetings on discussing small changes to their existing programs rather than address the deficiencies that the existing programs create. CN asked the CARS representatives to provide an estimate of the group's car supply requirements for the current crop year presumably to enable CN to develop an appropriate car supply regime to meet those requirements.

22. On August 23rd, the CARS group representatives provided CN with its specific car supply estimates for the current crop year by month and by corridor (copy attached as **Appendix 4**). The car requirements of CWB by month and by corridor, are included in the car supply estimates that were provided to CN.

23. The position of the CARS group in connection with car supply is simple and consistent with the Agency's decision, i.e. CN has an obligation to supply adequate and suitable accommodation for the group's traffic, which includes the provision of railway equipment in acceptable quantities at acceptable times.

24. Because of the lack of progress in the negotiations, the CARS group decided to provide CN with its comments in writing, which it did on August 29th (copy attached as **Appendix 5**). At the meeting August 31st, the CN representatives presented a letter to the CARS group in which CN incorrectly categorized its position as a reasonable response to the Agency's decision. At that meeting CN also provided a proposal for car supply to the CARS group for discussion (copy attached as **Appendix 6**).¹

CN's latest proposal does not provide adequate and suitable accommodation for CWB's traffic

25. The CN proposal is predicated on CN continuing its advance products programs, and on CN's claim that there will be sufficient general distribution cars available to meet the requirements of the CARS group notwithstanding the continuation of the advance products programs. This is not correct. A simple review of the proposal will confirm that it will not meet the requirements of the members of the CARS group, and that there will continue to be significant shortfalls in car supply as there were in the last crop year, and is already evident as of Week 7 of the current crop year.

26. CN's advance products programs, as they existed in the 2005-06 and 2006-07 crop years, are well described in the application of GNG in paragraphs 15 through 20 and the CWB intervention (copy of excerpt from GNG's application attached as **Appendix 7**). Based on our discussions with CN to date, CN has made the following changes to the program that was in place in the 2006-07 crop year²:

- a. They have introduced a GT Secure Series B of 75 cars per week for companies that do not or are unable to bid on the GX 100

¹ CN had provided CWB with a proposal June 26, 2007, before the issuance of the Agency's decision on GNG's level of service complaint. That proposal was unacceptable to CWB because the proposal required the CWB to agree to participate in CN's flawed advance products programs while still relying on general distribution car supply (with its proven unreliability in terms of volumes and service).

² A description of CN's current advance railway products is attached as **Appendix 8**.

- b. They have introduced a GT Secure Series A of 100 cars per week
- c. They have reduced their GX 100 program from 600 cars per week to 400 cars per week
- d. They have reduced the minimum bid period to 20 weeks on both GT Secure programs
- e. They have verbally indicated in meetings with the CARS group that they will allow trading of all car supply
- f. They have published their rationing criteria for their advance products
- g. They have delayed the introduction of the advance product programs by three weeks
- h. They have introduced a deficit account on their advance products that reduces CN's contractual obligations on these products so that they can provide more general distribution cars when CN is in a serious shortfall service situation
- i. At the last meeting with the CARS group, CN introduced the concept of reserve capacity for the CARS group.

27. Copies of CN's tariffs comprising its various advance product programs in place currently are attached as **Appendix 9**.

28. While CN has argued otherwise, the changes that CN has made amount to nothing more than tinkering. The changes do not address the systemic issues identified in the Agency Decision No. 344-R-2007. For instance:

- a. CN's new Series B GT Secure product offers 75 cars per week to shippers who do not qualify or bid on the GX 100's. As per the Agency's order, 50 of those 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 100's. CWB believes that the Agency's order, in the case of GNG, correctly sets out the requirement that CN is to fulfill in the case of all of its grain shippers (like North East Terminal Ltd., North West Terminal Ltd.,

Parrish & Heimbecker Ltd., Paterson Grain, and Providence Grain Group Inc.) that are in a similar position to GNG:

“[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.”

- b. In order to secure the 50-car GT Secures in Series A, a company must have bid on a GX 100. As demonstrated by the CWB’s intervention in the GNG application, only 22 per cent of the grain handling facilities in Western Canada have a 100-car spot and are physically capable of participating in the GX 100 program. As a result, the GT Secure Series A is available to only a limited group of shippers. This is inconsistent with the Agency’s decision (quoted above) that stated:

“[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.”

- c. Despite the change made by CN, the GX 100’s still represent a very significant proportion of the capacity they are offering in the Vancouver corridor. This is particularly the case given the fact that participation in the GX 100 creates exclusivity to the same group for the GT Secure Series A. When one looks at performance by CN in the last crop year, these 500 cars (400 GX 100’s plus 100 GT Secure Series A) exceed 40 per cent of the executed capacity CN provided to the Vancouver corridor. Maintaining such

a regime is inconsistent with the Agency's decision (quoted above) that stated:

"[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 required 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 portions of 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."

- d. CN's change to the minimum number of weeks is inconsequential as successful bids for these programs are still based on the length of bid which tends to be focused on the maximum (experience has shown that bids that specify less than the maximum number of weeks have not been accepted).
- e. One area where CN has indicated they will comply with the Agency's order is in the trading of all rail cars. While this is an improvement and the CARS group supports it, we also agree with the Agency's finding in relation to this issue, i.e.:

"[75] The Agency finds that these counter measures GNG has been forced to adopt with other grain companies in its attempt to ensure a sufficient supply of rail cars to meet its sales commitments are precarious and lack any kind of business surety for GNG."

- f. The "rationing criteria" published by CN in Tariff form for CN's advance products (taken from CN's Freight Tariff CNR 6151-H) is as follows:

"If the number of contract units available is oversubscribed:

Contract offers shall be deemed available for acceptance for fewer than the number of Grain Weeks specified in the Contract Offer, and CN reserves the right to allocate available Contract Units among Contract Offers by awarding GX Contracts that reserve one Contract Unit for a Grain Week, for a specified series of Grain Weeks less frequent than every Grain Week, during the Contract Period;

CN may allocate a portion of the available Contract Units among Contract Offers such that each Registered Member that has submitted a valid GX 100 Contract Offer is awarded some Contracted Allocation, and may allocate the balance by giving preference to Contract Offers having the greatest number of Grain Weeks. If there is a tie among the Contract Offers, CN may award Contracted Allocation using the Registered Member's Historical Corridor Shipping Percentage as a weighting factor."

The "rationing criteria" published by CN in Tariff form for CN's general distribution car supply (taken from CN's website) is as follows:

"Guidelines for Rationing of General Car Order Requests

At times when general car order requests in a corridor exceed CN's forecast of available capacity, CN is required to ration among these general car order requests. When this occurs, CN uses one or a combination of the following factors as allocation guidelines:

- Pipeline management
 - Whether the terminal or receiving facility is capable of accepting and unloading the rail cars requested by a shipper
- Historic shipping percentage
 - Cars are first allocated between groups of similar customers that reflects past share of shipments for the customer group within a corridor, then among customers based on their respective historic shipping percentage within the customer group
- Off-the-top
 - Available to smaller shippers with minimal historic shipping percentages unable to participate in CN's GT products to reserve cars in advance
- Pro-rata basis
 - In proportion to demand among all customers
- Order utilization

- Whether the shipper requesting general car allocation has used cars allocated for previous requests”

The Agency’s order encouraged CN to publish its rationing criteria on its website, to the extent that other grain shippers might also benefit by this information (paragraph 113). With respect, CN’s “rationing criteria” is not a set formula, but is subject to the exercise of substantial discretion by CN that makes it impossible for grain shippers to know in advance what CN’s rationing criteria will be. An important part of transparency is the publication of a shipping plan, and the measurement of the railway’s performance to that plan. During the negotiations, the CARS group sought an assurance from CN that it would publish a shipping plan by corridor and provide statistics to measure CN’s performance to that plan, but CN did not respond. In fact, CN published a Weekly Spotting Performance Scorecard up until Week 26 of last crop year, and the CWB understands that CN discontinued providing this information to its customers. In addition, CN has discontinued providing its capacity plan numbers on its website.

- g. While CN delayed the introduction of their programs to permit dialogue with the CARS group, the dialogue was not meaningful. CN is implementing its programs on the same shipping week as they did for the last crop year, and without having developed a plan to satisfy the car supply requirements of the CARS group. CN’s implementation of its programs at this time has necessitated this application and our request for interim relief (see the interim relief requested by CWB below).
- h. The fact that CN is already considering waivers on their advance products to manage industry concerns with general distribution cars reflects even CN’s pessimism that it will have the ability to perform to their verbally stated capacity plan. The focus of the CAR group’s discussions with CN has been about increased accountability around a mutually agreed shipping program.

CN's approach is to reduce their accountability on their advance products while providing no change in accountability on general distribution cars.

- i. The reserve capacity model presented to the CARS group does not at all change the program design of CN's advance products or our concerns with them. In our meeting with CN we were clear about this. We were also clear that as bad as their current advance car programs are, their reserve capacity proposal is even worse.

CN is proceeding to lock in car supply to a sector of the grain industry

29. At the August 31st meeting, the CN representatives advised the CARS group that CN was proceeding with its deadline of September 4, 2007 for bidding on its products. The products are scheduled to be awarded by CN September 6, 2007. CWB and the other CARS group members are being told by CN that they must either bid on CN's products, or face the vagaries of general distribution, when both CN and the CARS group know for a fact that the advance products prevent CN from providing adequate and suitable accommodation for our traffic. In other words, CN is forcing CWB and the other CARS members to participate in its products in order to secure car supply notwithstanding the Agency's findings.

30. CWB submits that CN should not be permitted to nullify the Agency's decision in this manner. CWB submits that CN should be prevented from implementing its advance products programs (and locking in car supply to a sector of the grain industry for the current crop year) until such time as CN can demonstrate to the satisfaction of the Agency that its general distribution of cars will be sufficient to meet the requirements of shippers like CWB who are effectively forced into bidding on GX 100's to secure car supply while denying the CWB the flexibility it requires to properly market grain on behalf of farmers as mandated by the *CWB Act*.

31. In the CARS group's discussions with CN, we were clear that we are not CN's only grain customers. We stated that we recognized that CN has customers who are 100-car shippers and that CN needs to work with them to meet their needs. However, we also stated that CN has an obligation to design these programs to not only meet the needs of those shippers but also to provide adequate and suitable accommodation for traffic required by other grain shippers. When CN refused to respond positively to this principle and recognizing that their position put our group in an untenable position as it relates to access to CN capacity, we were left with no alternative but to launch this application.

Substantial Commercial Harm

32. CWB, in order to fulfill its mandate under the *CWB Act* to ensure the orderly marketing of wheat and barley, is required to make forward sales of grain. Inextricably tied to the ability of the CWB to make these sales is its business reputation which is developed and maintained through the timely delivery of grain to its customers.

33. CWB relies on CN to transport the grain required to meet these sales commitments. Our success on behalf of farmers, and our reputation hinges upon correctly forecasting the availability of railcars in order to make grain sales.

34. The CWB recognizes and supports the proposition that producers must have access to a viable and competitive primary elevator industry. The more grain companies that are competing for the producer's grain in the country, the better off the producer will be. In order to be viable and competitive, grain companies need access to rail cars on an equal footing with all other grain companies so that they can move their grain to port and fulfill sales obligations. Additionally access to rail cars permits grain companies to free up space in the primary elevator to accept more grain from the producers.

35. Consistent with this principle, the CWB strives to create a level playing field for grain companies delivering CWB grain and it attempts to provide equal opportunities for shippers to ship through ports that pay incentive payments. As grain companies without a 100-car spot cannot spot a 100-car train, it is very difficult for CWB to ensure this equal opportunity through the ports where incentives are paid. This ultimately affects their individual competitiveness and the competitive choices of the farmers that the CWB serves.

36. CN's programs, irrespective of the changes they have made, force shippers that can participate, to secure car supply that is inflexible given the variations in the demand for car supply in a crop year. There are many varieties of grain and grades that must be moved to various port positions over the course of the crop year. As nearly 80 per cent per cent of grain facilities do not have a 100-car spot, these 100-car trains are distributed among the few companies that have facilities with a large enough car spot and are able to book a 100-car train week and week after week. Companies who book GX 100's are then incited to load and ship grain each and every week grain that may or may not be required at port in order to avoid paying a penalty on the rail cars. This raises costs in terms of storage and demurrage at port and causes congestion in the grain pipeline.

37. CWB ships a large range of products of different classes and grades of grain throughout the crop year. These products are sometimes only available through grain handling facilities that have less than 50-car spots. CWB is hindered in its ability to source grain, fulfill its sales commitments and maximize returns to farmers.

38. The fundamental problems with CN's advance products outlined above are exacerbated by the fact that CN's general distribution policy is completely unreliable, non-transparent with no accountability. This of course forces participation in the limited advance products available to non 100-car shippers or be effectively shut out from CN capacity.

39. CWB submits that these factors clearly affect the competitive environment in the grain industry. CWB says that this is a concern to CWB and producers because if these grain companies cannot remain economically viable and competitive; it is producers who lose through reduced competition. Producers will lose in terms of delivery opportunities (including producer cars) and choice of country elevators; lost trucking and other incentives; higher input costs etc. Producers will also lose because it is the producers ultimately pay the increased cost of shipping grain to port.

40. CWB has tried to work within CN's advance products programs in the past, utilizing mitigation techniques such as trading cars within the CARS group, overapplication of grades of grain, moving vessels between Vancouver and Prince Rupert in times of shortages, multiple berthing of vessels, moving additional volumes from Canadian Pacific Railway origins, excessive payments above regulated tariff rates for bidding on CN bid cars, and deferring grain sales. As the Agency has properly identified in the case of trading of cars, these mitigation techniques are precarious and lack any kind of business surety. The CWB pays a substantial price (both monetarily and in loss of reputation) for having to employ these mitigation techniques, all of which are caused by CN's failure to provide adequate and suitable accommodation for CWB's traffic. It is unacceptable for CN to attempt to perpetuate this regime following the issuance of the Agency's decision.

41. CWB submits that the minimalist changes CN has applied to its programs have not addressed the serious issues for the transportation of grain created by their advance products. These issues are as systemic as they were in our intervention in GNG's application just over five months ago. CWB submits that CN is not meeting its level of service obligations under the *Canadian Transportation Act*.

42. By way of example of substantial commercial harm, in Week 7 of the current crop year CWB bid on 150 CN GT Pro bid cars to Vancouver in an attempt to secure required car supply for upcoming sales. CWB was the successful bidder on only 50 of the cars, at a price of \$312.00 per car. When requesting general distribution cars for Week 7, CWB requested 400 cars, but received only 175. Similarly, in Week 7 of the current crop year CWB bid on 100 CN GT Pro bid cars to Thunder Bay in an attempt to secure required car supply for upcoming sales. CWB was the successful bidder on all 100 cars, paying \$42.00 per car for one 50 car block, and \$67.00 per car for the other 50 car block. When requesting general distribution cars for Week 7, CWB requested 300 cars, but received only 50. Despite CWB's best efforts to obtain car supply to meet its needs, and despite paying a premium for CN's bid cars, the net result was that CWB was in a substantial deficit position on cars in Week 7, because it was not successful in all of its bids, and because CN failed to provide the general distribution cars that were requested. The reason why this happened is unknown to CWB, as CN does not provide any clarification of its rationing criteria. Further, the CWB has no way of knowing if CN gave a disproportionate supply of general distribution to other shippers who may not have been successful in bidding on CN's GT Pro cars. A chart showing the general cars requested and received by CWB for the current crop year-to-date is attached as **Appendix 10**.

Relief Requested

42. As a result of the above, CWB requests that the Agency determine that CN has not fulfilled and is not fulfilling its level of service obligations to CWB.

43. In default of CN proposing a car supply regime that will ensure that it can provide adequate and suitable accommodation for the carriage of CWB's traffic, CWB also requests that the Agency make the following orders:

- (a) That CN be required to provide reasonable and suitable accommodation for the transportation of CWB's grain;

- (b) That cars, motive power or other equipment required for the movement of grain be allocated, distributed, used or moved by CN under a system of rail car distribution that conforms to the following principles:
- That the rationing process utilized by CN be fair, fully transparent and not discriminatory;
 - That CN size and maintain its fleet of rail cars available for grain service at a size that will enable CN to meet its level of service obligations to CWB and other small grain companies;
 - That CN be required to offer, distribute, spot and deliver at least 50 per cent of its fleet of rail cars made available for grain service for general distribution to shippers by corridor on a weekly basis;
 - CN be required to report to shippers and the Agency their performance to this requirement;
 - That the maximum car blocks permitted for CN's advance products offerings be set at 50 cars (which could be then combined to 100 car blocks by shippers that are able to do so);
 - That CN's practice of auctioning cars to the highest bidder be discontinued;
 - That shippers be permitted to 'trade' all of CN's distributed cars, whether distributed by advanced products or general distribution, amongst themselves to meet their individual needs;
 - That CN be required to report to the Agency as to any rail cars in its fleet used for grain service that have been retired from service or that have been made unavailable for grain service through storage or otherwise since the initial implementation of its advance products programs; and
 - That prior to making any reduction to its fleet of rail cars available for grain service, CN be required to notify the Agency and grain companies of such reduction, and satisfy the Agency that CN will be capable of fulfilling its level of service obligations to CWB as well as small grain companies notwithstanding the reduction.
- (c) That CN implement such specified steps, systems or methods as may be ordered by the Agency;
- (d) That CN be obligated to fulfill its level of service obligations in such manner and within such time or during such period as the Agency deems expedient having regard to all proper interests, and that the particulars of the obligations to be fulfilled be specified by the Agency; and

(e) That all such further and other relief be granted as the Agency may deem reasonable in the circumstances.

44. In light of the fact that CN is imposing a deadline on shippers to bid on its advance products, and that the bidding process will result in the locking in of car supply to a sector of the grain industry for the current crop year, CWB also requests that the Agency issue an interim order, pursuant to subsection 28(2) of the *Canada Transportation Act*, suspending CN's advance products programs for the crop year 2007-08 until further order of the Agency.

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

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