CANADIAN TRANSPORTATION AGENCY

IN THE MATTER OF The Application of Great Northern Grain Terminals Ltd. pursuant to sections 26, section 37 and sections 113 to 116 inclusive of the *Canada Transportation Act*, S.C. 1996, c. 10 as amended.

BETWEEN:

GREAT NORTHERN GRAIN TERMINALS LTD.

Applicant

- and –

CANADIAN NATIONAL RAILWAY COMPANY

Respondent

APPLICATION

Great Northern Grain Terminals Ltd. ('GNG") hereby applies, 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 an order requiring Canadian National Railway Company ("CN") to fulfil its level of service obligations for the receiving, carrying and delivering of grain to and from its facility at Nampa, Alberta. Specifically, GNG submits that CN's Advance Products Program discriminates against GNG in the distribution of rail cars, rendering GNG and other small grain handling companies[1]

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[1] In this application, reference to small or smaller grain companies is a reference to grain companies that are either not capable of loading a 100-car spot at one of their facilities, or are not capable of loading 100-car blocks of rail cars each week for handling on a particular rail corridor for an extended period of time.

uncompetitive in the marketing of grain. GNG also submits that CN has failed and continues to fail to provide adequate rail service through the supply of general distribution rail cars to GNG.

Background information

1. GNG is an independently owned and operated grain company that was established in 1986. GNG provides grain handling, drying, cleaning, and merchandising services to individuals and businesses in the Peace River and Killam regions, and offers producer car-marketing services throughout Western Canada. GNG operates two grain terminals, one at Nampa, Alberta and the other at Killam Alberta.

2. The Nampa Terminal is located 26 kilometres south of Peace River and has a holding capacity of 17,300 tonnes. It has a 73 car rail spot capacity (two rail spots, one a 50 car spot and the other a 23 car spot, with an overhead bridge to transfer product), and is capable of loading 50 car units or 4,000 – 4,500 tonnes of grain within a 12 hour period. GNG ships board wheat, canola, peas, oats, rye, flax and non-board feed wheat from its Nampa Terminal. Given the terminal's capacity and the size of the existing rail siding, the Nampa Terminal is capable of processing up to 120,000 tonnes of non-board grain and 80,000 tonnes of board grain annually. The Nampa Terminal is captive to CN.

3. The Killam Terminal is located 65 kilometres east of Camrose, Alberta on the junction of Highways 13 and 36, and has a holding capacity of 7,920 tonnes. It has a 30 car rail spot, and is capable of loading 30 cars or 2,700 tonnes of grain in an 8 hour period. GNG ships board wheat and non-board feed wheat from its Killam Terminal. Given the terminal's capacity and the size of the existing rail siding, the Killam Terminal is capable of processing up to 12,000 tonnes of non-board grain and 40,000 tonnes of board grain annually. The Killam Terminal is captive to CP.

The Importance of Rail Transportation to GNG

4. Rail transportation is the only feasible way to move GNG's grain to market. As a result, the service and cost of this mode of transportation directly impacts GNG's profitability and competitiveness.

5. Grain companies operating primary elevators (i.e., elevators that take delivery of farmers' grain on the prairies for furtherance to a terminal or processor elevator) make money through three main revenue streams: (1) handling CWB grain (i.e., wheat and barley for the export or domestic human consumption market); (2) handling and marketing non-CWB grain (i.e., other commodities and wheat and barley for the domestic feed market); and (3) other services, including the sale of farm inputs such as crop protection products and seed. The revenue streams are linked in that if a customer chooses to deliver their grain to a certain facility they will often purchase their inputs there and *vice versa*.

6. The main objective of a grain company is to handle as much grain in a given year as it can at acceptable margins. Because companies' costs are largely fixed the more volume they handle through their facilities at acceptable margins the greater their profit. To gain as much volume as possible grain companies compete against one another for farmers' business using various price and service incentives, such as covering the cost of trucking to their facility, lowering the cost of inputs, or offering a higher payment for the producer's grain.

7. In order to provide grain handling and marketing services, grain companies must build a new facility or buy an existing facility. Grain handling facilities represent a major investment for grain companies. Depending on the size and specifications, a modern primary grain handling facility of approximately 20,000 tonnes with a 100 car spot costs between $10 and $15 million to construct (modest estimate). The current average storage capacity for primary elevators is around 15,500 tonnes, but they can

be as large as 100,000 tonnes. There are also a handful of smaller facilities that can store between 2,000 and 3,000 tonnes.

8. In Western Canada, there are two Class I railways, CN and Canadian Pacific Railway Company (CP). There are also a handful of short line railways interspersed throughout the prairies. Where short lines operate, they provide service to the primary grain facilities loading the rail cars and then hand those cars off to the mainline railway at inter-switching points for furtherance to the final destination. It is important to note that because they own and operate the main lines over which all traffic must travel to destination, the mainline railways determine the car supply available for grain shippers whether that grain is originated on their rail line or on a feeder short line.

9. Logistically, a grain company must have rail track alongside its facilities where the railway can drop off or "spot" rail cars for loading. The number of rail cars that can fit on the track is known as the "car spot". The larger the car spot, the more rail cars the grain company will be able to load in a day. However, regardless of the size of the car spot, the amount of grain a facility can handle is dependant upon its storage capacity and rail service. A facility with a 50 car spot which is serviced by the railway twice a week, can handle the same amount of grain as a facility with similar storage capacity with a 100 car spot that is serviced once a week.

10. It would cost Great Northern Grain (GNG) approximately $800,000 to increase its car spot capacity at Nampa, Alberta from 73 to 100. At GNG's Nampa facility, it would cost an additional $4 to $5 million dollars for extra storage, cleaning capability and load speed to be able to load a 100-car train in 24 hours. Even if this investment were made however, the reality of the industry is that no single elevator facility will ship 100 cars each week for 42 consecutive weeks into the same corridor. In fact, even large grain companies that use CN's GX 100 product use multiple originating elevators in order to meet the 42 consecutive week requirement into the same corridor.

11. There is a great deal of diversity in the storing and loading capabilities of grain facilities in Western Canada. However, what is a constant is that once a company has built or purchased a facility, it must rely on the railway to ensure its viability. The pricing and availability of rail service will largely determine how competitive and how successful any one company or facility can be. With only two mainline railways and in most cases with grain companies only having access to one, it is critical to a grain company's financial viability that the rail service provided be appropriate for the facility it is serving.

CN has changed the Policy for Distribution of its Rail Cars in the Grain Industry since 2000

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 programs 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.

CN's Current Policy for Distribution of Rail Cars

15. In the Vancouver corridor for 2006-07, CN offered 3 types of advance products (CN's tariffs relating to its advance products are attached in **Appendix 1**). The first type is the GX 100, which is a 100-car train that is distributed by CN to grain companies that contractually commit to book the rail cars for consecutive weeks. The CN Tariff requires that a company must offer a minimum of 30 weeks to a maximum of 42 weeks. The GX 100 must load in a 100-car block in 24 hours, and move to the same destination each week. GNG's understanding is that grain companies must practically commit to book the GX 100 product for 42 consecutive weeks in order to secure supply. From crop weeks 10-28, the GX 100 product has made up 49% of CN's Vancouver car supply for 2006-07. It is important to note that weeks 10-28 in the Crop Year are the busiest weeks in the grain industry, and therefore create the highest demand for rail cars.

16. The second type of CN's advance products are bid cars, known as GT Pro's. GT Pro is a 50 car unit that is booked 2-5 weeks ahead of shipping. Grain companies must bid a premium to secure these cars. For the 2006-07 crop year the average GT Pro minimum winning bid is $4.59 per tonne over tariff, and has traded as high as $9.21 per tonne over tariff. From crop weeks 10-28, the GT Pro product has made up 16% of CN's Vancouver car supply.

17. The third type of CN's advance products is known as GT Transload. GT Transload are also bid cars that must move in increments of 10 or more cars. This product is only available to facilities that are not licensed by the Canadian Grain Commission, and therefore is not applicable to GNG. The GT Transload product represents 4% of CN's Vancouver car supply for crop weeks 10-28.

18. Finally, CN offers one type of car supply that is not an advance product. This type of car supply is known as CN's general distribution car supply. Companies submit requests for general distribution car supply approximately 1 ½ weeks prior to the

load week. The criteria by which rail cars offered through general car supply are rationed by CN is unknown to GNG or other grain shippers because the process is not disclosed by CN. For crop weeks 10-28, CN has offered 31% of its Vancouver car supply in general distribution car supply. This is less than the 43% that CN had indicated to shippers at the beginning of the crop year. As total car supply is limited, when CN capacity falls below its plan capacity, CN rations its general car supply to shippers first.

CN's Changes to its Advance Products from Crop Year 2005-06 to Crop Year 2006-07

19. **Appendix 2** describes CN's 2006-07 and 2005-06 capacity offerings in the Vancouver corridor. CN made public its intentions regarding the 2006-07 capacity offering only days before the offer was posted in its tariff on July 14, 2006. GNG was not consulted nor notified in advance as to CN's 2006-07 offering, and was therefore unable to provide to CN any input on the products and the impact of these products on its operations or business prior to CN's implementation.

20. The main difference between CN's product offering in 2005-06 and 2006-07 is that CN increased its offer of the GX 100 product, which must be loaded in 100-car units, and discontinued its GT Secure products to Vancouver, which could be loaded in 50-car units (both at no cost above the posted tariff rate).

CN's Car Distribution policy Discriminates against GNG and Results in Inadequate and Unsuitable Service

21. The rail car distribution policies in effect within CN discriminate against GNG, and prevent GNG from receiving an adequate and suitable supply of rail cars for the traffic that GNG offers for carriage by CN on its railway.

22. CN's GX 100 product: In making the decision as to which grain companies receive rail cars under its advance products CN takes into account the length of contract period offered by a shipper, and CN gives preference to those shippers that commit to the longest number of consecutive weeks. Such a commitment is necessary, under CN's car distribution policy, for a shipper to secure 100-car block car supply. GNG and other smaller shippers simply cannot forward book rail car supply through the GX 100 program due to insufficient car spot availability or the inability to load 100-cars each week for 42 weeks to one corridor. The length of contract criterion in CN's car distribution policy thereby discriminates against GNG, and other smaller grain companies that cannot load 100-car block sizes every week for 42 consecutive weeks to the same corridor. As such, GNG is excluded from almost half of CN's Vancouver car supply.

23. CN's GT Pro product: In this product, CN distributes cars to shippers in 50 car blocks on the basis of an auction, where shippers bid against other shippers to secure cars. This "bid car" process requires the successful bidder to pay CN the amounts bid for the use of the cars. CN gives preference to shippers that bid higher amounts to secure bid cars. Given that CN's GX 100 product is unavailable to GNG, the only way GNG can forward plan is to participate in CN's GT Pro product, which is limited because GNG may not win the car supply, and at times of the year when demand for additional rail capacity is higher, a GT Pro will be very expensive and render GNG uncompetitive in the marketplace.[2] The "bid car" criterion in CN's car distribution policy thereby also discriminates against GNG.

24. GNG submits that providing secure car supply to the highest bidder in its 50 car advance product renders CN incapable of fulfilling its level of service obligation to GNG, and to those many other shippers who, like GNG, are incapable of

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[2] The auction that CN has imposed on this product offering has resulted in GT Pro cars being "priced" at between $250 and $829 per car over tariff. CN is storing as many as 1,800 covered hopper cars that had been employed in the movement of grain. The practice of storing such cars helps render CN's general car distribution insufficient and helps explain why bid cars are being auctioned at such exorbitant prices.

participating in the GX 100 product offerings at tariff rates and are therefore forced to pay bids over tariff to secure cars under the GT Pro Program. Auctioning rail cars to the highest bidder has another negative consequence - inadequate service (i.e. scarcity of cars) equates to high prices (see footnote 2 above with respect to the auctioning and storing of cars).

25. CN's General Distribution of Cars: Weekly car supply not offered through CN's advance products is known as general car supply. This residual car supply is offered on a weekly basis with no guarantee that the railway will provide the cars. There are no restrictions on unit size, and there are no additional charges for these cars above the posted tariff rate. In the Vancouver corridor for 2006-07, CN has offered 31% of its weekly car supply in the Vancouver corridor for weeks 10-28 through the general car supply. The criteria by which rail cars offered through the general car supply are rationed by CN is unknown to GNG or other grain shippers because the process is not disclosed by CN. What GNG knows is that it doesn't receive the rail cars that it has orders from CN on general distribution. In fact, CN has consistently failed to authorize the number of rail cars ordered by GNG to handle its traffic at Nampa. (see **Appendix 3** attached, showing that CN has only authorized 20.8% of the cars ordered by GNG for the Nampa facility) .

Strategies adopted by GNG and Others to Counteract CN's Failure to provide Adequate Service due to CN's Car Distribution Policy

26. Since the implementation of CN's advance products program, GNG has found it increasingly more difficult to secure car supply from CN. The inability of GNG to qualify for CN's GX 100 advance product has forced GNG to adopt alternative strategies for survival. Specifically, GNG and other smaller grain companies, and the Canadian Wheat Board, have formed a group (the "CARS group") for the purpose of "trading" rail cars secured by members of the group. CN advised the

group that it would not permit the trading of general distribution cars amongst the group's members.[3]

27. The CARS group is currently comprised of the following members:

Great Northern Grain Terminals Ltd.
Providence Grain Group Inc.
North West Terminal Ltd.
North East Terminal Ltd.
South West Terminal Ltd.
Weyburn Inland Terminal Ltd.
Paterson Grain
Parrish & Heimbecker, Limited
Delmar Commodities Ltd.
Great Sandhills Terminal
Prairie West Terminal Ltd.
Louis Dreyfus Commodities
Canadian Wheat Board

28. The CARS group "trades" rail cars secured under CN's advance products program among its members, thereby helping to offset in part the service difficulties encountered by many of the group members, including GNG. In previous years, companies in the CARS group were able to participate in CN's 50 car products (GT Secure) and trade amongst themselves to secure confirmed car supply in future weeks to meet upcoming sales. However, for the 2006-7 crop year, changes in CN's Advance Car distribution policy from 50 car advance products, available at tariff rates, to 100 car advance products have rendered this defensive strategy impracticable for cars distributed by CN.

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[3] CP permits trading in all of its products, including general distribution cars.

29. During the current crop year, CN made an exception to its prohibition against the trading of general distribution cars. It permitted a selected number of grain shippers within the CARS group (shippers that had employed GNP Consulting Ltd. to handle their transportation requirements) to trade general distribution cars, while maintaining the prohibition for the other members of the group. The ability to trade general distribution cars has enabled GNG to obtain more cars than were authorized by CN. **Appendix 3** shows that GNG has been able to use 270 more cars as a result of having the ability to trade. It is important that this practice continue and be expanded to all industry participants.

Examples that illustrate the Difficulties that CN's Advance Products Program Causes to GNG

Shipment of non-CWB Grain

30. GNG's facility at Nampa, Alberta has structural and car spot parity with the facilities of other grain companies at Rycroft, Alberta, which are in the vicinity of Nampa. GNG competes with those companies.

31. The three facilities that exist at Rycroft are only capable of loading a 50-car train as they have less than 100-car spots. As such, according to CN's programs, the shippers at Rycroft should not be able to access CN's GX 100 car product. However, CN permits those shippers to access this product at the posted tariff rate by spotting the train in two consecutive blocks. As GNG understands it, the Rycroft facilities receive the 100-car rate incentive as though the trains are GX 100's.

32. GNG has a 73-car spot at Nampa, but GNG's facility at Nampa is not eligible for a GX 100 because CN does not accord GNG the same privilege. As a result, in order to pre-book any rail capacity, GNG must participate in the auction for the GT Pro (50-car trains) product. At, say, $829 per car, GNG would be paying approximately a $9.21 per-tonne premium relative to the posted tariff freight rate to access car supply and compete with other larger grain companies at Rycroft that have obtained GX

100's at no premium. The amount that must be paid by GNG for the GT Pro car supply is, of course, determined by the level of bids put in by GNG's competitors. When other companies bid up the cost beyond the level that GNG expected based on its sales program, GNG is exposed to significant risk.

33. It must be noted that a company that ships a 100-car unit receives an incentive if $7 per tonne, while a 50 car loader receives an incentive of $3 per tonne. Although this is a major factor in the ability of GNG to compete with other grain shippers in the area, the price spread is not part of GNG's complaint. That is, GNG does not dispute that qualified shippers of 100-car trains should receive an incentive. However, if the facilities at Rycroft are paid the $7.00 incentive payment for the 100-car train that CN allows, GNG is put at a disadvantage vis-a-vis these facilities that have less car spotting capacity than GNG.

34. If GNG is unable to successfully acquire GT Pro's, it has to settle for general distribution car supply. As previously indicated, general distribution car supply is typically booked one and one-half weeks prior to loading. This scheduling does not give GNG enough time to put a sale together based on the car supply received because general distribution car supply is incredibly uncertain in an environment where CN is incented to serve advance orders before any general distribution car supply. Sales are made up to six months in advance of the shipment period at port. Buyers do not buy in a shorter time frame as they require time to purchase the required ocean freight at an economically affordable rate. In addition buyers want to ensure that the seller is able to supply their demand. Because it is costly for a buyer to run a mill or crushing plant out of product, depending on the ability of a seller to execute a spot sale is an extremely risky endeavour for a buyer.

35. Even if GNG does order general distribution car supply, there is no commitment on CN's part to supply those cars in the week for which they were ordered, or indeed at all. If CN is unable to spot a confirmed rail car order in the ordered week, whether on advance car supply or general car supply, the car orders are rolled over to the

next week. Rolled car orders are called "shortfall". If CN is in a shortfall position, it will shortfall the general distribution orders before it will shortfall the advance products because shortfalling the advance products would put the railway at risk of paying a penalty.[4] This situation leaves GNG and other smaller shippers exposed to a great deal of risk of not being able to execute on sales due to a lack of rail capacity, and rail reliability.

36. The net result is that when it comes to competing for farmers' non-CWB grain, if GNG gets CN bid car supply under the advance products policy, it can be at a $13.21 per-tonne disadvantage to other grain shippers in the same market area who have access to GX 100's at tariff rates.[5] If it does not get car supply at all, clearly GNG is at a much more serious disadvantage.

Shipment of CWB Grain

37. For CWB grain, the CWB secures rail capacity and then allocates orders to fill those cars to grain companies. The CWB also determines the port of destination on this movement.

38. The impact of CN's advance products is also significant for GNG's shipments of CWB grain. For 2006-07, the CWB has secured CN rail supply per week in the Vancouver corridor. However, as a 73-car loader, where CWB allocates the 100-car units that it has received from CN, GNG is not eligible to receive this allocation. GNG's understanding is that CWB receives an average of 200 cars a week in general distribution car supply to Vancouver. From this general distribution, the CWB must cover its requirements for grain that is sourced in smaller volumes (e.g. malting barley is generally sourced in less than 100-car unit trains due to volume and

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[4] For all of CN's advance products, penalties are assessed if the railway fails to provide the car, or if the shipper fails to load it within a specific time frame. The penalty is currently $250.00 per car in both cases.

[5] The $13.21 is comprised of the $9.21 per tonne described in paragraph 32, and the $4.00 incentive payment spread described in paragraph 33.

production patterns), as well as from shippers with less than a 100-car spot (i.e. other grain companies in GNG's position and farmers who load rail cars directly, or producer car shippers). Due to this combination of factors, GNG may receive very limited CWB allocation to Vancouver for an extended period of time.

39. The net result is that when it comes to competing for farmers' CWB grain, GNG is at the same disadvantage as it is with non-board grain. GNG is not eligible for any 100-car trains that CWB allocates, which GNG believes makes up a large portion of CWB's CN car supply to Vancouver. In addition, it is left to compete with all other grain companies for CWB's general allocation which, as mentioned, CWB must allocate amongst all companies including those that cannot load 100-car trains, as well as companies that supply specific grades of grain over large geographical areas but in smaller quantities, requiring a smaller number of rail cars. In addition, when GNG secures CWB cars, it ships more grain to Prince Rupert versus Vancouver, where CWB appears to be able to secure a higher number of general allocation rail cars which it can distribute to GNG and similar shippers. When GNG ships to PRG, it is at a competitive disadvantage vis-a-vis shippers that ship 100-car trains to Vancouver, allocated to them by CWB, because it does not receive a diversion payment (paid by terminal elevator owners in Vancouver to attract the grain of grain companies that do not have terminal facilities) and it is also at a disadvantage because it does not receive the incentive for loading 100-car trains.

Substantial Commercial Harm

40. GNG will suffer substantial commercial harm if the relief sought in this application is not granted by the Agency. CN's discrimination in the distribution of advance products rail cars to GNG, and CN's failure to authorize general distribution car supply to GNG directly impacts GNG's ability to compete with larger grain companies, ship its products, and serve its customers. Continued discrimination in the distribution of advance products rail cars to GNG and continued failure to

authorize general distribution car supply to GNG will result in GNG very possibly going out of business.

Relief Requested

41. GNG requests that the Agency determine that CN has not fulfilled its level of service obligations to GNG.

42. GNG also requests that the Agency make the following orders:

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

b) That cars, motive power or other equipment required for the movement of grain be allotted, 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 GNG and other small grain companies;
- That CN be required to offer, distribute, spot and deliver at least 50% of its fleet of rail cars made available for grain service for general distribution to shippers by corridor on a weekly basis;
- 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 grain service or that have been made unavailable for grain service through storage or otherwise since the initial implementation of its advance products program; 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 GNG and other 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.

All of which is respectfully submitted this 8th day of March, 2007.

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