

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36836 (SUB-NO. 1)

CSX TRANSPORTATION, INC.
—TERMINAL TRACKAGE RIGHTS—
NORFOLK SOUTHERN RAILWAY COMPANY AND
NORFOLK & PORTSMOUTH BELT LINE RAILROAD COMPANY

CSX TRANSPORTATION, INC.'S REPLY TO
NORFOLK SOUTHERN'S MOTION TO SUMMARILY REJECT
RESPONSIVE APPLICATION FOR TERMINAL TRACKAGE RIGHTS

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1. Introduction and Summary.

CSXT¹ hereby submits this reply to NS’s Motion to Summarily Reject CSXT’s Responsive Application for Terminal Trackage Rights (“Motion”), filed on November 13, 2025. Pursuant to the amended procedural schedule in this proceeding, CSXT will also submit a rebuttal in support of its responsive application (“Responsive Application”) on December 19, 2025.

The Board should deny NS’s Motion. The premise of NS’s Motion and the assumption underlying all of NS’s arguments is that CSXT’s Responsive Application is a request for trackage rights under 49 U.S.C. §§ 11323-25. NS argues that CSXT failed to meet the specific information requirements under the regulations implementing those statutory provisions. But the Responsive Application is not a request submitted under §§ 11323-25. It is a request for terminal trackage rights

¹ Unless otherwise defined, the acronyms and defined terms used herein are the same as those used in the Board’s *Decision No. 2*, served on March 14, 2025 in this proceeding, or in CSX Transportation, Inc.’s Petition to Reject Norfolk Southern’s Minor Application, filed on February 27, 2025.

under 49 U.S.C. § 11102. The Responsive Application complies with the applicable statute, as well as ICC and STB precedent for such a request in a control proceeding. Therefore, the Board should accept the Responsive Application and consider its merits.

NS's Motion ignores the context in which CSXT has submitted the Responsive Application. CSXT seeks terminal trackage rights in this proceeding only if the Board grants NS the authority to control NPBL. To be clear, CSXT believes that the Board should deny the NS control application. But if the Board does grant NS authority to control NPBL, then CSXT believes that terminal trackage rights are necessary to ensure that CSXT will have effective access to NIT. The Responsive Application and the substantial information available in the broader control proceeding provide the Board with a sufficient basis to determine that the requested terminal trackage rights would satisfy the relevant statutory standard and are needed to ameliorate the anticompetitive effects of a grant of control authority. NS's Motion should be denied.

2. The Responsive Application is not a request for trackage rights under 49 U.S.C. §§ 11323-25.

NS's Motion must be denied for the simple reason that it is based almost entirely on the premise that CSXT failed to submit information required under a statute and corresponding regulations that are simply not relevant here.

The main thrust of NS's Motion is that CSXT was required to submit more information in support of the Responsive Application, including information that is specifically required under the Board's regulations for applications for Board authority pursuant to 49 U.S.C. §§ 11323-25. (*See, e.g.*, NS Mot. 2, 4-5.) NS asks the Board to reject the Responsive Application because CSXT did not submit the information that was supposedly required. But CSXT did not request Board authority for a transaction under §§ 11323-25, and the "missing" information

flagged by NS is simply not required for applications for Board authority pursuant to 49 U.S.C. § 11102.

CSXT recognizes that an application for trackage rights under 49 U.S.C. §§ 11323-25 must contain specific supporting information under the Board's regulations at 49 C.F.R. Part 1180, Subpart A. *See* 49 C.F.R. § 1180.0 ("The regulations in this subpart set out the information to be filed and the procedures to be followed in control, merger, acquisition, lease, trackage rights, and any other consolidation transaction involving more than one railroad that is initiated under 49 U.S.C. 11323."). However, the Responsive Application is not a request for trackage rights under 49 U.S.C. §§ 11323-25. It is an application for terminal trackage rights under 49 U.S.C. § 11102, requested only as a condition to address the clear anticompetitive effects that would result from any grant of control authority to NS.

NS relies largely on a 1996 decision in which the Board rejected a responsive application seeking trackage rights filed in the UP/SP merger proceeding by Cen-Tex Rail Link, Ltd./South Orient Railroad Company, Ltd. (collectively, "Cen-Tex"). *Union Pac. Corp.—Control & Merger—S. Pac. Rail Corp. (UP/SP)*, FD 32760, 1996 STB LEXIS 123, at *10-12 (STB served Apr. 12, 1996). But this decision only states that Cen-Tex was seeking "trackage rights." *Id.* at *10. Because there is no indication in the decision that Cen-Tex was seeking **terminal** trackage rights under 49 U.S.C. § 11102, the decision is readily distinguished from the instant scenario.

In a particularly confused footnote, NS appears to argue that CSXT should have pursued its trackage rights relief under §§ 11323-25, not § 11102, because NS has invoked §§ 11323-25 in the primary docket where it seeks authority to control NPBL. (*See* NS Mot. 4 n.6.) But this argument fails from the very start given that, as shown below, the ICC and STB have accepted and granted responsive

applications seeking terminal trackage rights under § 11102 (or its predecessor) in connection with primary proceedings that invoked §§ 11323-25.

3. The Responsive Application properly requests terminal trackage rights under 49 U.S.C. § 11102 and complies with the statute and Board precedent.

3.1 The Responsive Application complies with the governing statute.

Under 49 U.S.C. § 11102(a), the Board may require use of “terminal facilities, including main-line tracks for a reasonable distance outside of a terminal,” if the Board finds that use to be “practicable and in the public interest without substantially impairing the ability of the rail carrier owning the facilities or entitled to use the facilities to handle its own business.” Accordingly, the statute sets out four straightforward requirements: (1) that the facilities be “terminal facilities”; (2) that use of the trackage rights be “practicable”; (3) that the trackage rights be in the “public interest”; (4) and that the trackage rights not “substantially impair” the incumbent carriers’ use of the facilities.

Unlike with transactions subject to 49 U.S.C. §§ 11323-25, the STB has not promulgated rules that specify the information requirements for a § 11102 terminal trackage rights application, either in a stand-alone context or in a responsive application context. CSXT’s Responsive Application addresses each of the statutory requirements and shows that the requested terminal trackage rights satisfy each of these criteria.² The Responsive Application therefore satisfies the relevant filing requirements.

3.2 The Responsive Application is consistent with Board precedent.

The Responsive Application is consistent with the level of detail provided in prior applications accepted and approved by the Board seeking terminal trackage

² In its December 19, 2025 rebuttal, CSXT will further address why the requested terminal trackage rights satisfy the criteria of 49 U.S.C. § 11102.

rights under § 11102 to address the anticompetitive effects of a request for control authority. In such control proceedings, extensive evidence was developed on the existence and dynamic of affected markets, operations, and competition. The agency made the required § 11102 statutory findings in these decisions without extensive analysis of the underlying evidence. If the record in the control proceeding demonstrates that terminal trackage rights are needed to address the anticompetitive effects of a grant of control authority, then trackage rights are appropriate if the § 11102 statutory conditions are met.

For example, in the UP/SP merger proceeding, the Board granted an application for terminal rights filed by Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company (collectively, “BNSF”) and the primary applicants in the proceeding. *Union Pac. Corp.— Control & Merger—S. Pac. Rail Corp (UP/SP Decision No. 44)*, 1 S.T.B. 233, 246, 446 (1996). The application sought an order under 49 U.S.C. § 11103 (now § 11102) permitting BNSF to use certain segments of The Kansas City Southern Railway Company’s (“KCS”) track. *Id.* at 256-57. The application, attached here as Exhibit A, contained a similar level of detail to CSXT’s Responsive Application.

That application provided a description of the terminal trackage and demonstrated that the subject segments were classic terminal facilities, that the requested terminal rights were in the public interest, and that BNSF’s use of the terminal facilities was practicable without substantially interfering with KCS’s ability to handle its own business. (See Ex. A, BNSF/Primary Applicants Appl. 124-28.) BNSF and the primary applicants did not provide the information that NS contends is necessary here.

The Board accepted and ultimately granted the application. *UP/SP*, FD 32760, 1995 WL 758788, at *1-2, 9 (STB served Dec. 27, 1995); *UP/SP Decision No. 44*, 1 S.T.B. at 446-49. The Board briefly addressed its findings “that the three KCS

segments at issue are terminal facilities, that use of such segments by BNSF is practicable and in the public interest, and that use of such segments by BNSF will not substantially impair KCS' ability to handle its own traffic." *UP/SP Decision No. 44*, 1 S.T.B. at 447; *see also id.* at 448-49. No extensive factual analysis from the application itself was required to support the necessary findings.

Similarly, in the DM&E/IC&E control proceeding, the Board accepted for consideration an application for terminal trackage rights, filed by Dakota, Minnesota & Eastern Railroad Corporation ("DM&E"). *Dakota, Minn. & E. R.R. Corp.—Control—Iowa, Chi. & E. R.R. Corp. (DM&E/IC&E)*, FD 34178 (STB served Sept. 26, 2002). The application sought an order under 49 U.S.C. § 11102 permitting DM&E to use certain terminal trackage owned by Union Pacific Railroad Company. *Id.*, slip op. at 11.

As with CSXT's Responsive Application, DM&E's application, attached here as Exhibit B, provided a description of the terminal trackage, explaining that the trackage was consistent with the scope of "terminal facilities," that the requested terminal trackage rights were in the public interest, and that DM&E's use of the terminal facilities was practicable and would not substantially impair UP's ability to handle its own business. (Ex. B, DM&E Appl. 2-6.) DM&E did not provide the level or type of information that NS contends is necessary here. The Board accepted DM&E's application for consideration, noting that the application was "in compliance with the applicable regulations." *DM&E/IC&E*, FD 34178, slip op. at 11.

Additionally, in *UP/SP*, the Board also granted an application filed by the Texas Mexican Railway Company ("Tex Mex") seeking terminal trackage rights under § 11103 (now § 11102) over certain tracks owned by the Houston Belt & Terminal Railway ("HB & T"). *UP/SP Decision No. 44*, 1 S.T.B. at 274, 424-25. In its decision granting Tex Mex's application, the Board briefly stated that it found

“that the use by Tex Mex of the HB & T terminal facilities at issue . . . is practicable and in the public interest, and will not substantially impair HB & T’s ability to handle its own traffic.” *Id.* at 425 n.184; *see also id.* at 524-25.

In *CSX Corp.—Control—Chessie Sys., Inc.*, 363 I.C.C. 521, 583 (1980), the ICC granted an application for terminal rights filed by Norfolk and Western Railway Company (“NW”) under § 11103 (now § 11102) for authority to operate over certain terminal facilities owned by Consolidated Rail Corporation. In its decision granting NW’s application, the Board briefly addressed its findings that the subject track was a terminal facility and that NW’s use of the terminal facilities was “practicable and in the public interest, and that it [would] not substantially impair the ability of any of the rail carriers owning or entitled to use of the facilities to handle their own business.” *Id.* at 599; *see also id.* at 583-85.

4. NS’s concerns about specific information allegedly missing from the Responsive Application are unfounded.

4.1 The Responsive Application sufficiently describes the “terminal facilities” that CSXT is seeking rights to use.

NS claims that CSXT failed to define the “terminal” to which it seeks access. (NS Mot. 5.) This claim is particularly illustrative of the lack of any foundation for NS’s Motion. Notably, NPBL – the other railroad at issue here and the entity that NS seeks authority to control – does not contest that its lines are located within a “terminal.” (NPBL Reply 7, Nov. 20, 2025.) In his verified statement, R. Cannon Moss, NPBL’s President and General Manager, repeatedly acknowledges that the NPBL lines are located within a terminal. (*See, e.g.*, V.S. Moss 3, Nov. 20, 2025 (discussing “CSXT operations through the terminal” and noting that NPBL and CSXT have engaged in discussions “regarding NPBL providing terminal switching service for CSXT’s intermodal traffic to and from NIT”); *id.* at 4 (describing the area as “a congested and complex terminal area”).)

In any event, the statute requires only that the facilities at issue be “terminal facilities.” The Responsive Application provides a detailed description of the terminal trackage and a map depicting the lines. (CSXT Responsive Appl. 3-5.) CSXT also explained that the lines are classic terminal facilities used to reach shippers in the Norfolk marine terminal area, including NIT. (*Id.* at 6-7.)

CSXT’s approach is consistent with prior terminal trackage rights applications that the Board has accepted. (*See, e.g.,* Ex. A, BNSF/Primary Applicants’ Appl. 126, 130-37 (arguing that the subject segments are classic terminal facilities and providing a map and a verified statement describing the terminal trackage and operations); Ex. B, DM&E Appl. 4-5, *id.*, V.S. Wessler (arguing that the subject track was well within the scope of “terminal facilities,” and providing maps and a verified statement describing the relevant terminal trackage and operations).)

4.2 Neither the relevant statute nor the Board’s regulations require the submission of detailed financial information, cost information, or market analyses.

NS claims that CSXT failed to present financial information, cost information, or a market analysis. (NS Mot. 4-5.) While detailed financial information and market analyses are required for certain applications filed pursuant to 49 U.S.C. §§ 11323-25, those requirements do not apply to applications for terminal trackage rights under 49 U.S.C. § 11102, the relevant statute here. As explained above, the statute sets out four basic findings that must be made – geographic scope, practicability, public interest, and no substantial impairment. CSXT’s Responsive Application provides sufficient information on those issues for the STB to act in a manner consistent with prior terminal trackage rights applications submitted in control proceedings that the Board has accepted.

In any event, if the STB considers such information relevant to its analysis here, there is extensive information in the record related to the affected markets, relevant costs, and relevant financial considerations regarding shipper decisions and commercial alternatives. (*See generally* CSXT Opp’n Section 3; V.S. Miller, Sept. 18, 2025; V.S. Carey, Sept. 18, 2025.) The Responsive Application incorporated by reference CSXT’s Opposition and the accompanying testimony. (CSXT Responsive Appl. 3.)

4.3 Detailed operational data is not needed to make the required practicability findings under the relevant statute.

NS claims that CSXT failed to present detailed operational data on how it plans to use the requested terminal trackage rights. (NS Mot. 4, 22.) This argument is misplaced. The statute does not require submission of an operating plan. It requires a finding that terminal trackage rights are “practicable” and would not substantially impair NS or NPBL operations. As CSXT explained, this practicability requirement is clearly met, as the CSXT terminal trackage rights would simply be used to replace the same theoretical NPBL switching service that both NS and NPBL have already acknowledged is practicable. (CSXT Responsive Appl. 11.) Indeed, NS and NPBL repeatedly tout the feasibility of CSXT terminal access to NIT via NPBL switch by pointing to the historical experience in 2015 when terminal access to NIT was briefly provided to CSXT during a period of high demand.

Furthermore, 49 U.S.C. § 11102 is clear that “[t]he rail carriers are responsible for establishing the conditions and compensation for use of the facilities.” As required by the statute, the Board typically leaves the details regarding how a party would use terminal facilities to the carriers to resolve among themselves. *See, e.g., BNSF Ry. Co.—Terminal Trackage Rights—Kansas City S. Ry. Co. & Union Pac. R.R. Co.*, FD 32760 (Sub-No. 46), slip op. at 16 (STB served

July 5, 2016) (“As required by statute, we leave the details regarding *how* BNSF will use the facilities (including, e.g., scheduling of window(s) of operation, unit vs. manifest volumes, length of train(s), and similar issues) to all three carriers to resolve among themselves.”) (emphasis in original); *see also UP/SP Decision No. 44*, 1 S.T.B. at 449 (“Section 11103(a) provides that the carriers are responsible for establishing the conditions and compensation applicable to terminal trackage rights awarded under 49 U.S.C. 11103, and we will therefore allow BNSF and KCS an opportunity to reach an agreement respecting such matters.”).

The Board should take a similar approach here. There is substantial information in the record of this proceeding that addresses operations over the relevant facilities. (*See, e.g.*, CSXT Responsive Appl. 3-5, 13-15; CSXT Opp’n 10-16, 21-23; *see generally* V.S. Kenney, Sept. 18, 2025.) But the Board does not need to consider the precise operational details regarding the requested terminal trackage rights now. The STB need only find that terminal trackage rights are practicable without substantially impairing NS or NPBL’s operations. Historical experience and the pleadings of NS and NPBL in this proceeding demonstrate that this requirement is readily met. If the Board grants the Responsive Application, CSXT is ready and willing to negotiate the specific and detailed conditions of use with NS and NPBL.

4.4 Environmental and historic reports and documentation are not required.

NS also claims that CSXT failed to comply with the Board’s environmental regulations and to address any environmental effects of the proposed terminal trackage rights application. (NS Mot. 1, 17-20.) The Board has established a categorical exclusion from environmental and historic review for transactions such as those described in the Responsive Application that involve “[c]ommon use of rail terminals and trackage rights.” 49 C.F.R. § 1105.6(c)(3); 49 C.F.R. § 1105.8(b)(3).

Although the Board's rules provide for the submission of specific environmental data in certain applications for trackage rights filed pursuant to §§ 11323-25, *see* 49 C.F.R. § 1180.6(a)(8), the Board has not promulgated similar rules for applications under § 11102. Other applications filed under § 11102 have not included environmental information. (*See* Ex. A, BNSF/Primary Applicants' Appl. (no environmental data provided)); *UP/SP Decision No. 44*, 1 S.T.B. at 446-50 (granting the BNSF/Primary Applicants' application for terminal rights without addressing environmental review with respect to the application).

As to the restoration of the diamond and connecting track, any such restoration work does not require an STB construction license, so there is no need for an environmental review here of that work. *See, e.g., CSX Corp., et al.—Control & Merger—Pan Am Sys., Inc., et al.*, FD 36472, slip op. at 11-12 (STB served Dec. 10, 2021) (affirming that an environmental and historic review was not required for the merger transaction or the related transactions, which included plans to rehabilitate certain existing track). Regardless, CSXT asked in its Opposition – not its Responsive Application – that the Board impose a condition that would require such restoration work.

5. Any rejection or denial of the Responsive Application would not affect CSXT's stand-alone request for terminal trackage rights.

NS argues that the Responsive Application should be dismissed with prejudice. (NS Mot. 1, 21.) To the extent that NS is arguing that rejection or denial of the Responsive Application would mean that CSXT could not pursue its stand-alone request for terminal trackage rights in FD 36859, *CSX Transp., Inc.—Terminal Trackage Rights—Norfolk S. Ry. Co. & Norfolk & Portsmouth Belt Line R.R. Co.*, CSXT strongly disagrees. There is simply no reason why CSXT could not pursue its stand-alone terminal trackage rights application if the Board decides to

reject or deny the Responsive Application here. The Board should acknowledge that any such decision would have no effect on CSXT's stand-alone case.

6. Conclusion.

For the reasons stated above, CSXT respectfully requests that the Board deny NS's Motion. The Board should accept and grant CSXT's Responsive Application.

Respectfully submitted,

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PORTSMOUTH BELT LINE RAILROAD COMPANY

EXHIBIT A

APPLICATION FOR TERMINAL RIGHTS
FILED BY BNSF AND THE PRIMARY APPLICANTS IN *UP/SP*

Before the
INTERSTATE COMMERCE COMMISSION

Finance Docket No. 32760 (Sub-No. 9)

BURLINGTON NORTHERN RAILROAD COMPANY AND
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY
-- TERMINAL TRACKAGE RIGHTS --
KANSAS CITY SOUTHERN RAILWAY COMPANY

APPLICATION FOR TERMINAL RIGHTS

I

INTRODUCTION

The terminal trackage rights sought in this proceeding are related to and contingent upon the UP/SP merger proposed in Finance Docket No. 32760.

In this Application, the primary applicants in the UP/SP merger proceeding, Finance Docket No. 32760, joined by Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company (collectively referred to as "BN/Santa Fe"), respectfully request that the Commission enter an order under 49 U.S.C. §11103 permitting BN/Santa Fe to use two short segments of KCS terminal trackage in Shreveport, Louisiana, and Beaumont, Texas. Use of these segments by BN/Santa Fe is necessary in order for BN/Santa Fe to promote stronger rail competition to the merged UP/SP system in the Houston-Memphis and Houston-New Orleans corridors, pursuant to a settlement agreement between BN/Santa Fe and UP/SP in the merger proceeding. SP already has trackage rights over both terminal trackage segments, and MPRR also has trackage rights over the Beaumont segment. However, Commission authority under 49 U.S.C. § 11103 is

being invoked because the underlying trackage rights agreements arguably require KCS' consent to the use of the trackage by BN/Santa Fe.^{1/}

Commission approval of the primary application, conditioned, as the primary Applicants have requested, by the UP/SP-BN/Santa Fe settlement agreement, should constitute sufficient authority to permit BN/Santa Fe to use the subject trackage, regardless of whether KCS consents to such use. The Interstate Commerce Act, in 49 U.S.C. §11341(a), expressly provides that a person participating in an approved railroad merger transaction is exempt from the antitrust laws and from all other law . . . as necessary to let that person carry out the transaction." In Norfolk & Western Ry. v. ATDA, 499 U.S. 117, 127-30 (1991), the Court held that Section 11341(a) overrides contractual obligations. Any consent requirements in the underlying trackage rights agreements that would prevent a Commission merger condition from being carried out would thus be overridden by Section 11341(a), and the Commission should so hold. Nonetheless, because of some pre- Norfolk & Western Commission precedent suggesting that Section 11341(a) might not override a consent requirement in a joint facility agreement,^{2/} applicants herein are also requesting

^{1/} While Petitioners would prefer to negotiate a voluntary agreement with KCS, such an agreement may be difficult to achieve given the expected opposition of KCS to the primary merger application.

^{2/} E.g., Finance Docket No. 31505, Rio Grande Industries, Inc. - Purchase & Related Trackage Rights - Soo Line R.R. Line between Kansas City, MO. & Chicago, IL. Decision served Nov. 15, 1989, p. 8, and cases cited.

terminal rights under Section 11103 to eliminate any possibility of KCS' blocking implementation of the UP/SP merger and the UP/SP-BN/Santa Fe settlement agreement, which are strongly pro-competitive and in the public interest.

II

DESCRIPTION OF THE TERMINAL TRACKAGE AND APPLICABLE AGREEMENTS

Shreveport - The trackage in Shreveport consists of two segments totaling 3.52 miles in length which serve as an integral portion of SP's through route between Houston and Memphis. The trackage is also used for interchange with connecting railroads at Shreveport and for access to a nearby industrial area jointly served by SP, UP and KCS. SP has rights to use this trackage under agreements with KCS and a predecessor dated May 8, 1933 and December 17, 1980. The 1933 agreement covers a 1.32-mile segment of track between engineering stations 8872+81 and 8941+24 (no mileposts have been assigned). Operation under the agreement was approved by the Commission in Finance Docket No. 9956, Texas & New Orleans Ry. Operation, 193 I.C.C. 245 (1933). The 1980 agreement covers approximately 2.2 miles of track between KCS mileposts 559 and 671.2. The agreement was exempted by the Commission (as a relocation) in Finance Docket No. 29565, Southern Pacific Transportation & St. Louis Southwestern Ry. Co. - Exemption, decision dated April 3, 1981.

Beaumont - The trackage in Beaumont consists of approximately 1.8 miles between KCS mileposts 764.9 and 766.7. Both SP and UP have trackage rights over this trackage, which serves as an integral part of separate UP and SP through routes between

Houston and New Orleans. The trackage is also used for switching and interchange purposes and for access to facilities of the Port of Beaumont. MPRR and SP obtained rights to use this trackage pursuant to an agreement dated July 1, 1965 among KCS, MPRR, SP, Santa Fe and the City of Beaumont.^{3/} The agreement provided for a series of reciprocal grants of trackage rights and related abandonments to rearrange rail facilities in and near Beaumont. It was approved by the Commission in Finance Docket No. 24199 and embraced proceedings, Kansas City Southern Ry., Trackage Rights Agreement In & Near Beaumont, TX, decision served Oct. 11, 1966.^{4/}

III

**THE REQUESTED TERMINAL
RIGHTS SATISFY THE CRITERIA
OF 49 U.S.C. §11103
AND SHOULD BE GRANTED**

Under 49 U.S.C. §11103(a), the Commission may require use of "terminal facilities, including main line track for a reasonable distance outside of a terminal," if the Commission finds that use to be "practicable and in the public interest without substantially impairing the ability of the rail carrier owning the facilities or entitled to use the facilities to handle its own business." The requested terminal rights satisfy each of these criteria.

^{3/} Santa Fe did not acquire the rights sought in the present application under the 1965 Agreement.

^{4/} Applicants herein are not requesting the Commission to interpret the underlying trackage rights agreements. The Commission's authority to preempt contractual limitations under Section 11341(a) and to require joint use of terminals under Section 11103 is not dependent upon resolving any contract issues.

First, as shown in the attached Verified Statement of E. H. Hord and accompanying maps, the short segments of track subject to this application are classic terminal facilities. All of the trackage is in built up metropolitan or industrial areas. Train operations are a combination of through train and switching. The Commission decision approving the Shreveport trackage rights agreement expressly recognized that a terminal was involved:

"The record shows that the proposed trackage operation is expected to be justified by the substitution of direct interchange between the applicant's and St. Louis Southwestern's lines in lieu of the existing interchange through intermediate switching lines and will result in material savings in time and expense, besides being profitable by rendering practical unification of terminals of both companies at Shreveport."

193 I.C.C. at 246-47 (emphasis supplied).

While the Commission decision approving the Beaumont trackage rights does not use the word "terminal," it is clear from the description of the trackage, the use being made of it, and the purpose of the transaction that those trackage rights were established unify and rearrange of railroad terminal facilities. See Finance Docket No. 24199, decision served October 11, 1966, pp. 2-3 (use of track, purpose of transaction), pp. 6-7 (use of tracks being abandoned in favor of new arrangement).

Second, the requested terminal rights are clearly in the public interest. The purpose of the terminal rights is to permit BN/Santa Fe to provide the competitive rail services contemplated by the settlement agreement. The Beaumont and Shreveport terminal segments are integral parts of two through routes over which BN/Santa Fe will operate --

Houston-New Orleans and Houston-Memphis. These operations will preserve -- and indeed increase -- the competition now provided by SP and UP in these corridors.

In each case, the terminal segment is roughly in the center of the SP route in question -- Beaumont on the Houston-New Orleans route, and Shreveport on the Houston-Memphis route. Unless BN/Santa Fe obtains rights to enter and exit the Beaumont and Shreveport terminals by operating over the subject terminal segments, BN/Santa Fe will be unable to provide single-line service over these two important through routes, and a pro-competitive condition that facilitates approval of a merger that is clearly in the public interest will be frustrated. The situation here closely parallels Southern Pacific Transportation Co. v. ICC, 736 F.2d 708, 722-23 (D.C. Cir., 1984), cert. denied, 469 U.S. 1208 (1985), aff'g Union Pacific Corp., Union Pacific R.R. & Pacific Rail System, Inc.-- Control -- Missouri Pacific Corp. & Missouri Pacific R. R. ("UP/MP/WP"), 366 I.C.C. 459, 574-76 (1982) in which the court upheld Commission imposition of terminal trackage rights under Section 11103 which were necessary to create a competitive alternative to merging railroads.^{5/}

Third, BN/Santa Fe's use of the Beaumont and Shreveport terminal facilities is practicable without substantially interfering with the ability of KCS to handle its own business. SP already has trackage rights over the Shreveport terminal trackage and (along with UP) over the Beaumont terminal trackage. As discussed in the accompanying Verified

^{5/} The court also held that Section 11103 terminal rights could properly be granted to "bridge the gap" in a carrier's line, and that the carrier did not have to use the segment for terminal purposes. 736 F.2d at 723.

Statement of E. H. Hord, UP/SP has projected that new BN/Santa Fe trains will largely replace existing SP operations.

Finally, 49 U.S.C. § 11103(a) provides that compensation for joint use of terminal facilities is to be established by the parties thereto or, if the parties are unable to agree, by the Commission. The section further provides that the compensation be "paid or adequately secured before a carrier may begin to use the facilities of another carrier under this section." BN/Santa Fe is prepared to negotiate compensation terms with KCS as provided in Section 11103(a). However, the Commission should not require that the compensation to be established before BN/Santa Fe begin use of the KCS terminal facilities, since this will simply delay the public benefits of the BN/Santa Fe settlement agreement. In UP/MP/WP, the Commission gave the parties an opportunity to negotiate compensation terms. If no agreement were reached, the Commission would set compensation terms under the statutory condemnation standard. See 366 I.C.C. at 576. n.114. However, the parties were permitted to commence trackage rights operations immediately upon consummation of the consolidation. The compensation terms to be later established were required to accrue from the start of trackage rights operations, and be payable after terms were determined. This approach was specifically affirmed and held to satisfy Section 11103(a) compensation requirements in Southern Pacific Transportation Co. v. ICC, 736 F.2d at 723-24.

This same approach should clearly be followed in this proceeding, so that the public benefits of the BN/Santa Fe settlement agreement can be achieved immediately upon consummation of the UP/SP consolidation.

IV

CONCLUSION

For the reasons stated above, applicants herein respectfully request that the Commission order that the Beaumont and Shreveport terminal trackage described herein may be used by BN/Santa Fe.

Respectfully submitted,

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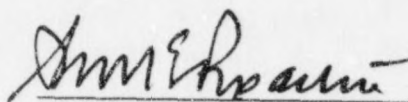
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**VERIFIED STATEMENT
OF
E. L. HORD**

My name is E. L. "Buck" Hord, and my business address is 1860 Lincoln St., Denver, Colorado. I am Assistant to Executive Vice President-Operations for Southern Pacific Rail Corporation and its operating railroad subsidiaries ("SP").

I have over 30 years' experience in train operations and management for SP, and was General Manager-Transportation prior to my present appointment. I am generally familiar with SP's operations system wide, including those at Shreveport, Louisiana and Beaumont, Texas.

The purposes of this statement are (1) to describe the Shreveport and Beaumont terminal trackage and operations involved in the application for terminal rights in Finance Docket No. 32760 (Sub-No.9), and (2) to describe UP/SP's expectations about the proposed operations of BN/Santa Fe and how they would be integrated into other rail operations in the terminal.

**I
Shreveport**

A. Description of Trackage and Rail Operations

Attached to this statement as Exhibit ELH-1 is a diagram of the terminal trackage in Shreveport. The trackage involved in this application is all in a built up, metropolitan area and consists of two KCS segments totaling 3.52 miles as follows:

- "Old IC Main" - This segment is double track and extends approximately 1.32 miles between the points designated "A" and "B" on Exhibit ELH-1, IC

engineering stations 8872+81 and 8941+24, respectively (no mileposts have been assigned). By agreement dated May 8, 1933, the trackage rights were originally granted to the Texas and New Orleans Railway Company (an SP predecessor) by the Yazoo and Mississippi Valley Railroad, which later became part of IC. IC later transferred the track to MidSouth Corporation, which in turn was acquired by KCS.

- KCS Main - This segment extends approximately 2.2 miles between the points designated "C" and "D" on Exhibit ELH-1. Point C corresponds to the SP-KCS connection in the vicinity of Jordan Street, KCS milepost 559 (SP milepost 230.79). Point D corresponds to Red River Junction, KCS milepost 671.2 (SSW milepost 450.67). These trackage rights were granted by KCS to SPT and SSW by agreement dated December 17, 1980. The purpose of these trackage rights was to give SPT/SSW a second route through Shreveport in addition to the route over the Old IC Main described above.^{1/}

The trackage rights arrangements described above are integral parts of the SPT/SSW mainline between Houston, Texas and Memphis/St. Louis. Without these trackage rights, the SPT mainline south of Shreveport would have no connection with the SSW mainline north of Shreveport. The trackage is also used for interchange with connecting railroads at Shreveport and for access to a nearby industrial area jointly served by UP, SP and KCS. The trackage rights arrangements are the product of a long history

^{1/} The agreements for both the "Old IC Main" and the "KCS Main" referred to above have been amended from time to time. A complete set of the agreements is contained in my workpapers.

of mutual cooperation by the railroads serving Shreveport to use trackage efficiently in common so as to serve and traverse the Shreveport terminal without unnecessary duplication of tracks and facilities within the city's urban area. I am advised that this cooperation goes back at least as far as 1909. As a result of this cooperation, and subsequent acquisitions of IC trackage by KCS, SP's operation in and through the Shreveport terminal is completely dependent upon the use of KCS trackage.

Operations over both segments are controlled by the KCS Shreveport Terminal Yardmaster. SP's Shreveport Yardmaster contacts the KCS Yardmaster when an SP train needs to operate over the track, and the train proceeds when permitted by KCS. In general, SP trains which have switching or other work to do in Shreveport will use the Old IC Main, while through trains will use the KCS Main. However, the KCS Yardmaster alters this pattern from time to time.

SP's current train operations over the trackage rights segments range from 8-10 trains per day (an average of 8.8 in the 1994 Base Year). The distribution between the two routes varies from day to day, but tends to balance over time. SP also operates two local switch engine assignments at Shreveport which use the "Old IC Main" twice daily to access SP served industries in the Shreveport terminal.

B. Anticipated BN/Santa Fe Operations

Under the UP/SP-BN/Santa Fe agreement, BN/Santa Fe will be granted overhead trackage rights on "SP's line between Houston, Texas and Fair Oaks, Arkansas via Cleveland and Pine Bluff"^{2/} In order to operate its trains between Houston and Fair

^{2/} Agreement, §6(a).

Oaks, BN/Santa Fe will need to operate over the same KCS trackage at Shreveport that SP is using. No changes in the existing arrangements for controlling use of the trackage are anticipated. As shown in the King/Ongerth Verified Statement in Volume 3 of the Application, UP/SP projects that an average of 3.7 BN/Santa Fe trains would operate through the terminal per day.

The BN/Santa Fe traffic should be readily accommodated on the KCS terminal trackage, as UP/SP's projections show that BN/Santa Fe will essentially be using capacity that is freed up by UP/SP. While the UP/SP Operating Plan contemplates that UP/SP will run roughly the same number of trains through the terminal as SP (an average of 9.1 UP/SP trains daily in a normal year after full merger implementation vs. 8.8 SP trains daily in 1994), it also contemplates a substantial reduction in the use of the KCS trackage. First, the SP Shreveport Yard, which is accessed via the KCS "Old IC Main", will be closed, and yard operations will be consolidated at UP's Shreveport Yard, to be accessed via a new connection southwest of Shreveport at La Rosen, where UP and SP lines now cross (this location can be seen from the Exhibit ELH-1 map just south of the UP Yard), which will cut UP/SP use of the Old IC Main approximately in half. Further reductions in UP/SP use will result from elimination of the daily local to and from Tenaha, Texas, and elimination of the twice daily SP switch engine. Their functions will be taken over by assignments operating from the UP yard. These reductions will directly affect the Old IC Main. Freeing up capacity on this route will also indirectly free up capacity on the KCS Main, due to KCS's ability to allocate train movement between the two routes. According

to UP/SP's projections, the added BN/Santa Fe trains should not even use all of the capacity that is being freed up by the UP/SP operating changes.

There is no alternate way to get through the Shreveport terminal other than by using the KCS trackage. If KCS insisted on moving the traffic across the trackage itself, this would severely disrupt BN/Santa Fe service, and could easily use more capacity, depending on the way the interchanges were arranged. Operation of BN/Santa Fe trains through the terminal is clearly the only feasible alternative.

II BEAUMONT

A. Description of Trackage and Rail Operations

Attached to this statement as Exhibit ELH-2 is a diagram of the terminal trackage in Beaumont. The trackage involved in this application is in a built up metropolitan and industrial area. It extends approximately 1.8 miles between KCS milepost 764.9 and KCS milepost 766.7, designated, respectively, as "E" and "C" on the Exhibit, and includes the KCS bridge over the Neches River. The rights were originally granted to SP by KCS in an agreement dated July 1, 1965.^{3/}

Prior to the 1965 Agreement, SP operated its own line parallel to KCS, had its own bridge over the Neches River, and its own railroad yard in downtown Beaumont. The 1965 agreement was a cooperative undertaking by the City of Beaumont and the four railroads serving the city (KCS, MPRR, SP, and Santa Fe) to rationalize and consolidate the railroad terminal facilities in the city, thereby reducing railroad space requirements

^{3/} A copy of the agreement is contained in my workpapers.

within the central city and improving the flow of highway traffic. This was accomplished by a series of abandonments and exchanges of trackage rights by the four railroads to consolidate their operations on a corridor between the points designated "A" and "C" on the Exhibit ELH-2 map. As a result, SP moved its downtown yard west of the city, abandoned its Neches River Bridge and downtown trackage, and moved onto the KCS for approximately 1.8 miles. This made SP completely dependent upon use of KCS trackage to operate in and through the Beaumont terminal. MPRR (which became part of the UP system in 1983) also obtained trackage rights over the KCS trackage under the 1965 agreement. The joint track is double track west of the Neches River Bridge (located approximately in the middle of the 1.8 mile segment) and single track to the east. Train operations are controlled by the KCS Tower Operator at the Neches River Bridge.

The 1.8 miles of trackage rights at Beaumont are an integral part of SPT's mainline between Houston, Texas and New Orleans, Louisiana. Without these rights, SPT would have no connection between its mainline west of Beaumont and its mainline east of the city. Similarly, they are an essential part of UP's mainline between Houston and New Orleans. KCS will continue to have control over all UP/SP operations in the Southern Corridor after merger, as UP/SP has no economically reasonable alternative route.

SP currently uses the KCS trackage through the Beaumont terminal for approximately 14-15 through freight trains and 3 local moves a day. UP operates about 13 trains per day. An industry switch assignment also uses the track. Combined SP and UP use of the KCS trackage averaged 27.4 trains per day in 1994.

B. Anticipated BN/Santa Fe Operations

Under the BN/Santa Fe Settlement Agreement,^{4/} BN/Santa Fe will be granted overhead trackage rights on "SP's line between Houston, Texas and Iowa Junction in Louisiana." In order to operate trains between these two points, BN/Santa Fe will need to operate over the same KCS trackage at Beaumont that SP and UP are now using. No changes in existing arrangements for controlling use of the trackage are anticipated.

As shown in the King/Ongerth Verified Statement, UP/SP project that an average of four BN/Santa Fe trains will operate through the terminal per day. The BN/Santa Fe trains would simply operate over the KCS trackage and do no work on it, since the trackage rights from UP/SP are overhead rights only at Beaumont. The addition of this small number of BN/Santa Fe trains projected by UP/SP over this short, 1.8-mile track segment, half of which is double track, can readily be accommodated.

As at Shreveport, UP/SP anticipates that the BN/Santa Fe trains would be mostly using capacity freed up by UP/SP. The UP/SP Operating Plan projects an average 25.8 trains per day through the terminal, a reduction of 1.6 trains per day from the average 27.4 trains per day that UP and SP moved through the terminal in 1994. Thus, according to the UP/SP projections, the net increase represented by BN/Santa Fe is only an average of 2.4 trains a day, which is insignificant. In addition, the UP/SP Operating Plan calls for a shift of seven or eight trains per day from the KCS Beaumont-DeQuincy line to the SP line east of Beaumont, improving the flow of KCS traffic to and from Beaumont.

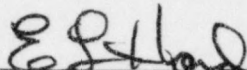
^{4/} Agreement, §5(a).

There is no way to get through the Beaumont terminal other than by use of the short KCS track segment.

VERIFICATION

STATE OF COLORADO)
CITY AND) ss.
COUNTY OF DENVER)

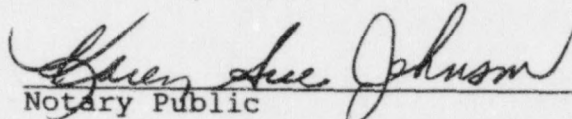
E. L. Hord, being duly sworn, deposes and says that he has read the foregoing document, knows the facts asserted therein, and that the same are true as stated.



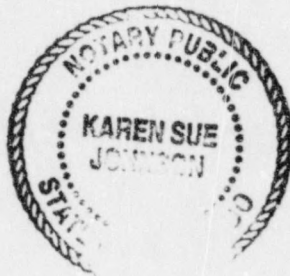
E. L. HORD

Subscribed and sworn to before me by E. L. Hord this 15th day of November, 1995.

My commission expires: October 14, 1998.



Notary Public



- LEGEND**
- UNION PACIFIC RR
 - - - KANSAS CITY SOUTHERN Rwy
 - - - SOUTHERN PACIFIC RR
 - - - ST. LOUIS-SOUTHWESTERN Rwy
 - - - MID-SOUTH RAIL CORP.
 - - - LOUISIANA & ARKANSAS Rwy
 - - - UP-KCS JOINT TRACKS

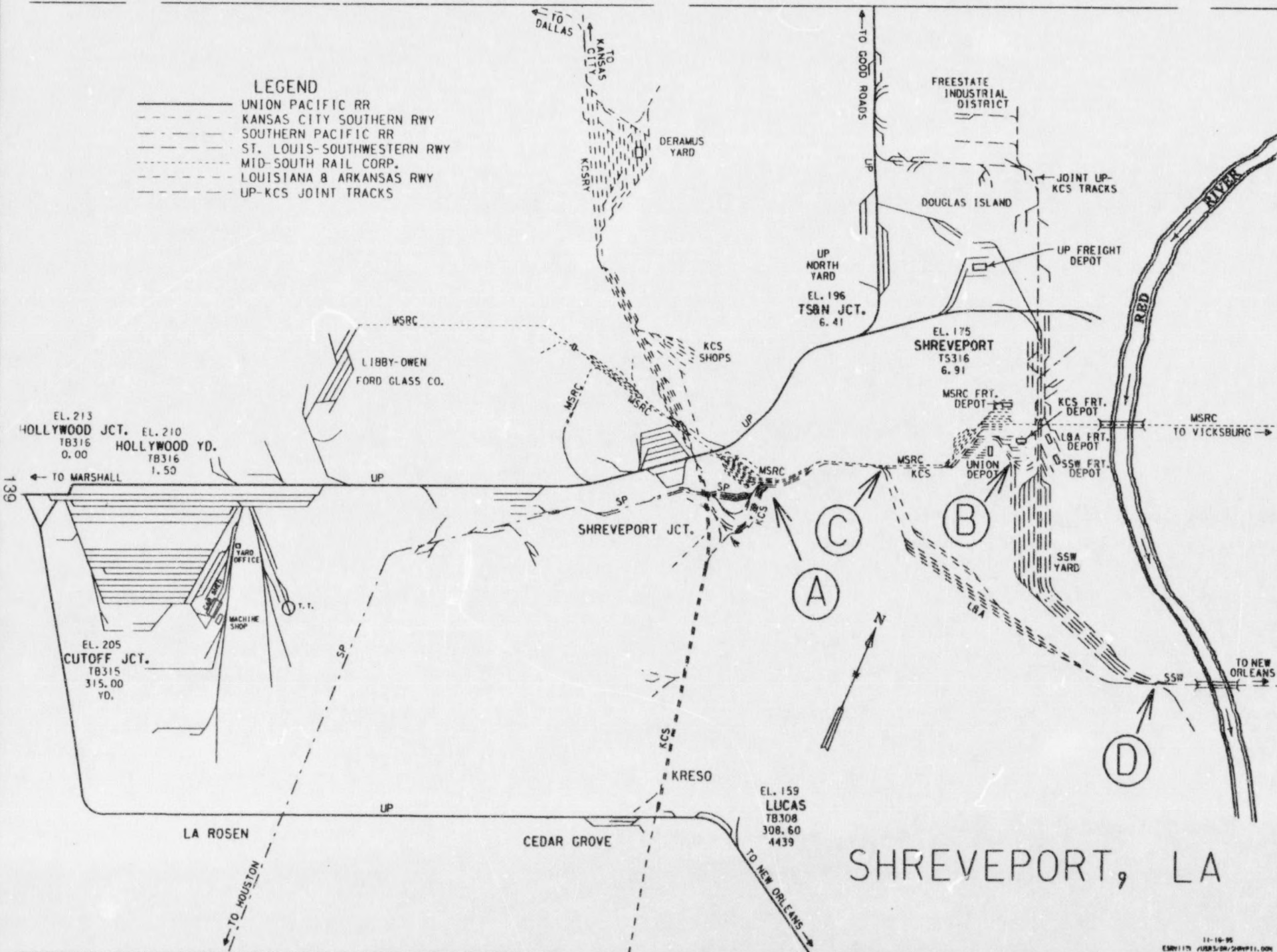


Exhibit ELH-1

BEAUMONT, TEXAS

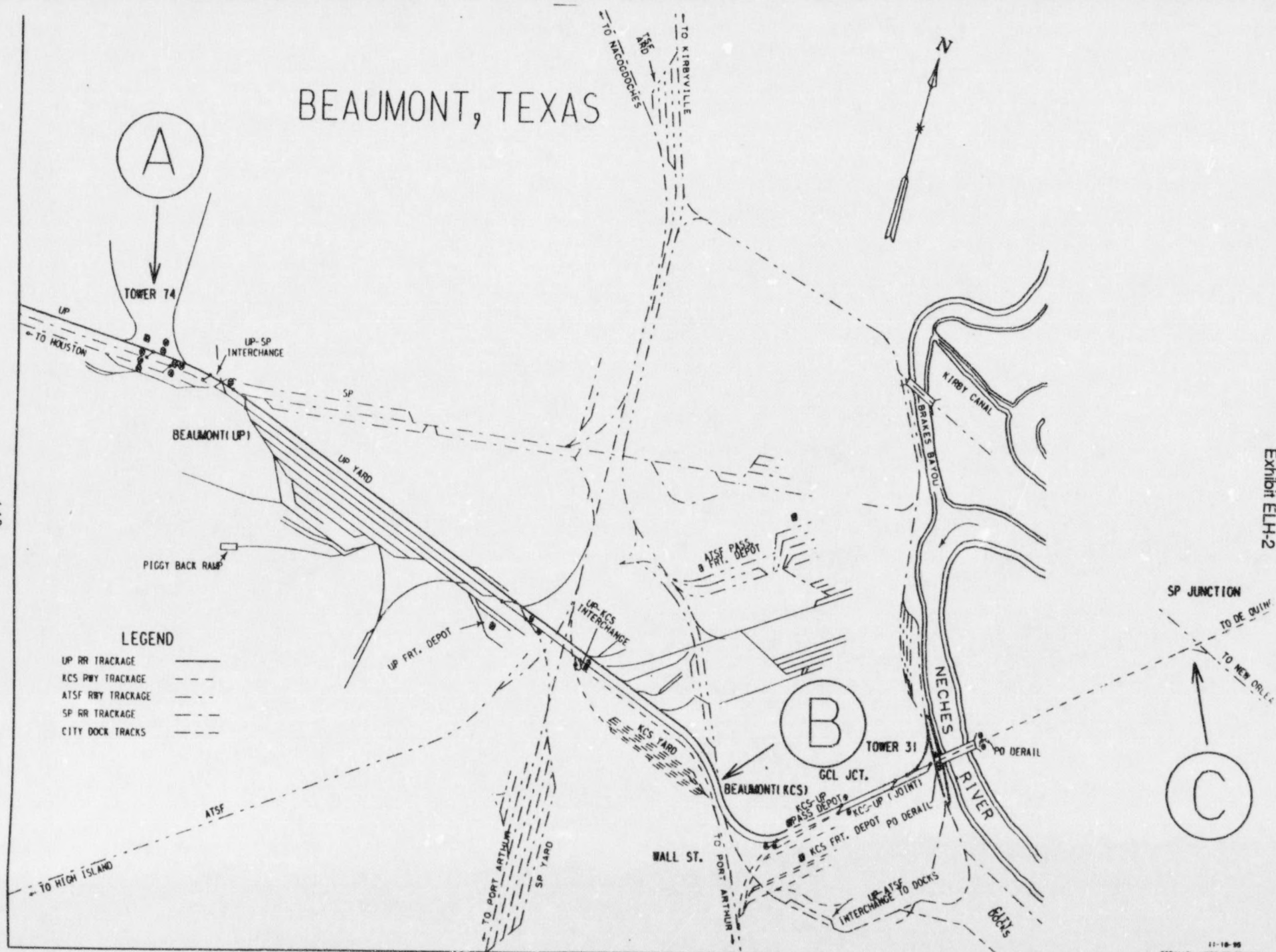


Exhibit ELH-2

CSXT-32-35

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36836 (SUB-NO. 1)

CSX TRANSPORTATION, INC.
—TERMINAL TRACKAGE RIGHTS—
NORFOLK SOUTHERN RAILWAY COMPANY AND NORFOLK &
PORTSMOUTH BELT LINE RAILROAD COMPANY

EXHIBIT B

APPLICATION FOR TERMINAL TRACKAGE RIGHTS
FILED BY DM&E IN *DM&E/IC&E*

427

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206129 August 28, 2002

VIA FEDERAL EXPRESS

Mr. Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W., Room 700
Washington, DC 20006

ENTERED
Office of Proceedings

AUG 29 2002

Part of
Public Record



Re: **Finance Docket No. 34178 (Sub-No. 1)**
Dakota, Minnesota & Eastern Railroad Corporation --
Terminal Trackage Rights -- Union Pacific Railroad Company

Dear Secretary Williams:

Enclosed for filing in the above-captioned proceeding are an original and ten copies of the **Application for Terminal Trackage Rights** of Dakota, Minnesota & Eastern Railroad Corporation, dated August 28, 2002. A check in the amount of \$14,000, representing the appropriate fee for this filing, is attached.

One extra copy of the Application and this letter also are enclosed. I would request that you date-stamp those items to show receipt of this filing and return them to me in the provided envelope.

Please feel free to contact me should any questions arise regarding this filing. Thank you for your assistance on this matter.

Respectfully submitted,

FEE RECEIVED

AUG 29 2002

SURFACE
TRANSPORTATION BOARD
WCS:tjl

Enclosures

cc: Parties on Certificate of Service


William C. Sippel
Attorney for Dakota, Minnesota & Eastern
Railroad Corporation

FILED

AUG 29 2002

SURFACE
TRANSPORTATION BOARD

ORIGINAL

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34178 (SUB-NO. 1)

DAKOTA, MINNESOTA & EASTERN RAILROAD CORPORATION
-- TERMINAL TRACKAGE RIGHTS --
UNION PACIFIC RAILROAD COMPANY



APPLICATION FOR TERMINAL TRACKAGE RIGHTS

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**ATTORNEYS FOR DAKOTA, MINNESOTA &
EASTERN RAILROAD CORPORATION**

Dated: August 28, 2002

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34178 (SUB-NO. 1)

DAKOTA, MINNESOTA & EASTERN RAILROAD CORPORATION
-- TERMINAL TRACKAGE RIGHTS --
UNION PACIFIC RAILROAD COMPANY



APPLICATION FOR TERMINAL TRACKAGE RIGHTS

I. INTRODUCTION

Dakota, Minnesota & Eastern Railroad Corporation ("DM&E") hereby submits this Application pursuant to 49 U.S.C. § 11102 for trackage rights over certain terminal trackage owned by Union Pacific Railroad Company ("UP") in Owatonna, Minnesota. The trackage rights sought herein are related to and contingent upon approval of the application of DM&E and Cedar American Rail Holdings, Inc. ("Holdings") in Finance Docket No. 34178 for DM&E to control Iowa, Chicago & Eastern Railroad Corporation ("IC&E") through Holdings.

DM&E respectfully requests that the Board enter an order under 49 U.S.C. § 11102 permitting DM&E to use, without restriction, approximately 3700 feet of UP trackage at Owatonna as shown on Exhibit B attached hereto. Use of this short segment of UP trackage by DM&E is necessary to establish a direct connection and unrestricted interchange between DM&E and IC&E (which do not presently connect with each other at any location). Without such relief, DM&E and IC&E would be unable to effectuate the new competitive traffic routings made possible by the DM&E/IC&E combination. The trackage rights sought herein would also make possible DM&E's operation via trackage rights over IC&E's line between Owatonna and Mason City as contemplated in Finance Docket No. 34178 (Sub-No. 2). The ability to operate

over IC&E to Mason City would provide DM&E with an efficient and unrestricted interchange with IC&E at Mason City, Iowa, with the Cedar River Railroad Company ("CEDR") at Lyle, Minnesota and with the Iowa Northern Railway Company ("IANR") at Plymouth Jct./Nora Springs, Iowa.

II. DESCRIPTION OF THE TERMINAL TRACKAGE AND PERTINENT AGREEMENTS

The trackage in Owatonna over which DM&E seeks trackage rights consists of approximately 3700 feet of trackage owned by UP between the end of DM&E ownership west of Owatonna and the connections with IC&E's line to the north and south of Owatonna, as shown on Exhibit B. DM&E has overhead trackage rights over the main track and the right to use ancillary UP trackage at Owatonna for certain limited purposes. Although a physical track connection currently exists between DM&E and IC&E at Owatonna, the operative agreements between DM&E and UP for DM&E's use of UP's trackage preclude DM&E from using the connection with IC&E at Owatonna except for the interchange of certain traffic originating or terminating in Owatonna. As discussed below, and in the accompanying Verified Statement of Robert L. Wessler, DM&E's Chief Transportation Officer, the segment over which DM&E seeks trackage rights is, for UP, an "island." See map attached as Exhibit A. UP conducts no operations over the trackage (and has not conducted any such operations for over fifteen years) and, indeed, the trackage is not even connected to the rest of the UP system.

DM&E was formed in 1986 when it acquired approximately 1000 miles of rail lines and related trackage rights in South Dakota, Minnesota and Iowa from the Chicago & North Western Transportation Company ("C&NW") generally between Rapid City, South Dakota on the west and Winona, Minnesota on the east. Dakota, Minnesota & Eastern Railroad Corporation -- Acquisition and Operation -- Chicago and North Western Transportation

Corporation, Finance Docket No. 30889 (ICC served September 8, 1986). Not included in the sale, however, was a 2.4-mile segment of the east-west main line in Owatonna, a segment which included a physical connection to the north-south line of the Soo Line Railroad Company ("Soo"). C&NW retained ownership of the segment and all ancillary trackage in Owatonna, including the track connection with Soo. The effect of this "carve out" was to create a 2.4-mile C&NW "island" unconnected to the rest of the C&NW system.¹ As part of the transaction, C&NW granted DM&E exclusive operating rights over the 2.4-mile segment through Owatonna and the limited right to use the ancillary trackage. Despite the existence of the connecting track between the island segment and the Soo's line, the trackage rights agreements prohibited DM&E from interchanging any traffic with Soo except traffic that originated or terminated on the island segment or originated or terminated at the industries in Owatonna served by the Soo and open to reciprocal switching. Sixteen years later, UP has succeeded to the C&NW's ownership of the island segment and IC&E now owns and operates the former Soo line through Owatonna. However, the contractual restrictions on DM&E's use of the connection to IC&E's line are still in effect.

As presently configured, IC&E's line approaches Owatonna from the southeast and runs alongside and parallel to the east-west line used by DM&E for approximately a half-mile before crossing the east-west line on a diamond and continuing to the northwest. An existing track connection known as the "transfer track" in the northeast quadrant of the crossing connects the east-west line to the IC&E line.

During the current work season, IC&E plans to remove the diamond crossing and replace it with a track switch as shown on Exhibit B. The purpose of the track changes is to

¹ The C&NW (now UP) north-south "Spine Line" between Kansas City and the Twin Cities passes through the western section of Owatonna and under the island segment used by DM&E, but does not connect with either the island trackage or IC&E.

allow for the movement of DM&E and IC&E trains through the area at faster speeds and to avoid the cost of maintaining the diamond. However, the track changes do not affect the contractual restrictions which prohibit DM&E from using the connection to connect with IC&E. The terminal trackage rights sought herein are based on the new track configuration at Owatonna which is expected to be completed during the current work season.

In a recent decision the Board granted authority to DM&E to construct a 1.7-mile connection between DM&E and IMRL (now IC&E) just east of Owatonna -- beyond the eastern end of the UP island segment -- in connection with DM&E's proposal to construct a rail line into the Powder River Basin in northeastern Wyoming. However, the Board agreed with the conclusion of the Section of Environmental Analysis that "Alternative O-5" (which would involve replacement of the existing diamond in Owatonna with a "Y" connection at the location where the lines of DM&E and IMRL [now IC&E] currently cross) -- similar to the track changes to be completed this work season -- was environmentally preferable to constructing the loop connection east of town. The Board acknowledged that Alternative O-5 could not be implemented in that case without the agreement of UP. Dakota Minnesota & Eastern Railroad Corporation Construction into the Power River Basin, Finance Docket No. 33407 (STB served January 30, 2002) ("PRB Construction") at 19.

**III. THE REQUESTED TERMINAL TRACKAGE RIGHTS SATISFY
THE CRITERIA OF 49 U.S.C. § 11102 AND SHOULD BE GRANTED.**

Under 49 U.S.C. § 11102(c), the Board may require use of "terminal facilities" including main line tracks for a reasonable distance outside a terminal "if the Board finds that use to be practicable and in the public interest without substantially impairing the ability of the rail carrier owning the facilities or entitled to use the facilities to handle its own business." The requested terminal trackage rights satisfy these criteria.

First, as shown in the attached Verified Statement of Robert L. Wessler, and the accompanying map exhibits, the short segment of track subject to this application is well within the scope of "terminal facilities, including main line tracks for a reasonable distance outside the terminal" within the meaning of § 11102(a). As the Board and its predecessor have consistently recognized, the term "terminal facility" is to be construed liberally to effectuate the remedial purpose of the statute. CSX Corp. -- Control -- Chessie and Seaboard C.L.I., 363 I.C.C. 521, 585 (1980) ("CSX"). Railroad property constitutes a terminal facility if it is located in a cohesive commercial area, is used for the transfer or delivery of freight, and assists in any way in the performance of the functions of a terminal. Rio Grande Industries, Inc., et al. -- Purchase and Related Trackage Rights -- Soo Line Railroad Company Line between Kansas City, MO and Chicago, IL, Finance Docket No. 31505 (ICC served November 15, 1989) at 10-11. Here, the subject tracks are located entirely within the City of Owatonna and have been used for switching and limited interchange operations as well as for line-haul movements through Owatonna. See Union Pacific/Southern Pacific Merger, 1 S.T.B. 233, 447 (1996) ("UP/SP").

As the Board also expressly recognized in UP/SP, the fact that DM&E will utilize the Owatonna terminal trackage rights for through train movements rather than for providing service within Owatonna does not make approval of this application any less compelling or justified. 1 S.T.B. at 447 (citing Southern Pacific Transp. Co. v. ICC, 736 F.2d 708, 723 (D.C. Cir. 1984) and noting prior ICC decisions ordering "bridge the gap" terminal trackage rights under former 49 U.S.C. § 11103).

Second, the requested terminal trackage rights are clearly in the public interest. DM&E notes that it is the broad public interest standard of 49 U.S.C. § 11102(a) itself -- rather than the criteria of Midtec Paper Corporation v. CNW et al, 3 I.C.C.2d 171 (1986) -- which

governs this request for terminal trackage rights in connection with the proposed DM&E-IC&E control transaction. UP/SP, 1 S.T.B. at 448-449. The purpose of the rights sought here is to provide an efficient direct connection between DM&E and IC&E and thereby permit DM&E/IC&E to provide the new routing and competitive rail service contemplated by the DM&E/IC&E transaction. In addition to creating a direct, unrestricted connection and interchange between DM&E and IC&E, such rights would also make possible the establishment of unrestricted interchanges with CEDR and IANR. Given the strong public interest benefits that will arise from DM&E-IC&E common control -- provided that DM&E and IC&E can "bridge the gap" at Owatonna and handle rail traffic on a single-system basis -- the terminal trackage rights sought here plainly satisfy the public interest.

While DM&E could reach the IC&E line by constructing the new bypass line around Owatonna approved in PRB Construction, such a construction project is completely unnecessary and wasteful given the much more direct, existing connection that can be utilized where the DM&E and IC&E lines cross in Owatonna. Eliminating the need to invest scarce railroad capital dollars in the construction of such wholly redundant rail facilities is, of course, the classic statutory purpose underlying the Board's authority under 49 U.S.C. § 11102. See, e.g., Spokane, P. & S. Ry. Co. and Union P. R. Co. -- Control, 348 I.C.C. 109, 142 (1975). Indeed, the Board and its Section of Environmental Analysis have already determined that use of the existing connection in Owatonna is the environmentally preferable alternative to construction of a new connection east of Owatonna. The requested terminal rights will require no construction whatsoever, will avoid unnecessary burdens and disruptions to the citizens and community of Owatonna, and are plainly in the public interest.

Third, DM&E's use of the terminal facilities Owatonna is practicable and will not substantially impair UP's ability to handle its own business. Indeed, such operations will not and cannot have any effect on UP's ability to operate its own trains, since UP does not conduct any operations over the Owatonna trackage, has not utilized the trackage for over fifteen years, and cannot even access that trackage from the rest of the UP system. Given that DM&E currently conducts dispatching and all maintenance on the Owatonna trackage, Wessler V.S. at 3, it is doubtful that DM&E's terminal trackage rights operations will even be perceptible to UP.

Finally, 49 U.S.C. § 11102(b) provides that compensation for joint use of terminal facilities is to be established by the parties involved, or if the parties are unable to agree, by the Board. The section further provides that the compensation be "paid or adequately secured before a carrier may begin to use the facilities of another rail carrier under this section." DM&E is prepared to negotiate compensation terms with UP as provided in § 11102(b). However, the Board should not require that the compensation be established before DM&E is able to begin use of the Owatonna terminal facilities, particularly given that such action would delay the public benefits of the proposed DM&E-IC&E common control transaction.

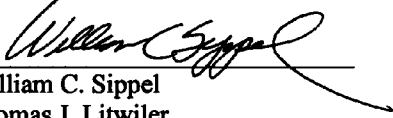
In Union Pacific -- Control -- Missouri Pacific, Western Pacific, 366 I.C.C. 459, 574-76 (1982), aff'd, Southern Pac. Transp. Co. v. ICC, 736 F.2d 708, 722-23 (D.C. Cir. 1984), cert. denied, 469 U.S. 1208 (1985), the ICC gave the parties the opportunity to negotiate compensation terms for terminal trackage rights ordered by the agency under what is now 49 U.S.C. § 11102. If no agreement was reached, the ICC indicated it would set compensation terms under the statutory condemnation standard. See 366 I.C.C. at 576, n.114. However, the parties were permitted to commence trackage rights operations immediately upon consummation of the underlying merger transaction. The compensation terms to be later established were

required to accrue from the start of trackage rights operations, and would be payable after terms were determined. This approach was specifically affirmed and held to satisfy compensation requirements of then Section 11103(a). Southern Pac. Transp. Co. v. ICC, 736 F.2d at 723-24. At UP's request, the Board also applied this approach in UP/SP. 1 S.T.B. at 449 & n.215. The same approach should be followed in this proceeding, so that the public benefits of DM&E/IC&E common control can be fully achieved immediately upon consummation of that transaction.

IV. CONCLUSION

For the reasons stated herein, DM&E respectfully requests that the Board enter an order pursuant to 49 U.S.C. § 11102 permitting DM&E to use the Owatonna trackage described herein.

Respectfully submitted,

By: 

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Thomas J. Litwiler
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Two Prudential Plaza, Suite 3125
180 North Stetson Avenue
Chicago, Illinois 60601-6721
(312) 540-0500

**ATTORNEYS FOR DAKOTA, MINNESOTA &
EASTERN RAILROAD CORPORATION**

Dated: August 28, 2002

**VERIFIED STATEMENT
OF
ROBERT L. WESSLER**

My name is Robert L. Wessler. My business address is 337 22nd Avenue South, P.O. Box 178, Brookings, South Dakota 57006. I am Chief Transportation Officer for the Dakota, Minnesota & Eastern Railroad Corporation ("DM&E").

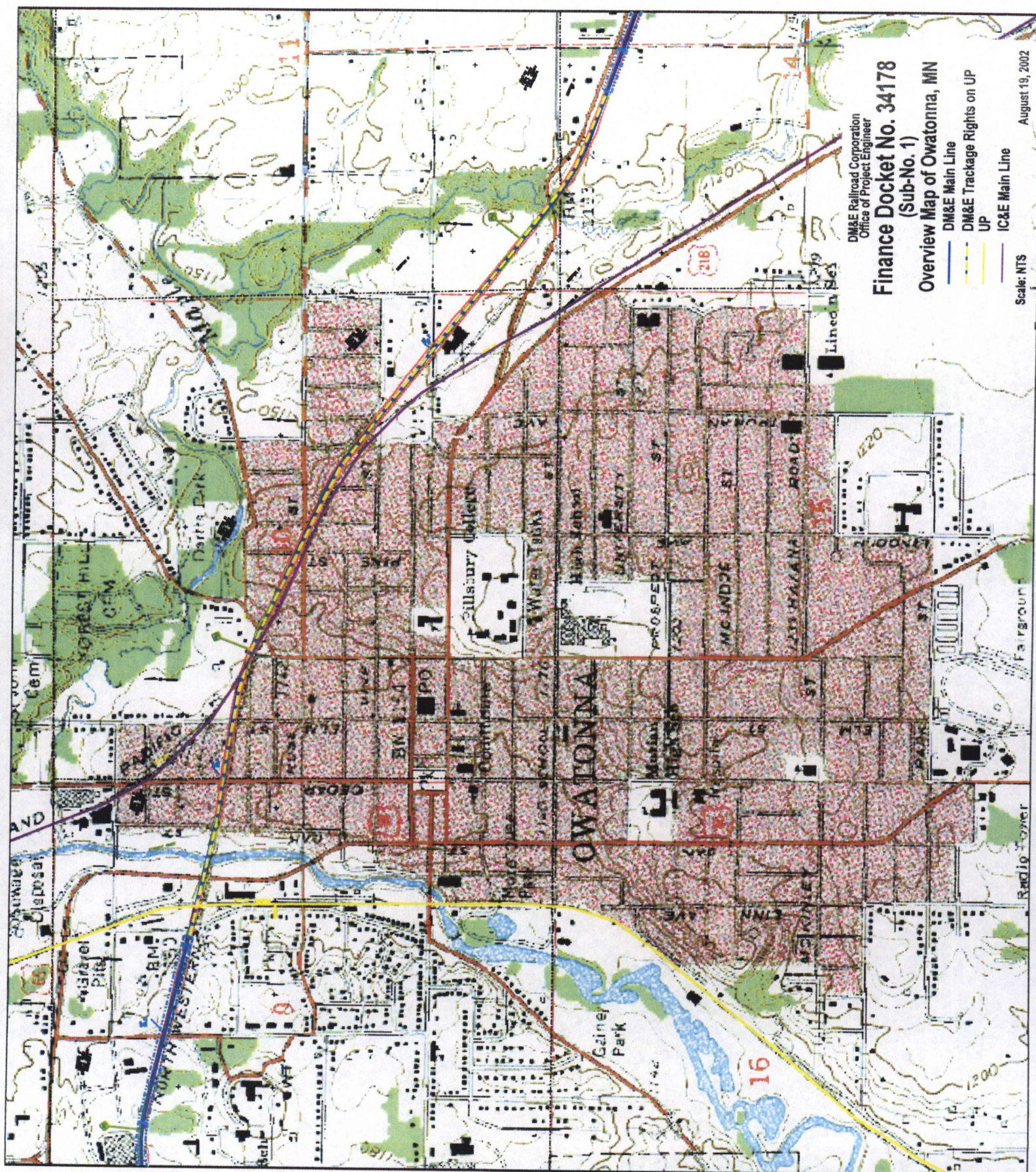
In my 23 years in the railroad industry, I have held various positions in the operating departments of the Missouri Pacific, the Santa Fe and the DM&E. I joined DM&E in June, 1997 as Superintendent of Transportation and was named Chief Transportation Officer in July, 2002 of this year. I am familiar with DM&E's operations systemwide, including in Owatonna, Minnesota.

The purpose of this statement is to describe the Owatonna terminal trackage and operations involved in the DM&E's application for terminal trackage rights in Finance Docket No. 34178 (Sub-No. 1).

A. Description of Trackage and Rail Operations.

Attached to the application as Exhibit A is a map showing the rail lines serving Owatonna, Minnesota. The terminal trackage of Union Pacific Railroad ("UP") in Owatonna over which DM&E seeks trackage rights is shown on Exhibit B. The latter map depicts the configuration of the tracks in Owatonna after certain track changes (discussed below) are completed during the current work season.

Owatonna is a city of over 20,000 inhabitants located in southeastern Minnesota. Three rail carriers have lines serving Owatonna: (i) DM&E serves Owatonna via its single-track east-west line through the city. However, as I discuss in more detail below, DM&E does not own any tracks in or through the city. Rather, it operates on trackage rights over UP trackage



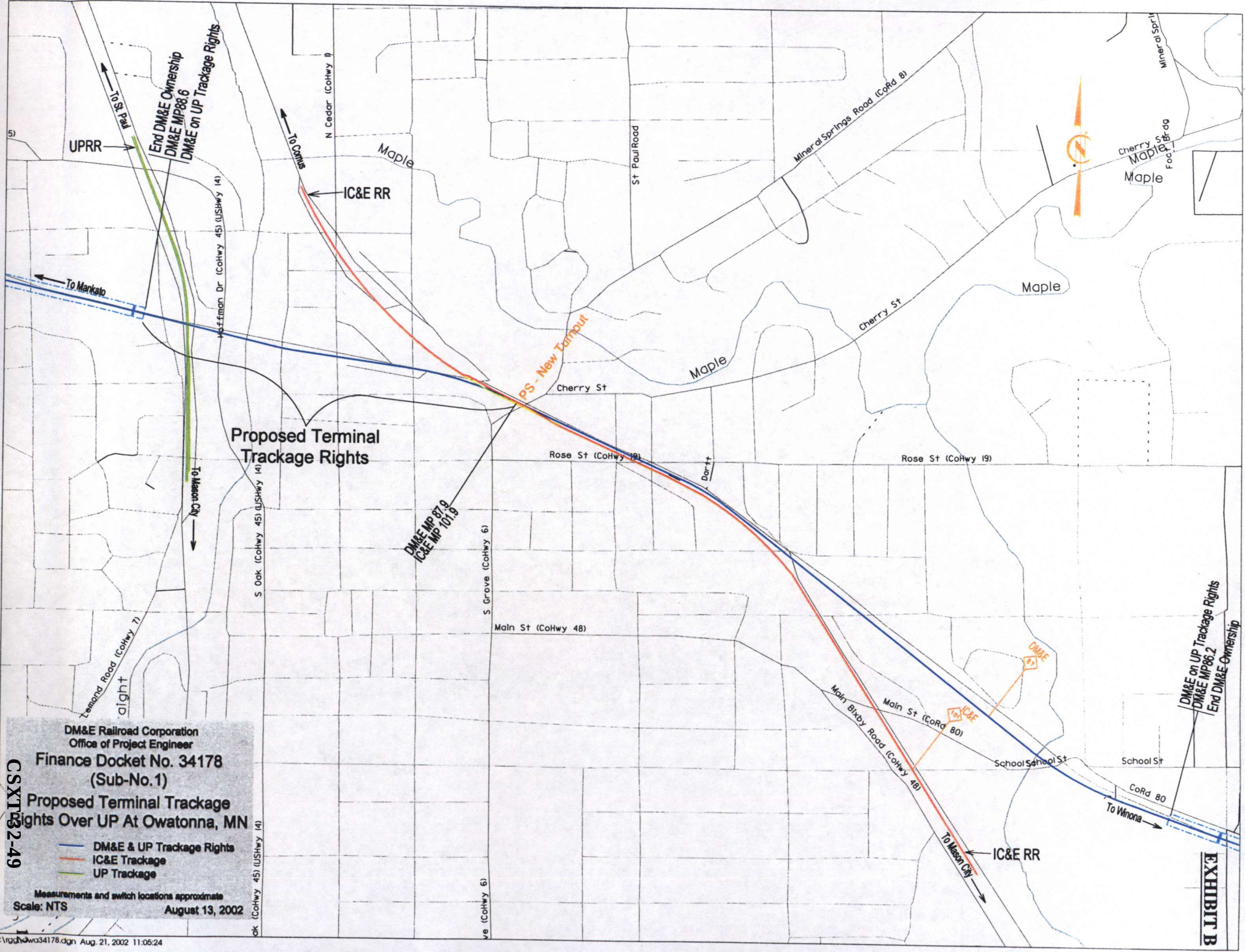


EXHIBIT B

into the city; (ii) IC&E serves Owatonna via a line that runs generally north-south through the city. Approaching Owatonna from the southeast, IC&E's line currently comes up alongside and parallel to the east-west line used by DM&E for approximately a half mile before crossing the east-west line on a diamond and proceeding toward the northwest; and (iii) UP serves Owatonna via its north-south "Spine Line" which passes through the west side of Owatonna (and under the east-west line) but does not physically connect with either the east-west line or the IC&E's line.

Although DM&E's line through Owatonna is an integral part of its main line between Rapid City, South Dakota and Winona, Minnesota, DM&E does not own the main line or any other tracks in Owatonna. At the time of DM&E's formation in 1986 when it acquired approximately 1000 miles of rail lines and trackage rights in South Dakota, Minnesota and Iowa from the Chicago & North Western Transportation Company ("C&NW"), C&NW chose not to sell to DM&E a 2.4 mile segment of the main line through Owatonna, a segment which included a connection to the Soo Line Railroad ("Soo") known as the "transfer track" located in the northeast quadrant of the crossing. C&NW retained ownership of the segment and all ancillary trackage, including the track connection with Soo, and instead granted DM&E overhead trackage rights over the main line and the right to use the ancillary trackage subject to certain restrictions. The trackage rights agreement granted DM&E the right to serve local industries in Owatonna along the line. However, the trackage rights agreement and a related track lease agreement with C&NW prohibited DM&E from using the connection with the Soo, except for the interchange of cars to and from local industries served by DM&E or open to DM&E in Owatonna. The trackage retained by C&NW passed over, but did not connect with, C&NW's north-south line through Owatonna. The effect of this arrangement was to create a 2.4-mile C&NW "island" not connected to the rest of the C&NW system and over which C&NW conducted no operations.

UP has since succeeded to C&NW's ownership of the island segment. The Soo's line through Owatonna is now owned and operated by IC&E. Although the track connection between the two lines at Owatonna remains in place, 16 years after the original DM&E transaction, the restrictions on DM&E's use of the connection with IC&E are still in effect.

During the current work season, IC&E will replace the diamond crossing at Owatonna with track switches as shown on Exhibit B. The track changes are intended to allow for faster movement of trains on both lines through the area by eliminating speed restrictions associated with the diamond and to avoid the cost of maintaining the diamond. Although DM&E dispatches and maintains the UP's island segment through Owatonna, UP retains ownership of it and the restrictions on DM&E's use of the connection to IC&E's line at Owatonna remain in effect.

The terminal trackage rights sought herein would provide DM&E and IC&E with direct, efficient and unrestricted access to each other's lines and would permit for the first time a direct interchange between them. Although on a map, DM&E and IC&E lines intersect at five locations (Winona, Minnesota City, Owatonna and Albert Lea, Minnesota and Mason City, Iowa), DM&E and IC&E presently do not have a direct connection or interchange between them anywhere. Between Minnesota City and Winona, DM&E operates via overhead trackage rights over the Canadian Pacific Railway ("CPRS") and UP. At Winona, DM&E only has the right to operate into UP's yard for the purpose of interchanging traffic with UP. IC&E operates through Minnesota City and Winona on overhead trackage rights over CPRS's line. However, IC&E's trackage rights agreement with CPRS prohibits a direct interchange between DM&E and IC&E anywhere along the line. Similarly, both DM&E and IC&E operate in Mason City, Iowa. However, DM&E reaches Mason City through Albert Lea, Minnesota via overhead trackage

rights over UP between Hartland, Minnesota and Mason City. At Mason City, DM&E's rights over UP only permit DM&E to operate into UP's yard for purposes of interchanging traffic with UP. The trackage rights agreement with UP does not permit a direct interchange between DM&E and IC&E anywhere along the trackage rights route. Without a direct connection, DM&E and IC&E would not be able to provide the routes and competitive rail service contemplated by the combination.

As part of DM&E's application for authority to construct a line into the Powder River Basin, the STB authorized DM&E to construct a 1.7-mile loop connection between DM&E's line and IMRL's (now IC&E's) line east of Owatonna beyond the eastern end of the UP island segment. In doing so, the Board found that replacing the diamond in Owatonna with a track switch -- as will occur this work season -- to physically allow direct movements between the two lines was environmentally preferable to construction of the loop connection. However, the Board acknowledged that such alternative "could not be implemented without an agreement between UP and DM&E that would allow DM&E to connect with I&M." As the Section of Environmental Analysis stated in the Final Environmental Impact Statement, such a direct connection "is not currently feasible because the trackage rights agreement that DM&E has with UP prohibits DM&E from interchanging rail traffic along this portion of rail line." Operation of the proposed terminal trackage rights does not require any construction whatsoever. Granting the terminal trackage rights sought herein would eliminate the cost of constructing the loop connection and would implement the arrangement already found by the Board to be environmentally preferable.

DM&E access to IC&E's line at Owatonna would also make possible DM&E's operation via trackage rights over IC&E's line between Owatonna and Mason City, Iowa, as

contemplated in the Notice of Exemption in Finance Docket No. 34178 (Sub-No. 2). The trackage rights agreement under which DM&E operates today over UP's line to Mason City contains provisions restricting DM&E's ability to interchange traffic with other carriers along the line, including with the Cedar River Railroad ("CEDR") (a subsidiary of CN) at Glenville, Minnesota and the Iowa Northern Railroad ("IANR") at Manly, Iowa. The trackage rights agreement originally prohibited any interchange with Cedar River or Iowa Northern. However, in 1993, as part of a negotiated settlement with C&NW, the trackage rights agreement was amended to allow DM&E to interchange traffic with the CEDR at Glenville and with IANR at Manly, but limited to traffic which originated or terminated on their respective lines (excluding Cedar Rapids on the IANR). The ability to operate over IC&E's line from Owatonna to Mason City would provide DM&E with an efficient and unrestricted interchange with IC&E at Mason City, with CEDR at Lyle, Minnesota, and with IANR at Plymouth Jct./Nora Springs, Iowa, thus opening up new competitive joint line routings for shippers.

Operation of the proposed terminal trackage rights will not substantially impair the ability of UP to handle its own business. In fact, it won't have any effect on UP operations over the terminal trackage. As discussed above, DM&E is the only operator on that trackage. UP does not conduct any operations over the terminal trackage involved and the trackage is not even physically connected to the rest of the UP system.

I urge the Board to approve the application.

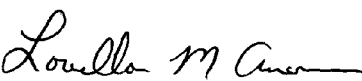
VERIFICATION

State of South Dakota)
)
County of Brookings) SS:

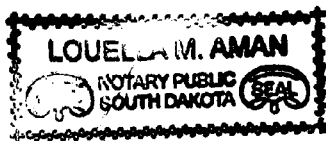
Robert L. Wessler, being duly sworn, deposes and says that he is Chief Transportation Officer of Dakota, Minnesota & Eastern Railroad Corporation, that he has read the foregoing statement and knows the facts asserted therein, and that the same are true as stated.


Robert L. Wessler

SUBSCRIBED AND SWORN TO
before me this 21st day
of August, 2002.


Notary Public

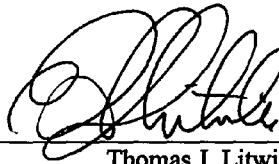
My Commission expires: 6-2-05



CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of August, 2002, a copy of the foregoing
Application for Terminal Trackage Rights was served by first class mail, postage prepaid,
upon:

Robert T. Opal, Esq.
General Commerce Counsel
Union Pacific Railroad Company
1416 Dodge Street, Room 830
Omaha, NE 68179



Thomas J. Litwiler

CERTIFICATE OF SERVICE

I hereby certify that I have caused this CSX Transportation, Inc.'s Reply to Norfolk Southern's Motion to Summarily Reject Responsive Application for Terminal Trackage Rights in Finance Docket No. 36836 (Sub-No. 1) to be served electronically or by first class mail, postage pre-paid, on the Secretary of Transportation, the Attorney General of the United States, Administrative Law Judge Jenifer Soulikias, Applicants' representative, William Mullins, and all parties of record in this proceeding.

/s/ Sally Mordi

Sally Mordi

Attorney for CSX Transportation, Inc.

December 3, 2025