

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 36263

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**CITY AND COUNTY OF DENVER –
VERIFIED PETITION FOR DECLARATORY ORDER**

**INITIAL COMMENTS OF THE DENVER ROCK ISLAND RAILROAD COMPANY TO
THE CITY AND COUNTY OF DENVER'S VERIFIED PETITION FOR
DECLARATORY ORDER FILED ON DECEMBER 21, 2018**

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SUMMARY OF ARGUMENT AND REQUESTED RELIEF

The Denver Rock Island Railroad’s (“DRIR”) hereby files these reply comments to the Petition for Declaratory Order (“Petition”) filed on December 21, 2018 by the City and County of Denver (“CCD”), a political subdivision of the State of Colorado. In the Petition, CCD seeks a declaration that CCD’s proposed construction, removal, and relocation/reconfiguration of existing tracks and railroad facilities owned and operated by DRIR located in what is known as the Denver Stockyards or National Western Center¹ does not require Board approval under 49 U.S.C. §10901 or §10903. According to CCD, the Project would not disrupt service to shippers, effect DRIR’s revenues, expand DRIR’s service into new territory, or alter the existing competitive situation. In such situations, the Board has found that the exercise of its jurisdiction is not required for the construction and removal aspects of a relocation project. City of Detroit v.

¹CCD seeks to remove and reconfigure approximately 21,000 feet of common carrier (Section 10901) and ancillary (Section 10906) track located on the National Western Drive Corridor and the River Corridor and to remove related DRIR railroad maintenance and office facilities (collectively, all of the tracks located within the Stockyards will be referred to as the “Stockyard Lines” and are described and set forth in the Petition). DRIR refers to CCD’s construction, rail relocation, and rail reconfiguration plans to redevelop the National Western Center as the “Project”. The Project will preclude DRIR from expanding service to its shippers in the future.

Canadian Nat'l Ry., 9 I.C.C. 2d 1208 (1993), aff'd sub nom. Detroit/Wayne Cnty. Port Auth. v. ICC, 59 F.3d 1314 (D.C. Cir. 1995).² CCD also correctly notes that the construction of a newly relocated route and the abandonment of the previously used track and routes does not require prior Board approval as long as the relocation allows the carrier to operate "in the same manner as the existing line, no shippers are involved, and no new competitive territory is reached." The State of Texas, Dept. of Transp. – Petition for Declaratory Order Regarding Highway Construction in Tarrant Co., TX, FD 32589 (ICC served Feb. 7, 1995), slip op. at 2 (citing Denver & R.G.W.R. Co. – Jt. Proj. – Relocation over BN, 4 I.C.C.2d 95, 97-99 (1987)).

CCD's request for such a declaratory order should be denied. The Project would not allow DRIR to operate "in the same manner as the existing line." DRIR will suffer financial and operational impacts. The Project would, and has already resulted, in lost revenues and added expenses to DRIR. The Project has already resulted in DRIR losing 300 carloads per year.

Likewise, there are shippers involved. In fact, the Project will result in operational impacts on nine shippers. CCD mistakenly claims that National Western Properties, LLC, a subsidiary of McDonald Farms Enterprises, Inc. ("MFEI"), is the only shipper with operations on the Stockyard Lines. MFEI is the primary shipper that DRIR serves over the Stockyard Lines, but contrary to CCD's representations, there are two other rail shippers that depend upon DRIR's service over the Stockyard Lines for their business operations: Truck Rail Handling, Inc. ("TRH") and Viper Railcar Storage ("Viper"). Additionally, the Stockyard Lines are used by

² See also, The Indiana Rail Road Co. and CSX Transp., Inc. – Joint Relocation Project Exemption – Terre Haute, Ind, FD 36203 (STB served Oct. 12, 2018), slip op. at 2; CSX Transp., Inc., The Baltimore & Ohio Chicago Terminal RR Co., and Norfolk Southern Ry. Co. – Joint Relocation Project Exemption – Gary-Chicago International Airport Authority, FD 35804 (STB served May 21, 2014), slip op. at 2. Under these criteria, the incidental abandonment and construction relating to a relocation project require no separate approval or exemption because the relocation project would not disrupt service to shippers, expand the incumbent railroad's service into a new territory, or alter the existing competitive situation.

DRIR to provide both common carrier service and ancillary rail service to five other shippers located in the connecting North Stockyard Operations Facilities (“NSO Facilities”). The removal and relocation of the Stockyard Lines and related railroad maintenance and office facilities will significantly adversely impact DRIR’s service to all nine of DRIR’s shippers – a fact CCD wants the Board to ignore.³

In essence, CCD, perhaps recalling that its predecessor, the Western Stock Show Association’s (“WSSA”) attempts to remove DRIR without DRIR’s consent were unsuccessful,⁴ is attempting to do an end-run around the Board’s adverse abandonment/discontinuance precedents by seeking a ruling that its Project does not require the exercise of the STB’s jurisdiction. Once it obtains that ruling, CCD plans to utilize its eminent domain rights and will seek to condemn and move DRIR’s tracks and related railroad maintenance and office facilities without DRIR’s consent. When DRIR cites ICCTA and STB jurisdiction, CCD will claim that the Board has found that it does not have jurisdiction over the Project. The Board should not become a co-conspirator in such a scheme.⁵

³ The impacts on those shippers is discussed in Exhibit A, a verified statement from Jason Travers, DRIR General Manager. Exhibit B consists of letters from many of the shippers currently served by DRIR using the Stockyard Lines and who express concern that the Project will adversely impact their services.

⁴ See W. Stock Show Ass’n – Abandonment Exemption – in Denver, Co., 1 S.T.B. 113 (STB served July 3, 1996) (“1996 Adverse Discontinuances”).

⁵ Because the Project would violate ICCTA, DRIR has filed an action against CCD in the United States District Court for the District of Colorado (“District Court Action”) and a second complaint with the Board (“DRIR Complaint”). The District Court Action seeks a finding that the various actions to be undertaken by the CCD are preempted under ICCTA and that CCD has breached the terms of the easement that allows DRIR to operate over the real property underlying the Stockyard Lines. The DRIR Complaint alleges that CCD’s actions have and continue to violate 49 U.S.C. §10903(d), §10906, and 10501(b)(2) by seeking to remove 10901 and 10906 tracks and railroad facilities owned and operated by DRIR without the consent of DRIR and without STB approval. DRIR also has a complaint pending in NOR 42160, which alleges that CCD’s actions to remove track Nos. 420 and 421 is a violation of 49 U.S.C. §10903 and §10501(b)(2).

Clearly, contrary to CCD's misleading statements, the Project simply does not qualify for the relocation exception to the Board's jurisdiction. It will, absent CCD reaching appropriate agreements with DRIR and its shippers, result in adverse impacts to both DRIR and its shippers. As such, the Board should outright deny the Petition for failure to meet the requirements for the exception that CCD has invoked.

Nonetheless, if the Board desires to have a further evidentiary record before making that decision, given the existence of the District Court Action and the corresponding complaints pending at the Board, it would be entirely consistent with Board precedent to hold off ruling on the Petition until the District Court Action is completed,⁶ or until the Board resolves the DRIR complaints.⁷

FACTUAL BACKGROUND

Since 1993, DRIR, a Class III common carrier by rail subject to the jurisdiction of the Board, or its predecessor, the Denver Terminal Railroad Company ("DTRC"), has been authorized to provide rail transportation over the Stockyard Lines.⁸ DRIR provides shippers and other rail customers with common carrier service and other forms of rail transportation, such as

⁶ See Fillmore & Western Freight Service, LLC – Emergency Petition for Declaratory Order, FD 35813, slip op. at 2 (STB served Mar. 12, 2015) ("Fillmore"). In that case, the Board was asked to decide whether 49 U.S.C. § 10501(b) preempted an entity's ability to terminate common carrier rights under a series of agreements at issue in two state court cases. The Board denied the petition and declined to initiate a proceeding because the issues raised should be resolved by the state court before the Board decided the declaratory order.

⁷ Alternatively, if the Board does not dismiss the Petition outright or hold it in abeyance pending the outcome of the District Court Action and the DRIR complaints, at a minimum, the Board should establish a procedural schedule that provides for discovery and a full opportunity for the public and shippers to develop the record and provide comments prior to any Board ruling. See Metropolitan Council – Petition For Declaratory Order, FD 36178 (STB served May 22, 2018) ("Metropolitan Council").

⁸ See Denver Terminal R.R. – Acquisition And Operation Exemption – Denver Ry., ICC FD 32356 (September 29, 1993) ("DTRC Acquisition"). Mr. Thomas Z. Mars acquired all of the stock of DRIR's predecessor in December, 1993; and, continues to control DRIR

staging, storage, switching, and facilitating interchange to both BNSF Railway Company (“BNSF”) and Union Pacific Railroad Company (“UP”) over the Stockyard Lines.⁹

DRIR also operates over two rail lines that connect the Stockyard Lines to shippers and tracks located in DRIR’s North Washington terminal complex (the NSO Facilities). See Denver Terminal Railroad Company, d/b/a Denver Rock Island Railroad – Acquisition and Operation Exemption – Rail Lines of Union Pacific Railroad Company, FD 34692 (STB served June 14, 2005). DRIR uses the Stockyard Lines to serve the shippers and customers located in the NSO Facilities. Prior to acquiring ownership of the NSO Facilities, DRIR leased them from UP. See Denver Terminal Railroad Company, d/b/a Denver Rock Island Railroad – Lease and Operation Exemption – Rail Line of Union Pacific Railroad Company, FD 34637 (STB served Jan. 12, 2005).

DRIR not only has STB operating authority over the Stockyard Lines, but it also owns almost all of the tracks constituting the Stockyard Lines. It also has real property rights in the form of easement rights to conduct rail operations over the real property underlying those tracks. DRIR’s track ownership and easement rights came about through a series of transactions, including a settlement agreement between CCD’s predecessor, WSSA, and DRIR. The settlement agreement came after the Board denied WSSA’s request for an adverse abandonment/discontinuance authority in the 1996 Adverse Discontinuances case. The settlement agreement provided that WSSA (1) would retain ownership of the real property underlying the Stockyard Lines; (2) that DRIR owned the rail, ties, ballast, spikes, tie plates, bolts, and angle irons; and (3) granted to DRIR a non-exclusive easement to operate over the

⁹ Although DRIR has been the primary freight operator on the Stockyard Lines for over two decades, historically a number of railroads have also operated over the Stockyard Lines, including the predecessors of UP and BNSF. Indeed, similar rail operations have been occurring on the Stockyard Lines for over a century. See 1996 Adverse Discontinuances.

Stockyard Lines. See City And County Of Denver – Acquisition Exemption – Western Stock Show Association In The City And County Of Denver, Colo., FD 36157, slip op. at 3 (STB served Aug. 9, 2018) (“Aug 9 Decision”).¹⁰

There is no question that DRIR has STB operating rights on the Stockyard Lines, ownership of the tracks in the Stockyard Lines, and real property rights to use the property underlying the Stockyard Lines. The Project, as currently proposed, seeks to substantially and significantly change all of the parties’ rights and obligations with respect to the Stockyard Lines, without DRIR’s consent.

The parties have been negotiating for over four years over the effects of the Project and those negotiations have continued throughout 2018. The negotiations have addressed issues pertaining to construction, replacement facility requirements, relocation issues (both with respect to DRIR’s new facilities and relocation of shipper facilities served by DRIR), compatibility with BNSF’s facilities (profile grade variance to ensure connectivity to BNSF), salvage of existing facilities, construction of traffic and rail signals, and the CCD’s payment to DRIR, which was necessary for DRIR to acquire replacement facilities.¹¹ Despite these good faith negotiations, in December 2018, and to the surprise of DRIR, CCD aggressively terminated negotiations and

¹⁰ The easement deed dated July 10, 1997, is referred to herein as “Easement Deed,” and is attached as Exhibit C. Prior to this, DRIR had also acquired easement rights in the Stockyard Lines in December 1993, when the Colorado and Eastern Railway Company (“C&E”) conveyed ownership of River Corridor tracks to DTRC. C&E acquired the tracks from WSSA’s predecessor, Denver Union Corporation (“Denver Union”), via quitclaim deed in 1982. DRIR acquired additional easement rights when UP assigned easement rights, which UP had acquired from Denver Union, to DRIR on April 28, 1995.

¹¹ Progress was made, but no agreements reached, partly because as CCD admits in its Petition as of November 2018, CCD’s relocation rail design plans are only 60% complete. Petition at 6. It is hard to finalize agreements when one does not have the complete plans.

filed the Petition.¹² To be clear, there are no agreements between CCD and DRIR that would allow CCD to move forward with the Project in a manner that would avoid the cost of service changes and disruptions to DRIR's shippers.

The Petition conveniently omits nearly all of the above facts in its eleven-page narrative, which attempts to portray the Project as an ordinary railroad-initiated relocation not subject to the Board's jurisdiction. CCD offers the Board the same empty assurances it has offered DRIR: don't worry we will "allow for DRIR's continued operations until the railroad can cut over to the relocated facilities" and "DRIR's rights as a common carrier providing transportation by rail ... will be preserved throughout the City's construction process." Petition at 7. Clearly, without DRIR's consent, those are empty promises. As the Project now stands, the Board cannot grant the Petition as requested.

ARGUMENT

I. CCD HAS FAILED TO DEMONSTRATE THAT THE PROJECT QUALIFIES FOR THE RELOCATION EXCEPTION TO THE BOARD'S EXERCISE OF ITS ABANDONMENT JURISDICTION AND THEREFORE THE PETITION SHOULD BE DENIED

The information provided by CCD in the Petition is misleading and/or insufficient to demonstrate that Project qualifies for the relocation exception to the Board's jurisdiction. The Board and its predecessor have consistently held that removing existing track and railroad facilities and building substitute track at another location does not fall under the ambit of 49 U.S.C. §§ 10901 and 10903 if "there is no effect on (1) service to shippers; (2) the carrier's

¹² Likewise, in the later part of 2018, CCD begun removing what its claims are shipper owned sidetracks and over which DRIR has operated and threatened to remove more tracks that were used by the relocated shippers. CCD's removal of these tracks is currently pending before the Board and in a quiet title action in state court. See Denver Rock Island Railroad Company v. The City and County of Denver, Colorado, FD 36240, NOR 42160 (pending before the Board) and City and County of Denver v. Denver Rock Island Railroad, District Court, City and County of Denver, State of Colorado, Case No. 2019CV34300.

territory or traffic; (3) competition; or (4) the “carrier’s revenue or operating expenses.” See BNSF Railway Company – Petition for Declaratory Order, FD 35164, slip op at 8 (STB served May 20, 2009) discussing Denver & R.G.W. R. Co – Jt. Proj. – Relocation Over BN, 4 I.C.C. 2d 95, 97-99 (1987). In simplest terms, relocations qualify for the exception to the Board’s jurisdiction when “the proposed relocation is to operate in the same manner as the existing line, no shippers are affected, and no new service territory is reached.” Id. Absent CCD entering into appropriate agreements with DRIR to preserve DRIR’s ability to continue to serve its customers in the same manner and consistent with the service levels provided today and without adversely impacting service to shippers, the Project fails to satisfy the basic requirements of the exception.

There are three basic reasons why the Project does not qualify for the relocation exception to the Board’s jurisdiction. First, DRIR does not consent and the STB has never approved a relocation exception when a carrier objects because the relocation will adversely impact its service. Second, the Project will have significant adverse impacts on DRIR’s ability to serve its shippers and DRIR will not be able to serve its shippers consistent with the manner in which it serves them today. Finally, the Project will have impacts on DRIR’s revenues through the loss of business, added operating costs, and having to expend unreimbursed expenses to find and build replacement tracks.

A. DRIR Does Not Consent To The Project

The relocation exception does not apply when the serving carrier objects. Unlike in this case, for nearly all, if not all, of the relocations where the exception has applied, the relocation was undertaken with consent of and directly by the common carrier that owned and operated the tracks **or** at a minimum consented to the project because it had entered into agreements with a public entity to be fully compensated for relocating their operations to serve a broader public

purpose, e.g. construct a necessary highway. In this proceeding, the carrier that owns or controls the tracks does not consent and has not entered into any agreements providing consent. Here, the entity attempting to use the relocation exception precedent provides no common carrier service itself. Yet, it desires to relocate DRIR's operations without DRIR's concurrence and without executing agreements to ensure that DRIR's can continue to serve its customers in the same manner and consistent with the service levels provided today without adversely impacting DRIR's service to shippers.

Our initial research only found one instance where an entity other than the railroad sought to relocate a carrier's operations and the Board declined to exercise jurisdiction even though the railroad had raised a (minor) objection. See The State of Texas Department of Transportation – Petition for Declaratory Order Regarding Highway Construction In Tarrant County, TX, FD 32589 (STB served February 7, 1995) (“TX DOT”). That case is not applicable here for a number of reasons. For starters, in that proceeding, there was no impact to shippers and no shippers objected to the proposed relocation. Moreover, the government entity looking to relocate the carrier's rail operations demonstrated “with reasonable certainty” using expert testimony that land for the replacement track could be obtained in a timely manner, provided unrefuted evidence that replacement tracks could be installed in a timely manner, provided a statement from an independent railroad consultant that the replacement tracks were adequate to allow railroad operations to continue as currently performed, and retained an independent real estate appraiser to determine the amount that would fully compensate the carrier for the cost of obtaining the land and constructing the replacement facilities. Id at *8-*10. Even more remarkable, and unlike in this proceeding, the rail carrier did “not argue or demonstrate that the proposed project, if completed in a timely fashion, would interrupt or even hinder the

performance of its common carrier service.” Id. In this proceeding, as established in the verified statement of Mr. Travers and the shipper letters, DRIR does not consent, the Project will adversely impact DRIR’s service to its shippers, DRIR will not be able to operate in a manner consistent with its prior service, and the Project will have an adverse impact on DRIR’s revenues. As such, the facts and findings in TX DOT do not support a finding in favor of CCD.

B. There Will Be Adverse Impacts To Shippers’ Service

Another primary reason why the Project does not qualify for the exception is because the Project as currently proposed would have an adverse impact on shippers. DRIR will not be able to serve its customers in the same manner and consistent with the service levels provided today. The Petition clearly demonstrates that CCD does not understand or appreciate the complexities of DRIR’s operations or the adverse effects that the Project will have on DRIR’s provision of service to its shippers. As previously noted, there are actually three customers that DRIR directly serves in the Stockyard Lines terminal itself -- MFEI, TRH, and Viper. In addition to the three aforementioned shippers, DRIR serves six other shippers: Evraz Recycling Denver (“Evraz”), CMC Banner Rebar (“CMC”), Waste Management (“WM”), Iron and Metals Inc. (“IM”), Colorado Petroleum (“CP”), and Darling Ingredients Inc. (“Darling”) using the Stockyard Lines. These shippers operations are primarily located in the NSO Facilities, but DRIR uses the Stockyard Lines and railroad maintenance and office facilities on the Stockyard Lines to provide both common carrier service and ancillary rail service to these six shippers.

The removal and relocation of the Stockyard Lines will significantly adversely impact DRIR’s service to these shippers – a fact CCD wants the Board to ignore.¹³ Indeed, even if

¹³ To help the Board understand, how DRIR operations are conducted over both the Stockyard Lines and the NSO Facilities, the VS Travers explains in detail how DRIR currently uses the

MFEI, DRIR's largest shipper, agrees to relocate, as postulated by CCD, MFEI fully understands that without adequate replacement tracks and facilities somewhere else on DRIR's system (presumably in the NSO Facilities), the Project will adversely impact its service, even at a relocated facility. See Exhibit A - VS Travers at 5. This is why MFEI has provided a letter expressing concern over the Project notwithstanding the fact that it is in the process of coming to terms with CCD concerning relocation of its rail facilities. Id.

The testimony of Mr. Travers is also confirmed by the shippers themselves. As demonstrated by the letters included in Exhibit B, DRIR's shippers believe that DRIR's service to them will be adversely affected because CCD has failed to reach agreements with DRIR to allow operations to continue consistent with how they are performed today. To help the Board develop an appreciation for the implications of a proposed transaction, summarized below from Exhibit A - VS Travers are some of what DRIR understands to be some of the shippers' concerns:

- MFEI will continue to need the same storage, staging and side track services that DRIR currently provides and is concerned that the Project will not accommodate those requirements. MFEI wants to ensure the Project does not preclude it from continuing to interchange with both BNSF and UP.
- TRH does not own its own facilities on the Stockyard Lines; thus, it is entirely dependent on DRIR for the storage, staging and side track services that DRIR currently provides over the Stockyard Lines. The Project as structured could force TRH out of business.
- Viper has operations on both the Stockyard Lines and in the NSO Facilities. Yet, CCD did not bother to consult it concerning the Project. Viper depends on DRIR's continued ability to provide storage, staging and side track services and facilitate interchange with both BNSF and UP and the Project as structured could also significantly impacts its business.
- Evraz wants to ensure that the Project does not adversely impact DRIR's ability to stage, store, and facilitate the interchange of a significant number of cars. 97% of Evraz's long-

Stockyard Lines to serves its shippers and how the Project as proposed would adversely impact the service that it provides to its shippers. See Exhibit A - VS Travers at 5-7.

distance traffic was interchanged to BNSF over the main line and side tracks located on the Stockyard Lines that CCD wants to relocate/reconfigure.

- IM wants to ensure that the Project does not hinder DRIR's ability to provide transportation services or preclude IM from continuing to interchange with both BNSF and UP.
- CP is concerned that rail service will not continue to be provided in a manner that is consistent with current operations or alternatively in a manner that does not affect service to shippers.

From the onset, DRIR has expressed concern over the Project's impacts on its service to its shippers -- both during construction and afterward. Over the four years of negotiations, CCD seemed to understand that DRIR's consent to the Project was needed and service to shippers had to be preserved. But as noted previously, in December, and quite surprisingly to DRIR, CCD abruptly terminated its discussions with DRIR and withdrew all previous commitments¹⁴ to provide DRIR with a plan and financial resources so as to ensure that rail service could continue in the future consistent with how it is performed today without adversely impacting DRIR's service to its customers. There is no question that without such agreements, the Project does not qualify under the relocation exception precedents.

As further explained in Exhibit A - VS Travers, absent appropriate agreements, the Project will adversely impact DRIR's rail transportation services to its shippers. To summarize:

- The Project as currently proposed would eliminate a substantial amount of track that DRIR currently uses to provide service to its shippers and without providing equivalent replacement facilities. The Project calls for the removal, relocation and reconfiguration of approximately 21,000 feet of common carrier and ancillary (Section 10901 and 10906) track and the removal of railroad maintenance and office facilities. Even if CCD was to again offer to replace the 11,400 feet of track it recently proposed to replace, a total of 9,000 feet of track necessary for DRIR to serve shippers consistent with how it does today will be lost forever. Such a loss will significantly adversely impact DRIR's service to its shippers.

¹⁴ CCD even proposed providing DRIR with the financial wherewithal to locate and build replacement tracks and facilities so as to allow it to continue to serve its customers.

- The Project as proposed will leave DRIR without adequate track or facilities for the staging and storage of rail cars as necessary to serve its customers with the same level and type of service that DRIR provides today. None of the nine shippers will receive the type of service they do today, and DRIR could become disconnected from UP and BNSF. Such effects would result in financial ruin for both DRIR and its customers.
- A grade variance is required to ensure continued connectivity with BNSF. While BNSF and DRIR have reached an agreement in principle, nothing has been finalized because CCD and DRIR have not reached a final agreement on the design and location of DRIR's replacement tracks, which are necessary predicates for determining how and where BNSF and DRIR would continue to connect. By CCD's own admission, as of December 2018, its relocation rail design plans were only 60% complete. Yet, CCD wants DRIR to sign off on the Project, despite not knowing whether connectivity with BNSF (or UP for that matter) can be preserved or whether replacement tracks will be built to provide shippers service consistent with the type and level of service provided today.
- CCD and DRIR have also yet to reach an agreement governing the timing of the various construction elements of the Project so that the removal and relocation of the Stockyard Lines will not occur until sufficient replacement tracks have been built. CCD has withdrawn its offer to provide DRIR with the financial resources necessary to acquire property and build replacement tracks.
- There is no agreement governing the construction and maintenance of new traffic and rail signals that would be necessary for DRIR to provide rail transportation over the new roads and crossings proposed by the Project. Yet Again, CCD wants DRIR to sign off on the relocation/reconfiguration without resolving this critical and costly issue.

CCD simply fails to understand that almost all the tracks DRIR has along the Stockyard Lines have multiple functions. If 9,000 feet of track and railroad maintenance and office facilities that DRIR uses to provide rail transportation service to shippers is removed without providing replacement tracks or facilities, operations over both the Stockyard Lines and the NSO Facilities will come to a screeching halt.¹⁵ CCD totally disregards the fact that the NSO Facilities as they exist today cannot handle the increase in car numbers that would be caused by

¹⁵ The City's "assurance" that DRIR will be able to operate on at least one of its corridors at all times, Petition at 6, is no assurance at all. Such an assurance does nothing to resolve the problems caused by the removal of the Stockyard Lines used for DRIR's ancillary rail services. Without an assurance that replacement tracks and railroad facilities can be built and in place before CCD removes any of the Stockyard Lines, there will be adverse impacts on DRIR's shippers. Such impacts need to be mitigated through a construction agreement and the construction of replacement tracks.

the removal of the Stockyard Lines. It is simply not possible to accommodate shifting service that currently occurs over the Stockyard Lines to the NSO Facilities without adversely impacting DRIR's existing service to its customers.

C. There Will Be Adverse Financial Impacts On DRIR

If the Project moves forward as proposed, DRIR will incur added operating expense and potentially could lose significant revenues. Under such circumstances, the relocation exception does not apply. Indeed, the City's actions have already caused DRIR to suffer a loss in "revenue," contrary to the basic elements needed to qualify for the relocation exception. CCD has forced three shippers to relocate by threat of condemnation and this has already reduced DRIR's revenues.¹⁶ As noted in the shipper letters and in VS Travers, it is also possible that other shippers may be forced to relocate away from DRIR's lines or go out of business altogether. Resulting in further revenue losses.

Absent appropriate agreements, if the Board declines jurisdiction, DRIR will either lose significant track capacity requiring DRIR to make service cutbacks and increase DRIR's service times or it will have to expend millions of unreimbursed dollars to replace that lost capacity. Either approach will further reduce DRIR's operating revenues and ability to continue to provide service to its shippers consistent with how it does today. Indeed, based upon CCD's promise to reimburse DRIR \$3.5 million as part of the negotiations, DRIR has already spent \$3.8 million on the acquisition of some replacement property (which is only a small portion of replacement costs). VS Travers at

¹⁶ In the most recent year in which those three shippers were located on the Stockyard Lines, those shippers' collective rail traffic totaled 300 cars. As a result of CCD's actions to date, DRIR has already permanently lost revenues, which DRIR has long used to maintain its network.

3. If the Board allows the Project to move forward under the relocation exception, DRIR may never recover these sunk costs. There will also be additional costs associated with operating from any replacement tracks to serve existing shippers, costs that would not be reimbursed. Such sunk costs, additional operating expenses, and lost management time, professional fees, legal fees, etc....will be at DRIR's expense if the Board allows this Project to move forward.

DRIR will also have to replace its maintenance and operations facility, which is currently located on the Stockyard Lines property.¹⁷ This facility is required by FRA regulations and is used to support DRIR's service to shippers on both the Stockyard Lines and connecting NSO Facilities. Allowing the Project to move forward as proposed would require DRIR to spend even more than it has already spent to improve the land and buildings it acquired to be consistent with FRA requirements. This too would be an unreimbursed expense. Clearly, because DRIR has already suffered revenue losses and could suffer significant additional adverse revenue impacts, the Project fails to qualify under the relocation precedent.

In summary, to qualify under the relocation precedent, the Project must have the consent of the existing common carrier, must allow the carrier to continue to serve shippers in a manner consistent with how it serves those shippers today, and must not adversely impact either the carrier or the shippers. Here, those conditions are not met. CCD, who provides no common

¹⁷ DRIR's maintenance facility on the Stockyard Lines has supported DRIR's service to shippers on both the Stockyard Lines and connecting North Stockyard Operations Facilities, since 2006.

Because the Project would force DRIR's maintenance and office facilities to be relocated, after engaging in good faith negotiations with CCD, DRIR purchased some land and buildings that could potentially be improved to relocate some of the rail and maintenance facilities. DRIR spent \$3.8 million on this acquisition based on CCD's promise to reimburse DRIR \$3.5 million as part of 'settlement. CCD's termination of negotiations has already cost DRIR dearly and diverted resources that DRIR would have used to provide service to DRIR's shippers.

carrier service itself, wishes to relocate DRIR's operations without DRIR's concurrence and without executing agreements to ensure that DRIR's can continue to service its customers in the same manner and consistent with the service levels provided today. Both DRIR and its shippers have expressed concerns that the Project will adversely impact DRIR's provision of STB jurisdictional rail transportation service. The relocation will affect both shipper and carrier revenues. All of these facts taken collectively demonstrate that the Project does not qualify for the relocation exception to the Board's jurisdiction. As such, the Board should outright dismiss the Petition for failure to meet the requirements for the exception that CCD has invoked. If the Board is not inclined to dismiss the Petition outright, it should at a minimum hold the proceeding in abeyance pending a decision in the District Court Action and/or the two DRIR s before the Board.

II. IF THE BOARD IS INCLINED NOT TO DENY THE PETITION AT THIS TIME, A DECISION ON THE DISTRICT COURT ACTION AND/OR THE TWO DRIR COMPLAINTS BEFORE THE BOARD WOULD GIVE THE BOARD FURTHER GUIDANCE AND FACTUAL INFORMATION BEFORE DECIDING THE PETITION

Under 5 U.S.C. § 554(e) and 49 U.S.C. § 1321, the Board may issue a declaratory order to terminate a controversy or to remove uncertainty. The Board has broad discretion to determine whether to issue a declaratory order. See Bos. & Me. Corp. v. Town of Ayer, 330 F.3d 12, 14 n.2 (1st Cir. 2003); Intercity Transp. Co. v. United States, 737 F.2d 103 (D.C. Cir. 1984); Delegation of Auth.—Declaratory Order Proceedings, 5 I.C.C. 2d 675, 675 (1989). However, when certain threshold questions should be addressed first or there is a pending state or federal court action seeking to address similar and related questions, the Board has the discretion to either dismiss the request outright or to hold the declaratory order proceeding in abeyance pending resolution of the threshold questions in the courts. See Soo Line Railroad

Company – Petition for Declaratory Order, FD 36107 (STB served Aug. 10, 2017) (“Soo Line”); see also Fillmore.

Because the Project does not qualify for the relocation exception to the Board’s jurisdiction, the Board would be more than justified to deny the Petition outright. However, if the Board is not inclined to do so, as it did in the Soo Line case, the Board should at a minimum hold this proceeding in abeyance because the questions to be answered and the record to be developed in both the District Court Action and DRIR’s two complaint proceedings would provide the Board the additional information necessary to fully evaluate the Project’s impact on shippers. As such, it would be entirely consistent with Board precedent to hold off ruling on the Petition until these proceedings are decided.

A. DRIR’s District Court Action

DRIR seeks three primary findings in the District Court Action. First, any efforts by CCD to exercise eminent domain to remove and relocate DRIR’s tracks as planned by the Project are preempted by ICCTA and the United States Constitution and would discriminate against and unduly burden interstate commerce. Second, actions by CCD that attempt to regulate, manage, or otherwise interfere with DRIR’s provision of its railroad transportation services are preempted by ICCTA. Third, the Defendant has breached its obligations as set forth in the Easement Deed and Agreement for Resolution of Disputed Issues.¹⁸

The claims are briefly summarized below in order to provide the Board with an understanding of the merits of those claims, and to show the Board that if DRIR does prevail in the District Court proceeding, the Board would not need to act at all on the Petition. Of course,

¹⁸ DRIR has attached the complaint filed in the District Court Action as Exhibit D.

both the Board and the courts can address issues of preemption;¹⁹ however, given that DRIR has also brought a breach of contract claim, which the Board does not resolve,²⁰ DRIR had to bring the District Court Action to raise its breach of contract claim.

1. The Breach Of Contract Claims

As noted, DRIR has brought a breach of contract claim based upon the fact that CCD will violate DRIR's easement rights if it attempts to undertake the Project without DRIR's consent. CCD, as the purchaser of the real estate owned by WSSA stands in the shoes of WSSA for purposes of the agreement. The Easement Deed granted DRIR a nonexclusive rail easement over the Stockyard Lines, so long as the property is used for rail purposes. The terms also prohibited WSSA (now CCD) from interfering with DRIR's railroad operations. By seeking authority to relocate DRIR's operations without DRIR consent, and outside the jurisdiction of the

¹⁹ City of Sammamish, Wash – Petition For Declaratory Order, FD 36161 (STB served Mar. 29, 2018) (noting that preemption issues can be decided either by the Board or the courts in the first instance, as both the Board and courts have concurrent jurisdiction to determine preemption); see also, Adrian & Blissfield R.R.--Pet. for Declaratory Order, FD 36148, slip op. at 4 (STB served Jan. 31, 2018); 14500 Ltd.--Pet. for Declaratory Order, FD 35788, slip op. at 2 (STB served June 5, 2014); CSX Transp., Inc.-- Pet. for Declaratory Order, FD 34662, slip op. at 8 (STB served May 3, 2005).

²⁰ Indiana Harbor Belt Railroad Company – Trackage Rights – Consolidated Rail Corporation, CSX Transportation, Inc., and Norfolk Southern Railway Company, FD 36099, slip op. at 5 (STB served Mar. 14, 2017) (Noting that “the Board has consistently stated that contractual disputes are properly for courts to decide.”). This general principle is found over and over again in Board decisions. See, e.g., Canadian Pacific Railway Company, et al. – Control – Dakota, Minnesota & Eastern Railroad Corp., et al., FD 35081, slip op. at 7 (STB served May 7, 2009) (“The Board's policy is to refrain from interpreting or enforcing private contracts, leaving such issues to be resolved by the parties to the contract or in court.”); City of Peoria and the Village of Peoria Heights, II – Adverse Discontinuance – Pioneer Industrial Railway Company, AB-878, slip op. at 6 (STB served Aug. 10, 2005) (noting in part that “the Board does not undertake to interpret or enforce operating agreements or contracts. . .”). The same principle applies with respect to the interpretation of trackage rights agreements authorized by the Board. See, e.g., BNSF Railway Company – Trackage Rights Exemption – Union Pacific Railroad Company, FD 35601, slip op. at 5-6 (STB served Sept. 11, 2013); Indiana Northeastern Railroad Company – Change in Operators – Branch and St. Joseph Counties Rail Users Association, Inc. in Branch County, Michigan, FD 33760, slip op. at 4 (STB served Sept. 1, 1999).

Board, the Defendant and its proposed actions, unless appropriate agreements with DRIR are executed, will interfere with DRIR's railroad easement. As such, CCD is breaching the terms of the Agreement for Resolution of Disputed Issues²¹ and DRIR's rights pursuant to the Easement Deed.

CCD offers empty assurances that DRIR will continue to conduct its railroad operations without interruptions in DRIR's service. It provides no support for these assertions. It provides no witnesses or factual information at all to establish to the Board that DRIR's STB and real property easement rights will not be violated. None of CCD's filings in this or related proceedings address how DRIR's operations can continue consistent with DRIR's existing service when the number of tracks that it has used for nearly 26 years is reduced by 9,000 feet. In short, the relocation/reconfiguration of the Stockyard Line not only breaches DRIR's current contractual rights, but it will also result in significant degradation of service and interference with DRIR's ability to provide common carrier service.

This, of course, is not the proper forum to argue the merits of DRIR's breach of contract claims. DRIR briefly summarized the issues above to explain to the Board that a decision on the District Court Action could be beneficial to the Board in resolving the Petition. Even if DRIR loses in its District Court proceeding, the record developed by the District Court on the breach of contract claims and preemption claims would help the Board determine whether the Board should decline to exercise jurisdiction over the Project.

2. The ICCTA Preemption Claims

DRIR is not asking the Board to rule on its ICCTA preemption claims in these reply comments. DRIR has asked the Federal Court to resolve that issue. To summarize briefly,

²¹ The Agreement for Resolution of Disputed Issues is included as part of Exhibit C.

DRIR's preemption claims rest on the notion that any effort by CCD to condemn DRIR's tracks and easement rights, and the subsequent removal and relocation of DRIR's tracks as planned by the Project are preempted by ICCTA and the United States Constitution. Indeed, any attempt to take DRIR's easement, which DRIR uses for its rail operations, will be *per se* preempted.²²

Furthermore, CCD has already undertaken efforts to remove tracks used by DRIR and to otherwise regulate, manage, and interfere with DRIR's provision of its railroad transportation services. Actions that directly result in the disruption and interference of DRIR's common carrier rights are preempted. DRIR seeks a finding that any such further interference with its operations would likewise be preempted by ICCTA. See e.g., Petition of Union Pacific Railroad Company for Declaratory Order, FD 35960 (STB served Sept. 30, 2016) (indicating the Board looks at whether the proposed action will unreasonably interfere with interstate transportation); The City of Ozark, Arkansas – Petition for Declaratory Order, FD 36104 (STB served July 28, 2017) (holding that the City of Ozark, Arkansas's installation of an at-grade crossing at its proposed location would unreasonably interfere with present and future rail operations on the tracks and such is preempted under § 10501(b); TriCity Railroad Company – Petition for Declaratory Order, FD 35915 (STB served September 14, 2016) (explaining that The Board's broad and exclusive jurisdiction over railroad transportation prevents the application of state laws that would otherwise be available, including condemnation to take property used for rail transportation for another, conflicting use that would unreasonably burden or interfere with rail use, present or future); Pace v. CSX Transp., Inc., 613 F.3d 1066, 1068-69 (11th Cir. 2010) (finding that state claims related to side track are preempted and explaining that federal preemption applies without regard to whether the Board actively regulates the railroad operations

²² See e.g., Soo Line R. Co. v. City of St. Paul, 827 F. Supp. 2d 1017, 1022 (D. Minn. 2010); and Wisconsin Central Ltd. v. City of Marshfield, 160 F. Supp. 2d 1009, 1013 (W.D. Wis. 2000).

or activity involved); Port City Props. v. Union Pac. R.R., 518 F.3d 1186, 1188 (10th Cir. 2008) (state law claims preempted even though Board does not actively regulate spur and side track); Maumee & W. R.R.—Pet. for Declaratory Order, FD 34354, slip op. at 2 (STB served Mar. 3, 2004) (noting that preemption may shield a railroad from state eminent domain laws where the effect of those laws is an unreasonable interference with railroad operations).

Given the existence of the District Court Action, if the Board does not dismiss the Petition outright on the basis that the Project does not qualify for the relocation exception to the Board’s jurisdiction, the Board should not take any action to grant this Petition without the benefit of a ruling in the District Court Action. At a minimum, the Board should allow the public and DRIR to undertake discovery, analyze the facts, and develop the record further through additional comment.²³

B. The Two DRIR Complaint Cases

DRIR has filed two complaints with respect to the Project. The first complaint, in NOR 42160, alleges that CCD’s actions to remove track Nos. 420 and 421 is a violation of 49 U.S.C. §10903 and §10501(b)(2). DRIR claims to own those tracks and claims to have easement rights over them as well. Pursuant to its ownership and easement rights, DRIR has operated over those tracks pursuant to its STB authority. CCD’s removal of those tracks thus interfered with DRIR’s rail operations and constituted an unlawful abandonment of those tracks.

The second complaint, which DRIR is filing concurrently with this reply, seeks a finding that any effort by CCD to remove the Stockyard Lines would violate 49 U.S.C. §10903(d), §10906, and 10501(b)(2) by seeking to remove 10901 and 10906 tracks and railroad facilities owned and operated by DRIR without the consent of DRIR and without first obtaining an

²³ See Metropolitan Council.

adverse abandonment finding (or a declaratory order with respect to Section 10906 operations) from the Board that the public convenience and necessity require or permit the removal of the STB's jurisdiction over those tracks.

As previously mentioned, the STB rejected CCD's predecessor's attempts to terminate rail service over the Stockyard Lines in 1996. CCD has known for years it needed to seek abandonment/discontinuance authority in connection with the Project. CCD is also well aware that aside from the abandonment of 10901 and 10906 tracks being subject to the Board's jurisdiction, the Easement Deed and the Assignment of the 1976 Easement, gives DRIR the right to conduct rail operations on the property. CCD knows DRIR's operating rail rights are subject to the exclusive jurisdiction of the STB and cannot be extinguished without DRIR filing for abandonment authority, or CCD filing an application for adverse abandonment and discontinuance of service under 49 U.S.C. 10903(d) (or a petition for declaratory order with respect to the Section 10906 rights) so as to remove the STB's jurisdiction in order to allow application of state property law, i.e. condemnation authority. CCD is trying to avoid well established STB precedent by not filing such an adverse abandonment application.²⁴ The complaint seeks a finding that any attempt to remove the Stockyard Lines without first removing the STB's jurisdiction violates ICCTA.

Both of the STB complaints involve similar, but not identical facts. Both touch on some of the very issues the Board must decide to grant the Petition. Given the existence of the two pending STB complaints, if the Board does not dismiss the Petition outright on the basis that the

²⁴ As set out in the District Court Action, the very first report on the Project in 2014 specifically stated that DRIR would have to obtain abandonment authority, if it moved forward with the Project. Trying to classify the Project as a relocation not subject to the Board's jurisdiction, is merely an attempt by CCD to move forward with the Project by any means necessary irrespective of DRIR's Board-approved and contractual operating rights, and regardless of the adverse impact on DRIR's provision of common carrier service to shippers.

Project does not qualify for the relocation exception to the Board's jurisdiction, the Board should not take any action to grant this Petition without the benefit of a ruling on those two complaints. Such complaints allow parties, including shippers, to fully participate, undertake discovery, analyze the facts, and develop the record further through additional comment. The petition for declaratory order does not provide similar evidentiary processes.

CONCLUSION

DRIR respectfully requests that the Board dismiss the Petition for failure to meet the requirements for the relocation exception to the Board's jurisdiction. To meet the requirements, CCD has the burden to show that the Project has the consent of DRIR, will not disrupt service to shippers, will allow DRIR to continue to serve shippers in the manner consistent with its existing service, and will not affect DRIR's revenues. CCD has failed to meet that burden. Shippers and DRIR will both be adversely impacted. DRIR will suffer financial losses and will not be able to maintain its existing service. In such situations, the Board should deny the Petition and require CCD to file an adverse abandonment application or obtain DRIR's consent (findings that would likely moot the District Court complaint and the second complaint filed concurrently with this reply).

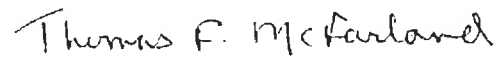
Alternatively, the Board should hold the proceeding in abeyance pending a decision by the District Court on DRIR's preemption and breach of contract claims. The District Court record could provide the Board much of the information it needs to properly evaluate the Petition. However, if the Board is disinclined to either dismiss the proceeding or hold the Petition in abeyance pending a decision by the District Court, the Board should, at a minimum, set a procedural schedule to allow for public comment, discovery, development of a complete

record, and a deeper analysis of the Project. In similar situations in the past, the Board has followed that precise course of action.

Respectfully submitted,



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Attorneys for The Denver Rock Island Railroad
Company

February 4, 2019

CERTIFICATE OF SERVICE

In accordance with 49 C.F.R. §1111.3, I hereby certify that on February 4, 2019, I served a copy of the foregoing Initial Comments of The Denver Rock Island Railroad Company to the City and County of Denver's Verified Petition for Declaratory Order filed on December 21, 2018 on representatives of The City and County of Denver, Colorado, i.e.:

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cc: Parties of Record


William A. Mullins

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 36263

**CITY AND COUNTY OF DENVER –
VERIFIED PETITION FOR DECLARATORY ORDER**

**INITIAL COMMENTS OF THE DENVER ROCK ISLAND RAILROAD COMPANY TO
THE CITY AND COUNTY OF DENVER'S VERIFIED PETITION FOR
DECLARATORY ORDER FILED ON DECEMBER 21, 2018**

Exhibit A

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 36263

**CITY AND COUNTY OF DENVER –
VERIFIED PETITION FOR DECLARATORY ORDER**

**INITIAL COMMENTS OF THE DENVER ROCK ISLAND RAILROAD COMPANY TO
THE CITY AND COUNTY OF DENVER’S VERIFIED PETITION FOR
DECLARATORY ORDER FILED ON DECEMBER 21, 2018**

Exhibit A

**VERIFIED STATEMENT OF JASON TRAVERS, GENERAL MANAGER OF
THE DENVER ROCK ISLAND RAILROAD
ON THE EFFECTS OF THE PROJECT ON DRIR’S OPERATIONS AND PROVISION
OF COMMON CARRIER SERVICE TO SHIPPERS.**

INTRODUCTION

I am the General Manager of the Denver Rock Island Railroad (“DRIR”). Since mid to late 2014, I have been involved in discussions with the City and County of Denver (“CCD”), a political subdivision of the State of Colorado, and its predecessor, the Western Stock Show Association (“WSSA”), concerning plans to redevelop/reconfigure the National Western Center to create a year-round campus for agricultural education, innovation, and entertainment (the “Project”).¹ Those plans are set forth in CCD’s petition for declaratory order filed on December

¹ The Project is being undertaken in what is known as the Denver Stockyards Area. The Project calls for the removal, relocation and reconfiguration of approximately 21,000 feet of common carrier and ancillary (Section 10901 and 10906) track (collectively, the tracks located within the Stockyards will be referred to as the “Stockyard Lines”) and railroad maintenance and office facilities. Even if CCD was to again offer to replace the 11,400 feet of track it originally proposed to replace, a total of 9,000 feet of track necessary for DRIR to serve shippers consistent

21, 2018 (the “Petition”). While the Petition claims that DRIR’s service to its shippers will not be adversely impacted because of the Project, this is simply not true. As currently proposed, the Project would eliminate DRIR’s ability to service its customers in the same manner and consistent with the service levels provided today and will adversely impact shippers’ service needs.

From the very beginning and continuing until today, DRIR has had one goal: to ensure that any actions undertaken by CCD in connection with the Project does not substantially interfere with and/or preclude DRIR’s ability to provide rail transportation to its customers consistent with how it does it today and without adversely affected service to shippers. I, and other DRIR personnel, have spent over four years diligently negotiating with CCD to preserve DRIR’s ability to conduct rail service while at the same time allowing the Project to move forward. As a common carrier, DRIR has an obligation to ensure that any modifications to its operations arising from the Project do not adversely affect service to its shippers by reducing staging, storage, transit times, transloading capabilities, or hindering DRIR’s interchange with its Class I partners.

During the past four years of discussions and negotiations, significant progress was made. There was agreement on many elements of the rail aspects of the Project. Negotiations continued until late November. About that time, DRIR expressed concern that a handful of critical issues still needed to be resolved, especially given that CCD’s rail design plans were not fully complete. In fact, CCD admitted that only about 60% of the rail design plan was completed. In December and quite surprisingly to DRIR, CCD abruptly terminated its

with how it does today will be lost forever and such a loss will significantly adversely impact DRIR’s service to its shippers. Even more concerning, the Project will also preclude DRIR from expanding service to its shippers in the future.

discussions with DRIR and withdrew all previous commitments to provide DRIR with a plan and financial resources so as to ensure that rail service could continue in the future without impacting DRIR's service to its customers.

The purpose of this initial statement is to explain how the operations are currently conducted over the Stockyard Lines and to explain how the Project, without an agreement with DRIR and without adequate replacement tracks and railroad maintenance and office facilities² will cause adverse impacts to DRIR's ability to provide the levels of service that it does today. CCD actions thus far, including the fact that it intends to undertake the Project without any consent from DRIR, demonstrates to the Board that the Petition's statements that the Project will not adversely impact service to DRIR's service to its shippers are simply false and misleading.

BIOGRAPHY

I have included a brief background of myself to show that I am fully qualified to deliver this verified statement. I started my railroad career with DRIR in August of 2011. I started as a Mechanic/ Technician then was promoted to Maintenance Of Way "MOW" and Mechanical manager May of 2014 then was later promoted to General Manager in March of 2017. Prior to my railroad career, I was an automotive technician and shop manager for 14 years.

² DRIR's maintenance facility on the Stockyard Lines has supported DRIR's service to shippers on both the Stockyard Lines and connecting North Stockyard Operations Facilities, since 2006 when DRIR purchases the real estate and building for \$635,000 and improved the facilities and installed an inspection pit to support rail operations consistent with FRA requirements.

Because the Project would force DRIR's maintenance and office facilities to be relocated, after engaging in good faith negotiations with CCD, DRIR purchased some land and buildings that could potentially be improved to relocate some of the rail and maintenance facilities. DRIR spent \$3.8 million on this acquisition based on CCD's promise to reimburse DRIR \$3.5 million as part of settlement. CCD's termination of negotiations has already cost DRIR dearly and diverted resources that DRIR would have used to provide service to DRIR's shippers.

CURRENT OPERATIONS

Since 1993,³ DRIR or its predecessor, DTRC, has provided the Stockyard Lines shippers and other rail customers with common carrier service and other forms of rail transportation, what would be called Section 10906 operations, such as staging, storage, and switching on various sidetracks, spur tracks, and yard tracks. DRIR also facilitates interchange to both BNSF Railway Company (“BNSF”) and Union Pacific Railroad Company (“UP”). All of DRIR’s rail carrier functions are subject to the exclusive jurisdiction of the STB.

DRIR currently serves nine shippers using the Stockyard Lines.⁴ These shippers include National Western Properties, LLC, a subsidiary of McDonald Farms Enterprises, Inc. (“MFEI”), Truck Rail Handling, Inc. (“TRH”), Viper Railcar Storage (“Viper”), Evraz Recycling Denver (“Evraz”), CMC Banner Rebar (“CMC”), Waste Management (“WM”), Iron and Metals Inc. (“IM”), Colorado Petroleum (“CP”), and Darling Ingredients Inc. (“Darling”). DRIR used to serve three additional shippers (Crystal Packaging, Rocky Mountain Colby Pipe, and International Paper); however, CCD caused those shippers to relocate away from the Stockyard Lines by apparently threatening to condemn their property for a public purpose if they did not voluntarily agree to relocate to make way for the Project. Crystal Packaging, Rocky Mountain Colby Pipe, and International Paper relocated to sites that do not use DRIR services. Those actions precipitated by CCD have resulted in DRIR losing 300 annual carloads of revenue.⁵

³ Similar rail operations have been occurring on the Stockyard Lines for over a century.

⁴ To be clear, DRIR’s shippers are concerned about the implications of the Project. See Exhibit B (Shipper Letters) to the Initial Comments of The Denver Rock Island Railroad Company to the City and County of Denver’s Verified Petition for Declaratory Order filed on December 21, 2018.

⁵ In the most recent year in which those three shippers were located on the Stockyard Lines, those shippers’ collective rail traffic totaled 300 cars. As a result of CCD’s actions to date, DRIR has permanently lost revenues, which DRIR has long used to maintain its network.

CCD misleads the Board as to the real impacts of the Project. While MFEI is the primary shipper that DRIR directly serves in the Stockyard Lines, there are two other shippers/users that conduct operations along the Stockyard Lines, TRH and Viper. Moreover, what CCD does not disclose to the Board is that the tracks and railroad maintenance and office facilities located on the Stockyard Lines are also used to provide both common carrier service and ancillary rail service to five other shippers located in the connecting North Stockyard Operations Facilities (“NSO Facilities”). As such, the removal and relocation of the Stockyard Lines will significantly adversely impact DRIR’s service to these shippers – a fact CCD wants the Board to ignore. Indeed, even if MFEI agrees to relocate, MFEI understands fully that without adequate replacement tracks somewhere else on DRIR’s system (presumably in the NSO Facilities) even MFEI service from its new location will be adversely impacted. This is why MFEI has provided a letter expressing concern over the Project notwithstanding their agreement with CCD.

The following bullets are offered to explain how DRIR currently uses the Stockyard Lines to serve its shippers and to explain how the Project as proposed would adversely impact the service that it provides to these shippers:

- MFEI has its own yard in which it does transloading. It owns various tracks (461, 462, 463 and 464), which connect to the Stockyard Lines. MFEI often has an excess of cars which it requires the DRIR to store until needed. DRIR generally stores those cars on DRIR-owned tracks 408 and 410, which are located on the Stockyard Lines. DRIR assists MFEI with interchanging cars to both BNSF and UP. As stated in the Petition, CCD and MFEI are in negotiations to relocate the rail-served facilities it owns on the Stockyard Lines to an area in the NSO Facilities. While an agreement between CCD and MFEI would provide MFEI replacement facilities for the four tracks it owns, DRIR understands that MFEI remains concerned about the Project because MFEI will continue to need the same storage, staging and side track services that DRIR currently provides.⁶ MFEI also wants to ensure the Project does not preclude it from continuing to interchange with both BNSF and UP. Absent CCD reaching an agreement with DRIR concerning appropriate replacement facilities, there is no

⁶ A letter from MFEI expressing concerns over the Project is included in Exhibit B.

guarantee that MFEI rail's service will continue consistent with how it is provided today, or in a manner that does not adversely affect their rail transportation.

- TRH is a transloading company which does transloading on DRIR-owned track 450, located on the Stockyard Lines. TRH also uses DRIR-owned track 410 for car storage. DRIR assists TRH with interchanging cars to both BNSF and UP. TRH does not own its own facilities on the Stockyard Lines; thus, it is entirely dependent on DRIR for the storage, staging and side track services that DRIR currently provides over the Stockyard Lines.⁷ Absent CCD reaching an agreement with DRIR concerning appropriate replacement facilities, TRH stands to lose critical facilities, which are necessary for TRH to stay in business.
- Viper is a storage company that manages short and long-term rail car storage for oil refineries. DRIR assists Viper with rail car storage on tracks 408 and 441, which are located on the Stockyard Lines and in the NSO Facilities on tracks 305 or 301. DRIR assists Viper with interchanging cars predominantly with BNSF, but also to UP. Viper's operations depend on DRIR's continued ability to provide storage, staging and side track services and facilitate interchange with both BNSF and UP. Attached as part of Exhibit B is a letter from Viper stating that CCD did not bother to consult it concerning the Project and expressing concern that the Project will unreasonably interfere with its operations, absent CCD reaching an agreement with DRIR concerning appropriate replacement facilities.
- Evraz handles car from trackage they own off a DRIR spur that goes into their property. Evraz generally moves around 100-120 cars per month and efficient staging is critical to their business. DRIR assists Evraz with interchanging cars to BNSF predominantly, so all of their traffic goes through the Stockyard Lines and staging cars takes place on both the NSO Facilities (tracks 305 and 301) and the Stockyard Lines (tracks 406, 408 and 410). Evraz can have as many as 70-80 cars in the yard at one time. In 2018, Evraz moved 1108 cars to BNSF and 32 cars to UP. As explained in Evraz's letter, which is included as part of Exhibit B, in 2018, 97% of Evraz's long-distance traffic was interchanged to BNSF over the main line and side tracks in the Southern Denver Stockyard (406, 408, and 410) that CCD wants to relocate/reconfigure. DRIR understands that Evraz wants to ensure that the Project does not unreasonably interfere with DRIR's ability to stage, store, and facilitate the interchange of a significant number of cars and that CCD reaches an agreement with DRIR concerning appropriate replacement facilities.
- CMC unloads rail cars from trackage they own off a DRIR spur that goes into their property. CMC uses both BNSF and UP interchange routes. CMC can have as many as 30-40 cars in the yard at one time and places cars for staging on both the NSO Facilities and the Stockyard Lines (on tracks 301, 305, 406, 408 and 410). In 2018, CMC moved 353 cars to BNSF and 18 cars to UP.
- WM loads cars from trackage that they own off a DRIR spur that goes into their property. WM uses both BNSF and UP interchange routes. WM sometimes exceeds their spot capacity. The excess cars are generally staged on the NSO Facilities (on track 305);

⁷ A letter from TRH expressing concerns over the Project is included in Exhibit B.

however, the sometimes use storage on the Stockyard Lines. In 2018, WM moved 153 cars to UP and 73 cars to BNSF over the Stockyard Lines.

- IM loads cars from trackage they own off a DRIR spur that goes into their property. IM uses both BNSF and UP interchange routes. IM generally stores excess cars on the NSO Facilities (on track 305). In 2018, IM moved 381 cars to BNSF over the Stockyard Lines and 212 cars to UP. In its letter to the Board, IM expresses concern that CCD has not been honest about the impacts on the Project on its operations. See Exhibit B. DRIR understands that IM wants to ensure that the Project does not hinder DRIR's ability to provide transportation services or preclude IM from continuing to interchange with both BNSF and UP.
- CP unloads cars from trackage they own off a DRIR spur that goes into their property. Excess cars are placed on the NSO Facilities (on track 301 or 305). In 2018, CP moved 56 cars to UP and 57 cars to BNSF over the Stockyard Lines. DRIR understands that absent CCD reaching an agreement with DRIR, CP is concerned that rail service will not continue to be provided in a manner that is consistent with current operations or alternatively in a manner that does not affect service to shippers.
- Darling unloads cars from trackage they own off a DRIR spur that goes into their property. Darling uses both BNSF and UP interchange routes. In 2018, Darling moved 12 cars to UP and 69 cars to BNSF over the Stockyard Lines.

ABSENT APPROPRIATE AGREEMENTS, THE PROJECT WILL ADVERSELY IMPACT DRIR'S RAIL TRANSPORTATION TO THESE ITS SHIPPERS

From the onset, DRIR has expressed concern over the Project's impacts on its service to its shippers -- both during construction and afterward. Indeed, to ensure that the Project did not interfere with DRIR's common carrier obligation and provision of other ancillary rail service to its customers, DRIR, very earlier on in negotiations, provided CCD the minimum requirements that DRIR would need to continue to be able to provide service consistent with the manner that it does today should the Project move forward.

Over the four years of negotiations, CCD seemed to understand that DRIR's consent to the Project was needed and service to shippers had to be preserved. Indeed, as recently as the spring and summer of 2018, there was substantial progress toward ensuring that the removal and reconfiguration of the Stockyard Lines would not impact DRIR and its customers. CCD even proposed providing DRIR with the financial wherewithal to locate and build replacement tracks

and facilities so as to allow it to continue to serve its customers. All of that came to an end in December of 2018 when CCD filed its Petition.

CCD claims the Project as currently proposed would not adversely impact shippers. This is simply untrue, especially because there is no agreement with DRIR or its customers. Indeed, six of the nine shippers served by DRIR have written letters confirming that the Project as currently proposed and without further agreement will substantially interfere with their current rail operations. In fact, as proposed by CCD in the Petition, the Project as currently proposed would eliminate approximately 50% of the facilities that DRIR uses to provide service to its shippers without providing equivalent replacement facilities. CCD's proposed condemnation and relocation/reconfiguration of the Stockyard Lines will result in a loss of approximately 9,000 feet of track that DRIR uses for both its Section 10901 and Section 10906 rail operations, and related railroad maintenance and office facilities. This is approximately 45% of all usable track that comprises the Stockyard Lines.

The Project as proposed will not leave DRIR with adequate track or rail facilities for the staging and storage of rail cars as necessary to serve its customers with the same level and type of service that DRIR provides today. Without any agreement providing for replacement tracks, yards, and railroad maintenance and office facilities DRIR's operations will be effectively precluded. None of the nine shippers will receive the type of service they do today and DRIR could become disconnected from UP and BNSF. Such effects would result in financial ruin for both DRIR's customers and DRIR.

Another problem is that the Project does not account for the fact that DRIR would also need a grade variance to ensure continued connectivity with BNSF. While BNSF and DRIR have reached an agreement in principle, nothing has been finalized because CCD and DRIR have

not reached a final agreement on the design and location of DRIR's replacement and relocated tracks, which are necessary predicates for determining how and where BNSF and DRIR would continue to connect. By CCD's own admission, as of December 2018, its relocation rail design plans were only 60% complete. Yet, CCD wants DRIR to sign off on the Project, despite not knowing whether connectivity with BNSF (or UP for that matter) can be preserved or whether replacement tracks will be built and available so DRIR can continue to conduct its operations to its shippers consistent with the type and level of service provided today.

CCD and DRIR have also yet to reach an agreement governing the timing of the various construction elements of the Project so that the removal and relocation of the Stockyard Lines will not occur until sufficient replacement tracks have been built. Indeed, CCD has even gone so far as to withdraw its offer to provide DRIR with the financial resources necessary to acquire property and build replacement tracks. Without such a construction agreement and the financial resources necessary to find replacement tracks, DRIR's shippers will be adversely impacted by the Project.⁸

Likewise, there is no agreement governing the construction and maintenance of new traffic and rail signals that would necessary for DRIR to provide rail transportation over the new roads and crossings proposed by the Project. Yet Again, CCD wants DRIR to sign off on the relocation/reconfiguration without resolving this critical and costly issue.

⁸ The City's "assurance" that DRIR will be able to operate on at least one of its corridors at all times, Petition at 6, is no assurance at all. Such an assurance does nothing to resolve the problems caused by the removal of the Stockyard Lines used for DRIR's ancillary rail services. Without an assurance that replacement tracks and railroad facilities can be built and in place before CCD removes any of the Stockyard Lines, there will be adverse impacts on DRIR's shippers. Such impacts need to be mitigated through a construction agreement and the construction of replacement tracks.

The Project fails to recognize that almost all the tracks DRIR has along the Stockyard Lines have multiple functions. To be clear, only customer leased tracks are dedicated to transloading. All of the other main line and side tracks located with the Stockyards are used by DRIR for either common carrier rail service or the interchange, staging for loading and unloading, storage of its customer's railcars, or for blocking for interchange to UP or BNSF. CCD's most recent proposal seeks to remove, relocate and reconfigure approximately 21,000 feet of common carrier and ancillary (Section 10901 and 10906) track (collectively, the tracks located within the Stockyards will be referred to as the "Stockyard Lines") and railroad maintenance and office facilities and even if CCD was to replace some of those tracks the Project as currently proposed will eliminate 9,000 feet of existing track and facilities entirely.

Just one example of the type of adverse impacts that will occur absent an agreement involves cars to be interchanged to/from BNSF. DRIR currently sets out cars for interchange over the Stockyard Lines on tracks 402, 404, 405, and 420. BNSF usually pulls our outbound cars 1-2 times a week which usually equates to 50-60 cars per outbound. When BNSF brings cars for inbound interchange which usually happens 1-4 times per week it uses tracks 406, 407, 409 and 410 depending on availability and car numbers. All of these tracks are in the Stockyards and will be removed by the Project. Yet, without such tracks DRIR cannot provide the same level of service and interchange to its shippers that it provides today. DRIR simply does not have enough tracks elsewhere on its system to mitigate the adverse impacts that would occur from the removal, relocation and reconfiguration of the Stockyard Lines and the related railroad maintenance and office facilities. CCD had originally agreed to resolve these concerns, but now wants the Board to ignore them. If DRIR is forced to go with the Project as proposed by the CCD without CCD coming to terms with DRIR, DRIR's common carrier and ancillary rail

services will be significantly and unreasonably impacted with corresponding adverse impacts on its customers.

Additionally, CCD totally disregards the fact that the NSO Facilities as they exist today cannot handle the increase in car numbers that would be caused by the removal of the Stockyard Lines. It is simply not possible to accommodate shifting service that currently occurs over the Stockyard Lines to the NSO Facilities without adversely impacting DRIR's existing service to its customers. The only thing that DRIR can do to replace the lost track footage that will result from the Project is to add additional tracks to the north. DRIR would have to purchase property, relocate utilities, relocate retention ponds and possibly make an out fall for storm water on those properties and construct new track. All of which would need to be done before any cutover from the existing Stockyard Lines track. CCD has withdrawn all offers to compensate DRIR for such actions or to reach an agreement with DRIR so that its service can be maintained in a post-Project environment.⁹

To be clear, for the Project not to unreasonably interfere with or adversely impact DRIR's current provision of service to its customers, CCD must reach an agreement with DRIR on construction scheduling, replacement facility requirements, various relocation issues (both with respect to DRIR's new facilities and relocation of shipper facilities served by DRIR), compatibility with BNSF's facilities (profile grade variance to ensure connectivity to BNSF), salvage of existing facilities, construction of traffic and rail signals, and timing of CCD's payment to DRIR. Without such agreements and corresponding financial resources to carry out

⁹ Even more perplexing, CCD wants the entire relocation/reconfiguration to be completed by May 2020. DRIR is incredibly concerned that CCD's delays could result in the price of the real estate that DRIR would need to acquire increasing beyond what DRIR, a small shortline carrier, could afford to pay. DRIR cannot enter into the transactions necessary to accommodate relocation/reconfiguration of its operations without a commitment from the city in writing and without financial support.

those agreements, DRIR's service to its customers will be adversely impacted. DRIR will not be able to conduct its STB authorized common carrier service and its ancillary rail services consistent with and at the same level and type of service that it provides today. Such an adverse impact will cause financial harm to DRIR and its shippers – some of whom may have to switch to trucks or to relocate altogether. If CCD wants its Project to move forward, it should be required to abide by its previous commitments and reach agreement with DRIR as necessary to mitigate the adverse impacts on DRIR's shippers.

SUMMARY

Absent adequate agreements with DRIR, the Project as proposed will substantially interfere with DRIR's existing rail transportation services and will adversely impact DRIR's existing and future service to its shippers. The relocation/ reconfiguration will make it nearly impossible for DRIR to provide the same type and level of service that it provides today and that the shippers demand. The Project will significantly change the alignment, track capacity, and current operating structure of the Stockyard Lines and remove tracks that are vital to DRIR's STB jurisdictional service. Moreover, if DRIR cannot continue to provide adequate staging, storage, and interchange, it will not only have adverse financial impacts on DRIR, but it will likely also cause customers, like Evraz and CMC that rely on the rail transportation services that DRIR provides, to go out of business or relocate at significant expense. The Board should not allow this to happen, certainly not without adequate protections for DRIR and its customers.

Verification

I, Jason Travers, General Manager of The Denver Rock Island Railroad Company verify under penalty of perjury under the laws of the United States that the foregoing is true and correct to the best of my knowledge. Further, I certify that I am qualified and authorized to file this Verified Statement in connection with The Denver Rock Island Railroad Company's Reply Comments to the City and County of Denver Petition for Declaratory Order filed on December 21, 2018 with the Surface Transportation Board.

Executed on February 4, 2019



Jason Travers

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 36263

**CITY AND COUNTY OF DENVER –
VERIFIED PETITION FOR DECLARATORY ORDER**

**INITIAL COMMENTS OF THE DENVER ROCK ISLAND RAILROAD COMPANY TO
THE CITY AND COUNTY OF DENVER'S VERIFIED PETITION FOR
DECLARATORY ORDER FILED ON DECEMBER 21, 2018**

Exhibit B

LETTERS FROM DRIR'S SHIPPERS

January 25, 2019

Ms. Cynthia T. Brown
Chief, Section of Administration
Surface Transportation Board
Office of Proceedings
395 E Street, S.W.
Washington, DC 20423-0001

**Re: City and County of Denver – Verified Petition for Declaratory Order,
FD 36263**

Dear Ms. Brown:

Colorado Petroleum (“CP”) is writing this letter in opposition to certain statements made by The City and County of Denver (the “City”) in its December 21, 2018 Petition for Declaratory Order (“Petition”). In the Petition, the City explains that it plans to relocate rail tracks currently operated by Denver Rock Island Railroad (“DRIR”) and to significantly change DRIR’s operations in the Denver Stockyard tracks. The City claims that the relocation would not impact DRIR’s service to shippers. This is untrue. Unless a voluntary agreement is reached, and there is no such agreement at this time, CP, a rail shipper stands to be adversely affected by the proposed relocation/reconfiguration of the DRIR tracks and operations. For these reasons, CP respectfully requests that the Board deny the City’s request, exercise jurisdiction over the proposed transactions, and implement a proceeding to carefully consider the impacts of the relocation/reconfiguration proposed by the City.

CP’s new state of the art facility is now the company’s worldwide headquarters. The facility includes 235,000 square feet of warehouse space, 30,000-gallon blending tanks, six packaging lines, QC laboratory, tank farm that holds in excess of 1,000,000 gallons as well a concrete based tank truck and rail car receiving and shipping depot. As you can imagine, CP has invested heavily in its operations, which has tripled in size since 1960.¹ Because rail operations are important to CP’s success, CP has invested in and built trackage in the Denver Stockyards that directly connects to the DRIR. CP long ago established its operations in Denver, Colorado because it afforded CP direct access to BNSF, UP, and DRIR. In addition to interchanging traffic with BNSF, UP, and DRIR, DRIR assists with car storage in nearby yards located on the main line. CP is dependent on all of its rail partners for interchange purposes, staging, and storage all of which ensure the efficiency of our operations. The plan currently proposed by the City would adversely impact our service, our operations, and our relationships with our railroad partners.

CP was consulted about how the expansion of the National Western Center would impact our operations. Regardless, as of the date of this letter **no agreement has been reached for either CP to relocate its operations, or to preserve CP’s rail access to the three carriers** that currently serve CP. As such, abandonment and relocation of the track will harm shippers, including CP, absent adequate protections. It is imperative that the Board not allow the City to move forward with its plans, without fully considering the needs of the rail shippers that depend on the main lines and

¹ CP was originally founded in 1927, and has been under current ownership since 1971.

side tracks that comprise the Denver Stockyards. CP and other shippers' economic vitality depend on maintaining the status quo of rail operations.

While the City wants the Board to view its relocation/reconfiguration as a routine transaction, the truth is there is nothing routine about its plans to substantially reconfigure rail operations in the Denver Stockyards. Rail shippers and other users of the DRIR's stockyard tracks have legitimate reasons to be concerned. The City has not obtained the consent of DRIR, the only rail carrier providing local service, over the main lines and side tracks to the relocation/reconfiguration. It should be required to do so in order to ensure us, and others, that our rail service would not be impacted by the relocation/reconfiguration.

It is in the interest of all stakeholders that the Board carefully scrutinizes this complicated transaction. Indeed, this is not the first time that the City or its predecessors have attempted to terminate rail operations over the stockyard operations. In 1996, the Board found in an adverse abandonment proceeding that the entity seeking to terminate rail service over the stockyard rail operations had failed to establish that the future public convenience and necessity require or permit the abandonment of rail service. Nothing has really changed since those findings many years ago. While some shippers have relocated, BNSF, UP, and DRIR all continue to operate in the yards. CP suspects the City may be trying to avoid having to file another adverse abandonment in this proceeding because it is afraid the result would be the same.

The City must obtain the consent of BNSF, UP, DRIR, and CP or else CP's rail service will be adversely impacted. Without such agreements, it is difficult for CP to entrust a public entity that does not operate freight rail service with ensuring the continued provision of rail service during and post-relocation/reconfiguration. Without the consent of all parties, which the City does not have, the current plan does not make sense and provides little, if any, assurance to CP that its rail service will be adequately protected. Put simply, it would be a mistake to allow the City's relocation/reconfiguration project to move forward at this time, without requiring the City to reach an agreement with DRIR, the only railroad providing local service.

Without the consent of CP and DRIR, CP stands to be adversely affected by the proposed relocation/reconfiguration. It is inaccurate that the City's current plan as set forth in its Petition would not adversely impact CP or other rail users in the Denver Stockyards. For the reasons explained herein, CP respectfully requests that the Board reject the City's Petition, exercise jurisdiction over the proposed transaction, and implement a proceeding to carefully consider the impacts of the relocation/reconfiguration proposed by the City in FD 36263.

Respectfully submitted,

Colorado Petroleum Prod. Co.



Clark Thompson
President

cc: Parties of Record



January 23, 2019

Ms. Cynthia T. Brown
Chief, Section of Administration
Surface Transportation Board
Office of Proceedings
395 E Street, S.W.
Washington, DC 20423-0001

Re: City and County of Denver – Verified Petition for Declaratory Order, FD 36263

Dear Ms. Brown:

Evrax Recycling Denver ("Evrax") is writing this letter in opposition to certain statements made by The City and County of Denver (the "City") in its December 21, 2018 Petition for Declaratory Order ("Petition"). In the Petition, the City explains that it plans to relocate rail tracks currently operated by Denver Rock Island Railroad ("DRIR") and to significantly change DRIR's operations in the Denver Stockyard tracks. The City claims that the relocation would not impact DRIR's service to shippers. This is untrue. Unless a voluntary agreement is reached, and there is no such agreement at this time, Evraz, a rail-dependent shipper stands to be adversely affected by the proposed relocation/reconfiguration of the DRIR tracks and operations. As explained herein, Evraz respectfully requests that the Board deny the City's request, exercise jurisdiction over the proposed transactions, and implement a proceeding to carefully consider the impacts of the relocation/reconfiguration proposed by the City.

While Evraz is the largest metal scrap recycler in western Canada, it also operates three facilities in the United States - one in North Dakota and two in Colorado. Evraz buys, processes and sells a wide range of ferrous and non-ferrous materials, and offers a variety of metal recycling and other services including auto wrecking yards that provide a great selection of low-cost parts on a self-serve basis. Evraz's Denver Stockyard facility supports customers throughout the region. Because staging is critical for our operations, we built trackage in the Denver Stockyards that directly connects to the DRIR. In 2018, 97% of long-distance traffic was interchanged to BNSF Railway ("BNSF") over the main line and side tracks in the Southern Denver Stockyard (406, 408, and 410) that the City wants to relocate/reconfigure. We also use Tracks 301 and 305 in the Northern Denver Stockyard when interchanging with Union Pacific Railroad Company ("UP"). We intentionally established our operations in Denver, Colorado because it afforded us direct access to BNSF, UP, and DRIR. We have continued to invest heavily in our Denver operations. In addition to interchanging traffic with BNSF, UP, and DRIR, DRIR assists with car storage in nearby yards located on the main line. We are dependent on all of our rail partners for interchange purposes, staging, and storage all of which ensure the efficiency of our operations. The plan currently proposed by the City would adversely impact our service, our operations, and our relationships with our railroad partners.

Evrax was/ was not consulted about how the expansion of the National Western Center would impact our operations. Moreover, as of the date of this letter no agreement has been reached for either Evraz to relocate its operations, or to preserve Evraz's rail access to the three carriers that currently serve Evraz. As such, abandonment and relocation of the track will harm shippers, such as Evraz, absent adequate protections. It is imperative that the Board not allow the City to move forward with its plans, without fully considering the needs of the rail-dependent shippers that depend on the main lines and side tracks that comprise the Denver Stockyards. Evraz and other shippers' economic vitality depends on maintaining the status quo of rail operations.

While the City wants the Board to view its relocation/reconfiguration as a routine transaction, the truth is there is nothing routine about its plans to substantially reconfigure rail operations in the Denver Stockyards. Rail dependent shippers and other users of the DRIR's stockyard tracks have legitimate reasons to be concerned. The City has not obtained the consent of DRIR, the only rail carrier providing local service, over the main lines and side

tracks to the relocation/reconfiguration. It should be required to do so in order to ensure us, and others, that our rail service would not be impacted by the relocation/reconfiguration.

It is in the interest of all stakeholders that the Board carefully scrutinize this complicated transaction. Indeed, this is not the first time that the City or its predecessors have attempted to terminate rail operations over the stockyard operations. In 1996, the Board found in an adverse abandonment proceeding that the entity seeking to terminate rail service over the stockyard rail operations had failed to establish that the future public convenience and necessity require or permit the abandonment of rail service. Nothing has really changed since those findings many years ago. While some shippers have relocated, BNSF, UP, and DRIR all continue to operate in the yards. Evraz suspects the City may be trying to avoid having to file another adverse abandonment in this proceeding because it is afraid the result would be the same.

The City must obtain the consent of BNSF, UP, DRIR, and Evraz or else Evraz's rail service will be adversely impacted. Without such agreements, it is difficult for Evraz to entrust a public entity that does not operate freight rail service with ensuring the continued provision of rail service during and post-relocation/reconfiguration. Without the consent of all parties, which the City does not have, the current plan does not make sense and provides little, if any, assurance to Evraz that its rail service will be adequately protected. Put simply, it would be a mistake to allow the City's relocation/reconfiguration project to move forward at this time, without requiring the City to reach an agreement with DRIR, the only railroad providing local service.

Without the consent of Evraz and DRIR, Evraz stands to be adversely affected by the proposed relocation/reconfiguration. It is inaccurate that the City's current plan as set forth in its Petition would not adversely impact Evraz or other rail users in the Denver Stockyards. For the reasons explained herein, Evraz respectfully requests that the Board reject the City's Petition, exercise jurisdiction over the proposed transaction, and implement a proceeding to carefully consider the impacts of the relocation/reconfiguration proposed by the City in FD 36263.

Respectfully submitted,


A handwritten signature in dark ink, appearing to be 'C. J. W.', is written over a horizontal line.

Evraz Recycling Denver

cc: Parties of Record

January 22, 2019

Ms. Cynthia T. Brown
Chief, Section of Administration
Surface Transportation Board
Office of Proceedings
395 E Street, S.W.
Washington, DC 20423-0001

**Re: City and County of Denver – Verified Petition for Declaratory Order,
FD 36263**

Dear Ms. Brown:

Iron and Metals, Inc. (“IMI”) is writing this letter in opposition to certain statements made by The City and County of Denver (the “City”) in its December 21, 2018 Petition for Declaratory Order (“Petition”). In the Petition, the City explains that it plans to relocate rail tracks currently operated by Denver Rock Island Railroad (“DRIR”) and to significantly change DRIR’s operations in the Denver Stockyard tracks. The City claims that the relocation would not impact DRIR’s service to shippers. This is untrue. Unless a voluntary agreement is reached, and there is no such agreement at this time, IMI, a rail shipper, stands to be adversely affected by the proposed relocation/reconfiguration of the DRIR tracks and operations. For these reasons, IMI respectfully requests that the Board deny the City’s request, exercise jurisdiction over the proposed transactions, and implement a proceeding to carefully consider the impacts of the relocation/reconfiguration proposed by the City.

IMI is a family owned business located north of the Denver Stockyard tracks. IMI has been located at its current location for almost 45 years. IMI needs daily track service to efficiently operate its scrap metal facility. Without this service, IMI will suffer significant and irreparable economic damage that will threaten its economic viability. Rail operations as opposed to more expensive trucking services are critical to IMI’s successful operations. In 1975, IMI invested in and built trackage in the Denver Stockyards that directly connects to the DRIR. IMI established its operations in Denver, Colorado because it afforded IMI direct access to BNSF, UP, and DRIR. In addition to interchanging traffic with BNSF, UP, and DRIR, DRIR assists with car storage in nearby yards located on the main line. IMI is dependent on all of its rail partners for interchange purposes, staging and storage, all of which ensure the efficiency of its operations. The plan currently proposed by the City would adversely impact our service, our operations, and our relationships with our railroad partners.

IMI was not consulted accurately about how the expansion of the National Western Center would impact our operations. Regardless, as of the date of this letter **no agreement has been reached for either IMI to relocate its operations, or to preserve IMI’s rail access to the three carriers** that currently serve IMI. As such, abandonment and relocation of the track will harm shippers, including IMI, absent adequate protections. It is imperative that the Board not allow the City to move forward with its plans without fully considering the needs of the rail shippers that depend on the main lines and side tracks that comprise the Denver Stockyards. IMI and other shippers’ economic vitality depend on maintaining the status quo of rail operations.

While the City wants the Board to view its relocation/reconfiguration as a routine transaction, the truth is there is nothing routine about its plans to substantially reconfigure rail operations in the Denver Stockyards. Rail shippers and other users of the DRIR's stockyard tracks have legitimate reasons to be concerned. The City has not obtained the consent of DRIR, the only rail carrier providing local service, over the main lines and side tracks to the relocation/reconfiguration. It should be required to do so in order to ensure us, and others, that our rail service would not be impacted by the relocation/reconfiguration.

It is in the interest of all stakeholders that the Board carefully scrutinizes this complicated transaction. Indeed, this is not the first time that the City or its predecessors have attempted to terminate rail operations over the stockyard operations. In 1996, the Board found in an adverse abandonment proceeding that the entity seeking to terminate rail service over the stockyard rail operations had failed to establish that the future public convenience and necessity require or permit the abandonment of rail service. Nothing has really changed since those findings many years ago. While some shippers have relocated, BNSF, UP, and DRIR all continue to operate in the yards. IMI suspects the City may be trying to avoid having to file another adverse abandonment in this proceeding because it is afraid the result would be the same.

The City must obtain the consent of BNSF, UP, DRIR and IMI, or else IMI's rail service will be adversely impacted. Without such agreements, it is difficult for IMI to entrust a public entity that does not operate freight rail service with ensuring the continued provision of rail service during and post-relocation/reconfiguration. Without the consent of all parties, which the City does not have, the current plan does not make sense and provides little, if any, assurance to IMI that its rail service will be adequately protected. Put simply, it would be a mistake to allow the City's relocation/reconfiguration project to move forward at this time, without requiring the City to reach an agreement with DRIR, the only railroad providing local service.

Without the consent of IMI and DRIR, IMI stands to be adversely affected by the proposed relocation/reconfiguration. It is inaccurate that the City's current plan as set forth in its Petition would not adversely impact IMI or other rail users in the Denver Stockyards. For the reasons explained herein, IMI respectfully requests that the Board reject the City's Petition, exercise jurisdiction over the proposed transaction, and implement a proceeding to carefully consider the impacts of the relocation/reconfiguration proposed by the City in FD 36263.

Respectfully submitted,



Iron and Metals Inc.

Michael Cohen, President

cc: Parties of Record



7440 East I-25 Frontage Rd. • Frederick, CO 80516
(303) 772-4577 • (303) 442-6829 • Fax (303) 442-5706

January 28, 2019

Ms. Cynthia T. Brown
Chief, Section of Administration
Surface Transportation Board
Office of Proceedings
395 E Street, S.W.
Washington, DC 20423-0001

**Re: City and County of Denver – Verified Petition for Declaratory Order,
FD 36263**

Dear Ms. Brown:

National Western Properties, LLC, a subsidiary of McDonald Farms Enterprises, Inc. ("MFEI") is writing this letter in opposition to certain statements made by The City and County of Denver (the "City") in its December 21, 2018 Petition for Declaratory Order ("Petition"). In its Petition, the City explains that it plans to relocate rail tracks currently operated by Denver Rock Island Railroad ("DRIR") and to significantly change DRIR's operations in the Denver Stockyard tracks. The City claims that the relocation would not impact DRIR's service to MFEI. This is untrue. Unless a voluntary agreement is reached, and there is no such agreement at this time, MFEI stands to be adversely affected by the proposed relocation/reconfiguration of the DRIR tracks and operations. For the reasons explained herein, MFEI therefore respectfully requests that the Board deny the City's request, exercise jurisdiction over the proposed transactions, and implement a proceeding to carefully consider the impacts of the relocation/reconfiguration proposed by the City.

For over 52 years, MFEI has offered clients an economical solution to a wide range of industrial needs, including the safe transportation, recycling, resource recovery and/or disposal of common waste commodities and industrial by-products. The central location of our Denver facility, which is located at 4647 National Western Drive, in Denver, CO, near the Denver Stockyards complex, allows for the immediate provision and direct deployment of trans-loading and weighing services, along with other specialized services quickly as a local provider in the Denver area. The transload rail operations housed at this facility are currently conducted by

BNSF Railway (“BNSF”), Union Pacific Railroad Company (“UP”), and DRIR. We have invested heavily in our Denver operations, including purchasing and establishing four rail yards (Tracks 461-464), which connect to the main line (on National Western Drive) to support MFEI’s operations. In addition to interchanging traffic with BNSF, UP, and DRIR, we look to DRIR to assist with car storage in nearby yards located on the same rail line. We are dependent on our rail partners for interchange purposes, staging, storage, and transloading, all of which ensure the efficiency of our operations. The plan currently proposed by the City would adversely impact our service, our operations, and our relationships with our railroad partners.

MFEI was first approached about the expansion of the National Western Center several years ago. While we have engaged in conversations with the City concerning its development plans, to be clear, as of the date of this letter no agreement has been reached to preserve MFEI’s rail access to the three carriers that currently serve MFEI. Abandonment and relocation of the track will harm shippers, including MFEI, absent adequate protections. As such, it is imperative that the Board not give the City a blank check to move forward with its plans, without fully considering the needs of the rail-dependent shippers that depend on the main lines and side tracks that comprise the Denver Stockyards. MFEI and other shippers’ economic vitality depends on maintaining the status quo of rail operations.

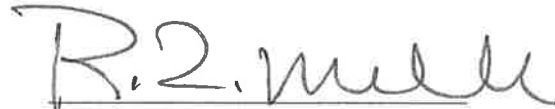
While the City wants the Board to view its relocation/reconfiguration as a routine transaction, the truth is there is nothing routine about its plans to substantially reconfigure rail operations in the Denver Stockyards. Rail dependent shippers and other users of the DRIR’s stockyard tracks have legitimate reasons to be concerned. The City has not obtained the consent of DRIR, the only rail carrier providing local service, over the main lines and side tracks to the relocation/reconfiguration. It should be required to do so in order to ensure us, and others, that our rail service would not be impacted by the relocation/reconfiguration.

It is the interest of all stakeholders that the Board carefully scrutinize this complicated transaction. Indeed, this is not the first time that the City or its predecessors have attempted to terminate rail operations over the stockyard operations. In 1996, the Board found in an adverse abandonment proceeding that the entity seeking to terminate rail service over the stockyard rail operations had failed to establish that the future public convenience and necessity require or permit the abandonment of rail service. Nothing has really changed since those findings years ago. While some shippers have relocated, BNSF, UP, and DRIR all continue to operate in the yards, MFEI suspects the City may be trying to avoid having to file another adverse abandonment in this proceeding because it is afraid the result would be the same.

The City must obtain the consent of BNSF, UP, DRIR, and MFEI or else MFEI’s rail service will be adversely impacted. Without such agreements, it is difficult for MFEI to entrust a public entity that does not operate freight rail service with ensuring the continued provision of rail service during and post-relocation/reconfiguration. Without the consent of all of the parties, which the City does not have, the current plan does not make sense and provides little, if any, assurance to MFEI that its rail service will be adequately protected. Put simply, it would be a mistake to allow the City’s relocation/reconfiguration project to move forward at this time, and especially not without requiring the City to reach an agreement with the main railroad providing local service, DRIR.

In summary, without the consent of MFEI or DRIR, MFEI stands to be adversely affected by the proposed relocation/reconfiguration. It is inaccurate that the City's current plan as set forth in its Petition would not adversely impact MFEI or other rail users in the Denver Stockyards. For the reasons explained herein, MFEI respectfully requests that the Board reject the City's Petition, exercise jurisdiction over the proposed transaction, and implement a proceeding to carefully consider the impacts of the relocation/reconfiguration proposed by the City in FD 36263.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "R.L. McDonald", written over a horizontal line.

R.L. McDonald, General Manager
National Western Properties, LLC, a subsidiary of
McDonald Farms Enterprises

cc: Parties of Record
Don Ostrander
Marjorie McDonald
Douglas McDonald

Truck-Rail Handling, inc.

CORPORATE OFFICE • 4505 I INDUSTRIAL DRIVE • FREMONT, CA 94538-6436 • (510) 657-4267 • CSR-(FAX) (510) 657-5083 • ADM-(FAX) (510) 354-3941

January 18, 2019

Ms. Cynthia T. Brown
Chief, Section of Administration
Surface Transportation Board
Office of Proceedings
395 E Street, S.W.
Washington, DC 20423-0001

Re: City and County of Denver – Verified Petition for Declaratory Order, FD 36263

Dear Ms. Brown:

Truck Rail Handling, Inc. ("TRH") is writing this letter in opposition to certain statements made by The City and County of Denver (the "City") in its December 21, 2018 Petition for Declaratory Order ("Petition"). In the Petition, the City explains that it plans to relocate rail tracks currently operated by Denver Rock Island Railroad ("DRIR") and to significantly change DRIR's operations in the Denver Stockyard tracks. The City claims that the relocation would not impact DRIR's service to shippers. This is untrue. Unless a voluntary agreement is reached, and there is no such agreement at this time, TRH, a rail dependent shipper stands to be adversely affected by the proposed relocation/reconfiguration of the DRIR tracks and operations. As explained herein, TRH respectfully requests that the Board deny the City's request, exercise jurisdiction over the proposed transactions, and implement a proceeding to carefully consider the impacts of the relocation/reconfiguration proposed by the City.

TRH provides service from and to plant sites of rail cars, silos, surge bins and most any type of container. We help our clients protect their bottom line by streamlining the transportation process by handling everything from food grade products to a variety of chemicals with perfection and precision. We provide break-bulk, warehousing, and bulk shipping of dry & liquid, hazardous and non-hazardous materials. We currently use DRIR's tracks 450 and 410, both of which the City seeks to eliminate, in support of our operations. Our transload rail operations are currently handled in conjunction with the BNSF Railway ("BNSF"), Union Pacific Railroad Company ("UP"), and DRIR. We have invested heavily in our Denver operations. In addition to interchanging traffic with BNSF, UP, and DRIR, we look to DRIR to assist with car storage in nearby yards located on the main line. TRH is dependent on our rail partners for interchange purposes, staging, storage, and transloading, all of which ensure the efficiency of our operations. The plan currently proposed by the City would adversely impact our service, our operations, our relationships with our railroad partners and ultimately our customers who require our services for their manufacturing processes.

TRH was not consulted about how the expansion of the National Western Center would impact our operations. However, as of the date of this letter no agreement has been reached for either TRH to relocate its operations, or to preserve TRH's rail access to the three carriers that currently serve TRH tracks. Abandonment and relocation of the track will harm shippers, including TRH, absent adequate protections. As such, it is imperative that the Board not allow the City to move forward with its plans, without fully considering the needs of the rail-dependent shippers that depend on the main lines and side tracks that comprise the Denver Stockyards. TRH and other shippers' economic vitality depends on maintaining the status quo of rail operations.

While the City wants the Board to view its relocation/reconfiguration as a routine transaction, the truth is there is nothing routine about its plans to substantially reconfigure rail operations in the Denver Stockyards. Rail dependent

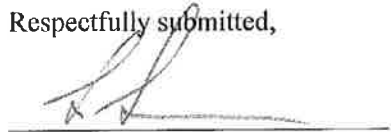
shippers and other users of the DRIR's stockyard tracks have legitimate reasons to be concerned. The City has not obtained the consent of DRIR, the only rail carrier providing local service, over the main lines and side tracks to the relocation/reconfiguration. It should be required to do so in order to ensure TRH, and others, that our rail service would not be impacted by the relocation/reconfiguration.

It is in the interest of all stakeholders that the Board carefully scrutinize this complicated transaction. Indeed, this is not the first time that the City or its predecessors have attempted to terminate rail operations over the stockyard operations. In 1996, the Board found in an adverse abandonment proceeding that the entity seeking to terminate rail service over the stockyard rail operations had failed to establish that the future public convenience and necessity require or permit the abandonment of rail service. Nothing has really changed since those findings years ago. While some shippers have relocated, BNSF, UP, and DRIR all continue to operate in the yards. TRH suspects the City may be trying to avoid having to file another adverse abandonment in this proceeding because it is afraid the result would be the same.

The City must obtain the consent of BNSF, UP, DRIR, and TRH or else TRH's rail service will be adversely impacted. Without such agreements, it is difficult for TRH to entrust a public entity that does not operate freight rail service with ensuring the continued provision of rail service during and post-relocation/reconfiguration. Without the consent of all parties, which the City does not have, the current plan does not make sense and provides little, if any, assurance to TRH that its rail service will be adequately protected. Put simply, it would be a mistake to allow the City's relocation/reconfiguration project to move forward at this time, without requiring the City to reach an agreement with DRIR, the only railroad providing local service.

In summary, without the consent of TRH and DRIR, TRH stands to be adversely affected by the proposed relocation/reconfiguration. It is inaccurate that the City's current plan as set forth in its Petition would not adversely impact TRH or other rail users in the Denver Stockyards. For the reasons explained herein, TRH respectfully requests that the Board reject the City's Petition, exercise jurisdiction over the proposed transaction, and implement a proceeding to carefully consider the impacts of the relocation/reconfiguration proposed by the City in FD 36263.

Respectfully submitted,



Lee Schorno - President

Truck Rail Handling, Inc.

cc: B. Hitner & B Meeker

January __, 2019

Ms. Cynthia T. Brown
Chief, Section of Administration
Surface Transportation Board
Office of Proceedings
395 E Street, S.W.
Washington, DC 20423-0001

**Re: City and County of Denver – Verified Petition for Declaratory Order,
FD 36263**

Dear Ms. Brown:

Viper Railcar Storage (“Viper”) is writing this letter in opposition to certain statements made by The City and County of Denver (the “City”) in its December 21, 2018 Petition for Declaratory Order (“Petition”). In the Petition, the City explains that it plans to relocate rail tracks currently operated by Denver Rock Island Railroad (“DRIR”) and to significantly change DRIR’s operations in the Denver Stockyard tracks. The City claims that the relocation would not impact DRIR’s service to shippers. This is untrue. Unless a voluntary agreement is reached, and there is no such agreement at this time, Viper, a rail dependent shipper stands to be adversely affected by the proposed relocation/reconfiguration of the DRIR tracks and operations. As explained herein, Viper respectfully requests that the Board deny the City’s request, exercise jurisdiction over the proposed transactions, and implement a proceeding to carefully consider the impacts of the relocation/reconfiguration proposed by the City.

Viper provides hazardous and non-hazardous railcar storage predominantly to the petrochemical and coal industry for any type of privately marked, empty, or loaded railcar. To maximize efficiency of operations for our clientele, we strategically locate our facilities in areas that offer interchange with multiple Class I railroads and short line rail carriers. Our Denver Stockyard facility support customers throughout the Southwest (Region 2). We currently use DRIR’s tracks 408 and 441, both of which are in the Denver Stockyard area that the City proposes to relocate/reconfigure, in support of our operations. Our rail operations are currently conducted by BNSF Railway (“BNSF”), Union Pacific Railroad Company (“UP”), and DRIR. We have invested heavily in our Denver operations. In addition to interchanging traffic with BNSF, UP, and DRIR, DRIR assists with car storage in nearby yards located on the main line. We are dependent on our rail partners for interchange purposes, staging, and storage all of which ensure the efficiency of our operations. The plan currently proposed by the City would adversely impact our service, our operations, and our relationships with our railroad partners.

Viper [REDACTED] was not consulted about how the expansion of the National Western Center would impact our operations. Most important, as of the date of this letter no agreement has been reached for either Viper to relocate its operations, or to preserve Viper’s rail access to the three carriers that currently serve Viper. Abandonment and relocation of the track will harm shippers, including Viper, absent adequate protections. As such, it is imperative that the Board not allow

the City to move forward with its plans, without fully considering the needs of the rail-dependent shippers that depend on the main lines and side tracks that comprise the Denver Stockyards. Viper and other shippers' economic vitality depends on maintaining the status quo of rail operations.

While the City wants the Board to view its relocation/reconfiguration as a routine transaction, the truth is there is nothing routine about its plans to substantially reconfigure rail operations in the Denver Stockyards. Rail dependent shippers and other users of the DRIR's stockyard tracks have legitimate reasons to be concerned. The City has not obtained the consent of DRIR, the only rail carrier providing local service, over the main lines and side tracks to the relocation/reconfiguration. It should be required to do so in order to ensure us, and others, that our rail service would not be impacted by the relocation/reconfiguration.

It is in the interest of all stakeholders that the Board carefully scrutinize this complicated transaction. Indeed, this is not the first time that the City or its predecessors have attempted to terminate rail operations over the stockyard operations. In 1996, the Board found in an adverse abandonment proceeding that the entity seeking to terminate rail service over the stockyard rail operations had failed to establish that the future public convenience and necessity require or permit the abandonment of rail service. Nothing has really changed since those findings many years ago. While some shippers have relocated, BNSF, UP, and DRIR all continue to operate in the yards. Viper suspects the City may be trying to avoid having to file another adverse abandonment in this proceeding because it is afraid the result would be the same.

The City must obtain the consent of BNSF, UP, DRIR, and Viper or else Viper's rail service will be adversely impacted. Without such agreements, it is difficult for Viper to entrust a public entity that does not operate freight rail service with ensuring the continued provision of rail service during and post-relocation/reconfiguration. Without the consent of all parties, which the City does not have, the current plan does not make sense and provides little, if any, assurance to Viper that its rail service will be adequately protected. Put simply, it would be a mistake to allow the City's relocation/reconfiguration project to move forward at this time, without requiring the City to reach an agreement with DRIR, the only railroad providing local service.

In summary, without the consent of Viper and DRIR, Viper stands to be adversely affected by the proposed relocation/reconfiguration. It is inaccurate that the City's current plan as set forth in its Petition would not adversely impact Viper or other rail users in the Denver Stockyards. For the reasons explained herein, Viper respectfully requests that the Board reject the City's Petition, exercise jurisdiction over the proposed transaction, and implement a proceeding to carefully consider the impacts of the relocation/reconfiguration proposed by the City in FD 36263.

Respectfully submitted,


Viper Railcar Storage

cc: Parties of Record

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 36263

**CITY AND COUNTY OF DENVER –
VERIFIED PETITION FOR DECLARATORY ORDER**

**INITIAL COMMENTS OF THE DENVER ROCK ISLAND RAILROAD COMPANY TO
THE CITY AND COUNTY OF DENVER'S VERIFIED PETITION FOR
DECLARATORY ORDER FILED ON DECEMBER 21, 2018**

Exhibit C

EASEMENT DEED

1-40
9700122742 1997/09/15 15:00:35 1/ 40 EAS
DENVER COUNTY CLERK AND RECORDER 201.00 .00 JCZ

EASEMENT DEED

THIS DEED, made effective as of the 10th day of July, 1997, by and between THE WESTERN STOCK SHOW ASSOCIATION, a Colorado nonprofit corporation ("Grantor") and DENVER ROCK ISLAND RAILROAD, a Colorado corporation ("Grantee"):

WITNESSETH, that Grantor, for and in consideration of the sum of Ten Dollars (\$10.00) the receipt whereof is hereby confessed and acknowledged, by these presents does grant, bargain, sell, convey and quitclaim unto Grantee, without warranting title or interest and subject to the terms and conditions hereinafter set forth, a non-exclusive EASEMENT, for so long as such easement is used for rail purposes, for a right of way for the operation, maintenance, repair, renewal and reconstruction of railroad trackage (the "Trackage") over and across the land situate in the City and County of Denver, State of Colorado, described in Appendix 1 hereto attached and hereby made a part hereof (the "Easement Property").

TO HAVE AND TO HOLD the above-mentioned easement unto Grantee, subject to the terms and conditions hereinafter set forth.

The above-mentioned easement is granted upon, and subject to, the following terms and conditions:

- 1. This easement deed is given pursuant to, and governed by the provisions of, an agreement entered into of even date herewith by Grantor and Grantee entitled**

"Agreement for Resolution of Disputed Issues" (the "Agreement"), the terms of which are incorporated herein by this reference represented by Appendix 2 hereto attached and made a part hereof (excluding the exhibits attached thereto).

2. The Trackage includes the rail and related items described in the bill of sale between Grantor and Grantee of even date herewith represented by Appendix 3 hereto which is incorporated herein by reference, including the respective rights and obligations of Grantor and Grantee.

3. So long as Burlington Northern Railroad Company uses that component of the Easement Property designated on Appendix 1 as the River Corridor (the "River Corridor") without paying rental to Grantor therefor, Grantee shall be entitled to the use of the River Corridor without the payment of rental for such usage. In the event Burlington Northern Railroad Company is required to pay rental for its right to use the River Corridor, Grantee shall pay Grantor an equivalent amount of rental on a track-mile basis. Grantee's failure to make any such rental payment shall provide Grantor the right, at its option, to terminate the above-mentioned easement upon 30 days' prior written notice to Grantee of such failure unless Grantee cures the same within such 30 day period.

4. Grantor may adjust the amount payable under Section 3 above on each anniversary date of this Deed. The adjusted amount shall be reasonable and in no event

shall it exceed the amount paid to Grantor by Burlington Northern Railroad Company for use of trackage in the River Corridor computed on a track-mile basis.

5. Grantor reserves the right of ownership, use and occupancy of the Easement Property insofar as said ownership, use and occupancy does not impair the rights granted to Grantee hereunder. Grantee's rights hereunder shall be nonexclusive and Grantor shall have full right and authority to grant other easements or rights to use the Easement Property as will not impair Grantee's rights under this Deed. Grantor reserves the right to cross over and through the easement granted hereunder for access to and from Grantor's National Western Complex for Grantor and its employees, agents, invitees, licensees, guests and the livestock, vehicles and equipment of any of the foregoing, as well as the general public, at any place and for any purpose so long as such crossing and use does not unreasonably interfere with Grantee's railroad operations, and during the month of January of each year, Grantee's use of such easement shall be specifically subject to the provisions of Subsection 6.1 below. Grantee acknowledges that any impairment by Grantee of such right to cross over and through the easement granted hereunder for access to and from Grantor's National Western Complex reserved by Grantor for itself and the others identified above cannot be adequately compensated by monetary damages and that injunctive relief may be appropriate.

6. So long as this Deed remains in effect, Grantee agrees as follows:

6.1 Grantee shall limit its activities on the easement in accordance with Appendix 4 attached hereto and will use its best efforts to coordinate such rail use with Grantor and the shipper served by the trackage on the easement granted hereunder in accordance with said Appendix 4.

6.2 Grantee, at its sole expense, shall maintain all road crossings of the Trackage to meet FRA standards and standards of the City and County of Denver, Colorado, and also shall maintain the crossings in condition so that they can accommodate safely all types of motor vehicle traffic.

6.3 Grantee shall, at all times, conduct its operations at crossings and at all points on the Trackage with reasonable care and shall observe all applicable federal, state and municipal laws, ordinances, rules and regulations in conducting its operations on the easement granted to it hereunder.

6.4 All taxes (real estate, personalty or of whatever nature), wastewater, storm, sanitary sewer, tap charges, or any charges made by any government authority against or on the easement granted hereunder shall be borne and promptly paid when due by Grantee.

6.5 Grantee shall not dump any waste or debris of whatsoever nature on the easement granted hereunder.

6.6 Grantor may, in connection with the use of its adjacent properties, create necessary or appropriate easements, rights of way and/or crossings on the easement granted hereunder to Grantee for underground or surface pipelines and use the easement for reasonable installation, maintenance, removal, replacement,

installation and rehabilitation of the same so long as such use by Grantor does not interfere unreasonably with the use thereof by Grantee for railroad purposes.

Accordingly, Grantor shall have the right to place, maintain, remove, replace, install, and rehabilitate old or new pipes or utilities on the easement, by going in, upon, over, under, across and through the easement and Trackage and other facilities thereon with Grantee's prior approval which shall not be unreasonably withheld, temporarily cutting the Trackage, and any other means necessary, and replacing same, all upon reasonable prior notice to Grantee; provided, any cutting of the Trackage shall be performed by Grantee at reasonable cost to Grantor, unless Grantee is unavailable, in which case such cutting of the Trackage may be performed by Grantor.

6.7 Grantee's use of the easement granted hereunder is subject to the rights of others, and Grantee in this respect, under all track agreements with third parties, shall hold Grantor harmless for any repairs, replacements or safety requirements for the tracks on the easement while this Deed is in effect, including but not limited to railroad entities.

6.8 Grantee shall, at all times while this Deed is in effect, keep on file with the Surface Transportation Board and the Colorado Public Utilities Commission (or any successor agencies), to the extent applicable, all tariffs and all other documents and papers which Grantee is required by law, rule or regulation to keep on file with the Surface Transportation Board and/or the Public Utilities Commission, or any successor agencies.

6.9 Except in case of emergency, when Grantee shall notify Grantor as soon as reasonably possible, Grantee shall notify Grantor in advance of any maintenance, repair or reconstruction work on the Trackage which could reasonably be expected to interfere with use by Grantor of any portion of the Easement Property. Relocation of any Trackage within the Easement Property identified as Parcel 2-A-1 of the River Corridor on Appendix 1 shall require the prior written consent of Grantor, which consent shall not be unreasonably withheld.

7. All rights of Grantee under this Deed shall terminate on the effective date of an order of the Surface Transportation Board or successor agency authorizing DRIR to discontinue service over the rail lines located on the easement granted hereunder. In the event the Surface Transportation Board or any such successor agency authorizes the discontinuance of service over some but not all of the rail lines located on the easement granted hereunder, the easement granted hereunder will terminate with respect to the portion of the property on which such service has been discontinued. In the event of termination of the easement in whole or part, Grantee shall have 30 days to remove all personal property and fixtures to which it has title from such property over which the easement has terminated.

8. Notices given under this Deed shall be in writing and may be given personally or sent to each respective party by express courier, facsimile, or United States certified mail

at the address for each party set forth below, or to such other address as such party may designate in writing to the other parties.

If to Grantor:

Address: 4655 Humboldt Street,
Denver, CO 80216

Attention: Patrick A. Grant, President

Facsimile: 303-292-1708

Telephone: 303-297-1166

If to Grantee:

Address: 3400 E. 56th Avenue
Commerce City, CO 80022

Attention: Tom Mars, President

Facsimile: 303-296-2347

Telephone: 303-296-0900

Any notice shall be deemed given on the date of delivery if given personally, on the date of the return receipt if given by mail, on the date evidenced by the courier service receipt if given by express courier, and on the date of transmission indicated by a machine generated confirmation if sent by facsimile.

9. This Deed shall not constitute or imply any partnership, joint venture or agency agreement among the parties for any purpose. Nothing in this Deed shall be deemed to constitute an agreement for the benefit of any third person or entity.

10. This Deed and the easement granted herein by Grantor may not be assigned or transferred by Grantee without the prior written approval of Grantor, provided, under no circumstances shall Grantor be required to approve any such assignment unless the assignee consents to be bound by the covenants of Grantee set forth in this Deed and the insurance and indemnity provisions of the Agreement, and such other reasonable conditions as Grantor may impose.

11. No failure to require performance or observation of any provision of this Deed shall constitute a waiver thereof unless waived in writing signed by the party benefitted by such provision. Any waiver of a provision on one occasion shall not constitute a continuing waiver or the waiver of any other provision.

12. Subject to the provisions of Section 1 above, this Deed constitutes the entire agreement and understanding among the parties with respect to the subject matter hereof and supersedes all prior discussions, representations, understandings and agreements, written or oral. No modifications of this Deed shall be valid unless made in writing and signed by the parties.

IN WITNESS WHEREOF, the parties hereto have caused this Deed to be executed by their duly authorized representatives as of the 10TH day of JULY, 1997.

THE WESTERN STOCK SHOW
ASSOCIATION

DENVER ROCK ISLAND RAILROAD

By: 
Patrick A. Grant
Title: President

By: Thomas F. McFarland Jr.
Thomas F. McFarland, Jr.
Title: Attorney-in-Fact

STATE OF Colorado)
) ss.
COUNTY OF Denver)

The foregoing instrument was acknowledged before me this 9th day of
July, 1997 by PATRICK A. GRANT as President of THE WESTERN STOCK
SHOW ASSOCIATION, a Colorado corporation.

Witness my hand and official seal.

My commission expires: 3-30-99



Carrie A. Grant
Notary Public

STATE OF ILLINOIS)
) ss.
COUNTY OF COOK)

The foregoing instrument was acknowledged before me this 11th day of
JULY, 1997 by THOMAS F. McFARLAND, Jr. as attorney-in-fact of DENVER
ROCK ISLAND RAILROAD, a COLORADO corporation.

Witness my hand and official seal.

My commission expires:



Stephen C. Herman
Notary Public

APPENDIX 1

[LEGAL DESCRIPTION]

All that portion of the following described real property located in the City and County of Denver, Colorado lying between the easternmost boundary of each Parcel and ten feet West of the centerline of the westernmost track on each Parcel.

Parcels identified as "2-A-1" and "2B" below shall constitute the "River Corridor."

Parcels identified as "2-C"; "10"; "2J" and "2D" below shall constitute the "National Western Drive Corridor."

PARCEL 2-A-1 Property Tax Assessment No. 2143-00-096.

A strip of ground lying within the SW 1/4 of Section 14, Township 3 South, Range 68 West of the 6th Principal Meridian, bounded as follows: West of the West line of Book 2042 at Page 631; Southerly boundary lines of Property described in Book 1961 at Page 496, Book 426 at Page 199 and Book 1582 at Page 539; Northerly and Westerly of Northerly and Westerly boundary lines of Property described in Book 2363 at Page 320, Book 1518 at Page 151, Book 2044 at Page 153, Book 1748 at Page 115 and addition to Parcel F as described in Book 1044 at Page 127 as said Property lines connect each other; and Easterly of Easterly boundary line of Property described in Book 748 at Page 49, more particularly described as follows: Commencing at the Center of said Section 14; thence S 00 degrees 16'21" W along the North-South centerline of said Section 14 a distance of 131.39 feet to its intersection with the Southeastery line of the Official Channel of the South Platte River; thence S 47 degrees 02'03" W along said Southeastery line a distance of 1603.04 feet; thence S 42 degrees 57'57" E a distance of 50.00 feet to the Southwesterly most corner of a Parcel of land described in Book 426 at Page 199 of the Records of the Clerk and Recorder of the City and County of Denver, said point also being on the Southerly line of a Parcel of Land described in Book 1582 at Page 539 and the Point of Beginning; thence S 42 degrees 57'57" E along the Southerly line of said Parcel described in Book 426 at Page 199 a distance of 22.07 feet to the Southeastery line of said Parcel; thence N 69 degrees 56' E along said Southerly line a distance of 605.91 feet to the Northeastery line of said Parcel; thence N 42 degrees 57'57" W along said Northeastery line a distance of 6.32 feet to the Southerly corner of a Parcel of Land described in Book 1961 at Page 496; thence N 69 degrees 57'08" E along the Southeastery line of said Parcel described in Book 1961 at page 496 a distance of 202.73 feet to a point of curve; thence along said curve to the left, the chord of which bears N 44 degrees 43'36" E a distance of 445.28 feet through a central angle of 50 degrees 27'04" having a radius of 522.4 feet and arc length of 459.86 feet to a point of non-tangency on the Westerly line of Book 2042 at Page 631; thence S 00 degrees 16'21" W being 50 feet West of and parallel to said North-South centerline of Section 14 and along said Westerly line of Book 2042 at Page 631 a distance of 101.86 feet to a point of non-tangent curve on the Northerly line of a parcel of land described in Book 2363 at Page 320; thence along said non-tangent curve to the right the chord of which bears S 46 degrees 48'57" W a distance of 401.69 feet through a central angle of 46 degrees 08'24" having a radius of 512.55 feet and arc length of 412.86 feet; thence continuing along said Northerly line S 69 degrees 50'49" W a distance of 749.83 feet to a point of curve; thence continuing along said Northerly line of said Parcel described in Book 2363 at Page 320 along said curve to the left the chord of which bears S 67 degrees 38'57" W a distance of 47.91 feet through a central angle of 04 degrees 23'43" having a radius of 624.51 feet and arc length of 47.91 feet to a point of non-tangency and the Southwesterly line of said Parcel described in Book 2363 at Page 320; thence S 55 degrees 03'52" E along said Southwesterly line a distance of 17.46 feet to the Westerly line of a Parcel of land described in Book 2044 at Page 153 and a point of non-tangent curve; thence along said Westerly line of said Parcel described in Book 2044 at Page 153 and along said non-tangent curve to the left the chord of which bears S 50 degrees 25'58" W a distance of 298.04 feet through a central angle of 29 degrees 49'51" having a radius of 577.79 feet and arc length of 300.82 feet to a point of non-tangency and the Northerly line of a Parcel described in Book 1748 at Page 115; thence N 55 degrees 10'27" W along said Northerly line a distance of 2.50 feet to the Westerly line of said Parcel described in Book 1748 at Page 115; thence S 34 degrees 38'18" W along said Westerly line a distance of 405.38 feet to a point of curve; thence along said curve to the left the chord of which bears S 22 degrees 01'05" W a distance of 234.20 feet a central angle of 25 degrees 14'26" having a radius of 535.96 feet and arc length of 236.11 feet to the Northwest corner of a Parcel of land described as addition to Parcel F in Book 1044 at Page 127; thence S 02 degrees 56'35" W along the Westerly line of said Parcel described in Book 1044 at Page 127 for this and the next 3 courses a distance of 251.22 feet; thence S 00 degrees 18'44" E a distance of 140.06 feet; thence S 04 degrees 14'32" E a distance of 82.79 feet; thence S 08 degrees 05'54" E a distance of 107.08 feet to the South line of Southwest 1/4 of said Section 14; thence S 89 degrees 58'16" W along said South line a distance of 61.68 feet to the Easterly line of a Parcel of land described in Book 748 at Page 49; thence N 04 degrees 22'22" E along said Easterly line of said Parcel described in Book 748 at Page 49 a distance of 347.62 feet; thence N 02 degrees 35'15" W continuing along said Easterly line a distance of 152.08 feet to the Northerly line of said Parcel; thence S 54 degrees 33'48" W along said Northerly line a distance of 22.62 feet to the Easterly line of a Parcel of land described in Book 1582 at Page 539 and a point of non-tangent curve; thence Northeastery along said Easterly line and along said non-tangent curve to the right the chord of which bears N 23 degrees 59'25" E a distance of 720.34 feet through a central angle of 46 degrees 53'00" having a radius of 905.37 feet and arc length of 740.84 feet; thence N 47 degrees 00'51" E continuing along said Easterly line a distance of 426.20 feet to the Point of Beginning.

all in the City and County of Denver,
State of Colorado.

A strip of ground lying within the NW 1/4 NW 1/4 of Section 23, Township 3 South, Range 68 West of the 6th Principal Meridian, bounded as follows: North and West of the Westerly boundary line of that which is described in Book 1440 at Page 470; Easterly of the Easterly boundary lines of Property described in Book 184 at Page 221 and Book 748 at Page 49; and Westerly of the Westerly boundary lines of Property described in Book 1021 at Page 627; Addition to Parcel F in Book 1044 at Page 127; in Book 748 at Page 52; in Book 737 at Page 483 and that which is being conveyed to Albert S. Karsh and Adele S. Karsh by quit claim and correction deed as recorded in Book 2643 at Page 322 as said property lines connect each other, more particularly described as follows: Beginning at the intersection of the Easterly line of a Parcel of land described in Book 184 at Page 221 of the Records of the Clerk and Recorder of the City and County of Denver and the Northwestern line of Packing House Road as described in Book 1440 at Page 470; thence N 03 degrees 53'48" W along the Easterly line of said Parcel described in Book 184 at Page 221 a distance of 251.76 feet; thence continuing along said Easterly line N 29 degrees 55'11" W a distance of 35.52 feet to the Easterly line of a Parcel of land described in Book 748 at Page 49; thence N 04 degrees 22'22" W along said Easterly line a distance of 550.79 feet to the North line of the Northwest 1/4 of said Section 23; thence N 89 degrees 58'16" E along said North line a distance of 61.68 feet to the Westerly line of a Parcel of land described as Addition to Parcel F in Book 1044 at Page 127; thence S 08 degrees 05'54" E a distance of 46.01 feet; thence continuing along said Westerly line S 09 degrees 01'39" E a distance of 89.23 feet; thence continuing along said Westerly line S 07 degrees 22'12" E a distance of 42.19 feet to the Westerly line of a Parcel of land described in Book 1021 at Page 627; thence S 05 degrees 57'20" E along said Westerly line a distance of 48.08 feet to the Southerly line of said Parcel; thence S 65 degrees 18'30" E a distance of 2.97 feet to the Northwest corner of a Parcel of land described in Book 748 at Page 52; thence S 04 degrees 17'34" E along the Westerly line of said Parcel described in Book 748 at Page 52 a distance of 203.96 feet to the Northwest corner of a Parcel of land described in Book 737 at Page 483; thence S 02 degrees 24'06" W along the Westerly line of said Parcel described in Book 737 at Page 483 a distance of 185.8 feet to the South line of said Parcel; thence S 85 degrees 08'31" E along the South line of said Parcel a distance of 2.51 feet; thence S 00 degrees 07'58" E along the West line of Parcel described in Book 2643 at Page 322 a distance of 182.01 feet to the Northwestern line of Packing House Road; thence S 37 degrees 20'21" W along said Northwestern line a distance of 44.56 feet to the Point of Beginning.

all in the City and County of Denver,
State of Colorado.

A strip of ground lying within the NW 1/4 NW 1/4 of Section 23, Township 3 South, Range 68 West, of the 6th Principal Meridian, bounded as follows: Northerly of the Northerly Right of Way line of 46th Avenue; Easterly of the Easterly boundary line of Property described in Book 637 at Page 371; Southeasterly of the Southeasterly boundary line of that which is described in Book 1440 at Page 470; Westerly of the Westerly boundary line of Property described in Book 628 at Page 183, and Westerly of the Westerly Right of Way line of the Burlington Northern Inc. Railroad; and Southerly of the Southwesterly Right of Way line of that easement described in Book 1217 at Page 10, more particularly described as follows: Beginning at the intersection of the North line of 46th Avenue and the Easterly line of Parcel 2 as described in Book 637 at Page 371; thence N 32 degrees 46'44" E along the Easterly line of said Parcel 2 described in Book 637 at Page 371 for this and next 2 courses a distance of 144.34 feet; thence N 22 degrees 41'27" E a distance of 148.88 feet; thence N 11 degrees 52'27" E a distance of 152.21 feet to the Southeasterly line of Packing House Road as described in Book 1440 at Page 470; thence N 46 degrees 54'41" E along said Southeasterly line of Packing House Road for this and the next 2 courses a distance of 33.59 feet; thence N 37 degrees 20'21" E a distance of 91.70 feet; thence N 20 degrees 31'11" E a distance of 90.43 feet to the Southwesterly line of a strip of land described in Book 1217 at Page 10 and a point of non-tangent curve; thence along said Southwesterly line of said strip of land described in Book 1217 at Page 10 and along said non-tangent curve to the left through a central angle of 03 degrees 10'55" having a radius of 645.2 feet and arc distance of 35.67 feet to the Westerly line of a parcel of land described in Book 628 at Page 183; thence S 21 degrees 46'13" W along said Westerly line of said parcel described in Book 628 at Page 183 for this and the next 2 courses a distance of 64.73 feet; thence S 21 degrees 14'12" W a distance of 351.19 feet; thence S 23 degrees 53'58" W a distance of 146.99 feet; thence S 45 degrees 23'40" W leaving said Westerly line of said parcel described in Book 628 at Page 183 a distance of 42.79 feet to the North line of 46th Avenue; thence S 89 degrees 59' W along said North line of 46th Avenue a distance of 40.74 feet to the Point of Beginning,

all in the City and County of Denver,
State of Colorado.

A strip or tract of land situate in the N 1/2 of NW 1/4 of Section 23 and in the SE 1/4 of SW 1/4 of Section 14, Township 3 South, Range 68 West of the Sixth Principal Meridian, in the City and County of Denver, Colorado, bounded and described as follows: Commencing at the point of intersection of the northeasterly line of the old Colorado & Southern Railway Company right of way (abandoned in 1938) with the northwesterly right of way line of the Burlington Northern, Inc. (formerly Chicago, Burlington & Quincy Railroad Company):

thence N. 45 degrees 48' E. along said northwesterly right of way line of the Burlington Northern, Inc. a distance of 36.35 feet, more or less;
 thence northwesterly and northerly along the easterly boundary line of that certain parcel of land heretofore conveyed by Union Pacific Railroad Company to The Denver Union Stock Yard Company by Quitclaim Deed dated August 11, 1942 which is a curve concave easterly, the center of which bears N. 63 degrees 40' E. a distance of 595.3 feet, an arc distance of 382 feet, more or less, to the most northerly corner of said parcel heretofore conveyed which is the true point of beginning of the parcel hereby described;
 thence continuing northeasterly along the extension of the last described curved line which is also the southeasterly boundary line of that certain strip of land heretofore conveyed by The Denver Union Stock Yard Company to Union Pacific Railroad Company by Warranty Deed dated February 19, 1918, a distance of 154.19 feet to the end of said curve;
 thence N. 25 degrees 20' E. a distance of 465.17 feet, more or less, to a point in the north line of said Section 23 that is 144.82 feet east from the northwest corner of the NE 1/4 of NW 1/4 of said section;
 thence continuing N. 25 degrees 20' E. a distance of 14.11 feet;
 thence northeasterly along a line curving to the right, having a radius of 1003 feet, a distance of 174.42 feet;
 thence N 35 degrees 18' E. a distance of 620.0 feet;
 thence northeasterly along a line curving to the right, having a radius of 930.4 feet, a distance of 210.2 feet;
 thence N 50 degrees 07' E. a distance of 222.48 feet;
 thence N. 59 degrees 41' E. a distance of 207.8 feet;
 thence northeasterly along a line curving to the left, having a radius of 610.3 feet, a distance of 42.6 feet;
 thence N. 34 degrees 19' W. along a line drawn radially to the last described curve a distance of 13.0 feet;
 thence southwesterly along a curve concave northwesterly, the center of which bears N 34 degrees 19' W. a distance of 597.3 feet, an arc distance of 41.69 feet;
 thence S. 59 degrees 41' W. a distance of 353.0 feet;
 thence S. 55 degrees 51' W. a distance of 83.37 feet;
 thence N. 41 degrees 45' W. a distance of 4.6 feet;
 thence southwesterly along a curve concave southeasterly, the center of which bears S. 41 degrees 45' E. a distance of 980.4 feet, an arc distance of 221.5 feet;
 thence S. 35 degrees 18' W. a distance of 620.0 feet;
 thence southwesterly along a line curving to the left, having a radius of 1053.0 feet, a distance of 183.12 feet;
 thence S. 25 degrees 20' W. a distance of 37.78 feet, more or less, to a point in the south line of said Section 14 that is 89.5 feet distant east from the southwest corner of the SE 1/4 of SW 1/4 of said Section;
 thence continuing S 25 degrees 20' W. a distance of 441.5 feet;
 thence southwesterly along a line curving to the left, having a radius of 645.3 feet a distance of 345.64 feet, more or less, to the northwesterly corner of said parcel of land which was heretofore conveyed to The Denver Union Stock Yard Company by Quitclaim Deed dated August 11, 1942;
 thence northeasterly along a straight line portion of the northwesterly boundary line of said parcel heretofore conveyed by said deed dated August 11, 1942 a distance of 55 feet, more or less;
 thence continuing northeasterly along a curved line portion of the northwesterly boundary line of said parcel heretofore conveyed by said deed dated August 11, 1942, which is a line curving to the left, having a radius of 773 feet, a distance of 95.7 feet, more or less;
 thence continuing northeasterly along the remaining portion of said northwesterly boundary line of parcel heretofore conveyed by said deed dated August 11, 1942 which is a straight line a distance of 28 feet, more or less, to the true point of beginning.
 EXCEPT that portion thereof described in the following deeds:
 Deed recorded October 2, 1972 in Book 574 at Page 196; Deed recorded January 12, 1973 in Book 628 at Page 183; Deed recorded December 23, 1975 in Book 1173 at Page 76; Deed recorded April 5, 1976 in Book 1223 at Page 315; Deed recorded April 5, 1976 in Book 1223 at Page 317; Deed recorded December 9, 1976 in Book 1358 at Page 617; Deed recorded May 9, 1977 in Book 1440 at Page 470; Deed recorded December 17, 1982 in Book 2711 at Page 6.

all in the City and County of Denver,
 State of Colorado.

A strip of ground lying within the NW 1/4 NW 1/4 of Section 23, Township 3 South, Range 68 West, of the 6th Principal Meridian, bounded as follows: Northerly of the Northerly Right of Way line of 46th Avenue; Easterly of the Easterly boundary line of Property described in Book 637 at Page 371; Southeasterly of the Southeasterly boundary line of that which is described in Book 1440 at Page 470; Westerly of the Westerly boundary line of Property described in Book 628 at Page 183, and Westerly of the Westerly Right of Way line of the Burlington Northern Inc. Railroad; and Southerly of the Southwesterly Right of Way line of that easement described in Book 1217 at Page 10, more particularly described as follows: Beginning at the intersection of the North line of 46th Avenue and the Easterly line of Parcel 2 as described in Book 637 at Page 371; thence N 32 degrees 46'44" E along the Easterly line of said Parcel 2 described in Book 637 at Page 371 for this and next 2 courses a distance of 144.34 feet; thence N 22 degrees 41'27" E a distance of 148.88 feet; thence N 11 degrees 52'27" E a distance of 152.21 feet to the Southeasterly line of Packing House Road as described in Book 1440 at Page 470; thence N 45 degrees 54'41" E along said Southeasterly line of Packing House Road for this and the next 2 courses a distance of 33.59 feet; thence N 37 degrees 20'21" E a distance of 91.70 feet; thence N 20 degrees 31'11" E a distance of 90.43 feet to the Southwesterly line of a strip of land described in Book 1217 at Page 10 and a point of non-tangent curve; thence along said Southwesterly line of said strip of land described in Book 1217 at Page 10 and along said non-tangent curve to the left through a central angle of 03 degrees 10'55" having a radius of 645.2 feet and arc distance of 35.67 feet to the Westerly line of a parcel of land described in Book 628 at Page 183; thence S 21 degrees 46'13" W along said Westerly line of said parcel described in Book 628 at Page 183 for this and the next 2 courses a distance of 64.73 feet; thence S 21 degrees 14'12" W a distance of 351.19 feet; thence S 23 degrees 53'58" W a distance of 146.99 feet; thence S 45 degrees 23'40" W leaving said Westerly line of said parcel described in Book 628 at Page 183 a distance of 42.79 feet to the North line of 46th Avenue; thence S 89 degrees 59' W along said North line of 46th Avenue a distance of 40.74 feet to the Point of Beginning.

all in the City and County of Denver,
State of Colorado.

PARCEL 10

Property Tax Assessment No. 2143-00-079

A tract or parcel of land in the SE $\frac{1}{4}$ of Sec. 16, Twp. 3 S., Range 68 W., of the 6th P.M., more particularly described as follows: That land lying between the west boundary line of that certain tract of the property described in that certain deed of even date herewith from Western Stock Center, Inc., to The Western Stock Show Association, and the west boundary line of that certain deed recorded October 2, 1972, in Book 574, page 196, of the real estate records of the City and County of Denver, and the eastern boundary line of that certain right-of-way and private roadway referred to as "Packing House Road" and as described in that certain quit claim deed of even date herewith from Western Stock Center, Inc., and Denver Union Corporation to John F. O'Dea, et al., reserving, however, to grantor the right to use, maintain, repair, replace or remove the existing railroad trackage lying on said tract.

A strip of ground lying within the South 1/2 of Section 14, Township 3 South, Range 68 West of the 6th Principal Meridian, bounded as follows: Easterly of the Easterly line of that which is described in Book 1440 at Page 470; Northerly of the Southwesterly line extended Northwesterly of Property described in Book 1285 at Page 231; Westerly of the Westerly boundary lines of Property described in Book 1922 at Page 676, Book 1285 at Page 231, and in Book 1727 at Page 619 and Southerly of the Southerly line of the 60 foot portion of Parcel C described in Book 1440 at Page 470, more particularly described as follows: Commencing at the center of said Section 14; thence S 00 degrees 16'21" W along the North-South centerline of said Section 14 a distance of 1328.3 feet; thence S 89 degrees 43'39" E a distance of 30 feet to the intersection of the Southeasterly line of Packing House Road as described in Book 1440 at Page 470 of the Records of the Clerk and Recorder of the City and County of Denver and the Westerly line of a Parcel of land described in Book 1712 at Page 415, and the Point of Beginning; thence S 00 degrees 16'21" W along said Westerly line of said Parcel described in Book 1712 at Page 415 a distance of 8.04 feet to the Northwesterly line of a Parcel of land described in Book 1727 at Page 619 and a point of non-tangent curve; thence along said Northwesterly line and along said non-tangent curve to the right the chord of which bears S 40 degrees 08'29" W a distance of 21.73 feet through a central angle of 01 degrees 04'58" having a radius of 1149.91 feet and arc length of 21.73 feet to the Southwesterly corner of said Parcel; thence S 54 degrees 33'57" E along said Southwesterly line a distance of 17.46 feet to the Northwesterly line of a Parcel of land described in Book 1922 at Page 676 and in Book 1285 at Page 231 and a point of non-tangent curve; thence along said Northwesterly line and along said non-tangent curve to the right the chord of which bears S 44 degrees 04'11" W a distance of 135.00 feet through a central angle of 08 degrees 16'14" having a radius of 936.05 feet and arc length of 135.12 feet; thence continuing along said Northwesterly line S 48 degrees 09'21" W a distance of 30.13 feet to a point of curve; thence continuing along said Northwesterly line and along said curve to the right the chord of which bears S 54 degrees 16'30" W a distance of 219.10 feet through a central angle of 11 degrees 15'11" having a radius of 1117.37 feet and arc length of 219.45 feet; thence continuing along said Northwesterly line S 59 degrees 23'55" W a distance of 114.39 feet to the Westerly most corner of said Parcel described in Book 1922 at Page 676; thence N 54 degrees 33'16" W along the Southerly line extended Northwesterly of said parcel described in Book 1922 at Page 676 and in Book 1285 at Page 231 a distance of 16.54 feet to the Southerly line of a Parcel of land described in Book 1217 at Page 10; thence N 59 degrees 25'24" E along said Southerly line a distance of 153.87 feet to a point of curve; thence continuing along said Southerly line and along said curve to the left the chord of which bears N 57 degrees 25'24" E a distance of 42.60 feet through a central angle of 04 degrees 00'01" having a radius of 610.3 feet and arc length of 42.61 feet to a point of non-tangency; thence S 34 degrees 17'24" E along the Easterly most line of said Parcel described in Book 1217 at Page 10 extended Southeasterly a distance of 1.18 feet to the Southerly line of Packing House Road as described in Book 1440 at Page 470; thence N 57 degrees 58'30" E along said Southerly line a distance of 117.91 feet; thence continuing along said Southerly line N 39 degrees 37'12" E a distance of 214.83 feet to the Point of Beginning,

all in the City and County of Denver,
State of Colorado.

A strip of ground lying within the South 1/2 of Section 14, Township 3 South, Range 68 West of the 6th Principal Meridian, bounded as follows: Easterly of the Easterly line of that which is described in Book 1440 at Page 470; Northerly of the Southwesterly line extended Northwesterly of Property described in Book 1285 at Page 231; Westerly of the Westerly boundary lines of Property described in Book 1922 at Page 676, Book 1285 at Page 231, and in Book 1727 at Page 619 and Southerly of the Southerly line of the 60 foot portion of Parcel C described in Book 1440 at Page 470, more particularly described as follows: Commencing at the center of said Section 14; thence S 00 degrees 16'21" W along the North-South centerline of said Section 14 a distance of 1328.3 feet; thence S 89 degrees 43'39" E a distance of 30 feet to the intersection of the Southeasterly line of Packing House Road as described in Book 1440 at Page 470 of the Records of the Clerk and Recorder of the City and County of Denver and the Westerly line of a Parcel of land described in Book 1712 at Page 415, and the Point of Beginning; thence S 00 degrees 16'21" W along said Westerly line of said Parcel described in Book 1712 at Page 415 a distance of 8.04 feet to the Northwesterly line of a Parcel of land described in Book 1727 at Page 619 and a point of non-tangent curve; thence along said Northwesterly line and along said non-tangent curve to the right the chord of which bears S 40 degrees 08'29" W a distance of 21.73 feet through a central angle of 01 degrees 04'58" having a radius of 1149.91 feet and arc length of 21.73 feet to the Southwesterly corner of said Parcel; thence S 54 degrees 33'57" E along said Southwesterly line a distance of 17.46 feet to the Northwesterly line of a Parcel of land described in Book 1922 at Page 676 and in Book 1285 at Page 231 and a point of non-tangent curve; thence along said Northwesterly line and along said non-tangent curve to the right the chord of which bears S 44 degrees 04'11" W a distance of 135.00 feet through a central angle of 08 degrees 16'14" having a radius of 936.05 feet and arc length of 135.12 feet; thence continuing along said Northwesterly line S 48 degrees 09'21" W a distance of 30.13 feet to a point of curve; thence continuing along said Northwesterly line and along said curve to the right the chord of which bears S 54 degrees 16'30" W a distance of 219.10 feet through a central angle of 11 degrees 15'11" having a radius of 1117.37 feet and arc length of 219.45 feet; thence continuing along said Northwesterly line S 59 degrees 23'55" W a distance of 114.39 feet to the Westerly most corner of said Parcel described in Book 1922 at Page 676; thence N 54 degrees 33'16" W along the Southerly line extended Northwesterly of said parcel described in Book 1922 at Page 676 and in Book 1285 at Page 231 a distance of 16.54 feet to the Southerly line of a Parcel of land described in Book 1217 at Page 10; thence N 59 degrees 25'24" E along said Southerly line a distance of 153.87 feet to a point of curve; thence continuing along said Southerly line and along said curve to the left the chord of which bears N 57 degrees 25'24" E a distance of 42.60 feet through a central angle of 04 degrees 00'01" having a radius of 610.3 feet and arc length of 42.61 feet to a point of non-tangency; thence S 34 degrees 17'24" E along the Easterly most line of said Parcel described in Book 1217 at Page 10 extended Southeasterly a distance of 1.18 feet to the Southerly line of Packing House Road as described in Book 1440 at Page 470; thence N 57 degrees 58'30" E along said Southerly line a distance of 117.91 feet; thence continuing along said Southerly line N 39 degrees 37'12" E a distance of 214.83 feet to the Point of Beginning,

all in the City and County of Denver,
State of Colorado.

APPENDIX 2
AGREEMENT FOR RESOLUTION
OF DISPUTED ISSUES

THIS AGREEMENT FOR RESOLUTION OF DISPUTED ISSUES ("this Agreement") dated effective as of July 10, 1997, is entered by and between THE WESTERN STOCK SHOW ASSOCIATION, a Colorado nonprofit corporation ("WSSA"), and DENVER ROCK ISLAND RAILROAD, a Colorado corporation (formerly known as Denver Terminal Railroad Company and hereinafter referred to as "DRIR").

RECITALS

A. In 1995, WSSA initiated federal administrative proceedings seeking the discontinuance of rail service by DRIR over two lines of railroad on WSSA's property in Denver, Colorado.

B. In July, 1996, the Surface Transportation Board rendered its order in those administrative proceedings (Service Date, July 3, 1996 in Docket No. AB-452 (Sub-No. IX)) and WSSA thereafter filed its Petitions for Review of the Board's order with the United States Court of Appeals for the Tenth Circuit (No. 96-9531 and No. 97-9507).

C. WSSA and DRIR have agreed to resolve the disputed issues pending in those proceedings before the United States Court of Appeals for the Tenth Circuit and those issues remaining before the Surface Transportation Board as hereinafter set forth.

AGREEMENT

In consideration of the premises and other good and valuable consideration, the parties hereby agree as follows:

1. This Agreement supersedes in all respects that certain Agreement dated December 10, 1993 between WSSA and the predecessor in interest to DRIR, Tom Mars (which agreement is hereinafter referred to as the "1993 Agreement").

2. WSSA shall grant to DRIR a nonexclusive rail use easement, in accordance with Exhibit A attached hereto, on WSSA's real property where the River Corridor (as described on the Easement Deed represented by Exhibit A attached hereto) and National Western Drive Corridor trackage is presently located, so long as the property is used for rail purposes and subject to (i) the right to cross over and through the real property and the rail line and tracks situate thereon for ingress and egress to and from WSSA's National Western Complex reserved by WSSA for itself and its employees, agents, invitees, licensees, guests and the livestock, vehicles and equipment of each of the foregoing, as well as the general public, at points where such crossing has customarily taken place and at such additional points as WSSA may reasonably need (as more specifically provided for in Exhibit E attached hereto), so long as such crossing and use do not unreasonably interfere with DRIR's railroad operations, and (ii) to the insurance requirements of Section 6 hereof, (iii) the requirement that during the month of

January of each year, DRIR's use of such easement shall be subject to the provisions set forth in said Exhibit A, and (iv) that certain Easement Deed from Denver Union Corporation, as Grantor, to Union Pacific Railroad Company, as Grantee, dated March 22, 1976, and recorded in Book 1217 at page 10 of the real property records of the City and County of Denver, Colorado, and assigned to DRIR pursuant to an Assignment of Easement Deed between Union Pacific Railroad Company, as Assignor, and DRIR, as Assignee, dated effective April 28, 1995, and recorded May 19, 1995 under No. 9500053501.

3. WSSA shall grant to DRIR and Drywall Products, Inc. a nonexclusive license for drywall unloading operations, in accordance with Exhibit B attached hereto, on WSSA's real property described in said Exhibit B adjoining the trackage on WSSA's property described in Exhibit A hereto, subject to (i) the right to the use of the licensed property reserved by WSSA for itself and its employees, agents, invitees, licensees, guests and the livestock, vehicles and equipment of each of the foregoing so long as such use does not interfere unreasonably with the off-loading of drywall products by DRIR and Drywall Products, Inc., and (ii) WSSA's right to terminate as set forth in said Exhibit B.

4. WSSA shall quit claim and convey to DRIR, by a bill of sale in accordance with Exhibit C hereto, the rail, ties, ballast, spikes, tie plates, bolts and angle irons on the rail use easement referred to in Section 2 above, subject to the rights reserved (i) with respect to common carrier obligations and (ii) to cross over and through the rail tracks for access to and from WSSA's National Western Complex by WSSA for itself and its employees, agents, invitees,

licensees, guests, and the livestock, vehicles and equipment of each of the foregoing, as well as the general public, at any place and for any purpose so long as such crossing and use do not unreasonably interfere with DRIR's railroad operations, and during the month of January of each year, DRIR's use of such items acquired by it shall be subject to the provisions set forth in said Exhibit C.

5. DRIR shall quit claim to WSSA, by a quit claim in accordance with Exhibit D hereto, all right, title and interest of DRIR in the real property owned and used by WSSA described in Appendix A hereto, except the rail use easement and license referred to in Sections 2 and 3 above and the other exceptions set forth in Exhibit D.

6. So long as DRIR exercises its rights under the rail use easement granted by WSSA pursuant to Section 2 above, DRIR will maintain insurance coverage as follows:

6.1 DRIR shall, at all times while this Agreement is in effect, carry railroad commercial comprehensive general liability insurance coverage on a claims made basis on the following terms and conditions:

6.1.1 The insurance coverage will include all coverage required by law but not limited to the following specific types of coverage: bodily injury and property damage, liability for pollution and contamination, including evacuation liability, seepage liability, federal employer liability, liability for owners and contractors protective liability insurance, comprehensive railroad and railroad

liability insurance, personal injury coverage, broad form blanket contractual endorsement, cargo legal liability and foreign rolling stock coverage.

6.1.2 The insurance policy will have a minimum limit of \$2,000,000 per occurrence and \$4,000,000 aggregate, with a maximum self-insured retention limit of \$25,000 and be provided by an insurer licensed to do business in Colorado and reasonably satisfactory to WSSA; provided, in the event that DRIR ships significant amounts of hazardous materials not excluded on the liability policy, including without limitation methanol, over the nonexclusive rail use easement granted by WSSA to DRIR pursuant to Section 1 of this Agreement, then such combined single limit of insurance coverage shall be increased by DRIR to \$6,000,000 combined single limit. For purposes of the proviso to the immediately preceding sentence, the parties acknowledge that shipments of hazardous materials will be deemed significant if such shipments exceed (i) 10 rail cars per calendar month and (ii) 100 rail cars during any period of 12 consecutive calendar months.

6.2 DRIR shall cause a true copy of the whole insurance policy to be furnished to WSSA prior to the anniversary or effective date of the policy each year.

6.3 As an additional insured, WSSA shall have the right to reasonable access to the insurer and any of its adjusters with respect to material occurrences and information which may be reasonably anticipated to related to WSSA and/or its insurance carriers in any manner.

6.4 No commodities or activities excluded by the insurance policy will be allowed on the easement granted by WSSA to DRIR or over the railroad trackage thereon.

6.5 Any and all material accidents or similar material incidents on the easement granted by WSSA to DRIR must be reported by DRIR to WSSA.

6.6 DRIR will maintain the retroactive date of November 20, 1993 on any renewal or new insurance policy.

6.7 The maximum speed DRIR will permit its railroad engines and cars on the easement granted by WSSA to DRIR will comply with FRA Class 1 safety standards which are currently ten miles per hour.

6.8 The fund in the amount of approximately \$7,530 paid by DRIR to WSSA under the 1993 Agreement for the purpose of purchasing rail insurance shall be paid by WSSA to DRIR for purposes of defraying a portion of the insurance premium expense incurred by DRIR in satisfying its insurance obligations hereunder.

6.9 To the extent permitted by applicable Law (as defined below), DRIR hereby releases WSSA from any and all liability or responsibility to DRIR or anyone claiming through or under DRIR by way of subrogation or otherwise for any loss or damage to property caused by fire or any other peril insured in policies of insurance covering DRIR's activity upon WSSA's property, unless such loss or damage shall have been caused by the fault or negligence of WSSA, or anyone for whom WSSA may be responsible.

7. So long as DRIR exercises its rights under the rail use easement granted by WSSA pursuant to Section 1 above, DRIR agrees, among other things, to limit its activities on the easement in accordance with Exhibit E attached and will use its best efforts to coordinate such rail use with WSSA and the shippers served by the trackage covered by such easement in accordance with Exhibit E.

8. (a) To the extent permitted by applicable Law, DRIR assumes the risk of, and waives and releases WSSA and its parents, subsidiaries, affiliates, shareholders, directors, officers, employees and agents, and their respective shareholders, directors, officers, employees and agents (each a "Released Party") from liability for, any damage or injury (including death) sustained by DRIR or its shareholders, affiliates, partners, employees, agents, representatives, contractors, operators, licensees and invitees (collectively, "Covered Persons") as a result of (i) any act or omission of any Released Party relating in any way to, or occurring on, the facilities or any part thereof, except (subject to the other provisions hereof) if such act or omission was willful or grossly negligent or constituted a material breach of this Agreement; or (ii) the condition of WSSA's property or any part thereof, whether or not such condition was apparent or discoverable (unless WSSA deliberately and willfully concealed such condition).

(b) Tenant shall not:

- (i) cause or permit any Hazardous Substance (as defined below) to be placed, held, located, released, transported or disposed of on, under, at or from the premises from

WSSA's property, or any land contiguous thereto, unless directly related to and necessary for the permitted operations on WSSA's property or the maintenance or repair of DRIR's equipment, and then only if done so in a safe, prudent and environmentally sound manner and in accordance with the requirements of, and not in violation of, applicable Laws, including Environmental Laws (as defined below); or

- (ii) permit any person to engage in any activity on WSSA's property that could result in any liability, cost or expense to WSSA or the creation of any lien on WSSA's property pursuant to any Environmental Law.
- (c) DRIR shall be responsible for the management and disposal of all Hazardous Substances and wastes in an environmentally sound manner and in compliance with all pertinent legal requirements. DRIR shall promptly report to WSSA and the appropriate governmental agencies any Release or threat of Release of any Hazardous Substance in connection with DRIR's operations at or occupancy of WSSA's property, provided that DRIR shall use its best efforts to notify WSSA prior to reporting any such Release or threat of Release in a manner as shall be appropriate under the circumstances. WSSA will assume full responsibility for reporting

to the appropriate governmental agencies any Release or threat of Release of any Hazardous Substance in connection with WSSA's operations at or occupancy of WSSA's property. As used herein, the term:

- (i) **"Environmental Law"** means any Law or Permit regulating Releases or threatened Releases of pollutants, contaminants, or hazardous or toxic materials or wastes into ambient air, surface water, ground water, or land, or otherwise relating to pollution or the protection of health or the environment, including the following Laws: The Water Pollution Control Act, as amended, 33 U.S.C. § 1251 *et seq.* (1972); Clean Air Act, as amended, 42 U.S.C. § *et seq.* (1970); Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended ("**CERCLA**", 42 U.S.C. § 9601 *et seq.*; Resource Conservation and Recovery Act of 1976, as amended, 42 U.S.C. § 6901 *et seq.* Toxic Substances Control Act, as amended, 15 U.S.C. § 2601 *et seq.* (1976); Safe Drinking Water Act, as amended, 42 U.S.C. § 300(f) *et seq.* (1974); Federal Insecticide, Fungicide and Rodenticide Act, as amended, 7 U.S.C. § 136 *et seq.* (1975); Marine Protection, Research, and Sanctuaries Act of 1972, as amended,

33 U.S.C § 1401 *et seq.*; National Environmental Policy Act of 1969, as amended, 42 U.S.C. § 4321 *et seq.*; and any comparable state or local Law;

- (ii) *"Hazardous Substance"* means any "hazardous substance" defined as such in (or for purposes of) section 9601(14) of CERCLA, or any so-called "superfund" or "superlien" Law; any "pollutant or contaminant" as defined in 42 U.S.C. § 9601(33); any material now defined as "hazardous waste" pursuant to 40 C.F.R. Part 260; any petroleum, including crude oil or any products, by-products or fraction thereof, natural gas, natural gas liquids, liquefied natural gas or synthetic gas usable for fuel; any "hazardous chemical" as defined pursuant to 29 C.F.R. Part 1910; asbestos; and any other pollutant, contaminant, chemical mixture, compound, element, or toxic or hazardous substance or waste whose presence, nature, quantity or intensity of existence, use, manufacture, disposal, transportation, Release or effect, either by itself or in combination with other materials on the Premises, is either (A) potentially injurious to the public health, safety or welfare, the environment or the Premises, (B) regulated under any Environmental Law or (C) a basis for liability of

Landlord to any governmental agency or third party under any applicable Law; and

(iii) *"Release"* means any release, spill, leak, discharge, disposal, pumping, pouring, emission, emptying, injecting, leaching, dumping, burying, abandonment or escaping into the environment.

(d) DRIR shall indemnify, protect, defend and hold WSSA and any Released Party harmless from and against any and all claims, losses, damages, injuries penalties, fines, judgments, liens, obligations, liabilities, costs and expenses (including reasonable attorneys' and consultants' fees, costs of investigation, court costs and settlement costs) (collectively, "Environmental Liabilities") arising out of or relating to (A) the failure of DRIR or any Covered Person to comply with the provisions of this Section 8; (B) the handling, transport, use, storage, disposal or Release of any hazardous substance brought onto, or generated, stored, treated or handled at, or transported or released from, WSSA's property by, for, at the direction of or for the benefit of DRIR or any Covered Person, or related in any way to DRIR's operations or activities at, on, about or from WSSA's property; or (C) the violation or alleged violation of any Environmental Law by DRIR or any Covered

Person in connection with WSSA's property or DRIR's operations or activities thereat.

- (e) As of the date hereof, WSSA and DRIR do hereby release, acquit and forever discharge each other, and their respective present and former directors, officers, agents, employees, representatives, affiliates, subsidiaries from all claims asserted or that could have been asserted in Civil Action Nos. 96-9531 and 97-9507 pending in the United States Court of Appeals for the Tenth Circuit and related prior administrative proceeding before the Surface Transportation Board, Docket No. AB-452 (Sub-No. IX).
- (f) In addition to the environmental indemnity provided by DRIR herein, to the extent permitted by applicable Law, DRIR agrees to indemnify, protect, defend and hold WSSA and each Released Party harmless from and against all claims, losses, damages, injuries, penalties, claims, judgments, liens, obligations, liabilities, costs and expenses (including any reasonable attorneys' fees and court costs) arising out of or relating to (i) any injury (including death) or damage to any person (including DRIR's employees, even though such claim might otherwise be barred against DRIR under applicable workers' compensation or similar laws) or property whatsoever arising out of or relating to (i) any breach of this Agreement on the part of DRIR; (ii) any act or omission of

DRIR or any Covered Person relating to this Agreement or the use of WSSA's property; or (iii) DRIR's or any Covered Person's presence on WSSA's property in connection with DRIR's or any of its affiliates' use of or operations at WSSA's property. Provisions of this section shall survive the expiration or termination of this Agreement.

9. Notices given under this Agreement shall be in writing and may be given personally or sent to each respective party by express courier, facsimile, or United States certified mail at the address for each party set forth below, or to such other address as such party may designate in writing to the other parties.

If to WSSA:

Address: 4655 Humboldt Street,
Denver, CO 80216
Attention: Patrick A. Grant, President
Facsimile: 303-292-1708
Telephone: 303-297-1166

If to DRIR:

Address: 3400 E. 56th Avenue
Commerce City, CO 80022
Attention: Tom Mars, President
Facsimile: 303-296-2347
Telephone: 303-296-0900

Any notice shall be deemed given on the date of delivery if given personally, on the date of the return receipt if given by mail, on the date evidenced by the courier service receipt if given by express courier, and on the date of transmission indicated by a machine generated confirmation if sent by facsimile.

10. This Agreement shall not constitute or imply any partnership, joint venture or agency agreement among the parties for any purpose. Nothing in this Agreement shall be deemed to constitute an agreement for the benefit of any third person or entity.

11. This Agreement and the easement granted herein by WSSA may not be assigned or transferred by DRIR without the prior written approval of WSSA.

12. Attached hereto as Exhibit F is a form of Stipulation (the "Stipulation"), to be signed concurrently with this Agreement, pursuant to which WSSA and DRIR agree to dismiss Civil Action Nos. 96-9531 and 97-9507, and all claims pursuant thereto, with prejudice. WSSA and DRIR agree to prepare, execute and file such further motions or papers as may be necessary to cause the dismissal with prejudice of said civil actions.

13. No failure to require performance or observation of any provision of this Agreement shall constitute a waiver thereof unless waived in writing signed by the party benefitted by such provision. Any waiver of a provision on one occasion shall not constitute a continuing waiver or the waiver of any other provision.

14. This Agreement constitutes the entire agreement and understanding among the parties with respect to the subject matter hereof and supersedes all prior discussions, representations, understandings and agreements, written or oral. No modifications of this Agreement shall be valid unless made in writing and signed by the parties.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be
executed by their duly authorized representatives as of the _____ day of _____,
1997.

**THE WESTERN STOCK SHOW
ASSOCIATION**

DENVER ROCK ISLAND RAILROAD

By: _____
Patrick A. Grant
Title: President

By: _____
Thomas F. McFarland, Jr.
Title: Attorney-in-Fact

**APPENDIX 3
BILL OF SALE**

KNOW ALL MEN BY THESE PRESENTS:

That THE WESTERN STOCK SHOW ASSOCIATION ("Seller"), for the sum of Ten and no/100 Dollars (\$10.00) and other good and valuable consideration, the receipt and adequacy of which is hereby acknowledged, does hereby sell and convey and quitclaim, to DENVER ROCK ISLAND RAILROAD ("Buyer") all of Seller's right, title and interest in rail, ties, ballast, spikes, tie plates, bolts and angle irons (collectively, the "Tracks") located in Sections 14 and 23, Township 3 South, Range 68 West in the City and County of Denver, Colorado; provided, however, that the sale and conveyance hereunder of the Tracks is expressly subject to, and Seller specifically reserves all rights to use existing tracks or replacement tracks to satisfy common carrier obligations with respect to the Tracks until abandonment authority is obtained from the Surface Transportation Board, and Buyer accepts the Tracks subject to the obligations of other entities to provide common carrier services; and agrees not to remove the Tracks or replacement tracks prior to final abandonment authority being obtained from the Surface Transportation Board; and provided further, that Seller reserves the right to cross over and through the Tracks for access to and from Seller's National Western Complex for Seller and its employees, agents, invitees, licensees, guests and the livestock, vehicles and equipment of any of the foregoing, as well as the general public, at any place and for any purpose so long as such crossing and use do not unreasonably interfere with Buyer's railroad operations, and during

the month of January of each year, Buyer's use of the Tracks shall be specifically subject to the provisions of Appendix 1 attached hereto. Buyer acknowledges that any impairment by Buyer of such right to cross over and through the tracks for access to Seller's National Western Complex reserved by Seller for itself and the others identified above cannot be adequately compensated by monetary damages and that injunctive relief may be appropriate.

SELLER TRANSFERS AND CONVEYS ONLY SUCH RIGHT, TITLE OR INTEREST, IF ANY, AS IT MAY HAVE IN THE TRACKS AND DISCLAIMS ANY WARRANTY OF TITLE TO THE TRACKS.

THIS BILL OF SALE DOES NOT CONVEY ANY RIGHT, TITLE, ESTATE OR INTEREST WHATSOEVER IN OR TO THE REAL PROPERTY ON WHICH THE TRACKS ARE SITUATED.

SELLER, BY THIS BILL OF SALE, MAKES NO WARRANTY OF ANY KIND, EXPRESS OR IMPLIED, AND FURTHER MAKES NO WARRANTY AS TO THE MERCHANTABILITY OR FITNESS FOR ANY PARTICULAR PURPOSE OF THE TRACKS, IT BEING UNDERSTOOD THAT BUYER IS PURCHASING EACH COMPONENT OF THE TRACKS "AS IS", "WHERE IS", WITH ANY AND ALL FAULTS. IN ADDITION, SELLER HAS MADE NO AFFIRMATION OF FACT AND HAS MADE NO PROMISE RELATING TO THE TRACKS WHICH HAS CREATED OR AMOUNTED TO

**AN EXPRESS WARRANTY THAT THE TRACKS WOULD CONFORM TO ANY SUCH
AFFIRMATION OR PROMISE.**

**THE PROVISIONS OF THIS BILL OF SALE SHALL BE BINDING UPON ANY
AND ALL SUCCESSORS AND ASSIGNS OF BUYER AND SELLER.**

**IN WITNESS WHEREOF, Seller has caused this Bill of Sale to be executed as of the
10th day of July, 1997.**

(SEAL)

**THE WESTERN STOCK SHOW
ASSOCIATION**

ATTEST:

**By: _____
Randall Weeks
Secretary**

**By: _____
Patrick A. Grant
President**

APPENDIX 4

1. RAIL OPERATIONS

- A.** During the month of January of each year, and at such other times as WSSA shall notify DRIR of WSSA's need to cross DRIR's rail lines, including all existing and future rail tracks, for access to and from WSSA's National Western Complex, rail operations will be conducted on the lines only during the hours between 10:00 a.m. and 5:00 p.m., and between 10:00 p.m. and 4:00 a.m; provided, (i) there shall be no off loading of drywall products on the National Western Drive Corridor trackage at any time during the month of January, and (ii) with respect to the River Corridor trackage, there may be off loading of drywall products from railroad cars in place prior to the month of January and located so as not to interfere with WSSA's need to cross such trackage. The excluded hours (4:00 a.m. to 10:00 a.m., and 5:00 p.m. to 10:00 p.m.) are those that typically involve significant activity in the area of the tracks, moving animals, people and equipment.
- B.** For a period of approximately 16 days in January of each year (to be identified in writing by WSSA to DRIR not later than December 1 of the previous year), no rail operations will be conducted on weekends or holidays. This is the period in which the National Western Stock Show and Rodeo is held and especially large numbers of visitors are in the area, including the area where the tracks are located, on weekends.
- C.** During the period in January of each year identified by WSSA pursuant to paragraph A above, in conformity with the practice during previous Stock Shows, no methanol deliveries will be made on the lines unless a shutdown of the Commerce City methanol facility of DRIR's customer, Power Assist, makes truck deliveries unfeasible, or if an inability to deliver by truck results due to the incapacity of the Power Assist tractor-trailer, Power Assist will be required to ship by rail. If either of these contingencies occur, Power Assist can accept rail

delivery from DRIR between the hours of 10 a.m. and 5 p.m. weekdays. If Power Assist is required to ship methanol by rail, the WSSA will be notified as soon as this possibility arises.

2. **ACCESS ACROSS TRACKS**

DRIR agrees to take no action that would impede WSSA or its employees, agents, invitees, licensees, guests and the livestock, vehicles and equipment of each of the foregoing, as well as the general public, from crossing the tracks at points where such crossing has customarily taken place, including the crossing of the track along National Western Drive across the street from Drywall Products, Inc.; the crossing at the west end of the alley immediately north of the Livestock Exchange Building; the crossing where the feed concessionaire crosses from National Western Drive which is north of Le Mouton Building; the crossing which is the entry into the Aetna Building and parking lot; the crossing from National Western Drive into the property known as the Livestock Exchange Building; the crossing of the river track approximately 150 feet north of the point where the river track crosses National Western Drive (east of National Byproducts); the animal and pedestrian crossing west of "Swift Lot" and immediately southeast of cattle tie-outs; road access across tracks near Cherokee RV; and such additional points as WSSA may reasonably need so long as the cost of maintenance of the crossings at such additional points are not unreasonably burdensome to DRIR.

3. **CONSTRUCTION**

WSSA is fearful that construction of trackage and other rail facilities along National Western Drive or on the river track during the same period, when thousands of people, vehicles and animals are moving in these areas, presents an impediment to free movement in connection with the National Western Stock Show and Rodeo, and, more importantly, would present a serious safety hazard. The construction will almost certainly intrude onto the already narrow right-of-way of National Western Drive and the tie-out areas of WSSA along the river track, and the additional line opened will itself

intrude onto the shoulder area of National Western Drive. Therefore, all such construction should cease during the month of January of each year unless coordinated with the WSSA for emergency purposes only.

PLEASE RETURN TO:

**Barbara J. Mueller, Esq.
Davis, Graham & Stubbs LLP
Post Office Box 185
Denver, CO 80201-0185**

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 36263

**CITY AND COUNTY OF DENVER –
VERIFIED PETITION FOR DECLARATORY ORDER**

**INITIAL COMMENTS OF THE DENVER ROCK ISLAND RAILROAD COMPANY TO
THE CITY AND COUNTY OF DENVER'S VERIFIED PETITION FOR
DECLARATORY ORDER FILED ON DECEMBER 21, 2018**

Exhibit D

DISTRICT COURT ACTION

(FEDERAL COMPLAINT ONLY, EXHIBITS OMITTED)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Acton No. 19 – cv -

The Denver Rock Island Railroad,
a Colorado Corporation

Plaintiff,

v.

The City and County of Denver, a home rule city
and a municipal corporation of the State of Colorado

Defendant,

COMPLAINT FOR DECLARATORY RELIEF

Plaintiff The Denver Rock Island Railroad (“DRIR”), through its attorneys
and for its complaint against Defendant The City and County of Denver (“CCD”),
states and alleges as follows:

INTRODUCTION

1. Since 1993, DRIR or its predecessor, the Denver Terminal Railroad
Company (“DTRC”), has been authorized by the Surface Transportation Board
(“STB” or “Board”), or its predecessor, the Interstate Commerce Commission
(“ICC”), to provide rail transportation over tracks in the Denver Stockyards Area,

known as the National Western Drive Corridor and the River Corridor (collectively referred to as the “Stockyard Lines”) pursuant to the Interstate Commerce Act, as amended, 49 U.S.C. § 10101, et. seq.

2. For the past several years, CCD has been developing a plan to reconfigure and redevelop the Stockyard Lines located within the National Western Center. The plan would require DRIR to remove and relocate approximately 21,000 feet of STB-regulated track and railroad maintenance and office facilities that DRIR uses to provide rail transportation.

3. Despite several years of negotiations and various proposals, CCD has not obtained DRIR’s consent to the National Western Center removal, relocation, and reconfiguration project (“Project”). Having failed to obtain DRIR’s consent, CCD now threatens to remove DRIR’s right of way, tracks, and railroad maintenance and office facilities that DRIR uses to provide rail transportation through the exercise its eminent domain power to accomplish its objectives.

4. The use of eminent domain by CCD would constitute regulation and management of DRIR’s rail transportation service and would substantially interfere with and/or preclude DRIR’s ability to provide rail transportation to its customers contrary to the Interstate Commerce Commission Termination Act of 1995 (“ICCTA”). ICCTA, specifically 49 U.S.C. § 10501(b), forbids local and state

governments from regulating freight railroad transportation and interfering with a railroad's ability to provide rail transportation to its customers.

5. To protect its rights and ensure that DRIR can continue to serve shippers and other customers in the region, DRIR brings this action seeking a declaration that CCD's attempts to condemn and relocate approximately 21,000 feet of STB-regulated track and railroad maintenance and office facilities without DRIR's consent are preempted by ICCTA.

PARTIES

6. DRIR is a Class III common carrier by rail subject to the jurisdiction of the Board under the Interstate Commerce Act, as amended, by 49 U.S.C. § 10101 et seq. and has three separate terminal switching yards: North Washington, Denver Stockyards, and Airlawn. DRIR's predecessor, DTRC, was authorized by the Board's predecessor, the Interstate Commerce Commission, to become a rail carrier and to provide rail transportation over the Stockyard Lines in 1993. See Denver Terminal RR -- Acquisition and Operation Exemption -- Denver Ry., FD 32356 (ICC served September 29, 1993), Exhibit A.

7. In 2005, DRIR received acquisition and operation authority to conduct common carrier and ancillary rail services (such as switching, staging, and storing railcars) over two rail lines that connect the Stockyard Lines to shippers located in

the North Stockyards Operations Facilities (“NSO”) and the North Washington terminal. See Denver Terminal Railroad Company, d/b/a Denver Rock Island Railroad—Acquisition and Operation Exemption – Rail Lines of Union Pacific Railroad Company, FD 34692 (STB served June 14, 2005). Exhibit B. DRIR uses the Stockyard Lines to serve the shippers and customers in the NSO and North Washington terminal complex via these connecting track rights. Prior to acquiring ownership of the connecting lines, DRIR leased them from UP. See Denver Terminal Railroad Company, d/b/a Denver Rock Island Railroad – Lease and Operation Exemption – Rail Line of Union Pacific Railroad Company, FD 34637 (STB served Jan. 12, 2005). Exhibit C.

8. Pursuant to its common carrier rights and its rights under 49 U.S.C. §10906 (authorizing rail carriers to own and operate spur, storage, and yard tracks to conduct ancillary rail transportation services), DRIR uses the Stockyard Lines to provide rail transportation services to numerous customers and to interchange rail cars from both the Union Pacific Railroad Company (“UP”) and BNSF Railway Company (“BNSF”) (BNSF’s predecessor was the “BN” and became the BNSF in 1995 through a merger).

9. CCD, is a Class III, non-operating common carrier by rail subject to the jurisdiction of the Board under the Interstate Commerce Act, as amended, 49

U.S.C. § 10101, et seq. See City and County of Denver – Acquisition Exemption – Western Stock Show Association in the City and County of Denver, Colorado, FD 36157 (STB served August 9, 2018) (“Aug 9 Decision”) (holding that CCD acquired a common carrier obligation when it acquired the real estate underlying some of the Stockyard Lines from the Western Stock Show Association (“WSSA”), although CCD’s common carrier obligation is residual in nature and is subservient to DRIR’s rights). Exhibit D

JURISDICTION

10. Plaintiff, DRIR, is a corporation under the laws of Colorado with its principal place of business in Commerce City, Colorado.

11. Defendant, CCD, is a home rule city and municipal corporation of the State of Colorado.

12. This Court has subject matter jurisdiction because of the Court’s federal question jurisdiction under 28 U.S.C. § 1331. As to Count I, the Court also has jurisdiction pursuant to 28 U.S.C. § 1337 in that it involves an action arising under an Act of Congress regulating commerce, specifically, the ICC Termination Act of 1995 (“ICCTA”), Pub. L. 104-88, 109 Stat. 806. The Court also has supplemental jurisdiction over DRIR’s state law breach of contract claims.

13. Venue over this case is proper in this district pursuant to 28 U.S.C. § 1391(b) because CCD is a resident of this district and because a substantial portion of the events giving rise to the counts occurred in this district. Likewise, the Stockyard Lines, the property that is the subject of this action, is also situated in this district.

ICCTA

14. In 1995, Congress enacted ICCTA, which became effective on January 1, 1996. ICCTA amended and recodified the Interstate Commerce Act, 49 U.S.C. §§ 10101 et. seq. As amended by ICCTA, 49 U.S.C. § 10501(b) gives the Board exclusive jurisdiction over transportation by rail common carriers and the facilities used by such carriers to provide freight rail service.

15. Specifically, under 49 U.S.C. § 10501(b):

“The jurisdiction of the [STB] over—

(1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and

(2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State,

is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to the regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.”

Since ICCTA became effective, the preemption provision of Section 10501(b) has been held to preempt state and local efforts to condemn rail tracks and facilities and/or to otherwise manage and regulate railroad operations, actions which CCD seeks to do here. See, Soo Line R. Co. v. City of St. Paul, 827 F.Supp.2d 1017, 1022 (D. Minn. 2010); Wisconsin Central Ltd. v. City of Marshfield, 160 F. Supp. 2d 1009, 1013 (W.D. Wis. 2000); Petition of Union Pacific Railroad Company for Declaratory Order, FD 35960 (served Sept. 30, 2016); Pinelawn Cemetery – Petition for Declaratory Order, FD 35468 (served April 21, 2015); and CSX Transportation, Inc. – Petition For Declaratory Order, FD 34662, 2005 STB LEXIS 675 (STB served May 3, 2005); City of Commerce City v. BNSF Ry. Co., 2017 Colo. Dist. LEXIS 922, Exhibit E (Cited for informational purposes only not as precedent.)

THE COMMERCE CLAUSE

16. Article I, Section 8 of the United States Constitution gives to Congress the exclusive power to regulate interstate commerce.

17. The Commerce Clause has consistently been construed as precluding any state or local government from engaging in actions that impose an undue and unnecessary burden on interstate commerce.

BACKGROUND

18. Since 1993, DRIR or its predecessor, DTRC, has provided shippers and other rail customers with common carrier service and other forms of rail transportation, such as staging, storage, switching, and facilitating interchange to both BNSF and UP over the Stockyard Lines. Indeed, similar rail operations have been occurring on the Stockyard Lines for over a century. See W. Stock Show Ass'n – Abandonment Exemption – in Denver, Co., 1 S.T.B. 113, 114-115, 144-145 (STB served July 3, 1996) (“1996 Adverse Discontinuances”). Exhibit F.

19. Although DRIR has been the primary freight operator on the Stockyard Lines for over two decades, historically a number of railroads have also operated over the Stockyard Lines, including the predecessors of UP and BNSF.

20. DRIR acquired ownership of its tracks, rail facilities, and other track materials through a series of transactions in 1993 and 1995. See Adverse Discontinuances, slip op. at **18-**19. Through these same transactions and others in 2005 and 2006, DRIR also acquired real property rights, primarily in the form of easement rights, in the real property underlying the Stockyard Lines.

21. DRIR acquired further easement rights when UP assigned the easement which it had acquired from Denver Union to DTRC on April 28, 1995.

See Assignment of Easement Deed & Bill of Sale (“Assignment of the 1976 Easement”), Exhibit G.

22. Realizing that even prior to ICCTA a government entity could not condemn rail tracks and facilities as long as those tracks were subject to the then jurisdiction of the ICC (the predecessor to the STB), in August 1995, CCD’s predecessor, WSSA, filed three adverse discontinuance applications asking the ICC to remove its jurisdiction over the rail operations conducted over the Stockyard Lines by finding that the public convenience and necessity require or permit the discontinuance of the rail operations of BNSF, UP, and DTRC. WSSA also sought authority to abandon and remove the tracks once BNSF, UP, and DTRC operations were no longer required. Such findings by the ICC would have removed the ICC’s jurisdiction and allowed WSSA to seek the removal of the operations and abandonment of the tracks. See 1996 Adverse Discontinuances (explaining the ownership and history of rail operations in the Stockyard area in response to the adverse discontinuance/abandonment sought).

23. In a decision served July 3, 1996, the Board denied WSSA’s adverse discontinuance applications for both DTRC’s operating authority over the Stockyard Lines and BNSF’s trackage rights over the River Corridor, and denied WSSA’s request to abandon its common carrier operations as well. Id. at 141. The

Board granted the discontinuances of BNSF's trackage rights over a portion of the National Western Drive Corridor and UP's trackage rights over the Stockyard Lines because neither party objected to the adverse discontinuance and abandonment for those tracks, but according to CCD and DRIR, neither railroad consummated the discontinuances granted and still hold trackage rights over the Stockyard Lines. See Aug 9 Decision, slip op. at 3.

24. After a series of disputes before the Board and federal courts, WSSA and DRIR came to an agreement in 1997 for both the National Western Drive Corridor and the River Corridor, whereby WSSA (1) retained ownership of the real property underlying much of the Stockyard Lines; (2) sold to DRIR the rail, ties, ballast, spikes, tie plates, bolts, and angle irons (collectively, the Tracks); and (3) granted to DRIR a non-exclusive easement to operate over the portions of the Stockyard Lines it owned. See Aug 9 Decision. The easement deed was dated July 10, 1997 and is referred to herein as "Easement Deed". Exhibit H.

25. The second paragraph of the Easement Deed for the 1997 easement states:

that Grantor, for an in consideration of the sum of Ten Dollars (\$10.00) the receipt whereof is hereby confessed and acknowledged, by these presents does grant, bargain, sell, convey, and quitclaim unto Grantee, without warranting title or interest and subject to the terms and conditions hereinafter set forth, a non-exclusive

EASEMENT, for so long as such easement is used for rail purposes, for a right of way for the operation, maintenance, repair, renewal, and reconstruction of railroad trackage (the "Trackage") over and across the land situate in the City and County of Denver, State of Colorado, described in Appendix 1 hereto attached and hereby made a part hereof (the "Easement Property").

26. Page 3, Paragraph 5, of the Easement Deed reserves for the Grantor,

WSSA,

the right of ownership, use and occupancy of the Easement Property insofar as said ownership, use, and occupancy does not impair the rights granted to Grantee hereunder. Grantee's rights hereunder shall be nonexclusive and Grantor shall have full right and authority to grant other easements or rights to use the Easement Property as will not impair Grantee's rights under this Deed.

27. The Bill of Sale to the Easement Deed states that WSSA,

"for the sum of Ten and no/100 Dollars (\$10.00) and other good and valuable consideration, the receipt and adequacy of which is hereby acknowledged, does hereby sell and convey and quitclaim, to [DRIR] ("Buyer") all of Seller's right, title, and interest in rail, ties, ballast, spikes, tie plates, bolts, and angle irons (collectively, the "Tracks") located in Sections 14 and 23, Township 3 South, Range 68 West in the City and County of Denver Colorado...."

See Appendix 3 to Exhibit H.

28. In the Easement Deed, the parties agreed to special restrictions to accommodate the Stock Show, during the month of January, and "at such other

times as WSSA shall notify DRIR of WSSA's need to cross [the Tracks] . . . for access to and from WSSA's National Western Complex," to certain times of day and specific types of operations. See Appendix 4 to Exhibit H.

29. In November 2017, CCD filed a verified notice of exemption with the STB seeking to acquire from WSSA the real property underlying the portions of the Stockyard Lines described in the Easement Deed. CCD also filed a corresponding motion to dismiss that notice of exemption on the basis that its acquisition from WSSA of the real property under the Stockyard Lines qualified as a State of Maine transaction (See Maine Department of Transportation—Acquisition & Operation Exemption—Maine Central Railroad (“State of Maine”), 8 I.C.C.2d 835 (1991), not subject to the Board's jurisdiction because CCD was only acquiring the real property and not acquiring any common carrier obligation. In its Aug 9 Decision, the Board held that the transaction “was not consistent with the State of Maine line of precedent. Because this transaction is therefore not appropriate for dismissal under the State of Maine family of precedent, the [CCD] acquired WSSA's common carrier obligation upon consummation of the transaction and [became] a common carrier subject to the Board's jurisdiction.” See Aug 9 Decision, slip op. at 7.

30. The Aug 9 Decision determined that while DRIR has a current and primary common carrier obligation for the Stockyard Lines, CCD has a residual common carrier obligation -- meaning that if DRIR ever stopped providing rail service, CCD would have to provide that service or seek abandonment/discontinuance authority from the Board.

31. The Board's Aug 9 Decision noted that CCD's November 2017 filings were "part of a plan to consolidate ownership and control of 250 acres of property, including the Denver Stockyards, to redevelop the site as the National Western Center, an agricultural innovation, education, event, and tourism center." Id. at 4. The Board made clear that its Aug 9 Decision only addressed CCD's acquisition of the real property underlying the Stockyard Lines and was not dispositive concerning authority for any future plans that the parties may have. See Aug 9 Decision, FN 3.

32. Since that decision and over the past year, CCD has attempted to reach an agreement with DRIR that would allow for the redevelopment and relocation of the Stockyard Lines. CCD has also had discussions with UP, BNSF, and numerous other customers and shippers. When negotiations have not satisfied its plans, CCD has aggressively moved forward with its relocation/reconfiguration plans absent agreements.

33. Given the findings in the 1996 Adverse Discontinuances proceedings, CCD knows that as long as there are shippers and rail customers using DRIR's service and as long as DRIR's operations remain subject to the STB's jurisdiction it cannot move forward with its redevelopment plans. As a result, CCD is undertaking efforts through negotiations and threats of condemnation to eliminate shippers and customers from using the Stockyard Lines. It continues to use this carrot/stick approach with other DRIR customers as well, and despite a year and half of negotiations with DRIR, it has now terminated its discussions with DRIR without reaching an agreement with DRIR on appropriate replacement tracks and facilities.

34. CCD has also already begun removing what its claims are shipper owned sidetracks and over which DRIR has operated and threatens to remove more tracks that were used by the relocated shippers. CCD's removal of these tracks is currently pending before the Board and in a quiet title action in state court. See Denver Rock Island Railroad Company v. The City and County of Denver, Colorado, FD 36240, NOR 42160 (pending before the Board) and City and County of Denver v. Denver Rock Island Railroad, District Court, City and County of Denver, State of Colorado, Case No. 2019CV34300.

35. In furtherance of its efforts to get around having to file another adverse abandonment/discontinuance application, on December 21, 2018, CCD petitioned for a declaratory order (“Dec. 21 Petition”) from the Board. See Exhibit I. Its petition seeks a finding that CCD’s planned relocation of the Stockyard Lines and its related railroad facilities are not a transaction regulated by the STB. CCD does not assert, nor could it, that the Stockyard Lines are not subject to the STB’s jurisdiction or that DRIR’s operations are not subject to the STB’s jurisdiction. CCD fails to disclose that DRIR has not consented to the Project. It does disclose CCD’s plans to remove and salvage tracks, relocate tracks and railroad facilities, and reconfigure the Stockyard Lines.

36. The Dec. 21 Petition makes it clear that CCD plans to move forward with the Project regardless of whether DRIR consents and regardless of DRIR’s use of the Stockyard Lines to serve shippers and customers in both the Denver Stockyards and the North Washington terminal.

37. Absent DRIR’s consent, the only way that CCD can remove and relocate DRIR’s tracks and railroad facilities is to condemn DRIR’s fee property and easement rights and revoke DRIR’s operating rights – actions that are subject to the exclusive jurisdiction of the STB and are preempted by ICCTA.

CCD HAS NOT OBTAINED DRIR'S CONSENT TO THE PROJECT

38. For the past 26 years, DRIR and its predecessor, DTRC, have invested in and improved its facilities to accommodate shippers' needs, including purchasing and establishing various tracks and facilities in the Denver Stockyards and the North Washington terminal complex. For the past two decades, DRIR has been the primary freight operator on the Stockyard Lines.

39. Not only is DRIR authorized by the Board to provide common carrier and ancillary rail transportation service over the Stockyard Lines. DRIR also owns the vast majority of the tracks, ties, switches, and other track materials located within the Stockyard Lines, NSO and the North Washington terminal. The Easement Deed and the Assignment of the 1976 Easement also give DRIR the property rights to conduct rail operations over the real property underlying the Stockyard Lines.

40. DRIR's STB operating rail rights and tracks are subject to the exclusive jurisdiction of the STB. DRIR's operating rights and tracks cannot be extinguished and removed without DRIR filing for abandonment authority, or an entity other than DRIR filing an application for adverse abandonment and discontinuance of service under 49 U.S.C. 10903(d) so as to remove the STB's

jurisdiction in order to allow application of state property law to condemn and remove DRIR's tracks.

41. Absent DRIR's consent, DRIR's real property and easement rights can only be removed via eminent domain and only after the STB's jurisdiction has been removed.

42. DRIR was first approached concerning CCD's proposed plans for the National Western Center and its desire to relocate/reconfigure DRIR's operations in mid to late 2014. As a result of its preliminary discussions, DRIR provided CCD with the minimum requirements that DRIR would need to continue to be able to provide service to shippers, interchange with BNSF and UP, access maintenance facilities, and maintain current rail operations under the same conditions.

43. In March 2015, CCD commissioned a Rail Consolidation Study, which was not provided to DRIR until April 2016. The Rail Consolidation Study is publicly available.

<https://www.denvergov.org/content/dam/denvergov/Portals/NDCC/documents/NWC/FASTLANEGrant/Final%20Report%20Rail%20Consolidation%20Study%20032315.pdf>. The Rail Consolidation Study ("RCS") recognized that should the DRIR Stockyard Lines be relocated, abandonment authority from the STB would have to be obtained for the Stockyard Lines. Id. at 7.

44. The 2015 Master Plan Recommendations for Rail Consolidation proposed removing the DRIR tracks along the River Corridor and consolidating the tracks into National Western Drive alignment, maintaining DRIR's connection to BNSF, providing through-tracks for DRIR through the National Western Center site to serve industries to the north, developing a Memorandum of Understanding between DRIR and CCD; continuing discussions related to track realignment, track design and DRIR's maintenance facility relocation; developing safe vehicular and pedestrian crossings of the DRIR's tracks, and identifying any track and maintenance facility replacement needs for DRIR off-site, within the City and County of Denver, with the goal to maintain the DRIR's existing through track and rail car storage capacity. RCS at 8.

45. Per the RCS, the next steps for the Project included developing an Agreement between DRIR and CCD for the preliminary and final design for the relocated rail. The document to be developed was to identify the roles and responsibilities of each party, timing, design process, review and approval process, business and track relocation, and funding. Id.

46. From 2016 through late 2017, DRIR and CCD began discussions and negotiations towards remedying the adverse effects of CCD's proposed removal, relocation and reconfiguration on DRIR's operations and provision of rail service

to shippers and allow for the abandonment of railroad operations over the Stockyard Lines. Because the negotiations appeared to be productive and the Project appeared to be likely to move forward, DRIR supported a Fastlane application to help fund the Project.

47. In 2017, however, resolution of the adverse effects was hindered by CCD's lack of specificity concerning the effects of consolidating multiple carriers' operations into a single corridor, failure to reach an agreement on the basic requirements necessary to ensure that the proposed removal, relocation and reconfiguration of approximately 21,000 feet of STB-regulated track and railroad maintenance and office facilities does not interfere with DRIR's operations, and failure to execute documents (such as a construction agreement and an operation and maintenance agreement) so as to ensure that the Project does not interfere with DRIR's provision of service during construction and afterwards.

48. Negotiations and discussions continued throughout 2018. Negotiations addressed issues pertaining to construction, replacement facility requirements, relocation issues (both with respect to DRIR's new facilities and relocation of shipper facilities served by DRIR), compatibility with BNSF's facility (profile grade variance to ensure connectivity to BNSF), salvage of existing facilities, construction of traffic and rail signals, and the CCD's payment to DRIR,

which was necessary for DRIR, a small shortline carrier, to begin to acquire some of the replacement facilities it would need to continue to carry out its common carrier obligation.

49. Even if CCD was to renew its recent offer to replace the 11,400 feet of track it recently proposed to replace, a total of 9,000 feet of track necessary for DRIR to serve shippers consistent with how it does today would be lost forever and such a loss will significantly adversely impact DRIR's service to its shippers.

50. CCD and DRIR were close to a final agreement. Progress was made, but no agreements have been reached or executed.

51. The Project, without CCD reaching appropriate agreements with DRIR, will also e DRIR from expanding service to its shippers in the future.

52. The Dec. 21 Petition makes it clear that CCD seeks to move forward with the Project with or without DRIR's consent and without seeking appropriate adverse abandonment authority from the Board.

53. As of the date of this filing, no agreements have been finalized or executed to ensure that CCD's proposed removal, relocation and reconfiguration of approximately 21,000 feet of STB-regulated track and railroad maintenance and office facilities does not interfere with DRIR's provision of service to shippers, which is why DRIR was forced to bring this action.

54. The only way to ensure that CCD's proposed Project does not interfere with DRIR's common carrier obligation and provision of service to shippers is for CCD and DRIR to reach an agreement in writing, which meets the minimum requirements that DRIR would need to continue to be able to provide service to shippers, exchange with BNSF, access maintenance facilities, and maintain current rail operations under the same conditions.

THE PROJECT HAS AND WILL CONTINUE TO INTERFERE WITH DRIR'S PROVISION OF RAIL SERVICE TO ITS SHIPPERS

55. As a common carrier, DRIR is required to provide rail service at reasonable rates and upon reasonable request over the Stockyard Lines. DRIR cannot abandon or discontinue its common carrier service without authority from the STB pursuant to 49 U.S.C. §10903, nor can a third party entity, such as CCD, force DRIR to abandon or discontinue its service without first obtaining adverse abandonment/discontinuance from the STB. 1996 Adverse Discontinuances.

56. DRIR also provides non-common carrier rail operations pursuant to 49 U.S.C. 10906. While DRIR can abandon or discontinue such Section 10906 operations without prior authorization from the STB, such operations are also within the exclusive jurisdiction of the STB and are governed by ICCTA. A third party must seek a petition for declaratory order from the STB if it seeks to remove such 10906 tracks and operations from the STB's jurisdiction. Pinelawn

Cemetery--Pet. for Declaratory Order, FD 35468 2017 STB LEXIS 43, *2 (STB served Apr. 21, 2015).

57. Not only is DRIR authorized by the Board to provide common carrier service, but the Easement Deed and the Assignment of the 1976 Easement, give DRIR distinct property rights for as long as DRIR is using such rights for the purpose of conducting operations as a rail carrier. The Easement Deed prohibits CCD from interfering with DRIR's operations.

58. The actions CCD has taken and proposes to take with respect to the Project has and will significantly impair DRIR's existing and future operations and is an unlawful attempt to manage and regulate DRIR's operations, practices, routes, services, and facilities contrary to ICCTA.

59. 49 U.S.C. § 10501(b), gives the Board exclusive jurisdiction over transportation by rail common carriers and the facilities used by such carriers to provide freight rail service, and forbids local and state governments from regulating freight railroad transportation as the Defendant is attempting to do.

A. CCD Has Already Interfered With DRIR's Easement And Railroad Rights Under ICCTA

60. CCD has already caused DRIR to suffer a loss of rail traffic and permanent damages. In 2018, CCD caused three shippers (Crystal Packaging, Rocky Mountain Colby Pipe, and International Paper) to relocate away from the

Stockyard Lines by threatened and actual condemnation of their property if they did not voluntarily agree to relocate to make way for a proposed improvement of National Western Center facilities. Those shippers relocated to sites that do not use DRIR services. In the most recent year in which those three shippers were located on the Stockyard Lines, those shippers' collective rail traffic totaled 300 cars – traffic that DRIR has permanently lost.

61. CCD has also removed sidetracks previously used by DRIR to provide Section 10906 operations and without obtaining prior approval from the STB that the public convenience and necessity required or permitted the removal of those tracks. See Denver Rock Island Railroad Company v. The City and County of Denver, Colorado, FD 36240, NOR 42160 (pending before the Board).

B. Moving Forward With the Project As Proposed Without DRIR's Consent Will Result In Further Interference With DRIR's Continued Operations Over the Stockyard Lines

62. Because DRIR is a carrier subject to the STB's jurisdiction, DRIR has common carrier rights and obligations and Section 10906 rights to use the Stockyard Lines.

63. DRIR uses the Stockyard Lines for common carrier service, interchange purposes, staging, storage, and transloading, all of which are rail carrier functions subject to the exclusive jurisdiction of the STB. Without the

consent and concurrence of DRIR, CCD's efforts to undertake the Project will result in the regulation, management, and interference with DRIR's rail transportation in violation of ICCTA. The paragraphs that follow are offered as examples of just some of the ways the Project will interfere with DRIR's provision of rail service.

64. CCD's proposed condemnation and removal, relocation and reconfiguration of the Stockyard Lines will result in a loss of approximately 9,000 feet of STB jurisdictional track regularly used by DRIR in its rail operations, which is equivalent to approximately 45% of all track that comprises the Stockyard Lines.

65. Section 10906 tracks (side, spur, and yard tracks) are used by railroads to sort, stage, block, switch and park railcars and trains to allow other railroad operations. DRIR uses the Stockyard Lines not only for common carrier service but also to conduct Section 10906 operations. DRIR also uses the Stockyard Lines to allow for trains to pass one another, to sort rail cars for interchange to and from BNSF & UP, and to store rail cars.

66. Loss of the 9,000 feet of tracks as proposed by the Project will materially interfere with DRIR's rail operations and adversely impact DRIR's ability to provide rail transportation services to its shippers and rail customers that

use the Stockyard Lines. The loss of such a significant amount of DRIR's tracks without reaching an agreement with DRIR to replace the lost trackage and remedy the adverse effect of CCD's proposed removal, relocation and reconfiguration on DRIR's operations and provision of rail transportation to its shippers and customers would cause an adverse material and financial impact on both DRIR and its shippers.

67. The Project will require the removal and relocation of almost all of the Stockyard Lines tracks and result in the loss of critical side and storage tracks, some of which not only does DRIR operate over, but DRIR also owns the underlying right of way via fee, not easement.

68. The City's Dec. 21 Petition acknowledges that it intends to reconfigure, remove, and relocate DRIR's tracks and related railroad facilities but claims the Project will not interfere with DRIR's rail operations. However, the City ignores that any attempt to remove tracks and reconfigure DRIR's operations is an attempt to regulate and manage DRIR's rail operations without an agreement with DRIR and contrary to ICCTA.

69. Not only is the Project an attempt to regulate and interfere with DRIR's rail transportation services, but the proposed Project also violates the terms of the Easement Deed. The only way to ensure that construction does not impact

DRIR's operations would be for CCD to enter into a mutually agreed upon construction agreement with DRIR, which it is seeking to avoid doing.

70. Allowing the City to move forward with its removal, relocation and reconfiguration Project without reaching an agreement with the only carrier providing service over the Stockyard Lines would materially injure DRIR's operations and financial structure. DRIR would also lose all area for staging, storage and transloading. Indeed, even if CCD reaches an agreement with McDonald Farms, DRIR's largest shipper on the Stockyard Lines, to relocate its operations, there are still two other customers on the Stockyard Lines whose service would be disrupted. The other shippers not located on the Stockyard Lines but whose service nonetheless depends upon DRIR's ability to provide adequate staging, storage, and transloading on the Stockyard Lines will likewise suffer adverse effects on service.

71. Another problem is that the Project does not account for the fact that DRIR would also need a grade variance to ensure continued connectivity with BNSF. While BNSF and DRIR have reached an agreement in principle, nothing has been finalized because CCD and DRIR have not reached a final agreement on the design and location of DRIR's replacement and relocated tracks, which are necessary predicates for determining how and where BNSF and DRIR would

continue to connect. By CCD's own admission, as of December 2018, its relocation rail design plans were only 60% complete. Yet, CCD wants DRIR to sign off on the Project, despite not knowing whether connectivity with BNSF (or UP for that matter) can be preserved or whether replacement tracks will be built and available so DRIR can continue to conduct its operations to its shippers consistent with the type and level of service provided today.

72. CCD and DRIR have also yet to reach an agreement governing the timing of the various construction elements of the Project so that the removal and relocation of the Stockyard Lines will not occur until sufficient replacement tracks have been built. Indeed, CCD has even gone so far as to withdraw its offer to provide DRIR with the financial resources necessary to acquire property and build replacement tracks. Without such a construction agreement and the financial resources necessary to find replacement tracks, DRIR's shippers will be adversely impacted by the Project.

73. Likewise, there is no agreement governing the construction and maintenance of new traffic and rail signals that would necessary for DRIR to provide rail transportation over the new roads and crossings proposed by the Project. Yet Again, CCD wants DRIR to sign off on the removal, relocation and reconfiguration without resolving this critical and costly issue.

74. Absent adequate protections the Project will interfere with DRIR's rights and responsibilities as a rail carrier subject to the exclusive jurisdiction of the STB. Specifically, the removal, relocation and reconfiguration of approximately 21,000 feet of STB-regulated track and railroad maintenance and office facilities will interfere with DRIR's ability to provide rail transportation service to its shippers and customers. It will significantly change the alignment, track capacity, and current operating structure of the Stockyard Lines and permanently remove without replacing 9,000 feet of track, which is vital to DRIR's common carrier service.

COUNT ONE

Declaratory Judgment (28 U.S.C. § 2201) **Federal Preemption under ICCTA**

75. The preceding paragraphs are incorporated herein by reference.

76. A justiciable controversy exists between the parties regarding CCD's attempt to regulate and manage DRIR's tracks, operations, routes, services, and practices, which are within the exclusive jurisdiction of the STB.

77. Fed. R. Civ. P. 57 and 28 U.S.C. § 2201 provides this Court with the authority to declare the rights and other legal relations of the Parties with respect to this controversy.

78. Pursuant to ICCTA, the actions to be undertaken by CCD are specifically preempted by federal law and cannot be undertaken because they would interfere with and manage DRIR's rail operations directly contrary to federal law.

79. Specifically, under 49 U.S.C. § 10501(b):

“The jurisdiction of the [STB] over—

(1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and

(2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State,

is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to the regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.”

80. “Transportation” is broadly defined in ICCTA, 49 U.S.C. § 10102(9), and includes:

(A) a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use; and

(B) services related to that movement, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property.

81. ICCTA defines “rail carrier” in 49 U.S.C. § 10102(5) as a person providing common carrier railroad transportation for compensation., but does not include street, suburban, or interurban electric railways not operated as part of the general system of rail transportation.

82. DRIR is a “rail carrier” as defined in 49 U.S.C. § 10102(5). Defendant’s plans to realign, relocate, reconstruct, and remove mainline tracks, sidetracks, and railroad maintenance and office facilities along the Stockyard Lines that are critical for DRIR’s common carrier operations will constitute the regulation of DRIR’s rail transportation services and abandonment of DRIR’s tracks in violation of Section 10501(b). Such actions are preempted under ICCTA (under either a per-se or an as-applied analysis). See cases cited in ¶ 15.

83. DRIR lacks an adequate remedy at law because damages for injuries it will sustain for this Count would be difficult, if not impossible, to determine.

COUNT TWO

Federal Commerce Clause

84. The preceding paragraphs are incorporated herein by reference.

85. All actions of CCD alleged herein have been and will be under color of state law.

86. In attempting to move forward in its relocation/reconfiguration of DRIR's facilities without DRIR's consent and concurrence, the Defendant is attempting to directly regulate interstate commerce and/or engaging in regulatory activities that discriminate against and unduly burdens interstate commerce.

87. Such activity violates the Commerce Clause of the United States Constitution.

88. DRIR lacks an adequate remedy at law because damages for injuries it will sustain for this Count would be difficult, if not impossible, to determine.

COUNT THREE

Breach of Contract (Easement Deed and Agreement for Resolution of Disputed Issues)

89. The preceding paragraphs are incorporated herein by reference.

90. WSSA, the predecessor to CCD, and DRIR entered into the Agreement for Resolution of Disputed Issues in connection with the Easement Deed. CCD, as the purchaser of the real estate owned by WSSA stands in the shoes of WSSA for purposes of the agreement.

91. The Easement Deed was given pursuant to, and is governed by the agreement entered into of even date herewith by Grantor and Grantee entitled Agreement for Resolution of Disputed Issues. Appendix 2 to Exhibit H.

92. Paragraph 2 of the terms of the Agreement for Resolution of Disputed Issues granted DRIR a nonexclusive rail easement over the Stockyard Lines, so long as the property is used for rail purposes. The terms also prohibited WSSA (now CCD) from interfering with DRIR's railroad operations.

93. By seeking authority to relocate DRIR's operations without DRIR's consent, even if the STB's jurisdiction is removed, the Project will interfere with DRIR's railroad easement. As such, CCD is breaching the terms of the Agreement for Resolution of Disputed Issues and DRIR's rights pursuant to the Easement Deed.

94. As a direct result of CCD's breach of DRIR's easement rights, DRIR will be damaged in an amount to be determined at trial.

REQUEST FOR RELIEF

WHEREFORE, DRIR respectfully requests that the Court:

95. Enter judgment in favor of DRIR against the Defendant;

96. Declare that Defendant's efforts to remove and relocate DRIR's tracks and railroad facilities as planned by the Project are preempted by ICCTA.

97. Declare that Defendant's efforts to remove and relocate DRIR's tracks and railroad facilities as planned by the Project violates the United States

Constitution and would discriminate against and unduly burden interstate commerce;

98. Enjoin the Defendant from taking further actions that would attempt to regulate, manage, or otherwise interfere with DRIR's provision of its railroad transportation services contrary to ICCTA;

99. Award damages to DRIR for CCD's breach of DRIR's easement rights in an amount to be determined at trial.

100. Award DRIR its attorneys' fees and costs; and

101. Enter an Order for any such other and further relief as allowed by law or determined to be just and appropriate.

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