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206129 August 28, 2002

VIA FEDERAL EXPRESS

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

ENTERED
Office of Proceedings

AUG 29 2002

Part of
Public Record



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

Dear Secretary Williams:

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

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

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

Respectfully submitted,

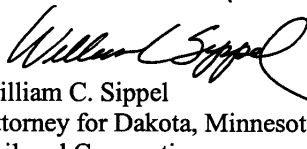
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AUG 29 2002

SURFACE
TRANSPORTATION BOARD
WCS:tjt

Enclosures

cc: Parties on Certificate of Service


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

FILED

AUG 29 2002

SURFACE
TRANSPORTATION BOARD

ORIGINAL

BEFORE THE
SURFACE TRANSPORTATION BOARD

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

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



APPLICATION FOR TERMINAL TRACKAGE RIGHTS

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

Dated: August 28, 2002

BEFORE THE
SURFACE TRANSPORTATION BOARD

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

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



APPLICATION FOR TERMINAL TRACKAGE RIGHTS

I. INTRODUCTION

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

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

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

II. DESCRIPTION OF THE TERMINAL TRACKAGE AND PERTINENT AGREEMENTS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

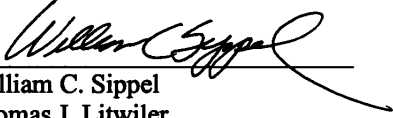
In Union Pacific -- Control -- Missouri Pacific, Western Pacific, 366 I.C.C. 459, 574-76 (1982), aff'd, Southern Pac. Transp. Co. v. ICC, 736 F.2d 708, 722-23 (D.C. Cir. 1984), cert. denied, 469 U.S. 1208 (1985), the ICC gave the parties the opportunity to negotiate compensation terms for terminal trackage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

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

IV. CONCLUSION

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

Respectfully submitted,

By: 

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

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

Dated: August 28, 2002

**VERIFIED STATEMENT
OF
ROBERT L. WESSLER**

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

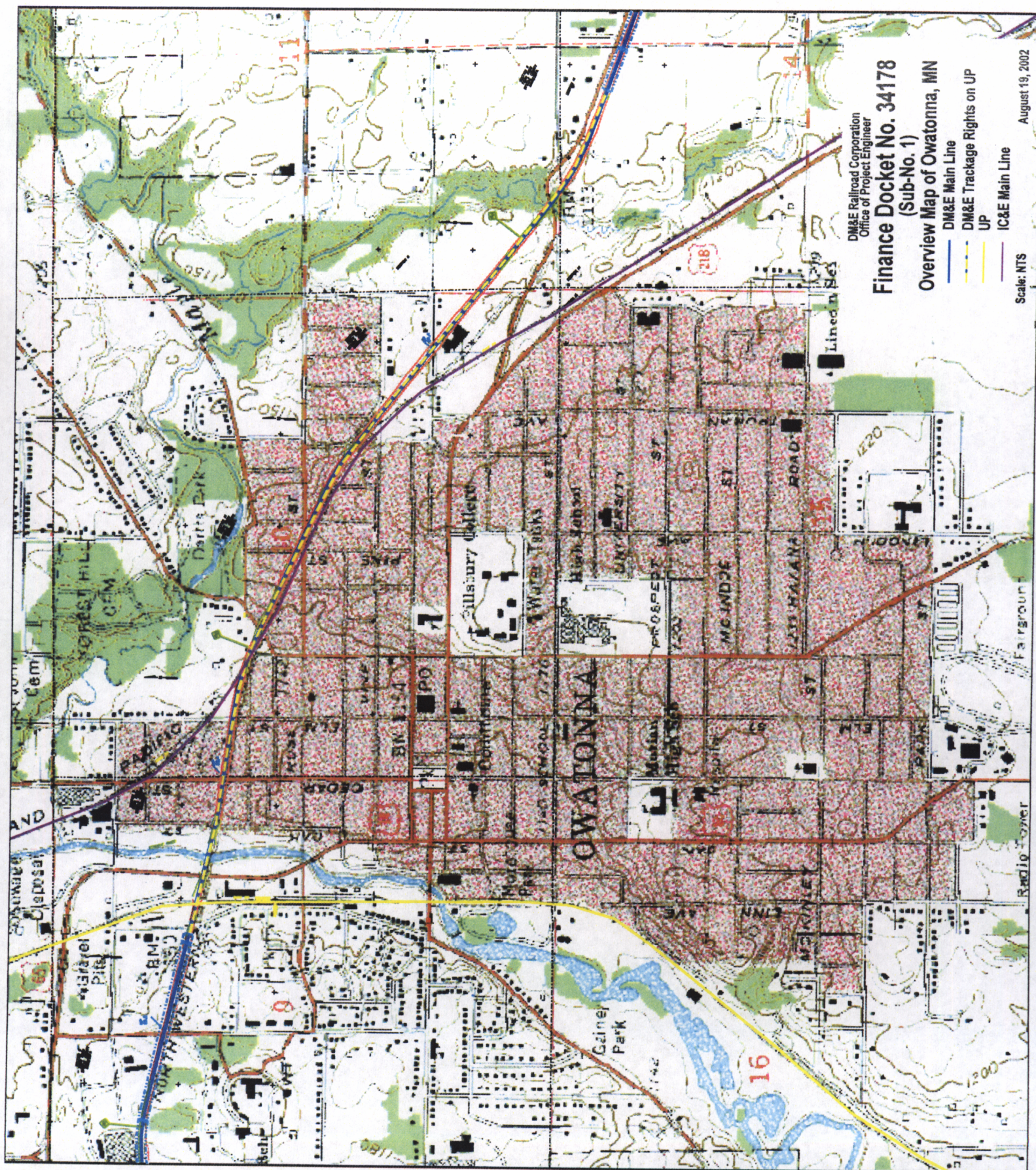
In my 23 years in the railroad industry, I have held various positions in the operating departments of the Missouri Pacific, the Santa Fe and the DM&E. I joined DM&E in June, 1997 as Superintendent of Transportation and was named Chief Transportation Officer in July, 2002 of this year. I am familiar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

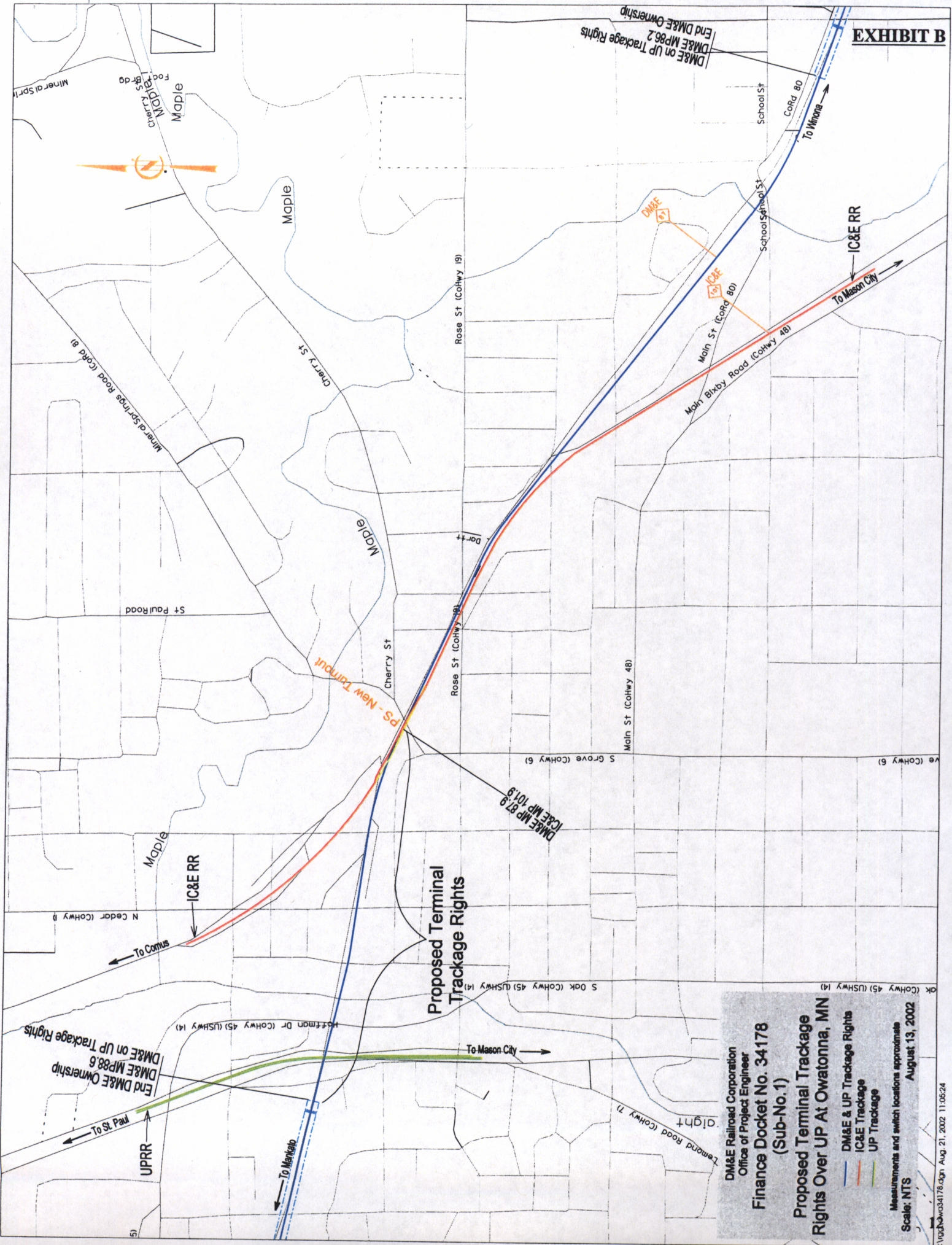
The purpose of this statement is to describe the Owatonna terminal trackage and operations involved in the DM&E's application for terminal trackage rights in Finance Docket No. 34178 (Sub-No. 1).

A. Description of Trackage and Rail Operations.

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

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





DM&E Railroad Corporation
Office of Project Engineer
Finance Docket No. 34178
(Sub-No. 1)
Proposed Terminal Trackage
Rights Over UP At Owatonna, MN

DM&E & UP Trackage Rights
IC&E Trackage
UP Trackage

Measurements and switch locations approximate
Scale: NTS
August 13, 2002

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

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

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

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

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

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

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

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

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

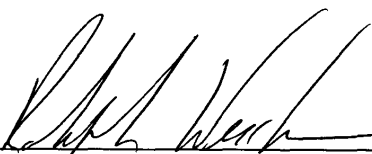
Operation of the proposed terminal trackage rights will not substantially impair the ability of UP to handle its own business. In fact, it won't have any effect on UP operations over the terminal trackage. As discussed above, DM&E is the only operator on that trackage. UP does not conduct any operations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

I urge the Board to approve the application.

VERIFICATION

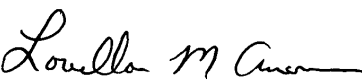
State of South Dakota)
) SS:
County of Brookings)

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



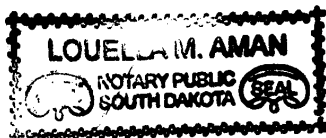
Robert L. Wessler

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



Notary Public

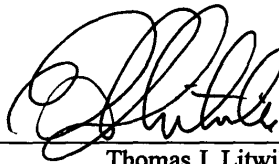
My Commission expires: 6-2-05



CERTIFICATE OF SERVICE

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

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

A handwritten signature in black ink, appearing to read 'T. Litwiler', is written over a horizontal line.

Thomas J. Litwiler