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November 14, 2002

BY HAND

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001



206642

Re: Finance Docket No. 34178, Dakota, Minnesota & Eastern Railroad Corporation and Cedar American Rail Holdings, Inc. – Control – Iowa, Chicago & Eastern Railroad Corporation

Dear Secretary Williams:

FD 34178-1 206643

I have enclosed for filing in the above-captioned proceeding an original and 25 copies of the "Public" version of the Comments of Union Pacific Railroad Company.

Under separate cover, I am filing an original and 25 copies of the "Highly Confidential" version of Union Pacific's Comments. The "Public" version has been served on all parties of record. The "Highly Confidential" version has been served only on the applicants' outside counsel. Outside counsel for parties of record who wish to obtain a copy of the "Highly Confidential" version of Union Pacific's Comments should contact the undersigned.

A 3.5-inch disk containing the text of the Comments in a format compatible with WordPerfect 9.0 was filed with the "Highly Confidential" version.

I have also enclosed one extra copy of the "Public" version of Union Pacific's Comments. Please date-stamp and return the extra copy to our messenger.

Thank you for your assistance.

Sincerely,

ENTERED
Office of Proceedings

NOV 15 2002

Part of
Public Record

Michael L. Rosenthal

cc: All Parties of Record

REDACTED – To Be Placed on Public File

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 34178

DAKOTA, MINNESOTA & EASTERN RAILROAD CORPORATION
AND CEDAR AMERICAN RAIL HOLDINGS, INC.
– CONTROL –
IOWA, CHICAGO & EASTERN RAILROAD CORPORATION



Finance Docket No. 34178 (Sub-No. 1)

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

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COMMENTS OF UNION PACIFIC RAILROAD COMPANY

Part of
Public Record

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November 14, 2002

Contains Color Images

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BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 34178

DAKOTA, MINNESOTA & EASTERN RAILROAD CORPORATION
AND CEDAR AMERICAN RAIL HOLDINGS, INC.
– CONTROL –
IOWA, CHICAGO & EASTERN RAILROAD CORPORATION

Finance Docket No. 34178 (Sub-No. 1)

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

COMMENTS OF UNION PACIFIC RAILROAD COMPANY

Union Pacific Railroad Company (“UP”) opposes the application for terminal trackage rights over its trackage in Owatonna, Minnesota, filed by Dakota, Minnesota & Eastern Railroad Corporation (“DM&E”) in Finance Docket No. 34178 (Sub-No. 1). A grant of terminal trackage rights would be contrary to the public interest. Moreover, DM&E is not entitled to terminal trackage rights under 49 U.S.C. § 11102 and the Board’s competitive access standards.

In its primary application, DM&E seeks approval to control Iowa, Chicago & Eastern Railroad Corporation (“IC&E”) through Cedar American Rail Holdings, Inc.¹ DM&E claims that terminal trackage rights are “necessary” to establish an interchange with IC&E and that, without such relief, the railroads would be “unable to effectuate” new routings made

¹ UP takes no position on the primary application filed in Finance Docket No. 34178.

possible by the control transaction. See Terminal App. at 3.² However, DM&E has already obtained the authority necessary to construct a connection with IC&E in Owatonna. Moreover, UP is prepared to negotiate an agreement under which DM&E would be permitted to connect with IC&E via existing trackage in Owatonna. Board intervention is thus both unnecessary and undesirable, as it would interfere with the parties' reaching a negotiated agreement. One way or the other, DM&E will connect with IC&E without Board involvement, and it would disserve the public interest for the Board to short-circuit efforts to reach a marketplace solution.

Even if the Board were inclined to intervene, it could not grant the rights requested by DM&E. Under 49 U.S.C. § 11102, the Board's authority to grant one rail carrier access to another's trackage is limited to "terminal facilities," but DM&E's request involves no such facilities. The UP trackage at Owatonna over which DM&E operates (the "Owatonna trackage") is a short segment of DM&E's main line that is used only for overhead operations, and there are no terminal facilities in or near Owatonna. Moreover, even if the Owatonna trackage were a terminal facility, DM&E could not show that terminal trackage rights are necessary to remedy or prevent anticompetitive conduct by UP. DM&E thus could not satisfy the applicable legal test for obtaining trackage rights through regulatory intervention rather than the marketplace.

UP's Comments are supported by the Verified Statement of Jerald B. Groner, UP's Senior Manager - Interline Marketing. Mr. Groner, who was employed by the Chicago and North Western Transportation Company ("CNW") prior to the UP-CNW merger, has been

² We use the abbreviation "Terminal App." to refer to DM&E's Application for Terminal Trackage Rights, dated August 28, 2002. Page references are to the consecutive numbering used in the filing.

involved in matters concerning DM&E from the original sale negotiations that led to the formation of DM&E in 1986 to the present.

In Part I of UP's Comments, we provide an overview of the Owatonna trackage and discuss DM&E's options for developing a connection with IC&E in Owatonna. We show that a grant of terminal trackage rights is both unnecessary and contrary to the public interest. In Part II, we show that the Owatonna trackage is not a terminal facility under 49 U.S.C. § 11102 and that DM&E could not, in any event, obtain terminal trackage rights under the Board's competitive access standards.

I. A GRANT OF TERMINAL TRACKAGE RIGHTS OVER UP'S OWATONNA TRACKAGE WOULD NOT BE IN THE PUBLIC INTEREST

DM&E argues that a grant of terminal trackage rights at Owatonna is in the public interest because "it is necessary to permit a connection between DM&E and IC&E and to allow the parties, shippers and the public to realize" the asserted benefits of DM&E-IC&E common control. DME-2 at 7; see also Terminal App. at 3, 8. DM&E, however, has a distorted view of both the facts and the public interest. DM&E does not need terminal trackage rights in order to connect with IC&E at Owatonna. It can build the new connection that the Board approved in Dakota Minnesota & Eastern Railroad Corporation Construction into the Powder River Basin, STB Finance Docket No. 33407 (STB served Jan. 30, 2002) ("PRB Construction"), slip op. at 19. Or it can pursue a negotiated agreement with UP to obtain additional rights permitting it to connect with IC&E using UP trackage in Owatonna. Indeed, it is in UP's and DM&E's interest to reach such an agreement, unless the Board eliminates DM&E's incentive to negotiate by granting its terminal trackage rights request.

In these circumstances, the public interest would be best served by denying DM&E's request. Achieving a connection between DM&E and IC&E is not at stake here. At

stake is the public's interest in having commercial issues resolved through private negotiations rather than Board-imposed outcomes.

A. DM&E Elected to Purchase Only Overhead Trackage Rights at Owatonna

As DM&E acknowledges, it cannot connect with IC&E at Owatonna today because it operates through Owatonna under an agreement with the former CNW granting it overhead rights only. See Terminal App. at 4; Groner V.S. at 35-37.³ In an effort to add weight to its request for a forced expansion of its rights, DM&E asserts that its existing trackage rights agreement contains "anti-competitive paper barriers." See DME-2, Schieffer V.S. at 63; see also DME-2 at 7. However, the agreement to grant overhead rights was decidedly pro-competitive.

As Mr. Groner explains, CNW agreed to sell its lines for reduced up-front compensation – the purchase price was close to liquidation value – because it expected DM&E to feed its on-line traffic to the CNW (now UP) system. Groner V.S. at 33 & n.1. A key element of this feeder-line structure was CNW's retention of various segments of trackage over which DM&E received overhead trackage rights. Id. at 33. As the ICC observed in 1995, the package of agreements between CNW and DM&E – including the trackage rights agreement at issue here – established a relationship "no different from that between numerous feeder line spinoffs and the class I railroads of which they were previously a part." Union Pacific Corp., Union Pacific R.R., & Missouri Pacific R.R. – Control – Chicago & North Western Transportation Co. & Chicago & North Western Ry., ICC Finance Docket No. 32133, (ICC served Mar. 7, 1995), slip op. at 100-01.

³ The UP segment over which DM&E operates is shown on the map attached as Exhibit 1.

The structure of the DM&E spinoff was as much DM&E's choice as CNW's. CNW was willing to negotiate a sale of the Owatonna trackage, but DM&E chose not to pursue the opportunity. The reason was simple: acquiring overhead trackage rights saved DM&E significant funds. As DM&E's Lynn Anderson explained in testimony before the ICC in 1992, DM&E did not "follow through and acquire the segments" because "[i]t would have involved substantial additional dollars." Chicago & North Western Transportation Co. Abandonment Between Norfolk and Chadron, NE, ICC Docket No. AB-1 (Sub-No. 230), Transcript of Oral Hearing, Feb. 4, 1992 at 90-91 (examination of Lynn A. Anderson, DM&E Vice President Marketing & Public Affairs) (attached as Exhibit 3).⁴

Far from being "anticompetitive," therefore, DM&E's acquisition of only overhead trackage rights at Owatonna was an integral part of the pro-competitive transaction that formed DM&E in 1986, thereby preserving service over several hundred miles of light-density former-CNW lines across southern Minnesota and South Dakota and making possible DM&E's proposal to use those lines to provide new competition for Powder River Basin coal shipments. *Groner V.S.* at 37-38. And there is certainly nothing anticompetitive about a trackage rights agreement that grants overhead rights only. As the Board is aware, overhead trackage rights are common in the railroad industry and ordinarily do not allow the tenant to connect with other carriers via the owner's trackage. *Id.* at 36-37; see also Union Pacific Corp., Union Pacific R.R. & Missouri Pacific R.R. – Control & Merger – Southern Pacific Corp., Southern Pacific Transportation Co., St. Louis Southwestern Ry., SPCSL Corp. & The Denver & Rio Grande

⁴ Mr. Andersen is now DM&E's Vice President Marketing and Corporate Secretary. According to his verified statement submitted with the primary application in this case, he was "directly involved in the formation of the DM&E." DME-2, *Anderson V.S.* at 67.

Western Ry., STB Finance Docket No. 32760 (Sub-No. 21) (STB served Nov. 8, 2001), slip op. at 10 (refusing to nullify entry/exit restrictions on overhead trackage rights acquired by BNSF).

B. DM&E Will Connect With IC&E at Owatonna Without Board Intervention

DM&E is now asking the Board to grant it rights that it decided not to purchase when it was formed in 1986. For that reason alone, Board intervention would be inappropriate. But DM&E's request for terminal trackage rights is especially inappropriate in this case because DM&E has several options for achieving a connection with IC&E at Owatonna without Board intervention. DM&E is well aware of those options, but apparently hopes the Board will grant the rights it wants free of charge, thereby bypassing the need to negotiate with UP or build its own new connection.

1. DM&E Can Build Its Own Connection

If DM&E wishes to connect with IC&E at Owatonna, it can do so simply by carrying out its authority to build a connecting track between its own line just east of Owatonna and IC&E's line just south of Owatonna.⁵ That 1.7-mile connecting track – the so-called “Alternative O-4” – was approved by the Board in PRB Construction without significant environmental or other conditions.⁶ Indeed, although DM&E sought approval for the new construction in connection with its proposed Powder River Basin expansion, it told the Board that it intended to build the connection whether or not it started running coal trains through Owatonna. In comments submitted to the Board's Section of Environmental Analysis (“SEA”)

⁵ DM&E's agreements with CNW (now UP) contain no restrictions that would prevent DM&E from building such a connection and operating across UP trackage to reach it. Groner V.S. at 46.

⁶ See PRB Construction at 19; see also Groner V.S. at 46-47. The O-4 connection is depicted on the map attached as Exhibit 1.

in August 1999, DM&E explained that the Owatonna project was a "connection we expect will be built regardless of the project in question [i.e., the Powder River Basin extension] because of the stand-alone rail service improvement and related competitive opportunities."⁷ DM&E's application in this case acknowledges that DM&E has the authority to build the Alternative O-4 connection. See Terminal App. at 6. DM&E makes no claim that it faces any barriers to building or using such a connection to handle DM&E-IC&E traffic.⁸

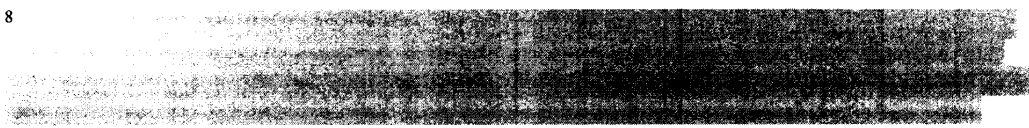
2. A Negotiated Agreement Is Likely If the Board Does Not Intervene

Because DM&E has the authority to build a connection with IC&E at Owatonna, the likelihood is that – unless the Board intervenes – DM&E and UP will negotiate an agreement granting DM&E the additional rights it needs to connect with IC&E via existing UP trackage. Such an agreement would obviate the need to build the new connection.

Both UP and DM&E have strong incentives to reach such an accommodation. UP knows that DM&E could simply build the new connection without seeking UP's approval, in which case UP would gain nothing. It is therefore strongly in UP's interest to reach agreement with DM&E so that UP receives at least some consideration. DM&E, on the other hand, knows that an agreement with UP would save it the cost of building a new connection. It therefore has an equally strong incentive – again, absent Board action giving DM&E what it wants for free – to reach agreement under which it pays UP some amount less than the cost of construction. Logic compels the conclusion that UP and DM&E will agree on consideration valued

⁷ Letter from Kevin V. Schieffer, DM&E President & CEO, to STB Section of Environmental Analysis, dated Aug. 12, 1999, Att. B.2 (attached as Exhibit 4).

⁸



somewhere between zero and the cost of new construction. UP has been and remains willing to negotiate such an agreement. Groner V.S. at 47-49.

Before it filed its terminal trackage rights application, DM&E recognized UP's entitlement to compensation for the additional rights it is requesting and expressed confidence that a privately negotiated agreement would be reached. In 2001, in comments on the SEA's Draft Environmental Impact Statement in PRB Construction, DM&E explained that it was seeking authority to build the Alternative O-4 connection as a predicate for a "mutually agreeable compromise with UP." DM&E Comments on Draft EIS, filed Mar. 7, 2001 at 29 (attached as Exhibit 6). DM&E intended to build the connection only "if for inexplicable reasons" it was unable to reach such a compromise. Id. "But DM&E [did] not believe that [construction was] either necessary or likely." Id. As DM&E explained: "Common sense will prevail. DM&E has a good, positive working relationship with UP and this is a straight-forward business issue. UP can and should expect reasonable compensation in reaching an agreement, and the cost of constructing [a new connection] provides all the common sense incentive in the world for both parties to take the logical path of a negotiated agreement." Id. at 29-30. UP agrees, and it is prepared to take the path DM&E described in 2001. Groner V.S. at 49.

DM&E's trackage rights request, however, would cut off the path to a negotiated resolution by eliminating any incentive for DM&E to reach a "mutually agreeable compromise." To be sure, DM&E would be required to pay compensation at a level determined by condemnation principles. See Terminal App. at 9; see also Union Pacific/Southern Pacific Merger, 1 S.T.B. 233, 449 n.215 (1996). But DM&E has taken the position in discussions with UP that UP is not entitled to any additional compensation beyond that already paid for DM&E's use of UP's trackage. Groner V.S. at 45. In other words, DM&E expects to use the additional

rights for free, and thus, if the Board grants those rights, its incentive to negotiate with UP would disappear.

The public interest balance thus tilts sharply against granting the rights DM&E seeks. As demonstrated above, Board action is not needed to avoid the construction of "wholly redundant facilities," as DM&E suggests (Terminal App. at 8), since a negotiated compromise is likely absent Board intervention. Nor would Board-granted rights offer any timing advantage. A negotiated agreement could be implemented just as quickly, and even if DM&E ultimately chooses to build a new connection, the construction would not unduly delay realizing any of the purported benefits arising from DM&E-IC&E common control.⁹

The only "benefit" flowing from a grant of terminal trackage rights is that the price DM&E would pay for the right to connect with IC&E would be established by the Board rather than through negotiations with UP. This may be a benefit to DM&E, but it is not a public benefit. As the Board has repeatedly recognized, the public interest lies in the resolution of these sorts of "straight-forward business issue[s]" through private negotiations. See, e.g., 49 U.S.C. § 10101(2) (policy "to minimize the need for Federal regulatory control over the rail transportation system"); Canadian National Ry., Grand Trunk Corp. & Grand Trunk Western R.R. – Control – Illinois Central Corp., Illinois Central R.R., Chicago, Central & Pacific R.R. & Cedar River R.R., STB Finance Docket No. 33556 (STB served May 25, 1999) ("CN/IC"), slip

⁹ In any event, DM&E could not start moving significant traffic via a new Owatonna connection until it completes a rehabilitation of IC&E's line between Owatonna and Mason City, Iowa. That trackage is in horrible condition today. It consists mostly of FRA excepted track that must be upgraded before it will support significant traffic. Groner V.S. at 49 n.8.

That project will take time, eliminating any immediate need for a connection between DM&E and IC&E at Owatonna. Groner V.S. at 49 n.8.

op. at 53 (“We prefer and encourage the parties to resolve these sorts of issues, which have little nexus to the merger, through private negotiations.”); San Jacinto Rail Ltd. – Construction Exemption – & The Burlington Northern & Santa Fe Ry. – Operation Exemption – Build-Out to the Bayport Loop Near Houston, Harris County, TX, STB Finance Docket No. 34079 (STB served July 19, 2002) (“San Jacinto Rail”), slip op. at 6 n.5 (“The Board’s policy is to encourage private sector dispute resolution whenever possible . . .”). DM&E’s attempt to short-circuit the negotiation process is inconsistent with the Board’s stated policy and contrary to the public interest.

II. THE REQUESTED TERMINAL TRACKAGE RIGHTS DO NOT SATISFY THE CRITERIA OF 49 U.S.C. § 11102

Even if the Board were inclined to intervene, it could not grant the rights requested by DM&E. The Board may grant terminal trackage rights only if the Owatonna trackage is a terminal facility, and then only if DM&E meets the competitive access standards announced in Midtec Paper Corp. v. Chicago & North Western Transportation Co., 3 I.C.C.2d 171 (1986), *aff’d sub nom. Midtec Paper Corp. v. United States*, 857 F.2d 1487 (D.C. Cir. 1988). As we explain below, the Owatonna trackage is not a terminal facility, and even if it were, DM&E fails to meet the Board’s competitive access standards.

A. The Owatonna Trackage Is Not a Terminal Facility

Under 49 U.S.C. § 11102, the Board may require a rail carrier to make its “terminal facilities, including main-line tracks for a reasonable distance outside of a terminal” available to another carrier. However, the Board must first find that the facilities sought to be used are, indeed, terminal facilities.

DM&E has not submitted any evidence supporting its application on this essential issue. Its application merely asserts that the “short segment of track subject to this application”

is a terminal facility. Terminal App. at 7. Although DM&E says that the Verified Statement of Robert L. Wessler demonstrates that the trackage is “well within the scope” of the statute (id.), in fact the Wessler statement says nothing about the issue. See Wessler V.S. (describing history and configuration of trackage, and purported benefits to DM&E of expanded rights, but not addressing whether segment is a terminal).

This omission is not surprising. As we demonstrate below, there are no terminal facilities in or near Owatonna. Neither the Owatonna trackage nor any other trackage in or near Owatonna is a terminal facility as the Board and the ICC have defined that term: The trackage is not itself a terminal facility or used as such, it is not contained within a cohesive commercial area that includes a terminal, and it is not main-line track extending for a reasonable distance from a terminal. Quite simply, there is no terminal in or near Owatonna. DM&E’s assertion to the contrary ignores the nature of the facilities in question.

1. There Are No Terminal Facilities in or Near Owatonna

The Interstate Commerce Act does not define “terminal facilities,” but at the very least, terminal facilities must themselves be recognized terminal facilities or be part of or connect with a “terminal area.” See Rio Grande Industries, Inc. – Purchase & Related Trackage Rights – Soo Line Railroad Co. Line Between Kansas City, MO and Chicago, IL, ICC Finance Docket No. 31505 (ICC served Nov. 15, 1989) (“RGI/Soo”), slip op. at 11. “A terminal area (as opposed to main line track) must contain and cannot extend significantly beyond recognized terminal facilities, such as freight or classification yards or team tracks, and a cohesive commercial area immediately served by those facilities.” Id.; see also, e.g., Golden Cat Division

of Ralston Purina Co. v. St. Louis Southwestern Ry., STB Docket No. 41550 (STB served Apr. 25, 1996) (“Golden Cat”), slip op. at 7.¹⁰

The Owatonna trackage over which DM&E requests terminal rights does not include any recognized terminal facilities, and it is not part of and does not connect with any terminal area. As Mr. Groner explains and the maps attached as Exhibits 1 and 2 depict, the Owatonna trackage is main line track. It happens to pass through the town of Owatonna and cross an IC&E branch line at grade, but that is the full extent of the facility. DM&E’s own witness describes it as a “2.4 mile segment of main line through Owatonna” that forms “an integral part of [DM&E’s] main line between Rapid City, South Dakota and Winona, Minnesota.” Terminal App., Wessler V.S. at 14. It does not contain any recognized terminal facilities; there are no freight yards, classification yards, team tracks, engine facilities or car facilities. See DME-6, Request No. 12 at 13 (no DM&E yards or other facilities);¹¹ see also Groner V.S. at 40 (no UP yards or other facilities). There is an old track connection with IC&E that has not been used in many years (Groner V.S. at 40), but even if the connection were an active interchange track, it would not be a terminal facility. See New York Central R.R. v. The Talisman, Long Island R.R., 288 U.S. 239, 242 (1933) (“The expression ‘terminal facilities,

¹⁰ Terminal facilities can include “main-line tracks for a reasonable distance outside a terminal,” but they still must include a terminal from which the tracks extend. See RGI/Soo at 11 (discussing the extent of the terminal area in order to determine whether trackage was a “reasonable distance” beyond the terminal area). The “reasonable distance” clause merely permits the Board, in the course of granting rights to trackage within a terminal, to grant rights over trackage extending from the terminal for a reasonable distance. DM&E never suggests that the Owatonna trackage is main-line track extending beyond a terminal: it neither identifies a recognized terminal or explains why the Owatonna trackage is a “reasonable distance” from a terminal. In fact, as discussed below, there is no terminal in or near Owatonna to which the trackage at issue connects.

¹¹ We attach DME-6, the Responses to Union Pacific Railroad Company’s First Set of Discovery Requests to Applicants, as Exhibit 7. Page references are to the consecutive numbering used in the filing.

including main-line track or tracks for a reasonable distance outside of such terminal, of any carrier' does not include mere interchange facilities.'").¹²

When terminal facilities are not present, the Board and the ICC have consistently held that Section 11102 does not confer jurisdiction to entertain a terminal trackage rights application. That is the case, moreover, even where the trackage over which rights are sought is used to switch local industries. See, e.g., Golden Cat at 7-8; RGI/Soo at 11; Iowa Northern at 3. Here, there is not even one active shipper located on the Owatonna trackage,¹³ and that trackage thus even more clearly fails to qualify as a terminal facility.

Nor is the Owatonna trackage within a cohesive commercial area that contains recognized terminal facilities. A "cohesive commercial area" has major communities, switching or classification yards, and other shippers located at or near the facilities over which terminal trackage rights are sought. See Golden Cat at 8. As shown in the maps attached as Exhibits 1 and 2, and as reflected in the applicants' responses to discovery requests, Owatonna cannot plausibly be considered a cohesive commercial area, or even part of a larger cohesive commercial area. DM&E serves only one shipper in Owatonna, Owatonna Concrete, which is located on DM&E's own trackage on the west side of town and generates approximately [REDACTED] **REDACTED**. See DME-6, Request No. 2 at 4. Its next closest shipper to the west is 8 miles away in Meriden, Minnesota, and its next closest shipper to the east is 11 miles away in

¹² See also Chicago, Milwaukee, St. Paul & Pacific R.R. v. Iowa Northern Ry., ICC Finance Docket No. 30509 (ICC served Nov. 21, 1984) ("Iowa Northern"), slip op. at 3 (holding that an interchange track connecting the lines of two railroads was not a terminal facility).

¹³ DM&E's discovery responses identified Interstate Mills in Owatonna as a shipper facility located on the UP track segment that DM&E uses, but [REDACTED]. The switch and spur trackage used to access the Interstate Mills facility have been removed. Groner V.S. at 41.

Claremont, Minnesota. See id., Request No. 4 at 6-8. There are no recognized terminal facilities at either location. See id., Request No. 12 at 13.

Owatonna and the surrounding area does not look any more like a “cohesive commercial area” if one also considers the shippers served by all of the railroads that operate through town. Owatonna has only three active shippers by rail, and each is served by a different railroad. None of them is open to reciprocal switching. See DME-6, Request No. 2(f) at 4; id., Request No. 3(f) at 5; see also Groner V.S. at 44. IC&E serves Chiquita Processed Foods, which generates **REDACTED**. See DME-6, Request No. 3 at 5. Its next closest shipper to the north is 15 miles away in Faribault, Minnesota, and its next closest shipper to the south is 18 miles away in Blooming Prairie, Minnesota. See id., Request No. 5 at 9-10. UP serves Owatonna Metal Recycling, which generated only **REDACTED**. Groner V.S. at 41. Its next closest shipper to the north is 15 miles away in Faribault, Minnesota, and its next closest shipper to the south is 10 miles away in Hope, Minnesota. See id.

Even if Owatonna were “a cohesive commercial area,” none of the railroads that operate through the town have any freight yards, classification yards, team tracks, engine facilities, or car facilities in all of Owatonna or anywhere nearby. Nobody’s trains even change crews there. See DME-6, Request No. 12 at 13 (no DM&E yard or facilities); id., Request No. 13 at 14 (no IC&E yards or other facilities); Groner V.S. at 40 (no UP yards or other facilities). The only DM&E facilities of any kind located within 25 miles of Owatonna are in Waseca, Minnesota, more than 14 miles to the west, and DM&E typically serves Owatonna using a local operating from Rochester, Minnesota, approximately 39 miles to the east. See DME-6, Request

No. 12 at 13; id., Request No. 16 at 16.¹⁴ IC&E has a three-track yard facility 15 miles north at Faribault that it uses to switch its one Faribault customer, but it serves Owatonna using a local operating from Austin, Minnesota, more than 33 miles to the south. See id., Request No. 13 at 14; id., Request No. 14 at 15. UP's nearest facilities are 32 miles to the south in Albert Lea, Minnesota,¹⁵ and UP serves Owatonna using a local operating from Mason City, approximately 68 miles to the south. Groner V.S. at 43.

In sum, the Owatonna trackage over which DM&E seeks terminal trackage rights does not include recognized terminal facilities or a terminal area, it is not part of a cohesive commercial area that includes a terminal area, and thus it cannot be a "terminal facility" under 49 U.S.C. § 11102. Owatonna is simply a medium-sized town through which three rail lines happen to pass. The facilities and rail operations on each of the railroads serving Owatonna are indistinguishable from those at any of the many isolated rural points along the Nation's railroads at which shipper facilities are served by local trains.

2. DM&E Misstates the Applicable Test and Misapplies Its Own Criteria

DM&E contends that 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 terminal functions." Terminal App. at 7. It asserts (without evidentiary support) that the Owatonna trackage meets this test because "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 movement through Owatonna." Id.

¹⁴ DM&E has an 8-track yard at Waseca that it uses for flat switching and block swapping, as well as an engine fueling facility, a car repair facility, and a team track. See DME-6, Request No. 12 at 13.

¹⁵ UP has an industry switching yard in Albert Lea. Groner V.S. at 40.

DM&E is incorrect to assert that the use of tracks and the character of the area in which they are located are sufficient to establish whether trackage constitutes a terminal facility. Use and the character of the area are merely two factors that help determine how far a terminal area extends beyond recognized terminal facilities, such as freight or classification yards or team tracks. See RGI/Soo at 11. They help determine whether tracks that are not themselves recognized terminal facilities are nonetheless part of a terminal area. See id. at 10 (concluding that track used for switching local shippers and interchanging line-haul traffic was not part of a terminal area); see also Midtec, 3 I.C.C.2d at 179 (concluding that a terminal area extended to track used to perform service that was “typical origin and destination terminal switching” and that took place “within a cohesive commercial area”).¹⁶ However, location and use cannot supplant the basic requirement that there be a terminal area that contains “recognized terminal facilities, such as freight or classification yards or team tracks.” RGI/Soo at 11; Golden Cat at 5-6. Thus, for example, in Denver & Rio Grand Western R.R. & Missouri-Kansas-Texas R.R. v. St. Louis Southwestern Ry., ICC Finance Docket No. 30759 (ICC served Jan. 9, 1987), slip op. at 5, the ICC explained that trackage to be used for interchange purposes nonetheless qualified as “terminal facilities” under 49 U.S.C. § 11102 because the interchange would occur “on track located in a rail carrier’s classification yard.” See also id. at 6 (“Here, there is no ambiguity in the nature of the involved trackage.”). As demonstrated above, there are no classification yards or other recognized terminal facilities in or near Owatonna.

¹⁶ The use of track is also a factor in assessing whether the track is a “reasonable distance” outside of a terminal. See, e.g., Florida East Coast Ry. v. United States, 256 F. Supp. 986, 989 (M.D. Fla. 1966), aff’d, 386 U.S. 8 (1967); CSX Corp. – Control – Chessie Systems, Inc., & Seaboard Coast Line Industries, Inc., 363 I.C.C. 521, 585 (1980). However, as noted above, the Owatonna trackage cannot qualify as main-line track a reasonable distance from a terminal because it connects with no terminal – there simply is none in or near Owatonna.

Even if DM&E were correct that trackage could be considered a terminal facility based solely on its location in a cohesive commercial area and its use for switching and interchange, the Owatonna trackage would not qualify as a terminal facility. As discussed above, the Owatonna trackage is not located in a cohesive commercial area. Even if Owatonna qualifies as a “major community,” which seems unlikely, it generates virtually no rail traffic and contains no switching or classification yards. DM&E, IC&E, and UP each serve only one active shipper in Owatonna, with none accounting for more than **REDACTED** on average. One must travel eight rail miles before reaching the next closest shipper on DM&E (at Meriden), 10 miles before reaching another on UP (at Hope), and 15 miles before reaching another on IC&E (at Faribault). See generally Exhibit 2.

Moreover, in discovery, the applicants revealed that the Owatonna trackage is not used for switching and interchange operations. No active shipper facilities are located on the Owatonna trackage. And none of the shipper facilities anywhere in or near Owatonna is open to reciprocal switching or other forms of access by any other carrier. See DME-6, Request No. 2 at 4; id., Request No. 3 at 5; id., Request No. 4 at 8; id., Request No. 5 at 10; see also Groner V.S. at 44. DM&E may provide industry switching for its one active shipper on the west side of Owatonna, but industry switching performed for isolated shippers along a railroad’s main line is not the type of activity that provides a basis for granting terminal trackage rights. See Golden Cat at 7-8; see also Iowa Northern at 3.

Furthermore, no carrier uses the Owatonna trackage for interchange operations. According to the applicants’ discovery responses, “no traffic has been interchanged between [DM&E or IC&E] and any other rail carrier at or within 25 miles of Owatonna, Minnesota” since at least January 1, 2000. See DME-6, Request No. 7 at 11; id., Request No. 8 at 12. In fact, the

applicants state that, even if they obtain terminal trackage rights, they will not conduct interchange operations in Owatonna, because "existing track configurations would not easily accommodate interchange operations" and an interchange "would potentially interfere with DM&E and IC&E through train movements." See DME-2 at 45 n.7; DME-6, Request No. 15 at 15. Instead, they intend interchange traffic between DM&E and IC&E more than 72 miles south of Owatonna in Mason City, Iowa. See DME-6, Request No. 14 at 14.

DM&E has submitted no evidence that either UP (the owning carrier) or DM&E (the current tenant), or IC&E (the third carrier in Owatonna) uses the Owatonna trackage as a terminal facility. See Iowa Northern at 3.

In applying its faulty test to the Owatonna trackage, DM&E attempts to track the Board's explanation for granting terminal trackage rights over track owned by Kansas City Southern Railway in the UP/SP merger proceeding.¹⁷ However, the two situations are poles apart. In the UP/SP proceeding, the record contained extensive evidence that the segments were located in recognized terminal areas in Beaumont, Texas, and Shreveport, Louisiana, and that they were actively used to move traffic within those terminals.¹⁸ Moreover, Beaumont and

¹⁷ In its terminal trackage rights application, DM&E asserts that the Owatonna 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." Terminal App. at 7 (emphasis added). In the UP/SP proceeding, the Board explained that each segment was located "in the middle of a city, and each is used for switching and interchange movements as well as for line-haul movements through the terminal." Union Pacific/Southern Pacific Merger, 1 S.T.B. at 447 (emphasis added).

¹⁸ The terminal trackage rights involved two segments in Shreveport and one segment in Beaumont. See Union Pacific-Southern Pacific Railroad Merger Application, Application for Terminal Rights, Vol. 5 (UP/SP-26) (attached as Exhibit 8); Union Pacific-Southern Pacific Applicants' Rebuttal, Rebuttal Argument in Support of Application for Terminal Trackage Rights, Vol. 3 (UP/SP-232), Tab F (attached as Exhibit 9). The fact that these cities were terminal areas is perhaps most clearly demonstrated by the track diagrams accompanying the terminal rights application. See UP/SP-26 at 139-40 (Exhibit 8 hereto). Shreveport is home to
(continued ...)

Shreveport were heavily industrialized cities that undoubtedly qualify as “cohesive commercial areas.” In this proceeding, the city is a rural outpost, and the record does not reveal any active switching or interchange operations, or the existence of any terminal in Owatonna. The Board’s decision in the UP/SP proceeding does not support a grant of terminal trackage rights in this case.

B. DM&E Fails to Meet the Board’s Competitive Access Standards

Even if the Owatonna trackage were a terminal facility, DM&E would not be entitled to terminal trackage rights under 49 U.S.C. § 11102 because it cannot meet the applicable standards for granting such access.

First, contrary to DM&E’s contention, the Board’s competitive access standards apply in this case, so that DM&E would have to show that that UP has engaged in anticompetitive conduct with respect to the Owatonna trackage. See Midtec, 3 I.C.C.2d at 181. DM&E does not attempt to make such a showing in its terminal trackage rights application, and it could not make such a showing if it tried.

DM&E asserts that “it is the broad public interest standard of 49 U.S.C. § 11102(a) itself – rather than the criteria of [Midtec] – which governs this request for terminal trackage rights in connection with the proposed DM&E-IC&E control transaction.” Terminal

(... continued from previous page)

Kansas City Southern’s largest freight yard, and Union Pacific and Southern Pacific had extensive yard facilities in Beaumont. Moreover, the ICC had previously recognized that the Shreveport segments were part of a terminal. See UP/SP-26 at 126. They were used “for access to a nearby industrial area jointly served by” the railroads serving Shreveport, id. at 131, and had been built as part of a historic effort “by the railroads serving Shreveport to use trackage efficiently in common so as to serve and traverse the Shreveport terminal without unnecessary duplication of tracks and facilities within the city’s urban area.” Id. at 132. Similarly, the Beaumont segment was part of that city’s terminal facilities, and it was actively used to reach yards and perform switching within the city. Id. at 134-35.

App. at 7-8. However, DM&E is wrong. The Board and the ICC have applied the “public interest” standard in previous railroad mergers to require non-applicant carriers to grant terminal trackage rights to another carrier “only in limited circumstances where the rights were designed to bridge a gap within broader trackage rights imposed on applicants and deemed necessary to remedy or mitigate anticompetitive effects in the transaction.” CN/IC at 51-52. The “flexibility” provided by the public interest standard allows the Board “to prevent carriers opposing a merger from blocking [the Board’s] ability to craft merger conditions that are clearly in the public interest.” Union Pacific/Southern Pacific Merger, 1 S.T.B. at 449.

In this case, DM&E is not seeking terminal trackage rights in order to bridge a gap “within the broader trackage rights imposed on applicants” that are “necessary to remedy or mitigate anticompetitive effects in the transaction.” It is seeking to bridge a gap in its own system for its own use. Nor is UP “blocking [the Board’s] ability to craft merger conditions” that would allow an otherwise beneficial merger to proceed. It is seeking market-based compensation for additional contract rights that will directly benefit the applicants. Moreover, a grant of terminal trackage rights is not necessary for the DM&E-IC&E transaction to proceed. As explained above, UP stands ready to negotiate a grant of rights, and, even if negotiations somehow fail, DM&E has already obtained regulatory approval to build a practical connection at Owatonna.

Second, UP has not engaged in anticompetitive conduct with respect to the Owatonna trackage, and DM&E thus cannot satisfy the Midtec standard. DM&E does not seriously attempt to prove the contrary. As discussed above, the primary application contains the bare assertion that DM&E’s inability to interchange with IC&E results from “anti-competitive” conduct in the form of “paper barriers” imposed by CNW. But the ICC and the Board have

recognized that the agreements creating DM&E – including the limitations on DM&E’s rights to interchange via its trackage rights segments – were routine and justified, and those agreements were integral to the pro-competitive creation of DM&E. Significantly, moreover, the evidence shows that DM&E declined the opportunity to acquire unrestricted rights. See pages 8-9, above.

Third, even if a “broad public interest standard” were applicable, DM&E would not be entitled to terminal trackage rights. DM&E argues that a grant of terminal trackage rights is in the public interest because of “the strong public interest benefits that will arise from DM&E-IC&E common control.” Terminal App. at 8. However, as discussed above, the rights have little nexus to the control proceeding: they are not necessary for DM&E to obtain an Owatonna interchange with IC&E or any of the other benefits arising from DM&E-IC&E common control, because DM&E has an approved, practical construction alternative. See pages 10-11, above. DM&E also argues that the public will benefit from a grant of terminal trackage rights because it will avoid “unnecessary and wasteful” construction of a new connection. Terminal App. at 8. However, as also discussed above, even DM&E does not believe that such construction will be necessary. Rather, it expects that – unless the Board intervenes – it will negotiate a compromise with UP, since both parties stand to lose if construction proceeds. See pages 11-12, above.

The only “benefit” arising from a grant of terminal trackage rights is that the price DM&E pays for the right to connect with IC&E will be established by a regulatory process rather than by negotiations. But this is not a public benefit. The public interest lies in the resolution of “straight-forward business issue[s]” such as this through private negotiations. See, e.g., 49 U.S.C. § 10101(2). The Board thus follows a policy of encouraging private resolution of disputes such as this one. See, e.g., CN/IC at 53; San Jacinto Rail at 6 n.5. Granting DM&E’s

request for regulatory intervention where private negotiation promises a resolution would be inconsistent with the Board's stated policy and contrary to the public interest.

III. CONCLUSION

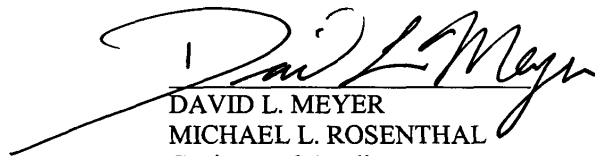
The Board should deny DM&E's application for terminal trackage rights. The Owatonna trackage is not a "terminal facility" under 49 U.S.C. § 11102, and neither CNW's sale of overhead rights to DM&E nor UP's refusal to expand those rights for free constitutes anticompetitive conduct under Midtec.

Moreover, even if the Owatonna trackage were a terminal facility and the Board decided to apply a public interest test despite the fact that terminal trackage rights are not necessary to mitigate any anticompetitive effects of the proposed DM&E-IC&E transaction, DM&E's request should still be denied. DM&E's terminal trackage rights application is not in the public interest. It is not necessary to obtain the benefits of DM&E-IC&E common control. DM&E already has the authority necessary to create an interchange with IC&E, and absent Board intervention the parties likely would reach a negotiated agreement to grant DM&E the additional rights it seeks to connect via UP's existing trackage. As DM&E recognizes, this ought to be "a straight-forward business issue" on which parties have "all of the common sense incentive in the world . . . to take the path of a negotiated agreement."¹⁹ The Board should not cut off that path. It should reject DM&E's application and leave UP and DM&E to negotiate, secure in the knowledge that, even in the unlikely event negotiations fail, DM&E has an approved, practical option for accomplishing its goals.

¹⁹ See DM&E Comments on Draft EIS at 29-30 (attached as Exhibit 6).

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A handwritten signature in dark ink, appearing to read "David L. Meyer", is written over the printed name and address of David L. Meyer.

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November 14, 2002

CERTIFICATE OF SERVICE

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GRONER

**VERIFIED STATEMENT
OF
JERALD B. GRONER**

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My name is Jerald B. Groner. I am Senior Manager - Interline Marketing for Union Pacific Railroad Company ("UP"), 1416 Dodge Street, Omaha, Nebraska 68179.

I have held my present position at UP since 1995. Prior to that, I was employed by the Chicago and North Western Transportation Company ("CNW") since 1969 in a variety of positions. My position at the time of the UP-CNW merger was Assistant Vice President - Sales and Marketing Planning.

I have been involved in matters concerning the Dakota, Minnesota and Eastern Railroad ("DM&E") from the original sale negotiations that led to the formation of DM&E in 1986 to the present. In my current position I am UP's primary contact for issues involving DM&E and Iowa, Chicago & Eastern Railroad ("IC&E"). I am familiar with DM&E's "Application for Terminal Trackage Rights" in Finance Docket No. 34178 (Sub-No. 1) and with the rail facilities and services of UP, DM&E and IC&E at and in the vicinity of Owatonna. I have inspected the rail facilities in and near Owatonna on several occasions, most recently on September 20, 2002, in connection with this proceeding.

I. BACKGROUND

A review of the history of the DM&E-CNW/UP relationship would be useful. CNW historically had two east-west lines that reached Rapid City, South Dakota. One was the line across South Dakota and southern Minnesota that is now DM&E's main line. The other was a line running across the northern part of Nebraska (sometimes called the "Cowboy Line"), which reached Rapid City via a point in far western Nebraska called Dakota Junction. In the 1970's and 1980's, these were light density lines, and CNW determined that existing traffic levels could not support both of them.

CNW's initial solution to this problem was to seek abandonment of the portion of the South Dakota route between Rapid City and Pierre (approximately 166 miles). The principal reason CNW selected the South Dakota route for abandonment rather than the Nebraska route was because the Nebraska route was the historic routing for bulk traffic moving east from Rapid City, whereas the South Dakota route could not handle most of that traffic due to track and bridge conditions.

CNW's strategy received a setback in 1984 when the Interstate Commerce Commission, by a tie vote, denied CNW's application to abandon the Pierre-Rapid City line (Docket No. AB-1, Sub-No. 154). Realizing that CNW would return to the ICC with another application to abandon the line, the South Dakota Congressional delegation, headed by Senator Larry Pressler, undertook efforts to save the line by finding another solution to CNW's redundant line problem.

Those efforts resulted in negotiations between CNW and an investor group led by L. B. Foster, with active involvement by Senator Pressler and the South Dakota Congressional delegation. The initial concept was to create a relatively small short line, consisting primarily of the 166-mile Pierre-Rapid City segment that CNW had tried to abandon. The scope of the transaction grew during the negotiations as the parties realized that the "small" railroad would not generate sufficient business to support itself.

The final result of this process was the creation of DM&E with a main line running from Rapid City to the Mississippi River at Winona, Minnesota; a second route between Waseca, Minnesota (a point on the east-west line approximately 14 miles west of Owatonna, Minnesota) and Mason City, Iowa; and several short branch lines. DM&E's new system was a combination of track it owned and trackage rights over several segments

retained by CNW. Overall, the package represented 965.7 route miles. The purchase price was \$25 million, consisting of \$21 million cash and a promissory note for \$4 million.¹ The Federal Government and the states of South Dakota and Minnesota supported the new venture over the next few years with \$16 million in financial commitments, including \$12.5 million in loans and \$3.5 million in grants.

The fundamental concept underlying the 1986 transaction was that DM&E would serve primarily as a "feeder line" to CNW and would interchange most of its traffic with CNW at several gateways (Mankato, Minnesota; Winona, Minnesota; and Mason City, Iowa). The transaction had been expanded from the original "small" proposal to a transaction encompassing hundreds of miles of track across South Dakota and Minnesota in an effort to create a viable DM&E. Had that expansion put at risk CNW's participation in the traffic generated by the additional trackage, CNW would not have agreed to it without a significant increase in the purchase price to compensate for the value of this business. This relationship was established by a series of agreements, including agreements dealing with service, car supply and divisions. As an integral part of the "feeder line" structure, the parties agreed that CNW would retain track segments at various points, including Owatonna (the track segment involved in this proceeding) and Winona, and that DM&E would receive only overhead trackage rights over those segments.

The feeder line relationship has changed over the years, but DM&E still feeds important traffic onto the former-CNW system. Since 1986, DM&E has obtained greater

¹ DM&E's \$25 million purchase price represented approximately \$26,000 per route mile. As a point of comparison, when CNW filed for abandonment of the portion of its Nebraska line between Norfolk and Chadron, Nebraska in Docket No. AB-1 (Sub-No. 230), the ICC found the net liquidation value of that 320-mile line to be \$8,057,916 (Decision served April 17, 1992, Attachment 1), or approximately \$25,000 per route mile.

ability to interchange traffic with other carriers. In 1988, DM&E built new trackage that bypassed the CNW trackage rights segment at Winona, Minnesota, and thereby achieved a direct connection with CP/Soo at Minnesota City. In 1993, CNW and DM&E reached an agreement that granted DM&E the right to interchange certain traffic with the Iowa Northern at Manly, Iowa, and the Cedar River Railroad (now part of CN) at Glenville, Iowa. (Manly and Glenville are located on the UP line between Albert Lea and Mason City over which DM&E has trackage rights.)

CNW, later UP, took other steps to foster a cooperative working relationship with DM&E on traffic generated by DM&E's former-CNW lines. In 1993, for example, as part of the arrangement that gave DM&E additional interchange rights described above, CNW forgave the unpaid principal and interest on the promissory note CNW obtained in 1986. A key reason CNW made this concession was because of the feeder line relationship between DM&E and CNW, and CNW's desire to keep DM&E viable. In 1995, after the UP-CNW merger, UP and DM&E agreed to phase out the 1986 Car Supply Agreement (which had obligated DM&E to use CNW cars for certain traffic, and obligated CNW to supply the cars), so that DM&E could supply its own cars for DM&E-UP traffic, and to modify the 1986 Divisions Agreement in ways favorable to DM&E. In 1996, UP sold to DM&E the former CNW Colony-Rapid City-Crawford line, based on DM&E's commitment to route a significant portion of the line's traffic via UP long-haul routes. UP has thus

continued to value the cooperative interline relationship set up by the agreements that formed DM&E in 1986.²

II. THE TRACKAGE RIGHTS AGREEMENTS

DM&E's rights to operate over UP's former-CNW trackage in Owatonna are governed by two trackage rights agreements, both of which were an integral part of the original DM&E-CNW line sale in 1986. The first is the "Overhead Trackage Rights Agreement," which governs segments of CNW (now UP) trackage that DM&E uses as part of its main line through Mankato, Owatonna, and Winona.³ Section 1.1 provides that as a general matter DM&E received overhead rights only:

"1.1. Except as hereinafter provided, Lessor hereby grants to Lessee the use of said Facilities for the sole purpose of bridging Lessee's trains, engines, and cars manned by Lessee's crews. In the use of said facilities, Lessee shall not be entitled to serve any existing or future industries or interchange trains or cars with any third party railroad located upon or connected to said facilities. Notwithstanding the foregoing, Lessee shall have the right to serve Lessor's industries and make interchange with Soo Line Railroad Company [now IC&E] at Owatonna, Minnesota, pursuant to the terms of a separate Lease of Track Agreement entered between the parties hereto as of the date hereof."

(Explanatory material in brackets added.)

The second agreement (referred to in the above quote) is the Lease of Track Agreement, which applies only at Owatonna. The two key provisions of this agreement are as follows:

² UP also anticipates that DM&E would be a competitor with respect to coal traffic generated by its proposed extension into the Powder River Basin.

³ The agreement originally also covered a line segment at Rapid City that DM&E subsequently acquired outright from CNW.

“1. Lessor grants to Lessee the nonexclusive right to use the Track [defined as the industry and side tracks adjacent to Lessor’s line between Mileposts 88.6 and 86.1 at Owatonna] for the limited purpose of originating or terminating traffic at industries located on such Track and for handling traffic that is switched to or from the Owatonna Canning Company Facility [now Chiquita Processed Foods]. In addition, Lessor grants its permission to Lessee to use that portion of Lessor’s main line between Mileposts 88.6 and 87.9 solely for the purposes above specified, and subject to the restrictions on Lessee’s use in paragraph 2.”

“2. In the use of such Tracks, Lessee shall not be entitled to use said Track for the purpose of directly interchanging traffic with any common carrier at Owatonna except to or from Lessor, provided that, the Lessee shall be entitled to directly interchange traffic that originates or terminates on the Track or originates or terminates at the Owatonna Canning Company [now Chiquita Processed Foods] with any common carrier serving Owatonna.”

(Explanatory material in brackets added.)⁴

I note that DM&E refers to the above provisions as “anti-competitive,” apparently because they do not grant DM&E unrestricted rights to connect or interchange with other railroads from the Owatonna trackage rights segment. That is a gross mischaracterization.

First, overhead trackage rights agreements are quite common in the rail industry. They typically do not permit the tenant to serve any industries or interchange with any carriers (other than the owner) from the trackage rights segment. There is nothing “anticompetitive” about a track owner and tenant agreeing on the tenant’s use of the track owner’s property. The only thing unusual about the two CNW-DM&E agreements is that they permit the tenant (DM&E) to serve any shippers (which no longer exist) from the UP

⁴ As discussed in Section III of this statement, there is no active shipper on the Owatonna trackage and DM&E does not have access to, and is not providing service to, Owatonna Canning, now known as Chiquita Processed Foods.

track at Owatonna and to interchange any traffic from those shippers with carriers other than UP at Owatonna. In other words, the agreements are less restrictive than the usual overhead trackage rights agreement.

Second, calling these agreements "anticompetitive" is particularly inappropriate given their history. The purchase price that DM&E paid for its line in 1986 was predicated on CNW continuing to participate on an interline basis in a significant portion of the traffic generated by the DM&E lines. CNW's retention of the line segments covered by the Overhead Trackage Rights Agreement was an essential part of that business deal. Had DM&E acquired those segments, the purchase price would have been substantially higher. This was acknowledged by DM&E's Lynn Anderson in 1992 testimony, as follows:

"Q [Mr. McFarland]: Isn't it true that the DM&E connects with other carriers at these points, not including Rapid City, of course, and cannot reach other connection such as Soo Line directly?

A [Mr. Anderson]: That's correct, at Winona, if that's what you're talking about.

Q: At Winona, and I think also at Owatonna?

A: That's correct.

Q: Do you know if there was any discussion between NorthWestern and the DM&E acquirers as to whether these segments would add to the viability of the DM&E and should be included in the deal?

A: Yes.

Q: Was the NorthWestern willing to sell those segments?

A: They were willing to negotiate on them.

Q: Why did DM&E not follow through and acquire the segments?

A: It would have involved substantial additional dollars.

Q: Initial purchase dollars, you're saying?

A: Yes."⁵

Third, the trackage rights agreements were integral parts of the entire DM&E transaction and cannot be viewed in isolation. Nothing about the 1986 transaction was anticompetitive. The transaction did not eliminate any competitive options that shippers previously had. The South Dakota-Minnesota trackage that DM&E acquired had been part of CNW, and CNW did not compete against itself. Further, the overall transaction was procompetitive. It preserved service that would otherwise have ceased to exist and led to the offering of additional competitive services by DM&E after it was created. Indeed, it is only because of the 1986 transaction that DM&E can now seek to enter the Powder River Basin in competition with BNSF and UP.

III. OWATONNA AND ITS RAIL LINES

A. The Community.

Owatonna is a medium size town in south central Minnesota with a population of 21,600. The town is not industrial, and it is not part of a larger commercial or industrial area. It is surrounded on all sides by farmland. The nearest major commercial/industrial areas are Rochester, Minnesota, approximately 40 miles to the east, and the Twin Cities area (Minneapolis/St. Paul), approximately 50 miles to the north. Owatonna is simply one of many isolated communities located along the rail lines in

⁵ Docket No. AB-1 (Sub-No. 230), transcript of February 4, 1992 hearing at Valentine, NE, p. 93. At the time Mr. Anderson was DM&E's Vice President-Marketing & Public Affairs, and had been involved with DM&E from its inception. Mr. Anderson is currently DM&E's Vice President-Marketing & Corporate Secretary and has submitted a verified statement in support of the primary application in this proceeding.

Southern Minnesota. Exhibit 2 to UP's Comments is a map showing Owatonna and the surrounding area. The map also shows the location of shippers and rail facilities within 25 miles of Owatonna.

B. Rail Lines and Rail Facilities.

Three rail lines serve Owatonna, as shown on the map attached as Exhibit 1 to UP's Comments. The first and major line is the UP Twin Cities-Kansas City mainline ("Spine Line"), which is the north-south line shown in yellow on the Exhibit 1 and 2 maps.

The second line is the UP line used by DM&E, the line running roughly east-west shown in yellow on the Exhibit 1 and 2 map. This is the line covered by the "Overhead Trackage Rights Agreement" and the "Lease of Track Agreement" described in Section II of this statement, and it is also the line over which DM&E seeks terminal trackage rights. As can be seen, DM&E-owned trackage (the east-west line shown in blue on the Exhibit 1 map, and in red on the Exhibit 2 map) connects at both ends of the UP segment, and DM&E uses both its own trackage and the UP trackage as its main line across southern Minnesota and through Owatonna. The UP trackage has been historically maintained and dispatched by UP. Recently, however, UP and DM&E agreed for DM&E to take over these functions and pay a reduced trackage rights fee.

The third line in Owatonna is the IC&E line, the north-south line shown in blue on the Exhibit 1 map and in green on the Exhibit 2 map.⁶ As shown on the Exhibit 1 map, the IC&E line crosses the DM&E (UP) route on the north side of Owatonna, and the

⁶ The IC&E line was originally part of the Chicago, Milwaukee, St. Paul & Pacific (Milwaukee Road). After the Milwaukee Road went bankrupt, the line was sold to Canadian Pacific's Soo Line Railroad Company, and then sold again to IMRL in 1997. IMRL sold the line to IC&E in July of this year as part of the sale of its entire system.

two lines then run parallel to each other for about a mile to the east before diverging. The crossing was formerly a "diamond" crossing maintained by IMRL (IC&E's predecessor). This crossing had badly deteriorated by 2002, and needed to be replaced. As a result, shortly after IC&E acquired the line, UP agreed to allow IC&E to replace the diamond crossing with a pair of switches (a two-turnout crossing) instead of a new diamond. The work was in progress when I inspected the area on September 20, and my understanding is that it has since been completed.

The agreement covering this track change specifically provides as follows:

"Notwithstanding the track changes described in this paragraph, the restrictions set forth in the Agreements on DM&E's interchange of trains and cars with other carriers at Owatonna, Minnesota and shall apply to DM&E's use of the new connection. This agreement neither diminishes nor enhances either party's position relative to those restrictions."

There is no physical connection between the Spine Line and the other two lines at Owatonna. An old connecting track between the DM&E (UP) and IC&E lines in the vicinity of the crossing between the two lines appeared to have been unused for some time when I looked at it on September 20. The new two-turnout crossing arrangement permits a physical connection between the two lines directly from the track DM&E's uses as its mainline without a separate connecting track.

There are no yard facilities, freight houses, repair facilities or similar facilities on either the UP Spine Line or the UP track in Owatonna that DM&E uses. UP's nearest facility is its industry switching yard in Albert Lea, Minnesota, 32 miles south of Owatonna. Based on the DM&E/IC&E discovery responses, there are similarly no facilities on either the DM&E-owned trackage or on the IC&E trackage at or near Owatonna. I observed none during my September 20 inspection. According to DM&E/IC&E discovery

responses, the lack of facilities at Owatonna is the reason DM&E does not intend to interchange traffic with IC&E at Owatonna post-consolidation. Instead, DM&E intends to use trackage rights over IC&E south from Owatonna to interchange with IC&E at Mason City, Iowa, 72 miles south of Owatonna via IC&E's route.

C. Rail Shippers.

Based on UP records and my physical inspection of Owatonna on September 20, there are only three active rail shippers in Owatonna. The location of these shippers is shown on the Exhibit 1 map. They are as follows:

UP Spine Line: The only active shipper is Owatonna Metal Recycling, a scrap yard on the north side of town. Its rail facilities consist of a single spur track. It generates very little rail traffic – [REDACTED] in 2001. There isn't another shipper on the Spine Line for many miles. The next closest shipper to the north is about 15 miles away in Faribault, Minnesota, while the next closest shipper to the south is about 10 miles away in Hope, Minnesota.

DM&E Route: There are no active rail shippers on the UP-owned portion of DM&E's route. Interstate Mills, located along the tracks about two blocks west of the IC&E crossing, used to be a rail shipper, but is no longer. During my September 20 inspection trip, I observed that the switch and the trackage accessing Interstate's facility had been removed.

One active rail shipper is located on DM&E own lines near Owatonna. That shipper is served by a single spur track from DM&E's mainline at the Steele-Rice Supplies facility on the west side of town. It was obvious from my September 20 site visit that this spur is the origin of the Owatonna glass cullet traffic that DM&E interchanges to UP at

Mankato, Mason City and Winona, as there was broken glass all over the track area, and a carload of broken glass ready to be pulled. The shipper of record for this traffic is Owatonna Concrete Products (rather than Steele-Rice). DM&E designated the traffic information it furnished for its shippers to be "highly confidential," so I do not know the total volume of traffic shipped to or from this spur. However, the nature of the rail facilities would prevent the handling of more than one or two cars at a time.

IC&E Line: Based on my September 20 inspection, the only active rail shipper on IC&E at Owatonna is Chiquita Processed Foods, on the north side of town roughly one block north of the IC&E crossing. It is served by a single active spur track from IC&E's mainline. This is the former Owatonna Canning Company facility mentioned in the Lease of Track Agreement described in Section II above. I understand DM&E/IC&E provided traffic information for this customer in discovery, but, due to a "highly confidential" designation, I do not have access to it. Again, however, the limited nature of this firm's rail facilities suggests that it is shipping or receiving a relatively small amount of traffic by rail.

D. Rail Service.

Through Trains: UP and DM&E both operate through trains on their respective routes through Owatonna. There is no switching, classification or assembly of these trains at Owatonna. The trains do not change crews there. Neither UP nor DM&E has any facilities for performing switching, classification or assembly of trains at Owatonna.

IC&E does not operate "through trains" through Owatonna. Its only train operation consists of a local train (described below) that runs through Owatonna on its way to and from Faribault, 15 miles to the north.

Local Service: All service to the three industries at Owatonna is provided by local trains operating from distant locations. UP's single shipper at Owatonna on the Spine Line is served by a local "turn" operating from Mason City (about 68 miles from Owatonna via UP trackage) five days per week (Monday through Friday). The train serves customers located on the Spine Line and operates as far as Owatonna on its assigned days only when there is traffic to or from the shipper at Owatonna. It does not lay over at Owatonna. Based on DM&E/IC&E discovery responses, the single DM&E shipper at Owatonna is served by a "Rochester Wayfreight," which is a local train based at Rochester that operates to the east and west of Rochester on alternate dates, generally five days per week (Rochester is 40 miles from Owatonna). It operates to Owatonna on an as-needed basis. DM&E has also served Owatonna with a wayfreight based at Waseca, about 14 miles from Owatonna. IC&E serves its one shipper at Owatonna with a local train operating out of Austin, Minnesota (about 33 miles from Owatonna). That train runs through Owatonna to Faribault and back three to five times per week.

Interchange: There is no interchange between the UP Spine Line and the other two rail lines at Owatonna, as there is no physical connection between these lines. As previously discussed, there is a physical connection between the DM&E route and IC&E. However, based on DM&E/IC&E discovery responses, there has been no interchange of traffic between DM&E and any other rail carrier at or within 25 miles of Owatonna since January 1, 2000 (the period covered by UP's discovery request). The lack of DM&E interchange at Owatonna shows that DM&E has not been using the interchange rights it has under the Overhead Trackage Rights Agreement and the Lease of Track Agreement in recent years.

Reciprocal Switching: Owatonna is not part of any switching district. No reciprocal switching is performed at or within 25 miles of Owatonna. The one shipper on UP's Spine Line is not open to reciprocal switching and, in any event, there are no physical connections with the other two rail lines at Owatonna that would allow such service to be performed. The DM&E/IC&E discovery responses show that there are no industries on DM&E or IC&E open to reciprocal switching, and no tariffs or other pricing documents covering such a service.

Other Switching Service: No switch engines or crews are stationed on any railroad at Owatonna. Any required movement of cars into and out of customer sidings is done by local trains operating from other locations.

E. Summary.

As shown above, Owatonna is not exactly a bustling beehive of railroad "terminal" activities. It is simply a place that three rail lines happen to pass through. No interchange or reciprocal switching is performed between any of these lines at or near Owatonna; they are commercially and operationally isolated from each other. No physical facilities exist on any of the lines to support "terminal" activities. Each of the three routes has one active shipper, which is served by local trains based at and supported by facilities located elsewhere. The service to the shippers in Owatonna is no different from an operating standpoint than the service provided to the handful of small shippers located along these rural lines elsewhere in southern Minnesota (and as shown on Exhibit 2). It seems to me that if Owatonna is a "terminal" under the law governing terminal trackage rights, it is hard to imagine any location where two railroads cross and serve a shipper or two that would not be a "terminal."

IV. THE TERMINAL TRACKAGE RIGHTS REQUEST

According to the DM&E application, DM&E wants “terminal trackage rights” to use UP trackage at Owatonna to make a direct connection with IC&E, without regard to the limitations on the use of this track that appear in agreements that were negotiated at arm’s length between CNW and DM&E in 1986. DM&E’s stated justification for this request is that “(w)ithout such relief, DM&E and IC&E would be unable to effectuate the new traffic routings made possible by the DM&E/IC&E combination.” (Application, p. 1). DM&E does not disclose in its application or in its discovery responses how much it intends to pay UP as compensation for these upgraded rights. However, a senior DM&E official has advised me that DM&E believes it should pay no compensation for the expanded trackage rights beyond what DM&E is currently paying. In other words, DM&E expects the Board to give it the requested rights for free.

As I will discuss below, DM&E doesn’t need the expanded terminal rights at all. It wants them simply because “free” terminal trackage rights would be cheaper than DM&E’s STB-approved alternative. The best thing that the Board can do in this case is to deny the requested terminal trackage rights and leave it to UP and DM&E to work out a private arrangement. There are adequate economic incentives on both sides of the table for the parties to come to a mutually satisfactory arrangement.

A. DM&E’s Claimed Need for the Terminal Trackage Rights.

DM&E already has authority from the Board to build a new connection between DM&E-owned track on the east side of Owatonna and the IC&E line. This connection will permit DM&E to effectuate all of the new DM&E-IC&E routings it uses to justify its terminal trackage rights request. The new connection is “Alternative O-4,” approved by the Board in Finance Docket No. 33407 (DM&E’s “PRB Construction” case).

The map appearing as Exhibit 1 to this statement shows the location and configuration of the Alternative O-4. DM&E's agreements with CNW (now UP) contain no restrictions that prevent DM&E from constructing this connection.

DM&E's application in this case acknowledges that DM&E has the authority to build the Alternative O-4 connection. DM&E makes no claim that there would be any problems in building or in using such a connection to handle DM&E-IC&E traffic. It could hardly do so given the statements it made in the PRB Construction case.⁷ DM&E, nonetheless, argues that the Board should grant the terminal trackage rights because the Board found use of the existing connection ("Alternative O-5") to be "environmentally preferable to construction of the loop connection," and because it would eliminate the costs to DM&E of constructing the new connection (Wessler VS, p. 4).

I have been closely following the PRB Construction case and am familiar with DM&E's principal submissions, SEA's recommendations and the Board's decision in that case. It is true that the Board and SEA stated that use of the existing connection was "environmentally preferable," essentially because it avoided any new rail construction. But neither the Board nor SEA found there to be any particular environmental problems with the Alternative O-4 connection (which would pass through an undeveloped area). This is demonstrated by the fact that the Board's January 30, 2002 decision approving the PRB project did not impose any site-specific mitigation measures on the Alternative O-4 connection (see Decision, pp. 69-72, describing Minnesota site specific mitigation

⁷ For example, in August 1999 DM&E's President, Kevin Schieffer wrote the Board explaining that a new connection with IMRL (now IC&E) is one "we expect will be built regardless of the project in question [the PRB extension] because of the stand-alone rail service improvement and related competitive opportunities." Att. B.2 to DM&E letter of August 12, 1999 to STB.

measures). Further, nothing in the decision even remotely suggests that UP should be forced to allow DM&E to use the existing connection at Owatonna for environmental or any other reasons. To the contrary, the Board expressly recognized that Alternative O-5 could be implemental only with UP's agreement, and found the Alternative O-4 connection to be "the environmentally preferable route if there is no such agreement" (Id., p. 19).

With respect to the cost of a new connection, there is no doubt that, if the Board gives DM&E expanded rights to use the in-town connection for free, it will cost DM&E less than building the Alternative O-4 connection. But that is not a justification for forcing UP to give DM&E rights that it decided not to purchase in 1986. There is nothing unreasonable in requiring DM&E – if it wishes to establish a connection without compensating UP – to bear the cost of building a new STB-approved connection, just as DM&E did when it built a new connection at Winona/Minnesota City in 1988.

More importantly, it is highly likely that DM&E will never have to build its new connection – thereby avoiding the cost and environmental issues it raises. As I explain in the next section, I expect that the parties will be able to arrive at a mutually agreeable compromise that grants DM&E the right to use the existing trackage to connect with IC&E in exchange for additional consideration.

B. The Marketplace Solution.

I have little doubt DM&E and UP can negotiate an equitable agreement for use of the Alternative O-5 in-town connection at Owatonna. The Board-imposed solution DM&E requests is one-sided and completely unnecessary. It would actually discourage a negotiated outcome.

The reason there will be a marketplace solution in the absence of a Board imposed solution is because both UP and DM&E have economic incentives to reach one. DM&E, of course, would like to save the costs of building the Alternative O-4 connection by using the existing, in-town connection (Alternative O-5). DM&E would obviously prefer to obtain expanded rights in Owatonna at no cost. However, the economics of the situation dictate that, in the absence of Board action, DM&E would agree to compensate UP for the expanded rights, so long as the compensation was appreciably below the cost of building the Alternative O-4 connection.

UP, on the other hand, is fully aware that DM&E could obtain unrestricted rights to connect with IC&E at Owatonna without paying UP anything. If an agreement is not reached for DM&E to use the existing, in-town connection, DM&E will simply build the Alternative O-4 connection to obtain the connection it wants. UP gains nothing if DM&E builds the connection. The only way UP obtains any benefit is if DM&E agrees to pay UP additional compensation (in monetary terms, or in the value of non-cash consideration). But DM&E will not pay any additional compensation to UP unless it obtains unrestricted rights to use the in-town connection. Thus, UP must be willing to agree to terms that are attractive enough to DM&E that it is economically better off making an agreement with UP than building the Alternative O-4 connection.

While not reflected in its submissions in the present proceeding, DM&E has recognized the likelihood of a negotiated resolution. In its March 6, 2001 Comments to SEA on the Draft EIS in the PRB Construction case (pp. 29-30), DM&E explained that it wanted authorization to build a connection because it was a necessary precondition to a

mutually agreeable compromise with UP for use of the in-town connection with IMRL

(IC&E). DM&E had no doubt that a reasonable compromise would be achieved:

“Common sense will prevail. DM&E has a good, positive working relationship with UP and this is a straight-forward business issue. UP can and should expect reasonable compensation in reaching an agreement, and the cost of constructing Alternative O-4 provides all the common sense incentive in the world for both parties to take the logical path of a negotiated agreement.”

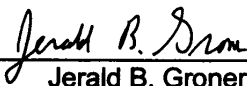
UP agrees with the sentiments DM&E expressed in 2001. UP is and has been prepared to negotiate over granting DM&E expanded rights at Owatonna. Accordingly, there is no need for the Board to impose a solution. Doing so would make it impossible for the parties to arrive at a mutually-agreeable compromise, since DM&E would lose all incentive to negotiate if the Board grants its request for relief.⁸

⁸ I note that DM&E has no immediate need for expanded rights at Owatonna. As stated by DM&E in its primary application (Exhibit 15, Operating Plan, p. 9), the IC&E line that serves Owatonna is in poor condition (FRA “excepted track,” according to the DM&E/IC&E discovery responses). DM&E will not be able to route any significant additional traffic over this line until its condition is improved, which will take time.

VERIFICATION

JERALD B. GRONER, under penalty of perjury, declares and verifies that he has read the foregoing statement, knows the facts stated therein, and that said facts are true as stated.

Dated: November 12, 2002.

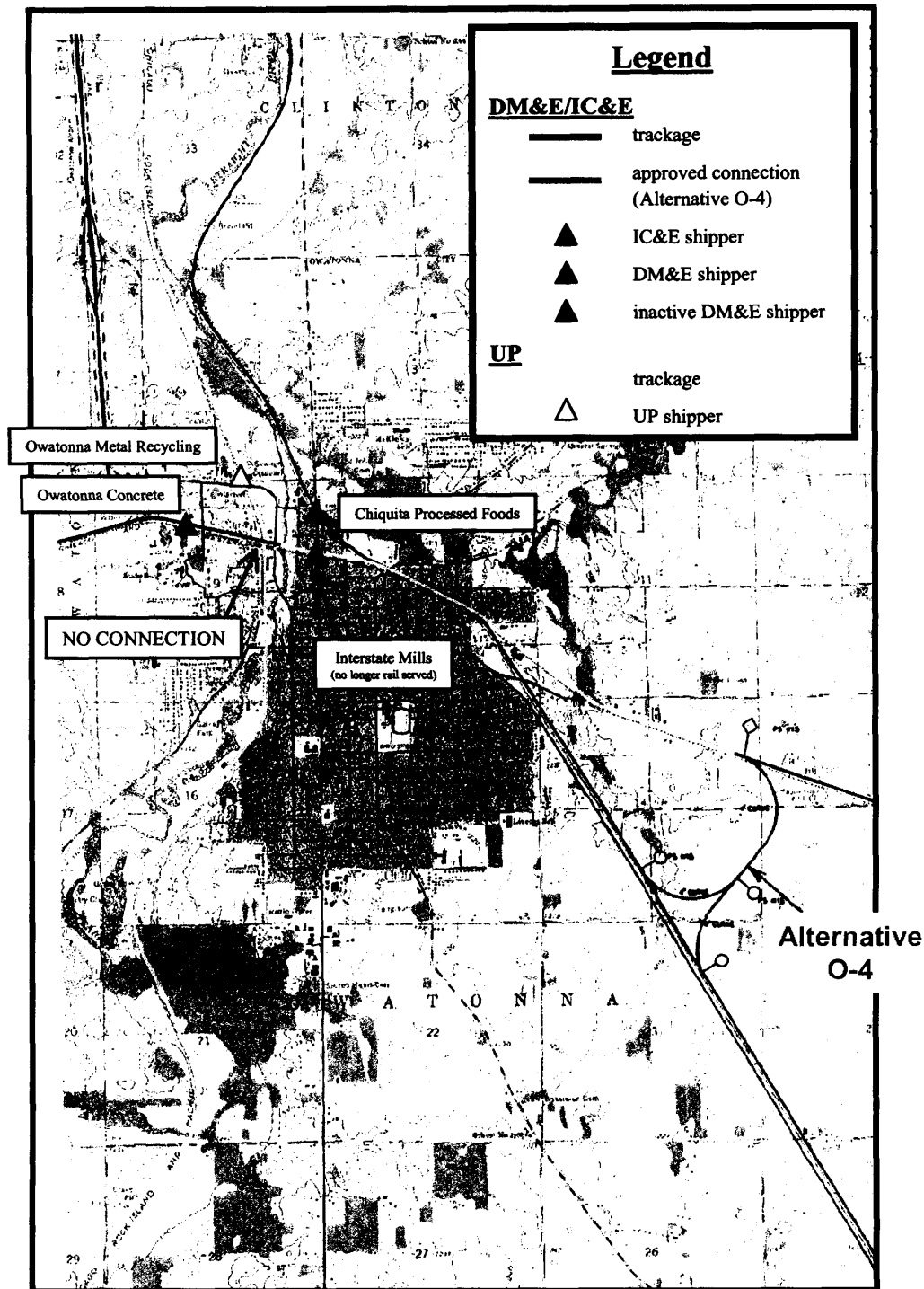


Jerald B. Groner

EXHIBITS

EXHIBIT 1

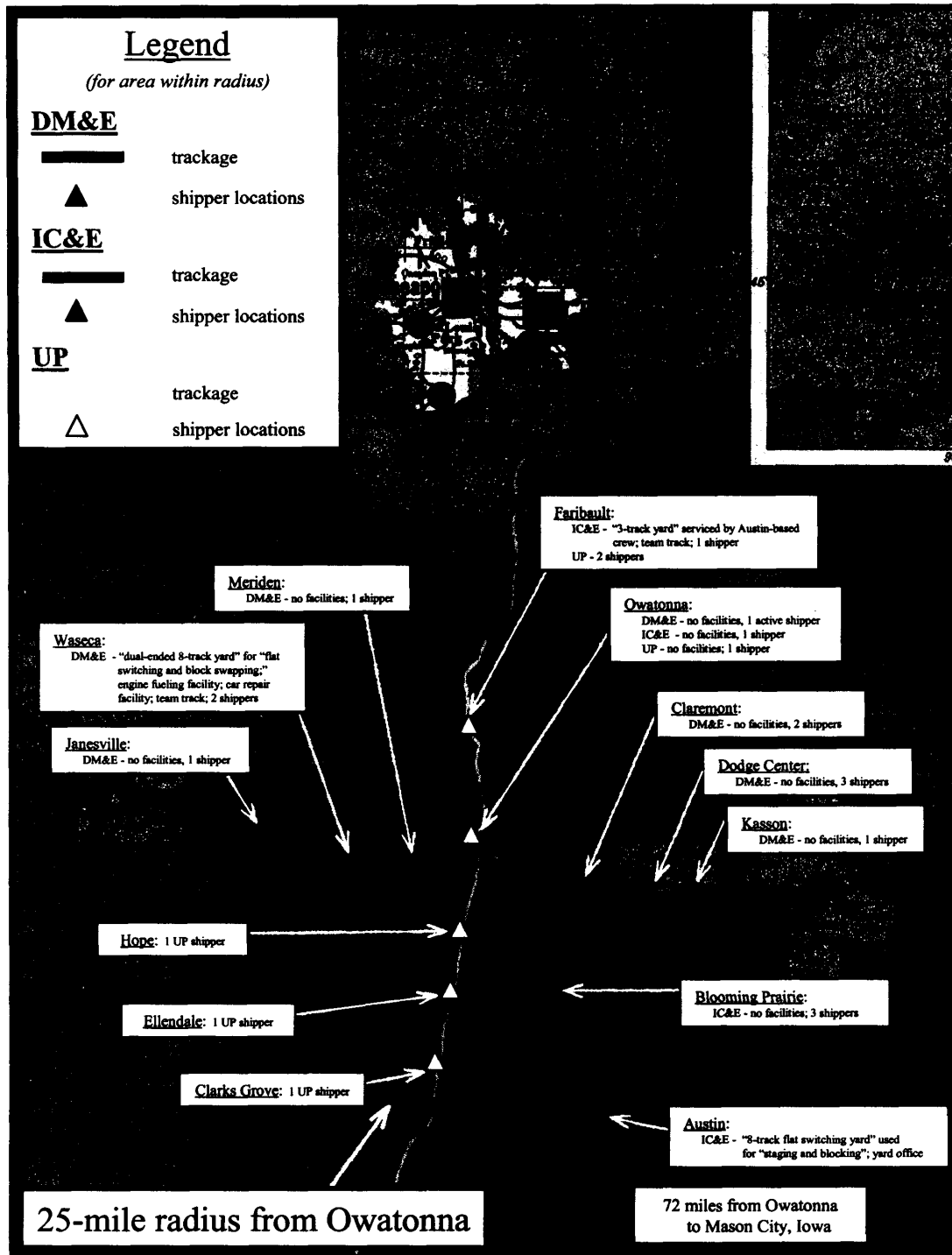
EXHIBIT 1



Source: DM&E discovery; Groner VS.

EXHIBIT 2

EXHIBIT 2



Source: DM&E discovery; Groner VS.

EXHIBIT 3

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
INTERSTATE COMMERCE COMMISSION

CHICAGO & NORTHWESTERN

TRANSPORTATION COMPANY

Docket No.

ABANDONMENT BETWEEN NORFOLK

AB-1 (Sub 230)

AND CHADRON, NEBRASKA

PLACE Valentine, Nebraska

DATE February 4, 1992

PAGES 1 - 218

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AFTERNOON SESSION

JUDGE CROSS: Let's go back on the record if we may please.

I'll have to swear you in.
Whereupon,

LYNN A. ANDERSON
appeared as a witness herein, and having been first duly sworn, was examined and testified as follows:

JUDGE CROSS: Thank you.

MR. GASSNER: Your Honor, Mr. Conlon has finished testifying, and I was wondering if he could be released from the hearing.

JUDGE CROSS: Insofar as I'm concerned, he's free to leave.

MR. GASSNER: Thank you, Your Honor.

I'd like to call Mr. Lynn A. Anderson to the stand please.

JUDGE CROSS: Yes, sir, he's here and has been sworn.

MR. GASSNER: I would like to have marked for identification a verified statement of Lynn A. Anderson as Exhibit Number 9.

JUDGE CROSS: Yes, sir.

(The document referred to was
marked as Exhibit Number 9

(C&NW) for identification)

DIRECT EXAMINATION

BY MR. GASSNER:

Q Mr. Anderson, do you have before you what has been marked for identification as Exhibit Number 9?

A Yes, I do.

Q Mr. Anderson, would you state your name and spell it for the record, give your address and your employment?

A My name is Lynn A. Anderson, L-y-n-n Anderson, A-n-d-e-r-s-o-n. I'm Vice President of Marketing and Public Affairs for the Dakota, Minnesota and Eastern Railroad. The address is 337 22nd Avenue South, Brookings, South Dakota.

Q Do you have any additions or corrections to your statement, Mr. Anderson?

A I have one correction to the statement. The last sentence in which I referred to the fact that we were currently in the process of exercising an option. I would like the statement to be changed to reflect the fact that we have indeed signed an asset purchase agreement exercising the option to purchase the line from Colony to Dakota Junction.

Q And with that correction bringing your statement up to date, do you have any other additions or corrections?

A No, I do not.

Q Is it true and correct to the best of your knowledge?

1 A Yes, it is.

2 MR. GASSNER: The witness is tendered for cross
3 examination, counsel.

4 CROSS EXAMINATION

5 BY MR. BLASZAK:

6 Q Good afternoon, Mr. Anderson.

7 A Good afternoon.

8 Q I'm Mike Blaszak representing the State of
9 Nebraska.

10 I'd like to get some details on your 20 years of
11 railroad experience. Can you tell me what your first
12 railroad job was?

13 A I was hired by the Chicago NorthWestern in June of
14 1971. I went through a variety of positions in the pricing
15 and administrative areas of the railroad. The last position
16 was a General Manager of the Grain Marketing and Pricing
17 Section of the C&NW. I resigned from the C&NW in 1986 and at
18 that point was directly involved with the formation of the
19 Dakota, Minnesota and Eastern Railroad. And I have been
20 employed there ever since.

21 Q Was the bulk of your pricing and marketing
22 experience in the grain area?

23 A Approximately ten years.

24 Q Did you have any involvement with NorthWestern's
25 bentonite traffic during your ten years with NorthWestern?

1 A Yes, I did. In the mid-1970s, I was the pricing
2 manager for bentonite.

3 Q At that time, was the NorthWestern routing
4 bentonite over both the current DM&E line and the Chadron
5 line or what was the NorthWestern's policy on routing
6 bentonite at that time?

7 A I'm not sure that I can answer that. My
8 recollection was the majority of it moved across the state of
9 Nebraska and a lot of the empty equipment came back across
10 the state of South Dakota.

11 Q Were there routes and rates available over both of
12 these lines for bentonite?

13 A As far as I know, yes.

14 Q Were you involved at all in the NorthWestern's
15 effort to abandon the railroad between Pierre and Rapid City?

16 A No, I was not.

17 Q Did that effort have any impact on your pricing and
18 marketing activities at the time?

19 A Relating to what?

20 Q Relating to efforts to market or promote movement
21 of grain via Pierre out of Rapid City as opposed to via
22 Chadron.

23 A The marketing and pricing we did were to maximize
24 the hauls that we could get off a line. Because of the
25 condition of the track and the bridges, the trackage west of

1 Fort Pierre, South Dakota was restricted to 210,000 pounds of
2 gross weight, which meant loading a grain hopper to about 70
3 tons instead of 100 tons. So there were some efficiencies in
4 being able to load 100 ton cars and also load unit trains.
5 So there were unit train rates available at Pierre and Fort
6 Pierre, that were not available to the people west of there,
7 but that was the condition of the track itself. And
8 naturally there are some incentives for loading unit trains
9 as opposed to single car shipments.

10 Q But that had nothing to do with the abandonment
11 effort itself, I take it.

12 A No.

13 Q It was strictly due to the condition of the
14 railroad at the time.

15 A Yes.

16 Q Is that correct?

17 A Yes.

18 Q Would you explain how you became involved in the
19 DM&E?

20 A There was a group of people that was negotiating
21 with the Chicago NorthWestern headed by an individual from
22 L.B. Foster. And as my position heading up the grain group, I
23 had some dealings with that individual and some of the other
24 people that were involved with some of the initial analysis
25 and at a point in time -- I was not directly involved with

1 the negotiations on the sale, but as it got time to close the
2 deal, they approached me to become involved with the initial
3 venture that put the company together and I was part of the
4 initial management team. I elected at that time to resign
5 from the C&NW.

6 Q You mentioned L.B. Foster. Could you explain what
7 this firm does?

8 A L.B. Foster -- I can't tell you exactly the kind of
9 business they're in, they're in a number of lines of
10 business. They formed a rail venture group back in the early
11 to mid-1980s and they looked at properties around the country
12 to acquire and set up regional railroads, the first of which
13 was the Gulf & Mississippi, the former ICG Line, and the DM&E
14 Railroad was the second regional railroad that they did.

15 Q Isn't one of L.B. Foster's businesses the
16 dismantling of rail lines and the sale of the scrap materials
17 for reuse?

18 A I believe they do have a small portion of their
19 business that's related to that. They have a bigger piece of
20 their business that's as a railroad supplier. That was, in
21 my understanding, the original reason they got involved with
22 forming some of these regional railroads. They supply rail,
23 they supply ties and anchors and equipment like that.

24 Q Do you happen to know if L.B. Foster is still
25 involved with the Gulf & Mississippi?

1 A I do not know.

2 Q You said there were a group of people that were
3 negotiating with the NorthWestern that was headed by L.B.
4 Foster. Who were the other people in the group?

5 A Well there were two main people involved, one of
6 them from L.B. Foster and another from a company called TXL,
7 which no longer exists.

8 Q What did TXL do?

9 A They were one of the deal makers that negotiated
10 the deal with the C&NW. They were an investment firm.

11 Q Do you happen to know whether these two people
12 approached the NorthWestern and offered to buy what became
13 the DM&E or was it the reverse?

14 A I do not know that. Like I said, I was not
15 involved with the original negotiations.

16 Q Who owns the DM&E?

17 A We're privately held by a group of private
18 investors and a few of the management people of the company.

19 Q Are you part of the ownership?

20 A Yes, I am.

21 Q Does L.B. Foster have an interest in the DM&E?

22 A Yes, they do.

23 Q Does the NorthWestern have an interest in the DM&E?

24 A No, it does not.

25 Q Do you happen to know when negotiations began

1 toward the acquisition of the DM&E?

2 A I'm not certain. Probably 1985 at some point. The
3 asset purchase agreement was signed in July of '86 and the
4 DM&E went into business September 5 of 1986.

5 Q Do you know who negotiated the sale for the
6 Northwestern?

7 A It was in their Planning Department headed by Mr.
8 Conlon at the time. He had some individuals that reported to
9 him that were involved with the negotiations.

10 Q How was the purchase of the railroad financed?

11 A There was an equity contribution to the company and
12 we have -- our senior lender in the company is Westinghouse
13 Credit Corporation. There were some additional notes
14 involved with other banks, there was some equipment that was
15 handled through other banks, locomotives and things like
16 that, but Westinghouse is the senior lender.

17 Q Your statement mentions trackage rights to Mason
18 City, Iowa. Were these included in the initial negotiations
19 or did they come in later, and what was the purpose of those
20 rights?

21 A When the original deal was negotiated, as I
22 understand, it was a small transaction. The people that were
23 involved with the negotiations did not have enough -- could
24 not determine that there was enough revenue, enough business
25 on the line to support a company and then the scope and the

1 magnitude of the deal grew. The addition of the trackage
2 from Waseca down to Mason City was the final piece that was
3 put together to generate some additional revenue to help make
4 the sale financeable.

5 Q Well let me go into that in a little more detail.
6 The original deal was a small transaction, would that have
7 been just to acquire the line from Pierre to Rapid City
8 perhaps?

9 A I think it was more than that, but I really was not
10 involved with those negotiations.

11 Q The amount of revenue that was expected to be
12 generated by this original segment, you say was not
13 sufficient to support the company. By that do you mean that
14 it couldn't be -- the acquisition could not be financed or do
15 you mean that the company could not be operated profitably?

16 A I would say it could not be financed, it's really
17 one and the same. You've got to make a profit if you're
18 going to service your debt.

19 Q And then there were negotiations between the
20 acquisition group and the NorthWestern to try to come up with
21 a financeable and economically viable railroad, is that
22 correct?

23 A That's correct.

24 Q And the Mason City trackage rights resulted from
25 that.

1 A Uh-huh.

2 Q Isn't it true, Mr. Anderson, that the NorthWestern
3 retained ownership of certain segments of railroad between
4 Rapid City and Winona, I think specifically it included
5 Mankato and Owatonna, giving the DM&E overhead trackage
6 rights?

7 A That's correct.

8 Q Do you have any knowledge as to why that was done?
9 Or putting it another way, why the NorthWestern did not sell
10 those segments to the DM&E?

11 A It was part of the original negotiations. The
12 NorthWestern maintains a significant presence at those
13 locations. Mankato is a line they've got north and south
14 through Mankato, it's a major terminal for them and they kept
15 the ownership. We have overhead trackage rights to go
16 through the city. We do business at Mankato but they provide
17 the switching for us.

18 Q And isn't the same true at Rapid City, that the
19 DM&E enters Rapid City on trackage rights from the
20 NorthWestern?

21 A That's correct.

22 Q Is that also true at Winona?

23 A That's correct.

24 Q Isn't it true that the DM&E connects with other
25 carriers at these points, not including Rapid City of course,

1 only through the NorthWestern and cannot reach other
2 connections such as Soo Line directly?

3 A That's correct, at Winona, if that's what you're
4 talking about.

5 Q At Winona, and I think also at Owatonna.

6 A That's correct.

7 Q Do you know if there was any discussion between
8 NorthWestern and the DM&E acquirers as to whether these
9 segments would add to the viability of the DM&E and should be
10 included in the deal?

11 A Yes.

12 Q Was the NorthWestern willing to sell those
13 segments?

14 A They were willing to negotiate on them.

15 Q Why did DM&E not follow through and acquire the
16 segments?

17 A It would have involved substantial additional
18 dollars.

19 Q Initial purchase dollars, you're saying?

20 A Yes.

21 Q Would that have -- would the purchase price have
22 been justified by the traffic, in your view?

23 A I can't comment on that.

24 Q Turning to page 2 of your statement, you referred
25 to some relationships between DM&E and C&NW in which C&NW

EXHIBIT 4

DM&E

DAKOTA, MINNESOTA & EASTERN RAILROAD CORPORATION

August 12, 1999

Ms. Victoria J. Rutson
Project Leader
Section of Environmental Analysis
Surface Transportation Board
1925 K Street, NW Room 715
Washington, D.C. 20423-0001

Re: Finance Docket No.33407, Powder River Basin Expansion Project-
Request for Additional Information for Draft Environmental Impact Statement
Request for Yard and Siding Information

Dear Ms. Rutson:

This is intended to provide additional information as set forth in my June 18 letter to you, in response to your request for additional information. We believe this letter and its attachments provide all the additional information you requested, as summarized below. This filing and its Attachments are being placed on our website (www.dmerail.com) to facilitate public dissemination of the information contained herein as it relates to sidings and yard facilities.

Sidings. Attached hereto is the proposed "Sidings Locations" (Attachment C) for the 43 proposed sidings to be built immediately adjacent to our mainline, all of which would be within the right of way as proposed. The operating assumption is that none of the construction relative to these sidings needs to take place outside of the right of way. Having said that, however, the computer generated footprint of the "template" design indicates several locations where -- using a 3:1 slope and 28 foot roadway top with appropriate ditch sections -- the construction impact would fall outside of our existing right of way. While most of these are expected to come back well within our right of way as the engineering is advanced through the construction phase, there may be a few cases where it could make sense to have a side-slope or ditch extend outside of our existing right of way for stability, drainage, or other reasons. But as of this date there is no location where that is determined to be a necessity. Accordingly, for purposes of the 404 permit preparation work, we are continuing to develop and plan to submit a footprint that occasionally goes outside of our right of way, with the understanding that such activity will not occur unless (a) the environmental analysis reveals no major impact problems associated with that footprint, (b) the logical business decision would be to build according to the computer generated model (which I expect will be in less than half the cases), and (c) the landowner involved is agreeable to a sale or easement that would allow the work to be done.

The total length of sidings to be built includes approximately 181 miles. This list shows the specific locations of each siding (Milepost references indicate beginning point and ending point) between the west staging yard and the eastern-most point on our system. Additionally, the list includes the preliminary engineering preference as to which side of the mainline the siding should be located on. The siding locations depicted here may be lengthened or shortened to accommodate field conditions. Please continue to keep in mind the qualifying conditions that affect the placement or movement of yards and sidings, as noted in my June 18

letter. Additionally, it should again be emphasized that there is considerable flexibility in whether the sidings can be located on the north or south side of the mainline. It is rare that operations would be materially impacted by which side of the mainline the siding is placed. Environmental considerations and more refined engineering data will play a greater role in making that determination. As we already have communicated to the STB contractor, any environmental impact insight or other preferences you can offer as to whether the placement is better to the North or South side of the mainline would be appreciated. However, any movement to the east or west could have a significant impact upon the location of many, if not all, of the other siding locations. We have tried hard to minimize impacts, seeking to avoid waterways, wetlands, and road crossing wherever possible.

Yard Facilities. The major known yard facilities are listed in Attachments B.1, B.2, and B.3 ("Yard Facilities"). These depict the yards' (1) locations (B.1), (2) activities associated with each (B.2), (3) reasonably anticipated job impacts at various levels of operations (B.2), (4) overall facility dimensions (B.1), (5) general operating issues as to yard activity, and other impact information (B.3). In the event any revisions are made, this correspondence will be updated accordingly.

As it relates to the employment impact question in your letter, please note that anticipated employment figures relative to these major yard facilities does not constitute the entire employment impacts relative to this project. First, there are hundreds of jobs that will be spread out throughout the property which are not identified in this document, nor can they be identified with any precision at this stage of the process. But none of these are project construction impact issues in that their placement is not necessarily tied to any given operations plan or rail facilities placement. For example, there will be numerous maintenance of way crew facilities established up and down the line, the locations for which have not been determined (and need not be determined until operational startup, or post operations. These are also the types of facilities that can be readily relocated without material impact upon the overall operation, and accordingly would be difficult if not impossible to predict with any degree of certainty at this juncture. Various administrative offices also fit into this category. The jobs tied to individual yard facilities are significantly different in that they are more permanently tied to the location of major facilities. It is not foreseeable or likely that they will change materially unless the facility location is changed.

Section 4 Offset Alignment. We have forwarded to your contractor an "offset alignment" for significant portions of Section 4 (between Wall and Pierre, SD). This generally gets us a little further away from the Bad River and corrects many existing landowner access issues. It also appears to simplify addressing some of the subsoil stability issues in that area. We believe this is a "win-win-win" improvement for the landowners, the rail operations, and environmental issues. Following our discussions with landowners and based on our understanding of wetland and waterway issues, this depicts our proposed alignment for the main line in this section, which offset remains within our existing right-of-way except for three short points where the mainline track would go outside of our right-of-way (at MP 522.5, MP 526 and at MP 547.5). Additionally, we expect you will see in the 404 Application (which we hope to have finalized by the first of October) that this offset results in additional areas where the construction impact will go slightly beyond our right-of-way onto the neighboring landowners, even though no track will be outside our right-of-way (e.g., slope improvements). In all of these cases, it is our understanding that this would be a favorable improvement for the adjoining landowner, and will have a favorable environmental impact compared to rebuilding on the existing alignment. In none of these cases is it absolutely necessary that this be done. If the environmental analysis reveals problems with this "offset alignment" segment, we can stay on our existing alignment.

We have also identified landowners adjacent to our existing (Rebuild) and proposed (New Construction) right of way for the entire project, and for this area in particular. All will receive a formal notice relative to the 404 permit process, but we already have met with them and they are well aware of this already.

Potential Section 5 Modifications. As a reminder, I think you know we are working on additional segment options for various portions of Section 5 (the New Construction section from Wall to Smithwick, in the area of the Cheyenne River's Hay Canyon & Spring Creek areas) that have been identified by the agencies as sensitive. Depending on whether or not something reasonable can be developed there, that may impact this information. Preliminary indications are that we can develop significantly improved alternatives to the Hay Canyon and Spring Creek problems identified in environmental analysis to date. A description of those options is being finalized and will be forwarded to you shortly under separate cover.

If you have any further questions regarding this information, please do not hesitate to give me a call.

Sincerely,

Kevin V. Schieffer
President and Chief Executive Officer

KVS:jeh

Attachments:

A = Public Comment Aids

B = Yard and Facilities

B.1 = Facility, location and dimensions

B.2 = Overview description of yard/facility major activities

B.3 = Typical traffic/activity profile

C = Sidings

cc: Elaine Kaiser, STB
Wendy Schmitzer, USFS
Bill Carson, BLM
Jerry Folkers, CoE (Omaha)
Tim Fell, CoE (St. Paul)
Mike Hammer, EPA (Region 8, Denver)
Mazin Enwiya, EPA (Region 5, Chicago)
Steve Thornhill, B&M
Jack Palma, DM&E NEPA counsel

Attachment A - Page Index									
Page 1	Page 2	Page 3	Page 4	Page 5	Page 6	Page 7	Page 8	Page 9	Page 10
Attachment B.1		Attachment B.2			Attachment B.3		Attachment C		

STB Application Link Index Table

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Dakota, Minnesota & Eastern Railroad Corporation

http://www.dmerail.com/8_12_99filing/letter.htm

10/31/2002

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Brookings, SD 57006
605-697-2400



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**Yard Facilities -- Major Activities Description
Attachment B.2**

to the
August 12, 1999 DM&E Letter to STB

1. East Staging & Marshaling Yard -- Utica and Lewiston, MN

This yard is planned to be located between Lewiston and Utica, MN. It would serve as a staging yard for loaded and empty coal trains moving to and from Minnesota City, MN. It also serves as a marshaling yard for grain, manifest and way freight service at the east end of the DM&E system, and supports the interchanges with the Union Pacific and CP Rail at Minnesota City. Mixed groups of cars received from the Union Pacific Railroad and CP Rail will be classified at this yard into blocked westbound trains which can operate efficiently across the DM&E system. Helper locomotives to provide additional braking capability for trains moving down Lewiston Hill will be based here. This yard may contain a very small mechanical facility designed to accomplish emergency repairs to cars and locomotives and also the refueling of some locomotives. (The majority of the refueling of DM&E trains is planned to occur at the Middle Yard.) This yard is also designed to accommodate a limited amount of maintenance of way equipment to perform maintenance work on the eastern end of the DM&E system. This yard will have a small yard office from which supervisors will oversee local operations. This is also a crew base location for all train crews starting and finishing work between Utica and Winona. Commercial crew lodging and eating facilities are expected to be utilized and no company facilities are expected to be provided at this location.

Approximately 20-30 jobs are expected to be based here at start-up, and it is likely that 40-50 jobs will be based here at full operations. These are railroad direct employees only, - and do not include contract or support related jobs (which we cannot determine with certainty).

2. New IMRL Connection -- Owatonna

This facility is proposed to be built outside the city limits of Owatonna, and is discussed in more detail in our previous filings. This is a connection that we expect will be built regardless of the project in question because of the stand-alone rail service improvement and related competitive opportunities. But it is significant to the project and as such its construction was included in the application.

It is premature to determine whether and to what extent there are associated job impact opportunities.

It should also be noted that this connection could be effectuated without significant construction of any kind, as noted in our previous filing relative to alternatives. This would involve the utilization of track over which DM&E today has exclusive operating rights but does not own in fee.

3. Waseca Marshaling Yard -- Waseca, MN

This yard is planned to be located just west of Waseca. It should be noted at the outset that this is not necessarily an impact resulting from the project construction, but rather a significant improvement to our existing operations. It will help lessen the amount of blocking and switching activity that today occurs on a regular basis in downtown Waseca. In essence, much of this current activity will be taken out of downtown. This facility would serve as a marshaling yard for manifest, grain and way freight traffic to and from the surrounding communities and the Hartland Subdivision (which branches off the main track and goes south from Waseca). Way freights will be based here. Other trains may stop to set out and/or pickup cars. The new Waseca yard will not serve as a mainline crew change

EXHIBIT 5

REDACTED MATERIAL

REDACTED MATERIAL

REDACTED MATERIAL

REDACTED MATERIAL

REDACTED MATERIAL

EXHIBIT 6

201665

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March 6, 2001

Office of the Secretary
Case Control Unit
STB Finance Docket No. 33407
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

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**Re: Comments on Draft Environmental Impact Statement for the
Powder River Basin Expansion Project**

Dear Sir or Madame:

On September 27, 2000, the Surface Transportation Board ("STB") issued the Draft Environmental Impact Statement ("Draft EIS") for the Dakota, Minnesota & Eastern Railroad Corporation's proposed Powder River Basin Expansion Project ("Project"). 65 Fed. Reg. 58146 (Sept. 27, 2000). The comment period for the Draft EIS was originally set to end on Jan. 5, 2001. However, on Dec. 22, 2000, the extended the comment period to March 6, 2001. 65 Fed. Reg. 80987 (Dec. 22, 2000). These comments on the Draft EIS are submitted to the SEA on behalf of the Dakota, Minnesota & Eastern Railroad Corporation ("DM&E"). Please consider these comments and include them in the administrative record for the Project application and Environmental Impact Statement.

Introduction

Part I of these comments addresses several distinct areas where the Draft EIS should be clarified, expanded, or augmented prior its issuance in final form. Primarily, Part I discusses the substantial economic and social benefits that will result from the Project in an attempt to provide the decision makers a full understanding of the national and regional scope of the Project. This approach is necessary to allow the STB and cooperating agencies to properly analyze all impacts, both adverse and beneficial, in their consideration of the Project.

Part II addresses applicant proposed mitigation measures and their potential to substantially reduce the significance of the Project's impacts on all resource

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B. Owatonna Competitive Connection (DM&E to I&MRL)

DM&E agrees with the Draft EIS's designation of the O-4 Alternative (shortest connection) as the preferred action alternative. Alternative O-4 should be approved. This is true even though DM&E believes that the common sense result of this approval would be to facilitate a private agreement between the two railroads which would obviate the need for its ultimate construction (i.e., STB authority to construct the O-4 Alternative would lead to utilization of what is defined in the Draft EIS as the O-5 Alternative). But without approval of Alternative O-4, neither Alternative likely will be implemented and a significant part of the Project's stated purpose and need (i.e., to provide meaningful competitive alternatives for existing and future customers) would be defeated because neither a private agreement for using the existing connection nor construction of an independent competitive connection could be achieved. This issue is understandably confusing because of the peculiar history behind it. Understanding that history and DM&E's current operations there may help.

When DM&E was created from parts of the former Chicago & North Western Railroad ("CNW") in 1986, CNW retained slightly over 2 miles of track in Owatonna in order to prevent DM&E from interchanging traffic with the Soo Line Railroad (which at the time owned the track that today belongs to the I&M Rail Link ("IMRL")). This 2-mile segment constituted a truly remote "island", physically separated from and remote to the rest of the CNW system. DM&E enjoyed exclusive (but limited) operating rights on this CNW island that CNW itself could not reach.

Unless there is a pro-competitive alternative, there is no logical reason to negotiate reasonable competitive use of the existing connection. The authority DM&E seeks here, however, is not sought in an attempt to eliminate a contract obligation. Seeking competitive options for DM&E's own line is fully consistent with DM&E contract obligations and encouraged by federal statute. Seeking STB authority for DM&E to use the UP-owned "island" line for constructing a competitive connection, however, would not logically square with the trackage rights agreement. And if for inexplicable reasons DM&E is unable to reach a mutually agreeable compromise with UP, it is DM&E's intention to build a competitive access connection. But DM&E does not believe that is either necessary or likely. Common sense will prevail. DM&E has a good, positive working relationship with UP and this is a straight-forward business issue. UP can and should expect reasonable compensation in reaching an agreement, and the

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Office of the Secretary
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cost of constructing Alternative O-4 provides all the common sense incentive in the world for both parties to take the logical path of a negotiated agreement

DM&E and the City of Owatonna are in agreement that the best alternative for Owatonna is the O-5 Alternative (using the existing connection in town). But DM&E agrees with STB's interpretation as to the agency's legal limitations in granting construction authority that would fundamentally alter a foreign railroad's mainline operation (albeit a hypothetical one) given the history of this issue and the existing agreements. Unlike the situation with Mankato, there is not a partial "no-action" alternative that will work in Owatonna.

The Draft EIS provides the best solution within STB's proper jurisdiction. It is consistent with the original contractual agreements. It is not only within the STB's authority to grant, but it also promotes the kind of competitive options Congress has encouraged by statute. It is necessary to achieve the purpose and need of the Project, which DM&E also believes is strongly encouraged by congressional statute and STB policy. This connection is important to both existing agricultural and other customers, and potentially for new customers as well. Even though traffic may or may not actually flow in this direction, simply having the alternative available will create profoundly positive pro-competitive effects.

V. Bypasses

A. General bypass issues

Three bypasses were being advocated by the three communities of Rochester, MN, Pierre, SD and Brookings, SD as of the Draft EIS publication. The Draft EIS eliminated Pierre from further consideration, and sought more input relative to Rochester and Brookings, noting a preliminary preference for the Brookings proposal. For reasons set forth below, and in Attachment A hereto, and in our previous submissions to the STB on the bypass issue, the Final EIS should eliminate all bypasses from further consideration.

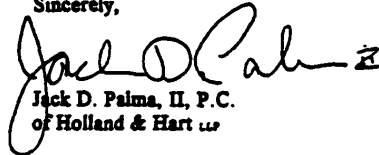
The Draft EIS incorrectly analyzes the Rochester and Brookings bypass proposals as Alternatives. See Draft EIS at ES-55 to 58. These are not Alternatives as defined by NEPA. There is no "Proposed Action" for which any of them can serve as a Reasonable Alternative. As the Draft EIS correctly points out and as was noted in the original EIS scoping, the STB has no authority over the reconstruction of DM&E's existing line. The review conducted in that regard

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Page 12

These are two examples, but not meant to be all-inclusive. The bottom line is that this bypass concept is fraught with legal and policy defects not considered and addressed in the Draft EIS, and should be dropped now.

Sincerely,



Jack D. Palma, II, P.C.
of Holland & Hart LLP

Jerrold A. Long
for Holland & Hart LLP

JAL

cc: Kevin V. Schieffer

2746630_4.DOC

EXHIBIT 7

REDACTED

DME-6

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 34178

**DAKOTA, MINNESOTA & EASTERN RAILROAD CORPORATION
AND CEDAR AMERICAN RAIL HOLDINGS, INC.
-- CONTROL --
IOWA, CHICAGO & EASTERN RAILROAD CORPORATION**

**RESPONSES OF
DAKOTA, MINNESOTA & EASTERN RAILROAD CORPORATION
CEDAR AMERICAN RAIL HOLDINGS, INC. AND
IOWA, CHICAGO & EASTERN RAILROAD CORPORATION
TO UNION PACIFIC RAILROAD COMPANY'S
FIRST SET OF DISCOVERY REQUESTS TO APPLICANTS**

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AMERICAN RAIL HOLDINGS, INC.**

Dated: October 19, 2002

REDACTED

DME-6

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 34178

**DAKOTA, MINNESOTA & EASTERN RAILROAD CORPORATION
AND CEDAR AMERICAN RAIL HOLDINGS, INC.**

-- CONTROL --

IOWA, CHICAGO & EASTERN RAILROAD CORPORATION

**RESPONSES OF
DAKOTA, MINNESOTA & EASTERN RAILROAD CORPORATION
CEDAR AMERICAN RAIL HOLDINGS, INC. AND
IOWA, CHICAGO & EASTERN RAILROAD CORPORATION
TO UNION PACIFIC RAILROAD COMPANY'S
FIRST SET OF DISCOVERY REQUESTS TO APPLICANTS**

Dakota, Minnesota & Eastern Railroad Corporation ("DM&E"), Cedar American Rail Holdings, Inc. ("Holdings") and Iowa, Chicago & Eastern Railroad Corporation ("IC&E") (collectively, "Applicants") hereby submit these responses to the First Set of Discovery Requests to Applicants propounded by Union Pacific Railroad Company ("UP"):

GENERAL OBJECTIONS

The following general objections are made with respect to all of the discovery requests. Additional specific objections are stated in response to individual discovery requests.

1. Applicants object to UP's discovery requests collectively and individually to the extent those discovery requests seek information that is neither relevant to the Control Application and related matters pending before the Board in this proceeding nor reasonably calculated to lead to the discovery of admissible evidence.

2. Applicants object to UP's discovery requests to the extent those discovery requests seek information or documents for the period prior to January 1, 1998.

3. Applicants object to UP's discovery requests to the extent those discovery requests seek confidential or proprietary information or documents.

4. Applicants object to UP's discovery requests collectively and individually to the extent that UP requests information that is subject to the attorney-client privilege, the attorney work product doctrine or any other legal privilege.

DISCOVERY REQUESTS

Subject to and without waiver of the General Objections set forth above, Applicants respond individually to the discovery requests propounded by UP to Applicants as follows:

REQUEST NO. 1.

Produce all workpapers for the following portions of the Application:

- (a) the Terminal Trackage Rights Application; and
- (b) the following portions of DME-2: (i) the first paragraph of page 43; (ii) pages 45-47 (Section 2); (iii) Schieffer V.S., pages 58-61 (beginning with start of paragraph on 58; ending with the end of the paragraph on 61) and pages 63-64 (carry-over paragraph); (iv) Anderson V.S., pages 67-76; and (v) Lamberton V.S., pages 77-100.

RESPONSE:

(a) Workpapers for the Terminal Trackage Rights Application are being produced.

(b) Workpapers pertaining to pages 43 and 45-47 of the Application (DME-2) and to the Verified Statements of Lynn A. Anderson and Charles E. Lamberton are being produced. There are no workpapers for the Verified Statement of Kevin V. Schieffer. Also, responsive documents are being produced in response to Request No. 1(a).

REQUEST NO. 2.

For all shipper facilities directly served by or reached via DM&E at Owatonna, Minnesota, that have been active since January 1, 1998, provide the following information:

- (a) name and any known corporation affiliations;
- (b) precise location, including street address if known;
- (c) the commodities shipped to or from the facility since January 1, 2000;
- (d) the volume (in carloads) of each commodity identified in response to (c) originated at the facility during 2000, 2001 and year-to-date 2002;
- (e) the volume (in carloads) of each commodity identified in response to (c) terminated at the facility during 2000, 2001 and year-to-date 2002; and
- (f) the identity of any railroad other than DM&E that has access to the shipper facility, and the nature of such access (*e.g.*, direct-served via trackage rights, reciprocal switch access, etc.).

RESPONSE:

(a)-(e):

(f) None.

REQUEST NO. 3.

For all shipper facilities directly served by or reached via IC&E at Owatonna, Minnesota, that have been active since January 1, 1998, provide the following information:

- (a) name and any known corporate affiliations;

- (b) precise location, including street address if known;
- (c) the commodities shipped to or from the facility since January 1, 2000;
- (d) the volume (in carloads) of each commodity identified in response to (c) originated at the facility during 2000, 2001 and year-to-date 2002;
- (e) the volume (in carloads) of each commodity identified in response to (c) terminated at the facility during 2000, 2001 and year-to-date 2002; and
- (f) the identity of any railroad other than IC&E that has access to the shipper facility, and the nature of such access (*e.g.*, direct-served via trackage rights, reciprocal switch access, etc.).

RESPONSE:

(a)-(e):

(f) None.

REQUEST NO. 4.

For all shipper facilities directly served by or reached via DM&E within 25 miles of Owatonna, Minnesota, that have been active since January 1, 1998, and were not identified in response to Request No. 1 above, provide the following information:

- (a) name and any known corporate affiliations;
- (b) precise location, including street address if known;
- (c) the commodities shipped to or from the facility since January 1, 2000;
- (d) the volume (in carloads) of each commodity identified in response to (c) originated at the facility during 2000, 2001 and year-to-date 2002;

- (e) the volume (in carloads) of each commodity identified in response to (c) terminated at the facility during 2000, 2001 and year-to-date 2002; and
- (f) the identity of any railroad other than DM&E that has access to the shipper facility, and the nature of such access (*e.g.*, direct-served via trackage rights, reciprocal switch access, etc.).

RESPONSE:

(a)-(e):

- (a) name and any known corporate affiliations;
- (b) precise location, including street address if known;
- (c) the commodities shipped to or from the facility since January 1, 2000;
- (d) the volume (in carloads) of each commodity identified in response to (c) originated at the facility during 2000, 2001 and year-to-date 2002;
- (e) the volume (in carloads) of each commodity identified in response to (c) terminated at the facility during 2000, 2001 and year-to-date 2002; and
- (f) the identity of any railroad other than DM&E that has access to the shipper facility, and the nature of such access (*e.g.*, direct-served via trackage rights, reciprocal switch access, etc.).

RESPONSE:

(a)-(e):

(f) None.

REQUEST NO. 6.

If you identified any shipper facilities located on DM&E or IC&E in or within 25 miles of Owatonna, Minnesota, that are open to reciprocal switching by any other railroad, produce copies of all applicable reciprocal switch tariffs, agreements or other pricing documents dated or in effect after January 1, 2000.

RESPONSE:

N/A.

REQUEST NO. 7.

For all traffic interchanged between DM&E and any other carrier at or within 25 miles of Owatonna, Minnesota, since January 1, 2000, provide, in electronic form if available, detailed traffic data setting forth the following information:

- (a) date of movement;
- (b) number of carloads in movement;
- (c) shipper (and consignee, if different);
- (d) origin city and state;
- (e) origin SPLC;

- (f) destination city and state;
- (g) destination SPLC;
- (h) commodity (seven-digit STCC code); and
- (i) detailed route, including origin and destination carriers; all carriers in route and interchange points (if full routing information is unavailable, provide at minimum carrier delivering to DM&E and interchange point; and carrier receiving from DM&E and associated interchange point).

RESPONSE:

Since January 1, 2000, no traffic has been interchanged between DM&E and any other rail carrier at or within 25 miles of Owatonna, Minnesota.

REQUEST NO. 8.

For all traffic interchanged between IC&E and any other railroad at or within 25 miles of Owatonna, Minnesota, since January 1, 2000, provide, in electronic form if available, detailed traffic data setting forth the following information:

- (a) date of movement;
- (b) number of carloads in movement;
- (c) shipper;
- (d) origin city and state;
- (e) origin SPLC;
- (f) destination city and state;
- (g) destination SPLC;
- (h) commodity (seven-digit STCC code); and
- (i) detailed route, including origin and destination carriers; all carriers in route and interchange points (if full routing information is unavailable, provide at minimum carrier delivering to IC&E and interchange point; and carrier receiving from IC&E and associated interchange point).

RESPONSE:

Since July 30, 2002, no traffic has been interchanged between IC&E and any other rail carrier at or within 25 miles of Owatonna, Minnesota.

REQUEST NO. 9.

Produce all agreements governing interchange between DM&E and any other railroad at or within 25 miles of Owatonna, Minnesota, dated or in effect after January 1, 1998.

RESPONSE:

Responsive documents are being produced in response to Request No. 1(a).

REQUEST NO. 10.

Produce all agreements governing interchange between IC&E and any other railroad at or within 25 miles of Owatonna, Minnesota, dated or in effect after January 1, 1998.

RESPONSE:

None.

REQUEST NO. 11.

Produce all agreements between DM&E and IC&E relating in any manner to operations at or within 25 miles of Owatonna, Minnesota, dated or in effect after January 1, 1998.

RESPONSE:

None. See, however, Finance Docket No. 34178 (Sub-No. 2), Dakota, Minnesota & Eastern Railroad Corporation -- Trackage Rights Exemption -- Iowa, Chicago & Eastern Railroad Corporation and Iowa Northern Railway Company.

REQUEST NO. 12.

For all yards, engine facilities, car repair facilities, team tracks and other railroad facilities owned or used by DM&E in or within 25 miles of Owatonna, Minnesota, provide the following information:

- (a) location and name (if any) of facility;
- (b) nature of facility;
- (c) detailed description of facility (e.g., for yards, nature of yard (hump, flat-switching, block-swapping, etc.), number of tracks, capacity of yard);
- (d) detailed description of how facility is used; and
- (e) identification of traffic served or supported by the facility.

RESPONSE:

Applicants object to Request No. 12 as vague, overly broad and unduly burdensome to the extent that it seeks information regarding "other railroad facilities." Without waiver of such objection, Applicant respond as follows:

DM&E has a dual-ended 8-track yard at Waseca, Minnesota, where DM&E performs flat switching and block swapping for manifest traffic originating or terminating at various points on the DM&E system. The yard has a fluid capacity of approximately 150 cars. An engine fueling facility, a car repair facility and a team track also are located at Waseca.

REQUEST NO. 13.

For all yards, engine facilities, car repair facilities, team tracks and other railroad facilities owned or used by IC&E in or within 25 miles of Owatonna, Minnesota, provide the following information:

- (a) location and name (if any) of facility;
- (b) nature of facility;
- (c) detailed description of facility (e.g., for yards, nature of yard (hump, flat-switching, block-swapping, etc.), number of tracks, capacity of yard);

- (d) detailed description of how facility is used; and
- (e) identification of traffic served or supported by the facility.

RESPONSE:

Applicants object to Request No. 13 as vague, overly broad and unduly burdensome to the extent that it seeks information regarding "other railroad facilities." Without waiver of such objection, Applicants respond as follows:

IC&E has a 3-track yard facility at Faribault, Minnesota primarily utilized for industry switching. The facility is serviced by a local crew out of Austin, Minnesota on a tri-weekly basis. Faribault has a capacity of 15-20 cars. IC&E has team tracks at Faribault and Blooming Prairie, Minnesota.

REQUEST NO. 14.

To the extent not provided in response to Request No. 13, provide the categories of information sought in Request No. 13 with respect to facilities owned or used by IC&E at Austin, Minnesota, including without limitation the facilities at Austin where Applicants propose to carry out interchange operations. *See DME-2, p. 45 n.7.*

RESPONSE:

Applicants object to Request No. 14 to the extent that it states "Applicants propose to carry out interchange operations" at Austin, Minnesota. DM&E and IC&E intend to interchange traffic at Mason City, Iowa. DM&E and IC&E would have an ability to interchange cars at Austin, and could do so for DM&E-originated traffic destined to points on IC&E's lines north and west of Austin (or traffic moving via a reverse route). Applicants are not currently aware of any such traffic.

Without waiver of the foregoing objection, Applicants respond as follows:

IC&E has an 8-track flat switching yard at Austin, Minnesota with a capacity of 300 cars, utilized for staging and block swapping. A yard office is located at Austin as well. A local crew headquartered at Austin serves both Owatonna and Austin. The yard is also served by train crews from Mason City, Iowa and Wells, Minnesota, each of which pick up and drop off cars at Austin.

REQUEST NO. 15.

Explain in detail why Applicants do not intend to conduct interchange at Owatonna, Minnesota, including without limitation the basis for the statement that "existing track configurations would not easily accommodate interchange operations." DME-2, p. 45, n.7. Explain why facilities, track configuration and/or other circumstances at Austin, Minnesota, are superior to those at Owatonna.

RESPONSE:

The existing rail siding at Owatonna, Minnesota has a 10-car capacity, is utilized to serve a local Owatonna customer and would not generally allow DM&E and IC&E trains to drop off, pick up and interchange traffic off of the respective DM&E and IC&E main lines. Conducting interchange utilizing the main lines themselves would potentially interfere with DM&E and IC&E through train movements. Conducting DM&E and IC&E interchange at Owatonna would inefficiently split existing crew operating patterns and require at least a three-carrier routing for DM&E traffic to be interlined to Cedar River Railroad Company at Lyle, Minnesota or Iowa Northern Railway Company at Plymouth Springs, Iowa. Information with respect to facilities at Austin, Minnesota is provided in the response to Request No. 14.

REQUEST NO. 16.

Describe in detail the DM&E train operations that serve shipper facilities located at or within 25 miles of Owatonna, Minnesota. As part of such description, describe, as to each train operation, the nature (e.g., local train, way freight, switching assignment) and designation (e.g.,

train symbol) of the operation; its frequency; its origin and termination; and the specific shipper facilities within 25 miles of Owatonna it serves. For each such operation, describe in detail the nature of any work performed at Owatonna. To the extent subsets of the information sought by this request are set forth in the Application, you may respond by identifying the specific location of that information and supplementing your response with the further detailed information sought herein.

RESPONSE:

Owatonna is located on the DM&E Waseca Subdivision, extending from Waseca to Winona, Minnesota. The Subdivision is switched by the Rochester Wayfreight, which operates from Rochester east and from Rochester west on alternate days. The Rochester crew provides service to Owatonna and Dodge Center on an as-needed basis. The crew is available 5 days per week, and Saturday, if necessary. Owatonna customers are also periodically served by the yard crew at Waseca, as well as the Waseca Wayfreight, all on an as-needed basis. Further information regarding DM&E service is provided at pages 42-47 of the Control Application.

REQUEST NO. 17.

Describe in detail the IC&E train operations that serve shipper facilities located at or within 25 miles of Owatonna, Minnesota. As part of such description, describe, as to each train operation, the nature (e.g., local train, way freight, switching assignment) and designation (e.g., train symbol) of the operation; its frequency; its origin and termination; and the specific shipper facilities within 25 miles of Owatonna it serves. For each such operation, describe in detail the nature of any work performed at Owatonna. To the extent subsets of the information sought by this request are set forth in the Application, you may respond by identifying the specific location of that information and supplementing your response with the further detailed information sought herein.

RESPONSE:

A local crew operating out of Austin on a tri-weekly to 5-day per week basis serves Austin through Owatonna on to Faribault. Additional information may be found in the Control Application at pages 40-42 and 47.

REQUEST NO. 18.

Produce all documents studying, analyzing or discussing (including without limitation surveys and geographic analyses) the feasibility or cost of constructing trackage at or in the vicinity of Owatonna, Minnesota, that would achieve a connection between DM&E and IC&E without requiring the Proposed Owatonna Terminal Trackage Rights, including without limitation "Alternative O-5" referred to in the Terminal Trackage Rights Application, at page 4.

RESPONSE:

Applicants object to Request No. 18 as overly broad and unduly burdensome to the extent that it seeks documents submitted to or issued by the Surface Transportation Board in Finance Docket No. 33407. Subject to and without waiver of such objection, Applicants respond as follows:

Responsive documents consisting of maps and track profiles are being produced. Other responsive documents can be found in the record in Finance Docket No. 33407 at the Surface Transportation Board. Applicants are conducting a search for other responsive documents.

REQUEST NO. 19.

Produce all documents studying, analyzing or discussing (including without limitation surveys and geographic analyses) the feasibility or cost of achieving direct or indirect interchange between DM&E and IC&E at any location, including without limitation at Austin, Minnesota.

RESPONSE:

None, except as otherwise produced in response to Request No. 18.

REQUEST NO. 20.

State the FRA Class level of all segments of IC&E trackage between Owatonna, Minnesota, and Mason City, Iowa.

RESPONSE:

Mason City, Iowa to Ramsey, Minnesota: FRA Class 2

Ramsey, Minnesota to Blooming Prairie, Minnesota: FRA Class 1

Blooming Prairie, Minnesota to Owatonna, Minnesota: FRA Excepted Track.

REQUEST NO. 21.

Produce all documents since January 1, 1998, discussing or describing plans, proposals to projects (actual or potential) to upgrade or rehabilitate IC&E's trackage between Owatonna, Minnesota, and Mason City, Iowa, including without limitation the timing and cost of such work.

RESPONSE:

Applicants object to Request No. 21 as irrelevant and not reasonably calculated to lead to the discovery of admissible evidence to the extent that documents sought arise solely from DM&E's proposal to construct a rail line into and transport coal from the Powder River Basin of Wyoming. Subject to and without waiver of such objection, otherwise responsive documents are being produced. Also, Applicants have had internal conceptual discussions regarding a potential loan from the Federal Railroad Administration to fund track rehabilitation work on IC&E lines including on the line between Owatonna, Minnesota and Mason City, Iowa. However, there is, as yet, no plan, proposal or project.

REQUEST NO. 22.

Produce any documents studying, analyzing or discussing the need to perform work on the IC&E Owatonna-Mason City segment in order to accommodate the proposed interchange of traffic between DM&E and IC&E at Owatonna, Minnesota.

RESPONSE:

Applicants object to Request No. 22 to the extent that it states that DM&E and IC&E propose to interchange traffic at Owatonna, Minnesota. Without waiver of such objection, Applicants respond as follows:

See objection and response to Request No. 21.

REQUEST NO. 23.

Produce the most current available track charts/diagrams and other records pertaining to the IC&E trackage between Owatonna, Minnesota, and Mason City, Iowa, sufficient to reflect the mainline grade and curvature on the line; bridges (including without limitation date and type of construction, condition, and any weight restrictions); weight and condition of rail; identification of passing and yard trackage; maintenance history (including without limitation rail, ties and ballast); and any traffic restrictions (weight, dimensional or otherwise).

RESPONSE:

Responsive documents are being produced.

REQUEST NO. 24.

Produce all due diligence materials provided by IMRL to DM&E (whether directly or through intermediaries) pertaining to the condition of IMRL's lines in and north of Mason City, Iowa, including without limitation the Mason City-Owatonna segment.

RESPONSE:

Responsive documents are being produced.

REQUEST NO. 25.

For all traffic movements that Applicants anticipate would in the future be handled over the Proposed Owatonna Terminal Trackage Rights, provide, in electronic form if available, detailed traffic data setting forth the following information:

- (a) date of movement;
- (b) number of carloads in movement;

- (c) shipper;
- (d) origin city and state;
- (e) origin SPLC;
- (f) destination city and state;
- (g) destination SPLC;
- (h) commodity (seven-digit STCC code); and
- (i) detailed route, including origin and destination carriers; all carriers in route and interchange points (if full routing information is unavailable, provide at minimum carrier delivering to IC&E and interchange point; and carrier receiving from IC&E and associated interchange point).
- (j) total revenue (or revenue for that portion of the route known by DM&E and/or IC&E);
- (k) DM&E's division of revenue; and
- (l) IC&E's division of revenue.

If detailed traffic records are not available, identify such traffic with as much detail as possible.

RESPONSE:

Applicants anticipate that 1) traffic diverted from DM&E-foreign road joint-line movements, as identified in the Verified Statement of Lynn A. Anderson (DME-2 at 67-76); 2) traffic diverted from long-haul motor carrier movements, as identified in the Anderson Verified Statement; and 3) DM&E traffic moving to/from interchange with Cedar River Railroad Company at Lyle, Minnesota and Iowa Northern Railway Company at Plymouth Junction, Iowa will move over the proposed Owatonna terminal trackage rights. Non-divertible traffic moving to/from interchange with UP at Mason City, Iowa may also move over the proposed Owatonna terminal trackage rights. If DM&E's proposed Powder River Basin line is constructed, some portion of the PRB coal handled by DM&E would move over the proposed Owatonna terminal trackage rights. Available information regarding the rail-diverted traffic and DM&E-UP,

DM&E-CEDR and DM&E-IANR interchange traffic is included in traffic data documents being produced. See also Anderson V.S., DME-2 at 70-75. Applicants will also provide this information as to rail-diverted traffic in electronic form as soon as it is available.

REQUEST NO. 26.

Please state the amount of compensation, and/or the methodology for calculating the compensation, that Applicants propose to pay to UP for use of the Proposed Owatonna Terminal Trackage Rights.

RESPONSE:

As is customary in such matters, DM&E intends to negotiate appropriate compensation with UP for use of UP's trackage. Should any further compensation beyond that already paid by DM&E under existing agreements be required under the STB's statutory condemnation standards for terminal trackage rights, DM&E will pay such amounts in accordance with agreement of the parties or order of the Board. If no agreement can be reached, either party may request the Surface Transportation Board to set compensation terms under the Board's statutory condemnation standard.

REQUEST NO. 27.

Produce the materials distributed by IMRL (directly or via intermediaries) to potential bidders for IMRL's assets in connection with the offering that resulted in the acquisition of IMRL's assets by DM&E. (UP received a set of offering materials from IMRL but has destroyed them pursuant to the confidentiality agreement governing those materials.)

RESPONSE:

Applicants object to Request No. 27 to the extent that it asserts that IMRL's assets were acquired by DM&E. IMRL's assets were acquired by IC&E. Without waiver of such objection, Applicants state that the responsive documents were provided by IMRL to DM&E

pursuant to a confidentiality agreement. Applicants have sought permission to provide a copy of these documents to UP.

REQUEST NO. 28.

Produce all documents reflecting communications between or among DM&E, IC&E, IMRL, and/or CP/SOO regarding DM&E's trackage rights at Owatonna, Minnesota, and the Owatonna Restriction.

RESPONSE:

Applicants are conducting a search for responsive documents.

REQUEST NO. 29.

Produce all documents discussing, analyzing, or otherwise referring to the Owatonna Restriction.

RESPONSE:

Applicants object to Request No. 29 as vague, overly broad and unduly burdensome to the extent that it seeks any documents "otherwise referring" to the Owatonna Restriction; documents sent to, received from or otherwise in the possession of UP; or documents submitted to or issued by the Surface Transportation Board in Finance Docket No. 33407. Applicants further object to Request No. 29 as irrelevant and not reasonably calculated to lead to the discovery of admissible evidence to the extent that it seeks documents arising solely in connection with DM&E's proposal to construct a rail line into and transport coal from the Powder River Basin of Wyoming.

Subject to and without waiver of such objections, otherwise responsive documents are being produced.

REQUEST NO. 30.

Produce all trackage rights agreements or other joint facility agreements to which DM&E and/or IC&E is a party that contain restrictions on the traffic that any user of the trackage or facility is permitted to handle.

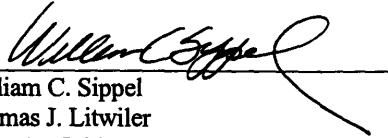
RESPONSE:

Responsive documents are being produced.

Respectfully submitted,

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Scott B. Anderson
Davenport, Evans, Hurwitz &
Smith, L.L.P
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Dated: October 19, 2002

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of October, 2002, a copy of the foregoing
**Responses of Dakota, Minnesota & Eastern Railroad Corporation, Cedar American Rail
Holdings, Inc. and Iowa, Chicago & Eastern Railroad Corporation to Union Pacific
Railroad Company's First Set of Discovery Requests to Applicants (DME-6)** was served by
overnight delivery, in redacted form with produced documents designated as "public," upon:

David L. Meyer, Esq.
Michael L. Rosenthal, Esq.
Covington & Burling
1201 Pennsylvania Avenue, N.W.
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and by first class mail, postage prepaid, upon:

J. Michael Hemmer, Esq.
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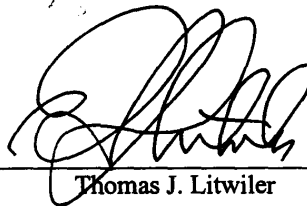

Thomas J. Litwiler

EXHIBIT 8

Before the
INTERSTATE COMMERCE COMMISSION

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

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

APPLICATION FOR TERMINAL RIGHTS

I

INTRODUCTION

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

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

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

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

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

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

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

II

**DESCRIPTION OF THE TERMINAL
TRACKAGE AND APPLICABLE AGREEMENTS**

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

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

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

III

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

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

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

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

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

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

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

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

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

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

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

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

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

IV

CONCLUSION

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

Respectfully submitted,

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Missouri Pacific Railroad Company

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

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

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

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

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

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

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

**I
Shreveport**

A. Description of Trackage and Rail Operations

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

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

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

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

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

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

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

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

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

B. Anticipated BN/Santa Fe Operations

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

^{2/} Agreement, §6(a).

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

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

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

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

II

BEAUMONT

A. Description of Trackage and Rail Operations

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

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

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

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

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

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

B. Anticipated BN/Santa Fe Operations

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

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

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

^{4/} Agreement, §5(a).

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

VERIFICATION

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

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

E. L. Hord
E. L. HORD

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

My commission expires: October 14, 1998.

Karen Sue Johnson
Notary Public

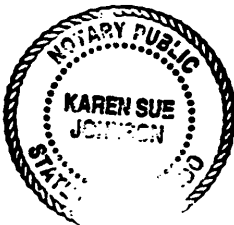






EXHIBIT 9

Before the
SURFACE TRANSPORTATION BOARD

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

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

**REBUTTAL ARGUMENT IN SUPPORT OF
APPLICATION FOR TERMINAL TRACKAGE RIGHTS**

I.
INTRODUCTION

The Application in this sub-proceeding involves a request by the primary applicants in the UP/SP merger proceeding, Finance Docket No. 32760, joined by Burlington Northern Railroad Company and The Atchison, Topeka and Santa Fe Railway Company (collectively referred to as "BN/Santa Fe"), for an order under former 49 U.S.C. § 11103¹ permitting BN/Santa Fe to use two short segments of KCS terminal trackage in Shreveport, Louisiana, and Beaumont, Texas. As discussed in the Application (UP/SP-26, p. 122) use of these segments by BN/Santa Fe is necessary in order for BN/Santa Fe to promote stronger rail competition to the merged UP/SP system in the Houston-Memphis and Houston-New Orleans corridors, pursuant to a settlement agreement among BN/Santa Fe, UP and SP in the merger proceeding.

In KCS-32, KCS opposes the requested terminal trackage rights on essentially three grounds: (1) the track segments are not terminal facilities; and (2) use

¹ Since the Application was filed on November 30, 1995, it is governed by the law in effect prior to the enactment of the ICC Termination Act, § 204, Pub. L. No. 104-88. Accordingly, all statutory citations are to provisions that were in effect on November 30, 1995, unless otherwise specified.

of the track segments by BN/Santa Fe is not practical; and (3) the requested rights do not meet the statutory "public interest" standards. We will show below that KCS' arguments have no merit. In fact, the positions taken by KCS in KCS-32 are directly opposed to positions being taken by KCS' own affiliate, the Texas Mexican Railway Company ("Tex-Mex"), in the latter road's request for terminal trackage rights in the Houston area (TM-23). Further, we will show that, if KCS' position were to be accepted, it would be virtually impossible to craft competition-related conditions in rail merger transactions, because the railroads involved could not obtain the terminal trackage rights they would require to assemble continuous routes.

Before responding to the arguments actually presented by KCS, however, we will first address an important issue KCS has completely ignored – the preemptive effect of 49 U.S.C. 11341(a).

II.
BOARD APPROVAL OF THE UP/SP MERGER, CONDITIONED
BY THE BN/SANTA FE SETTLEMENT, WILL GIVE BN/SANTA FE
AUTHORITY TO USE THE BEAUMONT AND SHREVEPORT
TRACK SEGMENTS UNDER 49 U.S.C. § 11341(a)

SP already has trackage rights over both the Beaumont and Shreveport terminal trackage segments, and MPRR has trackage rights over the Beaumont segment. KCS, however, claims that the underlying contracts require KCS' consent to permit BN/Santa Fe to substitute for SP, and that it is not about to grant such consent (KCS-32, pp. 12, 14).

As discussed in the Sub-No. 9 Application, Board approval of the primary application, conditioned by the UP/SP-BN/Santa Fe settlement agreement, will authorize BN/Santa Fe to operate over the Beaumont and Shreveport track segments regardless of any contractual provisions that would otherwise permit KCS to bar such operations.

49 U.S.C. § 11341(a) (1995) expressly provides that a person participating in an approved railroad merger/control transaction is "exempt from antitrust law and all other law ... as necessary to let that person carry out the transaction." The UP/SP-BN/Santa Fe agreement is part and parcel of the "transaction" itself, so there can be no question of "necessity."

Prior to 1991, the ICC had expressed doubts as to whether it could override contractual consent requirements under § 11341(a), see Finance Docket No. 31505, Rio Grande Industries, Inc. - Purchase & Related Trackage Rights - Soo Line R.R. Line Between Kansas City, MO & Chicago, IL (not printed), Decision No. 6 served Nov. 15, 1989, p. 8 ("RGI/Soo") and cases cited. However, any such doubts were firmly put to rest by the Supreme Court decision in Norfolk & Western Ry. v. ATDA, 499 U.S. 117, 127-30 (1991), which expressly held that § 11341(a) overrides contractual rights. Thus, any contractual consent requirements in the Beaumont and Shreveport agreements that would prevent a Board-approved UP/SP-BN/Santa Fe settlement agreement from being carried out would be overridden by § 11341(a), and the Board should so hold.

As noted above, KCS has not even addressed § 11341(a) or its preemptive effect in KCS-36. However, KCS affiliate Tex-Mex specifically discusses § 11341(a) in its request for terminal trackage rights in the Houston area, TM-23. In its Application in Finance Docket No. 32760 (Sub-No. 14), Tex-Mex claims that Board approval of its Responsive Application in Sub-No. 13, coupled with the preemptive effect of § 11341(a) "should constitute sufficient authority to permit Tex-Mex to use the subject trackage regardless of whether HB&T consents to such use" (TM-23, Application in Sub-No. 14, p. 2). Tex-Mex's position in § 11341(a) is identical to ours.

III.
THE RAIL SEGMENTS ARE
TERMINAL FACILITIES

KCS argues that the Board has no jurisdiction over the Beaumont and Shreveport track segments because they are supposedly not "terminal facilities." This claim is frivolous and is addressed in the accompanying Rebuttal Verified Statement of E. L. Hord.

As discussed by Mr. Hord, these track segments are classic terminal facilities. In both cases, the short track segments go through the heart of the cities, and are used for switching and interchange movements as well as line-haul movement through the terminal. In fact, KCS' own witness confirms that the subject trackage is used for these purposes.

What KCS is really arguing is that trackage cannot be a terminal facility unless switching or interchange is actually performed on the track, or industries are switched from it.² As pointed out by Mr. Hord, under this view there would be no such thing as a Chicago terminal, or a Kansas City terminal -- just a collection of disconnected "terminal islands" scattered throughout an area. The connecting trackage that ties these islands into a cohesive railroad operating unit would not be "terminal facilities," and could not be the subject of a grant of trackage rights under 11103(a). Most of the terminal trackage rights granted by the ICC over the years would fail KCS' strange test.

Not surprisingly, the two cases cited by KCS on this point do not in any way support its "terminal island" concept. RGI/Soo supra, questioned whether a 42-mile rural track segment could be considered part of the Kansas City "terminal area," and whether

² Under KCS' own criteria, the Shreveport trackage is a terminal facility. KCS' witness admits that it does perform industry switching from the track (KCS-32, Nelson, p. 3).

a 10.24-mile bypass west of Chicago could be considered part of the "Chicago Terminal." There is nothing in this decision to suggest that there is simply a series of disconnected "terminal islands" in Kansas City and Chicago. If anything, this decision makes clear that the criteria for terminal facilities is whether the facility is within a "cohesive commercial area." Midtec Paper Corp. v. Chicago & N.W.T. Co., 3 ICC2d 171, 179 (1986), held a 7.9-mile track segment in Wisconsin to be a "terminal facility" because it was "within a cohesive commercial area." There was no suggestion that it was an unbroken, 7.9-mile stretch of industry switches, one after another.³

KCS' affiliate, Tex-Mex, obviously does not agree with KCS "terminal island" concept. Tex-Mex is seeking terminal trackage rights over 15.5 miles of track in the Houston areas in connection with its responsive application. Tex-Mex claims that the Houston trackage is "terminal trackage" because it is located "in metropolitan or industrial areas," that train operations over it "are a combination of through trains and switching" and that the ICC had previously referred to the track owner as a "terminal railroad." Moreover, Tex-Mex does not claim that it will conduct interchange or switching operations on the track, or switch industries from the track. Rather, Tex-Mex wants the right to "bridge a gap in Houston" on the intercity route it is seeking to acquire, provide an "alternate route through Houston" and to access a yard and interchange point in Houston (TM-23, p.163; Application in Sub-No. 14, pp. 4-5). Clearly, Tex-Mex has a more realistic view of terminals than KCS.

³ The accompanying Rebuttal Verified Statement of E. L. Hord discusses two track segments over which the ICC granted "terminal" trackage rights to SP or its affiliates; the Pueblo-Nyberg, CO segment involved in the UP/MP merger, and the Joliet-Kensington/Markham, IL segment involved in the RGI/CMW acquisition (RVS Hord, pp. 8-9). Neither of these would have qualified as "terminal facilities" under KCS' "terminal island" concept.

IV.
USE OF THE TRACK SEGMENTS BY BN/SANTA FE IS PRACTICAL
AND WILL NOT IMPAIR KCS' ABILITY TO HANDLE ITS OWN BUSINESS

KCS claims that use of the Beaumont and Shreveport terminal segments by BN/Santa Fe means that "more trains will be operating in the same limited area." This, in turn, will supposedly result in "substantial interference" with KCS' business (KCS-32, p.11). These conclusions are said to be supported by KCS' witness Nelson, who claims that existing traffic over both of these segments is already "straining its capacity" (KCS-32, Nelson, pp. 6, 13).

These claims are addressed in the accompanying rebuttal statement of E. L. Hord, and it is unnecessary to repeat that discussion at length here. Briefly, Mr. Hord shows that, once Mr. Nelson's rhetoric is ignored, the facts he presents fail to show that the track segments in either location are "straining" their capacity. In fact, in case of Shreveport, Mr. Nelson's own statement demonstrates that the track is considerably underutilized.⁴ Mr. Hord's original statement demonstrates that the BN/Santa Fe trains will mostly be using track capacity freed up by UP/SP. The use of this trackage may require cooperation and coordination by the carriers using it, but that does not render the operations impractical, see Union Pacific - Control - Missouri Pacific, Western Pacific, 366 ICC 462, 576 (1982) ("UP/MP/WP").⁵ Finally, UP and SP are offering BN/Santa Fe

⁴ Mr. Nelson demonstrates that a segment of the Shreveport corridor is occupied for about 6-hours a day. What he neglected to mention is that this is a triple track segment. If there is a train on one of the three tracks for only six hours of a 24-hour day, each track is occupied for only two hours, and there is plenty of capacity (RVS Hord, pp. 6-7).

⁵ As Mr. Hord points out, the divestitures that KCS is seeking involve corridors that include the Beaumont and Shreveport terminal track segment, with the intention of itself operating the corridors. It is difficult to see how KCS could be an effective competitor if its capacity is so "strained" that it is unable to run additional trains.

the option of running Northbound trains over a route that avoids Shreveport, which could reduce the number of BN/Santa Fe trains by half (RVS Rebensdorf).

V.
THE TERMINAL TRACKAGE RIGHTS
ARE IN THE PUBLIC INTEREST

There is a direct precedent for the terminal trackage rights being requested in this proceeding - the terminal trackage rights granted to DRGW in UP/MP/WP. In that case, the ICC granted rights to DRGW over two segments of ATSF track totalling 20 miles. The purpose of the rights was to "bridge the gap" between DRGW's own trackage, and a segment of MPRR over which DRGW was being given trackage rights as a condition to the merger. The ICC found the terminal rights over ATSF to be in the public interest because they enabled DRGW to form part of a new Central Corridor route to address competitive effects of the UP/MP/WP merger, UP/MP/WP, supra, 366 ICC 574-577. The grant of terminal trackage rights in UP/MP/WP was specifically affirmed in Southern Pacific Trans. Co. v. ICC, 736 F.2d 708, 723-724 (D.C. Cir., 1984).

The parallels to the instant case are obvious. Here, BN/Santa Fe is being introduced into the Texas and Louisiana corridors in order to address competitive effects of the proposed UP/SP merger. In order to serve the corridors, BN/Santa Fe must be able to operate over Beaumont and Shreveport terminal trackage, which is owned by a carrier other than the primary applicants. The only significant differences between the two cases are that, in this case, the primary applicants have agreed in advance to the competitive alternative which include the terminal segments and the terminal segments in this case are much shorter (5.32 miles total) than those in UP/MP/WP (20 miles total). By imposing the settlement as a condition, the Board will eliminate the first difference.

Thus, under UP/MP/WP, the requested terminal trackage rights are clearly in the public interest and should be granted. KCS does not dispute that UP/MP/WP would support a grant of the requested rights. Rather, KCS' position is that the public interest standard applied in UP/MP/WP has been replaced by the standard utilized in Midtec, supra. Under the Midtec standard, terminal trackage rights are granted only to address competitive problems, such as cases where the track owner has been shown to have acted in an anticompetitive manner.

A. The UP/MP/WP Standard Applies To This Case

The ICC has repeatedly held that terminal trackage rights may be imposed to remedy the competitive effects of mergers without application of Midtec standards. The cases discussed by KCS do not, in any way, undermine UP/MP/WP. In fact, to the extent that they have anything to do with mergers, these cases confirm that the UP/MP/WP public interest standard is alive and well in merger cases. A review of the cases cited by KCS makes this clear:

Midtec, supra, involved a request by a shipper who was served by a single railroad to get a second railroad into its facility.⁶ The case has nothing to do with a merger or consolidation, or conditions imposed in such cases. Midtec does not purport to overrule UP/MP/WP, disagree with its reasoning, or even discuss standards for mergers and consolidations.

Finance Docket No. 30759, Denver & Rio Grande Western R. Co. & Missouri-Kansas-Texas R. Co. v. St. Louis Southwestern R. Co. (not printed), served January 9, 1987, discussed at KCS-32, p. 8, is a post-Midtec case involving a request

⁶ Shenango Inc. v. Pitts., Charters & Yough Ry. Co., 5 ICC2d (1989), also cited by KCS, involves a similar, non-merger situation.

by DRGW and MKT to use SSW terminal facilities in Herington, KS for interchange. As KCS recognizes, the ICC granted the requested rights on the grounds that they were needed to provide the Central Corridor competition intended by the UP/MP/WP conditions. KCS correctly notes that the ICC did not undertake a Midtec analysis on the grounds that the relief being granted was considered an implementation of conditions imposed in UP/MP/WP. However, KCS conveniently neglects to mention the rest of the ICC's discussion of this issue:

"However, we note that a grant of shared facilities authority is consistent with such an analysis [i.e., Midtec and Intramodal Rail Competition, 1 ICC2d 822 (1985)], since the trackage rights condition imposed in UP-MP was designed to ameliorate anticompetitive effects of a major consolidation" (DRGW, p. 5 n. 5).

Rio Grande Industries - Pur & Track - CMW Ry. Co., 5 ICC2d 952 (1989) ("RGI/CMW"), discussed at KCS-32, p. 7, is directly contrary to KCS' position. This case involved acquisition of rail lines of the Chicago Missouri and Western Ry. by SPCSL, an SP affiliate. As part of the acquisition, SPCSL desired to acquire trackage rights over the IC between Joliet and Kensington/Markham, IL, but the rights could not be assigned without ICRR's consent. SPCSL requested the ICC to grant it terminal trackage rights over this segment. The ICC granted the rights, and specifically refused to apply the Midtec standard (as embodied in the Intramodal Rail Competition rules) stating as follows:

"In analyzing the various trackage rights sought here, we will not apply the competitive access rules adopted in Intramodal Rail Competition, 1 ICC2d 822 (1985) (49 C.F.R. Part 1144). Those rules address the addition of another carrier to the market outside the context of acquisition or merger proceedings." 1 ICC2d at 980 n 30 (emphasis supplied).⁷

⁷ At KCS-32, p. 7, KCS suggests that the ICC intended this holding to be "... limited to the unique circumstances of [the] case." This phrase is taken out of context. The "limitations" language follows a description of the severe time limitations faced by the

Finance Docket No. 31505, Rio Grande Ind.-Pur. & Rel. Trackage Rights - Soo Line R. Co., Decision No. 6 (not printed) served November 13, 1989 ("RGI/Soo") is discussed at KCS-32, p. 8. According to KCS, the decision shows that Midtec is now the standard that must be met for terminal trackage rights in a merger proceeding.

But RGI/Soo does not help KCS at all. At most, all that RGI/Soo stands for is that, if terminal trackage rights are sought in a merger or acquisition that do not address competitive effects of the transaction, the Midtec standard will apply.⁸ The distinction between terminal trackage rights sought to address competitive effects of a transaction, and requests which have nothing to do with such effects is quite clear from the text of the decision:

"We question whether the Union Pacific merger proceeding supports applicants' requested relief in any fashion. It is one thing to resort to Section 11103 to supply short missing links in creating a competitive route necessary to ameliorate the adverse competitive impact of, and thus permit, approval of a merger shown to have substantial public benefits; it is quite another to use it to permit a carrier to sell entry over possibly non-assignable trackage rights while continuing to operate itself over such rights." RGI/Soo, p. 11 n 12 (emphasis supplied).

The terminal trackage rights being sought in this proceeding are expressly intended "... to supply short missing links in creating a competitive route necessary to ameliorate the adverse competitive impact of, and thus permit approval of a merger

parties, and an observation that none of the parties were able to "address the legal issues underlying §11103 remedies in depth." Read in context, the "limitations" language does not refer to the ICC's holding on the inapplicability of Intramodal Rail Competition. In any event, the later RGI/SOO decision confirms that Midtec and Intramodal Rail Competition do not apply to competition-related conditions in mergers.

⁸ RGI/Soo involved a sale transaction in which the selling carrier (Soo) was retaining the right to continue operating over the involved rail lines, including trackage rights segments owned by other railroads. The effect was to put three carriers on the trackage rights segments (the owner, the buyer, and Soo) where there had previously been only two (the owner and Soo). There was no claim that adding a third carrier to the segment was intended to address competitive effects of the transaction.

shown to have a substantial public benefits" RGI/Soo, supra. Accordingly, a Midtec showing is not required.

B. Tex-Mex's Position

Once again, it is instructive to contrast the positions being taken by Tex-Mex, KCS' affiliate, with the position being taken by KCS itself. Tex-Mex's Application for terminal trackage rights over 15.5 miles of Houston area trackage does not even mention Midtec, or any cases applying Midtec standards. There is no allegation in its Sub-No. 14 Application or in its supporting evidence that the terminal rights are being sought because of any "anticompetitive" conduct by HB&T. Rather, terminal rights are being sought to facilitate Tex-Mex's operations through and within the Houston area in connection with its operations over the intercity corridors covered by its responsive application (TM-23, p. 163; Sub-No. 14 Application pp. 4-5).

VI.

KCS' POSITIONS COULD HAVE WIDE RANGING
CONSEQUENCES IF ADOPTED BY THE BOARD

Consider the practical effect of the positions being taken by KCS. Major through routes often include short segments of terminal trackage owned by other carriers. Conditions sought or imposed to address competitive effects of a merger often involve placing new carriers on routes over which they have not previously operated. Under KCS' position, any track owner of a small segment of terminal trackage anywhere along the route could veto entry by the new carrier wherever the underlying agreements contain standard consent requirements.

VII.
CONCLUSION

For the reasons stated above, applicants herein respectfully request that the Board hold that 49 USC 11341(a) (1995) permits BN/Santa Fe to use the Beaumont and Shreveport terminal trackage described herein or, in the alternative, order KCS to allow BN/Santa Fe to use the terminal trackage under 49 USC §11103 (1995).

Respectfully submitted,

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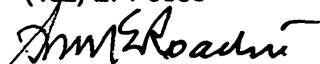
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**REBUTTAL VERIFIED STATEMENT
OF
E. L. HORD**

My name is E. L. "Buck" Hord and my business address is 1860 Lincoln Street, Denver, Colorado. I am Assistant to Executive Vice President-Operations for SP and have over 30 years' experience in SP train operations and management.

I am the same E. L. Hord who submitted a verified statement at UP/SP-26, p. 130 in support of the Application for Terminal Trackage Rights in Finance Docket No. 32760 (Sub-No. 9). As explained in that statement, the rights are intended to permit BN/Santa Fe to operate on KCS terminal trackage in Shreveport and Beaumont, TX to provide competition to UP/SP.

The principal purpose of this statement is to respond to some very remarkable claims made by KCS' witness Tom J. Nelson in KCS-32. Mr. Nelson claims that the trackage in Beaumont and Shreveport are not "terminal facilities," and that they are "strained to capacity," and unable to handle BN/Santa Fe traffic. As I will show, these claims are disingenuous and refuted by facts stated in Mr. Nelson's own statement. After discussing Mr. Nelson's statement, I will briefly discuss the trackage rights segments involved in the various divestiture proposals that have been made in this proceeding.

I. The Shreveport and Beaumont Track Segments Are Terminal Facilities

I find it difficult to believe that a supposedly knowledgeable railroad operating person would claim that these track segments are not "terminal facilities."

If these segments are not terminal facilities, then what is? Nevertheless, Mr. Nelson makes such a claim, so let me discuss the points he makes:

Beaumont

Mr. Nelson's first claim is that the Beaumont segment is not a "terminal facility" because it is "... used only for main-line, line haul operations, and not used to transfer, collect and deliver freight" (VS Nelson, p. 10). This claim is false. The Beaumont segment is used by switch engines and trains which perform terminal functions in the Beaumont area, in addition to "line haul" trains. As one example, the trackage is the only access between the KCS, UP and SP yards at Beaumont and the Port of Beaumont and a nearby industrial area along the Neches River. This is clearly shown by the map included with my statement at UP/SP-26, p. 140.¹ Mr. Nelson's own statement admits that both KCS and SP operate switch engines over the trackage to service North Star Steel, a major Beaumont industry (KCS-32, Nelson, p. 13).

Second, Mr. Nelson claims that the track is not a "terminal facility" because it is not located in an "industrial or commercial area" (KCS-32, Nelson, p. 11). The fact is that track runs through the center of Beaumont, and there is a string of industries on both sides of the track. I have placed in my workpapers a series of photographs from an inspection trip which I made of this trackage on December 18, 1995, which shows this quite clearly.

¹ The map also shows that the joint UP-KCS passenger depot for Beaumont was once located along the track segment. A passenger terminal, of course, is unquestionably a terminal facility.

Third, Mr. Nelson claims that the track is not a terminal facility and does not "assist with the functions of a terminal" because there are no rail customers "located within the limits of the trackage," no interchanges located "on the trackage," and no switching or marshalling of trains "performed immediately off or on the trackage" (KCS-32, Nelson, p. 11). I have difficulty understanding this argument. The track segment is critical to all of these things in the Beaumont terminal area. Just to give one example, SP must use this trackage to move cars between its Beaumont yard and the industries along the Neches River.

Consider for a moment the practical consequences of Mr. Nelson's position. He is saying that track is not a "terminal facility" unless there are rail-served industries directly alongside it, or some sort of switching or interchange physically conducted on it. Under this view, there is no such thing as a "Beaumont Terminal" or, for that matter, a "Chicago Terminal" or a "Kansas City Terminal." There are just a series of isolated "terminal islands" in these locations, which exist only over the few dozen or hundred feet where the stated activities occur. The trackage between these islands that ties the terminal into a cohesive railroad operating unit is not itself a "terminal facility." This position is contrived and simply ignores the realities of railroad operations.

Fourth, Mr. Nelson claims that the governing trackage rights agreements with UP and SP "contractually prohibit terminal activities on the trackage," essentially because the agreements provide the tenants with bridge rights only. This is another variant of Mr. Nelson's idea of "terminal islands." The fact that UP and SP have

bridge rights over the track segments does not mean the tracks cannot be used for terminal services. It means simply that switching operations cannot physically be performed on the trackage by the tenant, a very different thing.

Shreveport

Mr. Nelson makes essentially the same claims as to Shreveport as he does for Beaumont. Since I have already responded to these claims as they apply to Beaumont, I will not repeat my discussion at length here. I simply note the following:

First, like Beaumont, the Shreveport trackage lies in the center of the city, and provides access between the Shreveport area yards of UP, KCS and SP, and local industries.² The trackage is also used for interchange movements between the SP yard and the yards of the other two railroads. Mr. Nelson's own description of the train operations over this trackage where he tries to show how congested it is (VS Nelson, p. 7) should leave no doubt that it is a classic example of terminal trackage.

Second, by Mr. Nelson's own criteria, the Shreveport trackage is a terminal facility. The north access track to SP's main yard on the Red River connects directly with the "Old IC Main," as can be seen from the map attached as Exhibit 1 to Mr. Nelson's statement. Mr. Nelson also admits that KCS does industrial switching directly from this trackage, although he attempts to downplay its significance.

² The IC's main passenger station for Shreveport was located along the "Old IC Main." It is no longer extant, but a nearby IC freight terminal is still standing. KCS' main passenger station for Shreveport was on the "KCS Main." This large structure is still standing, and a photograph of it is included in my workpapers.

II. The Beaumont and Shreveport Terminals Can Readily Handle BN/Santa Fe Operations

In my earlier verified statement, I showed that BN/SANTA FE operations through the Shreveport and Beaumont terminals could readily be accommodated, and would largely use capacity freed up by UP/SP. Mr. Nelson claims, in response, that both terminals are "strained to capacity" and could not handle BN/SANTA FE traffic. As I will show below, this is not the case. In fact, once Mr. Nelson's rhetoric is ignored, the actual facts contained in his statement support my position, not his.

Beaumont

The only specific capacity problem Mr. Nelson identifies at Beaumont is the "bottleneck" that is supposedly created by the need to raise and lower the Neches River bridge for water traffic. According to Mr. Nelson, a raise/lift cycle takes 20 minutes. I will accept this estimate for present purposes.

What is evident from Mr. Nelson's statement is that this bridge does not normally need to be raised very much. According to Mr. Nelson, weekday waterway traffic averages 4 barge moves and 2 pleasure boat moves a day (6 total). I note that he is very careful to avoid saying that the bridge must actually be raised for each of these movements.³ Even if it did, however, the bridge would be "out of service for rail traffic" only 2 hours per weekday. Mr. Nelson tries to paint a darker picture by

³ I inspected this bridge in December. There appears to be plenty of clearance between the lift span and the river to allow pleasure craft to pass without raising the span unless they have masts or tall superstructures. A photograph of the bridge is in my workpapers.

taking an exceptional situation (a weekend where pleasure boat moves "can be in excess of 24 moves a day"), and then using this as the basis of his 8 hour estimate. Even here, and assuming 24 separate openings, the bridge would still be available 16 hours a day for rail service.

I have no doubt that moving train traffic in and around Beaumont requires coordination and cooperation both by KCS and the other railroads in the terminal. That, however, is a common requirement in all railroad terminals, and is the reason we employ skilled operating personnel.⁴

Shreveport

Mr. Nelson's treatment of this location is considerably less than candid. The centerpiece of his testimony is an exercise that ends up demonstrating the corridor between Point A and Point C⁵ is occupied for 6 hours 10 minutes or more a day, which supposedly proves that it is congested. What he neglects to note is that this segment is triple tracks. The fact that a train may be occupying one of the 3 tracks for 6 hours and 10 minutes or so a day demonstrates that the corridor is substantially underutilized and has plenty of capacity to handle additional train traffic.

⁴ Mr. Nelson suggests that the 4 BN/Santa Fe trains discussed in my earlier statement as moving through the Beaumont corridor somehow shows that BN/SANTA FE will not be an effective competitor (VS Nelson, p. 14). The point of my statement was to show the amount of train traffic moving through the corridor. Depending on the ebbs and flows of competition, BN/Santa Fe might run more trains through the corridor, and UP/SP will run less. The total train traffic, however, would remain approximately the same.

⁵ The "points" are shown on the map included with my statement at UP/SP-26, p. 139.

This is confirmed by the fact that the corridor has been able to handle its train traffic even though a portion of one of the 3 tracks has been temporarily out of service for over a year due to construction of an expressway overpass near Point A. (It is currently scheduled to be returned to service in November, 1996.)

III. The Conrail and KCS Divestiture Proposals Include Beaumont and Shreveport Terminal Trackage

I am aware that both Conrail and KCS are requesting the divestiture of various UP and SP rail lines in Texas and Louisiana, among other places. The obvious reason they are seeking this is that they want to themselves acquire the routes covered by their divestiture requests. That leads to two observations:

First, Conrail will need terminal trackage rights in Beaumont and Shreveport in order to provide service over the corridors covered by its divestiture requests. The terminal rights would be over the same Beaumont and Shreveport trackage that is involved in our request.

Second, the routes covered by KCS' divestiture requests also include the Beaumont and Shreveport terminal trackage. Of course, KCS would not require terminal trackage rights to operate over its own tracks. However, the service KCS would perform over the divested routes would require use of the terminal trackage at both locations. If we believe Mr. Nelson, this terminal trackage is already "strained to capacity." One has to wonder how KCS could be an effective competitor if it does not have the capacity to run any additional trains.

IV. Other Terminals

Finally, the ICC has granted "terminal trackage rights" to SP or its predecessors in other cases. In this section, I will describe two important facilities involved in these grants.

A. Pueblo-Nyberg, CO

This is a 12-mile line segment running east from Pueblo, owned by BN/Santa Fe (formerly ATSF). DRGW was granted "terminal" trackage rights over this ATSF segment in the UP/MP merger. Unlike the Shreveport and Beaumont track segments, which pass through the center of the cities they serve, the Pueblo-Nyberg, CO segment is almost entirely in a rural area of eastern Colorado with a few widely scattered shippers. Train operations consist almost entirely of through trains.

I note that Montana Rail Link has filed an inconsistent application in this proceeding, requesting divestiture of a "Central Corridor" route involving SP and UP lines in Colorado and Kansas. LSBC Holdings also wants to acquire this route. This routing would require use of the Pueblo-Nyberg segment.

C. Joliet-Kensington/Markham (Chicago), IL

This is a line segment approximately 51 miles in length in northeastern Illinois owned by IC. SPCSL (an SP affiliate) obtained "terminal" trackage rights over this segment in 1989, in connection with its acquisition of the Chicago Missouri & Western Railway.

Unlike the Pueblo-Nyberg segment, the Joliet segment serves an industrial area, and it passes through the Chicago Sanitary and Ship Canal industrial

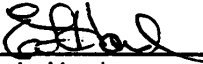
corridor. However, the segment is definitely not a continuous string of industrial switches. There are segments of track several miles in length between industrial "pockets." For example, there are no industry switches in a 2.8-mile segment between Joliet and Lockport, or in a 7.6-mile segment between Lockport and Romeoville. Under Mr. Nelson's view of "terminal islands," of course, these intervening segments would not be part of the "terminal facility" because there are no industries directly served from them.

I note that Conrail is requesting the divestiture of certain UP/SP routes in Illinois. The routes involved include the Joliet-Kensington/Markham terminal facility described above.

VERIFICATION

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

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



E. L. Hord

Subscribed and sworn to before me this 19th day of April, 1996.



Notary Public
1860 Lincoln Street, Suite 601
Denver, CO 80295

My Commission Expires:

Feb. 16, 1997