

FLETCHER & SIPPEL LLC

Two Prudential Plaza, Suite 3125
180 North Stetson Avenue
Chicago, Illinois 60601-6721

Phone: (312) 540-0500
Fax: (312) 540-9098
www.fletcher-sippel.com

William C. Sippel
(312) 540-9451
wsippel@fletcher-sippel.com

March 24, 2003

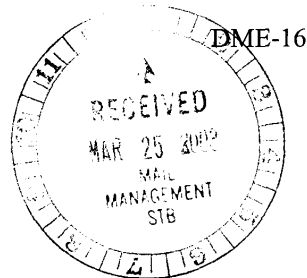
VIA FACSIMILE AND FEDERAL EXPRESS

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

ENTERED
Office of Proceedings

MAR 25 2003

Part of
Public Record



Re: **Finance Docket No. 34178 - 207456**
Dakota, Minnesota & Eastern Railroad Corporation
and Cedar American Rail Holdings, Inc. -- Control --
Iowa, Chicago & Eastern Railroad Corporation

Finance Docket No. 34178 (Sub-No. 1) - 207457
Dakota, Minnesota & Eastern Railroad Corporation --
Terminal Trackage Rights -- Union Pacific Railroad Company

Dear Secretary Williams:

We are in receipt via facsimile at the close of business Friday of the Petition for an Emergency Order of Union Pacific Railroad Company (UP-5). While including the word "emergency" in the title of its pleading and requesting expedited consideration, UP specifically states that it "is not seeking preliminary injunctive relief" (UP-5 at 11 n.9), and it does not seek to shorten the period for reply by Dakota, Minnesota & Eastern Railroad Corporation ("DM&E"). At the least, UP's somewhat vague request for relief does not appear to contemplate the issuance of a Board order prior to a reasonable opportunity for a response by DM&E.

DM&E will endeavor to submit a complete response to the UP-5 petition by Wednesday, April 2, 2003. It is sufficient to note here that -- as the UP-5 petition amply demonstrates -- UP has a contractual dispute with DM&E, and that DM&E opposes UP's attempt to use the Board to extricate UP from the weaknesses of its own contractual position in that dispute. The Board should question why UP would seek to protect its contractual interests at the Board rather than at a court with jurisdiction over the contract at issue. A brief background on the contractual dispute with UP is provided in the attached verified statement of Kevin Schieffer, President and Chief Executive Officer of DM&E.

DM&E informed UP prior to its filing that DM&E will take no action prior to April 4, 2003 regarding train movements at Owatonna, Minnesota that would divert any traffic away from existing UP routings (Schieffer V.S., Attachment 1), and there is no pending threat of irreparable harm to UP. Nor has there been any abuse of the Board's process or "flouting" of the

FLETCHER & SIPPEL LLC

Mr. Vernon A. Williams
March 24, 2003
Page 2

Board's decision in these proceedings. We note for the Board's information that DM&E is seeking to continue its negotiations with UP regarding Owatonna, notwithstanding the pendency at the Board of the UP-5 petition and DM&E's earlier petition for reconsideration and reopening.

Twenty-five copies of this letter are enclosed for filing with the Board. One extra copy also is enclosed, and I would request that you date-stamp that copy to show receipt of this filing and return it to me in the provided envelope. I certify that a copy of this letter filing has been served on counsel for UP by facsimile and overnight delivery, and on all other parties of record by first-class mail, postage prepaid.

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

Respectfully submitted,



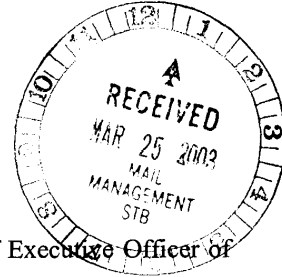
William C. Sippel
Attorney for Dakota, Minnesota & Eastern
Railroad Corporation

WCS:tjl

Attachment

cc: David M. Konschnik (via facsimile)
David L. Meyer, Esq. (via facsimile)
Parties of record

**VERIFIED STATEMENT
OF
KEVIN V. SCHIEFFER**



My name is Kevin V. Schieffer. I am President and Chief Executive Officer of Dakota, Minnesota & Eastern Railroad Corporation ("DM&E"), Cedar American Rail Holdings, Inc. ("Holdings") and Iowa, Chicago & Eastern Railroad Corporation ("IC&E"). I have previously submitted verified statements in this proceeding in support of the DM&E-IC&E common control application and in response to the opposition of the Union Pacific Railroad Company ("UP") to DM&E's application for terminal trackage rights at Owatonna, Minnesota.

I have been personally involved in the negotiations with UP, first with Mr. Jerry Groner then with Mr. John Rebensdorf. I was also directly involved in the decisions relating to our previous submissions to the Board in this case. In the late afternoon of Friday, March 23, 2003, Mr. Rebensdorf called me out of a meeting to inform me that UP would be filing an emergency petition at the Board. The letter attached hereto was written prior to Mr. Rebensdorf's notification.

I have since had the opportunity to briefly review the UP filing and the attached affidavit of Mr. Rebensdorf. If the Board grants UP's request to provide the anti-competitive protection it seeks, shippers who have for the first time found new competitive markets will be directly and immediately harmed. In no event will UP suffer irreparable harm if the Board allows the existing private contracts between the companies to govern -- as UP so adamantly demanded when it thought the contract favored its position. I note with interest that UP neglected to cite the contract provisions in dispute. The insistence of reliance on contract rights that UP so vigorously demanded of the STB earlier in this proceeding has suddenly disappeared.

Additionally, UP cannot cite a basis for its claimed "irreparable harm" because none exists. Indeed, UP is not harmed by our contemplated movements at all -- much less in any irreparable manner. In the event UP is able to show any breach of our contracts, there are ample damages provisions in those contracts to protect UP rights (though I know of no damages it could claim). There is no basis for the extraordinary anti-competitive protection UP seeks.

UP seeks the Board's assistance in maintaining an indefensible anti-competitive block on traffic, even where its successful movement has no negative effect on UP, and suggests that DM&E is "flouting" the Board's decision, citing out of context quotes from our filings. At the outset of this case, it was clear to us that the connection at Owatonna was absolutely essential to the successful implementation of the common control and for maximum shipper benefit. Very early on in the process, I explained to UP that we had numerous approaches to accomplishing this objective, but preferred a negotiated settlement. The distance between our positions, however, has been significant. What UP describes as "a very attractive offer" for 3,700 feet of track that UP doesn't use or maintain is ridiculous by comparison to any commercial rail trackage rights arrangement in the country. And UP's claimed "small per-car charge" would create unacceptably anti-competitive costs to shippers without justification. These costs would have to be passed through to the customer on moves already facing thin margins and to markets that have other modal alternatives. To dry up competitive alternatives and thwart the effectiveness of this connection to pay unwarranted tribute to UP defeats the purpose and objective of delivering competitive alternatives. What UP says DM&E is accomplishing "through a legal sleight of hand" is a straightforward contract issue. If it is a "sleight of hand", UP has every opportunity to address it in a court of law. To illustrate the lack of harm to UP, UP is wrong to suggest that this move will begin on Monday, March 24. In fact, it began last week -- as I advised UP we

expected do last February. UP's shock and surprise of learning about this movement just last week is overstatement, at best.

It appears from UP's reaction and last Friday's filing that UP does not understand the history, purpose or application of the contractual agreements (written by C&NW) controlling in this case. Rather than recognizing its misunderstanding of the contracts, it has chosen to attack the credibility of DM&E in negotiations and STB filings. With respect, we are trying hard to serve our customers and make this acquisition work for shippers, employees, and our entire service region. We wish to maintain good relations with UP, but will not be intimidated into foreclosing customer opportunities, ignoring legitimate employee and operational concerns, or paying extortionist rates when reasonable and legal alternatives avail themselves.

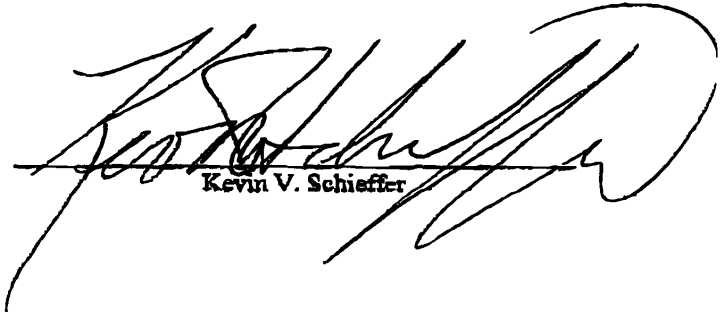
While UP will not suffer irreparable harm, DM&E and IC&E and their shippers and employees will suffer serious and potentially irreparable harm if the Board grants UP's request to help it foreclose a contractual right to a competitive connection. These new connections already have been established for customers. Those would be immediately lost if the Board acts on UP's behalf. Neither UP's suggestion that we comply with its unilateral demands nor that we should build a new connection are reasonable or will accomplish the objectives of this acquisition in the near term.

As will be demonstrated in our filing next week, DM&E's negotiating position has, contrary to UP's claim, been very straightforward. Further, as the filings will demonstrate, neither DM&E nor IC&E filed or otherwise made any misrepresentations to the Board, as UP's filing implies. No Board process has been or will be abused by DM&E. The statements in our filings are consistent with the facts and law in place or contemplated at the time of our filing. Circumstances have changed relative to the contractual rights. It is unreasonable to expect that

DM&E should not take full advantage of the law in any manner reasonably possible to inject new competition and serve new customers in new markets. This is but the second of a series of additional alternatives that DM&E and IC&E will pursue to accomplish this important objective. There is nothing in the STB order that requires us to remain totally dependent on UP, though that is exactly what UP's new petition would accomplish.

VERIFICATION

I, Kevin V. Schieffer, declare under penalty of perjury under the laws of the United States that the foregoing is true and correct, and that I am qualified and authorized to make this statement.



Kevin V. Schieffer

Dated: March 24, 2003

KEVIN V. SCHIEFFER
President & CEO

21 March 2003

VIA FAX AND OVERNIGHT

Mr. John Rebensdorf
V-P Network & Service Planning
Union Pacific Railroad
Union Pacific Bldg.
1416 Dodge Street
Omaha, NE 68179

Dear John:

Thank you for your letter of March 19. After reflecting on our discussions yesterday, we remain extremely interested in reaching a settlement. There seems to be a clear disagreement, however, as to our ability to bridge traffic at Owatonna. That, it seems to me, is fundamental to our approach here. Your concern about losing traffic revenue is different from the construction cost savings basis of the original proposal. I have already outlined our position with respect to why construction cost savings does not seem to us a logical basis for the amount of compensation requested. However, if in fact these traffic movements both (a) are not authorized by our existing agreements, and (b) would result in diverting traffic to which UP is otherwise entitled, I would agree that is a basis for reconsideration of our offer. Our position is that (a) we have clear authority under the existing agreements for bridge moves, and (b) it would not affect any UP traffic that we do not today have a right and means to move via another route.

In order to facilitate this discussion, let me begin by responding to UP's current position that "[t]here is absolutely no basis in our existing agreements for [DM&E's] claim" to use the Owatonna Trackage for "bridge move[s]". In my reading of the 1986 Agreement, Section 1.1 states clearly that "Lessor [C&NW] hereby grants to Lessee [DM&E] the use of said Facilities for the sole purpose of bridging Lessee's trains, engines, and cars manned by Lessee's crews."¹ We do not currently contemplate anything but bridge moves over the trackage in question. It will involve only DM&E trains. And they will be manned by DM&E crews (which is one of the labor concerns I noted earlier that we would like to avoid by reaching a mutual agreement with UP).² Given DM&E's ownership of IC&E and trackage rights over the IC&E, this clearly can be made solely as a bridge move.

¹ *Overhead Trackage Rights Agreement*, September 3, 1986, Section 1.1, at p. 2.

² We have been in labor discussions concerning an asset purchase of the Northern tier of our IC&E line.

John Rebensdorf
March 21, 2003
Page 2

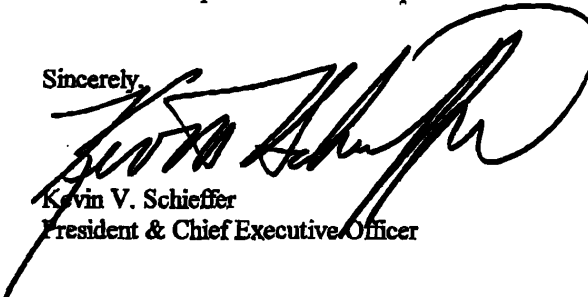
Section 8.1 of the 1986 Agreement provides that "If Lessee shall make default in any of the payments . . . or shall fail to faithfully perform or otherwise fails to comply with any of the covenants herein required of it . . . then in such case Lessor may thereupon declare this Agreement terminated . . .".³ Your letter of 19 March purports to provide notice of such default, but does not identify which covenant or other provision of the agreement you allege we are in violation of so that we can assess its merits and, if correct, make reasonable use of the cure period. It would be greatly appreciated if UP would identify what provision of the agreement you feel we would be in violation of, along with the reasoning therefore. That also would be a helpful step in assessing whether we should further modify our settlement proposal. After reading your letter and reviewing the 1986 Agreement you cite, I see no indication that we are in violation of any provision of that agreement.

Also, I do not believe we ever intended to move any UP traffic via this connection that we do not already have the ability to route via an alternative carrier even if the Owatonna connection did not exist. If there is a concern to the contrary, I would appreciate understanding that.

I recognize that it may take some time to work through this issue. Accordingly, I have directed our marketing department to delay until at least April 4 any movement via this route that would affect any traffic going via UP routings today – regardless of whether or not there are other routing alternatives available to us in addition to Owatonna. Hopefully, that will give us until at least the STB reporting date to determine whether something can be worked out in a time-frame that does not have any economic impact on UP – direct or indirect. But we will go forward with traffic that does not affect UP (e.g., origin to destination on IC&E/DM&E, etc.).

Thank you for your consideration of these requests. I remain hopeful that we will be able to work something out.

Sincerely,



Kevin V. Schieffer
President & Chief Executive Officer

KVS:lma (kvs/wordjrebensdorf21 March)

³ *Id.*, at pp. 8-9.