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**SURFACE  
TRANSPORTATION BOARD**

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Office of Proceedings



BY HAND

**JAN 30 2004**

**Part of  
Public Record**

January 30, 2004

Hon. Vernon A. Williams  
Secretary  
Surface Transportation Board  
1925 K Street  
Washington, D.C. 20423-0001

**FILED**

JAN 30 2004

**RE:** FD No. 34464, Wisconsin & Southern Railroad Co.  
- Acquisition Exemption - Iowa, Chicago &  
Eastern Railroad Corporation

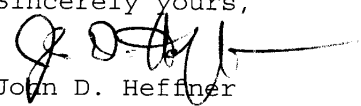
Dear Mr. Williams:

On behalf of Petitioner Wisconsin & Southern Railroad Co. ("WSOR") I am filing an original and ten copies of a petition for exemption under 49 U.S.C. 10502 from the provisions of 49 U.S.C. 10902 for the acquisition by WSOR of a line of railroad of the Iowa, Chicago & Eastern Railroad Corporation.

I am also enclosing one check payable to the Board for \$4,900 to cover the applicable filing fee and a computer disk formatted in Word containing this filing. A wordperfect copy can be provided Monday if required.

Please date stamp and return one copy of this filing for our records.

Sincerely yours,

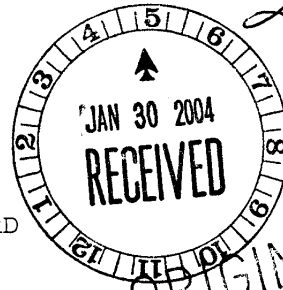
  
John D. Heffner

Enclosures

cc: David Konschnik, Esq.  
William C. Sippel, Esq.  
Mr. William Gardner  
Mr. Tim Karp

ORIGINAL

BEFORE THE  
SURFACE TRANSPORTATION BOARD



ORIGINAL

STB Finance Docket No. 34464

**FILED**

WISCONSIN & SOUTHERN RAILROAD CO.  
-- ACQUISITION EXEMPTION --  
IOWA, CHICAGO & EASTERN RAILROAD CORPORATION

JAN 30 2004

PETITION FOR EXEMPTION  
UNDER 49 U.S.C. 10502

EXPEDITED CONSIDERATION REQUESTED

3

**FILED**

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JAN 30 2004

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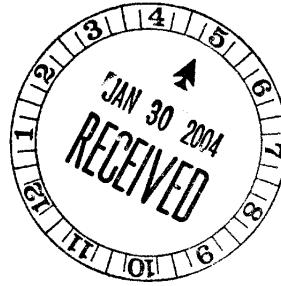
ORIGINAL

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Counsel for Petitioner  
Wisconsin & Southern Railroad Co.

Dated: January 30, 2004

BEFORE THE  
SURFACE TRANSPORTATION BOARD



STB Finance Docket No. 34464

WISCONSIN & SOUTHERN RAILROAD CO.  
-- ACQUISITION EXEMPTION --  
IOWA, CHICAGO & EASTERN RAILROAD CORPORATION

PETITION FOR EXEMPTION  
UNDER 49 U.S.C. 10502

EXPEDITED CONSIDERATION REQUESTED

I.

INTRODUCTION

Pursuant to 49 U.S.C. 10502, Wisconsin & Southern Railroad Co. (hereafter "WSOR" or "Petitioner"), an existing class II regional railroad seeks an exemption from 49 U.S.C. 10902 permitting it to acquire approximately 7.33 miles of railroad (approximately 6.48 miles which it currently leases and operates plus .85 miles of connecting track). The subject trackage comprises the following track segments in Janesville, Rock County, WI as follows: between the division of ownership at MP 94.49 on Buyer's line to Fox Lake, IL, and the division of ownership at MP 11.02 on Buyer's line to Monroe, WI, between MP 98.27 and MP 46.75 on Buyer's line to Milton, Jct., WI, and

between MP 9.96 and MP 46.08 consisting generally of the north leg of the wye track at Janesville, WI (collectively "the Leased Properties") and the connecting trackage between MP 45.23 and the connection with the Leased Premises at MP 46.08 ("the Connecting Line"). WSOR submits as Exhibits A, B, and C three maps, respectively depicting the location of railroad trackage in Janesville, WI, the WSOR Railroad System, and all railroad lines in the State of Wisconsin. The purpose of this transaction is to enable WSOR to purchase railroad lines and facilities in Janesville that it currently leases and for which it is currently the primary user. Seller Iowa, Chicago & Eastern Railroad Corporation (hereafter "IC&E") will retain local and overhead trackage rights over all of the subject trackage. WSOR requests expedited handling for this Petition with a decision served on or before March 15, 2004, effective on service, so that it may close the transaction by or before March 31, 2004.

## II.

### FACTUAL BACKGROUND

Petitioner is an existing class II railroad common carrier operating over 600 miles of trackage in Wisconsin and adjacent northern Illinois. Originally established in 1980 to operate segments of the former Milwaukee Road that were being abandoned and subsequently acquired by the State of Wisconsin, WSOR has grown substantially over the past 23 and ½ years. Starting as a class III short line rail carrier operating 93 miles of track, WSOR eventually took over several former CP Rail

and Union Pacific lines radiating out of Madison, WI as well former CP Rail trackage in Milwaukee. In 1992, WSOR's owner and President William Gardner acquired control of another class III Wisconsin-based short line railroad, the Wisconsin & Calumet Railroad ("WICT"). In 1996, WSOR merged WICT's operations and properties into WSOR, leaving WSOR as the surviving company.<sup>1</sup> WSOR also acquired trackage rights from other railroads for the purpose of connecting all of these lines. Early in 2003, WSOR's revenues increased to the point it became a small class II railroad.

IC&E is a Midwestern class II regional railroad that began operations in 2002 when it acquired substantially all of the rail assets of the former I&M Rail Link, LLC ("IMRL"). Controlled by the South Dakota-based Dakota, Minnesota & Eastern Railroad Corporation, IC&E operates approximately 1,400 miles trackage in six Upper Midwest States stretching from Chicago to the Twin Cities, western Iowa, and Kansas City. As relevant here, IC&E owns a stub-ended branch line extending from a connection with its Chicago-Kansas City mainline at Davis Jct., IL, northwards to Janesville, WI, where it connects with WSOR.

WSOR (or its predecessors) have held operating rights allowing it to use the subject trackage for 18 years, going back to the time the line was owned by CP Rail's predecessor, the Soo Line. Subsequently, IMRL acquired Soo's lines to Iowa and

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<sup>1</sup> See, STB FD No. 33450, Wisconsin & Southern Railroad Co.-Corporate Family Transaction Exemption-Wisconsin and Calumet Railroad Company (served September 5, 1997).

Kansas City including the Janesville trackage and then IC&E in turn recently acquired substantially all of IMRL's assets. IC&E has now agreed to sell the subject rail properties to WSOR. WSOR has historically used and continues to need the yard and engine facilities at Janesville. In addition, it intends to develop new local freight business along the subject trackage.

III.

ADDITIONAL INFORMATION

So that the Board may expeditiously process its request, WSOR provides the following additional information about the transaction:

- (1) The full name and address of the  
Petitioner is Wisconsin & Southern Railroad Co.,  
5300 N. 33<sup>rd</sup> Street, P.O. Box 90229, Milwaukee, WI  
53209-0229.
- (2) The name, address, and telephone number  
of the representative of the Petitioner who  
should receive correspondence is John D. Heffner,  
John D. Heffner, PLLC, 1920 N Street, N.W., Suite  
800, Washington, D.C. 20036. Phone is 202-263-  
4180.
- (3) The name and address of the railroad  
transferring the rail line is Iowa, Chicago &  
Eastern Railroad Corporation, 140 North Phillips,  
Sioux Falls, SD 57104.
- (4) The parties are presently negotiating  
an agreement for WSOR to purchase the subject

properties from IC&E.

- (5) The parties propose to consummate this transaction as soon as the exemption sought here becomes effective.
- (6) The rail lines being acquired here extend between the division of ownership at MP 94.49 on Buyer's line to Fox Lake, IL, and the division of ownership at MP 11.02 on Buyer's line to Monroe, WI, between MP 98.27 and MP 46.75 on Buyer's line to Milton, Jct., WI, and between MP 9.96 and MP 46.08 consisting generally of the north leg of the wye track at Janesville, WI (collectively "the Leased Properties") and the connecting trackage between MP 45.23 and the connection with the Leased Premises at MP 46.08 ("the Connecting Line. The total distance is approximately 7.33 miles.
- (7) A map indicating the lines being acquired is attached hereto as Exhibit A.
- (8) After the transaction, WSOR will continue to be a class II carrier.

IV.

ARGUMENT

THE ACQUISITION OF THE SUBJECT

TRACKAGE SHOULD BE EXEMPTED

Petitioner seeks an exemption under 49 U.S.C. 10502

from 49 U.S.C. 10902 to permit it to purchase approximately seven miles of trackage which it has been operating for many years. But for the exemption of 49 U.S.C. 10502, WSOR's acquisition would require the Board's authorization under 49 U.S.C. 10902 applicable to the acquisition (and also operation) of actively used railroad lines by existing class II and III rail carriers. Under §10902(c), the Board shall issue a certificate authorizing a class II carrier to acquire an additional line of railroad unless the Board finds that the acquisition is inconsistent with the public convenience and necessity.

Petitioner believes that its request is appropriate for exemption from the formal requirements of §10902. Section 10502 directs the Board to grant an exemption from regulation if it finds that (1) regulation is not necessary to carry out the transportation policy of §10101a and (2) either (a) the transaction or service is of limited scope, or (b) the application of a provision of this subtitle is not needed to protect shippers from the abuse of market power. Indeed, the legislative history behind §10505 [the predecessor section to the current §10502] makes clear Congress' intent that the Interstate Commerce Commission and [now the Board] use its exemption authority liberally to free certain transactions and services from the administrative and financial costs associated with continued regulation.

In discussing the exemption powers of the Board's predecessor -- the ICC -- the Staggers Act legislative history

states:

The policy underlying this provision is that while Congress has been able to identify broad areas of Commerce where reduced regulation is clearly warranted, the Commission is more capable through the administrative process of examining specific regulatory provisions and practices not yet addressed by Congress to determine where they can be deregulated consistent with the policies of Congress. The conferees expect that, consistent with the policies of this Act, the Commission will pursue partial and complete exemptions from remaining regulation.

H.R. Rep. No. 96-1430, 96th Cong. 2d Sess. 105 (1980); see also, Exemption from Regulation--Boxcar Traffic, 367 I.C.C. 424, 428 (1983), vacated and remanded on other grounds, Brae Corp. v. United States, 740 F.2d 1023 (D.C. Cir. 1984). This statement applies equally to the Board as the ICC's successor.

Exemption of the proposed transaction from §10902 is exactly the type of minor transaction Congress contemplated when it enacted §10502. Requiring WSOR to submit a formal application is not necessary to carry out the transportation policy of 49 U.S.C. 10101a. A grant of the exemption will further several goals of the I.C.C. Termination Act including §10101a(2) and (7), minimizing federal control over transportation and reducing regulatory barriers to entry. A grant will also facilitate the goals of §10101a(5) and (9) providing for sound economic conditions in the transportation industry and honest and efficient management of railroads. IC&E's sale of this trackage to WSOR will permit a locally based carrier with strong ties to the State to own and rehabilitate

this track while the much larger IC&E can concentrate its efforts on running a larger Midwestern regional railroad system.

Granting WSOR's request also satisfies both the limited scope and the no abuse of captive shippers tests of the statute. The total length of the track involved is approximately 7.33 miles comprising several short contiguous segments. The trackage serves only one customer and Seller will continue to have direct access to all current and future customers and interchanges on the subject lines. WSOR (or its predecessors) have been operating over the subject trackage for almost 18 years<sup>1</sup> and the ICC had previously found in 1994 that its lease operation of this trackage qualified for an exemption. FD No. 32546, Wisconsin & Southern Railroad Co.-Purchase, Lease & Operation Exemption-Canadian Pacific Rail Services (slip op., served Aug. 5, 1994) (authorizing WSOR's lease and operation of the subject trackage as well as the purchase and operation of another line). Under the terms of the retained trackage rights, existing and new customers will continue to have direct access to IC&E. For these reasons WSOR's acquisition of the subject trackage will have no impact on either the competitive situation at Janesville or rail carrier employees who work on these lines. Accordingly, this transaction meets the second part of the §10502 exemption test.

In 1996, the Board promulgated a class exemption

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<sup>1</sup> In addition, WSOR through its control and later acquisition of WICT holds trackage rights over the subject trackage. See, FD No. 32546, slip op. at 2.

entitling class III carriers to acquire and/or operate actively used rail lines without having to undergo the expense and burden of submitting either a formal application or an individual petition for exemption for operating authority. Class Exemp. For Acq. Or Oper. Under 49 U.S.C. 10902, 1 S.T.B. 95 (1996). Had WSOR still been a class III carrier at the time of this filing, it would have been entitled to avail itself of that class exemption. Moreover, WSOR would have been entitled to use the class exemption established by Ex Parte No. 392 (Sub-No. 1)<sup>2</sup> in 1988 to acquire this trackage *had it been* [emphasis supplied] a newly established class II carrier like IC&E was at the time it acquired this line. Due to the absence of such a class exemption for the acquisition of actively used lines by class II carriers, WSOR must file an individual petition for exemption. But the reasons for granting the exemption here are the same as those applicable to a grant of the class exemptions discussed above.

Recent STB precedent, involving the purchase of short segments of railroad operated by the purchasing carrier and involving no change in the operating carrier, also supports a grant of the requested exemption. See, e.g., STB FD. No. 34285, Wisconsin & Southern Railroad Co.-Acquisition Exemption-Soo Line Railroad Company d/b/a Canadian Pacific Railway (served Jan. 17, 2003) (involving WSOR's acquisition of a 32.5 mile long line of railroad which it had been operating since 1998); cf., STB FD

<sup>2</sup> Class Exemption-Acq. & Oper. Of R. Lines Under 49 U.S.C. 10901, 4 I.C.C.2d 309.

No. 34410, Buffalo & Pittsburgh Railroad, Inc.-Acquisition And Operation Exemption-CSX Transportation, Inc. (served Nov. 19, 2003) (involving a regional railroad's acquisition and restoration of operations on a CSX rail line it had formerly leased and operated before both carriers had received discontinuance authority over it).

V.

EMPLOYEE PROTECTION; CERTIFICATION OF NOTICES

Although no IC&E employees are expected to be affected by this acquisition, WSOR recognizes that this acquisition will be subject to the employee severance conditions described in 49 U.S.C. 10902(d) as set forth in Wisconsin Central Ltd-Acquisition Exemption-Union Pacific Railroad, 2 S.T.B. 218 (1997), rev'd in part sub nom. Association of American Railroads v. STB, 162 F.3d 101 (D.C. Cir. 1988).

Under 49 CFR 1150.42(e) WSOR is required to post and serve a notice<sup>3</sup> at least 60 days before the exemption becomes effective of applicant's intent to undertake the proposed transaction. Within the next several days, WSOR will be submitting a request for waiver of 49 CFR 1150.42(e) so that it may consummate this transaction on or before March 31, 2004.

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<sup>3</sup> indicating available jobs, terms of employment and principles of employment selection, and the lines to be transferred

VI.  
ENVIRONMENTAL AND HISTORIC IMPACTS

UNDER 49 CFR 1105

Pursuant to 49 CFR 1105.6(c)(2), the proposed transaction is exempt from environmental review under 49 CFR 1105(c)(2)(i), because the actions proposed herein will not cause any operating changes that exceed the thresholds established in 1105.7(e)(4) or (5).

In addition, this transaction is exempt from historic review under 1105.8(b)(1). Under this section, a sale, lease or transfer of a rail line is exempt if rail operations will continue. Further Board approval is required for the parties to abandon service, and there are no plans to dispose of or alter the properties subject to Board jurisdiction.

VII.  
WSOR REQUESTS EXPEDITIOUS HANDLING

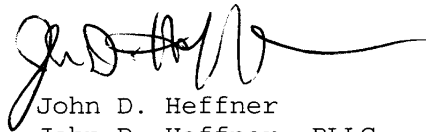
WSOR respectfully asks the Board to issue a decision granting this exemption on or before March 15, effective on the date of service. Although the parties are still negotiating the details of the Asset Purchase Agreement, IC&E has provided financial incentives to WSOR to close the transaction on or before March 31, 2004. In STB FD. No. 34410, Buffalo & Pittsburgh Railroad, Inc., supra., a case also involving the purchase of a line the purchaser had operated in the past, the Board granted the requested exemption a mere 26 days after filing, with an effective date 56 days after filing. Because

WSOR needs to be able to close promptly, it requests the similar expedited relief to that granted in that proceeding.

VIII.  
CONCLUSION

Accordingly, WSOR requests that the Board grant it an exemption from the provisions of 49 U.S.C. 10902 to permit it to acquire the subject rail line with a decision served on or before March 15, 2004, effective upon service.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John D. Heffner", with a long horizontal flourish extending to the right.

John D. Heffner  
John D. Heffner, PLLC  
1920 N Street, N.W.  
Suite 800  
Washington, D.C. 20036  
Telephone: (202) 263-4180

Counsel for Petitioner  
Wisconsin & Southern Railroad Co.

Dated: January 30, 2004

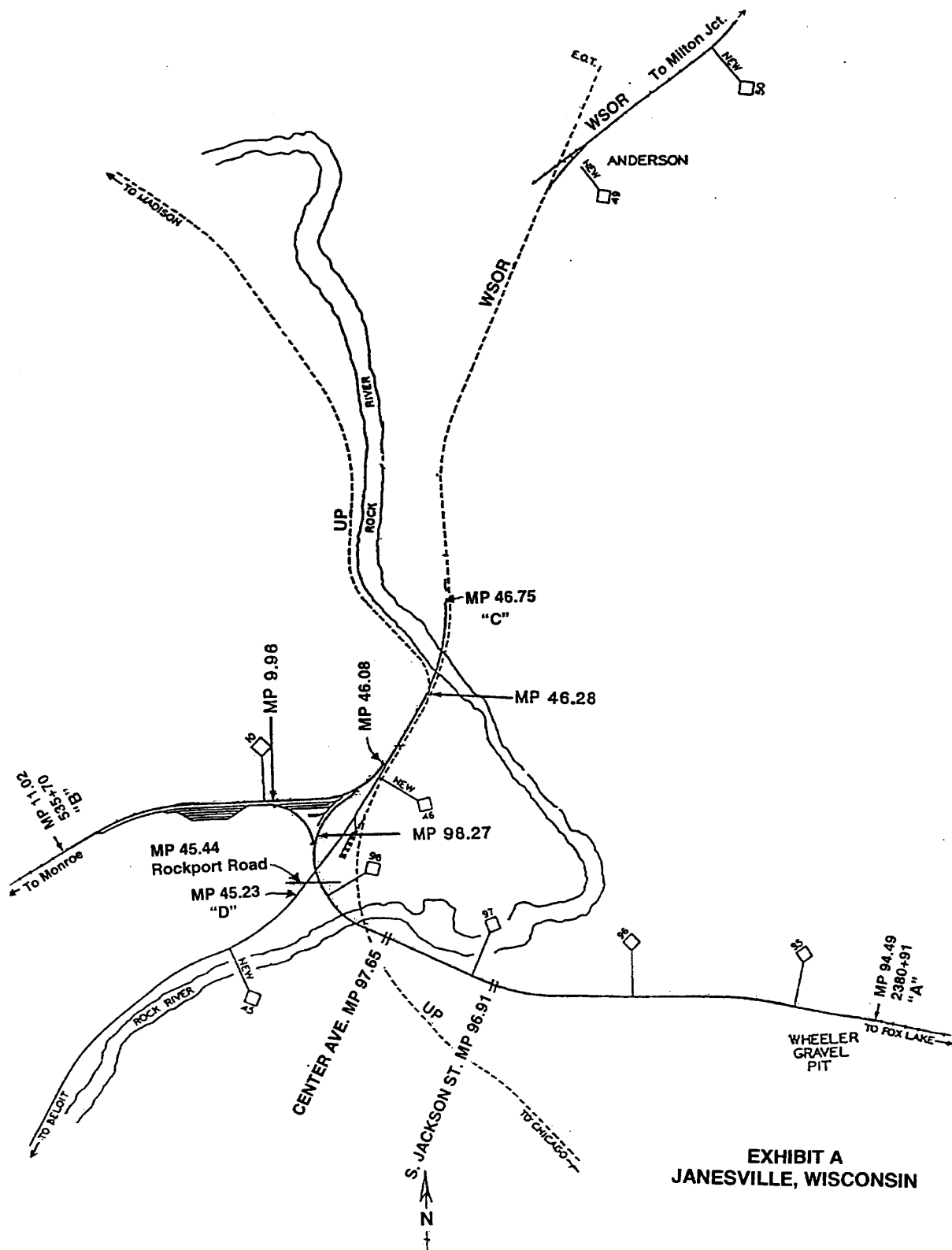


EXHIBIT A  
JANESVILLE, WISCONSIN

EXHIBIT B

# Wisconsin & Southern Railroad Present

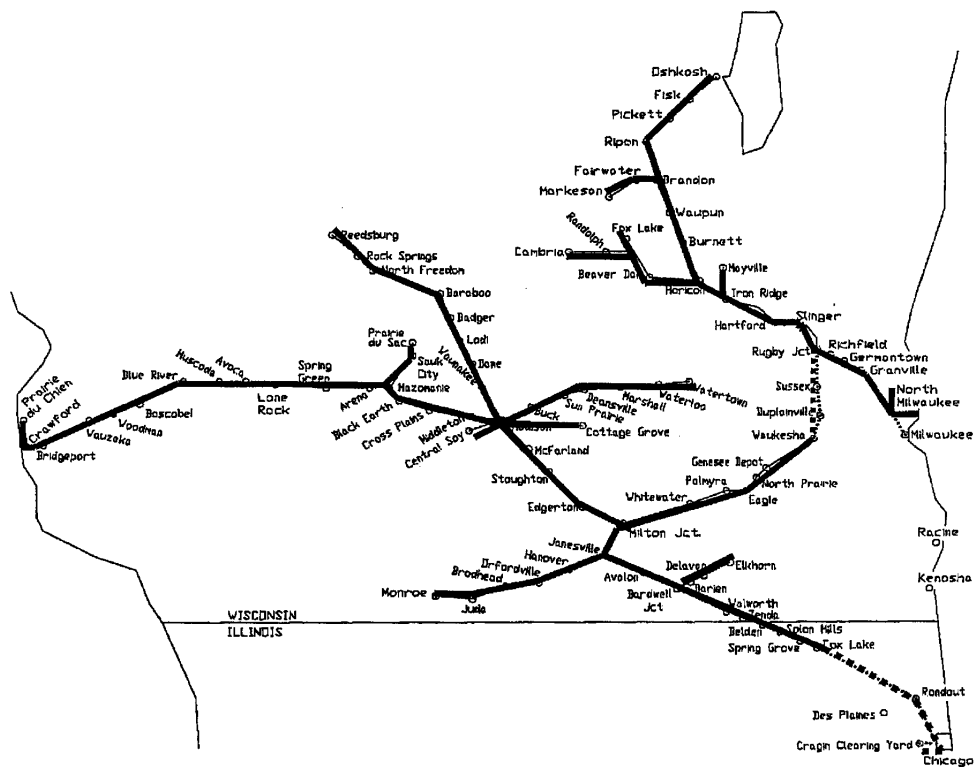
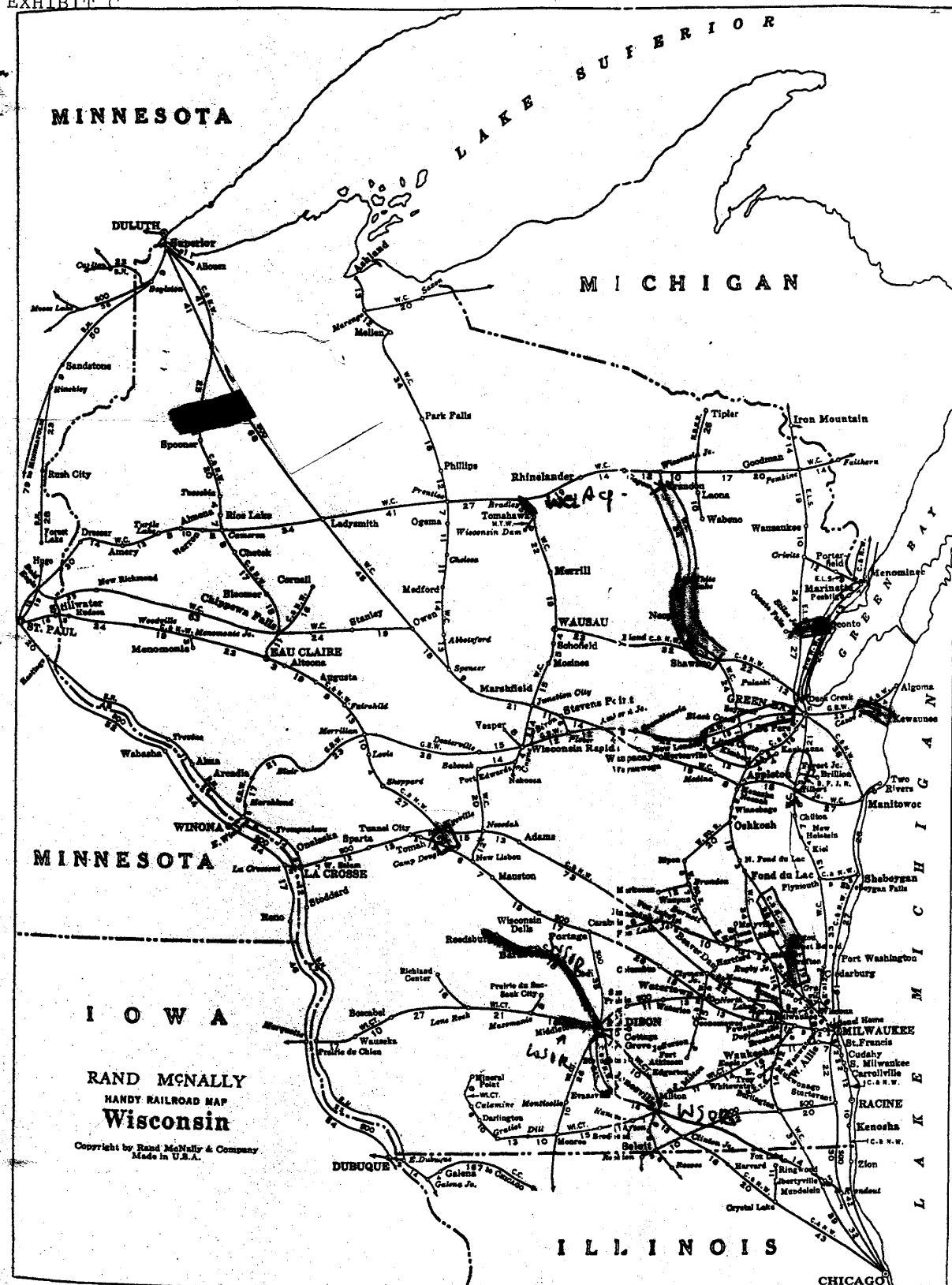


EXHIBIT C



VERIFICATION

STATE OF WISCONSIN    )  
                              )    SS  
CITY OF MILWAUKEE    )

Timothy J. Karp, being duly sworn according to law, hereby  
deposes and states that he is authorized to make the  
Verification, has read the foregoing document, and knows the  
facts asserted therein are true and accurate as stated, to the  
best of his knowledge, information and belief.

Timothy J. Karp

Subscribed and sworn to before me, a Notary Public, in and for  
the City of Milwaukee in the State of Wisconsin, this 30  
day of January 2004

Cathy Cornell  
Notary Public

My Commission expires:

3-25-07