

BEFORE THE
SURFACE TRANSPORTATION BOARD

Canadian Pacific Railway Company, *et al.* – Control -
Dakota, Minnesota & Eastern Railroad Corp., *et al.*

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)
) Finance Docket No. 35081 (Sub-No. 2)
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**CANADIAN PACIFIC RAILWAY COMPANY'S REPLY TO THE SECOND
SUPPLEMENT TO THE PETITION OF THE STATE OF SOUTH DAKOTA
ACTING BY AND THROUGH ITS DEPARTMENT OF TRANSPORTATION TO
ENFORCE INVESTMENT REPRESENTATIONS**

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Canadian Pacific Railway Company and its subsidiary, Dakota, Minnesota & Eastern Railroad Corporation (“DME”) (referred to collectively as “CP”) submit this response to the Second Supplement to the Petition of the State of South Dakota Acting By and Through Its Department of Transportation to Enforce Canadian Pacific Railway Company’s Investment Representations, filed in the above-captioned proceeding on August 29, 2014 (the “Second Supplement”).

The State begins its Second Supplement by announcing that it has completed “its investigation of whether CP has adhered to the investment representations it made in *CP/DME*.” Second Supp. at 2. But the State fails to acknowledge that its “investigation” actually confirmed the truth of everything that CP told the Board last year in its August 28, 2013 Reply to the State’s Petition (and everything that CP told the State in the months before the State filed its Petition). Instead, the State requests that the Board “award” it approximately \$22 million, plus attorney’s fees, based upon an utterly fictitious investment commitment that is flatly contradicted by the record.

As an initial matter, it is instructive to focus on the key factual findings that emerged from the State’s “investigation”:

First, the State’s “investigation” confirmed the accuracy of the capital investment data that CP submitted to the Board in response to the State’s Petition.¹ In its First Supplement, the State called into question the veracity of the data furnished by CP (and verified under oath by CP witness Wilson), claiming that “there is no way to know whether the information on these sheets is accurate.”² However, as Table 1 below demonstrates, the State’s subsequent audit of the extensive documentation produced by CP in discovery confirmed that the capital investment figures presented to the Board by CP were true and correct.

¹ See Canadian Pacific Railway Company’s Reply to the Petition of the State of South Dakota to Enforce Investment Representations, filed August 28, 2013 (“CP Reply to Petition”), Attachments 2 through 5. The CP Reply to Petition presented capital spending as of August 28, 2013. Table 1 updates that data to include full year 2013 spending and 2014 capital spending through September 30, 2014. See Attachment A to the enclosed Verified Statement of John Huber for further breakdowns of this data.

² See Supplement to the Petition of South Dakota, filed Sept. 20, 2013 (“First Supp.”) at 2-3.

TABLE 1

THE STATE'S CAPITAL INVESTMENT CALCULATIONS ARE NEARLY IDENTICAL TO THOSE CP PRESENTED IN ITS AUGUST 2013 REPLY³

YEAR	CP'S INVESTMENT CALCULATIONS ⁴		INVESTMENT CALCULATIONS IN STATE'S SECOND SUPPLEMENT ⁵	
	Annual Total	Cumulative Total	Annual Total	Cumulative Total
2009 ⁶	\$78,519,899	\$78,519,899	\$78,242,252	\$78,242,252
2010	\$62,160,150	\$140,680,049	\$61,900,274	\$140,142,526
2011	\$86,112,521	\$226,792,570	\$87,616,025	\$227,758,551
2012	\$84,116,716	\$310,909,286	\$82,673,143	\$310,431,694
2013	\$82,928,967	\$393,838,253	\$83,953,967	\$394,385,661

Second, the State's "investigation" confirms that CP has invested far more than the \$300 million it committed to spend during the *CP/DME Control* proceeding. Indeed, the State's witness Emmert calculates that CP made \$394.4 million in DME capital investments between January 1, 2009 and December 31, 2013, and more than \$310 million during the four calendar years 2009 through 2012. Again, it is worth noting that after the State obtained substantial discovery to "verify" the capital investment numbers that CP provided in its August 2013 Reply, its witness calculated numbers that are nearly-identical to CP's August 2013 numbers. *Compare* Emmert V.S. at 9 (calculating \$310,431,694 in 2009-2012 capital spending) with Attachment 4 to CP Reply (showing \$310,909,286 in 2009-2012 capital spending). As CP

³ The minor differences between the CP and State figures for individual years are attributable to differences in the timing of reclassification of Assets Under Construction ("AUCs") in the three data sources produced to the State in discovery.

⁴ Source: CP Reply to Petition, Attachment 4; V.S. Huber at Attachment A (source for full year 2013 total).

⁵ Source: Second Supp., V.S. Emmert at 9.

⁶ CP has adjusted Mr. Wilson's 2009 calculation to mirror the State's decision to treat the \$13.5 million that CP advanced to DME in 2008 (to enable it to begin upgrading its Rochester – Owatonna, MN line) as part of the 2009 capital budget. In Mr. Wilson's original verified statement this advance was included in 2008 numbers.

demonstrates below, when one includes CP's 2014 capital spending on DME to date, CP's total post-acquisition capital investment on DME exceeds \$459 million.

Third, the State's "investigation" has confirmed that CP never made a commitment to upgrade the entire DME to FRA Class 3 track. While the State's initial Petition asked the Board to enforce what it claimed was a "requirement to upgrade all track to Class 3 standards,"⁷ it now concedes that CP is not required to do so. *See* Second Supp. at 27 ("The State has not requested that CP upgrade all DME track to Class 3 standards"). The State's retreat on this point is likely a response to FRA's submission in this proceeding agreeing that such a commitment was never part of the SIP and taking responsibility for inadvertently suggesting in a 2008 letter to the Board that CP would upgrade the entire DME Line to Class 3.⁸ While the State lambasts CP for not taking some post-*Decision* action to correct a footnote in the *Decision* that referenced FRA's misstatement, it is unable to show how any party was harmed (or how CP benefited) from an inconsequential misstatement by another party in a footnote to the *Decision*. Nor has the State cited any authority demonstrating that CP had an affirmative obligation to correct immaterial misstatements made by other parties like the one at issue here.

Because the State's "investigation" confirmed that CP complied with its investment representations, the logical end of that "investigation" would be to withdraw the State's complaint and bring this proceeding to a close. Refusing to give up, however, the State continues to insist that CP made an additional "representation" to spend \$473 million, not \$300 million. Undaunted by the fact that this \$473 million figure appears nowhere in the Application, the Safety Integration Plan ("SIP"), any party's comments, or the *Decision* itself, the State selectively quotes language from Applicants' Rebuttal that it claims constituted a

⁷ Pet. at 29.

⁸ *See* Letter from Kathryn Thomson to Chairman Elliott at 2 (Sept. 30, 2013).

“second” \$473 million commitment. The State’s theory depends entirely on a misleading partial citation of the relevant language from Applicants’ Rebuttal, which in context makes clear that CP was referring to its original and only commitment to spend \$300 million and was not introducing, for the first time on Rebuttal, a “second” commitment to increase capital spending on DME to \$473 million. In any event, CP’s total capital investment spending on the line will soon surpass that \$473 million mark, rendering the State’s claim moot. Based on its theory that CP violated a commitment to invest \$473 million in DME’s infrastructure, the State makes a jaw-dropping request that the Board order CP to write it a check for \$22 million dollars (plus pay an unspecified amount of attorney and consultant fees).

The deficiencies in this request are almost too numerous to count. For starters, the State is entitled to no damages because CP has fully complied with its investment representations. And the State’s metric for calculating damages—a “route-mile” share of the alleged shortfall from the \$473 million commitment—ignores both that the alleged shortfall is rapidly evaporating as CP continues to invest on DME and that the State has no claim to any particular share of CP’s DME capital budget. Moreover, the sale of DME South Dakota lines to the Rapid City, Pierre and Eastern Railroad (“RCP&E”)—a sale that proceeded with the State’s approval—moots any residual claims related to CP’s investment in those lines. Furthermore, the Board has no statutory authority to impose multimillion dollar damages on CP—let alone to order it to write a check to a party that failed to participate in the underlying proceeding and whose disposition of the windfall funds it requests would be outside the Board’s oversight authority. Lastly, the State’s demand for attorneys’ and consultant fees is completely inconsistent with Board precedent and would violate constitutional limits.

While the State may not like the results of its “investigation,” they are clear. CP spent far more than \$300 million in DME capital investment, and it has complied with the only investment representation it ever made. It is time to bring this proceeding to an end, and the Board should dismiss the State’s Petition.

Section I of CP’s Reply explains the significant investments that CP made on DME rail lines in South Dakota, and the resulting substantial improvements in the safety and reliability of those lines. Section I also explains that South Dakota benefitted directly from an ample share of total DME investment when considering relative volumes and densities, and that CP continued to invest in South Dakota lines until the sale of those lines to RCP&E. (Indeed, CP spent over {{ }} in capital on DME West End lines during the first five months of 2014—even after CP had entered a transaction agreement with RCP&E and before the sale was consummated.) Section II discusses the three claimed “investment representations” that the State asserts: (1) the commitment to invest a total of \$300 million (which CP made on the record and has satisfied); (2) a supposed commitment to spend an additional \$473 million over “the next several years” (which CP never made and which it will, in any event, soon surpass); and (3) a supposed commitment to upgrade the entire DME to Class 3 track (which CP never made and for which the State does not even request compliance). Section III concludes by explaining the multiple legal and equitable reasons why the State is not entitled to the exorbitant “damages payment” it seeks.

I. CP AMPLY FULFILLED ITS INVESTMENT REPRESENTATIONS AND LEFT THE DME WEST LINES IN FAR BETTER CONDITION THAN WHEN CP PURCHASED DME.

The State’s Supplement is based on a series of false premises. As demonstrated below, the notion that CP failed to comply with the single \$300 million investment commitment it made in the *CP/DME Control* proceeding is false, and the two other “commitments” that the State

invented plainly were never made by CP. But perhaps the most significant false premise underlying the State's position is the notion that the State of South Dakota has anything to be aggrieved about in the first place. CP invested heavily in South Dakota, and there can be little question that the DME lines in South Dakota that are now operated by the RCP&E are in far better shape today than they were on the day CP acquired them. CP is proud of the work it did to serve South Dakota customers and improve South Dakota rail infrastructure, and the RCP&E has inherited a strong, well-maintained infrastructure with which it can provide safe and reliable rail service.

A. CP Significantly Improved the Safety and Reliability of Its Former Lines In South Dakota.

The best evidence of the substantial improvements CP made to DME's infrastructure comes from an independent and objective source—FRA—which recognized last year that “CP has greatly improved the overall safety of the former DM&E.” *See* J. Szabo Letter to Sen. Thune, at 1 (July 10, 2013) (Attachment 8 to CP Reply to State's Pet.). FRA based this conclusion on safety data that showed “a marked reduction in personal injuries per 200,000 man-hours (a reduction of almost 69 percent) and total train accidents per million train-miles (a reduction of over 80 percent).” *Id.* Significantly, the number of total reportable train accidents attributable to rail defects declined from 11 accidents in 2008 to only two in 2012, while the number of all track-related accidents declined 65%, from 20 accidents in 2008 to seven in 2012. *See* CP Reply, V.S. Wilson at 13. It is in part because of these dramatic improvements that FRA confirmed to the Board that “CP has fulfilled its safety commitments under the SIP.” Letter from Kathryn Thomson to Chairman Elliott at 2 (Sept. 30, 2013) (emphasis added).

It should not be forgotten that the current condition of the DME contrasts starkly with its past history. As recently as 2005 FRA found “systemic deficiencies” in DM&E's track

conditions that contributed to unusually high numbers of track-caused derailments and employee injuries. *See* Ex. 2 at 1-2 (Safety Compliance Agreement). FRA found it necessary to enter a Safety Compliance Agreement with DM&E in 2005 to remedy those deficiencies. *See id.* Even though the Safety Compliance Agreement terminated in early 2008, FRA still had “concerns about DME track.” *See id.* at 1. FRA’s recent statements show that those concerns have been mitigated by the intensive CP rehabilitation and capital spending program that has transformed DME into a safer railroad.

These overall safety improvements benefited both South Dakota shippers and South Dakota rail employees. As demonstrated below, they are the result of significant capital investments CP made in order to improve DME lines located in South Dakota.

B. CP Made Significant Investments In South Dakota.

As CP witness Wilson testified previously, between 2008 and July 2013, CP invested {{ }} for engineering capital improvements on DME’s lines in South Dakota.⁹ CP continued to spend capital dollars on DME’s lines in South Dakota during 2013 and 2014, spending {{ }} in 2013 and another {{ }} in the first five months of 2014 before the lines were sold to the RCP&E. CP’s capital expenditures in South Dakota have included over {{ }} for rail, ties, ballast and other track material; {{ }} to repair and upgrade bridges and culverts; {{ }} for grading; and {{ }} for signals and communications facilities. *See* V.S. Wilson at 8.¹⁰ As a result of those investments, approximately 57 miles of track within the State of South Dakota were upgraded from FRA Class 1 or Class 2 to FRA Class 3 standards. *See id.* at 8. Indeed, virtually all of the 206 miles

⁹ *See* CP Reply, V.S. Wilson at 7-8.

¹⁰ To be conservative, CP excluded all 2008 capital expenditures from these calculations (even though CP assumed control of DME in November 2008 and indeed had advanced \$13.5 million for DME to spend on capital investments before the transaction was consummated).

of DME main line track between the South Dakota/Minnesota border and Pierre, SD are now Class 3 track capable of supporting 40 MPH train operations. *Id.*

The State attempts to downplay this spending by claiming that South Dakota did not receive its “fair share” of CP’s capital budget, measured on a “per-route mile” basis. The State also alleges that CP began directing resources elsewhere after it announced in December 2012 its intention to sell the portion of the DME that is now the RCP&E.¹¹ The State is wrong on both points—the evidence shows that South Dakota received an ample and appropriate share of DME capital investment spending.

While CP made no commitment to invest any particular quantity of money in South Dakota,¹² DME’s South Dakota lines received a significant share of CP’s overall capital investment. The State’s approach to allocate investment dollars (based on a comparison of expenditures per route mile) ignores the role that relative density and traffic volume play in railroads’ decisions as to where to deploy their limited capital resources. The State’s analysis assumes (contrary to reality) that capital dollars should be spread evenly across a railroad’s primary main lines, secondary lines, and branch lines. However, CP and other railroads focus capital investments where they will generate the greatest overall benefit. In other words, capital dollars are usually best spent on those lines that serve more customers and handle more traffic. The State’s argument ignores the reality that a substantial portion of DME’s lines in South Dakota are extremely low-density, particularly the West End lines that are now operated by the RCP&E. *See* V.S. Wilson at 8-9 (describing relative densities on DME). It would be both imprudent management and unfair to most customers for CP or any other railroad to allocate

¹¹ *See* Ludwig/Ellison V.S. at 5-6.

¹² *See infra* at 21-23 (showing that CP did not commit to spend any particular percentage of its DME capital budget in South Dakota).

capital investment dollars on an equal route-mile basis among high-density segments used by many customers and low-density customers used by few customers.

A more appropriate way to assess CP's state-by-state capital investment spending is by ton-miles, not route miles. As CP Witness John Huber shows, while rail lines in South Dakota accounted for 29% of the DME's route-miles, the State generated just {{ }} of DME's ton-miles in 2012. *See* Huber V.S. at 10. Since nearly {{ }} of CP's location-specific DME investments were made in South Dakota, South Dakota's share of total CP capital spending thus was actually greater than its total percentage of DME ton-miles. *See id.* at 11. Indeed, CP's allocation of capital dollars across the states served by DME was proportionate to the ton-miles of traffic moving over the lines serving each state. *See id.* Table 3.

C. CP's Capital Investment Spending in South Dakota Did Not Contribute To Recent Grain Service Difficulties.

The State's assertion that "CP's failure to adhere to its investment representations is a material contributing factor to" the "ongoing service crisis in South Dakota" is utterly baseless. Second Supp. at 3. Neither the State nor any of its witnesses identified a single fact to support this irresponsible accusation. On the contrary, the Board has heard extensive testimony that the recent rail service problems are attributable to car supply, unusually severe winter weather, and an unusually large crop.¹³ Indeed, the State itself acknowledged in its testimony in *United States Rail Service Issues* that "[t]he shortage of rail cars" and "the impact of severe weather"

¹³ *See, e.g., United States Rail Service Issues*, Tr. at 125-26 (Apr. 4, 2014) (testimony of American Soybean Association recognizing that "severe winter weather has contributed to service disruptions"); *id.* at 137 (National Farmers Union testimony finding that "unusually cold weather" was "understandable" contributor to delays); *id.* at 47 (North Dakota Grain Association testimony noting that "tight rail car situation" was contributor to service delays); *id.* at 363 (United Sugars testimony citing problems with obtaining "a sufficient number of railcars").

were primary factors contributing to grain transportation problems. Tr. at 91-92, *United States Rail Service Issues*, (Apr. 4, 2014).

The State’s suggestion that inadequate capital investment by CP is the cause of recent grain service problems is further undermined by the fact that the vast majority of South Dakota grain shippers served by DME are located on lines east of Pierre that have been upgraded to FRA Class 3 standards. See Huber V.S. at 11. Over 90% of all DME South Dakota grain shipments originate on upgraded FRA Class 3 lines. Therefore, it is utterly illogical to attribute grain service issues to the condition of the former DME track in the State.

CP is working hard to address lingering service problems, and its continuing efforts are substantially reducing the backlog of grain car orders.¹⁴ The Board has been actively monitoring rail service issues in Ex Parte No. 722 (Sub-No. 2), and it has the authority to act appropriately in that proceeding to oversee the resolution of recent grain service issues. There is no need for it to take any action in this proceeding based on service issues that have nothing to do with whether or not CP fulfilled its investment commitments in the *CP/DME Control* proceeding.

D. CP Did Not Shift Capital Investment Dollars From South Dakota.

The State also accuses CP of shifting capital investment dollars from South Dakota to other states once CP began to explore the possibility of selling the DME West End lines. See Ludwig/Ellison V.S. at 5. CP witness Huber shows that, to the contrary, CP continued to make substantial capital investments on the DME West End lines after announcing its intention to explore a sale of the West End, and even after it entered a contract to sell the West End. CP invested approximately {{ }} in DME’s South Dakota lines in 2013—even though

¹⁴ See CP’s Fourteenth Weekly Report, Ex Parte No. 724 (Sub-No. 2) (filed Sept. 26, 2014) (reporting that CP “fulfilled 2868 grain orders this week which is our best performance in 2014” and that “[o]rders fulfilled exceeded new requests by 1401”).

CP had announced in December 2012 that it intended to seek a buyer for those lines.¹⁵ During the five months of 2014 prior to the sale of the West End to the RCP&E, CP spent another {{ }} for improvements to the West End lines.¹⁶

If anything, documents related to the RCP&E sale illustrate the significant investments CP made in the DME West End. {{

}} The evidence is clear that the rail lines that RCP&E operates today are in far better condition than they were when CP acquired them in November 2008, due largely to the substantial investments made by CP.

II. CP FULLY COMPLIED WITH THE CONDITIONS OF THE CONTROL PROCEEDING.

A. CP Has Satisfied the Only Investment Representation It Made By Investing Far More Than \$300 Million In DME.

CP made one—and only one—commitment in the *CP/DME Control* Proceeding relating to planned CP capital investments in DME. CP committed that “CPR will make available to

¹⁵ This fact could not have been more obvious to the State, since it is apparent from comparing the Pivot Tables provided with the capital investment spreadsheet CP produced ending in July 2013 and the spreadsheet ending in December 2013. *Compare* “DME Road Property Cap adds Nov 2008 – July 2013.xls,” “Pivot Tables” Tab at Cell H94 (showing {{ }} in South Dakota investment) *with* “DME Road Property Cap adds Nov 2008 – Dec 2013.xls,” “Pivot Tables” Tab at Cell H96 (showing {{ }} in South Dakota investment).

¹⁶ Because this 2014 spending was incurred after CP executed an agreement to sell the West End lines, it was booked as an ordinary expense rather than as engineering capital, as required by applicable accounting principles.

DME \$300 million over the next several years to repair and upgrade its track, bridges, and other facilities.”¹⁷ This planned \$300 million commitment was made clear in the Application and the supporting Verified Statements.¹⁸ It was repeated as a commitment in the Operating Plan.¹⁹ And it was incorporated into the SIP as one of the important measures CP would take to improve safety on DME.²⁰ In short, the \$300 million commitment—unlike the other “commitments” the State alleges—was an on-the-record commitment that CP was obligated to fulfill under Condition 8 of the *CP/DME Control Decision*.²¹

There is no question that CP fulfilled that commitment. CP has spent far in excess of the \$300 million that it promised to spend. The State’s experts admit as much—Mr. Emmert’s calculations show that CP spent over \$310 million between 2009 and 2012.²² The State’s only quibble is that it took CP four years (rather than three) to spend the promised \$300 million. According to the State, “CP’s investments following 2011 are not relevant in determining if CP did what it represented it would do: spend \$300 million . . . over the first three post-acquisition years.” Second Supp. at 13. The State’s position in this regard is utterly meritless—indeed it is nonsensical. As the State admits, CP informed FRA in early 2009 that “economic conditions” required CP to amend its plan for capital expenditures on the DME.²³ FRA made no objection to this altered plan. Since FRA was responsible for overseeing implementation of the SIP—which

¹⁷ CP/DME Application at 5.

¹⁸ See CP/DME Application at 5, 13-14; *id.* V.S. Green at 5; *id.* V.S. Graham at 4.

¹⁹ See CP/DME Application, Exhibit 13 at 36 (Operating Plan (“CPR projects that it will make available to DME approximately \$300 million in capital for improvements to DME’s track, bridges and other rail facilities in the first three years following approval of the transaction.”)).

²⁰ See SIP at 89-90.

²¹ See *CP/DME Control Decision* at 27 (“Applicants are required to adhere to any and all of the representations they made on the record during the course of this proceeding.”).

²² See *Emmert V.S.* at 9.

²³ See Mar. 25, 2009 V. Graham Letter to J. Strang (Attachment 6 to CP Reply to State’s Petition (filed Aug. 28, 2013)).

the Board recognized “may be updated as necessary,”²⁴ FRA’s concurrence was all that was required.

The State’s claim that CP and FRA made this change “secretly” is false. CP—like all other railroads—made clear to the public that the economic crisis of 2009 necessitated significant cuts in capital spending.²⁵ In 2009, as the impact of the 2008-09 credit crisis was becoming clear, CP publicly announced its FRA-sanctioned plan to spread its \$300 million DME capital investment plan over more than three years. On September 9, 2009, then-CP President and CEO Fred Green announced at an analyst conference that “[o]n the capital expenditure side, we have committed to spend several hundred million dollars [on DME] over a three to four to five-year period. Obviously, with the economy we’ll do that over the longer period, not a shorter period.”²⁶ In light of this plain public disclosure, there is absolutely no merit to the State’s claim that FRA and CP agreed to this minor timing change in “secret.”

Indeed, the serious economic crisis of 2009 arguably would have justified a request by CP to be relieved of its \$300 million investment commitment altogether. *See, e.g., CSX Corp. and CSX Transp., Inc., Norfolk Southern Corp & Norfolk S. Ry. Co. – Control and Operating Leases/Agreements – Conrail Inc. & Consolidated Rail Corp.*, STB Fin. Docket No. 33388

²⁴ *CP/DME Control Decision* at 27.

²⁵ Nearly every Class I railroad indicated that it was aggressively reducing capital spending in response to the adverse economic environment. *See, e.g.,* Norfolk Southern Quarterly Earnings Call Transcript 4Q 2009 (“we reduced planned spending in 2009 . . . as the magnitude of last year’s economic contraction became clear”); Union Pacific Quarterly Earnings Call Transcript 4Q 2008 (“With soft demand, we are reducing gross spending by more than \$300 million in capacity and commercial facilities.”); Canadian National Quarterly Earnings Call Transcript 4Q 2008 (reducing “CapEx budget on the order of 13 to 15%” in order to “manag[e] . . . our capital envelope to reflect the current business environment”); Kansas City Southern Quarterly Earnings Call Transcript 4Q 2008 (“[T]he company did make a decision in connection with its business process to reduce capital expenditures in Mexico The company will obviously carefully monitor economic conditions and will adjust its capital spending to appropriately manage its cash flows.”)

²⁶ *See* Ex. 5 at 2.

(served Sept. 19, 2001) (Board allowed NS to close a repair shop and to forego previously promised investment despite statement on the record that NS would not do so). As the Board has recognized, operational and financial adjustments are a necessary element of implementing any rail consolidation. *Id.* at 6 (acknowledging that carriers can be forced “to make numerous operational and financial adjustments” as a result of “a declining National economy” and changed circumstances).²⁷ The Board has made clear that railroads must have flexibility in complying with representations and conditions imposed on mergers, and that, in determining whether carriers have complied with such conditions, the Board must take into account the realities of an ever changing business and financial environment. *Conrail*, at 6. In this case, CP did not seek to avoid its investment commitment, but instead proactively (and prudently) informed FRA that it would fulfill that commitment over an additional year. As the State’s audit of CP’s investment data confirmed, CP did, in fact, reach the promised \$300 million investment level during 2012. CP’s actions plainly do not constitute violation of a Board condition; rather, they represent a model of complying with a condition in the face of serious economic obstacles.

The State’s claim that CP was wrong to adjust its capital plans during the recession is particularly outrageous in light of the State’s own response to economic conditions in 2009. Like many other entities, the State was forced to significantly revise its budgets in response to the recession.²⁸ As the recession continued, then-Governor Mike Rounds called on the State to

²⁷ See also *Canadian Pac. Ry. Co., et al. – Control – Dakota Minnesota & Eastern R.R. Corp, et al.*, STB Docket No. 35081 (Sub-No. 1), slip op. at 3 (served Aug. 16, 2011) (“CP/DME”) (recognizing that railroads must make representations on the record “in good faith” but that representations—such as operating plans—are “a projection, and not an absolute restriction”).

²⁸ For example, South Dakota’s initial 2009 Adopted Budget called for expenditures totaling \$1,220,090,055. That number quickly dropped to a revised budget of \$1,153,932,280—more than \$66 million less than projected and \$22 million less than the 2008 actual spend (\$176,506,396)—as the effects of the recession hit the state. Compare *The South Dakota Budget in Brief, Fiscal Year 2009* with *The South Dakota Budget in Brief, Fiscal Year 2010*. Indeed,

be “frugal” during the economic crisis. State of the State Address, Gov. Mike Rounds (Jan 12, 2010). The Governor recognized that the state must “hold down the ongoing spending as much as we can” in order to “maximize the recovery” from the economic crisis. *Id.* That tone was reiterated by Governor Daugaard in his first State of the State address in 2011, where he acknowledged that the “dominant challenge of this legislative session will be the state budget,” which “will present tough choices. This challenge stems from the national recession, which has caused revenues to fall even as the demand for services has risen.” State of the State Address, Gov. Dennis Daugaard (Jan. 11, 2011). Just like the State did, CP reasonably adjusted its financial plans in response to severely unfavorable economic conditions, and it is hypocritical of the State to criticize CP for doing so.

In any event, the State is unable to identify any harm that it (or anyone) suffered because CP took four years (instead of three) to invest \$300 million in DME. Nor does the State identify any damages resulting from what it alleges was a failure to comply with this investment condition. While the State stubbornly insists that it is “not relevant” that CP actually did exceed \$300 million in DME capital investment in 2012, it is unable to explain why this is the case. Second Supp. at 13. On the contrary, the fact that CP has now invested far more than \$300 million in DME is completely dispositive of any claim to “enforce [CP’s] investment representations.” Both parties agree that CP has now spent far more than \$300 million, and there is no unfulfilled \$300 million investment representation for the Board to “enforce.”

South Dakota’s spending did not return to pre-recession levels again until 2012. *See South Dakota Budget in Brief, Fiscal Year 2014* (reflecting actual FY2012 spend of \$1,206,729,539).

B. The State’s Claim That CP Violated A “Second” Commitment To Make Capital Investments of \$473 Million In DME Is Meritless.

The State’s request for a cash “award” of nearly \$22 million is premised on the notion that CP failed to satisfy an alleged “second” representation—*i.e.*, that CP “would invest \$300 million in additional engineering capital dollars (over and above monies previously budgeted by DME) over the next several years following CP’s acquisition of DME.” Second Supp. at 2 (emphasis added). Based upon information regarding DME’s pre-acquisition capital budget set forth in the Safety Integration Plan (“SIP”), the State contends that this “second” representation required CP to invest a total of \$472.9 million for capital improvements to DME’s lines. Second Supp. at 16, V.S. Emmert at 2-3. While the State acknowledges that CP actually invested \$394.4 million in engineering capital on DME through the end of 2013, it asks the Board to require CP to pay the State approximately \$22 million, which (according to the State) represents “South Dakota’s pro rata share of the difference between the monies CP [allegedly] represented it would expend on engineering capital project on DME [\$472.9 million] and the amounts it has actually expended [\$394.4 million].” Second Supp. at 29 (emphasis added).

The State’s claim should be rejected, for several reasons:

First, as CP has demonstrated previously, the State’s assertion that CP made multiple representations regarding its intended level of capital investment in DME is simply not true.²⁹ The State’s claim that CP promised to make a total capital investment of \$472.9 million is premised on the following excerpt from Applicants’ Rebuttal (as quoted in the State’s Second Supplement):

²⁹ See Canadian Pacific Railway Company’s Reply to the Petition of the State of South Dakota to Enforce Investment Representations, filed August 28, 2013 at 17-20; Canadian Pacific Railway Company’s Reply to the Supplement to the Petition of the State of South Dakota, filed October 18, 2013 at 4-6.

With respect to Mayo’s concern about DME track conditions, CPR has committed to invest at least \$300 million in additional capital (over and above DME’s projected capital budget) over the next several years to upgrade DME’s track and structures. This capital investment will be used to make significant improvements to DME infrastructure, which in turn will improve the efficiency of DME operations and the safety of the DME system, all in a relatively short period of time. One effect of this additional investment will be to increase total capital spending on improvements to the DME system (previously planned DME capital spending plus additional CPR capital spending) to approximately \$100 million annually in each of the first three years following approval of the transaction.”³⁰

The State attempts to portray this passage as a response to Mayo Clinic’s observation that CP’s \$300 million investment commitment represented an increase of only \$128 million over what DME might have spent absent the proposed transaction. The State argues that the quoted passage constituted a “new” commitment by CP on Rebuttal to spend \$300 million plus the amount that DME had previously budgeted. According to the State, CP promised to invest that additional \$179.2 million “over the next several years” (following CP’s initial three-year investment of \$300 million).³¹ The State’s position is not credible.

As an initial matter, neither the cited excerpt—nor any other statement by CP on the record—mentioned (much less purported to respond to) Mayo’s calculations regarding the net value of CP’s \$300 million investment commitment. To the contrary, on its face, the cited passage responds explicitly to “Mayo’s concern about DME track conditions” by highlighting CP’s intention to invest \$300 million to improve DME’s infrastructure. (CP also pledged specifically to upgrade the rail line through Rochester, MN to FRA Class 3 standards, and it

³⁰ Second Supp. at 18. See CPR-14 DME-14, Applicants’ Rebuttal at 75.

³¹ The State acknowledges that “the \$100 million [CP] committed to invest annually in the first three post-acquisition years consisted of ‘previously planned DME capital spending plus additional CPR capital spending.’” Second Supp. at 10.

fulfilled that commitment.) The State’s attempt to bootstrap this excerpt into a “new” commitment by CP on Rebuttal to invest an additional \$172.9 million is unavailing.

Indeed, in its original version, the sentence upon which the State bases its claim (the first sentence of the paragraph) was followed by citations to the CP/DME Operating Plan and SIP. (In quoting this paragraph from CP’s Rebuttal, the State conveniently chose to remove those citations.) The cited references in both the Operating Plan and the SIP make clear that CP’s commitment was to invest \$300 million—no more, no less—to improve DME’s track and facilities.³² Dozens of other references to CP’s investment commitment throughout the record likewise stated consistently that the amount that CP promised to invest was \$300 million, not \$479.2 million—indeed, the latter figure did not appear anywhere in the record until the State filed its Second Supplement on August 29, 2014.

In any event, the last sentence of the paragraph quoted by the State states unequivocally that CP planned to “increase total capital spending on improvements to the DME system (previously planned DME capital spending plus additional CPR capital spending) to approximately \$100 million annually in each of the first three years following approval of the transaction.” That sentence flatly contradicts the State’s assertion that CP promised more than the \$300 million capital investment referenced repeatedly throughout the CP/DME Application, Operating Plan and SIP.

CP’s investment commitment was an integral element of the SIP. In that document, CP explicitly committed to making engineering capital investments of approximately \$100 million

³² See CP/DME Application, Operating Plan at 36 (“CPR projects that it will make available to DME approximately \$300 million in capital for improvements to DME’s track, bridges and other rail facilities in the first three years following approval of the transaction.”); SIP at 90 (indicating post-acquisition engineering capital investments of \$100 million in 2009, \$101 million in 2010, and \$100.2 million in 2011).

in each of the years 2009, 2010, and 2011.³³ The SIP contains no mention whatsoever of a further commitment by CP to spend an additional \$179.2 million “over the next several years.” In its July 3, 2008 letter to the Board—submitted months after CP had filed its Rebuttal—FRA made clear its understanding that “CP has committed to investing approximately \$300 million over the next four years”³⁴ FRA confirmed that understanding in both a July 2013 letter to Senator Thune, and in its September 30, 2013 letter advising the Board that CP had fulfilled its safety obligations under the SIP.³⁵ If CP had, in fact, promised to follow up an investment of \$300 million in the first three post-acquisition years with additional capital expenditures of \$179.2 million in subsequent years, surely FRA would have acknowledged that commitment and held CP to it.

As the record overwhelmingly demonstrates, the reality is that CP made only one representation: that it would make a \$300 million capital investment in DME’s track, bridges, and facilities.³⁶ The State’s “investigation” confirmed that CP had, in fact, spent nearly

³³ See SIP at 89-90.

³⁴ See CP Reply, Attachment 7 at 1. As FRA later acknowledged, that letter mistakenly suggested that CP had committed to “upgrade all DM&E track to FRA Class III standards.” See Canadian Pacific Railway Company’s Reply to the Supplement to the Petition of the State of South Dakota, filed October 18, 2013 (“CP Reply to 1st Supp.”), Attachment 1, letter dated September 30, 2013 from Kathryn B. Thomson (DOT) to Hon. Daniel R. Elliott III at 2 (confirming that “the SIP contained no representation about upgrading all DM&E track to Class 3 standards” and that “FRA regrets the overgeneralization in its July 3, 2008 letter related to the track upgrades contemplated by CP”) (emphasis added).

³⁵ See CP Reply to 1st Supp., Attachment 1, letter dated September 30, 2013 from Kathryn B. Thomson (DOT) to Hon. Daniel R. Elliott III at 2 (“In the SIP that CP filed during the course of this proceeding, CP made a general commitment to expend approximately \$300 million to repair and upgrade DM&E’s 2,500 miles of track, bridges, and facilities”) (emphasis added); Attachment 8, Letter dated July 10, 2013 from Hon. Joseph Szabo to Hon. John Thune at 2 (“in the SIP, CP projected the need to invest approximately \$300 million in capital for improvements to DME’s track and ties, bridges and other rail facilities and systems and processes”) (emphasis added).

³⁶ See, e.g., CP/DME Application at 5, 13-14; V.S. Green at 5; V.S. Graham at 4; Exhibit 13 (Operating Plan) at 36; SIP at 89-90.

\$400 million through the end of 2013 to improve DME's physical plant. CP's total engineering capital investment in DME stands at approximately \$459 million as of September 30, 2014, and CP continues to work to improve the safety and efficiency of its DME lines.

Second, the State does not even claim—much less demonstrate—that CP made a commitment to invest a specific number of capital dollars in South Dakota. Indeed, the record is undisputed that CP never committed to invest a particular dollar amount in any State or on any specific segment of the DME network, with two exceptions. In response to concerns expressed by Mayo Clinic and the City of Owatonna regarding the condition of the DM&E lines serving Rochester and Owatonna, MN, CP promised to rehabilitate and upgrade the DM&E line from Owatonna through Rochester to FRA Class 3 track.³⁷ In addition, in response to shipper concerns about the condition of IC&E's so-called "Corn Lines," CP agreed to invest the funds necessary to bring the Corn Lines up to a 25 MPH service standard (*i.e.*, FRA Class 2). The Owatonna–Rochester and Corn Lines rehabilitation projects were the only location-specific capital investments in DME's rail lines to which Applicants committed during the course of the *CP/DME Control* proceeding. CP fulfilled both of those location-specific investment commitments.

In contrast, neither the State nor any other party requested any condition, or solicited a promise from CP, to undertake any track rehabilitation project involving DME rail lines in the State of South Dakota. While the State filed a Notice of Intent to Participate, it did not file comments or otherwise participate in the *CP/DME Control* proceeding.³⁸ Likewise, although the

³⁷ See CP Reply at 4-6.

³⁸ The State's suggestion that the State supported CP's application to acquire DME based on a pledge by CP to make capital improvements to the DME line west of Pierre, SD (*see* Petition, Exh. DMD-2, Page 1 of 9, Letter dated February 5, 2013 from Hon. Dennis Daugaard to Hunter

State asked the Board to modify the procedural schedule to provide an opportunity for parties to comment on the SIP (which the Board did by Decision served on February 5, 2008), the State neither commented on nor provided any input to CP or the FRA with respect to the SIP.

Notwithstanding the State’s failure to seek any commitment with respect to post-acquisition capital investments in DME’s lines in South Dakota, CP/DME invested approximately {{ }} in South Dakota from 2008 through the date upon which the DME West lines were sold to RCP&E.³⁹ This investment includes more than {{ }} in spending on the DME lines west of Tracy MN since December 2012—even though CP announced at that time that it intended to seek a buyer for those lines.⁴⁰ The State’s assertion that {{ }} following that announcement is simply not supported by the facts.

As a result of CP’s substantial capital investments in South Dakota, virtually all 206 miles of DME main line track between Pierre, SD and the Minnesota border were at FRA Class 3 standards when they were sold to RCP&E.⁴¹ As CP has explained previously, devoting capital to upgrade DME’s lines west of Pierre in a similar fashion is neither economically

Harrison at 1) is simply not true. The State of South Dakota never requested (nor did CP make) any commitment regarding investment in DME’s rail lines west of Pierre.

³⁹ See V.S. Huber at Attachment A.

⁴⁰ CP executed an agreement to sell the DME lines west of Tracy, MN to the Rapid City, Pierre 7 Eastern Railroad (“RCP&E”) on January 2, 2014. Approximately {{ }} of the {{ }} invested in South Dakota since January 2013 was spent after that date. Accordingly, that {{ }} was booked as an ordinary expense rather than as engineering capital, as required by applicable accounting principles.

⁴¹ See Canadian Pacific Railway Company’s Reply to the Petition of the State of South Dakota to Enforce Investment Representations, filed August 28, 2013, V.S. Wilson at 8.

justified by the traffic volumes moving over those lines nor necessary to meet the service requirements of that traffic.⁴² *See* Huber V.S. at 9-10.

Finally, even if the Board were to find that CP did (as the State alleges) commit to invest additional capital (beyond its three-year commitment of \$300 million) “over the next several years” (Second Supp. at 15), CP has not failed to fulfill that commitment.

The State acknowledges repeatedly that CP promised to invest a total of \$300 million (including amounts previously budgeted by DME) during the 2009-2011 period:

“CP did not adhere to its representation that it would invest \$300 million in engineering capital dollars in the first three post-acquisition years: 2009,2010 and 2011 (including monies previously budgeted by DME).”⁴³

“CP represented in its Application that it would invest \$300 million in DME road facilities in the first three years following its acquisition of DME.”⁴⁴

“CP promised a quick capital infusion of \$300 million to fund engineering projects for DME in 2009, 2010 and 2011.”⁴⁵

“CP simply decided not to do what it represented it would do: invest \$300 million in engineering capital projects between 2009 and 2011.”⁴⁶

According to the State, CP made a further commitment to increase that \$300 million investment to \$472.9 million (\$300 million plus the \$172.9 million budgeted by DME prior to

⁴² *See id.*, V.S. Wilson at 9. DME’s former CEO, Kevin Schieffer, has stated publicly that there is simply not enough traffic west of Pierre to justify extensive rehabilitation of that part of the DME system. *See* Canadian Pacific Railway Company’s Reply to the Petition of the State of South Dakota to Enforce Investment Representations, filed August 28, 2013, Attachment 2, Harriman, *DM&E owner spent \$405M on railroad*, ARGUS LEADER, Aug. 29, 2013, at 1-2.

⁴³ Second Supp. at 2.

⁴⁴ *Id.* at 8

⁴⁵ *Id.*

⁴⁶ *Id.* at 13.

the transaction) “over the next several years.”⁴⁷ Given the State’s acknowledgement that CP promised to spend a total of \$300 million between 2009 and 2011, its reference to an additional investment “over the next several years” necessarily means that CP (allegedly) promised to spend the additional \$172.9 million in years subsequent to 2011. Indeed, the State witness Emmert’s analysis of CP’s compliance with this (alleged) commitment is based upon his review of CP investment data through the end of 2013.⁴⁸

However, witness Emmert’s conclusion that, in investing \$394,385,660 in engineering capital on DME through December 2013, CP “fell short” of its (alleged) commitment to spend an additional \$172.9 million “over the next several years” is incorrect. The Oxford English Dictionary defines “several” as “[a] vague numeral: of an indefinite (but not large) number exceeding two or three; more than two or three but not very many.”⁴⁹ Likewise, Webster’s Dictionary defines the term “several” as “more than two but fewer than many.”⁵⁰ Under either definition, one cannot determine whether CP has complied with an (alleged) commitment to invest an additional \$172.9 million by reference only to the 2012-2013 data upon which witness Emmert’s conclusion is based. Rather, because a period of “several” years beyond 2011 would, at a minimum, encompass CP’s capital investments in 2014 (and, under the Oxford Dictionary definition, 2015), CP’s capital investments in those years must be taken into account as well. In other words, any conclusion regarding CP’s compliance with the “second” investment representation posited by the State is premature.

CP has continued to make substantial capital investments in DME’s physical plant. As CP witness Huber demonstrates, CP has spent approximately \$66 million of engineering capital

⁴⁷ Second Supp. at 15. *See id.*, V.S. Emmert at 2-3.

⁴⁸ Second Supp., V.S. Emmert at 8-9.

⁴⁹ OXFORD ENGLISH DICTIONARY (online edition).

⁵⁰ WEBSTER’S DICTIONARY (1977 ed).

on DME's lines during the current year (through September 30, 2014), bringing CP's total post-acquisition investment to approximately \$459 million.⁵¹ CP will continue to invest in DME's lines, where such investments are economically justified based on traffic volumes and service requirements. CP anticipates that it will exceed \$473 million in total post-acquisition DME investment later this year or next year. Though not required by the commitment that it made in the *CP/DME Control* proceeding, CP will advise the Board when its total engineering capital investment in DME exceeds \$472.9 million.

C. CP Did Not Commit To Upgrade The Entire DME to FRA Class 3 Track.

The State's final alleged "commitment" by CP—to upgrade the entirety of the DME to FRA Class 3 track capable of accommodating 40 mph traffic—is both mythical and moot. CP never stated to FRA, to the Board, or to the public that it would upgrade the entire DME network to FRA Class 3 status. After the State filed its Petition, FRA made clear to the Board that CP never made such a commitment, and that FRA's July 2008 letter suggesting that CP would upgrade the entire DME system to Class 3 track was an inadvertent error. Despite this statement from FRA eviscerating the State's asserted "Class 3 representation," the State doggedly contends that CP was obligated to correct FRA's misstatement. This is wrong for multiple reasons.

In the first place, this issue is moot because the State no longer contends that CP is obligated to upgrade the entire DME to Class 3. *See* Second Supp. at 27 ("The State has not requested that CP upgrade all DME track to Class 3 standards.").⁵² Nor does the State argue for

⁵¹ The slight differences between the 2009-2012 figures included in Mr. Huber's statement and those included in CP's 2013 Reply to Petition result from differences in the timing of reclassification of AUCs.

⁵² This represents a substantial reversal from the State's earlier position that CP was required to make "track upgrades" to fulfill an alleged "upgrade requirement." Pet. at 29-30; *see also* First Supp. at 5 (alleging that CP was "estopped" from not upgrading all of DME tracks to FRA Class 3).

any damages based on CP's failure to upgrade all of DME's track to Class 3. *See* Second Supp. Attachment 1 (calculating "award request" solely on alleged shortfall from supposed \$473 million commitment). Since the State does not identify any action that it wants the Board to take based on CP's failure to comply with this supposed commitment, its claim that CP failed to satisfy the alleged "Class 3 commitment" is moot.

Moreover, the State's assertion that CP had a legal "obligation" to correct FRA's misstatement is incorrect. FRA filed the July 3, 2008 letter after dozens of parties had submitted hundreds of pages of evidence and briefs in a complex control proceeding. The purpose of that letter was to advise the Board that CP had responded satisfactorily to FRA's safety concerns and that FRA would continue to monitor CP's progress in complying with the SIP.⁵³ FRA's letter mistakenly suggested that CP's \$300 million commitment was intended "to upgrade all DME track to FRA Class III standards." The mistake consisted of the single word "all"—while FRA was right that CP had committed to spend \$300 million in part to upgrade DME track, it was incorrect to suggest that that investment would result in upgrading "all" DME's track to Class 3. FRA has admitted its error, and it has indicated that it "regrets the overgeneralization in its July 3, 2008 letter related to the track upgrades contemplated by CP."⁵⁴

FRA's letter constitutes dispositive proof that CP did not make any "representation[] . . . on the record during the course of [the *CP/DME Control*] proceeding" that could violate Condition 8 of the *CP/DME Control Decision*. *CP/DME Control Decision* at 27. Accordingly, that letter should have been the end of the matter. CP did not have an obligation to review every

⁵³ FRA's letter was the 196th entry on the Docket. *See* Joint Appendix at 18, *Commuter Rail Div. of the Regional Transport. Auth., Metra v. STB*, No. 08-1346 (D.C. Cir. filed Mar. 12, 2010).

⁵⁴ *See* Letter from Kathryn B. Thomson to Hon. David Elliott at 2 (filed Sept. 30, 2013).

statement in every party's filings to correct inadvertent (and immaterial) errors. Rather, CP's obligation was to fulfill its actual commitments, and it clearly did.

While the State now admits that CP never promised to upgrade the entire DME to Class 3, it asserts that CP "gamed the system" by "allowing" the Board to approve the transaction by "rely[ing] on information CP knew was false." Second Supp. at 22. This irresponsible accusation is ridiculous on its face. The Board could not possibly have relied on FRA's misstatement as the basis for approving the transaction; under 49 U.S.C. § 11324(d), the Board was required to approve the transaction once it found that the transaction was not likely to result in a substantial lessening of competition, creation, of a monopoly, or restraint of trade in freight surface transportation. *Id.*; see *CP/DME Control Decision* at 8-11 (applying statutory criteria). FRA's misstatement was not a material factor in the Board's approval decision.

The State's claim that Footnote 35 of the *CP/DME Control Decision* relied on the mythical Class 3 commitment as grounds for denying any condition requested by a party is likewise incorrect. See Second Supplement at 28. What Footnote 35 actually says is that the Board would not impose any safety conditions "other than holding CPRC to its commitments in the SIP."⁵⁵ The State truncates its quotation of Footnote 35 so as to not even mention the SIP, in an attempt to create the misleading impression that the Board actually declined to impose a

⁵⁵ In full, Footnote 35 to the *CP/DME Control Decision* reads as follows:

Several entities, including Owatonna, have cited concern about DM&E's track record regarding safety and what CPRC's plans are with regard to improving the DM&E's lines. We note that the SIP outlines CPRC's commitment to improving the safety record of DM&E and the FRA has specifically stated it will monitor CPRC's commitment to upgrade all of DM&E's track to Class 3 standards. Therefore, we find it unnecessary to impose any specific conditions on the transaction other than holding CPRC to its commitments in the SIP.

specific condition based on FRA's erroneous statement.⁵⁶ While the footnote does mention FRA's Class 3 misstatement, the Board's holding was based not on that misstatement but rather on the Board's conclusion that it was unnecessary to impose any specific safety conditions in light of the fact that FRA would monitor CP's post-acquisition compliance with the SIP.

Indeed, the State's theory that the Board "relied" on the Class 3 misstatement (as opposed to simply repeating FRA's mistaken language) is irreconcilable with the other, real location-specific commitments that were recognized in the *Decision*. What sense would it have made for the Board to mention CP's specific commitment to upgrade Rochester-to-Owatonna track to Class 3⁵⁷ if CP had promised to upgrade the full line to Class 3? How can one possibly reconcile CP's specific commitment to upgrade the Corn Lines to FRA Class 2 (25 mph) by 2013⁵⁸ with a supposed commitment to upgrade the entire DME system (including the Corn Lines) to FRA Class 3 (40 mph) by 2011? It is impossible to reconcile the Board's explicit references to those location-specific commitments with the State's suggestion that the Board was relying on a broader commitment by CP to upgrade the entire DME network to FRA Class 3.

The State's further accusation that "South Dakota shippers" relied on FRA's misstatement is equally absurd. FRA's misstatement was made after the close of the evidentiary record, and long after numerous South Dakota shippers and shipper groups indicated that they supported the transaction. As for the State itself, since it chose not to participate in any phase of

⁵⁶ While the cited passage mentions the City of Owatonna's "concern" about DME's track record with respect to safety, the City did not request that the Board impose any condition to address its concerns. CP's pledge to upgrade the Rochester-Owatonna, MN segment of DME's east-west main line to Class 3 standards effectively resolved the issue raised by the City.

⁵⁷ See *CP/DME Control Decision* at 23 (recognizing specific commitment "that the line through Rochester will be upgraded to FRA Class 3 track").

⁵⁸ See *id.* at 46 (recognizing specific commitment "to bring the Corn Lines up to 25 mph by 2013").

the *CP/DME Control* Proceeding, it can hardly claim to have “relied” on FRA’s misstatement to its detriment.

The State’s assertions that CP “gamed the system,” “failed to produce honest and truthful information,” offended “basic notions of fairness,” and “impugned the integrity of the administrative process” are hysterical, politicized rhetoric that has no place in this or any Board proceeding.⁵⁹ The State has produced absolutely no evidence to support its venomous accusations of “gaming” and dishonesty. Indeed, the State’s primary evidence of “gaming” is

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In short, CP gained absolutely no advantage from FRA’s inadvertent statement, and the State has not shown that any party relied on the error to its detriment.

Lastly, while the State asserts that “the law required” CP to correct FRA’s misstatement, it is unable to cite any authority that supports its position. The only citation the State can muster for a duty to correct statements made by others is a quarter-century-old student comment proposing a “new framework” for securities regulations.⁶¹ An outdated comment from a law student opining on federal securities laws cannot possibly support sanctioning a party for not correcting a minor misstatement made by another party. The State also references *Canadian National Ry. Co. & Grand Trunk Corp. – Control –EJ&E West Co.*, Docket No. FD 35087, at 1

⁵⁹ Second Supp. at 22, 25, 26, 27.

⁶⁰ See Ex. 6.

⁶¹ See Second Supp. at 25 (citing 1987 student comment from *Maryland Law Review*). The State failed to disclose to the Board that it was citing a student comment, rendering hypocritical its assertions regarding CP’s alleged lack of candor.

(served Dec. 21, 2010) (“*CN-EJ&E*”), but there is no analogue between that case, where the Board found that a carrier “knowingly violat[ed] Board orders” by making false statements to the Board and failing to disclose the existence of certain information, and this one, where CP has not violated any Board order (much less knowingly) and where the only misstatement was made by FRA.

* * * * *

The State’s claims in these proceedings violate both the letter and the spirit of the Board’s standard condition that parties adhere to representations they made on the record. The State is attempting to transform that condition into a game of “Gotcha” in which an applicant is held responsible not just for its own clearly stated commitments (like the \$300 million commitment), but for alleged “commitments” that creative lawyers craft by selectively editing quotes from pleadings filed by the applicants (like the supposed \$473 million commitment) or by other parties (like the supposed “Class 3 commitment”). While the Board can (and should) hold applicants to promises they clearly make “on the record,” it should not tolerate legal gamesmanship that wastes the time and resources of the Board and the parties by conjuring up “representations” that an applicant plainly never intended to make on the record.

III. SOUTH DAKOTA IS NOT ENTITLED TO THE EXORBITANT RELIEF IT SEEKS.

South Dakota is not entitled to the extraordinary and exorbitant relief it demands, for multiple legal and equitable reasons. In the first place, the relief that the State seeks is unrelated to the purported premise of its Petition. Specifically, on the first page of its Second Supplement, the State requests that the Board “enforce the investment representations made by the Canadian Pacific Railway Company . . . in this proceeding.” Second Supp. at 1. But the relief that the State requests is a \$22 million “monetary award” to be paid to the State “as compensation for

CP's failure to adhere to its investment representations." *Id.* at 30. The State's proposed remedy has nothing to do with "enforcing investment representations." Indeed, it is apparent that the State is less interested in having CP fulfill its actual investment representations than it is in exacting a "pound of flesh" from CP as it exits the state. There is no precedent or statutory authority for such an extraordinary "monetary award," and the Board should reject it for at least four reasons.

First and foremost, CP complied with the commitments it made during the *CP/DME Control* proceeding. The State's request for relief should be denied on that basis alone. Moreover, the State's asserted metric for measuring damages—the difference between CP's total DME spending and the supposed "\$473 million commitment"—will soon show zero damages under the State's own formula, because CP soon will exceed even that level of total capital investment in DME. Second, the State's claims are moot because CP no longer owns any rail lines in South Dakota. Third, the Board has no statutory authority to fine CP. Finally, the Board should abide by its precedent and refuse the State's unfounded request for attorneys' fees.

A. CP Did Not Violate Any of the Conditions in the Control Proceeding and Thus South Dakota's Request for Relief is Unreasonable.

As CP has demonstrated above, CP has not violated any condition imposed on it in the *CP/DME Control* proceeding. To the contrary, CP has more than lived up to its investment commitment, having invested more than \$459 million to date to improve the track, bridges, and facilities across the DME system. *See supra* 21-22. Because no violation of the *CP/DME Control* decision has occurred, the Board should dismiss the State's Petition.

Even if the Board were to find the State's assertion that CP promised to invest \$473 million in the DME plausible, no damages would follow. As demonstrated above, the State's contention that CP was required to spend \$179.2 million (in addition to an initial

investment of \$300 million) “over the next several years” necessarily refers to “several” years subsequent to 2011. As CP witness Huber shows, CP continued to invest in DME long after it had spent \$300 million—as of September 30, 2014, CP has invested more than \$459 million in DME. CP projects that its total investment in DME will exceed \$473 million in 2015 (if not by the end of the current year). As a result, the alleged investment “shortfall” of {{ }} upon which the State’s request for relief is premised has dwindled to approximately {{ }}, and will soon reach zero. At that point, any claim that CP has failed to live up to the mythical \$473 million investment commitment posited by the State will be moot.⁶²

While the Board has “the authority to take equitable actions ‘that are legitimate, reasonable and directly adjunct to the [agency’s] explicit statutory power,’” it would be inappropriate to exercise that power in the manner proposed by the State. *W. Coal Traffic League – Petition for Declaratory Order*, FD 35506 (decided July 24, 2013) (*quoting ICC v. Am. Trucking Ass’n*, 467 U.S. 354, 365 (1984)). A monetary “award” to the State is not a legitimate or reasonable way to remedy any shortfall in CP’s investment in DME. If the Board were to find (contrary to the record) that CP has failed to live up to its investment representations, the appropriate remedy would be to require CP to make the promised investment—not to write a check to the State of South Dakota.⁶³

⁶² CP would be prepared to report to the Board on its investments in the DME in order to confirm with the Board that it has met this supposed commitment.

⁶³ Importantly, the Board should not award the State monetarily because the Board has no jurisdiction to oversee the use of those funds. While the state claims that any money it is given would be used to fund rail investment, the Board has no jurisdiction over the State and no authority to oversee the allocation of those funds. South Dakota claims that it is “seeking a monetary award because CP no longer operates in South Dakota” and that the “State pledges to the Board, and is willing to accept as a condition to its receipt of a monetary award, that it will dedicate the funds for rail-related investments that will benefit South Dakota rail shippers.” Supp. Pet. at 29-30. The State’s words hold no water and are meaningless. The Board has no authority to put conditions on the manner in which a State spends its money, and therefore, there

Moreover, granting the State's request for a monetary award would not be equitable because the State did not participate in the *CP/DME Control* proceeding. The State never opposed CP's acquisition of DME nor did it ask that any condition be imposed on the Board's approval of that acquisition. Unlike other parties (including Mayo Clinic, the City of Owatonna and the State of Iowa), the State did not ask CP to make any specific improvements to DME's tracks serving South Dakota, nor did it seek any commitment that CP would spend a specific portion of its capital investment dollars within the State. Rather, the State did nothing until after CP announced, in December 2012, that it would explore a possible sale of the DME West End lines serving South Dakota. Given those facts, the State cannot credibly ask for a multimillion dollar "monetary reward" for CP's purported failure to spend a satisfactory "share" of its investment capital in the state.

The State's suggestion that it is entitled to a "pro rata share" of the alleged shortfall in CP's investment in DME is meritless. Second Supp at 29. The State does not even claim (much less demonstrate) that CP promised to allocate its capital investment in DME on a pro rata basis by state, or that CP ever committed to spend one single dollar in South Dakota. To the contrary, CP made clear that "[t]he specific projects, quantities and details by subdivision would be determined following detailed field inspection."⁶⁴ Fundamentally, decisions about how and where to make capital investments are managerial decisions best left to the railroad. It is certainly not up to the State of South Dakota to dictate where and how CP should have allocated its promised investment in DME.⁶⁵

is absolutely no guarantee that any money provided to the State would be spent in the manner it states. As a result any "pledge" from the State is toothless and cannot justify the relief it seeks.

⁶⁴ CP/DME Application, Ex. 13 (Operating Plan) at 36.

⁶⁵ See, e.g. *CSX Corp. and CSX Transp., Inc., Norfolk Southern Corp & Norfolk S. Ry. Co. – Control and Operating Leases/Agreements – Conrail Inc. & Consolidated Rail Corp.*, STB Fin.

B. The State’s Claim Is Moot Because of the Sale of the DME Lines in South Dakota.

Even if the Board were to find that CP has not fulfilled its investment commitments—and it should not—the State’s claim for damages is moot because of the recent sale of the DME lines serving South Dakota to RCP&E. As a result of that transaction, CP no longer owns or operates any rail line in the State of South Dakota. That change of ownership moots any pending claim with respect to the prior operation or maintenance of the DME lines in the state.⁶⁶

The State had ample opportunity to challenge the sale of the DME West lines to RCP&E, but it chose not to do so. Indeed, not only did the State not request that the Board hold that proceeding in abeyance during the pendency of the State’s petition in this docket, but Governor Daugaard “welcome[d]” G&W into the State with open arms. Letter from Governor Daugaard to Chairman Elliott, STB Docket No. 35799 (Feb. 12, 2014). The State could have requested, as a condition upon the sale, that CP be required to fulfill any unsatisfied investment commitment. Alternatively, the State could have requested conditions pertaining specifically to the DME track in South Dakota. It did not do so. The State’s failure to exercise its right to object to the sale of

Docket. No. 33388 (served Sept. 19, 2001) (“*Conrail*”) (allowing NS to close a repair shop despite statements on the record that NS would not do so).

⁶⁶ See, e.g., *PYCO Indus., Inc. – Feeder Line Application – Lines of South Plains Switching, Ltd. Co.*, STB Docket No. 34890; *Keokuk Junction Ry. Co. – Feeder Line Application – Lines of South Plains Switching, Ltd. Co.*, STB Docket No. 34922 (served Dec. 20, 2007) (sale of the rail line in the midst of a proceeding involving that line made a petition for reconsideration moot); *Waccamaw Coast Line Railroad – Modified Rail Certificate*, STB Docket No. 34064 (Feb. 3, 2014) (where railroad terminates rail service, no case or controversy remains and request to modify certificate is rendered moot); *CF Indus., Inc. v. Indiana & Ohio Ry., Point Comfort & N. Ry. & Michigan Shore R.R. – Petition for Declaratory Order*, Docket No. 35517 (served June 21, 2013) (dismissing as moot for lack of active case or controversy a petition for declaratory order where railroad was acquired by another carrier in the midst of the proceedings); cf. *SunBelt Chlor Alkali P’Ship v. Norfolk S. Ry. Co.*, STB Docket No. 42130 (served Mar 27, 2013) (denying as moot petition for clarification where party reversed course and no longer sought payment for license of computer program).

the DME West lines to RCP&E effectively moots its request that CP now be required to compensate the State for any alleged investment shortfall.

C. The Board Does Not Have the Statutory Authority to Issue a Fine Against CP For A Violation of the SIP.

Any sanction for failing to fulfill investment representations contained in the SIP is properly within the jurisdiction of FRA, because CP's capital investments were an element of the SIP process. The Board has no authority to sanction CP for any alleged violation of the SIP. Rather, 49 C.F.R. § 244.5 gives FRA the authority to impose civil penalties against railroads who fail to abide by a SIP. But FRA has clearly stated that CP has complied with the SIP and that "CP has fulfilled its safety commitments under the SIP." Letter from Kathryn Thomson to Chairman Elliott at 2 (Sept. 30, 2013). Moreover, FRA has stated on multiple occasions its understanding that CP's commitment was to spend "approximately \$300 million to repair and upgrade DM&E's 2,500 miles of track, bridges, and facilities. . .". *Id.* at 1.⁶⁷ The record in this proceeding has shown that CP has done much more than it committed to do in the SIP. Indeed, CP has spent more than \$459 million to improve the DME's lines and facilities. FRA is the only agency with the authority to determine whether CP has complied with the SIP.

Moreover, in only one instance has the Board exercised its authority to impose a fine on a railroad that it found was "knowingly violat[ing] the Board's orders." *Canadian National Ry. Co. & Grand Trunk Corp. – Control – EJ&E West Co.*, Docket No. FD 35087, at 1 (served Dec. 21, 2010). Even in that case (where a majority of the Board found that CN had violated a

⁶⁷ See also CP Reply to 1st Supp., Attachment 8, Letter dated July 10, 2013 from Hon. Joseph Szabo to Hon. John Thune at 2 ("in the SIP, CP projected the need to invest approximately \$300 million in capital for improvements to DME's track and ties, bridges and other rail facilities and systems and processes") (emphasis added).

Board directive to provide information in CN's possession), the Board limited its fine to \$250,000. *Id.*

In this case, CP has not violated a Board order—knowingly or otherwise. To the contrary, CP has complied with the conditions imposed by the Board on its acquisition of DME. CP has been forthcoming and truthful at all stages of this proceeding with the Board, FRA, and the public. Indeed, the State's "investigation" confirmed that the investment information that CP submitted to the Board in its Reply to the State's Petition was, in all respects, true and accurate. Accordingly, there is no legitimate basis for the Board to take the extraordinary step of imposing a fine on CP.

In any event, any fine assessed by the Board for a failure to abide by a Board order would be payable to the United States Treasury.⁶⁸ There is no provision in the law for ordering that a fine assessed pursuant to 49 U.S.C. §11901(a) be paid instead to a party to the proceeding. An "award" to the State based on the Board's Section 11901(a) authority would therefore be unfounded and unsupported by statutory authority.

D. The State's Request For Attorneys Fees or Litigation Costs Should Be Denied.

The State's further request that the Board award it attorneys' fees and litigations costs is unwarranted and in direct conflict with both the Board's longstanding practice and with constitutional standards. It is well established in the United States that each party to litigation must bear its own expenses. *See, e.g., Unbelievable, Inc. v. NLRB*, 118 F.3d 795, 800-801 (D.C. Cir. 1997) (recognizing that the "American Rule" requires each party to bear its own litigation

⁶⁸ *Canadian Nat'l Ry. Co. & Grand Trunk Corp. – Control –EJ&E West Co.*, Decision No. 27, STB Docket No. 35087 (served Dec. 21, 2010) ("It is worth noting also that the \$250,000 fine will go directly to the U.S. Treasury and will not be used to mitigate the impacts of the CN/EJ&E merger or to assist in our merger monitoring process.") (V.C. Nottingham dissenting)

costs and that absent clear, exceptional statutory authorization, parties to agency litigation may not recover their litigation expenses from opposing parties); *PCI/RCI v. United States*, 37 Fed. Cl. 785, 788 n.2 (“For over 200 years, United States courts have generally required each party to bear its own litigation costs.”) (*citing Arcambel v. Wiseman*, 3 U.S. (3 Dall.) 306 (1796)).

The Board and the ICC before it have consistently applied the American Rule and have required parties to agency proceedings to bear their own costs. To do otherwise, the Board has recognized, “would be contrary to agency practice. The ICC consistently rejected awarding attorney fees unless specifically authorized by the statute.” *Caddo Antoine et al. – Feeder Line Acquisition – Arkansas Midland R.R.*, 4 S.T.B. 610, 630-31 (2002).⁶⁹

There is no legitimate reason for the Board to change course and award attorneys’ fees in this case. The State made a voluntary decision to initiate this proceeding and to pursue its complaint even after CP’s Reply to the State’s Petition showed that CP had fully complied with its investment obligation. The American Rule requires that the State absorb the cost of that decision. Further, the State requests attorneys’ fees as a method to “send a strong signal to the shipping public that the Board does not condone this type of behavior from regulated carriers.” Second Supp. at 30. Putting aside the fact that CP has thoroughly discredited the State’s irresponsible allegations, this argument ignores the Supreme Court’s clear directive that “courts are not free to fashion drastic new rules with respect to the allowance of attorneys’ fees . . . or to pick and choose among plaintiffs and the statutes under which they sue and to award fees in some cases but not in others, depending upon the courts’ assessment of the importance of the

⁶⁹ See also *Burlington N. Inc. – Control and Merger – St. Louis-San Francisco Ry. Co.*, 6 I.C.C.2d 351, 358 (1990) (“[U]nder the ‘American Rule’ ‘the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys’ fee from the loser.’” (*citing Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240, 247 (1975))); *CF Indus. V. Koch Pipeline Co.*, 4 S.T.B. 647, 647 n.2 (2000) (Board has “no authority” to award litigation costs).

public policies involved in particular cases.” *Alyeska Pipeline*, 421 U.S. at 269. The ICC recognized the “restrictive interpretation by the Supreme Court of the power to award attorneys’ fees” and has consistently refused to award them. *Burlington/St. Louis-San Francisco*, 6 I.C.C.2d at 358. The State’s vague references to “public policy” do not warrant a departure from well established precedent. *Alyeska Pipeline*, 421. U.S. at 269.

The State’s reliance upon 49 C.F.R. § 1114.31 as a basis for awarding attorneys’ fees in this case is both misplaced and misleading. Section 1114.31, on its face, applies only where a party fail[s] to respond to discovery by “refus[ing] to obey an order made under paragraph (a) of this section requiring him to answer designated questions or . . . requiring him to produce any document.” 49 C.F.R. 1114.31(b)(2); *see also Public Serv. Co. of Colorado d/b/a Xcel Energy v. The Burlington N. Santa Fe Ry. Co.*, STB Docket No. 42057 (served Sept. 25, 2002) (“The Board’s authority to penalize parties under 49 C.F.R. 1114.31 for being unresponsive during discovery is limited to instances of failure to comply with a Board order and does not extend to an alleged failure to answer.”) (emphasis added). In this case, the State’s request for attorneys’ fees is not premised on any alleged failure by CP to abide by a Board discovery order. Rather, the State simply seeks reimbursement of legal expenses it incurred in pursuing its (frivolous) Petition. The Board “lack[s] authority” to make such a grant of attorneys’ fees, and the State’s request should be dismissed. *Burlington/St. Louis-San Francisco*, 6 I.C.C.2d at 358.⁷⁰

⁷⁰ Were the Board to depart from its well-settled practice in this case, CP notes that it is the prevailing party that is entitled to attorney’s fees when such fees are awarded. What is good for the goose is good for the gander.

CONCLUSION

For all of the foregoing reasons, and those set forth previously in CP's Reply to the State's Petition and its Reply to the First Supplement to the State's Petition, CP respectfully requests that the Board deny the Petition in its entirety.

Respectfully submitted,



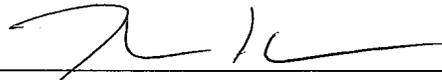
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Dated: October 2, 2014

CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing Canadian Pacific Railway Company's Response to Second Supplement to the Petition of the State of South Dakota Acting By and Through Its Department of Transportation to Enforce Canadian Pacific Railway Company's Investment Representations to be served by first class mail, postage prepaid, this 2nd day of October 2014, on all parties of record.



Matthew J. Warren

Exhibit 1

REDACTED – PUBLIC VERSION

BEFORE THE
SURFACE TRANSPORTATION BOARD

Canadian Pacific Railway Company, *et al.* – Control –)
Dakota, Minnesota & Eastern Railroad Corp., *et al.*) Finance Docket No. 35081
)

CANADIAN PACIFIC RAILWAY COMPANY’S REPLY TO THE SECOND
SUPPLEMENT TO THE PETITION OF THE STATE OF SOUTH DAKOTA
ACTING BY AND THROUGH ITS DEPARTMENT OF TRANSPORTATION TO
ENFORCE INVESTMENT REPRESENTATIONS

VERIFIED STATEMENT OF JOHN HUBER

My name is John Huber. I am Director Property Accounting at Canadian Pacific Railway Company (“CP”). My business address is 120 South Sixth Street, Minneapolis, MN 55402. I have been employed by Canadian Pacific Railway since May 1979. In my 35 years at CP, I have held a variety of positions, most of which have been accounting positions. My current position of Director Property Accounting includes responsibility for the proper reporting of fixed asset expenditures for all of CP’s North American network, including the Dakota, Minnesota, and Eastern Railroad (“DME”). CP’s capital budget averages \$1.3 billion annually. My educational background includes a Bachelor of Arts in Accounting and a Masters in Administration, both from the University of Saint Thomas in Saint Paul, MN.

This Verified Statement responds to the allegations in the Verified Statement of Michael P. Emmert (“Emmert V.S.”) and the Verified Statement of John M. Ludwig and Douglas J. Ellison (“Ludwig/Ellison V.S.”) regarding CP’s capital investments on DME. This Statement explains that there is no question that CP’s capital investments on DME far exceed the \$300 million that CP committed to invest when it acquired DME in the *CP/DME Control*

proceeding. CP's engineering capital spending on DME since January 2009 (including spending through September 30, 2014, and the \$13.5 million from the 2009 capital budget that CP advanced to DME during 2008) now totals \$459 million.¹ CP projects that it will continue to invest many more millions in DME's infrastructure in the coming years. In addition, this Statement demonstrates that during CP's ownership of the DME West End (what is now the Rapid City, Pierre and Eastern Railroad ("RCP&E")), CP invested significant amounts of capital in the West End. Indeed, while DME's former South Dakota lines generated less than {{ }} of DME's total traffic ton-miles, nearly {{ }} of CP's location-specific DME investments were made in South Dakota. In short, CP has clearly fulfilled the investment commitments it made in the *CP/DME Control* proceeding. As a result of CP's investments, both the RCP&E and the DME properties retained by CP are in vastly better shape today than they were when CP acquired them.

My Verified Statement supplements the Verified Statement of Glen Wilson submitted on August 28, 2013 in conjunction with CP's Reply to South Dakota's Petition to Enforce Investment Representations. Mr. Wilson's statement explained the substantial safety improvements that CP had made on DME during CP's implementation of the Safety Integration Plan ("SIP"); detailed the capital improvements that CP had made to DME properties as of July 2013; and demonstrated CP's compliance with the only location-specific investment representations it made during the *CP/DME Control* proceeding—the promise to upgrade the

¹ See Attachment A. Attachment A shows CP's total capital investment on DME from January 1, 2009 through September 30, 2014. The sources are provided in my workpapers. This data is drawn from the same database and presented in the same format as the investment data CP presented in its August 28, 2013 Reply to the State's initial Petition and the investment data CP produced to the State in response to its discovery requests.

portion of DME's lines between Owatonna and Rochester, MN to FRA Class 3 standards, and the commitment to upgrade the "Corn Lines" in Iowa to FRA Class 2 track.

I note that nearly all the facts in Mr. Wilson's prior statement are unchallenged by the State's witnesses. The State does not dispute any of the facts Mr. Wilson set forth about safety improvements on the DME lines, the amount of CP's overall capital spending as of July 2013, or CP's total capital spending in South Dakota. Instead, the State's witnesses assert claims that are based entirely on the State's mistaken theory that CP actually committed to invest \$473 million on DME—not \$300 million. That assertion is flatly contradicted by the record. Nevertheless, CP in fact will exceed \$473 million of total investment on the DME in the near future.

I. CP'S OVERALL CAPITAL SPENDING ON DME FAR EXCEEDS ITS \$300 MILLION COMMITMENT TO THE STB.

A. The State's Witnesses Admit That CP Has Invested Far More Than \$300 Million On DME.

There is no longer any question whether CP fulfilled its promise in the *CP/DME Control* proceeding to invest \$300 million in DME's infrastructure. Indeed, the State's own witnesses attest to this fact. Mr. Emmert calculates that "CP has made capital investments of \$394.4 million from 2009-2013." Emmert V.S. at 2. Mr. Ludwig and Mr. Ellison similarly concede that "CP invested \$394.4 million from 2009-2013." Ludwig/Ellison V.S. at 6. The results of the State's "investigation" of whether CP has adhered to the investment representations it made in the *CP/DME Control* proceeding are clear. Second Supplement at 2. CP spent far more than it said it would, and it continues to invest in the DME's infrastructure today.

The predicate for the State's demand that the Board "award" it \$22 million is an incorrect assertion that CP actually committed to make \$473 million (rather than \$300 million) in capital investments on DME. Second Supplement at 2. That theory is not supported by the record. As explained in CP's foregoing Reply to the State's Second Supplement, CP's commitment to spend

\$300 million was well-documented in the SIP, in the Application, in verified statements supporting the Application, and in the Board’s Decision itself.

Even if the State were correct that CP increased its initial commitment of \$300 million to \$473 million on Rebuttal—and it is not—CP will soon have spent significantly more than that. CP has already made nearly \$66 million in capital investments this year, bringing its total capital investment on DME since 2009 to more than \$459 million and counting. *See* Attachment 1.

Table 1 below shows the capital expenditures for each year, which are set forth in more detail in Attachment 1 and my workpapers.

TABLE 1
CP CAPITAL SPENDING ON DME, 2009-2014

Year	DME Capital Investment
2009	\$78,242,252 ²
2010	\$61,869,160
2011	\$87,296,821
2012	\$82,147,485
2013	\$82,928,967
2014 (as of 9/30/14)	\$66,629,617 ³
Total (as of 9/30/14)	\$459,114,302

Based on its current capital budgets, CP projects that its total capital investment in DME will exceed \$473 million later this year or next year. Therefore, even if the State’s claim that CP

² The 2009 figure includes \$13.5 million from the 2009 capital budget that CP advanced to DME to begin critical capital work between Rochester and Owatonna, MN in 2008 before CP assumed control.

³ The 2014 figure includes {{ }} in work on DME West End lines that has been classified as operating expense pursuant to Generally Accepted Accounting Principles because it was undertaken after CP had entered an agreement to sell the lines.

actually promised to spend \$473 million were valid (and it is not), there is no basis for the “award” that the State seeks.

B. 2008 Capital Investment Spending

Table 1 actually understates CP’s total capital investment in DME, for it does not include capital investments that were incurred in 2008 after CP took control of DME. While the State does give CP credit for the \$13.5 million that CP advanced to DME before CP acquired control of DME (to enable DME to begin work on upgrading its line through Rochester and Owatonna, MN during the 2008 season), the State gives CP no credit for any other 2008 capital investments. CP assumed control of DME on November 1, 2008, and therefore should properly be credited with all capital investments made after that date. Nearly {{ }} in DME capital investments were completed and booked in December 2008.⁴

It is certainly true that much of the {{ }} that CP booked in December 2008 reflects 2008 capital work that was begun before CP assumed control of DME. But it is equally true that some of that amount reflects capital work that was performed after CP assumed control. CP’s accounting records do not make it possible at this date to reconstruct precisely how much of DME’s 2008 capital spending was incurred before November 1, 2008 and how much was incurred after November 1, 2008. For this reason, CP has conservatively not included any of DME’s 2008 capital work (other than the \$13.5 million advanced to DME) in CP’s calculation of the \$459 million total capital investment on DME to date. But the Board should recognize that excluding capital expenses that were made after November 1, 2008 results in an understatement of CP’s total capital expenditures on DME.

⁴ See CP WP “DM&E Road Property Cap adds Nov. 2008-Dec 2013.xls”

Mr. Emmert's speculation that a December 31, 2008 capitalization date for a DME asset must reflect only "the date the assets were transferred from CP's legacy accounting system" is incorrect. Emmert V.S. at 6. Assets with a December 31, 2008 capitalization date represent costs incurred in 2008, as recorded in DM&E's accounting system. Those 2008 costs were transferred from an Asset Under Construction ("AUC") account to depreciable assets in December 2008.⁵ They were assigned a December 31, 2008 capitalization date because the accounting work required to transfer the costs from the AUC account to depreciable assets was performed in December 2008. When those assets were later transferred from the DM&E accounting system to CP's SAP system, the capitalization date remained the same as recorded in DM&E's accounting system.

C. The State's Other Complaints About CP's Capital Investment Data Lack Merit.

While Mr. Emmert accepts all of CP's investment data, he makes some general complaints about the data. None of his complaints have merit.

CP produced data on DME capital investments to the State on February 12, 2014. The data were extracted from CP's SAP asset capitalization database and were provided in three files that correspond to the three periods for which the State requested investment data.⁶

Mr. Emmert's suggestion that he was unable "to verify the completeness of what was provided by CP" is difficult to understand. Emmert V.S. at 6. CP produced a substantial volume of backup information in response to the State's request to "verify" CP's numbers. This

⁵ AUC accounts are explained further below in Section I.C.

⁶ One file included data from November 2008 through December 2013 (in response to the State's Interrogatory 1 asking for all spending between CP's acquisition of DME and the present); another included data from January 2008 through December 2013 (in response to the State's Requests for Production 6 and 7 requesting such data); and another included data from January 2008 until July 2013 (in response to the State's Request for Production 12 requesting the backup data for the information in CP's August 2013 Reply to the State's Petition).

information included capital budgets and tax records that the State insisted CP provide so that it could “check” the validity of CP’s capital investment records. *See* South Dakota Mot. to Compel at 9 (filed Feb. 14, 2014). It is telling that the State’s witnesses do not even mention any of that information. However, the testimony of the State’s witnesses makes it apparent that the State’s review of the CP data disclosed no basis for disputing the accuracy of Mr. Wilson’s calculations.⁷

Second, Mr. Emmert insinuates that there was something improper about CP including AUCs in its capital investment data and that CP may have overstated its capital investment calculations by including AUCs. *Emmert V.S.* at 6-7. This claim is utterly meritless. AUC asset values are a way to account for assets as ongoing capital projects are completed. Assets that are completed as a project progresses are assigned AUC asset values, and once the project is completed the AUC values are rolled up into the final asset value. Any snapshot of capital spending therefore will include a significant number of AUC assets, and such assets certainly represent capital spending.

Moreover, Mr. Emmert substantially exaggerates the number of AUCs in CP’s data. Mr. Emmert misleadingly asserts that \${{ }} million of CP’s capital investment spending was AUCs. But as his own workpaper clearly shows, the \${{ }} million figure was drawn from the spreadsheet the State requested that ended in July 2013. *See* State WP “Verified Statement of Michael P Emmert – Workpaper File.xls,” Tab “Calculation –NCI.” Midyear, of course, is a time when many railroad capital programs are in process. Mr. Emmert’s own

⁷ In the same vein, Mr. Emmert’s recounting of his alleged confusion during his “initial analysis” of CP’s investment data downplays the fact that CP answered all the questions the State asked about its data. *See* Attachment C (April 4 letter responding to South Dakota questions on capital investment data). If the State had any lingering questions about CP’s capital investment data, the State could have asked those questions during discovery.

analysis shows that by the end of 2013 CP's capital investment totals included only \${{ }} million in AUCs. *Id.* And the vast majority of those AUCs are for investments that CP is making to comply with Congress's PTC mandate. Approximately \${{ }} million of the \${{ }} million in DME AUCs as of December 2013 are PTC-related investments.⁸ While it is true that PTC is not yet operational on DME, Mr. Emmert's suggestion that CP should not be credited with PTC capital investment spending because PTC has not yet been placed into service is ludicrous.

II. THE DME LINES IN SOUTH DAKOTA RECEIVED AN AMPLE SHARE OF CP'S CAPITAL INVESTMENT DOLLARS.

A substantial portion of CP's capital investment in DME was devoted to improving DME lines located in South Dakota. As Glen Wilson explained in his Verified Statement submitted with CP's Reply, DME capital expenditures in South Dakota between 2008 and July 2013 totaled approximately {{ }}, including approximately {{ }} for rail, ties, ballast and other track material; {{ }} to repair and upgrade bridges and culverts; {{ }} for grading; and {{ }} for signals and communications facilities. *See Wilson V.S.* at 8. As a result of those investments, virtually all of the 206 miles of DME main line track between the South Dakota/Minnesota border and Pierre, SD are now Class 3 track capable of supporting 40 MPH train operations. CP continued to invest in DME's South Dakota lines even after it announced plans to pursue a possible sale of those properties.

The State complains that South Dakota did not receive its "fair share" of CP's capital spending. Specifically, the State claims that CP spent less capital "per-route mile" in South Dakota than it did in other states, and it alleges that CP began directing resources elsewhere after

⁸ *See* "DM&E Road Property Cap adds Nov. 2008-Dec 2013.xls." AUC accounts in the spreadsheet can be identified by searching for asset numbers that begin with 6.

it announced its intention to sell the portion of the DME that is now the RCP&E.

Ludwig/Ellison V.S. at 5-6. The State is wrong—in fact the evidence shows that South Dakota received an ample share of DME capital investment spending.

In the first place, CP made no commitment whatsoever to invest a specific amount of capital in South Dakota. CP made two location-specific investment commitments in the *CP/DME Control* proceeding: (1) a commitment to invest in upgrading track between Rochester and Owatonna, Minnesota (in response to concerns expressed by the Mayo Clinic and the City of Owatonna); and (2) a commitment to upgrade the “Corn Lines” of the former IC&E to Class 2 track (in response to requests made by Iowa agricultural shippers). Neither the State of South Dakota nor any South Dakota interest groups made similar requests for location-specific spending in South Dakota—indeed, the State did not file any comments at all in the *CP/DME Control* proceeding. There is no legitimate basis for the State to claim now that it was entitled to any specific percentage of DME’s capital spending budget.

Even though CP had no obligation to invest any particular quantity of money in South Dakota, the State actually received more than its share of capital investment. The Ludwig/Ellison statement asserts that South Dakota received relatively less spending per route mile than other portions of the DME. This crude route-mile analysis completely ignores the need to account for relative density and traffic volume in allocating capital spending. In essence, Messrs. Ludwig and Ellison assume that capital dollars should be spread evenly across all primary main lines, secondary lines, and branch lines. However, railroads do and should focus capital investments where they can do the most good, which means that capital dollars are usually prioritized to denser lines that serve more customers. The reality is that a substantial portion of DME’s lines in South Dakota (particularly west of Pierre) are extremely low-density

lines. See V.S. Wilson at 8-9 (describing relative densities on DME). It would be both imprudent management and unfair to most customers for CP or any other railroad to allocate capital investment dollars equally (on a route-mile basis) among high-density segments used by many customers and low-density lines that handle relatively little traffic.

A more appropriate way to assess CP’s state-by-state capital investment spending is by ton-miles, not route miles. As Table 2 below shows, while South Dakota accounted for 29% of the DME’s route miles, it accounted for just {{ }} of its ton-miles in 2012.

**TABLE 2
DME ROUTE MILES AND TONS BY STATE⁹**

State	Route Miles	Route Mile Percentage	Ton Miles	Ton-Mile Percentage
IA	656.80	31.4%	{{ }}	{{ }}
IL	150.40	7.2%	{{ }}	{{ }}
MN	481.10	23.0%	{{ }}	{{ }}
MO	145.00	6.9%	{{ }}	{{ }}
NE	33.90	1.6%	{{ }}	{{ }}
SD	606.50	29.0%	{{ }}	{{ }}
WI	14.40	0.7%	{{ }}	{{ }}
WY	6.60	0.3%	{{ }}	{{ }}
Total	2,094.70	100.0%	{{ }}	100.0%

As Table 3 demonstrates, nearly {{ }} of location-specific DME investments¹⁰ between 2008 and 2013 were made in South Dakota. South Dakota’s share of total CP capital spending thus was greater than its total percentage of DME ton-miles. Table 3 also shows that CP’s allocation of capital dollars on DME generally was proportionate to the ton-miles of traffic moving over the lines serving each state.

⁹ Source: “DME 2012 DENSITY.xls.” This file was one of multiple density charts produced to the State on February 14, 2014 in response to the State’s discovery requests.

¹⁰ In other words, investments that were allocated to particular locations rather than to DME system-wide.

DME's track had more pressing capital needs than its bridges.¹² CP conducted detailed inspections of the DME property after it completed the transaction. Those post-acquisition bridge inspections indicated that the life of many DME bridges could be extended by performing more limited repairs, thereby avoiding the need for immediate replacement. Conversely, CP discovered that in some locations DME's tracks were in significantly worse condition than CP initially believed based upon the reported FRA Class of track. CP therefore focused its post-acquisition spending on improving and rehabilitating DME's track structure.

Finally, the State's witnesses accuse CP of shifting capital investment dollars from South Dakota to other states once CP began to explore the possibility of selling the DME West End. *See Ludwig/Ellison V.S.* at 5. The only evidence the State cites to support this accusation is that the mix in capital spending between the former DM&E lines and the former IC&E lines differed from that projected in CP's original Application. *See id.* But as CP has explained, (1) CP made capital investments where they were most needed based upon the detailed inspections it conducted after completing the acquisition; (2) CP made no commitment to spend any particular percentage of its DME capital investment budget in South Dakota; and (3) on a ton-mile basis South Dakota actually received more than its share of capital spending. The most definitive evidence disproving the State's theory that CP was shifting investment dollars away in anticipation of the West End sale is the fact that CP was still making capital investments on DME West End well after it announced its intention to explore a sale of the West End in December 2012—and indeed after it entered a contract to sell the West End. CP invested approximately {{ }} in capital spending on DME lines in South Dakota during 2013—even though CP had announced in December 2012 that it intended to seek a buyer for

¹² *See* CP Reply to State's Petition, V.S. Wilson at 4-5.

those lines.¹³ During the five months of 2014 before the sale of the West End lines to RCP&E was consummated, CP spent another {{ }} for improvements to the West End lines.¹⁴ (Because this 2014 spending was incurred after CP executed an agreement to sell the West End lines, it was booked as an ordinary expense rather than as engineering capital, as required by applicable accounting principles.)

¹³ See “DME Road Property Cap adds Nov 2008 – Dec 2013.xls” (showing{{ }} in 2013 South Dakota investment).

¹⁴ See Attachment A.

VERIFICATION

I, John Huber, declare under penalty of perjury that the foregoing is true and correct.

Further, I certify that I am qualified and authorized to file this statement.

Executed on this 15 day of October 2014.

John Huber

A handwritten signature in black ink, appearing to be 'J. Huber', is written over a horizontal line. The signature is stylized and cursive.

Attachment A

REDACTED – PUBLIC VERSION

**DME Engineering Capital Investment
By Year (2009 - September 2014)**

Asset Groups	2009	2010	2011	2012	2013	2014 (Jan-Sept)	Grand Total
Bldg Office&Common							
Bridges/Culverts							
Computer Hardware/Software							
Equip.Rep.Shop & Shop Equip							
Fuel/Water Stations							
Grading							
Land							
Locomotives							
Other							
Public Improvements							
Roadway Machines							
Signals & Communication							
Track (rail, Otm, ties, ballast)							
Trucks/Autos							
Work Equipment							
Grand Total	\$78,242,252*	\$61,869,160	\$87,296,821	\$82,147,485	\$82,928,967	\$66,629,617	\$459,114,301

Attachment B

REDACTED – PUBLIC VERSION

Grain Carloads Originating on DM&E West End in South Dakota

Grain Carloads Originating Ft. Pierre and East	% of Carloads Originating Ft. Pierre and East	Grain Carloads Originating West of Ft. Pierre	% of Carloads Originating Ft. Pierre and East
--	---	---	---

Year	Cars	%	Cars	%	Total

Grain Products Carloads Originating on DM&E West End in South Dakota

Grain Products Originating Ft. Pierre and East	% of Carloads Originating Ft. Pierre and East	Grain Products Originating West of Ft. Pierre	% of Carloads Originating Ft. Pierre and East
--	---	---	---

Year	Cars	%	Cars	%	Total

Total Grain and Grain Products Carloads Originating on DM&E West End in south Dakota

Total Grain and Grain Products Originating Ft. Pierre and East	% of Total Carloads Originating Ft. Pierre and East	Total Grain and Grain Products Originating West of Ft. Pierre	% of Total Carloads Originating Ft. Pierre and East
---	--	---	---

Year	Cars	%	Cars	%	Total

Grain STCCs

STTC Description	STCC
BARLEY	113110
BIRD FOOD,SEED	2042110
CORN	113230
CORN	113231
CORN	113240
CORN, SHELLED	113215
CORN, SHELLED	113216
CORN,NT SHELLED	113210
DURUM WHEAT	113720
GRAIN,NEC	113990
MIDLINGS,WHEAT	2041210
MILLET	113925
MILLET SEEDS	115943
MILO GRAIN	113655
PETFOOD BIRSED	2047110
SAFFLOWER SEEDS	114935
SORGHUM GRAIN	113690
SOYBEAN HULLS	2092316
SOYBEAN HULLS	2092317
SOYBEANS,DRIED	114410
SOYBEANS,DRIED	114411
SUNFLOWER SEEDS	114940
SUNFLWR SEEDS	2071236
WHEAT	113710
WILD BIRD SEED	2042111

Grain Product STCCs

STTC Description	STCC
DIST MASH,SPT	2085940
ETHY ALCO DENAT	2818446
ETHY ALCO DENAT	4909152
SOYBEAN MEAL	2092314
SOYBEAN OIL SOA	2092336
SOYBEAN SOYA,BE	2092110
SRGM GR MEAL	2041958

Attachment C

REDACTED – PUBLIC VERSION

Exhibit 2

REDACTED – PUBLIC VERSION

Exhibit 3

REDACTED – PUBLIC VERSION

Exhibit 4

REDACTED – PUBLIC VERSION

Exhibit 5

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— MANAGEMENT DISCUSSION SECTION**Jason Seidl, Airfreight and Surface Transportation Analyst, Dahlman Rose & Co.**

[Starts Abruptly] CEO of Canadian Pacific Railway, one of the two major railways in Canada focused a large part on bulk transportation. Mr. Green has been with the company since 1978, held a variety of positions, many in marketing and also operations. So, he has a very good feel for the railroad.

So without further ado, I want to introduce Fred Green and he will give us an update on CP.

Fred Green, President and Chief Executive Officer

Thank you, Jason. Good morning everybody. I am not going to spend a lot of time on the industry as a whole. I trust it on the previous speakers and previous presentations from myself and others, there's a clear understanding that the industry is also well positioned in the long-term.

It's a pretty unique set of franchises that are very difficult to replicate by anybody, very difficult barrier to entry into the business and that increasingly as the debt and deficits in the respective countries continue to grow, there will be increasing pressure on public funding for things like highways and it's going to position our mode as a great alternative, privately funded, assuming that we can sustain or improve our return on capital employed and that – between that and the environmental benefits of this industry, we will see demand for our services continue to be strong for the foreseeable future.

However, that's context and the landscape, if you look at it over a three to five, ten-year horizon, a pretty favorable environment. Now all that is said and done, one has to get through the marketplace that we are working in today and it requires a little bit of situational management. And as a consequence, as an organization, we have prioritized some activities and I'll share some of that with you, but again against the backdrop of a pretty appealing place to be if you think about it over a long-term.

Our vision is to be the safest and most fluid railway. The safest parts is pretty easy to understand, we are the safest railway with regard to train incidents and we continue to aspire both on our existing properties and the properties we've acquired in recent times such as the DM&E to sustain that position.

With regard to fluidity, it's simply because we are such an asset intensive business that the more miles per day we get out of our locomotive or a car while maintaining a consistent standardized product that's in our collective best interest to do that. So, while we've made some progress in that regard, that's an opportunity of substance for us.

So, in the shorter starting really about this time last year arguably may be July of last year, we had to rethink the circumstances that we are facing. Clearly, we didn't understand the order of magnitude of the depth and perhaps even the sustained nature of the recession but we could see a softening occurring.

So, we established some priorities or established some priorities at that time including either creating but most importantly preserving options for growth. There's many other things we had done and we'll speak about a few in a minute, were things that I think were wise and thoughtful and helpful over the longer term, but obviously the ability to execute upon them during certain recessionary periods may not be imminent, but its still incumbent on us to preserve those options for growth and we have done that.

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In the time like that we were about to face, again, not fully understanding the depths of the recession, price increases something that we had not been very good at for the prior decade and over the last two or three years as an industry or maybe three or four years, clearly illustrated the value that our industry has to offer.

We needed to make sure that we maintain the service level despite the need to trim cost, because that was what had allowed us to successfully command substandard prices – price increases and there was no reason that we should ever give that up because that is a big part of the formula for our success going forward.

Number three is driving productivity improvements to reduce unit cost. I'd like you to think about that as kind of a shorter-term variable cost focus. Clearly, it is absolutely essential whether you're managing the balance sheet or whether you are simply trying to deal with your expense ratios that we had to do all that we possibly could do, while sustaining a good quality service to abstract cost as fast as we could. Those are largely shorter-term variable cost activities we'll talking about some success in that regard.

More importantly, in my mind is also finally a window of opportunity arising, we're not going full tilt. If you think about the prior three or four years we were basically creating capacity by whatever means we could to meet the kind of, at that time, never ending demand, leading us to run pretty much at full capacity.

The consequences of running at full capacity as you maybe have built it in a less than perfect way, it has inherently some inefficiencies embedded in it and this is a window of opportunity when our volumes drop substantially, which we'll look at, which gave us the opportunity to step back and ask ourselves, given that we've got this window of opportunity we can do some more testing, some experimenting without any collateral damage, which you could not do when you are running at 100%.

We need to determine what can we do to lower our overall structural costs that are sustainable at a low level that will be a very important foundation on a go-forward basis. A lot of work has gone into that, I'll share some of the early evidence of that and our attentions in that regard. And then finally strengthening the balance sheet and I'll take you through some of the things we've done not a lot of new news there, but certainly things we've done over the last several months.

So, with regard to our quality and book of business, there's a picture of our Intermodalversus merchandize, there is this bulk, and as Jason said, we do have a substandard bulk franchise. I'll talk to each of those sub-components of that in a moment.

If you move to the right side, you can see that 45% of our business is what we describe as global that effectively means that it's going through a port, either in or out of the continent, a lot of ports and what that means is we are less dependent on the North American economy than some, so that adds the other economies, particularly the Asian economy either move quickly as in the last several years or may come out faster to be determined of course. We have some diversification in risk but not being entirely dependent on North America.

From a marketing perspective, we have to reinforce the importance, so even in tough times you have to keep looking for sectors and segments that you can continue to open shorter term and long term to creating growth, not just holding on to what you have and preserving it, but keep creating growth.

I want to give you a market update by segment and talk a little bit about pricing. I won't read each one of these, but for those who have the presentation in front, you all can see it up above. You'll see that we have on the left hand side some longer term growth opportunities, they are lettered A

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through F. These are just a handful of examples, the Edmonton Intermodal terminal is over 200 acres just south of Edmonton that we've acquired those lands. We have not yet developed them.

The Industrial Heartland is to the Northeast of Edmonton. It will, in my opinion, become the next major industrial complex to be developed in Canada. They don't come along that often. We went in and acquired a substantial number of miles of right of way that will service all of the substantive facilities that will be built over there.

Now whether they get built in the next week or year or whether they get built in the next 5 to 10 years is obviously a debate. Clearly, it's going to be a little longer than we originally thought, but we have the access, when it does get built and I think it will get built over time, we will be there and servicing those major facilities in the oil sands and oil sands offshoots, upgrading facilities and whatever other industrial complexes come with that.

Regina Intermodalis going to be about a 1,000 acre facility. The provincial government is actively involved in acquiring some of the lands. We will be moving our facility there. Already the announcements of Canada's largest merchandiser in the sense of both food and general merchandise, a company called Loblaws and their subsidiary called Westfair, will be located with the -- I think this -- the first phase of this facility is about 500,000 square feet. And it will attract over the course of time, as all of our other like facilities in Toronto, in Vancouver, and Calgary have, a whole series of partners who will surround this facility.

DM&E, I'll talk more about that specifically, but it's been a story that we're very, very pleased with. Automotive, the Toyota facility, last year we built into a new facility that Toyota established in Southern Ontario. That facility is going to -- that and its sister facility at Cambridge about 20 miles apart are going to now start to produce the Corolla, which will no longer be produced in California as a result of the, I think it was NUMMI or some facility of that nature with GM, has been collapsed or will be collapsed and the facility which is producing Corollas, those Corollas will be produced in our facilities. So we have some good growth opportunities in that regard.

And finally we've acquired Les Cèdres, which is 1,000 acres just to the west of Montreal. And over the course of time, we will again establish a very large complex there, surrounded no doubt by our partners and business associates. On the shorter term side, I won't read each of these. You can look at them. Condensate is moving in and out of the oil sands to liquefy the bitumen. Elevator expansions are occurring. Canola is becoming an increasingly active crop and a series of crush facilities have been built. We are acquiring access to all of the facilities that are being built. Ethanol is proving to be a pretty exciting market that people -- it went away for a year but it's back in a pretty aggressive way.

So let me take you on and talk about the DM&E. The DM&E is progressing exactly as we hoped it would. We've been very patient with how we chose to introduce this. The operational integration has well progressed. The last of our series of operating systems will go into place on October 1. That will complete all of the IT integration. All of our SAP systems, all of our payroll systems are all in place. Everything is working perfectly. On the capital expenditure side, we have committed to spend several hundred million dollars over a three to four to five-year period. Obviously, with the economy we'll do that over a longer period, not a shorter period.

We have fulfilled our commitments. We have put in new rail where it's important. We have spent, I think about \$90 million this year to fulfill our commitments under our SIP, which is the safety plan that we committed to do with the FCB. On a safety perspective, we are seeing the early evidence of what we anticipated, and we have seen between 50 and 60% improvement in both personal injury rates and in train incident rates. This is consistent with what we thought would happen and it is about halfway towards where we want them to be and we'll make them get to through the application of our industry-leading approaches, particularly on train incident management.

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With regard to the marketplace, I referred to ethanol. I think everyone, except one of the facilities that had been anticipated on the property, is now up and operational after a period of bankruptcy and refinancing, et cetera. We believe the last one will also come up. I think the industry, as a whole, is running about 85 or 86% of capacity, which is a good news story. Where public policy will go in this regard and where the demands will go remains to be seen, but certainly, while we had discounts at approximately 60% of all of the, I'll call it, potential that might exist for ethanol because of our belief of uncertainty with regard to public policy, it looks like it's materializing in a pretty favorable way, and we should be the beneficiaries of that.

Kansas City gateway, we connect with all of the major railways at Kansas City. And as you can see from the map, it's in our interest not to hand it off at Chicago or Minneapolis. We would rather haul it all the way to Kansas City. There will be circumstances, whether it's for routing or service or pricing reasons. It makes sense to do it elsewhere, but in the absence of a compelling reason, we should be extending our haul as far as south as we can and we are. And as these contracts have come due, we have been pursuing those gateways with success. And as the balance of them come due over maybe the remaining year or so, we'll take them all to Kansas City unless there's a compelling reason to be shorter haul than that.

And single line hauls, again, opportunities are now existing and maybe even a little more than we originally thought with regard to products that might be originating on our Canadian franchise or one of our other U.S. franchises, originating and now terminating all within the CP System. So that gives us a single line haul and obviously, we share with no one else in the thesis like that. Carload volumes, an important message, I'd like you to take a good look at this. This is 2007 in green, '08 in blue, and of course 2009 in red. And if you look at the Q2 period, particularly April and May, we had some very, very difficult periods.

For any industry, any company that has the amount of infrastructure that someone like ourselves has to lose upwards of 25 to 30. I think we had some weeks worse than 30% volume, it's a massive reduction in activities. That causes a lot of short-term activities. It also provides as I said, windows of opportunity to rethink your business. As you look across the line into Q3, this takes us to end of August 29, all AAR publicly available data. What you see is that it's no longer as that as the high-20s, but it's still 19 or 20% less than the same period and prior year. So, our challenge now is to determine what will happen as we go forward through the balance of September, October and of course through the balance of the fourth quarter and we would anticipate that there will be some form of fall peaks, but it is unlikely to be as dramatic as historic fall peaks.

Fall peaks are driven by grain crop, they're driven by the fertilizer business to support the grain business, and they're driven largely by the retail trade, starting usually in late August through September, from October getting their product in the warehouses, in the DCs, on the shelves, ultimately at the retailers for Christmas. We all know that the retail consumption has been somewhat more modest. Our expectation is that this peak will not be to the extreme peaks that we have seen in prior years, but we do if you follow the red line, you'll see that volumes are kind of gradually growing back up. But one exception I think you should pay attention to of course is potash business because if it comes back, it will come back in pretty substantive numbers and it could that in itself could cause a bit of a bump, we'll talk about that in a minute.

So on a carload basis year-to-date, let's take the bulk, the grain business is probably the best new story for what we've experienced so far, and it could well be a good news story on a go forward basis. The U.S. crops in the territory on the Soo, which is our primary U.S. Midwest enterprise has really the crops have come in very, very well, obviously it's not quite over yet, but the early evidence is very strong. I believe it could be as the third biggest crop ever in the history of the territory that we are talking about on the Soo Line. That's obviously going to bode very well for our activity going forward, little better on beans and on corn.

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With regard to the DM&E, it also looks like a very good crop. So we think we are going to have a good U.S. grain crop, how and when it moves to be determined, but certainly the early evidence is very favorable with regard to the volumes being produced.

The Canadian grain crop is looking like it might be a little better than people anticipated. I don't want to prejudge it. I simply would say that we had a great week last week with lots of heat and sunshine. And if we can get through another 10 days or 14 days without a significant frost and there is nothing forecasted at this point of time, we could very well end up with a crop that's not near the bottom end of what people were talking about, which was kind of 42 million metric tons. The ten-year average is 47 million metric tons. Last year we did 52 million tons, a great crop. So we'll have a good carryover, regardless.

Our view at this point in time, obviously subject to no extreme weather in the next couple of weeks, is that that number might be somewhere between 42 to 44 million tons, just slightly off the seven year – the 10-year average, but with a very good crop carryover from this year's big, big crop. In Canada they do not have the on-farm storage that exists in the United States. As a consequence, you will see the majority of this tonnage move in the next crop year from basically August 1 through to July 31 next year. So we anticipate a good grain business.

On the coal side, I really want to pay – for those who do modeling, pay attention to our car loadings. It's important to understand, we said this every time we can publicly that the U.S. car loadings are short haul car loadings. These are 50-, 100-mile termination car loadings at facilities and it can be deceptive because we had, in fact, had a substantial increase in those, but those car loadings at 50 miles are not quite the same as the Canadian car loadings which are obviously of a much longer haul.

So for contracts, I would suggest you that the numbers that look reasonably flat with regard to coal car loadings are deceptive; we are up substantially. On the short haul U.S. thermal coal car loadings we are down fairly significantly, July was about normal year-on-year for net coal the prior year, August was down, and you might want to think of order of magnitude probably down about 15% or so.

So a little softer than I guess people had anticipated even as late as the end of the second quarter when we are talking about spot sales to China, etcetera, or fair number of mine shutdowns and other activities for maintenance throughout the month of August. We would hope that it will be a fairly strong fall. We don't know, just way too much volatility and we'll have to let all of this forecasting with regard to metallurgic coal volumes lie with our customer and we'll let them, Teck Coal can make their own comments. We will be available to move what they have. We have plenty of resources for the short term anyway.

On sulfur and fertilizer side, sulfur markets are very difficult. Those who follow the business know that prices are in the tank. Not much volume moving, more and more going to block. On the fertilizer side, potash kind of a difficult story. We did have a fairly busy, not by historic standards but relative to the first half of the year, fairly busy August. September so far is a little quieter and we just don't know when this market is going to break. It's obviously a deliberation between mostly the Chinese and the various consortiums around the country – around the world including Canpotex.

When it breaks, when the prices are done, whether it's this fall, next week or whether it's in the spring, Canadian Pacific has 100% of the contracts to move those volumes to export markets. So little frustrating waiting but obviously our clients need to do what they need to do to protect their franchises and they're doing that. We have the capability. We have the crews and we have the power. All of the cars for their export potash are owned by the consortium Canpotex. So there's no cost to us of sitting on those assets.

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In the merchandize side, the automotive business and the forest products business, stories into themselves, we see no sign whatsoever with regard to housing activities, the movement of panel and lumber. Obviously, we all hope for that. We just don't see it coming yet and we'll wait until we get some evidence before we declare victory in that regard.

Industrial and consumer products, very difficult. If you look at the steel business, we are still down 25 to 30%. We would anticipate. The chemical business is a little bit better by the way. It seems to be hovering about 10 to 12% under prior years and that's been pretty consistent for the last several months.

The automotive business in itself is a little hard to read because of the cash for clunkers program. The good news is the biggest selling – two biggest selling cars in the cash for clunkers are Toyota Corolla and Honda Civic. Honda Civics are produced at our Alliston plant in Ontario and now the Corolla will be produced at one of the two plants that Toyota has on our lines in Southern Ontario. All that said and done, I think we're going to have to wait through the next several months to see the sustained demand or is there just a blip as a result of the incentives, to be determined obviously.

Intermodal, I think I am probably more conservative than most people with regards to Intermodal. I have spent some time chatting with CEOs of major retailers that we were involved with, and I would anticipate that people are going to be pretty conservative with regard to managing their working capital. They are not going to take on massive inventories for fear that there will not be a sustained demand for their products and as a consequence we are seeing evidence of that.

The containers that come in through the West Coast are generally bringing in that type of merchandise that you would find in the retail stores and we are down anywhere from 25 to 30% off the West Coast Port and I don't anticipate that that's going to change dramatically. Hopefully there will be a little bit of a fall surge. Certainly if confidence is illustrated in early purchasing, conceivably some of these parties may start to order or reorder, but many of the decisions that were made with regard to what's arriving at the port today obviously were made back in the tail end of the spring when it was a pretty uncomfortable time.

So while we have – we think tremendous port access at both the Port of Montreal and the Port of Vancouver, these are medium and longer term plays and it's a little quieter than one would expect or had expected at this point of time.

From a yield perspective, we are – we have a very clear pricing strategy. The strategy is we pursue about a 4% increase. There are obviously situations where we would like to command somewhat more if the market opportunity exists.

There will also be situations for subsets of clients, strategic clients with strategic facilities, long-term commitments to us, where we may be able to accommodate them to get them through a rough spot, that's common sense. We will do that if it makes good sense. But when our people leave, they head out into the marketplace with the expectation that we ought to be bringing home 4% unless there's a good reason not to.

One of the other efforts that this window of quieter activity has provided, is the ability to go deeper and analyze the amount of services and features that are involved in our products. And what we're finding is that in some cases if you go to the client and say would you rather have a 5% increase or give up A, B and C, many of them would rather give up A, B and C. Giving up the A, B and C may be of much greater value to us, not having to provide that added service, than it is to get an extra 1 or 2% on the price. So the trade-offs are made in the yield group that has been handed to our new sales group and the sales group's responsibilities is to understand the market and to command the values as worked out collaboratively with our pricing yield group in advance.

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Fuel coverage is good and getting better. We have – we'll be over 70% coverage with regard to margin. We have a 100% coverage on WTI. But we didn't get the crack margins covered as early as we would have liked. We've made great progress. We have about 10% of our business that only gets repriced once a year. That is a rate that is governed by the Canadian government for grain.

As a consequence, we have done some forward buying or hedging to the tune – we're building up to a maximum of about 10% of our purchases. We're not trying to out-guess the market on price, we're just trying to make sure that we average a price in to reflect what will happen with our grain, not the commercial grain, but the regulated grain prices.

Operations, we've had some good early success. If you want to take a look, I'm going to show you two pages of slides here. Train speeds 8% year-over-year improvements. Yard dwell, the categories are Q1, Q2 and then Q3 quarter-to-date, so August and July data. And as you can see we've had some – sustained some very good results on yard dwell.

Active cars online down by 19%, these are -- the next thing is productivity, so train weights, the category basically is Intermodal trains. So these are trains that are going 3,000 miles, so every time you can get substantive improvement in train weights or train lengths, these are big, big impacts for us on a strength basis right across the continents.

So as you can see in quarter-to-date the work that our product design team has done and the operations execution is favorably resulting in substantial improvements in train weight. Better train weights, longer trains means fewer train starts, you'll see that, these are all improvement numbers. So 23% fewer train starts in third quarter this year versus last year, despite the fact the business is only down 19% from the prior slides.

And the crew utilization simply means the amount of re-crews or the number of re-crews or the number of the crew to train ratio. Ideally it would be one, life doesn't always work that way, congestion, incidents, derailments, anything that would cause you to have to re-crew trains. So we have improved the number re-crews or the reduction of re-crews by 18%, good crew utilization improvements.

More important than those, I would characterize those as a short-term variable cost management, clearly doing some good things. Obviously more to be done. More important than those is the long-term structural cost. So we began again, about this time last year, a little earlier, to start to do some experimenting with whether this enterprise was now ready to take on what I – for lack of a better term we'll just call it application of kind of lean processes that many others have successfully implemented. We've done some of that work, often in a collaborative way with our clients.

The grain cycles, as a matter of interest, from the spout in the middle of the Canadian prairie to the Port of Vancouver and back under the spout, have gone from nearly 18 days or 17.8, I believe, they are down to about 12.1 days over the last four or five months. So we clearly – part of that will be as a result of a little bit less activity, but part of it is clearly a result of the collaborative effort with the ports and with the grain companies and the cycles are substantially better, that's productivity improvements for everybody.

We have done some pilots in both the diesel shops and the car shops, and the yards and we have got some very favorable early evidence and we will be rolling this out over a more -- in a more sustained, deeper way, but it does take time, it does take money.

So I am not here today -- say look for immediate results, I am saying that we are doing the right things and that as we get some more evidence under our feet, we will be able to communicate the quantum of those types of benefits on a sustained long-term basis, which I think is probably more important than the short-term variable things that we are doing and doing reasonably well.

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In addition to that, in times like this, obviously in a contraction period, we have had to do some difficult things and we've had at this point over 300 management employees that have either left the company or have been put on what we call working notice, which says there will be no severance, but when your time is up, it could be three months, six months, 12 months, or in some cases 18 months for long service employees, the job will be eliminated if we have not been able to redeploy those people to needed positions, they will leave the company.

This is just a quick example of a diesel shop in Toronto that we applied the lean approach to and you can see some pretty substantive improvements here now, again that, what we did was after we had this example, this pilot done, we then used this summer to go out and test four or five other facilities and say, will those same principles apply.

We didn't go through the full exercise; we just did a testing based on making sure we didn't have a one-off example. Our early evidence is, we think versions of this, it may not be identical, but versions of these levels of improvements may well be available at some of the other facilities. So that's the process we have now begun. As I said, we will do our best to quantify those over the coming quarters.

And finally, from a balance sheet perspective I don't think there is any new news here at the top of the page. We issued equity in January. We issued debt and we repurchased, took the caps off, some of the peak periods of debt on a go-forward basis, netted out, a reduction of about \$75 million in debt.

We trimmed back our capital program and I would anticipate we'll try and keep it tight again in the coming year. We will protect the engineering because it's important that the quality of the product offering which is a function of the structure that you have in place is sustained at a high level.

And finally we've undertaken some efforts to monetize a number of assets. We sold our interest in the Detroit River Tunnel, although we control it, strategically we control the operations of it, but we sold that for about \$130 million, 110 was cash, with a contingent payment based on volumes.

Windsor Station, our original head office in Montreal was sold for \$86 million and just last week we were able to monetize \$43 million worth of land, it will be used by another party for public transit over time. So nearly \$250 million of asset monetization trying to strengthen the balance sheet in a very uncertain period of time.

So to summarize then long-term growth potential it's responsible -- responsibility that I have to protect those long-term things, even the short-term difficulties we faced, we've done that, we will continue to do that. Value pricing we'll continue to pursue our 4% pricing strategy and we think that is a very doable thing given the long-term demand for our services. Variable cost control, we've been on it, we're going to stay on it. You'll see the evidence. You are seeing the evidence of that.

Structural cost is probably the most important thing I'm seeing today about our intent and our commitment to drive down the structural long-term costs, and of course with Kathryn having joined us several years ago now, because our CFO, Kathryn McQuade came from a very, very strong background as a Senior Vice President of Finance at Norfolk Southern for a number of years before she went on to EVP there. Kathryn is our CFO and is very, very focused on prudent financial management. You're seeing the evidence of that in our balance sheet activities and others and feel like we've got the formation of a pretty strong team going forward, so away we go. Thank you.

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QUESTION AND ANSWER SECTION

<Q – Jason Seidl>: I'll ask few questions here, Fred, can you clear up, there was a press release out about you're I guess interested in the PRB in terms of building in obviously there are some confusion. Can you talk about that little bit for the investors out there?

<A – Fred Green>: Yes, I'd be happy to be the – there are numbers of parties who would love to see us not pursue the PRB as a consequence every time a move gets made of any consequence they will put their own spin on it. And what's happened is the various parties have chosen to spin certain things that have occurred in the last short while. So let me give you context.

When we acquired the DM&E, we said this is a great regional railroad, very similar to our Prairie properties and in fact we are delivering, did deliver in the first year and will deliver based on the things that are happening, benefits to our shareholders better than we said when we presented it to the board. When we bought that, we also got the opportunity to build into the PRB. It's a great opportunity but that's how it is, it's an opportunity. And we said at the time that the things that are required you've got to have right – you have got to have the environmental and all the other permitting, you've got to have a contract with the parties who are interested in acquiring that at terms that are acceptable for our shareholders for a long term investment. And you've got to have basically an environment that would welcome that.

So those conditions did not exist at the time, still do not exist, but we have continued to take steps to preserve that options. So the permitting is all being preserved, some of the engineering work was done in the first year, they've get kind of lock down and put in a box we know exactly what it looks like, it will have to be refreshed, but the essence was completed. We have made overtures to various land owners to determine whether they have interest, we own some land, we own options on other land.

The DM&E had no money, because the DM&E had no money they skipped us up with negotiating with the land owners and went right to condemnation or expropriation for those use the Canadian version of that and as a consequence they created some unrest in the marketplace. We need to preserve the right because it is right for the Federal railway to condemn the land or expropriate the land if at some point in time we can come to terms, but we similarly need to show the party that we start to try and negotiate commercially.

So we have preserved in both South Dakota and in Wyoming the ability to do those things, what we have not done is pursued aggressively the condemnation activities in Wyoming and it is not because we don't have long-term interest, there may at some point in the future have a series of stars that line up which makes us a compelling investment not necessarily with our money but other parties might be interested with us. But if it ever materializes, we will need to retain the ability to condemn, and we will do that but in short-term it's just not a compelling place to be condemned in railways or land for the railways.

So we just dropped our activities in Wyoming in front of the courts that's the vehicle that has caused people say, we are no longer interested in Powder River. It's my responsibility to keep the option alive for me, for my successor or my successor's successor as the case maybe, but there clearly is no imminent activity underway that would cause us to be able to declare that all of those stars have lined up and that it makes economic sense today to make those investments.

<Q – Jason Seidl>: You touched a little bit about the port of Vancouver, I know they are looking to add I believe is two cranes at this spot, can you give us an update where that's at?

<A – Fred Green>: The port of Vancouver is comprised of separate facility, so there are two operating units in the inner harbor, which is the regional harbor and there is a further set of

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activities that will occur at place called Roberts Bank. Roberts Bank is combination of the Deltaport, as known as the subset that is the container facility. It's also where the Westshore coal facility is, that kind of separated, it's kind of four pod operation like a cloverleaf, two of which are coal and two of which are containers.

The facility run by Global at Deltaport has in fact received two, and I don't know, I've lost track on how to describe these things but super Panamax or something rather where they can basically do multiple list of multiple containers across the widest of the vessels that are available. So in the inner harbor both Centerm and Vanterm have upgraded their facilities over the last two or three years with more capacity, and more capability and now what we've got is the Deltaport facility at Roberts Bank that has now brought on these substantial cranes able to do even larger vessels.

<Q – Jason Seidl>: Okay. And our last question, before I turn it over to the crowd, I know you said you didn't want to make any projections on demand for met coal. But with some movements going out of the East to China apropos to the future loadings I would assume that that bodes pretty well for somebody who already has a natural route out of the Port of Vancouver in terms of export coal?

<A – Fred Green>: The problem we have here is quite simply that I'm a conduit between a party that owns and produces the coal and sells the coal [inaudible] and the ports. The nature of the relationship unlike perhaps that which we have with the potash companies or Canpotex that we're just a provider of service. We're not really a partner of any kind. Their approach but not ours on site. And as a consequence you really have to listen to Teck if Teck feels that they've got substantial volume opportunity and that they're going to move that coal, that's fantastic. And I hope they're really, really successful and I hope we get the opportunity to move that coal.

Having seen the movie a few times, I'm just really reluctant to start conveying to you that these volumes will materialize when we hope they'll materialize. So we got resources in place. The nature of the situation, given the substandard recession we have 400 locomotives part, we have about today 2,000, that number could climb a little bit as the vacationers come back and the people who are replacing them have to be laid off, time will tell. I hope demand offset that, but if it doesn't, it doesn't.

And we've got maybe 17 or maybe 15,000 cars these days parked and sometimes it goes to [inaudible]. So if the client has an opportunity to sell successfully this fall and all of next year into the Chinese or any other market, we can and will be there to meet their needs under contract certainly through March and we hope that happens.

My conscience is simply that I, it's not my call, it's not my judgment and I don't any longer, I think they burned a few times, I don't put any string on it, I get entirely up to them to tell you as potential people, shareholders and their companies or ours what might happen because we can't really don't know.

Jason Seidl, Airfreight and Surface Transportation Analyst, Dahlman Rose & Co.

Fair enough. We'll turn it over to audience for any questions for Fred. Fred, I think you did such a good job of describing everything, there is no question. Well then please give a round of applause to Fred Green with Canadian Pacific.

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Exhibit 6

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