

BEFORE THE
SURFACE TRANSPORTATION BOARD

238942

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July 29, 2015
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Finance Docket No. 35918

CITY OF APPLETON
--PETITION FOR DECLARATORY ORDER--

**UNION PACIFIC RAILROAD COMPANY'S REPLY
TO CITY OF APPLETON'S
PETITION FOR DECLARATORY ORDER**

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As ordered by the Board in its decision served on June 29, 2015, Union Pacific Railroad Company ("Union Pacific") hereby replies to the Petition for Declaratory Order filed on April 2, 2015 ("Petition") by the City of Appleton, Wisconsin ("Appleton"). In its decision, the Board instituted a declaratory order proceeding as requested by Appleton to determine ownership of a railroad bridge across the Fox River in Appleton. Because the bridge was previously owned by one of Union Pacific's predecessor railroads, the Board ordered Union Pacific to file a reply and submit information and supporting documentation regarding: (1) a description of the lines Union Pacific owns and/or owned in Appleton; (2) any records or deeds showing an ownership interest; (3) any maps that might clarify ownership of the bridge or connecting track; and (4) a specific statement as to whether Union Pacific has any ownership interest in the bridge at issue and the basis for that determination.

This reply provides the history of the line in question, to the best of Union Pacific's knowledge, and responds to the Board's specific requests for information and documents.¹ As shown below, Union Pacific *does not* have any ownership interest in the bridge at issue.

¹ The information in this reply was compiled by a review of Union Pacific's records and is verified by Olin Dirks, Senior Manager Rail Line Planning.

I. History of the Line

Prior to 1988, the rail line in question through Appleton was owned by the Chicago and North Western Transportation Company (“CNW”).² As shown in green on Exhibit 1, the line through Appleton was part of CNW’s Duck Creek South lines. Duck Creek South consisted of three CNW lines: (1) the Air Line Subdivision running generally north-south from Granville (a point north of Milwaukee), through Appleton, to Tavit (near Green Bay); (2) a portion of the Shoreline Subdivision running generally north-south from Tavit to Cleveland (a point north of Sheboygan); and (3) the Ashland Line running east-west from New London, through Appleton, to Kimberly.

The Air Line Subdivision was constructed around 1863. The Ashland Line was constructed around 1875 by the Milwaukee, Lake Shore and Western, a CNW affiliate that was merged into CNW in 1893. The bridge in question was part of a line, constructed around 1879, that connected the Air Line Subdivision with the Ashland Line, as shown in blue on Exhibit 2. In 1935, CNW conveyed a portion of this connecting track, shown as a dotted-blue line in Exhibit 2, to Appleton. This dotted-blue segment of the connecting track was later removed. The remaining segment of the connecting track, including the bridge, shown in solid blue on Exhibit 2, remained active throughout CNW’s ownership to serve the customers located on this segment.

In 1988, CNW entered into an asset purchase agreement (“APA”) with FRVR Corporation for the sale of the Duck Creek South lines.³ The Duck Creek South lines, as described in the APA, included the Air Line and Ashland Line, among other lines. *See* Exhibit 3,

² For simplicity, CNW will hereafter be used to refer to Chicago and North Western Transportation Company and its railroad operating entity, Chicago and North Western Railway Company.

³ We are only including relevant excerpts from the APA in this filing. If the Board believes the complete APA would be beneficial in its analysis we are willing to file it as a confidential document subject to a protective order.

APA Ex. B. The assets conveyed to FRVR included all real property directly or indirectly related to or associated with CNW's operations over the Duck Creek South lines and all buildings, improvements, structures and tracks located on the real property. *See* Exhibit 4, APA §3(a). The bridge at issue and the then-active portion of the connecting track fell within the definition of assets conveyed to FRVR.⁴

Along with the APA, CNW provided FRVR with a quit-claim deed describing the real property to be conveyed.⁵ *See* Exhibit D to Appleton Petition ("Quit-Claim Deed"). The Quit-Claim Deed contains two sections describing property in Outagamie County, where the bridge at issue is located. The first section describes the Air Line Subdivision. *See* Quit-Claim Deed at p. 18 of 23. Based on this legal description, CNW conveyed the entire Air Line Subdivision within Outagamie County. *Id.* The second section concerning Outagamie County describes the Ashland Line. *See* Quit-Claim Deed at p. 20 of 23. This legal description includes CNW's entire Ashland Line running from New London to Kaukauna.⁶ The Quit-Claim Deed conveyed all of CNW's railroad operating property in Outagamie County, leaving CNW with no ownership interest in the bridge at issue or the connecting track.

The Quit-Claim Deed and APA also refer to a "Bridge Easement" retained by CNW. Despite its name, this easement does not concern the bridge in question and did not result in CNW retaining an ownership interest in the bridge or connecting track. Instead, the easement allowed CNW to retain access to its Duck Creek North lines, because the sale of the Duck Creek

⁴ The APA did exclude certain property and assets from the sale but the bridge and connecting track were not among the exclusions. *See* Exhibit 5, APA § 4 and Ex. A.

⁵ As required by Wisconsin law, currently Wisconsin Statute 190.11, the Quit-Claim Deed was recorded at the state level, with the Wisconsin Department of State. In preparing this reply, Union Pacific learned that Outagamie County records appear to identify Union Pacific as the owner of a single parcel of land on the eastern end of the bridge in question. We believe this is an error in the county records.

⁶ Specifically, this legal description includes the real property where the bridge and connecting track are located: Township 21 North, Range 17 East, Sections 25, 35 and 36.

South lines severed CNW's physical connection to the Duck Creek North lines, shown in blue on Exhibit 1. CNW retained commercial access to customers located on the Duck Creek North lines by entering into an agreement for FRVR to move traffic for CNW. The Bridge Easement allowed CNW to move equipment over the Air Line and Shoreline Subdivisions if necessary.⁷ See Exhibit 4, APA § 3(b). In other words, the easement provided a "bridge" for CNW trains to cross the gap between its two north-south subdivisions. The Bridge Easement did not, however, allow CNW to access the east-west Ashland Line meaning CNW did not have access to the bridge in Appleton. The Bridge Easement's sole purpose was for CNW to retain access to customers located north of Green Bay so long as CNW still owned the Duck Creek North lines. *Id.* The easement terminated by its own terms when Union Pacific, as successor to CNW, sold the Duck Creek North lines in 1998 to Sault Ste. Marie Bridge Company.⁸

Union Pacific has no records concerning ownership of the bridge after the conveyance from CNW to FRVR in 1988.

II. Response to Board Requests

(1) a description of the lines Union Pacific owns and/or owned in Appleton

Union Pacific does not own any rail lines in Appleton. Prior to 1988, Union Pacific's predecessor CNW owned two mainlines that ran through Appleton: the Air Line Subdivision running north-south and the Ashland Line running east-west. CNW also owned ancillary tracks connected to these mainline tracks including the connecting track and the track across the bridge at issue.

⁷ CNW's retention of the easement was authorized by the Interstate Commission when it authorized the acquisition of the lines by FRVR in *FRVR Corporation--Acquisition and Operation Exemption--Chicago and North Western Transportation Company*, FD 31205 (ICC decided Dec. 31, 1987).

⁸ See *Sault Ste. Marie Bridge Company--Acquisition and Operation Exemption--Lines of Union Pacific Railroad Company*, FD 33290 (STB served Feb. 4, 1997).

(2) any records or deeds showing an ownership interest

The Quit-Claim Deed, attached to Appleton's Petition as Exhibit D, is the most recent record of ownership in Union Pacific's possession. This deed transferred ownership of all of CNW's railroad operating property in Appleton, including the bridge at issue, to FRVR Corporation. Union Pacific has no records or deeds concerning ownership of the bridge after the transfer to FRVR.

(3) any maps that might clarify ownership of the bridge or connecting track

The map attached as Exhibit 2 shows ownership of the bridge and connecting track prior to the sale by CNW. Union Pacific has no maps showing current ownership of the bridge or connecting track.

(4) a specific statement as to whether Union Pacific has any ownership interest in the bridge at issue and the basis for that determination

Based on the APA and the Quit-Claim Deed, CNW conveyed all of its interest in the bridge and connecting track to FRVR. Therefore, Union Pacific has no ownership interest in the bridge or connecting track. A review Union Pacific's Real Estate and Tax records also confirmed that Union Pacific has no property interests related to the bridge or connecting track.

Respectfully submitted,



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July 29, 2015

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of July 2015, I caused a copy of the foregoing document to be served on:

James P. Walsh
Office of the City Attorney
100 North Appleton Street
Appleton, Wisconsin 54911
Jim.Walsh@appleton.org

A handwritten signature in black ink, appearing to read "Jeremy M. Berman", is written over a horizontal line.

Jeremy M. Berman

VERIFICATION

I, Olin H. Dirks, Senior Manager Rail Line Planning for Union Pacific Railroad Company, declare under penalty of perjury that I have read the foregoing Reply of Union Pacific Railroad Company to Petition for Declaratory Order and that, based on a review of records in the possession of Union Pacific, the facts and information set forth therein are true and correct to the best of my knowledge and belief. Further, I certify that I am qualified and authorized to file this Verification.

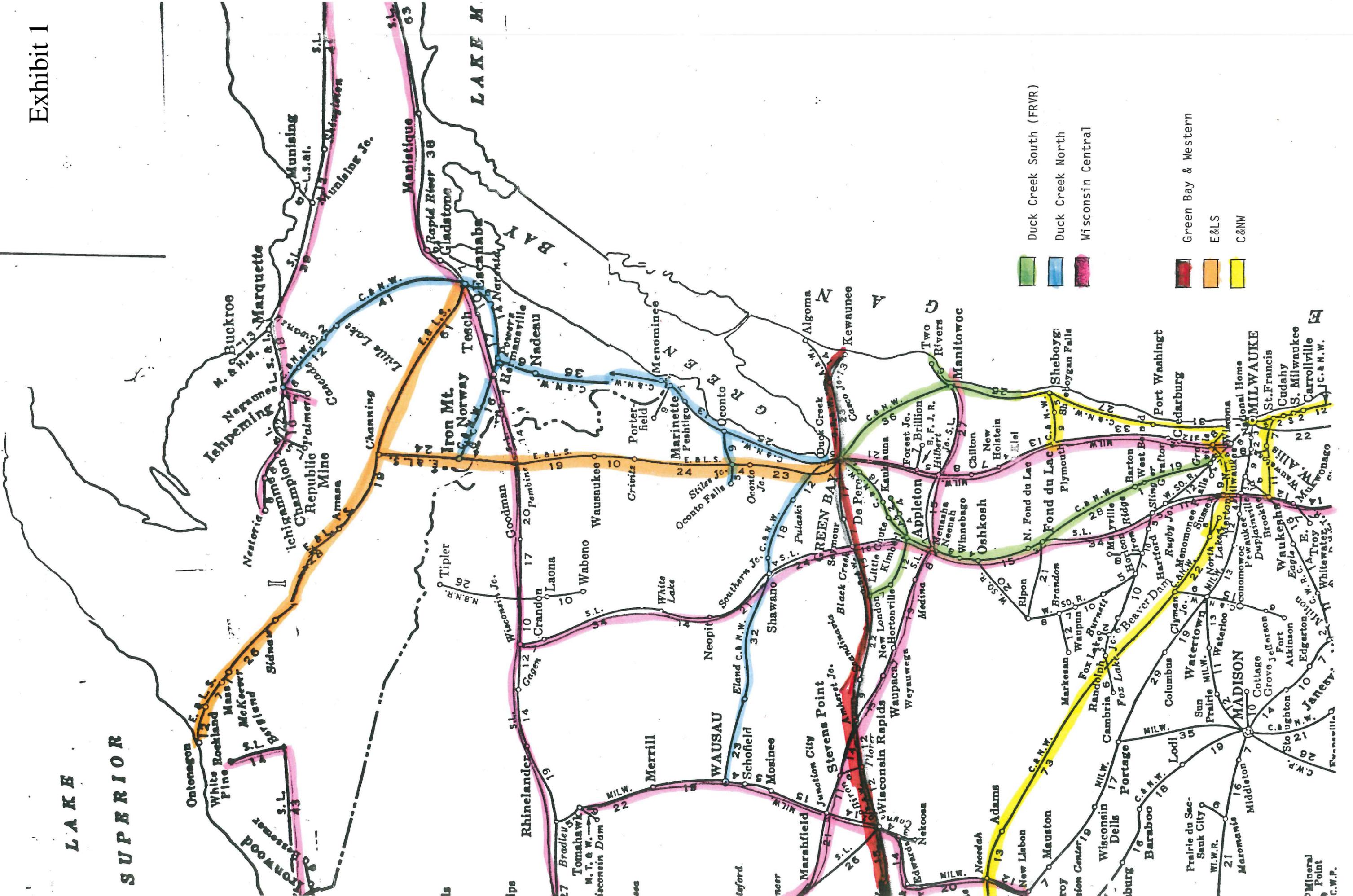
Executed on July 29, 2015



Olin H. Dirks

LAKE SUPERIOR

LAKE SUPERIOR



- Duck Creek South (FRVR)
- Duck Creek North
- Wisconsin Central
- Green Bay & Western
- E&LS
- C&NW

Mineral Point C.W.P.

Exhibit 3

"EXHIBIT B"

DUCK CREEK SOUTH

SUBDIVISIONS BY ROUTE MILES

DUCK CREEK - CLEVELAND & GRANVILLE

<u>MAIN LINE:</u> <u>Subdivision</u>	<u>Milepost</u>		<u>Miles</u>		<u>Route Miles Total</u>
	<u>From</u>	<u>To</u>	<u>Sell</u>	<u>Grant Trackage Rights</u>	
Shoreline (includes portion of Marinette)					
Duck Creek-Green Bay	4.00	00.00	4.00	---	4.00
Green Bay-Tavil	243.05	241.95	1.10	---	1.10
Tavil-Cleveland ^{1/}	113.60	62.285	<u>51.315</u>	---	<u>51.315</u>
			<u>56.415</u>	---	<u>56.415</u>
Air Line					
Tavil-Fond du Lac	241.95	176.70 ^{2/}	65.25	---	65.25
Fond du Lac-Granville	146.40 ^{2/}	99.50	46.90	---	46.90
Granville-Butler Yard ^{4/}	99.48	M14.50	---	15.29	15.29
Oshkosh-N.Oshkosh	22.30	20.10	2.20	---	2.20
			<u>114.35</u>	<u>15.29</u>	<u>129.64</u>
TOTAL MAIN LINE			<u>170.765</u>	<u>15.29</u>	<u>186.055</u>
<u>BRANCH LINE:</u>					
Kimberly	121.60	112.30	9.30	---	9.30
New London	121.40	140.65	19.25	---	19.25
Two River Spur ^{3/}	76.30	A7.50	<u>8.65</u>	---	<u>8.65</u>
TOTAL BRANCH LINE			<u>37.20</u>	---	<u>37.20</u>
TOTALS			<u>207.965</u>	<u>15.29</u>	<u>223.255</u>

^{1/} Short miles totaling 1.16 miles within this portion of line.

^{2/} Equation M.P. 176.70 = M.P. 146.40.

^{3/} Equation M.P. A1.08 = M.P. 78.53.

^{4/} Equations M.P. 92.34 (Airline Subdivision) = M.P. 8.64 (Adams Subdivision) and M.P. 13.39 (Adams Subdivision) = M.P. M17.90 (New Line Subdivision).

3. Purchase and Sale of Assets; Bridge Easement; Right of First Refusal. (a) C&NW agrees to sell and transfer to Buyer and Buyer agrees to purchase at and as of the Closing Date (defined in Paragraph 7), under the terms and conditions contained in this Agreement, all of the right, title and interest of the C&NW in the Rail Assets identified below (other than those which would or might constitute Rail Assets or Rail Properties except for the fact that they are specifically excluded by Paragraph 4(a)), including any after-acquired title, free and clear of all indebtedness for borrowed money, mortgages, pledges, liens and security interests except Permitted Liens and any which secure only obligations which Buyer is to assume or take Rail Assets subject to pursuant to Paragraphs 9 and 38 of this Agreement or the Purchase Agreements:

(1) Subject to the exclusions, exceptions, reservations, covenants and terms shown in Exhibit A and

Schedule 1 of Exhibit F, attached to this Agreement and hereby made a part thereof, and subject to encumbrances and restrictions whether or not so shown, all right, title and interest of the C&NW, to the extent transferable and/or assignable: (A) in all the real property located in Wisconsin owned, used or held by C&NW, or with respect to which C&NW may have any claim of any nature whatsoever or may otherwise be entitled to possess, which real property directly or indirectly relates to or is in any way associated with (1) the conduct of the Railroad along, upon or under the Lines to be conveyed to Buyer, as outlined in Exhibit B attached hereto and hereby made a part hereof, and/or (2) the conduct of any real estate operations and activities of the C&NW of any nature whatsoever involving real property situate near, about, along, abutting or in the vicinity of said Lines (including real property which is leased by C&NW to third parties for agricultural purposes, storage and manufacturing, among other uses, and real property held by C&NW for sale, development or investment purposes), all of which real property forms a railroad right of way, together with all buildings, improvements, structures and railroad tracks now or hereafter located thereon and together with all easements, tenements, roadways, appurtenances, hereditaments, fixtures (and all additions thereto and replacements thereof) and together with any and all benefits, rights and privileges now or

hereafter contained in, belonging to or in any way beneficial to such real property; excepting however the properties stated to be excluded in Exhibit A, and (B) in trackage rights to be granted in respect of the Lines, as outlined in Exhibit B.

(ii) All of the Miscellaneous Equipment and Material owned by C&NW which is listed or described in Exhibit C attached hereto and hereby made a part hereof.

(iii) All right, title and interest of the C&NW, to the extent transferable and/or assignable and relating to the interests in Rail Assets to be transferred to Buyer pursuant to subparagraphs (i) and (ii) hereof, under leases, contracts, permits, licenses and other instruments identified or described in Exhibit D, attached hereto and hereby made a part hereof.

(iv) All interests of the C&NW in rights with respect to any warranties or guarantees of any manufacturer or supplier, grantor or other transferor of the Rail Assets, to the extent transferable and/or assignable and relating to the Rail Assets.

(v) All other interests of any nature of the C&NW, to the extent transferable and/or assignable and relating to the interests in Rail Assets to be transferred to Buyer pursuant to subparagraphs (i), (ii), (iii) and (iv) hereof, including rights in and to general intangibles and contract rights, in addition to those identified or described in

Exhibit D, including franchises, governmental and contractual operating rights and other contracts, leases, licenses, permits and privileges.

(vi) To the extent available, and except as limited by Paragraph 23, the original (or, if available, copies if originals are not available) Property Records which relate solely (or copies if they relate other than solely) to the Rail Assets and are generally listed or described on Exhibit H, attached hereto and hereby made a part hereof. Buyer hereby acknowledges receipt of a full and complete set of the valuation maps relating to the real property to be conveyed to Buyer pursuant to the terms of this Agreement.

(b) The Transfer Documents, in the form of Schedules to Exhibit F, shall reserve an easement (the "Bridge Easement") and right of use of and operation over all trackage and other facilities and property, in, on, over and with respect to the main lines of the Shoreline and Air Line Subdivisions described in Exhibit B. To the extent that both such lines are from time to time suitable for such use and operation, the choice as between them will be by the mutual agreement of the parties on the basis of their mutual convenience. Such easement and rights shall always be prior and paramount to any and all adverse claims of title or interest, liens, security interests or other encumbrances of any persons and shall be exercisable, subject to any required regulatory approvals or exemptions, only during any period or periods, whether before or after any sale or sales of all or any portion or portions of Duck Creek North, in which C&NW (which term in this Paragraph 3(b) and Paragraph 3(c) shall mean

only Chicago and North Western Transportation Company and any grantees, transferees, successors and assigns of any of its trackage or interests in trackage extending southerly from the Lines who also acquire rights, current or potential, to operate trains over all or any part of Duck Creek North) is operating trains over all or any part of Duck Creek North.

When exercising the rights specified in this Paragraph 3(b), C&NW shall pay as rental standard Association of American Railroads detour charges or at C&NW's option a trackage rights charge on customary industry terms to be agreed to by C&NW and Buyer.

It is understood that the Bridge Easement is not intended for regular or frequent use by C&NW and, in exercising its rights under this Paragraph 3(b) and the Transfer Documents, C&NW agrees to use only the lines and facilities which are reasonably necessary or appropriate in connection with the movement of locomotives, equipment and personnel required in connection with Duck Creek North service.

The Bridge Easement and C&NW's rights set forth in this Paragraph 3(b) and Paragraph 3(c) shall terminate when all rights, current or potential, of C&NW to operate trains over all or any part of the trackage of Duck Creek North (including rights which may be reserved or agreed to in connection with any sale of all or any part of Duck Creek North) have expired.

(c) In the event Buyer sells, conveys or otherwise disposes of all or part of such Lines, or any interest therein, for continuing railroad service, the Bridge Easement and C&NW's rights under Paragraph 3(b) and Buyer's covenants under this Paragraph 3(c) and Paragraph 9(c) shall run with the land and all

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other property included in such Lines, or any interest therein, and shall not be abrogated; and Buyer shall take all required action to insure that any such land and other property which is sold, conveyed or otherwise disposed of remains subject to such Bridge Easement, rights and covenants and shall take no action which would cause any thereof to not remain subject thereto. Unless Buyer takes all required action to insure that C&NW is afforded the benefits of the Bridge Easement and rights provided in Paragraph 3(b) and this Paragraph 3(c) and of Buyer's covenants under this Paragraph 3(c) and Paragraph 9(c) by the right of use of other trackage, facilities and property in order for C&NW to move locomotives, equipment and personnel required in connection with Duck Creek North service, said right of use to be prior and paramount to any and all adverse claims of title or interest, liens, security interests or other encumbrances of any persons, Buyer shall not abandon, or discontinue the use for the continuation of railroad service of, or, other than for the continuation of railroad service, sell or convey, all or any part of such Lines, or any interest therein, the use of which would be reasonably necessary or appropriate in order for C&NW to use the Bridge Easement and other rights provided in Paragraph 3(b), without the written approval of C&NW first obtained. Notwithstanding the preceding sentence, Buyer may abandon or so discontinue the use of or so sell or convey all or any part of such Lines, or any interest therein, if there remain other lines, including the Shoreline and/or Air Line Subdivisions, connecting C&NW's lines immediately south of the Lines to Duck Creek North subject to the Bridge Easement and said rights and covenants

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meeting all of the requirements of Paragraph 3(b), this Paragraph 3(c) and Paragraph 9(c), in which case, if requested by notice from Buyer to do so, C&NW will release such Lines or portions thereof, or interests therein, so abandoned, discontinued, sold or conveyed from the Bridge Easement and the rights and covenants provided in Paragraphs 3(b), 3(c) and 9(c). Buyer covenants that there will at all times until the termination of the Bridge Easement pursuant to Paragraph 3(b) be lines connecting C&NW's lines immediately south of the Lines to Duck Creek North subject to the Bridge Easement and said Paragraph 3(b), 3(c) and 9(c) rights and covenants which are available for C&NW's use and which meet all of the requirements of Paragraphs 3(b), 3(c) and 9(c) and that in the event of any failure to meet all of said requirements, Buyer shall pay to C&NW any excess of C&NW's costs of the movement of locomotives, equipment and personnel required in connection with continued Duck Creek North rail transportation service over the costs which would have been incurred in the absence of such failure. No sale, conveyance, disposition, abandonment or discontinuance shall release Buyer from any of its obligations hereunder or under the Transfer Documents unless specifically agreed to in writing by C&NW.

(d) Provided that Buyer, at the time of its written and binding commitment hereinafter referred to, is in compliance in all material respects with all material obligations due C&NW under any Purchase Agreement other than this Agreement and Exhibit M of which C&NW has notified Buyer in C&NW's notice

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hereinafter referred to (or promptly after a subsequent failure to comply) that Buyer has failed to comply, in the event that C&NW elects to sell its line, yards, facilities and real estate between Cleveland (M.P. 62.285) and Wiscona, Wisconsin (M.P. 5.43) (together with any insignificant other properties to be included in such sale, the "Sheboygan Line"), but only if such sale is not part of a transaction significantly larger in scope and effect than the sale of the Sheboygan Line separately as a unit and includes significant other railroad property connected thereto, and C&NW receives a bona fide offer therefor from a third party buyer, acceptable to C&NW, Buyer shall have the exclusive right of first refusal to purchase the Sheboygan Line, on the same price, terms and conditions offered by the third party buyer. C&NW shall give Buyer written notice of receipt of an acceptable offer to purchase the Sheboygan Line and the price, terms and conditions thereof and Buyer may exercise its right of first refusal by providing to C&NW within 30 days of such notice a written and binding commitment delivered in accordance with Paragraph 37 to purchase the Sheboygan Line on such price, terms and conditions.

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4. Excluded Assets; Hart-Scott-Rodino Filing. (a)

The Rail Assets and Rail Properties do not include (i) any executory rights not related to the Rail Assets described in Paragraph 3(a)(1) through (v) that relate solely to obligations and commitments not assumed by Buyer under this Agreement, (ii) general ledgers, minute books and similar records required for the C&NW's corporate and tax purposes, (iii) patents, trade marks

service marks, trade names, copyrights and other similar intangible rights, and (iv) all assets which would or might constitute Rail Assets or Rail Properties except for the fact that they are specifically excluded by this Agreement.

(b) Both C&NW and Buyer have filed with the Federal Trade Commission and the Department of Justice the notifications and reports required to be filed pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976 and the rules and regulations promulgated thereunder and shall promptly respond to any request for additional information or documentary material made in connection therewith, which notifications, reports, filings and responses shall comply in all material respects with the requirements of such Act and such rules and regulations. C&NW and Buyer shall furnish to each other such information as each may reasonably request of the other to assist it to make such filings and responses as it may be legally required to make under such Act and such rules and regulations.

EXHIBIT "A"

REAL ESTATE EXCLUSIONS AND RESERVATIONS

THE EXCLUSIONS:

C&NW's conveyance of the Rail Assets shall exclude: (i) all land grant properties which are not used in the conduct of railroad operations, (ii) all real estate underlying former lines of railroad which have been abandoned pursuant to Interstate Commerce Commission order (or exemption) except to the extent used in the conduct of the Railroad, and (iii) the properties subject to pending agreements or offers to purchase listed on Schedule 1 hereto.

THE RESERVATIONS:

C&NW's conveyance of the Rail Assets shall reserve: (i) the Bridge Easement and other rights referred to in Paragraph 3(b) of the Agreement, (ii) the specified 100 per cent reservations, and (iii) the Longitudinal Occupations easements, all as more specifically set forth in Schedule 1 to Exhibit F.

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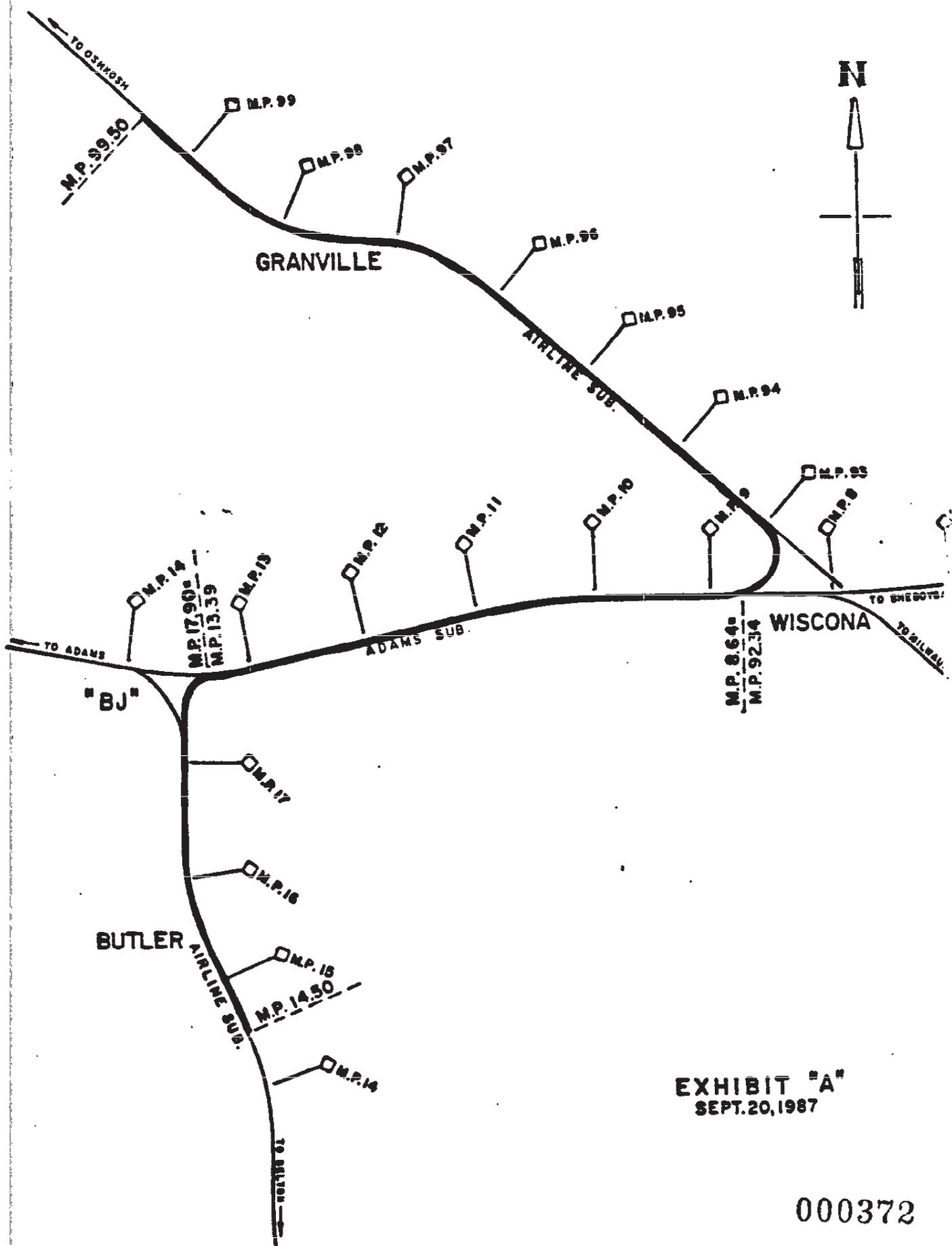


EXHIBIT "A"
SEPT. 20, 1987

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SCHEDULE 1
TO
EXHIBIT "A"

EXCLUDED PROPERTIES

<u>Control Number</u>	<u>Transmittal Date</u>	<u>Location</u>	<u>Sale Price</u>	<u>Purchaser</u>
5334	09/23/86	Appleton, WI		Kent Paper
5545	03/31/87	Near Maribell, WI		Town of Cooperstown
5692	08/21/87	Manitowoc, WI		City of Manitowoc
5750	10/13/87	Manitowoc, WI		Staudt-Wigen Land Co.

RE6A-3

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