

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

CANADIAN PACIFIC RAILWAY COMPANY, ET AL. – CONTROL – DAKOTA, MINNESOTA & EASTERN RAILROAD CORP., ET AL.))))))	Finance Docket No. 35081 234652 ENTERED
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**PETITION OF THE STATE OF SOUTH DAKOTA ACTING BY AND THROUGH
ITS DEPARTMENT OF TRANSPORTATION TO ENFORCE CANADIAN
PACIFIC RAILWAY COMPANY’S INVESTMENT REPRESENTATIONS**

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Attachment 1 – Requested Investment Information

Verified Statement of the Hon. Dennis M. Daugaard, Governor of the State of South Dakota

Verified Statement of Harvey H. Stone, P.E. and John M. Ludwig, P.E.

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The State of South Dakota acting by and through its Department of Transportation (“South Dakota” or “State”) files this Petition requesting that the Surface Transportation Board (“STB” or “Board”) enforce the investment representations made by the Canadian Pacific Railway Company (“CP,” “CPR” or “CPRC”)¹ in this proceeding and in support hereof states as follows:

PREFACE AND SUMMARY

In 2007, CP filed an application seeking the Board’s approval of its plan to acquire the Dakota, Minnesota and Eastern Railroad Corporation (“DM&E”) and DM&E’s wholly owned subsidiary the Iowa, Chicago & Eastern Railroad Corporation (“IC&E”) (collectively “DME”). In its application, CP informed the Board that CP’s acquisition of DME would benefit both CP and DME’s shippers.

¹ Unless otherwise noted, references to CP include affiliated corporate entities during the referenced time period.

CP said that it would benefit because its acquisition of DME would permit CP to obtain profitable new business and efficiently serve new markets. CP represented that DME shippers would benefit because they would obtain new single-system access throughout the combined CP/DME system and because CP would make substantial new capital investments in DME.

There were three different representations made to the Board about CP's new capital investments: (i) CP represented it would invest \$300 million (including investment dollars previously budgeted by DME) in the first three post-acquisition years; (ii) CP represented it would invest \$300 million (in addition to investment dollars previously budgeted by DME) in the first few years following its acquisition of DME; and (iii) the Federal Railroad Administration ("FRA") informed the Board that, as part of the Safety Integration Plan ("SIP") process, CP had represented it would expend \$300 million in the first four post-acquisition years to upgrade all DME track to Class 3 standards.

CP's proposed acquisition of DME was of great importance to South Dakota rail shippers. DME operates the only east-west rail line traversing the entire State. This line is vitally important because for many South Dakota shippers it is their only means of transporting their goods to market. It is also critically important to communities located along the line that depend on adequate rail service as the backbone of their local economies.

South Dakota shippers, and local South Dakota communities, supported CP's plans to acquire DME because they believed, and relied upon, CP's promises that CP's acquisition of DME would bring new single-system service options and the infusion

of new capital to improve DME lines in South Dakota. The latter was of particular importance because many segments of the DME lines in South Dakota operated under significant speed and weight restrictions.

In 2008, the Board approved CP's acquisition of DME. In its approval decision, the Board cited CP's promises of single-system service, as well as CP's capital investment representations, as benefits to the shipping public. The Board also denied all shipper requests for specific track upgrade conditions based on CP's general representation that it would upgrade all DME track to Class 3 standards.

In December of 2012, CP did an about-face. CP announced that it planned to sell or otherwise dispose of the DME line west of Tracy, MN. The west-of-Tracy line includes the entirety of DME's lines in South Dakota. CP's plans were of great concern to the State because, if implemented, they would have eliminated the single-system service benefits CP had promised South Dakota shippers, leaving shippers with only marginalized service and fewer competitive options than those that existed when DM&E first began operations in 1986.

CP's plans also called into question whether CP had or would honor its capital investment representations. Obviously, a carrier that plans to sell a line has little financial incentive to invest capital dollars in it. Shortly after CP's announcement, South Dakota's Governor, the Honorable Dennis M. Daugaard, informed CP that CP's plans would have substantial anti-competitive impacts on South Dakota shippers. Governor Daugaard also asked CP to provide sufficient information so that the State could determine whether CP had honored its investment representations.

In response, CP claimed it had made \$316 million in investments in DME since 2008, but did not provide the detailed investment data necessary to verify this assertion; ignored its representation to invest \$300 million (in addition to previously budgeted DME funds) in DME facilities; admitted that substantial portions of DME, including most of the DME lines west of Pierre, SD remained below Class 3 standards; and stated that it had no intention of upgrading all DME track to Class 3 standards. Governor Dugaard then requested FRA to provide the same detailed investment data that CP had refused to provide. In mid-July of 2013, FRA informed the Governor that FRA did not possess the requested information.

The State now turns to the STB. The STB has broad authority to enforce CP's compliance with CP's investment representations. The State requests that the Board exercise its broad enforcement authority here by taking the following enforcement actions:

- The Board direct CP to provide the investment data and other information necessary to determine whether CP has adhered to the first two of its three investment representations. (As to the third representation, CP has already admitted that it has not upgraded all DME track in South Dakota to Class 3 standards.) The specific investment information the State seeks is identified in Attachment 1.
- The Board direct CP to submit a verified statement addressing CP's views on its compliance obligations. For example, CP has said that it has no plans to upgrade all DME track to Class 3 standards, even though the Board relied on this representation in denying all individual requests for track investment conditions in its decision approving CP's acquisition of DME.
- The Board afford the State, and other interested parties, the opportunity to file comments responding to CP's

submissions, and following its receipt of these comments, issue an appropriate enforcement order.

- The Board adopt a 75 day procedural schedule calling for CP's submissions to be made on day 30, with party comments following on day 75.

The Board has promised to be “vigilant in doing what we can to ensure that representations made by parties to our proceedings are actually honored.”² The State respectfully asks the Board to exercise that vigilance here by granting the modest relief requested by the State. There is good cause to do so.

South Dakota shippers and the Board relied on CP's investment representations. CP's recent actions, including its proposed sale of the DME line west of Tracy, its failure to provide the State with requested capital investment information, and its failure to make track upgrades, raise serious questions concerning CP's adherence to its representations. It is now time for the Board to create a full data record (by ordering CP to produce the requested investment information), hear from all sides, and then issue an appropriate enforcement order.

The State submits two verified statements in support of this Petition, one from Dennis M. Daugaard, Governor of the State of South Dakota (“Daugaard VS”) and one from Harvey H. Stone, P.E. and John M. Ludwig, P.E. (“Stone/Ludwig VS”).

² See *CSX Corp., et al. – Control & Operating Leases/Agreements – Conrail Inc., et al.*, FD 33388 (STB served May 21, 2001) (“*Conrail May 2001 Decision*”), slip op. at 7.

I. BACKGROUND

The following background facts are pertinent.

A. DM&E is Created to Provide Vital Rail Service in South Dakota (1986)

1. In the early 1980's, the Chicago & North Western Transportation Company ("C&NW") sought to abandon its rail line running east from Rapid City to Pierre, SD.³ This proposed abandonment was opposed by a broad coalition of South Dakota shippers whose livelihoods depended on the continuation of service on this line.⁴

2. Following the denial of C&NW's abandonment request, South Dakota shippers and South Dakota governmental representatives worked diligently with C&NW to find a solution to meet C&NW's and South Dakota shippers' differing needs.⁵ The solution came in 1986 in the form of C&NW's sale of its main line between Rapid City, SD and Winona, MN to a new carrier called the DM&E.⁶ The sale also included four branch lines and the grant of incidental trackage rights.⁷ All told, DM&E acquired

³ See Roger Larson, *Laying the Tracks for the Future*, Huron Daily Plainsman, reprinted at 142 Cong. Rec. S11488-11489 (daily ed. Sept. 27, 1996).

⁴ *Id.*

⁵ *Id.*

⁶ See Dakota, Minnesota and Eastern Railroad Corp.; Acquisition and Operation Exemption; Chicago and Northwestern Transportation, 51 Fed. Reg. 32,260 (Sept. 10, 1986).

⁷ *Id.*

operating rights over 965.7 route miles. DM&E began operating over the main line in September 1986.⁸

B. DM&E Grows by Acquiring the Colony Line and IC&E; Obtains Rights to Build into the PRB (1996-2006)

3. In 1996, DM&E expanded its operations by purchasing a Union Pacific Railroad Company (“UP”) line running between Colony, WY and Crawford, NE via Rapid City, SD.⁹ Most of this 203 mile north-south line, which is colloquially referred to as the “Colony Line,” is located in western South Dakota and serves South Dakota shippers in that area. As the Board observed at the time, DM&E’s acquisition of the Colony Line would “provide shippers on the [Colony] line with single carrier service eastward through Minnesota” and “shippers will benefit from the efficiencies that will result from elimination of the [DM&E/UP] interchange.”¹⁰

4. In 2003, DM&E further expanded its operations by acquiring the IC&E.¹¹ At that time, IC&E owned or operated 1,397 route miles in six Midwestern states: Minnesota, Iowa, Kansas, Missouri, Wisconsin, and Illinois.¹² DM&E informed the Board that its acquisition of IC&E was very important to DM&E shippers because it would transform DM&E from a “feeder line railroad – dependent on Class Is to get to the ultimate

⁸ *Id.*

⁹ *See Dakota, Minn. & E. R.R. – Acquisition & Operation – Colony Line Segment of Union Pac. R.R.*, FD 32864, 1996 WL 200555 (STB served April 25, 1996).

¹⁰ *Id.*, 1996 WL 200555 at *2, *3.

¹¹ *See Dakota, Minn. & E. R.R. & Cedar Am. Rail Holdings, Inc. – Control – Iowa, Chicago & E. R.R.*, 6 S.T.B. 511 (2003) (“DM&E/IC&E Decision”).

¹² *DM&E/IC&E Decision*, 6 S.T.B at 516.

termination or gateway”¹³ to “a truly viable, competitive origin to destination rail system”¹⁴ – a result that DM&E stated was the “culmination of its long-standing efforts to gain independent, competitive access to major markets and gateways for DM&E’s customers,”¹⁵ including “for the first time, direct, single-system service to the major rail gateways of Chicago and Kansas City.”¹⁶

5. In its decision approving DM&E’s acquisition of IC&E, the Board agreed with DM&E that DM&E’s acquisition of IC&E would benefit DM&E and IC&E shippers “by enabling both railroads to compete more effectively against their Class I rail competitors”¹⁷ and by providing “shippers on both DM&E and IC&E new routing and service options and more efficient and competitive single-system access to significant new markets and gateways.”¹⁸

6. In 2006, the Board also granted DM&E final authority to build a new 280 mile rail line from a point on DM&E’s main line in western South Dakota to the Wyoming Powder River Basin (“PRB”).¹⁹ DM&E also planned to upgrade and

¹³ Railroad Control Application, Verified Statement of Kevin V. Schieffer, President and Chief Executive Officer at 5, *DM&E/IC&E* (filed Aug. 29, 2002).

¹⁴ *Id.* at 4.

¹⁵ *Id.*, Railroad Control Application at 9.

¹⁶ *Id.*

¹⁷ *DM&E/IC&E Decision*, 6 S.T.B. at 524.

¹⁸ *Id.*

¹⁹ *Dakota, Minn. & E. R.R. Constr. into the Powder River Basin*, FD 33407 (“*DM&E PRB*”) (STB served Feb. 15, 2006), *aff’d sub nom. Mayo Found. v. STB*, 472 F.3d 545 (8th Cir. 2006).

rehabilitate 598 miles of its existing rail lines in South Dakota and Minnesota to accommodate PRB unit train coal traffic – if the PRB construction project was actually pursued.²⁰ During the course of its review of DM&E’s PRB expansion plans, the Board observed that “[m]any parts of DM&E’s system currently are in poor condition and operate under speed and weight restrictions, thus making it difficult to provide reliable and efficient rail service to existing shippers and attract additional business.”²¹

C. CP Proposes to Acquire DME; Says Its Interest Is Not Tied to DME’s PRB Rights (2007-2008)

7. On October 5, 2007, CP filed an application at the STB to acquire the DME.²² In its Application, CP’s then-CEO Fred Green informed the Board in no uncertain terms that CP had decided to purchase DME because CP had concluded that combining CP’s existing operations with DME’s existing operations would be beneficial to CP, not because of CP’s interest in DME’s PRB access rights:

Regardless of whether the PRB line is ultimately built, I firmly believe that CPR’s acquisition of DME will be beneficial for CPR, DME, their respective customers and the communities that they serve. It is on that basis – and not on the basis of speculation regarding the future of the PRB line project – that CPR made its decision to acquire DME.²³

²⁰ *DM&E PRB*, 6 S.T.B. 8, 11 (2002).

²¹ *Id.* at 40.

²² Application by Canadian Pac. Ry., et al. for Approval of Control of Dakota, Minn. & E. R.R., et al., *Canadian Pac. Ry., et al. – Control – Dakota, Minn. & E. R.R.*, FD 35081 (“*CP/DME*”) (filed Oct. 5, 2007) (“Application”).

²³ Application, Verified Statement of Fred Green, President and CEO of CP, at 6.

Mr. Green went on to say that “[t]his reality is demonstrated by the consideration that CPR agreed to pay under its acquisition agreement with DME, which is structured to reflect the separate nature of the decision whether to proceed with the PRB line project.”²⁴ Under the terms of CP’s purchase arrangements, CP paid a specified sum to acquire DME, and then agreed to pay substantial additional amounts if CP pursued construction of the PRB line.²⁵

D. CP Represents That Shippers Will Benefit from Its Acquisition of DME Because CP Offers Expanded Single-System Service and Agrees to Undertake Substantial Capital Investments in DME (2007-2008)

8. CP explained to the Board that its purchase of DME would benefit DME shippers in two principal ways. First, DME shippers would obtain new “single system” service options “throughout CPR’s cross-border transcontinental network.”²⁶ Second, DME shippers would benefit from “CPR’s plan to make \$300 million of additional capital available” to invest in DME facilities:

CPR’s acquisition of DME will enhance the transportation services available to DME shippers by giving them single system rail access to end markets throughout CPR’s cross-border transcontinental network. In addition, CPR’s plan to make \$300 million of additional capital available over the next several years to upgrade DME’s track, bridges and other rail facilities will enable DME to provide safer, more fluid rail service.²⁷

²⁴ *Id.*

²⁵ *Id.*, Application at 7.

²⁶ *Id.* at 13.

²⁷ *Id.* at 13-14.

9. The Mayo Clinic challenged CP's plan to make "\$300 million of additional capital available."²⁸ It noted that, prior to the acquisition transaction, DME had budgeted a total of \$172 million for capital expenditures to be made between 2009 and 2011 so, taking these already budgeted funds into account, CP was really only proposing to make "*additional* capital expenditures of approximately \$128 million" in the first three post-acquisition years.²⁹

10. In response to Mayo Clinic's argument, CP clarified that its \$300 million additional investment commitments contained two component parts: (i) CP committed to expend a total of \$300 million (including DME's previously budgeted sums) in the first three post-acquisition years and (ii) CP committed to expend a total of \$300 million "over and above DME's projected capital budget[] over the next several years."³⁰

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

²⁸ *Id.* at 13.

²⁹ See Mayo Clinic, Argument and Request for Conditions at 14-15, *CP/DME* (filed March 4, 2008) (emphasis in original).

³⁰ Applicant's Response to Comments and Requests for Conditions and Rebuttal in Support of Application Vol. 1 at 75, *CP/DME* (filed April 18, 2008) ("Applicant's Response").

spending) to approximately \$100 million annually in each of the first three years following approval of the transaction.³¹

11. CP also discussed its capital-investment commitments with FRA as part of the SIP process in this case. FRA submitted a letter to the STB, dated July 3, 2008, stating that “CP has committed to investing approximately \$300 million over the next four years to upgrade all DM&E track to FRA Class III standards.”³² FRA also stated that if the STB approved CP’s acquisition of DME, FRA would be placing a “special focus” on CP’s honoring this commitment “during the operations integration period.”³³

E. South Dakota Shippers and Communities Rely on CP’s Representations and Support CP’s Acquisition of DME (2007-2008)

12. South Dakota-based shippers and communities cited and relied upon CP’s capital investment representations and CP’s new single-system service representations as the basis for their support of CP’s acquisition of DME. *See* Verified Statement of Ron Mitzel on behalf of Dakota Mill & Grain at 1-2 (grain shipper);³⁴ Verified Statement of Daniel W. Baker on behalf of GCC Dacotah at 1-2 (cement and concrete products shipper);³⁵ Verified Statement of James F. McKeon, President & CEO on behalf of the Rapid City Area Chamber of Commerce at 1-2 (members include

³¹ *Id.*

³² Letter from the Hon. Joseph H. Boardman, FRA Administrator to the Hon. Charles D. Nottingham, STB Chairman at 1, *CP/DME* (filed July 14, 2008) (“July 2008 FRA Letter”).

³³ *Id.*

³⁴ Application, Vol. II, Shippers Tab at 4-5.

³⁵ *Id.* at 6-7.

bentonite, cement and grain shippers);³⁶ Verified Statement of Lisa Richardson on behalf of the South Dakota Corn Growers Association at 1-2 (corn shippers);³⁷ Verified Statement of Carl Anderson on behalf of the South Dakota Grain & Feed Association at 1-2 (wheat, corn, soybeans and fertilizer shippers);³⁸ Verified Statement of Barry Schaps on behalf of VeraSun Energy Corporation at 1-2 (ethanol shipper);³⁹ Verified Statement of Dale Locken on behalf of the South Dakota Wheat Growers at 1-2 (corn, wheat and soybean shippers);⁴⁰ Verified Statement of Mayor David Schneider on behalf of the City of Belle Fourche, SD at 1-2 (constituents include bentonite, ethanol and grain shippers);⁴¹ Verified Statement of David McGirr on behalf of the City of Huron, SD at 1-3 (constituents include grain, ethanol and lumber shippers);⁴² Verified Statement of John Hart on behalf of the City of Phillip, SD at 1-2 (constituents include wheat farmers);⁴³ Verified Statement of David L. Hahn, Mayor of Wall, SD at 1-2 (grain shippers);⁴⁴ Verified Statement of Richard

³⁶ *Id.* at 13-14.

³⁷ *Id.* at 18-19.

³⁸ *Id.* at 20-21.

³⁹ *Id.* at 26-28.

⁴⁰ Supplement to Application by Canadian Pacific Railway Company, *et al.* for Approval of Control of Dakota, Minnesota and Eastern Railroad Corporation, *et al.*, Additional Verified Statements from Shippers Tab, *CP/DME* (filed Dec. 5, 2007).

⁴¹ *Id.*, Additional Verified Statements from Communities Tab.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

Jones on behalf of Bentonite Performance Minerals, LLC at 1-2 (bentonite shipper);⁴⁵ Verified Statement of Tim Luken on behalf of the Oahe Grain Corporation at 1-2 (shipper of wheat, sunflower seeds and corn);⁴⁶ Verified Statement of David Owen on behalf of the South Dakota Chamber of Commerce at 1-2 (members include over 600 businesses);⁴⁷ Verified Statement of Rodney Christianson on behalf of the South Dakota Soybean Processors at 1-2 (soybean meal and oil shipper);⁴⁸ Verified Statement of Fred Weekee on behalf of the City of Aurora, SD at 1 (constituents include grain and ethanol shippers);⁴⁹ Verified Statement of Vikki Day on behalf of the City of Highmore, SD at 1-2 (constituents include grain shippers);⁵⁰ Verified Statement of Joe Woitte on behalf of the Town of Midland, SD at 1-2 (constituents include grain, lumber and scrap iron shippers);⁵¹ Verified Statement of Duane Sanger on behalf of the City of Redfield, SD at 1-2 (constituents include grain shippers);⁵² Verified Statement of Maury LaRue, Mayor of the City of Sturgis, SD at 1-2 (constituents include grain shippers);⁵³ and Letter from Mike Pulaski,

⁴⁵ Applicants' Response, Vol. 1, Shippers Tab.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*, Communities Tab.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

Corresponding Secretary for the Committee for a Safer Pierre and Fort Pierre to the Hon. Vernon Williams, STB Secretary at 1, 7, *CP/DME* (filed Nov. 19, 2008).

F. The Board Relies on CP’s Service and Investment Representations in Its Decision Approving CP’s Acquisition of DME; Retains Jurisdiction to Enforce These Representations (2008)

13. The STB also relied on CP’s investment and service representations when it granted the Application, subject to specified conditions, in its decision served on September 30, 2008 (“*Dec. No. 11*”). For example, the Board denied all specific requests for all safety-related conditions directed at “improving DM&E’s lines” because of “CPRC’s commitment to upgrade all DM&E’s track to FRA Class 3 standards.”⁵⁴

Several entities, including [the City of] Owatonna [MN], have cited concern about DM&E’s track record regarding safety and what CPRC’s plans are with regard to improving 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 FRA 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.⁵⁵

Similarly, the Board held that “[c]ommon control should also give shippers on CPRC, DM&E, and IC&E new routing and service options and more efficient and competitive single-system access to significant new markets and gateways.”⁵⁶

⁵⁴ *Dec. No. 11* at 21 n.35.

⁵⁵ *Id.*

⁵⁶ *Id.* at 11.

14. The Board’s approval of the Application was subject to the condition that CP adhere to “any and all of the representations they made on the record during the course of this proceeding.”⁵⁷

Applicants are required to adhere to any and all of the representations they made on the record during the course of this proceeding, whether or not such representations are specifically referenced in this decision.⁵⁸

15. The Board’s approval of the transaction was also subject to the condition that the CP adhere to the SIP process, a process that was to continue until “FRA has informed the Board that the integration of applicants’ operations has been safely completed”:

Approval of the . . . control application . . . is subject to the condition that applicants shall comply with the SIP prepared under 49 CFR 1106, which may be updated as necessary, and continue to coordinate with FRA in implementing the SIP during the operations integration period. The ongoing safety integration process shall continue until FRA has informed the Board that the integration of applicants’ operation has been safely completed.⁵⁹

16. CP consummated its acquisition of DME on October 30, 2008.⁶⁰

⁵⁷ *Id.* at 27 (Condition No. 8).

⁵⁸ *Id.*

⁵⁹ *Id.* at 27 (Condition No. 5).

⁶⁰ *See* Letter from CP Counsel to Anne K. Quinlan, Acting STB Secretary at 1, *CP/DME* (filed Oct. 30, 2008).

G. CP Does an About-Face: Announces Plans to Shelve PRB Project and Cease CP/DME Operations West of Tracy, MN (December 2012)

17. On December 3, 2012, CP announced that it had decided to “defer indefinitely plans to extend its rail network into the PRB coal mines based on continued deterioration in the market for domestic thermal coal, including a sharp deterioration in 2012.”⁶¹

18. The next day, December 4, 2012, CP announced its plan to “explore strategic options for its main line track from Tracy, MN west into South Dakota, Nebraska and Wyoming” and stated that the carrier was “inviting expressions of interest from prospective partners.”⁶² The “track from Tracy, MN west” includes all DME track in South Dakota.

H. The State Expresses Its Grave Concerns about the Adverse Impact of CP’s Plans on South Dakota Shippers; CP Does Not Provide the State with Requested Capital Investment Data; CP Admits that Substantial Segments of DME Track Have Not Been Upgraded to Class 3 Standards (2013)

19. CP’s plans are of great concern to the State of South Dakota. CP’s plans were directed at “explor[ing]” its options for what is the only east-west main line traversing the entire State of South Dakota. Reliable, low-cost service over this line is

⁶¹ See CP Press Release, Canadian Pacific to write-down Powder River Basin option (Dec. 3, 2012), <http://www.cpr.ca/en/news-and-media/news/Pages/CP-to-write-down-Powder-River-Basin-option.aspx>.

⁶² See CP Press Release, CP seeks expressions of interest for the DM&E west end (Dec. 4, 2012), <http://www.cpr.ca/en/news-and-media/news/Pages/CP-expression-of-interest-for-DME.aspx>.

critical to the many South Dakota shippers who utilize it, as well as to the entire economy of South Dakota. *See* Daugaard VS at 1.

20. On February 5, 2013, Governor Daugaard and the South Dakota congressional delegation sent a letter to CP's CEO Hunter Harrison.⁶³ They expressed their strong concerns about CP's apparent plan to convert rail operations west of Tracy, MN into a CP feeder operation, thus denying South Dakota shippers the competitive single-system benefits DM&E had worked so hard to achieve in *DM&E/IC&E* and CP had promised would be expanded in *CP/DME*.⁶⁴ They also expressed their strong concerns about whether CP had complied with the investment representations CP had made in *CP/DME* and asked for a "specific accounting" of CP's capital investments in DME since 2008.⁶⁵

21. In response, CP said it "understands [the State's] concerns regarding the competitive effects of any transaction," but offered no details on how CP planned to address those concerns.⁶⁶ CP provided the following response to the State's capital investment inquiries:

- CP asserted that it had made \$316 million in capital investments in DME facilities between 2008 and 2012. CP did not provide the detailed investment data requested by the State that is necessary to verify its asserted investments.⁶⁷

⁶³ *See* Daugaard VS, Exhibit DMD-2 at 1-3.

⁶⁴ *Id.* at 1.

⁶⁵ *Id.* at 2.

⁶⁶ *Id.* at 4.

⁶⁷ *Id.* at 5.

- CP did not provide any information concerning its compliance with its representation that it would make a total of \$300 million in capital investments (over and above capital dollars previously budgeted by DME);
- CP admitted that it had not upgraded substantial portions of DME track to Class 3 standards, including most of the DME line west of Pierre, SD.⁶⁸
- CP stated that the investment representations it made in 2007/2008 “were made by different corporate management” and were made before changes in energy markets “effectively killed the PRB option for the near term.”⁶⁹

22. Following its receipt of CP’s response, Governor Daugaard and the State congressional delegation wrote two letters to FRA asking the agency to provide a detailed accounting of CP’s capital investments in DME since 2008.⁷⁰

23. FRA provided two letters in response, one dated April 9, 2013 and a second dated July 10, 2013.⁷¹ In the second letter, FRA stated that it “does not have a detailed financial breakdown of CP’s annual capital expenditures.”⁷² FRA did not address the amount of DME track that remained classified below Class 3 standards in either response.

⁶⁸ *Id.* at 5, 8, and 9.

⁶⁹ *Id.* at 4.

⁷⁰ *See* Daugaard VS, Exhibit DMD-3 at 1, 14-15.

⁷¹ *Id.* at 2-13, 16-17.

⁷² *Id.* at 17.

II. ENFORCEMENT REQUESTS

CP made three capital-investment representations in the 2007-2008 proceedings before the Board: (i) it would make capital investments totaling \$300 million in the first three post-acquisition years (including previously budgeted DME funds) (“First Investment Representation”); (ii) it would make capital investments totaling \$300 million (in addition to previously budgeted DME funds) in the first few years following its acquisition of DME (“Second Investment Representation”); and (iii) according to FRA, CP committed as part of the SIP process to expend \$300 million in the first four post-acquisition years to upgrade all DME track to Class 3 standards (“Third Investment Representation”).

As a condition of its approval of CP’s acquisition of DME, the Board ordered CP to adhere to its representations, including those made as part of the SIP process. The Board has broad, plenary authority to enforce merger conditions, including conditions requiring carriers to honor their representations. The State asks the Board to exercise that broad authority here by directing CP to produce the capital investment, and related information set forth in Attachment 1, along with a verified explanation from CP concerning its compliance with its investment representations. The State also requests that it, along with interested parties, be given the opportunity to review and comment on CP’s submission, followed by a final Board enforcement ruling.

Good cause exists for the Board to grant this Petition. The only way the State, other interested parties, and the Board can determine whether CP has adhered to the

First Investment Representation and the Second Investment Representation is to obtain and review CP's capital investment records. Similar information is needed to verify the amount of DME track that remains classified below Class 3 standards.

In addition, CP has ignored the State's request to produce the investment records voluntarily; has told the State that it has no intention of upgrading all of its track to Class 3 standards; and has stated that its investment commitments were made before CP decided to abandon construction of a new PRB line. All of these factors call into question whether CP has complied with its investment representations, particularly in light of CP's announced plans to stop operations over the DME line west of Tracy.

Finally, South Dakota shippers and local communities relied on CP's promises of capital investments in DME facilities in South Dakota and expanded single-system service options when they supported CP's acquisition of DME in 2008. Now, a few years later, CP has announced plans that, if implemented and approved, will end single-system service for most South Dakota shippers using CP/DME. These shippers are entitled to know whether CP has also decided to walk away from its investment representations.

A. CP's Investment Representations

CP made the following investment representations in *CP/DME*.

1. CP's Representation to Invest \$300 Million (Including Previously Budgeted DME Monies)

In its Application Operating Plan, CP represented that it would make \$300 million in capital investments in DME road property in the first three post-acquisition

years. *See, e.g.*, Application, Exhibit 13 at 2 (“Following Board approval of the transaction, CPR intends to invest approximately \$300 million in capital in DME over the next three years to upgrade and improve the condition of DME’s infrastructure, reduce deferred maintenance, and substantially enhance DME safety performance.”).

CP’s Operating Plan showed that it planned to invest the \$300 million in approximately even monthly increments in 2009, 2010 and 2011, and contained a table breaking down “the types of capital expenditures CPR projects it will make on the DME system in those three years”:⁷³

<u>Proposed Annual Capital Expenditures on DME</u>	
Item	Annual Capital (\$000,000s)
Rail	11.268
Ballast	2.385
Cross Ties	16.394
Other Track Maintenance	5.756
Structures	60.700
Signals & Communications	2.168
Work Equipment	1.354
Other	0.697
TOTAL	100.722

CP’s operating plan also provided that approximately 60% of these capital investments would be made on DM&E lines and 40% on IC&E lines.⁷⁴

⁷³ Application, Exhibit 13 at 36.

⁷⁴ Application, Exhibit 13, Appendix L (“Projected CPR Capital Expenditures on DME System”).

As discussed below, CP later clarified that this First Investment Representation included previously budgeted DME funds.

2. CP's Representation to Invest \$300 Million (Excluding Previously Budgeted DME Monies)

CP also represented in its Application that it “plan[ned] to make \$300 million of additional capital available over the next several years to upgrade DME’s track, bridges and other rail facilities.” *See* Application at 13.

In its comments, the Mayo Clinic pointed out that CP had included in its SIP a chart showing that if DME was not acquired by CP, DME planned to make engineering capital expenditures between 2009 and 2011 totaling \$172 million.⁷⁵ It then argued that CP’s claims of making \$300 million in “additional expenditures” in DME were misleading because, if the already budgeted DME monies were included, “CP’s acquisition of DME will apparently result in *additional* capital expenditures of approximately \$128 million over that three-year span”⁷⁶ (*i.e.*, \$300 million - \$172 million = \$128 million).

In its Response, CP agreed that its First Investment Representation included previously DME-budgeted funds, but said that Mayo Clinic’s criticism was wrong because CP was also committing to expend \$300 million “over and above” DME’s previously budgeted amounts “over the next several years.” *See* Applicants’ Response at 75 (“With respect to Mayo’s concern about DME track conditions, CPR has committed to invest at

⁷⁵ Mayo Clinic, Argument and Request for Conditions at 14-15, *CP/DME* (filed March 4, 2008).

⁷⁶ *Id.* (emphasis in original).

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.”).

CP also maintained that there was nothing inconsistent with its Application investment representations because the First Investment Representation was just one part of a larger dollar pie. *Id.* (“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.”).

3. CP's Representation to Invest \$300 Million to Upgrade All DME Track to Class 3 Standards

In its Application, CP agreed to engage in the Board's, and FRA's, SIP process. As part of that process, FRA provided the Board with its preliminary findings and conclusions on CP's SIP commitments in a letter filed with the Board on July 14, 2008.⁷⁷ In this letter, FRA informed the Board that CP had submitted a proposed SIP to FRA on December 14, 2007, and that “FRA has met with CP several times since then as the SIP has continued to evolve.”⁷⁸

FRA also informed the Board that it was satisfied with CP's SIP commitments so long as they were properly implemented and that it intended to place

⁷⁷ See July 2008 FRA Letter at 1-2.

⁷⁸ *Id.* at 1.

“special focus” on CP’s commitment to invest “approximately \$300 million over the next four years to upgrade all DM&E track to Class III standards.”⁷⁹

To date, the CP has responded satisfactorily to all of FRA’s safety concerns. Assuming CP’s acquisition of DM&E is approved FRA will monitor CP’s implementation of the SIP during the operations integration period, with a special focus on the following significant items:

- Track Improvements. CP has committed to investing approximately \$300 million over the next four years to upgrade all DM&E track to FRA Class III standards.⁸⁰

The Board cited and relied on this representation in denying all requests made by shippers for individual line-segment track-upgrade conditions.⁸¹

B. The Board Has Broad Authority to Enforce CP’s Investment Representations

The Board approved CP’s acquisition of DME subject to several conditions, two of which are pertinent for present purposes: (i) the Board ordered CP to “adhere to any and all of the representations [it] made on the record during the course of this proceeding” (Condition No. 8), and (ii) the Board ordered CP to “comply” with the SIP process (Condition No. 5).⁸²

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Dec. No. 11* at 21 n.35.

⁸² These two conditions became legally binding on CP when CP consummated its acquisition of DME on October 30, 2008. *See Canadian Nat’l Ry., et al. – Control – Ill. Cent. Corp., et al.*, 6 S.T.B. 492, 495-96 (2002) (acquisition case conditions imposed by the Board become legally binding on the applicants when they “consummate the transaction”).

The Board has broad authority to enforce its orders directing applicants in merger and acquisition cases to adhere to Board-ordered conditions. *See, e.g.*, 49 U.S.C. § 11327 (“When cause exists, the Board may make appropriate orders supplemental to an order made in a[n acquisition or merger case]”); 49 U.S.C. § 11901(a) (Board has jurisdiction to issue civil penalties for “knowingly violating . . . an order of the Board”); *Canadian Nat’l Ry., et al. – Control – EJ&E W. Co.*, FD 35087 (“*CN/EJ&E*”) (STB served Dec. 21, 2010), slip op. at 1 (STB issues civil penalty because a carrier “knowingly violated” a Board-ordered condition); *Canadian Nat’l Ry. – Control – Ill. Cent. Corp.*, FD 33556 (Sub-No. 4) (STB served Nov. 7, 2001), slip op. at 4 (“we have authority . . . to enforce or revise merger conditions as warranted upon request or on our own initiative”).

The Board’s broad authority specifically includes the power to enforce its orders directing applicants in acquisition and merger cases to adhere to the representations the applicants made on the record in these cases. *See, e.g.*, *Conrail May 2001 Decision*, slip op. at 7 (“We will continue to be vigilant in doing what we can to ensure that representations made by parties to our proceedings are actually honored”); *Union Pac. Corp., et al. – Control & Merger – S. Pac. Rail Corp., et al.*, FD 32760 (STB served Aug. 14, 1997), slip op. at 5 (“applicants must be held to the representations made by their witnesses in the course of this proceeding”); *id.* (STB served Dec. 5, 2012), slip op. at 1 (setting schedule for oral argument on claim that a carrier failed to “adhere to representations” made to a shipper in a merger case).

The Board’s broad authority also specifically includes the power to enforce the SIP implementation process. *See* 49 C.F.R. § 1106.4 (Board exercises “continuing

jurisdiction” over the SIP process following its approval of transactions where SIP compliance is ordered).

C. The Board Should Exercise Its Broad Authority Here

1. The Board Should Direct CP to Produce the Investment Information Necessary to Determine CP’s Actual Capital Investments in DME Since 2008

The only way the State, other interested parties, and the Board can determine whether CP has adhered to its First Investment Representation – making \$300 million in capital investments in DME facilities in the first three post-acquisition years (including previously budgeted DME funds) – is to obtain from CP sufficiently detailed, verified capital investment information that sets forth: (i) each capital investment CP made in DME road property; (ii) the location of each such investment; and (iii) the dollar amount expended for each such investment. The requested information should be provided for each year, starting in calendar year 2009 and ending on the date of the submission. The State requests that the Board order CP to produce this information.

The aforementioned information is also necessary for the State, other interested parties, and the Board to determine whether CP has adhered to its Second Investment Representation – making \$300 million in capital investments in DME facilities in the first few post-acquisition years (over and above the amounts DME previously budgeted). In addition to that information, the amounts DME budgeted prior to CP’s

acquisition of DME for each year must also be provided.⁸³ The State requests that CP produce DME's budgeted or forecasted capital expenditures for years 2012 and 2013.

With regard to its Third Investment Representation, CP has acknowledged that it did not expend \$300 million to upgrade all DME track to Class 3 standards in the first four post-acquisition years. CP has provided some summary data showing track classifications for calendar years 2007 and 2013. The State requests that CP provide the source data for these calculations.

Attachment 1 summarizes these requests. The requested investment information is information that railroads normally keep in the ordinary of business and is identical to information which railroads routinely produce in other Board proceedings such as rate cases. *See Stone/Ludwig VS* at 3. In addition, the Board has not hesitated to require a carrier to provide detailed internal records when necessary to determine a carrier's compliance with an acquisition case condition. *See CN/EJ&E* (STB served Apr. 21, 2010), slip op. at 4 (ordering carrier to provide detailed internal carrier data for purposes of determining the carrier's compliance with a Board-ordered condition).⁸⁴

The State requests that the Board direct CP to provide the requested information to the State and all other parties of record. To the extent that CP reasonably

⁸³ The amounts that DME budgeted for years 2009, 2010, and 2011 are in the record. However, amounts after that date are not.

⁸⁴ *See also* 49 U.S.C. § 721(b)(3) (STB can "obtain from those carriers and persons information the Board decides is necessary to carry out [its regulatory responsibilities]"); *Pub. Serv. Co. of Colo. v. Burlington N. & S.F. Ry.*, NOR 42057 (STB served Jan. 19, 2005), slip op. at 4 ("we are empowered to obtain from the railroads whatever information we deem necessary to carry out our duties").

believes any of the requested information contains confidential business information, CP can designate the information as “confidential” or “highly confidential” under the governing protective order.

2. The Board Should Direct CP to Provide a Verified Compliance Statement

The State requests that the Board direct CP to provide a verified statement discussing its views on its obligations to comply with its investment representations.⁸⁵ This is important because CP is disavowing certain requirements of the Board’s final decision approving CP’s acquisition of DME. For example, CP has informed the State that CP has not upgraded all DME track to Class 3 standards. CP’s position is that it is not required to complete the upgrade. It asserts this position even though the Board specifically denied all shipper-specific requests for track improvement-related conditions because all DME track was to be upgraded to Class 3 standards.

It is imperative that CP be required to explain why, at this juncture, it is not required to complete the upgrade. The time for protesting or disavowing the requirement to upgrade all track to Class 3 standards was immediately after the Board issued its decision and before CP consummated the transaction. Instead, CP sat on its hands for five years, purposely ignoring the upgrade requirement and then at the eleventh hour, on the eve of a new transaction, CP is claiming it never had to follow the Board’s decision. At a

⁸⁵ The Board has followed similar procedures in other condition enforcement proceedings. *See, e.g., Conrail May 2001 Decision*, slip op. at 8 (directing carrier to file a compliance pleading); *CN/EJ&E* (STB served Apr. 21, 2010), slip op. at 5 (ordering carrier to provide oral compliance testimony).

minimum, CP should publicly justify its belated effort to avoid these track upgrades to the agency, shippers, and communities who relied on this representation.

3. The Board Should Permit the State and Other Interested Shippers to Submit Comments on CP’s Submissions and then Issue an Appropriate Enforcement Order

The State requests that it, along with other interested parties, be afforded a reasonable period of time to review CP’s submissions and to provide comments on these materials to the Board. This procedure is consistent with procedures followed in other condition enforcement proceedings. *See Conrail May 2001 Decision*, slip op. at 8 (interested parties permitted to file replies to Board-ordered carrier condition compliance filing); *CN/EJ&E* (STB served Apr. 21, 2010), slip op. at 4 (“public is invited to file written comments” on internal data the Board ordered a carrier to produce in a proceeding to enforce an acquisition condition).

4. Suggested Procedural Schedule

The State suggests that the Board adopt the following procedural schedule:

Day	Action
0	Procedural schedule issued
30	CP produces investment data/verified compliance statement
75	Interested parties file comments

D. Good Cause Exists to Grant the State’s Petition

The Board should grant the State’s Petition because there is good cause to do so.

CP enticed South Dakota shippers and South Dakota communities to support CP's acquisition of DME because CP said it would adhere to the investment representations it made in this case and because CP's acquisition of DME would provide new "single-system" rail service options throughout the CP system. *See* Background ¶ 12. CP's plans to cease operations in South Dakota – if implemented and approved – will clearly breach CP's "single-system" service promises.

CP's recent actions have also raised serious questions concerning its adherence to its investment representations:

- CP has not provided the State with the detailed investment data needed to determine whether CP has complied with its First Investment Representation and Second Investment Representation.
- CP has informed the State it has no obligation to comply with its Third Investment Representation.
- CP appears to have no incentive to spend capital dollars on DME lines west of Tracy because it has announced plans to stop operations over these lines.
- CP informed the Board in 2007/2008 that its capital investment representations were not tied to the PRB access project, but CP told the State earlier this year that its decisions concerning capital investments on DME lines in South Dakota were impacted by its decision to shelve the PRB project.

Under these circumstances, the State has demonstrated good cause for the Board to grant what, in the end, is a very modest set of requests specifically tailored to the facts of this case. The State is simply asking the Board to order CP to provide investment data that only CP possesses along with a verified compliance statement; to afford the State

and other interested parties the opportunity to comment on CP's submissions; and then to issue an appropriate enforcement order.

CONCLUSION

The State requests that the Board grant this Petition for the reasons set forth above.

Respectfully submitted,

By:

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Special Assistant Attorney General
South Dakota Department of
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(605)-773-3262

John H. LeSeur 
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(202) 347-7170

Dated: August 8, 2013

Attorneys for Petitioner

Attachment 1

Requested Investment Information

1. Documents sufficient to show, by calendar year, starting in calendar year 2009 to date: (i) each capital investment CP made in DME road property; (ii) the location of each such investment; and (iii) the dollar amount expended for each such investment.
2. Documents sufficient to show the amounts DME had budgeted, or forecasted, prior to DME's acquisition by CP, for capital expenditures to be made in 2012 and 2013.
3. All source documents utilized to prepare the track classification chart, and the track classification schematics, appended to CP's Feb. 21, 2013 letter to Governor Daugaard *et al.* (reproduced in Daugaard VS, Exhibit DMD-2 at 7-9).

VERIFIED STATEMENT OF THE HONORABLE
DENNIS M. DAUGAARD

My name is Dennis M. Daugaard. I am the Governor of the State of South Dakota. My address is 500 East Capitol Avenue, Pierre, South Dakota, 57501.

I am submitting this Verified Statement in support of the State's Petition asking the Surface Transportation Board ("STB" or "Board") to enforce the investment representations Canadian Pacific Railway Company ("CP") made when CP acquired the Dakota, Minnesota & Eastern Railroad Corporation ("DME") in 2008. This Petition addresses rail transportation issues that are of great consequence to the State of South Dakota.

Rail transportation is vitally important to South Dakota shippers and to the State's overall economy. South Dakota shippers arrange for the transportation of a wide variety of commodities, including corn, wheat, soybean products, bentonite clay, cement, and lumber/wood products. In many cases, the only practical and economically viable way to transport these commodities is by rail, and for many shippers in South Dakota the only available rail carrier is the DME.

The DME's main line runs through most of the State of South Dakota and it is the only east-west rail line traversing most of the State. Several branch lines run off this main line, including the "Colony" line serving shippers in western South Dakota. I append as my Exhibit DMD-1 a copy of a map showing the routing of the DME line through the State.

In December 2012, CP announced that it was seeking to sell or otherwise dispose of its interests in the DME lines located west of Tracy, MN. These include all of DME's lines in South Dakota. In effect, CP was announcing its plan to cease all CP/DME operations in South Dakota. This announcement was of great concern to me, particularly in light of the history of DME's operations in South Dakota and representations CP made before this Board when it acquired DME.

In the early 1980s, the Chicago & Northwestern Transportation Company ("CNW") proposed to abandon its rail line in western South Dakota. This abandonment would have had devastating impacts on South Dakota rail shippers and the State's economy. Eventually, with the help of South Dakota elected officials, CNW agreed to sell its lines between Rapid City, SD and Winona, MN, to a newly formed railroad – DME.

DME began operations in September of 1986. From the outset, DME tried to meet the transportation needs of the shippers and communities situated along its lines. A decade later, DME began to grow. In 1996, DME purchased the Colony Line from Union Pacific Railroad Company. In 2003, DME acquired the Iowa, Chicago & Eastern Railroad Corporation and, in 2008, DME itself was acquired by CP, one of the nation's largest railroads. Thus, over a short 20-year time period, DME grew from a regional feeder line, with limited financial resources, into an integral part of a large, financially strong Class I carrier.

DME shippers in South Dakota benefitted from DME's growth, as each acquisition brought with it expanded single-system routing options and other competitive

benefits. In addition, CP's acquisition of DME brought an important new benefit – CP's promise to make substantial capital investments in DME road property.

CP sought Board approval for its proposed acquisition of DME in proceedings conducted before the Board in 2007 and 2008. In its filings in these proceedings, CP represented it would expend substantial capital dollars to improve DME road property. DME's specific capital investment representations are detailed in the State's Petition.

CP's promises to make capital investments in DME were particularly important to South Dakota rail shippers. As the Board itself had observed a few years earlier, many parts of the DME line in South Dakota were "in poor condition . . . thus making it difficult to provide reliable and efficient rail service to existing shippers and attract additional business." 6 S.T.B. at 40.

CP also used its capital investment promises as a carrot to obtain shipper support for its acquisition of DME. CP's efforts were successful. CP submitted numerous shipper-support statements in its 2007/2008 STB filings, including many tendered by South Dakota shippers, and local South Dakota communities, served by DME.

South Dakota shippers, and South Dakota communities, served by DME told the Board they supported CP's acquisition of DME because CP had promised to invest in DME lines to improve rail service in South Dakota and because CP's acquisition of DME offered shippers new, competitive and cost-effective "single-system" service throughout the extensive CP rail network.

CP cited these shipper-support statements as proof that its proposed acquisition of DME was in the public interest because its acquisition would help DME shippers in South Dakota through infusions of capital and improved service. As discussed in detail in the State's Petition, the Board itself also relied on CP's representations in its final decision approving CP's acquisition of DME.

However, CP did an about-face in December 2012, when it announced that it was planning to cease CP/DME operations in South Dakota. Following this announcement, I, along with the South Dakota congressional delegation, sent a joint letter to CP expressing our grave concerns that CP's plans – if implemented – would strike a devastating blow to South Dakota shippers who currently enjoy service from a financially strong, independent Class I railroad.

We informed CP that, among other things, CP's plans would provide South Dakota shippers with fewer competitive options than they had when the DME was first created in 1986. These plans clearly were a major step backwards for South Dakota shippers.

We also informed CP that we were very concerned that CP might be planning to cease operations in South Dakota without first having fulfilled the investment commitments it made to South Dakota shippers when it acquired DME in 2008. To address our investment concerns, we asked CP to provide a detailed accounting of its capital investments in DME road property since 2008.

In its letter responding to our request, CP acknowledged but did not respond to our concerns about the adverse impact its proposed plans would have on South

Dakota rail shippers and the entire State economy. CP provided some general information on its capital investments in DME since 2008, but CP did not provide the detailed accounting we had requested, so we had no way of verifying CP's asserted capital expenditures, and no way of identifying where any such expenditures had been made. I append a copy of this correspondence in my Exhibit DMD-2.

Having been rebuffed by CP, we wrote two letters to the Federal Railroad Administration ("FRA") asking for the same detailed investment information that we had sought from CP. FRA provided some responsive material, but did not provide the detailed investment information we had requested, because, the agency said, it did not possess it. I append a copy of this correspondence in my Exhibit DMD-3.

I add here that in addition to not providing us with the capital investment data we requested, CP did provide us with some information that was very troubling to me. CP told us that it had not upgraded many of its lines to Class 3 standards, including most of its lines west of Pierre, SD, and that it had no intention of upgrading all of its lines to Class 3 standards. This appeared to directly conflict with CP's "commitment to upgrade all of DM&E's track to FRA Class 3 standards." F.D. No. 35081, STB Decision served September 30, 2008, at p. 21.

The State now turns to the STB to seek the information it failed to obtain from CP and FRA. The only way the State, and the Board, can determine whether CP has adhered to specific investment representations it made when it acquired DME is to first obtain the detailed investment information necessary to make this determination.

We are also asking that the Board address CP's representations concerning Class 3 track upgrades.

In this Petition, the State requests that the Board order CP to produce the necessary capital investment information along with a verified statement addressing its compliance with its representations; to afford the State and other interested parties the opportunity to review and comment on this information; and, after receiving public comments, to issue an appropriate enforcement decision.

I thank the Board for considering our Petition and respectfully request that the Board grant it.

DME System in South Dakota

Source: Canadian Pacific Railway Website





STATE OF SOUTH DAKOTA
DENNIS DAUGAARD, GOVERNOR

February 5, 2013

Hunter Harrison
President and CEO
Canadian Pacific
Gulf Canada Square
401 – 9th Avenue SW
Calgary, AB T2P 4Z4

Dear Mr. Harrison,

We write to convey serious concerns about Canadian Pacific's (CP) recent announcement expressing intentions to sell its rail holdings in South Dakota.

CP purchased the Dakota, Minnesota & Eastern Railroad (DM&E) just a few years ago, with an express commitment to make serious investments in this rail line. In particular, CP emphasized the importance of making safety improvements acutely needed on the rail line west of Pierre, South Dakota. Based in large part on these commitments, the state of South Dakota supported CP's application to purchase the DM&E railroad.

The Surface Transportation Board (STB) decision approving CP's application to buy the DM&E documents the representations that CP made to many shippers and to the state of South Dakota at that time. It details, in the relevant part, "CPRC's commitment to investing approximately \$300 million over the next four years to upgrade all DM&E track to Class 3 standards." (STB Decision, Docket FD-35081-0, dated September 30, 2008.) We believe the commitments made in the CP's last STB application should be honored before new applications are considered.

Beyond the promised investments, we are also highly concerned that if the track is sold as proposed, South Dakota shippers will not have competitive shipping options. When purchased, the DM&E was providing South Dakota with highly efficient and competitive options all the way to Chicago. It appears you now wish to leave us with a railroad that is highly dependent upon the CP, while simultaneously eliminating shipping options that exist today in our state.

Given questions about track conditions west of Pierre, and considering the aforementioned noncompetitive elements, we are highly concerned about your proposal. It could leave South Dakota in a dramatically different situation than that

Hunter Harrison
February 5, 2013
Page 2

which existed when the CP sought and received our support, which of course was conditioned upon the commitments the CP made at the time. While we understand that those representations were made by the CP under other management, we hope you can appreciate our expectations of corporate accountability and adherence to STB requirements.

While offering these concerns, we also express our strongest desire to work with you constructively to ensure commitments are honored, and that any sale results in the best possible competitive rail service for the people of South Dakota. With this in mind, it would be helpful if you would provide us with the following information:

1. The amount of annual capital expended from your station at Pierre to all points west in South Dakota for the year of 2004 and all subsequent years up to the date of this writing.
2. Beyond the Pierre-west segment, similar capital expenditure figures for the entire system you purchased (DM&E and Iowa, Chicago, and Eastern Railroad). We request a specific accounting of the CP's DM&E capital work toward the \$300 million supplemental amount CP promised in addition to the base capital for the years prior to acquisition of the DM&E, including an accounting as to what you consider to be the base capital in those years.
3. A map showing the current FRA Class standards of the line west of Pierre, an explanation of what would be required to achieve the Class 3 standards cited from the STB decision above, and your estimate of the cost to get those lines to Class 3 standards.
4. A summary of how many system miles of DM&E were in each respective FRA Class of track on the day CP took control of DM&E and a similar summary of the system as it stands today. A map indicating where those miles were located as of the change of control and another showing where they are today would be most useful in that regard.
5. Whether you might be open to revising your offering so that whatever railroad is left operating in South Dakota will have sufficient routing miles and competitive connections east of South Dakota to ensure it is as competitive as the former DM&E was prior to CP's purchase.
6. The information being shared with potential bidders, toward our better understanding of this possible transaction.

Hunter Harrison
February 5, 2013
Page 3

We hope this letter constructively communicates our concerns and interests. This is our only rail link for most of western South Dakota. It is of critical importance to today's shippers and the agricultural and industrial communities they serve. It is equally important for tomorrow's economic development opportunities. Notwithstanding our high degree of concern today, we hope to work with you to accurately assess your intentions and develop a mutually acceptable long-range plan for this critical rail line.

Thank you for your consideration. We look forward to your reply and toward finding a mutually satisfying resolution.

Sincerely,



Governor Dennis Daugaard



Senator Tim Johnson



Senator John Thune



Representative Kristi Noem

DD:nn

✓ cc: John Brooks-Canadian Pacific



**CANADIAN
PACIFIC**

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February 21, 2013

The Honorable Dennis Daugaard
Governor, State Capitol
500 East Capitol
Pierre, SD 57501

The Honorable Tim Johnson
136 Hart Senate Office Building
United States Senate
Washington, DC 20510

The Honorable John Thune
511 Dirksen Senate Office Building
United States Senate
Washington, DC 20510

The Honorable Kristi Noem
1323 Longworth House Office Building
United States House of Representatives
Washington, DC 20515

Dear Governor Daugaard, Senators Johnson and Thune, and Representative Noem:

Your letter of February 5, 2013 has been referred to me for response. I am the Senior Operating Officer for Canadian Pacific (CP) in the United States. CP understands the concerns you raise and shares your strong desire to work together constructively to address those concerns.

As an initial matter, let me say that it is not a certainty that CP will simply sell the DM&E lines west of Tracy, Minnesota. While that is the basic concept expressed to potentially interested parties, CP has invited those interested parties to consider different transaction structures that they believe could maximize the value of the line. Should none of these parties present CP with proposals that we believe will add value to the line, it is possible that CP will continue to own and operate the line.

CP also understands your concerns regarding the competitive effects of any transaction. Given the uncertainty regarding who and what might be involved in any potential transaction, however, it is difficult to predict precisely what those effects might be. Any transaction would involve the Surface Transportation Board (STB), which is charged with considering competitive affects and the views and concerns of shippers.

As you note in your letter, the commitments made by CP in 2007 were made by different corporate management. I would add that they were also made shortly before the American economy, and indeed the world economy, plunged into the worst recession since the Great Depression. CP was forced to let go or lay off thousands of employees. In addition, energy markets, and especially thermal coal markets, softened substantially, which effectively killed the PRB option for the near term.

February 21, 2013

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The Honorable Dennis Daugaard
The Honorable Tim Johnson
The Honorable John Thune
The Honorable Kristi Noem

Notwithstanding those challenges, CP has made improvements that have significantly improved the safety and efficiency of the lines at issue. The following charts show the dramatic improvements in safety that have occurred on the DM&E since CP purchased the property:

DME FRA Reportable Train Accident Rates per Million Train Miles

	2006	2007	2008	2009	2010	2011	2012
DME Network	10.2	9.79	11.4	6.78	5.28	8.26	5.24
South Dakota	6.33	7.34	7.39	5.65	0.99	6.67	3.93

DME FRA Reportable Personal Injury Rates per Hundred Employees

	2006	2007	2008	2009	2010	2011	2012
DME Network	3.83	3.54	3.5	2.38	1.38	1.69	1.38
South Dakota	4.77	2.03	2.78	0.92	0.28	0.89	1.47

With respect to questions 1 and 2 in your letter, I can tell you that CP made over \$316M in capital expenditures for the five year period from 2008 through 2012. The fact that it took us longer than originally projected to spend over \$300,000,000 in capital was a function of delaying some projects (e.g., the original four year bridge plan was extended over ten years) and modifying others to save money (e.g., the use of relay rail as opposed to new rail in certain segments resulted in savings of over \$25,000,000).

Regarding the issues raised in questions 3 and 4 of your letter, enclosed are maps and a table showing track classifications in 2007 and 2013. You will see that track speeds on the DM&E have increased substantially since CP took ownership. Notwithstanding those improvements, Class III track conditions obviously do not exist over the entire DM&E. In that regard, the origin of the statement “CP has committed to investing approximately \$300 Million over the next four years to upgrade all DM&E track to FRA Class III Standards” appears to be a July 3, 2008 letter from FRA Administrator Boardman to the STB. While we find many references by CP that we projected spending over \$300 Million in capital over the next several years, we are unclear where the link between \$300,000,000 and Class III track originated. In hindsight, it is clear that

February 21, 2013

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The Honorable Dennis Daugaard
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increasing the track speed to Class III on the entire DM&E would involve capital expenditures many times greater than \$300,000,000. I also note the STB's requirement that we upgrade the Corn Lines to a 25 mph (FRA Class II) standard by 2013 is inconsistent with the purported commitment to upgrade the entire system to Class III standards.

With respect to questions 5 and 6 in your letter, as noted above, CP's offering is not rigid; we have expressly encouraged interested parties to propose whatever alternatives to a simple line sale that they believe will maximize the value of the assets. We understand your concerns that any new railroad be competitive and would be happy to discuss those concerns.

In sum, whoever ends up owning and/or operating the DM&E lines in South Dakota will get a railroad that is substantially safer, faster, more efficient and better maintained than the one CP acquired five years ago. Should you wish to explore these issues in greater detail, CP will arrange for an appropriate group of representatives to meet with an appropriate group from the State. We look forward to working with you as this process moves forward.

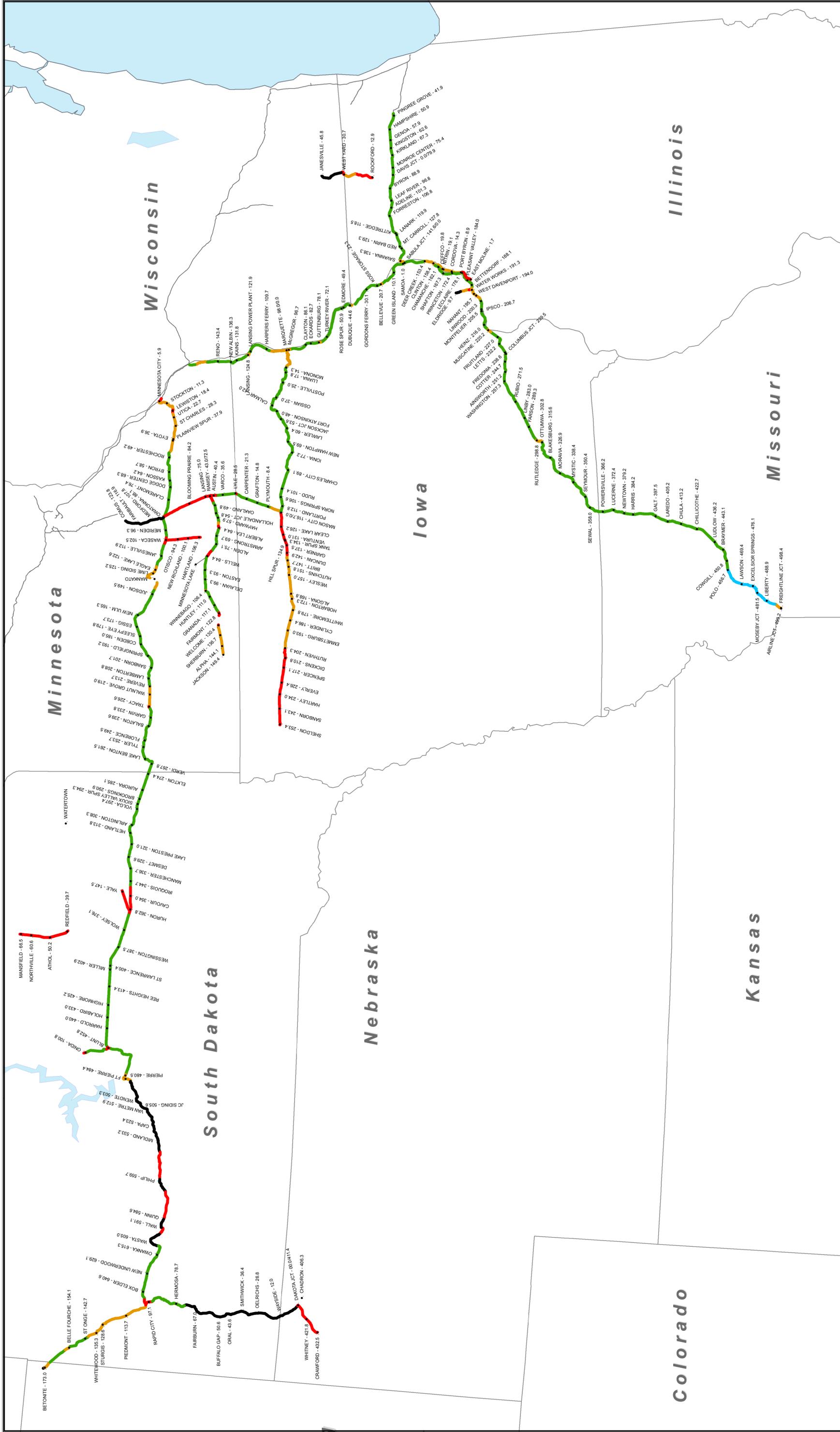
Sincerely,



Douglas N. McFarlane
Senior Vice President, U.S. Operations

cc: E. Hunter Harrison

SUBDIVISION	EXCEPTED TRACK		CLASS 1		CLASS 2		CLASS 3		CLASS 4	
	2007	2013	2007	2013	2007	2013	2007	2013	2007	2013
Waseca			4.8	5.9	93.3	37.3		54.9		
Tracy			10.5	3.7	39.9	26.3		81.3		
Huron			32.8	15.4	44.1			120.3		
Pierre			4.0	3.6	7.5	4.8		110.2		
PRC	80.2	80.2	44.1	44.3		3.6		37.2		
Black Hills	74.7	74.7	10.0	5.0	33.4	49.0		45.7		
Hartland				18.8	18.8					
Crawford	5.5		22.5							
Mansfield			27.2	27.2						
Onida			4.0	1.5			12.8	12.8		
Yale Spur	11.8			15.3						
Chicago					97.5	3.7		98.1		
Davenport			0.6		20.1	11.9		41.5		
Ottumwa					15.3	8.9		91.8		
Laredo					0.4	0.1		102.0		
Kansas City					12.7	4.8		51.5	34.2	37.3
Marquette			1.6		83.2	27.5		72.4		
Mason City			1.3	1.3	47.6	13.5		67.8		
Sheldon			4.7	75.7	132.0	61.0				
Owatonna	21.9	21.9	11.8	30.7	29.1	10.0		31.2		
Jackson			7.7	14.8	19.2	19.3		72.4		
Rockford	2.3	14.4	14.4	13.4	18.1	7.0				
Eldridge	2.7	2.7	7.0	2.0		5.0				
Nitritin				6.1		12.5				
TOTAL	199.1	193.9	209.0	284.7	712.2	306.2	866.1	1190.1	34.2	37.3



SYSTEM OVERVIEW

2013 CLASS OF TRACK



- Legend**
- DM&E Stations
 - CPR MAINLINE
 - EXCEPTED TRACK
- CLASS 1
 - CLASS 2
 - CLASS 3
 - CLASS 4

Data is to be used for Reference only.
Sources:
USGS NED Dataset 1:150M
ESRI Data and Maps 2005
North_America_Albers_Equal_Area_Conic
Path: F:\Projectworking\Caskey\System Map_Class of Track2013.mxd
Author: JCC
Date: February 2013

Congress of the United States
Washington, DC 20515

March 21, 2013

Administrator Joseph C. Szabo
Federal Railroad Administration
1200 New Jersey Avenue, SE
Washington, DC 20590

Dear Administrator Szabo:

We write regarding an update on Canadian Pacific's (CP) compliance with the Safety Integration Plan (SIP) approved on September 29, 2008, by the Surface Transportation Board (STB) in relation to CP's purchase of the Dakota, Minnesota & Eastern Railroad (DM&E).

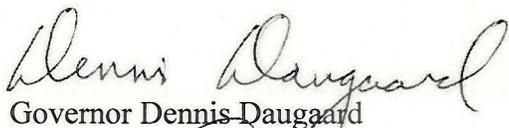
As you know, CP purchased the DM&E over four years ago, with an express commitment to make various infrastructure and safety investments in the rail line.

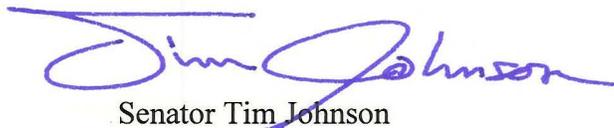
The SIP (STB Decision 11, Docket FD-35081-0) also included an express condition on the Federal Rail Administration (FRA) "requiring that applicants comply with the SIP and continue to coordinate with FRA until FRA informs us [the STB] that the transaction has been safety implemented." To date, we are unaware of any communication by the FRA to the STB confirming completion of the SIP.

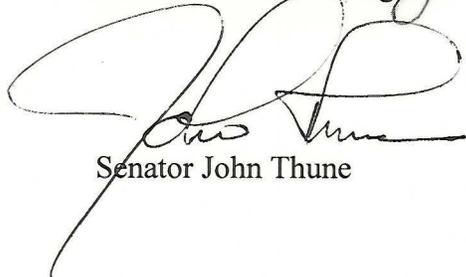
In light of the recent announcement by CP of their intention to potentially sell its rail holdings west of Tracy, Minnesota which would include all of the DM&E's operations in South Dakota, Nebraska and Wyoming, we are respectfully requesting an update on CP's implementation of the SIP. Specifically, we are interested to know which requirements have been met, a detailed breakdown of the annual capital expenditures made by CP since the transaction, what steps were taken to successfully fulfill these requirements, and the date of completion for each. For those requirements that have yet to be fulfilled, an update on the progress is also requested. Finally, for both the met and unmet requirements, an explanation of how they have impacted, or might impact, the DM&E line between Rapid City and Pierre South Dakota, would also be helpful.

Because CP is currently soliciting detailed information from interested parties for a potential sale of the DM&E rail line this year, an early response is requested. The above mentioned questions will assist us to ensure that South Dakota shippers are not disadvantaged, particularly as it relates to having competitive shipping options, should CP move forward with a sale of this critically important rail line. Thank you for your consideration of this important matter.

Sincerely,


Governor Dennis Daugaard


Senator Tim Johnson


Senator John Thune


Representative Kristi Noem



U.S. Department
of Transportation

**Federal Railroad
Administration**

1200 New Jersey Avenue, SE
Washington, DC 20590

APR 9 2013

The Honorable Dennis Daugaard
Office of the Governor
500 East Capitol Avenue
Pierre, SD 57501

Dear Governor Daugaard:

Thank you for your joint March 21, 2013, letter to the Federal Railroad Administration (FRA) in which you requested an update regarding the Canadian Pacific Railway's (CP) compliance with the Safety Integration Plan (SIP) approved on September 29, 2008, by the Surface Transportation Board (STB) in relation to CP's purchase of the Dakota, Minnesota, and Eastern Railroad.

Last year, CP initiated discussions with FRA concerning the SIP, and requested that FRA consider notifying the STB that the SIP has been completed. On February 18, 2013, CP sent a letter to FRA outlining its progress in complying with the SIP. CP also requested that, if FRA was satisfied with CP's progress, the agency provide notification to the STB that the integration of operations has been safely completed.

The FRA is in the process of reviewing the documentation provided by CP and is currently evaluating other pertinent safety information. Due to the important and complex nature of the SIP, FRA headquarters and regional senior staff, specialists, and inspectors are involved in the review. We are also reviewing accident data and other considerations. FRA is aware of CP's stated intention to sell their rail holdings west of Tracy, Minnesota. As such, the agency is working to complete its review of this matter. Once our review is completed, we will advise you of the findings.

An identical copy of this letter has been sent to Senator Tim Johnson, Senator John Thune, and Representative Kristi Noem. I appreciate your interest in this matter.

Sincerely,

A handwritten signature in cursive script that reads "Bonnie J. Murphy".

Bonnie J. Murphy
Deputy Associate Administrator
for Safety Compliance and Program Implementation

Enclosure

**CANADIAN
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February 18, 2013

Federal Railroad Administration
1200 New Jersey Avenue
Washington, DC
20590

Attention: Jo Strang
Associate Administrator for Railroad Safety/Chief Safety Officer

Dear Jo;

RE: CP/DM&E Safety Integration Plan Accountability (SIPA) 2011 Results

At the request of Mr. Ron Hynes, Director, Office of Safety Assurance and Compliance, I am submitting a final version (revised) of the draft letter, dated January 31, 2012, that I sent to you on February 1, 2012. The items reported as completed in the draft letter have not changed. This final version corrects the following editorial issues:

- Removes the duplicative use of "Appendix B" as a reference and changes the "CP/DM&E Safety Integration Plan Accountability (SIPA) Results from January 2010 - December 31 2011" reference to "Appendix A"
- Adds the final version of Vern Graham's status report dated February 17, 2010. (Appendix C). (The version included originally in Appendix B was an internal draft which was not provided to FRA. This version is being retained in this letter as originally provided to FRA on February 1, 2010.)

As indicated in our original draft, the CP/DM&E team has completed the remaining attached actions outlined in the Safety Integration Plan Accountability document (see Appendix A for details).

At this time, we would appreciate it if you could please review this information and, if satisfied, provide notification to the STB that the integration of operations has been safely completed. Such notification of the STB is contemplated by 49 CFR Part 244.17(g)(3) and required under Condition #5 of STB's September 29, 2008 Decision, which is quoted below.

STB Finance Docket No. 35081 - CANADIAN PACIFIC RAILWAY COMPANY, ET AL. - CONTROL - DAKOTA, MINNESOTA & EASTERN RAILROAD CORP., ET AL. Decision No. 11 Decided: September 29, 2008, Page 27, Condition #5

"5. Approval of the CPRC/DM&E/IC&E control application in STB Finance Docket No. 35081 is subject to the condition that applicants shall comply with the SIP prepared under 49 CFR 1106, which may be updated as necessary, and continue to coordinate with FRA in implementing the SIP during the operations integration period. The ongoing safety integration process shall continue until FRA has informed the Board that the integration of applicants' operations has been safely completed.

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Should you wish to discuss this request, or any of the specific elements of the SIPA, please do not hesitate to call me at 403-319-7218.

Sincerely,



Glen Wilson
Vice President
Safety, Environmental & Regulatory Affairs

CANADIAN PACIFIC

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APPENDIX A

CP/DM&E Safety Integration Plan Accountability (SIPA) Results from January 2010 – December 31 2011

A. CORPORATE SAFETY CULTURE:

- Implemented Cross Functional Senior Safety Committee
- Established local functional H&S Committees
- Established formal Safety/Environmental audits based on prioritized schedule. First audit conducted in Mason City (Q2 2011)
- Developed and rolled out an event based CRV violation reduction program

B. STAFFING/MANAGEMENT OF US OPERATIONS

- All activities under this section were reported complete in January 2010.

C. TRAINING

- Management & Employee - Joint Health & Safety Committee/Teams were trained in their roles and responsibilities, terms of reference and how to operate effective committees. The training also provided a variety of tools that can be used by teams to develop and maintain a safe working environment.
- Training records, including required historical records, are being tracked in a common HR database which is available to managers. (Q3 2011)

D. OPERATING PRACTICES

- Implemented new GCOR manual starting (Q1 2010)
- Implemented one Efficiency Test program in compliance with FRA regulation Part 217 (FOps, MS, Customer Service, and Dispatch)
- Implemented Accident/Incident Reporting finalized Internal Control Plans (ICP) which are harmonized with new FRA guidelines effective June 1, 2011. (Q1 2010)
- Implemented CP policies / guidelines on Crew Lodging and Transportation to ensure consistent safety standards. (Q2 2010)

D. MOTIVE POWER/MECHANICAL EQUIPMENT

- All activities under this section were reported complete in January 2010.

F. ENGINEERING

Bridges & Structures:

- CP/SOO Inspection process implemented so that all bridges are inspected within these timelines/guidelines
- Implemented CP/SOO process for tracking and filing inspection reports in electronic database (Q3 2011)

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Signals & Communication

- Required frequency of signal tests are performed and properly documented (SCA term 2007) including tracking of malfunctions and electronic reporting of tests and inspections (Q3 2011)
- Implemented CP/SOO S&C policies and procedures (new Requirements Book) on inspection, maintenance and repairs (Q2 2010)
- Implemented CP/SOO practices for ensuring reporting and tracking of prompt investigation of credible grade crossing warning system malfunction to determine the nature of the malfunction (SCA term 2006)

Wayside Inspection Systems

- All activities under this section were reported complete in January 2010.

Earthquake Notification System

- Implemented CP/SOO protocol

Track & Roadway Maintenance & Inspection

- Per capital plan, removed all current in track defective rails by December 31, 2010.

Track & Roadway (Eng Procedures and Practices)

- All activities under this section were reported complete in January 2010.

Engineering Rules Training and Promotion

- Regulatory training deficiencies addressed through prioritization of key components and implementation of training (Q1 / Q2 2010)
- Technical training deficiencies addressed through prioritization of key components and implementation of training (2010)

G. HAZARDOUS MATERIALS

- Updated emergency response plans for key terminals and conducted training (Dec. 2011)
- Conducted gap analysis of current locations spill kits and responders and implemented or enhanced, where required
- Implemented integrated process for community preparedness and awareness training. Initiatives with community emergency response groups identified and executed with appropriate community groups.
- Integrated DME into the CP/SOO formal audit and inspection processes to mitigate violations.
- Implemented auditing and proficiency testing processes for customer service reps related to Hazmat documentation and inventory handling
- Implemented customer service semi-annual document audits to ensure compliance

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H. DISPATCHING SYSTEMS

- All activities under this section were reported complete in January 2010.

I. CROSSINGS AND TRESPASSING

- Crossing database for DM&E property updated and all calls are being handled at CP Police Control Centre
- CP Police officers deployed on DM&E Property
- Trespass enforcement / education rolled out consistent with the rest of the CP network.
- Safety presentations provided to some local law Enforcement Agencies.
- Updated "no trespass" signage has been placed on the property and further signs will continue to be added consistent with CP Police policy.

J. No section "J" in the filed DM&E SIPA

K. INFORMATION TECHNOLOGY

- All activities under this section were reported complete in January 2010.

L. SECURITY

- Integrated DME into CP's Security Management System
- Security awareness training rolled out to all DM&E employee and managers.

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APPENDIX B Vern Graham Draft Letter January 25, 2010

January 25, 2010

Federal Railroad Administration
1200 New Jersey Avenue
Washington, DC
20590

Attention: Jo Strang
Associate Administrator for Railroad Safety/Chief Safety Officer

Dear Jo;

RE: CP/DM&E Safety Integration Plan Accountability (SIPA) 2009 Results

The CP/DM&E team made significant progress in completing the actions and tactics outlined for completion in the 2009 calendar year, as well as progressing a number of 2010/2011 planned initiatives.

A. CORPORATE SAFETY CULTURE:

- A Corporate Safety Plan strategy was established at the end of 2008, and for both 2009 and 2010, DM&E Safety Plans were developed and implemented across the property
 - This annual plan includes: measure tactics and actions as well as a 3 year injury/train accident reduction plan, occurrence response, investigation and corrective action process
 - Safety Advisors were put in place on the property to cover Mechanical, Engineering and Transportation; supported by CP's safety program and leadership
- Train Accident Cause Finding training was conducted June 2008 and is now part of standard operating practices
- A new customer safety handbook was developed and distributed to all customers in Q1 2009

B. STAFFING/MANAGEMENT OF US OPERATIONS

- The first implementation of the Integrated Operating Plan (IOP) was rolled out Q1 2009; as part of the CP IOP process, it is revised on a regular basis

C. TRAINING

- One day safety training for both managers and employees was completed
- All functional safety training was completed
 - Functional Engineering track related training was completed in November (original plan Q4 2010)
 - Functional Field Operations training was completed mid 2009 (original plan Q1 2010)

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- Train dispatching and crew management training was completed as part of the implementation of the new systems
- Training was provided for customer service employees, customers and communities related to hazmat

E. OPERATING PRACTICES

- Implemented GCOR revised communication rules
- Implemented new Safety Rules and Work Procedure Manuals (FOPs, Mech, Eng) (original plan was Q2 2010)
- Implemented recommendations from comparison of SOO and DM&E Air Brake & Train Handling Rules
- Integration of Drug and Alcohol testing programs complete; supported by an Occupational Health Nurse hired for the DM&E (June 2009)
- Implemented CMA to ensure compliance to rest rule agreements (June 2009)
- Implemented PPE best practice policy and distributed PPE prior to an effective date of April 15, 2009
- Internal requirement to have all cars high visibility by Dec 2010 was complete in Sept 2009 across the property

F. MOTIVE POWER/MECHANICAL EQUIPMENT

- The initiative related to implementation of CM422 for Train Inspections has been cancelled due to the fact that CM422 is a Canadian process and not applicable in the US.
- Implemented CIM to support bad order repairs process in November (original plan Q4 2010)

F. ENGINEERING

Bridges & Structures:

- Bridge and Structures inspectors have been trained on CP/SOO policies and procedures (Q1 2009)
- Implemented CP/SOO Bridge and Structures Inspection System (Q3 2009)

Signals & Communication

- Trained S&C employees in CP/SOO policies and procedures (Q4 2009)

Wayside Inspection Systems

- Completed evaluation of HBD requirements and included in 2009 capital plans
- Waseca subdivision upgraded including implementation of two HBDs in Rochester (July 2009)

Track & Roadway Maintenance & Inspection

- Implemented engineering processes related to: Red Book, rail flaw detection, track geometry, GRMS, high speed video imaging and laser rail, audit inspections
- Implemented CP/SOO audit process for track inspection documents (Jan 2010)

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Track & Roadway (Eng Procedures and Practices)

- Implemented Red Book requirements for newly found defective rail (Jan 2009)
- Red Book training and implementation complete in March 2009, seasonal employees completed in April 2009
- Implemented CP/SOO process for tracking and filing inspection reports per guidelines
- Capital plan continues to support the removal of all current in track defective rails during the first three years of operation
- CP using Multi Year Planning strategy to ensure DM&E included in MYP capital plans
- Implemented “ride with inspector” as part of Track Maintenance processes Q2 2009 (original plan Q1 2010)

Engineering Rules Training and Promotion

- Audit of regulatory and technical training deficiencies complete in Q4 2008 and training programs/materials augmented as required

G. HAZARDOUS MATERIALS

- Implemented training programs to achieve and maintain compliance in HAZMAT or hazmat response Nov 2008 for managers and Jan 2009 for employees
- Conducting emergency response exercises for terminals and communities included in regular management duties; (original plan Q4 2011)
- Completed incident responder contractor network audit to ensure quality and service thresholds met
- Spill trailer and materials in place at all fueling facilities, training in progress for completion end of January 2010
- Emergency response training for the city of Rochester was completed (Dec 2008)
- All DME customer service employees were trained for Hazmat qualification (March through June 2009)

H. DISPATCHING SYSTEMS

- All systems and related processes were successfully implemented per the schedule outlined for Train Control Management and Dispatch, Crew Management and Dispatch (original plan Q4 2010) , and Inventory Systems/Hazmat Marshalling Protection - TYES

I. CROSSINGS AND TRESPASSING

- 2011 targeted initiatives in progress

J. No section “J” in the filed DM&E SIPA

K. INFORMATION TECHNOLOGY

- All systems identified in the SIPA have been implemented
 - Implemented Midas/MARVIN system and processes for FRA reporting in December 2009 (original plan Q4 2010)

**CANADIAN
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M. SECURITY

- E-Rail Safe implemented in 2008; CP/SOO and DM&E E-Rail Safe programs currently integrating with one system managed by the CP/SOO Security team by end 2010
- All emergency numbers on the DM&E now route to the CP Command and Control Center for tracking, management and assignment of issues

For 2010, we will continue to focus on implementing and accelerating wherever possible, the remaining SIPA initiatives.

If you have any questions or wish to discuss further, please call me at 612-904-5926.

Sincerely,

Vern Graham
President DM&E

**CANADIAN
PACIFIC**

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Vice President Safety, Environment &
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APPENDIX C – Vern Graham Final Letter February 17, 2010 (Unsigned Version)



February 17, 2010

Federal Railroad Administration
1200 New Jersey Avenue
Washington, DC
20590

Attention: Jo Strang, Acting Deputy Administrator

Dear Jo;

RE: Update on 2009 Progress CP/DM&E Safety Integration Plan Accountability (SIPA)

The CP/DM&E teams made significant progress in completing the actions and tactics outlined for completion in the 2009 calendar year.

- The one day safety training for both managers and employees was completed
- All functional safety training was completed
- Safety Advisors were put in place on the property to cover Mechanical, Engineering and Transportation; supported by CP's safety program and leadership
- There is a clearly communicated corporate safety strategy and plan in place across the property; this includes an annual plan with measure tactics and actions as well as a 3 year injury/train accident reduction plan
- A new customer safety handbook was developed and distributed to all customers
- All IT systems were successfully implemented per the schedule outlined for Train Control Management and Dispatch, Crew Management and Dispatch, and Inventory Systems/Hazmat Marshalling Protection - TYES
- Spill trailer and materials in place at all fueling facilities
- Waseca subdivision upgraded including implementation of two HBDs in Rochester
- Implemented engineering processes related to: Red Book, rail flaw detection, track geometry, GRMS, high speed video imaging and laser rail, audit inspections

In fact, a number of 2010 and 2011 planned initiatives were also completed in 2009. These include:

- Implementing the Crew Management Application in July (original plan Q4 2010)
- Implementing the Midas/MARVIN system and processes for FRA reporting in December (original plan Q4 2010)
- Functional Field Operations training was completed mid 2009 (original plan Q1 2010)
- Functional Engineering track related training was completed in November (original plan Q4 2010)
- Customer Service/Customer/community training was completed in September (original plan Q4 2011)
- Introduction of the new safety rules and work procedure manuals was completed in Q2 (original plan was Q2 2010)

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DM&E

Dakota, Minnesota & Eastern Railroad Corporation

- Implementation of CIM to support bad order repairs process in November (original plan Q4 2010)

For 2010, we will continue to focus on implementing and accelerating the implementation of all SIPA initiatives on the property. The plan for 2010 includes:

- Complete the merge of training records for employees into a common HR database
- Complete the merge of ERailSafe processes
- Complete the implementation of the Earthquake Notification System
- Establish local functional Health & Safety Committees
- Conduct formal Safety/Environmental audits
- Implement a cross functional senior safety committee
- Develop an event based CRV violation reduction program
- New GCOR manual rollout starting March 31st
- Implement a common efficiency test program

If you have any questions or wish to discuss further, please call me at 612-904-5926.

Sincerely,

Vern Graham
President, DM&E

United States Senate
WASHINGTON, DC 20510-4105

<http://thune.senate.gov>

July 3, 2013

Administrator Joseph C. Szabo
Federal Railroad Administration
1200 New Jersey Avenue, SE
Washington, SD 20590

Dear Administrator Szabo:

On March 21, 2013, we wrote to request detailed information about Canadian Pacific's (CP) compliance with the Safety Integration Plan (SIP) approved on September 29, 2008, by the Surface Transportation Board (STB) in relation to CP's purchase of the Dakota, Minnesota & Eastern Railroad (DM&E). We were particularly interested in learning about CP's progress in fulfilling all of its commitments to upgrade the DM&E line. For your ease of reference, we enclose a copy of our earlier letter, which specifically outlines our request.

On April 9, 2013, we received an interim response from Bonnie J. Murphy, Deputy Associate Administrator for Safety Compliance and Program Implementation, advising that the Federal Railroad Administration was working to complete its review and would advise us of the findings. To date, we have not received the specific information we feel we must have to appropriately assess whether the CP has lived up to its commitments, which we stood behind when this transaction was initially proposed to our constituents in 2007 and 2008.

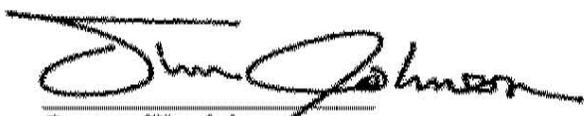
Due to the fact that the DM&E rail line cuts across the entire width of our state, and because it is one of only two class I railroads in the state, the health and continuing viability of the line is of critical importance to the people and small businesses of South Dakota.

On September 30th of this year, five years will have passed since the STB required CP to implement the SIP. With this five-year deadline looming, there is little time to spare for FRA to provide the necessary information we feel is important in assessing the degree to which CP has met its commitments. At this critical juncture, we respectfully request that you provide the information we have requested no later than July 10, 2013. We also ask that prior to reaching a final determination regarding the completeness of the SIP, that we have the opportunity to meet with you to discuss our concerns, if any, following our

opportunity to review the information we have requested. Thank you for your consideration and we look forward to hearing from.

Sincerely,


Governor Dennis Daugaard


Senator Tim Johnson


Senator John Thune


Representative Kristi Noem

Enc.



U.S. Department
of Transportation

Federal Railroad
Administration

Administrator

1200 New Jersey Avenue, SE
Washington, DC 20590

JUL 10 2013

The Honorable John Thune
United States Senate
Washington, DC 20510

Dear Senator Thune:

Thank you for your March 21 and July 3, 2013, letters inquiring about Canadian Pacific Railway's (CP) compliance with the Safety Integration Plan (SIP) filed in connection with CP's 2008 purchase of the Dakota, Minnesota and Eastern Railroad (DM&E). In your March 21 letter, you requested an update on CP's implementation of the SIP and asked which requirements of the SIP have been met and the dates of completion for each. You also asked which requirements have not been met, for an update on the status of CP's efforts to complete those requirements, and for a detailed breakdown of the annual capital expenditures made by CP since the transaction.

Since approval of the transaction by the Surface Transportation Board in 2008, FRA has worked closely with CP to monitor the railroad's compliance with the SIP. To date, among other improvements, CP has installed additional defective equipment detectors, particularly to the east and west of the city limits of Rochester, Minnesota; worked extensively with State transportation agencies to enhance safety at highway-rail grade crossings along the DM&E; and conducted emergency response training with community groups. FRA continues to verify and monitor CP's compliance with all the requirements of the SIP, and expects to continue this monitoring for the full 5-year period (i.e., until September 29, 2013) that is anticipated by the applicable regulation. See Title 49 Code of Federal Regulations (CFR) Part 244, Regulations on Safety Integration Plans Governing Railroad Consolidations, Mergers, and Acquisitions of Control. To evaluate the effectiveness of actions CP has taken under the SIP, FRA conducted a detailed review of the DM&E reporting data (and data reported by CP for the former DM&E territory) from 2008 to 2012. The safety data shows 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). Accordingly, it is clear that based on safety data since the merger, CP has greatly improved the overall safety of the former DM&E.

One area of concern that FRA noted during its monitoring of the SIP's implementation is the apparent increase of miles of track that CP classifies as "excepted track" under FRA's Track Safety Standards. Although such classification can indicate that track is being maintained for slower train speeds and other operational limitations, further investigation showed that a

large portion of the track classified by CP as "excepted track" is being maintained at higher levels. Ultimately, the administrative classification of that track as "excepted" has not caused a safety concern.

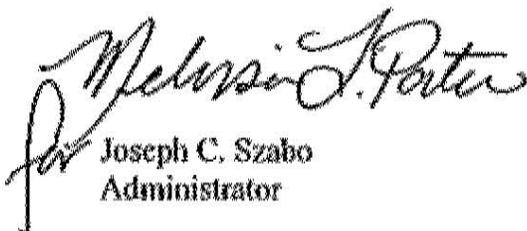
In your March letter, you also requested detailed financial information about CP's annual capital expenditures. Presumably, your request relates to CP's expenditures related to implementation of the SIP, and in the SIP, CP projected the need to invest approximately \$300 million in capital for improvements to DME's "track and ties, bridges and other rail facilities and systems and processes." (See page 89 of the SIP). So far, CP has invested just over \$300 million in the DM&E line, in part to replace existing infrastructure, reduce or eliminate temporary slow orders previously in place at a number of key locations, and in an effort to ultimately remove the 286,000 pound restrictions on certain routes, as well as to make overall safety improvements. These capital investments are reflected in improvements that were made, to include (1) installing significant mileage of continuous welded rail between Philip and Midland, South Dakota; (2) replacing six switches near Brookings, South Dakota; (3) performing substantial bridge work near Rapid Cities, South Dakota; (4) and major tie replacement between Fairburn, South Dakota, and Dakota Junction, Nebraska, in the last 2 years. Unfortunately, FRA does not have a detailed financial breakdown of CP's annual capital expenditures and suggests that CP itself would be the best source for that information.

FRA certainly understands the importance of the DM&E line to the State of South Dakota and to that end, as noted above, FRA expects to continue monitoring CP's compliance with the SIP for the full 5-year period prescribed in 49 CFR Section 244.17(g)(1). After that time, FRA will continue to monitor the safety of CP (including the former DM&E territory), as it does all railroads, through the use of the agency's inspection and enforcement authority.

I appreciate your interest in this important transportation matter and should you have any questions or concerns regarding CP's compliance with the SIP, I would be glad to meet with you upon request. We look forward to working with you on this and other transportation issues of importance to you and your constituents. If you have further questions, please feel free to contact Mr. Nathan Robinson, FRA's Associate Director for Congressional Affairs, at (202) 493-6022 or Nathan.Robinson@dot.gov.

An identical copy of this letter has been sent to Governor Dennis Daugaard, Senator Tim Johnson, and Representative Kristi Noem.

Sincerely,



for Joseph C. Szabo
Administrator

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

CANADIAN PACIFIC RAILWAY COMPANY,)	
ET AL. – CONTROL – DAKOTA, MINNESOTA)	Finance Docket No. 35081
& EASTERN RAILROAD CORP., ET AL.)	
)	

**VERIFIED STATEMENT OF
HARVEY H. STONE, P.E. AND JOHN M. LUDWIG, P.E.
ON BEHALF OF
THE STATE OF SOUTH DAKOTA**

We are Harvey H. Stone, P.E. and John M. Ludwig, P.E. We are engineers and, respectively, the Executive Vice President and Vice President Engineering of Stone Consulting, Inc., an engineering firm that has been engaged for many large and small projects involving railroad freight and passenger feasibility studies, railroad track and structure design, railroad rehabilitation and maintenance, and civil works projects in more than 20 states, including South Dakota. Mr. Stone brings more than 40 years of railroad engineering experience to the firm that he founded in 1996. Mr. Stone is a registered Professional Engineer in 31 states, and he has testified as an expert witness in numerous maximum reasonable rate proceedings before the Surface Transportation Board (“STB”). A copy of his credentials is included as Exhibit No. 1 to this verified statement (“VS”).

Mr. Ludwig has been with Stone Consulting, Inc. since 2003. During this time, Mr. Ludwig has participated in a wide range of bridge and structure projects for many railroads. Mr. Ludwig is a registered Professional Engineer in 45 states, including South Dakota. A copy of his credentials is included as Exhibit No. 2 to this VS.

We understand that the State of South Dakota is asking the Board to direct the Canadian Pacific Railway Company (“CP”) to provide the following information:

1. Documents sufficient to show, by calendar year, starting in calendar year 2009, to date: (i) each capital investment CP made in Dakota, Minnesota and Eastern Railroad Corporation (“DM&E”) and Iowa, Chicago & Eastern Railroad Corporation (“IC&E”) (collectively “DME”) road property; (ii) the location of each such investment; (iii) the dollar amount expended for each such investment.

2. Documents sufficient to show the amounts DME had budgeted, or forecasted, prior to DME’s acquisition by CP, for capital expenditures to be made in 2012 and 2013.

3. All source documents utilized to prepare the track classification chart, and the track classification schematics, appended to CP’s Feb. 21, 2013 letter to Governor Daugaard, *et al.* (reproduced in Daugaard VS, Exhibit DMD-2 at 7-9).

We have been asked by the State to identify the types of information that CP would need to provide to permit independent verification of CP’s responses. Based on our extensive experience with rail capital investments, we are of the opinion that in order to respond to the State’s requests CP will need to provide the following categories of information for each applicable year:

- Timetables and track charts covering the DME system.
- FRA class of track data for the DME system.
- Construction and rehabilitation project data for the DME system, including authorizations for expenditure, start/end dates, construction specifications and plans, invoices, and photos or videos of the projects.
- DME/CP high-level plans for DME capital expenditures.
- FRA citations and inspection reports.

It has been our experience that the above-listed information is routinely kept by large railroads in the ordinary course of business. It has also been our experience that information of this type has been routinely produced by carriers in rail rate cases.

VERIFICATION

I, Harvey H. Stone, verify 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 August 8, 2013

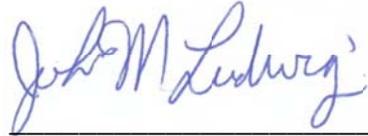


Harvey H. Stone

VERIFICATION

I, John M. Ludwig, verify 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 August 8, 2013



John M. Ludwig

Harvey H. Stone, PE

Executive Vice President



Education: BSCE, Rensselaer Polytechnic Institute, Troy NY

Registrations: Professional Engineer: PA and 30 additional states

Years of Experience: 40+ **Years with Firm:** 16

Affiliations & Memberships: American Council of Engineering Companies
AREMA
American Society of Civil Engineers
APTA Vintage Streetcar Committee

Professional Experience:

Harvey Stone established Stone Consulting & Design, Inc. to provide a consulting service to the industrial development and rail industries. Prior to forming SC&D, Mr. Stone was with a regional engineering firm for 28 years, president from 1980 to his leaving in 1996. SC&D merged with TranSystems in 2007 and was reestablished as Stone Consulting, Inc. in 2010.

During Mr. Stone's many years of experience, he has successfully handled large projects involving industrial development and site design, sanitary sewers, sewage treatment, roads and streets construction, storm drainage, solid waste management, building construction, economic studies and feasibility reports, water lines and water treatment, foundations, bridges, etc.

Additionally, he has designed railroad and streetcar lines and bridges and has inspected numerous vehicle and railroad bridges. He is frequently called upon to prepare preliminary engineering feasibility studies for industrial development projects and rail projects involving federal and state grants, many of which have been funded and constructed.

Mr. Stone is involved with the American Council of Engineering Companies, APTA Vintage Streetcar Committee, PA Economic Development Association, and the American Railway Engineering and Maintenance of Way Association. His membership in the American Council of Engineering Companies has enabled him to obtain invaluable exposure to the many changes in engineering technology over the years as well as continued awareness of the constantly changing rules, regulations and grant programs on all governmental levels. He is a past chairman of ACEC's Quality Committee on which he served for more than ten years and currently serves on the Curriculum Committee.

Project Experience:**Greater Erie Industrial Development Corporation, Erie, Pennsylvania***Knowledge Park, Harborcreek Township*

Design of access roads and parking facilities for several sites.

Erie Biofuels Rail Access Project

Redesign of former rail yard and design of rail access for bio-diesel plant



SPEDDCORP Business Park, Berwick, Pennsylvania

Project Engineer for a new industrial park located on a Brownfield site. The project included demolition and cleanup of over 200,000SF of structurally unsound buildings and the design of several new buildings, access roads and parking facilities.

SPEDD, Inc., Warren Industrial Center, Warren, Pennsylvania

Renovations to existing structures and design of a new retail shopping center with site utilities including new storm drainage system.

Sunnyside Ethanol, LLC, Pittsburgh, Pennsylvania

Design of rail access, loading & unloading facilities for ethanol plant.

Bionol Clearfield, LLC, Clearfield, Pennsylvania

Developed an ethanol site in Clearfield County, PA along R.J. Corman Railroad's Wallaceton Sub. After assisting with on-site layout and rail access for several sites that were eventually rejected, a site was finally located that met all of the company's parameters. Stone assisted in the development of the rail access for the site, track rehabilitation, new track design and construction, "weigh in motion" scale and car storage tracks. Stone also advised on planning issues such as required car storage capacity and operational issues.

Meridian Southern Railroad, Meridian, Mississippi

Three rounds of bridge inspections, 86 timber bridges and several concrete and steel truss structures were inspected. Stone has also provided load ratings and bridge repair and reinforcement design services.

Allegheny Valley Railroad, Pittsburgh, Pennsylvania

Capital improvements grant for \$5.4 million project replacing worn jointed rail with Class 1 welded rail along 6 miles of AVR Main; track rehabilitation of the 7-mile Brilliant Branch, Pittsburgh Branch and Main Line; Design of a Pittsburgh Strip District rail siding; preliminary design for an industrial park rail access spur; complete rebuild of the Indian Run Branch.

Western New York & Pennsylvania Railroad, Falconer, New York

Mr. Stone provided the engineering design for \$9.3 million track rehabilitation program including tie and rail replacement, surfacing, geometry testing and 11 miles of CWR replacement. Rehabilitation of several concrete structures as well as design of a replacement structure after a flood washed it away.

Rail America, Inc. Lubbock, Texas

Rail line feasibility study, cost study, and negotiations for the relocation of 12 miles of railroad track. Estimated project cost \$16,000,000.

Warren County Development Association, Warren, Pennsylvania

Euclid Avenue Industrial Park – South Irvine Street Building
\$320,000 project including a 10,000SF pre-engineered metal building, site and street improvements, and permitting.





John M. Ludwig, PE

Vice President Engineering

Education: B.S.A.E., Cornell University, 1981

Registrations: Professional Engineer: SD and 44 additional states

Years of Experience: 33 **Years with Firm:** 11

Affiliations & Memberships: AREMA
American Society of Civil Engineers

Professional Experience:

John's primary function is to provide expertise in the area of structural design and analysis for bridges and building structures as well as general design of roadways and railroads.

During his years as a Professional Engineer, he has obtained diverse experience in project management, design, manufacturing and construction. Much of his extensive structural experience was gained while employed for ten years as the Senior Engineer for one of the country's largest bleacher and stadium contractors. John now has an additional 10 years of experience inspecting, analyzing and rehabilitating railroad bridges.

Mr. Ludwig is a registered Professional Engineer in 45 states.

Project Experience:

Western New York & Pennsylvania Railroad

Emergency Washout Bridge Replacement - Designed and supervised the emergency replacement of a washed out bridge in Friendship, New York. Specific accomplishments include obtaining permits, design of new bridge abutment, procurement and evaluation of a used bridge and full construction. Bridge was replaced and in use within one week from start of construction.

Keating Summit Bridge Rehabilitation - evaluated Railroad owned highway overpass bridge closed down by Pennsylvania DOT, proposed rehabilitation plan including repairs to structure and replacement of concrete deck with lighter timber deck. Bridge re-opened within 6 months of involvement.

Misc. Bridge Repair Projects- Provided technical assistance to Railroad and bridge contractor on repairs to bridges in Corry, PA, Jamestown, NY and Falconer, New York.

West Virginia State Rail Authority, Moorefield, West Virginia

John has performed the following services for this client:

Elkins Tunnel Inspection and Repairs – Provided engineering services to evaluate a 100 year old, 1800 feet long timber lined tunnel through mountain east of Elkins, WV and oversee repairs. Repairs included the design of steel support frames, use of rock anchors, super-lightweight concrete backfill and polyurethane grouting.



2007 Bridge Inspections - Inspection of all bridges which includes 34 (timber and steel) on the South Branch Valley Railroad and 35 (mainly steel) on the West Virginia Railroad.

Clifford Run Bridge Endwall and Sidewall Replacement using Gabion Baskets – Design replacement for failing timber walls using gabion basket construction.

Durgoon Creek Bridge Repair Recommendations – Provide cost estimate and repair recommendations to upgrade timber bridge over Durgoon Creek, Petersburg WV.

Durbin Greenbrier Valley Railroad – Construction observation of abutment replacement and overall bridge inspection for bridge over West Fork of Greenbrier River, Durbin WV.

Meridian Southern Railroad, Meridian Mississippi

Inspection of 86 bridges, including timber, steel truss and concrete arch bridges. Inspections in 2005 and 2008 included reports and recommendations for repairs and upgrades.

Morristown and Erie Railroad, Morristown, New Jersey

Provided detailed bridge inspection and component measurements required for bridge rating of a 100-year old bridge over the Amtrak Northeast Corridor. Constructed a computer model of the bridge using STAAD Pro structural software for in-depth analysis. Numerous locomotive and car sizes and configurations were run across the bridge in the computer model. Provided design for upgrading bridge to 286 ton capability.

Owego & Harford Railroad, Owego New York

Provided New York State mandated annual inspections of all railroad bridges in 2003 thru 2006. Provided emergency inspection and evaluation of a partially washed out abutment and bridge approach over Owego Creek. Made recommendations for approach slope stabilization. Provided cost estimates to FEMA for permanent repairs.

Berks County Redevelopment Authority – Reading, Pennsylvania

Bridge Inspections and Evaluation – Provided inspection of all bridges and advised county, prior to purchase of railroad by Berks County Redevelopment Authority. Also inspected low overhead clearance bridge struck by tractor trailer and estimated repair cost for insurance settlement.

Bovertown Grade Crossing Replacement – Provided plans and specifications for key grade crossing replacement project. Conducted competitive bid process in conjunction with Berks County purchasing department.

Arcade & Attica Railroad, Arcade New York

Provided yearly New York State mandated inspections of all railroad bridges from 2003 thru 2010. Evaluated the extent of damage of an old truss bridge that was struck by a vehicle. Provided emergency inspection and rating for a damaged bridge for continued use until repairs were made. Provided bridge rating for before and after conditions. Recommended bridge repairs.

Railroad Unloading Pits

Designed rail car unloading pits for gravel and aggregate materials for Aggregate Industries in LaPlata, Maryland and S.J. Anderson Construction Company in Philadelphia, Pennsylvania. Design included the pit and abutments as well as bridge components over the pit. Provided designs and design calculations to Class 1 carriers for approval.

Railroad Turntables

New FRA Part 237 regulations require ratings and annual inspections for all bridges, and the FRA has also stated that turntables are considered bridges and subject to those regulations. John has provided those service for five turntables in the last year alone.



CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of August, 2013, I served copies of the forgoing Petition on all parties of record to this proceeding by U.S. Mail, postage prepaid.

A handwritten signature in black ink, appearing to read "John H. LeSeur", written over a horizontal line.

John H. LeSeur