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PUBLIC VERSION
BEFORE THE
SURFACE TRANSPORTATION BOARD

CANADIAN PACIFIC RAILWAY)	
COMPANY, ET AL. – CONTROL –)	
DAKOTA, MINNESOTA & EASTERN)	Finance Docket No. 35081 (Sub-No. 2)
RAILROAD CORP., ET AL.)	
)	

**MOTION TO COMPEL OF THE STATE OF SOUTH DAKOTA ACTING BY
AND THROUGH ITS DEPARTMENT OF TRANSPORTATION**

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Dated: February 14, 2014

Attorneys for Movant

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

CANADIAN PACIFIC RAILWAY)	
COMPANY, ET AL. – CONTROL –)	Finance Docket No. 35081 (Sub-No. 2)
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**MOTION TO COMPEL OF THE STATE OF SOUTH DAKOTA ACTING BY
AND THROUGH ITS DEPARTMENT OF TRANSPORTATION**

The State of South Dakota acting by and through its Department of Transportation (“South Dakota” or “State”) files this motion asking the Board to issue an order compelling Canadian Pacific Railway Company (“CP”) to respond to the following discovery requests propounded by the State:¹ Interrogatory Nos. 3, 4, 5 and 6 and Document Production Request Nos. 9, 10, 15, 17, 18 and 19.

BACKGROUND

1. In 2007, CP and affiliated companies sought approval under 49 U.S.C. § 11321 *et seq.* for CP’s acquisition of indirect control of the Dakota, Minnesota & Eastern Railroad Corporation (“DM&E”) and the Iowa, Chicago & Eastern Railroad Corporation (“IC&E”)² through ownership of DM&E/IC&E stock by a CP affiliate. The

¹ A copy of these requests is appended in Attachment 1. CP’s responses to these requests (“CP Objections”) are appended in Attachment 2.

² DM&E and IC&E shall be referred to collectively as “DME.”

Board approved the acquisition, subject to specified conditions, in September 2008. *See Canadian Pacific Railway – Control – Dakota, Minnesota & Eastern Railroad*, F.D. No. 35081 (STB served Sept. 30, 2008) (“*Acquisition Case*”).

2. On August 8, 2013, the State filed a petition (“*Petition*”) asking the Board to institute a proceeding to determine whether CP had adhered to three investment representations made in the *Acquisition Case*. These representations were summarized by the Board in its decision served in this proceeding on December 20, 2013 (“*December 2013 Decision*”):

(1) CP represented it would invest \$300 million in the first three post-acquisition years; (2) CP, in clarification, represented that 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 (3) the Federal Railroad Administration (FRA) informed the Board that, as part of the Safety Integration (SIP) process for the acquisition, CP had represented that it would expend \$300 million in the first four post-acquisition years to upgrade all of DME’s track to FRA Class 3 standards.

Id. at 1-2 (footnotes omitted). The State’s *Petition* was supported by many shippers, as well as the United States Department of Agriculture, the United States Department of Transportation, and the Governor of the State of Wyoming.

3. On August 28, 2013, CP replied in opposition to the State’s *Petition* (“*CP Aug. 2013 Reply*”). CP argued that no proceeding was necessary because CP had adhered to its investment representations (as characterized by CP).³ The United States

³ Following receipt of CP’s *Aug. 2013 Reply*, the State filed a supplement to its *Petition* (“*Supp. Petition*”) on September 20, 2013 addressing new information contained

Department of Transportation, which supports the State's Petition, also informed the Board in a letter dated September 30, 2013, that it had not found anything in its internal record review to date indicating that CP had committed to upgrading all DME track to Class 3 standards and that the Federal Railroad Administration's ("FRA") prior representation to the contrary in the 2008 *Acquisition Case* appeared to be incorrect. *Id.* at 2.

4. In its December 2013 Decision, the Board addressed these developments, and directed that the State avail itself of the Board's discovery process "to obtain additional documentation to fully present its case:"

Given the significance of DOT and FRA's letter and the ambiguity regarding CP's investment commitment, and to provide a full and fair opportunity for the State to obtain relevant information needed to support its petition, we will permit the State to engage in discovery at this time pursuant to the Board's rules at 49 C.F.R. Part 1114. Through discovery, the State can test the foundation of the assertions made by CP and obtain additional documentation to fully present its case.

Id.

5. In response to the Board's December 2014 Decision, the State served its discovery requests on CP on January 10, 2013. The State initially requested that CP tender its answers and objections on January 27, 2014. At CP's request, the State extended this due date to February 3, 2014. CP served its answers and objections on February 3, 2014.

in CP's Aug. 2013 Reply. CP filed a reply to the State's Supp. Petition on October 18, 2013 ("CP Oct. 2013 Reply").

ARGUMENT

The Board’s discovery rules at 49 C.F.R. Part 1114 permit “discovery . . . regarding any matter, not privileged, which is relevant to the subject matter involved in a proceeding” 49 C.F.R. § 1114.21(a)(1). The Board’s discovery rules “follow generally those in the FRCP [Federal Rules of Civil Procedure]”⁴ and, as such, accord “broad” discovery rights to parties.⁵

The Board’s discovery rules also place significant limits on responding parties’ attempts to evade permitted discovery. Responding parties are “expect[ed] . . . to comply with discovery in a prompt and forthright manner.”⁶ As particularly pertinent here, a party seeking discovery “is entitled to all relevant and potentially admissible information . . . not only the information that [the responding party] believes is sufficient”⁷ and the Board will not permit “boilerplate” objections⁸ “relating to [production] burden [that] are conclusory and unpersuasive.”⁹

⁴ *Simplified Standards for Rail Rate Cases*, STB Ex Parte No. 646 (Sub-No. 1) (STB served Sept. 5, 2007) at 69.

⁵ *Ocean Logistics Mgmt., Inc. v. NPR, Inc.*, STB Docket No. WCC-102 (STB served Jan. 14, 2000) at 2.

⁶ *Id.*

⁷ *Seminole Elec. Coop., Inc. v. CSX Transp., Inc.*, STB Docket No. 42110 (STB served Feb. 17, 2009) at 2.

⁸ *Trailer Bridge, Inc. v. Sea Star Lines, LLC*, STB Docket No. WCC-104 (STB served Oct. 27, 2000) at 8.

⁹ *Arizona Elec. Power Coop., Inc. v. Burlington N. & Santa Fe Ry.*, STB Docket No. 42058 (STB served Sept. 11, 2002) at 4.

A. Class 3 Track Investment Representations

In 2008, FRA informed the Board that CP had committed to spend \$300 million over 4 years to upgrade all DME track to Class 3 standards. The Board relied on FRA's assertions in approving CP's acquisition of DME.¹⁰ CP now says that it made no such representation to FRA.

CP's assertions raise two issues: (i) what did CP say to FRA about its investment representations, and (ii) if CP is correct that it did not tell FRA it would upgrade all DME track to Class 3 standards, why did it sit idly by while both FRA and the Board relied on false information. The State's Interrogatory Nos. 3, 4, 5 and 6, ask CP to provide relevant information concerning these issues:

Interrogatory No. 3: Please state the date CP became aware the FRA had informed the STB that CP had "committed . . . to upgrade all DM&E track to FRA Class III standards." (Letter from the Hon. Joseph H. Boardman, FRA Administrator to the Hon. Charles D. Nottingham, STB Chairman at 1, filed with the STB on July 14, 2008 in F.D. No. 35081).

Interrogatory No. 4: Please identify, and describe in detail, any actions that CP undertook, if any, prior to the filing of CP's 2013 Reply to modify, correct, clarify, or dispute the FRA's statement that CP had "committed . . . to upgrade all DM&E track to FRA Class III standards."

Interrogatory No. 5: Please identify, and describe in detail, any communications CP had with the FRA, or the United States Department of Transportation, relating to FRA's statement that CP "had committed . . . to upgrade all DM&E track to FRA Class III standards."

¹⁰ See Petition at 25; Supp. Petition at 5.

Interrogatory No. 6: Please identify, and describe in detail, any communications CP had with the STB relating to FRA’s statement that CP “had committed . . . to upgrade all DME track to FRA Class III standards.”

Accompanying these interrogatories was a single document production

request:

Request for Production No 9: Please produce all documents containing communications from 2007 to present between CP and the FRA relating to actual or planned capital investments in the DME System from 2007 to present.

CP claims these requests are not “relevant” because CP says it never told FRA it would upgrade all DME track to Class 3 standards.¹¹ However, CP is simply playing dodge-ball here. These requests focus on what CP did, or did not do, in response to FRA’s letter informing the Board that CP planned to upgrade all DME track to Class 3 standards. This issue is highly relevant for obvious reasons: regulated entities cannot sit idly by when they know that incorrect information is being relied upon by their regulators.¹²

CP also claims that responding to these requests would be “unduly burdensome” because CP would have to “search files of, numerous current and former CP

¹¹ See CP Objections at 6-8.

¹² See Supp. Petition at 5-6. CP claims that regulated entities can sit idly by. See CP Oct. 2013 Reply at 3. Putting to one side the legal absurdity of CP’s argument, the Board will not deny a discovery request “merely because [a party] may question [another party’s] legal theories of its case.” See *Entergy Arkansas, Inc. v. Union Pac. R.R.*, STB Docket No. 42104 (STB served May 19, 2008) at 5 (“*Entergy*”).

employees”¹³ and would “require CP to review literally every letter, correspondence, email, notes of telephone conversations” with the FRA and the STB.¹⁴ CP’s objections are simply boilerplate excuses for doing nothing.

When faced with similar burden/do nothing objections, the Board has ordered the objecting party to undertake a “reasonable search of its files” for responsive information. As the Board stated in *Entergy*:

UP must conduct a reasonable search of its files for documents and information responsive to the request. The Board does not know enough about how UP maintains its files to establish the exact parameters of this search. At a minimum, however, UP’s search for records within its possession, custody or control should include files that are located on its premises, files that are kept electronically, and the off-site storage or archived files of those individual employees likely to have responsive information.¹⁵

The State requests that the Board order CP to undertake a the same type of “reasonable search” it ordered the objecting party to undertake in *Entergy* and, after CP conducts that search, respond to the State’s Interrogatory Nos. 3, 4, 5 and 6 and its Document Production Request No. 9.

B. CP’s Investment Representations

CP claims the State has misinterpreted the scope of the investment representations CP admits to making in the *Acquisition Case*. The State tendered a single request for information relevant to CP’s assertions:

¹³ CP Objections at 6-7.

¹⁴ *Id.* at 8, 13.

¹⁵ *Entergy* at 5-6.

Request for Production No. 10: Please produce all documents containing communications from 2007 to present discussing the capital investment representations CP made in F.D. No. 35081, except public filings CP has made at the STB in F.D. No. 35081.

CP claims that this request seeks information that “is far beyond the scope of this proceeding” because it was not included in the document request appended to the State’s Petition.¹⁶ The State’s Petition preceded CP’s Aug. 2013 Reply. In that Reply, CP claimed for the first time that the State had misread the plain text of CP’s investment representations in the *Acquisition Case*. Obviously, CP cannot raise an issue, and then claim credibly the State’s discovery on that issue is not relevant.

CP also argues that production of responsive documents “would be entirely duplicative of the electronic records on CP’s capital investments” that CP plans to produce.¹⁷ This assertion is incorrect. The electronic data should identify specific investments, but will not contain information concerning the scope of CP’s investment representations.

Finally, CP claims looking for responsive documents would be “unduly burdensome.”¹⁸ CP’s burden objection is just a boilerplate excuse for doing nothing. The State requests that the Board order CP to undertake a reasonable search of its files in the

¹⁶ CP Objections at 14.

¹⁷ *Id.*

¹⁸ *Id.*

manner the Board ordered the objecting party to undertake in *Entergy*, and after undertaking that search, respond to the State’s Document Production Request No. 10.

C. The Amount of CP’s Capital Expenditures

CP has stated it will provide documents responsive to some of the State’s requests for documents relating to the amount and location of CP’s capital expenditures in DME facilities, but objects to several others, including the State’s request seeking capital investment information CP may have filed with taxing authorities:

Request For Production No. 17: Please produce documents sufficient to show any reductions, credits or deferrals received and/or requested by CP in the ad valorem or personal property taxes payable and/or owed by CP to any state, county or municipality as a result of any capital investment made on the DME System from 2008 to present.

CP admits the information requested is “relevant” but claims its production “would be completely duplicative of the capital investment data that CP is producing.”¹⁹ CP’s assertions may, or may not, be correct, but there is no way for the State to know the answer here without reviewing responsive documents produced by CP. In addition, the tax records should serve as a valuable check on CP’s electronic data collection. CP also makes a boilerplate burden objection, but, as with its other burden objections, the State simply requests that the Board order CP to engage in a reasonable search for responsive documents.

¹⁹ CP Objections at 17.

D. Specific Capital Investments

CP informed FRA and the Board in 2008 that it planned to prioritize capital expenditures on DME based on the results of its post-acquisition field studies. The State asked CP to produce documents concerning these studies:

Request For Production No. 19: Please produce documents sufficient to show (i) the specific investment projects, quantities and details by subdivision CP determined to undertake based on the planned inspections, assessments, measurements and reviews (collectively “studies”) CP cited at page 90 of the document entitled “Applicant’s Safety Integration Plan Submitted to Federal Railroad Administration” (filed at the STB in F.D. No. 35081 on Feb. 4, 2008) (“ Feb. 2008 SIP”); (ii) the bridge replacement and repair priorities CP stated at page 90 of the Feb. 2008 SIP it planned to establish following completion of inspections and structural assessments; (iii) the status of CP’s implementation of the investments CP identified in response to its studies referenced in (i) above; and (iv) the status of CP’s implementation of investments in bridge replacement and repairs CP identified in response to the inspections and assessments referenced in (ii) above.

CP objects to producing responsive documents on grounds that location-specific investment plans, and the fulfilment of those plans, is “not relevant to the issue presented in the State’s petition – *i.e.*, whether CP has fulfilled the investment representations it made when it acquired control over DME.”²⁰ DME has a very selective view of relevance. In its Reply, CP repeatedly touts the investments it claims to have made in DME facilities “in South Dakota” that “benefitted” South Dakota shippers.²¹ The State

²⁰ CP Objections at 18.

²¹ Aug. 2013 Reply at 13.

simply requests that CP provide it with information to determine whether CP met its own location-specific capital investment spending targets to “benefit” shippers in South Dakota and other states.

CP also referenced in its Aug. 2013 Reply a {

}²² The State’s Request for Production No. 15 asks that CP produce documents sufficient to show {what the 10-year plan entailed}:

Request For Production No. 15: Please produce documents sufficient to show the {

} which is referenced on page 8, item F.h.6 of Attachment 9 to CP’s 2013 Reply.

CP argues that documents responsive to the request are not relevant, but the State is simply seeking information CP itself found sufficiently relevant to reference in its Aug. 2013 Reply and, like Request for Production No. 18, this request is relevant to the issue of whether CP met its own internal capital investment targets.

E. Safety

CP devoted a large chunk of its Aug. 2013 Reply to the State’s Petition to its safety record. *See, e.g.*, Aug. 2013 Reply at 14 (“Implementation of the capital expenditures . . . has produced a major improvement in rail safety along the DME network”). In order to obtain relevant information concerning CP’s assertions, the State tendered the following discovery request:

²² CP designated this information as “Highly Confidential.”

Request For Production No. 18. Please produce all documents containing communications from 2007 to the present between CP and the FRA relating to the safety of train operations on the DME System.

CP objects to this request as “beyond the scope of this proceeding.”²³

However, it was CP, not the State, that raised the safety issue, and having raised it, CP cannot now claim the issue is “beyond the scope of this proceeding.”

CP also claims that the request is “overbroad and unduly burdensome” and responsive information “would be entirely duplicative of the electronic records on CP’s capital investments on the DME that CP intends to produce.”²⁴ As with its other burden objections, CP provides no specifics, just boilerplate. The State simply requests that CP undertake a reasonable search for responsive documents. Nor, of course, is production of investment data responsive to DME’s safety assertions.

F. Privilege Log

CP has objected to producing answers to Interrogatory No. 4, and documents responsive to Document Production Requests No. 10 and 12, to the extent the answers or documents are subject to the attorney-client privilege or the attorney work product doctrine.

²³ CP Objections at 17.

²⁴ *Id.* at 17-18.

CP has ignored the State's Instruction No. 3, which requires CP to provide the following information concerning responsive material withheld on these asserted grounds:

If an answer or the production of any responsive document is withheld under 49 C.F.R. § 1114.30(a)(1) on the basis of a claimed privilege or attorney work product, then for each such answer or document, provide the following information: its date, type (*e.g.*, letter, meeting, notes, memo, etc.), author (note if author is an attorney), addressee(s)/recipient(s) (note if addressee(s) or recipient(s) is an attorney), general subject matter, and basis for withholding the information.

The State requests that the Board order CP to prepare a privilege log containing the information requested in its Instruction No. 3. This information is necessary to permit the State to review the merits of CP's privilege/work product assertions.

CONCLUSION

The State respectfully asks the Board to grant the relief requested herein.

Respectfully submitted,

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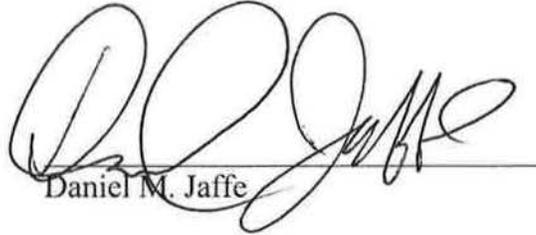
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Dated: February 14, 2013

Attorneys for Movant

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of February, 2014, I served redacted copies of the forgoing on all parties of record to this proceeding by U.S. Mail, postage prepaid, and served Highly Confidential copies of the foregoing on counsel for Canadian Pacific Railway Company via email.



Daniel M. Jaffe

Attachment 1

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

CANADIAN PACIFIC RAILWAY COMPANY,)	
ET AL. – CONTROL – DAKOTA, MINNESOTA)	
& EASTERN RAILROAD CORP., ET AL.)	Docket No. FD 35081 (Sub-No. 2)
)	

**THE STATE OF SOUTH DAKOTA’S INTERROGATORIES
AND REQUESTS FOR PRODUCTION OF DOCUMENTS
TO CANADIAN PACIFIC RAILWAY COMPANY**

The State of South Dakota acting by and through its Department of Transportation (“South Dakota”) hereby requests, pursuant to 49 C.F.R. §§ 1114.26 and 1114.30, that Canadian Pacific Railroad Company (“CP”) respond to the following interrogatories and document requests (collectively “requests”) in accordance with the definitions and instructions set forth below.

South Dakota requests that CP serve its written objections and answers by January 27, 2014 and that CP produce copies of responsive documents at the offices of Slover & Loftus LLP, 1224 Seventeenth St., N.W., Washington, D.C. 20036 on a rolling basis, with full production completed by February 10, 2014.

South Dakota is prepared to cooperate with CP to facilitate the expeditious and cost-efficient production of information responsive to these discovery requests. South Dakota also agrees to abide by the terms of the protective order entered in this proceeding on September 21, 2007. South Dakota requests that CP promptly contact the undersigned counsel at Slover & Loftus LLP should CP have any questions regarding the meaning or scope of any of these discovery requests, the nature of information and documents responsive to them, or the procedure for producing responsive material.

I. DEFINITIONS

The following defined terms are used herein:

1. “And,” “or,” and/or “each” shall be construed in the disjunctive or conjunctive as necessary in order to bring within the scope of each request all responsive information or documents which otherwise might be construed as outside the scope of the request.

2. “Capital investment(s)” means an investment in the DME System that is capitalized and not expensed under the STB’s General Accounting Regulations codified at 49 C.F.R. § 1200.

3. “Communication” means the transmittal or exchange of information of any kind in any form, including oral, written or electronic form.

4. “CP” means Canadian Pacific Railway Company, its present or former employees, agents, counsel, officers, directors, advisors, consultants, divisions, departments, predecessor, parent and/or holding companies, subsidiaries (including DME and DM&E), or any of them, and all other persons acting (or who have acted) on its behalf.

5. “CP’s 2013 Reply” means the document entitled “Canadian Pacific Railway Company’s Reply to the Petition of the State of South Dakota To Enforce Investment Representations” filed with the STB in F.D. No. 35081 on August 28, 2013 (public and highly confidential versions).

6. “CP/DME Application” means the document entitled “Application by Canadian Pacific Railway Company, *Et Al* for Approval of Control of Dakota, Minnesota and Eastern Railroad Corporation, *Et Al*” filed with the STB on October 5, 2007 in F.D. No. 35081, including all subsequently filed supplements and amendments thereto.

7. “DME” means the DM&E and DM&E’s former wholly-owned subsidiary the Iowa, Chicago & Eastern Railroad Corporation.

8. “DME Acquisition Date” means October 30, 2008.

9. “DME System” means the track, bridges, buildings, facilities and other appurtenances owned or utilized by DME.

10. “DM&E” means the Dakota, Minnesota and Eastern Railroad Corporation.

11. “Document(s)” means all writings or visual displays of any kind, whether generated by hand or electronic means, including, without limitation, photographs, lists, memoranda, reports, notes, letters, electronic mail, phone logs, contracts, drafts, workpapers, computer print-outs, electronic data, telecopies, newsletters, notations, books, affidavits, statements (whether or not verified), speeches, summaries, opinions, studies, analyses, evaluations, statistical records, proposals, treatments, outlines, any electronic or mechanical records or representations (including physical things such as, but not limited to, computer disks or drives), and all other materials of any tangible medium or expression, in CP’s current or prior possession, custody or control. A draft or non-identical copy is a separate document within the meaning of this term.

12. “F.D. No. 35081” means STB Finance Docket No. 35081, *Canadian Pacific Railway Company, et al. – Control – Dakota, Minnesota & Eastern Railroad Company, et al.*, and sub-docket Nos. 35081 (Sub-No. 1) and 35081 (Sub-No. 2).

13. “FRA” means the Federal Railroad Administration.

14. “Person” means a natural person, corporation, institution, partnership, firm, joint venture, association, political subdivision or other legal entity, as the case may be.

15. “Present” means the date CP submits its responses to the State’s requests.

16. “South Dakota’s August 2013 Petition” means the document entitled “Petition of the State of South Dakota Acting By and Through Its Department of Transportation to Enforce Canadian Pacific Railway Company’s Investment Representations” filed in F.D. No. 35081 on August 8, 2013.

17. “Related,” “related to,” and “relating to” mean discussing, describing, referring to, reflecting, explaining, analyzing, or in any way pertaining to, in whole or in part, the subject matter of the request.

18. “STB” means the Surface Transportation Board.

19. “USD” means United States dollars.

II. INSTRUCTIONS

CP is requested to conform to the following instructions in responding to these requests.

1. Each request shall operate and be construed independently. Unless otherwise indicated, no request limits the scope of any other request.

2. Where these requests seek data in a computer-readable format, machine-readable format, or in its native format, this data is defined as including, but is not limited to, any electronically stored data on hard disk drives, optical storage media (*e.g.*, CD or DVD), flash or solid state memory (*e.g.*, USB drive or SSD), or magnetic tapes as an “active” file or files readily readable by one or more computer applications (*e.g.*, a Microsoft Excel file).

3. If an answer or the production of any responsive document is withheld under 49 C.F.R. § 1114.30(a)(1) on the basis of a claimed privilege or attorney work product, then for each such answer or document, provide the following information: its date, type (*e.g.*, letter, meeting, notes, memo, etc.), author (note if author is an attorney), addressee(s)/recipient(s)

(note if addressee(s) or recipient(s) is an attorney), general subject matter, and basis for withholding the information.

4. If the answer to any interrogatory or the production of any responsive document is withheld on claimed grounds other than privilege or attorney work product, state with specificity the basis for such withholding.

5. CP is requested to supplement its production in the manner provided in 49 C.F.R. § 1114.29.

6. All documents should be produced or made available for inspection in the form in which they are retained by CP in their usual course of business (*e.g.*, if the documents are in a file, the file containing the documents should be produced), unless otherwise agreed by South Dakota and CP. All files containing responsive documents should be identified by the file name and number.

7. Please organize or number the documents produced in such a manner that South Dakota may readily determine which documents are being produced in response to each specific request. If no document is produced in response to any specific request, please so indicate in the response.

8. South Dakota reserves the right to file supplemental or follow-up requests and other discovery, as necessary or appropriate.

III. INTERROGATORIES

Interrogatory No. 1

For each capital investment in excess of \$10,000 (USD) made by CP between the DME Acquisition date to present on the portion of the DME System located west of Tracy, MN please (i) describe the capital investment made, (ii) provide the beginning date of the capital investment, (iii) provide the completion date of the capital investment, and (iv) provide the location of the capital investment.

Interrogatory No. 2

Please state CP's definition of the term "Engineering Capital Investment" as used in Attachments 2, 3 and 4 of CP's 2013 Reply.

Interrogatory No. 3

Please state the date CP became aware the FRA had informed the STB that CP had "committed . . . to upgrade all DM&E track to FRA Class III standards." (Letter from the Hon. Joseph H. Boardman, FRA Administrator to the Hon. Charles D. Nottingham, STB Chairman at 1, filed with the STB on July 14, 2008 in F.D. No. 35081).

Interrogatory No. 4

Please identify, and describe in detail, any actions that CP undertook, if any, prior to the filing of CP's 2013 Reply to modify, correct, clarify, or dispute the FRA's statement that CP had "committed . . . to upgrade all DM&E track to FRA Class III standards."

Interrogatory No. 5

Please identify, and describe in detail, any communications CP had with the FRA, or the United States Department of Transportation, relating to FRA's statement that CP "had committed . . . to upgrade all DM&E track to FRA Class III standards."

Interrogatory No. 6

Please identify, and describe in detail, any communications CP had with the STB relating to FRA's statement that CP "had committed . . . to upgrade all DME track to FRA Class III standards."

Interrogatory No. 7

Please identify, and describe in detail, any studies or other analyses prepared by CP concerning the costs to upgrade all DME System track, or portions thereof, to FRA Class 3 standards.

IV. DOCUMENT PRODUCTION REQUESTS

Request for Production No. 1

For each year 2008 through the present, please produce the timetables covering the DME System.

Request for Production No. 2

For each year 2008 through the present, please produce the track charts (condensed track profiles) covering the DME System.

Request for Production No. 3

For each year 2008 through the present, please produce detailed maps and inventories by milepost of the DME System that show the FRA class of track.

Request for Production No. 4

Please produce the source documents CP utilized to prepare (i) the FRA class of track chart reproduced in Exhibit DMD-2, page 7 to South Dakota's August 2013 Petition and (ii) the FRA class of track maps reproduced in Exhibit DMD-2 at 8-9 in South Dakota's August 2013 Petition.

Request for Production No. 5

For each year 2008 through the present, please produce density charts for the DME System.

Request for Production No. 6

Please produce documents sufficient to show the following for each capital investment which exceeded \$10,000 (USD) in cost and was completed on the DME System by CP and /or DME, or an outside contractor acting on CP and/or DME's behalf, between January 1, 2008 to present:

- i. The location(s) of the project;
- ii. The date the project was started;
- iii. The date the project was completed;
- iv. All invoices paid and any summaries of those invoices; and
- v. An accounting of any portion of each project not paid for by CP and/or DME (*i.e.*, contributions from governmental entities, industries or other third-parties).

Request for Production No. 7

To the extent documents concerning a capital investment on the DME System were not produced in response to Request for Production No. 6 (*e.g.*, the capital investment was less than \$10,000 (USD)), please produce documents sufficient to show, by calendar year, starting in calendar year 2008 to the present: (i) each capital investment CP and/or DME made in the DME System; (ii) the location(s) of each such capital investment; (iii) the amount expended for each such capital investment; (iv) the start date of the project; and (v) the end date of the project.

Request for Production No. 8

For the DME System facilities located west of Pierre, SD, please produce documents sufficient to show, by calendar year, starting in calendar year 2004 and ending in calendar year 2008: (i) each capital investment CP and/or DME made; (ii) the location of each such capital investment; (iii) the amount expended for each such capital investment; (iv) the start date of the project; and (v) the end date of the project.

Request for Production No. 9

Please produce all documents containing communications from 2007 to present between CP and the FRA relating to actual or planned capital investments in the DME System from 2007 to present.

Request for Production No. 10

Please produce all documents containing communications from 2007 to present discussing the capital investment representations CP made in F.D. No. 35081, except public filings CP has made at the STB in F.D. No. 35081.

Request for Production No. 11

Please produce documents prepared prior to the DME Acquisition Date sufficient to show the annual amounts DME had budgeted for capital investments to be made on the DME System for each calendar year after 2008.

Request for Production No. 12

Please produce (i) native file versions (*e.g.*, Excel files) of Attachments 2, 3 and 4 of CP's 2013 Reply and (ii) all documents (including spreadsheets underlying and/or relied upon) used to develop the calculations shown in Attachments 2, 3 and 4 of CP's 2013 Reply.

Request for Production No. 13

Please produce all documents provided to potential purchasers of the DME System west of Tracy, MN that reference capital investments that CP has made, or planned to make, on the DME System west of Tracy, MN.

Request for Production No. 14

Please produce all documents provided to potential purchasers of the DME system west of Tracy, MN that reference CP's capital investment representations in F.D. No. 35081.

Request for Production No. 15

Please produce documents sufficient to show the [REDACTED] [REDACTED] which is referenced on page 8, item F.h.6 of Attachment 9 to CP's 2013 Reply.

Request for Production No. 16

Under *Alternative Methods of Accounting for Railroad Track Structures*, 367 I.C.C. 157, 180 (1983), CP is required to submit a standard "unit of property" that distinguishes between when a certain cost should be expensed or capitalized. Please produce CP's most recent, STB-approved, property units and the supporting information and data for those units.

Request for Production No. 17

Please produce documents sufficient to show any reductions, credits or deferrals received and/or requested by CP in the ad valorem or personal property taxes payable and/or owed by CP to any state, county or municipality as a result of any capital investment made on the DME System from 2008 to present.

Request for Production No. 18

Please produce all documents containing communications from 2007 to the present between CP and the FRA relating to the safety of train operations on the DME System.

Request for Production No. 19

Please produce documents sufficient to show (i) the specific investment projects, quantities and details by subdivision CP determined to undertake based on the planned inspections, assessments, measurements and reviews (collectively “studies”) CP cited at page 90 of the document entitled “Applicant’s Safety Integration Plan Submitted to Federal Railroad Administration” (filed at the STB in F.D. No. 35081 on Feb. 4, 2008) (“ Feb. 2008 SIP”); (ii) the bridge replacement and repair priorities CP stated at page 90 of the Feb. 2008 SIP it planned to establish following completion of inspections and structural assessments; (iii) the status of CP’s implementation of the investments CP identified in response to its studies referenced in (i) above; and (iv) the status of CP’s implementation of investments in bridge replacement and repairs CP identified in response to the inspections and assessments referenced in (ii) above.

Request for Production No. 20

Please produce each study or analysis CP identified in its answer to Interrogatory No. 7.

By:

Karla L. Engle
Special Assistant Attorney General
South Dakota Department of Transportation
700 E. Broadway Ave.
Pierre, SD 57501-2586
(605) 773-3262

John H. LeSeur
Daniel M. Jaffe
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A handwritten signature in black ink, appearing to read "Daniel M. Jaffe", is written over the printed name and partially over the address of Slover & Loftus LLP.

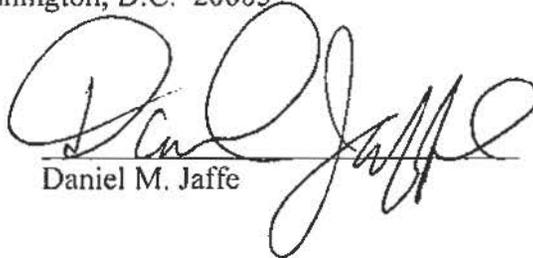
Dated: January 10, 2014

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of January 2014, I caused copies of the State of South Dakota's Interrogatories and Requests for Production of Documents to be served by hand-delivery upon counsel for CP, as follows:

Terence M. Hynes
Matthew J. Warren
Hanna M. Chouset
Sidley Austin LLP
1501 K Street, N.W.
Washington, D.C. 20005



Daniel M. Jaffe

Attachment 2

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

CANADIAN PACIFIC RAILWAY COMPANY,)
et al. – CONTROL – DAKOTA, MINNESOTA)
& EASTERN RAILROAD CORP., et al.)

Finance Docket No. 35081 (Sub-No. 2)

**CANADIAN PACIFIC RAILWAY COMPANY’S RESPONSES AND OBJECTIONS
TO THE STATE OF SOUTH DAKOTA’S INTERROGATORIES AND
REQUESTS FOR PRODUCTION OF DOCUMENTS**

Pursuant to 49 C.F.R. Part 1114 and other applicable rules and authority, Canadian Pacific Railway Company (“CP”), through undersigned counsel, responds as follows to the State of South Dakota’s (“South Dakota’s”) Interrogatories and Requests for Production of Documents (collectively, the “Discovery Requests”).

GENERAL OBJECTIONS

CP’s General Objections, as set forth herein, are objections to each of the individual interrogatories and document requests (including subparts) that follow. CP’s objections shall not waive or prejudice any objections that it may later assert.

1. CP objects to any and all definitions and/or instructions to the extent that the definitions and instructions either seek to expand upon or conflict with 49 C.F.R. Part 1114, Subpart B. Further, CP objects to these Discovery Requests to the extent that they seek to impose obligations on CP that are greater than, or are inconsistent with, those imposed under 49 C.F.R. Part 1114, Subpart B.

2. CP objects to each and every Discovery Request to the extent that it seeks information protected by the attorney-client privilege, the attorney work-product doctrine, or any other applicable privilege, exemption, or protection from discovery or disclosure. In the event that any such privileged or protected information is inadvertently produced or provided, and such

information is the proper subject of the attorney-client privilege, the attorney work-product doctrine and/or other applicable privilege, exemption, or protection, such disclosure is not to be construed as a waiver of any privilege, exemption, or protection. CP reserves the right to demand that such inadvertently produced privileged information be returned to it and that all copies in South Dakota's possession, and that of its counsel, consultants, subsidiaries or other agents, be destroyed.

3. CP objects to each and every Discovery Request to the extent that it seeks production of information or data that is not relevant to the subject matter at issue in this proceeding and/or not reasonably calculated to lead to the discovery of admissible evidence.

4. CP objects to each and every Discovery Request that generically requests that CP produce "all" responsive information. For those requests to which it is obliged to respond, CP will produce or make available for inspection such responsive non-privileged information or documentation as it is able to locate or identify in a reasonable search.

5. CP objects to each and every Discovery Request to the extent that it would require CP to perform a "special study" to identify, collect, or derive the requested information.

6. CP objects to each and every Discovery Request to the extent that it is: a) overly broad; b) impermissibly vague or ambiguous, and fails to describe with reasonable particularity the information sought; or c) imposes undue burdens that outweigh any probative value the information sought may have in this proceeding.

7. CP objects to each and every Discovery Request to the extent that it purports to request information that is already in the possession of South Dakota. Further, CP objects to each and every Discovery Request to the extent that it seeks disclosure of information that is publicly available or accessible to South Dakota.

8. CP objects to South Dakota’s Definition 11 defining “Document” to the extent it seeks to impose obligations broader than, or inconsistent with, those imposed by 49 C.F.R. Part 1114. CP objects to South Dakota’s demand that CP produce documents in its “prior possession, custody and control.” It is both unreasonable and illogical to demand that CP produce documents that are not in its current possession, custody, or control. CP further objects to the definition of “Document” to the extent it seeks information or data that is privileged, protected by the work product doctrine, or otherwise protected, exempted, or excluded from discovery or disclosure by an applicable privilege, protection, rule, or doctrine. In these Responses, CP will interpret the term “Document” to exclude any data or information that is protected from discovery or disclosure by such privilege, protection, doctrine, or rule.

9. CP objects to South Dakota’s Definition 17 defining “related,” “related to,” and “relating to” on the grounds that such definition is overbroad and unduly burdensome.

10. CP objects to South Dakota’s Instructions 3, 6, and 7, to the extent they attempt to impose obligations or requirements beyond, in addition to, or inconsistent with CP’s discovery obligations under 49 C.F.R. Part 1114. CP’s obligations in responding to South Dakota’s discovery requests are governed by the Board’s rules, and South Dakota cannot change or expand those duties by propounding “Instructions.”

11. CP objects to South Dakota’s failure to limit its requests to a relevant time period as overbroad and unduly burdensome. In particular, several requests seek information from periods prior to CP’s acquisition of control over the Dakota, Minnesota, and Eastern Railroad Corporation (“DME”). Such information, by definition, is not relevant to the subject matter of South Dakota’s Petition—*i.e.*, whether CP has fulfilled the representations it made when it acquired control over DME, and it is far outside the scope of the “Requested Investment

Information” in Attachment 1 to that Petition. Moreover, production of the requested information from the pre-acquisition period would be difficult and unduly burdensome, because most of the requested information from time periods before CP’s control over DME is not available from CP’s computer systems. Subject to, and without waiving this objection, unless otherwise indicated, CP’s responses will cover the period from CP’s acquisition of control over DME until December 31, 2013.

12. CP does not concede the relevance, materiality, competency, or admissibility as evidence of documents or information requested in the Discovery Requests. CP reserves its right to object on any ground to the use of the responses herein in this proceeding or in any subsequent appeal, proceeding, action or trial.

SPECIFIC OBJECTIONS AND RESPONSES

In addition to its General Objections (which apply in full to each and every Discovery Request, without further enumeration), below CP sets forth Specific Objections and Responses to each Request for Admission, Interrogatory, and Request for Production. CP preserves all of its General Objections set forth above, and none of the following Specific Objections shall waive its General Objections. Nor shall any of CP’s specific objections limit the scope, breadth, generality, or applicability of those General Objections.

ANSWERS TO INTERROGATORIES

Interrogatory No. 1

For each capital investment in excess of \$10,000 (USD) made by CP between the DME Acquisition date to present on the portion of the DME System located west of Tracy, MN please (i) describe the capital investment made, (ii) provide the beginning date of the capital investment, (iii) provide the completion date of the capital investment, and (iv) provide the location of the capital investment.

ANSWER: CP objects to this Interrogatory to the extent it requires a special study. CP further objects to the interrogatory’s request that CP segregate information on capital

investments “located west of Tracy, MN” because the total amount of capital investments on that portion of the DME system is irrelevant to whether CP fulfilled its commitment to spend \$300 million in capital investments on the DME system as a whole. Subject to and without waiving this objection and the General Objections, CP responds that it will produce business records or other documents from which the answer to this Interrogatory can be derived or ascertained. *See* 49 C.F.R. § 1114.26(b).

Interrogatory No. 2

Please state CP’s definition of the term “Engineering Capital Investment” as used in Attachments 2, 3 and 4 of CP’s 2013 Reply.

ANSWER: Subject to and without waiving the General Objections, CP responds that it used the term Engineering Capital Investment in its 2013 Reply to mean all engineering projects that were accounted for as capital investments pursuant to CP accounting policy. CP’s accounting policy for capital projects is detailed in CP’s public statements, including at pages 92-93 of its 2012 Annual Report, which is replicated below:

Properties

Fixed asset additions and major renewals are recorded at cost, including direct costs, attributable indirect costs and carrying costs, less accumulated depreciation and any impairments. When there is a legal obligation associated with the retirement of property, plant and equipment, a liability is initially recognized at its fair value and a corresponding asset retirement cost is added to the gross book value of the related asset and amortized to expense over the estimated term to retirement. The Company reviews the carrying amounts of its properties whenever changes in circumstances indicate that such carrying amounts may not be recoverable based on future undiscounted cash flows. When such properties are determined to be impaired, recorded asset values are revised to fair value.

The Company recognizes expenditures as additions to properties or operating expenses based on whether the expenditures increase the output or service capacity, lower the associated operating costs or extend the useful life of the properties and whether the expenditures exceed minimum physical and financial thresholds.

Much of the additions to properties, both new and replacement properties, are self-constructed. These are initially recorded at cost, including direct costs and attributable indirect costs, overheads and carrying costs. Direct costs include, among other things,

labour costs, purchased services, equipment costs and material costs. Attributable indirect costs and overheads include incremental long-term variable costs resulting from the execution of capital projects. Indirect costs include largely local crew facilities, highway vehicles, work trains and area management costs. Overheads primarily include a portion of the cost of the Company's engineering department which plans, designs and administers these capital projects. These costs are allocated to projects by applying a measure consistent with the nature of the cost based on cost studies. For replacement properties, the project costs are allocated to dismantling and installation based on cost studies. Dismantling work is performed concurrently with the installation.

Ballast programs including undercutting, shoulder ballasting and renewal programs which form part of the annual track program are capitalized as this work, and the related added ballast material, significantly improves drainage which in turn extends the life of ties and other track materials. These costs are tracked separately from the underlying assets and depreciated over the period to the next estimated similar ballast program. Spot replacement of ballast is considered a repair which is expensed as incurred.

Interrogatory No. 3

Please state the date CP became aware the FRA had informed the STB that CP had "committed . . . to upgrade all DM&E track to FRA Class III standards." (Letter from the Hon. Joseph H. Boardman, FRA Administrator to the Hon. Charles D. Nottingham, STB Chairman at 1, filed with the STB on July 14, 2008 in F.D. No. 35081).

ANSWER: CP objects to this Interrogatory to the extent that it assumes the truth of facts that are contrary to the record and is not relevant to any issue in this proceeding. FRA has made clear that CP did not, in fact, commit to upgrade all DM&E track to FRA Class III standards. *See* K. Thomson Letter to D. Elliott (filed Sept. 30, 2013) (noting that "the SIP contained no representation about upgrading all DM&E track to Class 3 standards," that FRA's "review of its records supports CP's assertion [that it made no such representation]," and that "FRA regrets the overgeneralization in its July 3, 2008 letter related to the track upgrades contemplated by CP."). The record is thus clear that CP never made a commitment to upgrade all DM&E track to Class III standards. Accordingly, there is no relevance to "the date when CP became aware" of the State's incorrect statement that CP had made such a commitment. CP further objects to this Interrogatory as overbroad and unduly burdensome to the extent that responding would require CP to make inquiries of, and search the files of, numerous current and former CP employees who

were communicating with FRA during the SIP development and implementation process or otherwise were involved with the STB regulatory approval process, all in an attempt to answer a question that is not relevant to any remaining issue in this proceeding.

Interrogatory No. 4

Please identify, and describe in detail, any actions that CP undertook, if any, prior to the filing of CP's 2013 Reply to modify, correct, clarify, or dispute the FRA's statement that CP had "committed . . . to upgrade all DM&E track to FRA Class III standards."

ANSWER: CP objects to this Interrogatory to the extent that it assumes the truth of facts that are contrary to the record and is not relevant to any issue in this proceeding. FRA has made clear that CP did not, in fact, commit to upgrade all DM&E track to FRA Class III standards. *See* K. Thomson Letter to D. Elliott (filed Sept. 30, 2013) (noting that "the SIP contained no representation about upgrading all DM&E track to Class 3 standards," that FRA's "review of its records supports CP's assertion [that it made no such representation]," and that "FRA regrets the overgeneralization in its July 3, 2008 letter related to the track upgrades contemplated by CP."). The record is thus clear that CP never made a commitment to upgrade all DM&E track to Class III standards. Accordingly, there is no relevance to listing what actions CP may have taken to correct the FRA's incorrect statement that CP had made such a commitment. CP further objects to the extent that this Request encompasses information protected by the attorney-client privilege and the attorney work product doctrine.

Interrogatory No. 5

Please identify, and describe in detail, any communications CP had with the FRA, or the United States Department of Transportation, relating to FRA's statement that CP "had committed . . . to upgrade all DM&E track to FRA Class III standards."

ANSWER: CP objects to this Interrogatory to the extent that it assumes the truth of facts that are contrary to the record and is not relevant to any issue in this proceeding. FRA has made clear that CP did not, in fact, commit to upgrade all DM&E track to FRA Class III standards.

See K. Thomson Letter to D. Elliott (filed Sept. 30, 2013) (noting that “the SIP contained no representation about upgrading all DM&E track to Class 3 standards,” that FRA’s “review of its records supports CP’s assertion [that it made no such representation],” and that “FRA regrets the overgeneralization in its July 3, 2008 letter related to the track upgrades contemplated by CP.”). The record is thus clear that CP never made a commitment to upgrade all DM&E track to Class III standards. Accordingly, there is no relevance to identifying whether CP and FRA had any communications related to the FRA’s incorrect statement that CP made such a commitment. Moreover, the State’s request for “any communication” is overly broad and unduly burdensome, to the extent that it would require CP to review literally every letter, correspondence, email, notes of telephone conversations, and other forms of communication with FRA over the entire five-year SIP implementation process in order to provide a response.

Interrogatory No. 6

Please identify, and describe in detail, any communications CP had with the STB relating to FRA’s statement that CP “had committed . . . to upgrade all DME track to FRA Class III standards.”

ANSWER: CP objects to this Interrogatory to the extent that it assumes the truth of facts that are contrary to the record and is not relevant to any issue in this proceeding. FRA has made clear that CP did not, in fact, commit to upgrade all DM&E track to FRA Class III standards. *See* K. Thomson Letter to D. Elliott (filed Sept. 30, 2013) (noting that “the SIP contained no representation about upgrading all DM&E track to Class 3 standards,” that FRA’s “review of its records supports CP’s assertion [that it made no such representation],” and that “FRA regrets the overgeneralization in its July 3, 2008 letter related to the track upgrades contemplated by CP.”). The record is thus clear that CP never made a commitment to upgrade all DM&E track to Class III standards. Accordingly, there is no relevance to identifying whether CP and the STB had any communications related to the FRA’s incorrect statement that CP had made such a commitment.

Interrogatory No. 7

Please identify, and describe in detail, any studies or other analyses prepared by CP concerning the costs to upgrade all DME System track, or portions thereof, to FRA Class 3 standards.

ANSWER: CP objects to this Interrogatory to the extent it requires a special study that CP is not required to conduct. CP further objects to this Interrogatory to the extent that it is not relevant to any issue in this proceeding. FRA has made clear that CP did not, in fact, commit to upgrade all DM&E track to FRA Class III standards. *See* K. Thomson Letter to D. Elliott (filed Sept. 30, 2013) (noting that “the SIP contained no representation about upgrading all DM&E track to Class 3 standards,” that FRA’s “review of its records supports CP’s assertion [that it made no such representation],” and that “FRA regrets the overgeneralization in its July 3, 2008 letter related to the track upgrades contemplated by CP.”). The record is thus clear that CP never made a commitment to upgrade all DM&E track to Class III standards. Accordingly, there is no relevance to identifying whether CP made any studies of this issue. Subject to and without waiving this objection and the General Objections, CP responds that it will produce business records or other documents from which the answer to this Interrogatory can be derived or ascertained, to the extent that any exist and can be identified after a reasonable search. *See* 49 C.F.R. § 1114.26(b). CP also refers the State to filings and decisions in Finance Docket No. 33407 that may reference studies of the costs necessary to upgrade DME lines.

RESPONSES TO DOCUMENT PRODUCTION REQUESTS

Request for Production No. 1

For each year 2008 through the present, please produce the timetables covering the DME System.

RESPONSE: Subject to and without waiving the General Objections, CP responds that it will produce non-privileged, responsive documents in its possession, to the extent that they can be located in a reasonable search.

Request for Production No. 2

For each year 2008 through the present, please produce the track charts (condensed track profiles) covering the DME System.

RESPONSE: Subject to and without waiving the General Objections, CP responds that it will produce non-privileged, responsive documents in its possession, to the extent that they can be located in a reasonable search.

Request for Production No. 3

For each year 2008 through the present, please produce detailed maps and inventories by milepost of the DME System that show the FRA class of track.

RESPONSE: Subject to and without waiving the General Objections, CP responds that it will produce non-privileged, responsive documents in its possession, to the extent that they can be located in a reasonable search.

Request for Production No. 4

Please produce the source documents CP utilized to prepare (i) the FRA class of track chart reproduced in Exhibit DMD-2, page 7 to South Dakota's August 2013 Petition and (ii) the FRA class of track maps reproduced in Exhibit DMD-2 at 8-9 in South Dakota's August 2013 Petition.

RESPONSE: Subject to and without waiving the General Objections, CP responds that it will produce non-privileged, responsive documents in its possession, to the extent that they can be located in a reasonable search.

Request for Production No. 5

For each year 2008 through the present, please produce density charts for the DME System.

RESPONSE: Subject to and without waiving the General Objections, CP responds that it will produce non-privileged, responsive documents in its possession, to the extent that they can be located in a reasonable search. CP notes that density charts for the year 2013 are not yet available at this time.

Request for Production No. 6

Please produce documents sufficient to show the following for each capital investment which exceeded \$10,000 (USD) in cost and was completed on the DME System by CP and/or DME, or an outside contractor acting on CP and/or DME's behalf, between January 1, 2008 to present:

- i. The location(s) of the project;
- ii. The date the project was started;
- iii. The date the project was completed.
- iv. All invoices paid and any summaries of those invoices; and
- v. An accounting of any portion of each project not paid for by CP and/or DME (i.e., contributions from governmental entities, industries or other third-parties).

RESPONSE: CP objects to South Dakota's request as overbroad and unduly burdensome. In particular, the production of "[a]ll invoices paid and any summary of those invoices" would be enormously time-consuming, likely requiring several person-months of effort. CP further objects to South Dakota's request for invoices because it is not reasonably calculated to lead to the discovery of admissible evidence. Specifically, many invoices that would be responsive to this request are invoices that reflect bulk purchases of materials that were used in both capital and noncapital projects, and both on DME and other CP lines. While technically responsive, such invoices are worthless for purposes of determining CP's amount of spending on capital projects on DME. Moreover, the production of invoices is duplicative and unnecessary. CP's electronic records provide ample detail on its capital investments on the

DME, and production of invoices would be entirely duplicative of that data. CP further objects to the extent that this Request calls for a special study. Subject to and without waiving these objections and the General Objections, CP responds that it will produce non-privileged documents in its possession responsive to subparts (i), (ii), (iii), and (v), to the extent that they can be located in a reasonable search. As for subpart (v), CP notes that the capital investment data it intends to produce will only include CP investment costs and will not include any amounts paid for by other parties.

Request for Production No. 7

To the extent documents concerning a capital investment on the DME System were not produced in response to Request for Production No. 6 (e.g., the capital investment was less than \$10,000 (USD), please produce documents sufficient to show, by calendar year, starting in calendar year 2008 to the present: (i) each capital investment CP and/or DME made in the DME System; (ii) the location(s) of each such capital investment; (iii) the amount expended for each such capital investment; (iv) the start date of the project; and (v) the end date of the project.

RESPONSE: CP objects to South Dakota's request as overbroad and unduly burdensome. CP objects to the extent that this Request calls for a special study. Subject to and without waiving this objections and the General Objections, CP responds that it will produce non-privileged, responsive documents in its possession, to the extent that they can be located in a reasonable search. CP notes that it only capitalizes projects involving expenditures in excess of \$5,000. Therefore, the capital investment data that it will be producing to South Dakota understates the total amount invested by CP to improve DME lines.

Request for Production No. 8

For the DME System facilities located west of Pierre, SD, please produce documents sufficient to show, by calendar year, starting in calendar year 2004 and ending in calendar year 2008: (i) each capital investment CP and/or DME made; (ii) the location of each such capital investment; (iii) the amount expended for each such capital investment; (iv) the start date of the project; and (v) the end date of the project.

RESPONSE: CP objects to this Request as not reasonably calculated to lead to the discovery of admissible evidence to the extent it seeks information on investments made before CP acquired control of DME. Such information is not relevant to the issue raised by its Petition—*i.e.*, whether CP has fulfilled the representations it made when it acquired control over DME. Moreover, production of DME information from the pre-acquisition period would be unduly burdensome, for most of the requested information from time periods before CP’s control over DME is not reasonably available from CP’s computer systems.

Request for Production No. 9

Please produce all documents containing communications from 2007 to present between CP and the FRA relating to actual or planned capital investments in the DME System from 2007 to present.

RESPONSE: CP objects to South Dakota’s request for “all communications” relating to capital investments as overbroad and unduly burdensome. The State’s sweeping request for “all communications” with FRA is far beyond the scope of this proceeding. The State’s Petition identified specific categories of “Requested Investment Information” in Attachment 1, which it characterized as “a very modest set of requests specifically tailored to the facts of this case.” Petition at 31. The STB’s order granting the State discovery rights plainly did not authorize the State to expand the scope of that requested discovery into a broad-based fishing expedition for “all communications.” Moreover, compliance with the State’s request would require substantial and burdensome searches that would require CP to review literally every letter, correspondence, email, notes of telephone conversations, and other forms of communication with FRA over the entire five-year SIP implementation process in order to identify responsive documents. And any information in those files relating to CP’s capital investment spending would be entirely duplicative of the electronic records on CP’s capital investments on the DME that CP intends to produce.

Request for Production No. 10

Please produce all documents containing communications from 2007 to present discussing the capital investment representations CP made in F.D. No. 35081, except public filings CP has made at the STB in F.D. No. 35081.

RESPONSE: CP objects to South Dakota’s request for “all documents containing communications” with any party relating to capital investment representations as massively overbroad and unduly burdensome. The State’s sweeping request for “all documents containing communications” is far beyond the scope of this proceeding. The State’s Petition identified specific categories of “Requested Investment Information” in Attachment 1, which it characterized as “a very modest set of requests specifically tailored to the facts of this case.” Petition at 31. The STB’s order granting the State discovery rights plainly did not authorize the State to expand the scope of that requested discovery into a broad-based fishing expedition for all communications with literally anyone. Moreover, compliance with the State’s request would require substantial and burdensome searches of email and correspondence files, and any information in those files relating to CP’s capital investment spending would be entirely duplicative of the electronic records on CP’s capital investments on the DME that CP intends to produce. CP also objects to this Request to the extent that it seeks information that is protected by the attorney-client privilege and/or the work product doctrine.

Request for Production No. 11

Please produce documents prepared prior to the DME Acquisition Date sufficient to show the annual amounts DME had budgeted for capital investments to be made on the DME System for each calendar year after 2008.

RESPONSE: CP objects to this Request as not reasonably calculated to lead to the discovery of admissible evidence to the extent it seeks information on investments made before CP acquired control of DME. Such information is not relevant to the issue presented in the State’s Petition—*i.e.*, whether CP has fulfilled the representations it made when it acquired

control over DME. Subject to and without waiving this objection and the General Objections, CP responds that it will produce non-privileged, responsive documents in its possession, to the extent that they can be located in a reasonable search.

Request for Production No. 12

Please produce (i) native file versions (e.g., Excel files) of Attachments 2, 3 and 4 of CP's 2013 Reply and (ii) all documents (including spreadsheets underlying and/or relied upon) used to develop the calculations shown in Attachments 2, 3 and 4 of CP's 2013 Reply.

RESPONSE: CP objects to this Request to the extent that it seeks information that is protected by the attorney-client privilege and/or the work product doctrine. Subject to and without waiving this objection and the General Objections, CP responds that it will produce non-privileged, responsive documents in its possession, to the extent that they can be located in a reasonable search.

Request for Production No. 13

Please produce all documents provided to potential purchasers of the DME System west of Tracy, MN that reference capital investments that CP has made, or planned to make, on the DME System west of Tracy, MN.

RESPONSE: CP objects to this Request as irrelevant and unduly burdensome. What documents CP may have chosen to provide to potential purchasers of the DME System are not relevant to the issue presented in the State's Petition—*i.e.*, whether CP has fulfilled the representations it made when it acquired control over DME. Subject to and without waiving these objections and the General Objections, CP responds that it will produce non-privileged, responsive documents in its possession, to the extent that they can be located in a reasonable search.

Request for Production No. 14

Please produce all documents provided to potential purchasers of the DME system west of Tracy, MN that reference CP's capital investment representations in F.D. No. 35081.

RESPONSE: CP objects to this Request as irrelevant and unduly burdensome. What documents CP may have chosen to provide to potential purchasers of the DME System are not relevant to the issue presented in the State’s Petition—*i.e.*, whether CP has fulfilled the representations it made when it acquired control over DME. Subject to and without waiving these objections and the General Objections, CP responds that it will produce non-privileged, responsive documents in its possession, to the extent that they can be located in a reasonable search.

Request for Production No. 15

Please produce documents sufficient to show the [REDACTED] which is referenced on page 8, item F.h.6 of Attachment 9 to CP’s 2013 Reply.

RESPONSE: CP objects to this Request as irrelevant and unduly burdensome.

Documents related to particular [REDACTED] are not relevant to the issue presented in the State’s Petition—*i.e.*, whether CP has fulfilled the representations it made when it acquired control over DME.

Request for Production No. 16

Under *Alternative Methods of Accounting for Railroad Track Structures*, 367 I.C.C. 157, 180 (1983), CP is required to submit a standard “unit of property” that distinguishes between when a certain cost should be expensed or capitalized. Please produce CP’s most recent, STB-approved, property units and the supporting information and data for those units.

RESPONSE: Subject to and without waiving the General Objections, CP responds that it will produce non-privileged, responsive documents in its possession, to the extent that they can be located in a reasonable search.

Request for Production No. 17

Please produce documents sufficient to show any reductions, credits or deferrals received and/or requested by CP in the ad valorem or personal property taxes payable and/or owed by CP to any state, county or municipality as a result of any capital investment made on the DME System from 2008 to present.

RESPONSE: CP objects to this Request as not reasonably calculated to lead to the discovery of admissible evidence, overbroad, and unduly burdensome. Information about CP's taxes is not relevant to the issue presented in the State's Petition—*i.e.*, whether CP has fulfilled the representations it made when it acquired control over DME. Moreover, any marginally relevant information in CP's tax filings related to particular capital investments would be completely duplicative of the capital investment data that CP is producing.

Request for Production No. 18

Please produce all documents containing communications from 2007 to the present between CP and the FRA relating to the safety of train operations on the DME System.

RESPONSE: CP objects to South Dakota's request for "all communications" relating to capital investments as overbroad and unduly burdensome. The State's sweeping request for "all communications" with FRA is far beyond the scope of this proceeding. The State's Petition identified specific categories of "Requested Investment Information" in Attachment 1, which it characterized as "a very modest set of requests specifically tailored to the facts of this case." Petition at 31. The STB's order granting the State discovery rights plainly did not authorize the State to expand the scope of that requested discovery into a broad-based fishing expedition for "all communications." Moreover, compliance with the State's request would require substantial and burdensome searches that would require CP to review literally every letter, correspondence, email, notes of telephone conversations, and other forms of communication with FRA over the entire five-year SIP implementation process in order to identify responsive documents. And any information in those files relating to CP's capital investment spending would be entirely

duplicative of the electronic records on CP's capital investments on the DME that CP intends to produce.

Request for Production No. 19

Please produce documents sufficient to show (i) the specific investment projects, quantities and details by subdivision CP determined to undertake based on the planned inspections, assessments, measurements and reviews (collectively "studies") CP cited at page 90 of the document entitled "Applicant's Safety Integration Plan Submitted to Federal Railroad Administration" (filed at the STB in F.D. No. 35081 on Feb. 4, 2008) ("Feb. 2008 SIP"); (ii) the bridge replacement and repair priorities CP stated at page 90 of the Feb. 2008 SIP it planned to establish following completion of inspections and structural assessments; (iii) the status of CP's implementation of the investments CP identified in response to its studies referenced in (i) above; and (iv) the status of CP's implementation of investments in bridge replacement and repairs CP identified in response to the inspections and assessments referenced in (ii) above.

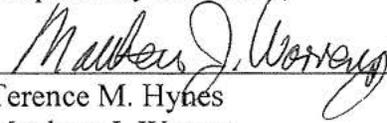
RESPONSE: CP objects to this Request as overbroad and unduly burdensome to the extent it seeks specific analyses and reports on the "status" of individual projects. Such information is not relevant to the issue presented in the State's Petition—*i.e.*, whether CP has fulfilled the representations it made when it acquired control over DME. What is relevant to that issue is CP's aggregate spending levels on DME—not the status of individual projects or CP's "bridge replacement and repair priorities." CP also objects to the extent that this Request calls for a special study. CP also notes that, as it explained in its Reply to South Dakota's Petition, the SIP was modified in consultation with FRA as CP implemented the SIP and learned that a number of bridges could be repaired rather than replaced (thereby making more funds available for needed track repairs). Those modifications resulted in an even greater proportion of CP investments being devoted to track work than was originally contemplated.

Request for Production No. 20

Please produce each study or analysis CP identified in its answer to Interrogatory No. 7.

RESPONSE: Subject to and without waiving the General Objections, CP responds that it will produce non-privileged, responsive documents in its possession, to the extent that they can be located in a reasonable search.

Respectfully submitted,

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

Terence M. Hynes
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Counsel for Canadian Pacific Railway Company

Dated: February 3, 2014

CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing Canadian Pacific Railway Company's Responses and Objections to the State of South Dakota's Interrogatories and Requests for Production of Documents to be served by email and first-class mail this 3rd day of February 2014, on:

Daniel M. Jaffe
Slover & Loftus LLP
1224 17th Street, N.W.
Washington, D.C. 20036-3003


Matthew J. Warten