

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

ENTERED
Office of Proceedings
March 6, 2014
Part of
Public Record
Finance Docket No. 35081 (Sub-No. 2)

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

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**CANADIAN PACIFIC RAILWAY COMPANY’S REPLY TO THE
THE STATE OF SOUTH DAKOTA’S MOTION TO COMPEL**

The State of South Dakota’s Motion to Compel fails to identify any category of information relevant to the issues raised by the State’s August 8, 2013 Petition that Canadian Pacific Railway Company (“CP”) has not provided. When the State initiated this proceeding, it told the Board that it sought only “a very modest set of requests specifically tailored to the facts of this case,” and it appended a list of three items of “Requested Investment Information” that it wished CP to produce.¹ Before the State filed its Motion to Compel, CP produced information responsive to each of those three requests, including detailed documentation of its capital investments on the DME. That information demonstrates definitively that CP invested more than \$465 million on DME lines through the end of 2013, thus proving that CP has more than fulfilled its investment representation.

That should have been the end of this proceeding. But rather than accepting the undeniable truth that CP spent what it said it would, the State has chosen to prolong this proceeding by asking the Board to compel CP to comply with multiple wide-ranging discovery requests that go far beyond the “very modest set of requests” that it told the Board it was seeking. The requests that are the subject of the State’s Motion range from sweeping requests

¹ See Petition of the State of South Dakota Acting By and Through its Department of Transportation to Enforce Canadian Pacific Railway Company’s Investment Representations at 31 & Attachment 1 (hereafter “Petition”).

for “all communications” related to safety issues, to demands that CP produce tax filings so the State can “check” the filings against the capital investment data CP has already produced, to demands that CP produce documents detailing the specifics of individual CP investment projects. These diverse requests have one thing in common: they have no clear purpose or relevance to the only question before the Board: whether CP has complied with the representations it made on the record in Finance Docket No. 35081 (“*CP-DM&E Control Proceeding*”). The Motion to Compel should be denied, and the State should be instructed to either file whatever supplemental evidence it wishes to file or admit that the documentation provided by CP confirms that it complied with its investment representations and withdraw its Petition.

Part I of this Reply provides background on the discovery process in this case; Part II demonstrates that all discovery relevant to the claims in the State’s Petition has already been produced to the State; and Part III discusses each of the individual discovery requests for which the State seeks to compel responses.

I. BACKGROUND OF DISCOVERY

CP’s August 28, 2013 Reply to the State’s Petition (“*August 2013 Reply*”) and its October 18, 2013 Reply to the State’s “Supplement” to its Petition explain the relevant substantive issues in this proceeding, including the representations that CP actually made in the *CP/DME Control Proceeding*, CP’s fulfillment of those representations, and the errors in the State’s claims to the contrary. CP will not repeat that explanation of the substantive issues here, but instead focuses this background section only on issues relevant to the discovery process.

As mentioned above, the State’s Petition enumerated “a very modest set of requests” to which it wanted CP to respond. Petition at 31 & Attachment 1. After the Board allowed the State to take discovery, however, the State served CP with twenty-seven separate discovery requests, most of which went far beyond the “Requested Investment Information” that the State

initially claimed it was seeking. *See* State’s Interrogatories and Requests for Production of Documents (Attachment 1 to Motion to Compel). While CP objected to a number of requests for being irrelevant, overbroad, and outside the scope of this proceeding,² CP produced a substantial volume of responsive information. *See* M. Warren Letter to D. Jaffe (Feb. 12, 2014) (Exhibit 1). As the cover letter to CP’s initial production explained, CP’s production included all of the “Requested Investment Information” enumerated in the State’s Petition:

Today’s production also encompasses the three categories of “Requested Investment Information” that South Dakota listed in Attachment 1 to its August 8, 2013 Petition: (1) detailed information on CP’s capital investments in DME road property . . . ; (2) documents sufficient to show DME’s capital expenditure projections for 2012 and 2013 prior to CP’s acquisition of DME . . . ; and (3) source documents for certain track classification charts.

Exhibit 1 at 1-2.³ The State’s Motion does not question the completeness or sufficiency of any of the information that CP produced, and the State does not argue that CP has not given it the “Requested Investment Information” for which its Petition asked.

Instead, the State completely ignores its initial claim to be seeking “a very modest set of requests specifically tailored to the facts of this case” and argues that it has “broad” discovery rights that entitle it to make sweeping demands for production of all documents that it claims may be relevant. *Compare* Petition at 31 *with* Motion to Compel at 4. The State moves to compel CP to identify and produce literally every communication with FRA over a six-year period about capital investments and safety issues; all tax records that might reflect capital investment data; information on CP’s specific investment plans and priorities; and other

² *See* CP’s Responses and Objections to the State’s Interrogatories and Requests for Production of Documents (Attachment 2 to Motion to Compel).

³ Exhibit 1 notes that density charts were not included in CP’s initial production. Density charts for every year but 2013 were produced on February 14, 2014. *See* Exhibit 2. The 2013 density chart, which was not yet available on February 14, 2014, was produced to the State on March 4, 2014. *See* Exhibit 3.

information that is simply not relevant to whether or not CP fulfilled the investment representations that it made on the record in the *CP/DME Control Proceeding*.

II. THE ONLY DISCOVERY RELEVANT TO THE STATE’S LIMITED CLAIMS HAS BEEN COMPLETED.

A party’s “right to discovery . . . has limits,”⁴ and those limits are defined in part by the scope of the proceeding for which discovery is sought. *See* 49 C.F.R. § 1114.21(a)(1) (discovery only allowed for matters “relevant to the subject matter involved in a proceeding”). A corollary to this rule is that the Board only grants motions to compel when a moving party can “demonstrate a real, practical need for the information” requested. *Total Petrochemicals USA, Inc. v. CSX Transp., Inc.*, STB Docket No. 42121, at 2 (Nov. 24, 2010). Neither idle curiosity nor speculation that requested information might be relevant are sufficient, for “the Board requires ‘more than a minimal showing of potential relevancy’ before granting a motion to compel discovery.” *Id.* (quoting *Potomac Elec. Power Co. v. CSX Transp., Inc.*, 2 S.T.B. 290, 292 (1997)). What a party must demonstrate is that the requested information has some nexus to the issues that the Board must decide in the proceeding; otherwise, a party does not have the requisite “real, practical need for the information.” *Id.* And of course “discovery also may be denied if it would be unduly burdensome in relation to the likely value of the information sought.” *Waterloo Ry. Co. – Adverse Abandonment – Lines of Bangor & Aroostook R.R. Co.*, STB Docket No. AB-124 (Sub-No. 2), at 2 (Nov. 14, 2003).

The State’s Motion to Compel should be denied because it seeks information that would be burdensome to produce and that is, in any event, far beyond the scope of the issues presented for the Board to decide in this proceeding. The State itself defined the scope of this proceeding

⁴ *CF Indus., Inc. v. Kaneb Pipe Line Partners, L.P.*, STB Docket No. 42084, at 2 (Nov. 23, 2004).

in its Petition, when it claimed that CP failed to comply with three alleged “investment representations” made during the *CP/DM&E Control Proceeding*. Thus, the only questions before the Board are (1) what representations did CP make on the public record in the *CP/DME Control Proceeding*; and (2) whether CP complied with those representations. Discovery is only appropriate if it is addressed to those topics. Generalized questions about CP’s safety record, its tax returns, and its internal communications have nothing at all to do with what CP promised to do on the record and whether it fulfilled those promises.

The three alleged “investment representations” that the State claims CP did not fulfill are: (1) a representation to invest \$300 million on the DME; (2) an alleged representation to invest \$300 million over and above DME’s previously planned capital investment budget; and (3) an alleged representation to upgrade the entire DME system to FRA Class III status. All relevant discovery on each of these items is complete and was provided to the State before it filed its Motion to Compel.

First, as CP explained in its *August 2013 Reply* and its Reply to the State’s “Supplement” to its Petition, the only commitment that CP actually made was the first one: to invest \$300 million in capital improvements on the DME. CP produced detailed capital investment data to the State on February 12, 2014 demonstrating that CP has in fact made \$465 million in capital investments on the DME as of the end of 2013. This production included information regarding more than 4,000 individual capital projects, each of which was provided with data on asset groups, locations, and estimated dates of completion. This granular data permits analysis of what particular investments were made at what particular locations on the DME system at what time. The State’s Motion does not question the completeness or sufficiency of that production,

and thus all relevant discovery for the first (and only actual) “investment representation” has been completed.

Second, the State claims that CP committed to spend \$300 million over and above the DME’s initial planned capital investments. CP has shown that this claim is utter nonsense and based on a disingenuous parsing of the Applicants’ Rebuttal Evidence, which in context plainly stated that CP’s commitment was to increase DME’s three-year capital budget to a total of \$300 million, not to increase DME’s capital budget by \$300 million. *See August 2013 Reply* at 17-20. But even if this issue were subject to reasonable dispute (and it is not), discovery would do nothing to shed further light on it. The question before the Board is whether the record in the *CP/DME Control Proceeding* supports the State’s claim that CP made such a “second” investment representation. Moreover, CP has disclosed the total amount of its capital investments on the DME to the State, and if the State wishes to argue that CP’s spending was somehow inconsistent with its public representations in the *CP/DME Control Proceeding*, then the State has all the information it needs to do so—including both detailed data regarding CP’s actual investments and documents showing DME’s capital investment plans before the *CP/DME Control* transaction.

Third, the State continues to insist that CP was bound to upgrade the entire DME to FRA Class III status because of a misstatement by FRA in a letter that was submitted to the Board after CP filed its final brief.⁵ This claim, too, is meritless. Indeed, FRA itself has made clear that CP “did not commit to upgrade the entirety of DM&E’s trackage to FRA Class 3 standards,” that “the SIP contained no representation about upgrading all DM&E track to Class 3 standards,”

⁵ CP’s final brief in the *CP-DME Control Proceeding* was filed on July 2, 2008. The FRA letter on which the State bases its argument was dated July 3, 2008 and not filed on the Board’s docket until July 14, 2008.

and that “FRA regrets the overgeneralization in its July 3, 2008 letter related to the track upgrades contemplated by CP.” K. Thomson Letter to D. Elliott (filed Sept. 30, 2013); *see also August 2013 Reply* at 20-24. FRA’s unambiguous confirmation that CP never committed to upgrade the entire DME to Class III standards plainly settles this issue. More importantly for present purposes, there is no possible discovery that could be relevant to this claim. It is clear that CP did not upgrade the entire DME to Class III status (although CP’s massive investment in DME’s infrastructure did upgrade more than 300 miles of the DME system to Class III standards). *See August 2013 Reply*, V.S. Wilson at 10-11. If the State wishes to argue that CP had some obligation to correct misstatements made by other parties about its commitments and that not doing so somehow transformed such misstatements into commitments binding on CP, then it has everything it needs to make that argument. No further discovery is necessary for the State to make that claim.

In short, the only information relevant to the limited claims in the State’s Petition is the detailed capital investment data that CP provided the State before it filed its Motion to Compel. The State’s expansion of the “very modest set of requests” in its Petition into sweeping requests for communications, tax records, reports on specific projects, and other burdensome requests goes far beyond the “specifically tailored” discovery that the State said that it was seeking, Petition at 31, and the State cannot show that it has a “real, practical need” for the additional information to which its Motion is addressed.

III. THE STATE’S MOTION SHOULD BE DENIED FOR EACH RESPONSE IT SEEKS TO COMPEL.

A. The State’s Interrogatories 3, 4, 5, and 6 About “Why” CP Did Not File a Supplemental Correction to the FRA’s Misstatement Are Irrelevant and Unduly Burdensome.

The State first seeks to compel responses to a series of interrogatories allegedly related to its claim that CP was required to upgrade all DME track to Class III status. As CP explains above—but as the State steadfastly refuses to acknowledge—FRA has made clear that CP never made any representation that it would upgrade the entire DME to Class III status and that the FRA letter on which the State premises its argument was a simple misstatement on FRA’s part. *See* K. Thomson Letter to D. Elliott (filed Sept. 30, 2013). Yet the State argues that CP somehow was required to identify and correct that inaccurate statement at the time of the *CP/DME Control Proceeding*, and that discovery should be compelled so the State can explore “why” CP did not do so. Motion to Compel at 5. Even if the State’s substantive theory had some merit (and it does not), “why” CP did not respond to an inaccuracy in a letter filed after the submission of final briefs in the *CP-DME Control Proceeding* is irrelevant. There is no question that CP did not, in fact, submit a supplemental, post-brief filing addressing the statement in FRA’s July 14, 2008 letter. If the State wishes to argue that CP’s failure to submit such a supplemental filing means that it is now legally required to pay for upgrades that FRA agrees CP never promised to make, the State is free to do so. But it does not have a “real, practical need” to seek discovery that is only directed to “why” CP did not make such a filing.

The State admits that the information it seeks in these interrogatories “was not included in the document request appended to the State’s Petition,” but claims that it did not know CP’s position that the FRA’s letter misstated CP’s investment commitment before CP’s *August 2013 Reply*. Motion to Compel at 8. That claim is false, and the proof of its falsity has been placed

into the record by the State itself. Exhibit 2 to Governor Daugaard's Verified Statement supporting the State's Petition includes a February 21, 2013 letter from CP Senior Vice President, U.S. Operations Douglas N. McFarlane to Governor Daugaard, Senators Johnson and Thune, and Representative Noem that clearly stated that CP had made no commitment to upgrade the entire DME to Class III standards. Accordingly, contrary to the State's assertion that CP raised this issue "for the first time" in the *August 2013 Reply*, the State was well aware of CP's position on this issue at the time it filed its Petition—indeed, a letter stating CP's position was appended to the State's filing.

The State's Motion also gives short shrift to the substantial burden that its interrogatories would impose on CP. The burdens of Interrogatory 5's request that CP identify "all communications" related to its capital investment representations are obvious. As CP explained to the State in its discovery responses, CP would have "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 to provide a response." Motion to Compel Ex. 2 at 8. Interrogatories 3, 4, and 6 are similarly burdensome, as a complete response would require review of the files and the memories of multiple CP personnel—several of whom have left the company—to determine the answers to questions that are ultimately irrelevant to the issues in this proceeding. For example, answering the metaphysical question of when "CP became aware" of the FRA's misstatement would require a massive review of archived records and consultation with multiple CP personnel and outside consultants just to determine whether (or when) anyone at CP became aware of the error in FRA's letter. Determining what "actions . . . CP undertook" upon learning of the misstatement would require review of communications from many individuals who worked with FRA on the SIP implementation process. The burden

of fully responding to these interrogatories far outweighs any negligible relevance they might have to the legitimate issues in the proceeding.

Nevertheless, in the spirit of compromise CP is providing partial responses to Interrogatories 3 through 6. As noted below, in several instances CP is unable to provide a complete and definitive response to the Interrogatory without conducting a burdensome search that is not justified by the negligible relevance of the requested information. As these partial responses should make clear, CP is not using its objections to “hide” any information. On the contrary, CP’s objections are based on the significant burden that complete and definitive answers to the State’s interrogatories entail.

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).

ADDITIONAL RESPONSE: Subject to the objections set forth in CP’s February 3, 2014 responses and objections, CP provides the following additional information: CP was generally aware that the FRA had filed a letter updating the Board regarding its work on the Safety Integration Plan. However, CP is not aware at this time of any CP employee, officer, or outside counsel or consultant who knew that the FRA’s July 14, 2008 letter had misstated CP’s investment commitment before the Board issued its final decision in the *CP/DME Control Proceeding*. A more definitive answer to this interrogatory could not be provided without an exhaustive survey of all the many individuals involved with the *CP/DME Control Proceeding*, many of whom are now former employees. For the reasons detailed above, such an exhaustive survey is unduly burdensome.

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."

ADDITIONAL RESPONSE: Subject to the objections set forth in CP's February 3, 2014 responses and objections, CP provides the following additional information: After CP became aware that the State interpreted FRA's July 3, 2008 letter to mean that CP had committed to upgrade all DM&E track to FRA Class III standards, CP corrected that misinterpretation in conversations with, and letters to, the State, including the February 21, 2013 letter from Douglas McFarlane to Governor Daugaard, Senators Johnson and Thune, and Representative Noem that the State appended to its Petition. A more definitive answer to this interrogatory could not be provided without an exhaustive survey of all the many individuals involved with the *CP/DME Control Proceeding*, which is unduly burdensome for the reasons detailed above.

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."

ADDITIONAL RESPONSE: Subject to the objections set forth in CP's February 3, 2014 responses and objections, CP provides the following additional information: CP is not aware at this time of any communications with the FRA during the course of the *CP/DME Control Proceeding* or the SIP implementation process that related to the FRA's misstatement that CP had committed to upgrade all DME track to Class III before CP became aware in 2013 that the State interpreted FRA's July 3, 2008 letter to mean that CP had committed to upgrade all DM&E track to FRA Class III standards. CP notes that a complete answer to this interrogatory could not be provided without a review of the massive amounts of communications between CP

and FRA during the SIP development and implementation process and discussions with the many CP employees who interacted with the FRA. The burden of such a search far outweighs any negligible relevance of the interrogatory.

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."

ADDITIONAL RESPONSE: Subject to the objections set forth in CP's February 3, 2014 responses and objections, CP provides the following additional information: CP had no communications with the STB regarding the FRA's misstatement that CP "had committed . . . to upgrade all DME track to FRA Class III standards" apart from CP's public filings in STB Docket No. 35081 (Sub-No. 2).

B. The State's Request for Production 10 for Communications About the "Scope" of CP's Public Commitments Is Irrelevant and Overbroad.

Request for Production No. 10 asks CP to produce "all . . . communications from 2007 to present" between CP and the FRA relating to CP's capital investment representations, which the State claims are necessary to define "the scope of CP's investment representations." Motion to Compel at 8. This request is both irrelevant and overbroad. It is irrelevant because the only question before the Board in this proceeding is what CP represented on the record and whether it complied with its representations. The State does not have a "real, practical need" to conduct a fishing expedition into CP's private communications with the FRA; what is relevant here are the public statements on the record in the *CP-DME Control Proceeding*. It should not be forgotten that the condition that the State asks the Board to "enforce" is a condition "to adhere to any and all of the representations [CP] made on the record during the course of this proceeding." *CP/DME Control Decision* at 27 (Sept. 30, 2008) (emphasis added). All that matters is the

public commitments on the record, and nonpublic communications between CP and FRA are irrelevant to the scope and nature of those public commitments. Moreover, compliance with Request for Production 10 would impose a serious burden on CP, which would be required to hunt through years of correspondence with FRA by multiple CP employees during the SIP implementation process for information that is irrelevant to the ultimate issues before the Board.

C. The State’s Requests for Production 9 and 17 for Information to “Check” the Capital Investment Data CP Produced Are Unnecessary and Unduly Burdensome.

Two of the requests for which the State seeks to compel production are unabashedly duplicative requests for capital investment information that has already been provided to the State in a more complete and user-friendly format. Request for Production No. 9 asks for “all communications” with FRA relating to actual or planned capital investments on the DME, and Request for Production No. 17 asks CP to produce tax records that might reflect capital investments. The State has no need—and certainly no “real, practical need”—for alternative data sources for the capital investment data that it already possesses. Parties do not have a right to seek duplicative discovery. *See, e.g., Trailer Bridge, Inc. v. Sea Star Lines, LLC*, STB Docket No. WCC-104, at 2 (Oct. 27, 2000) (discovery can be denied where “evidence is available through less intrusive means”). Put differently, now that the State has comprehensive data detailing all of CP’s capital investments on the DME, what is the value of knowing what particular capital investments CP discussed with FRA or how particular capital investments were reflected in CP’s tax returns?

The State’s Motion provides no independent justification for Request for Production 9, instead choosing to group it with the interrogatories discussed above.⁶ And there is plainly no

⁶ It is not clear why the State grouped Request for Production 9 with interrogatories that address different issues. But to the extent that the State views Request for Production No. 9 as a way to

justification for requiring CP to produce communications with FRA about capital investments when CP has already provided the State with an electronic set of data detailing its actual capital investments. CP should not be required to sift through years of communications with the FRA to give the State investment information that it already has.

In the same vein, the State's request for tax records to "check" CP's capital investment representations cannot be justified. In the first place, it is not at all clear how tax records could be used to "check" the accuracy of CP's "electronic data collection." Moreover, the suggestion that the State is entitled to pursue duplicative discovery because it needs to "check" the accuracy of internal records maintained by CP in the normal course of business is outrageous. The detailed information provided to the State is the same source that CP used to develop the capital investment data submitted to the Board with CP's Reply. That Reply was supported by a verified statement sponsoring the capital investment data and declaring under oath that the information submitted is true and correct. The State has articulated no grounds to question the truth of that testimony or the accuracy of the internal investment data that CP provided to it.

D. The State's Requests for Production 15, 18 and 19 for Information Related to Statements In CP's Reply Are Outside the Scope of this Proceeding and Unduly Burdensome.

Three of the requests for which the State seeks to compel a response are so far afield that the State does not even try to argue their relevance to the claims in its Petition. First, Requests for Production 15 and 19 seek detail on certain internal CP capital investment documents on the theory that such data "is relevant to the issue of whether CP met its own internal capital investment targets." Motion to Compel at 11. But the only issue here is whether CP complied with its commitments on the record in the *CP-DME Control Proceeding*; the details of how CP's

determine "why" CP did not file a correction to the FRA's misstatement, that theory does not have any relevance for the reasons discussed above.

ultimate capital investment spending matched up with its internal planning are irrelevant. And the State's argument that it needs "location-specific investment" information to determine whether CP made investments that benefited South Dakota shippers is baffling. The investment data furnished in discovery contains location-specific investment information from which the State can see precisely where CP made its investments in South Dakota and other states. Moreover, the Highly Confidential investment information appended to CP's *August 2013 Reply* (which has been available to the State's outside counsel for more than six months) similarly provided detailed information for fifteen separate types of capital investments both by state and (more granularly) by property section. *See August 2013 Reply Exs. 2-4.*

Second, the State attempts to justify its stunningly broad request for all "communications from 2007 to the present between CP and FRA relating to the safety of train operations on the DME System" on the theory that CP "raised the safety issue." Motion to Compel at 12. In the first place, all CP did to "raise the safety issue" was to point out the significant decline in FRA-reportable train accidents on the DME since CP acquired control and the fact that FRA itself informed the State that "CP has greatly improved the overall safety of the former DM&E." *August 2013 Reply* at 14-15. The notion that the mere mention of these facts authorized broad discovery into "the safety issue" is ludicrous. Moreover, the State's Request is extraordinarily burdensome, for it would require a massive search for more than six years of safety-related communications between CP and the primary agency responsible for rail safety. The State does not even attempt to explain how this information would relate to the claims set forth in its Petition, and its motion to compel this unnecessary production should be denied.

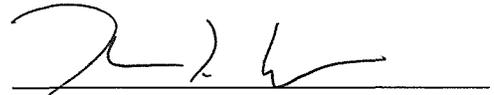
E. The State Has Not Justified Its Demand for a Privilege Log, and It Should Be Denied.

Finally, the State demands that CP produce a privilege log, but the State does not identify any particular need for a privilege log in this case. Instead, the State simply says that a privilege log must be provided because the State requested one in its discovery instructions. *See* Motion to Compel at 12-13. The Board does not “routinely require the production of a privilege log” and typically only does so in situations where it is possible that a privilege may have been waived or where “unique circumstances make knowledge of the existence of privileged material important.” *Ballard Terminal R.R. Co., L.L.C. – Acquisition and Operation Exemption – Woodinville Subdivision*, Docket No. 35731, at 5 (Aug. 22, 2013); *Reasonableness of BNSF Ry. Co. Coal Dust Mitigation Tariff Provisions*, STB Docket No. 35557, at 7-8 (June 25, 2012). The State has done nothing to demonstrate any “unique circumstances” here that would make production of a privilege log appropriate; instead, its position is that it should receive a privilege log simply because it asked for one. To grant the State’s request would effect a significant change in established Board practice under which privilege logs would become the rule and not the exception. Such a significant change would increase litigation costs and burdens for all parties involved in Board proceedings, and the Board should not make it.

IV. CONCLUSION.

For the reasons stated above, the State’s Motion to Compel should be denied in its entirety.

Respectfully submitted,



Terence M. Hynes
Matthew J. Warren
Hanna M. Chouest
Sidley Austin LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
(202) 736-8711 (fax)

Counsel to Canadian Pacific Railway Company.

Dated: March 6, 2014

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of March, 2014, I caused a copy of Canadian Pacific Railway Company's foregoing Reply in Opposition to Motion to Compel of the State of South Dakota to be served on the following parties by first class mail, postage prepaid or more expeditious method of delivery:

John H. LeSeur
Daniel M. Jaffe
Stephanie M. Archuleta
Slover & Loftus LLP
1224 Seventeenth Street, N.W.
Washington, D.C. 20036

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


Matthew J. Warren

EXHIBIT 1



SIDLEY AUSTIN LLP
1501 K STREET, N.W.
WASHINGTON, D.C. 20005
(202) 736 8000
(202) 736 8711 FAX

mjwarren@sidley.com
(202) 736 8996

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GENEVA	SAN FRANCISCO	

FOUNDED 1866

February 12, 2014

By Hand Delivery

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

Re: Canadian Pacific Railway Co. et al.—Control—Dakota, Minnesota & Eastern
Railroad Corp., STB Finance Docket No. 35081 (Sub-No. 2)

Dear Dan:

Enclosed are two disks containing documents that Canadian Pacific Railway Company (“CP”) is producing in response to the State of South Dakota’s Interrogatories and Requests for Production of Documents in the above-referenced proceeding. The documents on CP-SD-HC-DVD-01, which include pdf pages CP-SD-HC-00001 through CP-SD-HC-00238, are designated Highly Confidential pursuant to the September 21, 2007 Protective Order issued by the Surface Transportation Board in Docket Number 35081 (“Protective Order”), and they should be treated accordingly. The documents on CP-SD-C-DVD-02, which include pdf pages CP-SD-C-00239 through CP-SD-C-01390, are designated Confidential pursuant to the Protective Order and should be treated accordingly.

The enclosed productions include CP’s responses to the following South Dakota requests: Interrogatory 1; Request for Production (“RFP”) 1; RFP 2; RFP 3; RFP 4; RFP 6; RFP 7; RFP 11; RFP 12; RFP 13; RFP 14; and RFP 16. CP notes that it has not located any studies responsive to Interrogatory 7 and the corresponding RFP 20.

Today’s production also encompasses the three categories of “Requested Investment Information” that South Dakota listed in Attachment 1 to its August 8, 2013 Petition: (1) detailed information on CP’s capital investments in DME road property (see “Capital Investment Data” folder on CP-SD-HC-DVD-01¹); (2) documents sufficient to show DME’s capital expenditure

¹ Capital investment data has been provided in three files that correspond to the three time periods for which South Dakota requested an accounting of capital investment data: (1) November 2008 to the present (Int. 1); (2) January 2008 to the present (RFPs 6 & 7); and (3) January 2008 through July 2013 (RFP 12).



Daniel M. Jaffe
February 12, 2014
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projections for 2012 and 2013 prior to CP's acquisition of DME (see "New York Management Presentation.pdf" on CP-SD-HC-DVD-01); and (3) source documents for certain track classification charts (see the track charts and timetables being produced today on CP-SD-C-DVD-02).

As I mentioned in our conversation this morning, CP is still locating the density charts that South Dakota requested in RFP 5. CP expects to produce the density charts before the close of discovery.

Sincerely,

A handwritten signature in black ink, appearing to read "M. J. Warren", written over a horizontal line.

Matthew J. Warren

Enclosures

EXHIBIT 2



SIDLEY AUSTIN LLP
 1501 K STREET, N.W.
 WASHINGTON, D.C. 20005
 (202) 736 8000
 (202) 736 8711 FAX

mjwarren@sidley.com
 (202) 736 8996

BEIJING	HONG KONG	SHANGHAI
BOSTON	HOUSTON	SINGAPORE
BRUSSELS	LONDON	SYDNEY
CHICAGO	LOS ANGELES	TOKYO
DALLAS	NEW YORK	WASHINGTON, D.C.
FRANKFURT	PALO ALTO	
GENEVA	SAN FRANCISCO	

FOUNDED 1866

February 14, 2014

By Hand Delivery

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

Re: Canadian Pacific Railway Co. et al.—Control—Dakota, Minnesota & Eastern
 Railroad Corp., STB Finance Docket No. 35081 (Sub-No. 2)

Dear Dan:

The enclosed disk contains documents that Canadian Pacific Railway Company (“CP”) is producing in response to the State of South Dakota’s Interrogatories and Requests for Production of Documents (“Discovery Requests”) in the above-referenced proceeding. The documents on CP-SD-C-DVD-03 are designated Confidential pursuant to the September 21, 2007 Protective Order issued by the Surface Transportation Board in Docket Number 35081 (“Protective Order”), and they should be treated accordingly.

CP-SD-C-DVD-03 contains density charts for 2008, 2009, 2010, 2011, and 2012 that CP is producing in response to South Dakota Request for Production 5. As CP noted in its Responses and Objections to South Dakota’s Discovery Requests, the density chart for 2013 is not yet available. CP expects that the 2013 density chart will be completed soon, and CP will produce the 2013 density chart as soon as it is available.

Sincerely,

A handwritten signature in black ink, appearing to read "M. J. Warren".

Matthew J. Warren

Enclosure

EXHIBIT 3



SIDLEY AUSTIN LLP
 1501 K STREET, N.W.
 WASHINGTON, D.C. 20005
 (202) 736 8000
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 LOS ANGELES
 NEW YORK
 PALO ALTO
 SAN FRANCISCO

SHANGHAI
 SINGAPORE
 SYDNEY
 TOKYO
 WASHINGTON, D.C.

FOUNDED 1866

March 4, 2014

By Hand Delivery

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

Re: Canadian Pacific Railway Co. et al.—Control—Dakota, Minnesota & Eastern
 Railroad Corp., STB Finance Docket No. 35081 (Sub-No. 2)

Dear Dan:

The enclosed disk contains a document that Canadian Pacific Railway Company (“CP”) is producing in response to the State of South Dakota’s Interrogatories and Requests for Production of Documents (“Discovery Requests”) in the above-referenced proceeding. The document on CP-SD-C-DVD-04 is designated Confidential pursuant to the September 21, 2007 Protective Order issued by the Surface Transportation Board in Docket Number 35081 (“Protective Order”), and it should be treated accordingly.

CP noted in its February 14, 2014 production of density charts that the density chart for 2013 was not available at that time. 2013 density information recently became available, and it is enclosed on CP-SD-C-DVD-04. The year 2013 density information that CP is producing to the State constitutes the best information that CP has at this date. CP notes that 2013 density information has not been fully verified as of this date and that it remains subject to change.

Sincerely,

A handwritten signature in black ink, appearing to read "M. J. Warren".

Matthew J. Warren

Enclosure