

BEFORE THE
SURFACE TRANSPORTATION BOARD

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

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

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Dated: October 18, 2013

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Canadian Pacific Railway Company and its subsidiary, Dakota, Minnesota & Eastern Railroad Corporation (“DME”) (referred to collectively hereinafter as “CP”) submit this response to the Supplement to the Petition of the State of South Dakota Acting By and Through Its Department of Transportation to Enforce Canadian Pacific Railway Company’s Investment Representations, filed in the above-captioned proceeding on September 20, 2013 (the “SDDOT Supplement”).¹ Based upon what it characterizes as “new information, not available to the State when it filed its Petition” (SDDOT Supplement at 1), SDDOT reiterates its request that the Board order CP to submit “investment documentation sufficient to show its engineering capital investments in DME” as well as “a verified filing addressing CP’s compliance with the investment representations it made (or were attributed to it),” and that the Board thereafter establish a schedule for interested parties to “comment on CP’s documentation and compliance filing,” and “issue an appropriate enforcement decision.” SDDOT Petition at 1–2. However,

¹ The SDDOT Supplement was filed on September 20, 2013. Under the Board’s regulations at 49 C.F.R. § 1104.13, CP’s Reply to the SDDOT Petition would have been due on or before October 10, 2013. However, in response to the Federal Government shutdown on October 1, 2013, the Board announced that it would not receive filings, and that all filing deadlines were tolled, for the duration of the shutdown. Accordingly, this Reply is timely.

neither SDDOT's original Petition nor its Supplement establishes any legal or factual basis to support the requested relief.

As an initial matter, SDDOT's Supplement contains no "new information"—rather, it consists entirely of commentary (and rebuttal argument) regarding information presented by CP in its Reply to the SDDOT Petition. SDDOT's assertion that its Supplement is not a prohibited "reply-to-a-reply" simply because it "addresses information that was not available to the State at the time it filed its Petition" (SDDOT Supplement at 6–7) is incorrect. Reply filings routinely contain information that was not known to the opposing party prior to the filing of the Reply—indeed, if Replies contained no new information, there would be little point in submitting them. SDDOT's Supplement is a classic "reply-to-a-reply." Nevertheless, CP does not object to the Board accepting the SDDOT Supplement, so long as the Board also accepts this Reply to the Supplement.

More fundamentally, SDDOT's Supplement (like its original Petition) is predicated on the existence of alleged CP investment commitments that have no basis in the record. SDDOT argues that the Board should bind CP not only to "the representations [it] made on the record" (as required by Condition No. 8 to the *CP/DME Control Decision*),² but also to any representations that "were attributed to it." SDDOT Supplement at 2. Specifically, SDDOT contends that the Board should require CP to upgrade DME's entire 2,500-mile network to FRA Class 3 track standards because FRA (incorrectly) stated in a July 3, 2008 letter to the Board that CP had made such a promise. SDDOT Supplement at 5. However, as CP Witness Wilson explained, "CP never made such a representation to FRA. Nor has FRA ever notified CP that (in FRA's view) CP's obligations under the SIP include a requirement that CP make the capital

² See *CP/DME Control Decision* at 27 (Condition No. 8).

improvements necessary to bring the entire DME system up to Class 3 standards.”³ On September 30, 2013, DOT/FRA confirmed that “the SIP contained no representation about upgrading all DM&E track to Class 3 standards,” that “FRA’s review of its records supports [Witness Wilson’s] assertion” that CP never made such a commitment to FRA, and that “FRA regrets the overgeneralization in its July 3, 2008 letter related to the track upgrades contemplated by CP.”⁴ DOT’s letter puts to rest the notion that CP made any commitment—on or off the record—to upgrade the entire DME network to FRA Class 3 track standards.

Nevertheless, SDDOT makes the extraordinary claim that, even if CP actually made no commitment to upgrade all DME lines, it is nevertheless “estopped from taking a different position” because it did not take steps to correct FRA’s misstatement back in 2008. SDDOT’s estoppel argument is meritless. The notion that a party to an STB proceeding is obligated to correct every erroneous statement contained in a filing by a different party, or be bound by such errors, is ludicrous. Moreover, the cases cited by SDDOT in support of its claim stand for the unremarkable proposition that, where a government agency authorizes a transaction subject to a condition, the parties to the transaction may not consummate it and then initiate legal action to challenge or eliminate the condition. *Kaneb* involved an attempt to lift a dividend restriction imposed by the FSLIC in connection with its approval of a bank merger, after the parties had completed the merger without challenging the condition.⁵ Likewise, the Supreme Court’s

³ See CP Reply at 21, V.S. Wilson at 10.

⁴ See Attachment 1, letter dated September 30, 2013 from Kathryn B. Thomson (DOT) to Hon. Daniel R. Elliott III at 2 (emphasis added). DOT’s letter also notified the Board that “FRA has concluded that CP has fulfilled its safety commitments under the SIP, including the integration of the railroads’ operating practices, engineering, hazardous materials, dispatching and highway-rail grade crossing systems and processes.” DOT’s letter confirms that CP has also fully satisfied Condition No. 5 to the Board’s *CP/DME Control Decision*.

⁵ See *Kaneb Services, Inc. v. Federal Savings and Loan Insurance Corporation*, 650 F.2d 78 (5th Cir. 1981).

decision in *Federal Power Commission v. Colorado Interstate Gas Co.*, 348 U.S. 492 (1955), upon which the *Kaneb* court relied, held that a company cannot “be allowed to attack an officially approved condition” to a merger after consummating the transaction. 348 U.S. at 502 (emphasis added). *Kaneb* and *Colorado Interstate Gas* are clearly inapposite. In this case, the Board did not impose any condition obligating CP to upgrade the entire DME system to FRA Class 3 standards. Rather, the relevant condition required CP to “adhere to any and all of the representations [it] made on the record during the course of this proceeding.”⁶ CP has not challenged that condition, nor does it seek to have it vacated or modified—to the contrary, CP has complied fully with the condition. DOT/FRA’s September 30, 2013 letter to the Board confirms both that CP never represented that it would upgrade all DME lines to Class 3 standards and that CP has satisfied the condition obligating it to cooperate with FRA in implementing the SIP.

In short, SDDOT’s claim that CP should be bound to an alleged promise to upgrade the entire DME system to FRA Class 3 track standards is meritless, and provides no basis for the Board to initiate further proceedings with respect to SDDOT’s Petition.

Nor is SDDOT’s continued insistence that CP promised a “near-term capital infusion of \$300 million ‘over and above DME’s projected capital budget’” (SDDOT Supplement at 4) supported by the record. SDDOT bases this supposed “Second Investment Representation” entirely upon its erroneous interpretation of a single sentence in Applicants’ Rebuttal filing.⁷ SDDOT’s claim that the cited sentence constituted a commitment by CP to invest more than \$300 million to rehabilitate the DME system is flatly contradicted by the final sentence of the very same paragraph, which stated unequivocally that:

⁶ See *CP/DME Control Decision* at 27 (Condition No. 8).

⁷ See CP Reply at 17-20.

“One effect of this additional investment will be to increase total capital spending on improvements to the DME system (previously planned DME capital spending plus additional CPR capital spending) to approximately \$100 million annually in each of the first three years following approval of the transaction.”⁸

Moreover, the sentence upon which SDDOT relies cited directly to portions of the CP/DME Application, Operating Plan and SIP that consistently stated that CP was committing to invest a total of \$300 million to repair and upgrade DME’s track and facilities. Accordingly, the record provides no support for SDDOT’s request that the Board “enforce” a supposed promise by CP to invest more than \$300 million in DME’s infrastructure, or its request that the Board require CP to produce documents proving that it has done so.

Nor do SDDOT’s rebuttal arguments regarding the evidence that CP has submitted to demonstrate that it has complied with its \$300 million investment commitment warrant further proceedings before the Board. For example, SDDOT cites the (supposedly) “new” fact that the engineering capital invested by CP during the first three years following the acquisition (2009-2011) totaled only \$226.8 million. SDDOT Supplement at 3. But CP acknowledged in its Reply that it took an additional year to spend the full \$300 million. As CP Witness Wilson explained, like all Class I railroads, CP deferred a portion of its planned capital spending in 2009-2010 in response to an economic downturn that resulted in a substantial reduction in rail traffic.⁹ At that time, CP apprised FRA of its decision to defer a portion of its previously planned capital spending, and the SIP was amended to reflect that decision.¹⁰ CP fulfilled its investment commitment during 2012 by spending an additional \$84.1 million to repair and improve DME’s

⁸ See CP Rebuttal filed April 18, 2008 at 75 (emphasis added).

⁹ See CP Reply, V.S. Wilson at 5.

¹⁰ See CP Reply, Attachment 6.

track and facilities, raising its total four-year investment in DME to \$311 million.¹¹ And CP has continued to invest in DME, making capital improvements totaling \$32.4 million during the first seven months of 2013 and earmarking an additional \$16.7 million to complete the Corn Lines rehabilitation project during early 2014.¹² Total capital investment in DME's infrastructure from 2008 through July 2013 (not counting the remaining Corn Lines work) is approximately \$405 million.¹³ As these figures demonstrate, CP has more than satisfied its commitment to invest \$300 million to improve the safety and reliability of the DME rail network. The fact that it took four years rather than three (during a severe economic recession) to complete the promised capital work provides no legitimate grounds to find CP in default of its investment commitment or to conduct further proceedings in response to SDDOT's Petition.

CP takes exception to SDDOT's assertion that "there is no way to know whether the information" submitted by CP regarding its investment in DME is "accurate." The investment data were accompanied by the Verified Statement of witness Glen Wilson, CP's Vice President-Safety, Environment & Regulatory Affairs, who sponsored and explained the investment data.

¹¹ See CP Reply, Attachment 4.

¹² See CP Reply at 5–6, V.S. Wilson at 6–7. Completion of the Corn Lines upgrade, which CP originally committed finish by the end of 2013, has been delayed due to the unavailability of sufficient quantities of suitable relay rail. The Corn Lines project will be completed during 2014. See CP Reply at 5.

¹³ SDDOT's carping that "[CP] has not come close to spending the cited \$405 million" because that total includes the funds expended by DME prior to CP's acquisition of control in late 2008 (SDDOT Supplement at 3, n.7) is irrelevant. CP's Reply demonstrates beyond question that CP fully complied with its only investment representation—that it would make available \$300 million to repair and upgrade DME track and facilities. Even discounting the \$61.9 million spent during 2008 prior to CP's assumption of control, total capital investment for the period is more than \$343 million.

Mr. Wilson declared under oath that the information set forth in his testimony was true and correct. SDDOT has not proffered a shred of evidence to suggest otherwise.¹⁴

SDDOT's demand for more detailed information regarding CP's capital investment in DME is ironic, considering that the State neither requested any commitment from CP to invest in DME's lines in South Dakota nor otherwise participated substantively in the *CP/DME Control* proceeding. Nevertheless, the information submitted by CP shows that it spent approximately \$66 million to improve DME's infrastructure in South Dakota even though it was not required to do so.¹⁵ As a result of that investment, virtually all 206 miles of DME main line track between Pierre and the Minnesota border are now at FRA Class 3 standards.¹⁶ A similar upgrade of DME's lines west of Pierre to Class 3 standards is neither economically justified by the traffic volumes moving over those lines nor necessary to meet the service requirements of that traffic.¹⁷ Indeed, in a recent interview, former DME President Kevin Schieffer stated that, absent

¹⁴ SDDOT's suggestion (SDDOT Supplement at 2–3) that CP's disclosure of investment data in this proceeding is analogous to the situation before the Board in *Canadian National Ry. Co. & Grand Trunk Corp. – Control – EJ&E West Co.*, Docket No. 35087 (served Dec. 21, 2010) is specious. In *CN/EJ&E*, the Board fined CN based on evidence that CN reported only a fraction of the rail crossing delays occurring on EJ&E's lines (by excluding delays caused by any reason other than "stopped" trains), and stated that it was not feasible to collect data regarding other types of rail crossing delays even though such information was already in its possession. Moreover, the Board's decision to investigate CN's submission in that case was motivated by complaints from citizens and communities that, based on their observations, CN's reporting of rail crossing delays was clearly understated. By contrast, in the instant case, CP has voluntarily submitted to the Board (and made available to SDDOT's counsel pursuant to the protective order) detailed information regarding the types, locations and cost of the capital investments in DME's infrastructure since 2008. SDDOT has proffered no evidence whatsoever that calls into question the veracity of CP's investment data.

¹⁵ See CP Reply at 12; V.S. Wilson at 7–10, Attachment 3.

¹⁶ See CP Reply, V.S. Wilson at 8.

¹⁷ See CP Reply, V.S. Wilson at 9.

completion of the Powder River Basin expansion, there would not be enough traffic west of Pierre to warrant extensive rehabilitation of that part of the DME system.¹⁸

In any event, CP's Reply to the SDDOT Petition contains detailed information regarding CP's investments in DME's infrastructure during the 2008-2013 period. Attachments 2 through 4 to CP's Reply break down CP's capital expenditures by 15 separate categories (such as track, bridges and culverts, grading, signals & communications facilities, buildings, public improvements, etc.). Attachment 3 identifies the specific dollar amounts spent in each State in which DME operates. Attachment 2 provides even greater geographic detail, breaking down the dollars spent in each of those 15 categories by DME Property Section (and identifying the mileposts included in each Property Section). For example, Attachment 2 shows that, on DME's Black Hills Subdivision, CP spent {{ }} on track work between Milepost 0.0 and Milepost 13.1, {{ }} on track work between Milepost 13.1 and Milepost 168.2, and approximately {{ }} on track work between Milepost 168.2 and Milepost 174.7. Likewise, Attachment 2 shows that CP invested a total of {{ }} on the portion of DME's Huron Subdivision in South Dakota (between Milepost 274.2 and Milepost 362.8), including {{ }} for track work, {{ }} for computer upgrades, {{ }} for fueling stations, {{ }} for signals & communications facilities, {{ }} for bridges and culverts, and smaller amounts for various other types of repairs and improvements. Attachment 4 identifies CP's total engineering capital investment in the DME system (in each of those 15 categories) during each of the years 2008 through July of 2013.

¹⁸ See Attachment 2, Harriman, *DM&E owner spent \$405M on railroad*, ARGUS LEADER, Aug. 29, 2013, at 1-2 (reporting that Schieffer acknowledged that "there was not enough traffic on the line to pay for an extensive rail rehabilitation").

CP respectfully submits that Attachments 2 through 4 to its Reply provide more than sufficient evidence to support a finding that CP has lived up to its \$300 million investment representation. SDDOT's Supplement does not identify what additional evidence it believes would be necessary to "verify" CP's post-acquisition investments in DME (which have already been attested to by the Verified Statement of Witness Wilson). Absent any showing by SDDOT that there is legitimate reason to question the veracity of the information submitted by CP, requiring CP to respond to SDDOT's vague request by producing Authorizations for Expenditure, contracts with vendors or other documents relating to literally hundreds of capital projects undertaken on DME over the past five years would be unduly burdensome and would serve no useful purpose. Nevertheless, if the Board determines that additional information regarding particular expenditures would assist it in resolving the issues raised by the SDDOT Petition, CP of course will provide such information to the Board.

Finally, SDDOT asserts that there is "wide-spread public support for the State's Petition."¹⁹ However, a review of the letters filed in response to the SDDOT Petition indicates that the primary concern of shippers and community groups is the potential impact of a sale of DME's lines west of Tracy, MN to a third party.²⁰ As stated in CP's Reply to the SDDOT Petition, CP has not made any decision regarding whether (or to whom) it might sell any portion

¹⁹ SDDOT Supplement at 7.

²⁰ *See, e.g.*, Statement of the City of Pierre, SD (September 19, 2013) ("CP's announced plans to sell are of great concern to members of our community and the people of South Dakota as well."); Statement of Oahe Grain (September 13, 2013) ("Oahe Grain is strongly opposed to the sale of the CP rail line"); Statement of South Dakota Grain & Feed Association (September 10, 2013) (expressing concern about "the possible sale or lease of the Dakota Minnesota & Eastern Railroad"); Statement of the South Dakota Corn Growers Association (August 27, 2013) ("If the CP sells the 575 miles of rail . . . it would be very unlikely that another party would invest many millions of dollars to bring the line up to safety standards"); Statement of South Dakota Wheat Inc. (September 10, 2013) ("On behalf of the wheat producers across South Dakota, we would like to share our concerns regarding the sale of the Canadian Pacific Rail Line").

of DME's existing rail system. Until such a transaction is proposed and its terms are known, it is premature to speculate about its potential effects.²¹ Moreover, most of the comments that do address the issue of CP's capital investment in DME proceed from the faulty premise that CP did, in fact, agree to upgrade the entire DME network (including all lines in South Dakota) to Class 3 standards.²² The obvious confusion among shippers and communities regarding the nature of CP's investment commitment is attributable to both the bogus claims asserted by SDDOT in its Petition and to inaccurate media reports (based on public statements by State officials).²³ At bottom, the comments filed by shippers and communities urge the Board to require CP to adhere to its investment representations. As CP has amply demonstrated, it has

²¹ See CP Reply at 24.

²² See, e.g., Statement of South Dakota Corn Growers Association (August 27, 2013) ("CP stated in its 2007 plan to acquire the DM&E Railroad that it would invest \$300 million during the first three years into the rail line and upgrade all of that track to Class 3 standards."); Statement of Pennington County, SD (August 20, 2013) (supporting State's petition "to require Canadian Pacific Railroad to demonstrate compliance with the commitments it made for capital improvements and safety compliance for its railroad lines in South Dakota"); Statement of City of Sturgis, SD (September 10, 2013) (presenting resolution endorsing State's petition "to require the CPRR to demonstrate compliance with the commitments which it made for capital improvements and safety compliance on the railroad trackage in South Dakota"); Statement of South Dakota Soybean Association (September 10, 2013) ("CP has not fully completed the upgrades that were agreed upon with the State of South Dakota."); Statement of U.S. Department of Agriculture (September 20, 2013) ("It is important to enforce the investment representations with regard to the former DM&E line, particularly for the line west of Tracy, Minnesota.") (emphasis added).

²³ See Attachment 2, John Lee McLaughlin, *State charges Canadian Pacific with not upgrading line*, RAPID CITY JOURNAL, Sept. 13, 2013 (quoting transportation advisor to Governor Daugaard as saying that CP "promised it would spend \$300 million in the first three years after its acquisition of the DM&E network then another \$172 million for previously budgeted capital improvements for the entire network"); Dirk Lammers, *Canadian Pacific, state at odds over DM&E deal*, AP NEWS, Aug. 29, 2013 (quoting transportation advisor to Governor Daugaard as saying that CP's \$300 million commitment "was supposed to be above and beyond the amount that DME might have otherwise spent, and accusing CP of improperly "counting separate upgrades around Rochester, Minnesota and improvements required by the Iowa Department of Transportation in that state"); Peter Harriman, *DM&E owner spent \$405M on railroad*, ARGUS LEADER, Aug. 29, 2013 (quoting transportation advisor to Governor Daugaard as accusing CP of "counting the money twice").

complied fully with its commitment to invest \$300 million to repair and upgrade the DME network. Based on the record, there is no need for the Board to conduct further proceedings, or to solicit additional comments, regarding that issue.

CONCLUSION

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

Respectfully submitted,



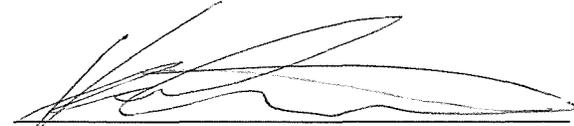
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Counsel for Canadian Pacific Railway Company

Dated: October 18, 2013

CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing Applicants' Response to Supplement to the Petition of the State of South Dakota Acting By and Through Its Department of Transportation to Enforce Canadian Pacific Railway Company's Investment Representations to be served by first class mail, postage prepaid, this 18th day of October 2013, on all parties of record:



Hanna M. Chouest

ATTACHMENT 1



**U.S. Department of
Transportation**
Office of the Secretary
of Transportation

General Counsel

1200 New Jersey Avenue, S.E.
Washington, D.C. 20590

September 30, 2013

234920

ENTERED

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The Honorable Daniel R. Elliott III
Chairman
Surface Transportation Board
395 E. Street, S.W.
Washington, D.C. 20423

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

Dear Chairman Elliott:

The United States Department of Transportation (DOT or Department) and the Federal Railroad Administration (FRA), an operating administration of DOT, write in support of the State of South Dakota's (State) request for full disclosure by the Canadian Pacific Railway Company (CP) of documents that demonstrate that CP has met the financial investment commitments CP made on the record during the course of this proceeding. The Department also wishes to clarify a statement made in a July 3, 2008 letter to the Board from former FRA Administrator Joseph Boardman in connection with the Safety Integration Plan (SIP) filed by CP in the 2008 transaction.

CP made representations in the SIP and on the record outside of the SIP regarding the capital investments CP intended to make in the Dakota, Minnesota & Eastern Railroad Corporation (DM&E) should CP acquire control of DM&E. The Department understands and supports the State's desire for full disclosure to the Board of CP's capital expenditures in DM&E so that the Board and the parties to the proceeding may verify that CP has met each of its financial commitments. In the Department's view, the information that CP has submitted to the Board thus far does not permit such verification and should be supplemented.

In the SIP that CP filed during the course of this proceeding, CP made a general commitment to expend approximately \$300 million to repair and upgrade DM&E's 2,500 miles of track, bridges, and facilities, and to take specific steps to ensure that the operations of DM&E were effectively integrated into CP's.¹ We note that in a letter to the Board dated July 3, 2008, FRA indicated that it would monitor CP's implementation of the SIP with a "special focus" on track improvements, wayside detectors, hazardous materials traffic, highway-rail grade crossings, and

¹ Applicants' SIP Submitted to FRA at 89 (Feb. 4, 2008).

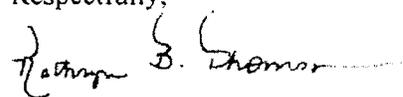
emergency preparedness. In that letter, FRA also indicated that CP had committed to investing approximately \$300 million over the next four years to upgrade "all" DM&E track to FRA Class 3 standards.² The Board took note of this representation in its Decision approving the transaction, and in footnotes, specifically cited FRA's explanation of CP's alleged commitment to invest approximately \$300 million over 4 years to upgrade all DM&E track to Class 3 standards.³ However, the SIP contained no representation about upgrading all DM&E track to Class 3 standards. Furthermore, CP has filed a verified statement from Glen Wilson stating that CP "never" made a representation to FRA that it would upgrade all DM&E track to Class 3 standards, and indicating that the only representation CP made to FRA in the SIP process regarding the upgrading of DM&E track to Class 3 standards was a pledge to upgrade the Rochester-Owatonna segment to Class 3 standards.⁴ FRA's review of its records supports CP's assertion in this regard, and FRA regrets the overgeneralization in its July 3, 2008 letter related to the track upgrades contemplated by CP.

Furthermore, the Department wishes to inform the Board that FRA has monitored CP's compliance with the safety components of the SIP through physical inspections, analysis of safety data, and consultations with CP. As a result of these efforts, FRA has concluded that CP has fulfilled its safety commitments under the SIP, including the integration of the railroads' operating practices, engineering, hazardous materials, dispatching and highway-rail grade crossing systems and processes.

In conclusion, the Department supports the State's request for full disclosure of CP's capital expenditures in the DM&E. The Department also agrees with CP in its assertion in this proceeding that it did not commit to upgrade the entirety of DM&E's trackage to FRA Class 3 standards.

We hope that the Board finds this information helpful. If DOT and FRA can be of any further assistance in this proceeding, please let us know.

Respectfully,



Kathryn B. Thomson
Acting General Counsel

² FRA's track safety regulations divide track into separate classes, depending on the quality of the track, and also specify inspection and maintenance requirements dependent on the class and type of track. Each of FRA's track classes is essentially based on the same foundation, with a set of progressively stricter safety limits as operating speeds increase. The class of track determines the train speed limit on that track (e.g., Class 1 track allows freight trains to operate a maximum speed of 10 mph; Class 2, 25 mph; and Class 3, 40 mph). Track geometry, turnout specifications, and other factors can limit train speeds well below what would be allowed on Class 3 track.

³ Decision at 20 n.33, 21 n.35 (served Sept. 30, 2008).

⁴ CP Reply, Verified Statement of Glen Wilson at 10 (Aug. 28, 2013).

CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the foregoing to be served upon all Parties of Record to this proceeding.


Christopher S. Perry

United States Department of
Transportation

ATTACHMENT 2

DM&E owner spent \$405M on railroad

Written by Peter Harriman

Aug. 29, 2013 |

argusleader.com

Canadian Pacific Railway says it has spent more than \$405 million upgrading tracks, bridges and facilities, easily meeting the \$300 million promise it made when buying the Dakota, Minnesota & Eastern railroad in 2007.

Gov. Dennis Daugaard's office, however, says the company is counting some of those dollars twice and has not addressed concerns the state raised with a petition to the federal Surface Transportation Board, which oversees railroads.

Daugaard earlier this month expressed doubts about Canadian Pacific's investments into the important shipping corridor in light of the company's announcement it plans to sell its line through the state.

Canadian Pacific on Wednesday offered its own lengthy reply to the STB, claiming it spent more than \$405 million, including \$66 million on capital improvements in South Dakota, as well as substantially improving safety and operations on the DM&E line.

"In fulfillment of that commitment, CP/DME have actually spent more than \$405 million in engineering capital on DME's infrastructure since 2008," Canadian Pacific wrote the federal board Wednesday.

Daugaard's transportation policy adviser, Matt Konenkamp, says Canadian Pacific is counting toward that figure \$178 million the STB already had demanded the railroad spend on DM&E rail improvements near Rochester and Owatonna, Minn. Canadian Pacific is counting the money twice, Konenkamp says, and in the company's response to the STB, "there is little discussion of the claim we have pointed out."

CP spokesman Ed Greenberg counters that "our filing to the STB shows we have invested substantially more than the approximately \$300 million in improvement and replacement capital outlined to the STB prior to the purchase. We met our commitment to the STB."

Canadian Pacific's submission to the federal board gives some specific expenditures, but there is no comprehensive list of building projects and purchases to back up the claim.

STB spokesman Dennis Watson says the board now will decide whether to set up a procedural schedule for the parties to submit new evidence or rule on South Dakota's petition "based on the findings that have already been made." There is no timetable.

Greenberg declined to speculate on how the dispute before the STB could affect CP's plans for the DM&E, including any pending sale. But he added that "no decision has been made on the entire expression of interest process we are going through."

He also said "it should be made clear if a decision was made to sell the 660-mile section, it would only be with a party that can provide quality service to shippers and grow the business."

DM&E's goal in seeking to haul Wyoming coal was to create a railroad large enough to justify the capital expense of replacing aging track and bridges, mostly West River. Former DM&E head Kevin Schieffer

said while it was possible to make an operational profit on the existing DM&E, there was not enough traffic on the line to pay for an extensive rail rehabilitation, and without one the railroad ultimately would fail.

While Greenberg declined to say whether that structural shortcoming would continue to exist for anyone who bought the DM&E from Canadian Pacific, Koenkamp pointed out the development of drought-resistant seed is gradually pushing the corn belt west and potentially adding significant new agricultural traffic to the DM&E line.

“That’s a long-term play, obviously,” he said, and the uncertainty CP is creating over the future of the DM&E has a chilling effect on such investment.

“Now people are holding their cards and their breath,” Koenkamp says. “They’re not going to put \$50 million into a shuttle loading facility not knowing the long-term viability of the line.”

Regarding the DM&E line’s future, Koenkamp says of Canadian Pacific, “it would be helpful for them to be communicating with us about their vision and who they want to sell it to.”



State charges Canadian Pacific with not upgrading line

SEPTEMBER 13, 2013 6:30 AM • JOHN LEE MCLAUGHLIN JOURNAL STAFF

State officials are charging that the Canadian Pacific Railway Company has failed to live up to its promise to spend \$472 million to improve a rail system that includes the only direct east-west line that serves western South Dakota.

On Thursday, Gov. Dennis Daugaard met in the nation's capital with the secretary of transportation, the secretary of agriculture and the Federal Railroad Administration to ask the agencies to support his efforts to have the company disclose its investments in the former Dakota, Minnesota and Eastern Rail Corporation, which the company purchased in 2008.

The state also fears the company is planning to sell the section of the line that runs through the state, which officials claim would make it more difficult to ship products to Chicago and other markets in the eastern U.S.

Matt Konenkamp, a policy adviser for the governor's office, said the company promised it would spend \$300 million in the first three years after its acquisition of the DM&E network and then another \$172 million for previously budgeted capital improvements for the entire network, which runs through Wyoming, Nebraska, Missouri, Illinois, Minnesota, Iowa, Wisconsin and South Dakota.

In particular, he said, the company appears to have spent little on the section of line that includes Rapid City.

"As near as we can tell, the line that most affects West River has had no substantive upgrades other than maintenance-type improvements," Konenkamp said.

South Dakota officials have sent a petition to the federal Surface Transportation Board that calls for proof that the money has been spent on promised upgrades. Rapid City and Pennington County have both prepared resolutions to support the state's request.

"I would say that the secretaries were very receptive to listening to our concerns, and we hope to understand soon whether they will take interest in the petition or not," Konenkamp said after the governor's team met with federal officials.

Canadian Pacific, however, disputes the state's claims and said that it has met its financial obligations for the line.

"In fact from 2008 to July of 2013, Canadian Pacific has invested more than \$400 million to improve the safety and efficiency of the former DM&E network," company spokesman Ed Greenberg said. "Clearly for Canadian Pacific, we feel we have met our commitment to the Surface Transportation Board."

Konenkamp said, however, the company is engaging in creative accounting when it says it has spent the \$405 million noted in the company's response to the state's petition.

"To get to that number, they're double counting," he said. "They're counting money that DM&E already

spent. It is in line with good faith and fair dealing that they truly let us know in detail the money that they invested so that we can see with our own eyes whether or not they have met their representations."

Canadian Pacific also said at the time of the purchase that it would provide "direct, single-service" resources to shippers and the communities that rely on the rail system, according to the state's petition.

But South Dakota officials fear that Canadian Pacific will sell the portion of the system that serves South Dakota, "leaving shippers with only marginalized service and fewer competitive options than those that existed when DM&E first began operations in 1986," according to the petition.

If sold, Koenkamp said South Dakota would only have direct access to Minnesota and would have to deal with Canadian Pacific to get access to Chicago or Kansas City, both of which South Dakota now has direct access to.

Greenberg said no decisions have been made about selling the 660-mile section of rail line that crosses South Dakota.

"It should be made clear if a decision was made to sell the 660-mile section, it would only be with a party that can provide quality service to shippers and grow the business," he said.

<http://www.businessweek.com/ap/2013-08-29/cp-says-it-has-met-obligations-from-dm-and-e-purchase>

AP News

Canadian Pacific, state at odds over DM&E deal

By Dirk Lammers August 29, 2013

SIOUX FALLS, S.D. (AP) — Canadian Pacific Railway Ltd. and the state of South Dakota are at odds over whether the railroad has met its obligation to invest \$300 million in upgrades as part of the 2007 purchase of the Dakota, Minnesota & Eastern Railroad.

South Dakota Gov. Dennis Daugaard earlier this month asked the federal Surface Transportation Board to look into whether Canadian Pacific has lived up to its promises as it seeks a buyer for the former DM&E line west of Tracy, Minn.

Canadian Pacific spokesman Ed Greenberg said that the company sent a comprehensive response to the board that shows it has invested substantially more than the \$300 million in improvement and replacement capital it outlined to the agency.

"In fact, from 2008 through July 2013, CP has invested more than \$400 million to improve the safety and efficiency of the former DM&E network," Greenberg said Thursday. "CP believes we have met our commitment to the STB."

But Matt Konenkamp, a policy adviser in the governor's office, said the figures are misleading.

Konenkamp said DM&E was already planning to spend \$172 million on track and bridge upgrades, and the \$300 million was supposed to be above and beyond the amount. Canadian Pacific also seems to be counting separate upgrades around Rochester, Minn., and improvements required by the Iowa Department of Transportation in that state, he said.

"Because the brief is redacted, it's hard to know just exactly whether this money was spent and where it was spent," Konenkamp said.

Greenberg said Canadian Pacific's response to the federal board addresses each of the concerns raised by the state's petition.

Canadian Pacific in 2007 bought 2,500 miles of track and equipment from South Dakota-based DM&E and its subsidiaries for \$1.5 billion.

In December, Canadian Pacific announced that it was looking into the possibility of selling 660 miles of track in South Dakota, Minnesota, Wyoming and Nebraska. The announcement came a day after the company said it was mothballing plans to extend its DM&E network into the Powder River Basin to ship Wyoming coal to power plants in other states because of weakening demand for coal.

The railroad did not directly link the two decisions.

Daugaard said that before DM&E was sold, the line provided shipping service to critical transportation hubs including Minneapolis, Chicago and Kansas City.

Konenkamp said one portion of the track that needs work is the Pierre to Rapid City portion, on which trains can't travel above 10 mph.

"Very little work, as near as we can tell, has been done on that section of the line," he said. "It causes problems for logistics and costs, and things along those lines."

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