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September 20, 2013

BY HAND DELIVERY

Ms. Cynthia Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423-0111



Re: *Canadian Pacific Railway Company, et al. – Control –
Dakota, Minnesota & Eastern Railroad Corp., et al.,
Finance Docket No. 35081* SUB No. 2

Dear Ms. Brown:

Enclosed for filing in the above-referenced docket, please find an original and ten (10) copies of 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.

We have also enclosed an additional copy of this letter and the Supplement to be date-stamped and returned to our messenger. Thank you for your attention to this matter.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'John H. LeSeur'.

John H. LeSeur

Enclosure

234847

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

CANADIAN PACIFIC RAILWAY COMPANY, ET AL. – CONTROL – DAKOTA, MINNESOTA & EASTERN RAILROAD CORP., ET AL.)))))	Finance Docket No. 35081 <i>Sub. No. 2</i>
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**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**

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Dated: September 20, 2013

Attorneys for Petitioner

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

**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**

The State of South Dakota acting by and through its Department of Transportation (“South Dakota” or “State”) files this Supplement to the Petition the State filed on August 8, 2013 requesting that the Surface Transportation Board (“STB” or “Board”) enforce the investment representations made by the Canadian Pacific Railway Company (“CP,” or “CPRC”)¹ in this proceeding.

This Supplement presents the Board with new information, not available to the State when it filed its Petition, which provides additional support for the relief requested by the State. In support hereof, South Dakota states as follows:

1. In its Petition, the State requested the Board to: (i) order CP to produce investment documentation sufficient to show its engineering capital investments

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

in DME;² (ii) direct CP to provide a verified filing addressing CP's compliance with the investment representations it made (or were attributed to it) on the record in this proceeding prior to the Board's approval of CP's acquisition of DME; (iii) permit the public the opportunity to comment on CP's documentation and compliance filing; and (iv) issue an appropriate enforcement decision following receipt of public comments.

2. CP filed a reply ("CP Reply") to the State's Petition on August 28, 2013. In its Reply, CP takes the position that that it has "fully complied" with its investment representations and therefore the State's Petition "should be denied."³

3. CP has not produced any of the documents requested by the State. Without this documentation – documentation only CP possesses – there is no way for the State, the Board, or the public to be able to independently determine and verify the amount, location, and timing of CP's capital investments.

4. Rather than supplying the requested documents, CP presented summary sheets purporting to show levels of investment. In the absence of supporting documentation, there is no way to know whether the information on these sheets is

² "DME" refers to the Dakota, Minnesota and Eastern Railroad Corporation ("DM&E") and DM&E's wholly owned subsidiary the Iowa, Chicago & Eastern Railroad Corporation ("IC&E").

³ CP Reply at 2.

accurate,⁴ but putting that very consequential issue to one side, the undocumented information CP has submitted – which was not available to the State at the time it submitted its Petition – provides additional evidence that the Board should investigate CP’s compliance in the manner requested by the State in its Petition.

5. Prior to its acquisition of DME, CP represented that it would “make available to DME approximately \$300 million in capital for improvements to DME’s track, bridges and other rail facilities in the first three years following approval of the transaction.”⁵ However, CP’s Reply summary sheet data shows that CP expended only \$226.8 million during the first three post-acquisition years (2009, 2010 and 2011).⁶ Thus, CP’s tendered data shows that CP did not come close to meeting its representation to spend \$300 million in the first three post-acquisition years.⁷

⁴ See, e.g., *Canadian Nat’l Ry., et al. – Control – EJ&E W. Co.*, STB Docket No. FD 35087 (“*CN/EJ&E*”) (STB served April 21, 2010), slip op. at 3 (internal carrier documents show “significantly different story” than data contained in carrier summary reports).

⁵ Application by Canadian Pac. Ry., et al. for Approval of Control of Dakota, Minn. & E. R.R., et al., *Canadian Pac. Ry., et al. – Control – Dakota, Minn. & E. R.R.*, FD 35081 (“*CP/DME*”) (filed Oct. 5, 2007) (“Application”), Exhibit 13 at 36.

⁶ CP Reply (Public Version) at Attachment 4 shows that CP expended \$65 million in 2009, \$62.2 million in 2010, and \$86.1 million in 2011. Attachment 4 also says that CP advanced \$13.5 million in 2009 budgeted funds for DME expenditure in 2008. The total, including the CP advanced funds, equals \$226.8 million.

⁷ CP also claims that “[a]s of July 2013, CP had spent a total of \$405 million to repair and upgrade DME’s . . . facilities.” CP Reply at 12. However, CP Reply Attachment 4 shows that CP’s \$405 million total includes approximately \$61.9 million in funds DME spent in 2008 prior to CP’s acquisition of DME. Thus, CP’s own figures show it has not come close to spending the cited \$405 million.

6. Prior to its acquisition of DME, CP also represented that it had “committed to invest at least \$300 million in additional capital (over and above DME’s projected capital budget) over the next several years to upgrade DME’s track and structures.”⁸ CP’s Reply summary sheet data shows that CP did not come close to meeting this representation as well. DME’s pre-acquisition projected capital budgets called for engineering expenditures of approximately \$58 million annually.⁹ CP’s summary sheet shows that, post-acquisition, CP has made DME engineering capital expenditures of approximately \$78 million annually.¹⁰ While CP’s data shows annual capital expenditures that are slightly greater than the pre-acquisition capital expenditures DME budgeted, these expenditures fall far short of CP’s promised near-term capital infusion of \$300 million “over and above DME’s projected capital budget.”¹¹

⁸ Applicant’s Response to Comments and Requests for Conditions and Rebuttal in Support of Application Vol. 1 at 75, *CP/DME* (filed April 18, 2008) (“Applicant’s Response”).

⁹ See Applicants’ Safety Integration Plan Submitted to Federal Railroad Administration (Feb. 4, 2008) at 89. This filing shows that DME had a projected engineering capital budget of \$57.5 million in 2009; \$56.6 million in 2010 and \$58.8 million in 2011. CP has not produced pre-acquisition DME capital budget figures for years after 2011, though the State requested CP do so in its Petition.

¹⁰ CP Reply, Attachment 4. CP’s data shows that it spent \$78.5 million in 2009 (including advanced monies spent in 2008); \$62.2 million in 2010; \$86.1 million in 2011; and \$84.1 million in 2012 – an average of \$78 million annually between 2009 and 2012 ($\$310.9 \text{ million} \div 4$). This data also shows capital spending of only \$32.4 million in 2013 (through July 2013).

¹¹ Applicant’s Response at 75.

7. The Federal Railroad Administration (“FRA”) informed the Board in July 2008 that CP had “committed . . . to upgrade all DM&E track to FRA Class III standards”¹² and the Board expressly relied on “CPRC’s commitment to upgrade all DM&E’s track to FRA Class 3 standards” in its September 2008 decision granting CP’s request to acquire DME.¹³

8. In its Reply, CP states for the first time that CP “never . . . made such a representation to FRA” that it would upgrade all of DME track to Class 3 standards.¹⁴ Assuming that CP’s current statement is accurate, that is hardly the end of the matter. CP never informed the Board in 2008 that it would not upgrade all DME track to Class 3 standards; the Board relied on CP’s Class 3 upgrade commitment in approving CP’s acquisition of DME; and CP is now estopped from taking a different position. *See Kaneb Servs., Inc. v. Fed. Sav. & Loan Ins. Corp.*, 650 F.2d 78, 81 (5th Cir. 1981) (“a party with full knowledge of the facts, which accepts the benefits of a transaction . . . or order may not

¹² Letter from the Hon. Joseph H. Boardman, FRA Administrator to the Hon. Charles D. Nottingham, STB Chairman at 1, *CP/DME* (filed July 14, 2008).

¹³ *CP/DME* (STB served Sept. 30, 2008), slip op. at 21 n.35 (“FRA has specifically stated it will monitor CPRC’s commitment to upgrade all of DM&E’s track to FRA Class 3 standards. Therefore, we find it unnecessary to impose any specific conditions on the transaction other than holding CPRC to its commitments in the SIP.”).

¹⁴ CP Reply at 21.

subsequently take an inconsistent position to avoid the corresponding obligations or effects”).¹⁵

9. In addition, CP never offers an explanation in its Reply why it chose to sit idly by while the Board cited, and relied upon, consequential information CP now says it knew was incorrect all along. CP’s actions raise serious issues concerning the integrity of the administrative process that in and of themselves merit further investigation.¹⁶

10. CP says many things in its Reply that the State can demonstrate are incorrect. However, the State’s purpose in filing this Supplemental Petition is not to engage in a point-by-point response to CP’s Reply at this time.¹⁷ The State is simply supplementing its Petition with supporting information that was not available to the State when it filed its Petition.

11. The State does not believe its Supplemental Petition constitutes a “reply-to-a-reply,” but, to the extent the Board deems otherwise, the State respectfully requests that it be granted leave to file this Supplement on grounds that the Supplement

¹⁵ “The Supreme Court [has] extended this principle . . . to include estoppel based upon acceptance of the benefits of an administrative order or ruling.” *Kanab Servs., Inc.*, 650 F.2d at 81.

¹⁶ See *CN/EJ&E* (STB served Dec. 21, 2010), slip op. at 8 (“Our regulatory process relies on the honest and truthful production of information held by the carriers we regulate.”).

¹⁷ The State can and will provide a detailed response to CP’s assertions in the manner called for under its proposed procedural schedule.

addresses information that was not available to the State at the time it filed its Petition and that the information cited in this Supplement will assist the Board in its decisional process by establishing a more complete record.¹⁸

12. Finally, there is wide-spread public support for the State’s Petition. As of September 20, 2013, the Board has received statements supporting the relief requested by the State in its Petition from: the South Dakota Wheat Commission; the City of Brookings, South Dakota; Pennington County Commissioners; Bentonite Performance Minerals, LLC; South Dakota Corn Growers Association; Dakota Mill and Grain, Inc.; Brown County South Dakota Board of Commissioners; North Central Farmers Elevator; City of Sturgis, South Dakota; Brookings Area Chamber of Commerce; Amcol International Corporation; City of Huron, South Dakota; South Dakota Department of Agriculture; Oahe Grain Corporation; South Dakota Soybean Association; South Dakota Grain & Feed Association; and City of Pierre, South Dakota.

¹⁸ See, e.g., *Cal. High-Speed Rail Auth. – Construction Exemption in Merced, Madera & Fresno Cntys., Cal.*, STB Docket No. FD 35724 (STB served June 13, 2013), slip op. at 11 (reply-to-reply accepted “in the interest of compiling a more complete record”); *Mich. Air-Line Ry. – Abandonment Exemption – In Oakland Cnty, Mich.*, STB Docket No. AB 1053 (Sub-No. 1X) (STB served May 18, 2011), slip op. at 1 (surreply accepted where it addressed “allegations first asserted in [another party’s reply]” and its acceptance “establish[ed] a more complete record”); *Union Pac. R.R. – Abandonment Exemption – In Rio Grande & Mineral Cntys., Colo.*, STB Docket No. AB-33 (Sub-No. 132X) (STB served June 22, 2004), slip op. at 3 (reply-to-reply accepted “to ensure a just determination of the issues presented” and “[i]n the interest of compiling a full and complete record”).

13. The State continues to respectfully request that the Board grant its
Petition.

Respectfully submitted,

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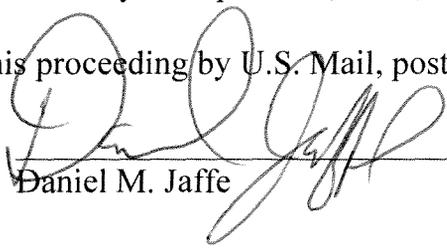
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Dated: September 20, 2013

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of September, 2013, I served copies of the forgoing on all parties of record to this proceeding by U.S. Mail, postage prepaid.



Daniel M. Jaffe