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206847

December 13, 2002

VIA HAND DELIVERY

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W., Room 711
Washington, D.C. 20423-0001



WCTL-2

Re: STB Finance Docket No. 34178, *Dakota, Minnesota & Eastern Railroad Corporation and Cedar American Rail Holdings, Inc. -- Control -- Iowa, Chicago & Eastern Railroad Corporation*

Dear Secretary Williams:

Enclosed for filing in the above-referenced proceeding, please find an original and 25 copies of the Reply Comments of Western Coal Traffic League ("WCTL-2"). A copy of these Comments is also included in electronic form on the enclosed diskette.

We have included an extra copy of the filing. Please indicate receipt by time-stamping this copy and returning it with our messenger.

Sincerely,


Peter A. Pfohl

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Office of Proceedings

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Public Record

Enclosures

cc: All Parties of Record

BEFORE THE
SURFACE TRANSPORTATION BOARD

WCTL-2

206847

Dakota, Minnesota & Eastern Railroad)
Corporation and Cedar American Rail) Finance Docket No. 34178
Holdings, Inc. -- Control -- Iowa,)
Chicago & Eastern Railroad Corporation)



**REPLY COMMENTS OF
WESTERN COAL TRAFFIC LEAGUE**

ENTERED
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Public Record

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Dated: December 13, 2002

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As set forth in its initial Comments, WCTL generally supports the DM&E Control Application because it would enhance DM&E's ability to complete its Powder River Basin ("PRB") access project and its access to friendly connections at the eastern end of its system. In addition to WCTL, nine parties filed initial comments on the DM&E Control Application. WCTL has carefully reviewed these comments. Two of them, in particular, warrant reply, and are briefly addressed herein. These include the Comments of Arkansas Electric Cooperative Corporation ("AECC") and the Comments of Union Pacific Railroad Company ("UP").

A. Reply to AECC Comments

1. Competition-Preserving Conditions

In its opening Comments, AECC, in part, has presented constructive (while perhaps premature) comments concerning the possible need for maintaining open gateways and access to a "neutral" IC&E. AECC states that such access is necessary to ensure that the viability of a possible future new PRB rail carrier entrant (in addition to DM&E) is sufficiently protected. Two of the four requested conditions sought by AECC address these subjects. These include AECC's request that any newly established PRB carrier be provided "non-discriminatory" access to IC&E (AECC Request No. i), and its request that DM&E/IC&E maintain "neutral connections at Kansas City" for inter-

changing PRB coal traffic with any such new PRB carrier (AECC Request No. iv).¹

It should be recognized that AECC's expressed concerns may already have been addressed through representations made by the Applicants themselves. The Applicants have represented that “[n]o customer will lose any competitive rail service options as a result of the transaction” (Application at 14); that the transaction does not involve the elimination of facilities or discontinuation of service (*id.* at 11-13); and that “[t]he transaction will not threaten the economic viability or competitive effectiveness of other railroads” (*id.* at 20). Indeed, a major purpose of the Application, as an outgrowth of the DM&E PRB project, is to promote PRB intracarrier railroad service and competition.

At least to the extent that any potential future new PRB carrier would seek to serve electric utilities outside the area of DM&E's proposed service territory, DM&E should have every economic incentive to negotiate mutually agreeable terms and conditions for service over its facilities. In fact, it appears that a possible future new PRB entrant, as discussed by AECC, would principally involve destination markets south and east of those expected to be served by the DM&E. Of course, because there is no such

¹ The other two conditions requested by AECC (AECC Request Nos. ii and iii), however, have nothing to do with this proceeding, or with AECC's stated desire for commercially reasonable IC&E connection/access terms. Accordingly, these requests should be rejected by the Board in approving the proposed control transaction.

new PRB access proposal on the table, it is difficult to predict the eventual destination markets such a carrier might eventually serve.²

In any event, WCTL is cognizant of AECC's concerns about the need to protect against the possibility that DM&E may be unwilling to negotiate in good faith appropriate connection/access agreements with any possible new-entrant PRB carrier.³ To protect against such an eventuality, WCTL believes it would be appropriate for the Board to consider requiring DM&E to negotiate in good faith reasonable IC&E connection and access terms at Kansas City with any new PRB carrier, while reserving the right to impose appropriate competitive enhancement measures should such negotiations fail as part of the Board's continuing oversight of the transaction. This would help ensure that approval of the Application will not reduce important future PRB

² AECC has not provided in its Comments any degree of specificity with respect to a possible new PRB entrant, including the status of such a project (including timing), its construction and routing plans (other than its stated need to connect with IMRL/IC&E at Kansas City), and any marketing plans, including traffic projections to any destination utilities it might serve. It is clear that any such project is far behind DM&E's PRB access project, as DM&E appears poised to obtain final financing and begin construction once the pending judicial review proceedings involving the Board's approval of its project are completed.

³ WCTL has long advocated, in the context of individual rail merger/control proceedings, the imposition by the Board of appropriate conditions protecting shippers from the potential loss of competitive service and preserving and promoting competition among existing and possible new rail carrier entrants. Such conditions are in the public interest (especially given the massive consolidation of the rail industry nationally) because they promote efficient, adequate, and competitive transportation to the public. See, e.g. Statement of Western Coal Traffic League (filed Feb. 29, 2000) in STB Ex Parte No. 582, Public Views on Major Rail Consolidations.

competitive service options by new market entrants, while fully preserving the economic benefits of DM&E's PRB construction project and protecting DM&E from possible economic harm.

The imposition of such measures is consistent with those approved in the CN/WC acquisition proceeding,⁴ and with the Board's new merger rules which incorporate the requirement that merger applicants include competitive enhancements as part of their merger plans.⁵ Such measures would help ensure that, if eventually needed for additional PRB access, commercially reasonable IC&E connection and access terms at Kansas City (for example) are made available.

2. AECC's Other Requested Conditions

Predominantly through the testimony of its retained witness Michael Nelson, AECC offers comments and requests some irrelevant conditions directed to DM&E's PRB construction project. These subjects (e.g., project viability, project costs, financing plans, etc.) were fully considered and resolved in the Board's Finance Docket

⁴ Finance Docket No. 34000, Canadian National Railway Company, et al. -- Control -- Wisconsin Central Transportation Corporation, et al., (STB Decision No. 10 served Sept. 7, 2001). In CN/WC -- a similar railroad control proceeding involving end-to-end connecting carriers -- the Board held that it would hold the applicants to their representations that they would keep open active gateways with connecting carriers at commercially reasonable rates and terms, and, at a shipper's request, quote commercially reasonable contract through rates with third party carriers that interchange traffic with the Wisconsin Central, the railroad being acquired in the proceeding. Id. at 12-14.

⁵ The Board's new merger rules, which focus on "major" rail mergers and consolidations, require applicant carriers to preserve major gateways, potential bottleneck relief, and other competitive enhancements. See Ex Parte No. 582 (Sub-No. 1), Major Rail Consolidation Procedures (STB served June 11, 2001) at 10.

No. 33407 proceeding.⁶ As WCTL addressed in its initial Comments, the many claims made by parties to the DM&E's PRB construction proceeding were raised, fully evaluated, and finally decided on the merits in that proceeding. Accordingly, the Board should reject Mr. Nelson's invitation to address various non-relevant issues fully resolved in that proceeding and that do not warrant reconsideration in this proceeding.⁷

B. Reply to UP Comments

In its initial Comments, UP opposes the granting of terminal trackage rights to DM&E over UP's trackage at Owatonna, MN, to reach the IC&E. UP's position is not surprising given its vested economic interest in preserving its duopoly position in the PRB, and in attempting to make it difficult and economically expensive for DM&E to become a viable PRB marketplace competitor.

In particular, UP engages in a misguided legal assault on the Board's competitive access standards, of which UP itself has been a principal beneficiary. UP's

⁶ That decision is currently on appeal before the United States Court of Appeals for the Eighth Circuit. In fact, a number of the issues raised by Mr. Nelson are virtually identical to issues addressed by Petitioners' Mid-States Coalition, et al. in their briefs in that proceeding -- which asks the reviewing court to overturn the Board's decision approving DM&E's application for line construction and other authority needed to enable it to complete its PRB access project.

⁷ WCTL is particularly troubled by Mr. Nelson's suggestion that the Board should re-assess DM&E's financing plans for its PRB project. DM&E's project is being privately financed, and (as was the case with the Chicago and North Western Railway's project to access the PRB in the early 1980s) the market will dictate whether it is a financially viable project. Any action by the Board to reopen this matter now would lead to additional, and possibly fatal, delay in bringing this project to fruition.

position is contrary to governing Board precedent, and its own past pronouncements on the expansive nature of the statutory access provisions at least in the merger/consolidation context.

UP contends that the requested terminal trackage rights do not satisfy the applicable legal criteria, principally because (1) while the trackage involved goes through the heart of Owatonna and may be used for switching local shippers and interchanging line-haul traffic, there are no "classification yards" or other "recognized terminal facilities" in Owatonna (UP Comments at 15-19); and (2) the Applicants have not demonstrated that UP has engaged in any "anticompetitive conduct" (*id.* at 23-26).

In the UP/SP merger proceeding, where UP was the beneficiary of the Board's liberal access standards, UP propounded a contrary legal position. UP/SP involved the granting of terminal trackage rights over KCS's facilities in Shreveport, LA and Beaumont, TX. In that proceeding, citing the same RGI/Soo decision⁸ that UP attempts to rely on here in support of its very restrictive definition of "terminal facilities," UP concluded that the standard requires at most, that terminal facilities merely consist of rail trackage within a "cohesive commercial area." See Applicants' Rebuttal Argument in Support of Application for Terminal Trackage Rights, Finance Docket No. 32760 (Sub-No. 9), Burlington Northern Railroad Company et al. -- Terminal Trackage Rights -- Kansas City Southern Railway Company (part of UP/SP-232, filed Sept. 29, 1996)

⁸ Finance Docket No. 31505, Rio Grande Industries, Inc. -- Purchase & Related Trackage Rights -- Soo Line Railroad Co. Line Between Kansas City, MO and Chicago, IL (ICC served Nov. 15, 1989).

("Applicants' Rebuttal") at 5.

In fact, in the UP/SP case, UP specifically cited with approval the ICC's expansive definition of a terminal adopted in the UP/MP merger proceeding,⁹ where it granted terminal trackage rights to DRGW over a rural stretch of ATSF trackage where only overhead traffic had moved:

Pueblo-Nyberg, CO This is a 12-mile line segment running east from Pueblo, owned by BN/Santa Fe (formerly ATSF). DRGW was granted "terminal" trackage rights over this ATSF segment in the UP/MP merger. Unlike the Shreveport and Beaumont track segments, which pass through the center of the cities they serve, the Pueblo-Nyberg, CO segment is almost entirely in a rural area of eastern Colorado with a few widely scattered shippers. Train operations consist of almost entirely of through trains.

Applicants' Rebuttal, V.S. Hord at 8. The Board, in its UP/SP decision, agreed with this expansive definition. See 1 S.T.B. 233, 447 (1996). UP's newly proffered restrictive "terminal" definition is clearly inconsistent with governing precedent and its own past position on the subject.

In UP/SP, UP also strenuously disavowed the legal requirement that an applicant demonstrate that the track owner has acted in an anticompetitive manner (the so-called Midtec standard) in order for terminal trackage rights to be granted, declaring that such a position "could have wide ranging consequences if adopted by the Board." Id. at 11. UP warned that, if such a position were approved, "any track owner of a small

⁹ Union Pacific -- Control -- Missouri Pacific, Western Pacific, 366 I.C.C. 462, 574-577 (1982); aff'd Southern Pac. Trans. Co. v. ICC, 736 F.2d 708, 723-24 (D.C. Cir. 1984).

segment of terminal trackage anywhere along the route could veto entry by the new carrier wherever the underlying agreements contain standard consent requirements." Id.

The Board clearly rejected such attempts to invoke the restrictive standard

UP advocates here:

Whether the ICC ever applied its relatively exacting Midtec precedent in the context of a merger is a matter of some debate. In any event, we believe that it is inappropriate to do so here, and, to the extent that ICC cases suggest otherwise, we specifically overrule them. Instead, we will apply the broad "public interest" standard that is in section 11103(a) itself.

UP/SP, 1 S.T.B. at 446-47.

UP's position in the UP/SP proceeding was correct, and its contrary position here should be rejected.¹⁰ The public interest favors DM&E's competitive rail service and the clearly expressed interests of the 20,000+ citizens of Owatonna, MN who support DM&E's terminal trackage rights application as a means of promoting the health, safety, and welfare of their community.¹¹ The Board should view UP's opposition to the Owatonna terminal trackage rights application for what it is -- an attempt to thwart or otherwise hinder the viability of a new direct PRB rail competitor.

¹⁰ UP's position here is also contrary to the Board's recent pronouncement in Major Rail Consolidation Procedures, supra, that it favors additional competitive enhancements sought through merger proceedings. See Decision served June 11, 2001, at 10.

¹¹ See Comments of the City of Owatonna, MN, at 12-18.

CONCLUSION

For the reasons set forth above, and in its initial Comments, WCTL believes that, based upon the information included in the DM&E Control Application, Board approval of the transaction is warranted subject to a reservation of jurisdiction to preserve competition at potential future connection points between IC&E and a possible new PRB rail carrier entrant should that prove necessary.

Respectfully submitted,

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Dated: December 13, 2002

Attorneys for the Western Coal
Traffic League

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Comments of Western Coal Traffic League (WCTL-2) was served this 13th day of December, 2002 by first-class mail, postage prepaid upon all parties of record to this proceeding.


Peter A. Pfordner