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March 3, 2008

The Honorable Anne K. Quinlan  
 Acting Secretary  
 Surface Transportation Board  
 395 E. Street, S.W.  
 Washington, DC 20423

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

Dear Secretary Quinlan:

Enclosed for filing in the above-referenced proceeding are an original and ten (10) copies of Applicants' Opposition to Kansas City Southern Railway's Motion to Compel Discovery Responses to the First Set of Discovery Requests. A disk containing an electronic version of the Opposition is also enclosed.

Please acknowledge receipt of the Opposition for filing by date-stamping the enclosed extra copies of the Opposition and returning them to our messenger. If you have any questions, please contact the undersigned counsel.

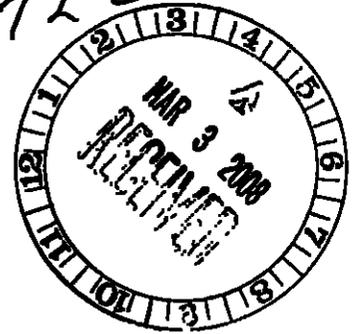
Sincerely,

Terence M. Hynes

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 Enclosures

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**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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Canadian Pacific Railway Company, *et al* -- Control -- )  
Dakota, Minnesota & Eastern Railroad Corp., *et al* ) Finance Docket No. 35081  
\_\_\_\_\_)

**APPLICANTS' REPLY IN OPPOSITION TO  
KANSAS CITY SOUTHERN RAILWAY COMPANY'S  
MOTION TO COMPEL RESPONSES TO  
FIRST SET OF DISCOVERY REQUESTS**

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Dated. March 3, 2008

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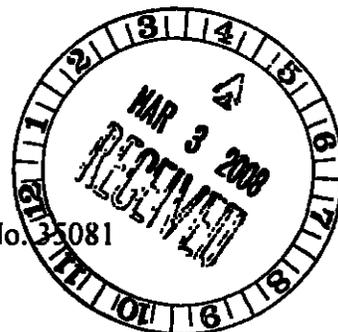
**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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

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Finance Docket No. 35081



**APPLICANTS' REPLY IN OPPOSITION TO  
KANSAS CITY SOUTHERN RAILWAY COMPANY'S  
MOTION TO COMPEL RESPONSES TO  
FIRST SET OF DISCOVERY REQUESTS**

Pursuant to the Board's regulations at 49 C.F.R. § 1114.31, Canadian Pacific Railway Company ("CPR"), Soo Line Holding Company ("SOO Holding"), Dakota, Minnesota & Eastern Railroad Corporation ("DM&E") and Chicago, Iowa & Eastern Railroad Corporation ("IC&E"),<sup>1</sup> hereby submit this Reply in opposition to Kansas City Southern Railway Company's ("KCS") Motion to Compel Responses to the First Set of Discovery Requests ("Motion"). For the reasons set forth hereinafter, KCS' Motion should be denied in its entirety.

To date, Applicants have produced thousands of pages of workpapers, traffic data and other documents to KCS. A substantial portion of that production (including all of the workpapers underlying the Application and 100% traffic tapes for both CPR's and DM&E's 2005 grain traffic) was made to KCS informally before it ever filed any discovery requests. Applicants have also provided written answers to two dozen KCS interrogatories, and have produced four witnesses for deposition by KCS.

Notwithstanding Applicants' extensive production, KCS has filed a Motion to Compel further responses to certain of its discovery requests. KCS waited a full week, until February 28, 2008, to file its Motion. In the interim, KCS never informed Applicants that it had any concerns about the adequacy of Applicants' discovery responses. Indeed, most of the discovery requests

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<sup>1</sup> CPR, SOO Holding, DM&E and IC&E are referred to collectively herein as "Applicants."

to which KCS' Motion is addressed are ones for which Applicants have already produced all responsive information in their possession. Others call for information that is either clearly irrelevant or whose production would pose an undue burden on Applicants. Moreover, the timing of KCS' Motion – just three business days before the deadline for KCS to submit its evidence – strongly suggests that KCS' true motive in filing the Motion is to create a predicate for it to seek an extension of time in which to file its evidence (or the right to supplement that evidence at a later date). There is no justification for the Board to grant KCS' Motion to compel further discovery at this late date, or to reward KCS' eleventh-hour tactics by modifying the procedural schedule.

**I. KCS's Motion Should Be Denied Because It Is Untimely.**

The Board should deny the Motion because it is untimely. Indeed, KCS' Motion represents a transparent and unjustified attempt to delay the proceedings. Applicants' first notification that KCS had any objection to the adequacy of their discovery responses was KCS' service of this Motion at approximately 7:00 PM on February 28 – only three business days before the March 4 deadline for KCS (and other interested parties) to submit requests for conditions, evidence and argument regarding the proposed transaction. KCS does not explain why it waited a full week after receiving Applicants' discovery responses before seeking relief from the Board. KCS' delay has made it impracticable for the Board to rule on its Motion prior to the time for KCS to submit its evidence (which is tomorrow). *See* Mot. at 14 (requesting production of documents "within five (5) days of an appropriate Board order").<sup>2</sup> KCS' failure to seek relief in timely fashion, in and of itself, warrants denial of the Motion in its entirety.

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<sup>2</sup> There plainly would be no purpose in compelling the production of documents to KCS *after* KCS has submitted any evidence.

KCS itself is solely responsible for the fact that its Motion arises at such a late date. The Board's December 27, 2007 decision adopting a procedural schedule indicated that parties should begin discovery "immediately." (Dec. 27, 2007 Decision at 10). However, KCS did not initiate any formal discovery until February 6, 2008, when it filed its written discovery requests.<sup>3</sup> Applicants timely responded to those requests on February 21, 2008. In their response, Applicants provided both answers to the twenty-four interrogatories posed by KCS and copies of documents responsive to KCS's thirty-seven document requests, including documents responsive to a number of requests that Applicants deemed objectionable. (Applicants had previously produced to KCS all of the workpapers underlying the Application and the testimony of Applicants' witnesses, as well as 100% traffic tapes for both CPR's and DME's 2005 gram traffic.) KCS could have promptly filed a Motion to Compel for any responses it deemed insufficient. Or, it could have contacted Applicants to attempt to resolve any discovery disputes informally. KCS did neither.<sup>4</sup> Instead, KCS elected to wait a full week before filing the instant Motion last Thursday night.

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<sup>3</sup> Indeed, Applicants filed an Application pursuant to 49 U.S.C. §§ 11323 *et seq.* for approval of the acquisition of control of DM&E and IC&F by SOO Holding (and, indirectly, by CPR) on October 5, 2007. KCS therefore had well over two months before the Board approved a procedural schedule to determine whether it wished to seek discovery. There is no justification for KCS's decision to wait to file discovery requests until over four months after Applicants filed the Application.

<sup>4</sup> KCS's claim that it "offered opportunities to confer with counsel for CPR and DM&E . . . so as to avoid the necessity of a filing like this one" is simply not true. Mot. at 2. KCS never contacted either CPR or DM&E to express any concerns about the sufficiency of Applicants' February 21, 2008 responses before filing its Motion. KCS seems to believe that a sentence in its discovery requests asking Applicants to contact it "to discuss any objections or questions" constitutes a good-faith effort to resolve discovery disputes before filing a motion to compel. Mot. at 8. It plainly is not. While the Board's rules did not require KCS to confer with Applicants before filing this Motion, KCS certainly would have done so if it were truly concerned about resolving this dispute without the need for this Motion. For KCS to suggest that it attempted to resolve its concerns informally with Applicants before filing its Motion is, at best, highly misleading.

KCS' unjustified delay in pursuing discovery, and in filing its Motion, is reason enough to deny the Motion in its entirety. See STB Finance Docket No 33877 (Sub-No 1), *Illinois Cent R R Co —Pet for Crossing Authority—in East Baton Rouge Parish LA* (Nov 20, 2001) (denying KCS request for depositions in part because of unjustified delay in seeking discovery that would take place five days before KCS evidence was due) Indeed, this case is even a clearer instance of improper delay than *Illinois Central*, for here KCS is demanding that the Board compel discovery that could not be produced until *after* the deadline for KCS to submit its evidence.

## **II. Applicants Have Complied Fully With Their Discovery Obligations.**

Applicants have provided KCS with extensive discovery. Applicants answered all twenty-four interrogatories posed to them by KCS, and they have produced voluminous workpapers, traffic data and other documents in response to both formal and informal requests by KCS. Many of these materials were produced before KCS initiated any formal discovery requests. The documents Applicants have produced include:

- Traffic waybill data for grain and grain products for CPR, IC&E and DM&E for 2005 (CPR Response to KCS Request for Production No 2 (attached as Mot Ex C)).
- IC&E and DM&E financial data (DME Response to KCS Request for Production No 2 (attached as Mot Ex D));
- All workpapers underlying the Application and the testimony of Applicants' witnesses (CPR Response to KCS Request for Production No 4 (attached as Mot Ex. C));
- All marketing plans and traffic diversion studies prepared by CPR that relate to the transportation of grain originating on DME (CPR Response to KCS Request for Production No. 6, 14, 17 (attached as Mot Ex C)).
- Studies and analyses of potential post-transaction traffic flows on the CPR and DME systems (CPR Response to KCS Request for Production No 7 (attached as Mot Ex. C)),

- Marketing plans and studies prepared by CPR related to the transportation of ethanol (CPR Response to KCS Request for Production No. 10 (attached as Mot. Ex. C));
- Documents reflecting the only communications between CPR and DME regarding KCS' existing agreements with IC&I (CPR Response to KCS Request for Production No. 16 (attached as Mot. Ex. C); DME Response to KCS Request for Production No. 15 (attached as Mot. Ex. D)),
- Documents related to the potential extension of DME's current agreements with KCS (DME Response to KCS Request for Production No. 14 (attached as Mot. Ex. D))

In addition to this document production, Applicants have produced four witnesses for deposition by KCS, including DME's President, Kevin Schieffer, and CPR's Executive Vice President and Chief Operating Officer, Kathryn McQuade. Applicants produced three of those witnesses without objection, despite the fact that KCS waited to notice those depositions until after the close of business on February 11 – more than four months after the Application was filed. Applicants objected to the deposition of Kathryn McQuade on the grounds that she did not possess relevant information that KCS could not obtain through less burdensome means – Ms. McQuade was not personally involved in the negotiations which led to the agreement between CPR and DME or in the preparation of the Application. *See* Emergency Motion of Applicants for Issuance of a Protective Order at 3-5 (Feb. 14, 2008). KCS insisted that she be produced to discuss its claimed “competitive issues,” and the Board agreed to allow the deposition. *See* Decision No. 7 (Feb. 20, 2008).

Despite KCS' representation that Ms. McQuade would be a critical source of relevant information about “the competitive issues surrounding this case,” KCS's Reply to Emergency Motion for Issuance of a Protective Order at 9 (Feb. 15, 2008), her deposition proved to be a waste of time. KCS' deposition of Ms. McQuade took less than an hour and a half – most of which was spent asking repeated questions relating to marketing matters that Ms. McQuade, as CPR's Chief Operating Officer, obviously was the wrong witness to ask. Moreover, the other

depositions taken by KCS have revealed that KCS' purported concern that a supposed strategic alliance between CPR and Union Pacific Railroad Company ("UP") may cause the proposed transaction to produce anticompetitive effects is completely unfounded. As KCS now knows, there is no such strategic or marketing alliance between CPR and UP. Rather, the "strategic alliance" hypothesized by KCS consists of nothing more than informal initiatives that CPR and UP (like other carriers) have undertaken to improve their interline service offerings in an effort to divert traffic off the highways. *See* Dep. of Ray Foot at 34-40, 63-64.

In short, KCS has obtained more than sufficient discovery to explore the supposed "potential anticompetitive effects" it claims as a basis for discovery: the future access of KCS grain receivers to DME-origin grain and "KCSR's ability to compete for certain NAFTA traffic flows." Mot. at 5-6. KCS' demands for extensive further discovery seem to be aimed less at developing serious evidence to support its case (whatever that may turn out to be) than at harassing Applicants in an effort to create negotiating leverage.

### **III. KCS's Demands for Additional Discovery are Irrelevant and Overbroad, and They Should Be Denied.**

Even if KCS's Motion were timely – and it is not – it would be meritless. Discovery is not an opportunity for a party to gain unlimited access to the Applicants' files in order to obtain any information in which it might be interested. Rather, discovery must be relevant, and a party seeking to compel discovery must "show clearly that the information sought is relevant and would lead to admissible evidence." *Export Worldwide, Ltd v Knight*, 241 F.R.D. 259, 263 (W.D. Tex. 2006), *Alexander v FBI*, 186 F.R.D. 154, 159 (D.D.C. 1999) ("[t]he proponent of a motion to compel discovery bears the initial burden of proving that the information sought is relevant."). As the Board has recognized, relevance is a function of whether the specific information sought is needed for the Board's determination. For example, recently the Board

denied a motion to compel discovery on rail traffic and environmental issues relevant to a merger application because the Board itself would study the issues in the “less formal environmental review process that is taking place under the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 *et seq*” so that the information sought was not necessary to the Board’s public interest determination. STB Fin. Dkt. No. 35087, *Canadian Nat’l Ry Co & Grand Trunk Corp Control—EJ&E West Co* (Feb 22, 2008). As KCS has been warned before, the only legitimate purpose of discovery is to “to elicit information to reply to the petitioner’s case in chief.” *Ill Cent RR Co—Constr & Operation Exemption—in E. Baton Rouge Parish*, 2001 WL 940574, at \*2, STB Fin. Dkt. No. 33877 (Aug. 21, 2001) (“the timing of KCS’s filings simply undermines KCS’s assertion that its discovery request was motivated by a need to elicit information to reply to the petitioner’s case in chief, which is the essential purpose of discovery”). KCS has not satisfied this burden with respect to any of the requests encompassed by its Motion.

The purported basis for KCS’ Motion is its need to obtain further discovery regarding two competitive “issues.” First, KCS asserts that “the transaction raises questions about whether KCSR-served shippers will retain access to DML-origin grain . . . or whether CPR would effectively eliminate KCSR-served shippers’ access to such grain sources.” Mot. at 5-6. Specifically, KCS has propounded extensive discovery requests aimed at determining whether, following the proposed transaction, a CPR-controlled IC&E would agree to extend an existing agreement under which KCS has pricing authority for corn shipments originating on IC&E’s lines, and IC&E delivers such shipments to KCS at Kansas City (the “KCS-ICE Grain Agreement”). *See, e.g.*, KCS Interrogatories (to CPR) 3, 4, 5, 6, 7, 8; Production Requests (to CPR) 12, 13, 14, 15, 16, 17.; KCS Interrogatories (to DML) 3, 4, 5, 6, 7. Production Requests

(to DME) 12, 13, 14, 15 Second, KCS expresses concern about “whether CPR would act to undermine KCSR’s ability to compete for NAFTA traffic flows, particularly to and from the Chicago gateway.” *Id* Again, KCS’ apparent concern is that a CPR-controlled IC&E might cancel an existing agreement that grants KCS haulage rights for certain traffic over IC&E’s line between Kansas City and Chicago (the “KCS-ICE Chicago Haulage Agreement”), and that such an action might adversely impact competition.

However, as KCS well knows, the KCS-IC&E Grain Agreement has an initial term that runs through December 31, 2017, and the agreement cannot be terminated by either party until after that date whether or not CPR acquires control of DME. Moreover, the KCS-ICE Chicago Haulage Agreement is a dormant arrangement that was inherited by IC&E when its acquired the Kansas City-Chicago line from IMRI in 2002. KCS has never tendered a single carload of traffic to IC&E for movement under that agreement. Given these facts, it strains credulity to assert (as KCS does) that KCS’ existing agreements with IC&E raise any legitimate competitive issue with respect to the proposed transaction. Rather, KCS’ desire to extend those agreements is a matter of parochial concern to it, and does not implicate the public interest. Viewed in light of reality, KCS’ discovery requests addressed to those agreements are clearly not relevant to any issue properly before the Board in this proceeding.

**A. KCS’s Overbroad Time Instruction Is Unwarranted**

KCS complains that Applicants did not comply with its demand to produce responsive documents dating back to 2004, asserting that it needs these documents “to properly evaluate” data for its impact analysis. Mot. at 7. It is not clear what KCS means by this, but it is clear that such a vague claim does not satisfy its burden of demonstrating relevance. KCS has everything it needs from Applicants to perform a competitive analysis of the proposed transaction. The Board’s *November 2 Decision* in this proceeding established 2005 as the “study year” for

competitive analysis of the transaction Pursuant to an informal request by KCS counsel, Applicants have already produced 100% traffic tapes containing all CPR and DME: 2005 grain traffic. Applicants have also produced all workpapers underlying the competitive analyses conducted by witness Williams, whose testimony is based upon 2005 data (including the 2005 *Carload Waybill Sample*). Like other carriers, KCS may obtain access to the *Carload Waybill Sample* for use in preparing its evidence in this proceeding KCS has not explained why it needs other documents, or data for years prior to the 2005 study year designated by the Board, in order to evaluate the proposed transaction. In any event, data regarding DME-originated grain that moved via Kansas City to points on KCS' lines, or so-called "NAI/IA traffic" that KCS participated in, during years other than 2005 would already be in KCS' possession Because KCS has not carried its burden, its overbroad request should be denied.

**B. Applicants Appropriately Responded To KCS Interrogatory Number 1.**

KCS' demand that Applicants identify "any and all . . . employees and Consultants who have assisted in developing marketing plans, analyses, memoranda, financial projections, and/or any other studies related to the Transaction" is stunningly overbroad. KCS Interrogatories (to CPR) No. 1, KCS Interrogatories (to DME) No. 1. As written, this request would require CPR and DME to determine, and to identify to KCS, literally every in-house employee, every consultant, every attorney, and every employee of any investment banker or financial advisor who played any role in the negotiations that led to the proposed transaction, the due diligence conducted by CPR, the development of CPR's bid to acquire DME: (or DME's analysis of CPR's bid) and all other aspects of the corporate transaction pursuant to which CPR acquired DME: Such a request is both unprecedented and utterly irrelevant to any issue properly before the Board. The Board has never authorized such wide-ranging discovery in a control proceeding,

for the simple reason that this information is irrelevant to the determination of whether the transaction satisfies the competition-based standard prescribed by 49 U.S.C. § 11324(d).

Despite its unprecedented scope, CPR answered the Interrogatory, both by identifying the persons who were primary responsible for the analyses contained in the Application. The workpapers furnished to KCS also identify non-witnesses who assisted in the preparation of CPR's marketing plans and projections. *See* 49 C.F.R. § 1114.26(b) (party responding to interrogatory has option to produce business records from which answer can be ascertained). CPR witness Foot provided further information responsive to this Interrogatory during his recent deposition. As for KCS's demand that the Board compel DME to identify "consultants" it used, DME had no such consultants.

Thus, Applicants have provided much of the information sought by KCS Interrogatory No. 1. KCS has failed to articulate any legitimate basis for requiring Applicants to ascertain, and to identify to KCS, the names of literally every person who has played any role in connection with the proposed transaction. KCS' Motion to compel a further response to Interrogatory No. 1 should be denied.

**C. Applicants Appropriately Responded to DME Document Request No. 4 and CPR Document Request No. 5.**

KCS's demand for documents reflecting all communications between CPR and DME or the Trustee "regarding the operation of DME" is inexplicably vague. "Operation" encompasses nearly every conceivable aspect of DME's business, and is hopelessly overbroad. To be sure, Applicants have produced documents related to communications about "operations" relevant to the claimed competitive concerns raised by KCS. *See, e.g.*, CPR Response to KCS Request for Production No. 16 (attached as Mot. Ex. C); DME Response to KCS Request for Production Nos. 14, 15 (attached as Mot. Ex. D)). Moreover, in response to KCS Interrogatory No. 5, CPR

stated unequivocally that “it has not communicated or in any way indicated to a Trustee, DM&E or IC&E (or their Consultants) any views with regard to whether IC&E should terminate, honor, or extend its existing agreements with KCS ” CPR Response to KCS Interrogatory (to CPR) No 5 (attached as Mot Ex. C) (emphasis added).

In apparent recognition of the over breadth of its initial request, KCS attempts in its Motion to “focus” its request on communications relating to the manner in which DME handles grain traffic, and works with other railroads, both pre-transaction and post-transaction. Those issues are also the subject of KCS Document Requests (to CPR) Nos. 6 and 7, to which CPR has already provided a complete response (including the production of all responsive documents). As to DME, KCS’ request, even as “focused”, encompasses literally every aspect of DME’s day-to-day grain operations, from marketing to car supply to maintenance. Mot. at 11

That said, in the spirit of compromise Applicants can provide some further information about communications about the “manner” of DME’s grain transportation. CPR and DME have not communicated at all about the “manner” in which DME handles the transportation of grain pre-transaction. And as for “the manner in which DME works with other railroads” for grain transportation, DME interchanges grain traffic with both UP and BNSF pursuant to normal interline arrangements as it would for other non-grain traffic. DME does not have agreements similar to the KCS-ICE Grain Agreement with any other rail carrier. This information, along with the materials previously produced by Applicants, constitute more than adequate response to KCS’ discovery requests on this subject. Accordingly, KCS’ Motion to compel a further response to Document Request No. 4 (to DME) and Document Request No. 5 (to CPR) should be denied.

**D. DME Adequately Responded to Document Request No. 5.**

As DME explained in its response to KCS's Document Request No. 5, it has not conducted (and therefore does not have) any marketing plans and analyses related to the impact of the transaction on the transportation of grain originating on DME lines, any potential diversion of traffic as a result of the transaction, or any potential post-transaction price changes. *See* DME Response to KCS Request for Production No. 5 (attached as Mot. Ex. D)). Unsatisfied with this complete response, KCS demands that DME produce any other marketing plans and analyses that forecast changes in grain traffic originated on DME and delivered to points on other carriers. Even if such documents were relevant, they do not exist. DME does not forecast grain traffic by interchange carrier or by gateway. DME only forecasts grain traffic by origination, and those forecasts do not have any information relevant to potential increases or decreases in the amount of grain traffic destined for particular connecting carriers. Accordingly, such documents are not relevant to any competitive issue, and KCS' Motion to compel a further response to Document Request No. 5 (to DME) should be denied.

**E. CPR Adequately Responded to Document Request No. 11.**

KCS's claim that CPR should not have responded to Request No. 11 by incorporating its objection and response to Request No. 10 is ludicrous. There is nothing at all unusual about incorporating a previous objection and response by reference. More to the point, CPR has already produced documents related to CPR's projected post-transaction revenue from DME-originated grain traffic, including the workpapers of CPR witness Ray Foot and a traffic study performed by consultant John Williams. CPR has not conducted any study or analysis of "the impact and/or importance of this [grain] revenue on CPR's ability to finance its acquisition of DME." This information, along with the materials previously produced by Applicants, constitute

more than adequate response to KCS' Document Request (to CPR) No. 11, and KCS' Motion to compel a further response to that Request should be denied.

**F. Document Request No. 11 to DME and Document Request No. 12 to CPR Fatally Overbroad and Utterly Irrelevant.**

KCS' Document Request No 11 to DME, and Document Request No 12, which are identical, demand the production of "all joint marketing agreements, haulage agreements, joint rate agreements, divisions agreements, joint ventures, division of revenue agreements, volume incentive agreements, voluntary coordination agreements . . . or other existing contracts" between DME and any other rail carrier relating to the movement of grain. KCS Request for Production to DME No 11 (attached as Mot. Ex. C); KCS Request for Production to CPR No 12 (attached as Mot. Ex. D). This Request literally demands that DME disclose to KCS every haulage agreement, marketing initiative or joint rate agreement covering grain traffic that DME may have with any other rail carrier – including carriers that may be KCS' competitors – as well as the basis upon which DME's divisions on interline grain shipments with those connecting carriers are calculated.<sup>5</sup> KCS' demand for such information is unprecedented, grossly overbroad and (potentially) anticompetitive.

KCS asserts that disclosure of all of DME's grain transportation arrangements with other carriers is necessary "to assuage KCS's concerns that once the Transaction is completed, the Applicants will implement new or modified traffic agreements that will impact traffic flows, encourage traffic routings to new markets, and discourage certain existing traffic flows." Mot at 12. As this statement makes patently clear, KCS' true concern is not with the potential impact of the proposed transaction on "competition" – indeed, the development of grain traffic

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<sup>5</sup> It is not clear why KCS directed a request for DME's agreements to CPR. CPR is not a party to any of DME's agreements with other rail carriers, nor does CPR have authority to disclose any such agreements.

movements to “new markets” in response to shipper demand would be decidedly procompetitive. Rather, KCS seeks assurance that the proposed transaction will not result in the diversion of grain traffic from KCS itself – a parochial concern that is not relevant to the Board’s determination in this case.

KCS already has access to the agreements that it negotiated with IC&E. The obvious reason for KCS’s participation in this proceeding appears to be its desire to extract an extension of the terms and scope of those agreements. KCS has not justified its demand that it be permitted to pore through every commercial agreement that DME may have with other carriers related to grain transportation. KCS has the burden of explaining why granting it access to these agreements would lead to relevant evidence of the effect of the transaction on competition. It has not carried that burden. Accordingly, KCS’ Motion to compel a further response to Document Request No. 11 (to DMI:) and Document Request No. 12 (to CPR) should be denied.

**G. DME Adequately Responded to Document Request No. 12.**

KCS’s demand that DME produce additional documents in response to Request No. 12 is moot. DME has no responsive documents.

**H. KCS’s Document Request No. 16 to DME is Grossly Overbroad and Poses a Substantial Burden.**

KCS’s demand that DME produce documents responsive to Request No. 16 would impose a crippling burden on DME and recover virtually no relevant documents. The request demands production of all communications between and among DME employees and agents relating to the marketing of the transportation of grain for destinations on rail carriers other than KCS. DME handles between sixty and seventy thousand carloads of grain every year – much of it for destinations other than ones on KCS – and the volume of internal correspondence that relates to the marketing of grain is overwhelming. DME believes that responding to this request

would require the review of tens of thousands of emails and consume hundreds of person-hours of time. DME is not a major railroad, and such a voluminous production would seriously inhibit DME's ability to carry out its business.

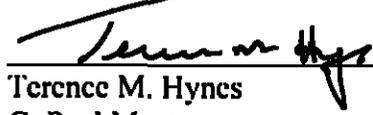
KCS cannot muster an explanation of why this discovery is relevant – instead it simply states that it “disagrees” that the discovery is unduly burdensome. That does not come close to carrying its burden to justify such intrusive and wasteful discovery. And if KCS believes there is some secret strategy to divert grain traffic from KCS destinations, it is deeply mistaken. As the traffic study produced by Applicants in response to KCS' Document Requests makes clear, Applicants do not anticipate that the transaction will result in the diversion of any of the grain traffic that KCS handles jointly with DME today. (If such diversions were to occur in the future, it would be as a result of decisions by grain shippers to direct their product to different end markets, or to sell their grain locally to ethanol producers.) KCS' Document Request (to DME) No. 16 is nothing more than a fishing expedition that would seriously damage DME's business, and KCS' Motion to compel a further response to that Request should be denied.

**CONCLUSION**

For the foregoing reasons, Applicants respectfully request that the Board deny KCS'

Motion to Compel in its entirety.

Respectfully submitted,



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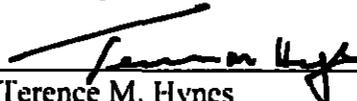
Dated. March 3, 2008

**CERTIFICATE OF SERVICE**

I hereby certify that I have caused the foregoing Applicants' Reply in Opposition to Kansas City Southern Railway Company's Motion to Compel Responses to First Set of Discovery Requests to be served by first class mail, postage prepaid, this 3rd day of March 2008, on all parties of record and the following persons:

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

Attorney General of the United States  
c/o Assistant Attorney General  
Antitrust Division  
United States Department of Justice  
950 Pennsylvania Avenue, N W . Rm 3109  
Washington, D C. 20530

  
\_\_\_\_\_  
Terence M. Hynes