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April 7, 2008

VIA E-FILING

The Honorable Anne K. Quinlan, Acting Secretary
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423-0001

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

Dear Acting Secretary Quinlan:

In Decision No. 8 (“Decision”) served March 27, 2008 in the above proceeding, the Surface Transportation Board (“STB” or “Board”) granted in part and denied in part a motion to compel discovery responses that had been filed on February 28, 2008 by The Kansas City Southern Railway Company (“KCSR”). In summary, the Board’s Decision required applicants to provide (1) the job titles and roles of the various individuals noted in the workpapers; and (2) all documents “prepared in connection with this transaction” that otherwise qualify for production under DM&E Document Request Nos. 5(c) and (d). Such information and/or documents were to be delivered by April 1.

On April 1, applicants provided KCSR with the job title and role information noted in No. 1 above. Nothing more was said with respect to producing documents responsive to DM&E Document Request Nos. 5(c) and (d). After follow-up e-mail correspondence, KCSR was informed on April 3 that applicants had no responsive documents with respect to DM&E Document Request Nos. 5(c) and (d) as limited by the Board’s Decision. Accordingly, while KCSR appreciates the opportunity to supplement the record today in response to the information produced in accordance with the Decision, there is nothing more that KCSR can currently say to supplement the record, given that applicants produced no responsive documents.

The Honorable Anne K. Quinlan
April 7, 2008
Page 2

The lack of documents responsive to KCSR's initial discovery request and now in response to the Board's Decision indicates that applicants are taking an extremely narrow view of what is and isn't responsive. Indeed, in response to KCSR's initial discovery filed against CPR, CPR produced exactly 46 pages. DM&E and IC&E produced 81 pages – almost all of which dealt with the e-mail correspondence between DM&E and KCSR regarding extending the existing IC&E/KCSR agreements and/or were pages from the proposed agreements themselves.¹ This is in contrast to the over 1,000 pages of e-mails, internal analysis, PowerPoint presentations, consultant reports, and discussion memos that KCSR has produced in response to the applicants' discovery requests directed to KCSR.² Given the absence of an administrative law judge or Board staff member assigned to review discovery issues, it is difficult to determine whether applicants have given full and complete answers and responses to KCSR's discovery and/or have accurately characterized the agreements alluded to in their response to KCSR's motion to compel.

This is particularly the case with respect to the various agreements that applicants may have with other carriers. As the Board knows, applicants produced no documents related to the DM&E/BNSF grain agreement or with respect to the CPR/UP grain routings and alliance relationships, apparently on the basis that such arrangements were not "like the IC&E/KCS agreement," were not "akin to the KCS/IC&E agreement," and were merely normal interline agreements. Yet declassified deposition transcripts and other public documents³ show that there is in fact a DM&E/BNSF agreement that is not a normal interline agreement. Indeed, BNSF has even gone as far as adopting DME stations as BNSF served origins, which is not standard in interline arrangements. The DM&E/BNSF agreement may, in a very narrow sense, not be "akin" to the IC&E/KCSR agreement, but neither the Board nor KCSR can test this assertion as the agreement has not been provided to KCSR, the Board, the record, or put into the document depository.

Likewise, while there may be no "Alliance" agreement between CPR and UP "akin" to the KCSR/CN Alliance agreement, the public records show that there appear to be several

¹ The over 1,000 pages that applicants referred to in response to KCSR's motion to compel was a reference to the workpapers in the document depository, not a reference to documents produced in response to KCSR's discovery requests. Furthermore, the workpapers merely address the issues in the Application and are not responsive to the discovery requests, which were directed at the competitive concerns of the transaction; issues that were not addressed in the application.

² This is in addition to over a 1,000 pages of workpapers that KCSR placed in its document depository which were the back-up materials to the witness statements that were included within KCSR's March 4 comments.

³ The declassified deposition transcripts and other public documents addressing these issues can be provided to the Board if the Board so desires. Likewise, there are other highly confidential portions of the deposition transcripts that address this issue.

BAKER & MILLER PLLC

The Honorable Anne K. Quinlan
April 7, 2008
Page 3

agreements that govern the “Can-Am” corridor “innovative service Alliance”⁴ between CPR and UP, including capital investment and coordinated operations agreements. These agreements were likewise not provided to KCSR. Again, given that the agreements have not been provided to KCSR or the Board, it is unclear whether or not they should have been produced in response to KCSR’s original discovery or the Board’s Decision No. 8.⁵

In summary, it is possible, indeed likely, that the existing agreements between the applicants and other railroads are not merely normal interline agreements; a statement on which the Board’s Decision relied in declining to compel their production. Presumably these issues will be addressed (and the agreements produced) either in response to KCSR’s second set of discovery or applicants’ April 18 filing. In the meantime, KCSR cannot supplement the record in response to Decision No. 8 because applicants have produced no further documents. KCSR reserves the right to supplement its March 4 comments, either in the reply or rebuttal stage, when, and if, it obtains access to any relevant responsive documents that were not produced due to an overly narrow reading of what is and isn’t responsive and subsequent narrow characterization to the Board as to what those agreements represent.

Sincerely,



William A. Mullins

cc: Parties of Record

⁴<http://www8.cpr.ca/cms/English/Customers/New+Customers/Where+We+Ship/Can+Am+Corridor.htm> and <http://www8.cpr.ca/cms/English/Investors/Fact+Book/default.htm>.

⁵ On April 2, KCSR served a second set of discovery against applicants requesting production of the DME/BNSF and UP/CPR agreements. Due to the Board’s regulations that provide for a party to have a minimum of 15 days to respond to any written discovery, applicants’ response is not due until April 17, one day before the deadline for parties to file a reply to any comments or evidence filed on March 4. If the agreements are not provided to KCSR on April 17 or provided to the Board on April 18 with the applicants’ reply, KCSR will likely again seek a motion to compel their production.