

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

**APPLICANTS' RESPONSE TO COMMENTS
AND REQUESTS FOR CONDITIONS AND
REBUTTAL IN SUPPORT OF APPLICATION**

Volume 1 of 2

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Dated: April 18, 2008

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Pursuant to Decision No. 4 in this proceeding, Canadian Pacific Railway Company (“CPRC”); Soo Line Holding Company (“SOO Holding”); Dakota, Minnesota & Eastern Railroad Corporation (“DM&E”); and Iowa, Chicago & Eastern Railroad Corporation (“IC&E”) (collectively referred to hereinafter as “Applicants”)¹ respectfully submit this response and rebuttal, supported by the reply verified statements of Bob Milloy, Lynn Anderson, Don Smith, Vern Graham and John Williams, and a number of shippers and committees that are served by Applicants.

INTRODUCTION

Applicants seek authority under 49 U.S.C. §§ 11323-25 and the Board’s Railroad Consolidation Procedures, 49 C.F.R. Part 1180, for authorization for SOO Holding (and, indirectly, CPR) to acquire control of DM&E and IC&E.² The proposed transaction does not involve the merger or control of two or more Class I railroads. Accordingly, the Board’s

¹ CPRC and SOO Holding are referred to together herein as “CPR.” DM&E and IC&E are referred to together as “DME.”

² In Decision No. 2, served November 2, 2007, the Board found the proposed transaction to be “significant” and considered Applicants’ submission of October 5, 2007 (CPR-2 DME-2) as a prefiling notification, thus allowing Applicants to perfect their application by submitting supplemental materials and information. On December 5, 2007, Applicants submitted the supplemental material (CPR-7 DME-7). Applicants’ October 5 and December 5 submissions are referred herein together as the “Application.”

analysis in this proceeding is governed by 49 U.S.C. § 11324(d). Under Section 11324(d), the Board must approve the transaction unless it finds both that: (1) the transaction is likely to result in a substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States; and (2) the anticompetitive effects of the transaction outweigh the public interest in meeting significant transportation needs. In a proceeding governed by Section 11324(d), the Board “must grant the application unless there will be adverse competitive impacts that are both ‘likely’ and ‘substantial.’” *Ind. R.R. Co. – Acquisition – Soo Line R.R. Co.*, Fin. Docket No. 34783, Decision No. 4, served April 6, 2006 at 4.

Even if there are such “likely” and “substantial” anticompetitive effects, the Board may not disapprove the transaction “unless the anticompetitive impacts outweigh the benefits and cannot be mitigated through conditions (which the Board has broad authority to impose under 49 U.S.C. 11324(c)).” *Canadian Nat’l Ry. Co. and Grand Trunk Corp. – Control – Duluth, Missabe and Iron Range Ry. Co., Bessemer and Lake Erie R.R. Co., and the Pittsburgh and Conneaut Dock Co.* (“CN/DMIR”), Fin. Docket No. 34424, 2004 WL 761305, at *9, (Decision served April 9, 2004).³ The Board generally limits itself to conditions that are “feasible” and would ameliorate “significant” competitive harm. *Id.* The Board is also careful to distinguish harms caused by the merger from pre-existing conditions that other railroads, shippers, or communities may have been experiencing that are not “merger-related” (*i.e.*, pre-existing conditions that will neither be caused nor exacerbated by the merger). *Id.*

³ See also, *e.g.*, *Fortress Inv. Group, LLC – Control – Fla. E. Coast Ry. LLC*, Fin. Docket No. 35031, Decision served September 28, 2007, slip op. at 4; *Kansas City Southern –Control –The Kansas City Southern Ry. Co., Gateway Eastern Ry. Co., and the Texas Mexican Ry. Co.* (“KCS/TexMex”), Fin. Docket No. 34342, 2004 WL 2700648, at *10, (Decision served Nov. 23, 2004); *Canadian Nat’l Ry. Co. – Control – Wis. Cent. Transp. Corp., et al.* (“CN/WC”), 5 S.T.B. 890, 899 (2001).

Because conditions generally tend to reduce the benefits of a consolidation, the Board has long maintained a policy of refraining from burdening mergers with conditions unless they are necessary either to ameliorate the anticompetitive impact of a merger or to protect essential services. *See Grainbelt Corp. v. STB*, 109 F.3d 794, 796 (D.C. Cir. 1997); *Lamoille Valley R.R. Co. v. ICC*, 711 F.2d 295, 302 & n.8 (D.C. Cir. 1983). The Board will impose a condition only where: (1) a transaction threatens harm to the public interest, such as a significant reduction in competition, (2) the condition would ameliorate or eliminate that harm, (3) it is operationally feasible, and (4) the condition would result in greater benefit to the public than detriment to the transaction. *Grainbelt Corp.*, 109 F.3d at 796; *Union Pac. Corp. – Control – Mo. Pac. Corp.*, 366 I.C.C. 462, 562-65 (1982); *see also Wisc. Cent. Transp. Corp. – Continuance in Control – Fox Valley & W. Ltd.*, 9 I.C.C.2d 233, 239 (1992).

The burden is on the requesting party to prove that a condition is necessary. In its decision setting forth the procedural schedule for this case, the Board required that any party seeking “either the denial of the application or the imposition of conditions upon any approval thereof, on the theory that approval (or approval without conditions) would harm competition and/or their ability to provide essential services . . . must present substantial evidence in support of their positions.” Decision No. 4 at 10, *citing Lamoille Valley*, 711 F.2d 295.

The Application contains substantial evidence on both the absence of any anticompetitive effects and on the significant public benefits that will result from transaction. The Application demonstrated that the proposed transaction would not result in a substantial lessening of competition at any possible “2 to 1” or “3 to 2” station, that *none* of the fourteen short line carriers that presently connects with DME would be left without competitive routing options following the proposed transaction, and that the transaction will not reduce or eliminate source or

destination competition for the traffic in which Applicants participate today. *See Williams V.S.; Williams Supp. V.S.* The Application also included verified statements from shippers who would benefit from the transaction, and many similar statements of support have been filed since the Application was submitted. The Application thus firmly establishes that the transaction merits approval under 49 U.S.C. § 11324(d).

In order to eliminate any question about the competitive effects arising from the proposed transaction, Applicants hereby pledge to keep open all gateways affected by the proposed transaction on commercially reasonable terms. Applicants are willing to accept a condition on the Board's approval of the proposed transaction requiring them to adhere to this pledge.

In Decision No. 4, the Board adopted a procedural schedule that provided for submission of “all responsive applications, requests for conditions, and any other evidence and argument in opposition to the application” by March 4, 2008, and for Applicants to file their responses to responsive applications, requested conditions and other opposition by April 18, 2008. Although several freight carriers initially requested conditions on any approval of the transaction, as a result of private negotiations and Applicants’ pledge to keep open gateways, the disputes with all but one of those carriers have been resolved. As of this filing, Kansas City Southern Railway Company (“KCS”) is the only freight railroad with pending condition requests. In addition, requests for conditions by several non-carrier parties also remain pending.

Most of the requested conditions are inappropriate efforts to improve a party’s commercial position, or to alter the terms of agreements that were voluntarily negotiated. The Board’s prior decisions make clear, however, that it will not impose conditions “designed simply to put its proponent in a better position than it occupied before the consolidation.” *Canadian Nat’l Ry. – Control – Ill. Cent. Corp* (“CN/IC”), 4 S.T.B. 122, 141 (1999). The Board has also

declined to impose conditions where “parties seek material changes to, or extensions of, existing contracts, or to compel new contractual commitments or property sales” *CSX Corp., Norfolk Southern Corp. — Control & Operating Leases— Conrail, Inc.*, 3 S.T.B. 196, 1998 WL 456510 at *62 (July 23, 1998) (“*CSX/NS/Conrail*”). An agreement that “manifests an equality of bargaining positions and a mutuality of interests” should not be reformed by the Board; rather any disagreements should be resolved by the parties under the terms of their agreement. *St. Louis Sw. Ry. Co. — Purchase (Portion) — Rock Island & Pac. R.R. Co.*, 363 I.C.C. 323, 367-68 (1980) (“*Tucumcari*”).

Applicants hereby reply to opposition comments and requests for conditions, and request that the Board approve the Application without any conditions other than the standard *New York Dock* labor protective conditions (and a condition requiring Applicants to adhere to their pledge regarding open gateways).⁴

DISCUSSION

None of the commenters has presented any evidence, let alone the “substantial evidence” required by *Lamoille Valley*, showing that the proposed transaction will cause a “substantial lessening” of competition. And, even if such effects had been shown, no party has provided any evidence that those effects could outweigh the transaction’s contribution to the public interest in meeting significant transportation needs. There likewise has been no showing that any of the proposed conditions are necessary or appropriate or meet the approval criteria of 49 U.S.C. § 11324(d).

⁴ See *New York Dock Ry. — Control — Brooklyn E. Dist. Term.*, 360 I.C.C. 60, *aff’d sub nom. New York Dock Ry. v. United States*, 609 F.2d 83 (2d Cir. 1979).

In Part I, Applicants reiterate the substantial pro-competitive benefits of the transaction, and demonstrate that shippers overwhelmingly support the Application. In Part II, Applicants respond to individual comments and requests for conditions.

I. THE TRANSACTION HAS RECEIVED SUBSTANTIAL SUPPORT

A. Shippers

The Application has been greeted with overwhelming support by shippers, community organizations and business groups. Numerous statements of support have been filed by shippers. The statements have emphasized the improved competitive options promised by the expanded single-system service alternatives on a stable Class I railroad, as well as the expected substantial improvement in the reliability and service quality on DM&E and IC&E lines. An important public benefit is also expected from the enhanced focus on safety that CPR – one of the safest Class I railroads – will bring to DME.

For example, CHS, Inc. (“CHS”), the largest farmer-owned cooperative in the United States, “supports the transaction because it will create enhanced market access and competitive benefits for shippers on both the Canadian Pacific (“CP”) network and the DM&E/IC&E network.”⁵ CHS ships more than one billion bushels of grain a year, in addition to significant volumes of other products related to its leading grain processing operations. CHS cites as a particular benefit the prospect that Applicants will provide direct service to Kansas City from other parts of the CPR system. In addition, CHS believes that the resulting expanded network will result in “more streamlined and cost-effective shipments” for its traffic from DM&E/IC&E

⁵ Verified Statement of Dan Mack on behalf of CHS, Inc., Application Vol. 2., CPR-2 DME-2, Shippers at 1, 2.

to the Great Lakes and Pacific Northwest for export, as well as opening more competitive routings for its CPR traffic.⁶

These views are echoed by the National Industrial Transportation League (“NITL”), which foresees “significant transportation benefits” from “new single-system rail options where none currently exists.”⁷ NITL also believes that the combined resources of the Applicants will help bring the highly desirable and pro-competitive proposed expansion of DM&E into the Powder River Basin (“PRB”) to fruition.

Other shippers’ associations, particularly those representing grain shippers on DM&E and IC&E, also support the proposed transaction. Notably, the Southern Minnesota and Northern Iowa Shippers Association, whose members operate “virtually all of the 46 grain elevators located on IC&E” and thus represent the principal shippers on the IC&E’s “Corn Lines,” supports the transaction.⁸ The Association comments that its members will gain single-system access to “a variety of additional destinations,” allowing them to tap new markets and compete more effectively with grain elevators served via Canadian National single line service.⁹ The South Dakota Corn Growers Association also supports the Application “because it will significantly increase competition” for their members.¹⁰ Likewise, the Southern Grainbelt

⁶ *Id.*

⁷ Letter to Secretary Quinlan of March 4, 2008, NITL-2.

⁸ Comments of the S. Minn. & N. Iowa Shippers Assoc. (“SMNISA”) at 1.

⁹ *Id.* at 2.

¹⁰ Verified Statement of Lisa Richardson on behalf of the S.D. Corn Growers Assoc., CPR-2 DME-2, Shippers at 18 (“V.S. Richardson”).

Shippers Association notes that shippers of soybeans, wheat, and ethanol will benefit from single-line service to markets east of Chicago.¹¹

IPSCO Inc., a manufacturer of steel coil, plate, and pipe “strongly supports” the Application because it will enable IPSCO to take advantage of single-system service between three of its major U.S. facilities and its facilities in Canada – improved service quality for more than 20,000 cars shipped from its Iowa facility alone.¹² Al-Corn Clean Fuels, an ethanol plant in Minnesota that currently relies heavily on trucks for transportation, supports the transaction because the resulting single-line service to markets across the nation will make rail transport a much more attractive option.¹³ The Mosaic Company, a fertilizer producer supplying millions of tons of potash to farms in the Midwestern United States, expects that single-system service from its mines on CPR to farms on DM&E will result in improved transit times, more reliable service, and more predictable pricing.¹⁴ The Southern Grainbelt Shippers Association anticipates increased competitive options for fertilizer shipments.

Shippers not only cite the new market opportunities made possible by expanded single-system service, but also improved service on the DM&E and IC&E lines. GCC Dacotah, a major producer of cement and concrete products, foresees “enhanced, more reliable and safer shipping services” as a result of CPR’s commitment to invest \$300 million to improve the DM&E and IC&E infrastructure.¹⁵ McNeilus Steel, Inc. notes that track improvements would allow it to use more efficient 40-ton steel coil as inputs in place of the 25-ton coils it currently

¹¹ Verified Statement of Randall M. Rieke on behalf of S. Grainbelt Shippers Assoc., CPR-2 DME-2, Shippers at 22. (“V.S. Rieke”).

¹² Verified Statement of Greg Maindonald on behalf of IPSCO Inc., CPR-2 DME-2, Shippers at 11.

¹³ Verified Statement of Randall Doyall on behalf of Al-Corn Clean Fuels, CPR-7 DME-7, Shippers

¹⁴ Verified Statement of Doug Montgomery on behalf of the Mosaic Co., CPR-7 DME-7, Shippers

¹⁵ Verified Statement of Daniel W. Baker on behalf of GCC Dacotah, CPR-2 CME-2, Shippers at 6.

uses.¹⁶ The Southern Minnesota and Northern Iowa Shippers Association points to the Applicants' commitment to bring the corn lines up to a 25 mph service standard if volume economically supports such an investment.¹⁷ (Applicants are willing to accept a condition requiring them to adhere to this commitment). The South Dakota Corn Growers Association believes that "those improvements are essential to maintaining quality rail service in a growing environment."¹⁸

CPR is proud of its record as one of the safest Class I carriers. Virtually all shippers on the existing DM&E and IC&E lines expressing support for the transaction mentioned the prospect of improved safety as an important reason for their support. For example, the South Dakota Grain & Feed Association expects that CPR's "high standards of safety will carry over to the DM&E."¹⁹ This is not a theoretical benefit. The Committee for a Safer Pierre and Fort Pierre (the "Committee") notes that "DM&E has one of the worst safety records in the industry."²⁰ In the two counties served by the Committee, there have been 16 accidents on DM&E lines since 2003. The Committee believes that the "enormous investment" of \$300 million CPR has committed to improving DM&E's infrastructure will go a long way toward solving the problem. Even more important, in the Committee's view, is that CPR's management has for a long time "made an unambiguous, honest commitment" to safety.

¹⁶ Verified Statement of Paul Blaisdell on behalf of McNeilus Steel, Inc., CPR-7 DME-7, Shippers

¹⁷ SMNISA Comments at 2.

¹⁸ V.S. Richardson CPR-2 DME-2, Shippers at 19.

¹⁹ Verified Statement of Carl Anderson on behalf of S.D. Grain & Feed Assoc., CPR-2 DME-2, Shippers at 20.

²⁰ Letter to Secretary Williams of Feb. 8, 2008, at 2.

B. Freight Railroads

In addition to the overwhelming support of shippers, the proposed transaction has gained the support of a number of freight railroads CPR's most significant competitor, Canadian National Railway Company, has filed a comment with the Board supporting the transaction. After resolving their concerns with CPR (through private negotiations), the Twin Cities & Western Railroad Company, the Minnesota Prairie Line, Inc. and the Wisconsin & Southern Railroad all have withdrawn their Comments in Opposition and now support the Application.

C. Government Officials

The transaction has received support from many levels of government. The United States Department of Agriculture ("USDA") filed extensive comments with the Board outlining the benefits of CPR's acquisition of the DM&E and IC&E lines. Among the benefits outlined by the USDA are that the transaction will help to preserve competition and competitive rail rates in South Dakota and northern Iowa; create a more efficient and safer railroad; and provide higher paying railroad, ethanol production, and manufacturing jobs for the region. In explaining these benefits, the USDA makes one thing abundantly clear: this transaction is in the best interest of the public.

This belief is shared by numerous local officials. For example, the Mayor of Huron, South Dakota reports that the City Commission unanimously passed a resolution supporting the transaction because it will "improve the competitive environment" for grain and ethanol, which will benefit from single-system service to markets in New York, Philadelphia, and Canada, as well as better access to export markets.²¹ The Mayor of Belle Fourche, South Dakota, comments that the city has a "growing reliance" on rail to ship bentonite clay and ethanol, and applauds

²¹ Verified Statement of Mayor David McGirr on behalf of the City of Huron, S.D., CPR-7 DME-7, Communities.

CPR’s planned investment to improve DME’s rail service.²² The Mayor of Wall, South Dakota, expects that the transaction will result in better and faster service for its wheat shippers, as well as great safety improvements.²³ The statement submitted by the Mayor of Springfield, Minnesota sums up the position of many local communities: “Springfield supports the proposed transaction because it will improve rail service and enhance the competitive position of Springfield shippers,” which include corn, soybean, and wheat farmers, as well as local industries such as manufacturers of bricks and trailers.²⁴

II. RESPONSE TO OPPOSING COMMENTS AND REQUESTS FOR CONDITIONS

A. Freight Railroad

1. Kansas City Southern (“KCS”)

KCS asserts that the proposed transaction would result in a reduction in competition for both corn traffic that currently moves from IC&E origins to poultry feeder mills located on KCS’ lines, and for “NAFTA traffic” moving between the Chicago and Laredo gateways. KCS’ comments focus on two existing contracts between it and IC&E: (i) a July 18, 2002 agreement between those carriers giving KCS the right to quote rates for service between the IC&E “Corn Lines” in northern Iowa and southern Minnesota and KCS-served feeder mills in the South Central States (the “IC&E/KCS Grain Agreement”), and (ii) a May 20, 1997 agreement under which IC&E’s predecessor I&M Rail Link, LLC (“IMRL”) granted KCS haulage rights for certain commodities moving between Kansas City and Chicago (the “IC&E/KCS Chicago Haulage Agreement”). KCS is asking the Board to alter those contracts by (1) making them

²² Verified Statement of Mayor David Schneider on behalf of the City of Belle Fourche, S.D., CPR-7 DME-7, Communities.

²³ Verified Statement of Mayor David L. Hahn on behalf of the City of Wall, S.D., CPR-7 DME-7, Communities.

²⁴ Verified Statement of Mayor Mark Brown on behalf of the City of Springfield, MN, CPR-7 DME-7 Communities.

permanent; (2) requiring CPR to negotiate "tougher" service standards and penalties in both; and (3) adding a provision to the IC&E/KCS Chicago Haulage Agreement that would give KCS the right to convert the haulage to trackage rights if CPR does not meet specified service quality standards.²⁵

KCS' conditions proposals, like those of several other protestants, represent an attempt to use this proceeding to improve its commercial position under existing, privately negotiated agreements. There is, however, one aspect of KCS' proposed conditions which distinguishes its proposal from others in this case: KCS' proposed conditions – particularly the request that its rights under the two contracts be made "permanent" – are an attempt by KCS to garner for itself the benefits that it would have achieved if its failed bid to acquire DME itself had been successful. KCS has utterly failed to demonstrate any competitive harm from the transaction that would justify its proposed conditions. As described in greater detail below, KCS' claim that the proposed transaction will have adverse effects on horizontal competition is baseless. KCS' conditions requests are principally predicated on vertical foreclosure arguments that are fatally flawed and claims of competitive harms that are completely unfounded.

(a) KCS' Horizontal Effects Arguments Are Meritless

KCS argues briefly that "there are parallel elements to this transaction that were not analyzed and for which Applicants have failed to meet their evidentiary burden to establish that

²⁵ KCS alleges that DM&E/IC&E's refusal to agree to modifications of the two agreements reflects improper influence by CPR over DM&E/IC&E prior to approval of the proposed transaction. KCS Comments at 23. As explained by Lynn Anderson, DM&E's Senior Vice President – Marketing, IC&E'S decision not to extend its agreements with KCS was neither dictated nor influenced by CPR. Anderson Reply V.S. at 14-16. Mr. Anderson declined KCS' request to extend or modify the IC&E/KCS Grain Agreement based upon his assessment that the current volatility in the corn markets, including the effect of the "ethanol boom," makes it impossible to determine whether a continuation of that Agreement on the same terms and conditions beyond the year 2017 would be in IC&E's best interest (whether or not IC&E becomes part of the CPR rail system). *Id.* at 15. Mr. Anderson declined KCS' request to extend the IC&E/KCS Chicago Haulage Agreement because no traffic had ever moved under that Agreement and IC&E had consistently indicated since 2002 that it had no interest in doing business under the terms of the haulage arrangement that it inherited from IMRL. *Id.* at 16.

there will not be a substantial lessening of competition.” KCS Comments at 12. In support of this assertion, KCS cites the verified statement of Curtis Grimm, who claims that the transaction will result in movements from Minnesota and Iowa to the Pacific Northwest (“PNW”) a decline in “horizontal competition, for export grain shipments.” *Id.* at 12-13. Notably, KCS does not attempt to demonstrate that such horizontal effects would result in a “substantial lessening of competition,” the standard under 49 U.S.C. § 11324(d). Instead, KCS argues the negative proposition that Applicants have somehow failed to demonstrate sufficiently that their transaction will not result in such competitive harm. KCS’ assertion is belied by the record.

The Verified Statement submitted by Mr. Williams as part of the October 5 Application presented a detailed analysis of every rail station that is (or could be) commonly served by CPR and DME today. As that testimony demonstrates, the proposed transaction would not result in a substantial lessening of competition at *any* possible “2 to 1” or “3 to 2” station. Mr. Williams’ Opening Verified Statement also showed that none of the fourteen short line carriers that presently connects with DME would be left without competitive routing options following the proposed transaction — indeed, most of those short lines have access to multiple options involving non-Applicant carriers.

Nevertheless, in a Verified Statement submitted on behalf of Iowa Northern Railway Company (“IANR”) on October 26, 2007, witness Curtis Grimm²⁶ suggested that the October 5 Application did not adequately address the potential competitive impacts of the proposed transaction. *See* IANR-1, Comments of Iowa Northern Railway Company on Proposed Procedural Schedule, Grimm V.S. at 43-47. Dr. Grimm made no attempt to analyze the

²⁶ Dr. Grimm first appeared in this proceeding as a witness on behalf of IANR. As described below, after IANR determined not to file any further comments or to seek conditions in this proceeding, Dr. Grimm was retained by KCS as an expert consultant.

competitive effects of the proposed transaction, nor did he identify a single competitive problem raised by the transaction. Rather, Dr. Grimm asserted that

[O]ne cannot reach a conclusion that there are no horizontal competitive effects without a careful and systematic analysis of whether the instant merger eliminates independent rail routings between broader geographic areas, such as counties or BEAs. In addition, rail mergers can result in reductions in market and/or geographic competition. *Id.* at 43-44.

In order to demonstrate that Dr. Grimm's assertions lacked substance, Mr. Williams conducted a supplemental analysis that examined Applicants' participation in rail traffic at the Bureau of Economic Analysis Economic Area ("BEA") level, rather than the station-specific level used in his Opening Verified Statement. Mr. Williams' Supplemental Verified Statement buttresses his conclusion that the proposed transaction will not result in a substantial lessening of direct rail competition between CPR and DME. That testimony also shows that the transaction will not reduce or eliminate source or destination competition for the traffic in which Applicants participate today.

IANR resolved its concerns through private negotiations with Applicants, and did not file comments or requests for conditions. In support of its quest for conditions, however, KCS has reintroduced Dr. Grimm into the case. Once again, Dr. Grimm has not undertaken any serious analysis of the competitive effects of the proposed transaction. Instead, he offered the vague suggestion that the STB should apply "a structural approach" to analyzing the competitive effects of the transaction. KCS Comments, Grimm V.S. at 2. In support of that suggestion, Dr. Grimm provided a single example of data of traffic moving in one direction between one BEA-pair [] and then calculated a Herfindahl Index with respect to those data. *Id.* at 3-6 and Table 1. Dr. Grimm's calculations purported to show that the transaction would lead

to CPR exercising market power because []
[]].

The shortcomings of Dr. Grimm’s “analysis” are legion and include: looking only at a single BEA-pair (Grimm Dep., attached as Appendix S, at 15-19); considering only at traffic in one direction (*id.* at 31); failing to review data for the study year (2005) designated by the Board (*id.* at 24-26); failing to consider in either his market share or Herfindahl calculations any mode of transportation other than rail, regardless of the commodity or the length of haul involved (*id.* at 55); failing to consider whether CPR and DME actually served the same shippers in the two BEAs (*id.* at 60-70); and failing to consider evidence that CPR and DME carried different commodities between the two BEAs (*id.* at 71-88).

Even putting all these fatal infirmities to one side, Dr. Grimm’s single example showing that CPR’s and DME’s combined rail share of all traffic moving in one direction between two BEAs would amount to [] does not undermine the conclusion, based on the substantial evidence provided by Applicants, that the proposed transaction would not substantially lessen competition. Nor does Dr. Grimm’s Herfindahl Index calculation alter this conclusion. The ICC and the Board have consistently pointed out the limited usefulness of the Herfindahl Index to analyze railroad consolidations. *See, e.g., Union Pac. Corp. – Control – Chicago & North Western Transp. Co. (“UP/CNW”),* Fin. Docket No. 32133, Decision No. 25, 1995 WL 141757, at *76-77 (served March 7, 1995).

Nor is there any merit to KCS’ contention that the proposed transaction would eliminate direct competition between the current DM&E/BNSF route (via Florence, MN) and the current CPR/UP route (via Kingsgate, AB) for corn shipments to Pacific Northwest (“PNW”) export terminals. KCS Comments at 12-13. To begin with, the proposed transaction will not result in a

significant reduction in competition for corn traffic moving for export via the PNW. As witness Williams shows, ample competition involving railroads other than Applicants exists for corn shipments to the PNW ports. Williams Reply V.S. at 5-6. Indeed, Applicants' combined share of PNW export corn shipments amounted to [] of such shipments during 2005. *Id.* at 6.

Moreover, as explained by Mr. Anderson, the potential diversions hypothesized by KCS are not likely to occur. As KCS acknowledges (KCS Comments at 11), the DM&E/BNSF corn traffic moves pursuant to a [] between those railroads. *See* Anderson Reply V.S., Attachment E. Under the agreement, [] [] []. *See id.*, Amendment ¶ 3. Each of those elevators is located within 85 miles of the DM&E/BNSF interchange at Florence, MN. Anderson Reply V.S. at 2. BNSF and DM&E [] to facilitate the movement of this traffic. *Id.* Att. E, ¶ 11. The [] []. Anderson Reply V.S. at 2. Therefore, [], even if CPR acquires control of DME.

Further, as witness Smith explains, CPR is not likely to be able to divert these corn shipments to a CPR/UP routing via Kingsgate, because the DM&E/BNSF route to Seattle, WA via Florence is far shorter than the CPR/UP routing. Smith Reply V.S. at 5-6. It is unlikely that a more circuitous interline routing could be competitive, on either a cost or service basis, with BNSF's single line route to the PNW for the traffic correctly handled by DME and BNSF. Anderson Reply V.S. at 3.

In sum, KCS has not in any way undermined the conclusion that the proposed transaction would not have any substantial horizontal effects.

(b) KCS' Vertical Foreclosure Arguments Are Fatally Flawed

KCS' complaints about both grain and NAFTA traffic moving between Chicago and Kansas City are essentially "vertical foreclosure" arguments. The predicate for KCS' conditions is alleged vertical foreclosure of KCS from participating in joint movements south of Kansas City. KCS Comments at 14-15. At the outset, it should be noted that both the Board and the ICC have been appropriately skeptical about vertical foreclosure arguments, particularly with respect to highly competitive grain markets and in transactions, such as this, that are end-to-end consolidations. *See, e.g., Kansas City Southern –Control –The Kansas City Southern Ry. Co., Gateway Eastern Ry. Co., and the Texas Mexican Ry. Co. ("KCS/TexMex")*, Fin. Docket No. 34342, Decision served Nov. 23, 2004 (2004 WL 2700648, at *12 (S.T.B.)) (vertical integration will not affect the end-product consumer adversely); *CN/WC*, 5 S.T.B. at 904 (rejecting request for gateway protection because "we prefer to allow a merged entity the flexibility to determine what routes are most efficient given the newly restructured system because shippers would benefit from this process"); *CSX Corp., Norfolk Southern Corp. – Control & Operating Leases— Conrail, Inc.*, 3 S.T.B. 196, 1998 WL 456510 at *67 (1998); *UP/CNW*, 1995 WL 141757, at *52, 59 (rejecting vertical foreclosure argument with respect to upper midwestern grain markets in view of extensive modal and source competition).²⁷

²⁷ The two cases principally relied upon by KCS, the *UP/MoPac* and *UP/MKT* cases, both involved transactions featuring extensive horizontal overlaps. *See Union Pac. Corp. – Control – Mo.-Ks-Tx. Corp. ("UP/MKT")*, 4 I.C.C.2d 409, 436 (1988) ("The proposed consolidation is largely a parallel one."); *Union Pac. Corp. – Control – Mo.-Pac. R.R. Co. ("UP/MoPac")*, 366 I.C.C. 462, 1982 WL 190779, at *34 (1982) (noting that the transaction encompassed "substantial parallel aspects," or horizontal overlaps). KCS attempts to evade the lack of precedent for the relief it seeks by arguing that the types of competitive harm it alleges "are not easily categorized within the contexts of previous merger cases" and that the "adverse impacts of this Transaction cannot be labeled easily or

But even beyond the high hurdles created by these decisions, KCS’ vertical foreclosure argument is fatally undermined by the fact *neither CPR nor DME has any lines south of the gateway at which KCS claims it would be foreclosed (Kansas City)*. In fact, CPR does not even reach Kansas City today; its lines extend only as far south as Chicago and the Twin Cities.

KCS attempts to side-step this fatal flaw by arguing that CPR and Union Pacific Railroad Company (“UP”) (which does operate south of Kansas City) should be tied together in analyzing the competitive effects of the proposed transaction because of their participation in a “multi-faceted strategic relationship” (KCS Comments at 15). KCS asserts, among other things, that CPR and UP are parties to “numerous alliances” (KCS Comments, Grimm V.S. at 7); that they participate in “a comprehensive traffic solicitation, pricing and operating alliance” (KCS Comments, Woodward V.S. at 7), and that “CP’s motivations and incentives are also guided by those of UP pursuant to the CanAm alliance” (KCS Comments at 17). Indeed, KCS characterizes the relationship between CPR and UP as “a commercial bond just short of a merger” (KCS Comments at 15). According to KCS, CPR’s supposed strategic relationship with UP will create incentives for it to foreclose routings involving IC&E and KCS via the Kansas City gateway following CPR’s proposed acquisition of control of DM&E.

Larry Lawrence, KCS’ Executive Vice President and Assistant to the Chairman, and the KCS official who [] (Lawrence Dep., Appendix R, at 6, 12), takes these allegations even farther, stating, among other things, that [] [] (*id.* at 36) (emphasis added) and [] (*id.* at 37). Mr. Lawrence testified

conveniently.” KCS Comments at 35. That is because these are neither real competitive harms or even plausible private harms to KCS itself that would warrant the Board’s imposition of public interest conditions.

that []
[] (*id.*). Indeed, according to Mr. Lawrence, []
[] (*id.* at 21, 37), []
[] (*id.* at 39-40). In sum,
KCS' chief strategist in this case concluded that []
[] (*id.* at 73) (emphasis added).

In support of its view of the world, KCS offers only two isolated statements. First, KCS cites a statement by a UP marketing official in a 2001 *Railway Age* article that "we are two railroads thinking of ourselves as one." KCS ignores, however, a statement *in the same article* by Fred Green (then CPR's Executive Vice President-Operations & Marketing, now CPR's President and CEO) making clear that "CP Rail will not stop working with CN or other railroads, nor will UP."²⁸ Second, KCS witness Woodward quotes out of context a single sentence from CPR's 2006 Fact Book indicating that "Joint CPR/UP teams oversee the operations of the Can-Am corridors and make strategic decisions with respect to operations, marketing, technology and investment."²⁹ KCS fails to reveal, however, that the prior paragraph on the same page of the Fact Book says that CPR has partnerships with *all* of the major Class 1 railroads plus Transportation Ferroviaria Mexicana. Milloy Reply V.S. at 6 & Appendix C, page 44. And the paragraph from which KCS lifted its quote begins: "One successful alliance, with UP, operates under the Can-Am name." *Id.* Appendix C, page 44.

²⁸ See Appendix D, Christopher Ytuarte, *Canadian Pacific Rail's New Alliance with UP is a Pivotal Point in its Existence as a Newly Independent Company*, *Railway Age*, Oct. 2001, <http://www.railwayage.com/oct01/cprail.html> ("CP Rail will not stop working with CN or other railroads, nor will UP.").

²⁹ Canadian Pac. Ry, 2006 Corporate Profile + Fact Book 44 (2007), included as Appendix C.

These two statements plainly do not constitute evidence, much less substantial evidence, that UP guides CPR in the marketplace or that CPR and UP should be “viewed as one” in analyzing the competitive effects of the proposed transaction. Indeed, the Board has rejected similar assertions as "illogical" in analyzing the competitive significance of alliances. *CN/IC*, 4 S.T.B. at 148 (“[Alliance members] will have every incentive to continue to compete aggressively for traffic where they are able to provide service alternatives For these carriers to behave otherwise would not be consistent with their economic self interests to compete for traffic they can handle profitably.”).

Moreover, contrary to the claim of KCS witness Grimm (KCS Comments, Grimm V.S. at 8), CPR's relationship with UP does not create any incentives to "undercut the competitive position of KCS." CPR witness Milloy demonstrates there exists no exclusive strategic relationship between CPR and UP. Although CPR and UP do work closely together to offer shippers efficient interline rail service, those arrangements are primarily operating initiatives designed to improve service reliability and transit time via CPR-UP interline routes between points in the United States and Canada. Milloy Reply V.S. at 2-5. Those arrangements [] [] – rather [] [] *Id.* Most importantly, [] [] To the contrary, [] [] [] [] (Emphasis added.) *Id.* at 5.

As Mr. Milloy demonstrates, both CPR and UP do, in fact, participate in competing interline services with other carriers. Both CPR and UP participate with other railroads in interline routings for traffic that could move via the CPR-UP CanAm services, where it is in that carrier's best economic interest to do so. For example, []

[]

[]

Milloy Reply V.S. at 7. CPR handles this business []

[]

[] *Id.* CPR

interchanges shipments []

[] *Id.* at 7-8.

When []

[], CPR worked with the customer to shift the traffic to a CPR-BNSF []

[]. *Id.* at 8. Under KCS' fanciful hypothesis regarding the nature of the relationship between CPR and UP, one would have expected CPR to refuse to quote a reasonable revenue requirement for the CPR-BNSF routing, []

[]. Instead, CPR acted in its own economic self-interest to handle the business in conjunction with UP's competitor (BNSF).³⁰

KCS' thesis that CPR and UP prefer each other to the exclusion of other connecting carriers is further disproven by the *Carload Waybill Sample*. As witness Williams testifies (Williams Reply V.S. at 29-30), during 2005, UP interchanged with CN []

³⁰ Mr. Milloy also provides examples of UP working with carriers other than CPR where UP finds it in its best economic interest to do so. Milloy Reply V.S. at 8.

[]]. UP's interchange of such traffic with CPR amounted to [] []. These data refute any suggestion that CPR would be motivated to work exclusively with UP (to KCS' detriment) in handling NAFTA traffic.

In short, KCS' prediction that "CP (with DME under its control) will look to adjust and augment its strategic ties with UP and to thwart traffic flows or strategic relationships with other railroads whose services compete with those of CP/UP" (KCS Comments at 17) is utterly inconsistent with the facts of record. The truth of the matter is that CPR and UP (like other connecting railroads) work closely together to maximize the efficiency of their interline operations. However, the relationship between CPR and UP is by no means exclusive – both carriers participate in "alliances" and other interline service arrangements with other Class 1 railroads. CPR's individual economic self-interest – not the terms of any strategic alliance with UP – motivates CPR's actions in the marketplace today, and will continue to do so if the Board approves the proposed transaction.

The conclusion that the proposed transaction would *not* change CPR's incentives to compete vigorously with UP for traffic is strongly supported by the Board's decision approving CN's acquisition of Illinois Central. In that case, the Board flatly rejected arguments that CN/IC would not compete with KCS because of a formal marketing and operational Alliance between CN and KCS:

Protestants' attempt to paint the [CN-KCS] Alliance as a creature that has taken over, or will ultimately take over, the lesser enterprises of the participating railroads, is unpersuasive. Their claim that the Alliance railroads will forgo aggressive competition for certain traffic in favor of cooperation for their more important Alliance traffic is illogical. . . . The argument is illogical because KCS and CN/IC will have every incentive to continue to compete

aggressively for traffic where they are able to provide service alternatives, just as they have competed in the past.

CN/IC, 4 STB at 147-48.

CPR's arrangements with UP are not nearly as extensive as the CN/IC/KCS Alliance.

For example, under the CN/IC/KCS Alliance, KCS and CN/IC agreed not only []

[]

[] but also to []

[]

[]

[] By comparison, the []

[]

[] which both frequently do. *V.S. Milloy*, at 2-3, 5. The [] also

[]

V.S. Milloy at 4.

Furthermore, under the CN/IC/KCS Alliance, []

[]

[]

[]

[] The [], on the other hand, []

[]; rather CPR and UP []

[] In sum, the CPR/UP routing arrangements are far less

pervasive than the CN/IC/KCS Alliance that the Board found was insufficient to create any

inference that the Alliance participants would act contrary to their individual economic self-

interests. *A fortiori*, KCS' claim that CPR will cause IC&E to foreclose its routings with KCS in order to promote less efficient CPR-UP routings must be rejected.

Finally, even if there were merit to KCS' vertical foreclosure claims (and there is not), any such concerns are fully addressed by Applicants pledge to keep open all gateways affected by the proposed transaction on commercially reasonable terms. Applicants are willing to accept a condition on the Board's approval of the proposed transaction requiring them to adhere to this pledge.³¹ The ICC and Board have accepted virtually identical pledges as sufficient to address concerns about vertical foreclosure in prior control proceedings including KCS' acquisition of control of TexMex. *See, e.g., CN/IC*, 4 S.T.B. at 158-59; *CN/WC*, 5 S.T.B. at 902; *KCS/TexMex*, 2004 WL 2700648, at *13.

(c) KCS' Claims Of Competitive Harm From Vertical Foreclosure Are Unfounded

KCS advances two specific claims of vertical foreclosure arising from the proposed transaction – one related to grain originating on IC&E's "Corn Lines" and a second relating to NAFTA traffic moving between Chicago and Kansas City. Both claims are demonstrably without merit.

KCS' first claim is that, upon acquiring control of DM&E, CPR would seek to divert corn traffic that currently moves from origins on IC&E's Corn Lines in northern Iowa and southern Minnesota to KCS-served feed mills in the South Central States either to a "long haul"

³¹ This commitment to keep gateways affected by the proposed transaction open on commercially reasonable terms also responds to the concerns of some shippers about the continued viability of KCS/IC&E grain routings and KCS/IC&E routings over the Chicago gateway. *See Boise Cascade V.S. at 1-2; OK Industries V.S. at 2; Tyson Foods, Inc. Supplemental V.S. at 1-2; J.W. Nutt Company V.S. at 2; see also MFA Incorporated V.S. at 2-3.*

IC&E-DM&E-CPR-UP route to the PNW ports, or to IC&E-UP routes via Kansas City to feed mills that are served by UP rather than KCS. KCS Comments at 3, 18.³²

At the outset, KCS' claims of anticompetitive effects with respect to grain movements from northern Iowa and southern Minnesota should be reviewed in light of the Commission's analysis of Iowa grain markets, just over a decade ago, in the *UP/CNW* proceeding:

As respects grain (in particular, grain originated in Iowa), we have given attention to the role that intermodal competition (especially truck competition) currently plays, and will play post-transaction, in the midwestern markets served by CNW, and we have given attention to source competition as well. Because grain grown on the farm must necessarily be trucked somewhere, and because grain grown in Iowa competes with grain grown elsewhere (both in the United States and throughout the world), common control of UP and CNW will not result in a diminution of transportation competition as regards Iowa grain originations.

UP/CNW, 1995 WL 141757 at *52; *see also id.* at *59, *76-77. The market data provided by Mr. Williams in this case demonstrate that the Commission's conclusions from a decade ago remain valid.

Corn is a ubiquitous commodity that is handled by all the major U.S. railroads. Williams Reply V.S. at 3-4 & Table 1. In 2005, the two largest originators of corn traffic were [] with [] []. NS [], CSXT [] and CN [] also originated substantial

³² Several shippers submitted near-identical letters claiming that, if KCS' claim that CPR would seek to divert corn traffic comes to pass, the "loss of those IC&E Iowa or Minnesota origins . . . would result in [the shipper] having to pay more for its grain." *OK Industries V.S.* at 2; *Tyson Foods, Inc. Supplemental V.S.* at 1-2; *J.W. Nutt Company V.S.* at 2; *see also MFA Incorporated V.S.* at 2-3. As the analysis of Mr. Williams demonstrates, this is simply incorrect. *See Williams Reply V.S.* at 18-26. Receivers of corn on the KCS lines can obtain corn from alternative locations such as Council Bluffs, Iowa, Atchison, Kansas or Topeka, Kansas that is cost-competitive with IC&E corn—and in most cases slightly less expensive on a delivered cost basis than IC&E-origin corn. Moreover, these shippers' concerns that after the transaction corn from IC&E origins will no longer be a viable option is not supported. For example, MFA Incorporated is served by the IC&E at Laredo, Missouri, which is located approximately 70 miles from Kansas City. It is unrealistic to think that this corn traffic will be diverted onto circuitous routes to the PNW rather than being interchanged over the nearby Kansas City gateway.

volumes of corn on their rail lines. By contrast, CPR, which originated only [] carloads (or [] of total shipments) and DM&E/IC&E, which originated [] carloads ([] of all originated cars) had a combined share of corn originations of []. *Id.* Applicants' share of terminated corn shipments is even smaller. In 2005, the combined share of corn terminations for the CPR-DME system would be []. *Id.*

Even if one focuses more narrowly on the States of Iowa and Minnesota, Applicants' combined shares of corn traffic is modest. *Id.* at 5 & Table 2. DM&E/IC&E collectively accounted for [] of the corn shipments that originated in Iowa and Minnesota in 2005. CPR's share of corn originations in those two states was [] []. Thus Applicants' combined share of corn shipments originating in Iowa and Minnesota was []. By contrast, UP and BNSF originated [] and [], respectively, in those two states. CN also handled a substantial volume of corn traffic in Iowa/Minnesota, with [].

Moreover, contrary to KCS' assertions, CPR has consistently viewed the ability to serve domestic grain markets south of the Kansas City gateway as a *benefit* of the proposed transaction. Don Smith, Senior Account Manager – US Grain Division of CPR, underscored this conclusion when he analyzed DME's existing and projected grain business as part of CPR's *preacquisition* due diligence:

In contrast to CPR, DME has a significant domestic corn franchise that includes service to the South Central poultry feeder industry (jointly with KCS), Chicago and points beyond, and the growing ethanol-related corn transportation business in Iowa and Minnesota. From CPR's perspective, one of the key benefits of the transaction is the ability to augment our export corn business by gaining the ability to participate in these domestic corn traffic flows. I was responsible for reviewing DME's existing and projected grain business as part of CPR's pre-acquisition due diligence. In my report – which was prepared in July 2007, as

CPR was attempting to determine the value of a DME acquisition – the very first item I listed under the heading “Potential CPR-DME Grain Synergies” was the following:

“A direct connection with the KCS may provide improved market access for both US and Canadian Grain to:

- Mexico: for shipments of wheat, malt barley, soybeans, canola, oilseed meals and DDG;
- Arkansas/East Texas/ MS poultry and livestock markets: for shipments of corn, oilseed meals and DDG.”

Smith Reply V.S. at 3-4.³³

The Application likewise predicts that “[e]xtension of the CPR system to the Kansas City gateway will provide CPR grain shippers a more efficient routing option for shipments to Gulf Coast export terminals and consumption points in the U.S. Southwest and Mexico.” Application, Exh. 12, Market Analysis at 4. Such diversification of CPR’s U.S. corn business will improve CPR’s competitive position, by enabling CPR to match the service offerings of other Class I railroads (including BNSF, UP and CN) who currently provide single line service to a variety of domestic points of grain consumption. Smith Reply V.S. at 4. Indeed, the Southern Minnesota and Northern Iowa Shippers Association, whose members include virtually all of the grain elevators on the Corn Lines, “strongly endorse[s] the proposed transaction.³⁴

KCS witness Bilovesky acknowledges that grain elevators served by DM&E and IC&E will benefit from the ability to reach new end markets via CPR’s Class 1 network as a result of the proposed transaction. (KCS Comments, V.S. Bilovesky at 7). Nevertheless, Mr. Bilovesky

³³ Likewise, in his deposition, Ray Foot, CPR’s Vice President – Marketing & Sales (Merchandise) testified: []
[] to
[] a
[] Foot Dep. Tr. at 30, Appendix O at O-7.

³⁴ See Comments of the Southern Minnesota and Northern Iowa Shippers Associations, filed March 4, 2007, at 1.

asserts that shifting IC&E origin corn away from the current KCS-served destinations would harm receivers, primarily feed lots, that (he claims) are dependent on IC&E as a source of corn, and would therefore be anticompetitive (*id.* at 8-10). Mr. Bilovesky’s assertions are wrong, for several reasons.

As an initial matter, the IC&E/KCS Grain Agreement []
[]
[]
[] Anderson Reply V.S. App. F, Section 1. Thus,
notwithstanding the acquisition of control of DME by CPR, KCS will []
[]
[] Witness Bilovesky acknowledges that reality. KCS Comments, V.S.
Bilovesky at 9.

However, Mr. Bilovesky argues that, in the short term, Applicants can effectively cause KCS (and its customers) to lose access to IC&E origin grain by downgrading the service provided by IC&E under the IC&E/KCS Grain Agreement. KCS Comments, V.S. Bilovesky at 9-10. This argument ignores the fact that []
[]
Specifically, []
[] IC&E is
[]
[] Anderson
Reply V.S. App. F, Section 6. This []
is sufficient to [] Anderson Reply V.S. at 5.

Indeed, based upon KCS witness Woodward’s testimony that []
[] Woodward V.S. at 18, Exhibit 7), []
[]
[] In any event, []
about which Mr. Bilovesky complains [].

In essence, KCS is asking the Board to improve KCS’ position under the IC&E/KCS Grain Agreement by requiring Applicants to negotiate [].
KCS Comments at 40. No legitimate basis exists for the Board to alter the terms of the IC&E/KCS Grain Agreement for the sole benefit of KCS.

As the testimony accompanying these Reply Comments shows, the notion that corn originating on IC&E’s Corn Lines could readily be diverted to the PNW is meritless for several reasons. To begin with, the agreement under which CPR currently provides interline service for grain shipments to the PNW ports in conjunction with UP []
Reply V.S. Smith at 4-5 & Appendix B (CPR-UP Grain Agreement). Moreover, diverting a significant volume of IC&E-originated corn shipments to the CPR-UP route would, in all likelihood, cause CPR to [] . Reply V.S. Smith at 5. CPR would need to []
[] *Id.* at 4. It is, at best, uncertain whether UP would agree to amend the agreement to []
[] *Id.* at 5.

Even if CPR were successful in [] to permit the movement of IC&E-originated corn to the PNW ports, such movements would have to traverse a more circuitous and far longer route – by over 400 miles generally – than competing

corn shipments moving from DM&E-served elevators via the Florence gateway and BNSF's lines. Smith Reply V.S. at 5; Anderson Reply V.S. at 6. The cost of transporting such shipments an additional 400+ miles is likely to render IC&E origin corn noncompetitive vis-à-vis corn from the many origins that BNSF and UP can serve on a single line basis to the PNW. Anderson Reply V.S. at 6. Indeed, the current movements that DM&E handles in conjunction with BNSF to the PNW are [] *Id.*

Further, joint DM&E-BNSF corn shipments to the PNW []

[]

[] MN. *Id.* By contrast, most grain elevators on the Corn Lines are [] *Id.* []

[]

[] would further undercut the ability of Applicants to offer cost-competitive service from Corn Lines origins to the PNW. *Id.*

Ultimately, the likelihood that CPR could successfully divert corn from IC&E origins to the PNW ports is illustrated by current actions in the marketplace. As KCS witness Jones testifies, the PNW export market currently enjoys a significant "spread" advantage over the U.S. Gulf coast due to a variety of factors, including lower vessel costs from the PNW. (KCS Comments, Jones V.S. at 12-13.) If PNW export destinations were truly a viable option for IC&E shippers, they would already be directing their corn to the PNW in order to take advantage of the more favorable commodity price available there. However, notwithstanding such favorable market conditions, []. This strongly suggests that such movements are simply not economically viable.

In the face of all of these factors, KCS attempts to buttress its claim that CPR will seek to divert corn traffic that originates on IC&E (and currently moves via the Kansas City) to a CPR-UP route to PNW ports for export by advancing a “contribution analysis” sponsored by KCS witness Woodward. KCS Comments, Woodward V.S. at 18 & Exhibit 7. Mr. Woodward’s analysis purports to show that CPR has strong economic incentives to cause the diversion of corn traffic originating on IC&E’s Corn Lines to the PNW, because CPR would earn a substantially greater contribution from such shipments than IC&E does today in handling the traffic in conjunction with KCS. Mr. Williams’ Reply Verified Statement demonstrates that Mr. Woodward’s analysis is fatally flawed. Williams Reply V.S. at 10-15.

Mr. Woodward submitted an extensive Verified Statement (Exhibit C to KCS' March 4, 2008 Comments, KCSR-2) in which he described his analysis of certain traffic flows to determine "the likely adverse impacts" of the proposed transaction upon KCS and its shippers. Concluding that such impacts would adversely affect "certain KCSR-served grain shippers³⁵ and receivers" and that the transaction "would undermine KCSR's ability to compete in an important NAFTA corridor" (Woodward V.S. at 2), Mr. Woodward concluded that the Board should require the "long-term extension of the Grain Agreement along with more rigorous performance standards" (*id.* at 18) and that "CPR should be required to permanently keep in place the Chicago Agreement, and CPR should be required to negotiate modifications to that agreement to allow for the movement of all traffic under reasonable terms." *Id.* at 24.

³⁵ The "KCSR-served grain shippers" referenced by Mr. Woodward are the members of the Southern Minnesota and Northern Iowa Shippers Association" who have filed comments expressing support for the proposed transaction, citing a number of benefits that they perceived from the Applicants' pledge to upgrade the IC&E Corn Lines and from the expanded range of markets that the consolidated system would open up to them. Moreover, Mr. Woodward testified that he had not seen the Association's comments until shown them by CPR counsel during his deposition (Woodward Dep. Tr., Appendix Q, at 29).

Remarkably, however, in his deposition Mr. Woodward admitted that []
[] (Woodward Dep. Tr., Appendix Q, at 64); that []
[] until CPR's counsel showed it to him during
the course of deposition questioning (Id. at 43-44); that []
[] until it was shown to him during questioning by CPR counsel (*id.*
at 57); and that the basis of his understanding of []
[] (*id.*) – and this notwithstanding the fact that []
[], literally only
two tabs behind Mr. Woodward's own Statement. In these circumstances, it is difficult to place
much, if any weight on Mr. Woodward's testimony.

According to Mr. Woodward's Exhibit 7, CPR and UP would []
[]. This is nearly five
[]
[] – a route that is 400 miles shorter than the CPR/UP route.
Such a conclusion is, on its face, utterly irrational. Mr. Woodward also purported to develop a
contribution for [] However, there are no shipments of
export corn – involving CPR or any other railroad – through the port of Vancouver, BC because
no corn moves through that port (for a variety of reasons that are explained in Mr. Smith's
testimony). (Smith V.S. at 7-8.)³⁶ Moreover, in calculating CPR's contribution, Mr. Woodward
[] to the Canadian portion of the
CPR-UP route. (*See* V.S. Woodward, Exh. 7 (notes).) As the Board knows, there are no

³⁶ Moreover, as the Board knows, rail rates for Canadian export shipments of other grains (including wheat) are subject to a complex scheme of economic regulation that renders meaningless any attempt to compare revenues or contribution on such shipments with potential movements of corn from Iowa/Minnesota to U.S. ports in the PNW.

“URCS” costs for CPR’s Canadian operations. Finally, Mr. Woodward appears to have based his calculations on (unspecified) movements originating today on CPR’s lines in North Dakota and northern Minnesota, rather than at IC&E-served origins in Iowa (which are hundreds of miles further from the PNW). Mr. Williams presents a contribution analysis of both current shipments from CPR’s existing corn origins and potential movements from IC&E-served origins. (*See Williams Reply V.S. at 10-15.*) Mr. Williams cures the defects in Mr. Woodward’s analysis by (1) identifying specific stations for study; (2) using actual STB URCS costs for the U.S. portion of the studied movements; and (3) using the CPR-specific costs from the Canadian Transportation Agency’s (“CTA”) Agency Regulatory Costing Model (“ARCM”) for the Canadian portion of those movements. As Mr. Williams’ testimony shows, when the correct revenue and cost data for the subject movements are used, CPR’s contribution on existing corn shipments from origins on its lines to the PNW ports ranges [] [] posited by witness Woodward). When the proper methodology is applied to potential shipments from IC&E origins to the PNW, it is clear that the rates CPR would need to charge just to “break even” (much less earn a contribution equal to or greater than []) witness Woodward estimates IC&E earns today on corn shipments that it interlines with KCS at Kansas City) would render the CPR-UP route noncompetitive with the single line services offered by BNSF and UP.

In any event, pursuing a strategy of diverting IC&E-origin corn to the PNW would be counter to CPR’s interest in diversifying its U.S. corn business. *Smith Reply V.S. at 7.* Developing and maintaining routes to the Gulf coast and South Central poultry markets will enhance CPR’s competitive position vis-à-vis carriers such as BNSF, UP and CN by enabling

CPR to offer corn shippers a wider variety of destinations for their product. Having paid \$1.5 billion to acquire DME, CPR has no economic incentive to “dismantle” DME’s domestic corn franchise by taking the actions posited by KCS. *Id.* Indeed, notwithstanding KCS’ statements in this proceeding concerning CPR’s supposed incentives, KCS grain marketing personnel have recently engaged in discussions with their counterparts at CPR (including Mr. Smith) regarding the potential for developing shipments of grain via a CPR/IC&E/KCS routing to Mexico. (Smith Reply V.S. at 7.)

Finally, contrary to KCS’ claims, receivers in the KCS field mill states have the ability to obtain corn from a variety of carriers and sources. Williams Reply V.S. at 15-18. Mr. Williams’ Reply Verified Statement also demonstrates that KCS witness Bilovesky’s claim that obtaining corn from alternative destinations would impose substantial additional costs on South Central feeder mills is simply not true. *Id.* at 18-24.

KCS’ second vertical foreclosure claim is that the proposed transaction “threatens to limit NAFTA shipper options and erode competition” in the Chicago - Laredo corridor. KCS Comments at 30. This argument is not credible. In particular, KCS’ attempt to portray the IC&E/KCS Chicago Haulage Agreement as a critical factor in the competition for NAFTA traffic is belied by the fact that *the IC&E/KCS Chicago Haulage Agreement has never actually been used.* Anderson Reply V.S. at 12. Although KCS maintains that the Agreement nevertheless constrains rates for NAFTA traffic “because of the potential for its use as a competitive counterbalance.” (KCS Comments, Grimm V.S. at 8.), KCS fails to mention that both IC&E and KCS []

[]

[]

[Anderson Reply V.S. at 12-13. For that reason, all traffic that has moved in KCS-IC&E interline service since the day IC&E acquired the Kansas City-Chicago line has [Agreement. *Id.* at 13.

Given these facts, KCS' contentions that the IC&E/KCS Chicago Haulage Agreement has any competitive significance, or that CPR's incentives with respect to continuing that Agreement would be any different than IC&E's current incentives, are implausible and contrary to fact. There would be no changed incentive regarding the Agreement if CPR acquires IC&E. Accordingly, KCS' claims of competitive harm with respect to the Agreement lack any "nexus" to the proposed transaction.

Moreover, any suggestion that the IC&E/KCS routing between Chicago and Kansas City plays a significant role today in the transportation of "NAFTA traffic" between Chicago and Laredo is nonsense. The volume of "NAFTA traffic" (*i.e.*, traffic moving between a point in the United States or Canada, on the one hand, and a point in Mexico, on the other hand) that DM&E/IC&E handles in conjunction with KCS to or from Mexico is de minimis. A total of [moved by rail to/from Mexico in 2005. In assessing the potential competitive role of the dormant KCS/IC&E Chicago Haulage Agreement might play in the Chicago-Laredo corridor, it is important to understand that the Agreement [See KCS Comments, Exh. E at 166-169. Rather, KCS' rights under the Agreement [[*Id.* at 169. Therefore, the IC&E/KCS Chicago Haulage Agreement does not – and could not – [

[]
[]

Moreover, even with respect to carload traffic, the IC&E/KCS route via Kansas City plays almost no role whatsoever. Only [] of southbound NAFTA traffic moved via a routing involving IC&E and KCS during 2005. (Those cars were delivered by CPR to IC&E at St. Paul, MN, and were interchanged by IC&E to KCS at Kansas City. Williams Reply V.S. at 26 & Attachment JHW-18. Northbound, KCS and IC&E interchanged only [] NAFTA traffic in 2005. Thus, the IC&E/KCS route via the Kansas City gateway accounted for [] of total NAFTA carload traffic during 2005. Moreover, the [] southbound cars interchanged by IC&E to KCS at Kansas City moved between the Twin Cities and Laredo, not in the Chicago – Laredo corridor that is the focus of KCS’ request for perpetual haulage rights. *Id.* As these data show, the IC&E/KCS route between Kansas City and Chicago is simply not a material factor in the transportation of NAFTA traffic.

As Mr. Williams’ reply verified statement shows, NAFTA traffic that could potentially move via a Chicago-Laredo route actually moved in 2005 over a total of 32 different single line and interline rail routes. Only five of the routes over which southbound NAFTA traffic moved, and two routes that handled northbound traffic, involved CPR, DME or both. Thus, in 2005, customers routed southbound NAFTA traffic via 27 different southbound rail routes, and 30 northbound routes, that were independent of Applicants. Many of those routes handled more traffic than the IC&E/KCS route via Kansas City. *Id.* The routes reflected in the *Carload Waybill Sample* reflect the actual routing decisions made by shippers for this traffic in 2005.

Moreover, the data demonstrate that neither CPR nor DME is a significant competitor for southbound NAFTA traffic. In 2005, CPR participated in [] and [] [] of southbound NAFTA traffic, and [] and [] of northbound NAFTA traffic, that could have been routed via Chicago. (See Attachment JHW-18.) IC&E's traffic share consisted of [] southbound cars (which were interchanged by CPR with IC&E at St. Paul, MN for furtherance to KCS at Kansas City) and [] of northbound NAFTA traffic, which IC&E handled in conjunction with KCS. (See Attachments JHW-18, JHW-19.) Because the participation of CPR and DME (and KCS) in NAFTA traffic that could move in the Chicago – Laredo corridor is de minimis – amounting to [] such traffic in 2005 – the proposed transaction clearly will not have any material effect on NAFTA traffic.

In any event, as described above, Applicants have pledged to keep open the Kansas City gateway on commercially reasonable terms. This commitment ensures that shippers will continue to have the ability to move traffic via IC&E – KCS routings following the proposed transaction, regardless of whether the ICE/KCS Grain Agreement and/or the IC&E/KCS Chicago Haulage Agreement continue beyond their current terms.

(d) KCS' Conditions Are Designed To Reap The Benefits Of Its Failed Effort To Acquire DM&E

KCS' proposed conditions – particularly the request that its rights under the two KCS/IC&E contracts be made "permanent" – are nothing more than an attempt by KCS [] [] if []. Documents produced in discovery show that KCS made a lower, unsuccessful bid of [] []

[]. See Appendix M [KCSR-HC-00383-385; KCSR-HC-00848] hereto; Lawrence Dep. at 76-84. (CPR did, in fact, pay [] to acquire DME.)

Those documents also show that []
[] to
[]
[]
[] at

[]. See Appendix M [KCSR-HC-01058; KCSR-HC-00556-557]; Appendix R, Lawrence Dep. Tr. at 61, 70-71. Indeed, the documents show that []
[]
[]
[]
[]. See Appendix M [KCSR-HC-00843-852; KCSR-HC-00448-450].³⁷ In formulating [], KCS attributed “zero

[]
[]. See Appendix R, Lawrence Dep. Tr. at 71-72.

In essence, KCS' conditions are designed to give it many of the benefits of []
[]. KCS' conditions – especially a condition that would give it permanent pricing control over IC&E corn – would dilute the benefits of the transaction for Applicants. The Board should not impose a condition which plainly would result in greater detriment to the transaction than benefit to the public. *Grainbelt Corp., supra*, 109 F.3d at 796.

³⁷ Mr. Lawrence's deposition also shows that []
[]. Appendix R, Lawrence Dep. Tr. at 33-34. Getting to Chicago via a permanent haulage agreement imposed by the Board here would provide KCS [] [], and enable KCS to[[

The architect of KCS' condition requests, Mr. Lawrence, repeatedly emphasized that the purpose of KCS' proposed conditions also was to [] []. Appendix R, Lawrence Dep. at 20, 24-25, 36, 39, 60-61 and 70. The Board has made clear that it will only impose conditions to protect competition – not competitors. *UP/MKT*, 4 I.C.C.2d at 460 (“We have said on numerous occasions that we protect competition, not competitors.”); *accord*, *KCS/TexMex*, 2004 WL 2700648, at *12 (“This [KCS favoring its own routings] could well mean some harm to a competitor (UP, BNSF), but not harm to competition.”). Accordingly, KCS' request for conditions should be denied.

B. Shippers

1. Arkansas Electric Cooperative Corporation (“AECC”)

AECC, a generation and transmission cooperative that provides wholesale electric power to electric cooperatives, holds ownership interests in three coal-fired Arkansas generating stations (the White Bluff plant at Redfield, the Independence plant at Newark, and the Flint Creek plant at Gentry) that burn each year over 14 million tons of PRB coal. AECC Comments at 1-2. In a prior proceeding, AECC conceded that PRB coal moving to its Arkansas facilities would not move via the DM&E line.³⁸ Nonetheless, AECC claims a direct interest in rail competition, particularly as it relates to PRB capacity and price/service options available to shippers. AECC Comments at 2.

Although AECC does not take issue with Applicants' statement that CPR control of DM&E “will lend credibility to DM&E's ongoing efforts to bring the PRB project to fruition,”

³⁸ *Dakota, Minn. & E. R.R. Corp. – Control – Iowa, Chi. & E. R.R. Corp. (“DM&E/IC&E”)*, 6 S.T.B. 511, 537 (2003) (“AECC concedes that, even after DM&E's recently-approved PRB line has been constructed, PRB coal moving to AECC's Arkansas facilities will not move via the DM&E line (because, as respects destinations in Arkansas, the route to be operated by DM&E will be a good deal more circuitous than the routes now operated by UP and BNSF”).

AECC asserts that two aspects of the proposed transaction would make it less likely that the PRB Project will be built: (1) the provision obligating CPR to make payments of up to \$1 billion if the PRB Project is built and specified volumes of PRB coal move over the Project's lines prior to December 31, 2025; and (2) CPR's alleged "interdependence" with the incumbent PRB carriers UP and BNSF. AECC also argues that the proposed transaction could undermine future efforts to create a hypothetical PRB rail line to Kansas City, which AECC's consultant dubs the "World Class Line." AECC Comments at 8-10; Nelson V.S. at 12-18.

To address these circumstances, AECC requests four conditions: (1) rewriting the DME purchase agreement to disallow the payments contingent on Applicants proceeding with the PRB Project; (2) a requirement that Applicants advise the Board by September 1, 2009 whether or not they will undertake the Project; (3) a requirement that the real estate interests acquired by the Applicants for the Project should be made available for purchase by any person other than UP or BNSF or affiliates of those carriers, if (a) Applicants report they are not undertaking the project, (b) do not commence construction within five years of the date of Board approval of this transaction, or (c) fail "to proceed with reasonable expedition to complete construction of the Project"; and (4) a requirement that, until otherwise directed by the Board, Applicants preserve for rail use any real estate, easements or other forms of land access acquired by Applicants for construction of the PRB Project.

AECC has not even remotely met its burden of showing that the proposed transaction will have "likely" and "substantial" anticompetitive effects with respect to the transportation of PRB coal. In particular, AECC has not shown that CPR's acquisition of DME will impair the PRB Project. The record supports a contrary conclusion.

As the Board is aware, DM&E participated in protracted regulatory and environmental review proceedings to obtain the necessary authority to construct 282 miles of new rail lines to serve the PRB and to upgrade its existing lines to handle unit train coal traffic. DM&E must now accomplish a number of additional tasks before the line can be built, including securing sufficient commitments from prospective coal shippers to justify the large investment to build the line and arranging financing for the project. Over the last several years, DM&E has not been successful in obtaining financing from outside investors or securing a loan from the Federal Railroad Administration. Accordingly, even if CPR did not build the PRB line, that would not lead to a reduction in competition – rather it would maintain the competitive status quo in the PRB. However, CPR’s greater financial capability, its demonstrated expertise in designing and constructing new rail lines, and its extensive coal hauling experience will *enhance* – not detract from – DM&E’s ongoing efforts to bring the PRB Project to fruition. Green V.S. at 5-6. Significantly, the contingent payments about which AECC complains are not triggered until various economically valuable benchmarks are met. For example, the full \$1 billion payment would not be required unless 125 million tons of PRB coal moved *annually* over DM&E’s lines prior to December 31, 2025 – a highly ambitious target.

AECC’s argument has been made and rejected in prior cases. In questioning the financial viability of the PRB Project and touting the preferability of the World Class Line, AECC is essentially trying to relitigate the Board’s approval of the PRB Project. The Board rejected prior efforts by AECC to relitigate these issues – particularly the financial viability of the Project – when DM&E acquired control of the IC&E:

AECC is arguing, in large part, that we may have erred when we authorized DM&E to build in PRB Construction. But we will not permit AECC to use this proceeding to relitigate *PRB Construction*. As noted by DOT, we approved PRB Construction

after a thorough consideration of all aspects of the proposal, including financial viability. Further, because our approval of construction of DM&E's PRB line was merely permissive, we agree with DOT that it is not particularly pertinent whether DM&E/IC&E common control makes construction of that line more or less likely. Rather, as DOT points out, that is a question for DM&E's potential investors and financial supporters. What is important in the control proceeding before us here is whether the combination of DM&E and IC&E will affect the ability of these carriers to meet their common carrier obligations and provide essential services. As indicated, applicants have shown that common control will produce a stronger rail system that will be better able to offer improved services to their existing shippers. No party (including AECC) has introduced persuasive evidence to the contrary.

DM&E/IC&E, 6 S.T.B. at 525-26.

Further, AECC's suggestion that CPR would forego the PRB Project because of its alleged "interdependence" with BN and UP is completely unsupported and unfounded speculation. All railroads are "interdependent" because the North American railroads operate as a network. Railroads compete and at the same time cooperate with other railroads. The notion that this routine collaboration alone would cause CPR not to build the PRB line is nonsense. AECC has *not* shown the existence of any relationship between CPR and either BNSF or UP that would create incentives not to build the PRB line. CPR today competes vigorously with both BN and UP for some traffic, while participating as interchange partners for other traffic. Milloy Reply V.S. at 6-8. Nothing about the proposed transaction would change CPR's incentives to compete vigorously with UP and BNSF. *Id.* at 8. Indeed, in approving Canadian National's acquisition of Illinois Central, the Board flatly rejected arguments that CN/IC would not compete with KCS because of a formal marketing and operational Alliance between CN and KCS:

Protestants' attempt to paint the [CN-KCS] Alliance as a creature that has taken over, or will ultimately take over, the lesser enterprises of the participating railroads, is unpersuasive. Their claim that the Alliance railroads will forgo aggressive competition

for certain traffic in favor of cooperation for their more important Alliance traffic is illogical. . . .The argument is illogical because KCS and CN/IC will have every incentive to continue to compete aggressively for traffic where they are able to provide service alternatives, just as they have competed in the past.

CN/IC 4 S.T.B. at 147-48.

Finally, not only has AECC failed to show that the proposed transaction will have “likely” and “substantial” anticompetitive effects with respect to the transportation of PRB coal, the conditions AECC seeks conflict with Board precedent or are beyond the Board’s authority to impose. AECC’s request that the Board order the Applicants to revise their purchase agreement to eliminate the contingency payments associated with Applicants proceeding with the PRB Project conflicts with the well-established principle that the Board will not, in considering a proposed transaction, rewrite the underlying transaction documents. *Tucumcari*, 363 I.C.C. at 367-68.

AECC’s request that the Board order Applicants to make a final decision by September 1, 2009 whether they intend to undertake the PRB Project is an impermissible collateral attack on the terms of the Board’s prior approval of the Project. *See DM&E/IC&E*, 6 S.T.B. at 525 (“[B]ecause our approval of construction of DM&E’s PRB line was merely permissive, we agree with DOT that it is not particularly pertinent whether DM&E/IC&E common control makes construction of that line more or less likely.”). The Board’s authorization of a construction of a line is permissive and, absent any specified limits or conditions, does not contain a time limit for closing or completing the authorized transaction or construction project.

AECC’s last two proposed conditions – requiring divestiture of rights to real estate along the PRB Project right-of-way under certain circumstances and requiring preservation for rail use of such real estate rights – is likewise an impermissible ancillary attack on the Board’s prior

approval of the PRB Project and, in any event, requests relief the Board lacks authority to provide. The Board has no jurisdiction over the acquisition or sale of land or real estate rights by railroads. DM&E's efforts to obtain interests in real estate along the PRB Project right-of-way have necessarily been undertaken pursuant to state laws. The Board has no jurisdiction or authority to define or limit the scope of DM&E's rights under those state laws.

2. Boise Cascade LLC ("Boise")

Boise ships wood products via various rail carriers, including on KCS and IC&E between points on KCS to Chicago via Kansas City. Citing KCS' comments, Boise supports KCS' request that the IC&E/KCS Chicago Haulage Agreement be made permanent. For the reasons, set forth above, KCS has not provided any justification for the permanent imposition of an agreement pursuant to which no traffic has ever moved.

Boise's comments do not alter this conclusion. Today, Boise moves a small volume of traffic ([]) over KCS/IC&E via the Kansas City gateway. CPR has pledged to keep open all gateways affected by the proposed transaction, including Kansas City, on commercially reasonable terms. Accordingly, Boise traffic can move after the transaction in interline service, just as it has in the past. Moreover, Boise, like other shippers, has numerous routing options between Kansas City and Chicago that do not involve Applicants. Williams Reply V.S. at 27-30. Accordingly, there is no basis for extending the IC&E/KCS Chicago Haulage Agreement.

3. MFA, Inc.

MFA is a regional agricultural cooperative that markets grain at retail locations in Missouri, Kansas, Arkansas and Iowa. The company's elevator is served only by IC&E at Laredo, MO, approximately 70 miles north of Kansas City. Most of MFA's grain moves to

poultry feed mills in Arkansas, Oklahoma and Mississippi via IC&E and KCS through the Kansas City gateway. MFA expresses concern that if CPR acquires IC&E, IC&E will “lose its neutrality” and speculates that CPR will favor grain buyers located on its lines and adjust its rail rates to foreclose MFA from marketing to destinations on other railroads. Accordingly, MFA supports KCS’ request for conditions. For the reasons, set forth above, KCS has not provided any justification for extending the term of the IC&E/KCS Grain Agreement[] [].

MFA’s argument does not alter this conclusion. The small amount of traffic MFA moves today via the Kansas City gateway will almost certainly continue to move via that gateway in the future given Laredo, MO’s close proximity to Kansas City. As described above, it would not be economical for grain produced on the Iowa Corn Lines to be diverted to the PNW. It is even more absurd to speculate that grain originating hundreds of miles further south could be diverted to the PNW. In any event, MFA’s grain can continue to move under the IC&E/KCS Grain Agreement for nearly ten more years. Finally, Applicants have pledged to keep open the Kansas City gateway on commercially reasonable terms. This commitment ensures that MFA will continue to have the ability to route traffic via DM&E/IC&E – KCS routings following the proposed transaction, regardless of whether the ICE/KCS Grain Agreement continues [] [].

4. Muscatine Power and Water (“MP&W”)

MP&W, a municipal electric utility headquartered in Muscatine, IA, owns and operates four coal-fired electric generating facilities, three of which are located at the Muscatine Electric Generating Station (Muscatine Station) at Muscatine, IA. The Muscatine Station, which is served by a single railroad (IC&E), burns, on an annual basis, approximately 1.1 million tons of

coal, all of which is currently acquired from the PRB of Wyoming. This coal currently moves by rail via BNSF to Ottumwa, IA, where it is interchanged with IC&E for delivery to the Muscatine Station. This BNSF/IC&E movement is provided in accordance with [] [] MP&W also could originate PRB coal on UP for interchange with IC&E at Clinton, IA, Owatonna, MN or Kansas City, MO, or on BNSF for interchange with IC&E at Kansas City or Ottumwa, IA. MP&W also has rail/barge transload options which it can use to move its PRB coal. For example, MP&W could bypass IC&E altogether by using a combination of BNSF service to Keokuk, IA and barge service from there to Muscatine Station.³⁹

In 2002, MP&W filed comments in connection with DM&E's application to acquire control of IC&E, asserting that DM&E's future construction and operation of a rail line serving the PRB might cause DM&E to favor its single-line route to Muscatine and foreclose interline routes with BNSF and UP. DM&E and IC&E addressed those concerns by entering into an agreement with MP&W in which DM&E/IC&E agreed not to take any action to close the IC&E interchanges with BNSF or UP, and to offer, upon request, segment contract rates or proportional common carrier rates via those interchanges to Muscatine Station.

In its comments in this proceeding, MP&W expresses concern that, if the proposed transaction is approved, CPR/DM&E could [], upon completion of the PRB Project, would have incentives to favor a single-line route and refuse to quote a segment or proportional rate from those interchanges to Muscatine Station via BNSF or UP. Based on this concern, MP&W requests four conditions: (1) that Applicants

³⁹ Other potential rail/barge routings between the PRB and Muscatine Station include (i) BNSF to Sioux City, IA, CN to Dubuque and barge to destination; (ii) UP to Council Bluffs, IA, CN to Dubuque and barge to destination; (iii) BNSF to St Louis and barge to destination; and (iv) UP to St Louis and barge to destination.

maintain (apparently in perpetuity) the DM&E/IC&E interchange points with UP and BNSF for MP&W unit train coal traffic; (2) Applicants only close any of these interchange points with the consent of MP&W or the permission of the Board, provided that at least one of the interchange points would always remain open; (3) upon request of MP&W, Applicants should be required to offer segment contract rates and/or quote proportional rates applicable to MP&W's unit train coal movements via all published interchanges so long as they remain open; and (4) Applicants should be required to waive all defenses to the "contract exception" to the Board's "Bottleneck Decisions"⁴⁰ based upon Applicants' service to both a PRB origin and Muscatine Station.

MP&W has not shown – and cannot show – that the proposed transaction will have any anticompetitive effects on service to Muscatine Station from the PRB, much less that the transaction "likely" will have "substantial" anticompetitive effects. Absent the transaction, MP&W is a party to two agreements: [] [] covering service over IC&E between Ottumwa, IA and Muscatine Station, []. DM&E and IC&E will continue to be parties to, and bound by, both of those agreements. Accordingly, CPR/DM&E/IC&E would have the same rights and incentives if the proposed transaction is approved as DM&E/IC&E have today absent the transaction. Simply put there is no nexus between the proposed transaction and any competitive harm to MP&W. CPR's acquisition does not change the incentives of DM&E which were addressed by the prior settlements. Because the proposed transaction would in no way change MP&W's competitive circumstances, there is no justification for imposing the conditions

⁴⁰ *Cent. Power & Light Co. v. Southern Pac. Transp. Co.*, 1 S.T.B. 1059 (served Dec. 31, 1996), *clarified* 2 S.T.B. 235 (served Apr. 30, 1997), *aff'd in part*, *MidAmerican Energy Co. v. STB*, 169 F.3d 1099 (8th Cir. 1999).

sought by MP&W. *CN/DMIR, supra*, 2004 WL 761305, at *9, *13; *CN/IC, supra*, 4 S.T.B. at 141-42 & n.72.

5. North Dakota Grain Dealers Association (“NDGDA”) and North Dakota Wheat Commission (“NDWC”)

NDGDA is an association of 150 companies operating over 300 grain elevators in North Dakota. NDWC is a quasi-public agency that promotes North Dakota wheat domestically and internationally. Only about 70 of the over 300 grain elevators operated by NDGDA members are located on CPR, DMVW or NP lines. NDGDA/NDWC Comments at 2. NDGDA/NDWC assert that, for the past several years, CPR car supply and car conditions for grain shipments has been problematic. *Id.*

NDGDA/NDWC express concern about three representations made in connection with the Application: (1) that CPR plans to make \$300 million of capital available over the next several years to upgrade the tracks and other facilities of DME; (2) that DME and its customers will benefit from access to CPR’s car supply; and (3) that surplus CPR locomotives may be made available to DME. NDGDA/NDWC complain that no similar commitments have been made to North Dakota grain shippers and that shippers on DME may get better car and locomotive service than North Dakota shippers. *Id.* at 3-4. Based on these concerns, NDGDA requests two conditions: (1) that CPR be required to provide “no fewer cars available for grain loading at North Dakota elevators than it maintained on average over the past three years to service those elevators;” and (2) that CPR be required to make a commitment “to utilize some substantial part of the \$300 million it says it will spend on post-acquisition infrastructure, including rail yards and locomotives, and to make the grain fleet it uses to serve North Dakota elevators serviceable and adequate.”

NDGDA's portrayal of CPR's recent service to the North Dakota grain industry is, at best, misleading. Smith Reply V.S. at 8-10. Since 2004, CPR has invested (including [] targeted specifically to CPR's export grain route via Kingsgate) [] to upgrade its western Canadian lines. These investments doubled CPR's train throughput capacity. *Id.* at 9. CPR has also made joint investments with its customers to enable more elevators to load 100-car shuttle trains (and thereby to take advantage of lower unit train rates). CPR also participated in capital projects totaling approximately [] to assist the Dakota, Missouri Valley & Western Railroad, Inc. ("DMVW") and the Northern Plains Railroad, Inc. ("NPR") to upgrade the lines on which CPR's North Dakota grain shipments originate. *Id.* CPR has also invested in [], which were introduced to the grain fleet in late 2006. These investments were made to give North Dakota grain shippers an efficient competitive alternative to BNSF service for grain shipments to the growing PNW export market. The benefits that have occurred to North Dakota shippers are reflected in the fact that the volume of grain traffic handled by CPR from North Dakota origins has grown [] [] since 2004. *Id.* As Mr. Smith's testimony also demonstrates, CPR's grain car fleet is in good condition. *Id.* at 9-10.

NDGDA/NDWC have made no showing that the transaction will have any adverse competitive effect on North Dakota grain shippers. Today, CPR and its short-line partners compete vigorously with BNSF to provide service to North Dakota grain shippers, and BNSF serves over three times the number of North Dakota grain elevators that are served by CPR and its affiliates. The record shows that the *only* change to those competitive circumstances as a result of the proposed transaction would *enhance* the routing options of North Dakota shippers. Specifically, the proposed transaction will enable CPR to offer single-system rail service for

North Dakota grain shipments to the Kansas City gateway. Indeed, witness Williams' initial Verified Statement indicated that the origin-destination state/province pair most likely to benefit from new single system service as a result of the transaction would be North Dakota to Missouri. Williams V.S. at 5.

CPR's commitment to make capital investments to improve DME's rail lines – an undeniably pro-competitive consequence of the proposed transaction – cannot be cited as a reasonable basis for concluding that the transaction will “likely” have “substantial” anticompetitive effects. If the Board were to establish a precedent that a commitment to upgrade service over certain railroad lines acquired in a control transaction could serve as a predicate for conditions requiring the acquiring railroad to make similar upgrades on other rail lines not affected by the transaction, it would discourage Applicant carriers from making any such pro-competitive commitments in the future.

Further, the conditions proposed by NDGDA are unwarranted. NDGDA's request that CPR be required to provide “no fewer cars available for grain loading at North Dakota elevators than it maintained on average over the past three years to service those elevators” ignores a myriad of factors that affect car distribution in a competitive market. For example, if demand for grain cars in North Dakota fell relative to demand at other origins during some period, a condition precluding CPR from moving cars to other origins with higher demand would plainly be inefficient and anticompetitive. Second, NDGDA's request that CPR be required to divert “some substantial part of the \$300 million [CPR] says it will spend on post-acquisition [DM&E] infrastructure” to North Dakota to make the grain fleet CPR uses to serve North Dakota elevators “serviceable and adequate” ignores capital investment criteria applicable in competitive markets. For example, those factors would include the relative physical condition of the infrastructure in

different areas and the demands for rail transportation services in those areas. In connection with this transaction, CPR has targeted the \$300 million to address safety issues on DME rail lines. Diverting these funds would undermine CPR's ability to bring DME up to CPR's safety standards. The suggestion that the Board should micromanage the allocation of capital expenditures at all, much less without any specific information regarding these types of factors, is plainly an invitation to inefficiency and results contrary to the public interest.⁴¹

C. Government Authorities and Officials

1. Iowa DOT

Iowa DOT supports the Application, subject to two requested conditions: (1) a requirement that CPR work with Iowa shippers to assure the viability of the Iowa Corn Lines⁴² by maintaining and upgrading the line to a 25 mph standard; and (2) a requirement that CPR provide competitive rates and markets to Corn Line shippers and farmers. With respect to its second proposed condition, Iowa DOT requests that the Board require CPR to work with Iowa Northern Railroad ("IANR") to assure competitive rates for Iowa shippers to Cedar Rapids and to work with KCS to assure competitive markets for Iowa grain shippers. Applicants have *already* taken steps to address all of the issues identified by Iowa DOT. In light of those steps, and for the reasons set forth in the Application, the proposed transaction will enhance service to Iowa grain shippers and will not have any adverse competitive impacts on such shippers.

⁴¹ In support of their proposed conditions, NDGDA/NDWC cite the Board's *CN/WC* decision. NDGDA/NDWC Comments at 5. That decision provides no support for NDGDA/NDWC's proposal. In *CN/WC*, the applicants proposed their own Service Assurance Plan, which the Board approved and the Board ordered operational reporting for one year. 5 STB at 909. The Board did not mandate the number of cars to be provided in any particular area nor the allocation of capital expenditures across the applicants' systems as proposed by NDGDA.

⁴² The "Corn Lines" include the line from Marquette, IA to Sheldon, IA and the line from Mason City, IA to Lyle, MN.

Accordingly, imposition of further conditions to address the matters identified by Iowa DOT is not warranted.

The two issues addressed by Iowa DOT on behalf of Iowa Corn Line shippers have been addressed directly by an agreement between Applicants and those shippers. As stated above, the Southern Minnesota and Northern Iowa Shippers Association has filed comments supporting the transaction. In those comments, the Association cites not only the improved single-system service that will be available to its members, but also Applicants' commitments (1) to bring the Corn Lines up to a 25 MPH service standard by the end of 2013 (provided that future traffic volume on those lines economically supports such an investment) and (2) to keep the Kansas City and Chicago gateways open on commercially reasonable terms. Similarly, having resolved its concerns regarding the proposed transaction through private negotiations with Applicants, IANR has not filed any opposition or request for conditions. Accordingly, the issues raised by Iowa DOT have been fully addressed.

2. Minnesota Department of Transportation ("MN/DOT")

MN/DOT comments that the proposed transaction "has the potential to provide substantial economic benefit to Minnesota shippers by expanding markets for Minnesota products through improved access to the national rail network." MN/DOT Comments at 2. Nevertheless, MN/DOT seeks two conditions relating to grade crossing safety. MN/DOT asserts that, *prior* to the proposed transaction, DM&E raised speed limits along certain portions of its lines in Minnesota from 30 mph to 40 mph, but that DME has not yet formally agreed to implement the safety upgrades commensurate with those increases. MN/DOT also accepts Applicants' representation that the transaction will not increase the level of train operations by more than one additional train per day along any segment of the Applicants' systems over the

next five years. But MN/DOT argues that this statement does not address potential future train speed increases, which it is concerned could create additional safety hazards at grade crossings.

In light of these circumstances, MN/DOT requests that the Board condition any approval of the transaction with two requirements: (1) that CPR and DM&E proceed immediately with the implementation of grade crossing upgrades as deemed necessary by MN/DOT, with cost responsibility as determined by MN/DOT; and (2) that should future train speed increases occur that create safety hazards, CPR and DM&E shall implement any additional improvements deemed necessary by MN/DOT, with cost-responsibility as determined by MN/DOT.

CPR shares MN/DOT's commitment to railroad safety. Indeed, as explained in the Application and discussed in more detail in Applicants' Safety Integration Plan ("SIP"), CPR intends to introduce on DME the safety practices and technologies that have made CPR one of the safest railroads in North America (with the fewest reportable train accidents of any railroad over the past decade). However, because MN/DOT submits no evidence indicating that its proposed conditions are warranted, and they are unrelated to any anticipated impact (competitive or otherwise) of the transaction, there is no legal basis to impose either of the conditions requested by MN/DOT.

MN/DOT admits that its first proposed condition relates to speed increases that were implemented by the DM&E prior to the proposed transaction. There is thus no nexus between the transaction and the potential impact that MN/DOT's first condition seeks to mitigate. Accordingly, that condition is not warranted.

MN/DOT's proposed condition to address *potential future* increases in the speed of trains operating in Minnesota is likewise unwarranted. This condition needlessly invites the Board to intervene in a well-established relationship among the U.S. Department of Transportation, state

governments and the nation's rail carriers to administer and finance federal railroad highway crossing safety programs. The Federal Railroad Administration ("FRA") regulates various aspects of grade crossing safety pertaining specifically to the railroads: track safety, train-activated warning devices, and train safety and conspicuity. For example, the Agency's regulations specify the type of lighting to be placed on a locomotive, the audibility of the train horns, and the inspection, testing, and maintenance standards for active grade crossing signal system safety. The FRA also regulates train speeds and the quality of track necessary to support safe operations at different speeds. *See* 49 C.F.R. Parts 200-245 (FRA's extensive freight rail safety regulations). The Federal Highway Administration ("FHWA"), along with state government agencies such as MN/DOT, are responsible for public grade crossing issues that affect highway safety. FHWA has promulgated extensive and detailed guidelines and standards for the design of grade crossings, the assessment of safety at a grade crossing, and appropriate placement of traffic control devices at, and on the approach to, a grade crossing. *See* Manual on Uniform Traffic Control Devices, FHWA (2003); *see generally* Railroad-Highway Grade Crossing Handbook, U.S. Dept. of Transportation, FHWA (Revised Second Ed. 2007).

Based in part on rail crossing inventory and safety data compiled by the FRA, states evaluate public grade crossings, determine which public crossings could benefit from safety improvements, prioritize improvement projects, and allocate funds to be highest priority projects. *See* Railroad-Highway Grade Crossing Handbook at III-VI. In order to make such improvements, states rely heavily on federal funding pursuant to 23 U.S.C. § 130 (which are called "Section 130 funds"), and the "Safe, Accountable, Flexible, Efficient Transportation Equity Act for the 21st Century: A Legacy for Users." ("SAFETEA-LU") These programs allocate money to the states for the specific purpose of improving safety at public highway-

railroad grade crossings. The FHWA administers the distribution of Section 130 funds. The statute and implementation regulations generally provide that funds for grade-crossing safety improvements are available at a 90 percent Federal share, with the remaining 10 percent to be paid by the State, local authorities and/or the railroad. The Federal share may amount to 100 percent for projects such as signage, pavement markings, active warning devices, the elimination of hazards and crossing closures.

MN/DOT has a strong and successful program for evaluating and implementing projects to improve safety at railroad-highway grade crossings. Applicants understand the existing program and process for grade crossing safety improvements in Minnesota, and they have consistently cooperated with MN/DOT and FHWA in the implementation of this program. As discussed above, federal law establishes that federal funding pays for 90% of such grade crossing improvements, and state and local governments and rail carriers are responsible for the remaining 10%. *See, e.g.*, MN/DOT Office of Freight and Commercial Vehicle Operations, Railroad-Highway Grade Crossing Safety Improvement Program – Project Development Process (2007). Allocation of responsibility for that 10% is determined under applicable state and federal law and rules. In general, the states (here MN/DOT) have responsibility and authority to determine which grade crossing improvements are funded by the state’s allocated federal monies. Applicants will continue to cooperate with MN/DOT and other state and local government agencies in evaluating and implementing public highway grade crossing safety improvements in accordance with the provisions and requirements of applicable law, including provisions concerning funding responsibility.⁴³

⁴³ The condition requested by MN/DOT would require Applicants to implement grade crossing upgrades and improvements “as deemed necessary by MN/DOT, with cost-responsibility as determined by MN/DOT.” As Applicants have explained, criteria for evaluation and implementation of grade crossing safety improvements are

MN/DOT's comments are somewhat ambiguous. If the agency is seeking in this proceeding the power to override the established regulatory and funding scheme governing grade crossing safety improvements, Applicants strongly oppose that proposal. There is no evidence in the record that would remotely support such extraordinary intervention by the Board in the rail safety programs administered by FHWA and the States. If, on the other hand, MN/DOT's comment is meant to seek assurance that, following the proposed transaction, Applicants will continue to work and cooperate with MN/DOT's grade crossing safety improvement program in the same manner they have in the past, Applicants reaffirm their commitment to such continued cooperation.

3. Wisconsin DOT ("WisDOT")

WisDOT compliments CPR on its current freight service and cooperation with Amtrak on passenger service. "CPR works diligently to provide superior freight service to Wisconsin customers and provides outstanding service to Amtrak." WisDOT Comments at 1. Indeed, WisDOT correctly notes that Amtrak's Hiawatha Service operating between Milwaukee and Chicago "routinely enjoys the best on-time performance of any train in the Amtrak system." *Id.*

Nevertheless, WisDOT proposes that approval of the transaction be subject to no fewer than six conditions: (1) that CPR provide information about specific improvements that will be made on the line between Davis Jct. and Janesville, WI; (2) that CPR provide information as to whether the line from Davis Jct. to Janesville is currently capable of handling rail cars loaded to

specified by federal and state law and regulations, and funding responsibility is also determined by federal and state law. MN/DOT's comments suggest that it may be seeking to alter the grade crossing safety program and funding formulas established by federal law, giving MN/DOT greater authority, particularly with respect to funding, than it has under applicable law and regulations. Although Applicants will certainly continue to participate in the FHWA-MN/DOT program in accordance with the provisions of state and federal law, they do not agree to expansion of MN/DOT's authority beyond that provided by existing law. There is certainly no basis for the STB to impose a condition that would alter the provisions and requirements of governing federal grade crossing law and programs administered by the FHWA.

286,000 pounds and identify deficiencies if it is not; (3) that the Board ensure that any Environmental Impact Statement (“EIS”) prepared if CPR moves forward to construct lines to serve the PRB consider primary, secondary and cumulative impacts on lines and communities in Wisconsin; (4) that CPR clarify the impact of a routing protocol between CPR and CN announced November 1, 2007; (5) that the Board ensure that CPR negotiates in good faith with carriers who have trackage rights over any of the Applicants to provide alternative routings, if traffic levels proposed by CPR will degrade services provided by these other carriers; and (6) that the Board ensure that neither CPR nor IC&E will increase speeds on any of their lines through Wisconsin until such time as grade crossing warning devices at at-grade crossings are determined by the Wisconsin Office of the Commissioner of Railroads to provide adequate warning for the proposed speed.

WisDOT submitted no evidence in support of any of its proposed conditions. Those conditions are unrelated to any anticipated competitive impact of the transaction. Indeed, as the Application demonstrated, CPR and DME do not serve any common points in Wisconsin. Williams V.S. at 7. Accordingly, the proposed transaction will not result in a diminution of competition anywhere in Wisconsin, and there is no legal basis to impose the conditions requested by WisDOT.

Although there is no nexus between the proposed transaction and any of the conditions sought by WisDOT, to eliminate disputes Applicants provide in these Reply Comments the information WisDOT seeks in its requested condition Nos. 1, 2 and 4. In response to the first two requested conditions, Applicants provide the following information concerning the Janesville line.

IC&E installed 10,000 new ties on the line segment between Beloit and Janesville in 2007. Graham Reply V.S. at 21. IC&E's capital budget for 2008 includes approximately \$475,000 for repair and maintenance of the line, including approximately 3000 ties, ballast work, and bridge repairs. *Id.* at 21-22. Because IC&E does not own the segment of the line between Rockford, IL and Davis Jct., IL (it operates on trackage rights over the Illinois Railway), Applicants do not have the right to make improvements to that line segment. *Id.* at 21.

In the short term, Applicants do not plan any further upgrades to the Janesville line. *Id.* at 22. Currently, the line does not have the capacity to handle rail cars loaded to 286,000 pounds. The volume and type of traffic moving over the line are not sufficient to warrant the investment that would be necessary to upgrade the line to 286,000 pound capacity. *Id.* If changes in traffic volumes or market conditions, or other circumstances warrant it at any time in the future, however, Applicants would be willing to consider reasonable improvements or upgrades commensurate with such changes. *Id.*

WisDOT's third proposed condition – that the environmental review to be conducted if CPR determines to move forward with the PRB project include consideration of impacts on Wisconsin communities – is premature. Applicants have not yet made any decision regarding the PRB Project. Moreover, the Board has already determined to impose conditions on any decision authorizing the proposed transaction (1) precluding transportation of coal unit trains originating on new PRB lines operated by IC&E and/or CPR until the Board has conducted an environmental review and issued a final decision addressing the environmental impacts of such operations, and (2) requiring Applicants to notify the Board of their intent to begin construction of the PRB lines and to submit to the Board projections regarding movement of DM&E PRB coal traffic so that environmental review can begin. Decision No. 9 issued April 4, 2008, at 9.

In response to WisDOT's request for information concerning the impact of the CP/CN routing protocol on traffic through Wisconsin, CPR provides the following summary. On November 1, 2007, CPR and CN announced a new routing protocol designed to expedite the movement and exchange of interline traffic through certain gateways (the "Joint Routing Protocol" or "JRP"). This Joint Routing Protocol is designed to provide customers with the most efficient routes for their traffic, regardless of line ownership. *Graham Reply V.S.* at 21. CPR anticipates that the JRP will not have any appreciable effect on rail traffic flows through the State of Wisconsin. *Id.* Nor will the proposed transaction have any effect on the movement of traffic under the JRP, because the JRP does not apply to movements to or from points on the DME system (*e.g.*, IC&E lines through Wisconsin). *Id.* This explanation should satisfy WisDOT's request and eliminate any need for imposition of a "condition" concerning information pertaining to the routing protocol.

WisDOT's request that the Board require Applicants to negotiate in good faith with carriers who have trackage rights over any of the Applicants to provide alternative routings, if traffic levels proposed by CPR will degrade services provided by these other carriers is unwarranted and unsupported by any evidence. There is no evidence in the record that traffic levels following the transaction will degrade services provided by other carriers on any CPR lines (in Wisconsin or elsewhere). The only reference to this issue in the record is wholly unsupported speculation by WSOR that *potential future* congestion could occur on CPR lines. As discussed above, WSOR has withdrawn its request for conditions, and now supports the proposed transaction.

Finally, the condition WisDOT requests to address potential future increases in the speed of trains operating in Wisconsin should be rejected for the same reasons as the similar conditions

sought by MN/DOT (discussed above). The proposed transaction would not result in any increase in current train speeds over Applicants' lines in Wisconsin. Absent a demonstrated nexus between the transaction and the impacts WisDOT seeks to mitigate, the condition WisDOT seeks to address those impacts is not warranted. Moreover, like the similar conditions sought by MN/DOT, the condition sought by WisDOT needlessly invites the Board to intervene in a well-established regulatory system and program cooperatively administered by agencies of the U.S. Department of Transportation, state governments and the nation's rail carriers to administer and finance federal railroad highway crossing safety programs. CPR, DM&E and IC&E abide by FRA safety regulations and cooperate in the programs administered by the FHWA and States to improve safety at public grade crossings, and they will continue to do so following the transaction. Even if WisDOT had demonstrated that the proposed transaction will cause increased train speeds in Wisconsin – which it has not – there would be no reason for the Board to intervene in the existing, ongoing regulation of grade crossing safety in Wisconsin.

In sum, of WisDOT's six requested conditions, three are obviated by the information Applicants have provided, one has already been addressed by the Board's decisions regarding the process of environmental review of the potential PRB line project, and one is clearly within the core jurisdiction and responsibility of FRA, FHWA, and cooperating state agencies and their well-established rail safety programs. WisDOT's sole remaining request for a condition is based upon speculation that, at some future time, increased CPR traffic levels on unspecified lines may cause service problems for other carriers – a premise for which WisDOT has not even attempted to provide any supporting evidence, and which has no evidentiary basis in the record.

D. Unions

The proposed transaction is essentially end-to-end, and it is not expected to have significant effects on the work forces of SOO, D&H, DM&E, or IC&E. Applicants plan to implement only one operational change that will potentially have an affect on employees – a rerouting of certain trains that currently operate between Huron, SD and Chicago. As explained in the Verified Statement of witness Frankenberg at 4-5, this rerouting will affect a handful of IC&E train and engine service employees by reducing the number of such employees who draw their assignments at two locations in Iowa. However, there is currently sufficient work available on IC&E for all of the carrier’s active train and engine service employees, and it is not anticipated that any active employee will be unable to hold a position as a result of this change. Applicants do not anticipate making any significant operational changes that would adversely affect employees during the three years following consummation of the proposed transaction. In any event, should any of Applicants’ employees be adversely affected as a result of implementation of the transaction, they will have the benefit of the *New York Dock* protective conditions.

Applicants are mindful of their obligations under the *New York Dock* conditions, and certainly will give notice and negotiate implementing agreements when the conditions require. However, implementation of the proposed transaction is not expected to result in significant consolidation of facilities or train operations, and there is no inconsistency with existing labor agreements.

1. Brotherhood of Maintenance of Way Employees Division of the International Brotherhood of Teamsters (“BMWED”) and The Brotherhood of Railroad Signalmen (“BRS”)

BMWED represents maintenance of way employees of SOO and D&H. BRS represents signal employees of SOO and D&H. Employees in the corresponding crafts on DM&E and IC&E are not represented.

In their jointly filed comments, BMWED and BRS state that they “take no position on the proposed transaction at this time.”

2. International Brotherhood of Electrical Workers (“IBEW”), International Association of Machinists and Aerospace Workers (“IAM”), National Conference of Firemen & Oilers-SEIU (“NCFO”), American Train Dispatchers Association (“ATDA”), and Brotherhood of Locomotive Engineers, a Division of the Rail Conference of the International Brotherhood of Teamsters (“BLET”)

Five unions – IBEW, IAM, NCFO, ATDA, and BLET – have jointly filed comments. These unions do not oppose the proposed transaction, but collectively say: “We take no position as to whether the Application should be approved.” They do individually raise matters of particular concern to them, which are discussed below.

(a) IBEW, IAM, and NCFO

IBEW, IAM, and NCFO represent employees of SOO and D&H who work in various mechanical department crafts. IBEW also represents communications workers on SOO and D&H. Employees who perform mechanical and communications work on DM&E and IC&E are not collectively represented.

Although these three unions acknowledge Applicants’ statement that they “do not currently envision any DME facility rationalization with CPR,” the unions assert that they “are concerned that CPR may use the transaction as a basis for transferring work and employees from represented locations on CPR to unrepresented locations on DME.” They ask the Board “to

ensure that employees of CPR they represent are as well protected from any adverse effects of the transaction as are the unrepresented employees of DME.” Comments of IBEW, et al., at 3. The unions cite but do not comment on, and certainly do not object to, Applicants’ statement that they expect to use existing CPR shop facilities “as a backup to the existing DME mechanical operations for locomotive and/or car repairs that are beyond DME’s current capabilities” (*id.*, quoting Operating Plan at 33). Use of CPR’s shop facilities in this fashion would benefit CPR’s employees who are represented by these unions, by increasing the amount of work available for them to perform.

No action beyond the application of the *New York Dock* conditions to the proposed transaction is warranted by the joint comments of these unions. Applicants have no plans to consolidate mechanical functions of SOO and DME. However, if, in the future, in their continuing implementation of the proposed transaction, Applicants decide to make operational changes in their mechanical functions, all the employees who may be adversely affected – whether employees of SOO or DME – will be protected by the *New York Dock* conditions imposed on the transaction. If the protective conditions should, in the future, require the giving of notice and negotiation of an implementing agreement, Applicants will, of course, give the appropriate notice to the affected employees and unions, and will make the operational changes in accordance with the conditions.

(b) ATDA

ATDA represents SOO employees working in Minneapolis who dispatch trains on SOO and D&H. DM&E and IC&E trains are dispatched by Operations Supervisors at Sioux Falls, SD and Kansas City, MO, who are not represented. ATDA cites Applicants’ statement that they do not currently plan significant changes in train dispatching, but the union expresses concern that

CPR may undertake “future consolidations” not currently foreseen. ATDA asks the Board to ensure that the train dispatchers it now represents “are as well protected from potential adverse future effects of the control transaction as are employees of DME.” Comments of IBEW, et al., at 4.

No action beyond the application of the *New York Dock* conditions to the proposed transaction is warranted by ATDA’s comments. Applicants have no plans to consolidate the dispatching functions of SOO and DME. However, if, in the future, in their continuing implementation of the proposed transaction, Applicants decide to make operational changes in their dispatching functions, all the employees who may be adversely affected – whether employees of SOO or DME – will be protected by the *New York Dock* conditions imposed on the transaction. If the protective conditions should, in the future, require the giving of notice and negotiation of an implementing agreement, Applicants will give the appropriate notice and will make the operational changes in accordance with the conditions.

(c) BLET

BLET represents locomotive engineers employed by SOO and D&H and all operating craft employees of IC&E. (Operating craft employees of DM&E are represented by the United Transportation Union.)

BLET observes that Applicants have stated that they intend to eliminate two daily IC&E trains operating between Owatonna, MN and Chicago, a change that will affect some BLET-represented IC&E operating craft employees. BLET asks the Board to hold Applicants to their representation that employees who are adversely affected by this operational change will be protected by the *New York Dock* conditions; and BLET also asks the Board to apply *New York*

Dock “to every employee BLET represents on both the IC&E and the CPR properties.”

Comments of IBEW, et al., at 4.

The short answer to BLET’s request is that the *New York Dock* conditions will apply to all employees of Applicants’ railroads who may be adversely affected as a result of implementation of the proposed transaction. Applicants have explained that a few BLET-represented IC&E employees, who currently report at Mason City, IA and Dubuque, IA, will be affected by the one change in train operations that Applicants propose to implement. Applicants have also explained that these employees have seniority covering all of IC&E’s territory, and that it is expected that there will be sufficient work available on IC&E for all of the carrier’s train and engine service employees. V.S. Frankenberg at 4-5. In any event, if any current IC&E employees should be adversely affected as a result of the planned operational change, they will have *New York Dock* protection. *Id.* If, in the future, other BLET-represented employees of Applicants’ railroads should be affected by operational changes made in the course of implementing the proposed transaction, they, too, will have *New York Dock* protection. No other relief is requested by BLET, and none would be warranted.

3. United Transportation Union (“UTU”)

UTU, which represents train service employees of SOO and D&H and all operating craft employees of DM&E, has not filed comments in this proceeding. However, comments have been submitted by two UTU affiliates: a local union that represents train service employees on a portion of SOO, and the head of a general committee in Vancouver, Washington, that represents certain BNSF Railway train service employees (but no employees of Applicants).

(a) UTU Local 911

UTU Local 911, which represents train service employees on a portion of SOO, has submitted comments asking the Board in general terms to impose protective conditions for the benefit of SOO employees.

Local 911 seeks relief in connection with two hypothetical circumstances it claims to envision, in which SOO employees might lose work to DM&E or IC&E train crews. First, Local 911 asks that DME crews not be allowed to operate DME trains “out of the Minnesota City [MN] gateway onto the CP Rail main line,” other than through the use of existing trackage rights. Comments of Local 911 at 1. Local 911 does not suggest how such operation might occur in the absence of either (1) a consolidation of work that would be subject to the *New York Dock* requirement of notice and an implementing agreement or (2) a new grant of trackage rights by SOO to DM&E or IC&E, which would carry its own employee protective conditions. In either event, any affected employees of SOO would be protected by the appropriate protective conditions.

Second, Local 911 expresses concern that existing operations by IC&E between St. Paul and Kansas City might be expanded, diverting traffic from SOO and reducing the work available to SOO train service employees. Local 911 wants its members to share in this putatively expanded IC&E work. *Id.* This is a nonexistent problem of Local 911’s own invention. As an initial matter, SOO does not currently operate train service between the Twin Cities and Kansas City, so the work of SOO train service employees does not involve any such traffic. Moreover, Applicants have no plans to shift existing traffic from SOO trains to IC&E trains. However, the short answer to Local 911, again, is that if SOO and DME should, in the future, decide to carry out an operational change that is not now foreseen and that amounts to implementation of the

proposed transaction, concerns such as those raised by Local 911 are among the matters that would appropriately be handled in the course of negotiating implementing agreements under the protective conditions.

Finally, Local 911 apparently wants the Board to direct that train service jobs on IC&E lines, now conducted by IC&E using its own employees, should be taken away from those employees (who are BLET-represented) and given to SOO employees (who are UTU-represented), because the IC&E lines were once part of SOO's system. *Id.* at 2. However, the lines in question were divested by SOO in 1997 and have not been part of the SOO system for more than a decade. Local 911's misconceived request seems to assume, contrary to fact, that CPR intends to absorb IC&E into CPR's existing SOO operations, and that IC&E trains will simply become SOO trains. As Applicants have explained, upon consummation of the proposed transaction, IC&E's lines will continue to be operated by that carrier, not by SOO. IC&E will continue to operate its own trains and will continue to employ its own employees. SOO will not operate IC&E's trains. Moreover, there is no aspect of the proposed transaction that could serve as a basis for dispossessing IC&E's employees of their work or transferring work from a BLET-represented craft to UTU representation. Representation matters are, in any event, exclusively within the jurisdiction of the National Mediation Board.

(b) Jay L. Schollmeyer, General Chairman of UTU/GO-386

Jay L. Schollmeyer, General Chairman of United Transportation Union-General Committee of Adjustment GO 386 ("UTU/GO-386"), an affiliate of UTU located in Vancouver, Washington, has filed argument in opposition to the proposed transaction, supported by a verified statement. Mr. Schollmeyer's General Committee represents train service employees on

some lines of BNSF Railway, but it does not represent any employees of SOO, D&H, DM&E, or IC&E.

Mr. Schollmeyer disputes the Board's preliminary determination to act on the Application in this proceeding while deferring analysis of the potential environmental impacts of moving Powder River Basin coal over the lines of CPR, should Applicants decide in the future to implement DM&E's authority to build a new line into the PRB. Mr. Schollmeyer's objection in this regard was resolved, however, in Decision No. 9 in this proceeding (served April 4, 2008), in which the Board confirmed the approach to environmental review that it had preliminarily adopted.

Mr. Schollmeyer also contends, without any evidentiary support, that the Board should find that the proposed transaction will have anticompetitive effects. Applicants have thoroughly addressed the competition issues elsewhere, both in the Application and in this Reply submission.

Mr. Schollmeyer more candidly acknowledges, in his Verified Statement, that he opposes CPR's acquisition of control of DM&E and IC&E because he believes the acquisition "would be adverse for BNSF train and engine service employees." In particular, he speculates there could be a diversion of BNSF traffic to CPR routes. V. S. Schollmeyer at 2. However, Mr. Schollmeyer does *not* ask for the imposition of protective conditions for the benefit of BNSF employees, saying that he lacks "a full understanding as to the probable consequences of the transaction upon BNSF employees." *Id.* at 4. In fact, there is no evidence in the record of this proceeding that would support a finding that there will be any consequences with respect to the

employees who are represented by Mr. Schollmeyer's committee, or any other BNSF employees.⁴⁴

E. Mayo Clinic

1. Introduction

Before discussing the Mayo Clinic's ("Mayo") specific comments in more detail, it is important to reiterate some foundational principles and to establish the context in which the Board should evaluate Mayo's comments and requests for conditions. First, as a threshold matter, the Board only imposes conditions on its approval of a proposed transaction in order to address harms or conditions that are *caused by the transaction*, not to address pre-existing conditions that are unrelated to the transaction. *CN/DMIR, supra*, 2004 WL 761305, at *9, *13; *CN/IC, supra*, 4 S.T.B. at 141-42 & n.72. Here, DME's safety performance, its safety culture, and the condition of its track and infrastructure are all pre-existing conditions that are not in any way attributable to the proposed transaction. In fact, the reality is the polar opposite. Far from causing DME's historical safety difficulties, the proposed transaction will ameliorate those conditions and have myriad positive benefits and effects on the safety and efficiency of DME's operations. Mayo does not deny that safety benefits and improvements will result from approval of the transaction. As the Board recently summarized, "approval of the proposed transaction

⁴⁴ There would be no basis for extending *New York Dock* protection to BNSF employees, in any event. The Board, like the ICC before it, has routinely rejected requests by labor unions and their affiliates, including Mr. Schollmeyer's General Committee, that *New York Dock* protection be afforded to employees of nonapplicant carriers. *E.g., Canadian Nat'l Ry.—Control—Ill. Cent. Corp.*, 4 S.T.B. 122, 165-66 (1999) (rejecting request of UTU General Committee of Adjustment 386 for protection of, *inter alia*, employees of BNSF, a nonapplicant carrier, and observing that "labor protection was intended to cushion the impact on employees of merger-related restructuring of the carriers for which they work, not to insulate employees from competitive impacts of mergers not involving their employers"); *CSX Corp.—Control and Operating Agreements—Conrail Inc.*, 3 S.T.B. 196, 332 (1998) (rejecting UTU request for application of *New York Dock* conditions to employees of D&H, a nonapplicant carrier, and stating that "the ICC, the Board, and the courts have consistently ruled that the employees of a nonapplicant carrier . . . are not entitled to labor protection under 49 U.S.C. 11326" (footnote omitted)); *see also, e.g., Lamoille Valley R.R. v. ICC*, 711 F.2d 295, 323-24 (D.C. Cir. 1983) (Congress did not contemplate the protection of employees of nonapplicant railroads).

would likely lead to improvements that would enhance the safety of train traffic through Rochester and elsewhere on the DM&E system . . .” STB Dkt. No. 35081, Decision No. 9 at 8 (served April 4, 2008).

Second, most of Mayo’s requested conditions concern matters at the heart of the jurisdiction, responsibility, and expertise of FRA, FHWA and other transportation safety agencies, such as highway-rail grade crossing protection and signaling, safety devices, track safety standards, maximum speeds for track, and operating practices. *See* Graham Reply V.S. at 3, 9-10. There are well-established processes and programs conducted by those agencies that address most of Mayo’s concerns. For example, with respect to public grade crossing safety and protections (the subject of two of Mayo’s requested conditions), FHWA, in cooperation with state transportation agencies, administers a comprehensive, detailed program involving the inventorying, study, analysis, ranking, and evaluation of rail grade crossings throughout the nation. *See* 23 U.S.C. § 130; 23 C.F.R. Part 924. Based upon a thorough, multi-factor analysis, the cognizant state agency prioritizes grade crossing safety improvement and selects projects for implementation and funding each year. *See id*; *Railroad-Highway Grade Crossing Handbook*, FHWA (2d ed. 2007) (lengthy manual describing program and procedures for evaluation, selection, implementation and funding of highway grade crossing projects). Those projects are implemented, funded, and reviewed through cooperative efforts of FHWA (which provides the bulk of the funding), FRA, state and local governments, and rail carriers.

Mayo, a private non-governmental entity, is effectively asking the Board to preempt these orderly, well-established processes – run cooperatively by multiple federal and state government transportation agencies with clear statutory responsibility for these matters at the intersection of rail and highway safety – and direct Applicants to take specific actions to address Mayo’s

concerns. Such precipitous action would be unwarranted and inconsistent with the statutory and regulatory schemes governing grade crossings and other aspects of railroad safety. There is no reason for the Board to inject itself into these processes and programs conducted by expert agencies and designed to evaluate safety issues and prioritize and implement competing safety projects based on consistent application of neutral, objective safety criteria. If Mayo believes that grade crossing safety improvements are needed in the vicinity of its facilities, it should seek to participate in those processes in consultation with FHWA, FRA, MN/DOT and other responsible agencies.

Third, most of the concerns expressed by Mayo are simply an attempt at a second or third bite at the same apple – safety and environmental matters related to the DM&E line through Rochester. Mayo had more than ample opportunity to air its safety concerns regarding the operation of the DM&E in the *DM&E PRB Construction* case⁴⁵, and it raises few new concerns here. *See* Decision No. 9 at 6 (“[T]he suggestions of Mayo . . . that the Board should revisit the potential impacts of increases in train traffic on Rochester . . . or Mayo ignore the thorough environmental review that has taken place, and are untimely.”). Indeed, some of Mayo’s requested conditions are little more than an effort to impose on Applicants today a variant of conditions the Board has already imposed on DM&E in the event it decided to construct a line into the PRB. As the Board noted in its decision rejecting Mayo’s request for a new NEPA analysis based on potential increases in ethanol traffic,

⁴⁵ *See Dakota, Minnesota & Eastern RR Corp. Construction Into The Powder River Basin*, STB Fin. Docket No. 33407 (Jan. 28, 2002); *reversed and remanded in Mid-States Coalition for Progress v. STB*, 345 F.3d 520 (8th Cir. 2003); *Dakota, Minnesota & Eastern RR Corp. Construction Into The Powder River Basin*, STB Fin. Docket No. 33407 (Feb. 13, 2006); *upheld in Mayo Foundation v. STB*, 472 F.3d 545 (8th Cir. 2006) (herein collectively “*DM&E PRB Construction*”).

Mayo's concerns about safety due to potential increased ethanol traffic through Rochester do not warrant preparation of NEPA documentation of the proposed acquisition . . . or the imposition of additional environmental conditions should the proposed transaction be approved. Safety was a paramount concern in the environmental analysis in *DM&E PRB Construction*, and 24 of the environmental conditions imposed by the Board in that case will adequately address the potential safety concerns raised during the EIS process if DM&E decides to build into the PRB.

Decision No. 9 at 7, STB Dkt. No. 35081 (emphasis supplied).

Fourth, Mayo's comments fail to acknowledge the very substantial safety improvements made by DM&E over the last several years, and DM&E's continuing obligation to comply with all FRA and DOT safety and security regulations. *See generally* Graham Reply V.S. at 1-4. Mayo's comments indicate that its primary concern is DM&E track condition and maintenance. Mayo highlights its perceived importance of this concern by noting that the one remaining element of the DM&E Safety Compliance Agreement ("SCA") that had not yet been terminated by FRA concerned track inspection and maintenance. Mayo Comments at 12. What Mayo failed to note was that, approximately three weeks *before* Mayo filed its comments, FRA did, in fact, terminate that last remaining condition, and the entire SCA, eight months ahead of schedule. *See* Appendix J; Graham Reply V.S. at 1-4 Thus, prior to Mayo's filing, the FRA's independent review and analysis determined that DM&E's safety performance had improved sufficiently to allow termination of the special safety review and oversight conditions established 2 ½ years earlier.

Fifth, Applicants directly address in these comments Mayo's concern that Applicants have not provided sufficient detail concerning whether and when capital improvements will be made to DM&E track in the Rochester area. As discussed in more detail below and in the Reply Verified Statement of Vern Graham, Applicants' capital budget provides for significant capital

investments in the DM&E line between Owatonna and Rochester in 2009, the first year following the Board’s scheduled decision regarding the proposed transaction. *See* Graham Reply V.S. at 6-10. Moreover, as part of its existing capital plan, DM&E will make capital investments in that same line (the Waseca Subdivision) this year (2008). As a result of Applicants’ capital investments over the next two years, the DM&E line from Owatonna through Rochester will be upgraded to FRA Class 3 track, capable of safely accommodating trains at speeds of up to 40 MPH. *See id.* at 6-10, 13. This capital investment commitment eliminates the main factual premise for Mayo’s safety arguments – the contention that DM&E track in and around Rochester is in such poor condition that it poses an unacceptable risk of train accidents or derailments that might potentially result in the release of hazardous materials.

Finally, Mayo’s various hypothetical illustrations and arguments about potential hazardous materials incidents obscure one essential fact: very few hazardous materials move through Rochester by rail. In each of the last two years, [] was *the sum total of all hazardous materials* that DM&E moved through Rochester. Graham Reply V.S. at 4. Contrary to Mayo’s suggestion, DM&E moved no cars carrying propane through Rochester in either of those years.⁴⁶ Given the minuscule volume of TIH shipments through Rochester and Applicants’ planned capital improvements to the track through Rochester, Mayo’s concerns about the likelihood of a TIH release from a DM&E car are overstated at the very least.⁴⁷ Moreover, as the Board has accurately observed, “Mayo also fails to recognize that

⁴⁶ As the Graham analysis illustrates, DM&E has had very few accidents in Rochester. []
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⁴⁷ As explained below, Applicants do project that, due to growth in ethanol production and demand, some volume of ethanol (a hazardous material, but not a TIH) may move through Rochester in the future.

DM&E, like any other railroad, must comply with all Department of Transportation regulations covering transportation safety, security, and the handling of hazardous materials on its existing line, which goes through Rochester.” Decision No. 9 at 7.

2. Summary of Mayo’s Concerns and Applicants’ Response

Mayo asserts that DM&E operates over substandard tracks in some places and has a poor safety history and culture, and that CPR’s proposals to ameliorate these problems may be insufficient and implemented over too long a period of time. Mayo also questions CPR’s projections of the volume of hazardous materials (including ethanol) that will move through Rochester, MN (where Mayo is located) following the proposed transaction..

Applicants are sensitive to the railroad safety issues raised by Mayo. Indeed, an important benefit of the proposed transaction will be the introduction onto DME of practices and technologies that have made CPR one of the safest railroads in North America (with the fewest reportable train accidents of any railroad over the past decade). As Mayo acknowledges, CPR and Mayo have already commenced discussions concerning these issues on their own initiative. Mayo Comments at 18. CPR looks forward to continuing to work with Mayo and relevant government agencies to develop reasonable cooperative solutions to address Mayo’s concerns. *See Graham Reply V.S. at 3.* As demonstrated below, however, there is no basis for the Board to impose any of the conditions requested by Mayo.

Several of Mayo’s proposed conditions seek mitigation of impacts related to the PRB project. The Board has already imposed conditions to mitigate impacts on Rochester *if* the PRB line is built. *See DM&E PRB Construction.* There is no need to reimpose those conditions here and certainly no basis to modify them. *See Decision No. 9 at 6-7.*

Mayo's conditions are largely directed at *existing* safety conditions on the DM&E. For example, Mayo repeatedly argues that DM&E operates over substandard track in many places and that DM&E's safety record is poor. *See* Mayo Comments at 4-5, 8, 12-13. These complaints plainly pre-date the proposed transaction and do not justify the requested conditions. While Mayo acknowledges that the proposed transaction would permit CPR to *improve* track conditions and safety on the DME (Mayo Comments at 14), it repeatedly argues that CPR is not planning to devote sufficient resources to address these problems (*id.* at 3-4, 14-16) and that the steps CPR plans to take may not be sufficiently expeditious (*id.* at 4, 8, 17). As a matter of law, the mitigation of a pre-existing harm or risk does not justify the imposition of conditions on this transaction. *CN/IC, supra; CN/DMIR, supra.* Mayo has not met its burden of showing that the proposed transaction will cause any harm (much less any harm to competition).

With respect to Mayo's concern about DME track conditions, CPR has 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. *See* Graham Reply V.S. at 6-10; Application Operating Plan at 36-37; SIP at 89-90. This capital investment will be used to make significant improvements to DME infrastructure, which in turn will improve the efficiency of DME operations and the safety of the DME system, all in a relatively short period of time. 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. Graham Reply V.S. at 10.

Despite this extraordinary capital commitment, Mayo complains that Applicants' Safety Integration Plan does not provide sufficient detail to allow it to determine when Applicants plan

to make capital investments to improve and upgrade track in the Rochester area. Mayo Comments at 16-17. CPR has been working diligently to assess the capital needs and priorities for the DME system since the filing of the Application last fall. Such needs assessments and capital budgeting are time-intensive processes, particularly where, as in this case, a carrier must familiarize itself with a 2500-mile rail network with significant capital needs. In addition, the process has been made somewhat more difficult by the fact that DME is in a voting trust during the pendency of the Application and CPR has carefully avoided any activity that could be perceived as seeking to prematurely exercise control over the operations of DME. Despite these difficulties, CPR's review and capital planning process has now progressed to the stage at which CPR has determined the nature and timing of planned capital expenditures on track and infrastructure in the Rochester area.

Applicants have included in their capital plans for 2008 to 2010 (DME's existing capital plan for 2008 and CPR's plan for 2009-10) funds to rehabilitate and upgrade the DM&E line from Owatonna through Rochester to FRA Class 3 track. This includes, among other improvements, the installation of approximately 30 miles of continuous welded rail ("CWR") in the vicinity of Rochester and 10 miles of CWR in and around Owatonna. Improvements scheduled to be completed in 2009 (and which DME plans to begin in 2008) will bring the DM&E track from Owatonna through and beyond Rochester up to Class 3 standards, enhancing the safety of that line and allowing greater train velocity. In total, during the three-year period from 2008 to 2010, Applicants will make capital investments totaling approximately [] [] to improve and upgrade DM&E's Waseca subdivision (from Owatonna to Minnesota City). This commitment fully addresses Mayo's concerns about the condition of DM&E track in and through Rochester. It also addresses the concern expressed by the City of Owatonna

regarding track conditions in and around Owatonna.⁴⁸ And, as explained below, these planned improvements also address Mayo's concerns about transportation of hazardous materials on the line that goes through Rochester, and obviates Mayo's requested speed limit condition.

Mayo also expresses a related concern about potential future routing of cars containing hazardous materials through Rochester. As Mayo's comments acknowledge, the nascent market for ethanol transportation is dynamic and evolving, and the lines of DME are at the epicenter of U.S. ethanol production. *See* Mayo Comments at 9-11; Anderson Reply V.S. at 7-9; Graham Reply V.S. at 4-8. As new ethanol plants come on line and other projects are abandoned, demand for ethanol develops and shifts in various geographic regions. Under these circumstances, it is difficult to project with precision either the volume of ethanol that will be transported by rail, or the destinations to which it will be transported. *See* Anderson Reply V.S. at 9-10; Graham Reply V.S. at 4-5.

Based on developments since the filing of the Application last October, and Applicants' continuing assessment of potential ethanol traffic flows and DME's potential share of that traffic, Applicants have revised their projections of potential ethanol traffic volumes that may move over DME and CPR in the future, and the destinations to which that traffic may move. *See* Anderson Reply V.S. at 7-9. Applicants now project that greater volumes of ethanol may flow from origins on the DME system (including new plants now scheduled to come on line in 2008 and 2009) to the Chicago gateway. Applicants now project they may move [] [].

⁴⁸The City of Owatonna, MN neither supported nor opposed the proposed transaction, but it expressed concern that Applicants were not able to advise it whether they intended to make capital investments to upgrade track in the Owatonna area. Owatonna Comments at 6-7. As discussed above, Applicants have now determined that, in 2008 and 2009, they will make capital investments necessary to upgrade the track between in and around Owatonna to FRA Class 3 standards. As a result of this and other investments, the DM&E track from Owatonna through Rochester will all be Class 3 track by the end of 2009. Graham Reply V.S. at 22.

Anderson Reply VS at 9-10; Graham Reply V.S. at 4-5. []

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Chicago in 2010. *Id.*⁴⁹ These revised projections represent the greatest volume of ethanol that *might* move over the DM&E to Chicago, absent construction and operation of additional new ethanol plants beyond those presently scheduled to open in 2008 – 2010. Graham Reply V.S. at 5; *See* Anderson Reply V.S. at 9-10.

On the current DME system and under its existing operating plan, all of that projected ethanol traffic would turn south at Owatonna, MN and follow the IC&E line to Chicago. Graham Reply V.S. at 5-6. Based upon Applicants’ projection of increased volumes of ethanol traffic on both IC&E and DM&E (with significantly greater volume increases projected for IC&E origins), and Applicants decision to improve and upgrade DM&E’s Waseca Subdivision in 2008 and 2009 (including the line segment through Rochester), []
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[] *Id.*; *see* Anderson Reply
V.S. at 9-10. []
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⁴⁹ Projection of volumes and flows of ethanol traffic originating on DME is, at best, a very uncertain venture. *See* Anderson Reply V.S. at 9-10. As Witness Anderson emphasizes, the volumes of ethanol transported by DME and the destinations to which it may move depend on a number of variables, most of which are entirely outside Applicants’ control. *Id.* Applicants revised projections are thus necessarily rough estimates. In order to reduce the likelihood of underestimating potential ethanol traffic that might be routed over the Waseca Subdivision, Applicants have used robust assumptions about ethanol traffic moving from DME to Chicago. To be conservative, Applicants assumed, for the sake of these projections, that *all* of that potential DME ethanol traffic to Chicago would move east over the DM&E to Minnesota City, rather than turning south on the IC&E at Owatonna (the route of movement of eastbound DM&E ethanol traffic today).

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[] will depend on a variety of factors, including but not limited to the volume of ethanol traffic moving to Chicago, track conditions, operating considerations, and commercial and market considerations. []

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[] Graham Reply V.S. at 6. As discussed above, upon completion of Applicants' planned capital improvements in 2009, the track from Owatonna through Rochester will be new FRA Class 3 track.

3. Applicants' Response to Mayo's Specific Proposed Conditions

Mayo asks the Board to impose nine conditions on any approval of the transaction: (1) require Applicants "to install multiple grade separated crossings at mutually acceptable locations" after consultation with the FRA, FHWA, appropriate state and local transportation authorities, and the City of Rochester; (2) require CPR's "upper management" to meet with representatives of the Mayo Clinic prior to "initiation of [PRB] project-related reconstruction activities in Rochester" concerning "how best to minimize project-related impacts on the Clinic"; (3) require Applicants to install wayside detectors to the west and east of Rochester; (4) require Applicants to impose speed limits on "local hazardous materials traffic of 10 MPH and non hazardous train traffic at 20 MPH;" (5) require Applicants to construct fencing or other appropriate protection for bike paths and pedestrian crossings and other sound and aesthetic barriers; (6) for non-grade separated road crossings, require Applicants to develop and maintain grade crossing protection devices that will allow whistle-free rail operations; (7) require Applicants to provide Rochester emergency services with pre-notification of the transportation of

hazardous materials through the city; (8) require coal cars transported through Rochester to be covered and/or sprayed to reduce dust; and (9) require Applicants to negotiate with Mayo and City of Rochester “voluntary contractual limitations” on the total number of through-traffic trains moving through the city.

Mayo’s first and sixth requested conditions – requiring Applicants to install multiple grade separated crossings and requiring grade crossing protection devices that will allow whistle-free rail operations – overlap with Conditions 1A, 1B, 2, 121 and 123 imposed in the *DM&E PRB Construction* case. They also seek to insert the Board in well-established programs run by agencies of the U.S. Department of Transportation and state governments in cooperation with rail carriers, which evaluate grade crossing safety, select priority grade crossing improvement projects, and implement them. CPR, DM&E and IC&E abide by all FRA safety regulations and cooperate in the programs administered by FHWA and states to improve safety at public grade crossings. Applicants commit to continue to do so following approval of the transaction. Given this undertaking and the existence of rail crossing safety programs operated by other responsible agencies, further Board intervention on grade crossing safety issues in Rochester, MN is neither necessary nor appropriate.

Mayo’s second requested condition – that the Board require CPR’s “upper management” to meet with representatives of Mayo prior to “initiation of project-related reconstruction activities in Rochester” concerning “how best to minimize project-related impacts on the Clinic” – is unnecessary. Mayo and CPR management are already engaged in discussions regarding Mayo’s concerns. *See* Graham Reply V.S. at 2-3. Moreover, the condition is nearly identical to Condition 122 imposed in the *DM&E PRB Construction* case. If and when Applicants decide to construct the PRB line, they will abide by that condition.

Mayo's third requested condition, the installation of wayside detectors east and west of Rochester, is inconsistent with the terms and conditions of AAR Circular OT-55 ("OT-55"), whose standards Mayo also asks the Board to apply to Applicants' operations "through Rochester and other communities." See Mayo Comments at 18, 20. As U.S. DOT's Pipeline and Hazardous Materials Safety Administration ("PHMSA") explained this week in a announcing regulations that, *inter alia*, adopted OT-55 recommended practices:

The rail industry, through the Association of American Railroads (AAR), has developed a detailed protocol on recommended railroad operating practices for the transportation of hazardous materials. The recommended practices were originally implemented by all of the Class 1 rail carriers; short-line railroads are also signatories to the most recent version of this document, known as Circular OT-55-I. . . .

Pipeline and Hazardous Materials Safety Administration, "Hazardous Materials: Enhancing Rail Transportation Safety and Security for Hazardous Materials Shipments," Interim Final Rule, 73 Fed. Reg. 20752, 20754 (April 16, 2008) ("Hazardous Materials Transportation Safety Rule"). These are uniform, objective standards for hazardous materials transportation by rail, which are endorsed by the U.S. Department of Transportation. As signatories to OT-55, Applicants are committed to following the operating practices and standards established by that protocol, as well as the related regulations just promulgated by PHMSA. See Graham Reply V.S. at 9.

As PHMSA further explained, certain "key route" requirements of OT-55 – including the placement of wayside detectors every 40 miles – are triggered by movement over a track segment of 10,000 carloads of hazardous materials or 4000 carloads of PIH (TIH) commodities. See Hazardous Materials Transportation Safety Rule at 20754. The tiny volume of hazardous materials moved over DM&E track [] does not remotely approach the level that would trigger OT-55 key route standards. Moreover, even if Applicants did, in fact, []

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See Graham Reply V.S. at 9-10.

If, at some future time, the volume of hazardous materials Applicants move through Rochester reaches the key route threshold prescribed by OT-55 or other applicable regulations, Applicants will, of course, follow those requirements. *Graham Reply V.S. at 9-10.* Unless and until those requirements are triggered, Mayo has not established a basis for departure from the objective “detailed protocol” and standards developed by AAR and endorsed by PHMSA.

Mayo’s fourth requested condition asks the Board to impose a 20 MPH speed limit for all trains, and a 10 MPH limit for trains moving hazardous materials, through Rochester. Mayo has articulated no basis for the Board to intervene in matters that are subject to regulations by FRA in order to impose speed limits requested by a private party. Maximum train speeds for track conditions are established and regulated by FRA under its Track Safety Standards. *See 49 C.F.R. Part 213.* When Applicants complete planned capital improvements to the Rochester track in 2009, the track will be FRA Class 3 track, with a maximum permissible speed of 40 mph. *See Graham Reply V.S. at 13.* As the federal agency primarily responsible for rail safety, it is the responsibility of FRA to make determinations about rail track speed. Although the Board has a general responsibility to promote a safe and efficient rail transportation system, FRA is the agency with primary expertise and responsibility for rail safety matters.⁵⁰ In a joint

⁵⁰ FRSA confers jurisdiction over railroad safety matters on FRA, expressly declaring that “[t]he purpose of [FRSA] is to promote safety in every area of railroad operations and reduce railroad-related accidents and incidents.” 49 U.S.C. § 20101. To accomplish this purpose, FRSA conferred authority on FRA to “prescribe regulations and issue orders for every area of railroad safety.” *Id.* § 20103(a); 49 U.S.C. § 103.

rulemaking, the STB and FRA summarized the division of regulatory responsibility between the two agencies in considering rail acquisitions and consolidations :

FRA and STB are jointly responsible for promoting a safe rail transportation system. Under federal law, primary jurisdiction, expertise and oversight responsibility in rail safety matters are vested in the Secretary of the Department of Transportation, and delegated to the Federal Railroad Administrator. 49 U.S.C. § 20101 *et seq.*; 49 C.F.R. § 1.49. FRA has authority to issue regulations to promote safety in every area of railroad operations and reduce railroad-related accidents and injuries. . . . FRA has expertise in the safety of all facets of railroad operations. Concurrently, the [STB] has expertise in economic regulation and assessment of environmental impacts in the railroad industry. Together, the agencies appreciate that their unique experience and oversight of railroads complement each other's interest in promoting a safe and viable industry.

STB Ex Parte No. 574, FRA Dkt. No. 199-4985, “Regulations on Safety Integration Plans Governing Rail Consolidations . . .,” Final Rules at 9 (March 8, 2002 (emphasis added)). Those rules essentially establish that, in a rail consolidation proceeding, FRA reviews and considers public comments on the SIP, and advises the Board if, under applicable FRA rules and standards, the SIP is adequate and if FRA recommends any appropriate modifications. Based on those recommendations, the Board is to review the SIP (with any modifications recommended by FRA) and consider the SIP as part of its overall decision in the case. If the Board approves the transaction, compliance with the SIP adopted in the case becomes a condition to that approval. FRA then monitors the parties' compliance with the SIP and submits information to the Board regarding that compliance. *See generally* STB Ex Parte No. 574 Decision (March 8, 2002); *see it* at 61-62 (STB analysis of final SIP rule); 49 C.F.R. Part 244 (FRA SIP regulations).

The rules make clear that FRA has the primary responsibility for evaluating rail safety issues raised in connection with a transaction, and advising the Board on whether the proposed transaction and the SIP satisfy applicable FRA rules and standards. The rules do not contemplate

what Mayo seeks – a system in which the Board grants special exceptions to FRA standards to private parties that are not satisfied with governing FRA rules and standards. Consistent with the division of responsibility provided by federal law and the agencies’ rules, the Board should not consider any proposed safety condition (beyond those embodied in the SIP) unless FRA determines it is appropriate and advises the Board that the SIP should be modified to address the additional safety issue. Unless and until FRA advises the Board that, in its expert judgment, Applicants should make modifications to the SIP, the Board should reject Mayo’s requests for conditions imposing requirements above and beyond those established by applicable FRA, FHWA, PHMSA, TSA, and DOT regulations.

FRA has clear standards and rules governing maximum train speeds. Mayo has provided no basis for the Board to order a departure from those standards. Moreover, FRA and PHMSA are presently engaged in a rulemaking considering a proposed 30 MPH speed limit for trains carrying TIH commodities in dark (unsignaled) territory. *See* NPRM, Hazardous Materials: Improving the Safety of Railroad Tank Car Transportation of Hazardous Materials, 73 Fed. Reg. 17818, 17820 (April 1, 2008) (to be codified at 49 CFR Pts. 171, 172, 173, & 174). The proposed rule bases this speed limit and other proposed TIH tank car safety measures on extensive research and studies. *See id.* at 17834-17850. The rule does not propose any lower speed limit for non-TIH hazmats. Given the pendency of a rulemaking addressing the very issue raised by Mayo, the Board should defer to the judgment and expertise of agencies with primary responsibility for rail safety matters and reject Mayo’s unjustified request for special speed limits.

Mayo's fifth requested condition, for "sound and aesthetic barriers," is not even discussed in its comments and is wholly unsupported. The Board should reject this proposed condition without further consideration.

Mayo's seventh proposed condition, that Applicants provide Rochester officials with "pre-notification of the transportation of hazardous materials through Rochester" is impractical, contrary to CPR's policy concerning the distribution of sensitive security information, and inconsistent with security regulations and guidance promulgated by the Transportation Security Administration ("TSA"). CPR provides communities, upon appropriate request, notice of the top 25 hazardous commodities that may be transported through their area. *Graham Reply V.S.* at 11. If the City of Rochester advises Applicants that it believes the information it already has in its possession is not sufficient to identify such commodities (only four carloads of hazardous materials of any kind moved through Rochester in each of the last two years), Applicants will provide further information identifying those commodities. *Id.*

DME has conducted training sessions for hazardous materials emergency responders in the Rochester area. DME has advised CPR that it believes that at least some emergency response personnel from Rochester participated in that training. *Graham Reply V.S.* at 11. CPR frequently conducts hazmat emergency response training and tabletop simulation exercises for emergency responders and local government officials in cities and towns in which it operates. Applicants are willing to conduct emergency response training for Rochester emergency responders if Rochester requests such training. *Id.* In addition, Applicants have procedures and resources in place to assist Rochester officials and emergency responders and provide them with current, accurate information in the event of an incident involving rail cars carrying hazardous materials. *Id.*

Given the availability of training, notice of the types of hazardous materials that may travel through Rochester, and the ready availability of assistance from Applicants should a hazmat incident occur, pre-notification of each rail movement of hazardous materials through the Rochester area would not significantly improve the ability of Rochester officials to respond to a hazardous materials incident. *Graham Reply V.S.* at 11. Moreover, any marginal safety preparedness improvement that might result from prior notification would be outweighed by the difficulty of providing such notice and the security risks posed by dissemination of sensitive information regarding the location and route of movement of hazardous materials. *Id.* at 11-12. Every year, tens of thousands of carloads of hazardous materials move by rail through various jurisdictions in the United States. Most of those cars do not follow a strict, predetermined schedule. *Id.* at 12. The large quantity, transitory nature and unpredictable timing of movements of hazardous materials makes a pre-notification system of the sort proposed by Mayo unworkable and extremely difficult and costly to implement, both for rail carriers and for local officials and emergency responders. *Id.*

Apart from the impracticality, cost and burden of prior notification of local governments of each movement of a railcar containing hazardous material, such a practice would also create a security risk. For security reasons, []

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The proposed pre-notification of specific movements of hazardous materials would significantly increase the accessibility of information regarding the location of hazardous materials, and thereby increase the vulnerability of those materials to terrorist or criminal attack. *Id.* This very real security risk is the reason that TSA has issued guidance and “voluntary action items” narrowly limiting the distribution of such “sensitive security information” to government personnel having security clearance and a need to know that information for security reasons. Just this week, FRA, TSA, and PHMSA issued regulations to mandate many of the limitations currently set forth in guidelines and voluntary action items. *See Hazardous Materials Transportation Safety Rule, 73 Fed. Reg. 20752 (April 16, 2008).* Here again, there is simply no reason for the STB to act in a manner inconsistent with other federal agency rules and standards, simply because a private party (Mayo) requests it in a rail consolidation proceeding.

Mayo’s eighth proposed condition, requiring the covering or spraying of coal cars, is an inappropriate and untimely attempt to augment the Board’s prior *DM&E PRB Construction* order, which in Condition 84 already covers minimization of dust emissions from PRB coal movements. In any event, Mayo’s proposed condition is moot because Mayo premised its request on the Board’s overturning its preliminary determination regarding additional environmental review of the effect of PRB movements on lines other than those of the DM&E. The Board affirmed its preliminary determination in Decision No. 9.

Finally, Mayo’s ninth proposed condition – that the Board require Applicants to negotiate with Mayo and City of Rochester “voluntary contractual limitations” on the total number of through-traffic trains moving through the city – is plainly unwarranted. The proposal to require

“voluntary” limitations is, on its face, internally inconsistent. Moreover, the proposal to require a common carrier to negotiate with a private party, who is not a shipper (such as Mayo) how many trains to operate is unprecedented. There is nothing in the record of this case which justifies bestowing such a right on either Mayo or Rochester.

In sum, Mayo has not met its burden of showing that its proposed conditions are justified or reasonable, and all of its proposed conditions should be rejected.

F. Metra

Metra provides commuter rail service in the six counties of Northeastern Illinois. Metra service currently operates on 11 different rail lines that link suburban communities with downtown Chicago. For over twenty years, Applicants and their predecessors have operated over two line segments owned by Metra, the Milwaukee District West Line (“West Line”) and the Milwaukee District North Line (“North Line”). CPR dispatches both passenger and freight service over those lines. CPR operates over the North Line and IC&E over the West Line. CPR does not operate over the West Line today, and does not plan to operate over that line on a scheduled basis for the foreseeable future. Graham Reply V.S. at 20.

CPR and Metra have a longstanding, cooperative and productive relationship, working together on the two lines they share. On those infrequent occasions when difficulties or disputes have arisen concerning the operation of those lines, CPR and Metra have worked together to resolve such matters promptly and to the satisfaction of both parties. *See* Graham Reply V.S. at 13-15. On numerous occasions, Metra has complimented CPR on its proactive and cooperative approach to the parties’ relationship. *Id.*

One example of CPR’s cooperative, pro-active approach is the daily conference call between CPR dispatch and operations personnel and Metra operations personnel. At CPR’s

suggestion, the parties established a daily conference call at 7:30 A.M. each morning to address any operational issues and concerns that Metra may have regarding the North and West Lines. *See* Graham Reply V.S. at 14. Metra, including its Chief Operating Officers, have complimented CPR for establishing this daily conference and have advised CPR that they find it to be an excellent way to minimize problems and to address any problems that do arise promptly. CPR is the only freight carrier that engages in such a daily consultation with Metra. *Id.*

CPR's current Integrated Operating Plan for the Chicago area is designed to facilitate Metra and Amtrak passenger service and to avoid interference with that service. Graham Reply V.S. at 14. For example, CPR's train schedules for the North and West Lines are designed around Metra's peak periods. CPR freight trains rarely run on Metra lines during those periods. *Id.* CPR's dispatch center works diligently to ensure that it adheres to the dispatch priorities established in the agreements between CPR and Metra, including those giving Metra trains priority during peak periods. *Id.* One indicator of the success of CPR's dispatch operation in the Chicago region is that Amtrak's Hiawatha service, which moves between Chicago and Milwaukee over the North Line, had Amtrak's *number one* on-time service performance in the entire nation in 2007. Graham Reply V.S. at 15.

The relationship between Metra and CPR – including detailed dispatching service priorities designed to protect both freight and passenger service quality; responsibility for maintenance of, and capital improvements to, the lines; and cost sharing between the parties – is governed by a complex series of agreements privately negotiated by the parties over two decades. The parties have negotiated amendments to those agreements from time to time.

Metra and CPR are currently discussing potential amendments to the existing agreements to accommodate changes in traffic patterns that may result from the proposed transaction.

Nevertheless, Metra requests that the Board, by regulatory fiat, impose seven conditions that would drastically alter the terms of the parties' privately negotiated agreements.⁵¹ Metra's requests fall into three categories: (1) that CPR be compelled to transfer to Metra the right to control dispatching over the West Line and North Line as well; (2) that certain terms of the parties' agreements relating to operations, capacity improvements and cost sharing over the West Line be extended to cover the North Line; and (3) that the parties' existing agreements be interpreted to provide that, following approval of the proposed transaction, both DM&E and IC&E would continue to be treated as third parties under the agreements, rather than as part of the CPR system.

CPR has been and remains committed to working cooperatively with Metra to promote efficient passenger and freight operations on the lines they share. However, Metra has not remotely met the standards for imposition of conditions, and its requests should be denied.

Even if Metra could demonstrate that the proposed transaction would result in a degradation of its commuter services (and it has not) Metra's request for conditions would have to be denied for failing to meet the applicable standard for a grant of conditions – *i.e.*, showing

⁵¹ Metra requests imposition of the following conditions:

- (1) transfer to Metra the right to control and dispatch train operations over the North and West Lines;
- (2) prohibit CPR from operating PRB coal trains over the North Line until Metra has completed construction of necessary capacity improvements as determined in accordance with the provisions equivalent to those applicable to the West Line in existing agreements;
- (3) require CPR to bear the expense of such capacity improvements to the extent they are required solely for the movement of such coal trains or other CPR/DM&E/IC&E trains.
- (4) require CPR to pay Metra specified usage fees on the North Line equivalent to those applicable on the West Line;
- (5) when implementing the preceding condition, count, as IC&E trains, any trains originated or terminated along the DM&E/IC&E lines that operate over the West Line or the North Line, regardless of the ownership of the locomotives powering such trains;
- (6) require CPR to acknowledge that its right to admit third party carriers to the West and North Lines have been exhausted; and
- (7) require CPR to negotiate with Metra such agreements as appropriate to implement the preceding conditions, with a right of either party to petition the Board to impose further conditions reasonably necessary to achieve the objectives of these conditions.

that the proposed transaction would cause it competitive harm. Metra has not shown that its speculation about its service is in any way related to a competitive harm. Metra does not even attempt to satisfy this standard. Instead, Metra asserts that the proposed transaction would threaten its ability to provide “essential services.” This assertion is both legally inapposite and factually unsupported.

First, the “essential services” standard applies, by its terms, only in “major” cases. Metra repeatedly cites the Board’s policy statement governing Class I mergers and consolidations, 49 C.F.R. § 1180.1(d). Metra Comments at 10, 11. Metra’s citation of this statement is meritless. The title of that policy statement makes clear that it applies to “merger or control of at least two Class I railroads.” Broader application of the policy, such as to a control proceeding like this involving only one Class I railroad, would violate the plain language of 49 U.S.C. 11324(d), which requires the Board to approve a transaction not involving two Class I railroads unless there will be adverse competitive effects that are both likely and substantial.

Second, Metra has not shown that any “essential services” that it provides would, in fact, be threatened by the proposed transaction. To the contrary, Metra proffers only unsubstantiated speculation that the proposed transaction could adversely affect the on-time performance of its passenger trains. In so doing, Metra ignores the detailed provisions of the existing agreements that are designed to preclude interference with its passenger service,

Finally, the conditions Metra seeks – which essentially amount to a rewriting of its agreements with CPR – are not related to the harm alleged by Metra. The Board is not authorized to provide such relief and, in any event, such relief is entirely unjustified.

In evaluating Metra’s proposed conditions, it is important to understand the existing agreements that govern the relationship between CPR and Metra with respect to the use of the

West Line and North Line. Metra’s comments largely ignore the substantive provisions of its agreements with CPR.

On February 19, 1985, the Trustee of the Property of the Chicago, Milwaukee, St. Paul and Pacific Railroad (“Milwaukee”) and SLRCO (an affiliate of Soo Line), entered into an agreement (“1985 Trackage Agreement”, attached in Appendix N), [] [] the West Line and North Line (together the “Joint Line”). 1985 Trackage Agreement § 2.1. That Agreement was reached in connection with CPR/Soo’s acquisition of Milwaukee Road’s core rail assets. Although CPR/Soo bought most of Milwaukee’s lines, CPR/Soo acquired trackage rights over the Joint Line. *See Chi., Milwaukee, St. Paul & Pac. R.R. Co. — Reorganization — Acquisition by Grand Trunk Corp.*, 2 I.C.C.2d 161, 384 (1984). As described below, the Milwaukee Trustee subsequently sold the Joint Line to Metra, subject to CPR/Soo’s rights under the 1985 Trackage Agreement.

The 1985 Agreement [] [] [] [] []

The 1985 Trackage Agreement [] [] [] [] []

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On September 3, 1987, the United States District Court for the Northern District of Illinois entered a Final Judgment Order permitting Metra to exercise the right of eminent domain over the Joint Line and establishing Just Compensation for the property. *Reg'l Transp. Auth. v. CMC Real Estate Corp., et al.*, No. 85-C-05969 (N.D. Ill.) (attached in Appendix N). The Final Judgment Order made clear, however, that Metra's rights to the property were subject to Soo Line's prior rights with respect to the Joint Line, []
[] "neither the Stipulation [resolving the eminent domain proceeding] nor this Judgment Order shall vest in RTA or Metra any property or property rights of Soo Line which may have been included in the [Joint Line]." *Id.* ¶ 3a.

On May 27, 1993, CPR and Metra (as successor in interest to the Milwaukee Estate) entered into a Supplemental Agreement ("1993 Supplemental Agreement", attached in Appendix

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N), amending certain provisions of the 1985 Trackage Agreement. Paragraph 1 of the Supplemental Agreement made clear that all references to the “Milwaukee” in the 1985 Trackage Agreement “shall be deemed to be references to Metra” and all references to SLRCO in the prior agreement “shall be deemed to be references to CP.”

The 1993 Supplemental Agreement []
[]
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[] The
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On April 7, 1997, in connection with CPR’s sale of Soo’s Chicago-Kansas City Line (and the Corn Lines) to I&M Rail Link, LLC (“IMRL”), CPR and Metra signed an agreement (“IMRL Chicago Trackage Rights Agreement”, attached in Metra Comments, Ex. E) []
[]
[]

On April 1, 2003, in connection with the sale of IMRL’s assets to IC&E, CPR and IC&E signed a Trackage Rights Agreement (“ICE Chicago Trackage Rights Agreement”; attached in Metra Comments, Ex. C) []
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to eight trains per day, but provided that IC&E could operate Excess Trains (additional trains

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On April 1, 2003, Metra and CPR also entered into an amendment of the 1985 Trackage]

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In sum, the agreements voluntarily negotiated by Metra and CPR over the past two decades govern in comprehensive fashion the joint use of the Joint Track by Metra, CPR and IC&E. Through numerous amendments and supplemental agreements, Metra and CPR have consistently adhered to the provisions of the Milwaukee Trustee's original agreement[] [.] The parties have also agreed upon (and modified from time to time) dispatching priorities designed to protect passenger and freight service quality. The agreements relating to the Joint Line specify the charges to be borne by the parties for the operation, maintenance and capital improvement on the Joint Track (charges that typically are a function of gross ton miles or train counts operated by Metra and CPR and thus change as relative volumes increase or decrease).

Metra has not remotely met its burden of showing, with substantial evidence, that the conditions it requests are necessary to prevent its essential services from being impaired. Metra begins its comments with some general complaints about the on-time performance of Metra trains operating over the two lines dispatched by CPR. Metra Comments at 4. Metra's own comments show that on-time performance on the Joint Lines (95.7%) over the past five years is equal to Metra's 2007 systemwide on-time performance. *Compare* Metra Comments at 1 & 4. *See generally*, Graham Reply V.S. at 13-20 (analysis, using Metra's own reports, showing that Metra service on West and North Lines is very nearly the same as service on other Metra lines, and that even Metra attributes only a minute portion of delays on North and West Lines to CPR). Further, Metra's own data and service reports show that on-time service on CPR-dispatched lines is not materially different from service on Metra-dispatched lines. *See* Graham Reply V.S. at 16-18. Moreover, as Metra's own records also show, the on-time performance differences about which Metra complaints are not attributable to CPR's dispatching of CPR's trains (as opposed to

other factors affecting the lines such as weather, passenger loading and unloading, interference from non-CPR freight trains, signal failures, track conditions, and similar causes). *See* Graham Reply V.S. at 16-18. More importantly, Metra’s allegations relate to preexisting conditions that plainly have not been caused (and will not be exacerbated) by the proposed transaction. Accordingly, these allegations cannot serve as a predicate for imposing conditions on the transaction.

Metra purports to identify “three things that will change with CP’s acquisition of DM&E/IC&E that impact the [2003 ICE Chicago Trackage Rights Agreement and the 2003 Amendment Agreement].” Metra Comments at 7. First, Metra claims that CPR will no longer be a neutral, third party gatekeeper for the West Line and that, as a result, “Metra’s service over the West Line and the North Line is no longer protected by effective safeguards.” *Id.* In essence, Metra suggests that, upon acquiring DME, CPR will no longer dispatch traffic over the West Line and North Line in accordance with the terms of the 1985 Trackage Agreement and 1993 Supplemental Agreement, but rather may use its control over dispatching to breach that agreement in ways that favor Applicants’ trains or avoid paying charges that are CPR’s responsibility under the agreements. Metra provides *no* evidence whatsoever to support this allegation. To the contrary, the record flatly refutes Metra’s claims. The Metra/CPR agreements, like all joint facility agreements, have required cooperation and good faith conduct by both parties for over twenty years. The evidence demonstrates that CPR has carried out its dispatching responsibilities over this period reliably and in good faith. *See* Graham Reply V.S. at 13-20. In particular, since at least the 1993 Supplemental Agreement, CPR has dispatched trains subject to specified priorities for Metra’s trains during peak traffic periods. Despite the fact that CPR is *not* a “neutral gatekeeper” with respect to these dispatching requirements, which

give priority to Metra trains in preference to CPR's own trains, Metra has never alleged that CPR has intentionally failed to adhere to these dispatching priorities. Graham Reply V.S. at 13-14.

Second, Metra points to the fact that CPR anticipates rerouting certain traffic that currently moves in two daily DM&E/IC&E trains (one in each direction) which currently operate via IC&E over the West Line to and from Chicago to CPR trains that move over the North Line to and from Chicago. Metra Comments at 7. However, there is no basis for simply assuming, as Metra apparently does (without providing any traffic studies or any other evidence) that handling this traffic via the North Line – *in existing Soo trains* – would impair Metra's service. To the contrary, []
[]
[]
[] Accordingly, the same dispatching provisions that have protected Metra's service over the North Line for over fifteen years will continue to protect Metra service after the proposed transaction is approved.

Third, Metra asserts that construction by DM&E of a rail line to serve the PRB "is far more likely than it was in 2003." Metra Comments at 7. This speculative assertion plainly is not evidence, much less substantial evidence, that Metra's essential services will be impaired. Moreover, even assuming that years from now Applicants were to complete the PRB line and begin to carry PRB coal via the West Line or North Line to Chicago, the existing agreements between CPR and Metra specify dispatching priorities for such train movements, and contain provisions allocating financial responsibility for any capital improvements that may be required to preserve the efficiency of both passenger and freight service on these lines.

Finally, the conditions that Metra proposes would not address the problems that Metra claims they are intended to address. Metra’s first proposed condition – that the Board order CPR to transfer to Metra the right to control and dispatch train operations over the North and West Lines – would do nothing to remedy the problem Metra alleges. Metra argues that it needs to take over the dispatch role in order to better enforce restrictions on the use of the Joint Lines. However, dispatchers for the Joint Lines generally do not visually observe the trains they are dispatching. Giving Metra dispatch rights would hardly improve its ability to verify that a particular train is actually a CPR or IC&E train rather than a train operated by some other carrier. In addition, given the frequency with which freight railroads exchange locomotives and cars today, even real-time visual observation would not, in all likelihood, [] [] .]

Metra does not argue that CPR has failed to [] . Rather, Metra professes concern that CPR may [] [] Contrary to Metra’s suggestion, it has ample ability to monitor CPR’s adherence to the terms of the agreements between Metra and CPR concerning [] [] Those agreements expressly authorize Metra to [] [] .] None of the audits conducted by Metra has made any findings or comments about [] See Graham Reply V.S. at 19. Nor has any audit found that CPR failed to [] [] *Id.* In addition, the parties’ agreements give Metra the right [] []

Finally, the agreements authorize Metra to []

[.] Although Metra has

rarely []

[] *See*

Graham Reply V.S. at 19. This incident further illustrates that Metra’s purported concern, that it is unable to detect unauthorized traffic moving over its lines unless it dispatches those lines, is unfounded.

For more than a century, North American railroads have relied upon each other for honest and accurate reporting to implement hundreds (if not thousands) of trackage rights and joint facility agreements. Most of those agreements have provisions allowing the non-reporting party to review and audit the records of the reporting party, like the provisions in the agreements between Applicants and Metra. Graham Reply V.S. at 20. This “trust but verify” approach is the way joint operations are routinely conducted throughout the industry, and is how CPR and Metra have conducted their successful relationship for more than 20 years. *Id.* Metra has articulated no basis for legitimate concern that Applicants would suddenly begin to ignore their contractual obligations, or that they would unreasonably refuse to provide information necessary for Metra to verify that Applicants have complied with the terms of their agreements.

Several of the conditions sought by Metra are attempts to have the Board rewrite the existing terms of the agreements that govern the Joint Lines. For example, Metra asks the Board to extend to the *North* Line []

[]

[]

[] Construction of capital improvements, financial

responsibility for capacity improvements and line usage charges on the North Line are currently governed by the terms of the 1985 Trackage Agreement and the 1993 Supplemental Agreement.

Metra's third proposed condition – requiring CPR to bear the expense of capacity improvements to the extent they are required solely for the movement of CPR/DM&E/IC&E trains – is particularly inexplicable. []
[]
[] Metra has not provided *any* justification for the Board to alter the terms of joint facility agreements that were negotiated voluntarily by the parties and have been in place for many years. *See CSX/NS/Conrail*, 3 S.T.B. at 220 (rejecting proposals for conditions by “parties seek[ing] material changes to, or extensions of, existing contracts, or to compel new contractual commitments or property sales. . . .”); *Tucumcari*, 363 I.C.C. at 367-68 (an agreement that “manifests an equality of bargaining positions and a mutuality of interests” should not be reformed by the Commission; rather any disagreements should be resolved by the parties under the terms of their agreement).

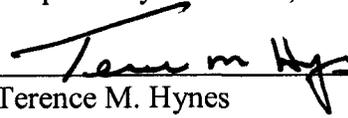
Metra's fifth and sixth proposed conditions essentially asks the Board to impose on CPR Metra's interpretation of the parties' prior agreements []
[] Again, Metra has provided no justification for the Board to embroil itself in potential contract disputes between the parties. If Metra believes the existing agreements should be interpreted in a particular manner, it has judicial remedies to enforce the agreements. *Tucumcari*, 363 I.C.C. at 367-68.

Accordingly, Metra has not met its burden of showing that its proposed conditions are justified or reasonable.

CONCLUSION

For the reasons set forth in the Application and these Reply Comments, Applicants respectfully request that the Board approve, pursuant to 49 U.S.C. §§ 11323 *et seq.*, the transaction contemplated by the Application, without conditions.

Respectfully submitted,



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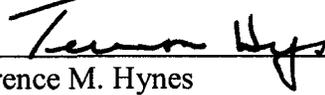
Dated: April 18, 2008

CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing Applicants' Response to Comments and Requests for Conditions and Rebuttal in Support of Application to be served by first class mail, postage prepaid, this 18th day of April 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



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BEFORE THE
SURFACE TRANSPORTATION BOARD

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

)
)
) Finance Docket No. 35081
)

REPLY VERIFIED STATEMENT OF BOB MILLOY

My name is Bob Milloy. I am Vice President -- Marketing and Yield of Canadian Pacific Railway Company ("CPR"). My business address is Gulf Canada Square, 401 9th Avenue S.W., Calgary, Alberta T2P 4Z4 Canada. In my current position, I have responsibility for CPR's strategic pricing initiatives, yield management, car management and after sales service programs.

I am also responsible for CP Logistics Services, a CPR affiliate that delivers customized multi-modal solutions to supply chain, logistics and facility management problems. I have been employed by CPR for more than 30 years. During my career, I have held a variety of positions with increasing responsibility involving all facets of marketing and sales of carload traffic, grain, coal and sulphur, as well as pricing and yield management.

The purpose of this Reply Verified Statement is to respond to Kansas City Southern Railway Company's ("KCS' ") claim that there exists a "multi-faceted strategic relationship" (KCS Comments at 15) between CPR and Union Pacific Railroad Company ("UP") pursuant to which those railroads supposedly have a strong incentive to work exclusively with one another. KCS asserts, among other things, that CPR and UP are parties to "numerous alliances" (KCS Comments, V.S. Grimm at 7); that they participate in "a comprehensive traffic solicitation, pricing and operating alliance" (KCS Comments, V.S. Woodward at 7); and that "CP's motivations and incentives are also guided by those of UP pursuant to the CanAm alliance"

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“CanAm” interline services were developed explicitly acknowledges that CPR and UP may enter into interline pricing and service arrangements with other railroads on the same traffic, and both CPR and UP frequently do so.

The “CanAm” corridor concept began in 1999 as an initiative designed to improve interline service on shipments of potash, grain and lumber from western Canada to California and other western states. CPR and UP operating and marketing personnel collaborated in developing plans for a more efficient interline service offering between Alberta and California, via the Kingsgate, BC/Eastport, ID gateway. The carriers made investments in improved interchange facilities at Kingsgate and coordinated their train schedules and blocking operations for the new service, which was referred to as the “CanAm corridor.” These measures were, in part, a response to an initiative by the government of Alberta to develop a “CanAm highway” linking the province with U.S. border states. Through these efforts, CPR and UP were able to reduce transit time by nearly half and to improve service reliability significantly. CPR and UP expanded the initiative to include additional commodities, and succeeded in diverting a significant volume of truck traffic moving between Alberta and the western United States to the CanAm interline service.

The success of the original CanAm service (which is marketed today as the “Pacific CanAm service”) encouraged CPR and UP to develop similar “CanAm” services between western and central Canada, on the one hand, and the midwestern United States, on the other hand, via the St. Paul gateway (known as the “Midwest CanAm service”) and between eastern Canada and the U.S. Southwest via Chicago (known as the “Eastern CanAm service”). As in the case of the western CanAm service, CPR and UP undertook measures to improve the efficiency of their interchange operations at St. Paul and Chicago, and coordinated both train operations and

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network management along those interline routes. The result has been a more reliable interline service offering, with improved transit time, in each of those corridors. The Midwest CanAm service has generated significant additional traffic for both CPR and UP. To date, the Eastern CanAm service has not been as commercially successful as its Western and Midwest counterparts due to greater competition from motor carriers and the lower level of demand for interline rail service in that corridor. CPR and UP marketing teams work together to solicit business for the three CanAm services. For marketing purposes, the services offered by CPR and UP in these corridors are sometimes referred to collectively as the “CanAm alliance.”

In May 2000, CPR and UP entered into a [] [] is set forth in Appendix A to these Reply Comments.) The express purposes of the [] [] are to “[]” and [] [] [] (See [] []). To that end, the Agreement specifies [] [] [] (Id., Exhibit I.) [] [] . Importantly, [] [] [] (Id., [] []).

The [] [] [] (Id. [] []). Rather, like other interlining railroads, CPR and UP negotiate revenue requirements and divisions for interline traffic on a case-by-case basis. Neither the [] []

[], nor any other agreement between the carriers, grants either CPR or UP
“exclusive” rates, divisions or economic terms that may not be offered to other connecting
railroads. More importantly, []
[]

(Emphasis added.) In other words, contrary to KCS’ claims, CPR and UP have not committed
to working exclusively with each other, but rather are free to participate with other railroads in
providing interline service via routings that compete with CPR-UP routes contemplated by the
[]. As I discuss below, both CPR and UP do, in fact, participate in
competing interline services with other carriers.

CPR and UP are also parties to []
[]
[] (A copy of the []
[] is set forth in Appendix B to these Reply Comments.) Pursuant to the []
[]
[]

[]. [] in conjunction with improvements made to the interchange facilities at
Kingsgate, has enabled CPR to offer shippers a competitive option to BNSF single-line service
for export grain shipments from North Dakota and Minnesota origins to the PNW.² Since
service under [] was introduced, CPR has handled increasing
volumes of export corn business originating on its lines in North Dakota and Minnesota. Neither

² As witness Smith explains, although CPR serves the port of Vancouver, BC on a single-line
basis from grain origins in Minnesota and North Dakota, it could not compete with BNSF for
export corn traffic prior to [] because the port of Vancouver, BC
does not have terminal facilities for the handling of corn.

[], or any other agreement between CPR and UP, precludes (or discourages) either railroad from participating in interline shipments of corn, domestically or for export, with other rail carriers.

The “CanAm” services, and the development of an interline route for export grain traffic pursuant to [], have enabled CPR to provide shippers faster, more reliable service in several important cross-border rail corridors and to offer a viable competitive alternative to direct BNSF service for PNW export grain traffic. Contrary to KCS’ unsupported assertions, these cooperative arrangements between CPR and UP are decidedly pro-competitive.

CPR’s efforts to improve the quality of its interline services with UP are by no means exclusive. To the contrary, as CPR’s 2006 Corporate Profile and Fact Book (“CPR Fact Book”) explains, “[w]e have working partnerships with all the major Class 1 railroads in the U.S. and with Transportacion Ferroviaria Mexicana [now known as KCS de Mexico] and Ferrocarril Mexicano in Mexico.” (See Appendix C, p. 44.)³ Pursuant to those relationships, CPR has participated in a variety of initiatives designed to improve the quality and efficiency of its interline rail services. For example, in 2002, CPR and Norfolk Southern Railway Company (“NS”) implemented a joint initiative (including a grant of trackage rights to NS over the line of CPR’s subsidiary, D&H, between Sunbury, PA and Mechanicville, NY) to improve rail service to points in upstate New York, northern Pennsylvania and New England. Two years later, CPR, NS and CN entered into a series of agreements (which included trackage rights, haulage and terminal sharing arrangements) that substantially improved the efficiency of all three carriers’

³ UP likewise indicates that it “has rail alliances with CSX, Norfolk Southern, Canadian Pacific and Canadian National, plus Mexican railroads FXE and TFM. These alliances are improving overall transit times while expanding market reach and creating new business opportunities.” (UP 2002 Annual Report at 10.)

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rail services. In particular, the arrangement enabled CN to reduce its existing route between eastern Canada and eastern U.S. points by 330 miles, saving up to two days transit time for 20,000 annual shipments. In addition, an exchange of haulage rights and terminal sharing arrangements produced significant savings for both CPR and NS. As reported in the CPR Fact Book, “[that] initiative takes costs out of the rail industry by placing freight traffic on the most efficient routing without regard to ownership.” (See App. C, p. 45.)

CPR is a party to []
[]. Like [] described above, these
arrangements are []
[]. In each case, []
with connecting carriers reserve both parties’ right to participate in competing interline routings on the same traffic. Such cooperative arrangements promote operational efficiency without diminishing the competitive options of shippers.

KCS’ claim that CPR will cause IC&E to foreclose its routings with KCS in order to promote CP-UP routings is belied by CPR’s (and UP’s) actions in the marketplace. Both CPR and UP participate with other railroads in interline routings for traffic that could move via the CPR-UP CanAm services, where it is in that carrier’s best economic interest to do so. For example, CPR interlines with BNSF shipments of wheat and durum that originate on CPR’s lines in North Dakota and Minnesota and are destined to St. Louis and to various points in Texas (including []). CPR handles this business in conjunction with BNSF rather than with UP because CPR was able to negotiate a more favorable divisions arrangement with BNSF for the traffic. Accordingly, the CPR-BNSF routing is in CPR’s economic self-interest. CPR interchanges shipments of malt originating in Calgary, AB and

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destined to Texas and California with BNSF at Couatts, AB (rather than with UP at Kingsgate) for the same reason. When UP announced a substantial price increase on shipments of fuel oil from Alberta to points in the Pacific Northwest, CPR worked with the customer to shift the traffic to a CPR-BNSF routing. Under KCS' hypothesis regarding the nature of the relationship between CPR and UP, one would have expected CPR to refuse to quote a reasonable revenue requirement for the CPR-BNSF routing, thereby forcing the shipper to absorb UP's price increase. Instead, CPR acted in its own economic self interest to handle the business in conjunction with UP's competitor (BNSF).

UP likewise works with carriers other than CPR where UP finds it in its best economic interest to do so. For example, during the initial years of the Western CanAm service, CPR and UP handled substantial volumes of lumber originating in British Columbia and destined to points along the I-5 corridor. In 2005, UP began to handle most of this traffic in conjunction with BNSF as a result of service issues and CPR's desire for a greater revenue division on the traffic. More recently, shipments of steel for [] which previously moved from eastern Canada to Mexico via the Eastern CanAm CPR-UP routing via the Chicago gateway were diverted to a CN-St. Louis-UP routing, apparently because CN offered a lower revenue requirement than CPR for the business. UP's economic self-interest, rather than adherence to its supposed "CanAm alliance" with CPR, dictated the rerouting of this NAFTA traffic. Indeed, as witness Williams' Reply Verified Statement shows, notwithstanding the existence of the Eastern CanAm service, [] [] UP also regularly interchanges with NS and CSXT at Chicago shipments to/from the U.S. Northeast that could be routed via CPR.

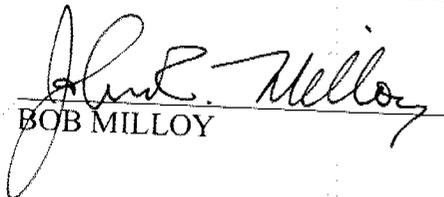
PUBLIC VERSION

In short, KCS' prediction that "CP (with DME under its control) will look to adjust and augment its strategic ties with UP and to thwart traffic flows or strategic relationships with other railroads whose services compete with those of CP/UP" (KCS Comments at 17) is belied by the facts. The truth of the matter is that CPR and UP (like other connecting railroads) work closely together to maximize the efficiency of their interline operations. CPR and UP collaborate in marketing the joint CanAm routes, and service improvements made possible by the initiatives discussed above have allowed both CPR and UP to reduce their costs and to enhance their revenues by attracting new business. However, the relationship between CPR and UP is by no means exclusive — both carriers participate in "alliances" and other interline service arrangements with other Class 1 railroads. CPR's individual economic self-interest — not the terms of any strategic alliance with UP — motivates CPR's actions in the marketplace today, and will continue to do so if the Board approves the proposed transaction.

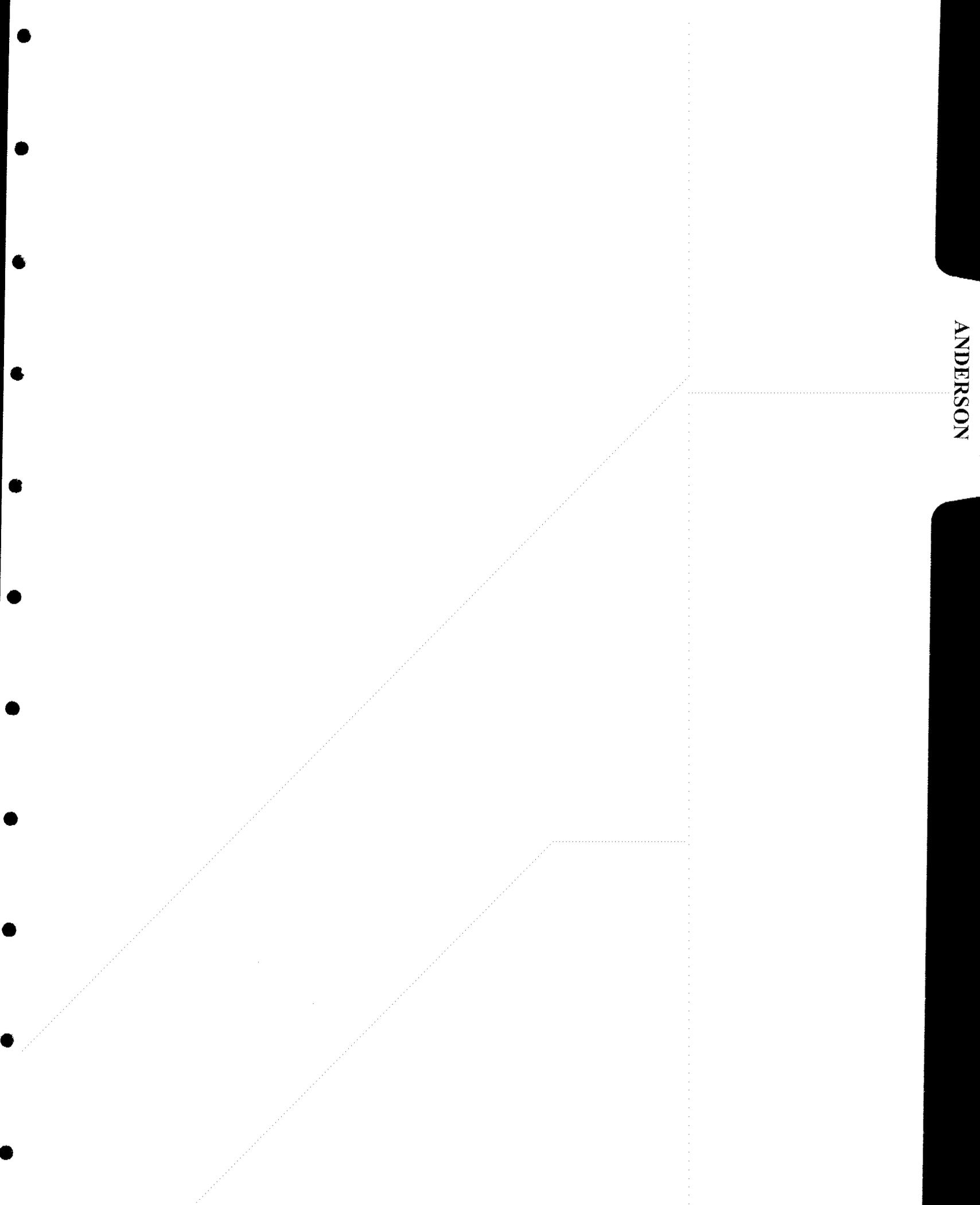
VERIFICATION

I, Bob Milloy, declare under penalty of perjury that the foregoing is true and correct.

Further, I certify that I am qualified and authorized to file this Reply Verified Statement.


BOB MILLOY

Executed on April, 2008.



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
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REPLY VERIFIED STATEMENT OF LYNN A. ANDERSON

My name is Lynn A. Anderson. I am Senior Vice President - Marketing for the Dakota, Minnesota & Eastern Railroad (“DM&E”) and the Iowa, Chicago & Eastern Railroad (“IC&E”). My business address is 140 N. Phillips Avenue, Sioux Falls, SD 57104.

I have thirty-seven years of railroad experience, beginning in 1971 with the Chicago and North Western Transportation Company (“CNW”). I was directly involved in the formation of DM&E, which began operations in 1986 as a CNW spin-off, and of IC&E, which was created in 2002 when DM&E acquired the lines formerly operated by I&M Rail Link, LLC (“IMRL”).

I have previously served as Vice President – Traffic, Vice President – Marketing and Public Affairs, and Vice President – Marketing, Public Affairs and Strategic Planning of DM&E.

The purpose of this Reply Verified Statement is to respond to several issues raised in the Comments filed by Kansas City Southern Railway Company (“KCS”) on March 4, 2008. KCS asserts that the proposed transaction would result in a reduction in competition for both corn traffic that currently moves from IC&E origins to poultry feeder mills located on KCS’ lines, and for “NAFTA traffic” moving between the Chicago and Laredo gateways. Specifically, KCS claims that CPR has a strategic relationship with UP that will lead it to foreclose IC&E/KCS routings via the Kansas City gateway (1) by degrading service in the short term on corn

shipments delivered by IC&E to KCS at Kansas City pursuant to a July 18, 2002 agreement between KCS and IMRL (assigned to the IC&E) (the “IC&E/KCS Grain Agreement”) and, in the longer term, by canceling the IC&E/KCS Grain Agreement; and (2) by canceling a May 20, 1997 agreement (assigned to the IC&E) under which IMRL granted KCS haulage rights for certain commodities moving between Kansas City and Chicago (the “IC&E/KCS Chicago Haulage Agreement”) – an agreement under which no KCS/IC&E traffic has ever actually moved. As the following sections of my testimony show, KCS’ claims are not supported by the facts.

I. THE PROPOSED TRANSACTION WILL NOT REDUCE COMPETITION FOR CORN TRAFFIC.

KCS asserts that the proposed transaction would lead to reduced competition for the rail transportation of corn, in several ways:

First, KCS contends that the proposed transaction would eliminate direct competition between the current DM&E/BNSF route (via Florence, MN) and the current CPR/UP route (via Kingsgate, BC) for corn shipments to PNW export terminals. (See KCS Comments at 12-13.)

This is not likely to occur, for a number of reasons. As KCS acknowledges (KCS Comments at 11), the DM&E/BNSF corn traffic moves pursuant to a Grain Marketing Agreement between those railroads. (A copy of [] is set forth in

Appendix E to these Reply Comments.) Under the [] at []

[] (See App. E, []) Each of those elevators is located within 85 miles of the DM&E/BNSF interchange at Florence, MN. BNSF and DM&E []

[] (See App. E, ¶ 11.) []

has [], and [].

Therefore, BNSF will retain access to these DM&E corn origins until at least 2015, even if CPR acquires control of DM&E.

Moreover, as witness Smith explains, CPR is not likely to be able to divert these corn shipments to a CPR/UP routing via Kingsgate. The DM&E/BNSF routings to Seattle, WA via the highly efficient Florence interchange are 1,753 miles (from Lambertson), 1,769 miles (from Springfield) and 1,797 miles (from New Ulm). Diverting those shipments to a CPR/UP routing would require trains to move via IC&E's lines east to Marquette, IA or LaCrescent, MN, then north to St. Paul, then northwest on CPR's US lines to Portal, ND, west on CPR's Canadian lines to Kingsgate, BC, and finally southwest on UP's lines to a port such as Seattle or Kalama, WA. Such a routing would involve a movement of 2,184 miles (from Lambertson), 2,168 miles (from Springfield) and 2,140 miles (from New Ulm). It is highly unlikely that such a circuitous routing could be competitive, on either a cost or service basis, with BNSF's direct route to the PNW. In any event, as witness Williams shows, ample competition involving railroads other than Applicants exists for corn shipments to the PNW ports. Indeed, Applicants' combined share of PNW export corn shipments amounted to only 23 percent of such shipments during 2005.

Accordingly, the proposed transaction will not result in a significant reduction in competition for corn traffic moving for export via the PNW.

Second, KCS claims that, upon acquiring control of DM&E, CPR would seek to divert corn traffic that currently moves from origins on IC&E's "Corn Lines" in northern Iowa and southern Minnesota to KCS-served feeder mills in the South Central States either to a "long haul" IC&E-DM&E-CPR-UP route to the PNW ports, or to IC&E-UP routes via Kansas City to

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feeder mills that are served by UP rather than KCS. (KCS Comments at 3, 18.) KCS witness Bilovesky acknowledges that the ability to reach new end markets via CPR's Class I network as a result of the proposed transaction will be beneficial to grain elevators served by DM&E and IC&E (KCS Comments, V.S. Bilovesky at 7). (Indeed, the Southern Minnesota and Northern Iowa Shippers Association, whose members include the operators of all of the major grain elevators on the IC&E system, unanimously supports the proposed transaction.) Nevertheless, Mr. Bilovesky asserts that shifting IC&E origin corn away from the current KCS-served destinations would harm receivers, primarily feed lots, that (he claims) are dependent on IC&E as a source of corn, and would therefore be anticompetitive (*id.* at 8-10). Mr. Bilovesky's assertions are wrong, for several reasons.

As an initial matter, the IC&E/KCS Grain Agreement (a copy of which is set forth in Appendix F to these Reply Comments) has a term of [] years, and cannot be terminated by either party until at least []. After that date, the agreement will automatically renew for additional one year terms unless it is terminated by one of the parties on six months written notice. (*See* App. F, Section 1.) Moreover, [] explicitly provides that, [] [] (*Id.* Section 9.) Thus, notwithstanding the acquisition of control of DM&E and IC&E by CPR, the IC&E/KCS Grain Agreement will continue to be binding upon IC&E, and KCS will continue to have pricing authority for shipments of corn from IC&E origins to KCS-served poultry feed mills, for at least another nine years. Witness Bilovesky acknowledges that the rate structure under which IC&E origin corn moves to KCS-served feeder mills in the South Central States will be fully protected during that time. (KCS Comments, V.S. Bilovesky at 9.)

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However, Mr. Bilovesky argues that, in the short term, Applicants can effectively cause KCS (and its customers) to lose access to IC&E origin grain by downgrading the service provided by IC&E under the IC&E/KCS Grain Agreement. (KCS Comments, V.S. Bilovesky at 9-10.) This argument ignores the fact that the []

[]

[]

[]

[]

[] (See

App. F, []) Witness Bilovesky complains that these service standards and penalty provisions are “extremely weak” and therefore are unlikely to deter CPR from acting to degrade service on IC&E/KCS corn shipments. (KCS Comments, V.S. Bilovesky at 9.) In my experience, a penalty of [] per car — or [] — per day is both reasonable and sufficient to discourage poor service, intentional or otherwise. Indeed, based upon KCS witness Woodward’s testimony that IC&E earns a contribution of [] per car on this traffic (KCS Comments, V.S. Woodward at 18, Exhibit 7), a delay of only [] in delivering loaded cars of corn to KCS would cost IC&E [], or nearly [] of its contribution from the traffic. Both the transit time standard and the penalty provisions were negotiated at arms length between KCS and IMRI. The conditions requested by KCS essentially ask the Board to improve KCS’ position under the IC&E/KCS Grain Agreement by requiring Applicants to negotiate more “rigorous service protection provisions.” (KCS Comments at 40.) No legitimate basis exists for the Board to alter the terms of the IC&E/KCS Grain Agreement for the sole benefit of KCS.

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In any event, the notion that corn originating on IC&E's Corn Lines could readily be diverted to the PNW is, at best, far-fetched. Such movements would traverse a long and circuitous route, from a point on the Corn Lines to St. Paul, then via CPR to the US-Canada border at Portal, ND and through western Canada to Kingsgate, then via UP to a PNW port such as Seattle or Kalama, WA. As mentioned above, corn shipments from DM&E-served elevators via the Florence gateway and BNSF's lines involve movements of 1,750-1,800 miles. By contrast, a shipment originating near Winnebago, MN (the midpoint of the Jackson Line) via a IC&E-CPR-UP route to Kalama, WA would move 2,155 miles, while a shipment originating near Algona, IA (the midpoint of the Sheldon Line) would have to travel 2,192 miles. The cost of transporting such shipments an additional 400+ miles is likely to render IC&E origin corn noncompetitive vis-a-vis corn from the many origins that BNSF and UP can serve on a single line basis to the PNW. Indeed, the current movements that DM&E handles in conjunction with BNSF to the PNW are limited to three elevators that are in close proximity to the Florence gateway.

Moreover, joint DM&E-BNSF corn shipments to the PNW enjoy the cost advantages of originating at large elevators capable of loading 110-car shuttle trains in less than 15 hours and moving via the highly efficient interchange at Florence, MN. The lower cost of providing unit train service makes it economically feasible for those elevators to ship their product over relatively long distances to the PNW. By contrast, most grain elevators on the Corn Lines are capable of loading only 25 (or, in some cases, 50) cars at a time. The additional switching costs required to aggregate corn shipments originating at multiple country elevators on the Corn Lines into trains of 100+ cars for movement to the PNW would further undercut the ability of Applicants to offer cost-competitive service from Corn Lines origins to the PNW. Ultimately,

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the likelihood that CPR could divert corn from IC&E origins to the PNW ports is illustrated by current market conditions. As KCS witness Jones testifies, the PNW export market currently enjoys a significant “spread” advantage over the U.S. Gulf coast due to a variety of factors, including lower vessel costs from the PNW. (KCS Comments, V. S. Jones at 12-13.) If PNW export destinations were truly a viable option for IC&E shippers, they would already be directing their corn to the PNW in order to take advantage of the more favorable commodity price available there. However, notwithstanding such favorable market conditions, no IC&E origin corn moves in that direction today. This strongly suggests that such movements are simply not economically viable.

It is impossible to discuss the corn territory served by DM&E/IC&E without mentioning ethanol. Because of ethanol’s growing importance as an alternative fuel, ethanol production is experiencing tremendous growth. U.S. ethanol production reached almost 5 billion gallons in 2006 (an increase of 1 billion gallons over 2005) and is expected by USDA to exceed 10 billion gallons by 2009.¹

Because the primary ingredient of ethanol is corn, the explosive growth in ethanol production is having an enormous effect on corn markets. During the 2005-2006 crop year, approximately 14% of the corn grown in the United States went to ethanol production.² While corn plantings in Iowa and other states have increased in response to greater demand, USDA

¹ Paul C. Wescott, USDA Economic Research Service, *Ethanol Expansion in the United States: How Will the Agricultural Sector Adjust?* 1 (May 2007).

² Wescott, *supra* note 1, at 4.

forecasts that ethanol production will consume more than 30% of the nation's corn crop by 2009-2010.³

DM&E/IC&E is at the epicenter of this ethanol boom. As the map set forth in Attachment 1 to my Verified Statement shows, there currently are eight active ethanol facilities on DMF's lines, including five on IC&E. An additional ten facilities (including six on IC&E) have either been announced or are already under construction.

Table 1 depicts the actual volume of ethanol traffic that moved on DM&E and IC&E during the years 2003 through 2007. The table also projects the potential volume of ethanol traffic that could move on DM&E and/or IC&E from both existing plants and others that are scheduled to begin production between 2008 and 2010, based on the production capacity (and competitive situation) at each facility.

Table 1
DM&E/IC&E Actual and Potential Future Ethanol Carload Traffic
Originated Traffic

RR	Origin	St	2003	2004	2005	2006	2007	2008Est	2009Est	2010Est
ICE	Clinton	IA								
ICE	Muscatine	IA								
ICE	Winnebago	MN								
DME	Huron	SD								
DME	Aurora	SD								
ICE	Charles City	IA								
ICE	Mona	IA								
ICE	Hartley	IA								
ICE	Welcome	MN								
DME	Janesville	MN								
ICE	Lawler	IA								
DME	Lamberton	MN								

Total Carloads

Millions of Gallons

³ *Id.*

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I have been asked by Applicants to project the volume of ethanol traffic that could potentially move to Chicago via DM&E's line between Huron, SD and Minnesota City, MN over the next several years. (As witness Graham testifies, all ethanol traffic that originates at IC&E-served plants currently moves to Chicago via IC&E's lines, and will continue to do so following the proposed transaction.) It is difficult to predict with certainty how much ethanol traffic DM&E is likely to handle from a particular origin, or the routing and ultimate destination of such shipments, for several reasons. As I explained above, the ethanol industry is dynamic and, at the present time, somewhat unpredictable. New ethanol plants are being announced, planned, and constructed in DM&E's service territory, while at the same time plans for other new ethanol facilities have been abandoned or placed on hold. The destination markets and receivers to which ethanol traffic moves are likewise in a state of flux; the volume of ethanol shipped by DM&E-served facilities to particular destinations (including the East and West Coasts of the United States) can shift over time. For example, over the past few years, the amount of ethanol produced at the DM&E-served plant at [] that moved to [] [] has varied from [] percent to as much as [] percent of that facility's output.

Even if future output for all DM&E-served ethanol plants could be predicted with certainty (which it cannot), the volume of ethanol traffic that DM&E will actually originate at each facility, and the destination to which that traffic will move, cannot be determined with precision, for a variety of reasons. First, if there is not sufficient demand for ethanol, some plants may produce less than their full capacity in a given year. Second, DM&E faces competition from trucks at some ethanol plants on its lines. Third, plants may be built on other railroads' lines that compete with DM&E-served plants to supply ethanol to the same users and destinations. In addition, some plants that open in the future may be served by other rail carriers

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who could compete with DM&E for the transportation business. Fourth, the ability of ethanol plants to ship volumes of product commensurate with their full production capacity may be constrained by unloading capacity constraints at destination terminals. Especially in the short term, capacity limitations at destination may effectively limit the volume of ethanol that can be shipped to certain markets, regardless of end-user demand for ethanol in those markets. Fifth, future growth in production capacity may lead to periodic shortages of tank cars capable of transporting ethanol. Such a shortage would effectively limit the ability of ethanol facilities to achieve their maximum output.

Notwithstanding the uncertainty created by all of the foregoing variables, I have attempted to estimate the volume of ethanol traffic that might move over DM&E's line to Chicago during 2009 and subsequent years. Those estimates, which are set forth in Table 2, take into account the production capacity of DM&E-served plants that are either currently in operation or scheduled to commence operation by the second quarter of 2009, and my projection of how much of each plant's capacity might potentially move to Chicago or through the Chicago gateway to destinations in the East.

Table 2
Ethanol Carloads Which Could Potentially
Move Over the DM&E Destined for Chicago in 2009-2010

Plant Location	State	RR	Startup	Plant Capacity in Millions of Gallons	Annual Carloads Via Rail	Potential Carloads via DM&E to Chicago
Huron	SD	DM&E	Existing			
Aurora	SD	DM&E	Existing			
Janesville	MN	DM&E	4Q 2008			
Lamberton	MN	DM&E	2Q 2009			

Totals

4

⁴ The Lamberton plant is currently scheduled to begin production in May 2009, with an annual

The growth in ethanol production in DMF's service territory has had, and will continue to have, a major impact on the destinations to which Iowa corn producers choose to ship their product. Given the proximity of existing and planned ethanol producers to IC&E-served sources of corn, I anticipate that a substantial portion of the corn that IC&E originates today is likely to be diverted to short-haul rail movements or transportation by truck to ethanol plants. This is likely to result in a significant decline in the volume of corn from IC&E origins that will be available to feeder mills in the South Central States. Indeed, while approximately [] carloads of corn traffic moved from IC&E origins to KCS-served destinations during each of 2005 and 2006, the volume of such shipments declined to only [] cars in 2007, notwithstanding a record increase in corn plantings in Iowa from 12,600,000 acres in 2006 to 14,200,000 acres in 2007.⁵ KCS-served feeder mills are likely to face increasing competition for IC&E-origin corn for reasons that have little to do with PNW export demand and nothing to do with the proposed transaction.

As witness Williams demonstrates, any reduction in shipments from IC&E-served elevators can readily be replaced with shipments of corn from alternate origins on the lines of

production capacity of approximately [] rail carloads. Because the plant will be in operation for less than a full year in 2009, I have estimated that plant will produce approximately [] carloads in 2009, and [] carloads in 2010. Because of the lower production of the Lamberton plant in 2009 the volume I project may move to Chicago from that plant is correspondingly lower. The final column of this table illustrates this change from 2009 to 2010. I estimate that [] carloads may move over the DM&E from the Lamberton plant to Chicago in 2009, resulting in a total potential carloads of ethanol moving from DM&E origin plants to Chicago of [] carloads. In 2010, the projected carloads from Lamberton to Chicago increase to [] carloads (reflecting a full year of operation of the Lamberton plant at capacity), and the projection of total carloads moving from DM&E origin plants to Chicago increases to [] carloads.

⁵ USDA National Agricultural Statistics Service, *Prospective Plantings* (March 31, 2008) at 4.

KCS and other railroads serving the South Central region. Moreover, the rising price of corn has resulted in a substantial increase in corn production in the states where KCS-served poultry feeder lots are located. For example, corn production in Mississippi increased from 105 million bushels to 141 million bushels in 2007. During the same period, corn production in Arkansas increased from 73 million bushels to 99 million bushels. In Louisiana corn production grew by almost 80 million bushels, to 120.5 million bushels, from 2006 to 2007, while Oklahoma corn production increased by 16 million bushels to over 39 million bushels during the same period.

Overall, the states of Mississippi, Arkansas, Oklahoma, and Louisiana collectively produced 399.7 million bushels of corn in 2007. This represents more than [] times the volume of corn ([] cars, or approximately [] million bushels) that were delivered to KCS-served poultry feeder mills from IC&E origins during 2007. It is obvious that the reduction in the amount of corn available to South Central feeder mills from IC&E-served elevators was more than offset by increased local production. The rise in corn production in the states where feeder mills are located is likely to benefit those receivers by reducing their transportation costs substantially.

II. THE PROPOSED TRANSACTION WILL NOT RESULT IN A REDUCTION IN COMPETITION FOR NAFTA TRAFFIC.

KCS' claim that the proposed transaction "threatens to limit NAFTA shipper options and crude competition" in the Chicago - Laredo corridor (KCS Comments at 30) is not credible. In particular, KCS' attempt to portray the [] as a critical factor in the competition for NAFTA traffic is, at best, disingenuous. While KCS acknowledges that the [] "has never actually been used," KCS maintains that the Agreement nevertheless constrains rates for NAFTA traffic "because of the potential for

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its use as a competitive counterbalance.” (KCS Comments, V.S. Grimm at 8.) What KCS omits to mention is that both IC&E and KCS have had a clear understanding that the [] [] is a “dead letter.” When IC&E acquired IMRL’s rail lines in 2002, I promptly informed KCS that IC&E was not interested in continuing the Agreement (which KCS had negotiated with IMRL in 1997) because its terms were economically unfair to IC&E. KCS has understood that, if it ever tendered traffic for movement pursuant to the IC&E/KCS Chicago Haulage Agreement, IC&E would immediately serve notice to cancel the Agreement. (IC&E has the unilateral right to cancel the Agreement at any time by providing 90 days written notice. See []) For that reason, all traffic that has moved in KCS-IC&E interline service since the day IC&E acquired the Kansas City-Chicago line (other than corn to KCS poultry feeder mill locations) has moved under customary joint rate and divisions arrangements, rather than under the haulage agreement. Given these facts, KCS’ contentions that the [] has any competitive significance, or that CPR’s incentives with respect to continuing that Agreement would be any different than IC&E’s current incentives, are contrary to fact.

Moreover, any suggestion that the IC&E/KCS routing between Chicago and Kansas City plays a significant role today in the transportation of “NAFTA traffic” between Chicago and Laredo is simply not true. The volume of “NAFTA traffic” (*i.e.*, traffic moving between a point in the United States or Canada, on the one hand, and a point in Mexico, on the other hand) that DM&E/IC&E handles in conjunction with KCS to or from Mexico is minimal. In 2007, such traffic totaled only [] cars (consisting of [] cars originating on IC&E and moving southbound to Mexico via KCS, [] northbound cars delivered by KCS at Kansas City and terminating on IC&E, and [] cars of bridge traffic that IC&E handled between KCS at Kansas City and various

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carriers at Chicago). The *Carload Waybill Sample* indicates that the volume of "NAFTA traffic" handled jointly by IC&E and KCS during 2005 was likewise minimal, amounting to fewer than [] cars. (See Reply V.S. Williams.) As these data show, the IC&E/KCS interline route between Chicago and Laredo is simply not a significant factor in the transportation of NAFTA traffic.

In any event, Applicants have pledged to keep open the Kansas City gateway (and other gateways affected by the proposed transaction) on commercially reasonable terms, and they have invited the Board to impose a condition requiring them to adhere to that pledge. This commitment ensures that shippers will continue to have the ability to route traffic via DM&F/IC&E – KCS routings following the proposed transaction, regardless of whether the IC&E/KCS Grain Agreement and/or the IC&E/KCS Chicago Haulage Agreement continue beyond their current terms.

III. IC&E'S DECISION NOT TO EXTEND ITS AGREEMENTS WITH KCS WAS NEITHER DICTATED NOR INFLUENCED BY CPR.

Finally, I would like to address the insinuation, set forth in KCS' Comments and the testimony of Mr. Bilovesky, that CPR either dictated or influenced IC&E's decision not to agree to extend the term of the [] and/or the [] [] (See KCS Comments at 23; V.S. Bilovesky at 13-14.). I was the person who made the decision to decline KCS' requests that those agreements be extended beyond their current terms, and that they be amended in various other ways desired by KCS. At no time did CPR ever instruct IC&E regarding what position we ought to take with respect to KCS' request, nor has anyone at CPR ever attempted to influence our decisions regarding those agreements. KCS' insinuation to the contrary is simply not correct.

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KCS' suggestion (KCS Comments at 24) that the words [] in a [] constituted an instruction that I refuse to extend IC&E's agreements with KCS is wrong. My understanding of [] was [] (which CPR apparently had not been aware of previously), and indicating that he did not need anything further from me at that time. Neither Mr. Craig – nor anyone else at CPR – ever communicated any instruction regarding how I ought to respond to KCS' requests. Mr. Bilovesky's further suggestion that the [] [] "signaled" to DM&E how CPR wanted it to respond to KCS – or that we "obviously [got] the message" – is likewise incorrect. (KCS Comments, V.S. Bilovesky at 13-14.)

I declined KCS' request to extend or modify the [] based upon my assessment of IC&E's best business interests. While (as I acknowledged in my letter to Mr. Bilovesky) [] the current volatility in the corn markets makes it impossible to determine whether a continuation of that Agreement on the same terms and conditions beyond the year 2017 would be in IC&E's best interest (whether or not IC&E becomes part of the CPR rail system). In particular, the "ethanol boom" has had a profound impact on the destinations to which IC&E-served corn elevators are directing their product. As stated above, rail shipments of corn from IC&E origins to KCS-served destinations declined by approximately [] cars (or []) last year. If that trend continues, or if a greater portion of the corn originating on IC&E's lines is shifted to short-haul destinations, the provisions of the [] that call for KCS (rather than IC&E) to furnish cars for joint movements – and to earn a correspondingly higher division for

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doing so — may no longer be in IC&E’s economic interest. Indeed, if changing shipment patterns were to put DM&E/IC&E in a surplus position with respect to grain cars in the future, we would certainly want to have the ability to deploy our own fleet in handling traffic that moves in KCS equipment today. Given that the ethanol industry is still in a relatively early stage of development, I concluded that it would be in IC&E’s business interest to defer a decision on extending the [] until we have a better sense of what the future holds for ethanol (and corn) transportation in our service territory. The remaining initial term of the [] [] will allow the parties to continue operating under that Agreement for nine more years, and to make decisions regarding the longer term based upon a better understanding of the long term impact of ethanol.

My response to Mr. Bilovesky with respect to the [] [] could not have come as a surprise. Indeed, in [] (see KCS Comments, Exh. E at 177), Mr. Bilovesky acknowledged that [] [] [] My []

Appendix H to these Reply Comments) and IC&E’s prior correspondence with KCS about that agreement have consistently indicated that IC&E has no interest in doing business under the terms of the haulage arrangement that it inherited from IMRI. Rather, IC&E believes that

[] [] [] (See App. H at 1.) As my letter to Mr. Bilovesky made clear, [] [] []

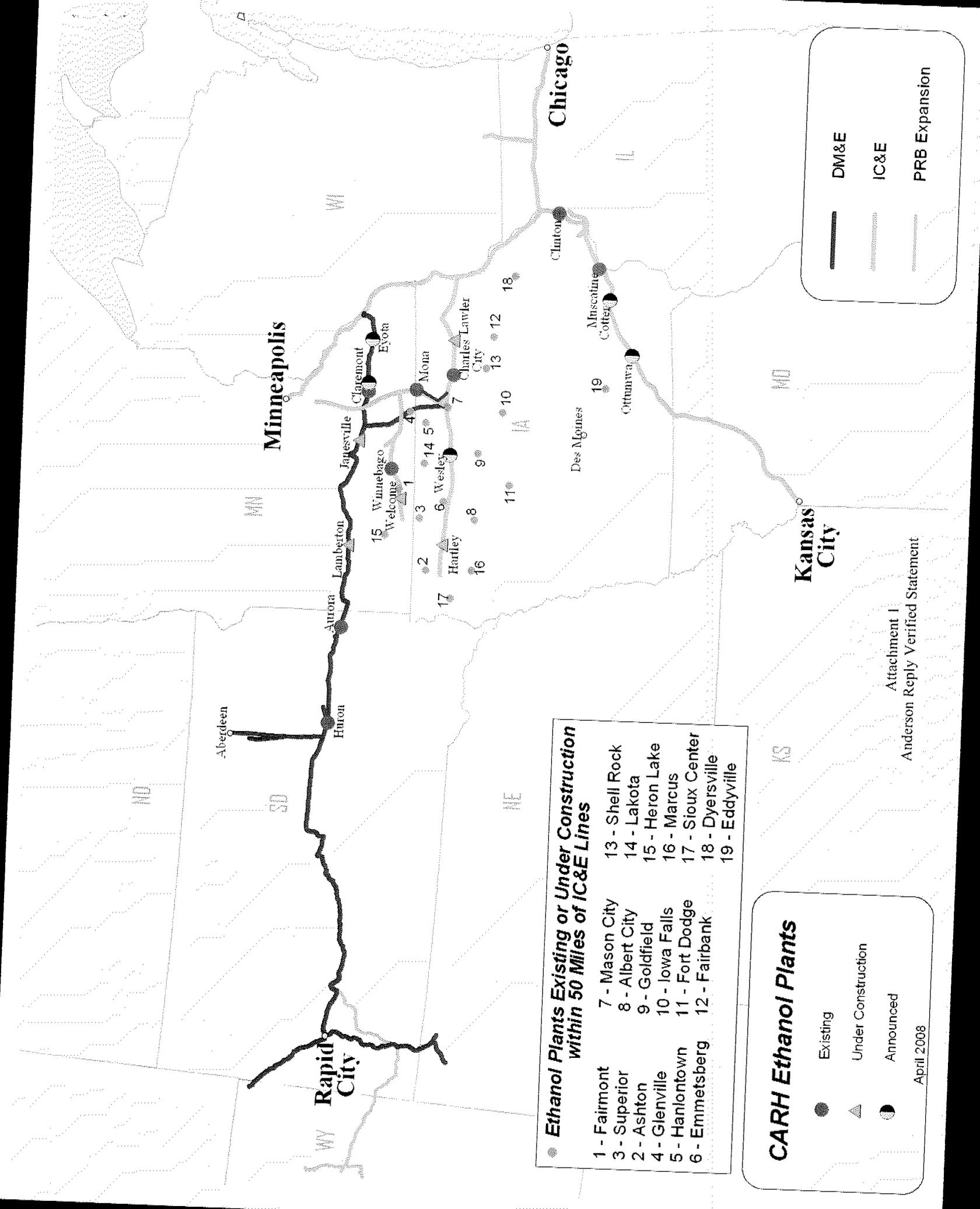
[] (App. II at 2.) Nor has KCS provided any legitimate basis for the Board to grant it such broad long-term rights.

VERIFICATION

I, Lynn A. Anderson, declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Reply Verified Statement.


LYNN A. ANDERSON

Executed on 4/17, 2008.



- Ethanol Plants Existing or Under Construction within 50 Miles of IC&E Lines**
- | | | |
|----------------|-----------------|-------------------|
| 1 - Fairmont | 7 - Mason City | 13 - Shell Rock |
| 3 - Superior | 8 - Albert City | 14 - Lakota |
| 2 - Ashton | 9 - Goldfield | 15 - Heron Lake |
| 4 - Glenville | 10 - Iowa Falls | 16 - Marcus |
| 5 - Hanlontown | 11 - Fort Dodge | 17 - Sioux Center |
| 6 - Emmetsberg | 12 - Fairbank | 18 - Dyersville |
| | | 19 - Eddyville |

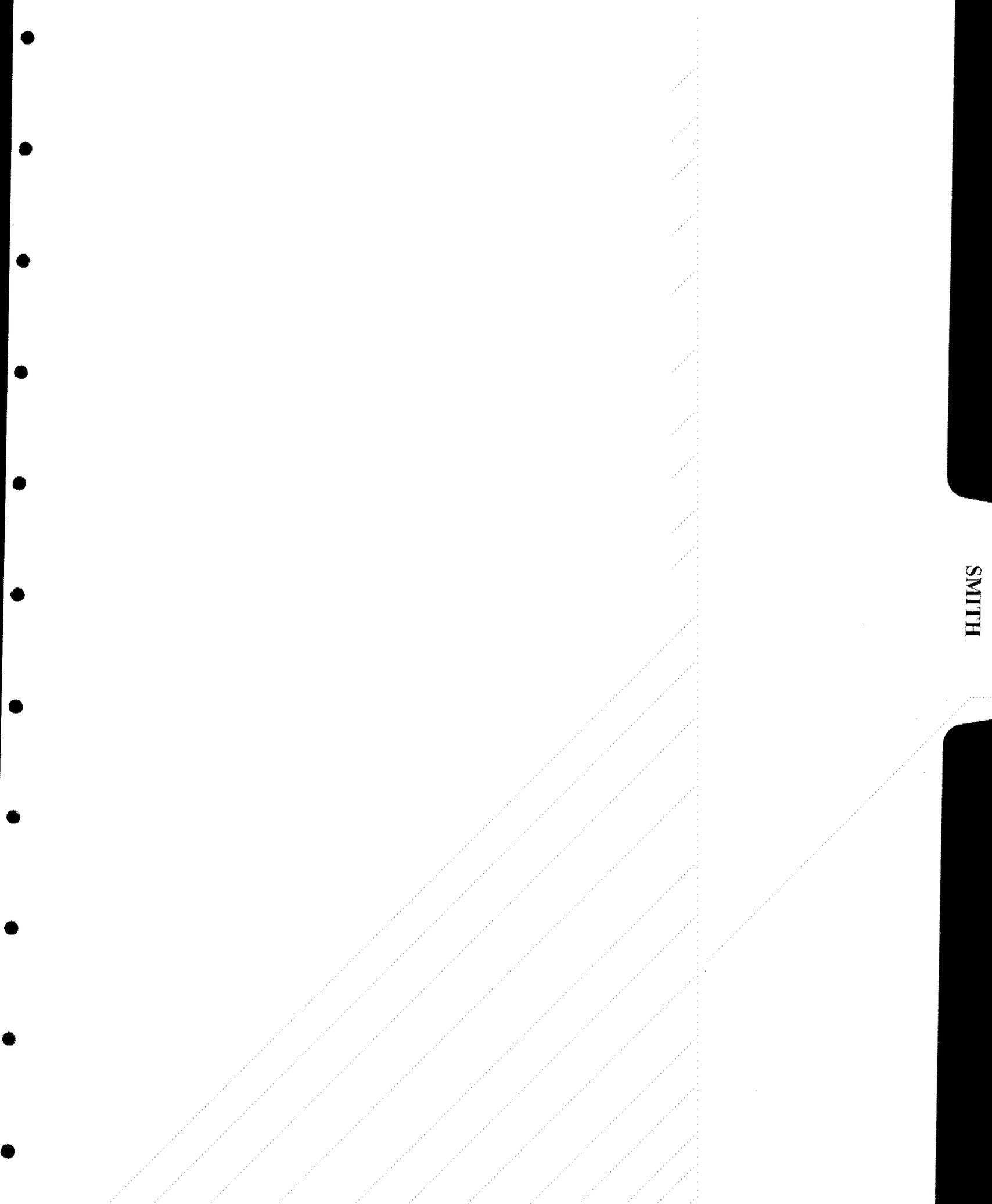
CARH Ethanol Plants

- Existing
- ▲ Under Construction
- ◐ Announced

April 2008

- DM&E
- IC&E
- PRB Expansion

Attachment I
Anderson Reply Verified Statement



ELLIIS
SMITH

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

_____)	
Canadian Pacific Railway Company, <i>et al.</i> -- Control --)	
Dakota, Minnesota & Eastern Railroad Corp., <i>et al.</i>)	Finance Docket No. 35081
_____)	

REPLY VERIFIED STATEMENT OF DON SMITH

My name is Don Smith. I am Senior Account Manager – US Grain Division of Canadian Pacific Railway Company (“CPR”). My business address is 501 Marquette Avenue, Minneapolis, MN 55402. In my current position, I have responsibility for managing CPR’s US grain account relationships with shippers, domestic mills, processors and export grain terminals. I also have responsibility for pricing with respect to CPR’s U.S. origin wheat and flour traffic. I have been employed by CPR for 10 years. Prior to joining CPR, I spent 18 years in a variety of positions with Cargill and Conagra, during which time I had responsibility at various points for the merchandising of corn, soybeans, wheat and sorghum. I hold a BA in Economics from St. Olaf College, and an MBA from the University of Minnesota’s Carlson School of Business.

The purpose of this Reply Verified Statement is to respond to certain assertions made by Kansas City Southern Railway Company (“KCS”) and the North Dakota Grain Dealers Association/North Dakota Wheat Commission (“NDGDA”) in their comments filed on March 4, 2008. KCS contends that the proposed transaction would be harmful both to corn shippers served by DM&E/IC&E and to receivers (primarily poultry feeder mills in the South Central States) served by KCS. According to KCS, CPR’s strategic relationship with UP creates an incentive for CPR to foreclose future IC&E/KCS corn shipments via the Kansas City gateway. KCS asserts that, rather than continuing to participate with KCS in interline shipments of corn to

KCS-served destinations, CPR will seek to divert that corn traffic either to CPR/UP routes to Pacific Northwest (“PNW”) ports or to poultry feeder mills south of Kansas City that are served by UP rather than KCS. (KCS Comments at 3, 18.) NDGDA complains about the condition of CPR’s grain cars used in North Dakota (NDGDA Comments at 2-3), expresses concern that the proposed transaction may reduce the supply of grain cars available for loading by NDGDA members (*id.* at 4), and requests that the Board require CPR to redirect a portion of the \$300 million in additional capital that CPR has committed to invest in DM&E/IC&E lines over the next several years to upgrade CPR’s tracks and facilities in North Dakota (*id.* at 5). Part I of my testimony responds to KCS’ claims, and Part II responds to the assertions made by NDGDA.

I. CPR DOES NOT HAVE INCENTIVES TO DIVERT CORN SHIPMENTS FROM KCS-SERVED DESTINATIONS TO PNW PORTS OR TO COMPETING UP-SERVED POULTRY FEEDER MILLS.

KCS claims that the proposed transaction will eliminate DME as a “neutral” carrier for the transportation of corn, and alter DME’s incentives in ways that are harmful to corn shippers and receivers, and to KCS itself. Specifically, KCS contends that CPR’s supposed “multi-faceted strategic relationship” with UP will cause CPR to “act quickly following CP’s acquisition of DME to incorporate traffic flows to and from DME’s lines into existing and/or supplemental alliances with UP.” (KCS Comments at 17.) KCS predicts that CPR will take steps to degrade service on existing IC&E/KCS corn shipments via Kansas City, in order to facilitate the diversion of that traffic to either a CPR-UP route (via Kingsgate, BC) to the PNW ports or to UP-served poultry feeder mills south of Kansas City. (KCS Comments at 17-19; V.S. Bilovesky at 9-12.) Contrary to KCS’ assertions, such a strategy is neither feasible nor consistent with CPR’s economic interest.

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As the Application indicates, approximately 95 percent of the corn presently originated by CPR in the United States does move to PNW export terminals. (Application, Exh. 12, Market Analysis at 8.) The primary reason why CPR's existing corn business is so heavily oriented to the PNW export market is geographic. CPR's existing U.S. corn origins are located in North Dakota and northern Minnesota. These origins are more distant from the Gulf Coast, the South Central feeder industry and most domestic corn processors than are many alternate corn origins that are served by railroads such as BNSF, UP, CN and DME. Moreover, BNSF, UP and CN all have the ability to offer single line service to the Gulf coast and to the South Central region. By contrast, transporting CPR-origin corn to those destinations today would require either a two-carrier routing via Chicago, or a three-carrier (albeit less circuitous) routing via Kansas City. Under these conditions, CPR's corn shippers find it difficult to compete today for business to markets south of Kansas City. Instead, they direct their traffic to the PNW (where margins have been favorable in recent years) and, to a lesser extent, to Chicago or the U.S. Northeast (both of which CPR can serve on a single line basis).

In contrast to CPR, DME has a significant domestic corn franchise that includes service to the South Central poultry feeder industry (jointly with KCS), Chicago and points beyond, and the growing ethanol-related corn transportation business in Iowa and Minnesota. From CPR's perspective, one of the key benefits of the transaction is the ability to augment our export corn business by gaining the ability to participate in these domestic corn traffic flows. I was responsible for reviewing DME's existing and projected grain business as part of CPR's pre-acquisition due diligence. In my report – which was prepared in July 2007, as CPR was attempting to determine the value of a DME acquisition – the very first item I listed under the heading “Potential CPR-DME Grain Synergies” was the following:

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“A direct connection with the KCS may provide improved market access for both US and Canadian Grain to:

- Mexico: for shipments of wheat, malt barley, soybeans, canola, oilseed meals and DDG;
- Arkansas/East Texas/ MS poultry and livestock markets: for shipments of corn, oilseed meals and DDG.” (See Appendix I to Reply Comments at CPR-DME-HC001564.)

The Application likewise predicts that “[c]xtension of the CPR system to the Kansas City gateway will provide CPR grain shippers a more efficient routing option for shipments to Gulf Coast export terminals and consumption points in the U.S. Southwest and Mexico.”

(Application, Exh. 12, Market Analysis at 4.) Such diversification of CPR’s U.S. corn business will improve CPR’s competitive position, by enabling us to match the service offerings of other Class I railroads (including BNSF, UP and CN) who currently provide single line service to a multitude of domestic points of corn consumption. Contrary to KCS’ assertions, CPR views the ability to serve domestic corn markets south of the Kansas City gateway as a benefit, not as a competitive threat to be eliminated.

KCS’s professed fear that “CP will have an incentive to seek to achieve the long haul for itself [by routing] DME-originated grain to the PNW” (KCS Comments at 18) is misplaced, for several reasons:

First, [] under which CPR currently provides interline service for grain shipments to the PNW ports in conjunction with UP []. (See Appendix B, [].) [] of the [] defines [] [] []

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[redacted]. In order to move traffic originating on the lines of IC&E to the PNW under [redacted], CPR would need to [redacted]

[redacted].

UP does not serve the territory in North Dakota and northern Minnesota in which CPR currently originates corn shipments destined to the PNW. However, UP does operate rail lines that serve corn origins in Iowa. It is, at best, uncertain whether UP would agree to [redacted]

[redacted] to permit corn shipments to the PNW from IC&E-served elevators that compete directly with UP's own origins.

Second, under the [redacted]

[redacted]. (App. B, [redacted].) CPR's existing grain traffic through the Kingsgate gateway already amounts to [redacted]. Diverting a

significant volume of IC&E-originated corn shipments to the CPR-UP route would, in all likelihood, [redacted], and would render us unable to accommodate any growth in corn shipments from North Dakota origins resulting from recent increases in corn production in that state.

Third, even if CPR were successful in negotiating changes to [redacted]

[redacted] to permit the movement of IC&E-originated corn to the PNW ports, it is not likely that such a service offering would be economically viable. Shipments originating on IC&E's "Corn Lines" would move to the PNW via a very long and circuitous route involving movement east on IC&E's lines to Marquette, IA or LaCrescent, MN, then north to St. Paul, then northwest on CPR's US lines to Portal, ND, west on CPR's Canadian lines to Kingsgate, BC, and finally

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southwest on UP's lines to a port such as Seattle or Kalama, WA.¹ For example, a shipment from Winnebago, MN (the midpoint of the Minnesota Corn Line) to Kalama, WA would move 2,155 miles, and a shipment originating near Algona, IA (the midpoint of the Iowa Corn Line) would have to travel 2,192 miles. As witness Williams shows, the cost of transporting shipments of corn over such a great distance would make it infeasible for CPR to offer rates that would be competitive with BNSF or UP single line service to the PNW under current market conditions. Moreover, most of the grain elevators located on the Corn Lines are smaller facilities that are not capable of loading 100+ car shuttle trains. The added cost of gathering cars from multiple country elevators to build unit trains presents a further obstacle to the competitiveness of CPR-UP interline service from Corn Lines origins to the PNW.

Fourth, pursuing a strategy of encouraging Corn Lines shippers to divert their shipments to the PNW would entail significant risk and expense for CPR. I understand that, [] [] []. In order to divert those shipments to the PNW ports (or to any alternate destination), the CPR/DME system would have to supply sufficient cars to handle the business. Given the demands placed on CPR's grain car fleet, particularly during peak periods, it likely that we would be required to augment our existing fleet to handle the 20,000+ cars of corn traffic generated on IC&E's lines. However, as witness Anderson testifies, the rapid growth of the ethanol industry in Iowa and Minnesota is generating a sharp increase in demand for corn from ethanol producers throughout IC&E's service territory. To the extent that

¹ Unit trains of grain moving on IC&E to CPR at St. Paul could not move via Owatonna, MN. IC&E's north-south line between Owatonna and Rosemount, MN is in poor condition and is not capable of handling such traffic. Indeed, IC&E does not currently conduct any train operations on that segment today. In addition, IC&E does not have trackage rights over the line between Rosemount and St. Paul, which is owned by UP.

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IC&E-served elevators either lose corn business to direct truck shipments to ethanol producers or sell more of their product to local consumers, a substantial portion of the corn traffic that IC&E has handled in conjunction with KCS in recent years will be diverted to short-haul rail or truck movements. Indeed, during 2007 alone, IC&E's corn shipments to the poultry feeder markets declined by [], from [] cars to [] cars. Given the uncertainty regarding the future volume of long-haul shipments of corn from IC&E-served origins, it would be imprudent for CPR to make long-term investments in cars and locomotives to handle such traffic.

Fifth, pursuing a strategy of diverting IC&E-origin corn to the PNW would run counter to CPR's interest in diversifying its U.S. corn business. Developing and maintaining routes to the Gulf coast and South Central poultry markets will enhance CPR's competitive position vis-à-vis carriers such as BNSF, UP and CN by enabling us to offer our corn shippers a wider variety of destinations for their product. Having acquired the Corn Lines and access to Kansas City through the proposed transaction, it would be contrary to CPR's economic interest to "dismantle" DME's domestic corn franchise by taking the actions posited by KCS. Indeed, notwithstanding KCS' statements in this proceeding concerning CPR's supposed incentives, KCS grain marketing personnel have recently engaged in discussions with their counterparts at CPR (including me) regarding the potential for developing shipments of grain via a CPR/IC&E/KCS routing to Mexico.

Finally, KCS witness Woodward's contention that CPR's first preference would be to divert IC&E-origin corn to a single line CPR route to the port of Vancouver, BC. (KCS Comments, V.S. Woodward at 14, 19-20.) demonstrates Mr. Woodward's utter lack of familiarity with grain transportation via that port. Vancouver, BC is the primary port for exports

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of Canadian wheat and canola, and smaller volumes of barley and peas also move through that port. However, no shipments of corn move through Vancouver, BC, for a variety of reasons. Most importantly, there are no terminal facilities currently handling corn traffic at Vancouver, BC. The difference in grain handling costs at Vancouver, BC terminals (\$10-12 per ton compared to approximately \$4 per ton at neighboring U.S. ports) strongly discourages the movement of U.S. corn through Vancouver, BC. Because very little corn is grown in western Canada, there simply is not any demand for shipment of “domestic” corn through the port. In addition, there are no U.S. agricultural inspectors at the port of Vancouver, so that cross-border shipments of corn cannot be inspected at that location. Finally, Vancouver, BC is Canada’s primary west coast port facility. The volume of wheat and other commodities (including coal) that move through the port is already straining the capacity of both the port’s facilities and the rail lines that serve them. Under these market conditions, it is highly unlikely that an export market for U.S. corn via the port of Vancouver will develop in the future.

II. THE CONDITIONS REQUESTED BY THE NORTH DAKOTA GRAIN DEALERS ASSOCIATION ARE NOT RELATED TO THE PROPOSED TRANSACTION, AND ARE IN ANY EVENT UNWARRANTED.

NDGDA’s comments raise several issues relating to the quality of CPR’s car fleet used to serve grain shippers in North Dakota. Specifically, NDGDA asserts that “[f]or the past several years, CP car supply, and car condition for grain shipments has been problematic.” (NDGDA Comments at 2.) NDGDA also professes concern that the proposed transaction will result in the diversion of grain cars currently used to serve North Dakota shippers to origins on DME.

NDGDA asks the Board to impose a condition on its approval of the proposed transaction that would require CPR to “make no fewer cars available for grain loading at North Dakota elevators than it maintained on average over the past three years.” (*Id.* at 5.)

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NDGDA's portrayal of CPR's recent service to the North Dakota grain industry is, at best, incomplete and misleading. Since 2004, CPR has invested heavily to grow this business. In particular, CPR invested \$160 million to upgrade our western Canadian lines (including \$60 million targeted specifically to the PNW grain routes) which doubled our train throughput capacity. Similar investments were made by UP to upgrade its portion of the interline route over which North Dakota grain moves to PNW ports. These investments in CPR's lines were augmented by joint investments with our customers to enable more elevators to load 100-car shuttle trains (and thereby enjoy the benefit of lower unit train rates). CPR also participated in capital projects totaling approximately \$16 million to assist the Dakota, Missouri Valley & Western Railroad, Inc. ("DMVW") and the Northern Plains Railroad, Inc. ("NPR") to upgrade the lines on which the majority of CPR North Dakota grain shipments originate. CPR has also invested in 500 new 5300' covered hopper cars, which were introduced to the CPR fleet in late 2006. These investments have given North Dakota grain shippers access to an efficient competitive alternative to BNSF service. As a result, the volume of grain traffic handled by CPR from North Dakota origins has grown by approximately 22 percent since 2004.

CPR's grain car fleet is in good condition for its age. With an average age of 19 years, our fleet composition is similar to that of most other Class 1 railroads (with the exception of BNSF, which has a somewhat more modern grain car fleet). Safety is critical to CPR, and we take measures to ensure that all of our covered hopper cars are safe and comply with all applicable FRA regulations. NDGDA expresses concern about the condition of bottom gates on CPR grain cars used in North Dakota. Gates experience significant stress due to forces generated in opening and closing during the unloading process. CPR repairs gates whenever a problem is identified either by our own inspections or by a customer. Moreover, the incidence of gate

failures is quite infrequent – during the 18-month period from July 2006 through December 2007, CPR supplied approximately 175,000 grain cars for loading, and only 1,500 cars (less than 1%) were rejected on account of gate issues.

CPR is committed to working with North Dakota grain shippers to move their product efficiently, and to provide them cost-competitive access to as many end markets as possible.

CPR single system service to the Kansas City gateway following the proposed transaction will improve North Dakota grain shippers' ability to participate in shipments to the Gulf Coast, Mexico and other destinations south of Kansas City. CPR has made substantial investments to keep pace with the demand for grain transportation service from North Dakota origins. The conditions proposed by NDGDA would unnecessarily restrict CPR's ability to deploy capital and equipment across the combined CPR-DME system in a manner that optimizes the benefits of the proposed transaction for all CPR-served grain shippers.

VERIFICATION

I, Donald Smith, declare under penalty of perjury that the foregoing is true and correct.

Further, I certify that I am qualified and authorized to file this Reply Verified Statement.

Donald Smith
DONALD SMITH

Executed on 4/11, 2008.

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Canadian Pacific Railway Company, <i>et al.</i> -- Control --)	
Dakota, Minnesota & Eastern Railroad Corp., <i>et al.</i>)	Finance Docket No. 35081
)	

REPLY VERIFIED STATEMENT OF JOHN H. WILLIAMS

My name is John H. Williams. I am President of The Woodside Consulting Group, Inc., a firm that specializes in railroad transportation consulting. My business address is 385 Sherman Avenue, Suite 1, Palo Alto, CA 94306. My qualifications and experience are set forth in the Verified Statement that I submitted in this proceeding on October 5, 2007 (my "Opening Verified Statement"). The purpose of this Reply Verified Statement is to respond to certain issues raised by Kansas City Southern Railway Company ("KCS") in its Comments seeking conditions on the proposed acquisition of Dakota, Minnesota and Eastern Railroad Corporation ("DM&E") and its rail carrier subsidiary, Iowa, Chicago & Eastern Railroad Corporation ("IC&E") by Soo Line Holding Company and, indirectly, by Canadian Pacific Railway Company ("CPR").¹

KCS contends that the proposed transaction would have both adverse horizontal and vertical competitive effects. (KCS Comments; V.S. Grimm at 4-9.) Specifically, KCS claims that the proposed transaction would result in a substantial reduction in competition between DM&E-BNSF and CPR-UP routings for export corn shipments to Pacific Northwest ("PNW")

¹ DM&E and IC&E are referred to collectively herein as "DME" and Canadian Pacific Railway Company and its U.S. subsidiaries, Soo Line Railroad Company ("SOO") and Delaware and Hudson Railway Company, Inc. ("D&H") are referred to collectively as "CPR."

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ports (KCS Comments at 12; V.S. Grimm at 6). KCS also claims that CPR's acquisition of DME would reduce competition for corn traffic that currently moves from IC&E origins to poultry feeder mills located on KCS' lines and for "NAFTA traffic" moving between Chicago and Laredo, because CPR's supposed close strategic relationship with UP will lead it to foreclose IC&E/KCS routings via the Kansas City gateway for such traffic (KCS Comments at 15-17, 26-35; V.S. Grimm at 6-10). KCS also asserts that CPR will have both the economic incentive and the ability to divert IC&E-originated corn shipments away from the Kansas City gateway to CPR "long-haul" routes to the PNW, and that such diversions would be harmful to receivers of corn at KCS-served poultry feeder mills. (KCS Comments at 17-21; V.S. Woodward at 11-23; V.S. Bilovesky at 6-12.)

Other Applicant witnesses demonstrate that there exists no exclusive strategic relationship between CPR and UP (as posited by KCS), and that CPR will not pursue a strategy designed to dismantle DME's domestic corn business by attempting to divert that traffic to PNW ports. My Reply Verified Statement will address KCS' assertions (1) that the proposed transaction would reduce competition for corn traffic; (2) that the potential diversion of IC&E-origin corn from current destinations in the South Central States would produce harmful effects for poultry feeder mills in those states; and (3) that the proposed transaction will result in reduced competition in the NAFTA corridor between Chicago and Laredo.

I. CPR'S ACQUISITION OF DME WILL NOT RESULT IN A LESSENING OF COMPETITION FOR CORN TRAFFIC.

KCS' claim that the proposed transaction would have adverse horizontal and vertical competitive effects for corn traffic is not credible. CPR and DME are both very minor participants in the transportation of U.S. corn traffic. While both CPR and DM&E participate

(on an interline basis) in shipments of corn to PNW ports for export, their combined share of that traffic is dwarfed by the shipments that are handled on a single line basis by other carriers, including BNSF and UP. Moreover, while DME participates in shipments of corn to the South Central poultry feed mills, CPR does not handle any corn traffic to those destinations today. However, several non-Applicant railroads compete for corn traffic to the feed mill states. As this agency's prior decisions have recognized, the transportation of grain - and, in particular, the transportation of corn originating in the Iowa/Minnesota territory served by DME - is characterized by vigorous intramodal, intermodal and geographic competition.

A. Applicants' Combined Share of U.S. Corn Traffic Is Modest.

Corn is a ubiquitous commodity that is handled by all the major U.S. railroads. As Table 1 shows, U.S. railroads collectively handled a total of [] shipments of corn during 2005.

Table 1: Railroad Originated and Terminated Corn Traffic in 2005

<u>Railroad</u>	<u>Originated Units</u>	<u>Share of Total Originated Units</u>	<u>Terminated Units</u>	<u>Share of Total Terminated Units</u>
BNSF				
CN				
CPR				
CSXT				
NS				
UP				
KCS				
DME				
ICE				
All Other Class II/III				
Total				

Notes:

- 1) KCS includes TM
- 2) All Other Class II/III includes APA, CAGY, CIC, CLP, DQE, FEC, IAIS, IMRR, INRD, MMA, MMRR, MPLI, NECR, NYA, PW, RRVW, ST, TCWR, TPW, TSBY, VTR, WE, WSOR, WTNN.

Source: 2005 Carload Waybill Sample; Attachment JHW-1

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The two largest originators of corn traffic were BNSF, with [] carloads (or 24.7% of total shipments), and UP, with [] carloads (or []% total shipments). Norfolk Southern (“NS”), CSXT and CN also originated substantial volumes of corn on their rail lines. The two Class I railroads that originated the fewest corn shipments were CPR, which originated only [] carloads (or []% of total shipments) and KCS, which originated [] carloads (or []% of total shipments). DM&E and IC&E combined accounted for [] carloads, or []% of all originated cars. Based upon these data, the combined share of corn originations for the CPR-DME system would be only []%.

Applicants’ share of terminated corn shipments is even smaller. In 2005, CPR terminated only [] carloads of corn, or []% of total terminations. DM&E and IC&E combined terminated only [] carloads of corn, or []% of total terminated shipments. Thus, the combined share of corn terminations for the CPR-DME system would be only []%.

As was the case with corn originations, the railroads with the largest shares of terminated corn shipments were BNSF, with [] terminated shipments (or []%) and UP, with [] terminated shipments (or []%). The substantial shares of both originated and terminated corn traffic by BNSF and UP reflect the fact that both carriers operate extensive rail networks with access to large quantities of corn and the ability to serve multiple domestic and export destinations on a single line basis. As other Applicant witnesses have testified, the proposed transaction will enhance the ability of the CPR-DME system to compete with those carriers by combining CPR’s North Dakota/northern Minnesota corn origins and export business with DME’s access to substantial sources of corn in southern Minnesota and Iowa and to destination markets south of Kansas City.

Even if one focuses more narrowly on the States of Iowa and Minnesota, Applicants' combined shares of corn traffic is modest.

Table 2: Corn Originated in Iowa and Minnesota by All Railroads

	<u>Carloads</u>	<u>Share</u>
Total		
BNSF		
CN		
CPR		
KCSR		
NS		
UP		
DME		
IAIS		
ICE		
MPLI		
RRVW		
TCWR		

Source: 2005 Carload Waybill Sample

As Table 2 shows, DM&E/IC&F collectively accounted for [] cars (or []%) of the corn shipments that originated in Iowa and Minnesota in 2005. CPR's share of corn originations in those two states was only [] carloads (or []%). Thus Applicants' combined share of corn shipments originating in Iowa and Minnesota was only []%. UP and BNSF once again had the largest shares of corn originations in Iowa/Minnesota, with [] carloads (or []%) and [] carloads (or []%), respectively. CN also handled a substantial volume of corn traffic in Iowa/Minnesota, with [] (or []% of all originated shipments).

While neither CPR nor DME can serve the PNW export terminals directly, both participate in interline shipments of corn for export via various PNW ports. CPR interchanges such export corn traffic with UP at Kingsgate, BC, while DM&E participates in an interline route with BNSF via the Florence, MN gateway. As Attachment JHW-13 shows, [] cars of corn moved via the CPR-UP route in 2005, while [] cars of corn moved via the DM&E/BNSF

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route. Applicants' combined participation in export corn flows amounted to [] cars, or []% of the total shipments of corn exported via the PNW in 2005. Once again, BNSF was the largest participant in this market, with [] cars (or []% of all PNW export corn shipments) moving in BNSF single line service, in addition to the [] cars that BNSF handled in conjunction with DM&E. In addition to participating in CPR-originated shipments via Kingsgate, UP handled [] cars of corn to PNW export terminals on a single line basis.

As these data show, CPR and DME are relatively minor participants in the rail transportation of corn, particularly as terminating carriers. Applicants face vigorous competition from three Class I rail systems (BNSF, UP and CN), each of which has access to substantial sources of corn, and each of which can serve a variety of corn destinations on a single system basis. As the Board recognized in its *UP-CN* decision, competition for the transportation of corn originating in Iowa and Minnesota is intense. Not only are there multiple railroads competing for corn traffic, but barge service via the Mississippi River is also an important competitive option. With only []% of Iowa/Minnesota corn traffic (and only []% of all U.S. corn shipments) originating on CPR or DME, and with only []% of all U.S. corn shipments terminated by CPR or DME, Applicants will not be in a position to impair competition for corn traffic following the proposed transaction. Moreover, the relatively small share of corn shipments to PNW ports in which CPR and DM&E participate today, and the fact that both CPR and DM&E must rely on railroads (UP and BNSF, respectively) with which they compete to terminate their PNW corn shipments, makes it highly unlikely that the proposed transaction will result in a loss of competition for export corn traffic.

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B. Railroads Seek To Diversify Their Corn Transportation Business.

The *Carload Waybill Sample* data demonstrate that most railroads seek to diversify their corn transportation business by participating in movements to as many corn destinations as possible. The two railroads with the greatest share of corn originations (BNSF and UP) each deliver corn to a variety of domestic and export destinations.

The distribution of BNSF's 2005 corn traffic, which totaled [] units, is shown in Attachment JHW-10. BNSF's largest destinations were in Washington and Oregon, with [] cars of both domestic and export traffic. BNSF also delivered [] cars of corn to the feed mill states of Arkansas, Oklahoma, Alabama, Mississippi and Texas (excluding Mexico), and another [] cars to California. Other destinations for BNSF-originated corn included the western states of Colorado, Montana, New Mexico and Arizona ([] cars) and Mexico (with [] cars handled in joint service with KCSR). (See Attachment JHW-12).

The distribution of UP's corn traffic, which totaled [] carloads in 2005 - see Attachment JHW-11) was likewise diverse. UP's largest single corn destination was California, with [] cars. UP also handled [] cars of corn to the feed mill states of Louisiana and Texas, and another [] corn shipments to Arkansas and Oklahoma. UP corn shipments to other western states (including Colorado, Utah, Arizona, Idaho and Nevada) totaled [] carloads, while shipments to the Midwestern states of Illinois, Iowa, Nebraska and Missouri accounted for [] carloads. UP also handled [] carloads of corn destined to Mexico, and delivered [] cars of CPR-originated corn to PNW ports for export. (See Attachment JHW-11.)

KCS itself participates in shipments of corn between a variety of origins and destinations. In addition to handling [] carloads of corn in conjunction with IC&E to the feed mill states

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of Arkansas, Oklahoma, Louisiana, Mississippi and Texas (*see* Attachment JHW-2), KCS originated an additional [] cars of such corn traffic from points in Alabama, Iowa, Kansas, Louisiana, Missouri and Mississippi. (*See* Attachment JHW-5.) KCS also delivered [] carloads of corn to Texas (including shipments destined to Mexico via Laredo) and another [] cars of corn to Illinois. (*See* Attachment JHW-12.)

As these data show, railroads seek to diversify their corn traffic. Such a strategy is in a railroad's economic self-interest. By offering service to multiple destinations, the railroad is likely to attract more business by making it possible for customers to access more end markets for their product. Such a strategy also provides protection against a sharp drop in traffic and revenues if demand to a particular destination falls off substantially (as has occurred in recent years with respect to corn shipments to Mississippi barge terminals). What is also clear from the variety of destinations to which BNSF, UP, CN and even KCS move corn traffic today is that rail customers want broad geographic reach from their rail carriers so that they can select from a diversified portfolio of the most attractive corn markets, knowing that efficient rail service will be available to access the markets that they elect to serve.

As other Applicant witnesses have testified, the proposed transaction will expand the number of markets that can be accessed efficiently by grain shippers served by both CPR and DME. CPR-served grain shippers will gain direct rail access to Iowa river terminals served by ICE. Extension of the CPR system to the Kansas City Gateway will also offer CPR grain shippers a more efficient routing option for shipments to Gulf Coast export terminals and consumption points in the U.S. Southwest and Mexico. DME-served grain shippers will gain direct access to domestic end users in the U.S. Northeast and to Great Lakes export terminals at Duluth/Superior through single line service via the expanded CPR System. These new rail

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transportation opportunities will be of value to corn shippers on both DME and ICE, since none of their corn moved to those markets in 2005, as shown by my Attachments JHW-2 and JHW-3.

Notwithstanding this quantitative evidence to the contrary, KCS would have the Board believe that CPR will seek to divert all of IC&E's corn traffic to the PNW for export simply because doing so would give CPR the longest possible haul on such traffic (and, according to KCSR, thereby maximize CPR's profits). As I will demonstrate in Part I. C. below, KCS witness Woodward's analysis purporting to show that CPR could earn a substantially greater contribution from IC&E's corn traffic by diverting it all to a IC&E-CPR-UP routing to the PNW is fatally flawed. KCS' hypothesis is further undermined by the actual behavior in the marketplace of those railroads (BNSF and UP) that currently serve both corn origins in Iowa and Minnesota and PNW export terminals. Under KCS' hypothesis, BNSF and UP would be able to maximize their profits by shifting more of their corn traffic to long-haul movements to the PNW. Yet, the *Carload Waybill Sample* data indicate that UP moves only a relatively small portion of its on-line corn traffic ([] cars in 2005 -- see Attachment JHW-13) to the PNW for export. At the same time, UP terminated [] cars of corn (including [] shipments that originated in Iowa and Minnesota) in the same feed mill territory served by KCS (see Attachment JHW-8). While BNSF moved [] carloads of corn that originated on its lines to PNW export terminals in 2005 (see Attachment JHW-13) BNSF also delivered [] cars of corn (including [] shipments that originated in Iowa and Minnesota) to the feed mill states in that year as well (see Attachment JHW-8). The substantial participation of UP and BNSF in shipments of corn to the feed mill states, particularly from origins in Iowa and Minnesota, despite the fact that they both have single line routes to the PNW that are considerably less circuitous than a prospective IC&E-CPR-UP route via Kingsgate, BC -- belies KCS's hypothesis that, following the proposed

transaction, CPR would automatically seek to maximize its profits by shifting IC&E-origin corn to the PNW export market. Rather, the “real world” evidence suggests that railroads (including BNSF, which has the strongest commitment of all carriers to the PNW export market) actively seek to diversify their corn franchises in order to be able to offer customers service to as many end markets as possible. Such behavior presumably serves to maximize the long-term profitability of BNSF and UP, and a similar strategy would likewise appear to be in CPR’s economic self-interest as well.

C. KCS Witness Woodward’s Analysis of the Contribution Earned By CPR On Corn Shipments to the PNW Is Fatally Flawed.

KCS contends that CPR will seek to divert corn traffic that originates on IC&E (and currently moves via the Kansas City gateway to KCS-served feed mills) to a CPR-UP route via Kingsgate to PNW ports for export. (KCS Comments at 18, V.S. Woodward at 14-20.) KCS witness Woodward’s Exhibit 7 (V.S. Woodward at 18) purports to be a “contribution analysis” showing that CPR has strong economic incentives to cause the diversion of corn traffic originating on IC&E’s Corn Lines to the PNW, because CPR would earn a substantially greater contribution from such shipments than IC&E does today in handling the traffic in conjunction with KCS. Mr. Woodward’s analysis is fatally flawed, for several reasons.

First, according to Mr. Woodward’s Exhibit 7, CPR and UP would earn a combined net contribution of \$[] per car on corn traffic moving from IC&E origins to the PNW. CPR’s supposed contribution alone would be \$[] per car. (KCS Comments, V.S. Woodward at 18, Exh 7.) Yet, Exhibit 7 also suggests that DM&E and BNSF are earning a combined net contribution of only \$[] per car on shipments from DM&E’s lines to the PNW via Florence, MN. As witness Anderson testifies, the DM&E/BNSF route to Seattle, WA is 1,753 miles (from

appears that Mr. Woodward simply applied the same “proprietary” URCS-based costs that he used for the U.S. portion of the movement to the CPR segment as well. Attributing the URCS costs for the U.S. operations of Soo Line Railroad Company to the Canadian portion of the movements studied by witness Woodward clearly produced inaccurate results. My analysis of the contribution that CPR might earn on shipments of IC&E-origin corn to PNW ports (set forth below) instead uses the regulatory costs developed specifically for CPR’s Canadian operations by the Canadian Transportation Agency (“CTA”) in calculating the Canadian portion of the movement.

Fourth, witness Woodward did not identify the particular IC&E origin stations that he purported to study in calculating the cost of a hypothetical IC&E-CPR-UP movement to the PNW. Nor do witness Woodward’s workpapers indicate that he made any effort at all to take account of the additional miles that corn originating on IC&E’s lines (which are several hundred miles south of the corn origins served by CPR today) would have to travel to reach the PNW. Witness Woodward’s failure to do so resulted in a substantial understatement of the costs associated with the hypothetical IC&E-CPR-UP route.

In order to test the accuracy of witness Woodward’s contribution analysis, I developed an estimate of the contribution that CPR currently earns in transporting corn from three current CPR-served corn origins to PNW export terminals. For purposes of analysis, I selected the stations of Glenwood, MN (which is located on CPR’s main line in Minnesota), Enderlin, ND (which is located on CPR’s main line in North Dakota), and Oakes, ND (which is situated on a branch line in North Dakota from which CPR corn traffic is gathered). In each case, I considered the cost of moving the traffic over a CPR-UP route via Kingsgate, BC to the port of Seattle. In developing the cost of moving corn from each of these CPR origins to the PNW, I used actual

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STB URCS costs for Soo Line Railroad Company for the segment between the origin and the U.S. – Canadian border at Portal, ND. For the segment between Portal, ND and CPR's interchange with UP at Kingsgate, BC, I used the CPR-specific costs from the CTA's Agency Regulatory Costing Model ("ARCM"). Those costs are the equivalent of URCS costs for Canadian regulatory purposes. For the final leg of the movement, I applied the UP revenue requirement specified by the agreement under which UP handles the traffic for CPR's account between Kingsgate and the port (which represents the "cost" to CPR associated with that portion of the movement). All of the costs were based on 100-car unit trains with loads of 103 tons per car. The revenue assigned to each movement was the current CPR through rate (net of the incentive payments for cars moving in shuttle train service) from that origin to Seattle.

The results of my analysis are set forth in Attachment JHW-14. As that Attachment shows, when the correct revenue and cost data for the subject movements are used, CPR's contribution on corn shipments from origins on its lines to the PNW ports ranges from a low of \$[] per carload to a high of \$[] per carload. These contribution figures are far lower than the contribution of \$[] per car estimated by witness Woodward based upon his faulty methodology. My contribution estimates are, however, fully consistent with the contribution of \$[] per carload that witness Woodward posits for corn shipments moving from origins in Minnesota to the PNW over the DM&E/BNSF route via the Florence, MN gateway. As my analysis shows, the flaws in witness Woodward's methodology (in particular, his failure to use ARCM costs rather than URCS costs for the Canadian portion of the movement) resulted in a significant overstatement of the contribution earned by CPR on its existing corn traffic to the PNW.

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Using the same methodology, I also developed the costs that CPR would incur in transporting corn from IC&E origins to PNW export terminals. For purposes of analysis, I selected two representative origins on IC&E's so-called "Corn Lines." The first selected origin was Algona, IA, which is located at the approximate mid-point of the Iowa Corn Line between Sheldon and Mason City, IA. The second selected origin was Winnebago, MN, which is located at the approximate mid-point of the Minnesota Corn Line between Jackson and Ramsey, MN. In developing the cost of moving corn from each of these origins to the PNW, I used the STB's URCS costs for Soo Line Railroad Company for the segment between the origin and the U.S. - Canadian border at Portal, ND. For the segment between Portal, ND and CPR's interchange with UP at Kingsgate, BC, I again used the CPR-specific ARCM costs developed by the CTA. For the final leg of the movement, I applied the UP revenue requirement specified by the agreement under which UP handles the traffic for CPR's account between Kingsgate and the port (which represents the "cost" to CPR associated with that portion of the movement).

The results of my analysis of potential shipments from IC&E origins to the PNW are set forth in Attachment JHW-14. As that Attachment shows, based upon application of the correct cost data for the subject movements, CPR would need to charge a rate of \$[] from Algona, IA to the PNW, and \$[] from Winnebago, MN to the PNW, just to "break even" on such movements. In order to match the contribution of \$[] per car that witness Woodward estimates IC&E earns today on corn shipments that it interlines with KCS at Kansas City (*see* V.S. Woodward at 18, Exh. 7), the CPR-DME rate would have to be \$[] from Algona, IA and \$[] from Winnebago, MN.

In order to determine the viability of such rates in today's market, I compared them with the rates currently offered by BNSF and UP for single line service to the PNW from a variety of

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destinations in Iowa and Minnesota. As Attachment JHW-14 shows, UP's current rates (net of shuttle train incentives) from various origins in Iowa and Minnesota range from \$[] to \$[] per car. Current BNSF single line rates (net of shuttle train incentives) from Iowa and Minnesota origins range from \$[] to \$[] per car. In order for a CPR-UP interline service from IC&E origins to the PNW to be competitive, CPR's rates for such movements could not substantially exceed the rates charged by its competitors. As my analysis indicates, the costs associated with the circuitous CPR-UP routing from IC&E origins via Kingsgate to the PNW would make it virtually impossible for that route to be competitive with the single line services offered by BNSF and UP under current market conditions. Accordingly, witness Woodward's assertion that CPR would have a strong economic incentive to seek to divert IC&E origin corn to such a routing is clearly incorrect.

D. Receivers In The Feed Mill States Have The Ability To Obtain Corn From A Variety Of Carriers And Sources.

KCS states that IC&E origins supply corn to 28 poultry feed mills in Texas, Oklahoma, Missouri, Arkansas, Louisiana and Mississippi. According to KCS, IC&E origins are "the primary source of grain for many of the KCSR-served feed mills in the south-central states." (KCS Comments at 10.) KCS witness Bilovesky likewise asserts that "[t]oday, for our feed mills in Kansas, Arkansas and Oklahoma, the Corn Lines grain represents the primary source of grain." (KCS Comments, V.S. Bilovesky at 8.).

KCS' reference to IC&E as a significant supplier of grain to feed mills in the States of Kansas, Missouri and Alabama is puzzling. According to the *Carload Waybill Sample*, there were no cars of corn that moved from any IC&E origin to a KCS-served destination in Kansas during 2005. (See Attachment JHW-2.) Indeed, only [] cars of corn were terminated by rail in

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Kansas during that year – all by BNSF. This is not surprising; Kansas is a major corn producing state in its own right, and Kansas consumers are unlikely to be dependant on Iowa for corn. The *Carload Waybill Sample* likewise does not contain a single carload of corn that originated at an IC&E-served station and was delivered by KCS to a destination in Missouri or Alabama during 2005. (*Id.*) Moreover, shipments from IC&E origins to KCS-served destinations in Texas during 2005 were limited to [] cars – [] – while shipments from IC&E origins to Louisiana were only [] cars. (*Id.*) Based on these data, any suggestion that feed mills in the states of Kansas, Missouri, Alabama, Texas or Louisiana are in any way dependent on corn from IC&E-served elevators is, at best, highly dubious.

KCS itself played only a minor role in shipments of corn to feed mills in the states of Alabama, Louisiana and Texas in 2005. KCS' corn deliveries to those three states were [] cars to Alabama, [] cars to Louisiana and [] cars to Texas (excluding shipments via Laredo for export). (*See Attachment JHW-9.*) Shipments from IC&E origins to Texas were only [] cars (or only [] percent of the corn delivered to feed mills in that state by KCS), while shipments from IC&E origins to Louisiana accounted for only [] cars (or [] percent) of the corn shipments delivered by KCS in that state. Once again, actual car shipment data demonstrate that receivers in the states of Alabama, Louisiana and Texas are by no means dependent on IC&E (or, for that matter, KCS) as a source of corn.

Rather, the 2005 *Carload Waybill Sample* shows that almost all of the corn that IC&E interchanged with KCS at Kansas City was delivered to destinations in three states -- Mississippi ([] cars), Oklahoma ([] cars) and Arkansas ([] cars). (*See Attachment JHW-2.*) KCS witness Bilovesky candidly admits that, while feed mills in Mississippi do receive corn shipments from IC&E origins, "such corn is not their primary source of corn." (KCS Comments,

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V.S. Bilovesky at 8, n.5.) Thus, it appears that the only destination states that were even arguably dependent on IC&E-originated corn in 2005 were Arkansas and Oklahoma. As the *Carload Waybill Sample* shows, receivers in these feed mill states have multiple rail options for their corn.

As shown in Attachment JHW-8, KCS terminated [] cars of corn in the states of Arkansas and Oklahoma during 2005. UP was close behind, with [] cars, followed by BNSF with [] cars. However, of the [] cars of corn delivered by KCS, only [] cars originated on IC&E. The remaining [] cars originated either at stations served by KCS itself, or on carriers such as BNSF and NS. (*See* Attachment JHW-8.) Indeed, IC&E-originated corn accounted for only []% of the corn delivered by rail to the states of Arkansas and Oklahoma in 2005. These data belie KCS' suggestion that feed mills in Arkansas and Oklahoma are "dependent" on IC&E origins for their corn.

KCS delivered [] cars of corn to Mississippi destinations during 2005. (*See* Attachment JHW-9.) Of that total, only [] cars were originated by IC&E. (*Id.* *See* Attachment JHW-2.) These data confirm witness Bilovesky's observation that the Corn Lines are not the primary source of corn for Mississippi feed mills.

Overall, KCS delivered [] (or []%) of the [] cars of corn that moved to feed mills in the states of Arkansas, Oklahoma, Alabama, Louisiana, Mississippi, and Texas in 2005. (*See* Attachment JHW-9.) BNSF terminated [] cars of corn (or []% of total shipments) to these feed mill states, while UP terminated [] cars (or []% of total shipments). (*Id.*) CN, with [] cars, was a significant competitor for shipments destined to Alabama, Louisiana and Mississippi. (*Id.*) The [] cars of corn that moved from IC&E-served origins to KCS-served destinations in these states represented only [] percent of the [] cars that were delivered

from all sources.² These data lead me to conclude that feed mills in states served by KCS have the ability to obtain corn from a variety of sources and carriers other than Applicants.

Moreover, the rising price of corn (due in large part to the growth of the ethanol industry) has generated a massive increase in local corn production in the feed mill states. USDA data indicate that corn plantings in Mississippi almost tripled, from 340,000 acres to 960,000 acres, from 2006 to 2007. This increase in Mississippi corn acreage raised production from 105 million bushels in 2006 to 141 million bushels in 2007. In Arkansas, corn acreage almost quadrupled from 190,000 acres to 610,000 acres, with a corresponding increase in production from 73 million bushels to 99 million bushels. Louisiana increased its corn acreage from 300,000 acres to 740,000 acres from 2006 to 2007, with production growing by almost 80 million bushels to 120.5 million bushels. Oklahoma corn plantings grew from 270,000 acres to 320,000 from 2006 to 2007, increasing that state's production by 16 million bushels to more than 39 million bushels. *See* USDA National Agricultural Statistics Service, *Prospective Plantings* 4, 27 (March 31, 2008). These data indicate that the volume of locally grown corn available to meet the demand of feeder mills in each of these states has increased significantly.

E. KCS Witness Bilovesky's Claim That Obtaining Corn From Alternate Destinations Would Impose Substantial Economic Costs On South Central Poultry Feeder Mills Is Demonstrably Incorrect.

KCS witness Bilovesky agrees that alternative sources of corn are available to KCS-served feed mills – indeed he acknowledges that “most of our feed mills do receive some corn from these alternate sources.” (KCS Comments, V.S. Bilovesky, 11 and n.6.) However, Mr. Bilovesky contends that, if IC&E corn is diverted to other destinations, KCS-served feed

² As the note on Attachment JIIW-4 explains, the total of [] carloads of ICE corn terminated includes [] carloads from the corn lines in Iowa and Minnesota and 468 carloads from Missouri.

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mills will incur additional costs to acquire corn. *Id.* Thus, KCS argues, those receivers could be harmed by the proposed transaction unless the Board extends KCS's rights under the IC&E/KCS Grain Agreement in perpetuity. Mr. Bilovesky did not present any quantitative data to support this assertion.

In order to test the validity of Mr. Bilovesky's assertion, I analyzed the per-bushel price of corn at, and the cost of rail transportation to, feed mill states from IC&E-served origins and several alternate sources of corn to which KCS has access. Specifically, I compared the cost of transporting corn by rail to the feed mill states of Arkansas and Oklahoma (from IC&E origins, on the one hand, and from three origins to which KCS obtained haulage rights in the *UP-MKT* control proceeding (including Omaha, NE/Council Bluffs, IA; Atchison, KS and Topeka, KS), on the other hand. I conducted this analysis for both the year 2005 and for the first Quarter of 2008. For 2005, I used the revenue for shipments from each origin set forth in the 2005 *Carload Waybill Sample*. For 2008, I used the current published KCS tariff rates. Based upon those rate data, I calculated the difference in rail transportation cost, on a per-bushel basis, from each origin to destinations in the states of Arkansas and Oklahoma. I then determined the per-bushel price of corn at each origin that I considered, based upon published USDA daily cash corn prices at each location. As the following discussion shows, the total delivered cost of corn from alternate sources in 2005 would not have been greater than KCS-served receivers paid for IC&E-origin corn.

For example, as Table 3 shows, the average rail revenue per car in 2005 for shipments of IC&E-origin corn to KCS-served destinations in Arkansas was \$[] per car from Iowa and \$[] per car from Minnesota. During the same year, the average rail revenue per car to Arkansas destinations from Omaha/Council Bluffs was \$[], while the average revenue per

car from Atchison and Topeka, KS was \$[] and \$[], respectively. The significantly higher rail rates from IC&E-served origins in Iowa/Minnesota reflect the substantially greater distance that corn shipments must move from Iowa/Minnesota to Arkansas. (See Attachment JHW-4.) As Table 3 shows, this difference in per car rail rates equated to a difference of \$[] per bushel for shipments originating in Iowa and \$[] per bushel from Minnesota origins.

The results for shipments to KCS-served destinations in Oklahoma are similar. As shown in Table 3, the average rail revenue per car in 2005 for shipments of IC&E-origin corn to KCS-served destinations in Oklahoma was \$[] per car from Iowa and \$[] per car from Minnesota. During the same year, the average rail revenue per car to Oklahoma destinations from Omaha/Council Bluffs was \$[], while the average revenue per car from Atchison and Topeka, KS was \$[] and \$[], respectively. This difference in per car rail rates equated to a difference of \$[] per bushel for shipments originating in Iowa and \$[] per bushel from Minnesota origins.

Table 3. Comparison of 2005 Rail Rates between KCS Origins and IC&E Origins (per car and per bushel).

<u>Origin</u>	<u>Rail Rate</u>	<u>Difference Per Railcar</u>	<u>Difference Per Bushel</u>
Iowa - Terminating in Arkansas = \$2,580			
Atchison			
Topeka			
Omaha – Co. Bluffs			
Iowa - Terminating in Oklahoma = \$2,237			
Atchison			
Topeka			
Omaha – Co. Bluffs			

Minnesota - Terminating in Arkansas = \$2,515

Atchison
 Topcka
 Omaha – Co. Bluffs

Minnesota - Terminating in Oklahoma = \$2,281

Atchison
 Topeka
 Omaha – Co. Bluffs
 Source: Attachments JHW-7 and JHW-15.

If Mr. Bilovesky's hypothesis that KCS-served feed mills would have been economically disadvantaged if they had been required to buy corn from sources other than IC&E-served elevators were correct, the difference between the per-bushel price of corn at IC&E-served points and the corresponding price at the alternate origins displayed in Table 3 would have to have been greater than the per-bushel rail rate differential. However, as Table 4 indicates, this was not the case.

**Table 4. 2005 Average Corn Prices From USDA
 Daily Cash Corn Reports**

<u>Month</u>	<u>Iowa</u>	<u>Omaha - Council Bluffs</u>	<u>Kansas City</u>
January	\$1.71	\$1.75	\$1.78
February	\$1.75	\$1.81	\$1.82
March	\$1.83	\$1.88	\$1.97
April	\$1.80	\$1.84	\$1.90
May	\$1.79	\$1.85	\$1.92
June	\$1.85	\$1.91	\$2.03
July	\$1.95	\$1.96	\$2.15
August	\$1.70	\$1.70	\$1.92
September	\$1.54	\$1.57	\$1.79
October	\$1.47	\$1.49	\$1.70
November	\$1.52	\$1.63	\$1.62
December	<u>\$1.71</u>	<u>\$1.85</u>	<u>\$1.79</u>
2005 Average	\$1.72	\$1.77	\$1.87

In 2005, the average daily corn price at Iowa was \$1.72 per bushel. By comparison, the average daily corn price at Omaha-Council Bluffs was \$1.77 per bushel, and the average daily

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corn price at Kansas City was \$1.87.³ As Table 4 shows, while the commodity price of corn was somewhat more expensive at both Omaha/Council Bluffs and Kansas City than it was at Iowa origins, the actual differential – \$0.05 per bushel at Omaha/Council Bluffs and \$0.15 per bushel at Kansas City – is not sufficient to offset the lower cost of rail transportation from those origins. Thus, contrary to Mr. Bilovesky's assertion, KCS-served feed mills would not have suffered economically by sourcing corn from those alternate origins.

An analysis based upon 2008 rail rates and per-bushel corn prices tells a similar story. As shown in Table 5, the current KCS rate for shipments of IC&E-origin corn to destinations in Arkansas is \$[] per car from Everly, IA and \$[] per car from Wells, MN.⁴ By comparison, KCS' current published rail rate to Arkansas destinations from Omaha/Council Bluffs is \$[] per car, while its published per car rates to Arkansas from Atchison and Topeka, KS are \$[] and \$[], respectively. The current KCS rate for shipments of IC&E-origin corn to destinations in Oklahoma is \$[] per car from Everly, IA and \$[] per car from Wells, MN. By comparison, KCS' current published rail rate to Oklahoma destinations from Omaha/Council Bluffs is \$[] per car, while its published per car rates to Oklahoma from Atchison and Topeka, KS are \$[] and \$[], respectively. The per car difference in rail rates equates to \$[] per bushel for shipments originating in both Iowa and Minnesota and moving to both Arkansas and Oklahoma.

³ I used Kansas City reported prices as a proxy for the prices at Topeka and Atchison because Kansas City is the closest location for which the USDA reported corn prices. Topeka is approximately 63 miles and Atchison is only 49 miles from Kansas City. To the extent that corn sales at Atchison or Topeka are governed by the daily price at Omaha/Council Bluffs (which tend to be lower), my analysis is conservative.

⁴ I selected Everly, IA and Wells, MN for analysis because both of those stations are high-volume origins on one of the IC&E Corn Lines.

Table 5. Comparison of 2008 Rail Rates between KCS Origins and IC&E Origins (per car and per bushel).

<u>Origin</u>	<u>Rail Rate</u>	<u>Difference Per Railcar</u>	<u>Difference Per Bushel</u>
Everly, IA - Terminating in Arkansas = \$3,179			
Atchison			
Topeka			
Omaha – Co. Bluffs			
Everly, IA - Terminating in Oklahoma = \$3,033			
Atchison			
Topeka			
Omaha – Co. Bluffs			
Wells, MN - Terminating in Arkansas = \$3,171			
Atchison			
Topeka			
Omaha – Co. Bluffs			
Wells, MN - Terminating in Oklahoma = \$3,025			
Atchison			
Topeka			
Omaha – Co. Bluffs			

Once again, if Mr. Bilovesky’s hypothesis that KCS-served feed mills would be economically disadvantaged today if they are required to buy corn from sources other than IC&E-served elevators is correct, the difference between the current per-bushel price of corn at IC&E-served points and the corresponding current price at alternate origins must be greater than the per-bushel rail rate differential of \$[] at each of these locations. However, Table 6 indicates that this is not the case.

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**Table 6. 2008 Average Corn Prices From USDA
Daily Cash Corn Reports**

<u>Month</u>	<u>Iowa</u>	<u>Omaha - Council Bluffs</u>	<u>Kansas City</u>
January	\$4.49	\$4.64	\$4.72
February	\$4.83	\$4.93	\$5.09
March	<u>\$5.10</u>	<u>\$5.20</u>	<u>\$5.32</u>
1Q Average	\$4.81	\$4.92	\$5.04

As in 2005, the difference in the per-bushel commodity price of corn between these locations during the 1st Quarter of 2008 was not large enough to cause feed lots to suffer economic harm by shifting their purchases from IC&E-served origins in Iowa/Minnesota to alternate sources served by KCS. The reported per-bushel commodity price difference between Omaha-Council Bluffs and Iowa is \$0.11, only [] than the difference between the rail rates at Omaha/Council Bluffs and IC&E stations in Iowa. The reported per-bushel commodity price at Kansas City is \$0.23 more than the current price at Iowa origins. However, this difference is \$[] between IC&E served origins in Iowa and Minnesota, on the one hand, and either Atchison or Topeka, KS, on the other hand. These data demonstrate that KCS-served feed mills would not suffer economically today by sourcing corn from those KCS-served origins.⁵

⁵ KCS witness Thad Jones states that the per-bushel commodity price of corn “is typically pegged to the price traded at the Chicago Board of Trade.” V.S. Jones at 2- 3. To the extent that Mr. Jones’ observation is correct with respect to the prices paid by KCS-served feeder lots, then the difference between the delivered price of corn originating at IC&E-served origins and the delivered price of corn purchased at alternate origins served by KCS would be a function of the difference in the rail rate from each of those origins. As my analysis shows, the rail rates from alternate origins such as Omaha/Council Bluffs, Atchison and Topeka are, in all cases, substantially lower than the rail rates from IC&E-served origins in Iowa and Minnesota.

II. THE PROPOSED TRANSACTION WILL NOT RESULT IN A REDUCTION IN COMPETITION FOR “NAFTA TRAFFIC” MOVING IN THE CHICAGO – LAREDO CORRIDOR.

KCS asks the Board to impose a condition on the proposed transaction that would make permanent a haulage agreement entered into by IC&E’s predecessor, IMRL, and KCS in 1997, under which IMRL granted KCS haulage rights between Kansas City and Chicago for certain carload traffic. KCS acknowledges that this haulage arrangement has never actually been used. (KCS Comments at 31, n. 50; V.S. Grimm at 8.) But KCS contends that this dormant Kansas City – Chicago haulage agreement “is nevertheless a competitive counterbalance to UP’s Chicago-Laredo service” (KCS Comments at 31, n. 50), and that the potential cancellation of that agreement would “adversely affect KCSR’s ability to compete with UP and CPR in NAFTA traffic flows” (*id.* at 34).

KCS’ contentions about the role of its never-used haulage rights, and the impact of the proposed transaction on “NAFTA traffic” (i.e., traffic that moves between a point in the United States or Canada, on the one hand, and a point in Mexico, on the other hand) are nonsensical. As my testimony demonstrates, traffic handled jointly by IC&E and KCS to/from Mexico is virtually non-existent. Moreover, there are a very large number of routes involving carriers other than Applicants over which NAFTA traffic can, and does, move today. Accordingly, the proposed transaction will not have an appreciable impact (either positive or negative) on NAFTA traffic flows.

A. The IC&E – KCS Route Between Chicago and Kansas City Does Not Play A Significant Role In The Movement of NAFTA Traffic.

The total volume of NAFTA traffic is very large. As Attachment JHW-16 shows, a total of [] units (consisting of [] carloads and [] intermodal units) moved by rail

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to/from Mexico in 2005. UP was the most significant participant in this traffic, with [] units, followed by BNSF with [] units and KCS/TM with [] units. (See Attachment JHW-16.)

In assessing the potential competitive role of the dormant KCS/IC&E Chicago Haulage Agreement, it is important to understand that the [] []. (See KCS Comments, Exh. E at 166-169.) Rather, KCS' rights under the Agreement are []. (Id. at 169.) Therefore, [] [] [].

Moreover, [], the IC&E/KCS route via Kansas City handles almost no NAFTA traffic. As Attachment JHW-18 indicates, only [] of southbound NAFTA traffic were handled jointly by IC&E and KCS during 2005. Those cars were delivered by CPR to IC&E at St. Paul, MN, and were interchanged by IC&E to KCS at Kansas City. (See Attachment JHW-18). Northbound, KCS and IC&E interchanged only [] cars of NAFTA traffic in 2005. See Attachment JHW-19. Thus, the IC&E/KCS route via the Kansas City gateway accounted for only [] cars – or less than two hundredths of one percent – of total NAFTA carload traffic during 2005. Moreover, the [] southbound cars interchanged by IC&E to KCS at Kansas City moved between the Twin Cities and Laredo, not in the Chicago – Laredo Corridor that is the focus of KCS' request for perpetual haulage rights. As these data show, the IC&E/KCS route between Kansas City and Chicago is simply not a material factor in the transportation of NAFTA traffic.

B. The NAFTA Market Is Served By Numerous Competitive Rail Routes That Do Not Involve Either CPR Or IC&E.

KCS asserts that the proposed transaction “will result in reduced competition in the NAFTA corridor between Chicago and Laredo.” (KCS Comments at 29.) In order to evaluate that claim, I identified all NAFTA traffic for which a routing between Chicago and Laredo might possibly be efficient. For purposes of this analysis, I assumed that all traffic in the 2005 *Carload Waybill Sample* that moved between the Northeastern states of the U.S. and the Eastern provinces of Canada, on the one hand, and Mexico, on the other hand, could potentially be routed via the Chicago gateway. The specific states and provinces included in my analysis are listed in Attachment JHW-17. The total volume of NAFTA traffic that moved between those points in 2005 was [] units, or about one third of all 2005 NAFTA traffic. (See Attachments JHW-18 and JHW-19.)

As shown in Attachment JHW-18, southbound NAFTA traffic between the Northeastern U.S./Eastern Canada and the Mexican border consisted of [] carloads and [] intermodal units. (Making the IC&E/KCS Chicago Agreement “permanent,” as KCS asks the Board to do, would do nothing to preserve or enhance rail competition for the [] []

Attachment JHW-18 groups the southbound NAFTA traffic by the carrier that handle the traffic and the gateways over which they do so. The routes identified in Attachment JHW-18 reflect the actual routing decisions made by shippers for this traffic in 2005.

As Attachment JHW-18 indicates, the southbound NAFTA traffic that could have moved via a Chicago-Laredo route actually moved over a total of 32 different single line and interline rail routes. Only five of those routes involved CPR, DME or both. Thus, in 2005, customers

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routed southbound NAFTA traffic via 27 different single line or interline rail routes that were independent of Applicants. Eleven of those routes handled more units (carload and/or intermodal) than the IC&E/KCS route via Kansas City (which handled only [] cars). *Id.*

Moreover, the data demonstrate that neither CPR nor DME is a significant competitor for southbound NAFTA traffic. In 2005, CPR participated in only [] carloads and [] intermodal units of southbound NAFTA traffic that could have been routed via Chicago. (See Attachment JHW-18, Lines 4, 13, 14, 28, 29.) Of that traffic, [] carloads were the cars that CPR interchanged with IC&E at St. Paul, MN for furtherance to KCS at Kansas City. (See Attachment JHW-18, Line 13.) IC&E participated in only [] carloads of southbound NAFTA traffic in addition to the [] cars it handled in conjunction with CPR and KCS. Thus, Applicants' combined share was only [] units -- or less than 1 percent -- of the [] southbound units of NAFTA traffic that could have moved via a Chicago-Laredo routing. With participation in only [] cars of southbound NAFTA traffic that could have moved via a Chicago-Laredo routing, it is likewise clear that KCS is only a bit player on the NAFTA stage.

Analysis of northbound NAFTA traffic that could have moved via a Chicago-Laredo routing leads to the same conclusion. As shown in Attachment JHW-19, northbound NAFTA traffic between the Mexican border and the Northeastern U.S./Eastern Canada consisted of [] carloads and [] intermodal units. (Again, making the IC&E/KCS Chicago Agreement "permanent" would do nothing to preserve or enhance rail competition for those [] units.) Attachment JHW-19 groups the northbound NAFTA traffic by the carrier that handled the traffic and the gateways over which they do so.

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As Attachment JHW-19 indicates, the southbound NAFTA traffic that could have moved via a Chicago-Laredo route also moved over a total of 32 different single line and interline rail routes. Only two of those routes involved CPR, DME or both. Thus, in 2005, customers routed northbound NAFTA traffic via 30 different single line or interline rail routes that were independent of Applicants. Fifteen of those independent routes handled more units (carload and/or intermodal) than the IC&E/KCS route via Kansas City. *Id.*

Again, the data demonstrate that neither CPR nor DME is a significant competitor for northbound NAFTA traffic. In 2005, CPR participated in only [] carloads and [] intermodal units of northbound NAFTA traffic that could have been routed via Chicago. (*See* Attachment JHW-19, Line 29.) IC&E participated in only [] carloads of northbound NAFTA traffic, which it handled in conjunction KCS. (*See* Attachment JHW-19, Line 22.) Thus, Applicants' combined share was only [] units – again, less than 1 percent of the [] northbound units of NAFTA traffic that could have moved via a Chicago-Laredo routing. As the data in Attachments JHW-18 and JHW-19 show, the proposed transaction clearly will not have any material effect on southbound NAFTA traffic.

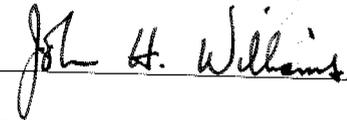
Moreover, the *Carload Waybill Sample* data undermine KCS' claim that CPR and UP are parties to a "strategic alliance" that creates incentives for them to prefer each other to the exclusion of other connecting carriers. Attachment JHW-18 indicates that UP interchanged with CN a total of [] units of southbound NAFTA traffic that could have moved via a Chicago-Laredo routing, while UP handled only [] such southbound units with CPR. Likewise, Attachment JHW-19 shows that UP interchanged with CN a total of [] units of northbound NAFTA traffic that could have moved via a Chicago-Laredo routing, while handling [] such northbound units with CPR. In total, UP worked with CN rather than CPR for [] units of

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NAFTA traffic that could have moved via the Chicago gateway – nearly ten times the volume of such NAFTA traffic as it handled in conjunction with CPR. (See Attachments JHW-18 and JHW-19.) These data refute any suggestion that CPR and UP have committed to work exclusively with each other to handle NAFTA traffic that might move between Chicago and Laredo.

VERIFICATION

I, John H. Williams, verify under penalty of perjury that the foregoing statement is true and correct. Further, I certify that I am qualified and authorized to file this statement.



John H. Williams

Executed on April 18, 2008.

Attachment JHW-1

REDACTED

Attachment JHW-2

REDACTED

Attachment JHW-3

REDACTED

Attachment JHW-4

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Attachment JHW-5

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Attachment JHW-6

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Attachment JHW-7

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Attachment JHW-8

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Attachment JHW-9

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Attachment JHW-10

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Attachment JHW-11

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Attachment JHW-12

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Attachment JHW-13

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Attachment JHW-14

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Attachment JHW-15

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Attachment JHW-16

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Attachment JHW-17

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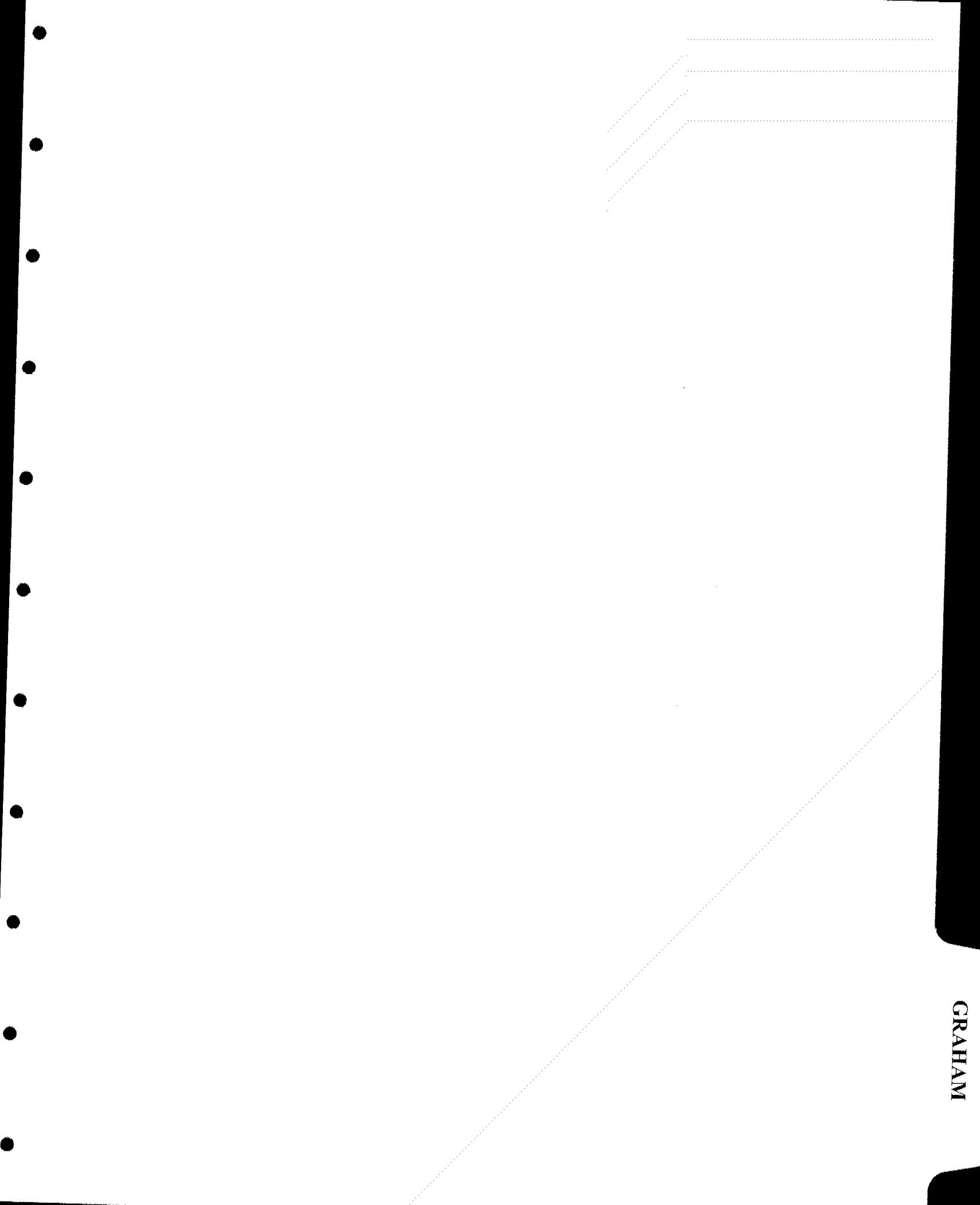
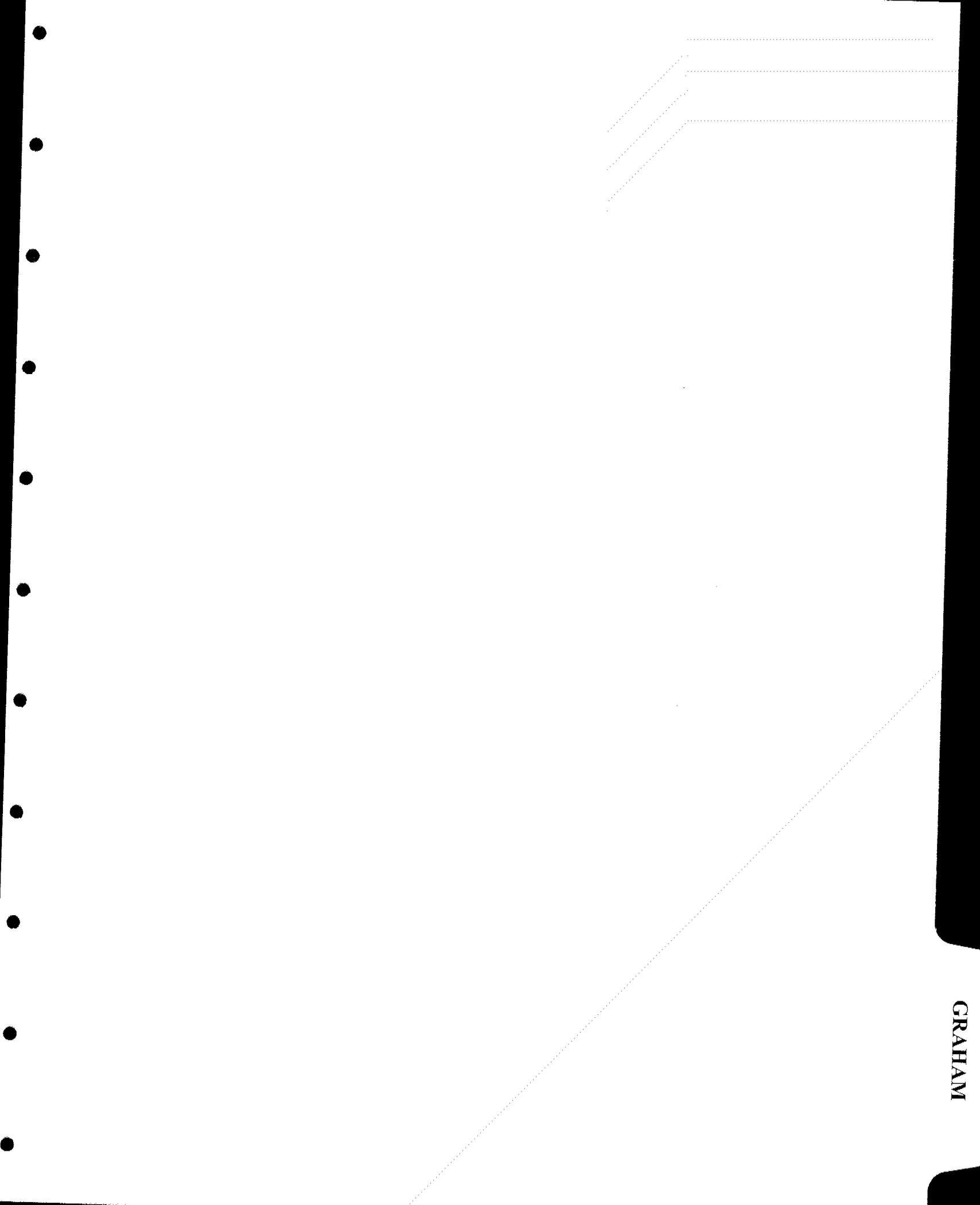
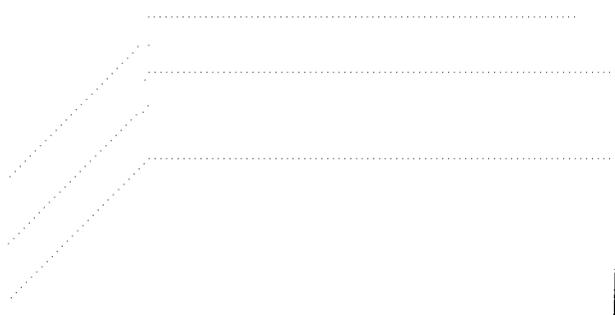
Attachment JHW-18

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Attachment JHW-19

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BEFORE THE
SURFACE TRANSPORTATION BOARD

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

REPLY VERIFIED STATEMENT OF VERN GRAHAM

My name is Vern Graham. I am Vice President-Engineering for Canadian Pacific Railway Company (“CPR”). My business address is Gulf Canada Square, 401 9th Avenue, S.W., Calgary, Alberta, T2P 4Z4, Canada. I previously submitted a verified statement in support of the Application of Canadian Pacific Railway Company et al for Approval of Control of Dakota, Minnesota and Eastern Railroad Corporation et al, STB Finance Docket No. 35081 (Oct. 5, 2007) (the “Application”)

I submit this Reply Verified Statement in response to the comments of certain interested parties concerning the Application, and in further support of that Application.

I. DME SAFETY RECORD

Applicants discussed DME’s safety improvement, and their plan to bring DME’s safety performance up to a level commensurate with the performance of CPR and other Class I railroads, in their Safety Integration Plan (“SIP”). Applicants submitted a copy of that plan to the Board, and made it available for public review. In response to public comments on the SIP, I would like to note a few items. First, on February 15, 2008, the FRA terminated DME’s Safety Compliance Agreement (“SCA”), finding that DME’s strong progress in complying with the requirements of the agreement warranted terminating the SCA eight months ahead of schedule. See Appendix J (FRA Termination of Safety Compliance Agreement). Second, the Mayo Clinic misinterpreted statements in Applicants’ SIP regarding their plan to continue operating the DME

system in a manner similar to that followed today. *Compare* Mayo Clinic Comments at 13 with SIP at 32 (quotation was taken out of context and omitted immediately following sentence stating “The focus will be on local execution in the field with centralized planning that will ensure the success of the overall Integrated Operating Plan and the Safety Plan.”) What Applicants were describing was continuing to use the integrated operating plan (train schedules, logistics, etc.) followed by DME, not continuation of its current operating practices or infrastructure and equipment inspection, maintenance, and repair. As Applicants explained in the SIP, they plan a thorough, top-to-bottom revision and strengthening of DME’s safety culture and practices, and will work hard to make safety an integral part of everything DME does and to bring DME’s safety practices and performance up to CPR’s levels. *See generally* Applicants Safety Integration Plan Submitted to Federal Railroad Administration.

CPR’s safety improvements over the course of a decade were achieved in every division and department of the railroad, and have been the result of a concerted effort by every employee throughout the company. It is not correct to suggest (as the Mayo Clinic does) that CPR’s overall safety performance improvement was due primarily to its sale of the Corn Lines in 1997. Nor is it true that the Soo’s safety improvement is primarily attributable to sale of the Corn Lines. For example, in the last full year prior to sale of the Corn Lines (1996), Soo had 92 reportable accidents, a figure that does not include the 15 reportable accidents on the Corn Lines. The following year (1997), reportable accidents on Soo declined to 47, and in 1998, that number dropped to 41. Thus, without accounting for the Corn Lines’ 15 accidents, Soo’s reportable accidents declined by 55 % (from 92 to 41) from 1996 to 1998. Soo achieved that safety improvement through its safety programs and investments in infrastructure, not through the sale of the Corn Lines.

The FRA is the agency primarily responsible for regulation and oversight of rail carrier safety in the United States. Applicants are strongly committed to compliance with all FRA safety rules and requirements (including track speeds and inspections, track maintenance and repairs, and regulations and requirements covering many other infrastructure, signal, and mechanical safety matters), and to continuing to work with FRA with respect to any safety concerns that agency may have, now or in the future. The FRA has detailed and systematic processes for evaluating safety issues and developing consistent safety rules and decisions. Applicants believe that any requests for specific additional safety measures above and beyond those required by the FRA should be evaluated by the FRA using its rail safety expertise and experience, and not imposed by the STB as conditions upon CPR's acquisition of DME.

II. MAYO CLINIC COMMENTS

The Mayo Clinic ("Mayo") expresses concern about the safety of trains carrying hazardous materials on the DM&E line that passes through Rochester, Minnesota. CPR is aware of Mayo's concerns, and it has engaged in discussions with Mayo aimed at addressing those concerns. These discussions, including meetings between high-level officers of CPR and Mayo, and meetings with concerned public officials, have been cooperative and promising. CPR looks forward to continuing to work with Mayo and relevant government agencies, to seek reasonable, mutually acceptable resolutions of their concerns.

While any train accident is one too many, I note there have been few significant train accidents on the DM&E in the Rochester area over the last several years. From January 2004 through February 2008, there were a total of two reportable grade crossing accidents and one minor derailment in the Rochester area. In each of the two grade crossing accidents, the "highway user" (driver of vehicle that collided with a train) was found to have been at fault.

Neither accident resulted in injury to any person. The derailment was the result of soft track bed on a spur line serving local industries (primarily spotting vegetables, lumber, and scrap for customers) in the Rochester area. Hazardous materials are not moved on that line. Two cars derailed upright and there was no spilling of their lading. The train was moving at approximately 5 MPH when the two cars derailed, resulting in approximately \$8000 in total damage to track and equipment. Today, that industry spur is in significantly better condition due to repairs and improvements conducted by DM&E, including replacement of ties on the line.

Mayo's statements regarding the danger imposed by shipments of hazardous materials over DM&E's line through Rochester are misplaced. []

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The market for ethanol transportation is dynamic and evolving. As new ethanol plants come on line and other projects are abandoned, and demand for ethanol develops and shifts in various geographic regions, it is difficult to project with precision either the volume of ethanol that will be transported by rail, or the destinations to which it will be transported. As Witness Anderson discusses, even during the period since CPR and DME filed their Application in

September 2007, the ethanol market has continued to evolve, and Applicants' projections of potential ethanol traffic volumes, and the destinations to which that traffic may move, have changed. []

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I understand that the projections (based on the analysis of DM&E Senior Vice-President, Marketing Lynn Anderson) described above likely represent the greatest volume of ethanol that might move over the DM&E to Chicago, absent construction and operation of additional new ethanol plants beyond those presently scheduled to open in 2008 – 2010. Those projections represent a rough ceiling on the volume of ethanol that may move over that route because of liberal or optimistic assumptions about several variables, including that all existing and new ethanol plants will operate at capacity; the proportion of that production that will move east (rather than west); unloading capacity at eastern terminals; truck competition; and adequate tank car supply and availability to accommodate increased ethanol production volumes. []

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On the current DME system and under its existing operating plan, []

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[] Whether, when, and how much ethanol traffic will be re-routed in this manner will

depend on a variety of factors, including but not limited to those described above and operating plans, operating efficiency, track conditions, and commercial and market considerations.

Applicants will not move additional volumes of ethanol or other hazardous materials over the DM&E line between Owatonna and Minnesota City unless and until they are confident that track conditions are adequate to ensure safe movement of those cars along that route. In order to ensure that DM&E track from Owatonna through Rochester, Minnesota is capable of safely handling hazardous material traffic, Applicants have included in their capital plans for 2008 to 2010 (DME's existing capital plan for 2008 and CPR's plan for 2009-10) funds to rehabilitate and upgrade the line from Owatonna through Rochester to FRA Class 3 track. []

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Applicants do not intend, for the foreseeable future, to route over the DM&E lines any ethanol traffic originating on the IC&E “Corn Lines” and moving to Chicago. Therefore, barring something unforeseen, even substantial additional growth in ethanol traffic over IC&E to Chicago should not result in any significant additional ethanol traffic moving from Owatonna to Minnesota City over the DM&E for the foreseeable future.

CPR has 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. *See* Application at 13; Operating Plan at 36-37; SIP at 89-90. As I explained in my initial Verified Statement, this capital investment will make significant improvements to DME infrastructure, which in turn will improve the efficiency of DME operations and the safety of the DME system, all in a relatively short period of time. For example, the 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. *See* Operating Plan at 36-37; SIP at 89-90.

Mayo attempts to diminish CPR’s planned capital investment by comparing it to the investment DME estimated (in the *PRB Line Construction* proceeding) would be required to rebuild the entire DM&E main line for PRB coal operations. The capital investments DME projected would be needed to upgrade its line from Wasta, SD to Winona, MN for heavy coal operations cannot be compared with the investment Applicants plan to make to improve and rehabilitate the lines of DM&E and IC&E over the next several years. The DME projection represented the cost of rebuilding approximately 600 miles of railroad line to allow it to be used as a heavy coal-hauling rail line. The infrastructure demands and requirements for such coal lines

are much greater than those for lines used primarily to haul corn, merchandise, ethanol, and similar commodities. Unlike the wholesale reconstruction investments that would be necessary to prepare DM&E lines to handle heavy volume coal unit train shipments, the capital investments Applicants plan to make over the next several years will be targeted to provide rail facilities that can handle Applicants non-PRB traffic safely and efficiently. Specifically, Applicants' capital projects will focus on upgrading specific portions of the DM&E system, in order to improve the safety, efficiency, and performance of the DME in moving its existing traffic mix and projected growth in volume of that traffic over the next few years. If Applicants were to decide to build the PRB line in the future, they would need to make substantial additional capital investments, over and above those they plan to make during the next few years, to upgrade the line from Wasta to Minnesota City to coal hauling standards.

Applicants are strongly committed to complying with all applicable safety rules and standards promulgated by the FRA, the agency primarily charged with regulating and overseeing rail safety in the United States. In addition, CPR has agreed to the terms of Circular No. OT-55-I of the Association of American Railroads ("OT-55"), which specifies operating practices and standards for the movement of hazardous materials. Applicants will follow the requirements of OT-55 in operating over any track segment for which volume of hazardous materials exceeds the threshold triggering those requirements. I understand that the requirements of OT-55 are triggered when a line segment carries 10,000 car loads or more of hazardous materials per year, or 4,000 or more annual carloads of TIH commodities. []

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Mayo requests that the Board intervene in the grade crossing evaluation and regulation process conducted by other federal and state agencies to require Applicants to take certain specific measures concerning grade crossings. *See* Mayo Comments at 21. If Applicants decide to build the PRB line, they will comply with the grade crossing separation requirements imposed by the STB's final decision in the *PRB Construction* proceeding. Before Applicants make a decision regarding the PRB line, they are willing to work with the City of Rochester, FRA, FHWA, Minnesota DOT, and other interested government agencies to address grade crossing issues, and other concerns.

Rules and requirements related to grade crossing safety, applicable safety devices and measures, and their funding are governed by an extensive, cooperative process involving several government agencies, including FRA, FHWA, State departments of transportation, and local communities. Applicants will cooperate with agencies that wish to consider additional grade crossing safety measures, in Rochester or elsewhere. With respect to development of measures that would allow the reduction or elimination of train horn and whistle noises, or other "quiet zone" designations, my understanding is that the process for establishing such zones must be initiated by a local community or government entity requesting such a designation from the FRA. If such a process is initiated, Applicants will participate if requested, and provide any reasonable assistance requested by FRA and other government agencies to allow them to evaluate whether a quiet zone(s) should be established.

The Mayo Clinic's proposal that Applicants provide Rochester officials with "pre-notification of the transportation of hazardous materials through Rochester" is impractical, contrary to CPR's policy concerning the distribution of sensitive security information, and inconsistent with security regulations and guidance promulgated by the Transportation Security Administration ("TSA"). CPR provides communities, upon appropriate request, notice of the top 25 hazardous commodities that may be transported through their area. If the City of Rochester advises Applicants that it believes the information it already has in its possession is not sufficient to identify such commodities [] [] Applicants will provide further information identifying those commodities. DME has conducted training sessions for hazardous materials emergency responders in the Rochester area and it has advised CPR that DME believes at least some emergency response personnel from Rochester participated in that training. CPR frequently conducts hazmat emergency response training and tabletop simulation exercises for emergency responders and local government officials in cities and towns it serves. Applicants are willing to conduct emergency response trainings for Rochester emergency responders if Rochester requests such training. In addition, Applicants have procedures and resources in place to assist Rochester officials and emergency responders and provide them with current, accurate information in the event of an incident involving rail cars carrying hazardous materials.

Given the availability of training, notice of the types of hazardous materials that may travel through Rochester, and the ready availability of assistance from Applicants should a hazmat incident occur, pre-notification of each rail movement of hazardous materials through the Rochester area would not significantly improve the ability of Rochester officials to respond to a hazardous materials incident. Any marginal safety preparedness improvement that might result

from prior notification would be outweighed by the difficulty of providing such notice and the security risks posed by dissemination of sensitive information regarding the location and route of movement of hazardous materials. Thousands of carloads of hazardous materials move by rail through and between various jurisdictions in the United States. Most of those carloads do not follow a strict, predetermined schedule. The large quantity, transitory nature and unpredictable timing of movements of hazardous materials makes a pre-notification system of the sort proposed by Mayo unworkable and extremely difficult and costly to implement, both for rail carriers and for local officials and emergency responders.

For security reasons, it is CPR's policy not to provide information regarding the location, route, schedule or other operational parameters of its movement of hazardous materials to anyone other than U.S. federal government agencies (including TSA and FRA). Even then, CPR provides that information only upon written request, and only to federal agency personnel having both the necessary security clearance and a need to know. []

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Finally, the proposed pre-notification of specific movements of hazardous materials would significantly increase the accessibility of information regarding the location of hazardous materials, and thereby increase the vulnerability of those materials to terrorist or criminal attack. This very real security risk is the reason that the TSA has issued guidance and "voluntary action items" narrowly limiting the distribution of such "sensitive security information" to government personnel having security clearance and a need to know that information for security reasons. I understand that TSA has proposed regulations to mandate the limitations currently set forth in its

guidelines and voluntary action items, and that final regulations are projected to be issued by the end of 2008.

Mayo has also proposed that the Board impose specific speed limits on trains carrying both hazardous and non-hazardous materials through Rochester. As I previously stated, Applicants' operations will fully comply with FRA rules and requirements, including the operational capabilities of track and facilities. Upon completion of the track work in the Rochester area scheduled for 2009, the track through Rochester will be FRA Class 3 track. Applicants' current plan is initially to continue to operate over that segment using the present DM&F timetable speeds of 30 MPH, even though the FRA specifies that Class 3 track is designed for 40 MPH operations. Applicants may adjust train speeds on the Waseca Subdivision, in compliance with applicable government regulations and requirements, at some point in the future. Mayo's proposal to reduce train speeds to 20 MPH for non-hazardous materials traffic, and to 10 MPH for hazmats is both inconsistent with FRA regulations and entirely unnecessary. FRA is currently conducting a rulemaking in which it is considering speed limits on trains carrying TIIH commodities. The limit that FRA is considering for such trains is 30 MPH (far higher than Mayo's proposed limit of 10 MPH). I understand a final rule will likely be issued sometime in 2008. The much lower speed limits Mayo proposes will be particularly unnecessary because the track segment through Rochester will be newly rehabilitated to Class 3 standards.

III. METRA COMMENTS

CPR and Metra have a strong, cooperative, and productive relationship, working together on the two lines they share. To my knowledge, Metra has never raised a significant complaint with CPR about its dispatching of the Milwaukee District North Line ("West Line") or the

Milwaukee District West Line (“West Line”). On those infrequent occasions when difficulties or disputes have arisen concerning the operation of those lines, CPR and Metra have worked together to resolve such matters promptly and to the satisfaction of both parties. I understand that, on numerous occasions, Metra has complimented CPR on its proactive and cooperative approach to the parties’ relationship.

One example of CPR’s cooperative, pro-active approach to its working relationship with Metra and efforts to address any issues or potential issues promptly and directly is the daily conference call between CPR dispatch and operations personnel and Metra operations personnel. At CPR’s suggestion, the parties established a daily conference call at 7:30 A.M. each morning to address any operational issues and concerns that Metra may have regarding the North and West Lines. Metra, including its Chief Operating Officers, have complimented CPR for establishing this daily conference and have advised CPR that they find it an excellent means to minimize problems and to address any problems that do arise promptly. CPR is the only freight carrier that has established such a daily consultation with Metra. According to Metra, it has asked other freight carriers (including its “contract carriers”) to follow CPR’s example and participate in a similar process with Metra, and the other carriers have consistently declined.

CPR’s current Integrated Operating Plan for the Chicago area is designed to facilitate Metra and Amtrak passenger service and to avoid interference with that service. For example, CPR’s train schedules for the North and West Lines are designed around the Metra’s peak periods. As a result, CPR freight trains rarely run on Metra lines during those periods. CPR’s dispatch center works diligently to ensure that it adheres to the dispatch priorities established in the agreements between CPR and Metra, including those giving Metra trains priority during peak periods. One indicator of the success of CPR’s dispatch operation in the Chicago region is that

Amtrak's Hiawatha service, which moves between Chicago and Milwaukee over the North Line, had Amtrak's *number one* on-time service performance in the entire nation in 2007.

Metra's comments suggest that its on-time performance on lines dispatched by CPR is significantly worse than its on-time performance on other lines. As discussed below, however, Metra's own data and reports show this is not correct. Metra's comments also seem to suggest that CPR's dispatching of the North and West Lines is the cause of lower on-time service on those lines. As explained below, however, Metra's own reports show that its service and on-time performance is not negatively affected by CPR dispatching of the North and West Lines. Metra has consistently told CPR in our biannual service meetings that its goal is 95% on-time performance, and that Metra is very satisfied when it attains 95% on-time performance on a line or subdivision. Metra trains operated on the North and West Lines generally achieve that goal, although they occasionally slip below that level. In CPR's experience, the primary causes of Metra train delays on the North and West Lines have nothing to do with CPR dispatching or its operations over those lines. Instead, the main causes of delays include weather conditions; passenger loading and unloading delays; and track, signaling, crossing protection, or equipment malfunctions, none of which are CPR's responsibility (as both the North and West Lines are owned and maintained by Metra). Based on CPR's discussions with Metra, and its review of Metra's on-time reports and analyses, it appears that CPR activity (including dispatch errors) generally accounts for delays on less than one percent of all trains on the two lines.

In response to Metra's comments in this proceeding, CPR reviewed and analyzed the monthly "On-Time Performance Reports" issued by Metra's Chief Transportation Officer for 2007 and 2008. During that period, CPR-dispatched lines consistently had better on-time performance than lines dispatched by Metra. Moreover, Metra's reports attributed most of the

reported delays on CPR-dispatched lines to factors not caused by, or within the control of, CPR, such as weather-related problems, track problems, and equipment malfunctions.

More specifically, CPR analyzed Metra's reports for the three most recent months we were able to locate, December 2007, January 2008, and March 2008 (we do not have a copy of the February 2008 report). As any observer of Chicago weather could confirm, the weather in Chicago this winter has been particularly brutal and inhospitable to on-time rail performance. If the weather in any recent period would be likely to cause train delays, it would be December 2007 through March 2008. The following table summarizes the results of CPR's analysis of Metra's own service reports.

Line	On-time Performance (percent)	On-time Performance of Metra-Dispatched Lines (percent)	No. of Metra Trains	No. of Delays Metra Attributed to CPR	Percentage of Metra Trains Reported Delayed by CPR
March 2008					
North Line	96.3	96.7	1451	8	.5%
West Line	97.1	96.7	1426	3	.2%
January 2008					
North Line	96.0	94.5	1490	7	.4%
West Line	94.3	94.5	1461	1	.1%
December 2007					
North Line	87.3	94.4	1411	9	.6%
West Line	93.3	94.4	1388	6	.4%

As the foregoing table illustrates, in January 2008 Metra reported that the North Line had 96.0% on-time performance, 1.5% better than the on-time performance of lines dispatched by Metra, which had on-time performance of 94.5%. Metra reported that, during January 2008, only 13 of 1490 Metra trains operating over the North Line were delayed due to freight train interference. Of those 13 delays, six were caused by manual interlocking (controlled by CN) at the intersection of Metra's line with a line operated by CN/WC at Grays Lake, Illinois. Therefore, Metra's January 2008 on-time report indicates that, of 1490 trains run on the North

Line, only seven were caused by CPR (according to Metra). While CPR does not necessarily agree that those seven delays were attributable to it, even assuming that Metra's report is accurate, it attributes delays to CPR on less than one-half of one percent (.4%) of Metra's trains.

On the CPR-dispatched West Line, Metra reported that service was on-time 94.3% of the time in January 2008, or slightly less than the trains dispatched by Metra, which had a 94.5% on-time percentage in January. The West Line's on-time performance compared favorably with lines operated for Metra by other private carriers (primarily UP and BNSF), which had 92.4% on-time performance that month. Most of the delays on the West Line during this period were caused by weather or factors that are the responsibility of Metra, including equipment malfunctions, track conditions, right-of-way accidents, and other Metra trains backing up traffic on the line. Of the 1461 trains operated on the West Line in January 2008, Metra reported that two were caused by freight train interference. One of those delays was caused by an EJ&E train at Spaulding, Illinois, leaving only one delay of Metra's 1461 trains (less than one-tenth of one percent) that Metra attributed to CPR.

The on-time data reported by Metra for March 2008 were similar. The North Line had 96.3% on-time performance, virtually the same as the average on Metra-dispatched tracks of 96.7%. Metra attributed delays on eight out of 1451 trains moving on the North Line, or one-half of one percent, to CPR. West Line Metra trains enjoyed 97.1% on-time performance in March 2008, again virtually the same as 96.7% on-time performance on Metra-dispatched tracks. Metra attributed delays to CPR "freight interference" on only three of 1426 Metra trains (two-tenths of one percent) on the West Line in March 2008.

Results reported by Metra in December 2007 were similar. Although the overall on-time performance on both the North and West Lines declined somewhat due to problems with signal applications, control appliances, weather, and other issues beyond CPR's control, the proportion of delays that Metra attributed to CPR was consistent with the first quarter of 2008. For example, Metra operated 1411 trains over the North Line in December, and attributed 21 delays to freight interference. Twelve of those delays were attributed to manual interlocking (operated by CN) at Grays Lake to accommodate CN trains. Metra attributed the remaining nine (or .6% of total passenger trains running over the North Line) to CPR. On the West Line, Metra thus attributed six delays to CPR out of 1388 Metra trains operated over the West Line (or .4 % of all Metra trains on the line) in December 2007.

To confirm the accuracy of Metra's reports, CPR also analyzed the daily delay reports that it prepares and submits to Metra (and which CPR and Metra discuss on their daily call), for the same three-month period. Although CPR generally attributed slightly fewer Metra delays to CPR "freight train interference," the overall proportion of Metra trains that were delayed by CPR train interference was approximately the same as that summarized in Metra's reports. Analysis of the CPR-generated reports also shows that delays due to "dispatcher error" were extremely low, accounting for zero train delays on the West Line and 10 train delays on the North Line in December 2007, zero delays on the West Line and only one train delay on the North Line in January 2008, and two train delays on the West Line and zero train delays on the North Line in March 2008. Over the three month study period, CPR's daily reports show a total of 2 Metra trains delayed out of a total of 4275 (or approximately .05 percent) on the West Line. The same analysis shows a total of 11 Metra trains delayed on the North Line, out of a total of 4352 (or .2 percent) over those three months. Thus, according to CPR records, CPR dispatching on the

North and West Lines is responsible for delaying only a miniscule fraction -- consistently far less than one percent -- of all Metra trains running over those lines.

The various agreements and amendments between Metra and CPR concerning the use of the North and West Lines authorize Metra to conduct audits of CPR's performance and joint facilities expenses. Metra has occasionally exercised those rights, most recently in 2005 for services and activity in 2004. None of the audits conducted by Metra has made any findings or comments about CPR dispatching as a cause of Metra delays or service problems. Nor has any audit found that CPR failed to honor dispatch priorities and obligations under the agreements between CPR and Metra. In addition, the parties' agreements give Metra the right to examine CPR's books and dispatching records at any reasonable time. Metra has never exercised that right in the more than two decades that CPR and Metra have operated jointly over the North and West Lines. The agreements also provide that Metra may request from CPR any information that it believes is necessary to enforce its rights under the parties' agreement. Although Metra has rarely sought such information, it recently did so with respect to a WSOR train that erroneously moved over the North Line without Metra's permission. *See* J. Bauer (Metra) Letter to J. Bender (CPR) (Feb. 6, 2008), copy at Appendix K. This incident further illustrates that Metra's purported concern, that it is unable to detect unauthorized traffic moving over its lines unless it dispatches those lines, is unfounded.

CPR is not aware of any significant delays of Metra trains or other significant consistent interference with Metra traffic caused by IC&E's operation of trains over the West Line. The agreements entered by CPR, IC&E, and Metra in 2003 set limits on the number of trains that IC&E may run over the West Line. CPR, as dispatcher, monitors those limits. Metra has never advised either CPR or IC&E that Metra believes CPR has failed to effectively monitor IC&E's

compliance with those limits, or that either IC&E or CPR had failed to honor its obligations under those agreements. If the Application is approved, CPR will continue to honor its obligations under applicable agreements with Metra, including its dispatch and priority commitments.

Applicants' Operating Plan contemplates a small net reduction of daily DMÉ trains traveling over the West Line following approval of the Application. CPR does not presently plan to schedule movement of any Soo trains over the West Line in the normal course of operations. Any occasional movement of a Soo train over the West Line that might occur would be a "detour train," routed over the West Line as a temporary short-term alternative because of maintenance or other issues on its normal route. If Applicants were to, at some future time, move more trains over the West Line than the eight trains per day provided for under their existing agreements with Metra, they would comply with the provisions and requirements of those agreements.

For more than a century, North American railroads have relied upon each other for honest and accurate reporting to implement hundreds (if not thousands) of dispatch, trackage rights and joint facility agreements. Most of those agreements have provisions allowing the non-reporting party to review and audit the records of the reporting party, like the provisions in the agreements between Applicants and Metra. This "trust but verify" approach is the way such business is routinely conducted throughout the industry, and is how CPR and Metra have conducted their successful relationship for more than 20 years. Metra has articulated no basis for legitimate concern that, Applicants would suddenly begin to ignore their contractual obligations, or that they would unreasonably refuse to provide information necessary for Metra to verify that Applicants have complied with the terms of their agreements.

IV. IOWA DOT COMMENTS

Applicants have entered into an agreement with the Southern Minnesota and Northern Iowa Grain Shippers Association, pursuant to which Applicants have committed to upgrade the Corn Lines to allow movement of trains at 25 miles per hour, so long as the volumes shipped on that line will economically support that investment. This commitment eliminates any need for the first of two conditions requested by the Iowa Department of Transportation.

V. WI DOT COMMENTS

I understand that the Wisconsin Department of Transportation has asked about the effect of a CPR-CN routing arrangement on rail traffic through Wisconsin. On November 1, 2007, CPR and CN announced a new routing protocol designed to expedite the movement and exchange of interline traffic through certain gateways (the "Joint Routing Protocol" or "JRP"). This Joint Routing Protocol is designed to provide customers with more efficient routes for their traffic, regardless of line ownership. CPR anticipates that the JRP will not have any appreciable effect on rail traffic flows through the State of Wisconsin. Nor will the proposed transaction have any effect on the movement of traffic under the JRP, because the JRP does not apply to movements to or from points on the DME system (e.g., IC&E lines through Wisconsin).

I understand that WI DOT has also requested some information regarding the IC&E line between Janesville, Wisconsin and Davis Junction, Illinois (the "Janesville line"). *See* WI DOT Comments at 2. []

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In the short term, Applicants do not plan any upgrades to the Janesville line . Currently, the line does not have the capacity to handle rail cars loaded to 286,000 pounds. The volume and type of traffic moving over the line are not sufficient to warrant the investment that would be necessary to upgrade the line to 286,000 pound capacity. If changes in traffic volumes or market conditions, or other circumstances warrant it at any time in the future, however, Applicants would be willing to consider reasonable improvements or upgrades commensurate with such changes.

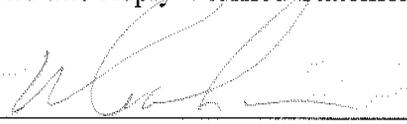
VI. CITY OF OWATONNA COMMENTS

The City of Owatonna, Minnesota neither supported nor opposed the proposed transaction. Owatonna did express concern that Applicants were not able to advise it whether they intended to make capital investments to upgrade track in the Owatonna area. *See* Owatonna Comments at 6-7. Based on further review and evaluation, Applicants have now determined that, in 2008 and 2009, they will make capital investments necessary to upgrade the track between in and around Owatonna to FRA Class 3 standards. As a result of this and other investments, the DM&E track from Owatonna through Rochester will all be Class 3 track by the end of 2009. This addresses the concern expressed by the City of Owatonna. *See id.* at 6, n. 4 (suggesting that Applicants consider upgrading Owatonna area track to class 3 standards).

VERIFICATION

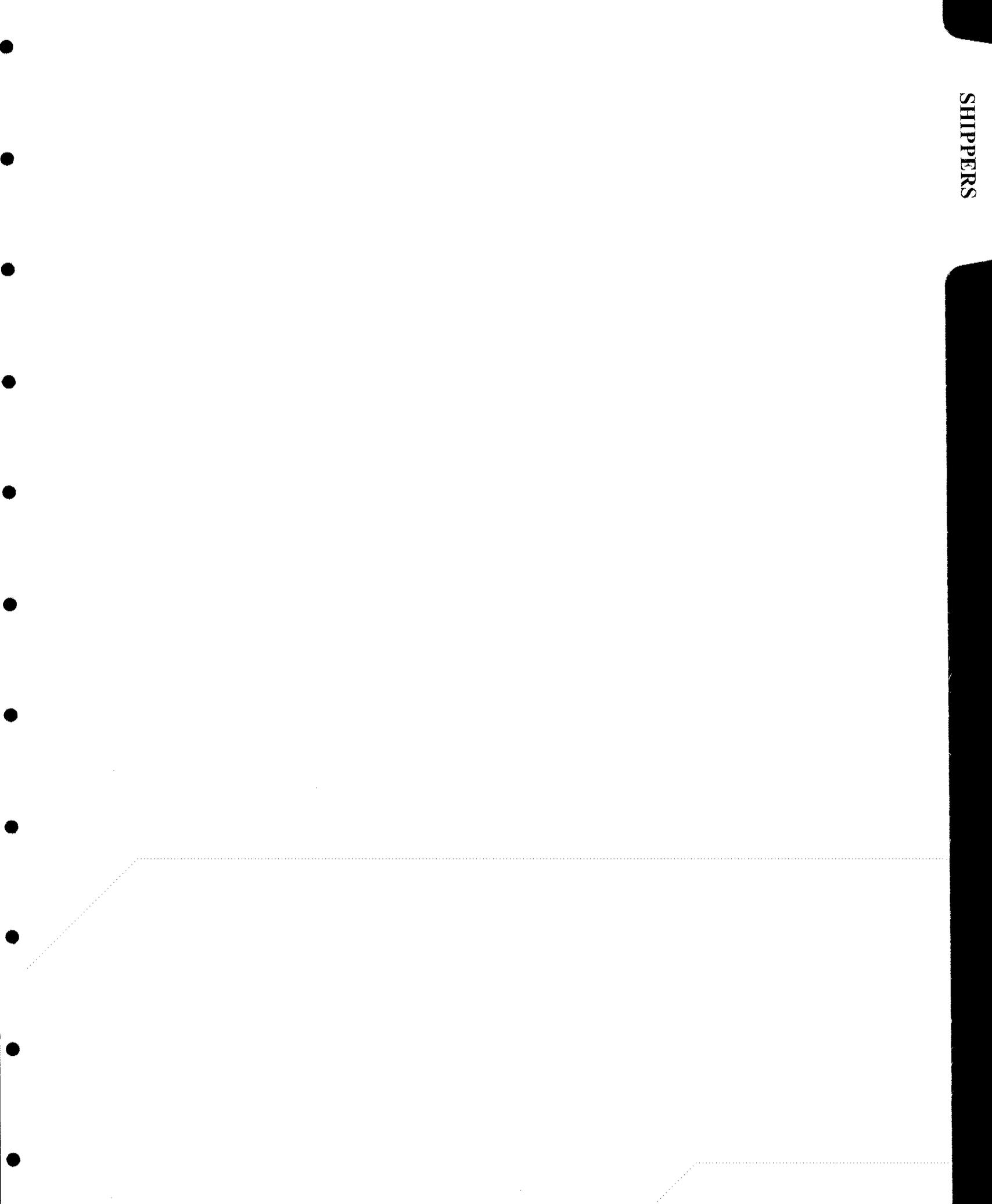
I, Vern Graham, declare under penalty of perjury that the foregoing is true and correct.

Further, I certify that I am qualified and authorized to file this Reply Verified Statement.



VERN GRAHAM

Executed on 4/16, 2008.



**Verified Statement of Richard Jones
on behalf of
Bentonite Performance Minerals, LLC**

My name is Richard Jones, and I am Traffic Manager for Bentonite Performance Minerals, LLC ("BPM"). BPM submits this Verified Statement in support of Canadian Pacific Railway Company's ("Canadian Pacific") proposed acquisition of the Dakota, Minnesota & Eastern Railroad Corporation ("DM&E"). BPM supports this transaction because we believe that the consolidation of Canadian Pacific and the DM&E both will improve competition by allowing better rates on single-line traffic and will allow the continuation of needed investment in track and equipment.

BPM mines, processes, and markets bentonite clay. BPM markets its products to the foundry, well drilling, iron ore palletizing and pet litter industries. BPM operates several bentonite processing plants, including one at Bentonite (Colony), Wyoming located on the lines of the DM&E. BPM depends on the DM&E's rail service to transport its products to customers. In 2006 over three-quarters of BPM's total production at the Colony plant was shipped on the DM&E outbound to customers; these shipments amounted to approximately 426,000 tons. These rail shipments were destined both for BPM's customers throughout the country (including the Midwest, Texas, Oklahoma, Louisiana, and the northeastern United States) and for export to Canada and to Asia through the Pacific Northwest, and Europe through the Great Lakes. Reliable and affordable rail service is therefore critical to BPM's ability to market its products to its customers.

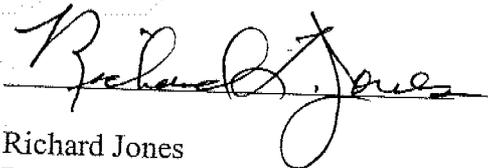
BPM supports the transaction because the transaction will improve BPM's ability to compete in the global marketplace, in at least two ways. First, the end-to-end consolidation of Canadian Pacific and the DM&E will allow BPM to reach its customers through single-line shipments. As mentioned above, we are already shipping to customers in Canada and the northeastern United States. The proposed transaction would allow us to ship directly to those customers over more efficient and cheaper single-line routes. Second, we believe that the proposed transaction will allow continued investment in track and equipment. Over the past two decades the DM&E has made good progress in upgrading the lines that serve us, but further investment is needed to ensure that we will have reliable rail service in the future. We were happy to learn of Canadian Pacific's intention to invest \$300 million in capital improvements to DM&E over the next several years and believe that such an investment, in conjunction with Canadian Pacific's financial ability to make future improvements, will ensure future good service. BPM has a good working relationship with the DM&E and has been satisfied with the service we have received from them. We expect to have that same level of customer service in the future.

BPM does not see any anti-competitive consequences arising from the consolidation of Canadian Pacific's acquisition of DM&E. As discussed above, we believe the transaction would help us compete by giving us single-line service to customers on the Canadian Pacific network.

In short, we support the proposed transaction, and would urge the Board to approve the transaction at the earliest possible time.

I, Richard Jones, declare that the foregoing is true and I am qualified and authorized to file this verified statement.

Executed on April 9, 2008.

A handwritten signature in black ink that reads "Richard Jones". The signature is written in a cursive style with a large, stylized "J" and "R".

Richard Jones
Bentonite Performance Minerals, LLC
3000 North Sam Houston Parkway East
Houston, Texas 77379

**Verified Statement of
Tim Luken
on behalf of
Oahe Grain Corporation**

My name is Tim Luken, and I am General Manager for the Oahe Grain Corporation ("Oahe"). I am submitting this Verified Statement to express Oahe's support for Canadian Pacific Railway Company's proposed acquisition of the Dakota, Minnesota & Eastern Railroad and Iowa, Chicago & Eastern Railroad (collectively "DM&E"). We support the transaction because it will benefit DM&E shippers and open up a broad spectrum of new markets.

Oahe is an independent elevator located in Onida, South Dakota, a small community located about 30 miles northeast of Pierre. Onida is in Sully County, which is the largest sunflower-growing county in the United States. Our elevator handles a mix of agricultural products: primarily wheat (which constitutes 80-90% of our volume), sunflowers, and some corn. Oahe is located on a DM&E branch line, and we rely on its rail service to move our products to customers across the country. Domestically we ship to customers in states ranging from New Jersey to Florida to Wisconsin. We also ship a substantial amount of agricultural products southeast for export from the Gulf of Mexico. Because rail service is important to our business, we have invested to expand our facility's loading capacity.

Oahe supports the transaction because the consolidation of Canadian Pacific and the DM&E will create an expanded network that will give us more efficient access to new markets. The combined railroad would have a significantly greater reach than the current DM&E and allow us to have more competitive single-line rail service to destinations on Canadian Pacific's network. For example, Oahe currently ships sunflower seeds to oil crushing

plants located outside the DM&E network over joint-line rail service. If the transaction is approved, Oahe would have the option of shipping directly to crushing plants on Canadian Pacific's network. This is just one example. The proposed transaction would allow Oahe and other South Dakota businesses access to an expanded Class I network that would open up many new markets. This improved access to rail service could be a spur to new industries in South Dakota.

For these reasons, we believe the transaction will benefit Oahe and other South Dakota shippers, and we strongly urge the Board to approve the transaction.

I, Tim Luken, declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this verified statement.

Executed on April 14, 2008.



Tim Luken



**Verified Statement
of
David Owen
On behalf of the
South Dakota Chamber of Commerce**

My name is David Owen, and I am the President of the South Dakota Chamber of Commerce. On behalf of the Chamber, I submit this verified statement to support the proposed acquisition of the Dakota, Minnesota & Eastern Railroad Corporation ("DM&E") by the Canadian Pacific Railway Company ("Canadian Pacific"). The Chamber supports the acquisition because we believe that it will enhance the competitiveness of our member businesses. The Chamber's mission is to address issues of concern to leading businesses including manufacturing, financial services, health care and the entire delivery system that sustains a robust retail environment

The Chamber represents over 600 businesses in the State of South Dakota and serves as the state's manufacturing association as well. In South Dakota there are approximately 1,100 manufacturers that employ over 43,000 people. It is essential that South Dakota maintain a robust manufacturing industry in the State. Transportation and access to suppliers and markets are essential elements to maintaining a strong business atmosphere. Currently, the DM&E provides valuable transportation services to our member businesses, but we expect that the acquisition by Canadian Pacific will provide even more opportunities of growth for our member businesses.

PO Box 190 • 108 N. Euclid Ave.
Pierre, South Dakota 57501-0190
PH. 605.224.6161 • 1.800.742.8112
www.sdchamber.biz

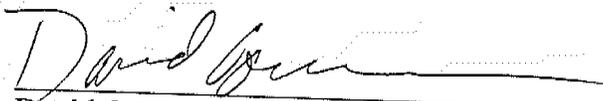
As a result of the acquisition, South Dakota businesses will have direct, single-line service to multiple markets on the Canadian Pacific's network. Our businesses will now be able to ship direct to markets east of Chicago, as well as to markets in the Pacific Northwest. In addition, we support the transaction because manufacturers will have more competitive transportation options and access to the materials they import into the State for purposes of production.

Finally, we believe that the proposed acquisition will improve and enhance the existing DM&E line and service. Canadian Pacific has represented that it will invest \$300 million to rehabilitate and upgrade DM&E's rail lines and infrastructure. This investment will improve DM&E's operations and efficiency, which will foster our businesses' competitiveness in the marketplace.

For these reasons, the South Dakota Chamber of Commerce strongly supports the proposed transaction and requests that the Board expeditiously approve the acquisition.

I, David Owen, declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this verified statement.

Executed on March 3, 2008.


David Owen

**Verified Statement of Rodney Christianson
on behalf of
South Dakota Soybean Processors**

My name is Rodney Christianson, and I am the Chief Executive Officer of South Dakota Soybean Processors, LLC ("SDSP"). SDSP submits this verified statement in strong support of the Canadian Pacific Railway Company's proposed acquisition of the Dakota, Minnesota, and Eastern Railroad and the Iowa, Chicago and Eastern Railroad (together referred to as the "DM&E"). SDSP supports this proposed transaction because it will allow better access to markets for South Dakota Soybean Processors.

SDSP is owned by approximately 2200 farmer members. SDSP was established in 1993. We are a value added enterprise, with emphasis on adding value to soybeans. SDSP owns and operates a soybean processing plant in Volga, South Dakota, which enables us to process soybeans into meal and oil. In total we process about 28 million bushels per year of soybeans into soybean oil, soybean meal, and soybean hulls. Much of our soybean meal is shipped to the Pacific Northwest, both for use as dairy feed by customers in Washington and Oregon and for export. We also sell a significant amount of meal to customers in Canada. We also ship soybean meal to customers through the Chicago gateway and as far south as Mexico. We sell our soybean oil to customers across the United States, from Illinois to Washington and the West Coast.

SDSP depends on the DM&E's rail service to ship its products to market. We ship 90% of our soybean oil and approximately half of our soybean meal to customers via rail. In 2007 we shipped over 2600 cars of soybean meal and over 1100 cars of soybean oil on the DM&E from Volga. We also receive some inbound rail shipments of soybeans via the DM&E.

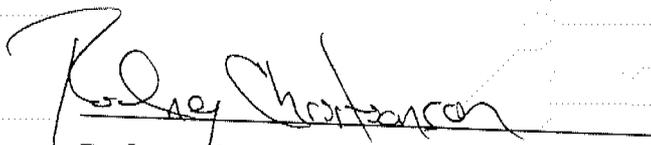


SDSP supports the proposed transaction because it will allow more competitive access to markets served by Canadian Pacific. The DM&E has been a good partner with us, but because it is a regional carrier there are a limited number of customers that we can reach via single-line service. The consolidation of the DM&E with a Class I carrier would give us access to direct, single-line service to destination markets on Canadian Pacific's network. For example, we have been selling an increasing amount of soybean meal to the Canadian market, which is a strong consumer of U.S. protein. Currently we truck this soybean meal north to Rosholt, SD, where it is transloaded onto the Canadian Pacific for rail transportation to Canadian destinations. If the transaction is approved, we will be able to reach these customers through single-line service from Volga. The proposed transaction would also improve our access to markets in the eastern United States by allowing single line hauls to points on the Canadian Pacific network.

In conclusion, SDSP believes that the proposed transaction is in the best interests of our members, and we urge the Board to approve it at the earliest possible time.

I, Rodney Christianson, declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this verified statement.

Executed on April 10, 2008.


Rodney Christianson

COMMUNITIES

CITY OF AURORA**P.O. Box 338
Telephone: (605) 693-3548
Aurora, SD 57002****Verified Statement
of
Fred Weekes
On behalf of the
City of Aurora, South Dakota**

My name is Fred Weekes, and I am the Mayor of the City of Aurora, South Dakota. This verified statement is being submitted on behalf of the City to support the proposed acquisition of the Dakota, Minnesota & Eastern Railroad Corporation ("DM&E") by the Canadian Pacific Railway Company ("Canadian Pacific"). We support this transaction because of the higher quality rail service we anticipate.

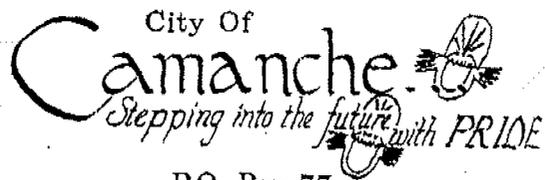
Aurora is a community that is dependent on quality rail service. Within the City's limits is a grain elevator, and in addition, an ethanol plant is located just one mile outside of town. Thus, it goes without saying that Aurora primarily ships grain. Aurora's grain shippers are currently dependent on the DM&E for transportation. Unfortunately, the current conditions of track do not permit the high quality and efficient service that our shippers prefer. We, therefore, support the proposed transaction because the Canadian Pacific has publicly stated that it will invest \$300 million in track rehabilitation and other upgrades. We believe such a large investment will provide our shippers with the efficient service they require to make them competitive in the marketplace. Also, the shippers will have access to markets on the Canadian Pacific's much larger network, including markets in the eastern United States. Having single-line access to these markets will also enhance the competitiveness of our shippers.

For these reasons, the City of Aurora supports this acquisition.

I, Fred Weekes, declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this verified statement.

Executed on March 3, 2008.


Mayor Fred Weekes,
City of Aurora, South Dakota



P.O. Box 77
Camanche, Iowa 52730

April 14, 2008

To Whom It May Concern:

The City of Camanche supports the proposed merger of the Dakota, Minnesota and Eastern Railroad with the Canadian Pacific Railway. As the City continues its efforts to improve the local economy, we view this merger to offer opportunities that were not previously available. We believe the proposed merger would be attractive to industries that might consider locating in the Camanche area.

A major local initiative underway is the development of a "port authority" and construction of a "rail port" facility. The merger of these two railroads would enhance the likelihood of the success of these projects. For that reason, we offer our support to this merger.

Sincerely,

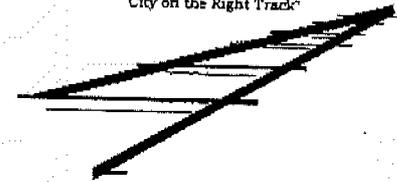
A handwritten signature in black ink, appearing to read 'Tom Roth', is written over a horizontal line.

Tom Roth
City Administrator

City of Claremont

235 Front Street, PO Box 235
Claremont, MN 55924-0235
Phone (507) 528-2137 Fax (507) 528-2126

Claremont Minnesota
"City on the Right Track"



Verified Statement of Russ Lucas On behalf of the City of Claremont, Minnesota

My name is Russ Lucas, and I am the Mayor of Claremont, Minnesota. On behalf of the City, and the City Council, I submit this verified statement to support the proposed acquisition of the Dakota, Minnesota & Eastern Railroad Corporation ("DM&E") by the Canadian Pacific Railway Company ("Canadian Pacific"). The City of Claremont believes that the proposed acquisition will provide high quality rail service to our City's shippers, and enable our shippers to be more competitive in the marketplace.

Claremont is a small city situated between Owatonna and Rochester, Minnesota. Despite our size Claremont is a significant shipping community. Not only do we have a local grain elevator within the City's limits, but we are also home to Al-Corn Clean Fuel. Al-Corn is an ethanol plant that is owned by local farmers and investors, each of whom provide the grain used in the ethanol process. Thus, a significant portion of the City's livelihood is dependent on the success of Al-Corn as a major competitor in the ethanol market. As the demand for ethanol increases it is essential that Al-Corn stay competitive in the marketplace.

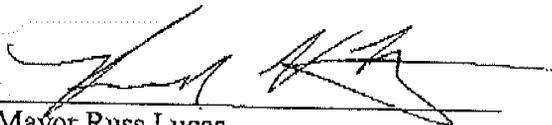
Currently, Al-Corn's shipping needs are served by DM&E's rail service and the trucking industry. The primary reason the City supports this acquisition is because our shippers will be able to reach markets on the Canadian Pacific's extended network. Without having to resort to other modes of transportation, our shippers will be able to reach markets east of Chicago as well as markets in the Pacific Northwest on the Canadian Pacific's reliable and efficient single-line service. Increased reliability and efficiency translates into competitive advantages for our shippers. Moreover, our manufacturers will be able to import raw materials

from more markets on the Canadian Pacific's network at more cost-competitive prices, which also enhances the competitiveness of our local businesses.

We have no doubt that the City of Claremont will only benefit from the proposed acquisition as it will result in better, more reliable and efficient rail service to our community. For these reasons, the City of Claremont as well as our City Council, supports the proposed transaction.

I, Russ Lucas, declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this verified statement.

Executed on March 31, 2008.



Mayor Russ Lucas
Claremont, Minnesota

Verified Statement of
Mayor Bill Ketchum
on behalf of the
City of Dodge Center, Minnesota

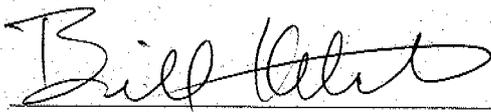
My name is Bill Ketchum, the Mayor of Dodge Center, Minnesota. On behalf of the City of Dodge Center, I am submitting this verified statement to show my support of the proposed acquisition of the Dakota, Minnesota & Eastern Railroad Corporation and Iowa, Chicago & Eastern Railroad Corporation (collectively, "DM&E") by Canadian Pacific Railway Company ("Canadian Pacific").

Dodge Center is a small rural community of approximately 2,600 in southeastern Minnesota. Rail service is very important to our community and region. Our farmers depend on the railroad to ship their crops to market. Likewise, local industry is dependent upon the railroad for delivery of materials used in making their products.

The City of Dodge Center supports this transaction because our community, and other communities like ours, needs good, viable rail service. The consolidation of the DM&E and Canadian Pacific provides the potential to strengthen and improve that service, to the overall good of our community.

I Bill Ketchum, declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this verified statement.

Executed on February 27, 2008



Mayor Bill Ketchum
P.O. Box 430
Dodge Center, MN 55927

Lee A. Mattson
City Administrator

Julie A. Deno
Finance Director

Bill Ketchum
Mayor

**CITY OF HARTLEY
HARTLEY MUNICIPAL UTILITIES**

11 S Central Avenue
Hartley, Iowa 51346
www.hartleyiowa.com
(712) 928-2240

Clayton Pyle, Mayor
Council Members:
Ian Coburn
Kevin Snider
Jerry Olson
Gina Wiekamp
Ann Petersen

Mike Boeve, Public Works Supt.
Brian Pats, City Clerk/Admin.

**Verified Statement of
Mayor Clayton Pyle
on behalf of the
City of Hartley, Iowa**

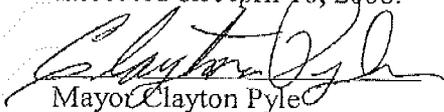
My name is Clayton Pyle, the Mayor of Hartley, Iowa. On behalf of the City of Hartley, I am submitting this verified statement to show my support of the proposed acquisition of the Dakota, Minnesota and Eastern Railroad Corporation and Iowa, Chicago and Eastern Railroad Corporation (collectively, "DM&E") by Canadian Pacific Railway Company ("Canadian Pacific").

Hartley is an agricultural community of approximately 1733 in northwestern Iowa. Rail service is very important to our community and region. Our farmers grow corn and soybeans and they depend on the DM&E's service to ship these crops to market.

The City of Hartley supports this transaction because our community, and rural communities like ours, need good, viable rail service. The consolidation of the DM&E and Canadian Pacific will ensure that our community continues to receive high-quality rail service. The broader network that the transaction will create will give Hartley area shippers single-line service to more destinations on Canadian Pacific's network. The creation of a consolidated railroad with the resources to undertake upgrades and improvements as necessary will be good for our community.

I, Clayton Pyle, declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this verified statement.

Executed on April 16, 2008.



Mayor Clayton Pyle
11 S Central Ave
Hartley, IA 51346

City of Highmore

P.O. Box 299

Highmore, SD 57345-0299

Phone (605) 852-2716

Fax (605) 852-3183

Email: highmore@sbtc.net



TOGETHER WE ARE BETTER

**Verified Statement of
Vikki Day
On behalf of the
City of Highmore, South Dakota**

My name is Vikki Day, and I am the Mayor of Highmore, South Dakota. On behalf of the City of Highmore, I submit this verified statement to support the proposed acquisition of the Dakota, Minnesota & Eastern Railroad Corporation ("DM&E") by the Canadian Pacific Railway Company ("Canadian Pacific"). We strongly support and welcome the acquisition because we believe that it will greatly enhance and benefit our rural agricultural economy, which the entire town is dependent upon.

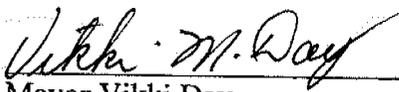
Highmore is a small town located in central South Dakota with a population of 850, and we are the only town in the county. Highmore is dependent on the success and vibrancy of its rural agricultural economy. DM&E's rail service has been essential to our town's two-grain elevators, as well as our economy. While it is obvious that quality rail service directly supports our grain shippers by providing efficient and competitive access to markets, the rest of the town's reliance on rail is less obvious. As a small town, each and every business in Highmore relies on the success of our grain shippers. The success of our town is inextricably tied to the success of the town's grain businesses. Therefore, quality rail service is a necessary component to the success and vibrancy of our town.

As you can see, Highmore is significantly dependent on quality, efficient and strong rail service, and this is why we support the proposed transaction. The transaction will give local Highmore shippers access to Canadian Pacific's wide network and will increase the number of markets that our grain shippers can efficiently access. After the acquisition, Highmore's shippers will have single-line access to markets east of Chicago, Illinois, as well as access to the Pacific Northwest. There is no doubt that our town's economy will benefit from our grain shippers' opportunity to reach more markets. We also believe that the transaction will lead to improved and more efficient service, which makes our shippers more competitive. In short, Highmore welcomes the transaction because as a town we transport large amounts of grain, which is the foundation of our town's economy, and the transaction will increase the competitiveness of our shippers by opening up additional markets on a more efficient, direct and reliable rail network.

For these reasons, the City of Highmore strongly supports the proposed transaction, and urges the Board to expeditiously approve the transaction.

I, Vikki Day, declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this verified statement.

Executed on February 27th, 2008.



Mayor Vikki Day

**Verified Statement
of
Joe Woitte
On behalf of the
Town of Midland, South Dakota**

My name is Joe Woitte, and I am the President of the Board for the town of Midland, South Dakota. This verified statement is being submitted on behalf of the town of Midland to support the proposed acquisition of the Dakota, Minnesota & Eastern Railroad Corporation ("DM&E") by the Canadian Pacific Railway Company ("Canadian Pacific"). We support this transaction because we believe access to a broader rail network will improve rail service to Midland and the surrounding communities.

Midland is located in western South Dakota, halfway between Rapid City and Pierre. Rail service is extremely important to our community. We have long been supporters of the DM&E railroad and will continue our support going forward in the future. In the early 1980's when Chicago and North Western railroad proposed to abandon the line through Midland, Midland was a strong and vocal supporter of the creation of the DM&E railroad in order to maintain rail service to our community.

We supported this creation to fulfill the need for dependable rail service to maintain the ability for the local area to have access to markets for their products. Many of our residents and nearby farms rely on the railroad to export their products. Be it grain, lumber, scrap iron, or other products, the railroad is the best and most efficient means to transport large quantities of product for large distances at a reasonable cost. For this reason, the presence of the railroad allows heartland communities like Midland to survive and prosper.

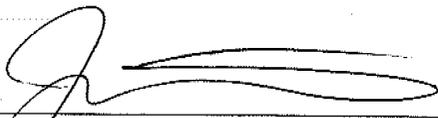
We support this transaction because we believe it will enhance Midland businesses' to compete and stay vibrant and competitive for the future. The proposed acquisition will allow

Midland businesses' and farmers to ship to markets on the Canadian Pacific system via single-line service, and help keep costs lower and profits more viable. This will give many of our shippers competitive alternatives to transport their products to domestic markets on the Canadian Pacific system east of Chicago. In addition, the transaction would give Midland shippers more competitive access to export markets via Vancouver. For these reasons the town of Midland supports the transaction and we ask the Board to approve it at the earliest possible time.

I, Joe Woitte, declare under penalty of perjury that the foregoing is true and correct.

Further, I certify that I am qualified and authorized to file this verified statement.

Executed on February 28, 2008.



Joe Woitte,
President of the Board for the
Town of Midland

RESOLUTION 08-48

Councilor RockVam offered the following resolution and moved its adoption:

WHEREAS, the City of New Ulm, with a 2000 census population of 13,594, is located in South Central Minnesota; and

WHEREAS, the Dakota, Minnesota & Eastern Railroad and Iowa, Chicago & Eastern Railroad (collectively "DM&E") operates a rail system through the City of New Ulm; and

WHEREAS, the City of New Ulm is interested in obtaining coal for electric power production from the Wyoming Powder River Basin coal fields on the DM&E rail system due to efficiency and cost; and

WHEREAS, the farming community surrounding New Ulm, through the Farmers CO-OP of Hanska uses the DM&E rail system to ship 18 Million bushels of grain to domestic and foreign markets; and

WHEREAS, New Ulm Steel and Recycling ships 100 cars of ferrous scrap metal to foreign and domestic markets; and

WHEREAS, the purchase of the DM&E by the Canadian Pacific Railway Company ("Canadian Pacific") would open up a rail system that would expand the capabilities of our community and local industries to ship materials in more efficient and effective methods, inject \$300 Million of capital into the DM&E rail system to make it safer and efficient while providing a desirable single line service to the East and West coasts.

NOW, THEREFORE, BE IT RESOLVED, the New Ulm City Council supports the acquisition of the DM&E by Canadian Pacific in order to maintain a strong rail presence and safer more efficient service to the City of New Ulm, our local industries, and the New Ulm area agricultural community that currently or in the future, relies on the DM&E rail system.

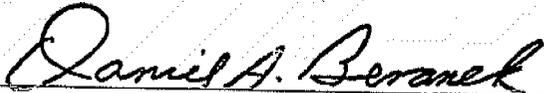
The motion for the adoption of the foregoing resolution was duly seconded by Councilor Webster and, the roll being called, the following vote was recorded:

Voting Aye: Councilors Olson, RockVam, Webster and President Beranek.

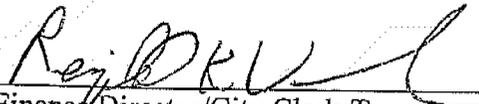
Voting Nay: None.

Not Voting: Councilor Weinkauff (*absent*).

Whereupon said resolution was declared to have been duly adopted this 15th day of April, 2008.


President of the City Council

Attest:


Finance Director/City Clerk-Treasurer

The above resolution approved April 15, 2008.


Mayor

(Reserved for Recording Information)

State of Minnesota

}

}

} ss

Certificate of Transcript

COUNTY OF BROWN
CITY OF NEW ULM

}

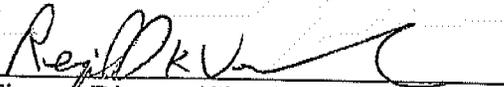
}

I, Reginald K. Vorwerk, Finance Director/City Clerk-Treasurer of the City of New Ulm in said county and state, do hereby certify that I have carefully compared the annexed copy of

RESOLUTION No. 08-48

with the original records and files in my office, and that the same is a true and correct copy thereof and of the whole of said original records.

Witness my hand and the seal of said City at New Ulm, Minnesota this 16th day of April
A.D. 2008.


Finance Director/City Clerk-Treasurer



City of Redfield

626 Main Street
Redfield, South Dakota 57469-1127
Telephone: 605-472-4550
Fax: 605-472-4553
Web Site: www.redfield-sd.com
E-Mail: cityhall@redfield-sd.com

Verified Statement of

Duane Sanger
On behalf of the
City of Redfield, South Dakota

Mayor
Duane Sanger

City Council President
Richard Gallup

City Attorney
Paul Gillette
James Hare

City Council Members
Ward 1

Darrell Ronnfeldt
Lue Anne Keating

Ward 2
Eileen Kearney
Norman Sihrer

Ward 3
Frank Schwartz
Richard Gallup

Ward 4
Kenneth Avery
Larry Eldeen

City Finance Officer
Adam L. Hansen

Parks & Recreation
Yvette Albrecht

My name is Duane Sanger, and I am the Mayor of Redfield, South Dakota. On behalf of the City of Redfield, I submit this verified statement to support the proposed acquisition of the Dakota, Minnesota & Eastern Railroad Corporation ("DM&E") by the Canadian Pacific Railway Company ("Canadian Pacific"). Redfield supports this acquisition because we believe access to a broader rail network will improve rail service to the community, which has become more essential over the last several years because of Redfield's increased usage and reliance on rail service.

Redfield is located in east central South Dakota, and sits in the largest wheat-producing county in the State. Currently, our community is served by the DM&E, which runs north-to-south, from Aberdeen to Yankton, South Dakota. Rail service has traditionally been important to our community because much of our economy is dependent on the success of the wheat industry. Our reliance on quality rail service, however, has increased greatly over the recent

"In accordance with Federal law and U.S. Department of Agriculture policy, The City of Redfield is prohibited from discriminating on the basis of race, color, national origin, sex, age, or disability."

To file a complaint of discrimination, write USDA, Director, Office of Civil Rights, 1400 Independence Avenue, S.W., Washington, D.C. 20250-9410, or call (800) 795-3272 (voice) or (202) 720-6382 (TDD)."

Pheasant Capital of the World



City of Redfield

626 Main Street
Redfield, South Dakota 57469-1127
Telephone: 605-472-4550
Fax: 605-472-4553
Web Site: www.redfield-sd.com
E-Mail: cityhall@redfield-sd.com

Mayor

Duane Sanger

City Council President

Richard Gallup

City Attorney

Paul Gillette

James Hare

City Council Members

Ward 1

Darrell Ronnfeldt

Lue Anne Keating

Ward 2

Eileen Kearney

Norman Sihrer

Ward 3

Frank Schwartz

Richard Gallup

Ward 4

Kenneth Avery

Larry Eldeen

City Finance Officer

Adam L. Hansen

Parks & Recreation

Yvette Albrecht

years because of increased grain producing and handling.

Recently, grain businesses have increased the capacity and handling of our grain storage elevators to over four million bushels per year. In addition, an ethanol plant recently opened just two miles outside of town. As a result, we expect that there will be a greater need for rail service and traffic will increase through the coming years.

Accordingly, Redfield needs a dependable, efficient rail network to serve and support our growing economy.

Redfield supports this transaction because it will benefit our grain shippers, allowing them to compete on a nationwide level. The proposed acquisition will allow our shippers to reach both export and import markets on Canadian Pacific's single-line service, which includes markets in the Pacific Northwest and the Eastern United States. The Canadian Pacific's single-line service not only increases number of markets that our shippers reach, but also provides more efficient service, which will only serve to benefit our shippers.

For these reasons, the City of Redfield strongly supports the proposed transaction.

"In accordance with Federal law and U.S. Department of Agriculture policy, The City of Redfield is prohibited from discriminating on the basis of race, color, national origin, sex, age, or disability."
To file a complaint of discrimination, write USDA, Director, Office of Civil Rights, 1400 Independence Avenue, S.W., Washington, D.C. 20250-9410, or call (800) 795-3272 (voice) or (202) 720-6382 (TDD)."

Pheasant Capital of the World



City of Redfield

626 Main Street
Redfield, South Dakota 57469-1127
Telephone: 605-472-4550
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Web Site: www.redfield-sd.com
E-Mail: cityhall@redfield-sd.com

Mayor

Duane Sanger

City Council President

Richard Gallup

City Attorney

Paul Gillette

James Hare

City Council Members

Ward 1

Darrell Ronnfeldt

Lue Anne Keating

Ward 2

Eileen Kearney

Norman Sihrer

Ward 3

Frank Schwartz

Richard Gallup

Ward 4

Kenneth Avery

Larry Eldeen

City Finance Officer

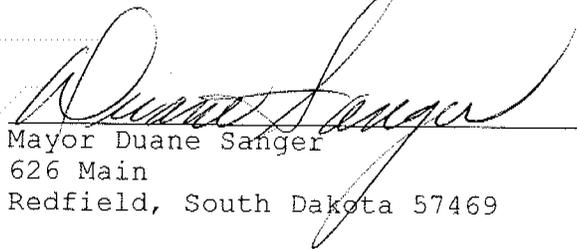
Adam L. Hansen

Parks & Recreation

Yvette Albrecht

I, Duane Sanger, declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this verified statement.

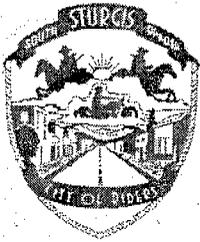
Executed on February 29, 2008.



Mayor Duane Sanger
626 Main
Redfield, South Dakota 57469

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CITY OF STURGIS

**Verified Statement
of
Maury LaRue
Mayor of the
City of Sturgis, South Dakota**

My name is Maury LaRue, and I am the Mayor of Sturgis, South Dakota. As Mayor of Sturgis, I submit this verified statement to support the proposed acquisition of the Dakota, Minnesota & Eastern Railroad Corporation ("DM&E") by the Canadian Pacific Railway Company ("Canadian Pacific"). As a long time supporter of railroad prosperity and because of the multiple benefits I anticipate as a result of the acquisition, I strongly support this transaction.

Sturgis is a city located at the base of the northeastern Black Hills, in western South Dakota. Sturgis's businesses are diverse, and our economy is dependent on the success of all its businesses from firearms manufacturing to grain production. Although Sturgis's grain shipments are minimal in comparison to other South Dakota cities, I have been a long, strong supporter of the railroad industry, which is evident by my appointment of Sturgis representatives on the Railroad Authority Board. In addition, Sturgis has a grain elevator located nearby, which allows our shippers to compete in wheat and grain markets. Access to an increased number of markets will tremendously benefit the City.

Unlike other communities, however, the enhancement of the grain industry is not the primary reason I support the acquisition. Instead, I support the acquisition because of the potential benefit that can be bestowed upon the city through the presence of a

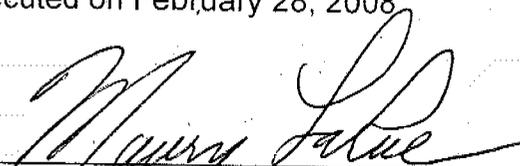
City Hall
Mayor's Office - Finance Office
1040 Second Street, Suite 103, Sturgis, SD 57785
(605) 347-4422 • Fax (605) 347-4861
www.sturgis-sd.gov

financially strong and vibrant Class I railroad. The primary benefit I anticipate from the transaction is Canadian Pacific's ability to make potential capital improvements to the DM&E. I understand that Canadian Pacific, has promised to invest \$300 million in rail improvements and infrastructure on the DM&E, and this investment will be critical to improve safety in our community and elsewhere in the state. In addition, as a forward-looking city, I believe that the presence of a strong Class I railroad might create the potential to develop a commuter line as well as a tourist line to the Black Hills to see the majesty of Mount Rushmore. Further, the rail line provides the most efficient and quickest route to Rapid City, and along that line lives a significant population which would benefit from a commuter line. Although I understand that no plans to create such lines currently exist, I also know that the presence of and ability to access capital is the key to business expansion and growth, and this is why I support this transaction.

For these reasons, as Mayor of the City of Sturgis, I support the proposed transaction.

I, Maury LaRue, declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this verified statement.

Executed on February 28, 2008



Mayor Maury LaRue
1951 Junction
Sturgis, South Dakota 57785



City of Waseca, Minnesota

508 South State Street • Waseca, Minnesota 56093-3097
(507) 835-9700 • FAX (507) 835-8871 • www.ci.waseca.mn.us

**Verified Statement
of
Allan Rose
On behalf of the
City of Waseca, Minnesota**

My name is Allan Rose and I am the Mayor Pro Tem for the City of Waseca, Minnesota. This verified statement is being submitted on behalf of the City of Waseca to support the proposed acquisition of the Dakota, Minnesota & Eastern Railroad Corporation ("DM&E") by the Canadian Pacific Railway Company ("Canadian Pacific").

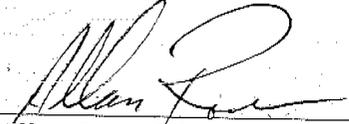
The City of Waseca has a diverse business community, which includes large to small employers and a variety of businesses ranging from printing to electronics. Currently, Waseca is served by DM&E's north-to-south line which starts in Waseca and ends in Mason City. Because of the industrial businesses and development south of our City, as well as the recent construction of a new ethanol plant just eight miles west of the city, the City relies on a reliable and efficient rail service to maintain and enhance those businesses.

In particular, two of Waseca's businesses will especially benefit from the proposed acquisition. Bird's Eye Foods, which transports vegetables by rail, and Brown Printing, which ships magazines and other commodities, are dependent upon efficient and reliable rail service. The DM&E acquisition by Canadian Pacific will strengthen both these businesses by increasing the number of markets each could access on Canadian Pacific's wider network. Also, shipping on a single-line will provide faster and more efficient routes to the businesses' markets, which will make them more competitive.

For the foregoing reasons, the City of Waseca supports and encourages the Board to approve the proposed acquisition.

I, Allan Rose, declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this verified statement.

Executed on March 4, 2008.



Allan Rose, Mayor Pro Tem