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Subject Finance Docket No 35081 – *Canadian Pacific Railway Company, et al*  
*Control – Dakota Minnesota & Eastern Railroad Corporation, et al*

Dear Acting Secretary Quinlan

Enclosed for filing in the above proceeding is the Metra's Rebuttal to Applicants' Response to Comments and Requests for Conditions (METRA-3).

Sincerely yours,

Robert P vom Eigen

RVE dmo

Encls

cc Michael C Noland (w/encl )  
Terence M Hynes (w/encl )  
John D Heffner (w/encl )  
Parties of Record (w/ encl )

**BEFORE THE  
SURFACE TRANSPORTATION BOARD  
WASHINGTON, D.C.**

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Finance Docket No. 35081

**CANADIAN PACIFIC RAILWAY COMPANY, *ET AL* – CONTROL –  
DAKOTA, MINNESOTA & EASTERN RAILROAD CORP., *ET AL***

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**METRA'S REBUTTAL TO APPLICANTS' RESPONSE TO COMMENTS AND  
REQUESTS FOR CONDITIONS**

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**SUMMARY OF ARGUMENT**

Applicants' Response to Comments and Requests for Conditions (CPR-14/DME-14)<sup>1</sup> responds to Metra's request for conditions by ignoring that change will occur on day one after CP takes control of the DM&E. CP will have the ability to shift DM&E/IC&E traffic from Metra's West Line to its North Line, thereby depriving Metra of revenue and remedies that were designed to mitigate the potential adverse impacts that this traffic would have on Metra's commuter rail service over the West Line. Rerouting this traffic to the North Line could materially interfere with Metra service on that Line, which has less excess capacity than the West Line, and Metra will be deprived of the revenues and remedies that were negotiated in the context of the admission of IC&E to the West Line. Metra is not seeking to improve its "commercial position" or to place itself in a better position than it was prior to the consolidation.

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<sup>1</sup> References to this pleading will be to "Response to Comments" with page number

proposed by CP,<sup>2</sup> but rather it is seeking to preserve the position that it had by virtue of contracts it negotiated with CP and DM&E/IC&E in April 2003

The April 2003 agreements between the parties addressed the issue of the possible material interference with Metra service created by additional traffic being transported between the DM&E/IC&E service territory and the West Line. There was no prospect at that time that DM&E/IC&E would short haul its own route via the West Line by agreeing to route Chicago gateway traffic via its interchange with CP/Soo Line at Minnesota City for CP/Soo to handle via Metra's North Line.<sup>3</sup> As a result, Metra settled its dispute with CP and DM&E/IC&E over the admission of the IC&E to the West in Finance Dockets Nos. 34177 and 34178 by negotiating the IC&E Trackage Rights Agreement and the Amendment Agreement with CP<sup>4</sup> that created new fees and remedial provisions and that designated CP as the front line of enforcement. However, that structure did not contemplate that the new DM&E/IC&E traffic would be shifted to the North Line or that CP would be allied with the DM&E/IC&E. Although this change gains its greatest significance once CP proceeds with construction of the line the Powder River Basin, the impact is immediate, and the existing agreements between the parties do not provide an effective remedy.<sup>5</sup>

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<sup>2</sup> See Response to Comments at 4.

<sup>3</sup> Indeed, CP took precaution in §§13 – 15 of the Chicago Trackage Rights Agreement between Soo Line and IC&E, attached as Exhibit C to Metra Comments and Request for Conditions, METRA – 2, (“IC&E Trackage Rights Agreement”) to restrict the routing of traffic by DM&E via the West Line that formerly was routed by IMRL via the Minnesota City interchange.

<sup>4</sup> See Exhibit D to METRA – 2.

<sup>5</sup> CP suggests that Metra has a remedy by virtue of its ability to conduct costly audits of CP's records long after the fact, but that will not extend the fees and remedies to DM&E traffic handled over the North Line.

More striking and immediate than these transaction related changes, however, is CP's new assertion, never previously expressed privately to Metra or on the record of the proceeding, that by virtue of acquiring control of IC&E (but without any merger of corporate entities), this carrier should no longer be treated as a third party under its agreements with Metra, but rather "as part of the CPR system." See Response to Comments at 90. The consequence of this assertion is that through its control of DM&E, CP can introduce an additional third party to the North and West Lines under the 1985 Trackage Agreement.

The 2003 Amendment Agreement between CP and Metra acknowledges that CP in admitting IC&E to the West Line has exercised its right to admit a third party under the original 1985 Trackage Agreement.<sup>6</sup> Admission of IC&E with its affiliated DM&E represented a significant expansion of the service territory and traffic potential that could be expected over the West Line.<sup>7</sup>

CP's new assertion is triggered by the sixth condition sought by Metra.<sup>8</sup> In requesting that condition, Metra did not seek to change the April 2003 agreements, but rather to confirm what it understands to be the legal effect of one carrier acquiring control of another. The acquiring carrier takes its new subsidiary subject to the terms and conditions of its existing contracts, and that by acquiring the DM&E, CP would not be entitled to admit another carrier

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<sup>6</sup> See Exhibit D to METRA-2, at 2-3.

<sup>7</sup> Indeed, the service territory accessed by DM&E, including the potential construction of the line to the Powder River Basin, went far beyond the previous IMRL service territory.

<sup>8</sup> "(6) CP and its affiliates shall acknowledge that its rights to admit third party carriers to the line have been satisfied and that it may not admit any third party carrier in the future to the West or North Lines." Metra Comments in Opposition to Proposed Transaction and Request for Conditions (METRA-2) (hereinafter, "Request for Conditions") at 10.

with the additional traffic to the Joint Line.<sup>9</sup> It now appears for the first time that CP takes issue with that characterization of the effect of a control transaction. It apparently claims that DM&L and IC&E by virtue of this control transactions are no longer "third parties" under the agreements, but rather part of the CP system, thereby rendering inoperative the acknowledgment by CP in the 2003 Amendment Agreement. *See* Response to Comments at 90

This is a major change in the status quo, one deserving of attention by this Board in this proceeding. The logical extension of CP's position is that its rights under the 1985 Trackage Agreement to admit a third party to the Joint Line is in effect an evergreen provision that permits it to endlessly admit third parties carriers to the Joint Line once it acquires control of that last carrier admitted to the Joint Line, thereby subjecting Metra to ever increasing traffic sources over its North and West Lines. As a matter of contract law, Metra does not believe that CP is entitled to such a construction, but if that were the effect of this control proceeding, then Metra requires imposition of a condition foreclosing such a prospect.

CP claims that the STB has no discretion to impose any conditions, even for the purpose of preserving essential services, because Metra does not allege that the transaction possesses anti-competitive impacts. *Response to Comments at 90-91*. Metra respectfully suggests that the provisions governing the imposition of conditions under 49 U.S.C. §11324 (c) apply equally to major transactions processed under subsection (b) and significant transactions processed under subsection (d). Therefore, the discussion of the standards for imposition of conditions contained in STB's policy statement for major transactions, 49 C.F.R. §1180.1(c) and (d), applies to

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<sup>9</sup> The 1985 Trackage Agreement refers to the West Line and North Line Corridors as the "Joint Line."

requests for conditions in cases involving significant transactions, such as CP's acquisition of DM&E.

CP objects to Metra's desire to alter terms in existing agreements through imposition of conditions<sup>10</sup> However, if essential services are threatened by CP's acquisition of the DM&E, the STB can assess the adequacy of contractual provisions to address those issues, and to require modifications as conditions to the approval of the transaction

Metra will show that these modifications are directly related to the proposed change in control, and are reasonable and necessary to protect essential services CP claims that the existing agreements are "comprehensive,"<sup>11</sup> but they do not deal with the shifting of traffic from the West Line to the North Line, which is possible only as a result of the proposed control transaction

CP states that the parties "are currently discussing potential amendments to the existing agreements to accommodate changes in traffic patterns that may result from the proposed transaction." Response to Comments at 89 Metra and CP had very preliminary discussions just after the Application was filed, and then they were terminated When Metra filed its Request for Conditions in early March, it believed based upon a discussion with a now retired CP employee that such discussions were about to resume,<sup>12</sup> but in fact prior to this date no substantive

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<sup>10</sup> CP characterizes these proposed conditions as "drastic" alterations to the contractual arrangements between Metra and CP Response to Comments at 90 In fact, one condition, the sixth, seeks no change at all, and in five of the remaining six changes proposed simply extend to the North Line the protections agreed to for the West Line. The lone exception is the transfer of dispatching responsibilities, which is necessitated by CP's acquisition of DM&E and the inability of Metra to monitor the possible re-routing of DM&E-IC&E traffic to the North Line

<sup>11</sup> Response to Comments at 96

<sup>12</sup> Metra "Request for Conditions" at 9

discussions have occurred. A first meeting of representatives to discuss such matters is now scheduled for May 19, the date of this filing. See Rebuttal Verified Statement of Jack Bauer, attached hereto, at ¶10

A The Board has the Authority Under §11324(c) to Impose Conditions to Protect Essential Services, Regardless of the Type of Railroad Consolidation

CP argues that Metra is not entitled to the conditions it seeks because it has not shown that the transaction will cause it competitive harm. Comments at 90-91. CP misreads the statute. Section 11324(c) states that, "The Board shall approve and authorize a transaction under *this section* when it finds the transaction is consistent with the public interest." (emphasis added). This subsection proceeds to define the Board's broad discretion to impose conditions, which is by no means limited to major transactions involving at least two Class I railroads approved under subsection (b). Subsection (c) applies both to major transactions approved under subsection (b) and to significant transactions approved under subsection (d). In *Canadian National Railway – Control – Wisconsin Central Transportation Corp.*, STB Finance Docket 34000 (served September 5, 2001) 2001 STB LEXIS 711, at n. 18, the Board confirmed that its broad power to condition transactions under Section 11324(d) extended to minor transactions.

Of course, the substantive standards for approving or disapproving major and significant railroad considerations do differ, and the public interest factors play less of a role under subsection (d). However, the notion that the STB is powerless to prevent potential harm to essential services provided by commuter rail authorities in a significant rail transaction, which by definition entails consolidations of regional or national significance, is quite simply implausible.

Congress expressed no policy of promoting such rail consolidations when they could do harm to essential commuter rail service

The general policy statement for merger or control of at least two Class I rail carriers and its discussion of the Board's "broad authority" under Section 11324(c) does not suggest that those principles to be inapplicable to "significant" transactions any more than the language of the subsection itself.

The policy statement codified at 49 C.F.R. §1180.1 has evolved over the years, but the concern over potential impact on essential services dates back at least to days following enactment of the Staggers Rail Act. *See Railroad Consolidation Procedures*, 363 I.C.C. 200 (1981). In *Lamoille Valley Railroad Co. v. Interstate Commerce Commission*, 711 F.2d 295 (D.C. Cir. 1983), 1983 U.S. App. LEXIS 26338, the D.C. Circuit went to considerable lengths to scrutinize the appropriate application of that standard, and concluded that it turns on whether there exist adequate alternative forms of transportation and on the likelihood that the adverse impacts on the service will occur based upon the incentives of the parties. *Id.* at 310 and 319-323.<sup>13</sup>

The alternative to Metra's service for commuters in the Chicago region is a system of highly congested highways. The challenge for Metra is to find funding to provide more service, and to avoid any reduction in the quality of the existing service. Surely, this service is essential. The likelihood that this transaction will impact that service depends upon whether the change in

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<sup>13</sup> The focus of that case was on the impacts of service on a single talc shipper in northern Vermont served by the Lamoille Valley Railroad and on the potential downgrading of service via the Canadian National Railway's most efficient route linking the Maine paper industry to the Midwest. The Court remanded these cases to the I.C.C. because it found the business termination test employed in the case of the talc company as too restrictive (*id.* at 311) and the I.C.C.'s reliance on CN's competitive leverage to preserve the service was unreasonable (*id.* at 320-21).

CP's incentives by virtue of its acquisition of the DM&E and its ability to shift potentially significant quantities of coal traffic to the North Line. The fee structure imposed on additional DM&E/IC&E traffic over the West Line by the April 2003 agreements does not apply to the North Line. CP will own the DM&E/IC&E, and (unlike the stand-alone DM&E/IC&E) will not promote the long haul via the West Line for Chicago gateway traffic. These new incentives to route traffic via the North Line threaten Metra service on that Line.

**B CP's Factual Assertions About the Current Operations on the Joint Lines are Inaccurate**

CP begins its recitation of the facts relative to the service over Metra's West and North by stating that, "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." Response to Comments at 88. CP witness Vern Graham's Reply Verified Statement is cited for this proposition, but it does not quite say the same thing at page 20. Mr. Graham states that, "CPR does not presently plan to schedule movement of any Soo trains over the West Line in the normal course of operations." *Id.*

Metra data indicates that CP operated on average 11.2 trains per day over the West Line between Tower B-12 at Franklin Park and Tower A-5 for the twelve month period between June 1, 2006 and May 31, 2007. See Metra's Request for Conditions at 3, note 4, cite the then most recent compilation of annual data compiled by Metra. Those operations continue to this day. See Rebuttal V S of Jack Bauer at ¶3.

CP also takes issue with data presented by Metra comparing the on-time performance of its trains in corridors dispatched by Metra with the on-time performance of Metra trains dispatched by CP on the North and West Lines. At page 4 of its Request for Conditions, Metra

cited five year performance data for 2002-2007 for service corridors dispatched by both carriers. These data show clearly that Metra trains in each of the Metra dispatched corridors had superior on-time performance percentages when compared with Metra trains in each of the CP dispatched corridors over that five year period.

CP responds through Mr. Graham by presenting a detailed analysis of the three months of performance data (December 2007, January and March 2008). Graham Reply V.S. at 15-18. Metra believes the five year data is more reliable than the three month data during the recent winter months. Nevertheless, these more recent data show that during December 2007 the Metra trains in the Metra dispatched corridors performed better than its trains on the West and North Lines. During January and March 2008, train performance in Metra dispatched corridors was superior to either that experienced on the West and North Lines.<sup>14</sup>

This focus on the data detracts from the key point. Metra owns and maintains the North and West Lines that it does not dispatch. That is a unique circumstance in the Chicago terminal and is unusual within the rail network in general. See Bauer Rebuttal V.S. at ¶4. Metra believes that its on-time performance on the West and North Lines would be better if it dispatched the trains rather than a CP dispatcher in Minneapolis. However, that is not a situation created by the proposed transaction. Metra offered the on-time performance data – not to justify the imposition of conditions – but to provide a context for Metra's for its requested conditions.

Once it exercises control over DM&E, CP admits that it will be in a position to shift DM&E/IC&E traffic from the West Line to the North Line, which is approaching full capacity.

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<sup>14</sup> CP's reference to its record in dispatching the Amtrak Hiawatha train is a bit of an apples and oranges comparison. Amtrak train performance statistics for its long distance trains have a 30 minute tolerance for on-time performance, while Metra's tolerance is only five minutes.

*See Application at 21-22, Exhibit 13 at 27, and Graham V S in Application Vol II at 4.* That would not happen, but for this transaction CP also has the incentive to avoid fees and more structured procedures for resolving issues related to necessary capital expenditures which now only apply to DM&F/IC&E traffic on the West Line. Metra is not alleging bad faith by CP dispatchers (or their supervisors). However, dispatchers receive information about each train that seeks access to a line segment, including the train symbol, the lead locomotive number, the number of loads and empties, the length of the train, its tonnage and destination, and this data is entered on a train sheet.

If Metra were dispatching the North and West Lines it could insist that CP/Soo identify whether its trains operating on the North Line have picked up (or will set off) blocks of traffic at Minnesota City, MN that were routed via DM&E/IC&E. Trains operating west of Tower B-12 on the West Line will be presumed to be to and from DM&E/IC&E stations or injunctions, unless the engineer states that it is a CP/Soo Line operating via the Soo Line route intersecting the West Line at Davis Junction. *Bauer Rebuttal V S at ¶5*

Metra needs to obtain that information on a real time or daily basis, so that it can monitor the shifting patterns of train traffic, and determine compliance with the remedial provisions that it negotiated in the context of the admission of the IC&E to the West Line and trigger the procedures for resolving disputes concerning needed capacity expansions. If there are other ways to obtain that information, Metra is prepared to consider that, but there needs to be a mechanism in place for obtaining that information. Without this data, follow-up audits would be impossible to perform.

C. Metra's Essential Services will be Harmed if the 2003 Remedies for the West Line are Not Extended to the North Line with an Effective Monitoring Mechanism or if CP is Permitted to Admit Another Third Party Carrier to the Joint Line.

The April 2003 IC&E Trackage Rights Agreement and the CP-Metra Amendment Agreement provided for additional fees to be paid to Metra when traffic levels exceeded particular thresholds or when Powder River Basin coal trains begin operations over the West Line, and created a process by which Metra could refuse to admit this additional traffic until such time as necessary capital improvements were made to accommodate that traffic. *See e.g.* Chicago (or IC&L) Trackage Rights Agreement, Exhibit C to Metra's Request for Conditions at §§2 13 and 2 14. Section 2 14 contains a dispute resolution procedure that currently does not exist for disputes over capital improvements on the North Line with CP.<sup>15</sup> Another principal component of this remedial structure was the undertaking by CP to monitor IC&L movements as the dispatcher of the West Line. An independent mechanism to monitor the traffic to or from DM&E/IC&E stations or moving via those lines is essential to the remedial provisions negotiated in April 2003 agreements.

Absent the extension of these provisions to the re-routing of traffic via the North Line, essential services provided by Metra are threatened. The inability to track Excess Trains or Coal Trains operating over the North Line will deprive Metra of sorely needed revenues to provide its

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<sup>15</sup> CP claims that the existing voluntary agreements between Metra and CP govern in a "comprehensive fashion" with problems arising between the parties. Response to Comments at 96. CP is correct that the existing agreement allocates costs to parties which benefit solely from an improvement. *Id.* at 101. However, the absence of a practical mechanism for resolving disputes over allocation of responsibility for necessary capital improvements has been a major obstacle for Metra in its dealings with CP, and a principal reason that Metra negotiated to obtain the §2 14 procedures in connection with the DM&E/IC&E traffic. See Bauer Rebuttal V S at ¶¶6 and 7. To the extent that traffic is re-routed via the North Line, the same measures should be in place to resolve these disputes.

essential services Bauer Rebuttal V S. at ¶8. These charges are specified at § 3.1 and § 3.2 of the ICE Chicago Trackage Rights Agreements. Exhibit C to Metra's Request for Conditions. 1, 4 and 5 address this issue

The process for determining necessary capital improvements to accommodate additional traffic is critically important to Metra's service. Metra negotiated for a process that would be employed to resolve disputes over what improvements were required to be made on the West Line and over which party would be responsible. See § 2.14 of ICE Chicago Trackage Rights Agreement. Those procedures do not apply to Metra's North Line, and Conditions 2 and 7 would extend those provisions to the North Line.<sup>16</sup>

**D Conditions Requested by Metra Will Not Impose Operating or Other Burdens Upon CP or Detract from the Benefits of the Transaction**

CP claims that Metra trains already receive the priority to which they are entitled under the Supplemental Agreement between the parties and that freight trains are not in fact the cause of delays to Metra's trains. See Response to Comments at 94 and Graham Reply V S. at 17. The performance of CP/Soo or DM&E/IC&E trains will not be impacted if Metra performs the dispatching. Moreover, Metra will assume the financial costs associated with the transfer of dispatching authority and the performance of dispatching services, which should reduce CP's expenses.

The other conditions will not impact CP or DM&E/IC&E. CP will remain free to shift traffic between the West and North Lines, and it will pay no more fees than IC&E would have

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<sup>16</sup> CP is correct that Condition 3 is not necessary if the provisions of Condition 2 are imposed on the transaction

paid had all of the new traffic generated on the DM&E/IC&E system been routed via the West Line

Extending to the North Line the procedures relating to necessary capital improvements on the West Line does not impose a more rigorous process than the procedures which currently exist for capital improvements not subject to the IC&E Trackage Rights Agreement. However, there is no satisfactory mechanism for resolving disagreements between CP and Metra expeditiously. See, Bauer Rebuttal V S at ¶6. Movement of coal trains over the North Line should not proceed until the necessary improvements are completed on that line. The existing agreements between Metra and CP do not provide that protection, and the Board should require that they be amended to do so. Such a condition imposes no unreasonable burden upon CP.

Finally, the question of whether CP has exhausted its right to admit a third party to gain access to the Joint Line should be resolved in this proceeding. The admission of DM&E/IC&E traffic to the Joint Line has significantly increased the territory from and to which traffic flows through the Chicago gateway on these lines. No reasonable construction of the existing contracts or reasonable expectation arising from this control transaction, would permit CP to take a second bite at the apple.

### CONCLUSION

Metra seeks in this proceeding to preserve the bargain it struck in April 2003 when it agreed to admit DM&E/IC&E traffic to the West Line. Fees were to be paid, and procedures were to be in place to efficiently resolve disputes over the level and allocation of costs associated with capital improvements on the West Line, and there was no prospect that that traffic would be shifted to the North Line. The conditions sought by Metra do not seek to restrict CP's routing of

that traffic, but rather just extend the same protections negotiated in April 2003 to the North Line. The Board has the discretion to impose such conditions upon this significant transaction, and it should do so to protect the essential services Metra provides on the North and West Lines

Respectfully submitted,



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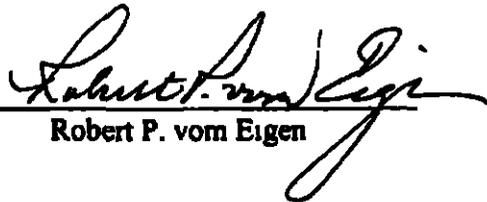
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May 19, 2008

COUNSEL FOR METRA

**CERTIFICATE OF SERVICE**

I hereby certify this 19<sup>th</sup> day of May, 2008 that I have caused Metra's Rebuttal to Applicants' Response to Comments and Request for Conditions (METRA-3) to be electronically served with the Board and served first class mail, postage pre-paid, on all parties of record other than Washington, D.C. counsel for Applicants, which were served by hand in the aforementioned proceeding.

  
Robert P. vom Eigen

**BEFORE THE  
SURFACE TRANSPORTATION BOARD  
WASHINGTON, D.C.**

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Finance Docket No 35081

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CANADIAN PACIFIC RAILWAY COMPANY, *ET AL* – CONTROL –  
DAKOTA, MINNESOTA & EASTERN RAILROAD CORP., *ET AL*

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**REBUTTAL VERIFIED STATEMENT OF WILLIAM JOHN (JACK) BAUER**

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1 My name is William John (Jack) Bauer, and I am Manager, Operations Administration for Metra. I began my career with Metra in 1993 and have served in the management of contracts since that time. Before Metra, I worked for the Chicago, Milwaukee, St. Paul & Pacific Railroad (“Milwaukee Road”) Engineering Department.

2 In this statement I will respond to certain factual assertions made in CP’s Response to Comments and to clarify why Metra service is threatened to be adversely impacted if the CP’s control application is approved without conditions sought by Metra in our initial submission to the Board.

3. CP asserts that the Soo Line does not presently operate, or intend in the future to operate, over the West Line, except under extraordinary conditions. Although it is true that Soo Line rarely operates over the entire length of the West Line, it certainly operates over the portion of that line between Tower B-12 at Franklin Park and Tower A-5, where it intersects with the North Line. As was stated in Metra’s Request for Conditions, at page 3, note 4 and based upon records

provided by CP, they operated 112 trains per day over that portion of the West Line during the period of June 2006 through May 2007. I have checked the monthly report for March 2008, the most recent period for which Metra has train counts, and CP operated an average of 166 trains per day over the B12 to A5 portion of the West Line during that month. I am not aware of any plan by Soo Line to cease operating over this segment of the West Line.

4 Metra owns and maintains the North and West Lines, but it does not dispatch them. To my knowledge, this is a unique circumstance in the Chicago terminal and is unusual within the industry. Metra acquired these lines through the Milwaukee Road bankruptcy process subject to the condition that they would be dispatched by the CP/Soo Line. I believe Metra could improve its service on these lines without degrading freight service or Amtrak service, if Metra were to dispatch the lines rather than the CP/Soo dispatchers in Minneapolis. We provided in Metra's initial filing five years of data showing that over that period on-time performance was higher on the lines dispatched by Metra than on the North and West Lines. Mr. Graham in his Reply Verified Statement cites data for three months last winter that do not, in the judgment, of Metra's dispatching supervisors contradict the general proposition that Metra trains perform better when they are dispatched by Metra dispatchers.

5 Metra has sought a condition transferring the dispatching of these lines to Metra for the sole purpose of obtaining on a current basis data concerning the routing of traffic coming from or going to the DM&E/IC&F served territory. In 2003, agreements were negotiated allowing the DM&E/IC&E access to the West Line for its existing freight traffic, and provisions and procedures to add service on the West Line for future expansion for coal trains from the Powder River Basin. Metra is seeking to apply to the North Line the same structure of fees and the same procedures contained in the April 2003 for the West Line. Of particular note is the procedure in

place in the agreements covering the West Line for agreements for determining whether capital expenditures are required to increase capacity due to increases in traffic to and from DM&E/IC&E territory that Metra believes are essential as a result of this transaction and its potential impact upon the North Line CP, prior to the current proposal to acquire the DM&E, had no incentive to avoid additional fees paid by DM&E/IC&E to Metra However, once it acquires these carriers, its incentives change If it can avoid additional fees and obligations and decision making process for determining necessary capital improvements that presently apply only to the West Line, it may well do so by re-routing the traffic to the North Line under the current agreements. Metra believes that only by extending the provisions of the 2003 agreements to the North Line, will that incentive be eliminated Moreover, once that occurs, Metra believes that only by acquiring the dispatch function, will it have the leverage and ability to obtain the necessary information on the composition of the trains seeking to gain access to West or North Lines However, Metra is prepared to discuss alternative measures for obtaining such information through negotiation with CP

6 Mr. Graham speaks of the “strong, cooperative, and productive relationship” between CP and Metra Those terms are easy to use, but they cover over the reality that each party has different perspectives and priorities. For instance, Metra and CP have disagreed for years over the installation of continuous welded rail on the West Line CP claims it derives no benefit from such improvement to the Line, and as a result a dispute over allocation of cost responsibility has delayed and prevented this needed capital improvement from being made causing the installation cost to rise with each passing year

7 The inability to resolve such a dispute cannot be tolerated in the context of possible increased coal trains on the West or North Lines For that reason, procedures negotiated in the

April 2003 agreements with CP and IC&E must be extended to the North Line. The procedures specified in §2 14(c) and (d) of the April 2003 IC&E Trackage Rights Agreement (Exhibit C to Metra's Request for Conditions) outline the factors that are to be considered by a neutral railroad engineering expert to resolve any disputes relating to improvements needed to avoid material interference to Metra's train operations. These provisions also establish a time line between the decision by DM&E to construct the Powder River Basin coal line and the actual operation of coal trains over the West Line. The parties agreed that no coal trains will operate over the West Line until the necessary improvements are completed, and acknowledge that the process for design and construction of needed improvements can take multiple years to complete from the time notice of the decision on the coal line is made. The provisions governing capital improvements on the North Line do not articulate the factors to be used to determine necessary improvements or to allocate financial responsibility for them. Most important, they do not place a bar upon entry of such traffic onto the line until such issues are resolved.

8 The IC&E Trackage Rights Agreement also provides for additional fees to be imposed upon IC&E if traffic exceeds the eight train per day threshold ("GTM Excess Train Charge," §3 1) or if Powder River Basin coal trains are introduced to the West Line ("GTM Coal Train Charge," §3 2). Those charges do not apply to Soo Line trains on the North Line. If CP routes DM&E/IC&E traffic via Owatonna and Minnesota City, MN for interchange with Soo Line trains operating to and from Chicago via the North Line, these additional revenues will be lost to Metra. This circumvents the intent of the April 2003 IC&E Trackage Rights Agreement, thereby preventing Metra from receiving compensation for excess trains. This additional revenue was meant to provide Metra with the extra funding to maintain the track structure that would incur additional wear due to the increased freight or coal traffic. During good faith negotiations in

2003, CP made no mention of increased coal or other traffic on the North Line. The loss of revenues will adversely impact Metra's ability to offer service to the millions of customers who depend upon it for public transportation. Metra can ill afford to forego these revenues, but that will be the result unless the Board requires the provisions of the IC&E trackage rights agreements be extended to DM&E/IC&E traffic handled in Soo Line trains operating via the North Line.

9 I need to express Metra's most fervent opposition to the striking assertion made in CP's Response to Comments that by virtue of its acquisition of control over the DM&E that IC&E should no longer be treated as an admittee to the West Line. The prospect of having CP admit another carrier to the North or West Line will impose serious consequences for Metra service. Metra should not be put to the burden of establishing that a carrier with additional freight traffic will impose material interference with Metra commuter service, or of litigating the effect of the control transaction upon the construction of CP's acknowledgement in the IC&E Trackage Rights Agreement that it had already exercised its right to admit a third party carrier. By designating IC&E as an admittee to the West Line, and by virtue of CP's announced introduction of at least some of that traffic to the North Line, it has imposed a quantum change to the traffic handled by these facilities, and CP should not be permitted to introduce the traffic of any additional carrier. We believe the contract and the approval of the control transaction would not have that effect, and request the Board to make such a finding so as not to force the parties to engage in wasteful litigation on the subject.

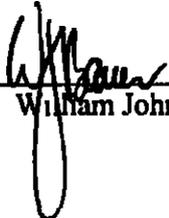
10 Finally, I would like to correct the record on the status of discussions with CP on the substantive amendments we seek to the April 2003 agreements. CP, in its Response to Comments filed on April 18, states that such discussions were "currently" being conducted. In

fact, that was not accurate as of that date. At a meeting that had been scheduled prior to the filing of CP's application for control, but which occurred after that filing, there was a very general discussion of the proposed transaction, changes Metra might want and the prospect for follow-up discussions. However, after an exchange of correspondence those discussions were terminated until just prior to Metra's March 3 filing, when Mr James Bender contacted me to explore our willingness to resume discussions. Since then, Mr Bender retired and the first substantive meeting did not occur until today, May 19, 2008

11 I have read Metra's Rebuttal to Applicant's Response to Comments and Requests for Conditions (Metra-3) dated May 19, 2008, and the factual statements and opinions contained therein are true and correct to the best of my knowledge and belief

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct

Executed this 19<sup>th</sup> day of May, 2008

  
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William John (Jack) Bauer