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December 4, 2009

## VIA ELECTRONIC FILING

Ms. Cynthia T. Brown  
Chief, Section of Administration  
Office of Proceedings  
Surface Transportation Board  
395 E Street, S.W., Room 1034  
Washington, DC 20423-0001

Re: **Finance Docket No. 35301**  
**Wisconsin Department of Transportation -- Petition for**  
**Declaratory Order -- Rail Lines in Janesville, Rock County, WI**

Dear Chief Brown:

Dakota, Minnesota & Eastern Railroad Corporation ("DM&E") hereby submits this reply to the petition for declaratory order filed by the Wisconsin Department of Transportation ("WisDOT") filed in the above-captioned proceeding on October 28, 2009 (and supplemented on November 13, 2009).<sup>1</sup> WisDOT's petition relates to WisDOT's proposed acquisition of rail lines in Janesville, Wisconsin (the "Janesville Lines") from Wisconsin & Southern Railroad Company ("WSOR"), and seeks a determination pursuant to Maine DOT -- Acq. Exempt. -- Maine Central R. Co., 8 I.C.C.2d 835 (1991) ("Maine DOT") and its progeny that the acquisition is not subject to the Board's regulatory authority. DM&E is a trackage rights tenant on the Janesville Lines. With the understanding that the proposed transaction will not diminish in any way DM&E's existing trackage rights, DM&E does not oppose WisDOT's petition.

The Janesville Lines were previously owned by Iowa, Chicago & Eastern Railroad Corporation ("IC&E"), a DM&E predecessor, and were acquired by WSOR in 2004. See Wisconsin Southern Railroad Co. -- Acquisition Exemption -- Iowa, Chicago & Eastern Railroad Corporation, Finance Docket No. 34464 (STB served June 30, 2004) ("WSOR/IC&E"); see also Canadian Pacific Railway Company, et al. -- Corporate Family Transaction -- Iowa, Chicago & Eastern Railroad Corporation, Finance Docket No. 35202 (STB served December 12, 2008) (merger of IC&E into DM&E). IC&E retained local and overhead trackage rights on the

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<sup>1</sup> DM&E is filing this reply in accordance with the Board's decision in this docket served December 2, 2009.

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Janesville Lines. WSOR/IC&E at 2.<sup>2</sup> A copy of the governing Trackage Rights Agreement between IC&E (now DM&E) and WSOR is attached as Exhibit 1.

In recent months, a dispute has arisen between WSOR and DM&E regarding the parties' respective rights to serve certain shippers located on the Janesville Lines. That dispute has resulted in litigation which is currently pending before the United States District Court for the Western District of Wisconsin. Dakota, Minnesota & Eastern Railroad Corporation v. Wisconsin & Southern Railroad Co., No. 09-cv-516 (W.D. Wis.).

Against this backdrop, WisDOT on October 28, 2009 filed its petition for declaratory order seeking a Maine DOT determination with respect to WisDOT's acquisition of the Janesville Lines from WSOR. Neither the original petition nor a subsequent supplement filed November 13, 2009 was served on DM&E. Neither WisDOT nor WSOR approached DM&E at any time prior to the STB filings to disclose or discuss the proposed transaction.

WisDOT's petition noted in a footnote that "In connection with the 2004 sale [of the Janesville Line to WSOR], the IC&E reserved the right to continue to service certain customers located on the Rail Lines." WisDOT Petition at 3, n.5. The body of the petition stated simply that "WSOR desire to see the [Janesville] Lines to WisDOT subject to any rights retained by the IC&E (now DM&E)." WisDOT Petition at 3. The WisDOT petition does not otherwise reference DM&E, or attempt to explain how, under Maine DOT, DM&E's common carrier operating rights on the Janesville Line will be preserved and protected in the proposed transaction.

Four agreements were attached to the WisDOT petition: an Asset Purchase Agreement dated as of October 23, 2009 between WSOR and WisDOT (the "APA"); a Land Use Agreement (with amendments) between WisDOT and the Wisconsin River Rail Transit Commission ("WRRTC"); a Grant Agreement (with amendments) between WisDOT and WRRTC; and an Operating Agreement (with amendments) between WRRTC and WSOR.

Only the Asset Purchase Agreement makes any reference to DM&E or to the trackage rights that DM&E holds on the Janesville Lines. Section 3 of the APA, entitled "Third Party Rights," provides in part that "The Seller [WSOR] purchased the [Janesville] Lines from the Iowa, Chicago & Eastern Railroad Corporation ("ICE") pursuant to an Asset Purchase Agreement dated as of June 8, 2004 (the "Original Purchase Agreement")." For reasons that are

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<sup>2</sup> Separate STB authorization for IC&E's retained trackage rights was not required. See BNSF Ry. Co. -- Trackage Rights -- Portland & Western R., Inc., 6 S.T.B. 507, 508-509 (2003). Those rights remain subject, however, to the Board's jurisdiction, and DM&E continues to possess a corresponding common carrier obligation on the Janesville Lines.

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not evident, the remainder of Section 3 of the APA was redacted from WisDOT's submission. Although not evident from its context, another redacted portion of the APA, Section 2(ii) (covering "Assets Excluded from Sale"), also proved to be related to DM&E. The two redacted provisions were the only portions of the APA that purported to deal with DM&E directly.<sup>3</sup>

Exhibit B to the APA is the Quit Claim Deed to be provided to WisDOT by WSOR, and includes the reservation of a retained "easement, for the benefit of itself [WSOR] and authorized third parties to use the [Janesville] Lines for the operation of its trains, engines and cars . . . ." <sup>4</sup> The reference to "authorized third parties" may include DM&E, in which case DM&E's continued trackage rights operations on the Janesville Lines would apparently be conducted under the auspices of WSOR's retained easement. That, in turn, implies that DM&E would remain in a contractual tenant-landlord relationship with WSOR, rather than with WisDOT or WRRTC. The APA does not address whether WSOR's interests in the existing DM&E-WSOR trackage rights agreement are being assigned as part of the sale of the Janesville Lines. DM&E understands that its rights under the trackage rights agreement will be enforceable against whatever party -- WSOR, WisDOT or WRRTC -- is in a position to fulfill them.

On November 19, 2009, after discussions between counsel for DM&E and WisDOT (and WisDOT's consultation with WSOR), WisDOT provided an unredacted version of the APA to DM&E that included the DM&E-related provisions. WisDOT did not file the unredacted version with the Board, and DM&E attaches the relevant unredacted provisions hereto as Exhibit 2.<sup>5</sup>

Section 3 of the unredacted APA provides that "[t]he purchase of the [Janesville] Lines and other Purchased Assets [by WisDOT from WSOR] is subject to any rights, if any,

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<sup>3</sup> The only other provision redacted from any of the voluminous agreements attached to the WisDOT petition was the purchase price in Section 5 of the APA. DM&E notes that the redaction of DM&E-related provisions, along with the lack of any notice to DM&E, has not been helpful in providing comfort that DM&E's rights are being fully protected here.

<sup>4</sup> The retained easement also purports to provide WSOR with the right to use "the Rail Lines to directly serve any existing or new customers or businesses located" on the Janesville Lines. Whether WSOR actually has such rights under the 2004 IC&E-WSOR sale transaction and the existing DM&E-WSOR trackage rights agreement with respect to certain shippers on the Janesville Lines is the subject of the pending federal court litigation between WSOR and DM&E. The retained easement obviously cannot expand whatever rights WSOR may currently hold under those prior agreements.

<sup>5</sup> The version of the APA provided to DM&E continues to redact the purchase price in Section 5.

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retained by ICE pursuant to the Original Purchase Agreement." While use of the phrase "any rights, if any" to refer to DM&E's common carrier rights on the Janesville Lines is not reassuring, DM&E has assumed that the intention of the language is to leave intact all of DM&E's existing rights under the DM&E-WSOR trackage rights agreement (attached hereto as Exhibit 1) without alternation or diminishment. Any Board decision in this matter granting WisDOT's petition should be expressly predicated on that understanding.

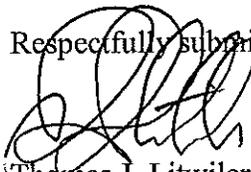
Section 2(ii) of the unredacted APA provides that among the "Assets Excluded from Sale" are "the spur trackage and underlying real property presently used to serve North American Pipe Corporation . . . ." That is the shipper which is the subject of the pending federal court litigation between WSOR and DM&E. Whatever perceived litigation advantage such an exclusion may have for WSOR, DM&E cannot conclude that the exclusion is relevant to the Maine DOT issues before the Board in this proceeding.

DM&E is not a party to the Operating Agreement between WSOR and WRRTC, and does not consider itself bound by any of the restrictions or conditions that that agreement might be read to impose on WSOR.

Subject to the foregoing understandings, DM&E does not oppose WisDOT's petition for declaratory order. DM&E expressly reserves the right to seek reopening of this proceeding if at any time WisDOT or WSOR take positions or actions in purported reliance on the proposed transaction or the Board's decision that would diminish, impede or otherwise affect DM&E's existing trackage rights over the Janesville Lines.

A copy of this reply has been served electronically upon counsel for WisDOT, and by first class mail, postage prepaid, upon other parties of record.

Respectfully submitted,



Thomas J. Litwiler  
Attorney for Dakota, Minnesota & Eastern  
Railroad Corporation

TJL:tl

## Attachments

cc: Kathleen Chung, Esq, WisDOT  
John D. Heffner, Esq., WSOR  
Mr. Karl Nilson, WRRTC

TRACKAGE RIGHTS AGREEMENT

THIS AGREEMENT is made and entered into this 30th day of July, 2004, by and between WISCONSIN & SOUTHERN RAILROAD CO., a Wisconsin corporation, hereinafter called "WSOR" and IOWA, CHICAGO & EASTERN RAILROAD CORPORATION, a Delaware corporation, hereinafter called "IC&E."

WITNESSETH:

WHEREAS, pursuant to that certain Asset Purchase Agreement dated June 8, 2004 between IC&E and WSOR ("Purchase Agreement"), IC&E has sold to WSOR and WSOR has purchased from IC&E the West Yard and certain rail lines in the Janesville, Wisconsin area (collectively, the "Rail Lines");

WHEREAS, as part of the sale of the Rail Lines to WSOR, IC&E retained trackage rights over the Rail Lines for all purposes, including but not limited to interchanging traffic with WSOR and with any other railroad now or in the future connecting to the Rail Lines, (including, but not limited to, Union Pacific Railroad Company ("UP")) and serving all present and future industries on the Rail Lines, including the retention of exclusive access, and the sole right to use the Rail Lines to provide rail freight transportation service, to certain industries on the Rail Lines as provided herein;

WHEREAS, IC&E and WSOR desire to set forth the terms and conditions under which IC&E will use the Rail Lines pursuant to its retained trackage rights thereover.

NOW, THEREFORE, in consideration of the terms and conditions contained herein, and other good and valuable consideration, the parties hereto agree as follows:

**Section 1. RAIL LINES DEFINED**

1.1 The tracks between Points A, B, C and D shown on Exhibit A hereto and the right-of-way, railroad facilities and appurtenances thereto known as "the West Yard" at Janesville, Wisconsin shall hereinafter be referred to collectively as the "Rail Lines," and shall include all main tracks, sidings, industrial tracks, yard tracks, roadbed, culverts, switches, signals, right-of-way fences, bridges, structures, access roads and highway crossing protection in, upon, under, or adjacent to same, and the railroad right-of-way, and all appurtenances, facilities, additions, betterments and improvements thereto, required for the operation of trains, engines and cars of the parties hereto.

**Section 2. RETENTION OF TRACKAGE RIGHTS**

2.1 IC&E shall have the right to use the Rail Lines (including the West Yard) for the operation of its trains, engines and cars, including track inspection cars and work or wreck equipment, in its account, for all purposes, including but not limited to interchanging traffic with WSOR and any other railroad now or in the future connecting to the Rail Lines (including, but not limited to, UP), providing overhead service, and serving all present and future industries on the Rail Lines. User shall have exclusive access, and the sole right to use the Rail Lines to provide rail freight transportation service, to Freedom Plastics and the sole right to use the Rail Lines to provide rail freight transportation service to Janesville Sand and Gravel ("Current Industry"), including any relocation or expansion that such Current Industry may undergo, and whether or not such Current Industry ships or receives by rail on the date of the Purchase Agreement, it being understood that WSOR shall not have the right, without written permission from IC&E, to:

- (a) directly serve any such Current Industry located adjacent to or on trackage connecting to the Rail Lines, nor have the right to construct switches and trackage from the Rail Lines to any such Current Industry, nor
- (b) permit any third party to use the Rail Lines to perform any service, conduct any operation or otherwise do anything WSOR is not permitted to do hereunder.

Notwithstanding the foregoing, WSOR and IC&E shall each have the right to use the Rail Lines to directly serve General Motors Corporation, any other existing industry located adjacent to or on trackage connecting to the Rail Lines and any New Industry that locates on the Rail Lines after the date of the Purchase Agreement. If use of any UP track is necessary for WSOR to serve General Motors Corporation, WSOR shall be solely responsible for obtaining from UP the right to use such UP track. If use of any UP track is necessary for Seller to serve Janesville Sand and Gravel, IC&E shall be solely responsible for obtaining from UP the right to use such UP track. If WSOR acquires such UP track, IC&E's trackage rights over the Rail Lines shall be extended to such acquired trackage at no additional cost to IC&E and the terms and conditions set forth herein shall otherwise apply to IC&E's use of such track. As used herein, a "New Industry" shall mean any industry, shipper, receiver or facility other than Freedom Plastics, Janesville Sand and Gravel and General Motors Corporation that constructs a new facility on a vacant site or occupies a previously vacant facility on the Rail Lines after the date of the Purchase Agreement.

2.2 In the event WSOR violates the conditions contained in Section 2.1, WSOR shall pay to IC&E as liquidated damages ("Liquidated Damages"), [REDACTED] per car for each car so handled. Such Liquidated Damages amount shall be adjusted upward or downward in accordance with the formula for adjusting the Annual

Compensation Amount set forth in Section 9, but shall never be less than [REDACTED]

2.5 Notwithstanding any other provisions of this Section 2, IC&E shall not handle in any one train over and upon the Rail Lines or any part thereof more cars than can, in the opinion of WSOR's Superintendent of Transportation or his authorized representative, be promptly and expeditiously handled thereover, it being understood and agreed that WSOR shall not arbitrarily apply to the movements of the trains of IC&E hereunder any restrictions that WSOR does not apply to the movements of its own trains over the Rail Lines or any part thereof.

**Section 3. OPERATION AND MAINTENANCE OF THE RAIL LINES**

3.1 WSOR shall maintain, repair and renew the Rail Lines at its sole cost and expense. WSOR shall maintain the Rail Lines to not less than Federal Railroad Administration ("FRA") Class 2 standards, except that WSOR shall maintain the tracks in the West Yard to not less than FRA Class 1 standards.

3.2 The management, operation, maintenance, repair and renewal of the Rail Lines shall be under the exclusive direction and control of WSOR which shall be bound to use only reasonable and customary care, skill and diligence in such management, operation, maintenance, repair and renewal and IC&E shall not, by reason of any defect therein or by reason of the failure or neglect on the part of WSOR to repair any such defect or by reason of the failure or neglect of WSOR to properly operate the same, have or make against WSOR any claim or demand for any loss, damage or injury whatsoever, resulting from any such defect, neglect or failure; provided, however, that in the event WSOR shall fail to repair any defect in the Rail Lines within a reasonable time after IC&E has given WSOR written notice specifying the defect

and requesting that it be repaired, then IC&E shall have the right to make the necessary repairs and WSOR shall reimburse IC&E for the entire cost thereof.

3.3 If the use of said Rail Lines or any portion thereof shall at any time be interrupted, or traffic thereon or thereover be delayed for any cause, WSOR shall, with reasonable diligence, restore the line for the passage of trains of the IC&E thereover; but IC&E shall not, in any event, have or make any claim against WSOR for loss or damage of any kind caused by or resulting from such interruption or delay.

3.4 Should any engine, train or car of either party be derailed or damaged while being run or operated upon any of said trackage, the use of which is contemplated under this Agreement, WSOR shall pick up and remove same and the cost and expense thereof shall be treated as an item of expense to be borne and assumed by the parties hereto under the provisions of the liability paragraphs of this Agreement; provided, however, that the employees of IC&E shall be permitted to rerail engines or cars in its trains where a wrecking derrick is not required.

3.5 So long as the track switch in the main track at Milepost 46.08 shall remain a hand-thrown switch, such switch shall normally be left lined and locked for the WSOR main track to the west, and IC&E crews operating over the Rail Lines shall unlock and open said switch and, after the movement of IC&E trains through said switch has been completed, shall reline said switch to its normal position and securely lock same. IC&E hereby agrees to save harmless and forever indemnifies WSOR from any and all loss, damage, injury, cost and expense that may result from or be occasioned by the failure of IC&E employees to properly place and securely lock said switch. In the event said switch is hereafter connected with any form of interlocking plant, said obligation of IC&E employees to handle said switch during such period shall be void.

3.6 When operating over the Rail Lines, IC&E's locomotives and crews shall be equipped to communicate with WSOR on radio frequencies normally used by WSOR in directing train movements on the Rail Lines.

3.7 IC&E crews entering or leaving the Rail Lines shall report by radio or telephone to WSOR's dispatcher.

**Section 4. EXAMINATION OF IC&E EMPLOYEES**

4.1 An IC&E employee or supervisory officer familiar with the Rail Lines and qualified to operate thereover may qualify a new IC&E train crew member for operation over the Rail Lines, provided however, that in the event a qualified IC&E employee or supervisory officer familiar with the Rail Lines is not available, at IC&E's request, WSOR may furnish an experienced person as a pilot to ride the IC&E's train until the IC&E train crew becomes familiar with the Rail Lines. IC&E agrees to reimburse WSOR for all expense incurred by it for wages and incidentals in connection with furnishing such pilot service.

4.2 All employees of IC&E engaged in or connected with the operation of trains on and along the Rail Lines shall be required to pass periodic examinations on the rules and regulations of WSOR, provided, however, that upon the request of IC&E, WSOR shall qualify one or more of IC&E supervisory officers on said rules and regulations and such supervisory officer or officers so qualified shall examine all employees of IC&E engaged in or connected with the operation of trains on and along the Rail Lines.

**Section 5. SWITCH KEYS, RULE BOOKS AND TIMETABLES**

5.1 WSOR shall furnish to IC&E, at no cost to IC&E, a reasonable number of WSOR's rule books, switch keys and timetables for use by IC&E employees.

**Section 6. COMPLIANCE WITH LAWS  
AND OTHER PUBLIC REGULATIONS**

6.1 Each party hereto with respect to its use of the Rail Lines and the operation of its trains, engines or cars thereon and thereover, shall comply with all applicable federal and state laws and regulations and all applicable rules, regulations and orders promulgated by any municipality, board or commission in respect thereto for the protection of persons, or otherwise, and if failure on the part of a party hereto so to comply therewith shall result in any fine, penalty, cost, or charge being imposed or assessed on or against the other party, the party failing to comply shall promptly reimburse and indemnify the other party for or on account of such fine, penalty, cost or charge and all expenses and attorney's fees incurred in defending that action which may be brought against the other party on account thereof; and the party failing to comply shall, in the event of any such action, upon notices thereof being given to it by the other party, defend such action free of cost, charge and expense to that party.

**Section 7. ADMISSION OF OTHER RAILROADS**

7.1 WSOR shall have the sole right to admit other tenants to the use of the Rail Lines or any part thereof, including detour movements, on such terms and conditions as it may deem proper, provided, however, that WSOR shall not permit such other tenant to perform any service, conduct any operation or otherwise do anything WSOR is not permitted to do hereunder, and provided further that such admittance shall not unreasonably interfere with IC&E's use of the Rail Lines for the purposes set forth herein; but in no event shall the Annual Compensation Amount provided for in Section 8.1 be reduced as a result of any such admission.

**Section 8. PAYMENTS BY IC&E**

8.1 As compensation for IC&E's use of the Rail Lines, IC&E shall pay to WSOR annually in advance the sum of [REDACTED] per calendar year

("Annual Compensation Amount"). For calendar year 2004 and for the calendar year in which this Agreement terminates, such Annual Compensation Amount shall be prorated based upon the number of days the Agreement was in effect during that calendar year. Such Annual Compensation Amount shall be subject to adjustment in accordance with Section 9. Such compensation amount shall be the sole compensation payable to WSOR for IC&B's use of the Rail Lines regardless of the number of trains, locomotives, cars, inspection vehicles or wreck or work trains operated by IC&E over the Rail Lines.

**Section 9. REVISION OF ANNUAL COMPENSATION**

9.1 The Annual Compensation Amount shall be revised upward or downward each year, beginning with the bill rendered during the month of July, 2005, to compensate for 80% of the increase or decrease in the cost of labor and material, excluding fuel, as reflected in the Annual Indexes of Charge-Out Prices and Wage Rates (1977=100), included in "AAR Railroad Cost Indexes" and supplements thereto, issued by the Association of American Railroads. In making such determination, the final "Material prices, wage rates and supplements combined (excluding fuel)" indexes for the Western District shall be used. The Annual Compensation Amount shall be revised by calculating the percent of increase or decrease in the index of the year to be revised (2004 Index for the first annual adjustment) as related to the index for the previous year (2003 Index for the first annual adjustment) and by applying that percent to the Annual Compensation Amount.

By way of example, assuming "A" to be the "Material prices, wage rates and supplements combined (excluding fuel)" final index figure for 2003; "B" to be the "Material prices, wage rates and supplements combined (excluding fuel)" final index figure for 2004; "C" to be the Annual Compensation Amount; "D" to be the percent of increase or decrease; and "E"

to be the adjusted revised percentage of increase or decrease, the revised Annual Compensation Amount stated herein would be revised by the following formula:

$$(1) \quad \frac{B - A}{A} = D$$

$$(2) \quad D \times 80\% = E$$

$$(3) \quad (C \times E) + C = \text{revised Annual Compensation Amount, effective July 1 of the year being revised.}$$

In the event the base for the Annual Indexes of Charge-Out Prices and Wage Rates issued by the Association of American Railroads shall be changed from the year 1977, appropriate revision shall be made. If the Association of American Railroads or any successor organization discontinues publication of the Annual Indexes of Charge-Out Prices and Wage Rates, an appropriate substitute for determining the percentage of increase or decrease shall be negotiated by the parties hereto. In the absence of agreement, the parties shall submit the matter to binding arbitration as outlined in Section 11 hereof.

9.2 Billing and Payment. Not earlier than November 1 of each calendar year during the term of this Agreement, WSOR shall render to IC&E an invoice for the Annual Compensation Amount for the following calendar year. Invoices shall be payable within sixty (60) days after receipt. All disputes concerning the Annual Compensation Amount shall be resolved in accordance with Section 11 hereof. During the pendency of any dispute, IC&E shall continue to pay WSOR's invoices for the Annual Compensation Amount (and for any other charges under this Agreement) on a timely basis.

9.3 Access to Records. The records of each party hereto pertaining to this Agreement shall be open to inspection by representatives of the other party at the expense of the inspecting party, upon reasonable prior written notice, during regular office hours.

**Section 10. RENDITION OF STATEMENTS - PAYMENT OF BILLS**

10.1 Any bills rendered hereunder for costs and expenses incurred by a party hereto that are the responsibility of the other party under the terms and conditions of this Agreement shall be paid by such other party within sixty (60) days after receipt thereof and said payment shall not be delayed for errors of ordinary character likely to occur in railroad accounts, the necessary corrections to be made in subsequent bills.

10.2 Bills rendered pursuant to the provisions of this Agreement, other than bills for the Annual Compensation Amount, shall include direct labor and material costs, together with applicable surcharges, overhead percentages and equipment rentals charged by the party performing the work at the time such work is performed.

10.3 Sales taxes, use taxes and other similar taxes paid by the billing party hereunder shall be billable on the same basis as the labor or material expense to which they pertain.

**Section 11. ARBITRATION**

11.1 Any irreconcilable dispute arising between the parties hereto with respect to this Agreement involving Five Hundred Thousand Dollars (\$500,000.00) or less shall be settled through binding arbitration under the Commercial Arbitration Rules of the American Arbitration Association. The decision of the arbitrator shall be final and conclusive upon the parties. Each party to the arbitration shall pay the compensation, costs, fees and expenses of its own witnesses, experts and counsel. The compensation, costs and expenses of the arbitrator, if any, shall be borne equally by the parties. Until the arbitrator shall issue the final decision or award upon any question submitted for arbitration, performance under the Agreement shall continue in the manner and form existing prior to the rise of such question. Each party shall

forthwith comply with said final decision or award immediately upon receipt. Any arbitration pursuant to this Agreement shall take place in Chicago, Illinois or such other location as the parties may agree.

**Section 12. LIABILITY**

12.1 Whenever the expression "Loss or Damage" is used in this Section, it means all costs, liabilities, judgments, fines, fees (including without limitation reasonable attorneys' fees and disbursements) and expenses of any nature arising from or in connection with death of or injury to persons, including without limitation employees of the parties hereto, or damage to or destruction of property including without limitation property of the parties hereto or the Rail Lines, in connection with operations of the parties on or over the Rail Lines.

12.2 For purposes of this Agreement, an employee of a party hereto while operating, maintaining or directing operations along the Rail Lines shall not be considered as a joint employee but shall remain the sole employee of that party.

12.3 For purposes of this Agreement, "Equipment" shall be defined as trains, locomotives, cars, cabooses, maintenance-of-way motorized equipment, work or wreck trains, and inspection vehicles.

12.4 Each party hereto in using the Rail Lines and operating its engines, cars and trains thereon and thereover, shall undertake to comply with all applicable federal, state and local laws or regulations, and all applicable rules, regulations or orders promulgated by any court, agency, municipality, board or commission. If any failure to comply with such laws, rules, regulations or orders in respect to the use of the Rail Lines results in any fine, penalty, cost or charge being assessed against the other party, the party that failed to comply agrees to reimburse promptly and indemnify the other party, its directors, officers, employees, agents,

parents, subsidiaries, affiliates, successors and assigns for such amount, including all expenses and attorneys' fees incurred in defending any action against such other party on account thereof, and shall, in the event of any such action, upon notice thereof being given to it by such other party, defend such action free of cost, charge and expense to such other party.

12.5 Notwithstanding anything else contained in this Agreement, liability for Loss or Damage resulting from or in connection with the operation of the Equipment of either IC&E or WSOR, or in connection with the presence on the Rail Lines of Equipment or property of either party, shall be borne and paid by IC&E or WSOR as follows:

- (a) When the same shall involve the Equipment of only one of the parties hereto, regardless of any third party involvement, all Loss or Damage, including but not limited to, restoration and repair of the Rail Lines and third party persons or property shall be borne by the party whose Equipment was involved.
- (b) When the same shall involve the Equipment of both IC&E and WSOR, Loss or Damage shall be borne by each party as to its own employees, property, or property in its custody (except for damage to the Rail Lines). As to third party person or property and the Rail Lines, Loss or Damage shall be borne equally by the parties involved.
- (c) For purposes of this Section 12.5, unattended Equipment of either party on the Rail Lines involved in any incident with attended Equipment shall be considered the Equipment of the party whose Equipment was attended.

12.6 Liability for Loss or Damage not involving the Equipment of either party, or where the identity of the Equipment involved is unknown, shall be borne and paid by the parties hereto as follows:

- (a) Liability for Loss or Damage shall be borne by either IC&E or WSOR as to its own employees, property, or property in its custody. As to third party persons or property (other than those covered by Section 12.6(b) below), Loss or Damage shall be borne equally by the parties.
- (b) Third party claims for Loss or Damage arising out of the killing or injuring of livestock or the setting of fires on or along the Rail Lines, when caused by the Equipment or employee of IC&E or WSOR, shall be handled or settled by the party whose Equipment or employee caused such Loss or Damage, but if it cannot be determined whose Equipment or employee caused such Loss or Damage, the claim shall be handled or settled on behalf of IC&E and WSOR in the first instance by WSOR, and the Loss or Damage shall then be borne equally by the parties hereto or equally by all users of the Rail Lines if WSOR has admitted any other railroad(s) to use of the Rail Lines.

12.7 Each party agrees that it shall pay for all Loss or Damage, the risk of which it has herein assumed, the judgment of any court to the contrary notwithstanding, and shall forever indemnify and save harmless the other party, its directors, officers, employees, agents, parents, subsidiaries, affiliates, successors and assigns, from such payment; provided, however, the indemnifying party shall be assigned any rights which the indemnified party may have against any third party or parties for recovery of any indemnified amount.

12.8 In the event that both parties hereto shall be liable under this Agreement for Loss or Damage, and the same shall be compromised and settled by voluntary payment of money or valuable consideration by one of the parties, the settling party shall obtain a valid and enforceable release from liability for both parties, specifically naming Iowa, Chicago & Eastern Railroad Corporation, Wisconsin & Southern Railroad Co., and their respective directors, officers, employees, agents, parents, subsidiaries, affiliates, successors and assigns. Neither party shall make any such compromise or settlement in excess of [REDACTED] without the prior, written authority of the other party, but any settlement made by one party in consideration of [REDACTED] or less shall be a settlement releasing all liability of both parties and shall be binding upon both parties.

12.9 In case a lawsuit or lawsuits shall be commenced against either party hereto for or on account of any Loss or Damage for which the other party would be solely or jointly liable under this Agreement, the party thus sued shall give the other party timely written notice of the pendency of such suit, and thereupon the party so notified shall assume or join in the defense thereof, and if the party so notified is liable therefor under this Agreement, such party shall save harmless the party so sued from all Loss or Damage in accordance with the liability allocation set forth in this Agreement. Neither party shall be bound by any judgment against the other party unless it shall have been so notified and shall have had reasonable opportunity to assume or join in the defense of the action. When so notified, and said opportunity to join in the defense of the action has been afforded, the party so notified shall to the extent of its liability under this Agreement be bound by such judgment.

12.10 Where WSOR conveys an easement or enters into an agreement, easement or license affecting the Rail Lines, WSOR shall provide that the indemnification provisions

contained therein, if any, pertaining to railroad operations on the Rail Lines will apply to both WSOR and IC&E.

12.11 Detour of foreign line Equipment over the Rail Lines shall be at the sole discretion and permission of WSOR, provided that such detour shall not unreasonably interfere with IC&E's use of the Rail Lines for the purposes set forth herein. In the event of a collision between such foreign line Equipment and that of IC&E or any Loss or Damage incurred by IC&E on or along the Rail Lines from such detour, such foreign line Equipment shall be considered to be that of WSOR for purposes of liability under this Agreement.

12.12 The allocations of Loss and Damage in this Section 12 and the provisions therein for indemnification are intended solely for the benefit of the parties, and their directors, officers, agents, employees, parents, subsidiaries, affiliates, successors and assigns. Section 12 shall not create any rights for non-parties.

**Section 13. INSURANCE**

13.1 IC&E shall carry, at its own cost, and WSOR shall carry, at its own cost, railroad and general liability insurance each with a combined single limit of at least [REDACTED] per occurrence with an annual aggregate of not less than [REDACTED] on a claims made basis, which shall provide coverage for personal injury, bodily injury, death, property damage, Federal Employers Liability Act liability and bill of lading and foreign rolling stock liability, with respect to all operations of IC&E and WSOR on the Rail Lines, and which shall include blanket contractual coverage. IC&E's insurance policy(ies) shall name WSOR as an additional insured and WSOR's insurance policy(ies) shall name IC&E as an additional insured. Nothing in this Section 13.1 shall be construed as limiting IC&E's liability to WSOR or WSOR's liability to IC&E under this Agreement.

13.2 The insurance policies obtained by IC&E and WSOR in fulfillment of their respective obligations under this Section 13 shall be issued only by insurance companies that are licensed and authorized to do business in the State of Wisconsin and that have a rating in the latest edition of "Bests Key Rating Guide" of "A" or better, or another comparable rating reasonably acceptable to the other party. Certificates of insurance evidencing the issuance of all insurance required hereunder, and guaranteeing at least thirty (30) days' prior notice to the other party of cancellation, non-renewal or modification of said insurance, shall be delivered by each party to the other party on or before the date of this Agreement, and in the case of new or renewal policies replacing any policies expiring during the term hereof, no later than thirty (30) days before the expiration dates of such policies.

13.3 In the event IC&E fails to maintain the levels of insurance coverage required in this Section 13, or fails to properly notify WSOR of said coverage, after giving IC&E written notice of non-compliance and ten (10) days from receipt of such notice within which to comply, WSOR may require IC&E to suspend operations over the Rail Lines until such time as IC&E complies with the insurance requirements hereunder or otherwise provides WSOR with evidence of financial responsibility acceptable to WSOR in its sole discretion.

#### **Section 14. DEFAULT**

14.1 It is understood and agreed between the parties hereto that should IC&E default in any of the payments to be made by it hereunder, or fail to faithfully perform any of the covenants herein set forth, and if such default or failure shall continue for a period of sixty (60) days after WSOR shall have given to IC&E written notice thereof, WSOR may, subject to existing law, thereupon declare this Agreement terminated and exclude IC&E from all the rights

and privileges reserved it hereunder and IC&E shall have no claim or demand upon WSOR at law or in equity on account of such exclusion.

14.2 WSOR may waive any such default or failure by IC&E, but no such action of WSOR in waiving such default or failure shall be construed to extend to any future default or failure, whether of a similar nature or otherwise, nor to impair WSOR's right of termination resulting therefrom.

**Section 15. PUBLIC AUTHORITY AND PERMISSION**

15.1 IC&E shall be solely responsible for obtaining any necessary governmental approval or exemption therefrom for the retention of the trackage rights provided for herein.

**Section 16. EFFECTIVE DATE - TERM**

16.1 This Agreement shall take effect on the date hereof. Unless sooner terminated or declared null and void in accordance with the provisions of Section 14 or 17, this Agreement shall remain in full force and effect for a term of ninety-nine (99) years from the date of this Agreement. Thereafter, this Agreement shall continue in full force and effect from year to year until terminated by either party upon one (1) year's prior written notice to the other party.

**Section 17. ABANDONMENT BY EITHER PARTY OF ITS OPERATION OVER THE RAIL LINES**

17.1 Subject to the approval of any governmental authority having jurisdiction, IC&E may, at any time, discontinue its operation over all or any portion of the Rail Lines and, in such case, IC&E shall have the right at any time to terminate this Agreement as of the date such discontinuance becomes effective after having given WSOR notice in writing of its intent to do so at least thirty (30) days prior to such effective date.

17.2 Subject to the approval of any governmental authority having jurisdiction, WSOR may, at any time, abandon all or any portion of the Rail Lines after having given IC&E six (6) months written notice of its intent to do so. IC&E shall, during such six (6) month period, have the option of purchasing from WSOR that portion of the Rail Lines to be abandoned, and if IC&E refuses or fails to exercise such option at the end of said six (6) month period, this Agreement shall be terminated as to the portion abandoned. No termination of this Agreement, under the provisions of this Section 17 or any other provision of this Agreement, shall serve to relieve or release either party hereto from any obligation incurred hereunder on or prior to the date of such termination.

17.3 In the event IC&E exercises the option herein provided to purchase that portion of the Rail Lines to be abandoned by WSOR, IC&E shall pay to WSOR therefor a sum equal to: (a) the salvage value of all tracks, materials, bridges, signals, buildings and other structures and facilities located thereon, less estimated cost of removal; and (b) the appraised value of the right-of-way owned and abandoned by WSOR.

17.4 If IC&E exercises the option herein provided, to purchase that portion of the Rail Lines to be abandoned by WSOR, WSOR shall assign to IC&E and IC&E shall accept, all contracts, leases, easements, licenses, permits and privileges then in effect upon such portion of the Rail Lines to be acquired by IC&E.

#### **Section 18. NOTICES**

18.1 All notices, demands and other communications to be given or delivered by reason of the provisions of this Agreement shall be in writing and shall be deemed to have been given when personally delivered, delivered by express courier, delivered by United States mail (by registered or certified mail, return receipt requested), or by such other method as the

parties agree. Notices, demands and communications shall, unless another address is specified in writing, be sent to the address indicated below:

If to IC&E: Iowa, Chicago & Eastern Railroad Corporation  
140 North Phillips Avenue  
Sioux Falls, South Dakota 57104  
Attention: Chief Operating Officer

If to WSOR: Wisconsin & Southern Railroad Co.  
5300 North 33<sup>rd</sup> Street  
Milwaukee, Wisconsin 53209  
Attention: Superintendent of Transportation

**Section 19. SECTION HEADINGS**

19.1 Section headings are inserted for convenience only and shall not affect any construction or interpretation of this Agreement.

**Section 20. AGREEMENT TO BE CONSTRUED LIBERALLY-  
NOT FOR BENEFIT OF THIRD PARTIES**

20.1 This Agreement shall be construed liberally so as to secure to each party hereto all the rights, privileges and benefits herein provided or manifestly intended. This Agreement, and each and every provision hereof, is for the exclusive benefit of the parties hereto and not for the benefit of any third party.

**Section 21. ENTIRE AGREEMENT**

21.1 This Agreement constitutes the entire agreement between IC&E and WSOR relating to IC&E's use of its retained trackage rights over the Rail Lines, and no other representation, warranty, or agreement, either oral or written, relating thereto, shall be binding upon IC&E or WSOR. This Agreement may be modified only by an instrument in writing signed by an authorized officer of IC&E and of WSOR.

**Section 22. NON-WAIVER**

22.1 Any waiver at any time of a breach of any provision, condition, or requirement of this Agreement shall extend only to the particular breach so waived and will not impair or affect the existence of any provision, condition, obligation, or requirement of this Agreement or the right of IC&E or WSOR thereafter to avail itself of any breach, subject to such waiver.

**Section 23. SUCCESSORS AND ASSIGNS**

23.1 This Agreement shall inure to the benefit of and shall be binding upon the parties hereto, their respective successors and assigns.

**Section 24. COUNTERPARTS**

24.1 This Agreement may be executed in any number of counterparts, each of which shall be deemed an original for any purpose.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed in duplicate as of the date first herein written.

WISCONSIN & SOUTHERN RAILROAD CO.

ATTEST: Timothy J. Kamp

By: Welle E. Dasher

Its: President

IOWA, CHICAGO & EASTERN RAILROAD CORPORATION

ATTEST: \_\_\_\_\_

By: \_\_\_\_\_

Its: \_\_\_\_\_

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22.1 Any waiver at any time of a breach of any provision, condition, or requirement of this Agreement shall extend only to the particular breach so waived and will not impair or affect the existence of any provision, condition, obligation, or requirement of this Agreement or the right of IC&E or WSOR thereafter to avail itself of any breach, subject to such waiver.

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IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed in duplicate as of the date first herein written.

WISCONSIN & SOUTHERN RAILROAD CO.

ATTEST: \_\_\_\_\_

By: \_\_\_\_\_

Its: \_\_\_\_\_

IOWA, CHICAGO & EASTERN RAILROAD CORPORATION

ATTEST: [Signature]

By: [Signature]

L.A. Anderson  
Vice President-Marketing  
Its: \_\_\_\_\_

## ATTACHMENT 2

## ASSET PURCHASE AGREEMENT

THIS ASSET PURCHASE AGREEMENT is dated as of Oct. 23, 2009, and is by and between WISCONSIN & SOUTHERN RAILROAD CO. a Wisconsin corporation ("Seller") and the WISCONSIN DEPARTMENT OF TRANSPORTATION, an administrative agency within the executive branch of Wisconsin state government ("Buyer").

## RECITALS

A. Seller is a regional railroad operating railroad track throughout southern Wisconsin and northeastern Illinois (the "Business").

B. Seller desires to sell to Buyer and Buyer desires to buy from Seller the Purchased Assets (as defined below) on the terms and conditions set forth in this Agreement.

## AGREEMENTS

In consideration of the promises and the mutual agreements herein contained, the parties agree as follows:

1. Purchase and Sale of Assets. Subject to the terms and conditions of this Agreement, Seller shall sell to Buyer and Buyer shall buy from Seller, on an "as is, where is" basis, as of the Closing Date (as defined below), all right and title to and interest in the following assets (collectively, the "Purchased Assets"):

(a) the real property and appurtenant rail lines located in Rock County, Wisconsin, commonly referred to as the Beloit to Janesville rail line, the North of Janesville to West of Janesville rail line and the Janesville Wheeler Pit Spur rail line. Said rail lines are more particularly described on attached Exhibit A (the "Rail Lines"); and

(b) all fixtures and articles of personal property attached to or located on the real property that constitutes the Rail Lines, including without limitation rail and other track material, ties, wires, switches, turnouts, crossovers, pipes, conduits, electrical and mechanical signal devices and radio and other communication facilities.

2. Assets Excluded from Sale. Notwithstanding anything herein to the contrary, all assets of the Seller not specifically listed as a Purchased Asset shall be excluded from the purchase and sale referenced above (the "Excluded Assets"): The Excluded Assets shall include, without limitation, (i) all assets of Seller not located on the Rail Lines; (ii) the spur trackage and underlying real property presently used to serve North American Pipe Corporation; (iii) the common carrier authority to provide rail service on the Rail Lines; (iv) cash, accounts receivable, prepaid expenses and other

