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February 5, 2010

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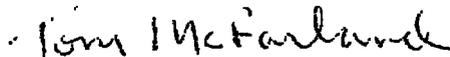
Chief, Section of Administration  
Office of Proceedings  
Surface Transportation Board  
395 E Street, S.W.  
Washington, DC 20024

Re: Finance Docket No. 35346, *Nebraska Northwestern Railroad, Inc. -- Purchase, Lease and Operation Exemption -- Dakota, Minnesota & Eastern Railroad Corporation*

Dear Chief:

Hereby transmitted is a Joint Petition For Rejection Or Stay Of Class Exemption for filing with the Board in the above referenced matter.

Very truly yours,



Thomas F. McFarland  
*Attorney for Petitioners*

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BEFORE THE  
SURFACE TRANSPORTATION BOARD

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NEBRASKA NORTHWESTERN )  
RAILROAD, INC. -- PURCHASE, LEASE ) FINANCE DOCKET  
AND OPERATION EXEMPTION -- ) NO. 35346  
DAKOTA, MINNESOTA & EASTERN )  
RAILROAD CORPORATION )

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JOINT PETITION FOR REJECTION  
OR STAY OF CLASS EXEMPTION

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WEST PLAINS CO.  
4800 Main Street, Suite 274  
Kansas City, MO 64112

NEBKOTA RAILWAY, INC.  
111 North Main Street  
Chadron, NE 69337

Petitioners

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Attorneys for Petitioners

DATE FILED: February 5, 2010

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RAILROAD, INC. -- PURCHASE, LEASE	)	FINANCE DOCKET
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DAKOTA, MINNESOTA & EASTERN	)	
RAILROAD CORPORATION	)	

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**JOINT PETITION FOR REJECTION  
OR STAY OF CLASS EXEMPTION**

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Pursuant to 49 C.F.R. § 1150.32(c), NEBKOTA RAILWAY, INC. ("NRI") and WEST PLAINS CO. ("WPC") hereby jointly petition for rejection or stay of a class exemption from 49 U.S.C. § 10901 for purchase by Nebraska Northwestern Railroad, Inc. ("NNW") from Dakota, Minnesota & Eastern Railroad Corporation ("DME") of a 7.22-mile rail line between Milepost 404.5 at or near Chadron, NE and Milepost 411.72 at or near Dakota Junction, NE and for lease by NNW from DME of a 20.88-mile rail line between Milepost 411.72 at or near Dakota Junction, NE and Milepost 432.6 at or near Crawford, NE.

A Notice of Exemption for those transactions was filed by NNW on January 25, 2010. Unless rejected or stayed, an exemption for that purchase and lease will become effective on February 24, 2010. *See* 49 C.F.R. § 1150.32(b).

**IDENTITY AND INTEREST OF PROTESTANTS**

As an aid to understanding of the interest of Protestants, there is attached to this Petition as Appendix 1 a railroad map of South Dakota and northwestern Nebraska. Reference to that map illustrates the current configuration of rail lines in the area under consideration.

NRI is a Class III rail carrier subject to the jurisdiction of the Board. NRI owns approximately four miles of rail line at and east of Chadron, NE.<sup>1/</sup> NRI's rail line is shaded in yellow on Appendix 1.

NRI's tracks connect with DME at Chadron, NE. NRI transports traffic between Dakota Junction, NE and Chadron, NE pursuant to a haulage agreement with DME. A copy of that Haulage Agreement dated October 14, 2008 is attached to this Petition as Appendix 2. As a result of the Haulage Agreement, NRI's interchange with DME is at Dakota Junction, not at Chadron. Substantial rail traffic moves via the interchange between NRI and DME at Dakota Junction. The trackage between Dakota Junction and Chadron over which NRI provides haulage is shaded in pink on Appendix 1.

NRI has overhead trackage rights over DME between Chadron and Crawford, NE, via Dakota Junction, which enables NRI to interchange with BNSF Railway Company (BNSF) at Crawford. The segment of track between Chadron and Dakota Junction (pink on Appdx. 1) over which NRI has trackage rights is the same trackage over which NRI provides haulage. Inasmuch as the Trackage Rights Agreement between NRI and DME does not permit interchange between NRI and DME at Dakota Junction, NRI's rail service at Dakota Junction is dependent on the continued existence of the DME-NRI Haulage Agreement. The trackage between Dakota Junction and Crawford that constitutes the second leg of NRI's trackage rights over DME is shaded in blue on Appendix 1.

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<sup>1/</sup> NRI's rail line is a segment of Chicago and North Western Railway Company's "Cowboy Line," portions of which were acquired by NRI in the mid 1990s in lieu of abandonment.

The significant point illustrated on Appendix 1 and explained in the foregoing is that NRI currently has the benefit of direct connections with two overland rail carriers: DME at Dakota Junction and BNSF at Crawford.

WPC is an employee-owned merchant of agricultural products. NRI is wholly-owned by WPC. As here pertinent, WPC has shipped substantial quantities of wheat from an elevator on DME at Chadron to points in the East and Southeast via DME to Chicago, utilizing NRI haulage rights from Chadron to connection with DME at Dakota Junction. WPC has also shipped wheat from that elevator to points in the East and Southeast via BNSF to Chicago or points beyond, utilizing NRI trackage rights over DME between Chadron and Crawford. The ability of WPC to utilize NRI haulage rights and NRI trackage rights to connect directly to two overland carriers for traffic east and southeast of Chicago has been an important benefit to WPC in terms of rail rates and rail service.

On December 22, 2009, WPC's elevator on DME at Chadron was destroyed by fire. WPC intends to build a new elevator on NRI a short distance east of Chadron to replace the elevator lost to fire. It will continue to be vital to WPC for NRI to have direct connections from that new elevator to two overland rail carriers on traffic east and southeast of Chicago.

As DME's connecting carrier via haulage at Dakota Junction, and as DME's trackage rights tenant between Chadron and Crawford, NRI would clearly be the logical purchaser and/or lessee if DME were to sell or lease the Chadron-Dakota Junction-Crawford trackage. On several occasions, representatives of WPC-NRI have expressed to representatives of DME a desire to purchase and/or lease that trackage if DME were to sell, lease, or abandon it. However, DME

now proposes to sell and lease that trackage to a newly-formed carrier, NNW, which has had no prior history or connection with that trackage.

NRI and WPC are seeking rejection, or, at a minimum, stay of the proposed purchase and lease because on the basis of the facts discernible at this time, (1) those transactions would have a serious adverse effect on both NRI and WPC as a result of NRI's loss of its direct connection with DME at Dakota Junction; and (2) safety would be seriously compromised as a result of operation by multiple rail carriers between Chadron and Crawford without any operating protocols being in place.

#### **STANDARDS FOR REJECTION OR STAY OF CLASS EXEMPTIONS**

In *Winimac Southern Ry. Co. - Trackage Rights Exempt. - A&R Line, Inc.*, 2009 WL 53358 (Finance Docket No. 35208, decision served January 9, 2009), the Board explained circumstances that would warrant rejection of a class exemption, viz. at \*1; emphasis added:

In general, the notice of exemption process is an expedited means of obtaining Board authority in certain classes of transactions, defined in the Board's regulations, that ordinarily do not require greater regulatory scrutiny. Thus, notices of exemption are intended to be used for routine and non-controversial cases (citing *Northeast Interchange Railway, LLC - Lease and Operation Exemption - Line in Croton-on-Hudson, NY*, STB Finance Docket No. 34734 [STB served Nov. 17, 2005], and *James Riffin dba the Northern Central Railroad - Acquisition and Operation Exemption - in York County, PA*, STB Finance Docket No. 34501 [STB served Feb. 23, 2005]). In cases where unresolved issues arise, the Board will reject a notice (citing *FPN-USA, Inc. - Operation Exemption - Tijuana-Tecate Short Line*, STB Finance Docket No. 35155, [STB served Aug. 8, 2008], and *Pro-Go Corp. - Operation Exemption - in Suffolk County, NY*, STB Finance Docket No. 35120 [STB served Mar. 13, 2008] . . .

Rejection of a Notice of Exemption does not necessarily mean that the proposed acquisition will not be approved. Rejection affects only the manner of processing of the acquisition. Rejection means that an Application under 49 U.S.C. § 10901 or a Petition for

Exemption under 49 U.S.C. § 10502 must be filed if the acquisition is to be considered because procedures associated with such Applications and Petitions allow for appropriate deliberative consideration of issues raised by the proposed acquisition.

Likewise, in *Consolidated Rail Corp. - Exempt. - Abandonment of the Weirton Secondary Track in Harrison and Tuscarawas Counties, OH*, 1998 WL 224657 (Docket No. AB-167 [Sub-No. 1088X], decision served September 7, 1988), the Board's predecessor, the Interstate Commerce Commission, explained circumstances under which a class exemption will be stayed, viz. at 2; emphasis added:

The exemption will be stayed pending detailed review. The line qualifies for the class exemption. (footnote omitted). However, the protestors raise numerous questions that warrant further investigation. The result of Conrail's proposal here is to break the continuity of this line. The parties have raised questions of resultant routing efficiency, deliberate downgrading, and effect of the proposal on economic development in the region and on energy issues, among others. The effect of the abandonment on transportation patterns and opportunities should be studied in greater depth.

As will be shown below, application of those standards dictates rejection, or, at minimum, stay of the proposed class exemption for NNW's purchase and lease of the involved rail lines.

### ARGUMENT

As made clear in the foregoing decisions, not all class exemptions for noncarrier acquisition of rail lines are consistent with public convenience and necessity, and certainly not all such exemptions should be processed under fast-track, notice-of-exemption procedure. To be sure, it may generally be in the public interest for rail lines of overland carriers to be acquired by shortlines, which often are more adept at cultivating and serving local traffic originated or

terminated on those lines. However, where, as here, a noncarrier acquisition would have serious adverse competitive and safety effects, the Board's power under 49 U.S.C. § 10901(c) to condition such an acquisition to eliminate or to substantially ameliorate such adverse effects comes into play, *viz.*; emphasis added:

The Board shall issue a certificate authorizing (a noncarrier acquisition) . . . unless the Board finds that such (acquisition is) inconsistent with public convenience and necessity. Such certificate may approve the application as filed, or with modifications, and may require compliance with conditions . . . the Board finds necessary in the public interest.

The Board's power to impose conditions on a class exemption for noncarrier rail line acquisition under 49 U.S.C. § 10502(a) is necessarily co-extensive with its power to impose conditions in approving an application for noncarrier rail line acquisition under 49 U.S.C. § 10901(c).

The challenge, in a case of that kind, is to approve the noncarrier acquisition so that the new shortline is free to develop originated and terminated traffic on the newly-acquired rail lines, while at the same time fashioning conditions to eliminate or substantially ameliorate the adverse competitive and safety effects of the acquisition. NRI and WPC suggest such an arrangement in the pages that follow, but the issues associated with that scenario cannot be given adequate consideration under highly-accelerated notice-of-exemption procedure. Consequently, NNW's Notice of Exemption should be rejected, and NNW should be required to file an Application under 49 U.S.C. § 10901 or a Petition for Exemption under 49 U.S.C. § 10502(a) if it continues to seek Board authority for the proposed acquisition. At a minimum, the effective date of the class exemption should be stayed pending closer scrutiny of the transaction by the Board.

Considering NNW's proposed acquisition in light of the legal standards explained in the decisions cited above, there are at least two serious "unresolved issues" that would arise from

that proposal, both of which “warrant further investigation,” and both of which require “stud(y) in greater depth” than is possible under accelerated class exemption procedure.

The first such unresolved issue is the serious adverse effect on both NRI and WPC that would result from NRI’s loss of a direct connection to DME at Dakota Junction. As noted, the Haulage Agreement between DME and NRI (Appendix 2) provides haulage by NRI of traffic over DME between Chadron and Dakota Junction, NE. The DME-NRI Haulage Agreement will be inherited by NNW as successor-owner of the Dakota Junction-Chadron rail line. That Haulage Agreement is cancellable without cause on 30 days’ notice. NNW would be able to terminate the Haulage Agreement and establish its own freight charge for transportation between Chadron and Dakota Junction under AAR Accounting Rule 11. That freight charge would likely be much higher than the charge presently paid by DME to NRI for haulage of DME traffic between Chadron and Dakota Junction. The presence of NNW between Chadron and Dakota Junction would block NRI’s direct connection with DME at Dakota Junction.

The adverse effect on Protestants from NRI’s loss of a direct connection to DME at Dakota Junction would be devastating. NRI would be deprived of the substantial revenue that it currently derives from haulage payments by DME. In 2009, haulage for DME via Dakota Junction constituted nearly 95 percent of NRI’s total traffic. It is doubtful that NRI would be able to survive that substantial loss of traffic and revenue. The Board’s power to impose conditions in financial transactions is designed to eliminate or to substantially ameliorate that kind of harm to a rail carrier’s ability to continue to provide essential rail services. *Lamoille Valley RR Co. v. ICC*, 711 F.2d 295, 313 (D.C. Cir. 1983).

WPC, too, would be significantly injured as a result of NRI's loss of a direct connection with DME. As noted, NNW's Rule 11 freight charge for transportation between Chadron and Dakota Junction would be likely to appreciably exceed the haulage charge that DME currently pays to NRI for that transportation. DME would be unlikely to absorb that increased charge out of the freight charge that it has assessed for transportation between Chadron and Chicago. As a consequence, WPC would be forced to pay the increase in freight charge that would result from NNW's Rule 11 freight charge. That would seriously harm WPC's competitive position in the market for grain from Nebraska origins to points in the East and Southeast via Chicago.

An unconditioned acquisition by NNW would harm rail competition itself. Whereas at present NRI can directly interchange with both DME at Dakota Junction and BNSF at Crawford, NNW's acquisition would deprive NRI of its direct connection with DME. Loss of that competition between DME and BNSF would expose WPC and NRI to increased rates and reduced service levels via NRI's then-captive interchange with BNSF. The Board's conditioning power is also designed to prevent such harm from loss of rail competition. *Lamoille Valley RR v. ICC, supra*, 711 F.2d at 309 ("... (T)here are two potential results from consolidations that would ill serve the public -- reduction of competition and harm to essential services ...").

Protestants suggest that the legitimate interests of both NNW and NRI would be harmonized if the Board were to authorize NNW's proposed acquisition, subject to the condition that NRI be provided with haulage rights or trackage rights over NNW between Chadron and Dakota Junction under terms substantially the same as exist in the Haulage Agreement between DME and NRI (Appendix 2). Under that resolution of issues, NNW would be free to develop

local originated and terminated traffic on the acquired rail lines, yet NRI would retain its direct connection with DME that is vital to its continued ability to provide rail service.

A second unresolved issue would arise from the ability of two rail carriers to operate between Chadron and Dakota Junction (i.e., NNW as owner and NRI as trackage rights tenant), and the ability of three rail carriers to operate between Dakota Junction and Crawford (i.e., DME as owner-lessor, NNW as lessee, and NRI as trackage rights tenant), without there being any operating protocols in place to ensure the safety of such dual or triple operations. The Board has determined that operations by a new rail carrier over trackage already operated by an existing carrier should not commence until operating protocols to ensure safe operations are in place.

*Central Illinois R. Co. - Operation Exempt. - Rail Line of the City of Peoria, et al. in Peoria and Peoria Heights, Peoria County, IL, 2005 STB LEXIS 113 (Finance Docket No. 34518, decision served February 23, 2005) viz., at \*14, emphasis added:*

... CIRY cannot operate the Kellar Branch until coordination protocols are in place. Due to the dispute in the record, the parties should, within 30 days of the effective date of this decision, jointly certify that protocols are in place. If the parties cannot reach agreement as to the terms of such protocols, they should bring their dispute to this agency for mediation. Such mediation will be conducted by the Board's Office of Compliance and Enforcement.

#### **CONCLUSION AND REQUESTED RELIEF**

Protestants submit that the foregoing identifies serious unresolved economic, competitive, and operational issues that cannot be adequately addressed and resolved in the restrictive time frame available under accelerated notice-of-exemption procedure. Accordingly, NNW's Notice of Exemption should be rejected, and NNW should be required to file a formal Application under 49 U.S.C. § 10901 or a Petition for Exemption under 49 U.S.C. § 10502(a) if it continues to

progress the proposed acquisition. Under those more deliberative procedures, such unresolved issues can receive the careful consideration and analysis that they deserve. At a very minimum, if the Notice is not rejected, the effective date of the Notice should be stayed pending the Board's more deliberative consideration and resolution of such issues.

Respectfully submitted,

WEST PLAINS CO.  
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NEBKOTA RAILWAY, INC.  
111 North Main Street  
Chadron, NE 69337

Petitioners

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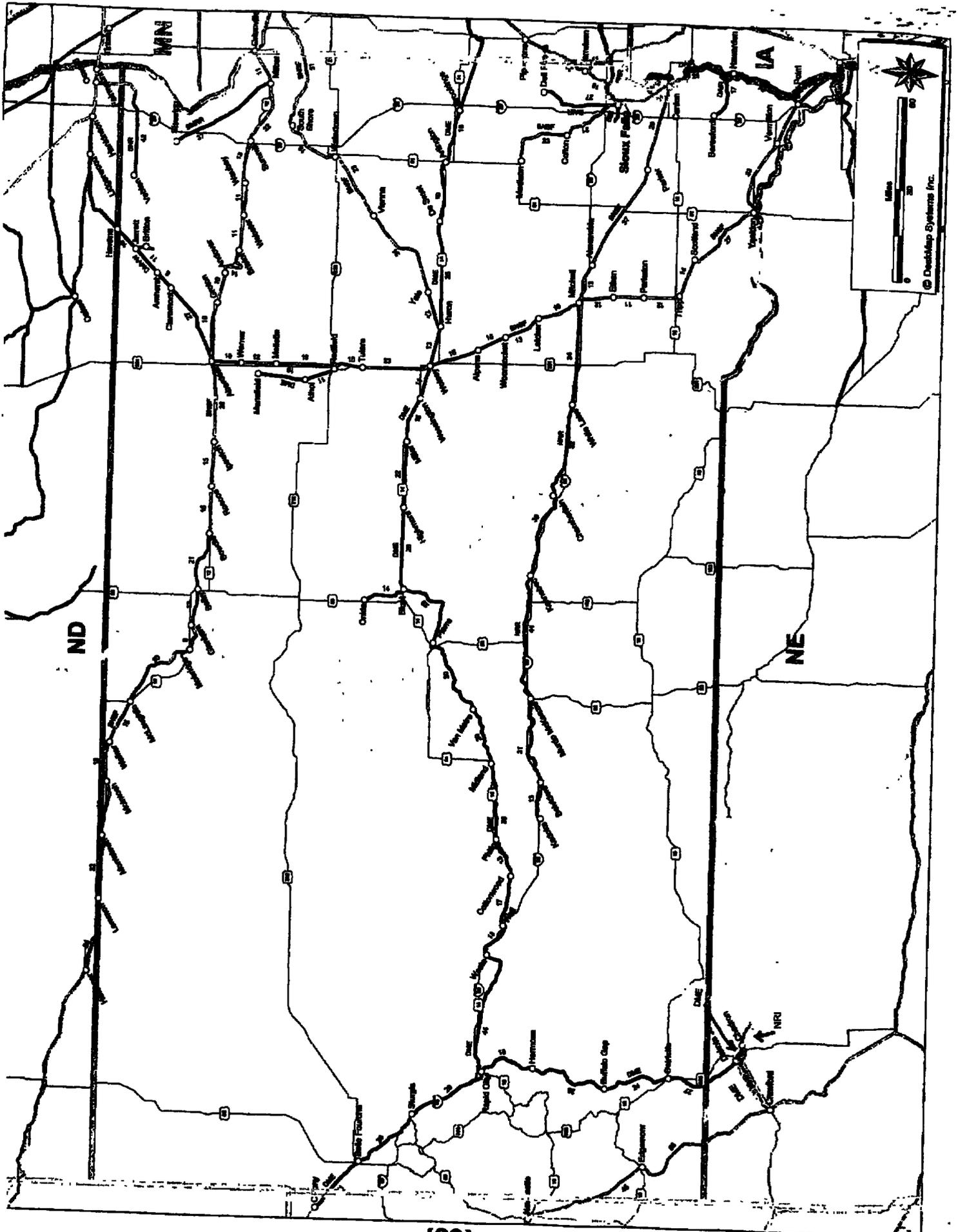
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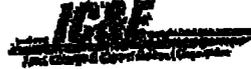
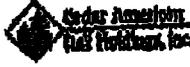
Attorneys for Petitioners

DATE FILED: February 5, 2010

## APPENDIX 1.



## APPENDIX 2



**Haulage Agreement between  
Dakota, Minnesota & Eastern Railroad Corp.  
and Nebkota Railway, Inc.**

**Tuesday, October 14, 2008**

**Nebkota Railway, Inc. (NRI) agrees to move cars for the account of Dakota, Minnesota & Eastern Railroad Corp (DM&E) between DM&E stations of Chadron NE and Dakota Jct, NE, at the rate of \$180 per car, round trip. Please note that this is different from the earlier proposal, in that there is no differentiation for size of units moved:**

**Fees are in dollars per car;  
Fees are round trip - to/from Dakota Junction to Chadron;**

**Applicable fee to be determined by number of cars physically left by DM&E at Dakota Jct. in a single delivery, with instructions to NRI for movement to Chadron, or number of cars at Chadron DM&E instructs, in a single calendar day, NRI to move to Dakota Jct.**

**Applies to empty or loaded cars (any contents except as provided immediately below).**

**Does NOT apply on cars placarded as hazardous or on cars requiring perishable protective service (for either add 20%).**

**Car handled by NRI under this haulage arrangement remain in DM&E car hire account.**

**NRI trackage rights usage fees to be waived by DM&E on DM&E haulage cars.**

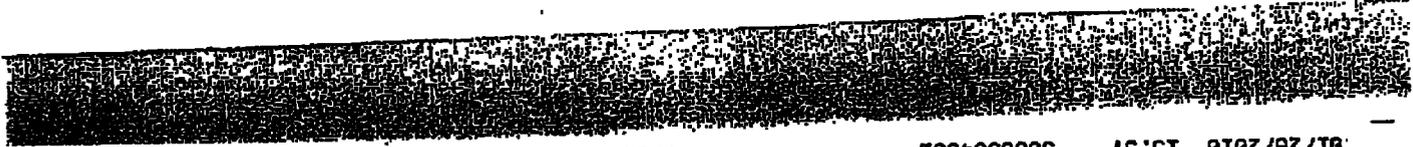
**Fees include all incidental switching, spotting, pulling, etc. at Chadron NE as instructed by DM&E.**

**NRI to provide DM&E customer service Center with all car event times, spots, pulls, etc.**

**This agreement may be cancelled by either party upon thirty (30) days written notice.**

**Note: Does not apply to cars handled by NRI from, or to, beyond Chadron on NRI. NRI will continue to handle "Chadron DM&E" interchanged traffic to/from**

**Unauthorizedly Documented Cedar American Station/Nebkota RR/Revised Haulage Agreement -  
Proper - Revised Fee**



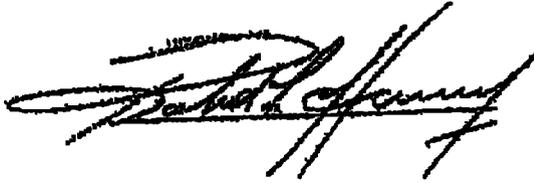
Dakota Jct. on a convenience/courtesy basis, unless or until DM&E requests otherwise.

The liability clause in current Trackage Rights Agreement will apply.

A copy of the Original Agreement, is hereto attached, and marked as Exhibit A.

For the NRI:

For the DM&E:



UNSTEVE\My Documents\Cadst American Staff\Nelson R\Revised Mustang Agreement -  
Proper - Revised.doc

**CERTIFICATE OF SERVICE**

I hereby certify that on February 5, 2010, I served the foregoing document, Petition For Rejection Or Stay Of Class Exemption, on Michael Blaszak by e-mail, *blaszak@blaszak.interaccess.com*, and by first-class, U.S. mail, postage prepaid, 211 Leitch Avenue, LaGrange, IL 60525-2162.

*Thomas F. McFarland*

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