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February 19, 2010



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Public Record

By Hand Delivery

Rachel D. Campbell.
Director
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, DC 20423

Re: Nebraska Northwestern Railroad, Inc.—Purchase, Lease, and Operation Exemption—Dakota, Minnesota & Eastern Railroad Corporation, STB Finance Docket No. 35346; Nebkota Railway, Inc. & West Plains Co.—Petition for Declaratory Order, STB Finance Docket No. 35352

Dear Ms. Campbell:

Enclosed for filing in the above-referenced matters is the original and ten (10) copies of Dakota, Minnesota & Eastern’s (“DM&E”) Reply to Nebkota Railway, Inc.’s and West Plains Co.’s (1) Joint Petition for Rejection Or Stay of the Class Exemption filed in Docket No. 35346; (2) Supplement to Joint Petition for Rejection or Stay filed in Docket No. 35346; and (3) Petition for Declaratory Order filed in Docket No. 35346. Because these three pleadings all arise from the same set of facts, DM&E is submitting a single Reply.

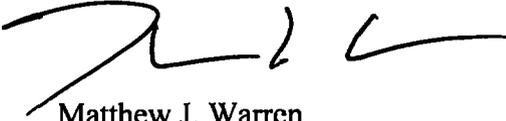
As discussed in the Reply, DM&E is also submitting copies of the relevant agreements between DM&E and Nebraska Northwestern Railroad, Inc. under seal for the Board’s information.

Please stamp one copy of DM&E’s Reply to indicate it has been received and filed, and return the stamped copy with our messenger for our files. Thank you for your assistance in this matter.

If you have questions, please contact the undersigned.

Rachel D. Campbell
Page 2

Very truly yours,

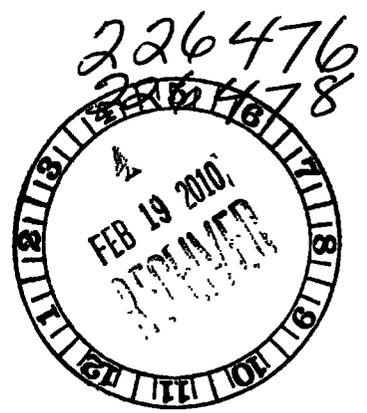
A handwritten signature in black ink, appearing to read 'M. J. Warren', with a long horizontal stroke extending to the right.

Matthew J. Warren

Enclosures

cc: Counsel of Record

BEFORE THE
SURFACE TRANSPORTATION BOARD



STB Finance Docket No. 35346

NEBRASKA NORTHWESTERN RAILROAD, INC. – PURCHASE, LEASE AND
OPERATION EXEMPTION – DAKOTA, MINNESOTA & EASTERN RAILROAD
CORPORATION

STB Finance Docket No. 35352

NEBKOTA RAILWAY, INC. & WEST PLAINS CO. – PETITION FOR
DECLARATORY ORDER

REPLY OF DAKOTA, MINNESOTA & EASTERN RAILROAD CORPORATION

ENTERED
Office of Proceedings

FEB 19 2010

Part of
Public Record

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Attorneys for Dakota, Minnesota & Eastern Railroad Corporation

Dated: February 19, 2010

Dakota, Minnesota and Eastern Railroad Corporation (“DM&E”) submits this Reply to the multiple pleadings filed by Nebkota Railway, Inc. (“Nebkota”) and West Plains Co. (“West Plains”) (collectively, Petitioners), namely (1) the Joint Petition for Rejection or Stay of the Class Exemption filed in Docket No. 35346 on February 5, 2010 (“Joint Petition”); (2) a Petition for Declaratory Order filed in Docket No. 35352 on February 12, 2010 (“Declaratory Order Petition”); and (3) a Supplement to Joint Petition for Rejection or Stay filed in Docket No. 35346 on February 17, 2010 (“Supplement”). While DM&E is not a party to the Notice of Exemption filed by Nebraska Northwestern Railroad, Inc. (“NNW”) in Docket No. 35346, DM&E is the Seller and Lessor in the subject transactions, and believes that it can provide information that will aid the Board’s consideration of these matters.

Petitioners’ pleadings are characterized by two fundamental flaws. First, Petitioners simply misunderstand the subject transactions. The transactions at issue are a simple line sale and lease that will not cause any kind of competitive harm to either Nebkota or West Plains. Indeed, the primary factual predicate of Petitioners’ complaints – that Nebkota would lose its ability to interchange with DM&E – is dead wrong. On the contrary, DM&E has offered to amend its Trackage Rights Agreement with Nebkota to confirm Nebkota’s continued ability to interchange with DM&E.¹ At the date of this filing DM&E has provided Nebkota with a DM&E-executed amendment to this effect, but Nebkota has not yet executed it. *See Exhibit A.* Similarly wrong is Nebkota’s contention that it would somehow be harmed because a haulage agreement it entered with DM&E would be assigned to NNW. In the first place, that haulage agreement will not be assigned to NNW; moreover, it is cancellable by either party for any

¹ This offer was conveyed verbally to Nebkota well before Petitioners filed their Supplement.

reason on thirty days notice, and Nebkota certainly is not entitled to a “condition” that it be made permanent.

Second, Petitioners misapprehend the controlling legal standards. They do not even attempt to demonstrate how they meet the rigorous standards for the Board to issue a stay, revoke an exemption, or institute a declaratory order proceeding. They cite precedent applying to major rail consolidations that plainly has no application to this exemption proceeding. *See* Joint Petition at 8 (citing “essential services” doctrine of *Lamoille Valley R.R. v. ICC*, 711 F.2d 295, 313 (D.C. Cir. 1983)). And under the guise of a “declaratory order proceeding” they ask the Board to reopen the quarter-century-old rulemaking proceeding in Ex Parte No. 392 (Sub-No. 1) to impose new restrictions on the class exemption of 49 C.F.R. § 1150.32.

In short, this is a routine transaction that has no competitive impact on Nebkota or West Plains. Petitioners fall far short of meeting their burden to revoke or stay the exemption, and they have not shown any reason for the Board to institute a declaratory order proceeding. Their Petitions should be denied.

I. BACKGROUND

The subject of the NNW-DM&E transaction is a 28.1 mile low-density DM&E line in Dawes County, NE between MP 404.5 near Chadron, NE and MP 432.6 near Crawford, NE (the “Line”). As described in the Notice of Exemption, NNW and DM&E have agreed that NNW will purchase the segment of the Line between MP 404.5 near Chadron and MP 411.725 Engineering Station 7492 +73 near Dakota Junction, and will lease and operate the segment of the line between the last-named point and MP 432.6 near Crawford. These agreements are set forth in an Asset Purchase Agreement and Track Lease Agreement, which DM&E is submitting to the Board under seal with this pleading. DM&E and NNW also intend to enter a separate Haulage Services Agreement. While this haulage agreement is not subject to the Board’s

jurisdiction, *see Waterloo Ry. Co.—Adverse Abandonment—Lines of Bangor & Aroostook R.R. Co.*, STB Docket No. AB-124 (Sub-No. 2) (May 6, 2003), DM&E is submitting the agreement under seal to provide the Board with the complete set of NNW’s and DM&E’s agreements.²

Nebkota and its parent West Plains claim that Nebkota would have been the “logical purchaser and/or lessee” of the Line and that prior DM&E management had some discussions with Nebkota about disposition of the Line.³ Joint Petition at 4-5; Declaratory Order Petition at 4. But Nebkota’s apparent disappointment that DM&E made the subject agreements with NNW and not Nebkota is plainly not a reason to grant it any relief. Nebkota’s rights under its two agreements with DM&E will be unaffected by the transaction, and the transaction will not otherwise competitively harm Nebkota in any way.

A. Nebkota Trackage Rights Agreement

Nebkota currently has overhead trackage rights over the Line that were acquired from DM&E’s predecessor-in-interest, Chicago and North Western Transportation Company (“CNW”), pursuant to the transactions described in *Nebkota Railway, Inc. – Acquisition and Operation Exemption – Line of Chicago and North Western Transportation Co.*, ICC Docket No. 32442 (served Jan. 14, 1994). Nebkota’s trackage rights are memorialized in a January 10,

² While Petitioners apparently asked NNW for copies of these agreements shortly before filing a petition to revoke the exemption, *see* Supplement at 3, NNW was contractually obligated to maintain their confidentiality. *See* Asset Purchase Agreement § 14.05; Track Lease Agreement § 22.12; Haulage Services Agreement § 11.05. Petitioners have not demonstrated any need for these confidential agreements, or cited any Board precedent that would permit them to inspect highly confidential documents in this exempt transaction. In any event, DM&E will not provide these contracts to Petitioners in the absence of a protective order with appropriate safeguards for Highly Confidential materials.

³ DM&E is not aware of any discussions that previous DM&E management may have had with Nebkota regarding disposition of the Line. As the Board well knows, DM&E has been under new management since the Board’s approval decision in *Canadian Pacific Railway Co. – Control – Dakota, Minnesota & Eastern Railroad Corp.*, STB Finance Docket No. 35081 (Sept. 30, 2008).

1994 Trackage Rights Agreement, which is attached as Exhibit B. Pursuant to the Trackage Rights Agreement, Nebkota has non-exclusive bridge rights over the Line. *See* Trackage Rights Agreement § 2.1. The agreement provides that the incumbent – originally CNW, now DM&E – has control over operations on the Line. Under the agreement Nebkota is required to conduct its operations “in accordance with the rules, instructions, and restrictions of CNW [and its successors-in-interest].” *Id.* § 4.7. The incumbent is required to accommodate Nebkota trains “with reasonable diligence and dispatch” in accordance with mutually agreed schedules. *Id.* The Nebkota Trackage Rights Agreement will be assigned to NNW as successor-in-interest to DM&E pursuant to both the Asset Purchase Agreement and the Track Lease Agreement. *See* Asset Purchase Agreement Schedule 2.01(iii); Track Lease Agreement Schedule 4.01(a).

The primary premise of Nebkota’s pleadings before the Board is that DM&E’s agreements with NNW will cause the “loss of [Nebkota’s] direct connection to DME at Dakota Junction.” Joint Petition at 8. This is simply not true. Nothing in DM&E’s agreements with NNW provides that Nebkota will lose its ability to interchange traffic with DM&E. In fact, DM&E’s agreements with NNW explicitly recognize that Nebkota/DM&E interchanges will continue after the transaction is closed. Specifically, NNW and DM&E agreed that DM&E’s interchange point with Nebkota would be moved to Dakota Junction. *See* Haulage Services Agreement at § 5.02. Contrary to the premise of Nebkota’s filing, therefore, Nebkota will continue to have the right to interchange traffic with DM&E and will not “lose” any competitive options.

DM&E first became aware of Nebkota’s claim that the transaction would sever its connection with DM&E on the afternoon of February 16, when the Declaratory Order Petition

was posted on the Board's website.⁴ In response to Nebkota's concerns, DM&E offered to execute an amendment to the Trackage Rights Agreement that would confirm Nebkota's continued right to interchange cars with DM&E at Dakota Junction after the closing of DM&E's transactions with NNW. *See* Exhibit A. DM&E informed Nebkota that the amendment would be assigned to NNW at closing. *See id.* DM&E provided Nebkota with an executed amendment on the morning of February 18, but as of the time of this filing Nebkota has not executed it. *See id.* Nebkota has also recently presented DM&E with several other demands, but those demands are unrelated to the claims in its Petitions before the Board. *See id.*

B. Nebkota Haulage Agreement

Nebkota and DM&E are also parties to an October 14, 2008 Haulage Agreement by which Nebkota agreed to move cars for DM&E's account between Chadron and Dakota Junction. *See* Joint Petition Appendix 2. The Haulage Agreement does not require DM&E to utilize the Agreement or to guarantee Nebkota any minimal amount of haulage revenues. *Id.* It also may be cancelled by either party for any reason on thirty days written notice. Significantly, the Haulage Agreement only applies to the movement of cars between Chadron and Dakota Junction – therefore it would not give Nebkota any rights to haul DM&E cars from the new elevator Nebkota plans to build “a short distance east of Chadron.” Joint Petition at 4. Since the Haulage Agreement would not apply to any movements from the new facility “east of Chadron,” it appears to be entirely irrelevant to this proceeding. The Haulage Agreement will not be assigned to NNW, and DM&E will remain a party to it.

⁴ The Joint Petition was filed on February 5, but not posted to the Board's website until this week. DM&E, as a non-party to the Exemption, was not served with either pleading.

Nebkota suggests that the haulage agreement provides revenue that is essential to its business. Even if true, this fact is irrelevant to these proceedings, since the haulage agreement is both unaffected by the proposed transaction and outside the Board's jurisdiction. *See Waterloo Ry. Co.—Adverse Abandonment—Lines of Bangor & Aroostook R.R. Co.*, STB Docket No. AB-124 (Sub-No. 2) (May 6, 2003).

II. ARGUMENT

A. Petitioners Fall Far Short of Meeting The Requirements for Revoking the Exemption

Nebkota and West Plains have the burden of proof on their petition to revoke the exemption, and that burden is a weighty one. *I&M Rail Link, LLC – Acquisition & Operation Exemption – Certain Lines of Soo Line R.R. Co. d/b/a/ Canadian Pac. Ry.*, 2 S.T.B. 167, 174 (1997). “[P]etitions to revoke must be based on reasonable, specific concerns demonstrating that reconsideration of the exemption is warranted and regulation of the transaction is necessary.” *Id.* (emphasis added); *Minnesota Commercial Ry., Inc.—Trackage Rights Exemption—Burlington Northern Ry. Co.*, 8 I.C.C.2d 31 (1991). Petitioners do not come close to satisfying this standard.

The primary concern raised in the Joint Petition – “the adverse effect on Protestants from NRI’s loss of a direct connection to DME at Dakota Junction” – is based on a misapprehension of the facts. Joint Petition at 8. Nebkota will retain the right to interchange cars with DM&E at Dakota Junction after the transaction. DM&E has offered Nebkota a DM&E-executed Amendment to the Trackage Rights Agreement that confirms this fact. Nebkota need only sign the Amendment to fully address its concerns.

Petitioners’ second expressed concern about sufficient “operating protocols” for the Line (Joint Petition at 10) is simply not credible. In the first place, DM&E’s and Nebkota’s combined operations on the Line generally have amounted to no more than two or three trains a week. *See*

Verified Statement of John Brooks (Exhibit C). That traffic volume plainly does not raise any “safety concerns.” Moreover, Petitioners’ suggestion that there will be no protocols to govern NNW and Nebkota operations is not true, because the Nebkota Trackage Rights Agreement provides the operating framework. That agreement requires Nebkota to conduct its operations “in accordance with the rules, instructions, and restrictions of CNW [and its successors in interest].” Trackage Rights Agreement at § 4.7. NNW will step into the shoes of DM&E as to the Nebkota Trackage Rights Agreement (just as DM&E stepped into the shoes of CNW), and as such Nebkota will be required to coordinate its operations with NNW rules, instruction, and restrictions. In turn, NNW will be required to accommodate Nebkota trains “with reasonable diligence and dispatch” in accordance with mutually agreed schedules. *Id.* Therefore, the framework for post-transaction operations is clear – NNW will have ultimate responsibility for establishing operational procedures on the line, and must do so in a way that fairly treats Nebkota trains. Nebkota provides no support for its allegation that the simple transaction of NNW stepping into DM&E’s shoes as to the Trackage Rights Agreement will raise any significant safety concerns. The Line at issue here is a low-speed, low-traffic line, and there is no reason to believe that Nebkota and NNW will have any difficulty fulfilling their obligations under the Trackage Rights Agreement to mutually agree on a schedule for trains on the Line without need for the Board’s intervention.

In short, Petitioners have raised no “reasonable specific concerns” demonstrating that regulation of the transaction is necessary. Perhaps because they cannot satisfy the applicable standard, Petitioners cite a series of inapposite cases where the Board rejected notices of exemption that appeared to be defective or to contain false and misleading information. See Joint Petition at 5 (citing *Winamac Southern Ry. Co.—Trackage Rights Exemption—A. & R.*

Line, Inc., Finance Docket No. 35208 (served Jan. 9, 2009); *FPN-USA, Inc.—Operation Exemption—Tijuana-Tecate Short Line*, Finance Docket No. 35155 (served Aug. 8, 2008); *Pro-Go Corp.—Operation Exemption—In Suffolk County, N.Y.*, Finance Docket No. 35126 (served Mar. 13, 2008). In *Winamec* the Board rejected a notice of exemption where one of the parties to the transaction was “actively opposed to the grant of the exemption” and where the Board “question[ed] whether a key component of the trackage rights exemption—that the trackage rights be based on a written agreement—is met.” *Winamec* at 2. The exemption in *Pro-Go* was rejected because the party failed to submit sufficient information for the Board to determine that the party was entitled to the exemption. *Pro-Go* at 2. And the exemption in *FPN-USA* was rejected because the party seeking the exemption did not demonstrate that the line in question “is even within the United States and thus . . . subject to the Board’s jurisdiction.” *FPN-USA* at 2. None of these situations is remotely analogous to the situation here, where there is no question that NNW meets the requirements of the class exemption.

The “Supplement” filed by Petitioners does not provide any additional reasons for the Board to grant their Petition. Petitioners claim that the fact that NNW did not disclose the terms of confidential agreements to Nebkota is sufficient cause for the Board to reject the Notice of Exemption. *See* Supplement at 4. They cite no authority for this proposition, because there is none. NNW submitted all the information that is required by the Board’s regulations, and nothing in the Board’s regulations require NNW to share the terms of the subject transactions with third parties. Indeed, NNW could not have satisfied Nebkota’s request without violating the confidentiality provisions of the transaction agreements.

Nebkota does not even articulate a theory for why it is entitled to see the confidential transaction documents, other than a claim that they are “relevant.” Supplement at 3. They are

not. What is relevant in this proceeding is whether NNW is entitled to invoke the class exemption, and whether Petitioners can point to reasonable and specific concerns demonstrating that regulation of the transaction is necessary. Petitioners' desire to "analyze" and "comment" on the transaction documents has no relevance to either of the concerns they raised in the Joint Petition. *Id.* at 4. Indeed, it would defeat the purpose of the class exemption to permit protestants to access confidential transaction documents on nothing more than bare allegations that they wish to analyze the contracts.⁵

B. Petitioners Have Not Satisfied the Requirements for a Stay

While Petitioners seek a stay, they do not attempt to demonstrate why they satisfy the well-established criteria for a stay:

In deciding petitions for stay, the Board follows the traditional stay criteria by requiring a party seeking a stay to establish that: (1) there is a strong likelihood that it will prevail on the merits of any challenge to the action sought to be stayed; (2) it will suffer irreparable harm in the absence of a stay; (3) other interested parties will not be substantially harmed; and (4) the public interest supports the granting of the stay. The party seeking a stay carries the burden of persuasion on all the elements required for such extraordinary relief.

Grand Elk R.R.—Lease & Operation Exemption—Norfolk So. Ry. Co., STB. Fin. Docket No. 35187 (Dec. 22, 2008) (internal citations omitted); *see R.J. Corman R.R. Co.—Abandonment Exemption—in Clearfield, Jefferson & Indiana Ctys., PA*, STB Docket No. AB-491 (Sub-No. 2X), at 2 (Dec. 11, 2008); *General Ry. Corp. d/b/a Iowa N.W. R.R.—Exemption for Acquisition*

⁵ As for Petitioners' claim that they need an answer from NNW to the inquiry posed by Nebkota about the status of the Haulage Agreement, NNW provided that answer in its Reply filed earlier today. DM&E also provided that information in the discussion above.

of R.R. Line—in Osceola and Dickinson Ctys., IA, STB Finance Docket No. 34867, at 1 (July 13, 2007).⁶

Petitioners meet none of these criteria. As demonstrated above in Section II.A., they have no likelihood of succeeding on the merits of their petition to revoke the exemption. They have demonstrated no irreparable harm from the transaction to themselves or other parties. And they have not shown any negative impact to the public interest.

C. The Petition for Declaratory Order Should Be Denied

Petitioners have also instituted a separate proceeding seeking a “declaratory order” that the class exemption for acquisitions that create Class III carriers should not apply “in situations where the acquiring shortline railroad is unlikely to provide transportation services but merely intends to avail itself of an economic opportunity to extract a premium from the shortline currently operating the line to be acquired.” Declaratory Order Petition at 5. This Petition should be rejected out of hand, for two reasons.

First, the factual predicate of Petitioners’ Request is wrong. NNW has made clear that it intends to be a bona fide railroad, and it has taken steps to do so. As NNW explains in its Reply, it has taken a variety of steps in anticipation of assuming its common carrier obligations, from obtaining the use of a locomotive to preparing tariffs to securing AAR reporting marks and an accounting code from the Association of American Railroads. NNW Reply to Declaratory Order

⁶ Petitioners cite a twenty-year-old ICC decision, suggesting that it stands for the proposition that a stay can be granted if “numerous questions . . . warrant further investigation.” See Joint Petition at 6 (citing *Consolidated Rail Corp.—Exemption—Abandonment of the Weirton Secondary Track in Harrison and Tuscarawas Ctys., OH*, ICC Docket No. AB-167 (Sub-No. 1088X) (Sept. 7, 1988)). However, the portions of the decision that Petitioners did not underline make clear that the ICC granted this stay based on traditional stay factors like alleged irreparable harm and adverse impact to the public interest. There is no reason to doubt that the ICC was applying this agency’s traditional stay criteria. Regardless, as demonstrated above, Petitioners have not raised any questions “warrant[ing] further investigation,” let alone “numerous” ones.

Petition at 2. There is no support for Petitioners' claims that NNW is "unlikely to provide transportation services." And, the assertions in the Declaratory Order Petition that NNW intends to force Nebkota to pay a "ransom payment to NNW for the right to operate over the line" are false. Declaratory Order Pet. at 4. As discussed above, the transaction will affect neither Nebkota's rights under the Trackage Rights Agreement nor its rights under the Haulage Agreement. Because the factual predicates of the Declaratory Order Petition are wrong, the Petition should be rejected.

Second, the Declaratory Order Petition is a procedurally improper attempt to reopen a long-established agency precedent. Indeed, the Petition does not seek a proper declaratory order at all. It seeks an order that would amend the class exemption adopted in Ex Parte No. 392 (Sub-No. 1), *Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. § 10901*, 1 I.C.C.2d 810 (1985), to adopt four new requirements for any acquiring carriers seeking to use the exemption. *See* Declaratory Order Petition at 6. Such an order is not a mere order "to terminate a controversy or remove uncertainty." *Vermont Ry.—Pet. For Declaratory Order*, STB Finance Docket No. 34364 (Jan. 3, 2005). Rather, it is a request for the full notice and comment rulemaking that would be required to amend the exemption adopted in Ex Parte 392 (Sub-No. 1), a rulemaking that would likely spur comments from many interested parties and create significant burdens on the Board. Other than the incorrect factual assertions discussed above, Petitioners have not given the Board any reasons to exercise its discretion to institute such a proceeding. The Petition for Declaratory Order should therefore be denied.

CONCLUSION

For all of the foregoing reasons, the Board should deny Petitioners' request for a stay, Petition for Revocation, and Petition for Declaratory Order.

Respectfully submitted,



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Attorneys for Dakota, Minnesota & Eastern Railroad Corporation

Dated: February 19, 2010

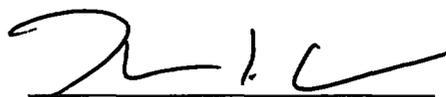
CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing Reply of the Dakota, Minnesota, and Eastern Railroad Corporation to be served by first class mail, postage prepaid, this 19th day of February 2010 on the following counsel of record:

Michael W. Blaszak
211 South Leitch Avenue
La Grange, Illinois 60525-2162

Thomas F. McFarland
Thomas F. McFarland, P.C.
208 South LaSalle Street, Suite 1890
Chicago, Illinois 60604-1112

Paul M. Donovan
Laroe, Winn, Moerman & Donovan
1250 Connecticut Avenue, N.W.
Washington, D.C. 20036



Matthew J. Warren

EXHIBIT A

From: John Brooks [mailto:jbrooks@cedaramerican.com]
Sent: Thursday, February 18, 2010 11:53 AM
To: Bryce Wells
Cc: John Brooks
Subject: Nebkota trackage rights amendment

<<document2010-02-18-103812.pdf>>
Bryce,

Attached is the amendment to Nebkota Railway's ("Nebkota") Trackage Rights Agreement with Dakota, Minnesota & Eastern Railroad ("DM&E") that we have discussed. This amendment confirms that Nebkota will be able to interchange cars with DM&E at Dakota Junction after the closing of DM&E's transactions with Nebraska Northwestern Railroad ("NNW").

We have executed the amendment on behalf of DM&E. Please execute it on behalf of Nebkota, and we will arrange for it to be assigned to NNW at closing. We trust that this amendment fully addresses Nebkota's concerns about its ability to interchange with DM&E at Dakota Junction.

The other requests you made in regards to an opportunity to bid on future line sales and to run passenger train service are unrelated to DM&E's transactions with NNW. While DM&E is certainly willing to discuss Nebkota's other issues at an appropriate time, they are not relevant to the NNW transaction.

Please PDF and email me an executed version of this amendment. Also, I have left you a phone message on these items, and I will be available throughout the day to discuss.

Thanks,
John

The information contained in this email and any attachments is confidential and may be subject to copyright or other intellectual property protection. If you are not the intended recipient, you are not authorized to use or disclose this information, and we request that you notify us by reply mail or telephone and delete the original message from your mail system.

AMENDMENT TO TRACKAGE RIGHTS AGREEMENT

THIS AMENDMENT TO TRACKAGE RIGHTS AGREEMENT (the "Amendment") is entered into as of this 18 day of FEB, 2010, by and between DAKOTA, MINNESOTA & EASTERN RAILROAD CORPORATION, a Delaware corporation with its principal place of business at 140 N. Phillips Avenue, Sioux Falls, SD 57104 (hereinafter referred to as "DM&E"), on the one hand, and NEBKOTA RAILWAY, INC, a Nebraska corporation with its principal place of business at 111 North Main Street, Chadron, NE 69337 ("NRI"), on the other hand. DM&E and NRI are referred to collectively as the "Parties."

I. RECITALS:

A. **WHEREAS**, NRI currently has trackage rights over DM&E's rail line between MP 404.5 at Chadron, NE and MP 432.3 at Crawford, NE, which were granted to NRI by DM&E's predecessor-in-interest, Chicago and North Western Transportation Company ("CNW"), pursuant to that certain Trackage Rights Agreement dated as of January 10, 1994 (the "Trackage Rights Agreement");

B. **WHEREAS**, pursuant to that certain Asset Purchase Agreement by and between DM&E and Nebraska Northwestern Railroad, Inc. ("NNW"), dated as of December 15, 2009 (the "Purchase Agreement"), DM&E has agreed to sell, transfer, assign and convey to NNW DM&E's rights, title and interest in and to DM&E's rail line between MP 404.5 near Chadron, NE and MP 411.75 near Dakota Junction, NE;

C. **WHEREAS**, pursuant to that certain Track Lease Agreement by and between DM&E and NNW dated as of December 15, 2009 (the "Track Lease Agreement"), DM&E has agreed to lease to NNW, and NNW has agreed to lease from DM&E, DM&E's rail line between MP 411.75 near Dakota Junction, NE and MP 432.6 near Crawford, NE;

D. **WHEREAS**, pursuant to Section 5.02 of that certain Haulage Agreement by and between DM&E and NNW dated as of December 15, 2009 (the "DM&E/NNW Haulage Agreement"), DM&E and NNW have agreed that, following consummation of the sale transaction contemplated by the Purchase Agreement, DM&E shall relocate its Rule 260 Interchange Junction with NRI from Chadron, NE to Dakota Junction, NE; and

E. **WHEREAS**, in order to implement the relocation of DM&E's Rule 260 Interchange Junction with NRI from Chadron, NE to Dakota Junction, NE contemplated by Section 5.02 of the DM&E/NNW Haulage Agreement, DM&E and NRI have agreed to amend the Trackage Rights Agreement to make explicit NRI's right to interchange rail traffic with DM&E at Dakota Junction, NE.

NOW, THEREFORE, the Parties hereto, intending to be legally bound, agree that the Trackage Rights Agreement shall be amended as follows:

II. AMENDMENTS:

A. In the last line of the second "WHEREAS" clause on the first page of the Trackage Rights Agreement, the phrase "between railroads serving Crawford and Chadron,

Nebraska” shall be amended to read “between railroads serving Crawford, Dakota Junction, and Chadron, Nebraska.”

B. A new section 2.1(f) is added to the Trackage Rights Agreement. Section 2.1(f) provides as follows:

- (f) interchange cars with other railroads on or along the Joint Trackage at points other than Crawford, NE, Chadron, NE, or Dakota Junction, NE.

IN WITNESS WHEREOF, each of the parties hereto has caused this Amendment to be duly executed on its behalf, as of the day and year first above written.

DAKOTA, MINNESOTA & EASTERN
RAILROAD CORPORATION

By: 
Vern Graham
President

NEBKOTA RAILWAY, INC.

By: _____

EXHIBIT B

TRACKAGE RIGHTS AGREEMENT

THIS AGREEMENT, made and entered into this ____ day of _____, 19__ by and between the **CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY**, a Delaware corporation (hereinafter sometimes referred to as "CNW"), and **NEBKOTA RAILWAY, INC.**, a _____ corporation (hereinafter sometimes referred to as "NK").

WITNESSETH:

WHEREAS, pursuant to agreement dated January 31, 1992, as amended, (the "Purchase Agreement") NK has acquired certain assets of CNW including substantially all of the track owned by CNW between Merriman, Nebraska and Chadron, Nebraska (the "Line"); and

WHEREAS, it is the desire of the parties hereto that NK acquire non-exclusive overhead trackage rights to operate its trains, engines and cabooses upon and over main line and yard trackage owned by CNW between and at Crawford, Nebraska and Chadron, Nebraska, for the sole and only purpose of handling cars interchanged or to be interchanged between railroads serving Crawford and Chadron, Nebraska; and

WHEREAS, CNW is agreeable to such aforesaid operation by NK between Crawford and Chadron, Nebraska, but only upon the terms and conditions hereinafter contained.

NOW, THEREFORE, the parties hereto hereby agree as follows:

SECTION 1 - JOINT TRACKAGE - DEFINED

1.1 The term "Joint Trackage" as used herein shall refer to (1) that portion of CNW's main line tracks between MP 404.5 at Chadron, Nebraska and MP 432.3 at Crawford, Nebraska, a total distance of 27.8 miles, as shown in red color on the print dated November 9, 1991, marked Exhibit "A", attached hereto and by reference herein made a part hereof; (2) all sidings now existent or hereafter constructed along the Joint Trackage to be jointly used hereunder; and (3) such other appurtenances and facilities, signals, switches, jointly used connecting tracks, interlocking devices and plants, signal and communication lines, and all improvements and betterments thereof and additions thereto, wherever located, as are required for the operation of the parties hereto over the Joint Trackage hereunder.

1.2 It is understood and agreed to by the parties hereto that as of the date of this agreement the length of the Joint Trackage as defined herein is 27.8 miles.

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SECTION 2 - GRANT OF RIGHTS

2.1 Subject to the terms and conditions herein contained, CNW grants to NK only for non-exclusive bridge rights the use of the Joint Trackage for the operation of its freight trains, locomotives, cabooses and cars in its account over the Joint Trackage in common with CNW and such other railroad company or companies as CNW has heretofore admitted or may hereafter at any time in the future admit to the joint use of all or any part of the Joint Trackage, it being understood and agreed that NK shall not have the right to:

- (a) set out, pick up or store cars or switch any existing or future industries upon the Joint Trackage, or any part thereof, except as necessary for handling locomotives, cabooses or cars bad ordered en route; or
- (b) serve any industry, team or house track now existing along the Joint Trackage, nor shall it have the right to serve any industry, team or house track hereafter located along the Joint Trackage; or
- (c) permit or admit any third party to the use of all or any portion of the Joint Trackage, nor under the guise of doing its own business, contract or make any agreement to handle as its own trains, locomotives, cabooses or cars over or upon the Joint Trackage, or any portion thereof, the trains, locomotives, cabooses, or cars of any such third party which in the normal course of business would not be considered as the trains, locomotives, cabooses or cars of NK;
- (d) construct tracks connecting to the Joint Trackage; or
- (e) use the Joint Trackage for traffic not originating or terminating on the Line, except for loaded or returning empty cars bearing CNW reporting marks and for the occasional movement of non-revenue equipment.

SECTION 3 - CONSTRUCTION, MAINTENANCE AND OPERATION OF CONNECTING TRACKS

3.1 In the event any connecting track, track changes and related signals, safety devices, telephones, telephone boxes, other facilities and appurtenances, hereinafter referred to collectively as "Additional Facilities", are required to permit the entrance to or exit from the Joint Trackage by the trains, engines and cars of NK, that part of the Additional Facilities as shall lie on the right-of-way of CNW shall be constructed, installed, changed, maintained, operated, repaired and renewed by CNW at the sole cost and expense of NK. The balance of any such Additional Facilities shall be constructed, installed, changed, maintained, operated, repaired and renewed by NK at its sole cost and expense.

3.2 The term "cost and expense", as used herein, shall include, but shall not be limited to, any taxes or assessments, general or special, levied against either party hereto by any governmental agency because of the existence of any Additional Facilities.

3.3 The normal position of any connecting track switch shall be for continuous movement by the trains of CNW over the Joint Trackage. Employees of NK when entering and leaving the Joint Trackage upon receiving proper authority from CNW's Dispatcher or other authorized person, shall unlock and open said switch and after movement of NK's train through said switch has been completed, the switch shall be relined to its normal position and securely locked by said employees of NK.

3.4 Notwithstanding any agreement for payment, the ownership of any Additional Facilities for the purpose of maintenance and operation under the terms and conditions of this agreement, shall be vested in the party constructing, installing or changing same. During the term of this agreement any part of said Additional Facilities, with consent of the other party, may be removed by the party so constructing or installing same. The materials salvaged therefrom and the cost and expense therefor shall be distributed between the parties in the same proportion as each party shared in the cost and expense of constructing, installing or changing same.

SECTION 4 - CONSTRUCTION, REPAIRS, MAINTENANCE, ADDITIONS AND BETTERMENTS, OPERATIONS, CONTROL OF THE JOINT TRACKAGE

4.1 The construction, maintenance, repair and renewal of the Joint Trackage shall be under the exclusive direction and control of CNW. CNW shall make any additions and betterments to the Joint Trackage which CNW deems necessary or appropriate for the safe, efficient and economical use of the Joint Trackage by the parties. Any such additions and betterments shall, as constructed, become part of the Joint Trackage.

4.2 The management and operation of the Joint Trackage shall be under the exclusive direction and control of CNW. CNW shall have the unrestricted right to change the management and operations on and over the Joint Trackage as in its judgment may be necessary, expedient or proper; provided that any such change shall not materially interfere with NK's right to use the Joint Trackage, and provided that any restrictions enforced by CNW apply equally against CNW and NK.

4.3 CNW shall employ all persons necessary to operate, maintain, repair and renew the Joint Trackage. The Joint Line shall be maintained to a standard of not less than FRA Class 1. CNW shall be bound to use only reasonable and customary care, skill and diligence in the performance thereof. Notwithstanding any provisions of Section 8 hereof, NK shall not have or make any claim against CNW for liability as defined in Section 8 hereof resulting from any defect in the Joint Trackage or any failure on the part of CNW

to properly maintain or repair same; provided that if CNW shall fail to repair any such defect within a reasonable time after NK has given CNW written notice specifying the defect and requesting that it be repaired, then NK shall have the right to make the necessary repairs and CNW will reimburse NK the entire cost thereof.

4.4 NK, at its sole cost and expense, shall install and maintain upon its trains, locomotives, cabooses and cars such equipment or devices as may now or in the future be necessary or appropriate, in the reasonable judgment of CNW, for operation of trains upon the Joint Trackage.

4.5 If the use of the Joint Trackage shall at any time be interrupted or traffic thereon or thereover be delayed for any cause, CNW shall, with reasonable diligence, restore the line for the passage of trains of the parties hereto. Except as provided in Section 8 hereof, neither party hereto shall have or make any claim against the other for any loss, damage, loss of business or expense of any kind resulting from such interruption or delay.

4.6 Each party shall be responsible for furnishing, at its own cost and expense, all labor, fuel and train supplies necessary for the operation of its own trains over the Joint Trackage.

4.7 The operation by NK on or along the Joint Trackage shall at all times be in accordance with the rules, instructions and restrictions of CNW, but such rules, instructions, and restrictions shall be reasonable and fair between all parties using the Joint Trackage and shall not unjustly discriminate against any of them. CNW shall accommodate NK trains with reasonable diligence and dispatch in a manner consistent with schedules established from time to time during the term of this agreement as may be mutually agreed to by the transportation officers of CNW and NK. All rules, regulations and orders, and interpretations and applications thereof governing the movement of trains over the Joint Trackage shall be reasonable, fair and just between CNW and NK and shall not discriminate against either of them, according equal priority to like classes of CNW and NK trains, provided that in making interchange with Burlington Northern at Crawford, Nebraska, NK shall not hold or block CNW's main track or interfere with CNW operations thereat.

4.8 NK shall be responsible for all mileage allowances and car hire charges accruing on cars in NK's account on the Joint Trackage and NK shall report and pay same direct to the owners of such cars.

4.9 With respect to operation of trains, locomotives, cabooses and cars on and over the Joint Trackage, each party shall comply with all applicable laws, rules, regulations and orders promulgated by any governmental body or agency having jurisdiction, and if any failure on the part of any party to so comply shall result in a fine, penalty, cost or charge being imposed or assessed on or against another party, such other party shall give prompt notice to the failing party and the failing party shall promptly reimburse and indemnify the

other party for such fine, penalty, cost or charge, and all expenses and attorneys' fees incurred in connection therewith, and shall upon request of the other party defend such action free of cost, charge and expense to the other party.

4.10 All employees of NK engaged in or connected with the operations of NK's trains on or along the Joint Trackage shall be required to pass periodic examinations on the rules of CNW provided that with respect to such examinations, upon request of NK, CNW shall qualify one or more of NK's supervisory officers on said rules and such supervisory officer or officers so qualified shall examine all employees of NK engaged in or connected with NK's operations on or along the Joint Trackage. Pending qualification of train and engine crews of NK, CNW shall furnish a pilot or pilots, at the expense of NK, as deemed necessary by CNW to assist in operating trains of NK over the Joint Trackage. For the purpose of Section 8 of this agreement, any such pilots furnished by CNW shall be deemed to be the sole employees of NK.

4.11 If any employee of NK shall neglect, refuse or fail to abide by CNW's rules, instructions or restrictions governing the operation on or along the Joint Trackage, CNW shall, in writing, so notify NK. CNW shall have the right to require NK to withhold any NK employee from service on the Joint Trackage pending the result of formal investigation, if in CNW's sole opinion such employee shall have neglected, refused or failed to abide by CNW's rules, instructions or restrictions governing the operation on or along the Joint Trackage. Upon such notice presented in writing, CNW and NK shall promptly hold a joint investigation in which all parties concerned shall participate and bear the expense for its officers, witnesses and employees. Notice of such investigation to NK employees shall be given by NK officers, and such investigation shall be conducted in accordance with the terms and conditions of schedule agreements between NK and its employees. If, in the judgment of CNW the conduct and result of such investigation warrants, such employee shall, upon written request by CNW be restricted by NK from operating on the Joint Trackage, and NK shall release and indemnify CNW from and against any and all claims and expenses because of such restrictions.

4.12 If any cars, cabooses or locomotives of NK are [?] bad ordered en route on the Joint Trackage and it is necessary that they be set out, such cars, cabooses or locomotives shall, after being promptly repaired, be promptly picked up by NK. Unless otherwise agreed, CNW shall at NK's expense furnish required labor and material and perform light repairs to make such bad ordered equipment safe for movement. In the event CNW shall perform any such repairs to freight cars in NK's account, billing therefor shall be at rates prescribed in the Field and Office Manuals of the Interchange Rules, adopted by the Association of American Railroads, hereinafter called "Interchange Rules", in effect at the date of performance of the repairs and CNW shall prepare and submit billing directly to and collect from the car owner for car owner responsibility items as determined under said Interchange Rules and CNW shall prepare and submit billing directly to and collect from NK for handling line responsibility items as described under said Interchange Rules. If

CNW shall perform repairs to NK equipment other than freight cars, CNW shall prepare and submit billing directly to and collect from NK as provided for in this agreement.

4.13 Should any locomotive, car or caboose in the train of either party be derailed or damaged while being run or operated upon or over the Joint Trackage, CNW 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 Section 8 of this agreement; provided, however, that the employees of NK shall be permitted to rerail locomotives, cars and cabooses where no wrecking derrick or on-track equipment is required.

SECTION 5 - APPORTIONMENT OF EXPENSES - PAYMENTS

5.1 For and in consideration of the rights herein granted, and in addition to any expenses herein elsewhere provided, NK shall pay to CNW \$13.50 per grain train mile for each grain train loaded or empty, operated by NK upon or over any part or all of the Joint Trackage. A grain train shall be deemed to consist of engines and 54 cars or less provided that for each car in excess of 54 cars in a grain train the rate shall be 25 cents per car mile. For trains other than grain trains, NK shall pay CNW at a rate of 25 cents per mile with an engine counting as two cars.

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5.2 Except as otherwise specifically provided for in this agreement, pursuant hereto shall be prepared in conformance with the then current real practices, procedures, rates, and schedules of CNW.

Grain Trains During Harvest

5.3 Within thirty (30) days after the close of a calendar month, NK to CNW's Manager of Billing a statement showing the number of trains, cars loaded and empty cars operated upon or over the Joint Trackage during month. Upon receipt of said statement, CNW shall render a bill against NK, which bill NK hereby agrees to pay within thirty (30) days after receipt thereof, and any amount outstanding after said thirty (30) days (except for liability and casualty bills which will be ninety (90) days) shall bear interest at a rate of one percent (1%) per month if payment is due and withheld or a one percent (1%) per month credit if paid and subsequently refunded.

Season normally severe car

Should NK fail to render the aforementioned monthly train usage statement within the time specified, CNW shall have the right to estimate such train usage for the purpose of rendering a bill against - and any required adjustments thereto shall be made in a subsequent bill after receipt of the train movement statement from NK.

5.4 The payment of bills rendered hereunder shall not be delayed or payment thereof refused because of minor errors which are not serious and important, but such bills shall be paid as rendered. The necessary correction and adjustment of all such errors shall be made on subsequent bills.

5.5 The records of each party hereto insofar as they pertain to matters covered by this agreement shall be open to representatives of either party for inspection during regular office hours.

5.6 It is expressly understood and agreed that the payments hereinabove to be made by NK to CNW do not in any case include any cost or expense which may be incurred by CNW on account of loss of or damage to any property whatsoever, or injury to or death of any persons whomsoever arising out of or in connection with the operation by NK of its freight trains, engines, cars, or cabooses over said Joint Line, connecting tracks or any part thereof. It is agreed by and between the parties hereto that such items of expense shall be borne and paid by the parties hereto under the liability provisions of Section 8 of this agreement.

5.7 Said rate of \$13.50 per train mile and excess car rate or car rate of 25 cents per car mile shall be adjusted on July 1, 1994 and on each July 1 thereafter by utilization of the Annual Indices of Charge-Out Prices and Wage Rates (1977=100), Series RCR, included in the "AAR Railroad Cost Recovery Index", and supplements thereto, issued by the Association of American Railroads. In making such adjustment, the final "Material prices, wage rates and supplements combined (excluding fuel)" Index for the Western District for the calendar year 1992 shall be compared to the final Index for the calendar year immediately preceding the year in which such adjustment is to become effective. Said Car Mile Rate shall then be adjusted by the percentage of increase or decrease, as the case may be, in the Index of the year to be escalated as related to the year 1992, provided, however, that said Car Mile Rate shall never be less than 25 cents. If the Association of American Railroads, or any successor organization or association, discontinues such Index, an appropriate substitute for determining in a similar manner the percentage of increase or decrease in the Car Mile Rate shall be agreed upon by the parties hereto.

SECTION 6 - SWITCH KEYS, RULE BOOKS, TIMETABLES

6.1 CNW shall furnish NK with necessary switch keys and rule books and NK shall pay to CNW the cost and expense thereof.

6.2 CNW shall furnish NK necessary timetables governing the operation of trains over and along the Joint Trackage and NK shall pay to CNW the cost of timetables so furnished. NK will also reimburse CNW for any expenses incurred by CNW in the issuance of timetables made necessary solely by the changes in the operation of trains of NK over the Joint Trackage.

SECTION 7 - ADMISSION OF OTHER RAILROADS

7.1 CNW only shall have the right to admit other parties to the use of the Joint Trackage, or any part thereof, on such terms and conditions as it may deem proper,

provided that such admittance shall not deprive NK of the reasonable and proper use of the Joint Trackage for the purposes herein granted; but in no respect shall the compensation provided in Section 5 of this agreement to be paid by NK be reduced thereby.

SECTION 8 - LIABILITY

8.1 For the purposes of this Section 8, all employees and equipment of CNW, including work trains and work train equipment and the crews thereof, engaged in the construction, maintenance, operation, repair or renewal of, the making of additions and betterments to, or the removal of the tracks, signal and communication facilities referred to in Section 3 hereof, shall be deemed the sole employees and sole equipment of NK.

8.2 Train and engine service employees of either party, except CNW train and engine service employees when acting as pilots on NK trains as provided in Section 4.10 or when acting as crews of work trains in connection with work upon the Joint Trackage as hereinabove and hereinafter provided, shall be deemed sole employees of such party.

8.3 Except as provided in Paragraphs 8.1 and 8.4 of this Section 8, all employees and equipment of CNW, including work trains and work train equipment and crews thereof, engaged in the operation, inspection, maintenance, repair or renewal of the Joint Trackage or any part thereof, or the making of additions and betterments thereto or retirements therefrom, or en route thereto or therefrom, shall be deemed the joint employees and joint equipment of the parties hereto.

8.4 Employees and equipment of CNW or its emergency service contractor engaged in clearing wrecks or derailments or engaged in the repair and renewal of the Joint Trackage in connection with such wreck or derailment, and while en route to such assignment and while returning therefrom, shall be deemed the employees and equipment of the party or parties responsible for such wreck or derailment as provided in this Section 8.

8.5 "Liability", as used herein, shall mean all loss, damage, expense or liability of any nature (including any penalties, fines, attorneys' fees, clean up, monitoring or investigation costs) arising, in any manner, from injury to or death of any persons whomsoever or loss or destruction of or damage to any property (including pollution, damage to or destruction of the environment) whatsoever (including the Joint Trackage) resulting from, arising out of, incidental to, or occurring in connection with the Joint Trackage, and shall be borne by the parties hereto as follows:

When Liability shall be due to:

- (a) the acts or omissions of a sole employee or sole employees of either party hereto (whether or not combined with acts or omissions of joint employees or third persons); or to

- (b) a defect in or failure of the sole property of either party hereto (not including the Joint trackage) or property in its possession, or of sole equipment as defined herein,

it shall be borne by the party whose sole employee, employees, equipment, property or property in its possession so caused such Liability.

When Liability shall be due to:

- (c) the combined acts or omissions of sole employees of both parties hereto; or to
- (d) the combined acts or omissions of a joint employee or joint employees and of sole employees of both parties hereto; or to
- (e) the sole acts or omissions of a joint employee or joint employees; or to
- (f) the failure of or any defect in the Joint Trackage or any part thereof or in any joint equipment as defined herein; or
- (g) acts of God, acts of third persons (except when combined with acts or omissions of sole employees of either party hereto) or any other cause or combination of causes whatsoever,

it shall be borne by each party hereto as to its sole property (not including the Joint Trackage), property in its custody or possession, and as to its sole employees, patrons, passengers, invitees and others on or about the Joint Trackage in connection with its business or operations and the property of all such persons, including lading; while as to the Joint Trackage and joint equipment, and as to joint employees and their property, and as to third persons and their property, such Liability shall be borne by the party hereto whose trains, locomotives, cars or lading were involved in the incident giving rise to such Liability; but, if the trains, locomotives, cars or lading of both parties, or if no trains, locomotives, cars or lading of either party were so involved, such Liability shall be borne by the parties hereto equally.

8.6 If a claim is made involving joint Liability, the party hereto against which such claim is made shall give prompt notice thereof to the other party which shall have the opportunity to share or join in the defense of the claim. If the party so notified does not exercise such opportunity, it shall be bound for its share of any settlement of such claim and all expenses incident thereto. If a claim is made against a party which is not chargeable hereunder in whole or in part with the Liability involved in such claim, such party shall promptly notify in writing the responsible party.

8.7 If a judgment should be recovered against and satisfied by one party hereto involving Liability which should, under this agreement, be borne or participated in by the other party, then all expenses in connection therewith shall be settled by the parties hereto in accordance with the provisions of this agreement, and the party against which such judgment shall have been rendered shall be promptly reimbursed by the other party to the extent to which such other party is indebted. All releases taken pursuant to the settlement of claims involving liability of either or both parties shall include both parties hereto, their parents, affiliates, directors, officers, successors and assigns and copies shall be furnished each of the parties hereto.

8.8 Notwithstanding any provision hereof to the contrary, any judgment or decree at law or in equity against one party hereto shall not be conclusive against the other party unless that party shall have had reasonable notice from such other party requiring it to appear in the action or suit and make defense thereto for its own account or jointly with such other party. If such notice shall have been given and the party receiving same shall have failed to appear and make defense, it shall be concluded by the judgment or decree in such suit.

8.9 Notwithstanding the foregoing provisions, whenever any loss of, damage to or destruction of any property whatsoever, or injury to or death of any person or persons whomsoever, occurs with the trains, locomotives, cars, cabooses or equipment of, or in the account of, both NK and any other user of the Joint Trackage or any portion thereof being involved, regardless of whether cause in whole or in part by the fault, failure, negligence, misconduct, nonfeasance or misfeasance of CNW, NK or any other user of the Joint Trackage or their officers, agents or employees, then any such other user shall be considered as CNW for the purpose of determining between the parties to this agreement NK's assumption and apportionment of liability, cost and expense under this Section 8.

8.10 It is understood and agreed that a number of vehicular and/or pedestrian crossings of the Joint Line presently exist, or may be constructed. NK agrees to accept all crossings in whatever condition they may be during the term of this agreement and will not assert any claim, demand or cause of action against CNW and will hold CNW harmless from any claim, demand or cause of action arising out of any crossing accident on the Joint Line in which the engines, cars, cabooses, trains or equipment of NK only is involved.

8.11 NK shall provide CNW with evidence of general liability and property damage insurance in an amount of \$5,000,000 providing for coverage for damage to CNW property, death or injury to CNW employees or third persons and naming CNW as an insured.

SECTION 9 - DEFAULT

9.1 It is understood and agreed between the parties hereto that should NK make default in any of the payments to be made by it hereunder, or fail to faithfully perform any

of its covenants herein or violate any term or condition of this agreement, and if such default, failure or violation shall continue for a period of sixty (60) days after CNW shall have given NK written notice thereof "an event of default", CNW may thereupon declare this agreement terminated and exclude NK from all the rights and privileges granted it hereunder, and NK shall have no claim or demand upon CNW at law or in equity on account of such exclusion.

9.2 CNW may waive any such default, failure or violation by NK, but no such action of CNW in waiving such default, failure or violation shall be construed to extend to any future default, failure or violation, whether of a similar nature or otherwise, nor to impair CNW right to termination resulting therefrom.

SECTION 10 - PUBLIC AUTHORITY AND PERMISSION

10.1 In the event it is necessary to secure from the Interstate Commerce Commission authority or exemption from such authority to enable the lawful accomplishment of the objects and purposes hereof and the lawful performance of the terms, provisions and conditions hereof, NK at its own expense, shall be responsible for the obtaining of such authority or exemption, shall forthwith apply to the Interstate Commerce Commission therefor, and shall diligently prosecute the application to final determination. CNW, at its own expense, shall assist and support such application and will furnish such information and execute, deliver and file such instrument or instruments in writing as may be necessary and appropriate to obtain such approval.

10.2 Should authority or exemption for any purpose in this Section 10 mentioned be denied by the Interstate Commerce Commission, or should such authority or exemption be granted subjected to limitations not reasonably acceptable to either or both of the parties hereto, then this agreement shall be null and void.

SECTION 11 - EFFECTIVE DATE - TERM

11.1 This agreement shall take effect upon meeting all regulatory approval requirements or as of the first day NK commences use of the Joint Trackage, and, unless sooner terminated in accordance with the provisions of Section 2, Section 9, Section 10 or Section 12 hereof, shall remain in effect for so long as NK shall continue to operate freight trains over the Joint Trackage; provided, however, that should NK fail to operate over the Joint Trackage for a continuous 360-day period, then, in such event, this agreement shall immediately terminate and be of no further force or effect.

11.2 No termination of this agreement shall serve to relieve either party hereto of any obligations incurred hereunder on or prior to the date of such termination.

11.3 In the event CNW sells the Joint Trackage, CNW shall assign this Agreement to the vendee and any such sale shall be subject to the terms and provisions of this Agreement and rights of NK hereunder.

SECTION 12 - NOTICES - HOW GIVEN

12.1 Any notices to be served hereunder shall be served, in writing, upon any executive or general officer of the party upon whom such notice is to be served.

SECTION 13 - SECTION HEADINGS

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

SECTION 14 - AGREEMENT TO BE CONSTRUED LIBERALLY - NOT FOR BENEFIT OF THIRD PARTIES

14.1 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 15 - SUCCESSORS AND ASSIGNS

15.1 This agreement shall inure to the benefit of and shall be binding upon the successors and assigns of CNW and NK, but no assignment, sales, conveyance, mortgage, lease, sublease or transfer of any interest or right given NK in the Joint Trackage or this agreement to any person or entity separate and apart from the assignment, sale, conveyance, mortgage, lease, sublease or transfer of all or substantially all of its railroad shall be valid or binding without the prior written consent of CNW.

SECTION 16 - GOVERNING LAW

16.1 This agreement shall be governed by the laws of the State of Illinois.

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

WITNESS: _____ **CHICAGO AND NORTH WESTERN
TRANSPORTATION COMPANY**
By: _____

WITNESS: _____ **NEBKOTA RAILWAY, INC.**
By: _____

EXHIBIT C

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 35346

**NEBRASKA NORTHWESTERN RAILROAD, INC. – PURCHASE, LEASE AND
OPERATION EXEMPTION – DAKOTA, MINNESOTA & EASTERN RAILROAD
CORPORATION**

STB Finance Docket No. 35352

**NEBKOTA RAILWAY, INC. & WEST PLAINS CO. – PETITION FOR
DECLARATORY ORDER**

VERIFIED STATEMENT OF JOHN K. BROOKS

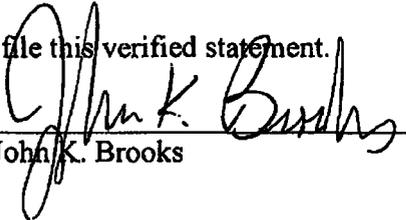
My name is John K. Brooks. I am General Manager, U.S. Sales for Canadian Pacific Railway (“CP”). My business address is 140 North Phillips Avenue, Sioux Falls, SD 57104. I am making this Verified Statement in support of the Dakota, Minnesota & Eastern Railroad’s (“DM&E”) Reply to the Petitions of Nebkota Railway, Inc. and West Plains Co. in STB Docket Nos. 35346 and 35352.

The Line that is the subject of DM&E’s transactions with Nebraska Northwestern Railroad is a 28.1 mile line that handles very little traffic. In recent years DM&E’s and Nebkota’s combined operations on the Line have averaged only two to three loaded trains per week.

VERIFICATION

I, John K. Brooks, declare under penalty of perjury that the foregoing is true and correct.

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



John K. Brooks

Executed on February 19, 2010