

FLETCHER & SIPPEL LLC

Two Prudential Plaza, Suite 3125
180 North Stetson Avenue
Chicago, Illinois 60601-6721

December 27, 2002

Phone: (312) 540-0500
Fax: (312) 540-9098
www.fletcher-sippel.com

William C. Sippel
(312) 540-9451
wsippel@fletcher-sippel.com

VIA FEDERAL EXPRESS

Mr. Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W., Room 700
Washington, DC 20006



Re: **Finance Docket No. 34178**
Dakota, Minnesota & Eastern Railroad Corporation
and Cedar American Rail Holdings, Inc. -- Control --
Iowa, Chicago & Eastern Railroad Corporation

206958

Finance Docket No. 34178 (Sub-No. 1)
Dakota, Minnesota & Eastern Railroad Corporation --
Terminal Trackage Rights -- Union Pacific Railroad Company

206859

Dear Secretary Williams:

Enclosed for filing in the above-captioned proceedings are an original and twenty-five copies of **Applicants' Response to Reply Comments of the United States Department of Transportation (DME-10)**, dated December 27, 2002. A 3.5-inch computer diskette containing the text of the rebuttal in Word 2000 format is attached.

One extra copy of the rebuttal and this letter also are enclosed. Please date-stamp those items to show receipt of this filing and return them to me in the provided envelope.

Please feel free to contact me should any questions arise regarding this filing. Thank you for your assistance on this matter.

Respectfully submitted,

ENTERED
Office of Proceedings

DEC 30 2002

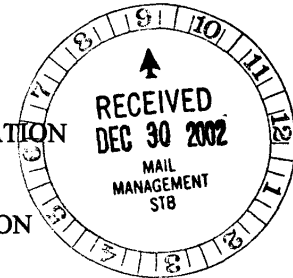
Part of
Public Record

William C. Sippel
Attorney for Dakota, Minnesota & Eastern
Railroad Corporation and Cedar American
Rail Holdings, Inc.

WCS:dg
Enclosures
cc: Parties on Certificate of Service

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34178
DAKOTA, MINNESOTA & EASTERN RAILROAD CORPORATION
AND CEDAR AMERICAN RAIL HOLDINGS, INC.
-- CONTROL --
IOWA, CHICAGO & EASTERN RAILROAD CORPORATION



FINANCE DOCKET NO. 34178 (Sub-No. 1)
DAKOTA, MINNESOTA & EASTERN RAILROAD CORPORATION
- TERMINAL TRACKAGE RIGHTS -
UNION PACIFIC RAILROAD COMPANY

**APPLICANTS' RESPONSE TO REPLY COMMENTS OF
THE UNITED STATES DEPARTMENT OF TRANSPORTATION**

David L. Knudson
Scott B. Anderson
Davenport, Evans, Hurwitz
& Smith, L.L.P.
206 West 14th Street
Sioux Falls, South Dakota 57104
(605) 336-2880

**ATTORNEYS FOR
IOWA, CHICAGO & EASTERN
RAILROAD CORPORATION**

William C. Sippel
Myles L. Tobin
Thomas J. Litwiler
Fletcher & Sippel LLC
Two Prudential Plaza, Suite 3125
180 North Stetson Avenue
Chicago, Illinois 60601-6721
(312) 540-0500

**ATTORNEYS FOR
DAKOTA, MINNESOTA & EASTERN
RAILROAD CORPORATION AND CEDAR
AMERICAN RAIL HOLDINGS, INC.**

Dated: December 27, 2002

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34178

DAKOTA, MINNESOTA & EASTERN RAILROAD CORPORATION
AND CEDAR AMERICAN RAIL HOLDINGS, INC.
-- CONTROL --
IOWA, CHICAGO & EASTERN RAILROAD CORPORATION

FINANCE DOCKET NO. 34178 (Sub-No. 1)
DAKOTA, MINNESOTA & EASTERN RAILROAD CORPORATION
- TERMINAL TRACKAGE RIGHTS -
UNION PACIFIC RAILROAD COMPANY

**APPLICANTS' RESPONSE TO REPLY COMMENTS OF
THE UNITED STATES DEPARTMENT OF TRANSPORTATION**

Dakota, Minnesota & Eastern Railroad Corporation ("DM&E"), Cedar American Rail Holdings, Inc. and Iowa, Chicago & Eastern Railroad Corporation ("IC&E") (collectively "Applicants") hereby submit this brief response to the Reply Comments ("Reply Comments") of the United States Department of Transportation ("DOT") dated December 13, 2002.¹

In its Reply Comments, DOT supports approval of the proposed control transaction without conditions.² DOT agrees with Applicants that the proposed transaction meets

¹ In its Decision served September 26, 2002 establishing the procedural schedule for this proceeding, the Board allowed DOT to file its comments in response to other parties' comments on the reply due date (December 13, 2002) and allowed Applicants the opportunity to file a response to DOT's responsive comments. Dakota, Minnesota & Eastern Railroad Corporation and Cedar American Rail Holdings, Inc. -- Control -- Iowa, Chicago & Eastern Railroad Corporation, STB Finance Docket No. 34178 (STB served September 26, 2002), footnote 16.

² Although DOT does not support the imposition of any conditions on the transaction, DOT states that it is "uncertain" whether and what extent relief would be appropriate to address the "bottleneck" issue raised by Muscatine Power and Water Company ("Muscatine Power") in its Comments and Request for Conditions dated November 22, 2002. Clearly, no relief is necessary or

the applicable standard for approval and that no basis has been presented by any party to condition approval of the transaction. As DOT notes, no party has introduced any persuasive evidence that the merger will not produce a stronger rail system that will be better able to offer improved services to shippers. Reply Comments at 4.

DOT, however, takes a divergent view with respect to DM&E's Application for Terminal Trackage Rights ("the Terminal Application") seeking terminal trackage rights over a short segment of trackage owned by Union Pacific Railroad Company ("UP") at Owatonna, Minnesota. DOT does not dispute that DM&E's proposed use of the trackage is practicable, in the public interest, and will not impair the ability of the UP to handle its own business. DOT acknowledges "the clear superiority (from almost any perspective) of using existing track over construction of a new connection" and the "negative impact on competition that commonly flows from 'paper barriers.'" Nevertheless, DOT states that it "cannot support the trackage rights request" because it fails to meet the Board's "competitive access standard." Reply Comments at 9. DOT also asserts that absent Board action, it "seems likely" that UP and Applicants have sufficient incentive to negotiate an agreement thus avoiding increased community impacts on Owatonna.³ Reply Comments at 10.

DOT, citing the Board's decision in Canadian National Ry., Grand Trunk Corp. & Grand Trunk Western R.R. -- Control -- Illinois Central Corp., Illinois Central R.R., Chicago,

appropriate. Subsequent to the filing of DOT's Reply Comments, Muscatine Power reached a settlement with Applicants. By letter to the Board dated December 18, 2002 (a copy of which is attached), Muscatine Power withdrew its Comments and Request for Conditions and advised the Board that it supports approval of the transaction.

³ The reasons why private negotiations between DM&E and UP are not likely to result in DM&E obtaining the necessary trackage rights over UP's trackage at Owatonna are set forth in Applicants' Rebuttal (DME-9) at 18-20, including specifically in the Rebuttal Verified Statement of Kevin V. Schieffer attached thereto at 34-36. (Page references are to the consecutive numbering used in that filing). It is clear that DOT had not yet seen Applicants' Rebuttal at the time it filed its Reply Comments.

Central & Pacific R.R. & Cedar River R.R., STB Finance Docket No. 33556 (STB served May 25, 1999) ("CN/IC"), claims that the Board has limited the exercise of its authority under Section 11102 in rail merger cases to only those "limited circumstances where the rights are designed to bridge a gap within broader trackage rights imposed on [the merger] applicants and deemed necessary to remedy or mitigate anticompetitive effects in the transaction." DOT asserts that since there is no harm resulting from the proposed transaction, the "much more demanding requirements" of the Board's competitive access standard apply. Reply Comments at 10.

DOT misconstrues the Board's precedent and in doing so seeks to place limitations on the Board's power to use its terminal trackage rights authority under Section 11102 in rail merger cases where the Board itself has not imposed such limitations. The Board's decision in CN-IC cited by DOT does not support DOT's argument. In that case, The Kansas City Southern Railway ("KCS") sought terminal trackage rights for its affiliate Gateway Western Railway ("GWWR") to permit an improved interchange between KCS-GWWR and the consolidated CN/IC at Springfield, Illinois. The Board denied the application because there was "an insufficient nexus between the merger and the applicants' [KCS-GWWR's] trackage rights proposal to justify consideration under the less demanding public interest standard we have applied in appropriate circumstances within the context of rail merger proceedings." CN-IC at 53. The Board found that the terminal trackage rights sought by non-merger applicants KCS-GWWR were "not designed to remedy any anticompetitive effects of, or fill in any gaps in, a consolidated CN/IC system." CN-IC at 52 (emphasis added).

Here, the terminal trackage rights requested by DM&E are unquestionably related to the proposed consolidation of DM&E and IC&E and are necessary to "fill in the gap" in the consolidated DM&E/IC&E system. As discussed in the Terminal Application and in Applicants'

Rebuttal, use of the short segment of UP trackage at Owatonna by DM&E is necessary to establish a direct connection and unrestricted interchange between DM&E and IC&E which do not presently connect with each other at any location. Without such relief, DM&E and IC&E would be unable to effectuate the new competitive traffic routings made possible by the DM&E/IC&E combination.

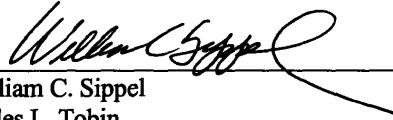
DOT's argument seeks to draw a distinction -- and thereby limit the Board's authority -- as to when the Board may exercise its authority under Section 11102 in rail merger proceedings. In essence, DOT argues that it is appropriate for the Board to exercise its terminal trackage rights authority under Section 11102 only where needed to fashion a remedy to fix a "bad" rail consolidation (i.e., one requiring the imposition of conditions to make it permissible), but not appropriate for the Board to exercise its authority to effectuate a "good" rail consolidation (i.e., one that does not require any conditions to be permissible). There is no logical basis and no sound public policy reason for so limiting the Board's authority. Indeed, such an argument would be inconsistent with the principle that a remedial statute such as Section 11102 should be construed liberally. See CSX Corp. -- Control -- Chessie and Seaboard C.L.I., 363 I.C.C. 521, 585 (1980). Unquestionably, the Board has exercised its terminal trackage rights authority under 11102 to effectuate conditions imposed on a rail merger consolidation. However, the Board has never limited the exercise of its 11102 authority to such circumstances.

The applicable standard for the proposed terminal trackage rights -- as established by the Board in Union Pacific/Southern Pacific Merger, 1 S.T.B. 233 (1996) ("UP/SP") -- is the "broad public interest" standard in Section 11102(a). UP/SP at 448-449.

The Terminal Application fully meets that standard and should be approved.

Respectfully submitted,

By:



William C. Sippel

Myles L. Tobin

Thomas J. Litwiler

Fletcher & Sippel LLC

Two Prudential Plaza, Suite 3125

180 North Stetson Avenue

Chicago, Illinois 60601-6721

(312) 540-0500

David L. Knudson

Scott B. Anderson

Davenport, Evans, Hurwitz &

Smith, L.L.P.

206 West 14th Street

Sioux Falls, South Dakota 57104

(605) 336-2880

ATTORNEYS FOR

IOWA, CHICAGO & EASTERN

RAILROAD CORPORATION

ATTORNEYS FOR

DAKOTA, MINNESOTA & EASTERN

RAILROAD CORPORATION AND CEDAR

AMERICAN RAIL HOLDINGS, INC.

Dated: December 27, 2002



Muscatine Power and Water

3205 Cedar Street • Muscatine, Iowa 52761-2204
319-263-2631

December 18, 2002

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W., Room 700
Washington, D.C. 20423-0001

Finance Docket No. 34178
Dakota, Minnesota & Eastern Railroad Corporation
and Cedar American Rail Holdings, Inc. – Control –
Iowa, Chicago & Eastern Railroad Corporation

Dear Secretary Williams:

I am writing on behalf of the Board of Water, Electric and Communications Trustees of the City of Muscatine, Iowa, d/b/a Muscatine Power and Water ("MPW") to express MPW's support for the proposed common control of Iowa, Chicago & Eastern Railroad Corporation ("IC&E") and the Dakota, Minnesota & Eastern Railroad Corporation ("DM&E").

As we stated in our filing on Friday, November 22, 2002, we had concerns relating to interchange gateways and stated that we were trying to work with DM&E and IC&E regarding those concerns but had not reached an agreement. Since our filing, those concerns have been addressed and based on the new agreement between MPW and DM&E and IC&E, we are now in full support of the transaction, withdraw the comments filed with the Board on November 22, 2002, and encourage the Board to approve the transaction in an expeditious manner.

Enclosed are 25 copies of this letter and a diskette containing the text of the letter in Wordperfect format. We are also concurrently serving the letter to all parties of record in accordance with the attached listing.

Respectfully submitted,


Jay D. Logel
General Manager

C: Duane Goedken, MPW Board Attorney
Parties of Record

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of December, 2002, a copy of the foregoing **Applicants' Response to Reply Comments of United States Department of Transportation (DME-10)** was served upon all parties of record in Finance Docket No. 34178 and Finance Docket No. 34178 (Sub-No. 1) by first-class mail, postage prepaid.

Dated at Chicago, Illinois this 27th day of December, 2002.



William C. Sippel