

Law Department

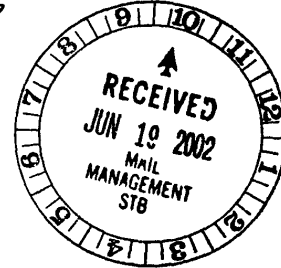
UNION PACIFIC RAILROAD COMPANY



205-657

June 18, 2002

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OMAHA, NEBRASKA 68179-0001  
FAX (402) 271-5610



**Via UPS Next Day Air**

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

ENTERED  
Office of the Secretary

JUN 19 2002

Part of  
Public Record

Re: Finance Docket No. 34177, Iowa, Chicago & Eastern Railroad  
Corporation – Acquisition & Operation Exemption – Lines of L&M  
Rail Link, LLC

Dear Mr. Williams:

Pursuant to the Board's decision served June 12, 2002, this letter constitutes the comments of Union Pacific Railroad Company ("UP") in the above proceeding.

UP takes no position as to whether ICE's Notice of Exemption is appropriate under 49 C.F.R. §1150.35, or whether the exemption should be permitted to go into effect on June 28, 2002. Rather, these comments are limited to certain UP-IMRL joint facilities that are involved in the above transaction.

Exhibit "A" to IC&E's Notice of Exemption lists four UP-IMRL joint facilities as part of the IMRL lines to be acquired by IC&E. These are described in the Notice as follows:

- Trackage rights over Union Pacific Railroad Company ("UP") from milepost 157.3 to milepost 157.8 in Clinton, Iowa, a distance of approximately 0.5 miles.
- Paired track with UP from milepost 456.7 at Polo, Missouri, to milepost 494.5 at Birmingham, Missouri, a distance of approximately 37.8 miles.<sup>1</sup>

<sup>1</sup> The "paired track" between Polo and Birmingham and the "joint track" between Birmingham and Kansas City, described in the immediately following bullet point, are part of an integrated joint facility extending from Polo to Kansas City.

- Joint track with UP from milepost 494.5 at Birmingham, Missouri, to milepost 499.2 at Air Line Junction, Kansas City, Missouri, and from KCS Junction to KCT Junction (Sheffield) in Kansas City, Missouri, a distance of approximately 4.8 miles.
- Trackage rights over UP from milepost 122.9 at Fairmont, Minnesota, to milepost 130.2 at Welcome Junction, Minnesota, a distance of approximately 7.3 miles.

UP does not oppose IC&E's acquisition of IMRL's interests in the above joint facilities, so long as IC&E assumes all of the agreements that govern these facilities. Our concern, however, is that IC&E may be attempting to acquire IMRL's rights to use these joint facilities without assuming the underlying agreements. This is suggested by the Exhibit "A" to the Notice of Exemption. The exhibit first lists certain IMRL line segments to be acquired by IC&E and the joint facilities included in those line segments, with no mention as to how IC&E intends to obtain the right to use these facilities. All of the UP-IMRL joint facilities shown above are included in this first group. Exhibit "A" then contains a separate listing of "incidental trackage rights" which IC&E is to acquire "via assignment from IMRL." The differing treatment of the two groups suggests that IC&E intends to assume the underlying agreements for the second group of joint facilities ("via assignment from IMRL"), but not the agreements governing the first group.

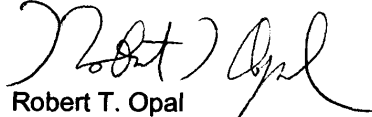
It is possible, of course, that we are misreading IC&E's intent, since we have not seen the Asset Purchase Agreement. It may be that IC&E is committed to assume all of the agreements governing the joint facilities listed in Exhibit "A" and fully intends to do so. If that is the case, UP's concerns as to the UP-IMRL joint facilities listed in Exhibit "A" will be satisfied and the Board need give no further consideration to this filing. We expect that IC&E will inform the Board of its intentions as to these agreements in its reply comments.

However, it could also be that IC&E intends to take the position that the Notice of Exemption gives it an independent right to use the joint facilities, regardless of whether it assumes the underlying agreements. If this is IC&E's position, the Board should make clear that the Notice of Exemption will give IC&E no such right. The Board and the ICC have repeatedly held that exemptions are only permissive. The fact that one railroad obtains an exemption to operate over another does not give it a legal right to do so. Similarly, an exemption does not compel one railroad to grant access to another. An exemption simply gives a railroad regulatory permission to operate a line if it already has the legal right to do so, or acquires it; Docket No. 41987, Western Fuels Service Corporation v. BNSF (not printed), served July 12, 1997, p. 11; Finance Docket No. 32706, Wisconsin & Southern R. Co. - Lease & Operation Exemption - Soo Line R. Co. (not printed), served July 14, 1995, p. 1; Finance Docket No. 32356, Denver Terminal R. Co. - Acquisition & Operation Exemption - Denver Ry., Inc. (not printed), served September 29, 1993, pp. 1-2; Finance Docket No. 30858, K & K Warehouse -

Exemption From 49 U.S.C. 11104 and 10901(d) (not printed), decided April 3, 1997, pp. 2-3. Accordingly, the Notice of Exemption will not give IC&E the right to use the UP-IMRL joint facilities unless IC&E obtains the contractual right to use them. In order to obtain IMRL's contractual rights, IC&E must assume the underlying agreements.

An additional 10 copies of this letter are enclosed for the Board's files.

Yours very truly,



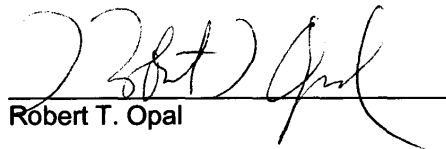
Robert T. Opal  
General Commerce Counsel  
Phone: 402/271-3072  
Fax: 402/271-5610

cc: William C. Sippel, Esq. (*by facsimile to 312/540-9098  
and UPS Next Day Air*)

CERTIFICATE OF SERVICE

I hereby certify that on June 18, 2002, I served the foregoing document by facsimile to 312/540-9098 and UPS Next Day Air on the following person:

William C. Sippel, Esq.  
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Robert T. Opal