



**U.S. Department
of Transportation**

Office of the Secretary
of Transportation

GENERAL COUNSEL

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Washington, D.C. 20590

July 14, 2006

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

Re: Finance Docket Nos. 34177, 34178

Dear Secretary Williams:

It has come to the attention of the United States Department of Transportation ("DOT" or "Department") that there is a petition before the Surface Transportation Board ("STB" or "Board") to modify conditions imposed in recent rail consolidation cases. The relevant conditions are those imposed for the benefit of communities through which large numbers of coal trains might pass when and if the Dakota, Minnesota & Eastern Railroad Corp. ("DM&E") builds a new rail line into the Powder River Basin ("PRB") area of Wyoming. DOT previously supported the clear purpose behind those conditions in filings in the above-referenced cases. The purpose of this letter is to inform the Board and interested parties that we still do.¹

Following a comprehensive environmental review, the STB granted DM&E's request for authority to construct a line of track into the PRB. Finance Docket No. 33407, Dakota, Minnesota & Eastern RR Co. - Construction - Powder River Basin, 6 S.T.B. 8 (2002) ("PRB Construction"). In the course of that proceeding the Board imposed conditions to mitigate the impact of large numbers of PRB coal trains on communities situated on DM&E lines.² The STB declined to extend the same protections to similarly situated communities on other railroads immediately "down line" from the DM&E system largely because it did not feel it could require DM&E "to take action on property it does not own." Id. at 34.

Shortly thereafter, the Board commenced two proceedings through which the lines of two other railroads would come under common control with DM&E. In Finance Docket No.

^{1/} Other parties have responded in opposition to the petition, and insofar as this letter both introduces no new considerations beyond those already before the Board and addresses the important matter of fulfilling the purpose of the relevant conditions, to the extent this letter is untimely DOT nonetheless asks that it be accepted.

^{2/} DM&E estimated that it could carry 100 million tons of coal annually by 2010. See PRB Construction, 6 S.T.B. at 42-46.

34177 the STB oversaw the acquisition of substantially all of the assets of the I&M Rail Link, LLC ("IMRL") by the Iowa, Chicago & Eastern Railroad Corp. ("IC&E"). Decision served July 22, 2002 ("IC&E/IMRL Decision"). At almost the same time, in Finance Docket No. 34178 the Board reviewed and approved the acquisition of control of the ICE by the DM&E. Dakota, Minnesota & Eastern RR Co. – Control – Iowa, Chicago & Eastern RR Co., 6 S.T.B. 511 (2003) ("DM&E/IC&E Decision").

In both of these consolidation proceedings the Department pointed out that through the transactions in question DM&E would extend its system so that communities previously on the IMRL or IC&E would no longer be "down line" from the DM&E but effectively "on line," and they therefore deserved the same solicitude for any impacts they would feel from large numbers of PRB coal trains.³ In light of various uncertainties about the actual construction of the PRB project and subsequent operations, the Board responded with two conditions. The first prohibited PRB coal trains from being routed on IMRL and IC&E lines until such time that an appropriate environmental review could be conducted, and the second required notice of the start of construction of the PRB line and submission of information sufficient to enable the STB to conduct that review. IC&E/IMRL Decision (slip opinion) at 16-17, 19; see also DM&E/IC&E Decision, 6 S.T.B. at 532-33.

DM&E and IC&E in their petition now report that the first condition has proven to be an obstacle to obtaining financing for the PRB project, and they argue as well that it is unnecessary to wait until construction begins before the appropriate information is available. The carriers have also submitted what they believe is appropriate information, purportedly in compliance with the second condition. See Petition at 6-9.

The Department concedes that it might not be necessary to actually begin construction of the PRB line before sufficiently specific routing and operational information is available on which to make a decision as to the level of environmental review and the mitigation conditions, if any, that might be appropriate. Given the importance of coal and the benefits of additional infrastructure and competition for its delivery, procedural or technical restrictions to construction should be minimized. To that extent DOT agrees with the petitioners. However, for the reasons that follow, we disagree that the information provided is sufficient to conduct the necessary environmental review.

Petitioners contend that the information establishes that the addition of the IMRL and IC&E to the DM&E system introduced no new routings or operations of PRB unit coal trains on the IMRL and IC&E lines beyond those of record in the PRB Construction proceeding. See, e.g., Petition at 15-16, 22-24. The petitioners reason that because this

³/ F.D. No. 34177, DOT Comments filed June 19, 2002, at 3-4; F.D. No. 34178, DOT Comments filed November 14, 2002, at 5-6.

projected traffic received full consideration in that proceeding, there is no basis for additional study of its impact or of any mitigating conditions.⁴

The Department believes the Board would not have imposed the conditions it did had it believed that no new information and no consideration of potential mitigation were appropriate.⁵ The STB deferred "a new environmental inquiry" in light of uncertainty over both the construction of the PRB line and "what portion of the traffic from/to that new line would move over the [IMRL] (now IC&E) lines." DM&E/IC&E Decision, 6 S.T.B. at 533. Thus, the Board's clear intent was to treat the IC&E and IMRL communities now within the greater DM&E system in the same way it did those communities located on the original DM&E system, since the primary reason for not doing so in the PRB Construction proceeding had been removed. By leaving the communities in the same position they were in when DM&E "did not own" the IC&E and IMRL lines the petitioners would not defer the inquiry, they would avoid it entirely. Now that it does own those lines, however, DM&E must also take ownership of the consequences of its planned new operations on all of the communities within its larger system, just as any other merging carriers must.

Respectfully submitted,



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cc: All Parties of Record

^{4/} See, e.g., Petition at 19 ("[T]he evidence [submitted with the Petition] indicates that IC&E acquisition and control [by DM&E] will not result in any meaningful diversions of PRB coal to IC&E/Owatonna routings from the routings they otherwise would have been expected to traverse. The Board's review should thus conclude that there are no cumulative impacts to address under the relevant regulatory criteria."). See also Petition at 24 ("IC&E's acquisition of IMRL's assets and DM&E's control of IC&E qualify under the categorical exclusions of [the STB's environmental rules] and do not require further environmental review.").

^{5/} However appropriate their conclusion might be in a consolidation involving essentially a continuation of existing traffic routings and operations between two carriers, see 49 C.F.R. §§ 1105.6(c)(2)(i), 1105.7(e), the petitioners' situation involves *no* existing PRB traffic routings or operations on the IC&E and IMRL lines. Further, there is no question but that, had DM&E acquired the IC&E and IMRL prior to seeking authority to construct the PRB project -- i.e., when there was no PRB coal traffic on those lines -- the Board would have included the impacts on all communities within the entire DM&E/IC&E/IMRL system in its environmental study and consideration of conditions. A simple reversal of those regulatory proceedings, with the PRB project studied first and the acquisitions considered second, changes nothing when the salient fact of no existing traffic (and no existing impact) remains the same. It is difficult to believe that petitioners seriously consider this to be merely "a happenstance of timing." Petition at 23 note 6.