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December 17, 2004

VIA HAND-DELIVERY

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, NW
Washington, DC 20423-0001

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Office of Proceedings

DEC 17 2004

Part of
Public Record

Re: Finance Docket No. 34630, MRC Regional
Railroad Authority – Trackage Rights
Exemption – Lines of the State of South
Dakota

- 212 790

Finance Docket No. 34630 (Sub-No. 1)
Dakota Southern Railway Company --
Trackage Rights Exemption – MRC
Regional Railroad Authority

- 212 792

Dear Secretary Williams:

The Burlington Northern and Santa Fe Railway Company ("BNSF") has just become aware of Notices of Exemption filed last week by MRC Regional Railroad Authority ("MRC"), a non-railroad, and Dakota Southern Railway Company ("Dakota Southern"), in the above-captioned dockets, for the acquisition and operation of trackage rights over a line of railroad owned by the State of South Dakota between Mitchell, South Dakota and Sioux City, Iowa (the "Mitchell-Sioux City Line"). In their Notices, MRC and Dakota Southern recognize that the Mitchell-Sioux City Line is operated by BNSF, that the State's right to grant other trackage rights on the line is subject to certain BNSF consent, and that BNSF has not granted that consent. MRC Notice at 3; Dakota Southern Notice at 2. Further, they recognize that the question of BNSF's consent is the subject of litigation in state court in South Dakota and that "BNSF consent may have to be obtained (either voluntarily or through litigation) before its third-party trackage rights operations can commence on the Mitchell-Sioux City Line." *Id.* They state that they are nevertheless seeking Board authorization, inasmuch as that authorization is "permissive," as a "prelude" to obtaining any necessary consent from BNSF. *Id.*

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The purpose of this letter is to confirm that BNSF has not given its consent to or otherwise agreed to the third-party trackage rights operation in question and that it does not intend to do so. BNSF regards MRC's and Dakota Southern's filings with the Board as ultra vires and a sham transaction to improperly influence the pending state court litigation.¹ In light of the fact that Dakota Southern has not notified BNSF of any desire or plan to begin joint operations on the Mitchell-Sioux City Line and no Dakota Southern crews are qualified to operate the line, BNSF does not plan to seek a stay of MRC's and Dakota Southern's Notices, but plans to take appropriate action in due course. If the Board publishes its own notices of MRC's and Dakota Southern's filings, BNSF urges the Board to qualify that publication, stressing issuance of those notices does not constitute any finding by the Board concerning the Board's jurisdiction over the transactions or Dakota Southern's right to operate over the line without BNSF's consent. Nor does it provide any basis for MRC or Dakota Southern to claim that the Board has permitted South Dakota and Dakota Southern to conduct operations in the absence of a final decision by the courts that Dakota Southern has a legal right to conduct such operations.

Sincerely yours,

Robert M. Jenkins III /gls

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and Santa Fe Railway Company

cc: Kenneth W. Cotton
Myles L. Tobin
John D. Fitzgerald
Gordon P. MacDougall
Richard E. Weicher
Sarah W. Bailiff

¹ Based on the recent Notice of Exemption filing with the STB, the owner of the line, the State of South Dakota, has filed a Motion to Dismiss the state court litigation and a Motion to Stay discovery in that lawsuit.