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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Canadian Pacific Railway Company, *et al.* – Control –
Dakota, Minnesota & Eastern Railroad Corp., *et al.*

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) Finance Docket No. 35081
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**APPLICANTS' REPLY TO BNSF RAILWAY COMPANY'S COMMENTS ON
ENVIRONMENTAL REVIEW PROCEDURES**



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Dated: October 29, 2007

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Canadian Pacific Railway Company ("CPRC"); Soo Line Holding Company ("SOO Holding"); Dakota, Minnesota & Eastern Railroad Corporation ("DM&E"); and Iowa, Chicago & Eastern Railroad Corporation ("IC&E") (DM&E and IC&E are referred to collectively herein as "DME," and CPRC, SOO Holding, DM&E and IC&E are referred to collectively herein as "Applicants"), hereby submit this Reply to "BNSF Railway Company's Comments on the Environmental Review Procedures" filed by BNSF in the above-captioned proceeding on October 24, 2007 ("BNSF Comments"). For the reasons set forth below, the Board should reject BNSF's flawed and unnecessary proposals that Applicants be required to submit information regarding the environmental effects of hypothetical future Powder River Basin ("PRB") coal movements on the lines of IC&E and CPR, or to modify the Control Application "to exclude acquisition of DM&E's authority to build into the PRB at this time." (BNSF Comments at 15)

In the Control Application, Applicants suggested that the Board impose a condition on approval of this transaction requiring an appropriate environmental review of the impact of hauling PRB-origin coal over the lines of IC&E and CPR prior to the movement of any such coal. This condition fully addresses and satisfies the requirements of NEPA. Applicants' proposal serves the public interest because it will ensure the completion of a full and robust

environmental review, premised on adequate information, prior to the movement of PRB coal over IC&E and CPR lines. The purposes of such an environmental review would not, however, be served by conducting the review prior to Board approval of this Control Application.

Applicants have not decided whether to build the PRB line. Until it is clear that Applicants can secure sufficient coal traffic to support construction of the PRB line, assemble the required properties for the route in South Dakota and Wyoming, and complete access agreements with the mines, the expenditure of time and resources by Applicants (and the Board) to conduct an environmental review addressing hypothetical future PRB coal operations on the lines of IC&E and CPR would not be justified. Neither the identities nor the locations of future PRB coal customers, nor the volumes, destinations or routing of their coal shipments beyond DM&E's lines, can be determined at this time. DM&E has acquired only two parcels of land required for the new line and has reached no final agreements with mines in the PRB. In contrast, consideration of the environmental impacts of future PRB coal operations on the lines of IC&E and CPR after more is known about the characteristics of the PRB coal traffic on those lines, as Applicants propose, will enable the Board to base its analysis on more reliable traffic and routing information than is available today.

In addition, Applicants' approach will permit the timely completion of this control proceeding which promises significant public interest benefits to DME's employees, its customers and the communities in which it operates. These benefits include, among other things, giving DME access to the resources it needs to become a safer and more efficient railroad. CPR will make \$300 million available to improve the safety and fluidity of the existing DME system. DM&E will introduce practices and technologies that have made CPR one of the safest railroads in

North America. And CPR will be able to offer new, extended single-line rail service to non-coal shippers served by DME

In contrast, BNSF's principal proposal – that an environmental review of PRB coal operations over IC&E and CPR lines be conducted before approval of this Control Application – does not serve the interest of achieving a thorough and accurate environmental review, and it is otherwise contrary to the public interest. Adoption of this proposal would delay realization of the benefits the proposed transaction so clearly will provide. Moreover, BNSF's proposal inevitably serves an anticompetitive purpose, because it contemplates an environmental review now, in the course of which Applicants would be required to divulge highly confidential and proprietary information. Applicants are having preliminary discussions with utilities, coal mines, and other entities potentially having an interest in PRB coal shipments over IC&E and CPR lines. Requiring exposure of Applicants' marketing plans to BNSF (and other competing railroads), which BNSF contemplates when it suggests (BNSF Comments at 11) that an environmental review could be based on potential traffic opportunities identified in Applicants' preliminary discussions, would necessarily be anticompetitive.

Nor does the filing of the Control Application create any need for an immediate environmental review of PRB coal operations over IC&E and CPR lines, as a matter of law. BNSF argues to the contrary, even though it professes not to object to the proposed control transaction and acknowledges that the environmental effects of the construction and operation of the PRB line by DM&E have already been adequately analyzed. But BNSF describes this proposed control transaction incorrectly and bases its proposals, and its arguments, on that characterization. Specifically, BNSF asserts that the proposed transaction involves the acquisition by CPR of the "assets" of DME, including "transferring DM&E's PRB rights to

CPRC.” (BNSF Comments at 9, n.4.) However, as the Control Application makes abundantly clear, the proposed transaction is not an asset transfer, but an acquisition of “control” of DME through a merger of SOO Holding with and into DM&E. That transaction neither includes, nor requires any separate Board approval for, a “transfer” of DM&E’s PRB rights to CPR. There is no nexus between what will actually occur in the proposed control transaction and the “procedures” suggested by BNSF – withholding Board approval of the control transaction or requiring Applicants to divest DM&E’s right to construct the PRB line until Applicants complete an Environmental Impact Statement (“EIS”) addressing the potential effects of PRB coal traffic on IC&E’s and CPR’s lines.

In this Reply, Applicants first explain in more detail why there is no merit to the asserted premise for BNSF’s proposals, which is that the control transaction contemplates the “transfer” of DM&E’s PRB rights to CPR. Applicants then show that BNSF’s proposals are unrelated to its professed concerns; that deferral of an environmental review is consistent with NEPA; and that the early environmental review proposed by BNSF would be contrary to the public interest because it necessarily would be based on speculation and the proposal contains an anticompetitive element. Finally, Applicants explain that, even apart from the effect that a delay in this proceeding might have on DM&E’s ability to exercise the authority it already has to move ahead with PRB rail line construction, such a delay would be contrary to the public interest

I. The Proposed Transaction Does Not Involve A “Transfer” Of DM&E’s PRB Rights.

BNSF’s argument that the Board must require Applicants to complete an EIS addressing the potential effects of transporting PRB coal traffic on IC&E’s and CPR’s lines before the Board can approve the Control Application proceeds from the premise that “[t]he ‘proposed transaction’ before the Board includes CPRC’s acquisition of DM&E’s PRB rights.” (BNSF

Comments at 2, Argument I heading 1.) Specifically, BNSF contends that “[a]pproval of the proposed transaction would permanently alter the status quo by transferring DM&E’s PRB rights to CPRC.” (*Id.* at 9, n.4.) According to BNSF, “[i]t is this transfer of DM&E’s PRB rights to a party that operates lines not studied during the PRB Construction proceeding that triggers the Board’s NEPA obligations ” (*Id.*)

Contrary to BNSF’s assertions, the proposed transaction does not involve the “transfer” to CPR of DM&E’s authority to construct and operate a new rail line serving the PRB (or, for that matter, the transfer of any other “asset” of DM&E or IC&E). Rather, as the Control Application explicitly states, “[t]he transaction for which this Application seeks approval is the acquisition of control of DME by SOO Holding (and, indirectly, by CPRC).” (CPR-2, DME-2, Control Application at 3.) The transaction was accomplished through the merger of SOO Holding with and into DM&E, with DM&E the surviving corporation. (*Id.* at 7.)

Nowhere do Applicants propose to “transfer” the right to construct and operate the PRB line from DM&E to CPR. Rather, as BNSF itself points out, the stated purposes of the proposed transaction include the “opportunity for CPR to assist DME in pursuing its goal of constructing and operating a rail route to serve the Powder River Basin.” (BNSF Comments at 2-3 (quoting Control Application at 10) (emphasis added).) As DM&E President Kevin Schieffer testifies, “CPR’s participation in the PRB project will greatly assist DM&E in its ongoing efforts to bring that project to fruition.” (V.S. Schieffer at 5 (emphasis added).) Accordingly, there is no merit to BNSF’s claim that the Control Application is incomplete because it does not address the environmental effects of “CPRC’s acquisition of DM&E’s authority to construct a new rail line into the PRB” (BNSF Comments at 5). Likewise, BNSF’s assertion that the proposed

transaction “triggers” an obligation to conduct a supplemental environmental review because it involves a “transfer” of DM&E’s PRB rights to CPR is wrong.

II. BNSF’s Proposals To Defer Approval Of The Proposed Control Transaction, Or To Sever DM&E’s Already-Approved Right To Construct And Operate The PRB Line, Have No Nexus To BNSF’s Professed Concerns.

The expansive and unprecedented procedures that BNSF seeks to impose lack any nexus to its professed concerns and are entirely unnecessary. BNSF acknowledges that the environmental effects of the construction and operation of the PRB line by DM&E have been fully considered by the Board, and it “is not asking that the already-completed environmental review be repeated.” (BNSF Comments at 2.) Rather, BNSF’s stated concern is that the Board has not addressed the potential environmental effects of the movement of PRB coal trains on the lines of IC&E or CPR. *See, e g, id* at 2, 9, 12-14. Yet, to address that limited concern, BNSF would have the Board either defer approval of CPR’s acquisition of control of DME until a supplemental environmental review is completed or, alternatively, exclude DM&E’s PRB rights from the transaction authorized in this proceeding. (*Id* at 15.) BNSF’s proposed procedures are utterly unrelated to the purported problem. DM&E’s right to construct and operate the PRB line, and to operate coal trains over its existing lines, has no connection with the environmental issue raised by BNSF – *i.e.*, the possible effects of routing PRB coal trains over the lines of IC&E and CPR. Rather, the environmental effects that BNSF wants the Board to address can occur only if IC&E and CPR commence PRB coal train operations on their respective lines.

BNSF assures the Board that it has no objection to CPR’s acquiring DME, and that it does not seek to reopen the Board’s prior comprehensive review of the environmental impacts of the PRB project. (BNSF Comments at 1-2.) Taking those statements at face value, BNSF’s NEPA concerns would be fully addressed by the condition proposed in the Control Application

(at 25). That condition would prohibit Applicants from handling PRB coal on the lines of IC&E or CPR “until the Board has completed any required review of, and has issued a final decision addressing, the environmental impacts of such coal operations” *Id.* This condition, in conjunction with the restriction previously imposed by the Board in approving DM&E’s acquisition of IC&E,¹ effectively prohibits the movement of PRB coal trains over CPR or IC&E lines – and, accordingly, prevents any adverse environmental effects from occurring – until the Board has studied such effects and imposed any appropriate mitigation conditions. No broader condition is necessary to address BNSF’s stated concerns or to protect the public interest pending completion of a supplemental environmental review of the environmental effects of such operations

BNSF’s proposed procedures, if adopted by the Board, could have significant negative effects on the transaction and the public interest because they would impair the PRB project. BNSF’s primary proposal is that the Board defer a final decision on CPR’s acquisition of control of DME until what BNSF characterizes as an “extensive environmental study” is completed. (BNSF Comments at 4-10). During the time required to conduct such an environmental review, DME would remain in trust, and neither CPR nor potential PRB line customers would know whether (or when) CPR would ultimately be granted authority to control DME. Because of that uncertainty, it would be difficult for Applicants to obtain access agreements with PRB mines, continue with the land assembly process, or secure binding commitments from utilities to ship coal via the proposed PRB line (thereby hampering their ability to satisfy critical prerequisites to commencing construction of the PRB line). *See, e.g., V.S. Green* at 5-6. Such delays could

¹ *See Iowa, Chicago & Eastern Railroad Corporation–Acquisition and Operation Exemption–Lines of I&M Rail Link, LLC*, Finance Docket No. 34177, slip op. at 19 (July 22, 2002) (hereinafter “*IC&E Acquisition*”), *as modified* (October 18, 2006).

negate the progress that DM&E has made to date and jeopardize the potential success of the PRB project.

BNSF's alternative proposal – *i.e.*, that Applicants submit a “new” application that severs DM&E's PRB rights from the transaction, and that CPR later “return to the Board for a separate approval, separately subject to NEPA, of the acquisition of DM&E's PRB rights” (BNSF Comments at 15) – makes no sense. This proposal is based on a fundamental misunderstanding of the nature of the proposed transaction. As discussed previously, the transaction does not involve a transfer of DM&E's PRB rights (or any of its other assets) to CPR. DM&E already possesses all necessary STB authorization to construct and operate the PRB line, and no additional Board authorization – “separate” or otherwise – is required for DM&E to exercise those rights under CPR control.²

Moreover, it is neither necessary nor appropriate to sever DM&E's PRB rights from the Board's authorization of the proposed control transaction. Such action would be no more effective in preventing adverse environmental impacts pending completion of a supplemental environmental review than the less onerous condition proposed by Applicants. DM&E already has the right to build the PRB line and to move PRB coal trains over DM&E lines in accordance

² BNSF's suggested use of a voting trust for DM&E's PRB rights pending Applicants' return to the Board at some unspecified future date (BNSF Comments at 15 n.9) is not consistent with the Board's voting trust regulations. Voting trusts are not intended to be used to hold stock (or assets) of a carrier indefinitely. Rather, a voting trust “is merely a temporary device designed to avoid a technical violation of the law in the context of a corporate acquisition. It is not, and cannot be, a device for holding stock on a permanent basis.” *Water Transp. Ass'n-Pet. for Declaratory Order—American Commercial Lines Voting Trust*, 367 U.S. 559, 568, *aff'd*, 715 F.2d 581 (D.C. Cir. 1983). In any event, BNSF does not identify any “violation of the law” that would occur if CPR were to acquire control of DME through stock ownership while DM&E held its PRB rights – nor could BNSF do so.

with the conditions imposed by the Board in the *DM&E PRB Construction* proceeding.³ Those rights are independent of the question whether CPR's acquisition of control of DME is consistent with the public interest (and BNSF does not suggest otherwise). It would serve no public interest purpose to "suspend" that authorization, and to bring the PRB project to a halt, by excluding DM&E's PRB rights from the transaction approved by the Board in this proceeding.

Applicants' proposed condition would give BNSF precisely what it claims it wants – appropriate environmental review of the effects of moving PRB coal trains over the lines of IC&E and CPR before a single PRB coal train moves over those lines. By contrast, BNSF's excessively broad proposals would unnecessarily delay a final Board decision on the Control Application and would impede Applicants' ability to deliver the many public benefits made possible by the proposed transaction, including the potential introduction of a new competitive option to the Powder River Basin. Such a delay might suit BNSF's commercial objectives, but it would be manifestly contrary to the public interest.

Indeed, it is apparent that BNSF's "Comments" on the Control Application amount to a thinly veiled request for revocation or material modification of DM&E's right to construct and operate the PRB line, which the Board authorized after nearly a decade of consideration and litigation in *DM&E PRB Construction*. BNSF's request is untimely, inappropriately raised in this proceeding and unnecessary by any measure.⁴

³ See *Dakota, Minnesota & Eastern R.R. –Construction–Powder River Basin*, 6 S.T.B. 8 (2002), and *Dakota, Minnesota & Eastern R.R. Construction into the Powder River Basin*, STB Finance Docket No. 33407 (Feb. 15, 2006), *aff'd*, *Mayo Foundation v. STB*, 472 F.3d 545 (8th Cir. 2006) (collectively, "*DM&E PRB Construction*")

⁴ Even if the Board were to determine that the process of reviewing the environmental effects of potential PRB coal movements on the lines of IC&E and CPR should commence now – and it should not – there would be no reason for the Board to defer a final decision on the merits of the Control Application pending completion of that environmental review. Rather, on the basis of

(continued ...)

III. Deferral Of The Environmental Study Would Not Violate NEPA.

BNSF's argument that NEPA requires the Board to review the environmental impacts of transporting PRB coal over IC&E and CPR lines before it can authorize CPR to control DME is legally flawed, factually unsupportable and utterly inconsistent with the position asserted by BNSF itself in *IC&E Acquisition*. In that proceeding, the Board took the very approach that Applicants propose here (and that BNSF now challenges), by deferring its review of the environmental effects of PRB coal movements on IC&E's lines while imposing a condition prohibiting such movements until that review is completed. The Board reasoned that deferral of the environmental review was appropriate,

given the current uncertainty as to whether the line approved in DME Construction will be built and, if built, what portion of the traffic to and from the new line would move over which IMRL lines. Because the information we would need to assess the potential environmental impacts is not yet available, it would be premature to attempt to make that assessment now.

IC&E Acquisition at 16-17. The Board explained that imposing the PRB coal routing prohibition until completion of the environmental review would maintain the environmental "status quo" and comply with NEPA. *See id.* at 18 (citing, *inter alia*, *Sierra Club v. FERC*, 754 F.2d 1506, 1509-10 (9th Cir. 1985)). Nothing relevant to this question has changed since the Board's decision in *IC&E Acquisition*. It still is uncertain whether DM&E will construct the PRB line and, if it is built, how trains carrying PRB coal will be routed beyond DM&E's lines. *See IC&E Acquisition* at 15-16 & n.34 (further explaining the Board's decision to defer environmental analysis of the effects of routing PRB trains over the IC&E lines by noting that "as DME has not yet obtained

(... continued)

the information currently available, the Board should authorize the control transaction, subject to a condition prohibiting PRB coal shipments on IC&E or CPR until that supplemental environmental review is completed.

any specific contracts to handle Powder River Basin coal, how the carrier intends to route the traffic coming from or moving to the new line is not known at this time”). The STB’s rationale in *IC&E Acquisition* was both reasonable and well supported in the law, and that decision is not only binding here, it is entirely consistent with NEPA.

Nevertheless, BNSF incorrectly asserts that the Board’s decision in *IC&E Acquisition* “was contrary to NEPA.” (BNSF Comments at 8 n.3.) Specifically, BNSF reasons that it was unlawful for the Board to separate its environmental review under NEPA from its approval of DM&E’s acquisition of the IC&E lines.⁵ This argument is directly contrary to the position that BNSF itself took in *IC&E Acquisition*. There, BNSF explicitly endorsed the Board’s approach, stating that the Board’s “affirmative action” to lift the routing prohibition (as requested by DM&E) – *not* DM&E’s acquisition of control of IC&E – “qualifies as a ‘major Federal action’ subject to NEPA’s environmental review requirements” with respect to the routing of coal over IC&E’s lines. *See* Comments of BNSF Railway Company in *IC&E Acquisition* at 12, 13 (Dec. 11, 2006) (excerpts reproduced as Attachment A hereto). In a breathtaking about-face, BNSF now argues that the federal action requiring review of the same environmental issues is, in fact, CPR’s acquisition of control of DME. BNSF had it right the first time.

BNSF’s contention that the Board’s approach in *IC&E Acquisition* was improper is not supported by relevant case law. Courts have held that it is proper and consistent with NEPA for

⁵ BNSF seems to suggest that the Board’s decision in *IC&E Acquisition* is not a valid precedent because it “was not challenged.” *Id* This is nonsense. The precedential value of a final Board decision is not dependent on whether that decision is challenged and sustained on appeal. Moreover, BNSF’s challenge now to the routing condition adopted by the Board in *IC&E Acquisition* is both too late and in the wrong forum. If BNSF were concerned about the legality of this condition, it should have sought judicial review within 60 days of July 22, 2002, when the Board imposed it. *See* 28 U.S.C. §§ 2321(a), 2342(5), 2344. But BNSF failed to do so, and the Board’s decision is now final and binding.

an agency to defer environmental review when the analysis would be speculative and the issues raised were not properly before the agency. For example, in *Crounse Corp. v ICC*, 781 F.2d 1176 (6th Cir. 1986), the court rejected a challenge to the ICC's decision not to review the environmental impacts of the construction and operation of several intermodal facilities in the context of a proposed merger. The Court reasoned that the ICC "did not have before it a proposal to construct intermodal transfer facilities," but rather was addressing "a proposal that two companies merge. The merger does not inherently require construction of new facilities." *Id.* at 1194. The court also reasoned that the ICC's decision not to review those impacts was proper because, in the absence of firm plans, the review would have been purely speculative and other agencies would be evaluating the environmental impacts of the facilities before they could be built: "We do not believe that, in assessing the environmental impact of the merger, the Commission was obligated to assess the impact of contemplated projects which . . . are not an inherent component of the proposed merger, and which will be subject to environmental review should they ever reach the actual proposal stage." *Id.*

Similarly, in *City of Riverview v. STB*, 398 F.3d 434 (6th Cir. 2005), the court upheld the Board's decision not to evaluate the environmental impact of the potential future addition of river barge service to an intermodal facility that the Board authorized Riverview Train Railroad Company ("RTR") to operate. Because there were no established plans to add such barge service and because any environmental impacts associated with such service would be studied at a later time, the court agreed that "the potential effects of a water service terminal were too speculative" to consider. *Id.* at 442. The court reasoned that

RTR's consideration of adding barge traffic to its intermodal facility is not a proposed action, but rather a less imminent action that may or may not occur. Further, it does not appear that RTR has any developed plans for implementing a proposal on barge traffic. Without some details as to the

amount of barge traffic contemplated or the nature of the pier or dock to be built, any environmental analysis would be based solely on conjecture.

Id (citing *Crounse Corp* , 781 F.2d at 1195); *see also Colorado River Water Conservation District v. United States*, 593 F.2d 907, 909-10 (10th Cir. 1977) (no environmental review required of contract for transportation of water when no plan existed for such transport; consideration of impacts would be speculative, and subsequent environmental review would occur before transport of water).

The same reasoning applies here. The Board is not reviewing a proposal to construct the PRB line (which has been exhaustively reviewed and approved by the Board and the Eighth Circuit)⁶ or a proposal to transport PRB coal over the IC&E and CPR lines. Rather, the Board is reviewing the proposed acquisition of control of one railroad by another. This control transaction does not alter the *status quo* with respect to construction of the PRB lines or the future transportation of PRB coal over the lines of IC&E or CPR. Preserving the *status quo* until better information is in hand to make a meaningful review of the potential environmental effects of IC&E and CPR PRB coal operations is entirely consistent with the cases cited above and NEPA. *See Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.20 (1976) (NEPA requires consideration

⁶ The Mayo Clinic suggests in its Reply that the Board should reopen the environmental review conducted in *DM&E PRB Construction* because the merger agreement includes incentive payments for up to 125 million tons of coal to be transported on the new PRB lines. Mayo Reply at 5. Mayo's request is remarkable, given that these issues have been examined by the Board in an EIS and a Supplemental EIS and twice by the Eighth Circuit. There is no basis for reopening these issues now, particularly in light of the fact that a decision has not yet been made as to whether the PRB lines will be built. The existence of a negotiated incentive payment triggered by a specified tonnage amount, intended to share future upside value, does not convert that tonnage amount into an estimate of potential coal traffic over these lines. In fact, the capacity of the proposed DM&E line does not exceed 100 million tons. Moreover, the Board imposed 147 conditions to DM&E's authorization to construct and operate the PRB lines to ensure that any adverse environmental impacts associated with those lines are appropriately mitigated. *See DM&E PRB Construction*.

of proposed, not less imminent, actions. “Should contemplated actions later reach the state of actual proposals, impact statements on them will take into account the effect of their approach upon the existing environment”).⁷

IV. BNSF’s Proposal Envisions An Environmental Review Based On Speculation And Is Anticompetitive.

BNSF disputes Applicants’ contention that it is not feasible to perform a meaningful analysis of the potential environmental impacts of future PRB coal movements on the lines of IC&E or CPR until Applicants obtain better knowledge regarding the identities of the PRB coal customers and the volumes, destinations and routings of their future coal shipments beyond DM&E’s lines. (BNSF Comments at 10-11.) BNSF’s assertions have no merit. As explained in

⁷ For this reason, BNSF fails in its attempt to distinguish *Sierra Club v. FERC* and other cases the Board relied on as support for its decision to defer environmental review of the impact of PRB coal traffic over the IC&E lines. In neither *IC&E Acquisition* nor in this matter is the Board reviewing a proposal for the transport of PRB coal over the lines of IC&E or CPR. Thus, review of that issue is not properly before the Board. As in *Sierra Club* and the other cases cited above, before any coal can move over the IC&E or CPR lines, an environmental review of the impact of such movement will be conducted.

BNSF also contends that an environmental review of PRB coal traffic over IC&E and CPR lines should be conducted now, before approval of the Control Application, because “communities and broader environmental interest groups” that appealed the Board’s *DM&E PRB Construction* decisions will inevitably “raise additional environmental concerns” that should be heard now. BNSF Comments at 11 n.6. “Indeed,” states BNSF, the City of Winona, Minnesota and Metra, the Chicago commuter authority, “have already filed comments with the Board in this proceeding asking for further consideration of the environmental and operational effects of the proposed transaction.” *Id.* at 12 n.6. BNSF misreads those filings. Although the City of Winona seeks reconsideration of the Board’s orders denying mitigation relief it sought in the *DM&E PRB Construction* and *IC&E Acquisition* proceedings, it expressly endorses Applicants’ proposed condition that would defer environmental review of PRB coal train operations over IC&E and CPR lines. City of Winona Comments (October 19, 2007) at 3. Metra says nothing about the timing of environmental review of future PRB coal train operations, but simply asks for a two-week deferral of the due date for the submission of “comments, protests, requests for conditions, other opposition and evidence” in response to the Control Application. Metra Reply in Opposition to Applicants’ Motion to Establish a Procedural Schedule (October 18, 2007) at 2-3.

the Control Application, although DM&E has engaged in preliminary discussions regarding the PRB project with a number of prospective coal shippers, it has not yet secured any contracts to move coal over the proposed PRB line. Neither the volume of coal likely to be handled by Applicants nor the routing of such traffic beyond DM&E's lines can be determined.

Nevertheless, BNSF asserts that the limited (and speculative) information currently available to Applicants would be sufficient to enable them to proceed with a supplemental environmental analysis. In support of this assertion, BNSF refers to a petition filed by DM&E in May 2006, in which DM&E stated that an analysis of the potential environmental effects of routing PRB coal over the lines of IC&E "can be commenced now without being unduly hypothetical. . . ." (BNSF Comments at 11 (citing Finance Docket No. 34177, *IC&E Acquisition*, Petition of IC&E and DM&E To Reopen and Partially Modify Conditions at 8).) However, a fair reading of DM&E/IC&E's petition indicates that its argument that an environmental review would not be "hypothetical" was based not on the quality of available traffic data, but rather on the fact that other uncertainties regarding the PRB project and DM&E's ownership of IC&E had been eliminated by the Board's decision denying petitions to revoke the exemption pursuant to which DM&E acquired IC&E, and by the completion of appellate review of the Board's decision authorizing the PRB Project. *See* Finance Docket No. 34177, *IC&E Acquisition*, Petition of IC&E and DM&E To Reopen and Partially Modify Conditions at 7-8.

In any event, BNSF's reliance on DM&E's 2006 petition is fatally undermined by subsequent events. A March 21, 2007 letter from SEA Chief Victoria Rutson to DM&E President Kevin Schieffer (attached hereto as Attachment B) indicates that the EIS process with respect to environmental impacts on IC&E's lines was discontinued because DM&E had advised the Board that it would "need to develop up-to-date rail traffic projections of DM&E coal trains

from the PRB that would be routed over the former I&M Rail Link system ” *See* Attachment B, at 1.

There is also no merit to BNSF’s alternative assertion that the environmental analysis could be based on information gleaned from CPR’s discussions with utilities. As the Control Application makes clear, the Applicants have entered into no contracts with utilities providing for the shipment of PRB coal. CPR’s discussions with some utilities in the context of conducting due diligence are hardly sufficient to provide the type of information necessary to evaluate the routing of PRB coal over the IC&E and CPR lines. Indeed, in the transcript attached to BNSF’s comments, CPR made clear that a number of milestones need to be met before the PRB line will be built, including land assembly and customer interest. In short, until there is greater certainty as to the routing of any PRB coal over the IC&E and CPR lines, conducting a fact-based environmental review of these issues is not justified.

Not only would BNSF’s suggested approach be highly speculative, it would serve an anticompetitive interest by exposing Applicants’ PRB marketing efforts and strategies to BNSF and other competing carriers. In conducting the review envisioned by BNSF, Applicants would have to identify the origins and destinations of the PRB coal traffic that they hope to attract. Once that information is known, it would be a simple task for competitors such as BNSF to determine both the utilities that would be using the coal and the mines providing the coal. Revealing such corporate marketing strategy information now would facilitate preemptive commercial actions by those competitors that could impair Applicants’ ability to secure coal traffic and threaten the viability of the PRB project. For that reason, BNSF’s proposal is anticompetitive and should be rejected. In contrast, the procedure proposed by Applicants will preserve the confidentiality of their sensitive commercial negotiations with prospective coal

shippers and will result in an environmental analysis of the impacts of PRB coal traffic moved over the IC&E and PRB lines that is based on reliable traffic and routing information.

V. Deferring A Final Decision On The Proposed Control Transaction Until A Supplemental Environmental Review Is Completed Would Be Contrary To The Public Interest.

The principal relief sought by BNSF – that the Board consider now, before approval of the Control Application, environmental issues that should more appropriately be taken up later, after DME and CPR have actually decided to move ahead with PRB rail line construction – should be denied for another reason. Even apart from the effect of a delay on DME's ability to proceed with the PRB project itself, a delay in this proceeding would be contrary to the public interest.

Deferring a final decision on the proposed transaction pending completion of a supplemental environmental review would put off the date when DME, and its customers, its employees, and the communities in which it operates, will begin to realize the benefits of CPR's acquisition of this regional railroad. It will delay the time when CPR can begin making \$300 million available for the repair and upgrade of DME track, bridges and other facilities, which will improve the regional railroad's safety and fluidity of operations; and it will delay the time when CPR can roll out on DME its safety programs, practices and technologies that have made it one of the safest railroads in North America.

Delaying a decision would also inhibit the ability of DME shippers to take advantage of new single-line transcontinental rail service to CPR-served destinations including Buffalo, Calgary, Detroit, Montreal, New York, Philadelphia, Toronto and the Twin Cities, and the ports of Vancouver, Duluth/Superior, Montreal and New York/New Jersey. *See* Foot V.S. (describing marketing benefits of single-line service to DME shippers), *see generally* Verified Statements on

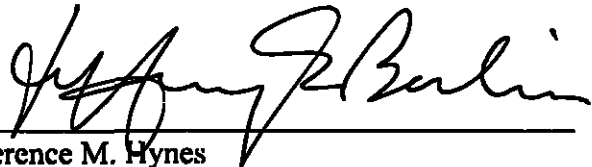
behalf of Shippers (supporting transaction in part because of advantages of single-line service over larger rail network).

Finally, delaying a decision would be affirmatively harmful to DME, because it would unnecessarily extend the period in which DME must remain in a voting trust, its ultimate status as a CPR affiliate unapproved. While held in the trust for an unnecessarily extended period, DME would inevitably be inhibited in making decisions on potential investments in equipment and other assets. It would lack full ability to make commitments to long-term projects, including obtaining access to capital. It could predictably lose business to competitors because it could not yet offer extended transcontinental single-line service. And its ability to retain valued employees could well be impaired, because employees would lack certainty as to their employer's future. The public interest would not be served by inflicting these severe consequences on DME.

CONCLUSION

For all of the foregoing reasons, Applicants respectfully request that the Board reject BNSF's proposed "procedures" for the consideration of the potential environmental effects of future PRB coal movements on the lines of IC&E and CPR, and that it instead impose the condition addressing this issue proposed in the Control Application (at 25).

Respectfully submitted,



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Dated: October 29, 2007

CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing Applicants' Reply To BNSF Railway Company's Comments On Environmental Review Procedures to be served by first class mail, postage pre-paid, this 29th day of October 2007, on the persons listed in 49 C.F.R § 1180.4(c)(5) and on all parties of record on the SIB service list for this proceeding as follows:

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ATTACHMENT A

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218253



**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 34177

**IOWA, CHICAGO & EASTERN RAILROAD CORPORATION
- ACQUISITION AND OPERATION EXEMPTION -
LINES OF I&M RAIL LINK, LLC**

COMMENTS OF BNSF RAILWAY COMPANY

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Dated: December 11, 2006

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 34177

**IOWA, CHICAGO & EASTERN RAILROAD CORPORATION
– ACQUISITION AND OPERATION EXEMPTION –
LINES OF I&M RAIL LINK, LLC**

COMMENTS OF BNSF RAILWAY COMPANY

INTRODUCTION

For nearly a decade, the Dakota, Minnesota & Eastern Railroad Corporation ("DM&E") has been making plans to extend its rail lines west into Wyoming's coal-rich Powder River Basin. DM&E received the Surface Transportation Board's permission to construct this extension in 2002. Soon after, however, the Board prohibited DM&E from routing Powder River Basin coal east and south over certain lines in Minnesota, Iowa and Illinois that DM&E was acquiring from I&M Rail Link, LLC ("IMRL"), pending further environmental review of that routing. When DM&E recently asked the Board to lift this routing restriction, the Board ordered DM&E to submit an Environmental Appendix explaining what level of additional environmental review DM&E believed should accompany that action. The Environmental Appendix that DM&E filed with the Board on November 8, 2006, represents the first effort, such as it is, to conduct *any* analysis of the potential environmental impacts of routing Powder River Basin coal traffic via the former IMRL lines as an integral extension of DM&E's rail network.

Unfortunately, the sparse information provided in DM&E's Environmental Appendix sheds little light on the potential environmental consequences that would result from lifting the Board's current prohibition on DM&E's ability to route Powder River Basin coal via the former

IMRL lines. The limited facts that are known or can be discerned from DM&E's prior filings indicate that granting DM&E's request would potentially have serious, unresolved impacts on other rail lines, including BNSF's. One of the most important examples of these impacts (depending on the specific operating and infrastructure plans that DM&E may or may not have in mind) is the potential that routing PRB coal via the former IMRL lines would significantly affect rail operations at Savanna, Illinois, where BNSF's main line crosses the former IMRL lines. From there, the former IMRL lines forward trains into Chicago—the nation's largest and most congested rail hub. Permitting DM&E to haul Powder River Basin coal along those lines could significantly increase train volumes, lengths and tonnage in both northwestern Illinois and the Chicago area, potentially adversely affecting BNSF's extensive main line and yard operations throughout the region.

BNSF does not believe that the Board should authorize such activity without taking a hard look at the potential environmental consequences and at whether any mitigation may be appropriate. No such examination has ever taken place in this case. Were the Board to undertake the requisite hard look at DM&E's requested action, BNSF believes that DM&E's operations would exceed the Board's thresholds, thereby necessitating a detailed environmental review. Accordingly, consistent with the Board's past practice, applicable laws and regulations, the Board should prepare detailed environmental documentation studying: the existing environmental conditions; the reasonably foreseeable environmental impacts of DM&E's plan to route substantial volumes—as much as 100 million tons annually—of Powder River Basin coal via the former IMRL lines into metropolitan Chicago; and, most especially, potential impacts to existing rail operations.

SUMMARY OF COMMENTS

Since June 22, 2002, the Surface Transportation Board ("STB") has prohibited DM&E from hauling coal mined in the Powder River Basin ("PRB") over the rail lines that DM&E acquired from IMRL. On May 12, 2006, DM&E filed a petition with the Board requesting the removal of this restriction. The Board essentially deferred consideration of DM&E's request pending the preparation of an Environmental Appendix. In the Environmental Appendix that DM&E submitted to the Board on November 8, 2006, DM&E concludes that its proposed action should be categorically excluded from further environmental review under the National Environmental Policy Act ("NEPA").

The first question before the Board is whether DM&E's Environmental Appendix even addresses the action being proposed. The Board's previous decisions have recognized that, without the Board's affirmative consent, DM&E cannot route any PRB coal over the former IMRL lines. In its May 12 petition and Environmental Appendix, DM&E has asked the Board to give that consent. Accordingly, for purposes of NEPA, the action here at issue is the Board's approval of DM&E's request to haul PRB coal on the former IMRL lines—not, as DM&E would have it, the "control" and acquisition of the former IMRL lines that occurred more than four years ago. DM&E acts as if the proposal before the Board were some perfunctory, technical change in operations to which four years of history and current traffic statistics have little relevance. Under NEPA, however, the Board cannot approve DM&E's request to transport PRB coal on the former IMRL lines without undertaking the long-deferred review of the potential environmental impacts of transporting PRB coal on the former IMRL lines. DM&E's Environmental Appendix makes no attempt to address those impacts in a meaningful way, and raises more questions than it answers about DM&E's anticipated operating plans for the routing of

PRB coal through Iowa and Illinois, including routing to reach connecting carriers in the Chicago area.

The Board has already established in the DM&E Construction case an effective manner of considering the potential environmental impacts of DM&E's projected PRB coal traffic. In that case, the Board conducted a tiered examination of the impact of 20, 50 and 100 million tons of PRB coal annually along the entire DM&E system as it existed prior to DM&E's acquisition of the former IMRL lines. Following a similar procedure to study the environmental impact of PRB coal traffic on the former IMRL lines should be a reasonable and efficient way of measuring those impacts. But even if the Board is inclined to conduct a new traffic study in connection with the present proposed action, as DM&E's Environmental Appendix suggests, the data provided by DM&E is patently insufficient for involved parties to draw meaningful conclusions about impacts that would result from routing PRB coal traffic via the former IMRL routes. DM&E's Environmental Appendix includes just three years of data for PRB coal shipments, and little if any indication of how it arrived at that data. Furthermore, since DM&E has provided no detailed operating plan, the public is left to speculate as to how this sparse data relates to any such plans. For its part, in the absence of more detailed information, BNSF has had to rely on its understanding of current train movements and traffic patterns across Iowa and Illinois, including at Chicago, and project the potential operational and other impacts of, in some cases, more than doubling existing train volumes on a daily basis across former IMRL routes.

DM&E's reasons for limiting the amount of PRB coal data in the Environmental Appendix are apparent. Adding two additional years of increasing foreseeable traffic would almost certainly mean exceeding the Board's thresholds for environmental review on every segment of the former IMRL lines, nearly all of which carried, and continue to carry, light densities of traf-

fic. Even the limited amount of data DM&E chose to provide shows that the thresholds would be exceeded on at least two segments, which under the Board's regulations necessitates a detailed review of the entire proposed action.

Once it is recognized that an actual, comprehensive environmental review is required in this case, the question becomes what environmental impacts such a review would reveal. Of primary concern to BNSF, in particular, are the impacts to BNSF operations in northwestern Illinois and the Chicago metropolitan area. If DM&E is permitted to haul PRB coal along the former IMRL lines, it would pose potentially serious disruptions to BNSF at Savanna, Illinois, where the BNSF main line crosses the former IMRL lines, and at locations upstream and downstream from Savanna. The increased volume within the Chicago Gateway, where serious congestion problems already exist, could also be significantly exacerbated by the routing of DM&E's PRB coal trains via the former IMRL route and via connecting carriers used to reach other rail connections. NEPA mandates an in-depth study of these impacts, including appropriate mitigation measures; DM&E should not be singled out for exemption from appropriate environmental review

DM&E's proposed shipment of PRB coal into Chicago over the former IMRL lines would have other environmental impacts that go unmentioned in the Environmental Appendix. Those may include impacts to air quality and transportation systems, as well as noise impacts, all of which could be faced by communities situated along the former IMRL lines and downstream in metropolitan Chicago. Commuters traveling into and out of Chicago on the city's Metra train system could also be forced to deal with various impacts from DM&E's PRB coal trains, which may use some of the same rail lines as Metra. Despite the Board's explicit instructions, the Environmental Appendix also fails to adequately discuss the potential cumulative impacts that

would result from the movement of PRB coal along the former IMRL lines. All of these impacts—direct, indirect, cumulative and downstream—are candidates for inclusion in the environmental study that must be conducted by the Board's Section of Environmental Analysis ("SEA") before the Board itself may consider DM&E's request to permit PRB coal trains on the former IMRL lines leading to metropolitan Chicago.

BACKGROUND

The Board is undoubtedly familiar with the facts and proceedings relevant to DM&E's Environmental Appendix. BNSF repeats them briefly below merely to give context to its comments, and to demonstrate how, through a series of procedural maneuvers, DM&E's route through Minnesota was thoroughly evaluated, and extensive mitigation imposed, while DM&E's main alternative route to access the Chicago Gateway effectively evaded the same kind of regulatory scrutiny of operational and environmental impacts.

A. The Construction Case

On February 20, 1998, DM&E sought authority from the STB to construct and operate a rail line into the PRB. In a decision served on December 10 of the same year, the STB concluded that DM&E's proposal satisfied the transportation-related requirements of the relevant statute, 49 U.S.C. § 10901. *See* Finance Docket No. 33407, *Dakota, Minnesota & Eastern Railroad Corporation Construction Into The Powder River Basin* (served December 10, 1998). The same decision indicated that the Board would conduct additional review of the environmental aspects of DM&E's proposal. *See id.*

The STB released a Draft EIS evaluating the environmental effects of DM&E's PRB expansion project in September, 2000. Following a review and comment period, the STB released a Final EIS in November, 2001. Both of these studies recommended approval of DM&E's pro-

PRB coal trains on the former IMRL lines. According to DM&E, the STB's condition was harming the railroad's ability to obtain private financing for its PRB expansion project.

Consistent with its prior decision in the Acquisition case, and to satisfy NEPA requirements, the STB responded to DM&E's petition by asking DM&E to submit an Environmental Appendix "containing sufficient detail to assist [the STB] in determining whether preparation of an EA or EIS is necessary." See Finance Docket No. 34177, *Iowa, Chicago & Eastern Railroad Corporation—Acquisition And Operation Exemption—Lines Of I&M Rail Link LLC* at 5 (served Oct. 18, 2006) ("Oct. 18, 2006 Decision"). As part of this process, the STB expected DM&E to develop "sufficiently detailed information about projected routings and levels of coal train traffic per day likely to operate over the IMRL rail lines." Memorandum from Victoria Rutson, Chief, Section of Environmental Analysis, to David M. Konschnik, Director, Office of Proceedings at 4 (July 26, 2006) ("Rutson Memo"). DM&E publicly released its Environmental Appendix on November 9, and BNSF is timely submitting these comments by the close of the STB's designated comment period, December 11, 2006. On November 22, the STB published a notice in the *Federal Register* announcing the availability of the Environmental Appendix and soliciting public comments. See 71 Fed. Reg. 67706 (Nov. 22, 2006). The Board's notice did not extend the comment period.

COMMENTS ON DM&E's ENVIRONMENTAL APPENDIX

BNSF believes that the most useful way to provide its comments is to present information and commentary in a format tailored to the approach SEA customarily uses in the preparation of its NEPA environmental documentation. Accordingly, for convenience of review, BNSF's comments are sequentially submitted in accordance with the Board's usual practice of address-

ing, in order, purpose and need, the nature of the proposed action, the existing environment at issue, the environmental consequences of the proposed action, and cumulative impacts.

I. Purpose and Need

DM&E's filings with the Board have made its purpose and need for the Federal "action" at issue abundantly clear. In its May 12 petition to reopen the Acquisition case and lift the restriction on PRB coal routing, DM&E explained that the "routing prohibition essentially closed an existing gateway that had long been an *important component of DM&E's PRB Line proposal*, and as a practical matter has come to serve as a significant . . . *impediment to PRB project financing efforts*" Finance Docket No. 34177, *Petition of Iowa, Chicago & Eastern Railroad Corporation and Dakota, Minnesota & Eastern Railroad Corporation to Reopen and Partially Modify Conditions* at 2 (filed May 12, 2006) ("Petition") (emphasis added). In other words, DM&E's purpose in requesting that the STB lift the PRB coal routing restriction stems directly from its need to (1) route PRB coal over the former IMRL lines and (2) obtain financing for construction of its planned PRB expansion.³ As discussed further below, DM&E's stated purpose and need inextricably link DM&E's present request for relief from the prohibition on routing PRB coal trains via the former IMRL lines to DM&E's PRB expansion project.

II. Definition of the Proposed Action

Before determining what potential environmental impacts should have been addressed in DM&E's Environmental Appendix, the Board must first define the "proposed action" from

³ The purpose and need discussion in DM&E's Environmental Appendix reinforces this understanding by conspicuously avoiding any mention of DM&E's May 12 request. Even so, the Environmental Appendix acknowledges that "[m]aterial amounts of PRB coal will move via the former IMRL lines"—that is, of course, if the Board grants DM&E's request to lift the restriction on PRB coal routing. Finance Docket No. 34177, *Environmental Appendix* at 7 (served November 9, 2006) ("Envtl. App.")

which those potential impacts would result. The issue of environmental impacts cannot be accurately addressed until the proposed action is properly understood.

A. DM&E's May 12 petition proposes that the STB act by removing the PRB routing restriction placed on the former IMRL lines.

NEPA requires all federal agencies, including the STB, to conduct an environmental review of all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C). Relevant NEPA regulations define the statutory term "major Federal action" as including "projects . . . regulated, or approved by federal agencies." 40 C.F.R. § 1508.18(a). Accordingly, the Board's legal obligations under NEPA depend first of all on what "action" the STB has been asked to take.

Since the STB's July 22, 2002 decision in the Acquisition case, DM&E has been prohibited from routing PRB coal traffic via the former IMRL lines. DM&E's May 12 petition plainly asked the STB to lift this prohibition. See Petition at 10-11. Nevertheless, in a decision served October 18, the Board maintained the restriction, reiterating that "DM&E is *precluded* from transporting *any* Powder River Basin coal trains over the former IMRL lines until the Board . . . allows such operations by DM&E over those rail lines." Oct. 18, 2006 Decision at 6. In other words, DM&E cannot move PRB coal over the former IMRL lines until the STB takes affirmative action allowing it to do so. Such an affirmative act qualifies as a "major Federal action" subject to NEPA's environmental review requirements.

The Board imposed its restriction on DM&E's PRB coal traffic to maintain the environmental status quo, namely, the complete absence of PRB coal traffic on the former IMRL lines. See July 22, 2002 Decision at 18. And while non-PRB traffic levels may increase between now and 2009, when DM&E proposes to begin routing PRB traffic over the former IMRL lines, the existing baseline conditions along those lines will not be impacted by DM&E's PRB coal traffic

unless the STB acts to lift the restriction here at issue. Because the absence of PRB coal traffic on the former IMRL lines represents the status quo (apart from affirmative STB action), any proper NEPA analysis of that action requires an assessment of the environmental impacts that would result from the lifting of the existing restriction—including the impacts of every train load or gross ton miles of PRB coal that would travel over the former IMRL lines.

B. DM&E presents an improper view of the proposed action.

DM&E obviously would prefer that the STB and SEA view the proposed action far more narrowly, so that the potential impacts of its proposal to route PRB coal via the former IMRL lines, which have not been reviewed to date, are permanently shielded from environmental scrutiny. It accordingly attempts to characterize the issue before the Board as “whether the IC&E acquisition transaction would affect the movement of PRB coal originating on the new DM&E line authorized in the PRB Construction case.”⁴ Env’tl. App. at 13. This definition of the proposed action is neither factually realistic nor legally supportable.

1 The impact of PRB coal trains on the former IMRL lines has never been the subject of NEPA review

As an initial matter, the STB has *never* analyzed the site-specific impacts from projected volumes of PRB coal that DM&E plans to move along the former IMRL lines and into metropolitan Chicago. Indeed, in its recent memorandum recommending that DM&E prepare an Environmental Appendix, rather than a lesser Environmental Notice, the chief of SEA acknowledges that fact.

[DM&E] also argues that the Environmental Notice [used in another case] is suitable here because the Board has already conducted an exhaustive environmental review of increased rail traffic over the IMRL rail lines in DM&E Construction.

⁴ As the STB is well aware, DM&E has *already* acquired the IMRL lines. The “acquisition,” therefore, is not the proposed action in front of the STB. The STB acted on DM&E’s acquisition proposal in 2002, and it is nonsensical to suggest that the “action” here at issue is a transaction that could not now be reversed.

This is not so. SEA stated in the DM&E Construction EIS that because it lacked specific information regarding numbers of DM&E trains that were projected to travel over the IMRL rail lines, it could not assess the potential environmental impacts to communities adjacent to the IMRL.

Rutson Memo at 4, fn. 2 (emphasis added). Thus, according to the official who had responsibility for the DM&E Construction EIS, the STB has not previously conducted an environmental study of the impacts of DM&E's PRB traffic on the former IMRL lines.⁵ Because lifting the current prohibition on routing PRB coal trains over the former IMRL lines would plainly allow activities whose environmental impacts have never been studied, taking such action on the basis of DM&E's paltry Environmental Appendix would not satisfy the STB's mandate under NEPA. *See Kleppe v Sierra Club*, 427 U.S. 390, 410 n.21 (1976) ("the essential requirement of the NEPA is that before an agency takes major action, it must have taken a 'hard look' at environmental consequences.").

2. *The timing of the Acquisition case should not exempt the former IMRL lines from NEPA review.*

Moreover, as the United States Department of Transportation ("U.S. DOT") has already appropriately observed, DM&E's argument allows it to avoid environmental review through what appears to be an accident of timing. According to DM&E, the fact that it acquired the former IMRL lines *after* the preparation of the initial EIS in the Construction case means that

⁵ If DM&E believes that the Construction EIS somehow adequately evaluates the environmental impacts along the former IMRL lines and metropolitan Chicago, DM&E bears the burden of proof to demonstrate the adequacy of such study by providing references to the exact sections of the EIS on which it relies. Without that information, the public is not fully informed and cannot reasonably evaluate the adequacy of the prior evaluation. BNSF believes—as apparently does SEA and other interested governmental authorities—that no such analysis has been conducted sufficient to satisfy the STB's NEPA requirements in connection with the action of lifting the routing restriction. *See* Rutson Memo at 4, fn. 2; Finance Docket No. 34177, Letter from U.S. Department of Transportation to Surface Transportation Board (July 14, 2006) ("U.S. DOT Letter"); Finance Docket No. 34177, Letter from Iowa Department of Transportation to Surface Transportation Board (June 1, 2006) ("Iowa DOT Letter"); Finance Docket No. 34177, Letter from City of Dubuque, Iowa to Surface Transportation Board (June 1, 2006) ("Dubuque Letter").

routing PRB coal over the former IMRL lines. In the face of that fact, DM&E is asking the Board to approve its request to do precisely the thing that has never been studied, to ship PRB coal on the former IMRL lines, as though the matter before the Board was a perfunctory and technical change in control. Even a cursory review of DM&E's Environmental Appendix reveals that DM&E's request could have potentially significant environmental impacts that demand a more thorough review. BNSF is particularly concerned that DM&E's plans could have serious long-term effects on its operations into and around Chicago, and potentially on other railroad operations as well. Under NEPA, DM&E's routing of PRB coal traffic via the former IMRL lines should not be permitted to evade review of the potential resulting impacts, and DM&E's request for a categorical exclusion for the proposed action should be denied.

Respectfully submitted,


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Attorneys for BNSF Railway Company

Dated: December 11, 2006

ATTACHMENT B

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vjr



SURFACE TRANSPORTATION BOARD
Washington, DC 20423

Office of Economics, Environmental Analysis and Administration

March 21, 2007

Kevin V. Schieffer
President and CEO
Cedar American Rail Holdings, Inc.
140 North Phillips Avenue
Sioux Falls, SD 57104

Re: Finance Docket No. 34177, Iowa Chicago & Eastern R R —
Acquisition And Operation Exemption—Lines of I&M Rail Link

Finance Docket No. 33407, Dakota, Minnesota & Eastern
Railroad Corporation Construction into the Powder River Basin

Dear Mr. Schieffer:

I appreciate the opportunity to speak with you on March 6, 2007 regarding (1) the Environmental Impact Statement (EIS) the Board's Section of Environmental Analysis (SEA) is preparing on the environmental effects of the proposal by the Dakota, Minnesota & Eastern Railroad (DM&E) to route coal trains from the Powder River Basin (PRB) on the former I&M Rail Link system that DM&E has purchased (Finance Docket No. 34177 or the acquisition case) and (2) compliance with the conditions imposed by the Board in the separate proceeding authorizing the DM&E to construct and operate a new 280-mile line into the PRB (Finance Docket No. 33407 or the construction case).

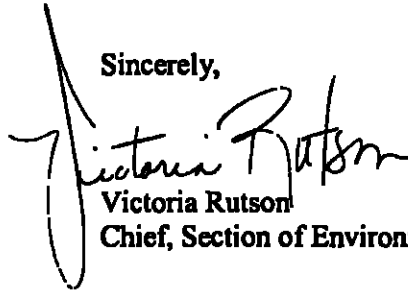
You explained that, in light of current circumstances, DM&E would like to place on hold for the moment further work on the EIS in the acquisition case because you need to develop up-to-date rail traffic projections of DM&E coal trains from the PRB that would be routed over the former I&M Rail Link system. (Of course, the DM&E may initiate track improvements and maintenance work on the former I&M Rail Link system and operate trains carrying any commodity other than PRB coal on those lines whenever it chooses.)

In the meantime, in the construction case you would like to continue to move forward with the work necessary to ensure compliance with the Programmatic Agreement document signed by the Board, the cooperating agencies, the three state historic preservation officers, the Advisory Council on Historic Preservation, and certain Tribes. The Programmatic Agreement sets out the methods to be followed by the Board and others for avoiding or minimizing impacts of the construction case on historic sites and structures.

In sum, it is my understanding that, at this time, you would like to concentrate your resources on ensuring compliance with the Programmatic Agreement. You will advise me when you have gathered the necessary traffic data to permit SEA to move forward with the environmental review in the acquisition case. Until that time, you have indicated that you would like the Board to place on hold preparation of an EIS in that proceeding on the environmental effects of DM&E's proposal to route coal trains from the PRB on the former I&M Rail Link lines.

I trust this accurately reflects the substance of our recent telephone call. If you have any questions or comments, please feel free to contact me at (202) 245-0295.

Sincerely,

A handwritten signature in black ink, appearing to read "Victoria Rutson". The signature is fluid and cursive, with a large initial "V" and "R".

Victoria Rutson
Chief, Section of Environmental Analysis