

15302



Gabriel S. Meyer
Assistant General Attorney

September 30, 2008

Via Electronic Filing

The Honorable Anne Quinlan
Acting Secretary
Surface Transportation Board
395 E Street, SW
Washington, DC 20423

Re: Finance Docket No. 35087, Canadian National Railway Company, et. al., -- Control -- EJ&E West Company

Dear Secretary Quinlan:

Enclosed for filing in the above proceeding are the comments of **Union Pacific Railroad Company** in response to the Draft Environmental Impact Statement prepared by the Board's Section of Environmental Analysis.

Sincerely,

A handwritten signature in cursive script that reads "Gabriel S. Meyer".

Gabriel S. Meyer

cc: (w/attachments)
Parties of Record

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 35087

**CANADIAN NATIONAL RAILWAY COMPANY AND GRAND TRUNK
CORPORATION--CONTROL--EJ&E WEST COMPANY**

COMMENTS OF UNION PACIFIC RAILROAD COMPANY

J. MICHAEL HEMMER
GABRIEL S. MEYER
Union Pacific Railroad Company
1400 Douglas Street
Omaha, Nebraska 68179
Telephone: (402) 544-1658
Fax: (402) 501-3393

Attorneys for Union Pacific Railroad Company

Dated and Filed: September 30, 2008

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I. Introduction

Union Pacific Railroad Company ("UP") respectfully submits these comments in response to the July 25, 2008 Draft Environmental Impact Statement ("DEIS") prepared by the Board's Section of Environmental Analysis ("SEA"). SEA proposes that Canadian National Railway Company ("CN") contribute to grade separations at as many as 15 at-grade road crossings as a condition of its acquisition of EJ&E West Company ("EJ&E"). UP takes no position on CN's proposed acquisition of EJ&E. It applauds the Board for its efforts to improve grade crossing safety and recognizes that rail carriers, and federal, state, and local governmental entities must continue to act in partnership to further enhance grade crossing safety.

At the same time, UP has a number of concerns regarding the extent of the grade crossing mitigation SEA proposes, and its potential impact upon CN's proposed acquisition and future transactions subject to Board review. As discussed below, the scope of the proposed grade separation measures, which could cost CN more than \$300 million, is unjustified and without precedent. SEA has never before in a

transaction on any scale—including the UP/SP merger and the CSX/NS acquisition of Conrail—required an applicant rail carrier to undertake such extensive mitigation measures, or to foot such a large portion of their cost. Without explanation, SEA has adopted new methodologies to identify crossings requiring mitigation, producing questionable recommendations. Moreover, SEA's proposed grade separations aim to alleviate vehicular traffic congestion that has resulted from rapid population growth and automobile use in the regions surrounding the EJ&E line—not from railroad operations.

Requiring CN to pay for such large scale improvements imposes an unfair and disproportionate burden on it and runs contrary to national transportation policy, which encourages railroad mergers that are in the public interest. The expenses associated with the grade separations could impose such a heavy financial burden that CN could be forced to abandon its acquisition of EJ&E. Additionally, if the Board imposed such costs on rail carriers in connection with other acquisitions or transactions, in addition to blocking many beneficial transactions designed to allow railroads to handle increasing traffic, it would place the entire railroad industry at a further disadvantage relative to competing transportation modes.

For these reasons, the STB should limit its imposition of mitigation measures in this transaction to a level consistent with other past transactions of similar scale. The STB should also limit CN's portion of the costs associated with grade separations to no more than five to ten percent, consistent with federal policy and past precedent.

II. SEA's Proposed Grade Separation Mitigation Is Not Justified

a. The scope of the proposed grade separations is without precedent, and the proposed CN contribution to it is excessive.

The scope of SEA's proposed grade separations is without precedent. While the STB has imposed mitigation measures in prior proceedings, it has never required mitigation measures on the scale it has here, even in substantially larger transactions including the UP/SP merger and the CSX and NS acquisition of Conrail.¹ Here, SEA has identified a need for grade separations at as many as 15 at-grade road crossings on the EJ&E line. If fully implemented, these mitigation measures could cost well over \$500 million.² If the Board requires CN to pay 25 to 50 percent of these costs as suggested by SEA (*DEIS* at ES-41), CN could spend in excess of \$300 million on grade separations. CN has also proposed comprehensive voluntary mitigation measures that will total at least \$40 million. These amounts would be in addition to the \$300 million in acquisition costs and \$100 million of improvement costs that CN has already budgeted to acquire the EJ&E line, which is less than 200 miles long.

In numerous other transactions involving much larger acquisitions, the Board has imposed only minor mitigation requirements. For example, in CN's 2001 acquisition of Wisconsin Central and its nearly 2,500 mile rail network, the STB imposed only limited mitigation measures, and no grade separation requirements.³ Similarly, in CN's 1999

¹ Where the STB has imposed significant mitigation measures in past transactions, it has generally required the rail carrier to pay only a small portion of the cost. In the UP/SP merger, mitigation costs were far below those considered here.

² This estimate assumes costs that could be as much as \$50 million per grade separation, based upon pending and recently completed projects in the Chicago area. In the CREATE project, the latest estimates are that the average cost for a grade separation will be \$75 million.

³ Like the EJ&E line, portions of Wisconsin Central's (now CN's) line run through well developed suburbs. In the Chicago region, the Wisconsin Central line crosses the EJ&E line at Leighton, IL, before continuing approximately 30 miles south through Chicago's northern and northwest suburbs to River Forest, IL. Few of the railroad/road crossings along this route segment are grade-separated.

acquisition of Illinois Central, which operated a rail network stretching more than 3,300 miles, the STB did not impose any grade separation requirements. And in the 1996 UP/SP merger, which involved the consolidation of rail properties totaling more than 30,000 miles in length, UP's cash expenditures for STB-imposed mitigation measures totaled less than \$50 million.⁴

Additionally, SEA's proposed division of costs, which could force CN to pay up to 50 percent of the grade separation costs, is more than is allowed under law. The Supreme Court has held that railroads must only pay for grade separations from which they derive a benefit,⁵ while the Interstate Commerce Commission held:

[H]ighway users are the principal recipients of the benefits flowing from rail-highway grade separations and from special protection at rail-highway grade crossings. For this reason the cost of installing and maintaining such separations and protective devices is a public responsibility and should be financed with public funds the same as highway traffic devices.⁶

This view is reflected in the Federal-Aid Highway Act, which provides that where federal funds are used to pay for grade crossing mitigation costs, a railroad's contribution to the project "shall in no case exceed ten per centum." 23 U.S.C. § 130(b). And where grade crossing elimination projects are involved, Federal Highway Administration regulations cap a railroad's share of costs at five percent. 49 CFR 646.210(b)(3).

As explained in greater detail in Section III-a, below, the grade separations that SEA proposes will be primarily for the benefit of automobile and truck users, and the

⁴ This amount was the result of negotiations between UP and local government entities. The Board did not order UP to pay a particular share of the costs.

⁵ *Nashville, C. & St. L. Ry. v. Walters*, 294 U.S. 405, 429-30 (1935). ("[S]o-called assessments for public improvements laid upon particular property owners are ordinarily constitutional only if based on benefits received by them.")

⁶ *Prevention of Rail-Highway Grade-Crossing Accidents Involving Railway Trains and Motor Vehicles*, 322 I.C.C. 1, 87 (1964).

Board should therefore limit CN's share of construction costs to no more than five to ten percent, in accordance with precedent and federal law.

b. The new methodologies SEA uses to identify crossings requiring grade separation produce questionable results.

UP joins in the comments of the Association of American Railroads regarding SEA's use of new and untested methodologies to identify crossings requiring grade separation. SEA's crossing selections raise serious questions about the validity of its new methodologies.⁷

For example, Liberty Street in Aurora, IL, is a two-lane, secondary road. It parallels a major thoroughfare, East New York Street, which is located a half mile to the south and includes a four-lane overpass across the EJ&E line. East New York Street carries approximately 24,000 vehicles per day compared to Liberty Street's approximately 18,000, and provides an alternate route for drivers on Liberty Street. As additional alternatives to Liberty Street, motorists can also use existing grade separations on North Aurora Road (less than one mile north of Liberty Street), or on McCoy Drive (less than a half mile south of East New York Street). Given that three grade separations already exist within one mile of Liberty Street, UP questions the need to construct another.

Another selection that casts doubt upon SEA's methodologies is Allanson Road in Mundelein, IL, which is not even located on the EJ&E line. Rather, it is located on a former Wisconsin Central Line that CN now owns, approximately three-quarters of a mile to the north the EJ&E line. Although some trains may pass through Allanson Road at slightly lower speeds as a result of CN's proposed acquisition, CN does not anticipate

⁷ UP has trackage rights over much of the EJ&E line and is familiar with many of its crossings.

that rail traffic levels at this location will change. As a result, any additional delays incurred by motorists will be nominal.

Additionally, UP questions whether many of the proposed grade separations would have any overall impact on traffic flow and average trip times for motorists. SEA has adopted new criteria to identify crossings requiring grade separation, including queuing impacts (cars blocking intersecting streets while delayed at grade crossings) and vehicle delays (cumulative delays to vehicles at railroad crossings in excess of 40 hours per day). These criteria produce questionable results.

Several roads for which SEA proposes grade separations contain traffic signals in the vicinity of EJ&E line crossings, which can routinely cause traffic queues and delays to occur, even without the presence of a train. Notable examples include Hough Road in Barrington, IL, and Ogden Avenue in Aurora, IL. UP understands that in relying upon queuing and vehicle delays, SEA only considered increases in delays directly attributable to grade crossing activity. SEA did not consider total levels of queuing and vehicle delays that would exist after CN's acquisition of EJ&E. UP believes that in many instances, the increases in total queues and delays would be minimal (i.e., some of the queues and delays that currently result from traffic lights will instead be caused by grade crossing activity, but overall queues and delays will remain largely unchanged) and would have little impact upon average vehicle trip times. In identifying crossings that require grade separation the Board should rely upon the level of service standard, a measure of the operational efficiency of highway/rail at-grade crossings that it has traditionally used, rather than changes in delays directly attributable to grade crossing activity.

III. Requiring CN to Invest Substantial Resources in Grade Separations is Inequitable and Contrary to National Transportation Policy

Imposing extraordinary mitigation costs upon CN is inequitable and contrary to national transportation policy because: (1) rail traffic has little impact upon the automobile traffic congestion that the grade separations are intended reduce, and; (2) the cost of the proposed grade separations amounts to an unjust penalty on CN, which could double the cost of and potentially block its proposed acquisition of EJ&E.

a. Increasing traffic congestion is primarily the result of increasing vehicular use.

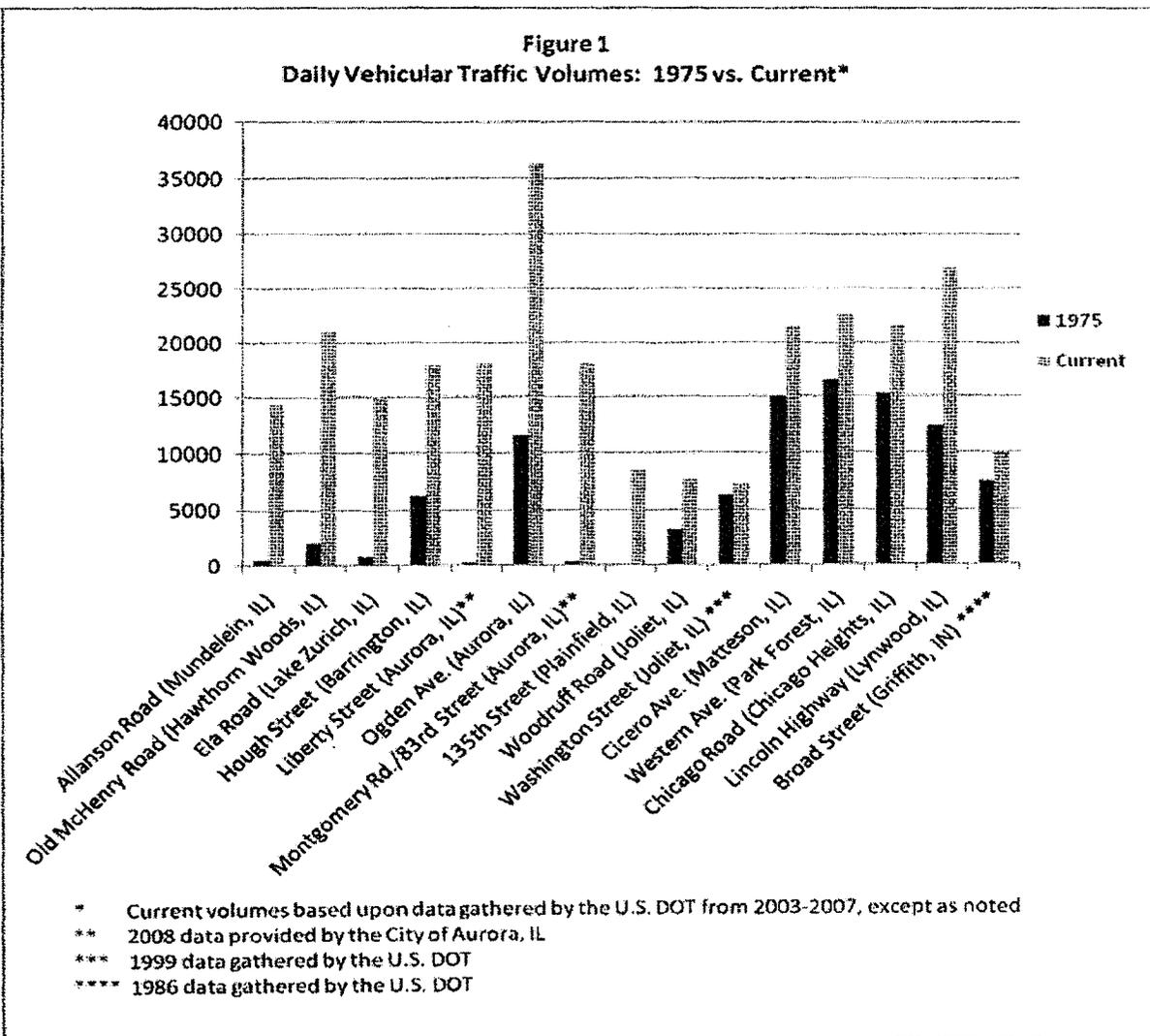
As justification for the proposed grade separations, SEA cites increasing traffic congestion in the regions located along EJ&E's line. SEA suggests that the increased traffic congestion has resulted in large measure from rail traffic using at-grade rail crossings, belonging both to EJ&E and to other carriers. SEA states:

[M]any of these communities [along the EJ&E line] already face traffic congestion at highway/rail at-grade crossings on the same roadways that would be potentially affected by the Proposed Action. In addition, traffic congestion is not caused solely by existing EJ&E freight trains but also by the presence of multiple-rail freight lines, some of which are also used by commuter trains. (*DEIS* at ES-40.)

Contrary to SEA's suggestion that railroad activity has been a major cause of vehicular traffic congestion, railroad activity has had little to do with it. Instead, most of the congestion has been the byproduct of population increases in the communities along the EJ&E line, and associated but even greater increases in vehicle volumes. According to U.S. Census data, the populations in a majority of the counties containing the 15 grade crossings targeted for separation have grown substantially during recent decades. The population of Lake County, IL, at the northern end of the EJ&E line, increased from less than 400,000 in 1970 to more than 700,000 today. The population

of DuPage County, which encompasses the portion of Aurora, IL, that the EJ&E line passes through, nearly doubled during the same period, from less than 500,000 to more than 900,000. And further south in Will County, the population nearly tripled, rising to almost 700,000.

As regional populations have increased, automobile traffic has exploded. According to U.S. Department of Transportation data, vehicular traffic at each of the crossings identified for mitigation has increased since 1975, in many cases exponentially. As illustrated in Figure 1, two thirds of the crossings saw vehicular traffic at least double, while at six of them, traffic increased by a factor of ten or more.



Although earlier data is unavailable, automobile traffic levels along most of the EJ&E line were probably non-existent to minimal when EJ&E began operations. Most of the suburban growth that now encompasses the EJ&E line did not exist, and vehicular traffic at many of the crossings has grown since then. Because the public is the primary cause of all of this growth, it should be primarily responsible for mitigation costs.

The traffic congestion that many communities along the EJ&E line face today has resulted primarily from aggressive residential and commercial development and related population growth that has occurred during recent years. It has had little to do with railroad activities. While the projected increases in rail traffic on the EJ&E line following CN's proposed acquisition could have a nominal impact upon automobile traffic congestion, even with new grade separations most of the congestion would remain.

If vehicular traffic at each of the crossings had remained at 1970s or earlier levels, it appears unlikely that online communities would call for grade separations. Traffic congestion would be much lower than it is today, and few communities would perceive a need for costly mitigation measures to deal with the effects of increased rail traffic on the EJ&E line. Similarly, if the fast growing communities along the EJ&E line had invested in adequate roadway capacity to handle the surge in vehicular traffic, congestion would also be lower, reducing calls for installation of new grade separations. The Board should not require CN to pay for the cost of communities' failures to make adequate roadway infrastructure investments.

b. Requiring CN to pay for extensive grade separation measures could block needed railroad capacity growth.

Were the STB to require CN to contribute substantially to the construction of the 15 proposed grade separations, it would deliver a potentially fatal blow to an initiative aimed at creating badly needed additional railroad capacity. As the STB recognizes,

many rail lines today operate at or near capacity levels, and railroads must develop additional capacity in order to handle continuing traffic growth.⁸ Chairman Nottingham has called expanding railroad capacity a top priority and has stated, "We need to be ready for the reality that freight traffic will grow more than 100% in the next 20 years."⁹

CN's proposed acquisition could help provide badly needed new capacity in an area—Chicago—that is widely recognized as the U.S. rail network's busiest hub and a key chokepoint. CN seeks to boost capacity in this critical area by routing its trains off congested rail lines near the heart of Chicago and onto the underutilized EJ&E line in the city's suburbs. It would run contrary to national transportation policy and to the Board's own stated priorities if it were to impose an array of conditions that could effectively kill an otherwise viable, capacity-enhancing transaction. Moreover, requiring CN to spend millions of dollars to alleviate vehicular congestion—for which it bears little responsibility—imposes a stiff penalty on CN for its efforts to boost railroad capacity through acquiring an underutilized railroad property and using it productively.

A failure to expand railroad capacity here and in future proceedings would also further aggravate traffic congestion, adversely impact roadway safety, and harm the natural environment. If rail carriers cannot expand to meet rising transportation demands, much of the additional freight that would otherwise move via rail in the future will be forced to travel by truck. This will lead to more traffic congestion and an associated increase in truck and automobile-related accidents, injuries, and deaths. Indeed, SEA should consider the safety impacts of forcing trucks onto highways—the nation's most dangerous form of transportation. The environment will suffer as well.

⁸ See *Rail Capacity and Infrastructure Requirements*, Ex Parte 671, STB served Mar. 6, 2007.

⁹ Daniel P. Bearth, *Transport Topics*, *STB's Top Priority Is Increasing Rail Capacity To Meet Growing Volumes*, *Chairman Says*, Dec. 18, 2006.

Railroads are the most fuel-efficient land-based freight transportation mode, using only about one third the amount of fuel per ton-mile as trucks.

Furthermore, the possible benefits of CN's proposed acquisition are not limited to additional rail capacity. As CN has explained in its application, its proposed acquisition has the potential to benefit both CN, which could see efficiency gains associated with its acquisition, and its customers, who could benefit from faster, more efficient rail service. CN's proposed acquisition could also benefit the general public. And as SEA recognized in its DEIS, it will lower the overall rate of train accidents and improve overall grade crossing safety,¹⁰ and at the same time reduce traffic congestion in Chicago.¹¹

The proposed mitigation measures amount to a merger tax that CN would be forced to pay for the benefit of on-line communities, who seek mitigation of their own traffic problems. At the same time, by potentially blocking CN's proposed acquisition, the mitigation measures could harm shippers, who would be denied the service benefits of the acquisition, and the public at large, which would not gain the benefits of improved safety in the Chicago region.

Requiring CN to make substantial mitigation payments could also set a dangerous precedent, under which carriers taking part in future mergers, acquisitions, or transactions subject to SEA's environmental oversight could be liable for excessive costs of similar mitigation measures. These costs which, as seen here, can total hundreds of millions of dollars, could stifle many worthy transactions, including those with potential to provide badly needed additional rail capacity, improve safety, and deliver benefits to railroads and shippers. They have already stifled UP projects. In

¹⁰ DEIS at 12. ("Overall, highway/rail at-grade crossing accidents would decrease by 8% (from 10.7 to 9.8) under the Proposed Action.")

¹¹ DEIS at 14. ("Vehicle delays would generally decrease along the CN subdivisions which would benefit travel times on roadways in downtown Chicago.")

short, transactions like CN's proposed acquisition, which could benefit not only the railroad and shipping community, but the public at large, should not be jeopardized by extensive, unnecessary, and costly mitigation measures.

IV. Railroads Already Pay More Than Their Fair Share of Infrastructure Costs

A Board decision requiring CN to pay the proposed grade crossing mitigation costs would tilt government policy even further in favor of competing transportation modes. Other transport operators benefit from various government-sponsored trust funds and other funding mechanisms designed to pay for infrastructure development and maintenance, whereas rail carriers receive little government assistance. Unlike motor, water, and air carriers, which do not pay the full cost of the publicly-funded infrastructure they use, rail carriers own, maintain, and pay for their own rights-of-way and associated infrastructure. UP estimates that if Class I rail carriers received infrastructure subsidies similar to motor carriers, the government would provide more than \$1 billion annually. If Class I rail carriers received infrastructure subsidies similar to operators of trucks weighing more than 80,000 pounds—who are even greater beneficiaries of federal aid—this amount would be larger still.

Because railroads own their rights-of-way, they are also liable for property taxes. In 2008, Class I rail carriers paid property taxes totaling nearly \$600 million.

In addition to the lack of government support they receive and the property taxes they pay, rail carriers suffer other disadvantages relative to other transportation modes. The tax code requires rail carriers to depreciate their capital assets, including infrastructure investments, generally over a seven-year period. In contrast, motor carriers can immediately and fully deduct their infrastructure costs—they pay for a

portion of their infrastructure costs via fuel taxes (the government pays most remaining infrastructure costs), which are treated as deductible expenses that reduce taxable income.

Rail carriers also incur greater payroll tax liabilities than competing transportation modes. Unlike non-railroad employers who contribute payroll taxes to Social Security to fund a portion of their employees' retirement benefits, rail carriers contribute to Railroad Retirement. Because Railroad Retirement pays a higher level of benefits to each retiree than Social Security, and because the ratio of railroad retirees to employees is higher than in non-railroad industries, rail carriers pay a higher amount of payroll taxes for each worker they employ.

Additionally, rail carriers face a number of hidden costs that other transportation modes do not pay. For example, rail carriers pay ongoing grade crossing maintenance costs. Although rail carriers normally pay only a small portion of the cost associated with initial grade crossing installations, they are responsible for ongoing maintenance and replacement costs. Each year, UP spends more than \$200 million to maintain existing at-grade railroad/highway crossings, and it makes additional contributions to replace crossings with overpasses or underpasses. These costs amount to a further subsidy for automobiles and motor carriers, without which these expenditures would be unnecessary.

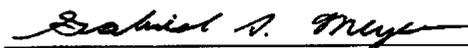
Finally, unlike non-rail carriers, rail carriers face liability risks resulting from infrastructure failures. If grade crossing signals fail to work properly and cause an accident involving an automobile, the railroad may be liable. Similarly, if a track or other infrastructure defect causes a derailment, the railroad may be liable for environmental and property damage. Non-rail carriers, on the other hand, bear little or no

responsibility for maintenance of their own infrastructure and seldom face these types of liability exposures.

V. Conclusion

While UP remains committed to initiatives aimed at further enhancing grade crossing safety and recognizes the important partnerships between railroad and communities needed to achieve this end, railroads should not bear the brunt of the responsibility to alleviate traffic congestion problems they did not create. Transactions like CN's proposed acquisition of EJ&E have the potential to improve service and add badly needed capacity to the national rail network. The Board should not block them by making approval contingent upon applicant rail carriers' willingness to pay for costly mitigation measures. UP therefore respectfully requests that the STB limit its imposition of mitigation measures in this transaction to a level consistent with other transactions of similar scale.

Respectfully submitted,



J. MICHAEL HEMMER
GABRIEL S. MEYER
Union Pacific Railroad Company
1400 Douglas Street
Omaha, Nebraska 68179
Telephone: (402) 544-1658
Fax: (402) 501-3393

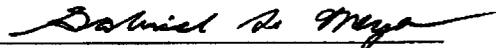
Attorneys for Union Pacific Railroad Company

September 30, 2008

CERTIFICATE OF SERVICE

I certify that I have this day served a copy of the foregoing document upon all parties of record in this proceeding. Service was made via prepaid first class United States Mail.

Dated at Omaha, Nebraska this 30th day of September, 2008.



Gabriel S. Meyer