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June 27, 2018

VIA E-FILING

Cynthia Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423-0001

Re: Docket No. FD 36178, Metropolitan Council - Petition for Declaratory Order

Dear Ms. Brown:

On June 27, 2018, we filed the Reply of Metropolitan Council to the Board's May 22, 2018 Decision in this docket.

We are now filing with the Board, under seal, a Confidential version of the workpapers of Mr. Robert D. Mulholland, who submitted a verified statement as part of the Metropolitan Council's Reply. We will be filing a motion with the Board to seek the entry of a Protective Order pertaining to this or any other Confidential filings that may be made in this docket. Once that Protective Order is issued, any party seeking to obtain a copy of any Confidential filings will be able to do so subject to the terms of the Protective Order.

Please do not hesitate to contact me if you have any questions.

Sincerely,

Edward D. Greenberg
Attorney for Metropolitan Council

cc: Parties of Record



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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DOCKET NO. FD 36178

METROPOLITAN COUNCIL – PETITION FOR DECLARATORY ORDER

REPLY OF METROPOLITAN COUNCIL TO MAY 22, 2018 DECISION

In its decision served May 22, 2018 in this proceeding (the “May 22 Decision”), the Board initiated a declaratory order proceeding to resolve any controversy and remove uncertainty concerning the Metropolitan Council’s (“Council”) proposed acquisition of rail assets currently owned by the Hennepin County Regional Railroad (“HCRRA”) and the Soo Line Railroad Company, doing business as Canadian Pacific (“CP”). The Council submits this reply to the issues raised in the May 22 Decision and to various matters that have been asserted by Twin Cities & Western Railroad Company (“TCWR”).¹ As the matters in this proceeding also relate to the issues raised in Docket FD 36177, the Council’s reply is also joined by HCRRA.

I. PREFATORY STATEMENT

Notwithstanding the volume of documentation accompanying the initial filings and TCWR’s meritless objections, this matter is a routine *State of Maine*² transaction. As a prerequisite for the construction and operation of the southwest extension of the light rail system

¹ Consistent with the May 22 Decision, the Council previously submitted an operations and maintenance agreement between it and HCRRA on June 5, 2018 and served copies of this document on all parties of record.

² *Maine, Dept. of Transp. – Acquisition and Operation Exemption – Maine Central R.R. Co.*, 8 I.C.C. 2d 835 (1991).

serving the Twin Cities metropolitan area (the “SWLRT Project”), the Council, a non-carrier public entity, must acquire the freight rail assets (*i.e.*, real property and the associated rail track) that lie within the so-called Kenilworth Corridor and the Bass Lake Spur. Those assets are currently owned by, respectively, HCRRA and the Soo Line Railroad Company, doing business as Canadian Pacific (“CP”). Consequently, as the Council is not a rail carrier and is not authorized by law to assume the common carrier obligations associated with those lines, it would acquire their freight rail assets, while HCRRA – which has possessed the common carrier obligation on the Kenilworth Corridor since 1993 – would retain that common carrier obligation on the Kenilworth Corridor and assume the common carrier obligation on the Bass Lake Spur.

TCWR, a holder of overhead trackage rights on the subject lines, has opposed the transaction on several meritless grounds. These include the erroneous claims that (1) HCRRA does not currently possess the common carrier obligation associated with the Kenilworth Corridor; and (2) even if HCRRA does possess the common carrier obligation and would continue in that capacity after closing, the transaction as proposed by HCRRA and the Council does not meet the *State of Maine* criteria because the Council will unduly interfere with HCRRA’s ability to exercise that common carrier obligation. TCWR also makes the novel (and similarly flawed) claim that the Council’s request should be denied because the proposed transactions will unduly interfere with TCWR’s overhead operations. In a nutshell, despite having no ownership interest in the lines at issue and possessing only limited overhead trackage rights, TCWR essentially claims it has the unprecedented (and unsupported) right to veto this transaction and critically threaten the \$2 billion SWLRT Project.

The Council briefly discussed the history of discussions it held with TCWR in the Reply it filed on May 2, 2018 to TCWR’s “Initial Comments” (“Council Reply”, at 17-21) and provides a

more expansive explanation of those discussions below and in the attached Verified Statement of Jim Alexander (the “Alexander V.S.”). The Council Reply recounted how TCWR supported this transaction and the related SWLRT Project as recently as last August. (Reply at 18.) Indeed, during the earlier SWLRT route selection process at the environmental impact assessment stage, TCWR lobbied for having the LRT run adjacent to and within the freight rail corridor, as the Council now contemplates, rather than having the freight rail tracks moved to a new location out of the Kenilworth Corridor. (*Id.* at 20.) Yet, TCWR now claims that this this co-location of freight rail and the LRT will unreasonably interfere with its operations.

Indeed, the parties had even exchanged drafts of papers to be filed at the Board whereby the Council would acquire the freight rail assets and TCWR would acquire the common carrier obligation on these lines. (*Id.* at 18.) In short, except for its change of heart of some business terms that are discussed below, TCWR supported the contemplated *State of Maine* filings necessary to go forward with the SWLRT Project.

What changed? The answer is simple: money. The current dispute between the parties relates to how much TCWR is demanding from the Council to subsidize TCWR’s purchase of real estate and construction of newer and larger rail sidings away from the Bass Lake Spur and the Kenilworth Corridor that would replace sidings that are today used primarily for storage, despite the *facts* that TCWR (1) does not own the sidings at issue, (2) can continue its operations permitted by the TRAs without any undue interference without the sidings that need to be removed and (3) has no right in any event to use any of the sidings for storage. The Council worked to ensure that the LRT construction and operations would not interfere with freight rail operations, and the Council previously had agreed to all of TCWR’s conditions, including TCWR’s financial demands regarding the replacement of the sidings that were to be removed. However, and as discussed in

the Alexander V.S., TCWR reneged on its agreement that all issues – especially those relating to the alleged effect of the LRT on its operations – had been resolved and increased its financial and other demands. (Alexander V.S., ¶¶21-22). Because TCWR reneged on its agreement, the Council determined that TCWR was no longer a reliable partner, and the Council then restructured the transaction that was ultimately presented to the Board. Now, HCRRA rather than TCWR will have the responsibility to provide any requested local freight rail service and fulfill any related common carrier obligations. Nonetheless, TCWR will continue to operate via its overhead trackage rights without any change to those rights.

Having failed to obtain the Council’s approval of its 11th hour demands, TCWR has initiated a scorched earth attack on an arrangement that was carefully structured *with its input* to avoid any interference with its operations both during construction of the SWLRT Project and after. By challenging the transaction both before the Board (including unsuccessfully trying to extend this process by seeking discovery and a lengthy procedural schedule) and the U.S. District Court for the District of Minnesota, TCWR seeks to use the threatened delay as leverage in settlement negotiations. TCWR has taken this position specifically because it is aware that the Council needs an affirmative decision from the Board on its *State of Maine* request by the middle of July or it will lose the ability to commence construction during 2018; that delay would critically threaten the viability of the entire \$2 billion project.

If a delay prevents the Council from beginning construction in 2018, it will critically threaten the viability of the entire \$2 billion project. Accordingly, the Council respectfully requests a decision from the Board by the middle of July.

Both the Council and HCRRA are cognizant of the large number of comments the Board has received from shippers and municipalities raising concerns about the Council’s plans regarding

the SWLRT's claimed effect on TCWR. In identical language³, the public comments filed on behalf of TCWR after the May 22 Decision raise two issues. First, the commenters express concern that the LRT will be operating in the same corridor as the freight rail and that there will be outages to accommodate the planned realignment of the freight rail. Second, they worry that the removal of "a significant number of sidetracks" will "significantly impact" TCWR's transit times. It is not surprising that parties dependent upon TCWR rail service would comment in that fashion, as they reasonably assumed that TCWR's public relations program accurately reflected the facts and raised legitimate concerns.

That is not the case however, as TCWR well knows, because its representations were self-serving and inaccurate. In soliciting public support, TCWR failed to let the targets of those efforts know that its management had been supportive of the co-location of freight rail and LRT for well over two years. TCWR omitted revealing that it had agreed to a mutually negotiated set of detailed protocols for the construction of the LRT, slight realignment of the freight rail (including the planned outages), and operation of the LRT in this precise location. Similarly, TCWR neglected to tell its customers and the various public entities that it had no problem with the removal of the side tracks at issue as long as it was paid significant sums, money that presumably would be used to subsidize its construction of sidings in excess of what is to be removed and continue a long term storage contract for a chemical company that has nothing to do with the movement of freight through this corridor or service to any shipper or community that submitted comments to the

³ Exhibit 1 to this Reply is an email dated June 5, 2018 that TCWR addressed to its Customers and local community organizations requesting that they submit public comments and providing a draft template to be used. Each of the comments submitted to the Board appears to mirror TCWR's suggested text, word for word in virtually every instance.

At the same time, a number of Minnesota communities submitted statements in this proceeding commenting on the importance of the SWLRT Project to the region. (*See, e.g.*, comments of the City of Minneapolis, Minnesota; Eden Prairie; City of Hopkins and Minneapolis Regional Chamber.)

Board.⁴ Nor did TCWR reveal that the storage contract breached a fundamental provision in its Trackage Rights Agreement with CP that specifically prohibits the use of any track or sidings for storage. To this day, and despite having made two separate filings at the Board which repeated the same “undue interference” mantra, TCWR has failed to explain how any service to its customers or the various communities would be delayed or otherwise adversely affected by the proposed transactions, the SWLRT Project and subsequent operations and maintenance of the corridors.⁵

II. RESPONSE TO ISSUES RAISED BY THE BOARD

As we understand TCWR’s contentions in this matter, it argues that this is not a typical *State of Maine* transaction because (1) HCRRA is not really a common carrier and (2) the Council’s acquisition of the real estate underlying these corridors will interfere with TCWR’s trackage rights. Neither of these points has any merit. First, it cannot reasonably be disputed that the Council, a public corporation and political subdivision of the State of Minnesota, intends to purchase the physical rail assets belonging to two entities that have been accorded rail common carrier status by the ICC or the Board (namely, HCRRA and CP). Second, in each case, HCRRA will reserve (in the case of the Kenilworth Corridor) or acquire (in the case of the Bass Lake Spur) a permanent, exclusive and irrevocable easement and responsibility for providing any common carrier service that may be required.

⁴ Interestingly, Nova Chemicals did not submit comments raising any concerns with the transactions in these proceedings. Although the storage sidings are being provided on behalf of Nova Chemicals, Nova Chemicals is not a shipper on the TCWR. (Mulholland V.S., at 19.)

⁵ On the assumption that TCWR would now attempt to support its claim that the LRT construction or operation contention would unreasonably affect the railroad’s operations, the Council has also attached the Verified Statement of Rob Mulholland (the “Mulholland V.S.”), which shows that TCWR’s allegations concerning the need for the sidings in question have no merit. *Infra*, at 21.

Nonetheless, TCWR argues that the 1995 ICC decision approving HCRRA's acquisition of the Kenilworth Corridor from the Chicago and North Western Transportation Company⁶ meant that HCRRA was not really a rail common carrier. After all, it contends, HCRRA does not operate any locomotives and purportedly cannot then be a common carrier. If that is the case, and as there has been no local common carrier rail service since the line's acquisition, the rail track HCRRA acquired is necessarily something akin to private track (*i.e.*, track that is not subject to STB jurisdiction) even though TCWR has the contractual right through its trackage rights agreement and the easement to operate its overhead service on the line. Consequently, following TCWR's flawed logic, HCRRA's sale of the Kenilworth Corridor would not require STB approval since the line would not have been subject to STB jurisdiction since the 1995 decision.

There are only two choices. If HCRRA is a common carrier (which both it and the Council believe to be the case, and which the ICC confirmed when HCRRA acquired the Kenilworth Corridor, as discussed below), this is a typical *State of Maine* transaction between a public entity and a railroad. Alternatively, if HCRRA is not a common carrier, no Board licensing authority is required for the Council's acquisition of its rail assets.⁷

TCWR's second contention is equally specious. It has solicited and obtained a number of public comments supporting the proposition that its service is important, and neither the Council nor HCRRA doubt that point. Nonetheless, it is abundantly clear that neither the property acquisition before the Board nor the construction, operation or maintenance of the LRT will jeopardize TCWR's overhead service. As discussed below and in the accompanying statements

⁶ See AB-1 (Sub-No. 252X), *Chicago and North Western Transportation Company Abandonment and Discontinuance of Service Exemption in Hennepin County, MN*, and FD 32816, *Hennepin County Regional Railroad Authority – Exemption – From 49 USC Subtitle IV* (ICC served December 20, 1995).

⁷ As discussed below, under no circumstance can TCWR – which has no ownership rights or common carrier obligation on these corridors – be considered as the “selling carrier.”

of Messrs. Alexander and Mulholland, neither the planned realignment of the freight rail nor the removal of some of the sidings on the Bass Lake Spur will have any material adverse effect on TCWR's overhead service. While TCWR may lose its ability to store plastic pellet cars on the sidings, it has no legal right to do so and its past conduct in that regard has been in direct breach of its trackage rights agreement with CP.

The Council now responds to the several specific issues raised in the May 22 Decision for which the Board sought comments.

Issue 1 – Possible Changes to Transaction Documents and Mediation

Initially, the Board asked: “What steps, if any, need to be taken with respect to the transaction agreements for which the Council seeks a *State of Maine* declaratory order in order to appropriately protect TCWR's interests?” The Board also asked if the parties would agree to participate in Board-sponsored mediation.

As the Board is aware, both the Council and HCRRA have agreed to participate, and are actively participating, in mediation that is being held under the auspices of the Federal Mediation and Conciliation Service.⁸ As to the Board's first question, the Council understands it pertains to the protection of TCWR's operations pursuant to its overhead trackage rights rather than the list of demands it has presented.

In that regard, no changes to the transaction documents are necessary to “appropriately” protect TCWR's rights under the trackage rights agreements. These documents, as well as the Alexander V.S. (at ¶¶24, 27) reflect that the Council has always kept TCWR's legitimate need to continue its overhead freight operations over the rail corridor firmly in consideration and has

⁸ Mediation sessions have been held in Minneapolis on June 15 and June 21, 2018 and additional sessions are scheduled for July 2 and 11, 2018 in the hope that the parties can resolve their issues.

protected TCWR's ability to carry out the overhead operations it has the right to conduct. For example, when the route was being selected for the LRT, the Council solicited and understood TCWR's concerns about an alternative that would have relocated freight rail to another location outside the Kenilworth Corridor in a way that could have affected TCWR's operations. When the current co-location routing option was selected instead, the Council immediately commenced discussions with TCWR to ensure that the LRT and TCWR would be able to co-exist in the same right-of-way, that TCWR's overhead rights would not be infringed, and that neither the construction nor operation of the LRT would unreasonably interfere with TCWR's operations. In pursuit of that goal, when the Council commenced negotiations with HCRRA and CP to acquire their rail property interests in the Kenilworth Corridor and Bass Lake Spur it initiated discussions with TCWR for TCWR to become the "common carrier" on this corridor to provide any local freight service in the unlikely event that any materialized.⁹

During those negotiations, all involved parties agreed that the appropriate regulatory step would involve use of the *State of Maine* process. Accordingly, the transactional documents and the papers to be filed with the Board were structured so that both CP and HCRRA would transfer a permanent, exclusive and irrevocable easement to TCWR prior to closing on the property acquisitions, that the Council would buy the physical freight rail assets on the two line segments from HCRRA and CP, that TCWR would file a Notice of Exemption under 49 C.F.R. 1150.42 to obtain the common carrier rights and obligations on these tracks, and that the Council would file

⁹ (Alexander V.S., at ¶21.)

Just as the ICC recognized, in 1995, that there was no actual need for local freight service on the Kenilworth Corridor and accordingly issued the exemption from Subtitle IV of Title 49, AB-1 (Sub-No. 252X), *Chicago and North Western Transportation Company Abandonment and Discontinuance of Service Exemption in Hennepin County, MN*, and Docket No. FD 32816, *Hennepin County Regional Railroad Authority – Exemption – From 49 USC Subtitle IV* (served December 20, 1995), there has similarly been no demand or need for local service on the Bass Lake Spur for over 15 years. (*Id.* at ¶ 29.)

either a Notice of Exemption under Section 1150.41 together with a motion to dismiss or a petition for declaratory order requesting that the Board confirm that its approval was not needed for the Council's acquisition of the physical property.

As a key part of those discussions, the Council and TCWR negotiated and arrived at agreements that specifically protected TCWR's ability to continue using the tracks for its overhead service. Mr. Alexander discusses the construction and operation protocols that the parties developed and to which TCWR specifically agreed. (*Id.* at 20.) At the same time, the Council and TCWR negotiated a comprehensive Operating and Maintenance Agreement that would have been submitted to the Board had the transaction gone forward as initially agreed.

Unfortunately, the Council was forced to rethink this plan when TCWR reneged by attempting to extract additional monies and other non-operational considerations. Accordingly, as an alternative, HCRRA – which already holds the common carrier obligation to provide local service on the Kenilworth Corridor – agreed that it would retain those rights and also obtain the common carrier obligation on the Bass Lake Spur. In other words, the holder of the common carrier obligation on these segments was switched from TCWR to HCRRA. TCWR would therefore retain only rights under the trackage rights agreements, but would have no further role in these arrangements. Notwithstanding the switch in the identity of the common carrier on the corridor, there is nothing in the transactional documents that infringes on TCWR's rights. The Council has publicly committed to observing the construction and operating protocols that it negotiated with TCWR and through its binding bid documents the Council is requiring its construction contractor to comply with these protocols. And, the Council and HCRRA have submitted an Operations and Maintenance Agreement to the Board that also specifically protects TCWR's ability to provide its contractually authorized overhead freight rail service without any

material interference. Accordingly – and specific to the STB’s first question addressed here –there is no need for any changes to the transaction documents to protect TCWR’s interests. The construction protocols are legally baked into the binding construction documents, and the Council/HCRRA OMA contractually guarantees non-interference with TCWR’s operations during and post-construction.

The Council is hopeful that the mediation process will serve to allay any continuing reservations TCWR may have. Regardless, the Council respectfully believes that the existing transactional documents submitted to the Board (and now also including the Council/HCRRA OMA) do appropriately protect TCWR’s interests under the *State of Maine* process.

Issue 2. – HCRRA’s 1995 Exemption

The Board next asked: “What is the effect on the State of Maine analysis, if any, of HCRRA’s exemption from Subtitle IV of the United States Code?”

HCRRA’s exemption from Subtitle IV of Title 49 of the U.S. Code has no relevance to the Board’s *State of Maine* analysis because it does not affect the scope of rights retained or to be acquired by HCRRA. Board precedent clearly establishes that exemption from Subtitle IV regulation does not mean that the Board has no jurisdiction over the entity that has secured that exemption. Rather, the Board specifically retains jurisdiction so that, when necessary and in appropriate circumstances, it can revoke the exemption and assert its regulatory authority over the otherwise-exempted carrier.

Under *State of Maine* and its progeny, the Board considers whether an entity acquiring the physical assets of a railroad line also acquires, expressly or by necessary implication, the interstate freight transportation authority and obligations attached to the railroad line. *See Mass. Dep’t of Transp. – Acquisition Exemption – Certain Assets of CSX Transp., Inc.*, FD 35312 (STB served

May 3, 2010), *aff'd Bhd. of R.R. Signalmen v. Surface Transp. Bd.*, 638 F.3d 807 (D.C. Cir. 2011). For nearly 30 years, the Board and its predecessor agency have held that such authority is not transferred, and the Board therefore need not approve the transaction, if the transferor retains “a permanent, exclusive freight operating easement, together with the common carrier obligation on the line, and that the terms of the sale must protect the [selling] carrier from undue interference with the provision of common carrier freight rail service.” *Id.* at 7. In other words, under the *State of Maine* analysis, the Board considers whether the proposed acquisition would materially alter the status quo with respect to who holds common carrier authority.

That inquiry is simply not affected by the fact that HCRRA has been granted an exemption from Subtitle IV. That fact of that exemption has no bearing on whether the proposed transaction would unduly interfere with HCRRA’s common carrier rights and obligations, or those of carriers with trackage rights, over the railroad line.

The circumstances under which HCRRA was granted the Subtitle IV exemption are instructive. HCRRA succeeded to CNW’s common carrier authority over the Kenilworth Corridor in 1993, when CNW discontinued service over the railroad line. *Chi. & N.W. Transp. Co. – Abandonment & Discontinuance of Serv. – in Hennepin Cty., Minn.*, AB-1 (Sub-No. 252X) (STB served Dec. 20, 1995). At that time, the STB explained that “when Hennepin acquires the track on the segment that will remain in service, ‘it will acquire a common carrier obligation to provide service over that line segment.’” *Id.* at *1. When HCRRA sought clarification, the ICC explained:

When Hennepin acquires the track on the east line segment, it will assume CNW's rights under the trackage rights agreements with Soo and TCW. The east segment is an active rail line used by Soo and TCW as an overhead traffic route. When assuming CNW's obligations under the trackage rights agreements, Hennepin also will assume the common carrier obligation to assure that Soo and TCW will be permitted to continue service. Thus, Hennepin would be required to obtain Commission authorization under 49 U.S.C.

10901 to acquire the east segment and the common carrier obligation that goes with it.

Id. at *2.

The ICC nevertheless issued, *sua sponte*, an exemption to HCRRA from Subtitle IV, finding that regulation of HCRRA was not necessary to carry out the rail transportation policy.

It explained that

there is no evidence that any vital interests of shippers, communities, or competitors would be adversely affected by a grant of the exemption. To the contrary, granting the exemption will minimize the need for Federal regulatory control, expedite regulatory decisions and reduce barriers to exit and encourage cooperation with states and their political subdivisions.

Id. at *3 (citing 49 U.S.C. § 10101a (2), (7), (9)). The ICC specifically noted that there were “no active or potential shippers on the line [] and Soo’s and TCWR’s overhead traffic operations will continue” *Id.*

The ICC determined, in other words, that it was not necessary to subject HCRRA to the full panoply of Subtitle IV regulation to protect the interests of potential shippers on the railroad line. But this exemption from particular regulatory requirements, which was based on particular circumstances present at the time, did not – and could not – remove the Board’s jurisdiction over HCRRA. Rather, that jurisdiction remains, so that should circumstances change in the future, the Board can and would revoke the exemption and hold HCRRA to the requirements of Subtitle IV. Indeed, the ICC took the unusual step, *sua sponte*, in creating a docket number pertaining to the exemption it issued; *i.e.*, FD 32816. Any party seeking to revoke or modify the exemption can move to reopen that docket. At present, however, the stated basis for the exemption remains: the absence of local shippers, the provision of overhead service by other carriers, and the absence of any abuse of market power.

The basis for the ICC's determination regarding HCRRA's common carrier status is not upset by the Council's acquisition of the physical assets of the line. HCRRA will retain a permanent freight easement to provide common carrier service (and assure that overhead carriers are permitted to continue service) over the Kenilworth Corridor, and will also acquire such rights over the Bass Lake Spur. Just as the 1995 ICC decision confirmed its retention of jurisdiction over HCRRA, along with the ability to revoke that exemption if necessary, so too will the STB retain that jurisdiction over HCRRA after the proposed transaction. At any time, the Board can step in and require HCRRA to ensure, through its retained freight easement, that HCRRA take whatever steps might be necessary to provide local service or ensure that TCWR's ability to operate the overhead service rights granted by the TRA continues unimpeded.

TCWR's argument that this contingency is somehow insufficient is unfounded. HCRRA has affirmed before this Board and in the transaction documents that it will provide common carrier service should such service be requested in the future. Should HCRRA fail to deliver on that commitment, a prospective shipper on the subject railroad lines would be no worse off petitioning the Board for a revocation of the Subtitle IV exemption than it would be if a railroad carrier *without* a Subtitle IV exemption failed to discharge its common carrier obligation.¹⁰

TCWR appears to advance three additional arguments for why HCRRA's exemption from Subtitle IV should derail the Board's *State of Maine* inquiry: (1) that HCRRA does not have "any common carrier obligation" as a result of its Subtitle IV exemption; (2) that exempting this acquisition would result in a "de facto abandonment"; and (3) that HCRRA is not a rail carrier providing transportation subject to the jurisdiction of the Board. These arguments fail as well.

¹⁰ TCWR lists a number of cases where proceedings to revoke an exemption granted under 49 U.S.C. § 10502 were not resolved expeditiously. None of those cases, however, involved requests by shippers for common carrier service otherwise unavailable. HCRRA does not doubt that the Board could swiftly revoke its Subtitle IV exemption should that be necessary.

The ICC already answered TCWR’s first argument. As discussed above, it specifically explained that when HCRRA acquired the line from CNW it “acquire[d] a common carrier obligation to provide service over that line segment” and that HCRRA has a “common carrier obligation to assure that Soo and TCWR will be permitted to continue service.” *Chi. & N.W. Transp. Co., supra*. Moreover, it is plain from the ICC’s decision that if HCRRA does not possess the common carrier obligation over the Kenilworth Corridor, *then no one does*. That could hardly have been the ICC’s intent. No one else – not TCWR or CP or any other railroad – has the authority to serve local shippers on the Kenilworth Corridor. In view of the specific limitations in the existing trackage rights agreements, limitations that were approved by the ICC, if a local shipper were to appear and demand service, that demand would fall upon HCRRA, and HCRRA would meet that demand. This common carrier obligation lies with HCRRA, and because the Council is not acquiring HCRRA’s common carrier obligation, the proposed transaction meets the *State of Maine* criteria.

Exempting the proposed transaction under *State of Maine* and its progeny also would not constitute a “de facto abandonment.” In issuing HCRRA’s Subtitle IV exemption, the ICC was clear that those carriers with overhead traffic rights would be required to seek discontinuance authority from the Board should they wish to end service. And, even under the Subtitle IV exemption, HCRRA would be required to certify to the Board that such discontinuance authority had been consummated before it could abandon-in-fact the railroad lines or the physical assets thereof. *See L.A. Cty. Metro. Transp. Auth. – Abandonment Exemption – In L.A. Cty., Cal., AB-409 (Sub-No. 5X) (STB served July 17, 2008); L.A. Cty. Metro. Transp. Auth. – Abandonment Exemption – In L.A. Cty., Cal., AB-409 (Sub-No. 6X) (STB served Feb. 8, 2012)*. Thus, contrary

to TCWR's unsupported and erroneous assertion, this transaction does not ask the Board to deprive itself of oversight over the railroad line.

Finally, there is no merit to TCWR's claim that a declaration that the proposed transactions meet the parameters of *State of Maine* and its progeny must be denied on the ground that HCRRA is not a "rail carrier providing transportation subject to the jurisdiction of the Board." *See* Rebuttal at 5. "[I]t is well established that an exemption granted under 49 U.S.C. § 10502 – like [HCRRA's] exemption here from most provisions of Subtitle IV – may remove the agency's regulatory authority under those provisions, but does not remove the agency's jurisdiction over the rail carrier or rail line at issue." *L.A. Cty. Metro. Transp. Auth. – Petition for Declaratory Order*, FD 36112, *slip op.* at 4 (STB served Oct. 27, 2017). The STB's 2017 decision regarding LACMTA confirms that the entity with the ultimate common carrier obligation on a line of railroad need not be providing that service itself. In other words, an entity need not actually operate locomotives to be a common carrier.¹¹

In LACMTA's case, the freight railroads that have shared use agreements on the line provide that service. In HCRRA's case, the documents presented to this Board confirm that HCRRA is making contractual arrangements that will ensure that if the demand arises for service on the lines over which it has the ultimate common carrier obligation, that service will be provided if and when necessary. As a result, HCRRA will be able to meet any demand for service quickly and lawfully under applicable STB law. In the unlikely event of a request by a local shipper on the line for direct service, the STB statute and regulations specifically permit HCRRA to contract with another rail carrier to come onto the line and provide that service and, more importantly, to be able to accomplish an engagement with that new carrier quickly. Thus, the request for service

¹¹ *See*, also, the discussion and cases cited, *infra*, at 19-20.

by a common carrier can be honored in a timely way, and TCWR's claim that there really is no common carrier available to provide service is baseless.

Because HCRRA has a common carrier obligation over the railroad line, notwithstanding its exemption from Subtitle IV, and because the Council does not propose to acquire or interfere with HCRRA's obligation, the proposed transaction satisfies the *State of Maine* criteria.

Issue 3. – Effect of the Joint Powers Agreement

The May 22 Decision next posed the question: “What is the effect on the State of Maine analysis, if any, of Section 1(a)(2) of the Joint Powers Agreement between the Council and HCRRA?”

Section 1(a)(2) and the rest of the Joint and Cooperative Exercise of Powers Agreement (“JPA”) have no adverse effect on the question posed by the Petition for Declaratory Order – *i.e.*, whether the acquisition of the described rail assets by the Council requires Board approval. More specifically, the terms of the JPA do not give the Council the ability to unduly interfere with HCRRA's exercise of the common carrier obligations. To the contrary, in addition to addressing the relative financial obligations between these two governmental agencies, the JPA specifically requires that the Council assist HCRRA in meeting *HCRRA's* common carrier obligations.

While Section 1 gives the Council the contractual obligation to administer on HCRRA's behalf the TRAs and common carrier obligations, Section 1 also ensures that if the Council fails to perform, HCRRA is ultimately responsible for these obligations. Section 1(a)(2) states that one of the purposes of the JPA is “(2) subject to para. (b) below, to assign responsibility to the Council for administering on behalf of HCRRA the Trackage Rights Agreements and HCRRA's performance of the Common Carrier Obligation.” The pertinent provisions of paragraph (b), to which 1(a)(2) is made subject, states that

[i]f the Council breaches or otherwise does not perform its obligations under this Agreement, (1) HCRRA is still ultimately responsible to fulfill its Common Carrier Obligation in the Corridors or HCRRA's commitment to fulfill that responsibility [as described in this proceeding and FD 36177].

That HCRRA is ultimately responsible for any common carrier obligation is made manifestly clear by Section 1(b) of the JPA, which provides that "HCRRA is still ultimately responsible to fulfill its Common Carrier Obligation" and administer the TRAs in the event the Council breaches its obligations to secure any third parties as may be necessary.

This provision also states HCRRA is "ultimately responsible to fulfill its retained or assumed rights and obligations under the Trackage Rights Agreements" It further provides that if the Council breaches the JPA or doesn't perform its duties under the Agreement, "*HCRRA* will continue to hold the Common Carrier Obligation." (Emphasis supplied.)

Although the Council is empowered to design, construct, maintain and operate the LRT, its statutory transit authority does not extend to operating freight rail. On the other hand, HCRRA is authorized by Minnesota law to acquire, *operate* and protect railroads.¹² HCRRA has held the common carrier obligation on the Kenilworth Corridor since that line's acquisition from C&NW in 1993¹³ and is willing to extend that obligation to the Bass Lake Spur in order to permit the SWLRT Project to go forward. HCRRA agreed to take on that responsibility, however, on the condition that it would not be subject to any additional costs or other exposure.¹⁴ And, HCRRA's

¹² Minn. Stat. § 398A.04, subd. 2; JPA Recital 13.

¹³ It is also noteworthy that TCWR, which has enjoyed conducting its overhead trackage rights under HCRRA's ownership and maintenance of the common carrier obligation for 25 years, has never previously complained that HCRRA was somehow not competent or qualified to be a common carrier.

¹⁴ Although the Council is to procure insurance on behalf of HCRRA to cover any liability that might arise from HCRRA's obligations under the JPA and trackage rights agreements (JPA, §6), the designated operator will have direct responsibility for any claims and will be required to have insurance and hold both HCRRA and the Council harmless for any claims, loss or damage arising out of any common carrier service that would be provided in the event such a request for service is made. *Cf. Kansas City Transportation Company LLC – Lease and Assignment of Lease*

decision to be the common carrier in both the Kenilworth Corridor and the Bass Lake Spur was memorialized in the Property Transfer Agreement by which the Kenilworth Corridor will be conveyed from HCRRA to the Council.¹⁵

To implement these arrangements, the Council and HCRRA entered into the JPA setting forth each agency's role and responsibilities in this transaction. Under this agreement, HCRRA would continue to hold (for the Kenilworth Corridor) or acquire (for the Bass Lake Spur) the common carrier obligation, with the understanding that the Council would, if requested by HCRRA, obtain a qualified third party to provide any needed rail service. And so, Section 1(a)(2) states that the purpose of the agreement is to give the Council the responsibility to "administer" the TRAs and HCRRA's performance of the common carrier obligation.

But "administering" the trackage rights agreements and any common carrier obligation does not mean that the Council is going to act to fulfill any common carrier obligation itself. To the contrary, the JPA makes it clear that the Council's obligations under the agreement are limited to acting on behalf of (i.e., assisting) HCRRA to ensure that the common carrier obligation is satisfied. For example, Section 5(a) of the JPA, which implements the "purpose" provision of the agreement from Section 1, states that the Council is, "if and when requested by HCRRA," to "secure on behalf of HCRRA appropriate third parties to provide any needed freight service... as a designated carrier." It is not uncommon for public entities that have common carrier obligations to discharge those functions by arranging for a designated carrier. *See, e.g., City of Rochelle, IL—Notice of Exemption—Commencement of Rail Common Carrier Obligations*, FD 33587 (STB

Exemption – Kansas City Terminal Railway Company and Kaw River Railroad, FD 34830 (STB served May 23, 2007).

¹⁵ *See* Petition for Declaratory Order ("PDO"), Attachment 2, sections 2.2.1 & 2.2.4 ("HCRRA will have the Common Carrier Obligation in the Kenilworth Corridor ... [and] over the Bass Lake Spur Corridor.").

served July 7, 1998)(the Board held the City to be the common carrier and not ever required to identify its designated operator); *see also Jackson Co., MO.—Acquisition and Operation Exemption—UP R.R. Co.*, FD 35982 (STB served Feb. 4, 2016); *State of Texas, acting by and through the Texas Dept. of Transp.—Acquisition Exemption—Union Pacific Railroad Co.*, FD 34834 (STB served Feb. 24, 2006). As the Council would only make those arrangements on behalf of HCRRA, and at that only if and when requested, it is clear that this obligation remains that of HCRRA. Most important for the inquiry here, where a party is acting *on behalf of* another party, by definition the first party is not interfering with the second party’s obligations but is furthering those obligations.

TCWR contends, without any explanation, that this situation is different from the litany of cases where a municipality has appropriately retained the services of a designated operator. And there is no logic supporting that contention in any event. It makes no difference, in determining a municipality’s ability to delegate its responsibilities to a qualified third party, how the agency became subject to having the common carrier obligation. In all instances, the municipality became a common carrier pursuant to Sections 10901 or 10902 of the Act.

Similarly, the Council acting on HCRRA’s behalf is to undertake or secure third parties to undertake any other services or obligations, “other than the operation of trains,” of HCRRA due to its common carrier obligations or under the trackage rights agreements. (*Id.* at § 5(a).) The mere obligation to secure a third party to provide maintenance and/or capital repair of freight rail does not make one a common carrier. For example, the Board has found that the responsibility for track maintenance by itself, does not constitute an acquisition of a railroad line requiring Board authorization. *Virginia Port Authority – Acquisition Exemption – Norfolk and Portsmouth Belt Line RR Co.*, FD 35532 (STB served August 1, 2011), at 4, *citing Utah Transit Auth.—Acquis.*

Exemption.—Union Pac. R.R., FD 35008 (STB served July 23, 2007); *N.M. Dep’t of Transp.—Acquis. Exemption—Certain Assets of BNSF Ry.*, FD 34793 (STB served Feb. 6, 2006).

TCWR also contends that the Board has denied *State of Maine* requests “if the owning public entity had *some* ability to manage or control the common carrier.” Rebuttal Comments at 9¹⁶ (emphasis added). This is simply false. The notion that only “some” ability to manage or control the common carrier results in the denial of a *State of Maine* request is clearly not the law, as the Board has repeatedly and consistently approved *State of Maine* requests where the transaction documents permitted a non-carrier purchaser of railroad assets to perform various activities associated with the provision of freight rail service on the line. *Virginia Port Authority, supra*, at 4 (maintenance and dispatching), *Maryland Transit Admin., supra*, at 5-7 (specified times for exclusive freight operations, management and dispatch, right to make improvements, passenger operation priority, abandonment for non-use). *Utah Transit Auth. – Acquis. Exemption – Union Pacific R.R.*, FD 35008 (STB served July 23, 2007).

The cases cited by TCWR provide no support for this mischaracterization of the law. The most obvious example is *City of Austin, TX – Acquisition – Southern Pacific Transp. Co.*, FD 30861(A), (ICC served Nov. 4, 1986), which preceded *State of Maine* by five years and so cannot possibly support TCWR’s assertion. In any event, in that 1986 case the City attempted to fully retain the common carrier obligation along with the track assets, which effort the ICC summarily rebuffed. The other cases TCWR cites refute its wrong assertion that *some* control is enough because they are simply examples of when a *State of Maine* request was denied because the transaction documents would have given the public entity *too much* control over the seller’s

¹⁶ See TCWR Rebuttal Comments, filed May 17, 2018.

exercise of the common carrier obligation. TCWR makes no attempt to argue that the facts and holdings of those case apply to the Council’s *State of Maine* request, and none of them do.¹⁷

Accordingly, although the two agencies have decided between themselves how the costs of this project will be borne, with respect to freight rail, the Council acts only on behalf of HCRRA and HCRRA is “ultimately responsible” for the common carrier obligations. As such, the existence of the JPA has no effect on the *State of Maine* analysis. The Council’s willingness through the JPA to act “on behalf of” HCRRA instead directly contradicts any notion that the Council is somehow *interfering* with HCRRA especially, where, as here, through the JPA HCRRA expressly retains the common carrier obligation.

Issue 4. – Significance of Second Easement Holder

The May 22 Decision next raises the question: “What is the effect on the *State of Maine* analysis, if any, of the presence of a second easement holder, *i.e.*, TCW?”

Simply stated, TCWR’s trackage rights and the easement it holds on the Kenilworth Corridor (albeit not on the Bass Lake Spur) do not have any effect on the narrow issue in a *State of Maine* case, which is typically whether the acquisition of railroad assets by a non-carrier public agency requires Board authorization.

The *State of Maine* analysis is limited to the question of whether Board approval is required for a transaction between the selling carrier and the buyer of the assets of a jurisdictional line of railroad. The aim is to ensure that the common carrier obligation associated with the line at issue

¹⁷ TCWR’s reliance on *City of Woodinville, Wash. - Petition for Declaratory Order*, FD 35905 (STB served Oct. 7, 2016) is also misplaced. First, that case did not involve any allegation of interference with a third-party holder of an easement to provide overhead trackage rights. Rather, it involved an unsuccessful claim of undue interference by the assignee of the selling carrier’s permanent, exclusive easement. Second, in any event, TCWR’s easement on the Kenilworth Corridor is not an “exclusive rail easement” on par with the easement the seller is required to retain in *State of Maine*. TCWR Rebuttal at 10, n. 10. By its express terms, TCWR’s easement is *non-exclusive*, and indeed CP also has rights to provide overhead trackage rights service. Third, TCWR’s claim that HCRRA or the Council would take any precipitous action regarding TCWR’s non-exclusive easement is belied by the construction and operating protocol developed by the parties with TCWR’s input.

resides with the appropriate party to the transaction. This limited analysis is therefore not affected by the easement rights or other valid rights of another railroad to use the line. In *V&S Railway, LLC – Petition for Declaratory Order – Railroad Operations in Hutchinson Kan.*, FD 35459 (STB served July 12, 2012), a case cited by the Board in the May 22 Decision,¹⁸ the Board explained that the requirement that the seller retain a permanent “exclusive” easement to continue to fulfill the common carrier obligation has no effect on other valid rights to use the line.¹⁹ Rather, it is intended “to mean that the carrier holding the easement will remain as the exclusive common carrier for that rail line, at least *vis-à-vis* the non-carrier acquiring the underlying rail assets.” *Id.* at 10, n. 14.

The exclusive permanent easement retained by HCRRA to continue to fulfill the common carrier rights and obligations on the Kenilworth Corridor *vis-a-vis* the Council has no effect on CP’s and TCWR’s pre-existing rights under the Kenilworth Corridor trackage rights agreement (“KC TRA”). Consistent with this principle, the Board has previously approved a *State of Maine* transaction where the selling carrier retained a “permanent, irrevocable, and exclusive freight

¹⁸ The second case cited by the Board within Question 4, *City and County of Denver – Acquisition Exemption – Western Stock Association in the City and County of Denver, Colo.*, FD 36157 (STB served March 23, 2018), is not applicable to these facts. In that case, unlike HCRRA here, the seller of the line did not reserve an exclusive, permanent easement to continue to fulfill the common carrier obligations. In fact, it did not reserve any easement to provide rail service. Instead, the purchaser City and County of Denver sought approval under *State of Maine* principles by asserting the common carrier obligations associated with the line would be fulfilled by a short line railroad via its existing *non-exclusive* freight rail easement. Moreover, unlike here, the short line’s easement in *City of Denver* was subject to the seller’s reservation of “all rights to use the existing tracks . . . to satisfy common carrier obligations with respect to the Tracks until abandonment authority is obtained from the Surface Transportation Board” and the requirement that the short line “accepts the Tracks subject to the obligations of other entities to provide common carrier services” *Id.* at 2. This language raised questions with the Board whether the selling railroad was a common carrier that was required to retain an exclusive, permanent, and irrevocable easement in order to pass muster under *State of Maine* and its progeny. The Board also asked the separate question of whether the reservations in the short line’s easement would permit the seller to unreasonably interfere with the short line’s operations. This too, is inapposite from the facts of this proceeding, where HCRRA’s reservation of an exclusive easement for common carrier operations is made expressly subject to TCWR’s easement on the Kenilworth Corridor.

¹⁹ In *V&S*, the other right to use the line was private contract carriage, but the Board also discussed that such use could also include commuter rail operations, as long as neither subsequent use unduly interfered with the seller’s reserved common carrier operations over the line.

easement” over the line despite the fact that another railroad possessed pre-existing operating rights on the subject line to which the transaction documents were made subject. *Virginia Port Authority – Acquisition Exemption – Norfolk and Portsmouth Belt Line RR Co.* FD 35532 (STB served August 1, 2011) (“*Virginia Port Authority*”), at 4 (where short line was selling carrier and Norfolk Southern Railway (“NS”) had existing trackage rights on the line).

Moreover, the existence of a second easement holder on a line of rail has no effect on the second prong of the *State of Maine* test, which is whether the transaction documents on their face give the purchasing non-carrier undue control over the ability of the selling carrier to perform the common carrier obligations it has retained through the permanent, exclusive easement. In *Virginia Port Authority*, the Board concluded that the terms of the transaction documents between the selling carrier and the purchasing non-carrier would not result in the Port interfering with the selling carrier’s ability to fulfill its common carrier obligations, and so the proposed transaction did not require Board authorization under 49 U.S.C. §10901. *Id.* at 5. No analysis was conducted of the potential effect of the proposed transaction on NS’s pre-existing trackage rights, the Board instead simply noting that “[t]he Operating Agreement states that use of the Line is also subject to operating rights of NSR, pursuant to an operating rights agreement between NPBL and NSR.” *Id.* at 4, n. 9 (record cite omitted). This is precisely the same process followed by HCRRA and the Council in their transaction documents, all of which are made expressly subject to TCWR’s rights under the Kenilworth Corridor TRA.

As the Board points out in the May 22 Decision, TCWR was granted a railroad easement over the Kenilworth Corridor in conjunction and consistent with the non-exclusive overhead trackage rights and other rights it received under the KC TRA. The easement conveys no additional property rights to TCWR other than what rights it obtained under the KC TRA. As

such, TCWR's easement has always been subject to several complementary uses. For example, CP was also granted non-exclusive overhead trackage rights, over the Kenilworth Corridor.²⁰ And, of course, the TCWR easement on the KC Corridor was and is subject to the HCRRA's right and obligation to provide any needed common carrier rail freight service and to ensure that there is no interference with TCWR's ability to operate pursuant to the trackage rights agreement. As such, the easement is simply a memorialization in a document filed with the Minnesota land records in furtherance of the trackage rights that are similarly memorialized in the KC TRA and can in no way be seen as inconsistent with the easement HCRRA retained to assure that HCRRA can exercise its common carrier obligations if local service is requested or if some action is necessary to preserve the trackage rights of TCWR or CP over this corridor.

The mere fact that railroads other than the selling carrier²¹ in a proposed *State of Maine* transaction have rights to use the line at issue should have no effect on the *State of Maine* analysis.²² This is because the analysis is limited to determining whether a particular transaction involving the sale of the assets of a line or railroad subject to the Board's jurisdiction requires Board authorization pursuant to 49 U.S.C. §10901. *Florida Department of Transp. – Acquisition Exemption – Certain Assets of CSX Transportation, Inc.*, FD 35110 (STB served December 15,

²⁰ CP has not exercised those rights in many years, but it nevertheless has neither expressed an objection to the transaction proposed by HCRRA and the Council, nor complained that this or the SWLRT Project would result in undue interference with CP's rights under the Kenilworth Corridor TRA. Moreover, TCWR has no easement on the Bass Lake Spur.

²¹ As explained above, HCRRA's legal status for purposes of the *State of Maine* analysis is the selling "carrier."

²² One of TCWR's unusual claims is that it purportedly possesses the common carrier obligation on the Kenilworth Corridor and Bass Lake Spur due to its trackage rights. (TCWR Initial Comments, filed April 24, 2018 at 16-17.) The law is clear, however, that the granting of trackage rights does not somehow divest the landlord common carrier of its common carrier rights and obligations. *Eric Stohmeyer and James Riffin – Acquisition and Operation Application – Valstir Industrial Track in Middlesex and Union Counties, N.J.*, FD 35527 (STB served May 14, 2012); *Southern Pacific Transportation Co. – Trackage Rights Exemption – The Houston Belt & Terminal Railway Co.*, FD 33461 (STB served Dec. 21, 1998).

2010), at 2, n. 3 (*State of Maine* cases do not entail whether Board has jurisdiction over the line at issue). Under the *State of Maine* principles, Board approval is not required if, on the face of the relevant transaction documents, the selling carrier has retained a permanent, exclusive easement to continue to fulfill the statutory common carrier obligation attached to the line and the terms of the transaction documents do not permit the acquiring non-carrier to unduly interfere with the seller's ability to fulfill those obligations. *Id.* at 5. Consequently, the proposed transactions cannot proceed without receiving Board authorization or amending of the transaction documents to omit the language that gives the purchaser undue control over the seller's ability to provide common carrier service. *Santa Cruz Regional Transportation Comm'n – Petition for Declaratory Order*, FD 35491 (STB served August 22, 2011).

Accordingly, the existence of TCWR's easement on the Kenilworth Corridor has no effect on the *State of Maine* analysis.

Issue 5: – Operational Impact on State of Maine Analysis

The Board also asks: “Should operational impacts on TCW be considered as part of the *State of Maine* analysis? If so, should they be considered as a result of treating TCW as the *State of Maine* ‘carrier,’ as opposed to HCRRA? Alternatively, should they be considered due to TCW's status as an overhead trackage rights operator? What specific operational impacts would the transactions have on TCW, if any -- for example, due to loss of sidings or due to the narrowness of the corridor and shared uses?”

Consistent with the foregoing discussion in response to Issue 4, the operational impacts of the proposed transactions on TCWR should not be considered “as part of” the Board's *State of Maine* analysis of the proposed transactions. That analysis is limited to the narrow question of whether, as between HCRRA and the Council, the transaction documents meet the *State of Maine*

requirements and permit the sale of the track assets to the Council without requiring Board authorization.

The limited purpose of the *State of Maine* analysis does not make it conducive to a detailed consideration of the impact of the proposed transactions on TCWR's operations (or any third party with rights to use a line in a *State of Maine* transaction). Not surprisingly, the Council has located no instances where the Board or its predecessor the ICC applied the *State of Maine* rules in this fashion and TCWR has cited no authority supporting a contrary view.

TCWR does not own any of the rail assets of the Bass Lake Spur or Kenilworth Corridor, so there is no transaction with TCWR involving a line of rail to be analyzed under either prong of the *State of Maine* test. Nor does TCWR hold the common carrier obligation to provide service over the subject lines, so it cannot retain an exclusive permanent easement to continue to provide that service. TCWR is obviously not the "selling carrier" in any legal sense. Yet, if the Board were to review the "operational impacts" on TCWR "as part of" the "undue interference" prong of a *State of Maine* analysis, this would essentially be treating TCWR as a carrier interested in conveying freight assets it owns, which is not the case here. In summary, the operational impacts on TCWR should not be considered "as part of" the *State of Maine* analysis of HCRRA's and the Council's transactions.

The foregoing does not mean that the Board is precluded from reviewing the potential effects of the proposed transactions on TCWR's operations even if the Board ultimately concludes (as it should) that HCRRA's and the Council's transaction meet the criteria of *State of Maine*. The question of whether the transaction will result in unreasonable interference with TCWR's operations is a separate inquiry TCWR could have raised pursuant to 49 U.S.C. § 11101. Such a claim would be asserted by TCWR in its status as an overhead trackage rights holder. *See V&S,*

supra, where (in a decision not involving a *State of Maine* jurisdictional question) the STB first determined the respective rights of the parties, and then engaged in a separate analysis of whether the exercise of those rights unduly interfered with the common carrier rights and obligations on the rail line. *V&S* at 12, citing 49 U.S.C. §11101. See also, *Maumee & Western RR Co. and RMW Ventures LLC – Petition for Declaratory Order – CSX Transportation, Inc., Crossing Rights at Defiance, OH*, FD 34527 (STB served May 9, 2007) (in dispute between two railroads, “Under 49 U.S.C. 11101(a), every rail carrier subject to the jurisdiction of the Board has a common carrier obligation to ‘provide[] transportation service on reasonable request.’ Neither a public or private entity may interfere with a carrier’s ability to fulfill its common carrier obligation by severing a carrier’s line without Board authorization.”).

While consideration of TCWR’s allegations of interference with its operations should not be part of the *State of Maine* analysis, the Board’s separate consideration of its claims could include a review of the transaction documents to determine if, on their face, they permit HCRRA and/or the Council to unreasonably interfere with TCWR’s operations despite the multiple provisions stating that the transaction is subject to TCWR’s existing rights.²³ That is clearly not the case here, as the documents are replete with commitments that there will be no such interference.²⁴

Such an inquiry into allegations of interference is, in any event, premature at this point. HCRRA and the Council have taken great pains to show how and why TCWR’s operations will not be affected. Until any such impact occurs, such an analysis is premature and would be based on the wholly unfounded premise that HCRRA and the Council plan to disrupt TCWR’s ability to

²³ For example, in *V&S*, the Board strongly implied that the existence of a permanent, exclusive easement is an indicator of a lack of undue interference, *V&S* at 13, note 21. The Council also submits that the multiple references in the agreements that the transactions will not interfere with TCWR’s existing trackage rights should be considered another strong indicator that there will be no undue interference.

²⁴ HCRRA Freight Rail Operating Easement and Consent to LRT, sections 2.2.2, Attachment 2, Exhibit 4 to the PDO; Bass Lake Spur Freight Rail Easement Agreement, section 7.2 Attachment 3 at Exhibit C to the PDO.

provide overhead service. The course of dealings throughout the negotiations that preceded TCWR's precipitous withdrawal from the discussion, and the documents submitted to this Board, together confirm that the intent of the Council and HCRRA is precisely the opposite. In addition to the words in the transactional documents, the facts are that there will be no unreasonable interference with TCWR's operations resulting from the construction, operations or maintenance of the SWLRT. Although TCWR has to date provided no support for its allegations, it appears that TCWR's main complaints about possible interference relate to the mere existence of the SWLRT in the adjacent property,²⁵ the fact that there will be scheduled outages of freight rail service to accommodate the construction of the LRT, and that the project necessarily requires removal of approximately 16,000 feet of sidings, thus allegedly interfering with TCWR's ability to operate over the corridors. Insofar as the construction outages are concerned, these have all been scheduled and developed in coordination with and the consent of TCWR. Most outages will be about four hours and will be scheduled around TCWR's operations. Even the scheduled 36-hour outage is planned over a 3-day holiday weekend, again with TCWR's knowledge and agreement, to minimize the adverse effect on TCWR's operations. (Alexander V.S., at ¶ 20, fn. 3.) These minor outages, which will take place over a 4-year period, will not adversely affect the service TCWR provides to its customers.

Moreover, even if the outages had some temporary impact that prevented 24 hours per day, 7 days per week continuous operations, that is not uncommon in the freight rail industry. The needs for maintenance and rail track improvements are a fact of life for railroads, and there is a not uncommon need to temporarily shut down freight rail tracks for a variety of reasons, such as

²⁵ As noted below, *infra.*, at 36-37, Mr. Alexander provides significant detail of the steps that have been and will be taken to coordinate all activities with TCWR to both design the LRT to avoid physical interference and to minimize disruptions in the future.

installing positive train control apparatus at crossings, repairing culverts and bridges, replacing track, etc. These occurrences do not constitute undue interference with rail operations. *See, e.g. Granite State Concrete Co., Inc. v. Boston and ME Corp. & Springfield Terminal Railway Co.*, FD 42083 (STB served Sept. 24, 2004). Rather, these scheduled outages are the equivalent of a designated operating window, which the Board has held to be reasonable. *Mass. Dept. of Transp.—Acquisition Exemption—Certain Assets of CSX Transp., Inc.*, FD 35312 (STB served May 3, 2010); *Metro Regional Transit Authority—Acquisition Exemption—CSX Transp., Inc.*, FD 33838 (STB served Oct. 10, 2003).

Similarly, TCWR’s complaint about the loss of the side tracks is not legally or factually well taken, as the only thing TCWR will lose is the ability to store rail cars on the sidings, which service it has no right to provide in the first place. *See Bass Lake Spur Trackage Rights Agreement (“BLS TRA”), Section 1.5: “[TCWR] shall not have the right to do any of the following on the Subject Trackage: (a) Except as permitted in Section 1.3(b), (d) and (h) hereof²⁶, setout, pickup, or store equipment or switch industries upon all or any part of the Subject Trackage, except as necessary for handling locomotives, cabooses or cars bad ordered enroute.”* (emphasis added)

From the outset of its decision to support the retention of freight rail in use these corridors, the Council had concluded that the planned removal of approximately 16,000 feet of sidings – and leaving an additional 11,600 feet intact for TCWR’s use in switching or setting out cars or for parking trains to avoid train meets coming from the opposite direction – would not materially interfere with TCWR’s overhead service.²⁷ Once TCWR commenced its public relations

²⁶ Nothing in these other sections provides an exception from the prohibition on storing equipment.

²⁷ *See* Section 2.1 of the BLS TRA which gives CP the right to make, inter alia, “any removals to or along the Subject Trackage which [CP] deems necessary...provided that any such change shall not materially interfere with [TCWR’s right to use the Subject Trackage for the purposes defined... [in the TRA].” *Id.*

campaign alleging, incorrectly, that this siding removal would jeopardize its service, the Council engaged Robert Mulholland, a rail operations expert, to review TCWR's use of the sidings both prior to and post-LRT construction to determine whether the removal of these sidings would have any material effect on TCWR. The Mulholland V.S. details the materials he reviewed, the nature of his site visit of the Bass Lake Spur and each of the various sidings located there, the type of cars he personally saw on the sidings during his visit and the computer analysis he did using the Rail Traffic Controller that is commonly used in proceedings before the Board to model rail operations.

Mr. Mulholland conducted six (6) separate analyses, using both the volume of trains moving over the line during the one-month period of January 16 - February 16, 2018 and a volume increased by 10%. His model reviewed both the existing and post-construction infrastructure, the latter meaning that there would be no storage for the plastic pellets TCWR stores pursuant to a contract it has with a shipper, particularly one that is not even on its line. In summary, Mr. Mulholland concluded that there was sufficient excess capacity on the Bass Lake Spur, as is demonstrated by TCWR's current unauthorized use of the sidings for the storage of plastic pellets for Nova Chemicals. If that unauthorized storage is eliminated, the remaining sidings are capable of handling TCWR's traffic. Consequently, the planned removal of existing sidings would not result in train conflicts, and transit times would not increase for any class of traffic after the construction is completed. Accordingly, as long as TCWR does not continue to engage in providing storage in direct contravention of the BLS TRA, its operations will not be adversely affected by the removal of the sidings.

Issue 6. – Operations and Maintenance Agreement

In its May 22 Decision, the Board also directed the Council and HCRRA to submit an Operations and Maintenance Agreement, which those parties filed with the Board on June 5, 2018.

The Council elaborates here on the relevance of that agreement to the five questions posed by the Board, since that agreement has not been previously addressed by the parties.

The terms of that agreement, as well as the transactional documents submitted originally as part of the Petition for Declaratory Order, confirm that the Council will not be able to unduly interfere with HCRRA's exercise of its common carrier obligations on the two segments after the transaction is consummated. Moreover, the reality is that there has been no local freight service over the corridors for over 25 years in one instance and at least 15 years in the other and the only future rail freight use of the tracks is expected to be TCWR's overhead operations. Thus, there is no current use of the common carrier obligations held by HCRRA and CP with which the Council could conceivably interfere.

Insofar as the separate issue of TCWR's overhead service is concerned, the terms of the trackage rights agreement between HCRRA, TCWR and CP make it clear that for the Kenilworth Corridor, TCWR will have (1) exclusive management, direction and control of the Corridor; (2) the obligation to perform all construction, derailment and wreck clearing, maintenance, repair and renewal of the trackage (including improvements); (3) the right to employ all persons necessary to discharge these functions, (4) control over any use of this track by CP; and (5) control over the dispatch of all freight rail traffic on the line.²⁸ Similarly, with respect to the trackage rights agreement between CP and TCWR for the Bass Lake Spur, which CP will assign to HCRRA as a part of these transactions, CP has (1) exclusive management, direction and control of the Bass Lake Spur; (2) the obligation to perform all construction, derailment and wreck clearing, maintenance, repair and renewal of the trackage (including improvements); (3) the right to employ all persons necessary to discharge these functions, (4) control over any use of this track by TCWR;

²⁸ KC TRA, at Section 4, Attachment 2 at Exhibit 4d to the PDO.

and (5) control over the dispatch of all freight rail traffic on the line.²⁹ And, as noted above, CP has agreed to continue to discharge these responsibilities after closing until June 30, 2019, at which point either CP or some other qualified 3rd party will be engaged to provide that service on behalf of HCRRA.

Consequently, there is no present need for local freight service, and the existing trackage rights agreements will continue to govern the use, maintenance, management of the line, dispatch and improvements to the freight rail track and protect both the existing trackage rights operations and any future need for local freight rail service. As such, the need to demonstrate that freight rail operations will not be jeopardized by the proposed transaction has clearly been satisfied in the present proceeding. *Compare Md. Transit Admin. – Pet. For Declaratory Order*, FD 34975 (STB served Oct. 9, 2007).

Moreover, the documents submitted with the Petition demonstrated that the transaction was structured so that the Council would not interfere with HCRRA's ability and responsibility to ensure the continuity of freight rail operations. For example, prior to closing, HCRRA reserves a permanent, irrevocable, exclusive, transferable and assignable freight rail operating easement giving it the exclusive right to exercise the rights and obligations of a rail common carrier.³⁰ Among other things, HCRRA recognizes that it cannot discontinue or abandon freight rail service without STB authorization.³¹ And, although HCRRA consents to the Council's use of the property in the corridors adjacent to the freight rail easement area to construct, operate and maintain the

²⁹ BLS TRA, at Section 2, Attachment 2 at Exhibit J(C) to the PDO.

³⁰ HCRRA Freight Rail Operating Easement and Consent to LRT, Attachment 2, Exhibit 4, Sections 2.1 & 2.2.

³¹ *Id.*, 2.1.3.

LRT, that is conditioned on the Council's not unreasonably interfering with HCRRA's operations as a rail common carrier or TCWR's operations under its trackage rights agreements.³²

As noted above, the Operations and Maintenance Agreement filed in response to the May 22 Decision memorializes additional issues that have been addressed by these parties, as well as TCWR and CP, that were intended to ensure that the construction, operation and maintenance of the LRT would not unreasonably interfere with HCRRA's common carrier obligations or the continuance of TCWR's overhead service. The agreement specifically recognizes that HCRRA (1) has the exclusive obligation, as the common carrier, to provide or ensure that any local freight service is provided; (2) will remain a party to the Kenilworth Corridor TRA; (3) will acquire the exclusive, permanent and irrevocable easement on the Bass Lake Spur and succeed to CP's rights and obligations for the BLS TRA and (4) will ensure that the LRT will not interfere with freight rail operations. (Operations and Maintenance Agreement, Section 2.1(a) & (b).) In carrying out those obligations, HCRRA has requested the Council to develop freight/LRT coordination protocols that provide, among other things:

- Establishing a management plan covering all maintenance for the freight rail track;
- Establishing a safety plan to cover areas of concern relating to the interaction of freight rail and LRT in the corridors;
- Establishing flagging procedures pertaining to all maintenance of freight rail track for both the Kenilworth Corridor and Bass Lake Spur;
- Establishing separate flagging procedures for the LRT to avoid interference with freight rail operations;
- Ensuring that there will be annual inspections of the freight rail facilities by qualified third parties. (*Id.* Section 2.1(c.)
- Ensuring that all local freight service is conducted in compliance with federal and state safety regulations. (*Id.* Section 2.2(d).)

³² *Id.*, 2.2.2.

The agreement also recognizes the Council's responsibility to manage and control all activities related to the construction, operation and maintenance of the LRT. (*Id.* Section 2.2(a).) With respect to the freight rail service, the agreement memorializes the Council's obligation under the JPA to secure qualified third parties both to act as designated operators on HCRRA's behalf for any necessary local freight service and/or to carry out HCRRA's obligations under the existing trackage rights agreements. (*Id.* Section 2.2(b).) And, the agreement similarly sets forth the Council's obligations to:

- Ensure that its activities will not cause unreasonable interference with freight rail operations;
- Ensure that LRT activities are coordinated with CP and TCWR;
- Develop and implement protocols to secure LRT and freight safety with respect to LRT construction, operation and maintenance;
- Install and maintain fencing adequate to separate the freight rail track from an adjacent bicycle/pedestrian trail; and
- Coordinate LRT inspections with TCWR overhead activities to minimize interference. (*Id.* Sections 2.2(b)-(e).)

In addition, after noting in Section 4 who has the responsibility for dispatching rail freight in the corridors as noted above, the Agreement sets forth a detailed list of coordination protocols that the Council has developed, vis-à-vis constructing the LRT in the right-of-way adjacent to the freight rail tracks. (*Id.* Section 5.) These protocols were specifically established to ensure that all construction of the LRT would not unreasonably interfere with TCWR's overhead freight operation. A key point of these protocols is that all the myriad of activities that will go into the LRT construction will be subject to coordination with TCWR, even to the point of providing a full-time coordinator to liaison between the Council, HCRRA and TCWR.

This Operations and Maintenance Agreement is not an aspirational document, but instead memorializes carefully considered issues and requirements that have been developed and negotiated between all affected parties, including TCWR. As detailed in the Alexander V.S., there

was an extensive environmental review of the SWLRT Project in general and, specifically, of the route for the LRT extension. Ultimately the decision was made, with considerable support from TCWR and several of the shippers who have filed comments in this proceeding, to accept the so-called “co-location” alternative (*i.e.*, to construct and operate the LRT adjacent to the freight rail tracks in these corridors).³³

Mr. Alexander recounts that TCWR was actively involved in the technical discussions resulting in implementing changes to the final design of the LRT and the associated adjustment of freight rail tracks that was necessary to accommodate the light rail tracks, as well as developing an agreed upon schedule of planned outages detailing the infrequent freight rail service interruptions that would be required during the LRT construction. There were numerous meetings and other communications between the Council and TCWR on this subject, with the Council even paying TCWR \$500,000 to compensate it for its inputs and technical assistance. Similarly, TCWR and the Council also negotiated the terms of an operating and maintenance agreement post-closing as well as a construction agreement addressing the parties’ obligations during the construction period. Although TCWR will ultimately not take on the common carrier obligation on this corridor, the Council incorporated the protocols established in the construction agreement into its SWLRT Project Construction Bid documents and will require the various contractors to abide by these terms. Moreover, the Council will establish a joint working group charged with coordinating issues with TCWR and BNSF Railway relating to the construction and operation of the LRT.³⁴

³³ Alexander VS, ¶¶ 5-7 and fn. 2.

³⁴ *Id.*, ¶¶ 10-15. When it solicited the support of shippers and local communities in this proceeding, TCWR neglected to tell them that it had in fact consulted with the Council to avoid disruption during the planned outages, that the parties had worked through concerns about the proximity of the LRT to the freight rail or that it and the Council had in fact negotiated both construction and operations agreement, but that TCWR had withdrawn its support when it could not persuade the Council to capitulate to its new business demands. (*See* Exhibit 2 and the draft inaccurate text it provided when soliciting public support.) As noted above, the commenting parties were clearly unaware of those misrepresentations

Accordingly, the Council and HCRRA have carefully worked out and memorialized how operations and maintenance will be conducted on the Kenilworth Corridor and Bass Lake Spur in a manner consistent with the requirements in any *State of Maine* transaction. With respect to day to day operations, nothing will change and TCWR operations will continue to be conducted in accordance with the existing trackage rights agreements. Once construction of the LRT commences, the Operations and Maintenance Agreement, coupled with the protocols that were negotiated and developed with TCWR and the oversight of the joint working group, will ensure that there will no unreasonable interference with freight rail service over these tracks.

III. CONCLUSION

The May 22 Decision sought additional information from the parties and public comment on the transaction proposed by HCRRA and the Council due to “the significance of the transactions at issue here and the widespread public interest in them.” May 22 Decision at 2. Indeed, as the Council has previously explained, the SWLRT Project is a \$2 billion project that has been studied and planned for over a decade and, when constructed, will be the largest public works project constructed in the State of Minnesota. However, this project is on a critical timeline, whereby immediate STB approval is a prerequisite to other project decisions and other federal approvals.

The additional information and evidence provided by the Council in this submission should remove any doubts the Board may have held that the transactions proposed by HCRRA and the Council clearly meet the *State of Maine* standards, and that therefore the sale of the freight rail assets of the Bass Lake Spur and the Kenilworth Corridor to the Council do not require Board authorization. This submission also provides further confirmation that the complaints of TCWR regarding the potential of the transactions to unreasonably interfere with its operations are highly exaggerated and unsupported, and that HCRRA and the Council have bent over backwards to

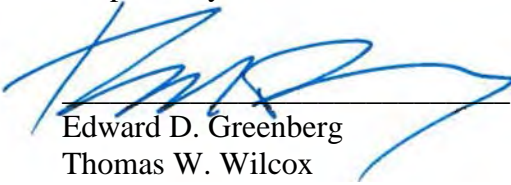
accommodate the concerns TCWR raised during the course of the parties' long discussions, as opposed to the overblown, self-serving and financially-motivated claims it has made in this proceeding and to its customers.

The Council and HCRRA hope that the mediation will help resolve any remaining issues TCWR may have. Nonetheless, those issues have no relevance to the *State of Maine* analysis that is requested here. HCRRA is a rail carrier and will have the common carrier obligation and ability to satisfy those responsibilities. And, the Council will not be able to interfere with HCRRA's rights, but rather is charged with facilitating them. Board approval of the Council's acquisition of the freight rail assets, accordingly, is not required.

Finally, deciding that no Board authorization is needed for a transfer of the assets of a line of rail does not change the fact that the Board has jurisdiction over the parties and the freight rail operations that are conducted subsequent to the transfer. To the contrary, the Board will continue to have plenary jurisdiction over the provision of any local freight service over these corridors should it ever be requested, as well as the exercise by TCWR of its overhead trackage rights. To the extent any party believes that there has been an unreasonable refusal by HCRRA to provide service or there has been any unreasonable interference with TCWR's overhead service, those claims can be presented to the Board for resolution if and when necessary.

Accordingly, and as these transactions satisfy the well-defined *State of Maine* criteria, and as TCWR's contentions to the contrary have no merit, the Board should promptly grant the petition for declaratory order submitted by the Council in this proceeding and release the housekeeping stay that was issued in Docket No. FD 36177 pertaining to HCRRA's Notice of Exemption to acquire the common carrier obligation on the Bass Lake Spur.

Respectfully submitted,



Edward D. Greenberg
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Special Counsel for the Metropolitan Council

Ann Bloodhart, Esq.
Metropolitan Council
390 Robert Street North
St. Paul, MN 55101
Telephone: 651-602-1105

Dated: June 27, 2018

Exhibit 1

From: Tina Ryberg <tRyberg@TCWR.NET>
Date: 5 June 2018 at 5:09:49 PM GMT-5
Cc: Mark Wegner <mWegner@TCWR.NET>, Dave Long <dLong@TCWR.NET>
Subject: RE: Update from TC&W Regarding Southwest Light Rail Project

Dear Customer & Community Leaders,

A couple tidbits for those that are submitting letters yet...

- ? There are a few words or phrases shown in brackets in the last paragraph of the draft letter we sent you. In order to personalize your letter, please choose the one bracketed word or phrase that you feel best fits your position and then prior to submitting your letter to the STB please be sure to delete the bracketed words/phrases you did not select.

- ? You may receive a response from the STB asking if you want your letter to be entered into the official docket. If you do receive this response, please proceed with having it entered into the official case record, and follow the directions they provide in doing so. I have a couple additional email address (i.e. "more expeditious means of delivery") for some of the parties on record if that would be helpful as well.

With much appreciation,

Tina Ryberg
Twin Cities & Western Railroad
Glencoe, MN
612-655-3405

From: Tina Ryberg
Sent: Friday, June 01, 2018 2:59 PM
Cc: Mark Wegner <mWegner@TCWR.NET>; 'Dave Long' <dlong@tcwr.net>
Subject: Update from TC&W Regarding Southwest Light Rail Project

Dear Customers & Community Leaders,

Thank you to all of you who sent letters of concern to the Surface Transportation Board (STB) – your letters made a tremendous difference!

Because of your letters, the STB made a decision on May 22 (see attached link):

<https://www.stb.gov/decisions/readingroom.nsf/9855c1fb354da09b85257f1f000b5f79/a82bc6a0ce6d04c2852582950038829d?OpenDocument>

In its decision, the STB opened up a period for public comments which are due in to the STB by June 21.

With help from TC&W's Washington DC Counsel, I am attaching two sample letters (one for cities & counties, the other for shippers) which spell out significant concerns and how these concerns ought to be addressed:

- 1) As a condition for Met Council proceeding with the Light Rail project, a Construction Agreement acceptable to TC&W needs to be executed between TC&W & Met Council.
- 2) As a condition for Met Council proceeding with the Light Rail project, an Operations & Maintenance Agreement acceptable to TC&W needs to be executed between TC&W & Met Council.
- 3) As a condition for Met Council proceeding with the Light Rail project, satisfactory arrangements need to be made between Met Council and TC&W for Met council to adequately fund 16,000' of side track capacity (that TC&W uses daily to serve our customers) that Met Council will be removing as part of the Light Rail project.

I am sensitive to County Board meetings occurring next week, so I wanted to make sure this was sent out today.

Please personalize to the degree you feel comfortable. (If you are a City or a County, you can personalize with, for example, the name(s) of the rail shippers in your area. If you are a shipper, you can personalize with the number of employees, \$ impact you have, etc.)

You can submit your letters on-line to the STB at [stb.gov](https://www.stb.gov/stb/Other_Submissions.nsf/wCorrespondence?OpenForm), under e-filing/other submissions: https://www.stb.gov/stb/Other_Submissions.nsf/wCorrespondence?OpenForm (docket # is FD 36178), or you can send a hard copy letter to the STB directly.

Thank you VERY much for your support and help – whatever the STB decides will have a permanent impact on TC&W's ability serve you efficiently and effectively, and they need to hear from you!

Sincerely,

Mark

Mark Wegner
President & CEO
Twin Cities & Western Railroad Company
Glencoe, MN

This e-mail may contain information that is privileged, confidential or otherwise protected from disclosure. If you are not the intended recipient or otherwise have received this message in error, you are not authorized to read, print, retain, copy or disseminate this message or any part of it. If you are not the intended recipient or otherwise have received this message in error, please notify us immediately by e-mail, discard any paper copies and delete all electronic files of the message.

SHIPPER LETTERHEAD

VIA E-FILING

Cynthia T. Brown, Chief
Section of Administration, Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington DC 20423-0001

Re: FD 36178, Metropolitan Council - Petition for Declaratory Order

Dear Ms. Brown:

_____ hereby files these comments in response to the Surface Transportation Board's ("Board or STB") May 22, 2018 decision permitting public comments on the Petition for Declaratory Order ("Petition") filed on April 4, 2018 by the Metropolitan Council ("Met Council"). In that Petition, Met Council requests the Board find that certain proposed transactions involving Met Council, Hennepin County Regional Railroad Authority ("HCRRA") and Soo Line Railroad Company d/b/a Canadian Pacific ("CP") would not require Surface Transportation Board ("Board" or "STB") authorization and would not result in Met Council becoming a rail common carrier. As relevant to us and our concerns, the Board's decision specifically requested comments on whether operational impacts on Twin Cities & Western Railroad Company ("TCW") should be considered as part of the Board's analysis. The unequivocal answer to that question is "yes."

_____ is an active shipper on TCW's line. TCW serves our facility at _____. It currently [originates] or [terminates] approximately ____ carloads a year at that facility. All of these carloads traverse some or all of the rail lines that are involved in this proceeding. Efficient and time sensitive rail service is a significant part of our business model. Any activities undertaken by Met Council that could result in a reduction in transit times or delayed shipments would have a financial impact on our bottom line.

With this in mind, _____ has two main operational concerns. First, as we understand from public records related to the Southwest Light Rail Transit Project ("Project") and our discussions with TCW, the Project will involve a four year construction timeline. As part of that process, we understand that the rail line will be relocated and realigned. In order to do that, by necessity, the rail line will have to be taken out of service from time to time during certain construction periods. We also understand that in the future, light rail trains and freight trains will be operating within 25 feet of each other. These two factors give us great concern that our shipments will be delayed during the construction period or that future crashes, without adequate restoration of service plans, could result in the line becoming unusable during the crash clean-up phase, delaying our rail service. These concerns could be alleviated if there was some sort of construction and operation agreement between Met Council and TCW. We understand,

however, that there is no such current agreement. The only existing agreements are trackage rights agreements governing TCW's overhead operations. From what we understand, those agreements were entered into many years ago and do not contain any provisions dealing with what happens during construction of a parallel passenger transit system in the same railroad corridor or how the corridor should operate in the future when you have both passenger and freight operations in the same corridor. To avoid any operational impacts during the construction phase or during future operations, _____ believes that as a condition to any STB approval, Met Council should be required to enter into a construction and operation agreement with TCW that would protect shippers' transit times during the construction phase, provide for safety plans to prevent future accidents that could delay rail service, and sets forth the obligations of the parties with respect to the future shared usage of the corridor.

Our second major operational concern involves Met Council's plans to remove a significant number of the existing sidetracks currently used by TCW. We understand that those sidetracks are an integral component of TCW's service to/from our facility. TCW has informed us that without those sidetracks or the ability to use replacement tracks somewhere else nearby, which do not currently exist, our transit times will be significantly impacted. This will cost us both time and money. This is unacceptable. Either the tracks should not be removed, or if they are removed in order to accommodate light rail, Met Council should be required to work with TCW to come up with a plan for the replacement of those tracks in a manner and location that would not adversely impact rail service, and since it is Met Council's plans that are causing the disruption, they should pay all costs associated with the replacement side tracks. The replacement side tracks should be built and in place before the existing sidetracks are torn up. Otherwise, there could be significant operational disruptions in our service.

_____ [does not take a position on] [does not oppose] [supports] the light rail Project. Our concerns have to do with the operational and safety impacts that will occur due to the realignment of the tracks that TCW operates over and the removal of the sidetracks that TCW currently uses to provide us service. Those concerns must and should be addressed in any STB decision. If not, there could be significant operational problems and financial impacts on our business if the Project moves forward.

Respectfully submitted,

June __, 2018

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of these comments via prepaid first class mail to all parties of record in this proceeding or by more expeditious means of delivery.

Dated this __ day of June, 2018.

CITY OR COUNTY
LETTERHEAD

VIA E-FILING

Cynthia T. Brown, Chief
Section of Administration, Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington DC 20423-0001

Re: FD 36178, Metropolitan Council - Petition for Declaratory Order

Dear Ms. Brown:

_____ hereby files these comments in response to the Surface Transportation Board's ("Board or STB") May 22, 2018 decision permitting public comments on the Petition for Declaratory Order ("Petition") filed on April 4, 2018 by the Metropolitan Council ("Met Council"). In that Petition, Met Council requests the Board find that certain proposed transactions involving Met Council, Hennepin County Regional Railroad Authority ("HCRRA") and Soo Line Railroad Company d/b/a Canadian Pacific ("CP") would not require Surface Transportation Board ("Board or STB") authorization and would not result in Met Council becoming a rail common carrier.

There are many active TCW shippers located in our county. These shippers depend upon efficient and time sensitive TCW service to/from the Twin Cities for export/import by the various river ports or for interchange with other carriers. We are fully aware of the Southwest Light Rail Transit Project ("Project"). The point of our comments is not to focus on whether we support or oppose the Project itself, but rather, we are concerned that some of the Project related activities undertaken by Met Council could result in a reduction in TCW's transit times or delayed shipments from the shippers located in our region. If this happened, there could be significant financial impacts on our shippers and the regional economy.

From what we understand, the light rail Project will involve a four year construction timeline. As part of that process, we understand that the existing rail line that TCW operates over will be relocated and realigned. In order to do that, by necessity, part of the rail line will have to be taken out of service during certain construction periods. We also understand that Met Council plans to remove a significant number of existing sidetracks currently used by TCW as part of the Project. TCW has informed us that these sidetracks are an integral component of TCW's service to/from the Twin Cities and that without those sidetracks or the ability to use replacement tracks somewhere else nearby, which do not currently exist, our shippers' transit times will be significantly impacted. This will cost our shippers both time and money.

These two factors give our shippers great concern that their shipments will be delayed during the construction period. They are also concerned that without the existing sidetracks (or the ability to use replacement tracks somewhere else nearby, which do not currently exist), their transit times will be significantly impacted. This will cost them both time and money. This is unacceptable.

These concerns could be alleviated if there was some sort of construction and operation agreement between Met Council and TCW to minimize any service disruptions during the realignment and construction period. Likewise, Met Council should be required to work with TCW to come up with a plan for the replacement of the sidetracks in a manner and location that would not adversely impact rail service, and given that it is Met Council's plans that are causing the disruption, they should pay all costs associated with the replacement tracks. The replacement tracks should be built and in place before the current sidetracks are torn up. Otherwise, there could be significant operational disruptions in service to our shippers.

Accordingly, _____ believes that as a condition to any STB approval of Met Council's Petition, Met Council should be required to enter into a construction and operation agreement with TCW that would protect shippers' transit times during the construction phase, sets forth the obligations of the parties with respect to the future shared usage of the corridor, and requires Met Council to build replacement sidetracks for the benefit of TCW and its shippers. Without such conditions, our shippers could face significant operational problems and financial impacts, which adversely impacts our regional economy.

Respectfully submitted,

June __, 2018

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of these comments via prepaid first class mail to all parties of record in this proceeding or by more expeditious means of delivery.

Dated this __ day of June, 2018.

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DOCKET NO. FD 36178

VERIFIED STATEMENT OF JIM ALEXANDER, P.E.

Background

1. My name is Jim Alexander. I am the Project Director for the Metropolitan Council's Southwest Light Rail Transit project (SWLRT Project). I am a registered professional engineer in the State of Minnesota.

2. The Council is a public corporation and political subdivision of the State of Minnesota and the regional policy-making body, planning agency, and provider of essential services, including public transit, for the Minneapolis-Saint Paul metropolitan region.

3. The Council is managing the design and engineering and future construction of the SWLRT Project that will, when completed, provide light rail transit (LRT) service over 14.5 miles to 16 stations in the cities of Minneapolis, St. Louis Park, Hopkins, Minnetonka, and Eden Prairie. The current SWLRT Project budget is \$2.003 billion which is expected to be funded by federal and local sources. The SWLRT Project expects to begin passenger service in 2023.

4. In order to accomplish this, it is necessary for the Council to acquire (1) a 2.6-mile segment of rail line and rail right-of-way currently owned by the Hennepin County Regional Railroad Authority (HCRRA) referred to as the Kenilworth Corridor and (2) a 6.7 mile-long track and rail right-of-way currently owned by Soo Line Railroad Company d/b/a Canadian Pacific (CP) known as the Bass Lake Spur.¹ These two line segments connect in the west with a line of railroad that is owned and operated by Twin Cities & Western Railroad (TCWR) and in the east with a line owned and operated by BNSF Railway (BNSF).

5. The SWLRT Project went through extensive state and federal environmental review processes in which TCWR participated. The Council assumed responsibility for the SWLRT Project from HCRRA as the local lead agency at the end of

¹ A map of the two line segments is attached as Exhibit A to the Council's Petition for Declaratory Order.

the Draft Environmental Impact Statement (DEIS) comment period on December 31, 2012. The DEIS identified a preferred LRT alignment that included LRT at-grade in the Bass Lake Spur and Kenilworth Corridor and relocated the freight tracks out of the Bass Lake Spur at the CP owned MN&S Corridor (MN&S) in Saint Louis Park, joining the BNSF tracks west of Minneapolis, and bypassing the Kenilworth Corridor all together. Three public hearings were held on the DEIS and approximately 1,000 comments were received (including 75 written comments from TCWR and its supporters²). TCWR strongly opposed the proposed freight relocation shown in the DEIS and raised concerns with the track geometry, operating environments, and increased track distances created by the new proposed track alignment on the MN&S.

6. As a result of the comments received on the DEIS, in 2013 and early 2014, the Council evaluated several existing and potential freight rail options including: 1) freight rail alignments that would co-locate freight rail and the LRT in the Bass Lake Spur and the Kenilworth Corridor (co-location); 2) relocate the freight rail tracks out of the Kenilworth Corridor via the MN&S generally as depicted in the DEIS (relocation), or 3) relocate freight rail tracks out of the Kenilworth Corridor and Bass Lake Spur via other alternative routes in the Twin Cities area. This alignment evaluation included analyses conducted under my supervision, input and recommendations by advisory committees, and input received from the public.

7. As a part of the public input process, TCWR provided comments at the February 5, 2014 Southwest LRT Corridor Management Committee (CMC) meeting, and TCWR and eleven shippers attended the CMC meeting on March 12, 2014, to provide comments on the proposed freight rail locations. TCWR and the shippers implored the CMC to preserve safe, efficient, and economical rail freight service through the Kenilworth Corridor.

² The following entities commented on the DEIS and also filed form comments on TCWR's behalf in this STB docket: Heartland Corn Products, Glacial Plains Cooperative, Carver County, Sibley County, Consolidated Grain & Barge Company, Corona Grain & Feed, County of McLeod, Farmers Cooperative Elevator, Farmer Union Oil Company, Renewable Products Marketing Group, LLC., Renville County, Step Saver, Inc., The Mosaic Company, United Farmers Cooperative, Form A Feed, Granite Falls Energy, LLC., Minnesota Valley Regional Rail Authority, The City of Montevideo, CHS Inc., Southern Minnesota Beet Sugar Cooperative, City of Stewart.

8. In addition to its participation in the public input process, TCWR participated in numerous technical resolution meetings with the Council and other SWLRT Project partners to provide input on the co-location and relocation freight rail alignment options being evaluated by the Council. During this evaluation, TCWR maintained its opposition to relocation alternatives. It should be noted that in early 2014, TCWR commented that one of the alignments developed as part of the relocation analysis met its geometric operating requirements, but noted that further discussions on the economic operating conditions would be necessary if that alignment were to be incorporated into the SWLRT Project.

9. On April 9, 2014, after a year-long process of evaluations, meetings, and public input, the Council adopted the co-location alternative which TCWR and its shippers preferred. The adopted co-location alternative includes a light rail tunnel in the western portion of the Kenilworth Corridor and retention of the freight tracks and the pedestrian/bicycle trail in the Bass Lake Spur and Kenilworth Corridor with some adjustments to the alignment of the freight track and trail to accommodate light rail.

10. On May 22, 2015, the Federal Transit Administration (FTA), with Council assistance, prepared and published a Supplemental Draft EIS (SDEIS) which was required because of design adjustments made to the locally preferred alternative of the SWLRT Project since the DEIS - including those made to freight rail to address TCWR's concerns - that needed to be evaluated for environmental impacts. The SDEIS included: 1) light rail alignment changes in Eden Prairie; 2) site evaluation of the proposed LRT Operations and Maintenance Facility; 3) the retention of existing freight rail service in the Kenilworth Corridor with some modification to freight rail tracks to accommodate light rail; and 4) a light rail tunnel in the Kenilworth Corridor.

11. The SDEIS analysis established co-location of freight rail and LRT in a manner that minimized relocation of a portion of the freight rail tracks in the Bass Lake Spur. The Bass Lake Spur connects to the MN&S in St. Louis Park via a switching wye. As part of the SWLRT Project construction, the Council will remove the northern portion of the switching wye to facilitate the LRT alignment and construct a 'Southerly Connector' to reestablish the connection between the Bass Lake Spur and the MN&S. The Southerly Connector will improve existing freight rail movements between the Bass Lake Spur and the MN&S as compared to the switching wye.

12. As part of the SDEIS analysis, three public hearings were held and over 200 comments were received, including comments from TCWR and some of its shippers.

13. On May 13, 2016, the FTA, with Council assistance, published the Final EIS (FEIS). The FEIS identified co-location of freight and LRT in the Kenilworth Corridor as the environmentally locally preferred alternative. Approximately fifty comments were received on the FEIS including comments from TCWR. TCWR's primary comments on the FEIS related to impacts to its operations resulting from the proximity of freight tracks to LRT tracks and concern over the removal of siding tracks in the Bass Lake Spur. As discussed in paragraphs 17-20 below, the Council and TCWR subsequently engaged in technical discussions to address the operational issues raised by TCWR.

14. On July 15, 2016, the FTA issued the Record of Decision and on August 10, 2016, the Council issued its Determination of Adequacy under state law. There were no challenges to the Record of Decision or Determination of Adequacy.

15. Once constructed, the SWLRT Project will run adjacent to the freight rail on a portion of the Bass Lake Spur and the entire Kenilworth Corridor right-of-way. When constructing the SWLRT Project, the Council will temporarily and permanently adjust portions of the freight rail track on the Kenilworth Corridor and Bass Lake Spur. These adjustments will at their greatest extent result in locating the freight trackage no more than 48 feet from its present location. The adjustment will not alter the milepost designations of either the Bass Lake Spur or Kenilworth Corridor. The SWLRT Project will construct an independent light rail alignment that is mostly at-grade, spaced at least 25 feet apart from the freight rail tracks (measured from the centerline of freight tracks to the centerline of nearest LRT tracks), is located below grade in an LRT tunnel in the western portion of the Kenilworth Corridor, overhead on an LRT bridge over the freight rail tracks and Excelsior Boulevard in Hopkins, and crosses several bridges at the same level as the freight rail bridges. The SWLRT Project will leave sufficient room on the rights-of-way for freight rail operations and inspection, maintenance, repair, and replacement of the freight rail facilities as required in the Bass Lake Spur and Kenilworth trackage rights agreements. In addition, construction of the SWLRT Project will eliminate one at-grade pedestrian/bicycle trail crossings with freight rail. The plan sheets depicting these adjustments are available at <https://metro council.org/swlrt/engineering/plans.aspx>

16. The planned construction also includes removal of approximately 16,000 feet of siding track on the Bass Lake Spur; approximately 2,500 feet of siding track will be removed in 2018 and approximately 13,500 feet in the summer/fall of 2019. Approximately 11,600 feet of existing siding will remain on the Bass Lake Spur for use by TCWR after the SWLRT Project is constructed. Considering that TCWR was using a

significant portion of its sidings for storage which is not permitted under the trackage rights agreement, the Council believed that the siding removal will not have a materially adverse effect on TCWR's overhead operations and that the remaining tracks are sufficient to permit TCWR to switch cars and avoid material delay from train meets.

Technical Discussions with TCWR

17. The Council and TCWR's engineering teams were actively involved in technical discussions beginning in November 2015. The Council and TCWR met formally seven times between November 2015 and April 2016 and had numerous other communications continuing into 2017. Discussions included review and revisions to the design based on TCWR's input and the parties established protocols to ensure that the construction and operation of the SWLRT Project would not materially impact the safety or operations of the freight service. The Council included in its construction documents the construction plans and specifications and protocols which were developed in coordination with TCWR.

18. The Council reimbursed TCWR \$500,000 for TCWR's costs to review and provide comments on the SWLRT Project plans, specifications and protocols and to develop agreements for the SWLRT Project. A copy of the Council's agreements to reimburse TCWR for these costs is attached as Exhibit A.

19. The activities TCWR performed as part of its review included:
- A. Analyzing proposed changes to the freight corridor with respect to the sufficiency of the plans and specifications, including safety requirements to ensure TCWR would continue its freight rail operations in the corridor effectively, efficiently, and safely during construction and long term;
 - B. Planning and coordinating with the Council, including providing information and documentation related to TCWR engineering guidelines and requirements related to design, construction, maintenance, safety, and operation of freight rail infrastructure;
 - C. Reviewing and commenting on engineering and design plans and specifications related to freight rail elements such as ballast, ties, tracks, and signals, as well as associated elements including soil improvement, drainage, fencing, landscaping, retaining walls, bridge structures and monitoring construction of adjacent structures; and

- D. Developing agreements addressing construction, operations and maintenance, acknowledging that the SWLRT Project is planned and will be constructed to ensure that TCWR will be able to continue its freight operations effectively, efficient, and safely.
20. As a result of input from TCWR, the Council:
- A. Implemented changes to the SWLRT Project design elements and construction specifications as they relate to SWLRT Project proximity to freight rail. For example, the Council redesigned over three miles of the SWLRT Project to change the alignment of the pedestrian/bicycle trail in the Bass Lake Spur corridor as well as redesigned all drainage in this area to accommodate TCWR's request to maximize the distance between the relocated pedestrian/bicycle trail and the freight rail mainline;
 - B. Developed a technical "Design & Plan Summary", which details and summarizes the SWLRT Project design, construction activities, and staging as reviewed and commented on by TCWR (attached as Exhibit B);
 - C. Developed a "Pre-Planned Outages" schedule which lists the short and infrequent freight rail service interruptions required to construct the SWLRT Project³ and as included in the HCRRA and Council OMA. The Council included the schedule of outages in the SWLRT Project Construction Bid documents; and
 - D. Developed construction protocols that set safety requirements for construction adjacent to the active freight rail line. The Council included these protocols in the SWLRT Project construction bid documents and in the HCRRA and Council OMA. The Council will require its construction contractor to comply with the protocols in the construction bid

³ The Pre-Planned Outages schedule lists eleven outages planned over the duration of civil construction, which is anticipated to be approximately four years. Planned outages are short and infrequent and were developed in coordination with and with the consent of TCWR. Most outages are anticipated to be approximately four hours and are scheduled on Sundays when TCWR does not generally operate service through the corridor, minimizing disruption to TCWR's operations. One 36-hour outage is required to relocate a freight rail bridge over a state highway and conduct utility work in the Kenilworth Corridor. The Council has coordinated with both TCWR and the Minnesota Department of Transportation (MnDOT) to schedule the outage over a 3-day holiday weekend to minimize any material adverse impact on freight operations.

documents. The protocols include, among other things, requiring the Council's construction contractor to develop the following management plans which will be shared with the freight railroad companies (TCWR, BNSF Railway, and Canadian Pacific):

- A Freight Railroad Safety Action Plan (FRSAP) that will describe the actions the Council's contractor will implement to safely work adjacent to freight railroads. The FRSAP will identify areas of concern and plans to address those identified concerns, provide a summary of the employee training program and job safety briefings to be conducted by Council's contractor, emergency preparedness plans, fire prevention plans, and on-site safety assessments.
- A Freight Railroad Management Plan (FRMP) that will provide a detailed accounting of how the Council's contractor will manage work activities occurring adjacent to freight railroads in a safe manner, in accordance with the schedule approved by the Council for each Site Specific Work Plan (see below). The FRMP will identify organization and staffing levels for each site specific work plan, freight railroad interface control, safety and security management, community and public impact, clean up and disposal, environmental impact and emergency response and contact information.
- Site Specific Work Plans (SSWPs), which are detailed plans for the contractor's work in the freight corridor. The type of SSWP required will depend on the proximity to freight rail facilities (referred to as "type of adjacency" in the contract documents) for which the work is being performed. The SSWPs will identify the detailed scope of work, schedule, personnel and equipment requirements, contingency plans, controls, safety, community and public impact, clean up and disposal, emergency response, and contact information.

E. Agreed to provide improvements to the rail infrastructure used by TCWR, at no cost to TCWR, that will enhance the safe and efficient operations within the corridor. Improvements in the SWLRT Project plans and specifications include:

- New rail, ballast and ties;
- New signals and gates at roadway crossings;
- New bridge structures and retaining walls;
- New freight equipment defect detection;
- New continuous fence separating adjacent pedestrian/bicycle trails from freight rail; and
- A more efficient connection to the MN&S in St. Louis Park (Southerly Connector).

Common Carrier Agreement Negotiations

21. The parties attempted to negotiate agreements that would have been required if TCWR, instead of HCRRA, became the common carrier in the Bass Lake Spur and Kenilworth Corridor. From August 2016 through August 2017, the Council and TCWR negotiated the terms of an operations and maintenance agreement that would have been required if TCWR assumed a responsibility to provide local service, dispatching, and maintenance in the Bass Lake Spur and local service in the Kenilworth Corridor (TCWR is and will remain responsible for maintenance and dispatching in the Kenilworth Corridor under the existing trackage rights agreement). The parties met in person and by phone numerous times during this period and exchanged numerous drafts of the planned operations and maintenance agreement. The Council and TCWR reached agreement on the substantive terms relating to construction, operations and maintenance. The Council also agreed to provide TCWR \$295,000,000 in insurance coverage for incidents occurring in the shared freight/LRT corridor that would not have occurred but for the presence of LRT.

22. In negotiations, the Council made significant concessions to TCWR on many terms, as described throughout this Statement. After receiving confirmation from TCWR in August 2017, that all terms were acceptable, the Council believed it reached agreement with TCWR on all substantive issues and that this had been approved by TCWR's board of directors. This agreement was announced to the public and presented to the Council board. Then, in September 2017, TCWR made five new demands, none related to operations and each designed to extract new financial concessions from the SWLRT Project. The Council felt that these demands were unreasonable. While TCWR then characterized these demands as only trying to keep TCWR financially whole, in reality TCWR introduced new, broad terms that would have demanded taxpayer compensation for TCWR claims that were not fairly traceable to the SWLRT Project.

23. Based on these demands, the Council, in consultation with HCRRA, owner of and the current common carrier on the Kenilworth Corridor, concluded that

TCWR would not be a reliable partner and that they needed to find an alternative plan to provide any local service that might be requested, dispatching and maintenance in the Bass Lake Spur and local service in the Kenilworth Corridor. The plan needed to protect the rights of all freight operators and shippers in accordance with federal law. The Council and HCRRA determined that (1) preserving the existing trackage rights agreements in both corridors, (2) HCRRA retaining the common carrier obligation to provide any needed local service in the Kenilworth Corridor in the unlikely event this might be requested, and (3) HCRRA obtaining the common carrier obligation to provide any needed local service in the Bass Lake Spur, in place of CP, was the means to achieve this.

24. The Council and TCWR also negotiated a construction agreement for the SWLRT Project in 2017. This agreement addressed the parties' rights and obligations during construction and incorporated the protocols and design and specification adjustments discussed above. Despite being unable to reach agreement with TCWR, as described in paragraph 20D, the Council incorporated protocols that were developed in coordination with TCWR into the SWLRT Project construction bid documents and will require the contractor to abide by these terms. Additionally, the Council is requiring its contractor to provide general liability, business auto, workers' compensation, contractor pollution liability, builder's risk, and railroad protective liability insurance including TCWR as an insured on its policies

25. In late 2017, the Council began mobilizing for construction and hired additional construction staff. At that time, the Council's understanding of TCWR's current operations on the Bass Lake Spur and Kenilworth Corridor was primarily based on information received from TCWR. I determined that it would be beneficial for the Council to have firsthand data of TCWR's freight rail operations for the purpose of construction coordination. Accordingly, in October 2017, Council staff began logging and monitoring TCWR's operations on the Bass Lake Spur and Kenilworth Corridor. The logging and monitoring was conducted by Council staff who observed TCWR's operations and logged the information in a spreadsheet. The Council has observation and photographic logging and monitoring information from October 2017 through the present. Additionally, to supplement the observations, in December 2017, the Council installed a camera on an out-of-service telegraph pole on the north side of the Bass Lake Spur mainline near Milwaukee Street and Excelsior Boulevard. In January 2018, the Council installed a second camera on the east side of Cedar Lake Parkway and Xerxes Avenue South, near the Cedar Lake Crossing on the Kenilworth Corridor. Camera locations were selected to assist the Council in determining the average lengths of time

trains are operating or staged within the construction limits. The Council provided the logging and monitoring spreadsheets to Rob Mulholland at L.E. Peabody & Associates. The Council also obtained select dispatch and other related records from CP relating to TCWR's operations on the Bass Lake Spur and provided these records to Mulholland.

Continued Dispatch and Maintenance

26. To further ensure that SWLRT Project activities will not unduly interfere with TCWR's exercise of its overhead trackage rights through the Bass Lake Spur, CP has initially agreed to continue to inspect, maintain, and repair the freight rail facilities on the Bass Lake Spur east of CP milepost 432.12 until at least September 4, 2018, and west of CP milepost 432.12 until June 30, 2019. CP will also dispatch all traffic on the Bass Lake Spur on behalf of HCRRA through at least June 30, 2019. If CP determines not to continue providing this service, the Council, which has been authorized to act on behalf of HCRRA, will thereafter make the necessary arrangements with another qualified third party to provide this service. TCWR will continue to provide maintenance and dispatch services in accordance with its trackage rights agreement for the Kenilworth Corridor. Accordingly, once CP's sale of the Bass Lake Spur and HCRRA's sale of the Kenilworth Corridor to the Council are consummated, there will be no functional change with respect to the freight rail operations on the Bass Lake Spur or Kenilworth Corridor or how TCWR's overhead traffic is able to move through the Bass Lake Spur and Kenilworth Corridor.

Joint Working Group

27. During construction, the Council will establish a joint working group for coordinating issues with BNSF Railway and TCWR (if TCWR accepts the Council's invitation to participate) related to the construction of the SWLRT Project, including the evaluation, documentation, and coordination of work that has the potential to impact freight operations. The Council will invite TCWR to participate in the joint working group. Each party will be encouraged to designate a representative for the joint working group and the representatives will establish a schedule for joint meetings and bring other individuals to the meetings as they deem appropriate to expedite the evaluation processes and resolution of any issues arising in connection with such processes. At joint working group meetings, the parties will, among other things, review, and discuss proposed updates to the SWLRT Project schedule, phasing plans, inspections, and phasing outage matrix.

28. After the Council begins its LRT service in the Kenilworth and Bass Lake Spur Corridors (location of the shared corridor with TCWR) and in the Wayzata

Subdivision (location of the shared corridor with BNSF Railway), the Council, BNSF, and TCWR (if TCWR accepts the Council's invitation to participate) will identify designated individuals within their respective organizations to be points of contact for their respective construction, maintenance, repair and other activities within the shared corridors that may impact the other. These designated individuals will be the joint working group. The joint working group will also work together in good faith to try to mitigate community issues or concerns in the shared corridors.


Any Reasonable Request for Local Freight Rail Service will be Met

29. HCRRA has advised that there has been no request for local freight service on the Kenilworth Corridor at least since it acquired this line segment in 1993 from the Chicago and Northwestern Transportation Company. Similarly, CP has advised that there has been no request for local freight service on the Bass Lake Corridor for at least the past fifteen years. Based on this history, and in view of the mostly residential nature of the properties and land use adjacent to these lines, it is unlikely that there will ever be a request for local freight rail service. Nonetheless, if there is such a request, the Council has been authorized by HCRRA to make the arrangements, on HCRRA's behalf, for a designated operator to come on these lines and provide that service.

Verification

I, Jim Alexander, declare under penalty of perjury that the above testimony is true and correct to the best of my knowledge and belief. Further, I certify that I am qualified and authorized to sponsor this testimony.

Dated: 20 JUNE, 2018



Jim Alexander, P.E.

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. FD 36178)
)
) **Metropolitan Council**
)
) **Petition for Declaratory Order**
)
)

Reply Verified Statement
of

Robert D. Mulholland
Senior Vice President

L. E. Peabody & Associates, Inc.

On Behalf Of

Metropolitan Council

Due Date: June 27, 2018

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LIST OF EXHIBITS

Exhibit No.	Exhibit Description
(1)	(2)
1	Statement of Qualifications of Robert D. Mulholland
2	June 13, 2018 Field Study
3	The Rail Traffic Controller (“RTC”) Model
4	Results of RTC Simulations

I. INTRODUCTION

I am Robert D. Mulholland, a Senior Vice President of L. E. Peabody & Associates, Inc. L. E. Peabody & Associates, Inc. is an economic consulting firm that specializes in solving economic, transportation, marketing, financial, accounting and fuel supply problems. I have spent most of my consulting career of over twenty (20) years evaluating railroad operations, capacity, costs and profitability, and pricing issues. I have conducted this work for shippers, producers, railroads and government agencies. I hold a Master's degree in Transportation Policy, Operations, and Logistics from George Mason University's School of Public Policy.

I have designed and conducted studies to evaluate the impact of proposed traffic and physical plant changes to existing rail facilities. I have conducted forecasts of the impact of Class I railroad mergers and I have evaluated the impact of railroad mergers on the operations of the combined systems. I have sponsored the development of operating plan components, including train lists, blocking and switching plans, and track and yard configuration, filed as Stand-Alone Cost ("SAC") evidence in multiple maximum reasonable rate proceedings before this Surface Transportation Board ("STB" or "Board"). A copy of my credentials is included as Exhibit No. 1 to this Verified Statement ("VS.")

Counsel for the Metropolitan Council ("the Council") asked me to assess the impact of proposed changes to the physical plant and track structures, i.e., upgrade of main line track and removal of certain siding track, on the operations of the Twin Cities & Western Railroad Company ("TCW") over the Bass Lake Spur ("BLS"). The proposed changes are part of the Green Line expansion project, which will entail replacing a portion of the existing BLS track and sidings with new, dedicated freight tracks as well as new, dedicated (and separate) passenger tracks.

I evaluated the impact of these proposed changes based on a comparison of the before and after scenarios.¹ Pursuant to instructions from Counsel, I evaluated the operations using specific assumptions regarding the storage of railcars on BLS track including carloads laden with plastic pellets.

¹ I was not asked to evaluate the impact of construction activities on the TCW operations during the construction period.

II. SUMMARY OF FINDINGS

The Southwest Light Rail Transit (“SWLRT”) project entails constructing double-track dedicated to passenger rail service and separate dedicated freight tracks on the eastern portion of the BLS. Two (2) existing sidings and one existing spur on the eastern portion of the BLS will be removed during construction. One existing siding and one existing spur that currently extend into the eastern portion of the BLS will be shortened. The existing connection to the Canadian Pacific Railway (“CP”) owned Minneapolis, Northfield & Southern Railway (“MN&S”) on the eastern portion of the BLS will be relocated. The 115 pound jointed rail on the BLS mainline east of milepost 432 will be replaced with 136 pound continuously welded rail (“CWR”).²

To determine whether, and the extent to which, TCW’s operations on the BLS will be affected by the BLS reconfiguration, I conducted a field study to observe the current infrastructure and operations. I also used Berkeley Simulation Software’s Rail Traffic Controller Model (“RTC”) to simulate the TCW operations over the BLS under multiple scenarios reflecting both existing infrastructure, traffic and operations and post-construction infrastructure, traffic and operations. My RTC analysis shows that the proposed removal of existing sidings will not result in train conflicts, and transit times will not increase for any class of train traffic after the project is completed.

Based on current traffic levels, there is excess capacity on the BLS, as demonstrated by TCW’s use of BLS sidings to store carloads laden with plastic pellets. If plastic pellet storage is eliminated,³ capacity will be freed up that can be used for operations which currently occur on other sidings. The sidings that will remain on the western portion of the BLS are capable of handling current TCW operations.

² The 115 pound CWR on the Kenilworth Corridor will also be replaced with 136 pound CWR.

³ I was instructed by Counsel to assume storage of plastic pellets will not occur on the BLS after construction.

III. FRAMEWORK FOR EVALUATION AND ASSESSMENT

To develop my opinion regarding the impact of the proposed removal of certain BLS sidings⁴ on TCW's operations, I asked the Council to provide all available factual information regarding the BLS infrastructure and TCW operations over the BLS and KC, I conducted an on-site field study, and I modeled the TCW operations both before and after the proposed changes to the physical plant and track structures.

A. REVIEW OF PROVIDED MATERIALS

The Council provided materials including BLS track charts, BLS timetables, engineering documents depicting the proposed track upgrades, removals and reconfiguration, narrative descriptions of the current operations and structures, observed train data, summarized CP train sheets data, and related materials. I included these documents in my work papers.⁵

B. FIELD STUDY

On June 13, 2018, I undertook a field trip to observe and document the BLS track, structures and operations. My observations are documented in Exhibit No. 2 to this VS.

C. THE RAIL TRAFFIC CONTROLLER MODEL

Using materials provided by the Council and based on my own field observations, I used the RTC to simulate the TCW operations over the BLS under multiple scenarios described below. The RTC is a sophisticated software suite developed by Berkeley Simulation Software. It is used in the normal course of business by all Class I railroads and many short line railroads to model

⁴ The planned construction also includes removal of approximately 16,000 feet of siding track on the Bass Lake Spur. Approximately 11,600 feet of existing siding will remain on the Bass Lake Spur for use by TCW after the SWLRT Project is constructed. Source: "Exhibit-Bass Lake Spur-Siding Tracks-Overall Length.pdf."

⁵ Materials provided by the Council are included in my work papers in folder "Southwest LRT Freight Rail Information."

operating scenarios and test network changes. The Board requires parties in STB maximum reasonable rate cases using the stand-alone cost methodology to use RTC to verify and demonstrate the feasibility of the proposed operating plans of hypothetical stand-alone railroads. The RTC dispatches trains using sophisticated meet and pass algorithms and incorporates the specific terrain and track conditions that form the rail network, plus the specifications of the equipment used by the carrier. These simulations may be used to identify system bottlenecks, to test theoretical changes to infrastructure or operating plans, to assess the impact of additional traffic on a rail network and various other analyses. The RTC and its capabilities are described in greater detail in Exhibit No. 3 to this VS.

1. Scenarios

I developed and modeled six (6) different scenarios in RTC. The scenarios reflect different assumptions in three (3) areas: (a) system infrastructure; (b) operating parameters; and (c) traffic group.

a. System Infrastructure

For four (4) of the scenarios, I modeled the existing BLS infrastructure, and for two (2) scenarios, I modeled the post-construction BLS infrastructure that will exist after select sidings are removed.

b. Operating Parameters

For four (4) of the scenarios,⁶ I assumed the BLS sidings would not be used to store loaded or empty railcars and for two (2) scenarios,⁷ I assumed the Dominick siding would be occupied by 50 carloads of stored plastic pellets.

⁶ Two (2) “existing infrastructure” scenarios, and two (2) “post-construction infrastructure” scenarios.

⁷ Two (2) “existing infrastructure” scenarios only.

c. Traffic Group

For three (3) of the scenarios, I modeled nine days (one week plus a warm-up day and a cool-down day) of actual historical trains that moved over the BLS. Specifically, I modeled trains observed during the busiest week⁸ of the January 16, 2018 to February 16, 2018 time period, for which I was provided both summarized CP train sheets data and field observations data collected and developed by Council staff.

For the other three (3) scenarios, I modeled a hypothetical group of trains that included the observed historical trains adjusted to reflect a 10 percent increase in local traffic and a 25 percent increase in unit train traffic. Specifically, in the growth scenario, the observed historical local train car counts were increased by 10 percent, and the total count of unit trains was increased by 25 percent, with additional grain trains added randomly throughout the study week. The 25 percent increase in unit grain trains was made to account for both growth and seasonality.

d. Summary

Table 1 below summarizes the scenarios I evaluated.

RTC Scenario	System Infrastructure	Operating Parameters	Traffic Group
(1)	(2)	(3)	(4)
1. Base Case	Existing	No Storage	Base Period Trains
2. Base Case w/ Storage	Existing	Plastic Storage	Base Period Trains
3. Future Case	Post-Construction	No Storage	Base Period Trains
4. Growth Case	Existing	No Storage	Base Period Trains Adjusted for Growth
5. Growth Case w/ Storage	Existing	Plastic Storage	Base Period Trains Adjusted for Growth
6. Future Growth Case	Post-Construction	No Storage	Base Period Trains Adjusted for Growth

⁸ As measured by train count.

The inputs, assumptions, outputs, and results of my RTC analysis are documented in detail in Exhibit No. 4 to this VS.

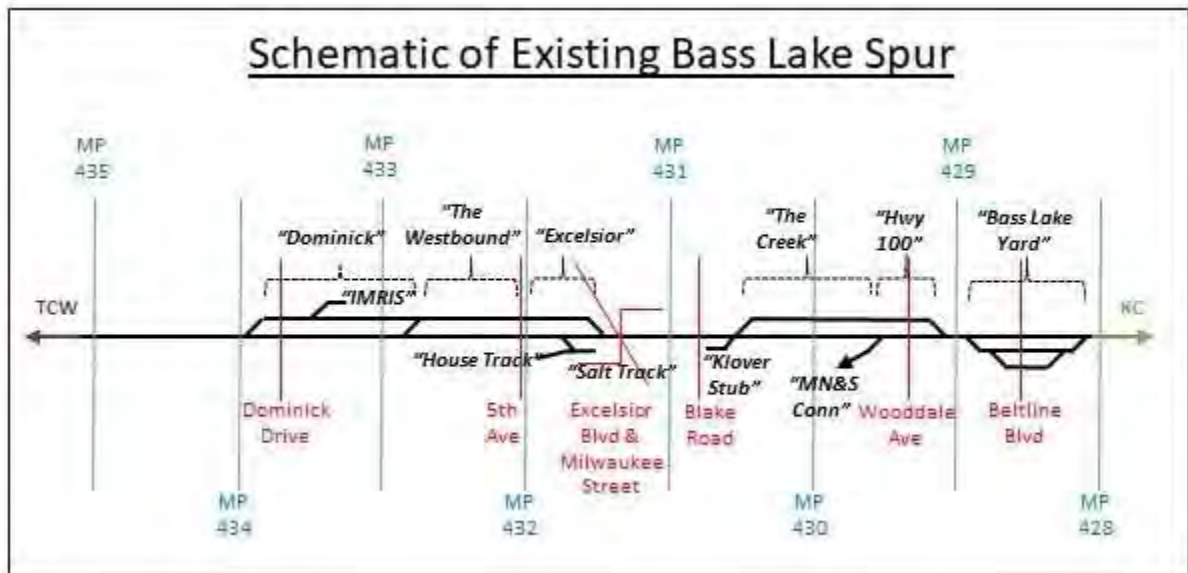
IV. THE BASS LAKE SPUR

The BLS is a 6.7 mile rail segment⁹ connecting the TCW's Glencoe Subdivision on the west to the Kenilworth Corridor ("KC") on the east. The KC is a 2.6 mile segment of single track on the east of the BLS.¹⁰ The BLS and KC connect the TCW to the BNSF Railway's ("BNSF") Wayzata Subdivision and beyond to at least two (2) more Class I railroads¹¹ and the Minnesota Commercial Railway ("MNNR") in Minneapolis/St. Paul.

A. CURRENT INFRASTRUCTURE

The BLS consists of a mainline and a series of auxiliary tracks. The mainline is principally composed of 115-pound jointed rail. There are three (3) sidings, three (3) short rail spurs, and one connection to the MN&S on the BLS. There is no active industry on the BLS. Figure 1 below is a schematic of the existing BLS.

Figure 1



⁹ From CP Milepost 435.06 on the western end to CP Milepost 428.38 on the eastern end. See: work paper "LIMITS OF CORRIDOR - UPDATE.pdf."

¹⁰ From CNW Milepost 16.3 on the western end to CNW Milepost 13.7 on the eastern end. Ibid.

¹¹ The CP and the Union Pacific Railroad ("UP").

1. Sidings

There are three (3) sidings on the BLS that are described below.

a. Dominick/The Westbound/Excelsior

This siding is on the north side of the BLS mainline. From west to east, the siding runs from 675 feet west of the Dominick Road at-grade crossing to the west side of the Excelsior Boulevard at-grade crossing. This siding is 12,490 feet long.¹² There are two (2) at-grade crossings intersecting the siding: (1) Dominick Road near the west end; and (2) 5th Avenue near the east end.¹³ This siding is accessed via turnouts at each end and a turnout approximately in the middle, just to the west of the 11th Avenue railroad bridge. The west and center turnouts provide entry and egress from/to the west, and the east turnout provides entry and egress from/to the east.

The portion of this siding between the western and center turnouts is called “Dominick.”¹⁴ The center turnout allows Dominick to be used for storage while maintaining the siding’s utility for efficient meet/pass events and switching and blocking of cars on the portion of the siding east of the center turnout. Approximately 86 cars can be held on the Dominick portion between the Dominick Road at-grade crossing and the center turnout.¹⁵ Carloads of plastic pellets have been regularly observed by the Council occupying the Dominick portion of the siding. I also observed carloads of plastic pellets stored on this track during my June 13, 2018 field trip.¹⁶

¹² See: “Exhibit-Bass Lake Spur-Siding Tracks-Overall Length.pdf” at items 1 and A under “Existing Siding Track Schedule.”

¹³ See: “Glencoe to St. Louis Park_TRACK CHART.pdf” and “TCWR's use of BLS Trackage - 20171221_jpa_20180122_WITH EDITS.pdf” at page 1.

¹⁴ See: Exhibit No. 2 at pages 1 and 2.

¹⁵ See: “TCWR_Bass Lake Spur Sidings Summary Sheet_20171226_jpa_20180122_WITH EDITS.pdf” at page 1.

¹⁶ I was unable to count the cars in the cut I observed. As shown in Exhibit No. 2 to this VS at pages 1 and 2, it extended from just east of Dominick Drive to just west of the center turnout.

The portion of the siding east of the center turnout and west of the 5th Avenue at-grade crossing is called “The Westbound.”¹⁷ Approximately 65 cars can be held on The Westbound.¹⁸ The Westbound is commonly used for switching and blocking cars, for meet/pass events, and to hold trains waiting to access BNSF’s Wayzata subdivision or waiting for re-crews.¹⁹ Switching on The Westbound sometimes involves picking up carloads of plastics that have been stored on Dominick. The Westbound was clear during my June 13, 2018 field trip.

The portion of the siding east of the 5th Avenue at-grade crossing is called “Excelsior.”²⁰ Excelsior can hold over 40 cars. Carloads of aggregate from locations on the TCW are sometimes placed on Excelsior and transloaded by backhoe to trucks on the adjacent gravel access road for use in construction work, after which they are picked up.²¹ Excelsior was clear during my June 13, 2018 field trip. I observed piles of rock debris on Excelsior during my June 13, 2018 field trip. I also observed five (5) empty gondolas connected to the stored carloads of plastic pellets on the Dominick portion of the siding during my June 13, 2018 field trip.

b. The Creek/Highway 100

This siding is on the north side of the BLS mainline. From west to east, it runs from the Minnehaha Creek Bridge to the Highway 100 Bridge. This siding is 8,480 feet long and is accessed via turnouts at each end.²² The west turnout provides entry and egress from/to the west and the east turnout provides entry and egress from/to the east. The west end turnout can accommodate

¹⁷ See: Exhibit No. 2 at page 2.

¹⁸ See: “TCWR_Bass Lake Spur Sidings Summary Sheet_20171226_jpa_20180122_WITH EDITS.pdf” at page 1.

¹⁹ *Id.* at page 2.

²⁰ See: Exhibit No. 2 at page 3.

²¹ See: “TCWR’s use of BLS Trackage - 20171221_jpa_20180122_WITH EDITS.pdf” at pages 2-3.

²² See: “Exhibit-Bass Lake Spur-Siding Tracks-Overall Length.pdf” at item D under “Existing Siding Track Schedule.”

six-axle locomotives. There is one at-grade crossing intersecting the siding at Wooddale Avenue toward the east end.²³

The portion of the siding west of Wooddale Avenue is called “The Creek.”²⁴ Approximately 105 cars can be held on The Creek between the west end turnout and Wooddale Avenue.²⁵ I observed a long cut of hopper cars on The Creek siding during my June 13, 2018 field trip. The siding is also used for meet/pass events and for switching and blocking cars moving into and out of St. Paul for interchange with Class I carriers. The Creek is also occasionally used as a hold location for eastbound trains and a re-crew location for westbound trains.²⁶

The portion of the siding east of Wooddale Avenue is called “Highway 100.” Approximately 30 cars can be held on Highway 100.²⁷ Highway 100 was clear during my June 13, 2018 field trip.

c. Bass Lake Yard

This double-tracked siding is on the south side of the BLS main line.²⁸ From west to east, it runs from just east of Highway 100 to near the end of the BLS. The longer, northern most track is 3,083 feet long, and the shorter, southernmost track is 2,077 feet long.²⁹ There is one at-grade crossing intersecting the siding at Beltline Boulevard, slightly to the west of center.³⁰ The sidings are accessed by two (2) turnouts at each end. The west turnouts provide entry and egress from/to

²³ See: “Glencoe to St. Louis Park_TRACK CHART.pdf” and “TCWR's use of BLS Trackage - 20171221_jpa_20180122_WITH EDITS.pdf” at page 1.

²⁴ See: Exhibit No. 2 at page 7.

²⁵ See: “TCWR_Bass Lake Spur Sidings Summary Sheet_20171226_jpa_20180122_WITH EDITS.pdf” at page 8.

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ See: Exhibit No. 2 at pages 1 and 2.

²⁹ See: “Exhibit-Bass Lake Spur-Siding Tracks-Overall Length.pdf” at items F and G under “Existing Siding Track Schedule.”

³⁰ See: “Glencoe to St. Louis Park_TRACK CHART.pdf” and “TCWR's use of BLS Trackage - 20171221_jpa_20180122_WITH EDITS.pdf” at page 1.

the west and the east turnouts provide entry and egress from/to the east. The short siding length, the position of the at-grade road crossing and the condition of the track limit the utility of this siding. TCW has used it to store carloads containing plastic pellets at times. The siding is not routinely used for switching/blocking or meet/pass events.³¹ Bass Lake Yard was clear during my June 13, 2018 field trip. The day of my trip, the northern siding track (longer track) was red flagged.³² I also observed significant heaving on the southern siding track (shorter track.)

2. Spurs

There are three (3) spurs on the BLS: (a) IMRIS; (b) Salt Track/House Track; and (c) Klover Stub. These spurs are described separately below.

a. IMRIS

The IMRIS spur is on the north side of Dominick. This spur is a little more than half a mile from the west end turnout on the east side of the Dominick Road at-grade crossing. It is 770 feet long and is accessed from the west via a turnout off Dominick.³³ This spur is not currently used by TCW on a regular basis, and it is commonly blocked by carloads storing plastic pellets, as it was on June 13, 2018 during my site visit.

b. Salt Track/House Track

The Salt Track/House Track spur is on the south side of the BLS mainline, opposite from Excelsior.³⁴ This spur is accessed from the west via a turnout, on the west side of the Excelsior Boulevard at-grade crossing. The Salt Track extends east from the turnout and is 960 feet long.

³¹ See: "TCWR_Bass Lake Spur Sidings Summary Sheet_20171226_jpa_20180122_WITH EDITS.pdf" at page 10.

³² Shortly before my June 13, 2018 field trip, the Federal Railroad Administration ("FRA") inspected the BLS and identified several deficiencies. I do not know whether the red flagged track was a result of the FRA inspection.

³³ See: "Exhibit-Bass Lake Spur-Siding Tracks-Overall Length.pdf" at item 2 under "Existing Siding Track Schedule."

³⁴ See: Exhibit No. 2 at page 4.

The House Track extends west from the Salt Track. To enter the House Track, equipment must first enter the Salt Track then reverse direction onto the House Track. The House Track is 1,010 feet long.³⁵ The Salt Track is occasionally used to store equipment and to repair bad-order railcars.³⁶ The Salt Track was clear during my June 13, 2018 field trip.

The House Track was red flagged during my June 13, 2018 site visit and it appears from my visual inspection that it is rarely used. I observed tall weeds and brush growing between the tracks. Very few ties were visible and those that were visible were severely deteriorated. In addition, the track was covered by gravel in spots.

c. Klover Stub

The Klover Stub spur is on the south side of the BLS mainline, just west of The Creek siding and is 640 feet long.³⁷ The spur is accessed from the east via a turnout that can accommodate six-axle locomotives. TCW uses this track to store locomotives and track maintenance equipment.³⁸ The spur was clear during my June 13, 2018 field trip.

3. Connection to MN&S Trackage

TCW has trackage rights over CP's MN&S.³⁹ Access to the MN&S is via the Skunk Hollow connection, which is on the south side of the BLS mainline opposite The Creek siding.⁴⁰ The Skunk Hollow connection is accessed from the east via a turnout just west of the Wooddale Avenue at-grade road crossing. The Skunk Hollow Connection has severe curves and significant

³⁵ See: "Exhibit-Bass Lake Spur-Siding Tracks-Overall Length.pdf" at items B1 and B2 under "Existing Siding Track Schedule."

³⁶ See: "TCWR_Bass Lake Spur Sidings Summary Sheet_20171226_jpa_20180122_WITH EDITS.pdf" at page 5.

³⁷ See: Exhibit No. 2 at page 5 and "Exhibit-Bass Lake Spur-Siding Tracks-Overall Length.pdf" at item C under "Existing Siding Track Schedule."

³⁸ See: "TCWR_Bass Lake Spur Sidings Summary Sheet_20171226_jpa_20180122_WITH EDITS.pdf" at pages 6-7.

³⁹ Per trackage rights agreement between TCW and CP dated July 26, 1991 as modified by supplemental agreement dated July 22, 1993.

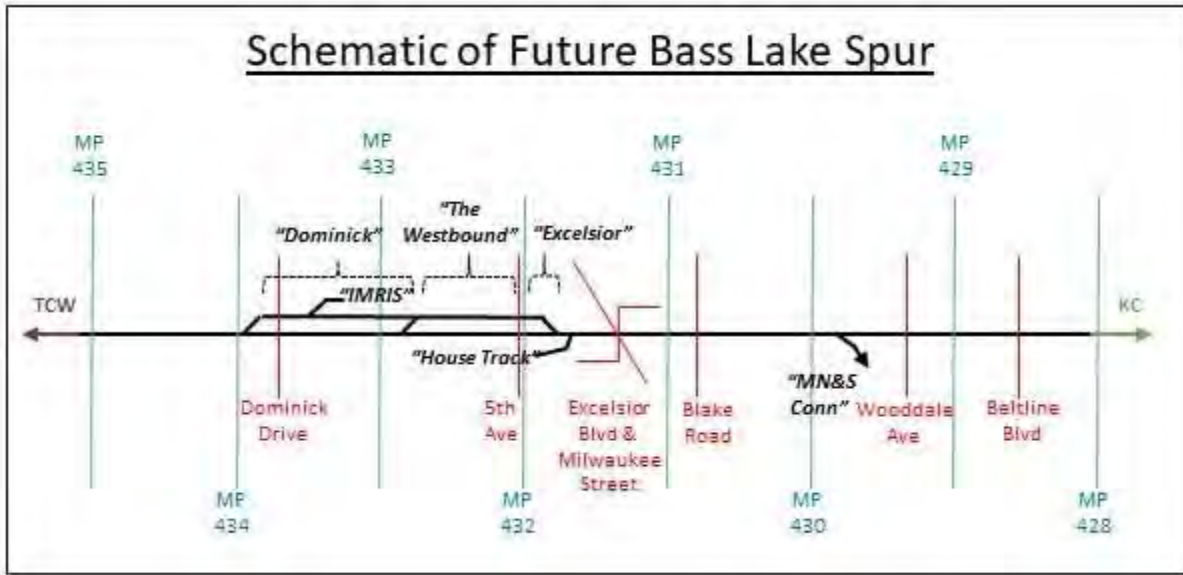
⁴⁰ See: Exhibit No. 2 at page 6.

grade. No more than seven (7) cars can be moved over this connection at a time. TCW does not use the Skunk Hollow connection to the MN&S for its current operations. The connection was clear during my June 13, 2018 site visit.

**B. PLANNED
INFRASTRUCTURE**

The Council will construct the SWLRT project on the eastern portion of the BLS and the KC to implement a double-track passenger rail service and separate dedicated freight tracks. The shared-use corridor will consist of separate, dedicated passenger and freight tracks. There will be no passenger service on the reconfigured Bass Lake Spur freight track. As a result of the SWLRT project, the existing sidings and spurs on the eastern portion of the BLS will be removed. After construction, one siding will remain on the western portion of the BLS, and it will be shortened. Two (2) spurs will remain on the western portion of the BLS after construction, with one of them being reconfigured. The existing connection to the MN&S will be severed and the northern portion of the connecting tracks will be removed. A new “Southerly Connector” will be built to replace this connection, improving the operations between the BLS and the MN&S. The 115 pound jointed rail on the mainline east of milepost 432 will be replaced with 136 pound continuously welded rail (“CWR”). Figure 2 below is a schematic of the post-construction BLS.

Figure 2



1. Sidings

The proposed changes to the three (3) sidings on the BLS are described below.

a. Dominick/The Westbound/Excelsior

Dominick and The Westbound will remain unchanged. In my after construction modeling scenario, I was instructed by Counsel to assume carloads of plastic pellets will no longer be stored on Dominick. Excelsior will be shortened. The turnout will be moved from its present location just west of the Excelsior Boulevard at-grade crossing to a new location adjacent to the Hopkins Depot west of the Highway 169 overpass. Excelsior will still be over 800 feet in length⁴¹ and will be capable of handling the aggregate transload operation that occurs on it currently, but the volume of cars that can be transloaded at one time will be reduced. Conservatively assuming large 65 foot gondolas, there will be room for over 10 cars of aggregate to be unloaded at a time on the remaining Excelsior siding east of 5th Avenue.

⁴¹ Determined using the measuring tool on Google Earth.

b. The Creek/Highway 100

This siding will be removed.

c. Bass Lake Yard

This siding will be removed.

2. Spurs

The proposed changes to the three (3) spurs on the BLS are described below.

a. IMRIS

This spur will remain unchanged. I have been instructed to assume it will no longer be blocked by carloads storing plastic pellets in my modeling exercise.

b. Salt Track/House Track

The Salt Track will be removed. The connection to the House Track will be relocated and the direction of the turnout will be reversed. After construction, the House Track spur will be accessed from the east via the new turnout, which will be relocated to approximately 200 feet east of the Highway 169 overpass. The reconfigured House Track will be approximately 1,010 feet long.⁴²

c. Klover Stub

This spur will be removed.

3. Connection to MN&S Trackage

The Skunk Hollow connection will be removed and replaced with a new “Southerly Connector” to the MN&S. The new connection will be accessed from the west via a turnout at milepost 429.8 (Louisiana Avenue). The upgraded Southerly Connector will have improved (less severe) grade and curvature characteristics compared to the Skunk Hollow connection.

⁴² See: “Exhibit-Bass Lake Spur-Siding Tracks-Overall Length.pdf” at item B2 under “Existing Siding Track Schedule.”

4. Summary

Table 2 below contains a summary of existing and post-construction sidings and spurs on the BLS and my understanding of TCW's current and post-construction use of each one.

Table 2			
<u>BLS Existing and Post-Construction Sidings and Spurs</u>			
<u>Track</u> (1)	<u>Post Construction Status</u> (2)	<u>Primary Current Uses</u> (3)	<u>Assumed Future Uses</u> (4)
<u>Sidings</u>			
A. Siding 1			
1. Dominick	Unchanged	Plastic Pellet Storage	B/S*, M/P**, Holds
2. The Westbound	Unchanged	B/S*, M/P**, Holds	Unchanged
3. Excelsior	Shortened	Rock Transload, Loco Storage	Unchanged
B. Siding 2			
1. The Creek	Removed	B/S*, M/P**, Holds, Empties	N/A
2. Highway 100	Removed	B/S*, M/P**	N/A
C. Siding 3			
1. Bass Lake Yard	Removed	Occasional Car Storage	N/A
<u>Spurs</u>			
D. Spur 1			
1. IMRIS	Unchanged	Not Used	Unchanged
E. Spur 2			
1. Salt Track	Removed	Occasional Loco & Car Storage	N/A
2. House Track	Reconfigured	Not Used	Unchanged
F. Spur 3			
1. Klover Stub	Removed	Occasional Loco & Car Storage	N/A
<u>Connector</u>			
G. M&NS Connection			
1. Skunk Hollow	Upgraded (Southerly Connector)	Not Used	Unchanged

*B/S = Blocking and Switching
 **M/P = Meet and Pass Events
 N/A = Not Applicable

C. CURRENT OPERATIONS

1. Traffic

Based on materials provided by the Council, including field observations and CP train sheets data, that TCW operates a six-day-per-week local manifest turn train that moves carload traffic between shippers west of the BLS and connecting carriers east of the BLS.⁴³ The turn train moves carloads east in the morning and returns west in the afternoon/ evening. In addition, TCW operates unit trains carrying ethanol, grain, and coal on an irregular, as needed basis over the BLS to serve locations on the TCW west of the BLS and to interchange with other rail carriers east of the BLS.⁴⁴ TCW also uses BLS sidings to store carloads laden with plastic pellets.⁴⁵ TCW does not move any traffic over the Skunk Hollow connection to the MN&S. There is no passenger service on the BLS. CP does not operate over the BLS on a regular basis.

a. TCW Local Trains

TCW operates a daily local turn train serving its customers west of the BLS and connecting them to Class I carriers and the MNNR at designated yards within the Twin Cities terminal.⁴⁶ The eastbound (morning) local train is sometimes split into two (2) smaller cuts of cars on the BLS and each cut is separately delivered to a carrier to the east. The local westbound (afternoon/evening) train serves customers west of the BLS in the daily return trip. On occasion, two (2) smaller cuts that TCW receives from Class I carriers are consolidated on the BLS sidings before moving a single longer train west. TCW principally uses The Westbound siding for blocking and switching, but it also uses The Creek siding for this purpose.⁴⁷

⁴³ See: "Baseline Freight Rail Information - Dec 2 final version_WITH EDITS.pdf" at page 7.

⁴⁴ *Id.*, at pages 2-4.

⁴⁵ *Id.*, at pages 4-5.

⁴⁶ *Id.*, at page 6.

⁴⁷ See: "TCWR's use of BLS Trackage - 20171221_jpa_20180122_WITH EDITS.pdf" at page 3.

b. Unit Trains

TCW operates unit trains moving grain and ethanol eastbound from locations on its system to Minneapolis/St. Paul for furtherance on Class I railroads. These trains return empty in the westbound direction. In addition, TCW operates UP unit trains moving coal westbound from St. Paul to Renville. These trains return empty, or the UP power returns light, in the eastbound direction.⁴⁸ TCW prioritizes unit trains over its local manifest trains in dispatching calls to CP.

c. Storage

TCW stores carloads of plastic pellets on the BLS sidings. These plastic pellets originate in Canada and are moved to the BLS via interchange with CP in St. Paul. The carloads are stored on the BLS until a destination and delivery date is determined, at which point they are retrieved from storage and returned to CP in St. Paul.⁴⁹

2. Operating Restrictions

There is a 25 mile per hour (“MPH”) speed limit on the BLS for most traffic. Loaded unit coal trains are restricted to 10 MPH.⁵⁰ There are six (6) at-grade road crossings on the 6.7 mile BLS.

D. FUTURE OPERATIONS

1. Traffic

To model future operations, I assumed TCW will continue to operate a daily local train that moves carload traffic between shippers west of the BLS and connecting carriers east of the BLS. In addition, I assumed TCW will continue to operate unit trains carrying various commodities on an irregular, as needed basis to serve locations on the TCW west of the BLS. I was advised by

⁴⁸ See: “Baseline Freight Rail Information - Dec 2 final version_WITH EDITS.pdf” at pages 2-4.

⁴⁹ *Id.*, at pages 4-5.

⁵⁰ See: work paper “Bass Lake Spur timetables.pdf.”

counsel that the SWLRT passenger trains will not operate on the freight track as they will operate on new dedicated track adjacent to the new freight mainline.

a. TCW Local Trains

I assumed TCW's daily local train will continue serving customers west of the BLS and connecting them to Class I carriers to the east. When a train must be split into two (2) smaller cuts of cars on the BLS, the required blocking and switching will occur on Dominick, The Westbound, and Excelsior as needed. Dominick can essentially assume the role currently filled by The Creek.

b. Unit Trains

I assumed TCW's unit train operations will not change and TCW will continue to prioritize unit trains over its local manifest trains in dispatching calls.

c. Storage

I was instructed by Counsel to assume that in future operations, TCW will not use BLS sidings to provide storage for railcars, including carloads laden with plastic pellets.⁵¹

2. Operating Restrictions

Despite the significant track upgrade from 115 pound jointed rail to 136 pound CWR east of Milepost 432 on the BLS, I assumed the speed limit restrictions will not change. Specifically, I assumed there will continue to be a 25 mile per hour ("MPH") speed limit on the BLS for most traffic and loaded unit coal trains will continue to be restricted to 10 MPH. The six (6) at-grade road crossings will remain.

⁵¹ I modeled plastic pellet storage in two (2) of the four (4) "existing infrastructure" modeling scenarios, but I did not model plastic pellet storage in either of the two (2) "post-construction" modeling scenarios.

V. RESULTS AND CONCLUSIONS

The utility of the BLS in its current state is limited. It is an old, light-duty segment of track. Two (2) BLS sidings were red-flagged during my site visit on June 13, 2018 (the northern siding in Bass Lake Yard and the House Track spur).

The BLS mainline east of Milepost 432 will be upgraded from 115 pound jointed rail to 136 pound CWR. Concurrent with the mainline upgrade, some of the existing BLS sidings will be removed from the eastern portion of the segment. Many of the sidings slated for removal have limited current use. The sidings that will remain on the western portion are capable of handling current TCW operations, assuming TCW discontinues its current practice of using some of the sidings for storing cars laden with plastic pellets.

A. IMPACT ON TCW OPERATIONS

Based on current traffic levels, there is excess capacity on the BLS. TCW would not store carloads laden with plastic pellets on existing BLS sidings if doing so reduced its ability to serve its customers. The existing excess capacity would remain even with reasonable volume growth estimates. Eliminating plastic pellet storage would free up capacity that could be used for operations which currently occur on other sidings.

B. IMPACT ON TRANSIT TIME AND THROUGHPUT

To establish a baseline for comparison, I modeled the 2018 base period using the existing infrastructure and performing the same operations observed in the provided data. The baseline scenario did not produce any unplanned delays or conflicts.

After I modeled the baseline scenario, I summarized and recorded the results as shown in Exhibit No. 4. I repeated this process iteratively for each of the additional scenarios (Scenarios #2 through #6) described above. After each scenario was modeled, I compared the results to the

baseline scenario. My RTC analysis shows that the proposed removal of existing sidings will not result in train conflicts and transit times will not increase for any class of train traffic after the project is completed.

C. CONCLUSIONS

Based on my analyses described above, I conclude the following:

1. TCW's use of the existing sidings to store carloads laden with plastic pellets demonstrates that there is currently excess capacity on the BLS.
2. If plastic pellets were no longer stored on the BLS sidings, those sidings could be used for the blocking/switching, meet/pass, and train holding operations that currently occur on sidings that are slated for removal.
3. RTC modeling suggests that the track reconfiguration will not adversely affect TCW's operations or its ability to serve its customers.
4. The mainline upgrade on the eastern portion of the BLS will provide benefits related to more reliable operations, lower chance of train derailment, and reduced maintenance costs.
5. The Southerly Connector will provide TCW with improved and more efficient access to the M&NS should there be opportunities in the future to serve M&NS customers.

VERIFICATION

I, Robert D. Mulholland, verify under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Reply Verified Statement.

Executed on June 27, 2018



Robert D. Mulholland

ROBERT D. MULHOLLAND
STATEMENT OF QUALIFICATIONS

My name is Robert D. Mulholland. I am an economist and a Senior Vice President of the economic consulting firm of L. E. Peabody & Associates, Inc. The firm's offices are located at: 1501 Duke Street, Suite 200, Alexandria, Virginia 22314; 760 E. Pusch View Lane, Suite 150, Tucson, Arizona 85737; and 7 Horicon Avenue, Glens Falls, New York 12801.

I am a graduate of George Mason University's School of Public Policy from which I obtained a Master's degree in Transportation Policy, Operations & Logistics and Bowdoin College from which I obtained a Bachelor of Arts degree in Government and Legal Studies. I have been employed by L. E. Peabody & Associates, Inc. since 2008 and from 1995 to 2004. From 2004 to 2006, I was the staff economist for the Office of Freight Management and Operations of the Federal Highway Administration ("FHWA") of the United States Department of Transportation ("USDOT"). From 2006 to 2008, I worked for ICF International as a consultant in the transportation group.

The Firm of L. E. Peabody & Associates, Inc. specializes in analyzing matters related to the rail transportation of all commodities. As a result of my extensive consulting experience since 1995 and my participation in and support of maximum-rate, rail merger, service dispute, reasonable practices, and rule-making proceedings before various government bodies, I have become thoroughly familiar with the major rail carriers in the United States. This familiarity extends to subjects of railroad operations, capacity, traffic prioritization, service, maintenance, costs and revenues, and contract and tariff terms that govern the movement of commodities by rail.

ROBERT D. MULHOLLAND
STATEMENT OF QUALIFICATIONS

As a consultant, I have directed and conducted economic and operations studies and prepared reports for freight carriers, shippers, federal agencies, the United States Congress, associations, and other public bodies dealing with transportation and related economic issues. Examples of studies I have participated in include organizing and directing rail facilities analyses, quantifying the impact of service disruptions for shippers, evaluation of traffic and operating factors in connection with single and multiple car movements and unit train operations for various commodities, rate and revenue division analyses, and other studies dealing with freight transportation markets for many commodities over various surface modes throughout the United States. Through these studies I have become familiar with railroad operating and dispatching practices.

I have conducted field studies of short line rail systems and rail spurs, and industry-owned rail facilities, and developed reports assessing their capacity to accommodate various projected operating scenarios and traffic levels. I have inspected and studied railroad terminal facilities used in handling various commodities to collect data that were used as a basis for the determination of traffic and operating characteristics for specific movements handled by rail.

I have developed operational and economic studies relative to the rail transportation of coal, chemicals, intermodal traffic, and other commodities on behalf of shippers, including analyses of the relative efficiency and costs of railroad operations over multiple routes. The results of these analyses have been used to assist shippers in

ROBERT D. MULHOLLAND
STATEMENT OF QUALIFICATIONS

the development and negotiation of rail transportation contracts that optimize operational efficiency and cost effectiveness.

I have presented written testimony before the STB related to the development of evidence including rail traffic volume and revenue forecasts, cross-over traffic revenue divisions, and train operations in several maximum reasonable rate proceedings on behalf of coal and chemicals shippers, and the development of evidence including rail fuel consumption and cost determinations in an unreasonable practice proceeding.

I have supported the negotiation of transportation contracts between shippers and railroads. Specifically, I have conducted studies concerning transportation rates based on market conditions and carrier competition, movement specific service commitments, and specific cost-based rate adjustment provisions. I have developed numerous variable cost calculations utilizing the various formulas employed by the Surface Transportation Board (“STB”) for the development of variable costs for common carriers, with particular emphasis on the basis and use of the Uniform Railroad Costing System (“URCS”). I have utilized URCS costing principles since the beginning of my career with L. E. Peabody & Associates Inc. in 1995.

I have conducted different economic analyses regarding rail transportation matters for dozens of electric utility companies located in all parts of the United States, and for major associations, including the Chlorine Institute, the American Chemistry Council, the Chemical Manufacturers Association, the National Industrial Transportation League, and the Western Coal Traffic League. In addition, I have assisted numerous government agencies in analyzing and solving various transportation-related problems.

ROBERT D. MULHOLLAND
STATEMENT OF QUALIFICATIONS

In the Western rail merger that resulted in the creation of the present Union Pacific Railroad Company, I reviewed the railroads' applications including their supporting traffic, cost and operating data and developed detailed evidence supporting requests for conditions designed to maintain the competitive rail environment that existed before the proposed merger.

While employed at FHWA, I was a member of the USDOT inter-agency working group that drafted the National Freight Policy. In addition, I served on the USDOT Freight Gateway Team, a group headed by the Undersecretary for Policy and composed of one representative from each of the surface modal agencies.

While employed at ICF International, I directed and conducted numerous analyses of the rail and trucking industries for federal transportation agencies including the Federal Railroad Administration ("FRA"), the Federal Motor Carrier Safety Administration ("FMCSA"), and the FHWA, including analyses of the current rail and trucking industries and forecasts of future trends in both industries.

FIELD TRIP TO BASS LAKE SPUR, JUNE 13, 2018

On June 13, I conducted a site visit to observe the Bass Lake Spur (“BLS”) facilities and operations. A description of my activities and my observations follows:

I started on the west end of the BLS, at the 62nd Street at-grade crossing near milepost 435. The track appeared to be 115 pound welded rail at this location.



Looking west toward TCW



Looking east toward BLS

At the Dominick Drive at-grade crossing at Milepost 433.74, I observed the west end of a long cut of carloads containing plastic pellets, sitting in storage to the east of Dominick Drive on the Dominick siding. The track was 115 pound jointed rail at this location and all points east.



Milepost marker

Looking east, stored plastic pellets

FIELD TRIP TO BASS LAKE SPUR, JUNE 13, 2018

At the turnout designating the end of Dominick and the beginning of The Westbound siding, I observed the east end of the same long cut of stored cars containing plastic pellets, along with 5 empty gondolas, taking up most of the Dominick track.



Looking west, Stored pellets and empty gons

Looking east

The tracks were clear on both sides of the 5th Avenue at-grade crossing, at milepost 432.02. The 5th avenue crossing separates The Westbound and Excelsior sidings. The gravel road north of Excelsior (east of 5th Ave) used for transloading aggregates to trucks was also clear.



Looking west across 5th Ave Xing

MP marker looking east

The Hopkins Depot is several hundred feet east of the 5th Avenue crossing, south of the main line/Excelsior and north of the House spur. I observed no activity at the Depot. Portions of Excelsior adjacent to the Hopkins Depot had piles of rock debris indicating transloading activity.

FIELD TRIP TO BASS LAKE SPUR, JUNE 13, 2018



Looking east from 5th Ave

Hopkins Depot and debris on Excelsior

There was orange ribbon on the rail braces at the turnout adjacent to the switch to the east of Excelsior siding.



Excelsior turnout and end of Salt Track

Excelsior switch and marked rail braces

The turnout to the Salt Track and House Track spurs is east of the Hopkins Depot and the Highway 169 overpass. Both spurs were clear. The House track was red flagged and is in disrepair. The House Track is almost buried in spots and overgrown with weeds and brush.

FIELD TRIP TO BASS LAKE SPUR, JUNE 13, 2018



Salt Track turnout



House track red flagged



Looking east



Looking west

[House Track from Hopkins Depot]

FIELD TRIP TO BASS LAKE SPUR, JUNE 13, 2018

From the west end of The Creek, I observed a clear Klover Stub.



Klover Stub and switch

Klover Stub turnout

The Creek was fully occupied by a long cut of hopper cars.



West end of The Creek, hopper cars

The Creek west end switch and turnout

FIELD TRIP TO BASS LAKE SPUR, JUNE 13, 2018



Looking west [The Creek from Skunk Hollow turnout] Looking east (Wooddale Ave Xing)

There was no activity on Skunk Hollow.



Looking NE [Skunk Hollow connection from south of TCWR] Looking SW

FIELD TRIP TO BASS LAKE SPUR, JUNE 13, 2018

Bass Lake Yard was clear. The northern siding (middle track) was red flagged. I observed heaving on the southern siding track.



Looking west (Beltline Blvd Xing) [Bass Lake Yard] Looking east toward the KC

On the Kenilworth Corridor, I observed a westbound TCW local train stopped on the main line on the east side of the Cedar Lake Parkway at-grade crossing (east of the BLS.)



Westbound TCW local waiting east of Cedar Lake Pkwy

D Signal from west of Cedar Lake Parkway looking east

FIELD TRIP TO BASS LAKE SPUR, JUNE 13, 2018

I saw an eastbound BNSF train waiting west of the turnout at Cedar Lake Junction (east end of the Kenilworth Corridor) on the BNSF Wayzata subdivision.



BNSF train waiting west of Cedar Lake Jct.

THE RAIL TRAFFIC CONTROLLER (“RTC”) MODEL

Berkeley Simulation Software’s Rail Traffic Controller (“RTC”) is a Windows-based program that simulates the movement of trains through rail networks at a detailed and realistic level. It is used for a variety of purposes ranging from the tactical improvement of traffic flow to determining where capital infrastructure money should be spent.

The RTC uses sophisticated meet-pass logic to facilitate dispatch operations and capacity analyses. It includes an integrated train performance calculator (“TPC”) which accounts for different equipment types, train consists, terrain and track conditions. The RTC has been an industry standard simulation model since 1995 and its results have been validated with hundreds of real-world networks.

Common uses for the RTC include:

1. Developing operating plans;
2. Diagnosing bottlenecks;
3. Recommending schedule changes;
4. Evaluating network reconfigurations;
5. Assessing the impact of additional volume; and
6. Assessing the impact of shared use networks.

The following describes the inputs and outputs of the RTC.

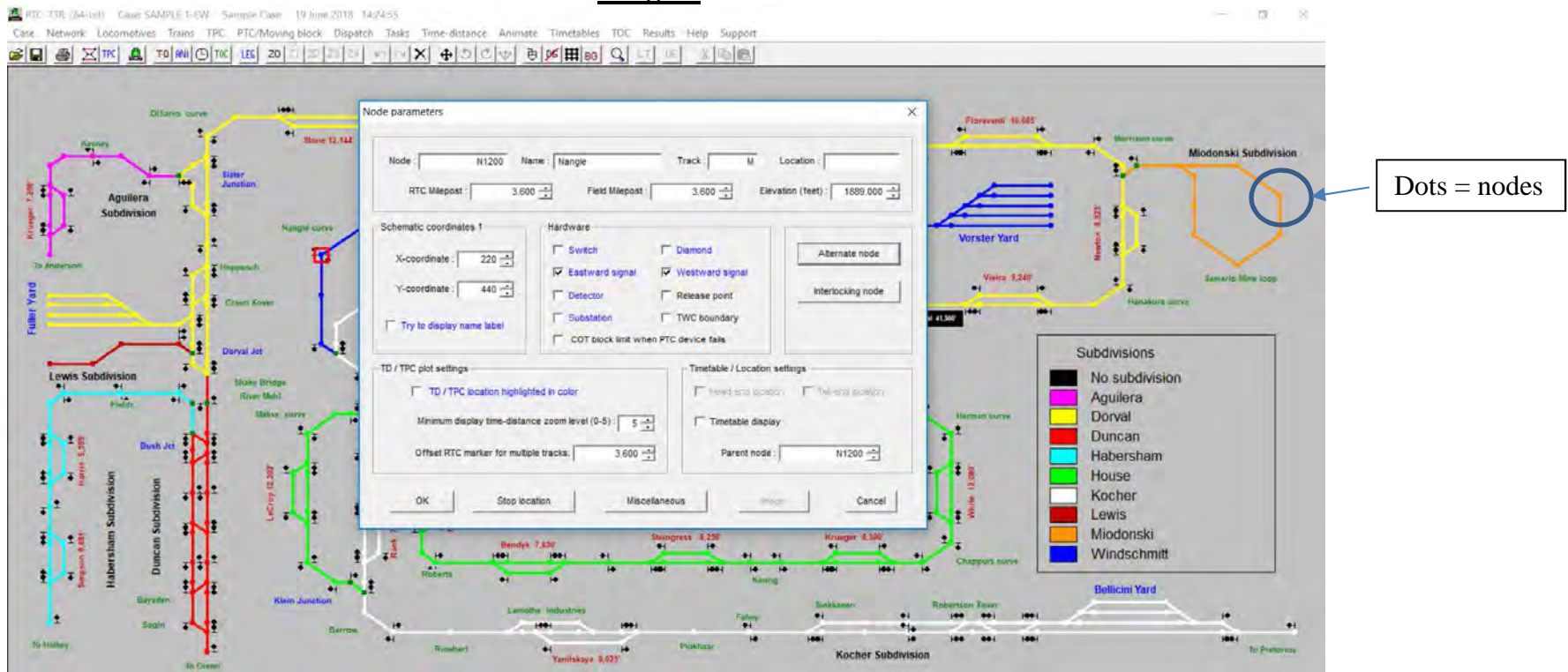
THE RAIL TRAFFIC CONTROLLER (“RTC”) MODEL

A. RTC INPUTS

The RTC requires detailed inputs of rail network information and train information. Mileposts, stations, signals, switches, beginning and endpoints for grades or curves, and other significant location points are all input into the RTC model as a “Node.”

Each node contains various data about the location. Image A below shows the input interface for a single node. Each of the dots on the network below represents a node.

Image A

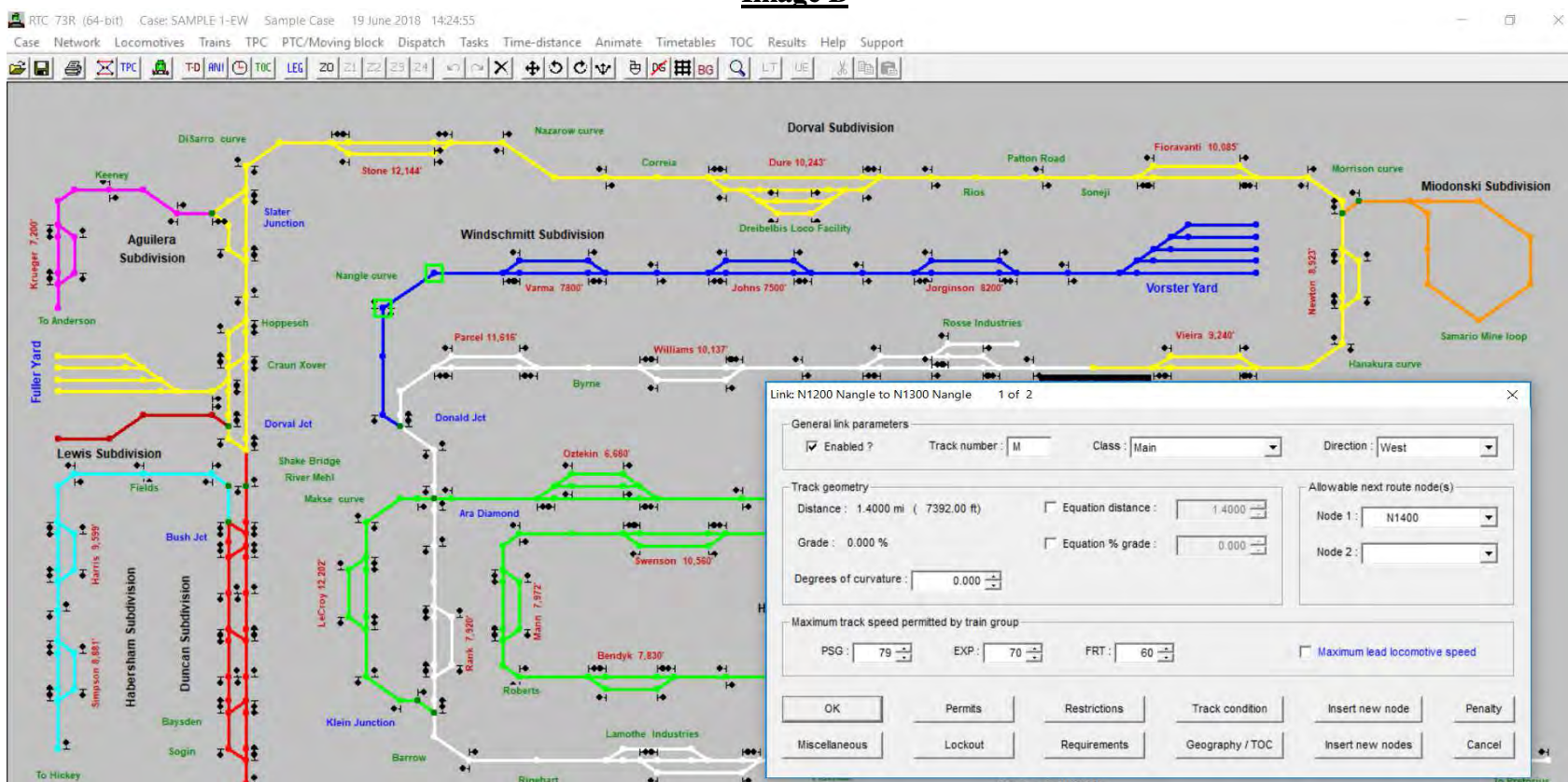


THE RAIL TRAFFIC CONTROLLER (“RTC”) MODEL

Information about the rail connecting two nodal points is input into the RTC as a “Link.” The link contains information for each direction of travel such as speed limit by train type, curve, grade, distance and any restrictions or required permits for the link.

Image B below shows the input interface for a single link. Each line segment (connecting two dots) on the network below represents a link.

Image B



THE RAIL TRAFFIC CONTROLLER (“RTC”) MODEL

Detailed information for each individual train must be input into the RTC. For each train, the train type, consist, schedule, origin, destination, route and each planned stop, e.g., crew change or helper service, must be input into the model. Image C below shows the train input interface for a sample train.

Image C

The screenshot displays the 'Edit seed train characteristics with the freight interface' dialog box. The 'Train symbol' is 'WestLocal', 'Train type' is 'L-Local', and 'Trip number' is '1'. The 'Linked train(s)' section shows 'Train 1' and 'Train 2' with 'Origin' and 'Destination' dropdowns set to 'Not specified'. The 'Initial conditions' section includes 'Head-end speed' (0), 'Tail-end node' (K9000), 'Equipment set' (0), and 'Linkage sequence' (0). Below the dialog is a table with the following data:

	Node	Node Location	Field Milepost	Requested Arrival DD:HH:MM	Requested Departure DD:HH:MM	Minimum Dwell HH:MM:SS	Departing Loads	Departing Empires	Trailing Departing Tons	Trailing Departing Feet	Total Departing Tons	Total Departing Feet
1	K9000	Bellini 4	1649.800	FLOAT	10:00	1:00	5	55	2600	3900	3191	-
2	H1630	White	36.238	FLOAT	FLOAT	1:00:00	5	55	2600	3900	3191	-
3	H2000	Lai	82.000	FLOAT	FLOAT	1:00:00	5	55	2600	3900	3191	-

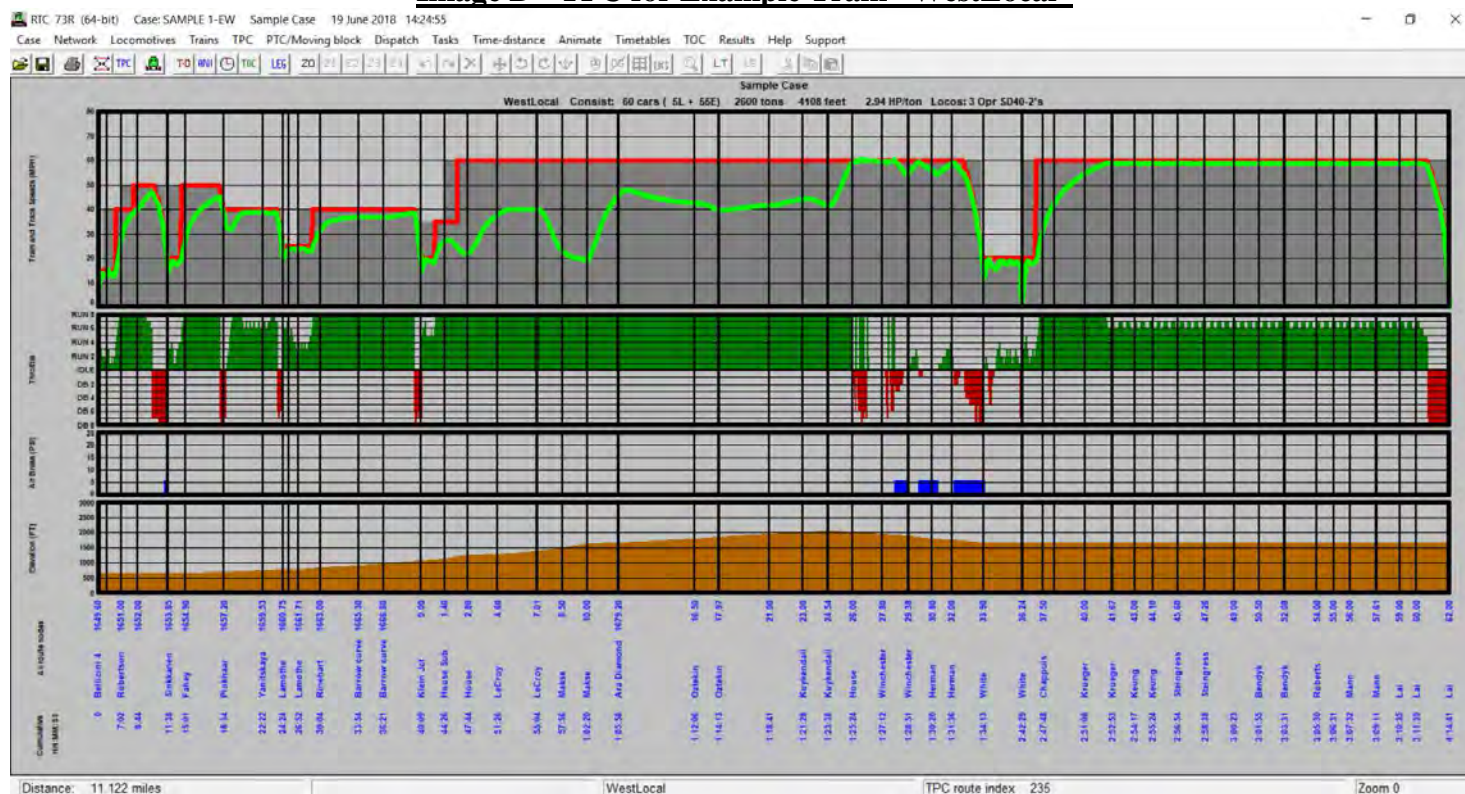
In addition to the three fundamental inputs of nodes, links, and trains, there are various other inputs such as divisions, subdivisions, planned outages, Positive Train Control (“PTC”) configurations, preferred directional flow, and others.

THE RAIL TRAFFIC CONTROLLER (“RTC”) MODEL

B. RTC OUTPUTS

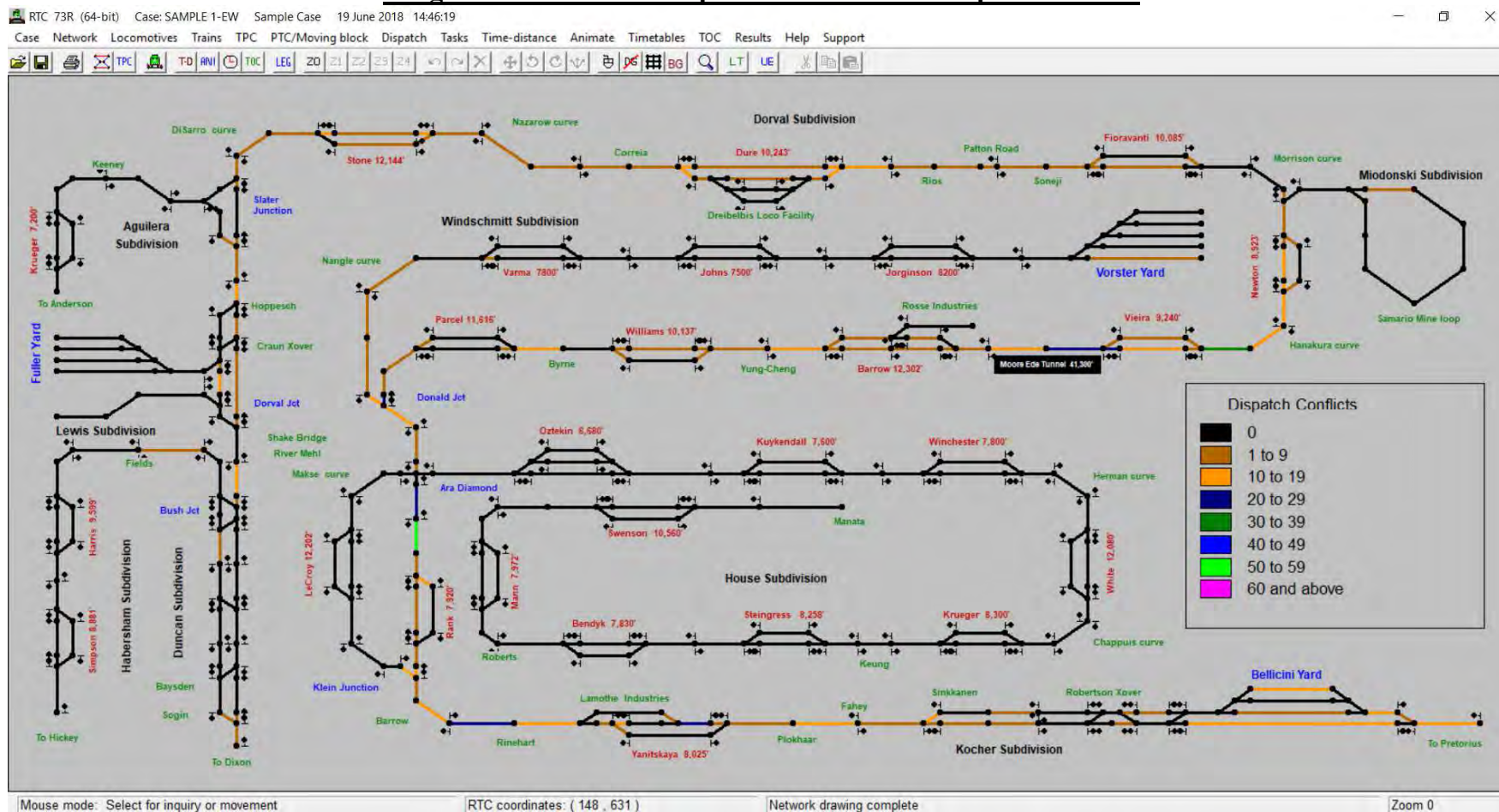
After all of the inputs are coded and verified, the RTC can be dispatched to produce various outputs. For example, output from the TPC can be shown for each individual train. Color-coded images of the network can also be produced to highlight locations with the highest number of train conflicts. An example of each of these is shown in Images D and Image E below.

Image D - TPC for Example Train “WestLocal”



THE RAIL TRAFFIC CONTROLLER (“RTC”) MODEL

Image E - Color Coded Dispatch Conflicts for Sample RTC Case



The detailed, train-specific dispatch information such as achieved speeds, conflicts encountered, and transit times is output into a flat file. This file is imported into a database program so that the train specific results can be evaluated and summarized. A

THE RAIL TRAFFIC CONTROLLER (“RTC”) MODEL

snapshot of the flat file output is pictured in Image F below. Once converted into a database, the report file can produce statistics such as average transit times, total dwell time, or other train type specific statistics.

Image F - Sample REPORT file output

Train	Average Speed w/o Dwell	Average Speed with Dwell	Ideal* Run Time DD:HH:MM:SS	Total Elapsed DD:HH:MM:SS	Sim Delta % of Ideal	Total Dwell* DD:HH:MM:SS	Dwell % of Run Time	Wait on* Schedule DD:HH:MM:SS	Wait on Sched % of Run Time	Switch Delay DD:HH:MM:SS	True* Delay DD:HH:MM:SS	Delay % of Run Time	Origin & Entry Delay DD:HH:MM:SS	Total Train Miles	Ideal* Delta Miles
1 EAST-Amtrak-2	38.03	36.54	3:30:46	3:49:06	8.70%	9:00	3.93%	0	0.00%	0	18:20	8.00%	0	139.515	0.000
2 EAST-Amtrak-3	38.53	37.00	3:30:46	3:46:14	7.34%	9:00	3.98%	0	0.00%	0	15:28	6.84%	0	139.515	0.000
3 EAST-Amtrak-4	38.19	36.68	3:30:46	3:48:13	8.28%	9:00	3.94%	0	0.00%	0	17:27	7.65%	0	139.515	0.000
4 EAST122-2	26.41	26.00	4:05:49	5:21:58	30.98%	5:00	1.55%	0	0.00%	0	1:16:09	23.65%	0	139.515	0.000
5 EAST122-3	26.63	26.21	4:05:49	5:19:22	29.92%	5:00	1.57%	0	0.00%	0	1:13:33	23.03%	0	139.515	0.000
6 EAST122-4	31.93	31.33	4:05:49	4:27:09	8.68%	5:00	1.87%	0	0.00%	0	21:20	7.99%	0	139.515	0.000
7 EAST140-2	31.46	30.88	4:05:49	4:31:07	10.29%	5:00	1.84%	0	0.00%	0	25:18	9.33%	0	139.515	0.000
8 EAST140-3	30.79	30.24	4:05:49	4:36:50	12.62%	5:00	1.81%	0	0.00%	0	31:01	11.20%	0	139.515	0.000
9 EAST140-4	31.37	30.79	4:05:49	4:31:50	10.58%	5:00	1.84%	0	0.00%	0	26:01	9.57%	0	139.515	0.000
10 EAST150-2	32.93	32.29	4:05:49	4:19:14	5.46%	5:00	1.93%	0	0.00%	0	13:25	5.18%	0	139.515	0.000
11 EAST150-3	32.88	32.24	4:05:49	4:19:37	5.61%	5:00	1.93%	0	0.00%	0	13:48	5.32%	0	139.515	0.000
12 EAST150-4	32.93	32.29	4:05:49	4:19:14	5.46%	5:00	1.93%	0	0.00%	0	13:25	5.18%	0	139.515	0.000
13 EAST200-2	25.58	13.35	9:36:16	10:27:13	8.84%	5:00:00	47.83%	0	0.00%	0	50:57	8.12%	0	139.515	0.000
14 EAST200-3	21.85	12.25	9:36:16	11:23:08	18.54%	5:00:00	43.92%	0	0.00%	0	1:46:52	15.64%	0	139.516	0.001
15 EAST200-4	25.59	13.35	9:36:16	10:27:05	8.82%	5:00:00	47.84%	0	0.00%	0	50:49	8.10%	0	139.515	0.000
16 EAST400-2	23.14	9.81	13:04:40	14:13:42	8.80%	8:12:00	57.63%	0	0.00%	0	1:09:02	8.09%	0	139.516	0.000
17 EAST400-3	25.27	10.17	13:04:40	13:43:17	4.92%	8:12:00	59.76%	0	0.00%	0	38:37	4.69%	0	139.516	0.001
18 EAST400-4	23.14	9.81	13:04:40	14:13:42	8.80%	8:12:00	57.63%	0	0.00%	0	1:09:02	8.09%	0	139.516	0.000
19 EAST410-2	22.08	12.24	9:47:31	11:24:02	16.43%	5:05:00	44.59%	0	0.00%	0	1:36:31	14.11%	0	139.515	0.000
20 EAST410-3	22.16	12.26	9:47:31	11:22:40	16.20%	5:05:00	44.68%	0	0.00%	0	1:35:09	13.94%	0	139.515	0.000
21 EAST410-4	22.41	12.34	9:47:31	11:18:30	15.49%	5:05:00	44.95%	0	0.00%	0	1:30:59	13.41%	0	139.516	0.000
22 EAST510-2	29.59	27.01	1:46:27	2:06:05	18.44%	11:00	8.72%	0	0.00%	0	19:38	15.57%	0	56.750	0.000
23 EAST510-3	29.59	27.01	1:46:27	2:06:05	18.44%	11:00	8.72%	0	0.00%	0	19:38	15.57%	0	56.750	0.000
24 EAST510-4	29.59	27.01	1:46:27	2:06:05	18.44%	11:00	8.72%	0	0.00%	0	19:38	15.57%	0	56.750	0.000
25 EAST520-2	25.60	24.49	1:39:57	2:19:02	39.10%	6:00	4.32%	0	0.00%	0	39:05	28.11%	0	56.750	0.000
26 EAST520-3	26.10	24.95	1:39:57	2:16:27	36.52%	6:00	4.40%	0	0.00%	0	36:30	26.75%	0	56.750	0.000
27 EAST520-4	27.30	26.05	1:39:57	2:10:43	30.78%	6:00	4.59%	0	0.00%	0	30:46	23.54%	0	56.750	0.000
28 EAST530-2	26.96	25.74	1:39:57	2:12:18	32.37%	6:00	4.54%	0	0.00%	0	32:21	24.45%	0	56.750	0.000
29 EAST530-3	27.25	26.01	1:39:57	2:10:56	31.00%	6:00	4.58%	0	0.00%	0	30:59	23.66%	0	56.750	0.000
30 EAST530-4	24.24	23.25	1:39:57	2:26:34	46.64%	6:00	4.09%	0	0.00%	0	46:37	31.81%	0	56.800	0.050
31 EAST540-2	36.24	34.07	1:39:57	1:39:57	0.00%	6:00	6.00%	0	0.00%	0	0	0.00%	0	56.750	0.000
32 EAST540-3	36.24	34.07	1:39:57	1:39:57	0.00%	6:00	6.00%	0	0.00%	0	0	0.00%	0	56.750	0.000
33 EAST540-4	36.07	34.02	1:39:57	2:16:37	36.60%	6:00	4.30%	0	0.00%	0	36:40	26.84%	0	56.750	0.000

The RTC is used by many Class I railroads and short line railroads during the normal course of business. It is also used to perform rail studies by various consultants and universities. In addition, it is used as a validation tool in various Surface Transportation Board proceedings.

RESULTS OF RTC SIMULATIONS

Operating capacity is determined by the configuration of the modeled network and whether any portion of the network is occupied. The purpose of the Rail Traffic Controller (“RTC”) modeling exercise I conducted was to identify whether, and to what extent, the proposed reconfiguration affected TCW’s operations. I used Berkeley Simulation Software’s RTC software package to evaluate the impact of the proposed reconfiguration on existing and future traffic.¹

This Exhibit No. 4 summarizes the process used and the results of my Bass Lake Spur RTC analysis under the following topical headings:

1. Simulation Inputs and Assumptions
2. Simulation Outputs and Results

1. Simulation Inputs and Assumptions

The RTC analysis is defined by the following three (3) components:

- a. The Train List;
- b. The Network Configuration; and
- c. The Operating Assumptions.

In my Bass Lake Spur RTC analysis, I evaluated the movement of Twin Cities & Western Railroad Company’s (“TCW”) traffic under various scenarios based on six (6) different combinations of network infrastructure, operating parameters, and traffic group. Each component is discussed below.

¹ RTC is the industry standard evaluation tool used by Class I railroads for capacity testing as well as testing infrastructure improvements or operating plan changes. In addition, RTC is used as the preferred testing tool for validation of operating plans in maximum rate cases before the Surface Transportation Board, which is explained in more detail in Exhibit No. 3.

RESULTS OF RTC SIMULATIONS

a. The Train List

I started by identifying the trains moving in the busiest week of the base period, as measured by train count, using historical data.² Based on the train information provided to me, I identified the seven (7) day period between January 20, 2018 and January 26, 2018 as the busiest week, i.e., most suitable for testing the impact of network reconfigurations. This period experienced the highest volume of traffic, during the periods for which I had data, from both TCW Observations and Canadian Pacific Railway (“CP”) Train Sheets.³ In addition to the identified week, I modeled traffic for one day prior and one day after the week to sufficiently occupy the network with traffic and clear the network of traffic before and after the observed simulation period. These additional periods are referred to as the warm-up and cool-down periods, respectively.

For my growth scenarios, I assumed 10 percent growth in manifest traffic and 25 percent growth in unit train traffic. The 10 percent growth in manifest traffic is modeled by increasing the car counts on TCW’s daily local trains that moved in the base period by 10 percent. The 25 percent increase in unit train traffic is modeled by randomly adding 25 percent more unit trains than observed during the base period. I added 25 percent more unit train traffic to account for growth and seasonality.

b. The Network Configuration

The existing network I modeled in the RTC is the Bass Lake Spur of the CP that runs between TCW and the Kenilworth Corridor. The modeled segment includes all existing track on the Bass Lake Spur between milepost 435.06 and milepost 428.38. The existing track includes three (3) sidings,

² The trains include local manifest trains, unit train traffic (ethanol, grain and coal trains) and light engines.

³ See: “2017 2018 TCWR Train Activity Log .xlsx.”

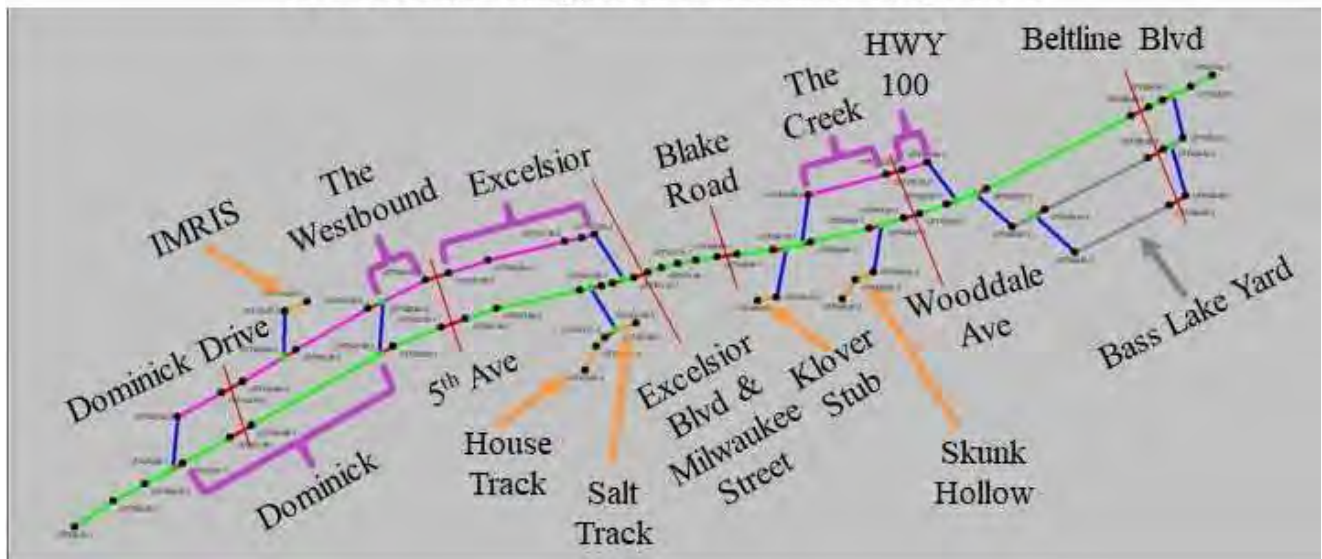
RESULTS OF RTC SIMULATIONS

three (3) spur tracks and a connection to the Minneapolis, Northfield and Southern Railway (“MN&S”).

The proposed reconfiguration of the network involves removing two (2) of three (3) existing sidings, shortening one existing siding, removing one of three (3) existing spur tracks, reconfiguring one of the two (2) remaining spur tracks, and reconfiguring the connection to the MN&S. The planned construction entails removal of approximately 16,000 feet of siding track on the Bass Lake Spur. Approximately 11,600 feet of existing siding will remain on the Bass Lake Spur for use by TCW after the project is completed. The existing infrastructure and proposed post-construction infrastructure as modeled in the RTC are pictured below in Images A and B, respectively.

Image A **Existing Infrastructure**

RTC Network configuration for Scenarios 1, 2, 4 and 5

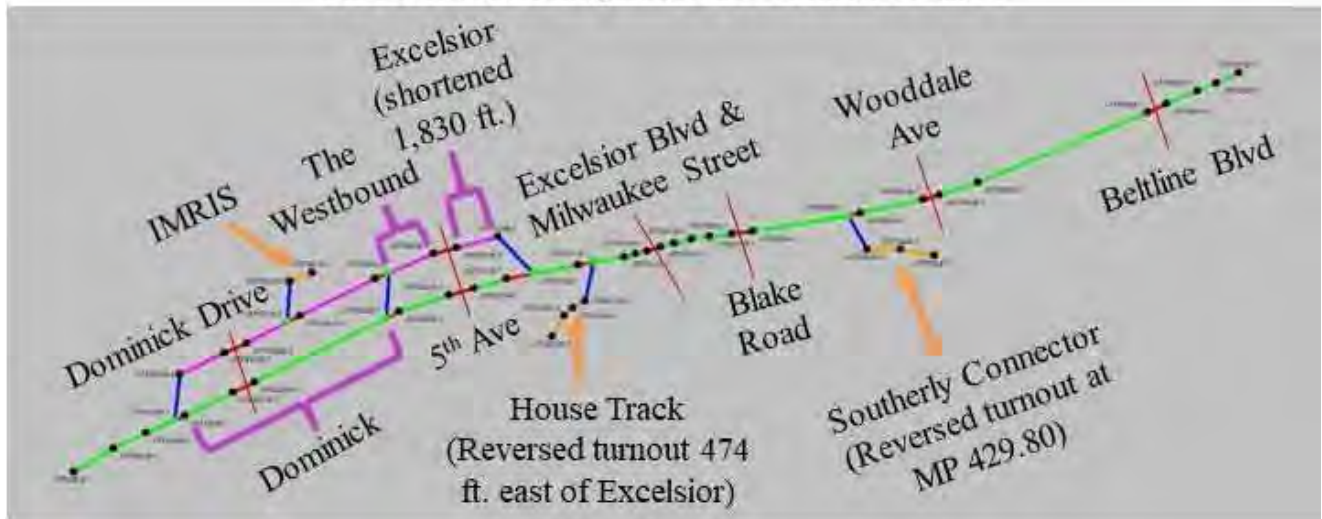


RESULTS OF RTC SIMULATIONS

Image B

Post-Construction Infrastructure

RTC Network configuration for Scenarios 3 and 6



c. Operating Assumptions

For some of my modeling runs, I assumed all track structures were clear (Scenarios 1, 3, 4 and 6). However, for two of the scenarios I modeled, I assumed one of the sidings (Dominick) was occupied by 50 carloads laden with plastic pellets (Scenarios 2 and 5).

My analysis included the following six (6) modeling scenarios:

- Scenario 1:*** existing infrastructure, base period peak week traffic;
- Scenario 2:*** existing infrastructure, 50 cars of plastic pellets stored on Dominick siding, base period peak week traffic;
- Scenario 3:*** future infrastructure, base period peak week traffic;
- Scenario 4:*** existing infrastructure, peak week traffic with additional growth traffic;
- Scenario 5:*** existing infrastructure, 50 cars of plastic pellets stored on Dominick siding, peak week traffic with additional growth traffic; and
- Scenario 6:*** future infrastructure, peak week traffic with additional growth traffic.

RESULTS OF RTC SIMULATIONS

**2. SIMULATION OUTPUT
AND RESULTS**

In Scenario 1, I modeled the current operations with the base period peak train volumes. The Scenario 1 results show that there is currently sufficient capacity for the Bass Lake Spur to carry the existing volumes with no issues. Table A below summarizes the number of trains and cars modeled and conflicts encountered for each of the six (6) scenarios.

<u>Scenario</u>	<u>Total Trains</u>	<u>Total Cars</u>	<u>Total Conflicts</u>
(1)	(2)	(3)	(4)
1	32	1,320	0
2	32	1,370	0
3	32	1,320	0
4	34	1,584	0
5	34	1,634	0
6	34	1,584	0

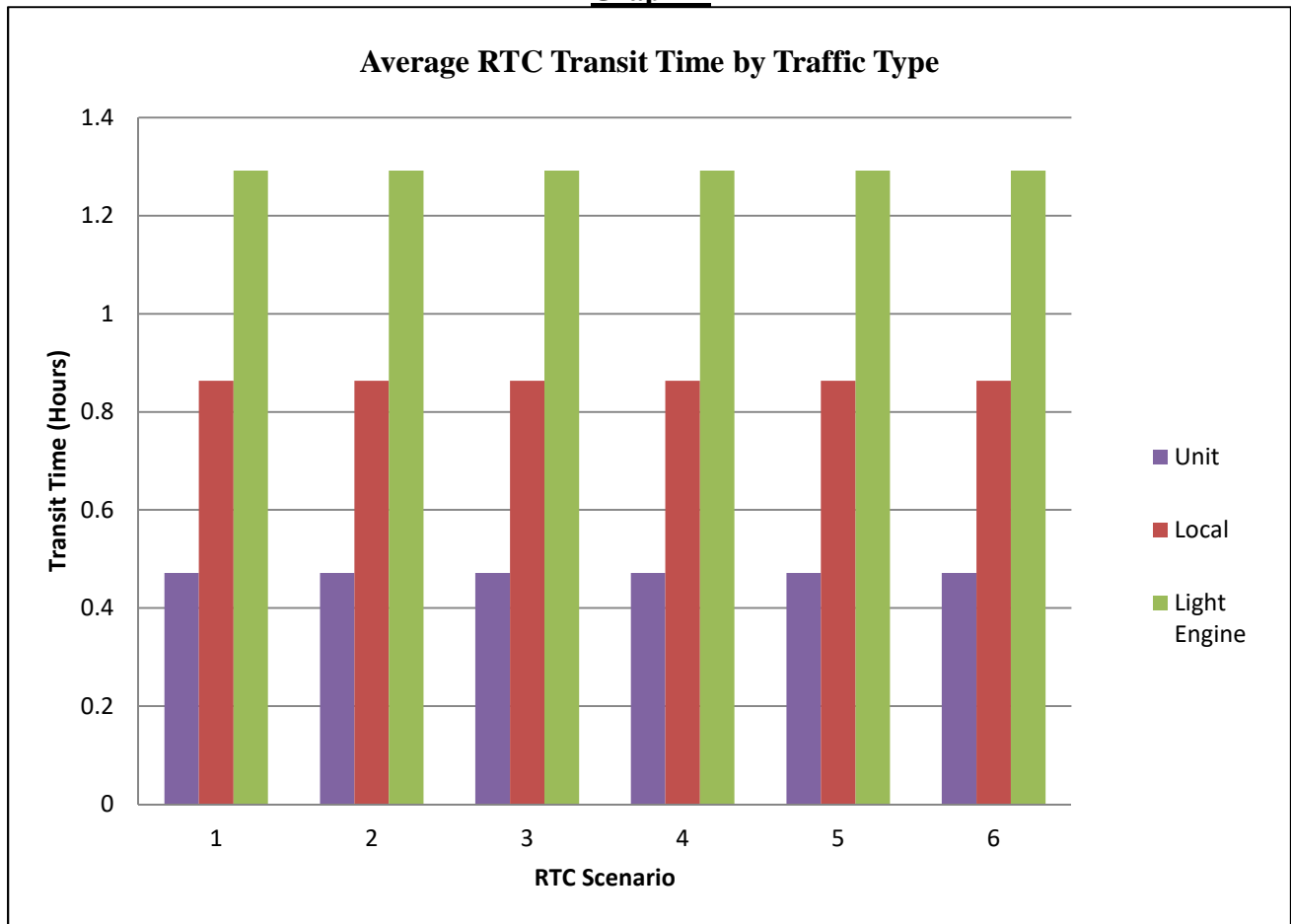
As shown in Table A above, for all scenarios, the capacity proved to be sufficient to handle the modeled operations with no conflicts.

a. Simulation Output

Graph A below shows the transit times exhibited by the various traffic groups remained unchanged for all scenarios.

RESULTS OF RTC SIMULATIONS

Graph A



As shown in Graph A above, unit trains moved through the Bass Lake Spur in roughly half an hour on average, reflecting their high dispatching priority. TCW local trains moved through the Bass Lake Spur in just under an hour on average. The relatively higher average transit time for local trains (just under an hour) results from some of the trains performing switching on the Bass Lake Spur. Light engine moves showed the longest average transit time in all scenarios (roughly an hour and a quarter). These moves reflect switching activities or repositioning locomotives.

RESULTS OF RTC SIMULATIONS

b. Simulation Results

All six (6) scenarios produced identical simulated results. Transit times were identical and no conflicts or train-meets were encountered. This indicates that the proposed reconfiguration of the network will not negatively impact TCW operations on the Bass Lake Spur. In Scenario 2 and Scenario 5, which included 50 cars of plastic pellets stored on the Dominick siding, the other sidings proved to be sufficient to handle any necessary switching or siding operations. The addition of significant growth traffic in Scenarios 4, 5, and 6 did not have any impact on transit times as shown in Graph A above.

The RTC analysis indicates that the Bass Lake Spur will still have sufficient capacity for current and future volumes without traffic disruption or increased transit times after the proposed network changes are made.

CERTIFICATE OF SERVICE

I do hereby certify that on this 28th day of June, 2018, I have served a copy of the foregoing Reply of Metropolitan Council to May 22, 2018 Decision by email on William A. Mullins, counsel for Twin Cities & Western Railroad Company, and by first class mail on each of the following persons or entities:

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