

CANADIAN PACIFIC RAILWAY LTD/CN

Form 6-K

September 07, 2007

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

Form 6-K

Report of Foreign Issuer

Pursuant to Rule 13a-16 or 15d-16 of
the Securities Exchange Act of 1934

For the month of September, 2007

CANADIAN PACIFIC RAILWAY LIMITED
(Commission File No. 1-01342)
CANADIAN PACIFIC RAILWAY COMPANY
(Commission File No. 1-15272)
(translation of each Registrant's name into English)

Suite 500, Gulf Canada Square, 401 9th Avenue, S.W., Calgary, Alberta, Canada, T2P 4Z4
(address of principal executive offices)

Indicate by check mark whether the registrants file or will file annual reports under cover Form 20-F or Form 40-F.

Form 20-F Form 40-F

Indicate by check mark whether the registrants by furnishing the information contained in this Form is also thereby furnishing the information to the Commission pursuant to Rule 12g3-2(b) under the Securities Exchange Act of 1934.

Yes No

If Yes is marked, indicate below the file number assigned to the registrant in connection with Rule 12g3-2(b):
82-_____

The Agreement and Plan of Merger included in this report furnished on Form 6-K shall be incorporated by reference into each of the following Registration Statements under the Securities Act of 1933 of the registrant: Form S-8 No. 333-140955 (Canadian Pacific Railway Limited), Form S-8 No. 333-127943 (Canadian Pacific Railway Limited), and Form S-8 No. 333-13962 (Canadian Pacific Railway Limited).

SIGNATURES

Pursuant to the requirements of the Securities Exchange Act of 1934, each registrant has duly caused this report to be signed on its behalf by the undersigned, thereunto duly authorized.

CANADIAN PACIFIC RAILWAY LIMITED
CANADIAN PACIFIC RAILWAY COMPANY
(Registrants)

Date: September 7, 2007

By: Signed: Donald F. Barnhardt

Name: Donald F. Barnhardt
Title: Corporate Secretary

AGREEMENT AND PLAN OF MERGER

dated as of September 4, 2007

among

SOO LINE HOLDING COMPANY,
SOO LINE PROPERTIES COMPANY,
CANADIAN PACIFIC RAILWAY COMPANY,
(solely for the purposes set forth herein)

and

DAKOTA, MINNESOTA & EASTERN RAILROAD CORPORATION

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AGREEMENT AND PLAN OF MERGER, dated as of September 4, 2007, among Soo Line Holding Company, a Delaware corporation and an indirect wholly owned subsidiary of the Guarantor (Parent), Soo Line Properties Company, a Delaware corporation and a wholly owned subsidiary of Parent (Purchaser), Dakota, Minnesota & Eastern Railroad Corporation, a Delaware corporation (the Company), solely for the purposes of Article V and Sections 6.03 and 6.12, Canadian Pacific Railway Company, a company organized under the laws of Canada (the Guarantor), and, at such time as it is appointed pursuant to Section 6.08(a), the Stockholders Representative.

WITNESSETH :

WHEREAS, the Boards of Directors of Guarantor, Parent, Purchaser and the Company have each determined that it is in the best interests of their respective stockholders for Parent to acquire the Company upon the terms and subject to the conditions set forth herein;

WHEREAS, the Boards of Directors of Guarantor, Parent, Purchaser and the Company have each approved this Agreement and declared its advisability and approved the merger (the Merger) of Purchaser with and into the Company in accordance with the terms of this Agreement and the applicable provisions of the General Corporation Law of the State of Delaware (the DGCL);

WHEREAS, concurrently with the execution and delivery of this Agreement by the parties hereto, the holders of a number of shares of the common stock, par value \$0.01 per share, of the Company (the Shares) sufficient to adopt and approve this Agreement and approve the Merger (the Requisite Stockholder Approval) are executing and delivering written consents to deliver the Requisite Stockholder Approval;

WHEREAS, the Company has issued the Preferred Stock and the Warrants (each as hereinafter defined);

WHEREAS, the Company has elected to redeem the Preferred Stock in accordance with its terms at the Closing (as hereinafter defined), and Purchaser wishes to fund such redemption, upon the terms and subject to the conditions set forth herein;

WHEREAS, it is intended that the holders of all of the Warrants (as hereinafter defined) will sell such Warrants to the Company at the Effective Time upon the terms and subject to the conditions set forth in the Warrant Purchase Agreement and Purchaser wishes to fund the purchase of such Warrants, upon the terms and subject to the conditions set forth herein;

WHEREAS, in order to induce Guarantor, Parent and Purchaser to enter into this Agreement, it is intended that the holders of Shares and holders of certain of the Warrants will enter into the Termination Agreement (as hereinafter defined) and it is intended that holders of Preferred Stock, Share Units and Options (each as hereinafter defined) will enter into a Release Agreement (as hereinafter defined); and

WHEREAS, the Company is required to satisfy its payment obligations for the Company Options and the Share Units in accordance with the terms thereof at the Closing, and

Purchaser wishes to fund such payment, upon the terms and subject to the conditions set forth herein;

NOW, THEREFORE, in consideration of the premises and of the mutual agreements and covenants hereinafter set forth, Guarantor, Parent, Purchaser and the Company hereby agree as follows:

ARTICLE I
DEFINITIONS

SECTION 1.01. Certain Defined Terms. As used in this Agreement, the following terms have the following meanings:

1994 Bonus Share Plan means the Company Bonus Share Plan approved and instituted by the Board of Directors of the Company by unanimous resolution dated June 28, 1994.

2004 Bonus Share Plan means the Company Bonus Share Plan approved and instituted by the Board of Directors by unanimous resolution dated December 9, 2004.

Action means any claim, action, suit, arbitration or proceeding by or before or brought or conducted by any third-party or Governmental Entity, or arbitrator, or any audit or investigation by any Governmental Entity.

Affiliate means, when used with respect to a specified Person, another Person that, either directly or indirectly through one or more intermediaries, Controls or is Controlled by or is under common Control with the Person specified.

Aggregate Closing Consideration means \$1,480,000,000.00.

Aggregate Strike Price Amount means the sum of the aggregate exercise price payable in respect of all Shares issuable upon the exercise of each vested and unvested Company Option and each Warrant and the aggregate Base Value of each Share Unit granted under the 2004 Bonus Share Plan.

Agreement means this Agreement and Plan of Merger, dated as of September 4, 2007, among Purchaser, Parent and the Company (together with attachments hereto) and all amendments hereto made in accordance with Section 9.10.

Audited Financial Statements means the balance sheets, statements of income and statements of cash flows as of the last day of, and for each of, the three most recent calendar years immediately preceding the date hereof, together with the reports thereon by an independent auditor.

Base Value means with respect to a Share Unit granted under the 2004 Bonus Share Plan, the base value established for such unit in accordance with the 2004 Bonus Share Plan.

Bonus Share Plans means the 1994 Bonus Share Plan and the 2004 Bonus Share Plan.

Books and Records means all books of account and other financial records and corporate records pertaining to the Company and the Subsidiaries.

Business means the business of the Company and the Subsidiaries as conducted as of the date of this Agreement, including, but not limited to, the railroad business.

Business Day means any day that is not a Saturday, a Sunday or other day on which banks are required or authorized by law to be closed in the City of New York.

Capital Expenditures Difference means the aggregate of the proposed Capital Expenditures, as set forth on Schedule 6.01(b)(vi) of the Disclosure Schedule, for the period beginning on July 1, 2007 through the last day of the calendar month immediately preceding the Closing Date, *less* the actual capital expenditures of the Company during such period (other than any amount for capital expenditures incurred in connection with the Flooding Repair Project).

Cash means the total amount of cash and cash equivalents and short-term investments, each of which shall be calculated in accordance with GAAP in a manner consistent with the calculation of the corresponding line items on the Company's Audited Financial Statements for the year ended December 31, 2006, held by the Company and its Subsidiaries as of 12:01 a.m., Central time, on the Closing Date.

Closing Date means the date on which the Closing occurs.

Common Equity Consideration means the amount equal to (i) the Aggregate Closing Consideration, (ii)(a) if Target Working Capital *less* Estimated Working Capital is a positive number, then *less* such number or (b) if Target Working Capital *less* Estimated Working Capital is a negative number, then *plus* the absolute value of such number, *less* (iii) the Estimated Debt Amount, *less* (iv) the Preferred Redemption Amount, *less* (v) the Consulting Fees Payable, *less* (vi) the Escrow Amount, *less* (vii) the Gross-up Escrow Amount and *plus* (viii) the Aggregate Strike Price Amount and *plus* (ix) an amount equal to the actual capital expenditures of the Company incurred from August 20, 2007 through Closing solely in connection with upgrading the existing bridges and tracks at the Waseca Sub, the Marquette Sub and the Rapid City Sub from 286K standard to 315K standard as part of the Flooding Repair Project, in each case, without duplication.

Consultants means any and all consultants (including, without limitation, engineering consultants), financial advisors, accountants, investment bankers or attorneys of the Company and its Subsidiaries in connection with this Agreement and the transactions contemplated hereby or with respect to any transactions considered by the Company or the Subsidiaries as alternatives to the Merger and, solely with respect to the matters set forth in the

Gross-Up Agreement, Kevin Schieffer, and, solely with respect to the matters set forth in the Director Change in Control Agreements, the directors named therein.

Consulting Fees Payable means any and all Liabilities of the Company or any of its Subsidiaries to be paid at the Closing for any item set forth on Schedule 1.01(a)(i) and any (i) fees, costs, or expenses of, or amount owing to, any Consultant, or (ii) dataroom and due diligence costs or expenses, in each case incurred by the Company or the Subsidiaries in connection with this Agreement and the transactions contemplated hereby or with respect to any transactions considered by the Company or the Subsidiaries as alternatives to the Merger.

Control (including the terms Controlling, Controlled by and under common Control with) means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a Person, whether through ownership of voting securities or otherwise.

Credit Risk Premium means any Credit Risk Premium (as defined in 49 United States Code 822(f)(3)) paid to the FRA in connection with the FRA Loan and accrued by the Company through the Closing Date.

Debt Amount means, as of 12:01 a.m., Central time, on the Closing Date, (i) the principal amount and accrued and unpaid interest outstanding under the FRA Loan, the Fishback Mortgage, the Illinois Rehabilitation Loan, the South Dakota Construction Loan and the Revolver and prepayment and termination costs related thereto, *plus* (ii) capital lease obligations of the Company and its Subsidiaries, calculated in accordance with GAAP in a manner consistent with the calculation of the corresponding line item on the Company's Audited Financial Statements for the year ended December 31, 2006, *plus* (iii) any other Indebtedness not included in clauses (i) and (ii), *minus* (iv) Cash, and (v)(a) if the Capital Expenditures Difference is a positive number, then *plus* such amount or (b) if the Capital Expenditures Difference is a negative number, then *minus* the absolute value of such amount.

Definitive Agreements means this Agreement, the Escrow Agreement, the Gross-up Escrow Agreement, the Termination Agreement, the Warrant Purchase Agreement, the Release Agreements and any contracts or agreements executed pursuant or related hereto or thereto, including any documents or certificates delivered pursuant hereto or thereto or to carry out the transactions contemplated under any Definitive Agreement.

Development Property means any real property that is, as of the date hereof, in one or more phases of development, including pre-construction, provided that a real property shall cease to be a Development Property at the time such real property becomes a Stabilized Property.

Disclosure Schedule means the Disclosure Schedule delivered to Purchaser by the Company pursuant to this Agreement.

DM&E means the Dakota, Minnesota & Eastern Railroad Corporation, a Delaware corporation.

Encumbrance means any security interest, pledge, mortgage, lien (statutory or other), charge, adverse claim of ownership or use, easement, encroachment, defect in title or other encumbrance of any kind.

Environment means surface waters, ground waters, soil, subsurface strata and ambient air.

Environmental Claims means actions, suits, demands, claims, notices of noncompliance, proceedings, consent orders or consent agreements relating to Environmental Laws, Environmental Permits or Hazardous Materials.

Environmental Law means any applicable Law relating to protection of the environment.

Environmental Permit means any permit, approval, identification number, license or other authorization required under any applicable Environmental Law.

Equityholders means the holders of Shares, Share Units, Warrants and Company Options, in each case outstanding immediately prior to the Effective Time.

Equityholder s Percentage means, except as set forth on Schedule 1.01(a)(iii), as to any holder of Shares, Share Units, Company Options or Warrants, in each case outstanding immediately prior to the Effective Time, the percentage as determined in good faith by the Stockholders Representative in accordance with the way that a marginal dollar of Per Share Merger Consideration would be allocated to such holder under Section 3.01(a), Section 3.02 and Section 3.05; provided that the aggregate Equityholder s Percentage for all holders of Shares, Share Units, Company Options and Warrants shall total one hundred percent (100%), and provided further that such Equityholder s Percentages may be adjusted from time to time upon certification by the Stockholders Representative that a transfer of the right, title and interest in an Equityholder s Percentage has occurred in accordance with any plan approved by a majority of the Equityholders. The Equityholder s Percentages for the Equityholders as of the date of this Agreement are set forth in Schedule 4.03 of the Disclosure Schedule.

Escrow Agreement means the Escrow Agreement, initially dated as of a date prior to the Closing Date, between the Company, Parent, Purchaser and a commercial bank or trust company having net capital of not less than \$250 million, as escrow agent, to be mutually agreed upon by Parent and the Company.

Expected Withholding Tax means (i) any Tax that would not have been imposed but for the failure of the payee to provide a properly completed and executed IRS Form W-9, or otherwise to establish an exemption from U.S. backup withholding tax, or the failure of the payee to provide a properly completed and executed IRS Form W-8 BEN and (ii) any applicable withholding Tax on compensation for services rendered to the Company or its Subsidiaries by employees, independent contractors or consultants.

Financial Agreement means the Financial Agreement dated November 22, 1993 between the Company and the Chicago & North Western Transportation Company, predecessor in interest to Union Pacific Railroad Company.

FIRPTA Report means a report, prepared by FMV Opinions, Inc., providing an opinion of the fair market value of the real property and total assets of the Company as of December 31st of years 2002-2006 and as of the Closing Date or as close thereto as practicable, in all cases determined in accordance with applicable regulations under Section 897 of the Internal Revenue Code.

Fishback Mortgage means the Mortgage Agreement, dated as of April 15, 2003, between the Company and Fishback Financial Corporation.

Flooding Repair Project means the construction and other work necessary to repair flooding damage to the Waseca Sub, the Marquette Sub and the Rapid City Sub as described on Schedule 4.08(a)(viii) and such other construction and other work as may be determined by the Company to be necessary to repair such flooding damage, including to make upgrades as necessary to achieve 315K standards.

FRA Loan means the Financing Agreement, dated as of December 16, 2003, among the Company, Iowa, Chicago & Eastern Railroad Corporation and the United States of America, represented by the Secretary of Transportation acting through the Administrator of the Federal Railroad Administration, as amended by Amendment No. 1 thereto, dated July 20, 2004 and as further amended by Amendment No. 2 thereto, dated as of February 21, 2007.

Future Consulting Fees means any and all Liabilities of the Company or any of its Subsidiaries (or the Surviving Corporation on behalf of the Company) not paid at the Closing or arising after the Closing for (i) any item set forth on Schedule 1.01(a)(ii), (ii) fees, costs, or expenses of, or amount owing to, any Consultant, or (iii) dataroom and due diligence costs or expenses, in each case incurred by the Company in connection with this Agreement and the Merger and the transactions contemplated hereby or with respect to any transactions considered by the Company or the Subsidiaries as alternatives to the Merger except (x) amounts payable in connection with the Construction Milestone Payment, the Coal Milestone Payment, the Final Adjustment Amount and the Transfer described in Section 2.02(e), and (y) amounts payable to the Consultants to the extent such amounts, fees, costs or expenses are incurred as a result of any engagement initiated by or on behalf of, or instructions from or for the benefit of, the Company or the Surviving Corporation following the Closing.

GAAP means United States generally accepted accounting principles in effect from time to time applied consistently throughout the period involved.

Governmental Entity means any United States or foreign federal, national, supra-national, state, provincial, or local government, governmental, regulatory, self-regulatory or administrative authority, agency or commission or any court, tribunal or judicial or arbitral body or political or other subdivision, department or branch of any of the foregoing.

Governmental Order means any order, judgment, injunction, decree, stipulation, determination or award entered, issued or made by or with any Governmental Entity.

Gross-up Agreement means the Withholding Tax Gross-up Agreement, dated as of the date of this Agreement, between Kevin Schieffer and the Company, which agreement shall

be amended and modified by the parties thereto after the date hereof to the extent reasonably necessary to reflect the principles set forth on Schedule 6.14 of the Disclosure Schedule.

Hazardous Materials means (a) those substances regulated under the United States Hazardous Materials Transportation Act, the Resource Conservation and Recovery Act, the Comprehensive Environmental Response, Compensation and Liability Act, the Clean Water Act and the Clean Air Act; (b) petroleum and petroleum products, radioactive materials and polychlorinated biphenyls; and (c) chemicals or substances regulated as toxic or hazardous under any applicable Environmental Law.

HSR Act means the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, and the rules and regulations thereunder.

ICCTA means the ICC Termination Act of 1995.

IC&E means the Iowa, Chicago & Eastern Railroad Corporation, a Delaware corporation.

Illinois Rehabilitation Loan means the Track Rehabilitation Loan Agreement, dated as of June 26, 1992, between the Company, as the successor to the Soo Line Railroad Company, and the State of Illinois, acting by and through its Department of Transportation.

Indebtedness means, with respect to any Person, (a) all indebtedness of such Person, whether or not contingent, for borrowed money and prepayment and termination costs related thereto, (b) all obligations of such Person for the deferred purchase price of property or services (including the aggregate principal amount thereof and the aggregate amount of any accrued but unpaid interest thereon), (c) all obligations of such Person evidenced by notes, bonds, debentures or other similar instruments and prepayment and termination costs related thereto, (d) all indebtedness created or arising under any conditional sale or other title retention agreement with respect to property acquired by such Person (even though the rights and remedies of the seller or lender under such agreement in the event of default are limited to repossession or sale of such property), (e) all obligations of such Person as lessee under leases that have been or should be, in accordance with GAAP, recorded as capital leases, (f) all obligations, contingent or otherwise, of such Person under acceptance, letter of credit (other than the Letter of Credit) or similar facilities or in respect of interest rate and currency obligation swaps, hedges or similar arrangements and prepayment and termination costs related thereto, (g) all obligations of such Person to purchase, redeem, retire, defease or otherwise acquire for value any capital stock of such Person or any warrants, rights or options to acquire such capital stock, valued, in the case of redeemable preferred stock, at the greater of its voluntary or involuntary liquidation preference plus accrued and unpaid dividends, other than the Preferred Stock, the Company Options and the Warrants, (h) all Indebtedness of others referred to in clauses (a) through (g) above guaranteed directly or indirectly in any manner by such Person, or in effect guaranteed directly or indirectly by such Person through any agreement and (i) all Indebtedness referred to in clauses (a) through (g) above secured by (or for which the holder of such Indebtedness has an existing right, contingent or otherwise, to be secured by) any Encumbrance on property (including accounts and contract rights) owned by such Person, even though such Person has not assumed or become liable for the payment of such Indebtedness.

Intellectual Property means all patents, copyrights, software, service marks, domain names, trade dress and trade secrets.

Internal Revenue Code means the Internal Revenue Code of 1986, as amended.

IRS means the United States Internal Revenue Service.

knowledge of the Company means the actual knowledge, after due inquiry, of Kevin V. Schieffer, Kurt V. Feaster, Lynn A. Anderson, J. Ed Terbell, Mike Ball, John Brooks, Randy H. Henke, Daniel L. Goodwin, Steve O. Scharnweber, Clyde F. Mittleider and Ray Gigear.

Land Holdings means any real property that is unimproved and not a Development Property.

Law means any United States or foreign federal, national, supra-national, state, provincial, local, municipal or similar constitution, statute, law, ordinance, regulation, rule, code, order, requirement or rule of law (including any rules of any self-regulatory organization, securities exchange or clearinghouse or common law).

Letter of Credit means the Irrevocable Standby Letter of Credit Number SCL SCL011670 issued by National City Bank, as amended through July 21, 2006, in favor of KM Strategic Investments, LLC, in the amount of \$10,000,000 as of the date of this Agreement.

Liabilities means any and all debts, liabilities and obligations, whether accrued or fixed, absolute, matured or determined.

Licenses means all of the licenses, permits, franchises and other governmental authorizations required under any Law for the operation of the Business.

Material Adverse Effect means any condition, change, circumstance, or effect (or any development that would result in any condition, change, effect or circumstance) that, individually or in the aggregate with all other changes, circumstances, or effects, is, or would reasonably be expected to be, materially adverse to the financial condition or results of operations of the Company and the Subsidiaries, taken as a whole, except for any such changes or effects resulting from (i) changes or effects affecting the securities markets generally or changes in general economic, regulatory or political conditions or other changes that affect the railroad or coal industries in general, (ii) any action taken pursuant to or in accordance with this Agreement, (iii) changes caused by acts of terrorism or war (whether or not declared) occurring after the date of this Agreement, (iv) the consummation of this Agreement or the transactions contemplated hereby or the announcement of the execution thereof and (v) any uninsured damage resulting from the flood conditions affecting the Waseca Sub, the Marquette Sub and the Rapid City Sub since August 2007 and so long as such uninsured damage does not exceed \$10,000,000, except, with respect to the foregoing clauses (i) through (iii), to the extent that such changes, effects, or actions have a disproportionate effect on the Company and the Subsidiaries, taken as a whole, relative to other participants in the industries in which the Company and the Subsidiaries operate.

New Construction means the construction and operation of a new line of railroad that extends between the existing lines of the DM&E and coal mines in the Powder River Basin area of Wyoming, as defined in STB Finance Docket No. 33407, or as may be modified by Parent or its Affiliates (or its or their transferees, successors and assigns) from time to time.

Off-the-Shelf Software means any and all Company Software that is commercially available off-the-shelf Software and (i) is not material to the Company or any Company Subsidiary, (ii) has not been modified or customized for the Company or any Company Subsidiary, and (iii) is licensed to the Company or any Company Subsidiary for a one-time or annual fee of \$10,000 or less.

Permitted Encumbrances means such of the following as to which no enforcement, collection, execution, levy or foreclosure proceeding shall have been commenced: (a) liens for Taxes not yet due and payable or the validity of which is being contested in good faith; (b) Encumbrances imposed by law, such as materialmen's, mechanics', workmen's, repairmen's, warehousemen's and carrier's liens and other similar liens arising in the ordinary course of business for sums not due and payable; (c) pledges or deposits to secure obligations under workers' compensation Laws or similar legislation or to secure public or statutory obligations under applicable Law; and (d) survey exceptions, reciprocal easement agreements and other customary encumbrances on title to real property that (i) were not incurred in connection with any Indebtedness and (ii) do not, individually or in the aggregate, materially adversely affect the use of such property.

Person means any individual, partnership, firm, corporation, association, trust, limited liability company, unincorporated organization, a Governmental Entity or other entity, as well as any syndicate or group that would be deemed to be a person under Section 13(d)(3) of the Securities Exchange Act of 1934, as amended.

PRB Expansion means the New Construction and the improvements or rehabilitation to the rail lines of the Company and its Subsidiaries reasonably relating thereto and the entering into of mine access agreements as referenced in Section 3.05(b)(i) of the Disclosure Schedule.

Preferred Redemption Amount means the amount, including accrued and unpaid dividends (whether or not declared) or similar amounts, required to be paid to the holders of the Preferred Stock to redeem the Preferred Stock pursuant to the terms of the Preferred Stock at the Effective Time.

Preferred Stock means, collectively, the Company's (i) Series A preferred stock, par value \$1.00 per share, (ii) Series B preferred stock, par value \$1.00 per share, (iii) Series C preferred stock, par value \$1.00 per share, (iv) the Series C-1 preferred stock, par value \$1.00 per share, and (v) the Series D preferred stock, par value \$1.00 per share.

Purchaser Disclosure Schedule means the Disclosure Schedule delivered to the Company by the Purchaser pursuant to this Agreement.

Real Property means any material real property owned or leased by the Company and the Subsidiaries.

Release means disposing, discharging, injecting, spilling, leaking, leaching, dumping, emitting, escaping, emptying, seeping, placing and the like into or upon any land or water or air or otherwise entering into the Environment.

Release Agreement means the agreement in form of Exhibit A to be executed by holders of Preferred Stock and holders of Share Units and Options.

Remedial Action means all action to (a) clean up, remove, treat or handle in any other way Hazardous Materials in the Environment; (b) prevent the Release of Hazardous Materials so that they do not migrate, endanger or threaten to endanger public health or the Environment; or (c) perform remedial investigations, feasibility studies, corrective actions, closures and post-remedial or post-closure studies, investigations, operations, maintenance and monitoring.

Revolver means the Loan Agreement, dated as of December 16, 2003, by and among the Company, IC&E and National City Bank.

Share Unit means a credit to the plan account of a participant in the applicable Bonus Share Plan entitling such participant to receive (i) a payment based on the fair market value of one Share upon settlement, in the case of the 1994 Bonus Share Plan or (ii) a payment based on the difference between the fair market value of one Share and such Share Unit's Base Value upon settlement, in the case of the 2004 Bonus Share Plan.

South Dakota Construction Loan means the Loan Agreement, dated as of August 12, 2005, between the Company and Brookings County Railroad Authority and the State of South Dakota.

Stabilized Property means any real property that is improved and (i) is 90% leased or (ii) one year has elapsed since a certificate of occupancy has been issued with respect to such real property.

STB means the Surface Transportation Board or any successor agency.

Stockholders Agreement means the Stockholders Agreement, dated September 3, 1986, as amended.

Subsidiaries means Cedar American Rail Holdings, Inc., a Delaware corporation, the IC&E, and Wyoming Dakota Railroad Properties, Inc., a Delaware corporation.

Tangible Personal Property means all machinery, equipment, tools, supplies, furniture, fixtures, personalty, vehicles, rolling stock and other tangible personal property used in the Business.

Target Working Capital means -\$40,010,843 (deficit of \$40,010,843).

Tax or Taxes means (i) any and all income, gross receipts, sales, use, employment, franchise, profits, property or other taxes, duties, assessments or other governmental charges in the nature of a tax (whether payable directly or by withholding), together with any interest and any penalties, additions to tax or additional amounts imposed by any taxing authority with respect thereto and (ii) any liability of the Company or any of its Subsidiaries for the payment of amounts determined by reference to amounts described in clause (i) as a result of being a member of an affiliated, consolidated, combined or unitary group, or as a result of any obligation of the Company or any of its Subsidiaries under any Tax sharing agreement or arrangement.

Tax Return means any report, return, declaration or other filing required to be supplied to any taxing authority with respect to Taxes including any amendments thereto.

Termination Agreement means the agreement entered into in connection with this Agreement in the form of Exhibit B hereto among holders of Shares, certain holders of Warrants and the Company.

Unaudited Financial Statements means the unaudited balance sheet, statement of income and statement of cash flow of the Company as of July 31, 2007.

Warrants means, collectively, the outstanding and unexpired warrants to purchase Shares issued by the Company set forth on Schedule 4.03 of the Disclosure Schedule.

Warrant Purchase Agreement means the Warrant Purchase Agreement, dated as of the date hereof, among the Company and each of the Sellers (as defined therein) in the form of Exhibit C hereto pursuant to which each of the Sellers has agreed to surrender to the Company at the Effective Time the Warrants held by such Seller in exchange for the applicable amount of the Option/Warrant Merger Consideration.

Working Capital means, as of a particular time, (a) (i) current assets (other than Cash, income taxes receivable and any deferred income taxes receivable) *less* (ii) Future Consulting Fees, to the extent not already reflected in current liabilities, *less* (iii) current liabilities other than deferred income Taxes payable, including, to the extent they have not been paid by the Company or arrangements have not been made for payment at the Closing by the Paying Agent on behalf of the Company, payroll, excise and similar Taxes arising as a result of the transactions contemplated by this Agreement and all change in control payments or deal/transaction bonuses paid or payable in connection with the transactions contemplated herein (other than current maturities of long-term debt, interest payable, Consulting Fees Payable and Future Consulting Fees) of the Company and its consolidated Subsidiaries, as of such time, in each case calculated in accordance with GAAP in a manner consistent with the calculation of the corresponding line items on the Company's Audited Financial Statements for the year ended December 31, 2006, *less* (iv) all costs and expenses to be incurred after the Closing for any work related to the Flooding Repair Project (other than the costs and expenses of upgrading the existing bridges and tracks at the Waseca Sub, the Marquette Sub and the Rapid City Sub from 286K standard to 315K standard as part of the Flooding Repair Project), and *plus* (v) all payments or other reimbursements to the Company from insurance carriers with respect to the Flooding Repair Project received, or reasonably expected to be received, after the Closing. For

purposes of determining Working Capital, (i) inventory shall not include any item in existence on December 31, 2006 but excluded from inventory in the December 31, 2006 Audited Financial Statements, (ii) prepaid expenses shall not include any expense category not set forth in the December 31, 2006 Audited Financial Statements, (iii) any cash payment or Liability (whether accrued, absolute, contingent or otherwise) arising specifically from the Company's termination of any capital lease at the request of Parent or Purchaser pursuant to Section 6.13(a) shall be excluded from Working Capital and (iv) any amounts paid or payable pursuant to the Gross-Up Agreement shall not be included in such determination.

(b) Unless otherwise specified herein, all references to dollars or \$ shall be deemed to be references to United States Dollars.

SECTION 1.02. Other Defined Terms. The following terms have the meanings defined for such terms in the Sections set forth below:

| Term | Section |
|---|----------------|
| 280G Amounts | 3.06(e) |
| 280G Report | 3.06(e) |
| 409A Amounts | 3.06(f) |
| Adjustment | 3.01(d) |
| Applicable Contracts | 6.13(b) |
| Benefit Plans | 4.09(a) |
| Budgets | 4.07(c) |
| Certificate of Merger | 2.02(a) |
| Certificates | 3.03(b) |
| Claim | 6.11(b) |
| Closing | 2.02(a) |
| Closing Date Payment Schedule | 2.02(b) |
| Coal Milestone Payments | 3.05(b)(ii) |
| Company | Recital |
| Company Intellectual Property | 4.16 |
| Company Licenses | 4.06(a) |
| Company Option | 3.02(b) |
| Construction Conditions | 3.05(b)(i) |
| Construction Milestone Payment | 3.05(b)(i) |
| Debt Payment Amount | 2.02(a) |
| Determination Date | 3.05(a) |
| DGCL | Recital |
| Disputed Pre-Closing Working Capital Amount | 3.04(a) |
| DM&E | 1.01 |
| Effective Time | 2.02(a) |
| Emergency Tonnage | 3.03(b)(iii) |
| ERISA | 4.09(a) |
| Escrow Account | 2.02(b) |
| Escrow Amount | 2.02(b) |
| Estimated Debt Amount | 3.04(a) |
| Estimated Working Capital | 3.04(a) |

| Term | Section |
|---|----------------|
| Estimated Working Capital Statement | 3.04(a) |
| Fifth Milestone Payment | 3.05(b)(ii) |
| Final Adjustment Amount | 3.05(a) |
| Final Debt Amount | 3.04(c) |
| Final Working Capital | 3.04(c) |
| First Milestone Payment | 3.05(b)(ii) |
| FIRPTA Amount | 3.06(d) |
| Fourth Milestone Payment | 3.05(b)(ii) |
| Gross-up Escrow Account | 2.02(b) |
| Gross-up Escrow Agreement | 2.02(b) |
| Gross-up Escrow Amount | 2.02(b) |
| Guarantor | Recital |
| Guaranteed Obligations | 6.12 |
| Holder | 3.03(a) |
| Incumbent Carrier | 3.05(b)(ii) |
| Indemnified Parties | 6.07(b) |
| Independent Accounting Firm | 3.04(d) |
| IRS Notice | 3.06 |
| Koch Transaction | 6.11(c) |
| LC Amount | 6.11(c) |
| Letter | 3.03(b) |
| Loss | 6.11(b) |
| Material Contracts | 4.13(a) |
| Merger | Recital |
| Milestone Statement | 3.05(b)(iii) |
| Non-Releasing Equityholder | 6.11(a) |
| Non-Releasing Equityholder Indemnity Amount | 6.11(a) |
| Notice of Disagreement | 3.05(b)(iii) |
| Option/Warrant Merger Consideration | 3.02(b) |
| Parent | Recital |
| Paying Agent | 3.03(a) |
| Paying Equityholder | 6.08(b) |
| Per Share Merger Consideration | 3.01(a) |
| Purchaser | Recital |
| Required Equityholders | 6.08(c) |
| Requisite Stockholder Approval | Recital |
| Restricted Equityholder | 3.05(b)(iii) |
| Second Milestone Payment | 3.05(b)(ii) |
| Shares | Recital |
| Sixth Milestone Payment | 3.05(b)(ii) |
| Stockholders Representative | 6.08(a) |
| Stockholders Representative s Losses | 6.08(b) |
| Surviving Corporation | 2.03 |
| Termination Date | 8.01(a) |
| Third Milestone Payment | 3.05(b)(ii) |

| Term | Section |
|-----------------------------|----------------|
| Tonnage Condition | 3.05(b)(ii) |
| Track Maintenance Agreement | 6.11(c) |
| Transfer | 2.02(f) |
| Voting Trust | 2.06 |
| Voting Trust Agreement | 2.06 |
| WARN Act | 4.09(f) |
| Working Capital Statement | 3.04(b) |

ARTICLE II

CERTAIN PAYMENTS; THE MERGER

SECTION 2.01. The Merger. Upon the terms and subject to the conditions set forth in this Agreement, and in accordance with the DGCL, at the Effective Time Purchaser shall be merged with and into the Company.

SECTION 2.02. Closing. (a) Subject to Section 6.13, as promptly as practicable after all of the conditions set forth in Article VII have been satisfied or, if permissible, waived, the parties hereto shall cause the Merger to be consummated by filing a certificate of merger (the Certificate of Merger) with the Secretary of State of the State of Delaware, in such form as is required by, and executed in accordance with, the relevant provisions of the DGCL (the date and time of such filing of the Certificate of Merger (or such later time as may be agreed by each of the parties hereto and specified in the Certificate of Merger) being the Effective Time). Immediately prior to such filing of the Certificate of Merger a closing (the Closing) shall be held at the offices of Shearman & Sterling LLP, 599 Lexington Avenue, New York, New York or such other office as the Company and Purchaser may mutually agree upon in writing.

(b) At the Closing, and immediately prior to the Effective Time, Parent or Purchaser shall (i) deliver to the Company (A) the Preferred Redemption Amount and (B) an amount equal to any outstanding Indebtedness of the Company and its consolidated Subsidiaries which will be, or may become, payable as a result of the consummation of the transactions contemplated by this Agreement (the Debt Payment Amount), (ii) deliver to the Paying Agent, (A) an amount equal to the consideration to which the holders of Shares become entitled pursuant to Section 3.01(a) hereof *less* such holders' proportional share of the aggregate Equityholder's Percentage of the Escrow Amount, (B) an amount equal to the Consulting Fees Payable, and (C) an amount equal to the consideration to which the holders of Share Units, Company Options and Warrants become entitled pursuant to Section 3.02 hereof *less* such holders' such holders' proportional share of the aggregate Equityholder's Percentage of the Escrow Amount and (iii) deposit or cause to be deposited (by wire transfer of immediately available funds) cash in the amount of (A) \$10,000,000, as such amount may be adjusted in accordance with Section 3.04(a) (the Escrow Amount), in an account (the Escrow Account) maintained pursuant to the Escrow Agreement to be entered into prior to Closing by Parent, Purchaser, the Company and the Stockholders' Representative which Escrow Agreement shall provide that any interest and other income resulting from the investment of the Escrow Amount

by the escrow agent shall be held in the Escrow Account and shall be disbursed from the Escrow Account in accordance with this Agreement and (B) \$7,500,000 (the Gross-up Escrow Amount), in an account (the Gross-up Escrow Account) designated by Purchaser and maintained pursuant to the Gross-up Escrow Agreement (the Gross-up Escrow Agreement) to be entered prior to the Closing by the Company, Kevin Schieffer, the Stockholders Representative and Purchaser, which Gross-up Escrow Agreement shall provide that any interest and other income resulting from the investment of the Gross-up Escrow Amount by the escrow agent designated by Parent shall be held in the Gross-up Escrow Account and shall be disbursed from the Gross-up Escrow Account in accordance with the Gross-up Agreement. The amounts described in clauses (i) and (ii) of this Section 2.02(b), and the calculations thereof, shall be specified in a certificate of an officer of the Company delivered to Purchaser seven Business Days prior to the Closing (the Closing Date Payment Schedule). The Closing Date Payment Schedule shall be prepared in good faith and shall include reasonable documentation supporting the amounts set forth thereon. If Purchaser notifies the Company at least five Business Days prior to the Closing that it disagrees with the Closing Date Payment Schedule, the parties hereto shall use commercially reasonable best efforts to reach an agreement on such disputed items and amend the Closing Date Payment Schedule to reflect such agreement. The amounts reflected on the Closing Date Payment Schedule, as amended (if applicable), shall be paid as described above by wire transfer in immediately available funds to the accounts designated at least two Business Days prior to the Closing by the Company in a written notice to Purchaser.

(c) At the Closing, and immediately prior to the Effective Time, the Company shall redeem all of the Preferred Stock in accordance with the terms of the Preferred Stock, and the Company shall withhold and retain for further payment to the applicable Governmental Authority any applicable withholding Taxes in accordance with Section 3.06.

(d) At the Closing, and immediately prior to the Effective Time, the Company shall pay the Debt Payment Amount to the applicable creditors in the amounts set forth in the Closing Date Payment Schedule.

(e) No less than five Business Days prior to the Closing, the Company shall deliver to Purchaser an updated version of Schedule 4.03, which shall be true and correct as of the Closing Date. The Company shall reasonably consider any changes thereto requested by Parent prior to Closing.

(f) At the Closing, the Company shall sell, transfer and assign (Transfer) all of its right, title and interest in and to the Credit Risk Premium to an entity to be designated by the Stockholders Representative. Following the Closing, Parent shall, and shall cause the Surviving Corporation, Parent and its Affiliates, to cooperate with the Stockholders Representative and the entity to which the Credit Risk Premium is intended to be sold, transferred and assigned pursuant to the foregoing sentence to give effect to such sale, transfer and assignment and, if the Company is unable to Transfer the Credit Risk Premium to such entity at the Closing, then the Surviving Corporation shall use its commercially reasonable best efforts, at no cost or expense to the Surviving Corporation or any of its Affiliates and as the Stockholders Representative may reasonably request, to take such actions as are necessary to provide such entity with the economic benefits of the ownership of the Credit Risk Premium. The Stockholders Representative shall reimburse Parent and its Affiliates for all costs and

expenses incurred in connection therewith and the Stockholders Representative shall indemnify and hold Parent and its Affiliates harmless from and against all Losses related thereto.

SECTION 2.03. Effect of the Merger. As a result of the Merger, the separate corporate existence of Purchaser shall cease and the Company shall continue as the surviving corporation of the Merger (the Surviving Corporation). At the Effective Time, the effect of the Merger shall be as provided in the applicable provisions of the DGCL. Without limiting the generality of the foregoing, and subject thereto, at the Effective Time, all the property, rights, privileges, powers and franchises of the Company and Purchaser shall vest in the Surviving Corporation, and all debts, liabilities, obligations, restrictions, disabilities and duties of the Company and Purchaser shall become the debts, liabilities, obligations, restrictions, disabilities and duties of the Surviving Corporation.

SECTION 2.04. Certificate of Incorporation: By-Laws.

(a) At the Effective Time, the Certificate of Incorporation of the Surviving Corporation shall be amended in its entirety to read as the certificate of incorporation of Purchaser in effect immediately prior to the Effective Time, until thereafter changed or amended as provided therein or by applicable law.

(b) Unless otherwise determined by Parent prior to the Effective Time, at the Effective Time, the By-laws of the Surviving Corporation shall be amended and restated in their entirety to read as the bylaws of Purchaser as in effect immediately prior to the Effective Time, until thereafter changed or amended as provided therein or by applicable law.

SECTION 2.05. Directors and Officers. The director or directors identified to the Company by Parent at least three (3) Business Days p