

October 24, 2007

Client-Matter: 28793-030

BY E-FILING

Mr. Vernon Williams
Secretar
Surface Transportation Board
395 E Street, S.W.
Suite 101
Washington, D.C. 20423-0001

**Re: Finance Docket No. 35081 - Canadian Pacific Railway Company, et al -
Control - Dakota Minnesota & Eastern Railroad Corporation, et al.**

Dear Secretary Williams:

Enclosed for filing in the above-entitled proceeding is Mayo Clinic's Reply in Opposition to Applicants' Motion to Establish a Procedural Schedule and Request for a Determination that the Application is Incomplete.

Sincerely,



C. Dean McGrath, Jr.

Enclosure

30202461.1

Finance Docket No. 35081

Mayo Clinic, by and through its undersigned counsel, offers the following reply in opposition to the procedural schedule proposed by Applicants in their motion filed with the Application by Canadian Pacific Railway Company (“CPRC”), *et al.*, for approval of control of Dakota, Minnesota & Eastern Railroad Corporation (“DM&E”) and Iowa, Chicago & Eastern Railroad Corporation (“IC&E”), in this Docket on October 5, 2007.

Mayo Clinic, which is one of the world's leading destination medical centers, is located in Rochester, Minnesota. Rochester is the third-largest city in Minnesota, with a population of just over 100,000. For seventeen consecutive years, *U.S. News & World Report* has named Mayo Clinic in Rochester either number one or two to the Honor Roll of America's Best Hospitals, just one indicator among many of its importance in health care delivery. Mayo Clinic has 1.42 million annual outpatient visits, 60,000 annual hospital admissions, more than 27,000 employees in Rochester, including more than 1,700 physicians and scientists in residence, more than 2,200 medical doctors in training, and thousands of nurses, technicians and other allied healthcare professionals. While Mayo Clinic closely guards the confidentiality of its patients,

public information routinely available reveals that national and international leaders and their family members routinely travel to Mayo Clinic in Rochester, Minnesota for diagnosis and treatment of highly complex medical diseases and disorders. Such information will not have escaped the notice of those desiring to cause harm and makes Mayo Clinic a unique terrorist target.

While large-scale rail incidents involving hazardous materials are thankfully rare, the potential for disaster for the Mayo Clinic is real. The main buildings of Mayo Clinic are located within several hundred feet of the DM&E's train tracks in Rochester, and some facilities are immediately adjacent to the tracks. Mayo Clinic has more than 1,500 hospital beds located in close proximity to the DM&E tracks, with 204 intensive care unit beds, where acute-care patients are recovering from surgery or being treated for a trauma or medical complications – from premature newborns to transplant recipients to accident victims. In the event of a hazardous-chemical spill it would be impossible to evacuate these patients. Patients in another 210 monitored hospital beds have limited mobility because they are connected to medical equipment and could not be evacuated on short notice. More than 800 nursing home residents also live within one block of the tracks. There are simply not enough ambulances available to transport these critically ill patients and there are not enough hospital beds to receive them. The closest beds to accommodate those needing intensive care are 90 miles away in Minneapolis or St. Paul, Minnesota. It would be impossible to evacuate these patients during a hazardous-chemical spill and deal with the spill itself according to the City of Rochester Fire Department. Because this reality poses a significant risk unique to the Mayo Clinic, it has a substantial interest in the outcome of this proceeding and is entitled to be heard.

I. The Proposed Procedural Schedule is Contrary to the Public Interest as it Fails to Provide Sufficient Time for Meaningful Negotiations.

Mayo Clinic is concerned about the expedited procedural schedule proposed by Applicants for consideration of the Application for acquisition of control of DM&E and IC&E by CPRC. Mayo Clinic has not made a decision about whether to oppose the transaction. Mayo Clinic is mindful of the Board's policy of favoring voluntary settlement of disputes. *See, e.g., Canadian National Railway Company—Control—Illinois Central Corp.*, STB Finance Docket No. 33556 (Oct. 16, 1998) (*citing CSX Corp. and CSX Transportation, Inc.—Control and Operating Leases/Agreements—Conrail Inc.*, STB Finance Docket No. 33388 (July 23, 1998) (“whenever possible, disputes should be resolved by negotiated settlement between affected parties, rather than addressed by a resolution imposed by government decree.”)

Mayo Clinic is currently scheduled to meet with CPRC to discuss the issues surrounding CPRC's acquisition of control of DM&E and IC&E that are of real concern to Mayo Clinic. Although Mayo Clinic looks forward to those discussions, Mayo Clinic is concerned that Applicants' proposed procedural schedule will not allow sufficient time for meaningful negotiations with CPRC following this initial meeting. Hence, Mayo Clinic currently supports the position taken by the Commuter Rail Division of the Regional Transportation Authority, a Division of a Municipal Corporation (“Metra”), which would extend the “due date for the submission of comments, protests, requests for conditions, other oppositions and evidence.”

Metra Reply at 2-3.¹

¹ Metra is the commuter rail authority serving the Chicago Metropolitan area. As duly set forth in its Reply in Opposition, Metra “transports more than 300,000 passengers each business day in approximately 700 trains serving more than 240 stations. Metra operates commuter rail service over several routes within the Chicago Metropolitan area, including routes that extend into Northern Indiana and Southeastern Wisconsin.”

II. The Board Should Compel the Applicants to Verify DM&E's Revenues.

Treatment of the transaction as "minor" is based on the assertion that DM&E is not a Class I railroad. While that may be true today, DM&E has repeatedly stated that it is the largest Class II railroad in the nation and that it plans to achieve Class I status. Furthermore, although the application indicates that DM&E, in 2006, "transported approximately 260,000 carloads of freight generating total revenues of approximately \$263,000,"² CPRC's President and CEO has advised the investment community that "we'll add over \$275 million to our revenue immediately ...with substantial growth opportunities beyond that."³ That would place DM&E close to the level of a Class I railroad.

Because DM&E is not publicly traded and has steadfastly refused to disclose any meaningful information about the true nature of its financial condition, the Board should require submission of verifiable documentation regarding DM&E's current revenues to ensure that it does not meet Class I status. In this respect, it is noted that none of the schedules mentioned in the purchase agreement are included with the application. Nor is there any indication that the schedules were redacted under the theory that they contain confidential information.

Moreover, the Board should carefully note that even if DM&E may not fit within Class I status at this time, this proceeding will no doubt propel it into Class I status. Hence, the impact of the underlying transaction should not be viewed simply in terms of a Class I acquiring a small or medium-sized Class II railroad. Instead, the Board should carefully consider the consequences of treating DM&E as other than a Class I railroad. Initially, the Applicants have been able to claim that the transaction is "minor" rather than "substantial." This, of course, has served to limit the information they had to provide in their application. More importantly,

² Application at p. 2.

³ Final Transcript, Conference Call, dated September 5, 2007, at p. 2.

treating DM&E as a mere Class II railroad has allowed the Applicants to avoid scrutiny of various competitive considerations, including whether the transaction will foster a major market extension free and clear of Board scrutiny.

III. The Board Should Compel the Applicants to Provide Meaningful Operational Information That Addresses the Future Movement of PRB Coal.

There is little doubt that this transaction could foster a major market extension into the Powder River Basin ("PRB"). Although the Applicants have requested the Board to don blinders regarding the PRB expansion and have claimed that no final decision has been made whether to build into the PRB, that suggestion should be viewed with extreme skepticism.

Indeed, it appears that the impetus for the entire transaction, while using ethanol as a justification, is actually driven by DM&E's inability to construct the line into the PRB. The Board cannot fail to notice that even though it has authorized DM&E to extend its service into the PRB, recent events have demonstrated that DM&E, if it is not acquired by a financially sound backer, is incapable of building into the PRB.

The failure to obtain the RIFF loan obviously altered the dynamic of DM&E's proposal and forced it to enter into the instant transaction. The point that should not be ignored when the Board evaluates whether the application is complete is whether it is reasonable to ignore the likely expansion into the PRB and the impact that such expansion, *when coupled with CPRC's expansive international rail network*, would have on the national rail system and on entities such as Mayo Clinic. Plainly, if the final Coal Milestone Payment were to be triggered, at least 125 million tons of coal would be transported in a calendar year through Rochester, Minnesota in close proximity to Mayo Clinic. This represents an additional 2.2 million cars per year (43 trains x 135 cars x 365 days) that would move over the line that is located just a few hundred feet of the Clinic. Given the Board's requirement of a full-scale Environmental Impact Statement

before any PRB coal can be routed over the IC&E, and the operational difficulties that would accompany the diversion of the new coal trains over the IC&E lines in order to reach Chicago, it seems certain that as many as 43 coal trains could be moved through Rochester to the point of interchange with CP at Minnesota City, MN. As the City of Winona, Minn. has already observed, at no time has the Board ever considered the environmental impact of that volume of movements.

Because such an increase in the number of coal trains would have an extremely adverse impact on Mayo Clinic, now is the time to address that impact and fashion voluntary agreed to conditions that would mitigate the anticipated damages. On the one hand, if CPRC were to decide that the PRB project is not financially feasible and would not be undertaken, the conditions would not be triggered. On the other hand, the existence of well-defined conditions would aid CPRC in making the decision that the construction project was financially feasible.

Once again, while the application seeks to downplay the potential impact of movements of PRB coal, CPRC has admittedly engaged in extensive due diligence. As its President and CEO has admitted, its team has been through “every utility that we currently have access to, anything we might have access to, what we do today, what we don’t do today, what the competitive issues are.”⁴ That information should be considered by the Board.

The milestone payments offered by CPRC, which represent nearly 42 percent of the potential total price for DM&E (\$1.07 billion vs. \$2.55 billion), are a clear indication that the real goal is the PRB and not solely DM&E’s current system. Most importantly, the milestone payments were not made up without some rationale.

⁴ Final Transcript, Conference Call, dated September 5, 2007, at p. 19.

It is inconceivable that CPRC would be seeking to reacquire the IC&E only a few short years after it disposed of those lines if it did not view the odds as presenting a high probability that it would complete the PRB project. Hence, it must be assumed that there is a strong likelihood that the PRB expansion will happen even though the Application is void of any meaningful evidence regarding its impact. This is particularly true given the fact that CPRC's milestone payments contemplate hauling more coal than the DM&E projected several years ago.

IV. The Board Should Compel the Applicants to Provide Meaningful Information That Addresses the Environmental Effects of the Transaction.

The Board's regulations at 49 C.F.R. § 1105.6 require, at a minimum, the preparation of an Environmental Assessment. In this instance, the acquisition will admittedly result in a dramatic increase in the number of trains transporting hazardous materials through downtown Rochester within a few hundred feet of Mayo Clinic. CPRC has made it abundantly clear that the acquisition "will give CPR the ability to participate in the rapidly growing transportation of ethanol." *See*, Application at p. 8.

This is a new development as the transpiration of significant quantities of ethanol was not an issue addressed by the Board in its consideration of the PRB construction project. In addition the transportation of other hazardous materials such as anhydrous ammonia, propane, and chlorine, all of which carry a substantial risk of a catastrophic spill, was not focused on during the PRB construction case. Given DM&E's previous representations to the Rochester Fire Department that it had no shipments of hazardous materials through Rochester in the first five months of 2005, this significant shift in commodities should be carefully addressed as part of this proceeding, especially when the anticipated growth in ethanol shipments would meet the regulatory threshold. The increase in coal shipments from the 34 trains per day considered by

the Board as part of the STB construction proceeding up to the 43 contemplated under the contingent payment schedule would also meet the regulatory threshold.

V. The Board Should Compel the Applicants to Provide a Safety Integration Plan.

The Board's regulations clearly require the preparation of a Safety Integration Plan. (49 C.F.R. § 1106). DM&E – historically one of the most dangerous railroads in the country -- currently runs only a few trains a day at very slow speeds through Rochester. The proposed acquisition would increase dramatically the number, size, speed and cargo of those trains, which would threaten Mayo Clinic's patients, many of whom are critically ill and could not be evacuated in the event of a derailment involving hazardous materials. Although DM&E apparently shipped no hazardous materials through Rochester during the first five months of 2005, no such assurances have been made concerning future shipments as part of the acquisition.

Because the DM&E according to government statistics has one of the worst safety records of any railroad in the United States, it is of critical importance to Mayo Clinic and every community that will be impacted by this transaction that the CPRC explain exactly how the integrated operations of the two companies will address the DM&E's abysmal safety record and the real safety threat that is posed by the increased transportation of hazardous materials such as ethanol. While the Applicants assert that the Board's regulations at 49 C.F.R. § 1180 do not require preparation of a Safety Integration Plan ("SIP") because the proposed transaction is not a major transaction (*see* Application at p. 27), the underlying facts demand the immediate preparation of a SIP. The Board should find that DM&E's dismal safety record, when coupled with the expected increase in the transportation of hazardous materials such as ethanol and the

potential increase of 2.2 million cars loaded with PRB coal, requires the submission of a SIP in this proceeding and that the application cannot be deemed complete in the absence of a SIP.

Conclusion

For all of these reasons, the current application should be found to be deficient. Because this proceeding provides the best opportunity for Mayo Clinic and CPRC to negotiate appropriate conditions, the Board should require CPRC to supplement the record to provide a meaningful operational plan based on the assumption that it will transport up to 125 million tons of PRB coal a year, a figure that is at least 25 percent higher than DM&E's original projections. Plainly, the application as currently structured does not provide the Board with any meaningful information regarding the post-merger operations once CPRC's expanded PRB projections are taken into consideration.

Of course, even if the PRB project were not to occur, it appears from the application that there will be a substantial increase in the volume of ethanol that is moved over the DM&E's line through Rochester. Given the potential for a catastrophic incident involving Mayo Clinic, it is essential that adequate conditions be in place to address the concerns of Mayo Clinic and its patients.

Respectfully submitted,

Mayo Clinic



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Date: October 25, 2007

Certificate of Service

I hereby certify that I have caused a true and correct copy of the foregoing "Mayo Clinic Reply in Opposition to Applicants' Motion to Establish a Procedural Schedule and Request for a Determination that the Application is Incomplete" to be served by first class mail, postage pre-paid, this 25th day of October 2007, on the following:

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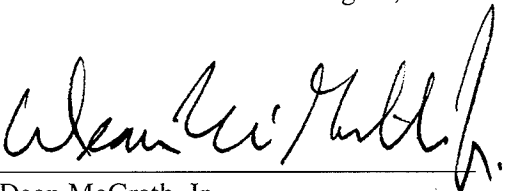
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