

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

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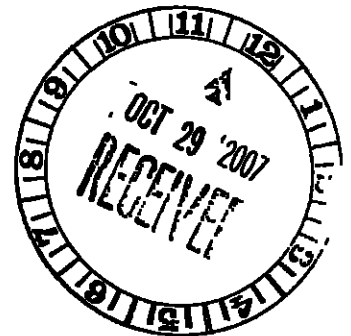


**APPLICANTS' REPLY TO IOWA NORTHERN RAILWAY COMPANY'S
COMMENTS ON PROPOSED PROCEDURAL SCHEDULE**

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Dated: October 29, 2007

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Canadian Pacific Railway Company ("CPRC"); Soo Line Holding Company ("SOO Holding"); Dakota, Minnesota & Eastern Railroad Corporation ("DM&E"); and Iowa, Chicago & Eastern Railroad Corporation ("IC&E") (DM&E and IC&E are referred to collectively herein as "DME," and CPRC, SOO Holding, DM&E and IC&E are referred to collectively herein as "Applicants"), hereby submit this Reply to the "Comments of Iowa Northern Railway Company on Proposed Procedural Schedule" filed by Iowa Northern Railway Company ("IANR") in the above-captioned proceeding on October 26, 2007 ("IANR Comments"). IANR's Comments are both improper and substantively meritless, and the Board should reject them.

I. IANR's Comments Are An Improper Motion To Reject The Control Application.

IANR's filing is styled as "comments" on Applicants' proposed procedural schedule. However, the pleading is, in fact, a thinly disguised motion to classify the Control Application as "significant" rather than "minor" and to reject the Application on the ground that it does not contain all of the information required for a "significant" application. Such a motion is improper and should be rejected out of hand.

The entirety of IANR's comments and supporting statements are devoted to arguments that the proposed transaction should be treated as "significant" under the Board's rules. As a result, IANR urges the Board to either "reject the application as incomplete" or do the practical equivalent by treating the Application as a notice of intent to file a significant application which Applicants would be required to "supplement" in the future. IANR Comments at 16-18. Indeed, the only objection to Applicants' proposed procedural schedule articulated by IANR is that it is based on the statutory time period prescribed for a minor transaction rather than a significant transaction.

It is well settled that petitions to reject applications "should be rejected and receive no consideration." Finance Docket No. 28499 (Sub-No. 1), *Norfolk & W Ry Co. & Baltimore & Ohio R R Co—Control—Detroit, Toledo & Ironton R.R. Co.* (Nov. 15, 1977). The decisions whether to accept or reject an application, and how to classify the application, are for the Board to make based on the application itself. Neither the statute nor the Board's regulations contemplate or authorize comments or motions on these issues within the 30-day period during which the Board must decide them. As the ICC explained,

[i]n providing only a 30 day period after filing during which the Commission can reject an incomplete consolidation application, it is clear that Congress did not contemplate the filing of petitions and replies on the rejection issue. The Commission's consolidation regulations do not provide for the filing of such petitions.

Id ; see also Finance Docket No. 31505 (Decision No. 5), *Rio Grande Industries, Inc —Purchase & Related Trackage Rights—Soo Line R.R Co. Line Between Kansas City, MO & Chicago, IL*, slip op. at 5 n 2 (Oct 17, 1989) (noting that "motion[s] to reject" are "improper" and citing supporting cases). Accordingly, IANR's *de facto* motion should be denied.

II. There Is No Merit To IANR's Claim That The Transaction Is "Major."

Even if IANR's pleading were appropriate, its arguments for not treating the transaction as minor are utterly meritless. IANR first suggests that the transaction should be classified as a "major" transaction, on the theory that, if the PRB extension were to be constructed, DM&E might earn revenues sufficient to qualify as a Class I carrier at some point in the future. IANR Comments at 4-5. This proposition is absurd. Under the Board's regulations, railroads are not classified on the basis of suppositions about their future "revenue potential," *id.* at 5. DM&E is not a Class I railroad. DM&E falls far short of the current revenue requirement for Class I status, which is \$346 million using the most recent deflator published by the Office of Economics, Environmental Analysis, and Administration ("OEEAA").¹ Moreover, DM&E certainly has not "satisf[ie]d the revenue requirement for 3 consecutive years," as is required for reclassification as a Class I. Ex Parte No. 634, *Proposal to Require Consolidated Reporting by Commonly Controlled Railroads*, slip op. at n.3 (served Nov. 7, 2001); *see* 49 C.F.R. Part 1201, General Instruction 1-1(b)(1). IANR cites no authority – because there is none – to support its suggestion that the Board may treat a Class II railroad like a Class I carrier because it might attain Class I status in the future. DM&E is a Class II carrier and the rules require the Board to treat it as such.² The transaction is therefore not major under § 1180.2(a).

¹ IANR's mistaken claim that the threshold for attaining Class I status is \$319.3 million likely stems from use of the 2005 deflator instead of the 2006 deflator.

² The Mayo Clinic's similar demand that the Board "[v]erify DM&E's [r]evenues" to determine whether it is a Class I railroad (Mayo Reply at 4) is entirely unjustified. The Board does not need to order "verification" of DM&E's revenues; DM&E – like all other carriers – has an obligation to notify the Board upon attaining Class I status. *See* 49 C.F.R. § 1241.15. And, as demonstrated above, DM&E is plainly not a Class I railroad.

III. IANR's Claim That The Transaction Is "Significant" Is Contradicted By The Board's Regulations And Precedent.

As demonstrated in the Control Application, the proposed transaction is not a significant transaction because it "clearly will not have any anticompetitive effects." Application at 4. The Board's regulations are clear transactions not involving two or more Class I railroads are not significant in either of two circumstances: (1) "the transaction clearly will not have any anticompetitive effects"; or (2) "any anticompetitive effects of the transaction will clearly be outweighed by the transaction's anticipated contribution to the public interest in meeting significant transportation needs." 49 C.F.R. § 1180.2(b). Indeed, the regulations provide that whether a transaction not involving two Class I railroads is "significant" turns exclusively on these two factors. *See id.* (a transaction is "not significant" if either determination can be made, and a transaction "is significant" if neither can be made). The question is therefore not whether a transaction is "significant" in some abstract sense, but, rather, whether the transaction will have anticompetitive effects.

IANR ignores this standard, and instead raises a hodgepodge of arguments intended to urge the Board to ignore its regulations as well. IANR begins by pointing to *pre-1993* ICC regulations, claiming that under those rules the transaction would have been treated as significant. *See* IANR Comments at 4-5. This argument should be rejected out of hand. The regulation on which IANR relies was repealed by the ICC in 1993, and the rules governing this transaction are the ones currently in effect. Equally meritless is IANR's suggestion that the Board should ignore the second part of § 1180.2(b) and deem a transaction to be "significant" regardless of its anticompetitive effect if it has "regional or national transportation significance" in some abstract sense, without reference to the regulatory definition. *See* IANR Comments at 5-8, 9 n.6. This misreads § 1180.2(b), which provides a clear standard for determining the

“regional or national transportation significance” of a transaction whether it will have anti-competitive effects, and, if so, whether those effects are clearly outweighed by the transaction’s anticipated contribution to the public interest.

Moreover, IANR’s contention that the transaction should not be treated as minor is contradicted by the testimony of its own witness. As Mr. Fauth explains, since 1996 the Board has approved five transactions involving a Class I railroad and a Class II railroad – *and every one was classified as a minor transaction*. See V.S. Fauth at 27-32. IANR’s claim that Applicants’ proposed transaction has a larger scope than these minor transactions rings hollow when the Canadian National/Wisconsin Central transaction is considered. See STB Finance Docket No 34000, *Canadian National Ry Co —Control—Wisconsin Central Transp Corp* (May 9, 2001). Like the proposed transaction, the Canadian National/Wisconsin Central transaction involved a Class I railroad acquiring control of a large Class II carrier. From a track mileage standpoint, Wisconsin Central and DME are nearly identical: Wisconsin Central’s network consisted of 2,464 route miles; DME’s network is approximately 2,500 route miles. IANR’s argument that DME’s network is located in more states than Wisconsin Central’s is irrelevant; the size and scope of the networks are identical. Indeed, from a revenue standpoint, Wisconsin Central was far closer to Class I status when it was acquired by CN than DME is today. See STB Ex Parte No. 634, *Proposal to Require Consolidated Reporting by Commonly Controlled Railroads* (Oct. 31, 2001), slip op. at n.3 (noting that in 1999 Wisconsin Central “had satisfied the revenue requirement” for Class I railroads). In short, there is ample precedent for the Board to apply its regulations to mean what they say: transactions that do not involve multiple Class Is and that do not have an anticompetitive effect are minor transactions.

IV. IANR's Criticism Of The Application's Competitive Analysis Is Not Well Founded.

IANR's discussion of the critical question in determining whether the Application is significant or minor – whether the proposed transaction will have any anticompetitive effects – is most telling for what IANR does not do. IANR does not identify any actual or potential competitive harm that might be caused by the transaction. Instead, IANR baldly asserts that Applicants' analysis of competitive issues is somehow "inadequate." IANR is wrong. The Application contains a searching and thorough analysis of all relevant competitive issues and leaves no doubt that the proposed transaction will not have any anticompetitive effects.

First, IANR complains that Mr. Williams did not inadequately assess potential 2-to-1 and 3-to-2 impacts because he should have analyzed such impacts on a geographic BEA level instead of by looking at "individual shippers or stations." IANR Comments at 12. At the outset, this point makes little sense; looking at individual shippers and stations is the most searching competitive analysis that could be done. More importantly, IANR does not identify any BEA in which the proposed transaction might reduce or eliminate effective rail competition, nor does IANR demonstrate any substantive flaw in Mr. Williams' conclusion that there are no significant 2-to-1 or 3-to-2 impacts. According to the Official Railway Station List ("OPSL"), only five stations are listed as exclusively served by CPR and DME. As Mr. Williams explains, the proposed transaction would not diminish rail competition at any of those five stations:

- River Junction, MN: River Junction is only an interchange point.
- Airline Junction, MO. While this station is listed in the OPSL as being served by CPR, CPR does not serve Airline Junction (or, for that matter, any other point in Missouri).

- La Crescent, MN: DME only has overhead trackage rights from the end point of its line at La Crescent to CPR's yard at St Paul, and CPR does not have any rights on DME lines in the vicinity of La Crescent. Accordingly, DME and CPR do not serve any common industries at La Crescent.
- Galewood, IL: DME has no physical access to Galewood, and no commercial access to the Chicago area other than through a terminal services agreement and switching tariff under which CPR switches cars for DME's account. Because industries currently open to DME under CPR's tariff are also open to other railroads serving the Chicago terminal area, those industries would continue to have competitive rail options after the proposed transaction.
- Itasca, IL: As at Galewood, DME has no physical access to Itasca, and its commercial access to Itasca industries is governed by its terminal services agreement with CPR and CPR's switching tariff. Therefore, any industries currently open to DME are open to multiple other rail carriers as well.

Mr. Williams's analysis of 3-to-2 impacts was a similarly searching analysis of the competitive impact station-by-station and shipper-by-shipper. IANR does not question Mr Williams' substantive conclusions as to any of these stations. Moreover, IANR's claim that he needed to perform more analysis is simply wrong.³ IANR singles out Galewood, Itasca, and Newport, MN as points where Mr. Williams's analysis was supposedly deficient, but in each

³ Indeed, IANR appears not to understand the analysis Mr. Williams performed. For example, IANR claims that Mr. Williams simply "infers" a lack of competition from his review of the Carload Waybill Sample. This is incorrect. Rather, as Mr. Williams' testimony states clearly, he examined the Carload Waybill Sample to confirm findings based upon his analysis of other evidence (including Applicants' tariffs, agreements governing DME's use of CPR trackage, and CPR's provision of terminal services to DME at Chicago and the Twin Cities) demonstrating that there is no competition between CPR and DME.

case the lack of any competition between DME and CPR could not be clearer. DME does not have physical access to any of these three stations except through terminal services agreements with CPR and CPR's switching tariff – under which any industry that is open to DME is open to other railroads as well. And all three are located in metropolitan areas that offer shippers a variety of competitive options – Galewood and Itasca in Chicago; and Newport in the Minneapolis/St. Paul area.⁴ In short, Mr. Williams performed a comprehensive analysis of potential 2-to-1 and 3-to-2 impacts, the accuracy of which cannot be questioned.

Moreover, IANR's claim that Mr. Williams should have performed more extensive analyses of "corridor" and "geographic" competition is meritless. Once again, IANR fails to identify any rail corridor in which competition might be adversely affected, nor does it articulate any way in which the proposed transaction would impair geographic competition. Instead, IANR asserts (erroneously) that the Application contains no "meaningful discussion" of these issues. IANR Comments at 14. This is plainly incorrect. The Market Analysis in Exhibit 12, the Verified Statements of Ray Foot and Mr. Williams, and the multiple supporting statements of DME shippers and shipper associations all make clear that the transaction will not affect corridor competition or geographic competition. DME and CPR operate end-to-end networks that do not compete over any rail corridor. The principal rail corridors served by DME are Chicago-Kansas City, Twin Cities-Kansas City and Rapid City, SD-Winona, MN. CPR does not operate in any of those corridors. Conversely, while CPR serves the Twin Cities-Chicago corridor, DME does not offer service between those points. Moreover, the Application demonstrates that CPR and DME have complementary traffic bases. CPR does not transport significant volumes of

⁴ While Mr. Williams' workpapers have been available to parties on request, neither IANR nor its witness Mr. Grimm asked to review them.

bentonite clay and ethanol, which are major commodities for DME. Conversely, while automotive and intermodal shipments account for a substantial portion of CPR's traffic base, DME does not participate meaningfully in the transportation of those commodities today. (Application, Exhibit 12 at 7-8.) While CPR and DME both handle significant volumes of grain, their current grain businesses are complementary rather than competitive. IC&E possesses extensive coverage of Iowa and southern Minnesota corn origins, while wheat is the predominant crop on CPR's grain gathering network. Moreover, more than 90 percent of CPR's U.S.-originated corn and soybean shipments are exported, while the majority of DME's corn and soybean traffic moves to domestic destinations. DME's wheat traffic is predominantly winter wheat, while CPR's wheat traffic consists largely of spring wheat. (See Application, Exhibit 12 at 7-8; V.S. Foot at 3.) These facts set forth in the Application refute IANR's unsupported suggestion that the proposed transaction may raise a material issue relating to product or geographic competition.

Finally, IANR's claim that Mr. Williams should have performed "a review of so-called 2-to-1 or 3-to-2 short lines" is baffling. IANR Comments at 13. Mr. Williams' testimony demonstrates clearly that there are no "2-1" or "3-2" short lines. Exhibit J to Mr. Williams' testimony lists every short line and regional carrier with which DME connects. Of the 14 carriers listed on Exhibit J, only seven also connect with CPR. Exhibit J further shows that each of those seven short line carriers has the ability to interchange traffic with no fewer than five other non-Applicant carriers. Indeed, the Iowa Interstate Railroad Limited connects with twenty other carriers. There are plainly no anticompetitive effects from a transaction that creates a 7-to-

6 short line.⁵ Moreover, Mr. Williams analyzed the Carload Waybill Sample to determine the degree to which traffic currently interchanged between those 14 short lines and Applicants would be susceptible to diversion by the CPR-DME system following the proposed transaction. Mr. Williams concluded that none of those short line carriers is likely to experience a material loss of traffic as a result of the transaction. Accordingly, there is no substance -- and no merit -- to IANR's assertion that Applicants' analysis of the potential competitive impacts of the proposed transaction on short line and regional carriers is deficient in any respect.

V. The Board Should Not Reject The Control Application.

As demonstrated above and in the Control Application, the proposed transaction should be classified as a "minor" transaction. But even if the Board were to decide to classify the transaction as "significant," IANR's suggestion that the Application is "incomplete" and therefore subject to rejection is wrong. The Application contains all the information prescribed by the Board's regulations for "significant" transactions, including the information required by 49 C.F.R. §§ 1180.6(b)(3) (Exhibit 8, Change in Control); (b)(5) (Exhibit 10, Issues); (b)(6) (Exhibit 11, Corporate Chart); (b)(7) and (b)(8) (Intercorporate or Financial Relationships); as well as a Market Analysis (Exhibit 12) and a more detailed Operating Plan (Exhibit 13).

IANR's suggestion to the contrary is wrong. The only supposed deficiency IANR perceives is in Applicants' Market Analysis, which IANR claims should be supplemented with "the required competitive analysis." It is not clear what IANR means (because, as discussed

⁵ Just as baffling is IANR's claim that Mr. Williams did not provide a sufficient analysis of gateways as required by "the Board's current regulations for major railroad transactions." IANR Comments at 15 (citing 49 C.F.R. § 1180.1(c)(2)(i)). This is not a major transaction, and those regulations are inapplicable to the threshold determination whether a transaction is significant or minor.

above, Applicants have submitted a full competitive analysis); but in any event there is no “required” analysis for Exhibit 12 in significant applications. Indeed, the Board has expressly declined to provide “specific regulations on impact analyses . . . so that the parties will have the greatest leeway to develop the best evidence on the impacts of each individual transaction.” 49 C.F.R. § 1180.7(c). The Market Analysis (Exhibit 12) and the Verified Statements of witnesses Foot and Williams and of various shippers clearly satisfy the Board’s regulations.

As a result, if the Board were to choose to treat the Control Application as significant – and it should not – no supplementation would be required. Therefore, there would be no justification for rejecting the Application as incomplete or for forcing Applicants to re-start the clock for seeking approval of the transaction. Indeed, such a course would delay realization of important public interest benefits of the transaction which include, but are not limited to, extended single-line service for DME shippers and significant investment in service and safety upgrades on the DME network. Even if the Board were to find the Application significant, the appropriate course would be to accept the Application as filed on October 5, 2007 and to establish a procedural schedule that would allow the transaction to be approved within the statutory deadline ⁶

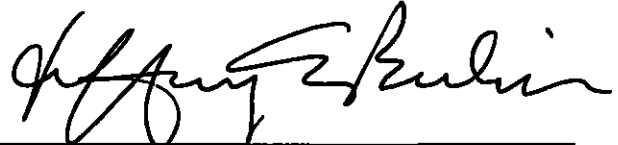
⁶ The Mayo Clinic wrongly claims that Applicants have proposed an “expedited procedural schedule.” Mayo Clinic Reply at 3. In fact, Applicants proposed a schedule that gives the Board the full 150 days to decide the Application before the statutory deadline prescribed by 49 U.S.C. § 11325(d)(2) expires on April 3, 2008. Applicants’ proposed schedule also gives Mayo Clinic and any other interested party 84 days after the Application was filed to pursue discovery and file any evidence or comments – which is more time than is contemplated by the statute. See § 11325(d)(1) (“Written comments about an application . . . may be filed with the Board within 30 days after notice of the application is published”)

Applicants do not object to Metra’s proposal to extend the due date for comments by fifteen days, so long as Applicants are given a similar extension to file a rebuttal in support of the Control Application. That said, the Board would be well within its discretion to deny the request for an extension in light of the ample time provided to commenters under the proposed schedule
(continued ...)

CONCLUSION

For all of the foregoing reasons, Applicants respectfully request that the Board reject IANR's proposal that it classify the Application as "significant," and reject the procedural schedule suggested by IANR.

Respectfully submitted,



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Dated: October 29, 2007

(... continued)
and the Board's need for sufficient time to issue a decision

CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing Applicants' Reply To Iowa Northern Railway Company's Comments On Proposed Procedural Schedule to be served by first class mail, postage pre-paid, this 29th day of October 2007, on the persons listed in 49 C.F.R § 1180 4(c)(5) and on all parties of record on the STB service list for this proceeding as follows:

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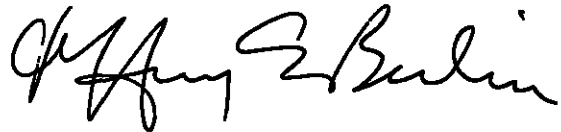
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