

Before the
SURFACE TRANSPORTATION BOARD

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

Finance Docket No. 35081

Mayo Clinic Environmental Comments

The Mayo Clinic, by and through its undersigned counsel, offers the following Environmental Comments. The goal of the Mayo Clinic, the City of Rochester and Olmsted County, Minnesota, is to ensure the safe operation of the railroad under its new owner. Currently, because DM&E's past focus on safety has been grossly inadequate, the physical infrastructure of the DM&E line in Rochester and elsewhere is aged and dangerous. Therefore, the prospect of substantial increases in traffic creates serious safety and environmental concerns and the need for immediate mitigation. The sources of increased traffic include: (1) the potential PRB coal traffic of dozens of trains per day; (2) the "natural" increase in hazardous materials traffic, such as ethanol; and (3) the potential increase in hazardous materials due to the anticipated acquisition of the DM&E by CPR.

This filing of necessity addresses the Board's preliminary determination that it will not consider the impact of PRB coal until CPR decides to go ahead with the project. The filing points out the clear disconnect and contradiction between the DM&E's continued headlong efforts to take private property through eminent domain and CPR's position that it has not yet

made a decision on the PRB. It also addresses the decision of the Board not to permit evaluation of the combined growth of non-coal hazardous traffic as a result of the proposed acquisition.

I. Procedural Concerns Regarding Ability to Comment on the SIP:

The Board has required the Canadian Pacific Railroad and the Dakota, Minnesota & Eastern Railroad to file a Safety Integration Plan (SIP). The Board has also acknowledged that the SIP is *normally* part of the environmental record.¹ However, in this proceeding, it appears that the Board inadvertently has failed to establish a procedure that will allow public participation and comments with regard to the SIP.

The SIP is due on February 4, 2008, the same date environmental comments are due. Thereafter, at some unspecified date, SEA has been instructed to “make a final recommendation to the Board regarding the level of environmental review that is needed to meet the Board’s NEPA responsibilities, and *how to conduct the SIP process, after considering any public comments received during the environmental comment period.*” Slip op. at 16.

A literal reading of the foregoing and the STB’s Procedural Schedule (Appendix A) appears to preclude public comments regarding the content of the SIP and “how to conduct the SIP process.” While we doubt that the Board intended to preclude public participation, such a result would deprive the public of any meaningful opportunity to address any concerns about the effectiveness of the SIP. We respectfully request that the Board clarify that the public will have the opportunity to comment on the SIP. We respectfully believe an early clarification is in order.

II. Analysis of Environmental Considerations:

The contradiction of DM&E moving ahead on the PRB while CPR claims no decision has been made on the project confuses the public policy picture. As we describe below, DM&E

¹ STB Finance Docket 35081, Decision served December 27, 2007, at 15.

is aggressively pursuing eminent domain actions in South Dakota and Wyoming at this very moment.² Because of DM&E's current activities, it is difficult to understand and accept CPR's claims that it has not made a decision as to whether it will actually build the line into the PRB. The Board's actions to indefinitely delay the required environmental analysis of the PRB coal on all of the combined CPR, DM&E and IC&E facilities (which the Board concedes will eventually be required), while DM&E is feverously working to change the reality on the ground with its eminent domain activities, create serious concerns.

Current PRB-Related Mitigation Orders Are An Inadequate Remedy:

Should the Board adhere to its preliminary determination that it will not consider the environmental impact of the movement of PRB coal until CPR "decides" whether it will actually build into the PRB, it should nevertheless recognize that increased movements of ethanol and other hazardous materials can be expected over DM&E, CPR and IC&E lines as a result of the proposed transaction. Therefore, the Board should give thorough consideration to the need to impose conditions that would mitigate the potential adverse consequences of a substantial, immediate increase in the movement of hazardous traffic over a dilapidated rail system.

In its December 27, 2007 Decision, the Board relies on mitigation conditions imposed during the DM&E Construction Case to avoid consideration of the environmental impact of the proposed transaction in this proceeding. According to the Board, "extensive mitigation for Rochester and the Mayo Clinic minimize[s] the potential impacts of [coal] traffic."³ Such reasoning ignores the fact that mitigation conditions imposed in the Construction Case do not

² Although the claim is made that no decision has been made, the Board should note that on September 28, 2007, DM&E's PRB Project Manager, Randy Henke, stated under oath in a land condemnation case in Wyoming that "construction activities are currently scheduled to begin in 2008 in three locations, including the West Yard, located on the Seeley property as defined in Case No. 07-CV-142-D. Contracts for construction will be let prior to that time." Plaintiffs' Responses to Defendants' First Combined Discovery Requests, at p. 5, DM&E v. 170 acres of Land in Weston County, WY; Civ. Action No. 07-CV-145-D.

³ STB Finance Docket 35081, Decision served December 27, 2007, at 14, n. 10

come into effect until PRB coal traffic exists and are inadequate to resolve the many concerns that are being raised herein by the Mayo Clinic and Rochester -- even if CPR should decide not to build into the PRB.

Because the mitigation conditions required in the Construction Case would not kick in until some time in the future and are dependent on future coal traffic levels, they do not protect Rochester and the Mayo Clinic from the dangers that will accompany the earlier substantial increase in DM&E's hazardous materials shipments through Rochester. Hence, it is not intellectually consistent to suggest that, because they might be afforded the benefit of some potential, future mitigation that would accompany the possible PRB expansion, there are no environmental impacts that result from the current acquisition. The increased movement of ethanol and other hazardous materials presents an immediate threat to Rochester and the Mayo Clinic that, by definition, is not addressed by any potential mitigation flowing from the PRB extension and must be addressed in the context of this transaction.

In terms of potential danger resulting from a substantial increase in the movement of hazardous materials over the DM&E's dilapidated track structure, the future is now! It would be dangerous and potentially unlawful to approve the instant transaction without addressing and eventually imposing meaningful conditions that would alleviate the clear and present danger posed by vastly increased movements of such hazardous materials over DM&E's severely antiquated track structure.

The immediate, substantial impact on the movement of hazardous materials that will follow consummation of the transaction cannot be summarily dismissed by claiming that "DM&E's movement of ethanol would likely take place regardless of the proposed acquisition."⁴

⁴ December 27 Decision at p. 14, n 10.

This would ignore the combination of the DM&E and CPR, as well as DM&E's increases. Simply put, in the highly unlikely event that CPR decides not to build into the PRB, a driving purpose behind this transaction is the lure of jointly increased ethanol shipments. Why else would CPR suddenly decide to reacquire a rail system that it shed slightly more than a decade ago?

As demonstrated by the repeated references to the anticipated increase in shipments of ethanol by the Applicants and their supporting shippers that would be the direct result of the transaction, the instant transaction is an essential component of a vastly expanded market for ethanol. For example, CPR claims that "[i]f current estimates for future growth in ethanol production become a reality [following approval of the acquisition], IC&E could originate more than 36,000 carloads of ethanol annually by the year 2010."⁵ CPR further states that the instant transaction "will significantly assist DME-served ethanol shippers in selling their products in distant end markets."⁶ In addition, Foot also claims that over the *next two years*, "approximately 3,000 carloads of ethanol originating on DME are likely to move in extended hauls on CPR's lines to points not served by DME today."⁷ Although DM&E has urged the Board to ignore the potential impact of such new hazardous materials shipments on Rochester and the Mayo Clinic by saying that DM&E's movement of ethanol would likely take place regardless of the proposed acquisition,"⁸ such a conclusion is clearly inconsistent with the facts as evidenced in the record and the claims by the Applicants about the benefits of the acquisition for increased ethanol shipments.

⁵ Foot, V S at 4

⁶ *Id* at 4-5.

⁷ *Id*

⁸ December 27 Decision at p. 14, n.10.

Even though the Applicants in this proceeding have deliberately downplayed the volume of traffic they hope to generate as a result of the proposed transaction in order to avoid close and regulatory scrutiny, the Application and the shipper statements in support thereof make crystal clear that the instant transaction will greatly expand the shippers' ability to reach distant markets with single-line rail service. That could, and likely would, of course, greatly expand the volume of ethanol that would pass through Rochester immediately adjacent to the Mayo Clinic.⁹ That being the case, the statement that "there is nothing in the available environmental information to indicate the potential for significant environmental impacts resulting from the proposed transaction"¹⁰ is simply not supported by the existing record or the DM&E or shippers out of application comments. In particular, that statement ignores the evidence of record that forecasts substantial increases in the movement of ethanol and other commodities over the expanded DM&E/CPR system. Particularly in the case of ethanol, the environmental impacts from the substantial increase in shipments of ethanol were not considered by the Board in the PRB Construction Case.

The Application makes it clear that the increased traffic generated by the proposed transaction, including shipments of ethanol and other hazardous materials, will move through Rochester on its way to and from the CPR interchange point at Minnesota City. Any other conclusion would run afoul of the single-line concept that underlies the Application. Because this increase will occur regardless of whether any line is ever built into the PRB, the Board must

⁹ See, e.g., Schieffer V.S. at 2 ("Direct rail access to these diverse points will enhance the ability of DM&E/ICE shippers to compete successfully in distant end markets for their products. An example of this point was made very effectively and clearly by the South Dakota Corn Growers Association (SDCGA) when this transaction was announced. The SDCGA noted that CPR would bring South Dakota ethanol producers direct access to important ethanol markets in the Northeastern United States ")

¹⁰ December 27 Decision at p. 14. That comment is undercut by the Applicant's repeated claim that "[a]s a result of the proposed transaction, DME will become part of a transcontinental Class I rail system with direct access to all of those locations, positioning DME shipper to take advantage of future opportunities for growth " Application, Ex. 12 at 3

recognize the environmental impact of the transaction and condition it in such a fashion to ensure that the Mayo Clinic, Rochester and all other impacted communities will be protected *from day one* and not at some unknown time in the future when CPR finally reveals its decision to build into the PRB.¹¹

Mitigation – Safety Investments?

Given the deplorable condition of the DM&E's infrastructure, the increased movements of hazardous materials will subject the Mayo Clinic to a potentially devastating disaster should a trainload of ethanol, anhydrous ammonia or other hazardous material derail or be the object of a terrorist attack in the vicinity of the Clinic. In this regard, CPR's promised expenditure of \$300 million over the next several years, when viewed against the potential consequences, is insufficient and to date incomplete in description. Even if no final decision has been made to expand into the PRB, the Board has properly recognized that "the work to be funded by CPR would involve substantially the same type of work, on the same properties, that was reviewed and is being addressed pursuant to the Programmatic Agreement for the DM&E PRB construction case." Slip op. at 12, n.6.

The Board's statement raises a very significant question. In December 1998, the Board estimated the cost of rebuilding *only* the 598 miles of existing DM&E track at \$875,750,000. STB Finance Docket No. 33407, Decision served December 10, 1998, p. 41. Based on the asserted increase in the estimated cost of the entire DM&E project from \$1.46 billion in 1998 (*id.* at p. 40) to \$2.33 billion (the alleged cost of financing construction of the PRB Project as reflected in DM&E's 2006 loan application under the Railroad Rehabilitation and Improvement

¹¹ For the reasons set forth in our previously filed Comment, we continue to believe that CPR has evidenced a commitment to build the PRB line and that the Board should consider the environmental impacts of the acquisition in light of that commitment

Financing (“RRIF”) program), it seems certain that the cost of rebuilding DM&E’s existing line has escalated. This, of course, has *nothing to do with any rebuilding of the IC&E lines*.

Even though the Board may be correct that “CPR’s plan to invest \$300 million in capital improvements on DM&E’s existing lines would enhance safety and the efficiency of its operations,”¹² the parties and the Board can only speculate as to what safety improvements would be covered by the \$300 million as CPR has both made it clear that this \$300 million will not be invested in 2008, at least until this proceeding concludes, and they have not publicly indicated where the \$300 million would be spent in the DM&E/IC&E facilities. Furthermore, there is no set timetable for the expenditure of the funds.¹³ As vaguely stated at page 5 of the Application, “CPR will make available to DME \$300 million *over the next several years* to repair and upgrade its track, bridges and other facilities” (emphasis added). Even if those expenditures would bring DM&E’s “safety performance closer to CPR standards” (as claimed at page 9 of the Application), that assertion is virtually meaningless in the absence of a description of where and when the money will be spent.

There are no assurances that any of the \$300 million expenditure would do anything to enhance the safety of movements of hazardous materials through Rochester over tracks that are adjacent to the Mayo Clinic. Simply put, only if the SIP that is to be filed on February 4 provides sufficient information will it be possible to reach any conclusion regarding the sufficiency of future capital investments for track and other physical structures. One thing is certain, even with no consideration being given to any IC&E tracks, the \$300 million is at least \$536 million short of the amount that DM&E recognized ten (10) years ago would be needed to

¹² STB Finance Docket 35081, Decision served December 27, 2007, at 4.

¹³ In his comments to analysts announcing CPR’s agreement to acquire DM&E, Fred Green, CPS’s President and CEO, indicated that the \$300 million could be spread over five years.

address the significant deficiencies in its track and structures. In addition, it is highly likely that the shortfall today would be significantly greater due to inflation and the further deterioration of tracks that has taken place over the last 10 years because of the lack of investment by DM&E

The impact on rail operations in the immediate vicinity of the Mayo Clinic may be revealed by the SIP. At a bare minimum, the Board must recognize that not only is the previously mandated mitigation not going to address the current operations, but the amount Applicants intend to invest in capital improvements “over the next several years” falls far short of what DM&E has previously claimed -- and what in fact -- is needed in order to address its dismal safety record. The Board should not allow the \$300 million to divert the Board’s attention from the true magnitude of what is needed to ensure the safety of DM&E’s operations.

III. Cumulative Impact and the Increasingly Contradictory Public Policy Positions of the DM&E and the CPR:

The Board should recognize the trap that Applicants have fashioned by requesting the Board to take a piecemeal approach regarding the environmental issues created by the proposed transaction. Recognizing that the PRB coal movements would require the Board to engage in a thorough environmental inquiry regarding the cumulative impact on Winona and Chicago, they implore the Board to hold off. At the same time, the Applicants conveniently downplay the anticipated growth in other traffic, especially hazardous materials, which would be expected to cover the cost of the proposed transaction. By taking that approach, Applicants seek to avoid having any thorough consideration of the environmental impact of the proposed transaction.

Given the Board’s apparent acceptance of the bifurcated approach urged by the Applicants, the Board should make the corollary finding that because the Applicants have sought to request the delay, they will be required to live with the consequences, including the real

possibility that because of the delay the existing environmental record is increasingly stale, thereby requiring a reanalysis of the environmental studies.

So as not to waive any objection, it is respectfully submitted that the decision to defer the preparation of environmental analysis on routing DM&E PRB coal traffic over the rail lines of IC&E and/or CPR is contrary to CEQ regulations, which require the Board to consider the cumulative impact of the proposed transaction on the entire system. By delaying consideration of the cumulative impact until such time as CPR decides to provide information about PRB coal trains, the Board would ignore the cumulative components of new traffic on locations such as Winona and the Chicago area, which is a non-attainment area. As is evident from the Application, PRB traffic will be routed over the DM&E line to CPR at Winona/Minnesota City and into Chicago. In addition, increased traffic moving over the IC&E line (from both DM&E and CPR) into Chicago can be expected. Plainly, if additional traffic is not to be expected, one would have to question the premium that CPR is paying in order to acquire ownership of the DM&E system.

If no decision has been made to construct the line into the PRB, why is it that DM&E continues to push forward with the eminent domain proceedings in South Dakota and Wyoming? Recent developments in this regard include a full scale campaign by the DM&E and its allies to change existing South Dakota law, by seeking passage of changes in existing law to repeal protections that exist for landowners faced with eminent domain proceedings. Also, even though no utilities have signed contracts, CPR is well aware of the utilities that it would seek to serve following consummation of the proposed transaction. In fact, CPR has already priced the anticipated volumes of coal traffic and paid an initial premium price that reflects the coal

component of the acquisition. The fact that additional payments to the DM&E officers and shareholders remain to be made does not change the premium already paid.

In addition to the other cumulative impacts of the proposed acquisition that must be considered under CEQ requirements, we note that the Board is currently considering the proposal by the Canadian National Railway to acquire control of the Elgin, Joliet & Eastern Railroad (STB Financial Docket No. 35087) and that as part of that proceeding the Board has required the preparation of an Environmental Impact Statement (EIS) (STB Financial Docket No. 35087, Decision (Dec. 21, 2007)), that includes consideration of the environmental impacts in and around Chicago. However, in this Canadian Pacific acquisition proceeding, the Board has preliminarily determined that environmental analysis can be deferred until after CPR has publicly announced its decision to build the PRB coal line. The Board's decision in this proceeding ignores the current and future collective impact of the combined acquisitions (CPR and CN) in and around Chicago. The additional environmental impact that would follow directly from additional CPR traffic in the Chicago area -- both with and without consideration of coal traffic -- must also be considered under a cumulative impact analysis in this proceeding.

Respectfully submitted,

Mayo Clinic



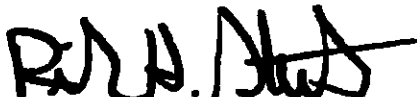
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Certificate of Service

I, Richard H. Streeter, do hereby certify that a true copy of the foregoing Reply was served this 1st day of February, 2008, by first-class mail, postage prepaid, on all Parties of Record as of this date.



Richard H. Streeter

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