

Before the
SURFACE TRANSPORTATION BOARD

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

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)
) Finance Docket No. 35081
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)

CERTIFICATE OF SERVICE

I hereby certify that, in compliance with the instructions in STB Decision No. 5, dated February 1, 2008, I, on behalf of Mayo Clinic, by first-class mail, postage prepaid, on the 8th day of February 2008, have served copies of the following documents on all parties of record in this proceeding that have not been previously served:

1. Mayo Clinic's Reply in Opposition to Applicants' Motion to Establish a Procedural Schedule and Request for a Determination that the Application is Incomplete;
2. Letter to STB indicating Mayo Clinic's intention to participate in this proceeding and enclosing Exhibits A and B regarding undertakings concerning treatment of confidential and highly confidential material signed by C. Dean McGrath, Counsel for Mayo Clinic;
3. Letter to STB announcing that Richard H. Streeter along with C. Dean McGrath, Jr. will serve as counsel of record on behalf of Mayo Clinic enclosing Exhibits A and B regarding undertakings concerning treatment of confidential and highly confidential material signed by Richard H. Streeter, Counsel for Mayo Clinic; and
4. Mayo Clinic Environmental Comments.

C. Dean McGrath, Jr.
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700 12th Street, NW
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October 24, 2007

Client-Matter: 28793-030

BY E-FILING

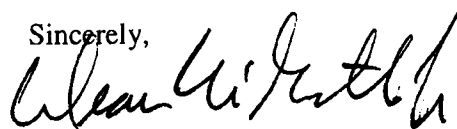
Mr. Vernon Williams
Secretar
Surface Transportation Board
395 E Street, S.W.
Suite 101
Washington, D.C. 20423-0001

**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, 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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Tele: 202-408-6933

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:

Party of Record:	Hynes, Terence M. Sidley Austin LLP 1501 K Street NW Washington, DC 20005
Party of Record:	William C. Sippel Fletcher & Sippel 29 North Wacker Drive Suite 920 Chicago, Illinois 60606
Non-Party:	Brennan, James W. Empire Wholesale Lumber Company PO Box 1248 Bath, OH 44210
Party of Record:	Zieziula, Timothy M. Knox McLaughlin Gornall & Sennett 120 West Tenth Street Erie, PA 16501
Party of Record:	Bannister, T. Scott Iowa Northern Railway Company Paramount Office Building 305 Second Street, Southeast Suite 400 Cedar Rapids, IA 52401
Party of Record:	Goldstein, Andrew P. McCarthy, Sweney & Harkaway, PC 2175 K Street, NW, Suite 600 Washington, DC 20037
Non-Party:	Nancy A. Hamer 1723 North Second Street Mankato, MN 56001
Party of Record:	Fauth III, Gerald W. GW Fauth & Associates, Inc. 116 South Royal Street Alexandria, VA 22314

Party of Record: Elliott III, Daniel R.
United Transportation Union
14600 Detroit Avenue
Cleveland, OH 44107-4250

Party of Record: Eigen, Robert P. Vom
Foley & Lardner, LLP
3000 K Street, NW, Suite 500
Minneapolis, MN 55402

Party of Record: Drentlaw, Stacey
Oppenheimer, Wolff & Donnelly, LLP
45 South Seventh Street, Suite 3300
Minneapolis, MN 55402

Party of Record: Heffner, John D.
John D. Heffner, PLLC
1750 K Street, NW, Suite 350
Washington, DC 20006

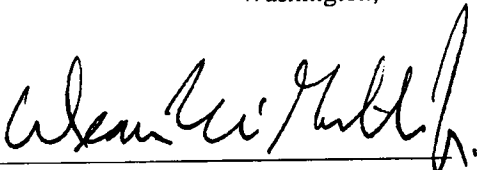
Party of Record: McFarland, Thomas F.
Thomas F. McFarland, PC
208 South LaSalle Street, Suite 1890
Chicago, IL 60604

Party of Record: Johnson, David K.
Iowa Traction Railroad
PO Box 309
Mason City, IA 50402

Party of Record: Steel, Jr., Adrian L.
Mayer Bown LLP
1909 K Street, NW
Washington, DC 20006

Party of Record: Mullins, William A.
Baker & Miller, PLLC
2401 Pennsylvania Avenue, SW
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Party of Record: Wimbish, Robert A.
Baker & Miller, PLLC
2401 Pennsylvania Avenue, SW
Suite 300
Washington, DC 20037



C. Dean McGrath, Jr.

October 25, 2007

Client-Matter: 28793-030

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
395 E Street, S.W.
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:

Mayo Clinic, of Rochester Minnesota, intends to participate as a party in the above-entitled proceeding. Accordingly, please include the following individuals as counsel of record on behalf of Mayo Clinic and add them to your Service List. (Both individuals are currently included as Non-Parties on the Service List). Any decisions, motions, notices, pleadings, statements or other filings in this proceeding should be served upon:

C. Dean McGrath, Jr.
Manatt, Phelps & Phillips
700 12th Street, NW
Suite 1100
Washington, DC 20005

In accordance with the Board's order in this proceeding served September 21, 2007, I am enclosing copies of Exhibit A, Undertaking – Confidential Material, and Exhibit B, Undertaking – Highly Confidential Material, signed by me. Copies of these executed agreements have been provided to counsel for Applicants.

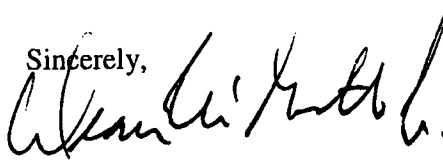
Thank you for your assistance.

Honorable Vernon A. Williams

October 25, 2007

Page 2

Sincerely,

A handwritten signature in black ink, appearing to read "C. Dean McGrath, Jr.", written over the word "Sincerely,".

C. Dean McGrath, Jr.

cc: Individuals Listed on Certificate of Service

Exhibit A

UNDERTAKING - CONFIDENTIAL MATERIAL

I, C. Dean McGrath, Jr., have read the Protective Order served on September 21, 2007, governing the production and use of Confidential Information and Confidential Documents concerning STB Finance Docket No. 35081, understand the same, and agree to be bound by its terms. I agree not to use or to permit the use of any Confidential Information or Confidential Documents obtained pursuant to that Protective Order, or to use or to permit the use of any methodologies or techniques disclosed or information learned as a result of receiving such data or information, for any purpose other than the preparation and presentation of evidence and argument in STB Finance Docket No. 35081, any related proceedings before the Surface Transportation Board (Board), and/or any judicial review proceedings in connection with STB Finance Docket No. 35081 and/or with any related proceedings. I further agree not to disclose any Confidential Information, Confidential Documents, methodologies, techniques, or data obtained pursuant to the Protective Order except to persons who are also bound by the terms of the Order and who have executed Undertakings in the form hereof, and that, at the conclusion of this proceeding (including any proceeding on administrative review, judicial review, or remand), I will promptly destroy any documents containing or reflecting materials designated or stamped as "CONFIDENTIAL," other than file copies, kept by outside counsel, of pleadings and other documents filed with the Board.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that Applicants or other parties producing Confidential Information or Confidential Documents shall be entitled to specific performance and injunctive and/or other equitable relief as a remedy for any such breach, and I further agree to waive any requirement for the securing or posting of any bond in connection with such remedy. Such remedy shall not be deemed to be the exclusive remedy for breach of this Undertaking but shall be in addition to all remedies available at law or equity.

Signed:

C. Dean McGrath, Jr.

Affiliation:

Manatt, Phelps & Phillips

Dated:

October 25, 2007

Exhibit B

UNDERTAKING - HIGHLY CONFIDENTIAL MATERIAL

I, C. Dean McGrath, Jr., am outside counsel for Mayo Clinic, for whom I am acting in this proceeding. I have read the Protective Order served on September 21, 2007, governing the production and use of Confidential Information and Confidential Documents concerning STB Finance Docket No. 35081, understand the same, and agree to be bound by its terms. I agree not to use or to permit the use of any Confidential Information or Confidential Documents obtained pursuant to that Protective Order, or to use or to permit the use of any methodologies or techniques disclosed or information learned as a result of receiving such data or information, for any purpose other than the preparation and presentation of evidence and argument in STB Finance Docket No. 35081, any related proceedings before the Surface Transportation Board (Board), or any judicial review proceedings in connection with STB Finance Docket No. 35081 and/or with any related proceedings. I further agree not to disclose any Confidential Information, Confidential Documents, methodologies, techniques, or data obtained pursuant to the Protective Order except to persons who are also bound by the terms of the Order and who have executed Highly Confidential Undertakings in the form hereof.

I also understand and agree, as a condition precedent to my receiving, reviewing, or using copies of any information or documents designated or stamped as "HIGHLY CONFIDENTIAL," that I will take all necessary steps to ensure that said information or documents be kept on a confidential basis by any outside counsel or outside consultants working with me, that under no circumstances will I permit access to said materials or information by employees of my client or its subsidiaries, affiliates, or owners, and that, at the conclusion of this proceeding (including any proceeding on administrative review, judicial review, or remand), I will promptly destroy any documents containing or reflecting information or documents designated or stamped as "HIGHLY CONFIDENTIAL," other than file copies kept by outside counsel of pleadings and other documents filed with the Board.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that Applicants or other parties producing Confidential Information or Confidential Documents shall be entitled to specific performance and injunctive and/or other equitable relief as a remedy for any such breach, and I further agree to waive any requirement for the securing or posting of any bond in connection with such remedy. Such remedy shall not be deemed to be the exclusive remedy for breach of this Undertaking but shall be in addition to all remedies available at law or equity.

Signed: C. Dean McGrath, Jr.

OUTSIDE COUNSEL

Dated: October 25, 2007

BARNES & THORNBURG LLP

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richard.streeter@btlaw.com

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Office of Proceedings

DEC 13 2007

Public Record

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December 12, 2007

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
395 E Street, S.W.
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

Mayo Clinic, of Rochester Minnesota, by letter dated October 25, 2007, previously announced its intent to participate as a party in the above-referenced proceeding. Please be advised that I, along with C. Dean McGrath, Jr., will serve as counsel of record on behalf of Mayo Clinic. Therefore, please revise the service list in this proceeding to reflect me as a Party of Record, rather than as a "Non-Party." Any decisions, motions, notices, pleadings, statements or other filings in this proceeding should be served upon:

Richard H. Streeter
Barnes & Thornburg LLP
750 17th Street, N.W.
Suite 900
Washington, D.C. 20006

In accordance with the Board's order in this proceeding served September 21, 2007, I am enclosing copies of Exhibit A, Undertaking - Confidential Material, and Exhibit B, Undertaking - Highly Confidential Material, signed by me. Copies of these executed agreements have been provided to counsel for Applicants.

Very truly yours,



Richard H. Streeter
Counsel for Mayo Clinic

RHS:rs

Cc. All parties on the Service List

Chicago Elkhart Fort Wayne Grand Rapids Indianapolis South Bend Washington, D.C.

Exhibit A

UNDERTAKING - CONFIDENTIAL MATERIAL

I, Richard H. Streeter, have read the Protective Order served on September 21, 2007, governing the production and use of Confidential Information and Confidential Documents concerning STB Finance Docket No. 35081, understand the same, and agree to be bound by its terms. I agree not to use or to permit the use of any Confidential Information or Confidential Documents obtained pursuant to that Protective Order, or to use or to permit the use of any methodologies or techniques disclosed or information learned as a result of receiving such data or information, for any purpose other than the preparation and presentation of evidence and argument in STB Finance Docket No. 35081, any related proceedings before the Surface Transportation Board (Board), and/or any judicial review proceedings in connection with STB Finance Docket No. 35081 and/or with any related proceedings. I further agree not to disclose any Confidential Information, Confidential Documents, methodologies, techniques, or data obtained pursuant to the Protective Order except to persons who are also bound by the terms of the Order and who have executed Undertakings in the form hereof, and that, at the conclusion of this proceeding (including any proceeding on administrative review, judicial review, or remand), I will promptly destroy any documents containing or reflecting materials designated or stamped as "CONFIDENTIAL," other than file copies, kept by outside counsel, of pleadings and other documents filed with the Board.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that Applicants or other parties producing Confidential Information or Confidential Documents shall be entitled to specific performance and injunctive and/or other equitable relief as a remedy for any such breach, and I further agree to waive any requirement for the securing or posting of any bond in connection with such remedy. Such remedy shall not be deemed to be the exclusive remedy for breach of this Undertaking but shall be in addition to all remedies available at law or equity.

Signed: Richard H. Streeter

Affiliation: Barrett & Thompson LLP

Dated: 12/12/2007

Exhibit B

UNDERTAKING - HIGHLY CONFIDENTIAL MATERIAL

Mr. Richard A. Straker, am outside [counsel][consultant] for Maya Clinic, for whom I am acting in this proceeding. I have read the Protective Order served on September 21, 2007, governing the production and use of Confidential Information and Confidential Documents concerning STB Finance Docket No. 35081, understand the same, and agree to be bound by its terms. I agree not to use or to permit the use of any Confidential Information or Confidential Documents obtained pursuant to that Protective Order, or to use or to permit the use of any methodologies or techniques disclosed or information learned as a result of receiving such data or information, for any purpose other than the preparation and presentation of evidence and argument in STB Finance Docket No. 35081, any related proceedings before the Surface Transportation Board (Board), or any judicial review proceedings in connection with STB Finance Docket No. 35081 and/or with any related proceedings. I further agree not to disclose any Confidential Information, Confidential Documents, methodologies, techniques, or data obtained pursuant to the Protective Order except to persons who are also bound by the terms of the Order and who have executed Highly Confidential Undertakings in the form hereof.

I also understand and agree, as a condition precedent to my receiving, reviewing, or using copies of any information or documents designated or stamped as "HIGHLY CONFIDENTIAL," that I will take all necessary steps to ensure that said information or documents be kept on a confidential basis by any outside counsel or outside consultants working with me, that under no circumstances will I permit access to said materials or information by employees of my client or its subsidiaries, affiliates, or owners, and that, at the conclusion of this proceeding (including any proceeding on administrative review, judicial review, or remand), I will promptly destroy any documents containing or reflecting information or documents designated or stamped as "HIGHLY CONFIDENTIAL," other than file copies kept by outside counsel of pleadings and other documents filed with the Board.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that Applicants or other parties producing Confidential Information or Confidential Documents shall be entitled to specific performance and injunctive and/or other equitable relief as a remedy for any such breach, and I further agree to waive any requirement for the securing or posting of any bond in connection with such remedy. Such remedy shall not be deemed to be the exclusive remedy for breach of this Undertaking but shall be in addition to all remedies available at law or equity.

Signed:

RA A. Straker
OUTSIDE [COUNSEL] [CONSULTANT]

Dated:

12/12/2007

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Before the
SURFACE TRANSPORTATION BOARD

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

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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, CPR'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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Date: February 1, 2008

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