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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
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Mayo Clinic Brief

As consistently repeated throughout the course of this proceeding, Mayo Clinic's sole objective is to ensure the safety and security of its patients and staff. Mayo Clinic does not oppose the instant transaction whereby Canadian Pacific Railway Company ("CPR") would acquire control of Dakota, Minnesota & Eastern Railroad Corp. ("DM&E") and the Iowa, Chicago & Eastern Railroad Corporation ("IC&E") (collectively "DME"), provided that Mayo Clinic's safety and security interests are adequately protected. Indeed, Mayo Clinic recognizes CPR's commitment to safety and the rehabilitation of the track through Rochester and looks forward to responsible management assuming control of DME so as to correct DME's focus on safety, which has been grossly inadequate.

ARGUMENT

I. SAFETY AND ENVIRONMENTAL CONDITIONS IMPOSED BY THE BOARD IN THE DM&E CONSTRUCTION CASE ARE NOT RESPONSIVE TO THE CURRENT THREAT POSED BY SUBSTANTIAL INCREASED MOVEMENTS OF HAZARDOUS MATERIALS THROUGH ROCHESTER, MINNESOTA.

The acquisition of DM&E by CPR will result in a substantial increase in the movement of hazardous materials traffic through Rochester, Minnesota by 2009, which creates additional, serious safety and security concerns and the need for immediate mitigation. That increase has

not heretofore been the subject of close scrutiny by the Board, either in this proceeding or in the earlier *DM&E PRB Construction Case*.¹ Therefore, it is essential that the Board consider the increased threat to the safety and security of the Rochester area caused by the substantial projected increase in the number of carloads of hazardous materials to be transported through Rochester beginning as early as 2009.²

Because CPR has not decided whether it will actually construct the extension of the DM&L's line into the PRB, the instant transaction must be viewed on a stand alone basis without any consideration being given to the prior imposition of conditions in the *DM&E PRB Construction Case*. In its April 23, 2008 Decision in *Canadian National Railway Company and Grand Trunk Corporation Control—EJ&E West Company*, STB F.D. No. 35087 (April 23, 2008), slip op. at 15, the Board declined to consider the potential impact of the future movement of DM&L PRB coal traffic over the IC&E and/or CP lines because no movements of PRB coal "are reasonably foreseeable at this time." *Id.* (emphasis added). That conclusion mirrors the Board's April 4, 2008 determination in this proceeding to defer indefinitely the preparation of an EIS addressing the possible future movement of DM&L PRB coal traffic over the IC&E and/or CP lines "because sufficient information is not available to conduct a meaningful environmental review now." Decision No. 9 at 1. If PRB coal shipments are not reasonably foreseeable in either this case or the *CN/EJ&E* case because CPR has made no decision to build the PRB extension, then it necessarily follows that it would be arbitrary, capricious or an abuse of

¹ See *Dakota, Minnesota & Eastern RR Corp. Construction Into the Powder River Basin*, STB F.D. No. 33407 (Jan. 28, 2002), reversed and remanded in *Mid-States Coalition for Progress v. STB*, 345 F.3d 520 (8th Cir. 2003), *Dakota, Minnesota & Eastern RR Corp. Construction Into the Powder River Basin*, STB F.D. No. 33407 (Feb. 13, 2006) upheld in *Mayo Foundation v. STB*, 472 F.3d 545 (8th Cir. 2006) (herein collectively "*DM&E PRB Construction*").

² In regulating the railroad industry it is the policy of the United States Government to promote a safe and efficient transportation system, to operate transportation facilities and equipment without detriment to the public health and safety, and to conduct honest and efficient management of railroads. See 49 U.S.C. § 10101(3), (8) and (9). See also, 49 U.S.C. § 721(a) requiring the Board to carry out this policy.

discretion to rely on conditions imposed in *DM&E PRB Construction* to justify the denial of needed conditions in this proceeding.

As the Board also recognized in its April 4, 2008 Decision, "the mitigation imposed in *DM&E PRB Construction* is not at issue here." Decision No. 9 at 7. That being the case, the Board is requested to recognize that if the safety-related conditions imposed in *DM&E PRB Construction* are effectively negated by a future decision by CPR not to build into the PRB, then the Board would have lost its only opportunity to impose safety-related conditions that would address Mayo Clinic's concerns associated with the expanded transportation of hazardous materials within a few hundred feet of its facilities. Therefore, the Board is urged to seize this opportunity to impose the safety and security-related conditions that Mayo Clinic has requested in this proceeding in order to address the impacts that are a direct result of the instant transaction and are wholly unrelated to the PRB project. The Board should do so even if a condition in this proceeding would duplicate a previously imposed condition that would accomplish nothing if CP for whatever reason decides not to construct the PRB extension.

II. BASED ON THE CURRENT RECORD, THE BOARD SHOULD DETERMINE THAT SAFETY AND SECURITY-RELATED CONDITIONS ARE ESSENTIAL.

The evidentiary record now reveals that a significant increase in the movement of hazardous shipments through Rochester will occur as a direct result of this transaction. Whereas the Application and the evidence in support thereof initially failed to reflect the growth of ethanol or the likely routing of ethanol over the DM&E, more recent filings have made it clear that Applicants intend to transport significant volumes of ethanol and other hazardous materials through Rochester as early as 2009 if the transaction is approved. Because the Application and the initial supporting evidence did not reveal the magnitude of the anticipated growth of such movements, the Board initially brushed aside Mayo Clinic's concerns about the need for

conditions to address its safety and security concerns. With the recent introduction of evidence that reflects a significant growth of hazardous materials moving through Rochester, as well as CPR's repeated assertions that no decision has been made to extend the DM&F's line into the PRB, the Board should reevaluate the changed data and impose safety and security-related conditions

A. Applicants' Initial Failure To Alert The Board To The Substantial Movements Of Ethanol Through Rochester Have Prejudiced Mayo Clinic.

Initially, Applicants literally ignored DM&F and instead focused on IC&E with the claim that ICE's "strategic location in the heart of Iowa's corn producing region creates the potential for it to be a major player in the transportation of ethanol"³ Without specifying the origin of the traffic, CPR's Vice President – Marketing and Sales, testified that "[w]hile some of this new traffic will move west to meet the requirements of consumers in the western United States, the majority is more likely to be directed to end users in the Chicago area and points east of DME's service territory"⁴ It was admitted, however, 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

The Applicants also claimed that the instant transaction "will significantly assist DME-served ethanol shippers in selling their products in distant end markets"⁶ and 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 However, little, if any,

³ Foot. V S at 4 Applicants carefully distinguish between the lines of DM&F and IC&E and both (DME)

⁴ Foot. V S at 4

⁵ Foot. V S at 4 During the course of a subsequent deposition, the 36,000 figure was reduced to 19,500 carloads of ethanol

⁶ *Id.* at 4-5

⁷ *Id.*

attention appears to have been paid to potential movements of ethanol through Rochester by any of Applicants' witnesses. Although the proposed operating plan ostensibly "took into account the anticipated growth in rail traffic on DME and CPR through the year 2010,"⁸ it did not mention the potential movement of thousands of carloads of ethanol through Rochester. Instead, the future operating plan called for the re-routing of some eastbound traffic so that it would continue east on DM&F's line to the junction with CPR's line to Chicago at Minnesota City, Minnesota instead of turning south at Owatonna, Minnesota.

In its initial submission, Mayo Clinic specifically focused on the potential movement of increased volumes of hazardous materials through Rochester as a result of the proposed transaction. *See* Mayo-1. As Mayo Clinic observed (*id.* at 7).

This is a new development as the transportation 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.

In its December 27, 2007 Decision, the Board disregarded Mayo Clinic's concerns about the potential impact of expanded volumes of ethanol being transported through Rochester as a result of the instant transaction. Instead, the Board relied on the safety conditions imposed in *DM&E PRB Construction* to avoid consideration of conditions that would address Mayo Clinic's safety and security concerns. According to the Board, "extensive mitigation for Rochester and the Mayo Clinic [in *DM&E PRB Construction*] minimize[s] the potential impacts of [coal] traffic."⁹ That reasoning erroneously ignored the fact that mitigation conditions imposed in *DM&E PRB Construction* did not consider ethanol shipments and, in any event, will not come

⁸ Graham, V S at 2

⁹ STB Finance Docket 35081, Decision served December 27, 2007, at 14, n 10

into effect unless and until CPR decides to construct the PRB extension and after the movement of PRB coal traffic actually happens. Hence, those conditions do nothing to resolve the safety and security concerns that are being raised herein by Mayo Clinic.

In its February 4, 2008 submission (Mayo-2), Mayo Clinic once again stressed that “[s]hould 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.” Mayo-2 at 3

In addition, Mayo Clinic argued (*id.* at 4) that:

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. 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.

Once again, the Board disregarded Mayo Clinic’s concerns regarding ethanol and focused on the deferred EIS that would apply to the movement of PRB coal. The Board announced that it would indefinitely defer consideration of the impact of hazardous materials until such time as it would address the impact of PRB coal. According to the Board “[t]his should satisfy the concerns of Mayo and Iowa DOT about the reliability of the traffic estimates that Applicants have provided to date” (Decision No. 9, at 11, n 18). Nothing could be further from the truth. The Board’s indefinite delay pending a decision by CNR to build the PRB extension, does nothing to address Mayo Clinic’s immediate safety and security concerns regarding the projected

movement of significant volumes of ethanol and other hazardous materials through Rochester that the record now reflects would occur as a result of this transaction

B. Applicants' Failure to Reveal the Full Extent of Anticipated Movements of Ethanol Through Rochester Misled the Board and DOT.

The Applicants' Response to Environmental Comments (CPR-12 DME-12), filed February 19, 2008, is of extreme importance with regard to the imposition of safety and security conditions. As stated at pp. 9-10 (* footnote omitted):

Although Mayo complains about the purported "substantial increases in traffic" through Rochester resulting from the proposed transaction or as a result of inherent growth on DM&L lines,* it presents no independent data to support its suggestion that these increases will actually occur or will trigger a requirement that the Board prepare an EIS prior to authorizing CPR to acquire DME. Instead, Mayo misconstrues or ignores the substantial traffic data Applicants submitted in support of the Application. These data show that not only is there no projected substantial increase in traffic through Rochester, but also the Board's environmental thresholds will not be exceeded even accounting for both the traffic increases projected as a result of the proposed transaction and "organic" growth in Applicants' traffic that is likely to occur whether or not the proposed transaction takes place.

Applicants further argued that Mayo Clinic (*id.* at 11, emphasis in original):

mistakenly assumes that all this [growth in Applicants'] traffic, including anticipated growth in ethanol shipments, will be routed over DM&E's line through Rochester, MN. In fact, all of the anticipated organic growth in ethanol traffic described by Mr. Foot will move either west (to interchanges with BNSF) or via IC&E's lines to the Chicago gateway. None of that traffic will be transported through Rochester over DM&E's lines.

The foregoing statements have proved to be outdated as thousands of carloads of ethanol are now being projected to move through Rochester on an annual basis. *See, Applicants'*

Response to Comments and Requests for Conditions and Rebuttal in Support of Application

(CPR-14 DME-14), at pp. 73, n. 47, 77-9, filed April 18, 2008. As stated therein (*id.* at 77):

Based on developments since the filing of the Application last October, and Applicants' continuing assessment of potential

ethanol traffic flows and DME's potential share of that traffic, Applicants have revised their projections of potential ethanol traffic volumes that may move over DME and CPR in the future, and the destinations to which that traffic may move

Applicants then projected that a greater volume of ethanol may flow from origins on the DME system than what was projected earlier in the proceeding as follows:

Applicants now project they may move [] Anderson Reply VS at 9-10. Graham Reply V.S. at 4-5. [

] Chicago in 2010.

Unfortunately, both the Board and DOT relied upon the Applicants' earlier projections when they considered Mayo Clinic's Environmental Comments. In its April 4 decision, (Decision No. 9 at 7), the Board summarized Mayo Clinic's position as follows:

Mayo asserts that the potential for derailment of rail cars containing hazardous materials, including ethanol, being transported through Rochester is far greater than Applicants have indicated and therefore request[s] numerous safety-related conditions should the acquisition be approved

The Board further commented (*id*) that

Mayo assumes, without adequate basis, that all of the increased traffic, including anticipated growth in ethanol shipments that would result from the proposed transaction, would be routed over DM&E's line through Rochester. There are numerous transfer points to other railroads on DM&L's existing system. And in their Response, Applicants specifically state that all of the anticipated growth in ethanol traffic will either move west (to interchange with BNSF) or via IC&E's lines to the Chicago gateway."

Similarly, in response to Mayo Clinic's comments about the Applicants' SIP, DOT noted (DOT-4 at 4) that:

it bears repeating that the Applicants have projected only a small additional increment in traffic as a result of their consolidation, including hazardous materials, and they deny that the organic growth in ethanol traffic will flow through Rochester in any event. CPR-12/DME-12 at 10-11.

Given the fact that Applicants have recently informed the Board that thousands of carloads of ethanol will be routed through Rochester, the Board must reassess its previous conclusions. Plainly, in light of the newly disclosed evidence, it would be arbitrary, capricious or an abuse of discretion for the Board to summarily dismiss Mayo Clinic's concerns as it has done earlier in this case. The Board should focus on the evidence about increased ethanol shipments that Applicants submitted on April 18, 2008 in response to Mayo Clinic's *Argument and Request for Conditions*.¹⁰ Whatever the reason for Applicants' "new" projections, the rationale for the Board's previous dismissive treatment of Mayo Clinic's concerns on the grounds that they did not have an "adequate basis" should be discarded. The transaction, if approved, will subject Rochester and Mayo Clinic to substantially increased risks associated with the movement of hazardous materials in close proximity to Mayo Clinic's facilities. Simply stated, the conditions that Mayo Clinic has requested represent a reasonable approach that will help to ensure the safety and security of its patients and staff and deserve the Board's full and immediate attention.

C. The Board's Refusal to Impose New Safety and Security-Related Conditions Would Be Contrary to the Public Interest and to the National Transportation Policy.

Throughout this proceeding, including their *Response To Comments And Requests For Conditions And Rebuttal In Support of Application* (CPR-14 DMF-14), the Applicants have insisted that the Board should be content with the previously-imposed conditions in *DM&E PRB Construction* and need not address the current threat. *Id.* at 69-73, 79-88. In an attempt to

¹⁰ In its *Argument and Request for Conditions*, Mayo Clinic demonstrated that DMF hazardous cargo numbers set forth in the Application could not be reconciled with public comments made by Kevin Schieffler, DM&E's CEO. There may still be a discrepancy between CPR's latest projections of [] and Mr. Schieffler's statement that in 2007, DM&E shipped 17,000 carloads of ethanol. Mayo Clinic also focused attention on the erroneous nature of Applicants' claim that Rochester would not be impacted by the projected growth in ethanol traffic. See, *Argument and Request for Conditions*, Mayo Clinic-3, at pp. 9-11.

deflect attention from Mayo Clinic's approach. Applicants assert (*id.* at 69, emphases in original) that "the Board only imposes conditions on its approval of a proposed transaction in order to address harms or conditions that are *caused by the transaction*, not to address pre-existing conditions that are unrelated to the transaction." Applicants have also claimed (*id.* at 69) that "DME's safety performance, its safety culture, and the condition of its track and infrastructure are all pre-existing conditions that are not in any way attributable to the proposed transaction."

Mayo Clinic readily accepts the fact that DME's current inadequate safety program is not attributable to the proposed transaction. What is attributable to the proposed transaction, however, is that the new operating system that will encourage and facilitate the expansion of the ethanol market for shippers in South Dakota and Western Minnesota – a point that is endorsed by Applicants and repeatedly emphasized by the shippers and trade associations that have lined up in support of the transaction. As Applicants recently revealed, that new system will, of course, greatly expand the number of carloads of hazardous materials that will move over the line through Rochester following the rehabilitation and upgrading of the line from Owatonna through Rochester to FRA Class 3 track by 2010. There is nothing in the record to suggest that DM&E, were it not for the infusion of \$300 million in CPR cash, would be able to carry out the necessary rehabilitation and upgrading that is needed to safely transport the significant expansion of carloads of hazardous materials to be moved through Rochester.

1. Routing Hazardous Materials Through Rochester Poses a Safety Threat That Must Be Addressed.

The Board should also consider the basis for the recent decline in the number of carloads of hazardous materials that DM&E has handled over the past few years. The Board in its Final

Environmental Impact Statement issued in November 2001 in *DM&E PRB Construction* found (p 9-72) (emphasis added) that

DM&E currently transports approximately 200-250 cars of hazardous materials per year. These materials include liquefied petroleum gas (LPG), anhydrous ammonia, phosphoric acid, ferric chloride, fuel oil, and ethylene acetyl (flammable gas). *The majority of these materials are received from other rail carriers or loaded in the Winona, Minnesota area and are transported westward through Rochester.*

Assuming that the foregoing was correctly stated in November 2001, what caused the precipitous decline in hazardous materials to the point that Applicants now claim that DM&E transported only a bare minimum of hazardous materials through Rochester during the past two years?¹¹ Mayo Clinic respectfully submits that the dramatic drop in the movements of hazardous materials that DM&E previously transported through Rochester demonstrates that DM&E, for political or business reasons, voluntarily rerouted traffic around Rochester so as to avoid a possible catastrophic incident that would have had a ruinous impact on DM&E. Following DM&E's acquisition of IC&E, it seems likely that such traffic was moved southwest out of St. Paul over trackage rights on the UP to Cornus and over IC&E's line from Cornus to Owatonna, Minnesota before turning west. If that is the case, then requiring future movements to follow that same routing would be consistent with DM&E's past – and apparently current -- operational practices. Obviously, maintaining the current routing to continue to avoid the safety and security threat to Mayo Clinic would mitigate and alleviate many of Mayo Clinic's concerns regarding

¹¹ "In each of the last two years, [] was the sum total of all hazardous materials that DM&E moved through Rochester." *Response To Comments And Requests For Conditions And Rebuttal In Support of Application* (CPR-14 DME-14), at 73 (emphasis in original). See also, *Graham RVS*, at 4. The Board should note that DOT's Pipeline and Hazardous Materials Safety Administration recently made it clear that the safety and security risks posed by "bulk quantities of PHH materials [which include anhydrous ammonia] are significant even if a rail carrier only transports a single carload." 73 Fed Reg at 20760 (April 16, 2008) (emphasis added).

hazardous materials without imposing any onerous operational burden on DM&E and its affiliated railroads.

Requiring the current routing of hazardous materials, including ethanol, would, in effect, hold the Applicants to their earlier testimony regarding the future routing of ethanol. This would mean that eastbound cars would turn south at Owatonna rather than moving through Rochester, while westbound cars would follow the IC&E routing south from St. Paul and west from Chicago through Owatonna.

2. Routing Hazardous Materials Through Rochester Poses a Security Threat that Must be Addressed.

Requiring a routing away from Mayo Clinic would also be consistent with policies of the Departments of Homeland Security and Transportation regarding safety and security concerns posed by hazardous materials shipments by rail. In the wake of the attacks of September 11, 2001, the Board, like every other agency of the Federal government, has a responsibility "to prevent terrorist attacks within the United States, reduce America's vulnerability to terrorism, and minimize the damage and recover from attacks that do occur." *National Strategy for Homeland Security* (October 2007) p. 3. As the *National Strategy* makes clear, "[t]he Federal Government as a united whole -- and not simply one or two agencies -- has a critical role in homeland security . . . where it possesses the unique capabilities to address the most catastrophic or consequential scenarios." *National Strategy* at p. 4. The Board cannot shirk its responsibility by assuming that it is some other agency's responsibility to address safety and security concerns voiced by Mayo Clinic. To shirk that responsibility would be to avoid the Board's obligation as a Federal agency "to protect the American people." The Board must help prevent a catastrophic incident should terrorists take advantage of Mayo Clinic's close proximity to tracks that are used to transport hazardous materials such as LPG, anhydrous ammonia, ethylene acetyl and ethanol.

The *National Infrastructure Protection Plan* (Oct 2006) ("NIPP"), sets forth an overarching goal (*id*) to:

Build a safer, more secure, and more resilient America by enhancing protection of the Nation's CI/KR to prevent, deter, neutralize, or mitigate the effects of deliberate efforts by terrorists to destroy, incapacitate, or exploit them; and to strengthen national preparedness, timely response and rapid recovery in the event of an attack, natural disaster or other emergency

The NIPP seeks "to ensure that governmental and private resources are applied where they offer the most benefit for mitigating risk by lessening vulnerabilities, deterring threats, and minimizing consequences of terrorist attacks and other manmade and natural disasters. In the context of the NIPP, [protection] includes actions to deter the threat, mitigate vulnerabilities, or minimize consequences." NIPP at 1 (emphasis added). The NIPP requires 17 separate Sector-Specific Plans, including a plan for transportation, *Transportation Systems, Critical Infrastructure and Key Resources Sector-Specific Plan as input to the National Infrastructure Protection Plan* (May 2007). This Transportation Plan establishes the following vision for the security of the Nation's freight rail system:

The freight rail mode's vision is to protect the Nation's freight rail network from terrorist or criminal attacks and prevent terrorists or other criminals from using freight rail conveyances and their cargoes as weapons of mass effect to attack the public and critical infrastructure. (Transportation SSP, Appendix E, Freight Rail, at A105)

The first goal identified for the freight rail system is to "[p]revent and deter acts of terrorism using or against the transportation system." Transportation SSP, Appendix E, at A109. The Transportation SSP, Appendix E, at A111, makes it clear that

Freight rail security priorities are determined on the basis of risk. Risk is a function of threat, vulnerability, and consequence. Freight rail policy, like all of transportation policy, is primarily driven by considerations of consequences or measures of loss of life and human injury, economic losses, and restoration costs. The

most important freight rail security objective is reducing the risk of TIII cars in transportation.

Contrary to the direction of the President and the Department of Homeland Security (as specifically endorsed by the Department of Transportation), the proposed transaction, by significantly increasing hazardous materials shipments through Rochester within a few hundred feet of the Mayo Clinic, would do nothing to deter the threat, mitigate the vulnerabilities, or minimize the consequences from a terrorist attack or a manmade disaster. In fact, the proposed transaction would increase the risk, especially considering that the current baseline risk is negligible (virtually no hazardous materials traffic is moving through Rochester), while doing nothing to mitigate that increased risk. In addition, in the event of a catastrophic incident near Mayo, the consequences would be exacerbated (not minimized) by crippling the capabilities of healthcare first responders, who would be the victims of the incident, and the availability of destination medical treatment facilities, which could be destroyed by the incident.

Absent action by the Applicants to provide firm assurances that they are willing to deter the threat posed by the increased shipments of hazardous materials; mitigate the vulnerabilities inherent in such increased shipments; and minimize the catastrophic consequences of an incident involving such shipments, it is the responsibility of the Board to impose conditions to deter the threat by requiring the rerouting of hazardous materials shipments away from Mayo Clinic whenever possible. Given the steps that have apparently been taken by DME to limit the volumes and types of hazardous materials that have been moved through Rochester in the past, there is no rational basis to reverse that practice by rerouting traffic through Rochester that can be moved to Chicago via an existing routing.¹² Simply put, a terrorist attack – or a manmade

¹² Maintaining the existing routing to avoid creating an essentially new threat to Mayo Clinic is consistent with the Department of Transportation's Pipeline and Hazardous Materials Safety Administration's recent regulations that require a carrier to "select the practicable route posing the least overall safety and security risk" (49 C.F.R. § 172.820(c)). See 73 Fed. Reg. 20752, April 1, 2008, emphasis added.

accident – involving the release of hazardous materials moving in close proximity to Mayo Clinic would not only trigger mass casualties, it could simultaneously wipe out the first responder community

III. THE BOARD SHOULD, AT A MINIMUM, IMPOSE A CONDITION THAT WOULD APPLY THE ASSOCIATION OF AMERICAN RAILROADS' RECOMMENDED RAILROAD OPERATING PRACTICES FOR TRANSPORTATION OF HAZARDOUS MATERIALS TO THE PORTION OF DM&E'S TRACK THAT IS LOCATED IN ROCHESTER, MN.

In its Request for Conditions, Mayo Clinic noted that "it seems only reasonable to impose a specific condition that would require CP on a best practices basis to apply OT-55 Recommended Practices to DM&E operations through Rochester ..." (Mayo Clinic-3 at 17-8) The substantial increase in ethanol shipments reconfirms the reasonableness and necessity of applying OT-55 to the unique situation involved herein.

The Association of American Railroads, in its Circular No. OT-55-I, has recommended several operating practices for the transportation of hazardous materials. Such recommended practices require the participating railroads, which include CPR, to designate certain tracks as "Key Routes." A "Key Route" is defined as follows.

Any track with a combination of 10,000 car loads or intermodal portable tank loads of hazardous materials, or a combination of 4,000 car loadings of PIH or TIH (Hazard zone A, B, C, or D), anhydrous ammonia, flammable gas, Class 1.1 or 1.2 explosives, environmentally sensitive chemicals, Spent Nuclear Fuel (SNF), and High level Radioactive Waste (HLRW) over a period of one year

Once a route has been designated as a Key Route, the railroad must comply with the following three requirements

1. Wayside defective bearing detectors shall be placed at a maximum of 40 miles apart on "Key Routes", or equivalent level of protection may be installed based on improvements in technology.

- 2 Main Track on "Key Routes" is inspected by rail defect detection and track geometry inspection cars or any equivalent level of inspection no less than two times each year, sidings are similarly inspected no less than one time each year, and main track and sidings will have periodic track inspections that will identify cracks or breaks in joint bars
- 3 Any track used for meeting and passing "Key Trains" must be Class 2 or higher. If a meet or pass must occur on less than Class 2 track due to an emergency, one of the trains must be stopped before the other train passes.

In addition, Circular OT-55-I also requires the signatory railroads to assist "in implementing TRANSCAER®, a system-wide community outreach program to improve community awareness, emergency planning and incident response for the transportation of hazardous materials."¹³

In order to provide adequate protection to Mayo Clinic's patients and staff, Mayo Clinic once again requests the Board condition its approval of the proposed transaction by imposing the OT-55-I requirements. Not only are such requirements in the public interest, but following the Applicants rehabilitation of the track through Rochester, compliance with the three OT-55-I requirements would greatly alleviate many of Mayo Clinic's concerns regarding the

¹³ The Circular sets out TRANSCAER's objectives which are as follows:

Demonstrate the continuing commitment of chemical manufacturers and transporters to the safe transportation of hazardous materials.

When requested assist Local Emergency Planning Committees (LEPC's) in assessing the hazardous materials moving through their communities and the safeguards that are in place to protect against unintentional releases. Upon written request, AAR members will provide bona fide emergency response agencies or planning groups with specific commodity flow information covering at a minimum the top 25 hazardous commodities transported through the community in rank order. The request must be made using the form included as Appendix F by an official emergency response or planning group with a cover letter on appropriate letterhead bearing an authorized signature. The form reflects the fact that the railroad industry considers this information to be restricted information of a security sensitive nature and that the recipient of the information must agree to release the information only to bona fide emergency response planning and response organizations and not distribute the information publicly in whole or in part without the individual railroad's express written permission. It should be noted that commercial requirements change over time, and it is possible that a hazardous materials transported tomorrow might not be included in the specific commodity flow information provided upon request, since that information was not available at the time the list was provided.

Assist LEPC's in developing emergency plans to cope with hazardous materials transportation incidents.

Assist community response organizations in preparations for responding to hazardous materials incidents.

transportation of hazardous materials through Rochester by ensuring that the track, once it is rehabilitated, will be properly maintained in the future. At the same time, the wayside defective bearing detectors would provide a modicum of protection against defective railcars.

Applicants have opposed Mayo's requested condition that would incorporate OT-55-I requirements. While they say that they would follow the requirements of OT-55 if "the volume of hazardous materials Applicants move through Rochester reaches the key route threshold prescribed by OT-55," the Applicants object to a "departure from the objective 'detailed protocol' and standards developed by AAR and endorsed by PHMSA." *Id.* at 82.

There is nothing in Circular OT-55-I that is onerous at levels below 10,000 carloads. Given the unique situation involving the proximity of the DM&F's track to Mayo Clinic's health care facilities, it would benefit all concerned if the Board were to require compliance with Circular OT-55 even though the shipments of hazardous materials through Rochester have not reached 10,000 carloads a year.

In the first place, DOT has agreed with Mayo Clinic "that emergency preparedness training should be a priority in the Rochester area." *Reply Comments of the United States Department of Transportation* at 6. Second, Applicants have testified that they intend to rehabilitate the line through Rochester to Class 3, which appears to be consistent with the OT-55 requirements. Third, as a matter of common sense, it would be prudent to have DM&F's Main Track through Rochester "inspected by rail defect detection and track geometry inspection cars or any equivalent level of inspection no less than two times each year" and to conduct "periodic track inspections that will identify cracks or breaks in joint bars."¹⁴

¹⁴ "The National Transportation Safety Board determined that the probable cause of the [Minot, North Dakota] accident [which resulted in one death and 11 serious injuries] was an undetected defective rail." 73 Fed. Reg. 17818 at 17827 (April 1, 2008) DOT, Pipeline and Hazardous Materials Safety Administration, Notice of Proposed Rulemaking "Hazardous Material Improving the Safety of Railroad Tank Car Transportation of Hazardous

Applicants have opposed the entry of various safety-related conditions on the grounds that CPR's "capital investment commitment eliminates the main factual premise for Mayo's safety arguments." *Applicants' Response To Comments And Requests For Conditions And Rebuttal In Support of Application* (CPR-14 DME-14), at 73. In addition, they contend that their commitment to bringing DM&E track in the vicinity of Rochester to Class 3 standards will "fully address[...] Mayo's concerns about the condition of DM&F track in and through Rochester." *Id.*, at 76. They further say that "these planned improvements also address Mayo's concerns about transportation of hazardous materials on the line that goes through Rochester, and obviates Mayo's requested speed limit condition." *Id.*, at 77.

Mayo Clinic's concerns regarding projections of vastly increased carloads of ethanol and other hazardous materials have not been eliminated by the planned rehabilitation of the track through Rochester. If anything, Mayo Clinic's concerns have been heightened by the lack of any concrete measures to protect Mayo Clinic from the constant threat posed by the movement of thousands of carloads of hazardous materials in extremely close proximity to its facilities. From Mayo Clinic's perspective, while immediate compliance with OT-55-I would alleviate some of its concerns, only the total elimination of future hazardous materials would fully address them.

Recognizing that the transaction within a matter of months will result in a significant increase in the number of carloads of ethanol and other hazardous materials being transported through Rochester, Mayo Clinic is resigned to the inevitable. That being said, the Board should recognize that accidents can and do happen and that the terrorist threat is real. Therefore, it should also recognize the unique nature of the threat to Mayo Clinic, its patients and staff and impose conditions that will help to ensure their safety and security. At a bare minimum, based

Materials." To the extent the recommended inspection requirements identify defective rail and prevent catastrophic incidents, they certainly would be a necessary and reasonable condition.

on the thousands of carloads of ethanol that are now projected to move through Rochester, the Board should require full compliance with the recommended railroad operating practices for the transportation of hazardous materials that are published in AAR Circular No. OT-55-1, as well as any subsequent modifications thereof. Simply stated, the wayside defective bearing detectors and the track inspection requirements represent an effective and inexpensive means of ensuring the safety of operations. Likewise, the implementation of TRANSCALER® will help enhance safety and security.

CONCLUSION

Applicants' Response To Comments And Requests For Conditions And Rebuttal In Support of Application has made it clear that the proposed transaction will result in a dramatic increase in the shipments of ethanol and other hazardous materials moving through Rochester on its way to and from the CPR interchange point at Minnesota City. Because this increase will occur regardless of whether a line is ever built into the PRB, the Board must recognize the impact of the transaction and condition it so as to ensure that Mayo Clinic and Rochester will be protected *from day one*. The Board must also recognize that the various adverse impacts associated with the substantial increase in shipments of ethanol were not considered by the Board in the PRB Construction Case. Hence, the previously imposed conditions provide no protection to Mayo Clinic and Rochester.

In seeking the imposition of conditions, Mayo Clinic is not asking the Board to usurp the jurisdiction of its fellow administrative agencies. It is merely seeking to have the Board implement reasonable conditions, similar to those imposed in *DM&E PRB Construction*, or as best practices in the railroad industry, that address Mayo Clinic's multiple concerns related to the

extensive movements of carloads of hazardous materials through Rochester adjacent to Mayo Clinic.

For all the above-stated reasons, the Board is requested to impose the following conditions:

- Consistent with routing practices in each of the last two years (2006 and 2007), Applicants shall continue to route hazardous materials so as to avoid through movements of such materials through the City of Rochester
- Applicants shall, immediately following the Board's approval of the instant transaction, apply the Association of American Railroad's recommended operating practices for transportation of Hazardous Materials to the DM&L's line of track through Rochester, Minnesota, which would include application of requirements and restrictions applicable to Key Trains, Key Routes and TRANSCALR®
- Applicants shall, immediately following the Board's approval of the instant transaction, install multiple grade separated crossings at mutually acceptable locations. Applicants shall consult with the ITRA, Federal Highway Administration (FHWA), appropriate state and local transportation authorities, and the City of Rochester on the design (for example, whether the road would go over or under the rail line), location, and funding of these grade separations. These grade separated crossings should be designed and located to facilitate the movement of emergency vehicles to and from medical facilities providing emergency services in Rochester, including Saint Mary's Hospital and Rochester Methodist Hospital, which are both facilities of Mayo Clinic.
- Applicants shall, immediately following the Board's approval of the instant transaction, for non-grade separated road crossings, develop and maintain grade crossing protection devices that will allow whistle-free rail operations through Rochester, Minnesota.

Respectfully submitted,

Mayo Clinic

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