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SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 35081

CANADIAN PACIFIC RAILWAY COMPANY, ET AL.—CONTROL—DAKOTA,  
MINNESOTA & EASTERN RAILROAD CORP., ET AL.

Decision No. 11

Decided: September 29, 2008

The Board approves the acquisition by Soo Line Holding Company (Soo Holding), a Delaware Corporation and indirect subsidiary of Canadian Pacific Railway Corporation (CPRC), of control of Dakota, Minnesota & Eastern Railroad Corporation (DM&E) and its wholly owned rail subsidiary, Iowa, Chicago & Eastern Railroad Corporation (IC&E).

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## INTRODUCTION<sup>1</sup>

*The CPRC/DM&E/IC&E Control Application.* CPRC, a Class I railroad,<sup>2</sup> Soo Holding, a noncarrier and an indirect subsidiary of CPRC, DM&E, a Class II railroad, and IC&E,<sup>3</sup> a Class II railroad, seek approval under 49 U.S.C. 11321-26 for CPRC’s acquisition of indirect control of DM&E and IC&E through ownership of DM&E/IC&E stock by Soo Holding.

An application was originally filed on October 5, 2007, under the Board’s procedures for “minor” transactions.<sup>4</sup> However, by decision served on November 2, 2007, the Board determined that the transaction was “significant” under 49 CFR 1180.2(b). Therefore, the October 5 filing was treated as a prefiling notification and the Board published notice of it in the Federal Register. The prefiling notification allowed the application to be perfected on December 5, 2007.

*Significant Transaction.* The Board’s November 2, 2007 decision found that the transaction would be a “significant transaction” under 49 CFR 1180.2(b) because the applicants’ initial submission did not clearly establish that there would be no anticompetitive effects that

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<sup>1</sup> Abbreviations and acronyms used in this decision are listed in Appendix A.

<sup>2</sup> Our regulations divide railroads into three classes based on annual carrier operating revenues. Class I railroads are those with annual carrier operating revenues of \$250 million or more (in 1991 dollars); Class II railroads are those with annual operating revenues of more than \$20 million but less than \$250 million (in 1991 dollars); and Class III railroads are those with annual operating revenues of \$20 million or less (in 1991 dollars). See 49 CFR Part 1201, General Instruction 1-1(a).

<sup>3</sup> CPRC, Soo Holding, DM&E, and IC&E are referred to collectively as applicants.

<sup>4</sup> See 49 CFR 1180.4.

might result from the transaction.<sup>5</sup> Applicants' December 5 submission contained supplemental information that analyzed the applicants' participation in rail traffic at the Bureau of Economic Analysis Economic Area (BEA) level rather than the station-specific level used in the October 5 submission.<sup>6</sup> Applicants state that this additional analysis supports a conclusion that the proposed transaction would not result in a substantial lessening of competition at any possible "2-to-1" or "3-to-2" station served by both of the applicants.

*Parties Supporting the CPRC/DM&E/IC&E Control Application.* The CPRC/DM&E/IC&E control transaction is supported by 26 parties, including 10 agricultural interests,<sup>7</sup> 4 railroads,<sup>8</sup> and 13 other parties.<sup>9</sup> Some of these parties, while supporting the transaction generally, request that the Board impose certain conditions. We address each of the requests for conditions later in this decision.

Other commenting parties include various shippers and shipper organizations, including Tyson Foods, Inc. (Tyson), Stepan Company (SC), O.K. Industries, Inc. (OK), North Dakota Grain Dealers Association & North Dakota Wheat Commission (NDGDA/NDWC), NITL, MFA Industries (MFA), J.W. Nutt, Inc. (Nutt), Arkansas Electric Cooperative Corporation (AECC), MP&W, and Boise Cascade, LLC (BC). Comments were submitted by various regional and local interests, including the Committee for a Safer Brookings (CSB), Citizens for a Safer Pierre and Fort Pierre (CSPFP), City of Dubuque, IA (City of Dubuque), Minnesota Department of

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<sup>5</sup> Mayo Clinic, Iowa Northern Railway Company (IANR) and the Iowa Department of Transportation (IDOT) filed comments objecting to the applicants' proposed designation of the transaction as "minor."

<sup>6</sup> See CPR-7 at 4.

<sup>7</sup> Agricultural interests include: Ag Processing, Inc.; the Southern Minnesota and Northern Iowa Shippers Association; CHS, Inc.; Dakota Mill & Grain, Inc.; Grain Processing Corporation; South Dakota Corn Growers Association; South Dakota Grain & Feed Association; Southern Grainbelt Shippers Association; VeraSun; and Winona River and Rail, Inc.

<sup>8</sup> Railroads include: Canadian National Railway Company; The Kansas City Southern Railway Company; Twin Cities & Western Railroad Company and Minnesota Prairie Line, Inc.; and Wisconsin & Southern Railroad Company.

<sup>9</sup> Other parties include: National Industrial Transportation League (NITL); Muscatine Power & Water (MP&W); Citizens for a Safer Pierre and Fort Pierre; Iowa Department of Transportation; Wisconsin Department of Transportation; United Transportation Union; U.S. Department of Agriculture; Mitchell County Board of Supervisors (MCBS); GCC Dacotah; IPSCO Inc.; the Rapid City Area Chamber of Commerce; Renewable Energy Group, Inc.; and Iowa Renewable Energy, LLC. The United States Department of Transportation (DOT), while not taking a formal position, believes that the transaction meets the statutory criteria for approval.

Transportation (MinnDOT), Mayo Clinic, MCBS, and City of Owatonna, MN (Owatonna). Several labor parties submitted comments, including the International Brotherhood of Electrical Workers (IBEW), Brotherhood of Locomotive Engineers and Trainmen (BLET), International Association of Machinists and Aerospace Workers (IAM), American Train Dispatchers Association (ATDA), National Conference of Firemen & Oilers–SEIU (NCFO), United Transportation Union Local 911 (Local 911), and United Transportation Union General Committee of Adjustment 386 (UTU/GO-386). Comments from the Commuter Rail Division of the Regional Transportation Authority of Northeast Illinois d/b/a Metra (Metra), the Federal Railroad Administration (FRA), and the Aftem Family (Aftem) were also submitted.

*Summary of Decision.* In this decision, we are approving CPRC’s acquisition of control of DM&E/IC&E, subject to New York Dock labor protective conditions.<sup>10</sup> Further, we are imposing environmental and historic preservation conditions, including conditions concerning the potential construction of a new rail line into the Powder River Basin (PRB) and requiring compliance with the Safety Integration Plan (SIP) developed by applicants in coordination with the Federal Railroad Administration (FRA). We are also requiring that applicants adhere to the representations they made on the record in this proceeding, including the pledge to keep open on commercially reasonable terms all gateways affected by the proposed transaction.<sup>11</sup>

### THE CPRC/DM&E/IC&E CONTROL APPLICATION

*Canadian Pacific Railway Corporation.* CPRC is a corporation organized under the laws of Canada. CPRC and its U.S. rail carrier subsidiaries, Soo Line Railroad Company (Soo Line) and Delaware and Hudson Railway Company, Inc. (D&H), operate a transcontinental rail network in Canada and the United States covering more than 13,000 route miles of rail lines. CPRC presently serves the principal business centers of Canada and the U.S. Northeast and Midwest regions. CPRC’s wholly owned subsidiary Soo Line operates 3,250 miles of rail lines serving the midwestern states of Illinois, Indiana, Michigan, Minnesota, North Dakota, South Dakota, and Wisconsin. Soo Line’s principal main line routes extend between Portal, ND, and Glenwood, MN; between Noyes, MN, and Glenwood, MN; between Glenwood, MN, and Portage, WI (via Minneapolis/St. Paul); and between Portage, WI, and Chicago, IL (via Milwaukee, WI).

*Dakota, Minnesota & Eastern Railroad Corporation.* DM&E owns or operates approximately 1,103 route miles of rail lines consisting of approximately 720 route miles of main line and approximately 383 route miles of branch lines. DM&E’s main line extends from Colony/Bentonite, WY, through Rapid City, SD, to Winona, MN. Branch lines extend from the

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<sup>10</sup> See New York Dock Ry.–Control–Brooklyn Eastern Dist., 360 I.C.C. 60, 84-90 (1979) (New York Dock).

<sup>11</sup> See CPR-14 at 4.

main line to Crawford and Chadron, NE; Onida, SD; Aberdeen and Mansfield, SD; and Hartland, MN.

*Iowa, Chicago & Eastern Railroad Corporation.* IC&E currently owns or operates approximately 1,322 route miles of rail lines consisting of 807 route miles of main lines, 299 route miles of secondary or branch lines, and 216 miles of trackage rights. IC&E's principal routes extend from Chicago through Sabula Junction, IA, and the Quad Cities to Kansas City; from Chicago through Sabula Junction and Marquette, IA, to St. Paul, MN; from Marquette through Mason City to Sheldon, IA; and from Ramsey to Jackson, MN; from Mason City, IA, through Ramsey and Owatonna, MN, to Comus, MN; and from Davis Junction, IL, through Rockford, IL, and Beloit, WI, to Janesville, WI.

*Cedar American Rail Holdings.* Cedar American Rail Holdings (CARH), a wholly owned noncarrier subsidiary of DM&E, functions as the holding company for DM&E and IC&E. CARH oversees the management and coordination on the DM&E/IC&E system, and provides marketing, information technology, administrative support, and operational support services to DM&E and IC&E.

*Soo Line Holding Company.* Soo Holding is the beneficial owner of all of the outstanding common stock of DM&E/IC&E, which is being held in an independent voting trust pending the outcome of this control proceeding. Applicants indicate that, if the control application is approved and consummated, the voting trust will be terminated, DM&E/IC&E's shares will be transferred to Soo Holding, and DM&E/IC&E will become a wholly owned subsidiary of Soo Holding (and an indirect subsidiary of CPRC).

*Nature of the Control Transaction.* Applicants contemplate that the acquisition by CPRC of indirect control of DM&E/IC&E through the termination of the voting trust in which the DM&E/IC&E stock is currently held and the distribution of that stock to Soo Holding will allow Soo Holding to exercise control over the DM&E/IC&E stock, making DM&E and IC&E indirect subsidiaries of CPRC.

*Public Interest Justifications.* Applicants contend that the proposed transaction will contribute to the public interest in meeting significant transportation needs because DM&E/IC&E shippers, for the first time, will have direct rail access to CPRC's transcontinental rail system which serves the major metropolitan centers of the U.S. Midwest (including Chicago, Detroit, Milwaukee, and Minneapolis/St. Paul), U.S. Northeast (including Buffalo, New York City, and Philadelphia), and Canada (including Calgary, Montreal, Toronto, and Vancouver). Applicants state that these new single-system routes will enhance shippers' ability to compete in distant end markets for their products. Applicants also state that CPRC shippers will likewise gain the ability to ship products to and from points served by DM&E/IC&E on a single-system basis.

According to applicants, DM&E/IC&E will gain access to the resources it needs to become a safer and more efficient railroad. Specifically, CPRC will make available \$300 million for repairs and upgrades to DM&E track, bridges, and other facilities. Applicants state that CPRC's commitment to safety will benefit DM&E/IC&E employees and customers, as well as the communities in which DM&E operates.

Finally, applicants state that, if the proposed transaction is approved, CPRC will work diligently with DM&E to accomplish necessary prerequisites to construction of the PRB line that was approved by the Board in 2006.<sup>12</sup> Applicants state that the PRB is the largest source of low-sulfur coal in North America. Applicants state that CPRC will be able to provide resources and expertise that will enhance the ability to purchase the necessary right-of-way, execute agreements with PRB mines for operations at loading tracks and facilities, and secure contractual commitments from prospective coal shippers to route their traffic over the PRB line. CPRC has not committed, however, to constructing the PRB line should its control application be approved by the Board.

*Environmental/Historic Review Considerations.* Applicants contended in their application that, under 49 CFR 1105.6(c)(2)(i), the CPRC/DM&E/IC&E common control transaction is exempt from environmental reporting requirements because common control will not result in changes in rail traffic, train operations, or yard activity that will exceed the regulatory thresholds established in 49 CFR 1105.7(e)(4) or (5) and that the Board should defer any required analysis of the environmental impacts of the movement of DM&E PRB coal trains over the lines of IC&E and/or CPRC because any information regarding the likely volume, destination, or routing of PRB coal trains beyond DM&E's existing line remains speculative. However, applicants stated that they planned to prepare a SIP under the Board's rules at 49 CFR 1106 setting out how they would ensure that safe operations are maintained throughout the acquisition-implementation process, if the proposed transaction is approved. Applicants further stated that, under 49 CFR 1105.8(b), the proposed transaction is exempt from historical review set forth in the National Historic Preservation Act, 16 U.S.C. 470f (NHPA), because the transaction does not involve line abandonments or elimination of duplicative rail facilities, and they do not have any plans to abandon any lines or alter or dispose of properties that are 50 or more years old.

As explained in more detail below, the Board, after notice and comment, determined in Decision No. 9 that an environmental and historic review of the proposed transaction would not be warranted; that there is no need to conduct any further environmental review here of the rail lines recently considered in DM&E PRB Construction; and that it would be appropriate to defer

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<sup>12</sup> See Dakota, Minnesota & Eastern Railroad Corporation—Construction into the Powder River Basin, STB Finance Docket No. 33407 (STB served Feb. 15, 2006) (DM&E PRB Construction), *aff'd*, Mayo Foundation, et al. v. Surface Transportation Board, 472 F.3d 545 (8th Cir. 2006).

preparation of an Environmental Impact Statement (EIS) addressing the possible future movement of DM&E PRB coal traffic over the IC&E and CPRC lines because sufficient information is not available to conduct a meaningful environmental review now. The Board further indicated that, should the Board ultimately decide to authorize the transaction, it would impose conditions on the authorization precluding such coal movements pending completion of a Final EIS and the issuance of a final decision addressing the impacts of such coal operations and allowing such operations to begin, if appropriate. We address below the comments received following issuance of Decision No. 9. As discussed in more detail below, we affirm our determination in Decision No. 9 and conclude that no environmental review of this transaction under the National Environmental Policy Act, 42 U.S.C. 4321 *et seq.* (NEPA) is warranted at this time.

*Labor Protection.* Applicants do not anticipate that any existing CPRC, DM&E, or IC&E employees will be adversely affected by CPRC/DM&E/IC&E common control. Applicants state that the labor protection conditions set forth in New York Dock will adequately protect any adversely affected employees.

## **DISCUSSION AND CONCLUSIONS**

Statutory Criteria. The acquisition of control of a rail carrier by another rail carrier or by a noncarrier that controls another rail carrier requires Board approval. 49 U.S.C. 11323(a)(3), (5).<sup>13</sup> Because the CPRC/DM&E/IC&E control transaction does not involve the merger or control of two or more Class I railroads, this transaction is governed by 49 U.S.C. 11324(d), which directs us to approve a control application unless we find that: (1) as a result of the transaction, there is likely to be substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States; and (2) the anticompetitive effects of the transaction outweigh the public interest in meeting significant transportation needs. In addition, the Board must comply with the requirements of NEPA.

In assessing transactions subject to section 11324(d), our primary focus is on whether there would be adverse competitive impacts that are both likely and substantial. If so, we also consider whether the anticompetitive impacts would outweigh the benefits or could be mitigated through conditions.<sup>14</sup>

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<sup>13</sup> Applicants have indicated that the transaction requires Board approval under section 11323(a)(5) (“Acquisition of control by a rail carrier by a person [Soo Holding] that is not a rail carrier but that controls any number of rail carriers.”).

<sup>14</sup> Under 49 U.S.C. 11324(c), we have broad authority to place conditions on our approval of section 11323 transactions. See Canadian National, et al.—Control—Wisconsin Central Transp. Corp., et al., 5 S.T.B. 890, 899-900 (2000).

General Competitive Analysis. After considering the application and the full record in this proceeding, we have determined that the CPRC/DM&E/IC&E control transaction is unlikely to cause a substantial lessening of competition or to create a monopoly or restraint of trade. CPRC and DM&E/IC&E connect at only four locations: (1) Chicago (Bensenville), IL; (2) Minnesota City, MN; (3) La Crescent, MN; and (4) St. Paul, MN. There is minimal overlap in their current operations. No shipper will lose the option of competitive rail service as a direct result of this merger.

In our November 2, 2007 decision accepting applicants' October 5, 2007 submission as a pre-filing notification and classifying the transaction as significant, we noted that applicants had based their competitive analysis on a showing of stations at which the applicants were the only two (or were two of three) railroads with a physical presence. The applicants had argued that we should not be concerned about any loss of competition for those stations where one of the railroads had no record of traffic movements to or from this station. We designated this case as significant because we found that the analysis was insufficient to allow us to conclude, at the application stage, that shippers would not have a reduction in competitive options post-transaction. Although applicants' submission stated that no currently served shipper would become captive as a result of the transaction, we determined that the applicants had not clearly established that there would be no other anticompetitive effects that might result from the transaction. Therefore, we concluded that more information was needed.

In applicants' December 5, 2007 supplement to their October 5, 2007 submission, and in the following rounds of evidence from other parties, we obtained sufficient information to make a final determination with respect to the likely effects of the transaction, including geographic competition and competition along corridors.<sup>15</sup> Broadening the geographic scope of the analysis provided a better measure of whether any specific station would likely be subject to competitive harm. The broadened analysis made clear the availability of other carriers in the area by possible transloading, build-ins, or other forms of competitive pressure. Specifically, the analysis reflected the presence or proximity of other carriers that might not serve the same station but could be reached via build-in or transloading or who exerted geographic competitive pressure by

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<sup>15</sup> In their December 5 supplement, applicants performed a market analysis often used in previous rail merger cases, referred to as a 50/10 screen, based on BEA to BEA movements and the 2005 waybill sample. The 50/10 screen identifies movements in which the acquiring railroad and the acquired one, together, account for at least 50% of the traffic and each accounts separately for at least 10% of the traffic. Applicants applied the screen separately to originations, terminations, and participation in movements. They gave movements that met or exceeded the screen a closer look, specifically in terms of whether other flows of the same commodity could be redirected in response to a rate increase. The closer look indicated to applicants that in none of the movements that passed the initial screen could they successfully apply market power to raise rates, as there was sufficient capacity from other movements and carriers that could be diverted toward the markets represented by those movements.

serving other shippers who, in turn, compete with the shippers at the station (or by serving other plants belonging to shippers at the station).

Moreover, applicants' December 5, 2007 Supplemental Verified Statement of John Williams, at 3, fn 3, specifically addressed those stations apparently served by both applicants but where only one has a record of traffic movements. Applicants note that, for Galewood, Itasca, and other stations in the Chicago and Twin Cities terminal areas, DM&E had no traffic in the 2005 carload waybill sample. Applicants also note that IC&E has no physical access to these stations, and its commercial access is limited to industries where CPRC switches. Those industries are also open to other railroads serving those terminal areas, making it unlikely that the transaction would lessen competition substantially.

We have also examined the effect of the proposed control transaction on geographic competition, when multiple carriers transport the same product to the same destination but from different origins, or conversely when multiple carriers transport the same product from the same origin to two different destinations. We examined whether the proposed transaction would have any such anticompetitive effects, and, if any were found, whether they would be offset by public benefits attributable to the transaction.

KCS's market analysis, applying an approach following U.S. Department of Justice antitrust guidelines based on the Herfindahl-Herschman Index (HHI), identifies a BEA to BEA corridor in which the increase in concentration due to the transaction should, according to KCS, signal concern: the Twin Cities/Chicago corridor. Applicants respond that this analysis is deficient in not focusing on particular shippers' access to particular railroads at particular points. We conclude that KCS's HHI analysis has identified the reduction of four railroads to three railroads in the same corridor.<sup>16</sup> In prior merger cases, this agency determined that a 4-to-3 reduction in competitors does not ordinarily necessitate a remedy.<sup>17</sup> We do not believe that the facts in this transaction warrant remedial conditioning, especially given the existing contractual restrictions on IC&E's access discussed below.

Another geographic competitive effect alleged by KCS involves the two dominant routes over which grain from the Midwest moves to the Pacific Northwest. Pre-transaction, this grain traffic has moved via either a CPRC/UP routing or DM&E/BNSF routing. Post-transaction, the originating carriers on both routes would be under common control. In some circumstances, this might have had the potential of negatively affecting competition. However, in this instance the

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<sup>16</sup> See KCS Comments, V.S. of Curtis Grimm, Table 1 (a summary of the 2006 movements from BEA 107 (Minneapolis – St. Paul) to BEA 64 (Chicago/Gary/Kenosha), which accounts mostly for the independent routings of DM&E, CPRC, UP, and BNSF, with a minor volume of a few other railroads).

<sup>17</sup> See, e.g., Burlington Northern et al.—Merger—Santa Fe Pacific et al., 10 I.C.C.2d 661 (1995).

applicants have adequately responded that the DM&E/BNSF movements, where BNSF has through-route rate quoting authority, are subject to an agreement that precludes even the potential for competitive harm for a substantial period of time.<sup>18</sup> More importantly, however, the Midwest grain growing area is crisscrossed by other railroads besides DM&E, affording BNSF alternative interlining choices.

Further, it is our view that the public benefits of the transaction offset any minimal decrease in geographic competition. The evidence demonstrates that this essentially end-to-end transaction will benefit shippers by enabling CPRC/DM&E/IC&E to provide single-system service where none currently exists. In addition to the benefit to the applicants of being able to compete more efficiently against rail competitors (as well as motor carriage and barge competition), shippers on the CPRC/DM&E/IC&E system should benefit from better equipment coordination and utilization, improved service patterns, enhanced resources for safety upgrades, and other operating efficiencies made possible by common control. Common control should also give shippers on CPRC, DM&E, and IC&E new routing and service options and more efficient and competitive single-system access to significant new markets and gateways. Applicants have also pledged to keep open on commercially reasonable terms all gateways affected by the proposed transaction, which we are making a condition of our approval.<sup>19</sup> These beneficial effects for shippers provide additional support for approval of the CPRC/DM&E/IC&E control transaction.

Accordingly, we find that the CPRC/DM&E/IC&E control application is not likely to result in either a substantial lessening of competition, the creation of a monopoly, or a restraint of trade in freight surface transportation in any region of the United States as a result of the control transaction and that any minor geographical competitive effects that may flow from the transaction are outweighed by the public interest benefits.<sup>20</sup>

Relief Sought By KCS. KCS does not oppose the transaction generally but seeks the imposition of several conditions relating to two agreements KCS currently has with DM&E and IC&E. First, the “Grain Agreement” gives KCS ratemaking authority for the transportation of grain from IC&E origins in Iowa and Minnesota to destinations in the South-Central United States. Second, the “Chicago Agreement” grants KCS pricing authority between Kansas City and Chicago for certain commodities. KCS asks that we impose relief by making both agreements permanent as a condition to approval of the transaction. For the reasons given below, we are denying the relief requested by KCS.

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<sup>18</sup> See CPR-14 at 16.

<sup>19</sup> See CPR-14 at 4.

<sup>20</sup> As discussed below, we find no merit to the competitive concerns raised by KCS, AECC, and MP&W, and reject their requests for conditions.

KCS contends that it is necessary to guarantee permanent access to the Chicago gateway via the Chicago Agreement in order to ensure competition in the movement of North American Free Trade Agreement (NAFTA)-oriented traffic. KCS also requests good faith negotiations for service commitments and penalties to ensure CPRC does not undermine the effectiveness of the Chicago Agreement. KCS argues that the proposed transaction would reduce competition both for corn traffic that currently moves from IC&E origins to poultry feeder mills located on its lines, and for NAFTA traffic moving between the Chicago and Laredo, TX gateways.

In requesting that the Grain Agreement be made permanent, KCS argues that the transaction will result in vertical foreclosure. Although none of the applicants operate south of Kansas City, KCS suggests that CPRC and UP should be treated effectively as a single carrier in the Board's analysis of anticompetitive effects because of the existence of a multi-faceted strategic relationship. KCS asserts that CPRC and UP are parties to numerous alliances regarding traffic solicitation, pricing, and operations. KCS characterizes CPRC and UP as having a commercial bond just short of a merger. KCS contends that CPRC's existing interline agreements with UP will cause it to favor the UP interchange over the KCS interchange in Kansas City. In addition, KCS contends that CPRC will favor Pacific Northwest interline corn movements with UP over destinations on the KCS system.

We will not grant the relief sought by KCS. The Chicago Agreement and the Grain Agreement are pre-existing agreements that were voluntarily bargained for by KCS well before the proposed transaction; they were not imposed by the Board.<sup>21</sup> Both agreements will remain in force well beyond the consummation of the proposed transaction, and applicants have stated that they will honor both agreements. To enforce either agreement beyond its current expiration date would certainly benefit KCS by protecting its economic interests for longer than it has otherwise bargained for, but that is not our charge under 49 U.S.C. 11324. We do not impose conditions designed to put the proponent in a better position than it occupied before the consolidation.<sup>22</sup>

The record shows that the proposed transaction provides new market options for corn suppliers and receivers, many of whom support the transaction, without any loss of existing routing options. To the extent that the costs of shipping to the Pacific Northwest are reduced as a result of the merger due to improvements in interline relationships between CPRC and UP, that is a benefit of the merger, not a drawback. The expected synergies that led CPRC to acquire DM&E, if achieved, may increase traffic movements over DM&E to all connecting railroads, including KCS. CPRC will have every motivation to achieve efficient traffic densities over the acquired lines, but KCS is not entitled to a guarantee of continuation of the status quo.

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<sup>21</sup> The fact that the Chicago Agreement routing has never been used also undercuts KCS's argument that it currently plays a significant competitive role.

<sup>22</sup> See Canadian National, et al.—Control—Illinois Central, et al., 4 S.T.B. 122, 141 (1999).

Further, the record does not indicate that CPRC and UP have an exclusive marketing relationship or support the claim that CPRC will favor its UP interchanges over its KCS interchange. Rather, the record shows that the CPRC and UP marketing agreements are designed to compete with BNSF single-line grain movements in the Pacific Northwest. It also appears that the CPRC and UP marketing agreements are similar in purpose to the agreements that KCS has with DM&E/IC&E. The Board has encouraged such interline marketing agreements to promote efficiency in the interconnected competitive railroad system. CPRC might find that it is in its interest to negotiate interline marketing agreements with KCS after the merger, but we recognize that KCS may have different marketing relationships with CPRC than it had with DM&E and IC&E after the expiration of the Grain Agreement and the Chicago Agreement. In any event, the record before us does not demonstrate that CPRC will favor its marketing relationships with one carrier over another in a way that would injure competition.

We will, however, hold applicants to their pledge to keep open on commercially reasonable terms all gateways affected by the proposed transaction.<sup>23</sup>

Relief Sought By Chicago Metra. Metra requests several conditions concerning service along Metra's Milwaukee District North Line (North Line) and Milwaukee District West Line (West Line) that might be affected by the CPRC/DM&E/IC&E transaction. CPRC has the right to dispatch the West Line and North Line by virtue of a 1985 trackage rights agreement with the Trustee of the Chicago, Milwaukee, St. Paul & Pacific Railroad Company (the Milwaukee Road). That agreement requires that priority be given to Metra's operations. Metra acquired the West Line and North Line from the Trustee in 1989. Metra is also an explicit third-party beneficiary in a 2003 trackage rights agreement between CPRC's Soo Line and DM&E/IC&E for the West Line. Under that agreement, CPRC, as dispatcher of the West Line, must act as a neutral gatekeeper to protect Metra's service by limiting the number of IC&E trains on the West Line.

Metra has many concerns surrounding the prospect of increased traffic as a result of the proposed transaction, particularly on its North Line. Metra contends that the proposed transaction threatens Metra's essential services over the West Line and North Line, and that existing agreements between Metra and CPRC do not provide adequate protection. Metra argues that CPRC's acquisition of DM&E/IC&E will impact the remedies negotiated under the

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<sup>23</sup> We believe that this condition should satisfy the concerns raised by the U.S. Department of Agriculture (USDA) and others with respect to the maintenance of cost-competitive gateways. We will not, however, impose USDA's requested condition that CPRC be required to maintain the same number of covered hopper cars on DM&E's system as were available in 2007. See also Comments of NDGDA/NDWC at 5. All carriers have a duty to provide adequate car service under 49 U.S.C. 11121. The Board does not micromanage the method by which carriers meet that obligation, and any shipper that believes that a carrier's car service is inadequate may bring a claim to the Board.

2003 trackage rights agreement. Metra reasons that the 2003 agreements do not address the impacts on the North Line and Metra's service over it as there was no threat at that time that CPRC would allow DM&E/IC&E traffic over the North Line. Metra notes that CPRC has announced that such rerouting would occur and states that it raises the specter that PRB trains will follow. Metra also asserts that, with CPRC's conversion from a neutral, third-party gatekeeper for the West Line, Metra's service over the Joint Lines will no longer be protected by effective safeguards. Lastly, Metra insists that CPRC's characterization of IC&E as part of the CPRC system, rather than a "third party," is a major change to the status quo, requiring a condition to foreclose the prospect of subjecting Metra to ever increasing traffic sources. Metra requests conditions relating to its West Line and North Line.<sup>24</sup>

CPRC asserts that the conditions Metra seeks are neither justified nor reasonable. CPRC disputes Metra's assertions regarding degradation in service resulting from the proposed transaction. Even if Metra could demonstrate that the transaction would impede its passenger services, CPRC argues that the conditions sought by Metra do not address a competitive harm nor relate to the harm alleged by Metra. Further, CPRC states that Metra has no basis to believe that CPRC will ignore its contractual obligations and that Metra is essentially requesting that the Board rewrite existing terms of agreement or impose on CPRC Metra's interpretation of prior agreements that govern the operations of the joint lines.

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<sup>24</sup> Metra requests the following conditions: (1) CPRC transfer to Metra the right to control and dispatch trains over the West Line and North Line; (2) CPRC delay use of West Line or North Line for PRB coal trains until Metra has completed construction of necessary capacity improvements in accordance with the current trackage rights agreements which protect Metra's service capabilities; (3) CPRC bears full expense for the capacity improvements, to the extent they are required solely for the movement of PRB coal trains or other CPRC/DM&E/IC&E trains; (4) CPRC pays Metra: (a) excess train charge or coal train charge, as specified in the 2003 IC&E Chicago Trackage Rights Agreement, adjusted annually in connection with any DM&E/IC&E traffic transported via the North Line; (b) a charge for increased traffic in connection with any DM&E/IC&E traffic transported via the North Line calculated on the same basis as specified in the 2003 trackage rights agreement; and (c) an annual rental charge for introduction of the DM&E/IC&E traffic to the North Line pursuant to the same provisions under which rent is paid in the 1985 trackage rights agreement; (5) When implementing the preceding condition, any trains originated or terminated along the DM&E/IC&E lines that operate over the West Line or North Line, regardless of the ownership of the locomotives powering such trains, shall be counted as IC&E trains for purposes of the IC&E Chicago Trackage Rights Agreement, the Metra/CPRC Trackage Agreement, and any other agreement governing the North Line; (6) CPRC and its affiliates shall acknowledge that its rights to admit third-party carriers to the line have been satisfied and that it may not admit any third-party carrier in the future to the West Line or North Line; and (7) CPRC shall negotiate with Metra such agreements as appropriate to implement the preceding conditions, with a right of either party to petition the Board to impose further conditions reasonably necessary to achieve the objectives of these conditions.

The conditions sought by Metra will be denied. Metra's alleged harm does not relate to competition, the major focus of our section 11324(d) analysis. Moreover, Metra seeks material changes to (or extensions of) existing agreements, or to compel new contractual commitments from CPRC to protect Metra from potential traffic increases that it might not have considered during prior contractual negotiations. We will not use our conditioning power here to compel resolution of potential differences between CPRC and Metra with respect to operating, dispatching, and compensation matters.<sup>25</sup> Given the intricate details involved in coordinating freight and passenger rail operations, capital expenditures, and compensation, commercial negotiation seems to be the better avenue for resolving such issues. CPRC has indicated that it remains committed to working cooperatively with Metra, and the Board strongly encourages both parties to work together to achieve a mutually acceptable arrangement to govern joint operations.

Relief Sought By AECC. AECC is concerned that the transaction would not enhance the likelihood of the entry of a third carrier into the PRB. AECC argues that the transaction may actually have a chilling effect on the prospects for completing construction of a new line into the PRB and would make it more difficult for some other party to enter. AECC cites two aspects of the transaction that make the construction less likely: (1) the imposition of up to \$1 billion or more in option payments if the PRB line construction project is completed;<sup>26</sup> and (2) CPRC's interdependence with the incumbent PRB rail carriers, BNSF and UP. AECC also asserts that CPRC might allow some of the DM&E PRB assets to revert to non-rail use, which would reduce the likelihood of a third party completing the entry into the PRB.

To allay its concerns regarding the transaction, AECC requests four conditions: (1) disallow any contingency payments associated with CPRC proceeding with the DM&E PRB project, and require the parties to submit a report to the Board within 6 months on whether they have renegotiated their agreement to eliminate contingent payments; (2) require CPRC to report to the Board by September 1, 2009, of its intentions to build into the PRB; (3) if CPRC elects not to build into the PRB, or if it elects to build but fails to begin construction within 5 years of the Board's decision approving this transaction, then the real estate interests acquired by CPRC or DM&E for the project should be made available for purchase by any party (other than BNSF,

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<sup>25</sup> Moreover, Metra's argument that it needs protective conditions because it will suffer harm if it obtains less revenue from negotiated excess train fees (if CPRC chooses to re-route traffic or consider DM&E or IC&E as subsidiaries) is unpersuasive. It is not the Board's responsibility to ensure a particular level of revenue for Metra, and any contractual disputes between Metra and CPRC can be litigated by them in an appropriate court.

<sup>26</sup> According to the terms of the agreement, CPRC would be required to pay DM&E \$350 million if it commences construction of the PRB line. An additional \$707 million would become due upon meeting various other milestones, including the achievement of traffic volume goals.

UP, or any affiliate of either) that obtains Board authority to construct a rail line into the PRB, with the Board establishing a fair market price should the parties fail to agree; and (4) require CPRC to preserve for rail use any real estate, easements, or other forms of land access acquired by CPRC or DM&E for the PRB project.

We will deny the conditions requested by AECC. We have previously stated that it is not “particularly pertinent” in a control proceeding whether that change in control makes the PRB line construction more or less likely.<sup>27</sup> In any event, AECC does not provide evidence that contingency payment arrangements have had a negative effect on the PRB line prospects or adequately explain why CPRC would want to terminate the effort. While AECC argues that the contingency payments would act as a “poison pill” to discourage CPRC from building the project, such contingent payments are common in purchase agreements to allocate risk between buyers and sellers. Without evidence to the contrary, it is reasonable to conclude that the structure of the agreement allows CPRC to defer paying for the full value of an asset (here the PRB line construction approval) until such time as CPRC determines that the asset can be monetized.

AECC argues that DM&E is less dependent on UP and BNSF than CPRC is, and, as a result, DM&E is insulated from possible retaliation by UP and BNSF if it were to enter the PRB coal market. AECC argues that the CPRC risks a loss of cooperation with UP and BNSF on traffic flows for goods other than coal. We believe that AECC’s argument does not fully acknowledge that all railroads are interdependent with other railroads. In a physically networked industry like railroads, it is necessary to have such relationships. This fact alone does not mean that CPRC would refrain from entering into a new market to compete when it is in its economic interest to do so.

In addition, AECC argues that CPRC’s acquisition of DM&E’s land rights along the proposed route might interfere with other projects to build new routes into the PRB, particularly possible routes to Kansas City, St. Louis, and points east. However, we have been given no reason to conclude that the route for which DM&E has obtained construction approval is the only route into the PRB from Kansas City. However, even if it were, to the extent that DM&E has obtained property rights through state eminent domain law, presumably an action could be brought in state court if DM&E does not ultimately use the property for the purposes for which it was acquired.

Relief Sought By MP&W. MP&W, a municipal utility located on the lines of IC&E, is concerned that CPRC may limit MP&W’s access to certain interchange points after the 2012 expiration of a voluntary access agreement reached between MP&W and DM&E/IC&E in 2002. MP&W requests that the Board impose the following conditions: (1) require applicants to

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<sup>27</sup> See Dakota, MN & Eastern, et al.—Control—Iowa, Chicago & Eastern, 6 S.T.B. 511, 525-26 (2003).

maintain the existing DM&E/IC&E interchange points for MP&W's unit train coal traffic at Kansas City, MO (with UP and BNSF), at Ottumwa, IA (with BNSF), at Clinton, IA (with UP), and at Owatonna, MN (with UP); (2) require CPRC to seek MP&W's consent or the Board's approval in order to close any of the above-mentioned interchange points, with any CPRC petition to the Board demonstrating that such a closure would not cause competitive harm to MP&W and would be justified by economic and operating efficiencies and would provide that applicants always maintain at least one of the above interchanges each with UP and BNSF; (3) upon the request of MP&W, applicants shall offer segment contract rates and/or quote proportional common carrier rates applicable to MP&W's unit train coal movements via all published interchanges capable of handling MP&W unit train coal traffic, including but not limited to the above-mentioned interchanges so long as they remain open; and (4) require applicants to waive all defenses to the "contract exception" based upon its service to both a PRB coal origin and the Muscatine Station. As discussed below, we will deny the requested conditions.

MP&W acknowledges that its concerns flow from DM&E's acquisition of IC&E in 2003.<sup>28</sup> In connection with that acquisition, MP&W reached an agreement with DM&E/IC&E in which DM&E/IC&E agreed not to take any action to close the IC&E interchanges with BNSF or UP, and to offer, upon request, segment contract rates or proportional common carrier rates via those interchanges to Muscatine Station.<sup>29</sup> Applicants state that DM&E/IC&E will continue to be bound by this contractual agreement with MP&W through its expiration in 2012, and CPRC will be similarly bound if the proposed transaction is consummated. Therefore, this transaction is not an event that would alter MP&W's competitive circumstances at all and it is protected from any perceived effects from a prior merger for several years. Although MP&W fears that CPRC will be less likely to extend the current agreement, that agreement was not Board-imposed, and MP&W also has no assurance that an independent DM&E would be willing to extend the agreement beyond 2012.

Because CPRC's acquisition of DM&E/IC&E will not diminish MP&W's access to interchanges and is unlikely to lead to MP&W suffering competitive harm, we find that MP&W has not provided a basis for imposing the conditions sought. Furthermore, MP&W has not shown how completion of the proposed construction of a new line into the PRB would place limitations on its ability to gain contractual access to PRB coal.

Labor Protection. Under 49 U.S.C. 11326 (with exceptions not pertinent here), the imposition of labor protection is mandatory when approval is sought for a transaction under sections 11323–11325. In the absence of a need for greater protection, the standard labor

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<sup>28</sup> See MP&W Reb. at 2-3.

<sup>29</sup> See Dakota, Minnesota & Eastern Railroad Corporation and Cedar American Rail Holdings, Inc.—Control—Iowa, Chicago & Eastern Railroad Corporation, STB Finance Docket No. 34178, slip op. at 31 (STB served Feb. 3, 2003).

protective conditions in New York Dock are appropriate for this type of transaction. Because no need for greater protection has been shown, these conditions will be imposed here.

CPRC states that it plans on implementing an operational change that will affect DM&E/IC&E employees who handle certain DM&E traffic to and from Chicago in two ways. First, a planned reduction of two crew starts per day on trains operating on the lines from Waseca, MN, to Nora Springs, IA, would affect employees who report for work at Waseca and draw their assignments from a crew board maintained there. However, an offsetting addition of two crew starts per day on trains operating from Waseca to Minnesota City would be available to employees who report to Waseca. Second, a proposed reduction of four crew starts per day on IC&E would affect IC&E train and engine service employees who currently report for work at Mason City, IA, and Dubuque, IA, and draw their assignments from crew boards maintained at those locations. However, applicants state that, because affected IC&E train and engine service employees have seniority covering all of IC&E's territory, they would be entitled, and expected, to take work assignments elsewhere on IC&E. Applicants expect sufficient work to be available on IC&E for all of the carrier's active train and engine service employees.

*JOINT COMMENTS OF IBEW, IAM, BLET, ATDA, AND NCFO.* IBEW, IAM, and NCFO, representing the Mechanical Department employees of Soo Line and D&H, request that CPRC employees be as well protected from any adverse effects of the transaction as are the unrepresented employees of DM&E. Similarly, ATDA, representing CPRC train dispatchers who control rail traffic over Soo Line and D&H, urges the Board to ensure that train dispatching employees of CPRC are as well protected from potential adverse effects of the transaction as employees of DM&E. BLET, representing all operating craft employees of IC&E, as well as the locomotive engineers employed by CPRC's U.S. subsidiaries, requests that the Board ensure that the employees BLET represents in Mason City and Dubuque, IA, are protected by New York Dock standard labor protection, as CPRC states will be the case, should CPRC, in keeping with its Operating Plan, eliminate two daily DM&E trains between Owatonna, MN, and Chicago, IL. BLET also requests that New York Dock standard labor protection be applied to every employee represented by BLET on both IC&E and CPRC properties.

New York Dock labor protective conditions will apply to all employees of applicants' railroads who may be adversely affected as a result of the implementation of the proposed transaction, regardless of representation. In addition, while CPRC states that it currently has no plans to consolidate the mechanical or dispatching functions of Soo Line and DM&E, should it decide to make such changes in the course of implementing the proposed transaction, all adversely affected employees will be protected by New York Dock conditions.

UTU Local 911. Local 911, CPRC's largest Union Local in North America, asserts that operation of trains or any freight out of Minnesota City onto the CPRC main line should be handled by CPRC crews and that any arrangement allowing for DM&E or IC&E crews to operate out of Minnesota City would be a device to evade a collective bargaining agreement. CPRC responds that any "hypothetical" changes in train crews would be subject to the New

York Dock requirement of notice and an implementing agreement or a new grant of trackage rights by Soo Line to DM&E or IC&E, which would carry its own employee protective conditions. With either event, any affected employees of Soo Line would be protected by the appropriate protective conditions.

Local 911 is also concerned that CPRC will reroute freight onto the IC&E line to Kansas City because IC&E employees generally receive lower salaries. Local 911 argues that CPRC crews are entitled to any extra freight coming out of St. Paul to Kansas City and requests that CPRC put in place CPRC equity jobs if CPRC runs more than one train a day between St. Paul and Kansas City on the IC&E line. Local 911 also requests that the Board hold CPRC to its representation that CPRC would not shift traffic from Soo Line trains to IC&E trains to create a lower pay scale in place of the one currently used and manned by CPRC employees. In response, CPRC states that this is a “nonexistent problem of Local 911’s own invention,” and that CPRC has no plans to shift existing traffic from Soo Line trains to IC&E trains. CPRC further notes that, if it should decide in the future to carry out an operational change that amounts to implementation of the proposed transaction, concerns such as those raised by Local 911 would be handled appropriately in the course of negotiating implementing agreements under the protective conditions.

Lastly, Local 911 requests that CPRC restore some former CPRC lines that are currently IC&E lines and provide CPRC equity jobs that were previously held by CPRC employees before the 1997 line sale. CPRC states that there is no aspect of the proposed transaction that could serve as a basis for this request and that such matters are exclusively within the jurisdiction of the National Mediation Board.

There is no evidence to suggest that the first two concerns of Local 911 are likely to occur. CPRC does not indicate any intention of having DM&E/IC&E crews handling traffic out of Minnesota City; rather, in its application, CPRC states that the operational change “will likely have no significant effect on Soo [Line] employees because cars moving from or to Minnesota City will simply be added to trains currently operated by Soo [Line] over its own lines.”<sup>30</sup> Nor does the record suggest that CPRC will shift existing Soo Line traffic to IC&E trains. However, should CPRC make changes to its operations in the course of implementing the proposed transaction that adversely impact employees, New York Dock protections would be available. Lastly, Local 911 provides no valid justification for requiring CPRC to restore former CPRC lines (thus, effectively dispossessing IC&E crews of work). Its requests will be denied.

UTU/GO-386. UTU/GO-386 opposes the proposed transaction. In a verified statement, UTU-GO-386’s General Chairman Jay L. Scholmeyer expressed his opposition to the proposed transaction because of the adverse effects the transaction would have on BNSF train and engine service employees. However, the Board has consistently ruled that the employees of a non-

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<sup>30</sup> CPR-2/DME-2, V.S. Frankenberg at 4.

applicant carrier, or employees of a carrier not directly involved in a transaction governed by 49 U.S.C. 11323, are not entitled to labor protection under 49 U.S.C. 11326.<sup>31</sup> UTU/GO-386 also presented arguments regarding the Board's environmental analysis in this proceeding. Those arguments are addressed below.

The SIP Process. In accordance with 49 CFR 1106, applicants prepared a proposed SIP and filed it with the FRA and the Board. In addition, the Board provided an opportunity for public review and comment on the SIP. The Board's Section of Environmental Analysis (SEA) also independently reviewed the SIP.

In a letter dated July 3, 2008, FRA stated that CPRC had formally presented a SIP to FRA on December 14, 2007, that applicants had met with FRA several times since then, and that applicants had satisfactorily responded to all of FRA's safety concerns.<sup>32</sup> FRA explained that, if the transaction were approved, it would monitor implementation of the SIP during the operations integration period and would keep the Board informed of applicants' progress.<sup>33</sup>

We hereby find that the SIP adequately presents a process to ensure that the transaction which we are approving will be safely implemented. Accordingly, we will impose a condition requiring that applicants comply with the SIP and continue to coordinate with FRA until FRA informs us that the transaction has been safely implemented.

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<sup>31</sup> Crouse Corp. vs. ICC, 781 F.2d 1176, 1192-93 (6th Cir. 1986), cert. denied, 479 U.S. 890 (1986); Railway Labor Executives' Ass'n v. ICC, 914 F.2d 276, 280-81 (D.C. Cir. 1990); Canadian National, et al.—Control—Illinois Central, et al., 4 S.T.B. 122, 165-66 (1999).

<sup>32</sup> In April 2007, DOT had suggested that the proposed SIP should be modified with respect to when the emergency response training exercises with appropriate community groups should be conducted. DOT stated that these exercises should begin no later than 60 days following the Board's approval of the transaction, rather than beginning in 2010. FRA's July 2008 letter stated that the applicants have agreed to this modification.

<sup>33</sup> FRA explained that its monitoring of the implementation of the SIP would include a special focus on: (1) CPRC's commitment to investing approximately \$300 million over the next 4 years to upgrade all DM&E track to Class 3 standards; (2) CPRC's commitment to installing additional defective equipment detectors to the east and west of the Rochester city limits; (3) CPRC's projection that any increase in hazardous material volume will be primarily in ethanol and be at levels below the DOT routing requirement levels; (4) CPRC's commitment to working with governmental agencies, including the Minnesota Department of Transportation (MinnDOT), to enhance safety at highway-rail grade crossings; and (5) CPRC's commitment to conducting emergency response training with community groups within 60 days of approval.

Several parties, including MinnDOT, WisDOT, and Mayo Clinic, have expressed concern about track safety and, specifically, the safety of railroad grade crossings.<sup>34</sup> MinnDOT requests two conditions on the transaction: (1) that CPRC and DM&E be required to immediately proceed with whatever grade crossing upgrades MinnDOT deems necessary, in light of recent speed increases on DM&E lines; and (2) that if train speeds increase in the future, CPRC and DM&E will implement any additional improvements deemed necessary by MinnDOT. Similarly, WisDOT requests a condition that would require CPRC and IC&E not to increase speeds on any Wisconsin lines until such time as the Wisconsin Office of the Commissioner of Railroads determines that the warning devices provide sufficient warning for the proposed speed.

Noting the commitments they have made to track safety in their SIP, applicants argue that there is no basis for imposing the conditions requested here. Applicants note that MinnDOT's first condition relates to speed increases already implemented by DM&E prior to (and clearly unrelated to) the proposed transaction. With respect to potential future increases in speed, applicants argue that such concerns do not necessitate Board intervention in the joint programs between DOT, state governments, and the rail carriers to administer and finance railroad highway crossing safety programs.

We agree that there is no justification for the imposition of the grade crossing safety conditions requested by MinnDOT and WisDOT. As noted by DOT, there are Federal regulations and programs already in place that govern train speed and grade crossing safety. Notably, the Federal Highway Administration (FHWA) has an extensive scheme in place that involves states, rail carriers, and others in the reduction of safety hazards at highway-railroad grade crossings. No showing has been made that these regulations and programs are inadequate to satisfy the concerns that have been raised.<sup>35</sup>

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<sup>34</sup> WisDOT also makes several requests for information that it styles as a request for conditions. These requests involve: (1) CPRC providing information about the specific improvements that will be made on the line between Davis Junction and Janesville, WI; (2) CPRC providing information as to whether the line from Davis Junction and Janesville, WI can handle rail cars loaded to 286,000 pounds and, if not, what the deficiencies are; and (3) CPRC clarifying the impact of the CPRC/CN Joint Routing Protocol on traffic movements through Wisconsin. See Wisconsin DOT-2 at 2. All of these information requests were addressed by applicants in their reply, and we find no basis to impose any conditions related to these requests.

<sup>35</sup> Several entities, including Owatonna, have cited concern about DM&E's track record regarding safety and what CPRC's plans are with regard to improving the DM&E's lines. We note that the SIP outlines CPRC's commitment to improving the safety record of DM&E and the FRA has specifically stated it will monitor CPRC's commitment to upgrade all of DM&E's track to FRA Class 3 standards. Therefore, we find it unnecessary to impose any specific conditions on the transaction other than holding CPRC to its commitments in the SIP.

Mayo Clinic, a renowned healthcare facility, a portion of which is located near DM&E's line in Rochester, MN, is concerned that future derailments involving hazardous materials could endanger the lives of both the staff and patients of its facility. Mayo Clinic states that applicants' proposed SIP does not provide adequate detail as to the rehabilitation of lines located near the Mayo Clinic facilities, nor does the SIP mention anything regarding the timing involved in addressing many of the potential safety concerns. Mayo Clinic also argues that the funds set aside for capital improvements for both the DM&E and IC&E lines fall far short of the amount previously stated by DM&E. Mayo Clinic further notes that inconsistent statements have been made by DM&E regarding the substantial number of shipments of ethanol to move over DM&E lines to Chicago.

Mayo Clinic, therefore, requests the imposition of conditions to minimize the potential risk of future CPRC/DM&E operations by requiring that applicants: (1) work with local, state, and Federal agencies to install multiple grade-separated crossings at mutually acceptable locations to facilitate the movement of emergency vehicles to and from medical facilities; (2) meet with representatives of Mayo Clinic to consult and coordinate ways to minimize rail transportation's impacts on the Clinic, especially the increased transportation of hazardous materials; (3) install wayside detectors to the west and east of Rochester to provide timely warning of any potential problem prior to entering the city limits; (4) impose speed limits on local hazardous materials traffic of 10 mph and non-hazardous train traffic at 20 mph; (5) construct fencing and other appropriate protections for bike paths and pedestrian crossings, and install other sound and aesthetic barriers; (6) develop and maintain grade crossing protection devices for non-grade-separated road crossings that allow whistle-free rail operations; (7) establish a protocol with Rochester emergency services that will provide pre-notification of the transportation of hazardous materials through Rochester; (8) be required to cover and/or spray coal cars transported through Rochester to reduce dust and/or dirt contamination, should the Board overturn its preliminary determination regarding the need to consider the environmental impact on movements of PRB coal beyond the terminus of the DM&E; and (9) negotiate voluntary contractual limitations with Mayo Clinic and the City of Rochester on the total number of through-traffic trains moving through Rochester.

In their reply, applicants state that DM&E's poor safety record is a pre-existing condition. Applicants further state that most of the Mayo Clinic's proposed conditions relate to issues that fall under the jurisdiction of FRA, FHWA, and other transportation safety agencies. Applicants argue that Mayo Clinic is asking the Board to preempt those safety agencies' procedures by directing applicants to take specific actions to address Mayo Clinic's concerns. Applicants state that many of the Mayo Clinic concerns are attempts to relitigate safety concerns raised during DM&E PRB Construction and that many of the sought conditions are similar to conditions already imposed by the Board in that case, which would be applicable in the event DM&E decided to construct a new PRB line.

Regarding DM&E's safety improvements over the last several years, applicants state that the last remaining condition of the DM&E Safety Compliance Agreement (SCA) with FRA was

terminated approximately 3 weeks before Mayo Clinic filed its comments. Applicants contend that the termination of the entire SCA demonstrates that FRA is satisfied that DM&E's safety performance had improved sufficiently to allow termination of the special safety review and oversight program. Applicants assert that significant investments to rehabilitate and upgrade the DM&E line between Rochester and Owatonna will be made in 2009, and that the line through Rochester will be upgraded to FRA Class 3 track. Moreover, applicants state that DM&E is improving its existing line as part of its existing capital improvement plan.

Finally, applicants assert that Mayo Clinic's concerns about hazardous materials obscure the fact that very few hazardous materials move through Rochester by rail. They state that additional volumes of ethanol or hazardous materials will not move over the DM&E line between Owatonna and Minnesota City until DM&E ensures that the route is capable of handling the transport of those cars.

The Board takes seriously the safety concerns raised by Mayo Clinic, particularly concerns regarding the safe transport of hazardous materials. However, based on the record, it appears that the projected increase in traffic resulting from the proposed transaction, much less through Rochester, will be minimal. In discussing the evolving market of ethanol transport, CPRC projects that "even substantial additional growth" in ethanol traffic over IC&E lines to Chicago should not result in significant additional ethanol traffic moving over DM&E lines through Rochester. We will hold applicants to their representation that the line through Rochester will be upgraded enough to permit the safe handling of the hazardous materials that will be routed over it (see condition No. 8, below), but the additional conditions that Mayo Clinic seeks here have not been shown to be warranted.<sup>36</sup>

Many of the risks identified by Mayo Clinic have been addressed by the current SIP. In working with FRA under the SIP process, CPRC has revised its proposed SIP to include a commitment to install additional defective equipment detectors to the east and west of the city limits of Rochester, and has committed to conducting emergency response training for community groups within 60 days of the Board's approval of the proposed transaction, as DOT had suggested. Moreover, our SIP condition (condition No. 6, below) assures that the SIP may be updated as necessary and that applicants will continue to coordinate with FRA in implementing the SIP until FRA has informed the Board that the integration of applicants' operations has been safely completed.

It also should be noted that most of Mayo Clinic's concerns can be addressed by existing programs and regulations. For example, all railroads must comply with DOT and Transportation Security Administration regulations covering transportation safety, security, and the handling of

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<sup>36</sup> We note that DOT does not support the specific conditions that Mayo Clinic seeks.

hazardous materials.<sup>37</sup> Applicants state that they are also committed to following the operating practices and standards established by the Association of American Railroads' OT-55, which establishes standards for hazardous materials transportation by rail, as endorsed by DOT's Pipeline and Hazardous Materials Safety Administration. Existing programs administered by FHWA and state agencies evaluate and ensure the safety of grade crossings. DOT regulations also provide local authorities with the means to establish whistle-free quiet zones. FRA has regulations to determine the maximum allowable speed for freight trains (see 49 CFR 213.9). No basis has been provided to support the imposition of reductions in speed for this line, which applicants plan to rehabilitate in any event. Nor has Mayo Clinic shown that it would be appropriate to require applicants to establish a protocol with Rochester emergency services that will provide pre-notification of the transportation of hazardous materials through Rochester.

In short, no need has been shown for conditions for Rochester related to the change in corporate control that will take place as a result of the proposed transaction. Moreover, the extensive mitigation for Rochester already imposed in DM&E PRB Construction will be applicable in the event the new line into the PRB is built. For all of these reasons, Mayo Clinic's requests for conditions will be denied.

Other Environmental Issues. In Decision No. 4, we preliminarily determined that an environmental and historic review of the transaction would not be warranted because it did not appear that the thresholds in the Board's environmental rules for triggering an environmental review would be met,<sup>38</sup> and there was nothing in the available environmental information to indicate the potential for significant environmental impacts resulting from the proposed change in corporate control. We also preliminarily found that historic review under the NHPA would not be warranted. We further directed applicants to file their proposed SIP with both the Board and the FRA.

With respect to the handling of DM&E's PRB coal traffic over the lines of IC&E and/or CPRC, we preliminarily concluded that there was no need to conduct any further environmental review of the rail lines considered in DM&E PRB Construction, and that the Board should defer the preparation of environmental documentation regarding routing DM&E PRB coal traffic over the rail lines of IC&E and/or CPRC (including the consideration of mitigation for Winona, MN) until more information becomes available. We proposed conditions that we would impose on any decision authorizing the proposed acquisition and requested comments on these preliminary determinations from all interested parties. DOT filed comments supporting our preliminary conclusions. Other commenters raised concerns about our preliminary determinations.<sup>39</sup> Applicants filed a response addressing the issues that commenters had raised.

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<sup>37</sup> See, e.g., 49 CFR 172.802 (outlining mandatory components of security plans used in the transport of hazardous materials).

<sup>38</sup> See 49 CFR 1105.6(c)(2)(i), 1105.7(e).

<sup>39</sup> See Decision No. 4 at 4-5.

In Decision No. 9, based on our review of all of the available information, we adopted the preliminary approach to environmental review set out in Decision No. 4. As explained in more detail in Decision No. 9 (at 5-6), none of the comments persuaded us that an environmental review of the proposed acquisition of corporate control of DM&E and IC&E by Soo Holdings (and indirectly, by CPRC) is warranted. In addition, we stated that there was no need to conduct any further environmental review of the rail lines considered in DM&E PRB Construction in this proceeding, given the thorough environmental review of DM&E's existing line that has already taken place; the fact that DM&E, like any other railroad, must comply with all DOT regulations covering transportation safety, security, and the handling of hazardous materials on its existing line; the fact that approval of the proposed acquisition would likely lead to improvements that would enhance the safety of train traffic on the existing DM&E system; and the ongoing SIP process, in which concerns regarding potential safety issues can be raised and addressed.<sup>40</sup> Finally, with respect to the handling of DM&E PRB coal trains over the lines of IC&E and/or CPRC, we concluded that environmental review can and should be deferred until more definitive information is available. We explained that this approach should not harm interested persons, communities, or the environment because, to preserve the environmental status quo, should we authorize the proposed acquisition, we would impose conditions precluding applicants from carrying this traffic over IC&E and/or CPRC lines until an EIS has been prepared and the Board has addressed the potential environmental impacts.<sup>41</sup>

Several parties and other entities raised environmental concerns with the approach set out in Decision No. 9. UTU/GO-386 opposes what it characterizes as a “bifurcation process” of review and states that a complete EIS would be appropriate now. However, we are not “bifurcating” our environmental process. Rather, we have determined that the acquisition itself does not have sufficient potential to affect the environment to require environmental documentation and that a determination of what cumulative effect the Board’s approval of DM&E PRB Construction might have on the Board’s approval of the proposed acquisition here is premature.

WisDOT requested a condition that would ensure that any EIS prepared as a result of CPRC’s decision to construct rail lines to serve the PRB would consider the primary, secondary, and cumulative impacts on lines and communities in Wisconsin.<sup>42</sup> As applicants have stated, however, any condition related to the construction of the DM&E PRB rail line is premature and the environmental conditions set out in Decision No. 4, which we are imposing here, satisfactorily address WisDOT’s concerns.<sup>43</sup> As we noted in Decision No. 9, when the EIS is

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<sup>40</sup> See Decision No. 9 at 6-8.

<sup>41</sup> Id. at 8-11.

<sup>42</sup> See Wisconsin DOT-2, p. 2.

<sup>43</sup> See CPR-14, DME-14 at 58-59.

conducted with regard to the movement of the DM&E PRB coal trains over the lines of IC&E and/or CPRC, WisDOT and all communities along the line will have the opportunity to suggest mitigating conditions to address the primary, secondary, and cumulative effects of these movements on their respective communities.

As mentioned in Decision No. 9, IDOT requests that Iowa communities be given the same opportunity for environmental review and mitigation as provided to the South Dakota and Minnesota communities in DM&E PRB Construction. We again state that any requests for PRB-related conditions in this particular transaction are premature, and that the opportunity to raise these concerns will be during the environmental review process that has been deferred until we are notified that the construction project will be undertaken by applicants. IDOT also requests that, when CPRC submits its projections for the movement of DM&E PRB coal in accord with Condition No. 4, below, the base traffic and the subsequent change in traffic resulting from the DM&E PRB construction project be as of 2008 traffic levels, and not as of a hypothetical construction date developed by petitioners. Because it is not clear that CPRC will build the rail line approved in DM&E PRB Construction, much less when that construction will take place, it would be inappropriate to base projections on 2008 traffic levels.

Effective Date. Under the Board's rules for a significant transaction, a final Board decision is due within 270 days after the primary application is accepted, which would be September 30, 2008.<sup>44</sup> This decision will be effective October 30, 2008.

Based on the record, we find:

1. The acquisition of control by Canadian Pacific Railway Company and Soo Line Holding Company of Dakota, Minnesota & Eastern Railroad Corporation and Iowa, Chicago & Eastern Railroad Corporation will not substantially lessen competition, create a monopoly, or restrain trade in freight surface transportation in any region of the United States. We further find that, to the extent that there are any anticompetitive effects, they are insubstantial and are outweighed by the public benefits.

2. This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. In STB Finance Docket No. 35081, the proposed acquisition of control by Canadian Pacific Railway Company and Soo Line Holding Company of Dakota, Minnesota & Eastern

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<sup>44</sup> See 49 CFR 1180.4(e).

Railroad Corporation and Iowa, Chicago & Eastern Railroad Corporation is approved subject to the conditions imposed herein.

2. Approval of the CPRC/DM&E/IC&E control application in STB Finance Docket No. 35081 is subject to the conditions for the protection of railroad employees set out in New York Dock Ry.–Control–Brooklyn Eastern Dist., 360 I.C.C. 60, 84-90 (1979).

3. Approval of the CPRC/DM&E/IC&E control application in STB Finance Docket No. 35081 is subject to the condition that applicants may not transport over lines currently operated by IC&E and/or CPRC unit trains of coal originating on the new rail line approved for construction in DM&E PRB Construction, until the Board has prepared an Environmental Impact Statement, and has issued a final decision addressing the environmental impacts of such coal operations and allowed such operations to begin.

4. Approval of the CPRC/DM&E/IC&E control application in STB Finance Docket No. 35081 is subject to the condition that, prior to commencing any construction of the new rail line approved in DM&E PRB Construction, applicants shall notify the Board of applicants' intent to begin construction, and shall submit to the Board reasonably foreseeable projections regarding the movement of DM&E PRB coal on the rail lines of IC&E and/or CPRC so that the environmental review can begin.

5. Approval of the CPRC/DM&E/IC&E control application in STB Finance Docket No. 35081 is subject to the condition that applicants shall comply with the SIP prepared under 49 CFR 1106, which may be updated as necessary, and continue to coordinate with FRA in implementing the SIP during the operations integration period. The ongoing safety integration process shall continue until FRA has informed the Board that the integration of applicants' operations has been safely completed.

6. Applicants must adhere to their representation that they will keep all gateways affected by the control transaction open on commercially reasonable terms.

7. Any conditions that were requested by any party in the STB Finance Docket No. 35081 proceeding that have not been specifically approved in this decision are denied.

8. Applicants are required to adhere to any and all of the representations they made on the record during the course of this proceeding, whether or not such representations are specifically referenced in this decision.

9. This decision shall be effective on October 30, 2008.

By the Board, Chairman Nottingham, Vice Chairman Mulvey, and Commissioner Buttrey.

Anne K. Quinlan  
Acting Secretary

**APPENDIX A: ABBREVIATIONS AND ACRONYMS**

AECC .....	Arkansas Electric Cooperative Corporation
Aftem .....	Aftem Family
ATDA .....	American Train Dispatchers Association
BC .....	Boise Cascade LLC
BLET .....	Brotherhood of Locomotive Engineers and Trainmen
BNSF .....	The Burlington Northern and Santa Fe Railway Company
Board .....	Surface Transportation Board
CARH .....	Cedar American Rail Holdings
CEQ .....	President’s Council on Environmental Quality
CFR .....	Code of Federal Regulations
CN .....	Canadian National Railway Company
CPRC .....	Soo Line Railroad Company d/b/a Canadian Pacific Railway
CSB .....	Committee for a Safer Brookings
CSPFP .....	Committee for a Safer Pierre and Fort Pierre
D&H .....	Delaware & Hudson Railway Company
DM&E .....	Dakota, Minnesota & Eastern Railroad Corporation
DOT .....	U.S. Department of Transportation
FHWA .....	Federal Highway Administration
FR .....	Federal Register
FRA .....	Federal Railroad Administration
IAM .....	International Association of Machinists and Aerospace Workers
IANR .....	Iowa Northern Railway Company
IBEW .....	International Brotherhood of Electrical Workers
ICC .....	Interstate Commerce Commission
IC&E .....	Iowa, Chicago & Eastern Railroad Corporation
IDOT .....	Iowa Department of Transportation
IMRL .....	I&M Rail Link, LLC
KCS .....	The Kansas City Southern Railway Company
Local 911 .....	United Transportation Union, Local 911
MCBS .....	Mitchell County Board of Supervisors
Metra .....	Commuter Rail Division of the Regional Transportation Authority of Northeast Illinois d/b/a Metra
MFA .....	MFA Incorporated
MinnDOT .....	Minnesota Department of Transportation
MP .....	milepost
MP&W .....	Muscatine Power and Water Company
NAFTA .....	North American Free Trade Agreement
NCFO .....	National Conference of Firemen & Oilers–SEIU
NDGDA/NDWC .....	North Dakota Grain Dealers Association/North Dakota Wheat Commission

NEPA .....	National Environmental Policy Act
NHPA .....	National Historic Preservation Act
NITL .....	The National Industrial Transportation League
NS .....	Norfolk Southern Railway Company
NUTT .....	J.W. Nutt Co.
OK .....	O.K. Industries, Inc.
Owatonna .....	City of Owatonna, MN
PHMSA .....	Pipeline and Hazardous Materials Safety Administration
PNW .....	Pacific Northwest
PRB .....	Powder River Basin
RTP .....	Rail Transportation Policy
SIP .....	Safety Integration Plan
SMNISA .....	Southern Minnesota and Northern Iowa Shippers Association
Soo Line .....	Soo Line Railroad Company
SC .....	Stepan Company
STB .....	Surface Transportation Board
TCW/MPL .....	Twin Cities & Western Railroad Company and Minnesota Prairie Line, Inc.
Tyson .....	Tyson Foods, Inc.
UP .....	Union Pacific Railroad Company
USDA .....	U.S. Department of Agriculture
UTU/GO-386 .....	United Transportation Union-General Committee of Adjustment
WCTL .....	Western Coal Traffic League
W&S .....	Wisconsin & Southern Railroad Company
WisDOT .....	Wisconsin Department of Transportation

**APPENDIX B: SUBMISSIONS RESPECTING COMMON CONTROL  
FREIGHT RAILROADS**

*CANADIAN NATIONAL RAILWAY COMPANY (CN)*. CN supports the proposed transaction and believes it is entitled to prompt consideration by the Board. CN offers no other comments.

*THE KANSAS CITY SOUTHERN RAILWAY COMPANY (KCS)*. KCS does not oppose the proposed transaction provided that it is properly conditioned to protect KCS-served grain shippers who depend on KCS for the transportation of grain from origins in Iowa and Minnesota to destinations in Texas, Oklahoma, Kansas, Missouri, Arkansas, Mississippi, Louisiana, and Alabama (South Central United States). KCS also seeks a condition to protect NAFTA traffic flows through the Chicago gateway by preserving KCS' haulage access from Kansas City to Chicago. KCS is a Class I railroad serving 10 states in the central and south central U.S. Grain shipments represent 12% of KCS's overall business.

KCS has two major agreements concerning the DM&E system. First, the "Grain Agreement" gives KCS ratemaking authority for the transportation of grain from IC&E origins in Iowa and Minnesota to destinations in the South-Central U.S. Second, the "Chicago Agreement" grants KCS pricing authority between Kansas City and Chicago for certain commodities. KCS reached these agreements in 1997 with I&M Rail Link, LLC (IMRL). When DM&E acquired control of IMRL in 2002, DM&E agreed to honor the existing agreements with KCS.

KCS seeks to have the applicants adhere to a series of commitments identified in all of the formal rail consolidations since the Board's Major Railroad Consolidation decision. These commitments include: (1) an open gateways pledge; (2) a bottleneck waiver pledge; (3) a commitment to remain bound by transportation service contracts in specific instances where shippers have expressed concerns; and (4) operational monitoring and oversight by the Board. KCS argues that other merger applicants have agreed to these commitments even though the Board's rules do not explicitly require such actions.

KCS also seeks two conditions on the proposed transaction. First, the Board should condition approval upon: (1) CPRC agreeing to make permanent the terms of the Grain Agreement; and (2) CPRC's commitment to negotiate rigorous service protections provisions for the Grain Agreement to ensure against possible deterioration of service for traffic handled under that agreement. Second, the Board should make permanent the Chicago Agreement as a constraint against UP and CPRC domination of the Chicago-Laredo corridor. KCS argues that it is necessary to guarantee permanent access to the Chicago gateway in order to ensure competition in the movement of NAFTA-oriented traffic. KCS also requests good faith negotiations for service commitments and penalties to ensure CPRC does not undermine the effectiveness of the Chicago Agreement. KCS argues that the proposed transaction would

reduce competition for both corn traffic that currently moves from IC&E origins to poultry feeder mills located on its lines, and for NAFTA traffic moving between the Chicago and Laredo gateways.

KCS argues that the transaction will result in vertical foreclosure. Although none of the applicants operate south of Kansas City, KCS suggest that CPRC and UP be tied together in analyzing anticompetitive effects because of the existence of a multi-faceted strategic relationship. KCS asserts that CPRC and UP are parties to numerous alliances regarding traffic solicitation, pricing, and operations. KCS characterizes CPRC and UP as having a commercial bond just short of merger.

Applicants responded to KCS's comments by arguing that KCS's proposed conditions are merely an attempt to use this proceeding to improve its commercial position under existing, privately negotiated agreements. Applicants dispute KCS's claims of potential adverse effects on horizontal and vertical competition. Applicants also dispute KCS's claims that applicants have a plan whereby corn traffic from northern Iowa and southern Minnesota will be diverted from KCS lines and KCS-served feed mills to UP lines and UP-served feed mills. In particular, applicants argue that domestic feed mills in the South-Central U.S. are not dependent on IC&E corn, and that, even if they were, ICE-originated corn would not be diverted to PNW export destinations. Applicants assert that corn is a ubiquitous commodity handled by all the major railroads. The transaction will not disproportionately impact KCS's ability to haul amounts of corn consistent with its past levels. Further, applicants assert that the ability to serve domestic grain markets south of Kansas City is a benefit of the proposed transaction, rather than a negative.

With respect to the Chicago Agreement, applicants responded by arguing that the current KCS-IC&E routing is ineffective, and that shippers will still have numerous alternative routings post-transaction. Applicants believe that the open gateways commitment is sufficient to resolve any competitive concerns. Applicants, on rebuttal, reiterated the fact that the Chicago Agreement has never been used, despite KCS's assertions regarding its importance to NAFTA traffic flows.

Applicants responded to the allegation of a commercial alliance between CPRC and UP by stating that CPRC has partnerships with all of the major Class I railroads. Applicants state that CPRC and UP do work together regarding efficient interline service. However, applicants contend that this relationship is not exclusive. Applicants compare the CPRC/UP relationship to the CN/IC/KCS Alliance and argue that latter relationship is far more extensive than the former. Applicants conclude by stating that its open gateway commitment is sufficient to assuage any anti-competitive concerns.

In rebuttal, KCS argues that feed mills in the South-Central United States do indeed rely on IC&E-originated corn. KCS further argues that CPRC will seek to divert this traffic post-transaction to PNW destinations. Also, KCS contends that CPRC, through its alliance with UP,

will degrade or otherwise seek to eliminate the KCS routing in the Laredo-Kansas City-Chicago corridor and will either interchange Kansas City-Chicago traffic with UP at Kansas City or favor existing UP-CPRC routings through Minneapolis and Chicago for NAFTA traffic. KCS relies on the testimony of expert witness Woodward to show that scope of the CPRC/UP partnership. Woodward argues that CPRC's interline traffic with UP grew at a substantial rate 2001-2006.

In response, applicants argue that the evidence clearly demonstrates that CPRC works with all major Class I railroads concerning interline service, and that its relationship with UP could never be mistaken for that of a de facto merger. Applicants refute KCS's expert Woodward by stating that CPRC's interline traffic grew substantially with other carriers during the 2001-2006 time period, namely BNSF and NS. Applicants state that, in fact, CPRC interchanged twice as many cars with BNSF, UP's rival.

Applicants further responded that KCS will not be denied access to IC&E-origin corn as a result of the transaction. Applicants note that KCS has itself acknowledged that the Grain Agreement guarantees KCS's pricing authority for shipments of corn from IC&E origins to KCS-served poultry mills for at least another 10 years. Further, the Grain Agreement contains service standards and penalties for IC&E's failure to comply. Applicants also state that KCS's argument that CPRC will divert IC&E-origin corn to alternate destinations is flawed because shippers, and not rail carriers, determine the destinations where corn is shipped. Any selection of alternate destinations would merely be a function of the market demand for grain, according to applicants.

*TWIN CITIES & WESTERN RAILROAD COMPANY AND MINNESOTA PRAIRIE LINE, INC (TCW/MPL).* TCW/MPL are affiliated short line railroads located in Minnesota. Their rail lines operate parallel to and north of the DM&E line from Rapid City, SD, east to Owatonna, MN. TCW/MPL originally opposed the proposed transaction and submitted a request for conditions that would require: (1) CPRC enter into a haulage agreement with TCW/MPL, at competitive rates, that would enable those carriers to price grain and ethanol from the Twin Cities to destinations served and interchanges reached by CPRC in and near Chicago, in Minnesota, and in Canada; and (2) CPRC waive restrictions under CPRC's trackage rights agreement with CN so as to permit CN to handle grain and ethanol originated by TCW/MPL to all destinations and third party carrier connections to which CN has access in Chicago and Canada. TCW/MPL have since discussed their concerns with CPRC, and filed a request to withdraw their comments and request for conditions. TCW/MPL now supports the proposed transaction.

*WISCONSIN & SOUTHERN RAILROAD CO. (W&S).* W&S is a Class II railroad operating in Illinois and Wisconsin. W&S originally opposed the proposed transaction, unless certain conditions were imposed by the Board. W&S sought conditions that would force IC&E to sell a line to W&S, and that would grant W&S trackage rights over another IC&E line. However, on April 16, 2008, W&S filed a motion to withdraw its comments and request for conditions.

## PASSENGER RAILROADS

*CHICAGO METRA.* The Northeast Illinois Regional Commuter Railroad Corporation and The Commuter Rail Division of the Regional Transportation Authority (Metra) requested the imposition of several conditions concerning service along Metra's Milwaukee District North Line (North Line) and Milwaukee District West Line (West Line) that might be affected by the CPRC/DM&E/IC&E transaction.

CPRC has the right to dispatch the West Line and North Line by virtue of a 1985 trackage rights agreement with the Trustee of the Milwaukee Road. There is a requirement that priority be given to Metra's operations. Metra acquired the West Line and North Line from the Trustee in 1989. Metra is also an explicit third party beneficiary in a 2003 trackage rights agreement between CPRC's Soo Line subsidiary and DM&E/IC&E for the West Line. Under this agreement, CPRC, as dispatcher of the West Line, must act as a neutral gatekeeper to protect Metra's service by limiting the number of IC&E trains on the West Line.

Metra states that the on-time performance average of the two CPRC-dispatched Metra routes have been worse than Metra's system-wide average, and worse than each of the 4 lines Metra dispatches. Further, Metra argues that CPRC's acquisition of DM&E/IC&E will negatively impact the 2003 trackage rights agreement, because: (1) CPRC will no longer be a neutral party; (2) DM&E/IC&E traffic can be routed over Metra's North Line; and (3) construction of a line into the PRB is more likely.

Metra requests the following conditions:

(1) CPRC transfer to Metra the right to control and dispatch trains over the West Line and North Line;

(2) CPRC delay use of West Line or North Line for PRB coal trains until Metra has completed construction of necessary capacity improvements in accordance with the current trackage rights agreements which protect Metra's service capabilities;

(3) CPRC bears full expense for the capacity improvements, to the extent they are required solely for the movement of PRB coal trains or other CPRC/DM&E/IC&E trains;

(4) CPRC pays Metra:

(a) Excess Train Charge or Coal Train Charge, as specified in the 2003 IC&E Chicago Trackage Rights Agreement, adjusted annually in connection with any DM&E/IC&E traffic transported via the North Line

(b) A charge for increased traffic in connection with any DM&E/IC&E traffic transported via the North Line calculated on the same basis as specified in the 2003 trackage rights agreement

(c) an annual rental charge for introduction of the DM&E/IC&E traffic to the North Line pursuant the same provisions under which rent is paid in the 1985 trackage rights agreement;

(5) When implementing the preceding condition, any trains originated or terminated along the DM&E/IC&E lines that operate over the West Line or North Line, regardless of the ownership of the locomotives powering such trains, shall be counted as IC&E trains for purposes of the IC&E Chicago Trackage Rights Agreement, the Metra/CPRC Trackage Agreement, and any other agreement governing the North Line;

(6) CPRC and its affiliates shall acknowledge that its rights to admit third party carriers to the line have been satisfied and that it may not admit any third party carrier in the future to the West Line or North Line; and

(7) CPRC shall negotiate with Metra such agreements as appropriate to implement the preceding conditions, with a right of either party to petition the Board to impose further conditions reasonably necessary to achieve the objectives of these conditions.

CPRC states that it has a longstanding, cooperative, and productive relationship with Metra, governed by a complex series of agreements privately negotiated and amended by the parties over two decades. CPRC states that it is currently engaged in discussions with Metra regarding potential amendments to the existing agreements to accommodate changes in traffic patterns that may result from the proposed transaction and remains committed to working cooperatively with Metra. In response to Metra's assertion that the proposed transaction would threaten its ability to provide "essential services," CPRC notes that the "essential services" standard applies only to major transactions; further, CPRC argues that Metra has not shown how its "essential services" would be threatened by the proposed transaction.

CPRC disputes Metra's general complaints about the on-time performance of Metra trains operating over CPRC-dispatched lines, asserting that on-time service the joint lines is not materially different from Metra-dispatched lines; that on-time performance differences are not attributable to CPRC's dispatching of CPRC's trains; and that Metra's allegations relate to preexisting conditions that have not been caused and will not be exacerbated by the proposed transaction. In regards to Metra's concerns about the 2003 trackage rights agreement, CPRC states that existing dispatching agreements have protected and will continue to protect Metra's service post-transaction and that such agreements contain provisions allocating financial responsibility for any capital improvements.

Accordingly, CPRC asserts that the conditions Metra seeks are neither justified nor reasonable. Even if Metra could demonstrate that the transaction would result in degradation in consumer services, CPRC argues that the conditions sought by Metra do not address a competitive harm, nor relate to the harm alleged by Metra. Further, CPRC states that Metra has no basis to believe that CPRC will ignore its contractual obligations and adherence to existing terms of agreements and that Metra is essentially requesting that the Board rewrite existing terms of agreement or to impose on CPRC Metra's interpretation of prior agreements that govern the operations of the joint lines.

In its rebuttal, Metra reiterates its concern surrounding CPRC's ability to shift DM&E/IC&E traffic from Metra's West Line to its North Line, thereby depriving Metra of revenue and remedies designed to mitigate the potential impacts that this traffic would have on Metra's commuter rail service over the West Line, as negotiated in the 2003 trackage rights agreements, admitting IC&E to the West Line. Metra states that the 2003 agreements did not contemplate that the new DM&E/IC&E traffic would be shifted to the North Line or that CPRC would be allied with DM&E/IC&E. Metra argues that its essential services will be harmed if the 2003 remedies for the West Line are not extended to the North Line with an effective monitoring mechanism or if CPRC is permitted to admit another third party carrier to the joint lines. The agreements provide for additional fees to be paid to Metra when traffic levels exceeded particular thresholds or when PRB coal trains begin operations over the West Line, and created a process by which Metra could refuse to admit this additional traffic until such time as necessary capital improvements were made to accommodate that traffic. Metra contends that, contrary to CPRC's assertions, existing agreements between Metra and CPRC do not provide the adequate protection and that the Board should require that they be amended to do so through Condition Nos. 2 and 7. Further, in support of Condition No. 6, Metra argues that CPRC's claim that DM&E and IC&E, by virtue of the control transaction, are no longer "third parties" but rather part of the CPRC system under the agreements is a major change to status quo, requiring a condition to foreclose the prospect of subjecting Metra to ever increasing traffic sources. Metra seeks to confirm the legal effect of the proposed acquisition: that the acquiring carrier takes its new subsidiary subject to the terms and conditions of its existing contracts, and that by acquiring DM&E, CPRC would not be entitled to admit another carrier with the additional traffic to the joint lines.

Metra also insists that, contrary to CPRC's argument, the Board has broad authority to impose conditions to protect essential services, regardless of the type of railroad consolidation. This would include the authority to assess the adequacy of contractual provisions if essential services would be threatened by a proposed transaction and to require modifications as conditions to the approval of the transaction. Metra also challenges CPRC's factual assertions about the current operations on the joint line, including statements regarding the amount of CPRC traffic on the West Line, CPRC's analysis of on-time performance data, and the effect of CPRC dispatching the North Line and West Line, versus Metra.

## SHIPPERS & SHIPPER ORGANIZATIONS

*AG PROCESSING INC (AGP)*. AGP is a regional cooperative owned by over 190 local and regional cooperatives. AGP supports the application. AGP anticipates that Board approval will allow for CPRC to provide single-line movements from Iowa to the Northeastern U.S., as well as several Canadian destinations. In particular, AGP anticipates that this transaction will allow AGP to compete with soybean processing plants served by CN in Iowa.

AGP states that CPRC has provided assurances that the Kansas City and Chicago gateways will remain open on commercially reasonable terms. AGP argues that this access is vital for its members to retain their existing markets and utilize the new single line opportunities. AGP also supports applicants' pledge to invest \$300 million to upgrade and rehabilitate the DM&E/IC&E lines. It is because of these assurances that AGP supports the proposed transaction.

*J.W. NUTT CO. (NUTT)*. Nutt, through the verified statement of its president, David W. Nutt, supports CPRC's acquisition of DM&E/IC&E. Nutt is the nation's leading cash grain and soybean meal brokerage firm. Nutt's customers include Tyson Foods, Inc., Pilgrim's Pride, O.K. Industries, Inc., and George's Farms among other poultry companies. Nutt supports KCS' request to make the KCS-IC&E Grain Agreement permanent.

*MFA INCORPORATED (MFA)*. MFA is a regional agricultural cooperative with 45,000 farmer owners operating in Missouri, Kansas, Arkansas, and Iowa. MFA is currently served only by IC&E at Laredo, MO. MFA regards IC&E as a neutral switching railroad that provides members of the cooperative with access to numerous destinations via interchanges with other Class I railroads. MFA is concerned that CPRC's acquisition of IC&E will result in favoritism for grain buyers located on CPRC lines and an adjustment of rates that will limit the number of available markets. In particular, MFA is concerned with the transactions impact on the KCS-IC&E agreement that allows MFA's product to reach poultry feed mills in Arkansas, Oklahoma, and Mississippi. MFA supports any request by KCS to ensure that its existing agreements with IC&E remain viable for the long term.

Applicants' reply states that MFA's arguments do not alter the conclusion that the Grain Agreement should not be made permanent. Applicants state that MFA's grain elevator is served only by IC&E at Laredo, MO, approximately 70 miles north of Kansas City. Most of MFA's grain moves south to poultry feed mills in Arkansas, Oklahoma, and Mississippi via IC&E and KCS through the Kansas City gateway. Applicants state that MFA's concern that IC&E will lose its neutrality post-transaction, allowing CPRC to favor grain buyers located on its lines is not justification for granting any of the conditions requested by KCS. In particular, MFA's small amount of traffic will continue to move via the Kansas City gateway given Laredo's close proximity to Kansas City. Applicants argue that it would be inefficient to ship grain produced along the Corn Lines to be diverted to PNW destinations. Applicants state that, regardless,

MFA's grain is still covered by the Grain Agreement for nearly 10 more years. Applicants also reiterate their pledge to keep open the Kansas City gateway on commercially reasonable terms.

*NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE (NITL)*. NITL represents freight shippers in their dealings with regulatory bodies. NITL expresses support for the proposed transaction because it will restore CPRC's direct access to the Kansas City gateway and because it will provide the financial and organizational resources necessary to complete the proposed extension of DM&E into the PRB.

*NORTH DAKOTA GRAIN DEALERS ASSOCIATION (NDGDA) AND NORTH DAKOTA WHEAT COMMISSION (NDWC)*. NDGDA is an association of 150 companies that operate over 300 grain elevators in North Dakota. NDWC is a quasi-public agency created by the North Dakota legislature to promote the state's wheat crop. NDGDA and NDWC are concerned with the level of service from CPRC in relation to their grain shipments. In particular, NDGDA states it members have had problems with car supply and car conditions. NDGDA is concerned that applicants' statement of \$300 million of capital for system upgrades focuses solely on DM&E, and makes no mention of CPRC's existing system.

NDGDA requests two conditions prior to approval of the application. First, CPRC must agree to make no fewer cars available for grain loading at North Dakota elevators than it maintained on average over the past three years to service those elevators. Second, CPRC must commit to utilize some substantial part of the \$300 million it says will be spent on post-acquisition infrastructure, including rail yards and locomotives, and to make the grain car fleet it uses to serve North Dakota elevators serviceable and adequate.

Applicants replied that the portrayal of CPRC's recent service to the North Dakota grain industry is misleading. Applicants state that significant sums have been invested to upgrade CPRC's western Canadian lines, doubling CPRC's train throughput capacity. Applicants state that CPRC has also made significant joint investments with customers to enable more elevators to load 100-car shuttle trains. Applicants state that NDGDA/NDWC has made no showing that the transaction will have any adverse competitive effect on North Dakota grain shippers. Applicants argue that the transaction would enhance the routing options of North Dakota shippers by enabling CPRC to offer single-system rail service for North Dakota grain shipments to the Kansas City gateway. Applicants state that the requested conditions are unwarranted. Applicants argue that the car availability requirement and a requirement for using a substantial portion of the \$300 million set aside for DM&E infrastructure ignores the need to be flexible in a competitive market. Applicants state the \$300 million is earmarked for safety upgrades on DM&E lines, and that any attempt to divert those funds could undermine CPRC's ability to bring DM&E up to CPRC's safety standards.

NDGA/NDWC responded to several statements made in applicants reply, primarily with regard to the condition of CPRC's grain hopper cars. In general, the ND shippers recognize that CPRC's capacity has improved, but explain that the condition of its grain cars has deteriorated.

The ND shippers clarify CPRC's statement that only 1% of their grain cars are rejected due to damaged bottom gate issues, by noting that shippers often repair the damaged cars because rejecting the cars would require waiting for replacement cars, in which case their shipments could be delayed. The ND shippers also note that CPRC still uses cars with round-top hatches that do not fit with current loading services and have less capacity, which, if the rate is on a per-car basis, increases the cost per bushel of grain. The ND shippers, therefore, reaffirm their request that a condition be placed on the transaction that CPRC be required to make investments for the benefit of its grain shippers, especially considering the merger will spread its fleet over DM&E as well.

*O.K. INDUSTRIES, INC. (OK).* OK is one of the world's largest vertically-integrated poultry companies. OK has two feed mills in Arkansas and Oklahoma served by KCS. OK states that a portion of the corn it receives from KCS comes from IC&E origins in Minnesota and Iowa pursuant to the Grain Agreement. OK, through the verified statement of its president, Russell Bragg, supports the proposed transaction. However, OK is concerned that the transaction may lead to a reduction in transportation options that will increase the price it pays for corn. Therefore, OK states that it supports any request by KCS to keep the Grain Agreement viable for the long term.

*SOUTHERN MINNESOTA AND NORTHERN IOWA SHIPPERS ASSOCIATION (SMNISA).* SMNISA represents approximately 26 shippers in Iowa in southern Minnesota, including shippers who operate virtually all of the 46 grain elevators located on IC&E. SMNISA supports the proposed transaction, and states that it will improve the quality of rail service in northern Iowa and southern Minnesota, provide access to new markets via CPRC's rail network, and spur needed investment in local rail infrastructure. SMNISA also states that it views the transaction as pro-competitive.

SMNISA requests 2 conditions, and states that CPRC and DM&E/IC&E have indicated that they will agree to a conditioning of the Board's approval that would require applicants to: (1) keep the Kansas City and Chicago gateways open on commercially reasonable terms; and (2) bring the Corn Lines up to a 25 mph service standard by the end of 2013 (provided that future traffic volume on those lines economically supports such an investment). Applicants did not address SMNISA in their reply or rebuttal.

*STEPAN COMPANY (SC).* SC ships cleaning, scouring, and washing compounds, and is a regular user of railroad transportation to ship this product. In particular, SC states that it uses KCS/IC&E to ship its products from Millsdale, IL, to Harrisonville, MO. SC states that it is concerned about the possible loss of cooperative KCS-IC&E service to Joplin, MO, via Kansas City. SC urges the Board to take action to ensure that this important competitive rail service option remains viable and available to shippers. SC further urges the Board to preserve KCS's ability to compete against UP/CPRC routings to and from Chicago. SC requests that the Board condition its approval of the proposed transaction upon the relief KCS seeks in its comments regarding the Chicago Agreement.

*TYSON FOODS, INC. (TYSON)*. John Grass, Vice President – Input Exposure, Management Desk, for Tyson submitted a verified statement in support of the verified transaction. Tyson has multiple poultry feed mills in Arkansas, Oklahoma, and Mississippi. Tyson stated that it receives the bulk of its corn through KCS from IC&E origins pursuant to the Grain Agreement. Mr. Grass supplemented his verified statement to include that it is important for Tyson to maintain its access to corn in Minnesota and Iowa in both the short and long term future. Therefore, Tyson states that it supports any request made by KCS to ensure that the Grain Agreement remains viable for the long term.

### **COAL SHIPPERS**

*ARKANSAS ELECTRIC COOPERATIVE CORPORATION (AECC)*. AECC is a membership based generation and transmission cooperative that provides wholesale electric power to electric cooperatives. AECC has a significant interest in several power generation plants that rely on significant amounts of coal from the PRB.

AECC neither supports nor opposes the proposed transaction. AECC is concerned, however, about the potential effects of the transaction on competition for the transportation of PRB coal. AECC argues that the transaction may actually have a chilling effect on the prospects for completing construction of a new line into the PRB. AECC cites two aspects of the transaction that make the construction less likely: (1) the imposition of up to \$1 billion or more in option payments if the DM&E project is completed; and (2) CPRC's interdependence with the incumbent PRB rail carriers, BNSF and UP. CPRC would be required to spend \$350 million if it commences construction. An additional \$707 million would become due contingent upon the project volume levels achieved. AECC argues that DM&E's relative independence from UP and BNSF insulate it from possible retaliation to the new PRB route. AECC argues, however, that the same cannot be said for CPRC, which risks a loss of cooperation with UP and BNSF on traffic flows for goods other than coal. In addition, AECC argues that CPRC's acquisition of DM&E's land rights along the proposed route might interfere with other projects to build new routes into the PRB, particularly possible routes to Kansas City, St. Louis, and points east. Therefore, AECC believes that CPRC's acquisition of DM&E may not solve the viability problems for the construction project into the PRB.

AECC asks the Board to investigate whether the transaction may actually lessen the prospects for completing a new PRB route. AECC also proposes four conditions. First, disallow contingency payments associated with CPRC's proceeding with the DM&E PRB project, with the parties required to submit a report to the Board within 6 months on whether they have renegotiated their agreement to eliminate contingent payments. Second, require CPRC to report to the Board by September 1, 2009, of its intentions to build into the PRB. Third, if CPRC elects not to build into the PRB, or if it elects to build but fails to begin construction within 5 years of the Board's decision approving this transaction, then the real estate interests acquired by CPRC or DM&E for the project should be made available for purchase by any party (other than BNSF,

UP, or any affiliate of either) that obtains Board authority to construct a rail line into the PRB, with the Board establishing a fair market price should the parties fail to agree. Finally, require CPRC to preserve for rail use any real estate, easements, or other forms of land access acquired by CPRC or DM&E for the PRB project.

Applicants reply by stating that AECC has not met its burden of showing that the transaction will have “likely” or “substantial” anticompetitive effects with respect to the transportation of PRB coal. Applicants state that AECC did not show how the transaction would impair any future PRB buildout. Applicants state that completion of a DM&E line into the PRB would not lead to a reduction in competition. Further, applicants state that CPRC’s financial support will enhance DM&E’s ability to complete the PRB project, not hinder it. Applicants contend that AECC is relitigating the Board’s prior approval of the PRB project. Applicants contend that AECC made similar arguments regarding the financial viability of the PRB project, which were rejected, during DM&E’s acquisition of IC&E.

Applicants further state that any suggestion that CPRC would forego the PRB project because of its alleged interdependence with BNSF and UP is unsupported speculation. Applicants state that the suggested conditions are contrary to Board precedent or are beyond the Board’s authority to impose. Applicants state that the September 1, 2009 deadline is an impermissible attack on the terms of the Board’s approval of the project. Applicants state the Board’s approval was permissive and did not contain a time limit for completing the project.

AECC responded in support of its request for conditions. AECC argues that: (1) building an extension into the PRB is important to the public interest; and (2) the acquisition of DM&E by CPRC will not enhance the prospects that the PRB project will be built.

AECC argues that Board precedent supports the tenet that undue impedance of a pro-competitive new construction project can be presumed to be contrary to the public interest. Additionally, AECC asserts that the potential of increasing rail competition, by the completion of the PRB project, is taken into consideration when the Board considers the public’s interest.

AECC makes several arguments in support of its contention that the proposed transaction will not enhance the prospect that the PRB project will be built. First, AECC challenges CPRC’s claim that its greater financial capability, expertise, and experience will enhance DM&E’s ongoing efforts on the PRB project. AECC refutes CPRC’s claim by citing a lack of evidence provided to support its claim. Second, AECC asserts that CPRC’s interdependence with UP and BNSF would discourage CPRC from building an extension into the PRB in order to compete with UP and BNSF for PRB coal. Third, AECC maintains that the contingent payments required under the agreement plan of the CPRC/DM&E merger would act as a “poison pill” to prevent the construction of the PRB project. Lastly, AECC states that the conditions it proposes are reasonable and well within the Board’s powers.

AECC requests that if the Board approves the proposed transaction, it do so with conditions that eliminate the contingent payment provisions; require CPRC/DM&E to make a decision within a time period whether or not to proceed with the PRB project; and if the PRB project is not built, then CPRC/DM&E should not be allowed to use the land they acquired to block someone else from building a new rail line into the PRB.

In rebuttal, applicants assert that AECC's reply is an effort to relitigate issues related to the PRB project in connection with DM&E's acquisition of IC&E. Applicants do not refute the argument that the PRB project is important to the public interest. Applicants provide fiscal figures to support their argument that CPRC has a greater financial capability to undertake the PRB project; further, they argue that the standard in reviewing this transaction is not whether competition would be enhanced, but rather would the transaction result in a substantial lessening of competition. Lastly, applicants refute the claim that CPRC lacks the expertise or experience to enhance DM&E's PRB project efforts; they explain that CPRC has recent experience in western Canada building new rail lines.

*MUSCATINE POWER AND WATER (MP&W)*. MP&W is a municipal utility located in Muscatine, IA. MP&W owns and operates four coal-fired electric generating facilities, and it burns approximately 1.1 million tons of coal annually which is delivered from the PRB. MP&W does not oppose the proposed transaction, but requests that the Board condition its approval upon preservation of the four existing points where DM&E/IC&E interchange traffic with UP and BNSF. This condition is similar to a 2002 agreement between MP&W and DM&E when DM&E acquired IC&E. DM&E/IC&E agreed not to take any action to close the IC&E interchanges with BNSF and UP, and to offer, upon request, segment contract rates or proportional common carrier rates via those BNSF/UP interchanges to Muscatine Station (to ameliorate MP&W's loss of the "contract exception" articulated in the Board's Bottleneck decisions).<sup>45</sup> MP&W states that its contractual access to PRB coal from BNSF through DM&E/IC&E's Ottumwa interchange expires in 2012.

MP&W is concerned that CPRC may severely limit MP&W's competitive access to any or all of the four interchange points after 2012. If CPRC were to complete the proposed

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<sup>45</sup> In general, a shipper is entitled to challenge the reasonableness of rates only on a through basis. However, where a bottleneck carrier cannot serve both the origin and the destination and where a shipper secures a separately negotiated contract for the non-bottleneck segment of the route, the shipper may separately challenge a common carriage bottleneck rate. Muscatine fears that CPRC's acquisition of DM&E/IC&E, and CPRC's potential to complete the build-in to the PRB, will eliminate its regulatory protection because applicants will serve both the PRB origin and the Muscatine destination. MP&W believes that its 2002 agreement with DM&E/IC&E alleviated this issue, but is not sure whether the agreement is binding on CPRC post-merger.

extension of DM&E/IC&E into the PRB, MP&W would have three competitive rail options at PRB origins if the four interchanges remain open. MP&W fears that CPRC might close any or all of those interchange points with UP and BNSF.

MP&W requests the following conditions: (1) require applicants to maintain the existing DM&E/IC&E interchange points for MP&W's unit coal train traffic at Kansas City, MO, with UP and BNSF, at Ottumwa, IA, with BNSF, at Clinton, IA, with UP, and at Owatonna, MN, with UP; (2) require CPRC to seek MP&W's consent or the Board's approval in order to close any of the above-mentioned interchange points. Any petition to the Board should demonstrate that such a closure will not cause competitive harm to MP&W and that it is justified by economic and operating efficiencies, provided that applicants always maintain at least one of the above interchanges each with UP and BNSF; (3) upon the request of MP&W, applicants shall offer segment contract rates and/or quote proportional common carrier rates applicable to MP&W's until coal train movements, via all published interchanges capable of handling MP&W unit train coal traffic, including but not limited to the above-mentioned interchanges so long as they remain open; and (4) require applicants to waive all defenses to the "contract exception" based upon its service to both a PRB coal origin and the Muscatine Station.

In its reply, applicants state that MP&W has not shown that the proposed transaction will have any anticompetitive effects on service to Muscatine Station from the PRB, much less that the transaction "likely" will have "substantial" anticompetitive effects. Applicants state that DM&E/IC&E will continue to be bound by its contractual agreements with MP&W. Accordingly, applicants state that CPRC will be similarly bound if the transaction is approved. Therefore, applicants argue that because the transaction would in no way change MP&W's competitive circumstances, there is no justification for imposing the proposed conditions.

MP&W asserts that CPRC has not provided assurances that the intent of the MP&W/DM&E/IC&E settlement agreement will be honored. Therefore, MP&W is concerned that in 2012, when the existing transportation contract with DM&E/IC&E expires, CPRC will not renew the contract exception. Also, MP&W maintains that a breach of contract action against CPRC in 2012 is an option, but it does not eliminate the competitive harm. MP&W requests that the Board impose conditions that will preserve the contract exception. In the alternative, if the Board does not impose that condition, then MP&W requests that the Board state that it is not acting with prejudice to MP&W's contract rights under the settlement with DM&E/IC&E.

In rebuttal, applicants assert that there is no nexus between the proposed transaction and the issues raised by MP&W. Applicants state that MP&W's competition issues originated with DM&E's acquisition of IC&E in 2002. Applicants argue that the transaction will not change MP&W's competitive circumstances, nor will it alter the terms of the agreements Muscatine bargained for with DM&E/IC&E in 2002. Applicants contend that MP&W's assertion that CPRC might interpret the agreements differently from DM&E/IC&E provides no basis for imposing the requested conditions. Applicants also cite to DOT's conclusion that there is basis

for the Board to act on MP&W's request. Accordingly, applicants maintain that there is no justification for the conditions MP&W seeks.

### **OTHER SHIPPERS & COMMERCIAL INTERESTS**

*BOISE CASCADE LLC (BC)*. BC ships engineered wood products, particleboard, lumber, and plywood. BC is a regular use of rail transportation for the movement of these products. BC is concerned about the potential loss of cooperative KCS-IC&E service to Chicago via Kansas City, and BC urges the Board to ensure that competitive access to Chicago remains in place. BC views the KCS-IC&E service as an important alternative to the UP service. BC urges the Board to preserve KCS's ability to compete against UP and CPRC routings to and from Chicago. BC supports KCS's request for a condition that makes the Chicago Agreement permanent.

Applicants' reply cites the same arguments made against KCS's request that the Chicago Agreement be made permanent. Namely, applicants reiterate that no traffic has ever been moved pursuant to this agreement. Applicants state that BC ships a limited amount of traffic over KCS/IC&E via the Kansas City gateway. Applicants state that they have pledged to keep open all gateways affected by the proposed transaction. Applicants also state that BC, like other shippers, has numerous routing options between Kansas City and Chicago that do not involve applicants.

### **REGIONAL/LOCAL INTERESTS**

*CITY OF DUBUQUE, IA (CITY OF DUBUQUE)*. City of Dubuque asks that the Board afford the state of Iowa equal protections as those given to Wyoming, South Dakota, and Minnesota in the course of this proceeding. City of Dubuque is concerned about the health, safety, and welfare effects of a potential PRB project. City of Dubuque states that SEA's EIS in the PRB construction proceeding granted environmental review to communities in Wyoming, South Dakota, and Minnesota prior to any construction of a PRB line. City of Dubuque states that this decision was based upon the fact that SEA determined that environmental review was appropriate for communities along former IMRL lines. City of Dubuque states that former IMRL lines also run through Dubuque, and that the applicants would obtain exclusive control of these lines. City of Dubuque anticipates construction of a large mixed use development in the vicinity of the former IMRL lines. City of Dubuque requests that any environmental review related to the construction of a PRB line include impacts upon Dubuque. City of Dubuque alternatively requests, if the Board accepts the applicants' assertion that rail traffic per day will increase minimally as a result of the transaction, that a condition be imposed restricting an increase in rail traffic to the five to eight trains as estimated in 2006. Furthermore, should the applicants wish to increase rail traffic above this level, City of Dubuque asks that the Board reserve the right to seek additional environmental review at that time.

In its reply, City of Dubuque states that after meeting with CPRC officials to discuss safety, maintenance, and future operating plans in the Dubuque area, they are still unsatisfied and continue to express concerns about the transaction. City of Dubuque requests that the Board investigate the safety record of each applicant railroad and impose appropriate conditions.

*CITY OF OWATONNA, MN (OWATONNA)*. Owatonna neither opposes nor supports the transaction, but submits comments so the Board will have a better understanding of its concerns as a community located along DM&E and IC&E lines. In particular, Owatonna is concerned about the impact on “quality of life” that would result from any potential increase in the number of trains on the DM&E and IC&E systems carrying either coal from the PRB or hazardous ethanol. In response to a question about how much of the \$300 million allocated for rehabilitating DM&E’s system would be spent in and around Owatonna, CPRC stated that it had not yet determined the locations where the funds would be deployed. Owatonna requests that the Board seek greater detail regarding applicants’ plans to restore the DM&E/IC&E system.

*COMMITTEE FOR A SAFER BROOKINGS (CSB)*. CSB is an organization comprised of local citizens in Brookings, SD. CSB is concerned about the proposed transaction. In particular, CSB worries about the effects of a new PRB line on Brookings. CSB has studied rail safety issues and the impact of potential coal traffic since DM&E first announced the PRB project in 1997. CSB states that the DM&E right-of-way through Brookings is no wider than 50 feet in most areas, and that many homes are located no further than 100 feet from the center of the right-of-way. CSB asks that the Board take into the accounts the needs of Brookings and other trackside communities in reviewing the proposed transaction.

*COMMITTEE FOR A SAFER PIERRE AND FORT PIERRE (CSPFP)*. CSPFP is an organization of local residents of two South Dakota communities who are concerned about improving the safety of freight rail operations. CSPFP was formed in March 2007 after the residents had documented 16 rail-related accidents in their communities since 2003. CSPFP states that the DM&E line is in close proximity to many public and private buildings, including schools, courthouses, post offices, motels, restaurants, and playgrounds.

CSPFP supports CPRC’s acquisition of DM&E/IC&E, and has high hopes for the long-term impact CPRC will have on safety throughout the DM&E system. However, CSPFP is concerned about short-term safety on the DM&E line in its communities. CSPFP states that it is particularly concerned that current DM&E leadership will, in its view, mismanage the increase of resources at its disposal post-merger. CSPFP urges strong involvement by CPRC to increase the safety performance along DM&E’s system. CSPFP urges the Board to require the creation of a long-term safety improvement plan for DM&E, with specific goals, metrics, and timetables.

*IOWA DEPARTMENT OF TRANSPORTATION*. IDOT supports the application, but requests two conditions. These conditions concern two lines referred to as the “Corn Lines.” The Corn Lines include the line from Marquette, IA, to Sheldon, IA, and the line from Mason City, IA, to Lyle, MN. First, IDOT asks the Board to require CPRC to work with Iowa shippers

to assure the future viability of the Corn Lines by maintaining and upgrading the line to a 25 mph standard. IDOT believes the proposed \$300 million to upgrade the DM&E/IC&E system is insufficient to upgrade the Corn Lines to a 25 mph standard. Second, IDOT asks the Board to require CPRC to provide competitive rates and markets to the Corn Lines shippers and the farmers they represent. IDOT requests that the Board require CPRC to work with IANR and KCS to assure competitive markets for Iowa shippers.

In reply, applicants state that they have already taken steps to address all of the issues raised by IDOT. Applicants argue that, in light of those steps, the transaction will enhance service to Iowa grain shippers and will not have any adverse competitive impacts on such shippers. Accordingly, applicants contend that the imposition of further conditions is not warranted.

Applicants state that they have addressed the concerns relating to shippers on the Corn Lines directly by an agreement between applicants and those shippers. Applicants have committed to bring the Corn Lines up to 25 mph by 2013 and keep the Kansas City and Chicago gateways open on commercially reasonable terms.

*MAYO CLINIC.* Mayo Clinic is a healthcare facility located in close proximity to DM&E's line in Rochester, MN. Mayo Clinic is concerned that future derailments involving hazardous materials could endanger the lives of both the staff and patients of its facility. Mayo Clinic therefore requests conditions to minimize the potential risk of future CPRC/DM&E operations. Mayo Clinic is also concerned that increased traffic from any future extension into the PRB could increase the likelihood for a serious accident. In particular, Mayo Clinic is concerned about the current state of DM&E's line in Rochester and what steps applicants plan to take to rehabilitate the line.

Mayo Clinic requests the imposition of the following conditions on applicants:

(1) Work with local, state, and federal agencies to install multiple grade-separated crossings at mutually acceptable locations to facilitate the movement of emergency vehicles to and from medical facilities;

(2) Meet with representatives of Mayo Clinic to consult and coordinate ways to minimize rail transportation's impacts on Mayo Clinic, especially the increased transportation of hazardous materials;

(3) Install wayside detectors to the west and east of Rochester, MN, to provide timely warning of any potential problem prior to entering the city limits;

(4) Impose speed limits on local hazardous materials traffic of 10 mph and non-hazardous train traffic at 20 mph;

(5) Construct fencing and other appropriate protections for bike paths and pedestrian crossings, and install other sound and aesthetic barriers;

(6) Develop and maintain grade crossing protection devices for non-grade separated road crossings that allow whistle-free rail operations

(7) Establish a protocol with Rochester emergency services that will provide pre-notification of the transportation of hazardous materials through Rochester;

(8) Should the Board overturn its preliminary determination regarding the need to consider the environmental impact on movements of PRB coal beyond the terminus of the DM&E, coal cars transported through Rochester should be covered and/or sprayed to reduce dust and/or dirt contamination; and

(9) Negotiate voluntary contractual limitations with Mayo Clinic and the City of Rochester on the total number of through-traffic trains moving through Rochester.

Applicants' reply to the Mayo Clinic begins with a reiteration of some foundational principles regarding rail mergers. First, 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 state that DM&E's poor safety record is a pre-existing condition. Applicants also state that Mayo Clinic does not deny that safety will improve on the DM&E system as a result of the transaction.

Second, applicants state that most of the Mayo Clinic's proposed conditions fall under the jurisdiction of FRA, FHWA, and other transportation safety agencies. Applicants argue that Mayo Clinic is asking the Board to preempt those safety agencies' procedures and direct applicants to take specific actions to address Mayo Clinic's concerns. Applicants argue such action is inconsistent with the current statutory and regulatory schemes covering railroad safety.

Third, applicants state that many of the Mayo Clinic concerns are attempts to re-litigate safety concerns raised during the DM&E-PRB construction case. Applicants argue that many of the sought conditions cover conditions already imposed by the Board in the event DM&E decided to construct a new PRB line.

Fourth, applicants argue that Mayo Clinic has failed to account for DM&E's safety improvements over the last several years. Applicants state that the last remaining condition of the DM&E Safety Compliance Agreement (SCA) with FRA was terminated approximately three weeks before Mayo Clinic filed its comments. Applicants, therefore, contend that the termination of the entire SCA demonstrates that FRA's independent review and analysis determined that DM&E's safety performance had improved sufficiently to allow termination of the special safety review and oversight program.

Fifth, Applicants address Mayo Clinic's concerns that applicants' plan for capital improvements lacks specificity as to DM&E track in the Rochester area. Applicants assert that significant investments in the DM&E line between Rochester and Owatonna will be made in 2009. Moreover, applicants state that DM&E is improving the line through part of its existing capital improvement plan.

Finally, applicants assert that Mayo Clinic's concerns about hazardous materials obscure the fact that very few hazardous materials move through Rochester by rail. Applicants argue that given the miniscule amounts of TIH through Rochester and applicants' planned capital improvements to the track through Rochester, Mayo Clinic's concerns are overstated.

In responding to Mayo Clinic's comments, applicants recognize the need for safety, and are sensitive to the safety issues raised by Mayo Clinic. However, applicants argue that Mayo Clinic is re-litigating issues from the DM&E-PRB construction case, ignoring the current regulatory framework for assessing rail safety, ignoring the capital improvements recently made by DM&E (and the detailed plans for additional improvements by CPRC upon approval of the transaction), and overstates the danger for accidents relating to the transportation of hazardous materials. Applicants argue that none of the nine proposed conditions are reasonable, and that Mayo Clinic has failed to reach its burden to justify their imposition.

In its reply, Mayo Clinic argues that testimony from pending condemnation proceedings in Wyoming contradict applicants' statements concerning the status of the PRB project. Applicants responded by stating that such condemnation proceedings are a necessary part of DM&E's efforts to acquire the land upon which the PRB line would be built. Applicants state that acquiring this land is merely a prerequisite to any decision by CPRC to proceed with construction of the line.

*MINNESOTA DEPARTMENT OF TRANSPORTATION.* MinnDOT is the state agency responsible for rail planning and rail programs in Minnesota. MinnDOT is concerned about safety at existing and future grade crossings along DM&E's lines. MinnDOT requests the Board condition approval of this transaction by requiring CPRC and DM&E proceed immediately with implementation of grade crossing upgrades as deemed necessary by MinnDOT, with cost-responsibility as determined by MinnDOT. MinnDOT also requests a condition that, should future train speed increases occur that create safety hazards, applicants shall implement any additional improvements deemed necessary by MinnDOT, with cost responsibility as determined by MinnDOT.

Applicants state that they share MinnDOT's commitment to railroad safety. However, because MinnDOT submits no evidence indicating that its proposed conditions relate to the competitive impacts of the transaction, then there is no legal basis to impose either of the conditions requested by MinnDOT. Applicants state that MinnDOT's first requested condition concerns a speed increase implemented by DM&E prior to the proposed transaction. In addition, MinnDOT's second requested condition, regarding potential future speed increases, invited the

Board to intervene in the relationship between DOT, state departments of transportation, and FRA regarding the implementation and financing of rail crossing safety programs. However, applicants state that they will continue to cooperate with MinnDOT in evaluating and implementing public highway grade crossing safety improvements.

*MITCHELL COUNTY BOARD OF SUPERVISORS (MCBS)*. MCBS supports the proposed transaction. MCBS states that Mitchell County is located just south of a diamond crossing between IC&E and CN. MCBS states that having two Class I railroads in such proximity will greatly help local industries. In addition, MCBS is concerned that any attempt by IANR to acquire any part of the IC&E system would be disastrous to economic growth in Mitchell County. It is for this reason that MCBS supports the proposed transaction.

*WISCONSIN DEPARTMENT OF TRANSPORTATION (WisDOT)*. WisDOT supports the proposed transaction, but requests six conditions to be included in the Board's approval. WisDOT states that CPRC traffic from Wisconsin origins and to Wisconsin destinations has significantly decreased in recent years, despite an increased need for rail service.

WisDOT requests the following conditions: (1) require CPRC to provide information about the specific improvements that will be made on the line between Davis Junction (MP 0.0) and Janesville (MP 45.8); (2) require CPRC to provide information as to whether the above described line is capable of handling rail cars loaded to 286,000 lbs, and to identify the deficiencies if it is not; (3) require any EIS prepared as a result of CPRC's decision to move forward with construction of a line into the PRB to include primary, secondary, and cumulative impacts on lines and communities in Wisconsin; (4) require CPRC to clarify the impact of the November 1, 2007 CPRC/CN routing protocol on traffic movements through Wisconsin; (5) ensure that CPRC negotiates in good faith with carriers who may have trackage rights agreements to operate over CPRC, DM&E, or IC&E lines to provide alternative routings, if traffic levels proposed by CPRC will degrade the services provided by these other carriers; and (6) ensure that neither CPRC nor IC&E will increase speeds on any of their lines through Wisconsin until such time as grade crossing warning devices at at-grade crossings are determined by the Wisconsin Office of the Commissioner of Railroads to provide adequate warning for the proposed speed.

In its reply, applicants state that WisDOT has submitted no evidence in support of its proposed conditions. Applicants state the proposed conditions are unrelated to any anticipated competitive impact of the transaction. Applicants reiterate that CPRC and DM&E do not serve any common points in Wisconsin. Therefore, applicants contend that no diminution will occur as a result of the transaction. Applicants, however, provided the information requested in conditions 1, 2, and 4.

With respect to the third requested condition, applicants argue that the environmental review of the PRB project on Wisconsin communities is premature. Applicants state that they have not made any decisions regarding the PRB project. In addition, applicants state that the

Board has already determined, in Decision No. 9, to: (1) impose conditions precluding the transportation of coal trains on a new PRB line until the Board has conducted an environmental review and issued a decision addressing the environmental impacts of such operations; and (2) require applicants to notify the Board of their intent to begin construction of the PRB lines.

With respect to the requested condition to require good faith negotiations with carriers who have trackage rights over applicants' lines to provide alternative routings if the traffic levels proposed by CPRC degrade service levels, applicants contend there is no evidence that traffic levels following the transaction will degrade services provided by other carriers on any CPRC lines. Finally, with respect to the requested conditions concerning potential future speed increases, applicants reference the arguments used for MinnDOT's similar requested conditions.

### **LABOR PARTIES**

*UNITED TRANSPORTATION UNION LOCAL 911 (LOCAL 911)*. Local 911, CPRC's largest Union Local in North America, supports the proposed transaction on condition that CPRC grants some protection to Local 911 members. Local 911 asserts that operation of trains or any freight out of Minnesota City onto the CPRC main line should be handled by CPRC crews. Local 911 asserts that any arrangement allowing for DM&E or IC&E crews to operate out of Minnesota City would be merely a device to evade a collective bargaining agreement. Local 911 further notes that, under the 1997 CPRC/IMRL Line Sale and the July 22, 2002 IMRL/DM&E Line Sale, these railroads were to only use the Minnesota City gateway as an interchange point and that CPRC crews would take freight cars or trains out of Minnesota City with CPRC crews.

Local 911 also requests that CPRC puts in place CPRC equity jobs if CPRC runs more than one train a day between St. Paul and Kansas City on the IC&E line. Local 911 is concerned that CPRC will likely reroute freight onto the ICE line to Kansas City on account of cheaper wages. Local 911 asserts that the CPRC crews are entitled to any extra freight that comes out of the St. Paul terminal to Kansas City.

Lastly, Local 911 requests that CPRC restore some former CPRC lines that are currently IC&E lines and provide CPRC equity jobs that were previously held by CPRC employees before the 1997 line sale.

In regards to Local 911's concerns about the Minnesota City gateway, CPRC states that Local 911 does not suggest how such an operation might occur in the absence of either a consolidation of work that would be subject to the New York Dock requirement of notice and an implementing agreement or a new grant of trackage rights by Soo Line to DM&E or IC&E, which would carry its own employee protective conditions; further, CPRC states that any affected employees of Soo Line would be protected by the appropriate protective conditions. On rebuttal Local 911 states that CPRC needs to explain how it plans on executing the extra Coal and Ethanol Trains and Combination Trains from the Minnesota City gateway to Chicago and

that CPRC has failed to produce any labor protections that would cover current CPRC employees.

As for Local 911's concerns surrounding expanded operations by IC&E between St. Paul and Kansas City, CPRC states that it is a "nonexistent problem of Local 911's own invention," and that CPRC has no plans to shift existing traffic from Soo Line trains to IC&E trains. CRPC notes, however, that Soo Line and DM&E should decide to carry out an operational change that is not now foreseen and that amounts to implementation of the proposed transaction, concerns such as those raised by Local 911 would be handled appropriately in the course of negotiating implementing agreements under the protective conditions. On rebuttal, Local 911 requests that the Board hold CPRC to its representation that CPRC would not shift traffic from Soo Line trains to IC&E trains to create a lower pay scale in place of the one current used and manned by CPRC employees. Local 911 also states that there are seniority issues and concerns surrounding the multiple overlapping seniority districts between Local 911 crews and IC&E crews around the Minnesota City gateway.

Regarding Local 911's request that jobs currently held by IC&E employees on IC&E lines be given to Soo Line employees, CPRC states that there is no aspect of the proposed transaction that could serve as a basis for dispossessing IC&E's employees of their work or transferring work from BLET-represented craft to Local 911 representations. Such matters, CPRC notes, are exclusively within the jurisdiction of the National Mediation Board.

*THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS (IBEW), THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS (IAM), THE AMERICAN TRAIN DISPATCHERS ASSOCIATION (ATDA), THE NATIONAL CONFERENCE OF FIREMEN & OILERS –SEIU (NCFO), AND THE BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND TRAINMEN (BLET), A DIVISION OF THE RAIL CONFERENCE OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS.* IBEW, IAM, BLET, ATDA, and NCFO submit joint comments. IBEW, IAM, and NCFO represent the Mechanical Department employees of CPRC's subsidiaries, Soo Line and D&H, and are concerned that the proposed transaction will result in CPRC transferring work and employees from represented locations on CPRC to unrepresented locations on DM&E, thereby depriving employees of the higher wages and other rights, privileges, and benefits currently provided under collective bargaining agreements between these unions and CPRC. IBEW, IAM, and NCFO request that the CPR employees they represent are as well protected from any adverse effects of the transaction as are the unrepresented employees of DM&E.

ATDA represents CPRC train dispatchers who control rail traffic over Soo Line and D&H. Employees represented by ATDA work under collective bargaining agreements that afford rights, privileges, and benefits not enjoyed by DM&E workers. ATDA notes that while CPRC's application addresses the effects of the proposed transaction on DM&E workers, little information is given about the effect on CPRC workers. Accordingly, ATDA urges the Board to

ensure that train dispatching employees of CPRC are as well protected from potential adverse effects of the transaction as employees of DM&E.

BLET represents all 262 of the operating craft employees of IC&E, as well as the locomotive engineers employed by CPRC's U.S. subsidiaries. BLET requests that the Board ensure that the employees BLET represents in Mason City and Dubuque, IA, are protected by New York Dock labor protective conditions, as CPRC states, should CPRC, in keeping with its Operating Plan, eliminate two daily DM&E trains between Owatonna, MN and Chicago, IL. BLET also requests that New York Dock labor protective conditions be applied to every employee represented by BLET on both IC&E and CPRC properties.

In response to the concerns raised by IBEW, et al., CPRC states that it has no plans to consolidate mechanical functions of Soo Line and DM&E. Should it decide to make such changes in the continuing implementation of the proposed transaction, CPRC notes that all adversely affected employees will be protected by New York Dock conditions imposed on the transaction.

*ATDA.* In response to the concerns raised by ATDA, CPRC states that it has no plans to consolidate the dispatching functions of Soo Line and DM&E. However, should operational changes be made in the continuing implementation of the proposed transaction, CPRC states that adversely affected employees will be protected by the New York Dock conditions imposed on the transaction.

*BLET.* CPRC notes that a few BLET-represented IC&E employees will be affected by the change in train operations under the proposed transaction, and CPRC states that New York Dock conditions will apply to all employees of applicants' railroads who may be adversely affected as a result of the implementation of the proposed transaction.

*UTU/GO-386.* United Transportation Union-General Committee of Adjustment (UTU/GO-386) opposes the proposed transaction. UTU/GO-386 takes issue with the Board's preliminary determination to defer environmental review in this proceeding of the rail lines considered in the DM&E PRB construction proceeding and to defer the preparation of environmental documentation on routing DM&E PRB coal traffic over the rail lines of IC&E and/or CRPC until more information is available. UTU/GO-386 asserts that if the Board approves the proposed transaction with no further environmental analysis, any subsequent proceeding must be a full proceeding under 49 U.S.C. 11324 that considers both transportation and environmental issues surrounding coal transportation. UTU/GO-386 opposes this "bifurcation process" of review and states that a complete EIS would be appropriate. UTU/GO-386 further states that the Board should find the proposed transaction to be anticompetitive. In a verified statement, UTU/GO-386's General Chairman Jay L. Scholmeyer expressed his opposition to the proposed transaction because of the adverse effects the transaction would have on BNSF train and engine service employees.

In its reply, CPRC notes that UTU/GO-386's concerns were addressed in Decision No. 9, served April 4, 2008, which confirmed that the Board's approach to environmental review ensured that the potential environmental impacts of transportation of DM&E PRB coal trains over IC&E and CPRC lines are considered at the appropriate time. CPRC states that UTU/GO-386 offers no evidence to support its contention regarding the anticompetitive effects of the proposed transaction. Lastly, UTU/GO-386 states that nothing in the record supports any finding that there would be any consequences with respect to the employees represented by UTU/GO-386.

### **FEDERAL PARTIES**

*UNITED STATES DEPARTMENT OF AGRICULTURE (USDA)*. USDA supports the proposed merger. USDA indicates that the proposed transaction could benefit agricultural shippers by: (1) providing competition in northern Iowa and South Dakota; (2) reduce transportation costs for coal; (3) allowing for construction of a new route into the PRB that will decrease the risk of having only one route into the PRB; (4) increasing safety and efficiency, which will in turn lead to increased ethanol and bio-fuels production; (5) reducing the cost of inputs used by farmers through the movement of anhydrous ammonia and other agricultural chemicals by rail; and (6) spurring economic growth in rail, ethanol, and manufacturing in the region.

USDA requests, however, that the Board condition approval of this acquisition by requiring CPRC to maintain economically competitive and non-discriminatory rates for those shippers seeking access to connecting railroads in Chicago and to the Pacific Northwest and Texas.

USDA also encourages CPRC to strive to maintain or improve service and safety levels on the DM&E system. To that end, USDA requests that the Board encourage CPRC to maintain the number of grain cars available to agricultural shippers on the DM&E system at the levels provided during 2007, and that CPRC not favor Canadian shippers over those from the U.S.

Finally, USDA encourages CPRC to make sufficient investments in current branch lines to maintain or improve their current conditions.

In its reply comments, USDA reaffirms its conditional support of the application and its request that the Board condition the approval of the transaction with the requirement of maintaining cost-competitive and non-discriminatory connections to other railroads, including KCS. Noting that DM&E provides neutral connections to all seven major railroads, USDA expresses its concern that grain shippers' will lose this neutrality, thereby diminishing their market access and their choice of carriers. USDA also states its support of the agreement reached between CPRC and SMNISA, which maintains cost-competitiveness and non-discriminatory connections and includes a commitment to upgrade certain lines. USDA requests

that the acquisition be conditioned with the agreement because it believes that would be in the best interests of agricultural shippers. USDA also requests that the Board condition the acquisition on CPRC maintaining the number of grain cars available to agricultural shippers on the DM&E system at 2007 levels without reducing the supply to North Dakota shippers. USDA further reaffirms its request that CPRC not favor Canadian shippers over those from the U.S.

*UNITED STATES DEPARTMENT OF TRANSPORTATION (DOT).* DOT's initial comments take no position on the merits of the proposed consolidation. DOT reserves judgment pending a review of the initial comments of other parties. DOT anticipates expressing a substantive view in its reply.

*Safety.* DOT urges that the Board condition any approval so that the applicants are instructed to cooperate with FRA regarding the SIP and its successful implementation.

In its reply comments, DOT notes that the application meets the standard for approval, assuming the Board holds applicants to their commitments to shippers regarding traffic interchanges and gateways. DOT also notes that the SIP should be modified regarding hazardous material response planning and training. Though it reserves the right to change its comments based on changes in the record, DOT makes several specific comments with regard to safety issues and competition issues.

First, DOT addresses the safety concerns of Mayo Clinic, who requests conditions to limit the quantity and speed of hazardous materials through Rochester, MN, to require installation of grade-separated crossings and wayside detectors, to institute whistle-free railroad operations, to provide advance notice of the transport of hazardous materials through Rochester, and to compel CPRC to discuss rail safety and emergency response matters with local officials. DOT agrees with Mayo Clinic that CPRC should make emergency preparedness training a priority in the Rochester area and explains that it will work with CPRC to conduct such exercises beginning no later than 60 days following approval of the transaction. DOT explains that the other conditions requested by Mayo Clinic are appropriately addressed by current rules, programs, ongoing regulatory proceedings, and the current SIP. Specifically, DOT rules already provide the means to local authorities to establish whistle-free zones. Furthermore, federal regulations already address how carriers route hazardous material traffic and newly adopted rules will enhance the safety and security of such movements. Railroad speed is also already regulated as a function of the standard of the track, and DOT finds no legal or policy basis to require reductions in speed for this proceeding. Finally, DOT does not agree that advance notification of hazardous material shipments should be required, because doing so is costly, imprecise, could create an overload, and has its own security risks.

Second, DOT addresses those safety concerns raised by MinnDOT, who, due to concern over increased train speeds from track upgrades, seeks conditions that would require applicants to make those improvements at grade crossings deemed necessary by MinnDOT. DOT opposes these conditions, noting that FRA regulations establish appropriate train speeds based on the

track classification and that FHWA administers an extensive government program, which includes the appropriate state entities, to prioritize crossing improvements within the state's boundaries.

With regard to competition issues, DOT first addresses KCS's contentions that the acquisition will adversely affect competition by foreclosing competitive options for grain receivers it serves and reducing competition for NAFTA-related traffic. KCS requests that conditions be placed on the merger that would preserve two agreements it currently has with DM&E and IC&E. DOT disagrees with both of KCS's assertions and the conditions KCS requests with regard to its concerns. It explains that the record reflects the potential of the proposed transaction to open new markets for grain shippers and that KCS's concerns do not amount to a loss of competition that requires remedial conditions. While DOT recognizes the importance of competition for NAFTA-related traffic and agrees that the DM&E/KCS routing of NAFTA traffic is a potential alternate option to UP single-line service, the record does not support the assertion that merging CPRC and the DM&E will reduce competitive options for such movements and believes there is no reason for CPRC to refuse to interchange with KCS on mutually beneficial terms. DOT states that the Board should hold CPRC to any commitments to keep gateways open and CPRC should fulfill the terms of any agreement with KCS to the extent DM&E must do so now.

DOT's final comments regarding competition are in response to MP&W, a power utility in Iowa that receives PRB coal on the IC&E after its origination on BNSF. MP&W requests that the merger be conditioned on the preservation of four interchange points where IC&E can interchange traffic with BNSF and UP and also requests preservation of the "contract exception" to the Board's "Bottleneck" decision. DOT does not support MP&W's request for such a condition because railroads enjoy a significant prerogative in their decisions about routes and rates for traffic. Generally, conditions to preserve interchanges or gateways are disfavored and there is no competitive harm to MP&W here that justifies a departure from that policy.

DOT filed a brief in reply to subsequent pleadings filed after its reply discussed above. DOT notes that the subsequent pleadings did not change its position and DOT reiterated that the transaction meets the statutory standard for approval, provided the Board: (1) continue its restriction on the transport of PRB coal, pending an expeditious environmental review at the appropriate time; (2) adopt the requirement that CPRC carry out the SIP and cooperate with the FRA until completion of the implementation; and (3) hold the applicants to their commitments regarding keeping open rail gateways.

With regard to the environment and safety, DOT first notes that it supports the determination of the Board not to conduct an environmental review except with respect to the impact of PRB coal. DOT urges that when those impacts are studied, it be done in a reasonably expedited, focused, and transparent manner with a clear procedural schedule. DOT also addressed Mayo Clinic's new information regarding the likely increases of ethanol on the DM&E line through Rochester, MN. Though DOT recognizes there will be a rise in ethanol

production in the Midwest, it believes that neither such an increase nor the possible additional ethanol transported through Rochester would support the conditions requested by Mayo Clinic. Noting that the government's regulations and programs already in place have made a vast majority of the movements of hazardous materials safe and that the applicants have agreed to improve track and infrastructure and install wayside detectors, DOT stated that the risk of moving hazardous materials through Rochester is minimal and does not form a basis to impose Mayo Clinic's requested conditions.

With respect to the challenges to the transaction based on competitive grounds, DOT concludes that the proposed transaction still meets the regulatory standard for approval. Because the rebuttal submission of KCS essentially makes the same anticompetitive arguments, DOT remains convinced that the transaction will open markets for grain shippers and not close them for receivers. DOT also notes that CPRC will have to fulfill the terms of any agreements in place to the same extent as DM&E and that if KCS or a shipper in the future does not believe CPRC is dealing in a commercially reasonable manner, they may then bring their complaints to the Board.

As to MP&W's concerns regarding CPRC's interpretation of a settlement agreement with DM&E in the DM&E/IC&E merger, MP&W's rebuttal offers only surprise at DOT's conclusions but no new information or arguments. DOT clarifies their previous statements by explaining that by the close of the record in the DM&E/IC&E merger any prospective loss of the ability to challenge the reasonableness of a bottleneck rate via the contract exception was not cognizable because the settlement agreement removed it from the Board's consideration. DOT notes that CPRC has committed to keeping affected gateways open and any regulatory action regarding a MP&W dispute with CPRC would be premature.

*FEDERAL RAILROAD ADMINISTRATION (FRA)*. In its preliminary findings and conclusions with regard to CPRC's SIP for the proposed transaction, FRA notes that CPRC responded satisfactorily to all of FRA's safety concerns. If the transaction is approved, FRA will monitor implementation of the SIP with a special focus on the following matters: (1) CPRC's commitment to investing approximately \$300 million over the next 4 years to upgrade all DM&E track to Class III standards; (2) CPRC's commitment to installing additional defective equipment detectors to the east and west of the Rochester, MN city limits; (3) CPRC's projection that any increase in hazardous material volume will be primarily in ethanol and be at levels below the DOT routing requirement levels; (4) CPRC's commitment to working with governmental agencies, including the Minnesota Department of Transportation (MNDOT), to enhance safety at highway-rail grade crossings; and (5) CPRC's commitment to conducting emergency response training with community groups within 60 days of approval. FRA explains it will monitor these and other commitments contained in the SIP and will submit summaries of their periodic findings on these matters to the Board.

**OTHER PARTIES**

*AFTEM FAMILY (AFTEM)*. Afterem opposes the proposed transaction on the grounds that CPRC's safety record should not enable it to acquire additional trackage. In particular, Afterem references the Soo Line derailment in Minot, SD, on January 18, 2002. The derailment resulted in an anhydrous ammonia spill. Afterem also references other derailments in the area as evidence that CPRC has a poor safety record that should be taken into account when the Board assesses the proposed transaction. Afterem states that it continues to urge Congress to repeal railroad liability immunity under the Federal Railroad Safety Act. Afterem states that it has filed comments in this proceeding in order to make the public aware of CPRC's and DM&E's poor safety record. Afterem states that the applicants' proposed \$300 million for safety upgrades is insufficient. Afterem requests that the Board lift the protective order in this proceeding so that applicants' highly confidential pleadings can be made public.