

Before the
SURFACE TRANSPORTATION BOARD

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Canadian Pacific Railway Company, <i>et al.</i> – Control -)	
Dakota, Minnesota & Eastern Railroad Corp., <i>et al.</i>)	Finance Docket No. 35081
)	
_____)	

Argument and Request for Conditions

Pursuant to the Board’s Decision, served December 27, 2007, Mayo Clinic, by and through its undersigned counsel, offers the following information and requests for conditions. The goal of Mayo Clinic, the City of Rochester and Olmsted County, Minnesota, is to ensure the safe operation of the Dakota, Minnesota and Eastern Railroad (DM&E) under its new owner, the Canadian Pacific Railway (CP). Because the acquisition of the DM&E, along with the organic growth of shipments of ethanol over DM&E lines, will likely result in an expansion of railroad operations through the heart of downtown Rochester,¹ including a potential increase in the transportation of hazardous materials less than 300 feet from Intensive Care Unit and inpatient facilities,² Mayo Clinic respectfully requests that the Board impose adequate conditions to mitigate against the possibility of a catastrophic occurrence.

Summary of Position

As the Board has been previously advised, the DM&E’s tracks, which were laid well after Mayo Clinic was sited, are located only a few hundred feet from Mayo Clinic’s facilities,

¹ See, V.S. V. Graham at 4.

² See, V.S. R. Foot, Working Papers CP-DME-FR-HC-0064 (filed under seal).

which house approximately 30,000 doctors, nurses, staff and students. Most importantly, in addition to more than 1 million annual outpatient visits, Mayo Clinic has a vulnerable patient population that includes an average of approximately 1,000 daily inpatients, 200 ICU beds, and 200 daily surgeries. In addition, Mayo Clinic's Charter House, a continuing care retirement facility, houses more than 300 seniors.

Moreover, on an average day, as many as 8,000 people with limited mobility are at healthcare facilities within 1,100 feet of the DM&E tracks:

- Rochester Methodist Hospital with 794 licensed beds
- Mayo Clinic Rochester, a medical group practice that treats 5,500 patients a day
- Federal Medical Center, a medical and mental-health prison facility with nearly 900 inmates
- Hope Lodge, 45 guest rooms for cancer patients and their families
- Charter House, a retirement living center with more than 230 independent-living units, 45 assisted-living units, 32 beds for skilled nursing and 32 beds for supportive care
- Central Towers, a 105-unit retirement living center
- Park Towers, a 180-unit retirement living center
- Olmsted County Medical Center, a hospital with more than 60 licensed beds
- Gift of Life Transplant House, with 48 guest rooms for transplant patients and their caregivers
- Northgate Plaza, 151 high-rise apartments for senior, handicapped or disabled residents
- Samaritan Bethany Home, a 62-bed nursing home.

Given the extreme, close proximity of the DM&E's tracks to all of the above facilities, it is clear that the failure to plan for a possible near-clinic train wreck could be devastating for the thousands of patients who visit Rochester daily to receive medical care. The potential for a

catastrophic incident is not a fiction, but is well founded. As a result, the extreme risks that are posed by a derailed train of anhydrous ammonia, chlorine, or some other hazardous materials, require the imposition of appropriate conditions that would protect Mayo Clinic and its patients without interfering with future rail operations.³

Mayo Clinic firmly believes that proper conditions would minimize the potential risk to Mayo Clinic and its patients, while maximizing the risk management benefits to be realized by the DM&E and CPR. However, if no conditions are imposed in the instant proceeding, the City and Mayo Clinic will not realize even the minimal, and we believe inadequate, protections afforded the City and Mayo Clinic in the construction case – protections that would be imposed only if certain levels of coal traffic are transported through the City. Currently, there are only two overpasses that permit ambulances to traverse the City, which is bisected by the DM&E track. Because of their location relative to Mayo Clinic, they are both inconvenient and inadequate and involve significant circuitry. From the standpoint of the railroad, there are no hot boxes on the line near Rochester to provide forewarning of an impending problem. Even though the instant transaction will increase the movement of hazardous materials over the line, there will be no limit on the type or quantity of hazardous cargo that could be transported through Rochester; no duty by DM&E to notify local first responders regarding such cargo; and no limit on the speed of the trains transporting hazardous material through Rochester within a few hundred feet of Mayo Clinic.

In reviewing the record, the Board is asked to focus on several fundamental issues. First, the Safety Integration Plan (SIP) does not provide any meaningful details as to the steps to be taken, if any, to rehabilitate the lines that are located adjacent to Mayo Clinic facilities. Second,

³ The particular concerns with ethanol will be addressed in detail *infra*.

the funds that are to be set aside for capital improvements for both DM&E and IC&E lines fall far short of what the DM&E has previously testified would be needed to rehabilitate its main line from Wasta, South Dakota to Winona, Minnesota. Indeed, there is reason to believe that the funding for capital improvements should be compared to the amounts that will be pocketed by current DM&E executives from the sale of the railroad. Third, while it is readily acknowledged in the SIP that DM&E's safety culture is far inferior to that of CPR, the SIP is virtually silent regarding the timing involved in addressing many of the concerns about safety that are addressed herein. Fourth, while an attempt has been made to downplay concerns about the movement of ethanol and other hazardous materials over the DM&E's line through Rochester, it is impossible to reconcile various past statements made by Kevin Schieffer, DM&E's current President and CEO, regarding increased shipments of ethanol over the DM&E lines with the statements in the Application that seemingly indicate that any such increase would occur only over the lines of the IC&E. Instead, evidence of record demonstrates that a substantial number of shipments of ethanol will move over the DM&E and SOO to the Chicago gateway. These failures compel Mayo Clinic to request the Board to impose reasonable conditions that would foster a safe environment while not impeding CP in its attempt to improve DM&E's current safety record and its future ability to offer extended rail service to its customers.

The SIP –An Overview

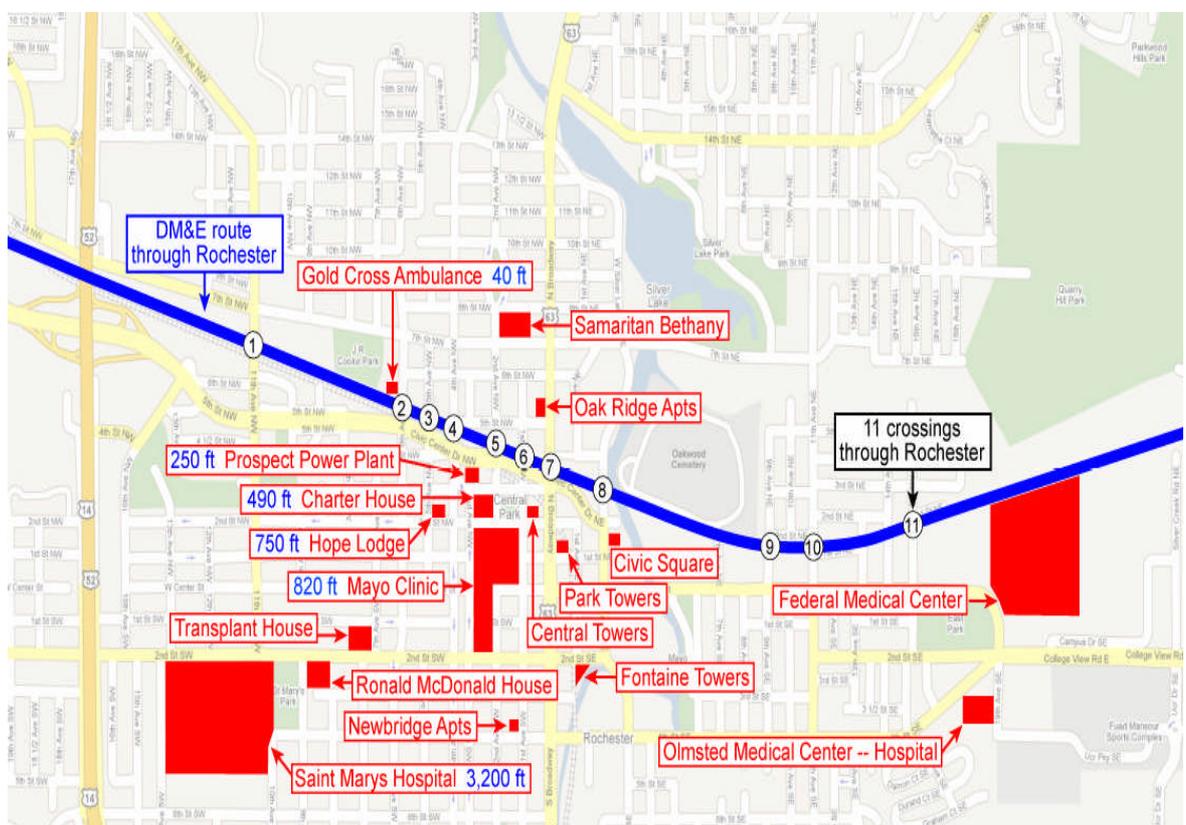
Unfortunately, the Applicants' SIP fails to provide any meaningful details regarding the rehabilitation, if any, of the lines of the DM&E that pass through the City of Rochester and within a few hundred feet of Mayo Clinic. In particular, no indication is given whether the Applicants have identified the potential safety issues associated with that portion of DM&E's track. While the SIP contains a statement that the IC&E operates in three high risk areas, none

of which is in Rochester, no mention is made as to whether consideration has been given to the potentially catastrophic impact of a derailment on the DM&E's line in the immediate proximity of Mayo Clinic's facilities. Since Mayo Clinic's medical facility is the focal point of any major emergency response in the event of a catastrophic occurrence involving the transportation of hazardous materials by DM&E in or around Rochester, there is no avoiding the need to take this opportunity to impose appropriate mitigation. Given the statements (V.S. Green, App. Vol. 2, p. 3, October 5, 2007) that consummation of the proposed transaction will allow it to increase hazardous materials (ethanol) shipments; that increased ethanol shipments will occur on the DM&E line (V.S. Foot, App. Vol. 2, at 4); and that operations will be changed to route traffic currently handled by IC&E between Nora Springs, IA and Chicago to the DM&E/SOO line (V.S. Frankenberg, App. Vol. 2, at 4; V.S. Graham, App. Vol. 2, at 4); the Board should recognize the need for the imposition of immediate conditions that would address this possibility.

There are many unanswered questions regarding the SIP that, when coupled with the increased threat of an accident that accompanies the increased volume and frequency of the transportation of hazardous materials through Rochester, have heightened, rather than lessened, the significant concerns that Mayo Clinic has previously voiced when faced only with the probability of an increased number of trains transporting PRB coal. As shall be discussed in detail *infra*, the SIP highlights the conclusion that DM&E's abysmal safety record is not solely the result of old tracks. Instead, DM&E's safety record can be attributed to a poor safety culture and a cavalier attitude toward safety, as well as an emphasis on executive compensation versus investment. Given the concession (SIP at 32) that operations on "DME will be managed in a manner similar to how it is done presently," outside intervention is required.

The Threat to Rochester and Mayo Clinic From Hazardous Materials

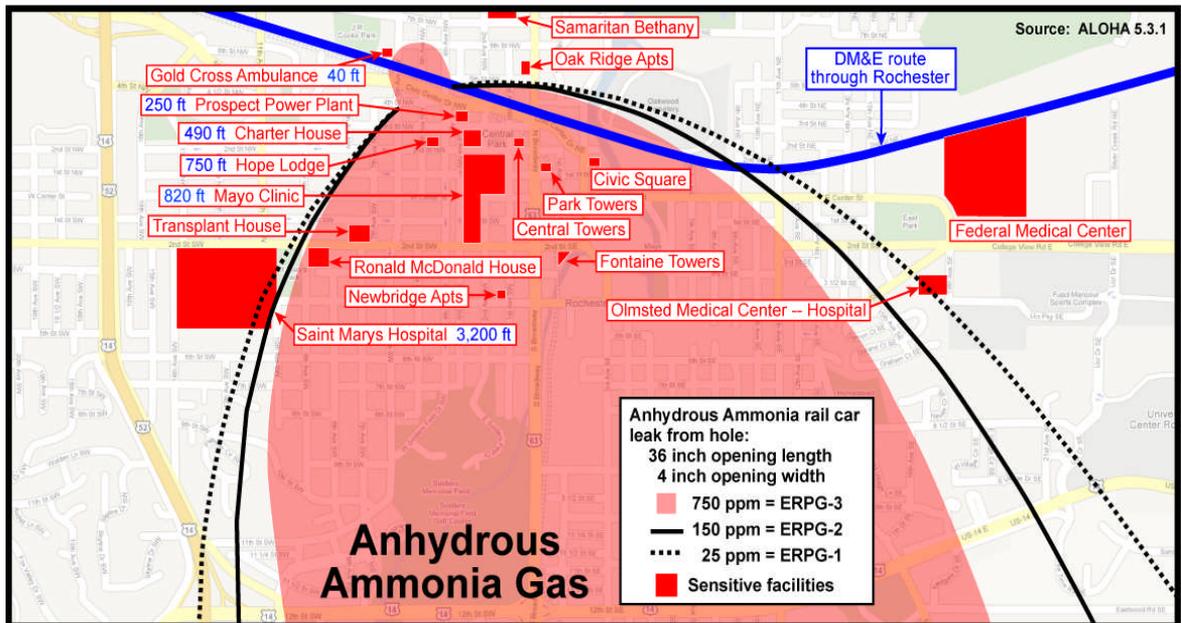
Mayo Clinic is particularly concerned that the threat posed by increased shipments of hazardous materials falls disproportionately on Rochester, Minnesota, which is home to 40 per cent of all the people who live along the DM&E's line. Rochester is also home to Mayo Clinic, the world's leading destination medical center. As shown below, many of Mayo Clinic's patient-care facilities are within hundreds of feet of the DM&E's tracks – at ground level.



There is no denying the proximity of DM&E's tracks to Mayo Clinic and the properties adjacent thereto, such as Charter House, which has 1,000 staff and residents, as well as 80 residents in assisted living and skilled nursing care beds. Therefore, it should be crystal clear that an accident involving the spill of hazardous materials near Mayo Clinic, with its vulnerable patient population, would be disastrous. The following charts reflect the catastrophic effects that

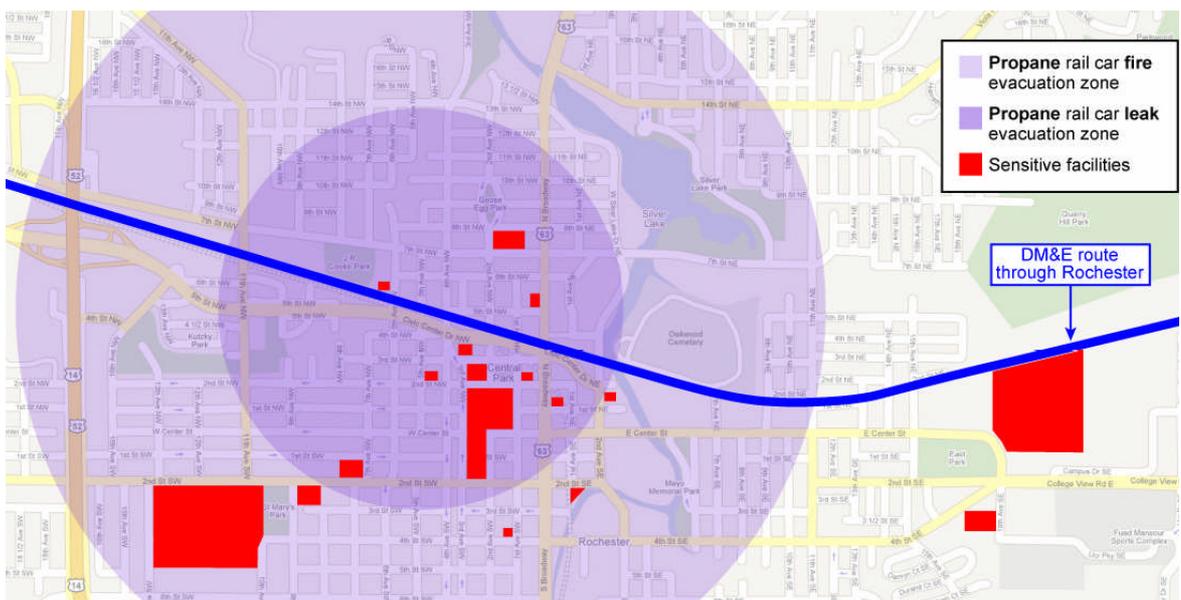
would follow a leak of only two of the hazardous materials the SIP and the Application indicate will be transported, namely anhydrous ammonia and propane.

Anhydrous Ammonia Gas Leak – Rochester/Mayo Clinic



Source: City of Rochester Fire Department

Propane Gas Leak – Rochester/Mayo Clinic



Source: City of Rochester Fire Department

The foregoing demonstrates the significant safety risks posed by even a railroad with an unblemished safety record. As everyone knows, accidents can and do happen even to safe railroads such as the CPR. (The January 18, 2002 derailment in Minot, North Dakota released a cloud of 222,000 gallons of anhydrous ammonia when 31 cars derailed and five tank cars ruptured, causing one death, 11 serious injuries and 322 minor injuries). When proper consideration is given to CP's candid, but unavoidable, admission in the SIP that DM&E has one of the worst safety records of all U.S. railroads, and that it is, and will continue to be, operating over admittedly substandard tracks for an indeterminate period of time following the proposed acquisition, there is no avoiding the conclusion that the Board has every reason to employ its authority to condition the merger so as to require CP to address immediately the substandard track conditions that threaten Mayo Clinic and Rochester. It is one thing for DM&E to spew hazardous materials in a sparsely populated area when it suffers a derailment, it would be quite a different situation if it were to do so when passing by Mayo Clinic and the tens of thousands of persons who are in harms way.

The need for the Board to impose adequate conditions as part of its approval of the proposed transaction is also highlighted by the Applicants' candid admission that the CP's Track Red Book cannot be implemented system-wide on the DM&E "[b]ecause of the current backlog of defective rails on DM&E." (SIP at 72). As a result of that backlog, "CP will be unable to adhere to this practice in the first few years of safety integration." (*Id.*) The lag time for implementing CPR's Track Red Book will not, however, impede the immediate, anticipated increase in the transportation of ethanol and other hazardous materials that will accompany the transaction.

DME Hazardous Cargo Numbers Cannot Be Reconciled

Although the statement is made (SIP at 8) that “DME presently transports about 4,500 car loads of hazardous material shipments each year, most of which is ethanol and anhydrous ammonia on the IC&E,” that statement conflicts with remarks made by DME’s CEO. According to a news article published in 2006, Mr. Schieffer stated that “[t]he number of ethanol cars moving through Brookings County alone has grown from 188 cars in 2002 to 4,500 cars in 2006 – a 2,300 percent increase in hazardous materials in four years, with much more growth expected in the future.” Kevin Schieffer, *Opponents of DM&E Agreement Spreading Misinformation*, ” Brookings Register, November 5, 2006. One month later, Schieffer said DM&E has gone from carrying just 280 carloads of ethanol to 5,000 carloads this year.” Kate Trunbow, *DM&E makes whistle stop in Pierre*, Pierre Capital Journal, December 12, 2006.

The accuracy of the 4,500 number in the SIP is further placed in doubt by a very recent article in which the statement is made that “[i]n addition, Schieffer has helped the DM&E embrace and grow ethanol traffic. In 2000, the regional moved 150 carloads of ethanol; in 2007, the railroad handled about 17,000 carloads. The DM&E served seven ethanol plants, and another five are under construction on its lines.” *South Dakota Corn Growers Honor the DM&E’s Schieffer as Agricultural MVP*, Progressive Railroading, January 17, 2008. In addition, the South Dakota Corn Growers Association has noted that “[w]hen DM&E first announced its PRB plans, we were moving 0.035 billion gallons of ethanol in South Dakota. In 2008 we will surpass 1 billion gallons.” *DM&E Announces Merger With Canadian Pacific Railway*, www.gotrak.org, September 4, 2007.

Plainly, ethanol figures heavily in CP/DM&E’s future despite the Applicants’ concerted efforts to downplay the movement of hazardous materials over DM&E’s dilapidated rail system.

See, e.g., Response to Environmental Comments, filed February 19, 2008, at 11, wherein it is claimed that “all of the anticipated organic growth in ethanol shipments described by Mr. Foot will move either west (to interchanges with BNSF) or via IC&E’s lines to the Chicago gateway.” A careful review of Mr. Foot’s Verified Statement, his deposition testimony and the Highly Confidential Worksheet that is attached to the foregoing Response demonstrates that Applicant’s counsel’s focus on the organic growth in ethanol is designed to avoid any focus on the increased carloads of ethanol that are anticipated to move over the SOO to the Chicago gateway. As Foot acknowledged during his deposition, not only is it anticipated that DME will experience a significant expansion in the number of carloads of ethanol in 2008, but that figure will more than double to 19,500 cars by 2010.⁴ Most importantly, while much of the increase will be generated from points located on the IC&E, several thousand carloads of ethanol are projected to move over the SOO. If those new carloads of ethanol are anticipated to move over the SOO, then it seems certain that they will likely move through Rochester in accordance with CP’s new Operating Plan and are not likely to move over the IC&E as has been suggested in the Response. This increase reflects the expansion in the number of ethanol plants located on the DM&E from four plants with a current capacity of 230 million gallons a year, to six plants with a projected capacity well in excess of 300 million gallons per year.⁵ In any event, the stark discrepancies that appear to exist between Mr. Schieffer’s published comments and those of Mr. Foot cannot be reconciled. Therefore, it is necessary to impose meaningful mitigation conditions at this time

⁴ The figure of 36,000 carloads that appears at page 4 of Mr. Foot’s Verified Statement was amended to 19,500 during Mr. Foot’s deposition on February 28, 2008.

⁵ Current plants are located at Aurora, SD – 120 mg/year; Huron, SD – 30 mg/year; Claremont MN 36 mg/year; Winnebago, MN 44 mg/year. One ethanol plant is under construction at Welcome, MN – 110 mg/year, while a further plant is planned for Volga, SD.

and not wait until dozens of cars of ethanol or unit-trains of coal are being transported from the PRB through Rochester on their way to the interchange with CP.

In particular, it is imperative that the Board impose conditions that would require CP to focus its earliest efforts on those areas where a derailment involving hazardous materials, and in particular ethanol, would have the harshest impact. In requesting such conditions, Mayo Clinic invites the Board's attention to a recent article which highlights the fact that "[e]thanol fires are harder to put out than gasoline ones and require a special type of firefighting foam...The problem is that water doesn't put out ethanol fires, and the foam that has been used since the 1960s to smother ordinary gasoline blazes doesn't work well against the grain-alcohol fuel." Chris Blank, *Ethanol Fuels Fire Concerns*, www.argusleader.com, Feb. 26, 2008. As is also noted in the article:

The risk is more than theoretical. Over the past several years, ethanol accidents on highways, along railroads and in storehouses and refineries have triggered evacuations and fires from Texas to Minnesota, injuring several people and killing at least one person.

* * *

To help firefighters identify when high concentrations of ethanol are burning, the U.S. Transportation Department has approved a rule requiring signs on tanker trucks hauling fuel that is more than 10 percent ethanol.

In the last three months of 2007, three major fires pointed up the danger. In western Pennsylvania, nine ethanol tanker cars derailed and triggered a blaze that tied up a busy rail line.

In Missouri, a tanker truck carrying several thousand gallons of ethanol and gasoline crashed near the state Capitol, killing the driver. The flames spurred the evacuation of two elementary schools and forced the state to rebuild a badly damaged bridge.

And in Ohio, a train heading through the northeastern part of the state to Buffalo, N.Y., derailed and burned, forcing more than 1,000 people from their homes.

These "ethanol" incidents highlight and confirm the concerns that are being voiced by Mayo Clinic. Without downplaying the impact of having to evacuate two elementary schools and

forcing more than 1,000 people from their homes, it is respectfully submitted that the impact of a similar incident that would force the evacuation of Mayo Clinic and its neighboring facilities would be far greater, especially for those patients who may be in the middle of an operation or residing in the intensive care unit having just emerged from an operation. Indeed, if a disastrous derailment were to occur adjacent to Mayo Clinic, it would compromise the clinic's ability to respond to the emergency and care for the victims of that disaster.

Plainly, any true "risk-based" analysis would dictate that tracks located in urban areas, such as Rochester, Mankato and Dubuque, Iowa should be the focal point of CP's initial efforts to try to get DM&E to comply with CP's current practices. As CP has explained, its "practice requires defective rail identified either visually or through automated rail flaw detection to be repaired within 20 to 30 days, depending on annual tonnage, and if not repaired within this time frame, a ten mile per hour speed restriction is placed on the track." (SIP at 72). As CP has candidly admitted, "[b]ecause of the current backlog of defective rails on DME, CP will be unable to adhere to this practice in the first few years of safety integration. *Id.*

Mayo Clinic's concerns in this regard are heightened by the further admission that the one element of the Safety Compliance Agreement with the FRA that has not been fulfilled "revolves around track inspection and maintenance." (*Id.* At 65). While the SIP touts DM&E's newly found zeal for safety compliance, the Board should carefully note that DM&E's CEO has stated under oath that the SIP is a "CP document" and that he was not "intimately familiar" with it. Schieffer Deposition, Feb. 20, 2008 at 112. Such comments cast significant doubts on DME's top management's willingness to make a strong commitment to the SIP.

Furthermore, it is readily apparent that any safety improvements came only after the FRA finally cracked down on DM&E and forced it to sign the Safety Compliance Agreement in 2005.

Moreover, Applicants' (SIP at 27) have candidly admitted that it had been necessary to "force feed" safety and that "there is not yet a cohesive vision for how to integrate safety into day-to-day operations." They have also acknowledged the possibility of backsliding. *Id.*

Mayo Clinic recognizes that it will take time and considerable effort to alter the DM&E's ingrained safety culture. That culture, as Applicants have conceded (SIP at 26), has produced a dismal safety record.

DME has accident and injury rates that are too high, both in absolute terms and in relation to their peers in the rail industry; standards and processes vary, not only between DM&E and IC&E, but within the two companies; safety is not fully integrated into day-to-day business practices; there is little direct employee involvement in safety processes; and the two companies varying policies are either not adequately understood or are not always followed.

If it is true, which we believe it is, that the transformation of CP's safety culture can be attributed to CP's top management, then the corollary, while more painful, is also true -- DM&E's poor safety culture must be attributed to DM&E's top management. That being the case, Mayo Clinic is cognizant of the admissions (SIP at 32) that "Applicants expect that the Operations on DME will be managed in a manner similar to how it is done presently" and that "the improved record may have plateaued, and new initiatives may be needed to effect further improvement." (SIP at 29). If changes in the management of DME's operations cannot be expected, the Board must work closely with Mayo Clinic, Rochester and other communities to impose appropriate conditions that will require DME and CP to immediately address the critical areas of concern that are being voiced by Mayo Clinic and others, concerns that necessarily include a realistic timetable for addressing track maintenance and replacement requirements. It is not enough to say that the "specific items and timing of [matters involving safety integration] will be developed in the DME Corporate Safety Plan." (SIP at 40-41). Given the hazardous

nature of the products that DME will increasingly transport, it is surprising that DME appears not to have a Corporate Safety Plan at this time. Mayo Clinic notes and appreciates CP's comment (SIP at 68) that "[c]ertain actions implemented to meet the SCA, which have been previously terminated by FRA, will continue to be monitored by CP within the first few months post safety integration, to ensure the processes put in place to meet the regulatory requirements and the agreement continue in effect."

New Investment In Safety Is Limited

CP's repeatedly states that "it will make available to DME approximately \$300 million for capital improvements to DME's track, bridges, and other rail facilities and systems and processes in the first three years following approval of the transaction." (SIP at 4). Given the projected increase in the movement of hazardous materials over both DM&E and IC&E of at least 19,500 new carloads of ethanol annually by the year 2010 (V.S. Foot, App., Vol. II, at 4), the expenditure of \$300 million on both of those systems over three years, while laudable and an increase over current spending, will not come close to meeting the need for capital infusion. As DM&E made abundantly clear during the PRB construction case, the cost of rehabilitating less than 600 miles of its line from Wasta to Winona was over \$875 million. That was ten years ago. Since that time, the price of steel rail has escalated significantly and the tracks have continued to deteriorate.

Furthermore, based on the projected expenditure of Engineering Capital (SIP at 89-91), it appears that DME, without consideration of the current proposed transaction, was going to spend \$57.6 million in 2009, \$56.6 million in 2010, and \$58.8 million in 2011 for Engineering Capital. (SIP at 89). Following CP's acquisition of DME, those figures increase to \$100 million in 2009, \$101 million in 2010, and \$100.3 million in 2011. In other words, CP's acquisition of DME will

apparently result in *additional* capital expenditures of approximately \$128 million over that three-year span.⁶

Safety investment in the DM&E properties is a critical issue. When a comparison is sought to be made between the amount of compensation received in the sale of the DM&E by its officers and investors and the amount that has been suggested to be invested for safety over a multi-year period, the comparison should not be hidden from the STB or the public. At a deposition taken on February 20, 2008, Mr. Schieffer, President and CEO of the DM&E, was asked under oath to disclose the payments to him, first for the sale of the DM&E, and second, the additional amount he will receive if CP goes ahead with the PRB. Mr. Schieffer was asked whether each payment was a specifically described amount. When he declined to confirm the amounts specified, he was asked to state how much he has been and will be paid, and he declined to respond to that request as well. The amount of these two payments, one made and one possible, should be compared with the approximate \$128 million in investment that CP is providing. The comparison of payments to DM&E officials, such as Mr. Schieffer, and safety investment is worthy of public scrutiny in another respect. As will be seen later in this document, the continued activity of DM&E executives to make the PRB project a reality before the CP takes over control and makes its decision is also explained by knowing the magnitude of such payments.

Moreover, a comparison with projected expenditures for the SOO reveals that is probable that more Engineering Capital will be spent on the SOO's system than either on the DM&E or the IC&E. Because the SIP provides no detailed information with regard to where and when the expenditures will be made, one can but speculate as to Applicants' ability to meet commitments.

⁶ CP's promise to invest the remaining \$172 million for safety improvements may be met in out years beyond 2011.

That will not, however, stop the Applicants from immediately expanding the shipments of hazardous materials over both DM&E and IC&E.⁷

Although the SIP may comply with FRA requirements and contain all of the appropriate buzz words, it is remarkably lacking in any detail. Assuming that it will take ten years “to remove 286,000 lb restrictions on selected routes” (SIP at 90) and that [s]pecific projects, quantities and details by subdivision will be determined following detailed field inspection, assessment of Track Evaluation Car Field measurements, tie inspection and geometry measurements and review of historical replacements” (*id.*), what can Mayo Clinic, Rochester and other communities along the DME lines expect in the interim? In this regard, there is nothing about how DM&E plans to work with communities to *prevent* accidents. There is a noticeable absence of any discussion of crossing improvements or the construction of overpasses and underpasses that will be needed as traffic levels increase (in particular increased movements of hazardous materials) following the proposed transaction. There is no discussion of how to prevent catastrophic accidents from occurring in locations where the threat does not currently exist. The SIP only addresses the steps that will be taken after accidents do in fact occur. Even the disaster responsive approach evidenced in the SIP fails to consider what happens when the

⁷ The above points to yet another contradictory aspect of the SIP. Applicants repeatedly assert that the significant decline of CP and SOO injury and train accidents between 1996 and 2007 is attributed to CP’s re-alignment of its management team. While Mayo Clinic readily acknowledges that the re-alignment may be partially responsible for the cited decline, the safety improvement statistics can also be traced to the fact that SOO, in April 1997, sold what is now the IC&E. Given the fact that the accident rates appear to follow a flat trajectory beginning in 1998 through 2007 (when train accidents actually increased on both CP and SOO), the sale of the IC&E lines undoubtedly played a major role in reducing the injury and train accident rates. (Paradoxically what was an unsafe railroad for the SOO was a safe railroad for DM&E – while SOO’s rate went up with the IC&E lines, the DM&E/IC&E’s combined accident rate actually went down). Hence, it is misleading to claim improvements of 61% and 81% from 1996 to 2007 without noting the significant modification of the CP and SOO systems in 1997. Of course, because IC&E’s accident rates are nearly as bad as those of DM&E, only time will tell whether CP’s accident rates will revert to their former higher levels if this transaction is approved.

accident itself cripples the ability of first responders like Mayo to act. Plainly, the Board should consider whether it should take steps now to prevent disasters rather than waiting for the inevitable disaster to occur.

Equally important, there is no established timetable for the needed repairs. The mere suggestion that DME's safety performance will improve and "*eventually* bring DME's safety record into line with that of CP and other Class I carriers" (SIP at 3) does nothing to assuage the substantial concerns that are raised by the lack of detail regarding any segment of the DME's lines. It is inconceivable that DM&E and IC&E lack awareness of needed repairs so as to be unable to prioritize them at this time, especially if DME has been actively bringing itself into safety compliance as a result of the FRA Safety Compliance Agreement.

The statement is also made that "DME does not have sufficient hazardous materials shipments to meet the requirements of AAR Recommended Practice OT-55 for Key Routes [and that] shipment volumes of ethanol will be monitored and steps will be taken to equip such routes as required." (SIP at 82). As demonstrated previously, given the extremely close proximity of DM&E's track to Mayo Clinic's facilities, it would not take a substantial volume of hazardous materials to wreck havoc on Mayo Clinic's patients, physicians and staff. Nor would it require a spectacular pile-up to release a devastating amount of anhydrous ammonia, propane, or ethanol to require the immediate evacuation of Mayo Clinic and the other facilities in close proximity to Mayo Clinic and DM&E's track. Indeed, as demonstrated *supra*, a leak from a small gash in a tank car that measures but 4 inches by 36 inches would require an immediate evacuation of the complex, which in the case of numerous critically ill patients would be impossible. Therefore, it seems only reasonable to impose a specific condition that would require CP on a best practices

basis to apply the OT-55 Recommended Practices to DM&E operations through Rochester and other communities that share the same basic safety concerns as are being voiced by Mayo Clinic.

Mayo Clinic notes that “DM&E has identified its critical infrastructure [and i]n the event of a raised alert level, local managers would assign designated employees to protect designated facilities.” (*Id.*). Mayo Clinic has absolutely no idea whether the infrastructure that passes within a few feet of its facilities has been identified as “critical” and, if so, what DM&E plans to do. From a risk management standpoint, it would seem prudent to impose conditions that would require full communication between Mayo Clinic and CP with regard to such plans.

In summary, the threat is real and given the potential for catastrophic consequences for Rochester and Mayo Clinic, the Board must carefully consider the safety and security effects posed by the transaction and take this opportunity to impose meaningful condition that would ameliorate the threats posed by DM&E’s well-documented failures to maintain its rail system. Simply stated, the SIP does not adequately address the need to change the safety culture at DM&E nor does it evidence a commitment of the resources needed to improve the safety of DM&E’s rail operations. These shortcomings put Rochester and Mayo Clinic at risk – a risk that can only be lessened by the imposition of conditions that would, among other things, require CP, in accordance with basic risk management concepts, to focus on DM&E’s track structure through Rochester and immediately begin the process of replacing all defective tracks that are discovered as well as identifying other measures that would enhance the safety of future rail operations through the City of Rochester. In addition, although Mayo Clinic and CP have already commenced discussions on their own initiative, the Board, in recognition of the unequal bargaining positions, should impose a requirement that CP negotiate in good faith with Mayo

Clinic. Simply put, Mayo Clinic has not been able to entice or compel DM&E's current management to do so.

Last, while Applicants continue to claim (Response to Environmental Comments, CPR-12, at 2) that no decision will be made to build into the PRB "until three preconditions are satisfied: (1) the necessary land is assembled and acquired, (2) agreements with utilities for the transportation of PRB coal are in place, and (3) DM&E obtains access to the PRB mines," current actions being ramrodded by DM&E's executives reflect that they are fully intent upon pushing forward at all costs. These efforts include an attempt to change the law in South Dakota to make it easier for DM&E to force the landowners to sell their land to DM&E even though DM&E has no contractual agreement with any utility and has not yet been able to obtain access to the PRB mines. Had DM&E expended the same amount of corporate energy to create a corporate culture that would have emphasized safety, rather than simply focusing on ways to increase executive compensation, there would have been no reason for the CP to state that "DME is where SOO was in the mid to late 1990's with respect to its safety culture." SIP at 25. As CP also observed (*id.* at 26):

DME has accident and injury rates that are too high, both in absolute terms and in relation to their peers in the rail industry; standards and processes vary, not only between DM&E and IC&E, but within the two companies; safety is not fully integrated into day-to-day business practices; there is little direct employee involvement in safety processes; and the two companies varying policies are either not adequately understood or are not always followed.

Given that very candid assessment, Mayo Clinic looks forward to working with CP. At the same time, however, Mayo Clinic must face the reality that it will take years for CP to correct the situation that it has inherited. For that reason alone, Mayo Clinic respectfully requests the Board to impose the following conditions so as to accelerate the implementation of the safety

measures that CP has promised.

Proposed Conditions

Mayo Clinic's top priority is the well being of Rochester and the safety of its patients and staff. To protect Rochester and to ensure that Mayo Clinic's patients and staff are exposed to the lowest level of risk possible and to ensure that Mayo Clinic remains the world's premier medical destination center and an economic engine for Rochester and the state of Minnesota, while allowing CP to realize the economic benefits of its acquisition of DM&E, the Board is requested to impose the following conditions:

- Applicants shall, immediately following the Board's approval of the instant transaction, install multiple grade separated crossings at mutually acceptable locations. Applicants shall consult with the FRA, Federal Highway Administration (FHWA), appropriate state and local transportation authorities, and the City of Rochester on the design (for example, whether the road would go over or under the rail line), location, and funding of these grade separations. These grade separated crossings should be designed and located to facilitate the movement of emergency vehicles to and from medical facilities providing emergency services in Rochester, including Saint Marys Hospital and Rochester Methodist Hospital, which are both facilities of Mayo Clinic.
- Prior to initiation of project-related reconstruction activities in Rochester, Minnesota, Applicants' upper management shall meet with representatives of Mayo Clinic to consult and coordinate with Mayo Clinic on how best to minimize project-related impacts on the Clinic, including, in particular, the increased transportation of hazardous materials through Rochester.
- Applicants shall, immediately following the Board's approval of the instant transaction, install wayside detectors, such as hot box/loose wheel detectors, to the west and east of Rochester, Minnesota so as to provide timely warning of any potential problem prior to entering the City limits of Rochester.
- Applicants shall, immediately following the Board's approval of the instant transaction, impose speed limits on local hazardous materials traffic of 10 MPH and non hazardous train traffic at 20 MPH.
- Applicants shall, immediately following the Board's approval of the instant transaction, construct fencing, or other appropriate protection, for bike paths and pedestrian crossings and other sound and aesthetic barriers.

- Applicants shall, immediately following the Board's approval of the instant transaction, for non-grade separated road crossings develop and maintain grade crossing protection devices that will allow whistle-free rail operations.
- Applicants shall, immediately following the Board's approval of the instant transaction, establish a protocol with Rochester emergency services that will provide pre-notification of the transportation of hazardous materials through Rochester.
- 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, Minnesota should be covered and/or sprayed to reduce dust and/or dirt contamination.
- Applicants shall negotiate voluntary contractual limitations on the total number of through-traffic trains moving through Rochester with Mayo Clinic and the City of Rochester.

Conclusion

The railroad and Mayo Clinic can and must coexist, but not when the DM&E is operated as it has in the past. Therefore, while Mayo Clinic may look forward with some relief to having CP acquire DM&E and impose an enlightened safety culture at some point in the future, it must also request the Board to impose the reasonable conditions that Mayo Clinic is proposing in order to ensure the immediate well being of both the railroad and Mayo Clinic. Such a request is clearly consistent with basic concepts of prudent risk management as a disastrous derailment and/or release of hazardous materials on the DM&E's track that is adjacent to Mayo Clinic would not be in anyone's best interest.

Respectfully submitted,

Mayo Clinic

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