

**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
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**APPLICANTS' RESPONSE TO COMMENTS
OF THE UNITED STATES DEPARTMENT OF TRANSPORTATION**

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Canadian Pacific Railway Company, *et al* – Control –)
 Dakota, Minnesota & Eastern Railroad Corp. *et al.*) Finance Docket No. 35081
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**APPLICANTS’ RESPONSE TO COMMENTS
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Pursuant to the procedural schedule set forth in *Decision No. 4* served in the above-captioned proceeding on December 27, 2008, Canadian Pacific Railway Company (“CPRC”); Soo Line Holding Company (“SOO Holding”); Dakota, Minnesota & Eastern Railroad Corporation (“DM&E”); and Iowa, Chicago & Eastern Railroad Corporation (“IC&E”) (collectively referred to hereinafter as “Applicants”) respectfully submit this Response to the Reply Comments of the United States Department of Transportation (“USDOT”) filed on April 18, 2008.¹

INTRODUCTION

USDOT’s Reply Comments provide compelling support for approval of the proposed transaction, and denial of virtually all of the pending requests for conditions. Based upon its analysis of the Application (and accompanying testimony), Applicants’ Safety Integration Plan (“SIP”), and the comments filed by other parties on March 4, 2008, USDOT concludes:

¹ *Decision No. 4* likewise designated April 25, 2008 as the date for Applicants’ response to any comments filed by the United States Department of Justice (“USDOJ”). USDOJ has not filed any comments or otherwise participated in this proceeding. Based upon its review of the Application and Supplement (and the accompanying testimony), USDOJ advised Applicants in February 2008 that it did not have competitive concerns regarding the proposed transaction and did not intend to participate as a party to this proceeding. *See Applicants’ Response to Comments* filed April 18, 2008, Appendix P at pp. P3 – P5. USDOJ’s conclusions apparently were not changed by the comments filed by various parties on March 4, 2008.

The proposed consolidation of CP and DM&E meets the statutory standard for approval. The Department will work with the Applicants to accelerate emergency response exercises with Rochester officials, but all other safety-related concerns are already properly addressed by existing or proposed Federal programs and regulations. The instant merger will not substantially reduce competition and thus there is no reason to impose conditions on this basis.

USDOT Reply Comments at 15 (emphasis added). USDOT's conclusions are particularly compelling in light of the fact that they were reached even before USDOT had an opportunity to review Applicants' Response to Comments and Requests for Conditions (which was filed on the same day as USDOT's Reply Comments). Indeed, USDOT reaches virtually the same conclusion as Applicants with respect to every significant issue addressed by USDOT. As discussed below, USDOT's Reply Comments strongly support Applicants' position that the proposed transaction should be approved without the opportunistic (and burdensome) conditions requested by various parties.

I. USDOT'S COMMENTS CONFIRM THAT APPLICANTS' SAFETY PLAN AND EXISTING RAIL SAFETY LAWS AND REGULATIONS FULLY ADDRESS ALL ISSUES RELATING TO SAFE IMPLEMENTATION OF THE PROPOSED TRANSACTION, AND THAT NO FURTHER SAFETY-RELATED CONDITIONS ARE WARRANTED.

USDOT has determined that Applicants' SIP, in conjunction with the extensive scheme of existing federal and state safety and security regulations, fully and appropriately address all safety issues and concerns related to the proposed transaction. Accordingly, USDOT – whose component agencies (including FRA, FHWA, and PHMSA) share primary responsibility for rail safety and security – does “not generally support the conditions sought” by the Mayo Clinic and other commenters. USDOT Reply Comments at 4 (emphasis added).²

² However, based upon concerns expressed by Mayo, USDOT believes that Applicants should work with USDOT to accelerate the timing of emergency preparedness exercises and training

Specifically, USDOT opposes all of the conditions that Mayo asks the Board to impose on future movements of hazardous materials through Rochester, MN, including: (1) that the Board require Applicants to limit the volume of such shipments; (2) that the Board impose speed limits on trains operating through Rochester that are significantly lower than those prescribed by FRA regulations; (3) that the Board require Applicants to install multiple grade-separated crossings and wayside detectors; (4) that Applicants be required to institute whistle-free rail operations in Rochester; and (5) that Applicants be required to provide advance notice of hazardous materials movements through Rochester. USDOT Comments at 3-4. While USDOT acknowledges the risks associated with hazardous materials transportation, it finds that “existing rules and programs, ongoing regulatory proceedings, and the current SIP appropriately address the real risks presented” by the prospective transportation of hazardous materials by Applicants following the proposed transaction. USDOT Comments at 4.

In responding to Mayo’s request that the Board impose special routing restrictions that would apply only to the Rochester area, USDOT explains, “federal regulations have for some time addressed the manner in which rail carriers are to route their hazardous materials traffic for safety and security purposes, and they have every incentive to handle these movements in the safest, most expeditious manner.” *Id.* Moreover, “newly adopted rules will further enhance rail safety and security with respect to the routing of hazardous materials.” *Id.* at 4-5. USDOT opposes Mayo’s proposed condition because “[s]pecial rules for the Rochester area that differ from nationally uniform rules would tend to impair rail safety and security, because no one locale can be isolated from the overall flow of hazardous materials traffic and such rules would distort the analyses on which the new rules depend.” USDOT Comments at 5 (emphasis added).

conducted by Applicants in the Rochester area. DOT Comments at 4, 6. As discussed below, Applicants do not object to this proposal.

USDOT likewise opposes Mayo's request for special speed limits for CPR/DME trains operating through Rochester. As USDOT indicates, train speeds are governed by existing FRA track standards and train speed regulations. USDOT Comments at 5. Contrary to the position taken by Mayo, USDOT observes that "moving hazardous materials through an area as quickly as possible consistent with track standards in fact reduces the likelihood and consequences of accidents." *Id.* Accordingly, USDOT concludes that "there is no legal or policy basis to order reductions in speed in this proceeding." *Id.*

USDOT believes that Mayo's request that Applicants be required to provide advance notice of all hazardous materials shipments through Rochester "would be a poor policy choice." USDOT Comments at 5. USDOT extensively regulates the packaging, labeling and transportation of hazardous materials. Those existing federal regulations, in combination with voluntary measures adopted by rail carriers (including Applicants), have resulted in excellent safety performance by rail carriers moving hazardous materials. *See* USDOT Comments at 6. As USDOT explains, requiring Applicants to furnish advance notice for each carload of hazardous materials moving through one or more local jurisdiction(s) would be costly and burdensome, could lead to information overload for local officials, and might very well pose additional security risks. *See* USDOT Comments at 6; Applicants' Response at 85-87.

USDOT does propose one modification to the SIP, namely that Applicants should work with USDOT to accelerate the timing of emergency preparedness and response training and exercises for local responders in the Rochester area. USDOT Comments at 4, 6.³ USDOT advises the Board that it plans to work with Applicants to modify the SIP to provide that

³ While Mayo expressed a general concern about emergency response training, *none* of its nine requested conditions seeks expedited or additional emergency preparedness or response training for Rochester officials and emergency responders. *See* Mayo Clinic Comments at 20-21.

Applicants will “conduct those exercises no later than sixty days following any regulatory approval of the merger.” USDOT Comments at 6.

Applicants agree with this recommendation. Indeed, Applicants have already offered to provide hazardous materials emergency response training, upon request, to Rochester officials and emergency response personnel. *See* Response Comments at 85; Graham Reply V.S. at 11.⁴ In 2007, the Rochester Hazardous Materials Assessment Team and CPR participated in a full scale response exercise held in Winona, MN. Emergency response training is an important part of CPR’s overall safety plan, and, as DOT indicates, Applicants plan to conduct such training in conjunction with many communities served by the DME. *See* DOT Comments at 6. Assuming Rochester wishes to participate in emergency response training and exercises, Applicants agree to work with DOT and with appropriate Rochester community groups to plan, schedule, and conduct such training and exercises as expeditiously as possible following Board approval of the transaction.⁵ As DOT notes, Rochester may also wish to participate in a DOT program whereby

⁴ Typically, emergency response training is initiated by a request for such training from a community (such as the City of Rochester) served by the carrier. Upon receipt of such a request, CPR works with the community and cognizant government agencies to schedule and conduct training. In some cases, the parties decide to follow up that training with fuller emergency response training exercises. As previously noted, some Rochester emergency response personnel have attended training sessions and participated in a response exercise conducted near Rochester. *See* Graham Reply V.S. at 11.

⁵ Following Board approval of the proposed transaction, Applicants will move as expeditiously as possible to schedule and conduct emergency response training for Rochester emergency response personnel. Assuming appropriate personnel from the City of Rochester are interested and available, Applicants believe they should be able to conduct the thorough emergency response training sessions contemplated by the SIP within 60 days of the effective date of STB approval of the proposed transaction. That training may include classroom sessions, a “table-top” simulation exercise, and hands-on drill training using actual tank cars, other rail cars, and a locomotive. Completion of that training and exercises within 60 days of final approval of the transaction would fully satisfy USDOT’s proposed modification of the SIP. In addition, following completion of the SIP-required training and exercises, Applicants offer to work with the Rochester officials and emergency responders to develop and conduct full emergency response exercises (again, assuming that Rochester officials wish to participate in such exercises)

State and local government officials may receive additional training in emergency preparedness and response to hazardous materials incidents.

Finally, USDOT opposes the conditions proposed by the Minnesota Department of Transportation (“MNDOT”). As USDOT explains, there is an extensive regulatory scheme in place for evaluating, prioritizing, funding and implementing grade crossing improvements. This program, administered by FHWA, “involves States, rail carriers, and others in a cooperative effort to reduce safety hazards at highway-railway grade crossings.” USDOT Comments at 7. Both MNDOT and Applicants participate in this program, and Applicants are committed to continued cooperation with MNDOT and other government agencies to address grade crossing safety issues through this well-established program. *See Applicants’ Response* at 52-55. USDOT concludes that “there is no basis to depart from the above [FHWA-administered grade crossing safety] approach and grant a condition giving exclusive authority to MinnDOT to prescribe grade crossing measures throughout the State.” USDOT Comments at 8.

II. USDOT OPPOSES EACH OF THE CONDITIONS PROPOSED BY KANSAS CITY SOUTHERN RAILWAY COMPANY AND MUSCATINE POWER AND WATER.

USDOT’s Reply Comments strongly support Applicants’ position that the proposed transaction will not lead to a reduction in rail competition. Based upon its analysis of the record, USDOT concludes that no conditions are necessary or appropriate to preserve competitive transportation options for shippers. Indeed, far from harming rail shippers or reducing their

in 2009. Unlike the training (including exercises and drills) contemplated by the SIP, full emergency response *exercises* involve very significant planning and coordination between a number of local, state, and federal agencies and personnel (including appropriate emergency responders, local government officials and other members of potentially affected communities), Applicants, and other interested parties. That process typically takes several months. If Rochester officials are interested, CPR and DME will use their best efforts to work with Rochester officials to develop, plan, and schedule such exercises in 2009, promptly after the completion of foundational emergency response training.

competitive options, USDOT finds that the proposed transaction may open new markets and improve efficiency for DME-served shippers.

The record reflects that the proposed merger holds the potential to open new markets for grain shippers currently served by the DM&E, while at the same time offering efficient single-line service options to those same shippers where none existed previously. . . . There will be no significant loss of rail competition because there is minimal overlap between CP and DM&E, and where the two carriers connect there will remain at least two rail options.

USDOT Comments at 10.

USDOT opposes KCS' request that the Board rewrite two privately negotiated agreements between KCS and IC&E (USDOT Comments at 10):

DOT opposes a condition to make permanent either of the agreements between KCS and DM&E/IC&E. These commercial arrangements resolve no competitive problems, but are designed to promote effective marketing between the parties. CP as successor in interest to DM&E will have to fulfill the terms of the agreements to the same extent as that carrier must now.

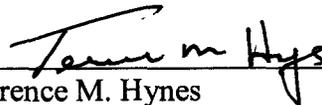
Id. (emphasis added).

USDOT likewise does not support Muscatine Power and Water's ("MPW's") request for conditions that would maintain in perpetuity DME interchange points with BNSF and UP, for transportation of coal to MPW electric power plants. Noting that "[t]here was no cognizable competitive harm posed to [MPW] in the DM&E/IC&E merger [much less in the current transaction]" (USDOT Reply Comments at 14), USDOT concludes that there is "no basis" for the Board to impose the condition sought by MPW (*id.*). Rather, USDOT (correctly) states that any dispute arising out of MPW's existing agreement with DME "will be a matter for the parties to resolve." *Id.*

CONCLUSION

USDOT's Reply Comments demonstrate that the proposed transaction meets the statutory standards for approval, and that no commenter has demonstrated the need for any condition, either to remedy any competitive harm that might result from the transaction or to ensure that the transaction is implemented safely. Accordingly, the proposed transaction should be approved without conditions.

Respectfully submitted,



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Dated: April 25, 2008

CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing Applicants' Applicants' Response To Comments Of The United States Department Of Transportation to be served by first class mail, postage prepaid, this 25th day of April 2008, on all parties of record and the following persons:

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