

June 9, 2008

VIA E-FILING

The Honorable Anne K. Quinlan
Acting Secretary
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423-0001

Re: STB Finance Docket No. 35081
*Canadian Pacific Railway Company, et al. – Control – Dakota Minnesota &
Eastern Railroad Corp., et al.*

Dear Acting Secretary Quinlan:

The Mayo Clinic hereby requests that the Board clarify that it will accept briefs in the above-referenced proceeding. We also request that the Board schedule a public hearing and/or oral argument in this proceeding.

The Board in Decision No. 3 (Notice of Proposed Procedural Schedule and Request for Comments, served November 26, 2007) and Decision No. 4 (Notice of Acceptance of Application; Issuance of Procedural Schedule, served December 27, 2007), clearly contemplated that briefs might be necessary when it set a due date of July 2, 2008 for the filing of final briefs. The Board has also determined that this is a significant transaction (Decision No. 2, Notice that the Board has Accepted as a Pre-filing Notice the Submission Tendered as an Application by Canadian Pacific Railway Corporation, *et al.* to Acquire Control of DM&E, *et al.* and that the Transaction is “Significant,” and Directed Applicants to Submit a Proposed Procedural Schedule, served November 2, 2007), which requires heightened factual and legal scrutiny. The record presents the Board with complex factual and legal issues involving safety, security, and competition that warrant further clarification. For example, the recent statements by the applicants that the acquisition will, in fact, result in significant increases in the transportation of hazardous materials calls into question the applicants earlier submissions, on which the Board and the Department of Transportation relied. Clarification of the implications of this recent and dramatic change in the evidentiary record is clearly warranted.

The proposed acquisition also raises significant issues about the safety and security threats posed by the rail transportation of hazardous materials -- particularly poisonous by

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inhalation materials involved in this proceeding -- that Congress (*see e.g.* the “Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. 110-53, 121 Stat. 266, Aug. 3, 2007, Title XV, Subtitle B “Railroad Security” codified at 6 U.S.C. § 1161 *et seq.*) and the Departments of Transportation and the Department of Homeland Security have made clear constitute a serious safety and security risk. *See e.g.*, Department of Transportation, Pipeline and Hazardous Materials Safety Administration, Interim Final Rule, “Hazardous Materials: Enhancing Rail Transportation Safety and Security for Hazardous Materials Shipments,” 73 Fed. Reg. 20752-20773 (April 16, 2008), which governs the transportation of hazardous materials at issue in this proceeding. Specifically, the PHMSA in the preamble to the final rule found that:

Shipments [of hazardous materials] frequently move through densely-populated or environmentally-sensitive areas, where the consequences of an incident could be loss of life, serious injury, property damage, and/or significant environmental damage. . . . The same characteristics of hazardous materials that cause concern in the event of an accidental release also make them attractive targets for terrorism or sabotage. . . . A primary safety and security concern related to the rail transportation of hazardous materials is the prevention of catastrophic release or explosion in proximity to densely populated areas . . . Also of major concern is the release or explosion of rail cars in close proximity to iconic buildings, landmarks, or environmentally significant areas. . . . The causes of intentional and unintentional releases of hazardous material are very different; however, in either case, the potential consequences of both releases are significant.

73 Fed. Reg. at 20752, emphasis added. *See also* Department of Transportation, Federal Railroad Administration, Notice of Proposed Rulemaking, “Railroad Safety Enforcement Procedures: Enforcement, Appeal and Hearing Procedures for Rail Routing Decisions,” 73 Fed. Reg. 20774 (April 16, 2008); Department of Transportation, Pipeline and Hazardous Materials Safety Administration, Notice of Proposed Rulemaking “Hazardous Materials: Improving the Safety of Railroad Tank Car Transportation of Hazardous Materials,” 73 Fed. Reg. 17818 (April 1, 2008); and Department of Homeland Security, Transportation Security Administration, Notice of Proposed Rulemaking, “Rail Transportation Security,” 71 Fed. Reg. 76852 (Dec. 21, 2006).

The application of these latest regulatory requirements to the safe and secure rail transportation of hazardous materials in order to prevent a catastrophic release or explosion is clearly the type of issue that should be considered by the Board as part of a public hearing and/or oral argument. Both Congress and the responsible Departments of the Federal government have made it clear that the transportation of hazardous materials is a significant public threat that warrants careful analysis and consideration. The previous approach to evaluating these threats was considered to be inadequate. The Board must, therefore, evaluate the current application – and the need for appropriate conditions to address the safety and security threats to Mayo Clinic – in light of these new requirements. At a minimum, the legal obligations of rail carriers and

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government agencies to select the safest and most secure route for the transportation of hazardous materials is appropriate for additional briefing. A public hearing and/or oral argument, as well as final briefs, would clearly assist the Board in making its final decision. In this regard, we agree with the position of the Kansas City Southern Railway Company that final briefs and a public hearing and/or oral argument “should not be used as the means by which parties are able to add to the evidentiary record.” (*See* Letter from William A. Mullins to Anne K. Quinlan, June 4, 2008).

For the foregoing reasons, Mayo Clinic respectfully submits that the Board should schedule a public hearing and/or oral argument and clarify that it will accept final briefs in this proceeding.

Sincerely,

C. Dean McGrath, Jr.

cc: Parties of Record

Certificate of Service

I hereby certify that I have caused a true and correct copy of the foregoing "Mayo Clinic Reply in Opposition to Applicants' Motion to Establish a Procedural Schedule and Request for a Determination that the Application is Incomplete" to be served by first class mail, postage pre-paid, this 25th day of October 2007, on the following:

Terence M. Hynes, Esq.
Sidley Austin LLP
1501 K Street, NW
Washington, DC 20005

Christopher A. Mills
Slover & Loftus
1224 Seventeenth Street, NW
Washington, DC 20036-3003

Scott T. Bannister
Iowa Northern Railway Company
Paramount Office Building
305 Second Street, SE
Suite 400
Cedar Rapids, IA 52401

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

Gerald W. Fauth III
GW Fauth & Associates Inc.
116 South Royal Street
Alexandria, VA 22314

Stacey Drentlaw, Esq.
Oppenheimer Wolff & Donnelly LLP
45 South Seventh Street, Suite 3300
Minneapolis, MN 55402

Robert P. Vom Eigen
Foley & Lardner, LLP
3000 K Street, NW
Suite 500
Washington, DC 20008

Thomas F. McFarland, Esq.
Thomas F. McFarland, PC
208 South LaSalle Street
Suite 1890
Chicago, IL 60604

John D. Heffner, Esq.
John D. Heffner, PLLC
1750 K Street, NW, Suite 350
Washington, DC 20006
David K. Johnson
Iowa Traction Railroad
P.O. Box 309
Mason City, IA 50402

Adrian L. Steel, Jr., Esq.
Mayer Brown LLP
1909 K Street, NW
Washington, DC 20006
Michael Noland
Metra
547 W. Jackson Boulevard
Chicago, IL 60661

William A. Mullins, Esq.
Baker & Miller PLLC
2401 Pennsylvania Ave., NW
Suite 300
Washington, DC 20037

Mark H. Sidman
Weiner Brodsky Sidman Kider PC
1300 19th Street, NW, Fifth Floor
Washington, DC 20036

William Sippel
Fletcher & Sippel
29 North Wacker Drive, Suite 920
Chicago, IL 60606-2875

Terry J. Voss
Ag Processing Inc.
P.O. Box 2047
Omaha, NE 68103-2047

Joseph J. Plaistow
L.E. Peabody & Associates, Inc.
1500 Duke Street, Suite 200
Alexandria, VA 22314

Michael L. Rosenthal
Covington & Burling, LLP
1201 Pennsylvania Ave., NW
Washington, DC 20004-2401

Peter J. Shudtz, Esq.
Csx Transportation, Inc.
500 Water Street
Jacksonville, FL 32202

Richard A. Allen
Zuckert Scoutt & Rasenberger LLP
888 Seventeenth Street, NW, Suite 700
Washington, DC 20006-3309

Neil Volmer
Iowa Department of Transportation
800 Lincoln Way
Ames, IA 50010

John V. Edwards
Norfolk Southern Corporation
Three Commercial Place
Norfolk, VA 23510

Andrew P. Goldstein, Esq.
McCarthy, Sweeney & Harkaway, PC
2175 K Street, NW, Suite 600
Washington, DC 20037

James W. Brennan
Empire Wholesale Lumber Company
P.O. Box 1248
Bath, OH 44210

John H. Leseur
Slover & Loftus
1224 17th Street, NW
Washington, DC 20036-3003

Nicholas J. Dimichael
Thompson Hine LLP
1920 N Street, NW, Suite 800
Washington, DC 20036

Stan Walk
Mitchell County Board of Supervisors
508 State Street
Osage, IA 50461-1229

Karla L. Engle
South Dakota Department
of Transportation
700 East Broadway Avenue
Pierre, SD 57501

Crenna Brumwell
City of Dubuque
Harbor View Place, Suite 330
300 Main Street
Dubuque, IA 52001

Kathleen Chung
Wisconsin Department of
Transportation
P.O. Box 7910
Madison, WI 53707-7910

Harry Bormann
CP Soo Iowa Minnesota Shippers
Association
PO Box 49
West Bend, IA 50597

Jeffrey O. Moreno
Thompson Hine LLP
1920 N Street, NW, Suite 800
Washington, DC 20036-1600
Michael F. McBride
Leboeuf Lamb Greene & MaCrae LLP
1101 New York Avenue, NW
Washington, DC 20005-4213

Eric Von Salzen
Hogan & Hartson
555 Thirteenth Street, NW
Washington, DC 20004-1109

James B. Dougherty
700 3rd St., SW
Washington, DC 20024

Paul A. Cunningham
Harkins Cunningham LLP
1700 K Street, NW, Suite 400
Washington, DC 20006-3817

William Gardner
Minnesota Department of Transportation
Office of Freight and Commercial
Vehicle Operations
395 John Ireland Blvd.
St. Paul, MN 55155-1899

Paul Samuel Smith
U.S. Department of Transportation
1200 New Jersey Avenue, SE
Washington, DC 20590

Mark A. Ostrem
Olmsted County
151 4th St. SE
Rochester, NY 55904

Gordon P. MacDougall
1025 Connecticut Avenue, NW, Suite 919
Washington, DC 20036-5444

Steven D. Strege
North Dakota Grain Dealers Association
118 Broadway 606 Black Building
Fargo, ND 58102

Brendon P. Fowler
Kirkpatrick and Lockhart LLP
1601 K Street, NW
Washington, DC 20036-1221

Rodney J. Nilsestuen
Wisconsin Department of Agriculture,
Trade and Consumer Protection
P.O. Box 8911
Madison, WI 53708-8911
Michael S. Wolly
Zwerdling Paul Leibig Kahn & Wolly
1025 Connecticut Ave., NW, Suite 712
Washington, DC 20036

Terry L. Adkins
Rochester City Attorney
201 4th Street, SE, Room 247
Rochester, MN 55904-3780
Jim Peterson
North Dakota Wheat Commission
4023 State Street
Bismarck, ND 58501-0690
Barbara C. Robinson
U.S. Department of Agriculture
1400 Independence Ave., S.W.
Room 1098-South Building
Washington, DC 20250-0264
Michael C. Van Milligen
The City of Dubuque
City Hall 50 West 13th Street
Dubuque, IA 52001

Paul A. Hemmersbaugh
Sidley Austin LLP
1501 K Street, NW
Washington, DC 20005

James H.M. Savage
1750 K St., N.W.
Suite 350
Washington, DC 20006

Bruce I. Knight
U.S. Department of Agriculture
Marketing and Regulatory Programs
1400 Independence Ave., S.W.
Washington, DC 20250

Tom O'Connor
Snively King Majoros O'Connor &
Lee, Inc.
1111 14th Street, NW
Suite 300
Washington, DC 20005

Dennis W. Towner
Utu Local 911
715 D Maple Hills Dr. E

Richard S. Edelman
O'donnell, Schwartz and Anderson, P.C.
1300 L Street, NW, Suite 1200
Washington, DC 20005
Charles Cott
Mfa Incorporated
201 Ray Young Drive
Columbia, MO 65201-3599
D.J. Gribbin
US Department of Transportation
1200 New Jersey Avenue, SE
Washington, DC 20590

Peter J. Shudtz
Csx Corporation
1331 Pennsylvania Ave., NW
Suite 560
Washington, DC 20004

Mike Pulaski
The Committee for a Safer Pierre and
Fort Pierre
1323 West Capitol Avenue
Pierre, SD 5750

Tom Lovlien
Boise Cascade Wood Products
P.O. Box 62
Boise, ID 83702-5389

Rose-Michele Nardi
Weiner Brodsky Sidman Kider PC
1300 19th Street, NW, Fifth Floor
Washington, DC 20036

John Grass
Tyson Foods Inc.
2210 W Oaklawn Dr.
Springdale, AZ 72762

Gerald Aftem
519 14th Street, NW
Minot, ND 58701

Maplewood, MN 55117
Russell E. Bragg
O.K. Transportation, Incc.
P.O. Box 810
Muldrow, OK 74948

Larry Prince
Stepan
22 West Frontage Road
Northfield, IL 60093

David W. Nutt
J. W. Nutt Co.
P.O. Box 15790
North Little Rock, AR 72231-5790

30209504.1