

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 35081

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

AGENCY: Surface Transportation Board.

ACTION: Decision No. 2 in STB Finance Docket No. 35081; Notice of Receipt of Prefiling Notification.

SUMMARY: The Surface Transportation Board (Board) has reviewed the submission filed October 5, 2007, by Canadian Pacific Railway Corporation (CPRC), Soo Line Holding Company, a Delaware Corporation and indirect subsidiary of CPRC (Soo Holding), Dakota, Minnesota & Eastern Railroad Corporation (DM&E), and Iowa, Chicago & Eastern Railroad Corporation, a wholly owned rail subsidiary of DM&E (IC&E). The submission is styled as an application seeking Board approval under 49 U.S.C. 11321-26 of the acquisition of control of DM&E and IC&E by Soo Holding (and, indirectly, by CPRC). This proposal is referred to as the “transaction,” and, for ease, CPRC, Soo Holding, DM&E, and IC&E are referred to collectively as “Applicants.”

The Board finds that the transaction would be a “significant transaction” under 49 CFR 1180.2(b). The Board’s rules at 49 CFR 1180.4(b) require that applicants give notice 2 to 4 months prior to the filing of an application in a “significant” transaction. Because Applicants did not file the required prefiling notification before their October 5 submission seeking Board approval of this “significant” transaction, and did not pay the filing fee for a “significant” transaction, their submission cannot be treated as an application at this time. The Board will, however, consider the October 5 submission a prefiling notification and publish notice of it in the Federal Register, which has the effect of permitting Applicants to perfect their application, and provide any supplemental materials or information, on or after **December 5, 2007**.

When filing a prefiling notification, merger applicants in a “significant” transaction must propose a procedural schedule for Board review of their proposed transaction. As part of their tender of an application for a “minor” transaction, Applicants had proposed a procedural schedule that tracks the statutory deadlines for processing “minor” applications. Because the Board finds the proposed transaction to be “significant,” Applicants must file with the Board no later than **November 13, 2007**, a revised proposed procedural schedule that reflects the Board’s determination that this is a “significant” transaction. The Board will promptly seek public comments on a proposed procedural schedule, with comments due 10 days after publication of the proposed procedural schedule in the Federal Register. Section 1180.4(b) also calls for

merger applicants to indicate in their pre-filing notification the year to be used for the impact analysis required in “significant” transactions. In their October 5 submission, Applicants cite the 2005 Carload Waybill Sample in their market analysis. The Board therefore designates 2005 as the year to be used for impact analysis in the application. In addition, Applicants must submit the difference between the filing fee for a “minor” transaction (which Applicants already have paid) and the fee for a “significant” transaction when they perfect their application on or after **December 5, 2007**.

**DATES:** Applicants must, by **November 13, 2007**, file a proposed procedural schedule with the Board. In addition, Applicants must submit the difference between the filing fee for a “minor” transaction and the fee for a “significant” transaction with or without supplemental information, on or after **December 5, 2007**.

**ADDRESSES:** Any filing submitted in this proceeding must be submitted **either** via the Board’s e-filing format **or** in the traditional paper format as provided for in the Board’s rules. Any person using e-filing should attach a document and otherwise comply with the instructions found on the Board’s website at “www.stb.dot.gov” at the “E-FILING” link. Any person submitting a filing in the traditional paper format should send an original and 10 paper copies of the filing (and also an electronic version) to: Surface Transportation Board, 395 E Street, S.W., Washington, DC 20423-0001. In addition, one copy of each filing in this proceeding must be sent (and may be sent by e-mail only if service by e-mail is acceptable to the recipient) to each of the following: (1) Terence M. Hynes (representing CPRC), Sidley Austin LLP, 1501 K Street, N.W., Washington, DC 20005; and (2) William C. Sippel (representing DM&E), Fletcher & Sippel, 29 North Wacker Drive, Suite 920, Chicago, IL 60606.

**FOR FURTHER INFORMATION CONTACT:** Julia M. Farr, (202) 245-0359. [Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1-800-877-8339.]

**SUPPLEMENTARY INFORMATION:** CPRC is a Canadian corporation whose stock is publicly held and traded on the New York and Toronto stock exchanges. CPRC and its U.S. rail carrier subsidiaries, Soo Line Railroad Company (Soo) and Delaware and Hudson Railway Company, Inc. (D&H), operate a transcontinental rail network over 13,000 miles in Canada and the United States. (CPRC, Soo, and D&H are referred to collectively as “CPR.”) CPR serves the principal business centers of Canada and 14 U.S. states in the Northeast and Midwest. The major commodities transported by CPR include bulk commodities such as grain, coal, sulfur, and fertilizers; merchandise freight including finished vehicles and automotive parts, forest products, industrial products, and consumer products; and intermodal traffic. In fiscal year 2006, the freight revenues of CPR were approximately \$4.4 billion.

DM&E is a privately held Class II rail carrier headquartered in Sioux Falls, SD. DM&E and its subsidiary, IC&E, operate over 2,500 miles of rail lines serving eight U.S. states, including the major Midwestern gateways of Chicago, IL, Minneapolis/St. Paul, MN, and Kansas City, MO. Together, DM&E and IC&E interchange rail traffic with all seven U.S. Class I railroads.

DM&E was created in 1986 from lines formerly owned by Chicago and North Western Transportation Company (CNW) in South Dakota, Minnesota, and Iowa. In 1996, DM&E acquired CNW's Colony Line, running from Eastern Wyoming through Western South Dakota and into Northwestern Nebraska. DM&E subsequently acquired the lines now operated by IC&E from the former Iowa and Minnesota Rail Link in 2002. IC&E owns or operates approximately 1,322 route miles of rail lines that were once part of the CPR system, in Illinois, Minnesota, Missouri, and Wisconsin.

In 2006, the Board granted DM&E authority to construct and operate 282 miles of new railroad lines to serve coal origins in Wyoming's Powder River Basin (PRB). DM&E states that it is currently pursuing the process of acquiring the right-of-way needed to build the PRB line. It must execute agreements with PRB mines on terms for operations by DM&E over their loading track and facilities. DM&E must also secure sufficient contractual commitments from prospective coal shippers to route their traffic over the PRB line to justify the large investment to build it. Finally, DM&E must arrange financing for the project and comply with the environmental conditions imposed by the Board. If the proposed transaction is approved, CPR states that it plans to work diligently with DM&E to accomplish these necessary prerequisites to construction of the proposed PRB line, assuming that the decision is made to build it.

The proposed transaction for which Applicants seek approval involves the acquisition of control of DM&E and IC&E by Soo Holding (and, indirectly, by CPRC).<sup>1</sup> On October 4, 2007, Soo Line Properties Company, a Delaware corporation and wholly owned subsidiary of Soo Holding (Soo Properties), merged with and into DM&E, subject to the voting trust described below. At the time of closing, DM&E shareholders received cash consideration of approximately \$1.48 billion, subject to certain working capital adjustments in accordance with the Agreement and Plan of Merger (Merger Agreement). As part of the \$1.48 billion paid at closing, DM&E and IC&E repaid certain obligations to third party creditors, including \$250 million to the Federal Railroad Administration (FRA). The Merger Agreement provides for future contingent payments by CPR to DM&E's shareholders of up to approximately \$1 billion. Specifically, an additional payment of \$350 million will become due if construction starts on the PRB line prior to December 31, 2025. Further contingent payments of up to approximately \$707 million will become due upon the movement of specified volumes of PRB coal over the PRB line prior to December 31, 2025.

Public Interest Considerations. Applicants contend that the transaction would not result in any lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States. Rather, Applicants state that CPR's acquisition of DM&E and IC&E would be strongly pro-competitive. Most significantly, Applicants note that the transaction would create new single-system rail options where none currently exist. Applicants contend that CPR's plan to invest \$300 million in capital improvements on DM&E's and IC&E's existing lines would enhance safety and the efficiency of their operations, thereby

---

<sup>1</sup> In Decision No. 1 in this proceeding, served September 21, 2007, the Board issued a Protective Order to facilitate the discovery process and establish appropriate procedures for the submission of evidence containing confidential or proprietary information.

strengthening the competitive ability of DM&E and IC&E. Applicants state that this investment would allow DM&E and IC&E to upgrade track, bridges, and other rail facilities and to bring their safety performance closer to CPR standards, thus improving the fluidity of their train operations. The transaction would restore CPR's direct access to the Kansas City gateway, enhancing their ability to compete effectively for rail traffic moving between CPR's current network and points in the U.S. Southwest and Mexico. Applicants assert that the transaction would enable CPR to assist DM&E in possibly bringing to fruition its proposal to introduce a third rail competitor to the PRB, which is currently served by UP and BNSF.

Independent Voting Trust. On October 4, 2007, Soo Properties was merged with and into DM&E. At that time, all the common shares of DM&E were deposited into an independent voting trust, pending Board approval of the proposed transaction, in order to avoid unlawful control of DM&E and IC&E in violation of 49 U.S.C. 11323. On or after the effective date of a Board final order authorizing the transaction, the voting trust would be terminated; DM&E's shares would be transferred to Soo Holding; and DM&E would become a wholly owned subsidiary of Soo Holding (and an indirect subsidiary of CPRC). In the event that the Board does not approve the transaction, Soo Holding would use its reasonable best efforts to sell or direct the trustee to sell the trust interests to one or more eligible purchasers or otherwise dispose of the trust interests during a period of 2 years after such a decision becomes final.

With the exception of the Board's final approval of the transaction, all conditions precedent to closing of the merger have been satisfied.

Environmental Impacts. Applicants contend that the transaction would not result in any increases in rail traffic, train operations, or yard activity that would exceed the Board's thresholds for environmental review in 49 CFR 1105.7(e)(5). Applicants therefore assert that the transaction does not require the preparation of environmental documentation under 49 CFR 1105.6(b)(4). However, Applicants plan to prepare a Safety Integration Plan (SIP) under the Board's rules at 49 CFR 1106 and 49 CFR 1180.1(f)(3) setting out how they would ensure that safe operations are maintained throughout the acquisition-implementation process, if the proposed transaction is approved.

In regard to the environmental impacts of the transportation of DM&E PRB coal trains over the lines of IC&E and/or CPR, Applicants propose that the Board 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 CPR because definitive information regarding the likely volume, destination, and routing of DM&E PRB coal trains beyond DM&E's existing line remains speculative.

The City of Winona, Mayo Clinic, and BNSF Railway Company (BNSF) have filed comments on Applicants' proposed environmental approach. Applicants replied to BNSF's comments. The Board will consider these comments in its review of the transaction; there is no need for the commenters to refile those submissions.

Significant Transaction. The statute and our regulations treat a transaction that does not involve two or more Class I railroads differently depending upon whether or not the transaction would have "regional or national significance." Compare 49 U.S.C. 11325(a)(2),(c) (addressing

“significant” transactions) with 49 U.S.C. 11325(a)(3),(d) (addressing “minor” transactions). Under our regulations, at 49 CFR 1180.2, a transaction is to be classified as “significant” unless the application shows on its face (1) that the transaction clearly would not have any anticompetitive effects, or (2) that any anticompetitive effects would clearly be outweighed by the anticipated contribution to the public interest in meeting “significant” transportation needs.

A transaction classified as “significant” must meet different procedural and informational requirements than one classified as “minor.” For example, Applicants are required to submit more detailed information regarding competitive effects, operating plans and other issues for a “significant” transaction than for a “minor” transaction. 49 CFR 1180.4(c)(2). Responsive applications are not permitted for a “minor” transaction but are allowed for a “significant” transaction. 49 CFR 1180.4(d). The time limit for Board review is shorter for a “minor” transaction and prefiling notification is not required. 49 U.S.C. 11325(d); 49 CFR 1180.4(b). Finally, the filing fee for a “significant” transaction is higher than the fee for a “minor” transaction. 49 CFR 1002.2.

Applicants contend that this transaction should be classified as “minor.” First, they argue that the transaction is pro-competitive due to its anticipated benefits, including (1) creating new single-system rail options where none currently exist, (2) enhancing the safety and efficiency of DM&E’s and IC&E’s operations through CPR’s plan to invest \$300 million in capital improvements on DM&E’s and IC&E’s existing lines, (3) restoring CPR’s direct access to the Kansas City gateway, enhancing its ability to compete effectively for rail traffic moving between CPR’s current network and points in the U.S. Southwest and Mexico, and (4) enabling CPR to assist DM&E in possibly bringing to fruition its proposal to introduce a third rail competitor to the PRB, which is currently served by UP and BNSF.

Second, Applicants assert that the transaction would not result in any lessening of effective rail competition because the networks of Applicants are largely complementary, not competitive. Applicants point to the competitive analysis prepared by their expert as confirmation that none of the stations commonly served by Applicants would lose competitive rail service as a result of the proposed transaction due to a variety of station-specific reasons, including the existence of another competitive option or the fact that one or the other of Applicants is not actively serving the station today. Applicants also state that vertical anticompetitive effects would be non-existent because virtually all of the shortlines that interchange with DM&E have many other interchange routing options.

Mayo Clinic, Iowa Northern Railway Company (IANR), and the Iowa Department of Transportation (IDOT) have filed comments taking issue with Applicants’ proposed designation of the transaction as “minor.” The Mayo Clinic suggests that the Board should compel Applicants to submit “verifiable documentation regarding DM&E’s current revenues to ensure that DM&E does not meet Class I status,” and that, in any event, this transaction would propel DM&E into Class I status.<sup>2</sup> IDOT argues that the geographic scope of the transaction means that

---

<sup>2</sup> Specifically, Mayo Clinic argues that Applicants’ claim that the transaction is “minor” rather than “substantial” serves “to limit the information they had to provide in their application” (continued . . .)

the merger “clearly has regional transportation significance,” and it states that applying the timetable for a “significant” transaction would give it sufficient time to analyze the effects of the deal. IANR argues that Applicants provided inadequate competitive analysis to show clearly that the transaction would not have any anticompetitive effects, or that any anticompetitive effects would clearly be outweighed by the public interest benefits. They maintain that use of larger market areas such as Business Economic Areas (BEAs) would have increased the number of 2-to-1 and 3-to-2 cases of potential loss of competition; that the market analysis failed to consider current competition from extending rail connections or from intermodal truck-rail competition; that the market analysis failed to identify potential vertical foreclosure of short line railroads; and that the market analysis did not sufficiently assess markets where Applicants do not “compete actively.”

In response to IANR’s comments, Applicants argue that their competitive analysis is sufficient to support a “minor” designation. Applicants assert that they provided a station-by-station review of competitive effects, and also provided information about every shortline that could be impacted by this transaction. Moreover, Applicants assert that they have provided the information that would be required if the transaction were classified as “significant,” so that their October 5 submission should be accepted as a complete application regardless of how the transaction is classified.

The purpose of the test articulated in section 1180.2 of the Board’s regulations is to allow the Board to lessen the regulatory burden when “a determination can clearly be made, at the time the application is filed, that the transaction passes muster under” the statute. See RR Consolidation Proced. of Significant Transactions, 9 I.C.C.2d 1198, 1200 (1993) (emphasis in original). It permits the Board to select the most appropriate procedures to apply to a proposed transaction. It is not the purpose of section 1180.2(b) to force the Board to make an advance determination on the extent of the likely competitive effects or to weigh those effects against the public benefits in cases where more information would be helpful. (Any broader reading of the regulation could effectively require a preliminary determination on the ultimate issue in the case even where the Board regards such a determination as premature.)

Here, although Applicants’ submission states that no currently served shipper would become captive as a result of the transaction (i.e., no shipper would have its competitive options reduced from two carriers pre-transaction to one carrier post-transaction), it does not clearly establish that there would be no other anticompetitive effects that might result from the

---

(. . . continued)

and allows “Applicants to avoid scrutiny of various competitive considerations, including whether the proposed transaction will foster a major market extension free and clear of Board scrutiny.” Mayo Clinic’s argument is not well taken because Applicants submitted additional information in their application to comply with the requirements for “significant” transactions, including a market analysis and a more detailed Operating Plan. Furthermore, the Board will not require Applicants to file verification documents as to DM&E’s revenues in this proceeding given the established procedures set forth at 49 CFR 1201 General Instructions 1-1(2) for the classification of railroads.

transaction. For example, it does not contain information that rules out the possibility that there are some shippers whose competitive options would be reduced post-transaction. Nor does it provide details regarding those stations that both Applicants could serve but at which only one Applicant derived revenue from originating or terminating traffic in 2005.

Applicants' submission asserts that there are anticipated benefits associated with the transaction.<sup>3</sup> Based on the information we have about the possible competitive impacts today, we are unable to conclude at this stage that such impacts would clearly be outweighed by the potential benefits. However, our classification of this transaction as "significant" should not be read as any indication of how we might ultimately assess and weigh the benefits and any impacts on competition after development of a more complete record.

The Board considers each proposed transaction based on its unique factual circumstances and our regulatory criteria for classifying transactions. Had Applicants' submission satisfied the criteria for a "minor" designation here, the transaction would have been classified as such even if it differed substantially from other transactions designated as "minor." We also reject arguments that the Board should consider this to be a "major" transaction based on the notion that DM&E and IC&E combined might someday have revenues for 3 consecutive years that would qualify for Class I status.

The Board finds the proposed transaction to be "significant" and is unable to accept the submission as an application now, due to Applicants' failure to provide pre-filing notification and pay the filing fee applicable for a "significant" transaction. Accordingly, the Board will treat Applicants' October 5 submission as a pre-filing notification. Furthermore, the Board designates 2005 as the year to be used for impact analysis because Applicants use the 2005 Carload Waybill Sample in the market analysis in their submission.

Applicants may perfect their application by submitting the remainder of the fee on or after **December 5, 2007**. Pursuant to section 1180.4(b)(2)(v), Applicants may perfect their application with or without supplemental information because they have already submitted sufficient information to substantially comply with the informational requirements for a "significant" transaction. Others who have already participated in this proceeding need not resubmit their previous comments, as the Board will consider what has already been submitted to the extent it remains relevant once an application is perfected.

**PROCEDURAL SCHEDULE.** The Board's determination that this transaction is "significant" necessitates a different procedural schedule than that proposed by Applicants. Metra, Mayo Clinic, and IANR submitted separate filings commenting on Applicants' proposed

---

<sup>3</sup> We do not consider the potential for introduction of another competitor into the PRB as one of those benefits. Applicants state that they have not yet determined whether they would proceed with the construction of that line if this merger is approved.

procedural schedule.<sup>4</sup> Some of the concerns expressed by these parties are moot, given the Board's determination that the transaction is "significant."

In its October 26, 2007 comments, IANR proposes a 270-day schedule starting on December 4, 2007, based on the schedule for a "significant" transaction. In their reply, filed on October 29, 2007, Applicants request that, if the Board treats the transaction as "significant," the Board accept as their application the submission tendered on October 5, 2007, and establish a procedural schedule that would allow the transaction to be approved within the statutory deadline.

Applicants must file with the Board no later than **November 13, 2007**, a revised proposed procedural schedule that reflects the Board's determination that this is a "significant" transaction. The Board will promptly seek public comments on a proposed procedural schedule, with comments due 10 days after publication of the proposed procedural schedule in the Federal Register.

Filing Requirements. Any document filed in this proceeding must be filed **either** via the Board's e-filing format **or** in the traditional paper format as provided for in the Board's rules. Any person using e-filing should attach a document and otherwise comply with the instructions found on the Board's website at "www.stb.dot.gov" at the "E-FILING" link. Any person filing a document in the traditional paper format should send an original and 10 paper copies of the document (and also an electronic version) to: Surface Transportation Board, 395 E Street, S.W., Washington, DC 20423-0001.

Service Requirements. One copy of each document filed in this proceeding must be sent to each of the following (any copy may be sent by e-mail only if service by e-mail is acceptable to the recipient): (1) Terence M. Hynes (representing CPRC), Sidley Austin LLP, 1501 K Street, N.W., Washington, DC 20005; and (2) William C. Sippel (representing DM&E), Fletcher & Sippel, 29 North Wacker Drive, Suite 920, Chicago, IL 60606.

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

---

<sup>4</sup> In its October 18, 2007 reply, Metra requests that the Board delay the due date for the submission of comments, protest, requests for conditions, other opposition, and evidence an additional 2 weeks until January 15, 2008, to allow it sufficient time to negotiate a settlement with Applicants to resolve questions regarding the potential impact the transaction could have on Metra's operations between Elgin, IL, and Chicago over its line, which it shares between Pingree Grove, IL, and Chicago with CPRC and IC&E. Likewise, Mayo Clinic, in its October 24, 2007 reply, states that it supports the request to extend the due date to allow it sufficient time for meaningful negotiations with CPRC.

It is ordered:

1. The submission filed by Applicants on October 5, 2007, in STB Finance Docket No. 35081 is treated as the prefiling notification of the anticipated application.
2. Applicants are directed to supplement the prefiling notification by submitting a revised proposed procedural schedule with the Board no later than November 13, 2007, that is consistent with the Board's determination that this is a "significant" transaction.
3. This decision is effective on November 2, 2007.

Decided: November 2, 2007.

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

Vernon A. Williams  
Secretary