

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. 4 in STB Finance Docket No. 35081; Notice of Acceptance of Application; Issuance of Procedural Schedule.

SUMMARY: The Surface Transportation Board (Board) is accepting for consideration the application filed on December 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 application filed on December 5 seeks 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 CPRC, Soo Holding, DM&E, and IC&E are referred to collectively as “Applicants.”<sup>1</sup>

The Board finds that the transaction is a “significant transaction” under 49 CFR 1180.2(b), and adopts a procedural schedule for consideration of the application, under which the Board’s final decision would be issued by September 30, 2008.

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<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. On October 5, 2007, Applicants submitted an application for the proposed transaction and requested that the Board treat the transaction as a “minor transaction.” In Decision No. 2, served November 2, 2007, and published in the Federal Register on November 8, 2007, at 72 FR 63232-63236, the Board found the proposed transaction to be “significant” and considered the October 5 submission as a prefiling notification, thus allowing Applicants to perfect their application by submitting the difference between the filing fee for a “minor” transaction and “significant” transaction, as well as any supplemental materials or information. On December 5, 2007, applicants submitted the difference in filing fees and other supplemental material. We will refer to the October 5 prefiling notification, as supplemented on December 5, as “the December 5 application.”

**DATES:** The effective date of this decision is **January 4, 2008**. Any person who wishes to participate in this proceeding as a party of record (POR) must file, no later than **January 25, 2008**, a notice of intent to participate if they have not already done so. Descriptions of anticipated responsive applications (including inconsistent applications) and any petitions for waiver or clarification with respect to such applications are also due by **January 25, 2008**. Applicants shall file a proposed Safety Integration Plan (SIP) with the Board's Section of Environmental Analysis (SEA) and the Federal Railroad Administration (FRA) by **February 4, 2008**. All environmental comments must also be filed by **February 4, 2008**, addressed to the attention of SEA. All responsive applications, requests for conditions, and any other evidence and argument in opposition to the application, including filings by DOJ and DOT, must be filed by **March 4, 2008**. Replies to responsive applications, requests for conditions, and other opposition, and rebuttal in support of the application must be filed by **April 18, 2008**. DOJ and DOT will be allowed to file, on the response due date (here, **April 18**), their comments in response to the comments of other parties, and Applicants will be allowed to file a response to any such comments filed by DOJ and/or DOT by **April 25, 2008**. Rebuttals in support of responsive applications, requests for conditions, and other opposition must be filed by **May 19, 2008**. Final briefs, if any, will be due by **July 2, 2008**. If a public hearing or oral argument is held, it will be held on a date to be determined by the Board. The Board will issue its final decision by **September 30, 2008**. For further information respecting dates, see Appendix A (Procedural Schedule).

**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) Secretary of Transportation, 1200 New Jersey Avenue, S.E., Washington, DC 20590; (2) Attorney General of the United States, c/o Assistant Attorney General, Antitrust Division, Room 3109, Department of Justice, Washington, DC 20530; (3) Terence M. Hynes (representing CPRC), Sidley Austin LLP, 1501 K Street, N.W., Washington, DC 20005; (4) William C. Sippel (representing DM&E), Fletcher & Sippel, 29 North Wacker Drive, Suite 920, Chicago, IL 60606; and (5) any other person designated as a POR on the service list notice (as explained below, the service list notice will be issued as soon as practicable).

**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 but has not committed to constructing the line.

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). 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 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.

Financial Arrangements. No new equity securities will be issued in connection with the transaction. The purchase price was funded by CPRC from available cash and credit facilities. In connection with the closing, Soo Holdings advanced \$250 million to DM&E to enable it to repay outstanding indebtedness to FRA. DM&E's obligation to FRA was replaced by an intercompany private loan from Soo Holdings to DM&E in the amount of \$250 million.

Passenger Service Impacts. Applicants state that no commuter or passenger service is provided over the lines currently operated by DM&E. Applicants do not anticipate that any CPR line over which passenger operations are presently conducted would be materially affected by the proposed transaction. Applicants state that CPR's freight train schedules are built around passenger and commuter operations, in order to avoid freight train interference with passenger train service. Applicants further assert that no such line will be downgraded, eliminated, or operated on a consolidated basis as a result of the transaction. The Board notes that both IC&E and CPR share tracks with the Commuter Rail Division of the Regional Transportation Authority (Metra), a commuter rail authority serving the Chicago metropolitan area. The Board also notes that the National Railroad Passenger Corporation (Amtrak) operates over CPR between Minneapolis/St. Paul and Chicago, with heavier traffic between Milwaukee and Chicago.

Discontinuances/Abandonments. Applicants state that they do not presently plan any line abandonments or the elimination of any duplicative facilities in connection with the transaction.

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 (collectively referred to as DME) 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 DME's existing lines would enhance safety and the efficiency of its operations, thereby strengthening the competitive ability of DME. Applicants state that this investment would allow DME to upgrade track, bridges, and other rail facilities and to bring its 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 its 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.

According to the application, the geographic limitations of DME's existing rail network restrict the ability of its shippers to compete in distant end markets for their products. Currently, DME must interchange traffic moving beyond its service territory with other railroads at busy rail gateways, including Chicago, Kansas City, and Minneapolis/St. Paul, thus requiring longer transit times. As a result of the transaction, Applicants state that DME would become part of a transcontinental Class I rail system with direct access to major metropolitan centers of the U.S. Midwest (including Chicago, Detroit, MI, Milwaukee, WI, and Minneapolis/St. Paul), U.S. Northeast (including Buffalo, NY, and Philadelphia, PA), and Canada (including Calgary, Montreal, Toronto, and Vancouver), positioning DME shippers to take advantage of future

opportunities for growth. Applicants state that the new single system routings created by the proposed transaction will give DME shippers—for the first time—direct rail access to all of these potential destinations, enhancing their ability to compete in distant end markets for their products.

Applicants state that CPR shippers would likewise gain the ability to ship products to/from points served by DME on a single-system basis. Specifically, Applicants assert that CPR's acquisition of IC&E's lines would give CPR the ability to participate in the growing transportation of ethanol. Applicants also state that the transaction would give CPR the opportunity to increase its participation in the substantial volume of bentonite clay traffic that originates at the western end of DM&E's system. Applicants state that CPR would also gain greater diversification in the U.S. grain network with IC&E's coverage of Iowa and Southern Minnesota corn origins.

Applicants state that DME and its customers would also benefit from access to CPR's large, modern car and locomotive fleet. The ability to draw upon CPR's fleet of almost 70,000 cars, and improved equipment utilization made possible by coordinating CPR and DME operations, would produce cost savings for DME and help it to meet the needs of its customers. The transaction would also generate substantial benefits for shippers of a variety of commodities, including grain, ethanol, bentonite clay, silica sand, steel, and plastics. In support of this, Applicants submit numerous statements of shippers who testify as to the opportunities for growth, increased access to markets, and improved ability to compete in distant markets, as potential benefits of the proposed transaction.

Applicants assert that the transaction would not result in any lessening of effective rail competition because the transaction is almost entirely "end-to-end," in that there is minimal overlap in Applicants' current rail systems. Applicants note that both CPR and DME operate between Minneapolis/St. Paul and Chicago, but several other rail carriers also operate between those points now, and they will continue to do so if the proposed transaction is approved and consummated. CPR and DME intersect at only four locations: Chicago, St. Paul, Minnesota City, MN, and La Crescent, MN. Thus, Applicants state that the rail networks of CPR and DME are complementary, not competitive. While intermodal shipments and motor vehicles are major commodities of CPR, Applicants argue that DME does not participate in significant volumes of such traffic. Conversely, steel shipments account for a far greater portion of traffic for DME than for CPR.

There are five U.S. states in which both CPR and DME offer rail service (either directly or through a haulage agreement or other commercial arrangement): Illinois, Minnesota, Missouri, South Dakota, and Wisconsin. In Wisconsin, CPR and DME do not serve any common stations. Within Illinois, Minnesota, Missouri, and South Dakota, Applicants believe that 30 stations are commonly served by CPR and DME. Of those 30 stations, ten stations are served by CPR, DME, and one other railroad. Fifteen stations are served by the Applicants and two additional carriers. Five stations, according to the Official Railway Station List (ORSL), are served exclusively by CPR and DME.

Based on the Board's Carload Waybill Sample for the year 2005, Applicants state that none of the five stations exclusively served by CPR and DME would lose competitive rail service as a result of the proposed transaction due to the fact that at least one of the carriers was not active at each station.

Applicants also assert that none of the ten stations served by CPR, DME, and one additional rail carrier (which are located in Illinois, Minnesota, Missouri, and South Dakota) would experience a loss of competitive rail service as a result of the transaction, due to a variety of reasons, including the fact that several stations served solely as a point of interchange for CPR and/or DME. Additionally, according to the Carload Waybill Sample, rail traffic that originated or terminated at several of the stations was not handled by both CPR and DME.

Regarding the 14 short line carriers in DME's service territory, Applicants state that none will be left without competitive routing options involving non-Applicant carriers following the proposed transaction. Thirteen of these short line carriers have the ability to interchange with at least one railroad other than Applicants. One short line carrier, the Iowa Traction Railroad Company, can connect only with IC&E today, so its options would not be affected by the transaction.

In response to comments filed by Iowa Northern Railway Company (IANR) on October 26, 2007, challenging the rigor and completeness of their station-specific analysis, Applicants also submitted an analysis of the impact on geographic (i.e., source or destination) competition, as well as further analysis of possible horizontal competitive issues, by examining Applicants' participation in rail traffic at the Bureau of Economic Analysis Economic Area (BEA) level. Applicants assert that the transaction would not reduce or eliminate source or destination competition for the traffic in which Applicants participate today.

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.

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.

Historic Preservation Impacts. Applicants contend that a historic review is not required for this transaction.

Labor Impacts. Applicants do not anticipate that the transaction would result in any operational changes that would adversely affect any Soo employees. The operational change involving the handling by Soo of traffic between Minnesota City and Chicago would likely have no significant effect on Soo employees because cars moving from or to Minnesota City would simply be added to trains currently operated by Soo over its own lines.

The transaction involves an operational change that would affect the handling of certain DME traffic to and from Chicago, which would affect DME employees in two ways. First, there would be a reduction of two crew starts per day on trains operating on the lines from Waseca, MN, to Nora Springs, IA. This would affect employees who report for work at Waseca and draw their assignments from a crew board maintained there. However, there would be an offsetting addition of two crew starts per day on trains operating from Waseca to Minnesota City, which would be available to employees who report to Waseca. Second, there would be a reduction of four crew starts per day on IC&E because two daily IC&E trains, each requiring two crews, would no longer operate between Nora Springs and Chicago. That reduction would affect IC&E train and engine service employees who currently report for work at Mason City, IA, and Dubuque, IA, and draw their assignments from crew boards maintained at those locations.

Applicants further state that it is possible that, as a result of this operational change, there would be a need for fewer active IC&E train and engine service employees at Mason City and Dubuque, for at least a short time. Because affected IC&E train and engine service employees have seniority covering all of IC&E's territory, they would be entitled, and expected, to take work assignments elsewhere on IC&E. Applicants expect sufficient work to be available on IC&E for all of the carrier's active train and engine service employees.

Applicants state that any carrier employees who are adversely affected by the proposed transaction would be entitled to the benefits of a fair arrangement in accordance with the requirements of 49 U.S.C. 11326. New York Dock Ry.—Control—Brooklyn Eastern District Terminal, 360 I.C.C. 60, aff'd sub nom. New York Dock Ry. v. United States, 609 F.2d 83 (2d

Cir. 1979). Applicants note that neither CPR nor DME has negotiated a protective agreement with any labor organization in connection with the proposed transaction.

**APPLICATION ACCEPTED.** For the reasons outlined in Decision No. 2, the Board finds that the transaction would be a “significant transaction,” under 49 CFR 1180.2(b), and accepts the December 5 application for consideration because it is in substantial compliance with the applicable regulations governing a significant transaction. See 49 U.S.C. 11321-26; 49 CFR 1180. The Board reserves the right to require the filing of additional supplemental information, if necessary for a full record.

**PUBLIC INSPECTION.** The application is available for inspection in the library (Room 131) at the offices of the Surface Transportation Board, 395 E Street, S.W., in Washington, DC. In addition, the application may be obtained from Mr. Hynes (representing CPRC) and Mr. Sippel (representing DM&E) at the addresses indicated above.

**PROCEDURAL SCHEDULE.** On November 13, 2007, Applicants filed a petition to establish a revised procedural schedule as directed by the Board in Decision No. 2. On November 26, 2007, the Board issued a notice of the proposed procedural schedule and requested public comments (Decision No. 3). The Board’s proposed procedural schedule was the same as the Applicants’ proposed procedural schedule, except that the record would close with the filing of briefs on July 2, 2008, and would provide for a possible oral argument or public hearing to be held on a date to be determined by the Board. No comments were received in opposition to the Board’s proposed procedural schedule.

Accordingly, the Board adopts the procedural schedule as previously proposed in Decision No. 3. Under the procedural schedule adopted by the Board: any person who wishes to participate in this proceeding as a POR must file, no later than **January 25, 2008**, a notice of intent to participate; descriptions of anticipated responsive applications (including inconsistent applications) and any petitions for waiver or clarification with respect to such applications are also due by **January 25, 2008**; applicants shall file a proposed SIP with SEA and FRA by **February 4, 2008**; all environmental comments must also be filed by **February 4, 2008**, addressed to the attention of SEA; responsive applications, requests for conditions, and any other evidence and argument in opposition to the application, including filings by DOJ and DOT, must be filed by **March 4, 2008**; replies to responsive applications, requests for conditions, and other opposition, and rebuttal in support of the application must be filed by **April 18, 2008**; DOJ and DOT will be allowed to file, on the response due date (here, **April 18**), their comments in response to the comments of other parties, and Applicants will be allowed to file a response to any such comments filed by DOJ and/or DOT by **April 25, 2008**; rebuttals in support of responsive applications, requests for conditions, and other opposition must be filed by **May 19, 2008**; final briefs, if any, will be due by **July 2, 2008**. Under this schedule, a public hearing or oral argument may be held on a date to be determined by the Board. The Board will issue its final decision by **September 30, 2008**, and that decision will be effective **October 30, 2008**. For further information respecting dates, see Appendix A (Procedural Schedule).

**NOTICE OF INTENT TO PARTICIPATE.** Any person who wishes to participate in this proceeding as a POR must file with the Board, no later than **January 25, 2008**, a notice of

intent to participate, accompanied by a certificate of service indicating that the notice has been properly served on the Secretary of Transportation, the Attorney General of the United States, Mr. Hynes (representing CPRC), and Mr. Sippel (representing DM&E). Notices of intent to participate received to date have been compiled in a preliminary service list, see Appendix B (Preliminary Service List). Parties who have already submitted a notice of intent to participate are not required to resubmit an additional notice.

If a request is made in the notice of intent to participate to have more than one name added to the service list as a POR representing a particular entity, the extra name will be added to the service list as a “Non-Party.” The final list will reflect the Board’s policy of allowing only one official representative per party to be placed as a POR on the service list, as specified in Press Release No. 97-68 dated August 18, 1997, announcing the implementation of the Board’s “One Party-One Representative” policy for service lists. Any person designated as a Non-Party will receive copies of Board decisions, orders, and notices but not copies of official filings. Persons seeking to change their status must accompany that request with a written certification that he or she has complied with the service requirements set forth at 49 CFR 1180.4 and any other requirements set forth in this decision.

**SERVICE LIST NOTICE.** The Board will serve, as soon after **January 25, 2008**, as practicable, a notice containing the official service list (the service-list notice). Parties should review the attached preliminary service list, Appendix B, and notify the Board of any corrections.

Each POR will be required to serve upon all other PORs, within 10 days of the service date of the service-list notice, copies of all filings previously submitted by that party (to the extent such filings have not previously been served upon such other parties). Each POR also will be required to file with the Board, within 10 days of the service date of the service-list notice, a certificate of service indicating that the service required by the preceding sentence has been accomplished. Every filing made by a POR after the service date of the service-list notice must have its own certificate of service indicating that all PORs on the service list have been served with a copy of the filing. Members of the United States Congress (MOCs) and Governors (GOVs) are not parties of record and need not be served with copies of filings, unless any Member or Governor has requested to be, and is designated as, a POR.

**ENVIRONMENTAL COMMENTS.** All environmental comments must be filed by **February 4, 2008**, and addressed to the attention of SEA.

**DESCRIPTIONS OF ANTICIPATED RESPONSIVE APPLICATIONS AND PETITIONS FOR WAIVER OR CLARIFICATION.** Descriptions of anticipated responsive, including inconsistent, applications and petitions for waiver or clarification with respect to such applications must be filed by **January 25, 2008**.

**RESPONSIVE APPLICATIONS, REQUESTS FOR CONDITIONS, AND OTHER OPPOSITION EVIDENCE AND ARGUMENT, INCLUDING FILINGS BY DOJ AND DOT.** All responsive applications, requests for conditions, and any other evidence and argument

in opposition to the application, including filings by DOJ and DOT, must be filed by **March 4, 2008**.

Protesting parties are advised that, if they seek either the denial of the application or the imposition of conditions upon any approval thereof, on the theory that approval (or approval without conditions) would harm competition and/or their ability to provide essential services, they must present substantial evidence in support of their positions. See Lamoille Valley R.R. Co. v. ICC, 711 F.2d 295 (D.C. Cir. 1983).

**REPLIES TO RESPONSIVE APPLICATIONS, REQUESTS FOR CONDITIONS, AND OTHER OPPOSITION, AND REBUTTAL IN SUPPORT OF THE APPLICATION.** Replies to responsive applications, requests for conditions, and other opposition, and rebuttal in support of the application must be filed by **April 18, 2008**.

**REBUTTALS IN SUPPORT OF RESPONSIVE APPLICATIONS, REQUESTS FOR CONDITIONS, AND OTHER OPPOSITION.** Rebuttals in support of responsive applications, requests for conditions, and other opposition must be filed by **May 19, 2008**.

**FINAL BRIEFS AND PUBLIC HEARING/ORAL ARGUMENT.** Final briefs, if any, will be due by **July 2, 2008**. The Board may hold a public hearing or an oral argument in this proceeding on a date to be determined by the Board.

**DISCOVERY.** Discovery may begin immediately. The parties are encouraged to resolve all discovery matters expeditiously and amicably.

**ENVIRONMENTAL MATTERS.** Under both the regulations of the Council on Environmental Quality (CEQ) implementing the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.* (NEPA), and the Board's own environmental rules, actions whose environmental effects are ordinarily insignificant may be excluded from NEPA review across the board, without a case-by-case review. Such activities are said to be covered by a "categorical exclusion," which CEQ defines at 40 CFR 1508.4 as:

[A] category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no effect in procedures adopted by a federal agency in implementation of these regulations . . . and for which, therefore, neither an environmental assessment nor an environmental impact statement is required.

An agency's procedures for categorical exclusions "shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect," thus requiring preparation of either an Environmental Assessment (EA) or an Environmental Impact Statement (EIS). *Id.* See also 49 CFR 1105.6(d). But absent extraordinary circumstances, once a project is found to fit within a categorical exclusion, no further NEPA procedures are warranted.

In its environmental rules, the Board has promulgated various categorical exclusions. As pertinent here, a rail line acquisition is a classification of action that normally requires no environmental review if certain thresholds would not be exceeded.<sup>2</sup> See 49 CFR 1105.6(c)(2)(i). The Board's regulations also provide that historic review normally is not required for acquisitions where there will be no significant change in operations and properties 50 years old and older will not be affected. See 49 CFR 1105.8.

The Proposed Acquisition. Applicants assert in their application that most of the rail lines of DME and CPR are located in attainment areas.<sup>3</sup> They project that the proposed transaction would not increase the level of train operations by more than 1 additional train per day along any segment of the combined CPR-DME system over the next 5 years (by 2012),<sup>4</sup> and therefore maintain that the 3 or 8-train-per-day threshold in the Board's environmental rules would not be met in this case.<sup>5</sup> Applicants assert that their traffic projections account for both (1) traffic that would move beyond DME's service territory on CPR's lines, and (2) projected growth in rail traffic on certain segments of DME lines that would likely occur in any case (e.g., anticipated growth of ethanol production).

Applicants also project only small increases in annual gross ton miles as a result of the proposed transaction, which would be well below the thresholds for preparation of environmental documentation. For example, Applicants maintain that the proposed acquisition would result in an increase of 5,800 carloads of "extended haul" traffic by the year 2010. All of

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<sup>2</sup> The thresholds differ depending on whether a rail line segment is in an area designated as in "attainment" or "nonattainment" with the National Ambient Air Quality Standards established under the Clean Air Act. For rail lines located in attainment areas, environmental documentation normally will be prepared if the proposed action would result in (1) an increase of at least 8 trains per day, (2) an increase in rail traffic of at least 100 percent (measured in annual gross ton miles), or (3) an increase in carload activity at rail yards of at least 100 percent. See 49 CFR 1105.7(e)(5)(i). For rail lines in nonattainment areas, environmental documentation typically is required when the proposed action would result in (1) an increase of at least 3 trains per day, (2) an increase in rail traffic of at least 50 percent (measured in annual gross ton miles), or (3) an increase in carload activity at rail yards of at least 20 percent. See 49 CFR 1105.7(e)(5)(ii).

<sup>3</sup> According to Applicants, the only nonattainment areas where traffic might change as a result of the proposed transaction are in the following counties: Cook and Lake Counties, IL; Lake and Porter Counties, IN; Kenosha, Milwaukee, Racine, and Waukesha Counties, WI; and Lenawee, Monroe, Washtenaw, and Wayne Counties, MI.

<sup>4</sup> Applicants project an increase of 1.5 trains per day with an empty back haul.

<sup>5</sup> Indeed, Applicants state that there could be a reduction in train activity along certain segments as traffic moving in shorter trains run by DME today between Huron, SD, and Chicago (via Owatonna, MN, Nora Springs, IA, and Dubuque) could be consolidated with CPR traffic at Minnesota City and moved to/from Chicago in existing Soo trains that operate between Minneapolis/St. Paul and Chicago.

this increase, Applicants state, would occur on the lines of CPR (either on Soo's lines east of Chicago, or its lines north of Minneapolis/St. Paul). According to Applicants, this modest traffic increase would translate into an increase of about 0.5 million gross ton miles, less than a 50 or 100 percent increase in gross ton miles over any portion of Applicants' rail lines. In addition, Applicants project only a modest increase by 2010 in gross ton miles over CPR's line between Milwaukee and Chicago as a result of the consolidation of DM&E carloads at Minnesota City onto existing CPR trains that operate between Minneapolis/St. Paul and Chicago. Further, Applicants contend that, even if the projected traffic growth that likely would occur regardless of this proposal were considered, the CPR line would only see an increase of about 17 percent (about 503 million gross ton miles), and the increase on the DME lines would be about 8.4 percent in gross ton miles between Davis Junction, IL, and Chicago (approximately 153 million gross ton miles).

Finally, Applicants anticipate only minor increases in rail yard activity.

Historic Review. According to Applicants, the proposed transaction would not involve any line abandonments or elimination of duplicative rail facilities. Any future line abandonment by Applicants would require Board authorization or exemption. Furthermore, Applicants state that they have no new plans to alter or dispose of properties 50 or more years old.<sup>6</sup>

Other Actions.

1. The DM&E PRB Rail Line. In 2006, DM&E obtained authority to build and operate its new rail line into the PRB.<sup>7</sup> Applicants argue that because the Board has already fully

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<sup>6</sup> Applicants note that CPR would make available to DM&E \$300 million to upgrade and rehabilitate its tracks, structures (bridges) and rail facilities. Applicants maintain, however, that the work funded by this investment relates to rail facility improvements that already have been the subject of extensive environmental and historic review by the Board in connection with the DM&E Powder River Basin construction project, authorizing DM&E to build a new 280-mile rail line extension of its current system to reach the PRB area of Wyoming.

Applicants note that the work to be funded by CPR would involve substantially the same type of work, on the same properties, that was reviewed and is being addressed pursuant to the Programmatic Agreement for the DM&E PRB construction case, which sets forth the historic review process for both DM&E's new line and the rehabilitation of DM&E's existing line in South Dakota and Minnesota. Thus, Applicants argue, there is no need for a separate, duplicative historical review for the planned rail line upgrades related to this case.

<sup>7</sup> See Dakota, MN & Eastern RR—Construction—Powder River Basin, 3 S.T.B. 847 (1998) (preliminary consideration); Dakota, MN & Eastern RR—Construction—Powder River Basin, 6 S.T.B. 8 (2002) (first approval), remanded sub nom. Mid States Coalition for Progress v. STB, 345 F.3d 520 (8th Cir. 2003) (requiring further consideration of four environmental issues), reauthorized Dakota, Minnesota & Eastern Railroad Corporation Construction into the Powder River Basin, STB Finance Docket No. 33407 (STB served Feb. 15, 2006), aff'd, Mayo Foundation v. STB, 472 F.3d 545 (8th Cir. 2006) (referred to as DM&E PRB Construction).

considered the environmental impacts of the construction and operation of that line in DM&E PRB Construction—in an environmental review process that encompassed the rehabilitation of DM&E’s existing lines in South Dakota and Minnesota—there is no need for a further environmental review of the same lines considered in DM&E PRB Construction here.

2. The Movement of DM&E Coal Trains Over the Lines of IC&E and CPR. Applicants note that in a separate proceeding the Board previously imposed a condition prohibiting the movement of DM&E’s PRB coal trains over IC&E’s rail lines until an environmental review of the potential impacts of such operations was conducted.<sup>8</sup> Subsequently, the Board determined that an EIS would be needed to comply with this condition.<sup>9</sup> At the request of DM&E, preparation of that EIS was put on hold.

Applicants assert that it would be appropriate to continue to defer preparation of that EIS because it is not possible at this time to evaluate any potential environmental issues that might be associated with the transportation of DM&E PRB coal traffic over the lines of IC&E and/or CPR. Applicants explain that DM&E has not yet secured contracts with shippers for the movement of PRB coal over the newly authorized DM&E PRB line, and that Applicants have not yet made a decision to build it. According to Applicants, in the absence of definitive transportation commitments, the identity of the CPR-DME system’s future coal customers, the volume of coal that would be transported to particular locations, the destinations to which such shipments would move, and the routing of such shipments beyond DM&E’s lines remain speculative. Without such information, Applicants state, it would not be possible for the Board to evaluate in a meaningful fashion the potential environmental impacts of such future coal transportation operations.

At the same time, Applicants recognize the Board’s obligation under NEPA to examine the environmental impacts of the transportation of DM&E PRB coal trains over the lines of IC&E and/or CPR. Accordingly, Applicants propose that the Board impose a condition on any decision authorizing this transaction that would 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 until such time as more definitive information regarding the likely volume and routing of those trains becomes available.

On October 19, 2007, Winona requested that the Board impose environmental mitigation for Winona as part of this acquisition proceeding, or alternatively, that it impose mitigation for Winona in connection with the currently deferred analysis of the movement of DM&E PRB coal trains over the lines of IC&E and/or CPR.

On October 24, 2007, BNSF submitted comments asserting that the application is incomplete because it fails to address the environmental effects of CPR’s acquisition of DM&E’s

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<sup>8</sup> Iowa, Chicago & Eastern Railroad Corporation—Acquisition and Operation Exemption—Lines of I&M Rail Link, LLC, STB Finance Docket No. 34177 (STB served July 22, 2002), modified (STB served Oct. 18, 2006) (IC&E).

<sup>9</sup> See IC&E; STB Press Release No. 07-07, available on the Board’s website.

authority to construct a new rail line into the PRB. Further, according to BNSF, the Board would not meet its NEPA obligations by deferring its environmental review of the effects of DM&E PRB coal traffic operating over the IC&E and/or CPR lines. BNSF asserts that the entire acquisition – both rail traffic moving now and DM&E PRB coal traffic that might eventually move over IC&E and/or CPR lines – should be examined now and together.

On October 24, 2007, as noted previously, Mayo Clinic filed a reply alleging that the Board should compel the Applicants to provide “meaningful information” that addresses the future movement of DM&E PRB coal trains through Rochester, MN, where the Mayo Clinic is located; that now is the time to address the potential increase in DM&E PRB coal traffic (and ethanol traffic) moving through Rochester; and that the Board should require the Applicants to prepare a SIP pursuant to the Board’s regulations at 49 CFR 1106.

On October 29, 2007, Applicants filed a reply to BNSF’s environmental comments.

Preliminary Conclusions. Based on the information provided to date and after consultations with SEA, the Board preliminarily concludes that, for the reasons discussed below, the environmental review process proposed by Applicants would allow the Board to meet its NEPA obligations. Specifically, the Board preliminarily determines that an environmental and historic review for the proposed acquisition is not warranted because it does not appear that the thresholds triggering an environmental review would be met, and there is nothing in the available environmental information to indicate the potential for significant environmental impacts resulting from the proposed acquisition.

With respect to the handling of DM&E PRB coal trains over the lines of IC&E and/or CPR, the Board preliminarily concludes, based on the available information, that there is no need to conduct any further environmental review here of the rail lines considered in DM&E PRB Construction,<sup>10</sup> and that the Board should defer the preparation of environmental documentation on routing DM&E PRB coal traffic over the rail lines of IC&E and/or CPR (including the consideration of mitigation for Winona) until more information is available.

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<sup>10</sup> Mayo Clinic’s suggestion that the Board should look again at DM&E’s movement of PRB coal traffic through Rochester ignores the extensive environmental review of those movements (at traffic levels of up to 100 million tons of PRB coal per year) that has already taken place. See DM&E PRB Construction (imposing extensive mitigation for Rochester and the Mayo Clinic to minimize the potential impacts of that traffic). Moreover, even if there is a potential for more than the 100 million tons of coal per year analyzed in DM&E PRB Construction, there is no basis for Mayo Clinic’s assumption that all of this traffic would move through Rochester, given the numerous interchange points on DM&E’s existing system.

DM&E’s movement of ethanol would likely take place regardless of the proposed acquisition and, therefore, does not require NEPA review in this case or the DM&E PRB Construction case.

BNSF's assertion that the application is incomplete because it does not adequately describe the potential environmental effects of running DM&E PRB coal trains over the IC&E and/or CPR rail lines ignores the fact that sufficient information does not appear to be currently available to conduct a meaningful environmental review now. Applicants state that they have not yet made a decision to build the new PRB line approved in DM&E PRB Construction. They note that numerous steps (including acquisition of the right-of-way and agreements with PRB mines) would have to be completed before the project would be justified. Moreover, it does not appear that there would be any harm to interested persons, potentially affected communities, or to the environment by deferring the environmental review because the Board would preclude Applicants from operating any DM&E PRB coal trains over lines of IC&E and/or CPR until the Board conducts an appropriate environmental review and issues a final decision addressing the impacts of such coal train operations and allowing such operations to begin.<sup>11</sup>

Specifically, Applicants proposed two environmental conditions to address the potential movement of DM&E PRB coal trains operating over the lines of IC&E and/or CPR. After reviewing the application, the Board preliminarily intends to impose the following modified conditions on any decision authorizing the proposed transaction:

Applicants may not transport coal unit trains originating on the new rail line approved for construction in DM&E PRB Construction over lines currently operated by IC&E and/or CPR until the Board has prepared an Environmental Impact Statement, and has issued a final decision addressing the environmental impacts of such coal operations and allowed such operations to begin.

Prior to commencing any construction of the new rail line approved in DM&E PRB Construction, Applicants shall notify the Board of Applicants' intent to begin construction, and shall submit to the Board reasonably foreseeable projections regarding the movement of DM&E PRB coal traffic on the rail lines of IC&E and/or CPR, so that the environmental review can begin.

Finally, regarding Mayo Clinic's argument that preparation of a SIP is warranted here, Applicants expressly state in their application that they intend to prepare a SIP and submit it to the Board. Under the Board's SIP rules, Applicants are to file a proposed SIP with SEA and FRA within 60 days of the filing date of the application, setting out how they intend to ensure that safe operations are maintained throughout the acquisition implementation process. 49 CFR 1106.4(a). Accordingly, the procedural schedule requires the proposed SIP to be filed no later than **February 4, 2008**.

The proposed SIP is normally part of the environmental record, is reviewed by SEA, and is put out for public review and comment during the environmental review process. 49 CFR 1106.4(b). If the Board authorizes the proposed transaction and adopts the SIP, the Board requires compliance with the SIP as a condition to its authorization. 49 CFR 1106.4(b)(4). The

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<sup>11</sup> The Board's environmental review process will provide ample opportunity for all to participate.

Board's rules also specifically provide that, in cases where no formal environmental review is required under NEPA, the Board will develop appropriate case-specific SIP procedures based on the facts and circumstances presented. 49 CFR 1106.4(c). Thus, the SIP process will take place here whether or not preparation of an EA or EIS is found to be warranted for the proposed transaction.

The Board is requesting comments from all interested parties on these preliminary determinations regarding how to handle the environmental review here. Environmental comments must be submitted to the Board by **February 4, 2008, addressed to the attention of SEA**. SEA will make a final recommendation to the Board regarding the level of environmental review that is needed to meet the Board's NEPA responsibilities, and how to conduct the SIP process, after considering any public comments received during the environmental comment period.

**FILING/SERVICE REQUIREMENTS.** Persons wishing to participate in this proceeding must file with the Board and serve on other parties: a notice of intent to participate (due by **January 25, 2008**) and a certificate of service indicating service of prior pleadings on persons designated as PORs on the service-list notice (due by the 10th day after the service date of the service-list notice). Such persons may file responsive applications, requests for conditions, and any other evidence and argument in opposition to the application (due by **March 4**); and any replies to responsive applications, etc. (due by **April 18**), any rebuttal in support of responsive applications, etc. (due by **May 19**), and any final briefs (due by **July 2**).

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. 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) Secretary of Transportation, 1200 New Jersey Avenue, S.E., Washington, DC 20590; (2) Attorney General of the United States, c/o Assistant Attorney General, Antitrust Division, Room 3109, Department of Justice, Washington, DC 20530; (3) Terence M. Hynes (representing CPRC), Sidley Austin LLP, 1501 K Street, N.W., Washington, DC 20005; (4) William C. Sippel (representing DM&E), Fletcher & Sippel, 29 North Wacker Drive, Suite 920, Chicago, IL 60606; and (5) any other person designated as a POR on the service-list notice.

**SERVICE OF DECISIONS, ORDERS, AND NOTICES.** The Board will serve copies of its decisions, orders, and notices only on those persons who are designated on the official service list as either POR, MOC, GOV, or Non-Party. All other interested persons are encouraged either to secure copies of decisions, orders, and notices via the Board's website at "www.stb.dot.gov" under "E-LIBRARY/Decisions & Notices" or to make advance arrangements with the Board's copy contractor, ASAP Document Solutions (mailing address: Suite 103, 9332 Annapolis Rd., Lanham, MD 20706; e-mail address: asapdc@verizon.net; telephone number: 202-306-4004), to receive copies of decisions, orders, and notices served in this proceeding.

ASAP Document Solutions will handle the collection of charges and the mailing and/or faxing of decisions, orders, and notices to persons who request this service.

**ACCESS TO FILINGS.** An interested person does not need to be on the service list to obtain a copy of the primary application or any other filing made in this proceeding. Under the Board's rules, any document filed with the Board (including applications, pleadings, etc.) shall be promptly furnished by the filing party to interested persons on request, unless subject to a protective order. 49 CFR 1180.4(a)(3). The primary application and other filings in this proceeding will also be available on the Board's website at "www.stb.dot.gov" under "E-LIBRARY/Filings."

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

It is ordered:

1. The application in STB Finance Docket No. 35081 is accepted for consideration.
2. The parties to this proceeding must comply with the procedural schedule adopted by the Board in this proceeding as shown in Appendix A.
3. The parties to this proceeding must comply with the procedural requirements described in this decision.
4. This decision is effective on January 4, 2008.

Decided: December 21, 2007.

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

Vernon A. Williams  
Secretary

**APPENDIX A: PROCEDURAL SCHEDULE**

September 10, 2007	Motion for Protective Order filed.
September 21, 2007	Protective Order issued.
October 5, 2007	Prefiling notification and Motion to Establish Procedural Schedule filed.
November 8, 2007	Notice of receipt of prefiling notification published in the <u>Federal Register</u> .
November 29, 2007	Proposed procedural schedule published in the <u>Federal Register</u> .
December 5, 2007	Application filed.
January 4, 2008	Board notice of acceptance of application to be published in the <u>Federal Register</u> .
January 25, 2008	Notices of intent to participate in this proceeding due. Descriptions of anticipated responsive applications (including inconsistent applications) due. Petitions for waiver or clarification with respect to such applications due.
February 4, 2008	Proposed SIP to be filed with SEA and FRA. Environmental comments due, addressed to the attention of SEA.
March 4, 2008	All responsive applications, requests for conditions, and any other evidence and argument in opposition to the application, including filings of DOJ and DOT, due.
April 18, 2008	Replies to responsive applications, requests for conditions, and other opposition due. Rebuttal in support of the application due. Response of DOJ and DOT to other parties' comments due.
April 25, 2008	Applicants' response to responsive comments of DOJ and DOT due.
May 19, 2008	Rebuttals to responsive applications, requests for conditions, and other opposition due.
TBD	A public hearing or oral argument may be held.
July 2, 2008	Final briefs, if any, due.

September 30, 2008

Date of service of final decision.

October 30, 2008

Effective date of final decision.

**APPENDIX B: PRELIMINARY SERVICE LIST**

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