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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DOCKET NO. FD 35522

**CSX TRANSPORTATION, INC.—ACQUISITION OF OPERATING
EASEMENT—
GRAND TRUNK WESTERN RAILROAD COMPANY**

**RESPONSE TO COMMENTS SEEKING RECONSIDERATION OR
REOPENING OF BOARD’S DECISION TO TAKE NO ACTION**

CSX Transportation, Inc. (“CSXT”) respectfully submits this response to comments submitted by the Village of Evergreen Park (the “Village”) and Alderman Matthew O’Shea on December 13, 2018 in the above-referenced proceeding.¹ Those comments were submitted three days after the Board released a split decision declining to take further action. *See CSX Transp. Inc. – Acquisition of Operating Easement – Grand Trunk Western R.R. Co.*, STB Docket No. FD 35522 (Dec. 10, 2018) (“December Decision”). While styled as “comments,” these new filings are plainly intended to challenge the Board’s decision to take no further action in this proceeding and to convince the Board to reopen or reconsider the December Decision. Indeed, after declining to offer substantive comments in this proceeding

¹ *See* Comments of The Village of Evergreen Park, *CSX Transp. Inc. – Acquisition of Operating Easement – Grand Trunk Western R.R. Co.*, STB Docket No. FD 35522 (filed Dec. 13, 2018) (“Village Comments”); Letter from Alderman Matthew O’Shea, *CSX Transp. Inc. – Acquisition of Operating Easement – Grand Trunk Western R.R. Co.*, STB Docket No. FD 35522 (filed Dec. 12, 2018).

for over two years, the Village now demands that the Board impose extraordinarily burdensome operating conditions: from requiring every train to clear every grade crossing in less than three minutes to compelling CSXT to construct separated grade crossings at unspecified intersections to demanding strict liability fines for every minute that a gate is down for more than 10 minutes (regardless of cause or circumstance). Village Comments at 11, 13. While some of these requests echo requests for environmental conditions that the Village made and the Board rejected in 2013,² the Village's Comments go even further—even suggesting that the Board should consider the “revocation of CSXT's operating authority on the Line.” *Id.* at 22.³

The Board should not reconsider its December Decision or otherwise reopen this proceeding, for five reasons. First, the Village's Comments fail to identify the “material error, new evidence, or substantially changed circumstances” required by statute to reopen this proceeding. Second, it remains the case that CSXT is not violating any of the conditions under which the Board granted the operating easement over the Elsdon Line. Third, the Village's Comments ignore much of the evidence CSXT has submitted in the last year. Fourth, the extraordinary relief the Village seeks would harm other communities in the Chicago area. And fifth, CSXT

² See *CSX Transp. Inc. – Acquisition of Operating Easement – Grand Trunk Western R.R. Co.*, STB Docket No. FD 35522, at 12-13 (served Feb. 8, 2013) (rejecting Evergreen Park requests for a separated grade crossing at 95th Street).

³ Alderman O'Shea's filing did not formally join in these requests, and instead was designed as a vehicle to submit comments from residents that the Alderman's Office gathered in June 2018.

is continuing to execute its plan to improve the fluidity of operations on the Elsdon and maintain communications with stakeholders.

I. The Village Has Not Met the Statutory Requirement to Reopen or Reconsider a Board Decision.

First and foremost, the Village has offered no basis to reopen this proceeding or to reconsider the December Decision. Under 49 U.S.C. § 1322(c) and 49 C.F.R. § 1115.4, the Board may reopen a proceeding or reconsider a prior decision only because of “material error, new evidence, or substantially changed circumstances.” Moreover, a petition to reopen or reconsider “must state in detail the respects in which the proceeding involves material error, new evidence, or substantially changed circumstances and must include a request that the Board make such a determination.” 49 C.F.R. § 1115.4. The Village neither mentions this standard nor attempts to meet it.

Instead, the Village tries to categorize its filing as a mere late submission and asks the Board to consider it in the interest of a “complete record.” Village Comments at 2, n.1. But even if the Board were inclined to accept a submission as grossly late as this one, its discretion to do so is sharply limited by its governing statute. Once the Board issued the December Decision, section 1322(c) governs any request to alter that decision, and the Board cannot reopen or reconsider simply because a party claims that its untimely comments would complete the record. The statutory standard must be met. *See Burlington N. & Santa Fe Ry. v. STB*, 403 F.3d 771 (D.C. Cir. 2005) (vacating STB decision that failed to apply section 1322(c) standards).

Here, the Village clearly cannot demonstrate “new evidence” or “changed circumstances.” Every piece of evidence cited in or attached to its Comments was available to it in the summer of 2018. *See, e.g.*, V.S. of Senator Bill Cunningham (signed Aug. 13, 2018); V.S. of Rep. Kelly Burke (signed Aug. 15, 2018); Police Report (dated Aug. 22, 2017). Alderman O’Shea’s letter similarly attaches citizen statements compiled many months ago, which all date from June 2018.

Alternatively, the Village suggests that its comments can be considered because Chairman Begeman “invited affected communities to comment on CSXT’s filings.” Village Comments at 1. This is plainly wrong. The context of the Chairman’s statement makes clear that she was speaking of the right of affected communities to comment on the hypothetical future filings that she indicated she would have supported. The Chairman was not asking for a round of new comments on past CSXT filings.

It would be fundamentally unfair to permit the Village to lay in wait until after the STB issues a decision. The Village does not advance any excuse for its delay, and it was plainly aware of the progress of this proceeding. Indeed, the Village filed comments on October 18, 2018 that did not dispute any aspects of CSXT’s reports to the Board and did not hint at any of the arguments the Village is pressing now. *See* Comments of the City of Chicago and Village of Evergreen Park (filed Oct. 18, 2018). The procedures put in place by Congress to govern the orderly and fair process before the STB do not tolerate this kind of litigation strategy. “Reopening is . . . not warranted if pertinent evidence was available before the

agency's decision but was not timely raised.” *Canadian Nat’l Ry. Co. & Grand Trunk Corp. – Control – EJ&E West Co.*, Docket No. FD 35087, at 9 (Sub-No. 8) (Nov. 8, 2012), *citing Friends of Sierra R.R. v. ICC*, 881 F.2d 663, 667 (9th Cir. 1989).⁴

II. CSXT Is Complying With All Conditions of the Transaction.

Even if the Board had the statutory authority to consider the Village’s claims on the merits (which it does not), CSXT is complying with all current conditions on the transaction, and there is no basis for any of the relief that the Village demands. While the Village generally asserts that CSXT is not complying with operating conditions, it tellingly does not identify what conditions on the transaction the Village believes are being violated. *See* Village Comments at 2. The Village’s assertion that CSXT “admits” that it is not complying with the conditions of the transaction is utterly false (and tellingly made without any citation to this alleged “admission”). Village Comments at 16. CSXT is complying and will continue to comply with all current conditions on the transaction.

Indeed, the Village faults CSXT for not achieving levels of performance that are plainly not conditions of the Transaction. For example, it claims that CSXT trains must be required to clear every crossing in 3 minutes or less because of its

⁴ *See also Canadian Nat’l Ry. Co. & Grand Trunk Corp. – Control – EJ&E West Co.*, Docket No. FD 35087 (Sub-No. 8) (served Dec. 21, 2018) (declining to reopen a proceeding where the Board had already considered the arguments raised and where evidence was available prior to, but not included in, the filing of an earlier petition); *Vill. of Barrington v. S.T.B.*, 892 F.3d 252, 267 (7th Cir. 2018); *I.C.C. v. Bhd. of Locomotive Eng’rs*, 482 U.S. 270, 277-78 (1987); *DesertXpress Enters.—Pet. for Declaratory Order*, FD 34914, at 6-8 (STB served May 7, 2010).

expectation in the original Application that trains could operate across the Elsdon Line at 40mph. *See* Village Comments at 11. But the Board has permitted CSXT to withdraw that expectation, which proved to be unrealistic. *See* July 26, 2017 Decision at 4.

The only specific condition on the Transaction that the Village claims is being violated is VM 4, which requires CSXT to “work with other railroads to establish reasonable and effective policies and procedures to prevent other railroads’ trains from interfering with CSXT’s trains on the Elsdon Line.” *See* Village Comments at 12. But the Village’s assertion that “CSXT[]...has made no progress on this front” (*id.*) is incorrect and unsupported. On the contrary, CSXT’s reports to the Board have detailed its work with other railroads to improve operations on the Elsdon and have provided examples of the protocol enhancements that CSXT has made with other railroads.⁵

III. The Village Misstates the Evidence and Fails to Acknowledge Evidence of Progress on the Line.

Many of the Village’s complaints are driven by a failure to acknowledge the extensive evidence that CSXT has provided to the Board and the community about its efforts on the Line. For example, the Village asserts that there is some question about CSXT’s participation in the Chicago Transportation Coordination Office (“CTCO”), and even that CSXT “failed to respond to the Board’s specific request [] for information [that] CSXT participates in the CTCO.” Village Comments at 6-7.

⁵ *See, e.g.*, CSXT Report of Operational Fluidity, at 25-28 (filed May 30, 2017); Response to July 27, 2018 Decision at 24-25, 28-29 (filed August 23, 2018).

That is simply not true; CSXT's December 15, 2017 monthly report states on the first page that "CSXT confirms that it is still participating in the Chicago Transportation Coordination Office." Indeed, CSXT's reports have discussed its continued participation in the CTCO and its use of the CTCO to address specific operational issues. *See, e.g.*, CSXT August 23, 2018 Response to July 27, 2018 Decision at 28-29 (explaining how the CTCO was used to address backups caused by a congested IHB yard).

In the same vein, the Village alleges that CSXT "failed to comply with the Board's directive . . . to present a plan [to] improve operations on the Line." Village Comments at 2. That is not true either—at pages 19 to 31 of its August 23 filing CSXT explained its specific plans to improve performance. It is true that CSXT's plan did not identify a magic bullet that would eliminate every instance where a train occupies a grade crossing for over 10 minutes. But that is because there is no such magic bullet for a line in the Chicago Terminal. As Member Miller observed, "it is indeed unlikely that there are additional, realistic actions CSXT could take that would have a significant impact on blocked crossings on the Elsdon Line, aside from rerouting trains off the Elsdon Line—a step that I believe would likely only create rail congestion elsewhere in the Chicago area." December Decision at 4.

Other claims are based on what is at best a misunderstanding of CSXT's monthly reports. For example, the Village claims that in June 2018 "the at-grade crossing at 95th Street experienced. . . 21 trains stopped for more than 10 minutes." Village Comments at 8 (emphasis added). That is not accurate. Only four trains

were forced to stop at 95th Street during the month of June. The other seventeen trains in the report were all moving trains (and seven of them cleared the crossing in 11 minutes or less). *See* Monthly Report No. 24, at Exhibit 2-A (filed July 16, 2018). And the Village's focus on the June 2018 report fails to acknowledge the specific factors that led to more June 2018 blockages, which CSXT explained to the Board in its monthly report. Specifically, during June 2018 the Elsdon Line hosted a number of additional CN trains that were rerouted to accommodate PTC construction on other CN lines. *See id.* at 2. During June, CSXT was also performing significant work to improve grade crossings on the Elsdon in Evergreen Park. This work required some road closures, which CSXT coordinated with local authorities so as to minimize impact. *See id.* at 6-7. And CSXT also explained that congestion in the BRC Yard that was alleviated in early July had caused some delays in June. *See id.* at 1.

In short, the Village's Comments are based in significant part on what are either misstatements or misunderstandings about what CSXT has done and a failure to acknowledge the steps that it has taken to respond to the Board's and the community's concerns.

IV. The Village's Suggestion that Traffic Be Rerouted from the Elsdon onto Other More Congested Lines is Not Reasonable.

Finally, the Board should not pit the interests of the citizens of the Village against other neighborhoods in Chicago. The draconian conditions sought by the Village would have the practical effect of forcing CSXT to reroute significant traffic off the Line and onto other congested corridors. Indeed, the Village all but admits

that rerouting is its goal when it says that the “obvious solution” to its complaints about the Elsdon is for CSXT to “reroute trains” and that the effect this might have on other lines in the Chicago Terminal “is not the issue.” Village Comments at 16, 19.

While the Village’s demand for preferential treatment at the expense of other Chicago neighborhoods is at least honest, the Board must take a less parochial perspective. It is not in the public interest to force CSXT to divert trains from the Line (or restrict the hours of operations or reduce train sizes) in the pursuit of perfect fluidity on the Elsdon, particularly when those steps would worsen congestion in other neighborhoods in Chicago and damage the overall fluidity of the rail network. (Indeed, the Village’s support for rerouting fails to recognize that many Elsdon trains would have to be diverted to the Blue Island Subdivision, a line with significantly higher volumes—and a line that also runs north-south through the eastern end of Evergreen Park. *See* CSXT August 23, 2018 Response to July 27, 2018 Decision at 15).

The Board does not need to be reminded that Chicago is one of the most congested and challenging rail gateways in America. A train that quickly travels from Los Angeles to Chicago can take days to traverse from one side of Chicago to the other. This summer, CSXT presented un rebutted evidence that fluidity on the Line is on par with other lines in Chicago and that the remaining congestion issues on the Line were not a function of a failure to abide by the conditions of the Transaction, but rather the result of the inherent difficulty of operating though the

Chicago gateway on a Line that also must accommodate CN, UP, and Amtrak trains regularly traversing parts of it, that crosses a number of other rail lines, and that connects with a number of other rail yards. There are therefore no grounds for imposing any of the added conditions sought by the Village.

V. CSXT Is Continuing to Execute Its Plan to Improve the Fluidity of the Elsdon Line and Minimize Adverse Impacts to the Community

In closing, CSXT reaffirms its commitment to operate the Elsdon Line in a way that furthers the transaction's purpose to improve traffic flows in the Chicago Terminal while minimizing inconvenience to the community. In particular, CSXT is committed to executing its plan for improving future performance on the Elsdon Line. As outlined in CSXT's August 23, 2018 submission, CSXT will work closely with the CTCO and other railroads to implement solutions to network inefficiencies; it will explore capital investments that could improve fluidity on the Elsdon Line, such as the recently-funded 75th Street Corridor Improvement Project; it will drive more efficient operations through its new operating management structure; and it will explore opportunities for improvement created through PTC implementation. *See Response to July 27, 2018 Decision at 28-30.*

Moreover, CSXT is committed to continued outreach and regular communications with interested communities and public officials. CSXT's Regional Vice President Tom Livingston continues to serve as a resource and point of contact for communities located along the Elsdon Line (including Evergreen Park and the 19th Ward). His role includes regular communications with localities about planned work on the Line (such as CSXT's recent rebuilds of several grade crossings in

Evergreen Park) and responding to individual concerns about issues with CSXT's operations. Going forward, CSXT pledges to be responsive to inquiries from the community or the Board about operations on the Elsdon Line.

VI. CONCLUSION

For the reasons set forth above, the Board should not reopen or reconsider its decision to take no further action in this Proceeding.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2018, I caused the foregoing Reply of CSX Transportation, Inc., to Comments Seeking Reconsideration or Reopening of Board's Decision to Take No Action, in Finance Docket 35522, *CSX Transportation, Inc.—Acquisition of Operating Easement —Grand Trunk Western Railroad Company*, to be served by first class mail or more expedient method upon all parties of record.


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