

October 4, 2018

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BY E-FILING

Ms. Cynthia Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423-0001

ENTERED
Office of Proceedings
October 4, 2018
Part of
Public Record

**Re: Canadian National Railway Company and Grand Trunk Corporation – Control –
EJ&E West Company [Barrington Petition for Mitigation] (Docket No. FD 35087
(Sub-No. 8))**

Dear Ms. Brown:

Enclosed for filing in the above-referenced docket please find CN's Reply to
Barrington's Motion for Leave to File a Surreply and Response to that Surreply.

Sincerely,

/s/ David A. Hirsh

David A. Hirsh
Counsel for Canadian National Railway Company
and Grand Trunk Corporation

Enclosure

cc: Richard H. Streeter

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 35087 (Sub-No. 8)

**CANADIAN NATIONAL RAILWAY COMPANY AND GRAND TRUNK
CORPORATION — CONTROL — EJ&E WEST COMPANY**

[Barrington Petition for Mitigation]

**CN'S REPLY TO BARRINGTON'S MOTION FOR LEAVE TO FILE A
SURREPLY AND RESPONSE TO THAT SURREPLY**

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October 4, 2018

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 35087 (Sub-No. 8)

**CANADIAN NATIONAL RAILWAY COMPANY AND GRAND TRUNK
CORPORATION — CONTROL — EJ&E WEST COMPANY**

[Barrington Petition for Mitigation]

**CN'S REPLY TO BARRINGTON'S MOTION FOR LEAVE TO FILE A
SURREPLY AND RESPONSE TO THAT SURREPLY**

Barrington seeks leave to file a Surreply in support of its Petition to reopen the Board's 2008 Final Decision. Its proffered Surreply, however, contains no material new evidence that would compel a different result from the Board's 2008 decision that CN's acquisition of the EJ&E rail line should be approved without requiring CN to fund a grade separation in Barrington. Instead, it reiterates arguments the Board has repeatedly rejected, and it mischaracterizes the existing record.

The Board's rule is that "[a] reply to a reply is not permitted."¹ The Board may waive that rule upon a showing of "good cause" and "in the interest of a more complete record."² However, the rule applies when a surreply is not "necessary . . . to complete the record" but merely makes arguments that are "not relevant" to the Board's rationale.³ Barrington's Surreply

¹ 49 C.F.R. § 1104.13(c).

² See, e.g., *Oakland Glob. Rail Enter.—Pet. for a Declaratory Order*, STB Docket No. FD 36168, 2018 WL 3655884, at *2, n.3 (served Aug. 1, 2018).

³ See, e.g., *Consol. Rail Corp.—Abandonment Exemption—in Hudson Cty., NJ*, STB Docket No. AB 167 (Sub-No. 1189X), 2015 WL 2442823, at *5 (served May 22, 2015).

is replete with irrelevant arguments and is not necessary to complete the record in this decade-long, exhaustively argued proceeding. Accordingly, Barrington's motion should be denied.

If the Board grants Barrington's motion, however, then as a matter of fairness and to complete the record, CN respectfully requests that the Board accept the following brief response.

I. BARRINGTON'S SURREPLY AMOUNTS TO AN CLAIM OF MATERIAL ERROR IN THE BOARD'S PRIOR DECISIONS.

Barrington's Surreply is founded on Barrington's continuing disagreement with the Board's basic approach to the Transaction-related increase in risk that emergency response vehicles could be temporarily blocked by trains at at-grade crossings in Barrington. That issue is not new. The Board specifically addressed it by requiring CN to make technology and information available to Barrington to enable its emergency responders to anticipate and route their vehicles around blocked crossings.⁴ Barrington calls the Board's mitigation a "failure,"⁵ and continues to insist that the Board should instead have ordered CN to fund a grade separation because any "alternative routing" of emergency vehicles is "unacceptable"⁶ and "inherently risky,"⁷ and "no technology" is "adequate[]." ⁸ Barrington's claim of "failure" is not based on concerns about the operation of the ACS technology the Board ordered CN to make available to Barrington. Instead, it is a rejection of the Board's prior decision, based on Barrington's position that anything less than a grade separation is unacceptable.⁹

⁴ See 2008 Final Decision at 48-49.

⁵ Surreply at 10.

⁶ *Id.* at 3; see also *id.* at 8.

⁷ *Id.* at Appendix A (VS Darch) at 8.

⁸ *Id.* at 10.

⁹ *Id.* at Appendix A (VS Darch) at 7.

That position, however, is unreasonable and inconsistent with Barrington's repeated claims that a grade separation is only required due to the Transaction.¹⁰ If any and all risk that an emergency vehicle might be delayed at an EJ&E grade crossing were truly unacceptable and had to be eliminated, then it follows that a grade separation was required in Barrington before the Transaction. As the Board found and Barrington has not denied, delays to emergency vehicles occurred before the Transaction.¹¹

As explained in CN's Reply, the Board's approach was, and remains, sound. The Board appropriately required CN to invest in technology and procedures that would "provide the emergency dispatchers with better and more timely information so that they can either take pre-planned alternative routes or dispatch services from alternative facilities when appropriate."¹² The Board reasonably declined to compel CN to spend tens of millions of dollars to grade separate an existing EJ&E road crossing at US Highway 14 in Barrington to reduce the likelihood that an emergency response vehicle could be delayed by a train. The Board thus chose cost-effective means to help minimize the potential increase in delays to emergency vehicles due to blocked EJ&E crossings that could occur after the Transaction.¹³ Barrington's continuing disagreement with that sound approach provides no basis for reopening.

¹⁰ See, e.g., Surreply at 10.

¹¹ See 2008 Final Decision at 49.

¹² *Id.*

¹³ See generally CN Reply at 15-16.

II. BARRINGTON’S SURREPLY PROVIDES NO MATERIAL NEW EVIDENCE THAT WOULD COMPEL A DIFFERENT RESULT ON BARRINGTON’S REQUEST FOR A CONDITION THAT CN FUND A GRADE SEPARATION.

Barrington’s Surreply provides no material new evidence. Instead, it repeats arguments the Board has already rejected and mischaracterizes the record.

Barrington contends that CN did not address the “bottom line reality” that re-routing emergency vehicles due to blocked crossings can cause delay.¹⁴ But the Board thoroughly considered that risk and CN addressed it. For example, CN’s Reply discussed the delays caused by Barrington’s re-routing of ambulances on June 12, explaining that they likely totaled less than 10 minutes and that they could potentially have been reduced had Barrington used ACS or nearby alternative hospitals.¹⁵ That is consistent with the Board’s expectations in its prior decisions that emergency vehicles could incur modest re-routing delays due to the Transaction.¹⁶

Barrington also mischaracterizes the record. Barrington incorrectly states that “CN concluded that the proposed closed-circuit camera system would not work.”¹⁷ The original version of Final Mitigation Condition 18 ordered CN to “consult with all appropriate agencies to implement a CCTV system.”¹⁸ As a result of that consultation, which included discussions with Barrington, a consensus was reached that ACS would provide greater utility to local emergency responders at less expense than CCTV.¹⁹ The Board approved the change from CCTV to ACS in 2010 because of that consensus, and after Barrington expressly consented to the substitution.

¹⁴ Surreply at 3.

¹⁵ See CN Reply at 2-3.

¹⁶ See *generally id.* at 14-16.

¹⁷ Surreply at 2.

¹⁸ 2008 Final Decision at 77.

¹⁹ See CN Reply, Attachment 2 (Kvedaras VS) at 2-3.

Barrington claims that ACS screen shots “may be misleading” because crossing gates are activated for a few seconds before and after a train is at the crossing.²⁰ Yet ACS accurately depicts for emergency responders whether a crossing gate is down and the crossing is blocked. Contrary to Barrington’s suggestion,²¹ emergency responders should never attempt to “get through” an activated gate when a train is a few seconds away. The railroad industry and the Federal Railroad Administration have spent years educating the public on the dangers of vehicles ignoring active crossing warning systems (*e.g.*, driving around activated gates).

Barrington incorrectly claims that CN “has admitted” that “it is incapable of providing real-time information to emergency responders.”²² As CN’s Reply explained, ACS offers accurate, real-time information on crossing gate status to any emergency response unit that uses it.²³ In addition to ACS, CN’s Communications Centre will provide additional information to emergency responders promptly and efficiently once the Communications Centre has that information.

Barrington accuses CN of misleading the Board by characterizing the confluence of events on June 12, 2018 as unusual and unlikely to recur.²⁴ On that day, due to an unexpected mechanical issue, a train stopped at a point where it blocked all four Barrington crossings and required the rerouting of two ambulances that were en route to the hospital. In support of its argument that CN mischaracterized the frequency of these combined events, Barrington Police Chief Dave Dorn’s new Verified Statement cites five instances in the last five years where a

²⁰ Surreply at 6.

²¹ *Id.* at 7.

²² *Id.* at 8.

²³ *See* CN Reply at 3.

²⁴ Surreply at 1-2.

stopped CN train blocked more than one crossing in Barrington.²⁵ However, only two of those instances involved a stopped train that blocked all four crossings in Barrington (Main Street, Hough Street, Northwest Highway, and Lake Zurich Road),²⁶ and in none of those instances does Barrington claim a stopped trains impeded an ongoing emergency response. Far from undermining CN's statement, Barrington's evidence underscores it.

Barrington argues that ACS "is not the answer,"²⁷ based on its claim that some unidentified "other communities have confirmed" they do not use ACS.²⁸ A number of communities, however, have licensed ACS and continue to do so. Whether some other communities on the former EJ&E line do not use ACS has no bearing on how well it works and how useful it can be to emergency responders. Some communities may not need ACS if their emergency responders rarely use at-grade crossings, which is why the Board did not require CN to make ACS available to every community. Indeed, Barrington is the only remaining community covered by Final Mitigation Condition 18, as the other four communities and CN reached voluntary mitigation agreements.

CN has also continued to make efforts to work with Barrington regarding ACS. CN recently renewed its offer to Barrington of a no-fee license to ACS plus free training and technical support as needed.²⁹ After Barrington raised objections to CN's proposed license

²⁵ Surreply Appendix B (VS Dorn) at Exhibit 1.

²⁶ As can be discerned from the relevant blocked crossing reports that CN filed with the Board, on February 9, 2015, and November 8, 2016, the train did not stop on Lake Zurich Road, and, as Chief Dorn acknowledges, on May 30, 2017, the train did not stop on Main Street.

²⁷ Surreply at 4.

²⁸ See Surreply Appendix B (VS Dorn) at 4.

²⁹ CN Reply, Attachment 2 (VS Kvedaras), Exhibit 3 (Aug. 24, 2018 letter from CN to Barrington).

terms, CN's Assistant Vice President and Head of US Public & Government Affairs sent a letter to Mayor Darch on September 27, explaining CN's need for a license agreement and clarifying that signing the license would not waive any of Barrington's rights or prevent it from sharing information with the Board.³⁰ That letter again reiterated CN's offer to work with Barrington on any technical or compatibility issues related to ACS.³¹ However, Mayor Darch declined to engage with CN while its present Petition is pending.³² CN's hope is that after denial of the Petition, Barrington will meet with CN to discuss its concerns. Contrary to Mayor Darch's claim that Barrington has never "expressed interest in ACS since the events of June 12, 2018,"³³ as CN's Jim Kvedaras attests, after June 12, 2018, he received a call from the Assistant Chief of the Barrington Police Department expressing interest in ACS.³⁴

CN has also recently reached out to all other EJ&E communities regarding ACS.³⁵ For communities that are not current licensees of ACS, CN reminded them of the availability of ACS and offered an informational session to demonstrate its use. A number of these communities have responded and expressed an interest in licensing ACS. For communities that are licensees of ACS, CN offered training sessions. CN is willing to consider whether there are any practical improvements that can be made to ACS, and to that end it has solicited suggestions from current licensees.

³⁰ See Attachment 1 (CN's September 27th letter and Mayor Darch's September 28th response).

³¹ *Id.*

³² *Id.*

³³ Surreply Appendix A (VS Darch) at 7.

³⁴ See Attachment 2.

³⁵ See Attachment 3 (examples of the letters sent to each EJ&E community).

CONCLUSION

Barrington's motion for leave to file its Surreply should be denied. If that motion is granted, the Board should accept this response to ensure a fair and complete record.

Barrington's Petition to reopen should be denied.

Respectfully submitted,

/s/ David A. Hirsh

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Counsel for Canadian National Railway Company and Grand Trunk Corporation

October 4, 2018

CERTIFICATE OF SERVICE

I certify that I have this 4th day of October, 2018, caused a true copy of the foregoing CN Reply to Barrington's Motion for Leave to File a Surreply and Response to that Surreply to be served upon all known parties of record in this proceeding by first-class mail or a more expeditious method.

/s/ Matthew W. Ludwig

ATTACHMENT 1



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Corporate Services

David D. Woodruff

Assistant Vice President and Head of
US Public & Government Affairs

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Washington, DC 20004
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September 27, 2018

David.Woodruff@cn.ca

Karen Darch
Village President
200 South Hough Street
Barrington, IL 60010
847-304-3445
kdarch@barrington-il.gov

Dear Village President Darch:

As I explained in our recent call and email exchange, Jim Kvedaras is now serving in a new role at CN. With Jim's reassignment, I am your non-emergency point of contact for CN. In the event of an emergency, please contact CN through the emergency phone line at 800-465-9239. I regret that you declined my offer to meet last week to discuss issues of concern to Barrington. If you reconsider, I am willing to meet with you.

Your email raised the subject of funding for a grade separation at US Highway 14. As you know, the STB and courts have concluded that CN has no obligation to fund most or all of the cost of a grade separation in Barrington. Instead, the applicable federal or state law concerning funding of grade separations would apply. CN is committed to providing 5% of the costs identified under federal regulation if Barrington secures funding for the remaining costs for the grade separation at US Highway 14.

Following up on your letter to Jim dated August 29, 2018, many of the points you raise in your letter were addressed in CN's August 28 Reply to Barrington's petition to reopen. However, there are a few additional points I want to clarify.

I understand that Barrington does not object to receiving the updated version of the ACS, but it is reluctant to sign CN's no-cost license agreement for its use. The license agreement is necessary to define the rights and responsibilities of CN and Barrington regarding the use of the data that CN would provide through the ACS. Requiring such a license as a precondition to use is customary and necessary for information security to manage access. The license agreement is consistent with the Surface Transportation Board's decisions, and CN kept the Board informed of its licensing efforts during the EJ&E oversight period. Finally, even if Barrington signs the proposed license agreement, Barrington is not waiving arguments concerning ACS, and it could still provide information about ACS.

CN continues to believe that ACS would be a useful tool for Barrington's emergency dispatchers, whether at CenCom, the Police Department, or the Fire Department. We would be pleased to connect Barrington with our technical staff to train or assist Barrington or CenCom personnel on any technical or compatibility issues that may arise in the future.

I look forward to working with you.

Sincerely yours,

A handwritten signature in black ink, consisting of a stylized 'D' followed by a horizontal line and a diagonal stroke.

David D. Woodruff

cc: Jeff Lawler, Barrington Village Manager (jlawler@barrington-il.gov)
Jim Arie, Barrington Fire Chief (jarie@barrington-il.gov)
Dave Dorn, Barrington Policy Chief (ddorn@barrington-il.gov)



BARRINGTON

September 28, 2018

Mr. David Woodruff
Assistant Vice President and Head of US Public & Government Affairs
601 Pennsylvania Ave NW
Suite 500, North Building
Washington, DC 20004

Dear Mr. Woodruff,

Thank you for your letter. Please do not interpret my desire to hold off on an in-person meeting until after the conclusion of the STB matters as indicating any desire not to meet at a more appropriate time. I would be happy to do so at that time.

You might understand from our Sur Reply filed with the STB earlier in September that we know that ACS does not provide reliable assistance for emergency response in Barrington. Given the terms of the ACS Agreement proffered this morning by your assistant, it is clear that signing the agreement does not make sense for Barrington. Were we to sign the Agreement, pursuant to paragraph 9, we would be agreeing to only use the system to dispatch emergency responders. As indicated in our STB filings and confirmed by paragraph 8 of the Agreement wherein the flaws and deficiencies of the system are highlighted, the system does not provide reliable assistance for emergency response in Barrington. I must stress, however, that we both should understand from the prior use of CN's ACS in Barrington without a signed agreement, that a lack of a signed agreement should not preclude our use of ACS.

As to CN's share of the funding for a grade separation of its tracks from US Route 14, while 5% of the cost might be a more usual share, we know that 100% of the issues we are facing are a result of CN's very smart, beneficial business decision to purchase the EJ&E railroad. We would not be working on a grade separation on US Route 14 had CN not purchased the rail line to run its ever growing and successful rail business. Please understand that Barrington does not hold CN's success with the EJ&E purchase against it whatsoever, we are just seeking reasonable mitigation of the tremendous negative impact that CN's success has had on our community and region, including serious public safety consequences.

Sincerely,

Karen Darch
Barrington Village President

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BARRINGTON, IL 60010
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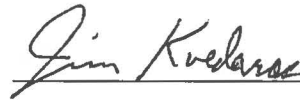
FIRE
TEL (847) 304-3600
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ATTACHMENT 2

VERIFICATION

I, Jim Kvedaras, declare under penalty of perjury that I have read the foregoing pleading, that I know the facts asserted therein regarding a call I received from the Barrington Police Department, and that the same are true as stated. Further, I certify that I am qualified to and authorized to submit this verification in this proceeding.

Executed on October 4, 2018.

A handwritten signature in cursive script, reading "Jim Kvedaras", is written over a horizontal line.

Jim Kvedaras

ATTACHMENT 3



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Corporate Services

David D. Woodruff

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September 27, 2018

David.Woodruff@cn.ca

Tom Poynton
Mayor
70 East Main Street
Lake Zurich, IL 60047

Dear Mayor Poynton:

I am CN's Assistant Vice President & Head of U.S. Public and Government Affairs. Jim Kvedaras has served as your point of contact along the former EJ&E rail line for many years. Effective September 4, Jim is serving in a new role at CN. Until CN identifies a new person to fill Jim's prior role, I will be your non-emergency point of contact for CN. In event of an emergency, please contact CN through the emergency phone line at 800-465-9239.

I am pleased that your community is a licensee of CN's Active Crossing System ("ACS"). CN developed ACS to help communities on the former EJ&E line avoid delays when dispatching their emergency vehicles over at-grade crossings, by providing emergency dispatchers a web-based, single-screen, real-time view showing whether crossing gates are activated. In case you or your emergency dispatchers might be interested, please let them know that we plan to hold an informational webinar in October to demonstrate how to use ACS and answer any questions you may have. If there is interest in attending or if you have any suggestions for changes or enhancements to ACS, please email David Witt at David.Witt@cn.ca.

I look forward to working with you as part of CN's continuing engagement with the communities along our network.

Sincerely yours,

A handwritten signature in black ink, appearing to read 'D. Woodruff', with a long, sweeping horizontal stroke extending to the right.

David D. Woodruff



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Corporate Services

David D. Woodruff

Assistant Vice President and Head of
US Public & Government Affairs

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September 27, 2018

David.Woodruff@cn.ca

Martin J. McLaughlin
Village President
112 Algonquin Road
Barrington Hills, IL 60010-5199

Dear Village President McLaughlin:

I am CN's Assistant Vice President & Head of U.S. Public and Government Affairs. Jim Kvedaras has served as CN's liaison to the communities along the former EJ&E rail line for many years. Effective September 4, Jim is serving in a new role at CN. Until CN selects a new Community Liaison, I will be your non-emergency point of contact for CN. In event of an emergency, please contact CN through the emergency phone line at 800-465-9239.

I understand from Jim that CN previously offered you access, free-of-charge, to our Active Crossing System ("ACS"). CN developed ACS to help communities on the former EJ&E line avoid delays when dispatching their emergency vehicles over at-grade crossings. ACS provides emergency dispatchers a web-based, single-screen, real-time view of which local EJ&E at-grade crossing gates are activated. The system is easy to use and requires no special equipment. I encourage you to sign up for access. In order to do so, please return the attached license agreement. We plan to hold an informational webinar in October for former EJ&E communities to demonstrate how to use ACS and answer any questions you may have. If you are interested in attending, please email David Witt at David.Witt@cn.ca.

I look forward to working with you as part of CN's continuing engagement with the communities along our network.

Sincerely yours,

A handwritten signature in black ink, appearing to read 'D. Woodruff', followed by a long horizontal stroke.

David D. Woodruff