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March 15, 2017

BY E-FILING

Ms. Cynthia Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
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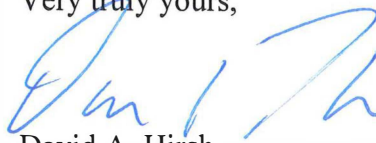
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March 15, 2017
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Public Record

**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 sub-docket please find CN's Reply to Motion of Illinois Department of Transportation and Village of Barrington, IL for Leave to File Comments in Response to CN's Reply to Petition Seeking Additional Mitigation and Reopening.

Very truly yours,



David A. Hirsh

Counsel for Canadian National Railway Company
and Grand Trunk Corporation

Enclosure

cc: Richard H. Streeter, Esquire (by email)

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No. FD 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 MOTION OF ILLINOIS DEPARTMENT OF TRANSPORTATION
AND VILLAGE OF BARRINGTON, IL FOR LEAVE TO FILE COMMENTS IN
RESPONSE TO CN'S REPLY TO PETITION SEEKING ADDITIONAL MITIGATION
AND REOPENING**

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March 15, 2017

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB 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 MOTION OF ILLINOIS DEPARTMENT OF TRANSPORTATION
AND VILLAGE OF BARRINGTON, IL FOR LEAVE TO FILE COMMENTS IN
RESPONSE TO CN’S REPLY TO PETITION SEEKING ADDITIONAL MITIGATION
AND REOPENING**

Canadian National Railway Company and Grand Trunk Corporation (together, “CN”)¹ hereby reply to the “Motion for Leave to File Comments in Response to Reply Filed by [CN],” served by Petitioners the Illinois Department of Transportation (“IDOT”) and the Village of Barrington, IL (“Barrington”), on February 24, 2017 (“Motion” or “Mot.”). Petitioners’ Motion should be denied under 49 C.F.R. § 1104.13(c).

Alternatively, if it is granted, CN should be permitted to file the following brief response, which demonstrates that Petitioners’ Motion shows no material new evidence or substantially changed circumstances, and provides no basis for the relief Petitioners seek. In any event, Petitioners’ petition for reopening filed on January 10, 2017 (“Petition” or “Pet.”), should be denied.

¹ CN incorporates by reference the short forms and abbreviations set forth in its Application (CN-2, at 8-11).

I. IDOT AND BARRINGTON SHOULD NOT BE PERMITTED ANOTHER UNAUTHORIZED SURREPLY

The Board's rule is clear: "A reply to a reply is not permitted." 49 C.F.R. § 1104.13(c). The Board should enforce its rule here. Petitioners present no evidence that was unavailable to them when they filed their Petition. Instead, they present argument and unverified speculation that would not usefully supplement the record. Further, as the Board knows, Petitioners have had ample prior opportunities to develop an extensive record: Barrington has already argued its case for grade separation to the Board in 2008, 2011, 2014, and 2015, and to the D.C. Circuit in 2009 and 2012, *see* CN's Reply to Petition Seeking Additional Mitigation and Reopening at 5-9 ("Reply"), and has already filed two surreplies (on November 14, 2011, and on January 5, 2015). Petitioners' Motion for leave to file another surreply should be denied.

II. THE SURREPLY PROVIDES NO BASIS FOR REOPENING

A. Petitioners Ignore Applicable Reopening Standards

In their underlying Petition, IDOT and Barrington acknowledged that since they are not claiming that the Board materially erred in its 2008 Approval Decision (after Barrington already lost on that claim), they must demonstrate "new evidence, or substantially changed circumstances." Pet. at 6. As CN's Reply explained (and as the Motion does not rebut), Board precedent further requires that the new evidence or circumstances (1) be so material as to "mandate a different result," and (2) involve new facts, not merely new arguments. *See* Reply at 10.

The Motion ignores these fundamental requirements for reopening. It argues that CN can have no expectation of "administrative finality" and that Petitioners need not meet the normal "re-opening criteria" because (in Condition 72 of the Approval Decision) the Board approved the Transaction subject to a retention of oversight jurisdiction. Mot. at 7; *see also id.* at 2. However,

the Board decisively rejected that view of Condition 72 when it denied Barrington's 2011 petition for reopening:

The intent of Condition No. 72 is to inform the public and parties that interested persons could seek to reopen the Final Decision in order to modify the conditions placed upon the transaction if a material change in facts or circumstances were to occur in the future. Condition No. 72, however, does not independently establish a standard for reopening to modify conditions apart from the statutory standards in the Interstate Commerce Act. *Cf. Burlington N. & Santa Fe Ry. v. STB*, 453 F.3d 473, 479 (D.C. Cir. 2006) (§ 722(c)^[2] limits the criteria for granting reconsideration to instances of material error, new evidence, or substantially changed circumstances). Therefore, the issue before us here is whether Barrington's claims of new evidence and material error warrant a different result than the one the Board reached in 2008, when Barrington's request for grade separation mitigation was addressed.

Decision served Nov. 8, 2012, slip op. at 9.

Similarly, in a theme that pervades their Motion, Petitioners state that they are not "requesting the Board to revisit any of its past holdings that were based on projections that are nearly a decade old," Mot. at 1-2, and urge the Board to "look past" – *i.e.*, ignore – the projections on which it based the Approval Decision and "instead, focus on the current state of affairs," *id.* at 2. But in order to succeed, a petition for reopening under 49 U.S.C. § 1322(c) and 49 C.F.R. § 1115.4 must demonstrate that reopening and modifying a prior final decision is warranted. Here, the question is whether there is material new evidence or a substantial change in circumstances that mandates reopening and modifying the Board's Approval Decision in order to retroactively impose an additional condition. To answer that question, the Board must compare subsequent developments to the information – including projections – before the Board when it made its decision. As Petitioners acknowledged in their Petition, for a reopening

² Former 49 U.S.C. § 722(c) is now re-codified, unaltered, at 49 U.S.C. § 1322(c).

analysis “it is necessary to compare key aspects of CN’s 2008 application and the environmental review” with such new evidence as Petitioners may provide. Pet. at 12.

Petitioners now resist that necessary comparison, which demonstrates that they have provided no material new evidence.³ But the requirement that evidence in support of reopening be new and material in comparison to the evidence that was before the Board when it issued the final decision is fundamental. Without it, administrative finality would be illusory. The Board should enforce the regulatory and statutory requirements for reopening, and uphold the basic principle of administrative finality, by denying the present Petition, just as it did in denying Barrington’s petitions in 2012 and 2015.⁴

B. Petitioners’ Latest Arguments Are Meritless and Unsupported

1. Board-Ordered Mitigation Has Been Costly

Petitioners question the costs to CN of Board-ordered mitigation. Mot. at 4. They state (without any supporting evidence) that “it seems likely that only a fraction” of the \$120 million CN has spent on environmental and safety mitigation measures “relates to Board-ordered mitigation measures,” and argue that CN’s contribution to the two grade crossings ordered by the

³ For example, Petitioners claim, without supporting evidence, that a grade separation “is needed solely because of” the Transaction. Mot. at 3; *see also id.* at 9 & n.4, 10-11. But the Board already rejected that claim, finding that the traffic issues that a new grade separation would address are largely issues that pre-existed and were independent of the Transaction. *See* Approval Decision at 47. Nothing filed by Petitioners calls that fundamental conclusion into question.

⁴ Petitioners argue that the Board “has never been presented with the opportunity to consider the actual impact of CN’s expanded operations.” Mot. at 5; *see also id.* at 7-8. That argument ignores the facts that (1) for years CN has been filing detailed monthly operational reports on incidents of crossing blockages, construction projects, traffic volumes, and accident and injuries, and quarterly environmental reports on measures to reduce crossing blockages, and (2) Petitioners have had multiple opportunities to present whatever new facts or changed circumstances they deem relevant to the Board – including in 2008, 2011, 2014, 2015, and in their current petition – and to the courts – in 2009 and 2012. *See* Reply at 5-9.

Board has been less than originally anticipated. *Id.* They also argue that because CN's overall cost of acquiring EJ&E was far less than the potential \$8 billion costs of constructing a new line around Chicago, additional mitigation costs should be imposed on CN. *Id.*

As unlikely as it may seem to Petitioners, the cost to CN for implementing Board-ordered mitigation totals approximately \$120 million. *See* Response Verified Statement of John Orr at 1-2 ("R.V.S. Orr") (appended as Attachment 1). The fact that Petitioners themselves have difficulty believing the magnitude of the cost of Board-ordered mitigation only underscores its scale relative to the size of the underlying Transaction. As for the cost of the two grade separations the Board ordered CN to partially fund, which is a subset of this overall cost, CN estimates that when those projects are completed, its contribution will be approximately \$53 million (not the \$48.8 million cited by Petitioners). Further, the correct comparison to original estimates is not to the "\$92.9 million" estimate of **total** costs, Mot. at 4, but to the projected **CN share** of those costs, which, as CN told the D.C. Circuit, was \$68.3 million (*see* CN's Opening Brief at 3, *CN v. STB*, No. 09-1073 (D.C. Cir. filed April 7, 2010) (extract appended as Attachment 2)).

More importantly, none of this supports Petitioners' requests. It is undisputed that CN has fully met its funding obligations and that work on the grade separations in accordance with Petitioner IDOT's specifications is almost complete. That IDOT, with CN's help, has succeeded in completing a project under budget is a positive development. It is not a basis for imposing new mitigation obligations on CN. The Board's job under NEPA was to consider appropriate

mitigation for the environmental impacts of the Transaction, not to impose unwarranted conditions on CN in order to reach some minimum aggregate expenditure.⁵

Similarly, the Board should reject Petitioners' suggestion that more mitigation expense should be imposed on CN's acquisition of EJ&E because of its smaller scale and lower cost as compared to the proposed Great Lakes Basin Railroad project, which calls for construction of almost 300 miles of new rail line around Chicago at an estimated cost of \$8 billion.⁶ Mitigation should be commensurate with the harms one is seeking to mitigate – if a project causes less harm, less mitigation should be required. Here, CN's efforts to reduce Chicago congestion by increasing the utilization of an existing rail asset rather than constructing hundreds of miles of new railroad threatened much less environmental harm and, as the Board determined, was in the public interest. Adopting Petitioners' suggestion that CN be penalized years after completing its acquisition of EJ&E because CN did not undertake a massive, expensive, and disruptive project would be the antithesis of good public policy, as it would create a disincentive for future efficient investment.⁷

⁵ As the Board explained in 2008, it used a "site-specific" approach to mitigation, making a "regional mitigation fund" inappropriate. Approval Decision at 46 n.103.

⁶ There is nothing new about the fact that constructing an entirely new rail line would cost more than acquiring the EJ&E, so Petitioners' suggestion provides no basis for reopening.

⁷ Petitioners also try to sidestep CN's point that had EJ&E not been acquired, substantial traffic growth could have occurred on its lines anyway given its strategic location, and that absent a jurisdictional event such growth would not have been subject to any mitigation. Mot. at 11. They argue that the possibility of substantial traffic gains was "negligible" because EJ&E by itself lacks the geographic scope of CN. *Id.* But a strategically placed rail line does not need geographic scope to attract traffic, and EJ&E was well placed to serve as a bridge carrier to allow traffic flows to avoid the congestion of the Chicago terminal area.

2. Post-2015 Data Show No Material Change

Petitioners argue that the Board should consider “post-acquisition operational data,” Mot. at 8, but the Board has already done so. As part of the Board’s oversight, CN has filed hundreds of reports containing post-acquisition data, on which Petitioners have relied, and CN’s Reply cited and provided additional post-acquisition data verified through sworn statements.⁸

Petitioners object to CN’s discussion of the logical flaw in Petitioners’ claim that **2016** data represent a material change in comparison to projections used in making the final decision that did not go beyond **2015**. Reply at 14.⁹ At a minimum, however, that point cautions against inferring a material change from modest variations between projections for 2015 and facts in 2016 and beyond. And modest variations are all that Petitioners claim.¹⁰

⁸ Petitioners claim that “[a]s both Petitioners and CN have mustered data regarding rail traffic through Barrington,” the Board should “hold a hearing.” Mot. at 10. There is no basis for a hearing here. In accordance with 49 U.S.C. § 1322(c) and 49 C.F.R. § 1115.4 petitioners must demonstrate “material error, new evidence, or substantially changed circumstances” **before** the Board will reopen. Petitioners, however, have offered no **material** new data, and no evidence to dispute CN’s data.

⁹ Petitioners suggest that recognizing this logical point would make the Board’s prior extension of oversight pointless. Mot. at 8. Not so: the Board retains the power to reopen in the event of **materially changed** circumstances, which oversight could reveal.

¹⁰ It is undisputed that relative to projections for 2015, train volumes in 2016 were moderately lower, train lengths in 2016 were moderately higher, and average train speeds in 2016 were moderately lower. See Mot. at 9-10; Reply at 14-15; V.S. Orr at 7-8; Pet. at 13-16. Those modest differences – fewer trains, but each blocking crossing traffic a bit longer – would not mandate a different result than the one the Board reached in its Approval Decision.

With respect to train speeds, Petitioners suggest without any evidence that “CN was aware from the outset that it would not be possible to operate through Barrington at 39 miles per hour.” Mot. at 9. To the contrary, CN imposed the speed reduction at the Barrington interlocking as a safety measure following investigation of a 2011 derailment (of which the Board was well aware from CN reports and its own audits) at the Spaulding interlocking in Bartlett, IL, approximately 12 miles along the rail line south of Barrington. See R.V.S. Orr at 2. The speed restriction was not limited to Barrington and it occurred several years after CN acquired EJ&E. *Id.*

3. Even if and when Phase II of the Prince Rupert Expansion is Completed, Its Additional Potential Traffic Will Not Be Material

The Petition speculated that the development of Prince Rupert Phase II might generate “massive[]” additions to CN’s rail traffic through Barrington beginning later this year. Pet. at 20. CN directly responded to that argument through the verified statement of Keith Reardon, CN’s Vice-President Intermodal Services. He explained that if Prince Rupert Phase II proceeds as planned, CN’s “best estimate” is that “2 additional southbound loaded trains and 2 additional northbound empty trains each week, equivalent to about 0.5 total additional trains per day (all intermodal), will move through Barrington.” V.S. Reardon at 2. That would not be a material change.

Petitioners offer no evidence to contradict that projection. Instead, they attack Mr. Reardon for recognizing that Phase II has not been completed. But CN’s response did not rely on that fact. Instead, CN demonstrated through a sworn statement that even if Prince Rupert Phase II is completed, its traffic will have no material effect on the EJ&E line.

4. CN Has No Plans to Double Track In or Near Barrington

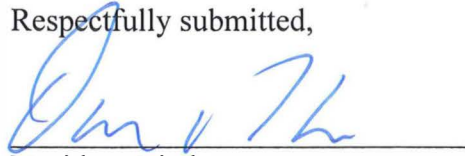
CN’s Senior Vice-President, Southern Region, John Orr, testified that “CN has no need and no current plans to install double track through or near Barrington,” and “CN has not designed or allocated money for a second track in or near Barrington. Nor is it likely to do so any time in the near future.” V.S. Orr at 8.

Without citing any source or providing any evidence, Petitioners seek to rebut Mr. Orr’s testimony based on their claimed “understanding that CN plans to reissue a new RFP post-2016.” Mot. at 12-13. Whatever the basis for Petitioners’ “understanding,” Mr. Orr once again makes clear that CN has no plans to double track in or near Barrington, and, he adds, no plans to issue an RFP for such work. See R.V.S. Orr at 2.

CONCLUSION

IDOT and Barrington's Motion for leave to file a surreply should be denied. But even if the Motion is granted, their Petition for reopening should be denied. CN has fulfilled all of the Board's conditions, and, as in prior efforts, Petitioners have neither shown the requisite material new evidence or substantially changed circumstances nor provided any sound justification for the relief they seek.

Respectfully submitted,



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Counsel for Canadian National Railway Company and Grand Trunk Corporation

March 15, 2017

Attachment 1

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

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

[Barrington Petition for Mitigation]

REPLY VERIFIED STATEMENT OF JOHN ORR

My name is John Orr. I am Senior Vice-President, Southern Region, for Canadian National Railway Company and its U.S. subsidiaries (together, “CN”). On January 30, 2017, I submitted a statement in this proceeding in support of CN’s Reply to the “Petition Seeking Imposition of Additional Mitigation Pursuant to the Board’s Oversight Jurisdiction and Reopening Pursuant to Governing Regulations” filed by Petitioners the Illinois Department of Transportation (“IDOT”) and the Village of Barrington, Illinois (“Barrington”). That statement discusses my background and knowledge of CN’s lines and operations in the U.S. and, in particular, those of the former Elgin, Joliet and Eastern Railway Company (“EJ&E”).

I have been asked by CN to respond in this statement to several assertions in Petitioners’ February 24, 2017, “Motion for Leave to File Comments in Response to Reply Filed by CN” (“Mot.”). As I explain, Petitioners’ latest arguments are misplaced and do not support their request that CN be required to pay tens of millions of dollars for a grade separation more than 8 years after CN’s acquisition of EJ&E.

First, Petitioners question whether the \$120 million referenced in my prior statement (at 2) as the estimated cost for environmental and safety measures related entirely “to Board-ordered

mitigation measures.” Mot. at 4. It does. The key components for that cost include grade separations, quiet zones, and compliance with voluntary mitigation agreements, each of which the Board ordered.

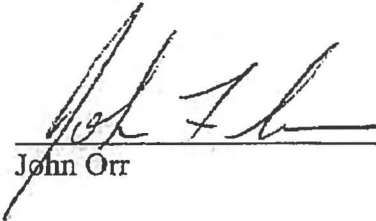
Second, Petitioners speculate that “CN was aware from the outset that it would not be possible to operate through Barrington at 39 miles per hour” and that “CN likely knew during the NEPA process that commuter trains would limit its ability to operate at 39 mph.” Mot. at 9. That is not the case. The speed reduction was instituted at several interlockings, including the Barrington interlocking, as a safety measure following a 2011 accident at the Spaulding interlocking in Bartlett, IL. It was thus precipitated by an event that occurred several years after the close of the NEPA process.

Finally, Petitioners claim to have an “understanding” that “CN plans to reissue a new RFP post-2016” for double track in or near Barrington. Mot. at 12-13. Petitioners’ understanding is incorrect. Such an RFP would fall within my area of responsibility, and I have neither seen nor approved of any such RFP. Further, I have consulted with relevant staff and understand none of them is aware of any such plan or proposal for an RFP. As I stated in my previous verified statement (at 8-9), CN has no plans to install double-track in or near Barrington.

VERIFICATION

I, John Orr, declare under penalty of perjury under the laws of the United States that I have read the foregoing Reply Verified Statement, that I know the facts asserted therein, and that the same are true as stated. Further, I certify that I am qualified to and authorized to provide this verification on behalf of Canadian National Railway Company and its subsidiaries.

Executed on MARCH 14, 2017



John Orr

Attachment 2

ORAL ARGUMENT NOT YET SCHEDULED

No. 09-1073
(Consolidated with 09-1002, 09-1028, 09-1048, 09-1049)

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

CANADIAN NATIONAL RAILWAY COMPANY
and **GRAND TRUNK CORPORATION**, Petitioners,

v.

SURFACE TRANSPORTATION BOARD
and **UNITED STATES OF AMERICA**, Respondents.

**On Petition for Review of a Final Order of the
Surface Transportation Board**

OPENING BRIEF OF PETITIONERS

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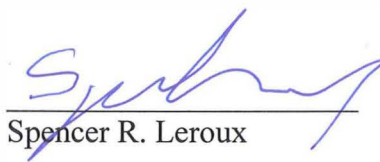
that any anticompetitive effects “would be outweighed by the public interest in meeting significant transportation needs,” FD at 15.

With CN’s consent, STB adopted as conditions CN’s 108 VMMs, and STB has incorporated as conditions to its approval VMAs CN has reached with 21 of 33 communities along the EJ&EW. See FD at 83-84; Decision Nos. 19-20, 22, (unopposed FD amendments adding VMAs).

STB (1) rejected CN’s argument that 49 U.S.C. § 11324(d) prohibits STB from imposing involuntary environmental conditions on a non-major transaction with no substantial anticompetitive effects, FD at 29-34; and (2) ordered CN, as an involuntary condition of approval, to pay an unprecedented 67% of the costs of a grade separation at Ogden Avenue and 78.5% of the cost of a grade separation at Lincoln Highway, *id.* at 76 (Condition 14), subject to the Illinois Department of Transportation (“IDOT”) securing the remaining funding for the grade separations and construction being initiated by 2015, *id.* at 47, 76. Based on SEA cost estimates, FEIS at 4-25, construction of the two grade separations would cost CN \$68.3 million.

CERTIFICATE OF SERVICE

I certify that I have this 15th day of March, 2017, served copies of CN's Reply to Motion of Illinois Department of Transportation and Village of Barrington, IL for Leave to File Comments in Response to CN's Reply to Petition Seeking Additional Mitigation and Reopening upon all known parties of record in this proceeding by first-class mail or a more expeditious method.



Spencer R. Leroux