

**BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON D.C.**

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Public Record

Docket No. FD 35087 (SUB-NO. 8)

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

**MOTION OF ILLINOIS DEPARTMENT OF
TRANSPORTATION AND VILLAGE OF BARRINGTON, IL
FOR LEAVE TO FILE COMMENTS IN RESPONSE TO
REPLY FILED BY CANADIAN NATIONAL RAILWAY
COMPANY AND GRAND TRUNK CORPORATION**

The Illinois Department of Transportation (IDOT) and the Village of Barrington ("Barrington"), by and through counsel, respectfully request the Surface Transportation Board ("Board") to waive the provisions of 49 C.F.R. 1104.13 and permit the filing of a Reply to the Reply filed by Canadian National Railway Company and Grand Trunk Corporation (hereinafter referred to as CN). By their Petition Seeking Imposition of Additional Mitigation Pursuant to the Board's Oversight Jurisdiction and Reopening Pursuant to Governing Regulations, filed January 10, 2017, IDOT and Barrington requested the Board to reopen this proceeding and impose additional mitigation under the authority of the Board's oversight jurisdiction. On January 30, 2017, CN filed its Reply.

In requesting the Board to take one further look at the impact of its decision authorizing CN to acquire the EJ&E, neither IDOT nor Barrington is requesting the Board to revisit any of its past holdings that were based on

projections that are nearly a decade old. Instead, Petitioners merely request that the Board take full advantage of the opportunity provided by the oversight period to scrutinize the actual consequences of the December 24, 2008 decision authorizing CN to acquire control of the EJ&E.

While CN has profited from its ability to avoid the congestion that previously plagued its operations through the Chicago gateway, the same is not true of the American citizens and taxpayers in the region who are being forced to endure the many inconveniences and expenses that are inextricably linked to CN's financial gains. Petitioners are not contesting CN's right to benefit from its bold business decision and foresight. What they are asking is that CN take a reasonable level of responsibility in mitigating the demonstrated harm that directly flows from the increased rail traffic over the EJ&E Line.

Petitioners respectfully request the Board to look past the pre-transaction multi-year projections that CN has admitted are inherently imprecise and, instead, focus on the current state of affairs. While CN insists that administrative finality must be reached, there is no avoiding the simple fact that it proceeded with the transaction knowing that the Board had retained the right to order future additional mitigation. The citizens of northwest Illinois are left with no alternative but to live with the results of CN operations. However, what is the justification for compelling taxpayers to bear the cost of mitigating the harms that are directly attributable to the increased rail traffic that disrupts their lives on a daily basis? To put this in perspective, CN's contribution of the \$37.5 million cost to complete the U.S. Highway 14

grade separation is a one-time expenditure of less than five (5) cents per share of its outstanding stock.¹

In reflecting upon Petitioners' request for the fundamental fairness envisioned in the retention of oversight, one must recognize that a grade separation at US Highway 14 is needed solely because of CN's ability to shift thousands of railcars from its other Chicago lines to the EJ&E, thus avoiding the congestion associated with movements through Chicago. As Mr. Orr, CN's Senior Vice-President, Southern Region, has testified in the Verified Statement attached to the CN Reply:

CN's through speed in the Chicago area has increased by 200%, and its velocity has improved by 60%, so CN trains which used to take between 6 and 36 hours to traverse Chicago now take between 4 and 6 hours, resulting in substantial benefits to CN's shippers.

What has been the benefit to CN? Every hour that has been saved has allowed CN to substantially reduce its operating costs. As a review of CN's financial ratios since 2008 demonstrates, its overall operating ratio has declined from 65.9 in 2008 to an all-time record of 59.5 at the end of 2016. While that tremendous gain is attributable to various improvements, it is also directly connected to CN's purchase of the EJ&E.

¹ According to publicly available data, CN current has 763,990,000 shares outstanding.

But improved operating ratio is only part of the story. The projected cost of building the proposed Great Lakes Basin Railroad around Chicago is \$8 billion. By way of comparison, CN purchased the EJ&E for \$300 million, and spent an additional \$271 million on additional infrastructure improvements. While CN at page 3 of its reply touts its expenditure of \$120 million on “environmental and safety mitigation measures,” it seems likely that only a fraction of this number relates to Board-ordered mitigation measures.

Furthermore, projected costs can be misleading. Take, for example, CN’s 2009 projected cost associated with the Board-ordered grade separations in Lynwood and Aurora of “\$92.9 million.”² With the two projects at about 99% complete with only punch list items remaining to be paid, as of February 23, 2017, CN’s share of the total costs for the Lynwood grade separation of \$29,336,726.32 is only \$23,029,330.16. In Aurora, CN’s contribution has amounted to \$25,804,695.57 out of the grade separation total cost of \$38,514,471.00. Hence, CN’s contributions total approximately \$48.8 million – only 52.5% of the “\$92.9 million” estimate that CN filed with the D.C. Court of Appeals in 2009. The foregoing example demonstrates the disparity between early projections and actual costs associated with this case and, most importantly, underscores the need to focus on current data and not on 10-year old projections.

² CN, *Non-Binding Statement Of Issues To Be Raised By Petitioners Canadian National Railway Company And Grand Trunk Corporation*, filed March 29, 2009, in Case No. 09-1072, U.S. Court of Appeals for the District of Columbia Circuit. Attachment 1 hereto.

In requesting the Board to disregard Petitioners' concerns, CN insists that the current petition merely re-hashes points the Board and the courts have previously rejected. First, the Board has never been presented with the opportunity to consider the actual impact of CN's expanded operations, as demonstrated by the facts. Second, on review, the courts have never considered the merits of Barrington's positions. Nor have they explicitly approved either the Board's determination that much of Barrington's traffic congestion stemmed from pre-existing conditions, or the Board's limited focus on congestion during peak morning and evening hours rather than the entire day. Instead, because Barrington, in Petitioners' Joint Opening Brief, failed to cite its own traffic study that demonstrated the basic error in the Board's determination that the U.S. 14 crossing did not exceed the 2400-minute threshold to show that it was "substantially affected," the Court declined to hear Barrington's argument.

Most importantly, the appeals court has never addressed the regional impact of the increased traffic on the EJ&E, which IDOT and Barrington have raised in their joint petition. Accordingly, the Board should consider the recent facts and data -- not pre-acquisition projections -- that are now available and which reflect the reality of regional post-acquisition impacts. The United States Department of Transportation, the Illinois Department of Transportation, and CMAP all have recognized the adverse impact of CN's expanded operations on Barrington and the surrounding area. Accordingly, there is no logical reason

for the Board to refuse to consider this adverse impact which was properly raised during the oversight period.

Furthermore, even though CN's expanded operations have benefited other areas around Chicago and served the job-creating interests of other communities, they do not excuse the harm that has been inflicted on the northwest region of the greater Chicagoland area. Providing grade separation relief in Barrington at U.S. Highway 14 comes at the cost of a mere five (5) cents per common share and will not impact the employment benefits being experienced by the communities that object to a continuation of oversight. In fact, the reality that four of the five statements/letters CN supplied in its Reply didn't object to the imposition of grade separation mitigation in Barrington underscores that reality.

All told, the oversight period affords the Board the luxury to consider and, most importantly, react to any adverse impacts that the EJ&E might have on communities such as the Village of Barrington. The Board should, therefore, reject CN's continuing efforts to trivialize the concerns that have been voiced jointly by IDOT and Barrington, as well as Senators Richard Durbin, Tammy Duckworth, and Congressman Peter Roskam. The united voices of Illinois government, the impacted municipality, the regional planning organization, with the bipartisan support of federal lawmakers are intended to protect the citizens and taxpayers who will be compelled to bear the cost of addressing a problem of CN's own creation unless, of course, the Board orders CN to pay a reasonable share of the requested grade separation.

Without question, a grade separation at the intersection of the EJ&E line and U.S. Highway 14 is needed. Moreover, the urgency of this need is directly attributable to CN's ability to greatly increase the number of trains that are passing through Barrington. That being the case, why should U.S. taxpayers be compelled to assume the burden of paying the full costs associated with the construction of the grade crossing? In reaching its decision, Petitioners request the Board to focus on the following matters in CN's Reply:

1. Administrative Finality and Re-Opening Criteria:

Although CN's Reply focuses on administrative finality and re-opening criteria, it neglects to recognize that it chose to consummate the underlying transaction fully knowing that Board oversight included the potential for the additional environmental mitigation Petitioners currently seek. Attempting to use case law that doesn't address the specific oversight rationale voiced by the STB for this particular transaction is nothing more than post hoc rationalization, and shouldn't be used post-acquisition to deny the Petition now before the Board.

Furthermore, in rehashing the legal history of this matter, CN ignores the fact that the DC Circuit, in its initial decision, never determined whether or not the Board had correctly determined hours of delay – which renders the facts developed since then all the more compelling for the Board to consider. Moreover, when Barrington sought review of the STB's refusal to reopen the matter to consider a 2011 traffic study that focused on 24-hours of delay, the

Court never delved into the basic issue of whether the STB's "peak-period" focus caused it to fail to consider the total impact on Barrington. In short, CN's Reply overstates the impact and meaning of the Court's affirmances.

2. The Board Should Use Post-Acquisition Operational Data:

At pages 13 and 14 of its Reply, CN objects to the use of actual operating data post-2015 to assess material changes that would warrant additional mitigation based on changed circumstances. To accept this argument, the Board must also necessarily accept that the additional years of oversight it imposed beyond 2015 served no practical purpose. Petitioners reject this argument, and believe that information developed during the twice-extended oversight period should be considered by the Board in determining the real impacts of the EJ&E at US 14.

3. CN Ignores IDOT's Involvement in this Petition to Revisit the Past:

CN ignores the reality that the Petition now before the Board is a joint appeal made by both IDOT and Barrington. IDOT is now involved in this matter as a Petitioner because, based on CN operations, it recognizes the importance of a grade separation at U.S. Highway 14 and the difficulty of financing it at a time when many worthy transportation projects go unfunded. Ultimately, someone will have to pay the cost for the grade separation – be it federal/state taxpayers and/or CN. As Petitioners made clear, the Board's own 2008 analysis showed that traffic delays had the EJ&E not been acquired by CN would have been only 2.49 hours daily at U.S. Highway 14 crossing today,

rather than the 31.8 hours the Board projected for the crossing once CN purchased the rail line.³ Given the wide differential in projected delay times based only on CN's freight traffic, Petitioners believe it is clear that they do not seek the mitigation of pre-existing traffic congestion.⁴ Rather, Petitioners ask the Board to consider evidence based on actual CN operations in 2016 in lieu of historical speculative projections.

4. CN Was Aware from the Outset That It Would Not Be Possible to Operate Through Barrington at 39 Miles Per Hour:

On page 2 of its Reply, CN talks of "minor variations in speed." In reality, the speed differential is 30% slower than what was used in the EIS process to predict crossing-specific delays stemming from CN's projected freight traffic.

In Orr's Verified Statement at page 5, footnote 3, Orr states that CN reduced its "allowable speed" through Barrington from 39 mph to 30 mph, but fails to say when CN made the change. If it was reduced following the NEPA process, the Board should inquire as to whether or not it was misled about CN's planned operations specific to the Barrington area. If this change was made due to intersecting Metra commuter rail traffic, CN likely knew during the NEPA process that commuter trains would limit its ability to operate at 39 mph. Again, the Board should inquire as to the accuracy of CN's original speed

³ Petitioners believe that current CN operational data would demonstrate that the projected 31.8 hours of delay understates the total actual delays experienced in the Village of Barrington at US 14. As stated in the Petition, Petitioners can demonstrate that the traffic on the EJ&E is longer and slower than what CN's application and the NEPA process contemplated.

⁴ Cite to CN reply at pp. 7-8.

projections because, absent accurate projections, the Board could not have made accurate calculations about delays at the U.S. Highway 14 crossing (as well as the other three impacted Barrington crossings that are in close proximity to Metra's Union Pacific Northwest Line.)

CN also claims the time difference for a train traveling through Barrington is a "few more seconds" of gate activation -- the difference between 3.63 minutes and 2.74 minutes. (Reply at page 15.) This difference, however, amounts to a 32.5% increase in gate activation times for CN trains traveling through Barrington. Such a delay amounts to more than the "minor variation" referenced in the Reply at page 15. In so dismissing the gate activation, CN fails to acknowledge, quantify or explain the impact a 32.5% increase in gate activation time has on vehicular traffic back-ups at U.S. Highway 14. The time it takes to clear such congestion is often longer than the actual gates-down time -- meaning that the delays are even greater than what CN acknowledges.

CN provides its own data summarizing its analysis of train lengths and speeds on the portion of the line running through Barrington. Should the Board choose to consider the CN's data, Petitioners urge the Board to verify its collection and analysis. As both Petitioners and CN have mustered data regarding rail traffic through Barrington, Petitioners urge the Board to hold a hearing to fully explore the true impact of CN's operations at US 14.

5. CN's Argument Regarding EJ&E's Legal Ability to Increase Traffic is a Smokescreen:

CN's Response posits that the EJ&E, while owned by USX, could have increased traffic exponentially in line with what CN has done since 2015 (and without Board approval). While this may have theoretically been the case, the likelihood for such a move was negligible. Without question, EJ&E, as a small stand-alone railroad, would not have had the reach of a tri-coastal Class I railroad that is able to connect to the Port of Prince Rupert where the number of calling ocean carriers is on the rise. Nor would EJ&E have had direct access to the Canadian oil fields, or the Gulf Coast refineries. Only CN is able to reach the ports on both sides of North America and the Gulf of Mexico.

6. The Impact of Port of Prince Rupert Cannot be Discounted:

The Port of Prince Rupert ("PPR") comments made in the Reardon verified statement are not credible: "Whether Phase II of the Fairview Container Terminal will be completed and precisely when is uncertain. Assuming it is completed, the additional traffic volumes it could generate are uncertain." It would be hard to understand why CN is "uncertain" about the completion of the PPR terminal given media reports (as December 2016) that the port is "75% complete and is on schedule to increase annual capacity at Prince Rupert's container terminal to over 1.35 million TEUs by the third quarter of 2017."

<http://www.hellenicshippingnews.com/fairview-container-terminal-expansion-project-reaches-75-milestone> .

Furthermore, to believe the verified statement regarding PPR-associated freight traffic operating through Barrington on its Chicago Bypass line, one

would need to ignore the March 2015 statement of Jean-Jacques-Ruest (CN's current Executive Vice-President and Chief Marketing Officer) that emphasizes CN's investment in bigger Intermodal facilities in Chicago and Memphis⁵, and further underscored by reviewing CN's own website.

<http://www.cn.ca/en/our-business/supply-chain-solutions/logistics-parks> :

“Construction is underway for CN's Memphis Logistics Center. This logistics park will be our first to offer access to rail, truck and barge services directly within the park and connect to CN's network to reach the ports of Vancouver, Prince Rupert and Halifax seamlessly. The facility will be centrally located with supply chain services to meet every customer's diverse needs.”

7. Double-Tracking:

CN denies any plans to double track: “Accordingly, 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.” (Orr Verified Statement at page 8 emphasis added.) CN claims that its 2016 Request for Proposals was nothing more than a routine “contingency planning exercise” (Reply at page 18.) If true, CN should be ordered to supply the Board and Petitioners with the original RFP used for its “prudential planning” and the September 2016 letter CN used to notify “bidders it would not proceed with any double tracking project on the EJ&E line.” (Orr VS at page 9.) Board exploration of this information (via

⁵ Cite 2017 Petition at page 22.

hearing or otherwise) is especially important given Petitioners' understanding that CN plans to reissue a new RFP post-2016.

8. Response Support:

Appendix C to CN's Response consists of five letters that are not germane to the northwest region of the greater Chicagoland area, and thus fail to address the regional impacts raised by Petitioners. Importantly, all except the Southland Chamber comments objected solely to the oversight extension and didn't address the merits of the grade separation mitigation request.

CONCLUSION

For all of the above-stated reasons, the Board should accept Petitioners' Reply Comments and should carefully consider them before issuing its ruling in this matter.

Respectfully submitted,

/s/ Richard H. Streeter

Richard H. Streeter
Law Office of Richard H. Streeter
Special Assistant Attorney General for
The State of Illinois and Counsel for
The Village of Barrington, IL
5255 Partridge Lane, NW
Washington, DC 20016
P: 202-363-2011
Email: rhstreeter@gmail.com

Dated: February 24, 2017

CERTIFICATE OF SERVICE

I, Richard H. Streeter, certify that I have this 24th of February, 2017, caused a true copy of the Motion of the Illinois Department of Transportation and the Village of Barrington, IL, for Leave to File Comments in Response to Reply filed by CN and Grand Trunk, by e-mail, upon:

Harkins Cunningham LLP
1700 K Street, N.W., Suite 400
Washington, D.C. 20006-3804
Paul A. Cunningham
pac@harkinscunningham.com
David A. Hirsh
dhirsh@harkinscunningham.com
Simon A. Steel
ssteel@harkinscunningham.com
James M. Guinivan
jguinivan@harkinscunningham.com
Matthew W. Ludwig
mludwig@harkinscunningham.com

Sean Finn
Canadian National Railway Company
P.O. Box 8100
Montréal, QC H3B 2M9
sean.finn@cn.ca

Theodore K. Kalick
Canadian National Railway Company
Suite 500 North Building
601 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-3608
ted.kalick@cn.ca

All other parties of record have been served by first-class mail, postage prepaid or by email.

Richard H. Streeter /s/

Richard H. Streeter

In the United States Court of Appeals
for the District of Columbia Circuit

Canadian National Railway Company	)	
and	)	
Grand Trunk Corporation,	)	
	)	Case No. 09-1073;
Petitioners,	)	consolidated with
	)	09-1002, 09-1028,
v.	)	09-1048, and 09-1049
	)	
Surface Transportation Board	)	
and	)	
United States of America,	)	
	)	
Respondents.	)	

**NON-BINDING STATEMENT OF ISSUES TO BE RAISED BY
PETITIONERS CANADIAN NATIONAL RAILWAY COMPANY AND
GRAND TRUNK CORPORATION**

Pursuant to the Court's order of February 25, 2009, Canadian National Railway Company and Grand Trunk Corporation (together, "CN") hereby submit this non-binding statement of issues that they intend to raise in their appeal of Decision No. 16 ("Decision"), issued by the Surface Transportation Board ("STB") on December 24, 2008 in STB Finance Docket No. 35087 (*Canadian Nat'l Ry. and Grand Trunk Corporation – Control – EJ&E West Co.*). The Decision authorized CN, subject to various conditions, to acquire control of the former EJ&E West Company ("EJ&EW"), which has since assumed the name Elgin, Joliet and Eastern Railway Company ("EJ&E").

CN's application for control of EJ&EW was filed pursuant to 49 U.S.C. §§ 11323-11325 and the STB's Railroad Consolidation Procedures, 49 C.F.R. Part 1180. Because the transaction did not involve the merger or control of two or more large "Class I" railroads, it was governed by 49 U.S.C. § 11324(d), which requires the STB to approve a control application *unless* it finds both that: (1) as a result of the transaction, there is likely to be substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States; *and* (2) the anticompetitive effects of the transaction outweigh the public interest in meeting significant transportation needs. The STB made neither finding. Decision at 13-15.

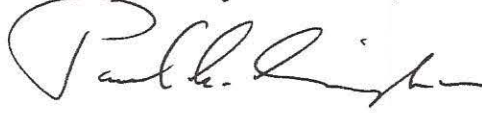
The grant of authority in the Decision was made subject to several conditions relating to potential competitive and labor impacts (not at issue in this appeal), and to 182 environmental mitigation conditions. Prior to the issuance of the Decision CN consented to 108 of the environmental mitigation conditions, and after the decision CN formally accepted all others save one. Thus, whether or not the STB had authority to impose involuntary environmental conditions on CN's proposed transaction, only one condition is at issue in this appeal, and that is the STB's grade separation requirements at two locations in Illinois where public roads cross EJ&E's rail lines, *see* Decision at 76, Final Mitigation Condition #14,

including its requirement that CN pay 67% and 78.5% of their costs, which have been estimated to total \$92.9 million.

Issue No. 1: Whether the STB erred, as a matter of law, in interpreting 49 U.S.C. § 11324(c) as granting it the authority to impose environmental mitigation conditions on its approval of a transaction that must be approved if it meets the competition standards of 49 U.S.C. § 11324(d).

Issue No. 2: Whether the STB's imposition of grade separation conditions at Ogden Avenue and Lincoln Highway (Decision at 76; Final Mitigation Condition #14), including its allocation to CN of 67% and 74% of the costs of each, respectively, was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.

Respectfully submitted,



Paul A. Cunningham

HARKINS CUNNINGHAM LLP
1700 K Street, NW
Suite 400
Washington, DC 20006

*Counsel for Canadian National Railway
Company and Grand Trunk Corporation*

March 27, 2009