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January 3, 2017

VIA E-FILE

Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, DC 20423

Re: *The Illinois State Toll Highway Authority - Petition for Declaratory Order*, STB
Docket FD 36075, CP's Reply to the Tollway's Motion for Leave and Surreply

Dear Ms. Brown:

Soo Line Railroad Company d/b/a Canadian Pacific¹ ("CP") respectfully submits this reply to the Motion for Leave and Surreply submitted by the Illinois State Toll Highway Authority (the "Tollway") by letter dated December 21, 2016 (the "Motion and Surreply"). The Motion and Surreply is in response to the Limited Reply Statement of CP filed with the Surface Transportation Board (the "Board" or "STB") on December 9, 2016 ("CP's Limited Reply").

The Tollway's Surreply contains several inaccurate claims and flawed arguments that CP addresses below. In the interest of compiling a more complete record, CP respectfully asks that the Board accept and consider this filing. See, e.g., *Am. Chemistry Council, the Chlorine Inst., Inc., the Fertilizer Inst., & PPG Indus., Inc.*, NOR 42129, slip op. at 5 (STB Served Sept. 30, 2011) ("In the interest of compiling a more complete record, we will accept the surreplies."). CP has no objection to the Board accepting the Tollway's surreply provided it also accepts this filing.²

1. The STB Should Consider the Tollway's Project as a Whole

The following facts are not in dispute. The Tollway's Elgin O'Hare Western Access Project ("EOWA") project calls for construction of an east-west tollway that approaches O'Hare International Airport ("O'Hare") from the west (the "Western Access Tollway") and divides into a northern leg that would connect to I-90 north of O'Hare and a southern leg that would connect to I-294 south of O'Hare and proceed through and across CP's

¹ Canadian Pacific (CP) is a trade name under which Canadian Pacific Railway Company's United States subsidiaries, Soo Line Railroad Company, Dakota, Minnesota and Eastern Railroad Corporation, and Delaware and Hudson Railway Company, Inc. operate. Bensenville Yard and the tracks referred to herein are owned and operated by Soo Line Railroad Company.

² CP is permitted, pursuant to 49 CFR § 1104.13(a), to reply to the Tollway's motion as a matter of right.

Bensenville Yard (the "Yard"). The two legs comprise the "Western Bypass." The Tollway's current alignment would require it to cross over CP's mainline, north of Bensenville Yard on to O'Hare property (the "Western Interchange") to connect with the Western Bypass. Once the Tollway crosses over CP's mainline, it is locked into the alignment through the Yard in order to complete the southern leg of the Western Bypass.

In order to cross CP's mainline, the Tollway seeks to acquire by condemnation portions of CP's right of way for its exclusive use. And once it crosses CP's mainline, the Tollway must acquire approximately 36 acres of CP's Bensenville Yard to complete the Western Bypass.³ In light of CP's long-expressed concerns that such acquisitions would disrupt current rail operations, undermine its ability to meet future rail demand, and adversely impact the Chicago Terminal and the larger rail network, CP has refused to sell the Tollway the property rights that would be necessary for the Tollway to complete construction based on its alignment and has encouraged the Tollway to pursue an alternative alignment that would avoid Bensenville Yard. Nevertheless, the Tollway has forged ahead with construction along the southern edge of Bensenville Yard in preparation to build through and across the Yard. These construction activities have included acquiring property, demolition of existing buildings, and hauling in thousands of tons of dirt for grading in preparation to connect through and across the Yard.

Notwithstanding these facts, the Tollway asks the Board to consider its proposed takings of CP's right of way to construct the Western Interchange, and to disregard – for now – the implications that constructing the Western Interchange would have for the Yard. The Tollway's request to have the Board put blinders on to the overall Tollway project and not address the very real impact on CP's Bensenville Yard (and on interstate rail transportation) would result in piecemeal consideration and repeated proceedings, and result in an increasingly politically toxic environment for the railroad. The Tollway's arguments for such a compartmentalized approach are fundamentally flawed and the Board should reject them.

The Tollway first contends that CP's argument for considering the impact on Bensenville Yard has already been rejected by the United States District Court for the Northern District of Illinois' ripeness finding. See *Soo Line Railroad Company, d/b/a Canadian Pacific v. Illinois State Toll Highway Authority*, Case No. 15-cv-10328. However, the court's ruling was grounded on the jurisdictional limits imposed on Article III courts by the U.S. Constitution: "[A]ny adjudication of this dispute would amount to an advisory opinion [which] the Constitution does not permit." Motion and Surreply, Ex. A, Memo. Op. at 8 (citing U.S. Const. Art. III). A key problem with the Tollway's reliance on the court's jurisdictional holding is that the STB's authority is not limited by Article III of the Constitution. See, e.g., *The Indiana & Ohio Ry. Co.—Constr. & Operation—Butler, Warren, & Hamilton Ctys., OH*, 9 I.C.C.2d 783, 786 (July 23, 1993) ("While courts are jurisdictionally barred from deciding abstract questions in the absence of a dispute by the 'case or controversy' requirement of Article III of the

³ On September 15, 2015, the Tollway served a Notice of Intent to Acquire with Railyard Modifications. See Exhibit A attached hereto. That notice identified approximately 36 acres of active Yard property that the Tollway had determined "were required for the construction of the Elgin O'Hare Western Access (EOWA) roadway project."

Constitution . . . administrative agencies are not so limited"). Rather, the STB's authority is derived from statute which confers authority to "issue a declaratory order to terminate a controversy or remove uncertainty." 5 U.S.C. § 554(e) (emphasis added). See also *Mendocino Coast Ry., Inc.—Discontinuance of Train Service in Mendocino Cnty., CA*, 4 I.C.C.2d 71 (Sept. 17, 1987) ("[T]he Administrative Procedure Act (APA) expressly permits issuance of declaratory orders 'to terminate a controversy or remove uncertainty.'" (quoting 5 U.S.C. § 554(e)). In rejecting similar arguments to those the Tollway makes here as to Bensenville Yard, i.e., there is "no case or controversy; that the matter is not ripe for consideration; . . . and that any decision . . . in this proceeding will be nothing more than an advisory opinion," the ICC previously explained:

We do not exercise the judicial power of a Federal court, and the "case or controversy" limitations on judicial power do not limit the powers of administrative agencies in declaratory order proceedings.

The Quaker Oats Co.—Transp. Within Texas & California—Petition for Declaratory Order, 4 I.C.C.2d 1033, 1034 (Aug. 10, 1987). Accordingly, the Board is not bound by the district court's subject matter jurisdictional findings and may exercise its broad authority to address the entire EOWA project as a whole.

Next, the Tollway argues that building the Western Interchange does not "make a Bensenville Yard crossing either imminent or inevitable" because the Tollway might possibly decide not to complete the southern leg through Bensenville Yard. However, the Tollway "freely admits it aspires" to build through the Yard. Motion and Surreply at p. 3. It is reasonable and realistic to expect that, having built the roadway up to the edges of either side of the Yard, it will, at the very least, try to complete the connection through the Yard. Notably, the Tollway does not contest CP's assertion that, once the Western Interchange is constructed, the Tollway's only option for completing the connection will be through Bensenville Yard. Nor does it contest CP's assertion that such a scenario would put substantial political pressure on CP, the Board, and/or Congress to accommodate the Tollway, at the expense of CP and the national rail network. It would appear to be in all stakeholders' interest, including the Tollway's, for the Board to preempt such a harmful standoff by addressing the issue now while the Tollway still has the option to change its alignment to avoid the Yard.

Additionally, the Tollway argues that consideration of the impacts on Bensenville Yard in this proceeding will unduly delay this proceeding and cause it severe harm. The claimed delay would result from the Tollway's purported need for a year for its engineers to draw up the plans for the Tollway's route through and across Bensenville Yard. Such delay, however, is totally unnecessary as the Board does not need to know the precise scope of the proposed takings in order to issue a declaratory order as to whether any such takings would be preempted by federal law. See, e.g., *14500 Limited LLC—Petition for Declaratory Order*, FD 35788 (STB served June 5, 2014) (finding federal preemption of adverse possession claim and claim for exclusive prescriptive easement of 0.44 acres of CSX's rail yard even though CSX was not using the parcel at issue for rail operations at the time). This is especially true in the case of a major rail yard such as Bensenville. More than a year ago, the Tollway served CP

with a Notice of Intent to Acquire with Railyard Modifications which detailed 36.43 acres of active railroad operating property in Bensenville Yard that it intends to acquire by condemnation for the Tollway's exclusive use, removing the property permanently from the rail network. See Exhibit A. While the exact amount of acreage the Tollway proposes to take might change, such change would not be material to the Board's determination as to federal preemption. *Cf. 14500 Limited*.

In any event, it is unclear how the Tollway would suffer "severe harm" from obtaining clarity and guidance on these issues before it expends hundreds of millions of dollars in wasteful construction on a project that it cannot complete. Moreover, since there is nothing to access on the west side of O'Hare now or in the foreseeable future, and since there is already western access from York Road via Irving Park Road, the alleged delay in completing construction of another western access road to O'Hare is of little apparent consequence.

Importantly, the Tollway's current position has evolved from its pre-litigation posture. The evolution belies both the Tollway's claim that the Western Interchange and the connection through Bensenville Yard are independent projects and its sense of urgency in obtaining the property interests purportedly necessary to complete the Western Interchange. Before CP initiated the litigation in November 2015, the Tollway's discussions with CP focused on obtaining the property interests in Bensenville Yard that the Tollway determined would be necessary to complete the EOWA project. It was after CP initiated litigation that the Tollway took formal steps to acquire the property interests purportedly necessary to construct the Western Interchange, while seeking to forestall any decision on the proposed Bensenville Yard takings. The Tollway's sudden shift in priorities appears to be driven by a strategy that now aims to tighten the noose around Bensenville Yard, and not by a genuine concern for the cost of delay in constructing the Western Interchange.

2. Discovery in this Proceeding is Appropriate and Necessary

Contrary to the assertions in the Tollway's Motion and Surreply, CP's request for 120 days to conduct focused discovery is not disingenuous; it is a reasonable request considering the significance of the issues in this proceeding. The Tollway has put forth a nearly 900-page filing which attaches numerous exhibits, including an expert opinion. In its Limited Reply, CP simply asked for a reasonable amount of discovery focused on exploring the Tollway's purported "need" for CP's property, including whether alternative and more feasible alignment options exist—which CP believes in fact do exist—and to discover the bases for the opinions put forth by the Tollway's expert(s). Moreover, since the Board should consider the project as a whole, discovery as to the Tollway's plans for the development toward Bensenville Yard is entirely appropriate and would aid the Board in having a more complete record before it in this proceeding. Accordingly, CP's request for discovery is reasonable and the Tollway's perfunctory objection to any discovery in this proceeding is without merit.

3. The Board Should Adopt CP's Reasonable Proposed Briefing Schedule

Similar to its categorical objection to reasonable discovery, the Tollway also pushes an aggressive briefing schedule to meet its own interests without regard to ensuring a complete

record before the Board. This is particularly troubling because, while pushing its schedule in this proceeding, the Tollway has contemporaneously and repeatedly sought to delay the appeal of the district court's ripeness decision, now pending before the Seventh Circuit, by seeking extensions of the Tollway's time to file its response brief. Notably, the Tollway first sought an extension on November 23, 2016, the same day it filed its petition demanding "expedited relief" by the STB. See *Soo Line Railroad Company, d/b/a Canadian Pacific v. Illinois State Toll Highway Authority*, Case No. 16-2911 (7th Cir.), Dkt. # 21. And two days before it filed its Motion and Surreply, on December 19, 2016, the Tollway again sought additional time to file its brief with the Seventh Circuit. *Id.* at Dkt. # 24.

As stated in its Limited Reply, if the Board decides to initiate a declaratory order proceeding, CP respectfully requests that its Reply be due 30 days after the close of the discovery period or, in the event that the Board declines to allow discovery, due on February 23, 2017.⁴ Given the voluminous size of the Tollway's Petition which included expert studies and reports, CP believes that this proposed schedule is reasonable and necessary.

Respectfully submitted,



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Attorneys for Soo Line Railroad Company

⁴ In its Motion and Surreply, the Tollway states it has no objection to providing CP until January 31, 2017 to submit the Reply. This proposed date is not based on any discussions between the parties and is arbitrary.

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of January, 2017, I served the foregoing Reply of the Soo Line Railroad Company d/b/a Canadian Pacific to the Illinois State Toll Highway Authority's December 21, 2016 Motion for Leave and Surreply by first class mail, postage-prepaid, on the following:

The Illinois State Toll Highway Authority
Lisa Madigan
Attorney General of the State of Illinois
2700 Ogden Avenue
Downers Grove, IL 60515

and by electronic mail and first class mail postage-prepaid on the following:

David A. Goldberg
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Downers Grove, IL 60515
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David F. Rifkind

EXHIBIT A



September 15, 2015

Mr. Robert A. Johnson
 Vice President of Operations
 Canadian Pacific Railroad/Soo Line Railroad
 120 South 6th Street
 Minneapolis, MN 55402

Re: Notice of Intent to Acquire with Railyard Modifications
 Project: Elgin O'Hare Western Access

<u>Parcel Number</u>	<u>County</u>	<u>PIN</u>	<u>Acquisition Type</u>
WA-1D-12-004	Cook	12-19-400-078	Full Fee
WA-1D-12-009	Cook	12-19-400-063	Partial Fee & TE
WA-1D-12-046	DuPage	12-19-400-019 03-12-509-003	Partial Fee, PE, TE & AC
WA-1D-12-066	Cook	12-19-200-002 12-18-501-001 12-18-400-015-6001 12-18-400-019 12-19-201-015 12-20-100-028	Partial Fee, PE, TE & AC
WA-2D-12-191	DuPage	03-12-509-001	PE & TE
WA-2D-12-195	DuPage	03-01-509-002	PE & TE

Dear Mr. Johnson:

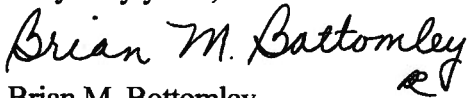
As previously indicated, the Illinois Tollway determined that the above land parcels were required for the construction of the Elgin O'Hare Western Access (EOWA) roadway project. Attached is the Tollway's April 1, 2015 letter. Subsequently, we have worked to appraise these land parcels and have also undertaken an extensive effort to address the current and future rail yard plans noted by the Canadian Pacific Railroad. Through these efforts, we were able to refashion some of the parcels after modifying our roadway design to ensure that only the land essential for the construction will be purchased. In addition to the real estate values, the Tollway intends to compensate or reimburse the railroad for its necessary intra-yard modifications, including the Canadian Pacific turntable.

We would like to meet with you in the near future to share our updated EOWA design plans, including the scaled back real estate take, and also to present our purchase offer. Mr. Mark Mathewson will lead the discussions for the Tollway. He will be contacting you within the next few days to arrange a meeting wherein we can discuss Canadian Pacific's needs and requirements, review the project updates, and present our formal offer to purchase.

Regarding the specific negotiation for the real estate, the Canadian Pacific Railroad, like any property owner in Illinois, has the right to submit counter offers and present material that it believes is relevant to determining the value of the property. I have enclosed a copy of the Illinois Attorney General's pamphlet on property owner's rights; it contains a more detailed explanation of your rights and the acquisition processes.

I am glad that we have been able to work closely through the development of this project; I know that a continuation of that cooperative effort will be mutually beneficial now and in the future. If you have any questions feel free to contact me directly at (630) 241-6800. Ext. 3949.

Very truly yours,

A handwritten signature in black ink that reads "Brian M. Bottomley". The signature is fluid and cursive, with a small flourish at the end.

Brian M. Bottomley
Senior Project Engineer &
Acting Land Acquisition Manager

Enclosures:

Plats
Attorney General pamphlet
April 10th 2015 letter