

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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Office of Proceedings  
March 31, 2017  
Part of  
Public Record

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**STB Docket FD 36075**

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**THE ILLINOIS STATE TOLL HIGHWAY AUTHORITY – PETITION FOR  
DECLARATORY ORDER**

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**MOTION TO STRIKE  
OR, ALTERNATIVELY,  
MOTION FOR LEAVE TO FILE SUR-REPLY OF THE  
SOO LINE RAILROAD COMPANY  
d/b/a CANADIAN PACIFIC**

Pursuant to 49 C.F.R. § 1104.8, and the Board’s Decision of January 17, 2017, Soo Line Railroad Company d/b/a Canadian Pacific (“CP”)<sup>1</sup> moves to strike the March 16, 2017 Response of the Illinois State Toll Highway Authority (the “Tollway”) on the grounds that it impermissibly exceeds the scope permitted by the Board’s January 17, 2017 order (the “Scheduling Order”). The Scheduling Order provides that the “Tollway . . . may file [a] response[] to CP’s reply, *limited to only the issue of the Bensenville Yard*, by March 16, 2017.” Scheduling Order at 4 (emphasis added). Notwithstanding this clear limitation, and without seeking Board permission, on March 16, 2017, the Tollway filed a response (“Response”) that far exceeds the issue of Bensenville Yard.

Although the Tollway purports to limit its Response to that which the Board ordered, it simultaneously admits it addresses extraneous matters, asserting it is “compelled to respond” to

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<sup>1</sup> 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.

CP's new evidence<sup>2</sup> regarding how it might use the right of way in the future. *See* Response at 2 n.2. The Tollway suggests that its transgressions are confined to the Addendum attached to its Response, but even a cursory reading of its Response belies its assertion. In direct contravention of the Board's Scheduling Order, much of the Tollway's Response exceeds the permitted scope and otherwise constitutes improper reply to a reply. The Tollway discusses the Western Interchange throughout the Tollway's Response. In addition, the Tollway's (erroneous) recitation of the parties' negotiating history simply reiterates the arguments already attempted in its Petition. *See* Petition at 3-4, 29. Finally, the Tollway's legal arguments are primarily addressed to rebutting CP's argument regarding the proposed takings of portions of the Bryn Mawr right of way (while ignoring STB decisions involving proposed taking of yard property). As the Tollway's violations run throughout its Response, in contravention of the Board's Scheduling Order, CP asks that the Board strike the Tollway's Response in its entirety.

Alternatively, should the Board consider the Tollway's Response in its entirety, CP should be permitted to reply. The Tollway's Response contains numerous factual inaccuracies, makes a new proposal to exchange property in an effort to offset the impact of the proposed yard takings, and introduces a substantial volume of new evidence into the record. Allowing CP to reply would be in the interest of a complete record. *See City of Alexandria, Va.—Pet. for Declaratory Order*, FD 35157 (STB served Nov. 6, 2008) (allowing reply to reply “[i]n the interest of compiling a full record). Accordingly, CP seeks leave of the Board to file the attached sur-reply.

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<sup>2</sup> While the Tollway seeks to justify filing of its Addendum based on the need to address “new” information contained in CP's reply, such information could have been obtained in discovery. The Tollway, however, opposed CP's request for discovery and should bear the consequences of that decision.

Dated: March 31, 2017

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

I hereby certify that on this 31st day of March, 2017, I served the foregoing MOTION TO STRIKE OR, ALTERNATIVELY, MOTION FOR LEAVE TO FILE SUR-REPLY OF THE SOO LINE RAILROAD COMPANY d/b/a CANADIAN PACIFIC by first class mail, postage-prepaid, on the following:

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**SUR-REPLY STATEMENT OF THE  
SOO LINE RAILROAD COMPANY  
d/b/a CANADIAN PACIFIC**

## TABLE OF CONTENTS

|                                                                                                      |    |
|------------------------------------------------------------------------------------------------------|----|
| INTRODUCTION AND BACKGROUND .....                                                                    | 1  |
| ARGUMENT .....                                                                                       | 3  |
| A. The Tollway Misconstrues the Law.....                                                             | 3  |
| B. It is Not Premature To Consider the Impacts on Bensenville Yard.....                              | 4  |
| 1. The Tollway Does Not Have Authority to Stop Construction at Irving Park Road .....                | 5  |
| 2. The Board Has Sufficient Information to Issue a Declaratory Order Addressing<br>Preemption .....  | 6  |
| 3. The Tollway’s Newly Proposed Property Exchange Is of No Moment .....                              | 7  |
| C. The Tollway’s Addendum Demonstrates the Perils of An “As Applied” Analysis .....                  | 8  |
| D. The History of Discussions Between the Parties Is Not Relevant to the Preemption<br>Analysis..... | 9  |
| CONCLUSION.....                                                                                      | 13 |

SUPPLEMENTAL VERIFIED STATEMENT OF DANIEL SABATKA, P.E.

SUPPLEMENTAL VERIFIED STATEMENT OF THOMAS J. PHELAN, P.E.

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**SUR-REPLY STATEMENT OF THE  
SOO LINE RAILROAD COMPANY  
d/b/a CANADIAN PACIFIC**

Soo Line Railroad Company d/b/a Canadian Pacific (“CP”)<sup>1</sup> submits this sur-reply in opposition to the Response of the Illinois State Toll Highway Authority (the “Tollway”) in support of its Petition for a Declaratory Order (the “Petition”). In support of this sur-reply, CP submits the Supplemental Verified Statements of Daniel Sabatka, P.E. and Thomas J. Phelan, P.E.

**INTRODUCTION AND BACKGROUND**

In this dispute, the Tollway seeks a declaration from the Board that federal law does not preempt a state law eminent domain action to take portions of CP’s active rail right of way and major rail yard for its exclusive conflicting use. Under any circumstance, the taking of rail operating property for conflicting use is preempted by federal law. Application of federal preemption is particularly important here given the significance of the rail property at issue both to CP and to the national rail network.

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In seeking this declaration, the Tollway asks the Board to depart from binding preemption jurisprudence and establish an exception to the bedrock rule that state law eminent domain taking of rail operating property is categorically preempted by federal law. This exception, claims the Tollway, is justified because the public interests in the proposed takings outweigh the harm to interstate rail transportation. The Tollway's desired exception has no legal basis and would have dangerous ramifications. Such an exception would undermine the strong federal policy which seeks to preserve and maintain the national rail network, expose the national rail network to repeated assaults by state actors, and place the Board and the courts in the untenable position of deciding these disputes. But even under an "as applied" approach, the proposed takings of CP's active rail operating property are subject to federal preemption.

Additionally, the Tollway's proffered exception is premised on several erroneous claims, including that: (1) the EOWA project is doomed if it cannot take CP's right of way and yard property; (2) CP's participation in discussions regarding a Bensenville alignment is evidence that the proposed takings would not unreasonably interfere with rail operations; and (3) it was reasonable for the Tollway to forge ahead with construction of the EOWA based on a Bensenville alignment. None of these assertions are true.

As to the Tollway's first erroneous claim, the Tollway has other alignment options that would avoid CP's Bensenville Yard, a fact it does not deny. As confirmed by the Tollway's own documents, alternative alignments are available, but the Tollway refuses to pursue them due to "local impact."<sup>2</sup> The Tollway also does not deny that an alternative alignment will be entirely foreclosed should the Tollway construct the Western Interchange as planned.

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<sup>2</sup> The Tollway's January 21, 2014 meeting minutes state that, "CP questioned why the design wasn't modified to avoid the machine shop and turntable by taking the roadway further south. It was explained that the local impact of relocating the roadway would be significant to local community (Village of Bensenville)." Tollway Response, Exh. 2-C - Page 3.

Next, CP's participation in discussions aimed at accommodating the Tollway's preferred routing is not evidence that the proposed takings would not unreasonably interfere with rail operations. Rather, CP participated in these discussions in an attempt to reach an agreement that would result in "zero" disruption and would not interfere with CP's ability to meet future demand. The parties never reached an agreement precisely because the proposed takings would unreasonably interfere with rail operations.

Finally, the Tollway's purported expectation that those discussions would ultimately result in an agreement is not a reasonable basis on which to invest an alleged \$1 billion. This is particularly true given that the parties never even executed a Memorandum of Understanding, let alone an agreement. Further, the Tollway's own documents confirm that CP expressed significant concerns regarding the EOWA project's impact on its rail operations and future capacity, and those concerns were escalating throughout the parties' discussions. Essentially, the Tollway disregarded the parties' inability to reach an agreement, acted as though an agreement was not necessary, and now cites those actions as a basis for removing the protection afforded rail operating property by federal preemption. The Tollway's backwards logic should be rejected.

## **ARGUMENT**

### **A. The Tollway Misconstrues the Law**

Ignoring the vast body of STB and court precedent holding proposed takings of rail operating property for conflicting uses is categorically preempted, the Tollway argues instead that the Board should analyze the proposed takings of CP's right of way and Yard property under an "as applied" standard. In support of its argument, the Tollway cites an Ohio Supreme Court decision that held a particular taking of railroad property was not preempted by ICCTA. *See*

Response at 28 citing *Girard v. Youngstown Belt Ry. Co.*, 979 N.E.2d 1273, 1287 (Ohio 2012). The Tollway's reliance on *Girard* is misplaced.

The property at issue in *Girard*, while named "Mosier Yard," was not a rail yard. It contained "no active or abandoned tracks," "no portion of rights-of-way of any rail lines," "no permanent structures" and was "undeveloped as a whole." *Id.* at 1283. The railroad intended to sell the property to a third party to construct and operate a transload facility which did not qualify as "rail transportation" subject to the STB's jurisdiction. *Id.* at 1284. Based on these unique facts, the court distinguished the case from precedent which holds that federal law categorically preempts actions that seek to take rail operating property. *Id.* at 1286. Indeed, *Girard* expressly acknowledges that under Board and court precedent, actions to take active rail property are "categorically preempted." *Id.* at 1282 ("Courts also generally recognize that eminent-domain actions that seek to take property containing active rail lines are categorically preempted by the ICCTA.").

In stark contrast to the facts in *Girard*, the property at issue in this dispute involves CP's active main line right of way and CP's only major rail classification yard in the Chicago Terminal. Accordingly, under STB and recognized preemption jurisprudence, including *Girard*, an action in eminent domain to take portions of these operating properties for conflicting use is categorically preempted.

**B. It is Not Premature To Consider the Impacts on Bensenville Yard**

The Tollway continues to persist in its smoke and mirrors assertions that building through Bensenville Yard remains aspirational and that its plans are not sufficiently advanced for the Board to issue guidance. Neither assertion is correct.

# **1. The Tollway Does Not Have Authority to Stop Construction at Irving Park Road**

As CP explained in its Reply, the Environmental Impact Statement (EIS) authorizing the EOWA project and accompanying Record of Decision (ROD) authorize construction of the EOWA project as a whole, indivisible project. Terminating at Irving Park Road either indefinitely or permanently is simply not an option authorized by the EIS and would require the Tollway to obtain a supplemental EIS. Moreover, terminating the project at Irving Park Road, would have environmental impacts that have not been studied and would undermine the Tollway's finances.

In its Response, the Tollway claims that the construction plan has always been to terminate at Irving Park Road "with traffic exiting on the surface streets for multiple years." Chanowitz VS Exh. 3, p. 2. However, this aspect of the Tollway's construction plan is addressed nowhere in the EIS. In other words, the environmental impacts have not been adequately considered under NEPA. See Phelan Supplemental VS. In its Response, the Tollway points to phases in its construction plan as if this allows for eliminating portions of the route altogether. Construction phases may affect the timing, but do not have any legal effect to change the route approved in the ROD. In any event, even assuming that the Tollway has the authority to terminate at Irving Park Road and open the terminus to traffic during the construction hiatus, this would not be a basis for treating completion of EOWA as discretionary.

While the Tollway admits that the EIS would need to be supplemented if it opted not to complete the EOWA through Bensenville Yard, it has not actually prepared a supplemental EIS for regulatory approvals. Accordingly, the Tollway is legally obligated to proceed in compliance with the ROD which approved completion of the entire EOWA. Indeed, as the Tollway's engineering plans included in its Response are based on the completion of the Bensenville Yard

segment and the Tollway continues to take actions on the ground to make this a reality. See Phelan Supplemental VS ¶ 4. Likewise, the Tollway's increased political efforts demonstrate it fully intends to complete the roadway connection. The Board should assume that the Tollway intends to act in compliance with the EIS and its regulatory obligations.

## **2. The Board Has Sufficient Information to Issue a Declaratory Order Addressing Preemption**

The Tollway argues that its plans for Bensenville Yard are not sufficiently developed for the Board to determine whether the proposed future takings of Yard property would be subject to federal preemption. This argument assumes that the Board will conduct a detailed factual inquiry to determine whether the impact of such takings rise to the level of unreasonable interference with interstate rail service. However, under well-settled precedent, “eminent-domain actions that seek to take property containing active rail lines are categorically preempted by the ICCTA.” *Girard*, 979 N.E.2d at 1282. Whether the Tollway ultimately proposes to take 35 acres or 16 acres, such action would be categorically preempted. *14500 Limited LLC-Pet. for Declaratory Order*, FD 35788, slip op. at 4 (STB served June 5, 2014) (adverse possession claim and claim for exclusive prescriptive easement involving 0.44 acres of CSX rail yard federally preempted). Thus, the Board need not know the exact magnitude of the proposed takings of rail operating property in order to render a declaratory order. In any event, all of the engineering drawings that the Tollway has advanced since 2009, and which it submitted in the EIS process, consistently show an alignment through the Yard which is unreasonable on its face given the obvious impacts to irreplaceable operating property. All the more so in the face of the un rebutted facts set forth in the Verified Statements of Tom Albanese and Dan Sabatka that the Tollway's alignment would prevent or unreasonably interfere with CP's use of this strategic property to meet customer demand for rail service currently and in the future.

### **3. The Tollway's Newly Proposed Property Exchange Is of No Moment**

The Tollway now proposes that, to compensate CP for loss of Yard acreage, it will purchase property for CP that is located across the street from Bensenville Yard. The Tollway asserts that CP will be better off as a result. The Tollway does not understand railroading and is wrong.

Because the proffered property exchange is located across the street and is disconnected from Bensenville Yard it is substantially useless from a rail operating perspective. To access the property, CP would have to traverse Franklin Avenue, a major thoroughfare, via a newly constructed grade crossing. The prospect of moving rail cars back and forth across the roadway for classification, intermodal lifts, or car repair raises substantial concerns including safety, rail operating efficiency, extra crew costs, congestion, and yard access.

From a safety perspective, a grade crossing presents obvious risks of accidents with vehicular and pedestrian traffic. Due to such risks, as well as to alleviate traffic and rail congestion, the rail industry, and state and federal entities have sought to reduce the amount of grade crossings in the Chicago Terminal and nationwide. The Tollway's proposal would further balkanize Bensenville Yard and degrade CP's operating efficiencies, and add significant cost. *See, e.g.,* CP Reply at 10-14, Albanese VS, ¶ 14. The impact would be particularly acute here as the road is a physical barrier that would impede and/or delay the movement of rail equipment and personnel resulting in congestion at a major rail yard in the Chicago Terminal. Further, the Tollway fails to account for the impact that a heavily used rail grade crossing would have on an already congested roadway. Adding a grade crossing undoubtedly would exacerbate the problem which, in turn, would interfere with access to and from the Yard generally and with respect to intermodal traffic in particular. Thus, while the proposed property exchange could leave CP with more acres in total, it would leave CP worse off than if it maintains the integrity of its Yard, and

would undoubtedly alter rail operations. Accordingly, such a property exchange does not alter the fact that the proposed takings would unreasonably disrupt rail operations and interfere with CP's ability to use its rail property to meet current and future demand.

**C. The Tollway's Addendum Demonstrates the Perils of An "As Applied" Analysis**

The Tollway and its engineers challenge CP engineering plans and evidence regarding the impact of the proposed takings on CP's use of the Bryn Mawr right of way. In doing so, the Tollway seeks to substitute its engineering opinions for those of CP, dictating how and where CP should build and operate. This is the very definition of unreasonable interference and constitutes state regulation of rail transportation which is categorically preempted. Thus, even under an "as applied" approach, the proposed takings are subject to ICCTA preemption.

Importantly, the dispute between the Tollway and CP's engineers illustrates the perils of the "as applied" preemption standard which the Tollway advocates. Establishing a standard that permits the takings of active rail property depending on the circumstances is an invitation for parties to ask the STB or a court to allow eminent domain actions against railroads. In such proceedings, the STB or court would be called upon to resolve a multitude of disputes over rail design, safety, engineering, and operating specifications.

Moreover, the Tollway's engineering arguments focus on the impact the proposed takings would have on the two options CP is currently considering for the right of way but ignore the impact that the proposed takings would have on CP's ability to utilize its right of way in the future. As CP explained on reply, the rail industry is dynamic and constantly adapting operations and facilities to changes in volume, traffic mix, and other variables. CP Reply at 20-21. CP cannot predict how it might use its right of way in the future to meet demand for rail service. Nor does the law require it to make such a prediction. *See, e.g., City of Creede, Co.*—

*Pet. for Declaratory Order*, FD 34376, slip op. at 6 (STB served May 3, 2005) (quoting *Midland Valley R.R. Co. v. Jarvis*, 29 F.2d 539, 541 (8th Cir. 1928)) (“[I]t cannot be said that property at the edge of a railroad’s ROW is ‘not needed for railroad transportation’ just because tracks or facilities are not physically located there now.”).

In addition, as CP’s Dan Sabatka explains in his supplemental verified statement attached hereto, the Tollway’s engineers are wrong on several key points. For example, the Tollway asserts that, based on CP’s applicable standards, the proposed inspection tracks could be built with 22-foot track centers rather than 24-foot. However, the Tollway cites the wrong standards, and its proposed modifications would compromise safety. Sabatka Supp. VS, ¶¶ 12-13.

The Tollway also asserts that CP lacks the necessary sign-offs and accommodations to implement either of the two options under consideration for the right of way, and exaggerates the difficulty of obtaining those rights. See Sabatka Supp. VS, ¶¶ 3-11, 16. CP reasonably expects that it will obtain the necessary rights in the ordinary course of business. *Id.* at ¶ 16. In the unlikely event CP is unable to do so, it has other uses for the property.

**D. The History of Discussions Between the Parties Is Not Relevant to the Preemption Analysis**

Just as in its Petition, the Tollway devotes much of its Response to the history of discussions between CP and the Tollway. This history, which the Tollway distorts, is not relevant to a preemption analysis. See *Union Pac. R.R. Co. v. Chicago Transit Auth.*, 647 F.3d 675 (7th Cir. 2011). Nevertheless, given the interest expressed by certain members of the Illinois Congressional delegation, it is important to correct the Tollway’s mischaracterizations of the parties’ prior dealings and to put these proceedings in the proper context.

The Tollway’s Response opens with a straw man argument that incorrectly asserts that “CP attempts to create the false impression that it unequivocally opposed the Western Access

Interchange and any encroachment on Bensenville Yard throughout the entire EOWA Project.” Response at 7. The Tollway then proceeds to dismantle the straw man. According to its Response, after CP led the Tollway to believe that it would accommodate the Tollway through Bensenville Yard and the Bryn Mawr Right of Way, CP precipitously changed its position in November 2015. *Id.* at 15. Further, according to the Tollway, even though the parties were not even able to reach agreement on a memorandum of understanding, CP’s actions or, in the case of the Western Interchange, its silence, justified the Tollway’s decision to spend allegedly \$1 billion to construct portions of the EOWA. The Tollway’s own evidence tells a different story.

As explained in CP’s reply and reflected in the record, while CP sought to work with the Tollway, its discussions with the Tollway were premised from the start on there being “zero” disruption to rail operations and no interference with CP’s ability to meet future demand for rail service. CP Reply at 15. *See also* Letter from I-DOT to CP’s Charles Wise dated September 21, 2009, attached to Tollway Response as Exh. 1-C - Page 2 (“CP Railroad has raised concerns regarding the ability to expand the CP’s western yard in the future . . . . We would like to work with you to develop an appropriate plan for offsetting any impacts caused by implementation of the EO-WB project, should it move forward.”). The record is clear that, far from an eleventh hour change of heart, over the course of discussions with the Tollway, CP expressed increasing concerns regarding the impact on CP current and future rail operations.

As early as December 2011, according to the Tollway’s own records, CP reported that “[u]pper management feels that the previous CP representation was not looking out for the railroads best interests and future growth.” Telephone Conversation Record, Tollway Response Exh. 1-H - Page 2. That same record also notes that “[t]he local General Manager . . . has the

strongest opposition to the present arrangement and his concerns for future growth restrictions.”  
*Id.*

After failing to reach agreement on a memorandum of understanding, the parties met again in July 30, 2013. At that meeting, according to the meeting minutes, CP warned the Tollway that its “new leadership has shifted the focus of the company to be more results driven and is very sensitive to operations impacts.” Exh. 2-B - Page 3.

Again, in January 2014, CP advised the Tollway of “significant concerns with the impacts to the CP operations” and refused “to move forward with any right-of-entry, service agreement, or other coordination on this project until they evaluate the feasibility of relocating existing facilities and the project impacts to the yard.” Tollway Response, Exh. 2-C - Pages 3-4.

In March 2014, the parties met again for CP to present the findings of its review:

In the initial statements by CP, the Bensenville Yard facility was described as critical in their operation, noting that Chicago has one of the highest car loadings in the nation. They further noted that the yard is small, approximately 300 acres and that their existing footprint is fully utilized to maximize their operations. Any loss of acreage will have an impact to the yard’s operation and is considered to have lost opportunity cost in the future. CP Leadership stated that the yard is not for sale, but given their review of the situation a compromise is offered to allow the project to proceed.

Exh. 2-D - Page 2.

At the March meeting, CP presented a one-time, non-negotiable offer. The Tollway sat on the offer for 20 months before finally rejecting it. By this time, CP, seared by the severe service disruption of 2013-2014, and by NIMBY efforts to thwart rail capacity expansions, was convinced that accommodating the Tollway would prove damaging to CP, its customers, and the national rail network as a whole. Of course, CP’s decision did not foreclose the Tollway from completing the project along a different alignment. According to the Tollway’s own documents,

other alignments are available to the Tollway, but are simply not being pursued due to “local impact.”<sup>3</sup> Exh. 2-C - Page 3.

Given that there was no agreement between CP and the Tollway, and CP’s increasing concerns with the project, the Tollway’s decision to forge ahead with construction is troubling.<sup>4</sup> The Tollway’s decision is even more egregious considering that, according to its website, all of the construction contracts for the EOWA project were approved and performed *after* the January 2014 meeting at which CP advised the Tollway that it had serious concerns about its ability to accommodate the Tollway’s alignment through Bensenville. See <https://www.illinoistollway.com/projects/construction-tracker> (listing contracts for EOWA starting on Feb. 27, 2014). Neither CP, nor its customers, nor the rail network should be forced to bear the consequences of the Tollway’s imprudent gamble. Simply stated, the Tollway, a sophisticated entity, knew it needed property rights to construct the roadway on its chosen alignment, knew it did not have the necessary property rights and that it was preempted from obtaining them by means of eminent domain, but chose to press ahead anyway apparently in the mistaken belief that it could force a deal politically.

Moreover, the Tollway’s claim that it has spent nearly \$1 billion dollars on the EOWA project based on CP’s apparent willingness to sell property needed for the Bensenville alignment is both unsupported and inconsistent with the information on its website. According to the Tollway’s website, it has entered into contracts for construction of the EOWA project totaling \$393 million. See <https://www.illinoistollway.com/projects/construction-tracker>. Of this sum,

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<sup>3</sup> In 2014, the Tollway advised CP that it was actually reconsidering the Tollway alignment. See Tollway Response, Exh. 2-G - Page 2. However, the Tollway presented no alternative alignments.

<sup>4</sup> A reader of the Tollway’s submission might think that the Tollway seeks to invoke some sort of estoppel doctrine, but the Tollway never identifies the doctrine by name, cites no legal authorities, and makes no mention of the elements necessary for its application. Perhaps this is because the Tollway knows the law and the facts would never support application of the doctrine in this situation. See *generally*, *Parks v. Kownacki*, 737 N.E.2d 287, 296 (2000).

significant portions were expended on portions of the extensive project that have no bearing on the railroad.

The Tollway makes much of the fact that CP did not object to its plans for the Western Interchange until recently. But as the Tollway admits, the parties' discussions were almost entirely focused on the Yard. Indeed, the Tollway only recently disclosed its plans for the Western Interchange with the degree of specificity that would allow CP to assess whether and to what degree the Western Interchange would affect CP's right of way. The first time CP learned that the Tollway's actual plan for the bridge piers would encroach a full five feet into CP's right of way, rather than the three feet that CP's engineer relied upon in trying to assess the impact of the proposed takings, was on March 16, 2017, when the Tollway filed its Response. Accordingly, the fact that the parties did not discuss the Western Interchange is not evidence that the Western Interchange, as ultimately proposed, would not interfere with rail operations. Nor does it change the fact that the Tollway knew it lacked the necessary property rights, or the fact that the Tollway's proposed temporary and permanent takings of portions of CP's active right of way for a conflicting use would in fact disrupt and unreasonably interfere with interstate rail operations, and are therefore preempted by ICCTA.

### **CONCLUSION**

For the reasons stated above, CP requests that the Board enter an order denying the Tollway's request to sanction acquisition of permanent and temporary easements for the construction of highway bridges over and on railroad right of way owned and operated by CP at York Road and Thorndale Avenue in DuPage County, Illinois, and declaring that the Tollway's state law eminent domain authority to acquire such permanent and temporary easements as well as to acquire permanent and temporary easements to construct a highway under, on and through

CP's Bensenville Yard, is preempted by federal law under 49 U.S.C. §10501(b), and for all further relief proper in the premises.

Dated: March 31, 2017

Respectfully submitted,

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*Attorneys for Soo Line Railroad Company d/b/a Canadian Pacific*

## **CERTIFICATE OF SERVICE**

I hereby certify that on this 31st day of March, 2017, I served the foregoing SUR-REPLY STATEMENT OF THE SOO LINE RAILROAD COMPANY d/b/a CANADIAN PACIFIC by first class mail, postage-prepaid, on the following:

The Illinois State Toll Highway Authority  
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Molly J. Moran  
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1200 New Jersey Avenue, S.E.  
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711 Hart Senate Building  
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The Honorable Tammy Duckworth  
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/s/ David F. Rifkind  
David F. Rifkind

**BEFORE THE SURFACE TRANSPORTATION BOARD**

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**STB Docket No. FD 36075**

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**THE ILLINOIS STATE TOLL HIGHWAY AUTHORITY – PETITION FOR DECLARATORY ORDER**

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**Supplemental Verified Statement of Daniel Sabatka, P.E.**

1. My name is Daniel Sabatka. I am a licensed Professional Engineer, registered in the State of Minnesota, employed by Soo Line Railroad d/b/a Canadian Pacific (“CP”). I have worked for CP in various engineering capacities since 2011, and am currently Senior Director Engineering Works. I hold a civil engineering degree from the University of Minnesota.

2. I have previously sponsored a Verified Statement in this matter to explain how the Tollway’s proposed takings both in the Bryn Mawr Right of Way and in Bensenville Yard (the Yard) would prevent or unreasonably interfere with CP using these strategic properties to expand capacity to meet customer demand for rail service. Additionally, I supplied background regarding discussions between CP and the Tollway regarding the Tollway’s planned alignment impacting CP’s properties. I have now been asked to review technical statements made by the Tollway in its March 16 response brief, and have done so. I offer this Supplemental Verified Statement to clarify and correct misstatements made by the Tollway, and provide background regarding how railroad improvement projects actually work in the ordinary course of business.

**CP’s Inspection Track Plans Do Not Place a Significant Burden on Union Pacific**

3. CP’s present plan for two inspection tracks on the Bryn Mawr track segment call for relocation of CP mainline no. 2 as far east as possible which in turn would require shifting of 1170 linear feet of existing shared access road onto Union Pacific Railroad’s (UP) adjoining right of way. Situations of this sort are common in the railroad industry, where infrastructure adjoins. Typically these matters

are accommodated and dealt with in a construction and maintenance agreement between the two railroads. I note too that this same access road is entirely on UP right of way immediately south of the proposed road relocation, therefore the proposed shift is consistent with the existing roadway alignment in the corridor.

4. It is not true, as claimed by the Tollway, that relocation of CP's mainlines would also require a shift of the currently shared drainage onto the UP right of way. A detailed analysis and design of the drainage on this corridor would be required prior to implementation and dependent on the findings, a stormwater conveyance system that captures CP runoff and directs it to the storm sewer (ditch) located on the opposite side (west) of CP's right of way may be necessary. Based upon my background, training and experience in the rail industry, this type of installation would be feasible and as a result there would be no drainage impact to UP.

5. The Tollway's objection regarding installation of switches at the Bryn Mawr interlocker is unfounded. The plan for the proposed inspection tracks would require installation of switches on UP property, but the location of these new switches is where existing switches to CP trackage already exist today. The addition of the switches would also require signal improvements, and likely upgrades, to the UP control point. Installation of the proposed switches would likely be handled through a construction and maintenance agreement between CP and UP, and based upon my experience, I do not anticipate that UP would withhold its consent in this instance. These types of agreements are common in the railroad industry, an industry where our respective infrastructure connects and interfaces, allowing for origination and delivery of traffic on one another's network.

**The Tollway's "Other Flaws" Contentions Misapprehend Applicable Standards and Exaggerate Routine Normal Course of Business Matters Into Something They Are Not**

6. There is no engineering reason that would prevent placement of all of the necessary signal structures on the CP Right of Way. Signals would be planned where the CP right of way is 100' in width and would likely be accommodated through the installation of a signal bridge. The signal bridge

would have one mast on the east side of the right of way, in the buffer between the east property line and the east main track clearance envelope, and the second mast would be west of the westerly inspection road. The signal bungalow would be located in the 10' ditch/drainage on the west side of the CP right of way and a culvert would be installed to accommodate drainage.

7. CP's proposed staging and inspection track improvements may require modifications to the existing drainage structure and drainage ditches between CP and York Road. Track expansion projects such as this usually impact existing drainage structures and conveyances, but in my experience drainage improvements or modifications, such as culvert extensions, re-grading and the installation of storm sewers eliminate the impacts. These sort of issues and the mitigation solutions I mention are routine issues with tried and true solutions not "flaws," as the Tollway asserts.

8. In my opinion there is no engineering reason that relocation of the O'Hare runaway lights cannot be accommodated on CP property. This would be accomplished with the installation of a cantilevered structure with the light on top. The mast for the structure would be located in the two foot buffer between the east property line and the east main track clearance envelope. The foundation of the structure would be built into the proposed retaining wall. The runway lights located on top of the new cantilevered structure would be spaced to maintain FAA requirements. In fact, the road authority implemented this very solution at York Road, just west of the CP right of way, for this specific array of runaway lights as a cantilevered structure is located just off the York Road shoulder and allows the runway lights to maintain the required FAA spacing.

9. The proposed western-most inspection track will not unduly limit the use of the industrial spur track. The proposed tracks will be used for inspection of bulk trains. Once inspection is complete, departure of bulk trains is a priority. These trains will not dwell long and there will be adequate scheduling opportunities to serve the industry spur track.

10. The Tollway's statement that "The design of CP's proposed south ladder track goes against industry-standard engineering practices" is vague and unclear to what engineering practice is being referred to. The design of CP's proposed south ladder track leading to the proposed inspection tracks does not go against industry-standard engineering practices as asserted by the Tollway, and meets CP track design practices.

11. With respect to the transload facility under consideration, access permits and approvals would be required from the York Road roadway authority. Traffic improvements would likely be required as part of the access permits. I would anticipate that access would be right turn in/right turn out only and acceleration and deceleration lanes would be required. Again, in my experience these sort of issues do not stop projects such as these, but rather are worked out satisfactorily.

**The Tollway's Proposed Western Access Interchange Will Permanently Prevent or Restrict CP's Ability to Expand Capacity Notwithstanding the Tollway's Suggested Refinements to CP's Capacity Expansion**

12. The Tollway's statement that "[a]ccording to CP's own standards, a seven foot clearance is more applicable" for the proposed access roads is inaccurate and misleading. The applicable CP best practice, for track centers for the new construction of inspection tracks is 24 feet. This provides a safe clearance for mechanical department trucks to travel adjacent to trains. Apparently the Tollway's statement is based on CP's standard of 14 foot track centers for mainline tracks, but the mainline track center standard is not applicable in this instance due to the safety implications of motor vehicles operating alongside active tracks.

13. The Tollway's statement that "CP's Bensenville Departure Yard appears to have seven inspection tracks with 21-foot track centers" fails to consider the difference between conducting train inspections within the Yard and conducting inspections outside the Yard. Within the Yard, train inspections are performed by personnel operating utility vehicles, which due to their smaller and narrower dimensions, can accommodate slightly reduced track centers. Inspections on the proposed

tracks located outside the Yard would be done by truck, as utility vehicles cannot be operated on the municipal streets between the Yard and the inspection tracks.

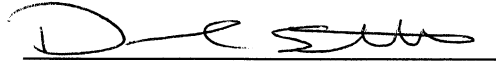
14. The Tollway's suggestion of picking up an additional three feet by narrowing the inspection roads would result in a substandard design from a railroad perspective. The width for inspection roads adjacent to a ditch should be 10' to provide a 2' clear zone to provide vehicles an area to safely maneuver or recover prior to entering the adjacent ditch. It also allows for a level surface for employees to enter or exit their vehicles.

15. Shifting the proposed transload facility 100 feet to the south of the location, as suggested by the Tollway, would reduce the capacity of the transload facility, and diminish its utility. Our concept drawing centers the transload structure on the proposed transload track, which in turn is centered between the existing industry track switch to the south and the existing crossover to the north. This centering of the transload structure maximizes car capacity and throughput. Moving the structure will reduce capacity.

16. The Tollway's general claim that CP's Plans are flawed is unsubstantiated. CP will perform a more detailed design and prepare detailed plans prior to implementation, if CP decides to go forward with the proposed project. If so, the detailed design will work through and solve the issues that are normal, or at least not unusual, for such projects.

17. A portion of CP's right of way in the Bryn Mawr corridor where the Tollway proposes to construct the five new overpasses is 90' in width. This existing width limits the amount of expansion that can be accomplished, and further reduction caused by the 5' encroachment of the Tollway's bridge piers will prevent and/or restrict future expansion of this strategic corridor.

I, Daniel Sabatka, verify under penalty of perjury that the forgoing is true and correct. Further, I certify that I am qualified and authorized to sponsor this Verified Statement. Executed on this 31st day of March, 2017.

A handwritten signature in black ink, appearing to read 'D. Sabatka', is written over a horizontal line.

Daniel Sabatka, P.E.

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**STB Docket No. FD 36075**

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**THE ILLINOIS STATE TOLL HIGHWAY AUTHORITY – PETITION FOR  
DECLARATORY ORDER**

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**Verified Supplemental Statement of Thomas J. Phelan, P.E.**

**I. Introduction**

i. I, Thomas J. Phelan, P.E., am the undersigned sponsor and author of this verified supplemental statement submitted in support of the Sur-Reply Statement of Soo Line Railroad Company d/b/a Canadian Pacific in the above-captioned proceeding before the Surface Transportation Board.

ii. The purpose of this supplemental statement is to assess the response filed on March 16, 2017 by the Illinois Tollway in this matter. As with the previous document prepared by me on this matter, the focus of this report is the feasibility and design aspects of the Tollway’s proposed approach to constructing the West Bypass along the CP alignment west of O’Hare Airport and north from I-294 in the south, but without completing the Bypass along the alignment under CP’s Bensenville Yard.

iii. The Elgin O’Hare-West Bypass project has been subject to extensive study in recent years, culminating with the publication of the *Elgin O’Hare-West Bypass (EOWB)*<sup>1</sup> Study

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<sup>1</sup> The acronym “EOWB” will be used in this document to describe the overall Elgin-O’Hare West Bypass initiative and its accompanying transportation improvements. In various documents related to this project, the acronym

*Tier Two Final Environmental Impact Statement (FEIS)* in 2012. The Preferred Alternative identified in the FEIS includes two major new roadway alignments: (a) an extension of the existing Elgin-O'Hare Expressway (Route IL-390) eastward to the western border of O'Hare Airport; and (b) a new O'Hare West Bypass that would connect I-90 in the north to I-294 in the south, with a system interchange with IL-390 along the western border of O'Hare Airport (this roadway will be referred to as "the Bypass" in this document).

iv. My preliminary review of the relevant items contained in the Petition, Response, and the associated documents is contained in the numbered paragraphs below. A summary of my findings is contained in the final section of this document.

## **II. Discussion**

### **A. Project Phases within the Tollway's Construction Staging Plan**

1. In its Response, the Tollway provides a phasing plan to complete the construction of the EOWB which include two phases that are relevant to this report. These are:

- Phase 4 – the Western Access Interchange and short segments of the Bypass to the north and south, with the southern segment terminating at Irving Park Road (Route IL-19).
- Phase 9 – the segment of the Bypass south of IL-19, which would traverse Bensenville Yard. These phases are illustrated in Figure 4 of the "Western Access Interchange Ramp Bridges over Canadian Pacific Railway and Union Pacific Railroad" (9/15/2016), which was included as Exhibit A of the Tollway's original November 2016 STB filing.

2. A conceptual design of the pertinent segment of the EOWB including Phases 4 and 9 is shown in **Exhibit A** attached hereto, with a detailed view of the Bensenville Yard area shown as **Exhibit B** attached hereto (Figure 2 from the Tollway's 3/16/2017 filing). Exhibit B shows Phases 4 and 9 in blue and yellow shades, respectively.

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"EOWA" (Elgin-O'Hare West Access) is used to describe the overall initiative or various elements of the program involving improvements west of O'Hare Airport.

3. The Exhibits A and B represent the most recent Tollway conceptual plans for Phases 4 and 9 of the EOWB initiative made available by Tollway in its Petition and Response as filed before the STB in this matter.

4. The new information provided by the Tollway in its March 2017 response contradicts the characterization of Phase 9 as “aspirational.” In fact, the conceptual plans for Phase 4 shown in Exhibits A and B show a layout of Phase 4 that only makes sense if the construction of Phase 9 is intended to begin soon thereafter, as described later in Paragraph 5.

The following features of the concept plan for Phase 4 are noted:

- The Bypass and Irving Park Road (IL-19) are shown intersecting at a grade-separated interchange, with the Bypass crossing over IL-19 on a bridge structure.
- The interchange has a unique configuration that has characteristics of both a diamond and a partial cloverleaf without all directional movements permitted. There is a single loop ramp in the southeast quadrant of the interchange to accommodate movements from eastbound IL-19 to the northbound Bypass. Other movements to and from the Bypass are accommodated via entrance (northbound) and exit (southbound) ramps on the north side of IL-19. There is no provision for eastbound traffic on IL-19 to access the southbound Bypass at this location, nor is there any exit from the northbound Bypass to IL-19.

5. The interchange configuration described above is consistent with the overall EOWB initiative to construct a complete Bypass west of O’Hare Airport, connecting I-90 in the north to I-294 in the south. This interchange is not, however, a feasible configuration for a scenario where the Bypass from the north terminates at Irving Park Road (IL-19). Two particular items are noted:

- If there is a possibility that the Bypass will not be completed south of IL-19, then the overpass at IL-19 and the loop ramp from eastbound IL-19 to the northbound Bypass are extraneous features that serve no purpose. They are designed only to serve a Bypass that extends to the next roadway segment to the south (Phase 9).
- If Phase 4 was really designed as an operationally independent project that could potentially serve as the southern terminus of the Bypass, this location

would likely function better in a different configuration. Two at-grade intersections in a partial diamond interchange configuration would provide full directional access between the Bypass and IL-19 (i.e., traffic from eastbound IL-19 would access the northbound Bypass via a left turn at grade, rather than a loop ramp to an overpass), with provisions made in the roadway geometry for possible future expansion of the Bypass to the south. This would preclude the need to construct the Bypass overpass over IL-19 in Phase 4.

6. There is no information anywhere – in the form of operational analyses, roadway/intersection capacity analyses, CMAP model runs, etc. – indicating that this potential alignment would work as designed. In addition, it seems unlikely that an update to the EIS reflecting this configuration could even satisfy the requirements for such an update, since the screening process from the EOWB EIS specifically cited the importance of “long distance travel continuity” through the corridor as one of the critical elements of the screening process.<sup>2</sup>

#### **B. Arterial Roadway Operations**

7. The Tollway indicates in its March 2017 response that the Phase 4 project for the Bypass includes arterial improvements to Irving Park Road (IL-19). These improvements are acknowledged, but all of the available EOWB documentation indicates that these improvements are designed as part of a complete Bypass project, not a scenario where Phase 4 would be the southern terminus of the Bypass. The Tollway has provided no information to indicate how Irving Park Road or any other arterials in the area would operate under this hypothetical scenario.

### **III. Conclusions**

A. The new conceptual plans provided by the Tollway for Phases 4 and 9 of the Bypass program reinforce a complete and functional design of these construction phases consistent with a completed Bypass that traverses Bensenville Yard.

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<sup>2</sup> Tollway Petition, Exhibit G, Page 6 – from *EOWB Tier One FEIS: Executive Summary*, Page ES-6.

B. The roadway geometry and alignment shown in the Phase 4 conceptual plan for the interchange of the Bypass and Irving Park Road (IL-19) is inconsistent with a plan for IL-19 to serve as the southern terminus of the Bypass for any significant period of time. The design of Phase 4 as developed by the Tollway is clearly consistent with a continuous Bypass alignment that includes Phases 4 (north of IL-19) and 9 (through the Bensenville Yard area).

C. Phase 4 of the Bypass does not meet – in a hypothetical scenario where it serves as the southern terminus of the Bypass – the purpose and need of the overall EOWB initiative as documented in the EOWB EIS and associated Record of Decision (ROD).

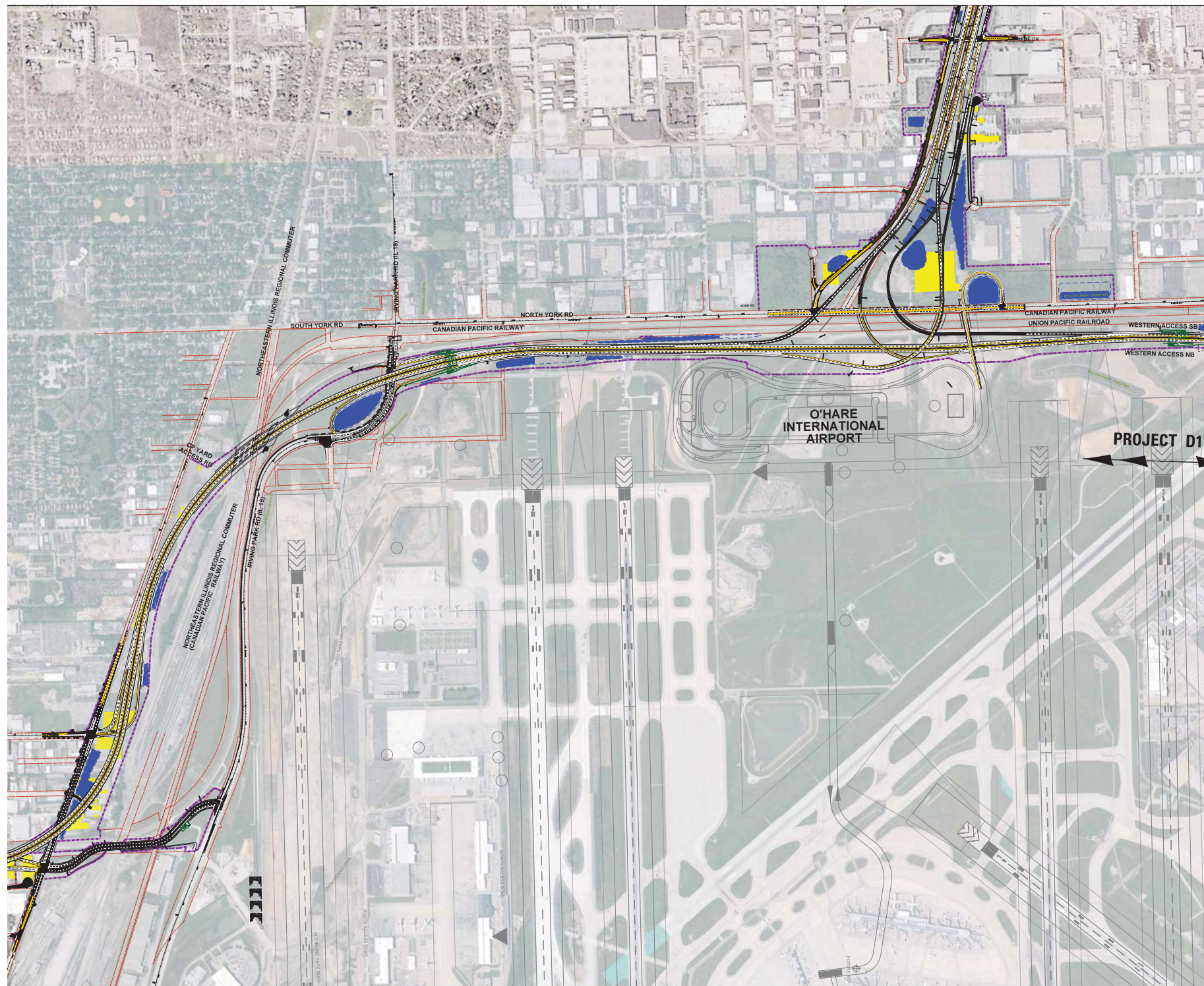
D. The Phase 4 construction of the IL-390/Bypass ramp system and the segment of the Bypass between IL-390 and IL-19 will fix the alignment of the Bypass in a location that makes a crossing of the western end of CP's Bensenville Yard inevitable when Phase 9 of the EOWB project is ultimately completed. Geometric requirements will dictate that a controlled-access freeway along the alignment of Phase 9 from the south along the County Line Road right-of-way can only be connected to the Phase 4 alignment by crossing the yard.

E. The Tollway, in various formal proceedings related to the NEPA process, ongoing litigation, and STB Petition, is attempting to provide different definitions of the overall EOWB action and the construction phasing of the ongoing project. However, the EOWB action was described, analyzed extensively, and justified in its entirety in the NEPA process.

## VERIFICATION

I, Thomas J. Phelan, verify under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to sponsor this Verified Statement. Executed on this 31<sup>st</sup> day of March, 2017.

  
\_\_\_\_\_  
Thomas J. Phelan

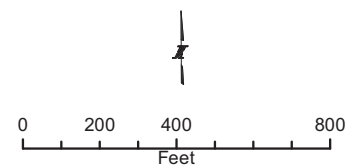




## Elgin O'Hare Western Access

### LEGEND

- CPR ROW
- CPR Track
- METRA Track
- UPRR Track
- Existing CPR Turntable and Turntable Track (to be relocated)
- Western Access Tollway Underpass Bridge
- CPR Land Acquisition Parcel
- Land Acquisition Type**
  - Permanent Easement
  - Temporary Easement



**Figure 2**

Western Access Tollway from  
IL 19 to Franklin Ave/  
Green St Project  
March 15, 2017

