

Before the
SURFACE TRANSPORTATION BOARD

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

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

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

The Village of Barrington, Illinois (“Barrington”), by and through counsel, respectfully requests the Surface Transportation Board (“Board”) to waive the provisions of 49 C.F.R. § 1101.13 and permit the filing of a Reply to *CN’s Reply to Barrington’s Petition to Reopen Based on Materially Changed Circumstance Pursuant to the Board’s Governing Regulations*. CN’s Reply included its responses “to filed supplements to [Barrington’s] Petition filed on April 10 and April 17, 2019.”¹

Preliminary Matter

In its December 21, 2018 Decision, the Board highlighted the fact that Barrington has filed multiple petitions to reopen this proceeding to require CN to provide funding for a grade-separated crossing in Barrington at U.S.

¹ CN’s Reply at p. 1.

Highway 14. The Board also noted that it has “denied Barrington’s three previous petitions seeking reopening and funding for a grade separation; and for those decisions for which Barrington sought judicial review the courts have affirmed the Board’s determinations.”² Furthermore, at footnote 9 of its decision, the statement is made that “Barrington does not allege material error in the Board’s *2008 Final Decision*.”

So that the Board can fully appreciate the situation that has compelled Barrington to repeatedly seek relief, the Board is requested to consider the following factors that illuminate the true record of these proceedings. When CN opposed the grade-separation mitigation awarded to Aurora and Lynwood, the D.C. Circuit affirmed the Board’s decision to require CN to pay a much larger share of the cost of construction than Barrington is requesting.

Although Barrington was denied relief by the D.C. Circuit Court of Appeals,³ its decision to deny Barrington relief had *nothing* to do with the merits of Barrington’s arguments regarding the flawed nature of the Village of Barrington Traffic Operational Analysis (VOBTOA) performed by the Board’s contractor that provides the only apparent basis for the Board’s repeated claims that area wide congestion in Barrington was due to pre-existing conditions rather than the transaction. By way of background, in responding to the DEIS, Barrington, on September 30, 2008, introduced the results of a special study that it had performed immediately following the release of the

² Slip op. at 3.

³ *Village of Barrington v. STB*, 636 F.3d 650 (D.C. Cir., 2011).

DEIS on July 25, 2008. Its study projected in excess of 135 hours of daily vehicular delay at the U.S. Hwy. 14 at-grade crossing attributed to the transaction. In the FEIS, OEA signaled that it was aware of a post-DEIS traffic simulation in Barrington that showed there should be more than one substantially affected crossing in Barrington as a result of CN's proposed freight operations, (namely the U.S. Hwy 14 crossing).⁴ However, for some unknown reason, no mention was made *in either the FEIS (which was meant to clarify issues raised from the DEIS) or the Board's December 2008 Final Decision* that 135 hours (or 8,100 minutes) of daily delay were projected for U.S. Highway 14 by Barrington's analysis.

Thereafter, during oral argument before the D.C. Circuit, Judge Tatel explicitly and repeatedly recognized that the results of Barrington's traffic study constituted *very strong evidence that would have required the Board to respond*. His comments provide a clear indication that the Court had reviewed the results of Barrington's study and realized the strength of its evidence. Nonetheless, the Court declined to consider Barrington's argument because counsel waived the argument by failing to mention Barrington's traffic study in the Community Petitioners' Opening Brief and only did so in Petitioners' Reply Brief. As the Court explained, by failing to mention the study, the Community Petitioners deprived "the Board of a fair opportunity to respond."⁵ Based solely

⁴ FEIS at 3.4-191. OEA maintained throughout the NEPA analysis that only IL 59 was substantially affected. In various oversight proceedings, the Board has reiterated its belief that U.S. Highway 14 was not substantially affected by CN's freight operations.

⁵ *Village of Barrington v. STB*, 636 F.3d at 672.

on that waiver, the Court disregarded the 8,100 minutes of projected delays and the harmful impact on the Village of Barrington with the statement that:

Without their traffic study, Community Petitioners' argument that they were treated differently than similarly situated communities must fail given that the Board's study projected that the Barrington crossings would not exceed the 2400 minute threshold while those crossing warranting grade separation (Ogden Avenue and Lincoln Highway) would.⁶

Hence the Court's decision *had nothing to do with the merits of Barrington's evidence*. Without explanation, however, the Board's subsequent decisions, upon which CN has relied at pages 11-12 of its 2019 Reply, have reiterated the misleading assertion that the Court of Appeals affirmed the merits of OEA's conclusion that Barrington was not entitled to a "grade separation mitigation condition, as any traffic issues would be primarily the result of preexisting conditions."⁷ Given the Court of Appeals' refusal to consider the merits of Barrington's position on procedural grounds, the Board's repeated claim that the D.C. Court of Appeals affirmed the merits of OEA's determination that Barrington's congestion stemmed from preexisting conditions ignores reality.⁸ If the Community Petitioners' 2010 Joint Opening

⁶ *Id.* at 672.

⁷ *October 2017 Decision*, slip op at 2, 9; *November 2015 Decision*, slip op. at 2; *May 2015 Decision*, slip op. at 2, 6; *November 2012 Decision*, slip op. at 7, 12-3.

⁸ The Board is also requested to note that the VOBTOA on which OEA relied did not solely focus on the crossing at U.S. Hwy. 14, but rather utilized a macro approach has focused on area-wide delays, which is not reflective of congestion during the full 24 hours in each day. It has also ignored the implications of CN's agreement "to provide priority to commuter rail operations, *which would limit freight operations across [U.S. Hwy. 14] during the morning and evening peak traffic periods.*" FEIS at 4-16 (emphasis added).

Brief had mentioned the Barrington traffic study, the Board would have been compelled to address the merits of Barrington's positions a full eight years ago.

Furthermore, as a review of the various decisions of the Courts of Appeal will confirm, because of this unfortunate "litigation error", Barrington has never been able to contest the material errors associated with the Board's initial failure to mention Barrington's 2008 traffic study in the FEIS or the *2008 Final Decision*. See, e.g., *Village of Barrington v. STB*, 758 F.3d 326, 328 (D.C. Cir. 2014) ("Barrington's claims of material error are outside our jurisdiction"); *Village of Barrington v. STB*, 892 F.3d 252, 268 (7th Cir. 2018) ("the Village's claims of material error fall outside our jurisdiction"). Nor has it been able to challenge the validity of OEA's unexplained focus on area-wide congestion in the FEIS instead of focusing on the impact of the crossing at U.S. Highway 14. Throughout this lengthy period, however, nothing would have precluded the Board from undertaking its own analysis to determine for itself what was actually occurring in Barrington as a result of CN's freight operations.

Now, at this time in 2019, the Board is unquestionably faced with new evidence – CN's own evidence of nine (9) additional trains -- that has not previously been brought to the Board's attention. Not only has Barrington introduced evidence that questions the veracity of CN's sworn testimony, its new evidence of changed circumstances demonstrates that the 2008 projections that have driven the debate for the past eleven years *do not reflect the reality of the current situation*. The daily reality is that given the absence of

a single grade separation in Barrington, let alone one at the U.S. Hwy. 14, the movement of more than 20 freight trains a day through the heart of the Barrington community has created a constant clear and present danger that is solely attributed to the Board's approval of CN's acquisition of the EJ&E Line. CN's USACE Application has revealed the plan for an additional nine (9) trains a day which, depending on the current level of CN trains, will likely result in the movement of up to 30 trains a day. Because this increase in traffic cannot be divorced from the Transaction, the current and future impact of the Transaction on Barrington is a matter that must be considered by this Board. It is Barrington's position that this new evidence of substantially changed circumstances will materially change the outcome the Board reached in 2008 and warrants the requested additional mitigation.

In requesting the Board to reexamine its prior holdings in light of this new evidence, Barrington also requests the Board to reexamine the "Selection of Alternatives" laid out by the Federal Highway Administration's *Railroad-Highway Grade Crossing Handbook, Revised Second Edition August 2007*. Because U.S. Highway is part of the designated National Highway System, its request for grade separation mitigation should be governed by the provisions of section 6.b, at pp. 151-52, which explicitly provide at section 6.b that:

Highway-rail grade crossings should be considered for grade separation across the railroad right of way whenever the cost of grade separation can be economically justified based on fully allocated life-cycle costs and one or more of the following conditions exist:

i. The highway is a part of the designated National Highway System.

viii. Crossing exposure (the product of the number of trains per day and AADT) exceeds 500,000 in urban areas or 125,000 in rural areas.

xi. Vehicle delay exceeds 30 vehicle hours per day.

CN's proposed share of the cost of constructing a grade separation at the U.S. Hwy. 14 crossing will not have any material economic impact on CN and its shareholders. Because at least three of FHWA's conditions exist, as well as extensive queuing caused by CN's current trains, reopening to bring its decisions in line with applicable FHWA standards would be in the public interest and would bring justice to the Village of Barrington and all regional commuters who use U.S. Hwy. 14 on a daily basis.

As a matter of fundamental fairness, the citizens of Barrington should not be penalized further by a litigation error, especially when sophisticated studies have shown that a single grade separation at the U.S. Hwy. 14 crossing will not only eliminate railroad crossing delays on U.S. Hwy 14, but will also reduce delays at the Hough Street crossing by more than 50%. As explained in Barrington's 2011 *CN Railway Traffic Impact Study Update*,⁹ the reduction in delays at that crossing will happen because traffic flow across that crossing will no longer have to interact with the effects of simultaneous traffic flow interruptions on U.S. Hwy. 14. These basic facts are the rationale for IDOT's and USDOT's decision to move forward with awarding Phase I and II funding,

⁹ Filed October 14, 2011, at pp. 16-7.

even in the absence of funding for the actual construction of the grade separation at the U.S. Hwy. 14 crossing.

I. CN'S CURRENT AND PROJECTED FREIGHT TRAFFIC ON THE FORMER EJ&E IS DIRECTLY ATTRIBUTABLE TO CN'S STRATEGIC DECISION TO ACQUIRE THE EJ&E LOOP AROUND CHICAGO FROM U.S. STEEL.

Barrington's request that the Board reopen the proceeding and reassess the actual impact of CN's international freight operations on Barrington is based on the new evidence that is contained in the USACE Application that revealed the projected increase of nine (9) additional daily trains that will move through Barrington within a year. Until now, the entire proceeding before the Board has focused on what has proved to be misleading and obsolete data.

A. Neither the current freight traffic on the former EJ&E loop around Chicago nor the anticipated addition of nine (9) more daily trains have an attenuated connection to the transaction.

In its Reply, CN requests the Board to ignore the impact of nine (9) additional trains because the "[p]otential train traffic increases in 2020 have such an 'attenuated' connection to the January 2009 Transaction that they cannot be considered "Transaction-related" in any meaningful way, so they provide no basis for imposing new conditions on the Transaction."¹⁰ The Board should summarily reject CN's request for the simple reason that it ignores the fundamental purpose of CN's acquisition of the EJ&E Line.

CN's senior management knew from the outset that the acquisition of the EJ&E loop would provide CN with an unparalleled ability to exponentially

¹⁰ CN Reply at 11.

enhance its international system between the Gulf Coast and Canada without getting bogged down in Chicago. Without the transaction, the perceived need to improve fluidity and resilience for northbound and southbound traffic flows in the Leithton subdivision would not exist. Without the transaction, there would be no reason for CN to invest in infrastructure that it would not own. As the Board recognized in its *Final Decision*, if the Transaction had not been implemented, there would be far fewer trains on the EJ&E than is now the case.¹¹ Lastly, there is nothing to indicate that further investments cannot be anticipated given CN's repeated claims in investor presentations that the EJ&E acquisition is a game-changer when it comes to moving through the Chicago region at speeds that beat all Class I competition.

As acknowledged in the USACE application, the Leithton subdivision is used to transport vital customer traffic. In fact, it has quickly become one of CN's primary north-south main line tracks even though CN is still in the process of expanding its capacity. One look at CN's system-wide map, which reflects the vast competitive advantage against the Class I rail carriers, confirms the strategic significance of the Leithton subdivision. CN alone is the only rail carrier in North America that provides single-line rail service from both the Pacific and Atlantic Coasts to the U.S. Midwest and the Gulf Coast.

The double tracking near Barrington is inextricably linked to the Board's approval of the Transaction that allowed CN's acquisition of the EJ&E loop track around Chicago from United States Steel Corporation. As the CN

¹¹ *Final Decision* at 42.

earnings reports reflect, CN senior management has repeatedly recognized that the traffic that now flows -- and will continue to flow through Barrington following construction of the new double tracks -- cannot be divorced from the underlying transaction.¹²

B. The USACE Application forcefully displays the links between the Transaction and the need to double-track near Barrington.

Rather than admitting the obvious increased impact on Barrington in its Reply, CN offers multiple excuses to divert attention from the supposedly abrupt and unexplained change in its plans to double track near Barrington. Without mentioning that the nine (9) new trains will pass through Barrington, CN downplays the significance of the new track with the innocuous comment that the “Sutton Project would improve the fluidity and resiliency of the Leithton Subdivision by improving meets, train staging, and CN’s ability to make crew changes.”¹³

The foregoing comment must be compared with the “Project Description” in CN’s USACE Individual Permit Application, LRC-2018-00651.¹⁴ As stated therein:

The basic purpose of the project is to add a second main line railroad track within the existing WCL right-of-way in the designated project area. *The WCL Leithton subdivision is one of the primary north-south main line tracks along the WCL corridor that transports*

¹² Given the importance of the Leithton subdivision, any fluctuation in traffic short of an economic depression is not likely to have any longstanding adverse impact on the CN system.

¹³ *Id.*; V.S. Hartley at 1.

¹⁴ Attachment A to Barrington’s Petition to Reopen, Letter to Mr. Soren Hall, U.S. Army Corps of Engineers, from Thomas E. Slowinski, V3 Companies, Ltd., dated December 20, 2018.

vital customer train traffic between Winnipeg, Canada and Chicago. Currently forecasted capacity for 2020 includes a growth of approximately nine (9) trains per day along this Subdivision. The completion of the second main line track in the proposed location will help improve fluidity and resilience for northbound and southbound traffic flows.

The proposed project consists of extending the existing siding track located north of Shoe Factory Road with 4.27 miles of new main line track in order *to allow for uninterrupted flow of traffic by allowing northbound and southbound trains to pass freely without stopping and/or slowing down.*

If trains are passing freely without stopping and/or slowing, it truly requires a leap of faith to accept CN's suggestion that the Sutton Project will improve CN's ability to make crew changes. The same is true of train staging.

C. The suggestion that U.S. Steel would have responded to the same market forces affecting CN's operations is absurd.

There is no chance whatsoever that "[a]bsent the Transaction, the EJ&E line's former owner might have responded to the same market forces affecting CN's operations by increasing traffic on the line."¹⁵ This assertion is rebutted by the sworn testimony of U. S. Steel, the previous owner of EJ&E, which was given in support of CN's application. As U.S. Steel therein explained, at one time, the EJ&E served U.S. Steel facilities located in Waukegan, Joliet and South Chicago, Illinois, as well as Gary Works in Indiana. However, "[a]s the steel industry contracted, U.S. Steel closed its facilities in Waukegan, Joliet and South Chicago, Illinois."¹⁶ Because "the EJ&E loop track around Chicago

¹⁵ *Id.*

¹⁶ V.S. Christopher J. Navetta, ¶¶ 5-6.

is no longer directly related to the service of U.S. Steel facilities in Illinois, U.S. Steel identified the loop as a non-core asset and decided to attempt to sell most of the loop, while retaining a small railroad at Gary to continue to provide direct rail service at Gary Works.”¹⁷

Given U.S. Steel’s obvious awareness that the EJ&E loop-track was of no use to it, CN’s argument that U.S. Steel would have responded to the same market forces and greatly increased rail operations on a local service rail line is baseless. A review of the entire history of the EJ&E rail line shows that it was basically a single line track that served a limited number of industries in the Chicagoland area. It was not until CN purchased the line that it became a vital link that ties CN’s transcontinental and tri-coastal rail system together and provides CN a competitive advantage by avoiding the CREATE geography’s renowned rail congestion.

II. CN’S REPEATED ACCUSATION THAT BARRINGTON’S POSITIONS THAT QUESTIONED THE RELIABILITY OF CN’S PROJECTIONS ARE BASED ON MERE “SPECULATION” MUST BE REJECTED IN LIGHT OF THE NEW EVIDENCE OF NINE ADDITIONAL TRAINS THAT CN – ITSELF -- PROVIDED TO THE U. S. ARMY CORPS OF ENGINEERS.

The word “speculation” is once again a dominant feature of CN’s reply to Barrington’s arguments for additional mitigation. However, despite CN’s claims, Barrington’s Petition is not based on speculation. Instead, it is based on **CN’s own evidence** that was presented to the U.S. Army Corps of Engineers in late December 2018. CN’s new evidence -- presented to another federal agency -- unequivocally states that CN has forecasted that an additional nine (9) trains a

¹⁷ *Id.*

day will pass over the Leithton subdivision following construction of a “new main track [from] MP 37.49 to MP 41.86.”¹⁸ Because Barrington is located on the Leithton subdivision, the additional trains will unquestionable move through Barrington.

CN’s newest projection of nine (9) trains, must be viewed and thoroughly compared with the following matters:

- CN’s past projection of 25 trains per day submitted to the Illinois Commerce Commission in 2010;¹⁹
- misleading comments of CN’s Director-U.S. Government Affairs in an email dated May 23, 2012 that the merger of EJ&E with Wisconsin Central will not result in “changes in CN operations, including Chicago are train traffic counts projected as part of the EJ&E acquisition”;²⁰
- the subsequent comment made by CN’s Director-U.S. Government Affairs to a resident of Hoffman Estates in February 2018 that CN was *then operating* “20-some” daily trains over the Leithton subdivision;²¹
- projections submitted to the U.S. Army Corps of Engineers in 2018 that the double-tracking of the Leithton subdivision just to the south of Barrington will allow the movement of nine additional daily trains;²² and

¹⁸ Barrington Petition, Attachment A at p. 2.

¹⁹ Barrington Petition, Second Supplement, Attachments F and G.

²⁰ Barrington Second Supplement at p. 6.

²¹ See email dated February 20, 2018, from Jim Kvedaras to Scott Gibrich (Attachment 1 hereto).

²² Barrington Petition to Reopen, Attachment A.

- repeated statements made to the press and CN shareholders by senior CN executives over the last decade that present a far different story regarding the operational changes and related developments that have enabled CN to increase the traffic directly attributed to CN's acquisition of the EJ&E loop of track around Chicago.²³

Given the February 2018 comment that “20-some” daily trains were moving through the Leithton subdivision just to the south of Barrington, there is no avoiding the conclusion that the new projection of nine (9) additional trains indicates that the transaction, following the complete integrations of EJ&E will result in at least a 466% increase over the numbers CN projected in 2008 regarding the number of daily trains that were projected to move through Barrington.²⁴ Because this new evidence of nine (9) additional trains was not previously provided to the Board, and was only released to the general public (in a highly limited fashion) in February 2019, it is obvious that the Board has never considered the impact on Barrington of such an increase.

Furthermore, the series of differing “projections” presented to different agencies/audiences, should cause the Board to ask itself wherein lies the

²³ The Board is reminded that the SEC holds CN to a high level of truthfulness vis-à-vis its investors, so its investor calls and quarterly and annual reporting should trump any self-serving protestations that CN makes to the Board about its current and planned operations.

²⁴ As Barrington has previously demonstrated, CN's recent trains are on average, far longer than the average length that was used to deny prior grade-separation mitigation relief to Barrington. Moreover, they have averaged only 28 to 29 mph. And as OEA has noted, “[t]he extent of increase or decrease in motorist delay and vehicle queues is directly affected” by these factors. DEIS 4.3-9.

truth. Given the sworn testimony of Mr. Krause, CN's Project Manager for the Sutton Project, the Board must accept that the Sutton Project was thoroughly reviewed and approved by "multiple departments within CN, including Finance and Operations, as well as CN's senior executives."²⁵ Moreover, in order for CN's Finance department to prepare an Authorization for Expenditure ("AFE"), a sufficient business case had to have been presented. In addition, because "[a]n AFE must be approved for a project to proceed,"²⁶ it must also be assumed that the AFE "describe[d] the business case for the project, including the costs and expected ROI, and [sought] funding authorization for all or part of the project."²⁷ In other words, between 2017 and 2018, CN's senior executives, after thoroughly analyzing all relevant data, decided that there is sufficient long-term traffic to support the conclusion that the expected return on investment justified the construction of a second track near Barrington.

While CN now insists that more recent forecasts through Q4 2020 project fewer than "the previous forecasted growth of 9 trains per day," such ever-evolving "projections of convenience" to deflect the Board's attention from reality once again call into question CN's integrity. To accept this assertion at face value, one must ask how CN's Operations and Finance Departments, as well its senior executives, could miss the number of projected trains by a nearly 50% margin? Given the fact that CN repeatedly has one of the best

²⁵ V.S. Krause at 2.

²⁶ *Id.*

²⁷ *Id.* Krause's suggestion that this project, even after receiving a USACE permit, may not be constructed is fatuous.

operating ratios of the Class I railroads, it defies reason that an error of that magnitude could have occurred. It further defies reason that CN's Capex investments are made in such a stop-and-start comedy of errors manner and based on continually missed projections.

Barrington submits that the most plausible explanation is that CN, following Barrington's initial petition for reopening filed October 14, 2011, was alerted to the critical need during the oversight period to sustain the myth that the original 2008 projects were remarkably accurate. Therefore, even though CN in 2010 had already jettisoned the 2008 projections regarding movements over the Leithton subdivision before the Illinois Commerce Commission, CN deliberately stuck to the obsolete 20.3 train projection before the Board. Of course, CN also was aware that the increased length of trains operating through Barrington meant that there was no need to operate 20.3 trains a day to satisfy the increasing number of carloads that CN was handling following its acquisition of the EJ&E Line that circles around Chicago.²⁸ Plainly, by increasing the length of trains, CN not only provided cover against Barrington's

²⁸ By way of background, it should be noted that post-transaction the length of the anticipated post-transaction 6.1 CN trains on the EJ&E would actually average **8,268 feet in length**. However, because no change was predicted in the length of either the 3.5 EJ&E trains or the other 0.7 trains operated by an unrelated rail carrier pre-transaction, the average length of the "Typical Train" was reduced to only 6,829 feet. By assuming the continued operation of trains that were only 1,062 feet in length that consisted of only 17 cars, the average length of trains that underlies the Board's oversight decisions was understated by a minimum of 1,439 feet, which, based on the average length of a railcar, represents an increase of 22 carloads per train. See Attachment 2 hereto (DEIS Appendix B, Attachment B2 Page 7 of 15).

arguments, it simultaneously improved productivity and the fluidity of operations in and around Chicago – an incredibly brilliant strategy.

Because CN was never required by the Board to provide data that would reveal the length of all trains that were moving through Barrington, CN was able to trick the Board into believing that “the rail traffic projections considered by the Board in 2008 were remarkably accurate for the segment of EJ&E that includes Barrington.”²⁹ In its May 15, 2015 Decision, the Board, after denying Barrington’s request that it require CN to provide data that would reflect the number and length of the trains that were then moving through Barrington, repeated CN’s assertion “that the rail traffic projections considered by the Board in 2008 were remarkably accurate for the segment of the EJE that includes Barrington.”³⁰ Rather ironically, the foregoing statement from CN was presented to the Board ***exactly four years to the day*** after CN notified the Illinois Commerce Committee that “traffic on the EJ&E mail line through Cook County across Shoe Factory Road is expected to increase to approximately twenty-five (25) trains per day when the integration of the EJ&E is complete.”³¹

The Illinois Commerce Commission was also informed that “[t]he proposed second track across Shoe Factory Road will be used as a passing track that will increase the length of trains that can pass each other at this location to accommodate the expected increase in train traffic.”³² Given the

²⁹ CN’s Reply to Petition of Village of Barrington Seeking Imposition of Additional Mitigation, dated December 16, 2014, at p. 2.

³⁰ Slip op. at 28.

³¹ See Barrington’s Attachment G to Second Supplement.

³² *Id.*

foregoing admission that construction of a second track near Barrington was planned in 2010, the Board is urged to reconsider its repeated refusal to reexamine the original 2008 freight projections in light of Barrington's pleadings. Plainly, while the Board in its *April 2017 Decision* claimed that it had "closely followed CN's operations on the line" throughout the oversight period, it is readily apparent that it failed to understand the unquestioned change in CN's operations that allowed it to reduce the number of trains by extending the length of its trains. In addition, the Board's refusal to vet any of CN's operational changes brought to its attention by Barrington also crippled Barrington's efforts to demonstrate exactly what was happening to regional traffic flow and emergency responders.

CN's deliberate effort to curtail the number of trains while it substantially increased the number of carloads proved to be effective in two ways. In denying Barrington relief, the Board repeatedly noted that "the actual 2014 average number of trains going through Barrington has been 17.5 trains per day—an average train number lower than the 2008 Draft EIS forecast."³³ Second, the Board seized upon Barrington's forced reliance on a monthly operational report prepared by CN to note that the "September 2014 operational report includes only trains that blocked crossings for more than 10 minutes and thus does not offer a complete account of rail traffic on the EJ&E line."³⁴ However, when Barrington requested the Board to require CN to report the actual lengths of all

³³ *May 2015 Decision*, slip op. at 4.

³⁴ *Id.* at 4.

trains that moved through Barrington, the Board arbitrarily denied Barrington's request. In the final analysis, the Board prevented Barrington from exposing the fact that CN's 2008 rail projections could not properly reflect post-transaction realities.

III. CN'S RENEWED ASSERTIONS IN 2019 THAT IT SHOULD NOT BE REQUIRED TO FUND A GRADE SEPARATION AT U.S. HIGHWAY 14 BECAUSE BARRINGTON'S MOUNTING VEHICLE DELAYS ARE NOT ATTRIBUTABLE TO CN'S ACQUISITION OF THE EJ&E LINE AND BECAUSE ROADWAY CAPACITY CONSTRAINTS WOULD NOT BE REMEDIATED BY A GRADE SEPARATION IGNORE REALITY.

The Board Members must understand that Barrington has never contested OEA's "belief" that it is not CN's responsibility "to mitigate for existing traffic congestion in the community by grade separating US 14."³⁵ Instead, as the arguments stated in the Community Petitioners' Reply Brief prove, it has repeatedly sought a rational explanation for OEA's decision at the tail end of the environmental review to evaluate the crossing at U.S. Hwy. 14 based on supposed area-wide congestion. OEA's own study (performed by contractor HDR) focused only on a peak-period analysis that failed to capture the compounding effect of 20 trains over a 24-hour period. Given OEA's awareness that CN had "agreed to provide priority to commuter rail operations, which would limit freight train operations" across U.S. 14, as well as the other at-grade crossing in Barrington, the focus on peak-periods was irrational.³⁶

In looking at conditions as they exist in 2019, the Board is requested to focus initially on the evidence of record concerning the pre-transaction delays

³⁵ FEIS, Chapter 4, Final Recommended Conditions, at 4-16.

³⁶ FEIS at 4-16.

at the U.S. Hwy. 14 at-grade crossing and then compare it with a data-driven review of current conditions. In doing so, the Board will find that its own 2008 environmental review of the U.S. Hwy. 14 crossing determined that pre-existing delays caused by the 5.3 trains operated by EJ&E, CN and one other railroad amounted to only 2.49 hours of daily delay. After including the additional 15 trains that CN originally projected, the conclusion was reached that freight-induced congestion at the U.S. Hwy 14 crossing would increase to only 30.78 hours of daily delay.³⁷ These calculations caused OEA to decide that the U.S. Hwy. 14 crossing would not be substantially impacted.³⁸

Simply put, OEA's 2008 determination that the U.S. Highway 14 crossing incurred a mere 2.49 hours of daily delay pre-transaction undercuts CN's Reply argument that the surge of post-transaction congestion at U.S. Highway 14 has not been caused by CN's post-transaction rail operations, but instead was pre-existing traffic congestion. While it may be that Barrington in the past experienced some area-wide congestion during the day that was not related to or caused by the minimal pre-transaction railroad operations, that area-wide

³⁷ OEA assumed CN's trains would average 6,829 feet in length and move through Barrington at 39 mph. While the average length has surpassed the length of the pre-transaction CN trains by over 1,400 feet per train, the average current speed remains at 29 mph, a fact that effectively rebuts the Board comments in its *November 2011 Decision* that assumed that operating speeds would increase as planned improvements were completed. See Slip op. at 21.

³⁸ See DEIS Table 3.3-3 (130 out of 26,573 vehicles delayed per day); Table E1.2-1 and Table E1.2-4 (164 out of 33,662 vehicles delayed per day). OEA's peak-period analysis also found a minimal increase in delay. Such projections, as well as Barrington's 2011 VISSIM study overestimated the ADT at U.S. Hwy. 14, which, by 2017 (which is the latest data available) has declined to 27,600 AADT west of the grade crossing and 25,400 AADT south/east of the crossing. Despite the decline, the delays at that crossing have soared in the past months.

congestion is irrelevant and immaterial when it comes to assessing the impact of CN's freight operations. The sole question that must be reexamined in light of the new evidence concerns the impact on the at-grade crossing at U.S. Hwy. 14 caused by 30 CN freight trains that are far longer and slower than the "Typical Train" on which the Board based its conclusions in 2008 and for which it ordered mitigation.

Without question, if this proceeding had involved the construction of an entirely new track instead of an expansion of an existing facility through double tracking, the Board would have been forced to recognize that the increased rail traffic has not only increased vehicle delays, it has negatively modified the character of the Barrington community. In addition, CN's operations have disrupted regional traffic and interfered with first responders who have repeatedly found themselves unable to penetrate a stopped train that can simultaneously block every at-grade crossing in Barrington.

The Board is also asked to take a further look at the CN-supplied data that reflects the comparative usage of Segment 14, Leithton to Spaulding, prior to 2008 and CN's post-transaction projections. Not only was U.S. Steel's subsidiary's provision of minimal trackage rights to other railroads of no material significance, the 3.5 trains that were operated on behalf of U.S. Steel, on average, contained only 17 cars and were only 1,062 feet long. Neither those trains or the 1.8 trains per day that were operated by CN and one other railroad could have had any simultaneous adverse impact whatsoever on the four at-grade crossings in Barrington. In fact, in Table A.5-1, "Total Vehicle

Traffic Delay and Percent Increase,” which OEA released on December 5, 2008 as part of the FEIS, OEA determined that total vehicular delay pre-transaction at the U.S. Hwy. crossing was a mere 149.4 minutes (or 2.49 hours) per day. Given the very short EJ&E trains (and the average speed of 38 miles per hour at which they were operated), and the likelihood that they would have primarily operated at night, the absence of any rail-induced delays attributable to EJ&E’s freight rail operations is not open to debate. The same is true of the other 1.8 daily trains.

Given Mr. Kvedaras’ comment in February 2018 to Mr. Gibrich that CN was then moving 20-some trains a day through Hoffman Estates, which is just to the south of Barrington, there is no avoiding the conclusion that trains moving through Barrington already simultaneously (or in quick succession) block all of the crossings in Barrington more than 20 times a day.³⁹ Therefore, this situation requires special consideration. Simply stated, in Barrington, its citizens on a daily basis are faced with the possibility that during an emergency, they may be prevented from reaching a hospital in a timely fashion because they lack a single grade-separated crossing that is guaranteed to be open.

Because the conclusion is inescapable that CN, as early as 2010, advised the Illinois Commerce Commission that the increase in the amount of rail

³⁹ As Mr. Kvedaras has testified in this same proceeding, he was actively involved as a liaison with communities along the EJ&E Line, including Barrington, from March 2009 until late in 2018. V.S. Kvedaras dated August 28, 2018.

traffic over the Leighton subdivision was attributed to the Transaction, it should not be allowed to tell a different story to the Board. While its change in operations temporarily provided cover to the misleading nature of CN's operations before the Board, the Board cannot ignore the fact that CN deceptively failed to share its 2010 projections with the Board. CN must be held accountable for such a lack of candor.

The Illinois Department of Transportation (IDOT), which is responsible for maintaining the fluidity of U.S. Highways that are part of the National Highway System (and that are designated Strategic Regional Arterial routes in Illinois) has consistently recognized the need for the grade separation at the U.S. Hwy. 14 crossing is solely attributed to the Transaction. Moreover, IDOT has also recognized that the situation in Barrington and the surrounding region has reached a critical state. IDOT, in recognizing the need for the grade separation at U.S. Hwy. 14 caused by the increased CN freight operations, has already acquired five residences and is in the process of acquiring at least three others in preparation for the road realignment associated with the essential grade separation at U.S. Hwy. 14.

In addition, IDOT, Barrington, and the U.S. Department of Transportation, have already spent or committed to spend the following amounts to construct the needed grade separation:

<u>Underpass</u>	<u>Spent/Obligated</u>	<u>Other Committed</u>
Phase I Design	\$3.5M (80% TIGER II, 20% IDOT)	NA
Phase II Engineering	None	\$1.64M (federal STP)
Phase II Acquisition	\$8M (50% Federal STP, 50% IDOT)	None
Phase III Construction	None	\$4M (Federal STP), \$403,317 Village

<u>Lake Zurich Road</u>	<u>Spent/Obligated</u>	<u>Other Committed</u>
Phase I Design	included with underpass	NA
Phase II Engineering	\$321,000 (50% Federal STP, 25% IDOT, 25% Village)	NA
Phase II Acquisition	\$2M (50% Federal STP, 25% IDOT, 25% Village)	NA
Phase III Construction	None	\$3.6M (80% Federal STP, 10% IDOT, 10% Village)

There is no avoiding the conclusion that these expenses would not have been incurred by U.S. taxpayers had it not been for CN's acquisition of the EJ&E Line. Hence, the Board is asked to reopen the proceeding and, after examining evidence that actually reflects the current situation, require CN to pay the remaining \$37 million of the cost of constructing the grade-separation that was not needed at any time in the past when the EJ&E track through Barrington was owned by U.S. Steel and primarily used to service its facilities that were once located along the EJ&E loop as well as a few other customers. Given the fact that the grade separation was not needed until CN acquired the EJ&E track, there is no legitimate reason to require U.S. taxpayers to subsidize CN's freight operations any further.

In its Reply, CN, which has realized tremendous financial gains from the Board's approval of its acquisition of the EJ&E, insists that additional mitigation would be inconsistent with notions of commercial certainty and fairness because it can no longer choose to walk away from the transaction. In the first place, CN closed on the transaction knowing this was always a possibility. In the second place, the proposed new mitigation would not have any material impact on CN, so such an argument should be rejected. CN has

offered no proof that a \$37 million expenditure to mitigate the harms it has created in any way undercuts the financial benefits stemming from this key acquisition. Fundamental fairness requires the Board to focus on the impact on Barrington in light of this new evidence and changed circumstances that are involved herein.

This, of course, would be consistent with the Board's *Final Decision* authorizing CN's acquisition. In that decision, the Board specifically announced that it "retains jurisdiction to impose additional conditions and take other action if, and to the extent, the Board determines it is necessary to address matters related to operations following the transfer of control."⁴⁰ Barrington also notes that the Board specifically recognized that until the full implementation of the operating plan has transpired, unanticipated matters, such as an additional nine (9) trains a day would warrant further consideration by the Board.⁴¹ Additionally, Board counsel reiterated that commitment to the appellate court in May 2018 when she stated in oral arguments: "the regulatory standard for reopening applies regardless of when the transaction was approved, and therefore, if they were able to come to us with such, with new evidence or changed circumstances that warranted re-opening, we would consider it even though the oversight period had ended."

Unlike CN, Barrington, from the outset, has had no opportunity whatsoever to walk away. As Barrington has previously noted, the cost to CN

⁴⁰ *Final Decision* at p. 26.

⁴¹ *Id.*

and its shareholders is less than a nickel per share. The cost to Barrington and state and federal taxpayers, who have been forced to bear the entire cost of mitigation for a problem that did not exist prior to 2008, is unjust.

The disparity in impact resulting from the transaction between CN and Barrington could not be greater. CN can boast that its operating income in the first quarter of 2019 was C\$1,080 million, as compared with C\$1,030 million in the 1st quarter of 2018; and that its net income for the 1st quarter of 2019 was C\$786 million as compared with C\$741 for the 1st quarter of 2018. CN can also point to 10 years of dividend growth. Plainly, CN will not be financially affected by a grant of Barrington's petition.

Nevertheless, CN callously asserts that "Barrington and the State of Illinois may construct a grade separation at U.S. Route 14 if they secure the necessary funding."⁴² Why should the Board excuse CN from funding a substantial part of the funding of the necessary grade separation at U.S. Hwy. 14 that is commensurate with the congestion that is related only to CN's expanding post-transaction operations? It should not!

IV. CN HAS MISCONSTRUED BARRINGTON'S COMMENTS REGARDING INTERMODAL TRAFFIC ORIGINATING AT THE PORT OF PRINCE RUPERT.

Barrington contests the misleading CN Reply argument that Barrington claims that there will be an actual growth of 9 trains per day of intermodal traffic to and from the Port of Prince Rupert. Barrington made no such claim. Instead, it relied on the 9 trains per day projected in the USACE Application to

⁴² CN Reply at p. 12.

indicate that the total number of trains would exceed Mr. Reardon's "best estimate" that a total of 0.5 additional trains will pass through Barrington.

The Board should note that any decrease in the number of intermodal trains from 2017 to 2019 moved to or from Prince Rupert may likely reflect the movement of longer trains consistent with CN's current operational practices. Because the Board denied Barrington's motion that would have required CN to provide full information regarding the number and length of its trains in 2015-16, Barrington was unfairly prevented from delving into this key issue and the Board has remained in the dark about the length of CN trains and their impact on Barrington. Given the increase in CN's intermodal traffic, which is related to continuing expansion of both the Port of Prince Rupert⁴³ and the Port of Vancouver, and the rapid expansion of the Joliet facilities over the past few years, CN's claims must be subjected to intensive scrutiny. Simply stated, CN's quickest path to the Joliet intermodal facility is through Barrington. The same is true of CN's intermodal facility in Memphis. That being the case, why hasn't the gross number of intermodal trains passing through Barrington increased in

⁴³ On May 13, 2019, the PPR Authority announced the completion of a container terminal master plan that outlines its goals for the future container terminal capacity and sequencing of development at the Port of Prince Rupert. "The planning work identifies the long-term potential to develop 6 – 7 million TEUs of capacity through the development of multiple terminals at the Port of Prince Rupert." See Attachment 3 hereto. At FEIS 3.4-103, OEA noted that CN's Operating Plan assumed that PPR at full capacity "would generate no more than two trains per day (one in each direction) of the maximum length of 10,000 feet that could move on the EJ&E rail line." It is obvious that CN literally missed the boat. FEIS 3.4-103. Unfortunately for Barrington, OEA missed it as well when it affirmed its determination in the DEIS that "*it would be too speculative to include future Port of Prince Rupert Phase 2 traffic in the rail traffic projection used in this Final EIS.*" FEIS 3.4-76.

recent years? The Board and Barrington region have the full right to know the answer.

Barrington's reliance on CN's USACE projections of an additional nine trains traveling through Barrington also includes the continuing increase in CN's crude-by-rail shipments. It is notable that CN's April 29, 2019 Reply did not contest Barrington's new evidence regarding the massive, wholly unanticipated increase in crude-by-rail shipments that started within the original oversight period.⁴⁴ How could it, after all, when on the same date, while participating in CN's Q1 results conference call JJ Ruest – President and Chief Executive Officer of CN stated:

On crude, we move on average 250,000 barrel per day back in December, but demand took a nose dive in February to less than 100,000 barrel per day after deduction in production was imposed by the province of Alberta. But CN has the capacity to move more crude. It is a national priority to get our natural resource to market, so as to protect the country's economic GDP and create jobs. Our CN railroaders are ensuring that we have the infrastructure to move any and all natural resource to world market....We also have the startup of the AltaGas propane export terminal in Rupert and the introduction of the new container service by ZIM Line in Rupert. We also have immediate capacity to move more crude. In April, we are running at 145,000 barrel per day but we do have the capacity to quickly ramp up to 300,000 barrel per day.

⁴⁴ As numerous news articles have revealed, the surge in CN's post-transaction movements has been facilitated by subsidies granted by the Canadian government to assist in the development of the Canadian ports in Vancouver and Prince Rupert. Moreover, the Canadian government is reported to have promoted the movement of crude-by-rail by acquiring tank cars for CN's and CP's usage.

These comments by CN's CEO clearly demonstrate that regardless of what CN says in its Board filings, CN takes a long-term view in making Capex decisions and does not change its collective mind on a month-by-month basis in response to short-term market forces. The EJ&E is now – and will always be – a major competitive advantage to CN and fully deserving of infrastructure investment because it allows the railroad to avoid Chicago with all commodity shipments, but also with hazmat shipments that must be routed outside the Chicago High Threat Urban Area (HTUA).

Conclusion

Given the foregoing, there is no avoiding the conclusion that CN's acquisition of the EJ&E line has enabled CN to solidify its dominant position in international transportation by being able to avoid Chicago. Nor is there any way to avoid the conclusion that CN has far exceeded the projections on which the Board relied in approving CN's acquisition of the EJ&E line.

Nor is there any way to avoid the conclusion that CN's freight rail operations have far exceeded the Board's 2008 anticipated impact on the Village of Barrington. Simply put, the increase in vehicular traffic delays from 2.49 hours a day to somewhere well in excess of 100 hours per day is but the tip of the Canadian driven iceberg. Barrington is well aware of the fact that vehicular delay is but one of the factors that the Board considered. It is also aware that OEA's calculations were based on what has proved to be a vast understatement of rail traffic, both in terms of the number and length of CN's trains, and far lower speeds at which they are operated through Barrington.

One needs to look no further than IDOT's acquisition of multiple private residences in order to construct the grade-separation at the intersection of the EJ&E Line and U.S. Hwy. 14 to realize the unrelenting impact of CN's acquisition of the EJ&E. As IDOT has previously advised the Board, there was no need whatsoever to even consider a grade separation at that intersection when EJ&E owned and controlled rail operations over its line.

Now that the Board is faced with the reality of double tracking near Barrington and projections of nine (9) additional trains, there is no avoiding the conclusion that there is nothing to prevent CN from further streamlining its entire corridor around Chicago. Without question, this new evidence and substantially changed circumstances warrants the requested additional mitigation.

Therefore, for all of the above reasons, the Board is urged to require CN to provide current data regarding operations over the EJ&E line so that the Board can reassess the impact on the regionally important U.S. Highway 14 in light of FHWA's governing standards that apply to highways are part of the designated National Highway System. If the Board does so, Barrington believes that the Board will agree with Barrington that the current situation in Barrington supports a requirement that CN pay a substantial share of the cost of constructing a grade separation.

Respectfully submitted,

/s/ Richard H. Streeter

Richard H. Streeter
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Washington, D.C. 20016
202-363-2011
rhstreeter@gmail.com
Counsel for Village of Barrington, IL

Dated: May 16, 2019

Certificate of Service

I, Richard H. Streeter, have served all parties of record via email this 16th day of May, 2019.

/s/ Richard H. Streeter

Richard H. Streeter

Attachment 1

Motion for Leave to File Reply

Neil,

Here is the first response I received from the CN rep after our February 2018 meeting about parking trains and double tracking the system. His responses are in red caps below.

Scott

----- Original Message -----

From: Jim Kvedaras <Jim.Kvedaras@cn.ca>

To: "abbey641@comcast.net" <abbey641@comcast.net>

Cc: "jim.norris@hoffmanestates.org" <jim.norris@hoffmanestates.org>,

"michael.hankey@hoffmanestates.org" <michael.hankey@hoffmanestates.org>

Date: February 20, 2018 at 4:08 PM

Subject: FW: Follow Up to February 8th Meeting regarding CN Train Idling

Good afternoon, Scott. My responses are in **RED CAPS** after your points. I'm not shouting – just trying to visibly differentiate.

Jim

From: SCOTT GIBRICH [<mailto:abbey641@comcast.net>]

Sent: Monday, February 19, 2018 7:12 PM

To: Jim Kvedaras <Jim.Kvedaras@cn.ca>

Cc: jim.norris@hoffmanestates.org; michael.hankey@hoffmanestates.org; methorn1@comcast.net; billdorian@gmail.com; ashley@mcpmc.com; doreen.gibrich@comcast.net; abbey641@comcast.net

Subject: Follow Up to February 8th Meeting regarding CN Train Idling

Mr. Kvedaras,

Thank you once again for attending our Deer Crossing association meeting on February 8, 2018. The primary focus of that meeting was to discuss the impact of idling CN trains on our community. In attendance were concerned citizens and residents from both the Deer Crossing and Bridlewood sub-divisions in Hoffman Estates.

AS I INDICATED I WOULD, I DID GO BACK AND TALK TO OUR ENGINEERING AND OPERATIONS OFFICERS TO DISCUSS THESE ITEMS. THE FOLLOWING RESPONSES ARE A RESULT OF THOSE DISCUSSIONS.

Issue:

As was discussed, our subdivisions to the east end, borders with the tracks managed by the Canadian National Railway. A "Siding" track of approximately 10,000 feet runs from the north at Old Sutton Road to just south of Shoe Factory Road. Trains going south bound will frequently park and idle for hours (several trains per day) in order to let northbound trains pass using the primary track. The south bound idling train engines park extremely close to our homes and causes significant impact to our quality of life. Loud low frequency engine noise, diesel odor, extreme vibration and loud brake spitting (every 15 seconds) are the base of our issues. I UNDERSTAND YOUR CONCERNS, BUT WHAT YOU ARE DESCRIBING ARE STANDARD RAILROAD OPERATING PRACTICES, DONE NO DIFFERENTLY THAN HOW ANY OTHER RAILROAD IN ANY OTHER AREA DOES, IN FULL COMPLIANCE WITH ALL APPLICABLE LAWS AND REGULATIONS. THE PROXIMITY OF THE HOMES TO THE ACTIVE RAILROAD IS INDEED UNFORTUNATE, AND AS WE HEAR ABOUT NEW HOUSING DEVELOPMENTS BEING EXPLORED IN OTHER AREAS, WE TRY TO ADVISE THE RESPECTIVE MUNICIPALITIES OR COUNTIES OF THE DOWNSIDES OF PUTTING INCOMPATIBLE LAND USES IN SUCH CLOSE PROXIMITY TO EACH OTHER. UNFORTUNATELY, DEVELOPERS TYPICALLY DO NOT AGREE, AND AS THEY FIND BUYERS FOR THEIR PROPERTIES, THE HOMEOWNERS FIND OUT AFTER A WHILE THAT THEY FIND THE SITUATION UNTENABLE, MUCH LIKE YOUR GROUP DOES NOW. THIS IS OF COURSE MORE DRAMATICALLY DEMONSTRATED HERE, WITH MORE DAILY TRAINS OPERATING THERE THAN WAS EXPERIENCED WITH THE PRIOR OWNERS (the EJ&E before we acquired it). WHILE THE 20-SOME TRAINS OPERATING DAILY THERE NOW ARE FAR FEWER THAN THAT ON MOST OTHER RAIL LINES IN THE METROPOLITAN AREA, I FULLY RECOGNIZE THAT THE RESIDENTS DO NOT LIKE TRAIN TRAFFIC, PARTICULARLY NON-MOVING TRAFFIC, BUT WE ARE USING THE PROPERTY EXACTLY AS WE SAID WE WOULD AS WE APPLIED FOR APPROVAL FROM OUR FEDERAL REGULATORS OVER TEN YEARS AGO TO ACQUIRE IT.

Discussion:

At the meeting, we discussed options such as alternative parking areas AS I INDICATED IN OUR MEETING, THERE IS NO ALTERNATIVE PARKING AREA IN THAT PART OF OUR SYSTEM, AS THIS IS THE ONLY LONG STRETCH WHERE WE CAN STAGE TRAINS WITHOUT BLOCKING ANY PUBLIC CROSSINGS, WHICH IS SOMETHING OUR REGULATORS TOLD US THEY EXPECT FROM US. WE HAVE SIMILAR SITUATIONS UP AND DOWN OUR LINE, AND EACH ONE OF THESE IS A SEPARATE AND DISTINCT PART OF OUR OVERALL RAIL NETWORK. AS SUCH, OPERATIONS DONE IN EACH INDIVIDUAL AREA HAVE A RIPPLE EFFECT ON ADJOINING AREAS, EVEN THOSE FAR AWAY, AND CANNOT BE TAKEN AS A STANDALONE SITUATION, double track extensions to the north, parking shorter trains further north of Shoe Factory Road THERE IS NO DEPENDABLE WAY WE CAN PREDICT HOW LONG OUR TRAINS ARE IN ANY PARTICULAR TIME, AND WE MAINTAIN CONSISTENT OPERATIONS, AS THAT INCREASES DEPENDABILITY AND SAFETY OF OUR OVERALL OPERATIONS. WE DO NOT MANAGE BY EXCEPTION SUCH AS WHAT YOU PROPOSE HERE, STOPPING CERTAIN TRAINS IN DIFFERENT LOCATIONS THAN OTHER TRAINS, ESPECIALLY WHERE WE ALREADY HAVE A SIGNAL

SYSTEM THAT IS OPERATING AS REQUIRED. CONSISTENCY IS A SIGNIFICANT FACTOR IN MAINTAINING SAFE OPERATIONS, AND ESPECIALLY HERE, WHERE THIS CONCEPT WOULD NOT BE APPLICABLE TO MANY TRAINS DUE TO THEIR LENGTH, IS NOT SOMETHING WE WILL PURSUE. and diesel engine stop and start up issues DIESEL LOCOMOTIVES CANNOT BE STOPPED AND STARTED IN COLD WEATHER – THEY NEED TO KEEP RUNNING SO THEIR PIPES DO NOT FREEZE. AS WE ACQUIRE NEW LOCOMOTIVES, MANY OF THEM ARE EQUIPPED WITH TECHNOLOGY THAT ALLOWS THEM TO CYCLE ON AND OFF (THEY CYCLE ON AGAIN TO MAINTAIN AIR PRESSURE IN THE BRAKE LINES, SO THAT WHEN A TRAIN IS CLEARED TO MOVE FORWARD, IT DOES NOT HAVE TO WAIT FOR ANY APPRECIABLE AMOUNT OF TIME TO RESTORE AIR PRESSURE) IN WARMER WEATHER. HOWEVER, THERE IS NO DEPENDABLE WAY TO PREDICT WHICH TRAINS GET THE NEWER TECHNOLOGY LOCOMOTIVES, AS THEY FLOW FREELY ACROSS OUR SYSTEM AS TRAFFIC PATTERNS DEMAND. The consensus from the attending residents was that we understand the need to park the trains on the "Siding" track and that we were looking for remedies to reducing the number of trains parking southbound and the duration of their presence THE AMOUNT OF TIME THEY SPEND THERE IS TOTALLY DEPENDENT ON WHAT THE OPERATING CIRCUMSTANCES ARE AT THAT TIME, AS OUR OPERATIONS ARE VIEWED AND CONTINUOUSLY COORDINATED ACROSS A MUCH BROADER AREA THAN JUST THE IMMEDIATE VICINITY. At the conclusion of the meeting, we received no encouraging signs that CN would take any actions toward respecting our relationship as a good neighbor to our communities. That was very disappointing.

Action:

You assured our attendees at the conclusion of the meeting that you would take our issue to the CN operations group so as to formulate an official response to our residents including any possible remedies.

Proposal:

The group proposed that the southbound train's "idling area" move further north of our communities. You noted that most trains are 6,000 to 8,000 feet in length. I ALSO NOTED THAT WE DO HAVE LONGER TRAINS, BUT THE OVERALL LENGTH IS DEPENDENT ON WHAT OUR CUSTOMERS REQUIRE OF US AT THE TIME AND VARIES A study revealed that if a new switch track signal was constructed about 2000 feet north of Shoe Factory Road, shorter trains (less than 8000 feet) could park further north thus avoiding our subdivisions. The new signal would provide visual feedback when the south switch was clear so shorter trains could park further north. This would reduce the number of idling train engines directly adjacent to our homes. Please refer to the two attachments as they illustrate this proposal. AS I INDICATED IN THE MEETING, THE INVESTMENTS WE MADE TO EXTEND THAT SIDING WERE MADE IN THE INTEREST OF SAFETY AS WELL AS EFFICIENCIES. AS CONSTRUCTED, IT ALLOWS US THE ABILITY TO STAGE A TRAIN OF ANY SIZE IN THE SIDING TO GIVE US THE FLEXIBILITY FOR ONE OR MORE TRAINS TO PASS ON THE MAIN TRACK IN A SAFE AND CONTROLLED MANNER. THE EXISTING SIGNAL SYSTEM IS DESIGNED AND CONSTRUCTED TO INDUSTRY STANDARDS TO

MAXIMIZE SAFETY AND EFFICIENCY AND HAS BEEN ENHANCED TO COMPLY WITH POSITIVE TRAIN CONTROL (PTC) REQUIREMENTS (WHICH ALL HAVE READ ABOUT DUE TO THE SERIES OF AMTRAK TRAGEDIES NATIONWIDE WITHIN THE PAST YEAR), WHICH IN ITSELF REQUIRED ADDITIONAL SIGNIFICANT INVESTMENTS TO ENSURE FULL COMPLIANCE WITH THAT SYSTEM. IT IS DESIGNED AND CONSTRUCTED TO GIVE US THE MAXIMUM UTILITY OF OUR INFRASTRUCTURE, WHICH WE OWN AND MAINTAIN AT OUR SOLE COST AND EXPENSE. IT WILL NOT BE MODIFIED SUCH AS YOU SUGGEST.

YOU DID NOT MENTION IT HERE, BUT ANOTHER IDEA THAT WAS SUGGESTED AT THE MEETING WAS FOR US TO ADD ANOTHER TRACK CONNECTION FURTHER NORTH IN THE SIDING, OSTENSIBLY TO ALLOW A SHORT TRAIN TO STOP FURTHER NORTH, AWAY FROM THE HOUSES, AND SWITCH ONTO THE MAIN THERE ONCE THEY ARE ALLOWED TO PROCEED. AS I SAID, WE HAVE MADE VERY SIGNIFICANT INVESTMENTS TO MAXIMIZE THE FLEXIBILITY OF OUR INFRASTRUCTURE. THIS IDEA RUNS COUNTER TO THAT AND COMPROMISES THE EFFECTIVENESS OF OUR OPERATIONS. IT ALSO INTRODUCES ADDITIONAL RISKS DUE TO THE NEED TO MAINTAIN ADDITIONAL SWITCHES WHERE THEY ARE NOT NEEDED FOR RAILROAD OPERATIONS, WHICH ALSO TIES INTO THE PTC DISCUSSION, AS SWITCHES REQUIRE FAR MORE ADVANCED SAFETY EQUIPMENT IF THEY ARE WITHIN PTC TERRITORY SUCH AS HERE.

Conclusion:

We respect the need to support Canadian National's legal right to traverse the tracks directly next to our communities but we also expect that respect to be returned with a meaningful response to our proposal and the need to reduce the impact of idling trains on our residents. We eagerly await your prompt response from Canadian National.

PLEASE REMEMBER THAT WE ARE A PRIVATE INDUSTRY, DOING WHAT WE DO ON PROPERTY THAT WE OWN, MAINTAIN AT OUR SOLE COST AND PAY PROPERTY TAXES ON. LIKE ANY OTHER PRIVATE INDUSTRY, AS LONG AS WE ARE OPERATING IN FULL COMPLIANCE WITH ALL APPLICABLE LAWS, WE NEED TO MAINTAIN THE FULL UTILITY OF OUR INFRASTRUCTURE WITHOUT PUTTING LOCAL RESTRICTIONS ON OUR OPERATIONS. AS I NOTED, THE ULTIMATE BENEFICIARIES OF WHAT WE DO ARE THE FINAL CONSUMERS, WHO PAY WHAT THEY DO FOR EACH AND EVERY ITEM THEY PURCHASE AT A PRICE SET BY THE PRODUCERS, WHO ALWAYS PASS ALONG THEIR COSTS OF PRODUCTION TO THE END USER. THEIR USE OF RAILROADS, FREQUENTLY TO MOVE THEIR RAW, SEMI FINISHED GOODS AND EVEN FINISHED GOODS THROUGH THEIR PRODUCTION PROCESSES, HOLDS THOSE COSTS LOWER THAN IF THEY WERE FORCED TO USE HIGHWAY/ROADWAY SERVICES EXCLUSIVELY.

Thank you very much.

Regards,

Scott Gibrich

1850 Nicholson Dr.

Hoffman Estates, IL. 60192

847-622-1850

Attachment 2

Motion for Leave to File Reply

Data for Typical Trains on EJ&E Rail Line Segments in United States Affected by Canadian National/EJ&E West Company Transaction

Transaction

Segment	From Station	To Station	EJE Trains				Other Trains				CN Trains				Typical Train			
			Trains/Day	Cars	Tons	Feet	Trains/Day	Cars	Tons	Feet	Trains/Day	Cars	Tons	Feet	Trains/Day	Cars	Tons	Feet
14	Leithton	Spaulding	3.5	17	1,629	1,062	0.7	117	10,243	6,358	1.1	113	8,576	6,242	5.3	51	3,867	2,760
13	Spaulding	Munger	3.6	26	2,343	1,578	0.7	117	10,243	6,358	1.1	113	8,576	6,242	5.5	56	4,254	3,042
12	Munger	West Chicago	3.6	26	2,340	1,575	0.7	117	10,243	6,358	0.0	0	0	0	4.4	42	3,278	2,246
11	West Chicago	East Siding	7.6	52	4,694	2,976	3.1	114	9,954	6,175	0.0	0	0	0	10.7	70	5,826	3,769
10	East Siding	Walker	8.9	62	5,596	3,534	6.8	85	6,408	4,655	0.0	0	0	0	15.7	72	5,544	3,881
9	Walker	Bridge Junction	11.6	50	4,559	2,881	6.8	85	6,408	4,655	0.0	0	0	0	18.5	63	4,841	3,398
8	Bridge Junction	Rock Island Jct	15.4	38	3,544	2,213	3.1	114	9,954	6,175	0.0	0	0	0	18.5	51	4,225	2,742
7	Rock Island Jct	Matteson	4.8	62	5,178	3,550	1.6	94	8,276	5,114	0.0	0	0	0	6.4	70	5,537	3,795
6	Matteson	Chicago Hts	5.8	53	4,505	3,072	1.6	94	8,276	5,114	1.2	93	7,106	5,119	8.6	66	5,158	3,615
5	Chicago Hts	Griffith	6.9	46	3,925	2,668	2.1	87	7,690	4,743	1.2	93	7,106	5,119	10.2	60	4,670	3,261
4	Griffith	Van Loon	7.1	45	3,839	2,605	0.5	114	9,948	6,171	0.0	0	0	0	7.6	50	3,870	2,717
3	Van Loon	Ivanhoe	9.1	54	4,436	3,113	0.5	114	9,948	6,171	0.0	0	0	0	9.7	57	4,344	3,144
2	Ivanhoe	Cavanaugh	9.2	53	4,385	3,076	0.5	114	9,948	6,171	0.0	0	0	0	9.8	57	4,294	3,108
1	Cavanaugh	Gary	11.2	46	3,870	2,671	0.5	114	9,948	6,171	0.0	0	0	0	11.8	49.1	3750.2	2692.7

Overall Average	47	3,761	2,590	94	7,285	4,976	105	7,585	5,794	62	4,846	3,353
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Transaction

Segment	From Station	To Station	EJE Trains				Other Trains				CN Trains				Typical Train			
			Trains/Day	Cars	Tons	Feet	Trains/Day	Cars	Tons	Feet	Trains/Day	Cars	Tons	Feet	Trains/Day	Cars	Tons	Feet
14	Leithton	Spaulding	3.5	17	1,629	1,062	0.7	117	10,243	6,358	16.1	132	9,850	8,268	20.3	112	8,059	6,829
13	Spaulding	Munger	3.6	26	2,343	1,578	0.7	117	10,243	6,358	18.1	127	9,511	7,937	22.5	110	7,970	6,714
12	Munger	West Chicago	3.6	26	2,340	1,575	0.7	117	10,243	6,358	19.0	129	9,649	8,046	23.4	112	8,124	6,843
11	West Chicago	East Siding	7.6	52	4,694	2,976	3.1	114	9,954	6,175	20.9	128	9,577	8,025	31.6	108	8,041	6,494
10	East Siding	Walker	8.9	62	5,596	3,534	6.8	85	6,408	4,655	23.8	126	9,500	7,875	39.5	104	7,684	6,203
9	Walker	Bridge Junction	11.6	50	4,559	2,881	6.8	85	6,408	4,655	23.8	126	9,500	7,875	42.3	98	7,239	5,842
8	Bridge Junction	Rock Island Jct	15.4	38	3,544	2,213	3.1	114	9,954	6,175	23.8	126	9,500	7,875	42.3	93	6,967	5,552
7	Rock Island Jct	Matteson	4.8	62	5,178	3,550	1.6	94	8,276	5,114	21.9	121	9,253	7,667	28.3	109	8,101	6,684
6	Matteson	Chicago Hts	5.8	53	4,505	3,072	1.6	94	8,276	5,114	24.2	110	8,849	7,284	31.6	98	7,612	6,256
5	Chicago Hts	Griffith	6.9	46	3,925	2,668	2.1	87	7,690	4,743	25.2	108	8,684	7,229	34.2	94	7,254	6,012
4	Griffith	Van Loon	7.1	45	3,839	2,605	0.5	114	9,948	6,171	21.0	112	9,000	7,219	28.6	95	7,336	5,915
3	Van Loon	Ivanhoe	9.1	54	4,436	3,113	0.5	114	9,948	6,171	20.0	110	8,774	7,191	29.7	93	7,057	5,777
2	Ivanhoe	Cavanaugh	9.2	53	4,385	3,076	0.5	114	9,948	6,171	20.0	110	8,774	7,191	29.8	93	7,033	5,758
1	Cavanaugh	Gary	11.2	46	3,870	2,671	0.5	114	9,948	6,171	20.0	110	8,774	7,191	31.8	88	6,659	5,437

Overall Average	47	3,761	2,590	94	7,285	4,976	122	8,941	7,623	104	7,686	6,321
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Attachment 3

Motion for Leave to File Reply

Prince Rupert Port Authority Container Terminal Master Planning Confirms Potential to Develop in Excess of 6 million TEUs of Capacity, Second Terminal identified as Next Phase of Development

EFFECTIVE MONDAY, MAY 13, 2019

PRINCE RUPERT, BRITISH COLUMBIA – The Prince Rupert Port Authority (PRPA) announced today the completion of a container terminal master plan that outlines the potential of future container terminal capacity and sequencing of development at the Port of Prince Rupert. The planning work identifies the long-term potential to develop 6 – 7 million TEUs of capacity through the development of multiple terminals at the Port of Prince Rupert.

The plan's research was completed with the assistance of AECOM, a global leader in infrastructure planning and development. It considered capital costs, operating efficiencies, optimization of construction sequencing to minimize disruptions to ongoing operations, and mitigation of human receptor impacts (air quality, noise and lighting) as criteria to determine the feasibility and sequencing of container terminal potential at the Port of Prince Rupert.

"Conducting this work ensures we have a clear understanding of the future potential for terminal development and contributes to a vision for the future of our container business to respond to the growing market demand for capacity at the Port of Prince Rupert," said Shaun Stevenson, President and CEO of the Prince Rupert Port Authority. "The terminal development potential identified in the study ensures that we can accommodate the short, medium and long term supply chain needs of Canadian exporters while continuing to provide the unparalleled reach, reliability and speed shippers have come to expect at the Port of Prince Rupert."

The master planning concluded the potential for further expansion of Fairview Terminal and the development of a second container terminal at the Port of Prince Rupert's South Kaien Island site. This second terminal features a capacity of 2.5 million TEUs and was identified as the next phase of terminal expansion for the container business at the Port of Prince Rupert following the expansion of Fairview Container Terminal announced with DP World in 2018, increasing its current capacity from 1.35 million TEUs to 1.8 million TEUs by 2022. Both the current Fairview Terminal and South Kaien sites are in close proximity to expanding export logistics operations on Ridley Island, and will fully integrate with these operations following PRPA's construction of the Fairview-Ridley Connector Corridor scheduled for the end of 2020.

"DP World continues to invest in terminal capacity, including advancing our current expansion project at Fairview Terminal," said Maksim Mihic, General Manager of DP World (Canada) Inc. "We fully support the Prince Rupert Port Authority's development vision which enables Canadian trade and improves the balance between imports and exports through the northern corridor."

“The Port of Prince Rupert continues to be an important part of CN’s supply chains to and from international markets,” said JJ Ruest, President and Chief Executive Officer at CN. “This strategic port provides a rail connection to key markets and its continued expansion will further solidify the port’s place as a world class gateway. Our recent record capital investments further underpin our commitment to getting Canadian natural resources and consumer products to markets safely and efficiently and the Prince Rupert gateway is key to that strategy.”

The Port of Prince Rupert is among the fastest growing ports in North America and handled a record 1 million TEUs and 27 million tonnes of cargo in 2018.

“Our planned container terminal capacity expansion ensures Canadian shippers will be able to meet their supply chain needs well into the future and Canada will be well-served in meeting its objectives of growing trade in the Asia Pacific region,” added Stevenson.

It is expected that the Port of Prince Rupert will become Canada’s second largest port in the next 5 years.

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