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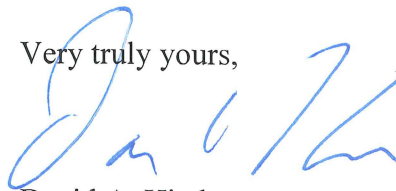
Ms. Cynthia Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423-0001

**Re: *Canadian National Railway Company and Grand Trunk Corporation –
Control – EJ& E West Company [Barrington Petition for Mitigation] (Docket
No. FD 35087 (Sub-No. 8))***

Dear Ms. Brown:

Enclosed for filing in the above referenced sub-docket please find CN's Reply to Illinois Department of Transportation and the Village of Barrington's Petition Seeking Additional Mitigation and Reopening.

Very truly yours,



David A. Hirsh

Counsel for Canadian National Railway Company
and Grand Trunk Corporation

Enclosure

cc: Richard H. Streeter, Esquire (by e-mail)

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

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

[Barrington Petition for Mitigation]

**CN'S REPLY TO ILLINOIS DEPARTMENT OF TRANSPORTATION AND THE
VILLAGE OF BARRINGTON'S PETITION SEEKING ADDITIONAL MITIGATION
AND REOPENING**

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January 30, 2017

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

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

[Barrington Petition for Mitigation]

**CN’S REPLY TO ILLINOIS DEPARTMENT OF TRANSPORTATION AND THE
VILLAGE OF BARRINGTON’S PETITION SEEKING ADDITIONAL MITIGATION
AND REOPENING**

Canadian National Railway Company and Grand Trunk Corporation (together, “CN”)¹ hereby reply to the “Petition Seeking Imposition of Additional Mitigation Pursuant to the Board’s Oversight Jurisdiction and Reopening Pursuant to Governing Regulations” filed by the Illinois Department of Transportation (“IDOT”) and the Village of Barrington, Illinois (“Barrington”) on January 10, 2017 (as amended on January 17, 2017) (“Petition” or “Pet.”).² The Petition should be denied. It offers nothing new and material in support of reopening. Instead, it re-hashes points Barrington made, and the Board and the courts rejected, in 2008 and in multiple reopening, reconsideration, and judicial review petitions and denials since then:

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

² Attached in support of this reply are verified statements of John Orr, CN’s Senior Vice-President, Southern Region, (attached as Exhibit A) and Keith Reardon, CN’s Vice-President Intermodal Services (attached as Exhibit B) (respectively, “V.S. Orr” and “V.S. Reardon”).

general observations about the EJ&E/U.S. Highway 14 crossing,³ minor variations in traffic and speed on the EJ&E line,⁴ and unsupported speculations about the future.⁵

Over eight years ago, the Board approved CN's acquisition of the EJ&E rail line (the "Transaction"), subject to extensive environmental mitigation and oversight reporting conditions.⁶ Among them, after a thorough review of the evidence in light of multiple objective factors, were the requirement that CN partially fund grade separations at two at-grade crossings on the EJ&E line, and that it provide other forms of mitigation at other crossings, including the crossings in Barrington. CN acquired the line on February 1, 2009, for \$303 million,⁷ and has

³ See, e.g., Decision served November 8, 2012 ("2012 Decision"), at 14-15 (comparison to other crossing "not new evidence" and designation of road as an SRA "not . . . controlling"), 20 (existence of TIGER II grant "not relevant"); Decision served May 15, 2015 ("May 2015 Decision"), at 8 (existence of TIGER II grant "not new evidence"); Decision served November 4, 2015 ("November 2015 Decision"), at 4 (Barrington's claims are "simply restatements of prior arguments" that were addressed by the Board and the D.C. Circuit).

⁴ See, e.g., 2012 Decision at 8-9 (new evidence must "mandate a different result"); November 2015 Decision at 4 (meeting or exceeding certain levels of traffic does not automatically warrant mitigation); May 2015 Decision at 7 ("the traffic mix and commodities transported over a crossing were not among the factors used to determine whether a crossing was substantially affected.")

⁵ *Canadian Nat'l Ry. – Control – EJ&E W. Co.*, Docket No. FD 35087, Decision No. 16, at 41 (STB served Dec. 24, 2008) ("Approval Decision"); May 2015 Decision at 7 (generalized concerns about future volumes of traffic do not justify reopening); November 2015 Decision at 5 ("speculation about what might occur in the future" is no basis for reopening).

⁶ See generally Approval Decision at 34-53, 59-84.

⁷ The Approval Decision became effective on January 23, 2009. Shortly after consummating the transaction, Elgin, Joliet and Eastern Railway transferred most of its assets to EJ&EW. Elgin, Joliet and Eastern Railway then changed its name to Gary Railway, and EJ&EW adopted the name of Elgin, Joliet and Eastern Railway Company ("EJ&E"). Effective January 1, 2013, EJ&E was merged into WCL, an operating subsidiary of CN. See letter from Thomas J. Litwiler (Counsel for WCL and EJ&E) to Cynthia T. Brown (Chief, Section of Administration, Office of Proceedings, STB), *Wisconsin Central Ltd. – Intra-Corporate Family Merger Exemption – Elgin, Joliet & E. Ry.*, Docket No. FD 35630 (filed Jan. 4, 2013). As the Board has noted, CN remains subject to the conditions imposed by the Board in the Approval Decision, and to the extent that any obligations may have been imposed separately on EJ&E, those obligations were inherited by WCL. *Wisconsin Central Ltd. – Intra-Corporate Family Merger Exemption –*

since invested approximately \$271 million in infrastructure, thereby helping to reduce congestion in and around the critically important Chicago hub of the national rail network. CN has also spent over \$120 million on environmental and safety mitigation measures, benefiting local communities (and, in the process, reaching and implementing voluntary environmental mitigation agreements with 28 of the 33 communities along the line).⁸ CN has fulfilled every condition the Board set. And, as the Board knows from over eight years of monitoring and hundreds of reports from CN on environmental and safety issues and crossing blockages,⁹ CN has an exemplary environmental and safety record on the EJ&E.

The environmental mitigation requirements the Board imposed in the Approval Decision, and the eight-year post-acquisition monitoring and reporting period that ensued, were unprecedented in size and scope for a transaction that qualified as “minor” under the Board’s rules. From the beginning, however, the Board made clear its conditions were not to be perpetual, and that it did not intend to micro-manage CN’s operations indefinitely. It was therefore entirely appropriate that, after the Board twice extended the five-year period of oversight, monitoring, and reporting provisions it originally set, they expired on January 23.

Petitioners do not, and cannot, dispute these facts. Yet they ask the Board to reverse itself, impose a new \$37.5 million mitigation condition on CN eight years after the Transaction, and extend oversight, monitoring, and reporting to a full decade after the Transaction. Barrington has made comparable grade crossing requests many times; the Board has rightly

Elgin, Joliet & E. Ry., Docket No. FD 35630, slip op. at 2 (STB served Sept. 5, 2012). The lines acquired in the Transaction are referred to herein as “EJ&E.”

⁸ See V.S. Orr at 2-3.

⁹ See *id.* at 3.

rejected them;¹⁰ and the D.C. Circuit has twice upheld the Board's decisions to do so.¹¹

Petitioners do not, and cannot, claim that the Board erred (although Barrington has repeatedly made that claim unsuccessfully in the past). As the Board has previously stated, to justify reopening in the absence of alleged error, they must present material new evidence or substantially changed circumstances that “would mandate a different result.”¹²

The Petition does not do so. It cites “new” evidence, but only in the most trivial sense that facts change with the passage of time. Projections made in 2007-08 could not possibly capture precise train volumes, lengths and consists or local population trends almost a decade later. That is one reason why the Board did not project that far into the future¹³ and has repeatedly made clear that variances from projected data over time are themselves not material.¹⁴ The Board has also emphasized that speculation is not grounds for reopening.¹⁵ Numbers always change over time, and speculation is always possible, so allowing reopening on such bases would mean that no decision could ever be meaningfully final.

¹⁰ As Petitioners acknowledge, Pet. at 29, the extension to a full ten years of oversight they now seek is also something Barrington has previously sought and the Board has denied. See Final EIS at 4-31. The Board extended oversight at the end of 2014, but that was based on concerns with widespread operating problems in the Chicago region over the preceding year, including a short spike in blocked crossings on EJ&E, related to historically severe weather during the winter of 2013-2014. See Decision served December 17, 2014, at 5. Chicago operations have returned to normal and, as noted by Mr. Orr in his Verified Statement (at page 2), CN's acquisition of EJ&E has added greater flexibility and capacity for CN and other carriers to better cope with disruptive events such as severe weather.

¹¹ *Village of Barrington v. STB*, 636 F.3d 650 (D.C. Cir. 2011); *Village of Barrington v. STB*, 758 F.3d 326 (D.C. Cir. 2014).

¹² See 2012 Decision at 8-9.

¹³ The Board used train traffic projections through 2015, reasoning that that was “the limit of what is reasonably foreseeable.” Approval Decision at 41.

¹⁴ See November 2015 Decision at 5; May 2015 Decision at 5 & n.9.

¹⁵ See Approval Decision at 41; November 2015 Decision at 5.

The Board's **material** considerations in the decisions Petitioners seek to overturn remain the same, and subsequent evidence relevant to those considerations only reinforces those decisions. The Transaction has strongly served the public interest, as the Board predicted. Safety concerns and effects on local communities have, if anything, been less than the Board anticipated – with fewer trains than predicted, safe operations, and few reportable crossing blockages at U.S. Highway 14 (less than one per month). And it remains true, as the Board has repeatedly noted, that Barrington's traffic problems pre-existed and are largely independent of the effects of the Transaction.¹⁶

The Board decided this case correctly eight years ago; there has been no material change; and it is time for Petitioners' repetitious efforts to overturn the Board's decision to end.¹⁷

BACKGROUND

Because the Petition relies on arguments unsuccessfully pressed by Barrington before, the Board has already addressed most of them. In its 2008 comments on the Board's Draft EIS, Barrington opposed the Transaction and argued that if the Board approved it, it should compel CN to fully fund grade separations at U.S. Highway 14 and other Barrington crossings.¹⁸ In 2011, Barrington sought reopening, asking the Board to require CN to "bear a substantial portion

¹⁶ See Final EIS at 4-14-4-16; Approval Decision at 45-46, n.101; 2012 Decision at 12-13 & n.60; May 2015 Decision at 6.

¹⁷ Barrington's repeated demands that regulation insulate it from natural increases in rail traffic over the strategic and operationally important EJ&E ignore a fundamental point the Board made in 2008: Barrington has no "reliance interest" in such protection because the previous owners of EJ&E could have increased the frequency of trains on the line without Board approval and without environmental mitigation. Approval Decision at 38. As the Board further explained, had the Board denied the transaction, Barrington and other communities along the EJ&E arc could have been worse off because the environmental effects of future traffic increases would not have been mitigated. *Id.*

¹⁸ Barrington's Comments on the Draft EIS at 20-22 (BARR-6) (Sept. 30, 2008).

of the cost of constructing a U.S. Route 14 grade separation;”¹⁹ in 2014, Barrington sought reopening, asking the Board to require CN to bear essentially the entire cost of a grade separation at U.S. Highway 14;²⁰ and in 2015, it sought the same relief in a petition to reconsider the Board’s denial of its 2014 reopening petition.²¹ Barrington has also twice sought judicial review of the Board’s decisions to allow the Transaction to proceed without requiring CN to fund a U.S. Highway 14 grade separation.²² Barrington’s arguments always have been fully and fairly considered and rejected.

CN will not repeat the details of that lengthy history here,²³ but the Board has made several key points that bear emphasis. First, it concluded that the Transaction “will greatly improve rail transportation through Chicago, a vital rail transportation center, and will have environmental benefits to those living in and near that city.” Approval Decision at 2; *see also id.* at 37-38, 40. In the eight years since, the Transaction has had precisely those effects. *See V.S. Orr* at 2. As the Board expected, and as recent letters from local communities and business

¹⁹ Pet. Seeking Imposition of Additional Mitigation Pursuant to the Board’s Oversight Jurisdiction and Reopening Pursuant to Governing Regulations at 3 (Oct. 14, 2011) (“2011 Petition”), denied by 2012 Decision.

²⁰ Pet. Seeking Imposition of Additional Mitigation Pursuant to the Board’s Oversight Jurisdiction and Reopening Based on Materially Changed Circumstances Pursuant to the Board’s Governing Regulations (Nov. 26, 2014) (“2014 Petition”), denied by May 2015 Decision.

²¹ Pet. Seeking Recons. (June 4, 2015) (“2015 Petition”), denied by November 2015 Decision.

²² In 2011, the D.C. Circuit unanimously denied Barrington’s petition for judicial review of the Approval Decision. *Village of Barrington*, 636 F.3d 650. After the Board denied its 2011 petition to reopen the proceeding, Barrington again petitioned for judicial review, and in 2014, the D.C. Circuit again unanimously ruled against Barrington. *Village of Barrington*, 758 F.3d 326.

²³ The Board summarized the relevant history at pages 1-3 of its November 2015 Decision denying Barrington’s petition for reconsideration.

associations attest,²⁴ the Transaction was precisely the kind of private investment furthering the public interest that should be encouraged. Its benefits should not be diminished or future investors discouraged by excessively onerous conditions requiring a private railroad to subsidize public road networks or by the prospect of perpetual Government oversight.

Second, the Board, through its Section on Environmental Analysis, used objective criteria to analyze road crossings along the EJ&E line to identify those that would be “substantially affected” by the Transaction. Approval Decision at 42-43. The Board found that eight crossings (which did not include U.S. Highway 14) met its threshold for mitigation, but that only two of them merited grade separation funding requirements. *See id.* at 44 & n.97. In addition, the Board conducted a special traffic study to address congestion concerns in Barrington, in response to Barrington’s comments on the Draft EIS.²⁵ That study concluded that the Transaction would have relatively modest effects on traffic congestion in Barrington relative to Barrington’s pre-existing traffic delays. *See id.* at 45 & n.101. The Board stressed that environmental mitigation conditions on railroad transactions are not intended to subsidize solutions to pre-existing conditions, including the pre-existing congested road network and active railroad right-of-way.

²⁴ *See* Letter from Joseph P. Schwieterman, Ph.D., Director, Chaddick Institute for Metropolitan Development (Jan. 27, 2017); Letter from Ted Stalnos, President, Calumet Area Industrial Commission (Jan. 26, 2017); Letter from Mayor Richard A. Hofeld, Village of Homewood (Jan. 24, 2017); Letter from Heather Haynes, Executive Director, Chicago Southland Chamber of Commerce (Jan. 24, 2017); Letter from Reggie Greenwood, Director Economic Development, Chicago Southland Economic Development Corporation (Jan. 20, 2017). These letters are attached as Exhibit C.

²⁵ Barrington’s comments on the Draft EIS included the results of its own highway impact analysis, the 2008 VISSIM Model. After the Board’s analysis found that a grade separation at U.S. 14 would provide minimal benefit, Final EIS at 4-16, Barrington submitted, as the basis of its 2011 Petition, an update of the 2008 VISSIM Model. The Board found that the “alleged ‘new evidence’ presented by Barrington . . . does not change the outcome of the Board’s decision not to require a grade separation at U.S. 14.” 2012 Decision at 13.

Id. at 47. Barrington challenged those conclusions before the Board and in court, and lost.²⁶

While Barrington continues to disagree, *see* Pet. at 5-6, there has been no material change that would affect the Board’s analysis. Indeed, ironically, Petitioners now complain that crossing blockages at U.S. Highway 14 are surprisingly ***infrequent*** – less than one per month. *See id.* at 16-17. Meanwhile, CN’s safety record for the EJ&E has been excellent, underscoring the adequacy of the safety-related mitigation conditions imposed by the Board.²⁷

Third, the Board expected the Transaction to “increase the risk of an accident involving the discharge of a hazardous material along the EJ&E line,” but concluded that the risk was acceptable, particularly given the countervailing reduction of risk to CN lines in more densely populated areas of Chicago from which hazardous materials traffic would be diverted, and the protections provided by applicable safety regulations, CN’s safety and response system, and additional mitigation measures the Board imposed. Approval Decision at 50; May 2015 Decision at 7.²⁸ In the eight years since the Transaction, there have been no significant hazardous materials releases along the EJ&E line.

²⁶ *See* nn.19-22, *supra*.

²⁷ Among other safety conditions, the Board required CN to install Wheel Impact Load Detectors, which detect defective train car wheels so they can be removed from service, Approval Decision at 70, and traffic advisory signs, *id.* at 76, and to provide Active Crossing Systems for local first responders, Decision 24 (served Aug. 30, 2010). (The Board also imposed a quiet zone condition specifically for Barrington’s benefit. Approval Decision at 39, 49.) The Petition makes the conclusory claim that “signage alone wholly failed to rectify the problems.” Pet. at 13. But the Board did not order, and CN did not implement, “signage alone,” and the Petition fails to identify any actual “problems” beyond the modest safety issues and modest traffic delays that the Board anticipated, and deemed acceptable, in 2008.

²⁸ The Board reiterated these explanations in denying Barrington’s petition for reconsideration of the May 2015 Decision, rejecting Barrington’s claim that safety regulations “offer[ed] no relief for Barrington.” November 2015 Decision at 5.

Finally, the Board clarified that, consistent with its statutory mandate, it was authorizing a private railroad to acquire and operate a rail line, with the same ability to compete, respond to market forces and evolve that other private railroads have. It declined to micro-manage the railroad by imposing traffic caps, Approval Decision at 42, declined to “speculat[e]” on the rail traffic levels that market forces might give rise to beyond 2015, *id.* at 41, and concluded that reporting and monitoring over a five-year period would verify that CN had fulfilled its mitigation conditions and to detect any “substantial departure” from projected traffic levels attributable to the Transaction itself (as opposed to subsequent events and market forces), *id.* at 42. Although it subsequently extended reporting and monitoring requirements, the Board has since reaffirmed that market-based deviations in traffic levels and consists and speculation about future developments provide no basis for reopening its decision. See May 2015 Decision at 6-7; November 2015 Decision at 5. And the 8 years of extensive oversight reporting have enabled the Board to verify that CN has fulfilled its mitigation conditions.

LEGAL STANDARDS

Administrative finality is essential to enable rail carriers and shippers to rely on the Board’s decisions and provide the confidence in the law upon which substantial commercial investments depend.²⁹ The law and the Board’s practice therefore impose demanding threshold requirements on petitions seeking substantial retroactive changes to final decisions.

²⁹ *Cf. S.R. Investors, Ltd., d/b/a Sierra R.R.–Aban.–In Tuolumne County, Cal.*, Docket No. AB 239X, slip op. at 5 (ICC served Jan. 26, 1988) (“If rail carriers and shippers are unable to rely upon a Commission decision over a year after it has become final and effective (with no pending petitions for review or stays of effectiveness), there would be no end to the administrative process and no certainty in administrative decisionmaking.”) (denying reopening), *aff’d sub nom. Friends of Sierra R.R. v. ICC*, 881 F.2d 663, 667 (9th Cir. 1989).

Under 49 U.S.C. § 1322(c), the Board may reopen a proceeding “because of material error, new evidence, or substantially changed circumstances.” The well-established limits of, and criteria for exercising, such discretion are outlined below:

- *Heavy Burden.* “Anyone who files a petition to reopen a decision has the burden of persuading the tribunal that reopening is warranted.”³⁰ “Petitions to reopen previously final agency decisions are to be granted only in the most extraordinary circumstances.”³¹
- *Materiality.* The Board will reopen only if the claimed error/new evidence/changed circumstance is material in the sense that it “would mandate a different result.”³²
- *New Evidence.* The “new evidence, or substantially changed circumstances” predicate for reopening does not mean new arguments about old evidence, or new theories or expert analyses of old facts; it means new facts.³³ New evidence “must not appear to be cumulative, and an explanation must be given why it was not previously adduced.”³⁴
- *The Board Approaches Reopening Cautiously, Weighing Interests of Administrative Finality and Repose.* Even when there is arguably material new evidence, the Board approaches petitions to reopen “cautiously, . . . striving to achieve an appropriate balance between the interests of fairness to all parties and of administrative finality and repose.”³⁵

³⁰ *Simmons v. ICC*, 760 F.2d 126, 132 (7th Cir. 1985).

³¹ *Farmers Export Co. v. ICC*, 758 F.2d 733, 737 (D.C. Cir. 1985).

³² Decision served November 8, 2012, at 8-9; *Montezuma Grain Co. v. STB*, 339 F.3d 535, 542 (7th Cir. 2003); *accord Desert Xpress Enters.—Pet. for Decl. Order*, Docket No. FD 34914 (STB served May 7, 2010).

³³ *See, e.g., Canadian Nat’l Ry. – Control – Ill. Cent. Corp.*, 6 S.T.B. 344, 350 (2002) (“CN/IC”) (“‘new evidence’ is not newly presented evidence, but rather is evidence that could not have been foreseen or planned for at the time of the original proceeding.”). New theories are insufficient to justify reopening because “[t]he administrative process might never end if parties could come back to the Board years after a final decision to try out a new theory.” *Pyco Indus., Inc.—Feeder Line Application—Lines of S. Plains Switching, Ltd.*, Docket No. FD 34890 (STB served June 11, 2010).

³⁴ 49 C.F.R. § 1115.3(c).

³⁵ *Ariz. Pub. Serv. Co. v. Atchison, Topeka & S.F. Ry.*, 3 S.T.B. 70, 75 (1998). Even when material new evidence or substantially changed circumstances are convincingly demonstrated, the Board has broad discretion to refuse to reopen. *Brooklyn E. Dist. Term. v. ICC*, 302 F. Supp. 1095, 1105 (E.D.N.Y. 1969). Administrative finality means that there is no right to reopening just because “some new circumstance has arisen, some new trend has been observed, or some new fact discovered.” *Vt. Yankee Nuclear Power Corp. v. NRDC, Inc.*, 435 U.S. 519, 554-55 (1978); *accord Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 373 (1989); *Theodore Roosevelt Conserv. P’ship v. Salazar*, 616 F.3d 497, 511 (D.C. Cir. 2010).

ARGUMENT

The Petition Fails to Demonstrate Any Material New Evidence or Substantially Changed Circumstances

Although they purport to provide “newly developed information,” Pet. at 1, Petitioners’ factual claims fall into three categories, none of which provides any basis for reopening under the applicable legal standards and in light of the Board’s prior decisions in this case: (a) old facts and commentary about the U.S. Highway 14 crossing; (b) minor variations in the operations of the EJ&E line, which have not affected the safe and efficient operation of the line; and (c) unsupported speculation about what may happen in the future, more than eight years after the Transaction.³⁶

A. The U.S. Highway 14 Crossing

Petitioners note that U.S. Highway 14 is “the only Federal highway that does not have a single grade separation from the CN/EJ&E line in Illinois” (*id.* at 3); it has ADT (average daily traffic) “in line with the other nine federal highway crossings that have already been grade separated” (*id.* at 3-4; *see also id.* at 12-13 (comparing U.S. Highway 14 to US 34/30, for which the Board ordered grade separation funding)); it is a Strategic Regional Arterial (*id.* at 5); and it may be used by first responders (*id.* at 19-20).

³⁶ Petitioners also resort to baseless attacks on CN’s credibility. Petitioners remind the Board that it found fault in CN’s blocked crossing reports. Pet. at 27. The Board made that finding over six years ago, Decision No. 27 (December 21, 2010), CN rectified the issue, and neither the Board nor Petitioners have identified any significant problems with CN’s reporting since then.

Petitioners also make a misleading *ad hominem* attack that they do not even pretend is relevant to the issues before the Board. They quote a legal argument by Amtrak in an unrelated case as if it were a Board finding, and suggest on that basis that CN is in violation of the law. *See* Pet. at 28, n.26. As the Board well knows from EP 728 and other proceedings, Amtrak’s claim of preference violations rests on an interpretation of the law that is strongly and justifiably disputed by the entire freight rail industry.

Each of those points was true, and known to the Board, when it issued its Approval Decision in 2008. As the Board explained, ADT alone was not sufficient, under the objective federal highway criteria the Board used, to designate a crossing “substantially affected” – much less, to merit grade separation funding by the railroad. Approval Decision at 42-44.³⁷ The Board rejected Barrington’s claim for a grade separation funding condition although U.S. Highway 14 at that time had a projected ADT of 33,949.³⁸ While touting its ADT as meriting such a condition now, Petitioners fail to note that the actual 2015 ADT level they cite for the crossing – 26,900 – is about 20% lower than the projection that informed the Board’s decision.

Likewise, while noting that other crossings are grade separated, Petitioners fail to note that most were grade separated before the Transaction and without CN funding. And, Petitioners fail to address the Board’s conclusion, *id.* at 45 & n.101, that traffic problems at U.S. Highway 14 largely pre-existed CN’s acquisition. Moreover, the Board acknowledged the possible effects on first responders and provided appropriate mitigation to meet their needs in 2008, *see id.* at 48-49; *see also* Decision 18 (served Jan. 16, 2009); Decision 24 (served Aug. 30, 2010), and Petitioners offer no evidence of substantially changed circumstances, or unanticipated effects, that suggest that mitigation was inadequate.

Petitioners note that population has grown in counties near U.S. Highway 14. Petition at 8-9. Their population data are not new; they are 2010 census data. In any event, the Board did not premise its Approval Decision on an assumption that population would remain static over the

³⁷ *See also* 2012 Decision at 10-11, 14 (comparison to US 34/30 was “not new evidence” in 2012), 15 (“An SRA designation alone, however, did not warrant a grade separation at a given intersection.”); November 2015 Decision at 4.

³⁸ Final EIS, App. A at 103, Table A.5-1.

next decade.³⁹ The Board sought to hold CN responsible for its operations, not for realities, such as local population growth, that exist independent of the Transaction. See Approval Decision at 47. Moreover, local population growth could only be relevant where local people are adversely affected by CN's operations at the crossing. Since CN's safety record has been excellent and since reportable crossing blockages at U.S. Highway 14 have remained at low levels, there is no material problem – and certainly no new material problem – that merits a \$37.5 million fix.⁴⁰

B. Current CN Operations

Petitioners argue that CN's 2016 train volumes, train lengths, train speeds, and traffic mix over the EJ&E line are not identical to the projections for 2015 that the Board used in 2008. Pet. at 13-19. Since multi-year projections are inherently imprecise, that fact is unsurprising and not a materially changed circumstance. As the Board has emphasized in denying prior Barrington petitions, in order to be material new evidence, differences in train operations after a Transaction would have to be of such significance that they undermine the fundamental bases of the Board's decision. See 2012 Decision at 8-9 (new evidence must "mandate a difference result"); November 2015 Decision at 4 (meeting or exceeding certain levels of traffic does not automatically warrant mitigation); May 2015 Decision at 5 & n.9, 7 (same). Nothing cited by

³⁹ See Final EIS at 2-35-36.

⁴⁰ Petitioners also repeat Barrington's argument from 2011 that its receipt of a TIGER grant for planning for the potential grade separation at U.S. Highway 14 somehow justifies reversing the Board's Approval Decision and requiring CN to provide the bulk of the funding for the grade separation. Pet. at 5 & n.5, 10-11. The Board explained in 2012 that the TIGER grant is "not relevant." 2012 Decision at 20; see also May 2015 Decision at 8. The minor updates the Petition provides regarding Barrington's efforts to secure government funding do not change that.

Petitioners also note another point of general context that is not new – Chicago is a critically important and growing rail and intermodal hub. See Pet. at 7, 9-10. Of course, the Board and all parties were well aware of that fact in 2008. Indeed, a large part of the rationale for CN's investment was to improve the fluidity of the hub.

Petitioners remotely rises to that level. Petitioners' allegations are especially inapt and insufficient now that we are beyond the projection horizon used by the Board for its Approval Decision. The Board did not rely on any projections regarding train volumes, lengths, speeds, or traffic mix for 2016 and beyond, so current data are by definition not inconsistent with the premises of that decision.

Further, the train volumes, lengths, and speeds Petitioners cite are not, as they suggest, indicative of operational issues in Barrington. The most telling fact is that reportable blockages at U.S. Highway 14 have been rare – averaging less than one per month (79 over a 91-month period). *See* Pet. at 17.

The train volumes and lengths cited by Petitioners are consistent with the Board's projections. As Petitioners concede, train volumes traversing Barrington are moderately (about 10-20%) lower than the volumes projected in the operating plan. *See* Pet. at 13-14. Conversely, average train length is about 10-20% higher. V.S. Orr at 7-8 & n.5. As Mr. Orr explains, from the perspective of local communities, this is a favorable trade-off. Fewer trains means fewer opportunities for collisions, and carrying roughly the same number of cars on fewer, longer trains will marginally tend to reduce aggregate crossing blockage times, since blockage times include a per-train component (before and after the train arrives) and a per-length component (while the train is traversing the crossing). *Id.* at 8.

Petitioners' concerns about somewhat lower average train speeds than projected through Barrington (28 m.p.h. instead of 39 m.p.h.) are also misplaced. *Compare* Pet. at 15-16 (Petitioners' 28 m.p.h. figure) *with* Final EIS Table 4.3-5 (39 m.p.h. projection used in Board's

2008 analysis).⁴¹ The Board has already rejected as immaterial a similar train speed argument by Barrington. *See* 2012 Decision at 20-21. Moreover, a change of speed from 39 m.p.h. to 28 m.p.h. would make only a marginal difference for traffic congestion. Using the methodology for calculating crossing down time the Board employed in its Final EIS, a 7,700 foot train moving at 28 m.p.h. will activate a crossing for 3.63 minutes, while the same train moving at 39 m.p.h. will activate the crossing for 2.74 minutes, a difference of less than a minute. As explained by Mr. Orr, and as borne out by blocked crossing data, far more important than this minor variation in speed is that CN manages its operations so that, absent extraordinary circumstances, its trains are not held and do not stop in Barrington. *V.S. Orr* at 4-7.

Finally, Petitioners speculate, based on a meeting that occurred two and a half years ago – before Barrington’s last two petitions to reopen/reconsider – that CN’s traffic mix over the EJ&E may include a relatively large percentage of hazardous materials. *Pet.* at 18. Hazardous materials concerns are another argument that Barrington has presented and the Board rejected, before. In any event, as Mr. Orr verifies, non-oil hazardous materials shipments on the EJ&E line remain at levels very close to the projections made in 2008, while the oil boom that Barrington relied on, and the Board rejected, as a basis for reopening in 2015, has subsided. *See V.S. Orr* at 7-8 & n.4; May 2015 Decision at 7. As the Board reiterated in 2015, its Approval Decision did not depend on or impose limitations on traffic mix or hazardous materials quantities; instead, the Board was reassured by applicable federal regulations, CN procedures and mitigation measures, all designed to minimize the safety risks associated with hazardous materials whatever their quantity. *See* Approval Decision at 50; May 2015 Decision at 7 (“the

⁴¹ That difference reflects a speed restriction imposed by CN to provide an added measure of safety for operations over the Barrington Interlocking. *V.S. Orr* at 6, n.3.

traffic mix and commodities transported over a crossing were not among the factors used to determine whether a crossing was substantially affected.”). Hazardous materials are not a safety problem if they are handled safely, and, in eight years of CN operations, the EJ&E has had no serious hazardous materials releases.

C. Speculation about Future CN Operations

Petitioners offer three speculations regarding CN’s future operations. As the Board has stated, “speculation about what might occur in the future” is no basis for reopening. November 2015 Decision at 5. If it were, no decision could ever be administratively final in a meaningful sense. Moreover, speculation beyond the 2015 horizon of projections the Board used in reaching its Approval Decision is inherently immaterial.

In any event, Petitioners’ speculations are unfounded. First, while conceding there have been remarkably few reportable blockages at Barrington, Petitioners speculate that now that oversight has ended, CN will change its operations and block the Barrington crossings more frequently. Pet. at 16-18. Petitioners note that while U.S. Highway 14 has experienced less than one reportable (10-minute-plus) blockage per month, other crossings on the EJ&E have experienced more – although, according to Petitioners’ table (*id.* at 17), only one of the nine listed crossings, Cuba Road, has experienced over four reportable blockages per month.

Petitioners’ speculation is wrong. As Mr. Orr explains in his verified statement, CN’s operational focus is to minimize grade crossing blockages where consistent with safe and efficient railroading practices. V.S. Orr at 5. Accordingly, CN’s dispatchers work with CN’s train crews to keep trains moving and avoid unnecessary or lengthy blocked crossings. *Id.* When trains must stop, CN’s dispatchers seek to hold them at locations that are either clear of crossings, or where they will cause the least serious blockage. *Id.*

Besides CN's continued commitment to minimizing lengthy crossing blockages, Mr. Orr explains there are important operational reasons why lengthy blockages of crossings in Barrington are highly unlikely to occur, both now and in the future. Mr. Orr explains that the UP line that crosses EJ&E at grade at Barrington ("Barrington Interlocking"), has frequent Metra commuter trains, which have priority over CN's traffic at the Barrington Interlocking. Because of this traffic, the windows available to CN to move its freight trains through this interlocking are generally short, requiring CN trains to move through the interlocking at as close to track speed as possible. V.S. Orr at 5-6. U.S. Highway 14 and the other Barrington crossings are so close to the Barrington Interlocking that if a CN train stops and blocks them, it will be difficult to achieve the speed to clear the interlocking within the window. *Id.* As a result, CN seeks to pace its trains and, if necessary, hold them outside the Barrington area, to avoid stopping in Barrington. *Id.*

This operational constraint explains why, as observed by Petitioners (at page 17 of the Petition), there are more 10-minute activations at the crossings immediately north and south of Barrington. It also explains why, with or without oversight lengthy activations in Barrington should remain infrequent.

Second, Petitioners speculate that "current and anticipated Port of Prince Rupert (PPR) traffic will massively impact the line segment." Pet. at 20. There is no basis for that claim. Only a portion of Prince Rupert traffic passes through Barrington. See V.S. Reardon at 1.⁴² While projections about future traffic are inherently uncertain, Mr. Reardon's statement rebuts

⁴² Petitioners concede that the Board's Approval Decision expressly took into account traffic from the Phase I expansion of Prince Rupert, see Pet. at 20-21, and they cannot deny that that traffic has been included in CN's reported train volumes which, as discussed above, do not differ substantially from the projections used by the Board.

Petitioners' vague speculation with an informed, specific projection: CN projects that, if Prince Rupert Phase II proceeds as planned, it will ultimately result in about 4 more trains per week (2 loaded trains southbound, and 2 empty trains northbound), or half a train per day, operating on the EJ&E line through Barrington. *Id.* at 2. If added to existing traffic levels, that small increase would leave train volumes at or close to the levels projected for 2015 in 2008; it certainly would not be material.

Third, Petitioners cite a Request For Proposal (RFP) CN issued last year for a high level estimate of engineering and construction costs to double track its Leithton subdivision (from Leithton to Joliet) as evidence that CN anticipates large traffic increases through Barrington. The Board denied reopening based on speculation about possible double-tracking less than 2 years ago. *See* November 2015 Decision at 5. And as Mr. Orr explains (V.S. Orr at 8-9), CN has no current plans to double track through or near Barrington, and that RFP was not an indication of anticipated volume increases. The RFP was part of CN's routine contingency planning – an effort to make a broad, network-wide assessment of where capital investments would achieve the greatest return on investment. The outcome of that analysis was a decision not to proceed because, given existing capacity and current and projected traffic levels, CN concluded that double tracking in and around Barrington would not be worthwhile. *See id.*

CONCLUSION

Petitioners provide no material new evidence, and demonstrate no material substantially changed circumstances, that could justify reopening and subjecting CN to either the multi-million grade separation funding requirement or the decade-long oversight that Petitioners seek. CN has satisfied every condition the Board imposed; the Transaction has, as the Board anticipated, benefited the public interest; and no substantial, unexpected Transaction-related

safety or traffic congestion problems have arisen. There is no more reason to impose additional onerous conditions on CN today than there was in 2008, when the Board rejected Barrington's initial requests for a grade separation funding condition and 10-year oversight period.

To the contrary, fundamental principles of administrative finality, enshrined in the Board's rules and precedents limiting reopening, require that the Petition be denied. As the Board has repeatedly explained, "new" facts that do not represent a material, substantial change undermining the basis of a decision, and speculations about future developments, do not provide grounds for reopening. Years after a decision, there will always be new facts, and speculation about the future will always be possible. Allowing reopening on such bases would mean that no decision could ever be meaningfully final. Likewise, it would be neither appropriate nor practical for the Board to oversee and micro-manage a private railroad indefinitely.

Administrative finality is essential to enable parties to plan and invest with confidence in the Board's decisions. CN's large investment of private capital to improve fluidity in and around the critical hub of the Nation's rail network, and to mitigate and improve environmental conditions, is exactly the kind of investment that should be encouraged. But changing course almost a decade after the fact to add tens of millions of dollars to CN's costs, and/or to subject it to a decade or more of extensive and burdensome reporting, would inevitably discourage CN and other railroads from such investments.

The Board has fulfilled its role as a regulator regarding CN's acquisition of the EJ&E.

The Petition should be denied.

Theodore K. Kalick
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(202) 347-7840



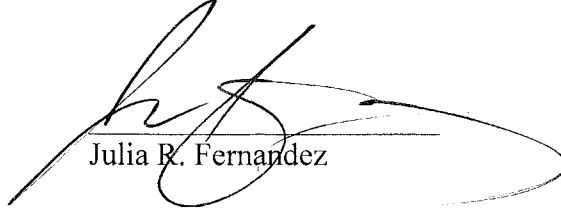
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Counsel for Canadian National Railway Company and Grand Trunk Corporation

January 30, 2017

CERTIFICATE OF SERVICE

I certify that I have this 30th day of January, 2017, served copies of CN's Reply to Illinois Department of Transportation and the Village of Barrington's Petition Seeking Additional Mitigation and Reopening upon all known parties of record in this proceeding by first-class mail or a more expeditious method.



Julia R. Fernandez

EXHIBIT A

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

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

[Barrington Petition for Mitigation]

VERIFIED STATEMENT OF JOHN ORR

My name is John Orr. I am Senior Vice-President (“SVP”), Southern Region, for Canadian National Railway Company and its U.S. subsidiaries (together, “CN”). I have held my current position since April 2015 and oversee CN’s operations on all of its U.S. lines, except for certain lines adjacent to the Canadian border. In particular, I am responsible for CN’s lines in and around Chicago, including those of Elgin, Joliet and Eastern Railway Company (“EJ&E”) that CN acquired pursuant to the Board’s authorization in the main docket of this proceeding.¹ I am very familiar with CN’s operations on the EJ&E line in and near Barrington, and with CN’s plans regarding those lines.

I have been asked by CN to respond to some of the assertions that Barrington and IDOT made in their January 10, 2017, Petition Seeking Imposition of Additional Mitigation (“Petition”) regarding CN’s operational practices related to trains that move through Barrington, and to their speculation that CN plans to increase the capacity of its line there in order to accommodate more traffic.

¹ *Canadian Nat’l Ry. – Control – EJ&E W. Co.*, STB Finance Docket No. 35087, Decision No. 16 (STB served Dec. 24, 2008) (“Approval Decision”).

I. Benefits of the Transaction and CN's Compliance with Mitigation Requirements

The EJ&E Transaction has brought substantial benefits to shippers, the public, CN, and other railroads. Many of these benefits were described in the Verified Statement of Jeffrey Liepelt (my predecessor as SVP for the Southern Region) filed with CN's Reply to Petition of Village of Barrington for Extension of Oversight (CN-66). In summary:

- CN's shifting of traffic from congested lines in Chicago has increased fluidity and capacity and reduced congestion in the region, especially on intermediate carriers such as IHB and BRC and on lines of other carriers that cross CN's at grade, resulting in a railroad system capable of handling present traffic more efficiently, and allowing a better response to strains like increasing demand and a more rapid recovery from disruptive exogenous events, such as the extreme winter of 2013-14;
- Because CN was able to move traffic off of its Elsdon Subdivision, it was able to grant CSXT an operating easement and control over that line, enabling CSXT to improve its Chicago-area operations by reducing congestion on its other lines;
- CN's throughput speed in the Chicago area has increased by 200%, and its velocity has improved by 60%, so CN trains which used to take between 6 and 36 hours to traverse Chicago now take between 4 and 6 hours, resulting in substantial benefits to CN's shippers;
- CN has made major infrastructure investments, totaling about \$271 million, to implement the Transaction, including approximately \$146 million for track connections, double-tracking, and siding extensions, and an additional \$125 million in spending for the renovation and expansion of Kirk Yard, and it has successfully integrated EJ&E into its system;
- CN has rationalized its several prior interchanges with other railroads in Chicago by making Kirk Yard its principal interchange location in the Chicago area;
- CN built a Joliet Intermodal Terminal at EJ&E's Joliet Yard, which comprises two working tracks and two support tracks, and has the capacity for 650 containers;
- CN has constructed a new 62,000-square-foot state-of-the-art safety training facility adjacent to the Woodcrest Mechanical Shop at Homewood, which opened in July 2014 and hosts approximately 250 students per week; and
- Besides the investments in infrastructure and facilities described above, CN has spent over \$120 million on environmental and safety mitigation measures, including funding the substantial portion of the two grade separations ordered by

the Board, and executed voluntary mitigation agreements with 28 of the 33 communities potentially affected by anticipated traffic increases.

These benefits have resulted in safer and more efficient rail operations, benefiting local communities and rail shippers throughout the United States.

As required by the Approval Decision, CN has now submitted 94 months of operational reports (including 533 separate reports over that time detailing interchanges, interlocking delays, traffic volumes, accident and injuries, crossing blockages, and infrastructure improvements on the EJ&E), and 32 multi-part quarterly environmental reports, describing in detail its implementation of the Board's environmental conditions. These reports confirm that 8 years after consummating its acquisition of EJ&E, CN has successfully integrated the line into its network, met all of the Board's conditions, and is operating the line smoothly and safely.

II. Train Operations In Barrington

CN's primary operational objective is to move our freight traffic as safely and efficiently as possible. Doing so benefits our workers, shippers, and the environment, and minimizes the impacts of our operations on local communities where we operate.

The Petition raises only generalized concerns about potential safety issues on the line, and fails to acknowledge the many investments CN has made to improve the safety of train operations in and around Barrington. For example, CN has installed a Wheel Impact Load Detector in Barrington Hills (just south of Barrington) and hot box detectors near Gilmer Road (north of Barrington) and south of the Barrington interlocking (where the EJ&E line crosses the Union Pacific ("UP") line).² CN has paid for all improvements at Illinois Route 59/Hough Street required to increase safety and create a quiet zone in Barrington. CN has installed warning signs

² These detectors "read" defective equipment, so that CN can take appropriate action to prevent derailments or other incidents that can adversely affect public safety.

for motorists, and has also installed fencing to protect parks and schools near the CN right-of-way. And CN has provided a web-based, password-controlled Active Crossing System to Barrington, which allows Barrington's emergency service providers to monitor the movement of trains on the EJ&E line in real time, anticipating and planning for trains at highway/rail grade crossings on the line. CN's operations through Barrington have been and will remain safe.

Petitioners also downplay the efficiency with which CN moves trains through Barrington, which reduces vehicular delays and other community impacts. The U.S. Highway 14 crossing, for which Barrington seeks a grade separation, experienced only ten crossing activations of 10 minutes or longer in all of 2016, or less than one per month. Further, none of the other crossings in Barrington experienced more than an average of one 10-minute activation per month in 2016.

Petitioners note (at pages 16-17 of the Petition) that there are more 10-minute activations at the crossings immediately to the north (Cuba Road) and south (Otis Road) of Barrington, and suggest that such a trend is "highly unlikely to continue once oversight concludes." The Petition states that "CN trains must frequently stop in the vicinity" of Barrington due to Metra cross traffic on the UP line that intersects the EJ&E line at grade in downtown Barrington, and speculates "that more of those trains will stop and block one or more of Barrington's crossings, rather than the crossings in neighboring towns." This conjecture reflects a misunderstanding of CN's operations.

First, and most important, although conflicts are inevitable between vehicular traffic and trains at grade crossings, CN works hard to minimize grade crossing blockages insofar as consistent with safe and efficient railroading practices. Our dispatchers know the best locations to hold trains of various lengths for extended periods without blocking busy crossings, and they know that they are subject to discipline if they unnecessarily block crossings. They work with

our train crews to keep our trains moving and avoid unnecessary or lengthy blocked crossings. This operational focus will continue, regardless of the end of oversight.

Second, Petitioners fail to appreciate the important operational reasons that make it highly unlikely that U.S. Highway 14 or other crossings in Barrington will experience many lengthy activations in the future. The UP line that crosses EJ&E at grade at Barrington (“Barrington Interlocking”), which the Petition (at page 17) cites as a cause of trains stopping “in the vicinity” of Barrington, is, in fact, a major reason trains do not stop on the crossings in Barrington. The UP line has frequent Metra commuter trains, all of which have priority over CN’s traffic at the Barrington Interlocking. The windows available to CN to move its freight trains through this interlocking are therefore generally short. U.S. Highway 14 and the other Barrington crossings are so close to the Barrington Interlocking that if a CN train stops and blocks them, it will be difficult to achieve the speed necessary to clear the interlocking within the available window. As a result, CN seeks to pace its trains to get past the crossings in Barrington and, if necessary, hold them outside the Barrington area.

Southbound trains are generally held at control point Gil, which is well north of Barrington, if they do not have a window to proceed through the Barrington Interlocking. This allows the train to traverse U.S. Highway 14 without stopping and to cross the interlocking at or close to maximum track speed.³ Occasionally, something happens on the UP line after the CN

³ Petitioners state (at page 16 of the Petition) that their contractor observed average CN train speeds of 28 m.p.h. through Barrington for selected months in 2015 and 2016. Overall projected train speeds at U.S. Highway 14 in our 2007 operating plan were 39 m.p.h., but CN later reduced the allowable speed through the Barrington Interlocking from 40 m.p.h. to 30 m.p.h. to provide an extra margin of safety. Barrington’s contractor’s estimate of a 28 m.p.h. average at a point where 30 m.p.h. is the limit is consistent with efficient, fluid, safe operations, as is the almost total absence of 10-minute crossing activations at Barrington. Trains averaging 28 m.p.h. take a few more seconds to clear the crossing than trains averaging 39 m.p.h. would,

train has departed Gil that requires a change to the CN train's window (for example, a Metra train could take longer than expected loading passengers at a station, delaying its arrival at the Barrington Interlocking). The CN train will then generally slow and begin pacing north of Barrington, then accelerate at Barrington, in order to quickly clear the crossings. If a train must stop for an extended period, dispatchers try to hold the train short of Lake Zurich Road (the northernmost crossing in Barrington). This ensures that the train will have sufficient time to accelerate once it receives clearance to proceed through the Barrington Interlocking. It also avoids blocking any crossings other than Cuba Road for any significant length of time.

Northbound trains are normally held at control point Sutton until they receive a window at the Barrington Interlocking, giving them space to accelerate so that they are moving close to or at track speed when they reach that interlocking and the other crossings in Barrington. A northbound train is occasionally forced to slow or pace due to a change in its window after the train has departed Sutton, but that affects crossings south of Barrington (typically Otis Road), not the crossings in Barrington itself.

These operational constraints explain why, as observed by Petitioners (at page 17 of the Petition), there are more 10-minute activations at the crossings immediately north and south of Barrington. They also explain why, with or without oversight, lengthy activations in Barrington should remain infrequent.

Absent extraordinary causes, lengthy activations at U.S. Highway 14 would be almost nonexistent. An analysis of the ten 10-minute activations at U.S. Highway 14 in 2016 shows each was caused by an unusual circumstance: four were caused by trains that had to move at a

but the fluidity and efficiency of operations, with barely any stoppages at the crossing, more than compensates for that.

severely restricted speed (due to weather or track conditions); four were caused by trains that had to stop and be flagged past a signal or gate malfunction; one was caused by a train that had a mechanical issue; and one was caused by a gate malfunction with no train in the vicinity. In all of 2016, not one train blocked U.S. Highway 14 more than 10 minutes as a result of “normal” train operations. And none were caused by trains stopped by Metra cross traffic.

Finally, Petitioners cite variations in volumes, lengths, speeds, and commodity types of trains moving through Barrington to suggest there must be operational problems through that area.⁴ Petition at 13-20. Their concerns are misplaced. On average, in 2016, we ran fewer, but moderately longer, trains along the EJ&E line than had been projected in the 2007 operating plan.⁵ As the Board is well aware, it is impossible to accurately predict freight demand years in advance, and it is remarkable how little our current operations differ from the projections made in CN’s operating plan almost a decade ago. Moreover, fewer, longer trains are generally preferable from the standpoint of public impacts to more, shorter trains. From a safety standpoint, fewer trains means fewer opportunities for collisions. After eight years of experience, CN’s safety record over the EJ&E has been excellent. From a vehicular traffic delay standpoint, distributing a roughly consistent level of traffic among fewer, longer trains reduces

⁴ Petitioners state that based on 2006 operations CN projected moving 209 cars of hazmat daily through Barrington, but that CN may actually be moving over 400 hazmat cars per day. Petition at 18. Petitioners’ speculation is incorrect. In 2016, CN moved an average of 254 hazmat cars per day (127 loaded cars and 127 empty cars) through Barrington. While this is an increase over our original operating plan, the difference can be explained by added crude oil traffic (an average of 71 cars (loads and empties) per day), which was not moving at the time of the operating plan, and which has declined since its peak in 2014.

⁵ According to the table at page 15 of the Petition, a contractor observed monthly average train lengths through Barrington for selected months during 2015 and 2016 of 7,700 or 8,000 feet. We have analyzed our train lengths for 2015 and 2016, and the average for trains moving through Barrington was 7,657 feet.

overall crossing activation time (since there is a fixed amount of time a crossing must activate before and after the arrival of each train, which does not vary with train length).

III. The Petition's Allegations Regarding Potential Double Track

Petitioners claim (at page 23 of the Petition) that “CN is actively planning for a second rail line” through Barrington. They cite (1) CN’s long-standing policy of requesting that any new grade separation be constructed to accommodate a potential future double track, and (2) an RFP CN issued in mid-2016 for a high level estimate of engineering and construction costs to double track the Leithton subdivision from Leithton to Joliet. They misread these facts. Let me be clear: based on our current traffic projections and the existing capacity of the line, CN has no need and no current plans to install double track through or near Barrington. The lack of sufficient traffic and existence of higher priority projects means the expected return on investment would be insufficient to justify such a project. Accordingly, CN has not designed or allocated money for a second track in or near Barrington. Nor is it likely to do so any time in the near future.

CN has previously explained its long-standing nationwide policy to request that any new grade separation project be designed and built so we could accommodate future traffic growth without reconstructing the grade separation.⁶ That sound general approach is designed to minimize long-term capital investments. It is not specific to the EJ&E line, and prudently leaving room for contingencies does not mean they are expected in the foreseeable future. Here they are not.

The cited RFP was issued as part of CN’s regular assessment of capacity and fluidity on its network. We asked various engineering firms to estimate the cost of double tracking various

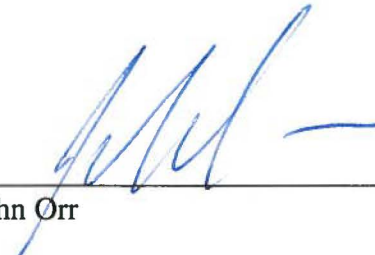
⁶ See CN-67, at 15 (filed Dec. 16, 2014), and the accompanying V.S. Liepelt at 5.

portions of the Winnipeg to Chicago corridor, so our capacity analysts could then use their computer modeling and simulation tools to identify those projects that would have the greatest impact on fluidity and capacity. Such a routine assessment does not mean that traffic growth is imminent or expected in the foreseeable future. Rather, it is simply prudential planning to enable CN to identify which possible capital investments would provide it with the greatest return on investment. As noted above, given existing capacity and current and projected traffic levels, we concluded that double tracking in and around Barrington would not be worthwhile. Accordingly, in September 2016, CN notified bidders it would not proceed with any double tracking project on the EJ&E line.

VERIFICATION

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

Executed on January 30, 2017



John Orr

EXHIBIT B

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

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

[Barrington Petition for Mitigation]

VERIFIED STATEMENT OF KEITH REARDON

My name is Keith Reardon. I am Vice-President Intermodal Services for Canadian National Railway Company and its subsidiaries (together, “CN”), a position I have held since May 2012. I oversee all CN’s intermodal activities in Canada and the United States. I have a detailed understanding of CN’s intermodal operations, including those related to the Port of Prince Rupert and the former EJ&E line in and near Barrington. I have been asked by CN to discuss rail traffic volumes through Barrington that may result from planned Phase II expansion of the Fairview Container Terminal at the Port of Prince Rupert. Those volumes were raised as a potential issue of concern by Barrington and IDOT in their Petition Seeking Imposition of Additional Mitigation (“Petition”).

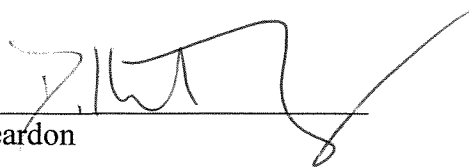
Not all trains that move to or from Prince Rupert move through Barrington. Some stay in Canada, moving either to Toronto or Montreal. Overall, an average of 3.4 trains per day (11 southbound loaded intermodal trains per week and 13 northbound empty intermodal trains per week) move to or from Prince Rupert through Barrington. These trains have been included in CN’s monthly train volume reports filed with the Board as part of the EJ&E acquisition oversight reporting.

Whether Phase II of the Fairview Container Terminal will be completed and precisely when is uncertain. Assuming it is completed, the additional traffic volumes it could generate are uncertain, but our best estimate is that the project expansion will result in 4 additional loaded trains and 4 additional empty trains per week. Of this total, we estimate that 2 additional southbound loaded trains and 2 additional northbound empty trains each week, equivalent to about 0.5 total additional trains per day (all intermodal), will move through Barrington.

VERIFICATION

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

Executed on January 30, 2017



Keith Reardon

EXHIBIT C



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

January 27, 2017

Re: STB Finance Docket No. 35087, Canadian National Ry. & Grand Trunk Corp. –Control—EJ&E West Co.

Dear Ms. Brown:

I am writing to express my opposition to a petition to extend for another two years the Surface Transportation Board's period of oversight over the Canadian National Railway Company's (CN) acquisition of the Elgin, Joliet and Eastern Railway Company (EJ&E). As a result of an earlier extension two years ago, this oversight was anticipated to end this month.

My experience studying railroad issues and urban challenges, which spans more than 25 years, puts me in a position to comment with authority on this issue. I have closely followed railroad mergers and acquisitions, including the CN/EJ&E integration, and published technical reports on the benefits and costs of rail investments. I understand that over the past ten years the volume of freight being shipped on the former EJ&E has risen sharply. I do not question the motives of those requesting the extension, but do know that CN has invested heavily in improvements to minimize the effects of this added traffic. I have seen these investments first hand.

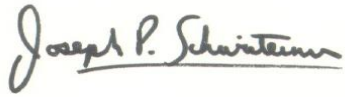
At this point, further extending STB oversight would not only be unfair to CN, it would be sharply detrimental to the larger goal of promoting the development of a modern and efficient rail-freight system. It is clear that the conditions placed on CN during the acquisition were far out of the norm based on historical context. CN has invested several hundred million dollars and adjusted operating practices along the former EJ&E to mitigate issues in ways unprecedented among Class I railroads. The carrier has responded vigorously to public concerns and acted in good faith to the benefit of shippers, communities, and the public as a whole.

Extending STB oversight would put a damper on the capital investment program both at CN and other Class I railroads, sending a warning to the investment community that uncertainties with the STB can be overly-protracted and costly. It would deter efforts to not only relieve congestion on our highways but also to improve transportation safety through rail infrastructure improvements. Railroads need clear and predictable policies in order to prosper, and unfortunately, an extension moves public policy in the opposite direction. Moreover, an extension violates the express purpose for which the STB was created, creating strong risk that politics will become a factor in the oversight process.

Our railroad industry is at a difficult moment due to a confluence of factors that have made diverting heavy trucks from the road to the rails far more difficult than just a few years ago. By creating an

unpredictable environment for the industry, another extension would have damaging effects on efforts to expand the industry's freight-hauling capacity, with negative consequences for the country as a whole.

Sincerely,

A handwritten signature in dark ink, reading "Joseph P. Schwieterman". The signature is written in a cursive style with a horizontal line underneath the name.

Joseph P. Schwieterman, Ph.D.
Professor, School of Public Service
Director, Chaddick Institute for Metropolitan Development
jschwiet@depaul.edu

cc: Richard H. Streeter, Esq.
Paul A. Cunningham, Esq.
David A. Hirsh, Esq.



January 26, 2017

Ms. Cynthia T. Brown
Chief, Section of Administration
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Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423

RE: STB Finance Docket No. 35087, Canadian National Railway & Grand Trunk Corporation – Control of EJ&E West Company

Dear Ms. Brown,

On behalf of the Calumet Area Industrial Commission (CAIC), an industry association comprised of business people from varying industries largely located on the south side and south suburban areas of Chicago, I would again like to share some perspective of your ongoing oversight of CN railroad as they work to successfully conclude their compliance efforts with your requirements of oversight of the 2009 acquisition of EJ&E West Company by CN.

CAIC is uniquely positioned to observe the interaction of various businesses and other parts of the economy of this region as they operate. Back before you granted your permission, we fully recognized the efficiencies and benefits of CN's ownership of EJ&E if they were allowed to acquire it. When you granted your permission, we watched with interest as they worked to incorporate the EJ&E property into their own rail network. For a transaction of this size, the oversight period seemed to be inexplicably long, even without the extensions added that brings us to this extraordinarily late date. This latest attempt to extend oversight yet again simply defies explanation.

By all measures, CN appears to have fully satisfied the requirements attached to your approval of the transaction back in late 2008. As an extremely active member of our regional business community, I have not heard of any complaints about their professionalism or business activities. CAIC considers them to be an upstanding business member of our region.

I shared with you in an earlier letter my concerns about what message the federal government is sending to the broader business community by imposing such burdens on a private company which has and continues to make very significant financial investments in the region.

More broadly speaking, the railroad industry as a whole remains a shining example of the benefits of government deregulation, even if only partial as was done with passage of the Staggers Act in 1980. By

allowing market economics to dictate what business decisions are made, this nation realized the return to profitability of a massive privately-owned and maintained transportation infrastructure system.

The request for your continued oversight of this very minor transaction runs counter to the spirit of what was done with this industry, the viability of which benefits not only their customers (our nation's employers) but every consumer in North America as they realize lower ultimate consumer prices by minimizing transportation costs in the production chain. Railroads' safety record continues to improve, to the point where it remains the safest mode of surface transportation.

It is past time for your agency to take a step back and let the railroad continue moving forward without any additional oversight or monitoring. Please allow the monitoring period to expire, thereby sending a message to the business community that the federal government does not intend on placing disincentives on private investment by insisting on continuing unwarranted oversight.

Sincerely,



Ted Stalnos
President
Calumet Area Industrial Commission

cc: Richard H. Streeter, Esq.
Paul A. Cunningham, Esq.
David A. Hirsh, Esq.



Village of Homewood

2020 CHESTNUT ROAD
HOMEWOOD, ILLINOIS 60430-1776
708-798-3000

January 24, 2017

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

RE: STB Finance Docket No. 35087, Canadian National Railway & Grand Trunk Corporation-Control of
EJ&E West Company

Dear Ms. Brown,

I have been advised that the Surface Transportation Board has recently received yet another filing that requests your extension of oversight on CN with regard to their 2009 purchase of the Elgin, Joliet & Eastern Railroad.

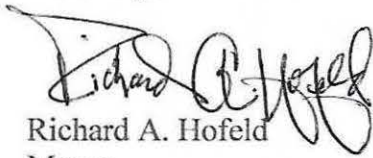
As I have stated in previous correspondence, the Village of Homewood is proud to be the home of CN's U.S. Operations headquarters. They have proven time and time again to be a good business and neighborhood partner, responsive to various requests from the Village, and participants in many ways with Village activities and entities. Their ongoing presence, both with their active workforce and their trainees as they continue to make use of their Training Center, continues to prove to be a positive factor in the economic well-being not only of Homewood, but of the overall south suburban region.

I find it incredulous that opposition continues with regard to the long-approved transaction. This latest effort to extend oversight seems to be driven by one community that is seeking to pass along the burden of a public improvement project to a private entity. Their efforts to use the guise of your approval of the transaction does not seem to be consistent with the STB's mission.



It is my strong belief that CN has already fulfilled and gone beyond the criteria imposed on them with your 2008 approval of the transaction. There is no possible benefit to any of the parties for yet again extending your oversight. I respectfully request that you allow the already extended oversight period to expire as intended and allow this company to move forward. CN as a provider of interstate commerce to the nation's economic benefit, they should be operating under market conditions, not unreasonable governmental constraints.

Sincerely,

A handwritten signature in black ink, appearing to read "Richard A. Hofeld". The signature is stylized with a large, sweeping initial "R" and "H".

Richard A. Hofeld
Mayor

Cc: Richard H. Streeter, Esq.
Paul A. Cunningham, Esq.
David A. Hirsh, Esq.



January 24, 2017

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
395 E Street, S.W.
Washington, D.C. 20423

Re: STB Finance Docket No. 35087, Canadian National Railway Company and Grand Trunk Corporation -- Control -- EJ&E West Company

Dear Ms. Brown,

Please accept this letter as notification that the Chicago Southland Chamber of Commerce opposes the recent petition filed by the Village of Barrington and the Illinois Department of Transportation seeking to impose additional conditions on CN's 2009 acquisition of the EJ&E. The Chicago Southland region encompasses the south and southwest suburban area of Chicago, a vast region with 86 communities, and 2.5 million residents. Several regional organizations, multi-national companies and numerous businesses co-exist in the region. The region also hosts a significant number of logistic centers, many which are new and imperative to the growth of our region. We are all working together to coordinate economic growth efforts in the region.

Our organization is interested in the economic vitality of our region. CN's acquisition has helped move freight rail traffic more efficiently, clearing up congestion, creating jobs and opening new economic development opportunities. Efforts like this to improve and expand our rail system are vital to accommodate the growing flow of commerce to and through our region.

In implementing the transaction, CN, whose U.S. Corporate Headquarters are located in south Cook County, has made major investments in our region's infrastructure. This private investment benefits our economy, our communities and our environment. Since CREATE has continued to remain substantially under-funded, such private initiatives are essential to alleviate some of our freight traffic congestion. We wish the remaining railroads that operate through our region would step up as CN has and invest more private dollars into our freight system.

We ask the STB to consider the public benefits of private investment in making its decision. The STB has already imposed, and CN has met, appropriate conditions on the transaction to protect our region's environment. Adding more conditions or extending oversight at this stage would discourage exactly the kind of the private investment in infrastructure that our region's economy needs.



Thank you for allowing the Southland Chamber of Commerce to submit our comments and our opinion in this matter heard.

Sincerely,

Heather N Haynes

Heather Haynes
Executive Director
Chicago Southland Chamber

cc: Paul A. Cunningham, Esq.
David A. Hirsh, Esq.
Richard H. Streeter, Esq.



January 20, 2017

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

RE: STB Finance Docket No. 35087, Canadian National Railway & Grand Trunk Corporation – Control of
EJ&E West Company

Dear Ms. Brown:

As Director of Economic Development for the Chicago Southland Economic Development Corporation (CSEDC), it is my function to work on behalf of the south region of the Chicago area to seek opportunities to enhance economic development.

Back when CN was initially acquiring the Elgin, Joliet & Eastern Railway, CSEDC was fully supportive of the transaction, as we felt (and continue to feel) that private sector investment is still the strongest factor to develop a productive and thriving economy. Unlike traditional PPPs, where the public sector is sometimes challenged to live up to its expectations (for example, CREATE in the Chicago area, where a lack of a consistent government funding stream continues to frustrate the region by not being able to realize the full benefits of the entire project), the benefits of private investment in private industries are more readily attained.

We recognize that CN's successful integration of the EJ&E is allowing them to experience efficiencies in surface transportation that were previously denied them before they were able to make their private investments in the property. The extended oversight period imposed on them was onerous, and any discussion of extending it even further is illogical. It occurs to us that the sole goal of extending oversight seems to be only financial, by a very narrow member of the region who is hoping to impose more costs onto a private entity that has already lived up to its requirements attached to your approval of their acquisition almost a decade ago.

Sincerely,

A handwritten signature in cursive script, reading "Reggie Greenwood".

Reggie Greenwood
Director Economic Development

cc: Richard H. Streeter, Esq.
Paul A. Cunningham, Esq.
David A. Hirsh, Esq.

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