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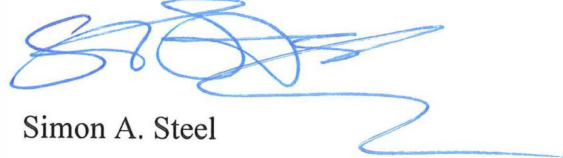
Ms. Cynthia Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423-0001

**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 Barrington's Petition for Reconsideration of the Board's April 26, 2017, Decision Denying Reopening.

Very truly yours,



Simon A. Steel

Counsel for Canadian National Railway Company
and Grand Trunk Corporation

Enclosure

cc: Richard H. Streeter, Esquire (by email)

**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 BARRINGTON'S PETITION FOR RECONSIDERATION OF THE
BOARD'S APRIL 26, 2017, DECISION DENYING REOPENING**

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June 5, 2017

**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 BARRINGTON’S PETITION FOR RECONSIDERATION
OF THE BOARD’S APRIL 26, 2017, DECISION DENYING REOPENING**

CN hereby replies to Barrington’s May 16, 2017, petition (“Petition” or “Pet.”) seeking reconsideration of the Board’s April 26, 2017, decision denying Barrington and IDOT’s petition for reopening (“April 2017 Decision”).¹ The Petition is frivolous: it merely rehashes the same evidence and arguments thoroughly considered and rejected multiple times by the Board and the D.C. Circuit.² Barrington seeks reconsideration only of the Board’s denial of its request that CN

¹ Except as stated, this reply uses the same abbreviations for the parties and other terms as were used in CN’s January 30, 2017, reply to the underlying petition for reopening.

² See Approval Decision (served Dec. 24, 2008) (approving CN’s acquisition of EJ&E over Barrington’s objection and denying Barrington’s request, supported by Barrington’s 2008 VISSIM traffic delay study, for a requirement that CN fund grade separations at U.S. Highway 14 and other Barrington crossings); *Village of Barrington v. STB*, 636 F.3d 650 (D.C. Cir. 2011) (“*Barrington I*”) (upholding Approval Decision); Decision served Nov. 8, 2012 (“2012 Decision”) (denying Barrington’s 2011 reopening petition, which appended Barrington’s 2011 VISSIM traffic delay study and requested a requirement that CN fund a grade separation at U.S. Highway 14); *Village of Barrington v. STB*, 758 F.3d 326 (D.C. Cir. 2014) (“*Barrington II*”) (upholding 2012 Decision); Decision served May 15, 2015 (“May 2015 Decision”) (denying Barrington’s 2014 reopening petition, which raised issues about energy-related traffic on the EJ&E and requested a requirement that CN fund a grade separation at U.S. Highway 14); Decision served Nov. 4, 2015 (“November 2015 Decision”) (denying Barrington’s petition to reconsider May 2015 Decision); April 2017 Decision (denying IDOT and Barrington’s 2017

be required to fund a grade separation at the U.S. Highway 14 crossing; the Board's denial of IDOT and Barrington's request to extend oversight is not challenged. Barrington's former co-petitioner, IDOT, has not joined the Petition.

LEGAL STANDARDS

To justify reconsideration, Barrington must show that the Board's April 2017 Decision denying reopening of its 2008 Approval Decision "involves material error" or "will be affected materially because of new evidence or changed circumstances." 49 C.F.R. § 1115.3(b).

Material Error. As the Board explained the last time Barrington petitioned for reconsideration of a Board decision denying reopening of the Approval Decision, any claim of material error must be "substantiate[d]," which requires more than "a general allegation," "restate[ments of] arguments previously made" or "cit[at]ions to] evidence previously submitted." November 2015 Decision at 3 (citations omitted). Moreover, Barrington must meet a high standard for materiality: the petition must demonstrate an error such as "would mandate a different result." April 2017 Decision at 4 (citing *Montezuma Grain v. STB*, 339 F.3d 535, 541-42 (7th Cir. 2003); *DesertXpress Enters. — Pet. for Declaratory Order*, FD 34914, slip op. at 6-8 (STB served May 7, 2010)); accord May 2015 Decision at 3.³ Insofar as a petition for reopening or reconsideration is based on alleged material error in the Board's 2008 Approval Decision, a denial by the Board is not judicially reviewable. *Barrington II*, 758 F.3d at 328-29.

reopening petition, which raised issues about train speed and length and future Port of Prince Rupert traffic, and requested imposition of a mitigation condition that CN fund a grade separation at U.S. Highway 14).

³ The standard for reopening under 49 C.F.R. § 1115.4 (applied in the April 2017 and May 2015 Decisions), and the standard for reconsideration (§ 1115.3) applicable here, both implement the same materiality requirement under 49 U.S.C. § 1322(c) and effectuate the same principles of administrative finality.

New Evidence. Insofar as a petition for reconsideration claims “new evidence or changed circumstances,” its evidence must be genuinely new. “The term ‘new evidence’ refers to evidence that was not reasonably available to the party when the record was developed, and not simply newly raised.” *Tex. Mun. Power Agency v. Burlington N. & S.F. R.R.*, 2004 STB LEXIS 597, STB Docket No. 42056, 2004 WL 2619767, at *5 (Sept. 24, 2004) (citations omitted) (“*TMPA*”). New analysis of old evidence is not “new evidence.” *Toledo, Peoria & W. Ry. v. STB*, 462 F.3d 734, 753-54 (7th Cir. 2006) (“*TPWR*”). In other words, “new” evidence must be not merely “newly presented,” but “evidence that could not have been foreseen or planned for at the time of the original proceeding.” *Canadian Nat’l Ry. Co., Grand Trunk Corp., & Grand Trunk W. R.R., Inc. — Control — Ill. Cent. Corp., Ill. Cent. R.R. Co., Chicago, Cent. & Pac. R.R., & Cedar River R.R.*, 2002 STB LEXIS 500, STB Docket No. 33556, 2002 WL 1969505, at *14 (Aug. 23, 2002) (“*Cedar River*”). Moreover, in cases alleging new evidence, the petitioner must demonstrate new evidence or changed circumstances that would be sufficient to “mandate a different result.” April 2017 Decision at 4 (citations omitted).

These high thresholds for reconsideration (or reopening) are essential to the administrative finality required for an orderly, practical, and fair regulatory process. As the Board has emphasized, finality is important both to the parties and to the Board:

Nothing in the statute or the Board’s regulations obliges the agency to rethink its decisions whenever a party wishes to try out a new theory or finds new information at a late stage in the process. And if a party were free to reshape its case, so long as it did so within 20 days after a decision, the administrative process might never end. The agency is not expected to behave like Penelope, unraveling each day’s work to start the web again the next day.

TMPA, 2004 WL 2619767, at *5. After almost a decade, five Board decisions, and two court decisions rejecting Barrington’s claims for a grade separation mitigation condition, that finality principle has particular application here.

ARGUMENT

I. BARRINGTON FAILS TO DEMONSTRATE MATERIAL ERROR

Barrington’s main (or perhaps only) claim on reconsideration is that “[t]he Board materially errs.” Pet. at 19. Barrington assails the “basic premise” of the Board’s 2008 Approval Decision and alleges “multiple material errors repeated time and again by the Board both before and after approval.” *Id.* at 2, 6. Barrington contends that the Board’s refusal to reverse its grade separation decision constitutes “current material error,” even though Barrington did not argue material error in its petition to reopen. *Compare id.* at 2, with April 2017 Decision (“Here, Petitioners do not allege material error.”). Barrington asks the Board to “right” what it calls a “long-standing wrong,” *i.e.*, to repudiate not just its latest decision but all of its decisions back to and including the 2008 Approval Decision. Pet. at 20.

As a preliminary matter, that request is improper at this point. The proper way to complain about material error in the Board’s 2008 Approval Decision (or any of the Board’s subsequent decisions in 2012-15) was by seeking reconsideration ***of that decision*** in a timely manner. The only decision within the scope of Barrington’s petition for reconsideration is the Board’s denial of the 2017 petition for reopening. Barrington’s petition for reopening did ***not*** make any claim of material error with respect to the Board’s prior decisions. *See* April 2017 Decision at 4 (“Here, Petitioners do not allege material error.”).⁴ Barrington’s arguments that the Board erred years ago – which form the bulk of its latest Petition – come too late and, having not been presented to the Board in the petition for reopening, afford no basis for reconsidering the

⁴ Rather than claim material error, the petition for reopening rested on alleged “unanticipated new evidence of substantially changed circumstances.” IDOT & Barrington’s Petition Seeking Imposition of Additional Mitigation Pursuant to the Board’s Oversight Jurisdiction and Reopening Pursuant to Governing Regulations at 3 (filed Jan. 10, 2017).

Board's disposition of that petition. *See, e.g., TMPA*, 2004 WL 2619767, at *5 (Board "generally does not consider new issues raised for the first time on reconsideration where those issues could have and should have been presented in the earlier stages of the proceeding.").

Barrington also fails to meet the other essential requirements for reconsideration based on material error. First, it offers no substantiation. What Barrington does offer in its Petition for Reconsideration – "cit[at]ions to] evidence previously submitted" and "restatements of prior arguments" – "do not provide sufficient basis for reconsideration." November 2015 Decision at 3, 4.⁵ Barrington primarily challenges what it calls the "implausible conclusion" of the Board's 2008 Approval Decision that, in part because traffic issues were largely attributable to pre-existing conditions, the U.S. Highway 14 crossing did not meet the Board's criteria for mandatory grade separation funding. Pet. at 19-20. Barrington has made, and the Board and the D.C. Circuit have rejected, the same argument many times. For example, when Barrington petitioned the D.C. Circuit to overturn the Approval Decision, it claimed the Board erred when it "refused to require any grade separations in Barrington . . . because some congestion already exists." *Vill. of Barrington v. STB*, D.C. Cir. No. 09-1002, Joint & Corrected Brief of Community Petitioners at 41 (filed Apr. 12, 2010). The Court unanimously rejected the argument. *Barrington I*, 636 F.3d at 672. And when Barrington rehashed its argument in a petition for reopening and subsequent petition for review, the Board and the D.C. Circuit unanimously rejected it again. *See* 2012 Decision at 9-14; *Barrington II*, 758 F.3d at 328-30.

Barrington similarly rehashes other old, rejected arguments. Barrington restates its 2008

⁵ Most of Barrington's Petition is devoted to rehashing old arguments based on old evidence – submissions by and in support of Barrington in 2008 and 2011 (*see* Pet. at 3-4, 7, 9-15), Barrington's old critiques of the Board's 2008 environmental analysis (*see id.* at 6, 10), and "2015/2016 data" Barrington submitted in January (*see id.* at 8, 15-16).

and 2011 arguments that the U.S. Highway 14 crossing met the Board’s delay and queue length criteria to be considered “substantially affected.” Pet. at 6-15. The Board thoroughly reviewed and rejected those arguments in 2008 and again in 2012, and it has repeatedly explained that even if Barrington satisfied those criteria, this would not entitle Barrington to a grade separation mitigation condition.⁶ Barrington similarly rehashes its more recent arguments about train length and train speed, and about the Port of Prince Rupert. Pet. at 15-19. The Board thoroughly reviewed and rejected those arguments in its April 2017 Decision.

Barrington’s reiteration of its prior arguments is not accompanied by anything substantiating its claims of error. Barrington does not rebut the Board’s thorough reasoning in its prior decisions – much less demonstrate that the Board erred in exercising its discretion. The D.C. Circuit also has previously recognized the Board has thoughtfully “address[ed] Barrington’s claims ... [i]n a lengthy opinion.” *Barrington II*, 758 F.3d at 328. Barrington criticizes the Board’s decisions and analysis as “reflect[ing] an unwillingness to protect American citizens,” “shortsighted,” “simplistic,” “incredible” and “inexplicable,” and it claims that a Board determination upheld by the D.C. Circuit “cannot withstand even casual scrutiny.” Pet. at 5, 6, 10, 13, 17, 19. Barrington uses this empty rhetoric instead of substantiating its claim of material error.

Second, Barrington’s unsubstantiated arguments fail to meet the high standard for materiality because they do not “mandate a different result.” April 2017 Decision at 4. The Board’s duty under the National Environmental Policy Act was to take a “hard look” at the environmental impacts of CN’s acquisition of the EJ&E. *Barrington I*, 636 F.3d at 670. It was

⁶ See Approval Decision at 42-45 & n.101; 2012 Decision at 5-6, 10-11; May 2015 Decision at 5-6; November 2015 Decision at 1-2, 4.

not to order CN to pay to eliminate all environmental impacts of the Transaction, particularly if doing so would require CN to fund solutions to community problems that are overwhelmingly due to pre-existing, non-Transaction-related causes. As the D.C. Circuit has twice affirmed, the Board acted appropriately in denying Barrington’s request for a grade separation condition. *See generally Barrington I; Barrington II; see also* May 2015 Decision at 4 n.7 (“agencies have considerable discretion in establishing the approach and methodology to be used in EIS studies”). In deciding whether to compel CN to fund a grade crossing, the Board properly considered multiple criteria, which involved more than just traffic delays, and rightly found that Barrington did not meet them.⁷ Among other factors, the Board correctly determined that Barrington had substantial pre-existing traffic problems, including but not limited to traffic problems associated with the pre-existing rights-of-way of not just the EJ&E but also another railroad.⁸ And the Board imposed appropriately tailored mitigation for Barrington⁹

II. BARRINGTON FAILS TO DEMONSTRATE MATERIAL NEW EVIDENCE OR CHANGED CIRCUMSTANCES

Nothing has occurred since Barrington’s last filing in support of its and IDOT’s petition for reopening – its surreply filed on February 23, 2017 – that could plausibly meet the legal requirements for reconsideration based on “new evidence or changed circumstances” under 49 C.F.R. § 1115.3(b)(1).¹⁰ And it is unclear whether Barrington even makes such a claim; the

⁷ *See* Approval Decision at 42-45 & n.101; 2012 Decision at 5-6, 10-11; May 2015 Decision at 5-6; November 2015 Decision at 1-2, 4.

⁸ *See* Approval Decision at 45 & n.101; 2012 Decision at 6, 12-13; May 2015 Decision at 6; November 2015 Decision at 2.

⁹ The Board’s mitigation conditions for and benefiting Barrington are summarized in footnote 27 of CN’s Jan. 30, 2017, filing in opposition to IDOT and Barrington’s petition for reopening.

¹⁰ Evidence reasonably available to Barrington on February 23, 2017, is not “new” for purposes of 49 C.F.R. § 1115.3(b)(1). *See, e.g., TMPA; TPWR; Cedar River.*

Conclusion to its Petition asserts only that the Board “materially errs.” Pet. at 19. Nonetheless, since Barrington seeks leave to introduce what it calls “new traffic delay evidence,” *id.* at 1, CN addresses in this section the possibility that Barrington is claiming new evidence or changed circumstances under Section 1115.3(b)(1).

Barrington cites only a few items that bear any relation to 2017. Those items do not represent new evidence within the meaning of 49 C.F.R. § 1115.3(b)(1), and certainly do not “mandate a different result.” April 2017 Decision at 4.

First, Barrington seeks leave to introduce what it calls “new traffic delay evidence – that was performed in February 2017.” Pet. at 1. But the only “new” thing that Barrington alleges happened in February 2017 is the “perform[ance]” of “updated calculations,” “based on Barrington’s 2011 VISSIM analysis but using the 2015 and 2016 data sets.” *Id.* at 8. That does not meet the requirement of “new evidence” for reconsideration, as elaborated in *TMPA*, *TWPR*, and *Cedar River*. The data at issue were readily available to Barrington long before it filed its January 2017 petition for reopening. In addition, new analysis of old data, or in this case, incorporation of old data into an even older analysis, is not new evidence. Barrington concedes that it received the “calculations” themselves by February 17, 2017, prior to its February 23 surreply. Pet. at 8.

In any event, Barrington’s “new” calculation using old data is essentially a rehash of an old analysis the Board rejected, reaching only modestly different conclusions that fall far short of mandating a different result. Barrington claims that, “based on Barrington’s 2011 VISSIM analysis,” there were, in early 2016, 118 hours of Transaction-related daily delay at the U.S. Highway 14 crossing. *Id.* That estimate is unsupported by any witness statement or workpapers. The estimate represents only a marginal increase over the 98-100 hours of such delay Barrington

estimated (after correcting its initial estimate of 116-122 hours) based on the same methodology in 2011. *See id.*; 2012 Decision at 10. Barrington's estimate is a substantial decrease from the 135-205 hours of such delay Barrington estimated, again using the same methodology, in its 2008 comments on the Board's Draft EIS. *See id.* Thus, the new delay hour calculation offered by Barrington is not materially different from the delay totals it proffered previously.

Even if one accepts at face value Barrington's claim of 118 hours of daily Transaction-related delay, that is far less than the 467 hours of daily non-Transaction-related delay the same analysis estimated would occur in 2015. *See Vill. of Barrington CN Railway Traffic Impact Study Update at 14 (Sept. 1, 2011) ("Barrington 2011 Study")* (attached to Barrington's Pet. Seeking Imposition of Additional Mitigation (filed Oct. 14, 2011)). Thus, nothing would change from the Board's prior conclusion that "Barrington's own model shows that existing capacity constraints on U.S. 14 will contribute much more significantly to the vehicle delays at that crossing than will individual CN trains on the EJ&E line." 2012 Decision at 12. Barrington's so-called new evidence, like its prior evidence, supports the Board's conclusion that vehicular delays are due largely to pre-existing traffic conditions, and not Transaction-related impacts.

Barrington's contrary claim, of a "4639% increase" over non-Transaction-related delay levels, is misleading. Pet. at 9. Barrington's "4639% increase" is calculated using an apples-to-oranges comparison between VISSIM-based and non-VISSIM-based delay calculations. Barrington compares its 118 hour VISSIM-based Transaction-related delay estimate and a non-VISSIM-based 2.49 hour non-Transaction-related delay estimate from the Board's 2008 FEIS. *See id.* at 6; 2008 FEIS, Appx. A at 482. Barrington itself has emphasized the differences between the VISSIM-based methodology and the FEIS methodology for measuring vehicular delay and the very different delay estimates each yields. *See Barrington 2011 Study at 3.*

In sum, neither Barrington's February 2017 re-calculation based on old data, nor its misleading calculation of a percentage increase, provides any basis for reconsidering an issue the Board thoroughly analyzed years ago. 2012 Decision at 9-14.

Second, Barrington cites what it calls a "directive of the President" on February 22, 2017. That "directive" also pre-dates Barrington's surreply. And it is not new **evidence**. It has nothing to do with the facts of this case. Although Barrington provides no citation for its claim, Barrington appears to refer to the following remarks the President made in an informal meeting regarding the federal budget:

I want the American people to know that our budget will reflect their priorities.
We'll be directing all of our departments and agencies to protect every last
American and every last tax dollar. No more wasted money.

Remarks by President Trump in Budget Meeting, Feb. 22, 2017.¹¹ As the context makes clear, the President was articulating a general policy not to waste federal funds – hardly a new policy or changed circumstance. Those remarks have nothing to do with whether CN's 2008 acquisition of the EJ&E should be retroactively conditioned on CN providing tens of millions of dollars of private funds for Barrington's grade crossing project at US Highway 14.

Third, Barrington refers to a statement from a CN investor call last month that, "We're trying to run the biggest heaviest train in line with meeting customer demand." Pet. at 17. That operational practice is neither specific to the EJ&E, nor new. Of course, CN strives to meet customer demand and, for sound economic and environmental reasons, it prefers to do so with fewer, longer trains rather than more, shorter trains. As the record reflects and the Board observed in its last decision, using fewer, longer trains has many benefits. April 2017 Decision at 7-8. Those benefits include reducing opportunities for train-motor vehicle collisions. Another

¹¹ Available at <https://www.whitehouse.gov/the-press-office/2017/02/22/remarks-president-trump-budget-meeting>.

benefit is reducing total crossing blockage times because there is a fixed period during which crossings must be blocked before and after each train passes, in addition to the period proportionate to train length when the train is actually traversing the crossing.

Finally, Barrington cites recent CN investor calls and news articles to reprise the argument from its 2017 petition for reopening that the expansion of Prince Rupert Terminal, over 2,000 miles from Barrington, will materially add to traffic on the EJ&E line. Pet. at 17-19. Again, there is nothing new here. CN acknowledged and estimated the potential for increased traffic from Prince Rupert along the EJ&E in CN's responses to the petition for reopening. The Board found that while some increased rail traffic can be anticipated, "Petitioners have not shown that rail traffic volumes in Barrington have been or would be **materially** impacted." April 2017 Decision at 6 (emphasis added). Barrington cites nothing in the CN investor calls and news articles that contradict the Board's finding.

CONCLUSION

Barrington's Petition for Reconsideration of the Board's April 2017 Reopening Decision rehashes old arguments, offers nothing genuinely new, and fails to show anything that would mandate a different result. It should be denied.

Respectfully submitted,



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Counsel for Canadian National Railway Company and Grand Trunk Corporation

June 5, 2017

CERTIFICATE OF SERVICE

I certify that I have this 5th day of June, 2017, served copies of CN's Reply to Barrington's Petition for Reconsideration of the Board's April 26, 2017, Decision Denying Reopening upon all known parties of record in this proceeding by first-class mail or a more expeditious method.


Spencer R. Leroux