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T
Robert T. Opal
General Commerce and EEA Counsel

June 2, 2008

Via E-Filing

The Honorable Anne Quinlan
Acting Secretary
Surface Transportation Board
395 E Street, SW
Washington, D.C. 20024

**Re: Finance Docket No. 35087, Canadian National Railway Company, et.
al., -- Control -- EJ&E West Company**

Dear Secretary Quinlan:

Enclosed for filing in the above proceeding is the Reply of Union Pacific Railroad Company to Applicants' Request for Establishment of Time Limits for NEPA Review and Final Decision.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Robert T. Opal".
Robert T. Opal

cc: (w/attachment)
Parties of Record

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 35087

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

REPLY OF
UNION PACIFIC RAILROAD COMPANY
TO
APPLICANTS' REQUEST FOR ESTABLISHMENT OF
TIME LIMITS FOR NEPA REVIEW AND FINAL DECISION

UNION PACIFIC RAILROAD COMPANY

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Dated and Filed: June 2, 2008

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Union Pacific Railroad Company ("UP") submits this Reply to "Applicants' Request for Establishment of Time Limits for NEPA Review and Final Decision." Applicants request a schedule under which environmental review would be completed by November 3, 2008, and a final decision issued by December 1, 2008. UP agrees that the Board should conclude its environmental review in this proceeding as expeditiously as possible.

As UP indicated in its initial filing, UP is concerned about the implications of this proceeding for future rail efficiency and capacity enhancement projects requiring Board approval. The Board should be concerned as well.

The Board has recognized in other proceedings the capacity challenges facing the rail industry. See, for example, Ex Parte No. 671, *Rail Capacity and Infrastructure Requirements*, decision served March 6, 2007, pp. 1-2. More recently, the Board held two days of hearings in Ex Parte No. 677, *Common Carrier Obligations of Railroads*, in which a major issue was the

railroads' ability to handle increasing traffic demands in the capacity-constrained environment projected for the foreseeable future.

If railroads are to meet these demands, they must more fully utilize unused capacity that already exists, add capacity to existing corridors, construct new facilities, and run more and longer trains. Some of these measures may involve transactions that require Board approval. This proceeding is an important test of the Board's environmental review process, and it will have far reaching effects on future proceedings and on private decisions.

If the Board responds to the local opposition in this proceeding by requiring an even longer environmental process that imposes extensive delays and uncertainty on the parties — or that causes the parties to walk away from the transaction — the Board will have made a significant policy decision. Railroads will shy away from efficiency and capacity enhancing projects that require Board approval. Ultimately, the Board's environmental review process will itself become a significant impediment to railroad growth and limit railroads' ability to satisfy the shipper needs that the Board recently explored. This is certainly not the result that the Board should want. An expeditious resolution of this case would be an important step toward preventing such an outcome.

I. A REASONABLY EXPEDITIOUS SCHEDULE IS APPROPRIATE GIVEN THE STATUTORY TIME LIMITS APPLICABLE TO THIS PROCEEDING

The Applicants are entitled to an expeditious decision in this proceeding. Applicants' proposal is a "minor transaction" and is thus subject to the statutory deadlines imposed by 49 U.S.C. § 11325(d). See Decision No. 2, p. 10. This section requires the Board to issue a

“final decision” within 180 days from the filing of the application (which, as the Board has recognized, was April 25, 2008).¹ That deadline has past.

The statutory time limits in section 11325 are not guidelines. They are substantive. Congress adopted the time limits as important regulatory reforms in 1976 and 1980. They were intended to remedy the delays experienced in ICC consolidation proceedings. As the Conference Committee Report on the 1976 Railroad Revitalization and Regulatory Reform Act (“4R Act”) explained:

“The bill takes steps to remedy the chronic problem of extended and unnecessary delay in the Commission’s processing of merger applications. The bill reforms the existing procedure by setting time deadlines on each stage of Commission action in merger cases.” S. Conf. Rep. No. 94-595, 2 U.S. Cong. & Admin. News (1976) at 151.

Four years later, Congress revisited the issue in the Staggers Act and imposed even more stringent deadlines for smaller transactions, those not involving merger or control of two or more Class I railroads. The new time limits included the limits applicable to this transaction, which now appear in 49 U.S.C. § 11325(d). As explained in the Conference Committee Report:

“First, the Commission would have to decide on smaller transactions faster than under present law. Present law permits the Commission to reach a decision in 15 months, regardless of their complexity or importance. For transactions having regional or national transportation significance, this section would require the Commission to reach a decision within 10 months. For transactions which do not have regional or national significance, this section would require the Commission to reach a decision within 6 months. These deadlines are, of course, maximum time limits and the Committee believes that many applications can and should be processed without taking the full amount of time allowed.” H. Conf. Rep. No. 96-1430, 4 U.S. Cong. & Admin. News (1980) at 4152.²

¹ The 180-day time limit is comprised of (i) 30 days from the filing of the application for the Board to issue a notice, (ii) 105 days from the notice to complete the evidentiary proceeding, and (iii) 45 days from the closing of the evidentiary proceeding to a final decision.

² See also *Railroad Consolidation Procedures – Expedited Processing*, 363 I.C.C. 767, 768 (1980), discussing the development of the statutory time lines and the policy behind them.

Significantly, the statutory time limits in 49 U.S.C. § 11325 do not contain an exception for environmental reviews, and nothing in the Conference or Committee reports for the 4R Act or the Staggers Act suggests that Congress allowed any such exception.³ In fact, an exception would be inconsistent with § 11325. That provision requires that a "final decision" be issued within the applicable time limits. Because a "final decision" cannot be issued until the environmental review process (where required) is complete, the statute expects the Board to complete any environmental review process within the statutory time limits.

It is no longer possible for the Board to issue a final decision in this proceeding within the applicable statutory deadline, but the Board should respect the policy behind the statutory time limits. The Board should issue a final decision as quickly as reasonably possible.⁴

II. THIS TRANSACTION DOES NOT REQUIRE LENGTHY AND EXPENSIVE ENVIRONMENTAL REVIEW

The Board is challenged in meeting its statutory deadlines because of its environmental review process, which strongly encourages "NIMBY" objections. Starting in our own proceeding to acquire Southern Pacific Transportation Company ("SP"), it became clear that localities which protested loudly in Board proceedings could impose large procedural costs on the applicants and could also obtain favorable conditions from the Board. Reno and Wichita were prominent examples. Other cities and towns noticed this pattern, generating a new and

³ Congress was necessarily aware of NEPA requirements when it adopted its deadline for a "final decision," and did not create an exception to that deadline for completion of an environmental review. The National Environmental Policy Act was enacted in 1970 and was already in effect when the existing statutory time limits were enacted in 1976 (4R Act) and 1980 (Staggers Act).

⁴ Applicants' proposed schedule would give the Board more than twice as long to issue a final decision as the statute allows, and nearly as much time as was permitted prior to the Staggers Act amendments.

rapidly expanding phenomenon of aggressive local environmental opposition to transactions under Board jurisdiction. As a result, the Board now finds itself having to engage in extensive, multi-year proceedings to respond to an expanding population of vocal protestants, imperiling rail industry initiatives that would benefit the nation.

Obviously, we are not suggesting that community concerns are irrelevant or should be casually dismissed, but they need to be considered expeditiously and with recognition that most rail traffic growth occurs without any need for Board approval. In matters before the Board, growing local resistance can be managed within reasonable parameters only by avoiding unnecessary delay and adhering to time-tested analytic techniques and remediation standards based on past precedent and NEPA requirements. These include recognizing environmental and transportation benefits of proposals, as well as other appropriate considerations, such as how rail traffic is already moving through other American communities with active rail lines.

As the Applicants have warned, the Board's environmental review can negatively influence or block marketplace actions with considerable public benefits. Already, environmental review and remediation delays and costs are a significant threat to efficiency and capacity-enhancing proposals under Board jurisdiction. UP can state unequivocally that the STB's environmental review process, and the "NIMBY" reactions it invites, have become a major factor in our decisions about whether to pursue efficiency opportunities and has caused us not to pursue more than one such opportunity.

In addition, environmental review costs have become excessive. Applicants state that the environmental review process in this proceeding may cost as much as \$16 million, a startling number in relation to the size of the transaction. Of course, this amount does not include future remediation costs. UP recognizes that the Board may feel pressure to ensure that its

environmental reviews are "bullet-proof" and cannot be second-guessed. (In fact, no matter what the Board does, it will be second-guessed, as it was in the DM&E extension proceeding.) The Board should consider, though, that it is causing the expenditure of railroad funds that could be used for other purposes, and it should, therefore, handle these reviews as efficiently as possible.

Finally, as we previously suggested, the environmental issues that have arisen in this proceeding should not require lengthy environmental review. While many parties have complained about the allegedly adverse environmental effects of this transaction, the principal concern they are raising is that the transaction will result in more trains at grade crossings along the EJ&E corridor. This is a straightforward issue that railroads and governmental entities deal with every day without extraordinary measures.

As we explained in our February 15, 2008 Environmental Comments (copy attached as Exhibit 3 to Applicants' Request), the traffic increases proposed in this transaction fall far below the train volumes on other rail corridors in Chicago and elsewhere. The additional traffic on EJ&E may represent a large percentage increase over present traffic, but that is only because the EJ&E corridor is so underutilized. The number of trains that would operate over grade crossings in the corridor is far below the number of trains operating over grade crossings throughout the Chicago area on other rail lines.

For example, Applicants project 20 trains a day on the portion of the EJ&E corridor through Barrington, IL, one of the most vocal opponents of the transaction. As shown in our Environmental Comments (p. 7), this is a relatively low number of trains for the Chicago area. Other rail lines running at grade through the Chicago suburbs carry far more traffic than this. The UP line through Barrington currently handles over 66 trains per day. Other suburban rail

lines carry even more traffic. BNSF and UP lines through the western suburbs each handle over 100 trains per day over numerous grade crossings.

Moreover, the additional train traffic projected for the EJ&E corridor is already moving on other rail lines and over numerous grade crossings in the Chicago area. Traffic will not be added to the area by this transaction. To the contrary, given the environmental and safety benefits of moving traffic out of the congested inner core of Chicago, it appears that the overall environmental consequences of the proposed transaction should be balanced or positive.

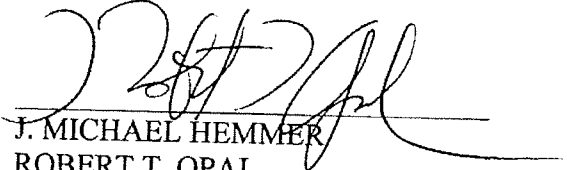
In short, the grade-crossing issues presented in this proceeding are not extraordinary in the Chicago area, or elsewhere, and should not require extraordinary or time-consuming analysis. It is incumbent upon the Board to apply common sense to its environmental review process and bring this matter to an expeditious resolution.

CONCLUSION

The Board has itself recognized the significant capacity constraints that confront the industry today and which are most likely to continue into the foreseeable future. The way in which the board handles capacity enhancing projects going forward will have a direct bearing on whether rail capacity challenges can be met. The Board should not want its environmental review process to frustrate the pursuit and implementation of capacity enhancing projects. The expeditious resolution of the environmental review in this proceeding will send an important message that the Board does not countenance such an outcome.

For the reasons stated above, the Board should complete its environmental review and issue a final decision in this proceeding promptly.

UNION PACIFIC RAILROAD COMPANY

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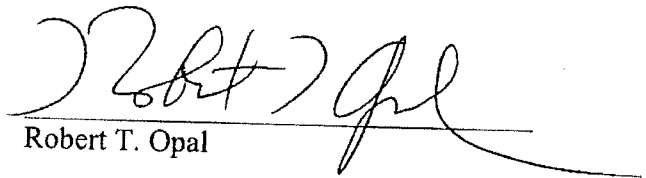
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CERTIFICATE OF SERVICE

I certify that I have this day served a copy of the foregoing document upon all parties of record, as listed in the Board's decision served January 25, 2008, in this proceeding. Service was made by first-class United States mail.

Dated at Omaha, Nebraska, this 2nd day of June 2008.


Robert T. Opal