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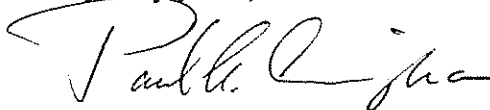
Phillis Johnson-Ball
Environmental Filing
Surface Transportation Board
395 E Street, SW
Washington, DC 20423

**Re: *Canadian National Railway Company and Grand Trunk Corporation –
Control – EJ&E West Company (STB Finance Docket No. 35087)***

Dear Ms. Johnson-Ball:

Pursuant to the December 21, 2007 decision of the Board's Section of Environmental Analysis, Canadian National Railway Company and Grand Trunk Corporation submit the enclosed comments on the scope of the environmental impact statement to be prepared in this proceeding.

Very truly yours,



Paul A. Cunningham

Counsel for Canadian National Railway Company
and Grand Trunk Corporation

Encl.

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 35087

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

APPLICANTS' COMMENTS ON THE DRAFT SCOPE OF STUDY

Canadian National Railway Company and Grand Trunk Corporation (together, "CN" or "Applicants") respectfully submit these comments in response to the December 21, 2007 decision of the Board's Section of Environmental Analysis ("SEA") requesting comments on the scope of the environmental impact statement ("EIS") to be prepared in this proceeding.¹ Applicants have general comments on the need for the environmental review process to proceed thoroughly, but expeditiously, and specific comments on both SEA's draft scope and on comments by other parties on the draft scope.

I. **THE NEED FOR A THOROUGH AND EXPEDITIOUS ENVIRONMENTAL REVIEW PROCESS**

In order to accommodate the competing values and interests implicated by this Transaction, the environmental review process undertaken by SEA must be both complete and expeditious. It is important for everyone who may be affected by the proposed Transaction that the environmental review process be transparent and conducted with scientific rigor and integrity. When making its final decision, the Board

¹ Unless otherwise indicated, abbreviated references used herein have the same meaning as those set forth in the Table of Abbreviations in the Application (CN-2 at 8-11).

needs a clear picture of the reasonably anticipated impacts of the Transaction. Parties who may be adversely affected need to understand what they can expect in order to better plan for the future. Moreover, a judicial challenge to the sufficiency of the EIS, which could further delay the Transaction, is much less likely if SEA conducts a thorough inquiry. Applicants agree that SEA should fully document the environmental impacts of the Transaction, and Applicants have sought to thoroughly and expeditiously comply with SEA's requests for information.

In addition to conducting a thorough review, the Board's environmental review process should be conducted as expeditiously as possible both to facilitate the immediate Transaction (which Applicants believe will have substantial regional and national benefits) and to encourage critical infrastructure investments by other railroads. This Transaction is likely but the first of a number of future attempts by railroads to increase the effective capacity of the nationwide freight rail system in order to keep pace with expected demand.² Such improvements are necessary to continue to make rail a competitive alternative to intercity truck traffic.³ The Board's handling of this Transaction will send a signal to other railroads on the issue of whether review of their investments in capacity will be conducted expeditiously under predictable standards, or whether potential investments could be delayed or defeated in a lengthy and uncertain review process. Especially in light of the fact that the impacts that would be the subject of study here are not out of the ordinary for communities built around railroads, there is

² See, e.g., Daniel Machalaba, *New Era Dawns for Rail Building: Lines Add Tracks, Upgrade Tunnels To Take On Trucks*, Wall Street J., Feb. 13, 2008, at A1 (describing current and anticipated future investments in rail infrastructure).

no apparent basis for sending any signal other than one encouraging the development of more efficient rail network.⁴

A. There Is A Broad Consensus That The Nation Needs More Railroad Capacity

Commenters representing a broad range of interests – including government agencies, shippers, and freight and passenger railroads – agree that there is a significant need for investment in rail capacity. The Secretary of Transportation has noted that “[t]he capacity of our rail network has not kept pace with the growing demand for freight transportation. Today, traffic on available rail lines has led to a reduction of system average train speed by 20 percent, resulting in network congestion and deterioration in service reliability.”⁵ A 2005 assessment by the American Society of Civil Engineering, found that “[f]or the first time since World War II, limited rail capacity has created significant chokepoints and delays.”⁶ The Government Accountability Office has found that “railroads must invest in . . . substantial new capacity to handle additional traffic in order to remain viable and effective.”⁷ As Vice Chairman Mulvey recently noted, “[t]he capacity shortfall that we see in many markets today will dramatically worsen unless bold

³ See *id.* (describing how railroads are “pressing for advantage over their main competitor, long-haul trucking, which has struggled with rising fuel prices, driver shortages and highway congestion”).

⁴ Communities throughout the nation regularly experience the environmental impacts of train volumes comparable to or exceeding those anticipated to result from this Transaction. See, e.g., *Conrail Final EIS* at table 2-2.

⁵ Mary Peters, U.S. Secretary of Transportation, Remarks for Railroad Day (Mar. 14, 2007), available at <http://www.dot.gov/affairs/peters031407p2.htm>.

⁶ American Society of Civil Engineering, *2005 Report Card for America's Infrastructure*, available at <http://www.asce.org/files/pdf/reportcard/2005reportcardpdf.pdf>.

⁷ U.S. Gov't. Accountability Office, *Freight Railroads: Industry Health Has Improved, but Concerns about Competition and Capacity Should Be Addressed* (Oct. 2006), at 56 (“GAO Report”), available at <http://www.gao.gov/new.items/d0794.pdf>.

new policies and strategies are adopted.”⁸

In the Board’s recent hearing on Rail Capacity and Infrastructure Requirements, (STB Ex Parte No. 671, Apr. 11, 2007), it heard the testimony of over 40 parties, each with its own agenda and point of view. However, the one constant was the recognition that there is an urgent need for increased capacity. Amtrak stated that “additional rail network capacity is critical to achieving growth and product excellence,”⁹ while the Alliance for Rail Competition, a group representing a number of major shippers, “agree[d] with the Board that the ability of the railroad industry to increase capacity to meet increasing freight volume is an important issue.”¹⁰

Rail capacity is important because rail transportation is generally more efficient and environmentally friendly than trucking and other alternatives. Because of rail’s advantages over other forms of transportation, especially trucking, moving more freight by rail will improve the quality of life, environment, and economics of our country.¹¹ The U.S. Department of Transportation has stated that “[r]ail transportation can provide significant public benefits” because it is “three to ten times more energy efficient than intercity trucking” and is “the safest way to transport freight over land.”¹² The Government Accountability Office has found that “[n]ew rail capacity . . . has the

⁸ Francis P. Mulvey, Vice Chairman, Surface Transportation Board, Speech before the North Dakota Grain Dealers Association Annual Conference (Jan. 21, 2008).

⁹ Testimony of Alex Kummant, President and Chief Executive Officer, Amtrak, *Rail Capacity and Infrastructure Requirements*, STB Ex Parte No. 671 (Apr. 11, 2007), at 10.

¹⁰ Comments of Alliance for Rail Competition, et al., *Rail Capacity and Infrastructure Requirements*, STB Ex Parte No. 671 (filed Apr. 4, 2007), at 2 (“ARC Comments”).

¹¹ See, e.g., GAO Report, *supra* note 7, at 58 (listing 17 potential public benefits from increased rail capacity).

¹² Statement of the Honorable Jeffrey N. Shane, *Rail Capacity and Infrastructure Requirements*, STB Ex Parte No. 671, at 7 (Apr. 11, 2007).

potential to benefit the public by improving traffic flow, air quality, and safety at the national, state, and local levels.”¹³

Conversely, insufficient rail capacity adversely impacts air quality, energy independence, road safety and congestion, and the cost of goods by forcing goods to move by less efficient modes. According to the U.S. Environmental Protection Agency, trucks emit roughly three times more nitrogen oxides and particulates per ton mile than locomotives, and other studies suggest an even greater advantage for railroads.¹⁴ If 10 percent of intercity freight that currently moves by highway were shifted to rail, 12 million fewer tons of greenhouse gases would be released annually.¹⁵ Railroads can move a ton of freight an average of 423 miles per gallon of fuel.¹⁶ If ten percent of intercity freight that current moves by highway were diverted to rail, the nation could save over one billion gallons of fuel annually.¹⁷ Moreover, rail has an excellent safety record. As the American Association of State Highway and Transportation Officials (“AASHTO”) has noted, the nation’s railroads handled 1.7 million carloads of hazardous materials in 2000, yet there were only 35 accidents that resulted in spills or leaks of the materials.¹⁸

¹³ GAO Report, *supra* note 7, at 53.

¹⁴ Association of American Railroads, *Railroads: Building A Cleaner Environment* (Sept. 2007), available at http://www.aar.org/GetFile.asp?File_ID=364.

¹⁵ Association of American Railroads, *Freight Railroads & Greenhouse Gas Emissions* (Jan. 2008), available at http://www.aar.org/GetFile.asp?File_ID=466.

¹⁶ *Id.*

¹⁷ Association of American Railroads, *Railroads: Building A Cleaner Environment* (Sept. 2007), available at http://www.aar.org/GetFile.asp?File_ID=364.

¹⁸ American Association of State Highway and Transportation Officials, *Freight Rail Bottom Line Report* (2003), at 29, (“AASHTO Bottom Line Report”), available at <http://freight.transportation.org/doc/FreightRailReport.pdf>; see also Association of

Obviously, there are limits to how much traffic the system can handle without investments in capacity. AASHTO predicts that freight rail tonnage will increase 44 percent by 2020, but this actually represents a loss in market share for railroads.¹⁹ However, this assessment assumes that tens of billions of dollars will be invested in rail infrastructure between now and then.²⁰ Without that tremendous investment to build new infrastructure or to make more efficient use of existing infrastructure, rail will lose even more market share to other modes of transportation,²¹ and the benefits discussed above would not materialize.

As in this Transaction, making more capacity available may require Board review.²² Construction projects are tremendously expensive – often costing \$1-3 million per mile of rail line²³ – and, as Chairman Nottingham has recently recognized, “can generate significant opposition on environmental and community-impact grounds.”²⁴

American Railroads, *Railroads: The Safe Way to Move* (Jan. 2008), available at http://www.aar.org/GetFile.asp?File_ID=161 (finding that 99.997% of rail hazmat shipments reached their destination without a release caused by accident, and that rail hazmat accident rates have decreased 86% since 1980 and 26% since 1990).

¹⁹ AASHTO Bottom Line Report at 51.

²⁰ AASHTO Bottom Line Report at 60-61.

²¹ AASHTO Bottom Line Report at 45 (finding that in the “worst case” with minimal investment, railroads could carry the same volume of freight in 2020 as today and that the excess would move to trucks and the highway system).

²² For example, trackage rights, the acquisition of part or all of a railroad, and construction of a line of railroad all require Board approval.

²³ Association of American Railroads, *Railroads Relieve Highway Congestion* (Jan. 2008), available at http://www.aar.org/GetFile.asp?File_ID=467.

²⁴ Charles D. Nottingham, Chairman, Surface Transportation Board, Testimony Before the U.S. Senate Committee On Commerce, Science, and Transportation’s Subcommittee on Surface Transportation and Merchant Marine Infrastructure, Safety, and Security: Oversight Hearing On The Surface Transportation Board, at 5 (Oct. 23, 2007), available at http://commerce.senate.gov/public/_files/NottinghamSenatetestimony102307000.pdf.

Given the expense and delay involved in construction projects, a cost-effective way for a carrier to quickly and substantially increase the capacity of its system is to re-locate traffic from congested lines to existing uncongested or underutilized lines.²⁵ This can be done through improved or new connections to existing main lines, or through acquisitions of smaller carriers who do not currently maximize the use of the existing capacity of their lines.²⁶ Further, investment in additional sidings, double tracking, turn outs, and other facility improvements can increase the capacity of the system without the need for expensive construction of entirely new lines.²⁷

The Board has a statutory obligation to promote adequate capacity,²⁸ and as the federal agency with responsibility for the economic regulation of rail carriers, it can and should play a central role in providing appropriate incentives and removing barriers to the necessary capacity investments in the nation's rail network. As the U.S. Department of Transportation has recognized, given the business realities of the industry, "the economic regulatory framework must ensure that needed capacity investments are not discouraged." It urged that the STB must "continue to contribute to solving capacity

²⁵ Shippers recognize this important possibility, with the Alliance for Rail Competition suggesting that the Board "investigate ways in which efficiency gains can contribute to the railroads' ability to handle more freight with existing infrastructure and equipment." ARC Comments, *supra* note 10, at 7.

²⁶ See e.g., AASHTO Bottom Line Report at 52 (finding that there is "considerable unused potential in the nation's rail system, capacity that could be reclaimed and utilized to strengthen the national freight transportation system").

²⁷ See *id.* (finding that the "significant physical constraints" of the railroads include "'missing' connections, outdated signal systems ... single track line without adequate sidings, bridges too weak to safely carry today's heavier rail cars and inadequate terminal capacity").

²⁸ See, e.g., 49 U.S.C. § 10101(4) (it is federal policy to "ensure the development and continuation of a sound rail transportation system ... to meet the needs of the public and

problems rather than compounding them.”²⁹

This Transaction provides one means of meeting the need for increased capacity. However, regulatory uncertainty and delay in this proceeding pose a risk, not only to this Transaction, but to future transactions by other railroads aimed at meeting capacity needs. As discussed in greater detail below, railroad investment will be stifled unless there is reasonable certainty regarding the standards, process, and timing of any regulatory review that may be required. Railroads, as private investors, often will be unable to afford to wait indefinitely while regulators review, with unpredictable results, a proposed transaction.

B. A Thorough And Expeditious Environmental Review Is Encouraged By Statute And Policy

The law favors an expedited review process for railroad control applications. There are two statutory standards the Board must consider: the ICC Termination Act³⁰ (“ICCTA”) and the National Environmental Policy Act³¹ (“NEPA”). ICCTA dictates an expeditious result – the Board *shall* approve a transaction if certain conditions are met,³² and it must do so within prescribed deadlines.³³ NEPA dictates a process, not a result.³⁴

the national defense”); *see also Rail Capacity and Infrastructure Requirements*, STB Ex Parte 671 (served Mar. 6, 2007), slip op. at 2.

²⁹ Comments of U.S. Department of Transportation, *Rail Capacity and Infrastructure Improvements*, STB Ex Parte No. 671 (filed Apr. 11, 2007).

³⁰ Pub. L. No. 104-88, 109 Stat. 803 (1995), enacting 49 U.S.C. §§ 701-727, 10101-16106.

³¹ Pub. L. No. 91-190, 83 Stat. 852 (1970), codified at 42 U.S.C. §§ 4321 *et seq.*

³² 49 U.S.C. § 11324(d).

³³ 49 U.S.C. § 11325(c) (prescribing, for minor transactions, a 150-day proceeding after acceptance of the application); 49 C.F.R. § 1180.4(e) (same).

³⁴ *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 333 (1989) (“[I]t is well settled that NEPA itself does not impose substantive duties mandating particular

NEPA does not require delay or different processes for issues that attract more attention than those that do not. While the Board cannot authorize the Transaction on the merits until the EIS process is complete, nothing in NEPA can be construed as limiting the Board's statutory requirement under ICCTA to expeditiously approve transactions that are in the public interest.

Reasonably thorough but expeditious environmental review is also sound public policy. Thoroughness will ensure that all affected parties have the ability to air their concerns, and that the Board will have correctly identified all significant impacts. Expedition will ensure that the Board's environmental review process does not unduly discourage capacity additions or encourage railroads to meet their capacity needs through less efficient measures that are outside the Board's regulatory jurisdiction and that might not require NEPA review. There are likely to be other efforts to improve capacity or to reroute trains to improve efficiency and railroads can be expected to look to this proceeding as an indication of how the Board will handle such efforts.

Because the rail system is privately owned, government generally cannot mandate spending to increase capacity.³⁵ With state and federal funding often impossible to secure, what is required to meet the looming capacity crisis is private capital. All else being equal, private capital prefers investments with more predictable risks, greater returns, and shorter horizons for realizing those returns. Adding regulatory uncertainty to the process through lengthy environmental review will make private capital more

results, but simply prescribes the necessary process for preventing uninformed – rather than unwise – agency action.”).

³⁵ Additionally, “[g]overnment has invested relatively little in the freight rail system.” AASHTO Bottom Line Report at 77 (finding that since 1980 government has provided

expensive or unavailable, reducing the ability and incentives for the railroads to make the investments necessary to increase capacity and efficiency.³⁶

Railroads are private businesses, and as such “it is not the responsibility of the freight railroad companies to create and operate a successful national freight transportation system. It is the responsibility of the railroads to operate successful businesses.”³⁷ Creating a system whereby the interests of private businesses are aligned with the interests of the nation in efficient and effective national freight transportation is sound policy. One step in that process is ensuring that environmental review is transparent, fair, and expeditious, so that the privately owned railroads can more accurately predict the likely return on their investment and have the incentives to make the necessary investments in capacity.

As commentors to the Board have recognized, railroads are more likely to make investments in capacity when the outcome of the regulatory process is predictable as to results and timing.³⁸ The less certainty regarding the regulatory process, especially when returns are capped by regulation, the less likely it is that railroads will invest in needed

just 14% of the total investment in freight and passenger rail, with the majority of that investment being provided by the states for passenger rail).

³⁶ GAO Report at 55-56 (“Railroads’ ability and willingness to invest in new capacity to meet demand reflects a number of key considerations,” primary among which is “maximizing returns for shareholders”; “[r]ail investment involves private companies taking a substantial risk which becomes a fixed cost on their balance sheets, one on which they are accountable to stockholders and for which they must make capital charges year in and year out for the life of the investment.”).

³⁷ Comments of AASHTO, *Rail Capacity and Infrastructure Improvements*, STB Ex Parte No. 671 (filed April 4, 2007) at 4.

³⁸ See Comments of Union Pacific, *Methodology To Be Employed In Determining The Railroad Industry's Cost Of Capital*, STB Ex Parte 664 (filed Nov. 27, 2007) at 4 (“if we are going to continue to prudently invest in the capacity our customers want and our

infrastructure improvements. This is especially true in times, such as these, where significant overall economic uncertainty makes projections of future rail traffic and revenues less certain. Transportation by rail is already so heavily influenced by factors outside the railroads' control³⁹ that increasing regulatory uncertainty regarding capacity investments will only serve to discourage them.

The Board's handling of this process will have national implications for the railroad industry's ability to keep pace with demand. Other railroads can be expected to look to this proceeding to determine whether it is worth making the kind of improvements to capacity necessary to increase the efficiency of the system, or whether their capital is better spent elsewhere on projects that are more certain. Transportation planners at all levels of government will view the Board's handling of this proceeding as an indication of whether it intends to encourage efforts to put more freight on the railroads or whether they need to plan for increased truck traffic.

Those who might be adversely affected by this Transaction will still benefit from a thorough yet expeditious environmental review process. Because the process is thorough, they will have a reasonably complete picture of the adverse impacts and can thereby plan for their mitigation. Because the process proceeds expeditiously, they also avoid the uncertainty and delay that can negatively impact their planning and budgeting.

Unfortunately, some who may be affected by improvements in the nation's rail infrastructure appear to see the EIS process as a plebiscite, and approach it narrowly as

nation needs, we need some assurance that regulatory action will not undermine our efforts to earn a return on investment sufficient to justify those investments.”).

³⁹ See, e.g., GAO Report at 55 (finding that railroads “do not prepare long-term capacity plans because of concern about the potential for significant economic changes” and that

primarily a means to block a proposed transaction rather than a means to understand it and mitigate its significant effects as appropriate.⁴⁰ Their approach should not be encouraged, because it is contrary to the public interest. Expedition will discourage narrowly focused local activists from wasting resources in an effort to use the environmental process to try to frustrate change that would serve the larger public interest. Expedition will require communities to promptly develop a realistic understanding of what the impacts would be and which impacts would be so significant as to warrant some reasonable measure of mitigation. Expedition will also enable Applicants to do more to protect real interests and develop real solutions in conjunction with affected communities, instead of expending resources on efforts to overcome delay. While litigiousness invites defensiveness and frustrates open dialogue, constructive expedition encourages transparency and realistic, pragmatic, and productive solutions.

C. There Is No Reason The Board Cannot Conduct A Thorough But Expeditious Review

There is no reason for delay here, because there are no insurmountable hurdles to conducting an expeditious review. This Transaction raises relatively few environmental issues, and any potential adverse environmental impacts are limited geographically. While there have been a lot of comments on the potential impacts of the Transaction, there has not been a lot of substance or variation to those comments. Simply because there are a lot of people who are able to make their voices heard does not mean that the

one railroad only forecasted improvement plans and demand projections for 3-5 years into the future because of the substantial uncertainty).

⁴⁰ Even a cursory review of the Board's environmental correspondence docket reveals that the vast majority of commenters narrowly assess and reflexively oppose the Transaction, often without offering any suggestions for further study by SEA or for reasonable ways to mitigate the environmental impacts.

issues they raise are unique or novel, or warrant delay.⁴¹

The primary concerns raised in the environmental comments filed to date are all related to four areas: safety (crossings and transportation of hazardous materials), vehicular delay, noise, and air pollution. The Board has the experience, precedent, and proven procedures for studying and documenting each type of impact.

Compared to the EIS prepared in the *Conrail* division case,⁴² which was completed in less than one year from the filing of the application, the issues here are straightforward, and very limited in complexity, geography, and type. *Conrail* was an almost \$7 billion transaction, involving over 1,000 rail segments on 10,500 route miles in 24 states and the District of Columbia. Traffic increases were projected over 289 rail segments, including more than 15 trains per day over 21 segments (many in heavily populated areas near Cleveland, Ohio), and increases above 30 trains per day over 4 segments. SEA analyzed 2,070 grade crossings, of which 278 met or exceeded the Board's thresholds for further environmental analysis.

Despite the incredible complexity and daunting scope of the task, SEA was able to complete its review and analysis of the *Conrail* transaction within a year. SEA was able to complete its work quickly because it followed a defined process with clear and

⁴¹ See, Council on Environmental Quality, *A Citizen's Guide to the NEPA: Having Your Voice Heard* at 27 (Dec. 2007), available at http://www.nepa.gov/ntf/Citizens_Guide_Dec07.pdf (stating that "Commenting is not a form of 'voting' on an alternative. The number of negative comments an agency receives does not prevent an action from moving forward. Numerous comments that repeat the same basic message of support or opposition will typically be responded to collectively. In addition, general comments that state an action will have 'significant environmental effects' will not help an agency make a better decision unless the relevant causes and environmental effects are explained.").

established standards. SEA was guided by and focused on the science and substance of its work, and not the volume or intensity of the community comments. The Board's work in *Conrail* has proven it is capable of quickly but thoroughly documenting the environmental impacts of rerouted traffic caused by an acquisition, and there is no reason to believe the Board cannot complete a review of a much smaller transaction, without the unique environmental issues posed by *Conrail*, in a shorter period of time.

The amount of data and analysis necessary to perform a review here should be markedly less than was required in *Conrail*. If the review process is driven by science and the established procedures of SEA and the Board, and not the number or extremity of the comments, there is no reason it cannot be conducted in a thorough yet expeditious manner. The Board already has a defined process with clear standards in place, and SEA is essentially a professional environmental analysis agency, with a dedicated, experienced staff trained to perform these types of reviews, and with extraordinary consulting resources under its command.

Because a thorough yet expeditious review is favored both by statute and as a sound policy and because there are no insuperable barriers to doing so, SEA should be able to complete the environmental review process with reasonable expedition, certainly well within the period required for the *Conrail* proceeding. Doing so would send a strong signal to other railroads and other interested parties that the Board will consider all the impacts of a proposed action, but will apply known standards and a known process, and will not needlessly delay issuing a decision on the merits. Such a process will open the

⁴² *CSX Corp. – Control & Operating Leases/Agreements – Conrail Inc.*, STB Finance Docket No. 33388, 3 S.T.B. 196 (1998), *aff'd sub nom. Niagara-Erie Rail Steering Cmte v. STB*, 247 F.3d 437 (2d Cir. 2001) ("*Conrail*").

door for increased railroad investment in critical capacity improvements, which will lead to a stronger and more efficient national freight rail system – a result that is in everyone’s interest.

II. COMMENTS ON SEA’S DRAFT SCOPE OF STUDY

For the reasons discussed above, Applicants believe it is critical that, absent a compelling reason to the contrary, SEA apply the same standards for review and mitigation as have been applied in previous environmental reviews. The standards and thresholds previously used by SEA are clear and transparent guidelines that allow railroads and impacted communities to better understand and plan for anticipated impacts. Changing the rules each time there is a new transaction would lead to great uncertainty and delay, and waste the time and resources of the Board and the parties in arguing about which standards and thresholds to apply in which situation.

Applicants also believe the review process should be symmetrical, meaning that it should consider in addition to the effects of additional trains resulting from the Transaction, the effects of the Transaction on those rail segments that would experience a reduction in trains as a result of the proposed Transaction. Under Applicants’ proposed operating plan, a significant number of trains would no longer be routed through, but would instead be routed around downtown Chicago, leading to environmental and safety benefits for people who live along those downtown segments. Because the EIS review will be limited in geography and scope, completing a symmetrical analysis should not add significant time to the environmental review process. The Board need only apply the same analysis to the CN segments as it does to the EJ&E segments, and Applicants are

willing to provide whatever data may be necessary to make that possible.

Such a symmetrical analysis is not only logical, but required. If the Transaction is not approved, it is reasonable to assume that all of CN's rail traffic to and through Chicago would continue along its present routes, and there would be avoidable detrimental environmental effects (or foregone environmental benefits) relating to: delay, fuel consumption from vehicles at crossings, accidents at grade crossings, train congestion, constrained capacity for commuter lines inside the arc, and environmental justice, as the same number of trains would continue to run through minority and low income neighborhoods. CEQ rules require that the EIS evaluate the impacts of this "no-action alternative."⁴³

By contrast, SEA should reject any suggestion that it evaluate the Chicago Region Environmental and Transportation Efficiency Program ("CREATE"), and in particular the Central Corridor proposed as part of that Program, as an alternative to the proposed Transaction. NEPA's requirement that an agency examine alternatives to the proposed action does not require it to look at alternatives other than "those [that are] reasonably available."⁴⁴ After five years of planning much of the project remains unfunded, with no prospect of money becoming available any earlier than 2010. Coupled with the fact that the required environmental reviews of the project are in the very early stages or have not even begun, this amply demonstrates that the project cannot appropriately be regarded as a reasonably available alternative to the Transaction. Any contentions to the contrary

⁴³ 40 C.F.R. §§ 1502.14(d), 1502.16(d).

⁴⁴ *Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827, 834 (D.C. Cir. 1972).

would be patently aimed at blocking the only real solution currently available for many of the problems CREATE was intended to address.

The founders of CREATE originally estimated that the project would cost approximately \$1.53 billion, with the rail participants collectively to contribute \$232 million to pay for the estimated railroad benefits of the Project, and the remainder to be funded from federal, state, and local sources to pay for the Project's public benefits. A 2003 Memorandum of Understanding among the participating railroads allocated the railroad contributions for CREATE. CN, the only railroad participating in CREATE that would be required to relocate its operations through Chicago (to the new Central Corridor), was to contribute \$63.4 million, to be dedicated solely to the rail assets (rail, ties, ballast, and signals) to construct the Central Corridor route. The railroads' financial contributions and their continuing participation in CREATE were dependent upon full authorization and availability of the public funds required for the Project.

In 2005, in the SAFETEA-LU legislation, which governs federal surface transportation spending through 2010, Congress authorized only \$100 million of the \$1.53 billion in federal funding sought by proponents of CREATE.⁴⁵ These funds were sufficient only for further planning and beginning implementation of a portion of the planned CREATE projects. Accordingly, the parties to CREATE agreed in 2006 to use these limited federal funds, along with certain railroad and state and local funds, to begin work on project components principally along the Beltway and Western Avenue corridors. These components were not part of the Central Corridor and would not benefit CN, so the CREATE participants agreed that CN would not be a financial contributor for

this limited implementation. Given the uncertainty of further funding, especially given the present economy and fiscal environment, realization of the remainder of the Project, including construction of a new CN Central Corridor route through Chicago, is at present no better than a “remote and speculative possibilt[y],”⁴⁵ rather than a “reasonably available” alternative.

In addition to these general points concerning the EIS process, Applicants have the following comments on the individual areas of study included in the draft scope of study, arranged in the order they appear in that draft. As these comments show, the limited scope of the inquiry required here should permit expeditious review.

1. Safety

A. At-Grade Rail Crossing Accident Probability

The proposal in the Scoping Notice is to examine environmental impacts (safety, traffic delay, air quality) from rail traffic increases at crossings with an ADT between 2,500 and 5,000. This is inexplicably at variance with the Board’s past practice. SEA has previously stated that in “applying [the 5,000 ADT] threshold for the review of at-grade crossings in past environmental documents,” it was using “a conservative baseline.” Notice of Final Scope of Environmental Impact Statement, *Conrail* (STB served Oct. 1, 1997). It would be arbitrary for SEA to decrease thresholds applied in previous environmental proceedings absent a sound basis for its departure from past practice, and it would inject a level of uncertainty into this and future proceedings. No such sound basis has been identified here. Absent such basis, the proposed change would

⁴⁵ Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, § 1301(m), Pub. L. No. 109-59, 119 Stat. 1144, 1203 (2005)).

⁴⁶ *Morton*, 458 F.2d at 838.

result in the unnecessary consumption of regulatory resources.⁴⁷

B. System-Wide Changes To The Probability Of Train Accidents

There is projected to be only a de minimis increase in traffic system-wide as a result of the Transaction. If SEA is interested only in system-wide effects, they can be assessed through a simple, straightforward calculation that may not even be necessary because of the small projected increase in system-wide tonnage (approximately 9,000 cars with extended hauls per year, none of which are new carloads on EJ&E and none of which will require the formation of additional trains).

C. Effects Of Increased Freight Traffic On Passenger Service

There will be no increase in traffic on any lines handling commuter or intercity passenger service operations. There would be traffic increases on EJ&E lines crossed by Metra trains lines at grade. Applicants believe that any impacts from this should be assessed in SEA's analysis. Applicants are willing to supply data that may be necessary for this portion of the study.

D. Impacts Based On The Transport Of Hazardous Materials

Some of this information is already available in Applicants' Safety Integration Plan ("SIP"), which Applicants filed with SEA and the Federal Railroad Administration ("FRA") on December 28, 2007. Any additional required information is readily available and the applicable calculations to determine impacts are straightforward. SEA has a

⁴⁷ In *Conrail and Dakota, M. & E. R.R. Construction into the Powder River Basin*, STB Finance Docket No. 33407 (STB served Feb. 15, 2006), ("DM&E"), *aff'd sub nom. Mayo Found. v. STB*, 472 F.3d 545 (8th Cir. 2006), only crossings with ADTs of 5,000 or greater were studied, and even then there were a large number of intersections with no significant impacts. Because CN plans to operate the same trains over crossings with ADTs between 2,500 and 5,000 as it does over crossings with ADTs of 5,000 or greater,

history of analyzing these types of impacts, and due to the limited number of segments that need to be studied, this analysis should not take long to complete.

E. Impacts Based On Local Truck Traffic Increases Attributable To Increased Intermodal Activities

As intermodal activities in Chicago are not projected to increase as a result of the Transaction, there is no need to study the effect of increased truck traffic.

F. Impacts Based On The Integration Of Different Rail Systems

As this is addressed in the SIP, and is subject to careful study by FRA, there should be no need for a duplicative in-depth analysis in the EIS.

2. Transportation Systems

A. Impacts Of Operational Changes On Passenger Service

These effects are already described thoroughly in the Operating Plan and throughout the Application, so there should be no need to do a redundant analysis in the EIS. Additionally, analysis of impacts on passenger/commuter traffic should not include any that are dependent on subsequent regulatory action (such as the abandonment of the St. Charles Air Line that Amtrak and a number of downstate cities are concerned about), as such action cannot be regarded as “reasonably foreseeable,” and any relevant environmental impacts would be evaluated in the separate regulatory proceeding under 49 U.S.C. § 10903 before such action occurred. Applicants have publicly committed to Amtrak that it may continue to operate on the Air Line indefinitely pending Amtrak’s selection of an alternative route.

To the extent the Transaction will impact at-grade crossings with Metra,

there is little reason to believe that decreasing the threshold to 2,500 would reveal significant impacts that would otherwise be overlooked.

Applicants believe those effects should be included in the study and will make available the data necessary for SEA to complete this analysis.

B. Passenger Segments That Will See An Increase In Freight Traffic

The Transaction would not cause an increase in traffic on any rail line used for commuter rail service, which should obviate the need for further study of this issue except with respect to the no-action case. Instead, the Transaction would actually reduce freight traffic on two commuter lines (the Wisconsin Central and Heritage Corridor), potentially making it available for use by Metra. Accordingly, the no-action alternative could eliminate the opportunity to make capacity available for expanded passenger service.

C. Reasonably Foreseeable Future Passenger Service

The Board has held that it will only include for study “reasonably foreseeable commuter rail inception or expansion plans (i.e., where capital improvements are planned, approved, and funded).” Final Scope of Study, *Conrail* (STB served Oct. 1, 1997). Applicants agree that capital improvements by third parties that have not been planned, approved, and funded should not be regarded as “reasonably foreseeable.”

Some commenters have suggested including the impact on the proposed STAR Line in the scope of study. As the capital improvements for this line are not reasonably foreseeable, in that they have not been fully planned,⁴⁸ and certainly have not been approved and funded, this should not be included for study.

⁴⁸ See Richard Wronski, Metra: Suburban rail depends on state funds; Legislature must match federal aid to secure new STAR Line, official says, *Chicago Tribune*, Feb. 14, 2008 (stating that “Metra officials *hope to complete planning* on the STAR Line and submit the proposal to the federal government later this year.”) (emphasis added).

D. Potential Diversion Of Freight Between Truck And Rail

No substantial or measurable diversions from trucks to rail or rail to trucks are projected; accordingly there is no need to include this in study.

E. Vehicular Delays At Rail Crossings And Intermodal Facilities

As no increase in traffic at intermodal facilities is anticipated as a result of the Transaction, there is no need to study the impact on vehicle delay from such an increase.

F. Potential Effects Of Increased Traffic On Moveable Railroad Bridges

There is only one moveable bridge on EJ&E lines that both crosses navigable water and will experience an increase in traffic as a result of the Transaction. When such bridges allow only one mode of transportation to pass at a time, federal law requires that water transportation be given the right of way.⁴⁹ Applicants took this into account when designing the Operating Plan by assuming the bridge would be closed to rail traffic for four hours per day. There is therefore no additional potential for significant environmental impacts due to moveable railroad bridges, and thus no need for extensive study of this issue.

3. Land Use and Socioeconomics

A. Whether Proposed Constructions Are Consistent With Existing Land Use Plans

As in past environmental reviews, SEA should exclude from study proposed construction that is inside existing railroad right of way. Construction is a limited aspect of this Transaction, and the proposed connections, siding extensions, and double track are limited in geography, scope, and impact, as they will largely be within railroad right of way. Accordingly, this analysis should not take a long time to complete.

B. Whether Proposed Constructions Will Affect Prime Farmland

See response to 3.A

C. Whether Proposed Constructions Are Consistent With Zoning Requirements

See response to 3.A.

D. Socioeconomic Issues Related To Changes In The Physical Environment

As the draft scope recognizes, the examination of socioeconomic issues is properly limited to those strictly “related to changes in the physical environment.” *See* 40 C.F.R. § 1508.14.

E. Proposed Mitigation Measures To Minimize Impacts On Social And Economic Resources

As noted above, the study should also conduct a reciprocal study to address positive impacts to social and economic resources resulting from decreased traffic on CN lines inside the EJ&E arc.

4. Energy

A. Transportation Of Energy Resources

Applicants will make available to SEA the data necessary for SEA to complete this analysis.

B. Potential Changes In Fuel Use

Applicants will make available to SEA the data necessary for SEA to complete this analysis.

5. Air Quality

A. Air Emissions Increases

Because the affected segments are so close together, and because the five affected

⁴⁹ *See* 33 U.S.C. § 494 and 33 C.F.R. § 117.5.

counties (Cook, Dupage, Lake, Will (IL), Lake (IN)) all are part of a single metropolitan area, SEA should consider the impact on both the larger Chicagoland region, as well as on a county-by-county basis. Applicants will make available to SEA the data necessary for SEA to complete this analysis.

B. Net Increase In Emissions From Railroad Operations

See response to 5.A.

C. Transportation Of Ozone Depleting Materials

Some of this information is already contained in the SIP. To the extent the information is not discussed there, Applicants will make available to SEA the data necessary for SEA to complete this analysis.

D. Potential Air Emission Increases From Vehicle Delay

The proposal to examine environmental impacts from rail traffic increases at crossings with ADT between 2,500 and 5,000 is at variance from the Board's past practice. SEA should not decrease thresholds applied in previous environmental proceedings absent a sound basis for its departure from past practice, and it would inject a level of uncertainty into this and future proceedings. There is no such sound basis here. Indeed, the proposed change may result in the unnecessary consumption of regulatory resources.

E. Local Impacts Caused By Diesel Particulate Emissions

Applicants will make available to SEA the data necessary for SEA to complete this analysis.

6. Noise & Vibration

Applicants believe the Board's established standards and thresholds for noise &

vibration analysis are reasonable, and they will make available to SEA the data necessary for SEA to complete this analysis.

7. Biological Resources

A. Potential Impact Of Construction On Endangered Or Threatened Species

Absent a clear demonstration that endangered or threatened species would be impacted by construction within the existing railroad right of way, this inquiry should be limited to construction occurring outside of the right of way. Construction of the proposed connections, siding extensions, and double track are limited in geography, scope, and impact, as it will largely be within railroad right of way.

B. Effects Of Construction On Wildlife Sanctuaries Or Other Parks

Absent a clear demonstration that there will be significant impacts on wildlife sanctuaries and other parks from construction within the existing railroad right of way, this inquiry should be limited to construction occurring outside the right of way. Construction of the proposed connections, siding extensions, and double track are limited in geography, scope, and impact, as it will largely be within railroad right of way.

8. Water Resources

A. Whether Potential Impacts From Construction May Be Inconsistent With Applicable Water Quality Standards

As in past environmental reviews, SEA should exclude from study proposed construction that is inside existing railroad right of way. Construction of the proposed connections, siding extensions, and double track are limited in geography, scope, and impact, as it will largely be within railroad right of way.

B. Whether Permits May Be Required For Any Proposed Construction

See response to 8.A.

9. Environmental Justice

A. Demographics In The Immediate Vicinity Of Proposed Construction

As in past environmental reviews, SEA should exclude from study proposed construction that is inside existing railroad right of way. Construction of the proposed connections, siding extensions, and double track are limited in geography, scope, and impact, as it will largely be within railroad right of way.

B. Demographics Along Segments With An Increase In Traffic

The EIS should also include reciprocal demographic information along rail lines that will see a decrease in traffic.

C. Whether Impacts Have a Disproportionate Adverse Effect on Minority or Low-Income Group

The EIS should also include an evaluation about whether the decrease in rail traffic on CN lines would have a beneficial health effect or impact on minority or low-income communities.

10. Cultural and Historic Resources

A. Potential Impacts From Proposed Construction On Cultural And Historic Resources

As in past environmental reviews, SEA should exclude from study proposed construction that is inside existing railroad right of way. Construction of the proposed connections, siding extensions, and double track are limited in geography, scope, and impact, as it will largely be within railroad right of way.

11. Secondary and Cumulative Effects

A. Environmental Impacts That Have Regional Or System-Wide Ramifications

Applicants are not aware of any impacts, other than those identified above, that

would have regional or system-wide ramifications.

B. Other Projects Or Activities That Relate To The Proposed Transaction

Applicants are aware of no other reasonably foreseeable projects related to the proposed Transaction, and none has been identified at scoping meetings. Accordingly, there is nothing to study.

C. Construction And Facility Modification Within Railroad Owned Property

Absent a clear indication that construction and facility modification within railroad-owned property will have a significant impacts, SEA should adhere to past precedent and only consider impacts that occur outside of the railroad right of way.⁵⁰

III. OTHER ISSUES RAISED DURING THE SCOPING COMMENT PERIOD

A. Gary Airport

A number of parties⁵¹ have filed environmental or other comments regarding the potential impact of the Transaction on the Gary-Chicago International Airport (“GCIA”). GCIA seeks to expand its runway, but has been unable to come to an agreement with EJ&E regarding the relocation of an EJ&E line that currently forms the western boundary of the airport. The airport cannot be expanded without relocating this line. The parties have been in negotiations for a number of years regarding this issue.

GCIA’s need to arrive at a negotiated agreement on relocation of the EJ&E line is a pre-existing condition, and one that will not be affected by the projected increase in traffic over the line that would result from the proposed Transaction. The Board

⁵⁰ Even if there is a compelling need to study such construction, because it is a limited aspect of this transaction, it should not take a long time to complete.

generally will “mitigate only impacts resulting directly from a proposed transaction, and not to require mitigation for existing conditions and existing railroad operations.”⁵²

Because the impacts that would result from the proposed acquisition – increases in rail traffic – will not affect GCIA’s environmental concern – relocation of the rail line – there are no impacts from the Transaction on GCIA’s relocation plans that merit study.

B. Towns

The Towns of Schererville and Griffith, both in Indiana, and the Town of Lake Zurich, Illinois, have filed environmental comments, while a number of other towns have filed comments in the proceeding nominally regarding the merits of the Transaction under ICCTA but which raise environmental concerns rather than ones relevant to the criteria set forth in ICCTA. The Towns request a variety of mitigation measures, but none requests that SEA study any issue not already identified in the draft scope of study. While Applicants are working with all affected communities to discuss their concerns, they believe requests for mitigation are currently premature. Until SEA’s environmental analysis has been further advanced it is too early to tell precisely what the impacts on each community will be. As the potential effects of the Transaction are more specifically documented any required mitigation measures can be tailored to the proposed impacts.⁵³

⁵¹ U.S. Representative Peter Visclosky, U.S. Senator Evan Bayh, and the Northwestern Indiana Regional Planning Commission.

⁵² Decision No. 2 at 15 n.14. *See also* 49 CFR 1180.1(f)(1).

⁵³ *See, e.g.,* Conrail Draft EIS at ES-11 – ES-12 (describing SEA’s process for environmental analysis and listing development of mitigation measures as the last step); *see also* Scoping Notice at 3 (“Scoping is an open process for determining the range of issues that should be examined and assessed in the EIS and their potential for significance.”)

The Village of Schaumburg, Illinois, has filed comments regarding the impact of the Transaction on the proposed STAR Line and the proposed time horizon for study. As discussed above, because the STAR line has not been “planned, approved, and funded,” it is properly excluded from current environmental review. With regard to the time horizon, growth or decline in rail traffic is highly uncertain, and dependent on a number of complex issues and variables.⁵⁴ It would not make sense to study the effects of this Transaction as far into the future as 20 years because any result would be resting on highly uncertain assumptions.

The City of Joliet has requested that delays at grade crossings be studied at all crossings with an ADT of 2,000, instead of the proposed ADT of 2,500 or the historical ADT of 5,000, so that the crossing of Woodruff Road can be studied. As discussed above, absent a substantial basis for change, SEA should follow past precedent and limit its analysis to crossings with ADT of 5,000 or greater. Communities should not be allowed to pick and choose which crossings are studied and the Board should not abandon its sound past practice unless there is some relevant reason to believe that the Transaction would cause significant impacts at additional crossings. Joliet has made no assertion, much less a showing, that there is any potential for significant impacts at Woodruff Road, or indeed at any grade crossing in the 2,000 – 2,500 ADT range. SEA should therefore decline Joliet’s request to expand the scope of study.

C. Others

The Environmental Law & Policy Center has filed environmental comments concerning the impact of the Transaction on intercity passenger rail. Any abandonment

⁵⁴ See *supra* note 39.

by CN of the St. Charles Air Line would require regulatory approval under 49 U.S.C. § 10903. The environmental impacts of that potential abandonment (which could not be proposed for the entire line unless CN were to obtain the concurrence of its co-owners of part of the line, UP and BNSF) would be the subject of any abandonment proceeding. In any event, Applicants are currently working with Amtrak to address its concerns regarding routing to Union Station and believe a mutually agreeable solution can be negotiated before expiration of Amtrak's current contract. If no such solution is reached, Amtrak has ample tools under existing law to ensure its continued use of rail assets needed for its own operations.⁵⁵ As noted above, there is no reason to believe that a consequence of the proposed Transaction would be to deny Amtrak the right to operate over the Air Line.

The Fermi National Accelerator Laboratory ("Fermilab") has filed comments requesting SEA to identify whether there would be adverse effects of vibrations on current and future experiments at Fermilab. The draft scope of study already includes an analysis of potential vibration effects. Applicants are not yet sufficiently informed to judge whether the specific impacts of vibration on Fermilab would require any analysis beyond those normally conducted by SEA.

The Friends of the Earth and Illinois Public Interest Research Group propose to expand greatly the scope of study with regard to the transportation of hazardous materials. Neither group offers any substantive suggestions for how SEA could improve their analysis; they suggest vaguely only that the current method is "severe[ly] deficient[t]" and that SEA should consider "more valid" alternatives. In the absence of

⁵⁵ See, e.g., 49 U.S.C. § 24308.

any relevant proposals for how SEA should conduct its study of the transportation of hazardous materials – an undertaking that should be conducted outside the ambit of a pending proceeding - SEA should continue to use their established methods for evaluating this area.

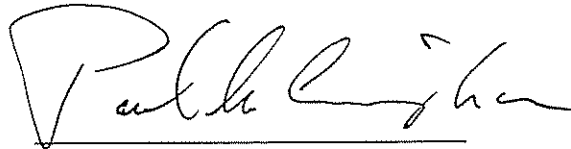
The Chicago Metropolitan Agency for Planning (“CMAP”) has suggested that the time horizon for the EIS should be at least 10 years after Board approval, and that calculations regarding CN rail traffic and traffic at grade crossings should be made using both present traffic figures and projections of traffic levels in 2030. Projections of rail traffic that far into the future are bound to be materially inaccurate and highly speculative. While CN is ready to further review these issues with SEA, CN has no reason to believe that projections of vehicular traffic that far into the future would aid SEA’s analysis more than the information provided in the Application to meet SEA’s previously applied standards. SEA should use its established and proven procedures for estimating future impacts.

CMAP has also suggested that mitigation measures be tied to threshold levels of rail activity. As CN does not anticipate the Transaction will lead to new traffic, any future growth would not be a result of this Transaction and therefore would be outside the Board’s conditioning power.

The Illinois Commerce Commission (“ICC”) has also filed comments on the draft scope of study. Applicants believe that all of ICC’s suggested “expansions” (such as delay at grade crossings, possible alternate routes around grade crossings, and grade crossings that may warrant separation) are already included in the grade crossing analysis

SEA will perform. As such, their comments do not appear to add anything to the scope of study.

Respectfully submitted,



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