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November 21, 2007

BY E-FILING

The Honorable Vernon A. Williams, Secretary
Surface Transportation Board
Office of the Secretary
395 E Street, S.W.
Washington, DC 20423-0001

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

Dear Mr. Williams:

Enclosed for filing in the above-referenced docket please find the Reply Of Applicants To Request Of Village Of Barrington For Preparation Of Environmental Impact Statement (CN-8).

Very truly yours,



Paul A. Cunningham
Counsel for Canadian National Railway Company
and Grand Trunk Corporation

Enclosure

cc: All parties of record

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 35087

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

REPLY OF APPLICANTS TO REQUEST OF
VILLAGE OF BARRINGTON FOR PREPARATION OF
ENVIRONMENTAL IMPACT STATEMENT

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CANADIAN NATIONAL RAILWAY COMPANY
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**REPLY OF APPLICANTS TO REQUEST OF
VILLAGE OF BARRINGTON FOR PREPARATION OF
ENVIRONMENTAL IMPACT STATEMENT**

On November 19, 2007, the Village of Barrington, Illinois (“Barrington”) filed a request that the Board prepare an environmental impact statement (“EIS”), rather than an environmental assessment (“EA”), regarding effects of the control transaction (the “Transaction”) proposed in this case.¹ That request is premature and based largely on erroneous or misleading factual assertions. It should be rejected, without prejudice to the Board’s authority to decide to prepare an EIS, should the Board’s examination of the environmental effects of the Transaction reveal that it is likely to cause significant impacts.

Under the Board’s rules implementing the National Environmental Policy Act of 1969 (“NEPA”), 42 U.S.C. §§ 4321 *et seq.*, the Board normally will prepare an EA rather than an EIS for an acquisition of control under 49 U.S.C. § 11323 that results in operational changes (*i.e.*, increases in train traffic or diversion of traffic from rail to motor carrier) exceeding thresholds set

¹ Applicants incorporate by reference the short forms and abbreviations set forth in the

forth in the Board's rules. 49 C.F.R. § 1105.6(b)(i). Because the CN/EJ&EW Transaction is expected to result in an increase in train traffic that would exceed those thresholds on certain rail line segments that CN proposes to acquire, the rules presumptively require preparation of an EA in this proceeding.

Applicants, however, did not assert that the environmental review of the Transaction would necessarily be limited to an EA, but rather acknowledged that the Transaction would "require preparation of *either* an EA *or* EIS" (CN-2 at 33 (emphasis added)) in light of the Board's rule providing that, "[f]or actions generally requiring an EA, the Board may prepare a full EIS where the probability of significant impacts from the particular proposal is high enough to warrant an EIS." 49 C.F.R. § 1105.7(d).

Presumably in reliance on that rule, Barrington calls for the Board to determine, at this early stage in the proceeding, that it will prepare an EIS for the CN/EJ&EW Transaction. At this point, however, neither the Board nor the parties know enough about the environmental effects of the Transaction to conclude that "the probability of significant impacts . . . is high," much less to assert, as does Barrington, that "[i]t is already clear that the CN Transaction will result in operational changes that significantly affect the quality of the human environment" (BARR-1 at 10). Barrington's request, made in the absence of any indication of the actual range or size of the environmental impacts that might result from the Transaction, is premature.

Barrington points to the Application's projection of 15 additional trains per day over the rail line segment passing through Barrington, and to projections of up to 26 additional trains per day on other segments, but by themselves those numbers do not amount to "significant,

short-term, and direct regional and local [environmental] impacts” (BARR-1 at 11). Although an increase in the number of trains operating on a segment may *lead* to significant environmental impacts, the Board has never held that any particular increase in train numbers was itself a significant impact. Barrington does not attempt to correlate the projected increases in train volumes to levels of environmental impacts that the Board – or any other agency, for that matter – has determined to be significant.²

Barrington compounds this omission by suggesting, on the basis of no more than speculation, that CN’s projections have underestimated the amount of rail traffic moving through Barrington, especially rail traffic originating at the Fairview Container Terminal at the Port of Prince Rupert.³ Barrington argues that “[a]lmost all the information in the Application was prepared to support CN’s assertion that the Transaction is a ‘minor’ transaction under the Board’s rules,” (BARR-1 at 10 (footnote omitted)), and that the Board cannot use the Application’s Operating Plan as a basis for its environmental review.

In fact, the Operating Plan had little or no bearing on the competitive arguments

² The closest Barrington comes to making such a correlation is its statement that “[e]ight EJ&E Line grade crossings located in the Barrington Community will see significant increases in CN freight traffic, with related environmental impacts,” and that “[a] single CN freight train . . . could block *all* traffic passing through the *entire* Village of Barrington simultaneously, including police, fire, and EMS vehicles.” (BARR-1 at 7-8). But Barrington provides no indication of the expected duration of the blockage, nor any other reason for concluding that the duration would rise to a significant level.

³ At one point, Barrington confusingly suggests that the growth in CN traffic to and from Prince Rupert is a “good example” of how “[t]he Chicago by-pass will help CN grow its freight business” (BARR-1 at 5). In fact, the growth in that traffic is a result of the opening of the Terminal, allowing CN to take advantage of the Port’s location and physical characteristics and of CN’s rail infrastructure across the Canadian Rockies. CN has been anticipating that traffic growth long before the Transaction, and in the absence of the Transaction, CN would still expect to handle that traffic, except that much of it might, absent other arrangements with EJ&E, have to

supporting CN's position that the Transaction is properly classified as "minor." Rather, it was created in compliance with the Board's rules at 49 C.F.R. § 1180.8, and with the specific understanding that it would form the basis for the Board's environmental review. For that reason, CN intended the Operating Plan to give as accurate a picture of post-Transaction operations as possible, but it wanted its traffic projections to be solidly grounded rather than based on speculation. CN, recognizing that the opening of the Fairview Terminal would lead to significant and predictable increases in CN traffic,⁴ adjusted the Operating Plan's traffic base from 2006 to reflect CN's best estimate of Prince Rupert traffic that could realistically be expected.⁵ Further adjustments to the traffic projections on particular segments, based on more general estimates of traffic growth, would have created a misleading impression of precision, presenting the products of speculation as if they were "reasonably foreseeable" and deviating from the approach that has guided the Board and its Section of Environmental Analysis in review of past control proceedings.

In support of its claim that additional traffic through Barrington, moving from or

move through downtown Chicago rather than across the EJ&EW arc.

⁴ Phase One of the Fairview Container Terminal, with a capacity of 500,000 twenty-foot equivalent units ("TEUs") opened in September 2007. Phase Two, which as Barrington itself states (BARR-1 at 7) is not projected to open before the first quarter of 2011, would expand the capacity of the terminal to 2 million TEUs per year.

⁵ Barrington misleadingly cites the statement by CN witness David A. Stuebner that he assumed that "[t]he environment of the railroad industry is that which existed on December 31, 2006, except for the direct effect of the Transaction, which I estimate as if the Transaction were fully implemented." BARR-1 at 10 n.18 (quoting Verified Statement of David A. Stuebner, CN-2 at 193). This assumption was entirely appropriate for Mr. Stuebner's purpose, which was to identify potential gains of traffic from other carriers due to the proposed Transaction. Mr. Stuebner's study, however, was not intended to be, and was not in fact, the source of changes to CN's traffic base due to ordinary traffic growth. As discussed above, CN separately made and included reasonable estimates of traffic growth for purposes of the Operating Plan.

to Prince Rupert but not reflected in CN's traffic projections, would in fact be "reasonably foreseeable," Barrington claims that the capacity of the Port "is expected" to rise to 4 million by 2015 with completion of a new facility on Ridley Island (BARR-1 at 7). That second terminal, however, is only in the planning stage, with no assurance that the plans will come to fruition.⁶ Any projected traffic increases, based on the assumption that the terminal would be operational, would be merely speculative, as those increases are not "sufficiently likely to occur that a person of ordinary prudence would take [them] into account in reaching a decision." *Mid States Coalition for Progress v. STB*, 345 F.3d 520, 549 (8th Cir. 2003) (citation omitted; cited in BARR-1 at 9).

Barrington speculates even further, however, by stating that *if* the Port implemented Phase II of the Fairview Terminal as planned, *if* the Terminal operated at 90% of capacity, *if* each train from the Terminal carried 400 TEUs, and *if* an equal number of trains carried empty containers back to the Port, then CN would operate 4,500 trains per year to and from Prince Rupert. Barrington varies the assumptions by stating that *if* the Port succeeded in

⁶ That fact is apparent in the sources that Barrington cites as evidence for the expected growth of the Port. One article notes that "[i]f these plans go ahead, Prince Rupert would be able to match Vancouver's container handling capacity by 2020." Leanne Ritchie, *Partners turn attention to Phase Two of port upgrade*, Daily News, July 10, 2007), available at <http://www.rupertport.com/pdf/media/partners%20turn%20attention%20to%20phase%20two%20of%20fairview%20container%20terminal%20upgrade%20july%2010%202007.pdf> (cited in BARR-1 at 7 n.24). Another states that the Port has "begun plans for a second container terminal that would bring an additional two to three million TEUs and catapult Prince Rupert's capacity above than in the province's Lower Mainland." Nathan Vanderklippe, *Prince Rupert's hope: This B.C. Port Is Counting On A Massive New Terminal To Break A Century-Old Cycle Of Failed Ambition*, NAT'L POST, Sept. 12, 2007, at FP1 (available on Lexis). (The Vanderklippe article appears to be the same one cited in BARR-1 at 7 n.21. The citation there indicated that the article was available at the National Post website, but in fact the website only makes articles available for 30 days.)

increasing its capacity to 4 million TEUs, then CN could operate 9,000 trains per year to and from Prince Rupert. Finally, Barrington invites the Board to speculate what might happen to Barrington *if* an unspecified portion of the CN trains to and from Prince Rupert were destined to or originating from U.S. locations, and *if* those trains moved on the EJ&EW line around Chicago that CN proposes to acquire. (BARR-1 at 12.) Barrington hedges by claiming its assumptions were provided “for purposes of *illustration only*” (*id.* (emphasis added)). It admits that “[o]ne can quibble with assumptions,” but one can do more than quibble; one can just as easily assume that Phase Two of the Fairview Terminal is not implemented, or that the Terminal is operated at 10% of capacity, in which case Barrington’s speculation falls apart. Illustrative assumptions are not solidly grounded facts, and can provide no basis for concluding that a transaction has a potential for significant environmental impacts, and that an EIS is therefore required.⁷

Barrington’s conclusion that “it is beyond any doubt that CN’s U.S.-bound container traffic to/from Fairview could add a substantial number of trains to the EJ&E Line” (*id.*), however, is based solely on a string of such assumptions.

Because Barrington fails to describe with any specificity the range of environmental impacts it expects to result from the CN/EJ&EW Transaction, it thus fails to demonstrate that the Board could not adequately examine those impacts in the context of an EA

⁷ In fact, on the one point in Barrington’s string of hypotheticals that is not purely a conjecture about future events but can be tested against present practice, Barrington errs seriously. Barrington assumed that a CN Prince Rupert train would carry 400 TEUs, but in fact CN’s intermodal department prefers to put together 10,000-foot trains, using 53-foot double-stack platforms, carrying 720 or 740 TEUs per train. Consequently, 2,432 or 2,500 trains per year (6.66 or 6.85 trains per day) would be required to move 90% of the capacity of Fairview Container Terminal’s expected capacity after completion of Phase Two, not 4,500 per year and 12 per day, as stated by Barrington (BARR-1 at 12).

or within the 156-day procedural schedule proposed by Applicants. At this point, CN is unaware of any reason why the Board could not do so. CN recognizes, however, that as the Board gathers information in the course of its environmental review of the Transaction, it may find that, to complete that review in accordance with its obligations under NEPA, it will need more than the 156 days called for in CN's proposed schedule, or even more than the 180-day maximum permitted for regulatory review of a "minor" transaction,⁸ and that it may find that the impacts would be potentially significant, requiring preparation of an EIS. But if the Transaction qualifies as a "minor" transaction under the Board's rules, neither finding would be a legitimate ground for the Board to extend the schedule for consideration of the substantive approval criteria for longer than 180 days,⁹ nor would such an extension be necessary. The Board could issue a final decision on the approval criteria within the prescribed 180 days, although if it found that the Transaction satisfied those criteria, it might have to defer the effective date of its approval until after completion of the NEPA process, so that the approval could be conditioned on appropriate

⁸ See 49 U.S.C. § 11325(c); 49 C.F.R. §§ 1180.2(b)-(c), 1180.4(c)(7), (e)(2)(iii), (e)(3)(iii). Barrington states that it takes no position on whether the Transaction qualifies as a "minor" transaction under the Board's rules (BARR-1 at 10 n.27), although it implies that the statutory and regulatory limits on the length of a proceeding to review a "minor" transaction should be disregarded if an EIS becomes necessary. As explained below, such an implication would be erroneous.

⁹ The substantive approval standards, which govern any control proceeding not involving two or more Class I railroads, provide that the Board must approve the transaction

unless it finds that –

(1) as a result of the transaction, there is likely to be substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States; and

(2) the anticompetitive effects of the transaction outweigh the public interest in meeting significant transportation needs.

mitigation of any adverse environmental effects that might be found.¹⁰ The mere possibility that the Board may need to take additional time to carry out its NEPA obligations, however, is no reason for it to reject the procedural schedule CN has proposed for examination of the

49 U.S.C. § 11324(d).

¹⁰ Such a two-step decisional process was common in Board proceedings for approval of construction projects before 2004. *See, e.g., New England Transrail, LLC, d/b/a Wilmington & Woburn Terminal R.R. – Construction, Acquisition, & Operation Exemption – In Wilmington & Woburn, MA*, STB Finance Docket No. 34391 (STB served Mar. 2, 2004); *S.W. Gulf R.R. – Construction & Operation Exemption – Medina County, TX*, STB Finance Docket No. 34284 (STB served May 19, 2003). While the Board has declined more recently to bifurcate construction proceedings, *e.g., Alaska R.R. – Construction & Operation Exemption – Rail Line Between Eielson Air Force Base (North Pole) & Fort Greeley (Delta Junction), AK*, STB Finance Docket No. 34658, slip op. at 2 (STB served Oct. 4, 2007), such bifurcation may be especially appropriate in control cases, where it may allow the Board to reconcile its obligation to conduct an environmental review that satisfies the requirements of NEPA with its obligation under 49 U.S.C. § 11325 to issue a final decision on the merits of a control transaction within specified time limits.

As the Board has noted, conditional approval of a construction proposal pending environmental review is problematic, because “[a] possible outcome of that environmental review is denial of the construction proposal notwithstanding a prior conditional grant.” *Alaska R.R.*, slip op. at 2. This is because the “public convenience and necessity” standard for approval of construction projects (and against which any proposal for exemption of a construction proposal must be measured), *see* 49 U.S.C. § 10901(c), extends to environmental issues. *Ind. & Ohio Ry. – Construction & Operation – Butler, Warren, & Hamilton Counties, OH*, 9 I.C.C.2d 783, 787-88 (1993). Thus, a preliminary decision that purports to rule on the public interest and necessity standard, without taking account of the environmental impacts of the project, will necessarily be based on incomplete information.

In control proceedings not involving two or more Class I railroads, on the other hand, the standards for approval do not extend to environmental issues, but are limited to the competitive impact of the proposed transaction (and, in some cases, the balance between those competitive impacts and the public interest in meeting significant transportation needs). 49 U.S.C. § 11324(d). Thus, for example, it is not necessary for the Board to await the results of environmental review in order to find definitively that a control transaction is not likely to cause “substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States.” If the Board makes such a finding (and CN is confident that it will do so with regard to the CN/EJ&EW Transaction), then it *must* approve the transaction, although it may impose environmental mitigation conditions on its approval. Under such circumstances, bifurcation of the proceeding would be perfectly

Transaction under the governing statutory standard. Without sufficient facts to do otherwise, such restraint is especially warranted here, where, as Applicants have outlined, the overall environmental effect of the Transaction on the greater Chicago metropolitan area would be beneficial, and where CN has commenced discussions and remains committed to working with suburban communities like Barrington that will be affected by re-routed traffic and to addressing their concerns.

CONCLUSION

The Board should reject Barrington's proposal that the Board decide now to prepare an EIS, without any prejudice to its right to make such a decision later in this proceeding if justified by factual findings in the course of its environmental review that indicate a potential for significant environmental impacts.

Respectfully submitted,



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appropriate.

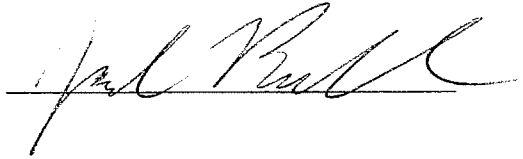
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*Counsel for Canadian National Railway Company
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November 21, 2007

CERTIFICATE OF SERVICE

I certify that I have this 21st day of November, 2007, served copies of the foregoing Reply of Applicants to Request of Village of Barrington for Preparation of Environmental Impact Statement (CN-8) upon all known parties of record in this proceeding by first-class mail or a more expeditious method.

A handwritten signature in cursive script, appearing to read "Paul R. Smith", is written over a horizontal line.