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VILLAGE OF BARRINGTON

May 23, 2008

Ms. Victoria J. Rutson
Chief, Section of Environmental Analysis
Surface Transportation Board
395 E Street, SW
Washington, DC 20423-0001

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

Dear Ms. Rutson:

I am writing on behalf of the Village of Barrington, IL ("Barrington"), on behalf of itself and the surrounding townships and municipalities that rely on Barrington for essential services (collectively, the "Barrington Community")¹ to provide comments on the Final Scope of Study in the above-captioned proceeding.

Proposed Transaction and Definition of Alternatives

Barrington filed comments on the Draft Scope of the Environmental Impact Statement ("Barrington Comments"). Barrington proposed two alternatives to the Proposed Transaction: the CREATE Central Corridor; and an alternative routing with track already substantially built for heavy volumes of freight traffic where CN already has ownership or trackage rights. Barrington Comments at 9-13.

The Final Scope of Study says that "[n]either CREATE nor any other non-EJ&E rail corridors will be treated as alternatives for the proposed action because they plainly would not meet the three-fold purpose and need articulated in the Application." Final Scope of Study, at 5-6. The Section of Environmental Analysis ("SEA") has an obligation to "[r]igorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated." 40 C.F.R. § 1502.14. Other than the obviously conclusory statement that CREATE and other non-EJ&E rail corridors "plainly" would not meet the purpose and need of the Proposed Transaction, SEA has not explained or discussed the reasons why it has concluded that these alternatives do not meet th purpose and need for the project.

SEA has adopted an unduly narrow view of the alternatives to the Proposed Transaction. Part of the problem is SEA's definition of the purpose and need of the Proposed Transaction. In the Final Scope of Study, SEA identifies the purposes of the transactions as follows:

These purposes are 1) connecting the five CN rail lines in the Chicago area to create operational improvement throughout the CN system, 2) obtaining access to the East Joliet and Kirk

¹ The Barrington Community consists of the Villages of Barrington, Barrington Hills, Deer Park, Lake Barrington, North Barrington, South Barrington and Tower Lakes, and Barrington and Cuba Townships.

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Yards, and 3) facilitating expanded business opportunities with EJ&E's shippers.

Final Scope of Study, at 5. The first enumerated purpose is close to the mark, but a review of the Application as a whole together with a review of public statements made by CN regarding the proposed project makes it clear that in defining the purpose, the emphasis should be on creating operational improvements throughout the CN system. Any reasonable alternative that would permit CN to have operational improvements throughout the CN system should be evaluated.

The second enumerated purpose, obtaining access to East Joliet and Kirk Yards is too narrowly defined. A review of the Application as a whole and CN's other statements and submissions made in connection with its application, demonstrates that it is more accurate to describe this purpose as expanding or enhancing the utility of CN's yard facilities in the Chicago area. As explained below, CN could achieve this purpose using or expanding other yards.

The third stated purpose, providing expanded business opportunities with EJ&E's shippers, seems to be at most a tertiary purpose and more likely a legally obligatory "purpose" of the Proposed Transaction. Again, SEA must consider the CN Application as a whole, and the other CN statements in the docket and made to the public. SEA cannot let this alleged purpose artificially narrow the defined alternatives to the Proposed Transaction. SEA has a duty under NEPA to critically evaluate CN's purpose and need statement. *Simmons v. Army Corps. Of Engineers*, 120 F.3d 664, 669 (7th Cir. 1997)(agency has duty under NEPA to exercise a degree of skepticism in dealing with self-serving statements from a prime beneficiary of the project). If SEA gives too much deference to the Applicants' purpose and need definition, it will allow the Applicants to unilaterally exclude any alternatives that do not include all rail lines that are involved in the Proposed Transaction. The true and primary purpose of the Proposed Transaction is to create operational improvements throughout the CN system and increase CN's yard capacity in Chicago. Any alternative that would reasonably allow those purposes must be considered by SEA.

In fact, CREATE is a reasonable alternative and it could meet each of the three purposes of the Proposed Transaction. The Central Corridor of CREATE, together with CN's existing trackage rights would allow CN to connect the five CN rail lines in the Chicago area and thereby create operational improvements throughout the CN system; and it would facilitate expanded business opportunities for EJ&E shippers. Absent a revised agreement with the EJ&E, CN would not have access to East Joliet Yard or Kirk Yard. However, such an agreement with the EJ&E is a reasonably foreseeable possibility. Moreover, CN could establish an automated classification yard like it presently plans for Kirk Yard and replicate the more modest plans it has for East Joliet Yard at CN's Markham, Glenn or Hawthorne Yards. CN has considerable yard capacity in the Chicago area and presently classifies cars at Glenn, Hawthorne and Markham Yards.² CN also would need the cooperation of non-Applicant railroads, but CREATE provides ample opportunities for such cooperation, and (as Barrington pointed out in its Scoping Comments at 11) SEA has an obligation to look at reasonable alternatives outside of the Board's jurisdiction and has done so in preparation of other Environmental Impact Statements.³ 40 C.F.R. § 1502.14(c).

² CN Application at 22.

³ See *Bayport Loop Final Environmental Impact Statement*, STB Fin. Docket No. 34079, p.1-9 (May 2003).

Similarly, the alternative route outlined in the Barrington Comments (pages 11-13) is a reasonable alternative. CN could use the described route to connect its five rail lines in the Chicago area and to expand opportunities for EJ&E shippers. Like the CREATE Central Corridor, CN would need to replicate the yard capacity it has planned for Kirk and East Joliet Yards elsewhere among its numerous Chicago area yards. On the other hand, CN would not need to get any ownership or operating rights that it does not already have. This makes the alternative route a reasonable alternative deserving of analysis in the EIS.

In addition to these alternatives, SEA has an obligation to look at any reasonable alternatives to the Proposed Transaction.

Hazardous Materials Transportation

The Final Scope of Study indicates that the EIS will access CN's safety record only in the United States. The only stated rationale for not accessing CN's overall safety record is that "rail safety statistics in Canada are collected and analyzed in a different manner than that used in the United States." Final Scope of Study at 6. This is an arbitrary reason to limit the analysis of CN's safety record. Canadian data on CN's safety record may not be available in an easily comparable format, but it is relevant to significant adverse impacts and it is available. We would submit that SEA is obligated to obtain and consider it. See 40 C.F.R. § 1502.22(a).

Planning Horizon

The Final Scope of Study indicates that the EIS will use a year 2015 threshold for analysis of the effects of increased rail traffic. Final Scope of Study at 7. Barrington had urged SEA to look well beyond 2015 to 2035, based in part on the fact that the U.S. Department of Transportation has projected rail demand out to 2035 and the Association of American Railroads has issued a study to identify rail freight infrastructure needs to cover the U.S. Department of Transportation's projection. See Barrington Comments at 4, fn. 6. The Final Scope of Study concludes that the longer time horizons suggested by Barrington and other commenters are too long to produce reliable information and that the three-year horizon proposed by CN is too short. SEA selected a 2015 planning horizon for rail traffic because it would provide at least five years of data. Final Scope of Study at 7. However, SEA does not explain why going beyond a minimum of five years would fail to produce reasonable and reliable forecasts.

Besides the U.S. Department of Transportation rail projection and the corresponding AAR study, mentioned above, there are other very good reasons to look beyond 2015. SEA needs to look beyond 2015 in order to capture the foreseeable impact of Western Canadian intermodal traffic. CN has made it very clear that expanding its intermodal business in the corridor between the Port of Prince Rupert and Memphis is a key element of the Proposed Transaction. Mr. Harrison has said that the Proposed Transaction "will certainly, for one example, help us from a marketing standpoint with Prince Rupert to Memphis service, which is going to be so important to us."⁴ As Barrington noted in its Reply to the Application, the Port of Prince Rupert is the deepest natural harbor in North America, with sufficient clearance for container ships with capacity up to 12,000 20-foot units (TEUs). It is the shortest route (both in time and

⁴ Statement of E. Hunter Harrison, "CN to Acquire Key Operations of Elgin, Joliet & Eastern Railway," CN Analyst Conference Call (September 26, 2007).

distance) between North America and all of the major Asian Ports.⁵ Don Krusel, the President and CEO of the Prince Rupert Port Authority has projected that the market share of the Port of Prince Rupert and Vancouver Port could be as much as 9 million TEUs by 2020.⁶ An article in the Financial Post (Vancouver, B.C.) on May 22, 2008, reported that the Port of Prince Rupert is billed as the "St. Lawrence of the West," with cranes capable of off-loading 9,600 TEUs per week. The Port of Prince Rupert's intermodal capabilities will grow steadily for decades to come. SEA needs to look beyond 2015 in order to capture the foreseeable impact of Western Canadian intermodal traffic.

Barrington would acknowledge that rate forecasts beyond 2015 would have less reliability than shorter-period forecasts. However, SEA could collect forecast data beyond 2015 for purposes of a complete and thorough analysis even if it had to give the out-years less weight in its analysis and conclusions. NEPA is designed to ensure that "important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast."⁷ Given the importance of not underestimating the impact of the Proposed Transaction, it is both reasonable and appropriate for SEA to either gather data beyond 2015 or at least explain why such data has no analytical value in this environmental review.

In addition, we support the idea discussed during the Chicago area environmental agency meetings of evaluating the full capacity of the EJ&E line. This evaluation would require SEA to look beyond 2015.

Air Quality

The Final Scope of Study indicates that the EIS will evaluate air emissions from increased railroad operations in the Chicago Metropolitan Area. Final Scope of Study at 12. That is not sufficient given the much broader geographic scope of the Proposed Transaction.

CN has made it abundantly clear that the Proposed Transaction means more than just the re-routing of freight traffic from inner Chicago to outer Chicago. One example is intermodal traffic from the Port of Prince Rupert through Chicago to Memphis.⁸ Mr. Harrison has said that the Proposed Transaction will "change significantly [CN's] whole U.S. network" and that "from an operational strategic standpoint, this just has – it's huge value to us. I think we really have maybe only scratched the surface on what the potential might be down the line."⁹ This will result in additional locomotive emissions outside of the Chicago Metropolitan Area and additional emissions from trucks serving CN's Memphis intermodal hub.

⁵ Reply of the Village of Barrington to the Railroad Control Application and Petition Suggesting Procedural Schedule of Canadian National Railway Company and Grand Trunk Corporation, November 19, 2007, at 6.

⁶ *Id.* at 8.

⁷ *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

⁸ See footnote 4 and the referenced quotation.

⁹ *Id.*

Clearly, the Proposed Transaction would have direct and indirect effects on air quality well beyond the Chicago Metropolitan Area. See 40 C.F.R. § 1508.8. SEA must evaluate air quality impacts beyond the Chicago Metropolitan Area.

Cumulative Impacts

In 1998, Canadian National purchased the Illinois Central Railroad and connected its existing lines across all of Canada with a line from Chicago to New Orleans. In 2001, CN purchased the Wisconsin Central Railroad, which gave CN a network of rail lines encircling Lake Superior, Lakes Michigan and Huron and enhanced CN's connections between Chicago and Western Canada. In 2004, CN acquired Great Lakes Transportation, the owner of the Bessemer & Lake Erie Railroad, the Duluth, Missabe and Iron Range Railway, and the Pittsburgh Conneaut Dock Company. This transaction, among other things, allowed CN to close an ownership gap in Duluth, Minnesota and further enhance its Western Canada to Chicago routings. The Surface Transportation Board did not do an environmental impact statement in connection with any of the above-listed transactions. The Board has not evaluated the cumulative effect of these transactions since CN's acquisition of the Illinois Central Railroad in 1999.

In addition, SEA must examine the effects of the proposed acquisition of the Dakota, Minnesota & Eastern Railroad Corporation ("DM&E") and the Iowa, Chicago & Eastern Railroad Corporation ("IC&E") by Canadian Pacific Railway Corporation ("CP"). DM&E's construction into the Powder River Basin is more than foreseeable – it is a virtual certainty – and any problems with gathering data on the movement of DM&E PRB coal traffic over the IC&E and/or CP lines does not excuse SEA from attempting to do so in this EIS.

It is imperative that the Board now consider the cumulative effect of the prior CN transactions listed above and of the movement of DM&E PRB coal traffic over the IC&E and/or CP lines in connection with the Proposed Transaction. See 40 C.F.R. § 1508.7 (requiring an environmental impact statement to consider "incremental impact of the action when added to other past...actions"); *Habitat Educ. Center v. Bosworth*, 363 F.Supp.2d 1090, 1098 (E.D. Wis. 2005) (invalidating an EIS where the EIS failed to include any evidence that the agency had considered five other approved timber projects in the area); *Idaho Conserv. League v. Bennett*, 2005 WL 1041396 at *5 (D. Idaho 2005) (invalidating an environmental assessment because of the "failure...to discuss in sufficient detail the connection between prior activities and the current project, which is critical to understanding what alternatives may produce the least environmental harm while still meeting project goals"); Council on Environmental Quality, *Considering Cumulative Effects* at 8, available at <http://www.nepa.gov/nepa/ccenepa/sec1.pdf> ("Repeated actions may cause effects to build up through simple addition...and the same or different actions may produce effects that interact to produce cumulative effects greater than the sum of the effects").

Mitigation

The Final Scope of Study includes a section on mitigation and includes a brief discussion of voluntary mitigation. That discussion concludes with the following sentence:

Voluntary mitigation and mutually acceptable negotiated agreements can result in cost sharing to allow completion of very costly measures, such as grade-separated crossings, which primarily benefit the community rather than the

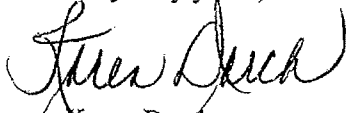
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railroad, and thus are typically funded primarily by entities other than the railroad.

Final Scope of Study at 16. SEA should not lose sight of the fact that the Proposed Transaction is CN's project. If SEA recommends that the Board approve the Proposed Transaction with mitigation measures, those measures will be to avoid an adverse environmental impact, minimize the magnitude of an adverse environmental impact, rectify an adverse environmental impact or compensate for an adverse environmental impact. See 40 C.F.R. 1508.20. Mitigation measures recommended by SEA would not be a benefit to the community. They would instead be an attempt to reduce a harm. SEA should not confuse CN's Proposed Transaction with a government-proposed grade separation project, where the railroad makes a modest financial contribution to the overall cost because it is not the railroad's project. This is a Class I railroad engaged in a private enterprise, proposing to acquire another railroad exclusively to benefit its business interests for the benefit of its shareholders. Barrington strenuously objects to SEA's suggestion that mitigation of an adverse environmental impact is a "benefit" to communities and that the cost of such mitigation (ordered as a condition of approval of the transaction) would be "typically funded" by entities other than the railroad.

It is our position that, if approved, Canadian National will be responsible for the costs of mitigation of the adverse environmental effects of its Proposed Transaction.

Very truly yours,


Karen Darch
Village President

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June 4, 2008

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Via Electronic Mail

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

Dear Ms. Rutson:

As discussed with Jim Hinda and other personnel in your office, a letter regarding the above proceeding was sent to you by Karen Darch, Village President of Barrington, Illinois, on May 23, 2008. As this letter has not been placed on file in the docket and could not be located by Surface Transportation Board personnel, we hereby resubmit the enclosed letter for inclusion in the record of this proceeding.

We appreciate your understanding in this matter, and please feel free to contact us if you have any questions. Thank you.

Respectfully submitted,



Edward J. Fishman
Attorney for Village of Barrington, Illinois

Enclosure