

Before the  
SURFACE TRANSPORTATION BOARD

Finance Docket No. 35087 (Sub-No. 8)

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

PETITION SEEKING RECONSIDERATION

The Village of Barrington, Illinois respectfully seeks reconsideration of the Board's May 12, 2015 Decision.

Summary of Argument

In its May 12, 2015, the Board, without taking a hard look at relevant evidence developed during the oversight period, denied reopening by relying on the fundamentally erroneous conclusion in the *Final Decision* that “the intersection at U.S. 14 did not meet the Board’s criteria for a grade separation mitigation condition.”<sup>1</sup> As the Board has candidly admitted, that conclusion was “[b]ased on OEA’s analysis and recommendations.”<sup>2</sup> Although Barrington had hoped that the new Board members would take a fresh look, the Board’s Decision demonstrates that the Board has once again refused to reexamine OEA’s pre-approval analysis in light of new evidence and materially changed conditions that have clearly revealed the shortcomings and inherent material

<sup>1</sup> Slip op. at 2.

<sup>2</sup> Slip op. at 8.

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errors in OEA's 2008 analysis. In seeking reconsideration, Barrington respectfully submits that the Board's continued reliance on OEA's 2008 analysis and its refusal to take a hard look at new evidence generated during the oversight period that was unforeseen in 2008 constitutes material error.

### Argument

As a preface, Barrington acknowledges that its repeated attempts to secure grade separation mitigation funded by CN during the oversight period the Board reserved for this transaction appears to be trying the patience of the Board. Barrington also acknowledges that its current request for reconsideration will likely do nothing to endear its interests to the Board members and its staff. However, the Village of Barrington cannot walk away from its efforts to secure railroad funding for this vital mitigation project, which has been necessitated solely by the Board's approval of CN's acquisition and the ensuing impacts of CN's freight operations through the Village of Barrington. Simply stated, there is no way that those negative traffic impacts can be substantially reduced other than by the construction of a grade separation in Barrington at U.S. Highway 14. This means that Barrington is between the proverbial rock and hard place in needing to return to the Board during the oversight period with evidence that should compel Board action.

In seeking reconsideration, Barrington requests the Board to move beyond the appellate court's "waiver" decision<sup>3</sup> that penalized Barrington for its prior counsel's failure to mention Barrington's 2008 projections in the Opening Brief filed with the Court. As was made clear during the course of oral argument, the failure to have raised the argument of disparate treatment in the initial appellate court brief caused the Court to affirm the Board's decision without considering that argument. That waiver, however, cannot change the reality of what is occurring in Barrington as a direct consequence of the transaction.

Despite the Board's repeated contentions that in 2008 it adequately reviewed the environmental impacts Barrington would experience resulting from CN operations on the EJ&E, the record of this and the underlying docket simply cannot support that contention. To the contrary, a thorough review of the record would require the Board to acknowledge the analytical errors that were made in 2008 that resulted in the denial of mitigation that would relieve some of the harms visited on Barrington and for the surrounding region by CN's vastly increased operations. Barrington and the surrounding region should not be condemned to suffer in perpetuity because of the failure to

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<sup>3</sup> In 2009/2010, Barrington sought judicial review of the Board's decision that failed to mitigate the harms in Barrington. Due to a failure to adequately raise the issue of disparate treatment in its opening brief, Barrington's arguments regarding disparate treatment were "waived" despite the fact that in oral arguments one judge referred to Barrington's traffic study as a "strong argument that the Board had to respond to." (November 10, 2010 Oral Arguments transcript at page 74.)

include a paragraph in an Opening Brief that caused the Court to refuse to adjudicate the issue of whether the Board erred in relying on OEA's analysis that was never subject to any public review due to the Board's haste to close the proceeding in order to accommodate CN's timeline for the transaction.<sup>4</sup>

While Barrington acknowledges that the Board is correct in stating that "agencies have considerable discretion in establishing the approach and methodology to be used in EIS studies," that does not mean that the Board has carte blanche to disregard Barrington's evidence and fail to explain its apparent belief that Barrington's two traffic studies are flawed, inaccurate, and/or immaterial. Barrington also points out that the Board has the discretion to reopen if it determines that material error was committed.<sup>5</sup>

In 2008 the Board properly employed its powers under NEPA to offer relief to Aurora and Lynwood. It should do the same for Barrington. Because CN closed the transaction fully aware that the Board had retained oversight to augment mitigation if necessary, CN's arguments about administrative finality are baseless post hoc efforts to avoid any responsibility for the harms it is

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<sup>4</sup> Barrington highlights the rushed NEPA process for the 198-mile EJ&E transaction by juxtaposing it to OEA's recent release on May 22, 2015 of the FEIS for the proposed construction and operation of a 43-mile rail line between Levan and Salina, Utah. The DEIS for that transaction was issued in 2007 and a supplemental draft in 2014, meaning the Board took eight years to carefully conduct the environmental review for that application even though it was mostly considering wetlands impacts in a relatively unpopulated area.

<sup>5</sup> While Barrington acknowledges that it will likely be embarrassing for the Board to admit material error, fear of embarrassment shouldn't be a defense in light of the reality that such error is penalizing a large impacted population in the nation's rail hub into perpetuity.

inflicting on Barrington. In seeking reconsideration, Barrington is simply asking the Board to rectify past errors and, based on evidence developed during the oversight period, to require CN to pay its fair share of the cost of a single grade separation at the U.S. 14 crossing.

In order to highlight the value of an oversight period that focuses on current realities, the Board's attention is respectfully invited to the *Final Regulatory Impact Analysis* ("RIA") released by the Pipeline and Hazardous Materials Safety Administration ("PHMSA") in May 2015. In its RIA, PHMSA strongly criticized AAR for arguing "that ECP brakes are not reliable ... and are an unproven technology that is not ready for wide spread deployment."<sup>6</sup> As PHMSA explained, "AAR relies on its own evidence—developed after publication of the NPRM—while discounting all other sources." PHMSA then pointed to the reality that "the evidence firmly establishes that ECP braking is a 'mature technology' that can, among other things, reduce derailment frequencies."<sup>7</sup> As PHMSA also observed, because ECP brake systems are currently in use in the United States and in other countries and because of other evidence of which both PHMSA and AAR were aware, AAR was deemed to be "looking at [the] issues through the wrong end of the lens."<sup>8</sup>

It is respectfully submitted that the Board reasoning vis-a-vis Barrington is remarkably similar to the AAR approach and is subject to the same criticism.

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<sup>6</sup> RIA at 222.

<sup>7</sup> Id.

<sup>8</sup> Id. at 223

By relying on the initial 2008 flawed conclusion that “the Barrington area total delay time would increase by 4% and 5% during the AM and PM peak periods,” the Board continues to rely on its own evidence while discounting all other evidence that has subsequently repudiated the Board’s flawed conclusion.<sup>9</sup>

To summarize the regulatory record of the underlying docket (FD-30587):

1. In the July 2008 DEIS, OEA “identified 15 highway/at-grade crossings as “Potentially Substantially Affected” by the Proposed Action in Chapter 4, Section 4.3.1.3, meaning the at-grade crossings would likely experience a serious impact on the overall mobility of the respective communities under the Proposed Action due to a substantial increase in queue length, vehicle delay, and a decrease in highway/rail at-grade crossing level of service (LOS).”<sup>10</sup> U.S. Highway 14 in Barrington was not on that list, so it failed to receive any further consideration for crossing-specific mitigation, up to and including a grade separation. For all practical purposes, the U.S. Highway 14 crossing was officially off the Board’s radar when it came to fashioning crossing-specific mitigation.
2. As a result of that omission, in 2008 Barrington retained Civiltech to conduct a state-of-the-art VISSIM traffic analysis on its behalf. The results of that traffic analysis were completely at odds with OEA’s DEIS analysis and showed that two of the Village’s crossings

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<sup>9</sup> Final Decision at 45, n.101.

<sup>10</sup> DEIS Executive Summary at page 40.

would be substantially affected due to both vehicle delays and expected substantial increases in queue lengths. Barrington filed DEIS comments on September 30, 2008 summarizing the Civiltech analysis for the Board.<sup>11</sup>

3. In early December 2008, OEA released the FEIS – which included a Barrington-specific analysis (known as the VOBTOA) that OEA said was undertaken in September 2008. OEA claimed this analysis was in response to Barrington’s DEIS comments, but that was not possible because OEA couldn’t have undertaken its analysis in September 2008 in response to Barrington’s DEIS comments because Barrington’s comments were not filed until the last day of September 2008. Instead, OEA’s analysis (which didn’t examine specific crossings, but improperly aggregated all of Barrington’s crossings in a combined analysis – a methodology only used in Barrington and nowhere else on the 198-mile span of the EJ&E) seemed meant to negate Barrington’s concerns, rather than illuminate the environmental impacts of the transaction specific to Barrington. Most importantly, the FEIS suppressed and made no mention of Barrington’s projections. Hence, there is no indication

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<sup>11</sup> If the Board had been alerted to Barrington’s 2008 VISSIM traffic study, it would have learned that Barrington, assuming 10,000-foot trains moving at 39 mph, had projected additional delays of up to 249 hours, which is well over the 40-hour delay threshold.

whatsoever that the Board members were ever made aware of those projections.

4. On December 24, 2008, the Board released its approval decision for the transaction. While the U.S. Highway 14 experiences almost identical impacts to those experienced at U.S. 30 in Lynwood and at U.S. 34 in Aurora, it was not granted grade separation relief as those two crossings were granted. That Decision never even acknowledged the discrepancy between Barrington's traffic analysis and OEA's traffic analysis, but again defaulted to the contested claims it made in the FEIS that the delays impacts would only amount to 4 to 5%.<sup>12</sup> However, Barrington, took some measure of comfort because the Board retained jurisdiction for the transaction, stating: "The Board retains jurisdiction to impose additional conditions and take other action if, and to the extent, the Board determines it is necessary to address matters related to operations following the transfer of control."<sup>13</sup>

As a review of the FEIS and the *Final Decision* conclusively proves, those documents *never* mentioned Barrington's evidence of projected additional delays that were attributed solely to CN's expanded operations. Instead, the Board relied only on its own evidence, developed by HDR, OEA's contractor, in

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<sup>12</sup> December 24, 2008 Approval Decision at page 45 FN 101.

<sup>13</sup> December 24, 2008 Approval Decision at page 26.

the *Village of Barrington Traffic Operational Analysis* (VOBTOA),<sup>14</sup> which was limited to only two hours of the day. Had OEA and HDR focused on the validity of Barrington's findings regarding delay after Barrington's DEIS comments were received instead of ignoring them, OEA would have squarely brought Barrington's projections to the Board's attention. Had that crucial step been taken, Barrington believes that the matter would have been properly resolved several years ago. Unfortunately, no mention was ever made at any point in the FEIS of Barrington's projections. As a result, the Board never mentioned nor refuted Barrington's traffic analysis projections in its *Final Decision*.

Rather ironically, the Board's conclusion that the U.S. 14 crossing "did not meet or exceed any of the three thresholds to be considered 'substantially affected'" is undermined by the fact that the VOBTOA showed that projected queue lengths could be expected to exceed all other crossings on the entire EJ&E line. Given this evidence alone, the Board's 2008, 2012 and 2015 conclusions cannot withstand any scrutiny. Hence, Barrington must once again question how the Board can continue to ignore the new evidence that Barrington has brought to its attention regarding unanticipated traffic flows that are now causing CN to exceed the projected average volumes of daily trains, as well as evidence that train lengths during the course of a day routinely exceed the paltry projected average of 6,829 feet.

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<sup>14</sup> FEIS, Appendix A.5

Indeed, in its most recent Monthly Report, CN has admitted to an average of 20.6 trains daily, so even the Board's claims on daily train counts were already outdated by the time it released its May 12 Decision. As the new evidence gleaned from CN earnings statements and investor calls reflect, there is nothing to indicate that this average – as well as the average length of trains – will not continue to increase in the future as CN pushes more and more traffic on the former EJ&E line in order to avoid moving through the congested Chicago rail network.

In choosing to brush off Barrington's request that the Board require CN to report the actual lengths that are passing through Barrington, the Board has ignored the undeniable fact that such information would be the best measure of the actual impact on vehicular traffic that moves over this Strategic Regional Arterial (SRA) highway.<sup>15</sup> Simply stated, even if a 9,500-foot long train does not block the crossing for more than ten minutes, a slow moving train that is nearly two miles in length is going to have an undeniable adverse impact on vehicular traffic that must wait for the train to pass. The substantial impact is measured in terms of additional delay and extended queue lengths. Barrington officials simply cannot understand the Board's unwillingness during the course of oversight to focus on this basic fact.<sup>16</sup> In the absence of any conclusive evidence, what is the basis of the Board's unsupported comment that "the

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<sup>15</sup> As Barrington has repeatedly noted, the Board never mentioned the fact that U.S. 14 is an SRA, a designation that played a significant role in the Board's decision to award grade separation mitigation to Aurora and Lynwood.

<sup>16</sup> Slip op. at 5, n.9.

length of trains going through Barrington is not substantially greater than the projected length of trains considered by the Board in its *Final Decision*”?<sup>17</sup>

Without question, the average length and number of trains that moved through Barrington in 2014 is ancient history and cannot be viewed as a harbinger of what will happen by the end of 2015 and beyond.

Most importantly, Barrington cannot help but note that the Board has not taken account of the evidence, developed post-*Final Decision*, that CN, over two years ago, candidly admitted that double tracking the line through Barrington is not out of the question. Although CN sought to downplay that possibility in opposing reopening, the fact remains that CN, in an email dated April 05, 2013, directed Joseph J. Emry, P.E., a Civiltech employee, to modify the draft minutes of a March 22, 2013 meeting with CN regarding a U.S. Route 14 Grade Separation at the CN/EJ&E Railway, that initially read as follows: “*CN stated that they have no current plans to add a second track in this area.*” However, after the meeting, the railroad requested that the line in question be amended to read: “*CN confirmed that a second track in this area would be consistent with other double-tracking projects completed and planned since CN’s takeover of the former EJE.*”

As the Board is aware, Barrington met with success in its attempt to obtain a TIGER Grant from U.S. DOT, which, along with an additional investment made by the Illinois Department of Transportation, obviously

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<sup>17</sup> Id. at 4.

recognized the need to address the problems created by CN's expanded rail operations.

In denying reopening, the Board has referenced the PHMSA rulemaking and the “[n]ew requirements that would affect the movement of oil by rail,”<sup>18</sup> and the DOT's Emergency Orders issued in April and May of 2014 that used “TSA-defined High Threat Urban Areas designations.”<sup>19</sup> What the Board fails to appreciate is that the former EJ&E line allows CN to avoid Chicago and its High Treat Urban Area designation while simultaneously shifting the risk to Barrington. Rather ironically, this shifting of routing transfers what are now defined as “high hazard flammable” CN trains from lines that feature numerous grade separations to a community that lacks a single grade separation. Moreover, given the fact that if a HHFT were to derail in Barrington, it could potentially block all four of the crossings in that community, the new PHMSA regulations offer no relief to Barrington. Instead, the new regulations inadvertently *increase* the threat to public safety.

Furthermore, it should be carefully noted that the HHFT definition applies only to trains that are “comprised of 20 or more loaded tank cars of a Class 3 flammable liquid in a continuous block or 35 or more loaded tank cars of a Class 3 flammable liquid across the entire train.”<sup>20</sup> The new regulations do not apply to manifest trains that contain 34 tank cars loaded with one million

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<sup>18</sup> Slip op. at 7.

<sup>19</sup> Id.

<sup>20</sup> 80 Fed. Reg. 26645.

gallons of hazmat if the tank cars are not in a continuous 20-car block. Given the fact that PHMSA has assumed that “any catastrophic event will stem from a derailment resulting in the damage of 5 or more tank cars,” it should be readily apparent that an incident involving a manifest train that fails to meet the HHFT definition could produce tragic results in Barrington, especially if first responders lack the ability to cross over the line at any point inside of Barrington and a timely mass evacuation is impeded.

Although the Board now says that “the Final EIS recognized that increases in freight rail traffic on the EJ&E line would also increase the risk of adverse hazardous materials incidents,” it is respectfully submitted that the Final EIS could not have anticipated the surge of crude by rail shipments as that market was barely on the radar screen of the railroads. Nor could it have recognized the extremely volatile nature of shipments of Bakken crude and the increased volumes. Without question, these movements, which were not anticipated in 2008 when the *Final Decision* was being written, have evolved during the oversight period. As such, they constitute new evidence that has never been properly considered by the Board. Because the new PHMSA regulations have further shifted the risk away from Chicago to Barrington, and because recent CN pronouncements leave no doubt that CN intends to fully develop the flow of such commodities through Barrington,<sup>21</sup> now is the time for

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<sup>21</sup> Barrington stresses that it fully recognizes that CN must be afforded the right to develop its business and to shift traffic over to the former EJ&E line. Hence, Barrington cannot be accused in any manner of being opposed to CN’s expansion of its traffic. However, it must be recognized that CN is the only

the Board to recognize and rectify its past errors rather than compound those errors by repeating the absurd mantra that “the Barrington area total delay time would increase by 4% and 5% during the AM and PM peak periods.”

Should the Board refuse to provide any meaningful relief, Barrington can only ask what is the point of oversight? Surely, oversight should amount to more than securing monthly blockage counts and updates on construction projects. Barrington believes that oversight should allow the Board to determine, as had been promised the public in 2008, whether OEA’s pre-transaction assumptions about environmental impacts are playing out as expected, and whether accompanying mitigation mandates are working out as intended.

In essence, the Board seems to be excluding Barrington from making use of oversight protection. That exclusion fails to meet the sense of American justice that would be best served if the Board would belatedly recognize that grade separation mitigation, which is vital to Barrington’s interests and the interests of the population of those living and working in the northwest region of the greater Chicagoland area, is fully supported by the record. Thus, Barrington respectfully and urgently requests that the Board exercise its retained jurisdiction to impose additional mitigation that will properly address unanticipated consequences.

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entity that stands to gain from its new route and, as such, it is only fair and equitable for CN to assume some responsibility for the harm that its expanded operations is inflicting on Barrington and its citizens.

Respectfully submitted,

/s/ Richard H. Streeter

Richard H. Streeter  
Counsel for the Village of Barrington, IL

Dated: June 4, 2015

Certificate of Service

I, Richard H. Streeter, do hereby certify that on June 4, 2015, I served a true copy of the foregoing Petition for Reopening on all parties of record by first-class mail, postage prepaid. I also served a copy by email on counsel for Canadian National Railway Company, Paul A. Cunningham and David A. Hirsh.

/s/ Richard H. Streeter