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Cynthia T. Brown
Chief, Section of Administration
Surface Transportation Board
Washington, D.C. 20423-0001

Re: *Canadian National Railway Company and Grand Trunk Corporation – Control – EJ&E West Company [Barrington Petition for Mitigation] (Docket No. FD 35087 (Sub-No. 8))*

Dear Ms. Brown:

This letter responds on behalf of Canadian National Railway Company and Grand Trunk Corporation (collectively, “CN”) to the Village of Barrington’s (“Barrington”) letter filed on February 23, 2015 (“Barrington Letter”). The Board should deny Barrington’s request for “oral argument or a comprehensive hearing.” Barrington Letter at 1.

Under the Board’s rules and precedents, this is not an appropriate case for oral argument or hearing. Outside of complaint proceedings, the Board grants oral argument or evidentiary hearings only in exceptional circumstances. *See, e.g., Tongue River R.R.—Construction & Operation—W. Alignment*, FD 30186 (Sub-No. 3), slip op. at 4 (STB served June 15, 2011) (“Generally, we rely on a written record to decide the cases before us.”) (citations omitted). Barrington cites one such instance – the hearing the Board held, on its own motion, regarding nationwide concerns about the quality of rail service after capacity limitations and weather problems reached a crisis point in early 2014. This is not such a case.

The only issue here is whether the Board should reopen to consider reversing a decision it made in 2008, and reiterated in 2012, that CN should not be required to fund a grade separation in Barrington as a condition of the Board’s approval of CN’s acquisition of the EJ&E line. The Board’s mitigation decision has already been the subject of an extensive EIS process (which included several public hearings in 2008), multiple Board and D.C. Circuit decisions, hundreds of pages of briefing, and hundreds of pages of evidentiary submissions.¹ Barrington has filed

¹ Barrington raised concerns about increased train traffic on the EJ&E line due to CN’s acquisition in multiple filings before the Board approved the acquisition, including 81 pages of comments on the Board’s Draft EIS (filed September 30, 2008), and the Board addressed those concerns in detail (*see* Decision No. 16, at 42-45). Barrington then sought judicial review of the Board’s decision in 2009, and lost in the D.C. Circuit. Barrington then filed a 34-page petition

HARKINS CUNNINGHAM LLP

Attorneys at Law

Cynthia T. Brown

February 25, 2015

Page 2

numerous verified statements and exhibits, presumably reflecting the strongest evidence it can muster after seven years of trying, and, as CN explained on December 16, 2014, and January 26, 2015, Barrington has failed to show any plausible basis for reopening this proceeding. Indeed, as CN detailed in those filings, Barrington's evidence fails even to raise a factual issue as to whether the Board's traffic projections in 2008 were reasonably accurate,² as to whether the Board's conclusion that Barrington's traffic problems are independent of CN's added trains was well-founded, or as to whether the composition of CN's traffic creates material new hazards that might merit imposition of a post-hoc multi-million-dollar grade separation condition.

There are no material factual issues that a hearing might illuminate, and there is no need to re-hash old arguments yet again in oral form.³ In the *Tongue River* case, the Board found that

for reopening, plus over 40 pages of supporting evidence, on October 14, 2011. When the Board denied that petition for reopening in November 2012, Barrington again sought review by the D.C. Circuit, and again lost.

On November 26, 2014, Barrington filed the present, second petition for reopening, consisting of a 34-page petition, plus a 36-page verified statement, plus nine evidentiary exhibits. After CN duly replied, on January 5 Barrington moved for leave to file an unauthorized sur-reply to CN's reply, contrary to 49 C.F.R. § 1104.13(c), filing a 4-page motion for leave, a 34-page sur-reply (longer than CN's reply), and two more verified statements. CN properly opposed that motion for waiver of the Board's rules, and filed a response (in essence, a sur-sur-reply) to Barrington's unauthorized sur-reply in case the Board accepted it. With its latest letter, which goes far beyond a simple request for oral argument or hearing, Barrington has added a third, 14-page, substantive filing (in essence, an unauthorized sur-sur-sur-reply) in support of its second petition for reopening.

² Barrington implicitly concedes as much when it says that it "wishes to get beyond the narrow issue of blockages and averages" – *i.e.*, the actual data about CN's operations, which are entirely consistent with the projections that informed the Board's 2008 decision. *See* Barrington Letter at 2. Instead, Barrington wants a hearing to address "what is reasonably foreseeable to happen" in the future. *Id.* In other words, Barrington wants a hearing in 2015 to entertain speculation about what might happen in, say, 2020, in order to try to change the Board's mind about a final decision it made in 2008.

³ A request for oral argument is appropriately denied where "all material issues of fact can be decided on the basis of written statements, and ... the proceeding can be processed efficiently without oral testimony," *see Delaware & H. Ry.—Discontinuance of Trackage Rights Exemption—In Susquehanna County, PA, & Broome, Tioga, Chemung, Steuben, Allegany, Livingston, Wyoming, Erie, & Genesee Counties, NY*, Docket No. AB-156 (Sub-No. 25X), slip op. at 2 (STB served Nov. 10, 2004), or where there is no showing that an oral hearing is "necessary for the development of a complete and accurate record" or "of a need to observe witness demeanor or to cross examine witnesses," *see CSX Transp., Inc.—Abandonment Exemption—In Harrison County, WV*, Docket No. AB-55 (Sub-No. 563X), slip op. at 1 (STB served Sept. 25, 1998). *See also Idaho N. & Pac. RR.—Abandonment & Discontinuance*

HARKINS CUNNINGHAM LLP

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Cynthia T. Brown

February 25, 2015

Page 3

there was “no need for an oral hearing” on an application after an EIS, public comments, public meetings and supplemental filings including verified statements. *Tongue River R.R.—Construction & Operation—W. Alignment*, FD 30186 (Sub-No. 3), slip op. at 12 (STB served Oct. 9, 2007). That conclusion applies even more strongly here after seven years of proceedings and after extensive written submissions on Barrington’s second petition for reopening.

CN respectfully asks the Board to put an end to Barrington’s repeated contravention of the Board’s rules (see footnote 1, above) by denying Barrington’s second petition for reopening based on the extensive and overwhelming record already before it.

Sincerely,



David A. Hirsh

Counsel for Canadian National Railway
Company and Grand Trunk Corporation

cc: All parties of record

Exemption—In Washington & Adams Counties, ID, 3 S.T.B. 50, 60-61 (1998) (same); *Schneider Transp., Inc.—Petition for Exemption*, Docket No. 40784, slip op. at 3 (ICC served June 14, 1995) (“Parties desiring an oral hearing have the burden to show ‘why the matter cannot be properly resolved under modified procedure.’ 49 CFR 1112.10 (1994).”)

CERTIFICATE OF SERVICE

I certify that I have this 25th day of February, 2015, caused a true copy of the foregoing Letter Response to Barrington's Request for Oral Hearing to be served upon all known parties of record in this proceeding by first-class mail or a more expeditious method.


Spencer R. Leroux