

LAW OFFICES OF
LOUIS E. GITOMER, LLC

LOUIS E. GITOMER
Lou@lgraillaw.com

MELANIE B. YASBIN
Melanie@lgraillaw.com
410-296-2205

600 BALTIMORE AVENUE, SUITE 301
TOWSON, MARYLAND 21204-4022
(410) 296-2250 • (202) 466-6532
FAX (410) 332-0885

240716

May 19, 2016

Ms. Cynthia T. Brown
Chief of the Section of Administration, Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423-0001

ENTERED
Office of Proceedings
May 19, 2016
Part of
Public Record

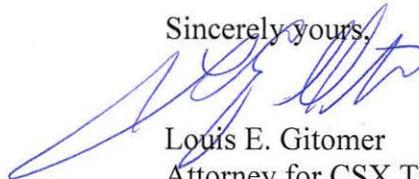
Re: **Docket No. FD 35522, CSX Transportation, Inc. –Acquisition of
Operating Easement – Grand Trunk Western Railroad Company**

Dear Ms. Brown:

Attached is the CSX Transportation, Inc. Response to the (1) Motion of the City of Chicago and Village of Evergreen Park for Leave to File a Reply to CSX's Reply to Petition of City of Chicago and Village of Evergreen Park and (2) Reply of the City of Chicago and Village of Evergreen Park to CSX's Reply to Petition of City of Chicago and Village of Evergreen Park to Reopen and Impose Sanctions. CSXT is e-filing the Reply.

Thank you for your assistance. If you have any questions, please contact me.

Sincerely yours,



Louis E. Gitomer
Attorney for CSX Transportation, Inc.

Attachment

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. FD 35522

CSX TRANSPORTATION, INC.—ACQUISITION OF OPERATING EASEMENT—
GRAND TRUNK WESTERN RAILROAD COMPANY

RESPONSE OF CSX TRANSPORTATION, INC. TO
(1) MOTION OF THE CITY OF CHICAGO AND VILLAGE OF EVERGREEN PARK FOR
LEAVE TO FILE A REPLY TO CSX'S REPLY TO PETITION OF CITY OF CHICAGO AND
VILLAGE OF EVERGREEN PARK AND
(2) REPLY OF THE CITY OF CHICAGO AND VILLAGE OF EVERGREEN PARK TO
CSX'S REPLY TO PETITION OF CITY OF CHICAGO AND VILLAGE OF EVERGREEN
PARK TO REOPEN AND IMPOSE SANCTIONS

Peter J. Shutz
Steven C. Armbrust
CSX TRANSPORTATION, INC.
500 Water Street
Jacksonville, FL 32202

Louis E. Gitomer
LAW OFFICES OF LOUIS E. GITOMER, LLC
600 Baltimore Avenue, Suite 301
Towson, MD 21204
(202) 466-6532

Charles D. Nottingham
CHARLES D. NOTTINGHAM, PLLC
1701 Pennsylvania Avenue, NW, Suite 300
Washington, DC 20006
(202) 461-2229

G. Paul Moates
Raymond A. Atkins
Matthew J. Warren
SIDLEY AUSTIN LLP
1501 K Street, NW
Washington, DC 20005
(202) 736-8000

Attorneys for: CSX TRANSPORTATION, INC.

Dated: May 19, 2016

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. FD 35522

CSX TRANSPORTATION, INC.—ACQUISITION OF OPERATING EASEMENT —
GRAND TRUNK WESTERN RAILROAD COMPANY

RESPONSE OF CSX TRANSPORTATION, INC. TO
(1) MOTION OF THE CITY OF CHICAGO AND VILLAGE OF EVERGREEN PARK FOR
LEAVE TO FILE A REPLY TO CSX’S REPLY TO PETITION OF CITY OF CHICAGO AND
VILLAGE OF EVERGREEN PARK AND
(2) REPLY OF THE CITY OF CHICAGO AND VILLAGE OF EVERGREEN PARK TO
CSX’S REPLY TO PETITION OF CITY OF CHICAGO AND VILLAGE OF EVERGREEN
PARK TO REOPEN AND IMPOSE SANCTIONS

CSX Transportation, Inc. (“CSXT”) responds in opposition to the (1) Motion of the City of Chicago and Village of Evergreen Park for Leave to File a Reply to CSX’s Reply to Petition of City of Chicago and Village of Evergreen Park (the “Motion”) and (2) Reply of the City of Chicago and Village of Evergreen Park to CSX’s Reply to Petition of City of Chicago and Village of Evergreen Park to Reopen and Impose Sanctions (the “Surreply”), both of which were filed on April 29, 2016. CSXT urges the Board to deny the Motion and the Surreply as out of time and unnecessary to complete the record. However, in the event the Board accepts the Surreply, CSXT requests that the Board similarly accept this brief response.

I. PETITIONERS’ MOTION FOR LEAVE TO FILE A REPLY SHOULD BE REJECTED AS OUT OF TIME AND UNNECESSARY TO COMPLETE THE RECORD.

The City of Chicago and the Village of Evergreen Park’s (“Petitioners”) Motion should be rejected under the Board’s rules for timely submissions and under the Board’s prohibition against surreplies.

Board rules provide that any reply or motion must be filed “within 20 days after the pleading is filed with the Board.” 49 C.F.R. § 1104.13(a). Petitioners’ Motion responds to CSXT’s Reply, filed on March 10, 2016 (the “March 10 Reply”). Any responsive motion to that filing would have been due on March 30, 2016. Instead, Petitioners waited until April 29, 2016—50 days after the March 10 Reply was filed—to file this Motion.¹ Petitioner’s Motion was filed significantly out of time and should be rejected on this basis alone.

Board rules also prohibit surreplies. 49 C.F.R. § 1104.13(c). The Board will allow surreplies in limited circumstances where the submission “provides a more complete record, clarifies arguments, will not prejudice any party, and does not unduly prolong the proceeding.”² Petitioners have not met this standard.

Petitioners’ Surreply simply reiterates the position stated in their February 12, 2016 Petition to Reopen and Impose Sanctions that CSXT has failed to comply with the conditions imposed in the *Approval Decision*.³ Petitioners provide no new or clarifying evidence that would complete the record. Instead, the sole basis for the Surreply and Motion appears to be Minutes from a November 5, 2012 Regular Meeting of the President and Board of Trustees of the Village of Evergreen Park (the “Minutes”), which are already part of the record in this proceeding.⁴

¹ Even if Petitioners had sought leave to reply to CSXT’s March 30, 2016 Reply (“March 30 Reply”)—and they did not—Petitioners’ Motion is out of time. Any response to the March 30 Reply would have been due on April 19, 2016.

² *BNSF Ry. Co. – Abandonment Exemption – in Kootenai Cty., ID*, STB Docket No. AB-6 (Sub-No. 468X) at 1 (served Nov. 27, 2009).

³ *CSX Transp., Inc.—Acquisition of Operating Easement—Grand Trunk Western R.R. Co.*, STB Docket No. FD 35522 (served Feb. 8, 2013) (“*Approval Decision*”).

⁴ The Village of Evergreen Park (“Evergreen Park”) filed the Minutes with the Board on November 28, 2012 as part of its comments on the Draft Environmental Assessment served on October 5, 2012 (the “Draft EA”). CSXT replied to those comments on December 12, 2012 (the “CSXT EA Comments”).

Petitioners contend that the Minutes evidence a commitment on CSXT's part not to operate trains over the Elsdon Line during the afternoon rush hour. No such commitment was ever made and the Final Environmental Assessment served by the Office of Environmental Analysis on January 9, 2013 (the "Final EA"), did not adopt this requested condition. The *Approval Decision* adopted the conditions proposed in the Final EA, not those requested by Evergreen Park.

Reliance on information that is already part of the record does nothing to "complete" or "correct" the record. Nor does Petitioners' Surreply clarify their arguments. Instead, Petitioners merely reiterate arguments that were made in their Petition to Reopen and that were considered and rejected over three years ago by OEA and the Board. This is precisely the sort of Motion that unduly prolongs proceedings and should be rejected. CSXT respectfully requests that the Motion be denied.

II. CSXT HAS FULLY COMPLIED WITH THE *APPROVAL DECISION*.

In their Surreply, Petitioners wrongly contend that CSXT has not complied with the *Approval Decision*. To the contrary, CSXT demonstrated in its March 10 Reply that it has fully complied with every condition in the *Approval Decision* and that CSXT has worked with the community to eliminate the causes of blocked crossings. March 10 Reply at 3. In addition to the evidence provided with CSXT's March 10 Reply, CSXT also provided additional information in its March 30 Reply, which addressed the collected community comments submitted by Petitioners on March 10, 2016 (the "Community Comments"). CSXT has extensively documented the significant investments it has made to improve the Elsdon Line, especially in Evergreen Park. CSXT provides an overview of those investments in subsection A, below. CSXT also responds to Petitioners' claims of "mischaracterizations" in CSXT's March 10 Reply. Surreply at 1. Specifically, CSXT responds to Petitioners' claims that CSXT (a) retracted

promises made to the community; (b) failed to abide by Voluntary Mitigation Measure 6 by blocking crossings for periods exceeding 10 minutes; and (c) violated its reporting requirements and commitment to public safety, all of which are unfounded.

A. CSXT Has Invested Heavily to Eliminate At-Grade Crossing Delays on the Elsdon Line.

CSXT has invested more than \$12 million in infrastructure improvements, including signal and grade crossing upgrades on the Elsdon Line. March 10 Reply at 7. CSXT has prioritized the elimination of at-grade crossing delays through Evergreen Park. CSXT has instituted weekly walking inspections of crossing approaches; installed equipment and developed analytical processes to enhance reporting capability and to remotely monitor the raising and lowering of gates on the Line at significant at-grade crossings; escalated the procedure to report false gate activations; and improved signals equipment to reduce false activations. *See* March 30 Reply at 2-3. Eliminating false gate activations has significantly reduced delays.

CSXT continues to take additional steps to improve the Line. CSXT explained in its March 30 Reply that it was installing a video surveillance system in Evergreen Park, which will deliver a live feed to CSXT dispatch and enhance CSXT's ability to respond to issues as they arise in real time. March 30 Reply at 4. As of May 4, 2016, the camera installations have been completed and are operational at all of the at-grade crossing in and near Evergreen Park, including: 103rd Street with views to 99th Street and 111th Street; 99th Street with a view to 103rd Street; 95th Street with a view East; 94th Street/Kedzie with a view to 95th Street; 91st Street with views to Kedzie/94th Street and 95th Street and the curve between 91st Street and 87th Street; 87th Street with views East and West; and 83rd Street with views to Columbus crossing and the Metra Diamond/ 83rd Street. Pictures from the video surveillance system are attached as Exhibit A.

CSXT has also submitted plans to the Illinois Commerce Commission to change the

island circuits at 94th Street and Kedzie Avenue and at 95th Street, which will reduce the waiting time at those crossings once a train has passed. March 30 Reply at 4. Finally, CSXT’s Positive Train Control (“PTC”) implementation plan includes PTC installation on the Elsdon Line (*Id.*), which will correspond to related signal system improvements at crossings. *Id.*

B. Petitioners’ Claims that CSXT Represented It Would Not Operate Trains During Rush Hour are Wrong.

Petitioners wrongly state that CSXT agreed not to operate trains through Evergreen Park during rush hour. Surreply at 2.⁵ Petitioners’ contention is based on the contents of the Minutes discussed at page 3 (which do not provide a transcript of what was said or attribution of who agreed to what, and that were prepared by Evergreen Park). Petitioners previously contended in this proceeding that CSXT had made a representation that trains would not operate at rush hour, a representation that CSXT never made and was further refuted in the CSXT EA Comments, at 10:

As to the prohibition on train traffic during rush hour, CSXT would [sic] commit to using its best efforts to avoid running trains through the Evergreen Park at rush hour. However, CSXT must point out that operating a railroad is a dynamic process and that there may be times when CSXT would have to operate trains through Evergreen Park during rush hour.

At no time did CSXT flatly promise “not to run trains during rush hour.” Surreply at 2. Rather CSXT stated that it would use “best efforts” not to do so. CSXT uses best efforts to avoid running trains on the Elsdon Line to avoid conflicts with Metra during rush hour. CSXT recognizes that conflicts with Metra are one of the causes of delays at Ashburn. As CSXT has explained, a majority of the at-grade crossing delays through Evergreen Park are caused because

⁵ CSXT has searched the record in this proceeding and found no indication of Evergreen Park’s “acceptance of CSX’s then proposed operations.” Surreply at 2.

northbound trains must cross tracks of the Norfolk Southern Railway Company (“NS”) at Ashburn, IL. The NS track at Ashburn is also used by Metra. March 10 Reply at 19-20.

Petitioners appear not to appreciate that railroad operations are dynamic, not static. Track availability can change minute to minute, especially in the most congested railroad location in the United States—Chicago. Even when CSXT receives a clear signal for trains moving toward Ashburn, due to events on the NS line at Ashburn, CSXT is sometimes required to stop trains in Evergreen Park. Recognizing this problem led CSXT to confer with NS and strengthen its protocols to alleviate delays to northbound trains on the Line because of conflicts with Metra trains at Ashburn. *Id.* at 10-11. CSXT took this action because the majority of delays involved northbound trains approaching Ashburn.

CSXT recognizes that conflicts with Metra are resolved by granting Metra priority. Therefore, CSXT uses its best efforts to avoid these conflicts with Metra and the delays to CSXT’s trains that are caused. However, there are times when CSXT must run trains during rush hour to avoid operating problems from rippling across the CSXT system and through Chicago.

To address what the Petitioners believe is a failed promise, they request imposition of a new condition that “for trains traveling in either direction: (a) CSX confirm that the line is clear and will be accommodated at the receiving end before a train may proceed; and (b) that CSX report on its performance under this requirement in its quarterly report.” Surreply at 2. This request is untimely and improperly broadens the issues before the Board. Moreover, delaying CSXT trains under criteria that no other railroad must meet would make CSXT less competitive, would reduce the fluidity of railroad operations through Chicago, and would require CSXT to re-route trains through other communities. *See* March 10 Reply at 19-20.

C. *Petitioners' Request that CSXT Cut All Trains that do not Clear At-Grade Crossings in Less Than 10 Minutes is Unreasonable.*

Petitioners again misinterpret Voluntary Mitigation Measure 6, which provides that “a public crossing must not be blocked longer than 10 minutes *unless it cannot be avoided.*” *Final EA* at 5 (quoting VM 6) (emphasis added). Petitioners contend that CSXT must cut all trains that will not clear an at-grade crossing in under 10 minutes.⁶ Under Petitioners’ request, a slow moving train that would take 15 minutes to pass an at-grade crossing would have to be stopped and cut. As CSXT explained in the March 10 Reply at 5-6 and at 12-13, it takes more than 30 minutes to cut a train. Under Petitioners’ reading of the condition, CSXT would be required in this instance to block the crossing for 30 minutes to cut the train, rather than allow the train to continue operations and block the crossing for a total of 15 minutes.

As an example of an actual problem with Petitioners’ suggestion, CSXT refers to an incident on May 1, 2016 at 87th Street. Train Q509 was moving slowly over the at-grade crossing at 87th Street. As a result, the gates at 87th Street were down for 10 minutes and 55 seconds. It appears that Petitioners are suggesting that once the gates were down for 10 minutes that CSXT should have stopped Train Q509 and cut the train, a procedure that would have taken at least 30 minutes. Instead, CSXT continued to run the train for another 55 seconds, saving at least an additional 29 minutes that the gates would have been down under Petitioners’ unreasonable proposal.

Petitioners’ interpretation of the condition is non-sensible and should be rejected.

⁶ “Condition VM-6 is not limited to blockages caused by stationary trains, but requires that, if trains are the cause of the blockage, they must be cut.” Surreply at 2-3.

D. Petitioners' Contention that CSXT's Operations Constitute a Public Safety Threat is Unfounded.

Petitioners seek to have CSXT held accountable for reporting failures and undefined “ongoing public safety threats” without providing any evidence of either. Surreply at 3. CSXT has consistently filed Quarterly Reports identifying all the information required by the *Approval Decision* as well as supplemental details on crossings blocked by trains and faulty gate activations. CSXT has been forthright about the condition of the line and has consistently involved the community in its efforts to improve operations.

CSXT's first priority is safety. CSXT is making improvements to the line to ensure that at-grade crossings are operating in a safe and efficient manner. CSXT will continue to work diligently with the community in its efforts to improve operations over the line and to minimize the impacts of its operations on the Petitioners and their citizens. CSXT will also continue to file Quarterly Reports with the Board.

CONCLUSION

CSXT respectfully requests that the Board deny the Motion, and in the alternative that the Board accept CSXT's response to the Surreply and deny the relief sought by Petitioners.

Respectfully submitted,



Peter J. Shudtz,
Steven C. Armbrust
CSX TRANSPORTATION, INC.
500 Water Street
Jacksonville, FL 32202

Louis E. Gitomer
LAW OFFICES OF LOUIS E. GITOMER, LLC
600 Baltimore Avenue, Suite 301
Towson, MD 21204
(202) 466-6532

Charles D. Nottingham
CHARLES D. NOTTINGHAM, PLLC
1701 Pennsylvania Avenue, NW, Suite 300
Washington, DC 20006
(202) 461-2229

G. Paul Moates
Raymond A. Atkins
Matthew J. Warren
SIDLEY AUSTIN LLP
1501 K Street, NW
Washington, DC 20005
(202) 736-8000

Attorneys for: CSX TRANSPORTATION, INC.

Dated: May 19, 2016

CERTIFICATE OF SERVICE

I hereby certify that I have caused the Response of CSX Transportation, Inc., in Docket No. FD 35522, *CSX Transportation, Inc.—Acquisition of Operating Easement —Grand Trunk Western Railroad Company*, to be served electronically on the following parties of record.



Louis E. Gitomer
May 19, 2016

Honorable Kelly Burke
State Representative
Capitol Office 266-S Stratton Office Building
Springfield, IL 62706
kellyb@ilga.gov

Charles A. Spitulnik, Esq.
Kaplan Kirsch & Rockwell LLP
1001 Connecticut Avenue, N.W., Suite 800
Washington, DC 20036
cspitulnik@kaplankirsch.com

David A. Hirsh, Esq.
Harkins Cunningham
1700 K Street, NW, Suite 400
Washington, DC 20006-3804
dhirsh@harkinscunningham.com

Todd Maisch
Illinois Chamber of Commerce
300 S. Wacker Drive, Suite 1600
Chicago, IL 60606
tmaisch@ilchamber.org

Theresa Mintel
Chicagoland Chamber of Commerce
410 N. Michigan Avenue, Suite 900
Chicago, IL 60611-4241
tmintel@chicagolandchamber.org

Michael S. Wolly, Esq.
Zwerdling Paul Leibig Kahn & Wolly
1025 Connecticut Ave NW Suite 712
Washington, DC 20036
mwoolly@zwerdling.com

EXHIBIT A – PHOTOGRAPHS OF EVERGREEN PARK AT-GRADE CROSSINGS

83rd St. Crossing Camera 1 263 2016-05-06 08:32:31



87th St. Crossing Camera 1 314 2016-05-06 08:38:43



91st St. Crossing Camera 1

288 2016-05-06 08:45:18



94th St. Crossing Camera 1 276 2016-05-06 08:51:42



95th St. Crossing Camera 0

0 2016-05-09 07:25:52



99th St. Crossing Camera 1 292 2016-05-09 07:22:42



103rd St. Crossing Camera 1

292 2016-05-09 07:15:31

