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SERVICE DATE – NOVEMBER 8, 2012

SURFACE TRANSPORTATION BOARD

DECISION

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

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

[Barrington Petition for Mitigation]

Digest:¹ In 2008, the Board authorized Canadian National Railway Company (CN) to acquire control of EJ&E West Company. The Village of Barrington, Ill. (Barrington) has asked the Board to require CN, as a condition of that approval, to pay for all costs involved in constructing a grade separated crossing at U.S. Route 14 in Barrington. This decision finds that Barrington has not produced new evidence that would warrant the imposition of an additional condition requiring CN to construct the requested grade separation. Nor has Barrington shown that the Board materially erred in its 2008 decision by relying on the environmental analysis performed at that time.

Decided: November 7, 2012

In the lead docket in this matter, Docket No. FD 35087, the Board approved the acquisition of control by Canadian National Railway Company and Grand Trunk Corporation (collectively, CN) of EJ&E West Company (EJ&E), subject to numerous conditions, including a monitoring and oversight condition under which the Board retained jurisdiction to impose additional conditions and take other action if necessary. See Can. Nat'l Ry.—Control—EJ&E W. Co., FD 35087 (STB served Dec. 24, 2008) (Final Decision), aff'd sub nom. Vill. of Barrington v. STB, 636 F.3d 650 (D.C. Cir. 2011) (Village of Barrington). In the Final Decision, the Board concluded that a grade separation was not warranted in Barrington, Ill.²

On October 14, 2011, the Village of Barrington (Barrington) filed a petition seeking imposition of additional mitigation pursuant to the Board's continuing oversight jurisdiction and,

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

² See Final Decision at 45 & n.101.

in the alternative, seeking to reopen the proceeding.³ Specifically, Barrington requests that the Board impose additional mitigation that would require CN to provide 100 percent of the funding for a grade separation (overpass or underpass) at the intersection of the CN/EJ&E rail line and U.S. Route 14 (U.S. 14) in Barrington. CN replied to Barrington's petition on November 3, 2011. Barrington filed a rebuttal on November 14, 2011, to which CN replied on December 5, 2011.

As discussed below, the Board has carefully reviewed and considered the arguments made in Barrington's request, together with the supporting materials. The Board finds that Barrington has not presented new evidence that would materially affect the outcome of the Board's Final Decision and warrant the imposition of an additional condition requiring CN to construct the requested grade separation. Nor has Barrington shown that the Board materially erred in the Final Decision by relying on the analysis performed in the course of its review of the potential environmental effects of the transaction. Therefore, Barrington's request for additional mitigation will be denied.

BACKGROUND

2008 Approval

As noted above, this proceeding arises out of a prior proceeding involving the Board's approval of an application filed by CN to acquire control of the EJ&E. As part of the Board's review of such an application, the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq.*, requires that the Board examine the environmental effects that significantly affect the human environment and inform the public concerning those effects.⁴ Accordingly, prior to the Board's authorization of CN's acquisition of EJ&E, the Board's Office of Environmental Analysis (OEA)⁵ examined the potential environmental effects of the transaction. As part of its environmental review, and with the assistance of a third-party contractor, HDR,⁶ OEA performed

³ The Board created this sub-docket, FD 35087 (Sub-No. 8), for adjudicating Barrington's petition. Can. Nat'l Ry.—Control—EJ&E W. Co., FD 35087 (Sub-No. 8) (STB served Nov. 1, 2011). The following parties submitted comments in support of Barrington's petition: United States Senators Richard J. Durbin and Mark Kirk; United States Representatives Joe Walsh, Don Manzullo, Robert Dold, and Peter Roskam; Village of Tower Lakes, Ill.; City of Aurora, Ill.; Village of Lake Barrington, Ill.; Barrington Township, Ill.; Village of Palatine, Ill.; Village of South Barrington, Ill., City of Crystal Lake, Ill.; Village of Cary, Ill.; and Chicago Metropolitan Agency for Planning.

⁴ Balt. Gas & Elec. Co. v. Natural Res. Def. Council, 462 U.S. 87, 97 (1983).

⁵ OEA was known as the Section of Environmental Analysis when the environmental review here was prepared.

⁶ Given the expertise needed to conduct a thorough environmental analysis, it would be impractical and prohibitively expensive for the Board to employ all of the various experts needed for its environmental review. Third-party contracting is a voluntary arrangement in which the

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an analysis of the transaction's potential impact on highway/rail at-grade crossings along the EJ&E rail line. Using CN's estimates for projected train traffic on the EJ&E rail line for the year 2015, which took into account proposed upgrades to the EJ&E rail line that would be completed before 2015,⁷ OEA examined all 112 crossings along the EJ&E rail line. This examination found that 87 of those crossings, including U.S. 14 in Barrington, met the Board's initial threshold for environmental analysis because they would experience projected average daily traffic volumes over the crossings of 2,500 or more vehicles per day.⁸

OEA then examined those 87 highway/rail at-grade crossings to determine which would be considered "substantially affected" by the transaction examining whether the crossing met or exceeded at least one of three threshold criteria: (1) crossing level of service (LOS)⁹ (where a crossing was at or over capacity and would be reduced to a Crossing LOS of E or F as a result of the transaction); (2) effects on queue length (where a transaction-related queue length would block another roadway that would not otherwise be blocked); and (3) total amount of delay for all vehicles stopped at a crossing (where a crossing would experience more than 40 hours of total transaction-related vehicle delay in a 24-hour period).¹⁰ These threshold criteria measurements were based on rail and car traffic projections for 2015.¹¹ The criteria for determining whether a crossing would be "substantially affected" were based on Federal Highway Administration (FHWA) guidelines.¹² Based on this analysis, OEA determined that 16 of the 87 crossings would be "substantially affected," because they met or exceeded at least one

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applicant pays for a contractor (here, HDR) to assist the Board, but the contractor works under the direction, control, and supervision of OEA. The agency provided guidance to HDR throughout the EIS process and is responsible for the scope and contents of the EIS, including the technical studies completed by HDR. See 40 C.F.R. § 1506.5(c), 49 C.F.R. §§ 1105.10(d), 1105.4(j).

⁷ See Draft Environmental Impact Statement (Draft EIS) at 4.1. CN's Operating Plan (Exhibit 15 of its application) proposed infrastructure improvements to the EJ&E rail line that would increase train volume capacity and efficiency of the line.

⁸ Draft EIS at 4.3-3.

⁹ LOS, as defined in the Highway Capacity Manual (a manual developed by the Federal Highway Administration, the Transportation Research Board, and the American Association of State Highway and Transportation Officials), refers to the efficiency at which a highway/rail at-grade crossing operates when a train passes through. Letters from A to F represent the LOS, with LOS A indicating relatively free-flowing traffic and LOS F indicating extreme congestion.

¹⁰ Draft EIS at 4.3.1.3.

¹¹ Based on CN's projections and public comments, OEA determined that 2015 represented the limit of what was reasonably foreseeable with regard to projected rail traffic on the EJ&E line and that projections beyond 2015 would be speculative. See Final Decision, slip op. at 41; Draft EIS at 2.2.1.5.

¹² Draft EIS at 4.3-9.

of the three threshold criteria.¹³ Once a crossing was determined to be “substantially affected,” OEA further evaluated whether each was potentially eligible for mitigation.¹⁴

More specifically, for the purposes presented here, OEA determined that one of the crossings included in the initial screening, in Barrington at U.S. Route 14, did not meet or exceed any of the three thresholds, and thus was not considered “substantially affected” under the screening criteria.

OEA included the results of this crossings analysis in its Draft EIS, which was made available for public review and comment on July 25, 2008. Barrington submitted comments, contending, first, that the Draft EIS analysis for Barrington did “not adequately account for the fact that traffic volumes in settings such as Barrington vary dramatically throughout the day.”¹⁵ Barrington specifically asserted that, had the Draft EIS “analyzed *peak hour* conditions of roadways,” it would have “properly accounted for variances in traffic volume.”¹⁶ Second, Barrington commented that OEA had failed to consider impacts to traffic flow caused by “nearby intersections, adjacent railroad crossings, traffic signals, and downstream flow restrictions.”¹⁷

In support of its comments on the Draft EIS, Barrington stated that it had prepared its own highway impact analysis (the 2008 VISSIM Model)¹⁸ to analyze and project the total vehicle delay over a 24-hour period at U.S. 14 and Lake-Cook Road in Barrington for 2015, based on the projected train traffic inputs used in the Draft EIS.¹⁹ Barrington provided the conclusions of its model, which projected that, as a result of CN’s acquisition, the crossing in Barrington at U.S. 14 would experience an increase of 135-205 hours in total vehicle delay per day—a greater delay than the approximately 30 hours of total vehicle delay forecasted for U.S. 14 for 2015 in the Draft EIS, and above the 40-hour threshold criterion employed in the Draft EIS.²⁰

In response to Barrington’s comments on the Draft EIS, and in light of Barrington’s preexisting high traffic volume and congestion, the Board’s third-party contractor, HDR, performed an additional traffic analysis specifically focused on the Barrington area. This further

¹³ Id. at 4.3-8-10.

¹⁴ Id.

¹⁵ Barrington Draft EIS Comments at 34-35.

¹⁶ Id. at 35.

¹⁷ Id.

¹⁸ VISSIM (a German acronym, which translated means “traffic in towns – simulation”) is a microscopic time step and behavior-based simulation program developed to model urban traffic and rail operations.

¹⁹ Barrington Draft EIS comments at 38, nn.67 & 68.

²⁰ Id. at 36-39. The 2008 VISSIM Model projected 135-205 hours of increased vehicular delay, based on a projection of 20 trains per day on the EJ&E line in 2015.

Barrington-specific study (the Village of Barrington Traffic Operational Analysis, or VOBTOA Study) also used a VISSIM model. The VOBTOA Study used VISSIM to, among other things, better understand the interaction between conditions on the local roadways in the Barrington area and the effects of the railroad crossings. The VOBTOA Study evaluated both existing (as of 2008) and projected 2015 traffic conditions on the U.S. 14, Main Street/Lake Cook Road, and Hough Street corridors in Barrington and the impact of two different rail lines, the EJ&E line and the Union Pacific/Northwest Line, which intersect in downtown Barrington, on vehicle traffic in those corridors. As suggested by Barrington's Draft EIS comments, the VOBTOA Study simulated peak hour conditions to represent a time period with higher expected car traffic volumes and resulting congestion and examined the impacts regionally across Barrington.²¹ The study assumed that one CN train of average length would travel on the EJ&E line during both the AM and PM peak hours, and noted that the assumption was conservative, because CN had agreed to adhere to existing freight train curfews, which could limit the number of trains on the EJ&E line during those periods.²² The study concluded that total vehicle delay time in the Barrington region would increase by 4% and 5% during the AM and PM peak periods, respectively, over the No-Action scenario (where no new CN trains would be added).²³

In the Final EIS, served December 5, 2008, OEA presented the VOBTOA Study and provided its recommended final mitigation conditions with respect to the acquisition transaction in its entirety. OEA's additional analysis in the Final EIS determined that of the 16 highway/rail at-grade crossings found to be "substantially affected" under the threshold criteria in the Draft EIS, five should be removed from that list and two added, resulting in 13 crossings designated as "substantially affected." U.S. 14, again, was not among the crossings determined to be "substantially affected."²⁴ In developing its final recommended mitigation conditions for those 13 "substantially affected" crossings, OEA considered a host of factors beyond the three screening criteria discussed above, including vehicle exposure, the importance of the highway at the particular crossing to regional traffic flows, preexisting congestion, existing structures (such as roadway configuration and mature trees), and the cost of a grade separation.²⁵ OEA's additional analysis determined that five of the "substantially affected" crossings (four of which were projected to exceed the 40-hour total vehicle delay criterion) did not warrant any mitigation.²⁶ Of the eight "substantially affected" crossings for which OEA recommended

²¹ Final EIS at 2-48 to -49.

²² VOBTOA Study at 19.

²³ Id. at 47.

²⁴ Final EIS at 2-37 to -42.

²⁵ Id. at 4-5, 4-8 to 4-11, including Table 4.2-1.

²⁶ Id. at 2-43 to -44. OEA determined that the following four crossings would exceed the 40-hour total vehicle delay criterion but did not warrant mitigation: Montgomery Road/83rd Street in Aurora, Ill. (which did not exceed the other two threshold criteria and had an alternative route created by mitigation recommended for Ogden Avenue); Western Avenue in Park Forest, Ill., (which did not exceed the other two threshold criteria and would experience reduced potential effects of the transaction due to improvements proposed at the Matteson connection);

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mitigation, OEA found that two (Ogden Avenue in Aurora, Ill., and Lincoln Highway in Lynwood, Ill.) warranted a grade separation.²⁷

Although U.S. 14 did not qualify as “substantially affected” under the three screening criteria, even after the Barrington-specific study OEA conducted in response to Barrington’s Draft EIS comments, OEA nevertheless took the additional step of specifically evaluating whether a grade separation should in any event be recommended at U.S. 14, taking into account a number of the additional factors for determining possible mitigation described above. Following that examination, OEA determined that a grade separation at U.S. 14 would provide minimal benefit to traffic flow in the Barrington area, primarily due to the preexisting conditions near U.S. 14, including existing traffic signals in close proximity to one another, as well as the proximity of the UP/Metra rail line, both of which result in substantial queuing along Hough Street and U.S. 14.²⁸

In its Final Decision, the Board granted CN’s application to acquire EJ&E, subject to numerous environmental mitigation and other conditions, including those described above. The Board adopted all of the analysis and conclusions in the EIS,²⁹ including OEA’s environmental analysis and conclusions regarding Barrington and other communities.³⁰ The Board found OEA’s final recommended environmental mitigation to be reasonable and feasible to address the potentially significant environmental effects of the transaction.³¹ The Board followed its practice of mitigating only impacts resulting directly from the transaction and not requiring mitigation for preexisting conditions and preexisting railroad operations.³² Based on OEA’s findings and recommendations in the Final EIS, including the VOBTOA Study, the Board concluded that a grade separation was not warranted in Barrington.³³ To address the transaction’s effect on queue length at the intersection of Hough Street and U.S. 14, OEA recommended, and the Board

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Chicago Road in Chicago Heights, Ill. (which did not exceed the other two threshold criteria); and Broad Street in Griffith, Ind. (which did not exceed the other two threshold criteria and experienced existing crossing delays due to seven railroad lines at that location).

²⁷ Final EIS at 4-10 to -11. OEA’s determination that Ogden Avenue and Lincoln Highway warranted grade separations was based, in part, on these crossings’ exceeding or approaching the vehicle exposure threshold of one million vehicles per day (see *infra* text accompanying note 51), in addition to exceeding the 40-hour total vehicle delay threshold.

²⁸ *Id.* at 4-16

²⁹ Final Decision at 38.

³⁰ See, e.g., *id.* at 42-45 & n.101.

³¹ *Id.* at 38, 45.

³² *Id.* at 38, n.82.

³³ *Id.* at 45 & n.101.

imposed, mitigation requiring installation of traffic advisory signs to alert drivers not to block roadway intersections during a train pass.³⁴

Barrington sought judicial review of the Board's Final Decision in the United States Court of Appeals for the District of Columbia Circuit (Court of Appeals) in Village of Barrington, arguing that the Board's environmental review and conditions were inadequate under NEPA. The Court of Appeals upheld the Board's decision, including the Board's determination that grade-separated crossing mitigation in Barrington was not warranted and the Board's conclusion that much of Barrington's congestion stemmed from preexisting conditions.³⁵

2011 Request For Additional Mitigation

Barrington has renewed its request that the Board impose a condition requiring a grade separation in Barrington. Specifically, Barrington requests that the Board impose additional mitigation that would require CN to pay for the full cost of a grade separation at U.S. 14.³⁶ In support of its request, Barrington submits an update of its 2008 VISSIM Model entitled, "CN Railway Traffic Impact Study Update" (2011 VISSIM Model). The 2011 VISSIM Model updates the original 2008 VISSIM Model's projections for 2015 by adjusting the train traffic inputs to reflect actual CN operations in mid-2011 (and not using CN's projected train traffic levels and parameters for 2015, which were used by OEA primarily to predict transaction-related impacts during the EIS process). Barrington explains that, during a 35-day period in May and June 2011, Barrington's contractor observed and recorded an average of six CN trains per day operating on the EJ&E rail line—an increase of one train from the pre-acquisition status quo of five trains per day in 2007. Based on these observations of CN's 2011 operations, Barrington's updated model then projects train operations and resulting vehicle delay for 2015.³⁷ Using this revised study, Barrington bases its request for more mitigation on three primary arguments.

³⁴ Id. at 45; Final EIS at 4-16.

³⁵ Vill. of Barrington, 636 F.3d at 672.

³⁶ Barrington requested in its initial petition in this new subdocket that CN bear at least 84% of the cost of a grade separation at U.S. 14. On rebuttal, Barrington modified its request so that CN would be required to pay the full cost of a grade separation, due to the asserted "interconnectedness" of traffic and compounding impact of freight at U.S. 14 and Hough Street. See Barrington Reb. at 15.

³⁷ Barrington's 2011 VISSIM Model calculates "Total 24-Hour Roadway Segment Delay." This delay output includes "the cumulative delay from all sources on the roadway network, including intersection delays, capacity constraints, and traffic flow restrictions or interruptions, in addition to railroad crossing delays." See 2011 VISSIM Model at 4. Although this measurement appears to be a broader measurement than OEA used in the EIS to determine whether the 40-hour total vehicle delay threshold was met or exceeded, both are similar measurements of vehicle delay, and we will refer to Barrington's 2011 VISSIM delay output as "total vehicle delay" calculations.

First, Barrington asserts that the 2011 VISSIM Model demonstrates the need for a grade separation at U.S. 14 because the study predicts that U.S. 14 will experience an increase of 98-100 hours of total vehicle delay per day in 2015 as a result of CN's transaction-related freight traffic, thus exceeding one of the Board's three "substantially affected" criteria.³⁸ Barrington makes this assertion even though its 2011 VISSIM Model calculation of total vehicle delay is less than the 135-205 hours of total vehicle delay predicted for U.S. 14 in the results of Barrington's 2008 VISSIM Model, using similar parameters.

Second, the 2011 VISSIM Model compares the crossing characteristics and impacts at U.S. 14 to the crossing characteristics and impacts at Ogden Avenue in Aurora, Ill., one of the two locations where the Board, in its Final Decision, found a grade separation to be warranted. Barrington asserts that, because the crossing characteristics and impacts at U.S. 14 are comparable to the crossing characteristics and impacts at Ogden Avenue, U.S. 14 is likewise entitled to a grade separation.

Finally, Barrington asserts that the Board materially erred in relying on its VOBTOA Study, which it claims served as the basis to deny its request for a grade separation in Barrington, because, in response to Barrington's own Draft EIS comments, the VOBTOA Study focused on peak periods and, in Barrington's view, contained a misleading and truncated VISSIM analysis.

PRELIMINARY MATTER

Barrington requests leave to file a rebuttal in response to CN's reply. Likewise, CN requests leave to reply to Barrington's rebuttal, should the Board accept Barrington's rebuttal. Under 49 C.F.R. § 1104.13(c), a reply to a reply is not permitted. However, in the interest of a more complete record, we are granting Barrington's and CN's requests and accepting their replies into the record.

DISCUSSION AND CONCLUSIONS

Standards for Reopening and Imposing Mitigation. Under 49 U.S.C. § 722(c) and 49 C.F.R. § 1115.4, the Board may reopen a proceeding because of "material error, new evidence, or substantially changed circumstances." The alleged grounds must be sufficient to convince the Board that they would lead it to materially alter its prior decision in this case. If a party has presented no new evidence, changed circumstances, or material error that "would

³⁸ The 2011 VISSIM Model originally projected an increase of 116-122 hours in total vehicle delay at U.S. 14. Barrington amended this figure on rebuttal to 98-100 hours of total vehicle delay in response to CN's statement that CN's crossing warning gates in Barrington do not operate in tandem (which would increase gate down time and vehicular delays), but instead are governed by constant warning time circuitry. See Barrington Reb., V.S. Andres at 2.

mandate a different result,” then the Board will not reopen.³⁹ Reopening also is not warranted if pertinent evidence was available before the agency’s decision but was not timely raised.⁴⁰

In Condition 72 of its Final Decision authorizing CN’s acquisition, the Board stated that, “[i]f there is a material change in the facts or circumstances upon which the Board relied in imposing specific environmental conditions, and upon petition by any party who demonstrates such material change, the Board may review the continuing applicability of its final mitigation, if warranted.”⁴¹ The Board also noted that it “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.”⁴² The intent of Condition No. 72 is to inform the public and parties that interested persons could seek to reopen the Final Decision in order to modify the conditions placed upon the transaction if a material change in facts or circumstances were to occur in the future. Condition No. 72, however, does not independently establish a standard for reopening to modify conditions apart from the statutory standards in the Interstate Commerce Act. *Cf. Burlington N. & Santa Fe Ry. v. STB*, 453 F.3d 473, 479 (D.C. Cir. 2006) (§ 722(c) limits the criteria for granting reconsideration to instances of material error, new evidence, or substantially changed circumstances). Therefore, the issue before us here is whether Barrington’s claims of new evidence and material error warrant a different result than the one the Board reached in 2008, when Barrington’s request for grade separation mitigation was addressed. Accordingly, we will consider in turn Barrington’s assertions that additional mitigation is warranted based upon alleged new evidence and alleged material errors in the Board’s Final Decision.

1. New Evidence. Barrington presents the 2011 VISSIM Model as “newly discovered evidence” that demonstrates a need for a grade separation at U.S. 14: (1) by showing that the crossing would experience over 40 hours of total vehicle delay in a 24-hour period, and hence exceeded one of three criteria used by OEA and the Board for determining “substantially affected” crossings; and (2) by comparing the transaction’s projected impact on U.S. 14 to its projected impact on Ogden Avenue in Aurora, Ill., where the Board did find a grade separation to be warranted in the Final Decision. For the reasons discussed below, we find that, even if this updated study could be characterized as new evidence, it is insufficient to warrant reopening because the updated study would not affect the outcome of the Board’s prior decision.

The 2011 “Updated” VISSIM Model: Vehicle Delay at U.S. 14. To warrant reopening based on new evidence, the evidence must be evidence that was not reasonably available to the

³⁹ See *Montezuma Grain v. STB*, 339 F.3d 535, 541-42 (7th Cir. 2003), and *DesertXpress Enters.—Petition for Declaratory Order*, FD 34914, slip op. at 6-8 (STB served May 7, 2010).

⁴⁰ *Friends of Sierra R.R. v. ICC*, 881 F.2d 663, 667 (9th Cir. 1989).

⁴¹ Final Decision at 81.

⁴² *Id.* at 26.

party when the record was developed.⁴³ The alleged new evidence must also mandate a different result.⁴⁴ Barrington presents its 2011 VISSIM Model as “newly discovered evidence,” based on CN operations observed in 2011. CN argues that the 2011 VISSIM Model is not new evidence because Barrington’s conclusions, even if based on data collected from more recent operations, are essentially the same as the conclusions from the 2008 VISSIM Model that Barrington had submitted to the Board in its comments on the Draft EIS.⁴⁵

Even if the updated 2011 VISSIM Model could be viewed as new evidence insofar as it contains some more recent CN operations data, we find that it would not change the outcome of the Board’s Final Decision and therefore is not material. This is because the 2011 VISSIM Model projections show *less* of an impact on total vehicle delay (98-100 hours of total vehicle delay per day) than the projections presented in the 2008 VISSIM Model (135-205 hours of increased vehicle delay), the conclusions of which were already before the Board when it issued the Final Decision. Thus, the projections in the 2011 VISSIM Model would not have altered the outcome the Board previously reached.

Additionally, exceeding the 40-hour traffic delay threshold did not automatically warrant any mitigation in the Final Decision, much less a grade separation. As OEA stated in the Final EIS, “in the Chicago metropolitan area, simply exceeding the thresholds used by [OEA] does not mean that the crossing must be grade-separated or even requires mitigation.”⁴⁶ Under FHWA standards, exceeding the 40-hour threshold served as just one factor in determining whether a grade separation is appropriate.⁴⁷ In fact, OEA determined that four “substantially affected” crossings that were projected to exceed the 40-hour threshold did not warrant any mitigation, let alone a grade separated crossing.⁴⁸

⁴³ See Toledo, Peoria & W. Ry. v. STB, 462 F.3d 734, 753 (7th Cir. 2006) (finding that evidence reasonably available before the Board issued its decision is not new evidence). Accord Friends of Sierra R.R., 881 F.2d at 667; Can. Nat’l Ry.—Control—Ill. Cent. Corp., 6 S.T.B. 344, 350 (2002) (“‘new evidence’ is not newly presented evidence, but rather is evidence that could not have been foreseen or planned for at the time of the original proceeding”).

⁴⁴ E.g., Montezuma Grain, 339 F.3d at 542.

⁴⁵ See CN Reply at 10. Like the 2008 VISSIM Model, Barrington’s 2011 VISSIM Model concludes that total vehicle delay in 2015 would exceed 40 hours at U.S. 14 due to new vehicular and CN rail traffic. The 2008 VISSIM Model had projected 135-205 hours of increased vehicular delay, based on train projections made in 2008 of 20 trains per day in 2015. The 2011 VISSIM Model shows less of an impact for 2015, projecting 98-100 hours of increased delay, based on 2011 train levels (six trains per day), extrapolated out to 20 trains per day in 2015.

⁴⁶ Final EIS at 4-8, 4-12.

⁴⁷ Id.

⁴⁸ Id. at 2-43; see supra n.26.

As the Final EIS and the Final Decision show, the Board examined the individual characteristics of each crossing in evaluating mitigation alternatives and adhered to its general practice of not requiring applicants to mitigate preexisting conditions, *i.e.*, conditions not caused by the transaction. As discussed above, no mitigation was required for five “substantially affected” crossings, which, as OEA noted, would experience traffic congestion not solely caused by CN trains on the EJ&E line, but rather caused by increasing development, other freight rail lines, and commuter trains that operate in the affected communities.⁴⁹ Additionally, OEA determined in general that, while a grade separation could eliminate the effects on vehicle queue lengths due to increased train traffic, it would not necessarily eliminate the existing congestion caused by queuing at signalized intersections.⁵⁰

Of the eight “substantially affected” crossings that warranted mitigation, OEA recommended a grade separation for only two crossings, Ogden Avenue in Aurora, Ill., and Lincoln Highway in Lynwood, Ill. Not only would those two crossings exceed the 40-hour total vehicle delay threshold, but they would also exceed or nearly exceed the vehicle “exposure”⁵¹ threshold of one million vehicles (a FHWA threshold at which construction of a grade separation should be considered). OEA determined that exposure would exceed the one million vehicle threshold at Ogden Avenue and would nearly exceed it at Lincoln Highway.⁵² In contrast, the exposure level at U.S. 14 was projected to be 689,165, well short of the one million vehicle exposure threshold.⁵³

The six “substantially affected” crossings that did not warrant a grade separation generally had alternative routes, met or exceeded only one of the three thresholds, or experienced delays in mobility due to existing conditions.⁵⁴ In its Final Decision, the Board noted that OEA

⁴⁹ Final EIS at 2-43 to -44. In addition to the four crossings previously discussed (*see supra* n.26), OEA determined in the Draft EIS that Diamond Lake Road in Mundelein, Ill., would be a “substantially affected” crossing due to queue length. However, in the Final EIS, OEA found that Diamond Lake Road would not require mitigation because a dedicated right-turn lane would allow traffic to turn from Diamond Lake Road onto eastbound IL 60/83 during a train pass, thus facilitating traffic movement and reducing queue length at the crossing.

⁵⁰ Final EIS at 4-10.

⁵¹ Vehicle exposure is a measurement that reflects the number of highway vehicles exposed to freight trains by multiplying the number of trains per day by the number of vehicles per day.

⁵² Final EIS at 4-5. OEA also found that the exposure level would exceed one million at Montgomery Road, in Aurora, which is located less than one mile south of the Ogden Avenue highway/rail at-grade crossing. Because the recommended mitigation for Ogden Avenue would provide an alternative route for traffic using Montgomery Road, OEA found no need for additional mitigation for Montgomery Road.

⁵³ *Id.* Appx. A.11 at 439.

⁵⁴ *Id.* at 4-11.

would have recommended mitigation (though not necessarily grade separation) for two of these crossings, Woodruff Road and Washington Street in Joliet, Ill., if a negotiated agreement between CN and the City of Joliet had not been in place. However, unlike U.S. 14, these two crossings not only exceeded the 40-hour total vehicle delay threshold, but they both would have experienced a reduction in LOS from LOS B to LOS F.⁵⁵

In addition, as explained in more detail elsewhere in this decision, even though the Board had found that U.S. 14 did not meet any of the three criteria for “substantially affected” crossings, it nevertheless went further and performed additional analysis, including the VOBTOA Study, in response to Barrington’s comments on the Draft EIS. The Board’s Final EIS found that Barrington experienced high traffic volume and congestion due to a variety of factors pre-dating the transaction. The Final EIS explained that a grade separation at U.S. 14 would have “minimal benefit to traffic flow” in the area due to existing congestion caused by multiple nearby traffic signals, as well as the nearby location of the UP/Metra rail line that created substantial queuing along Hough Street and U.S. 14.⁵⁶ Specifically, as discussed in the VOBTOA Study, “construction of a grade separation at [U.S. 14] would only be beneficial if capacity improvements are incorporated at the upstream and downstream signalized intersections.”⁵⁷ Thus, the Final EIS concluded that while the additional trains on the EJ&E line as a result of the transaction would increase delay to some degree, they would not substantially modify the basic nature of the traffic congestion that motorists were already experiencing and would continue to experience in Barrington due to preexisting roadway capacity constraints.

Barrington’s own 2011 VISSIM Model shows the impact of this preexisting congestion, projecting that, under the No-Action Alternative (where no new CN trains would be added), preexisting capacity constraints in the Barrington street network would cause 260 hours of additional vehicle delay per day at the U.S. 14 crossing by 2015 (compared to only 60 hours of additional delay per day in 2015 caused by preexisting conditions at Ogden Avenue).⁵⁸ Thus, even if CN’s additional trains were to add 98-100 hours of increased vehicle delay at U.S. 14 as Barrington predicts, Barrington’s own model shows that existing capacity constraints on U.S. 14 will contribute much more significantly to the vehicle delays at that crossing than will additional CN trains on the EJ&E line.

In addition, Barrington acknowledges numerous times in its current filings that there are unique preexisting traffic conditions in Barrington that significantly contribute to the existing and projected future delays in the area, a consideration that was already before the Board at the

⁵⁵ Id. at 4-18.

⁵⁶ Id. at 4-14 to -16.

⁵⁷ VOBTOA Study at 48. See also VOBTOA Study Figures 5-3 through 5-6 (showing that the signalized intersection of Hough Street and U.S. 14 (Northwest Highway) would operate at an unacceptable LOS (LOS D during AM peak hours and LOS E-F during PM peak hours) under both the No-Action and Proposed-Action scenarios).

⁵⁸ 2011 VISSIM Model at 14.

time of its Final Decision.⁵⁹ Therefore, in adhering to its consistent practice of not requiring mitigation for preexisting conditions, the Board reasonably determined that a grade separation was not warranted at U.S. 14.⁶⁰ The alleged “new evidence” presented by Barrington thus does not change the outcome of the Board’s decision not to require a grade separation at U.S. 14.

Furthermore, the conclusions of the 2011 VISSIM Model, which predict that the transaction will cause an increase of 98-100 hours of total vehicle delay per day in 2015 at U.S. 14, are not unassailable. The study projects traffic conditions for 2015 based on the size, speed, and schedule of six trains per day observed in 2011. But the projections do not take into account the improvements CN is currently implementing on the line, which will likely increase train speed and reduce delay.⁶¹ Indeed, Barrington’s own expert acknowledges that the 32-mile per hour average train speeds observed in 2011 may increase and that Barrington’s 2011 updated VISSIM Model only demonstrates the possible delay that may result if 2011 speeds are applied to 2015 traffic projections. As a result, Barrington has not presented sufficient evidence to show that the train schedule for six trains in 2011 will correlate to the schedule for 20 trains in 2015.⁶²

With respect to Barrington’s suggestion that the 2011 VISSIM Model constitutes new evidence because it shows that Barrington received disparate treatment by being subject to different criteria in the EIS’s examination of its grade crossings, as previously noted, the Draft EIS applied three threshold criteria to quantify the impacts of the transaction at all grade crossings: 24-hour total vehicle delay, LOS, and queue length. These threshold criteria were used to evaluate every crossing along the EJ&E line, including U.S. 14. While the Board determined that the crossing at U.S. 14 did not satisfy any of the three screening criteria, it nevertheless then conducted additional analysis of the Barrington area in the VOBTOA Study, using VISSIM methodology to analyze the transaction’s regional impact during peak hour periods by examining the infrastructure of local roadways and the effects of existing railroad crossings. The Board conducted this additional analysis to respond to Barrington’s specific comments on the Draft EIS. Thus, the Board afforded *greater* consideration to Barrington’s

⁵⁹ See Barrington Pet. at 12, 16, V.S. Andres at 9; Barrington Reb. at 14, V.S. Andres at 3, 19.

⁶⁰ The Court of Appeals, in affirming the Board’s Final Decision, specifically referred to the Board’s reasoning in this regard:

Between publishing the draft and final environmental impact statements, the Board also commissioned an additional traffic study, which concluded not only that much of Barrington's traffic congestion stemmed from pre-existing conditions, but also that Canadian National's acquisition would increase congestion during peak morning and evening hours by only 4% to 5%.

Vill. of Barrington, 636 F.3d at 672.

⁶¹ See CN Reply at 14 n.28.

⁶² Barrington Reb., V.S. Andres at 17-18.

crossings than to the other crossings, in light of the concerns Barrington raised in its comments on the Draft EIS.

Comparison to Ogden Avenue in Aurora. Barrington argues that its comparison between the U.S. 14 crossing in Barrington and the Ogden Avenue crossing in Aurora (where the Board ordered a grade separation) constitutes new evidence and shows that the two crossings will experience transaction-related impacts that are “virtually indistinguishable.”⁶³

Barrington’s comparison of U.S. 14 to Ogden Avenue is not new evidence. Barrington could have presented its Ogden Avenue comparison, or a comparison to any other crossing recommended for mitigation in the Final EIS, to the Board after the Final EIS was issued. Barrington bases its comparison to Ogden Avenue almost exclusively on data taken from the Final EIS.⁶⁴ All of the information presented in Barrington’s comparison chart presented in its recent filings⁶⁵ was available to Barrington either in the Final EIS or elsewhere prior to the Board’s Final Decision, with the exception of the last row of the chart. That row contains Barrington’s calculations for increases in vehicle delay at U.S. 14 and Ogden Avenue in 2015. However, Barrington had already performed that calculation for U.S. 14 in the 2008 VISSIM Model based on inputs used in the Draft EIS and presented that model result to the Board in its comments on the Draft EIS.⁶⁶

Barrington now suggests that preparing a calculation of increased vehicle delay for Ogden Avenue at that time would have been too costly and too risky, as it was aware that CN was going to challenge the two grade separation conditions imposed by the Board in court.⁶⁷ Barrington’s litigation strategy and decision not to prepare a comparison of U.S. 14 and Ogden Avenue and present it to the Board at that time does not mean that such evidence was not available to it before the Board issued its Final Decision or that Barrington lacked the opportunity to bring its comparison to the Board’s attention at that time. Barrington does not support its claim that this comparison constitutes new evidence, for newly raised evidence is not new evidence.⁶⁸

Further, Barrington previously had raised its disparate treatment argument in the Court of Appeals. The court rejected Barrington’s argument that it was treated differently from similarly situated communities, such as Aurora, Ill., which includes Ogden Avenue, because Barrington

⁶³ Barrington Reb. at 7.

⁶⁴ Compare, e.g., 2011 VISSIM Model at 16-17 with Final EIS Table A.5-1.

⁶⁵ Barrington Pet. at 13, 2011 VISSIM Model at 17; updated in Barrington Reb., V.S. Andres at 8.

⁶⁶ Barrington Draft EIS comments at 38-39.

⁶⁷ Barrington Reb. at 9-10.

⁶⁸ See Friends of Sierra, 881 F.2d at 667; Toledo, Peoria & W. Ry., 462 F.3d at 753.

failed to present in a timely manner to the court the 2008 VISSIM model results to support its disparate treatment argument.⁶⁹

Moreover, even if it constituted new evidence, the comparison to Ogden Avenue would not materially affect the Board's decision not to impose a grade separation in Barrington. As discussed above, exceeding the 40-hour traffic delay threshold did not automatically warrant mitigation.⁷⁰ The Final EIS makes clear that the individual characteristics of each crossing were considered in determining what, if any, mitigation would be appropriate. The Board determined that a grade separation was not warranted at U.S. 14 primarily because Barrington had significant preexisting traffic congestion that did not and would not result from the transaction. As discussed previously, Barrington's own 2011 VISSIM Model shows that Ogden Avenue does not have the same degree of preexisting congestion that afflicts Barrington.⁷¹ In addition, the characteristics of Ogden Avenue were significantly different from those of U.S. 14. Not only would the traffic delay at Ogden Avenue exceed the 40-hour threshold, the crossing had the highest projected average daily traffic volumes of any of the impacted at-grade crossings.⁷² Further, as discussed above, OEA considered vehicle "exposure" and determined that exposure would exceed one million vehicles (a FHWA threshold at which construction of grade separation should be considered) at Ogden Avenue but not at U.S. 14.⁷³ Thus, even if the projected traffic delay data were comparable, as Barrington argues, we find that it would not have changed the outcome of the Board's decision given the other factors the Board weighed in determining whether a grade separation would be appropriate.

Barrington notes that, like Ogden Avenue, U.S. 14 has been designated a Strategic Regional Arterial (SRA) route by the Illinois Department of Transportation. An SRA designation alone, however, did not warrant a grade separation at a given intersection, particularly in areas with preexisting roadway capacity constraints. SRA designation was just one factor that was considered when deciding if and what mitigation would be appropriate. Thus, while the Board's EIS did not discuss the status of U.S. 14 as an SRA, such a designation would not have been controlling. Indeed, in addition to Ogden Avenue and Lincoln Highway, Hough Street, the major north-south road that crosses through Barrington, was designated as an

⁶⁹ Vill. of Barrington, 636 F.3d at 672 (finding that Barrington's disparate treatment argument based on the 2008 VISSIM Model failed because Barrington did not discuss the 2008 VISSIM Model until its reply brief). Barrington may not attempt to revisit the law of the case as established in the court's decision by making again the same argument that was unsuccessful in court. See R.R. Ventures, Inc.—Aban. Exemption—Between Youngstown, Ohio & Darlington, Pa., AB 556 (Sub-No. 2X), slip op. at 6 (STB served Apr. 28, 2008).

⁷⁰ Final EIS at 4-8.

⁷¹ See 2011 VISSIM Model at 14 (showing Ogden Avenue with only 60 hours of vehicle delay under the No-Action Alternative, compared to 260 hours for U.S. 14).

⁷² See Final EIS Table A.5-1.

⁷³ Id. at 4-5. See supra text accompanying note 51.

SRA route.⁷⁴ However, OEA found that a grade separation was not an appropriate mitigation option at Hough Street due to the preexisting congestion in Barrington.⁷⁵ Thus, Barrington fails to demonstrate that its comparison to Ogden Avenue constitutes “new” evidence that would materially affect the outcome of the Board’s Final Decision.

2. Material Error. The Board may reopen a proceeding if it is shown that a prior Board decision contained material error.⁷⁶ Barrington alleges that the Board materially erred in relying on the VOBTOA Study that served as part of its reasoning for denying a grade separation to Barrington. Barrington states that the VISSIM analysis contained in the VOBTOA Study resulted in findings that were erroneous and misleading. In addition to raising various methodological errors, Barrington faults the study for measuring traffic delay only during AM and PM peak hour periods.

As a preliminary matter, it must be emphasized that such challenges to the Board’s VOBTOA Study and the manner in which the Board used it for the Final Decision were within the scope of the prior proceeding. Thus, they were part of the Board’s analysis affirmed on appeal, and any such challenges were or could have been timely raised during the earlier proceedings. We will, however, address below Barrington’s material error claims and explain why we find that they would not change the outcome of the Board’s prior decision.

Peak Hour Analysis. Barrington asserts that the Board applied different criteria to analyze its grade crossings than other crossings on the EJ&E line. Barrington claims that the VOBTOA Study measured traffic delay in Barrington only during AM and PM peak hour periods, rather than measuring traffic delay during a 24-hour period, as the Board did for other crossings on the EJ&E rail line. However, the peak study in the VOBTOA Study was not in lieu of, but in addition to, the analysis conducted for all 87 crossings.

As previously noted, in the Draft EIS, OEA analyzed 87 crossings on the EJ&E line, including U.S. 14, and used the same criteria for all crossings in determining whether a crossing would be substantially affected by the transaction. Under those criteria, OEA determined that U.S. 14 would not be “substantially affected.”⁷⁷ In its comments on the Draft EIS, Barrington criticized the Draft EIS for failing to take into account the interrelated effects of Barrington’s entire transportation network and faulted the Draft EIS for not analyzing peak hour conditions.⁷⁸ It was in direct response to these Draft EIS comments that the Board performed an *additional* traffic analysis of the Barrington region (the VOBTOA Study) to better understand the interaction of the local roadways with the existing railroad crossings in Barrington. As Barrington itself requested, the VOBTOA Study focused on AM and PM peak hour conditions

⁷⁴ See Final EIS at 4-14.

⁷⁵ See *id.*

⁷⁶ 49 U.S.C. § 722(c); 49 C.F.R. § 1115.4.

⁷⁷ Draft EIS at 4.3.1.3 and Table 4.3-4.

⁷⁸ Barrington Draft EIS Comments at 35.

“to represent a time period with higher expected traffic volumes and resulting congestion.”⁷⁹ In short, the Board performed the same initial analysis on U.S. 14 as on all other crossings on the EJ&E line, under which U.S. 14 failed to qualify as “substantially affected;” then, in response to Barrington’s comments, the Board performed additional analysis in light of the concerns raised by Barrington itself.

In addition, Barrington contends that, because the VOBTOA Study focused on peak period traffic, the observed traffic was unrepresentatively low due to freight train curfews CN imposes during peak hours. Barrington also argues that, because the peak hour analysis quantified the effect of only two additional trains during the peak hour period, it failed to capture the compounding effect of 20 trains over a 24-hour period. However, by setting peak hours as a parameter, the VOBTOA Study properly took into account the projected realistic conditions during those hours, which include a reduction of freight rail traffic to allow for commuter trains. In doing so, the study simulated the period of highest vehicular traffic, as well as an accurate level of freight train traffic, during the peak periods.⁸⁰

Moreover, Barrington asserts without supporting evidence that HDR, the Board’s third-party contractor, had an undisclosed “stratagem”⁸¹ in how and why it conducted the VOBTOA Study. Indeed, as the Final EIS explains, in seeking to “validate the analysis in the Draft EIS,”⁸² OEA decided to perform additional analysis regarding whether U.S. 14 (and Hough Street) would be “substantially affected” crossings by examining the potential impacts on the Barrington region during rush hour, because, as explained above, OEA believed this would be responsive to the issues raised by Barrington in its Draft EIS comments. In considering the study, the Board was aware of the difference between total vehicle delay per day and the delay reflected in the peak hour study, which examined potential impacts during rush hour periods.⁸³ Similarly, the Board understood the purpose and intent of the VOBTOA Study.⁸⁴

Methodological Errors. We also address here Barrington’s assertion that the VOBTOA Study contained several methodological errors. Barrington asserts that the VOBTOA Study failed to consider the entire PM peak period, in that the VISSIM simulation stopped at 6:00 PM—20 minutes before a queue created by a single train dissipated. Barrington essentially criticizes the time parameters defined in the VOBTOA Study. However, agencies have

⁷⁹ Final EIS at 2-49.

⁸⁰ VOBTOA Study at 19.

⁸¹ Barrington Pet. at 17-18.

⁸² Final EIS at 2-48.

⁸³ See Final Decision at 43, 45 n.101 (discussing total vehicle delay per day as a factor in determining substantially affected crossings and noting the peak hour findings of the VOBTOA Study).

⁸⁴ Id. at 45 n.101.

considerable discretion in establishing the approach and methodology to be used in EIS studies.⁸⁵ Any study requires defined parameters—a start time and an end time—and here, the VOBTOA Study reasonably looked at the impact during a defined rush hour PM time period from 4:00 PM to 6:00 PM.⁸⁶

Barrington also states that the VOBTOA Study’s inclusion of streets beyond the area affected by train delay dilutes the impact of CN trains. Again, however, a study requires defined parameters, and here, the VOBTOA Study reasonably defined the study area to include the regional roadways/highways and railroads that affect Barrington mobility.⁸⁷ Indeed, Barrington had suggested in its comments on the Draft EIS that the Board should examine the interrelated traffic effects in the Barrington region—and not just focus on the effects at particular crossings.⁸⁸ Hence, the Board’s geographic parameters in the VOBTOA Study are consistent with Barrington’s own views. In addition, the VOBTOA Study showed that the effects of the transaction would be centrally localized in the area around U.S. 14, Hough Street, the UP/Metra train line, and the EJ&E line. Thus, shrinking the margins of the geographic area of study, as Barrington now suggests, would not likely materially affect the conclusions of the study, because, when comparing the centrally localized impacts of the transaction to the No-Action Alternative in Barrington, changes to the outer margins of the study area should not significantly affect the results.

In addition, Barrington asserts that the VOBTOA Study provides no support for the conclusion that a grade separation would not address Barrington’s regional congestion because of the impact of preexisting capacity constraints. The VOBTOA Study, however, showed that a grade separation alone at U.S. 14 would not address regional congestion.⁸⁹ The study explained that the transaction would have some incremental impacts on traffic congestion in Barrington during peak hours, but would not considerably worsen traffic congestion or mobility, thereby indicating that, for the most part, congestion conditions are attributable to preexisting capacity constraints.⁹⁰ Moreover, the VOBTOA Study found that, given the excess vehicle demand at existing major roadway intersections surrounding the U.S. 14 crossing, construction of a grade separation would only be beneficial if capacity improvements were incorporated at the upstream and downstream signalized intersections.⁹¹ This conclusion is consistent with Barrington’s own 2011 study, which indicates that, under the No-Action Alternative (where no new CN trains

⁸⁵ See Lands Council v. Martin, 529 F.3d 1219, 1226 (9th Cir. 2008); Inland Empire Pub. Lands Council v. Schultz, 992 F.2d 977, 981 (9th Cir. 1993).

⁸⁶ VOBTOA Study at 10.

⁸⁷ Id. at 2.

⁸⁸ In suggesting that the Board examine the Barrington region during peak hours, Barrington did not propose parameters for such a study.

⁸⁹ VOBTOA Study at 48.

⁹⁰ Id. at 28-33.

⁹¹ Id. at 48.

would be added), vehicle delay would increase on U.S. 14 by 260 hours by 2015 due to preexisting capacity constraints in the Barrington street network (compared to Ogden Avenue, where the delay would increase by only 60 hours due to preexisting conditions).⁹² Thus, the Board reasonably concluded in the Final Decision that a grade separation at U.S. 14 would not address the regional congestion.

Barrington also claims that the VOBTOA Study did not take into account the interaction and cumulative effects of the UP/Metra line. However, the VOBTOA Study does analyze the interaction of the UP/Metra line with the regional roadways.⁹³

In addition, Barrington asserts that, in Table A.5-1 in the VOBTOA Study, HDR incorrectly calculated the percent increases in total vehicle traffic delay over a 24-hour period. Barrington claims that the table calculates the percent increase as the change in value of the term (“Proposed Action” minus “No-Action”), divided by the final value (“Proposed Action”), rather than initial value (“No-Action”), of the term. Thus, Barrington believes that, as a result, percentage increases in delay appeared much smaller in that table than they actually were. However, we find no material error here. Table A.5-1 is entitled “Total Vehicle Delay and Percent Increase;” but, as CN notes,⁹⁴ the figures in that table that Barrington challenges appear intended to reflect the percentage increase in projected delay attributable to the transaction by 2015, rather than the total percentage increase in delay by 2015, which would include vehicle delay increases from other factors as well as from the transaction. Thus, HDR appears to have mislabeled Table A.5-1. However, the mislabeling of the table does not constitute material error, because the vehicle delay threshold criterion used by the Board for determining whether an intersection would be “substantially affected” by the transaction is based on the *total* number of hours of vehicle delay per day, and not the *percentage increase* in vehicle delay per day.⁹⁵ A crossing with total vehicle delay projected to be greater than 40 hours per day was eligible to be considered a “substantially affected” crossing under one of the Board’s three threshold criteria.⁹⁶ Although Barrington asserts that U.S. 14 will experience a percentage increase in delay of 1,177%, compared to the No-Action level, total hours of delay, not the percentage increase, is the relevant criterion. And, under the Proposed Action scenario (the anticipated effects of the transaction in 2015), U.S. 14 is projected to experience 1757.8 minutes (or approximately 30 hours) of total traffic delay per day—well short of the Board’s 40-hour threshold.⁹⁷

Barrington also asserts that HDR failed to advise the Board that the peak period queue length increases of 1,550 feet at IL 59 and 2,100 feet at U.S. 14 would result in increases in

⁹² 2011 VISSIM Model at 14.

⁹³ See VOBTOA Study at 12-13, 19.

⁹⁴ CN Reply at 18 n.33.

⁹⁵ See Draft EIS at 4.3.1.3.

⁹⁶ See id.

⁹⁷ See Final EIS, Table A.5-1.

traffic backups of between 0.25 and 0.5 miles.⁹⁸ However, the VOBTOA Study, which was part of the Final EIS reviewed by the Board, specifically discussed the transaction's impact on queue lengths at IL 59 and U.S. 14. There was no failure to inform the Board of these findings, and the record here reflects that the Board was aware of them.⁹⁹ Further, the VOBTOA Study shows that queue lengths were primarily caused by high traffic volumes and a preexisting lack of capacity at the intersection of IL 59 and U.S. 14, rather than the transaction.¹⁰⁰

In sum, none of Barrington's assertions constitute material error sufficient to warrant reopening. As discussed above, in the Final Decision, the Board considered several factors, including the findings in the VOBTOA Study, in determining what, if any, mitigation for Barrington was warranted. We find that the alleged shortcomings in the VOBTOA Study are generally not supported by the record. In any event, any alleged shortcomings would not have changed the outcome of the Board's decision, given all of the factors previously weighed by the Board in determining whether a grade separation was appropriate mitigation at U.S. 14. Therefore, Barrington has failed to demonstrate that the Board materially erred in not requiring a grade separation at U.S. 14.

3. Other Arguments.

Federal Grant. Barrington argues that the \$2.8 million federal grant it received in 2010 under the Transportation Investment Generating Economic Recovery (TIGER II) program to undertake preliminary engineering studies for a grade separation at U.S. 14 supports the claim that the Board erred in not ordering a grade separation at U.S. 14 and that we should now hold CN responsible for funding the grade separation to correct this error. Barrington, however, has not cited to any statements relating to the awarding of the grant that refute the Board's decision in the Final Decision not to impose a grade separation there. Thus, Barrington's assertion that the federal grant was intended to "rectify" a Board action is not supported by the record. Barrington's receipt of the grant is therefore not relevant for purposes of the Board's consideration of reopening.

Train Length and Speed. Finally, Barrington contends that CN's estimates of train speeds and lengths, used to project the impacts of the transaction, are in retrospect inaccurate in light of what it alleges are "industry trends." Specifically, Barrington asserts that CN trains will be longer and slower than CN projected in its application, based on a press release regarding CN trains in Canada, which noted that newly-constructed sidings in Northern Ontario would "permit

⁹⁸ Barrington asserts that HDR failed to disclose several other matters to the Board, including the results of Barrington's 2008 VISSIM Model and the fact that the VOBTOA Study focused only on peak hour periods. However, Barrington's comments on the Draft EIS (which included the conclusions of its 2008 VISSIM Model) and the VOBTOA Study containing HDR's peak hour analysis were part of the record, which the Board examined in issuing the Final Decision. See Final Decision, slip op. at 38-45.

⁹⁹ See id., slip op. at 45, n.101; VOBTOA Study at 28, 34.

¹⁰⁰ VOBTOA Study at 46.

the highest average freight train speeds” of 40 miles per hour, and a newspaper article about a railroad running an 18,000-foot “test” train in California. Barrington, however, fails to show that the operations of CN trains in Canada and on an unrelated railroad in California are industry trends or that those operations apply to or reflect CN’s operations on the EJ&E rail line. CN has projected the average length of its trains passing through Barrington to be 6,829 feet in 2015.¹⁰¹ Barrington’s evidence regarding operations in other locations does not demonstrate that CN’s projections for the EJ&E line are unreasonable. Indeed, as discussed above, Barrington’s own expert acknowledges that the 32-mile per hour average train speeds observed on the EJ&E rail line in 2011 may increase as planned improvements are completed and that Barrington’s 2011 updated VISSIM Model only demonstrates the possible delay that may result if 2011 speeds are applied to 2015 traffic projections.¹⁰²

Conclusion. In the Final Decision, the Board considered a range of evidence, studies and factors in deciding what mitigation conditions to impose. We have carefully evaluated and considered the 2011 VISSIM Model that Barrington has submitted, as well as the points Barrington has raised regarding the studies and evidence relied upon by the Board in its Final Decision. As discussed above, Barrington presents no new evidence, change in facts or circumstances, or material error that would materially undermine the Board’s conclusions in the Final Decision regarding appropriate mitigation.¹⁰³ The Board continues to retain jurisdiction to impose additional mitigation to address any operational problems or other unanticipated concerns that might arise after the consummation of the transaction.¹⁰⁴ However, as discussed, Barrington has not demonstrated here that the Board should now impose the additional mitigation of requiring CN to fully fund a grade separation at U.S. 14.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Barrington’s request for additional mitigation pursuant to the Board’s oversight jurisdiction is denied.
2. Barrington’s request to reopen is denied.
3. Barrington’s and CN’s requests for leave to file a reply to a reply are granted.

¹⁰¹ Draft EIS Table 4.1-1.

¹⁰² Barrington Reb., V.S. Andres at 17-18.

¹⁰³ Because we find that Barrington has failed to show that additional mitigation is warranted, we need not address its argument that CN should be responsible for the full cost of a grade separation rather than a proportionate share of the cost.

¹⁰⁴ Final Decision, slip op. at 26.

4. This decision is effective on its service date.

By the Board, Chairman Elliott, Vice Chairman Mulvey, and Commissioner Begeman.