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Ms. Cynthia Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, DC 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:

Enclosed for filing in the above referenced sub-docket please find CN'S Reply to Petition of Village of Barrington Seeking Reconsideration of Decision Denying Petition Seeking Imposition of Additional Mitigation.

Very truly yours,



David A. Hirsh

Counsel for Canadian National Railway Company
and Grand Trunk Corporation

Enclosure

cc: Richard H. Streeter, Esquire (by e-mail)

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

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

[Barrington Petition for Mitigation]

**CN'S REPLY TO PETITION OF VILLAGE OF BARRINGTON
SEEKING RECONSIDERATION OF DECISION DENYING
PETITION SEEKING IMPOSITION OF ADDITIONAL MITIGATION**

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June 24, 2015

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

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

[Barrington Petition for Mitigation]

**CN'S REPLY TO PETITION OF VILLAGE OF BARRINGTON
SEEKING RECONSIDERATION OF DECISION DENYING
PETITION SEEKING IMPOSITION OF ADDITIONAL MITIGATION**

CN¹ hereby responds to the Barrington's "Petition Seeking Reconsideration" filed on June 4, 2015 ("Reconsideration Petition"). Barrington claims the Board's decision served in this sub-docket on May 15, 2015 ("May 15 Decision") was based on material error. That decision denied Barrington's 2014 Petition, which sought reopening of the Board's 2008 Approval Decision authorizing CN's acquisition of control of EJ&E West Company, and post-hoc imposition of a grade separation condition at U.S. 14 at an estimated cost to CN of \$47 million.

BACKGROUND

In its Approval Decision, the Board imposed 182 environmental mitigation conditions, but not a grade separation condition sought by Barrington. By unanimous decision, the D.C. Circuit rejected Barrington's petition for judicial review of that determination. *Vill. of*

¹ CN incorporates by reference the short forms and abbreviations set forth in the Application in the main docket (CN-2 at 8-11) and in CN's reply to Barrington's 2014 Petition (filed December 16, 2014).

Barrington v. STB, 636 F.3d 650 (D.C. Cir. 2011). In its 2011 Petition, Barrington asked the Board to reopen the proceeding and impose an additional condition requiring CN to fully fund the construction of a grade separation at the EJ&E/U.S. 14 crossing. The Board denied the 2011 Petition in a decision served in this sub-docket on November 8, 2012 (“2012 Decision”). Barrington again sought judicial review, which was again denied. *Vill. of Barrington v. STB*, 758 F.3d 326 (D.C. Cir. 2014).

In the 2014 Petition, Barrington again sought reopening for the purpose of securing the same grade separation condition. Barrington argued that new, unanticipated growth in rail traffic would have “significant impacts that were never considered by the Board,” and that this amounted to “new evidence, or substantially changed circumstances.” 2014 Petition at 1 (citing 49 C.F.R. § 1115.4). The Board denied reopening, finding “that Barrington ha[d] not presented new evidence or substantially changed circumstances that would materially affect the outcome of the Board’s [Approval Decision] and warrant the imposition of an additional condition requiring CN to pay for a grade separation at U.S. 14.” May 15 Decision at 3.

Barrington now seeks reconsideration of the May 15 Decision, claiming “material error” based on arguments that are either immaterial or were previously considered and rejected by the Board, the Court of Appeals, or both. The May 15 Decision did not involve error, much less material error. The Board should deny the Reconsideration Petition, and Barrington should cease its repetitious, burdensome litigation.

ARGUMENT

Under 49 C.F.R. § 1115.3(b) (which Barrington fails to cite), a petition for reconsideration must demonstrate that the decision to be reconsidered would be materially affected by “new evidence or changed circumstances” or that it involved “material error.” 49

C.F.R. § 1115.3(b). Barrington’s Reconsideration Petition does not claim “new evidence or changed circumstances.” Instead, it asserts “material error.” Reconsideration Petition at 2.

But Barrington barely attempts to demonstrate “material error” in the decision it asks the Board to reconsider – the May 15 Decision. There is not a single citation to the May 15 Decision in pages 2-9 of the Reconsideration Petition. As we discuss in Section I below, the bulk of the Reconsideration Petition is instead devoted to arguments previously rejected by the Board in its 2008 and 2012 decisions, and to strident, conclusory attacks on the Board (for example, accusing the Board of acting out of “fear of embarrassment” (*id.* at 4 n.5) and of repeating an “absurd mantra” (actually an objective finding of the Board’s independent expert consultants) (*id.* at 14)). Those old arguments and unsupported attacks should be summarily dismissed. As we demonstrate in Section II below, the few remaining points in the Reconsideration Petition fail to demonstrate any error at all in the May 15 Decision, much less any material error.

I. MOST OF BARRINGTON’S “MATERIAL ERROR” ARGUMENTS ARE UNTIMELY, REPETITIOUS, AND MERITLESS ATTACKS ON THE BOARD’S 2008 AND 2012 DECISIONS.

Barrington’s Reconsideration Petition consists mainly of claims that the Board erred in its Approval Decision and its 2012 Decision. As Barrington says, “[i]n seeking reconsideration, Barrington is simply asking the Board to rectify [alleged] past errors” from 2008 and 2012. *Id.* at 5. That request should be summarily rejected on two independent grounds.

First, Barrington’s arguments that the Board’s earlier decisions may involve material error are misplaced in a petition for reconsideration *of the May 15 Decision*. Moreover, Barrington’s 2014 Petition, the subject of the May 15 Decision, did not raise any claims of material error in the Board’s prior decisions. May 15 Decision at 3. (Instead, it made arguments

based on purported “new evidence or changed circumstances,” which the Board rejected.)

Barrington cannot ask the Board to “reconsider” claims it did not make in its 2014 Petition.

Second, Barrington has already had ample opportunity in earlier stages of this proceeding and when it sought judicial review of the Board’s Approval Decision and 2012 Decision to explain the supposed error of the Board’s ways.² Barrington’s present criticisms of the Board’s earlier decisions all repeat points Barrington made, and the Board rightly found unpersuasive, years ago. Neither the Board nor CN should be put to the burden of rehashing every few years, at Barrington’s whim, arguments resolved in final Board decisions that were upheld on appeal.³

² Barrington claims the Board unreasonably “rushed” the NEPA process in this proceeding, referencing by comparison STB Finance Docket No. 34075, *Six Cnty Ass’n of Gov’ts – Construction & Operation Exemption – Rail Line Between Levan & Salina, Utah*, a construction proceeding not subject to the statutory deadlines applicable to a control proceeding (*see* 49 U.S.C. § 11325(b)-(d)). *See* Reconsideration Petition at 4 & n.4. But the Board’s NEPA analysis of the EJ&E Transaction was exhaustive and met or exceeded all NEPA notice requirements, thus providing Barrington ample opportunity to make its arguments prior to the Approval Decision. Barrington likewise has had ample opportunity since the Approval Decision to assert any claims concerning the overall sufficiency of the NEPA process.

³ CN therefore will not rebut in detail herein Barrington’s distorted account of the record from 2008-12. CN notes, however, that the gist of Barrington’s argument is that the Board has given insufficient consideration to Barrington’s 2008 traffic study, which projected substantial delays and queues at crossings in Barrington. The Board has already explained why that study was not new evidence, and even if it had been new, was not material. 2012 Decision at 9-15. Moreover, contrary to Barrington’s suggestion (Reconsideration Petition at 3-4 & n.3), the Board specifically considered and rejected Barrington’s claims of “disparate treatment,” notwithstanding Barrington’s waiver of that argument in the D.C. Circuit. 2012 Decision at 13-16 (explaining the Board afforded *greater* consideration to Barrington’s crossing than to other crossings and rejecting Barrington’s claim that its comparison of U.S. 14 to Ogden Avenue is either new evidence or material).

Barrington also claims that the Board’s Village of Barrington Traffic Operational Analysis Study (“VOBTOA”) “showed that projected queue lengths [in Barrington] could be expected to exceed all other crossings on the entire EJ&E line.” Reconsideration Petition at 9. It showed no such thing, since its methodology was not applied to other crossings. *See* 2012 Decision at 4-5 (noting that VOBTOA was “specifically focused on the Barrington area,” considering impacts “on the U.S. 14, Main Street/Lake Cook Road, and Hough Street corridors”). Further, Barrington’s queue lengths are a reflection of the pre-existing traffic congestion problems in Barrington noted by the Board (*see id.* at 12 (“Barrington’s own model shows that existing capacity constraints on U.S. 14 will contribute much more significantly to the

The Board should summarily reject Barrington’s claims of error in the Board’s 2008 and 2012 decisions; doing so would not be subject to judicial review, *see ICC v. Bhd. of Locomotive Eng’rs*, 482 U.S. 270, 280 (1987).

II. BARRINGTON’S ARGUMENTS REGARDING THE MAY 15 DECISION ARE MERITLESS.

At pages 10-13 of its Reconsideration Petition, Barrington raises four issues that relate in some way to post-2012 evidence and facts, but fails to substantiate its claims that the Board materially erred when it concluded in its May 15 Decision “that Barrington ha[d] not presented new evidence or substantially changed circumstances that would materially affect the outcome of the Board’s [Approval Decision] and warrant the imposition of an additional condition requiring CN to pay for a grade separation at U.S. 14.” May 15 Decision at 3. This section addresses those points.⁴

A. Alleged Train Traffic Increases

Barrington notes that CN’s monthly operational report for April 2015 shows that an average of 20.6 trains per day moved over the EJ&E line through Barrington that month – 0.3 trains a day more than the 2008 DEIS projected would move through Barrington by 2015 – and alleges on that basis that “even the Board’s claims on daily train counts were already outdated by the time it released its May 12 Decision.” Reconsideration Petition at 10. The Board’s observation that the original environmental analysis considered the impacts of rail line operations

vehicle delays at that crossing than will additional CN trains on the EJ&E line.”; “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 ...”), and queue lengths were just one of the factors considered by the Board in deciding on mitigation conditions, Approval Decision at 43-45; 2012 Decision at 5.

⁴ Barrington also refers once again to the USDOT TIGER II grant for Barrington. Reconsideration Petition at 11-12. Barrington ignores the Board’s explanation of why the TIGER grant is neither new nor material. May 15 Decision at 8.

in Barrington “at the traffic levels that are moving through Barrington today and are expected in the near term” was not based on a one-month snapshot, but on longer term averages and trends. May 15 Decision at 4. Moreover, insofar as Barrington may be suggesting that April 2015 traffic volumes indicate an inevitable sustained increase in traffic, that notion is belied by traffic volumes for May 2015, which fell to an average of 19.7 trains per day, or 0.6 trains less than, but still roughly equivalent to, the Operating Plan projection. *See* Average Daily Train Counts on CN & EJ&E Segments for May 2015, available at <http://www.stbfinance.com/docket35087.com/html/monthlyreports.html>.

As there are no “substantially changed circumstances” at present, Barrington shifts to speculating about the future, asserting that “there is nothing to indicate that this average [number of trains per day] – 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.” Reconsideration Petition at 10. But speculation about the future is no substitute for “new evidence” or “substantially changed circumstances,” as required for reopening under 49 C.F.R. § 1115.4. The Board’s refusal to act on the basis of such speculation does not constitute material error.

Moreover, to the extent that recent traffic growth has been driven by increases in energy-related traffic, as argued by Barrington, 2014 Petition at 7, 13, 15, the most recent evidence is that such traffic is on the decline, *see, e.g.,* Alison Sider, *Fewer Oil Trains Ply America’s Rails*, Wall St. J., Apr. 6, 2015, at B1. It is, of course, normal for commodity volumes and traffic to fluctuate both up and down. And even if Barrington had more solid grounds for projecting future growth, the Board has now explained three times “that meeting or exceeding a certain

level of traffic did not automatically warrant mitigation.” May 15 Decision at 5 (citing also the Board’s two prior decisions on this point).

B. Alleged Train Length Increases

Barrington characterizes as “unsupported” the Board’s finding that “the length of trains going through Barrington is not substantially greater than the projected length of trains considered by the Board in its [Approval Decision].” Reconsideration Petition at 10-11 (quoting May 15 Decision at 4). But that finding is amply supported by the undisputed testimony of CN’s Senior Vice-President, Southern Region, regarding average train lengths in 2012, 2013, and the first 11 months of 2014. *See* V.S. Liepelt at 3-4. Barrington dismisses those data – “the average length and number of trains that moved through Barrington in 2014” – as “ancient history” which “cannot be viewed as a harbinger of what will happen by the end of 2015 and beyond.” Reconsideration Petition at 11. Again, the actual evidence and circumstances offer no support for Barrington’s case; its speculation about what might happen in the future is not a sufficient basis for reopening; and “meeting or exceeding a certain level of traffic [does] not automatically warrant mitigation,” May 15 Decision at 5.

Barrington also complains that it “simply cannot understand” why the Board will not order additional reporting of train lengths in light of the potential impact of train lengths on crossing blockages. Reconsideration Petition at 10 & n.16. The Board has explained why very clearly: it already requires CN to provide “detailed data” on the ultimate matter of concern – blocked crossings – so there is insufficient justification for imposing yet more reporting requirements on train length, which has no independent relevance to the issues raised by Barrington apart from blocked crossings. *See* May 15 Decision at 5 n.9.

C. CN's Statements Regarding Double-Tracking

Barrington accuses the Board of failing to “[take] account of” evidence that CN has not ruled out double-tracking its line through Barrington, and accuses CN of “amend[ing]” a 2013 statement that it has “no current plans” to double-track through Barrington. Reconsideration Petition at 11. CN did not “amend” that statement; the “no current plans” language remains in the final version of the 2013 minutes to which Barrington refers, and Mr. Liepelt reiterated and strengthened it in the verified statement that CN submitted in support of its reply to the 2014 Petition. V.S. Liepelt at 4-5. CN had no plans to double-track when the 2013 draft minutes were written; it had no plans when the final minutes were written; and it has no plans now.

D. PHMSA Rules Relating to High-Threat Urban Areas

In the 2014 Petition (at 3-7, 9-16), Barrington argued that increases in volumes of crude oil moving through Barrington presented an unanticipated danger that required a new grade separation. In denying that Petition, the Board explained that “hazardous materials, including flammable liquids, already moved over the line pre-transaction”; that “[i]t would not be realistic to expect a carrier’s traffic mix to remain static years after the approval of a transaction”; and that carriers have a common carrier duty to carry hazardous materials, subject to “comprehensive [FRA, Transportation Safety Administration, and PHMSA] safety regulations,” which specifically address the transportation of hazardous materials by rail. May 15 Decision at 7. Barrington does not dispute any of those points. However, Barrington argues that new PHMSA safety regulations relating to the movement of oil by rail (which the Board mentioned, without comment, in the May 15 Decision (at 7 & n.22)) “inadvertently *increase* the threat to public safety,” because Chicago (unlike Barrington) is designated a High Threat Urban Area and thus

subject to certain new restrictions, giving CN an incentive to shift hazardous traffic from lines in Chicago to the line through Barrington. Reconsideration Petition at 12.

The argument by Barrington that past or future traffic shifts to EJ&E are attributable to new PHMSA regulations necessarily fails. The purpose for which CN acquired the EJ&E line in 2009, with the Board's authorization, was to shift traffic, including hazardous materials, to the EJ&E from congested lines in densely-populated downtown Chicago. CN has always been clear about that purpose, and needed no new "incentive" from regulations to follow through with its traffic-shifting plans.

Barrington also suggests (at pages 12-13) that the new PHMSA regulations on enhanced tank car standards are insufficiently stringent, because they do not apply to manifest trains carrying fewer than 35 tank cars (or 20 consecutive tank cars) loaded with Class 3 flammable liquid.⁵ Whatever Barrington's concerns regarding the new regulations – whether it believes that they will cause diversions of traffic or that they are insufficiently stringent – those concerns provide no basis for concluding the May 15 Decision, which merely mentioned those regulations in passing, involved material error. Any concerns Barrington may have about the new rules should be directed to those agencies that, as the Board indicated, "have primary jurisdiction over rail safety issues," May 15 Decision at 7, or, as Barrington and others have chosen, to a U.S. court of appeals through a petition for judicial review.⁶

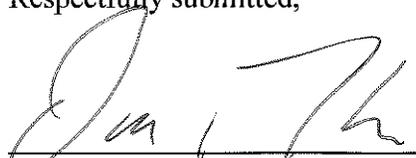
⁵ See Hazardous Materials: Enhanced Tank Car Standards and Operational Controls for High-Hazard Flammable Trains; Final Rule, 80 Fed. Reg. 26,644, 26,645-46 (May 8, 2015) (explaining rationale for tank-car thresholds).

⁶ Petitions for judicial review of the new PHMSA regulations were filed in several courts of appeals, but the federal respondents have determined that the petitions should be heard in the D.C. Circuit. Barrington moved to dismiss its Seventh Circuit petition on that ground (stating that it would re-file the petition in the D.C. Circuit), which the Seventh Circuit has granted. *Vill. of Barrington v. United States*, No. 15-2040 (7th Cir. June 23, 2015).

CONCLUSION

Barrington's Reconsideration Petition should be denied.

Respectfully submitted,



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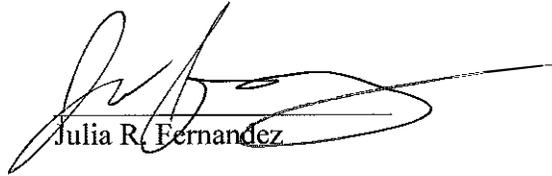
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*Counsel for Canadian National Railway Company
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June 24, 2015

CERTIFICATE OF SERVICE

I certify that I have this 24th day of June, 2015, caused a true copy of the foregoing CN's Reply to Petition of Village of Barrington Seeking Reconsideration of Decision Denying Petition Seeking Imposition of Additional Mitigation to be served upon all known parties of record in this proceeding by first-class mail or a more expeditious method.



Julia R. Fernandez