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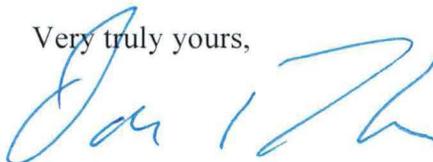
Ms. Cynthia Brown  
Chief, Section of Administration  
Office of Proceedings  
Surface Transportation Board  
395 E Street, S.W.  
Washington, DC 20423-0001

**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 Imposition of Additional Mitigation (CN-67).

Very truly yours,



David A. Hirsh  
Counsel for Canadian National Railway Company  
and Grand Trunk Corporation

Enclosure

cc: All Parties of Record

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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

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

[Barrington Petition for Mitigation]

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

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December 16, 2014

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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CANADIAN NATIONAL RAILWAY COMPANY  
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– CONTROL –  
EJ&E WEST COMPANY

[Barrington Petition for Mitigation]

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

Canadian National Railway Company and Grand Trunk Corporation (together “CN”)<sup>1</sup> reply to the Petition Seeking Imposition of Additional Mitigation Pursuant to the Board’s Oversight Jurisdiction and Reopening Based on Materially Changed Circumstances Pursuant to the Board’s Governing Regulations (“2014 Petition”) filed in this proceeding on November 26, 2014, by the Village of Barrington, IL (“Barrington”). Attached in support of this reply are the Verified Statements of Jeffrey A. Liepelt, Senior Vice-President, Southern Region, for CN (Attachment 1) and of Fiona Murray, Vice President Corporate Marketing, for CN (Attachment 2).

In its December 2008 final Approval Decision, the Board authorized CN to acquire the EJ&E railroad, which runs through Barrington, subject to certain conditions. After an extensive

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<sup>1</sup> CN incorporates by reference the short forms and abbreviations set forth in its Application (CN-2 at 8-11).

analysis, including thorough consideration of comments submitted by Barrington, the Board decided not to impose as a condition CN funding of a grade separation in Barrington.

The 2014 Petition is Barrington's fourth effort to overturn that decision. The D.C. Circuit unanimously denied Barrington's petition for judicial review of the Approval Decision; the Board unanimously denied Barrington's 2011 petition for reopening ("2011 Petition"), which sought essentially the same remedy, on essentially the same grounds, as its 2014 Petition now seeks; and five months ago, the D.C. Circuit unanimously denied Barrington's petition for judicial review of the Board's denial of the 2011 Petition.

The 2014 Petition recapitulates arguments Barrington made in 2008, 2009, and 2011. In addition, Barrington now speculates about changes in CN's traffic that it argues warrant a grade separation at the intersection of U.S. Route 14 and the EJ&E line. Those speculations neither justify reopening nor provide a basis for the relief Barrington seeks – an order retroactively "conditioning" CN's 2009 acquisition of the EJ&E railroad on payment of an additional \$47 million for that grade separation.

Barrington claims that its 2014 Petition "demonstrates both the carload movements and actual impacts of the transaction go far beyond what the Board had envisioned when imposing its original mitigating conditions." 2014 Petition at 1. To the contrary, the rail traffic projections considered by the Board in 2008 were remarkably accurate for the segment of EJ&E that includes Barrington. Barrington's 2014 Petition does not meet the demanding standards for reopening, and its repeated efforts to overturn the Board's Approval Decision run counter to basic principles of administrative finality. Neither the Board's approval of the EJ&E transaction ("Transaction"), nor CN's reliance on that approval in consummating the Transaction, should be subject to the fundamental change that Barrington requests.

## BACKGROUND

### A. The Board's 2008 Environmental Review and Approval Decision

In Decision No. 16 in the main docket, served on December 24, 2008 (“Approval Decision”), the Board approved the Transaction, and it was consummated on January 31, 2009. Before the Board approved the Transaction, its Section of Environmental Analysis (“SEA,” now the Office of Environmental Analysis (“OEA”)) conducted an extensive analysis, under the National Environmental Policy Act of 1969 (“NEPA”), of the Transaction’s environmental effects.<sup>2</sup> SEA issued a 3,500-page Draft Environmental Impact Statement (“DEIS”) on July 25, 2008, and, after receiving over 9,500 comments on the DEIS, a 3,100-page Final Environmental Impact Statement (“FEIS”) on December 5, 2008.

SEA thoroughly examined potential adverse environmental effects of increases in rail traffic at highway/rail at-grade crossings expected on the EJ&E line as a result of the Transaction. Applying three objective criteria, the DEIS identified 15 crossings as “potentially substantially affected” by the Transaction, and, as such, candidates for environmental mitigation to be imposed by the Board as conditions on its approval of the Transaction. U.S. Route 14 in Barrington met none of those criteria, and SEA did not recommend it for any Board-ordered mitigation.

Barrington commented on the DEIS, arguing that the Board should block the Transaction or else require CN to fund a trench to grade-separate four highways in Barrington, including U.S.

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<sup>2</sup> NEPA requires federal agencies to prepare an environmental impact statement (“EIS”) detailing the environmental effects of any “major Federal action” (including Board approvals of railroad acquisitions) that “significantly affect[s] the quality of the human environment.” 42 U.S.C. § 4332(2)(C). NEPA requires the EIS to discuss possible mitigation of adverse environmental effects, but it does not require the agency to implement or mandate mitigation. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352-53 (1989).

Route 14.<sup>3</sup> Relying on its own traffic study, Barrington claimed that SEA’s analysis of Transaction-related increases in delay to vehicles at grade crossings was methodologically flawed and understated the adverse impacts of the Transaction on highway traffic in Barrington.<sup>4</sup>

In the FEIS, SEA revised its list of “substantially affected” crossings to include 13 crossings (including Illinois Route 59 in Barrington, but not U.S. Route 14). After reviewing the individual characteristics of those 13 crossings, including such factors as pre-existing congestion, existing structures near the crossing, and the cost of a potential grade separation, SEA recommended grade separation (for which it recommended CN be required to pay 15% of the cost) for two of them (U.S. Route 30 in Lynwood and U.S. Route 34 in Aurora), and less expensive mitigation measures for six others.<sup>5</sup>

In response to Barrington’s criticism of the DEIS, SEA conducted a supplemental study of the Transaction’s effects on traffic in Barrington, using the same (“VISSIM”) software Barrington had used and recommended. SEA’s supplemental Barrington study concluded that by 2015, given serious pre-existing traffic congestion, the Transaction would increase total vehicle delay time in the Barrington region by only 4% in the morning peak period and 5% in the evening peak period.<sup>6</sup> SEA concluded that placing the EJ&E line in a trench (the mitigation sought by Barrington) was “neither reasonable nor practical”; that a grade separation at U.S. Route 14 “would have minimal benefit to traffic flow in the Barrington area”; and that “[e]ven if a grade separation were constructed, existing traffic signals in proximity to one another, as well

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<sup>3</sup> Village of Barrington’s Comments on DEIS at 20-21 (BARR-6).

<sup>4</sup> *Id.* at 34-40.

<sup>5</sup> II FEIS at 4-8 through 4-25.

<sup>6</sup> I FEIS at 2-49.

as the UP/Metra rail line, would result in substantial queuing along IL 59 and US 14.”<sup>7</sup> Since a grade separation would not solve Barrington’s pre-existing traffic congestion problems, and since it was “not the responsibility of the Applicants to mitigate for existing traffic congestion in the community by grade separating US 14,” SEA concluded that CN should not be required to fund a grade separation at U.S. Route 14 or elsewhere in Barrington.<sup>8</sup>

The Board’s Approval Decision imposed 180 mitigation conditions on its approval of the Transaction. In Final Mitigation Condition 14, the Board provided for grade separations at U.S. Routes 30 and 34, as recommended by SEA, and ordered CN to pay 78.5% and 67%, respectively, of their costs, rather than 15% as recommended by SEA.<sup>9</sup>

The Board agreed with SEA that a condition requiring CN funding for grade separation in Barrington was not warranted. It discussed SEA’s analysis of at-grade crossings at length,<sup>10</sup> noting specifically SEA’s finding in its supplemental study that a grade separation would reduce Barrington traffic delays by only a small percentage.<sup>11</sup> With particular relevance to Barrington, the Board explained that it would be improper to require CN to bear the cost of pre-existing, non-Transaction-related traffic problems:

[T]he primary cause of the existing traffic congestion in the communities along the EJ&E line is the high number of vehicles and lack of capacity on the current roadway system. Even where trains are responsible for traffic congestion, the problem would not be caused solely by applicants’ trains on the EJ&E line, but rather by the combined presence of multiple freight railroads and, in some locations, commuter trains as well. It would be inappropriate to hold the

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<sup>7</sup> II FEIS at 4-14, 4-16.

<sup>8</sup> *Id.*

<sup>9</sup> Approval Decision at 46-47, 76.

<sup>10</sup> *Id.* at 42-48.

<sup>11</sup> *Id.* at 45 n.101.

applicants responsible for the inadequate roadway system that now exists in the communities along the EJ&E line and the rarity (and in some communities, the absence) of grade-separated crossings.<sup>12</sup>

Nonetheless, the Board imposed a number of conditions for Barrington's benefit. It ordered CN (a) to work with Barrington to identify any improvements needed to maintain the existing quiet zone following the addition of CN traffic to the EJ&E, and, (b) for three years following the effective date of the Approval Decision, to fund reasonable improvements found necessary by the Federal Railroad Administration ("FRA") to maintain that designation.<sup>13</sup> It also ordered CN to coordinate with the Illinois Department of Transportation ("IDOT"), Barrington, and Lake County to develop a program to install traffic advisory road signs on Illinois Route 59 (Hough Street) at its crossing of the EJ&E line, advising motorists stopped in a queue at the crossing not to block upstream intersections,<sup>14</sup> and to provide, at CN's expense, closed-circuit television ("CCTV") systems to emergency service providers in Barrington and other designated communities, enabling them to see when grade crossings used by their emergency vehicles are blocked by trains.<sup>15</sup>

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<sup>12</sup> *Id.* at 45-46.

<sup>13</sup> *Id.* at 75 (Condition 8).

<sup>14</sup> *Id.* at 76 (Condition 15).

<sup>15</sup> *Id.* at 77 (Condition 18). In Decision No. 24 (served Aug. 30, 2010), the Board modified Condition 18 to permit CN, in lieu of the CCTV system originally mandated, to provide emergency service providers with Active Crossing System ("ACS") technology that would provide each emergency service providers with an electronic map of its service area that would show, in real time, when warning devices were activated at each grade crossing, thus providing a better sense of the timing and position of approaching trains. CN-61 at 2. The ACS has been implemented in Barrington. V.S. Liepelt at 6.

CN was also required to install or relocate on the EJ&E line Wheel Impact Load Detectors ("WILDs"), which detect defective train car wheels so that they can be removed from service. Approval Decision at 70 (VM 83). CN has installed three WILDs on the EJ&E line, including one at South Barrington.

## **B. Barrington's Post-Approval Re-Litigation Efforts**

Barrington has tried repeatedly to re-litigate the Approval Decision, and the Board and the U.S. Court of Appeals for the District of Columbia Circuit (“D.C. Circuit”) have repeatedly denied its claims:

- In 2009, Barrington petitioned for judicial review of the Approval Decision. It argued that the Board had failed to give proper consideration to Barrington’s 2008 traffic study, and that its environmental conditions were inadequate. The D.C. Circuit unanimously denied Barrington’s petition.<sup>16</sup>
- In 2011, Barrington petitioned the Board to reopen the control proceeding to require CN to fund a grade separation at U.S. Route 14 (“2011 Petition”).<sup>17</sup> Barrington presented revisions to its 2008 traffic study based on post-Transaction changes in rail traffic observed in Barrington, which it claimed constituted “new evidence” and “changed circumstances” justifying reopening. Also, as in the present petition, Barrington cited the Federal Highway Administration’s (“FHWA”) 2010 TIGER II grant to Barrington of \$2.8 million to fund preliminary engineering studies of potential infrastructure improvements including Barrington’s proposed grade separation, as proof of the need for the project.<sup>18</sup> CN, in response, pointed out that Barrington’s petition was based on “old evidence and arguments that ha[d] already been conclusively rejected by both the Board and the D.C. Circuit.”<sup>19</sup> The Board denied the 2011 Petition, noting that even if Barrington’s revised traffic study were deemed “new,” it could not be considered material, since Barrington now projected less vehicular delay than it had claimed in its 2008 traffic study, and since traffic delay was “just one factor in determining whether a grade separation is appropriate.”<sup>20</sup> The Board

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<sup>16</sup> *Village of Barrington v. STB*, 636 F.3d 650 (D.C. Cir. 2011).

<sup>17</sup> Petition Seeking Imposition of Additional Mitigation Pursuant to the Board’s Oversight Jurisdiction and Reopening Pursuant to Governing Regulations (Oct. 14, 2011).

<sup>18</sup> Barrington initially asked that the Board require CN to pay “at least an 84% share” of the costs of the proposed Route 14 grade separation, 2011 Petition at 34, but later asked that CN be required to pay “the full cost,” Motion of Village of Barrington, IL for Leave to File This Rebuttal at 15 (Nov. 14, 2011).

<sup>19</sup> CN’s Reply in Opposition to the Village of Barrington’s Petition Seeking Imposition of Additional Mitigation at 4 (Nov. 3, 2011) (CN-65).

<sup>20</sup> *Canadian Nat’l Ry. – Control – EJ&E W. Co. [Barrington Pet. for Mitigation]*, Docket No. 35087 (Sub-No. 8), at 10 (STB served Nov. 8, 2012) (“2012 Order”). The Board also noted that Barrington’s study was flawed and unreliable. *Id.* at 13.

continued to “adhere[] to its general practice of not requiring applicants to mitigate preexisting conditions, *i.e.*, conditions not caused by the transaction,”<sup>21</sup> and the Board noted that “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.”<sup>22</sup>

- In 2012, Barrington petitioned for judicial review of the Board’s denial of the 2011 Petition. Again, the D.C. Circuit unanimously denied Barrington’s petition.<sup>23</sup> Barrington sought rehearing by the panel and *en banc*, which were denied three months ago.<sup>24</sup>
- On August 27, 2014, Barrington petitioned for an extension of the Board’s regulatory and monitoring oversight for an additional two years. That petition remains pending.

### **C. Barrington’s Current Petition**

Barrington’s 2014 Petition seeks essentially the same relief it sought in its 2011 Petition – an order requiring CN to fund a grade separation at U.S. Route 14. Like the 2011 Petition, the 2014 Petition claims that “new evidence” and “changed circumstances” justifies reopening.

This time, Barrington does not revise its highway traffic study,<sup>25</sup> but instead claims that the “recent energy-related market developments on CN’s rail network” (in particular, growth in crude oil, ethanol, and frac sand traffic) are causing a “massive and recent surge of unanticipated freight movements” on the EJ&E line through Barrington.<sup>26</sup> These additional freight

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<sup>21</sup> *Id.* at 11.

<sup>22</sup> *Id.* at 12.

<sup>23</sup> *Village of Barrington v. STB*, 758 F.3d 326 (D.C. Cir. 2014).

<sup>24</sup> *Village of Barrington v. STB*, No. 12-1485, 2014 U.S. App. LEXIS 17541 (D.C. Cir. Sept. 10, 2014), 2014 U.S. App. LEXIS 17542 (D.C. Cir. Sept. 10, 2014).

<sup>25</sup> Barrington asserts that its previous conclusion that the Transaction would cause a 98-hour increase in total vehicular delay at Route 14 has “been accepted by the Board and CN as accurate during the oversight period for this transaction.” 2014 Petition at 17 n.36. That assertion is unsupported and false.

<sup>26</sup> 2014 Petition at 7.

movements, Barrington suggests, will cause the number and/or length of trains on the EJ&E line, and their adverse impacts on highway traffic and safety, to substantially exceed the Board's expectations. Barrington, however, does not attempt to quantify in any way the increased volumes of energy-related traffic on which its Petition is premised.<sup>27</sup> It instead asks the Board to assume that growth in energy related business in the rail industry and on CN warrants retroactive imposition of a grade separation condition.

Barrington's 2014 Petition also cites FHWA's TIGER II grant regarding the Route 14 grade separation as evidence that, "[i]n 2010, ... the United States Department of Transportation ('USDOT') recognized that increased freight traffic resulting from CN's acquisition of the EJ&E line had established the need for a grade separation at the intersection of U.S. Highway 14 and the EJ&E Line."<sup>28</sup> Barrington claims that the award of the TIGER II grant "reflects the federal government's determination that a grade separation at the U.S. Highway 14 crossing is essential if the objectives of the [Strategic Regional Arterial] system are to be achieved,"<sup>29</sup> suggesting that this demonstrates a need to require CN to fund a grade separation, and that the undemonstrated growth in energy-related traffic through Barrington accentuates that need. Barrington, however, does not claim that its 2010 TIGER II grant application and grant are new. Indeed, the Board rejected Barrington's arguments based on its TIGER II grant when it presented them in its 2011

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<sup>27</sup> *See id.* at 15 ("Given the rapid increase in this unanticipated traffic, it is impossible to guesstimate, much less pinpoint with any accuracy, the future number or length of additional CN freight trains engaged in the movement of petroleum and petroleum products that will pass through Barrington on a daily basis.").

<sup>28</sup> 2014 Petition at 8.

<sup>29</sup> *Id.* at 21.

Petition. Barrington also offers no written decision or findings by FHWA addressing the issue of whether CN should be required to pay \$47 million to fund a grade crossing.

### LEGAL STANDARDS

“If rail carriers and shippers are unable to rely upon a Commission decision over a year after it has become final and effective (with no pending applications for judicial review or stays of effectiveness), there would be no end to the administrative process and no certainty in administrative decisionmaking.” *S.R. Investors, Ltd., d/b/a Sierra R.R.—Aban.—In Tuolumne County, Cal.*, Docket No. AB 239X, slip op. at 5 (ICC served Jan. 26, 1988) (denying reopening), *aff’d sub nom. Friends of Sierra R.R. v. ICC*, 881 F.2d 663, 667 (9th Cir. 1989). To prevent that outcome, the law and the Board’s practice impose demanding threshold requirements on petitions seeking substantial retroactive changes to final decisions.

Under 49 U.S.C. § 722(c), the Board may reopen a proceeding “because of material error, new evidence, or substantially changed circumstances.” The well-established limits of, and criteria for the exercise of, such discretion are outlined below:

- *Heavy Burden.* “Anyone who files a petition to reopen a decision has the burden of persuading the tribunal that reopening is warranted.”<sup>30</sup> “Petitions to reopen previously final agency decisions are to be granted only in the most extraordinary circumstances.”<sup>31</sup>
- *Materiality.* The Board will reopen only if the claimed error/new evidence/changed circumstance is material in the sense that it “would mandate a different result.”<sup>32</sup> Thus, decisions to deny discretionary relief (such as the Board’s discretionary decisions, after taking the hard look mandated by

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<sup>30</sup> *Simmons v. ICC*, 760 F.2d 126, 132 (7th Cir. 1985).

<sup>31</sup> *Farmers Export Co. v. ICC*, 758 F.2d 733, 737 (D.C. Cir. 1985).

<sup>32</sup> *Montezuma Grain Co. v. STB*, 339 F.3d 535, 542 (7th Cir. 2003); *accord Desert Xpress Enters.—Pet. for Decl. Order*, FD 34914 (STB served May 7, 2010).

NEPA, regarding mitigation) do not constitute “material error” under the reopening standard, however they may appear “in hindsight.”<sup>33</sup>

- *New Evidence.* The “new evidence, or substantially changed circumstances” predicate for reopening does not mean new arguments about old evidence, or new theories or expert analyses of old facts; it means new facts.<sup>34</sup>
- *The Board Approaches Reopening Cautiously, Weighing Interests of Administrative Finality and Repose.* Even when there is arguably material new evidence, the Board approaches petitions to reopen “cautiously, . . . striving to achieve an appropriate balance between the interests of fairness to all parties and of administrative finality and repose.”<sup>35</sup>

These well-established principles are not altered by Condition 72 of the Board’s

Approval Decision. In Condition 72, the Board provided that:

If there is a material change in the facts or circumstances upon which the Board relied in imposing specific environmental mitigation 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.

Approval Decision at 84.

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<sup>33</sup> *Farmers Export*, 758 F.2d at 737-38.

<sup>34</sup> See, e.g., *Canadian Nat’l Ry. – Control – Ill. Cent. Corp.*, 6 S.T.B. 344, 350 (2002) (“*CN/IC*”) (“‘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.”). New theories are insufficient to justify reopening because “[t]he administrative process might never end if parties could come back to the Board years after a final decision to try out a new theory.” *Pyco Indus., Inc.–Feeder Line Application–Lines of S. Plains Switching, Ltd.*, FD 34890 (STB served June 11, 2010).

<sup>35</sup> *Ariz. Pub. Serv. Co. v. Atchison, Topeka & S.F. Ry.*, 3 S.T.B. 70, 75 (1998). Even when material new evidence or substantially changed circumstances are convincingly demonstrated, the Board has broad discretion to refuse to reopen. *Brooklyn E. Dist. Term. v. ICC*, 302 F. Supp. 1095, 1105 (E.D.N.Y. 1969). Administrative finality means that there is no right to reopening just because “some new circumstance has arisen, some new trend has been observed, or some new fact discovered.” *Vt. Yankee Nuclear Power Corp. v. NRDC, Inc.*, 435 U.S. 519, 554-55 (1978); accord *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 373 (1989); *Theodore Roosevelt Conserv. P’ship v. Salazar*, 616 F.3d 497, 511 (D.C. Cir. 2010).

In denying Barrington’s 2011 Petition, the Board made clear that “Condition No. 72 . . . does not independently establish a standard for reopening to modify conditions apart from the statutory standards [of 49 U.S.C. § 722(c)].” 2012 Order at 9. Rather, the Board held that reopening requires that the statutory standard be met through a showing of “material error, new evidence, or substantially changed circumstances” that “would mandate a different result.” *Id.* at 8-9 (citations omitted).

## ARGUMENT

### **I. BARRINGTON’S SPECULATIONS ABOUT FLUCTUATIONS IN TRAFFIC ARE INCORRECT, DO NOT CONSTITUTE “NEW EVIDENCE” OR “SUBSTANTIALLY CHANGED CIRCUMSTANCES,” AND DO NOT JUSTIFY REOPENING.**

Barrington’s 2014 Petition is founded on its claim that “newly developed information . . . demonstrates both the carload movements and actual impacts of the transaction go far beyond what the Board had envisioned when imposing its original mitigating conditions on” CN. 2014 Petition at 1. Based on generalizations about the growth in energy markets and CN’s rail network, Barrington speculates that there has been a “massive and recent surge of unanticipated freight movements” that was not considered by the Board for purposes of its NEPA analysis. *Id.* at 7. It asserts that CN must now be planning to double track its line through Barrington in order to accommodate the supposed massive new volumes of traffic, although such double tracking was not part of CN’s Operating Plan for implementing the Transaction. *Id.* at 22-24. And Barrington raises the specter of increased risk of catastrophic accidents as a result of what it speculates are greatly increased volumes of flammable liquids in the form of crude oil and ethanol moving through Barrington, noting past accidents involving ethanol and Bakken light crude oil (none on the EJ&E line) and the Pipeline and Hazardous Materials Safety

Administration (“PHMSA”) rulemaking concerning DOT-111 tank car standards for transporting light crude oil and ethanol. *Id.* at 26-32.

Barrington’s speculations are directly contradicted by the facts, which only underscore the accuracy of the traffic projections used by the Board. If Barrington’s 2014 Petition demonstrates anything, it is the potential for abusing the Board’s processes if parties are allowed to use speculative claims about potential fluctuations in rail traffic as “new evidence” or “changed circumstances” in support of reopening a final decision of the Board.

A. Train Volumes and Train Lengths

With respect to traffic volumes, Barrington barely acknowledges the most salient single fact – train volumes in Barrington remain *below* the levels projected by CN and anticipated by the Board in reaching its Approval Decision. The projected daily train volume for Barrington’s segment of EJ&E (Segment 14) was 20.3, while the actual year-to-date average is just 17.5, with a high for the year of 18.6 and a low of 17.0. *See* V.S. Liepelt at 2 & Ex. 1. Barrington’s speculation that increased energy traffic means significantly more trains than were projected in 2008 is simply wrong.<sup>36</sup>

Based on Barrington’s review of CN’s September 2014 report of blocked crossings, however, Barrington speculates that CN must be handling the supposed surge in traffic volumes through a large increase in the average length of trains moving through Barrington. It suggests an average length of 8,568 feet. It asserts that “[e]ven if the target number of daily trains may not yet have reached the figure originally projected by CN, the number of carloads has certainly exceeded the number of projected carloads by a wide margin.” 2014 Petition at 15-16. Not so.

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<sup>36</sup> The 2008 projections the Board used are considerably more accurate than Barrington’s assertion, in its 2010 TIGER II application, that CN would run “25-plus freight trains . . . through the Village on a daily basis.” V.S. Darch, Att. D, at 11.

The projected average train length relied upon by the Board for trains operating through Barrington was 6,829 feet. *See* Table 4.3-5 of DEIS/FEIS. CN's actual average train length for trains operating through Barrington in 2014 has been remarkably close to that projection – 6,916 feet. V.S. Liepelt at 3-4. Thus, Barrington's claims concerning existing train and carload volumes are demonstrably wrong.

Barrington's remaining volume argument is not based on "new evidence" or "changed circumstances" regarding present traffic volumes. It is based entirely on speculation concerning potential future energy-related traffic that it suggests could develop and could eventually cause overall volumes on EJ&E to significantly exceed projections. As discussed in Section III, below, the Board as a matter of principle should not accept traffic fluctuations as a basis for reopening a consummated transaction, particularly one that was consummated many years ago. The Board wisely declined to use traffic projections more than seven years into the future, given the inherently speculative nature of such long-term projections and the need to make its 2008 Approval Decision based on factual evidence and, pursuant to NEPA, reasonable foreseeability. Approval Decision at 41.

It would be far worse to accept speculation such as Barrington's concerning traffic fluctuations that *might occur in the future* as a valid basis for reopening a final decision. Given the natural fluctuations in traffic and the difficulty of accurately projecting traffic over even a short period, doing so would potentially subject the Board and applicants to a never-ending series of reopening requests.

In any event, Barrington's speculations in this case are groundless. First, Barrington concedes the massive potential volume increases on which it relies depend on double tracking. Barrington adopts SEA's conclusion "that the Applicants' Operating Plan [*i.e.*, projected traffic]

would consume nearly all of the main line capacity on the EJ&E rail line, after Applicants' constructions are completed." 2014 Petition at 23 (quoting DEIS Appx. B, Att. B4, at 13). Accordingly, Barrington premises its speculation about future volume increases on its further speculation that CN must have current or near term plans to double track the EJ&E line running through Barrington.

CN has no such plans. *See* V.S. Liepelt at 4. It has not designed or sought or allocated money for such double tracking. *Id.* at 5. CN requested that if a new grade separation is built, it provide sufficient clearance to accommodate double tracking in the future, but that request was a standard, prudent, precautionary request given the long life and high cost of replacing a railroad structure such as a bridge. In this case, Barrington's plans cite a 100-year useful life for its planned railroad structure. V.S. Darch, Att. D, at 9. As Mr. Liepelt explains, CN's request merely reflects its "consistent preference that grade separation projects be designed and built so that, if traffic grows to the level warranting a second track, it could be installed without reconstructing the entire grade separation." V.S. Liepelt at 5. It does not mean or suggest that such growth is imminent or reasonably foreseeable. *Id.*

CN has no plans to double track through Barrington because CN does not anticipate for the foreseeable future that traffic volumes on Barrington's segment of EJ&E will grow significantly beyond the volumes projected in its 2008 Operating Plan.

Barrington focuses on increased energy-related traffic. It is true that CN has experienced some increases in energy-related traffic through Barrington in the form of (i) heavy crude oil from Western Canada and (ii) frac sand from Wisconsin, but neither is moving or is expected to move in overwhelming volumes through Barrington. The crude oil that CN moves through Barrington originates in the oil sands of Western Canada and is destined either for terminals and

refineries served directly by CN or for interchange with other U.S. carriers. V.S. Murray at 3-4. In 2013, CN moved approximately 103 carloads per day of heavy crude oil through Barrington, all on manifest trains. *Id.* at 4. That volume increased to approximately 119 carloads per day in 2014. *Id.* Included in that 2014 volume are two unit trains per week of heavy crude oil that CN began moving through Barrington in the 4th quarter of 2014. *Id.* at 4. Next year, CN anticipates that (a) carloads moving in manifest service will remain flat compared to 2013 and 2014, and (b) between 8 and 13 additional unit trains of heavy crude oil per week will move through Barrington. *Id.* at 4-5. This would represent an increase of just 1.1 to 1.9 trains per day over current volumes. *Id.* at 4.

The frac sand that CN moves through Barrington originates in Wisconsin and is destined for interchange with other U.S. carriers, who transport it to regions where it is used in hydraulic fracturing operations. Frac sand movements through Barrington grew from approximately 55 carloads per day in 2013 to approximately 102 carloads per day for 2014. V.S. Murray at 2. Included in the 2014 volumes are approximately 2 unit trains per week that CN began operating in 2014; the rest of the traffic moves on manifest trains. *Id.* at 2-3. CN expects its frac sand shipments to grow in 2015 and beyond, but the rate of growth and specific routing is dependent on unpredictable market forces. *Id.* at 3. For example, new transload facilities and terminal capacity for frac sand in Western Canada are currently under development, and some existing volumes of frac sand as well as some potential growth could be shifted away from the EJ&E routing to destinations in Western Canada. *Id.* As Ms. Murray explains, this shift could be especially pronounced if crude oil prices remain low and that reduces demand for frac sand in the western United States, which is the principal destination for the frac sand moving through Barrington. *Id.*

Taking these factors into account, CN projects that a maximum of 3 to 4 additional unit trains per week (0.4 to 0.6 trains per day) of frac sand may move over Barrington by the end of 2015. *Id.* Given the sharp drop in crude oil prices, however, Ms. Murray concludes “it is quite possible that there will be less growth in frac sand volumes moved over Barrington in 2015, and specific growth (or decline) beyond that time cannot reasonably be projected.” *Id.*

In sum, CN has experienced a growth in energy-related traffic, but CN’s maximum total projected growth through Barrington of its primary energy-related traffic is only an additional 2.5 trains per day (1.9 of heavy crude oil plus 0.6 of frac sand). Adding 2.5 trains a day to the 2014 average of 17.5 trains a day (or to the 4th quarter to date average of 17.75 trains per day) on the Barrington segment of the EJ&E line would generate a total of between 20 trains a day (or 20.25 trains per day) – approximately equal to the 20.3 trains a day projected in the 2008 Operating Plan.

CN’s future energy-related traffic growth is not projected to increase CN’s average train lengths. CN expects that future growth in energy-related shipments through Barrington will be in unit trains. CN currently operates 100-car unit trains through Barrington of both crude oil and frac sand, but these trains are below average length (the crude oil trains are just over 6,100 feet in length, while the frac sand trains are approximately 4,200 feet). CN prefers running unit trains of this length because it optimizes the horsepower-to-tonnage ratio, but even if in response to customer demands CN began running longer unit trains, they would likely be no more than 120 cars, or about 7,200 feet in length (*i.e.*, slightly above average for trains that operate through Barrington). *Id.* at 5.

B. Flammable Hazmats and Safety Concerns

Barrington claims that supposed huge increases in flammable hazmat traffic through Barrington pose a new threat to public safety not considered by the Board.<sup>37</sup> Those claims are based on a fundamental misunderstanding of CN's business.<sup>38</sup>

Barrington, for example, cites concerns about increased shipments of ethanol. 2014 Petition at 6. Ms. Murray explains that while ethanol originating in Wisconsin travels through Barrington, that traffic has decreased by approximately 45% from 2011 to 2014.<sup>39</sup> V.S. Murray at 2. Moreover, CN is moving no ethanol unit trains through Barrington, and is moving only approximately 3 loads per day in manifest trains; this volume is not expected to increase in the foreseeable future. *Id.* at 3. These shipments pose no new, unusual, or unanticipated threat to Barrington.

Barrington's safety argument with respect to crude oil is also meritless. The crude oil which was involved in the Lac-Mégantic accident and other high profile crude-oil accidents, and

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<sup>37</sup> Barrington's other major safety argument is that the much longer trains it supposes CN to be operating pose a greater risk of blocking all four road crossings in Barrington simultaneously. 2014 Petition at 24. It states that trains of 9,000 feet or more may cause such a blockage. *Id.* But as discussed in Section I.A., CN's average train lengths in 2014 have been quite close to the projections relied on by the Board (6,916 actual versus 6,829 projected) and new energy-related unit trains are expected to be at or significantly below that 2014 average.

<sup>38</sup> They also ignore two essential facts. First, not all of the traffic growth on the EJ&E can be attributed to the Transaction. EJ&E forms a natural route around congested Chicago. As such, whether through interchange, haulage, or trackage rights, traffic volumes on the EJ&E line would likely have grown even without CN's acquisition. As the Board has repeatedly made clear, it does not seek to mitigate environmental impacts that are not Transaction-related. *See, e.g.,* Approval Decision at 38 n.82. Second, Barrington ignores the many safety improvements CN has made to the EJ&E pursuant to its operating plan and Board-imposed conditions. *See* Background, above; V.S. Liepelt at 6. Between CN's extensive investment in line improvements for the EJ&E and its safety investments and initiatives, operations over the EJ&E line through Barrington are likely the safest they have ever been.

<sup>39</sup> CN moves ethanol from other locations further west, but not through Barrington.

which is the focus of the rulemaking by the PHMSA with respect to DOT-111 cars, is light crude oil, particularly oil from fracking in the Bakken formation in North Dakota. That oil is hydrogen-heavy and carbon-light, which makes it flow easily, but also makes it more flammable than heavy crude oil.<sup>40</sup> CN does not directly serve the Bakken formation or other major areas producing fracking oil; its major participation in fracking-oil transportation is receiving movements in interchange from BNSF and CP, but that traffic is interchanged south of Barrington for movements proceeding further south. CN does not regularly move *any* volumes of the more flammable light crude oil through Barrington.

The heavy crude oil CN is moving through Barrington poses less safety risk than Bakken's light crude oil (which, it should be noted, presents only a minuscule safety risk when handled properly), as it has a higher flashpoint and is thus less flammable. These differences in characteristics have been recognized by PHMSA, which has proposed (1) requiring railroads to provide written notice to State Emergency Response Commissions of movements of trains carrying 1 million gallons or more of Bakken crude oil, but not of heavy crude oil from oil sands, and (2) limiting use of DOT-111 cars for Bakken crude oil and other flammable liquids, but not for liquids, such as the heavy crude oil from oil sands, that are classified as "combustible" rather than "flammable."<sup>41</sup> Nonetheless, CN has been a leader in providing heavy crude oil shippers

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<sup>40</sup> Pipeline and Hazardous Materials Safety Administration, Draft Regulatory Impact Analysis, "Hazardous Materials: Enhanced Tank Car Standards and Operational Controls for High-Hazard Flammable Trains; Notice of Proposed Rulemaking," [Docket No. PHMSA-2012-0082] (HM-251), at 81 n.66 (July 2014) ("Regulatory Impact Analysis"), available at <http://www.regulations.gov/contentStreamer?objectId=09000064817f3a1f&disposition=attachment&contentType=pdf>.

<sup>41</sup> Hazardous Materials: Enhanced Tank Car Standards and Operational Controls for High-Hazard Flammable Trains, 79 Fed. Reg. 45,016, 45,059, 45,040-45,042 (Aug. 1, 2014). *See also* Regulatory Impact Analysis at 81 ("[Oil sands crude] has a high flashpoint and is generally classified as a combustible liquid, which means tank cars carrying [oil sands crude] will not be covered by [the proposed restrictions on use of DOT-111 tank cars].")

with rate incentives to use upgraded DOT-111 cars built after November, 2011. Such cars comply with AAR's more rigorous CPC (Casualty Prevention Circular) 1232 safety standards. V.S. Murray at 4. Barrington's alarmist claims about a potentially catastrophic Lac-Mégantic-like accident and about the safety of DOT-111 cars moving light crude oil are therefore misplaced.

## **II. THE REMAINDER OF BARRINGTON'S PETITION ALSO FAILS TO PRESENT "NEW EVIDENCE" OR "CHANGED CIRCUMSTANCES" AND CANNOT SUPPORT REOPENING**

Apart from its speculation about changes in rail traffic, the remainder of Barrington's 2014 Petition is largely devoted to two things. First, relying on its supposed new facts about higher volumes of rail traffic, longer trains, and greater exposure to flammable hazmat commodities, Barrington tries to revive old arguments that have previously been made and rejected by the Board as unpersuasive. Second, Barrington cites its own 2010 application to FHWA for a TIGER II grant, and the fact that it received a study grant, as support for its 2014 Petition. None of this qualifies as "material . . . new evidence, or substantially changed circumstances," 49 U.S.C. § 722(c), and none of this supports reopening this proceeding or granting the added mitigation sought by Barrington.

Barrington argues, for example, that "[a]s CN's freight trains increase in number and in length, additional daily vehicular delays are inevitable!"<sup>42</sup> 2014 Petition at 17. As we show

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<sup>42</sup> Barrington's own evidence undermines its arguments about increasing delay at grade crossings in Barrington. Attachment A to the Verified Statement of Karen Darch shows that for the period March, 2009 to October, 2014 there were an average of 56.25 activations of 10 minutes or longer per crossing at the 4 crossings in Barrington. That equates to less than 1 such blockage per crossing per month, and less than 0.04 such blockages per crossing per day. These minimal delays do not justify a grade separation.

above, however, CN's freight trains have not increased substantially in number or in length beyond the projections utilized by the Board, and are not projected to do so. These facts also undermine Barrington's effort to revive its arguments about a potential blockage of all four crossings in Barrington and a resulting potential delay in access to Good Samaritan Hospital. *See, e.g., id.* at 24-26. The Board already considered and addressed those arguments, imposing mitigation conditions for the benefit of first responders,<sup>43</sup> but determining that CN should not be required to fund a grade separation in Barrington. Approval Decision at 39, 45, 48, 77. Lacking evidence of much longer or much more frequent trains, Barrington's repetition of those arguments adds nothing. Similarly, there is nothing new in Barrington's repeated reference to Route 14 as a Strategic Regional Arterial ("SRA") route. *E.g.,* 2014 Petition at 18. Barrington provides no basis for disturbing the Board's prior determination that an SRA designation was just one of many factors to be taken into account by the Board in determining mitigation. *See* 2012 Order at 15-16.

Barrington also suggests that its application and FHWA's 2010 decision granting \$2.8 million of TIGER II funding for a preliminary engineering study of several potential infrastructure improvements in Barrington provide a basis for the Board to change its 2008 Approval Decision and order CN to pay \$47 million to fund one of the potential improvements within the scope of that study, a grade separation at the EJ&E/Route 14 intersection. They do not, for several reasons.

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<sup>43</sup> As noted previously, CN has provided to Barrington Active Crossing System ("ACS") technology that allows Barrington's emergency service providers to monitor train movements over EJ&E in real time so they may anticipate and plan for the presence of trains at highway/rail grade crossings. V.S. Liepelt at 6.

First, Barrington's TIGER II application and the FHWA grant are not remotely "material . . . new evidence, or substantially changed circumstances," as required to justify reopening under 49 U.S.C. § 722(c). The FHWA grant dates from 2010; Barrington relied on it, making essentially the same arguments, in its 2011 Petition; and the Board has already rejected those arguments in denying Barrington's 2011 Petition.<sup>44</sup>

Second, FHWA's \$2.8 million study grant provides no basis for any inference that the Board should require CN to spend \$47 million on a grade separation. The FHWA grant is not supported by any factual findings (or at least, Barrington has not submitted any FHWA decision containing findings), so even if the Board were required to defer to FHWA, there is nothing to defer to. The fact that FHWA made a grant of money cannot be taken as an endorsement of any and all factual assertions made in Barrington's application. Moreover, FHWA's grant decision addressed questions far removed from those before the Board. It was deciding whether and how much federal funding should be granted to a potential project including multiple infrastructure improvements (including improvements at two major road (non-rail) intersections, a creek relocation, and two new road (only) bridges over that creek, *see* V.S. Darch, Att. D), so it was not exclusively focused on the interaction of road traffic with the EJ&E line. And FHWA had no reason to address whether and to what extent traffic problems in Barrington are Transaction-related, or to consider the broader rail transportation policy implications of burdening a proposed transaction with expensive mitigation.<sup>45</sup>

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<sup>44</sup> Nor do Barrington's TIGER II application and grant support its claims of increased energy-related traffic, which post-date the 2010 grant. Rather, they demonstrate that Barrington's claims are unrelated to the supposedly material new energy-related developments.

<sup>45</sup> While FHWA did not commit to any funding of Barrington's project beyond the \$2.8 million study grant and FHWA had no authority to determine whether CN should be required to provide

Finally, even if it were new evidence, Barrington's TIGER II grant application would still not warrant reopening. The benefits Barrington claims from its proposed project are not attributable to the grade separation alone, but to broader road and other infrastructure improvements. And Barrington's self-serving conclusions are not supported by any workpapers or data permitting it to be properly reviewed and challenged before the Board.

### **III. BARRINGTON'S PETITION IGNORES BASIC PRINCIPLES OF ADMINISTRATIVE FINALITY**

As discussed above, Barrington's 2014 Petition provides no basis for reopening. In addition, however, there is a broader principle that requires denial of Barrington's Petition. Barrington's reliance on potential variations from 6-year-old traffic projections as a basis to reopen the Board's final Approval Decision violates basic principles of administrative finality and the notions of fundamental fairness that underlie them.

Barrington does not and cannot claim that the Board made a "material error" in its Approval Decision. *See* 49 U.S.C. § 722(c). It does not and cannot claim that anything – much less anything material – that is *qualitatively* new has happened. As everybody anticipated in 2008, CN is continuing to meet its common carrier obligations; has invested in and is putting to good use the infrastructure identified in its 2008 Operating Plan; and is continuing to serve a variety of shippers, including energy producers. The only things that Barrington identifies as "new" are the specific *quantities* of commodities currently on the line and potentially projected for the future. As demonstrated above, however, those quantities are not *materially* different or *substantially* changed (as required under 49 U.S.C. § 722(c)) from the projections that were

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funding, Barrington told FHWA that it would propose to obtain just under \$3.5 million from CN – not the \$47 million it now seeks. *See* V.S. Darch, Att. D, at 8.

before the Board in 2008. Indeed, overall traffic on the EJ&E line is moderately below what was projected.

The changes Barrington points to are also not material to the rationale of the decision that Barrington is asking the Board to change years after the fact. Neither the Board's 2008 Approval Decision nor its 2012 Order denying Barrington's 2011 Petition rested on specific traffic numbers. Rather, while the Board had multiple reasons for denying Barrington's grade separation requests, both decisions emphasized, and the D.C. Circuit approved, the principle that the Board does not require an applicant railroad to fund "mitigation for preexisting conditions"<sup>46</sup> – a fundamental principle that the 2014 Petition fails to address.

The precise traffic numbers and composition details on the EJ&E line are, in a sense, "new."<sup>47</sup> The markets in which rail shippers compete fluctuate, so demand for rail services fluctuates, so railroad traffic fluctuates, so railroad traffic quantities and composition are never precisely as predicted years before. In that sense, there are always "new" quantitative data for every railroad every year – especially when compared to projections made more than six years earlier. But if that universal quality sufficed to support reopening and changing a final decision under 49 U.S.C. § 722(c)(1) and (3), and 49 C.F.R. § 1115.4, every Board decision would always be subject to reopening and change, there would literally be no such thing as administrative finality, and those provisions would be meaningless.

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<sup>46</sup> See, e.g., 2012 Order at 13; *Village of Barrington*, 636 F.3d at 672; Approval Decision at 45-47.

<sup>47</sup> While the precise details may be "new," however, they are not material. And there is nothing new about the proposition that traffic fluctuates. Traffic fluctuations are normal and foreseeable, and developments that are foreseeable are not "new" for purposes of 49 U.S.C. § 722(c) and 49 C.F.R. § 1115.4, see, e.g., *CN/IC*, 6 S.T.B. at 350.

It is critical, therefore, that the Board protect its own processes and the parties that seek authorization or relief in the matters before it by reaffirming in this proceeding that administrative finality matters. As the Board explained the last time Barrington asked the Board to require CN pay for a grade separation, that means that the standards for reopening are rigorous:

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

2012 Order at 8-9; *accord, e.g., Montezuma Grain Co. v. STB*, 339 F.3d 535, 541-42 (7th Cir. 2003) (under 49 U.S.C. § 722(c), any new evidence or changed circumstances must be material in the sense that it must mandate a different result); *DesertXpress Enters. – Pet. for Dec. Order*, FD 34914, slip op. at 6-8 (STB served May 7, 2010); Jt. Br. of Respondents at 32, *Village of Barrington v. STB*, No. 12-1485 (D.C. Cir. July 26, 2013) (“STB Br.”).

As the Board further elaborated to the D.C. Circuit when it successfully defended its 2012 Order, mere traffic fluctuations do not meet those requirements. *See* STB Br. at 37 (Barrington’s reliance on “post-acquisition train operation data” did not make its evidence “new” within the meaning of 49 U.S.C. § 722(c)). And as the D.C. Circuit affirmed, denial of reopening is appropriate when such new evidence as is presented does not “require [the Board] to reverse its [original] determination.” *Village of Barrington v. STB*, 758 F.3d 326, 329-30 (D.C. Cir. 2014) (citation omitted).

The Board’s and the D.C. Circuit’s respect for administrative finality is well-founded for several reasons. First, efficient investments, such as CN’s investments in the EJ&E line, are vital

to the Nation's rail network, and efficient investments depend on business certainty and confidence. If the Board were to reopen this proceeding and grant Barrington's request, the cost to CN of acquiring EJ&E's principal lines would retroactively increase by \$47 million (with no opportunity for CN to walk away from the Transaction because of the added cost), and the precedent the Board's action would set for limitless reopening and change of Board decisions would create a risk of further retroactive cost increases to come. If such a precedent had been set in 2008, CN might never have invested in the EJ&E line, and if it is set now, future efficient investments by CN and other railroads would certainly be deterred.

Second, if any trivial change were deemed a sufficient basis for reopening and change under 49 U.S.C. § 722(c), everyone – both applicants<sup>48</sup> and objectors – who disliked a Board decision could waste the limited resources of the Board and other parties with endless repetitious claims for the same relief year after year. This concern is not, of course, hypothetical: as discussed in the Background section above, it is precisely what Barrington has done.

Finally, Barrington's position contradicts basic legal doctrines that are essential to an orderly and efficient administrative process. The statute that provides the basis for the environmental analysis to which Barrington seeks to contribute allegedly "new" evidence, the National Environmental Policy Act ("NEPA"), requires the Board to perform an analysis before it takes a major Federal action – *i.e.*, pre-approval – not six

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<sup>48</sup> If, as Barrington contends, everything were up for grabs once traffic deviates from projections, applicants could petition the Board to modify its final decisions to eliminate mitigation requirements if traffic fell short of projections.

years later, when no federal action remains to be taken,<sup>49</sup> and it requires that analysis to address environmental impacts on the basis of reasonable foreseeability, not hindsight.<sup>50</sup> And the statute under which Barrington has twice unsuccessfully challenged the Board's decisions provides for judicial review of "final" administrative action,<sup>51</sup> not for repeated trips to the D.C. Circuit every couple of years to review the evolution of an interminable administrative process.

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<sup>49</sup> NEPA's environmental analysis mandates are not triggered when an agency adheres to an already adopted decision. *See, e.g., Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 73 (2004); *Fund for Animals v. Thomas*, 127 F.3d 80, 83-84 (D.C. Cir. 1997).

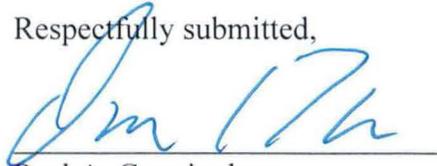
<sup>50</sup> *See, e.g.,* 40 C.F.R. § 1508.8 (defining the environmental effects subject to NEPA as those that occur directly and simultaneously with the major Federal action, plus those that are "reasonably foreseeable"); *see also Robertson*, 490 U.S. at 356 (NEPA review need only address "reasonably foreseeable" environmental impacts, as opposed to a worst-case scenario); *Theodore Roosevelt Conserv. P'ship*, 616 F.3d at 509 (under NEPA, a projection "serves as an analytical baseline for environmental impacts;" subsequent commerce in excess of the projection does not give rise to a NEPA violation).

<sup>51</sup> *See* 28 U.S.C. § 2342(5) (creating the D.C. Circuit's jurisdiction over "**final** orders of the Surface Transportation Board") (emphasis added).

**CONCLUSION**

For the foregoing reasons, CN respectfully urges the Board to deny the 2014 Petition.

Respectfully submitted,



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December 16, 2014

**CERTIFICATE OF SERVICE**

I certify that I have this 16th day of December, 2014, served copies of CN's Reply to Petition of Village of Barrington Seeking Imposition of Additional Mitigation (CN-67) upon all known parties of record in this proceeding by first-class mail or a more expeditious method.

  
Spencer R. Leroux

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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

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

[Barrington Petition for Mitigation]

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**VERIFIED STATEMENT OF JEFFREY A. LIEPELT**

My name is Jeffrey A. Liepelt. I am Senior Vice-President, Southern Region, for Canadian National Railway Company and its U.S. subsidiaries (together, “CN”). I have held my current position since March 2013 and am responsible for CN’s operations on all of its U.S. lines, with the exception of certain lines adjacent to the Canadian border. In particular, I am responsible for CN’s lines in and around Chicago, including those of Elgin, Joliet and Eastern Railway Company (“EJ&E”) that CN acquired pursuant to the Board’s authorization in the main docket of this proceeding.<sup>1</sup> I am very familiar with CN’s operations on the EJ&E line in and near Barrington, and with CN’s plans regarding those lines. On September 16, 2014, I submitted a Verified Statement in the main docket in support of CN’s Reply to the Petition of the Village of Barrington (“Barrington”) for Extension of Oversight.

I have been asked by CN to sponsor this statement to respond to some of the assertions that Barrington has made in its recent Petition to Reopen (“Petition”) regarding the volumes of

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<sup>1</sup> *Canadian Nat’l Ry. – Control – EJ&E W. Co.*, STB Finance Docket No. 35087, Decision No. 16 (STB served Dec. 24, 2008) (“Approval Decision”).

CN's rail traffic through Barrington and their suggestions of CN plans to increase the capacity of its line there in order to accommodate more traffic.

According to Barrington, CN is using or planning to use the EJ&E line through Barrington to handle much larger volumes of rail traffic than were projected at the time of the Application in this proceeding in 2007 or considered by the Board in its environmental review of the proposed acquisition (the "Transaction"). Barrington contends that this unanticipated rail traffic will have "catastrophic" effects on highway traffic in the Village of Barrington generally, making construction of a highway underpass at U.S. Route 14 necessary.

Barrington asserts that the Board's environmental review of the Transaction was flawed because it was based on post-Transaction traffic volumes projected for CN's Operating Plan, which could not account for unanticipated growth in energy-related traffic carried by the rail industry. But train volumes that, on the eve of 2015, are actually moving on the EJ&E line are lower than those projected in the Operating Plan and assumed in the Board's environmental review of the Transaction.<sup>2</sup> In its environmental review, the Board's Section of Environmental Analysis ("SEA," now Office of Environmental Analysis ("OEA")) assumed that traffic on the EJ&E segment between Leighton and to Spaulding<sup>3</sup> would rise to 20.3 trains per day by 2015.<sup>4</sup> In fact, as can be seen in Exhibit 1 hereto, traffic volumes fluctuate (see Table 2), but they have averaged 17.5 trains per day in 2014 (see Table 1). This means that CN can operate nearly three

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<sup>2</sup> I DEIS at 2-28 (served July 25, 2008) ("DEIS").

<sup>3</sup> Identified in the Operating Plan and the Board's environmental impact statements as EJ&E Segment 14.

<sup>4</sup> I DEIS at 2-19.

trains a day more than it did on average so far this year before it exceeds the traffic projections underlying the Board's environmental analysis.

Moreover, CN does not expect traffic on the EJ&E through Barrington to grow dramatically in the foreseeable future, and certainly not by the end of 2015. Barrington cites public information and statements by CN representatives regarding growth of energy-related traffic in the rail industry as a whole, or on CN's entire system, but that says very little about changes in traffic that can be expected on the particular segment of that line that includes Barrington. Fiona Murray, CN's Vice President, Corporate Marketing, is providing a verified statement that discusses in greater detail the movement through Barrington of the commodities cited by Barrington and refutes its suggestions that it faces massive increases in rail traffic in those commodities.

Barrington suggests that adverse impacts on Barrington from growth in CN rail traffic may be disguised by CN's operation of longer trains through Barrington than CN projected in 2007. Thus, Barrington suggests, even if CN is not operating more trains over the EJ&E, "the number of carloads has certainly exceeded the number of projected carloads by a wide margin," Petition at 15-16, subjecting Barrington to longer blockages at highway grade crossings, and consequently greater delay to vehicles passing through Barrington, greater air pollution, and greater risk that emergency vehicles will be unable to reach their destinations in time. Data regarding actual lengths of CN trains, however, indicates that this is not happening. While SEA assumed, for purposes of its environmental review, that the average train operating on EJ&E Segment 14 (including Barrington) after implementation of the Transaction would be 6,829 feet

long,<sup>5</sup> the average actual length of CN trains on that segment was 6,616 feet in 2012, 6,756 in 2013, and 6,916 during the first 11 months of 2014, or only 87 feet (less than the length of two typical railcars) longer than assumed in the Board's environmental review.<sup>6</sup>

Recognizing that "SEA ... concluded that the Applicants' Operating Plan would consume nearly all of the main line capacity on the EJ&E rail line, after Applicants' constructions are completed" and that, because of those capacity limitations, "the volume of through trains on the EJ&E rail line would likely not exceed the train volume proposed by the Applicants,"<sup>7</sup> Barrington also suggests that CN must be planning to double-track the line through Barrington in order to handle the "massive surge in energy commodities" it predicts. In fact, CN has no current plans

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<sup>5</sup> See II DEIS at 4.3-16 (Table 4.3-5); III DEIS Appendix E, Attachment E1 at 3 (Table E1.2-1).

<sup>6</sup> The current train lengths are for CN trains only and do not include those of non-CN trains, which operate on the EJ&E line pursuant to trackage rights or haulage agreements. The train length assumed in the Board's environmental review, on the other hand, was an average of the lengths of all trains, including trackage rights and haulage trains, expected to operate on the line. But the length of non-CN trains operating through Barrington was assumed for purposes of the environmental review to be even shorter (6,358 feet) than the average, which therefore was shorter than the length of CN trains considered by themselves. See V DEIS, Appendix Q, Attachment Q1 (Letter from Paul A. Cunningham to Victoria A. Rutson, Exhibit A (Feb. 15, 2008)).

Barrington points to the length of trains that block grade crossings in Barrington for more than 10 minutes as if that demonstrated that CN was operating much longer trains than had been anticipated in the Board's environmental review. Citing CN's monthly operational monitoring report, Barrington notes that the average length of the 29 trains that blocked crossings in Barrington for more than 10 minutes during September 2014 was 8,568 feet, that one train was longer than 10,000 feet, and that 24 of those 29 trains were longer than 7,000 feet. Petition at 15. Longer trains, however, are more likely to cause longer crossing blockages, so it is not surprising that Barrington's reliance on blocked crossing reports overestimates average train length. (As Barrington acknowledges (Darch V.S. at 10-11), when it made visual observations of *all* trains passing through Barrington during a 35-day period in 2011 (not just those that caused lengthy blockages), it found an average length of only 5,800 feet. Civiltech Engineering, Inc., Village of Barrington CN Railway Traffic Study Update, Final Report, Table A-1 (Sept. 1, 2011), *attached to* Petition Seeking Imposition of Additional Mitigation (Oct. 14, 2011)

<sup>7</sup> Petition at 23 (quoting DEIS Appendix. B, Attachment B4 at 13).

to double-track the EJ&E line in Barrington in order to accommodate anticipated traffic growth. It has not designed a second track to be installed in Barrington, nor has it sought or allocated money for such double tracking.

Barrington quotes a CN e-mail message to Civiltech Engineering, Inc. (“Civiltech”), a firm hired by the Illinois Department of Transportation (“IDOT”) to assist in design of the proposed grade separation project, as somehow “demonstrat[ing]” that “CN is well aware that the current single track through Barrington is insufficient to handle both the traffic projected in its 2007 Application and the wholly unanticipated energy commodities traffic that has been developing on its network during the past few years.”<sup>8</sup> But that e-mail demonstrates nothing of the kind. Patrick Jones, who as CN’s Manager Public Works was reviewing Civiltech’s design for the proposed grade separation, in order to ensure that it conformed to CN’s specifications, wrote the message quoted by Barrington in order to acknowledge that, at a meeting between CN, IDOT, and Barrington representatives, “CN confirmed that a second track in this area would be consistent with other double-tracking projects completed and planned since CN’s takeover of the former EJE.”<sup>9</sup> This simply reflected CN’s consistent preference that grade separation projects be designed and built so that, if traffic should grow in the future to a level that would require a second track, it could be installed without reconstructing the grade separation. It did not mean, or even suggest, that such growth was imminent or expected in the foreseeable future.

Barrington also raises the prospect of huge, unanticipated quantities of highly flammable hazardous materials moving on the EJ&E, such as Bakken crude oil (which caused a devastating

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<sup>8</sup> Petition at 22; Darch V.S. at 20.

<sup>9</sup> Email from Patrick Jones to Joseph J. Emry, P.E. (Project Manager, Civiltech), *quoted in* Darch V.S. at 20.

fire and explosion in Lac-Mégantic in 2013) and ethanol, and that the movement of these commodities jeopardizes the safety of its community. But as Fiona Murray notes in her verified statement, little or no Bakken crude oil moves through Barrington on the EJ&E, and volumes of ethanol moving through Barrington, which never were large, have been declining in recent years and are not expected to increase.

Moreover, Barrington overlooks the various measures CN has taken to improve the safety of the line since acquiring it in 2009. In particular, Barrington fails to mention CN's implementation of all the safety mitigation affecting Barrington that have been ordered by the Board. For example, CN has consulted with Barrington to ensure that the existing quiet zone continues to conform to Federal Railroad Administration requirements, and CN has paid for all improvements that were required to create a quiet zone at the one crossing in Barrington that had no quiet zone prior to CN's acquisition (at Illinois Route 59/Hough Street). CN has also installed fencing to protect parks and schools in the vicinity of the CN right-of-way. It has provided a web-based, password-controlled Active Crossing System to Barrington, which allows Barrington's emergency service providers to monitor the movement of trains on the EJ&E line in real time, anticipating and planning for the presence of trains at highway/rail grade crossings on the line. And it has installed a Wheel Impact Load Detector in Barrington Hills (just south of Barrington) and hot box detectors near Gilmer Road (north of Barrington) and south of the Barrington interlocking (where the EJ&E line crosses the Union Pacific line). These detectors "read" defective equipment, so that CN can take appropriate action to prevent derailments or other incidents that can adversely affect public safety.

## CONCLUSION

Barrington claims that the EJ&E line through its village is experiencing a “massive and recent surge of unanticipated freight movements.”<sup>10</sup> Actual rail operations through Barrington however, show that traffic volume at the end of 2014 remains lower than the Board had projected that volume to be in 2015. Further, CN has no plans to double-track or otherwise expand the capacity of its line through Barrington, nor does CN foresee any kind of “massive ... surge” of traffic that would require such an expansion. Barrington also overstates adverse effects of CN traffic on public safety, while neglecting to mention measures CN has taken to improve the safety of the line.

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<sup>10</sup> Petition at 7.

EXHIBIT 1

**Table 1**  
Comparison of STB Train Volume Projections to 2014 Actual

EJE Segment Number	From Station	To Station	STB Filing Projection	2014 YTD Average (through Nov.)	Comparison to projection (2014 YTD average)	Q4 Average (through Nov.)	Comparison to projection (Q4 average)
15	Rondout	Leithton	3.2	1.3	(1.9)	1.1	(2.1)
14	Leithton	Spaulding	20.3	17.5	(2.7)	17.8	(2.5)
13	Spaulding	Munger	22.5	19.6	(2.9)	19.7	(2.8)
12	Munger	West Chicago	23.4	19.2	(4.2)	19.2	(4.2)
11	West Chicago	East Siding	31.6	21.9	(9.7)	22.2	(9.4)
10	East Siding	Walker	39.5	26.4	(13.1)	25.9	(13.6)
9	Walker	Bridge Junction	42.3	29.6	(12.7)	28.9	(13.4)
8	Bridge Junction	Rock Island Jct	42.3	34.4	(7.8)	34.5	(7.7)
7	Rock Island Jct	Matteson	28.3	22.4	(5.9)	22.8	(5.5)
6	Matteson	Chicago Hts	31.6	24.8	(6.8)	27.1	(4.4)
5	Chicago Hts	Griffith	34.2	26.3	(7.9)	28.5	(5.7)
4	Griffith	Van Loon	28.6	27.2	(1.5)	29.2	0.6
3	Van Loon	Ivanhoe	29.7	28.2	(1.4)	30.3	0.6
2	Ivanhoe	Cavanaugh	29.8	26.7	(3.0)	29.0	(0.7)
1	Cavanaugh	Gary	31.8	28.8	(3.0)	31.4	(0.4)
0	Gary	Indiana Harbor	3.5	2.5	(1.1)	2.6	(0.9)
-1	Indiana Harbor	Hammond	1.8	2.0	0.2	1.8	(0.0)
-2	Hammond	South Chicago	0.9	2.1	1.2	1.8	1.0

Note: Due to rounding, some numbers may not appear to sum correctly.

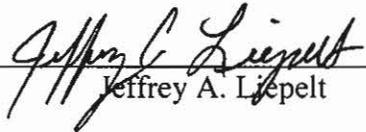
**Table 2**  
2014 Monthly Average Daily Train Counts by EJ&E Segment

Rail Segment Description			Monthly Average Trains per Day										
EJE Segment Number	From Station	To Station	January 2014	February 2014	March 2014	April 2014	May 2014	June 2014	July 2014	August 2014	September 2014	October 2014	November 2014
15	Rondout	Leithton	1.6	1.0	1.8	1.2	1.9	1.1	1.2	1.0	1.2	1.2	1.0
14	Leithton	Spaulding	15.9	15.9	16.0	18.3	20.0	18.0	18.6	17.3	17.2	17.0	18.5
13	Spaulding	Munger	17.6	17.9	17.7	20.3	21.9	20.1	21.1	19.6	19.7	18.9	20.4
12	Munger	West Chicago	17.4	17.6	17.3	20.0	21.3	19.6	20.7	19.3	19.3	18.6	19.8
11	West Chicago	East Siding	20.4	19.6	18.8	22.9	24.6	21.9	23.1	22.6	22.6	21.6	22.9
10	East Siding	Walker	24.5	23.1	23.3	27.8	30.5	26.9	27.7	27.4	27.8	25.5	26.4
9	Walker	Bridge Junction	28.0	25.9	27.0	30.9	34.5	29.9	30.4	30.4	30.7	28.5	29.2
8	Bridge Junction	Rock Island Jct	32.3	29.5	30.6	35.7	39.2	35.1	36.0	35.4	35.9	34.5	34.6
7	Rock Island Jct	Matteson	20.4	20.2	19.7	23.3	24.2	22.9	24.1	22.9	23.1	22.3	23.3
6	Matteson	Chicago Hts	21.1	22.2	21.5	24.7	28.3	25.6	24.5	23.7	26.4	27.5	26.8
5	Chicago Hts	Griffith	22.7	23.7	22.9	26.3	30.6	26.7	26.1	25.3	28.1	29.0	27.9
4	Griffith	Van Loon	23.3	24.0	23.6	27.2	32.1	27.5	26.5	26.8	29.6	29.6	28.7
3	Van Loon	Ivanhoe	24.3	25.2	24.9	28.4	33.2	28.2	27.1	27.9	30.9	30.9	29.6
2	Ivanhoe	Cavanaugh	22.7	23.7	23.7	26.8	31.0	27.0	25.6	26.3	29.2	29.4	28.6
1	Cavanaugh	Gary	24.4	25.5	26.2	28.8	32.8	28.7	27.8	28.2	31.4	31.5	31.2
0	Gary	Indiana Harbor	2.5	2.2	2.5	2.4	3.5	2.1	2.0	2.2	2.3	2.6	2.6
-1	Indiana Harbor	Hammond	2.0	1.8	2.1	2.0	3.2	2.1	1.9	1.7	1.8	1.9	1.8
-2	Hammond	South Chicago	2.1	1.9	2.3	2.0	3.2	2.1	1.9	1.7	1.8	1.9	1.8

## VERIFICATION

I, Jeffrey A. Liepelt, declare under penalty of perjury that I have read the foregoing Verified Statement, that I know the facts asserted therein, and that the same are true as stated. Further, I certify that I am qualified to and authorized to provide this verification on behalf of Canadian National Railway Company and its subsidiaries.

Executed on December 15, 2014

  
\_\_\_\_\_  
Jeffrey A. Liepelt

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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

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

[Barrington Petition for Mitigation]

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**VERIFIED STATEMENT OF FIONA MURRAY**

My name is Fiona Murray. I am the Vice President, Corporate Marketing for Canadian National Railway Company and its subsidiaries (collectively, “CN”), a position I have held since May 2012. I am responsible for overseeing corporate marketing, planning, e-business innovations, and strategic account activities, including leading the regional sales groups that focus on the growth of customers. Prior to my current position, I was the Assistant Vice-President, Sales and Marketing (Industrial Products). I am familiar with CN’s current energy-related business, including the customers, destinations, and volumes for that traffic, as well as the expected growth of that business.

I have been asked by CN to address certain claims made by the Village of Barrington (“Barrington”) in its Petition Seeking Imposition of Additional Mitigation Pursuant to the Board’s Oversight Jurisdiction and Reopening Based on Materially Changed Circumstances Pursuant to the Board’s Governing Regulations (“Petition”), filed with the Surface Transportation Board (“Board”) on November 26, 2014.

Barrington asserts in the Petition that “[t]he enormous surge in the movement by rail of crude oil and ethanol, along with the anticipated expanded exploitation of long-term oil sands

plays in Western Canada, has materially changed the rail environment and rendered CN's pre-transaction market projections and general operating assumptions obsolete." Petition at 6. This assertion, which is an essential premise of Barrington's Petition, is incorrect. While CN's energy-related traffic has increased significantly in recent years, the effects of this increased traffic on train volumes and train lengths through Barrington have been minimal. Moreover, not all of CN's energy-related products that do travel through Barrington are increasing in volume.

One example is ethanol, which is one of the commodities about which Barrington expresses particular concerns. Ethanol that originates in Wisconsin does travel through Barrington, but those volumes have decreased by approximately 45% between 2011 and 2014. Moreover, CN does not anticipate ethanol volumes moving through Barrington will increase in the foreseeable future. The total volume of ethanol carloads moving through Barrington is also very small – through November 2014, an average of only 3 carloads per day. These carloads move on manifest trains through Barrington; no unit trains of ethanol move through Barrington; and CN has no plans to move unit trains of ethanol through Barrington.

CN's frac sand and heavy crude oil businesses have been increasing, and some of this volume does and will continue to travel through Barrington, including in unit trains. However, the volumes are not nearly as large as Barrington speculates, and there is no basis for Barrington's supposition that this additional traffic will cause daily train counts through Barrington to exceed materially, much less massively, the projections used by the Board for its review of the EJ&E acquisition.

In 2013, CN moved approximately 55 carloads per day of frac sand through Barrington, all on manifest trains. This volume has increased to approximately 102 carloads per day in 2014. Included in that amount are approximately 8 unit trains of frac sand per month (approximately

0.3 trains per day) that CN began to run through Barrington in the 4th quarter of 2014. While CN expects its frac sand franchise to continue to grow in 2015 and beyond, the rate of growth and the specific routing of the traffic is dependent on unforeseeable market forces. New transload facilities and additions to terminal capacity for frac sand in Western Canada are currently under development, with some expected to be operational in 2015. As a result, some of the existing volume of frac sand through Barrington, as well as some of the future growth, could be shifted to serve that market, especially if crude oil prices continue to remain low and there is less demand for frac sand in the Western United States (the principal destination for the frac sand that is routed through Barrington). In any event, CN projects at this time that (a) there will be no increase in carloads moving in manifest traffic in 2014, and (b) a maximum of 3-4 additional unit trains per week (0.4-0.6 trains per day) of frac sand may be moving over the EJ&E line through Barrington by the end of 2015. Given the steep recent decline in crude oil prices, however, it is quite possible that there will be less growth in frac sand volumes moved over Barrington in 2015, and specific growth (or decline) beyond that time cannot reasonably be projected.

Contrary to what one might conclude reading Barrington's petition, CN does not transport crude oil from the Bakken region through Barrington. CN does participate in movements of Bakken crude oil, but that traffic is received in interchange from BNSF and from CP, both south of Barrington, and these movements continue south on EJ&E. CN has instead been transporting through Barrington modestly increased volumes of heavy crude oil from oil sands in western Canada, which it interchanges with other carriers or moves directly to refineries in Louisiana served by CN. This crude oil has a significantly higher flashpoint than crude oil from the Bakken region – it is carbon-heavy and hydrogen-light, which is the opposite of light crude from Bakken which is hydrogen-heavy and carbon-light. The high hydrogen content in

light crude enables it to flow easily but also makes it more flammable than bitumen-laden heavy crude from oil sands.

Barrington notes that the proposed PHMSA rulemaking would not prohibit the transportation of oil sands crude in DOT-111 tank cars. That, of course, is because PHMSA recognizes that there are reduced risks associated with transporting oil sands crude as compared to Bakken crude oil. Moreover, CN has been a leader in providing rate incentives to shippers to use the highest quality tank cars available for the transportation of crude oil, including heavy crude oil from Western Canada. Thus, although it exceeds safety standards, CN generally transports oil sands in CPC-1232 compliant cars. These cars are within the DOT-111 family, but they are newer (built after November 2011) and meet the current highest safety standards for tank cars for transporting crude oil (AAR's CPC (Casualty Prevention Circular) 1232 safety standards).

With respect to heavy crude oil moving through Barrington, in 2013 CN moved approximately 103 carloads per day, all on manifest trains. This volume has increased slightly, to approximately 119 carloads per day in 2014. Included in that volume are approximately 2 unit trains per week (0.3 trains per day) of heavy crude oil that CN began moving through Barrington in the 4th quarter of 2014. While CN expects its crude oil franchise to continue to grow in 2015 and beyond, the rate of growth and the specific routing of the traffic is dependent on unforeseeable market forces. CN projects at this time that (a) the carloads of heavy crude oil it moves on manifest trains will not increase from 2014 levels, and (b) it will move between 8 and 13 additional unit trains per week (1.1 to 1.9 trains per day) of heavy crude oil on the EJ&E line through Barrington by the end of 2015. CN does not project volumes of crude oil moving through Barrington to grow appreciably beyond 2015.

Thus, in total, CN projects adding fewer than 2.5 trains per day of new energy-related traffic through Barrington in 2015. Adding this energy-related traffic to the existing train volumes through Barrington would result in total CN train volumes that are not materially greater than the level of the projections used by the Board when analyzing the environmental effects of the EJ&E transaction.

Similarly, neither the heavy crude oil unit trains nor the frac sand unit trains that CN moves through Barrington are extraordinarily long, as Barrington speculates. Frac sand unit trains are either 80 or 96 cars long. A frac sand car is 42 feet long, so including two locomotives, a frac sand unit train is either 3,500 or 4,200 feet long. Heavy crude unit trains typically run at 100 cars (as this length optimizes the horsepower-per-ton ratio) although some customers have been requesting 120-car trains, and CN expects that some 120-car trains may run in 2015. The average car length for a heavy crude oil car is 60 feet. Thus, when locomotives are included, a 100-car unit train would be approximately 6,200 feet long and a 120-car train would be approximately 7,200 feet long. As discussed in the Verified Statement of Jeffrey A. Liepelt, the overall average length of trains that operated through Barrington in 2014 was 6,916 feet. Accordingly, there is no basis for Barrington's supposition that due to energy-related traffic either the volumes or average length of trains operating through Barrington will dramatically increase from current levels.

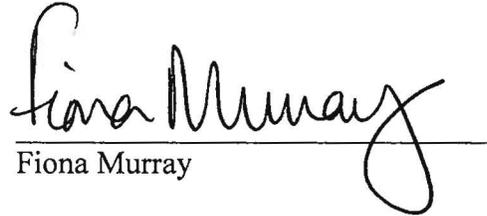
Finally, it is important to note that traffic volumes fluctuate over time for any number of reasons. Sometimes the routing of traffic shifts to accommodate new or expanded terminals; sometimes customers ship fewer goods by rail due to short- or long-term micro- or macro-economic causes; and sometimes CN gains or loses new customers entirely. As an obvious and directly applicable example, even if the precipitous decline in crude oil prices does not greatly

affect CN's overall energy-related business, it may well significantly dampen or halt the growth of frac sand traffic through Barrington. Moreover, while energy-related carloads have increased in 2014, that increase has coincided with a reduction in carloads for other products through Barrington. As noted above, this has included shipments of ethanol, but in addition it has included shipments of such commodities as grain and fertilizer, as well as forest products.

## VERIFICATION

I, Fiona Murray, declare under penalty of perjury under the laws of the United States that I have read the foregoing Verified Statement, that I know the facts asserted therein, and that the same are true as stated. Further, I certify that I am qualified to and authorized to provide this verification on behalf of Canadian National Railway Company and its subsidiaries.

Executed on December 15, 2014

  
Fiona Murray