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BY E-FILING

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, D. C. 20423-0012

**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 docket please find (1) CN's Reply to Barrington's Motion for Leave to File "Comments" in Response to CN's Reply to Barrington's Petition Seeking Additional Mitigation and (2) CN's Response to Barrington's Surreply "Comments" to CN's Reply to Barrington's Petition Seeking Additional Mitigation.

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**

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 BARRINGTON'S MOTION FOR LEAVE TO FILE
"COMMENTS" IN RESPONSE TO CN'S REPLY TO BARRINGTON'S PETITION
SEEKING ADDITIONAL MITIGATION**

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BARRINGTON’S PETITION SEEKING ADDITIONAL MITIGATION**

On November 26, 2014, the Village of Barrington filed its Petition Seeking Imposition of Additional Mitigation (“Petition”). That Petition renewed the request made in Barrington’s prior Petition Seeking Imposition of Additional Mitigation (filed in this sub-docket in 2011) that Canadian National Railway Company and Grand Trunk Corporation (together, “CN”) be required to fund a grade separation of the EJ&E line at Northwest Highway.¹ On December 16, 2014, CN replied to Barrington’s new Petition. On January 5, 2015, Barrington filed a Motion seeking leave (“Motion”) to file Comments in Response to Reply Filed by Canadian National Railway Company and Grand Trunk Corporation (“Surreply”), which it attached to its Motion. 49 C.F.R. § 1104.13 prohibits such a reply to a reply.²

Barrington’s Motion fails to demonstrate that a waiver of the Board’s prohibition on replies to replies is warranted. Barrington’s latest Petition argues that the Board should reverse

¹ CN incorporates by reference the short forms and abbreviations set forth in the Application filed in the main docket (CN-2 at 8-11).

² Incorrectly cited by Barrington as “49 C.F.R. 1101.13” (Motion at 1).

the decision it made in 2008 and again in 2012 to deny Barrington's request that CN be required to fund a grade separation. Barrington premises that claim on allegations that CN is carrying or expects to carry far more freight and far more dangerous freight through Barrington than was projected. CN's Reply demonstrates that those premises are unfounded.

Barrington's Motion spends just one conclusory paragraph discussing CN's Reply, claiming that CN "has taken a distorted, incomplete, and backward look at the record and the history of the proceedings related thereto." Motion at 3. Barrington's only elaboration is an equally vague claim that CN "has sought to avoid any meaningful consideration" of traffic impacts, and a claim that Barrington already made at length in its Petition (and CN addressed in its Reply) that CN statements to investors suggest that CN expects robust traffic growth. *Id.*

Barrington's rhetoric is insufficient. In this, as in every, case, the Board can take its own "look at the record" and provide such "meaningful consideration" as is appropriate, and the Board can consider the parties' opposing views on record evidence (such as CN's statements to investors, which do not specifically address traffic through Barrington), without waiving its rules.³ Calling CN's perspective "distorted" is merely an inflammatory way of saying that, as in most cases, the parties disagree; Barrington does not show any distortion of specific facts or

³ See, e.g., *Cal. High-Speed Rail Auth.—Pet. For Declaratory Order*, FD 35861 (STB served Dec. 12, 2014) (denying motion for leave to file a reply that was "not necessary to provide the information [the Board] need[s] to . . . address matters within the Board's expertise"); *212 Marin Boulevard, LLC—Pet. For Declaratory Order*, FD 35825 (STB served Aug. 11, 2014) (rejecting multiple replies to replies "as they do not clarify the record and are not necessary to complete it"); *St. Lawrence & Atlantic R.R.—Discontinuance Of Service Exemption—In Cumberland Cnty, ME*, AB 1117X (STB served Feb. 25, 2014) (granting motion to strike a reply to a reply).

evidence by CN. Barrington's Motion provides no basis for an exception to the Board's rule against replies to replies.⁴

Indeed, this is a particularly strong case for application of the Board's rule. When the Board confronts new issues that the parties have had limited opportunities to address, a surreply that is truly responsive to the reply, provides new information that could not reasonably have been provided before, and is brief, factual, and focused, may sometimes merit a waiver of the rule. Here, Barrington makes essentially the same arguments for a grade separation that it made, and the Board rejected (and the D.C. Circuit rejected on review of the Board's decisions⁵), in 2008⁶ and 2011-12,⁷ and it has already filed a 34-page Petition accompanied by a 35-page verified statement with 9 exhibits.⁸ Now, it asks the Board to consider another 34 pages of "Comments," plus two more verified statements. They contain no evidence that is "new" since the filing of Barrington's Petition. Instead, the Surreply relies on a 2010 highway funding grant

⁴ See, e.g., *Peter Pan Bus Lines – Pooling – Greyhound Lines*, Docket Nos. MC-F-20904, MC-F-20908, and MC-F-20912, slip op. at 3 (STB served Apr. 20, 2011) (an asserted need to correct alleged "misstatements" is not an adequate basis for an otherwise prohibited reply to a reply).

⁵ *Vill. of Barrington v. Surface Transp. Bd.*, 636 F.3d 650, 672-73 (D.C. Cir. 2011); *Vill. of Barrington v. Surface Transp. Bd.*, No. 12-1485, 2014 U.S. App. LEXIS 13720 (D.C. Cir. July 18, 2014).

⁶ See FD 35087, Decision No. 16, slip op. at 42-45 (STB served Dec. 24, 2008) ("Approval Decision").

⁷ See FD 35087 (Sub-No. 8), Decision served Nov. 8, 2012 ("2012 Decision") (denying Barrington's 2011 petition for reopening).

⁸ The facts and issues surrounding Barrington's request have already been exhaustively briefed by Barrington. Since the Board's Approval Decision in 2008 authorized CN to acquire the EJ&E rail line without requiring CN to fund a grade separation at Barrington, Barrington has filed five D.C. Circuit briefs (two petitions for review, two replies in support thereof, and one petition for rehearing) and four briefs to the Board (its 2011 petition for reconsideration, a surreply in support thereof, and the present Petition and Surreply) seeking reversal of that decision.

already fully addressed in the record (Surreply at 4), on a traffic study Barrington submitted to the Board in 2011 (*id.* at 6), on the commonplace fact that some trains are longer (and some shorter) than average train lengths (that being the nature of averages) (*id.* at 6-21), on a 2007 acquisition of a Canadian railway by CN (*id.* at 14), on a 2009 CN statement to investors (*id.*), on a critique of mitigation measures the Board ordered years ago, before Barrington's previous petition for reopening (*id.* at 21-25), and on a lengthy argument that administrative finality does not matter in this proceeding (*id.* at 25-33).⁹ In so doing, the Surreply buries the insubstantial facts it contains under a deluge of abusive *ad hominem* rhetoric.¹⁰

Barrington made its case to the Board in 2008 and again in 2011 for why CN should fund a grade separation. The Board rightly rejected that claim, as the D.C. Circuit twice held. Barrington made its case yet again in its 2014 Petition, and CN has thoroughly refuted it. There must be an end to Barrington's repeated efforts to wear the Board down by repeating the same essential arguments over and over again. At a minimum, Barrington should be required to comply with the Board's rules. Those rules prohibit Barrington from replying to CN's reply, 49 C.F.R. § 1104.13, and from filing "redundant, irrelevant, immaterial, impertinent, or scandalous matter," 49 C.F.R. § 1104.8. They should be enforced here.

⁹ Barrington's receipt of a 2010 highway funding grant, its 2011 traffic study, and its arguments about administrative finality were all addressed thoroughly in the Board's 2012 Decision denying Barrington's previous petition for reopening. *See* 2012 Decision at 8-9 (normal principles of administrative finality apply), 9-14 (2011 study insufficient for reopening), 20 (highway funding grant "not relevant").

¹⁰ Barrington calls CN's statements and arguments "audacious[]" (Surreply at 1), "disingenuous" (*id.* at 5 n.5), "duplicitous" (*id.* at 19), "spurious" (*id.* at 24), "gratuitously absurd" (*id.* at 27), and "ominous[]" (*id.* at 33); claims CN cannot be trusted to provide accurate data (*id.* at 8); and says that the verified statements of CN witnesses are "not credible" (*id.* at 16) and "can't pass the smell test" (*id.* at 20). If those characterizations were appropriate, a surreply would be superfluous; the Board can detect absurdity and administer the "smell test" without abnormal extra briefing. But Barrington's lawyers' rhetoric is baseless, and Barrington provides no data, and no factual claims in its verified statements, that support it.

CONCLUSION

The Board should deny Barrington's Motion. If the Board waives its rules and accepts Barrington's Surreply, then it should, in the interests of fairness and a complete record, also accept CN's Response to Barrington's Surreply, which CN is filing simultaneously herewith.

Respectfully submitted,



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*Counsel for Canadian National Railway Company
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January 26, 2015

CERTIFICATE OF SERVICE

I certify that I have this 26th day of January, 2015, caused a true copy of the foregoing Reply to Barrington's Motion for Leave to File "Comments" in Response to CN's Reply to Barrington's Petition Seeking Additional Mitigation, to be served upon all known parties of record in this proceeding by first-class mail or a more expeditious method.


Spencer R. Leroux

**BEFORE THE
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Docket No. FD 35087 (Sub-No. 8)

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As discussed in CN's Reply to Barrington's Motion for leave to file its surreply "Comments," CN hereby tenders this Reply to Barrington's Surreply and requests that it be accepted and considered if the Board grants Barrington's Motion.¹ Barrington's Surreply is voluminous (34 pages plus two verified statements), recycles arguments and assertions made previously (in some cases, many times) by Barrington, and makes unfounded, scurrilous attacks on CN's credibility. It provides no material new evidence or proof of substantially changed circumstances that could justify reopening – much less, granting Barrington's request that the Board fundamentally change – its 2008 Approval Decision.²

¹ The short forms and abbreviations set forth the Application, filed in the main docket on October 30, 2007 (CN-2 at 8-11), and in CN's Reply to Barrington's Motion for Leave to File "Comments" in Response to CN's Reply to Barrington's Petition Seeking Additional Mitigation, filed simultaneously herewith in this sub-docket, are hereby incorporated by reference.

² Docket No. FD 35087, Decision No. 16 (served Dec. 24, 2008) ("Approval Decision").

DISCUSSION

I. BARRINGTON'S SURREPLY CANNOT OVERCOME THE ESSENTIAL DEFICIENCIES OF ITS PETITION.

Barrington seeks a requirement that CN contribute tens of millions of dollars to fund a grade separation, even though the Board has twice concluded (in its 2008 Approval Decision and in its 2012 Decision³ denying Barrington's 2011 petition for reopening) that this remedy is not warranted. In seeking reopening of the Board's 2008 Approval Decision, Barrington must bear the heavy burden to demonstrate material "new evidence" or "substantially changed circumstances" sufficient to justify reopening. *See* 49 C.F.R. § 1115.4; 2012 Decision at 8-9.

Barrington's Petition sought to meet its burden by arguing that there are substantial ongoing changes to the rail traffic through Barrington – material increases in volume of traffic, material increases in train lengths causing material increases in vehicular delays, and material increases in danger – that undermine projections relied upon by the Board in its 2008 Approval Decision and thus undermine that decision itself. It further claims that these fundamental changes warrant imposing on CN, over six years after its acquisition of EJ&E, a new grade separation condition costing tens of millions of dollars. Petition at 3.

CN's Reply demonstrated that Barrington's premises are incorrect: in 2014, CN traffic through Barrington remained *below* the levels projected in 2008 for 2015, and average train lengths remain close to the levels projected in 2008 for 2015. CN's Reply demonstrated that growth in CN's energy-related business, which is uncertain and dependent on exogenous factors such as energy prices, is not expected to cause substantial increases in CN's overall traffic volume through Barrington in the foreseeable future. CN further demonstrated that, while there

³ Docket No. FD 35087 (Sub-No. 8), Decision served Nov. 8, 2012 ("2012 Decision").

had been increases in the volume of flammable energy-related commodities moving through Barrington, those increases were modest and did not involve substantial volumes of the more hazardous petroleum products that Barrington had suggested, through its extensive discussion of the PHMSA rulemaking concerning new tank car standards for light crude oil and by its invocation of the Lac Mégantic disaster (caused by derailment of a train carrying highly volatile Bakken crude oil), would be threatening to Barrington.

Barrington's Surreply is replete with unfounded and objectionable rhetoric attacking CN's credibility, and it repeats old arguments it has made many times before, but it is bereft of new evidence, substantially changed circumstances, or any factual basis for the claims CN refuted in its Reply. Barrington does not and cannot show that CN's traffic volumes in 2014 were higher, or that its average train lengths were materially greater, than was projected in 2008. Barrington is left instead to speculate that train volumes and lengths *may* increase in the future, that energy-related traffic *may* increase in the future, and that train volumes and train lengths *may* be substantially higher than the average in some instances. There is nothing new or material about those speculations.

Averages have always been averages, and have always reflected the reality that some points in a data set will be above, and some below, the average. It was well known and fully anticipated by the Board that the lengths of trains over the EJ&E would vary. Further, as discussed in the reply verified statement of Mr. Liepelt and in Section III.A, below, Barrington's supposition that there is a large spread among daily train volumes is incorrect. As for the possibility that traffic might increase years into the future, that possibility existed in 2008, just as it exists now. The burden is not on CN to preclude the possibility of moderate increases in the lawful and safe carriage of energy-related traffic on its rail lines (which the Board anticipated

and provided mitigation for in 2008 (*see* Approval Decision at 50)). The burden is on Barrington to prove there has been a material increase in hazard that justifies reopening the Board's 2008 and 2012 decisions and considering a retroactive order that CN pay nearly \$50 million.

Barrington did not carry that burden in its Petition, and its Surreply does not remedy that failing.

II. BARRINGTON HAS NOT SHOWN TRANSACTION-RELATED TRAFFIC CONGESTION BEYOND WHAT THE BOARD ANTICIPATED WHEN IT CONCLUDED IN 2008 AND 2012 THAT CN SHOULD NOT BE REQUIRED TO FUND A GRADE SEPARATION.

Barrington asserts that “the Board has given no consideration to the actual impact of developments that have followed CN’s acquisition of the EJ&E line during the oversight period.” Surreply at 2. Barrington appears to assume that the Board is under a continuing duty to review and re-assess the impacts of the Transaction, but the Board has no such obligation. The Board issued a final Approval Decision in 2008 that concluded its duties under the National Environmental Policy Act. And, as the Board explained in 2012, the Board’s retention of oversight does not relieve Barrington of the burden of demonstrating material “new evidence” or “substantially changed circumstances” before the Board may reopen its Approval Decision. *See* 2012 Decision at 8-9.

Moreover, Barrington’s assertion could not be more wrong. In terms of time, scope, and resources, the Board has engaged in unprecedented and thorough oversight and post-approval monitoring of this Transaction’s impacts, which included giving full and fair consideration to the purported evidence of post-Transaction impacts Barrington presented in its 2011 petition for reopening. *See id.* at 7-16. In any event, Barrington provides no evidence that actual environmental impacts on Barrington in 2014-15 are substantially (or at all) greater than projected in 2008.

Barrington claims that “[t]he lack of a grade separation in the downtown area is *now causing traffic gridlock* in the Village of Barrington.”⁴ But it offers no data to support that vague and self-serving conclusion. Barrington does not quantify the alleged “gridlock” in any of the concrete ways – including vehicle queue lengths, average delay per delayed vehicle, and total vehicle traffic delay over a 24-hour period – in which the Board quantified projected traffic concerns in its 2008 EIS. Thus, it provides no evidence that current “gridlock” materially exceeds (or even reaches) the levels the Board anticipated in 2008 when it approved the Transaction without a Barrington grade separation requirement.

Barrington also provides no new evidence that the alleged “gridlock” is Transaction-related. It cites only its 2011 traffic study, which it has not attempted to update. Surreply at 6. That 40-month-old study says nothing about the developments in CN’s rail traffic over the past few years that were the ostensible basis for Barrington’s Petition. Nor is it “current.” *Id.* Nor has the Board failed to give it “consideration.” *Id.* at 2. Despite serious questions as to whether Barrington’s study qualified as “new evidence” even in 2011, *see* 2012 Decision at 9-10, the Board reviewed it thoroughly on the merits in 2012.⁵ As for Barrington’s claim that its 2011 study “was never rebutted and shown to be in error” (Surreply at 6), that is incorrect. CN

⁴ Surreply at 29 (quoting Attachment H to Verified Statement of Karen Darch (filed Nov. 26, 2014 as attachment to Petition)) (emphasis added by Barrington).

⁵ As the Board explained then, Barrington’s 2011 study (i) projected *less* Transaction-related impact on total vehicle delay than Barrington had projected in 2008, before the Approval Decision, *id.* at 10; (ii) did not project sufficient Transaction-related impacts, even if taken at face value, to merit a grade separation requirement under the Board’s criteria, *id.*; (iii) did not alter the Board’s conclusion that “a grade separation at U.S. 14 would have ‘minimal benefit to traffic flow’ in the area due to existing congestion caused by multiple nearby traffic signals, as well as the nearby location of the UP/Metra rail line that created substantial queuing along Hough Street and U.S. 14,” *id.* at 12; and (iv) indeed, showed 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,” *id.*

rebutted it in 2011.⁶ Further, the Board concluded that the 2011 study was insufficient to help Barrington even if taken at face value. 2012 Decision at 12-13. In addition, although the Board therefore had no need to determine definitively whether the study was “in error,” the Board noted several reasons to doubt its reliability, including unfounded assumptions about an absence of line improvements, about train speeds, and about train schedules. *See id.* Barrington’s repeated reliance (*see* Surreply at 6, 31-32) on a flawed 40-month-old study that made assumptions about train quantities, train speeds, train schedules, and vehicular traffic levels that Barrington has not attempted to update in light of current realities only underlines its lack of material new evidence.

The evidence of record and developments since the Transaction do not support Barrington’s claims. Instead, they demonstrate that Barrington’s traffic congestion problems are not Transaction-related, and that the Transaction has not exacerbated them in a material way that might justify requiring CN to fund a grade separation.

First, as CN noted in its 2008 Comments on the DEIS,⁷ as the Board⁸ and the D.C. Circuit Court of Appeals⁹ have recognized, and as Barrington’s own traffic studies confirm,¹⁰

⁶ CN pointed out multiple flawed assumptions that caused Barrington’s 2011 study to overstate Transaction-related impacts. For example, it falsely assumed that crossing gates operated in tandem; it assumed that train speeds were faster before the Transaction than after it, which was (and continues to be) the opposite of the truth; it assumed unrepresentatively high vehicular traffic volumes for the post-Transaction scenario; it optimized traffic signals for pre-Transaction and No-Action but not post-Transaction scenarios; and it distorted the flow of vehicular traffic by omitting a stop light. *See* FD 35087 (Sub-No. 8), CN-1 at 11-12 & n.24 (filed Nov. 3, 2011) (“CN 2011 Reply”); *see also* FD 35087 (Sub-No.8), CN-2 at 11 & n.13, 12 & n.15 (elaborating on defects in the 2011 study in response to Barrington’s 2011 surreply).

⁷ CN’s Comments on DEIS at 64.

⁸ 2012 Decision at 12-13.

⁹ *Vill. of Barrington v. Surface Transp. Bd.*, 636 F.3d 650, 672 (D.C. Cir. 2011)

¹⁰ Barrington Pet. at 12, V.S. Andres at 9; Barrington Reb. at 14, V.S. Andres at 3, 19.

congestion in Barrington long pre-existed the Transaction.¹¹ As long ago as 2000 – almost a decade before the Transaction – Barrington was conducting traffic studies to analyze ways to reduce congestion in the downtown area. One of the suggested options was to grade separate Hough Street at the UP/Metra rail line and the EJ&E rail line “because Hough Street is already saturated with traffic during many hours of the day.”¹²

Second, as Barrington’s own data show,¹³ and as CN’s monthly blocked crossing reports demonstrate, reportable (10-minute-plus) activations at the four crossings in Barrington are extraordinarily rare. In 2014, the aggregate total of reportable activations at the 4 crossings in Barrington was 55. *See* Reply Verified Statement of Jeffrey A. Liepelt at 2 (“Liepelt R.V.S.”). This equates to 13.8 activations per crossing per year, or 1.1 activations per crossing per month. *Id.* Moreover, 10 of these activations (18%) were at night (10:00 p.m. to 6:00 a.m.), when the

¹¹ *See, e.g.*, Virginia Groark, *Barrington Committee Offers Ideas on Traffic; Hough Congestion a Longtime Problem*, Chi. Trib., Aug. 16, 2000, at Metro Northwest 1 (“Those who regularly travel on Hough Street in Barrington during the rush hour are familiar with the traffic that plagues the area”); David Sharos, *No big deals; Barrington offers proposals, but progress is taking time*, Chi. Trib., May 24, 2003, at New Homes 1 (quoting a Senior Planner in the Barrington government who noted that the combination of two major highway and the Union-Pacific Metra and the EJ&E railroad tracks is “enough to create congestion”).

¹² *See* Technical Memorandum re North-South Arterial Study: No-Build Option, from Civiltech Engineering, Inc. to Transportation Advisory Committee (Jul 9, 2001), available at http://web.archive.org/web/20011210002502/http://www.barrington-traffic.com/no-build_report_070901.htm. Barrington relies on a recent letter from the Deputy Director of Highways of the Illinois Department of Transportation (“IDOT”) stating that IDOT “had no plans for improvements” at the U.S. Route 14/EJ&E crossing prior to the Transaction. *See* Surreply at 29. But it did have plans for improvements at a nearby crossing – Hough Street – that were ultimately rejected by Barrington. *See* Margaret Van Duch, *Traffic measures move forward*, Chi. Trib., Oct. 26, 2001, at Metro Northwest 4. In any event, Barrington itself recognized its Transaction-independent congestion problems in 2000, and in its 2008 and 2011 traffic studies.

¹³ *See* CN Reply at 20 n.42.

volume of vehicular traffic that may be affected is small, and only 5 (9%) occurred during peak traffic hours (weekdays, 7:00 a.m. to 9:00 a.m. and 4:00 p.m. to 6:00 p.m.).¹⁴ *Id.* at 2-3.

Finally, the frequency of reportable crossing activations in Barrington in 2014 was close to (and for two crossings, less than) pre-Transaction levels, as shown in the following table:

Pre-Transaction Versus 2014 Reportable Activations At Barrington Crossings			
Crossing	Pre-Transaction Monthly Average¹⁵	2014 Monthly Average	Change (Pre-T to 2014)
Lake Zurich Rd.	0.9	0.8	(0.1)
NW Hwy (US 14)	0.8	0.9	0.1
Hough St. (IL 59)	1.4	1.3	(0.1)
Main St. (Barrington)	1.1	1.6	0.5
Total (all crossings)	4.2	4.6	0.4
Average (per crossing)	1.0	1.1	0.1

Source: CN's Monthly Operating Reports.

Thus, while train volumes over those crossings have increased by 12.4 trains per day over pre-Transaction levels (from 5.3 per day pre-Transaction to 17.7 per day in 2014),¹⁶ CN's efficient management of EJ&E and its investments in its operations have meant that reportable

¹⁴ Traffic congestion concerns are, of course, most significant during peak hours. In 2008, Barrington criticized the Board's DEIS for not focusing on peak hour effects, leading the Board to conduct an extra Barrington-specific traffic study. Barrington's Comments on the DEIS at 35 (Sept. 30, 2008). As that study showed, Village of Barrington Traffic Operational Analysis (FEIS Appendix A, Attachment A.5) at 46, and as experience has now borne out, Transaction-related effects on peak-hour traffic are minimal. They can be expected to remain so, because in order to avoid interference with Metra trains, CN generally avoids running its trains through Barrington during rush hours. *Liepelt R.V.S.* at 3.

¹⁵ August 2007 through January 2009. Data comes from restated RTU data files submitted to the Board on August 3, 2010.

¹⁶ Barrington claims that the Transaction has caused a "400% increase in rail traffic." Surreply at 4. Barrington's arithmetic is wrong – from 5.3 to 17.7 is not a 400% increase – and it also ignores the likelihood that, given increasing freight demand and the strategic location of the EJ&E line, traffic on the line would have increased even without the Transaction, *see Liepelt R.V.S.* at 4.

activations actually decreased from pre-Transaction levels at two of Barrington's crossings, and only marginally increased at Barrington's other two crossings. Liepelt R.V.S. at 3-4.

To put this in perspective, if in the intervening 7 years, EJ&E had added one train per day, and that train had caused crossing activations in Barrington at the same rate as the other 5.3 trains per day, there would be *more* reportable activations than there are now with CN's 2014 average of 17.7 trains per day. Liepelt R.V.S. at 4.

As the Board rightly concluded in 2008, and again in 2012, Barrington's traffic problems are largely independent of the Transaction. That conclusion is reinforced by the evidence demonstrating that significant crossing activations have barely increased despite substantial increases in train traffic. And nothing in Barrington's Petition or its Surreply rebuts it.

III. BARRINGTON'S SURREPLY CONTAINS NO NEW FACTUAL EVIDENCE THAT WOULD JUSTIFY REOPENING AND PROVIDES NO BASIS FOR IMPOSING NEW MITIGATION.

Barrington's Surreply rests primarily on conclusory allegations, attacks on CN's veracity, reiterations of previous assertions, and speculation about developments that might occur. For example, Barrington:

- Speculates that CN's witnesses' specific projections of volumes of energy-related traffic moving by rail *through Barrington* may be too low because they appear to project proportionately less growth than statements about CN's energy-related traffic *on its entire system* (Surreply at 15);
- Asks the Board to discount CN's data about train lengths based on attacks on CN's credibility (*id.* at 7-8);
- Speculates that, even though CN is not moving volatile light crude oil originating in the Bakken field through Barrington at present, and has no plans to do so, it *might* do so sometime in the future (*id.* at 19);
- Speculates that, even though CN has no plans to do so, CN *might* double-track its line through Barrington sometime in the future (*id.* at 16); and

- Reiterates the arguments it made in 2011, and the Board rejected in 2012, that the U.S. Department of Transportation’s 2010 TIGER II grant for a Phase I environmental/engineering study of the proposed U.S. Route 14 grade separation demonstrates that the Board should order CN to pay for that grade separation (*id.* at 2-3).

Such speculation and argument provide no material new evidence. Barrington’s specific claims, insofar as they can be teased out of its Surreply, are rebutted below.

A. *Barrington Does Not Demonstrate Material Increases in Volumes of Rail Traffic Moving Through Barrington Currently or in the Foreseeable Future.*

CN’s Reply demonstrated that total traffic moving through Barrington in 2014 was close to (but still under) the volumes projected by the Board’s environmental staff in 2008. Barrington does not and cannot deny that fact. Instead, Barrington says that CN is “myopic” to focus on the consistency between the Board’s 2008 projections and the real-world facts of 2014. Surreply at 5. That epithet notwithstanding, consistency between 2008 projections and 2014 realities precludes the finding of material “new evidence” or “substantially changed circumstances” required for reopening. *See* 49 C.F.R. § 1115.4.

Unable to show currently changed circumstances, Barrington speculates that circumstances may change in the future – beyond the 2008-15 period the Board decided in 2008 was the appropriate period for its environmental analysis (*see* Approval Decision at 41). Barrington has no direct evidence that substantial future train traffic increases ***through Barrington*** are likely, so its Surreply reiterates speculations voiced in its Petition about the implications of CN statements to investors and newspaper articles regarding the general prospects for rail traffic growth ***across North America***. Barrington argues that those speculations should trump the specific evidence provided by CN about its expectations for, and limitations on, traffic growth through Barrington, and Barrington disparages CN’s witnesses’

honesty. *See, e.g.*, Surreply at 20. Barrington’s vague inferences and rhetoric are no match for the evidence CN submitted in its Reply.

Barrington also suggests that traffic levels were uncharacteristically low in early 2014 because of bad weather, and speculates that the return of good weather will lead to traffic growth exceeding the Board’s 2008 projections. Surreply at 10 n.14. Its speculation is unnecessary. Good weather returned about nine months ago, and as CN’s monthly operational monitoring report for May 2014 (submitted to the Board on June 16, 2014) explained, with the return of good weather, traffic volumes rose during April and May, as “the backlog accumulated during winter service disruptions was cleared.”¹⁷ The Board therefore has had many recent months of data to use in assessing traffic levels under normal weather conditions. And, since the clearance of the backlog, volumes have returned to normal levels (18.0 trains per day for the last 6 months), which are close to the average for the year (17.7 trains per day for the entire year) and still below the volumes projected in 2008.¹⁸

Barrington then suggests that CN’s heavy crude oil traffic through Barrington may increase from 103 carloads per day in 2013 to 571 carloads per day in 2015 – a 455% increase.¹⁹ Surreply at 11-12. Barrington’s sole basis for that suggestion is a June 2014 report²⁰ by the Canadian Association of Petroleum Producers (“CAPP”), which said nothing about traffic

¹⁷ Letter from Karen Borlaug Phillips (Vice President, Public and Government Affairs, CN) to Lucille Marvin (Director, Office of Public Assistance, Governmental Affairs & Compliance, STB) at 3 (June 16, 2014).

¹⁸ *See* CN’s Monthly Operating Reports.

¹⁹ In doing so it ignores the point made by CN’s Senior Vice-President, Southern Region: general statements about growth “says very little about changes in traffic that can be expected on the particular segment of that line that includes Barrington.” Liepelt V.S. at 3; *see also* Murray Reply V.S. at 2.

²⁰ Canadian Association of Petroleum Producers, Crude Oil: Forecast, Markets & Transportation (June 2014) (“CAPP Report”).

through Barrington. Barrington suggests that because the CAPP Report projected a 455% increase in rail *loading capacity in Western Canada* over the *three* years from the start of 2013 to the end of 2015, CN's crude *traffic through Barrington* may increase by the same percentage in the *two* years from 2013 to 2015. *See id.* Barrington's suggestion is baseless speculation. Two years is not three years and, more importantly, there is no reason to suppose that traffic in Barrington will increase in proportion to loading capacity in Canada. Loading capacity is a complex, non-standardized measure of infrastructure available to load oil into rail cars; it does not directly relate to the supply and demand of oil movements generally – much less, to oil movements on a particular route. *See* CAPP Report at 32.

Indeed, the very CAPP report on which Barrington relies projects that overall rail *movements* of heavy crude from Western Canada will increase at a far slower rate than loading *capacity* there. *See id.*, Figure 4.5. Moreover, Barrington ignores the fact that since the June 2014 CAPP Report crude oil prices have declined by over 50%, causing CAPP to reduce its production forecast for 2015 by 65,000 barrels per day.²¹ Similarly, last week, CN's principal Canadian crude-by-rail competitor, Canadian Pacific, reduced its crude-by-rail volume forecast for 2015 by 30%, citing the decline in oil prices.²²

In any event, there is no need to speculate about heavy crude oil traffic growth through Barrington based on broad industry trends. Recognizing potential fluctuations in market conditions, Ms. Murray has provided a range for estimated growth of energy-related

²¹ *See* Rebecca Penty, *Canadian Energy Group Trims Output Forecast on Price Slump*, Bloomberg News (Jan. 21, 2015), available at <http://www.bloomberg.com/news/2015-01-21/canadian-energy-group-lowers-oil-output-forecast-on-price-slump.html>.

²² *See* Eric Atkins, *CP Rail Slashes Oil-volume Forecast as Shipments Slow*, The Globe & Mail (Jan. 22, 2015), available at <http://www.theglobeandmail.com/report-on-business/cp-rail-profit-climbs-on-10-per-cent-jump-in-revenue/article22572774/>.

commodities moving through Barrington. V.S. Murray at 4; Murray R.V.S. at 3. And as she notes, at current crude oil price levels, she “would not expect energy-related traffic growth to exceed the lower end” of her prior estimates. Murray R.V.S. at 3.²³

Again repeating suggestions in its Petition, Barrington’s Surreply also claims that “the continued expansion of intermodal traffic moving through the Port of Prince Rupert” (Surreply at 2) will lead to significant increases in intermodal traffic through Barrington that CN has not taken into account (*id.* at 2 & n.2, 5 & n.4, 16, 20-21; Petition at 16-17). According to Barrington, “CN’s 2007 projections did not account for any of the intermodal traffic that moves through the Port of Prince Rupert.” Surreply at 21. On the contrary: CN’s 2007 operating plan included intermodal traffic that CN anticipated as a result of completion of Phase I of the Fairview Container Terminal, as CN explained in correspondence with the Board’s environmental staff,²⁴ in its comments on the DEIS,²⁵ and as Barrington should know from

²³ Oil prices may rebound in the future. But whether, when, and how strongly they will do so, and whether that will lead to a substantial increase of traffic through Barrington, are matters of speculation. Such speculation about possible exogenous market forces years in the future falls far short of the material new evidence or substantially changed circumstances Barrington needs to justify reopening.

²⁴ FEIS, Appendix C, Attachment C1, Letter from Paul A. Cunningham (Counsel for CN) to Victoria J. Rutson (Chief, Section of Environmental Analysis, STB) 2 (Oct. 21, 2008) (“CN assumed that Phase 1 [of the Fairview Container Terminal at Prince Rupert] would in fact operate at capacity, and it factored the potentially resulting train traffic into its Operating Plan, which SEA relied on as the basis for its analysis of the impacts of the Transaction.”).

²⁵ CN’s Comments on the DEIS at 38.

responses provided by CN in discovery,²⁶ and from both the DEIS²⁷ and the FEIS.²⁸ Moreover, Phase I of the Fairview Container Terminal has been operating at full capacity for many years now, and any traffic between Price Rupert and Barrington would be reflected in CN's train volume reports, which are filed monthly with the Board. Murray R.V.S. at 6. Whether expansion of the Fairview Container Terminal will be approved, constructed, and operational is currently unknown. *Id.*

Finally, Barrington argues that CN's reliance on average number of trains per day, even if accurate, is "highly misleading" because some days will have above-average numbers of trains. Surreply at 9-10. There is nothing misleading about an accurate average, which is, by definition, lower than the highest numbers – and higher than the lowest numbers – in the data set from which it is taken. In any event, Barrington's hypothetical in which a low number of trains moves through Barrington on most days, and much larger than average number of trains (34.5) moves on the remaining few days, *see id.*, does not reflect reality. The daily train volume distribution on EJ&E is much narrower than Barrington suggests: in 2014, the maximum number of trains that operated through Barrington in a single day was 25, and on only 10.1% of the days did more than 21 trains operate through Barrington. Liepelt R.V.S. at 5.

²⁶ Applicants' Responses and Objections to the Village of Barrington's First Discovery Requests at 18-20 (Jan. 3, 2008) (Responses to Interrogatory Nos. 4-6) (Exhibit A hereto).

²⁷ DEIS at 4.1-17 ("Applicants' proposed Operating Plan accounts for future Port of Prince Rupert Phase I container traffic.").

²⁸ FEIS at 3.4-76 ("In the Draft EIS, SEA included the full development of future rail traffic from Port of Prince Rupert Phase 1 in its estimate of the reasonable foreseeable rail traffic that the Applicants would operate over the EJ&E rail line.").

B. Barrington Does Not Demonstrate Material Increases in the Length of Trains Moving through Barrington.

Barrington's Petition (at 18) claimed there had been a "rapid increase in the number and lengths of trains and carloads" moving through Barrington. But CN's Reply demonstrated not only that the number of trains in 2014 remained below the projections used in the Board's environmental review, but that the average length of CN trains moving through Barrington in 2014 (6,916 feet) was only slightly greater than the average length of all trains that was projected for purposes of that review (6,829 feet). Reply at 13-14.²⁹

In its Surreply, Barrington suggests that the average train length for 2014 reported by CN may be too low if it fails to reflect the lengths of trackage rights and haulage trains. Surreply at 7-8. As Mr. Liepelt explains, CN has now determined that the average train length through Barrington that it reported for 2014 (6,916 feet) included all trackage rights trains (no haulage trains are run on the segment). Liepelt R.V.S. at 6. In any event, the trackage rights trains that operate on the EJ&E line are shorter on average than the CN trains. *Id.* at 6-7.

²⁹ Barrington also claims that averages are misleading. Surreply at 7-9. But the use of average lengths is well accepted, was used appropriately by the Board in its 2008 environmental analysis, and has not been shown by Barrington to be in any way misleading. Barrington argues that, "even if [a] longer train is quickly followed by a much shorter train, the queues created by the longer train will not have fully dissipated, thereby increasing the adverse impact of the shorter train." *Id.* at 9. Barrington, however, presents no evidence on how frequently such an event can be expected or what actual impact it might have, and it fails to take into account that the bunching of trains at one time of day will be balanced by longer periods in which no trains pass over a crossing.

C. *Barrington Does Not Demonstrate Substantial Unanticipated Safety Risks from Energy-Related Traffic.*

In its Petition, Barrington suggested that the movement of energy-related products through Barrington could lead to fatal accidents such as the derailment in Lac Mégantic, Quebec. Surreply at 30-31. However, as CN explained, the Lac Mégantic accident was the result of the especially explosive nature of the light crude oil from the Bakken formation that was being transported on the train that derailed in that town, and “CN does not transport crude oil from the Bakken region through Barrington.” Murray V.S. at 3; *see also* Reply at 19.³⁰

CN’s Reply also stated that CN does not “regularly move any volumes of the more flammable light crude oil through Barrington.” *Id.* at 19. Barrington derides that statement as “duplicitous and purposefully opaque” because of the qualifier “regularly.” Surreply at 19. Barrington’s intemperate attack is unfounded.

As Ms. Murray explains, no unit trains of light crude oil move through Barrington, and that CN believes that no carloads from either the U.S. or Canadian Bakken formation move through Barrington. Murray R.V.S. at 4-5. However, CN used the word “regularly” because it is difficult to determine whether and to what extent very small volume movements of light crude oil may move through Barrington. *Id.* CN transports hundreds of thousands of carloads a year through Chicago; there is no specific STCC code for light crude oil; and routings among CN’s lines in Chicago can vary. *Id.* Therefore, identifying every possible light crude oil carload through Barrington would require identifying all crude oil shipment waybills, then reviewing

³⁰ In its discussion of Bakken light crude oil from U.S. origins that CN receives in interchange from BNSF and CP, CN’s Reply stated that “CN does not directly serve the Bakken formation or other major areas producing fracking oil” (Reply at 19). As explained by Ms. Murray, that statement was intended to refer to the *U.S.* Bakken formation. Murray R.V.S. at 4. In any event, as discussed below, CN believes that it does not move any Bakken light crude oil through Barrington – whether from the U.S. or Canadian Bakken formation.

their origins and destinations and considering their likely routing. *Id.* Ms. Murray has now reviewed origins, destination, and likely routings, and she concludes from that review that a small volume (between 150 and 500 carloads) of less volatile light crude oil from Western Canada likely moved in manifest trains through Barrington in 2014. *Id.* To put that volume in perspective, it represents at most less than 0.15% of the total carloads that moved through Barrington in 2014. *Id.*

Barrington also argues that notwithstanding CN's testimony that Bakken crude oil is not moving through Barrington, CN *might*, at some point in the *future*, "transport[] light Bakken crude through Barrington to meet a particular shipper's evolving market needs." Surreply at 19. Such speculation, based on no specific material facts, provides no basis for reopening.

Finally, Barrington argues that CN's Reply "downplay[ed] the flammability of heavy crude oil from Western Canada" and thus the safety risk borne by Barrington as a result of movements of such oil, arguing that heavy crude oil "must be heated or blended with a diluent in order to decrease viscosity for loading and unloading" and that "[a]ddition of any diluent will cause the heavy crude to become more flammable." *Id.* at 16-17. CN's Reply did not "downplay" anything – it merely noted the important difference in combustibility between the two products, which has been recognized by PHMSA and reflected in the proposed rulemaking. The fact is, the major safety concern and focus of the public, PHMSA, and FRA has been movement of light crude oil, and particularly U.S. Bakken crude, and CN's route through Barrington has not been and is not anticipated to be a significant route for those products. *See Murray R.V.S.* at 4-5.

As for the use of diluent, the very CAPP report cited by Barrington in connection with volumes of heavy crude oil from Western Canada points out that "[l]ess diluent is required when

bitumen is moved by rail where it is transported in heated rail tank cars that lower the viscosity of the bitumen.”³¹ Barrington suggests that the northbound counterparts to the southbound loaded crude oil trains moving through Barrington will “backhaul condensate and other petrochemical products.” Surreply at 15, 17. This is incorrect; CN backhauls little to no condensate or other petrochemicals in these trains. The northbound oil tank cars generally return empty, which presents none of the (already extremely minimal) safety hazards of a loaded train. Murray R.V.S. at 3. In any event, regardless of the specific characteristics of the commodities, the risk of an incident is extremely low: 99.998% of all hazmat moved by rail reaches its destination without a release caused by an incident.³²

D. Barrington Does Not Demonstrate that CN Is Likely to Double-Track the Line Through Barrington.

In response to suggestions in Barrington’s Petition (at 22-24) that CN might be contemplating double-tracking the EJ&E line through Barrington in order to accommodate significant growth in traffic volumes, CN’s Senior-Vice President Mr. Liepelt stated categorically that CN had no such plans, and in particular that it had not designed or sought or allocated funds for double-tracking. V.S. Liepelt at 4-5. As CN explained, it has no such plans because it does “not anticipate for the foreseeable future that traffic volumes on Barrington’s segment of EJ&E w[ould] grow significantly beyond the volumes projected in its 2008 Operating Plan.” Reply at 15.

In its Surreply, Barrington “suggests” that CN’s straightforward disclaimer of any intent to double-track the line is “not credible,” and that CN’s statements were “carefully parse[d]” in order to hide a possible “pre-design phase” plan to double track the line. Surreply at 16. In his

³¹ CAPP Report at 8.

³² <https://www.aar.org/todays-railroads/safety?t=hazmattransportation>.

reply verified statement, Mr. Liepelt makes clear that Barrington’s suggestion is incorrect. In order to lay to rest Barrington’s speculation, he supplements his prior statement by adding that “CN has no ‘pre-design phase’ plan or plan of any other kind to double track the line through Barrington.” *See* Liepelt R.V.S. at 5-6.

E. Barrington’s Concerns about Delays to Emergency Responders Are Speculative and Not New.

Barrington claims that “there is a constant threat that the inability to cross unimpeded through the heart of Barrington can be the difference between life and death.” Surreply at 24. That may be literally true – anything that can delay an emergency responder – be it a freight rail crossing, a commuter rail crossing, or other vehicular traffic – “can be the difference between life and death.” But society tolerates such risks if they appear small and if the cost of eliminating them appears excessive. Every at-grade crossing involves some risk, but at-grade crossings are generally permitted.³³ Consistent with that approach, having “determined that the transaction could adversely affect emergency service providers by increasing the potential for delay at highway/rail at-grade crossings due to increased train operations on the EJ&E line,” Approval Decision at 48, the Board ordered appropriate mitigation, but did not order grade separations in most of the locations where such effects “could” occur, *see id.* at 48-49.

The *possibility* of delays to emergency responders that *could* have grave consequences is, thus, nothing new. And Barrington offers no evidence that the risk is unexpectedly substantial. Indeed, despite submitting statements from its police and fire chiefs (Mr. Dorn and Mr. Arie, respectively), Barrington cites no data demonstrating that as a result of the Transaction there have been worse outcomes due to delays in emergency responses. The apparent absence of such

³³ As the Board noted, only 27% of grade crossings on the EJ&E line were grade separated before CN’s acquisition. Approval Decision at 46 n. 102.

evidence is a credit to Barrington's emergency services, which have adopted effective protocols to compensate for Barrington's long-standing lack of any grade separation (discussed below), but it also vindicates the Board's conclusion that any increased risks were at a tolerable level. That conclusion is further supported by the record evidence demonstrating that crossing activations of significant duration have not risen materially since the Transaction.

Based on the statements of Mr. Dorn and Mr. Arie, Barrington argues that the Active Crossing System ("ACS") that CN has provided Barrington and other communities in compliance with the Board's Decisions is not proving to be valuable. But Barrington and these witnesses fail to mention that Barrington consented to that system,³⁴ that the lack of a grade separation despite the possibility of rail crossing blockages is a condition emergency responders in Barrington have had to live with since well before the Transaction, and that Barrington had been seeking a grade separation independent of the Transaction. Moreover, their statements underscore that emergency responders have developed and successfully deployed protocols to help compensate for a lack of grade crossing.³⁵

³⁴ Barrington does not, and cannot, claim that the choice of ACS technology, to which it consented, was material error, or that the limitations of ACS technology constitute "substantially changed circumstances" that could justify reopening. In 2010, CN petitioned the Board to replace Condition 18 of the Approval Decision with an ACS requirement and Barrington provided a letter of consent supporting that petition, which the Board duly granted. *See* Decision No. 24 (served Aug. 27, 2010).

Nor does Barrington deny that it has benefitted from other aspects of the Board's mitigation. And, had Barrington wished to further tailor mitigation measures, it could, like 28 of the 33 communities around the EJ&E arc, have done so by negotiating a customized voluntary mitigation agreement with CN. If Barrington's emergency providers wish to do so, CN remains willing to work with them to determine if there are practical improvements that can be made to the ACS.

³⁵ As discussed by Mr. Arie, by entering protocols with neighboring emergency departments regarding responses to emergency calls, Barrington has established a practical solution to its longstanding lack of a grade separation. According to Barrington, those protocols "assure that for serious calls on the 'wrong side of the track,' a neighboring department on the

IV. BARRINGTON'S ARGUMENTS AGAINST ADMINISTRATIVE FINALITY ARE MERITLESS AND IGNORE THE BOARD'S 2012 DECISION.

Because Barrington has produced no evidence that calls into question the Board's Approval Decision and no evidence that could justify imposing a new almost \$50 million funding obligation on CN, the Board can dispose of this petition for reopening, as it did Barrington's 2011 petition for reopening, without parsing what evidence qualifies as "new" for reopening purposes. However, Barrington's endless stream of repetitive litigation also raises broader policy concerns about administrative finality.

Barrington devotes eight pages of its Surreply to the proposition that, in the context of this case, administrative finality does not matter. *See* Surreply at 25-33. Its argument recalls another Barrington surreply, filed in support of its 2011 petition to reopen, in which Barrington claimed that, given the Board's monitoring and oversight condition, reopening was "little more than a pro forma procedural step." FD 35087 (Sub-No. 8), Barr-2, at 5 (filed Nov. 11, 2011). The Board rejected that argument, holding that, regardless of the Board's monitoring and oversight condition, if Barrington "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 Decision at 8-9 (citations omitted).³⁶

'right side of the track' will start to respond to an emergency call and will continue to do so if Barrington is blocked at an EJ&E crossing" (Arie V.S. at 2-3). This solution appears consistent with the Board's original expectation of how its information-providing mitigation measures would be used: "The mitigation that the Board is imposing will provide the emergency dispatchers with better and more timely information so that they can either take pre-planned alternative routes or dispatch services from alternative facilities when appropriate." Approval Decision at 49.

³⁶ Barrington's repeated invocation of the Board's oversight condition as displacing normal principles of administrative finality, *see, e.g.*, Surreply at 25, 28-29, ignores the Board's ruling that it does not affect those principles at all, 2012 Decision at 9.

Barrington's latest iteration of its argument against administrative finality begins with a straw man: Barrington suggests that CN is denying the Board's jurisdiction to impose additional conditions upon reopening. Surreply at 25. CN has not denied that jurisdiction. Instead, CN's Reply emphasized that because of vital interests of reliance and administrative finality, and because, under the National Environmental Policy Act, the Board's decision on environmental conditions was to be made on the basis of reasonable foreseeability, not 20/20 hindsight, there are compelling reasons for the Board's well-established approach of requiring strong evidence of material changes to disturb the status quo, rather than reconsidering its decision de novo when it receives a petition for reopening. *See* CN Reply at 25-27.

Barrington further argues that because CN's acquisition of EJ&E was strategic and successful, CN would have gone ahead even had the Board imposed the grade separation condition Barrington now seeks. Surreply at 25-27. Whether CN would have done so is far from clear. The costs of mitigation imposed by the Board already greatly exceed CN's reasonable expectations at the time it entered into an agreement to acquire EJ&E. More importantly, Barrington offers no limiting principle to the Board's addition of post-Transaction mitigation. Acceptance of Barrington's notion that small traffic fluctuations years after the Transaction justify multi-million dollar retroactive conditions would mean that the real price of the Transaction and of future transactions would never be known. It is hard to imagine a mitigation approach that would be more damaging to future efficient transactions and investment.

In any event, the principle of administrative finality is not a special accommodation for the benefit of marginally viable transactions; it is a basic reflection of the rule of law and orderly regulation. And Barrington's notion that the EJ&E Transaction will be recognized as a "singular

event” such that the imposition of a nearly \$50 million condition six years after approval would not deter future transactions, *id.* at 28, is unprincipled and implausible.

Finally, Barrington claims that administrative finality should not apply with full force because CN allegedly “rush[ed] the NEPA review process,” while aware of the Board’s oversight condition. *Id.* Barrington’s complaints about “rushed analysis,” *id.* at 28 n.53, ignore the fact that the Board conducted the most thorough analysis of a “minor” transaction in its (or the ICC’s) history, spanning 12 months, multiple public hearings and voluminous public comments, a 3,500-page DEIS, a 3,100-page FEIS, and an Approval Decision that included 26 pages setting out 182 environmental mitigation conditions, even before multiple D.C. Circuit proceedings and a reopening proceeding affirming the Board’s conclusions.³⁷

The Board did its job thoroughly six years ago, and its conclusions have only been reinforced by subsequent data that show that the projected estimates the Board used of train volume and lengths were accurate and that road blockages due to crossing activations in excess of 10 minutes have barely increased since the Transaction. Barrington’s regret that the Board did not require CN to spend tens of millions of dollars on a partial solution to Barrington’s pre-existing traffic problems is not new evidence or a changed circumstance, and it justifies neither reopening nor Barrington’s ceaseless barrage of repetitive arguments.

³⁷ Barrington complains that the D.C. Circuit rejected one of its arguments based on its 2008 traffic study because Barrington waived it, rather than on the merits. Surreply at 30-31. The D.C. Circuit’s rationale does not affect the administrative finality of the Board’s 2008 and 2012 decisions, which explained why Barrington’s traffic studies were insufficient on the merits. In any event, a party who waives a point should not be rewarded by having it considered *de novo* several years later.

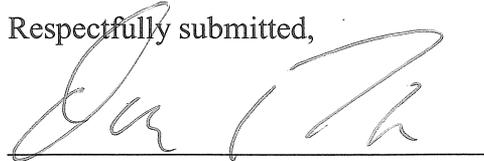
CONCLUSION

In its ongoing efforts to secure a grade separation condition, Barrington persists in disregarding important and broader elements of the Board's decision approving CN's acquisition of the EJ&E. While thoroughly reviewing reasonably foreseeable environmental impacts and imposing more than 180 conditions to mitigate those impacts and benefit communities along the EJ&E line, the Board approved the transaction as one that would "greatly improve rail transportation through Chicago, a vital rail transportation center, and will have environmental benefits to those living in and near [the] city." Approval Decision, at 2. There is little question that the more efficient use of all Chicago area rail infrastructure underlying that broader promise has been realized.

Barrington has pre-existing traffic problems which the Board rightly decided would not be solved by requiring CN to pay for a grade separation and should not be a basis for requiring CN to pay tens of millions of additional dollars. Barrington's Surreply adds nothing material to its Petition, which in turn added nothing material to the points that Barrington made, and the

Board rightly rejected, in 2008 and 2011-12. Accordingly, Barrington's Petition should be denied.

Respectfully submitted,



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January 26, 2015

Exhibit A

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January 3, 2008

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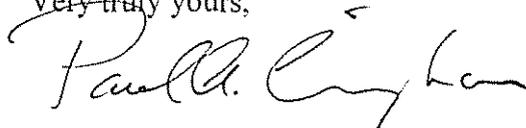
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**Re: Canadian National Railway and Grand Trunk Corporation – Control –
Elgin, Joliet & Eastern West Company (STB Finance Docket No. 35087)**

Dear Kevin:

Enclosed is a copy of Applicants' responses to Barrington's discovery requests. The documents should be available for inspection starting tomorrow.

Very truly yours,



Paul A. Cunningham

Enclosure

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 35087

CANADIAN NATIONAL RAILWAY CORPORATION
AND GRAND TRUNK CORPORATION
– CONTROL –
ELGIN, JOLIET & EASTERN WEST COMPANY

**APPLICANTS' RESPONSES AND OBJECTIONS TO
THE VILLAGE OF BARRINGTON'S
FIRST DISCOVERY REQUESTS**

Pursuant to the Surface Transportation Board's Discovery Rules, 49 C.F.R. §§ 1114.21 through 1114.31, and Decision No. 2, served in this proceeding on November 26, 2007, Applicants hereby make these combined responses and objections to the first sets of interrogatories and requests for production of documents served by the Village of Barrington ("the Village") on Friday, December 18, 2007, collectively referred to as the "Discovery Requests."

APPLICANTS' OBJECTIONS: BACKGROUND

The Village has served extraordinarily voluminous and burdensome Discovery Requests – a total of 101 numbered requests, with subparts and complex, burdensome definitions and instructions. These requests overlook the fact that the Village is not entitled to invoke the Board's discovery process to explore issues that the Board has ruled it will address, as requested by the Village, in the Board's environmental review process.

This is not a private civil action in federal district court or state court where the parties have broad latitude to pursue discovery under flexible, permissive standards and normally do not face inalterable statutory deadlines. Under the Board's longstanding

Response

Without waiving any objections, and subject to any specific objections and the General Responses and General Objections stated above, Applicants respond as follows:

There will not necessarily be an exact one-to-one shift of trains from CN's lines to EJ&EW's because the train plans before the acquisition and after full implementation will be different due to the efficiency gains of the proposed Transaction. By and large, the trains that are removed from CN's lines will be shifted to EJ&EW's lines, but the post-implementation system will not necessarily run the same trains, the same number of trains, nor will the trains necessarily have the same origin/destination as the pre-Transaction system. However, all post-implementation traffic that Applicants project would be added to the Leithton-Spaulding segment is traffic that would move via the Chicago terminal network if it were not carried in the 15 additional freight trains per day projected to operate over that segment.

Interrogatory No. 4

Please describe how many of the 15 additional freight trains per day on the Leithton-Spaulding segment of the EJ&E Line that you calculated would result from the CN Transaction will be attributable to and/or consist of traffic to or from PPR, including (i) descriptions of how many trains and/or carloads per day are attributable to traffic moving towards PPR over the EJ&E Line, and (ii) descriptions of how many trains and/or carloads per day are attributable to traffic moving from PPR to the EJ&E Line and beyond.

Response

Without waiving any objections, and subject to any specific objections and the General Responses and General Objections stated above, Applicants respond as follows:

The 15-train post-implementation increase over the Leithton-Spaulding segment includes one daily (i.e. 7 trains a week) Prince Rupert round trip (to/from Prince Rupert).

The expected train length based on the traffic forecast is approximately 9900 feet. See Rupert Train Plan 2008 - 2010 V3.xls, which is being added to Applicants' depository and will promptly be made available to the Village of Barrington and other parties of record, subject to the Protective Order in this proceeding.

- (i) Post-implementation, there will be one train a day moving towards PPR over the EJ&EW line. CN did not calculate carload information for this move, but this can be derived from the Rupert Train Plan 2008 – 2010 V3.xls spreadsheet cited above. It was assumed that there would be an equal number of carloads moving toward PPR over the EJ&EW line.
- (ii) Post-implementation, there will be one train a day moving from PPR to the EJ&EW line. CN did not calculate carload information for this move, but this can be derived from the Rupert Train Plan 2008 – 2010 V3.xls spreadsheet cited above.

Interrogatory No. 5

Please describe any and all new or increased traffic CN expects or anticipates over the EJ&E Line following full implementation of the CN Transaction, including (i) descriptions of how many trains and/or carloads per day of future traffic would be attributable to traffic moving towards PPR over the EJ&E Line, (ii) descriptions of how many trains and/or carloads per day of future traffic would be attributable to traffic moving from PPR to the EJ&E Line and beyond; and (iii) future traffic counts by each EJ&E Line segment, including carloads, tonnage, commodity and/or major business group, and other indicators of traffic flow.

Response

Without waiving any objections, and subject to any specific objections and the General Responses and General Objections stated above, Applicants respond as follows:

Attachments A.1 and A.2 to the Operating Plan included in the Application (as corrected by errata to be filed today) and CN's responses to these interrogatories describe the expected traffic following full implementation of the Transaction. See NOTE to Attachment A.2.

- (i) As discussed in CN's answer to interrogatory number 4, the train count includes one daily trip to Prince Rupert, and CN did not calculate carloads for this move. However, as mentioned in response to interrogatory

number 4, carloads from PPR are derivable from the Rupert Train Plan 2008 – 2010 V3.xls and CN assumed carloads to PPR were the same as carloads from PPR.

- (ii) As discussed in CN's answer to interrogatory number 4, the train count includes one daily trip from Prince Rupert, and CN did not calculate carloads for this move. However, as mentioned in response to interrogatory number 4, carloads from PPR are derivable from the Rupert Train Plan 2008 – 2010 V3.xls.
- (iii) Further information regarding train details is available in the work papers. See CN/EJEW 5 CO 100001, EJE_STB_OpPlan.mdb, tbl_TSP_X1, tbl_X1_Trains_via_EJE, and other tables in the EJE_STB_OpPlan.mdb database. To the extent not included in the work papers, CN has not made any characterization of post-implementation traffic. Any data regarding the character of the post-implementation trains that is not reflected in the work papers does not exist and would have to be developed separately.

Interrogatory No. 6

Please describe whether the Leithton-Spaulding segment of the EJ&E Line identified as Segment No. 14 in Attachment A.2 to the Operating Plan included in the Application will see an increase in freight trains per day as a result of the CN Transaction that are attributable to PPR traffic, including but not limited to the number of anticipated freight trains per day attributable to PPR traffic.

Response

Without waiving any objections, and subject to any specific objections and the General Responses and General Objections stated above, Applicants respond as follows:

See response to interrogatory 4, above. CN projects that the Transaction will result in an increase of 15 trains per day over the Leithton-Spaulding segment once implementation is complete. The 15 train increase includes one daily Prince Rupert round trip.

Interrogatory No. 7

For all train counts identified in Attachment A.1 to the Operating Plan included in the Application, describe whether and to what extent the counts include local trains, transfers, and/or other such switching traffic.

CERTIFICATE OF SERVICE

I certify that I have this 26th day of January, 2015, caused a true copy of the foregoing Response to Barrington's Surreply "Comments" to CN's Reply to Barrington's 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.


Spencer R. Leroux

**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]

REPLY 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”). On December 16, 2014, I submitted a statement in this proceeding in support of CN’s Reply to Petition of Village of Barrington Seeking Imposition of Additional Mitigation (“CN’s Reply”). Prior to that, on September 16, 2014, I submitted a Verified Statement in the main docket in support of CN’s Reply to Petition of the Village of Barrington for Extension of Oversight. Those statements discuss my background and qualifications regarding CN’s lines and operations in the U.S. and, in particular, those of Elgin, Joliet and Eastern Railway Company (“EJ&E”).

I have been asked by CN to respond in this statement to various assertions of Barrington in its January 5, 2015 “Comments” tendered to the Board as a surreply to CN’s Reply (“Surreply”). As I explain, Barrington’s latest arguments are misplaced and do not support its request that CN be required to pay tens of millions of dollars for a grade separation more than six years after CN’s acquisition of EJ&E (“Transaction”).

Barrington argues that CN has “sought to avoid any meaningful consideration of the ‘here and now’ actual impact of its greatly increased operations on Barrington and the

surrounding region.” Motion at 3. It is Barrington, however, that fails to address the on-the-ground reality that activations in Barrington of 10 minutes or longer have changed very little due to CN traffic as compared to pre-Transaction levels, and that there are other non-Transaction-related causes for Barrington’s traffic congestion.

Each month CN reports to the Board the number of Automatic Crossing Warning Device Activations of 10 minutes or longer for at-grade road crossings of the EJ&E. There are four such crossings in the area of downtown Barrington. These reports (which the Board makes public) demonstrate that in 2014 reportable activations were very infrequent in Barrington. Reportable activations are summarized in the following table.

Reportable Activations At Barrington Crossings (2014)			
Crossing	2014 Total	2014 Monthly Average	2014 Daily Average
Lake Zurich Rd.	10	0.8	0.03
NW Hwy (US 14)	11	0.9	0.03
Hough St. (IL 59)	15	1.3	0.04
Main St. (Barrington)	19	1.6	0.05
Total (all crossings)	55	4.6	0.15
Average (per crossing)	13.8	1.1	0.04

Source: CN’s monthly operating reports.

Taken together, these four crossings averaged only a total of 4.6 reportable activations per month in 2014. As the table shows, Northwest Highway – the crossing for which Barrington seeks a CN-funded grade separation – averages less than one 10-minute-plus blockage per month.

Barrington does not discuss the fact that most of these activations occur at times when they are unlikely to cause significant disruption to traffic in Barrington. For example, 10 of the activations at Barrington crossings in 2014 (18% of the total) were at night (defined as 10:00 p.m. to 6:00 a.m.), when traffic levels are relatively low. Further, in order to avoid interference

with Metra trains, which run at peak volumes through Barrington during the morning and evening rush hour, CN runs very few trains and causes very few activations during rush hours. In fact, for all of 2014, CN trains caused only 5 reportable activations during traffic rush hours (defined, as it was in the Board’s EIS,¹ as a weekday between 7:00 a.m. and 9:00 a.m. or 4:00 p.m. to 6:00 p.m.).

Barrington also does not acknowledge the degree to which activations affected the community prior to CN’s acquisition of EJ&E, and the fact that post-Transaction reportable activations have not increased significantly. Prior to the Transaction, rail traffic on EJ&E through Barrington averaged 5.3 trains per day. As of 2014, traffic over the EJ&E line through Barrington averaged 12.4 additional trains per day, for a total of 17.7 trains per day. As a result of CN’s capital investments and skillful dispatching and management, however, reportable activations actually decreased from pre-Transaction levels at two of Barrington’s crossings, and only marginally increased at Barrington’s other two crossings. This can be seen in the following table:

Pre-Transaction Versus 2014 Reportable Activations At Barrington Crossings			
Crossing	Pre-Transaction Monthly Average²	2014 Monthly Average	Change (Pre-T to 2014)
Lake Zurich Rd.	0.9	0.8	(0.1)
NW Hwy (US 14)	0.8	0.9	0.1
Hough St. (IL 59)	1.4	1.3	(0.1)
Main St. (Barrington)	1.1	1.6	0.5
Total (all crossings)	4.2	4.6	0.4
Average (per crossing)	1.0	1.1	0.1

¹ III FEIS, Appendix A, Attachment A.5, at 10.

² August 2007 through January 2009. Data comes from restated RTU data files submitted to the Board on August 3, 2010.

Thus, CN's substantial (albeit expected) increases in traffic have not led to significant increases in reportable activations at crossings in Barrington.

Had CN not acquired EJ&E, Barrington could well be experiencing a greater number of reportable blockages than at present. Barrington acknowledges the strategic value of the EJ&E line for bypassing congestion in Chicago. Given that strategic value, even if CN had not acquired EJ&E, it is quite likely that EJ&E would have experienced at least some traffic increases over the past 7 years. At the rate at which reportable blockages were occurring on EJ&E prior to the Transaction, if CN had not acquired this line and daily traffic volumes had increased by even a single train, reportable blockages at Barrington's four crossings would have exceeded their 2014 total.

Another factor that puts CN's addition of an average of 12.4 trains in perspective is the much greater volume of traffic on the Metra/UP line that crosses at grade three roads in downtown Barrington, including two of the roads CN crosses (Hough Street and Main Street). The 2014 daily train volumes on CN's line through Barrington (17.7), and the resulting number of activations caused by those trains, is dwarfed by the train volume on the Metra/UP line (reported in the EIS as 62 passenger trains and 5-6 freight trains)³ and their resulting activations.⁴

³ Draft EIS, Table 3.1-1, at 3.1-8. The number of Metra trains reported in the DEIS is consistent with Metra's current schedules, which show 62 Metra trains per weekday through Barrington. Metra's schedule through Barrington is available at http://metrarail.com/content/metra/en/home/maps_schedules/metra_system_map/up-nw/map/_jcr_content/download/file.res/UPNW_Timetable04282014.pdf.

⁴ Each train causes a gate activation, although not every activation would meet the 10 minute threshold for CN's reporting.

And whereas, as noted above, CN runs very few trains during rush hours, Metra runs approximately 20 trains through Barrington during weekday rush hours.⁵

In addition to accusing CN of ignoring actual traffic impacts, Barrington takes issue with my use of average daily train volumes. It formulates a hypothetical example of a month in which a low number of trains move through Barrington on most days, and a much larger than average number of trains (34.5) move on the remaining few days. Surreply at 9-10. Its hypothetical does not reflect reality. The daily train volume distribution on EJ&E is much narrower than Barrington suggests. In 2014, the maximum number of trains that operated through Barrington in a single day was 25, and this only occurred twice. And a total of 24 trains operated over the line on only 6 days. In total, 22 or more trains operated through Barrington on only 37 of 365 days – about 10% of the time.

Barrington claims that my statement regarding the lack of any CN plans to double track the EJ&E line in Barrington was “carefully parse[d]” in order to hide a possible “pre-design phase” plan to double track this line. Surreply at 16. Its suggestion is wrong. I explained in my prior verified statement (at pages 4-5) that CN has no current plan to double track this line, and that CN has not designed any such track and has not sought or allocated any money for such a track. I was trying to be expansive in my statement. To be clear, CN has no “pre-design phase” plan or plan of any other kind to double track the line through Barrington.

Finally, Barrington asserts that my statement regarding the length of trains through Barrington may be understated because I had noted that they do not include trackage rights trains. Surreply at 7-8. While our train length data generally do not include trackage rights

⁵ See Metra schedule at n.3, *supra*.

trains because our automated data sources for such lengths are incomplete,⁶ I now understand that this is not the case with respect to the relatively few trackage rights trains that operate through Barrington. These are loaded and empty coal trains operated via UP trackage rights over EJ&E between West Chicago and Leithton in connection with a CN line-haul movement north of Leithton. Because these trains, unlike most trackage rights trains, include a CN line haul, they have CN train identification numbers and thus were captured in the data on average lengths discussed in my prior statement.

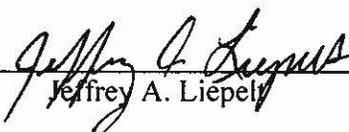
In any event, Barrington's speculation that the addition of trackage rights trains would increase the average length for trains operating over EJ&E is wrong. Due to the types of trackage rights trains operating on EJ&E and the preferences of carriers operating those trains, on average the trackage rights trains operating on EJ&E are shorter than CN's own trains. For example, the average length of the trackage rights trains moving through Barrington is 6,444 feet, which is less than the average length of all trains.

⁶ When these trains arrive at CN's line, the foreign carrier transmits an EDI-161 message that contains information about the train's consist, including train length. The EDI-161 message contains a number of data fields; if the data in any one of those fields is not formatted properly it will cause CN's primary data-tracking application, SRS, to reject the EDI-161 message, and the train length will not be recorded by that system. Carload information about the train will be still be captured in SRS, and train length information will be captured by CN's TMDS system (which generates the dispatch screens used by CN's dispatchers to dispatch both CN and foreign trains on CN's lines), but extracting and using this information would be an extremely difficult and time consuming process.

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 January 26, 2015



Jeffrey A. Liepelt

**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]

REPLY 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 oversee corporate marketing, planning, e-business innovations, and strategic account activities, which includes leading the regional sales groups that focus on business growth. Prior to assuming 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 assertions made by the Village of Barrington (“Barrington”) in its surreply, styled as Comments in Response to Reply Filed by Canadian National Railway Company and Grand Trunk Corporation (“Surreply”), filed with the Surface Transportation Board (“Board”) on January 5, 2015. In particular, Barrington takes issue with a number of points in my verified statement submitted with CN’s Reply to Barrington’s Petition and in CN’s Reply itself.

Barrington asserts that my forecast that volumes of crude oil moving through Barrington in manifest traffic will remain flat “is likely to prove wrong if PHMSA’s new tank car rules (as envisioned in the NPRM) allowing the continued use of structurally deficient DOT-111 rail cars on manifest trains are actually instituted.” Surreply at 11, n.16. CN’s projections regarding future traffic flows of crude oil through Barrington in either unit or manifest trains are not dependent on the outcome of the PHMSA rulemaking; they are related to economic demand and the ability of customers to receive this commodity in either unit or manifest trains.

Barrington also questions my statement that “CN does not project volumes of crude oil moving through Barrington to grow appreciably beyond 2015” by referencing statements from other CN executives about the long-term lead times for many energy-related facilities and a report from the Canadian Association of Petroleum Producers. *See* Surreply at 12-13.

Barrington makes the mistake (frequently repeated throughout both its initial Petition and the Surreply) of taking broad statements regarding macro growth and assuming they apply uniformly to the micro issue of traffic through Barrington. My projections for growth were based on facilities CN anticipates will come on line in 2015 and that will receive shipments of crude oil that move through Barrington. CN has a large network that serves many customers, and CN anticipates serving other facilities that may come on line in 2015 and beyond that will not require moving crude oil through Barrington. Moreover, as I discussed in my original statement (at 3), the decline in crude oil prices could impact the growth of energy-related traffic through Barrington. Over the 5 ½ weeks since my prior statement, already low oil prices have further declined, falling an additional 18% between December 15, 2014 and January 23, 2015. (During this period the price per gallon of West Texas Intermediate fell from \$56 to approximately \$46

per barrel.) At this price level, I would not expect energy-related traffic growth to exceed the lower end of my prior estimates.

Barrington suggests that the northbound counterparts to the southbound loaded crude oil trains moving through Barrington will “backhaul condensate and other petrochemical products.” Surreply at 15, 17. This is incorrect; CN backhauls little to no condensate or other petrochemicals in these trains. The northbound oil tank cars generally return empty, which presents none of the (already extremely minimal) safety hazards of a loaded train.

As noted above, if oil remains at or below \$50 per barrel,¹ I project that the additional volume of loaded heavy crude unit trains for 2015 will be no greater than the low end of my earlier estimate, that is, 8 trains per week, or 1.1 trains per day. Combined with loaded unit trains of frac sand (which, at current oil prices, I likewise do not expect to exceed the low end of my prior estimate, that is, 3 trains per week, or 0.4 trains per day), I estimate that for 2015 the total number of additional loaded unit trains of energy-related traffic will be about 1.5 trains per day. With empties added, total increased traffic volumes would be approximately 3.0 trains per day.

Barrington asserts that I “downplay[ed]” the flammability of heavy crude as compared to light crude and that the addition of diluent will cause heavy crude to become more flammable. Surreply at 16-17. My statements regarding the relative combustibility of heavy crude versus Bakken light crude did not “downplay” any risks, which are, in any event, extremely small, but I did note the important difference in combustibility between the two products, which has been

¹ Of course, no one can predict the movement of crude oil prices with certainty. That is why I provided in my prior statement a range of estimates for the potential growth of energy-related traffic in 2015 and is one of the reasons I cannot reasonably forecast a rate of growth beyond 2015. The higher end of the estimate I provided was based on crude oil fully recovering to price ranges at or above \$100 per barrel.

recognized by PHMSA and incorporated into the proposed rulemaking. The fact is, the major safety concern and focus of the public, PHMSA, and FRA has been movement of light crude oil, and particularly U.S. Bakken crude, and CN's route through Barrington has not been and is not anticipated to be a significant route for those products.

Barrington observes that my statement that CN does not directly serve the Bakken formation appears to be contrary to some CN marketing materials. Surreply at 18-19. That is because my comment was intended to reference the U.S. Bakken formation, which is the source of the lightest, most volatile crude oil and of the traffic that is most competitive for shipments to U.S. destinations. By contrast, the references cited by Barrington to CN service of the Bakken formation refer to a small facility in Willmar, Saskatchewan that serves oil producers who drill in the Canadian portion of the Bakken formation (among other formations in the area) and to a pipeline and railcar loading facility operated by Tundra Energy Marketing ("Tundra") in Cromer, Manitoba. None of the oil from either location is routed through Barrington; almost all of it moves to Eastern Canada, and the few carloads that may move to the U.S. do not move through Barrington.²

Barrington takes issue with the statement in CN's Reply that CN "does not regularly move *any* volumes of the more flammable light crude oil through Barrington" as "duplicious and purposefully opaque," because CN does not define what it means by "regularly." Surreply at 19. Use of the term "regularly" was not intended to obfuscate. Some qualification in discussing

² In addition, the crude oil from the Canadian Bakken is different from U.S. Bakken in terms of volatility (it is less volatile) and chemical makeup. (In fact, it is marketed as "Manitoba Sweet," to distinguish it from Bakken crude.) Tests show that the oil from Cromer falls into the packing group for crude oil with the highest flash point and least volatility (packing group 3—less volatile). Nonetheless, in an effort to be particularly safety-conscious, Tundra classifies the Cromer oil as packing group 2, which is subject to more restrictive packaging requirements.

light crude oil movements through Barrington is prudent because it is difficult to determine precisely each and every carload of such movements. CN transports hundreds of thousands of carloads a year through Chicago; there is no specific STCC code for light crude; and routings among CN's lines in Chicago can vary. Identifying every possible crude oil carload through Barrington would therefore require identifying all crude oil shipment waybills, then reviewing their origins and destinations and considering their likely routing.

To clarify, we know that no unit trains of light crude move through Barrington (as it had suggested) and, based on our knowledge of light crude oil origins, destinations, and interchanges, we strongly believe that no carloads from either the U.S. or Canadian Bakken formation move through Barrington, although we cannot rule out the possibility that an odd carload may have done so. However, carloads of less volatile light crude oil from various Western Canadian locations occasionally move in manifest trains to Chicago for interchange with other U.S. carriers, and some of these carloads move through Barrington. For 2014, I estimate that the volume of this traffic was between 150 and 500 carloads. To put that volume in perspective, it represents at most less than 0.15% of the total carloads that moved through Barrington in 2014.

Finally, Barrington asserts that "CN's 2007 projections did not account for any of the intermodal traffic that moves through the Port of Prince Rupert" and questions the absence of discussion of the "expanding traffic" from the Port of Prince Rupert in my original Verified Statement. *See* Surreply at 20-21. Barrington's assertion is wrong; CN's 2007 projections did include intermodal traffic moving through the Port of Prince Rupert.³ Moreover, Phase I of the

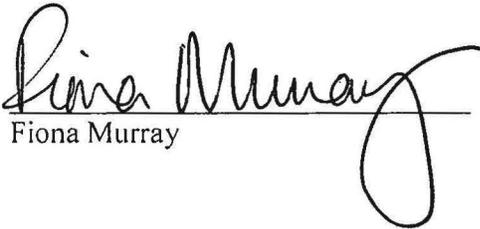
³ *See, e.g.*, CN's Comments on the DEIS at 38 ("CN assumed that Phase 1 would in fact eventually operate at capacity, and it factored the potentially resulting train traffic into its Operating Plan, which SEA relied on as the basis for its analysis of the impacts of the Transaction.")

Fairview Container Terminal at Prince Rupert began operations in October 2007 (before CN acquired EJ&E), and has been operating at capacity for years, so that any intermodal traffic to or from Prince Rupert (or any other location) that moves through Barrington has been reflected in CN's monthly train volume reports filed with the Board. As for expanding traffic, Phase II of the Fairview Container Terminal at Prince Rupert has not been finally approved, and if and when it may be approved, constructed, and operational is highly uncertain at this time.

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 January 26, 2015


Fiona Murray