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March 8, 2013

VIA ELECTRONIC FILING

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

233920
ENTERED
Office of Proceedings
March 8, 2013
Part of
Public Record

Re: STB Finance Docket No. 35087, Canadian National Railway Company
and Grand Trunk Corporation--Control--EJ&E West Company

Dear Ms. Brown:

Enclosed for filing in the subject proceeding are the Comments of the Illinois
Department of Transportation.

I certify that I this day have served a copy of this letter and its enclosure on
Canadian National Railway Company and Grand Trunk Corporation by e-mailing copies
to their counsel, Paul A. Cunningham, Esq., at pac@harkinscunningham.com.

If you have any question concerning this filing or if I otherwise can be of
assistance, please let me know.

Sincerely yours,



Fritz R. Kahn

encl.

cc: Paul A. Cunningham, Esq.

SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 35087

CANDIAN NATIONAL RAILWAY COMPANY AND GRAND TRUNK
CORPORATION--CONTROL--EJ&E WEST COMPANY

COMMENTS
OF
ILLINOIS DEPARTMENT OF TRANSPORTATION

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ILLINOIS DEPARTMENT OF TRANSPORTATION

Dated: March 8, 2013

SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 35087

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

COMMENTS
OF
ILLINOIS DEPARTMENT OF TRANSPORTATION

The Illinois Department of Transportation ("IDOT"), in response to the Board's announcement of January 20, 2010, inviting comments concerning the compliance by the Canadian National Railway Company ("CN") with the several environmental conditions imposed by the Board in its Decision, served December 24, 2008 ("Approval Decision"), states, as follows:

1. Environmental Condition No. 14 of the Approval Decision called for the grade separation of the crossing of US Highway 34 (Ogden Avenue) and the track of the EJ&E West Company ("EJ&E") in Aurora, Illinois, and of the crossing of US Highway 30 (Lincoln Highway) and the track of the EJ&E in Lynwood, Illinois. CN was directed to pay 67% of the cost of the grade separation in Aurora and 78.5% of the cost of the grade separation in Lynwood but only if the construction of the two projects is initiated no later than 2015. The Board anticipated that IDOT would be the "lead agency for the development of these grade separations".

2. IDOT, by its Petition, filed September 21, 2009, sought reopening of the proceeding to have the 2015 deadlines removed in view of then pending proceeding for

the judicial review of the Board's Approval Decision and asking that IDOT be allowed seven years from the date of the final unappealable court order to commence construction of the grade separations in Aurora and Lynwood. By its Decision, served October 23, 2009, the Board denied IDOT's request, deeming it to be premature and stating that, if reasonable progress has been made and yet it becomes clear that construction is not likely to be initiated due to circumstances beyond IDOT's control, the Board will entertain requests to extend the time deadlines in Environmental Condition No. 14 at that time.

3. The Board's Approval Decision and its Decision, served October 23, 2009, were upheld in *Village of Barrington, IL v. S.T.B.*, 363 F.3d 650 (D.C. Cir. 2011).

4. IDOT filed reports with the Board on February 23, 2010, September 14, 2010, and October 5, 2011, seeking clarification of the Board's intent and to inform it of the status of the planning and engineering for what the parties agreed would be overpasses to carry US Highway 34 over the track of the EJ&E in Aurora and US Highway 30 over the track of the EJ&E in Lynwood.

5. IDOT is concerned that some of the matters which IDOT in its Comments sought to bring to the attention of the Board remain unabated. These matters in the view of IDOT may negatively affect IDOT 's ability to meet the 2015 deadlines for the commencement of the construction of the two overpasses and thereby deny it the receipt of the contribution by CN of the predominant shares of the construction costs.

6. It is IDOT's intent to bring the Board up to date on the areas of impasse which IDOT has encountered in its negotiations with CN which have arisen in the context of its attempts to reach an agreement with both CN and Norfolk Southern Railway ("NS") as to the ground rules for moving forward with these two grade separation projects. It is

particularly important to highlight these areas of disagreement because the Second -- and final -- Audit, dated as of June 2012, which the Board received from HDR very well may have left the Board with the erroneous impression that the grade separations required by Environmental Condition No. 14 were progressing satisfactorily with no significant glitches. In its Executive Summary, at page ii of its report, HDR opined, "Generally, HDR found that CN is making satisfactory progress in . . . grade separations." Its view was reiterated at pages 12 and 13 of its report, where HDR discussed the grade separation projects and HDR again asserted, "CN is making satisfactory progress towards completing the required grade separation projects", and, according to HDR, "construction could begin in 2015". For the reasons stated hereinbelow, IDOT does not believe that satisfactory progress toward completion of the grade separations is being made due primarily to CN's intransigence with respect to the specific issues identified.

7. HDR's Second Audit, however, is internally inconsistent for the report itself cites one of the major areas of disagreement between IDOT and CN. At page 13 of its report, HDR notes:

"At the U.S. Highway 30 (Lincoln Highway) Grade Separation, there is uncertainty whether CN should be required to participate in the cost of pedestrian and bicycle accommodations since these features are not currently present. CN has expressed the position that the Board ordered it to participate in the funding of a grade separation only. IDOT's position is based on State law that requires bicycle and pedestrian accommodations in all new construction in urban areas. IDOT and CN are negotiating in good faith to resolve this issue, but if negotiations fail, IDOT may request a determination on the matter from the Board."

CN's contention as reported by HDR in its June 2012 report that CN is obligated to contribute only to the construction of an overpass which replicates the existing highway applies no less to the crossing of US Highway 34 over the EJ&E track in Aurora as it does to the crossing of US Highway 30 over the EJ&E track in Lynwood. The

existing US Highway 34 in Aurora and US Highway 30 in Lynwood were built long before the State law requiring the installation of bicycle and pedestrian accommodations in all new construction of any transportation facility in urban areas, 605 Illinois Compiled Statutes 5/4-220, was enacted in 2007. What CN, in effect, is saying is that it will contribute to the cost of the overpasses in Aurora and Lynwood only if they are constructed in violation of State law. IDOT strongly disagrees with CN's above referenced position that Illinois State law does not require a bicycle and pedestrian overpass. IDOT believes that the cited statute does, in fact, require such a bicycle and pedestrian accommodation.

8. Another area of major disagreement between IDOT and CN which was not mentioned in the June 2012 HDR report is the role of IDOT as the lead agency for the development of the grade separations in Aurora and Lynwood as contemplated by the Board in its Approval Decision. At page 60 of the Approval Decision, the Board records that CN in VM 8 voluntarily proposed, "Where grade-crossing rehabilitation is agreed to, Applicants shall assure that rehabilitated roadway approaches and rail line crossings meet or exceed the standards of the State Department of Transportation's rules, guidelines, or statutes, and the American Railway Engineering and Maintenance of Way Association ('AREMA') standards . . ." CN has taken an altogether contrary position in its negotiations with IDOT for the design and engineering of the overpasses in Aurora and Lynwood. CN has its own 2006 Guidelines for Design of Railway Structures, and it is demanding that its provisions shall be the prevalent ones. IDOT has responded that, in the design and engineering of the highway overpasses in Aurora and Lynwood, it will endeavor to incorporate the requirements of CN's 2006 Guidelines for Design of Railway

Structures as much as possible and practicable. If, however, in the planning for the construction of the overpasses there were to be a disparity between the standards of CN's 2006 Guidelines for Design of Railway Structures and those of IDOT and AREMA, IDOT submits that IDOT's policies, procedures and guidelines and those of AREMA must govern and that CN shall not be allowed to place an obstacle in the way of progress on these projects by imposing its own guidelines. That is the only sensible position for IDOT to take consistent with the Board's designation of IDOT as the "lead agency for the development of these grade separations". IDOT brought this impasse between it and CN to the Board's attention by its February 23, 2010 filing, but the Board has not yet clarified IDOT's role as the "lead agency for the development of the grade separations" as IDOT had sought. IDOT asks that the Board do so now, even as in the meantime the parties continue to work in good faith on trying to resolve this issue.

9. In general and perhaps more importantly, CN's reluctance to accept IDOT's role as lead agency has resulted in constant challenges to IDOT's decisions (and thereby delays in finalizing such decisions) with respect to the design of the grade separation projects. IDOT has had to contend with these challenges and time consuming revisions to the 3-party agreement between IDOT, CN and NS on issues such as how to proceed with the engineering, design, utility relocation, land acquisition, construction and funding reimbursement of the two grade separation projects. Illustrative of CN's reticence is that by letters sent to CN, dated July 12, 2012, November 5, 2012, and January 22, 2013, IDOT sent preliminary plans for both US-34 and US-30 projects, Phase-1 Project Report for the USD-34 project, Phase-1 Project Report for the US-30 project and the Type-Size-Location (TS&L) plans for the US-34 project respectively, asking that CN respond with

its concurrence and/or comments. As of this date, IDOT still has not received CN's response to any of the transmittals sent to it thus far.

Clearly motivated by its desire to minimize, as much as possible, its contribution toward the cost of constructing the overpasses, CN seems conveniently to forget that IDOT is no less desirous than it to minimize what it will need to pay as its share of the cost. However, it is important to also recognize that in order for IDOT to let the project, IDOT must initially provide in its budget the entire cost of the projects in order to pay for the cost of construction, utility relocation, land acquisition, etc., and then seek reimbursement from CN for its share of the project costs. CN has made it clear, in its negotiations with IDOT so far, that it will only reimburse IDOT for those costs that it deems customary and reasonable. The Board's Approval Decision requires IDOT to pay 33% of the cost of the grade separation in Aurora and 21.5% in Lynwood provided the 2015 deadlines are met. That is money that will need to come from the State Highway Improvement Program funds, which are sorely strained as sit is. IDOT cannot and should not be in a position where reimbursement of project costs is at all times subject to the CN's approval, if indeed the funds has been deemed eligible and approved by IDOT to be expended as part of a project cost. It seems that CN does not trust that IDOT will be responsible enough in its efforts to see that these projects are built safely, reasonably and with the least amount of inconvenience to the motoring public and the railroad companies involved in this project, and the CN is giving the impression that it must scrutinize every project invoice in order that it deems it approved for reimbursement. IDOT as the lead agency for the development of the grade separation projects and a good steward of the tax payers' money will hardly be a spendthrift but, to the contrary, will do its level best to

keep the costs of constructing the overpasses in Aurora and Lynwood as low as it can practically and responsibly. IDOT respectfully reiterates its request that the Board clarify IDOT's role as the lead agency as it relates to the choices that IDOT is making in the design, construction and funding of the grade separation projects.

10. Yet another important area of disagreement between IDOT and CN brought to the Board's attention by IDOT's February 23, 2010 filing, but in the meantime not clarified by the Board as IDOT had asked, pertains to the post-construction ownership and maintenance of the overpasses in Aurora and Lynwood. IDOT hasn't suggested that CN keep street cleaning or snow removal equipment at those locations. In fact, in the course of its discussions with CN, IDOT has offered not only to take care of sweeping and plowing the surface of US Highway 34 in Aurora and US Highway 30 in Lynwood but also to take ownership of and maintain the deck and road itself. However, the post-construction ownership and maintenance of the structure of the two overpasses were not among IDOT's obligations imposed by the Approval Decision. It is CN which should assume the post-construction ownership and maintenance of the structure of the two overpasses, including the beams, piers, abutments, retaining walls and culverts. As the Board correctly found in its Approval Decision, the need for the grade separated crossings in Aurora and Lynwood was occasioned by the increased traffic on the EJ&E track resulting from CN's acquisition of the EJ&E. The overpass structures accordingly are CN's to own and maintain, that is, to inspect them and repair them as needed in compliance with the regulations of the Federal Highway Administration. There is no good ground which CN can advance as to why those responsibilities and expenses should be borne by IDOT. IDOT has proposed this split of responsibilities to CN, but CN has

not responded to this proposal and continues to oppose any responsibility to own or maintain either of the two structures. Unless this issues is promptly resolved, it may very well prevent the commencement of their construction by the 2015 deadline dates.

11. The one item of good news is that the overpass in Lynwood need not be as long as had been contemplated. The Hartsdale Industrial Track of the Norfolk Southern Railway Company ("NS") intersected US Route 30 in Lynwood about 380 feet north of where the EJ&E's track intersects the highway. The overpass was going to have to be built to cover both tracks. NS, however, was most cooperative and, in response to IDOT's request, filed for the line's abandonment, approved by the Board by its Decision in Docket No. AB-290 (Sub-No. 336), *Norfolk Southern Railway Company-- Abandonment and Discontinuance of Service Exemption--In Lake County, Ind., and Cook County, Ill.*, served September 24, 2012. Thus, the overpass in Lynwood need merely be long enough to extend over the EJ&E's track.

12. IDOT's consultant has completed the Phase 1 and a substantial portion of the Phase 2 engineering for the overpasses Aurora and Lynwood.. In order to advance the project, IDOT funded and paid for the preparation of these reports. IDOT has proposed, and CN has agreed, that upon IDOT's signing a construction agreement and beginning actual construction of the overpasses in Aurora and Lynwood by the 2015 deadline dates, CN will pay its share of the engineering costs, limited, however, according to CN, to such amounts which CN has approved as being in its judgment, customary and reasonable. IDOT believes that all of the costs which it incurred were customary and reasonable. IDOT expects that CN will reimburse IDOT for CN's share of such actual costs incurred for the engineering services and that CN ultimately will pay its share of all other

construction costs provided that such costs are reasonable under the circumstances, which IDOT expects them to be.

13. IDOT shall continue to file periodic Comments with the Board to keep it informed of how the projects contemplated by Environmental Condition No. 14 of the Approval Decision are progressing.

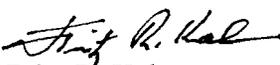
Respectfully submitted,

ILLINOIS DEPARTMENT OF TRANSPORTATION

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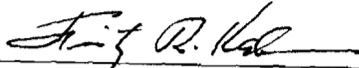

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Dated: March 8, 2013

CERTIFICATE OF SERVICE

I certify that I this day served the foregoing Comments on Canadian National Railway Company and Grand Trunk Corporation by e-mailing a copy to their attorney, Paul A. Cunningham, Esq., at pac@harkinscunningham.com.

Dated at Washington, DC, this 8th day of March, 2013.



Fritz R. Kahn