

**BEFORE THE  
SURFACE TRANSPORTATION BOARD  
WASHINGTON D.C.**

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**Docket No. FD 35087 (SUB-NO. 8)**

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

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**MOTION OF VILLAGE OF BARRINGTON, IL  
FOR LEAVE TO FILE COMMENTS IN RESPONSE TO  
REPLY FILED BY CANADIAN NATIONAL RAILWAY  
COMPANY AND GRAND TRUNK CORPORATION**

The Village of Barrington (“Barrington”), by and through counsel, respectfully requests the Surface Transportation Board (“Board”) to waive the provisions of 49 C.F.R. 1101.13 and permit the filing of a Reply to the reply filed by Canadian National Railway Company and Grand Trunk Corporation (hereinafter referred to as CN). By its Petition, filed November 26, 2014, Barrington requested the Board to reopen this proceeding and impose additional mitigation pursuant to the Board’s oversight jurisdiction. On December 16, CN filed its Reply.

On the following day, the Board, served its decision granting the combined Barrington/TRAC Coalition petition, filed August 28, 2014, that requested the Board extend for two years the oversight period for the

transaction by which CN acquired control of EJ&E West Company (“EJ&E”).<sup>1</sup> In granting the oversight extension petition, the Board specifically noted that it “may, on its own motion or on petition by an interested party, reopen a proceeding based on material error, new evidence, or substantially changed circumstances.” As the Board further explained, “we find it appropriate to grant the petition to extend the oversight period for two years because of the substantially changed circumstances concerning recent rail congestion in the Midwest, particularly in Chicago, and the potential impact of this congestion on the EJ&E line, as well as the recent spike in blocked crossings on the line.”<sup>2</sup>

In reopening, the Board cited CN’s statement that “it decided to purchase the EJ&E line precisely to ‘tak{e} CN trains off overloaded lines in the heart of Chicago and mov{e} them to the EJ&E lines.”<sup>3</sup> As the Board is well aware, Barrington is one of the communities that has been hardest hit by the shift in CN’s operations to the EJ&E line due to the fact that the line runs through the heart of the Village; the close proximity of all the Village’s crossings over the EJ&E; and the reality that two of those four crossings -- as Strategic Regional Arterials -- are substantially affected by CN’s freight traffic. Simply stated, the four hundred percent increase in the number of daily trains from only five to over 20 trains, as well as increasingly longer trains, has left Barrington no

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<sup>1</sup> On December 3, 2014, the Illinois Department of Transportation (IDOT) filed a separate petition requesting the same relief sought by Barrington. Because the Board granted Barrington’s petition, IDOT’s petition was denied as moot.

<sup>2</sup> Id.

<sup>3</sup> Id. at 4.

choice but to request the Board to take a hard look at the U.S. Highway 14 at-grade crossing and partially rectify the adverse environmental impacts by ordering a grade separation. Those increases, which feature unanticipated new traffic that has never been considered by the Board, are at the heart of Barrington's Petition Seeking Imposition of Additional Mitigation. Despite CN's protestations, these traffic movements are clearly and inextricably related to the substantially changed circumstances that have caused the Board to extend the oversight period.

In its reply to Barrington's petition to reopen, CN has taken a distorted, incomplete, and backward look at the record and the history of the proceedings related thereto in a shameless effort to misguide the Board members who were not involved in the underlying transaction's approval. In addition, largely based on prior traffic assumptions, 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. Furthermore, CN has taken positions with regard to its current and anticipated operations that appear to reflect a substantial disconnect between what CN executives told potential investors in an Earnings Call in October 2014 and in other materials provided to shareholders, such as the CN Investor Fact Books. In order to highlight the discrepancies and provide the Board with an accurate record for purposes of this proceeding, it is critical that Barrington be able to file, and that the Board accept, Barrington's response.

In addition to ordering a grade separation at U.S. Highway 14 in Barrington, the Village requests the Board, as part of its continuing oversight, to require CN to provide the Board with information regarding the actual train length of each train that is operated through Barrington on the EJ&E as part of its monthly operational report. Given the reliance in CN's Reply on "average" train lengths, it is apparent that such information is readily available to CN. With access to that information, the Board and Barrington, will be able to more accurately verify the future impacts of CN's expanded rail operations over the EJ&E.

Respectfully submitted,

/s/ Richard H. Streeter

Richard H. Streeter  
Counsel to Village of Barrington, IL

Dated: January 5, 2015

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The Village of Barrington, IL, by and through counsel, respectfully submits these Comments in order to correct certain erroneous or misleading statements in the Reply filed by the Canadian National Railway Company and Grand Trunk Corporation (“CN”). In its Reply, CN asserts that Barrington’s evidence is speculative and does not constitute new evidence or substantially changed circumstances and does not justify reopening. Furthermore, without mentioning that it was well aware that the Board retained oversight jurisdiction to revisit the mitigation measures it imposed at the time that CN chose to consummate its acquisition of the EJ&E line, CN audaciously claims that Barrington’s petition ignores basic principles of administrative finality. Lastly, CN claims that Barrington’s past and current efforts to secure a single grade separation in mitigation is wasting the Board’s limited resources.

In continuing to seek grade-separation mitigation in 2014, Barrington does not wish to waste the limited resources of the Board. Nor does it want to

waste its own extremely limited resources. However, the reality of the situation is 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, including the phenomenal increase in the transportation through Chicago of crude oil and oil sands by CN and other Class I railroads, as well as the continued expansion of intermodal traffic moving through the Port of Prince Rupert.<sup>1</sup> Because the combined impact of these unfolding developments is overwhelming Barrington and the surrounding region and will only worsen in the years ahead, Barrington has no alternative but to once again request the Board to focus on the critical need for at least one grade-separated crossing that will allow traffic to move through Barrington unimpeded at all times.

In this regard, the Board cannot ignore the fact that both the United States Department of Transportation and the Illinois Department of Transportation agree with Barrington that a grade separation is required at the point that U.S. Highway 14 crosses the EJ&E line and have provided grant money to Barrington that was used for the preparation of a Phase I engineering/environmental review. That work has now been completed and all

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<sup>1</sup> Although Barrington clearly discussed the fact that CN ignored the "new" major flow of traffic through the intermodal container shipping terminal at the Port of Prince Rupert when it filed its application in 2007, CN's Reply explicitly failed to reflect any consideration being given to the greatly increased intermodal traffic that unquestionably moves through Barrington since CN commenced operations on the EJ&E, and more than compensates for any temporary declines in grain, fertilizer, ethanol, and forest product shipments due to the longest recession in the U.S. since the Great Depression.

parties, including CN, have approved the project design. It is of extreme importance to note that the need for a grade separation is solely attributed to the increased rail traffic that has followed CN's acquisition of the EJ&E, and that prior to CN's acquisition of the line, a grade separation project at that crossing was not on the planning radar for any unit of government – local, state, or federal.

**I. Barrington's Petition, Which Requests The Board Impose Additional Mitigation, Is Based On Material New Evidence That Demonstrates The Actual Impact Of CN's Operations And That Has Never Been Considered By The Board.**

In its Reply to Barrington's petition, CN accuses Barrington of simply recapitulating arguments that Barrington made in previous submissions. At the same time, CN has admitted that "[n]either the Board's 2008 Approval Decision nor its 2012 Order denying Barrington's 2011 Petition rested on specific traffic numbers."<sup>2</sup> In other words, the Board's previous decisions could not have considered the actual post-transaction impact of CN's operations on the rail line, as they were merely speculative in nature.

It is true that Barrington has repeated some older evidence to provide the new Board members with reliable background information that will allow them to fully understand Barrington's plight. Most importantly, however, Barrington has provided the Board with extensive new evidence, *not previously available to Barrington at any stage of the proceeding*, which moves far beyond past

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<sup>2</sup> CN Reply at 24.

projections and demonstrates what is actually happening at the present time. Such new evidence includes the transcript of the October 21, 2014 CN Q3 2014 Earnings Conference Call; CN's Monthly Operating Reports for 2014, the recent post-acquisition shifts in traffic mix; information regarding the completion of the \$2.8 million TIGER II grant planning process for the Phase I engineering/environmental review for a grade separation at the U.S. Highway 14 crossing, which, as Mayor Darch has explained, includes the fact that "Phase I work has now been completed and the project design has been recently approved and finalized by all parties in the 'Project Study Group' after having received substantial input by local stakeholder residents and businesses under the leadership of the 'Community Advisory Group'."<sup>3</sup> All of this new evidence serves to acquaint the Board with the substantially changed circumstance with which Barrington must contend as a result of the 400% increase in rail traffic that has followed CN's acquisition of the EJ&E.

In addition, as part of this pleading, Barrington counters CN's assertions as to the efficacy of ordered mitigation. In particular, it will demonstrate that the existing mitigation it has received has been wholly inadequate to address the myriad problems caused by CN's increased traffic and longer average train lengths that have the ability to block all four of the at-grade crossings in Barrington simultaneously and cause significant queue delays over a broad and interconnected roadway network.

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<sup>3</sup> V.S. Darch at 19.

In an attempt to counter Barrington’s new evidence, CN insists upon regurgitating its 2007 application traffic projections, which Barrington in this reply has demonstrated do not reflect major flows of traffic, including energy-related products and expanding intermodal movements through the Port of Prince Rupert.<sup>4</sup> In its reply, CN also claims that it has not yet surpassed the 2007 average daily train projections and that Barrington’s evidence is “speculative.” However, as will be shown, CN’s reliance on the 2007 projections and “average” carload and train counts is misplaced and myopic as a substantive response.<sup>5</sup>

In addition, Barrington respectfully submits that CN has taken positions with regard to its current and anticipated operations that appear to reflect a substantial disconnect between what CN’s executive management team told

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<sup>4</sup> Wall Street Journal: *“Best Way for Asia-U.S. Trade? Via Canada.”* December 13-14, 2014. CN’s \$3 billion (Canadian) investment in the Port of Prince Rupert has allowed it to corner the market on transporting the 87% of containers arriving there from Asia that head into the U.S. – not a negligible amount of traffic given that Prince Rupert’s cargo traffic has risen by 11% in 2014 alone.

<sup>5</sup> CN appears to believe that anything that happens on the EJ&E past the end of 2015 is not reasonably foreseeable and shouldn’t be considered by the Board. Given the fact that CN’s original case was based on projections that extended 8 years into the future, CN’s current position is disingenuous. Furthermore, it is undermined by recent studies of the Association of American Railroads and the Railway Supply Institute, which have projected energy market tank car needs through 2034 to the Pipelines and Hazardous Materials Safety Administration (PHMSA) as their foundational argument against requiring an aggressive timeline for adopting more robust tank car standards for both the new and existing fleet of structurally deficient rail tank cars used to transport flammable liquids. If AAR and the RIA have no problem with developing longer term traffic projections when it suits industry’s interests, why can’t a railroad as sophisticated as CN do so as well?

potential investors in an Earnings Call in October 2014 and in other materials provided to shareholders, such as the CN Investor Fact Books. In particular, CN's assertion that it would have passed up the opportunity to acquire the EJ&E line if it knew it would have to fund a grade separation at Barrington flies in the face of the long-range strategic planning that prompted CN to acquire the EJ&E line in the first place.

Although CN suggests that Barrington is requesting it to fund "mitigation for existing conditions,"<sup>6</sup> that suggestion is countered by current evidence of record that demonstrates that a single grade separation at the U.S. Highway 14 crossing would only address the extensive hours of vehicular delay attributed to CN's expanding operations through Barrington. Although Barrington does not wish to belabor the issue, the fact of the matter is that its 2011 traffic study predicted that a single grade separation at the U.S. Highway 14 crossing "would reduce 2015 total 24-hour vehicle delays on both IL Route 59 and U.S. Route 14 to nearly the levels expected under the No-Acquisition scenario."<sup>7</sup> That analysis was never rebutted and shown to be in error.

## **II. Barrington's New Evidence Reveals The Inaccuracy Of CN's 2007 Traffic Projections And The Misleading Nature Of The "Average" Statistics Utilized By CN In This Proceeding.**

In its Reply, CN has offered the testimony of Jeffrey A. Liepelt in an attempt to counter Barrington's new evidence drawn from a review of CN's

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<sup>6</sup> CN Reply at 24.

<sup>7</sup> Village of Barrington, CN Railway Traffic Impact Study Update, September 1, 2011, at 22.

2014 Monthly Operational Reports.<sup>8</sup> At pages 3-4 of his statement, Mr. Liepelt notes that SEA assumed that the “average” train operating on the segment of the EJ&E line that passes through Barrington would be 6,829 feet long after implementation of the Transaction. As Mayor Darch has noted, in Barrington, the EJ&E crosses all four of the at-grade crossings “in a span of 5,918 feet within Barrington’s center.”<sup>9</sup> As a result, the length of the “average” train traveling through Barrington in 2014 causes CN simultaneously to block all four crossings or in such quick succession that traffic queues inevitably create vehicular gridlock throughout the Village.

As Mr. Liepelt has admitted, the “average” train length has increased over the past three years from 5,800 feet in 2011, to 6,616 feet in 2012, to 6,756 in 2013, to 6,916 feet during the first 11 months of 2014.<sup>10</sup> Hence, the average train length has already exceeded the projected train length. However, the “average” length reveals only a small part of the picture, which is why the CN’s Monthly Operational Reports support Barrington’s case, rather than CN’s.

Barrington also notes that Mr. Liepelt, at footnote 6 of his Verified Statement pointedly omits any discussion of train lengths for the non-CN trains running on the EJ&E due to trackage and haulage rights, so it is

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<sup>8</sup> While it pains Barrington to state the obvious, because the December 2013 through October 2014 Monthly Operational Reports could not have been available at any earlier stage of the proceeding, they must constitute new evidence.

<sup>9</sup> V.S. Darch at 8.

<sup>10</sup> V.S. Liepelt at 4.

impossible for the Board or Barrington to know the accuracy of Liepelt's claims regarding "average" train length. Given CN's history in this proceeding of providing only partial data on blocked crossings that resulted in a fine against the railroad, Barrington cannot be sanguine about the accuracy of CN's "average" train length data.<sup>11</sup>

As the Board will discover by tracking the references to Barrington that appear in the detailed charts in CN's monthly operating reports entitled "All Crossing Blockages of 10 or More Minutes," the focus on "average" length is meaningless in many respects. Of the 230 trains that can be shown to have passed through Barrington between December 2013 and October 2014, at least 202 were in excess of 7,000 feet. This means that 85% of such trains were in excess of 7,000 feet. Of those trains, 47 were in excess of 8,000 feet, 118 were in excess of 9,000 feet and 4 were in excess of 10,000 feet.

Although Mr. Liepelt seeks to discount the significance of the operating reports with the comment that longer trains "are more likely to cause longer crossing blockages," his comment simply misses the point that reliance on "average" train lengths fails to reflect the actual impact on Barrington.<sup>12</sup> Even

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<sup>11</sup> In order to obtain accurate information regarding this crucial issue, the Board is urged to require CN to provide information regarding the actual lengths of all trains that moved through Barrington in 2014 and continue to provide that information in future reports during the oversight period. Because CN was able to provide "average" train lengths for 2014, such information is readily available to CN and could be produced with a minimal effort.

<sup>12</sup> Barrington's reliance on the blocked crossing reports was never intended to show the overall average train length as Mr. Liepelt seems to suggest. V.S.

if the average length is now 6,916 feet, it is indisputable that an average train will not generate the same amount of delay as a 10,000 foot long train that is 45 percent longer than the hypothetical “average” train. Moreover, even if the 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.

Mr. Liepelt further relies on bare averages regarding the number of trains per day in 2014 to support his claim that “CN can operate nearly three trains a day more than it did on average so far this year before it exceeds the traffic projections underlying the Board’s environmental analysis”.<sup>13</sup> In reaching the conclusion that CN has “averaged” 17.5 trains per day in 2014, Mr. Liepelt refers to Table 2 in Exhibit 1 of his statement. In its Reply, CN supplements Mr. Liepelt’s comments with the assertion that Ex. 1 reflects “a high for the year of 18.6 and a low of 17.0” trains per day. However, a review of Ex. 1 shows that the actual high for the year was 20.0 trains, which was reached in May 2014.

In order to average 20 trains a day it would have been necessary to move a total of 620 trains during the month ( $31 \times 20 = 620$ ). If only 19 trains a day were moved during 29 days of the month, that would account for only 551 trains. The remaining 69 trains would have had to have moved in 2 days,

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Liepelt at 4, FN 6. Instead, it was intended to show the significant variance in the length of trains.

<sup>13</sup> V.S. Liepelt at 2-3

which means -- on average -- that a total of 34.5 trains would have moved each day. Similarly, if only 18 trains were moved on 29 days, that reflects the movement of 522 trains. That would require 98 trains to be moved in only two days or 49 trains a day to “average” the 20 trains per day that moved in May. While the foregoing examples may appear to be extreme, they illustrate the fact that *more* than 20 trains had to have moved through Barrington on several days in order to average 20 trains for the entire month. The same is likely true in other months where the “average” number of daily trains ranged between 18.0 and 18.6. In summary, CN’s dependence on “average” number of trains running through Barrington is highly misleading and does not reflect what is actually happening in the Village on any given day. The same is true of the underlying projections. While they have produced “average” numbers, they do not address the actual, day-to-day impact of the additional trains.<sup>14</sup>

Furthermore, the past “averages” do not reflect the anticipated growth of between 8 and 13 additional unit trains per week of heavy crude oil that is

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<sup>14</sup> A review of Table 2, which is attached to Mr. Liepelt’s Verified Statement, also raises the question of the impact of the harsh winter weather on the number of trains that moved in the first three months of the year. Given CN’s past comments that “much of CN’s service territory experienced an unprecedented combination of extremely cold weather and heavy snow ... [that] caused major disruptions in operations and fluidity for all rail carriers in the Chicago area,” (see Letter to the Honorable Richard J. Durbin from Claude Mongeau, dated June 9, 2014, which was attached to CN’s Reply to Petition of Village of Barrington for Extension of Oversight in FD No. 35087 filed September 16, 2014) Barrington suggests the average number of trains that moved during the first quarter of 2014 was made artificially low by the harsh winter weather and thus served to lower the overall average number of trains running on the EJ&E in 2014. Unfortunately, Barrington cannot count on bad winters to shield it from CN’s freight traffic onslaught into perpetuity.

projected in Fiona Murray's Verified Statement.<sup>15</sup> When added to the 2 unit trains of crude oil that are already being moved each week by CN through Barrington, this would result in 15 unit trains per week for a total of 60 unit trains per month of heavy crude. Even if there is no increase in carloads of crude oil moving in manifest traffic in 2014 as Ms. Murray has stated<sup>16</sup>, such increases on a given day are likely to cause the number of trains to exceed the "average" number of daily trains that were projected in CN's application and relied upon by the Board when devising mitigation plans.

Although CN has sought to misconstrue and ridicule Barrington's reference to the "surge" of new movements of crude oil by the rail industry over the past few years, Ms. Murray's testimony reflects far more than a modest increase in the volume of crude oil through Barrington. According to Ms. Murray, in 2014, which had not yet ended, approximately 119 carloads of heavy crude oil has moved through Barrington per day. Hence, the annualized approximate volume of such movements is 43,435 carloads.

As she has also testified, approximately 103 carloads per day (or 37,595 carloads per year) of heavy crude moved through Barrington in 2013. To put this in context thanks to a comprehensive report from the Canadian Association of Petroleum Producers: "At the beginning of 2013, the rail loading

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<sup>15</sup> V.S. Murray at 4.

<sup>16</sup> This assumption 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.

capacity originating in Western Canada was only about 180,000 b/d”<sup>17</sup> -- that is equal to 343 carloads a day at 525 barrels per carload.<sup>18</sup> This means that Barrington had 30% of ALL Alberta heavy crude oil moving by rail running through it on any given day. That same Canadian report indicates that by the end of 2015, rail uploading capacity for the Alberta oil sands will stand at 1 million b/d or 1,905 carloads daily. If the 30% CN market share running through Barrington holds true for 2015, Barrington will see 571 carloads of heavy crude oil traveling through the Village on any given day. Given the fact that in 2009, which was CN’s first year of EJ&E operations, the entire railroad industry moved only 10,800 carloads of total crude oil in the U.S.,<sup>19</sup> the current level of heavy crude traffic through Barrington is plainly substantial, even if CN does not choose to characterize it as a “surge” for purposes of this proceeding.

Barrington must also question Ms. Murray’s comment that “CN does not project volumes of crude oil moving through Barrington to grow appreciably beyond 2015.”<sup>20</sup> As explained during the October Earnings Call, although CN was not yet providing 2015 specific carload targets for crude by rail, the thought was expressed that CN thinks “our business will ramp up significantly

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<sup>17</sup> Canadian Association Of Petroleum Producers (“CAPP”), “Crude Oil Forecast, Markets & Transportation” June 2014, at page 31 (“2014 Crude Oil Forecast”).

<sup>18</sup> Rail tank car capacity carrying heavy oil is 500 to 525 bbls, whereas rail tank car capacity carrying light oil is 600 to 700 bbls. Id.

<sup>19</sup> PHMSA, Draft Regulatory Impact Analysis, Docket No. PHMSA-2012-0082, at 15.

<sup>20</sup> V.S. Murray at 4.

... because of customers investment either in loading facilities, unit train or loading facilities, many of them being unit train as well.”<sup>21</sup> Furthermore, given CN’s recognition of the substantial difference between shale plays and the long-term oil plays in Western Canada, CN is looking “how that pans out three – five years from now as opposed to next year.”<sup>22</sup> As Claude Mongeau emphasized, “for heavy oil sands you are talking like multi-year time frames for these capital deployment. So three, five, seven ten years.”<sup>23</sup>

CEO Mongeau’s understanding is strongly supported by CAPP’s 2014 Crude Oil Forecast, which anticipates “an annual growth of 170,000 b/d through to 2030.” As therein explained, because the rail industry is evolving from a manifest system to a unit train system, which is fostered by the current construction of several large unit train loading facilities in Western Canada, “western Canadian rail uploading capacity by the end of 2015 for crude oil is expected to exceed 1.0 million b/d” from the 180,000 b/d at the beginning of 2013. 2014 Forecast at 31.

CN’s existing network that extends from the oil sands in Western Canada to the highly sophisticated Gulf Coast refineries in Louisiana and Texas, where those refineries have “the capacity to process heavy, high sulphur crude oil, which is ideally suited for the growing supplies from Western Canada,”<sup>24</sup> makes

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<sup>21</sup> Earnings Call, Transcript at 19.

<sup>22</sup> Id. at 20.

<sup>23</sup> Id.

<sup>24</sup> 2014 Forecast at 17.

CN the lead player in CBR for this market. Being that CAPP's 2014 refinery survey indicates that western Canadian crude oil supplied *only* to the Gulf Coast market could reach 709,000 b/d in 2020, or 1,012 carloads per day (or ten 100-car unit trains per day), little credence can be paid to comment that "CN does not project volumes of crude oil moving through Barrington to grow appreciably beyond 2015."<sup>25</sup> It should also be noted that for every southbound train, there will be a similar number of northbound trains impacting Barrington as well.

Importantly, the Gulf Coast is not the only market in the U.S. that CN can reach through Barrington when transporting crude oil. As the map from its 2013 Investor Fact Book reflects, there are a number of crude destinations in U.S. Petroleum Administrative District II (PADD II - Midwest).

As CN commented in its 2009 Investor Fact Book, "CN has had its eyes on oil sands opportunities for a number of years now"<sup>26</sup> with daily production in the northern part of Alberta "expected to at least triple over the next 10 to 15 years."<sup>27</sup> In anticipation of the long-range development of the oil sands in Alberta, CN, in December 2007, announced the acquisition of Alberta's Athabasca Northern Railway.<sup>28</sup> That purchase further entrenched CN's position to control the outbound movement of oil sands products such as bitumen and

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<sup>25</sup> V.S. Murray at 4.

<sup>26</sup> CN 2009 Investor Fact Book at 19.

<sup>27</sup> *Id.*

<sup>28</sup> CN buys Alberta's Athabasca Northern Railway, Reuters, December 24, 2007; CN 2009 Investor Fact Book.

synthetic crude from Western Canada to the sophisticated refineries in the U.S. Gulf Coast region over the EJ&E.

CN's executive management team was plainly aware that its acquisition of the EJ&E line through Barrington would allow it to control high-velocity, single line turnaround service between the Louisiana petrochemical corridor of New Orleans and Baton Rouge, where much of CN's petroleum and chemical shipments originate, and northern Alberta.<sup>29</sup> Without question, the near simultaneous acquisitions of the Athabasca Northern Railway and the EJ&E line have set the stage for CN to reap dividends far into the future. As clearly reflected by its October 2014 Earnings call, CN is strategically located to withstand any short-term movements in the price of crude oil. Thus, the Board can safely assume that CN, far beyond 2015, will capitalize on its ability to utilize its Pipeline*OnRail*<sup>TM</sup> service to link the refineries in the Gulf Coast with Western Canada for crude oil moving south, and then backhaul condensate and other petrochemical products moving north through Barrington over the EJ&E line. The short-sighted and limited approach reflected in the verified statements of Ms. Murray and Mr. Liepelt should be severely discounted as self-serving assessments meant to benefit CN in these proceedings, as they are belied by the **totality** of the post-transaction financial statements of CN to its investors, financial analysts and the media.

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<sup>29</sup> See, e.g., CN 2011 Investor Fact Book, 79-82.

In light of the weight of the foregoing factors, Barrington strongly suggests that CN's claims that it has no "foreseeable" intention to double-track the EJ&E are not credible. Barrington urges the Board to note how CN carefully parses its response to double-tracking by stating "it has not designed a second track... nor has it sought or allocated money for such double-tracking." Given the significant expansion of rail-loading capacity for heavy oil in Alberta, and the continued growth of intermodal traffic moving through the Port of Prince Rupert to Chicago and beyond, that parsing seems quite telling. Just because a plan is in the pre-design phase, does not necessarily mean that a plan does not exist. Given the buildup of traffic and the continued congestion that plagues Chicago, the very real potential exists that CN management, which obviously has its eye on the future, has (or may decide when oversight has ended) that double-tracking through Barrington will eliminate what appears to be a bottleneck and further enhance the fluidity and capacity of its operations around Chicago.

Ms. Murray has also sought to downplay the flammability of heavy crude as compared with the light crude from the Bakken region in her Verified Statement.<sup>30</sup> Notably absent from that Verified Statement, however, is any mention of the fact that heavy crude at 50° F has the consistency of a hockey

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<sup>30</sup> V.S. Murray at 3-4. The Board should also note that even if heavy crude may not be as highly flammable as light crude, the fact remains that PHMSA has recognized that "bitumen-laden heavy crude from the tar sands ... may be particularly damaging to the environment." PHMSA, Draft Regulatory Impact Analysis, Docket No. PHMSA-2012-0082, at 81, n.66. In her Verified Statement, Ms. Murray fails to mention that fact.

puck, so it must be heated or blended with a diluent in order to decrease viscosity for loading and unloading. Addition of any diluent will cause the heavy crude to become more flammable.

One of the major diluents is the extremely flammable and toxic “condensate”, which is a light oil that is produced when natural gas comes to the surface and pressure is released and temperatures are lowered. Moreover, condensate vapors are heavier than air and may travel considerable distances to a source of ignition and flashback.<sup>31</sup> Ms. Murray also fails to note that CN has repeatedly touted the fact that “CN’s Pipeline *OnRail*<sup>TM</sup> service offers shippers the ability to move oil sands products to market and use the same railcars to return condensate to the oil sands.”<sup>32</sup> Hence, even if southbound heavy crude that CN transports is less flammable than the light crude from the Bakken, the return shipments of condensate from the Gulf Coast that move in the same cars used to transport heavy crude exposes Barrington to a product that is akin to Bakken crude in being extremely flammable.

Although Ms. Murray has discounted the potential impact on Barrington with the comment that “the effects of this increased traffic on train volumes and train lengths through Barrington have been minimal,”<sup>33</sup> the same could be said of Lac Mégantic until July 2013. Given the highly flammable nature of

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<sup>31</sup> “Fact Sheet: A Brief on Condensate and Diluents” prepared by Headwaters Initiative & Carrier Sekani Tribal Council.

<sup>32</sup> CN 2009 Investor Fact Book at 45.

<sup>33</sup> V.S. Murray at 2.

many of the products that are being transported through Barrington, and the number of recent fiery derailments involving CN, including the 2009 fatal incident in Cherry Valley, Illinois, there can be no guarantee that a tragic derailment will not occur in the future. If that were to happen in downtown Barrington, the lack of a single grade-separation at any of the grade crossings in Barrington would substantially impede the rapid response ability of First Responders and impede public evacuation operations.

Barrington must also respond to the statement in CN's Reply, that "CN does not directly serve the Bakken formation or other major areas producing fracking oil."<sup>34</sup> That assertion is directly contradicted by CN's 2011 Investor Fact Book. As stated therein, "CN is extending the Pipeline*OnRail*<sup>TM</sup> service to the Bakken Formation oil reserve in southern Saskatchewan where there are significant opportunities for outbound shipments. CN can also supply chemicals required for well drilling and oil sands production."<sup>35</sup>

In its 2013 Investor Fact Book, it is noted that "[t]he Company also has a strong presence in the Canadian Bakken Shale light crude region in southeast Saskatchewan and southwest Manitoba. Crude oil loading points in this area are also evolving into oilfield service centres for fracking and drilling materials."<sup>36</sup> Moreover, the map of CN's network that was reproduced at page 5 of Barrington's Petition contains four "red" circles reflecting "CN crude

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<sup>34</sup> CN Reply at 19.

<sup>35</sup> CN 2011 Investor Fact Book at 80.

<sup>36</sup> CN 2013 Investor Fact Book at 76.

origins” in southeast Saskatchewan and southwest Manitoba.” Simply stated, comments in CN’s Investor Fact Book appear to repudiate the statement in CN’s Reply that “CN does not directly serve the Bakken formation.”

Barrington must also question the duplicitous and purposefully opaque statement in CN’s Reply that “CN does not regularly move **any** volumes of the more flammable light crude oil through Barrington.”<sup>37</sup> Although the emphasis on “any” suggests that CN does not move the more flammable light crude oil through Barrington, that suggestion must be reexamined in light of the word “regularly” because CN’s carefully parsed statement is quiet as to what it means by “regularly.”

Ms. Murray also says that “CN does not transport crude oil from the Bakken region through Barrington.”<sup>38</sup> Even if Ms. Murray’s statement could be taken at face value at this moment, given its touted “strong presence in the Canadian Bakken Shale light crude region in southeast Saskatchewan and southwest Manitoba,”<sup>39</sup> what is to prevent CN from transporting light Bakken crude through Barrington to meet a particular shipper’s evolving market needs? As Ms. Murray has freely admitted, “the specific routing of the traffic is dependent on unforeseeable market forces.”<sup>40</sup>

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<sup>37</sup> CN Reply at 19.

<sup>38</sup> V.S. Murray at 3.

<sup>39</sup> CN 2013 Investor Fact Book at 76.

<sup>40</sup> V.S. Murray at 3.

Ultimately, CN's Reply claim that the energy surge will have just a minimal impact on Barrington can't pass the smell test. The transcript of the October 24 Earnings Call clearly shows that the EJ&E line, which permits CN to avoid the Chicago quagmire that impacts all of the other railroads, must be viewed as the crown jewel of the CN's widespread network. As is plainly evident from the glowing remarks of CN's executive management in discussing its financial and operational plans with analysts, CN is intent upon the EJ&E line playing a key role in this market. The limited role portrayed by CN's witnesses in this proceeding cannot be squared with the comments of top management or the annual reports that are crafted to meet SEC rules. As a result, the "projections" in the tendered Verified Statements must be viewed with extreme skepticism.

Ms. Murray also seeks to downplay the movement of traffic through Barrington by suggesting that a reduction in carloads for other products through Barrington has occurred.<sup>41</sup> However, even though Barrington explicitly focused on the movement of intermodal freight moving through the Port of Prince Rupert, Ms. Murray has made no mention of that expanding traffic in her Verified Statement. However, the Board should note that in 2013 CN increased its intermodal footprint in the U.S. by adding new terminals in Joliet, IL and Indianapolis, IN. As CN explained to its investors in its 2013 Fact Book, "[f]our years ago, about 25 per cent of CN international containers

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<sup>41</sup> V.S. Murray at 6.

from the West Coast were destined for the U.S. Today that number exceeds 40 per cent.”<sup>42</sup> Because CN’s 2007 projections did not account for any of the intermodal traffic that moves through the Port of Prince Rupert, none of this traffic and its impact on Barrington has ever been considered by the Board.

**III. The Limited Mitigation Granted Barrington Has Proven To Be Ineffective And Wholly Inadequate In Terms of Addressing CN’s Increased Operations That Are Crippling Barrington And The Surrounding Region.**

In 2008, the Board made impact assumptions upon which it based its mitigation mandates. Those mitigating conditions were meant to address the environmental harms created by CN’s huge increase in freight rail traffic on the EJ&E. None of the reporting data that CN submits to the Board can or has illuminated whether the environmental impact assumptions in Barrington -- that were the basis for those conditions imposed in the Village -- are proving accurate post-transaction. While CN spent eight full pages of its December 16 Reply to Barrington rehashing the history of the Board’s environmental review and the pre-approval and post-approval regulatory and legal actions surrounding Barrington’s case, none of what the railroad has said to date in the post-transaction period has illuminated for the public or the Board whether the pre-transaction environmental impact assumptions are proving to be accurate post-transaction, and whether the mitigating conditions are adequate based on CN’s actual rail operations on the EJ&E.

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<sup>42</sup> 2013 CN Investor Fact Book at 48; *see also*, FN 4 *supra*.

In its Reply, CN and Mr. Liepelt tout the “web-based, password-controlled Active Crossing System [“ACS”]” that CN has provided Barrington.<sup>43</sup> According to CN, the ACS technology provides “each emergency service providers (sic) with an electronic map of its service area that would show, in real time, when the warning devices were activated at each grade crossing, thus providing a better sense of the timing and position of approaching trains.”<sup>44</sup> And as Mr. Liepelt has commented, this system “allows Barrington’s emergency service providers to monitor the movement of trains on the EJ&E line in real time, anticipating and planning for the presence of trains at highway/rail grade crossings on the line.”<sup>45</sup>

Although the ACS technology may look good on paper, in reality, it has proven to be virtually worthless in Barrington. As Dave Dorn, Barrington’s Chief of Police has explained:

The only mitigation ordered that could have been theoretically useful to first responders was the technology allowing us to see what crossings are blocked by CN trains as a means of helping us determine the best routing available to our officers when responding to a call. The technology that CN provided is something called “Active Crossing System” technology that provides a screen depiction of which gates are in down position over a limited geography from the crossing at Old School Road in Libertyville to Smith Road crossing in Wayne, IL.

While our officers are able to access the ACS system from the laptops in their patrol vehicles, it is not regularly used for a number of reasons. First, the information provided cannot be used to influence routing, as the system

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<sup>43</sup> CN Reply at 6; V.S. Liepelt at 6.

<sup>44</sup> CN Reply at 6, FN 15.

<sup>45</sup> V.S. Liepelt at 6.

doesn't operate like an air traffic control system does – i.e. providing a constant real-time depiction of where CN trains are located and a travel speed and direction. Instead, for a very narrow territory, we will see a red dot appear on a screen if a crossing gate is activated. Once the crossing gate is no longer activated, there is nothing visible on the screen. This means that my officers cannot really determine if a train is in the general vicinity of a Barrington crossing without spending every minute monitoring the system. Operationally, that's impossible.

In the second place, the data is oftentimes inaccurate in that it can show a gate activation on the screen even when a train is not there. I reviewed police calls between January 1, 2011 to the end of October of 2014 and in that time there were a total of 56 calls about CN crossing issues. Railroad Gate Malfunctions were responsible for 28 calls.<sup>46</sup>

Chief Dorn's concerns are echoed by Jim Arie, Barrington's Fire Chief.

As he has explained, "the only real mitigation to address the needs of my Department is an access route to Advocate Good Shepherd Hospital that is guaranteed to remain free of all rail-related delays. It is for this reason that a grade separation at U.S. Highway 14 and the EJ&E is essential."<sup>47</sup>

As Chief Dorn has also explained:

Even if the ACS system operated flawlessly, it still wouldn't address the real problem experienced by Barrington's first responders – the need to have a crossing that can never be impacted by train-induced delays. Because U.S. Highway 14 is a strategic roadway used by a majority of the traffic flow that passes through the Village, and because it does not cross the UP Metra commuter line, it would be the most efficient routing for emergency responders who must get from one side of the tracks to the other quickly.<sup>48</sup>

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<sup>46</sup> V.S. Dorn at 3.

<sup>47</sup> V.S. Arie at 2.

<sup>48</sup> V.S. Dorn at 5.

Barrington will acknowledge that CN has installed a Wheel Impact Load Detector in Barrington Hills and hot box detectors in the immediate vicinity of the Village. However, as the CN's Monthly Operational Reports confirm, the installation of those safety-related devices has not prevented the simultaneous blockages of multiple crossings in Barrington (caused by stalled locomotives, separated air hoses, signal malfunctions, broken bolts, maintenance of way work and restricted speeds of 10 MPH) that have lasted for far more than 10 minutes. When such blockages happen, vehicular traffic moving through the Village is paralyzed.

Furthermore, longer freight trains moving at slow speeds have had the same result. As Chief Dorn has testified, "[b]ecause it has been the uniform observation of Barrington's patrol officers that the trains running on the EJ&E are longer now than they had been in the early years of CN's operations on the line, I foresee no mitigation that would improve the Department's responsiveness other than a grade separation at U.S. Highway 14."<sup>49</sup> Without question, there is a constant threat that the inability to cross unimpeded through the heart of Barrington can be the difference between life and death.

Adding insult to injury is CN's spurious efforts to convince the Board that Barrington is trying to fleece CN of \$47 million to build an array of infrastructure improvements completely unrelated to a grade separation: "two major road (non-rail) intersections, a creek relocation, and two new road (only

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<sup>49</sup> V.S. Dorn at 4.

bridges) over that creek.” While these elements – required only as part of the project -- do make construction of a grade separation more complex than anyone would like, there’s not much Barrington can do to change its geography, and the Village greatly resents the suggestion that it is attempting to include a grab bag of ancillary “toys” in seeking grade separation funding from CN.

### **III. CN’s Protestations Regarding Administrative Finality Lack Merit**

CN’s arguments regarding administrative finality must be rejected for at least three reasons. First, CN consummated the acquisition of the EJ&E line with knowledge that the Board had imposed oversight jurisdiction so that it could assess the **actual** impacts of increased rail traffic levels on the EJ&E line to the surrounding communities, and not merely the “projected” impacts. Because the Board, pursuant to 49 U.S.C. § 722(c) and 49 C.F.R. § 1115.4, has the unquestioned right on its own motion to reopen a proceeding based on material error, new evidence, or substantially changed circumstances, it clearly has the power to impose additional conditions in order to address unforeseen adverse impacts that are related to its grant of authority to CN to acquire the EJ&E line. Clearly stated -- the Board most certainly is not limited to the collection of data.

Second, CN’s assertion that it “might never have invested in the EJ&E line”<sup>50</sup> if it had been aware that the Board would take future corrective action

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<sup>50</sup> CN Reply at 24.

to address the actual adverse impacts of CN's expanded shift of traffic to the EJ&E line must be summarily rejected. Because the new Board members are not likely to be aware of CN's past position to the contrary, Barrington requests the Board to review CN's Petition, dated August 14, 2008, in which CN demanded that the Board adopt an expedited procedure that would have allowed CN to close the Transaction in October 2008 prior to completing the environmental review. In seeking to induce the Board to conditionally approve the Transaction in an October Merits Decision, CN stated that if it then "proceeded to close the Transaction, it would be doing so with no assurance as to any environmental conditions that the Board might impose after the closing."<sup>51</sup> Given CN's willingness to roll the dice in 2008 in order to gain quick control of this key, strategic Chicago bypass, it is disingenuous for it now to suggest that it would not have invested in the EJ&E line if it had to bear the cost of a grade separation at the U.S. Highway 14 crossing.

When it sought authority from the Board, CN was well aware that the EJ&E line was the only *existing* line of railroad in the United States that would allow it to synchronize its operations around Chicago, and thereby, give it a competitive advantage against competitors unable to avoid the renowned Chicago freight gridlock. As Claude Mongeau explained in the October 22, 2014 Earning Call:

It's all about connecting the dots and it's a multi-faceted advantage that we have. From a resiliency standpoint we saw it last year. *The ability to connect our own networks in*

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<sup>51</sup> CN Petition at 3.

*these webs around Chicago is just huge, it's a great asset. We worked hard. It took us many years to negotiate, many years to get the approval, all the work to get it done in terms of integration and we're reaping the benefit of all this hard work in terms of resiliency and services. It's also a huge opportunity from an asset standpoint and efficiency standpoint. We don't have locomotives waiting on either side. We don't have re-crews, we are able to [deploy] our assets and address the issues elsewhere in our network because it's not like we don't have issues elsewhere. And so it's cost, it's revenue, it's service and it's who we are and we think it's a great advantage how to quantify that, separately from the guidance and the success we've been having over the years is a bit difficult. This is why we're growing faster. This is why we're growing at low incremental cost. This is why we bounce back quicker when we face adversity. This is why we're back in sync across all our supply chain at the moment. This is why we're in business, it's a big asset.*<sup>52</sup>

Barrington acknowledges CN's foresight in recognizing that the EJ&E line is the crown jewel that connects its far-flung operations throughout the tri-coastal expanse of North America. Barrington also notes that the cost of acquiring the EJ&E line, even if CN is finally required to fund a majority share of the cost of constructing a single grade crossing in Barrington, is insignificant when compared with the prohibitive cost of constructing a new line that would have provided the same operational and financial benefits that CN is obviously realizing from its decision to acquire the EJ&E line. In short, the Board should disregard the gratuitously absurd suggestion that CN might never have invested in the EJ&E line if it had anticipated the Board would grant grade-separation mitigation relief to Barrington.

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<sup>52</sup> Transcript, CN Q3 2014 Earnings Conference Call, at 26 (emphasis added).

CN's claim that future efficient investments by it and other railroads would "certainly" be deterred if CN is required to fund a fair share of the cost of a grade separation that remedies the myriad adverse impacts that Barrington is experiencing solely as a result of CN's expanded operations over the EJ&E line is also baseless. Fully 25% of all the nation's rail freight passes through Chicagoland annually. Therefore, CN's acquisition of the EJ&E and the resultant ability to shift massive amounts of freight to what had been a little-used rail line is the type of singular event that is incapable of being replicated anywhere else in the nation.

Third, no one forced CN to rush the NEPA review process<sup>53</sup> and consummate its acquisition of the EJ&E line in January 2009, shortly after the Board issued its 2008 Decision authorizing that acquisition and ordering two grade separations in Aurora and Lynwood. Of course, when it did so, CN was well aware of the Board's rationale for maintaining oversight. As the Board explained:

If operational problems arise after consummation of the transaction, this oversight condition should provide a fully effective mechanism for quickly identifying and addressing them. The Board retains jurisdiction to impose additional conditions and take other action if, and to the extent, the Board determines it is necessary to address matters related to operations following the transfer of control.<sup>54</sup>

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<sup>53</sup> The environmental review of this particular transaction was completed with greater alacrity than any significant transaction in the Board's history. The rush was due to CN's insistence that it must have Board approval within a year, so any failures due to rushed analysis sit squarely on its shoulders.

<sup>54</sup> Approval Decision at page 26.

As the Board recently explained in its December 17, 2014 Decision, “one of the core reasons that the Board imposed oversight on this transaction was because of the potential impacts of increased rail traffic levels on the EJ&E line to the surrounding communities.”<sup>55</sup> While CN seeks to avoid consideration of the actual impacts on Barrington that have resulted from CN’s operations by suggesting that all that is involved are “mere traffic fluctuations,”<sup>56</sup> Barrington’s *Petition Seeking Imposition Additional Mitigation* conclusively demonstrates that far more is involved than mere fluctuations. As earlier explained, what is clearly involved are significant changes in traffic mix and rail operations that were not previously considered by the Board and that are not temporary in any respect.

The Board’s attention is also invited to the letter addressed to Mayor Darch from John Fortmann, IDOT’s Deputy Director of Highways. As he has explained, IDOT:

previously had no plans for improvements at [the U.S. Highway 14] location until after the CN Railroad acquisition. Based on the likelihood of multiple crossings being impacted by one train, this was the primary reason for the proposed design for a grade separation along U.S. Route 14 contained in the Environmental Impact Study and Design Report. The complexity of the Barrington situation is very clear. The lack of a grade separation in the downtown area is *now causing traffic gridlock* in the Village of Barrington.<sup>57</sup>

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<sup>55</sup> December 17, 2014 Decision, slip op. at 4.

<sup>56</sup> CN Reply at 25.

<sup>57</sup> Letter dated November 13, 2014 to The Honorable Karen Darch from John Fortmann, P.E., Attachment H to V.S. Darch (emphasis added).

CN's assertion that Barrington "cannot claim that the Board made a 'material' error in its Approval Decision"<sup>58</sup> is baseless. Although Barrington has focused on new evidence and materially changing circumstances, there is nothing that would bar Barrington from raising material error. More importantly, there is nothing to prevent the Board *on its own motion* from belatedly recognizing material error and taking steps to address such error. Furthermore, while the Board and Barrington disagreed pre-transaction on **projected** impacts, there can no longer be any denial that Barrington's pre-transaction concerns about the deal's impacts in the Village are being realized. Thus, continued arguments about which party was right or wrong in 2008 involve a moot point.

Finally, Barrington stresses that CN has baldly distorted the post-approval litigation background by omitting the fact that when the Court of Appeals affirmed the Board's 2008 decision, it **never** reached the merits of Barrington's argument that the Board committed material error when it failed to mention Barrington's September 2008 traffic study that showed the crossing at U.S. Highway 14 far exceeded the threshold for determining substantial impact. As the Board's own General Counsel must confirm, Judge Tatel (during the course of oral argument) recognized that if Barrington's traffic study correctly showed it was over the threshold, whereas the Board's showed it beneath the threshold, it "was obviously something the Board had to respond

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<sup>58</sup> CN Reply at 23.

to,”<sup>59</sup> and otherwise characterized the argument as being “strong.”<sup>60</sup>

Nevertheless, the Court declined “to consider the significance of Barrington’s traffic study because, as counsel for Community Petitioners conceded at oral argument, they failed to mention their study until their reply brief, thus depriving the Board of a fair opportunity to respond.”<sup>61</sup> Solely because of previous counsel’s waiver, Barrington’s argument that it was treated differently than similarly situated communities wasn’t considered. Hence, even though Barrington’s 2008 study projected delays that far exceeded the 40-hour delay threshold for being categorized as a “substantially impacted” crossing was never refuted, Barrington was denied consideration of proper, meaningful relief through erroneous omission of the U.S. Highway 14 crossing from that category of crossings.

The same is true of Barrington’s 2011 traffic analysis study. Although CN claims that the projected 98 hours of delay at U.S. Highway 14 was not accepted by the Board “as accurate during the oversight period for this transaction,”<sup>62</sup> there is nothing in the Board’s 2012 Decision that questions the validity of Barrington’s projected 98 hours of additional delay due to the increase in CN’s freight traffic, which delays are more than double the 40-hour

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<sup>59</sup> Transcript of oral argument at 9.

<sup>60</sup> *Id.* at 74.

<sup>61</sup> *Village of Barrington v. STB*, 636 F.3d 650, 672 (D.C. Cir. 2011).

<sup>62</sup> CN Reply at 8, n.25.

delay threshold that should have warranted the crossing's inclusion in the list of crossings that were considered to be "substantially affected."

In summary, given the Board's decision to extend the oversight period for an additional two years, CN may not be heard that it is somehow immunized from further mitigation relief.<sup>63</sup> As the transcript of CN's recent Earnings Call clearly demonstrates, CN is already recognizing huge financial benefits from its decision to consummate the transaction.

CN argues for the principle of "fundamental fairness" surrounding administrative finality. While that is a legal term of art, Barrington would argue that its repeated requests for a grade separation have been based on factual data that was collected in good faith because the Village believed in the promises made by the Board about the purpose for the oversight period.

Barrington asks the Board to consider the "fundamental fairness" issue in light of the need to provide greatly delayed justice to a community and region that has been harmed by CN's freight traffic; for "fundamental fairness" in treating a community that receives no financial benefits as a result of CN's increased freight traffic in a manner that is equitable with the way it has treated Aurora and Lynwood; and the fundamental *lack* of fairness to the

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<sup>63</sup> Underscoring Barrington's position is the very disclaimer that CN has inserted into its most recent 2013 Annual Report at page 44: "The resolution of matters that could arise during the STB's remaining oversight of the transaction cannot be predicted with certainty, and therefore, there can be no assurance that their resolution will not have a material adverse effect on the Company's financial position or results of operations."

people in the northwest region of the greater Chicagoland area who have critical need of an infrastructure project warranted only by CN's freight traffic.

Barrington questions the "fundamental fairness" of making a small local government invest its residents' tax dollars to protect their interests against a \$10 billion multi-national corporation that takes the approach that it is empowered to tell regulators what they can and cannot do. We question the "fundamental fairness" of CN expecting that state and federal taxpayers should be picking up the tab to underwrite its profitability by paying for a grade separation necessitated only by its rail operations.

While CN ominously warns the Board that ordering a grade separation in Barrington would create a precedent that would cause it and the other railroads to avoid future investments to strengthen the nation's rail network, this is nothing but a red herring. The EJ&E acquisition was unique in that it enabled a Class I with the right combination of access rail lines to purchase a roundabout route for a location that is a nexus for 25% of the nation's rail freight. That perfect confluence of conditions does not exist elsewhere in the U.S. Having brought its circus to Barrington, CN should be required to clean up some of the mess that its expanded operations have dropped on Barrington and the surrounding region.

### **Conclusion**

For all the above-stated reasons, the Board, based on its consideration of all evidence of record and consistent with the determinations of the Illinois

Department of Transportation and the United States Department of Transportation, should firmly reject CN's unsupported assertion that imposing grade-separation mitigation relief on CN would cause it to mitigate pre-existing traffic congestion in Barrington. Therefore, the Board should conclude that grade-separation relief at the intersection of U.S. Highway 14 and the EJ&E line in Barrington is essential in order to address the severe adverse impacts of CN's greatly increased freight operations.

Respectfully submitted,

/s/ Richard H. Streeter

Richard H. Streeter  
Counsel for the Village of Barrington, IL

Dated: January 5, 2015

Before the  
SURFACE TRANSPORTATION BOARD

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Finance Docket No. 35087

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

**VERIFIED STATEMENT OF DAVE DORN**

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My name is Dave Dorn and I am the Chief of Police of the Barrington Police Department. I've held this position since June of 2013 and have been a police officer for 16 years. My Department's mission is to deliver quality law enforcement services to residents and businesses of the Village of Barrington and to provide them with a safe and secure environment that fosters a sense of security in person, property, and mind. The Department accomplishes this mission through a dedicated, professional, and compassionate workforce committed to enforcing the law, preserving peace, preventing crime, controlling traffic, and protecting civil rights and liberties.

Partnering with the community, the Police Department provides the Village of Barrington with a full range of police services including patrol operations, criminal investigations and juvenile investigations, traffic and parking enforcement, crime prevention education, and community policing. The Patrol Division is the largest and most visible of all the Police Department's operational units. Officers are assigned to one of four patrol teams, two daytime shifts and two nighttime shifts. Each team is supervised by a Patrol Sergeant and works a 12-hour shift to provide 24 hour services to the community.

Through the cooperation and assistance of residents, business operators, and visitors, the patrol division responds to emergency and non-emergency calls for service, as well as self-initiated activities and extra patrol requests. The primary responsibility of patrol officers is the prevention and investigation of all criminal and traffic related matters in the Village. Personnel also help protect property and personal safety, render aid, mediate disputes, assist with civil matters, and assist other law enforcement agencies and Village departments when necessary.

Many common tasks which previously had to be done in the station are now accomplished in the officer's squad car, due to advances in technology. Officers can complete traffic crash and case reports, review in-car video, and check criminal and driver's license history from their squads.

Certain mitigation measures were ordered by the Board when it approved CN's purchase of the EJ&E rail line in 2008 and I have been asked to address how that mitigation is impacting policing effectiveness and responsiveness in the Village. The Board ordered three mitigation measures in Barrington: a quiet zone; traffic advisory road signs; and, closed circuit technology to allow police (and other emergency responders) to see what crossings are blocked by CN freight trains. I have carefully reviewed page 6 of CN's Reply to Barrington's Petition seeking imposition of additional mitigation, as well as the Verified Statement of Jeffrey Liepelt attached to CN's Reply. I have been duly authorized to present this Verified Statement in response to the Reply comments regarding the efficacy of the mitigation that CN has provided.

The quiet zone is operational and has no impact on police operations. The traffic advisory signs were meant, as CN states in its Reply --to be installed on "U.S. Route 59 (Hough Street) at its crossing of the EJ&E line, advising motorists stopped in a queue at the crossing not to block upstream intersections." This mitigation measure was meant to be implemented in partnership with the Illinois

Department of Transportation but was shelved because IDOT concluded that the signage was “not warranted.”

The only mitigation ordered that could have been theoretically useful to first responders was the technology allowing us to see what crossings are blocked by CN trains as a means of helping us determine the best routing available to our officers when responding to a call. The technology that CN provided is called “Active Crossing System.” This technology provides a screen depiction of which gates are in the down position over a limited geography from the crossing at Old School Road in Libertyville to the Smith Road crossing in Wayne, IL.

While our officers are able to access the ACS system from the laptops in their patrol vehicles, it is not regularly used for a number of reasons. First, the information provided cannot be used to influence routing, as the system doesn’t operate like an air traffic control system does – i.e. providing a constant real-time depiction of where CN trains are located and a travel speed and direction. Instead, for a very narrow territory, we will see a red dot appear on a screen if a crossing gate is activated. Once the crossing gate is no longer activated, there is nothing visible on the screen. This means that my officers cannot really determine if a train is in the general vicinity of a Barrington crossing without spending every minute monitoring the system. Operationally, that’s impossible.

In the second place, the data is oftentimes inaccurate in that it can show a gate activation on the screen even when a train is not there. I reviewed police calls between January 1, 2011 to the end of October of 2014 and in that time there were a total of 56 calls about CN crossing issues. Railroad Gate Malfunctions were responsible for 28 calls. This has been a problem with enough frequency that all of the Village’s patrol cars are equipped with a jerry-rigged tool for lifting a malfunctioning gate that allows the officer to simultaneously direct traffic, as the following photos demonstrate:



Because the Department can't rely on the system or the data being accurate, we cannot ask our officers to use it in their decision-making when determining the most efficient call routing.

Even if the ACS system operated flawlessly, it still wouldn't address the real problem experienced by Barrington's first responders – the need to have a crossing that can never be impacted by train-induced delays. Because U.S. Highway 14 is a strategic roadway used by a majority of the traffic flow that passes through the Village, and because it does not cross the UP Metra commuter line, it would be the most efficient routing for emergency responders who must get from one side of the tracks to the other quickly.

Because it has been the uniform observation of Barrington's patrol officers that the trains running on the EJ&E are longer now than they had been in the early years of CN's operations on the line, I foresee no mitigation that would improve the Department's responsiveness other than a grade separation at U.S. Highway 14.

### **VERIFICATION**

I, Dave Dorn, declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Verified Statement.

Executed on January 3, 2015

\_/s/ Dave Dorn

Dave Dorn

Before the  
SURFACE TRANSPORTATION BOARD

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Finance Docket No. 35087

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

**VERIFIED STATEMENT OF JIM ARIE**

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My name is Jim Arie. I am the Fire Chief for the Barrington Fire Department – a position I’ve held for almost twelve years. Our Fire Department is headquartered at 400 N. Northwest Highway (also known as U.S. Highway 14) and is located just 1/3 of a mile south of where U.S. Highway 14 crosses the EJ&E. The Department, which provides 24/7 professional coverage to the Village, consists of three divisions.

The Administration Division is responsible for oversight of day-to-day activities of the Fire Department, including all divisions and services. The Division provides the department with leadership, executive management, and administrative support. The Division also provides the services necessary to ensure that appropriate levels and quality of staff and equipment are available to efficiently and effectively provide services to the Village.

The Operations Division is dedicated to providing the most efficient and professional response to the broadest range of emergency incidents by making every unit and its crew capable of initiating lifesaving action at any emergency. Our primary service on every front-line emergency response vehicle includes immediate fire and medical response capabilities. All fire suppression vehicles are equipped to respond to medical emergencies with firefighters who are also cross-trained as firefighter/paramedics,

and all medical rescue transport vehicles carry specialized equipment that enables firefighter/paramedic crew members to support suppression efforts or conduct search and rescue activities at any fire incident.

The third Division is Fire Prevention and Education, which is responsible for coordinating school fire prevention education programs and addressing local civic groups regarding fire prevention and fire code enforcement practices.

I have been asked to address how the Surface Transportation Board's mitigation that was mandated in 2008 is assisting the Barrington Fire Department in realizing its mission. In short, it's not.

The verified statement of Mr. Jeffrey Liepelt states that CN "provided a web-based, password-controlled Active Crossing System to Barrington, which allows Barrington's emergency service providers to monitor the movement of trains on the EJ&E line in real time, anticipating and planning for the presence of trains at highway/rail grade crossings on the line." This claim demonstrates a complete lack of understanding as to the operational realities and needs of our Department.

First of all, a regional Emergency Communications Center is responsible for receiving all 9-1-1 telephone calls for service in Barrington at the CENCOM E9-1-1 Public Safety Communications Center in Round Lake Beach, Illinois. Although an ACS monitor is located at CENCOM, the ACS system is functionally useless when it comes to meeting the real needs of those requiring emergency medical or fire response services because the original dispatch of responders is not really the problem. The ACS software is not user-friendly and, at best, it provides minimal useful information for emergency responders.

Because we work in partnership with regional fire departments, Barrington has established a protocol to assure that for serious calls on the "wrong side of the track," a neighboring department on the "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. The real routing problem arises once our team is at the site of a medical emergency located on the wrong side of the tracks and needs to transport the victim or the victims to the hospital. Because the flawed ACS system is simply nothing more than a blip on the screen that disappears when a crossing gate is not activated<sup>1</sup>, it is unable to provide in real time the location and speed of a freight train to anyone observing the screen.

Because of its close proximity; the expertise it has in treating cardiac and stroke patients; and its designation as a Level II Trauma Center, unless we have a trauma patient with multiple critical injuries (concussion or brain injury, internal injuries, multiple broken bones), Advocate Good Shepherd Hospital is always our first choice hospital. Awaiting ACS system information before determining appropriate ambulance routing in cases where the patient is on the wrong side of the tracks is risky in and of itself, because such delay can cause a greater time loss than would have been the case if the ambulance just attempts the most direct route to that hospital. This holds true even when there's a possibility that the ambulance will ultimately need to turn around and go to another hospital because the alternatives are a much greater distance away.

The expectation by CN or the Board that any critical life-saving time should be wasted before determining the best route for reaching a hospital is a non-starter. Because the ACS system provides insufficient and useless data (and is error prone), I made the decision not to use it at all because it is counter-productive to operational efficiency and patient safety.

Ultimately, there are no technological solutions to address the emergency response problems created by CN's freight traffic, because the only real mitigation to address the needs of my Department

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<sup>1</sup> See Barrington Police Chief Dave Dorn's Verified Statement for a more complete description of the ACS system.

is an access route to Advocate Good Shepherd Hospital that is guaranteed to remain free of all rail-related delays. It is for this reason that a grade separation at U.S. Highway 14 and the EJ&E is essential.

### **VERIFICATION**

I, Jim Arie, declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Verified Statement.

Executed on January 5, 2015

/s/ Jim Arie

Jim Arie