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CN-57

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Finance Docket No 35087

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

APPLICANTS' RESPONSE TO PETITIONS FOR RECONSIDERATION

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PREFACE AND SUMMARY OF ARGUMENT

Applicants Canadian National Railway Company and Grand Trunk Corporation (together, "Applicants" or "CN")¹ hereby respond, pursuant to 49 C F R § 1104 13(a) and Decision No 16 in this proceeding, to the letters filed on January 23, 2009, by the Illinois Commerce Commission ("ICC") and the City of Gary, Indiana ("Gary") (together, "Petitioners"), seeking reconsideration of that decision² Neither the ICC nor Gary has satisfied the Board's criteria for reconsideration, *see* 49 C F R. § 1115 3(b), and their requests for reconsideration should therefore be denied³

¹ Applicants incorporate by reference the short forms and abbreviations set forth in the Table of Abbreviations at CN-2 at 8-11

² The ICC's letter is cited herein as "ICC Pct ," and Gary's letter as "Gary Pct "

³ The ICC and Gary satisfy neither the substantive requirements for reconsideration nor the Board's rules requiring filings to be double-spaced and addressed to the Secretary, *see* 49 C F R §§ 1104 1(a), 1104 2(a), and the ICC did not include a separate preface and summary of argument, *see* 49 C F R § 1115 3(d)

Under the Board's governing statute, rules, and precedent, reconsideration is only granted "if the petitioner shows that the prior action [in this case, Decision No 16] will be affected materially because of new evidence or changed circumstances or the prior action involved material error" *Union Pac Corp – Control & Merger – S Pac Rail Corp*, STB Finance Docket No 32760, Decision No 104, slip op. at 5 (citing 49 U S C § 722(c), 49 C F R §1115 3(b)) Neither the ICC nor Gary has cited the applicable standards for reconsideration, or made the showing required for such relief⁴ Instead, their letters merely present Petitioners' last-minute requests for conditions to mitigate alleged environmental impacts of the proposed Transaction – most of which conditions the ICC and Gary could have proposed earlier in this Proceeding, but did not

Even if the Board were to read Petitioners' requests as implicit claims that the Board erred materially by not imposing the requested conditions, that argument cannot be sustained Petitioners cite no legal basis for a claim of material error And even if the Board were to assume that such a claim was based either on the Board's organic statute, the ICC Termination Act of 1995, 49 U S C §§ 10101-16106 ("ICCTA"), or the National Environmental Policy Act of 1969, 42 U S C §§ 4321-4370f ("NEPA"), Petitioners provide no ground for questioning the Board's conclusion that no conditions beyond those imposed in Decision No 16 are needed for the Transaction to satisfy the standard for approval under 49 U S C § 11324(d) (requiring approval if the Transaction would not "substantially lessen competition, create a monopoly, or restrain trade in freight surface transportation in any region of the United States") See Decision No 16 at 53 Further, "it is now well settled that NEPA does not mandate particular results."

⁴ The ICC says that it "believes the STB should reassess certain oversights and errors contained in its Decision" (ICC Pet at 1), but it makes no attempt to demonstrate that those "oversights and errors" amount to "material error" for purposes of 49 C F R § 1115 3(b)

and that it “imposes no substantive requirement that mitigation measures actually be taken ” *Robertson v Methow Valley Citizens Council*, 490 U S 332, 350, 353 n 16 (1989) (citations omitted) NEPA “simply prescribes the necessary process.” requiring federal agencies to “take a hard look at environmental consequences” of certain federal actions, *id* at 350 (citations and internal quotation marks omitted) Neither the ICC nor Gary asserts that the Board failed to take that hard look and, as explained more fully below, neither makes any factual allegations that would justify such a conclusion

ARGUMENT

I. THE ICC HAS NOT DEMONSTRATED ANY MATERIAL ERROR THAT WOULD JUSTIFY IMPOSITION OF THE ADDITIONAL ENVIRONMENTAL MITIGATION CONDITIONS IT REQUESTS.

The ICC lists six areas of impact⁵ for which it seeks additional or different mitigation conditions than those the Board imposed in Decision No 16 While the ICC may prefer additional mitigation, it makes no showing that the decision involved material error that would require reconsideration or modification of the conditions that the Board did impose.

A Traffic Queuing

The ICC claims that its initial hope that the environmental review of the Transaction would lead to “a detailed study of all affected crossings” has been frustrated because “this type of detailed study did not occur” (ICC Pet at 1) But, in fact, the Draft Environmental Impact Statement (“DEIS”) included extensive analyses of changes in vehicular delay and in risk of accidents at every highway/rail at-grade crossing on the EJ&E arc for which an increase in rail

⁵ The six areas, identified by heading in the ICC’s letter, are Traffic Queuing, Signalized Intersections, New Bridges at Ogden Avenue in Aurora, Illinois (AAR/DOT #260 560X) and Lincoln Highway in Lynwood, Illinois (AAR/DOT #260 651D), Pedestrian Safety (Section 2 4 1 1 Students Walking or Cycling), Fencing, and Crossing Blocking

traffic is projected as a result of the Transaction (DEIS App C, Attachment C2, *id* App E, Attachment E1)

It appears that the ICC's real objection is not that no detailed study was conducted, but rather that the Federal Railroad Administration's accident prediction model, which the Board's Section of Environmental Analysis ("SEA") used as part of its study, did not take into account the possibility that "downstream roadway features and operational characteristics may cause queuing through a crossing" (ICC Pet at 2 (quoting letter from Tim Anderson to Anne K Quinlan at 1 (Feb 11, 2008) ("ICC Scoping Comments") (transmitting ICC comments on draft scope of study for EIS)) The ICC is concerned that motorists encountering a traffic light or other "roadway feature" some distance down the road from a rail crossing will form a queue that will back up over the rail crossing, and that motorists in that queue will stop their vehicles astride the track, in violation of Illinois law,⁶ rather than waiting to cross the tracks until they can safely proceed to the other side. It acknowledges that "current accident prediction formulae and analyses [presumably including those employed by the ICC itself] do not account for queuing of highway vehicles on highway-rail grade crossings" (ICC Pet at 2), but nevertheless asserts that "identifying locations where queues exist, either by 'pre-existing' or 'exacerbated congestion', should have been a critical component of the [Final Environmental Impact Statement ("FEIS")] "

Id

In fact, the FEIS specifically notes that SEA "performed an analysis and found 17 highway/rail at-grade crossings along the EJ&E rail line that have a traffic light within 1,000 feet of the crossing" and "identified several similar locations with traffic crossings close to CN

⁶ See 625 Ill Comp Stat 5/11-1303 (2009) (providing mandatory fine of \$500 or 50 hours of community service for stopping on any railroad track, except when necessary to avoid conflict with other traffic, or in compliance with law or the directions of a police officer or official traffic-control device)

lines ” FEIS at 3 3-45, *see also id* at 3 4-178 (possible queuing across EJ&E line in Lake Zurich area) Moreover, even though increased rail traffic over affected grade crossings would not result in any “increases in traffic queuing” from downstream highway crossings (*see* Letter from Tim Anderson (Executive Director, ICC) to Phillis Johnson-Ball (Deputy Chief, Section of Environmental Analysis, STB) at 3 (Sept 29, 2008) (“ICC DEIS Comments”)), the FEIS recommended, and the Board in Decision No 16 imposed, a condition obligating CN to consult with the ICC and the Indiana Department of Transportation “to identify circumstances where queued cars could extend over the EJ&E rail line and to consider reasonable solutions ” FEIS at 4-49 (Condition 20), Decision No 16 at 77 (Condition 17)

Although the ICC’s own comments on the DEIS did not suggest that any mitigation was necessary for downstream vehicle queuing, it is dissatisfied with the mitigation condition imposed by the Board, and it calls on the Board to impose additional requirements that CN “install and maintain solar powered highway amber flashing beacons mounted to regulatory highway signs [at all public highway-rail grade crossings on the EJ&E line] advising motorists not to stop on the crossings,” and that it “install and maintain highway pavement marking cross hatching at all the aforesaid highway-rail grade crossings ” ICC Pet at 3 The ICC does not explain why costly and distracting flashing beacons, calling on motorists to do what common sense and the law already requires of them. are necessary. Nor does it identify any special characteristics of the EJ&E highway crossings that would make the roadway markings currently required by the Illinois Administrative Code⁷ inadequate, or explain why the responsibility for placing those markings should be shifted from public roadway authorities to CN (much less how

⁷ *See* 92 Ill Admin Code, tit. 92, § 1535 310(d) (“The public authority having the duty of maintaining the approach to a grade crossing is required, where practicable, to place pavement markings consisting of a cross and the letters ‘R R ’ in accordance with current applicable standards.”)

CN could be expected to perform that function on property it neither owns nor controls) Finally, the ICC does not explain why, if failure to impose these additional conditions would constitute material error, it did not propose those conditions earlier The ICC has not justified its call for reconsideration

B Signalized Intersections

In Section 2.5.10 of the FEIS, SEA discussed the ICC's comments on the DEIS regarding "the proximity of signalized intersections (that is, the location of traffic lights in relation to the tracks) to the EJ&E rail line" FEIS at 2-46 The ICC claims that this discussion is inadequate, arguing that "the FEIS did not include a complete analysis of signalized intersections" ICC Pet at 3 The ICC asserts that "[n]o other queuing factors (other than industry track) were mentioned" and that "bus stops, driveways, and other similar factors also need to be considered" *Id* The ICC, however, does not explain how any of these factors (which appear to be independent potential causes of vehicle queuing) have anything to do with signalized intersections

The ICC also complains that the FEIS and Decision No. 16 "do not adequately explain why, in regard to signalized intersections, a 90-second cycle length is sufficient to clear a traffic queue when there could be pedestrians, Emergency Vehicle Preemption, or other cycle lengths in use" *Id* at 3-4 The FEIS, however, clearly explained that, even with the increased rail traffic anticipated on the EJ&E line following implementation of the Transaction, fewer than two trains per hour would pass through most affected crossings (FEIS at 2-48), which would mean that, even if the queue of vehicles at a crossing took much more than 90 seconds to clear, the probability that a second train would approach the crossing before the queue had dissipated would be low.

To mitigate the potential problem of vehicle queues at four grade crossings backing up to nearby highway intersections, SEA recommended and the Board imposed a condition requiring CN to cooperate in the development of a program of highway advisory signs at each of the affected intersections, calling on motorists not to block them FEIS at 4-48 (Condition 18), Decision No 16 at 76 (Condition 15) The ICC asks the Board to modify this condition so that advisory signs would be posted “at *all* public highway-rail grade crossings along the EJ&E rail line ” ICC Pet at 4 (emphasis added) In addition, the ICC requests that all the signs be in place within six months of the effective date of the Board’s Decision (rather than within a year, as provided in Decision No 16), and it renews its request that CN be required to install solar-powered flashing amber beacons *Id* at 5-6 The ICC provides no evidence that queue length would be a substantial problem at any intersections other than the four identified by SEA, much less that it would be a problem at intersections affected by queues at every public grade crossing Nor does it explain why signs should be posted at the grade crossings rather than at the affected highway intersections And again, the ICC does not explain how the Board’s failure to impose conditions that ICC did not request would constitute material error justifying reconsideration

C New Bridges at Ogden Avenue and Lincoln Highway.

In Decision No 16, the Board imposed a condition calling for installation of an overpass or underpass of what are now crossings at grade at Ogden Avenue in Aurora and Lincoln Highway in Lynwood Decision No 16 at 76 (Condition 14) The Board’s condition would require CN ultimately to bear 67% of the engineering and construction costs at Ogden Avenue and 78.5% of the costs at Lincoln Highway, provided in each case that construction begins by 2015 The ICC asks the Board to extend the date by which construction must begin to 2020 ICC Pet at 5-6 It bases this request on the claim that the 2015 date set by the Board is “not

practical” and on the argument that it would be “wrong” to “absolve[] the Applicants of any project costs if the bridges are not under construction by 2015 ” *Id* at 6

While it is obviously true, as the ICC points out, that the grade separation projects “will require extensive planning (preliminary engineering, right of way acquisition etc),” *id* , the ICC provides no evidence that this preparation cannot be completed in time to begin construction by the end of 2015 – a full seven years from the date of the Board’s decision. Indeed, in its comments on the DEIS, the ICC argued that it was unlikely that grade separations would be built within three years, but stated that “a minimum of five years.” or two years less than the period provided by the Board for the beginning of construction, would constitute “a more practical period ” ICC DEIS Comments at 3 (emphasis omitted). While the ICC stated that 10 years would be “the preferred time frame,” the 2015 date set by the Board falls within the 5-10 year range suggested by the ICC itself.

If, on the other hand, the responsible state and local actors fail to take the preliminary steps necessary for grade separation construction until 2020 – or 12 years from the date of the Board’s decision and two years past the date that the ICC’s comments on the DEIS said would be “preferable” – that very delay will indicate that grade separations at Ogden Avenue and Lincoln Highway are not a high priority. And at that late date, after changed rail traffic patterns that may be attributable to various causes other than the Transaction (and after up to 12 years of potentially rising construction costs), it would be fundamentally unfair to impose extraordinary funding obligations on CN based on the Board’s 2008 findings. The Board’s decision to limit CN’s funding obligations to construction begun by 2015 may not satisfy the ICC’s most recent preference, but it does not amount to material error justifying reconsideration.

D Pedestrian Safety

In the FEIS, SEA recommended that CN be required to comply with nine mitigation conditions – five proposed by CN itself – providing for the safety of pedestrians and cyclists, including students and others near schools and parks near the EJ&E line FEIS at 4-33—4-34, 4-38, 4-47 (VM 10-12, VM 43-44, Conditions 13-16) The Board imposed eight of those requirements as conditions of its approval of the Transaction⁸ Decision No 16 at 60, 65, 75 (VM 10-12, VM 43-44, Conditions 11-13)

The ICC asks the Board to reconsider Decision No. 16 to address further the perceived danger to students walking or cycling in the vicinity of schools near the EJ&E line. through additional mitigation conditions that would require CN to install and maintain solar-powered amber flashing beacons mounted on pedestrian warning signs at all public grade crossings on the EJ&E line where pedestrian traffic currently exists and a second main track is proposed. and to install and maintain “pedway pavement marking cross hatching” at those grade crossings ICC Pet at 6-7

The ICC provides no reason for questioning SEA’s conclusion that the Transaction “would have only a minor adverse impact beyond existing risk [to pedestrians and cyclists] at highway/rail at-grade crossings” and that the conditions imposed by the Board “are adequate to address the potential incremental adverse impact of the transaction ” .See Decision No 16 at 49 Moreover, even if, contrary to the Board’s finding, additional or different mitigation measures were appropriate, the ICC fails to show that the beacons, warning signs, and pavement markings it requests would be a preferable or appropriate way of further reducing the perceived hazard

⁸ The one exception was a condition requiring consultations with Camp Manitoqua in Frankfort, Illinois. regarding fencing near the Camp In lieu of that condition, the Board required CN to comply with its voluntary mitigation agreement with the City of Frankfort Decision No 16 at 40 n 87

The Federal Highway Administration Manual on Uniform Traffic Control Devices does not provide any specifications for the pedestrian warning signs that the ICC requests, which suggests that they are not a standard method of reducing danger to pedestrians at grade crossings. And the ICC has not identified any agency or other authority of the State of Illinois, including the ICC itself, that requires such measures, even at pedestrian crossings where multi-tracked rail lines carry 100 or more trains per day. The ICC's post-FEIS expression of its preference for a novel pedestrian warning system, installed at CN's expense, does not amount to a showing that the Board erred materially by not requiring it.

E Fencing

In addition to CN's proposal that fencing be required along portions of the EJ&E right-of-way located within a quarter mile of schools or parks, the FEIS recommended, and the Board adopted, a condition that the fencing be "a standard 6-foot-high, galvanized, chain-link fence at all locations where an effective fence does not currently exist." FEIS 4-33, 4-47 (VM 10, Condition 13), Decision No. 16 at 60, 75 (VM 10, Condition 11). The ICC now argues that "chain-link fencing material is not durable and is easily vandalized, thereby providing an opportunity for trespassing on railroad right-of-way." ICC Pet. at 7. The ICC therefore calls on the Board to modify Condition 11 to require, instead of chain-link, a fence "of materials that [are] resistant to vandalism." *Id.*

The ICC's request should be denied. The vague terms of its proposed new condition provide no guidance regarding what materials would satisfy the condition. Moreover, the proposed condition is inconsistent with the ICC's own practice of ordering installation of chain-

link fencing when it finds that fencing of a rail right-of-way is appropriate.⁹ The ICC cannot reasonably maintain that the Board's imposition of a similar requirement constitutes material error.

F Crossing Blocking

As a condition of its approval of the Transaction, the Board imposed a condition (a) requiring CN to adhere to U S Operating Rule No 526 (Public Crossings), "which provides that a public crossing must not be blocked longer than 10 minutes unless it cannot be avoided," and (b) providing that if a CN train is likely to block a public crossing on the FJ&E line for more than 10 minutes, "the train shall be promptly cut to clear the blocked crossing or crossings." Decision No 16 at 63 (VM 35). This condition was published in the DEIS as part of CN's Voluntary Mitigation Program, DEIS at 6-12 (VM 75). Although in its comments on the DEIS the ICC proposed several modifications to CN's voluntary mitigation proposals, it did not object to this condition or suggest that it would be inadequate. ICC DEIS Comments at 4-6. Now, however, the ICC maintains that this condition is unrealistic, because of the "[e]ffort required to cut a train, and then reconnect the train," and it calls on the Board to impose additional requirements that CN "contact [the] emergency services department of the affected community whenever a stopped train blocks a public highway-rail grade crossing on the EJ&E line for longer than 10 minutes," keep records of every blockage exceeding 10 minutes, and report all such instances as part of its quarterly report on compliance with the Board's conditions. ICC Pet at 7-8. The record-keeping and reporting requirements proposed by the ICC are unnecessary

⁹ See, e.g., *Village of Cherry Valley v Ill Dept of Transp*, No T02-0116, slip op at 9 (Ill Comm Comm'n Sept 4, 2003), available at <http://www.icc.illinois.gov/docket/files.aspx?no=T02-0116&docId=53442>, cf Ill Admin Code, tit 83, § 790.100 (ICC regulation permitting use of chain link fence around facilities of telephone utilities)

because CN is already required by Decision No. 16 to keep records and make reports of the kind sought by the ICC. *See* Decision No. 16 at 73 (Condition 2). And the ICC's proposed condition to require CN to notify emergency response personnel at the time of any blockage exceeding 10 minutes is unnecessary in view of the Board's requirement that CN install closed-circuit television systems for the use of all of the emergency response providers that would be substantially affected by the Transaction (other than those covered by Voluntary Mitigation Agreements with CN). *See* Decision No. 16 at 77 (Condition 18). The ICC does not explain how its proposed notification requirement would provide better information than the video cameras would to "assist in the timely response of emergency providers," *see id.* at 3, or how its proposed additional reporting requirement would otherwise serve a useful purpose not already served by the Board's existing reporting requirements. On the other hand, the new reporting requirements it seeks would create a substantial burden and distraction for CN's dispatching and train control personnel during real time operations.

Finally, the ICC provides no explanation of its failure to request imposition of this additional obligation earlier (in particular, in its comments on the DEIS), or any evidence in support of its *ipse dixit* that the condition volunteered by CN, approved by SEA, and adopted by the Board, is impractical or inadequate (especially as supplemented by the Board's Final Mitigation Condition 18). Because that condition has the force of an order of the Board, if CN fails to observe it, the Board will have authority to enforce it with appropriate sanctions. There is no basis to impose an additional condition simply because of the ICC's unsupported apprehensions that "railroads are resistant to 'cut a train' in order to clear a blocked crossing or crossings." *See* ICC Pet. at 7. The Board's failure to impose the burdensome new condition

requested by the ICC – one for which the ICC itself did not see a need until recently – can hardly constitute the material error necessary for reconsideration

II. THE CITY OF GARY'S PETITION FOR RECONSIDERATION IN NO WAY DEMONSTRATES MATERIAL ERROR THAT WOULD JUSTIFY RECONSIDERATION.

Gary asserts that it is “arguably [the community] most adversely affected” by the Transaction and refers to what it describes as “the failure of the STB to address the City’s previously articulated concerns” (Gary Pct at 1, citing nothing in record) But Gary has *never* previously articulated on the record in this Proceeding its concerns about adverse impacts Gary filed no comments on the DEIS, its petition for reconsideration is its first substantive filing in this Proceeding ¹⁰

In that petition, filed thirty days after the Board’s final decision approving the Transaction, Gary requests imposition of 11 additional conditions on that approval Gary provides no arguments in support of its requested conditions, it simply lists them, saying that it

¹⁰ Gary complains that the Board failed to recognize it as a “party of interest,” Gary Pct at 1, and attaches to its petition what purports to be a January 22, 2008 notice of intent to participate in the Proceeding Gary’s complaint rings hollow the service list for this Proceeding, as found on the “E-Library” on the Board’s website, includes the City of Gary as a party of record We must note, however, that Gary’s purported notice of intent – its only arguable filing in this proceeding before the Board’s final decision – is problematic. If it was filed at all, it was filed out of time, after the December 13 deadline set in Decision No 2 (at 12 (STB served Nov 26, 2007)) Moreover, the “E-Library” of filings does not indicate that Gary ever filed its notice with the Board, and the copy of the notice attached to Gary’s letter bears no date stamp or other indication that it was received by the Board And CN’s counsel never received the January 22 notice of intent purportedly filed and served by Gary (CN counsel did, however, receive a substantially identical notice of intent dated February 13, 2008, which does not appear on the Board’s docket and was not, according to the accompanying certificate of service, served on all parties of record on the Board’s service list)

Regardless of the details, what is clear is that Gary had notice of the Proceeding but never made any substantive comment until after the Board issued its final decision, and its minimal efforts to participate formally, although not substantively, at an earlier stage were untimely and procedurally defective Gary has no cause for complaint

“trust[s] that these requirements will be added to the final Decision of the Surface Transportation Board” (overlooking that the decision it seeks to have reconsidered *is* the Board’s final decision) Gary Pet at 2 Gary does not explain how any of the conditions sought is necessary to mitigate adverse impacts of the Transaction Nor does it demonstrate (as it must to obtain reconsideration) that it was material error for the Board to omit those conditions from Decision No 16

Gary’s wish list is astonishing in its breadth, its potential cost to CN, and its lack of any reasonable justification Gary’s request for \$4.2 million for “[f]inancial assistance with economic development projects within the City of Gary,” Gary Pet at 2, for example, has no relation to any adverse impacts of the Transaction on Gary and fails to acknowledge that the Transaction-related construction projects (including one within the City of Gary) are themselves economic development projects

Gary also demands that CN be required “to hire local residents for any and all construction and expansion projects required in conjunction with the purchase, including adherence to the City of Gary hiring ordinances” *Id* at 1 Gary’s theory, apparently, is that CN should not be allowed to create construction jobs in the Chicago area, even in the middle of a recession, unless they are allocated based on geography rather than qualifications

Other conditions Gary requests (relating to grade separations, noise barriers, hazardous materials transportation, and emergency response) could conceivably have some relationship to impacts of the Transaction, but Gary does not acknowledge that the EIS had already thoroughly examined those impacts and come to different conclusions regarding their appropriate mitigation Nor does Gary explain how its proposed conditions would be more appropriate or effective than

those imposed in Decision No 16, or how the different mitigation required by that decision constituted material error

Finally, Gary states that “[t]o date, the City of Gary has not met with CN to negotiate a reasonable and amiable resolution to these issues despite repeated requests by the City to do so” Gary Pet at 2 Any suggestion that CN did not meet with or negotiate with Gary in good faith is incorrect CN met with Gary officials at least four times to discuss mitigation issues, including meetings on January 4, 2008, January 9, 2008, February 28, 2008, and July 3, 2008

CONCLUSION

The Board should deny the petitions for reconsideration of the Illinois Commerce Commission and the City of Gary

Respectfully submitted,

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February 12, 2009

CERTIFICATE OF SERVICE

I hereby certify that I have this 12th day of February, 2009, served copies of Applicants' Response to Petitions for Reconsideration (designated as CN-57) upon all known parties of record in this proceeding by first-class mail or a more expeditious method of delivery

Alexander D Coon