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September 16, 2009

## **BY E-FILING**

Anne K. Quinlan, Esquire  
Acting Secretary  
Surface Transportation Board  
Office of the Secretary  
395 E Street, S.W.  
Washington, DC 20423-0001

**Re: *Canadian National Railway Company and Grand Trunk Corporation –  
Control – EJ&E West Company (STB Finance Docket No. 35087)***

Dear Ms. Quinlan:

225737

Enclosed for filing in the above referenced docket please find Applicants' Reply to Joint Petition to Reopen Final Decision and Issue a Supplemental Environmental Impact Statement (designated as CN-58), including the supporting Verified Statement of Gordon T. Trafton II.

~~Very truly yours,~~



Paul A. Cunningham  
Counsel for Canadian National Railway Company  
and Grand Trunk Corporation

Enclosure

cc: All parties of record

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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STB Finance Docket No. 35087

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

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APPLICANTS' REPLY  
TO JOINT PETITION TO REOPEN FINAL DECISION AND ISSUE A  
SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT

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**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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STB Finance Docket No. 35087

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

**APPLICANTS' REPLY  
TO JOINT PETITION TO REOPEN FINAL DECISION AND ISSUE A  
SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT**

Canadian National Railway Company and Grand Trunk Corporation (together "CN" or "Applicants")<sup>1</sup> hereby reply to the Joint Petition to Reopen Final Decision and Issue a Supplemental Environmental Impact Statement ("Petition") filed in this proceeding on August 27, 2009, by the Village of Barrington and the TRAC Coalition (together "Barrington/TRAC" or "Petitioners").<sup>2</sup> Attached in support of this reply is the Verified Statement of Gordon T. Trafton, II.

The Petition seeks to reopen the Board's administratively final Decision No. 16, served on December 24, 2008 ("Approval Decision"), approving CN's acquisition of control of EJ&E West Company, a wholly owned noncarrier subsidiary of Elgin, Joliet and Eastern Railway

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

<sup>2</sup> On September 10, 2009, Will County filed a motion to intervene and support the joint petition to reopen. Because that motion merely adopts and incorporates by reference the information and arguments of Barrington/TRAC and does not seek to broaden the issues, CN does not oppose Will County's motion.

Company (“Transaction”).<sup>3</sup> However, under 49 C.F.R. § 1115.4, the Board will reopen a final decision only when it determines that its prior action will be affected materially because of “new evidence, or substantially changed circumstances,” or involved material error. Parties seeking reopening must “bear the burden of proof to sustain their claims,”<sup>4</sup> and the Board need not reopen except “in the most ‘extraordinary circumstances.’”<sup>5</sup> Because Petitioners here do not allege material error and, as discussed below, fail to show that new evidence or substantially changed circumstances justify the relief they seek, the Petition should be denied.

### BACKGROUND

On October 30, 2007, Applicants filed their application in this proceeding (CN-2), seeking approval under 49 U.S.C. §§ 11323-11325 for the acquisition of control of EJ&EW (“Application” or “CN-2”). Among the stated purposes of the Transaction was to provide CN with a more efficient, continuous rail route around Chicago, IL, and to connect its five major lines radiating from Chicago, which are operated by various CN subsidiaries. See Approval Decision at 5 n.8. The Board reviewed and approved the proposed Transaction pursuant to its findings under 49 U.S.C. § 11324(d) that the proposed Transaction was unlikely to cause a substantial lessening of competition or to create a monopoly or restraint of trade (*id.* at 3, 53), and, to the extent that there are any anticompetitive effects, they are insubstantial and outweighed by the public benefits (*id.* at 53). Based on its extensive environmental analysis,

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<sup>3</sup> The Approval Decision became effective on January 23, 2009. Shortly thereafter, Elgin, Joliet and Eastern Railway transferred most of its assets to EJ&EW, which was then acquired by CN and GTC. Elgin, Joliet and Eastern Railway then changed its name to Gary Railway, and EJ&EW adopted the name of Elgin, Joliet and Eastern Railway Company (“EJ&E”).

<sup>4</sup> *Burlington N. R.R. – Abandonment Exemption – Between Klickitat & Goldendale, WA*, Docket No. AB-6 (Sub-No. 335X), slip op. at 3 (STB served June 8, 2005) (citing 5 U.S.C. § 556(d)).

<sup>5</sup> *Omaha Pub. Power Dist. v. Burlington N. R.R.*, 3 I.C.C.2d 853, 862 (1987) (quoting *Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc.*, 419 U.S. 281, 296 (1974)).

including a Final Environmental Impact Statement (“FEIS”), the Board imposed numerous conditions on its approval, including environmental mitigation conditions that include reporting and monitoring requirements for a five-year period from the effective date of the Approval Decision.

Along with its Application, CN had filed notices of exemption granting trackage rights for four of its rail carrier subsidiaries (CCP, GTW, IC, and WCL) over the EJ&E arc between Leighton and Gary, and for trackage rights for EJ&E over certain CCP and IC lines. These trackage rights, which would take effect only upon approval of the Transaction, were intended to increase the flexibility of CN’s operations among its several subsidiaries, each of which has separate corporate identity and thus its own franchise and labor agreements. No party raised objections directed specifically to these grants of trackage rights, and they were authorized by the Approval Decision pursuant to their applicable class exemption (Approval Decision at 4, 5).

CN noted in its Application that in order to facilitate operations in and through the Chicago terminal, there could be further post-Transaction coordinations. CN-2 at 228, 230-35. On February 26, 2009, CN’s subsidiary WCL sought authority for one such post-transaction coordination by filing a notice of exemption for authority to operate on IC’s tracks into IC’s Markham Yard, which would allow WCL to extend its operations from Matteson to Homewood. *See Ill. Cent. R.R. – Trackage Rights Exemption – Wisc. Cent. Ltd.*, STB Finance Docket No. 35223 (STB served Mar. 13, 2009). These trackage rights also took effect without objection.

Because CN did not wish to continue addressing “intra-family” operating issues in the Chicago area individually, on August 4 and 5, 2009, several CN subsidiaries filed a total of 17 notices of exemption for trackage rights over the lines of other CN subsidiaries located on or

within the EJ&E arc.<sup>6</sup> On August 17 and 18, 2009, the Board directed CN and the subsidiaries that had filed exemption notices to submit additional information concerning those notices, which they did in their Supplement to Verified Notices of Exemption, filed on August 21, 2009 (“Supplement”).

On August 27, 2009, Barrington/TRAC and United Transportation Union filed separate petitions to stay the 17 trackage rights exemptions from becoming effective. CN opposed both petitions on August 31, 2009, and the Board denied the petitions by decision served September 1, 2009, thereby allowing the 17 exemptions to take effect on September 3 and 4, 2009.

Also on August 27, 2009, Barrington/TRAC filed a joint petition to reopen the Approval Decision and for supplementation of the EIS. The Petition argues that the new trackage rights may cause “significant operational changes” (Petition at 5) and that the trackage rights therefore “call into question numerous basic premises” of the Approval Decision (*id.* at 4). The Petition also argues that supplementation of the EIS is warranted in accordance with applicable regulations and Board precedent. Petition at 5.

## ARGUMENT

The Petition should be denied. It fails to establish a basis either for reopening the Approval Decision or for supplementing the FEIS. As discussed in Section A, below, the Petition is based on a fundamental misunderstanding of CN’s intra-family trackage rights and thus lacks an essential factual predicate for the relief it seeks. In addition, as discussed in Section B, if concerns arise regarding CN’s intra-family trackage rights, those concerns can and should be addressed in the separate trackage rights proceedings themselves or, if necessary, through the oversight and reporting conditions already ordered by the Board. It is neither

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<sup>6</sup> The notices of exemptions were filed in STB Finance Docket Nos. 35264 through 35280.

necessary nor appropriate to attempt to address the impacts of those rights by reopening the Approval Decision or supplementing the FEIS.

**A. THE PETITION IS PREMISED ON A MISUNDERSTANDING OF THE NEW TRACKAGE RIGHTS AND THUS PROVIDES NO FACTUAL BASIS FOR THE RELIEF SOUGHT.**

The requests for reopening and for supplementation of the FEIS are both premised on Petitioners' speculation that CN's new intra-family trackage rights will result in changes to operations that are inconsistent with the Operating Plan underlying the Approval Decision and the FEIS. That speculation, however, is entirely unsupported and contrary to the facts.

As Mr. Trafton explains in his Verified Statement, the purpose and effect of the new trackage rights grants are to permit CN to operate the same trains over the same lines as it would operate without the new trackage rights, but to do so potentially more efficiently by providing it with additional flexibility in the crewing of those trains.<sup>7</sup> Trafton V.S. ¶ 4. The new trackage rights would not result in CN running additional trains or rerouting trains differently than provided for in the Operating Plan reviewed by the Board (and its Section of Environmental Analysis) as part of CN's acquisition of control of EJ&E ("Operating Plan"). *Id.* ¶ 5. The free movement of trains between CN subsidiaries that would be facilitated by the trackage rights was assumed for purposes of the Operating Plan and is fully consistent with it. *Id.*

Since the proposed new trackage rights will not result in different trains, different routings of trains, or different operations than were contemplated by the Operating Plan, the

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<sup>7</sup> In the absence of a grant of trackage rights, a train passing from the line of one CN subsidiary to that of a second subsidiary must be interchanged between the two railroads. The most significant consequence of this requirement is that the train must stop, and the crew employed by the first railroad subsidiary must get off the train and be replaced with a crew employed by the second. Trackage rights would improve train operations by eliminating delays caused by recrewings that can be inefficient when dictated by the unnecessary formality of an intra-family interchange. Trafton V.S. ¶ 4.

FEIS, or the Approval Decision, there is no basis for Petitioners' suggestion that those trackage rights undermine the Board's Approval Decision or create a need to supplement the FEIS, which was based on the Operating Plan.

The Petition offers no evidence to the contrary. Instead, it argues by innuendo that CN must be hiding something that requires investigation. CN has hidden nothing. Barrington/TRAC criticize CN for supposedly failing to explain "why such 'coordination' elements were not brought to the Board's attention during the Board's consideration of the transaction and environmental impacts." Petition at 3. But such coordinations are fully consistent with one of the primary stated purposes of the Transaction – connecting CN's lines in the Chicago area and providing a more efficient, continuous rail route around Chicago. See Approval Decision at 5 n.8. Moreover, in the Application itself, CN informed the Board that such coordinations were possible.<sup>8</sup> Minor coordinations (such as intra-family grants of trackage rights) are to be expected as parties integrate and gain operating experience with newly acquired rail properties, even though the details of those coordinations may not be predictable or known in advance.

Barrington/TRAC further suggest that CN may have been misleading in its Supplement and may be attempting to reserve its rights at some future time to reroute new trains through use of the new trackage rights. Petition at 4 (suggesting that CN's representations are just "*for the time being*"). Barrington/TRAC's argument, however, ignores practical reality – the trackage rights at issue provide CN with no new routes and thus create no new opportunities for rerouting traffic. See *Trafton V.S.* ¶ 5.

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<sup>8</sup> CN-2 at 228, 230-55.

In short, there is no substance behind Barrington/TRAC's rhetoric or suspicions. They fail to show how CN's new intra-family trackage rights could have any significant impact on CN's operations, much less an impact that could justify reopening the Approval Decision or supplementing the FEIS.

**B. REOPENING THE APPROVAL DECISION OR SUPPLEMENTING THE FEIS WOULD BE UNNECESSARY AND INAPPROPRIATE EVEN IF THERE WERE CONCERNS WITH CN'S NEW TRACKAGE RIGHTS.**

As discussed in Section A, above, Petitioners' arguments for reopening the Approval Decision and supplementing the FEIS lack merit because they have no factual basis. But even if valid concerns had been raised about the notices of exemption, they would not justify reopening the Approval Decision or supplementing the FEIS.

The notices of exemption for the new trackage rights are in separate proceedings from the Approval Decision, and the Approval Decision is not dependent upon them. Therefore, even if those notices raised environmental or other CN operating issues (which they do not), the appropriate place to challenge the potential impacts of those notices is in those notice proceedings themselves, not in this proceeding. The Petitioners, however, have not sought to reject or revoke the trackage rights exemptions.

Moreover, even if the new trackage rights created significant potential impacts on the Transaction approved in this proceeding that could not be addressed in the trackage rights exemption proceedings themselves, the Board has retained ample authority to address them through the extensive monitoring and reporting requirements already imposed by the Board as a

condition to approval.<sup>9</sup> Among other things, CN is required to report monthly on the number of trains operating per day over appropriate segments of the EJ&E and CN lines through Chicago, to report quarterly on the progress of, implementation of, and compliance with mitigation measures, and to notify the Board if Applicants depart substantially from “their traffic projections on the five existing CN lines through Chicago on a more than short-term, temporary basis.” See Approval Decision at 26, 39, 72 (Voluntary Mitigation Condition 101), 84 (Final Mitigation Condition 74). These requirements allow the Board to “closely monitor whether applicants have adhered to the various representations made on the record in this proceeding” (*id.* at 26), and to “take appropriate action if there is a material change in the facts or circumstances upon which [it] relied in imposing specific environmental mitigation” (*id.* at 39). In light of the available data and continuing oversight, reopening the proceeding or formal supplementation of the FEIS would be neither appropriate nor necessary to deal with any potential consequences of CN’s new intra-family trackage rights.<sup>10</sup>

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<sup>9</sup> Although the Board may wish to take the new trackage rights into account as part of its oversight in this proceeding, because the issues raised by Petitioners regarding CN’s more efficient operations using the new trackage rights are unrelated to the statutory standard for approval in this proceeding (49 U.S.C. § 11324(d)), those concerns provide no basis for reopening the essential decision to approve the Transaction and permit consummation. In order to support a request for reopening, a petitioner must demonstrate how alleged new evidence or changed circumstances “would materially affect the Board’s prior decision.” *A & R Line, Inc. – Abandonment Exemption – In Cass & Pulaski Counties, IN*, STB Docket No. AB-855 (Sub-No. 1X), slip op. at 2-3 (STB served Aug. 13, 2004); accord, *Consolidated Rail Corp. – Abandonment Between Warsaw & Valparaiso, in Kosciusko, Marshall, Starke, La Porte & Porter counties, IN*, Docket No. AB-167 (Sub-No. 1125), slip op. at 1 (ICC served Mar. 14, 1994).

<sup>10</sup> Use of the Board’s oversight authority to investigate operating concerns is also clearly more appropriate than undertaking to supplement the EIS in this proceeding. Under Council of Environmental Quality (“CEQ”) regulations and NEPA, as interpreted by the Supreme Court, supplementation of an EIS is appropriate only where there remains a major Federal action to be taken that could significantly affect the quality of the human environment in a way not already considered. See 40 C.F.R. § 1502.9(c)(1)(i), (ii); *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 374 (1990). The STB’s regulations provide for the STB to supplement an EIS

## CONCLUSION

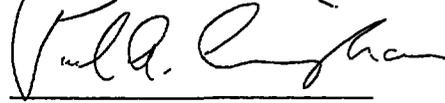
Pctitioners have failed to show material error, new evidence, or substantially changed circumstances to justify reopening the Approval Decision or supplementing the FEIS.

Accordingly, the Petition should be denied.

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“where necessary and appropriate” (49 U.S.C. § 1105.10(a)(5)), and, although worded somewhat differently than the CEQ regulations, it has been the Board’s policy to follow CEQ’s regulations “to the extent practicable.” *Revision of National Environmental Policy Act Guidelines*, 45 Fed. Reg. 15,236, 15,236 (1980). *See also Revision of National Environmental Policy Act Guidelines*, 363 I.C.C. 653, 654 (1980) (Commission intends to follow CEQ regulations except where compliance is inconsistent with its statutory requirements). The lone Board decision cited by Petitioners fully supports use of supplementation only where there remains a major federal action, as it involved a proceeding where a new construction authorization decision was necessary and contemplated. *See Tongue River R.R. – Construction & Operation – Western Alignment (Tongue River III – Rosebud and Big Horn Counties, Montana)*, STB Finance Docket No. 30186 (Sub-No. 3) (STB served Oct. 15, 2004), at 1-14 (discussing the need for “a subsequent decision by the Board as to whether the proposed Western Alignment satisfies the criteria of 49 U.S.C. 10901.”). Indeed, Applicants are unaware of any instance in which the Board has found it necessary or appropriate to supplement an FEIS where no further major federal action is contemplated.

Respectfully submitted,



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*Counsel for Canadian National Railway Company  
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September 16, 2009

VERIFIED STATEMENT  
OF  
GORDON T. TRAFTON II

1. My name is Gordon T. Trafton II. I am the Senior Vice-President, Strategic Acquisitions and Integration, for Canadian National Railway Company (“CNR”) and its rail carrier subsidiaries (together, “CN”). My duties include leading the integration of the Elgin, Joliet and Eastern Railroad Company (“EJ&E”) into CN’s rail system. I helped to develop and I have a solid understanding of CN’s operating plan that was submitted to the Surface Transportation Board (“STB”) in connection with CN’s acquisition of EJ&E (“Operating Plan”). I have been asked by CN to provide this Verified Statement in order to explain how the trackage rights that were the subject of the notices of exemption filed with the STB in STB Finance Docket Nos. 35264 through 35280 help to further that integration.

2. While CN markets its freight rail transportation service as an integrated system, using the “CN” name, it provides rail service through rail carrier subsidiaries, each of which has a separate corporate identity and thus its own franchise and labor agreements. Accordingly, when CN submitted its application in this proceeding for authority to acquire control of EJ&E,<sup>1</sup> in order to provide for greater operating flexibility after consummation, it simultaneously filed six notices of exemption<sup>2</sup> providing for exchanges of trackage rights between EJ&E and CN subsidiaries over certain of its Chicago-area lines. In particular, the notices of exemption provided for trackage rights for Chicago, Central & Pacific Railway Company (“CCP”), Grand Trunk Western Railroad Company (“GTW”), Illinois Central Railroad Company (“IC”), and Wisconsin Central

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<sup>1</sup> At the time of the application, EJ&E was known as EJ&E West Company. EJ&E adopted its present name upon its acquisition by CNR, pursuant to the authority granted by the Board in Decision No. 16 in this proceeding.

<sup>2</sup> The notices of exemption were filed in STB Finance Docket No. 35087 (Sub-Nos. 2 through 7).

Ltd. (“WCL”) over the EJ&E arc between Leighton and Gary, and for trackage rights for EJ&E over certain CCP and IC lines. Earlier this year, CN similarly sought to increase the flexibility of its operations by extending the operations of its subsidiary, WCL, from Matteson to Homewood. Accordingly, on February 26, 2009, WCL filed a notice of exemption with the Board for trackage rights that would allow it to operate on IC’s tracks into IC’s Markham Yard at Homewood. *See Ill. Cent. R.R. – Trackage Rights Exemption – Wisc. Cent. Ltd.*, STB Finance Docket No. 35223 (STB served Mar. 13, 2009).

3. In order to avoid the need to address similar operational issues on an individual basis as they arise, and to maximize the operating flexibility of CN’s Chicago-area subsidiaries, those subsidiaries entered into the trackage rights agreements that were the subjects of the notices in STB Finance Docket Nos. 35264 through 35280. Those notices became effective 30 days after their filing (i.e., on September 3 and 4, 2009), and each subsidiary now has the contractual right and regulatory authority to operate on any CN line on or within the EJ&E arc.

4. The purpose and effect of these new trackage rights is to permit CN to operate the same trains over the same lines as it would operate without the new trackage rights, but to do so potentially more efficiently because it would have additional flexibility in the crewing of those trains. In the absence of a grant of trackage rights, a train passing from the line of one subsidiary to that of a second must be interchanged between the two railroads. The most significant consequence of this requirement is that the train must stop, and the crew employed by the first railroad must get off the train and be replaced with a crew of the second railroad’s employees. Even under ideal circumstances, the need to change crews leads to some delay, which may be prolonged if the second railroad’s crew is not ready to board the train immediately on its arrival at the interchange point. Trackage rights improve train operations by eliminating re-crewing delays

caused by stops that are dictated by the unnecessary formality of an intra-family interchange rather than by operational requirements.

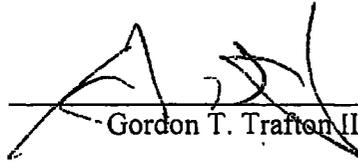
5. The new trackage rights are fully consistent with the Operating Plan, which was developed with the assumption that CN would be free to move any of its trains over any of its lines in the Chicago area. The new trackage rights are merely intended to maximize CN's flexibility in carrying out that Operating Plan. The trackage rights do not provide CN with any new routes or any new opportunities for rerouting traffic and they will not result in CN running additional trains, or rerouting any train differently than provided for in the Operating Plan.

6. I hope the STB finds this information useful to its understanding of the purpose and effect of CN's new intra-family trackage rights.

**VERIFICATION**

I, Gordon T. Trafton II, 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 September 16, 2009.

  
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Gordon T. Trafton II

**CERTIFICATE OF SERVICE**

I certify that I have this 16th day of September, 2009, served copies of Applicants' Reply to Joint Petition to Reopen Final Decision and Issue a Supplemental Environmental Impact Statement upon all known parties of record in this proceeding by first-class mail or a more expeditious method.



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Alexander Coon