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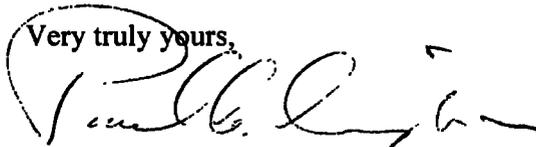
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Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, D. C. 20423-0012

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

Dear Ms. Brown:

Enclosed for filing in the above referenced docket please find Applicants' Reply to Comments Seeking Clarification of Illinois Department of Transportation (CN-60), including the supporting verified statement of Thomas J. Healey.

Very truly yours,


Paul A. Cunningham

Counsel for Canadian National Railway Company
and Grand Trunk Corporation

Enclosures

cc: All parties of record

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 35087

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

**APPLICANTS' REPLY
TO COMMENTS SEEKING CLARIFICATION OF
ILLINOIS DEPARTMENT OF TRANSPORTATION**

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March 15, 2010

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 35087

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

**APPLICANTS' REPLY
TO COMMENTS SEEKING CLARIFICATION OF
ILLINOIS DEPARTMENT OF TRANSPORTATION**

Canadian National Railway Company and Grand Trunk Corporation (together "CN" or "Applicants")¹ hereby reply to the Comments Seeking Clarification ("Comments"), filed in this proceeding on February 23, 2010, by the Illinois Department of Transportation ("IDOT").² In its Comments, IDOT nominally seeks clarification of three points related to Final Mitigation Condition 14 ("FMC 14"), which requires CN to substantially fund the construction of two grade-separated crossings as to which IDOT is to be the lead agency. IDOT's Comments are either (1) barred by the Board's rules or (2) premature. Accordingly, there is no need for the Board to clarify the issues raised by IDOT at this time. Should the Board wish to do so, however, CN respectfully submits that IDOT's requests should be denied.

¹ Applicants incorporate by reference the short forms and abbreviations set forth in the Table of Abbreviations in the Railroad Control Application in this proceeding (CN-2 at 8-11).

² IDOT did not serve its Comments, despite the requirements of 49 C.F.R. § 1104.12(a) ("*Every* document filed with the Board should include a certificate showing simultaneous service upon all parties to the proceeding.") (emphasis added).

BACKGROUND

In Decision No. 16, the Board granted CN's Application under 49 U.S.C. §§ 11323-11325 for authority to acquire control of EJ&E West Company ("EJ&EW"), a wholly owned noncarrier subsidiary of Elgin, Joliet and Eastern Railway Company.³ The Board's approval was conditioned on 181 separate provisions intended to mitigate potentially adverse impacts of the Transaction on the environment. Among those conditions was FMC 14, which required CN to coordinate with appropriate state and local officials for the implementation of grade separations (*i.e.*, rail overpasses or underpasses) at two locations where the EJ&E line presently crosses highways at grade: (1) the highway/rail at-grade crossing of Ogden Avenue (U.S. Route 34) in Aurora, Illinois, and (2) the highway/rail at-grade crossing of Lincoln Highway (U.S. Route 30) in Lynwood, Illinois. Decision No. 16 at 76. Further, FMC 14 requires CN to pay 67% of the cost of the grade separation at Ogden Avenue and 78.5% of the grade separation at Lincoln Highway.⁴ *Id.*

As accurately noted by IDOT (Comments at 1), "an initial coordinating meeting" was held between CN and IDOT on January 28, 2010. At that meeting, representatives of CN's Executive, Legal, Engineering, Structures, and Public Affairs departments met with representatives of IDOT and IDOT's consultants to preliminarily review the status of planning for the anticipated grade crossing projects. CN responded to a request from IDOT's chosen consultant, URS, for design standards and criteria that CN would like to see incorporated into the

³ Decision No. 16 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. 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").

⁴ The Board required that CN "pay this percentage of the cost of the preliminary engineering and environmental analysis, final design, ROW acquisition, utility relocation, and construction costs of these grade separations," except that CN is only required to pay for "one preliminary engineering study for each crossing." Decision No. 16 at 76.

projects. CN's responses to that request for input were in no sense framed as "demands"; they were instead part of an honest effort to share information about various issues that both parties thought should be explored regarding the projects. And at no time did CN insist on strict compliance with its preferences with respect to every issue that was raised. Rather, CN presented its standard 2006 Guidelines for Design of Railway Structures ("Guidelines") and raised other issues that would need to be resolved if the projects were to be built. IDOT has apparently misinterpreted remarks made by CN, and has, for reasons that remain unclear, filed its Comments with the Board instead of first seeking clarification from CN or even alerting CN to IDOT's apparent issues with CN's requests.

On January 20, 2010, the Board announced that, "as part of its efforts to determine whether CN's compliance reports are accurate and complete" it was "requesting feedback from Chicago-area communities affected by the merger" by "sending out questionnaires to elected officials in the 33 communities in Illinois and Indiana affected by the merger." The Board did not seek comments from entities that did not receive questionnaires; nor did it seek comments on the status of various mitigation conditions that were not part of those questionnaires. Instead, the questionnaire posed a specific set of questions unrelated to IDOT's "comments," and did not provide for or solicit general comments beyond that scope. IDOT, however, asserts that it is submitting its Comments "[i]n response to the Board's announcement of January 20, 2010, inviting comments concerning the compliance by . . . CN with the numerous environmental conditions imposed in Decision No. 16." Comments at 1.

ARGUMENT

I. IDOT's Comments Regarding Ownership and Maintenance and its Suggestion that IDOT be the Final Arbitrator of Engineering Requirements are Barred by the Board's Standards for Seeking Reopening.

In two respects, IDOT's requested "clarifications" seek substantive changes to Decision No. 16 for which a petition to reopen and modify is required under the stringent standards of 49 C.F.R. § 1115.4. Having failed even to attempt to meet the standards for such relief, those two requests should be denied.

First, IDOT seeks clarification that "the bridges would need to be owned and maintained by CN." Comments at 5. IDOT asserts that CN has "demanded" that the "abutments of the structures be located off of [CN's] right-of-way," which, according to IDOT, "would mean that the owner of the bridges would be IDOT, and IDOT would be responsible for all future inspections, maintenance and repairs of the entire structures." Comments at 4. IDOT argues that FMC 14 contemplated that the grade separations "would need to be owned and maintained by CN," Comments at 4-5, and asks the Board to clarify that such was the case.

This is a thinly veiled attempt to circumvent the requirements in 49 C.F.R. § 1115.4 for seeking reopening or modification of Decision No. 16. Unlike other mitigation conditions which specify that CN either will or will not own or maintain particular structures,⁵ FMC 14 does not impose a maintenance or ownership obligation on CN. IDOT is therefore not requesting that the

⁵ See VM-9 (CN is to maintain grade crossing signs); VM-40 (CN to maintain a pedestrian tunnel for Metra); VM-91 (CN to maintain drainage ditches); VM-105 (CN to install and maintain passages for turtles); FMC-11 (fences to be owned and maintained by communities); FMC-18 (CN not responsible maintenance of CCTV systems at grade crossings).

Board “clarify” its order but that it impose on CN significant new ownership and maintenance obligations that were not required by FMC 14.⁶

Second, IDOT’s request for a ruling that IDOT alone should be allowed to determine whether CN’s engineering Guidelines can be accommodated, must also be rejected as not in compliance with the requirements for a petition for reopening. The Board did not grant IDOT the authority it seeks, but instead required in FMC 14 only that the parties “coordinate” with each other while “anticipat[ing] that IDOT will be the lead agency.” That is a far cry from IDOT’s proposal, which would empower it to decide all disputes in its own favor and unilaterally dictate the design of infrastructure that it wishes to place on CN’s property. CN believes that if the parties are permitted to work out individual issues relating to the proper standards to apply (subject to either party returning to the Board if there is a real dispute), it will lead to the resolution of most, if not all, issues. Nonetheless, even if IDOT disagrees, it should not be permitted here to seek to co-opt the Board’s decision-making power without a properly filed petition for reopening that fully justifies the proposition that the public interest requires the Board to cede to IDOT its authority to oversee the implementation of FMC 14.

IDOT’s petition falls far short of the standards for reopening administratively final decisions of the Board. Under 49 C.F.R. § 1115.4, such petitions may be filed at any time, but they must state in detail the respects in which the proceeding involves material error, new

⁶ IDOT’s concerns about maintenance and ownership are also much too premature to warrant the Board’s attention. At the most basic level, they are premature because FMC 14 requires that the parties “coordinate” their efforts on the FMC 14 projects, yet that coordination has barely begun. And, perhaps because coordination has just begun, and the information is not yet available, IDOT has not really defined the implications of its proposal for the parties or the public interest, nor otherwise been able to offer any basis on which CN, which is quite willing to work through these issues with IDOT, could do other than oppose those proposals on the purely legal grounds it offers here, or on which the Board could make a reasoned public interest decision.

evidence, or substantially changed circumstances. IDOT's Comments contain no such details. Because IDOT has met none of the criteria for reopening Decision No. 16, IDOT's "comments" seeking "clarification" on these points must be rejected by the Board. *See Gen. Ry. Corp., d/b/a Iowa N.W. R.R. - Exemption For Acquisition Of R.R. Line - In Osceola & Dickinson Counties, IA*, STB Finance Docket No. 34867 (STB served July 13, 2007) (holding that a petitioner "may not avoid the obligation of meeting th[e] [Board's] standards merely by assigning a different label to its request for relief" and rejecting a motion that "recites unsupported, unspecific allegations . . . none of which [were] relevant to any entitlement to relief").

II. The Other Clarifications Requested by IDOT are Best Addressed by the Parties in the First Instance

IDOT's other requested clarifications are premature. IDOT's filing apparently stems from a misunderstanding of statements solicited from CN during the initial coordinating meeting. IDOT mischaracterizes those statements as "demands," but CN demanded nothing. If CN's comments were of concern to IDOT, the appropriate course would have been for IDOT to contact CN and attempt to resolve its concerns. IDOT did not do so, choosing instead to seek relief from the Board with respect to a series of issues that are best addressed in the first instance by the parties themselves.

CN's alleged "demands" were actually responses to questions from IDOT's consultants regarding the appropriate design parameters for the two grade separations. CN suggested the specifications it would like to see for the project. CN did not demand, either at the January 28 meeting or at any other time, that IDOT comply with any specific specifications that IDOT had not volunteered. And at that meeting, IDOT suggested that a cost/benefit analysis process would be used to determine final project parameters, which would of course leave the determination of those parameters until another day.

CN has successfully worked with IDOT on many other projects in the past, and will work with them on other projects in the future. Determining what is a “demand” and what is a response to a request for input is usually resolved through further communication and/or negotiation, not litigation. Indeed, disputes rarely rise to a level requiring intervention by a third party, and these issues are no exception. Constructing a grade separation is a complicated task involving many different parties with many different interests. Harmonizing those interests requires communication between the parties. Failing to discuss issues and instead needlessly seeking outside intervention, as IDOT has done, slows down the entire process and increases costs for everyone.

CN supports IDOT’s right to seek reopening and clarification or modification from the Board if there turn out to be genuine, material disputes that the parties are incapable of resolving themselves. At this point, however, it is not clear that there is such a dispute. If a matter remains unresolved after the parties have had an opportunity to resolve it themselves, IDOT would then be able to seek appropriate relief.

III. CN’s Response to IDOT’s Remaining Specific Comments

While CN believes that clarification from the Board is unwarranted at this point, CN offers the following further response in case the Board wishes to address the substance of the points raised by IDOT (in a manner that might truly be in the nature of clarification). IDOT seeks “clarification from the Board that it is correct in its understanding” of the following points:⁷

1. That the bridges constituting the grade separation structure at Ogden Avenue need only be constructed with dimensions (i.e., with widths of no less than 30 feet and

⁷ As discussed above, IDOT’s request regarding ownership and maintenance obligations is barred by the Board’s rules, and it mischaracterizes CN’s statements regarding the other issues as “demands.”

clearances of no less than 23 feet) that would permit CN to install a single additional track at that location; and

2. That IDOT should have “the sole and exclusive judgment” to determine which of CN’s 2006 Guidelines for Design of Railway Structures will be adhered in the construction of the grade separations.

IDOT’s Comments on these issues, to the extent not barred by the Board’s rules, appear to contradict IDOT’s own published procedures and standards in the Bureau of Design and Environment Manual (“BDE Manual”)⁸ governing such constructions, and IDOT offers no sound reason why the Board should allow the new approaches advocated by IDOT.

A. IDOT’s Request for Clarification Regarding the Dimensions of the Crossing Structure and the Number of Tracks to be Crossed

IDOT requests clarification that the grade separations need only accommodate one additional track, and that the bridges would have widths of no less than 30 feet with a vertical clearance of no less than 23 feet. Comments at 4. IDOT apparently believes that CN envisions (and has demanded) “grandiose structures” that “span the full 100-foot right-of-way, with a minimum clearance of 23 feet across the entire right-of-way.” Comments at 3. Contrary to IDOT’s representations, CN has made no such demand and, in any event, IDOT’s request for clarification may be at odds with the provisions of its BDE Manual governing such construction.

CN generally agrees with the minimum clearance requirements cited by IDOT, but it disagrees that the structure at Ogden Avenue should only accommodate one additional rail line with no provision for an additional rail line to accommodate Metra’s proposed STAR Line.

Chapter 7 of the BDE Manual, which addresses Railroad Coordination with IDOT, contains provisions regarding possible future rail lines at the crossing location. Specifically, the

⁸ The BDE Manual, which is intended to “establish[] uniform policies and procedures for the location, design and environmental evaluation of highway construction projects on the state highway system,” is available online at <http://www.dot.il.gov/desenv/bdmanual.html>.

BDE Manual states that for grade separation projects initiated by IDOT, 100% of the cost will be borne by IDOT except that “[w]here the Railroad has no definite plan for the installation of additional future tracks within a reasonable time, the Railroad will be responsible for 100% of the increased costs due to providing space for the additional future track(s).” BDE Manual § 7-1.02(a)(1)(b). Implicit in this statement is that where the railroad *does* have a definite plan for the installation of additional future tracks, the grade separation will be constructed to accommodate those tracks, and IDOT will be responsible for the increased cost of the grade separation.

As noted in the Application, *see* CN-2 at 222, CN has long planned to double track the portion of the EJ&E line at Ogden Avenue.⁹ Therefore, that grade separation structure needs to be able to accommodate at least two rail lines. IDOT has stated that it is amenable to this plan. *See* Comments at 4 (“IDOT is prepared to plan, design, and construct grade separations that would permit CN to install a second track”).

In addition, CN believes that the Ogden Avenue structure should be able to accommodate a third line, to allow for a dedicated passenger line if and when the STAR Line is ever built. IDOT has participated in planning meetings with Metra related to the STAR Line, and is aware of Metra’s interest in a dedicated passenger rail line for this portion of its system. In fact, CN understands that IDOT met with Metra the day before filing its Comments to discuss Metra’s plans for the STAR Line and its possible effects on the Ogden Avenue grade separation.

Given the intense interest in the STAR Line, and the recognition by the Board’s Section of Environmental Analysis (“SEA”) that construction of the STAR Line is reasonably foreseeable and that the Transaction would not preclude that construction, DEIS at 4.1-45, 4.1-

⁹ The EJ&E rail line that crosses Lincoln Highway is already double tracked.

47, CN believes the prudent course is to build the grade separation structure so that it might accommodate a dedicated track for STAR Line, rather than potentially to require expansion of the structure if the STAR Line is built.¹⁰ Indeed, Metra's STAR Line could rise to the level of a "plan" under the BDE Manual, which would appear to require IDOT to fund the extra cost of accommodating that line for the grade separation. This is just one of the issues that the parties should be allowed to discuss and attempt to resolve themselves, just as IDOT has done on dozens of other grade separation projects.

B. IDOT's Request for Clarification Regarding the Proper Arbiter of the Appropriate Engineering Standards

IDOT states that CN has "demanded" that its Guidelines be followed in the building of grade separation structures. Comments at 5. Further, IDOT asserts that following those Guidelines would allow CN to "place an obstacle in the way of progress on these projects by attempting to impose its own design guidelines" in the event of a "major disagreement between IDOT and CN about the standards to be followed." *Id.*

CN did not "demand" anything. CN submitted its standard grade separation Guidelines in response to a request from IDOT's engineering consultant for design standards and criteria that CN would like to see incorporated into the projects. CN believes that its Guidelines should be used to the extent possible – a position with which IDOT has told the Board it is comfortable.

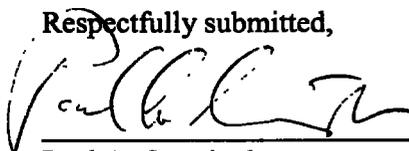
¹⁰ SEA acknowledged the possibility that the STAR Line might entail "either as a co-mingled freight and passenger service on the EJ&E rail line or as a standalone passenger rail service on an additional third track within the ROW of the EJ&E rail line." FEIS at 3.3-40. It would be imprudent to ignore and potentially foreclose one of these options prematurely, especially in light of the Board's requirement that CN "work with Metra to explore all options for service on the proposed STAR Line, including use of the EJ&E rail line." Decision No. 16 at 64 (VM-39). (If, however, at IDOT's insistence, the grade separation at Ogden Avenue is constructed so that modification is necessary to accommodate later construction of the STAR Line, CN should not be held responsible for paying any amount towards later improvements that might be necessary to accommodate a third passenger-only line.)

See Comments at 5 (“IDOT will maintain flexibility and will seek to accommodate CN by incorporating the railroad’s design criteria as much as possible and practicable”). The parties agree on the role the Guidelines should play, so it is entirely unclear why IDOT feels it needs clarification or why the Board should issue a clarification regarding this question when no concrete issue has been raised with the Board, much less negotiated between the parties.

CONCLUSION

For the foregoing reasons, intervention by the Board in this matter is unnecessary at this time, and the Board should deny IDOT’s request for clarification.

Respectfully submitted,



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*Counsel for Canadian National Railway Company
and Grand Trunk Corporation*

March 15, 2010

CERTIFICATE OF SERVICE

I certify that I have this 15th day of March, 2010, served copies of the foregoing Applicants' Reply to Comments Seeking Clarification of Illinois Department of Transportation (CN-60) upon all known parties of record in this proceeding by first-class mail or a more expeditious method.



Christine Mellen

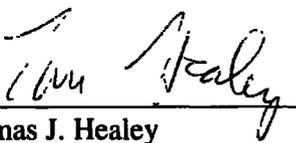
**VERIFIED STATEMENT
OF
THOMAS J. HEALEY**

1. My name is Thomas J. Healey. I am Counsel - Regulatory employed by Illinois Central Railroad Company to provide legal advice to the U.S.-based operating railroad subsidiaries of Canadian National Railway Company. I have been asked to submit this statement in response to the "Comments Seeking Clarification" filed by Illinois Department of Transportation ("IDOT") with the Surface Transportation Board in STB Finance Docket No. 35087.
2. I attended an initial coordinating meeting convened by IDOT on January 28, 2010, regarding the Ogden Avenue and Lincoln Highway grade separation projects.
3. I have read the response to IDOT's comments regarding that meeting (CN-60) and believe the factual statements in that response to be true and correct.

I, Thomas J. Healey, 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 March 9, 2010



Thomas J. Healey