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June 25, 2010

## **BY E-FILING**

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 CN's Response to TRAC's Comments Pursuant to Board Decision No. 23.

Yours truly,



David A. Hirsh

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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**CN'S RESPONSE TO  
TRAC'S COMMENTS PURSUANT TO BOARD DECISION NO. 23**

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**CN'S RESPONSE TO  
TRAC'S COMMENTS PURSUANT TO BOARD DECISION NO. 23**

In response to Decision No. 23, CN<sup>1</sup> filed comments (CN-62) on HDR's Final Report<sup>2</sup> addressing various specific issues raised in the Final Report and pointing out that the Final Report generally confirmed that CN has been complying with its obligations under the Approval Decision<sup>3</sup> and that CN is cooperating with local communities to mitigate the adverse impacts of additional rail traffic expected as a result of the Transaction. CN also responded to the Final Report and Decision No. 23 by: (a) filing new blocked crossing information extracted and compiled by Progress Rail, its vendor for cellular remote terminal units ("RTU"); (b) greatly expanding its monthly blocked crossing reports based on ongoing efforts to improve the quality,

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<sup>1</sup> As used herein, "CN" refers to Canadian National Railway Company, Grand Trunk Corporation, and their U.S. railroad subsidiaries. Unless otherwise defined, other short forms and abbreviations have the meanings set forth in the Table of Abbreviations in the Application (CN-2 at 8-11), which CN hereby incorporates by reference.

<sup>2</sup> Compliance Support Verification Final Report submitted to the Board by HDR Engineering, Inc. ("HDR") on April 14, 2010 ("Final Report").

<sup>3</sup> Decision No. 16 (STB served Dec. 24, 2008) ("Approval Decision").

processing, and collection of RTU messages; and (c) re-reviewing its internal records and voluntarily re-filing prior monthly accident and injury reports to supplement them, not only with the additional category of incidents discussed by HDR in its Final Report, but also with additional incidents that CN believes might be of interest to the Board even though they were not discussed by HDR or required to be reported to FRA.<sup>4</sup>

CN has also continued its focused efforts discussed in its comments to identify and implement means to address EJ&E's operational impacts on local communities.<sup>5</sup> This has involved ongoing intensive reviews of operating and engineering issues on a site specific basis to identify locations where automated crossing warning devices ("ACWD") activations can be reduced. In addition, CN is holding daily calls to review ACWD activations of 10 minutes or more and to maintain focus on operations and execution, and it is using all the tools available to it, including additional training of dispatchers and discipline for train crews who violate CN's rules and policies, in an effort to address crossing blockage issues.

The only other party that filed formal comments on the Final Report was TRAC,<sup>6</sup> which accuses CN of a pattern of deception and argues that various investigations, new reporting obligations, and sanctions are necessary. Principally, TRAC attempts to recast CN's failure to

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<sup>4</sup> See, e.g., Letter from David A. Hirsh to Matthew T. Wallen (April 26, 2010) (transmitting resubmitted blocked crossing reports and raw RTU data); Letter from Karen Borlaug Phillips to Matthew T. Wallen at 2-5 (May 10, 2010) (describing expanded blocked crossing report); Letter from Karen Borlaug Phillips to Matthew T. Wallen (June 16, 2010) (transmitted restated accident and injury reports).

<sup>5</sup> Most recently, on April 30, 2010, CN entered into a voluntary mitigation agreement ("VMA") with Barrington Hills to address its remaining concerns with the Transaction. With that agreement, CN has VMAs in place with 22 of the 33 communities situated on the EJ&E.

<sup>6</sup> In addition, five members of the Illinois and Indiana Congressional delegation sent a letter to the Board's Office of Governmental and Public Affairs commenting on Decision No. 23 and on the hearing held on April 28, 2010, in accordance with that decision.

come forward sooner with RTU information as part of an effort to hide RTU information in order to mislead or deceive the Board and the public.

CN rejects TRAC's characterizations. The company responded to the Board's concerns on these matters at the April 28 hearing and in written testimony, and explained why it had believed in good faith that its blocked crossing reporting up to that time was in compliance with the Board's oversight directives. And, as Mr. Trafton testified at the Board hearing, to the extent that CN failed to meet the Board's expectations to discuss sooner the usefulness of RTU messages in potentially developing a more complete understanding of blocked crossings, regardless of CN's concerns about the limitations of the information, it regrets and takes responsibility for that (Transcript at 57; Trafton Statement at 3). CN has been making and continues to make every effort to provide useful crossing blockage information, including working closely with its vendor to improve the collection, quality, and reporting of that data. CN has made no effort to mislead or deceive the Board or the public.<sup>7</sup>

TRAC's comments reflect fundamental misconceptions and include numerous misstatements concerning the availability, functioning, and use of RTUs, and the nature of RTU information. These must be addressed if the Board and the public are to understand the matters TRAC discusses. Thus, although Decision No. 23 does not specifically provide for replies to comments on the Final Report, CN hereby respectfully requests, pursuant to 49 C.F.R. § 1117.1,

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<sup>7</sup> TRAC's contrary assertions fail at a basic logical level. CN would not have begun integrating and using RTU information to help verify the accuracy of its reports of crossing blockages due to stopped trains if it had been intent on hiding the existence or potential usefulness of that information. Nor would it have voluntarily revealed its use of the RTU information to HDR as part of its audit. *See* Trafton Statement at 2 ("With respect to the data at issue here, we freely shared with HDR the fact that, in order to help prepare our monthly report to the Board of grade crossing blockages by stopped trains, CN had begun using ACWD activation notices generated by Cellular Remote Terminal Units (or RTUs) located at EJ&E's automated grade crossings. HDR did not have to dig to determine that fact, we volunteered it.").

that the Board accept this response to TRAC's Comments in order to correct the record and provide the Board and the public with an accurate understanding of the facts and issues presented.

**I. TRAC'S ARGUMENTS CONCERNING RTU REPORTING AND INFORMATION**

**A. RTUs Are Not Widely Used by CN or the Rail Industry and Are Not Designed or Generally Configured to Provide Messages Concerning ACWDs of 10 Minutes or Longer**

TRAC suggests that RTUs are widely used at CN and within the rail industry and questions how Mr. Trafton and others at CN could not have known about that technology and its potential for use in reporting crossing blockages of 10 minutes or more. TRAC Comments at 8. As support for these propositions, TRAC cites Mr. Morton's testimony that RTUs are installed at as many as 4,500 grade crossings nationwide, and it claims, based on installation records, that CN has been using RTUs on "at least 72 crossings within the EJ&E arc since 2003." It asks for more information about RTUs on CN's system, *id.* at 10, and, based on its supposition that working RTUs may be widespread, it asks that CN be required to expand its blocked crossing reporting to lines within the EJ&E arc as well as to other urban areas that are part of CN's network, *id.* at 14-15.

TRAC's evidence and arguments are highly misleading, and its requests for further reporting are misplaced. There are over 136,041 public grade crossings nationwide,<sup>8</sup> which means that 4,500 RTUs would at most represent only about 3% of the total.

As for the CN system, TRAC's speculation that CN may have many working RTUs at crossings apart from those on the EJ&E is incorrect.<sup>9</sup> CN has only two functioning RTUs on its

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<sup>8</sup> FHWA Safety Program - Facts and Statistics, [http://safety.fhwa.dot.gov/xings/xing\\_facts.cfm](http://safety.fhwa.dot.gov/xings/xing_facts.cfm) (last visited June 24, 2010).

system at non-EJ&E crossings.<sup>10</sup> Although old analog RTUs had been installed at some other non-EJ&E crossings on the CN system, they are no longer functional because they were not converted to digital technology when cell phone companies were permitted to shut down their analog cellular networks in early 2008.<sup>11</sup>

As discussed below, even when RTUs have been in use, their primary function has been to monitor the functioning of the crossing equipment through messages sent to signal maintainers. Apart from this proceeding, RTUs have never been used by CN (or, to CN's knowledge, by anyone else) to systematically collect information concerning the frequency or duration of blocked crossings.<sup>12</sup> Therefore, whatever else one might assume about CN's knowledge of RTU equipment, there would have been no reason to expect CN to associate RTUs with the Board's blocked crossing reporting requirement merely by notice of the existence of RTUs on EJ&E.

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<sup>9</sup> TRAC also speculates that CN might have known about the RTUs through its due diligence in acquiring EJ&E. TRAC Comments at 9. As RTU equipment would not materially affect the value of EJ&E for acquisition, there was no reason for RTUs to be brought to the attention of railroad management as part of due diligence.

<sup>10</sup> The two non-EJ&E crossings where CN has functioning RTUs are on its Freeport Subdivision at 1st Avenue and at Cermak Road. Illinois has also recently agreed to pay 90% of the cost for installing RTUs on CN lines over which Amtrak operates in Illinois south of the EJ&E arc. *See* Stipulated Agreement between Illinois Commerce Commission and Illinois Central Railroad Company, ICC Docket No. T10-0094 (filed May 19, 2010). CN is, therefore, not in a position, as TRAC proposes, TRAC Comments at 14-15, to provide gates down information for all of its lines inside the EJ&E arc or for other urban locations on its system.

<sup>11</sup> A major reason EJ&E may have been willing to convert its analog RTUs to digital technology was that the State of Illinois agreed to fully fund that conversion. *See* Stipulated Agreement between Illinois Commerce Commission and Elgin, Joliet & Eastern Railway, ICC Docket No. T08-0087 (filed June 12, 2008).

<sup>12</sup> As noted by CN in its comments on the Final Report (at 22 n.33), according to Progress Rail the only RTUs in the country configured to provide messages of ACWD activations of 10 minutes or more are those on CN/EJ&E.

In sum, it is not at all surprising that Mr. Trafton and others at CN would not have been familiar with RTUs and their potential to assist in reporting blocked crossings. Prior to this proceeding, these units were viewed as related primarily to signal maintenance; they are not in widespread use by the freight rail industry and, apart from those on the newly acquired EJ&E, since 2008 there have been only two working RTUs on the entire CN system.<sup>13</sup>

**B. The Use of RTU Messages to Provide Systematic and Reliable Crossing Blockage Information Has Been and Remains a Complex and Challenging Process**

TRAC suggests that the RTUs as installed on EJ&E provided a ready-to-use source of complete and accurate crossing blockage data of the type required by Condition No. 2.<sup>14</sup> Yet CN is still working to fully understand and utilize the RTU data to fulfill the Board's requirements. That work has been challenging because the RTUs were designed to automatically provide signal maintainers with information about the status of an ACWD – whether, for example the ACWD is experiencing a power failure or the crossing gates are stuck down or up. RTUs were not designed and, insofar as CN is aware, have not been used before to systematically monitor and report on crossing blockages.

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<sup>13</sup> Had the prospects for use of RTUs for reporting blocked crossings been common knowledge, as suggested by TRAC, then the Illinois Commerce Commission (which paid for installation of the RTUs, and is a party to this proceeding) or HDR (with its considerable railroad expertise) might have been expected to suggest as much to the Board.

<sup>14</sup> See, e.g., TRAC's Comments at 5 (“[RTU] technology . . . *easily captures* the relevant data”) (emphasis added). Condition No. 2 requires CN to report “the frequency, cause, and duration of train blockages of crossings of 10 minutes in duration or greater, listing each delay and including any notifications from persons affected by the blockage and the time of the beginning and end of each delay. Applicants shall summarize the cause of each type of blockage that the Applicants self-report and shall state how the Applicants intend to reduce the incidence of all blockages not attributed to emergencies or weather-related incidents (sometimes called Acts of God) in the quarterly report.” Approval Decision at 73. As discussed in more detail below, messages from RTUs can only be used to determine the time, location, and duration of 10-minute crossing blockages; they cannot be used to provide any of the additional information required by the Board and cannot distinguish “train blockages” from other events.

RTUs do not themselves measure the duration of ACWD activations such as gates down events (they have no timers), and they do not send their messages directly to CN. They act essentially as message generators for inputs received from various elements of the crossing warning device that are contained within the crossing bungalow. The devices rely on what is known as “exception-based logic” – they send messages to Progress Rail’s central office system (in Cincinnati) when preprogrammed channels that the RTUs monitor change between a normal state and an alarm state. The RTUs on EJ&E have seven different channels, one of which picks up an indicator from the ACWD that it has been activated for 10 minutes. Other channels monitor such things as power failures, whether maintenance activities are being conducted on the ACWD (“jumpers in use”), and whether gates are stuck up or down.

Following an alarm, whether on one channel or multiple channels, the RTUs on EJ&E are programmed to send an “all normal” message to the home office system only after all channels are back to a normal state. In other words, when two or more alarms have occurred, there is no discrete message provided when just one of those alarms returns to normal. The messages sent by RTUs to the central office system receive their date and time information only when the RTU successfully connects with the cellular network, which is sometimes delayed. Once the central office system receives a message from the RTU, depending on the setting of the individual RTU, the central office system processes it and then sends a fax or an e-mail, or both, to one or more designated recipients.

With respect to the gates down 10 minutes alarm, the RTUs can provide no information other than the time and location of the alarm (and, with the “all normal” message matching algorithm recently developed by Progress Rail at CN’s request, the estimated duration of the blockage) and therefore are blind to the reason for activation. RTUs cannot tell (and cannot be

programmed to tell) whether a train is present; if a train is present, which train it is; or, if a train is present, why the train is either stopped or moving slowly. All that information must be supplied by either the train crew or CN's dispatchers.

Through the time of the HDR audit, all that CN had available to it were the faxes and e-mails of individual RTU messages, because they were the only forms in which the RTU information was being received by CN.<sup>15</sup> These individual messages require considerable work to collect, interpret, and match (as between "alarm" and "all normal" messages), and present significant issues of accuracy and completeness that, as discussed below, CN and Progress Rail are only now coming to fully appreciate.<sup>16</sup>

Since the time of the HDR audit and following Decision No. 23, CN, with the assistance of Progress Rail, has been focusing a great deal of its time and attention on how to use the RTU messages that are stored on Progress Rail's home office systems as a means to improve the accuracy and completeness of CN's crossing blockage reporting.<sup>17</sup> But even with this source of

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<sup>15</sup> CN did not originally know, and its vendors never suggested, that there were messages stored in digital form on the home office system of the vendors that, with extraction and processing, might potentially be useful for identifying blockages.

<sup>16</sup> TRAC argues that it is inconsistent for CN to claim that this information was not itself reliable for reporting purposes while CN was at the same time utilizing this information to assist in the compilation of its reports on blocked crossings for stopped trains. TRAC Comments at 7-8. TRAC fails to appreciate that, given CN's well-placed concerns regarding the reliability of the RTU information, it was making only tentative and limited use of that information by comparing it to direct reports from the field of ACWD activations caused by trains stopped for 10 minutes in order to see if it identified possible additional ACWD activations that might warrant further investigation. This limited use, in conjunction with CN's independent field confirmation of the blockages by stopped trains, was not an indication that CN had confidence that the RTU messages themselves provided sufficiently reliable information for reporting purposes. To the contrary, it was part of CN's broader effort to try to understand and validate the RTU messaging information.

<sup>17</sup> CN has informed the Board that it expects to supplement and correct the crossing blockage information filed on April 26, 2010, to address issues that were known at the time of that filing or that have subsequently come to light, some of which are described below.

messages available, the challenges of using RTU messages to report all crossing blockages of 10 minutes or more have been and remain significant. Set forth below is a sampling of the issues we have encountered. These issues illustrate the complexity and difficulties encountered at virtually every stage of the process.

1. Having never been called upon to try to compile blocked crossing data from the raw RTU messages stored on its server, Progress Rail had to write a new program to isolate the messages for ACWD activations of 10 minutes, match each of those messages with its corresponding “all normal” message, and ultimately extract and present that information.
2. Under the time pressures of the Board’s Decision No. 23, the earliest batches of data extractions, reported in the data filed by CN on April 26, 2010, double counted ACWD activations of 10 minutes or more for the months of July 2007 through March 2008.<sup>18</sup> The filing noted above at footnote 17 will correct this.
3. As noted in CN’s April 26, 2010 cover letter to its data filing (at page 2), there was a more systematic problem with the extraction of ACWD activations of 10 minutes or more from the raw RTU message data that could not be fixed in time for that filing. This problem relates to the need to eliminate from the extraction duplicative messages of ACWDs of 10 minutes or more that are automatically generated by RTUs when, because of communication problems, their original messages are not acknowledged in time by the server. This error resulted in an overstatement of approximately 2% for all months, which will be corrected in the filing noted above at footnote 17.
4. CN recently learned of potential issues regarding the faxes and e-mails it receives of RTU messages. After initial inquiries, CN had understood that all RTU messages were being sent to CN as both faxes and e-mails and that those involving blocked crossings were all being sent to its dispatchers. Progress Rail recently reported, however, that individual RTUs had been set to provide specific messages to different people, and sometimes to provide those messages in only one form (fax or e-mail) rather than both. This appears to be one reason for the disparity in some prior months between CN’s dispatcher spreadsheets (which display blockage reports collected by CN through its use of individual RTU messages and reports from the field) and the data provided by Progress Rail from

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<sup>18</sup> This explains what has always appeared to be a data anomaly, but was initially thought by CN to potentially be related to differences between analog units operating during 2007 and digital units that began operating in March 2008. It also moots TRAC’s numerous speculations and questions related to alternative explanations for the anomaly. *See* TRAC Comments at 11-12.

its home office systems.<sup>19</sup> This problem has now been addressed by reconfiguring all RTUs to consistently report as fax and e-mail all ACWD activations of 10 or more minutes to CN's dispatchers.

5. As discussed above, the RTUs are multichannel, and if two or more channels go into alarm mode at the same time, an "all normal" message is not generated until all channels revert to a normal state. This is consistent with the intended use of the RTUs to let signal maintainers know when there is a potential problem with the ACWD. When one or more other alarms overlap with a message that gates have been down 10 minutes or more, and extend beyond the time that the gates are down, this results in a delay in the issuance of the "all normal" message necessary to determine the duration of the crossing blockage. The result is an overstatement of crossing blockage duration, which can be identified with a labor-intensive effort, but cannot be corrected. Progress Rail has suggested this issue might be fully addressed by reprogramming each individual RTU to provide for channel-by-channel notification relating to ACWD activation. CN is actively exploring this option to determine, among other things, whether such reprogramming could cause disruptions to RTU messaging or lead to other data issues.
6. As CN has previously reported, it has been working with Progress Rail to provide real time ACWD activation information to communities as part of CN's new Active Crossing System ("ACS"). This system requires that RTUs be reconfigured to provide a message immediately upon ACWD activation (rather than after 10 minutes). So far, seven RTUs have been reconfigured. This, however, has led to a new challenge. If there are modest server delays in processing the gates down messages from these reconfigured units, as happens with some regularity due to cellular communication delays, the result can be an alarm message for which there is no appropriate corresponding "all normal" message. When that happens, the extraction of the RTU messages can over report the duration of ACWD activations and indicate there are ACWD activations of 10 minutes when there were not. Unless and until a systematic fix can be developed for this problem, it can only be identified and corrected by hand.

Despite these and many other challenges, CN remains dedicated to providing the most accurate and timely reports of crossing blockages reasonably possible. It has added dedicated

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<sup>19</sup> This disparity was a subject of comment by TRAC. TRAC Comments at 14, Attachment C. Contrary to TRAC's suggestion, the disparity has nothing to do with improper instructions to CN's dispatchers. As CN has made clear, the primary focus of its entire team prior to Decision No. 23 was the identification of crossing blockages caused by trains stopped 10 minutes or more. CN began to collect and add to its dispatcher spreadsheets additional blockage information using RTU messages only as a cross check to be sure it was not missing any such blocked crossings. It is now apparent that its effort to do so was hampered by the communication issue noted in text above.

full-time management and other personnel to that process, and continuously pressed to improve the available crossing blockage information and the processes for collecting and reporting it. The suggestion that collecting information on and reporting all crossing blockages of 10 minutes or more is simple or became simple due to the availability of RTU messages is wholly unrealistic.

**C. TRAC’s Conclusions and Concerns Based on the Available RTU Data are Unfounded**

TRAC makes a number of general claims concerning patterns of blockages. It asserts that CN has caused a “day/night” shift in blockages (by which it apparently means that CN is causing a higher percentage of its blockages during the day than existed on EJ&E prior to CN control) that is “grid-locking vehicular traffic.” TRAC Comments at 12-13. It also asserts that CN is causing a higher “rate” of blockages during rush hour (which it defines as weekdays 6 to 8:30 a.m. and 3:30 to 6 p.m.). *Id.* These claims are either unsupported or based on what appears to be a flawed analysis.

TRAC cites no evidence of suburban “gridlock” attributable to the Transaction. The available blockage data shows that total blockages of 10 minutes or more have not on average worsened under CN control.<sup>20</sup>

As for TRAC’s claim of a shift toward greater daytime operations, that is actually the opposite of the concern noted in HDR’s report (with respect to noise) – that CN might be

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<sup>20</sup> Based on the crossing blockage information filed by CN on April 26, 2010, and CN’s crossing blockage reports for April and May 2010, the average number of monthly blockages on EJ&E under CN control has been lower than prior to CN control. This is true even after that data is adjusted to eliminate the double count for July 2007 to March 2008, discussed in Section I.B., above, and even ignoring the fact (previously reported) that there was a known undercount of EJ&E blockages during March 2008 (and possible undercounts also in February and April 2008), when many RTUs were turned off as part of the process of converting them from analog to digital.

operating more frequently during the evening (*see* Final Report, App. 2 at 4). This illustrates the fact that there is no clearly better day/night distribution in terms of local impacts from train operations – night operations may be preferable for congestion but day operations may be preferable for noise. In any event, as CN explained in response to HDR’s concern, CN “has not attempted to schedule a disproportionate number of trains for nighttime, and does not foresee a significant change in the distribution of its operations by time of day after full integration.” CN-62 at 17-18.

Similarly, CN has not attempted to shift additional traffic to the rush hour period, and believes, if anything, its operations tend to be reduced during rush hour in light of heavier commuter rail activity crossing the EJ&E. TRAC purports to show differences between CN and EJ&E in “rates of blockages” during rush hour, but what is more important to drivers are actual numbers of blockages, about which TRAC says nothing.

Moreover, although TRAC provides no clear explanation of either its methodology or the data it used for its analysis, from what little TRAC does reveal, CN believes that TRAC’s analysis is flawed. It appears, for example, that TRAC may have drawn some of its information from HDR’s data in the Final Report and some from the initial data submitted by CN to the Board. This would result in an apples-to-oranges comparison as the HDR data and the data submitted by CN to the Board cover different crossings<sup>21</sup> and different time periods.<sup>22</sup> Further, as CN explained in its May 10, 2010 cover letter to its operating reports, the “Approx Time”

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<sup>21</sup> Although CN has previously explained the scope of HDR’s data and the extracted RTU data that CN has submitted, TRAC admits that it remains confused. TRAC Comments at 13. The RTU data that CN has provided the Board has been (and was clearly identified as) data for all EJ&E lines, which is a broader data set than was provided by HDR in its Final Report, where HDR limited its data to EJ&E’s former Eastern and Western Subdivisions, which do not include such portions of EJ&E as its Illinois River Line, Lake Front Line, City Track, and Joliet Yard.

<sup>22</sup> The data provided in HDR’s report was limited to the winter months of November and December, whereas CN’s data covered many more months.

column in CN's restated blocked crossing reports filed by CN on April 26, 2010, was stated in Greenwich Mean Time. One cannot tell from TRAC's comments, but it seems unlikely that TRAC adjusted those times as necessary to correspond with Central Time as used in the HDR data. This potential error (which underscores the complexity and difficulty of dealing with this information) would by itself completely throw off TRAC's assignment of blockages by time of day.

As discussed earlier, CN expects to supplement and correct the crossing blockage information originally filed on April 26, 2010. That re-filed information will help facilitate any time-of-day comparisons for crossing blockages that may be of interest to the Board or public.

**D. TRAC's Claims and Concerns About CN's Present and Future Operations are Unfounded.**

CN addresses in this section a number of unfounded claims and concerns raised by TRAC regarding CN's present and future operations. The most fundamental of these is TRAC's speculation, based on its assertion of unspecified CN "failures to date" and the fact that CN's operating plan calls for moving additional traffic from its Chicago lines to EJ&E, that there will be large increases in future crossing blockages upon full implementation of the Transaction. As an initial matter, CN disagrees with TRAC's wholly unsupported characterization of its recent operation of the EJ&E as a "failure." TRAC Comments at 12. With respect to blocked crossings, for example, as noted in Section I.C., the available data indicate that, on average, there have been fewer blockages of 10 minutes or more since CN assumed control.

As for TRAC's concerns with future blockages due to increased traffic, it is important to understand that CN designed its operating plan and its planned infrastructure upgrades so that the

EJ&E can be operated as efficiently as possible with those additional volumes.<sup>23</sup> Consistent with CN's operating plan, CN does not expect new traffic to greatly affect the number of blockages of ten minutes or more, especially once all infrastructure upgrades are completed.<sup>24</sup> In addition, CN is continuing to evaluate locations where crossing blockages occur and whether additional infrastructure upgrades in those areas would both alleviate the blockages and be economically justified.

TRAC asks (at page 11) that CN be required to provide details as to where on the EJ&E planned infrastructure updates should result in decreased blockages. CN has already addressed this issue in both its testimony before the Board<sup>25</sup> and its comments on the HDR Final Report.<sup>26</sup> Should the Board nonetheless require additional information, CN will of course provide it.

TRAC also suggests, based on a brief quote from Mr. Trafton's oral testimony, that the Board should investigate issues relating to slow orders on the EJ&E. TRAC Comments at 16-17. What Mr. Trafton was discussing was the fact that CN has been improving line maintenance and infrastructure in an effort to resolve the underlying track conditions that, for safety reasons, have previously required the use of slow orders. *See* Trafton Written Testimony at 7; Transcript at 102-03. Thus, a reduction in slow orders means that CN has made an investment or taken other steps that permit CN to safely increase train speeds. Increased train speeds in turn decrease the

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<sup>23</sup> In addition, contrary to TRAC's claim that "the environmental review process did not examine data on crossing blockages," TRAC Comment at 15, the EIS included extensive analysis of the potential for crossing blockages. In fact, SEA estimated the average crossing delay at each crossing on lines where traffic volumes were expected to increase as a result of the Transaction. *See, e.g.*, DEIS at 4.3-11—15.

<sup>24</sup> Likewise, CN does not anticipate that there will be any specific locations where blockages "will likely increase exponentially once all infrastructure upgrades have been completed on the EJ&E," as suggested by TRAC. *See* TRAC Comments at 11.

<sup>25</sup> Trafton Statement at 7-8

<sup>26</sup> CN-62 at 24-27.

amount of time a moving train occupies any crossing in the vicinity of the track on which a slow order has been imposed. There is no basis for TRAC's effort to draw negative inferences from CN's positive efforts to reduce slow orders to help address crossing blockages.

TRAC similarly tries to raise a maintenance issue by citing an old e-mail from an Elgin resident concerned about potential erosion near a CN track. TRAC Comments at 17. TRAC claims that the complaint was never investigated. *Id.* To the contrary, as CN explained almost a year ago (in its July 16, 2009 letter to the Director of the Board's Office of Public Assistance, Governmental Affairs and Compliance, which was posted on the Board's Oversight and Monitoring website), CN's "engineers have reviewed the situation and determined that it poses no current threat to our track. We will continue to monitor this situation."

## **II. TRAC'S OTHER CLAIMS THAT CN HAS ENGAGED IN A "PATTERN OF DECEPTION" ARE UNFOUNDED.**

TRAC raises three other incidents that it claims "indicate that CN has been engaged in a pattern of deception throughout this transaction." TRAC Comments at 19. They demonstrate nothing of the kind.

First, TRAC reviews an old claim that, in CN's July 10, 2009 environmental report, CN misrepresented that required "signage was in place." CN's statement, however, was correct. Each crossing had signage in place, conforming to VM 9, when CN acquired EJ&E. As discussed in HDR's report and CN's memo on this issue, the decision was made to wait to install new signs until the new edition of the Federal Highway Administration's Manual on Uniform Traffic Control Devices ("MUTCD") was released. The existing signs that were in place complied with the then-current version of MUTCD, and the new signs CN has installed comply with the new edition of MUTCD, as required by VM 9. TRAC ignores the fact that the essence

of its complaint – that CN’s signs were not or are not prominent or large enough in TRAC’s view (see TRAC Comments at Attachment E) – is TRAC’s subjective opinion, and that MUCTD standards make clear that oversized warning signs are to be avoided lest they themselves become a distraction and hazard to drivers.<sup>27</sup>

Second, TRAC complains about CN’s reporting of a minor accident that occurred on October 3, 2009, when a train was misdirected into a yard as a result of an incorrectly lined switch. The accident was included in CN’s accident and injury report for October 2009. While TRAC would apparently have CN add more detail, it has not shown that CN’s description of the incident was in any way inadequate or inaccurate.

Finally, TRAC criticizes CN for its supposed failure to report a brush fire caused by a sparking locomotive in 2009. In fact, the incident regarding the sparking locomotive was described in CN’s May 10, 2009 cover letter to its monthly operating reports for April 2009. As CN noted in that letter, the incident was not required to be reported to the FRA because no injuries were sustained and no damage was done to rail property.

### **CONCLUSION**

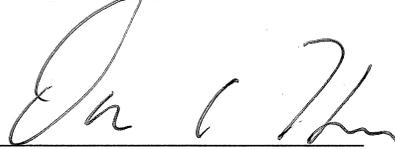
CN rejects TRAC’s characterization of its compliance with the Board’s oversight directives. CN is making every effort to meet the Board’s expectations regarding CN’s reports on the operations of the EJ&E. Pursuant to Decision No. 16 and Decision No. 23, CN is reporting an enormous amount of data about crossing blockages and other matters, and is working hard to improve further the quality of its reports, many of which are unique to this Transaction.

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<sup>27</sup> Federal Highway Administration, U.S. Department of Transportation, Manual on Uniform Traffic Control Devices for Streets and Highways, Section 8B.18, P9 (2009 ed.).

TRAC's Comments should also not be allowed to obscure the bigger picture. There has not been a major increase in the overall impact of railroading on the communities located along the EJ&E since the Transaction. And to the extent there have been new impacts, they have been the anticipated result of the effort to implement the Transaction that the Board found would serve the public interest in improving the overall rail transportation environment in the Chicago area. CN continues to address and mitigate those impacts, as recounted in CN's own comments on the Final Report.

Respectfully submitted,



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June 25, 2010

## CERTIFICATE OF SERVICE

I certify that I have this 25th day of June, 2010, served copies of CN's Response to TRAC's Comments Pursuant to Board Decision No. 23 (CN-63) upon all known parties of record in this proceeding by first-class mail or a more expeditious method.



Christine A. Mellen