



July 16, 2012

Lucille Marvin
Acting Director
Office of Public Assistance, Governmental Affairs and Compliance
Surface Transportation Board
395 E Street SW
Washington, DC 20423

**RE: Canadian National Railway Company Acquisition of the EJ&E West Company
Second Audit June 2012**

Dear Ms. Marvin,

On behalf of the greater Chicagoland communities impacted by the acquisition of the EJ&E rail line by Canadian National Railway (CN) in 2009, TRAC submits comments and makes recommendations ensuing from a review of the June 2012 Second Audit Report that was recently prepared for the Surface Transportation Board by HDR Engineering Inc. (HDR) relative to Finance Docket No. 35087.

TRAC respectfully submits that the June 2012 Audit Report prepared by HDR fails to provide meaningful information and/or analysis that the Board must have to satisfy the oversight/monitoring obligations that the Board imposed upon itself when it approved CN's acquisition of the EJ&E lines.¹ By imposing oversight authority, the Board committed to the impacted general public in the region that it would continue to monitor the situation in order to assess whether its initial environmental assumptions about the transaction would prove accurate in the aftermath of CN's commencement of operations on the EJ&E.

That commitment was clearly articulated by Vice Chairman Mulvey when he stated that "I would have preferred an approach that closely tied increasing levels of mitigation at applicants' expense to increasing levels of rail traffic, above the projections used in our analysis of this case. ***I will carefully scrutinize any***

¹ The purpose of the monitoring period was clearly enunciated in the acquisition's approval Decision No. 16 dated December 24, 2008 under Mitigation Measure 72 at page 56: "If there is a material change in the facts or circumstances upon which the Board relied in imposing specific environmental mitigation conditions and upon petition by any party who demonstrates such material change, the Board may review the continuing applicability of its final mitigation, if warranted."

divergence from applicants’ projections—both on rail and vehicular traffic – in future oversight proceedings.² (Emphasis added). Further underscoring this purpose, Board Member Buttrey commented “I fully support the Board’s decision to retain jurisdiction over this transaction and to continue oversight for at least five years and to impose monthly monitoring and public reporting by CN. This will enable the Board, if necessary, to take additional steps or impose additional requirements if conditions warrant.”³

Unfortunately, the recently concluded “audit” did not explore any divergences from the initial projections. As a result, it fails to provide the Board with the information that would be needed in order for the Board to determine whether there has been a material change in the facts or circumstances upon which the Board relied in imposing specific environmental mitigation conditions.

TRAC OBSERVATIONS ABOUT THE SECOND AUDIT REPORT

This second audit was required by the Board per Docket No. FD 35087 Decision 26 issued on December 17, 2010: “We have decided to conduct a similar audit next year to verify CN’s reports ***and to assist the Board in monitoring the impact of the transaction.***”⁴ (emphasis added) In addition to the original 2008 approval decision, that later twenty-six page Board Decision provided subsequent context that ultimately factored into the Board’s December 16, 2011 two-page letter to CN directing it to work with HDR on auditing the information found “in CN’s operational reports for the months of November and December 2011, and CN’s Quarter 2011 Environmental Report.” At no point did Decision No. 26 nor the Board’s December 2011 letter to CN state or infer that the Board’s oversight interests would henceforth be narrowly focused only on CN’s reports to the exclusion of “monitoring the impact of the transaction.”

Nonetheless, rather than undertaking a comprehensive examination of issues that could have diverged from the environmental assumptions preceding the transaction’s approval and that might be addressed in some fashion in these three 4th Quarter 2011 reports, HDR and/or CN decided to take the much more narrow approach of addressing only CN’s reporting of the four factors specifically outlined in the Board’s December 2011 letter.⁵

² STB Finance Docket 35087 Decision No. 16 dated December 24, 2008 at page 56. TRAC respectfully reminds the Board that since October 14, 2011 it has been in possession of a petition from Barrington, Illinois that provides detailed data demonstrating that HDR’s projections on vehicular traffic impacts with respect to that community have been proven to be grossly erroneous based on a 2011 post-transaction traffic analysis.

³ STB Finance Docket 35087 Decision No. 16 dated December 24, 2008 at page 57.

⁴ STB Finance Docket 35087 Decision No. 26 dated December 17, 2010 at page 15.

⁵ TRAC contends these issues were outlined in the Board’s second audit directive as specific instructions would naturally facilitate a vital update on certain aspects of the problems stemming from CN’s blockage of grade crossings for ten minutes or more.

Even when one moves beyond the fundamental flaw surrounding the extraordinarily narrow breadth of this audit report, however, the document fails to provide any rigorous analytical content. TRAC will take the liberty of addressing the failures found in certain components of this Second Audit Report to illustrate this point.

CN's progress in constructing rail improvements.

HDR spends six pages of the audit report addressing the issue of CN's progress in constructing rail improvements. Its findings? "CN's reports are consistent with the records reviewed and the observations conducted during the audit."⁶ One would think that HDR should understand that the Board's interest in construction progress is not rooted in mere idle curiosity, but instead, deemed necessary to assess the actual (as compared to the initially projected) impact of the improvements on the recognized environmental harms created by CN operations at various locations along the EJ&E.⁷

Yet, rather than reporting on how completed construction projects are impacting vehicular traffic flow and/or any other known environmental harms, HDR's audit finding is a simple statement that its personnel had witnessed construction progress as detailed in CN's reports! If the Board were to accept this finding, it would mean that the Board is no longer intent upon scrutinizing the actual environmental impacts of the transaction to determine whether they are consistent with pre-transaction assumptions. Instead, the Board will signal that it is only interested in whether CN is fully or partially truthful in its reporting obligations. TRAC cannot believe this approach would be in keeping with the Board's originally stated intent for the oversight period.

Grade crossing delays caused both by operations on adjacent rail lines (and not CN's operations), and by CN's operations at the nine crossings specified in Decision No. 26, as described in CN's operational reports.

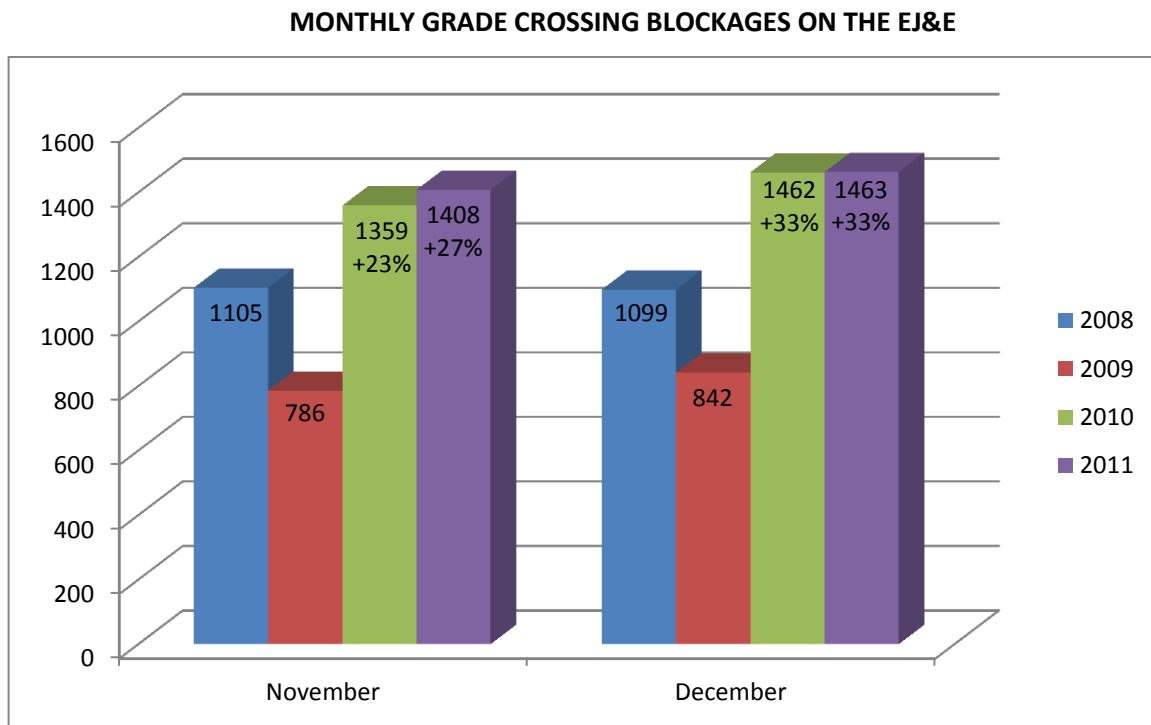
TRAC would be most grateful if HDR could explain the usefulness to the Board of the twenty-eight pages in the Second Audit Report devoted to grade crossing delays, beyond sharing HDR's determination that of the 277 grade crossing blockages attributed to something other than its own operations, CN was wrong in attributing them to circumstances beyond its control 38 times. It is hard to understand why HDR would

⁶ Canadian National Railway Company Acquisition of the EJ&E West Company Second Audit June 2012 at pages 4, 5, 6, 7 and 8.

⁷ In fact, the audit report directly addresses this rationale, so HDR's failure to analyze whether the improvements are working as envisioned is all the more baffling. "In Condition No. 16 in Decision No. 16, the Board ordered CN to construct the revised connection at Matteson, Illinois, as described in CN's letter dated August 21, 2008. The revised connection is needed to enhance train movement between the Matteson Subdivision and the Chicago Subdivision and to increase train speeds at Main Street, Cicero Avenue, and Western Avenue." At page 4 of the June 2012 Audit Report.

choose to focus so much on an issue that is germane to only 1.3% of the crossing blockages during the period of time in question.

This odd focus is especially puzzling because Decision No. 26 states that the “impact of the transaction... has resulted in an overall decrease in the average of blocked crossings... there remains 4 areas of concern where average road crossing blockages lasting 10 minutes or more per month have increased significantly.”⁸ Yet, there is absolutely no effort on the part of HDR to update that earlier conclusion to determine whether the 2009 decrease in blockages continued beyond that single year. In an effort to assist the Board through the provision of more useful data, TRAC has taken the liberty of providing greater historical context for those two months in the form of the following chart:



All percentage increases are calculated from the 2008 pre-transaction baseline.

Just this one chart does more than HDR’s twenty-eight pages to provide a modicum of context to what is occurring in regards to crossing blockages for a time period that extends beyond 2009. TRAC respectfully suggests that HDR tie this data to other context-rich information that would be useful for the Board to know:

- What percentage of total projected traffic was running on the EJ&E during these months; can that information be used to project the number of blockages that will likely occur when the EJ&E is running at CN’s promised capacity?

⁸ Canadian National Railway Company Acquisition of the EJ&E West Company Second Audit June 2012 at page 41.

- If there are decreases in blockages at certain crossings, can any decreases be attributed to infrastructure improvements made by CN?
- Can the increases in blockages in both 2010 and 2011 be attributed in any way to CN operating longer trains on the EJ&E than had been projected in its application?
- Are any variations in blockages on a full year month-to-month basis due to operational improvements instituted by CN or are they due to the natural ebbs and flows in freight volumes on the EJ&E?
- Can the increase in blockages after 2009 be attributed to trains operating at speeds slower than had been projected in the application?
- Is CN considering any additional infrastructure improvement projects that could result in a reduction of blocked crossing occurrences?

While TRAC does not pretend that the questions it has outlined are exhaustive when it comes to assisting the Board in its oversight objectives, it does demonstrate that the information provided relative to blocked crossings in the Second Audit Report does less to illuminate the impacts of the transaction than it does to obfuscate them.

Summary of November 3, 2011 derailment at Spaulding; followed by a comparison of CN's accident rates with other Class I railroads.

When HDR categorizes this section of the audit report as being a “summary,” it certainly means “summary” in the most perfunctory manner. TRAC wonders why CN provided fourteen distinct pieces of documentation to HDR (that HDR lists as in its possession) for the purpose of stating what needed no documentation to state: “The FRA’s investigation into this accident is still ongoing, and HDR is not aware of the schedule for a final report.” This section of the audit report added virtually nothing to the Board’s nor the public’s knowledge about the Bartlett (Spaulding) derailment.

The same can be said of the information provided on CN’s accident rates as compared to the other Class I railroads. HDR states: “The number of accidents per million train-miles... shows that over the past four years CN’s accident rate on a national basis, like the other Class I railroads, is less than 5 per million train miles.”⁹ Yet right before this conclusion, HDR has provided an accident rate chart that shows CN has had the highest or second highest accident rate of all Class I railroads for the past four years. This fact begs a few questions:

⁹ Canadian National Railway Company Acquisition of the EJ&E West Company Second Audit June 2012 at page 45.

- Why is CN always at the top end of the accidents chart?
- How serious are the CN accidents as juxtaposed to the record for the other Class I railroads?
- What is CN doing to improve its accident record?
- Is there anything in CN's accident record that could suggest one or more causal patterns?¹⁰

Beyond these questions relative to CN's safety record, the recent July 4, 2012 derailment of another railroad's train in the region¹¹ leads TRAC to request that the Board clarify for the general public the Federal Railroad Administration's (FRA's) obligations in conducting track safety reviews. During the EIS process, the Board assured the public that "the existing statutory and regulatory framework is designed to reduce the likelihood of an accident,¹²" however, the region learned from the news reports¹³ of this accident that the FRA is "in charge of (approving) the track on the bridge, not the bridge itself." That same news report went on to state: "The agency (FRA) delegates many inspection duties to the railroads." Given this reality, it is important for the public to understand the practical limitations of the regulatory framework designed to reduce the likelihood of accidents.

TRAC RECOMMENDATIONS ENSUING FROM THE REVIEW OF THE SECOND AUDIT REPORT

Ultimately, the Board's commitment to oversight of this transaction can only be measured by the effectiveness of the monitoring programs that are instituted to gather the data and information necessary for the Board to determine whether HDR's assumptions of environmental harms as detailed in the pre-approval EIS process are proving accurate post-transaction. Unfortunately, because CN demonstrated that it could not necessarily be counted on to live up to its legally binding reporting obligations to the Board, we now have a situation in which the Board's auditing consultant is pursuing only the red herring of CN's reporting accuracy. This gross diminution of the Board's oversight objective needs to stop.

TRAC fully recognizes that the Board is more experienced, and therefore more comfortable, when operating within its traditional purview of handling disputes between the rail industry and shippers. We remember very well the December 21, 2009 meeting when Chairman Elliott visited the EJ&E-impacted area to familiarize himself with the issue when he began his tenure as Board Chairman. When a TRAC representative inquired into what level of material evidence or change would be needed for the Board to review the

¹⁰ This is a key issue to review in the wake of the February 2012 release of the NTSB investigation report into the 2009 CN derailment near Cherry Valley, IL as that report indicated that CN's understaffing was a contributor to that tragedy that incinerated a woman stopped at a grade crossing awaiting the train's passage.

¹¹ On July 4, 2012, a Union Pacific freight train hauling coal derailed in Northbrook, Illinois as it was traveling on an overpass above vehicular traffic. That derailment led to the collapse of the overpass and the crushing death of two motorists.

¹² July 2008 DEIS Executive Summary at page 13.

¹³ *Chicago Tribune*, "Two Bodies Found at Site of Rail Bridge Collapse" from July 6, 2012.

continuing applicability of its mitigation mandates, Ray Atkins (then Chief of Staff to Chairman Elliott and the Board's current General Counsel) stated that he didn't really know as it had never occurred.

Despite the reality that these are "unknown waters" for the Board, TRAC has faith that the STB will live up to its commitment to the region and institute a robust and far-reaching monitoring audit for the period between 2012 and 2015. If the Board is truly intent upon determining whether the pre-transaction projections and assumptions were correct, we respectfully suggest that in addition to examining the issues we've already touched upon in this letter, that the Board request data and analysis that examine pre-transaction environmental assumptions relative to the following questions:

1. To what extent, if any, has the increase in CN freight traffic on the EJ&E negatively impacted Metra commuter rail and Amtrak inter-city passenger rail operations?
2. Are the average CN train lengths on the EJ&E in line with CN's application projections?¹⁴
3. Given that CN has just entered into a long-term agreement to ship bitumen from Alberta, Canada to Natchez, Mississippi,¹⁵ and the fact that CN has experienced a major increase in its ethanol business¹⁶ since the transaction was approved by the Board, are the projections for hazmat shipments running on the EJ&E still aligned with the EIS assumptions?
4. Does field monitoring demonstrate that the noise and vibration assumptions from the EIS are proving accurate post-transaction?¹⁷
5. Are the May 23, 2008 revised fuel usage estimates provided by CN during the EIS process that examined air emissions proving accurate post-transaction, or is fuel usage more in keeping with CN's original projections?¹⁸

¹⁴ A July 5, 2012 press release from CN noted that it "has extended or constructed 21 sidings to handle 12,000-foot trains between Edmonton and Prince Rupert since 2004" to "accommodate growing import-export traffic moving between the Port of Prince Rupert, the B.C. interior and major centers across CN's network in Canada and the United States."

¹⁵ From Zacks Equity Research, June 28, 2012: "With respect to Canadian National, the company expects to transport approximately 25,000 carloads of crude oil versus 5,000 carloads transported last year. As a result, the new agreement will remain accretive to Canadian National's projected growth in petroleum products."

¹⁶ CN's 2011 Investor Fact Book, outlines CN's expanding ethanol business: "CN has access to 22 ethanol production facilities in the U.S. and Canada, with an estimated annual production capacity of 1.6 billion gallons. The Company provides efficient access to key consumers in the U.S. Midwest. CN also has access to an additional 700 million gallons of ethanol production capacity on U.S. short lines. CN's ethanol traffic has tripled since 2006, reaching close to 39,000 carloads in 2010."

¹⁷ The DEIS Executive Summary (at page 18) made certain assumptions about the minimal nature of noise and vibration impacts, however, despite registered complaints and a Winter 2009 commitment by the Board to TRAC to do so, it is unclear as to whether the Board has ever verified those assumptions post-transaction by providing the promised field monitoring.

¹⁸ This is a key issue to review as the DEIS Executive Summary stated (at page 17): "Changes in emissions of air pollutant in 2015... would not exceed the *de minimus* thresholds under General Conformity rules. Thus the Proposed Action would not affect the Chicago area's ability to bring the area into attainment for ozone or particulate matter...."

6. To what extent has the tremendous growth of business at the Port of Prince Rupert (now the fastest growing port in North America¹⁹) impacted traffic volumes on the EJ&E, and to what extent could any increased freight volumes stemming from that port's rapid post-transaction growth, leading to additional track and/or capacity-enhancing construction plans for the EJ&E's ROW?²⁰

Again, the above delineated issues are not intended to be exhaustive in nature. However, they can serve as a starting point for a comprehensive review of the environmental assumptions that led to the Board's mandated mitigation measures outlined in approval Decision No. 16.

HDR Is Inherently Conflicted

In conclusion, we respectfully submit that this Second Audit Report is yet another example of HDR's fundamental inability to provide the type of unbiased information and analysis needed to properly monitor the original acquisition and the continuing appropriateness of the Board's mitigation mandates. Simply stated, because HDR played a major role in formulating many of the key environmental assumptions, one cannot realistically expect HDR to highlight its own analytical errors and admit that its analysis was flawed. While we have made that point in the past, it is hoped that the Board will now provide HDR the necessary direction to ameliorate the consequences of its conflict of interest moving forward as a way to assure the public that it's serious about its December 24, 2008 oversight commitment.

TRAC assures the Board that it can count on its assistance in participating in any future review in which the Board would attempt to identify erroneous and misleading assumptions and projections that have skewed the process and require continued oversight monitoring of this transaction. We would be most appreciative of having a seat at the table during the years of oversight that lay ahead.

¹⁹ "Port is an economic driver for B.C. -- Prince Rupert is ideally positioned and equipped to facilitate exports to China and other growing Asian markets." *Vancouver Sun* article dated June 25, 2012 by Don Krusel.

²⁰ The impact of increased volumes moving through the Port of Prince Rupert (PPR) is a matter of grave concern as demonstrated by Barrington's initial Comments filed in November 2007. However, because STB staff decided that the potential impact was too speculative, that impact has been flatly ignored. Given the undeniable increase in traffic moving through PPR, the Board should demand meaningful information that would allow it to determine whether the existing mitigation is sufficient.

Sincerely,



Karen Darch
President, Barrington &
TRAC Co-Chair



Tom Weisner
Mayor, Aurora &
TRAC Co-Chair

cc: Board Chairman Daniel R. Elliott III

Sen. Richard Durbin

Sen. Mark Kirk

Rep. John Mica

Rep. Nick Rahall, II

Rep. Bill Shuster

Rep. Corrine Brown

Rep. Peter Roskam

Rep. Joe Walsh

Rep. Judy Biggert

Rep. Randy Hultgren

Rep. Dan Lipinski

Rep. Bob Dold

Rep. Don Manzullo

Rep. Adam Kinzinger