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SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 35087¹

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

Decision No. 16

Decided: December 24, 2008

The Board approves, with certain conditions, the acquisition of control by
Canadian National Railway Company and Grand Trunk Corporation of
EJ&E West Company, a wholly owned, noncarrier subsidiary of Elgin,
Joliet and Eastern Railway Company.

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¹ This decision also embraces Elgin, Joliet and Eastern Railway Company—Corporate Family Exemption—EJ&E West Company, STB Finance Docket No. 35087 (Sub-No. 1); Chicago, Central & Pacific Railroad Company—Trackage Rights Exemption—EJ&E West Company, STB Finance Docket No. 35087 (Sub-No. 2); Grand Trunk Western Railroad Incorporated—Trackage Rights Exemption—EJ&E West Company, STB Finance Docket No. 35087 (Sub-No. 3); Illinois Central Railroad Company—Trackage Rights Exemption—EJ&E West Company, STB Finance Docket No. 35087 (Sub-No. 4); Wisconsin Central Ltd.—Trackage Rights Exemption—EJ&E West Company, STB Finance Docket No. 35087 (Sub-No. 5); EJ&E West Company—Trackage Rights Exemption—Chicago, Central & Pacific Railroad Company, STB Finance Docket No. 35087 (Sub-No. 6); and EJ&E West Company—Trackage Rights Exemption—Illinois Central Railroad Company, STB Finance Docket No. 35087 (Sub-No. 7).

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SUMMARY

In this decision, we are granting, subject to numerous environmental mitigation and other conditions, the application of Canadian National Railway Company (CNR) and Grand Trunk Corporation (GTC) (together, CN or applicants) to acquire control of the EJ&E West Company, a wholly owned non-railroad subsidiary of the Elgin, Joliet & Eastern Railway Company (EJ&E). EJ&E is a Class II railroad that operates approximately 200 miles of track in Northeastern Illinois and Northwestern Indiana, in an arc around Chicago. We are approving a transaction that will greatly improve rail transportation through Chicago, a vital rail transportation center, and will have environmental benefits to those living in and near that city. At the same time, however, the transaction will have adverse environmental impacts on communities along the EJ&E rail line, an area already stressed by existing vehicular congestion and freight and passenger rail traffic.

In reaching our decision, we have balanced both the transportation-related aspects of this transaction and the potential environmental impacts. The Board has carefully examined the effect of the transaction on transportation and competition and the concerns raised by various parties about possible anticompetitive consequences. We conclude that, with the conditions we are imposing, the transaction will not substantially lessen competition, create a monopoly, or restrain trade in freight surface transportation in any region in the United States, and that, to the extent there are anticompetitive effects, they are insubstantial and outweighed by the transaction’s public benefits.

The Board also has engaged in an extensive and thorough environmental review, which was completed with the issuance of the Final Environmental Impact Statement² on December 5, 2008. The level of public participation throughout the environmental review process has been unprecedented. More than 9,500 comments on the Draft EIS were received by our Section of Environmental Analysis (SEA) from members of the public, agencies, elected officials both in Illinois and Indiana, organizations, businesses, and other stakeholders. The “hard look” required by the National Environmental Policy Act that we have taken at the potential impacts—both beneficial and adverse—is documented in the substantial environmental record in this proceeding.

After carefully considering the results of the environmental analysis, and the concerns and issues raised by the parties and other commenters—both pro and con—we are imposing environmental mitigation that we believe is reasonable and appropriate to minimize, and in some cases eliminate, potential adverse environmental impacts of this transaction. Our mitigation includes two grade separations (and requires applicants to bear 67% of the cost of one and 78.5% of the cost of the other), cameras to assist in the timely response of emergency providers, programs related to school and pedestrian safety, noise mitigation, and a 5-year environmental reporting condition requiring applicants to file quarterly reports on the implementation of our environmental mitigation, so that we will be kept apprised of the effectiveness of the conditions. We are also establishing a 5-year formal oversight period, with detailed monthly reporting requirements imposed on the applicant carriers, to allow us to closely monitor applicants’ operations during the oversight period. In addition, applicants will be required to comply with their extensive voluntary environmental mitigation and with the negotiated agreements they have entered into with the National Railroad Passenger Corporation (Amtrak) and communities in Illinois and Indiana containing tailored mitigation that applicants will provide.

INTRODUCTION

The Control Application. By application filed on October 30, 2007, CNR and GTC³ seek approval under 49 U.S.C. 11323-26 for the acquisition of control by CN of EJ&E West Company (EJ&EW), a wholly owned, noncarrier subsidiary of EJ&E.⁴

² Under the National Environmental Policy Act (NEPA), 42 U.S.C. 4321 et seq., an Environmental Impact Statement (EIS) is prepared for “major federal actions significantly affecting the quality of the human environment.” 42 U.S.C. 4332(2)(C). An EIS normally is not required in acquisition cases; a more limited Environmental Assessment (EA) generally is sufficient because there are not usually significant environmental impacts from the change in ownership of the operation of existing lines. 49 CFR 1105(6)(b)(4). In this case, however, a full EIS was warranted in view of the large projected traffic increases on certain line segments and the potential impacts of the transaction on a number of communities that would likely result from the increased activity levels on rail line segments and at rail facilities.

³ GTC is a noncarrier holding company through which CNR controls its U.S. subsidiaries.

⁴ The transaction for which approval is sought is variously referred to as the control transaction or merger. This transaction is classified as a minor transaction. See 49 CFR 1180.2

(continued . . .)

Seven Related Filings. Also by application filed on October 30, 2007, CN filed notices of exemption involving an intra-corporate family transaction and the granting of trackage rights. The Sub-No. 1 filing provides for EJ&E to transfer property to EJ&EW, which, at that time, would become a rail common carrier, prior to applicants acquiring control of EJ&EW. The Sub-Nos. 2 through 7 filings provide for grants of trackage rights by EJ&EW to Grand Trunk Western Railroad (GTW), Illinois Central Railroad Company (IC), Chicago, Central & Pacific Railroad Company (CCP), and Wisconsin Central Ltd. (WC), and by IC and CCP to EJ&EW, promptly upon applicants' acquisition of control of EJ&EW, should the Board approve the proposed control transaction.

In this decision, the Board is granting the application for acquisition of control, subject to certain conditions, and authorizing the transactions covered by the notices of exemption.

Overview of the Transaction. As explained in the EIS prepared by SEA, Chicago is the only city in the United States where all seven Class I railroads meet to exchange freight or operate by means of trackage rights. Numerous smaller regional and switching railroads also operate in Chicago. One third of all rail freight in the United States moves to, from, or through Chicago. More than 600 freight trains operate within the Chicago metropolitan area each day, transporting an average of 37,500 rail freight cars carrying about 2.5 million tons of freight. In addition, there is passenger service provided by Amtrak, which operates about 78 trains per day; commuter service provided by Metra, which provides commuter service on its own lines and with trackage rights over the lines of freight railroads, and operates 720 trains per day; and commuter service provided by the Northern Indiana Commuter Transportation District (NICTD), which operates 41 trains per day.⁵

The EJ&E rail line, located in Northeastern Illinois and Northwestern Indiana, extends in a 120-mile arc of mainline track around Chicago through Northeastern Illinois and Northwestern Indiana. As the EIS states, the line has provided railroad transportation to the Chicago region for 120 years, and communities along the EJ&E line have benefited from freight and passenger rail service along the line that enhanced their ability to become centers for commerce and services and to function as a shipping point for farm commodities.⁶ According to the EIS, train volumes on the EJ&E rail line have fluctuated during its history, but there has always been some rail traffic on the line. During World War II, the EJ&E rail line generated as many as 50 trains per

(. . . continued)

(classification of transactions under 49 U.S.C. 11323), as applied in Decision No. 2 (served November 26, 2007, and published on November 29, 2007, at 72 FR 67622-67630).

⁵ The large volume of freight and passenger trains (more than 1,400 trains per day) and the use of the same rail lines by multiple rail companies result in delays as trains wait to cross other rail segments or use switching rail lines and yards. Because of current rail traffic congestion, a CN freight train can now take more than 24 hours to travel about 30 miles from near O'Hare International Airport to near Blue Island, IL.

⁶ See, e.g., Final EIS at 1-8.

day to support Chicago's steel and heavy manufacturing industries. The line continued to thrive throughout most of the 1950s and 1960s. While traffic levels declined during the 1970s, traffic rebounded in the 1990s when the rail lines that pass through the center of Chicago became more congested and the EJ&E line became an alternative route for freight moving through Chicago, such as coal and containerized import/export freight. Currently, approximately 3 to 18 trains per day travel along the EJ&E rail line.⁷

Under the transaction, applicants would shift much of the rail traffic currently moving over CN's five rail lines in Chicago to the EJ&E rail line, in order to improve the fluidity of intermodal and other CN traffic that must move into, from, or through Chicago.⁸ As the EIS explains, trains traveling within Chicago currently experience delays because of the congested rail lines and too much dependence on the Belt Railway Company of Chicago (BRC) Clearing Yard, which most of the Class I freight railroads in Chicago now use for train classification.⁹ According to the applicants, acquiring the Kirk Yard and other yards on the EJ&E line, including the East Joliet Yard, would permit CN to use those yards instead of the congested BRC Clearing Yard to classify and switch trains passing through the Chicago metropolitan area. Applicants expect this access to reduce the number of trains that, though bound for other destinations, would otherwise need to travel into Chicago. As a result, rail traffic on CN rail lines inside the EJ&E arc would generally decrease, reducing congestion and enabling CN to improve service to many companies in the Chicago metropolitan area and to those shipping products through Chicago. Thus, at the same time that applicants would increase rail traffic along the EJ&E rail line as a result of the transaction (generally by 15 to 24 trains per day), there would be corresponding decreases in rail traffic, and potential environmental benefits, in communities where CN traffic is routed today.¹⁰

Summary of the Decision. In this decision, the Board is approving CN's acquisition of control of EJ&EW, as proposed in the control application, subject to the following conditions: (1) applicants must adhere to their representation that they will keep all existing active gateways affected by the CN/EJ&E transaction open on commercially reasonable terms; (2) applicants must adhere to their representation that they will waive any defenses they might otherwise have

⁷ See Final EIS Figure ES-3 (at ES-7).

⁸ As discussed in more detail below, applicants give three primary purposes for seeking to acquire control of the EJ&E line. First, they seek to improve applicants' operations in and beyond the Chicago metropolitan area by providing a continuous rail route around Chicago, under CN's ownership, that would connect CN's five rail lines radiating from Chicago. Second, they expect to consolidate rail car classification work at EJ&E's Kirk Yard, as well as smaller facilities at East Joliet, IL and Whiting, IN. Finally, applicants hope to benefit from an important supply line the EJ&E line provides for North American steel, chemical and petrochemical industries, as well as utility companies; they expect the transaction to enable them to develop more extensive relationships with those potential customers. See Final EIS at ES-4.

⁹ See Final EIS at ES-4 and 1-9.

¹⁰ See Final EIS Figure ES-3 (at ES-7), setting out the proposed changes to rail traffic volumes.

as a result of the CN/EJ&E transaction, under the Board's general policy that it does not separately regulate bottleneck rates, in circumstances where a shipper prior to the transaction would have been entitled to regulation of a bottleneck rate under the Board's "contract exception" to the general rule; (3) the New York Dock labor protective conditions, see New York Dock Ry.—Control—Brooklyn Eastern District Terminal, 360 I.C.C. 60, aff'd sub nom. New York Dock Ry. v. United States, 609 F.2d 83 (2d Cir. 1979) (New York Dock), will apply to the control transaction; and (4) applicants will comply with the environmental mitigation conditions set forth in Appendix A, including the monitoring and reporting conditions contained therein. Further, the Board is exempting the corporate family transaction at issue in the Sub-No. 1 proceeding. The Board is also exempting the trackage rights at issue in the Sub-Nos. 2 through 7 proceedings, subject to the Norfolk and Western labor protective conditions, see Norfolk and Western Ry. Co.—Trackage Rights—BN, 354 I.C.C. 605 (1978), as modified in Mendocino Coast Ry., Inc.—Lease and Operate, 360 I.C.C. 653 (1980) (Norfolk and Western). The Board is also imposing a 5-year monitoring and oversight condition, and the Board is retaining jurisdiction to impose additional conditions and to take other action if, and to the extent, the Board determines it is necessary to impose additional conditions and to take other action to address matters respecting the CN/EJ&E transaction. Finally, the Board is denying all other conditions sought by the various parties to this proceeding.¹¹

Commenting Parties: Shipper Interests. Comments regarding the control transaction have been filed by various shipper parties, including: Ace Ethanol (Ace); Algoma Steel Inc. (Algoma); American Chemical Service, Inc. (ACS); American Suzuki Motor Corporation (ASMC); Aracruz Celulose USA, Inc. (Aracruz); Aux Sable Liquid Products, LP (Aux Sable); BASF Corporation (BASF); Equistar Chemicals, LP (Equistar); National Industrial Transportation League (NITL); PCS Sales (USA), Inc. (PCS); Potlatch Forest Products Corporation (Potlatch); Prairie Material Sales, Inc. (Prairie Material); Raw Materials, Inc. (RMI); Thomas Lighting; United Parcel Service (UPS); and United Sugars Corporation (United Sugars).¹²

Commenting Parties: Railroad Interests. Comments respecting the control transaction were submitted by: Adrian & Blissfield Railroad (A&BR); Canadian Pacific Railway Company (CPR); CSX Transportation, Inc. (CSXT); Effingham Railroad Company (Effingham); Norfolk Southern Railway Company (NS); and Wisconsin & Southern Railroad Co. (WSOR).

¹¹ On December 8, 2008, UP filed a petition to enjoin and remedy premature exercise of control by CN. CN filed a reply on December 12, 2008, and UP subsequently withdrew its petition on December 19, 2008.

¹² ArcelorMittal USA Inc., ArcelorMittal Burns Harbor LLC, ArcelorMittal Indiana Harbor LLC, ArcelorMittal Kote Inc., ArcelorMittal Tek Inc., ArcelorMittal Hennepin Inc., and ArcelorMittal Riverdale Inc. (collectively, ArcelorMittal), a current customer of EJ&E, filed comments and requests for conditions. By letter filed on May 9, 2008, ArcelorMittal withdrew its opposition to the control transaction, as well as its requests for conditions. Wisconsin Public Service Corporation also filed comments and request for conditions but withdrew as a party of record and its request for conditions by letter on December 10, 2008.

Commenting Parties: Passenger Rail Interests. Two passenger rail interests filed submissions: National Association of Railroad Passengers (NARP); and the Northeast Illinois Regional Commuter Railroad Corporation and the Commuter Rail Division of the Regional Transportation Authority (collectively, Metra).¹³

Commenting Parties: Governmental Parties. The following various governmental parties and local and state interests submitted comments: the United States Department of Transportation (DOT); Illinois Department of Transportation (IDOT); Wisconsin Department of Transportation (WisDOT); the Canadian Chamber of Commerce; the City of Carbondale, IL (Carbondale); the City of Memphis, TN (Memphis); the City of West Chicago, IL (West Chicago); Will County, IL, Village of Bartlett (Bartlett); Village of Crete (Crete); Village of Frankfort, IL (Frankfort);¹⁴ Village of Homewood (Homewood); Village of Mokena, IL (Mokena); Village of South Holland (South Holland); Gary Chicago International Airport Authority (GCIAA); Glendale Heights Chamber of Commerce (GHCC); Memphis Regional Chamber (Memphis Regional);¹⁵ Wheeling/Prospect Heights Area Chamber of Commerce and Industry (WPHC); United Business Association of Midway (UBAM); Wisconsin Department of Agriculture, Trade and Consumer Protection (DATCP); United States Representatives Melissa L. Bean (IL), Jerry F. Costello (IL), Donald A. Manzullo (IL), Judy Biggert (IL), Timothy V. Johnson (IL), Peter J. Roskam (IL), and Bill Foster (IL),¹⁶ Bart Stupak (MI), Joe Knollenberg (MI), Thaddeus McCotter (MI), John D. Dingell (MI), Jesse L. Jackson, Jr. (IL), Candice Miller (MI), Tim Walberg (MI), John M. Shimkus (IL), Danny K. Davis (IL), Janice D. Schakowsky (IL), and John M. Shimkus (IL); United States Senators Richard J. Durbin (IL), Debbie Stabenow (MI), and Carl Levin (MI); State Senators Mark Schauer (MI), Karen Tallian (IN), and Susan Garrett (IL); State Representatives Robert A. Rita (IL), Angelo Saviano (IL), Carolyn H. Krause (IL), and Terry Link (IL); Governor of Michigan Jennifer M. Granholm; and Mayor of Chicago Richard M. Daley.

Commenting Parties: Labor Parties. Submissions respecting the control transaction were filed by several labor interest parties, including: the Brotherhood of Locomotive Engineers and Trainmen, A Division of the Rail Conference, the International Brotherhood of Teamsters (BLET); the International Brotherhood of Electrical Workers (IBEW); the American Train

¹³ Amtrak withdrew its comments in opposition and requests for conditions on December 9, 2008. Also on December 9, 2008, Amtrak and CN jointly filed a notice of settlement and request for conditions discussed below.

¹⁴ On December 15, 2008, Frankfort and applicants executed a negotiated agreement. As discussed below, applicants will be required to comply with the terms of the agreement under the Board's environmental mitigation conditions.

¹⁵ Memphis Regional Chamber, the Memphis Regional Logistics Council, and the Memphis Regional Economic Development Council are referred to collectively as Memphis Regional.

¹⁶ The aforementioned United States Representatives filed a joint letter commenting on the merger. United States Representatives Bean, Biggert, and Manzullo each filed separate comments, as well.

Dispatchers Association (ATDA); the National Conference of Fireman & Oilers – SEIU (NCFO);¹⁷ and United Transportation Union – General Committee of Adjustment GO-386 (UTU GCA-386).

Commenting Parties: Environmental Issues. SEA received over 9,500 comments on its Draft EIS, including comments from members of the public, elected officials, Federal and state agencies, and local governments. Summaries of these comments and the issues raised by commenters can be found in the Final EIS, Chapter 3.

THE CN/EJ&E CONTROL TRANSACTION

Canadian National. CN is one of Canada's two major railroads, extending from Halifax, Nova Scotia, on the Atlantic coast to Vancouver and Prince Rupert, British Columbia, on the Pacific coast. Through its GTC subsidiary, CNR controls the following rail carriers: GTW, IC, CCP, WC, Duluth, Winnipeg and Pacific Railway Company (DWP), St. Clair Tunnel Company (SCTC),¹⁸ Cedar River Railroad Company (CRRC), Waterloo Railway Company (Waterloo), Sault Ste. Marie Bridge Company (SSMB), Wisconsin Chicago Link Ltd. (WCL), Duluth, Missabe and Iron Range Railway Company (DMIR), Bessemer and Lake Erie Railroad Company (B&LE), and The Pittsburgh & Conneaut Dock Company (P&C Dock). DWP extends the applicants' system from the international border at Duluth Junction, MN/Ranier, MN, over DWP's own lines to Nopeming Junction, MN. GTW also extends applicants' system to Chicago, IL, from the international border at Port Huron, MI/Sarnia, Ontario, and Detroit, MI/Windsor, Ontario. In 1999, applicants acquired IC, thus extending applicants' system from Chicago to the Gulf Coast, and becoming part of a North American Free Trade Agreement (NAFTA) rail network offering shippers access to Kansas City Southern de México, S.A. de C.V. (KCSM), Mexico's largest rail system. In 2001, applicants acquired WCL and its affiliates, and in 2004 applicants acquired the Great Lakes Transportation LLC (GLT) carriers including DMIR, thus providing applicants with a connection between Chicago and applicants' lines west of the Great Lakes. In the GLT transaction, applicants also acquired B&LE and P&C Dock, which, together with applicants' ownership of DMIR and Great Lakes Fleet, LLC (a water carrier operating on the Great Lakes), provides applicants a continuous chain to transport iron ore moving from the Missabe Iron Range of Minnesota to the Union Railroad Company, which serves the Edgar Thompson Steel Works of United States Steel Corporation (USS) in Braddock, PA.

EJ&E West. EJ&EW is an Illinois corporation formed on August 16, 2007, and is a wholly owned, noncarrier subsidiary of EJ&E. EJ&E is a Class II railroad that currently

¹⁷ IBEW, ATDA, and NCFO submitted joint comments. The International Association of Mechanists and Aerospace Workers (IAM) also submitted joint comments with IBEW, et al. In a letter filed on August 13, 2008, IAM states that it has reached an implementing agreement addressing its concerns and does not oppose the proposed transaction.

¹⁸ On September 1, 2008, GTW merged with and into SCTC, with SCTC as the surviving corporation. See 73 FR 43486 (July 25, 2008).

operates over 198 miles of track in Northeastern Illinois and Northwestern Indiana, consisting primarily of an arc around Chicago, IL, extending from Waukegan, IL, southwards to Joliet, IL, then eastward to Gary, IN, and then northwest to South Chicago along Lake Michigan. EJ&E provides rail service to approximately 100 customers, including steel mills, coal utilities, plastics, and chemical producers, steel processors, distribution centers, and scrap processors. EJ&E is a wholly owned indirect subsidiary of USS, a noncarrier. USS owns all of the issued and outstanding stock of Transtar, Inc. (Transtar), a noncarrier holding company, which owns all of the issued and outstanding stock of seven common carrier railroads, including EJ&E.¹⁹

The CN/EJ&E Transaction. Before applicants acquire control of EJ&EW, EJ&E plans to transfer all of its land, rail, and related assets located west of the centerline of Buchanan Street in Gary (together with the real property and related fixtures associated with the hump and Dixie leads located east of Buchanan Street) to EJ&EW, which at that time would become a rail common carrier. As noted above, this transaction is the subject of the Sub-No. 1 related filing. EJ&E would retain its land, rail, and related assets east of the centerline (other than the real property and related fixtures associated with the hump and Dixie leads). It is expected that, if the control transaction is approved and applicants acquire control of EJ&EW, EJ&E would change its name to Gary Railway Company, and EJ&EW would assume the Elgin, Joliet & Eastern Railway Company name.

In order to permit trains of its operating subsidiaries—GTW, IC, CCP, and WC—to operate over EJ&EW's line and provide for maximum operational flexibility, applicants intend to cause EJ&EW to grant trackage rights to those subsidiaries over the entire length of EJ&EW from Waukegan to Gary. Applicants also intend to grant EJ&EW trackage rights over selected portions of its CCP and IC subsidiaries. These proposed trackage rights are the subjects of notices of exemption filed in the related Sub-Nos. 2 through 7 proceedings, providing for grants of trackage rights by EJ&EW to GTW, IC, CCP, and WCL, and by IC and CCP to EJ&EW.

GTC and EJ&E have entered into a Stock Purchase Agreement (SPA), dated September 25, 2007. The SPA provides that, subject to Board authorization of the control transaction, and other conditions, GTC will purchase from EJ&E all of the issued and outstanding common stock of EJ&EW for an overall purchase price of \$300 million, subject to adjustments as provided for in the SPA.

Purposes Served. Applicants state three primary purposes for pursuing the control transaction. First, they believe the control transaction would improve their operations in and beyond the Chicago area by providing CN with a continuous rail route around Chicago, under applicants' ownership, that would connect the five CN lines that presently radiate from Chicago. Second, acquiring EJ&E's rail assets would make available to applicants EJ&E's Kirk Yard—an automated classification facility in Gary—as well as smaller facilities in Joliet and Whiting, IN,

¹⁹ In 2001, Transtar spun off its interest in B&LE, DMIR, P&C Dock, and a water carrier, Great Lakes Fleet, to GLT, which became a holding company controlled by the Blackstone Group. In 2004, in a transaction not involving USS, applicants acquired the GLT subsidiaries.

thus enabling applicants to consolidate car classification work at Kirk and East Joliet Yards and to reduce use of the BRC Clearing Yard. Lastly, applicants state that their system would benefit from the fact that EJ&E provides an important supply line for North American steel, chemical, and petrochemical industries, as well as for Chicago-area utilities and others, which would allow applicants to develop closer and more extensive relationships with companies in and serving those industries.

Transportation Considerations. Applicants state that the control transaction would help meet the need for a more efficient and reliable rail transportation system. Applicants assert that the control transaction would have no anticompetitive effects, as it would connect two transportation systems that do not compete but instead complement each other and would together create a stronger network. Applicants assert that there would be no 2-to-1 shippers, nor 3-to-2 shippers, on the CN/EJ&EW system. Moreover, applicants state that the control transaction would bring about no vertical foreclosure, no reduction in effective geographic competition, and no increase in market power. Applicants state that, as in past transactions, they are committed to keeping gateways open and honoring trackage rights and haulage agreements with all connecting carriers.

Applicants assert that, even if the control transaction had any adverse impacts on competition, those effects would be outweighed by its transportation benefits. The control transaction, applicants assert, would ensure more efficient and reliable rail transportation at a lower cost and would, over time, reduce rail traffic congestion, increase rail capacity for carriers operating in Chicago, and reduce traffic density in Chicago's urban core. Applicants state that the control transaction would provide CN with a continuous route around Chicago, which would make it possible for CN traffic to bypass the congested Chicago terminal. Applicants maintain that this rerouting would benefit CN-served customers in the Chicago area and customers served by other Class I railroads by reducing the demand on the capacity of BRC, Indiana Harbor Belt Railroad (IHB), and other CN lines through the central Chicago terminal area. Further, applicants note, the availability of a continuous CN route around Chicago would greatly improve the fluidity of intermodal and other CN traffic that must move to, from, or through Chicago. Also, the availability of a continuous CN route around Chicago would advance the congestion-reducing objectives of the Chicago Region Environmental and Transportation Efficiency Program (CREATE)²⁰ and make it possible for applicants to more quickly cease operations over the St. Charles Air Line. The control transaction, applicants state, would also eliminate interchanges between EJ&E and CN, making possible single-line service for approximately 10,000 carloads of traffic that the two railroads now carry in interline service each year. Applicants also note that the public would benefit from applicants' plans to spend approximately \$100 million to upgrade EJ&E's infrastructure.

²⁰ CREATE is a public-private partnership between the Chicago Department of Transportation, the Illinois Department of Transportation, and the American Association of Railroads, including Metra and the freight railroads operating in Chicago, to increase efficiency of the region's rail infrastructure and quality of life in the region.

Labor Impacts & Protection. Applicants anticipate two principal labor impacts as a result of the control transaction: the elimination of redundant positions and the organization/integration of forces to realize the efficiencies of the transaction. Applicants estimate that the control transaction would result in the elimination of 114 positions. Applicants anticipate that, to the extent the transaction leads to the elimination of positions, most of these impacts could be accommodated through normal attrition during the implementation period. Applicants' continuing need for experienced, skilled railroaders at its neighboring Chicago operations makes it highly likely that most of the affected employees would have the opportunity to fill other positions opening up elsewhere in applicants' Chicago operation. Applicants state that they would work with the respective collective bargaining units to attempt to secure labor implementing agreements that would provide for the flexibility to fully employ any potentially adversely impacted employee. Applicants further acknowledge that the control transaction would be subject to employee protective conditions and other procedures adopted in New York Dock.

Related Filings. In connection with this transaction, several notices of exemption were filed under 49 CFR 1180.2(d)(3) and 1180.2(d)(7).

Sub-No. 1. In Sub-No. 1, EJ&E filed a verified notice of exemption under 49 CFR 1180.2(d)(3) for a transaction within a corporate family. Under this notice of exemption, EJ&E would transfer all its land, rail, and related assets located west of the centerline of Buchanan Street in Gary (together with the real property and related fixtures associated with the hump and Dixie leads located east of Buchanan Street), to EJ&EW, which upon completion of the transfers would become a rail carrier. EJ&E would retain its land, rail, and related assets east of the centerline (other than the real property and related fixtures associated with the hump and Dixie leads). EJ&E intends to consummate the transaction with EJ&EW immediately before CN acquires control of EJ&EW, which would not occur until after approval of the control transaction by the Board. The purpose of the transaction is that it would allow EJ&E to segregate into a separate corporate entity (EJ&EW) the rail properties to be acquired by GTC, thus facilitating the transaction described in the primary application. According to EJ&E, this is a transaction within a corporate family of the type specifically exempted from prior review and approval under 49 CFR 1180.2(d)(3). As a condition to use of this exemption, EJ&E states that any employees adversely affected by the transaction would be protected by the conditions set forth in New York Dock.

Sub-No. 2. In Sub-No. 2, CCP submitted a verified notice of exemption under 49 CFR 1180.2(d)(7). Pursuant to a written trackage rights agreement, EJ&EW would grant CCP trackage rights over all of EJ&EW's line, which runs between milepost 74.6 at Waukegan and milepost 45.4 at Gary, including all trackage west of the centerline of Buchanan Street in Gary, plus trackage associated with the hump and Dixie leads located east of Buchanan Street, a distance of approximately 120 miles. Parties intend to execute the trackage rights agreement promptly upon applicants' acquisition of control of EJ&EW, should the Board approve the proposed control transaction. As a condition to this exemption, CCP states that any employees affected by the acquisition of the temporary trackage rights would be protected by the conditions imposed in Norfolk and Western.

Sub-No. 3. In Sub-No. 3, GTW submitted a verified notice of exemption under 49 CFR 1180.2(d)(7). Pursuant to a written trackage rights agreement, EJ&EW would grant GTW trackage rights over EJ&EW's lines between milepost 74.6 at Waukegan and milepost 45.4 at Gary, including all trackage west of the centerline of Buchanan Street in Gary, plus trackage associated with the hump and Dixie leads located east of Buchanan Street.²¹ Parties intend to execute the trackage rights agreement promptly upon applicants' acquisition of control of EJ&EW, should the Board approve the proposed control transaction. As a condition to this exemption, GTW states that any employees affected by the acquisition of the temporary trackage rights would be protected by the conditions imposed in Norfolk and Western.

Sub-No. 4. In Sub-No. 4, IC submitted a verified notice of exemption under 49 CFR 1180.2(d)(7). Pursuant to a written trackage rights agreement, EJ&EW would grant IC trackage rights over EJ&EW's lines between milepost 74.6 at Waukegan and milepost 45.4 at Gary, including all trackage west of the centerline of Buchanan Street in Gary, plus trackage associated with the hump and Dixie leads located east of Buchanan Street. Parties intend to execute the trackage rights agreement promptly upon applicants' acquisition of control of EJ&EW, should the Board approve the proposed control transaction. As a condition to this exemption, IC states that any employees affected by the acquisition of the temporary trackage rights would be protected by the conditions imposed in Norfolk and Western.

Sub-No. 5. In Sub-No. 5, WCL submitted a verified notice of exemption under 49 CFR 1180.2(d)(7). Pursuant to a written trackage rights agreement, EJ&EW would grant WCL trackage rights over EJ&EW's lines between milepost 74.6 at Waukegan and milepost 45.4 at Gary, including all trackage west of the centerline of Buchanan Street in Gary, plus trackage associated with the hump and Dixie leads located east of Buchanan Street. Parties intend to execute the trackage rights agreement promptly upon applicants' acquisition of control of EJ&EW, should the Board approve the proposed control transaction. As a condition to this exemption, WCL states that any employees affected by the acquisition of the temporary trackage rights would be protected by the conditions imposed in Norfolk and Western.

Sub-No. 6. In Sub-No. 6, CN submitted a verified notice of exemption under 49 CFR 1180.2(d)(7). Pursuant to a written trackage rights agreement, CCP would grant EJ&EW trackage rights over CCP's lines between milepost 35.7 at Munger, IL, and milepost 8.3 at Belt Crossing, IL. Parties intend to execute the trackage rights agreement promptly upon applicants' acquisition of control of EJ&EW, should the Board approve the proposed control transaction. As a condition to this exemption, CN states that any employees affected by the acquisition of the temporary trackage rights would be protected by the conditions imposed in Norfolk and Western.

Sub-No. 7. In Sub-No. 7, CN submitted a verified notice of exemption under 49 CFR 1180.2(d)(7). Pursuant to a written trackage rights agreement, IC would grant EJ&EW trackage rights over IC's lines between milepost 17.9 at Highlawn, IL, and milepost 31.4 at University Park, IL, and between milepost 36.7 at Joliet and milepost 7.9 at Lemoyne, IL. Parties intend to

²¹ GTW currently has trackage rights over EJ&E lines between milepost 36.2 at Griffith, IN, and milepost 24.0 at Eola, IL, which EJ&EW would acquire under Sub-No. 1.

execute the trackage rights agreement promptly upon applicants' acquisition of control of EJ&EW, should the Board approve the proposed control transaction. As a condition to this exemption, CN states that any employees affected by the acquisition of the temporary trackage rights would be protected by the conditions imposed in Norfolk and Western.

DISCUSSION AND CONCLUSIONS

Statutory Criteria. The acquisition of control of a rail carrier by another rail carrier or by a noncarrier that controls another rail carrier requires Board approval. 49 U.S.C. 11323(a)(3), (5). Because the proposed transaction does not involve the merger or control of two or more Class I railroads, this transaction is governed by 49 U.S.C. 11324(d), which directs us to approve a control application unless we find that: (1) as a result of the transaction, there is likely to be substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States; and (2) the anticompetitive effects of the transaction outweigh the public interest in meeting significant transportation needs.

In assessing transactions subject to section 11324(d), our primary focus is on whether there would be adverse competitive impacts that are both likely and substantial. If so, we also consider whether the anticompetitive impacts would outweigh the transportation benefits or could be mitigated through conditions.²² As discussed below, the Board also has the authority to consider the potential environmental effects of the transaction and to impose appropriate conditions to mitigate adverse environmental impacts.

Competitive Analysis. After considering the application and the full record in this proceeding, the Board has determined that the proposed control transaction is unlikely to cause a substantial lessening of competition or to create a monopoly or restraint of trade. Currently, no shippers are jointly served by CN and EJ&E. Where both railroads serve transloading and transfer facilities, shippers would still have comparable options to transload freight to or from several carriers in the Chicago area.

Build-out Option. ACS is a shipper solely served by EJ&E and is concerned with the loss of competitive leverage currently afforded by ACS's ability to build out a short distance of track in order to connect with CN. Accordingly, ACS opposes the proposed transaction unless approval of the transaction is conditioned on CN granting trackage rights to ACS (or to a rail carrier created by ACS) and to NS over EJ&E between Griffith and Hartsdale, IN (approximately 3 miles), or between Griffith and Van Loon, IN (approximately 4 miles), in order for ACS to connect with, and be rail served by NS. If for any reason this condition were not imposed, ACS requests the following conditions: (1) CN shall cause EJ&EW to continue to provide ACS with the level of service EJ&E currently provides, i.e., 5 days per week; and (2) CN shall cause EJ&EW to abide by all terms in the EJ&E Transportation Contract

²² Under 49 U.S.C. 11324(c), we have broad authority to place conditions on our approval of section 11323 transactions. See Canadian National, et al.—Control—Wisconsin Central Transp. Corp., et al., 5 S.T.B. 890, 899-900 (2000).

EJE-C-0003 between ACS and EJ&E for a period of 5 years from the date of consummation of CN control of EJ&EW, and annually thereafter pursuant to an evergreen provision. CN maintains that ACS has never raised or discussed the possibility of a build-out to either CN or EJ&E and that ACS underestimates the difficulty in building out to the CN line. CN contends that, contrary to ACS's assertions, the control transaction would not eliminate competition provided by build-out opportunities.

The Board's policy has been to preserve the competitive advantages made possible by build-outs.²³ Despite applicants' argument that construction of this build-out would not be feasible, the Board notes that the ultimate test of feasibility is whether the line is actually constructed, not whether the shipper has demonstrated that it is economically feasible.²⁴ The evidence shows that CN's line is in very close proximity to tracks owned by ACS. Should ACS build out to a CN connection, the Board will grant to NS or any third-party carrier the necessary trackage rights on CN to the build-out.²⁵ With this condition, no shipper would suffer a direct merger-related loss of competitive rail service.

Geographic Competition. In examining the effect of the proposed transaction on geographic competition, the Board examines the effect of the transaction on source competition, when two carriers can transport the same product to the same destination but from different origins, or conversely when two carriers transport the same product from the same origin to two different destinations. No party has questioned applicant's analysis or conclusion that there would not be a diminution in source competition as a result of the transaction. Therefore, based on the record, the Board finds that the transaction will not lead to a reduction in geographic competition.

Market Power. The Board also considers whether common control would increase CN's or EJ&E's market power. As noted above, no shipper would face a reduction in the number of rail carriers serving any of its facilities, and no reduction in geographic competition is expected. However, the issue is whether the vertical integration of CN and EJ&E would have any anticompetitive effects for the users of rail transportation services. In its application, CN alleges that there would be no adverse vertical effects on competition and that it would keep all gateways affected by the control transaction open on commercially reasonable terms²⁶ and is committed to honoring trackage rights and haulage agreements with all connecting carriers.²⁷

Equistar contends that the control transaction would result in the loss of a "neutral connection" that allows shippers efficient access to every Class I railroad (with the exception of

²³ See Conrail, 3 S.T.B. at 320; Union Pacific/Southern Pacific Merger, 1 S.T.B. 233, 420 (1996) (UP/SP).

²⁴ See Conrail at 319 n.179; UP/SP at 420.

²⁵ DOT also supports this condition.

²⁶ CN-2 at 24.

²⁷ CN-2 at 53.

The Kansas City Southern Railway Company (KCS)) at a range of gateways, as well as numerous short line and regional railroads.²⁸ Several parties anticipate that CN would maximize its own line-haul opportunities along the EJ&E and institute pricing and service to favor its own connecting route.²⁹ Many commenters assert that CN would not provide the same level of service and responsive rates that they currently receive from EJ&E.³⁰

The Board recognizes the vertical effects that might result from the proposed transaction, such as the potential for CN to impair the terms of trackage rights, interchange, or service associated with competing line haul carriers using EJ&E. Likewise, the Board takes seriously any possibility that CN might raise its rivals' costs by acquiring a line that currently provides neutral access to alternative line-haul railroads that compete with one another (including CN). As discussed below, the Board will hold applicants to their representation to keep open affected gateways on commercially reasonable terms. The Board also recognizes that the service received by shippers from a regional short-line railroad, such as EJ&E, might change when the railroad is acquired by a long-haul railroad, such as CN. By imposing the oversight and monitoring condition described below, the Board will be able to address any possible service issues that may arise and to ensure that service levels are reasonable and adequate.

In short, the evidence demonstrates that the transaction, in light of and subject to the conditions imposed in this decision, would not result in either a substantial lessening of competition, the creation of a monopoly, or a restraint of trade in freight surface transportation in any region of the United States.

But even if there were some modest anticompetitive effect, it would be outweighed by the public interest in meeting significant transportation needs. The proposed transaction would greatly improve efficiency for movements through the Chicago area and would benefit shippers through decreased transit times and more reliable service. Currently, traffic movement going through the Chicago area experiences severe congestion, resulting in significant delays of shipments to other parts of the country. Much of CN's traffic moving between its various components must travel through downtown Chicago. Rerouting CN traffic to bypass downtown Chicago would improve the fluidity on CN's system and the rest of the Chicago rail network. Additionally, CN's significant investment in EJ&E's infrastructure would add capacity and improve service currently provided on EJ&E.

Gateways and Requested Conditions. In its application, CN states that it would keep all gateways affected by the control transaction open on commercially reasonable terms³¹ and is committed to honoring trackage rights and haulage agreements with all connecting carriers.³² In

²⁸ See Equistar at 2.

²⁹ See Equistar at 2; Aux Sable at 4, 8-9.

³⁰ See Aux Sable at 5; ACS at 4-6; Equistar at 3.

³¹ CN-2 at 24.

³² CN-2 at 53.

its response to comments, CN further explains that this representation is meant to protect shippers' commercial options, particularly from vertical foreclosure.³³ The Board will hold applicants to their pledge that they will keep all existing gateways affected by the transaction open on commercially reasonable terms.

CSXT and WisDOT contend that CN's representation regarding its gateways is not sufficient.³⁴ Fearing operational problems for its operations in the Chicago area that might reverberate throughout the its entire system, CSXT requests a condition holding CN to its representations until there is mutual consent between CSXT and CN to change the interchange and requiring CN to abide by the commitments CN made to CSXT through confidential correspondence. CSXT goes on to request the following: (1) that the interchange locations for the following railroads and/or specified traffic will continue to be the following: (i) Clearing Yard for interchange between CSXT and Wisconsin Central Ltd.; (ii) Clearing Yard for interchange between CSXT and Minnesota and Western Canada freight; (iii) Barr Yard and Riverdale Yard for interchange between CSXT and Illinois Central Railroad Company; and (2) that all other existing CN and CSXT interchange properties will be handled in accordance with existing agreements. CSXT also requests that the interchange between CSXT and EJ&E that exists as of January 28, 2008, at Curtis Yard will be utilized only for EJ&EW traffic after consummation of the transaction. Applicants claim that their commitment in the application to keep all gateways open on commercially reasonable terms is in no way a commitment to freeze in place all of CN's and EJ&E's interchange locations and related practices, terms, and conditions. Applicants argue, among other things, that moving interchanges is the receiving carrier's prerogative and that the Board and the courts have consistently upheld this right, subject to location reasonableness.

The Board is disinclined to impose conditions that would freeze in place existing interchange locations. Such conditions may have anticompetitive consequences, precluding a carrier from making route changes that improve efficiency and service and from establishing related rate reductions. The Board would prefer to allow a merged entity flexibility in determining the most efficient routes for its newly restructured system, benefiting shippers in the process.³⁵ While interchange locations may change, the Board expects that CN will maintain its ability to interchange traffic effectively with all parties. Indeed, CN will continue to have the obligation to make available reasonable facilities for interchange under 49 U.S.C 10742.

WisDOT also asserts that CN provides no objective manner for the Board to effectively monitor CN's commitment to keeping all existing gateways affected by the transaction open on "commercially reasonable terms," as asserted in CN's application. Accordingly, WisDOT

³³ CN-29 at 40.

³⁴ In relation to the possible vertical effects of the control transaction, many shippers currently served by EJ&E request conditions to address this loss of a "neutral connector" to other line-haul railroads. Their comments and requested conditions are discussed below.

³⁵ See Canadian National, et al.—Control—Wisconsin Central Transp. Corp., et al., 5 S.T.B. 890, 903-04 (2001).

requests that the Board define “commercially reasonable terms” in a manner that will allow an objective determination of compliance with their assertion. The Board does not see the need to define “commercially reasonable terms.” Under the operational monitoring condition discussed below, the Board will retain jurisdiction to determine on a case-by-case basis, when raised by an affected party, whether CN has failed to honor its commitment.

Bottleneck Rule; Contract Exception. Under the Board’s “bottleneck” principles,³⁶ in certain circumstances a shipper may separately challenge a portion of a carrier’s rate for a segment of a movement if the shipper has obtained a contract with another carrier for the remainder of the movement (the “contract exception”). Applicants have pledged that they will not assert any claims that would deprive any shipper of the right and opportunity to use the contract exception that the shipper would have had before the transaction. See CN-2 at 75. The Board will hold applicants to their pledge.

Relief Sought by Shippers Served by EJ&E. Several shippers whom EJ&E currently serves assert that the control transaction would result in a diminution in service, noting that a regional short line railroad provides superior service to customers on its line than a Class I railroad that is more concerned with long-haul rail transportation.

ACS. ACS strongly disagrees with CN’s allegations that rail service to shippers would improve as a result of the proposed acquisition. Rather, ACS argues that shippers would be better served by a service-oriented local rail carrier, like EJ&E, than a large carrier like CN, whose headquarters are located far away. The Board will take very seriously any shipper allegation that it is not receiving adequate service to meet its needs as a result of the control transaction. The Board’s oversight condition is intended to address service issues that arise as a result of the control transaction.

Equistar and AuxSable. Equistar owns and operates a polymers plant in East Morris, IL, that is currently served by EJ&E. Equistar states that EJ&E currently provides its East Morris plant a neutral connection that permits Equistar to access not only every Class I railroad, with the exception of KCS, at a range of gateways, but also numerous short-line and regional railroads as well. Equistar has reservations that consummation of the proposed transaction effectively would eliminate such neutral connections, and it anticipates CN’s capturing a substantial portion of those connections to maximize its line-haul opportunities, thereby causing Equistar’s traffic to encounter inefficient and unnecessarily circuitous routing.

While CSXT has the capacity to serve the East Morris plant, Equistar contends that CSXT is not a viable competitor of EJ&E because CSXT does not have the storage-in-transit capacity that is a critical element in service to the plastics industry. Further, Equistar notes that CSXT does not offer a direct line connection between Chicago and East Morris, instead operating under trackage rights over EJ&E accorded between East Morris and Joliet. Equistar is

³⁶ See Central Power & Light Company v. Southern Pacific Transportation Company, 1 S.T.B. 1059 (1996), clarified, 2 S.T.B. 235 (1997), aff’d sub nom. MidAmerican Energy Co. v. STB, 169 F.3d 1099 (8th Cir. 1999).

therefore concerned that any reduction in or restriction of those trackage rights would further compromise CSXT's efforts to serve the East Morris plant. Thus, Equistar asserts, the loss of neutral connections as a result of the proposed transaction would serve to eliminate competition for Equistar's traffic. Accordingly, Equistar requests that the Board condition approval of the control transaction on CN granting trackage rights and storage-in-transit rights consistent with those currently offered by EJ&E to protect Equistar's ability to continue to receive the benefits equivalent to having a neutral connection at its East Morris plant.

Aux Sable is concerned with the reduction of rail competition resulting from CN's acquisition of EJ&E, which Aux Sable believes would jeopardize the existing favorable arrangement covering EJ&E's service to its plant in Channahon, IL. Accordingly, Aux Sable opposes the proposed transaction unless approval is conditioned on the following: (1) during the 10-year period following consummation of CN's control of EJ&EW, CN shall cause EJ&EW to provide the same level of service as currently provided by EJ&E to Aux Sable's plant at Channahon, unless there is a material decrease in rail-based customer demand at the plant during that period; (2) during the 5-year period following consummation of CN's control of EJ&EW, CN will cause EJ&EW not to cancel the agreement whereby Aux Sable leases 5,000 feet of trackage at East Joliet Yard from EJ&E; and (3) CN will cause EJ&EW to assess rates and charges that will ensure economic and non-discriminatory access to rail carriers that connect with EJ&E.

The conditions sought by Aux Sable and Equistar are not appropriate and go beyond what is necessary to address any anticipated adverse effect of the control transaction. As CN notes in its reply, the requested conditions do not seek to remedy a significant loss in competition (as the number of railroads serving Equistar and Aux Sable will remain the same post-transaction). Further, as DOT suggests and CN "generally agrees," CN can be expected to comply with any enforceable contractual commitments as EJ&E's successor-in-interest. The Board further notes that DOT does not support the requested conditions but supports a Board-oversight condition to monitor any service complaints. Accordingly, the conditions sought by Aux Sable and Equistar will be denied. However, as noted above, the Board recognizes the potential vertical effects that would result in losing a "neutral connector" and will hold CN to its representations that it will keep affected gateways open on commercially reasonable terms. The Board takes very seriously concerns regarding the impact on service following the control transaction. The operational monitoring condition the Board is imposing will allow the Board to identify and resolve service problems arising from the approval and consummation of the transaction.

Relief Sought by Wisconsin & Southern Railroad Co. WSOR, a Class II carrier operating in Illinois and Wisconsin, opposes the proposed transaction without the imposition of certain conditions. WSOR asserts that the combined effects of the proposed transaction with the acquisition of control by CPR of Dakota, Minnesota & Eastern Railroad Corporation (DM&E) and Iowa, Chicago & Eastern Railroad Corporation (IC&E) would result in significant rail congestion on those carriers' lines entering Chicago from Wisconsin. WSOR asserts that the increase in coal traffic (should CPR acquire DM&E and construct DM&E's extension of its line

into the Powder River Basin (PRB))³⁷ would make it difficult for CPR to accommodate WSOR's existing overhead service and growth potential.³⁸ WSOR also anticipates that, as CN continues to develop its through traffic to and from Prince Rupert, BC, at the expense of service to its Wisconsin shippers, those customers will be forced to find alternatives and to abandon CN by relocating to other railroads, such as WSOR, thus resulting in congestion on WSOR's own lines into Chicago.

WSOR asserts that, given the dramatic impact of the CN/EJ&E and CPR/DM&E/IC&E proceedings on Midwestern rail service, the Board must consider the adverse impacts of both transactions in deciding whether to grant the conditions sought by WSOR. Further, to relieve the anticipated congestion, WSOR requests that approval of the transaction be conditioned on the Board requiring the following: (1) CN to sell to WSOR CN's former Wisconsin Central rail line from Leithton (milepost 37.9) to Forest Park, IL (milepost 11.0) (where it connects with a line of CSXT, giving WSOR access to the BRC's Clearing Yard) at a price to be negotiated by the parties but subject to Board oversight; (2) CN to grant WSOR overhead trackage rights over CN's line between Grayslake (milepost 44.0) and Leithton (milepost 37.9); (3) CN to assign to WSOR its trackage rights over CSXT from milepost 11.0 to the entrance to the Clearing Yard (also known as CSXT milepost 9.9, distance of about 8.9 miles) or, alternatively, to grant WSOR overhead trackage rights on its entire line from Grayslake (milepost 44.0) to Leithton (milepost 37.9), and then to Forest Park, IL (milepost 11.0) at a fee not to exceed 36 cents per mile, and (4) CN to assign its rights over CSXT into the Clearing Yard.

Although Board regulations provide for the evaluation of the cumulative impacts and crossover effects likely to occur as rival carriers react to the proposed combination in a major merger,³⁹ those regulations do not apply to a minor transaction. And although the Board has approved the CP/DM&E transaction, CP has not yet taken steps to begin constructing a line to the PRB or sought to have the existing restrictions lifted that currently limit the routing of any PRB coal moving over that line.⁴⁰ In the meantime, any projections as to the resulting traffic and congestion, and the effects thereof, continue to be highly speculative. Further, the Board agrees

³⁷ See Dakota, Minnesota & Eastern Railroad Corporation—Construction into the Powder River Basin, STB Finance Docket No. 33407 (STB served Feb. 15, 2006), aff'd, Mayo Foundation, et al. v. Surface Transportation Board, 472 F.3d 545 (8th Cir. 2006) (Mayo Foundation).

³⁸ On September 30, 2008, the Board approved CPR's acquisition of DM&E and IC&E, subject to routing restrictions. See Canadian Pacific Railway Company, et al.—Control—Dakota, Minnesota & Eastern Railroad Corp., et al., STB Finance Docket No. 35081 (STB served Sept. 30, 2008).

³⁹ See 49 CFR 1180.1(i).

⁴⁰ See Canadian Pacific Railway Company, et al.—Control—Dakota, Minnesota & Eastern Railroad Corp., et al., STB Finance Docket No. 35081, slip op. at 25, 27 (STB served Sept. 30, 2008); Iowa, Chicago & Eastern Railroad Corporation—Acquisition and Operation Exemption—Lines of I&M Rail Link, LLC, STB Docket No. 34177, slip op. at 16-17 (STB served July 22, 2002), modified (STB served Oct. 18, 2006).

with CN's assertion that the conditions WSOR seeks do not address competitive harm caused by the proposed transaction. For these reasons, the Board finds WSOR's requested conditions to be inappropriate, and they will be denied. However, the operational monitoring condition will provide a means for the Board to monitor and address any congestion issues resulting from the control transaction.

Relief Sought by Wisconsin State Agencies.

Wisconsin Department of Agriculture, Trade and Consumer Protection. DATCP is concerned with the potential for decreased services to Wisconsin businesses that rely on rail transport. It argues that market concentration results in reduced services to small, remote shippers. Also, DATCP raises concerns about possible diminishing opportunities for short-line connections because of heavily concentrated mainline long-distance traffic, particularly traffic resulting from the opening of the Port of Prince Rupert container terminal. DATCP requests that approval of the proposed transaction be conditioned to clearly ensure that CN is held to a very high standard and commits to preserving access and service to those who may be affected by transport on these lines, whether directly or indirectly.

Wisconsin Department of Transportation. WisDOT is concerned about the transaction's impact on already congested CN lines traversing Wisconsin, particularly with the opening of the Port of Prince Rupert container terminal (scheduled for completion in 2010). WisDOT claims that the transaction would have negative effects on traffic that moves shorter distances, in light of the decrease in originating traffic and the static growth of terminating traffic following CN's acquisition of Wisconsin Central. Further, WisDOT asserts that the increase of traffic on the CN main line through Wisconsin would make it increasingly difficult for CN to accept trainloads of traffic from regional carriers serving Wisconsin.

WisDOT requests that the following conditions be imposed: (1) CN operations would not block access to business or individuals for an unduly lengthy period of time and CN would establish a means of removing blockages within 30 minutes when notified of a blockage; (2) CN would construct additional infrastructure as needed if CN is unable to prevent blockages that last an unduly lengthy period of time; (3) CN would negotiate alternative access to the access to the Chicago terminal area with regional carriers who may be negatively affected by increased CN traffic through Wisconsin; (4) CN would not increase speeds on its lines in Wisconsin above current speeds until the Wisconsin Office of the Commissioner of Railroads determines that grade crossing warning devices at at-grade crossings provide adequate warning for the proposed speed; and (5) CN would share its plan for improvement to trackage in Wisconsin to accommodate the increased volumes including dollar amounts by line segment with WisDOT.

DATCP's and WisDOT's concerns and requested conditions do not address any adverse competitive impacts on freight transportation. WisDOT's assertion that traffic would increase with the opening of the Port of Prince Rupert container terminal may be true, but, as CN notes, the facility would open regardless of the transaction. WisDOT has not shown how the control transaction would have a direct bearing on the increase in overhead traffic that WisDOT anticipates. Therefore, the Board will deny the requested conditions. The Board, however, takes

seriously DATCP and WisDOT's concerns regarding rail service. Pursuant to the operational monitoring condition and oversight period established in this decision, the Board will monitor and address any diminution in service resulting from the control transaction.

Relief Sought by Metra. Metra opposes the proposed transaction unless approval of the application is made subject to conditions that they claim would adequately protect the interests of Metra. Metra is concerned that the proposed increase in traffic on the EJ&E would pose a serious potential challenge to Metra's continued ability to provide high-quality commuter service. Metra notes that CN has stated that it would work with Metra and host freight operators to coordinate operations and adjust operating windows such that the needs of all users would be met and that CN would explore options to facilitate Metra's proposed Suburban Transit Access Route (STAR) line plans. Metra states it has met with CN to negotiate a resolution, but no resolution could be reached. Accordingly, Metra requests three conditions specifically concerning Metra's operations, one of which has a subset of conditions in the alternative. Metra also requests a fourth condition for the public interest.

STAR Line. Metra states that it is currently in the planning stages of instituting commuter operations, referred to as the STAR line, over a portion of the EJ&E. Metra states that at least two segments involving the EJ&E have been identified for future expansion of the STAR line: the Star Line East Segment that would operate along the EJ&E right-of-way from Joliet to Lynwood, IL; and the Star Line North Segment that would operate along the EJ&E right-of-way from Hoffman Estates, IL, to Waukegan. Accordingly, Metra requests that approval of the transaction be conditioned on CN granting trackage rights to Metra between milepost 7.5 and milepost 42.5 on EJ&E's Western Subdivision in order to implement Metra's STAR line, and CN's agreement to work cooperatively to consider future grants of trackage rights as Metra seeks to develop the Star Line East Segment and the Star Line North Segment. CN states that it is willing to cooperate with Metra concerning the STAR line but stresses that EJ&E has not entered into any binding agreement with Metra.

Southeast Service. Metra claims that, in conjunction with the Federal Transit Administration's New Starts Process, it is in the planning stages of developing a new rail service line, the Southeast Service Line, from Chicago to Crete, IL, on the joint right-of-way of UP and CSXT, and will cross the EJ&E at grade at Chicago Heights. Accordingly, Metra requests that approval of the proposed transaction be conditioned on CN agreeing to work cooperatively with Metra on the establishment of a commuter train schedule to accommodate the Southeast Service. The proposed condition also requests that, once such a schedule is established, CN agree to respect the integrity of the schedule and grant commuter trains priority over the Chicago Heights interlocking. CN asserts that the requested condition is unrelated to the competitive effects of the proposed transaction.

West Chicago, IL and Barrington, IL Interlockings. Metra notes two major locations of special concern where Metra trains cross the EJ&E at grade: (1) at West Chicago, IL Interlocking, where Metra trains operating over UP's West Line (UP-W Line) cross EJ&E; and (2) at the Barrington, IL Interlocking, where Metra commuter trains operating over UP's Northwest Line (UP-NW line) cross EJ&E. These trains are operated by UP pursuant to a Purchase of Service Agreement with Metra. Metra states that it seeks to upgrade the UP-W Line

and UP-NW Line to allow greater flexibility that will enable Metra to expand commuter rail service.

EJ&E controls the interlockings at West Chicago and Barrington. Metra states that EJ&E has been vigilant in minimizing freight train interference with Metra commuter trains at those locations. Metra asserts that the potential increase in EJ&E freight traffic, as well as the substantial increase in train lengths, could threaten efficient commuter rail operations crossing this line. Moreover, Metra asserts that any delays to UP freight trains crossing the interlockings could result in dire consequences to Metra's commuter rail service, as both lines rely upon intense coordination between commuter and freight train traffic.

Accordingly, Metra requests that approval of the proposed transaction be conditioned on the control of the West Chicago and Barrington interlockings being transferred from EJ&E to Metra as of the date of consummation of CN's control of EJ&E. In the event that control of those interlockings is not transferred to Metra, Metra states that the following alternative conditions are required: (1) CN shall cause EJ&EW dispatchers in control of the interlockings at West Chicago and Barrington to impose a curfew for freight train operation over those interlockings during peak periods of Metra's commuter operations; (2) CN shall cause EJ&EW dispatchers in control of the interlockings at West Chicago and Barrington to give priority to Metra commuter trains over EJ&EW freight trains at those interlockings during all non-peak hours and avoid any undue interference with the commuter service; and (3) CN shall cause EJ&EW dispatchers in control of the interlockings at West Chicago and Barrington to take due account of UP freight traffic in protecting Metra commuter trains at those crossings.

CN strongly opposes these proposed conditions and asserts that adequate capacity exists for Metra trains and that any additional and longer trains will not be running over and sharing UP lines, but merely cross the same diamonds as UP lines.

Metra's Requested Reporting Condition. Lastly, Metra requests that CN cause EJ&EW to report to the Board regarding the effect of the foregoing conditions on delay of Metra commuter trains at West Chicago and Barrington. The reports sought by Metra would be filed at 6-month intervals for a period of 10 years, beginning 6 months after the date of consummation of CN control of EJ&E. Metra would have the right to reply to any such report. Metra would have the Board expressly retain jurisdiction over the subject matter of the conditions during that 10-year period to take any action that might be required in the public interest.

The Board will not impose Metra's requested conditions concerning the STAR line, the Southeast Service line, or the West Chicago and Barrington interlockings, because they are unrelated to the competitive effects of the proposed transaction. Several of the issues that Metra raises are typically dealt with through negotiations and contracts between railroads. Metra has offered no reasons why the combined CN/EJ&E would be less inclined to negotiate than EJ&E. The Board encourages Metra and CN to negotiate reasonable commercial agreements concerning the STAR line, the issues surrounding the introduction of the Southeast Service through Chicago Heights interlocking, and the interlockings at West Chicago and Barrington.

The Board further notes that many of the concerns surrounding the proposed STAR line and Southeast Service have been addressed in the EIS prepared by SEA.⁴¹ As a voluntary mitigation measure, applicants state that they will operate the West Chicago and Barrington Interlockings according to the current agreements under which EJ&E operates, which require EJ&E to give priority to passenger trains over either UP or EJ&E freight trains. Applicants also commit to working with Metra to explore all options for service on the proposed STAR Line, including use of the EJ&E rail line. The timing and implementation of the STAR Line service remain subject to numerous variables, including securing government funding, but applicants are committed to continuing discussions with Metra on the STAR line. Lastly, applicants commit to complying with any written and executed curfew agreements that are now in effect regarding operations affecting passenger or commuter train service.

The Board also recognizes the concern surrounding any changes in protocol in the handling of passenger train traffic. The Board's operational monitoring condition will require the reporting of current protocol and changes to protocol during the oversight period. Parties, such as Metra, will have ample opportunity to report any diminution in service resulting from the proposed transaction. Further, the Board will hold applicants to their representation that affected gateways will be kept open on commercially reasonable terms.

St. Charles Air Line Route Condition. The St. Charles Air Line (Air Line) is a portion of elevated track that runs across the southern part of downtown Chicago and serves as part of CN's St. Charles Air Line Route (Air Line Route), which is used by CN to move traffic across the city of Chicago. The Air Line Route is also used by six daily Amtrak trains to access Chicago Union Station. As part of the transaction, applicants expect that, after the 3-year implementation period, CN will cease operations over the Air Line Route by rerouting traffic around Chicago on the EJ&EW.⁴² Applicants state these actions will reduce their reliance on suboptimal infrastructure and reduce congestion in downtown Chicago, while advancing the objectives of CREATE and the City of Chicago.⁴³ One aspect of the CREATE Program is the proposed construction of the Grand Crossing Connection between CN and NS. The Grand Crossing Connection would permit CN to discontinue use of the Air Line Route, and trains currently operating on the Air Line Route would use the Grand Crossing Connection to reach Union Station over NS's line. The Grand Crossing Connection is not fully funded and could take years to construct due to financing and regulatory approvals required for the project.

Several parties oppose the proposed transaction and assert that the abandonment of the Air Line Route would result in the disruption or discontinuance of Amtrak service to affected locations.⁴⁴ Parties raise concerns regarding the cost of maintenance of the Air Line Route

⁴¹ See Final EIS at 4-37 (VM 38, VM 39, and VM 41).

⁴² See CN-2 at 32 n.15.

⁴³ See CN-2 at 15-16 n.6, 203-04.

⁴⁴ See DOT Open. at 5-6; City of Mattoon Intent to Participate at 1-2; City of Carbondale at 3, and Champaign County Chamber of Commerce Board of Directors' Notice of Intent to Participate, p. 2. Several members of the United States House of Representatives, including

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should CN cease its operations, as well as concerns regarding funding for the Grand Crossing Connection.⁴⁵ Parties oppose CN's application to acquire control of EJ&E unless the approval of the control transaction is conditioned upon applicants preserving the Air Line Route at its current operating standards for use by Amtrak to access Chicago Union Station with no additional cost to Amtrak or the State of Illinois, until such time that an alternative route using the Grand Crossing Connection is completed and operational.⁴⁶

In their response, applicants addressed these concerns by stating that CN has now agreed to the conditions sought by Amtrak: that Amtrak may remain on the Air Line Route indefinitely, until the Grand Crossing Connection or another acceptable alternative is available, at a cost to be capped at the current level (adjusting only for inflation pursuant to the formula contained in the agreement between CN and Amtrak) and at the level of operating utility currently enjoyed by Amtrak.⁴⁷ Applicants do note, however, that CN never committed itself to making a financial contribution to the Grand Crossing Connection and did not make such a commitment as part of CREATE.⁴⁸

On December 9, 2008, Amtrak and CN jointly filed a notice of settlement and request for conditions. The settlement agreement memorializes the commitments made by CN regarding Amtrak's continued use of the Air Line Route and other IC lines in and near Chicago. Accordingly, CN and Amtrak request that the Board impose conditions that reflect the commitments made in the settlement agreement.⁴⁹

The Board finds that the terms of the settlement agreement sufficiently address the parties' concerns with regard to the Air Line Route. The Board will impose the conditions requested by CN and Amtrak that will effectively allow Amtrak to remain on the Air Line Route until an alternative route acceptable to Amtrak, such as the Grand Crossing Connection, is completed and operational, and that applicants will maintain the Air Line Route at its current operating level for use by Amtrak to access Chicago Union Station with costs to be capped at

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Reps. Melissa L. Bean (IL-08), Jerry F. Costello (IL-12), Donald A. Manzullo (IL-16), Judy Biggert (IL-13), Timothy V. Johnson (IL-15), Peter J. Roskam (IL-06), and Bill Foster (IL-14), have also expressed concern that compromising Amtrak's trains over the Air Line Route could be devastating to Illinois communities.

⁴⁵ See IDOT at 3; Carbondale at 3 (requesting that CN provide funding to help establish the Grand Crossing Connection).

⁴⁶ See Carbondale at 3; NARP at 1-2.

⁴⁷ See CN-29 at 56-7; Joint V.S. of Robert T. Holstrom and Paul E. Ladue at 2. As mentioned above, Amtrak withdrew its opposition and request for conditions on December 9, 2008.

⁴⁸ See CN-29 at 58.

⁴⁹ CN and Amtrak request that its conditions be imposed in lieu of the Voluntary Mitigation measure included in the Final EIS (See Final EIS at 4-37 (VM 37)).

their April 28, 2008 levels, adjusted only for inflation pursuant to the formula contained in the current CN/Amtrak agreement with the effective date of February 1, 1995.

Gary/Chicago International Airport Authority. GCIAA opposes the proposed transaction based on the belief that increased rail traffic would have negative effects on safety and economic development at the Gary/Chicago International Airport. Specifically, GCIAA raises concerns about impairment to its runway expansion project to increase the overall length of its primary runway. The expansion project, which has already begun, is designed to address expansion and safety issues, and to bring the runway up to Federal Aviation Administration (FAA) standards. The expansion plan requires that a portion of the EJ&E line running directly northwest of the runway be relocated. For approximately the last 6 years, GCIAA has tried unsuccessfully to negotiate with EJ&E to relocate 2.3 miles of the line. GCIAA asserts that the proposed transaction would significantly impair its ability to fund and complete the runway expansion. GCIAA explains that the increased traffic would further complicate the proposed track changes and create additional issues with compensating EJ&E for the changes to the track. Additionally, GCIAA asserts that the increased train operations would pose serious safety issues.

While GCIAA's concerns may be valid, its comments, as CN notes, do not allege any adverse competitive impacts in freight transportation. The difficulties in negotiating with EJ&E appear to be a longstanding issue of concern. GCIAA has not shown how future negotiations with applicants would be impeded as a direct result of the control transaction. While the Board urges parties to reach a resolution, GCIAA's comments do not address any competitive harm that would arise from the approval of the control transaction.

The Board notes, however, that GCIAA's safety concerns are addressed in the EIS. As discussed in the Draft EIS, GCIAA, EJ&E, CSX, and NS entered into a four-party Preliminary Memorandum of Understanding (PMOU) on June 27, 2008.⁵⁰ The PMOU provides for relocating the EJ&E rail line, building a bridge over the existing NS Gary Branch, and constructing a separated-grade crossing at Industrial Highway. While further definitive agreements would be required, the PMOU sets forth the core understanding of the parties on the elements of the relocation plan and underlying obligations that would enable the airport to proceed with its expansion plan, while protecting and improving rail operation in northwest Indiana. Because none of the proposed connections or double track would be constructed near the airport, the construction associated with the transaction would not affect the airport or its proposed expansion. As discussed below, the Board is adopting the mitigation condition recommended by SEA in the Final EIS requiring applicants to comply with the PMOU.

Monitoring & Oversight Condition. The Board is establishing an oversight period for 5 years so that it may assess the competitiveness of service provided by CN upon implementation of the proposed transaction, the various service and other impacts of the transaction, and the effectiveness of the various conditions we have imposed. Although the Board does not anticipate anticompetitive consequences from the transfer of control, it is mindful that operational difficulties can arise when implementing transactions of this scope. Therefore,

⁵⁰ See Draft EIS at 3.3-94-96.

approval of the transaction will be conditioned upon a monitoring and oversight condition. If operational problems arise after consummation of the transaction, this oversight condition should provide a fully effective mechanism for quickly identifying and addressing them. The Board retains jurisdiction to impose additional conditions and take other action if, and to the extent, the Board determines it is necessary to address matters related to operations following the transfer of control. At the end of the 5-year oversight period, the Board may elect to extend its oversight for an additional period if conditions warrant. The Board finds that an initial 5-year duration is appropriate, so that the oversight period will begin with the implementation phase (which applicants expect to be completed within 3 years after consummation of their acquisition of control over EJ&EW⁵¹) and continue for a 2-year period following the full implementation of the operating plan.

During the oversight period, the Board will closely monitor whether applicants have adhered to the various representations made on the record in this proceeding. To accomplish this goal we will require CN to report to us monthly on the operational matters described below. CN shall meet with Board personnel to establish appropriate measures and reporting procedures for this monitoring. CN shall continue to report these measures on a monthly basis during the oversight period unless the Board alters or terminates the reporting.

Interchanges. To monitor interchange activity, the Board will require CN to establish measurements of the effectiveness of each current (historic) interchange and to report the same measures for these interchanges post-merger. The reporting shall cover any new interchange should CN move traffic from one or more current interchanges to a new point. The new interchange with the Gary Railway Company shall also be included in the reporting.

Railroad At-Grade Crossings. EJ&E also has at-grade crossings with several railroads in the Chicago area. Several parties have expressed concern about changes in operation or operating protocols at these crossings.⁵² The Board will require monthly reporting and monitoring of the operations at these crossing points. CN shall provide a report of all existing (historic) protocols for service or priority at these crossings and shall report any changes that are made. CN shall also report monthly to the Board any delays occurring at each of these crossings by freight and passenger trains of CN, others using CN, and crossing carriers.⁵³

Train Volumes, Accidents and Incidents, and Street Crossing Blockages. CN will be required to provide monthly the following information pertinent to post-merger operations: the number of trains operating over appropriate segments of the EJ&E and CN lines through Chicago per day; the date and descriptive information about each accident or incident that occurs on the EJ&E rail line or CN lines through Chicago, including grade crossing accidents; and the date and descriptive information about each crossing blocking occurrence on the EJ&E rail line that exceeds 10 minutes in duration.

⁵¹ See CN-2 at 21.

⁵² See Metra at 4-7; WSOR, V.S. Gardner at 4-8.

⁵³ See, e.g., Metra at 8-10.

Labor Protection. Under 49 U.S.C. 11326 (with exceptions not pertinent here), the imposition of labor protection is mandatory when approval is sought for a transaction under sections 11323–11325. In the absence of a need for greater protection, the conditions in New York Dock are appropriate for this type of transaction. Because no need for greater protection has been shown (the evidence indicates that the CN/EJ&EW control transaction will be implemented with limited adverse effects on employees), these conditions will be imposed here. Applicants state that most job reductions (estimated at 114) will be addressed through normal attrition during the implementation period, and state that any workforce reductions would allow for increased administrative efficiency, improve equipment utilization and maintenance, and create centralized dispatching and crew-calling offices.

UTU GCA-386 has asked the Board to extend employee protection to include protections for employees of other railroads, in particular employees of BNSF Railway Company (BNSF), engaged in terminal operations in Chicago, Tacoma, WA, and other U.S. ports that would be adversely affected by the CN/EJ&EW control transaction. UTU GCA-386 claims that BNSF employees would be harmed because of the diversion of traffic and diminished competition in conjunction with CN container traffic via Prince Rupert, BC. UTU GCA-386 argues that employee protective conditions are available to non-applicant employees engaged in terminal operations via a “terminal exception.” However, the Board has consistently ruled that the employees of a non-applicant carrier, or employees of a carrier not directly involved in a transaction governed by 49 U.S.C. 11323, are not entitled to labor protection under 49 U.S.C. 11326.⁵⁴ Therefore, UTU GCA-386’s request will be denied.

BLET asks the Board to deny the application and related filings, or, in the alternative, apply New York Dock conditions on the entire transaction, including the proposed grants of trackage rights in STB Finance Docket No. 35087 (Sub-Nos. 2 through 7). BLET contends that these grants of trackage rights would provide CN a level of control over its five subsidiaries that would require Board approval under section 11323, and thus would necessitate the application of New York Dock conditions to the entire unified transaction, instead of imposing the standard level of protection for trackage rights exemptions set forth in Norfolk and Western. BLET also expresses concern regarding applicants’ statement regarding the need to create a single collective bargaining agreement for all train and engine personnel. Lastly, BLET takes issue with CN’s proposal to give trackage rights to GTW and WC over the entire length of EJ&EW’s main line, while EJ&EW would have no corresponding rights over GTW and WC.

New York Dock and Norfolk & Western provide differing levels of protection, but, as it respects affected employees of applicants and their rail carrier affiliates, these differences will be of no consequence: affected employees of applicants and their rail carrier affiliates covered by Norfolk & Western would also be covered by, and would therefore be entitled to the protections of, the New York Dock conditions. Further, as CN notes, any attempt by CN to bring all

⁵⁴ Crouse Corp. vs. ICC, 781 F.2d 1176, 1192-93 (6th Cir. 1986), cert. denied, 479 U.S. 890 (1986); Railway Labor Executives’ Ass’n v. ICC, 914 F.2d 276, 280-81 (D.C. Cir. 1990); Canadian National, et al.—Control—Illinois Central, et al., 4 S.T.B. 122, 165-66 (1999).

Chicago-area train and engine employees under a single collective bargaining agreement would not occur without negotiation and, if necessary, arbitration under New York Dock, subject to the Board's review.⁵⁵ This provision under New York Dock would also address BLET's concerns regarding pending employment proceedings and the proposed allocation of EJ&E employees between the Gary Railway and EJ&EW. Therefore, Board's approval of this transaction does not indicate approval or disapproval of any of the applicants' plans regarding the collective bargaining agreements of affected employees. BLET's request will be denied.

Lastly, IBEW, ATDA, and NCFO file joint comments requesting the Board to condition approval upon assurances from applicants that: (1) the collective bargaining agreements covering these unions' CN and EJ&E members remain intact; (2) CN succeed to EJ&E's contractual obligations in pending contract claims and disciplinary appeals; and (3) employees receive full New York Dock protections. As stated above, New York Dock protections will be imposed. The Board does not issue specific findings regarding any potential changes to collective bargaining agreements an applicant might implement to carry out a transaction. Those discussions are covered by New York Dock. New York Dock protections also apply to pending contract claims and disciplinary appeals. Therefore, the concerns of these parties are adequately addressed by our imposition of New York Dock as a condition to approval of this transaction.

Related Filings. *Corporate Family Transaction (Sub-No. 1).* In its application, CN has included a notice of exemption filed by EJ&E, under 49 CFR 1180.2(d)(3), that would allow EJ&EW to acquire the land, rail, and related assets of EJ&E located west of the centerline of Buchanan Street in Gary, immediately following the Board's approval of the proposed transaction. The pertinent class exemption exempts transactions within a corporate family that do not result in adverse changes in service levels, significant operational changes, or a change in the competitive balance with carriers outside the corporate family. Because this transfer, alone, would not affect service levels, operations, or competition, the Board will allow the notice of exemption to take effect on the effective date of this decision.

Trackage Rights Exemption Notices (Sub-Nos. 2 through 7). Applicants have filed six notices of exemption (in Sub-Nos. 2 through 7) under 49 CFR 1180.2(d)(7). In Sub-Nos. 2 through 5, applicants' subsidiaries—CCP, GTW, IC, and WC—seek to obtain trackage rights over EJ&EW, between Waukegan, IL, and Gary, IN. In Sub-Nos. 6 and 7, EJ&EW seeks trackage rights over selected portions of CN's CCP and IP subsidiaries. The pertinent regulation exempts the acquisition of trackage rights by a rail carrier over lines owned or operated by any other rail carrier that are: (1) based on written agreements and (2) not filed or sought in a responsive application in a rail consolidation proceeding. No individual findings under 49 U.S.C. 10502 are necessary as to the trackage rights notices because the transactions fall within the class exemption provided at 49 CFR 1180.2(d)(7). The Board will allow the notices of exemption to take effect on the effective date of this decision.

⁵⁵ See CSX Corp.—Control—Conrail Inc., 3 S.T.B. 196, 328-330 (1998) (“In approving a rail merger or consolidation . . . we have never made specific findings . . . regarding any CBA changes that might be necessary to carry out a transaction.”).

Environmental Issues.

Board Authority. The Board and, before it, the Interstate Commerce Commission (ICC) have long exercised authority to impose environmental mitigation conditions on the agency’s approval of transactions governed by what is now section 11324(d).⁵⁶ In its comments on the Draft EIS, CN asserted—for the first time in this or any other such proceeding—that the Board lacks the statutory authority to impose environmental conditions.⁵⁷ CN also questioned whether NEPA applies in a section 11324(d) proceeding because the time provided in section 11325(d) for a final decision is not sufficient for the Board to conduct the environmental review required by NEPA. As discussed below, CN is estopped from contesting the Board’s authority to attach environmental mitigation conditions in this case by its contemporaneous Congressional testimony. Moreover, CN waived its other claims by failing to raise them in a timely manner before the Board. Nevertheless, for the benefit of future applicants, we will discuss the basis of the Board’s statutory authority to impose environmental mitigation conditions on our approval of transactions subject to section 11324(d).

Estoppel. Three weeks before CN filed its comments on the Draft EIS questioning the Board’s authority to impose environmental mitigation conditions, CN’s President testified before Congress that the Board already has the authority to conduct an environmental review of the transaction and impose environmental mitigation conditions.⁵⁸ Consequently, CN is barred here from arguing that the Board does not have the authority to impose environmental mitigation conditions by analogy to the doctrine of judicial estoppel.⁵⁹ The elements of judicial estoppel⁶⁰ are present here: CN has taken clearly inconsistent positions before the Board and Congress; it

⁵⁶ See, e.g., Burlington Northern et al.—Control—Washington Central, 1 S.T.B. 792, 803-08 (1996) (BN/Wash. Cent.), aff’d sub nom. City of Auburn v. United States, 154 F.3d 1025 (9th Cir. 1998) (Auburn). See also Rail Exemption Procedures, 8 I.C.C.2d 114, 115 (1991) (in mergers under what is now section 11324(d) agency must consider both competitive factors and its obligations under “additional legislation, such as the various Federal energy and environmental statutes”).

⁵⁷ See CN DEIS Comments at 148-49 (filed Sept. 30, 2008) (characterizing the Board’s authority to impose environmental conditions in a section 11324(d) transaction as “unclear” and claiming that precedent appears to preclude the Board from imposing conditions to mitigate impacts other than effects on competition and labor).

⁵⁸ CN testified before the Committee on Transportation and Infrastructure of the House of Representatives on September 9, 2008 in opposition to H.R. 6707, the Taking Responsible Action for Community Safety Act. The written testimony and an archived broadcast of this hearing are available on the Committee’s website.

⁵⁹ See New Hampshire v. Maine, 532 U.S. 742, 749-50 (2001). Estoppel protects the integrity of the judicial process by preventing a party from asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in another proceeding or a different phase of the same proceeding.

⁶⁰ Id. at 750.

convinced Congress that new legislation was unnecessary by assuring them that the Board has environmental conditioning authority; and it would now derive an unfair advantage or impose an unfair detriment if it were not estopped from asserting before the Board the inconsistent position that the Board lacks environmental conditioning power here.

Waiver. In pleadings filed in May and August 2008, CN also suggested that NEPA does not apply to acquisition proposals designated as “minor” under the Board’s rules because the Board is required by statute to reach a decision within 180 days of the filing of the application, which is not adequate time to complete a NEPA review if preparation of an EIS is necessary. CN however, has waived this claim because it did not forcefully raise it in a timely manner.⁶¹ The time for CN to have done so would have been either before or immediately after the Board’s November 26, 2007 decision, which accepted the application as a minor transaction, announced the Board’s intention to prepare an EIS, rather than a more limited EA, in this case, and extended the date for a final decision as needed to complete the full environmental review process. CN failed to do so. Instead, it took the opposite position—that “the Board cannot authorize the Transaction on the merits until the EIS process is complete.”⁶² Had CN presented its current argument to the Board at the outset, the agency would have been in a better position to assess the extent to which NEPA applies and whether there were any suitable ways to shorten the environmental review process from the outset.⁶³

Environmental Conditioning Authority. This agency has had broad authority over rail consolidations since 1920. Prior to 1980, ICC review of all mergers and acquisitions was conducted under a single, broad public interest standard.⁶⁴ In 1980, Congress concluded that the ICC had been taking too long to decide non-controversial cases “where approval is routinely and consistently granted.”⁶⁵ Therefore, as part of its overhaul of railroad regulation in the Staggers Rail Act of 1980 (Staggers Act), Congress narrowed the factors to be considered by the agency in deciding whether to approve rail merger or acquisition proposals that do not involve more than one Class I railroad (current section 11324(d)) and imposed shorter timetables for the review of those cases (current sections 11325(c) and (d)). In applications that do not involve more than one Class I railroad, the schedule for review is either 300 days (for a proposal with regional or national transportation significance, section 11325(c)) or 180 days (for all other proposals, section 11324(d)).

⁶¹ An argument not forcefully raised in a timely manner is generally waived. See, e.g., Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 553-54 (1978); Western Resources v. STB, 109 F.3d 782, 793 (D.C. Cir. 1997); Erie-Niagara Rail Steering Committee v. STB, 247 F.3d 437-443-44 (2d Cir. 2001). The equitable doctrine of waiver applies with full force to statutory deadlines for agency decisions. See BNSF Ry. v. STB, 453 F.3d 473 (D.C. Cir. 2006); USAir, Inc. v. DOT, 969 F.2d 1256, 1259-60 (D.C. Cir. 1992).

⁶² Applicants’ Comments on the Draft Scope of Study at 8-9 (filed Feb. 15, 2008).

⁶³ See 40 CFR 1507.3(b),(d) (Council on Environmental Quality (CEQ) regulations permitting agencies to modify EIS procedures where necessary to comply with other statutes).

⁶⁴ See former 49 U.S.C. 11344(c) (1979).

⁶⁵ H. Conf. Rept. No. 1430, 96th Cong., 2d. Sess. 121 (1980).

As noted above, with regard to a transaction that does not involve the merger or acquisition of at least two Class I rail carriers, section 11324(d) directs the Board to approve the transaction unless: (1) as a result of the transaction, there is likely to be substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States; and (2) the anticompetitive effects of the transaction outweigh the public interest in meeting significant transportation needs. And because section 11324(d) was enacted specifically to curtail the substantive, transportation-related review of issues that were deemed “routine,” the ICC, shortly after passage of the Staggers Act, concluded that its substantive, transportation-related review in such cases should focus only on the “significant anticompetitive effects” standard in the statute.⁶⁶

Environmental conditions, however, are different, and we believe that Congress in the Staggers Act did not intend to preclude environmental conditions in section 11324(d) cases. Although NEPA was enacted in 1969, it had not come into play in ICC merger cases by the time of the Staggers Act. Nevertheless, Congress considered exempting section 11324 transactions from NEPA, but ultimately chose not to do so.⁶⁷ Because Congress has explicitly exempted other types of rail transactions from NEPA,⁶⁸ its failure to do so here is an important fact suggesting that it did not intend to preclude NEPA’s application.

As a general matter, the Board has broad powers to administer the Interstate Commerce Act, including the rail transaction review provisions. Section 721(a) makes clear that “[e]numeration of a power of the Board . . . does not exclude another power the Board may have in carrying out [the Act].” Section 11324(c) gives the Board explicit authority to impose conditions on rail consolidations subject to section 11324, including section 11324(d) transactions. The agency has always believed that the limitation against imposing traditional public interest conditions unrelated to competition in section 11324(d) transactions does not extend to environmental conditions, and it has imposed environmental conditions in other mergers subject to section 11324(d).⁶⁹

⁶⁶ See Norfolk & Western Ry. Co.—Pur.—Illinois Term. R. Co., 363 I.C.C. 882 (1981) (NW-Illinois Terminal), aff’d sub nom. Illinois Commerce Comm’n. v. ICC, 687 F.2d 1047 (7th Cir. 1982) (Illinois Commerce).

⁶⁷ An early House version of the Staggers Act merger section contained language explicitly providing that NEPA “shall not apply to transactions carried out pursuant to this section [referring to what is now section 11324].” See H.R. 7235, 96th Cong. at §309(a) (May 1, 1980). That language did not appear in either the Conference substitute or the final bill as enacted. See Conf. Rept. at 120-21.

⁶⁸ See Rock Island Railroad Employee Assistance Act, 45 U.S.C. 1010 (“The provisions of [NEPA] . . . shall not apply to transactions carried out pursuant to this chapter”); Milwaukee Railroad Restructuring Act, 45 U.S.C. 917 (same).

⁶⁹ BN/Wash. Cent. 1 S.T.B. at 806-08; Iowa, Chicago & Eastern Railroad—Acquisition and Operation Exemption—Lines of I&M Rail Link, LLC, STB Finance Docket No. 34177 slip op. at 13-18 (STB served July 22, 2002) (condition imposing traffic restrictions pending

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The agency’s clear demarcation of environmental conditions—as distinct from conditions relating to traditional public interest factors—stems from the special status of environmental protection under a separate legislative mandate. In NEPA, Congress required all federal agencies to incorporate informed environmental considerations into their decision-making. 42 U.S.C. 4332(C). To that end, Congress directed agencies to interpret and administer their statutes, regulations and policies in accordance with the environmental protection policies set forth in NEPA “to the fullest extent possible.” See 42 U.S.C. 4332; see also 40 CFR 1500.6 (CEQ regulation). Thus, where an agency’s authority to take a particular action—such as imposing conditions—is grounded in its own statute, NEPA “authorizes the agency to make decisions based on environmental factors not expressly identified in the agency’s underlying statute.” Natural Resources Defense Council v. EPA, 859 F.2d 156 (D.C. Cir. 1988). The Board has complied with NEPA’s mandate by construing the Interstate Commerce Act to permit the imposition of environmental conditions in mergers subject to section 11324(d).

Although Congress intended NEPA to be broadly applied to virtually all major actions taken by federal agencies, there are certain narrow exceptions to NEPA applicability when there is a “clear and unavoidable” conflict between an agency’s statute and NEPA.⁷⁰ As discussed below, however, none of the exceptions applies to the Board’s exercise of conditioning authority here, and nothing in the structure or language of the Interstate Commerce Act suggests that Congress intended to preclude the application of NEPA to transactions covered by section 11324(d).

Unless there is a direct conflict between NEPA and an agency’s organic statute or some other strong evidence demonstrating Congressional intent to repeal NEPA, then NEPA is to be followed. See Izaak Walton League v. Marsh, 655 F.2d 346, 367 (D.C. Cir. 1981). Although section 11324(d) limits the range of transportation-related conditions that the Board can impose in smaller mergers, it does not directly preclude the Board from considering environmental impacts when determining whether to impose environmental conditions on its approval of such transactions.⁷¹

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subsequent environmental review); Canadian Pacific Railway Railway Co.—Control—Dakota, Minnesota & Eastern Railroad Corp., STB Docket No. 35081 slip op. at 24-26 (STB served Sept. 30, 2008) (same).

⁷⁰ Flint Ridge Dev. Co. v. Scenic Rivers Ass’n, 426 U.S. 776, 788 (1976) (Flint Ridge).

⁷¹ Although CN suggests that the decisions in Illinois Commerce, 687 F.2d at 1055, and Lamoille Valley R.R. v. ICC, 711 F.2d 295 (D.C. Cir. 1983) (Lamoille Valley) place such limits on the Board’s conditioning authority, we find these cases inapposite. Neither case addresses the Board’s authority to mitigate the adverse environmental impacts of rail carrier consolidations. Illinois Commerce did not discuss the scope of the agency’s conditioning authority at all in upholding the ICC’s determination that the competitive effects approval standard was the proper one for transactions not involving multiple Class I carriers. Lamoille Valley did include a footnote in which the court rejected suggestions that the ICC’s ability to condition transactions was broader than its ability to approve or reject the merger as a whole. 711 F.2d at 301 n.3. But

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Consistent with the “direct contradiction” standard, in certain situations the time limits on an agency’s decisionmaking are so short as to reflect a clear Congressional intent to preclude the consideration of environmental issues.⁷² See, e.g., Flint Ridge (30-day time limit too short for NEPA); City of New York v. Minetta, 262 F.3d 169 (2d. Cir. 2001) (60-day time limit too short). The court cases do not support the conclusion that the 300-day review period for section 11324(d) transactions that have regional or national transportation significance and the 180-day review period for all other section 11324(d) transactions are so short as to reflect an intent by Congress to exempt the Board’s decisionmaking from NEPA.⁷³ The Board has conducted environmental reviews of varying detail under these time frames in prior cases, and has made informed decisions with regard to the need (or lack of need) to exercise our authority to impose environmental mitigation conditions.⁷⁴

In light of the foregoing, the Board concludes that Congress authorized the Board to impose conditions to mitigate adverse environmental effects. This is especially so where Board approval of a transaction—by statute—exempts the merging carriers from “all other law,” including state and local environmental laws, “as necessary” to let the carriers carry out the transaction and operate the rail property. See 49 U.S.C. 11321(a). Indeed, the current transaction illustrates why the Board’s conditioning authority must be construed to permit environmental mitigation. The CN/EJ&E transaction is expected to provide nationwide economic benefits by making the interstate rail transportation network more efficient and relieving rail congestion in the Chicago area. But the transaction also will impose substantial

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the footnote is dicta because the court was not reviewing the Board’s authority to impose a particular condition, nor was it considering the effect of NEPA on the Board’s conditioning authority.

⁷² NEPA may also be inapplicable if the agency’s decision is “ministerial” in nature or the agency lacks any discretion to consider environmental findings. See DOT v. Public Citizen, 541 U.S. 752 (2004) (Public Citizen). Here the Board has plenary and exclusive jurisdiction over rail transactions (see section 11321), explicit discretion to determine appropriate conditions on its approval of transactions (see section 11324(c)), and inherent unenumerated powers to carry out the Interstate Commerce Act (see section 721(a)). Accordingly, there is no basis to apply the Public Citizen exception to the Board’s determination of appropriate environmental conditions for mergers covered by section 11324(d).

⁷³ See, e.g., Forelaws v. Johnson, 743 F.2d 677 (9th Cir. 1994) (NEPA applicable despite 9-month deadline).

⁷⁴ See, e.g., BN/Wash. Cent. (EA prepared, environmental conditions imposed); The Kansas City Southern Railway Company, Gateway Eastern Railway Company and The Texas Mexican Railway Company, STB Finance Docket No. 34342, slip op. at 21-23 (STB served Nov. 29, 2004) (Environmental Appendix prepared with notice and comment; environmental conditions imposed). We also have certain procedural flexibility, including, but not limited to, instituting pre-filing notification requirements for merger applications, see, e.g., 49 CFR 1180.4(b), and delaying the effective date of decisions where warranted, see 49 U.S.C. 722(a).

environmental costs on the local communities along the EJ&E line in the form of emergency response delays, increased vehicular traffic congestion and delays, increased noise and vibration, and increased safety issues at highway/rail at-grade crossings. Without a clear statement to the contrary, the Board will not assume that Congress removed any power to impose reasonable and feasible conditions to mitigate these impacts.

Environmental Analysis. With the assistance of SEA, the Board has analyzed the potential environmental impacts of this transaction, which involves changes to rail operations, the related construction of rail connections totaling about 4.9 miles, construction of double-track segments totaling about 19 miles, primarily within existing right-of-way, and changes in rail yard operations, by preparing an EIS addressing a broad range of environmental issues.

The Requirements of NEPA. NEPA requires that the Board examine the environmental effects of proposed Federal actions and to inform the public concerning those effects. Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, 462 U.S. 87, 97 (1983). Under NEPA, the Board must consider potential beneficial and adverse environmental effects in reaching its decision. The purpose of NEPA is to focus the attention of the government and the public on the likely environmental consequences of a proposed action before it is implemented, in order to minimize or avoid potential negative environmental impacts. Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 371 (1989). While NEPA prescribes the process that must be followed, it does not mandate a particular result. Robertson v. Methow, 490 U.S. 332, 350-51 (1989). Thus, once the adverse environmental effects have been adequately identified and evaluated, the Board may conclude that other values outweigh the environmental costs. Id.

The EIS Process. SEA conducted a detailed analysis of all of the potential environmental impacts associated with the transaction. That analysis involved the development of a comprehensive environmental record to consider and study all aspects of the transaction. On December 21, 2007, the Board published in the Federal Register a Notice of Intent to Prepare an EIS, which initiated the scoping process; requested comments on a draft scope of study for the EIS; and notified the public of planned open house meetings on the draft scope. SEA held 14 scoping open house meetings in seven locations in January 2008. After reviewing and considering all comments received, the Board published a final scope of study for the EIS in the Federal Register on April 28, 2008.

In addition to the public scoping meetings, SEA held agency scoping meetings with Federal, state, and local agencies in Illinois and Indiana. At the Illinois agency scoping meeting, a number of agencies asked for a greater role in development of the Draft EIS. In response, SEA established the following five stakeholder focus area groups: Illinois Natural Resources/Water Resources Agencies, Illinois Transportation/Safety Agencies, Illinois Local Governments, Northern Indiana Agencies/Governments, and Indiana State Agencies. SEA invited 38 agencies to participate in the stakeholder focus area groups and to provide feedback in their areas of expertise. After providing all participants with a copy of the final scope of the EIS, SEA held five stakeholder meetings in the Chicago area on April 29-May 1, 2008. The stakeholders reviewed the methodologies and data sources being used in the analysis for the Draft EIS, offered comments and suggestions, and provided additional data.

SEA consulted extensively with appropriate Federal, state, and local agencies throughout the preparation of the EIS, including the United States Environmental Protection Agency (EPA), the United States Fish and Wildlife Service (USFWS), and state historic preservation offices. SEA also identified 28 communities with minority or low-income populations potentially affected by the transaction. SEA then conducted targeted and specific outreach efforts to engage these communities in the environmental review process, including direct calls to elected officials regarding the environmental review process and meetings with local representatives. SEA also met with the Metropolitan Mayors Caucus in Chicago to answer questions concerning the Board's process and conducted site visits to the project area.

SEA issued the Draft EIS on July 25, 2008, and made it available for public review and comment for a 60-day period to and including September 30, 2008. In addition to soliciting written comments on the Draft EIS, SEA held eight open house/public meetings throughout the Chicago area. Each meeting included an open house session and a more formal public meeting during which attendees could present oral comments. Comment forms were provided in several languages at the public meetings and were accepted on-site or by mail. A bilingual toll-free telephone line has remained open throughout the environmental review period's duration to record comments. Commenters could also submit electronic comments through the Board's website.

SEA received over 9,500 comments on the Draft EIS, including comments from members of the public, elected officials, Federal and state agencies, and local governments. The comments expressed both support for and opposition to the transaction. Many of those expressing support talked generally of project benefits, such as reduced noise or congestion along CN rail lines that would experience a decreased volume of freight rail traffic or improved regional rail traffic efficiency. A number of CN's rail freight customers wrote in support of the transaction because, by providing applicants a quicker route through Chicago, it would give their customers faster and more reliable service in shipping their products both regionally and nationally. Many of the commenters opposing the transaction raised concerns related to traffic delays and congestion, safety, and noise due to increased rail traffic (generally ranging from an additional 15 to 24 trains per day) along the EJ&E line. Commenters also questioned whether the reduction of rail traffic along the CN lines would be permanent and raised concerns that, if rail traffic through Chicago increases in the future, the potential benefits of the transaction could be short-lived.

In preparing the Final EIS, SEA revised information to clarify, update, and correct some information contained in the Draft EIS. In addition, SEA conducted additional analysis and evaluated new information furnished or suggested by agencies and the public during the public comment period. This additional analysis included supplemental evaluation of the potential impacts of the transaction on the Metra STAR Line service and the planned expansion of NICTD commuter service, school safety, hazardous materials transport, quality of life in communities along the EJ&E line, noise and vibration, and biological resources.⁷⁵ Additional and updated

⁷⁵ The results of the additional analysis are presented in Chapter 2 of the Final EIS; a summary can be found in the Final EIS at ES-9 to ES-13.

analysis was also provided on average daily traffic counts (ADT)⁷⁶ and potential effects resulting from changes to: highway/rail at-grade crossings; delays to emergency services; rail operations and safety; air quality and intersection mobility; and modifications to planned changes to the originally-proposed Matteson Connection and a revised Double Track—Leighton Connection.

On November 18, 2008, the Board held a public meeting at its offices in Washington, DC to discuss with SEA major issues raised in comments on the Draft EIS and how SEA proposed to address them in the Final EIS. The meeting was open for public observation, but not public participation. A video broadcast of the staff briefing was accessible to all interested parties, including those in the Chicago area, through the Board's web site. The Final EIS was issued on December 5, 2008.⁷⁷

Alternatives Analyzed. Three alternatives were evaluated during the environmental review process: the proposed action; the no action alternative (under which SEA assessed rail operations that would take place on the EJ&E line if applicants did not acquire control of that line); and the proposed action with conditions, including environmental mitigation measures. As the courts have repeatedly found, under NEPA, the Board need only consider "reasonable, feasible alternatives,"⁷⁸ and the Board agrees with the Final EIS that these were the reasonable and feasible alternatives in this case. Alternatives that do not advance the purpose of the

⁷⁶ ADT measures the average number of vehicles that pass through a given point during a 24-hour period. Of the at-grade crossings, 25 had a predicted ADT of less than 2,500 vehicles in 2015 or had no train increases.

⁷⁷ On December 16, 2008, United States Representatives Melissa L. Bean, Peter J. Visclosky, Donald A. Manzullo, Judy Biggert, Peter J. Roskam, and Bill Foster (collectively, the Illinois Delegation) filed a letter, requesting that the Board reclassify the Final EIS as a revised Draft EIS. In support of this request, the Illinois Delegation notes that the Final EIS contained "substantially different findings and analysis" than in the Draft EIS and states that a revised Draft EIS would allow for further public input and comments on these findings. The Illinois Delegation's request will be denied. As discussed, the Board has taken a hard look at all the environmental issues in this case, provided ample opportunity for public comment, and responded to the concerns that were raised by interested parties and concerned citizens. The additional information set forth in the Final EIS simply clarifies or expands on information in the Draft EIS, and does not rise to the level of "significant new circumstances or information relevant to environmental concerns" cited by the CEQ regulations at 1502.9(c)(1)(ii) as justification for agencies to prepare supplemental environmental documents. Therefore, further environmental review, as suggested by the Illinois Delegation, is not necessary. Moreover, the 5-year environmental reporting and monitoring period, as well as the separate operational oversight period that we are establishing, will allow the Board to keep track of how the applicants implement the transaction and to take appropriate action if necessary.

⁷⁸ Mid States Coalition for Progress v. STB, 345 F.3d 520, 546 (8th Cir. 2003); Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190, 195 (D.C. Cir. 1991) (citing Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 551 (1978)).

proposal before the agency are not considered reasonable or appropriate.⁷⁹ SEA therefore properly eliminated four other proposed alternatives from detailed study in the EIS because they did not meet applicants' stated purposes and need for the transaction.⁸⁰

The No-Action Alternative. Some citizens and communities along the EJ&E line have asked the Board to withhold its approval of the transaction on environmental grounds and have argued that the Board has the power to do so. The Board need not reach the question of whether the Board has such power, however, because we do not find a basis in the record to deny approval on environmental grounds. Although some communities on the EJ&E line will experience adverse environmental effects, the Board finds that these effects are outweighed by the many transportation and environmental impact benefits that approval of this transaction would bring about.

The transaction should produce substantial transportation benefits by making CN more efficient, reducing transit times, and reducing congestion on rail lines in the Chicago region, many of which were laid out over 100 years ago and were not designed to facilitate the movement of through traffic.⁸¹ Because Chicago is the nation's largest rail hub and one-third of all rail freight traffic in the United States moves to, from, or through Chicago, reducing congestion in Chicago would have wide-ranging beneficial impacts on the movement of freight throughout the country. It would be inconsistent with the Congressional policy "to ensure the development and continuation of a sound rail transportation system . . . to meet the needs of the public and national defense," 49 U.S.C. 10101(4) and other aspects of the Rail Transportation Policy, 49 U.S.C. 10101(1)-(15), to forgo these benefits.

⁷⁹ See Native Ecosystems Council v. USFS, 428 F.3d 1233, 1246-47 (9th Cir. 2005) (the "range of alternatives that must be considered in the EIS need not extend beyond those reasonably related to the purposes of the project"); Simmons v. Army Corps of Engineers, 120 F.3d 664, 669 (7th Cir. 1997) (because "identifying, assessing and comparing alternatives costs time and money," an agency need not consider "every conceivable alternative," but should "focus its energies only on the potentially feasible, not the unworkable"). Accord Mayo Foundation at 550; Environmental Law and Policy Center v. NRC, 470 F.3d 676, 683 (7th Cir. 2006).

⁸⁰ These alternatives were: (1) expanded trackage rights to CN; (2) implementation of the CREATE Program in lieu of CN's acquisition of the EJ&E rail line; (3) acquisition of a different rail line within the Chicago metropolitan area; and (4) construction of a bypass outside of the EJ&E rail line well away from the Chicago metropolitan area. As the Final EIS explains (at 1-16), these alternatives would be unreasonable because they would not give CN full ownership and use of a continuous rail route around Chicago and applicants could not gain access to the EJ&E rail yards. Further, some of the alternatives would be more expensive or would adversely impact the environment more than the transaction. See Chapter 2.5 of Draft EIS (at 2-65 to 2-69).

⁸¹ See CN Application, Exh. CN-1 at 23.

Moreover, many communities along CN's existing lines will experience environmental benefits from the reduction in rail traffic as CN reroutes traffic around Chicago over the EJ&E line. The Board does not believe that it is appropriate for these communities to continue to bear the full adverse environmental impacts of rail congestion in Chicago in order to protect the communities along the EJ&E line from traffic increases.

Finally, traffic on the EJ&E line could increase significantly even without CN's acquisition. The Board does not regulate frequency of service except to ensure service adequacy. Therefore, the current owner and the carriers with overhead trackage rights on the EJ&E could increase the frequency of trains on the line without Board approval and without environmental mitigation. Nor is prior Board approval required for many categories of railroad construction. Here, the EJ&E is an operational rail line, and the current owner could double-track the entire line without Board approval and without Board-imposed environmental mitigation. Under these circumstances, the communities along the EJ&E line do not have a "reliance interest" to be free from the adverse effects of traffic increases on the line, and denying the transaction could actually make the communities worse off because the environmental effects of future traffic increases would not be mitigated.

The Board appreciates the concerns of the communities along the EJ&E line and is imposing substantial mitigation measures to reduce the adverse impacts of the increase in traffic levels that will result from approval of the transaction. The Board's consistent practice has been to mitigate only those impacts that result directly from a proposed transaction. However, the Board does not require mitigation for existing environmental conditions, such as the effects of current railroad operations.

Overview of Environmental Mitigation. After carefully considering the entire environmental record, and except as otherwise stated here, the Board adopts all of SEA's analysis and conclusions, including those not specifically discussed below. However, for reasons stated in this decision, the Board is modifying several of SEA's final recommended mitigation conditions. The Board is satisfied that the Draft EIS issued for public review and comment, and the Final EIS, which responds to those comments and contains additional analysis, together have taken the requisite "hard look" at the potential environmental impacts associated with the transaction. The Board agrees with SEA's analysis of alternatives, and with the exceptions addressed below, the Board finds that SEA's final recommended environmental mitigation is reasonable and feasible to address the environmental effects of the transaction that SEA identified as potentially significant in the course of the environmental review.⁸²

As discussed in more detail below, the Board's environmental conditions require applicants to comply with all of their voluntary mitigation,⁸³ and include extensive additional

⁸² The Board has followed here its consistent practice of mitigating only impacts resulting directly from the transaction, and not requiring mitigation for existing conditions and existing railroad operations.

⁸³ Applicants proposed voluntary mitigation measures that were set forth in the Draft EIS. In their comments on the Draft EIS, applicants included revised voluntary mitigation,

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mitigation measures. There is mitigation for eight substantially affected highway/rail at-grade crossings, including requiring two grade separations: one at Ogden Avenue near Aurora, IL, and one at Lincoln Highway in Lynwood (with applicants responsible for 67% of the cost of the grade separation at Ogden Avenue and 78.5% of the cost of the Lincoln Highway grade separation, as discussed below). As the Final EIS explains, two other crossings (Woodruff Avenue and Washington Street) in Joliet also would have qualified for mitigation that could have included a grade separation. However, the City of Joliet and applicants have negotiated a mutually acceptable agreement that includes tailored mitigation that applicants would provide for Joliet that is more far-reaching, in certain respects, than mitigation the Board unilaterally could impose. Therefore, no mitigation for those crossings is imposed beyond requiring compliance with the parties' negotiated agreement.

In addition, there is mitigation requiring applicants to install a closed-circuit television (CCTV) system with video cameras to facilitate emergency service response at seven locations in Illinois and Indiana.⁸⁴ The Board's mitigation also includes noise and vibration mitigation, including assisting Barrington to maintain its existing quiet zone⁸⁵ and vibration mitigation for Fermilab in Batavia, IL. Mitigation related to school and pedestrian safety, including mitigation requiring appropriate fencing, also is imposed. Other conditions address the potential effects of the transaction-related construction activities. There also will be a 5-year environmental reporting and monitoring period condition requiring applicants to file quarterly reports on their progress in implementing the Board's mitigation conditions and also to notify the Board if applicants substantially depart from their traffic projections on the five existing CN lines through Chicago on more than a short-term, temporary basis. This monitoring and reporting condition will allow the Board to take appropriate action if there is a material change in the facts or circumstances upon which we relied in imposing specific environmental mitigation.

Finally, the Board's mitigation requires applicants to comply with the terms of their agreement reached with Amtrak, and their agreements with Joliet, IL, Crest Hill, IL, Dyer, IN, Schereville, IN, Chicago Heights, IL, Mundelein, IL, Hoffman Estates, IL, Frankfort, IL, and Griffith, IN,⁸⁶ and includes mitigation for the transaction-related construction activities. The

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which they supplemented on November 13, 2008. Applicants' final voluntary mitigation addresses such issues as grade crossings, hazardous materials transportation, land use, emergency vehicle delay, community outreach, noise and vibration, and biological and water resources. In some cases, our conditions enhance or modify applicants' voluntary mitigation.

⁸⁴ Some locations recommended for mitigation in the Final EIS have been omitted because of subsequent negotiated agreements.

⁸⁵ A quiet zone is a segment of track along which locomotive horns need not be routinely sounded. The Federal Railroad Administration (FRA) requires railroads to sound horns at highway/rail at-grade crossings unless a quiet zone has been established.

⁸⁶ The mitigation agreements reached with Schereville, Dyer, Chicago Heights, Mundelein, Hoffman Estates, Frankfort, and Griffith were reached after the issuance of the Final
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Board encourages communities and other entities and the applicants to reach negotiated agreements at any time during the environmental reporting period the Board is imposing. Mutually acceptable negotiated agreements can be more far-reaching than site-specific Board-imposed mitigation and are tailored to the specific needs of the community or other entity. Therefore, if negotiated agreements are reached after the Board's decision here has been issued and becomes effective, the Board will impose the terms of these negotiated agreements as additional mitigation conditions in subsequent decisions.⁸⁷

Analysis of Environmental Issues. The EIS evaluated a broad range of environmental issues, including: rail operations, safety, transportation systems (highways, railroads, waterways, and airports), hazardous waste sites, land use, socioeconomics, environmental justice, energy, air quality and climate, noise and vibration, biological resources, water resources, and cultural resources. The study area consisted of the Chicago metropolitan area, which includes the City of Chicago, and approximately 60 smaller communities, in Lake, Cook, DuPage, Grundy, Will, and Kendall counties in Illinois, and Lake County in Indiana. The study area included downtown Chicago, with its relatively high population density, along with surrounding counties that have strong social, economic, and cultural ties to the central urbanized area, as measured by commuting patterns, employment locations, and sense of place. The study area also included the communities along the EJ&E line that would be potentially affected by the increased rail operations associated with the transaction.

As the EIS explains, the transaction as proposed would produce significant transportation efficiency benefits by reducing congestion in Chicago and reducing transit times required to move railcars and would result in environmental benefits to communities located along the five CN rail lines leading into and out of Chicago—including decreased vehicle traffic delay, reduced noise, reduced air emissions, and fewer shipments of hazardous materials by rail. See Final EIS at ES-2-5, 20. At the same time, the EIS makes it clear that communities along the EJ&E rail line would experience increased train traffic, which could result in adverse impacts caused by increases in vehicle traffic delay, noise, air emissions, and risks to pedestrian and vehicular traffic at crossings. Moreover, the environmental analysis shows that pre-existing conditions along the EJ&E rail line already are problematic to the communities along the line. As the EIS explains (see, e.g., Final EIS at 2-32), these communities currently experience substantial vehicular traffic delays and safety risks during peak travel times due to the high

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EIS. The final mitigation conditions in the Final EIS have been revised to reflect these agreements.

⁸⁷ The terms of the negotiated agreements will be imposed in lieu of the site-specific mitigation conditions included in the Final EIS. Specifically, conditions requiring applicants to conduct a review of and address the concerns surrounding the Lake Street and Miller Street highway/rail at-grade crossings have been removed (conditions 7 and 8 in the Final EIS). Also, facilities in Mundelein, Chicago Heights, Schererville, and Griffith have been removed from the list of locations included under condition 18 in the Final EIS. Likewise, the terms of the negotiated agreement reached with Frankfort will be imposed in lieu of condition 14 in the Final EIS, regarding Camp Manitoqua.

volume of cars and trucks on roadways, and train noise and safety risks due to the freight and passenger trains that are currently on the EJ&E rail line.

Specific issues of particular concern. The Board addresses here some of the issues that were of particular concern to commenters during the EIS process. Except as otherwise specifically stated here, the Board is satisfied that all areas of concern have been fully studied and properly analyzed, and we adopt the conclusions in the Final EIS.

Rail Traffic Projections. Concerns were raised throughout the EIS process about the traffic projections used in the EIS. Applicants provided in their operating plan a traffic increase forecast covering the first 3 years following implementation of the transaction, and suggested that forecasts of future conditions beyond that time horizon would not produce accurate and reliable predictions. During scoping, commenters argued that the 3-year projections were too short and that SEA should project traffic until 2020 or beyond.

For the reasons set forth in the Final Scope and the EIS, SEA reasonably decided to use 2015 as the planning horizon year. As SEA explained, that year represented the limit of what is reasonably foreseeable with regard to projected rail traffic on the EJ&E line, and projections beyond 2015 would be speculative. SEA also properly found that the applicants' operating plan and rail traffic forecasts were reasonable and reflected the maximum amount of traffic that would likely move on the EJ&E line in 2015, based on a detailed assessment that evaluated (1) the EJ&E rail line capacity based on a constraint analysis,⁸⁸ Line Occupancy Index (LOI) evaluation,⁸⁹ and use of the Rail Traffic Control (RTC) model⁹⁰ and (2) additional analysis that included major trends in rail freight movement and an economic analysis based on anticipated growth in the gross national product.⁹¹

⁸⁸ A constraint analysis determines the location of bottlenecks, i.e., points or areas of congestion where traffic levels could not be expanded without addressing the congestion. SEA identified and factored in several constraint points on the EJ&E rail line. See Draft EIS at 2-24.

⁸⁹ A Line Occupancy Index is a ratio between the theoretical train capacity of a line segment and the projected actual train use of a line segment. This analysis calculates the amount of time a train would take to pass through a specific segment, taking into account such factors as train speed and length, track speed, number of tracks, and other factors that may affect capacity, such as bridge lifts.

⁹⁰ The RTC model is an industry-standard dispatching model used in this case to evaluate the ability of trains to operate on the EJ&E rail line based on factors such as track alignment, locations of crossings, interlocks, and turnouts. See Draft EIS, at 2-25.

⁹¹ DOT had expressed concerns about some of SEA's assumptions in its comments on the Draft EIS. The Final EIS fully responds to DOT's comment on the Draft EIS, however, and on November 25, 2008, DOT submitted a letter to the Board indicating that its concerns about CN's ability to implement its post-merger operating plan on the EJ&E line, and the concerns of others related to applicants' traffic projections, have now been addressed.

Traffic Caps. As previously noted, the rail traffic projections in the EIS show that, as rail traffic increases on the EJ&E line as a result of the transaction, there would be corresponding decreases—and potential benefits—in the communities along the five CN lines in the Chicago area on which CN’s traffic now moves. The traffic decreases would not necessarily be permanent, however, because, even if they increase traffic over the EJ&E line, applicants could decide to reintroduce more trains back onto the CN lines at some point in the future if the demand for applicants’ service increases beyond what is reasonably foreseeable today.

During the EIS process, a number of commenters requested that the Board impose traffic caps on the number of trains applicants could route on the lines on which CN’s traffic now moves to ensure that the benefits of the transaction are preserved for a specific period of time. But traffic caps would not be reasonable or appropriate here. As discussed above, applicants’ traffic projections are consistent with SEA’s own extensive analysis. Even if traffic levels on the CN lines turn out to be somewhat higher than what the EIS projects, based on unanticipated changes in market conditions, there still would be less traffic on the CN lines if this transaction is implemented than would be the case if applicants lacked full access to the EJ&E line. Nevertheless, given the concerns that have been raised, the Board will modify the recommended reporting and monitoring condition in the Final EIS to require applicants to notify the Board, in the quarterly reports that applicants will submit for 5 years, of any substantial departure from the projected traffic levels upon which this decision is based. The Board recognizes, however, that there can be emergency or other temporary conditions that could lead applicants to use the current CN lines for traffic that would otherwise be routed over the EJ&E line on a short-term basis. Therefore, the Board’s environmental monitoring and reporting condition (number 74) specifically exempts from this reporting requirement the need to report deviations that are only temporary or short-term (i.e., a rerouting to deal with an emergency, or to reduce congestion caused by temporary construction or maintenance activities on a line segment).

Highway/Rail At-Grade Crossing Analysis. Many of the comments expressed concern about the impact on safety and congestion at highway/rail at-grade crossings from increased rail traffic on the EJ&E. Therefore, SEA conducted a comprehensive analysis of highway/rail at-grade crossings that would be potentially affected by the transaction during the environmental review process. SEA’s analysis of impacts is based on Federal Highway Administration (FHWA) standards and guidelines for evaluating safety and congestion at at-grade crossings. From a safety perspective, SEA’s analyses considered at-grade rail crossing accident probability and safety factors related to increased freight traffic that would result from the transaction. The accident probability analyses addressed the potential for rail and vehicle accidents. The transportation analyses focused on vehicular delays and queue length changes at rail crossings due to the projected increases in rail traffic. Detailed analyses were done at highway/rail at-grade crossings that have an ADT of 2,500 vehicles per day or are within 800 feet of another crossing. SEA conducted the analyses for projected traffic levels in 2015.

The Draft EIS reviewed all highway/rail at-grade crossings on the EJ&E line and the CN lines to identify those that met the threshold for detailed analysis (see Draft EIS, section 4.3). SEA’s evaluation of vehicle safety is described in section 4.2 of the Draft EIS. It showed that, while overall predicted highway/rail at-grade crossing accidents would decrease under the transaction, the transaction would cause three crossings on the EJ&E line to have a high

predicted accident frequency.⁹² Three crossings on the EJ&E line would potentially experience a substantial increase in exposure of highway vehicles to trains to one million or greater per day.⁹³

The Draft EIS also evaluated the potential transportation effects of increased rail traffic at highway/rail at-grade crossings by the year 2015. Using screening criteria established by the Board in prior cases involving the construction of new rail lines (see Draft EIS, Table 4.3.1), in particular a minimum ADT of 2,500 vehicles per day in 2015, SEA determined that 87 out of 112 crossings along the EJ&E line met the Board's thresholds for further environmental analysis. SEA performed a detailed analysis of vehicle delays, mobility issues and length of vehicle queues at the 87 crossings in order to assess the potential effects of the transaction on the area's transportation system.⁹⁴

Based on this analysis, SEA concluded in the Draft EIS that 16 crossings would be "substantially affected," which SEA defined as a situation where transaction-related queue length would block a roadway that would not otherwise be blocked; the roadway crossing would be at or over capacity (Crossing Level of Service (LOS) E or F as set forth in the Draft EIS at 4.3-10); or total delay for all delayed vehicles would be more than 40 hours per day. The criteria for determining whether a crossing would be "substantially affected" are based on FHWA guidelines. SEA presented a range of mitigation options for fifteen crossings that could potentially warrant mitigation and requested comments on the mitigation options. See Draft EIS at 4.3-50.

In response to numerous comments on the Draft EIS, SEA updated its analysis of transportation systems in the Final EIS.⁹⁵ The Final EIS identified 13 at-grade crossings on the EJ&E line that would likely be substantially affected by the transaction. The changes reflect

⁹² Woodruff Road in Joliet, IL, and Lake Street and Miller Street in Griffith, IN.

⁹³ Ogden Avenue and Montgomery Road in Aurora, IL, and Lincoln Highway in Lynwood, IL.

⁹⁴ As the Draft EIS explains (at 3.3-1 to 3.3-28), SEA's analysis factored in the expected increase in freight traffic and traffic growth forecasts unrelated to the transaction. SEA calculated blocked crossing time per train; average delay per delayed vehicle; total delayed vehicles per day; vehicle queue length and number of vehicles; average delay for all vehicles; and total delay for all vehicles per day.

⁹⁵ In its updated analysis, SEA used the same three criteria thresholds to determine if highway/rail at-grade crossings would be substantially affected: (1) crossing LOS, (2) effects on queue length, and (3) cumulative delay for all vehicles delayed at a crossing in a 24-hour period. In some cases, SEA has found it adequate to use only LOS, which determines the effects of a proposed transaction at a single point along a roadway at the affected crossing. Crossing LOS, however, does not take into account the effects of a proposal on mobility in a community or region. There are many locations along the EJ&E line where roadways are important to regional mobility, such as Hough Street (IL 59) in Barrington, IL, an important commuter route in the region. Therefore, SEA used queue length and total vehicle delay, in addition to LOS, to fully understand the effects of the transaction on mobility. See Final EIS at 4-7 to 4-8.

updated ADTs provided by the IDOT and Lake County, IL, and the impact of improved train speed.⁹⁶

As the Final EIS explains (at 2-43 to 2-44 and 4-11 to 4-22), SEA considered the individual characteristics of each highway/rail at-grade crossing site, as well as the information provided in public comments, in determining what, if any, mitigation would be appropriate for the substantially affected at-grade crossings. Based on its analysis, SEA recommended mitigation for eight crossings and determined that mitigation was not needed for five crossings.⁹⁷ As part of its analysis of mitigation measures, SEA explained (see Final EIS at 4-9) that mitigation for substantially affected at-grade crossings generally includes: (1) traffic advisory signs to notify drivers to stay clear of intersections; (2) roadway modifications,⁹⁸ or (3) grade separation.⁹⁹ To develop its final mitigation recommendations, SEA considered a host of factors, including the importance of the highway at the crossing to regional traffic flows, existing congestion, existing structures (such as mature trees and local roadways) near the highway/rail at-grade intersection, and the cost of a grade separation. SEA's analysis of each substantially affected crossing is set forth in the Final EIS at 4-7 through 4-22.

SEA ultimately concluded that it would be appropriate for the Board to require two grade separations: one at Ogden Avenue in Aurora, and one at the Lincoln Highway in Lynwood. The Board agrees that a grade separation is warranted at those locations. According to the Final EIS,

⁹⁶ Updating the ADTs removed three crossings and added two as substantially affected. Improved train speed removed two crossings. See Final EIS, Figure 2.5-1 at 2-34, 2-32 to 2-44, and 4-8.

⁹⁷ The eight crossings needing some form of mitigation are: Old McHenry Road, Hawthorn Woods; Main Street, Lake Zurich; Hough Street, Barrington; Ogden Avenue, Aurora; Plainfield-Naperville Road, Plainfield; Woodruff Road, Joliet; Washington Street, Joliet; and Lincoln Highway, Lynwood. The five crossings not needing mitigation are: Diamond Lake Road, Mundelein; Montgomery Road/83rd Street, Aurora; Western Avenue, Park Forest; Chicago Road, Chicago Heights; and Broad Street, Griffith. See Final EIS, Figure 2.5-1, at 2-34. A thorough discussion of why the Board is excluding five of the substantially affected crossings from any mitigation can be found in section 2.5 of the Final EIS.

⁹⁸ Roadway modifications such as widening a road can increase capacity and reduce or eliminate queue length. However, widening a roadway may not be practical, and can potentially create a bottleneck where two lanes merge. Roadway widening also must be consistent with local and regional roadway planning, and the impacts of roadway widening on a community can be greater than the effects of increased train traffic, due to existing conditions (such as structures or mature trees that might need to be removed in order to widen the road). Final EIS at 4-9 to 4-10.

⁹⁹ Grade separating a highway/rail at-grade crossing eliminates any effect of increased train traffic on vehicle queue lengths, as well as potential safety concerns related to the exposure of vehicular traffic to freight trains; however, as the Final EIS states (at 4-10), a grade separation would not eliminate any queuing from traffic lights in a community. Grade separations also can potentially modify community character, and they are extremely costly. See Final EIS at 4-10.

the Ogden Avenue crossing has the highest ADT of any of the impacted at-grade crossings, and the total vehicle delay at the crossing is expected to go from 1,133 minutes per day under the no-action alternative to 4,377 minutes per day after the transaction. Lincoln Highway is also among the highest ADTs; it would go from a total delay under the no-action alternative of 395 minutes per day to 3,034 minutes per day after the transaction. The vehicle queue at the crossing would back up 940 feet and would therefore potentially block the intersection at Sauk Trail (a major thoroughfare).

Woodruff Road and Washington Street in Joliet also would be substantially affected because the total delay of 9,381 minutes and 9,879 minutes respectively are significantly higher than SEA's 2,400 minute threshold, and the transaction is expected to reduce the crossing LOS from LOS B to LOS F. Thus, as the Final EIS concludes, if the applicants' negotiated agreement with the City of Joliet were not in place, SEA would have recommended mitigation for those crossings that could have included grade separations. However, the City has entered into a negotiated agreement with applicants that both parties find satisfactory to address potential local concerns. Accordingly, the Board agrees with SEA that the mitigation for those crossings should be to require compliance with the parties' own agreement. See Final EIS at 4-18 & Table 4.2-1.

The Board will also impose mitigation requiring traffic advisory signs for four of the other substantially affected at-grade crossings to alleviate the potential to block an adjacent intersection because of increased queue length.¹⁰⁰ While numerous commenters requested grade separations at other substantially affected crossings, or questioned how effective traffic advisory signs could be, we agree with SEA's analysis in the Final EIS explaining why a grade separation (or other mitigation such as requests to place the EJ&E line in a trench in Barrington) would not be practical or warranted at those crossings.¹⁰¹ See Final EIS at 4-12, 4-14, 4-18, and 4-22. No mitigation related to roadway modifications (including closures) will be imposed, but as SEA explained (Final EIS at 4-16), where, as in Barrington, IL, roadway modifications could improve conditions, nothing in this decision prevents the community from negotiating with the applicants for roadway modifications.

Grade-Separation Funding. Many commenters requested that we require applicants to fully fund whatever grade-separated crossings we might require. But as SEA explained (Final EIS at 4-22), the primary cause of the existing traffic congestion in the communities along the EJ&E line is the high number of vehicles and lack of capacity on the current roadway system. Even where trains are responsible for traffic congestion, the problem would not be caused solely by applicants' trains on the EJ&E line, but rather by the combined presence of multiple freight railroads and, in some locations, commuter trains as well. It would be inappropriate to hold the applicants responsible for the inadequate roadway system that now exists in the communities along the EJ&E line and the rarity (and in some communities, the absence) of grade-separated

¹⁰⁰ See Final EIS, Table 4.2-1, at 4-11.

¹⁰¹ In response to numerous comments about congestion in the Barrington area, SEA prepared a traffic model to help it evaluate potential mitigation strategies. The results of the analysis show that, under the transaction, the Barrington area total delay time would increase by 4% and 5% during the AM and PM peak periods. See Final EIS at 2-48-49 and Addendum A.

crossings.¹⁰² Because many of the traffic problems along the EJ&E line are existing conditions, it would not be reasonable to require applicants to bear the entire cost of the design and construction of the two grade separations that we are requiring at Ogden Avenue and Lincoln Highway.

At the same time, the Board rejects the argument of applicants and some other railroads that, based on the precedent of grade separations using Federal funds, the Board should require applicants to pay only 5% of the grade-separation cost (the typical railroad share for crossings that obtain Federal funding). FHWA regulations limit railroad contributions to the cost of grade-separated crossings funded with federal highway grants to 5%, on the theory that a railroad typically derives little or no benefit from grade separations. 23 CFR 646.210(b)(1), (3). That rationale does not apply here, however. In this case, the applicants have sought, and in this decision are receiving, the substantial benefit of the Board's approval of this transaction, which will change the character of the EJ&E line from a line serving local traffic that also facilitates longer-haul movements through haulage and trackage rights into a line that will be integrated into CN's North American rail network at the very heart of the system. As the Final EIS shows, this transaction would have a substantial adverse effect on vehicular traffic delays and, in some areas, regional and local mobility and safety at grade crossings. Thus, applicants' share of the cost should be more than the traditional railroad share for grade-separation projects.

In the Final EIS, SEA suggested two different approaches for apportioning the costs of grade separating the crossings at Ogden Avenue and Lincoln Highway:¹⁰³ (1) a regional approach that considers all highway/rail at-grade crossings affected by the transaction on both the EJ&E rail line segments and the CN rail line segments, and measures total regional impact to vehicle delay; and (2) an approach that focuses only on the individual, site-specific impact of the transaction to vehicle traffic delay at Ogden Avenue and Lincoln Highway. (See Final EIS at 4-24 to 4-25). Under SEA's regional approach, applicants' contribution to the cost of the two grade separations would be 15%, because the transaction would cause a net increase in vehicle delay in the Chicago area of 356 hours per day out of a total of 2,259 hours per day for all the highway/rail at-grade crossings examined. (Final EIS at 4-24). Under SEA's site-specific approach, the transaction would contribute 74% of the total expected vehicle delay at Ogden Avenue (because the total delay under the no-action alternative would be 1,133 minutes, which would increase to 4,377 minutes under the transaction). (Final EIS at 4-24 to 4-25). For Lincoln Highway, SEA calculated that the transaction would contribute 87% of the total expected vehicle delay (based on a site-specific analysis showing that the total delay at that crossing under the no-action alternative would be 395 minutes, compared to 3,035 minutes based upon the applicants' projected train increases under the transaction). (Final EIS at 4-25).

In the Final EIS, SEA recommended that the Board use its regional analysis. However, the Board finds that SEA's regional approach understates the specific impact the transaction

¹⁰² The EIS states that, along the CN lines, 58% of all public highway/rail crossings are grade-separated. Along the EJ&E line, 27% are grade-separated.

¹⁰³ Because much of the mitigation we are imposing is site-specific, the Board agrees with SEA that a regional mitigation fund is unnecessary here.

would have on the grade crossings at Ogden Avenue and Lincoln Highway. On the other hand, the Board is concerned that SEA's alternative approach, which assigns cost responsibility to CN based solely on the impact of the transaction on traffic delay at those two crossings, is incomplete because, as noted earlier, the need for mitigation at those intersections arises not only from the transaction-related increase in traffic delay, but from the transaction-related increase in collision exposure as well.

Therefore, the Board will determine CN's required share of the cost of the grade separations at Ogden Avenue and Lincoln Highway by taking into account the share of both traffic delay and collision exposure attributable to the transaction at each intersection. As discussed above, in the Final EIS, SEA calculated that the transaction would contribute 87% of the total expected traffic delay in 2015 at Lincoln Highway and 74% of the expected traffic delay in 2015 at Ogden Avenue. SEA calculated expected changes in collision exposure as well, by using the standard methodology of multiplying the number of trains per day by the number of vehicles per day at each crossing. The following table shows the percentages of collision exposure that is due to pre-existing conditions:

<u>Crossing</u>	<u>2015 No Action (NA)</u>	<u>2015 Proposed Action (PA)</u>	<u>NA/PA as %</u>
Ogden Avenue	723,927	1,821,345	40%
Lincoln Highway	298,217	999,905	30%

This means that the transaction's expected contribution to collision exposure in 2015 at Ogden Avenue is 60% (100%-40%) and at Lincoln Highway is 70% (100%-30%).

The Board's consistent practice has been to require applicants to mitigate only those impacts associated with the proposed action before us, not preexisting conditions. To do so here, for each intersection, the Board will average the transaction-related share of the two relevant impacts—traffic congestion and collision exposure—to arrive at a single figure representing the percentage by which the transaction is expected to contribute to those problems. That figure will constitute CN's required share of the cost of the grade separation at that intersection. Performing that calculation, the Board determines that, at Ogden Avenue, CN's share of the cost will be 67% ((74% transaction-related traffic delay + 60% collision exposure)/2), and, at Lincoln Highway, it will be 78.5% ((87% transaction-related traffic delay + 70% collision exposure)/2).

The Board will not require CN to escrow these funds, nor will it require CN to be obligated indefinitely for its share of the cost of grade-separating the crossings at these intersections. The State of Illinois should notify the Board and CN once the non-CN funds (typically, public funding) necessary to design and construct the two grade separations have been committed and are available. Additionally, a construction contract must be signed and construction initiated no later than 2015. Failure on the part of the State of Illinois to meet the 2015 deadline will result in CN being automatically released from mandated financial responsibility related to these two grade-separation projects.

The Board notes that grade separations usually involve three phases: preliminary engineering/environmental review; right-of-way acquisition/utility relocation; and actual construction. The Board intends for applicants to contribute the cost percentages set out above for each of these phases. However, it would not be fair to require applicants to pay for repeated engineering studies related to these grade separations. Applicants will be obligated to contribute their share of the cost of only one preliminary engineering study for each grade separation. The Board's final conditions reflect these changes. Finally, as part of the Board's quarterly environmental monitoring and reporting requirement (see Appendix A, condition 74), applicants shall report on the progress and costs associated with these two grade-separation projects, so that the Board can monitor the reasonableness of those expenditures.

Quality of Life. The Draft EIS identified only minor effects on populations and demographics, economy, taxes, property values, housing, communities and community cohesion, travel patterns, and community facilities and public services. Many residents of communities along the EJ&E line raised concerns in their comments that increased train traffic due to the transaction would severely impact their quality of life. Following issuance of the Draft EIS, SEA prepared additional analysis on property values, socio-economics, and other quality-of-life issues, which is presented in the Final EIS at 2-74-96, 1-105-111. This analysis shows that air emissions, noise, vibration, and traffic delays from the increase in train traffic on the EJ&E line would affect residences located near the line. But these potential adverse effects are not expected to be great enough to induce a large number of residents to change their behavior or move, and impacts would be limited to the vicinity of the EJ&E line. While the transaction could have some adverse impact on property values, the Final EIS shows that the impacts typically would be far less than the amount claimed by some of the commenters. Further, the Final EIS contains mitigation to reduce the potential quality of life impacts, such as conditions requiring applicants to furnish fencing, identify at-grade crossings where additional pedestrian warning devices may be warranted, and make Operation Lifesaver programs and informational materials regarding railroad safety available. The Board is satisfied that the EIS has fully and appropriately analyzed potential quality-of-life concerns and that the conditions imposed on the transaction (which include applicants' voluntary mitigation and additional conditions developed by SEA) are sufficient to minimize or eliminate them.

Emergency Response. In the Draft EIS, SEA determined that the transaction could adversely affect emergency service providers by increasing the potential for delay at highway/rail at-grade crossings due to increased train operations on the EJ&E line. Based on public comments on the Draft EIS, SEA performed additional analysis and determined that there were a total of 14 fire protection and hospital facilities that might be substantially affected by the transaction. See Final EIS Section 2.6, at 2-49 – 2-65; Table 4.2-2. With the exception of one facility that would not need mitigation because of a grade-separated crossing within a 3-mile radius of its location and six facilities located in communities with negotiated agreements, the Board is imposing mitigation to minimize impacts on emergency response at each of these facilities. The Board's mitigation requires applicants to install a real-time video monitoring (CCTV) system with video cameras at appropriate locations so that the movement of trains can be monitored and reasonably predicted. It also requires applicants to train two individuals from each affected emergency service provider to use the system. See Final EIS at 4-26. Applicants

also proposed several voluntary conditions (VM-42 through 48) that address potential impacts of the transaction on emergency vehicles and during construction.

Commenters raised concerns about how grade-crossing cameras can help emergency responders and the people they are attempting to help if the cameras were to show, for instance, that all area crossings are blocked. However, as the Final EIS explains, since the EJ&E line is in place and an active rail line today, the affected emergency service providers' current dispatching process includes the possibility that a crossing could be blocked. The mitigation that the Board is imposing will provide the emergency dispatchers with better and more timely information so that they can either take pre-planned alternative routes or dispatch services from alternative facilities when appropriate. Therefore, the Board's mitigation is reasonable and feasible to address the potential impacts on emergency response discovered during the environmental review.

School Safety. Many commenters on the Draft EIS raised concerns regarding how the increased traffic along the EJ&E line might impact the safety of school children. Commenters stated that school buses cross the railroad tracks daily and could be delayed if crossings are blocked by trains, and that school children and other pedestrians could be at risk crossing the tracks by foot or bicycle. In response, SEA performed additional analysis to identify schools located along the EJ&E rail line that might be adversely impacted by increased train traffic. In addition, applicants proposed voluntary mitigation to provide fencing along the EJ&E line right-of-way (ROW) for schools and parks within 0.25 miles of the ROW (VM-10), to identify at-grade crossings where additional pedestrian warning devices may be warranted (VM-10); and to provide informational materials concerning railroad safety for schools within 0.50 miles of the ROW (VM-11). Applicants further agreed to make Operation Lifesaver programs available to affected schools (VM-43 and VM-44).

The Board is imposing applicants' voluntary mitigation along with the additional conditions (nos. 11 and 12) developed by SEA to strengthen it. The Board acknowledges that the safety of school children and pedestrians, as well as school bus delay, are important issues. But the EIS shows that the transaction would have only a minor adverse impact beyond existing risk at highway/rail at-grade crossings. In these circumstances, the Board finds that the conditions it is imposing are adequate to address the potential incremental adverse impact of the transaction.

Noise and Vibration. As explained in the Final EIS, applicants have proposed voluntary noise mitigation that would result in meaningful and appropriate noise reduction (see VM-3 through VM-5 and VM-77 through VM-83), which include constructing noise control devices such as noise barriers, installing vegetation or berms, or installing enhanced warning devices to allow communities to achieve quiet zone requirements. Also, the Board has imposed additional noise mitigation that requires applicants to consult with affected communities to identify locations where wheel squeal is considered a nuisance. The Board is also imposing a quiet zone condition for Barrington, noise mitigation for transaction-related construction activities, and vibration mitigation for Fermilab. Thus, the concerns raised about noise and vibration have been appropriately addressed.

Hazardous Materials. The EIS concludes that the transaction would increase the risk of an accident involving the discharge of a hazardous material along the EJ&E line and decrease this risk along the CN lines into Chicago. The Final EIS also explains, however, that the likelihood of a hazardous material incident or spill remains low throughout the region on all of these rail lines. Furthermore, the EIS shows that existing regulations,¹⁰⁴ along with applicants' current system of spill prevention and emergency spill response, and the voluntary and other mitigation the Board is imposing, will be adequate and more effective to address issues related to hazardous material shipments and possible spills than other containment measures suggested by commenters (such as impermeable membranes).

Passenger, Commuter Rail, and Airport Issues. As noted above, in a letter dated December 9, 2008, CN and Amtrak jointly informed the Board that they reached an agreement to amend the operating agreement between Illinois Central Railroad Company and Amtrak, dated February 1, 1995, which governs Amtrak's continued use of the St. Charles Air Line in Chicago. CN and Amtrak ask the Board to accept the terms of the agreement in lieu of applicants' voluntary mitigation measure 37, which the Board will do (see amended VM-37 and condition no. 62). The parties' agreement eliminates any remaining issues related to Amtrak.

In response to comments on the Draft EIS raising concerns about the effects of the transaction on Metra's STAR Line and future NICTD expansion plans, SEA performed additional detailed analysis for the Final EIS (as explained at 2-19 to 2-28). Based on this analysis, we conclude that the transaction will not have a substantial adverse effect on the potential implementation of the STAR Line service on the EJ&E line and that the transaction could potentially benefit future NICTD plans. There is also mitigation assuring continued discussion and cooperation with Metra on development of the proposed STAR line, including possible use of the EJ&E line (VM-39) and mitigation providing for continued access to the pedestrian tunnel between the Metra Park-n-Ride lot and the Metra Matteson train station (VM-40). This mitigation is adequate to address the potential concerns about these issues raised during the EIS process.

Concerns related to the effects of the transaction on Gary/Chicago International Airport expansion plans also have been addressed. The Board's environmental mitigation includes a condition (no. 19) requiring applicants to adhere to the terms of a preliminary memorandum of understanding (PMOU), announced in June 2008, to prevent the transaction from affecting the airport's expansion plans. The PMOU provides a framework to address such issues as relocation of the EJ&E line, construction of a bridge over the existing NS Gary Branch, and construction of a grade-separated crossing at Industrial Highway.

¹⁰⁴ In addition to the regulations cited in the Final EIS, there are new federal regulations governing the transportation of hazardous materials with which applicants must comply. See Hazardous Materials: Enhancing Rail Transportation Safety and Security for Hazardous Materials Shipments, 73 FR 72182 (Nov. 26, 2008) (final rule of the Pipeline and Hazardous Materials Safety Administration (PHMSA), Department of Transportation (DOT)).

Environmental Justice. SEA did not identify any disproportionately high and adverse effects on minority or low-income populations in the EIS. However, in recognition of the large Spanish-speaking population in the Chicago metropolitan area and along many segments of the EJ&E line, applicants committed to distributing all media information in Spanish as well as English (see VM-2) and to providing Operation Lifesaver programs in Spanish upon request (see VM-44).

During the preparation of the Draft EIS, SEA conducted environmental justice outreach meetings with leaders who represented community groups and church congregations near the EJ&E line. At those meetings, SEA sometimes needed a translator. As a result, SEA recommended, and the Board is imposing, conditions requiring that certain materials and programs be made available in both English and Spanish, upon request.

Biological Resources. The Board's mitigation requires applicants to designate a local resource agency liaison to work closely with Federal, state, and local natural and water resource agencies, for 5 years from the effective date of the Board's final decision to ensure that adaptive management strategies are developed to protect the area's threatened and endangered species habitat and sensitive ecological resources, such as Cuba marsh and the Lake Renwick heron rookery, near Barrington. See conditions 29-33. In particular, the Board's mitigation requires applicants to work with relevant natural resource stakeholder groups, forest preserve districts, and Federal and state agencies, including USFWS, to establish, and fund for a 5-year period following this decision, appropriate monitoring programs to identify baseline conditions and post-transaction conditions in areas adjacent to forest preserves and designated natural areas for species of concern to these groups. See condition 30.

Following issuance of the Final EIS, the Board received a submittal from the Illinois Natural Resources/Water Resources Stakeholder Group (INR/WRSG), representing four forest preserve districts located on the EJ&E line in Lake, Cook, DuPage and Will Counties, Illinois, as well as the Illinois Department of Natural Resources, USFWS, and EPA. In its submittal, INR/WRSG explains that it is currently negotiating with the applicants and asks the Board to impose additional mitigation to address potentially adverse impacts to critical habitat and wildlife communities caused by construction of the Munger Connection and additional train traffic on the EJ&E.

INR/WRSG asserts that applicants' voluntary mitigation measures 64 and 104 and SEA's recommended mitigation measures 29 and 30, while a good start, are not adequate to satisfy their concerns. Consequently, INR/WRSG requests additional mitigation that would require applicants to: enter into agreements on the management of the four forest preserve districts; develop containment facilities at all new and future construction sites that traverse wetlands or waterways at risk of rapid contamination from possible spills of hazardous materials; transfer certain of CN's railway assets entering and terminating within the Goose Lake Prairie State Park; develop a website to facilitate communication with all resource management agencies; establish a \$10.5 million escrow fund with the USFWS Conservation Fund as partial compensation for adverse wildlife impacts; fund a 5-year study, to be conducted by an independent third-party contractor, on the causal impacts on flora, fauna, and aquatic resources along the EJ&E line

caused by the transaction; and contribute \$1.5 million annually to the USFWS Conservation Fund to meet tiered mitigation obligations determined by the impact study.

The Board appreciates the efforts of the INR/WRSO and notes that the participation of experts with first-hand knowledge and experience in managing natural resources is essential to adapting that management in light of the transaction. The Board has adopted SEA's recommended conditions 29-38 and 49-60 so that applicants can address the range of concerns raised by INR/WRSO in both Illinois and Indiana. There is no reason to believe that the process required under these conditions—that is, consultation, coordination, and study of baseline conditions—will not lead to effective solutions consistent with the goals of INR/WRSO. Imposition of the specific mitigation measures proposed by INR/WRSO would be inconsistent with the process contemplated by SEA's recommended mitigation. Further, requiring the placement of the containment facilities urged by INR/WRSO (impermeable containment membranes capable of holding the equivalent of two tank cars of product) within 500 feet of rail lines that traverse sensitive areas would create a new standard for carriers that transport hazardous materials. And, as discussed in the Final EIS, the Board finds that imposing this requested condition is unnecessary given existing regulations, applicants' current system of spill prevention and emergency spill response, and the voluntary and other mitigation the Board is imposing on this transaction.

The Board expects that progress toward the goal of mutually acceptable solutions will be documented in the quarterly reports mandated by conditions 72-74. If progress is not documented in applicants' reports, further action by the Board could be warranted.

Safety Integration Plan. Pursuant to 49 CFR 1106, applicants prepared a Safety Integration Plan (SIP) that specifically addressed the process applicants propose to safely integrate the two rail systems. Applicants filed the SIP with the Board on December 28, 2007, and submitted the SIP to FRA for review. On June 27, 2008, the applicants submitted a revised version of the SIP addressing certain points raised by FRA, and FRA has approved the revised SIP. SEA also independently reviewed both versions of the SIP. To ensure that applicants complete the ongoing SIP process, the Board is imposing conditions requiring applicants to comply with their approved SIP, which may be modified and updated as necessary to respond to evolving conditions. Under the Board's conditions, the ongoing safety integration process shall continue until FRA notifies the Board that the integration of applicants' operations has been safely completed.

Threatened or Endangered Species. In preparing the Final EIS, SEA and applicants met with the USFWS to discuss concerns raised about the Hine's emerald dragonfly, Karner blue butterfly, Indiana bat, Eastern prairie fringed orchid, turtle crossings, and noise effects on migratory birds. See Final EIS at 4-30. Applicants have provided voluntary mitigation to avoid impacts with Federally or state-listed threatened or endangered species and other species of concern. See VM-102 through VM-108. In addition, SEA recommended conditions 49 through 54 that require additional mitigation to protect biological resources. Based on extensive informal consultation and the Biological Report submitted to USFWS (see Final EIS, Appendix A.9), SEA concludes that the transaction may affect, but is not likely to adversely affect, listed threatened or endangered species. On December 16, 2008, USFWS provided its formal

concurrence finding that, as conditioned, the transaction may proceed without adversely affecting listed threatened or endangered species. Thus, all issues involving threatened or endangered species have been adequately resolved.

Conclusion. The Draft EIS and Final EIS demonstrate that the Board has taken the requisite “hard look” at environmental issues in this case. The Board concurs with SEA’s detailed analysis and conclusions regarding the potential environmental benefits and harms of the transaction and has imposed reasonable and feasible measures to reduce or eliminate potential adverse environmental impacts of the transaction. The Board recognizes that the transaction may have adverse environmental effects that cannot be fully mitigated. For example, horn noise from train operations cannot be fully mitigated without compromising safety. And even with mitigation, there will still be vehicle delays at highway/rail at-grade crossings. However, many of the potential effects (such as vehicle delay) pertain to existing conditions that are present today. Moreover, at the same time that applicants will increase rail traffic along the EJ&E line, there will be corresponding decreases in rail traffic, and potential environmental benefits, in communities along the CN lines in the Chicago area where CN rail traffic is routed today. Given the substantial transportation benefits of this transaction to shippers and interstate commerce, discussed above, the Board is satisfied that the final conditions that it imposes here provide appropriate safeguards to ensure that applicants maintain safe operations and protect the environment and the quality of life in affected communities to the extent practicable following applicants’ acquisition of EJ&EW.

Administrative Appeals. Finally, under the CEQ regulations (40 CFR 1506.10(b)), agencies must wait 30 days from EPA’s Federal Register notice announcing the availability of the Final EIS before issuing a final decision unless they have an internal appeal process. The Board has such a process (see 49 CFR 1115.3(a) (petitions for reconsideration)) and may, therefore, issue this final decision in less than 30 days from December 12, 2008, the date that the Final EIS was noticed. The Board agrees, however, with SEA’s recommendation to extend the administrative appeal process to permit parties to seek agency reconsideration of our final decision within 30 days after it is served, rather than the typical 20 days under 49 CFR 1115.3(e). The Board will consider any petitions for reconsideration in a subsequent decision.

Based on the record, the Board finds:

1. The acquisition of control by Canadian National Railway Company and Grand Trunk Corporation of EJ&E West Company, as conditioned, will not substantially lessen competition, create a monopoly, or restrain trade in freight surface transportation in any region of the United States. The Board further finds that, to the extent that there are any anticompetitive effects, they are insubstantial and are outweighed by the public benefits.

2. As conditioned, this action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. In STB Finance Docket No. 35087, the proposed acquisition of control by Canadian National Railway Company and Grand Trunk Corporation of EJ&E West Company is approved, subject to the imposition of the conditions discussed in this decision.
2. In STB Finance Docket No. 35087 (Sub-No. 1), the corporate family transaction referenced in the notice filed October 30, 2007, is authorized pursuant to the class exemption at 49 CFR 1180.2(d)(3).
3. In STB Finance Docket No. 35087 (Sub-No. 2), the CCP trackage rights referenced in the notice filed October 30, 2007, is authorized pursuant to the class exemption at 49 CFR 1180.2(d)(7).
4. In STB Finance Docket No. 35087 (Sub-No. 3), the GTW trackage rights referenced in the notice filed October 30, 2007, is authorized pursuant to the class exemption at 49 CFR 1180.2(d)(7).
5. In STB Finance Docket No. 35087 (Sub-No. 4), the IC trackage rights referenced in the notice filed October 30, 2007, is authorized pursuant to the class exemption at 49 CFR 1180.2(d)(7).
6. In STB Finance Docket No. 35087 (Sub-No. 5), the WC trackage rights referenced in the notice filed October 30, 2007, is authorized pursuant to the class exemption at 49 CFR 1180.2(d)(7).
7. In STB Finance Docket No. 35087 (Sub-No. 6), the CNR trackage rights referenced in the notice filed October 30, 2007, is authorized pursuant to the class exemption at 49 CFR 1180.2(d)(7).
8. In STB Finance Docket No. 35087 (Sub-No. 7), the CNR trackage rights referenced in the notice filed October 30, 2007, is authorized pursuant to the class exemption at 49 CFR 1180.2(d)(7).
9. Applicants must comply with all the conditions imposed in this decision, including, but not limited to all the conditions reflected in Appendix A, whether or not such conditions are specifically referenced in these ordering paragraphs.
10. Applicants must adhere to their representation that a unified CN/EJ&EW will not engage in “vertical foreclosure” by closing gateways, but, rather, shall keep all gateways affected by the control transaction open on commercially reasonable terms.
11. Applicants must adhere to their representation that they “will waive any defenses they might otherwise have as a result of the CN/EJE transaction, under the general principle that the Board does not separately regulate bottleneck rates, in circumstances where shippers prior to

the CN/EJE transaction would have been entitled to regulation of a bottleneck rate under the Board's 'contract exception' to the general rule.”

12. Applicants must comply with the monitoring and oversight condition imposed in this decision, and, in connection therewith, must file the monthly operational and quarterly environmental reports containing information discussed in this decision.

13. Approval of the CN/EJ&EW control application is subject to the conditions for the protection of railroad employees described in New York Dock Ry.—Control—Brooklyn Eastern Dist., 360 I.C.C. 60 (1979).

14. Applicants are required to adhere to any and all of the representations they made on the record during the course of this proceeding, whether or not such representations are specifically referenced in this decision.

15. Any condition that was requested by any party in the STB Finance Docket No. 35087 proceeding that has not been specifically approved in this decision is denied.

16. Parties have until January 23, 2009, to file petitions for reconsideration. Replies must be filed by February 12, 2009.

17. This decision shall be effective on January 23, 2009.

By the Board, Chairman Nottingham, Vice Chairman Mulvey, and Commissioner Buttrey. Vice Chairman Mulvey and Commissioner Buttrey commented with separate expressions.

Anne K. Quinlan
Acting Secretary

VICE CHAIRMAN MULVEY, commenting:

I write separately to express my reasons for voting to approve the transaction before us.

From an economic policy perspective, I see the proposed project as one of national, if not international, significance. It is also a project that portends the future of transportation planning. Improved mobility of freight through the Chicago area is key to our economy. Those commodities traversing the area include components for construction and production of manufactured goods, energy resources, and finished goods – all of which contribute to the quality of life our citizens enjoy. Increased use of existing rail infrastructure is exactly the type of project our nation must support and implement if we are serious about shifting truck traffic to rail and reducing road traffic congestion.

From a legal perspective, in my view, 49 U.S.C. 11324(d) requires that the Board consider only competitive impacts in determining whether to approve or disapprove a “minor” merger transaction. I do not believe that the Board can deny approval of such a merger on grounds other than potential anticompetitive impacts. As stated in our decision, there will be no anticompetitive effects here, but even if there were, those effects would be outweighed by the public interest in meeting significant transportation needs.

It is gravely unfortunate that this project will impact the communities around Chicago to the extent it will, and I am a proponent of the enhanced mitigations we are ordering here. Indeed, I would have preferred that the Board require additional and more stringent mitigations. Specifically, 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 divergence from applicants’ projections – both on rail and vehicular traffic – in future oversight proceedings.

NEPA directs that agencies take a so-called “hard look” at potential environmental impacts in carrying out their mandates. I am satisfied we have done so. The Board has the ability to soften the adverse environmental impacts of a merger transaction through reasonable mitigations. Our monitoring and oversight conditions will assure that the mitigations we order here continue to be reasonable once the transaction is implemented and operational.

For these reasons, in addition to those in the Board’s decision, I vote to approve the applicants’ transaction.

COMMISSIONER BUTTREY, commenting:

I join the Board's decision today to approve the proposed control transaction, but I am filing this separate expression to make clear that I would have gone much farther in imposing conditions to mitigate its environmental impacts. I appreciate the hard work that has been done by the Board's Section of Environmental Analysis and the Board's consultant. However, as I explained at the public meeting held on November 18, 2008, to discuss SEA's recommendations, I do not feel that the mitigation conditions outlined in the Final EIS will be enough. And although the Board's decision today does go beyond SEA's recommendations in some respects, I would have gone even farther.

In this proceeding, much has been made of the issue of congestion on the five existing CN lines within the City of Chicago. Indeed, that is the heart of applicants' case for approval of the transaction based on transportation benefits. Furthermore, the anticipated amelioration of some of that existing inner city congestion is the only basis for the Final EIS's conclusion that there are benefits sufficient to offset the high environmental impacts expected for the communities along the existing EJE lines, including several environmentally pristine nature preserves.

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. However, I would have gone farther. Consistent with what a number of commenting parties requested, I would have imposed strict traffic caps on the existing CN lines within the City of Chicago as CN's trains are shifted to the outer EJE lines, to ensure that the touted benefits of reduced traffic on the inner city lines would be preserved. In this connection, I would be willing to reopen this proceeding during the oversight and monitoring period if it appears that the applicants do not live up to the commitment to reduce the number of train frequencies in the urban communities.

I also would have required applicants to reach a mutually-acceptable mitigation agreement with every impacted community along the EJE lines before rail volumes could be increased above pre-transaction levels. I commend CN for having reached agreements with many of the impacted communities. Although this process started slowly, the pace began to pick up toward the end of the proceeding after the strength of the opposition became clear. I feel strongly that this process should be allowed to continue. No one is in a better position to determine what mitigation measures are needed and appropriate than the affected community itself. In my view, this Board should not presume to know better than the affected communities what mitigation will be required in the public interest. If this transaction truly has as many potential benefits as applicants claim, then I believe that national, state and local officials would have every incentive to help CN and the affected communities along the EJE reach reasonable compromises in a timely fashion, so that the overall benefits of this transaction could be achieved.

The Chicago area is and has long been a major transportation hub for all modes of transportation — rail, highway, air and water. The insufficiency of the existing Chicago-area rail infrastructure to handle present and future needs for freight and passenger transportation is well known. Possible approaches to solve the problem have been discussed at the local, state, regional and national level for some time. The CREATE project attempted to address the problem on a comprehensive basis but has not yet gained sufficient momentum to provide the answer. In the meantime, individual railroad companies have taken steps to ameliorate their own situations. For instance, new intermodal facilities have been built far outside the city to avoid much of the congestion, and other infrastructure projects have been undertaken by individual railroads in an effort to remove some of their individual bottlenecks.

This transaction is an effort by CN to address its own problems in moving traffic through Chicago. Much of this traffic will be low value intermodal and merchandise traffic from the Pacific rim moving through Chicago on its way to other destinations in the Midwest and Southeast. While I see the benefits to CN's rail operations, I believe that it is unfortunate that this transaction does not address Chicago's insufficient rail infrastructure on a more comprehensive basis. I also fear that it could inhibit future much-needed regional commuter rail options including the proposed STAR Line service.

For all of these reasons, I would have required CN to do more to assure the benefits and ameliorate the impacts, as conditions of the Board's approval of this transaction.

APPENDIX A: ENVIRONMENTAL CONDITIONS

Applicants' Voluntary Mitigation

Safety

Grade Crossings

- VM 1. Applicants shall consult with appropriate agencies to determine the final design and other details of the grade crossing protections or rehabilitations on EJ&EW's rail line. Implementation of all grade crossing protections shall be subject to the review and approval of the Federal Railroad Administration ("FRA") and the appropriate state Departments of Transportation.
- VM 2. Applicants shall coordinate with the appropriate state departments of transportation, counties, and affected communities along the EJ&E rail line to develop a program for installing temporary notification signs or message boards, where warranted, in railroad right-of-way ("ROW") at highway/rail at-grade crossings, clearly advising motorists of the increase in train traffic on affected rail line segments. The format and lettering of these signs shall comply with the Federal Highway Administration's (FHWA) *Manual on Uniform Traffic Control Devices* (FHWA 2007b) and shall be in place no less than 30 days before and 6 months after the acquisition by CN of the control of EJ&EW. The Applicants shall conduct a media campaign throughout the affected counties and communities surrounding the EJ&E rail line advising the public of increased operations along the EJ&E rail line. The campaign shall include the use of different media (radio, television, newspaper, Internet). Applicants shall distribute all information in both English and Spanish, where appropriate.
- VM 3. Where necessary for implementation of a Quiet Zone, and in consultation with the affected community, FRA, and the appropriate state Department of Transportation, Applicants shall construct or install roadway median barriers to reduce the opportunity for vehicles to maneuver around a lowered gate.
- VM 4. Applicants shall cooperate with the municipalities affected to determine which improvements would be necessary for existing Quiet Zones to maintain FRA compliance.
- VM 5. Applicants shall cooperate with interested communities for the establishment of Quiet Zones and assist in identifying supplemental or alternative safety measures, practical operational methods, or technologies that may enable the community to establish Quiet Zones.
- VM 6. Applicants shall consult with affected communities to improve visibility at highway rail at-grade crossings by clearing vegetation or installing lighting to illuminate passing or stopped trains.
- VM 7. Within 6 months of acquisition by CN of the control of EJ&EW, Applicants shall cooperate with the Illinois Department of Transportation, Indiana Department of Transportation and other appropriate local agencies to coordinate a review of

corridors surrounding highway/rail at-grade crossings to examine safety and adequacy of the existing warning devices, and identify remedies to improve safety for highway vehicles.

- VM 8. Where grade-crossing rehabilitation is agreed to, Applicants shall assure that rehabilitated roadway approaches and rail line crossings meet or exceed the standards of the State Department of Transportation’s rules, guidelines, or statutes, and the American Railway Engineering and Maintenance of Way Association (“AREMA”) standards, with a goal of eliminating rough or humped crossings to the extent reasonably practicable.
- VM 9. For each of the public grade crossings on EJ&EW’s rail line, Applicants shall provide and maintain permanent signs prominently displaying both a toll-free telephone number and a unique grade-crossing identification number in compliance with Federal Highway Regulations (23 CFR. Part 655). The toll-free number shall enable drivers to report accidents, malfunctioning warning devices, stalled vehicles, or other dangerous conditions and shall be answered 24 hours per day by Applicants’ personnel. At crossings where EJ&EW’s ROW is close to another rail carrier’s crossing, Applicants shall coordinate with the other rail carrier to establish a procedure and share information regarding reported accidents and grade-crossing device malfunctions.
- VM 10. Within 6 months of acquisition by CN of the control of EJ&EW, Applicants shall cooperate with school and park districts to provide fencing where schools or parks are within one-quarter mile of the right of way and to identify at-grade crossings where additional pedestrian warning devices may be warranted.
- VM 11. Applicants shall continue ongoing efforts with community officials to identify elementary, middle, and high schools within 0.5 miles of EJ&EW’s ROW and provide, upon request, informational materials concerning railroad safety to such identified schools.
- VM 12. Within 6 months of the effective date of the Board’s final decision, Applicants shall initiate review of the locations of designated pedestrian and recreational trail at-grade crossings along the EJ&E rail line that would see an increase in train traffic under the Proposed Action. The Applicants shall cooperate in the review with local agencies and community trail groups to assess the adequacy of the existing warning devices, to ascertain if particular trail uses or issues reduce the effectiveness of these warning devices, and to identify appropriate remedies to improve safety for pedestrian and recreational trail users.

Construction

- VM 13. Before starting any construction activities for the proposed connections or installation of double track, Applicants shall develop – in conjunction with the affected communities and local fire and emergency response departments along the EJ&E rail line – an adequate plan for fire prevention and suppression and subsequent land restoration during construction and operation along the EJ&E rail line. Applicants shall submit the plan to local communities and local fire and emergency response departments. Applicants’ plan shall ensure that all non-turbocharged locomotives are

equipped with functional spark arrestors on exhaust stacks, and carry fire extinguishers suitable for flammable liquid fires, electrical fires, and combustible materials fires, as well as provide for the installation of low-spark brake shoes on all locomotives.

Hazardous Materials Transportation

- VM 14. Applicants shall comply with the current Association of American Railroads (“AAR”) “key route” guidelines, found in AAR Circular No. OT-55-I, and any subsequent revisions.
- VM 15. Applicants shall comply with the current AAR “key train” guidelines, found in AAR Circular No. OT-55-I, and any subsequent revisions.
- VM 16. To the extent permitted and subject to applicable confidentiality limitations, Applicants shall distribute to each local emergency response organization or coordinating body in the communities along the key routes a copy of the Applicants’ current Hazardous Materials Emergency Response Plans.
- VM 17. Applicants shall incorporate EJ&EW into their existing Hazardous Materials Emergency Response Plan.
- VM 18. Applicants shall comply with all hazardous materials regulations of the United States Department of Transportation (including the Federal Railroad Administration and the United States Pipeline and Hazardous Materials Safety Administration) and Department of Homeland Security (including the Transportation Security Administration). Applicants shall dispose of all materials that cannot be reused in accordance with applicable law.
- VM 19. Upon request, Applicants shall implement real-time or desktop simulation emergency response drills with the voluntary participation of local emergency response organizations.
- VM 20. Applicants shall continue their ongoing efforts with community officials to identify the public emergency response teams located along EJ&EW and shall provide, upon request, hazardous material training.
- VM 21. Applicants shall conduct Transportation Community Awareness and Emergency Response Program (TRANSCAER) workshops (training for communities through which dangerous goods are transported) in those communities along the EJ&E rail line that request this training.
- VM 22. Applicants shall assist in the hazardous materials training emergency responders for affected communities that express an interest in such training. Applicants shall support through funding or other means the training of one representative from each of the communities located along the EJ&E rail line segments where the transportation of hazardous materials would increase. Applicants shall complete the training within 3 years from the date that the Applicants initiate operational changes associated with the Proposed Action.
- VM 23. Applicants shall develop internal emergency response plans to allow for agencies to be notified in an emergency, and to locate and inventory the appropriate emergency equipment. Applicants shall provide the emergency response plans to the relevant

state and local authorities within 6 months of acquisition by CN of the control of EJ&EW.

- VM 24. Applicants shall provide dedicated toll-free telephone number to the emergency response organizations or coordinating bodies responsible for communities located along the EJ&E rail line. This telephone number shall provide access to applicant personnel 24 hours per day, 7 days a week, enabling local emergency response personnel to obtain and provide information quickly regarding the transport of hazardous materials on a given train and appropriate emergency response procedures should a train accident or hazardous materials release occur.
- VM 25. In accordance with their Emergency Response Plan, Applicants shall make the required notifications to the appropriate Federal and state environmental agencies in the event of a reportable hazardous materials release. Applicants shall work with the appropriate agencies such as the United States Fish and Wildlife Service, Illinois Environmental Protection Agency and Indiana Department of Environmental Management to respond to and remediate hazardous materials releases with the potential to affect wetlands or wildlife habitat(s), particularly those of federally threatened or endangered species.
- VM 26. Prior to initiating any Transaction-related construction activities, Applicants shall develop a spill prevention plan for petroleum products or other hazardous materials during construction activities. At a minimum, the spill prevention plan shall address the following:
- Definition of what constitutes a reportable spill;
 - Requirements and procedures for reporting spills to appropriate government agencies;
 - Methods of containing, recovering, and cleaning up spilled material;
 - Equipment available to respond to spills and location of such equipment; and
 - List of government agencies and Applicants' management personnel to be contacted in the event of a spill. In the event of a reportable spill, Applicants shall comply with their spill prevention plan and applicable Federal, state, and local regulations pertaining to spill containment and appropriate clean-up.

Transportation Systems

Grade Crossing Delay

- VM 27. Applicants shall comply with the Voluntary Mitigation Agreement concluded with the City of Joliet, which among other things addresses delay at the public highway/rail at-grade crossings at Woodruff Road and Washington Street.
- VM 28. Although Applicants have not identified any grade crossings, other than Woodruff Road and Washington Street, that would require mitigation under SEA's established standards, Applicants shall, upon request, cooperate with municipalities and counties in support of their efforts to secure funding, in conjunction with appropriate state agencies, for grade separations where they may be appropriate under criteria established by relevant state Department of Transportation. Applicants shall

contribute their statutorily required amount of funding to the cost of the grade separation.

- VM 29. Applicants shall examine train operations for ways of reducing highway/rail at-grade crossing blockages.
- VM 30. Applicants shall cooperate with the appropriate state and local agencies and municipalities to:
- Evaluate the possibility that one or more roadways listed in Table ES-1 [of the Draft EIS] could be closed at the point where it crosses the EJ&E rail line, in order to eliminate the at-grade crossing.
 - Improve or identify modifications to roadways that would reduce vehicle delays by improving roadway capacity over the crossing by construction of additional lanes.
 - Assist in a survey of highway/rail at-grade crossings for a determination of the adequacy of existing grade crossing signal systems, signage, roadway striping, traffic signaling inter-ties, and curbs and medians.
 - Identify conditions and roadway, signal, and warning device configuration may trap vehicles between warning device gates on or near the highway/rail at-grade crossing.
 - Cooperate with state and local agencies to develop and implement a plan to grade-separate the highway/rail crossing.
- VM 31. Applicants shall install power switches along EJ&EW where Applicants determine that manual switches could cause stopped trains to block grade crossings for excessive periods of time and that power switches would increase the speed of rail traffic and reduce the likelihood of such blockages.
- VM 32. In order to minimize the number of trains being stopped by operators at locations that block grade crossings on the EJ&EW system, Applicants shall work with other railroads to establish reasonable and effective policies and procedures to prevent other railroads' trains from interfering with Applicants' trains on EJ&EW.
- VM 33. Applicants' design for wayside signaling systems shall be configured and implemented to minimize the length of time that trains or maintenance-of-way vehicles or activities occupy at-grade crossings or unnecessarily activate grade-crossing warning devices.
- VM 34. Applicants shall install control signals ("A" block or absolute stop signals) at the ends of sidings, double track sections, crossovers, and other control switch locations (Applicants 2008a).
- VM 35. Applicants shall operate under U.S. Operating Rule No. 526 (Public Crossings), which provides that a public crossing must not be blocked longer than 10 minutes unless it cannot be avoided and that, if possible, rail cars, engines, and rail equipment may not stand closer than 200 feet from a highway/rail at-grade crossing when there is an adjacent track (Applicants 2008a). If the blockage is likely to exceed this time frame, then the train shall be promptly cut to clear the blocked crossing or crossings.
- VM 36. Applicants shall develop and submit to SEA a report on frequency and duration of train delays at crossing for a period covering the first 3 years of operational changes.

Commuter and Passenger Rail Service

- VM 37. Applicants and the National Railroad Passenger Corporation (Amtrak) will amend the February 1, 1995 operating agreement between Illinois Central Railroad Company (IC) and Amtrak to provide as follows: 1) IC shall maintain the St. Charles Air Line Route and Markham-to-Grand Crossing Route (as each is defined in the Settlement Agreement for purposes of the 1995 Agreement) for use by Amtrak at not less than the 1995 Agreement Section 4.2, “Maintenance of Rail Lines,” conditions existing on April 28, 2008; 2) Costs paid to IC by Amtrak for use of the St. Charles Air Line Route shall be capped at their April 28, 2008 levels, adjusted only for inflation pursuant to the formula in Appendix IV of the 1995 Agreement (as it may be amended); 3) Costs paid to IC by Amtrak for use of the Markham-to-Grand Crossing Route shall be determined on the same basis as costs for Amtrak’s use of IC’s lines between Markham and New Orleans; 4) Amtrak’s rights and obligations under these conditions regarding the St. Charles Air Line Route shall cease upon the earlier of (a) six (6) months after Amtrak begins to provide regularly scheduled passenger rail service either over the Grand Crossing Router or over another route that provides an alternative to the St. Charles Air Line Route for passenger rail service to or from Union Station in Chicago that is acceptable to Amtrak, or (b) such time as Amtrak ceases for a continuous period of one (1) year to use the St. Charles Air Line Route to provide regularly scheduled passenger service at least three (3) days per week to and from Union Station in Chicago; 5) Amtrak’s rights and CN’s obligations under these conditions regarding the Markham-to-Grand Crossing Route shall cease upon such time as Amtrak ceases for a continuous period of one (1) year to use the Markham-to-Grand Crossing Route to provide scheduled passenger rail service at least three (3) days per week to and from Union Station in Chicago. .
- VM 38. Applicants shall operate the key interlockings at West Chicago and Barrington, Illinois, according to the current agreements under which EJ&E operates. Those agreements require EJ&E to give priority to passenger trains over either UP or EJ&E freight trains (Applicants 2008k).
- VM 39. Applicants shall work with Metra to explore all options for service on the proposed STAR Line, including use of the EJ&E rail line. The timing and implementation of STAR Line service remain subject to numerous variables, including securing government funding, but the Applicants are committed to continuing discussions with Metra on the STAR Line (Applicants 2008j).
- VM 40. During and after construction, Applicants shall maintain the pedestrian tunnel from the Metra Park-n-Ride lot to the Metra train station on the east side of the Chicago Subdivision rail line at Matteson (Applicants 2008l).
- VM 41. Applicant shall comply with any written and executed curfew agreements that are now in effect regarding operations affecting passenger or commuter train service.

Emergency Vehicle Delay

- VM 42. Applicants shall notify Emergency Services Dispatching Centers for communities along the affected segments of all crossings blocked by trains that are stopped and may be unable to move for a significant period of time. Applicants shall work with

affected communities to minimize emergency vehicle delay by maintaining facilities for emergency communication with local Emergency Response Centers through a dedicated toll-free telephone number; and providing, upon request, dispatching monitors that allow Emergency Response Center dispatching personnel to see real-time train locations.

- VM 43. Applicants shall make Operation Lifesaver programs available to communities, schools, and other organizations located along the affected segments.
- VM 44. For up to 3 years after acquisition by CN of the control of the EJ&EW, Applicants shall provide Operation Lifesaver programs in Spanish, upon request.

Construction

- VM 45. At least one month prior to initiation of Transaction-related construction activities, Applicants shall provide the information described below regarding Transaction-related construction of sidings, double-tracking, or connections, as well as any additional information, as appropriate, to fire departments and the Local Emergency Planning Commissions (“LEPC”) for communities within or adjacent to the construction area:
- The schedule for construction throughout the project area, including the sequence of construction work relating to public grade crossings and approximate schedule for these activities at each crossing;
 - A toll-free number to contact Applicants’ personnel, to answer questions or attend meetings for the purpose of informing emergency-service providers about the project construction and operations; and
 - Revisions to this information, including changes in construction schedule, as appropriate.
- VM 46. In undertaking Transaction-related construction activities, Applicants shall use practices recommended by AREMA and recommended standards for track construction in the AREMA Manual for Railway Engineering.
- VM 47. During Transaction-related construction concerning at-grade crossings, when reasonably practicable, Applicants shall consult with the appropriate state Department of Transportation regarding detours and associated signage, as appropriate, or maintain at least one open lane of traffic at all times to allow for the quick passage of emergency and other vehicles.
- VM 48. Applicants shall minimize temporary road closures during construction activities associated with the connections and double track. Applicants shall manage construction schedules to:
- Minimize highway/rail at-grade crossing closures
 - Relay highway/rail at-grade crossing closure schedules to local emergency service providers

Land Use***General Land Use***

- VM 49. Before beginning construction activity, Applicants shall survey all suitable habitats potentially impacted by the construction activity for Federally and state-listed threatened or endangered plant species. If any listed plant species are located, Applicants shall implement a mitigation plan in consultation with the appropriate Federal and state agencies.
- VM 50. If identified in the area, Applicants shall coordinate with USFWS-Indiana and The Nature Conservancy (TNC) to monitor effects on the Karner blue butterfly in the West Gary Recovery Unit.
- VM 51. Applicants shall continue with the existing agreements for Paul Ales Branch operation for the protection of the Federally listed Hine's emerald dragonfly.
- VM 52. Applicants shall identify suitable habitat for Franklin's ground squirrel within construction limits, and minimize mowing along the ROW beyond what is necessary for reasonable railroad maintenance and safety.
- VM 53. Land areas that are directly disturbed by Applicants' Transaction-related construction and are not owned by the Applicants (such as access roads, haul roads, and crane pads) shall be restored to their original condition, as may be reasonably practicable, upon completion of Transaction-related construction.
- VM 54. During construction, temporary barricades, fencing, and/or flagging shall be used in sensitive habitats to contain construction-related impacts to the area within the construction Right Of Way ("ROW"). Staging areas shall be located in previously disturbed sites and not in sensitive habitat areas.
- VM 55. To the extent reasonably practicable, Applicants shall confine construction traffic to a temporary access road within the construction ROW or established public roads. Where traffic cannot be confined to temporary access roads or established public roads, Applicants shall make necessary arrangements with landowners to gain access from private roadways. The temporary access roads shall be used only during project-related construction. Any temporary access roads constructed outside the rail line ROW shall be removed and restored upon completion of construction unless otherwise agreed to with the landowners.
- VM 56. During Transaction-related earthmoving activities, Applicants shall remove topsoil and segregate it from subsoil. Applicants shall also stockpile topsoil for later application during reclamation of disturbed areas along the ROW. Applicants shall place the topsoil stockpiles in areas that would minimize the potential for erosion and use appropriate erosion control measures around all stockpiles to prevent erosion.
- VM 57. Applicants shall commence reclamation of disturbed areas as soon as reasonably practicable after Transaction-related construction ends along a particular stretch of rail line. The goal of reclamation shall be the rapid and permanent reestablishment of native ground cover on disturbed areas. If weather or season precludes the prompt reestablishment of vegetation, Applicants shall use measures such as mulching or erosion control blankets to prevent erosion until reseeding can be completed.

- VM 58. Applicants shall limit ground disturbance to only the areas necessary for Transaction-related construction activities.
- VM 59. Applicants shall review the limits of land disturbance prior to construction to determine whether any U.S. Department of Commerce, National Geodetic Survey monuments (that is, a government-owned permanent survey marker) would be disturbed. If any survey monuments would be disturbed, Applicants shall give a 90-day notification to the U.S. Department of Commerce.
- VM 60. Applicants shall consult with the appropriate state, county personnel, Forest Preserve and trail managers prior to construction activities on state land and shall flag the boundaries of the ROW.
- VM 61. Applicants shall notify the trail managers of new construction that intersects trails during final design. Where possible, Applicants shall maintain access to all existing trails, greenways, and scenic corridors during construction. If temporary trail closures are required during construction, Applicants shall provide appropriate signage to detour pedestrian and recreational trail users to a safe alternate route.
- VM 62. Before construction of the Applicants' Proposed Munger Connection adjacent to the Pratt's Wayne Woods Forest Preserve, Applicants shall flag the boundaries of the CN ROW, the EJ&E ROW, and the portion of the Commonwealth Edison ROW required for construction. Applicant shall remain within the flagged boundaries. Unless agreed by the Forest Preserve Management, no construction shall take place outside of the flagged construction area. Where possible, Applicants shall maintain access during construction activities to all existing roads, trails, and facilities within the Pratt's Wayne Woods Forest Preserve.
- VM 63. Applicants shall require contractors to dispose of waste generated during Transaction-related construction activities in accordance with all applicable Federal, State, and local regulations.

Community Outreach

- VM 64. Prior to initiation of Transaction-related construction activities, Applicants shall name a Community Liaison to: consult with affected communities, businesses, and agencies; seek to develop cooperative solutions to local concerns regarding construction activities; be available for public meetings; and conduct periodic public outreach regarding Transaction-related construction activities. The Community Liaison shall be available to consult with businesses and agencies until all Transaction-related construction activities are complete. Applicants shall provide the name and phone number of the Community Liaison to mayors and other appropriate local officials in each community where Transaction-related construction activities will occur.
- VM 65. Applicants shall continue their ongoing community outreach efforts by maintaining, throughout the period of construction of Transaction-related sidings, double-track, and connections, a website about the construction.

Residential

- VM 66. Applicants' Transaction-related construction vehicles, equipment, and workers shall not access work areas by crossing residential properties without the permission of the property owner or occupant.

Business and Industrial

- VM 67. Applicants' Transaction-related construction vehicles, equipment, and workers shall not access work areas by crossing business or industrial areas, including parking areas or driveways, without advance notice to the business owner.
- VM 68. Applicants shall work with affected businesses or industries to appropriately redress Transaction-related construction activity issues affecting any business or industry.
- VM 69. To the extent reasonably practicable, Applicants shall ensure that entrances and exits for businesses are not obstructed by Transaction-related construction activities, except as required to move equipment.

State Lands

- VM 70. Applicants shall consult with the General Land Office ("GLO") of Illinois to coordinate an Easement Agreement for crossing State-owned parks to reach Transaction-related construction areas.

Utility Corridors

- VM 71. Applicants shall make reasonable efforts to identify all utilities that are reasonably expected to be materially affected by the proposed construction within their existing ROW or that cross their existing ROW. Applicants shall notify the owner of each such utility identified prior to commencing Transaction-related construction activities and coordinate with the owner to minimize damage to utilities. Applicants shall also consult with utility owners to design the rail line so that utilities are reasonably protected during Transaction-related construction activities.
- VM 72. Applicants shall use the services of a qualified pipeline engineering firm that is familiar with the project area to assist in the identification of the various pipeline crossings and to assist in the design of crossings as necessary for Transaction-related construction activities.

Air Quality

- VM 73. Applicants shall accelerate implementation of EPA locomotive emissions reduction efforts by installing idling control systems on their switching locomotives assigned to the Chicago area and shall accelerate replacement of switching locomotives that are excluded from EPA emission standards and are now in service at Chicago-area yards that will experience increased yard activity as a result of the Transaction with locomotives that are compliant with EPA Tier 0 or more stringent emission standards.
- VM 74. Applicants, to the extent reasonably practicable, shall adopt efficient fuel saving practices that may include a range of operating practices that will help reduce

locomotive emissions, such as shutting down locomotives when not in use and when temperatures are above 40 degrees.

- VM 75. To minimize fugitive dust emissions created during Transaction-related construction activities, Applicants shall implement appropriate fugitive dust suppression controls, such as spraying water or other approved measures. Applicants shall also regularly operate water trucks on haul roads to reduce dust.
- VM 76. Applicants shall work with their contractors to make sure that construction equipment is properly maintained and that mufflers and other required pollution-control devices are in working condition in order to limit construction-related air emissions.

Noise and Vibration

- VM 77. Applicants shall work with affected communities that have sensitive receptors that would experience an increase of at least 5 dBA [A-weighted decibel] and reach 70 dBA to mitigate train noise to levels as low as 70 dBA by cost effective means as are agreed to by an affected community and Applicants. In the absence of such an agreement, Applicants shall implement cost effective mitigation that could include such measures as (1) constructing noise control devices such as noise barriers, (2) installing vegetation or berming, or (3) installing, or providing funding for installation of, enhanced warning devices in order to provide the level of warning necessary to allow the community to request a waiver from Federal Railroad Administration (FRA) of the requirement to sound the horn and achieve quiet zone requirements.
- VM 78. Applicants shall consult with affected communities and work with their construction contractors to minimize, to the extent reasonably practicable, construction-related noise disturbances near any residential areas.
- VM 79. Applicants shall work with their construction contractors to maintain Transaction-related construction and maintenance vehicles in good working order with properly functioning mufflers to control noise.
- VM 80. In addition to the development of other noise mitigation measures, Applicants shall consider lubricating curves where doing so would both be consistent with safe and efficient operating practices and significantly reduce noise for residential or other noise sensitive receptors. Applicants shall also continue to employ safe and efficient operating procedures that, in lieu of, or as complement to, other noise mitigation measures can have the collateral benefit of effectively reducing noise from train operations. Such procedures include:
- inspecting rail car wheels to maintain wheels in good working order and minimize the development of wheel flats;
 - inspecting new and existing rail for rough surfaces and, where appropriate, grinding these surfaces to provide a smooth rail surface during operations;
 - regularly maintaining locomotives, and keeping mufflers in good working order; and
 - removing or consolidating switches determined by Applicants to no longer be needed.

- VM 81. To minimize noise and vibration, Applicants shall install and maintain rail and rail beds according to AREMA standards.
- VM 82. Applicants shall comply with FRA regulations establishing decibel limits for train operations.
- VM 83. Applicants shall install or relocate a Wheel Impact Load Detector (WILD) on the EJ&E rail line within three years of acquisition by CN of control of EJ&EW.

Biological Resources

- VM 84. For impacts to non-jurisdictional isolated wetlands habitat along the new line, Applicants shall survey the route to determine if the Hine’s emerald dragonfly is present along the ROW.
- VM 85. Upon consultation with U.S. Fish and Wildlife Service, should the Hine’s emerald dragonfly be observed on the site of Transaction-related construction activities, Applicants shall implement appropriate measures prior to and during construction to reduce or eliminate impacts on the Hine’s emerald dragonfly.
- VM 86. Prior to initiating Transaction-related construction activities, Applicants shall consult with the local offices of the Natural Resource Conservation Service (“NRCS”) to develop an appropriate plan for restoration and re-vegetation of the disturbed areas (including appropriate seed mix specifications).
- VM 87. During construction activity, Applicants shall take reasonable steps to ensure contractors use fill material appropriate for the project area.
- VM 88. Applicants shall, to the extent reasonably practicable, revegetate the bottom and sides of the drainage ditches using natural recruitment from the native seed sources in the stockpiled topsoil.

Water Resources

- VM 89. In the case where there is a potential for a railroad drainage ditch to influence wetland hydrology, Applicants shall construct low permeability clay berms (wetland berms adjacent to the drainage channels that would be proximal to the isolated wetlands). These berms would minimize the impact to surface water drainage from the proposed drainage ditch.
- VM 90. Applicants shall compensate in accordance with USACE regulations in both Illinois and Indiana for wetland impacts that cannot be avoided and for impacts that are determined by USACE to be on waters of the U.S. for construction related to the proposed action.
- VM 91. Applicants shall maintain drainage ditches as permanent vegetated swales to provide storm water retention and treatment. Removal of accumulated sediments shall be conducted only as necessary to maintain storm water retention capacity and function.
- VM 92. To minimize sedimentation into streams and waterways during construction, Applicants shall use best management practices, such as silt fences and straw bale dikes, to minimize soil erosion, sedimentation, runoff, and surface instability during project-related construction activities. Applicants shall seek to disturb the smallest area possible around any streams and shall conduct reseeding efforts to ensure proper

- revegetation of disturbed areas as soon as reasonably practicable following Transaction-related construction activities.
- VM 93. In order to control erosion, Applicants shall establish staging and lay down areas for Transaction-related construction material and equipment at least 300 feet from jurisdictional waters of the United States and in areas that are not environmentally sensitive. Applicants shall not clear any vegetation between the staging area and the waterway or wetlands. To the extent reasonably practicable, areas with non-jurisdictional isolated waters will not be used for staging and lay down and will only be impacted when necessary for construction. When Transaction-related construction activities, such as culvert and bridgework, require work in streambeds, Applicants shall conduct these activities, to the extent reasonably practicable, during low-flow conditions.
- VM 94. During Transaction-related construction activities, Applicants shall require all contractors to conduct daily inspections of all equipment for any fuel, lube oil, hydraulic, or antifreeze leaks. If leaks are found, Applicants shall require the contractor to immediately remove the equipment from service and repair or replace it.
- VM 95. Applicants shall employ best management practices to control turbidity and disturbance to bottom sediments of surface waters during Transaction-related construction. Applicants shall implement best management practices in wetlands or other waters of the United States to avoid adverse downstream impacts on fish, mussels, and other aquatic biota.
- VM 96. Applicants shall implement their current noxious weed control program during construction and operation of Transaction-related sidings, double-track, and connections. All herbicides used by Applicants shall be approved by the U.S. EPA.
- VM 97. Applicants shall ensure that any herbicides used in ROW maintenance to control vegetation are approved by the U.S. EPA and are applied by licensed individuals who shall limit application to the extent necessary for rail operations. Herbicides shall be applied so as to prevent or minimize drift off of the ROW onto adjacent areas.
- VM 98. During construction, Applicants shall prohibit Transaction-related construction vehicles from driving in or crossing streams at other than established crossing points.
- VM 99. Applicants shall, to the extent reasonably practicable, ensure that any fill placed below the ordinary high water line of wetlands and streams is appropriate material selected to minimize impacts to the wetlands and streams. All stream crossing points shall be returned to their pre-construction contours to the extent reasonably practicable and the crossing banks will be reseeded or replanted with native species immediately following project-related construction.
- VM 100. Applicants shall obtain a National Pollutant Discharge Elimination System (“NPDES”) storm water discharge permit from U.S. EPA or appropriate State agencies for Transaction-related construction activities.

Monitoring and Enforcement

VM 101. Applicants shall submit quarterly reports to SEA on the progress of, implementation of, and compliance with, the mitigation measures for a period covering the first 3 years of operational changes.

Supplemental Voluntary Mitigation Measures

VM 102. Applicants shall cooperate with Midwest Generation, LLC (“MWG”), to identify locations on Applicants’ property, or available to Applicants, on which loaded coal trains could be staged while awaiting delivery to MWG’s Will County Generating Station and Joliet Generating Station and which would make unnecessary the construction of additional train storage capacity on MWG property that would adversely affect the Hine’s emerald dragonfly or its habitat. If no adequate existing train storage locations can be identified, Applicants shall make reasonable efforts to acquire or construct, at MWG’s expense, new train storage capacity, at locations where construction would not have adverse impacts on the Hine’s emerald dragonfly or its habitat, and which would make construction of additional storage capacity on MWG’s property unnecessary, and shall make that capacity available as needed for staging of coal trains destined for Will County and Joliet Stations.

VM 103. In consultation with the U.S. Fish and Wildlife Service (USFWS) and relevant natural resource stakeholders, Applicants shall participate in the development of a Habitat Conservation Plan for the Hine’s emerald dragonfly or necessary work plans applicable to State and Federally listed threatened and endangered species and take the necessary measures to ensure that rail operations do not cause undue impact to those species.

VM 104. [Migratory Birds] Where warranted, Applicants shall work with relevant natural resource stakeholder groups, Forest Preserve Districts, the Indiana office of The Nature Conservancy (TNC), Illinois Department of Natural Resources (IDNR), Indiana Department of Natural Resources (INDNR), and USFWS to support the creation or enhancement of migratory bird habitat away from those segments of the EJ&E rail line on which Applicants project Transaction-related increases in rail traffic, and where there is proposed Transaction-related construction of double-track and new or improved connections.

VM 105. [Rare and Listed Turtles] In consultation with USFWS, Applicants shall construct and maintain adequate passages (that is, pipes or culverts) for turtles to cross through the track bed in areas on the EJ&E rail line between Leighton and Gary on which Applicants expect to increase rail traffic and where habitat for rare and/or listed turtle species (that is, Blanding’s or spotted turtle) exists on both sides of the rail line.

VM 106. [Karner Blue Butterfly] In consultation with USFWS, Applicants shall identify areas of suitable habitat of the Karner blue butterfly within Kirk Yard and in the vicinity of all planned Transaction-related construction of double track and new or improved connections within the State of Indiana for potential habitat protection and/or enhancement. Applicants shall contact TNC about participation in the Safe Harbor Agreement for the Karner blue butterfly.

- VM 107. [Indiana Dune and Swale] In consultation with appropriate Federal and State natural resource stakeholders, including USFWS, INDNR and TNC, Applicants shall designate EJ&EW-owned areas of prime prairie and dune swale habitat for potential land management agreement and/or conservation easement. Should modifications to Kirk Yard be proposed in the future, Applicants shall review proposed plans for upgrading and expansion of Kirk Yard in order to avoid construction in identified dune swale areas. In the event that unavoidable impacts are identified, Applicants shall work with TNC to develop a plan for mitigation of those impacts and improvement of the quality of remaining dune swale areas.
- VM 108. [Eastern prairie fringed orchid] Prior to any ground disturbing activities, Applicants shall hire a qualified biologist to survey for the Eastern prairie fringed orchid (*Platanthera leucophaea*) in areas containing suitable habitat. Applicants shall survey each area on at least three non-consecutive days between June 28 and July 11, as this is when the orchid typically flowers and is most identifiable. If Applicants' biologist finds orchids, Applicants shall not conduct any construction activities in that area and Applicants shall notify USFWS and the Board immediately. The Board shall reinstate consultation with USFWS. Applicants shall work with the Board and USFWS to determine appropriate measures to offset impacts, most likely providing funding for an ongoing hand pollination project, or providing funding to be used to enhance another orchid site (that is, brush cutting, prescribed burning).

Board's Final Mitigation Conditions

Applicants' Voluntary Mitigation

- 1) Applicants shall comply with their voluntary mitigation measures.

Rail Operations

- 2) As part of the Applicants' quarterly reports that will be required under VM 101, VM 36, and Condition 74, Applicants shall report quarterly to SEA and communities adjacent to or intersected by the EJ&E rail line on 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.
- 3) Applicants shall distribute to communities adjacent to or intersected by the EJ&E rail line the contact information for the Applicants' community liaison established in VM 64 to ensure that Applicants are aware of highway/rail at-grade crossing blockages lasting 10 minutes or more.

Rail Safety

Safety Integration Plan

- 4) Applicants shall comply with their approved final Safety Integration Plan (SIP), prepared pursuant to 49 CFR 1106, which may be modified and updated as necessary to respond to evolving conditions.
- 5) Applicants shall continue to coordinate with FRA in implementing the approved final SIP, including any amendments thereto. The ongoing safety integration process shall continue until FRA notifies the Board that the integration of Applicants' operations has been safely completed.

Freight Rail Safety

- 6) Applicants shall adhere to all applicable Federal Occupational Safety and Health Administration (OSHA), FRA, and state construction and operational safety regulations to minimize the potential for accidents and incidents on the EJ&E rail line.

Vehicle Safety

Industry Track

- 7) As requested by the Illinois Commerce Commission, Applicants shall notify the Illinois Commerce Commission prior to modifying rail service to existing rail shippers along the EJ&E rail line during the morning and evening commuter rush hours, in areas where: 1) industry tracks cross highway/rail at-grade crossings, and 2) those industry track highway/rail at-grade crossings are protected with warning devices that are not interconnected with or part of the warning devices at a highway/rail at-grade crossing of the same roadway located within 300 feet which experiences commuter rail traffic. Before modifying the rail service Applicants shall allow the Illinois Commerce Commission to review the adequacy of the highway/rail at-grade crossing warning devices and abide by the Illinois Commerce Commission's reasonable determination(s), including contributing to funding any required modifications.

Quiet Zones

- 8) Applicants shall work with Barrington, Illinois, to determine which improvements would be necessary for the City to maintain its quiet zone designation, should the transaction cause it to fall out of compliance with FRA regulations. The existing Barrington Quiet Zone includes the highway/rail at-grade crossings at Lake/Cook Road, Otis Road, Penny Road, Old Sutton Road, Shoe Factory Road, Spaulding Road, and West Bartlett Road. For 3 years from the effective date of the Board's final decision, Applicants shall fund reasonable improvements FRA deems necessary to maintain the existing quiet zone.

Hazardous Materials Transportation Safety

- 9) To supplement Applicants' VM 21, Applicants shall conduct TRANSCAER workshops in English and Spanish upon request for 3 years from the effective date of the Board's final decision authorizing the Proposed Action.
- 10) In addition to Applicants' VM 25, Applicants shall adhere to all EPA regulations as described in 40 CFR 263 and shall coordinate with EPA, state agencies, and local agencies on spill responses.

Pedestrian and Bicycle Safety

- 11) To supplement Applicants' VM 10, Applicants shall coordinate with each affected community prior to installation of this fencing and shall install fencing where the community deems appropriate. Applicants shall furnish and install at their sole expense a standard 6-foot-high, galvanized, chain-link fence at all locations where an effective fence does not currently exist. Upon completion of construction, the fence shall be owned and maintained by the community unless both parties agree otherwise in writing. The community may decide to install fencing that differs from this standard, but Applicants shall only be obligated to provide funds sufficient to construct the standard fence.
- 12) To supplement Applicants' VM 43 and 44, Applicants shall make Operation Lifesaver programs available to communities, schools, and other appropriate organizations located along the EJ&E rail line for 3 years after the effective date of the Board's final decision. The programs will be designed and provided in coordination with the Illinois Commerce Commission and INDOT.
- 13) To address concerns raised by the U.S. Department of Transportation, Applicants shall either continue EJ&E's practice of holding trains south of Ann Street in West Chicago, Illinois, or work with the community to replace the George Street pedestrian crossing. Ann Street is located approximately 0.1 mile south of the George Street pedestrian crossing and 0.3 mile south of the signal in West Chicago. Applicants shall hold their trains at this location to avoid blocking the at-grade crossing at Ann Street (USDOT # 260545V, MP 28.50), the pedestrian crossing at George Street (USDOT # 260806T, MP 28.27), and the at-grade crossing at Church Street (USDOT # 260543G, MP 28.77). Upon obtaining a clear signal, to the extent possible, Applicants' trains shall not stop and block the at-grade crossings.

Transportation Systems

Regional and Local Highway Systems

- 14) In addition to VM 28, Applicants shall coordinate with the following state and local officials for the expeditious implementation of a grade separation at:
- The highway/rail at-grade crossing of Ogden Avenue and the EJ&E rail line in Aurora (USDOT # 260560X). Coordinate with DuPage County, Illinois, and Aurora, Illinois, the Illinois Department of Transportation (IDOT), and the Illinois Commerce Commission.
 - The highway/rail at-grade crossing of Lincoln Highway (US 30) and the EJ&E rail line in Lynwood (USDOT # 260651D). Coordinate with Cook County, Illinois, Lynwood, Illinois, IDOT, and the Illinois Commerce Commission.

The substantial effects of the transaction on traffic delay, regional and local mobility, and grade-crossing safety warrant an increase over the traditional railroad share of the cost of these grade separations if they are approved and funded. Once applicants have been notified that the required non-CN funds have been committed and obligated, applicants shall pay 67% of the cost of the grade separation at Ogden Avenue and 78.5% of the Lincoln Highway grade separation. Applicants shall 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. However, applicants shall not be required to pay for more than one preliminary engineering study for each crossing. This obligation shall only be in effect for projects where construction is initiated no later than 2015. The Board anticipates that IDOT will be the lead agency for the development of these grade separations.

- 15) Applicants shall coordinate with IDOT and the appropriate counties and affected communities to develop a program to install traffic advisory signs on roadway ROW at certain public highway/rail at-grade crossings along the EJ&E rail line. These signs shall clearly advise motorists not to block intersections, and the format and lettering of these signs shall comply with FHWA's *Manual on Uniform Traffic Control Devices*. These signs shall be in place within a year of the effective date of the Board's final decision, subject to the approval of the coordinating agencies, and shall be located near the following intersections:
- a. Old McHenry Road/Midlothian Road, Hawthorn Woods, Illinois
 - b. Main Street/IL 22, Lake Zurich, Illinois
 - c. Hough Street (IL 59)/Northwest Highway (US 14), Barrington, Illinois
 - d. Plainfield-Naperville Road/IL 59, Plainfield, Illinois
- 16) Applicants shall construct the revised connection at Matteson, Illinois, and the revised double track connection at Leithton (near Mundelein, Illinois) as described in the Applicants' letters dated August 21, 2008 and September 17, 2008, respectively.

- 17) As requested by the Illinois Commerce Commission, Applicants shall consult with Illinois Commerce Commission, as well as INDOT, to locate roadway intersections with traffic lights within 1,000 feet of existing highway/rail at-grade crossings along the EJ&E rail line to identify circumstances where queued cars could extend over the EJ&E rail line and to consider reasonable solutions.

Emergency Response

- 18) In addition to VM 42, to further assist with the timely response of the emergency service providers listed in Table ES- 1 below, Applicants shall consult with all appropriate agencies to implement a CCTV system with video cameras placed in locations so that the movement of trains can reasonably be predicted at the highway/rail at-grade crossings listed in Table ES-1. Applicants shall pay for the necessary equipment, including cameras, monitors, poles, cables, controllers, cabinets, communications equipment, electrical connections, or other necessary components, the installation of the equipment, and equipment training for up to two individuals for each emergency service provider listed in Table ES-1 below. Applicants shall work with all appropriate agencies to determine specifications and scheduling for the installation of this system. Applicants shall not be responsible for the ongoing maintenance and operation of the CCTV system after the system is installed and operational.

Table ES- 1. Emergency Service Providers Receiving CCTV at Affected Highway/Rail At-Grade Crossing Locations		
Community	Facility	Highway/Rail At-Grade Crossings
Lake Zurich, Illinois	Lake Zurich Rural Fire Protection District - Station No. 3	Gilmer Road Old McHenry Road Oakwood Road
Barrington, Illinois	Barrington Fire Department - Station No. 1	Lake Zurich Road Northwest Highway (US 14) Hough Street (IL 59) Lake Cook Road/Main Street
Barrington, Illinois	Advocate Good Shepherd Hospital	Lake Zurich Road Northwest Highway (US 14) Hough Street (IL 59) Lake Cook Road/Main Street
Bartlett, Illinois	Bartlett Fire Protection District - Future Station No. 3	Spaulding Road West Bartlett Road Stearns Road
West Chicago, Illinois	West Chicago Fire Protection District Headquarters/Station No. 1	Washington Street Aurora Street Church Street Ann Street
West Chicago, Illinois	West Chicago Fire Protection District - Station No. 3	Washington Street Aurora Street Church Street Ann Street
Plainfield, Illinois	Plainfield Fire Protection District - Station No. 3	111 th Street Ferguson Road/119 th Street 127 th Street

Airports

- 19) Applicants shall comply with the four-party Preliminary Memorandum of Understanding (PMOU) announced by the Gary/Chicago International Airport, EJ&E, CSX, and NS on June 27, 2008, regarding the airport's plan to extend its main runway and to relocate the EJ&E rail line.

Land Use

- 20) Applicants shall consult with and comply with the reasonable requirements of INDNR to demonstrate compliance with the Coastal Zone Management Act (CZMA) (16 U.S.C. 1451-1456) and the Indiana Lake Michigan Coastal Program in accordance with the guidelines found in the Indiana Natural Resources Commission's Information Bulletin #43 (Indiana Natural Resources Commission 2007). Applicants shall demonstrate CZMA compliance prior to initiating any project-related construction activities in Indiana.

Environmental Justice

- 21) In addition to VM 23, which requires Applicants to provide a copy of their emergency response plan to all appropriate state and local authorities within 6 months of the effective date of the Board's final decision, Applicants shall provide the appropriate authorities a Spanish-language version of the emergency response plan, upon request.
- 22) In addition to VM 11, all of Applicants' informational materials concerning railroad safety shall be provided to elementary, middle, and high schools within 0.5 mile of the EJ&E ROW in both English and Spanish, upon request. In addition to VM 65, Applicants shall make materials and information on their project-related website available in both English and Spanish.
- 23) In addition to VM 64, Applicants shall provide a Spanish-language translator to work with the Applicants' community liaison as needed to consult with affected communities and businesses, to attend public meetings, and to conduct public outreach.

Air Quality and Climate

- 24) Applicants shall comply with EPA emissions standards for diesel-electric railroad locomotives (40 CFR 92) when purchasing and rebuilding locomotives.
- 25) Applicants shall notify local fire departments along the EJ&E rail line at least 4 hours before any open burning activities along the EJ&E rail line ROW and in proposed construction areas and shall obtain oral or written permission from the fire departments prior to such burning activities.

Noise and Vibration

- 26) Upon request, Applicants shall consult with communities affected by wheel squeal at existing locations on the EJ&E rail line, and cooperate in determining the most appropriate methods for implementing VM 80.
- 27) Applicants shall make reasonable efforts to notify the U.S. Department of Energy Fermi National Accelerator Laboratory (Fermilab) in Batavia, Illinois, of potentially significant operational changes, such as substantial increases in train speed and/or axle loadings that could affect their vibration-sensitive equipment.
- 28) In addition to VM 77 through 83 and Condition 74, Applicants shall include in their quarterly reports documentation of their efforts to implement in a timely manner their voluntary noise and vibration mitigation, which is intended to provide effective and measurable noise reduction in areas that qualify for noise mitigation under IDOT or INDOT criteria, as discussed in Chapter 2 of the Final EIS.

Biological Resources

Resource Agency Liaison

- 29) In addition to VM 64, Applicants shall establish a local resource agency liaison(s) with expertise in environmental and natural resource management to work closely with Federal, state, and local natural and water resource agencies (including Fermilab) for the purpose of improved adaptive natural resource management. Applicants shall name their liaison(s) within 1 month of the effective date of the Board's final decision. Applicants' liaison(s) shall ensure that the adaptive management measures developed shall be incorporated into all relevant railroad ROW maintenance contracts. Applicants' liaison(s) shall be available to consult with resource agencies for 5 years following the effective date of the Board's final decision.
- 30) Applicants shall work with relevant natural resource stakeholder groups, forest preserve districts, TNC, INDNR, IDNR and USFWS to establish appropriate monitoring programs. These programs shall include identifying baseline conditions and post-transaction conditions, in areas adjacent to forest preserves and designated natural areas on species of concern to the above groups. Applicants shall fund the monitoring programs for a period of 5 years from the effective date of the Board's decision.

Plant Communities

- 31) In addition to VM 96 and VM 97, Applicants shall work with the natural resource agencies through the Applicants' resource agency liaison(s) (see Condition 29, above) to define sensitive areas where use of herbicides should be restricted.
- 32) In addition to VM 96, Applicants shall consult with and develop cooperative and adaptive management strategies with natural resource agencies to address invasive species spread directly by transaction-related operations. Applicants' local resource agency liaison(s) (see Condition 29, above) shall serve as coordinator(s).

- 33) Applicants, through the local resource agency liaison (established in Condition 29, above), shall work with the forest preserve districts to minimize disruptions and complications to the management and implementation of district-prescribed burn programs, to the extent possible.

Federally Listed and State-Listed Threatened and Endangered Species

- 34) In addition to VM 51, Applicants shall continue to abide by the special conditions of the 1996 USACE Permit #19960211 for train operations on the Paul Ales Branch in order to minimize further effects on the Hine's emerald dragonfly.
- 35) To avoid any direct take of Indiana bats, Applicants shall not remove trees within the former EJ&E ROW with a diameter of 3 or more inches between April 15 and September 15. Applicants shall avoid or minimize tree clearing and snag removal within project-related construction area limits.

Water Resources

- 36) Within 6 months of the effective date of the Board's final decision, Applicants shall consult with EPA, Illinois Environmental Protection Agency (IEPA), and Indiana Department of Environmental Management (IDEM) regarding sensitive surface or groundwater resources along the EJ&E rail line and potential cost-effective preventative measures that could be taken to protect such resources from potential contamination in the unlikely event of a hazardous material release from a rail car on the EJ&E rail line. Applicants shall include in their quarterly reports documentation of the outcome of their consultations and shall abide by the consulting agencies' reasonable requirements.
- 37) In addition to VM 90, and in response to concerns raised by INDNR, Applicants shall coordinate project-related wetland mitigation planning with INDNR.
- 38) Applicants shall meet with EPA, USFWS, and USACE during the design of all project-related construction (including the locations of connections and double track) and shall comply with the reasonable requirements of those agencies in order to avoid and minimize, to the extent feasible, effects on wetlands and biological resources.

Constructions

Rail Operations

- 39) In addition to VM 40, Applicants shall maintain access to the pedestrian tunnel from the Metra Park-n-Ride lot to the Metra train station on the east side of the Chicago Subdivision at Matteson, Illinois. Construction of the Applicants' proposed connection shall not interfere with the public's access along Front Street in Matteson. Prior to the proposed construction, Applicants shall consult with Metra to devise reasonable requirements pertaining to coordinating tunnel access, track construction and existing pedestrian safety.

Rail Safety

- 40) Applicants shall consult with state Departments of Transportation and other appropriate agencies and shall abide by the reasonable requirements of the Illinois Commerce Commission or INDOT prior to constructing, relocating, upgrading, or modifying highway/rail at-grade crossing warning devices on the EJ&E rail line.

Hazardous Waste Sites

- 41) Applicants shall use established standards for recycling or reuse of construction materials, such as ballast and rail ties. When recycling construction materials is not a viable operation, the Applicants shall use disposal methods that comply with applicable solid and hazardous waste regulations.
- 42) Applicants shall follow American Society of Testing and Materials (ASTM) E1527-05, Standard Practice for Environmental Site Assessments: Phase 1 Environmental Site Assessment Process, prior to construction activities related to the Proposed Action in areas where potential contamination may be encountered (ASTM 2005). If the Applicants encounter contamination (or signs of potential contamination) during these activities, Applicants shall perform a Phase 2 environmental investigation.

Land Use

- 43) In addition to VM 70, in response to concerns raised by IDNR, Applicants shall consult with IDNR or INDNR to coordinate a reasonable easement agreement for crossing state-owned parks in Illinois or Indiana, respectively, to reach project-related construction areas.
- 44) In addition to VM 54, VM 60, and VM 62, Applicants shall flag the boundaries of any project-related construction near a forest preserve, nature preserve, protected area, local park, scenic corridor, or land and water reserve and shall coordinate with the respective owners and/or managers and abide by their reasonable requirements.
- 45) Applicants shall store construction-related equipment and materials in established storage areas or on the Applicants' property.

- 46) Prior to construction of double track near Gilmer Road near Hawthorn Woods, Illinois, Applicants shall coordinate with and abide by the reasonable requirements of Hawthorn Woods regarding the Gilmer Road scenic corridor.

Noise and Vibration

- 47) Applicants shall implement best management practices when developing construction plans and performing transaction-related construction activities to ensure that construction-related noise and vibration effects are minimized to the extent possible.
- 48) Applicants shall design and build all new transaction-related, curved track sections of 3 degrees or above in a manner that minimizes or eliminates the potential for wheel flange squeal using guidance provided by AREMA standards.

Biological Resources

- 49) Applicants shall immediately cease transaction-related construction in the event that a previously unidentified Federally or state-listed threatened or endangered species is encountered during transaction-related construction activities. In that event, Applicants shall consult with USFWS for Federally-listed species and IDNR and/or INDNR for state-listed species for guidance on how to minimize transaction-related effects and protect these species, and shall comply with the reasonable solutions suggested by those agencies. Applicants' resource agency liaison(s) (see Condition 29, above) shall serve as coordinator(s).
- 50) In addition to VM 86, Applicants shall not include any invasive weed species in seed mixes for revegetation of areas that would be disturbed during transaction-related construction activities.
- 51) Applicants shall avoid construction of the Munger connection within Pratt's Wayne Woods Forest Preserve, or any other identified migratory bird nesting or breeding area, during the bird breeding season (April through August) to avoid disturbance of breeding birds.
- 52) Prior to transaction-related construction activities, Applicants shall reexamine the Federal and state lists of threatened and endangered species for any newly listed species and shall consult with the appropriate resource agencies on any newly listed species. Applicants' resource agency liaison(s) (see Condition 29, above) shall serve as coordinator(s).
- 53) Applicants shall ensure that all equipment for transaction-related construction activities is washed prior to entering the construction site and after the construction activities are completed. Prior to leaving the construction site, Applicants shall inspect all construction equipment and remove any attached flora, fauna, mud or seeds.
- 54) Applicants shall maintain the current access to Pratt's Wayne Woods near Wayne, Illinois at the Applicants' Proposed Munger Connection in accordance with existing access and management agreements.

Water Resources

- 55) Applicants shall compensate for effects on isolated wetlands according to the regulations of the State of Indiana for transaction-related construction activities. Isolated wetlands in Indiana are regulated as State Regulated Wetlands (SRWs) under 327 Indiana Administrative Code (IAC) 17.
- 56) For transaction-related construction activities, Applicants shall mitigate for effects on isolated wetlands according to the regulations of Lake and DuPage counties in Illinois, both of which have specific mitigation requirements for effects on isolated waters and their associated buffer areas.
- 57) When performing transaction-related construction activities, Applicants shall not affect existing wetlands in order to create the ponds or stormwater detention that may be required for the management of stormwater runoff.
- 58) Applicants shall comply with the reasonable requirements of the Will County, Illinois Stormwater Management Ordinance for all transaction-related construction activities in Will County.
- 59) When performing transaction-related construction activities, Applicants shall avoid increasing upstream flood elevations in Federal Emergency Management Agency (FEMA)-regulated floodplains and shall obtain a Letter of Map Revision (LOMR) from FEMA where construction of bridges, culverts, or embankments would result in an unavoidable increase in 100-year flood elevations greater than 0.1 foot.
- 60) Prior to beginning transaction-related construction activities, Applicants shall delineate wetlands and conduct floristic quality assessments in jurisdictional wetland and non-jurisdictional wetland habitat in transaction-related construction areas along the EJ&E rail line (including the six connections and the proposed double track).

Cultural Resources

- 61) During transaction-related construction activities, Applicants shall immediately cease excavation work if archeological resources are encountered during construction activities. Applicants shall inform and consult with the appropriate State Historic Preservation Office and/or appropriate Tribal Historic Preservation Office regarding appropriate measures for addressing the resource, and shall comply with the reasonable requirements those agencies suggest.

Agreements

- 62) Applicants shall comply with the terms of their agreement with Amtrak as set forth in VM 37.
- 63) Applicants shall comply with the terms of the negotiated agreement that was executed by Joliet, Illinois and the Applicants on August 25, 2008.
- 64) Applicants shall comply with the terms of the negotiated agreement that was executed by Crest Hill, Illinois and the Applicants on November 18, 2008.

- 65) Applicants shall comply with the terms of the negotiated agreement that was executed by Dyer, Indiana and the Applicants on December 4, 2008.
- 66) Applicants shall comply with the terms of the negotiated agreement that was executed by Chicago Heights, Illinois and the Applicants on December 8, 2008.
- 67) Applicants shall comply with the terms of the negotiated agreement that was executed by Mundelein, Illinois and the Applicants on December 9, 2008.
- 68) Applicants shall comply with the terms of the negotiated agreement that was executed by Schererville, Indiana and the Applicants on December 11, 2008.
- 69) Applicants shall comply with the terms of the negotiated agreement that was executed by Hoffman Estates, Illinois and the Applicants on December 15, 2008.
- 70) Applicants shall comply with the terms of the negotiated agreement that was executed by Frankfort, Illinois and the Applicants on December 15, 2008.
- 71) Applicants shall comply with the terms of the negotiated agreement that was executed by Griffith, IN and the Applicants on December 18, 2008.

Monitoring and Enforcement

- 72) 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.
- 73) Applicants shall retain a third-party contractor to assist SEA in the monitoring and enforcement of mitigation measures on an as-needed basis until Applicants have completed transaction-related construction activities, as well as a period covering the first 5 years from the effective date of the Board's final decision.
- 74) In addition to VM 101, Applicants shall submit quarterly reports to SEA on the progress of, implementation of, and compliance with these mitigation measures for a period covering 5 years from the effective date of the Board's final decision. Applicants shall notify the Board in their quarterly reports if applicants substantially depart from their traffic projections on the five existing CN lines through Chicago on more than a short-term, temporary basis.

APPENDIX B: ABBREVIATIONS AND ACRONYMS

A&BR	Adrian & Blissfield Railroad
Ace	Ace Ethanol
ACS	American Chemical Service
Algoma	Algoma Steel, Inc.
Amtrak	National Railroad Passenger Corporation
Aracruz	Aracruz Celulose USA, Inc.
ASMC	American Suzuki Motor Corporation
ATDA	American Train Dispatchers Association
Aux Sable	Aux Sable Liquid Products, LP
B&LE	Bessemer and Lake Erie Railroad Company
BASF	BASF Corporation
BLET	Brotherhood of Locomotive Engineers and Trainmen
BNSF	BNSF Railway Corporation
BRC	Belt Railway Company of Chicago
CCP	Chicago, Central & Pacific Railroad Company
CEQ	Council on Environmental Quality
CNR	Canadian National Railway Company
CPR	Canadian Pacific Railway Company
CREATE	Chicago Region Environmental and Transportation Efficiency Program
CRRC	Cedar River Railroad Company
CSXT	CSX Transportation, Inc.
DATCP	Wisconsin Department of Agriculture, Trade and Consumer Protection
DM&E	Dakota, Minnesota & Eastern Railroad Corporation
DMIR	Duluth, Missabe and Iron Range Railway Company
DOT	United States Department of Transportation
DWP	Duluth, Winnipeg and Pacific Railway Company
Effingham	Effingham Railroad Company
EJ&E	Elgin, Joliet and Eastern Railway Company
EJ&EW	EJ&E West Company
EPA	United States Environmental Protection Agency
Equistar	Equistar Chemicals, LP
FAA	Federal Aviation Administration
FHWA	Federal Highway Administration
FRA	Federal Railroad Administration
GCIAA	Gary Chicago International Airport Authority
GHCC	Glendale Heights Chamber of Commerce
GLT	Great Lakes Transportation LLC
GTC	Grand Trunk Corporation
GTW	Grand Trunk Western Railroad
IBEW	International Brotherhood of Electrical Workers
IC	Illinois Central Railroad Company

IC&E	Iowa, Chicago & Eastern Railroad Corporation
ICC	Interstate Commerce Commission
IDOT	Illinois Department of Transportation
INR/WRSB	Illinois Natural Resources/Water Resources Stakeholder Group
KCS	Kansas City Southern Railway Company
KCSM	Kansas City Southern de Mexico, S.A. de C.V.
Memphis Regional	Memphis Regional Chamber
Metra	Northeast Illinois Regional Commuter Railroad Corporation and the Commuter Rail Division of the Regional Transportation Authority
NAFTA	North American Free Trade Agreement
NARP	National Association of Railroad Passengers
NCFO	National Conference of Firemen & Oilers-SEIU
NEPA	National Environmental Policy Act
NICTD	Northern Indiana Commuter Transportation District
NITL	National Industrial Transportation League
NS	Norfolk Southern Railway Company
P&C Dock	Pittsburgh & Conneaut Dock Company
PCS	PCS Sales (USA), Inc.
PHMSA	Pipeline and Hazardous Materials Safety Administration
Potlatch	Potlatch Forest Products Corporation
Prairie Material	Prairie Materials Sales, Inc.
RMI	Raw Materials, Inc.
SCTC	St. Clair Tunnel Company
SSMB	Sault Ste. Marie Bridge Company
STAR	Suburban Transit Access Route
Transtar	Transtar, Inc.
UBAM	United Business Association of Midway
United Sugars	United Sugars Corporation
UP	Union Pacific Railroad Company
UPS	United Parcel Service
USFWS	United States Fish and Wildlife Service
USS	United States Steel Corporation
UTU GCA-386	United Transportation Union—General Committee of Adjustment GO-386
Waterloo	Waterloo Railway Company
WCL	Wisconsin Chicago Link Ltd.
WC	Wisconsin Central Ltd
WisDOT	Wisconsin Department of Transportation
WPHC	Wheeling/Prospect Heights Area Chamber of Commerce and Industry
WSOR	Wisconsin & Southern Railroad Co.