

SERVICE DATE – JULY 25, 2008

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 35087

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

Decision No. 13

Decided: July 24, 2008

In Decision No. 2, served November 26, 2007, the Board accepted for consideration the application filed by Canadian National Railway Company (CNR) and Grand Trunk Corporation (GTC) on October 30, 2007, for Board authorization of the proposed acquisition of control of EJ&E West Company (EJ&EW), a wholly owned noncarrier subsidiary of Elgin, Joliet & Eastern Railway Company (EJ&E), by CNR and GTC (collectively referred to as CN or applicants). The Board found the proposed transaction to be a “minor” transaction and the application to be in substantial compliance with the applicable regulations governing minor transactions. (This proposal is referred to as the transaction.) In this decision, the Board addresses applicants’ request for time limits for the remaining environmental review and issuance of a final decision. As discussed below, the Board sets a schedule for completion of the environmental review process and issuance of a final decision, but does not adopt applicants’ proposed schedule.

BACKGROUND

In Decision No. 2, the Board determined that preparation of an Environmental Impact Statement (EIS)¹ would be appropriate to fulfill the Board’s obligations under the National Environmental Policy Act (NEPA), 42 U.S.C. 4321 *et seq.* The Board noted that issuance of a final decision on the merits of the application would not occur until the completion of the environmental review process by the Board’s Section of Environmental Analysis (SEA) and recognized that this process might not be completed within the time limits set forth in 49 U.S.C. 11325(d)(2) for issuance of a final decision for a minor transaction (April 25, 2008). The Board indicated that no determination could be made regarding the time preparation of the EIS would take, but that, in the past, the EIS process has ranged from 18 months to several years.

¹ An EIS is the detailed written statement required by NEPA for major federal actions significantly affecting the quality of the human environment. *See* 49 CFR 1105.4(f).

On May 13, 2008, CN filed Applicants' Request for Establishment of Time Limits for NEPA Review and Final Decision, pursuant to the NEPA regulations of the President's Council on Environmental Quality (CEQ) at 40 CFR 1501.8. Claiming that failure to complete the transaction by December 31, 2008, could jeopardize the Stock Purchase Agreement (SPA) between CN and EJ&E (an indirect wholly owned subsidiary of United States Steel Corporation (USS)) and, ultimately, the transaction as a whole, applicants request that time limits be set by the Board. Applicants propose a schedule that they assert is fair and reasonable under the circumstances of the case, which contemplates the issuance of a final decision by December 1, 2008.

Numerous individuals and entities opposed CN's request. The opponents principally argue that applicants' proposed schedule is too short to allow SEA adequate time to complete the EIS process and provide for public involvement in this controversial case.² They note that the Board is not compelled by the CEQ regulations to adopt the schedule proposed by applicants (or any particular schedule).³ In addition, they argue that the SPA does not make clear that December 31, 2008, is a "drop-dead" date because the SPA provides that the right to terminate the parties' agreement on December 31, 2008, does not apply if the Board proceeding remains pending. Certain other parties complain that CN's efforts to mitigate the environmental impacts of the transaction have been inadequate.

Various parties filed statements in support of CN's request. For example, Union Pacific Railroad Company (UP) urges that the environmental review be completed as expeditiously as possible and raises concerns that an extended environmental review in this matter could deter future railroad transactions intended to increase rail capacity and efficiency.⁴ Similarly, a number of short line railroads express concern that delaying this transaction for an indefinite time to conduct an environmental review would set a bad precedent for other railroad transactions, noting that the Board's generally expeditious regulatory processes have helped

² See Village of Barrington, IL Reply (BARR-4) at 12-13 (filed May 20, 2008); Town of Schererville, IN Reply at 4 (filed May 28, 2008); Village of Frankfort, IL Reply (FRKF-5) at 5-6 (filed May 30, 2008); City of West Chicago, IL Reply at 4 (filed June 2, 2008); Will County, IL Reply (WILL-10) at 8-9 (filed June 2, 2008); Letter from Hon. Richard Durbin, United States Senator, and Hon. Melissa L. Bean, Member of Congress (May 16, 2008); Letter from Town of Griffith at 1-2 (May 20, 2008); Letter from Hon. Richard G. Lugar, United States Senator, et al. (May 20, 2008) (party referred to as the Indiana Delegation); Letter from Hon. Melissa L. Bean, Member of Congress, et al. (May 21, 2008); Letter from City of Aurora, IL (May 29, 2008); Letter from Village of Wayne, IL (June 2, 2008).

³ See BARR-4 at 3-7; FRKF-5 at 6-7; Town of Schererville Reply at 2; West Chicago Reply at 4; WILL-10 at 1-2; Letter from Richard G. Lugar, United States Senator, et al. (May 20, 2008); Letter from Village of Wayne (June 2, 2008).

⁴ See UP Reply at 2-3.

bring about a successful short line industry.⁵ Several other parties have submitted letters and comments in support of CN's request.

The United States Department of Transportation (DOT) states that it does not support any particular schedule, but favors the adoption of a reasonably expedited schedule for completion of this proceeding. DOT notes that a reasonable schedule can be established without harm to NEPA or the Interstate Commerce Act, given the progress made to date in this proceeding, the availability of adequate resources, and the Board's familiarity with the types of issues that have been raised.

On May 28, 2008, EJ&E and EJ&EW (collectively EJ&E) filed a reply to CN's request to clarify the record with regard to the SPA. EJ&E states that its position, and that of its parent company, USS, with regard to termination of the SPA is that the parties to the SPA have the "unconditional and unilateral right to terminate the agreement if the closing does not occur on or before December 31, 2008."⁶

DISCUSSION AND CONCLUSIONS

CN argues that the Board is required by 40 CFR 1501.8 to set time limits here and that the Board should adopt applicants' proposed schedule. For the reasons discussed below, the Board will set a reasonable schedule for the remainder of the environmental review process and the issuance of a final decision, but will not adopt applicants' proposed schedule.

1. The Applicable CEQ Regulations.

The CEQ regulations specifically state that while "prescribed universal time limits for the entire NEPA process are too inflexible," federal agencies should set time limits for a proposed action if an applicant for the proposed action requests them, provided that "the time limits are consistent with the purposes of NEPA and other essential considerations of national policy."⁷ The CEQ regulations do not require that an agency adopt the time limits proposed by an applicant. Instead, the regulations set forth eight factors for agencies to consider when determining appropriate time limits, including: "[p]otential for environmental harm"; "[s]ize of the proposed action"; "[s]tate of the art of analytical techniques"; "[d]egree of public need for the potential action, including consequences of delay"; "[n]umber of persons and agencies affected"; "[d]egree to which relevant information is known and if not known the time required for

⁵ See, e.g., Letter from Farmrail System, Inc. (May 22, 2008); Letter from Iowa Interstate Railroad, Ltd. (May 22, 2008); Letter from Watco Companies, Inc. (May 27, 2008); Letter from Red River Valley & Western Railroad Company (May 27, 2008); Letter from Wheeling & Lake Erie Railway Company (May 28, 2008); Letter from Indiana Rail Road Company (May 28, 2008).

⁶ EJ&E Reply at 2.

⁷ 40 CFR 1501.8.

which either party may terminate the SPA. While recognizing that the SPA also allows for amendment by mutual consent,¹² applicants argue that there is no reason to expect that USS, the parent company of EJ&E, would agree to an extension without a reliable completion date for the regulatory process. Indeed, EJ&E's reply, filed May 28, 2008, states that it is the "position of EJ&E and USS from the time that the provisions of the SPA were negotiated and finalized and continuing up to the present time that both EJ&E and GTC have the unconditional and unilateral right to terminate the agreement if the closing does not occur on or before December 31, 2008."¹³ Applicants therefore request that the regulatory process be completed by December 1, 2008, so as to allow for finalization of the transaction prior to December 31, 2008, if the proposed acquisition is approved.

Barrington and others,¹⁴ however, have pointed out that applicants' statements with regard to the "drop-dead" date of December 31, 2008, do not make clear that USS will have the right to unilaterally terminate the SPA if the closing cannot occur by December 31, 2008, due to the need to complete the Board's NEPA review. Article IX, "Termination and Abandonment," of the SPA, which is referred to in section 2.3, specifically states, in part:

§ 9.1 Termination. This Agreement may be terminated and the transactions contemplated hereby may be abandoned, at any time prior to the Closing:

...

(b) by any Party if the Closing shall not have occurred by December 31, 2008; provided that the right to terminate this Agreement under this Section 9.1(b) shall not be available . . . (ii) if the reason for failure of the Closing to occur on or before such date is one or more of the following: (A) the STB has not issued a final decision in the Exemption Proceeding or the Control Proceeding; . . . (C) the STB has not completed such review of the transactions contemplated by this Agreement as may be required under [NEPA] or the National Historic Preservation Act, 16 U.S.C. 470, in connection with the Exemption Proceeding and the Control Proceeding. . . .¹⁵

(. . . continued)

December 31, 2008, after which date this Agreement may terminate at the option of either party. Such date is herein referred to as the "**Closing Date**" (emphasis in original).

¹² See CN-2 at 297 (section 10.8 of the SPA).

¹³ EJ&E Reply at 2.

¹⁴ See BARR-4 at 13; WILL-10 at 6-7; FRKF-5 at 4-5; Letter from Village of Wayne (June 2, 2008).

¹⁵ CN-2 at 293.

As noted by several parties,¹⁶ this section, on its face, seems to conflict with section 2.3 of the SPA and appears to indicate that the parties to the SPA planned for the possibility that the transaction could require an environmental review process that extended beyond December 31, 2008. In these circumstances, the “consequences of delay” under 40 CFR 1506.8(b)(1)(iv) here do not warrant adoption of applicants’ proposed procedural schedule for this controversial case, which involves an unprecedented amount of public participation during the EIS process and a large number of potential environmental issues that need time to be adequately assessed.¹⁷

Applicants note that in reviewing agency compliance with NEPA, the courts have taken into account whether an agency’s governing statute imposes short, mandatory deadlines on the agency.¹⁸ Section 11325(d), the statutory provision at issue here, does set time deadlines for minor transactions but allows for discretion on the part of the Board, where appropriate, and does not contain predetermined outcomes if the deadlines in section 11325(d) are not met.¹⁹ Indeed, the U.S. Court of Appeals for the D.C. Circuit, in rejecting the argument that section 11325 requires the Board to adhere to a strict timetable, stated that “forcing the Board to proceed pursuant to [section] 11325 before it has had an opportunity to determine where the public interest lies would defeat altogether the purpose of the agency’s review.”²⁰ The same is true with NEPA, which requires agencies to take a “hard look” at the potential environmental issues, disclose the potential environmental impacts, and allow for public input so that the Board can weigh both environmental issues and issues on the transportation merits in deciding whether to approve a proposed transaction, deny it, or approve it with conditions, including environmental conditions.²¹ The fact that the proposed transaction has been classified as “minor” does not control the determination regarding the time necessary to complete the environmental review.

The CEQ regulations at 40 CFR 1501.8(b)(1)(vii) provide that, in setting time limits, agencies consider, as one of the factors, the “time limits imposed on the agency by law, regulations, or executive order.” Here, the time limits in 49 U.S.C. 11325(d) support the conclusion that the Board should complete this proceeding in an expeditious manner, but do not require adoption of applicants’ suggested schedule. Nothing in NEPA, the case law, or the CEQ regulations require the Board to set a specific date with regard to service of the Final EIS and it would not be appropriate to do so here since the Board cannot predict in advance the extent or types of comments that might be made on the Draft EIS. The schedule that the Board is adopting sets reasonable time limits that accommodate NEPA and Congress’ intent in section 11325(d) that the Board complete this proceeding expeditiously.

¹⁶ See BARR-4 at 14; WILL-10 at 6-7; Letter from Village of Wayne (June 2, 2008).

¹⁷ See 40 CFR 1501.8(b)(1)(v), (vii).

¹⁸ See CN-33 at 6, 15.

¹⁹ See Gottlieb v. Pena, 41 F.3d 730, 733 (D.C. Cir. 1994).

²⁰ Western Coal Traffic League v. Surface Transportation Board, 216 F.3d 1168, at 1172, 1175 (D.C. 2000).

²¹ See 40 CFR 1501.8(a).

The Board's schedule, which is set out fully below, projects completion of the Final EIS between December 1, 2008, and January 31, 2009, with issuance of a final decision subject to the time periods in the CEQ regulations at 40 CFR 1506.10(b)(2). With this schedule, the Board plans to complete the EIS process in less time than the time NEPA review has taken in other cases with similar issues.²² The goals of both NEPA and sections 11324-25 will be met under the timeline the Board is setting because the proceeding should be concluded in a reasonably expeditious manner without jeopardizing the ability to conduct a thorough and complete environmental review process. As always, the Board reserves the right to adjust this schedule as facts and circumstances require or if the Board determines that adherence to this schedule would hinder its ability to fulfill its obligations under NEPA.

Finally, several parties have addressed the appropriate length of comment period on the Draft EIS, which is being issued today. The CEQ regulations require a minimum of 45 days for public review and comment in a Draft EIS, which is the time period suggested by applicants in their proposed schedule. Barrington and a number of others have requested a 120-day comment period (or longer) to file comments on the Draft EIS. On June 10, 2008, applicants opposed those requests.

The parties have not shown that the delay that would be caused by a 120-day comment period would be warranted here. On the other hand, the minimum 45-day time limit set forth in the CEQ regulations might not allow for careful review and comment on all of the analysis in the multi-volume Draft EIS. Thus, the Draft EIS provides for a 60-day comment period. That period is appropriate for this transaction; it should provide adequate time for interested parties, agencies, government entities, and members of the general public to analyze and comment on all aspects of the Draft EIS, while allowing for a reasonably expeditious completion of this proceeding.

3. The Board's Schedule.

Having considered the extensive record that is before the Board on this matter, the NEPA regulations, and other relevant legal authority governing the transaction, the Board finds that the following schedule is appropriate under the circumstances. As noted, the Board reserves the right to adjust this schedule as necessary.

²² Applicants note that the Conrail merger, one of the most complicated merger transactions to come before the Board, only took 11 months from the date of the filing of the application to serve the Final EIS. But the environmental review process in Conrail actually took at least 18 months because substantial environmental work was ongoing by SEA (and, separately, by the applicants) beginning in early 1997, some six months before the application was filed.

Draft EIS served	July 25, 2008
Publication of Notice of Availability of Draft EIS in the <u>Federal Register</u> by the United States Environmental Protection Agency (EPA)	August 1, 2008
SEA Public Meetings on Draft EIS	Weeks of August 25, 2008 and September 8, 2008
Draft EIS comments due	September 30, 2008 (60 days after publication of EPA's Notice of Availability)
Final EIS served	Projected between December 1, 2008, and January 31, 2009
Final decision served	As soon as possible, pursuant to the CEQ regulations at 40 CFR 1506.10(b)(2)

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Applicants' request for the establishment of time limits for the remaining NEPA review and issuance of the final decision is granted, but the schedule requested by applicants is not adopted.
2. The Board adopts the schedule set forth above and denies all other requests for alternative schedules.
3. This decision is effective on its service date.

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

Anne K. Quinlan
Acting Secretary

COMMISSIONER BUTTREY, concurring:

I join in the Board's decision today setting a schedule for completion of the environmental review process and issuance of a final decision in this matter. However, I have asked that this separate expression be included in order to express my deep concern with certain issues raised on the record that has been developed to date in this proceeding. I do so in the hope that the applicants and other interested parties will address these issues squarely in the remaining months before the Board must decide whether to approve the proposed transaction.

The statute requires that the Board must determine whether the proposed transaction is consistent with the public interest. Further, for a transaction like this that does not involve the merger or control of at least two Class I railroads, the statute provides that the Board shall approve the application unless it finds serious anticompetitive effects that outweigh the public interest.

Rail congestion has been a long-standing challenge in the greater Chicago area. Many well intentioned efforts have been made to address this problem over the years, but without total success. The application in this proceeding appears to be yet another such effort. It may indeed be motivated largely by frustration with the lack of success in dealing with Chicago rail congestion in the past. But this proceeding is different from other comprehensive efforts in that it would benefit mostly one rail carrier and its commercial partners.

For this proposed transaction, the scope, in terms of track mileage and transaction cost, is relatively low. However, the issues related to environmental impacts, mitigation costs, and impacts on the affected communities both now and in the future appear to be incredibly high. The local Chicago communities directly impacted by this transaction, particularly, in my view, those located along EJ&E's line north of Joliet, are essentially being asked to bear the heavy burden of years of failed efforts to address the Chicago rail congestion problem in a more comprehensive manner. There could also be a chilling effect on the future development of commuter rail service in the communities west of Chicago, which appears to me to be antithetical to the broadly defined public interest.

The Board must be very sensitive to the environmental issues being raised by local communities, and I am confident that these concerns will be fully explored and considered in the EIS being prepared on the schedule we adopt today. I urge all interested parties to participate actively in this process. At the end of the environmental review process, I will carefully consider the recommended mitigation conditions that are generated, and they will factor importantly in my decision-making process. However, based on what I see now on the record, and what I saw when I recently visited the affected communities, it is hard for me to imagine how even the most far-reaching mitigation measures would be enough to offset or balance the environmental detriments that would flow from this proposal.