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SERVICE DATE – NOVEMBER 4, 2015

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35087 (Sub-No. 8)

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

Digest:¹ The Board denies reconsideration of a May 2015 decision to deny a petition, filed by the Village of Barrington, Ill. (Barrington), to reopen the Board's 2008 approval of Canadian National Railway Company's acquisition of EJ&E West Company. Barrington has not established that the Board materially erred when it denied the petition to reopen.

Decided: October 30, 2015

BACKGROUND

2008 Acquisition Transaction. In 2008, the Board approved the acquisition of control by Canadian National Railway Company and Grand Trunk Corporation (collectively, CN) of EJ&E West Company (EJ&E), a wholly owned, noncarrier subsidiary of Elgin, Joliet and Eastern Railway Company, subject to environmental and other conditions. Canadian Nat'l Ry.—Control—EJ&E West Co. (2008 Final Decision), FD 35087 (STB served Dec. 24, 2008), aff'd sub nom. Vill. of Barrington v. STB (Barrington I), 636 F.3d 650 (D.C. Cir. 2011). The approval was subject to a five-year monitoring and oversight period to allow the Board to closely examine various impacts of the transaction.²

As part of the Board's review of CN's application to acquire control of EJ&E, the Board conducted an environmental review in accordance with the National Environmental Policy Act, 42 U.S.C. § 4321-4347. The Board's Office of Environmental Analysis (OEA) prepared an Environmental Impact Statement (EIS) examining the potential environmental effects of the transaction. The EIS included an extensive analysis of the transaction's potential impact on highway/rail at-grade crossings along the EJ&E rail line. Using CN's estimates for projected

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

² Through subsequent decisions the Board has extended the oversight period, most recently until January 23, 2017. See Canadian Nat'l Ry.—Control—EJ&E W. Co., FD 35087, slip op. at 5 (STB served Dec. 17, 2014) (with Vice Chairman Begeman dissenting).

train traffic on the EJ&E line for the year 2015, which took into account proposed upgrades to the line that would be completed before 2015, OEA examined all 112 crossings along the EJ&E rail line. That included the intersection of the CN/EJ&E rail line and U.S. Route 14 (U.S. 14) in Barrington, Ill. Based on the criteria used to evaluate acquisition-related crossing mitigation, OEA recommended mitigation for eight of the 112 crossings on the EJ&E line, including grade separation mitigation for two of those crossings. OEA recommended noise and vibration mitigation for the crossing at U.S. 14 but concluded, after conducting a traffic study, that the crossing did not meet the Board's criteria for a grade separation. Based on OEA's analysis and recommendations, the Board did not impose a grade separation mitigation condition at the U.S. 14 crossing. 2008 Final Decision, slip op. at 45 & n.101.

2011 Petition by the Village of Barrington. In 2011, the Village of Barrington (Barrington) petitioned the Board, pursuant to its continuing oversight jurisdiction, to require CN to pay for a grade separation at U.S. 14 as a mitigation condition of the 2008 transaction. In support of its request, Barrington submitted an updated version of a traffic impact study that it had submitted to the Board in 2008. Barrington argued that the 2011 traffic impact study showed that U.S. 14 would experience over 40 hours of total vehicle delay in a 24-hour period, thus exceeding one of the three criteria used by the Board for determining "substantially affected" crossings. By decision served on November 8, 2012 (2012 Decision), the Board denied the petition, finding that Barrington had not presented new evidence or changed circumstances that would have materially altered the Board's conclusions in the 2008 Final Decision regarding appropriate mitigation at U.S. 14. The Board explained that exceeding one or more of the threshold criteria for "substantially affected" crossings did not automatically warrant any mitigation. Rather, the Board had considered a range of evidence, studies, and factors in deciding what mitigation conditions to impose in the 2008 Final Decision. The Board also found that the alleged new evidence in the 2011 traffic study would not have changed the outcome of the Board's 2008 decision not to require a grade separation at U.S. 14 because Barrington's vehicle delays were primarily attributable to preexisting traffic conditions and capacity constraints. 2012 Decision, slip op. at 12-13, *aff'd sub nom. Vill. of Barrington v. STB (Barrington II)*, 758 F.3d 326 (D.C. Cir. 2014).

2014 Barrington Petition to Reopen. On November 26, 2014, Barrington filed a petition to reopen the 2012 Decision, requesting that the Board provide mitigation in the form of a grade separation at U.S. 14 in Barrington, pursuant to the Board's continuing oversight jurisdiction. Specifically, Barrington asserted that the Board could not have considered the recent surge in energy-related rail traffic on CN's rail network when it imposed environmental mitigation conditions in its 2008 Final Decision in 2008. Barrington argued that this "unforeseen crude-by-rail phenomenon" amounted to new evidence and substantially changed circumstances, warranting reopening to require CN to pay \$47 million to complete the cost of a grade separation at U.S. 14.

By decision served on May 15, 2015 (May 2015 Decision), the Board denied Barrington's petition to reopen and request for additional mitigation, finding that Barrington had not presented new evidence or changed circumstances that would materially affect the outcome of the 2008 Final Decision. The Board noted that rail traffic volumes and train lengths on the

EJ&E line were close to or lower than the projected levels relied upon by the Board in its 2008 Final Decision. The Board further explained that, even if that had not been the case, exceeding a certain level of rail traffic did not automatically warrant mitigation under the Board's criteria. Lastly, the Board concluded that Barrington had not presented any new evidence that would alter the Board's determination that projected vehicular delays at and around U.S. 14 were primarily attributable to preexisting conditions at and around U.S. 14. May 2015 Decision, slip op. at 6.

2015 Petition for Reconsideration. By petition filed on June 4, 2015, Barrington seeks reconsideration of the May 2015 Decision. Barrington asserts that the Board materially erred by continuing to rely on the environmental analysis underlying the 2008 Final Decision and by not considering new evidence generated during the oversight period. Barrington claims that it was denied a grade separated crossing in the 2008 Final Decision in 2008 based on flawed environmental analysis and conclusions, which did not consider the 2008 traffic impact study that Barrington had submitted to the Board prior to the issuance of the 2008 Final EIS. Barrington also claims that the Board materially erred in the May 2015 Decision by ignoring evidence of an unanticipated increase in rail traffic going through Barrington.³

CN replied to Barrington's petition on June 24, 2015, asserting that the Board should deny Barrington's petition because Barrington raises arguments that are immaterial or were previously considered and rejected by the Board, the United States Court of Appeals for the District of Columbia Circuit (Court of Appeals), or both.

As discussed below, we find that Barrington has not demonstrated that the Board materially erred in its May 2015 Decision. The petition for reconsideration will therefore be denied.

DISCUSSION AND CONCLUSIONS

A party may seek to have the Board reconsider a decision by submitting a timely petition demonstrating material error in the prior decision or identifying new evidence or substantially changed circumstances that would materially affect the case. See 49 U.S.C. § 722(c); 49 C.F.R. § 1115.3(b). Where, as here, a petitioner alleges material error, it must do more than make a general allegation. It must substantiate the claim of material error. See Canadian Pac. Ry.—Control—Dakota, Minn. & E. R.R., FD 35081, slip op. at 4 (STB served May 7, 2009) (denying petition for reconsideration where petitioner did not substantiate its claim of material error, but instead restated arguments previously made and cited evidence previously submitted). The alleged grounds must be sufficient to convince the Board that its prior decision in the case would be materially affected. See Montezuma Grain v. STB, 339 F.3d 535, 541-42 (7th Cir. 2003); DesertXpress Enters.—Pet. for Declaratory Order, FD 34914, slip op. at 6-8 (STB served

³ Comments in support of Barrington's petition were filed by the following parties: Hon. Richard J. Durbin and Hon. Mark Kirk, United States Senators; Hon. Peter J. Roskam, Member of Congress; Chicago Metropolitan Agency for Planning; Village of Lake Barrington, Ill.; City of Aurora, Ill.; and Barrington Township, Ill.

May 7, 2010). As discussed below, we find no material error supporting reconsideration of the May 15 Decision.

For the most part, Barrington's claims of material error are simply restatements of prior arguments. Barrington's arguments, relating to the Board's examination in 2008 and 2012 of the need for grade-separation mitigation at U.S. 14, and of Barrington's 2008 traffic study and its 2011 update, were addressed by the Board and the Court of Appeals. The Court of Appeals upheld the 2008 Final Decision, including the Board's determination that the crossing at U.S. 14 did not meet the Board's criteria for grade separation mitigation. Barrington I, 636 F.3d at 672. In 2011, in support of its petition for reopening, Barrington submitted an update of its 2008 traffic impact study. In the 2012 Decision, the Board explained the process for assessing whether environmental mitigation was needed at rail/highway crossings along the EJ&E, thoroughly considered and discussed the traffic study evidence Barrington had submitted in 2011, and explained why that evidence was not new and would not have changed the outcome of the 2008 Final Decision with respect to U.S. 14. See 2012 Decision, slip op. at 9-20. After Barrington challenged the 2012 Decision in court, the Court of Appeals denied Barrington's petition for review. Barrington II, 758 F.3d at 329 (finding that the Board did not abuse its discretion where evidence would not have led to a different outcome regarding a grade separated crossing). Accordingly, Barrington's repeated arguments regarding grade-separation mitigation at U.S. 14 do not provide sufficient basis for reconsideration.

Barrington also claims that the Board ignored evidence of unanticipated traffic flows through Barrington that allegedly exceeded the average volume of daily trains projected in the Draft EIS (20.3 trains for the year 2015). (Draft EIS Table 4.3-4.) However, the Board did consider the recent traffic volumes detailed in CN's monthly operational reports and properly concluded that traffic volumes on the EJ&E line were lower than the projected level relied upon in the 2008 Final Decision. May 2015 Decision, slip op. at 4.

Barrington also argues that the Board's conclusions on traffic volumes, which cited the average traffic volume for 2014, relied on information that was outdated by the time the May 2015 Decision was served, noting that, for April 2015, the average daily train volume at U.S. 14 was 20.6 trains—0.3 more trains than projected in 2008. The Board finds no material error here. The April 2015 train volumes were very close to the traffic volumes projected in 2008 and do not indicate any significant increase. That is confirmed by more recent operational reports that show average train volumes in May 2015 through September 2015 falling below the 2008 projected volume (19.7, 20.1, 19.3, 19.5 and 19.8 average daily trains, respectively). (CN Monthly Operational Reports (June 2015-Oct. 2015), <http://www.stbfinancedocket35087.com/html/monthlyreports.html>.) Month-to-month fluctuations are expected, and no single month's data point is evidence of significant change. Here, the average daily train volume for 2015 to date, 20.0 trains per day, remains below the level projected in 2008. Id. (Feb. 2015-Oct. 2015). More importantly, as the Board has explained in past decisions, meeting or exceeding a certain level of traffic does not automatically warrant grade-separation mitigation (or other kinds of mitigation) under the Board's criteria. 2012 Decision, slip op. at 10-11; May 2015 Decision, slip op. at 5-6.

Barrington also claims that the Board did not support its determination in the May 2015 Decision that the length of trains going through Barrington was approximately the same as the projected length of trains considered in the 2008 Final Decision. However, the Board compared the 2014 average train length data provided by CN to the projected train lengths considered by the Board in the 2008 Final Decision. The Board found that CN's actual average train length figure in 2014 (6,916 feet) was only slightly higher than the average length projected in 2008 (6,829 feet). May 2015 Decision, slip op. at 4-5. Contrary to Barrington's claims, the Board did not "brush off" Barrington's request to require CN to report the actual lengths of trains passing through Barrington. Rather, the Board explained that there was no need to increase its reporting requirements to add data on average train lengths in response to Barrington's concerns about the impact of longer trains on blocked crossings, because the Board already requires CN to provide detailed data on trains that block crossings for 10 minutes or more in its monthly operational reports. Id., slip op. at 5 n.9.

Barrington also questions the relevance of 2014 data as an indicator of future traffic volumes, asserting that the Board did not take into account CN's statements regarding possible double-tracking through Barrington in the future. (Barrington 2015 Pet. for Reconsideration 11.) Barrington's claims based on CN's future plans are speculative at this point. (See CN 2015 Reconsideration Reply 8 (explaining that CN has no current plans to double-track through Barrington); CN Reopening Reply, V.S. Liepelt 5.) Thus, the Board properly considered CN's traffic data from 2014 and 2015 to find that the traffic volumes were at or near the projected volumes relied upon in the 2008 Final Decision. The Board did not materially err in relying upon the most current information available, rather than relying upon speculation about what might occur in the future, in reaching its conclusions.

Lastly, Barrington suggests that the Board erred in referencing the recent safety regulations adopted by agencies with primary jurisdiction over railroad safety when those regulations "offer no relief to Barrington" and "inadvertently *increase* the threat to public safety." (Barrington 2015 Pet. for Reconsideration 12 (emphasis in original).) In the May 2015 Decision, the Board rejected Barrington's argument that the movement of flammable hazardous materials posed a threat not previously considered by the Board. As the Board explained, the Final EIS recognized that increases in freight rail traffic on the EJ&E line would also increase the risk of adverse hazardous materials incidents, but concluded that the transaction "does not create any new threats" because flammable liquids and other hazardous materials already moved over the line pre-transaction. May 2015 Decision, slip op. at 7. The Board also explained that it is not realistic to expect a carrier's traffic mix to remain static years after the approval of a transaction; that the statutory common carrier obligation requires rail carriers to transport hazardous materials, where the appropriate agencies have promulgated comprehensive safety regulations; and that other federal agencies have established regulations applicable to the transportation of hazardous materials via rail, including new requirements that would affect the

movement of oil by rail. Id. Thus, there was no material error in the Board's recognition that such safety regulations applicable to the movement of oil by rail had been recently adopted.⁴

For these reasons, Barrington's petition for reconsideration is denied.

It is ordered:

1. Barrington's petition for reconsideration is denied.
2. This decision is effective on its date of service.

By the Board, Chairman Elliott, Vice Chairman Begeman, and Commissioner Miller.

⁴ To the extent Barrington's concerns relate specifically to the effectiveness of new regulations issued by other Federal agencies, those concerns can be addressed directly to those agencies, which have primary jurisdiction.