

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 35087¹

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

Decision No. 21

Decided: October 23, 2009

This decision grants in part the petition to reopen, filed jointly by the Village of Barrington (Barrington) and TRAC Coalition² (collectively, Community Petitioners), for the limited purpose of clarifying the reporting and monitoring and oversight conditions imposed in Decision No. 16, served December 24, 2008 (Approval Decision).³ This decision denies as premature the petition to reopen filed by the Illinois Department of Transportation (IDOT).

BACKGROUND

In the Approval Decision, the Board approved, subject to numerous environmental mitigation and other conditions, the acquisition of control by Canadian National Railway

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).

² TRAC Coalition consists of the Cities of Aurora and Naperville, IL, and the Villages of Barrington, Barrington Township, Barrington Hills, Lake Zurich, Bartlett, Hawthorn Woods, Plainfield, and Wayne, IL, and Du Page County, IL.

³ Will County, IL (Will County) filed a motion to intervene and join in Community Petitioners' petition to reopen. Will County's motion to intervene is granted.

Company and Grand Trunk Corporation (together, CN or Applicants) of EJ&E West Company, a wholly owned, noncarrier subsidiary of Elgin, Joliet and Eastern Railway Company (EJ&E).

As part of the Approval Decision, the Board established a 5-year monitoring and oversight period to allow the Board to closely examine various aspects of the transaction. As part of that process, Applicants must file monthly status reports on operational matters related to the acquisition, which provide information on railroad at-grade crossings, train volumes, accidents and incidents, cars interchanged, and street crossing blockages. Applicants must also file quarterly reports on the implementation of the environmental conditions and must notify the Board if they depart (on more than a short-term, temporary basis) from their traffic projections on the 5 lines CN had through Chicago prior to the acquisition.⁴ Applicants filed their first monthly and quarterly reports in April 2009, and have filed timely reports since that time.

As relevant here, the Board also conditioned its approval of the CN/EJ&E acquisition on CN coordinating with appropriate state and local officials for the expedited construction of two grade separations: one at Ogden Avenue in Aurora, IL, and the other at Lincoln Highway in Lynwood, IL (Condition No. 14). Condition No. 14 provides that once Applicants have been notified that the required non-CN funds necessary to design and construct the two grade separations have been committed and obligated, CN must bear 67% of the engineering and construction costs at Ogden Avenue and 78.5% at Lincoln Highway, provided that construction on each begins by the end of 2015. The Board anticipated that IDOT would be the lead agency for the development of these grade separations.⁵

The Approval Decision became effective on January 23, 2009, after petitions to stay the effective date of the decision pending judicial review were denied. On August 5, 2009, the Board denied the Illinois Commerce Commission's petition for reconsideration of the Approval Decision.⁶

On August 4 and 5, 2009, in 17 separate proceedings (STB Finance Docket Nos. 35264 through 35280), several subsidiaries of CN filed notices of exemption for trackage rights over the rights-of-way of other CN subsidiaries located on or within the EJ&E arc. On August 17 and 18, 2009, the Board directed CN and the subsidiary applicants to file an explanation of how the notices related to one another and how the trackage rights in the notices would impact the operating information provided to the Board in this proceeding. In reply, CN stated that the

⁴ See Approval Decision, slip op. at 26, 39, Condition No. 74.

⁵ See Approval Decision, slip op. at 44-48 and Condition No. 14. One of Applicants' voluntary mitigation measures, VM-28, also requires Applicants, on request, to support efforts of municipalities and counties to secure funding, in conjunction with appropriate state agencies, for other grade separations appropriate under criteria established by state departments of transportation, and to contribute the percentage of funding for the cost of any such grade separation(s) established by Illinois law.

⁶ The Approval Decision is pending judicial review in Village of Barrington v. Surface Transp. Bd., No. 09-1002 et al. (D.C. Cir. filed Jan. 5, 2009).

trackage rights would have no effect on the authority received in the Approval Decision because the Operating Plan submitted by the Applicants in this proceeding assumed that CN would be able to move any of its trains over any of its lines in the Chicago area. CN also stated that it has no plans to reroute any train for which rerouting was not already taken into consideration in the acquisition matter. The trackage rights became effective by September 4, 2009, after petitions for stay were denied.⁷ No petitions to revoke the trackage rights exemptions have been filed.

DISCUSSION AND CONCLUSIONS

Under 49 CFR 1115.4, petitions to reopen administratively final actions may be filed at any time. Such petitions must state in detail the respects in which the proceeding involves material error, new evidence, or substantially changed circumstances.

I. Community Petitioners

Community Petitioners assert that the 17 trackage rights agreements constitute new evidence and materially changed circumstances that warrant reopening the Approval Decision and supplementing the Board's Environmental Impact Statement (EIS) prepared in this proceeding. Community Petitioners are concerned that these trackage rights agreements could cause significant operational changes and could call into question what they characterize as certain bases of the Approval Decision, including the premise that communities along CN's existing lines inside the EJ&E arc would benefit from reduced freight traffic as CN reroutes trains along the former EJ&E line. Because CN did not bring these trackage rights agreements to the Board's attention in its filings prior to the Approval Decision, Community Petitioners assert that the Approval Decision did not take into account relevant and significant operational changes, as well as related environmental effects.

CN replies that the intra-family trackage rights agreements will not result in different trains, different routing of trains, or different operations than those contemplated by Applicants' Operating Plan submitted in its application here. Rather, CN states, the trackage rights are to permit CN to operate the same trains over the same lines as it otherwise would have but to do so more efficiently, particularly by providing added flexibility for crewing trains. CN also notes that, through the reporting and monitoring and operations conditions imposed in the Approval Decision, the Board has retained ample authority to address any potential impacts of the trackage rights on CN operations in the Chicago area. Finally, CN states that, because the trackage rights were brought to the Board in proceedings separate from the acquisition proceeding and the Approval Decision is not dependent on them, the appropriate place to raise any concerns related to the trackage rights is in the trackage rights proceedings themselves.

⁷ Elgin, Joliet & Eastern Railway Company—Trackage Rights Exemption—Illinois Central Railroad Company, Finance Docket No. 35264 (STB served Sept. 1, 2009) (Chairman Elliott not participating).

We will grant, in part, Community Petitioners' petition to reopen for the limited purpose of clarifying the reporting and monitoring and operating conditions imposed in this proceeding. In the Approval Decision, slip op. at 26, the Board indicated only that, in the monthly operating reports, CN should include information on "the number of trains operating over appropriate segments of the EJ&E and CN lines through Chicago per day [and] 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" (emphasis added). Id. Condition No. 74 requires quarterly reporting on traffic on the 5 lines through Chicago that were CN lines prior to the acquisition (i.e., the lines within the EJ&E arc). But that reporting requirement is only triggered "if applicants substantially depart from their traffic projections on more than a short-term, temporary basis."

In these circumstances, it is appropriate to reopen the Approval Decision to clarify that all of CN's future monthly operations reports will include information pertinent to the operations of the lines included in the 17 trackage rights agreements. Thus, the reference to "appropriate segments of the EJ&E line and CN lines through Chicago" in the Approval Decision encompasses the lines included in the 17 trackage rights agreements, all former EJ&E lines now operated by CN, and all CN lines within the EJ&E arc. We see no need to modify Condition No. 74, under which CN must continue to notify the Board in its quarterly environmental reports if Applicants substantially depart from their traffic projections on the lines to which the condition applies on more than a short-term temporary basis.

Our extensive reporting requirements, including the clarification made in this decision, will give us the information needed to closely monitor whether Applicants have adhered to the various representations made on the record in this acquisition proceeding and to take appropriate action if there is a material change in the facts and circumstances upon which the Board relied in the Approval Decision. Community Petitioners fail to show that a broader reopening of the Approval Decision is warranted or that it is necessary to supplement the EIS. The Approval Decision and the trackage rights agreements are separate and independent. The new trackage rights do not cast doubt on the traffic projections in CN's Operating Plan, which were used as the basis for the EIS and the Approval Decision. While CN did not notify the Board of these trackage rights until after the issuance of the Approval Decision, minor coordinations such as intra-family trackage rights arrangements are not unusual as carriers integrate or gain experience with newly acquired rail properties, and some details of these coordinations will not always be specifically contemplated in advance.

II. The Illinois Department of Transportation

IDOT asserts that the Approval Decision should be reopened to extend the 2015 date in Condition No. 14 for the initiation of construction on the grade separations at Ogden Avenue and Lincoln Highway to 7 years from the date of a final unappealable court order in this matter. IDOT alleges as new evidence and changed circumstances that the Board did not and could not have known when it issued the Approval Decision that petitions for judicial review would be filed (including a petition for review by CN), and that briefing in the D.C. Circuit court cases (which have been consolidated) would be delayed by petitions for administrative reconsideration

and now petitions to reopen. IDOT states that it is not unreasonable to expect that litigation on the Approval Decision will not be concluded until the end of 2010. According to IDOT, this will make it impossible for IDOT to meet the 2015 deadline set by the Board because IDOT cannot do any work on the grade separation projects (preliminary or otherwise) without knowing whether the Board's ruling on the amount of CN's contribution to the cost of the grade separations in Condition No. 14 will survive judicial review.

In reply, CN asserts that IDOT's petition should be denied. CN argues that IDOT has waived its argument by repeatedly ignoring prior opportunities to raise it and that the pending judicial appeals of the Approval Decision and petitions for reopening do not amount to new evidence or changed circumstances because they should have been anticipated. CN further asserts that IDOT has not shown that additional time is required or necessary and counters IDOT's claim that work on the grade separations cannot begin until judicial review is final. According to CN, IDOT has in fact already made progress toward construction of the grade separations. CN cites IDOT's "Professional Transportation Bulletin 153" (dated August 6, 2009), which solicits statements of interest from pre-selected contractors for work on the Ogden Avenue and Lincoln Highway grade separations. Finally, CN notes that extending the 2015 date, as requested by IDOT, would present an incentive for parties to manipulate and extend the construction deadline by filing additional petitions for reopening and reconsideration, which could further delay judicial review proceedings.

IDOT's petition to reopen will be denied as premature.⁸ As the Board explained in the Approval Decision, slip op. at 43-45, the Board imposed Condition No. 14 to address the potential acquisition-related safety concerns at Lincoln Highway and Ogden Avenue. The Board expects that grade separating these crossings will eliminate any effect of increased project-related train traffic on vehicle queue lengths, as well as potential safety concerns related to the exposure of vehicular traffic to freight trains. See Approval Decision, slip op. at 44 n.99. Accordingly, it is important that the grade separations at these two locations be constructed expeditiously. Indeed, it appears from CN's reply that IDOT has taken some preliminary steps toward the construction of these grade separations, which we commend and encourage.

The 2015 deadline in Condition No. 14, specifying that a construction contract must be signed and construction initiated, assures that the parties move forward now with the extensive planning, including preliminary engineering/environmental review, right-of-way acquisition/utility relocation, and other preconstruction measures that will be necessary for these two important grade-separation projects. Therefore, it would be inappropriate to modify or delay the time frames in Condition No. 14 at this time.

However, we recognize that IDOT has raised some legitimate concerns about the difficulty of meeting the 2015 date for the initiation of construction when court litigation related to Condition No. 14 may go on for some time. Therefore, we note that, if reasonable progress has been made, yet it becomes clear that construction is not likely to be initiated by 2015 due to circumstances beyond IDOT's control, such as a long appeals process, the Board will entertain

⁸ Because we are denying IDOT's petition on other grounds, we need not reach CN's waiver argument.

requests to extend the time deadlines in Condition No. 14 at that time. At this point, however, more than 6 years remain till the end of 2015, and there is no reason to believe that the preliminary steps needed for these grade separation projects cannot be completed in time to begin construction in accordance with the time frames in Condition No. 14.

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

It is ordered:

1. Will County's motion to intervene and join Community Petitioners' petition to reopen is granted.
2. Community Petitioners' petition to reopen is granted in part, and our decision served December 24, 2008, is clarified as indicated in this decision.
3. IDOT's petition to reopen is denied as premature.
4. This decision is effective on the date of service.

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

Anne K. Quinlan
Acting Secretary

CHAIRMAN ELLIOTT, commenting:

One of my objectives is to create more transparency in agency procedures, functions, and decision making. In that vein, I therefore believe it is appropriate to write separately and explain why I am participating in this decision, given my non-participation in the decision in Elgin, Joliet & Eastern Railway Company–Trackage Rights Exemption–Illinois Central Railroad Company, Finance Docket No. 35264, et al. (STB served Sept. 1, 2009) (“EJ&E Trackage Rights”). I have very carefully considered whether my participation in this case would create a conflict, or even the appearance of a conflict. With the agreement of the Designated Agency Ethics Official, I have concluded that I should participate in this transaction and the ongoing oversight of the merger.

In EJ&E Trackage Rights, the Board denied two requests to stay the effectiveness of the 17 trackage rights agreements between CN and several subsidiaries. One of the requests, filed by Community Petitioners, sought to stay all 17 agreements on the ground that they called for additional environmental review in this proceeding (the control transaction, F.D. No. 35087). I would have participated in that ruling had the matter involved only the stay request filed by Community Petitioners. However, United Transportation Union (UTU) filed a separate petition, seeking a stay of three of the trackage rights arrangements. UTU maintained that labor implementing agreements should have been negotiated before the trackage rights arrangements became effective. Because UTU had been my employer, I declined to participate in the decision, even insofar as it related to the 14 agreements that UTU had not challenged.

The EJ&E Trackage Rights proceeding is now concluded, and UTU is not involved in this proceeding (the control transaction, F.D. No. 35087). After consulting with the Board's Designated Agency Ethics Official in this matter, as I do in all matters involving potential ethics issues, I have concluded that because my former employer, UTU, is not a party,⁹ it is appropriate for me to participate in this important proceeding. The decision here does discuss the trackage rights agreements that UTU had earlier challenged. But because UTU is not participating in the control proceeding, the circumstance that caused me to recuse myself in the EJ&E Trackage Rights proceeding – UTU's participation – is not an impediment to my participation here. Nor are there any other impartiality or conflict-of-interest impediments to my participation, as UTU's interest in EJ&E Trackage Rights was wholly distinct from the interests of Community Petitioners.

In short, because my former employer is not involved in this proceeding, the fact that Community Petitioners have here raised issues similar to those that they raised in EJ&E Trackage Rights does not require my recusal here.

⁹ During a preliminary phase of the control proceeding, I did file, on behalf of the UTU's headquarters organization (the International), a request for reconsideration of the Board's procedural determination to treat the transaction as a "minor" transaction under the Board's regulations. That pleading argued that the transaction should instead have been treated as "significant" under the agency's regulations, which would have given the Board and the parties more time to process the case. But because I withdrew that request before the Board acted upon it, and had no further participation in the case, the Board's Designated Agency Ethics Official has concluded that I am not foreclosed from participating in this proceeding.

It should be noted that my affiliation with UTU has been with the International organization, and not with the local UTU organization that has continued to participate in this matter.