

SERVICE DATE – AUGUST 5, 2009

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 35087¹

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

Decision No. 19

Decided: August 4, 2009

In Decision No. 16, served December 24, 2008 (Approval Decision), the Board approved, subject to numerous environmental mitigation and other conditions, the acquisition of control by Canadian National Railway 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). The decision became effective on January 23, 2009, after petitions to stay the effective date of the Approval Decision pending judicial review were denied.²

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 The Approval Decision is pending judicial review in the United States Court of Appeals for the District of Columbia Circuit in No. 09-1002 et al., Village of Barrington et al. v. Surface Transportation Board (pet. for review filed Jan. 5, 2009).

On January 23, 2009, the Illinois Commerce Commission (ICC) filed a timely petition for reconsideration of the Approval Decision. The Applicants submitted their reply on February 12, 2009.³

The Board also has received post-decision comments dated January 12 and January 16, 2009, from the U.S. Environmental Protection Agency (EPA). In addition, Applicants have entered into new negotiated agreements with various communities in Illinois (Mokena, West Chicago, Richton Park, Matteson, Vernon Hills, Elgin, and Warrenville) and Indiana (Gary) providing for tailored mitigation that Applicants will provide. And in a letter dated March 18, 2009, the U.S. Fish and Wildlife Service (Fish and Wildlife) has advised us that one of the environmental conditions imposed in the Approval Decision is not necessary and can be removed.

In this decision, the Board denies the ICC's petition for reconsideration, considers the EPA comments, and modifies the mitigation measures imposed in the Approval Decision to reflect the Fish and Wildlife letter and the new negotiated agreements.

BACKGROUND

As explained in more detail in the Approval Decision, the EJ&E line is a 198-mile rail line in Northeastern Illinois and Northwestern Indiana that CN acquired after obtaining Board approval. The EJ&E line forms an arc around Chicago and crosses five other rail lines owned by CN. The transaction enables CN to route around Chicago much of the through traffic that otherwise would need to move to, from, or through Chicago—the nation's largest rail hub. See Approval Decision, slip op. at 2, 5. As a result, rail traffic on CN's other lines will generally decrease, reducing congestion and providing environmental benefits to those living in or near Chicago. However, the increase in trains operating on the EJ&E line will have adverse environmental impacts on communities along that line. To address the potential environmental impacts of the transaction, the Board conducted a comprehensive, year-long environmental review in compliance with the National Environmental Policy Act, 42 U.S.C. 4321 et seq. (NEPA),⁴ which culminated in the issuance of a detailed Final Environmental Impact Statement (EIS) on December 5, 2008. The Final EIS addresses comments on the Draft EIS (including the comments filed by the ICC and EPA), provides additional analysis, evaluates new information provided by agencies and the public during the comment period, and contains the final recommendations of the Board's Section of Environmental Analysis (SEA) for environmental mitigation.

In the Approval Decision (slip op. at 15), the Board found that the standards of section 11324(d) were met—a conclusion that is not challenged here. The Board also considered the

³ The City of Gary, IN (Gary) also filed a timely petition for reconsideration of the Approval Decision. However, Gary withdrew its petition after the Applicants and Gary voluntarily entered into a negotiated agreement for tailored mitigation.

⁴ See Approval Decision, slip op. at 34-36, summarizing the extensive environmental review process.

potential environmental impacts of the transaction. The Board was satisfied that the EIS had taken the requisite “hard look” at environmental issues required by NEPA. After carefully considering both the transportation-related aspects of the transaction and the results of the environmental analysis, the Board concluded that, given the substantial transportation benefits that would result from making CN’s rail service more efficient and reducing congestion on CN’s other rail lines in Chicago, the environmental mitigation being imposed would “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 the acquisition. Approval Decision, slip op. at 53.⁵ In addition, the Board established a 5-year oversight and reporting 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 mitigation, so that the Board is kept apprised of the effectiveness of the conditions. Applicants filed their first monthly and quarterly reports in April 2009, and have filed timely reports since that time.

DISCUSSION AND CONCLUSIONS

I. ICC Petition for Reconsideration

Under our statute, 49 U.S.C. 721(a), and regulations, 49 CFR 1115.3(b), a petition for reconsideration must show that the prior Board action will be affected materially because of new evidence or changed circumstances, or that the prior action involves material error. The ICC makes no claim that it has new evidence, nor does it argue that circumstances have changed in the short time since the Approval Decision. Therefore, the only basis for reconsideration must be that the Board materially erred in the Approval Decision.

The ICC does not challenge the Board’s findings on the transportation merits. Rather, it claims that the EIS did not adequately evaluate or mitigate the potentially significant environmental effects of this acquisition. As the record here shows, however, the issues raised by the ICC have been considered adequately, and ICC has not supported its request that we modify or adjust our mitigation at this point. Moreover, CN is filing the monthly and quarterly reports required by the Approval Decision. These reports, together with the comments received on them, provide information to the Board regarding CN’s progress in implementing this

⁵ The environmental mitigation conditions (set out in full in Appendix A of the Approval Decision, at 59-84) include: transportation systems mitigation, including two grade separations at street crossings (with applicants required to bear 67% of the cost of one and 78.5% of the cost of the other); installation of cameras to assist in the timely response of emergency providers; programs related to school and pedestrian safety; biological and water resource mitigation; and noise mitigation. Applicants also are required to comply with their extensive voluntary environmental mitigation commitments (see VM-1 to VM-108 in the Approval Decision) and with the negotiated agreements they have entered into with Amtrak and a number of communities in Illinois and Indiana.

acquisition.⁶ As noted in the Approval Decision, the oversight process provides an effective means for the Board to quickly identify the need to consider additional conditions if warranted.⁷

NEPA requires that the Board examine the likely environmental effects of its action and inform the public concerning those effects. See 42 U.S.C. 4332; 40 CFR 1500.11(b); Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, 462 U.S. 87, 97 (1983). Here, the Board fully complied with NEPA's requirements by preparing a detailed EIS evaluating and disclosing the environmental effects of this acquisition and providing a fair opportunity to interested persons, entities, and agencies to voice their concerns about the project.

A. The Analysis of Traffic Queuing and Signalized Intersections Was Adequate.

The ICC's petition addresses "traffic queuing" separately from "signalized intersections," but both topics relate to a common issue: the risk that a vehicle queue will form at a red traffic signal or other roadway feature downstream of a highway/rail at-grade crossing; that the traffic back up will extend through the crossing; and that motorists in the queue will not wait to cross the tracks until they can safely proceed to the other side, but will instead stop their vehicles on the track.⁸ The ICC claims that the EIS does not evaluate adequately the effect of traffic queuing on grade-crossing safety and does not include a complete analysis of signalized intersections. It asks that we require CN to install and maintain solar powered highway amber flashing beacons mounted to regulatory highway signs and pavement-marking cross-hatching at all highway/rail at-grade crossings on the EJ&E line.

The ICC's claim that the EIS' analysis of traffic queuing and signalized intersections is inadequate lacks merit. As noted in the Approval Decision (slip op. at 42-44), SEA conducted a comprehensive analysis of highway/rail at-grade crossings potentially affected by the transaction during the environmental review process. The EIS includes a detailed analysis of changes in vehicular delay and risk of accidents at every highway/rail at-grade crossing on the EJ&E line for which an increase in rail traffic is projected as a result of the transaction.⁹

The ICC fails to support its assertion that the EIS does not adequately analyze the impact of traffic queuing on the safety of highway/rail at-grade crossings. To the contrary, the ICC itself acknowledges that the accident-prediction formulae and analyses that are currently

⁶ All of CN's reports and related public comments are available on the Board-maintained oversight website at www.stbfinancedocket35087.com.

⁷ See Approval Decision, slip op. at 26.

⁸ It is a violation of Illinois law for a vehicle to stop on a railroad track except when necessary to avoid conflict with other traffic, or in compliance with law or the directions of a police officer or official traffic-control device. See Ill. Comp. Stat. 5/11-1303.

⁹ See, e.g., Draft EIS, section 3.3.1.2 and Table 3.3-3, section 4.3.1.3 and Table 4.3.11, section 6.3.3, Appendix C, attachment C2, Appendix E, attachment E1; Final EIS, section 2.5.9, section 2.5.10, section 4.2.3.1 and Table 4.2-1, section 4.4.3.1.

available “do not account for queuing of highway vehicles” on highway/rail at-grade crossings, making it impossible to quantify this risk. ICC Pet. at 2. For this reason, SEA examined and considered qualitatively the individual characteristics of each highway/rail at-grade crossing on the EJ&E line and identified locations where existing vehicle queues block nearby roadways.¹⁰ Moreover, in developing its final mitigation recommendations, SEA considered specific factors at each highway/rail at-grade crossing, including the importance of the highway to regional traffic flows, and existing congestion and structures (such as mature trees and local roadways) near the highway/rail at-grade intersection.¹¹

The ICC likewise claims that the Final EIS does not include a complete analysis of signalized intersections. But as the EIS shows, SEA examined the potential impact of traffic signals on vehicle queuing and found 17 roadways along the EJ&E line that have a traffic light within 1,000 feet of a highway/rail at-grade crossing.¹² At each of these locations, SEA thoroughly analyzed queue length generated by the highway traffic signal, and compared this length with the distance from the crossing to the intersection. Of these 17, the EIS identifies 10 intersections where vehicular traffic in 2015 could back up as far as the railroad track. In response, the Board imposed Condition No. 17 requiring Applicants to consult with the ICC and the Indiana Department of Transportation (INDOT) to consider reasonable solutions.

The ICC complains that the Board did not assess other potential queuing factors, such as bus stops and driveways. ICC Pet. at 3. The ICC, however, does not explain how any of these factors (which appear to be independent causes of vehicle queuing) relate to the transaction or to the proximity of signalized intersections to the EJ&E line. For all of these reasons, the ICC has not demonstrated material error in the EIS’ analysis of potential traffic queuing problems.

B. The Board’s Mitigation Conditions Are Reasonable and Appropriate.

a. Vehicle Queues

The Final EIS also identifies four at-grade crossings where vehicle queues are projected to back up to nearby intersections by 2015 as a result of the acquisition (Hawthorne Woods,

¹⁰ The ICC asserts that the Final EIS and the Approval Decision do not adequately explain why, in regard to signalized intersections, a 90-second cycle length is sufficient to clear a traffic queue when there could be pedestrians, emergency-vehicle preemption, or other cycle lengths in use. ICC Pet. at 3-4. As the Final EIS explains (at 2-48), however, even with the increased train traffic anticipated on the EJ&E line following implementation of the transaction, fewer than two trains per hour will pass through most of the affected crossings. Therefore, even if the queue of vehicles at a crossing takes more than 90 seconds to clear, the probability that a second train would approach the crossing before the queue has dissipated is low.

¹¹ See Final EIS, section 4.2.3.1, Table 4.2-1.

¹² See Final EIS at section 2.3.10, and 3.3-45, 3.4-178. See also Draft EIS at section 4.3.1.3 & Table 4.3.11 and section 6.3.3, Table 6.3-1; Final EIS section 2.5.9, Table 2.5-3 (all addressing queue length).

Lake Zurich, Barrington, and Plainfield, IL).¹³ To mitigate the queuing problem at these intersections, the Board imposed Condition No. 15, which requires Applicants to coordinate with the Illinois Department of Transportation (IDOT) and appropriate counties and communities to install traffic-advisory signs on the roadway right-of-way at the four highway/rail at-grade crossings advising motorists not to block intersections. And Applicants' voluntary mitigation (in VM-7) requires that they coordinate with IDOT, INDOT, and other appropriate local agencies to review the safety and adequacy of existing warning devices at highway/rail at-grade crossings, and identify improvements.¹⁴

The ICC suggests that we modify Condition No. 15 to require that traffic advisory signs be posted at all public highway/rail at-grade crossings along the EJ&E line, rather than at the specific locations that the EIS finds would be substantially affected. ICC Pet. at 4. In addition, it requests that all signs be in place within 6 months of the effective date of the Approval Decision, rather than within 1 year, as the Board required.

The ICC has not shown that modification of the conditions imposed in the Approval Decision is warranted. The ICC provides no evidence that acquisition-related queue length will be a substantial problem at intersections other than the four identified in the Final EIS, much less that it will be a problem at every public grade-crossing along the EJ&E line.¹⁵ It provides no justification for placing signs at grade-crossings rather than at the highway intersections that will be affected by the transaction, and it has not shown that Condition No. 15's 1-year time frame for installing the signs constitutes material error justifying reconsideration.¹⁶ As previously noted, the oversight and reporting period in the Approval Decision will allow us to modify our mitigation or take other appropriate action should it become apparent that additional signage, changes in sign placement, or reassignment of responsibility for sign installation and maintenance is appropriate. The ICC's argument that we should modify Condition No. 15 now is both unsupported and premature.

¹³ See also the discussion in the Final EIS, sections 4.2.3.1, 4.2.3-1, and 4.4.3.1.

¹⁴ Condition No. 7 also provides mitigation for locations where industry tracks cross roadways within 300 feet of a crossing with commuter rail traffic. Finally, Condition No. 17 requires Applicants to consult with the ICC and INDOT "to identify circumstances where queued cars could extend over the EJ&E rail line and to consider reasonable solutions."

¹⁵ The ICC relies on the general observation in the Final EIS that the approved transaction will "exacerbate [pre-existing] congestion" in the region. ICC Pet. at 2. But the Board here reasonably applied its long-standing policy of mitigating only impacts resulting directly from the transaction, and not requiring mitigation for existing conditions and existing railroad operations. See Approval Decision, slip op. at 38 n.22. Thus, it was not material error for the Board to decline to require Applicants to mitigate highway/rail at-grade crossings where queues would be problematic in 2015 without the transaction. Further, placing signs at every crossing would be inappropriate because many crossings are far from highway intersections.

¹⁶ It is reasonable to provide 1 year for installation so that Applicants can complete the consultations with IDOT and appropriate counties and affected communities required by VM-7 and Condition No. 15 before installing the signs.

b. Date By Which Grade-Separation Construction Must Begin

The Approval Decision requires two grade separations: one at Ogden Avenue in Aurora, IL, and the other at Lincoln Highway in Lynwood, IL. The Board’s mitigation further requires Applicants to bear 67% of the engineering and construction costs at Ogden Avenue and 78.5% at Lincoln Highway, provided that construction on each begins by 2015.¹⁷ The ICC asks that we extend the date by which construction must begin to 2020. ICC Pet. at 5-6. It claims that the 2015 date is “not practical” and that it would be “wrong” to “absolve[] the Applicants of any project costs if the [grade separations] are not under construction by 2015.” Id. at 6.

We do not find material error in our determination (Approval Decision, slip op. at 47 and Condition No. 14) that Applicants will be released from financial responsibility for these two grade-separation projects if construction is not initiated by 2015. Although these projects will require extensive planning, preliminary engineering, right-of-way acquisition, and other preconstruction measures, there is no reason to believe that these preliminary steps cannot be completed in time to begin construction by the end of 2015—a full 7 years from the date of the Approval Decision. Indeed, in its comments on the Draft EIS, the ICC argued (at 3) that the Board should allow a minimum of 5 years for any grade separations to be built. While the ICC would have preferred a 10-year time frame, the 2015 date in the Approval Decision falls within the 5-to-10-year range suggested by the ICC itself. Moreover, the extensive reporting we are requiring for this transaction during the 5-year oversight period will keep us apprised of the progress made on the grade-separation conditions, and it will allow us to enforce our mitigation requirements, including Condition No. 14, if circumstances show such action to be warranted.

c. Pedestrian Safety

The Approval Decision includes eight measures designed to protect pedestrians and bicyclists crossing the former EJ&E line.¹⁸ The ICC asks that the Board, in addition, require Applicants to install and maintain solar-powered highway amber flashing beacons mounted to “regulatory pedway signs” advising pedestrians and cyclists of an approaching public highway-rail grade crossing, and pavement-marking cross-hatching at all such highway/rail at-grade crossings. Under the ICC’s proposed mitigation, Applicants would be required to install the beacons and pavement markings where pedestrians currently walk across public highway-rail at-grade crossings on the former EJ&E rail line and where Applicants propose to double-track the rail line (add a second track parallel to the first).

¹⁷ See Approval Decision, slip op. at 44-48 and Condition No. 14. 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.

¹⁸ See Condition Nos. 11-13; VM-10-12, 43-44.

The ICC has not shown that the mitigation already imposed to protect pedestrians who cross the rail line at grade is inadequate based on the information available at this time. VM-10 requires that Applicants cooperate with school and park districts to identify where additional pedestrian warning devices might be needed.¹⁹ Moreover, the agencies charged with pedestrian safety have not requested the additional beacons and markings that the ICC claims are required.

d. Fencing

The ICC objects to the Board's requirement that Applicants furnish and install standard 6-foot-high galvanized, chain-link fences at schools or parks within 1/4-mile of the former EJ&E right-of-way where an effective fence does not exist. The ICC argues that the prescribed fences are not durable and are prone to vandalism. In their stead, the ICC requests that the Board revise Condition No. 11 to require Applicants to furnish, install, and maintain "a standard non-mountable 6-foot high fence of materials that [are] resistant to vandalism...." ICC Pet. at 7.

However, the ICC ignores its own precedent of requiring chain-link fencing for the fencing of rail rights-of-way.²⁰ As Applicants note, the ICC's request does not identify what materials would be suitable to resist vandalism, and Condition No. 11 permits communities "to install fencing that differs from [the 6-foot, galvanized, chain-link fence] standard, [although] Applicants shall only be obligated to provide funds sufficient to construct the standard fence." In these circumstances, the ICC has not shown material error in the Board's fencing condition.

e. Blocked Crossings

Finally, the ICC raises concerns with VM-35, in which Applicants commit to "promptly cut" trains that block a public crossing for longer than 10 minutes. The ICC notes that its experience is that railroads are highly resistant to cutting trains and that such actions can be counterproductive to rail operations. The ICC recommends that the Board supplement VM-35 to require Applicants to contact the emergency-service department in an affected community when a stopped train blocks a public crossing for longer than 10 minutes, record every time such a blockage occurs, and include each incident in the quarterly environmental reports that Applicants must provide.

The ICC fails to support its claim that supplementation of VM-35 is needed. Applicants are required to report such incidents to the Board in their monthly operational reports and provide information on the implementation of this condition in their quarterly environmental

¹⁹ The ICC endorsed VM-10 in its comments on the Draft EIS when it stated that it "concur[s] with the STB that the Applicants need to participate in Diagnostic Reviews with local communities and state agencies to address safety improvements at pedestrian-rail grade crossings along the [EJ&E] rail line, and participate in the cost of any improvements determined to be necessary." ICC Comments on Draft EIS at 2.

²⁰ See e.g., Vill. of Cherry Valley v. Ill. Dep't of Transp., No. T02-0116, slip op. at 9 (Ill. Commerce Comm'n Sept. 4, 2003) (ordering petitioner to construct an 8-foot high chain-link fence along a railroad's right-of-way).

reports. Thus, no additional notification requirement is necessary. As the Board gains more experience with Applicants' operations as the oversight period progresses, we will be in a better position to determine whether the mitigation measures imposed in the Approval Decision need adjustment, supplementation, or other modification.

For all of these reasons, the ICC's petition for reconsideration will be denied.

II. EPA's Comments

In its post-decision letter-comments to the Board, EPA offers generally favorable comments on the Final EIS, which had included a 16-page response (at 3.3-38 to 3.3-54) to EPA's earlier comments on the Draft EIS, including the results of additional analyses conducted following issuance of the Draft EIS to address EPA's concerns. In its January 2009 letter-comments, EPA recommends additional analysis and clarification on issues involving water/natural resources, hazardous spills, noise, rail operations, at-grade crossings, safety, and indirect and cumulative impacts. We have carefully reviewed EPA's comments, and we conclude that EPA has not demonstrated any material error. While EPA may disagree with some of the Board's conclusions, the Board has taken the requisite "hard look" at environmental impacts required by NEPA.

EPA is concerned that the 5-year operational program for adaptive natural-resource management adopted by the Board is too short. EPA would prefer a 20-year Natural Resources Adaptive Program (NRAP) to track wetlands and other natural resources as they respond to changes in operations. EPA suggests that the program include newly acquired EJ&E right-of-way, and that special hazardous-spill containment infrastructures be developed to protect highly sensitive natural resources where a spill impact would spread. For funding, EPA contemplates an initial contribution from CN, "an entity that could also receive contributions from federal, state and local governments," plus private, corporate and non-profit sources for these management and mitigation purposes.

EPA's suggestions will not be adopted. No showing has been made that the Board's existing mitigation is inadequate. Moreover, the Board could not unilaterally require participation in an NRAP by other Federal agencies, state and local governments, or private corporate and non-profit sources. But nothing in the Approval Decision precludes negotiations between Applicants and participating Federal, state, and local natural- and water-resource experts to suggest ways to expand the mitigation for adaptive natural resource management in the Approval Decision, if warranted.²¹

EPA raises concerns that construction of the planned Munger Connection would negatively impact wetlands, and EPA recommends that the Board require that the Munger Connection be dropped. But EPA has not shown that the Board's consideration of the potential environmental impacts of the Munger Connection was inadequate, or that the Munger

²¹ As EPA notes, wetlands information will be more fully developed during the Section 404 permitting process jointly administered by EPA and the Army Corps of Engineers.

Connection would have such potentially significant adverse environmental impacts that it should not be built. The environmental impacts of the Munger Connection (and several alternative connections at Munger) were evaluated in section 2.4 of the Draft EIS. As part of the EIS process, the original Munger Connection was revised so as to minimize potential environmental impacts. As revised, it will be constructed on existing railroad right-of-way and an existing utility corridor and will avoid Pratt's Wayne Woods Forest Preserve. Moreover, the Approval Decision includes a number of tailored mitigation conditions developed to protect sensitive areas during construction and operation of the Munger Connection.²²

EPA also does not show a need for further analysis of the Gary Airport runway expansion. The Gary Airport runway expansion is a pre-existing issue that is unrelated to the transaction. In any event, Condition No. 19 requires Applicants to comply with a four-party Preliminary Memorandum of Understanding entered into in June 2008 regarding the airport's plan to extend its main runway and to relocate the EJ&E line to permit the expansion. Thus, issues associated with the airport expansion have been adequately considered and addressed.

EPA further asserts that the Board should have required noise mitigation at a 65 decibel (dBA) level of loudness with an increase of at least 3 dBA, rather than at the level of 70 dBA Ldn²³ with an increase of 5 dBA (as is the Board's practice). But the explanation in the Draft EIS (at 4.10-29)—that “requiring mitigation for all of the noise-sensitive receptors predicted to experience an Ldn of 65 dBA or greater” could be unreasonable “[g]iven that the EJ&E rail line travels through approximately 50 communities”—reflects the Board's consistent position in cases where noise mitigation has been an issue that it would be unreasonably expensive for railroads to mitigate noise impacts down to 65 dBA.²⁴ See also Final EIS at 3.3-48 and 3.4-299 to 302 and 3.4-403, explaining why the 70 dBA threshold for mitigation discussed in the Draft EIS was used in this case.²⁵

²² Condition Nos. 51 and 54 and VM-60 and 62 pertain specifically to Pratt's Wayne Woods. Other conditions apply generally to the construction of all of Applicants' proposed connections.

²³ “Ldn” means average noise exposure over a 24-hour period rather than a single noise-generating event such as the sounding of a horn. When calculating Ldn, night-time noise is typically weighed more heavily.

²⁴ In the Conrail merger case, for example, the Board declined to require mitigation of noise impacts of 65 dBA. See CSX Corp.—Control—Conrail, Inc., et al., 3 S.T.B. 196, 361 (1998) (Conrail). Likewise, in Dakota, MN & Eastern RR—Construction—Powder River Basin, 6 S.T.B. 8, 29 (2002) (DM&E), aff'd, Mid States Coalition for Progress v. STB, 345 F.3d at 535-36 (8th Cir. 2003), the Board adopted SEA's finding that the use of a standard lower than 70 dBA Ldn would require noise mitigation to so many additional noise receptors and would be so costly that it would unreasonably burden the carrier. See Final EIS at 12-16.

²⁵ There is no merit to EPA's claim that the Board used the higher threshold in the Conrail and DM&E cases because of the rural nature of those projects. In both cases, the Board applied the 70 dBA threshold in urban as well as rural areas. See Conrail at 361; DM&E at 29.

EPA suggests that the Board's noise analysis was incomplete because the Board did not individually address each noise sensitive receptor (i.e., schools, libraries, and hospitals) or discuss how each affected noise sensitive receptor should be mitigated. But neither NEPA nor the Board's rules (see 49 CFR 1105.7(e)(6)) require this level of detail, and EPA provides no examples of other agencies or case law requiring such a burdensome approach.

The Approval Decision imposes all of CN's voluntary noise mitigation (including constructing noise control devices to allow communities to achieve quiet zone requirements), which should result in meaningful noise reduction in this case. To this the Board added additional noise mitigation, including a specific quiet zone condition for Barrington, IL, and noise mitigation for transaction-related construction activities. Thus, while EPA may disagree with the Board's final noise mitigation, the Board's approach was not unreasonable.

EPA also recommends that the Board develop an Infrastructure Adaptive Program to provide for mitigation adjustments if actual at-grade crossing experiences raise safety issues beyond those anticipated in the EIS, and for initial and ongoing funding for such infrastructure issues. Based on the information available at this point, however, there is no reason to believe that the mitigation that is already in place will be inadequate to address transaction-related impacts related to safety at at-grade rail crossings. Should problems arise as the transaction-implementation process continues, the Board's oversight and reporting requirements will allow us to quickly identify and address them. See Approval Decision, slip op. at 42.

Finally, EPA does not support its claim that the discussion of indirect and cumulative impacts in the EIS is inadequate. Chapter 5 of the Draft EIS provides a detailed analysis of indirect and cumulative impacts. Section 2.13 of the Final EIS presents additional analysis. And contrary to EPA's suggestion, the cumulative impacts on wetlands at the Munger Connection, Gary Airport, and the Lake Renwick Heron Rookery Nature Preserve were adequately addressed in the EIS.²⁶

In conclusion, EPA has not shown material error either in the analysis in the EIS or the mitigation imposed in the Approval Decision.

III. Modification of Mitigation Measures

A. The U.S. Fish and Wildlife Service Letter-Comment

In response to a request by Applicants, Fish and Wildlife reviewed Condition No. 38 and

²⁶ The cumulative impacts on wetlands of the Munger Connection and the construction of other planned connections are addressed in the Draft EIS at 5-1 and in the Final EIS at 2-24 and 2-217. The cumulative impacts on wetlands of the relocation of the EJ&E line to accommodate the runway extension at the Gary Airport are addressed in the Draft EIS at 5-2, 5-8, 5-16 and 5-22-23. Finally, EPA errs in suggesting that the Board failed to support the conclusion that there would be no cumulative impacts on the heron rookery at Renwick Lake. The rookery was appropriately evaluated in the Final EIS (at 3.3-13 to 14). See also Final EIS at 2-216.

has informed the Board that it is not necessary to protect the Indiana bat (*Myotis sodalis*), a federally listed endangered species. Condition No. 38 mandated avoidance or minimization of tree clearing and snag removal within project-related construction area limits and banned removal of trees with a diameter of 3 or more inches between April 15 and September 15 each year. However, Fish and Wildlife has now determined that the construction areas in question do not contain suitable habitat for the Indiana bat, and therefore the planned transaction-related construction activities are not likely to adversely affect it. In light of Fish and Wildlife's letter, we will reopen the Approval Decision to remove Condition No. 38.

B. Mitigation Modifications Resulting from Negotiated Agreements

In the Approval Decision (slip op. at 40), we encouraged communities and other entities to continue to seek to reach negotiated settlement agreements with Applicants. We indicated that we would impose the terms of any such agreements as additional mitigation conditions in lieu of any site-specific mitigation conditions related to that community or entity in the Approval Decision. As of the date of this decision, Applicants have submitted new negotiated agreements entered into with the Village of Mokena, IL (executed December 23, 2008), West Chicago, IL (executed March 4, 2009), Richton Park, IL (executed March 11, 2009), Vernon Hills, IL (executed March 18, 2009), Matteson, IL (executed March 19, 2009), Gary, IN (executed April 13, 2009), Elgin, IL (executed April 29, 2009), and Warrenville, IL (executed June 18, 2009). Accordingly, we will reopen the Approval Decision to impose upon Applicants conditions requiring them to comply with the terms of these new agreements. In addition, we will remove the Board's existing site-specific conditions that pertain to the communities that have now entered into negotiated agreements. The specific changes we are making are set forth in ordering paragraph 4.

It is ordered:

1. The petition for reconsideration filed by the ICC is denied.
2. This proceeding is reopened to the extent discussed above.
3. Condition No. 38 in Appendix A of the Approval Decision is removed.
4. To reflect new negotiated agreements, the following condition is added to the end of the environmental conditions in Appendix A of the Approval Decision:

Additional Agreements

75. Applicants shall comply with the terms of the following negotiated agreements:

- a. the negotiated agreement executed by Mokena, IL, and Applicants on December 23, 2008.

- b. the negotiated agreement executed by West Chicago, IL, and Applicants on March 5, 2009.
 - c. the negotiated agreement executed by Richton Park, IL, and Applicants on March 11, 2009.
 - d. the negotiated agreement executed by Vernon Hills, IL, and Applicants on March 18, 2009.
 - e. the negotiated agreement executed by Matteson, IL, and Applicants on March 19, 2009.
 - f. the negotiated agreement executed by Gary, IN, and Applicants on April 13, 2009.
 - g. the negotiated agreement executed by Elgin, IL, and Applicants on April 29, 2009.
 - h. the negotiated agreement executed by Warrenville, IL, and Applicants on June 18, 2009.
5. In view of the new negotiated agreements, the following site-specific mitigations are removed from the environmental conditions of Appendix A of the Approval Decision:
- a. Condition No. 13, which had applied only to West Chicago.
 - b. In Condition No. 18, the references to West Chicago.
 - c. Condition No. 39, which had applied only to Matteson.
6. This decision is effective on the date of service.

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

Anne K. Quinlan
Acting Secretary

ACTING CHAIRMAN MULVEY, commenting:

I write separately to further express my reasons for voting to deny the petition for reconsideration before the Board. The ICC's petition for reconsideration implicitly alleges that the EIS was inadequate because it failed to account for certain potential negative outcomes that may be worse than those estimated in the EIS. But this is the purpose of the five-year oversight period. If increased rail traffic on the former EJ&E lines causes significantly more congestion and/or delays than projected in the EIS, the Board can take additional steps to address those issues.

I want to assure those in the affected communities that I take very seriously the impacts of the Board's decisions on public health and safety. Indeed, in the early stages of this proceeding, I determined that this transaction merited serious scrutiny by the Board. When the proposed transaction first came before the Board, I voted against it being classified as a "minor" transaction, but the majority ruled otherwise. See Decision No. 2, STB Finance Docket No. 35087 (STB served Nov. 26, 2007).

The Board's governing statute provides that the only basis for disapproving a merger such as this one is on the ground that the transaction will have significant anticompetitive impacts that are not outweighed by any benefits to the public interest in meeting transportation needs. The Board found no serious anticompetitive impacts from the merger, Approval Decision, slip op. at 13, and no party before the Board asserts that we erred in that conclusion. Thus, the law required the Board to approve the CN/EJ&E transaction subject to appropriate mitigation. A bill to change the applicable merger approval standards was introduced in Congress in 2008, while the transaction was pending before the Board, but it did not pass in the House of Representatives.²⁷

From my perspective, although it could not deny merger approval on the record before it, the Board has the necessary tools to monitor this transaction in the coming years. If CN's reports, or other submissions from the Board's oversight process, indicate that additional mitigation is needed – including modifications such as those requested by the ICC here – the Board should consider possible new and enhanced mitigation at the appropriate time. I vote today, however, to deny the petition for reconsideration because the record presently before us does not support the need for the requested modifications at this time. Nonetheless, I hope that interested parties, including the ICC, will continue to keep the Board apprised of their concerns regarding the implementation of the transaction throughout the oversight period.

²⁷ A similar bill was introduced in July 2009 in the House of Representatives. See H.R. 3410, 111th Cong. (2009).