

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 35264<sup>1</sup>

ELGIN, JOLIET & EASTERN RAILWAY COMPANY–TRACKAGE RIGHTS  
EXEMPTION–ILLINOIS CENTRAL RAILROAD COMPANY

Decided: September 1, 2009

The Board is denying the joint petition for stay filed by the Village of Barrington, IL (Barrington), and the TRAC Coalition<sup>2</sup> (TRAC) (collectively, Civic Petitioners) and the separately filed petition for stay submitted by the United Transportation Union (UTU).

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<sup>1</sup> This decision also embraces: STB Finance Docket No. 35265, Elgin, Joliet & Eastern Railway Company–Trackage Rights Exemption–Wisconsin Central, Ltd.; STB Finance Docket No. 35266, Elgin, Joliet & Eastern Railway Company–Trackage Rights Exemption–Grand Trunk Western Railroad Company; STB Finance Docket No. 35267, Illinois Central Railroad Company–Trackage Rights Exemption–Chicago Central & Pacific Railroad Company; STB Finance Docket No. 35268, Illinois Central Railroad Company–Trackage Rights Exemption–Grand Trunk Western Railroad Company; STB Finance Docket No. 35269, Illinois Central Railroad Company–Trackage Rights Exemption–Wisconsin Central, Ltd.; STB Finance Docket No. 35270, Grand Trunk Western Railroad Company–Trackage Rights Exemption–Illinois Central Railroad Company; STB Finance Docket No. 35271, Grand Trunk Western Railroad Company–Trackage Rights Exemption–Illinois Central Railroad Company; STB Finance Docket No. 35272, Grand Trunk Western Railroad Company–Trackage Rights Exemption–Illinois Central Railroad Company; STB Finance Docket No. 35273, Grand Trunk Western Railroad Company–Trackage Rights Exemption–Wisconsin Central, Ltd.; STB Finance Docket No. 35274, Grand Trunk Western Railroad Company–Trackage Rights Exemption–Chicago Central & Pacific Railroad Company; STB Finance Docket No. 35275, Chicago Central & Pacific Railroad Company–Trackage Rights Exemption–Illinois Central Railroad Company; STB Finance Docket No. 35276, Chicago Central & Pacific Railroad Company–Trackage Rights Exemption–Illinois Central Railroad Company; STB Finance Docket No. 35277, Chicago Central & Pacific Railroad Company–Trackage Rights Exemption–Wisconsin Central, Ltd.; STB Finance Docket No. 35278, Chicago Central & Pacific Railroad Company–Trackage Rights Exemption–Grand Trunk Western Railroad Company; STB Finance Docket No. 35279, Wisconsin Central Ltd.–Trackage Rights Exemption–Illinois Central Railroad Company; and STB Finance Docket No. 35280, Wisconsin Central Ltd.–Trackage Rights Exemption–Grand Trunk Western Railroad Company.

<sup>2</sup> The TRAC Coalition consists of the Cities of Aurora and Naperville, IL, and the Villages of Barrington, Barrington Township, Barrington Hills, Lake Zurich, Bartlett, Hawthorn  
(continued . . . )

## BACKGROUND

On October 30, 2007, the Canadian National Railway Company (CN) and Grand Trunk Corporation (GTC) filed a control application in STB Finance Docket No. 35087 seeking approval under 49 U.S.C. 11323-26 for the acquisition of control of EJ&E West Company (EJ&EW), a wholly owned, noncarrier subsidiary of Elgin, Joliet and Eastern Railway Company. Among the stated purposes of the control transaction was to give CN a continuous rail route around Chicago, IL (EJ&E arc), connecting the five CN lines that radiate from Chicago. On December 24, 2008, the Board approved the control application subject to various conditions, including the imposition of a 5-year environmental reporting and monitoring period in which CN and GTC must file quarterly reports on their progress implementing the Board's mitigation conditions and notify the Board if CN and GTC depart substantially from "their traffic projections on the five existing CN lines through Chicago on a more than short-term, temporary basis."<sup>3</sup>

On August 4 and 5, 2009, several subsidiaries of CN (collectively, subsidiary applicants) filed notices of exemption for trackage rights over the rights-of-way of other CN subsidiaries located on and within the EJ&E arc. According to the subsidiary applicants, the purposes of the trackage rights exemptions are to facilitate more efficient movement of freight through the Chicago area. On August 17 and 18, 2009, the Board served notices in the 17 above-captioned cases, stating that the trackage rights exemptions were scheduled to become effective on either September 3 or 4, 2009.<sup>4</sup> Also in those notices, the Board directed CN and the subsidiary applicants to file an explanation of how the notices related to one another and how the notices impacted the operating information provided to the Board in CN-EJ&E, and a colored-coded map showing all 17 proposed trackage rights exemptions.

CN filed the requested information on August 21, 2009, explaining that upon the 17 trackage rights exemptions becoming effective, each subsidiary applicant would gain the right and authority to operate on any CN line within the EJ&E arc, thereby improving efficiency.<sup>5</sup> CN also stated that the 17 trackage rights exemptions would have no effect on the authority received in CN-EJ&E because the operating plan developed in that matter assumed that CN would be able

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( . . . continued)

Woods, Plainfield, and Wayne, IL, and DuPage County, IL.

<sup>3</sup> Canadian National Railway Company and Grand Trunk Corporation—Control—EJ&E West Company, STB Finance Docket No. 35087, slip op. at 39 (STB served Dec. 24, 2008) (CN-EJ&E), pending judicial review in No. 09-1002 et al., Village of Barrington v. STB (D.C. Cir. filed Jan. 5, 2005).

<sup>4</sup> The exemptions in STB Finance Docket Nos. 35264, 35265, 35266, 35269, 35273, and 35279 are scheduled to take effect on September 4, 2009, while the other 11 exemptions are scheduled to take effect on September 3, 2009.

<sup>5</sup> See CN Verified Supplement at 5-6.

to move any of its trains over any of its lines in the Chicago area.<sup>6</sup> Furthermore, CN stated that there were no plans to reroute any train for which rerouting was not already taken into consideration in the CN-EJ&E operating plan and that any operational changes pursuant to the trackage rights at issue in these cases would be subject to the monitoring and oversight conditions imposed in CN-EJ&E.<sup>7</sup>

On August 27, 2009, Civic Petitioners filed a joint petition to stay the 17 trackage rights exemptions captioned above from becoming effective. Simultaneously, Civic Petitioners filed a joint petition to reopen CN-EJ&E for a supplemental environmental analysis to take into account the alleged “extensive environmental implications” of the trackage rights exemptions.

Also on August 27, 2009, the UTU filed a separate petition to stay the effectiveness of the exemption in the three proceedings involving EJ&E trackage rights,<sup>8</sup> where labor implementing agreements have not yet been negotiated. In its petition, UTU argues that its members would suffer irreparable harm if the exemptions were allowed to go into effect in the three proceedings. UTU questions why CN has not negotiated implementing agreements for these transactions and complains that CN has not fully addressed the Board’s request for supplemental information.

CN replied to both petitions on August 31, 2009. The railroad argues that neither petition meets the required standards for the grant of a stay and asks that both be denied.

#### DISCUSSION AND CONCLUSIONS

The petitions for stay will be denied because neither Civic Petitioners nor UTU have met the stay criteria set forth in Washington Metro. Area Transit Comm’n v. Holiday Tours, Inc., 559 F.2d 841 (D.C. Cir. 1977) (Holiday Tours). A party seeking a stay must meet the traditional Holiday Tours criteria by establishing that: (1) there is a strong likelihood that it will prevail on the merits of any challenge to the action sought to be stayed; (2) it will suffer irreparable harm in the absence of a stay; (3) other interested parties will not be substantially harmed; and (4) the public interest supports the granting of the stay. Hilton v. Braunskill, 481 U.S. 770, 776 (1987); Holiday Tours, 559 F.2d at 843; Virginia Petroleum Jobbers Ass’n v. Fed. Power Comm’n, 259 F.2d 921, 925 (D.C. Cir. 1958). On a motion for stay, “it is the movant’s obligation to justify the . . . exercise of such an extraordinary remedy.” Cuomo v. United States Nuclear Regulatory Comm’n, 772 F.2d 972, 978 (D.C. Cir. 1985). The parties seeking a stay carry the burden of persuasion on all of the elements required for such extraordinary relief. Canal Auth. of Fla. v. Callaway, 489 F.2d 567, 573 (5th Cir. 1974).

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<sup>6</sup> See CN Verified Supplement at 6; Railroad Control Application (CN-2) at 228, 230-35, Canadian Nat’l Ry.—Control—EJ&E West Co., STB Finance Docket No. 35087 (filed Oct. 30, 2007).

<sup>7</sup> See CN Verified Supplement at 6-7.

<sup>8</sup> STB Finance Docket No. 35264, STB Finance Docket No. 35265, and STB Finance Docket No. 35266.

### Likelihood of Prevailing on the Merits

Civic Petitioners have not carried their burden of showing they would prevail on the merits of a challenge to the trackage rights exemptions. Indeed, these petitioners have not filed a petition to reject or revoke the 17 trackage rights exemptions. Instead, they have filed a petition to reopen CN-EJ&E and base their petition to stay these 17 trackage rights exemptions on that petition, not a petition to seek review of the proposed trackage rights they seek to stay. Civic Petitioners claim that they have a strong likelihood of showing that the CN-EJ&E decision should be reopened and the environmental impact statement (EIS) in that matter should be supplemented.

The issue of whether the final decision in CN-EJ&E should be reopened or whether the EIS in that matter should be supplemented will be resolved in that proceeding and that separate issue does not control our disposition of the merits of these 17 trackage rights exemptions. Thus, Civic Petitioners have made no claim here for which they can prevail on the merits.

Nor has UTU shown that, if the exemptions it complains about were stayed, it would be likely to prevail on the merits in a subsequent petition to revoke the three EJ&E trackage rights exemptions. UTU seems to object to the fact that implementing arrangements are not in effect for those three exemptions. This agency, however, imposed in the trackage rights exemptions the standard labor protection conditions set forth in Norfolk & Western Ry. Co.—Trackage Rights—BN, 354 I.C.C. 605 (1978), as modified in Mendocino Coast Ry., Inc.—Lease and Operate, 360 I.C.C. 653 (1980). Under those provisions, railroads may execute trackage rights agreements before an implementing arrangement is negotiated or arbitrated. The Board retains the authority to supplement the protection provided under those conditions, but UTU has not explained why it would be likely to prevail in any attempt to persuade the agency to do so here.

### Irreparable Harm

Civic Petitioners have similarly failed to show any irreparable harm that they would incur if the trackage rights exemptions become effective. No evidence has been provided of how allowing CN's various subsidiaries to move traffic within the EJ&E arc more efficiently would harm the Civic Petitioners. The only evidence submitted is CN's verified statement that it has no plans to reroute any train whose rerouting had not already been studied in the operating plan filed in STB Finance Docket No. 35087.<sup>9</sup> The question of whether any supplemental environmental analysis or further mitigation in Finance Docket No. 35087 is warranted as a result of the 17 trackage rights exemptions can be determined in the CN-EJ&E proceeding. Indeed, there is not even a request before the Board to have those impacts studied in the trackage rights proceedings. Based on the record before us, Civic Petitioners have failed to meet their burden of showing that their communities would suffer irreparable harm if the exemptions are allowed to become effective.

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<sup>9</sup> See CN Verified Supplement at 6.

UTU argues that its members would suffer irreparable harm if the trackage rights agreements were executed prior to adoption of an implementing arrangement. UTU contends that it would be “nearly impossible to unscramble the egg of seniority rights, and perhaps residence changes, once the trackage rights go into effect.” But the Board has imposed the standard labor protection conditions, and any adversely affected employees will have the protections required by those conditions. UTU has not shown that these protections are inadequate here.

#### Harm to Other Parties

Civic Petitioners have failed to show that a stay would not substantially harm CN or its subsidiary applicants. Those petitioners claim that CN and its subsidiaries have operated without the 17 trackage rights exemptions for “some time.”<sup>10</sup> CN, on the other hand, has stated that the trackage rights exemptions will allow its subsidiaries to structure their operations in a more efficient manner.<sup>11</sup> Delaying the effectiveness of the exemptions, therefore, would be detrimental to CN and its subsidiaries’ efficient operations and the shippers who would ultimately benefit from such efficiencies. The parties seeking a stay have failed to meet their burden as to this criterion.

#### Public Interest

Finally, the parties seeking a stay have not shown how a stay would be in the public interest. Civic Petitioners allege that a stay would allow “the Board to fully investigate and analyze all potential impacts on the public in and around the Chicago area and EJ&E arc.”<sup>12</sup> But the investigation and analysis requested by those petitioners is requested in STB Finance Docket No. 35087, not in these cases. Whether these exemptions go into effect will have no impact on the Board’s ability to consider the petition to reopen in STB Finance Docket No. 35087 and, if shown to be warranted, supplement the environmental analysis previously prepared in that case. In these circumstances, the public interest will be realized by allowing these exemptions to take effect absent a showing that the Holiday Tours criteria have been satisfied. The parties seeking a stay have failed to make this showing.

For all the reasons set forth above, the Civic Petitioners and the UTU have failed to meet the stay criteria and the joint petition for stay will be denied.

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

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<sup>10</sup> Petition for Stay at 6, n. 3.

<sup>11</sup> See CN Verified Supplement at 5-6.

<sup>12</sup> Civic Petitioners petition for stay at 6, n. 3.

It is ordered:

1. The joint petition for stay is denied.
2. The UTU petition for stay is denied.
3. This decision will be effective on its date of service.

By the Board, Vice Chairman Nottingham and Commissioner Mulvey. Chairman Elliott is not participating.

Anne K. Quinlan  
Acting Secretary

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COMMISSIONER MULVEY, commenting:

I write separately to express my reasons for concurring in the Board's decision to deny the petitions for stay filed by the Civic Petitioners and UTU in this proceeding.

UTU argues that it lacks the information necessary to determine the potential harm that may be caused to its members as a result of the implementation of those trackage rights agreements that lack implementing agreements. See UTU Petition at 7. Although it may lack the information today, UTU retains the option of seeking to revoke the exemptions should UTU ultimately conclude that its members need protections beyond the Board's standard labor conditions. To the extent UTU is concerned about the ability to "unscramble the egg[s] of seniority rights, and perhaps residence changes" after the trackage rights are in effect, UTU could minimize this risk by seeking revocation as soon as it is aware of CN's expectations with regard to employees on the three lines currently without implementing agreements.

The Civic Petitioners argue that they will be harmed if increased traffic and environmental impacts occur as a result of these trackage rights. See Civic Petitioners' Petition at 6, n.3. CN has stated that "the proposed new trackage rights will not result in different trains or different routings of trains" than that provided for in the Operating Plan in the CN-EJ&E proceeding. CN Reply at 6. Rather, CN claims that the rights will simply allow for more efficient operations and the avoidance of some crew shifts. Id. In the absence of further evidence, I believe that the CN-EJ&E proceeding gives the Board an adequate vehicle to address the Civic Petitioners' concerns about alleged routing and operating changes.