

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35087

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

Digest:<sup>1</sup> As part of its approval of Canadian National Railway Company's and Grand Trunk Corporation's (collectively, CN) acquisition of EJ&E West Company, the Board required CN to pay for a portion of the engineering and construction costs of grade separations at two highway/rail at-grade intersections in Illinois, but only if construction began by the end of 2015. This decision extends the 2015 deadline by two years to 2017 and encourages the parties to pursue alternative dispute resolution if needed.

Decided: May 29, 2013

In a decision served on December 24, 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), subject to numerous conditions.<sup>2</sup>

As relevant here, the Board conditioned its approval on CN's coordinating with appropriate state and local officials for the construction of two grade separations (overpass or underpass): one at Ogden Avenue in Aurora, Ill., and the other at Lincoln Highway in Lynwood, Ill. (Condition No. 14). Condition No. 14 provides that, once CN has 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 (2015 deadline). Because the Board did not consider it appropriate to require CN to be obligated indefinitely for these significant costs, the Board set a 2015 deadline by which a construction contract must be signed and construction initiated for CN to be required to pay its

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<sup>1</sup> 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).

<sup>2</sup> See Canadian Nat'l Ry.—Control—EJ&E W. Co., FD 35087 (STB served Dec. 24, 2008) (Approval Decision), aff'd sub nom. Vill. of Barrington v. STB, 636 F.3d 650 (D.C. Cir. 2011).

Board-mandated share of the costs of the two grade separations. The Board anticipated that the Illinois Department of Transportation (IDOT) would be the lead agency for developing these grade separations.<sup>3</sup>

In a decision served October 23, 2009, the Board denied as premature IDOT's petition to reopen to extend the 2015 deadline in Condition No. 14. In that decision, however, the Board noted that, if reasonable progress is being made but it becomes clear that construction is not likely to be initiated by 2015 due to circumstances beyond IDOT's control, the Board would entertain future requests to extend the time deadline in Condition No. 14.

On March 8, 2013, IDOT submitted comments raising various concerns that "may negatively affect IDOT's ability to meet the 2015 deadlines for the commencement of the construction" of the two grade separations. Specifically, IDOT states that, while progress on these projects has continued to be made, the parties disagree as to whether CN is obligated to contribute to the cost of design and construction of pedestrian and bicycle accommodations on the grade separations. IDOT further asserts that, although it has attempted to take CN's own design guidelines for railroad structures into account, if there ultimately is a disparity between CN's design guidelines and those of IDOT and the American Railway Engineering and Maintenance of Way Association (AREMA), the policies, procedures, and guidelines of IDOT, as lead agency, and AREMA must govern. IDOT also challenges CN's position that it need "only reimburse IDOT for those costs that [CN] deems customary and reasonable." Lastly, IDOT asserts that the parties disagree as to which party is to assume ownership of, and maintenance responsibilities for, the grade separations once they are constructed.

In a reply filed on March 28, 2013, CN asserts that the parties have been working hard to implement Condition No. 14. While CN concurs that disagreements remain about the issues pointed out by IDOT, CN sees no need to extend the 2015 deadline in Condition No. 14.

## DISCUSSION AND CONCLUSIONS

It appears that the parties have been negotiating in good faith and have taken significant steps towards initiating construction of the two grade separated crossings at issue here. According to IDOT, substantial progress has been made in the engineering for the two projects. CN indicates that it has provided input and assistance in developing the details of the grade separation projects and helped to facilitate the abandonment of the Hartsdale Industrial Track, which has shortened the necessary length of the overpass to be constructed at Lincoln Highway.

We encourage and commend the parties for the steps they have taken to date. However, the parties' filings demonstrate that difficult issues related to these two important projects remain unresolved. Although we believe that the parties are in the best position to resolve the matters still in dispute, the new information provided by IDOT and CN shows that negotiations may require additional time. Should the parties ultimately find themselves at an impasse on certain

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<sup>3</sup> See Approval Decision, slip op. at 44-48, 76 (Condition 14).

issues after good faith efforts, we urge them to seek initial resolution through third-party mediation, arbitration, or other form of alternative dispute resolution.

Given the record now before us, we will extend the time deadline currently in Condition No. 14, so that the parties know they will have time to proceed in an appropriate manner. Therefore, to help facilitate this ongoing process and permit sufficient time for the parties to seek assistance from an appropriate mediator or arbitrator, if needed, we will reopen this proceeding on our own motion for the limited purpose of extending the 2015 deadline in Condition No. 14 by two years, to December 31, 2017. Reopening for that purpose is warranted here in light of the substantially changed circumstances surrounding the grade separation projects since the Board's Approval Decision, including the nature and extent of the outstanding areas of disagreement. See 49 U.S.C. § 722(c).

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

It is ordered:

1. This proceeding is reopened.
2. The 2015 deadline in Condition No. 14 of the Board's Approval Decision is extended to December 31, 2017.
3. This decision is effective on its service date.

By the Board, Chairman Elliott, Vice Chairman Begeman, and Commissioner Mulvey. Vice Chairman Begeman dissented with a separate expression.

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VICE CHAIRMAN BEGEMAN, dissenting:

I was not serving as a Member of the Surface Transportation Board in 2008 when it approved the acquisition of control by Canadian National Railway Company and Grand Trunk Corporation (collectively, CN) of EJ&E West Company, subject to numerous conditions. Nor was I here in 2009 when the Board denied as premature the Illinois Department of Transportation (IDOT) petition to reopen the 2008 decision to extend the 2015 deadline in Condition No. 14. However, I do believe the imposed conditions must be fulfilled in as timely and reasonable a manner as possible, particularly the two grade separations at issue here, which are so important to promoting transportation safety.

I would consider an extension of the December 2015 deadline if, and when, the parties had exhausted all efforts to meet the current deadline. But the record does not support an extension at this time, particularly given that the 2015 deadline is still more than two and one-half years away.

The Board should be urging the parties to resolve their remaining disputes as quickly as possible in order for construction of the two overpasses at issue to begin soon. While today's decision does encourage the parties to pursue third-party alternative dispute resolution, it also extends the deadline to the end of 2017. It is worrisome that the message being sent is that it would take that long to resolve the remaining issues in dispute even if alternative dispute resolution is pursued. When issuing our own revised mediation and arbitration rules earlier this month, we suggested that alternative dispute resolution should be "less time-consuming and expensive" than formal adjudication, which would hardly be the case if it took four and one-half years to reach a final outcome. See Assessment of Mediation and Arbitration Procedures, EP 699 (STB served May 13, 2013).

More than two years remain for final agreements to be reached between IDOT and CN and for construction to commence. Extending the 2015 deadline now through 2017 could ultimately lead to even further delay in completion of the two overpasses, and in turn put the safety of the traveling public at risk. A better approach would be to hold firm to the 2015 deadline at this time, provide guidance on the issues in dispute between the parties, and ask for a joint status report in the summer of 2015. At that point, the Board could make a determination about whether the December 2015 deadline should be extended.

I dissent from the Board's decision.