

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 35087¹

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

Decision No. 8

Decided: February 22, 2008

In Decision No. 2, served November 26, 2007, the Board accepted for consideration the application filed by Canadian National Railway Company (CNR) and Grand Trunk Corporation (GTC), for Board authorization of the proposed acquisition of control of EJ&E West Company (EJ&EW), a wholly owned noncarrier subsidiary of Elgin, Joliet & Eastern Railway Company (EJ&E), by CNR and GTC. This proposal is referred to as the primary transaction. CNR and GTC are referred to collectively as applicants.

BACKGROUND

On January 22, 2008, the Village of Frankfort, IL (Frankfort), filed a motion to compel responses to discovery requests served on EJ&E and EJ&EW, and on January 25, 2008, Frankfort filed a motion to compel discovery requests served on applicants. Frankfort seeks to compel discovery from EJ&E, EJ&EW, and applicants on topics such as projections of rail traffic volume following the proposed acquisition; air pollution that would result from trains and vehicles waiting to cross blocked rail crossings; anticipated noise and vibration from rail

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).

construction and operations; effects of the proposed transaction on property values; potential railroad safety issues in the Frankfort vicinity, including grade crossing issues; issues related to traffic delays due to blocked grade crossings in Frankfort; and potential environmental mitigation to eliminate or reduce the foregoing types of potential environmental effects. Frankfort states that, in response to its request for documents and interrogatories, applicants, EJ&E, and EJ&EW provided no substantive answers to its information requests. On February 8, 2008, applicants, EJ&E, and EJ&EW filed a joint reply arguing that Frankfort was not entitled to invoke the Board's discovery process to explore issues that would be addressed in the ongoing environmental review process. They also objected to the discovery requests on grounds that EJ&E and EJ&EW were not parties in this proceeding and hence not subject to discovery.

On February 5, 2008, Will County, IL (Will County), filed a motion to compel responses from applicants regarding rail traffic congestion and possible gridlock; auto and truck traffic congestion and possible gridlock; and public safety and other environmental and transportation concerns.²

On January 31, 2008, ArcelorMittal USA Inc., ArcelorMittal Burns Harbor LLC, ArcelorMittal Indiana Harbor LLC, ArcelorMittal Kote Inc., ArcelorMittal Tek Inc., ArcelorMittal Hennepin Inc., and ArcelorMittal Riverdale Inc. (collectively ArcelorMittal) filed a motion to compel discovery responses from EJ&E and EJ&EW regarding any and all likely changes to the numerous agreements and day-to-day operations with ArcelorMittal should the Board approve the proposed transaction. Many of ArcelorMittal's requests pertain to actual, planned, anticipated, or possible changes to agreements and operations on the EJ&E line and/or the future Gary Railroad. On February 8, 2008, EJ&E and EJ&EW filed their reply to the motion to compel, asserting that they are not subject to discovery because they are not parties to this proceeding. They further argue that ArcelorMittal requests information that only applicants are in a position to offer, namely information on changes in operation of the assets applicants seek to acquire.

DISCUSSION AND CONCLUSIONS

Discovery of Environmental Matters. Frankfort and Will County, which adopts and incorporates Frankfort's arguments, assert that discovery is available regarding any matter relevant to the subject matter involved in a proceeding, including environmental matters, citing 49 CFR 1114.21(a)(1), even though they acknowledge that the Board will address the types of environmental issues on which they seek discovery during the environmental review process. Applicants, EJ&E, and EJ&EW maintain that discovery is not available to address environmental issues and that information needed to address concerns such as those raised by Frankfort and Will County are developed through the less formal environmental review process that is taking place under the National Environmental Policy Act (NEPA), 42 U.S.C. 4321 et seq.

² On January 28, 2008, Will County filed a motion to compel discovery responses from EJ&E and EJ&EW. On February 8, 2008, the motion was withdrawn.

The Board confirms that formal discovery on environmental issues such as those raised by Frankfort and Will County is not available because information of these types of issues will be developed by the Board's Section of Environmental Analysis (SEA) during the NEPA process. See Illinois Central Railroad Company—Construction and Operation Exemption—In East Baton Rouge Parish, LA, STB Finance Docket No. 33877 (STB served Aug. 21, 2001) (East Baton Rouge Parish); Dakota, Minnesota & Eastern Railroad Corporation Construction into the Powder River Basin, STB Docket No. 33407 (STB served Feb. 2, 2000). See also CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company—Control and Operating Leases/Agreements—Conrail Inc. and Consolidated Rail Corporation, STB Finance Docket No. 33388 (STB served May 27, 1998); Burlington Northern Santa Fe Corporation, BNSF Acquisition Corp., and Burlington Northern Railroad Company—Control—Washington Central Railroad Company, STB Finance Docket No. 32974 (STB served Sept. 20, 1996). As stated in East Baton Rouge Parish, the Board decides matters regarding transportation issues based on an evidentiary record developed by the parties including through the discovery process. In contrast, to assess the potential environmental effects of a proposed acquisition, SEA performs an independent environmental review that allows for and encourages public participation throughout the process.

In this case, a full Environmental Impact Statement (EIS) will be prepared to disclose and address environmental concerns related to the proposed transaction and develop potential environmental mitigation measures. As explained in the Notice of Intent to Prepare an Environmental Impact Statement, served December 21, 2007, the NEPA process is intended to assist the Board and the public in identifying and assessing the potential environmental consequences of a proposed action before a decision on that proposed action is made. This process involves soliciting public comments on a draft scope of study for the EIS,³ followed by the issuance of a final scope of study for the EIS. SEA then prepares a draft EIS that will evaluate the direct, indirect, and cumulative impacts of the proposed transaction and address a wide range of issues including, as appropriate, air quality, noise, environmental impacts to low income or minority populations, land use and safety, including grade crossing safety. The draft EIS also will include preliminary recommendations for environmental mitigation measures. As part of the EIS process, SEA can ask applicants for additional information on the planned operations, as appropriate, to permit the Board to take the requisite "hard look" at environmental issues required by NEPA.

The draft EIS will be made available for public and agency review and comment for a minimum of 45 days. A final EIS will then be issued that will address public comments, include further environmental analysis, if appropriate, and set forth SEA's final environmental mitigation recommendations. The Board will then consider the entire record, including the environmental record, in deciding whether to approve the proposed transaction, deny the proposed transaction, or approve it with conditions, including environmental conditions.

³ In this case, SEA has conducted seven scoping meetings in the project area to facilitate public input.

Throughout this process, Frankfort and Will County (as well as all other interested parties, communities, organizations, and members of the general public) will have ample opportunity to raise any environmental concerns they might have. The discovery responses sought by Frankfort and Will County pertain to the same issues that can and will be explored and addressed in the EIS. Accordingly, Frankfort and Will County's motions to compel, which seek information solely on environmental issues, will be denied.

EJ&E's "Party" Status. Under 49 CFR 1101.2, a party is defined as "a complainant, defendant, applicant, respondent, protestant, intervener, or petitioner in any proceeding, or other persons permitted or directed by the Board to participate in a proceeding." Frankfort and ArcelorMittal contend, among other things, that EJ&E and EJ&EW are parties by virtue of the notice of exemption submitted with the application, Elgin, Joliet and Eastern Railway Company—Corporate Family Exemption—EJ&E West Company, STB Finance Docket No. 35087 (Sub-No. 1), in which EJ&E filed for a notice of exemption based on a corporate family transaction with EJ&EW. ArcelorMittal further argues that this notice of exemption authorizing EJ&E to transfer its assets to EJ&EW is a central and necessary element to the proposed transaction.

In their responses, applicants, EJ&E, and EJ&EW assert that, under 49 CFR 1101.2 EJ&E and EJ&EW are not parties to this proceeding. They argue that EJ&E and EJ&EW do not fall into any of the categories listed in 49 CFR 1101.2. They concede that EJ&E filed a notice of exemption; however applicants argue that "such class exemptions do not start proceedings; they merely indicate that . . . no proceedings are necessary." Applicants, EJ&E, and EJ&EW also argue that the discovery requests sought by Frankfort and ArcelorMittal are not related to the notice of exemption.

The Board directs EJ&E and EJ&EW to participate in STB Finance Docket No. 35087 as parties, in accordance with 49 CFR 1101.2. As ArcelorMittal has noted, the transfer of EJ&E assets to EJ&EW is integral to the proposed transaction. Accordingly, the Board grants ArcelorMittal's motion to compel all discovery requests from EJ&E and EJ&EW regarding current operations and arrangements between EJ&E and ArcelorMittal and any requests regarding the Gary Railroad's future operations and commercial arrangements. Responses to document requests and interrogatories solely regarding future plans and possible actions by applicants, or post-transaction plans and actions with respect to EJ&E lines applicants seek to acquire, are not compelled because applicants have already responded to similar requests.

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

It is ordered:

1. Frankfort and Will County's motions to compel are denied.
2. ArcelorMittal's motion to compel is granted to the extent that discovery requests pertain to the Gary Railroad's future operations and commercial arrangements and/or EJ&E and EJ&EW's current operations and arrangements with ArcelorMittal.
3. This decision is effective on the service date.

By the Board, Chairman Nottingham, Vice Chairman Mulvey, and Commissioner Buttrey.

Anne K. Quinlan
Acting Secretary