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SERVICE DATE – DECEMBER 21, 2010

SURFACE TRANSPORTATION BOARD

Docket No. FD 35087

CANADIAN NATIONAL RAILWAY COMPANY AND GRAND TRUNK
CORPORATION—CONTROL—EJ&E WEST COMPANY¹

Decision No. 27

Digest:² This decision orders Canadian National Railway Company to pay a \$250,000 fine for knowingly violating Board orders.

Decided: December 20, 2010

Pursuant to 49 U.S.C. § 11901(a), the Board hereby orders Canadian National Railway Company (CN) to pay \$250,000 to the U.S. Treasury for violating Board orders. The Board orders were issued as part of the CN-EJ&E West Company (EJ&E West) acquisition approval, and mandated CN to report each blocked crossing occurrence on the former EJ&E West rail line exceeding 10 minutes in duration.³ The Board is imposing this penalty because it finds that CN knowingly violated the Board's orders. This finding is supported by the acquisition approval conditions' plain text, the outcome of a recent audit of CN records, and the April 28, 2010 statements made by the auditor and CN representatives (or officials) at a Board hearing. While § 11901(a) could allow the imposition of a multi-million dollar penalty against CN, the Board has taken into consideration a number of mitigating factors in concluding that a \$250,000 penalty is appropriate in this instance.

¹ This decision also embraces Elgin, Joliet & Eastern Railway—Corp. Family Exemption—EJ&E West Co., FD 35087 (Sub-No. 1); Chicago, Central & Pacific Railroad—Trackage Rights Exemption—EJ&E West Co., FD 35087 (Sub-No. 2); Grand Trunk Western Railroad—Trackage Rights Exemption—EJ&E West Co., FD 35087 (Sub-No. 3); Illinois Central Railroad—Trackage Rights Exemption—EJ&E West Co., FD 35087 (Sub-No. 4); Wisconsin Central Ltd.—Trackage Rights Exemption—EJ&E West Co., FD 35087 (Sub-No. 5); EJ&E West Co.—Trackage Rights Exemption—Chicago, Central & Pacific Railroad, FD 35087 (Sub-No. 6); and EJ&E West Co.—Trackage Rights Exemption—Illinois Central Railroad, FD 35087 (Sub-No. 7).

² 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).

³ See Canadian Nat'l Ry. & Grand Trunk Corp.—Control—EJ&E W. Co., FD 35087 (STB served Dec. 24, 2008) (Approval Decision) at 26; id., Appendix A at 73. The Board ordered CN to comply with all approval conditions. Approval Decision at 54.

BACKGROUND

On December 24, 2008, the Board approved CN's acquisition of control of EJ&E West (a wholly owned, noncarrier subsidiary of Elgin, Joliet and Eastern Railway Company (EJ&E)), subject to numerous conditions. The Board conditioned its approval, in part, on CN's filing of monthly and quarterly status reports regarding certain operating and environmental matters related to the acquisition.⁴

Approval conditions. The Board identified train volumes, accidents and incidents, and crossing blockages among those operating matters that would be subject to close monitoring during the 5-year oversight period:

CN will be required to provide monthly the following information pertinent to post-merger operations: the number of trains operating over appropriate segments of the EJ&E and CN lines through Chicago per day; 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; and the date and descriptive information about each crossing blocking occurrence on the EJ&E rail line that exceeds 10 minutes in duration.⁵

The Board also identified crossing blockages among the environmental matters that would be closely monitored during the oversight period:

As part of the Applicants' quarterly reports that will be required under [voluntary mitigation condition (VM)] 101, VM 36, and Condition 74, Applicants shall report quarterly to SEA and communities adjacent to or intersected by the EJ&E rail line on the frequency, cause, and duration of train blockages of crossings of 10 minutes in duration or greater, listing each delay and including any notifications from persons affected by the blockage and the time of the beginning and end of each delay. Applicants shall summarize the cause of each type of blockage that the Applicants self-report and shall state how the Applicants intend to reduce the incidence of all blockages not attributed to emergencies or weather-related incidents (sometimes called Acts of God) in the quarterly report.⁶

⁴ See, e.g., Approval Decision at 26; id., Appendix A at 73-78.

⁵ Id. at 26.

⁶ Approval Decision, Appendix A at 73.

The Board directed that CN meet with Board staff “to establish appropriate measures and reporting procedures”⁷ The Board also mandated that CN comply “with all the conditions imposed in this decision”⁸

HDR audit of CN reports. CN filed its first monthly and quarterly reports in April 2009. Soon after those initial submissions, citizens and communities along the former EJ&E line began to voice concerns about the reports’ accuracy and completeness. The Board decided to investigate those concerns by directing its independent third-party contractor, HDR, Inc. (HDR), to review and audit the information CN provided in its monthly reports for November and December 2009. HDR was specifically instructed to review the information reported by CN on the number of trains operating on the former EJ&E line that caused blockages at highway/rail at-grade crossings for 10 minutes or more.

HDR’s audit established a number of significant discrepancies between the data that CN reported and the data that CN had itself collected. In a February 5, 2010 meeting, during the course of the HDR audit, it came to light that the vast majority of the highway/rail at-grade crossings on the former EJ&E line were equipped with “Remote Terminal Units” or “RTUs.”⁹ When a crossing gate equipped with a RTU remains down for 10 minutes or more, the RTU generates a fax report that is sent to the dispatching desk of the carrier controlling the rail line. When that crossing gate goes back up, the RTU sends another fax to the carrier’s dispatcher. The carrier can thus calculate and archive the date and time of each instance of a blocked crossing of 10 minutes or more.¹⁰ While the CN November and December 2009 operating reports filed with the Board stated that 14 street crossing blockages of 10 minutes or more had occurred as a result of stopped CN trains, CN’s RTU data for that same time frame showed an additional 1,443 unreported instances wherein the crossing signal system was activated and the gates were in the down position for 10 minutes or more.¹¹

On April 20, 2010, the Board ordered CN to appear for a hearing, during which HDR would answer Board questions regarding the audit and CN would address its failure to report the existence and results of the RTU data.¹² The Board also directed CN both to resubmit the reports

⁷ Id. at 26.

⁸ Id. at 54.

⁹ HDR Technical Memorandum to STB, Task 3 Train Volumes and Street Blockages at 3-4 (April 14, 2010) (HDR Memorandum).

¹⁰ HDR Memorandum at 3-4. See also Chart Submitted by CN with April 28, 2010 Statement of Gordon T. Trafton II (Automated Crossing Warning Device Activations of 10 Minutes or More for All RTU-equipped EJ&E Crossings (CN hearing exhibit, April 28, 2010)).

¹¹ HDR Memorandum at Attachments 1 and 2.

¹² See Canadian Nat’l Ry. & Grand Trunk Corp.—Control—EJ&E W. Co., FD 38057, et al. (STB served Apr. 21, 2010) at 3.

from which the RTU data had been omitted and to submit RTU data for past periods during which these data were available to CN.¹³

Hearing statements. The Board hearing was held on April 28, 2010. At that hearing, John Morton answered Board questions on behalf of HDR. Mr. Morton stated that one of HDR's objectives was to "independently investigate the completeness and accuracy of the information CN reported in November and December 2009 monthly reports to the Board concerning the number of highway/rail at-grade crossing blockages"¹⁴ While pursuing that objective, HDR staff examined CN's reports, reviewed the comment letters the Board had received from citizens and communities, met and teleconferenced with CN staff, met with staff from the Illinois Commerce Commission, and observed train dispatching operations at CN's Homewood, Illinois regional center.¹⁵ Mr. Morton stated that HDR staff first became aware of the RTU data when CN staff described their data collection process during the February 5, 2010 meeting.¹⁶ CN provided HDR with the November and December 2009 RTU data on April 9, 2010.¹⁷

Following HDR's appearance at the April 28 hearing, CN was represented by Gordon T. Trafton II, Special Advisor to the CN Leadership Team; Theodore Kalick, Senior U.S. Regulatory Counsel; and Karen Phillips, Vice-President, Public and Government Affairs. Mr. Trafton began by reading a set of prepared remarks, including the statement that "[w]ith respect to blocked crossings, we had a good faith understanding that the Board's expectation was for reports on blockages caused by stopped trains, and we diligently worked to meet that expectation."¹⁸ Mr. Trafton also stated that "we consulted with the Board personnel concerning the content and the format of these reports" and that "we suggested that we comply with the Board's request for blocked crossing information by reporting crossing blockages of 10 minutes or more due to stopped trains."¹⁹ Appended to the prepared remarks was a graph prepared by CN showing monthly blocked crossing data from all causes, based on RTU data, as measured on the CN and EJ&E lines for the past 33 months.²⁰

After delivering those remarks, Mr. Trafton and the other CN staff answered a number of questions from Board members. During that questioning, CN staff stated that: (1) they became aware that RTU data "might be useful in terms of dealing with some blocked crossing questions"

¹³ Id. at 3-4.

¹⁴ Canadian Nat'l Ry. & Grand Trunk Corp.—Control—EJ&E W. Co., FD 38057, April 28, 2010 Hearing Transcript (Hearing Tr.) at 19.

¹⁵ Id. at 20, 24, 29.

¹⁶ Id. at 28, 41-43.

¹⁷ Id. at 26.

¹⁸ Id. at 56-57.

¹⁹ Id. at 58.

²⁰ See note 10, supra.

in “the latter part of March, and into early April . . . [of 2009]”;²¹ (2) “RTU information was used as more of an audit to try to make sure we weren’t missing things”;²² (3) they were aware of Approval Decision provisions establishing that the Board was concerned about, and interested in obtaining, “information about intersection blockages of more than 10 minutes”;²³ and (4) that CN was aware that the Board’s interest was not limited to blockages resulting from stopped trains, but rather that “throughout the oversight process [the Board] had expressed interest to CN that they were interested in measuring slow-moving trains at grade crossings.”²⁴ CN staff also acknowledged that as early as February 2009, Board staff had asked for data on all crossing blockages of ten minutes or greater, but that CN staff had responded with assertions that the collection of such data was infeasible.²⁵ Finally, it bears emphasis that, as indicated above, it was CN who suggested to the Board that its reporting be limited to “stopped trains,” even though, by the time CN had begun submitting reports, it was aware of the existence and availability of the far broader universe of RTU data that would provide information required by the express terms of the Board’s order.

DISCUSSION AND CONCLUSIONS

The enforcement provisions at 49 U.S.C. § 11901(a) provide that, “[e]xcept as otherwise provided in this section, a rail carrier providing transportation . . . [or] an officer or agent . . . knowingly violating this part or an order of the Board under this part is liable . . . for a civil penalty of not more than \$5,000 for each violation.”²⁶ Section 11901(a) specifies that liability “is incurred for each distinct violation,” and that “a separate violation occurs for each day the violation continues.”

A review of the Approval Decision text and the statements made by CN staff supports the conclusion that CN has knowingly violated the Board’s orders that CN report, on monthly and quarterly bases, the date and descriptive information for each crossing blockage exceeding 10 minutes in duration. CN’s alleged “good faith” interpretation that the reporting requirements regarded only stopped trains is contradicted by both the CN staff admissions and the plain text of the Approval Decision. As CN staff has admitted, the text of the Approval Decision establishes that the Board’s monthly and quarterly operations reporting requirements were not limited to crossing blockages resulting from stopped trains. CN staff also stated that they were aware of both the RTU data and its potential usefulness for reporting on slow-moving trains as early as

²¹ Hearing Tr. at 70-71.

²² Id. at 74-75.

²³ Id. at 81.

²⁴ Id. at 69.

²⁵ Id. at 85-92.

²⁶ The Supreme Court has defined a “knowing” statutory violation to include an omission with knowledge of the facts underlying the violation. E.g., United States v. Illinois Cent. R. Co., 303 U.S. 239, 242 (1938).

either the later part of March 2009 or the early part of April 2009, just before CN submitted its first reports. CN staff admitted responding to the Board staff's slow-moving train data inquiries with concerns of collection infeasibility. Despite becoming aware of the RTU data's availability and utility just a few weeks after the February 2009 meeting with Board staff, CN staff took no apparent action to correct their representations that acquisition of the data was not feasible. CN likewise failed to alert the Board to the existence and CN's own internal use of the RTU data as early as last spring when CN states it determined that RTU data "might be useful" in this proceeding, or to seek clarification from the Board whether submittal of that data would have assisted in satisfying the Board's monitoring conditions. Only after employing an independent auditor to investigate community and citizen concerns did the Board discover many months later the RTU data's availability. CN's February 2010 post hoc disclosure to HDR – during an audit – of the RTU data cannot be described as either fully voluntary or an adequate correction of CN's February 2009 infeasibility representations.

HDR's audit and statements also support the conclusion that CN knowingly violated the Board order. As established in the course of the HDR audit, the RTUs collect data from all crossing blockages of 10 minutes or greater at a significant number of former EJ&E rail/highway at-grade crossings. (On the EJ&E main line running between Mundelein and Gary, Indiana, 82 of 83 total crossings in Illinois were equipped with RTU capability, as were 9 out of 15 in Indiana.)²⁷ The RTU data were thus highly responsive to the reporting requirements specified in the Approval Decision. The HDR audit also concluded that not only did CN collect the RTU data, but CN actually used it internally to verify its far more limited reporting on stopped trains.²⁸ CN's collection and use of the RTU data are inconsistent with its expressed concerns that collection of the data would be infeasible or that the collected data is so inaccurate as to be unusable.

As a carrier that has knowingly violated a Board order, CN is liable under § 11901(a) for a civil penalty of not more than \$5,000 for each separate violation and for each day those separate violations continued unabated. The violations in this instance are CN's failures to

²⁷ Hearing Tr. at 24

²⁸ Id. at 43-45. As a result of the audit, HDR learned, and reported to the Board, that in relaying the results of these individualized RTU monitoring results, CN separately collected the data received from the RTU devices operating at crossings, reviewed it, and then removed all instances of blockages exceeding 10 minutes that did not involve stopped trains. Thus, while CN itself was making use of the RTU data internally, only the far more limited universe of stopped-train blockages were reported to the Board.

As the Board began to receive questions from the community about crossed blockings in Spring of 2009, the Board brought its concerns to CN. In response, CN launched a limited "pilot study" in June of 2009, in which it told the Board that it would send employees with stopwatches to designated crossing locations to manually time crossing blockages. Again, it appears that these specified crossings manually monitored in the June 2009 pilot study also were equipped with RTU monitors. The full results from those monitors, however, were not relayed to the Board in the results from that study.

comply with Board conditions requiring reports that included “the date and descriptive information about each crossing blocking occurrence on the EJ&E rail line that exceeds 10 minutes in duration” (the monthly report) and “summarize[d] the cause of each type of blockage that the Applicants self-report . . .” (the quarterly report).²⁹ CN’s violations continued unabated for over a year – 373 days for the monthly reporting requirement violation and 376 days for the quarterly reporting requirement violation.³⁰ The number of violations and the length of time CN failed to abate those violations could support the imposition of a multi-million dollar penalty.

However, there are factors that militate against the imposition of a multi-million dollar penalty against CN. Although the Board cannot accept CN’s failure to come forward earlier on this matter, the forthcoming statements CN staff made in response to Board questioning during the April 28, 2010 hearing support the imposition of a more modest penalty. CN has also devoted significant time and resources to the mitigation condition requirements imposed in the Board’s order approving the merger. It has invested significant resources in settlements with third-parties affected by the transaction, and has incurred and will incur significant expense in fulfilling the terms of those settlements.

Moreover, CN violated a reporting requirement, rather than an operational one that could have more direct consequences to the public. It is also true that some of the information that CN failed to report is, in fact, favorable to CN. For example, the Board has reviewed RTU data and concluded in a separate decision that there has been an overall decrease in the average number of blocked crossings since the transaction.³¹ At the same time, however, the RTU data showed that crossings were blocked in excess of 1400 times in the reporting period versus the 14 reported by CN, a discrepancy that certainly was not favorable to CN.

The Board’s decision to levy a penalty today is not made lightly. Although our predecessor agency, the Interstate Commerce Commission (ICC), made regular use of its penalty authority, the Board has not needed to so do until today.³² The Board trusts that the steps we

²⁹ See Approval Decision at 26; id., Appendix A at 73. Alternative interpretations of what may constitute a single violation (e.g., each report that did not include the required information) may also be permissible.

³⁰ The Board calculates the continuing violations as beginning the day CN first submitted each type of report (i.e., April 10 and 13, 2009) and ending on April 21, 2010, the service date of the Board order requiring disclosure of the data and resubmission of the reports.

³¹ The Board stated in that decision that it will monitor the 4 areas of concern where average monthly road crossing blockages lasting 10 minutes or more have increased significantly and will take appropriate steps if a decrease is not detected once the ongoing construction and infrastructure improvement projects in the surrounding areas are completed.

³² Agency records indicate that the ICC levied fines against motor carriers and rail carriers. See e.g., ICC 1982 Annual Report at 76 (noting that the ICC “was responsible for the imposition and collection of over \$2,200,000 in fines and settlements” in that fiscal year); ICC 1983 Annual Report at 76 (railroad settled penalty for \$150,000); Midwest Emery Freight

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take here will deter any similar misconduct in the future. Our regulatory process relies on the honest and truthful production of information held by the carriers we regulate. When a Board order calls for information to be produced, carriers do not have carte blanche to decide not to reveal obviously relevant information, as such a policy would undermine the basic integrity of the Board's entire process.

In light of these offsetting factors, the Board has concluded that a \$250,000 penalty is appropriate.

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

It is ordered:

1. CN has 45 days from this order's service date to pay \$250,000 to the U.S. Treasury for knowingly violating the Board's orders mandating monthly and quarterly CN status reports regarding each crossing blocking occurrence on the former EJ&E West rail line exceeding 10 minutes in duration.
2. This order is effective on its service date.

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

COMMISSIONER NOTTINGHAM, dissenting:

I respectfully dissent from my colleagues' decision to impose a \$250,000 civil penalty on CN under 49 U.S.C. § 11901(a).

Two years ago we approved, with conditions, CN's acquisition of control of EJ&E West. Our approval decision clearly conveyed this agency's interest in monitoring and collecting accurate information regarding rail traffic impacting highway grade crossings along the former EJ&E line. Later, CN discovered the existence of "Remote Terminal Units" (RTUs) at many of the crossings along the former EJ&E line, which provide a specific record of each instance in which a crossing gate remains down for 10 minutes or more. CN should have known that the RTU data would be of interest to this agency, even if it believed that information about slow-moving trains was not strictly required to be reported under our approval decision. That CN

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System, Inc. – Investigation and Revocation of Certificate, MC-114019 (Sub-No. 199) (ICC served July 2, 1982) (motor carrier fined \$100,000).

failed to disclose the existence of the RTU data prior to HDR's audit demonstrates poor judgment, inadequate management oversight of the merger implementation process and, perhaps, faulty legal advice. The integrity of this agency's regulatory oversight process was tarnished, and CN has earned a well-deserved rebuke.

I support the Board's embrace, as reflected in the other decision in this docket that we are also serving today,³³ of the proposal I suggested at our April 28, 2010 hearing to extend our merger oversight period by an additional year. This is a narrowly tailored remedy that accounts for the roughly one year period during which our oversight capabilities were weakened by CN's failure to disclose the RTU data. The additional year of merger oversight will likely cost CN hundreds of thousands of dollars in additional staff, legal and consultant fees. This added expense, in addition to the public criticism CN received from the Board at our oversight hearing, should send a clear message to CN and other regulated entities regarding the importance of carefully abiding by Board orders and, when in doubt, seeking clarification from the Board if an order is unclear.

My colleagues have decided to take the additional action, unprecedented for the Board, of imposing a civil penalty under 49 U.S.C. § 11901(a) in the amount of \$250,000 for what they apparently view as a knowing violation of the Board's reporting requirement. The power vested by statute in our agency to impose civil penalties is a formidable enforcement tool which, in my view, requires the utmost restraint and precision. I believe that a clear record of intent to knowingly violate a Board order is required before civil penalties should be deemed appropriate. Although the record before us convinces me that CN erred in neither sharing the RTU data with us on its own initiative nor seeking clarification of its responsibilities to do so, I cannot find clear evidence of a knowing, deliberate violation of a Board order. Specifically, the record before us contains no documentation of any statements or conduct that, in my view, clearly demonstrates the requisite intent.

Instead, the record contains a recommendation from our consultant auditor, HDR, that the Board clarify the very reporting requirement that CN stands accused of knowingly violating.³⁴ CN was consistent and clear in communicating with the Board and Board staff its interpretation of the reporting requirement as applying to grade crossing blockages resulting from stopped trains (rather than from slow moving trains or other causes).

³³ See Canadian Nat'l Ry. & Grand Trunk Corp.—Control—EJ&E West Co., FD 35087, et al., Decision No. 26 (STB served December 21, 2010) (Oversight Decision), Ordering Paragraph No. 2.

³⁴ HDR Technical Memorandum to STB, Task 3 Train Volumes and Street Blockages at 9 (April 14, 2010) (recommending that the Board “should clarify what constitutes a ‘crossing blocking occurrence on the EJ&E rail line that exceeds 10 minutes in duration’” and “should consider requiring CN to report all blockages of highway/rail at grade crossings that exceed 10 minutes for any cause, and explain the reason(s) for each blockage.”)(internal footnote with citation omitted).

A number of additional factors weigh against imposing a fine in my view. CN was forthcoming and cooperative during the April 28, 2010 hearing on this matter and during HDR's audit. CN has devoted significant time and resources to complying with the mitigation conditions we imposed in approving the transaction and has continued to work to reach settlements with communities along the former EJ&E affected by the transaction. The majority decision accurately notes the lack of public harm or injury caused by CN's interpretation of the reporting requirement at issue. During our consideration of the merger application, traffic forecasts and projected grade crossing delays were a central concern as we weighed the potential environmental impacts of the transaction. Here, as our other decision served today in this docket demonstrates, the RTU data that CN did not report to the Board shows that overall, the former EJ&E line experienced significantly fewer crossing blockages of 10 minutes or more in the months following the transaction than in those preceding it; in other words, the RTU data that is central to this decision is generally favorable to CN.³⁵ It is difficult to imagine why CN would be motivated to knowingly withhold information that actually casts CN in a favorable light. The absence of motive in this matter supports CN's position that it did not deliberately violate a Board order.

In light of these mitigating facts, my colleagues conclude that a fine of \$250,000 is appropriate, as opposed to a multi-million-dollar penalty. I disagree with my colleagues' conclusion; I do not believe that the record before us supports assessment of any fine. To my knowledge, the Board has never before imposed a civil penalty under § 11901(a), nor have we issued regulations or policy guidance explaining how we would implement the civil penalty authority vested in us under the statute. I am concerned that proceeding this way in this case exposes our agency to claims that the amount of the fine is arbitrary and invites further litigation by CN that will be costly in time, energy and focus to our taxpayer-funded agency. It is worth noting also that the \$250,000 fine will go directly to the U.S. Treasury and will not be used to mitigate the impacts of the CN/EJ&E merger or to assist in our merger monitoring process.

In sum, the lack of public harm caused by CN's actions; the lack of documentary evidence or other evidence in the record now before us sufficient, in my opinion, to show a deliberate intent to violate a Board order; the fact that HDR itself recommended that the reporting requirement in question be clarified; CN's cooperation with HDR's audit and its efforts generally to comply with our mitigation conditions and negotiate settlement agreements with affected communities; the fact that the RTU information is, in fact, generally favorable to CN; the arbitrary amount of the fine; and the costs and distractions likely to be imposed on our agency if this fine is appealed, all argue against taking the unprecedented step of imposing a civil penalty in this matter. Therefore, I respectfully dissent.

³⁵ See Oversight Decision at 9-10.