

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 35087¹

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

Decision No. 4

Decided: January 25, 2008

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

On December 17, 2007, Indiana Harbor Belt Railroad Company (IHB) filed a petition for reconsideration seeking reconsideration of the Board’s designation of the transaction as “minor” and requesting that the Board find the transaction to be “significant.” In the alternative, IHB requested that the Board extend the current procedural schedule by 30 days to give interested parties more time to file comments, protests, requests for conditions, or other opposition and evidence. On December 28, 2007, United Transportation Union (UTU) late filed a petition for reconsideration, incorporating the arguments made by IHB, and urging the Board to review the comments of the National Railroad Passenger Corporation (Amtrak), regarding the transaction’s

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).

impact on Amtrak lines. No other parties filed a petition for reconsideration.² Ten parties submitted filings in support of IHB's petition including American Chemical Service, Inc. (ACS), ArcelorMittal USA, Aux Sable Liquid Products, LLC (Aux Sable), Coilplus Illinois, Inc. (Coilplus), Environmental Law & Policy Center (ELPC), Gary/Chicago International Airport, Midwest High Speed Rail Association, Reichhold, Inc., Technical Propellants, Inc., and Will County, IL.

On January 3, 2008, applicants submitted a reply to IHB's petition for reconsideration, and addressed the filings of Will County and ELPC. Following several conversations and meetings with the applicants, IHB withdrew its petition on January 7, 2008, stating that it believed that the transaction would not result in a substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region in the United States. UTU also withdrew its petition for reconsideration on January 7, 2008.

Following IHB's withdrawal of its petition, Coilplus and Technical Propellants, Inc. withdrew as parties of record from this proceeding on January 11, 2008. Aux Sable, ACS, and Reichhold, Inc. informed the Board on that date that they continue to seek a reclassification of the proposed transaction as "significant" or, in the alternative, a 15-day extension of the January 28 deadline for filing opposition evidence and argument and requests for conditions. On January 14, 2008, ELPC reiterated its support for reclassifying the transaction as "significant" or, in the alternative, extending the comment period for an additional 30 days. On January 16, 2008, applicants submitted a reply, and Reichhold, Inc. withdrew as a party of record from this proceeding.

No basis has been shown to reclassify the proposed transaction or to extend the procedural schedule set forth in Decision No. 2. None of the parties seeking reclassification or, in the alternative, an extension of the schedule, themselves filed timely petitions for reconsideration. A letter, filed after the 20-day reconsideration period, in support of another party's timely petition for reconsideration, is not itself a timely filed petition for reconsideration.

And in any event, the remaining commenting parties have neither shown that the Board's action in the prior decision will be affected materially because of new evidence or changed circumstances, nor that there was material error. The central argument in several of the comments, that the number of public comments received by the Board demonstrates that the transaction is "significant," is without merit. As explained in Decision No. 2, the classification of a transaction as "minor" or "significant" has a particular, specialized meaning under our regulations, based on an examination of the transaction's possible anticompetitive effects and its anticipated contribution to the public interest in meeting significant transportation needs,³ not the

² Pursuant to 49 CFR 1115.3, petitions for reconsideration appealing an entire Board action must be filed within 20 days after the service of the action.

³ Under our regulations, at 49 CFR 1180.2, a transaction that does not involve two or more Class I railroads is to be classified as "minor"—and thus not having regional or national transportation significance—if a determination can be made either: (1) that the transaction

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breadth of public attention that the transaction attracts. Moreover, none of the parties' other arguments, which merely restate or expand arguments asserted before the Board issued Decision No. 2, warrant reconsideration.

Regarding an extension of the schedule, the commenting parties have not shown that the 60 days provided for comments and other filings in opposition is insufficient notwithstanding the 2-3 intervening days when many offices were closed for the holidays. As for those parties expressing concerns regarding time needed to assess and comment on matters related to the environmental impact of the transaction, we note that the Board's Section of Environmental Analysis (SEA) has determined that an Environmental Impact Statement (EIS) will be prepared.⁴ The EIS process will allow ample time for parties to assess and comment on these matters.

Therefore, the Board denies the requests to reclassify the transaction or to alter the procedural schedule issued in Decision No. 2.

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

It is ordered:

1. Requests to reclassify the transaction as "significant" and to alter the procedural schedule issued in Decision No. 2 are denied.
2. This decision is effective on the service date.

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

Anne K. Quinlan
Acting Secretary

(. . . continued)

clearly will not have any anticompetitive effects, or (2) that any anticompetitive effects will clearly be outweighed by the anticipated contribution to the public interest in meeting significant transportation needs. A transaction not involving the control or merger of two or more Class I railroads is "significant" if neither of these determinations can clearly be made.

⁴ See Canadian National Railway Company and Grand Trunk Corporation—Control—EJ&E West Company, STB Finance Docket No. 35087 (STB served Dec. 21, 2007).

VICE CHAIRMAN MULVEY, commenting

My position that this transaction should be categorized as “significant” rather than “minor” is unchanged, as expressed in my dissent to the majority’s decision in Canadian National Ry. – Control – EJ&E West Co., STB Finance Docket No. 35087 (STB served Nov. 26, 2007) (Decision No. 2), at 18. However, I agree that the limited pleadings before us on reconsideration of this categorization do not support reclassification or modification of the procedural schedule.