

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 35087

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

Decision No. 14

Decided: September 8, 2008

In this proceeding, Canadian National Railway Company (CNR) and Grand Trunk Corporation (GTC) (collectively referred to as CN or applicants) seek Board authorization to acquire control of EJ&E West Company (EJ&EW), a wholly owned noncarrier subsidiary of Elgin, Joliet & Eastern Railway Company (EJ&E). Under the terms of the stock purchase agreement dated September 25, 2007 (SPA),¹ the EJ&E would transfer a substantial portion of its existing rail line, consisting primarily of an arc around Chicago, IL, to EJ&EW, and then sell its EJ&EW stock to GTC.²

In Decision No. 2, served November 26, 2007, the Board accepted the application for consideration under 49 CFR 1180.2(c), and also concluded that an Environmental Impact Statement (EIS)³ would need to be prepared to fulfill the Board's obligations under the National Environmental Policy Act (NEPA), 42 U.S.C. 4321 *et seq.* The Board explained that it would not issue a final decision on the application until the EIS process is completed, which has taken from 18 months to several years to complete in other cases.

On May 13, 2008, CN asked the Board to complete the NEPA review and serve a final decision approving the application by December 1, 2008, so that GTC and EJ&E could complete the stock purchase by December 31, 2008. In Decision No. 13, served July 25, 2008, the Board set December 1, 2008, to January 31, 2009, as a target for the issuance of the Final EIS, followed by a final decision on the application as soon as possible thereafter.

On August 14, 2008, CN filed a further petition to modify the procedural schedule. CN now asks the Board to rule that applicants have met the criteria of 49 U.S.C. 11324(d)(1) for

¹ Railroad Control Application, CN-2, Exhibit 2.

² The details are summarized at CN-2, pp. 19-20.

³ An EIS is the detailed written statement required by NEPA for major federal actions significantly affecting the quality of the human environment. *See* 49 CFR 1105.4(f).

approval of an acquisition that does not involve more than one Class I railroad and to allow CN to take control of EJ&E before issuance of the Final EIS and subsequent Board consideration of the potential environmental impacts. CN proposes that the Board condition its approval of the acquisition on CN maintaining the environmental *status quo* until the decision on the deferred environmental issues and on CN acknowledging that the Board retains “all legal authority the Board currently possesses to impose environmental conditions in this proceeding.” CN requests that the Board serve a final decision by October 15, 2008, effective November 14, 2008, that would allow CN and EJ&E to complete the stock purchase by December 31, 2008. CN reiterates its previous assertion that there is a substantial risk the SPA will be terminated if not closed by December 31, 2008. CN argues that bifurcating the proceeding in the manner sought here—allowing CN to take control of EJ&EW subject to the requirement that it preserve the environmental *status quo* until completion of the environmental review—is consistent with NEPA.⁴ Several parties have filed replies in opposition.⁵

DISCUSSION AND CONCLUSIONS

CN has styled its request as a petition for relief not otherwise provided for in the Board’s rules pursuant to 49 CFR 1117.1. However, the essence of CN’s petition is that the Board should reopen the determination in Decision No.2 that a decision on the merits of the application would not be issued until after completing the environmental review. Under 49 U.S.C. 722(c) and 49 CFR 1115.4, a petition to reopen requires a showing of material error, new evidence, or substantially changed circumstances in order to obtain relief. CN has not satisfied any of these criteria.

We note also that CN’s petition appears to assume that, while the Board could impose environmental mitigation conditions on its approval of the application, the Board either could not or would not deny the application in this case on environmental grounds. In their reply, American Chemical Services et al. assert not only that denial is possible, but that there is “much more than a mere possibility” that this application would be denied due to adverse environmental impacts. We need not reach those issues here.

⁴ In its petition, CN also reiterates its prior argument that 49 U.S.C. 11325(d) requires the Board to issue a final decision on its application within 180 days. In Decision No. 13 (slip op. at 6), we explained that the Board has discretion in appropriate circumstances to take more than 180 days to complete the record and render a decision in an application for approval of a change in control under 49 U.S.C. 11324(d).

⁵ Joint Letter from Hon. Peter J. Visclosky, Member of Congress, et al. (Aug. 22, 2008); Reply in Opposition of American Chemical Service, Inc., Aux Sable Liquid Products, LP, and Equistar Chemicals, LP (filed Aug. 27, 2008); Village of Barrington Reply (filed Sept. 3, 2008); Village of Frankfort’s Opposition (filed Sept. 3, 2008). Letters in support of CN’s petition have also been filed by American Suzuki Motor Corporation, Canfor Wood Products Marketing Ltd., Chicago Heights Steel, Consolidated Grain and Barge Co., Hanjin Shipping Company, Ltd., Millar Western Forest Products Ltd., the National Industrial Transportation League, Patrick Engineering Inc., Solutions To Area Rail Traffic, SSAB North American Division, Verso Paper Corp., and Viterra.

As discussed below, we will deny CN's petition because (i) a procedure that gives CN control over EJ&EW before the Board rules on the environmental issues violates NEPA principles and regulations; and (ii) CN has failed to demonstrate that its proposal would be workable and would maintain the environmental *status quo*.

Proposed "Bifurcation"

The crux of CN's petition is that the Board can reconcile its responsibilities under the Interstate Commerce Act and its NEPA responsibilities by treating approval of the stock purchase as a separate Federal action for NEPA purposes from a subsequent determination of the decision concerning the environmental mitigation conditions to be attached to approval of CN's application. CN argues that approval of the stock purchase would not have any environmental effects in light of its willingness to maintain the environmental *status quo* while the Board completes the environmental review. CN also maintains that approving the stock purchase would not diminish the Board's conditioning authority since CN would be willing to accept any environmental mitigation conditions subsequently imposed in the environmental phase (subject to its right to challenge in court any conditions that it considers unreasonable). CN-49 at 12-13.

We do not believe that it would be consistent with NEPA or agency precedent to consider the proposed stock purchase separately from our environmental review. The regulations of the Council on Environmental Quality (CEQ) (the Federal agency responsible for establishing the implementing rules for Federal agency compliance with NEPA) provide that: "Proposals or parts of proposals which are related to each other closely enough to be, in effect, a single course of action shall be evaluated in a single impact statement." 40 CFR 1502.4(a). Indeed, CN itself has previously recognized in this case that NEPA requires the completion of the EIS before the Board issues its final decision on whether to approve the change in control.⁶

Nor do we believe that agency precedent supports treating approval of CN's acquisition of the EJ&EW and approval of CN's proposed Operating Plan as separate Federal actions. Since enactment of NEPA, neither the Board nor its predecessor, the Interstate Commerce Commission (ICC), has ever issued a final decision approving a merger or acquisition prior to the issuance of a Final EIS or an Environmental Assessment (EA) where such an environmental document, as defined by the CEQ at 40 CFR 1508.10, was required.

In fact, the cases cited by CN demonstrate why it would not be consistent with NEPA or the CEQ regulations to treat approval of the stock purchase as separate from CN's operating plan. In Union Pacific/Southern Pacific Merger, 1 S.T.B. 233 (1996), aff'd sub nom. Western Coal Traffic League v. STB, 169 F.3d 775 (D.C. Cir. 1996) (UP/SP), a comprehensive EA and Post Environmental Assessment (Post EA) were issued prior to the Board's final decision approving that merger with conditions. In its final decision, the Board imposed comprehensive systemwide and corridor-specific environmental conditions, as well as local environmental mitigation, and concluded that an EIS was unnecessary because, with those mitigation

⁶ Applicants' Comments on the Draft Scope of Study at 9 (filed February 15, 2008) ("the Board cannot authorize the Transaction on the merits until the EIS is complete").

conditions, the merger would not have significant environmental impacts. Although the Post EA found that more focused mitigation studies were warranted to develop appropriate mitigation for Reno, NV, and Wichita, KS, “[n]othing in the record suggest[ed] that the potential environmental effects of the merger in Reno or Wichita are so severe that implementation of the merger should not proceed prior to the completion of the studies.” 1 S.T.B. at 515. Thus, the Board imposed conditions to preserve the environmental *status quo* in Reno and Wichita pending the development of the additional mitigation for those cities. Here, in contrast, CN is asking the Board to act before the Board has issued a Final EIS for any part of the line and before any mitigation measures have been finally determined for any part of the line.

Neither of the other two cases cited by CN—Iowa, Chicago & Eastern Railroad Corporation—Acquisition and Operation Exemption—Lines of I&M Rail Link, LLC, STB Finance Docket No. 34177 (STB served July 22, 2002) (ICE/I&M), nor Canadian Pacific Railway—Control—Dakota, Minnesota & Eastern Railroad, STB Finance Docket No. 35081 (STB served Apr. 4, 2008) (CP/DME)—supports CN’s position. Both of those cases involved the Dakota, Minnesota & Eastern Railroad (DM&E) and threshold determinations by the Board that the environmental impact from the possible future construction by DM&E of a new rail line to transport coal from the Powder River Basin (PRB) in Wyoming was too speculative and uncertain to be studied in connection with the proposed carrier acquisitions by or of DM&E.⁷ In both cases, the Board found that the operating changes resulting solely from the acquisition of the other carrier were modest and did not warrant the preparation of an EIS or EA. In both cases, DM&E had not yet decided to actually build the line into the PRB, so there was no time table for construction of the line, and the information needed to prepare an EIS or EA related to new traffic from the PRB—such as likely shippers, routings for PRB coal, destinations and frequencies—did not exist. Therefore, it was reasonable in both cases for the Board to defer consideration of the impact of moving PRB coal over the newly combined lines until the construction of the new line became probable and to attach a condition to preserve the environmental *status quo* in the meantime with respect to the movement of PRB coal.

Here, by contrast, there is nothing speculative or remote about the traffic increases that are projected with this transaction. CN has provided detailed information on the frequencies and the routings of the increased EJ&EW traffic. Moreover, CN seeks to take control of EJ&E for the very purpose of integrating the EJ&E into CN’s system and rerouting significant amounts of rail traffic over the EJ&E’s lines. Approval of the application is a condition precedent to implementation of CN’s Operating Plan. They are two links in the same chain that must be studied together under 40 CFR 1502.4.

Finally, the agency’s former policy of conditionally approving proposals for the construction of a new or extended rail line before completion of the environmental review process does not support CN here because no authority was granted in those cases until the

⁷ Also, in CP/DME, slip op. at 10-11, the Board specifically found that Canadian Pacific Railway’s acquisition of DM&E was too remote from the potential future transportation of coal over the lines of Canadian Pacific or the ICE to be considered a single course of action under 40 CFR 1502.4(a) for NEPA review purposes.

Board subsequently issued a decision on the environmental issues. Here, in contrast, CN seeks more than a declaration from the Board that the transaction would not substantially lessen competition, create a monopoly, or restrain trade in freight surface transportation in any region of the United States. Rather, CN seeks authorization to acquire EJ&EW. Moreover, the Board's current practice in cases involving proposals for the construction of a new rail line is to consider the environmental aspects of a proposed action at the same time as it considers the transportation or other public interest aspects. See Alaska Railroad Corporation—Construction and Operation Exemption—Rail Line Between Eielson Air Force Base (North Pole) and Fort Greely (Delta Junction), AK, STB Finance Docket No. 34658, slip op. at 2 (STB served Oct. 4, 2007).

CN's Proposed Environmental Condition

In any event, we are not persuaded that the proposal outlined by CN in its petition would be sufficient to preserve the environmental *status quo* in the interim period between the requested approval of the transaction under section 11324(d) and the completion of the Board's environmental review. CN represents that, if allowed to take control of EJ&EW, it would not “undertak[e] Transaction-related actions (such as the re-routing of trains from intra-Chicago routes to the EJ&EW) that could cause adverse environmental impacts” prior to the completion of the environmental phase of the proceeding. Petition at 2, n.2. However, CN expressly excludes certain categories of actions from this voluntary forbearance, such as the service of new traffic tendered by shippers or the interchange of new trains with carriers not under the control of CN. Id. This exception could result in significant increases in traffic along the lines that would not have occurred but for the transaction.⁸ Armed with a favorable “October Merits Decision,” CN could solicit significant additional traffic from non-CN origination points, and increased traffic could begin to flow prior to completion of the NEPA review and the Board's consideration of appropriate conditions.

CN's proposal would be difficult to monitor and enforce. CN essentially asks us to trust that it would maintain the environmental *status quo*, as CN interprets it, and that it would bring to the Board in advance any close questions on whether a particular action would properly be considered within the *status quo*. To assure maintenance of the environmental *status quo*, there would need to be objective standards by which compliance could be monitored. Presumably, such maintenance would need to include establishing quantifiable traffic limits, retaining the services of an independent monitor to report traffic levels to the Board, and enforcing traffic restrictions with remedies significant enough to deter violations (including possible divestiture of the EJ&EW assets or suspension of operating authority). Such a monitoring regime, however, would unduly involve the Board in the day-to-day details of EJ&EW's operations and could well result in frequent complaints by communities along EJ&EW's lines that CN was increasing traffic beyond the *status quo*. CN has offered no feasible suggestions for independent monitoring or effective enforcement of the *status quo*.

⁸ Although it is true that EJ&E could, prior to the sale and on its own initiative, decide to increase traffic on its line to any level it deems appropriate without the need for Board approval, the record does not suggest that it has done so in the recent past or has any present intention to do so.

This case is unlike the other cases cited by CN in terms of the difficulty in establishing objective traffic standards and monitoring compliance. In both CP/DME and ICE/IM, where the new DM&E line into the PRB has not yet been constructed, the Board precluded the carriage of any coal traffic over Canadian Pacific or IC&E lines that originated on DM&E's proposed line into the PRB until the environmental review process for the impacts of the traffic flows is complete. Similarly, in UP/SP, the Board permitted the merged carrier to add only an average of two trains per day on the affected rail line segments to preserve the environmental *status quo* in Reno and Wichita pending the completion of supplemental studies to produce specifically tailored mitigation plans to ensure that localized environmental issues were addressed. 1 S.T.B. at 517. Moreover, the Board had already imposed significant systemwide environmental conditions and was satisfied that "with the systemwide and corridor-specific mitigation already imposed and the conditions to be arrived at following the independent mitigation studies, there would be no significant environmental impacts to Reno and Wichita" 1 S.T.B. at 516. In sum, the limitations on the carriers' operations were clear in those cases, and monitoring was simple. Here, in contrast, CN seeks to be allowed to control EJ&EW's traffic flows prior to the imposition of any environmental conditions whatsoever, save for CN's undefined pledge to maintain the *status quo* and to monitor itself.

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

It is ordered:

1. Applicants' petition is denied.
2. This decision is effective on its service date.

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

Anne K. Quinlan
Acting Secretary