

SERVICE DATE – MAY 15, 2015

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35087 (Sub-No. 8)

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

Digest:¹ The Village of Barrington, Ill. (Barrington), has asked the Board to require a grade separated crossing at U.S. Route 14 in Barrington, as a condition of its 2008 approval of Canadian National Railway Company's (CN) acquisition of EJ&E West Company. The Board finds that Barrington has not presented new evidence or substantially changed circumstances that support the additional mitigation condition that Barrington is seeking.

Decided: May 12, 2015

BACKGROUND

In the lead docket in this matter, Docket No. FD 35087, 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), a wholly owned, noncarrier subsidiary of Elgin, Joliet and Eastern Railway Company, subject to environmental and other conditions. Canadian Nat'l Ry.—Control—EJ&E West Co. (Final Decision), FD 35087 (STB served Dec. 24, 2008), aff'd sub nom. Vill. of Barrington v. STB (Barrington I), 636 F.3d 650 (D.C. Cir. 2011). The approval was subject to a five-year monitoring and oversight period to allow the Board to closely examine various impacts of the transaction.²

As part of the Board's review of CN's application to acquire control of EJ&E, the Board conducted an environmental review in accordance with the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 et seq. The Board's Office of Environmental Analysis (OEA) prepared an Environmental Impact Statement (EIS) examining the potential environmental

¹ 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).

² Through subsequent decisions, the Board has extended the oversight period. Most recently, the Board (with Commissioner Begeman dissenting) extended the oversight period until January 23, 2017. See Canadian Nat'l Ry.—Control—EJ&E W. Co., FD 35087, slip op. at 5 (STB served Dec. 17, 2014).

effects of the transaction, including an extensive analysis of the transaction’s potential impact on highway/rail at-grade crossings along the EJ&E rail line. Using CN’s estimates for projected train traffic on the EJ&E line for the year 2015, which took into account proposed upgrades to the EJ&E rail line that would be completed before 2015, OEA examined all 112 crossings along the EJ&E rail line, including the intersection of the CN/EJ&E rail line and U.S. Route 14 (U.S. 14) in Barrington, Ill. (Barrington). As discussed below, based on the criteria used to evaluate acquisition-related crossing mitigation, OEA recommended mitigation for eight of the 112 crossings and found that a grade separation to be appropriate mitigation for two crossings. Based on OEA’s findings and recommendations, the Board concluded that the intersection at U.S. 14 did not meet the Board’s criteria for a grade separation mitigation condition.³

In 2011, Barrington requested that the Board, pursuant to its continuing oversight jurisdiction, require CN to pay for a grade separation at U.S. 14. In support of its request, Barrington submitted an updated traffic impact study (2011 traffic study) that projected train operations and resulting vehicle delay for 2015, based on train operations through Barrington observed during a 35-day period in 2011. Barrington argued that the study showed that U.S. 14 would experience over 40 hours of total vehicle delay in a 24-hour period, thus exceeding one of three criteria used by the Board for determining “substantially affected” crossings. By decision served on November 8, 2012 (2012 Decision), the Board denied the petition, finding that Barrington had not presented new evidence or changes in facts or circumstances that would have materially altered the Board’s conclusions in the Final Decision regarding appropriate mitigation. The Board explained that simply exceeding the threshold criteria for “substantially affected” crossings did not automatically warrant any mitigation in the Final Decision. Rather, the Board had considered a range of evidence, studies, and factors in deciding what mitigation conditions to impose. The Board found that Barrington’s alleged “new evidence” in the 2011 traffic study would not have changed the outcome of the Board’s 2008 decision not to require a grade separation at U.S. 14 because Barrington’s vehicle delays were primarily attributable to preexisting traffic conditions and capacity constraints. Canadian Nat’l Ry.—Control—EJ&E W. Co., FD 35087 (Sub-No. 8) (STB served Nov. 8, 2012), aff’d sub nom. Vill. of Barrington v. STB (Barrington II), 758 F.3d 326 (D.C. Cir. 2014).

On November 26, 2014, Barrington filed a petition to reopen, once again requesting that the Board provide mitigation in the form of a grade separation at U.S. 14 pursuant to the Board’s continuing oversight jurisdiction. Specifically, Barrington asserts that the Board could not have considered the recent surge in energy-related rail traffic on CN’s rail network when it imposed environmental mitigation conditions in its Final Decision. Barrington argues that this “unforeseen crude-by-rail phenomenon” amounts to new evidence and substantially changed circumstances, warranting reopening to require CN to pay \$47 million to complete the cost of a grade separation at U.S. 14.

CN replied to Barrington’s petition on December 16, 2014, arguing that Barrington’s arguments regarding changes in CN’s traffic do not justify reopening or provide a basis for the

³ See Final Decision, slip op. at 45 & n.101.

relief sought. CN asserts that the rail traffic projections considered by the Board in 2008 were “remarkably accurate” for the segment of the EJ&E that includes Barrington. CN further argues that Barrington’s repeated efforts to overturn the Board’s Final Decision run counter to basic principles of administrative finality.

As discussed below, the Board finds that Barrington has not presented new evidence or substantially changed circumstances that would materially affect the outcome of the Board’s Final Decision and warrant the imposition of an additional condition requiring CN to pay for a grade separation at U.S. 14. Therefore, Barrington’s petition to reopen and request for additional mitigation will be denied.

PRELIMINARY MATTERS

By motion filed January 5, 2015, Barrington requests leave to file a rebuttal in response to CN’s reply. In a reply filed on January 26, 2015, CN requests leave to reply to Barrington’s rebuttal, should the Board accept Barrington’s rebuttal. Under 49 C.F.R. § 1104.13(c), a reply to a reply is not permitted. However, in the interest of a more complete record, we are granting Barrington’s and CN’s requests and accepting their replies into the record.

Barrington also requests that the Board waive the provisions of 49 C.F.R. § 1116.1 and permit oral argument in this proceeding. The granting of requests for oral argument is at the Board’s discretion, 49 C.F.R. § 1116.1(d). We find that the written record here is sufficient to decide the petition to reopen and will therefore deny Barrington’s request for oral argument.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. § 722(c) and 49 C.F.R. § 1115.4, the Board may reopen a proceeding because of “material error, new evidence, or substantially changed circumstances.” The alleged grounds must be sufficient to lead the Board to materially alter its prior decision. If a party has presented no new evidence, changed circumstances, or material error that “would mandate a different result,” then the Board will not reopen.⁴ Here, Barrington does not allege material error. And, as discussed below, we find that Barrington does not present new evidence or substantially changed circumstances that warrant the reopening of this proceeding for the purpose of requiring a grade separation at U.S. 14.

Barrington asserts that the surge of unanticipated, energy-related rail traffic on CN’s system presents new evidence and substantially changed circumstances that warrant reopening this proceeding. Barrington states that CN’s acquisition of the EJ&E line has facilitated this increased movement of energy commodity traffic (namely, crude oil, ethanol, and frac sand shipments) and that these unforeseen traffic volumes were not factored in the projections relied upon by the Board in its 2008 Final Decision. Barrington contends that the Board should now

⁴ See Montezuma Grain v. STB, 339 F.3d 535, 541-42 (7th Cir. 2003); DesertXpress Enters.—Pet. for Declaratory Order, FD 34914, slip op. at 6-8 (STB served May 7, 2010).

give consideration to this surge of energy related traffic and its impact on Barrington. In particular, Barrington states that the additional traffic will increase the number and length of trains on the EJ&E line, which will adversely affect roadway congestion and pose a threat to public safety in Barrington and the surrounding area. Barrington therefore argues that the Board should reopen the proceeding and require CN to pay \$47 million to complete a grade separation at U.S. 14.

At the outset, we note that the traffic volumes on the EJ&E line are *lower* than the projected levels relied upon by the Board in its Final Decision. In 2008, the Draft EIS projected that in 2015 U.S. 14 would experience an average of 20.3 trains per day.⁵ According to CN's recent operational reports,⁶ the actual 2014 average number of trains going through Barrington has been 17.5 trains per day—an average train number lower than the 2008 Draft EIS forecast. With regard to the anticipated future growth in energy-related traffic, CN projects that the maximum total growth through Barrington of its primary energy-related traffic will be an additional 2.5 trains per day, generating a total of 20 trains per day. Again, this train count does not exceed the 20.3 trains projected in the 2008 Draft EIS. Therefore, the Board's original analysis of the acquisition did in fact consider the impacts of rail line operations in Barrington at the traffic levels that are moving through Barrington today and are expected in the near term.⁷

Barrington argues that, while the average daily volume of trains may be below the projected figure, “the number of carloads has certainly exceeded the number of projected carloads by a wide margin.”⁸ To support its argument, Barrington cites CN's September 2014 operational report, which shows that the average length of 29 trains that passed through Barrington in September 2014 was 8,568 feet, up from the average train length in 2011 of 5,800 feet. However, the September 2014 operational report includes only trains that blocked crossings for more than 10 minutes and thus does not offer a complete account of rail traffic on the EJ&E line. Moreover, the length of trains going through Barrington is not substantially greater than the projected length of trains considered by the Board in its Final Decision. CN

⁵ Draft EIS Table 4.3-4.

⁶ See CN Monthly Operational Reports (Jan. 2014 – Dec. 2014), *available at* <http://www.stbfinancedocket35087.com/html/monthlyreports.html>.

⁷ Draft EIS Table 4.3-4. See also 2012 Decision, slip op. at 10 n.45 (considering 2015 projected traffic levels of 20 trains per day). In its surreply, Barrington takes issue with the Board's reliance on and use of averages in its analysis, arguing that such averages fail to reflect the actual impact of rail traffic on Barrington. To the extent that Barrington claims that the Board materially erred in how it calculated projected rail traffic, we note that agencies have considerable discretion in establishing the approach and methodology to be used in EIS studies. 2012 Decision, slip op. at 17-18. We find no material error sufficient to warrant reopening here.

⁸ Pet. 15-16.

states that the actual average train length for trains operating through Barrington in 2014 was 6,916 feet, only slightly higher than the 2008 projected average of 6,829 feet.⁹

The Board explained in both the Final Decision and the 2012 Decision that meeting or exceeding a certain level of traffic did not automatically warrant mitigation. As the Board has explained in its previous decisions on this matter, OEA conducted an extensive analysis of the 112 crossings along the EJ&E rail line, including U.S. 14 during the EIS process, and several factors were considered in determining whether a given crossing received mitigation. To meet the Board's initial threshold for environmental analysis, a crossing would have to experience a projected average daily traffic volume of 2,500 or more vehicles per day.¹⁰ Then, to be considered "substantially affected" by the transaction, those crossings would have to meet or exceed at least one of the following three threshold criteria based on rail and car traffic projections for 2015:¹¹ (1) crossing level of service (LOS)¹² (where a crossing was at or over capacity and would be reduced to a Crossing LOS of E or F as a result of the transaction); (2) effects on queue length (where a transaction-related queue length would block another roadway that would not otherwise be blocked); and (3) total amount of delay for all vehicles stopped at a crossing (where a crossing would experience more than 40 hours of total transaction-related vehicle delay in a 24-hour period).¹³ As noted by OEA in the Final EIS, "simply exceeding the thresholds used by [OEA] does not mean that the crossing must be grade-separated or even requires mitigation."¹⁴ A host of other factors—including vehicle exposure, the importance of the highway at the particular crossing to regional traffic flows, preexisting congestion, existing structures (such as roadway configuration and mature trees), and the cost of

⁹ See Draft EIS Table 4.3-5. In its surreply, Barrington requests that we require CN to report the actual lengths of all trains that moved through Barrington in 2014 and require CN to continue to provide that information for the duration of the oversight period. However, Barrington has not demonstrated a need to increase the Board's reporting requirements to add data on average train lengths. The crux of Barrington's concerns about this transaction have centered on the impact of longer trains on blocked crossings. CN is already providing detailed data for trains that block crossings for 10 minutes or more in its monthly operating reports.

¹⁰ Draft EIS 4.3-3.

¹¹ Based on CN's projections and public comments, OEA determined that 2015 represented the limit of what was reasonably foreseeable with regard to projected rail traffic on the EJ&E line and that projections beyond 2015 would be speculative. See Final Decision, slip op. at 41; Draft EIS 2-27 to 2-28.

¹² LOS, as defined in the Highway Capacity Manual (a manual developed by the Federal Highway Administration, the Transportation Research Board, and the American Association of State Highway and Transportation Officials), refers to the efficiency at which a highway/rail at-grade crossing operates when a train passes through. Letters from A to F represent the LOS, with LOS A indicating relatively free-flowing traffic and LOS F indicating extreme congestion.

¹³ Draft EIS 4.3-8 to 4.3-10.

¹⁴ Final EIS 4-8.

a grade separation—went into determining whether any mitigation was appropriate for a particular “substantially affected” crossing.¹⁵ Ultimately, of the 13 crossings found to be “substantially affected” by the transaction, eight crossings received mitigation, of which two crossings (Ogden Avenue in Aurora, Ill., and Lincoln Highway in Lynwood, Ill.) received grade separation mitigation.

Although the Board gave extensive consideration to U.S. 14 during the EIS process, that crossing did not meet or exceed any of the three thresholds to be considered “substantially affected.” In response to Barrington’s comments on the Draft EIS, the Board performed further analysis of Barrington, including an additional traffic analysis specifically focused on the Barrington area. OEA determined that a grade separation at U.S. 14 would provide minimal benefit to the traffic flow in the Barrington area, primarily due to preexisting roadway capacity constraints near U.S. 14. In keeping with its practice of mitigating only impacts resulting directly from the transaction and not requiring mitigation for preexisting conditions and preexisting railroad operations, the Board concluded that the U.S. 14 intersection in Barrington did not meet the Board’s criteria for a grade-separated crossing. Barrington sought judicial review of the Board’s Final Decision in the United States Court of Appeals for the District of Columbia Circuit, which upheld the Board’s decision, including the Board’s determination that, under the Board’s criteria, grade-separated crossing mitigation in Barrington was not appropriate.¹⁶

Barrington again seeks mitigation in the form of a grade separation at U.S. 14 but has not presented new evidence that would materially alter the findings of OEA’s environmental analysis or refute the Board’s conclusion that U.S. 14 did not meet the Board’s criteria for a grade separation mitigation condition. Barrington presents no new evidence that would now cause U.S. 14 to be deemed a “substantially affected” crossing that would warrant consideration of grade separated crossing mitigation under the Board’s criteria. Nor does Barrington present new evidence that would alter the Board’s determination that projected vehicular delays at and around U.S. 14 are primarily attributable to preexisting conditions at and around U.S. 14.¹⁷

¹⁵ Id. at 4-5, 4-8 to 4-11, including Table 4.2-1.

¹⁶ See Barrington I, 636 F.3d at 672.

¹⁷ In its surreply, Barrington argues that the 2011 traffic study demonstrates that a grade separation would only address the extensive hours of vehicular delay attributed to CN’s expanded operations through Barrington. Barrington also argues that its 2011 traffic study shows delays that would warrant U.S. 14 to be considered “substantially affected.” The 2011 traffic study is not new evidence. The Board considered the 2011 traffic study in its 2012 Decision and found that the traffic study would not have altered the outcome of the Board’s decision and that the study showed that existing capacity constraints on U.S. 14 would contribute much more significantly to the vehicle delays at the crossing than additional CN trains on the EJ&E line. 2012 Decision, slip op. at 10-12; Barrington II at 329 (agency did not abuse its discretion where evidence would not have led to a different outcome regarding a grade separated crossing).

Rather, Barrington raises generalized concerns regarding the surge of energy-related rail traffic on CN's system. But the traffic mix and commodities transported over a crossing were not among the factors used to determine whether a crossing was substantially affected, and Barrington fails to address the specific factors that the Board did consider in imposing grade crossing mitigation. While the Board has recognized that recent rail congestion in the Chicago region has had an effect on the entire rail network,¹⁸ Barrington has not shown how these circumstances would justify reopening for the purpose of requiring the relief that it seeks—a grade separation.

Barrington argues that the unanticipated movement of flammable hazardous materials through Barrington poses a threat to public safety not previously considered by the Board and asserts that a grade separation is the only relief that can adequately address the threat that these movements pose. However, the Final EIS recognized that increases in freight rail traffic on the EJ&E line would also increase the risk of adverse hazardous materials incidents.¹⁹ Because a variety of hazardous materials, including flammable liquids, already moved over the line pre-transaction, OEA concluded that the transaction “does not create any new threats.”²⁰ That conclusion remains valid even though the volume of energy-related traffic that moves through Barrington has increased by an additional 2.5 trains per day over CN's original projection and the specific types of hazardous materials moving through Barrington may not be exactly the same. It would not be realistic to expect a carrier's traffic mix to remain static years after the approval of a transaction. Moreover, the Board has made clear that rail carriers “have not only a right but a statutory common carrier obligation to transport hazardous materials, where the appropriate agencies have promulgated comprehensive safety regulations.”²¹ Other Federal agencies, including the Federal Railroad Administration (FRA), the Transportation Security Administration, and the Pipeline and Hazardous Materials Safety Administration (PHMSA), have primary jurisdiction over rail safety issues, and those agencies have established regulations applicable to the transportation of hazardous materials via rail. New requirements that would affect the movement of oil by rail have been recently announced.²²

¹⁸ See Canadian Nat'l Ry.—Control—EJ&E W. Co., FD 35087, slip op. at 3 (STB served Dec. 17, 2014).

¹⁹ Final EIS 2-74.

²⁰ Id.

²¹ Eric Strohmeier—Acquis. & Operation Application—Valstir Indus. Track in Middlesex & Union Cntys., N.J., FD 35527 (STB served Oct. 20, 2011), aff'd sub nom. Riffin v. STB, 733 F.3d 340 (D.C. Cir. 2013) (upholding Board's determination that railroads have a common carrier obligation to carry hazardous materials).

²² In April and May of 2014, the Department of Transportation issued Emergency Orders regarding the movement of crude oil by rail (using TSA-defined High Threat Urban Areas designations) and FRA/PHMSA jointly issued safety guidance regarding such movements. On May 1, 2015, PHMSA, in conjunction with FRA, adopted updated safety regulations that would apply to “high hazard flammable trains,” which include, among other things, certain crude oil

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Lastly, Barrington submits that its receipt of a \$2.8 million federal grant under the U.S. Department of Transportation's Transportation Investment Generating Economic Recovery (TIGER II) program to undertake preliminary engineering studies for a grade separation at U.S. 14 supports reopening. However, Barrington's TIGER II grant is not new evidence. Barrington relied on the same grant as support for its 2011 reopening petition, which the Board found not to be relevant for purposes of its consideration of reopening.²³ Barrington asserts that it would not have applied for the grant but for CN's acquisition, but here, as in 2011, Barrington has not cited to any statements related to the awarding of the grant that suggests that the Board should have imposed a grade separation at U.S. 14.²⁴

Conclusion. As discussed above, OEA performed an extensive analysis of at-grade crossings to determine the appropriate mitigation for crossings affected by CN's acquisition of the EJ&E line. While a crossing that met or exceeded specific threshold criteria received further review, it did not automatically require mitigation under the Board's criteria. Based on OEA's analysis and recommendations, the Board concluded in its Final Decision that U.S. 14 did not meet the Board's criteria for a grade separation mitigation condition and declined to reopen that determination in its 2012 Decision. Here, Barrington raises concerns about an increase in energy-related traffic on CN's system but does not provide new evidence or prove changed circumstances that would materially alter the Board's prior conclusions regarding mitigation.

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

(. . . continued)

movements by rail. The Federal Emergency Management Agency has assessed the training needs of those states where oil moves via rail and is working to ensure state participation in appropriate programs.

²³ 2012 Decision, slip op. at 20.

²⁴ In arguing that a grade separated crossing is the only appropriate mitigation, Barrington suggests that the Active Crossing System (ACS) technology developed by CN and required by Condition 18 of the Final Decision (as modified), is ineffective and inaccurate. See Surreply 21-23. As CN points out, however, Barrington consented to the use of ACS technology. See CN Reply to Surreply 20 n.34; CN Pet. to Reopen Decision 16 for the Limited Purpose of Modifying Final Mitigation Condition No. 18, Ex. A (filed Apr. 23, 2010). To the extent that Barrington has suggestions for a more effective technology, we encourage Barrington to discuss this issue with CN, which has indicated a willingness to "determine if there are practical improvements that can be made to ACS." CN Reply to Surreply 20 n.34.

It is ordered:

1. Barrington's petition to reopen is denied.
2. Barrington's and CN's requests for leave to file a reply to a reply are granted.
3. Barrington's request for oral argument is denied.
4. This decision is effective on its date of service.

By the Board, Acting Chairman Miller and Vice Chairman Begeman.