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U.S. Department of
Transportation
Office of the Secretary
of Transportation

General Counsel

1200 New Jersey Avenue, S.E.
Washington, D.C. 20590

DOT-7

October 27, 2008

Hon. Anne K. Quinlan, Acting Secretary
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423

Re: Canadian National Rwy – Control – EJ&E West Co
Finance Docket No. 35087

Dear Secretary Quinlan:

Introduction

The Canadian National Railway Company and the Grand Trunk Corporation (collectively, "Applicants" or "CN") have petitioned the Surface Transportation Board ("STB" or "Board") on several occasions to issue its final decision in this proceeding in a manner that allows them to complete their purchase of the Elgin, Joliet & Eastern Railway Company ("EJ&E") by the end of the calendar year. CN-49 (filed August 14, 2008); CN-33 (filed May 13, 2008) The Applicants are now pursuing this same end via litigation¹

The driving force behind these efforts is a provision in the contract by which CN would acquire control of the EJ&E that, on its face, may allow EJ&E's current owner to refuse to go through with the transaction if the regulatory approval process is not completed by December 31, 2008. Another contractual term, however, seems to allow for delays caused by the regulatory process. *See* Decision No. 13 (served July 24, 2008) at 4-6.

The United States Department of Transportation ("DOT" or "Department") expresses no view either on the legal arguments made in the course of the ongoing administrative and judicial processes or on the true import of potentially differing contractual terms. The public benefits of this transaction are such, however, that the public interest would suffer if the consolidation failed simply because of the difference of a few weeks' time in the release of the final decision in this proceeding. DOT accordingly urges the Board to exert every effort to reach its final decision within a time frame that allows for

¹ *In Re Canadian National Railway Co and Grand Trunk Corp*, No 08-1303 (DC Cir September 18, 2008)

of the final decision in this proceeding. DOT accordingly urges the Board to reach its final decision within a time frame that allows for completion of this acquisition by the end of the year, assuming the decision is favorable to the Applicants ²

Discussion

This proceeding is unprecedented in pertinent respects. It concerns a rail consolidation that is "minor" by underlying regulatory measures, and which ordinarily would receive the most expedited processing under the statute. 49 U.S.C. §11325(a), (d)(2); *also* 49 C.F.R. § 1180.2. At the same time the transaction merits preparation of a complete environmental impact statement ("EIS") by dint of its potential consequences for the affected region, a process without binding deadlines. *See, e.g.*, Decision No. 2 (served November 26, 2007) Indeed, the STB recognized at the outset that parties would likely have very different interests in these two facets of the proceeding, and specifically invited participation in one or the other or both. Notice of Intent to Prepare an EIS (served December 21, 2007) at 3

The underlying regulatory standard governing this merger essentially requires approval in the absence of a substantial lessening of competition or anticompetitive effects that outweigh the public benefits. 49 U.S.C. § 11324(d). The record in this case insofar as competition issues are concerned closed more than five months ago. The Department concluded that the transaction warrants approval, with fairly limited conditions, under this criterion. DOT-4 (filed March 13, 2008). Regardless of one's view of the merits of the transaction, however, it seems reasonable that a decision with respect to these issues in this "minor" combination could be completed in very short order.

More importantly for present purposes, DOT has also found that substantial public benefits would arise from the shift of rail traffic off CN lines and onto EJ&E track. Efficiency will be increased, public safety enhanced, underutilized rail capacity will be more fully used and expanded, and substantially fewer people will be exposed to the adverse impacts that attend rail operations. DOT-6 (filed September 30, 2008) at 3-6.

Those impacts are not insignificant. The Board's staff has therefore conducted a thorough examination of the various environmental consequences of the merger, and has considered a variety of mitigation options for the adverse impacts that will be visited upon the communities along the EJ&E. That process is very near its end; all scheduled public hearings have been held and comments filed. ³ What remains is to produce the final environmental impact statement ("FEIS"). The Board has previously projected that the FEIS will be completed between December 1, 2008 and January 31, 2009, and has

²/ DOT moves for leave to file this document, which is otherwise not contemplated by the current procedural schedule, so as to convey our very strong interest in a successful consummation of the pending consolidation

³/ DOT has recommended adoption of specific measures to ameliorate congestion-related and other impacts *id.* at 7-16

committed to issuing its final decision "as soon as possible" thereafter consistent with applicable regulations. Decision No 13, *supra*.⁴

Conclusion

The risk to the pending transaction is admittedly uncertain, but it appears that that risk can be avoided entirely with only a slightly more ambitious schedule in place. Given the transaction's public benefits, it should be. The Department therefore urges the Board to take all practicable steps to issue its final decision in a timely manner.

Respectfully submitted,



D.J. GRIBBIN
General Counsel

cc: All Parties of Record

⁴/ CN has financed the EIS process thus far, and presumably would supply whatever additional resources might be necessary to complete the final EIS sooner rather than later