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CN-34

May 27, 2008

BY E-FILING

The Honorable Anne K. Quinlan, Esq.
Acting Secretary
Surface Transportation Board
Office of the Secretary
395 E Street, S.W.
Washington, DC 20423-0001

Re: *Canadian National Railway Company and Grand Trunk Corporation –
Control – EJ&E West Company (STB Finance Docket No. 35087)*

Dear Ms. Quinlan:

Enclosed for filing in the above-referenced docket is a letter from the Association of American Railroads, dated May 23, 3008, in support of Applicants' Request for Establishment of Time Limits for NEPA Review and Final Decision (CN-33, filed May 13, 2008).

Very truly yours,



David A. Hirsh
Counsel for Canadian National Railway Company
and Grand Trunk Corporation

Enclosure

cc: All parties of record



ASSOCIATION OF AMERICAN RAILROADS

Office of the President
Edward R. Hamberger
President and Chief Executive Officer

May 23, 2008

Anne K. Quinlan, Esq.
Acting Secretary
Surface Transportation Board
Office of the Secretary
395 E Street, S.W.
Washington, DC 20423-0001

**Re: Canadian National Railway Company and Grand Trunk
Corporation – Control – EJ&E West Company (STB Finance Docket
No. 35087)**

Dear Secretary Quinlan:

The Association of American Railroads (“AAR”), on behalf of its freight railroad members,¹ respectfully submits this letter in support of Applicants’ Request for Establishment of Time Limits for NEPA Review and Final Decision, filed May 13, 2008 by Canadian National Railway and Grand Trunk Corporation (“Applicants”) in the above proceeding. The AAR has a strong interest in ensuring that regulatory proceedings that have the potential to increase the efficiency of the national rail transportation system and alleviate significant capacity constraints be resolved expeditiously by the Board and not delayed indefinitely or inordinately by the environmental review process. The AAR accordingly urges the Board to establish a reasonable timetable for completion of its environmental impact statement (EIS) and issuance of a final decision in this proceeding as requested by Applicants.²

A. Background of Proceeding

Applicants filed a request on October 30, 2007 to acquire control of the principal rail lines of EJ&E, an underutilized belt railroad running around Chicago (“the Transaction”). The application was filed under the acquisition of control provisions of 49 U.S.C. 11324

¹ The National Rail Passenger Corporation, an AAR member, is not a party to this letter. The Kansas City Southern Railway Company, also an AAR member, neither supports nor opposes the AAR’s position in this letter.

² The AAR otherwise takes no position with respect to this proceeding.

(d), and was designated by the Board as a “minor” transaction under its rules.³ See 49 C.F.R. 1180.2 (b) and (c). Under the ICCTA, Board decisions in “minor” control transactions are due within 180 days of the filing of the application. 49 U.S.C. 11325(d).

CN’s application described its plans upon approval of the Transaction to make improvements to the EJ&E line and yard infrastructure and reroute traffic from existing CN routes to the EJ&E line to alleviate the capacity problems experienced by CN and other railroads in the Chicago area. Applicants’ control application is opposed principally by local interest groups who have expressed concern about the increased noise, traffic congestion, and movement of hazardous material that would result from the rerouting of rail traffic by CN to the EJ&E.

The Board announced in its November 26, 2007 decision that it would prepare an EIS to address the potential environmental impacts of the proposed transaction. The Board noted that although the ICCTA provides for a decision by April 25, 2008, the date would be extended if necessary to complete the environmental review process. The Board also noted that “the time the EIS will take to prepare cannot be determined ahead of time because there is no way to predict in advance all of the specific issues that may arise.” November 26, 2007 Decision at 16.

On April 28, 2008, the Board issued a decision setting forth its Final Scope of Study for the EIS. The Board, however, set no procedural schedule for completion of the EIS or issuance of a final decision on the control application.⁴ Applicants’ Request for Establishment of Time Limits was filed in response to the Board’s April 28, 2008 decision.

B. Discussion

The AAR strongly supports Applicants’ Request for Establishment of Time Limits in this proceeding. Under the ICCTA, the Board’s governing statute, the Board is charged with specific statutory rail regulatory responsibilities and functions that are within its exclusive jurisdiction. One of the important decisions that fall exclusively within the agency’s authority is the approval of rail acquisition of control applications under 49 U.S.C. 11324 (d) and the evaluation of transportation efficiencies and other public benefits potentially arising from a proposed transaction. Although the Board (similarly to other federal agencies) may be required under NEPA to take into account the potential environmental impacts of its decisions in control and other proceedings deemed “major actions” under NEPA, the Board’s primary responsibility is to address specific rail

³ Minor transactions are those that do not involve two or more Class I railroads and for which a determination can be made either (1) that the transaction clearly will not have any anticompetitive effects or (2) that any anticompetitive effects of the transaction will clearly be outweighed by the transaction’s anticipated contribution to the public interest in meeting significant transportation needs. 49 C.F.R. 1180.2 (b).

⁴ See Notice of Availability of the Final Scope of Study for the Environmental Impact Statement (EIS), (STB served April 28, 2008)(“Scoping Order”)

regulatory issues under its governing statute.⁵ Moreover, under the Supreme Court decision in *Flint Ridge Development Company*, where an unavoidable conflict exists between NEPA and other statutes, “NEPA must give way.” *Flint Ridge Dev. Co. v. Scenic Rivers Ass’n of Okla.*, 426 U.S. 776, 788 (1976). Thus, the Board would be in derogation of its primary statutory responsibilities in this proceeding and similar proceedings if it were to defer a decision on the merits indefinitely or inordinately for the purpose of addressing ancillary environmental issues.

Moreover, Congress specifically recognized that merger and control proceedings under 49 U.S.C. 11124(d) have the potential to bring needed efficiencies to the rail transportation system by allowing carriers to rationalize their systems and reconfigure traffic flows for more efficient operations. Thus, in the Staggers Rail Act of 1980, Congress enacted specific time limits for regulatory review of merger and control proceedings, including the 180-day deadline applicable to the instant proceeding, to encourage carrier proposals that would bring greater efficiency to the national rail network.⁶ Given that the 180-day statutory timetable has now expired, the Board should adopt a reasonable timetable to complete the proceeding.

Further, and most important to this proceeding and similar proceedings, the Board’s setting of a reasonable deadline to address NEPA issues and issue a final decision would be consistent with the national public interest in ensuring a sound transportation system. As the Board and others recognize, there currently exists and will continue to exist for the foreseeable future serious and growing capacity constraints in the national rail transportation network. *See, e.g.*, Ex Parte no. 671, Rail Capacity and Infrastructure Requirements (STB served March 6, 2007); *see also* Report of the National Surface Transportation Policy and Revenue Study Commission (January 2008); Ex Parte No. 671, Comments of the U.S. Department of Transportation (April 11, 2007); National Rail Freight Infrastructure Capacity and Investment Study (Cambridge Systematics (September 2007)). Accordingly, there is a critical need for rail capacity improvements if the national rail network is to be able to handle the steep increases in demand that are expected over the next decades.

A rail network capable of handling future demand not only creates transportation benefits, but also benefits for the environment. For the commodities it carries, rail is a safer and more efficient means of transportation than trucks. Rail consumes far less fuel and emits far lower levels of greenhouse gases per ton mile of freight shipped than truck. In that regard, as the Board recognizes, the agency has a major regulatory role to play in ensuring that the rail capacity constraint problem is satisfactorily addressed and that the private (and public) investment necessary to expand capacity is encouraged. *See* STB Ex

⁵ NEPA requires only that an agency take a “hard look” at the potential environmental consequences and consider potential mitigation actions before taking “major action” under its governing statute. *See Baltimore Gas & Elec. Co. v. National Res. Defense Council*, 462 U.S. 87 (1983).

⁶ Pub. L. No. 96-448, sec. 228(d), 94 stat. 1895, 1932 (enacting former 49 U.S.C. 11345(d) (now 49 U.S.C. 11325(d))).

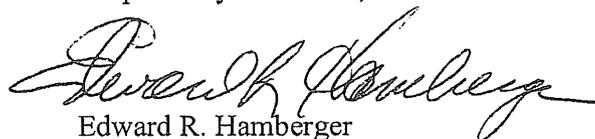
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Parte No. 671, Rail Capacity and Infrastructure Requirements, Slip Op. at 2 (STB served March 6, 2007).

One of the core statutory policy directives to the Board under the National Rail Transportation Policy (NRTP) is “to ensure the development and continuation of a sound rail transportation system ... to meet the needs of the public and national defense”, 49 U.S.C.10101 (4). Another core statutory policy directive to the Board under the NRTP is the “expeditious handling and resolution” of proceedings before it. 49 U.S.C. 10101 (15). In light of the potential significant efficiencies at stake, Board failure to adopt and adhere to a reasonable timetable for resolution of this proceeding or similar types of proceedings would be perceived as neglecting its statutory responsibilities to ensure a sound transportation system. It would also send a strong message of discouragement to rail carriers and potential private (and public) investors that any agency action required to approve even minor control transactions or infrastructure projects requiring environmental review may be indefinitely or inordinately delayed, imposing significant administrative and opportunity costs, and that agreements for the undertaking of such projects may be potentially jeopardized by agency inaction. In short, the AAR respectfully submits that the Board would be seriously remiss in implementing its statutory duties under these specific NRTP policy directives if it failed to adopt a reasonable schedule to address transactions.

The AAR further submits that Board failure to set a reasonable timetable in this proceeding or similar proceedings for completion of the EIS and issuance of a final decision would also be contrary to NEPA requirements. Under regulations of the Council on Environmental Quality (CEQ), the agency charged with administering NEPA, federal agencies are required in appropriate circumstances, such as this proceeding, to set time deadlines for completing environmental review. See 40 C.F.R. 1501.8. Applicants may also request a federal agency to set a deadline for environmental review if one has not been established. See 40 C.F.R. 1501.8 (a). Applicants’ request for a time limit for environmental review was filed pursuant to 40 C.F.R. 1501.8 and referenced the Board’s April 28, 2008 Scoping Decision defining the environmental issues to be addressed in this proceeding. Because all specific environmental issues to be considered by the Board in its environmental review are now identified, there is no longer any valid reason under the ICCTA or NEPA for the Board not to adopt a reasonable timetable for completion of environmental review and issuance of a final decision at this time.

Respectfully submitted,

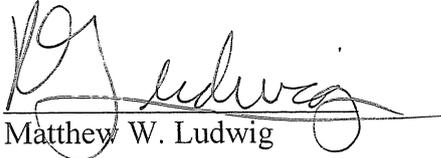


Edward R. Hamberger

cc: All parties of record

CERTIFICATE OF SERVICE

I certify that I have this 27th day of May, 2008, served copies of the foregoing letter, transmitting the letter from the Association of American Railroads in support of Applicants' Request for Establishment of Time Limits for NEPA Review and Final Decision, upon all known parties of record in this proceeding by first-class mail or a more expeditious method.


Matthew W. Ludwig