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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 35087

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

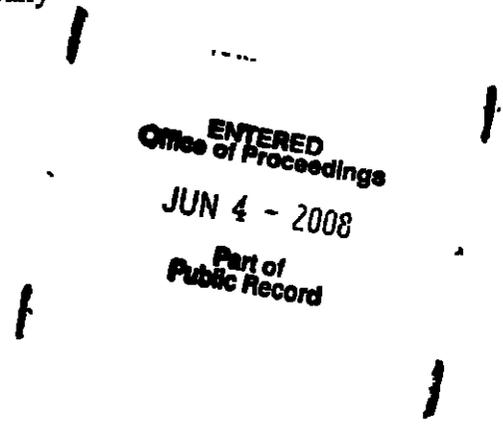
**BNSF RAILWAY COMPANY'S COMMENTS ON APPLICANTS' REQUEST FOR
ESTABLISHMENT OF TIME LIMITS FOR NEPA REVIEW AND FINAL DECISION**

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Dated: June 2, 2008



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BNSF Railway Company ("BNSF") respectfully submits these Comments on the Request for Establishment of Time Limits for NEPA Review and Final Decision filed by Canadian National Railway Company and Grand Trunk Corporation (collectively, "Applicants"). BNSF has not taken a position on the underlying transaction, but believes that the Applicants' most recent filing raises important issues that deserve careful consideration.

INTRODUCTION

On April 25, 2008, the Board served a decision setting forth the final scope of study for the Environmental Impact Statement ("EIS") being prepared in connection with the proposed transaction at issue. Applicants have now asked the Board to set a timetable for completing the EIS process and issuing a final decision. Such a request is consistent with the letter and spirit of NEPA regulations issued by the President's Council on Environmental Quality ("CEQ"). What is more, an efficient environmental review process will reduce transaction costs in future proceedings, and allow the public to receive the benefits of the Board's decisions more quickly. Without weighing in on the details of Applicants' timetable in this particular instance, BNSF

accordingly expresses its support for the use of NEPA decision-making timetables in appropriate circumstances.

COMMENTS

As the Board is well-aware, NEPA requires that federal agencies review and publish the potential environmental consequences of any “major Federal action” before deciding to undertake that action. As relevant here, a major Federal action includes regulatory approval of a project or transaction being carried out by private parties.

As the Board is also aware, the NEPA environmental review process can often take a very long time, and impose tremendous costs on both the agency and the regulated parties. When CEQ issued regulations governing agencies’ implementation of NEPA, it recognized this potential problem. Instead of proposing universal, inflexible time limits, however, CEQ “encouraged” agencies “to set time limits appropriate to individual actions” 40 C.F.R. § 1501.8. In addition, CEQ’s regulations specifically provide that “[t]he agency *shall* set time limits if an applicant for the proposed action requests them.” *Id.* § 1501.8(a) (emphasis added). The sole condition on this mandate is that the timetable set by the agency be “consistent with the purposes of NEPA and other essential considerations of national policy.” *Id.* Put differently, when a project proponent asks for a timetable for completion of the NEPA process, as Applicants have done in this instance, the Board is obligated to issue one, keeping in mind that the deadlines imposed must not interfere with the basic goals of NEPA or other vital “national policy.”

CEQ’s regulations further suggest eight factors that “may” affect the time limits set by the agency. *Id.* § 1501.8(b)(1). Several of these considerations focus on the time it would likely take to adequately review environmental impacts. For example, agencies are directed to consider the proposed action’s “[p]otential for environmental harm” and “[s]ize,” including the “[n]umber of persons and agencies affected.” *Id.* § 1501.8(b)(1)(i), (ii), (v). Also relevant are “[s]tate of

the art analytic techniques” and the “[d]egree to which relevant information is known and if not known the time required for obtaining it”—in other words, how quickly the agency will be able to catalogue and assess the potential environmental impacts of the proposed action. *Id.* § 1501.8(b)(1)(iii), (vi)

Crucially, CEQ’s list of potential considerations for the imposition of time limits on a NEPA review is not restricted to issues involving the extent of environmental impacts or the complexity of the review itself. The “[d]egree of *public need for the proposed action*, including the consequences of delay,” is equally important. *Id.* § 1501.8(b)(1)(iv) (emphasis added). This factor is particularly relevant to many of the rail transactions considered by the Board. Preserving rail carriers’ ability to serve the public by efficiently transporting freight in interstate commerce lies at the heart of the Board’s regulatory role. CEQ’s regulations confirm that NEPA’s environmental review requirements should be balanced with this goal, not used to subvert it.

Furthermore, the implementation of reasonable timetables for NEPA review in the sort of transaction at issue here will provide a measure of much-needed certainty to transacting parties. Simply knowing how long it will take the Board to reach a decision—regardless of what it decides—will allow parties to make necessary financial, commercial and operational plans. Conversely, the absence of time limits on the NEPA process may in some cases put an entire transaction at risk, regardless of the deal’s value to the public or its potential harm to the environment. In addition, leaving acquisition and merger transactions tangled up in an extended environmental review can create an incentive to use alternative, though not equivalent, arrangements like haulage and interchange agreements that often do not provide equivalent public benefits. NEPA should not be used in a manner that causes regulated parties to transact

business in a less efficient manner, without necessarily advancing the statute's basic goal of protecting the natural environment

Finally, it is worth noting that CEQ regulations also call for consideration of the “[d]egree to which the action is controversial” in determining appropriate time limits. 40 C.F.R. § 1501.8(b)(1)(vii). This does not mean, of course, that the application of time limits is inconsistent with the NEPA review of a controversial project. Far from it. Public controversy is really only relevant at the public comment stage of the environmental review process. Thus, an action that engenders significant public controversy may in some cases call for a longer public comment period, but likely would not affect the time necessary to prepare a Draft EIS. *See id.* § 1501.8(b)(2) (allowing agencies to set “limits for each constituent part of the NEPA process”). As Applicants suggest, controversial projects may need time limits even more than other actions to prevent the controversy from extending the NEPA process far beyond the time that the actual environmental review would otherwise take

CONCLUSION

All of the potential pitfalls that accompany a NEPA review without time limits underscore the wisdom of applying CEQ's straightforward regulatory framework: When an applicant requests reasonable time limits, the Board should set them. *See* 40 C.F.R. § 1501.8(a). Furthermore, the reasonableness of those time limits should be judged both by the nature of the requisite environmental review and by the public necessity of the proposed action. Accordingly, BNSF supports the use of NEPA decision-making timetables in appropriate circumstances such as are presented in this proceeding

Respectfully submitted,



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Dated: June 2, 2008

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of BNSF Railway Company's Comments on Applicants' Request for Establishment of Time Limits for NEPA Review and Final Decision was served on all parties of record in this proceeding by regular mail or a more expeditious manner.

