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SERVICE DATE – DECEMBER 17, 2014

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35087

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

Digest:¹ In 2008, the Board authorized Canadian National Railway Company to acquire control of EJ&E West Company. This decision grants a request by the Village of Barrington, Ill., to extend the oversight period for this transaction for two years, to January 23, 2017.

Decided: December 16, 2014

The Board is granting the petition by the Village of Barrington, Ill., and the TRAC Coalition (collectively, Barrington) to extend for two years the oversight period for the transaction in which Canadian National Railway and Grand Trunk Corporation (collectively, CN) acquired control of EJ&E West Company (EJ&E).

BACKGROUND

In Canadian National Railway & Grand Trunk Corp.—Control—EJ&E West Co. (Approval Decision), FD 35087 (STB served Dec. 24, 2008), the Board approved, subject to environmental and other conditions, CN's acquisition of control of EJ&E, a wholly owned, noncarrier subsidiary of Elgin, Joliet and Eastern Railway Company. The approval was subject to a five-year monitoring and oversight period to allow the Board to closely examine various impacts of the transaction. In a subsequent decision, the Board extended the oversight period for an additional year, until January 23, 2015. See Canadian Nat'l Ry. & Grand Trunk Corp.—Control—EJ&E W. Co., FD 35087 (STB served Dec. 21, 2010) (Decision No. 26). As part of the oversight, CN is required to submit to the Board quarterly reports detailing its compliance with environmental conditions imposed by the Board, and monthly reports detailing its operations, including the number of instances a crossing is blocked for more than 10 minutes and average daily train counts on various segments of the EJ&E line.

On August 28, 2014, Barrington filed a petition seeking an extension of the oversight period for two years, until January 23, 2017. Barrington notes that, in the Approval Decision,

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).

the Board intended the oversight period to cover a two-year period following the full implementation of CN's operating plan.² Barrington argues that CN's operating plan has not yet been fully implemented, and therefore, an additional two-year extension is necessary. Specifically, Barrington notes that CN's most recent monthly operating report shows that the rail traffic counts on the EJ&E have not yet reached the number of trains that CN envisioned, particularly on the Leighton to Spaulding segment on which Barrington is located.³ Accordingly, Barrington asserts that (assuming that CN will achieve the full planned level of train counts by the end of 2014) extending the oversight period until January 23, 2017 will provide the Board with the full two-year post-implementation time span for determining how CN operations are impacting affected communities, as was originally intended in the Approval Decision.

United States Senator Richard J. Durbin submitted a letter in support of Barrington's petition.⁴ Senator Durbin notes that during the first quarter of 2014 there was a significant increase of grade crossing blockages of 10 minutes or more on the EJ&E line, to 5,267 blockages—the most since CN acquired the EJ&E. Senator Durbin also expresses concern over potential record harvests and significant rail congestion in the Midwest, which, he states, could lead to additional congestion and crossing blockages on the EJ&E line in the near future.

On September 16, 2014, CN replied to Barrington's petition, arguing that extension of oversight or reporting is unnecessary and that CN's lower-than-projected traffic on the EJ&E shows that the Board's previous rail traffic analysis considered greater impacts than necessary and undercuts Barrington's request to extend oversight and reporting. CN argues further that its acquisition of, and major infrastructure investments, on the EJ&E line are helping to reduce rail traffic congestion through Chicago and that even if oversight is terminated as scheduled, the Board would still have sufficient authority to address any significant post-termination issues. In response to the concerns raised by Senator Durbin, CN asserts that the increase in crossing blockages on the EJ&E line likely resulted from the harsh 2013-14 winter and that the number of blockages has declined in the months since then.

U.S. Representative Steve Cohen and several other parties filed comments opposing an extension of the oversight period.⁵ Those parties argue that CN has met or exceeded its

² Barrington Pet. 1.

³ Id. at 2-3.

⁴ See Letter of United States Senator Richard J. Durbin, Sept. 11, 2014.

⁵ In addition to Congressman Cohen, the following parties submitted comments in opposition of Barrington's petition: U.S. Chamber of Commerce; Village of Homewood, Ill.; Mallory Alexander International Logistics; Ill. Chamber of Commerce; Gary Chamber of Commerce; Conexus, Ind.; Ind. Chamber of Commerce; Village of Mundelein; Forest Park Community Center; and Performance Team.

commitments and obligations with respect to this transaction, and that, as a result, further oversight is unnecessary.⁶

DISCUSSION AND CONCLUSIONS

The Board may, on its own motion or on petition by an interested party, reopen a proceeding based on material error, new evidence, or substantially changed circumstances. 49 U.S.C. § 722(c); 49 C.F.R. § 1115.4.⁷ Here, we find it appropriate to grant the petition to extend the oversight period for two years because of the substantially changed circumstances concerning recent rail congestion in the Midwest, particularly in Chicago, and the potential impact of this congestion on the EJ&E line, as well as the recent spike in blocked crossings on the line. See 49 U.S.C. § 722(c).

Over the past year, congestion in the Chicago region and the effect that it is having on the entire rail network have become a major concern.⁸ This congestion has increased pressure to move trains around Chicago, even to the extent of sending trains to alternative gateways in other locations.⁹ We understand CN's argument that factors such as winter weather played a role in the increased congestion experienced early in the year. But there have also been strong indications that the continuing congestion is the result of increased volumes and changes in traffic mix, and is not just a passing occurrence this last winter.¹⁰ And while traffic levels are

⁶ On December 3, 2014, the Illinois Department of Transportation (IDOT) submitted a separate petition in this docket requesting the same relief sought by Barrington. Because the Board is granting Barrington's petition, IDOT's petition will be denied as moot.

⁷ Indeed, the Board included in its Approval Decision a condition—Condition 72—specifically stating that the Board may revisit the mitigation measures it imposed if a party demonstrates a “material change” in facts or circumstances. Approval Decision, slip op. at 84; see also Canadian Nat. Ry.—Control—EJ&E West Co., FD 35087 (Sub-No. 8), slip op at 8-9 (STB served Nov. 8, 2012) (explaining that Condition 72 is consistent with the statutory reopening standard in 49 U.S.C. § 722(c)).

⁸ Based in part on comments made by carrier representatives at Board hearings in April 2014 and September 2014 that Chicago was a significant cause of the service problems facing the railroad industry, the Board recently directed the Class I rail carriers that interchange in Chicago to provide metrics and information concerning operations in that region. See U.S. Rail Serv. Issues—Data Collection, EP 724 (Sub-No. 3), slip op. at 4-5 (STB served Oct. 8, 2014).

⁹ See, e.g., Union Pac. R.R. presentation, U.S. Rail Serv. Issues, EP 724, slide 6 (filed Apr. 10, 2014); John Gray, Senior Vice President-Policy & Econ., Ass'n of Am. R.R.s, Current Rail Capacity Issues, Oct. 2, 2014, slide 19 (Gray Presentation), available at <http://www.stb.dot.gov/stb/docs/RETAC/2014/Oct/Retac%20Rail%20Infrastr.%20J.%20Gray.pdf>.

¹⁰ See, e.g., CN Reply 17 (referring to “strains like increasing demand”); Peak Letter Response from Claude Mongeau, President & Chief Exec. Officer, CN, to Daniel R. Elliott III, Chairman (Sept. 11, 2014) (CN Peak Letter Response) 3 (referring to “an unanticipated surge in business”), available at <http://www.stb.dot.gov/> (open tab at “E-Library”, select

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determined by demand and other factors that are, at least in part, beyond CN's control (see CN Reply 13), in one significant respect, increasing traffic levels on the EJ&E are not beyond CN's control: CN states that it decided to purchase the EJ&E line precisely to "tak[e] CN trains off overloaded lines in the heart of Chicago and mov[e] them to the EJ&E lines." CN Peak Letter Response 7.

CN's purchase of the EJ&E has provided significant benefits to the overall rail network by allowing it to route trains around the congested Chicago terminal. But one of the core reasons that the Board imposed oversight on this transaction was because of the potential impacts of increased rail traffic levels on the EJ&E line to the surrounding communities. For example, in the Approval Decision, the Board observed that increased train traffic can cause increases in vehicle traffic delay, noise, air emissions, and risks to pedestrian and vehicular traffic at crossings. Approval Decision, slip op. at 40.¹¹ Additional monitoring would allow the Board to better understand the reasons for the sudden increase in the number of blocked crossings earlier in the year. For example, in the first quarter of 2014, CN reported 5,267 crossing blockages over 10 minutes long, reflecting a 32.8% increase over the first quarter of 2013.¹² Within that time period, for March 2014, CN reported 1,959 crossing blockages over 10 minutes long, reflecting a 51% year over year increase. Continued crossing delay monitoring in both the operational and environmental reports will allow the Board to assess how blocked crossings in impacted communities relate to changes in train counts versus weather or other causes.¹³

Likewise, other reporting requirements will allow the Board to monitor continuing issues. For example, the Construction Status Report lists several projects that have not yet been completed (for various reasons) but could have a community impact.¹⁴ CN's environmental reports also discuss its community outreach, including Quiet Zones, noise, safety and other issues that could be impacted by changes in train counts on the EJ&E.

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"Correspondence", select "Fall Peak Letters", follow "09/11/2014", hyperlink under 2014/Fall Peak Demand Letter/CN, and select the ".pdf" icon); Gray Presentation, slides 7-8.

¹¹ See, e.g., Approval Decision Condition No. 2 (reports of blocked crossings); VM 29 (efforts to reduce blocked crossings); VM 77 (noise mitigation); VM 73 (locomotive emissions).

¹² See App. A.

¹³ See also App. B (EJ&E train counts). We recognize that train counts on the EJ&E have not generally exceeded the levels forecasted in the analysis the Board conducted prior to issuing its Approval Decision. See CN Reply 16; Barrington Pet. 3. However, traffic projections are estimates by nature, and they will rarely, if ever, be perfectly accurate in hindsight; otherwise, they would not be projections. Accordingly, we reject Barrington's argument that oversight should be extended simply because CN has not yet reached those projected levels.

¹⁴ See Construction Status Report included in CN's Monthly Operational Report submitted November 17, 2014.

We conclude that reopening to extend the oversight period here is warranted in light of the substantially changed circumstances concerning recent rail congestion in the Midwest, particularly in Chicago, and the recent spike in the levels of reported crossing blockages on the EJ&E line. See 49 U.S.C. § 722(c). Given that the potential impacts from higher rail traffic levels led the Board to institute oversight in the first place, in our view it would not be appropriate to end our oversight at a time when the pressure to avoid Chicago is greater due to increasing congestion levels. While CN has generally complied with the mitigation conditions included in the Approval Decision, we believe extending oversight for two years will enable the Board to better monitor traffic congestion issues in and around Chicago and specifically on operations on the EJ&E line, including impacts on surrounding communities.

We acknowledge the dissent's general concerns with rail service in Chicago and, despite some of the dissent's implications, share those concerns. But the issue before us in this docket is narrower than ways to improve service in Chicago in general—the question facing the Board here is whether this is the appropriate time to end our oversight conditions in this proceeding. As we have explained, we conclude that it is not. To the extent that there are other measures that can be taken to address the challenges in the Chicago area, those are considerations that should occur (and indeed have occurred) outside the bounds of this proceeding.

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

It is ordered:

1. This proceeding is reopened.
2. The oversight period for this transaction shall be extended two years, until January 23, 2017.
3. IDOT's petition is denied as moot.
4. This decision is effective on its date of service.

By the Board, Chairman Elliott, Vice Chairman Miller, and Commissioner Begeman.
Commissioner Begeman dissented with a separate expression.

COMMISSIONER BEGEMAN, dissenting:

I am willing to consider whether a modest extension of CN's operational reporting with respect to the Village of Barrington is appropriate because I know how important this matter is to the residents there. However, instead of reviewing the host of reporting requirements imposed six years ago and assessing what information remains useful, the majority has decided to simply

extend the *same* requirements for two more years. The majority's rationale for taking this action is the "recent rail congestion in the Midwest, particularly in Chicago."

I am alarmed by the majority's apparent conclusion that service problems will be the status quo for at least another two years. If that is indeed the majority's view, the Board should immediately intensify its efforts and determine what more must be done to meaningfully address service congestion throughout the Chicago area. Data collection alone is not enough.

The majority is well aware that I am very concerned about service in and around Chicago. Since the Fargo, ND hearing in early September, I have urged the Board to hold a hearing on the Chicago gateway, ideally before winter. When we sought additional information from Canadian Pacific (CP) in mid-October, I insisted we ask CP to clarify its plans for coordinating its traffic with other carriers if it wasn't participating in the Chicago Transportation Coordination Office (CTCO) (which coordinates Chicago-area operations between the railroads). And, I have repeatedly stressed that the Board should be seeking clarification on the information submitted about CTCO's service contingency protocols in response to our October 8, 2014 data order.

The Board's oversight of the CN/EJ&E continues through January 23, 2015. I believe we should put the time remaining in the current oversight period to good use by holding a comprehensive hearing on the Chicago gateway. This would not only allow the Board and interested stakeholders to gain a better understanding of the operational challenges affecting all carriers there and determine how best to help address those challenges, but it would also provide us an opportunity to hear first-hand from Barrington's citizens and CN in order to determine the best course of action on Barrington's petition. Such an approach would be far more meaningful in addressing our shared concerns about the Chicago gateway than continued reporting by CN on matters such as the "Hine's emerald dragonfly" and the "Karner-blue butterfly," as required by the 2008 merger decision.

I dissent.

Appendix A
Crossing Blockages Over 10 Minutes

| Month/Year | Number of Crossing Blockages Over 10 Minutes |
|----------------|--|
| January 2012 | 1350 |
| February 2012 | 1297 |
| March 2012 | 1346 |
| April 2012 | 1253 |
| May 2012 | 1356 |
| June 2012 | 1518 |
| July 2012 | 1585 |
| August 2012 | 1464 |
| September 2012 | 1238 |
| October 2012 | 1387 |
| November 2012 | 1368 |
| December 2012 | 1158 |
| January 2013 | 1288 |
| February 2013 | 1381 |
| March 2013 | 1297 |
| April 2013 | 1442 |
| May 2013 | 1454 |
| June 2013 | 1539 |
| July 2013 | 1305 |
| August 2013 | 1490 |
| September 2013 | 1266 |
| October 2013 | 1333 |
| November 2013 | 1495 |
| December 2013 | 1471 |
| January 2014 | 1588 |
| February 2014 | 1720 |
| March 2014 | 1959 |
| April 2014 | 1690 |
| May 2014 | 1525 |
| June 2014 | 1311 |
| July 2014 | 1673 |
| August 2014 | 1414 |
| September 2014 | 1232 |
| October 2014 | 1620 |

Appendix B
Average Daily Train Counts

| EJ&E Segment No. | From | To | 8/2009 | 8/2010 | 8/2011 | 8/2012 | 8/2013 | 8/2014 |
|------------------|------------------|------------------|--------|--------|--------|--------|--------|--------|
| 15 | Rondout | Leithton | 1.6 | 1.9 | 1.5 | 1.3 | 1.3 | 1.0 |
| 14 | Leithton | Spaulding | 7.2 | 8.0 | 7.0 | 14.4 | 17.0 | 17.3 |
| 13 | Spaulding | Munger | 7.7 | 8.3 | 9.1 | 16.8 | 19.2 | 19.6 |
| 12 | Munger | West Chicago | 6.7 | 8.3 | 8.1 | 15.0 | 18.8 | 19.3 |
| 11 | West Chicago | East Siding | 11.5 | 14.9 | 11.4 | 19.0 | 22.1 | 22.6 |
| 10 | East Siding | Walker | 12.6 | 18.8 | 18.8 | 25.4 | 27.6 | 27.4 |
| 9 | Walker | Bridge Jct. | 18.3 | 27.2 | 22.7 | 28.5 | 30.5 | 30.4 |
| 8 | Bridge Junction | Rock Island Jct. | 21.1 | 30.1 | 23.8 | 30.8 | 32.5 | 35.4 |
| 7 | Rock Island Jct. | Matteson | 8.7 | 10.2 | 9.8 | 16.8 | 19.8 | 22.9 |
| 6 | Matteson | Chicago Heights | 8.2 | 16.9 | 13.2 | 17.3 | 22.4 | 23.7 |
| 5 | Chicago Heights | Griffith | 10.2 | 17.0 | 15.0 | 19.5 | 24.0 | 25.3 |
| 4 | Griffith | Van Loon | 7.7 | 21.7 | 17.5 | 20.4 | 26.3 | 26.8 |
| 3 | Van Loon | Ivanhoe | 9.5 | 23.7 | 19.6 | 21.9 | 27.8 | 27.9 |
| 2 | Ivanhoe | Cavanaugh | 9.5 | 23.8 | 19.6 | 21.9 | 26.4 | 26.3 |
| 1 | Cavanaugh | Gary | 13.9 | 31.6 | 25.0 | 27.2 | 28.5 | 28.2 |
| 0 | Gary | Indiana Harbor | 2.9 | 4.5 | 2.3 | 2.2 | 2.1 | 2.2 |
| -1 | Indiana Harbor | Hammond | 1.5 | 3.9 | 2.1 | 2.0 | 2.0 | 1.7 |
| -2 | Hammond | South Chicago | 0.9 | 3.1 | 1.4 | 1.9 | 2.0 | 1.7 |