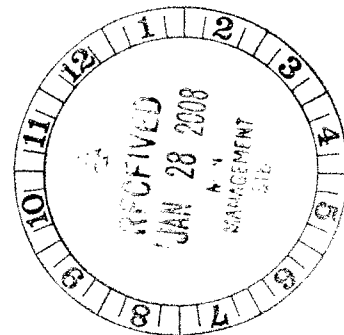


03130.012508.Ross.BUS.44113.O.N.
BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 35087



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

COMMENTS OF
BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND TRAINMEN,
A DIVISION OF THE RAIL CONFERENCE,
INTERNATIONAL BROTHERHOOD OF TEAMSTERS

ENTERED
Office of Proceedings
JAN 28 2008
Part of
Public Record

Harold A. Ross
Acting General Counsel
Brotherhood of Locomotive
Engineers and Trainmen
1370 Ontario Street, Mezzanine
Cleveland, Ohio 441113
(216) 241-2630

Dated: January 25, 2008

Surface Transportation Board
CN-EJ&E EIS - FD-35087
Log and Distribution
Date Recd: _____
HDR File No. _____
Scanned (Initial): _____
by: _____
Job File

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 35087

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

COMMENTS OF
BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND TRAINMEN,
A DIVISION OF THE RAIL CONFERENCE,
INTERNATIONAL BROTHERHOOD OF TEAMSTERS

The Brotherhood of Locomotive Engineers and Trainmen, a Division of the Rail Conference, International Brotherhood of Teamsters (“BLET”), submits, on the basis of the application and limited information available to it, that the application and the proceedings ancillary thereto are not in the public interest. Therefore, BLET, the union that represents the locomotive engineers employed on the rail lines that are the subject of this proceeding, opposes this application(s) filed by Canadian National Railway Company (“CNR”) and Grand Trunk Corporation (“GTC”).

Summarizing the total transaction described in Finance Docket No. 35087, including the seven ancillary exemption notices set forth at pages 338 through 512 of the Application as Finance Docket No. 35087 (Sub. No. 1) through Finance Docket No. 35087 (Sub. No. 7), the Operating Plan basically calls for the creation of a rail beltway around Chicago, which will be accomplished by:

- Sub No. 1 — permitting Elgin, Joliet and Eastern Railway Company (“EJ&E”) to transfer certain of its rail assets to EJ&E West Company (“EJ&EW”), which would be acquired by CNR through its U.S. subsidiary GTC;
- Sub No. 2 — granting CNR subsidiary Chicago, Central & Pacific Railroad Company (“CCP”) trackage rights over 29.2 miles of EJ&EW;
- Sub No. 3 — granting CNR subsidiary Grand Trunk Western Railroad Incorporated (“GTW”) trackage rights over the entire EJ&EW, thereby expanding the current 12.2 miles of such rights over EJ&E;
- Sub No. 4 — granting CNR subsidiary Illinois Central Railroad Company (“IC”) trackage rights over 29.2 miles of EJ&EW;
- Sub No. 5 — granting CNR subsidiary Wisconsin Central Ltd. (“WC”) trackage rights over the entirety of EJ&EW;¹
- Sub No. 6 — granting EJ&EW trackage rights over 27.4 miles of sister subsidiary CCP; and
- Sub No. 7 — granting EJ&EW trackage rights over 42.3 miles of sister subsidiary IC in two segments.

Through CNR’s Grand Trunk Corporation subsidiary, CNR owns and controls all of the subordinate subsidiaries involved in the entirety of the transaction.

This arrangement raises three concerns for the BLET. First, when viewed in this manner, the transaction is similar to that proposed in Michigan Central Railway, LLC – Acquisition and Operation Exemption – Lines of Norfolk Southern Railway Company, STB Finance Docket No. 35063 (service date December 10, 2007). See a/so Watco Companies, Inc., and Watco Transportation Services, Inc. – Continuance in Control Exemption – Michigan Central Railway, LLC, STB Finance Docket No. 35064;

¹ WC is properly identified in the caption of the Verified Notice of Exemption in Sub No. 5 and all other places other than the first paragraph of the Notice. In the first paragraph, WC is misidentified as GTW.

and Norfolk Southern Railway Company – Trackage Rights Exemption – Michigan Central Railway, LLC, STB Finance Docket No. 35065. In denying the acquisition and operation exemption and dismissing the related proceedings, the Board found that Norfolk Southern (“NSR”) had *de facto* control of Michigan Central, which was to be nominally controlled by Watco Transportation Services, Inc., and its corporate parent. Thus, the Board concluded, NSR would have sufficient control of Michigan Central that the transaction would not come within the scope of 49 U.S.C. Section 10901.

In the instant case, CNR and EJ&E agree that the Application filed by the former and the Notice of Exemption filed by the latter in Finance Docket No. 35087 (Sub No. 1) require the imposition of the New York Dock² conditions. However, CNR and its subsidiaries involved in Sub No. 2 through Sub No. 7 assert that the level of labor protection should be that set forth in the Norfolk & Western³ protective conditions. We assume that CNR will argue that the trackage rights notices do not involve 49 U.S.C. Section 10901 and the individual exemptions should be granted pursuant to Section 10902 and 49 C.F.R. Part 1180. We suggest there are two reasons negating that assertion: (1) the legal definition of “control” by CNR in the overall transaction; and (2) the ability of CNR by the very nature of the transaction in its totality to direct and manage the affairs of its five subsidiaries in the joint operations over this rail beltway.

² New York Dock Railway – Control – Brooklyn Eastern District Terminal, 360 I.C.C. 60 (1979), *aff’d sub nom. New York Dock Ry. v. United States*, 609 F. 2d 83 (2nd Cir. 1979).

³ Specifically, Norfolk & Western Ry. – Trackage Rights – Burlington Northern Inc., 354 I.C.C. 605 (1978), as modified by Mendocino Coast Ry. – Lease & Operation – California Western R.R., 360 I.C.C. 653 (1980).

As the Board well knows, the definition of “control” in 49 U.S.C. Section 10102(3) “includes actual control, legal control, and the power to exercise control, through or by (A) common directors, officers, stockholders, a voting trust, or a holding or investment company, or (B) **any other means**.” (emphasis added) Control for which Section 11323 authorization is required embraces the power or authority to manage, direct, superintend, restrict, regulate, govern, administer or oversee the day-to-day affairs of that carrier. Colletti – Control – Comet Freight Lines, 38 M.C.C. 95, 97 (1942). The existence of control is an issue of fact to be determined by the circumstances of each case. Rochester Telephone Corp. v. United States, 307 U.S. 125 (1939). If CNR, which is the owner of all of the interest of each of the involved subsidiaries, has substantial and dominant influence or power in the joint operations that will take place, it necessarily has control. New York, C. & St. L. R.R., 295 I.C.C. 703, 713 (1958).

Due to the nature of the transaction and the limited materials submitted by CNR, there is a strong inference that CNR has control over the joint operations that will take place. If the transaction cannot be denied on this basis, it nevertheless must be approved under Section 11323, with the proper labor protective conditions imposed under Section 11326(a). That is, the New York Dock conditions should apply to the trackage rights exemptions, as well as the basic Application; moreover, special labor protections may be necessary to ensure that one of the major motivations behind the transaction is not to transfer employees without negotiations with their labor representative or to modify collective bargaining agreement provisions favorable to labor or to avoid provisions favorable to employees on one of the subsidiary carriers.

The second concern of BLET is that the Application and trackage rights filings do not provide information that is helpful in addressing these issues and concerns. Making matters worse, CNR has objected to and refused to provide answers to Interrogatories or documents requested by almost all parties of record. In addition, EJ&E and EJ&EW have merely responded by stating that they are not applicants or parties to the transactions. We recognize, of course, that the time for completing discovery upon an amicable basis was severely limited under the procedural schedule proposed by CNR and adopted by the Board. Under the circumstances, the Board should take this into consideration in reaching a decision, and CNR's lack of responsiveness raises the propriety of denying the application on that basis.

The impact on the locomotive engineers working for CCP, EJ&E, GTW, IC, and WC are our concern, as BLET is the recognized collective bargaining representative for the craft on all CNR subsidiaries and on EJ&E. Appendix A to the Operating Plan, detailing CNR's "Projected Seniority, Agreement and Territory Changes Required for the Operating Plan," notes that the "resulting Transaction efficiencies can best be achieved if the train and engine service personnel needed to assure these seamless operations [via the EJ&EW] are covered by a single collective bargaining agreement, with expanded and consolidated seniority rosters." Application at p. 231. It then continues that CNR "anticipates placing the required train and engine service personnel who work under the WC, EJ&EW, and GTW agreements under a single carrier's agreements in order to facilitate the flow of traffic in and through Chicago, and would seek to apply the IC agreements for these purposes." Id. This statement goes on

to claim that “to achieve the efficiencies of the Transaction, it would be necessary for train and engine service crews from IC, CCP, WC and GTW to operate over the EJ&EW and the other CN properties” and “phased integration of the EJ&EW into the CN system may result in changes to train and engine crew reporting points.” Id.

However, the only labor impact data provided by CNR identify the anticipated impact on the current EJ&E labor force, which is shown on Attachment B at page 248 of the Application. With respect to the estimated 227 EJ&E train and engine service employees, CNR indicates that: 120 positions (52.9%) will be transferred to CNR at the same locations where they currently are based; 69 positions (30.4%) will be retained by the newly-created Gary Railway; and 38 positions (16.7%) will be abolished.

No data have been provided showing the labor impact on CCP, GTW, IC, or WC workers as a result of the transaction. No documents or information have been provided in discovery. When this is coupled with the deliberately vague language used both in references to implementation of the Operating Plan and when discussing protection, it is impossible to ascertain how broad a scope CNR seeks to alter the current labor relations landscape. It is unclear, and, we submit, contrary to current law, for CNR to suggest that it will attempt to essentially impose a single collective bargaining agreement over its entire U.S. operations under the guise of the “efficiencies” flowing from the routing options in Chicago.

In another context in this regard, the Chairman of the BLET's General Committee of Adjustment on the GTW requested, as early as November 2007, to meet with CNR/GTW's Labor Relations Department to determine the impact that the transaction will have upon GTW locomotive engineers, and to discuss a transactional path in light of his concern to protect the full seniority rights of all GTW locomotive engineers working within the terminal of the GTW Chicago zone. Prior cooperative efforts between the General Committee and management produced certain actions that led to the growth of business in this zone, and caused the number of engine crew assignments to be increased from a handful to a high of 20 within the terminal. To take the position that management can circumvent the obligations of the bargaining agreements, lessen the seniority rights of employees, and force one contract upon all the employees is not taken lightly, both because these actions are totally unnecessary for the proposed operations, in particular, as well as the transaction, in general. These same considerations also must extend to the employees on the other subsidiaries.

For example, EJ&E locomotive engineers are concerned about CNR's Operating Plan. Where the CNR-owned railroads will enjoy broad trackage rights over EJ&EW, EJ&EW has applied for only 14 miles of trackage rights on the IC and 22 miles over the CCP. Indeed, two CNR subsidiaries — GTW and WC — would have trackage rights over the entirety of EJ&EW, while there would be no corresponding EJ&EW trackage rights over GTW and WC. The EJ&E locomotive engineers fear that this disparity in the allocation of trackage rights will cause the remaining EJ&E or Gary Railway locomotive engineers to be confined to yard work.

In addition, the Stock Purchase Agreement between EJ&E and EJ&EW represents at Section 3.16, entitled "Employment Relations," that, except as identified in a confidential Disclosure Report, "(iii) no grievance or arbitration proceeding arising out of or under any collective bargaining agreement with respect to employees of [EJ&E] is pending, and no claim therefor has been asserted in writing; and (iv) there are no labor or employment claims or proceedings pending between [EJ&E] and any of its employees." See Application at p. 270. In actuality, there are at least thirteen (13) BLET cases awaiting hearing and adjudication before Public Law Board No. 6913. Three cases involve disciplinary matters, while the others involve time claims and grievances.⁴ There is another dismissal appeal that must necessarily proceed to arbitration upon completion of on-property handling, and others may be working their way through the grievance/arbitration process.

These facts raise a number of questions, in light of the fact that the EJ&E employees will be split among several railroads. Which rail carrier will be responsible for processing the matters to a conclusion? Which carrier will be responsible to pay any claim sustained? What are the rights of a currently discharged employee who is subsequently restored to service to work on one of the involved carriers? The New York Dock conditions provide neither answers nor remedies for these questions, and neither do the responses of CNR and EJ&E. Neither Party was willing to produce the Disclosure Letter regarding the involved provisions in the Stock Purchase Agreement,

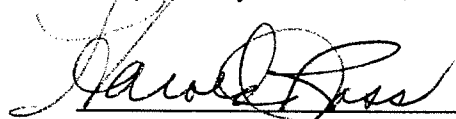
⁴ Several of the time claim cases are "pilot" cases involving collective bargaining agreement interpretations, which are associated with approximately 350 related claims that are being held in abeyance pending adjudication of the "pilot."

even though the appropriate confidentiality undertakings were executed. To cover these situations, which are unforeseen in the usual transactions covered by the New York Dock conditions, additional labor protections are required as a condition of any approval by the Board.

CONCLUSION

Based upon the foregoing, the Application and accompanying exemptions should be denied. In the event the Board should grant approval, the BLET requests that the New York Dock conditions apply to the entire unified transaction and the protections be modified to address the issues identified herein.

Respectfully submitted,

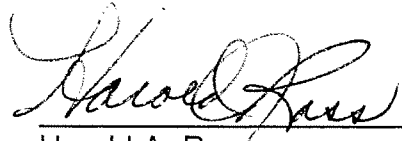
A handwritten signature in black ink, appearing to read "Harold A. Ross", is written over a horizontal line.

Harold A. Ross
Acting General Counsel
Brotherhood of Locomotive
Engineers and Trainmen
1370 Ontario Street, Mezzanine
Cleveland, OH 44113
(216) 241-2630

Dated: January 25, 2008

CERTIFICATE OF SERVICE

I hereby certify that I have on this 25th day of January, 2008, served copies of the foregoing Comments of the Brotherhood of Locomotive Engineers and Trainmen upon all parties of record by first class mail, postage prepaid.



Harold A. Ross