



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

General Counsel

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

May 29, 2008

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

Re: Finance Docket No. 35087

Dear Secretary Quinlan:

Enclosed herewith for filing in the above-referenced proceeding please find the Reply of the United States Department of Transportation to Applicants' Request for Time-Limited NEPA Review (designated as DOT-5).

Respectfully,

PAUL SAMUEL SMITH
Senior Trial Attorney

(202) 366-9280

Enclosure

**Before the
Surface Transportation Board
Washington, D.C.**

_____	)	
Canadian National Railway Company, and	)	
Grand Trunk Corporation -- Control --	)	Finance Docket No. 35087
EJ&E West Company	)	
_____	)	

**Reply of the
United States Department of Transportation
to Applicants' Request for Time-Limited NEPA Review**

I. Introduction

On May 13, 2008, the Canadian National Railway Co. and the Grand Trunk Corporation (collectively, "Applicants" or "CN") requested the Surface Transportation Board ("STB" or "Board") to establish a procedural schedule for completion of the environmental review process and issuance of a final decision in this case. CN-33. The United States Department of Transportation ("DOT" or "Department") does not endorse any particular schedule, including that proposed by the Applicants. We do, however, favor adoption of a definitive schedule that resolves the remaining issues in this case with dispatch.

II. Discussion

The Applicants' Arguments

The Applicants decry the pace of the environmental review process to date and aver that the lack of any schedule for either completion of this process or release of a final decision has created uncertainty. That in turn, they warn, could put at risk the

transaction itself and its transportation and environmental benefits. The Applicants have proposed a specific schedule to address their concerns.

They advance several legal and policy grounds for their request. First, Applicants point out that rules implementing the National Environmental Policy Act (“NEPA”) encourage (and in some cases require) agencies to set deadlines for their environmental reviews. CN-33 at 3-4, 14, citing 40 C.F.R. § 1501.8.¹ They next stress that Congress mandated a fixed, relatively expedited timeframe -- that has now expired -- for deciding consolidations of this nature. CN-33 at 2-3, 16, citing 49 U.S.C. § 11325(d). NEPA does not excuse non-compliance with that timeframe in CN’s view, and thus it argues that the law squarely supports accelerated preparation of a final environmental impact statement (“EIS”) and a date certain for resolving all pending issues in this case. Id. at 6, 15.

The Applicants also offer various practical and policy grounds in support of their request. They contend that the NEPA process in the Conrail case involved many more environmental impacts over a much more extensive area, yet progressed more quickly than is evidenced so far in this case, with its relatively narrow scope. Id. at 17-20. They also state that the recent scoping decision clearly identifies the issues to be resolved, that those issues and their analysis are commonplace in rail consolidations, and that the contractor overseen by the Board’s Section of Environmental Analysis (“SEA”) has sufficient resources to expedite processing. Id. at 5-7, 22-23.

CN expresses a concern as well that opponents of the merger will seek to delay it by misuse of the NEPA process. Id. at 7-9, 16. Finally, because the agreement CN

¹/ CN also notes that the STB has always set specific deadlines in the past Id.

struck with United States Steel Corp. to purchase the Elgin, Joliet & Eastern Railway Co. (“EJ&E”) contains a specific timeframe for completion of the transaction, the Applicants warn that an overly lengthy or indefinite decisional process risks the loss of this consolidation and all of its public benefits. Id. at 9-13, 23. ²

The Village of Barrington (“Barrington”) opposes CN’s proposal. BARR-4. Barrington takes issue with virtually all of CN’s legal and policy arguments. Barrington denies that the NEPA process must be curtailed because of the statutory timeframe for deciding this case, submits that the environmental review process and impacts in the Conrail case were very much different than CN describes, and rejects the notion that the purchase agreement between CN and U.S. Steel either allows the latter to walk away under the circumstances or is even particularly relevant. Id. Barrington contends that the schedule proposed by CN is wholly inadequate to properly assess and mitigate the impacts in prospect from the pending transaction. Id. ³

The Department’s Views

Although the Department does not find that the statutory provision specifying a time period for deciding this merger displaces NEPA, the considerations raised by Applicants warrant adoption of a reasonably expedited schedule for completion of this proceeding.

²/ CN alludes to the possibility that alternative or equivalent uses of EJ&E track, which would not trigger the Board’s jurisdiction or NEPA protections, would occur if the pending acquisition fell through Id. at 13.

³/ Other parties have also filed in support of (e.g., the Association of American Railroads) or in opposition to (e.g., members of the Illinois and Indiana congressional delegations) CN’s request.

NEPA must give way only in the face of a “clear and unavoidable conflict” with another statute, which generally occurs when such a statute either allows an agency no discretion or would be utterly frustrated by compliance with NEPA. Flint Ridge Development Co. v. Scenic Rivers Association, 426 U.S. 776, 788 (1976). The instant merger does not present such a case.⁴

Nonetheless, disparate provisions of federal law must be administered in a harmonious manner whenever possible, and it is clear that Congress intended a relatively short regulatory review process for consolidations involving a smaller railroad that, like this one, pose no substantial competitive problems. 49 U.S.C. § 11325(d). Moreover, clear, efficient procedural schedules in administrative proceedings are a hallmark of sound policy generally. They encourage prompt identification of issues, steady development of the record, and consistent progress toward a final decision, thereby serving both public and private interests alike. Finally, the recent identification of environmental issues, the fact that most are commonplace and entail familiar analytical methods, the progress made to date in this proceeding, and the availability of significant financial resources, all strongly suggest that preparation of the EIS in this case can be accelerated without harm to the interests of either NEPA or the Interstate Commerce Commission Termination Act.⁵

⁴ The cases cited by Applicants involve statutes that either allow agencies no discretion or not only establish a time frame for agency action, but also prescribe a particular result if the agency does not meet that time frame. See Flint Ridge, *supra*; City of New York v. Minetta, 262 F.3d 169, 178 (2d Cir. 2001). By contrast, 49 U.S.C. § 11325(d) requires the STB to decide consolidations like this one in 180 days, but does not specify an outcome or otherwise deprive the agency of jurisdiction if it does not act in a timely manner. See Gottlieb v. Pena, 41 F.3d 730, 733 (D.C. Cir. 1994) and cases cited therein.

⁵ Indeed, the non-environmental part of the record in this proceeding is already complete.

DOT consequently favors adoption of an expedited schedule setting specific dates for the remaining environmental steps and the final decision in this case.⁶

The Safety Integration Plan

The safety-related matters within the responsibility of the Department in this portion of the proceeding will not impede such a schedule, including the relatively ambitious one proposed by Applicants. CN previously submitted a proposed safety integration plan ("SIP") to the Federal Railroad Administration ("FRA") and to the STB's Section of Environmental Analysis ("SEA") as required under applicable rules. 49 C.F.R. §§ 244.17(a) and 1106.4(a). FRA is now considering the adequacy of the SIP and working with CN to obtain additional information and detail. 49 C.F.R. § 244.17 (b), (c). FRA will be prepared to submit its findings and conclusions to SEA staff in the near future. *Id.* at §§ 244.17(d) and 1106.4(b)(1), (2). The continuing cooperation shown by CN and the progress made to date indicate that completion of the SIP component in this case can accommodate any reasonably expedited schedule.

III. Conclusion

Sound public policy favors adoption of the most efficient procedural schedule consistent with fulfillment of the purposes of underlying statutes. The progress made to date on the EIS in this case, the familiarity of the issues and the required analysis

⁶/ DOT is uncertain how realistic a prospect there is for this transaction to fall through as a result of a prolonged and indefinite decisional process. Nonetheless, the efficiency and environmental gains that we believe are promised by the pending acquisition (DOT-4) are sufficiently beneficial that any risk of their loss should not lightly be countenanced.

generally, and the availability of considerable resources, all provide further evidence that a reasonably accelerated decisional process in this case can accommodate all legitimate environmental and other interests.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'D.J. Gribbin', with a stylized, cursive-like script.

D.J. GRIBBIN
General Counsel

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CERTIFICATE OF SERVICE

I hereby certify that on this date I have caused a copy of the Reply of the United States Department of Transportation to Applicants' Request for Time-Limited NEPA Review in Finance Docket No. 35087 to be served by first class mail, postage prepaid, upon all Parties of Record in this proceeding.


Paul Samuel Smith

May 29, 2008