

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 35087
(including all subdockets)

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

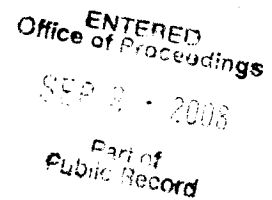
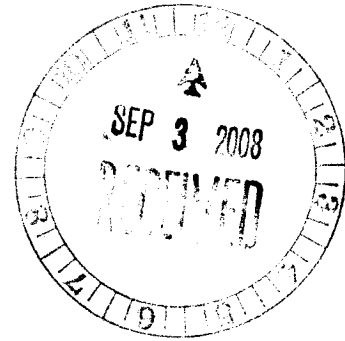
**VILLAGE OF FRANKFORT'S
OPPOSITION TO APPLICANTS' PETITION
TO MODIFY PROCEDURAL SCHEDULE**

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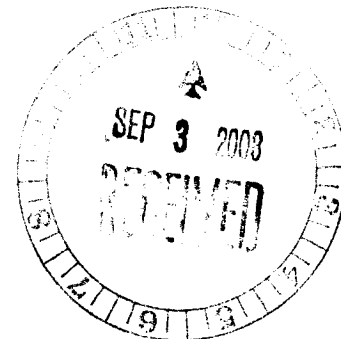
September 3, 2008



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The Village of Frankfort, Illinois ("Frankfort") hereby opposes the applicants' Petition to Modify the Procedural Schedule (CN-49) ("Petition"), filed August 14, 2008. The Petition should be denied for the following reasons:

- Granting the Petition effectively would forestall the possibility that the Board will elect the no-action option, thus limiting the Board's choice of reasonable alternatives in violation of the National Environmental Policy Act ("NEPA") and the implementing regulations of the Council on Environmental Quality ("CEQ").
- Section 9.1 of the applicants' Stock Purchase Agreement ("SPA"), which expressly extends the closing deadline if Board review is incomplete, belies the applicants' claim that the underlying transaction is in jeopardy if the Board does not issue a "final and effective" decision by October.

- Even if the Petition is granted, Section 7.5 of the SPA will permit the seller, if it so desires, to refuse to close before December 31, 2008. This calls into question any suggestion that the seller's desire to back out of the deal is the reason for seeking or granting bifurcation.
- Insofar as the Petition seeks reconsideration of Decision No. 2 in this proceeding it is eight months out of time and fails to make the requisite showing of new evidence, changed circumstances, or material error.
- Insofar as the Petition seeks to reopen Decision No. 2, the Petition is subject to 49 C.F.R. § 1115.4, not 49 C.F.R. § 1117.1. As such, the Petition—like a petition for reconsideration—can be granted only if it demonstrates “material error, new evidence, or substantially changed circumstances.” This it does not do.

Facts

In this proceeding, Canadian National Railway Company (“CN”) seeks to acquire the Elgin Joliet and Eastern Railway Company (“EJ&E”). CN avers that the primary reason for the acquisition is to “provid[e] CN with a continuous rail route around Chicago, under CN’s ownership, that would connect the five CN lines that presently radiate from the City. This would increase CN’s operational flexibility for traffic moving from, to and across the Chicago terminal.” Application (CN-2) at 22.

The transaction also would effect a massive increase in rail traffic through Frankfort and other communities along the EJ&E. *See id.* at 247 (as corrected Jan. 3, 2008). CN says that rail traffic through Frankfort will rise from six to twenty-eight trains a day, with a 560 percent increase in tonnage and a sixfold jump in daily carloads of hazardous material. *Id.* CN’s figures

may be substantially understated because they assume there will be no growth in rail traffic on the EJ&E despite the supposedly greater speed and efficiency resulting from the transaction.

As the Board's final scope announcement noted, approximately 2600 individuals attended the SEA's open meetings in the affected region and SEA received more than 3000 comments on the draft scope of the EIS. Decision served April 28, 2008, at 2-3. Although the high level of public interest is not the sole determinant of what the scope or timing of the environmental review ought to be, it is relevant, *see* 40 C.F.R. § 1501.8(b)(1)(v) and (vii) (2007), and reflects the degree to which the proposed acquisition would affect communities along the EJ&E right of way. The substantial final scope of the EIS emphatically reflects the same fact. *See* Decision served April 28, 2008, at 17-25.

Initially, the applicants sought to limit the environmental review to an environmental assessment, though they acknowledged that a full EIS might be required. Application (CN-2) at 33. The Board appropriately determined, though, that "[d]ue to the potentially significant impact that this transaction may have on the environment and communities in the affected area, the Board will prepare a full EIS." Decision No. 2 (served Nov. 26, 2007), at 6. CN, which has been regulated by the Board and its predecessor for many years, is well aware of the significant time period that typically is required for completion of the EIS process.

After reviewing the many substantive comments received from the public, the Board broadened the scope of the EIS beyond that set out in the draft scope. Decision served Apr. 28, 2008, *passim*. The added or broadened elements for study include alternative rail traffic configurations, *id.* at 6, hazardous materials issues, *id.*, a longer horizon for rail and motor traffic than suggested by the applicants, *id.* at 7-8, the effect of the proposed transaction on the Gary Chicago International Airport, *id.* at 8-9, the effect on STAR rail passenger traffic, *id.* at 9, and

air quality effects from increased rail traffic and resulting automotive delays at grade crossings, *id.* at 12. All in all, the environmental review process in this proceeding is no small undertaking.

Despite the foregoing, CN sought in May 2008 to secure what it had failed to achieve at the beginning of this proceeding—an expedited environmental review. The essence of CN’s argument was that CN’s purchase contract for the EJ&E expires December 31, 2008. Decision No. 13 (served July 25, 2008), at 2, 4-5. After that date, CN contends, “either party *may* terminate the Agreement.” *Id.* at 5 (emphasis added).

As this Board correctly noted, however, the text of the SPA calls into question the accuracy of CN’s claim. Although Section 2.3, on which CN relied, conceivably could be read to allow either party to terminate after December 31, 2008, Section 9.1(b) “seems to conflict with section 2.3 . . . and appears to indicate that the parties . . . planned for the possibility that the transaction could require an environmental review process that extended beyond December 31, 2008.” *Id.* at 6.¹ The Board accordingly found that “the ‘consequences of delay’ under 40 CFR 1506.8(b)(1)(iv) here do not warrant adoption of applicants’ proposed procedural schedule for this controversial case.” *Id.*

The applicants, undeterred by Decision No. 13, have returned only three weeks later with a new theory of how to avoid the procedural rules applicable to this proceeding. The Petition

¹ Section 9.1 reads, in pertinent part:

§ 9.1 Termination. This Agreement may be terminated and the transactions contemplated hereby may be abandoned, at any time prior to the Closing:

* * *

(b) By any Party if the Closing shall not have occurred by December 31, 2008; provided that the right to terminate this Agreement under this Section 9.1(b) shall not be available . . . (ii) if the reason for the failure of the Closing to occur on or before such date is one or more of the following: (A) the STB has not issued a final decision in the Exemption Proceeding or the Control Proceeding; [or] (C) the STB has not completed such review of the transactions contemplated by this Agreement as may be required under [NEPA] or the National Historic Preservation Act . . . in connection with the Exemption Proceeding or the Control Proceeding

Application (CN-2) at 293.

asks the Board to bifurcate the proceeding by ruling on the “merits” (i.e., Interstate Commerce Act aspects) by October 15, 2008 and leaving the environmental aspects for another day. This, the applicants claim, “would fully preserve the Board’s rights to impose any lawful environmental mitigation that it might determine is required with respect to any Transaction-related activities before those activities occur.” Petition at 2. The applicants argue that this course would allow the Board to “discharge its obligations under both ICCTA and [NEPA].” *Id.*

Discussion

I. Granting the Petition effectively would eliminate the no-action option, thus violating NEPA and its implementing regulations.

Once again, CN is asking the Board to save CN from the consequences of its own poor planning (or poor drafting). The Board—as it did only a few weeks ago in Decision No. 13—should decline the invitation.

NEPA requires that the Board’s final decision include “a detailed statement” addressing, inter alia, “the environmental impact of the proposed action” and “alternatives to the proposed action.” 42 U.S.C. § 4332(2)(C)(i) & (iii) (2006). The CEQ’s regulations, which bind the Board and the rest of the Executive branch, Exec. Order No. 11514, 3 C.F.R. 902 (1966-1970), *as amended by* Exec. Order No. 11991, 3 C.F.R. 123 (1977), require that the Board’s environmental review “[i]nclude the alternative of no action,” 40 C.F.R. § 1502.14(d) (2007). The CEQ regulations also prohibit the Board from taking any action prior to its final decision that would “[l]imit the choice of reasonable alternatives.” *Id.* § 1506.1(a). Further, the Board may choose—and has chosen in the past—the no-action option under NEPA and accordingly deny the application. *See Construction and Operation—Indiana & O. Ry. Co.*, 9 I.C.C.2d 783 (1993); *accord Alaska R. Corp.—Const. & Oper. Exempt.—Rail Line Between Eielson Air Force Base*

(North Pole) and Fort Greely (Delta Junction), 2007 STB LEXIS 579 (STB Finance Docket No. 34658) (served Oct. 4, 2007).

Just as the Petition focuses on Section 2.3 of the SPA and ignores Section 9.1, it focuses on potential *mitigation* requirements but ignores the potential for a no-action decision by the Board. See Petition at 2 (noting Board's right to require "lawful" mitigation but failing to acknowledge no-action option). Although the SPA contemplates the possibility of termination *prior* to the closing, Application (CN-2) at 293-94 (SPA art. IX), it does not appear to provide for unwinding the transaction if the Petition is granted, the closing occurs, and the Board *thereafter* chooses the no-action option or imposes mitigation requirements that CN considers unacceptable.

In effect, the applicants—deliberately or through oversight—will have painted themselves into a corner by closing without environmental clearance. Notwithstanding CN's claim that it's willing to take that risk, the fact that closing already has occurred would create a significant psychological barrier to unbiased consideration of the no-action option. This in turn means that a grant of the Petition would violate the NEPA-based rule prohibiting the Board from taking any action prior to its final decision that would "[l]imit the choice of reasonable alternatives." 49 C.F.R. § 1506.1(a) (2007).

II. Section 9.1 of the Stock Purchase Agreement belies the applicants' claim that the seller can terminate the underlying transaction if final action under the Interstate Commerce Act is delayed beyond December 31, 2008.

The stated motivation for the Petition is the contention that the underlying transaction might be terminated if the closing does not occur by December 31, 2008. Petition at 8-9. As the Board pointed out in Decision No. 13, though, Section 9.1 of the SPA, which is more specific than the provision (§ 2.3) relied upon by the applicants, expressly suspends that deadline if the

Board has not issued a final decision under the Interstate Commerce Act or under NEPA.²

Decision No. 13 (served July 25, 2008) at 5-6; Application (CN-2) at 293 (SPA § 9.1(b)).

Despite a potential ambiguity due to Section 2.3, Section 9.1 appears specifically designed to cover the current situation.

If the problem truly were the potential ambiguity of these two provisions of the SPA, the applicants could go to court to secure a declaratory judgment of its meaning. This they have not done. The failure of these sophisticated parties to plan ahead when they drafted the SPA, compounded by their failure to seek any needed clarification now, should not be the occasion for this Board to turn its usual procedures upside down, violating NEPA in the process.

III. Granting the Petition would not prevent the seller from refusing to close the underlying transaction.

Even were the applicants correct in claiming that the seller, United States Steel Corporation (“USS”), can terminate the underlying transaction if it doesn’t close by the end of 2008, granting the Petition will not foreclose such an action. The Petition states that USS has refused to modify the SPA to remove any doubt about the right of termination after December 31, 2008. Petition at 8.³ This is intended to imply, of course, that USS wants an excuse to terminate, and that only bifurcation and a resulting pre-December 31 closing can save the day.

But Section 7 of the SPA provides, in pertinent part, as follows:

§ 7. Conditions to the Seller’s Obligations. The sale of the Shares by the Seller on the Closing Date is conditioned upon satisfaction or waiver by the Seller, at or prior to the Closing, of the following conditions:

* * *

² The relevant text of § 9.1 appears at footnote 1 above.

³ The Petition is skimpy on this point and does not indicate, for example, whether USS has expressed willingness to modify the SPA in exchange for appropriate consideration—a typical occurrence in the commercial contracting context.

§ 7.4. Governmental Consents. Any and all approvals and authorizations required by the ICC Termination Act with respect to the transactions contemplated by this Agreement shall have been obtained.

§ 7.5. Other Consents. All other material consents, authorizations, Orders or approvals of, and filings or registrations with, any Governmental or Regulatory Authority . . . shall have been obtained or made and shall be in full force and effect on the Closing Date.

Application (CN-2) at 288. The SPA's broad definition of "Governmental or Regulatory Authority" does not exclude this Board. *Id.* at 254 (SPA § 1.1).

It thus would appear that while a grant of the Petition and an early decision under the Interstate Commerce Act might obviate any problem under Section 7.4 of the SPA, USS still could refuse to close, pursuant to Section 7.5, because of the absence of environmental clearance. This in turn suggests that possible loss of the deal is a straw man and that the applicants seek to hurry the process—and de facto short-circuit the NEPA process—for ordinary commercial reasons. The Board should not cut corners in support of such an effort.

IV. The Petition is out of time and fails to demonstrate that it meets the substantive criteria for reopening Decision No. 2 or receiving conditional approval.

A. The Petition is out of time and fails to demonstrate that it meets the applicable criteria for approval under the Board's rules.

Decision No. 2 was served more than nine months ago—on November 26, 2007.

Decision No. 2 established the procedural schedule for this proceeding and made clear that the Board's final decision on the merits would occur after the environmental review process had been completed, Decision No. 2 (served Nov. 26, 2007) at 2, and that this might not occur until well into 2009, *id.* at 16. The applicants did not seek reconsideration of Decision No. 2 during the twenty-day period allowed by the Board's rules. *See* 49 C.F.R. § 1115.3(e) (2007).

The Petition allegedly was filed under 49 C.F.R. § 1117.1 but in truth, it is a petition for reconsideration that has been submitted eight months late. It should be denied for that reason alone. Moreover, the Petition does not make, or even purport to make, the substantive showing required for reconsideration—namely, that new evidence, changed circumstances, or material error require the reopening of Decision No. 2. *See* 49 C.F.R. § 1115.3(b) (2007).

A petition to reopen Decision No. 2 might be proper under Section 1115.4, but it would face the same substantive criteria—namely, the need to demonstrate material error, new evidence, or substantially changed circumstances. 49 C.F.R. § 1115.4 (2007). As noted above, the Petition fails to make such a showing.

The applicants' attempt to proceed under the residual Section 1117.1 of the Board's rules, *see* Petition at 1, is an improper attempt to avoid the criteria of Sections 1115.3(b) and 1115.4. Section 1117.1 does not apply when "the Board has procedures"—here, Section 1115.4—"that apply specifically to the type of relief [CN] seeks." *City of Peoria and Village of Peoria Heights, IL—Adverse Discontinuance—Pioneer Indus. Ry. Co.*, STB Docket No. AB-878 (served Apr. 11, 2008) ("*City of Peoria*"), at 2.

B. The Petition does not meet the criteria for conditional approval.

The Board generally has ceased its onetime practice (in construction cases under 49 U.S.C. § 10901) of granting approval conditioned on later completion of the environmental review. *Alaska R. Corp.*, 2007 STB LEXIS 579, at 2. Although the Board has left open the possibility of such grants in cases of "unique or compelling circumstances," *id.*, no such showing has been made here. Conditional approval accordingly should not be granted.

Conclusion

For the reasons set forth above, the Petition should be denied in all respects.

Respectfully submitted,



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September 3, 2008

CERTIFICATE OF SERVICE

I hereby certify that on this third day of September 2008, a copy of the foregoing document was served on all parties of record in this proceeding by first class mail, postage prepaid. A copy also was served by hand delivery upon counsel for the applicants.

A handwritten signature in black ink, appearing to read 'Eric L. Hirschhorn', written over a horizontal line.

Eric L. Hirschhorn