

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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Finance Docket No. 35087  
(including all subdockets)

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

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**VILLAGE OF FRANKFORT'S  
OPPOSITION TO APPLICANTS' REQUEST  
FOR ESTABLISHMENT OF TIME LIMITS FOR  
NEPA REVIEW AND FINAL DECISION  
AND  
MOTION TO EXTEND COMMENT PERIOD ON  
DRAFT ENVIRONMENTAL IMPACT STATEMENT**

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May 30, 2008

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The Village of Frankfort, Illinois ("Frankfort") hereby opposes the applicants' motion (styled a "request") to set time limits for the ongoing NEPA review and the Board's final decision (CN-33) (the "Request"). Frankfort also moves to extend the public comment period on the draft environmental impact statement ("Draft EIS") from forty-five to at least 120 days.

In essence, the applicants' case for imposing time limits appears to be that in entering into the agreement to purchase the Elgin, Joliet & Eastern Railway ("EJ&E"), Canadian National ("CN") failed to take into account the substantial probability that the Board would require an environmental impact statement ("EIS") for this proceeding. For one thing, that contention is questionable in light of the Stock Purchase Agreement. Even were the claim accurate, it is

inappropriate to ask the Board to abjure its duty under the National Environmental Policy Act (“NEPA”) and rush to judgment due to CN’s lack of foresight.

Almost by definition, setting artificial deadlines either will require less than full consideration of the environmental issues by SEA, SEA’s consultant, and the Board, or less than an adequate opportunity for the public to comment on the Draft EIS. Either result would deprive Frankfort and the remainder of the public of their rights under NEPA. The applicants’ request should be denied and the EIS process permitted to take its normal and proper course.

Moreover, the broad scope of the environmental review makes it appropriate to extend the period for public comment on the Draft EIS to at least 120 days, rather than the forty-five days currently anticipated. *See* 72 Fed. Reg. 72820 (Dec. 21, 2007) (noting anticipated 45-day comment period). Frankfort’s motion for such an extension should be granted.

#### **Facts**

In this proceeding, CN seeks to acquire the 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 increase 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 notes, 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. Decision served April 28, 2008, at 17-25.

Initially, the applicants sought to limit the Board's 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 has 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 seeks to secure at this late date what it failed to achieve at the beginning of this proceeding—a truncated, hurried environmental review. The essence of CN’s argument for setting tight, artificial deadlines is that CN’s purchase contract for the EJ&E expires at the end of December 2008. Request at 12. After that, CN contends, “either party *may* be able to terminate the Agreement.” *Id.* (emphasis added).

The text of the Stock Purchase Agreement, however, calls into question the accuracy of CN’s claim. Section 2.3, which CN cites, *id.*, conceivably could be read to allow either party to terminate after December 31, 2008. *See* Application (CN-2) at 259. Importantly, though, CN fails to cite Section 9.1(b), which expressly defers any unilateral right to terminate until after the Board has completed its Interstate Commerce Act and NEPA reviews:

§ 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 . . . .

*Id.* at 293.

Given the substantially greater specificity of Section 9.1(b), that provision likely trumps Section 2.3. Even if one party could terminate the purchase agreement after December 31, 2008, that is not the likely effect of a delay beyond that date. Realistically, the worst-case effect of such a delay, from CN's standpoint, will be that CN ends up paying a slightly higher price for the EJ&E. That is a risk of doing business that CN should shoulder in preference to asking the Board to cut corners in a way that would limit the rights of Frankfort and the rest of the public.

### Discussion

#### **I. The Board should not impose time limits on the environmental review process.**

In essence, CN is asking the Board to protect CN from its own poor planning (or poor drafting) by truncating the environmental review process. The Board should decline the invitation. CN states that “[t]he Board is required, upon request, to impose time limits” on the process. Request at 1. That quote omits the fact that, as CN eventually notes—in a footnote buried three pages farther on, *id.* at 4 n. 5—any such limits must be “consistent with the purposes of NEPA and other essential considerations of national policy.” 40 C.F.R. § 1501.8(a) (2007).

The scope of the environmental review now has been established. 73 Fed. Reg. 22994 (Apr. 28, 2008), *corrected, id.* 24624 (May 5, 2008). The review will cover considerable ground and likely will result in a substantial Draft EIS. Presumably, it takes a finite amount of time to gather and analyze the relevant data. CN offers no evidence to support its demand that the Board's environmental consultant, the SEA, the Board, and the affected public rush through this process, let alone any proof that such haste will leave unaffected the quality of the data and the rigor of the analysis.

A prescribed schedule—particularly one as short as CN has requested<sup>1</sup>—would short-change interested parties in at least two ways. First, the SEA, which must review what the Board’s environmental consultants produce, has limited staff resources. The schedule proposed by CN likely would restrict the SEA’s ability to consider fully, and deliberate upon, the voluminous materials that the consultants and other interested agencies doubtless will produce.

Second, CN’s proposed schedule, particularly the forty-five day comment period—would be inadequate to allow affected communities and other parties to review and provide constructive comments on the Draft EIS. These parties lack the substantial resources available to CN; one result is that they will need additional time to ensure that their rights are protected and that the Board can fulfill its NEPA mandate to hear out all affected parties.

CN argues that the Board has set time limits in past control proceedings. Request at 3. Clearly, though, this is not a typical control proceeding, principally because it will involve massive increases in rail traffic along a one hundred sixty mile rail line that traverses numerous fast-growing suburban communities. Its effect along the EJ&E right of way will be far more like that of a typical construction proceeding than a typical control proceeding.<sup>2</sup>

The NEPA statute does not establish, or require agencies to establish, time limits for the completion of an environmental review. 42 U.S.C. § 4332 (2006). The regulations of the Council on Environmental Quality (“CEQ”) state that an agency shall set time limits if requested by an applicant but require that any such limits be “consistent with the purposes of NEPA and

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<sup>1</sup> CN is requesting the bare minimum time periods permitted by the CEQ regulations governing NEPA reviews. *See* 40 C.F.R. §§ 1506.10 (2007).

<sup>2</sup> CN also cites the *Conrail* proceeding as an example. Request at 3. As another party has pointed out, the many significant differences between that proceeding and the instant proceeding render the comparison inapposite. *See* The Village of Barrington’s Reply to Applicants’ Request for Establishment of Time Limits for NEPA Review and Final Decision, at 17-22 (May 20, 2008).

other essential considerations of national policy.” 40 C.F.R. § 1501.8(a) (2007).<sup>3</sup> Thus the Board may impose time limits on the environmental review process only if CN demonstrates that doing so will not detract from NEPA’s goals, which include ensuring that “the [environmental] information is of high quality” and includes “[a]ccurate scientific analysis.” *Id.* § 1500.1(b). CN has made no such showing and the Request accordingly should be denied.

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<sup>3</sup> The CEQ’s NEPA regulations bind the agencies 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).

**II. The Board should grant Frankfort's motion to set a time period for public comment on the Draft EIS of at least 120 days.**

The CEQ regulations require an opportunity for public comment on a draft EIS, 40 C.F.R. § 1503.1 (2007), and establish forty-five days as a *minimum* comment period, *id.* § 1506.10(d) (2007); *accord Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1119 (9<sup>th</sup> Cir. 2002). The comment period “must be adequate, and a court may hold that the period selected did not provide for adequate disclosure if the comment period is too short.” Daniel R. Mandelker, *NEPA Law and Litigation* § 7:14, at 7-63 (2007).

The Board's regulations provide that “the notice of availability of the draft [EIS] will establish the time for submitting written comments, which will *normally* be 45 days following service of the document.” 49 C.F.R. § 1105.10(a)(4) (2007) (emphasis added). Frankfort's motion to set a period of at least 120 days for such comments is not premature because the Board already has stated its intent to establish a forty-five day comment period in this proceeding. *See* 72 Fed. Reg. 72820 (Dec. 21, 2007). Given the significance of the potential environmental effects and the considerable scope of the EIS, the Board should allow a substantially longer comment period than the minimum forty-five days, namely at least 120 days.

**Conclusion**

For the reasons set forth above, the applicants' Request should be denied. The text of the Stock Purchase Agreement belies CN's contention that delay may kill the transaction. In any event, CN has not shown good cause for truncating the environmental review process.

Moreover, Frankfort's motion to extend the comment period on the Draft EIS from forty-five to at least 120 days should be granted. The issues are many and complex, and forty-five days is far too brief to respond to what doubtless will be a substantial document containing considerable technical analysis.

Respectfully submitted,



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May 30, 2008

**CERTIFICATE OF SERVICE**

I hereby certify that on this 30<sup>th</sup> day of May 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.



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Eric L. Hirschhorn