

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 35087

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

**ENVIRONMENTAL COMMENTS OF THE
ASSOCIATION OF AMERICAN RAILROADS**

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The Association of American Railroads (“AAR”) respectfully submits comments on the Draft Environmental Impact Statement (“DEIS”) issued by the STB’s Section of Environmental Analysis (“SEA”) on July 25, 2008, in connection with the above captioned proceeding. Since 1934, the AAR, a non-profit trade association, has represented the interests of major freight railroads in North America. All of its members have a keen interest in the agency’s environmental review process and its specific effect on freight rail capacity.

I. Introduction.

The AAR appreciates the opportunity to present comments on the DEIS in this proceeding. The proposal of Canadian National Railway Company (“CN”) to obtain control of EJ&E West Company (“EJ&E”) has generated a great deal of opposition from local interests who have voiced concern about increased rail traffic, and who are seeking either to defeat the transaction or impose expensive environmental mitigation conditions on it. The AAR’s comments are focused on the need for additional freight rail capacity and the negative impact

that extraordinary and burdensome environmental mitigation can have on the pursuit of rail capacity enhancing transactions.

In the DEIS, SEA sets forth a number of conclusions about the environmental impacts of the CN-EJ&E transaction and recommends various mitigation measures to address these impacts. The AAR's comments will focus specifically on SEA's conclusions relating to grade crossings potentially needing mitigation and its proposal for grade separations to mitigate the environmental impacts associated with those grade crossings. While the AAR takes no formal position on the specifics of the underlying proposal, it is concerned that the criteria used in this case to determine the grade crossings potentially needing mitigation and the imposition of grade separations as a mitigating condition are not fully grounded in sound policy or law, and will establish a dangerous precedent for allowing the environmental review process to trump the national interest in enhanced rail capacity.

II. The STB Must Not Take Actions That Frustrate the Pursuit of Rail Capacity Enhancing Transactions.

The STB is considering the CN-EJ&E transaction at a time when our nation's transportation capacity, and in particular its rail capacity, remains severely strained. As the agency itself has recognized, there is a critical need for the freight railroads to continue to add capacity if they are to be able to handle future traffic demands. *Ex Parte No. 671, Rail Capacity and Infrastructure Requirements* (STB served Mar. 6, 2007) ("*Ex Parte No. 671*"). The American Association of State Highway and Transportation Officials ("AASHTO") has projected that freight tonnage will grow by almost 57 percent between 2000 and 2020. AASHTO, *Freight-Rail Bottom Line Report 2* (2003). The U.S. Department of Transportation ("DOT") has estimated that rail freight traffic will grow by 35 percent between 2005 and 2020,

and that rail freight traffic could grow even faster if highway congestion drives more freight from trucks to rail. *Ex Parte No. 671*, Comments of the United States Department of Transportation at 3 (filed Apr. 4, 2007). There is no question that freight rail capacity will be in great demand for years to come.

The addition of freight rail capacity to meet future transportation needs clearly depends upon private investment, which is not limitless. A September 2007 report prepared by Cambridge Systematics showed that the capacity needs of the rail industry over the next 28 years are greater than the funds the study estimates the railroads will have available. *See National Rail Freight Infrastructure Capacity and Investment Study* at 7-6. The availability of sufficient private capital will be critical to meeting future capacity needs.

The STB has an important statutory obligation to ensure the development of a freight rail system that can meet the transportation needs of the country. Among the directives of the Rail Transportation Policy, the agency is to “ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense,” 49 U.S.C. 10101(4); *Ex Parte No. 671* at 2. In the current capacity-constrained environment the railroads now face, both on a national level and in the Chicago area that is the subject of this proceeding, the STB has a responsibility to be part of the solutions to rail capacity problems. It must be careful not to take actions that restrict private investment for needed rail capacity or otherwise frustrate the pursuit of rail capacity enhancing transactions.

III. Implementation of The STB’s Environmental Review Responsibilities Must Not Trump the National Interest in Enhanced Rail Capacity.

The STB’s environmental review process cannot and should not be used to undo or otherwise prevent rail capacity enhancing transactions in the national interest. Under the National Environmental Policy Act (“NEPA”), the agency is required to consider every significant aspect of the environmental impact of a proposed action. However, NEPA is a procedural statute that does not require any particular outcome. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (“NEPA itself does not mandate particular results, but simply prescribes the necessary process”). Where NEPA applies to a proposed action by a federal agency, its only requirement is that the “adverse environmental effects of the proposed action [be] adequately identified and evaluated.” *Id.* NEPA does not require an agency to elevate environmental concerns over all other appropriate considerations. It requires only that the agency take a “hard look” at environmental consequences before taking a major action. *See, e.g., Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983).

Thus, while the STB has a duty to consider environmental impacts and possible mitigation, the fulfillment of this duty does not require it to ignore its statutory obligation to ensure a freight rail system that can meet the nation’s transportation needs. The environmental review process should not be permitted to frustrate sound rail transactions that are in the national interest. The agency must not act so as to dampen transactions that can provide for needed rail capacity.

The need for the STB to carefully and properly apply NEPA in this context is illustrated in this proceeding, where the record demonstrates that the adverse impacts which could result from increased traffic that the transaction may bring to communities along the EJ&E

will be accompanied at the same time by beneficial impacts resulting from reduced train traffic in more populated areas on lines in Chicago's urban core. The "hard look" required by NEPA, and which the STB purports to be taking here, must consider both positive and negative impacts of a proposed transaction. 40 C.F.R. § 1508.8 ("Effects [to be evaluated under NEPA] may also include those resulting from actions which may have both beneficial and detrimental effects . . .").

Therefore, when the STB considers proposed environmental mitigation measures to address adverse impacts, it should not impose extraordinary and burdensome mitigating conditions that stifle the pursuit of capacity enhancing transactions with clear beneficial effects. Local opposition to train traffic such as what has been presented in this proceeding cannot trump the national interest in more rail capacity. The AAR urges the agency to consider this transaction in the context of how it will enhance rail capacity in the Chicago area and throughout the nation.

With these overall objections in mind, the AAR's comments will focus on SEA's identification of grade crossings potentially requiring mitigation and proposed grade crossing mitigation. SEA's recommendations as set forth in the DEIS, if fully adopted by the agency, will unnecessarily burden this transaction and establish a risky precedent for similar burdens in future cases that will surely have a chilling effect on rail transactions in the public interest.

IV. The STB's Approach In The DEIS To Identifying Grade Crossings Potentially Requiring Mitigation Does Not Reflect Sound Policy.

In the DEIS, SEA has identified 15 grade crossings as potentially requiring mitigation based on a number of inputs pertaining to train counts, traffic levels and growth rates, and vehicle delay. *See* DEIS at ES-13. A review of the agency's past decisions demonstrates

that this number is unprecedented, and the AAR is concerned that certain of the inputs that led to this result are not fully justifiable nor do they reflect sound past agency practice.

In particular, SEA seems without explanation to have relied more heavily in this DEIS on projected traffic growth than in the past. In no other case, except in the Draft Environmental Assessment issued in Finance Docket No. 34836, *Arizona Eastern Ry. – Construction & Operation – In Graham County, Ariz.*, Draft Environmental Assessment (STB served Feb. 25, 2008), where they projected ADTs forward to 2030, has SEA projected ADTs into the future. In previous EISs conducted by the agency in connection with line constructions or change in control transactions, SEA focused on a current, single-year ADT as a key basis for measuring impacts. See Finance Docket No. 34079, *San Jacinto Rail Ltd. – Construction Exemption – and Burlington Northern & Santa Fe Ry. Operation Exemption – Build-out to the Bayport Loop near Houston, Harris County, Tex.*, Draft Environmental Impact Statement, (STB served Dec. 6, 2002) at 3-21, F-8.

The reliance by SEA on projected traffic growth well into the future to determine grade crossings potentially in need of mitigation raises the question of whether the agency, if it adopts SEA's conclusions, will exceed its authority, as set forth by SEA itself in the DEIS, to impose mitigation conditions that are: 1) directly related to the environmental impacts of the specific transaction, 2) reasonable, and 3) supported by the record before the agency. See DEIS at ES-24. In particular, mitigation based on future highway traffic growth should not be considered directly related to the environmental impacts of the transaction: the Applicant railroads should not be held responsible for highway traffic growth. Increased highway traffic is the result of population growth, not railroad activities, and it should be the responsibility of local communities to deal with the problems caused by that future growth. This responsibility must

include efforts by local communities to find solutions to potential rail/highway conflicts. As a matter of sound public policy, railroads should not be penalized for problems associated with future traffic growth, over which they have no control. It is not reasonable to impose environmental mitigation conditions on applicant railroads based on the impacts of future traffic growth.

V. The Proposed Mandate For Grade Separations Does Not Appear to Be Based On Appropriate Criteria Nor Is It In Conformity With the Law.

In the DEIS, SEA proposes several possible mitigation options to address the adverse environmental impacts at the grade crossings it has identified. One such option involves the mandating of grade separations.

The AAR is concerned that this proposed option is based on inappropriate standards. In determining whether to mandate a grade separation at a particular grade crossing, SEA seems to be relying on Federal Highway Administration (FHWA) guidelines regarding vehicle delay that are not intended for use as a standard for determining whether a grade separation should be required in the first instance. These FHWA guidelines have their origins in a DOT manual compiled to provide guidance to assist engineers working with state highway agencies in the selection of traffic control devices or other measures at highway-rail grade crossings, and were not developed to be used by regulators as standards for implementing a particular regulatory policy. United States Department of Transportation, Federal Highway Administration, *Railroad-Highway Grade Crossing Handbook* 145 (rev. 2d ed. Aug. 2007) (“The [Transportation Working Group] document is intended to provide guidance to assist engineers in the selection of traffic control devices or other measures at highway-rail grade crossings. It is not to be interpreted as policy or standards and is not mandatory.”). These

guidelines were developed to help state highway agencies identify candidates for grade separation throughout their jurisdictions and to enable the state agency to rank its priorities for separation in light of its limited resources.

Given this background, it would not seem appropriate for these guidelines to be used to determine grade crossing candidates for grade separation mitigation in a case such as this one. By using these guidelines as triggers for mandatory mitigation, the grade crossings identified by SEA move to the top of the state list, without any regard for whether the need for grade separation may be more pressing elsewhere. Application of these guidelines could therefore have the effect of applying scarce resources inappropriately, and providing a windfall to the communities who have increased train traffic because of an STB-approved acquisition, while those who have equal or greater increases in train traffic for other reasons receive lower priority.

Furthermore, SEA seems without explanation to be using a methodology that diverges from past cases in which a broader analysis of grade crossing efficiency was relied upon. In particular, a review of the DEIS suggests that SEA has not focused here as much as in prior proceedings on the “level of service” (“LOS”) methodology. The STB in past cases recognized that the LOS methodology is a standard measure of the operational efficiency of a highway/rail at-grade crossing and useful in determining whether mitigation is needed. As SEA stated in the Conrail DEIS, it chose the LOS criteria as the appropriate criteria to “identify grade crossings where there would be a significant *degradation* in level of service as a result of . . . significant increases in proposed train traffic.” Finance Docket No. 33388, *CSX Corp. & CSX Transp., Inc., Norfolk S. Corp. & Norfolk S. Ry. – Control & Operating Leases/Agreements – Conrail Inc. & Consolidated Rail Corp.*, Draft Environmental Impact Statement (STB served

Dec. 12, 1997) at C-15 (emphasis added). The LOS analysis was subsequently used in the Dakota, Minnesota & Eastern line construction case to determine that two grade separations were required, and SEA's calculations were upheld by the Court of Appeals. *See Mid States Coalition for Progress v. STB*, 345 F.3d 520, 539 (8th Cir. 2003).

So, by relying on the FHWA methodology in a way for which it was not originally intended, and by seeming not to rely as much on methodologies used by the agency before, SEA has called its approach here into question. More grade crossings could ultimately be identified as significantly degraded as a result of the transaction and in need of a grade separation than is the case in reality.

The AAR is also concerned that a grade separation condition imposed by the STB would set an unsound precedent for requiring more funding contribution from applicants than what is appropriate and allowable under the law, particularly given that cost-sharing percentages are not by themselves an environmental matter at all. SEA suggests such a precedent in the DEIS where it states at ES-41 that it "has set forth a menu of mitigation options, ranging from the typical rail contribution toward grade-separated crossings (5 to 10 percent) to grade-separated crossings funding at a higher rate (i.e., 25 to 50 percent) by the Applicants," and where it further states at ES-43 that "SEA would require that Applicants participate in the funding of the improvements and is considering a range of possible funding limits."

The question of who should pay for grade separations has been the subject of much review by policymakers over the years. While the relative contributions from different entities has been refined over time, the consensus remains that, because the public derives most, if not all, of the benefit from a grade separation, the public should bear most, if not all, of the cost. Legislative history, DOT statements concerning the implementation of the current law, and

sound public policy support the argument that the railroads should not have to pay for something from which they do not reap a net benefit, and certainly no more than 10 percent of the overall cost.

The Railroad Safety Act of 1970, Pub. L. No. 91-458, 84 Stat. 971, directed the Secretary of Transportation (“Secretary”) to undertake a study of eliminating or protecting railroad grade crossings and provide recommendations for appropriate action, including a recommendation for equitable allocation of the economic costs of any such action. That same year Congress also passed the Highway Safety Act of 1970, Pub.L. No. 91- 605, 84 Stat. 1713, which called for a full investigation of how to provide for increased highway safety at public and private ground-level rail-highway crossings, including the estimate of the cost of such an effort.

The result of these two pieces of legislation was a two-part report, jointly prepared by the staff of FHWA and the Federal Railroad Administration, and submitted by the Secretary to Congress. Based on its investigation, the Secretary recommended that for grade separations “where benefits accrue to the railroad . . . the railroad contribution would be 5 percent of the railroad benefit related portion of the project cost” and for grade separations “where no benefits accrue to the railroad . . . there would be no railroad contribution to the project costs.” *United States Department of Transportation, Railroad-Highway Safety, Part II: Recommendations for Resolving the Problem* 105 (Aug. 1972).

Based on this report, Congress passed the Highway Safety Act of 1973, Pub. L. No. 93-87, 87 Stat. 250, in which a categorical safety program for the elimination or reduction of hazards at rail/highway at-grade crossings was established. The Act stipulated that the federal share of improvement costs was to be 90 percent.

The Surface Transportation Assistance Act of 1987, Pub. L. No. 100-17, 101 Stat. 171, formally established the Grade Crossing Safety Program. *See* 23 U.S.C. § 130. That law authorized the Secretary as part of this program to classify the various types of projects involved in the elimination of hazards at rail/highway crossings, and establish for each such classification a percentage of the costs of construction deemed to represent the net benefit to the railroad or railroads involved for the purpose of determining the railroad's share of the cost of construction. It also provides that the percentage so determined is in no case to exceed 10 percent.

The DEIS implies that the STB and SEA may attempt to undo what Congress and the President have clearly established as the law regarding the funding of grade separations. That the Applicants in this case might be required to pay more than 10 percent of the costs of a grade separation clearly has no foundation in the law. Nor is it grounded in the sound public policy that legislative intent reflects. The appropriateness of adhering to this policy is particularly evident in this case, where there are positive environmental impacts of benefit to the region from the proposed transaction stemming from significantly reduced vehicle crossing delays in Chicago's urban core. Inappropriately mandated grade separation investment dollars would be better spent on rail capacity enhancing initiatives.

VI. Summary

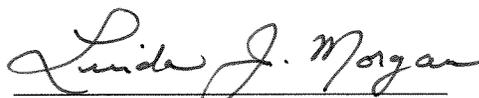
The AAR is concerned, based on the DEIS, that the STB will impose grade-crossing conditions based on methodologies, in particular pertaining to future traffic growth, that cannot be fully justified and diverge without explanation from past agency practice.

The AAR is also concerned, again based on the DEIS, that the STB will mandate more grade separations than is reasonable and appropriate, and the applicant railroad will be required to pay disproportionate to its net benefit, again based on methodologies that diverge

again without explanation from past agency precedent and policies that are not grounded in the law.

With such actions, the STB would be establishing a dangerous precedent for allowing the environmental review process to trump the national interest in transactions that enhance rail capacity. The AAR believes that such a precedent would be counter to sound transportation policy and the agency's statutory obligation to ensure a freight rail system that can meet the transportation needs of the country.

Respectfully submitted,



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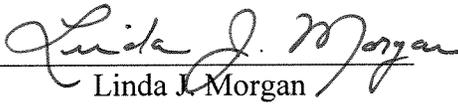
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September 30, 2008

CERTIFICATE OF SERVICE

I, Linda J. Morgan, certify that, on this 30th day of September, 2008, I caused a copy of the foregoing document to be served by first-class mail, postage prepaid on all parties of record in FD 35087.


Linda J. Morgan