

SERVICE DATE – AUGUST 30, 2019

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35087 (Sub-No. 8)

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

Digest:¹ This decision denies a petition by the Village of Barrington, Ill., to reopen the Board's 2008 decision approving Canadian National Railway Company and Grand Trunk Corporation's acquisition of EJ&E West Company.

Decided: August 29, 2019

On April 8, 2019, the Village of Barrington, Ill. (Barrington), filed a petition to reopen this proceeding to require Canadian National Railway Company to provide funding for a grade-separated crossing in Barrington at U.S. Highway 14 (U.S. 14). This is Barrington's fifth petition to reopen this proceeding requesting substantially the same relief. For the reasons discussed below, Barrington's petition will be denied.

BACKGROUND

The Board's 2008 Decision. In 2008, the Board approved the acquisition of control by Canadian National Railway Company and Grand Trunk Corporation (collectively CN) of EJ&E West Company (EJ&E), a wholly owned, noncarrier subsidiary of Elgin, Joliet and Eastern Railway Company, subject to environmental and other conditions. Canadian Nat'l Ry.—Control—EJ&E W. Co. (2008 Final Decision), FD 35087 et al. (STB served Dec. 24, 2008), aff'd sub nom. Vill. of Barrington v. STB (Barrington I), 636 F.3d 650 (D.C. Cir. 2011).

Prior to the approval of the acquisition, in accordance with the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370i, the Board's Office of Environmental Analysis (OEA)² prepared an Environmental Impact Statement (EIS) examining the potential environmental effects of the transaction, including an extensive analysis of the transaction's

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

² OEA was known as the Section of Environmental Analysis when the environmental review for this transaction was conducted.

potential impact on traffic congestion and safety at the 112 highway/rail at-grade crossings along the EJ&E rail line. Based on CN's estimates for projected train traffic on the EJ&E line for the year 2015 and using Federal Highway Administration (FHWA) guidelines, OEA concluded that 13 of the 112 crossings would be "substantially affected" by the transaction,³ recommended mitigation measures for eight of those 13 crossings, and, for two of the eight, recommended that the mitigation should include requiring CN to pay a portion of the cost of constructing a grade separation. See Final EIS 4-8 to 4-9, Dec. 5, 2008, Canadian Nat'l Ry.—Control—EJ&E W. Co., FD 35087. The crossing at issue here—U.S. 14 in Barrington—did not meet the criteria for a "substantially affected" crossing, much less for a grade-separation mitigation condition. See Draft EIS 4.3-11, July 25, 2008, Canadian Nat'l Ry., FD 35087; Final EIS 2-34, Dec. 5, 2008, Canadian Nat'l Ry., FD 35087.⁴

In response to Barrington's comments on the Draft EIS, OEA performed an additional traffic analysis, called the Village of Barrington Traffic Operations Analysis (VOBTOA) study, specifically focused on Barrington's transportation network prior to issuing the Final EIS. The VOBTOA study modeled the effects of freight traffic traveling through the Barrington area on the EJ&E line during AM and PM peak periods and compared the level of congestion to a situation in which no trains traveled through Barrington during peak periods. See Final EIS, App. A.5 at 53-102, Dec. 5, 2008, Canadian Nat'l Ry., FD 35087. The VOBTOA study concluded that "the increase in train traffic on the EJ&E line will likely have some impacts on traffic congestion in Barrington but will not considerably worsen traffic congestion or mobility." Id. App. A.5 at 101. Compared to a no-action scenario, "[u]nder the Proposed Action scenario, network-wide total delay time increased by four (4) percent and five (5) percent during the AM and PM peak periods, respectively." Id. The VOBTOA study further concluded that, because of preexisting capacity constraints, a grade separation at U.S. 14 was not a feasible method to address traffic congestion in the area. Id. at 101-02; see also Final EIS 4-16, Dec. 5, 2008, Canadian Nat'l Ry., FD 35087 (concluding that a grade separation at U.S. 14 would have a "minimal benefit to traffic flow in the Barrington area" because of preexisting conditions).

³ Applying those FHWA guidelines, OEA designated rail crossings as "substantially affected" if, based on rail and vehicle traffic projections for 2015, a crossing met or exceeded at least one of three threshold criteria: (1) crossing level of service (LOS) (where a crossing was at or over capacity and would be reduced to a Crossing LOS of E or F as a result of the transaction); (2) effects on queue length (where a transaction-related queue length would block another roadway that would not otherwise be blocked); and (3) total amount of delay for all vehicles stopped at a crossing (where a crossing would experience more than 40 hours of total transaction-related vehicle delay in a 24-hour period). Draft EIS, 4.3-8 to 4.3-10, July 25, 2008, Canadian Nat'l Ry.—Control—EJ&E W. Co., FD 35087.

⁴ As demonstrated in the 2008 Final Decision, a "substantially affected" crossing did not automatically receive mitigation, and mitigation did not automatically include a grade separation.

The Board, accordingly, did not require CN to provide funding for a grade-separated crossing in Barrington, even though the Board imposed other mitigation conditions. See, e.g., 2008 Final Decision, slip op. at 44 n.97, 76 (requiring installation of traffic advisory signs to address the transaction’s effect on queue length at the intersection of Hough Street and U.S. 14 in Barrington).⁵

Barrington’s 2019 Petition to Reopen. On April 8, 2019, Barrington filed a petition to reopen, followed by two supplements to that petition on April 10, 2019, and April 17, 2019. Barrington requests that the Board reopen this proceeding to consider what it contends is new evidence showing that CN intends to construct 4.27 miles of double track near Barrington along the EJ&E line’s Leithton Subdivision (the Sutton Project), and has projected nine additional trains per day through Barrington. (Barrington Pet. 1-2, Apr. 8, 2019.)⁶ Barrington alleges that this new evidence contradicts previous sworn testimony of CN’s representatives. (*Id.* at 1.) In support of its allegation of additional train traffic, Barrington also points to the expansion of the Port of Prince Rupert; a significant increase in crude by rail between Alberta, Canada, and the Gulf Coast; added capacity to the Joliet Intermodal Terminal; and CN’s infrastructure investments in Louisiana. (See, e.g., id. at 8-9, 12-13; Barrington First Suppl. 1-2, Apr. 10, 2019.) Barrington asks that the Board, “after assessing the impact of the projected increase of

⁵ Since the 2008 Final Decision, the Board has denied four petitions seeking reopening and Board-ordered funding from CN for a grade separation filed by Barrington in 2011, 2014, 2017 (jointly with the Illinois Department of Transportation (IDOT)), and 2018. The Board denied those petitions in decisions served on November 8, 2012, May 15, 2015, April 26, 2017, and December 21, 2018, respectively. Barrington sought reconsideration of the 2015 and 2017 decisions, which the Board denied by decisions served on November 4, 2015, and October 30, 2017, respectively.

In addition to seeking judicial review of the Board’s 2008 Final Decision, Barrington twice sought judicial review of the Board’s reopening denials, and all three times the courts affirmed the Board’s determinations. See Barrington I, 636 F.3d 650 (affirming 2008 decision); Vill. of Barrington v. STB (Barrington II), 758 F.3d 326 (D.C. Cir. 2014) (affirming 2012 decision); Vill. of Barrington v. STB (Barrington III), 892 F.3d 252 (7th Cir. 2018) (affirming 2017 decision). A detailed history of the petitions to reopen through 2017 can be found in the Board’s April 2017 decision and in the Seventh Circuit’s Barrington III decision. See Canadian Nat’l Ry.—Control—EJ&E W. Co. (April 2017 Decision), FD 35087 (Sub-No. 8), slip op. at 1-4 (STB served Apr. 26, 2017); Barrington III, 892 F.3d at 257-66.

⁶ On July 18, 2019, Barrington submitted a letter from the Department of the Army addressed to Wisconsin Central Ltd., CN’s subsidiary that has operated over the EJ&E line since it was acquired by CN, regarding CN’s permit application for the Sutton Project. Barrington states that the letter “reveal[s] the actual scope of CN’s current and planned expansion of operations” over the Leithton Subdivision. (Barrington Letter 1.)

nine daily trains on Barrington, order CN to pay a substantial percentage of the cost of the grade separation,” which amounts to “\$37 million to cover CN’s share of remaining construction costs.” (Barrington Pet. 18, Apr. 8, 2019.) In its second supplement, Barrington also alleges that reopening is warranted because CN failed to disclose that Elgin, Joliet & Eastern Railway Company (EJ&ERC) projected in 2010 that an average of 25 trains per day would travel along the EJ&E line near Barrington. (See generally Barrington Second Suppl., Apr. 17, 2019.)

CN filed a reply on April 29, 2019. CN argues, generally, that the projected train volumes are still speculative, that changes in train volumes over 10 years after the transaction cannot be attributed to the transaction, that potential traffic levels in 2020 are not material to the 2008 decision because they are outside the original 2015 projection, and that an increase in traffic does not automatically require mitigation because the Board’s original reasoning—that Barrington’s vehicle delays were primarily attributable to preexisting conditions—still stands. (CN Reply 2, 9-12, Apr. 29, 2019.) CN also provides additional verified statements to support its witnesses’ previous sworn statements and argues that the 2010 projection is not new evidence or a changed circumstance in 2019 that would materially change the outcome of the 2008 Final Decision. (See CN Reply 12; id. Ex. A, V.S. Krause & Ex. B, V.S. Hartley, Apr. 29, 2019.)

PRELIMINARY MATTERS

By motion filed May 16, 2019, Barrington requested leave to file comments in response to CN’s reply, and CN replied to Barrington’s motion on June 5, 2019, requesting that the Board deny the motion.

Under 49 C.F.R. § 1104.13(c), a reply to a reply is not permitted. However, in the interest of a more complete record, the Board will grant Barrington’s request to accept its reply into the record, and the Board will also accept CN’s reply to Barrington’s request.

Barrington also requests that the Board permit oral argument in this proceeding. (See Barrington Request for Oral Argument, June 7, 2019.) The granting of requests for oral argument is at the Board’s discretion. 49 C.F.R. § 1116.1(d). The Board finds that the written record here is sufficient to decide the petition to reopen and will therefore deny Barrington’s request for oral argument.

DISCUSSION

Standard for Reopening. Under 49 U.S.C. § 1322(c) and 49 C.F.R. § 1115.4, the Board may reopen a proceeding because of “material error, new evidence, or substantially changed circumstances.” The alleged grounds “must be sufficient to lead the Board to materially alter its prior decision.” Barrington III, 892 F.3d at 267.

Further, “new evidence” must be evidence that was not reasonably available to the party when the record was previously developed. See Toledo, Peoria & W. Ry. v. STB, 462 F.3d 734, 753 (7th Cir. 2006) (finding that evidence reasonably available before the Board issued its decision is not new evidence); accord Friends of Sierra R.R. v. ICC, 881 F.2d 663, 667 (9th Cir. 1989); Canadian Nat’l Ry.—Control—Ill. Cent. Corp., 6 S.T.B. 344, 350 (2002) (“‘[N]ew evidence’ is not newly presented evidence, but rather is evidence that could not have been foreseen or planned for at the time of the original proceeding.”).

Barrington’s Evidence of a Projected Increase in the Number of Trains Does Not Warrant Reopening. Barrington’s request predominantly focuses on a projected increase in the number of trains through Barrington due to various factors.⁷ Barrington’s evidence does not warrant reopening this proceeding. First, Barrington fails to address any of the factors that the Board considered when determining whether a grade separation should be required at U.S. 14. Specifically, Barrington does not provide evidence to show that the projected increase in the number of trains would make U.S. 14 a “substantially affected” crossing under the Board’s threshold criteria, much less that a grade-separation mitigation condition for Barrington would be warranted. Thus, Barrington has not met its burden of providing evidence that would materially alter the conclusions the Board reached in 2008.⁸

Moreover, Barrington fails to address the Board’s conclusion that existing capacity constraints in Barrington contribute more to vehicle delays than additional CN trains on the

⁷ To support its argument regarding future increases in train traffic, Barrington points to CN statements regarding train traffic forecasts, as well as more general statements regarding investments in CN’s equipment and infrastructure. Barrington primarily argues that, based on CN’s projection in a December 2018 U.S. Army Corps of Engineers (USACE) Permit Application, CN’s Sutton Project would result in an increase of nine trains moving through Barrington once the double track is constructed. CN counters that more recent forecasts of future traffic volumes on the Leithton Subdivision project an increase of only four to five trains per day. (See CN Reply 7, V.S. Greg Hartley 2, Apr. 29, 2019.) The Board finds CN’s revised projection to be more persuasive, as it is based on more recent forecasts. However, this disagreement is immaterial, because Barrington’s evidence of a projected increase in the number of trains would not warrant reopening in any event, as discussed below.

⁸ Similarly, in denying Barrington’s January 2017 petition to reopen, the Board noted that the argument that CN’s trains were longer and slower than had been projected was flawed because Barrington and IDOT did not “quantify the operational data they have collected to show that U.S. 14 now meets the Board’s criteria for a grade-separated crossing.” April 2017 Decision, FD 35087 (Sub-No. 8), slip op. at 8. The Board stated that “some variance between what was projected and what has occurred is expected,” and that “Petitioners therefore must do more than show that a variance exists to demonstrate new evidence or changed circumstance.” Id.

EJ&E line. See October 2017 Decision, FD 35087 (Sub-No. 8), slip op. at 4 n.5. As discussed above, the Final EIS thoroughly examined this issue, including through the VOBTOA study that specifically focused on congestion in Barrington.⁹ And Barrington's own 2011 traffic study confirmed this conclusion.¹⁰ Barrington has presented no evidence that refutes those findings and conclusions. Barrington's evidence relating to the projected increase in the number of trains is therefore not sufficient to lead the Board to materially alter the 2008 Final Decision.

CN's Representatives' Allegedly Misleading Statements. Barrington alleges that CN's representatives made misleading statements during the course of the litigation arising out of Barrington and IDOT's January 2017 petition to reopen. This claim does not have merit.

In their January 2017 petition, Barrington and IDOT asserted that CN was planning to construct double-track through Barrington, citing a Request for Proposal (RFP) that CN issued in 2016. (Barrington & IDOT Pet. 22-26, Jan. 10, 2017.) CN responded with a verified statement by John Orr, CN Senior Vice-President, Southern Region, who explained that CN later concluded that double tracking in and around Barrington would not be worthwhile and notified bidders in September 2016 that it would not proceed. (CN Reply, Ex. A, V.S. John Orr 9, Jan. 30, 2017.) Barrington now argues that CN's December 2018 USACE Permit Application, in which CN described the Sutton Project, a proposed addition of 4.27 miles of track on the Leithton Subdivision several miles south of Barrington, demonstrates that Orr's testimony was misleading as to CN's plans. (Barrington Pet. 1, 6, 17-18, Apr. 8, 2019.) In reply, however, CN witness Daniel Krause, the CN Project Manager for the Sutton Project, confirms that CN notified bidders in September 2016 that CN would not award contracts under the 2016 RFP, and he further states that the new RFP was issued in March 2018, after CN reassessed its needs following the winter of 2017-2018. (CN Reply, Ex. A, V.S. Daniel Krause 4, Apr. 29, 2019.) Thus, Barrington has not offered evidence to show that, when Orr made his statement in January 2017, CN had any plans to construct double track on the Leithton Subdivision. Orr's verified statement was not misleading.

Barrington also argues that the nine-train increase projected in the USACE Permit Application calls into question the 2017 verified statement of CN witness Keith Reardon that only an additional 0.5 trains per day would be expected to move through Barrington. (Barrington Pet. 9-11, April 8, 2019.) This argument, however, is without merit, as it misrepresents CN's statements. Reardon's 2017 estimate pertains only to trains moving over the

⁹ See also October 2017 Decision, FD 35087 (Sub-No. 8), slip op. at 6; Canadian Nat'l Ry.—Control—EJ&E W. Co. (November 2012 Decision), FD 35087 (Sub-No. 8), slip op. at 4-5, 13 (STB served Nov. 8, 2012); 2008 Final Decision, slip op. at 45 & n.101.

¹⁰ See October 2017 Decision, FD 35087 (Sub-No. 8), slip op. at 7-8; November 2012 Decision, FD 35087 (Sub-No. 8), slip op. at 12; (see also Barrington Pet., Attachment A, tbl. XI-1, Oct. 14, 2011); see also Barrington III, 892 F.3d at 271 & n.14.

EJ&E line to or from the Port of Prince Rupert, while the 2018 USACE Permit Application's estimate pertains to the total number of additional trains projected over the EJ&E line regardless of origin or destination. In fact, CN notes that in 2018, approximately 3.4 trains moved through Barrington to or from Prince Rupert per day, which is slightly *lower* than the 2017 average of 3.5 trains per day. (CN Reply, Ex. B, V.S. Greg Hartley 2-3, Apr. 29, 2019.) Thus, the Board finds that Reardon's 2017 statement was not misleading.

EJ&ERC's 2010 Rail Traffic Projection. In its second supplement to its petition to reopen, Barrington argues that the Board should reopen the 2008 Final Decision because of a 2010 projection that 25 trains per day would travel along the EJ&E line near Barrington. (Barrington Second Suppl. 2, Apr. 17, 2019.) The projection was made by EJ&ERC in a petition before the Illinois Commerce Commission. (See *id.* Attachments E & F.) Barrington argues that the projection was not reasonably available prior to the filing of Barrington's current petition to reopen. (*Id.* at 4.)

The petitions in which EJ&ERC made the projection are publicly available on the Illinois Commerce Commission's website, and there is every indication that the petitions were publicly available at the time the petitions were filed with the Illinois Commerce Commission and in the intervening nine years.¹¹ Barrington could have discovered and provided this evidence in any of its 2011, 2014, 2017, or 2018 petitions to reopen. EJ&ERC's 2010 projection, therefore, is not new evidence and provides no basis for reopening.¹²

¹¹ See Files for T10-0138, <https://www.icc.illinois.gov/docket/files.aspx?no=T10-0138&docId=155251> (last visited July 8, 2019); see also Internet Archive Capture of Ill. Commerce Comm'n Search Page, <https://web.archive.org/web/20101006072014/http://www.icc.illinois.gov/docket/Search.aspx> (archived Oct. 6, 2010) (allowing public to search dockets by docket number, entity, or document type). Barrington does not contend that these filings have not been publicly available since they were filed in 2010. (See Barrington Second Suppl. 4 n.5, Apr. 17, 2019.)

¹² Even if the 2010 projection were new evidence, it would not warrant reopening the 2008 Final Decision. As the Board has said in this and other decisions, simply noting a variance between what was projected in 2008 and more recent projections is not enough; Barrington still would have needed to provide evidence showing that U.S. 14 would meet the criteria for a Board-ordered grade-separated crossing and address the Board's finding that preexisting conditions contributed more to Barrington's congestion than additional CN trains. Additionally, since the Board first approved CN's acquisition of EJ&E in 2008, the average number of trains traveling through Barrington has consistently remained below or near the Board's 2015 projection of 20.3 trains a day, see, e.g., April 2017 Decision, FD 35087 (Sub-No. 8), slip op. at 6, and Barrington has not provided evidence to the contrary. Thus, the existence of the 2010 projection in the Illinois proceeding does not support reopening.

Finally, the Board notes that since the 2008 Final Decision, “the causal relationship between CN’s acquisition of the EJ&E line and the traffic conditions in Barrington, both current and future, has become more attenuated.” October 2017 Decision, FD 35087 (Sub-No. 8), slip op. at 10. “Rail traffic may fluctuate over time for many reasons that have nothing to do with the validity of the 2008 projections,” and “the Board has . . . recognized that a variety of other factors unrelated to the transaction, such as changes in industry, economic growth, and energy prices, are now just as likely to play a role in future fluctuations in rail traffic.” Id.

CONCLUSION

For the reasons described above, the Board will deny Barrington’s latest petition to reopen. Though Barrington has presented some new evidence, it is not sufficient to materially alter the Board’s decision because Barrington has failed to quantify how the additional projected trains would cause U.S. 14 to meet the criteria for a Board-ordered grade-separated crossing and has failed to present evidence to show that any resulting vehicle delay from increased trains in Barrington would not be primarily attributable to preexisting conditions. Barrington’s allegations of misleading statements and the 2010 projection also do not warrant reopening the 2008 Final Decision.

It is ordered:

1. Barrington’s April 8, 2019 petition to reopen is denied.
2. Barrington’s motion for leave to file a reply to CN’s April 29, 2019 reply is granted, and CN’s reply to Barrington’s motion is accepted into the record.
3. Barrington’s request for oral argument is denied.
4. This decision is effective on its date of service.

By the Board, Board Members Begeman, Fuchs, and Oberman.