Railway Development in an Age of Competing Requirements of Timely Decision Making and Public Participation

Case Example: The CN – EJ&E Proposed Merger

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Abstract

Balancing the competing needs of timely decision making and meaningful public participation can be a challenge for both the railroad and the Surface Transportation Board (STB), especially when it involves a controversial rail proposal. Using the recently completed Environmental Impact Statement (EIS) process for the Canadian National Railway (CN) acquisition of the Elgin, Joliet & Eastern Railway Company (EJ&E) as a case study, this paper describes the process from the viewpoints of both the regulatory agency and the applicant. The role and responsibilities of the STB for this proposed major and controversial rail acquisition is discussed, as well as the decision to prepare an EIS on the proposed transaction and the unprecedented public participation in the EIS process. A review of the major conclusions of the EIS is also presented. Details of the proposed acquisition, the operations plan for the EJ&E rail line, the community outreach activities and community agreements provide additional context for this discussion. The major challenge for this acquisition involved the need to balance the mutual desires of the STB and CN for a timely decision on the proposed transaction, which required significant public participation as part of the EIS process based on the strong desire by affected communities and a concerned public to have a voice in the review process, coupled with the need to maintain an appropriate and reasonable EIS scope. This paper describes the process used to
establish stakeholder groups and the impact of this process in maintaining dialogue among stakeholders. Finally, this paper concludes with a discussion of actions future applicants can take to meet the challenges of a controversial rail development proposal.

**Background**

On October 30, 2007, Canadian National Railway Company and the Grand Trunk Corporation (CN) filed an application with the Surface Transportation Board (STB) seeking the STB’s approval to acquire control of the Elgin, Joliet and Eastern Railway Company (EJ&E). Under 49 U.S.C. 11323-25 and 49 CFR Part 1180, STB approval is required any time two or more rail carriers seek to consolidate – whether through a merger or common control. CN identified three primary goals of the EJ&E rail line acquisition:

1. Improve CN operations in Chicago by establishing a continuous rail route around the Chicago terminal area and avoid rail traffic delays in Chicago for movements not ending in this city
2. Establish access to the EJ&E Kirk Yard in Gary, Indiana, to CN
3. Enable CN to expand its relationships with companies served by EJ&E

On November 26, 2007, the STB issued Decision Number 2 in this action. The essence of this decision was that the STB, to fulfill its responsibilities under the National Environmental Policy Act (NEPA), would prepare an Environmental Impact Statement on the transaction, through its Section of Environmental Analysis (SEA).

The timing of subsequent actions is shown in the brief chronology below. Essentially, this major EIS for an important yet controversial rail acquisition with an unprecedented inclusionary process for public involvement and comment was completed in just one year.

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1 STB Finance Docket No. 35087, Canadian National Railway Company and Grand Trunk Corporation – Control – EJ&E West Company

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• The SEA issued a Notice of Intent to Prepare an EIS on December 21, 2007.
• The SEA served the Draft EIS to CN on July 25, 2008, entering a period of review and public comment.
• The SEA served the Final EIS to CN on December 5, 2008.
• The STB approved the transaction in a decision issued on December 24, 2008.
• The approval became effective on January 23, 2009.
• CN completed the transaction on February 1, 2009.

CN owns an extensive rail system of approximately 20,300 route miles of track, stretching from the Pacific Coast to the Atlantic Coast in Canada and to the Gulf of Mexico in the United States. The CN Southern Region operates about 7,400 route miles of track in the United States. In the Chicago metropolitan area, CN operates about 150 miles of rail line on five subdivisions that converge on Chicago. CN operates several major rail yards in the Chicago area, including Hawthorne Yard on the Freeport Subdivision and Glenn Yard on the Joliet Subdivision as primarily classification yards, and Markham Yard on the Chicago Subdivision performing intermodal and classification functions. CN also uses its Schiller Park Yard on the Waukesha Subdivision for crew change and staging operations and the BRC Clearing Yard for switching and to facilitate movement of trains between the Waukesha, Chicago and Elsdon subdivisions.

The EJ&E rail line forms a continuous arc of about 120 miles around Chicago, extending from Waukegan, Illinois, north of Chicago to Joliet, Illinois, southwest of Chicago to Gary, Indiana, southeast of Chicago. The EJ&E rail line passes though five counties and about 50 communities in Illinois and Indiana. The EJ&E’s Kirk Yard in Gary, Indiana, is a large classification yard. The EJ&E also operates smaller yards in Joliet and Whiting, Indiana. At the time of the application to the STB, the EJ&E operated from 5.3 trains per day on the northern end of their rail line arc to about 18.5 trains per day near Joliet. The EJ&E rail line crosses all five CN

2 The Waukesha Subdivision approaches from Minneapolis/ St. Paul on the north; the Freeport Subdivision approaches from Omaha on the west; the Joliet Subdivision approaches from Joliet on the southwest; the Chicago Subdivision approaches from Memphis on the south; and the Elsdon/South Bend Subdivision approaches from Detroit on the east.

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subdivisions. Acquisition of the EJ&E lines would allow CN to connect its five rail lines into one continuous route around the crowded Chicago Terminal Area and consolidate its switching activities at Kirk Yard, eliminating the need to use the BRC Clearing Yard (a major bottleneck in the region).

In recent years, CN had successfully acquired several smaller rail lines, including the Illinois Central, the Wisconsin Central and several others. These acquisitions were relatively routine and did not generate much controversy. For example, the acquisition of the Illinois Central involved STB preparation of an Environmental Assessment (EA), a more limited document than the full Environmental Impact Statement. For the Wisconsin Central acquisition, the STB concluded that it met the criteria for a Categorical Exclusion (Cat Ex), meaning that the action did not require any environmental investigation.

The acquisition of the EJ&E would not be so routine. From the initial CN filing of the application, the level and intensity of community interest in the proposed acquisition of EJ&E by CN was unprecedented. The intense response to this action prompted both the CN and the STB to enhance their approaches to community outreach and public involvement. It is hoped that lessons learned and examples shared from this experience can be put to positive use in future transactions with a similar level of public interest.

The STB mailing list for the CN transaction quickly grew from just a few hundred interested parties to more than 34,000 interested parties in less than a year. The resulting massive public involvement effort is demonstrated by the data listed below. But beyond these formal outreach efforts, the STB’s SEA, working with its independent contractor, HDR Inc., held many informal meetings with various community and stakeholder groups.
• SEA held fourteen public EIS scoping meetings in communities along the EJ&E, attended by more than 2,600 people.
• SEA established and held numerous meetings with five stakeholder groups consisting of local and state resource agencies
• The STB held eight public meetings on the Draft EIS, attended by more than 4,600 people.
• The STB distributed more than 5,600 copies of the Draft EIS and received over 9,500 comment letters addressing over 55,000 issues.
• The STB distributed more than 13,400 copies of the Final EIS.

The predominate concerns of the public and community were related to traffic congestion, mobility and vehicle delay at grade crossings. Other concerns identified by the public included noise, community cohesion, pedestrian safety, property values, hazardous materials transportation and rail safety.

Description of the Transaction

The EJ&E arc around Chicago is approximately 120 miles long. In addition to this main line, the EJ&E operates several branch lines, including the Illinois River Line, the Paul Ales Branch Line, the Whiting Branch, the City Track and the Lake Front Line. Together, EJ&E operates about 200 track miles in the greater Chicago area. To facilitate the movement of rail traffic to the EJ&E over a three year phase in period, CN plans to establish new connections from the Freeport, Joliet, Chicago, and South Bend subdivisions to the EJ&E. CN also proposed to construct new connections from the CSX and the Norfolk Southern rail lines to the EJ&E to facilitate the interchange of rail traffic. CN also proposed to improve the connection between the Waukesha Subdivision and the EJ&E near Mundelein, Illinois and construct about 19 miles of double track.

3 Of the 55,000 comments identified over 15,000 were related to vehicle delay, delay to emergency response vehicles, and safety at grade crossings.
Traffic changes on the EJ&E would be phased in over the same three year period. In general, CN would route most of its through trains on the EJ&E tracks, bypassing the Chicago terminal area. The result would be that some sections of EJ&E track could eventually experience increases of between 15 and 23 trains per day, based on 2007 traffic levels (which do not reflect the current nationwide decline in freight movement.) CN planned eventually to remove all traffic from the downtown Chicago St. Charles Airline tracks, leaving Amtrak as the sole operator on this rail line.

**Making the Decision to Prepare an Environmental Impact Statement**

EA or EIS? This cryptic question resonates in the corridors of every Federal agency charged with complying with the requirements of the National Environmental Policy Act (NEPA). An EA is an Environmental Assessment, typically a relatively straight-forward process. An EIS, on the other hand, is a much more complex process required when an action is expected to create a “significant” effect on the environment. The resulting Environmental Impact Statement is typically a lengthy document that requires time for public and stakeholder review and comment and routinely takes several years to complete. The initial challenge for every Federal agency conducting an environmental review of some proposal or project is determining whether the facts of the action could result in “significant environmental impacts.” If not, an EA is the right document to prepare. If so, a more complex EIS is called for.

The environmental regulations of the STB, like those of most Federal agencies, group actions filed before the Board into one of three categories: 1) those that are likely to result in significant environmental impact and, therefore, require the agency to prepare an EIS; 2) those that may result in environmental impact less than “significant” and, therefore, warrant

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preparation of an EA; and 3) those that are unlikely to result in any environmental impact and, therefore, may be excluded from environmental review. These groupings are established at 40 CFR 1105.6(a)(b) and (c)(a) for EISs, (b) for EAs, and (c) for categorical exclusions). Under subsection (d), the STB reserves the right to reclassify actions depending on the potential for the action to result in significant environmental harm.

The Board groups railroad acquisitions like the CN-EJ&E merger under (b) – actions that generally require preparation of an EA. So why did the STB pursue a much more time consuming and lengthy EIS rather than an EA for this merger? This section will discuss how the STB reached the decision to prepare the more detailed and complex (and for the applicant, expensive) document.

The process began by first considering whether the acquisition of the EJ&E by CN could result in “significant” environmental impacts. To understand the definition of significant, the STB relied on guidelines established by the Council on Environmental Quality (CEQ), the federal agency responsible for drafting NEPA implementing regulations. Under 40 CFR 1508.28, the CEQ provides a number of suggestions to help agencies determine what constitutes a “significant” impact. The following list includes the major points the STB considered in its decision to pursue an EIS rather than an EA for the CN acquisition of EJ&E:

- Consider the context, such as society as a whole. Significance varies with the setting.
- Consider both short- and long-term effects. Balance the intensity or severity of the potential impact.
- Consider benefits as well as harms.
- Think about the degree to which the proposed action could affect public health and safety; may involve unique or unknown risks; or establish precedents for future actions.
- Weigh the degree to which an action could affect endangered species, historic sites and structures, or result in cumulative harm to the environment.
Of all the items listed in the CEQ regulations to help agencies decide what is truly “significant,” there is one that is quick to grab the attention of federal agencies involved in actions that require compliance with NEPA. That is the suggestion by CEQ to consider “the degree to which the effects on the quality of the human environment are likely to be highly controversial,” noted in 40 CFR 1508.27(b)(4).

Over many years, the STB Section of Environmental Analysis (SEA) has prepared many EAs and EISs, with an EA being the more prevalent. For past actions, the STB made the decision to prepare an EIS in cases where a proposal could result in substantial degradation to some part of the natural environment. An example would be a proposed new rail line that crossed a pristine lake with no prior construction. Or a merger of two rail systems that stretches across half of the United States. Or construction of a new rail line near the only riparian habitat for birds and other creatures in a large area. Deciding to prepare an EIS based solely in response to public opposition forces an agency to consider number of letters rather than severity of potential impacts -- not a desirable scenario for the STB or any other responsible decision-maker.

Inside SEA, experienced staff understood that the CN-EJ&E acquisition proposal would increase the amount of train traffic operating on the J Loop around Chicago, sparking concern and opposition among the residents of the many communities of the outer suburbs. The STB knew that a potential traffic rights case involving the J Loop in prior years had generated a flood of hundreds of letters addressed to the environmental section. A highly concerned public was eager to protest additional train traffic and its potential impact on the lives of the people who lived near the affected train tracks. Memories of file cabinets bursting with protest letters came
to mind inside the STB when CN representatives informed them they planned to seek acquisition of the J Loop. The STB clearly understood that the level of public controversy would be high.

SEA began their internal analysis by carefully studying the wording of the CEQ regulation that raised the issue of potential public controversy. The regulation stated that an agency should consider controversy about the “effects of the proposal on the human environment.” The STB decided that rather than counting the number of letters received in opposition and comparing that to letters in support of the proposal, they would focus on the potential impacts of the proposed merger on the human environment and consider how people might respond to those impacts. The difference was subtle, but an important distinction in the STB decision-making process.

It is not common for a federal agency to pursue an EIS based on the singular consideration that “people will be upset” at the proposal. The STB believed that such an approach would not satisfy the intended function or spirit of an environmental review or what has become known as “the NEPA process.” The result of a successful NEPA process should give the decision-maker the information needed about potential environmental impacts to enable a fully-informed decision. NEPA is not and should not become a popularity contest or an unofficial election to decide whether a project should or should not happen. By making the decision to focus on controversy related to human impact instead of on controversy about human feelings about the project allowed the STB to retain the essential functionality of the NEPA process as a tool for decision-makers to rule on the CN-ES&J merger.

That, in essence, describes the approach SEA took in deciding to prepare an EIS. Inside SEA, staff read every letter received; considered the entire project area, both inside the arc

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formed by the J and along the J itself; and drew upon prior experiences and lessons learned in other environmental reviews. In the end, the STB decided that because the CN-EJ&E acquisition had the potential to result in significant environmental impacts – both beneficial and adverse – preparation of an EIS was warranted.

Deciding to prepare an EIS has consequences. An EIS takes longer to complete, requires more analysis, consumes more resources and, consequently, costs more money. Still, no one can sue an agency for failing to do an EIS. These are points to consider, but alone, they do not justify a decision to prepare an EIS or an EA. Focusing on and documenting potential impacts across the entire project area, which is what the STB did in the CN-EJ&E merger, is perhaps the strongest argument to justify an EA/EIS decision.

Community Outreach Activities for the CN-EJ&E Acquisition EIS

CN began early in its efforts to engage the more than 50 communities along the affect route lines in dialogue about the proposed merger. Immediately after filing the acquisition application with the STB on October 30, 2007, CN began arranging methods to identify the most interested community leaders and organizations and defining strategies to engage them and explain the project. By the time SEA began its scoping process in December 2007, CN had initiated contact with every community along the EJ&E arc. CN also reached out to every community along existing CN rail lines on the inside the arc, made itself available at all SEA scoping meetings and participated in every SEA public meeting upon release of the draft EIS.

By the time the STB reached a decision to approve the transaction, CN had reached negotiated agreements with ten communities along the EJ&E rail line. In the months after receiving STB approval, CN has negotiated seven more community agreements, for a total of 17 community agreements.
agreements. As part of the EIS process, CN proposed 108 voluntary mitigation measures adopted and imposed as conditions of the STB approval. CN has established a community liaison to provide all affected communities with a direct point of contact.

**Lessons Learned**

Communities and the public are demanding to become more engaged in STB’s decision making process. The foundation of a public involvement project is finding ways to engage interested parties. Gaining public acceptance can be one of the greatest challenges, but involving, educating and engaging stakeholders at an early stage is key to reaching the finish line. Today, ready access to information from the 24/7 news cycle and web-based data sources haspushed stakeholder interest in projects to a new high. Effective public involvement is more important than ever to ensuring successful projects.

This explosion of potential and necessity drove the CN-EJ&E merger to become one of the largest EIS efforts ever undertaken by the STB, especially from a public involvement perspective. During the public comment period, more than 7,000 stakeholders participated in public meetings held in communities along the affected rail lines. Concerns raised included issues from safety to air quality, transportation and environmental concerns and even the impact of train vibrations on a nearby laboratory.

The issues that emerged through the EIS preparation for the CN-EJ&E acquisition are not unique to the Chicago region and it is likely that similar issues will surface on future rail-related development projects. While future transaction may not generate the volume of comments generated by the proposed CN acquisition of the EJ&E, communities in all regions will continue to demand that their voices be heard. The emergence of a wider variety of widely accessible
social media outlets, such as Twitter, blog sites and Facebook, will also increase the level of public connection to proposed actions along with their desire to express opinions in an inclusive atmosphere. Therefore, planning for future rail development projects should include a well-honed strategy for working with communities that presumes intensive public interest and interaction with the process.

To summarize the lessons learned from this complex and controversial, yet ultimately successful, rail acquisition effort, the following points are offered:

1. In the future, communities and the public will expect to be more engaged in the NEPA process on rail development projects. NEPA and the federal agencies encourage participation by the public so railroads should anticipate that the public and communities will be involved.

2. Railroads should have a plan for working with communities. Areas of possible controversy should be identified. The plan should include time to identify and resolve potential community “hot button” issues.

3. The STB encourages railroads to develop negotiated agreements with communities to address concerns. Such agreements can (and do) result in solutions that are more far reaching than those that might be imposed by the STB.

4. Recognizing that for very legitimate reasons development activities, such as rail mergers, must be confidential, railroads should develop a rollout plan that includes being proactive in working with communities and identifying concerns as early as appropriate. Issues that emerge late in a NEPA evaluation have the greatest potential to delay the process.