

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 35087

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

**WILL COUNTY, ILLINOIS' MOTION TO COMPEL DISCOVERY
FROM THE CANADIAN NATIONAL RAILWAY COMPANY
AND FROM THE GRAND TRUNK CORPORATION**

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February 5, 2008

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Pursuant to 49 C.F.R. §1114.31, Will County, Illinois ("Will County") moves to compel full, substantive responses by the Canadian National Railway Company and the Grand Trunk Corporation to two discovery requests served upon them by Will County.

STATEMENT OF FACTS

The Canadian National Railway Corporation and the Grand Trunk Corporation (collectively "CN") are the applicants in this proceeding. They are seeking to acquire the vast majority of the Elgin, Joliet & Eastern Railway Company ("EJ&E") yards and tracks, including all of the yards and tracks in Will County.

As detailed more extensively in Will County's Opening Memorandum and supporting Verified Statements, Will County is a metropolitan county directly south of Chicago that is one of the fastest growing counties in the country in terms of population. Its estimated population as of July 1, 2006 was 668,217 residents, and it no doubt is higher today.

The proposed control application will undoubtedly have a significant impact on Will County. The EJ&E bisects Will County, and there are 52 public at-grade crossings involving the EJ&E in Will County. According to Attachment A.2 to the CN's Operating Plan that was on page 247 of CN's Application, from the East Joliet Yard northward through Will County, rail traffic is projected to grow from 18 trains per day to 45 trains per day, with a concomitant 240 to 273 percent freight tonnage increase and a more than 750 percent increase in hazardous materials tonnage. The rail traffic south of the East Joliet Yards to the Will County border is expected to grow from 6 daily trains to 28 daily trains, with corresponding increases of 542 percent in freight tonnage and almost 700 percent in hazardous materials tonnage.

A. Discovery to Which CN Failed to Respond

Will County has not determined whether it will support or oppose the CN's proposed acquisition of the EJ&E track and yards until Will County understands the full impact of the acquisition upon Will County and its businesses and residents. For the purpose of obtaining information to assist it in understanding the impact of the proposed transaction, Will County served discovery requests and interrogatories on the EJ&E and the CN. Copies of Will County's discovery requests and interrogatories are attached as Exhibits 1 and 2. Will County's discovery was targeted at three principal concerns: (1) rail traffic congestion and possible gridlock; (2) auto and truck traffic congestion and possible gridlock; and (3) public safety and such traditional environmental and transportation concerns such as hazardous materials risk, and noise, air quality and vibration impacts.¹ CN's responses to that discovery are attached as Exhibit 3.²

¹ Will County's discovery concerning rail congestion issues to which the CN failed to provide adequate responses that are the subject of this motion are Will County's Document Request Nos. 3-7, 11, 12 and 22 and Will County's Interrogatory Nos. 6 a. and 6 c. Similarly, Will County's discovery concerning surface transportation issues to which the CN failed to provide adequate responses are Will County's Document Request Nos. 13, 14 and 17, and Will County's Interrogatory Nos. 1 d. and 6.c. The Will County discovery targeted at public safety at at-grade rail crossings are Will County's Document Request Nos. 18 and 19, and

1. **Rail Congestion Issues**

With respect to potential rail congestion issues, Will County requested documents and asked questions targeted at current and future maintenance issues, potential operating problems and future traffic growth. The CN essentially brushed this discovery aside.

a. **Maintenance**

Will County wanted to analyze whether the existing EJ&E track would withstand the pounding resulting from an enormous increase in rail traffic. If not, rail congestion is virtually certain. Will County requested that CN produce specific documents that would provide information as to the current condition of the track:

3. A listing of the planned track work, bridge and signal work for calendar year 2007 for the EJ&E rail system.
4. A listing of the planned track, bridge and signal work for calendar year 2008 for the EJ&E rail system.
5. A listing of all track, bridge and signal work completed in calendar year 2007 on the EJ&E system.
6. Rail detector car histories for rail detector cars run on the EJ&E system in calendar years 2006 and 2007.
7. Federal Railroad Administration ("FRA") geometry car/dynamic loading car (T-100) runs or data collected for trips on the EJ&E system by such cars in calendar years 2006 and 2007.

Ex. 1, Document Requests 3-7. The CN's uniform answer was:

Without waiving any objections, and subject to any specific objections and the General Responses and General Objections stated above, Applicants respond as follows:

Will County's Interrogatory Nos 3, 4 and 6 b. The Will County discovery targeted at environmental concerns are Will County Document Nos 15, 16, 20 and 23

² CN's discovery responses were served on Will County on January 22, 2008. The parties agreed to extend the date for filing this motion to February 5, 2008 to allow time, among others, to try and reach agreements that would make the motion unnecessary. The parties were unable to resolve their differences.

Such documents, if they exist, are not relevant or are insufficiently relevant to warrant the burden of production. Such a document, if properly discoverable in this proceeding, would be available from EJ&E.

Ex. 3, CN Response to Requests 3-7 at p. 16-18.³ The EJ&E, whom the CN identified as a possible source for the requested documents, has refused to respond to discovery in this proceeding and is the subject of two pending motions to compel.

Will County also sought documents reflecting any analysis that CN had performed to determine the type of future maintenance and associated costs required to handle the increased traffic. It requested of CN:

11. Any analysis you prepared of the increased maintenance or maintenance costs required for EJ&E track in Will County due to increased traffic in the event the Railroad Control Application is approved, both in the initial years and after the acquisition is fully implemented.

Ex. 1, Document Request 11. The CN responded:

Without waiving any objections, and subject to any specific objections and the General Responses and General Objections stated above, Applicants respond as follows:

The Application took maintenance costs into account, but Applicants did not perform a formal analysis of maintenance costs for EJ&E track in Will County. Applicants estimated generally that there would be an increase of \$2.50 for every incremental 1,000 gross ton miles of traffic.

Ex. 3, CN Response to Request 11 at p 19.

So, according to the CN, Will County really is not entitled to see the traditional documents that a railroad engineer would examine to determine the existing condition of the EJ&E track. The CN believes those documents are irrelevant. One possibility, based on the CN's answers, is that the CN did not perform any analysis of the maintenance requirements and

³ The CN's discovery response opened with 11 ½ pages of background and objections. See Ex. 3

simply selected a dollar figure for increased costs based solely on traffic. If that truly is the case, it is Will County's position that is grounds alone for denying the CN's application because it does not know and cannot predict whether it can effectively operate over the EJ&E tracks. If on the other hand, CN has the requested maintenance documents and it has performed maintenance analyses but it is just not calling them "formal" analyses, it is Will County's position that those documents ought to be produced.

b. Operations

With respect to operations, Will County is under the impression that switching operations for current shippers are occasionally or frequently conducted on the mainline EJ&E tracks. With 45 or even 28 trains a day (or possibly substantially more as discussed below), such switching operations become more difficult. Will County therefore submitted the following request:

12. All documents reflecting, referring or relating to any analysis of the operating plan or possible operational difficulties associated with the switching of local traffic onto the EJ&E main track in Will County in the event the Railroad Control Application is approved, both in the initial years and after the acquisition is fully implemented.

Ex. 1, Document Request 12 The CN's response was:

Without waiving any objections, and subject to any specific objections and the General Responses and General Objections stated above, Applicants respond as follows:

The Operating Plan took local switching into account. For example, the capacity analysis in the work papers made general allowances for switching local traffic, including general adjustments to track capacity and available track time, intended to assure the availability of sufficient capacity for such switching. See, e.g. CN/EJEW 5 CO 100002, Capacity Cals.xls.

Ex. 3, CN Response to Requests 12 at p. 19.

In essence, CN's response was: We will not give you any documents, but there is a spreadsheet in the workpapers that shows we factored a time analysis into our capacity

calculation. Will County's position is that it is entitled to the documents that it requested and not a spreadsheet reference.

c. Rail Traffic Projections

In order to assess the projected increase in rail traffic, Will County requested CN's projections of future growth. It requested the following documents:

22. All documents reflecting, referring or relating to your analysis of the likely growth in traffic on the EJ&E tracks in Will County assuming the proposed transaction is approved, both in the initial years and after it is fully implemented.

Ex. 1, Document Request 22. The CN responded:

Without waiving any objections, and subject to any specific objections and the General Responses and General Objections stated above, Applicants respond as follows:

The projected traffic over each segment of the EJ&E tracks in Will County as shown in Attachment A.2 assumes that the Transaction has been fully implemented. CN projected that traffic to and from the Port of Prince Rupert would grow from twice weekly to daily by the time the Transaction is completed. See CN/EJEW 5 CO 100003, Rupert Train Plan 2008-2010 V3.xls. CN witness David A. Stuebner also conducted an extended haul analysis, which concluded that while the combined system would gain extended hauls for 9,695 carloads of traffic. His workpapers are available in the CN/EJEW Document Depository. This traffic was accounted for in the Operating Plan, including Attachments A 1 and A 2.

The CN's predicted growth in rail traffic reflected in the Application and in its workpapers only contain projections for three years. Furthermore, the CN has not included any projections for growth in traffic carried by or for others or pursuant to future trackage rights agreements.

When Will County's counsel specifically requested any CN traffic projections beyond and in addition to what is contained in the application and workpapers, CN's counsel declined to

commit to producing those documents. As reflected in the motion to compel filed by the Village of Frankfort against CN, CN is refusing to allow anyone to see its future rail traffic projections.

It is Will County's position that CN's future rail projections are absolutely critical to the analysis of the rail transportation impact of the proposed control application.

The CN also refused to tell Will County who the CN's most knowledgeable person is concerning the CN's train operations over the EJ&E tracks in Will County. Will County asked:

6 Identify the individual employee or agent of each respondent most knowledgeable about any of the following subjects with respect to the EJ&E tracks in Will County if the proposed transaction is approved and consummated:

a. Train Operations;

Ex. 2, Interrogatory 6 a. The CN's rather remarkable response was:

Without waiving any objections, and subject to any specific objections and the General Responses and General Objections stated above, Applicants respond as follows:

The subjects of knowledge covered by this interrogatory are ones addressed in the EIS process for which discovery is not available. In addition, such information about "knowledgeable" personnel is typically sought in discovery to identify potential candidates for depositions and has no other apparent relevance. However, Will County is not entitled to take such depositions in connection with issues addressed in the EIS process.

Ex. 3, CN Response to Interrogatory No. 6.a. at p. 15-16.

It is Will County's position that it is entitled to an answer to this simple question.

2 Surface Transportation Congestion

With 52 public at-grade crossings in Will County involving the EJ&E, Will County is extremely concerned about what kind of impact the proposed transaction will have upon the surface transportation system in Will County. That is another reason for its request concerning the CN's projected rail traffic growth. In addition, Will County sought the following discovery and received the following responses:

13. All documents reflecting, referring or relating to any analysis of the frequency or duration of the possible or likely blockage of automobile and truck traffic at the at grade crossings in Will County in the event that the Railroad Control Application is approved, both in the initial years and after the acquisition is fully implemented.

Response:

Without waiving any objections, and subject to any specific objections and the General Responses and General Objections stated above, Applicants respond as follows:

The request relates only to matters covered in the EIS process.

Ex. 3, CN Response to Request No. 13 at p. 19-20.

14 All documents reflecting, referring or relating to any analysis of the proposed transaction on the regional or local transportation system.

Response:

Without waiving any objections, and subject to any specific objections and the General Responses and General Objections stated above, Applicants respond as follows:

The request is evidently incomplete. If it was meant to refer to "the effect" of the Transaction, CN's post-implementation traffic flows are contained in the work papers at STB_EJE_OpPlan.mdb, tbl_TSP_X1.

Ex. 3, CN Response to Request No. 14 at p 20.

17. All documents reflecting, referring or relating to any analysis of increased vehicle delay times at railroad grade crossings in Will County due to the proposed transaction.

Response:

Without waiving any objections, and subject to any specific objections and the General Responses and General Objections stated above, Applicants respond as follows:

See answer to Document Request No. 13.

Ex. 3, CN Response to Request No. 17 at p. 21.

6. Identify the individual employee or agent of each respondent most knowledgeable about any of the following subjects with respect to the EJ&E tracks in Will County if the proposed transaction is approved and consummated:

c. Frequency and duration of blockage by train traffic of automobile traffic at at grade crossings;

Response:

Without waiving any objections, and subject to any specific objections and the General Responses and General Objections stated above, Applicants respond as follows.

The subjects of knowledge covered by this interrogatory are ones addressed in the EIS process for which discovery is not available. In addition, such information about "knowledgeable" personnel is typically sought in discovery to identify potential candidates for depositions and has no other apparent relevance. However, Will County is not entitled to take such depositions in connection with issues addressed in the EIS process.

Ex. 3, CN Response to Interrogatory No. 6.c at p. 15-16.

6. Assuming that the proposed transaction is approved and fully implemented, for every at grade crossing in Will County please provide the following information.

d. The length of time that you project that the crossing will be blocked to automobile traffic due to the passage through the crossing of each such train. If you only have an average, please provide that average.

CN Responded:

Without waiving any objections, and subject to any specific objections and the General Responses and General Objections stated above, Applicants respond as follows:

The workpapers do not include projections of length of time.

Ex. 3, CN Response to Interrogatory No. 1(d) at p. 12-13.

The CN's position, simply stated, is that it has no obligation to address or provide discovery concerning the impact on Will County's surface transportation system in this proceeding. Will County's position, simply stated, is that the CN is wrong.

3. Public Safety

The CN plans to dramatically increase the number and size of trains through a major metropolitan county with 52 public at-grade crossings in that county alone. Will County assumed that since the CN is spending \$300 million to buy the EJ&E assets, it presumably has done a fairly sophisticated analysis of what grade crossing improvements would be required to handle the dramatic increase in train traffic. After all, one cannot efficiently operate a constant flow of full speed freight trains through a metropolitan area if there is a significant risk of auto incursions at even one grade crossing, much less a number of them.

Accordingly, Will County asked the CN about the type of safety protection and track circuitry at each of the grade crossings; for documents reflecting who owns the land at the at-grade crossings; and for information and documents concerning the safety protection and the adequacy of the safety protection at each of the crossings. See Ex 1, Document Requests 8, 9 and 19; Ex. 2, Interrogatories 3 and 4. The CN's response was that it does not know whether the existing crossing protection is adequate, and the CN does not have to respond anyway because these are environmental issues. Ex. 3, Answer to Interrogatory 3 and 4; Response to Document Request 19 at 21-22.

When Will County counsel questioned whether in fact the CN truly had done no analysis of the existing protection of the at-grade crossings, which he noted seemed extremely unlikely, CN's counsel indicated he would have to check with his client and would then respond. No response was received prior to this motion being filed.

Will County's position is that it is inconceivable that the CN, a very large and sophisticated railroad, entered into this transaction without doing an effective analysis of the public safety ramifications and costs associated with sending a dramatic increase of rail traffic through 52 at-grade crossings in a metropolitan county with a population of 668,000 people that

is one of the fastest growing counties in the United States. It cannot operate an efficient train system without that protection in place. It is Will County's position that it is entitled to the requested discovery.

4. Traditional Environmental Issues

Will County also served discovery concerning more traditional environmental issues, such as noise, vibration and air quality impacts and hazardous materials carriage. See, e.g. Ex. 3, Interrogatory 6.d. and Response at 15-16; Ex. 3, Document Requests and Responses 15, 16, 20 and 23. The CN's uniform response was that Will County is not entitled to discovery on environmental issues. *Id.* Will County disagrees.

ARGUMENT

I. DISCOVERY TARGETED AT RAIL CONGESTION ISSUES

Will County is frankly at a loss as to what possible legitimate objection the CN could have to Will County's requests for discovery concerning rail congestion. Information concerning current track conditions, future maintenance plans and requirements, potential operational difficulties, and projected traffic growth beyond a two or three year horizon are all critical factors in assessing the prospects for efficient transportation or congestion and possible gridlock. The Board should order CN to respond to that discovery.

II. DISCOVERY TARGETED AT SURFACE TRANSPORTATION ISSUES

Will County is concerned about the potentially enormous impact on its surface transportation system associated with the proposed control application. Will County's population is rapidly growing, and the application filed by the CN quite frankly gives it no handle on what impact the CN's application could have on Will County's automobile and truck transportation system.

The issues are straightforward. CN believes that the Board has no responsibility for, and can turn a blind eye to, the impact of the proposed rail acquisition on the regional transportation system, and that the STB has absolutely no responsibility to analyze the potential for surface transportation gridlock associated with any rail acquisition it approves. The Will County's position, as articulated below, is that the potential for gridlock in the automobile, truck and bus surface transportation system is no less significant than the potential for rail congestion and gridlock, and that the STB has a statutory duty to consider both. Will County's argument follows.

The standard governing this proceeding is set forth in 49 U.S.C. §11324(d). That statute provides in relevant part that the Board should approve the proposed control application unless the Board finds that:

- (1) as a result of the transaction, there is likely to be substantial lessening of competition, creation of a monopoly, or restraint or trade in freight surface transportation in any region of the United States; and
- (2) the anticompetitive effects of the transaction outweigh the public interest in meeting significant transportation needs.

In evaluating "the public interest in meeting significant transportation needs," Will County submits that the Board must consider public interest issues associated with the impact of the proposed acquisition on the entire regional transportation system, and not just the rail commuter and freight operations.

In making that argument, the County is aware of the definition of the word "transportation" in 49 U.S.C. §10102(9). 49 U.S.C. §10102(9) provide in relevant part:

In this part

* * * * *

- (9) "transportation" includes --

(A) a locomotive, car, vehicle, vessel, warehouse, wharf, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers and property, or both, by rail, regardless of ownership or an agreement concerning use, and

(B) services related to that movement, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property;

The definition of "transportation" to include rail passenger and freight services does not mean that the STB is limited to considering solely rail transportation needs in evaluating the merits of the proposed transaction. The word "include" is "a word of illustration, not limitation." *Richardson v. National City Bank of Evansville*, 141 F.3d 1228, 1232 (7th Cir. 1998). See *United States v. Vegas-Garnica*, 332 F.3d 471, 474 (7th Cir. 2003) (same); *United States v. Camacho*, 110 F.3d 260, 263 (5th Cir. 1997) ("including" is an inclusive, not exclusive, or exhaustive term). The word "includes" in statutory definitions is frequently construed as a word of extension or enlargement rather than of limitation or enumeration. See, e.g., *Federal Trade Comm'n v. MTK Marketing, Inc.*, 149 F.3d 1036, 1040 (9th Cir. 1998) (holding that statutory definition of person as including "an individual, firm, association, partnership, joint venture or other business entity" also encompasses governmental entities).

Will County is not aware of any statutory history suggesting that the definition of "transportation" in 49 U.S.C. §10102(9) was intended to restrict the STB's public interest consideration solely to impacts on rail transportation. Frankly, given the potential impact of this and similar proposed rail consolidations on the surface transportation system, it would do a disservice to the public to adopt such a restrictive interpretation. The potential meltdown of the surface transportation system would be no less harmful to the public interest than an increase in rail congestion. The STB should grant Will County's motion to compel, and direct that CN answer the discovery on this issue.

III. DISCOVERY TARGETED AT PUBLIC SAFETY AND ENVIRONMENTAL ISSUES

The issue of whether the Board's rules authorize discovery of the environmental aspects of this proceeding was succinctly and persuasively addressed in Section II of the Discussion part of Frankfort's Motion to Compel Discovery from Applicants filed January 25, 2008, at pages 6 through 8. Will County adopts and incorporates those arguments by reference in support of its motion to compel.

IV. RELATED PARTY ISSUES

The EJ&E and the EJ&E West Company have both responded to discovery served upon them by Will County and other parties with responses stating that they were not required to respond to discovery because they are not parties to STB Docket 35087-0 and, if they are deemed to be parties, they adopt the CN's objections and positions. Will County and the Village of Frankfort both filed motions to compel against the EJ&E and EJ&E West. In its filing, Will County suggested that the motions to compel against the EJ&E and EJ&E West should be jointly addressed by the STB in the interest of judicial economy.

The EJ&E's and EJ&E West's counsel recently filed a certificate of service certifying that he has served all of the parties in this proceeding in accordance with the Board's Decision No. 3 issued on January 8, 2008. See Ex. 4 attached hereto. The Board's Decision No. 3, as well as the conduct of counsel for EJ&E and EJ&E West, demonstrates that all parties to this proceeding, including the EJ&E and EJ&E West, cannot hide behind the sub-dockets. They are parties of interest to this proceeding, and subject to discovery on that basis. The only remaining issues with respect to their obligation to provide discovery are their incorporation of the CN's objections.

V. CONCLUSION

For all the reasons set forth above, Will County respectfully requests that the Board grant its motion to compel.

Respectfully submitted,
WILL COUNTY, ILLINOIS

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that he has caused a true and correct copy of the foregoing document(s) to be served upon:

ALL PARTIES OF RECORD

SEE ATTACHED SERVICE LIST

and

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by mailing a true and correct copy thereof from the law office of Hinshaw & Culbertson LLP, 400 South Ninth Street, Suite 200, Springfield, Illinois, 62701, to the persons named as parties of record on the Surface Transportation Board's service list as of this date, February 5, 2008.



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STB Finance Docket No. 35087

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 35087

**CANADIAN NATIONAL RAILWAY COMPANY AND
GRAND TRUNK CORPORATION**

-CONTROL-

EJ&E WEST COMPANY

WILL COUNTY'S REQUEST FOR PRODUCTION OF DOCUMENTS

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Counsel for Will County, Illinois

January 3, 2008



**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 35087

**CANADIAN NATIONAL RAILWAY COMPANY AND
GRAND TRUNK CORPORATION
~~-CONTROL-~~**

EJ&E WEST COMPANY

WILL COUNTY'S REQUEST FOR PRODUCTION OF DOCUMENTS

Pursuant to 49 C.F.R. §1114.30, Will County, Illinois ("Will County") directs the following requests for production upon Canadian National Railway Company, Grand Trunk Corporation, Elgin, Joliet and Eastern Railway Company, and EJ&E West Company. Will County requests that responses should be served as soon as possible, and in no event later than 15 days from the date of service hereof. Counsel for respondents should contact the undersigned promptly to discuss any objections or questions regarding these requests with a view to resolving any disputes or issues of interpretation informally and expeditiously. Will County will pay all reasonable costs for duplication and delivery of documents to counsel for the responding party.

DEFINITIONS

A. "Document" is defined to be synonymous in meaning and equal in scope to the usage of this term in Federal Rule of Civil Procedure 34(a). A draft or non-identical copy is a separate document within the meaning of the term.

B. "You" and "your" mean and refer to Canadian National Railway Company, Grand Trunk Company, Elgin, Joliet and Eastern Railway Company, and EJ&E West Company, as collective or individual respondents to the request for production of documents.

C. "EJ&E" means the Elgin, Joliet and Eastern Railway Company.

INSTRUCTIONS

If you withhold documents or information otherwise responsive to this request, please provide a privilege log that identifies for each document or part of a document withheld:

- a. The date of the document;
- b. The nature of the document;
- c. The author;
- d. All recipients;
- e. The subject matter; and
- f. The privilege or other basis for withholding production.

REQUESTS FOR PRODUCTION OF DOCUMENTS

The documents that you are requested to produce are described below:

1. The current EJ&E employee timetables for all EJ&E track.
2. The current EJ&E track charts for all EJ&E track.
3. A listing of the planned track work, bridges and signal work for calendar year 2007 for the EJ&E rail system.
4. A listing of the planned track, bridge and signal work for calendar year 2008 for the EJ&E rail system.
5. A listing of all track, bridge and signal work completed in calendar year 2007 on the EJ&E system.
6. Rail detector car histories for rail detector cars run on the EJ&E system in calendar years 2006 and 2007.
7. Federal Railroad Administration ("FRA") geometry car/dynamic loading car (T-100) runs or data collected for trips on the EJ&E system by such cars in calendar years 2006 and 2007.

8. Completed DV-107 forms for the right of way for the EJ&E current and projected expanded main track system in Will County, Illinois.

9. ICC valuation maps for the right of way for the EJ&E current and projected expanded main track system in Will County, Illinois.

10. All documents reflecting, referring or relating to the capital improvements that CN plans to make to the EJ&E system in the approximate amount of \$100 million, as referenced at page 212 of the Railroad Control Application you filed in this proceeding. This request includes, but is not limited to:

- a. A list of the capital improvements that you plan to undertake that are included in the approximately \$100 million of capital improvements;
- b. The schedule or timetable for the projects that you plan to undertake that are included in the approximately \$100 million of capital improvements; and
- c. Documents reflecting the details of any capital improvement included in the planned capital improvements.

11. Any analysis you prepared of the increased maintenance or maintenance costs required for EJ&E track in Will County due to increased traffic in the event the Railroad Control Application is approved, both in the initial years and after the acquisition is fully implemented.

12. All documents reflecting, referring or relating to any analysis of the operating plan or possible operational difficulties associated with the switching of local traffic onto the EJ&E main tract in Will County in the event the Railroad Control Application is approved, both in the initial years and after the acquisition is fully implemented.

13. All documents reflecting, referring or relating to any analysis of the frequency or duration of the possible or likely blockage of automobile and truck traffic at the at grade crossings in Will County in the event that the Railroad Control Application is approved, both in the initial years and after the acquisition is fully implemented.

14. All documents reflecting, referring or relating to any analysis of the proposed transaction on the regional or local transportation system.

15. All documents reflecting, referring or relating to any analysis of:

- a. Any increase in the noise levels in any area of Will County due to the projected increase in train traffic due to the proposed transaction; or
- b. The identity of any sensitive noise receptors in Will County that could be impacted by increased noise due to the proposed transaction.

16. All documents reflecting, referring or relating to any analysis of:

- a. Any increase in the vibration levels in any area of Will County due to the projected increase in train traffic due to the proposed transaction; or
- b. The identity of any sensitive vibration receptors in Will County that could be impacted by increased noise due to the proposed transaction.

17. All documents reflecting, referring or relating to any analysis of increased vehicle delay times at railroad grade crossings in Will County due to the proposed transaction.

18. All documents reflecting, referring or relating to any analysis of the impact of the proposed transaction on the provision of emergency services in Will County.

19. All documents reflecting, referring or relating to any analysis of the improved safety measures that could be required at any at grade rail crossing in Will County due to the increased traffic associated with proposed transaction. This request includes, but is not limited to:

- a. Any analysis of the safety of the existing safety measures in place at a given crossing;
- b. Any analysis of the type of safety measures or equipment that could or should be implemented or installed at a Will County crossing to address the safety issues posed by the increased train traffic associated with the proposed transaction;
- c. Any analysis of the cost of safety measures or equipment that could or should be implemented or installed at a Will County

crossing to address the safety issues posed by the increased train traffic associated with the proposed transaction; and

- d. Any analysis of the likely responsibility for or participation in the cost of safety measures at a crossing in Will County that could or likely would be required to address the safety issues posed by the increased train traffic associated with the proposed transaction.

20. All documents reflecting, referring or relating to your plans to protect public safety from the risks associated with the project increase in hazardous materials transported on EJ&E track through Will County if the proposed transaction is approved.

21. All documents reflecting, referring or relating to the budget or budgets for environmental mitigation that may be required if the proposed transaction is approved.

22. All documents reflecting, referring or relating to your analysis of the likely growth in traffic on the EJ&E tracks in Will County assuming the proposed transaction is approved, both in the initial years and after it is fully implemented.

23. All documents reflecting, referring or relating to any analysis of the impact on air quality in Will County if the proposed transaction is approved.

Respectfully submitted,
WILL COUNTY, ILLINOIS

By: Edward R. Gower

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that he has caused a true and correct copy of the foregoing document(s) to be served upon:

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by UPS Overnight Delivery at the below listed addresses as recorded with the Surface Transportation Board and listed below:

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ALL REMAINING PARTIES OF RECORD AS OF THIS DATE

SEE ATTACHED SERVICE LIST

by mailing a true and correct copy thereof from the law office of Hinshaw & Culbertson LLP, 400 South Ninth Street, Suite 200, Springfield, Illinois, 62701, to the persons named on the Surface Transportation Board's service list as of this date, January 3, 2008.



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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 35087

**CANADIAN NATIONAL RAILWAY COMPANY AND
GRAND TRUNK CORPORATION**

-CONTROL-

EJ&E WEST COMPANY

WILL COUNTY'S FIRST SET OF INTERROGATORIES

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January 3, 2008



**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 35087

**CANADIAN NATIONAL RAILWAY COMPANY AND
GRAND TRUNK CORPORATION**

-CONTROL-

EJ&E WEST COMPANY

WILL COUNTY'S FIRST SET OF INTERROGATORIES

Pursuant to 49 C.F.R. §1114.26, Will County, Illinois ("Will County") directs the following interrogatories upon Canadian National Railway Company, Grand Trunk Corporation, Elgin, Joliet and Eastern Railway Company, and EJ&E West Company. Will County requests that responses should be served as soon as possible, and in no event later than 15 days from the date of service hereof. Counsel for respondents should contact the undersigned promptly to discuss any objections or questions regarding these requests with a view to resolving any disputes or issues of interpretation informally and expeditiously. Will County will pay all reasonable costs for duplication and delivery of any responsive documents to counsel for the responding party.

DEFINITIONS

- a. "You" and "your" mean and refer to Canadian National Railway Company, Grand Trunk Company, Elgin, Joliet and Eastern Railway Company, and EJ&E West Company, as collective or individual respondents to the request for production of documents.
- b. "EJ&E" means the Elgin, Joliet and Eastern Railway Company.

- c. "At grade crossing" means a crossing in Will County, Illinois involving EJ&E track and pedestrian, bicycle or vehicular traffic.

INTERROGATORIES

INTERROGATORY NO. 1: Assuming that the proposed transaction is approved and fully implemented, for every at grade crossing in Will County please provide the following information:

- a. The average number of trains that you project will cross that crossing on a daily basis;
- b. The length of each train that you project will cross that crossing on a daily basis. If you have an average, please provide that average;
- c. The average speed of each such train; and
- d. The length of time that you project that the crossing will be blocked to automobile traffic due to the passage through the crossing of each such train. If you only have an average, please provide that average.

ANSWER:

INTERROGATORY NO. 2: Please describe the safety equipment and measures that are in place at each at grade crossing in Will County. Your answer should include, but need not be limited to, a description of the safety equipment in place and the existing track circuitry that triggers any safety warning devices, such as bells, gates or flashing lights.

ANSWER:

INTERROGATORY NO. 3: In the next five years, do you have any plans to improve the safety equipment or measures that are in place at any at grade crossing in Will County? If so, please identify the crossing and describe the proposed improvement and any cost sharing agreement or plan for paying for that improvement.

ANSWER:

INTERROGATORY NO. 4: Do you believe that the existing safety measures and equipment at each at grade crossing in Will County is adequate to protect the public safety if the proposed transaction is approved and is fully implemented? If your answer is no, please:

- a. Identify the at grade crossing where you believe the existing safety equipment and measures will be inadequate to protect the public safety after the transaction is approved and fully implemented.
- b. For each at grade crossing identified in response to 4.a., above, please describe the safety measures or equipment that you believe will be required in order to adequately protect the public safety at that crossing; and
- c. State how you believe the costs of any necessary safety improvements should be allocated.

ANSWER:

INTERROGATORY NO. 5: In the next five years, do you have any plans to seek the closure of any at grade crossing in Will county? If so, please identify the crossing, state the grounds that you believe support closure; and the time frame within which you intend to seek closure.

ANSWER:

INTERROGATORY NO. 6: Identify the individual employee or agent of each respondent most knowledgeable about any of the following subjects with respect to the EI&E tracks in Will County if the proposed transaction is approved and consummated:

- a. Train Operations;

- b. Public Safety at at grade crossings;
- c. Frequency and duration of blockage by train traffic of automobile traffic at at grade crossings;
- d. Noise and vibration impacts of increased train traffic;
- e. Evaluation of the existing EJ&B track with respect to its ability to handle the increased train traffic;
- f. Projected capital improvements; and
- g. The cost of environmental mitigation.

ANSWER:

Respectfully submitted,
WILL COUNTY, ILLINOIS

By: Edward R. Gower

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that he has caused a true and correct copy of the foregoing document(s) to be served upon.

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by UPS Overnight Delivery at the below listed addresses as recorded with the Surface Transportation Board and listed below:

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ALL REMAINING PARTIES OF RECORD AS OF THIS DATE

SEE ATTACHED SERVICE LIST

by mailing a true and correct copy thereof from the law office of Hinshaw & Culbertson LLP, 400 South Ninth Street, Suite 200, Springfield, Illinois, 62701, to the persons named on the Surface Transportation Board's service list as of this date, January 3, 2008.



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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 35087

**CANADIAN NATIONAL RAILWAY CORPORATION
AND GRAND TRUNK CORPORATION
- CONTROL -
ELGIN, JOLIET & EASTERN WEST COMPANY**

**APPLICANTS' RESPONSES AND OBJECTIONS
TO WILL COUNTY'S
FIRST DISCOVERY REQUESTS**

Pursuant to the Surface Transportation Board's Discovery Rules, 49 C.F.R. §§ 1114.21 through 1114.31, and Decision No. 2, served in this proceeding on November 26, 2007, Applicants¹ hereby make these combined objections and responses to the first request for production of documents and first set of interrogatories served on Applicants by Will County on January 3, 2008, collectively referred to as the "Discovery Requests."

APPLICANTS' OBJECTIONS: BACKGROUND

Will County has served burdensome Discovery Requests. These requests overlook the fact that Will County is not entitled to invoke the Board's discovery process to explore issues that the Board has ruled it will address in the Board's environmental review process.

This is not a private civil action in federal district court or state court where the parties have broad latitude to pursue depositions and documentary discovery under flexible, permissive standards and normally do not face inalterable statutory deadlines. Under the Board's longstanding rules and practice, the standards for discovery in STB proceedings to determine whether one railroad is to be authorized to acquire another have

¹ Applicants are Canadian National Railway Company and Grand Trunk Corporation. Elgin, Joliet and Eastern Railway Company and EJ&E West Company are not Applicants.



been carefully developed to be more limited in scope and subject to stricter application of standards in view of the public interest in the matters at hand, the inalterable deadlines imposed by Congress in the ICC Termination Act of 1995 ("ICCTA"), and the bifurcation of the Board's inquiry into the statutory merits of a transaction and the environmental review.

Will County is not directly involved with the railroad business; *i.e.*, it is not a shipper, a receiver, or an alternative source of transportation services by rail or otherwise. Nor does Will County's goal in this proceeding have anything to do with competition or improved rail transportation, subjects that are by law the focus of the Board's review process. Instead, Will County assesses CN's proposed acquisition of EJ&EW primarily as a threat to the environment and quality of life of its residents. Will County is also evidently concerned about such matters as increased traffic over existing EJ&E train lines and at grade crossings.

Will County's concerns about the proposed Transaction relate almost entirely to its potential effects on the immediate suburban/exurban environment of Will County, through part of which the EJ&E rail line being acquired by CN runs.

Some 30 or more cities, towns or villages have filed notices of intent to participate, the majority of which are on or adjacent to EJ&E or CN, and of which Will County is only one. In fact, Applicants have already received burdensome, differing discovery requests from several such entities, including one, the Village of Frankfort, located in Will County.

The concerns these parties express are generally legitimate concerns under the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. §§ 4321 *et seq.*, which

is administered by the Board through a separate, less-formal process (*see* 49 C.F.R. pt. 1105) which parallels the process focused on competition and the other control approval criteria under ICCTA and the Board's regulations.

Most of the discovery requests propounded by Will County seek information that has no possible bearing on either of the relevant factors (competition and "significant transportation needs") that, by statute, are the exclusive ones governing the Board's decision regarding the Transaction. *See* 49 U.S.C. § 11324(d). Instead, they seek information on particular environmental impacts (including impacts on human health and welfare) from rail operations, or from vehicular delay caused by rail operations, in Will County. *See, e.g.*, Document Request Nos. 13, 17 (traffic delay), 14 (effect on local or regional transportation), 15 (noise), 16 (vibration), 18 (impacts on emergency services), 19 (grade crossing safety), 20 (hazardous materials), 21 (environmental mitigation), and 23 (air quality). Those subjects, while having no bearing on the factors relevant to the Board's decision to approve or disapprove the Application, are ones which, pursuant to NEPA, the Board will evaluate under its environmental review process.

Unlike the Board's procedures for "consideration of substantive transportation issues, where litigants use discovery to develop an adequate evidentiary record and [the Board] render[s] a decision based on the parties' presentations," *Ill. Cent. R.R. – Construction & Operation Exemption – In E. Baton Rouge Parish, LA, STB Finance Docket No. 33877*, slip op. at 2 (STB served Aug. 21, 2001) ("*East Baton Rouge*"), the Board's environmental review process is "an informal one," *CSX Corp. – Control & Operating Leases/Agreements – Conrail Inc., STB Finance Docket No. 33388, Decision No. 83*, slip op at 2 n.3 (STB served May 27, 1998) ("*Conrail Decision 83*"), in which the

Board's Section of Environmental Analysis ("SEA") "prepares an independent environmental review of those . . . proposals for which an environmental review is required by NEPA," *East Baton Rouge*, slip op. at 2.²

Thus, in the environmental review process, SEA -- rather than parties to the proceeding -- takes the initiative in developing the record on which the Board will decide environmental questions arising under NEPA.³ This fact, however, does not mean that parties -- be they private individuals, railroads, other businesses, or state or local governments, such as Will County -- are left without influence on the environmental review process. On the contrary, "[t]he environmental review process is a fluid and open one that encourages the broadest possible participation by the public throughout the process." *Conrail Decision 83*, slip op. at 2. In the Board's Scoping Notice, the Board declared its intention "to give all interested persons the opportunity to actively participate in the forthcoming environmental review," and to that end provided a generous 42-day comment period in which "[a]ll interested agencies, organizations, communities, and members of the public" are invited to comment to SEA on "the range of issues that

² As the Board has explained, in its Scoping Notice in this proceeding:

The Board will review the proposed transaction through two parallel but distinct processes: (1) the economic process that examines the competitive, transportation, and economic implications of the acquisition on the national rail system, and (2) the environmental process conducted by SEA that assesses the potential environmental effects of the proposed acquisition on the human and natural environment through preparation of an EIS. Interested persons may participate in either, or both, processes, but if interests are focused on potential impacts on communities, including grade crossing safety, air emissions, emergency vehicle access, noise, vibration, and other similar environmental issues, then the appropriate forum is SEA's environmental review process.

Notice of Intent to Prepare an Environmental Impact Statement, slip op. at 3 (STB served Dec. 21, 2007) ("Scoping Notice"), 72 F.R. 72819, 72820 (2007).

³ These primarily relate to whether, if the Board approves the Transaction, mitigation of environmental impacts should be ordered by the Board as a condition of that approval, and if so, what that mitigation should be.

should be examined and assessed in the [environmental impact statement ("EIS")]."

Scoping Notice at 2, 4. If Will County (or any other interested party) believes there are particular items of information that SEA needs to take into account in reviewing the environmental impacts of the Transaction, it should take advantage of the current comment period (which ends February 1, 2008) to request that SEA inquire into those matters.

SEA intends, on the basis of the comments it receives by February 1, to issue a Final Scope of Study identifying the environmental issues and concerns it will address in its Draft Environmental Impact Statement ("DEIS"). Scoping Notice at 4. Under applicable Council of Environmental Quality ("CEQ") regulations, that DEIS must, to the fullest extent possible, provide a detailed statement of the environmental impacts of the proposed Transaction, of any unavoidable environmental effects that would result if the Transaction were implemented, of alternatives to the Transaction, and of all other information required by NEPA to be included in a final environmental impact statement ("FEIS"). 42 U.S.C. § 4332(2)(c); 40 C.F.R. § 1502.9. The DEIS will also include SEA's preliminary recommendations for mitigation of adverse environmental impacts from the Transaction. Scoping Notice at 4. After issuing the DEIS, SEA will provide a 45-day period for public comments on the DEIS. If Will County believes that in preparing the DEIS SEA failed to inquire sufficiently about or take account of particular subjects necessary to evaluate the environmental impacts of the Transaction adequately, it will have the opportunity at that time to urge SEA to remedy the perceived deficiencies in its analysis.

SEA will then prepare and issue its FEIS, which will address the public's comments on the DEIS, which may include such additional environmental analysis as it believes necessary to satisfy the requirements of NEPA. *Id.* The Board in turn will take into account the DEIS and FEIS, including all comments from the public on environmental issues and SEA's environmental analysis and recommendations for mitigation, in making its final decision on the Transaction.

In taking these steps, which include repeated and extensive opportunities for comments from Will County and other interested parties, SEA amply demonstrates its compliance with CEQ's policy that agencies "[m]ake diligent efforts to involve the public in . . . implementing their NEPA procedures." 40 C.F.R. § 1506.6(a). Following those procedures is therefore the appropriate way for Will County to ensure that the Board takes into account its concerns about "potential impacts on communities, including grade crossing safety, air emissions, emergency vehicle access, noise, vibration, and other similar environmental issues." Scoping Notice at 3.

The Board's legal position in these cases that discovery is not available to address issues covered in its environmental review process is also consistent with prior Board authority;⁴ with the Board's extensive – and instructive – Environmental Policy overview, issued shortly before the *Illinois Central* decision, of how environmental

⁴ See *Burlington N. Santa Fe Corp. – Control – Washington Cent. R.R.*, STB Finance Docket No. 32974 (STB served Sept. 20, 1996) (Board denied municipality's request for discovery concerning traffic effects of action for which Board approval had been sought (construction of a new line), because that subject was being examined by SEA as part of environmental assessment under way in that matter).

review under NEPA works in cases where (as here) an independent, third-party contractor is retained;⁵ and with the positions of other agencies.⁶

Nowhere does the Board's Environmental Policy statement, or its rules concerning environmental issues, indicate or even imply that discovery is a necessary, appropriate or even permissible part of this process, or that individual litigants can become private attorneys general and shadow or supplement SEA in its information-gathering and assessment functions. Quite to the contrary, it is SEA that is responsible for performing an independent, comprehensive environmental review and analysis. Public participation is plainly an essential key to environmental review under NEPA, and Will County is, of course, free to participate in that public phase as its interests may warrant. What Will County may not do is arrogate to itself a significant part of SEA's role in conducting and overseeing the environmental review. "NEPA mandates a process rather than a result," 5 S.T.B. at 479, and that process does not include third-party discovery.

Here, Will County's Discovery Requests relate to its interests concerning traffic and other environmental effects that are plainly subjects of the NEPA/EIS environmental process that the Board is undertaking. Will County's Discovery Requests are not focused on the transportation or competition issues that are the subject of the control proceeding itself for which discovery is authorized. Moreover, as noted, the Board's issuance of its

⁵ *Policy Statement on Use of Third-Party Contracting in Preparation of Environmental Documentation*, 5 S.T.B. 467 (2001) ("Environmental Policy").

⁶ See, e.g., *Alcoa Power Generating Inc.*, 121 FERC ¶ 61279 (Dec. 20, 2007); *Transcontinental Gas Pipe Line Corp.*, 119 FERC ¶ 61039 (Apr. 12, 2007), *order on reh'g*, 120 FERC ¶ 61181 (Aug. 23, 2007). As explained by EPA, an agency with preeminent environmental expertise, the public has a role "particularly during scoping" in the NEPA process. See <http://www.epa.gov/compliance/basics/nepe.html>.

Scoping Notice in this proceeding on December 21, almost two weeks before Will County served its Discovery Requests, makes clear that Will County will have an adequate opportunity in the EIS process to address the traffic and other environmental effects that concern it. This fact underscores the inappropriateness of the great bulk of Will County's Discovery Requests.

Will County's Discovery Requests are overly broad and burdensome, and insufficiently focused to assist the Board and the parties to the proceeding in assessing the competitive effects of the Transaction. They include not only broad document requests, but information evidently sought as a basis for depositions of persons "most knowledgeable" about nearly a score of separate environmental subjects.

Whether or not intended, Will County's belated⁷ pursuit of these wide-ranging requests burdens Applicants (and hence the Board) with time-consuming discovery that could interfere with the approval process.

In short, even though Will County is not entitled to it, CN is open to reasonable discovery. It must, however, largely oppose Will County's broad, burdensome, and legally unsupported requests.

APPLICANTS' GENERAL RESPONSES

The following general responses are made with respect to all of the interrogatories and requests.

⁷ Will County had weeks to prepare its Discovery Requests after the Application was filed on October 30, 2007. However, neither Will County nor its counsel has examined CN's work papers, and Will County could have served its requests immediately after the Board's Decision No. 2 on November 26, 2007, accepting CN's Application and allowing discovery to proceed. Yet it did not do so until more than a month later (January 3).

1. Applicants are in good faith completing reasonable searches for information and/or documents responsive to some of the requests or parts thereof. Where documents are being produced CN will do so by placing copies in its depository, subject to these objections.

2. Where objections are made, Applicants are willing to discuss searching for and producing information or documents covered by a more limited interrogatory or request taking into account: (i) the stated objections; (ii) related matters such as the breadth of the requests; (iii) the availability of extensive information in the Application and Applicants' work papers; (iv) the competitive sensitivity of the information or documents requested; (v) the substantial burdens of searching for, locating and providing the information and documents requested if they exist and can be readily located; and (vi) the lack of any substantial relevance to the Board's control decision concerning competition and related issues for much of the information or documents sought.

3. Production of information or documents does not necessarily imply that they are relevant to this proceeding, and is not to be construed as waiving any appropriate objection.

4. Because all of the documents or information that might be viewed as responsive to the Discovery Requests may not yet have been located and identified, Applicants reserve the right to assert further objections as appropriate and to supplement the objections and responses stated herein.

5. In line with past practice in control cases, Applicants have not secured verifications for the answers to interrogatories herein. Applicants are prepared to discuss the matter if it is of concern with respect to any particular answer.

APPLICANTS' PARTICULAR OBJECTIONS

In addition to the objections stated above, the following general objections are made with respect to all of the interrogatories and document requests, as appropriate.

1. Applicants object to the Discovery Requests insofar as they seek to use the Board's formal discovery process to obtain information that is outside the scope of this proceeding in that it is unrelated to, and is not reasonably calculated to lead to the discovery of admissible evidence regarding, the only relevant subjects, i.e., the likelihood that the Transaction would lead to substantial lessening of competition, creation of a monopoly, or restraint of trade in surface freight transportation in any region of the U.S., and its effect on the public interest in meeting significant transportation needs.

3. Applicants object insofar as the Discovery Requests seek information in a form not maintained by Applicants in the regular course of business or not readily available in the form requested, on the ground that such documents or information could only be developed, if at all, through special studies, which the Board does not ordinarily require and which Applicants object to performing.

4. Applicants object insofar as the Discovery Requests seek the production of documents or information that includes confidential or sensitive commercial information, including information subject to disclosure restrictions imposed by law, in other proceedings, or by contractual obligation to third parties, and that is of insufficient materiality to warrant production here even under the Board's protective order. In some cases Applicants may redact confidential information that is not itself to be produced (e.g., on relevance or other grounds) but is in a document containing information that is within the scope of production being made.

5. Applicants object insofar as the Discovery Requests are overbroad and unduly burdensome in seeking documents or information prepared in the routine course of day-to-day business, as opposed to studies, reports, analyses and the like.

6. Applicants object insofar as the Discovery Requests seek production of documents prepared in connection with, or information relating to, possible settlement of this or any other matter or controversy.

7. Applicants object insofar as the Discovery Requests seek the production of readily available public documents or information, including but not limited to documents in public files at the STB, the Securities and Exchange Commission, a court, or any other government entity, or that have appeared in newspapers, professional journals, internet sites, or other public media.

8. Applicants object insofar as the Discovery Requests seek the production of information or documents that are reasonably obtainable by Will County from its own files or are otherwise in its possession, custody or control.

9. Applicants object insofar as the Discovery Requests are vague and ambiguous, or are unduly broad and burdensome in that they seek information regarding plans that are in progress, ongoing, or otherwise not complete.

10. Applicants object to the Discovery Requests, insofar as they seek "any" or "all" information "relating to" a subject, as being unreasonably broad and burdensome.

13. Unless otherwise indicated, CN will respond with respect to the period from October 1, 2005, to the date of the filing of the Application, October 30, 2007.

14. Applicants object insofar as the Discovery Requests seek the production of information subject to the attorney-client privilege, the work product doctrine and/or the joint or common interest privilege.

15. Applicants object to the definition of "You" and "your" insofar as Requester is asking Applicants to provide information or documents possessed by Elgin, Joliet and Eastern Railway Company and EJ&E West Company, which are companies independent of Applicants and not subject to their control, and because as non-applicants those companies are not subject to such discovery under STB rules concerning interrogatories or document production, which only apply to "parties." 49 C.F.R. §§ 1114.26 and 1114.30.

INTERROGATORIES

INTERROGATORY NO. 1: Assuming that the proposed transaction is approved and fully implemented, for every at grade crossing in Will County please provide the following information:

- a. The average number of trains that you project will cross that crossing on a daily basis;
- b. The length of each train that you project will cross that crossing on a daily basis. If you have an average, please provide that average;
- c. The average speed of each such train; and
- d. The length of time that you project that the crossing will be blocked to automobile traffic due to the passage through the crossing of each such train. If you only have an average, please provide that average.

Response

Without waiving any objections, and subject to any specific objections and the General Responses and General Objections stated above, Applicants respond as follows:

- a. The traffic projections in Attachments A.1 and A.2 to the Application assume the Transaction will be approved and fully implemented. The segments that pass

through Will County are on Attachment A.2, segments 7 – 10. The grade crossings on the EJ&E line in Will County are shown in the line maps at CN/EJE 5 CO 31-129. See also Appendix C to Applicants' Safety Integration Plan, which contains a list of grade crossings (and their current protections) that will experience an increase in traffic.

- b. The length of each train that would operate when the Transaction has been fully implemented can be derived from the work papers at CN/EJE 5 CO 100003, STB_EJE_OpPlan.mdb, tbl_TSP_X1. Trains that will operate over the EJ&E lines can be found in CN/EJE 5 CO 100003, STB_EJE_OpPlan.mdb, tbl_X1_Trains_via_EJE. That table also lists where each train will enter and exit the EJ&E lines, providing a means to derive the estimated length of each train that will cross each grade crossing in Will County.
- c. The speed limit for each segment can be found on the line maps at CN/EJE 5 CO 31-129.
- d. The work papers do not include projections of length of time.

INTERROGATORY NO. 2: Please describe the safety equipment and measures that are in place at each at grade crossing in Will County. Your answer should include, but need not be limited to, a description of the safety equipment in place and the existing track circuitry that triggers any safety warning devices, such as bells, gates or flashing lights.

Response

Without waiving any objections, and subject to any specific objections and the General Responses and General Objections stated above, Applicants respond as follows:

The warning device at each public grade crossing is available in the FRA database, available at <http://safetydata.fra.dot.gov/officcofsafety/>. This should include track circuitry.

INTERROGATORY NO. 3: In the next five years, do you have any plans to improve the safety equipment or measures that are in place at any at grade crossing in Will County? If so, please identify the crossing and describe the proposed improvement and any cost sharing agreement or plan for paying for that improvement.

Response

Without waiving any objections, and subject to any specific objections and the General Responses and General Objections stated above, Applicants respond as follows:

Applicants have not determined whether the existing safety equipment or measures at any at grade crossings in Will County should be improved or are adequate to protect public safety, whether improvements in them are necessary, or, if not, whether or how they should be paid for. As noted in Applicants' Safety Integration Plan at page 70, E&B plans to upgrade the crossings at Renwick Road and Essington Road, both in Will County, with the addition of gates in 2008. As also noted in the Safety Integration Plan at pages 71-72, Applicants have committed to adding a gate at 116th Street in Will County if the Transaction is approved and consummated.

INTERROGATORY NO. 4: Do you believe that the existing safety measures and equipment at each at grade crossing in Will County is adequate to protect the public safety if the proposed transaction is approved and is fully implemented? If your answer is no, please:

- a. Identify the at grade crossing where you believe the existing safety equipment and measures will be inadequate to protect the public safety after the transaction is approved and fully implemented.
- b. For each at grade crossing identified in response to 4.a., above, please describe the safety measures or equipment that you believe will be required in order to adequately protect the public safety at that crossing; and
- c. State how you believe the costs of any necessary safety improvements should be allocated.

Response:

Without waiving any objections, and subject to any specific objections and the General Responses and General Objections stated above, Applicants respond as follows:

See response to Interrogatory No. 3.

INTERROGATORY NO. 5: In the next five years, do you have any plans to seek the closure of any at grade crossing in Will County? If so, please identify the crossing; state the grounds that you believe support closure; and the time frame within which you intend to seek closure.

Response

Without waiving any objections, and subject to any specific objections and the General Responses and General Objections stated above, Applicants respond as follows:

Applicants currently have no plans to seek the closure of grade crossings in Will County.

INTERROGATORY NO. 6: Identify the individual employee or agent of each respondent most knowledgeable about any of the following subjects with respect to the EJ&E tracks in Will County if the proposed transaction is approved and consummated:

- a. Train Operations;
- b. Public Safety at at grade crossings;
- c. Frequency and duration of blockage by train traffic of automobile traffic at at grade crossings;
- d. Noise and vibration impacts of increased train traffic;
- e. Evaluation of the existing EJ&E track with respect to its ability to handle the increased train traffic;
- f. Projected capital improvements; and
- g. The cost of environmental mitigation.

Response

Without waiving any objections, and subject to any specific objections and the General Responses and General Objections stated above, Applicants respond as follows:

The subjects of knowledge covered by this interrogatory are ones addressed in the EIS process for which discovery is not available. In addition, such information about "knowledgeable" personnel is typically sought in discovery to identify potential candidates for depositions and has no other apparent relevance. However, Will County is

not entitled to take such depositions in connection with issues addressed in the EIS process.

REQUESTS FOR PRODUCTION OF DOCUMENTS

1. The current EJ&E employee timetables for all EJ&E track.

Response

Without waiving any objections, and subject to any specific objections and the General Responses and General Objections stated above, Applicants respond as follows:

These are available in the work papers at CN/EJEW 5 CO 161-371.

2. The current EJ&E track charts for all EJ&E track.

Response

Without waiving any objections, and subject to any specific objections and the General Responses and General Objections stated above, Applicants respond as follows:

These are available in the work papers at CN/EJEW 5 CO 31-129.

3. A listing of the planned track work, bridge and signal work for calendar year 2007 for the EJ&E rail system.

Response

Without waiving any objections, and subject to any specific objections and the General Responses and General Objections stated above, Applicants respond as follows:

Such documents, if they exist, are not relevant or are insufficiently relevant to warrant the burden of production. Such a document, if properly discoverable in this proceeding, would be available from EJ&E.

4. A listing of the planned track, bridge and signal work for calendar year 2008 for the EJ&E rail system.

Response

Without waiving any objections, and subject to any specific objections and the General Responses and General Objections stated above, Applicants respond as follows:

See response to Document Request No. 3.

5. A listing of all track, bridge and signal work completed in calendar year 2007 on the EJ&E system.

Response

Without waiving any objections, and subject to any specific objections and the General Responses and General Objections stated above, Applicants respond as follows:

See response to Document Request No. 3.

6. Rail detector car histories for rail detector cars run on the EJ&E system in calendar years 2006 and 2007.

Response

Without waiving any objections, and subject to any specific objections and the General Responses and General Objections stated above, Applicants respond as follows:

See response to Document Request No. 3.

7. Federal Railroad Administration ("FRA") geometry car/dynamic loading car (T-100) runs or data collected for trips on the EJ&E system by such cars in calendar years 2006 and 2007.

Response

Without waiving any objections, and subject to any specific objections and the General Responses and General Objections stated above, Applicants respond as follows:

See response to Document Request No. 3.

8. Completed DV-107 forms for the right of way for the EJ&E current and projected expanded main track system in Will County, Illinois.

Response

Without waiving any objections, and subject to any specific objections and the General Responses and General Objections stated above, Applicants respond as follows:

See response to Document Request No. 3.

9. ICC valuation maps for the right of way for the EJ&E current and projected expanded main track system in Will County, Illinois.

Response

Without waiving any objections, and subject to any specific objections and the General Responses and General Objections stated above, Applicants respond as follows:

See response to Document Request No. 3.

10. All documents reflecting, referring or relating to the capital improvements that CN plans to make to the EJ&E system in the approximate amount of \$100 million, as referenced at page 212 of the Railroad Control Application you filed in this proceeding. This request includes, but is not limited to:

- a. A list of the capital improvements that you plan to undertake that are included in the approximately \$100 million of capital improvements;
- b. The schedule or timetable for the projects that you plan to undertake that are included in the approximately \$100 million of capital improvements; and
- c. Documents reflecting the details of any capital improvement included in the planned capital improvements.

Response

Without waiving any objections, and subject to any specific objections and the General Responses and General Objections stated above, Applicants respond as follows:

- a. The list of anticipated capital improvements can be found in the Application at pp. 220-22, 243.
- b. The schedule for the anticipated capital improvements can be found in the Application at pp. 215-16.
- c. Details reflecting the planned capital improvements can be found in the Application at pp. 215-26.

11. Any analysis you prepared of the increased maintenance or maintenance costs required for EJ&E track in Will County due to increased traffic in the event the Railroad Control Application is approved, both in the initial years and after the acquisition is fully implemented.

Response

Without waiving any objections, and subject to any specific objections and the General Responses and General Objections stated above, Applicants respond as follows:

The Application took maintenance costs into account, but Applicants did not perform a formal analysis of maintenance costs for EJ&E track in Will County.

Applicants estimated generally that there would be an increase of \$2.50 for every incremental 1,000 gross ton miles of traffic.

12. All documents reflecting, referring or relating to any analysis of the operating plan or possible operational difficulties associated with the switching of local traffic onto the EJ&E main track in Will County in the event the Railroad Control Application is approved, both in the initial years and after the acquisition is fully implemented.

Response

Without waiving any objections, and subject to any specific objections and the General Responses and General Objections stated above, Applicants respond as follows:

The Operating Plan took local switching into account. For example, the capacity analysis in the work papers made general allowances for switching local traffic, including general adjustments to track capacity and available track time, intended to assure the availability of sufficient capacity for such switching. See, e.g., CN/EJEW 5 CO 100002, Capacity Cals.xls.

13. All documents reflecting, referring or relating to any analysis of the frequency or duration of the possible or likely blockage of automobile and truck traffic at the at grade crossings in Will County in the event that the Railroad Control Application is approved, both in the initial years and after the acquisition is fully implemented.

Response

Without waiving any objections, and subject to any specific objections and the General Responses and General Objections stated above, Applicants respond as follows:

This request relates only to matters covered in the EIS process.

14. All documents reflecting, referring or relating to any analysis of the proposed transaction on the regional or local transportation system.

Response

Without waiving any objections, and subject to any specific objections and the General Responses and General Objections stated above, Applicants respond as follows:

The request is evidently incomplete. If it was meant to refer to "the effect" of the Transaction, CN's post-implementation traffic flows are contained in the work papers at STB_EJE_OpPlan.mdb, tbl_TSP_X1.

15. All documents reflecting, referring or relating to any analysis of:
- a. Any increase in the noise levels in any area of Will County due to the projected increase in train traffic due to the proposed transaction; or
 - b. The identity of any sensitive noise receptors in Will County that could be impacted by increased noise due to the proposed transaction.

Response

Without waiving any objections, and subject to any specific objections and the General Responses and General Objections stated above, Applicants respond as follows:

See answer to Document Request No. 13.

16. All documents reflecting, referring or relating to any analysis of:
- a. Any increase in the vibration levels in any area of Will County due to the projected increase in train traffic due to the proposed transaction; or
 - b. The identity of any sensitive vibration receptors in Will County that could be impacted by increased noise due to the proposed transaction.

Response

Without waiving any objections, and subject to any specific objections and the General Responses and General Objections stated above, Applicants respond as follows:

See answer to Document Request No. 13.

17. All documents reflecting, referring or relating to any analysis of increased vehicle delay times at railroad grade crossings in Will County due to the proposed transaction.

Response

Without waiving any objections, and subject to any specific objections and the General Responses and General Objections stated above, Applicants respond as follows:

See answer to Document Request No. 13.

18. All documents reflecting, referring or relating to any analysis of the impact of the proposed transaction on the provision of emergency services in Will County.

Response

Without waiving any objections, and subject to any specific objections and the General Responses and General Objections stated above, Applicants respond as follows:

See answer to Document Request No. 13.

19. All documents reflecting, referring or relating to any analysis of the improved safety measures that could be required at any at grade rail crossing in Will County due to the increased traffic associated with proposed transaction. This request includes, but is not limited to:

- a. Any analysis of the safety of the existing safety measures in place at a given crossing;
- b. Any analysis of the type of safety measures or equipment that could or should be implemented or installed at a Will County crossing to address the safety issues posed by the increased train traffic associated with the proposed transaction;
- c. Any analysis of the cost of safety measures or equipment that could or should be implemented or installed at a Will County crossing to address

the safety issues posed by the increased train traffic associated with the proposed transaction; and

- d. Any analysis of the likely responsibility for or participation in the cost of safety measures at a crossing in Will County that could or likely would be required to address the safety issues posed by the increased train traffic associated with the proposed transaction.

Response

Without waiving any objections, and subject to any specific objections and the General Responses and General Objections stated above, Applicants respond as follows:

See answer to Document Request No. 13. See Applicants' Safety Integration Plan at pages 68-72.

20. All documents reflecting, referring or relating to your plans to protect public safety from the risks associated with the project increase in hazardous materials transported on EJ&E track through Will County if the proposed transaction is approved.

Response

Without waiving any objections, and subject to any specific objections and the General Responses and General Objections stated above, Applicants respond as follows:

See answer to Document Request No. 13. See Applicants' Safety Integration Plan at pages 61-62.

21. All documents reflecting, referring or relating to the budget or budgets for environmental mitigation that may be required if the proposed transaction is approved.

Response

Without waiving any objections, and subject to any specific objections and the General Responses and General Objections stated above, Applicants respond as follows:

See answer to Document Request No. 13.

22. All documents reflecting, referring or relating to your analysis of the likely growth in traffic on the EJ&B tracks in Will County assuming the proposed transaction is approved, both in the initial years and after it is fully implemented.

Response

Without waiving any objections, and subject to any specific objections and the General Responses and General Objections stated above, Applicants respond as follows:

The projected traffic over each segment of the EJ&B tracks in Will County as shown in Attachment A.2 assumes that the Transaction has been fully implemented. CN projected that traffic to and from the Port of Prince Rupert would grow from twice weekly to daily by the time the Transaction is implemented. See CN/EJEW 5 CO 100003, Rupert Train Plan 2008 - 2010 V3.xls. CN witness David A. Stuebner also conducted an extended haul analysis, which concluded that while the combined system would gain extended hauls for 9,695 carloads of traffic. His work papers are available in the CN/EJEW Document Depository. This traffic was accounted for in the Operating Plan, including Attachments A.1 and A.2.

23. All documents reflecting, referring or relating to any analysis of the impact on air quality in Will County if the proposed transaction is approved.

Response

Without waiving any objections, and subject to any specific objections and the General Responses and General Objections stated above, Applicants respond as follows:

See answer to Document Request No. 13.

Respectfully submitted,



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601 Pennsylvania Avenue, N.W.
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*Counsel for Canadian National Railway Company
and Grand Trunk Corporation*

January 18, 2008

CERTIFICATE OF SERVICE

I certify that I have, this 18th day of January, 2008, served the foregoing Applicants' Response to Will County's First Discovery Requests by causing a copy to be sent by first-class mail, postage prepaid, or by a more expeditious method of delivery, to all known parties of record.

A handwritten signature in black ink, appearing to read "J. Paul M.", is written over a horizontal line.

Law Office

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January 25, 2008

Re: Canadian National Railway Company
and Grand Trunk Corporation
—Control—EJ&P West Company
STB Finance Docket No. 35087
Our File 5226-2



Honorable Anne K. Quinlan
Acting Secretary
Surface Transportation Board
395 E Street, S.W.
Suite 1260
Washington, DC 20423-0001

FEDERAL EXPRESS

EXEMPTED
Office of Proceedings
JAN 28 2008
Part of
Public Record

Dear Ms. Quinlan:

In accordance with the Board's Decision No. 3 in connection with the above proceeding, served on January 18, 2008, we enclose for filing the signed original and ten (10) copies of a Certificate of Service certifying that we have served a copy of all filings submitted so far in this proceeding on each Party of Record designated on the service list attached to the Board's Decision, including the parties listed on the Certificate who have not previously been served.

Sincerely yours,

VUONO & GRAY, LLC

John A. Vuono

CW/59906

Enclosures

cc: Parties of Record



CERTIFICATE OF SERVICE

On this 25th day of January, 2008, I hereby certify that I have served by first class mail, postage prepaid, or by overnight delivery, a copy of all filings submitted in this proceeding to all Parties of Record shown on the service list attached to Decision No. 3 in STB Finance Docket No. 35087, served on January 18, 2008, including the following Parties of Record who have not previously been served with such filings.

Mr. Karl Browning
Indiana Department of Transportation
100 North Senate Avenue
Room N758
Indianapolis, IN 46204

Mr. Richard E. Weicher
BNSF Railway Company
2500 Lou Menk Drive
Fort Worth, TX 76131

Mr. Rod Nilsestuen
Department of Agriculture, Trade
and Consumer Protection
2811 Agriculture Drive
P. O. Box 8911
Madison, WI 53708

Ms. Luann Hamilton
Chicago Department of Transportation
30 N. LaSalle Street
Suite 500
Chicago, IL 60602

Terri Blackmore
Washtenaw Area Transportation Study
705 North Zeeb Road, 2nd Floor
Ann Arbor, MI 48103

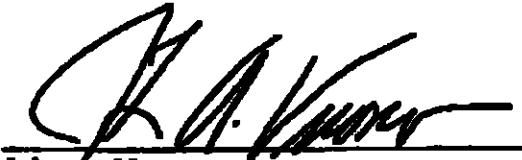
Honorable A. George Pradel
Mayor, City of Naperville
400 S. Eagle Street
Naperville, IL 60540

Mr. Rodney W. Kreunen
Wisconsin Railroad Commissioner
610 N. Whitney Way
P. O. Box 8968
Madison, WI 53708

Ms. Becky Barnhart
5327 Cedar Drive
Naperville, IL 60564

Honorable John M. Shimkus
U. S. House of Representatives
2452 Rayburn House Office Building
Washington, DC 20515

Honorable John D. Dingell
U. S. House of Representatives
2328 Rayburn House Office Building
Washington, DC 20515


John A. Vuono 757906