

**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 ELGIN, JOLIET AND EASTERN RAILWAY COMPANY
AND FROM EJ&E WEST COMPANY**

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January 28, 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 Elgin, Joliet & Eastern Railway Company and EJ&E West Company (collectively "EJ&E") 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 EJ&E's 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.

In order to obtain a better understanding of the likely impact if CN were permitted to acquire the EJ&E, 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.

The majority of the discovery was directed at obtaining information concerning the likely impact of the proposed acquisition on Will County after the proposed control application is fully implemented. Therefore, more likely than not only the CN could answer that discovery or would have responsive documents.

However, Will County also was concerned that the existing EJ&E tracks might not withstand the pounding associated with the tremendous increase in trains and freight tonnage. As there is nothing in the Application that addresses the condition of the existing track in any detail, Will County requested that the EJ&E produce some very specific documents so that it could assess the current and future track conditions and maintenance requirements. The document requests included the following requests:

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, 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.

Will County also wanted to know who owns the land under the 52 public at-grade crossings. It therefore included the following requests:

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.

If EJ&E had documents responsive to any of Will County's other document requests, it would probably be in the form of communications with the CN, but Will County would expect the EJ&E to produce whatever it has.

With respect to Will County's interrogatories, the questions that the EJ&E would most likely have been able to answer included the request in Interrogatory No. 2 for a description of the safety equipment and measures in place at each at-grade crossing in Will County and the request in Interrogatory No. 3 for information about any plans in the next five years for safety improvements at those crossings. Interrogatory No. 4 asked the respondents to identify any public at-grade crossing in Will County for which they thought the existing safety devices would be inadequate after the CN fully implemented its acquisition. If the EJ&E had information or

analyses concerning that issue, Will County certainly expected a response to that interrogatory as well.

Instead of providing a substantive response to Will County's discovery requests, the EJ&E faxed a letter to Will County on January 18, 2008 advising Will County that it would not provide the requested discovery because the EJ&E is not a party to this proceeding. The EJ&E's January 18, 2008 letter also stated that to the extent the EJ&E was found to be a party, the EJ&E adopted the objections and legal arguments made by CN in its responses to Will County's discovery. A copy of the EJ&E's January 18, 2008 letter setting forth the EJ&E's position is attached as Exhibit 3.

ARGUMENT

I. OVERVIEW

The EJ&E has taken the same position with respect to discovery served upon it by other parties to this proceeding. The Village of Frankfort ("Frankfort") filed a motion to compel against the EJ&E on January 22, 2008. As discussed below, Frankfort has made many of the same arguments as Will County and Will County has adopted some of those arguments.

The CN also has taken the same position with a number of parties concerning discovery as it has taken with Will County. The CN's basic position is that governmental entities are not entitled to obtain discovery in this proceeding concerning the impact of its proposed acquisition on the surface transportation system, on grade crossing safety, or on environmental issues such as air quality, noise and vibration impacts.

CN's response to Will County's discovery was served on Will County on January 22, 2008. Will County will be filing a motion to compel against the CN. Frankfort filed a motion to compel against the CN on January 25, 2008.

While the EJ&E discovery response raises the additional question of whether it is a party to this proceeding, it also incorporates the CN's arguments and responses. It therefore would appear to be in the interests of judicial economy to jointly address the motions to compel targeted at the EJ&E and the CN.

II. THE EJ&E IS A PARTY TO THIS PROCEEDING

The question of whether the EJ&E is a party to this proceeding was succinctly and persuasively addressed by Frankfort in Section 1 of its argument that appears at pages 5 and 6 of the Village of Frankfort's Motion to Compel Discovery From Elgin, Joliet and Eastern Railway Company and EJ&E West Company ("Frankfort's Motion to Compel"). Rather than repeating or restating those arguments here, Will County adopts and incorporates those arguments by reference. For the reasons set forth in Frankfort's Motion to Compel and adopted by Will County, the EJ&E is a party to this proceeding and subject to discovery in accordance with the Board's rules.

If the Board finds that the EJ&E is a party, then at a minimum it should direct the EJ&E to produce the documents that Will County requested the EJ&E to produce in requests 1 through 7 of Will County's document requests. These requests cannot possibly be characterized as requests for information solely involving environmental issues. Thus, the EJ&E should be directed to produce the responsive documents to those requests if the Board finds that the EJ&E is a party, regardless of how the Board rules on the other issues concerning the extent of permissible discovery in this proceeding.

III. WILL COUNTY IS ENTITLED TO DISCOVERY ON THE IMPACT OF THE CN'S PROPOSED ACQUISITION ON WILL COUNTY'S SURFACE TRANSPORTATION SYSTEM AND ON 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 at pages 6 through 8. Will County adopts and incorporated those arguments by reference in support of its motion to compel.

As reflected in Will County's Opening Memorandum to be filed in this proceeding on January 28, 2008, it is Will County's position that the reference in 49 U.S.C. §11324(d)(2) requiring the Board to weigh "the public interest in meeting significant transportation needs" includes all forms of transportation, and not just rail transportation. If the Board agrees, then Will County and others are entitled to the requested discovery concerning, for example, traffic delays due to the blocked crossings, regardless of how the Board rules on the right to take discovery on environmental issues. Because that really is an issue that involves Will County's discovery targeted at the CN, Will County will address that issue at greater length in its motion to compel directed to the CN.

IV. 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

By: Edward R. Gower

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Dated: **January 28, 2008**

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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:

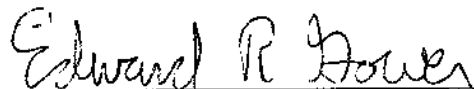
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VIA FACSIMILE AND UPS OVERNIGHT DELIVERY

and

ALL PARTIES OF RECORD

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 as parties of record on the Surface Transportation Board's service list as of this date, January 28, 2008.



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WILL COUNTY'S REQUEST FOR PRODUCTION OF DOCUMENTS

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EJ&E WEST COMPANY

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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, 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.
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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:

COUNSEL FOR CANADIAN NATIONAL RAILWAY COMPANY, GRAND TRUNK CORPORATION AND EJ&E RAILWAY COMPANY

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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Docket #: **FD_35087_0**

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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 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.

ANSWER:

Respectfully submitted,
WILL COUNTY, ILLINOIS

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-CONTROL--EJ&E WEST COMPANY**

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January 18, 2008

Re: Canadian National Railway Corporation and
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--EJ&E West Company
STB Finance Docket No. 35087

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Dear Sir and Madam:

We represent Elgin, Joliet & Eastern Railway Company ("EJ&E") and EJ&E West Company ("EJ&EW").

We have been served with the First Set of Interrogatories and Request for Production of Documents of Will County, IL ("Will County") (jointly, "Discovery Requests"). The Discovery Requests reference the above control proceeding and docket number and are simultaneously directed to the applicants, Canadian National Railway Company ("CN") and Grand Trunk Corporation ("GTC").

It is the position of EJ&E and EJ&EW that they are not parties to the above proceeding and therefore are not required to respond to the Discovery Requests. We note that the applicants have filed responses/objections to Will County's Discovery Requests and have made the distinction that we are raising here, *i.e.*, that CN and GTW are the applicants in the above proceeding and that EJ&E and EJ&EW are not applicants.

The regulations promulgated by the Board succinctly define a "party" as follows:

Party means a complainant, defendant, applicant, respondent, protestant, intervener, or petitioner in any proceeding, or other persons permitted or directed by the Board to participate in a proceeding....

49 C.F.R. §1101.2(d)

Neither EJ&E or EJ&EW are included within the aforesaid definition and therefore cannot be considered parties to the proceeding.

The relevant discovery regulations are clearly applicable only to parties, as defined above, and an entity which is not a party to a Board proceeding is not required to respond to discovery requests. *See* 49 C.F.R. §1114.26 (Written Interrogatories to Parties); §1114.27 (Request for Admission); and 1114.30 (Production of Documents, etc.).

As noted, the applicants have submitted responses/objections to Will County's Discovery Requests. In the unlikely event that EJ&E and EJ&EW are determined to be parties to the above proceeding and, as a result, are required to respond to Will County's Discovery Requests, they hereby incorporate by reference and adopt Applicants' legal arguments and/or to the extent relevant to EJ&E and EJ&EW Applicants' responses/objections to the Discovery Requests.

Sincerely yours,

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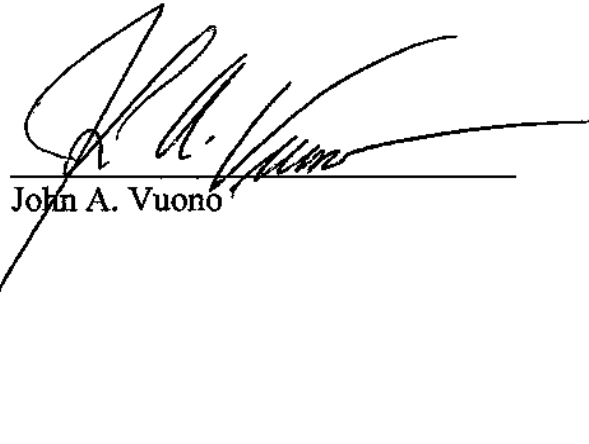
CW/59784

cc: Parties of Record

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing response of EJ&E and EJ&EW to the Will County's 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.

Signed this 18th day of January, 2008.



John A. Vuono

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 35087

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

-CONTROL-

EJ&E WEST COMPANY

CERTIFICATE OF SERVICE FOR WILL COUNTY, ILLINOIS

Pursuant to Decision No. 3 issued on January 18, 2008, in the above-captioned proceeding, the undersigned counsel certifies that copies of all filings previously submitted by Will County, Illinois to the Board, as well as copies of Will County's Request for Production of Documents, and Will County's First Set of Interrogatories were served via first class mail, postage prepaid to all known parties of record in this proceeding.

Respectfully submitted,
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