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July 2, 2008

BY E-FILING

Anne K. Quinlan, Esquire
Acting Secretary
Surface Transportation Board
Office of the Secretary
395 E Street, S.W.
Washington, DC 20423-0001

**Re: Canadian National Railway Company and Grand Trunk Corporation Control-
EJ&E West Company (STB Finance Docket No. 35087)**

Dear Ms. Quinlan:

Enclosed for filing in the above referenced docket please find Applicants' Reply to Illinois Department of Transportation's Motion to Compel Discovery from Canadian National Railway Company and Grand Trunk Corporation (CN-47).

Very truly yours,



Paul A. Cunningham

Enclosure

cc: All parties of record

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 35087

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

**APPLICANTS' REPLY TO
ILLINOIS DEPARTMENT OF TRANSPORTATION'S
MOTION TO COMPEL DISCOVERY FROM
CANADIAN NATIONAL RAILWAY COMPANY
AND GRAND TRUNK CORPORATION**

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*Counsel for Canadian National Railway Company
and Grand Trunk Corporation*

July 2, 2008

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SURFACE TRANSPORTATION BOARD**

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CANADIAN NATIONAL RAILWAY COMPANY
AND GRAND TRUNK CORPORATION**

The Illinois Department of Transportation ("IDOT") has moved to compel Canadian National Railway Company and Grand Trunk Corporation ("Applicants") to respond further to discovery requests that IDOT served on February 29, 2008 ("IDOT Motion"). As Applicants explain below, IDOT's discovery requests were untimely and were served too late to be used for their only legitimate purpose, *i.e.*, to prepare IDOT's response to the Application, which was due January 28, 2008, and which IDOT filed on February 15, 2008.

Applicants have been working and continue to work with the National Railroad Passenger Corporation ("Amtrak") (and indirectly IDOT, to the extent they are being consulted by Amtrak) on an agreement that would implement the commitments sought by Amtrak and agreed to by Applicants during this proceeding that address Amtrak's issues as well as IDOT's derivative concerns about Amtrak service that have prompted IDOT's discovery requests. Consequently, with IDOT's consent, the deadline for Applicants' response to IDOT's motion was extended, most recently through July 2 by Board decision served June 25, 2008. IDOT's

counsel has been unable to respond definitively to Applicants' request for a further extension while work continues on an underlying agreement, thus requiring that Applicants file this reply to IDOT's motion. For the reasons discussed below, IDOT's motion to compel should be denied.

Background and Summary

On October 30, 2007, Applicants filed an Application for Board approval of their acquisition of most of the rail assets of Elgin, Joliet & Eastern Railway Company ("EJ&E"), through an entity created by EJ&E for that purpose known as EJ&E West Company ("EJ&EW").¹

Amtrak filed comments in qualified opposition to the Application, stating that it was concerned that the Transaction would adversely impact its passenger service between Chicago and certain other cities. National Rail Passenger Corporation's Comments in Opposition to Proposed Transaction (NRPC-7, filed Jan. 28, 2008). Amtrak trains travel between Chicago and cities in downstate Illinois (such as Carbondale, Champaign, and Mattoon) and points further south (such as New Orleans), currently accessing Union Station over a portion of CN's track known as the St. Charles Air Line route ("Air Line route"). Amtrak's right to use of that line and the terms for such use are set forth in a 1995 agreement with CN that runs through January 31, 2010 ("Amtrak-CN Agreement").

In its Application, CN stated that the proposed Transaction would enable it to move its traffic off the Air Line route. CN was careful to state, however, that (1) it was not proposing to abandon the Air Line route, (2) before the line could be abandoned Amtrak trains would need to be re-routed, (3) any abandonment would require approval by the Board in a separate

¹ Unless otherwise indicated, abbreviated references used herein have the same meaning as those set forth in the Table of Abbreviations in the Application (CN-2 at 8-11).

proceeding, and (4) CN would work with Amtrak to try to accommodate its interests. CN-2 at 219, 222.

IDOT incorrectly asserts that in the Application CN states “that it will seek to ‘formally abandon’ the St. Charles Air Line, presumably when its contract with Amtrak expires in 2010.” IDOT Motion at 5 n.4. In fact, the Application stated that, before CN could abandon the Air Line route, Amtrak traffic would need to be re-routed, as planned as part of Project CREATE, and that CN would need to coordinate any such abandonment with BNSF and UP, which are co-owners of part of the Air Line route. CN-2 at 219, 222.

Amtrak’s comments asked the Board to condition its approval of the proposed Transaction on requiring CN to preserve the Air Line route for Amtrak’s use, at its current operating standards, at no additional cost to Amtrak or the State of Illinois until such time as the Grand Crossing route proposed in the CREATE Project² is completed and in operation. NRPC-7 at 6-7. Several other parties,³ including IDOT, joined Amtrak in expressing concern that the proposed Transaction would harm Amtrak’s existing service, and therefore opposed the Transaction or sought conditions.⁴

Notwithstanding the fact that the conditions sought are unrelated to anticipated competitive impacts of the Transaction, and therefore fall outside the Board’s authority to

² A connection long sought via Grand Crossing between CN and NS would allow Amtrak to reach Union Station over NS’s line, and was one of the projects proposed by CREATE.

³ This includes the Cities of Champaign, Carbondale, and Mattoon.

⁴ A number of other parties filed comments with the Board’s SEA requesting that the impact on Amtrak be included in the scope of study for the EIS that is being prepared in this proceeding. Notice of Availability of the Final Scope of Study for the Environmental Impact Statement at 10 (STB served Apr. 28, 2008). SEA issued the Final Scope of Study on April 28, 2008, providing that those issues would be evaluated in the EIS. *Id.* at 19, 20.

condition its approval of the Transaction,⁵ CN agreed to the conditions sought by Amtrak. It has committed to allowing Amtrak to remain on the Air Line route indefinitely, until the Grand Crossing routing or another alternative acceptable to Amtrak is available, at costs to be capped at their current level (adjusted only for inflation pursuant to the formula contained in the current agreement between Amtrak and CN) and at the level of operating utility that Amtrak currently enjoys. *See Applicants' Response to Comments, Requests for Conditions, and Other Opposition & Rebuttal in Support of the Application* at 57 (CN-29, filed Mar. 13, 2008), and documents cited therein. CN has also invited the Board to impose those commitments as conditions to authorization of the transaction. *See Applicants' Surrebuttal to Additional Comments Filed On Or After March 13, 2008* (CN-31, filed April 28, 2008) at 9-10.

These commitments go well beyond CN's statutory responsibilities to Amtrak, and would constitute a significant annual subsidy of Amtrak by CN. Congress has carefully defined the relationship between Amtrak and freight railroads – and that relationship does not require freight railroads ultimately to retain lines they do not need, solely or even primarily for Amtrak's benefit, or to subsidize Amtrak's operations.⁶ Nor has Congress required freight railroads to subsidize other passenger rail service, including commuter trains. As the Board has consistently

⁵ *See Lamoille Valley R.R. v. ICC*, 711 F.2d 295, 301 n.3 (D.C. Cir. 1983). *Lamoille Valley* held that, in reviewing rail control transactions, the agency must apply same public interest test to the transaction itself and to any conditions. In this case, that public interest test is limited by 49 U.S.C. § 11324(d) to consideration of whether the Transaction is likely to cause “substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States,” and if so, to whether those effects “outweigh the public interest in meeting significant transportation needs.” No credible evidence has been submitted in this case of any anticompetitive effects of the Transaction, so the Board has no occasion to weigh such effects against the Transaction's transportation benefits.

⁶ *See* 49 U.S.C. 24308(a)(2); *see also, e.g., National R.R. Passenger Corp. – Applic. – 49 U.S.C. 24308(a)*, 3 S.T.B. 143, 145 (1998); *National R.R. Passenger Corp. – Applic. – 49 U.S.C. 24308(a)*, 3 S.T.B. 157, 168 n.24 (1998).

recognized and enforced, the freight railroads are permitted to charge Amtrak the full incremental cost for using their rail lines – those costs that they would avoid but for Amtrak’s operations.

CN’s commitments to Amtrak therefore go well beyond the requirements of the law. CN is effectively subsidizing Amtrak by agreeing to forego (1) the proceeds and benefits of a sale of the Air Line route for as long as Amtrak wishes to remain on the line; and (2) the statutory compensation to which CN would be entitled for maintaining the Air Line route, which would otherwise rise significantly with CN’s withdrawal from the line.

CN’s offer to allow Amtrak to maintain its existing service at no additional cost not only fulfills the conditions sought by Amtrak, it also should resolve any and all issues raised in other comments concerning impacts of the proposed Transaction on Amtrak service. CN’s statement of its commitment on the record and its invitation for the Board to bind CN to those commitments through formal conditions now protects Amtrak, and those like IDOT with an interest in Amtrak service, from an abandonment by CN of the Air Line route that could result in a cessation of Amtrak service, and from any increase, resulting from a future relocation of CN’s traffic off of that line, in Amtrak’s cost for using the Air Line route. CN and Amtrak are working to implement CN’s commitments through amendments to the Amtrak-CN Agreement, but Amtrak’s essential rights have already been secured through CN’s unilateral commitments.⁷

⁷ IDOT’s motion accuses CN of “grossly mistat[ing] the facts” by supposedly asserting in its discovery response “that it has reached an ‘agreement’ with Amtrak regarding prospective service, and that all of IDOT’s concerns are thus ‘resolved.’” Motion at 2. IDOT is mistaken. CN did not state that it had reached an “agreement with Amtrak”: it stated that it had “agreed to the conditions sought by Amtrak.” See Applicants’ Response to the Illinois Department of Transportation’s Request for Production of Document at 1 (served Apr. 18, 2008) (“Applicants’ Response”) (attached as Exhibit 1). As discussed above, it is those commitments by CN that do indeed resolve IDOT’s issues.

IDOT's Objectionable Discovery Requests

The purpose of IDOT's discovery requests and motion, which come well after it filed its cursory comments on the merits and after the close of the evidentiary record, is apparently to assist IDOT in financial planning and perhaps in its future negotiations with Amtrak over the costs of Amtrak's passenger rail service that it may choose to subsidize. *See* IDOT Statement of Opposition at 6 (filed Feb. 15, 2008) ("In order to assess the financial and programmatic impact of the proposed acquisition, IDOT has asked CN to provide the actual and projected costs of operating and maintaining the eleven (11) mile stretch of track"). IDOT has also claimed that it requires cost information because the proposed Transaction could supposedly result in increased costs to Amtrak (and, indirectly, potentially IDOT) for maintenance of the Air Line (Motion at 2), but that claim is now moot in light of CN's commitments discussed above which, by capping those costs at current inflation-adjusted levels for as long as Amtrak remains on the Air Line route, directly address and preclude that possibility.

CN responded to IDOT's requests, all of which are focused on the Air Line route, by: (1) referring IDOT to CN's responses to the document requests and interrogatories of other parties, which include numerous documents that Applicant's have placed in their document depository, most of which are confidential or highly confidential under the Board's protective order and thus require IDOT's representatives to sign confidentiality undertakings; (2) providing IDOT with copies of CN's letters to Amtrak and other officials memorializing its commitments concerning Amtrak service and costs; (3) providing IDOT (on a confidential basis) with a copy of the Amtrak-CN Agreement; and (4) agreeing to make available to IDOT, upon receipt of an IDOT confidentiality undertaking, a confidential letter agreement between CN and the City of Chicago,

Department of Transportation, responsive to Document Request 5.⁸ IDOT has not visited Applicant's document depository, and has not even sent a confidentiality undertaking to CN or otherwise taken any steps of which CN is aware to follow through and review CN's proffered documents.

Despite having failed even to collect, much less review, much of what CN proffered in response to IDOT's document request, IDOT in its motion to compel seeks further documents related primarily to cost information for the specific Air Line route segment of CN's network. That information, as CN explained to IDOT in correspondence, is not developed or maintained by CN in the regular course of business. Letter from G. Trafton to M. Sees & J. Clary, dated February 7, 2008 (attached as Exhibit 3). In addition, for the reasons outlined by CN both in its correspondence with IDOT and above, IDOT does not need this information, at least not for the Board's proceedings. *Id.*

In propounding its requests and filing its motion, IDOT ignores a basic principle: a party to a proceeding before the Board does not have a right to take discovery except insofar as discovery is authorized by the Board under its rules and decisions. Most fundamentally, the Board's rules require that discovery be "relevant to the subject matter involved in a proceeding" and that it be "reasonably calculated to lead to the discovery of admissible evidence." 49 C.F.R. § 1114.21(a)(1)-(2). As discussed by Applicants' in their General Objections to IDOT's discovery requests, given the timing and subject matter of IDOT's requests, they should be denied on both these fundamental grounds. Applicants' Response at 2-3.

With respect to timeliness, IDOT has not shown that it served the requests in time to use the fruits of such discovery for a permissible purpose (*i.e.*, in connection with a submission it

⁸ Applicants' Response at 6-9; Letter from J. Guinivan to L. Parrish, dated March 17, 2008 (attached as Exhibit 2).

was entitled to make concerning the merits of this Transaction).⁹ To the extent IDOT is seeking to explore the impact of the Transaction on Amtrak passenger service, that is a subject being addressed in the Environmental Impact Statement (“EIS”) process now under way,¹⁰ but as to which the Board made clear in Decision No. 8 discovery is not available (Decision No. 8 at 2-4 (STB served Feb. 22, 2008)).

Moreover, even if IDOT’s requests had been timely, they are still improper under the Board’s rules, because they relate to passenger service issues that are irrelevant to the underlying competition issues that are dispositive of whether the Transaction should be approved. That fact is evident both from the substance of those requests and IDOT’s own statement that it needs the information it requested “in order to adequately anticipate and understand the likely impact that the acquisition will have on the public at large, the State of Illinois’ surface transportation system, and Amtrak service” (IDOT Motion at 7). These matters are not encompassed by the limited scope of the competition issues pertinent to the Board’s statutory authority to approve a “minor” transaction, and they are not valid purposes that can support IDOT’s requests for discovery under the Board’s rules.

⁹ Whether IDOT served its document request on February 28 (the date appearing on the certificate of service accompanying that request) or February 29, 2008 (the date on IDOT’s cover letter), the deadline for CN’s response to it was after the March 13 deadline for reply comments.

In *Consolidated Rail Corp. v. United States*, 812 F.2d 1444 (3d Cir. 1987), Judge Becker’s separate opinion warned that, “[i]n view of the short deadlines for deciding rail cases (49 U.S.C. 10327), complainant must make its discovery requests as soon as possible.” *Id.* at 1464. IDOT did not heed that advice; notwithstanding having had nearly a month to study the Application before it was accepted, IDOT did not make its discovery requests “as soon as possible” after the Board allowed discovery in Decision No. 2 on November 26, but waited an additional three months to do so, and also failed to serve its post-comments discovery so as to be plainly timely, if allowable at all.

¹⁰ See, e.g., Notice of Availability of the Final Scope of Study for the Environmental Impact Statement at 10-11, 19-20 (STB served Apr. 28, 2008).

As noted above, at most these requests seek information that might bear on the environmental impact process, for which discovery is not available. Decision No. 8 at 2-4. In Applicants' view, however, the particular issues that are the subject of IDOT's discovery – the costs of maintaining or operating the Air Line route for Amtrak's use – are not at all the proper subjects of this proceeding, but should be explored, as warranted, in CN's contract negotiations with Amtrak or in a future abandonment proceeding.

Even then, it should be recognized that CN's commercial relationship regarding Amtrak service in Illinois is with Amtrak, not with IDOT. IDOT does not pay anything to CN for that service; it pays subsidies to Amtrak. Given the fact that CN is now committed to abide by the pricing for the Air Line route that exists under its long-standing agreement with Amtrak until such time as Amtrak chooses to relocate off the Air Line route, if IDOT has questions about the future costs of Amtrak's passenger service, those questions should be directed to Amtrak. CN continues to work cooperatively with Amtrak, which has no outstanding discovery requests to CN and which has not supported IDOT's motion. CN strongly objects to IDOT's improper effort to use the Board's discovery processes to try to determine a discrete element of Amtrak's underlying costs, rather than to pursue its cost issues directly with Amtrak itself, which is the passenger service provider. The Board's discovery processes are not and should not be made available for such purposes.

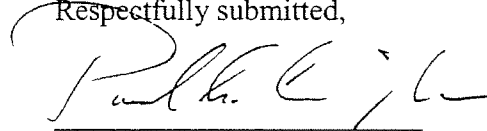
Finally, there is no reason to believe that IDOT will have any need for the data it seeks. As outlined above, IDOT is not at risk of further subsidies to maintain Amtrak service over the Air Line route as a result of the proposed Transaction. And even if CN could ultimately propose to abandon the Air Line route, its commitments preclude it from doing so while Amtrak continues its use the line. Nonetheless, if IDOT does have an interest in such information as part

of a future proposed abandonment, it can seek that information at that time, in that proceeding. Its present requests, however, are premature and have nothing to do with the acquisition of part of EJ&E involved in this "minor" proceeding, nor with the limited range of competition issues encompassed by such a proceeding for which discovery is available.

Conclusion

For the foregoing reasons, the Board should deny IDOT's motion to compel.

Respectfully submitted,



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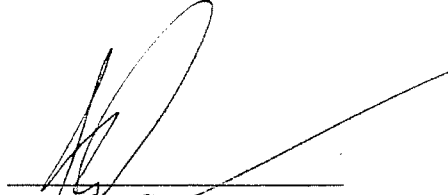
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*Counsel for Canadian National Railway Company
and Grand Trunk Corporation*

July 2, 2008

CERTIFICATE OF SERVICE

I certify that I have this 2nd day of July, 2008, served copies of Applicants' Reply to Illinois Department of Transportation's Motion to Compel Discovery from Canadian National Railway Company and Grand Trunk Corporation (designated as CN-47) upon all known parties of record in this proceeding by first-class mail or a more expeditious method of delivery



Alex Ceon

EXHIBIT 1

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April 18, 2008

BY E-MAIL AND FIRST CLASS MAIL

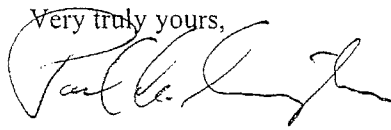
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**Re: Canadian National Railway Company and Grand Trunk Corporation –
Control – EJ&E West Company (STB Finance Docket No. 35087)**

Dear Mr. Parrish:

Please find enclosed a copy of Applicants' Response to the Illinois Department of Transportation's Request for Production of Documents.

Very truly yours,



Paul A. Cunningham

Enclosure

cc: All parties of record

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 35087

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

**APPLICANTS' RESPONSE TO THE ILLINOIS DEPARTMENT OF
TRANSPORTATION'S REQUEST FOR PRODUCTION OF DOCUMENTS**

The Illinois Department of Transportation ("IDOT") served its Request for Production of Documents on Applicants on February 28 or 29, 2008 ("Production Request").¹ In subsequent discussions between counsel, Applicants explained that in light of commitments that CN² had made regarding National Passenger Railroad Corporation ("Amtrak"), IDOT's Production Request was not relevant. The parties agreed that rather than Applicants initially providing a full response to the Production Request, Applicants would provide IDOT with a confidential copy of the February 1, 1995, Agreements Between National Railroad Passenger Service Corporation and Illinois Central Railroad Company ("Amtrak-CN Agreement"), which is responsive to Request No. 2 of the Production Request, and IDOT would review that document and determine the extent to which it requires responses, if any, to other items sought in the Production Request. By letter dated March 27, 2008 (postmarked April 1, 2008, and not received by counsel for Applicants until April 8, 2008), IDOT requested a full response to its

¹ While the last page of the Production Request has a typed service date of February 28, 2008, the letter of transmittal, dated February 29, also certifies service "on this date."

² Applicants incorporate by reference the short forms and abbreviations set forth in the Table of Abbreviations at CN-2 at 8-11.

Production Request. IDOT later agreed that Applicants could provide their response on or by April 18, 2008.

Accordingly, Applicants hereby respond to the Production Request, as follows:

APPLICANTS' GENERAL OBJECTIONS

The Production Request is objectionable for two primary reasons.

First, because the information sought in the discovery request relates solely to issues raised by IDOT and Amtrak that have since been fully resolved, the request seeks information that is itself no longer relevant to the subject matter of this proceeding and which cannot lead to the discovery of admissible evidence. 49 C.F.R. § 1114.21(a). IDOT's comments in this proceeding, which were belatedly filed on February 15, 2008, relate solely to its concerns that the Transaction will adversely impact Amtrak's passenger service over a portion of CN's track known as the St. Charles Air Line route ("Air Line route"). Amtrak itself raised the same concerns, and sought conditions to preserve the Air Line route for Amtrak's use, at its current operating standards, at no additional cost to Amtrak or the State of Illinois until such time as an alternative route acceptable to Amtrak is available. As discussed in Applicants' March 13, 2008 response to comments, Applicants have now agreed to the conditions sought by Amtrak. Specifically, Applicants have committed to allowing Amtrak to remain on the Air Line route indefinitely, until an alternative acceptable to Amtrak is available, and to cap Amtrak's costs at their current level (adjusted only for inflation pursuant to the formula contained in the current agreement between Amtrak and CN) and at the level of operating utility that Amtrak currently enjoys. *See* CN-29 at 56-59 (and letters cited therein). Because Applicants have now provided the assurances sought by IDOT and Amtrak to

fully answer the concerns they raised, there is no longer any need for or basis in this proceeding for IDOT discovery requests predicated on those concerns.

Second, the Production Request is entirely objectionable because it is untimely and cannot lead to the discovery of admissible evidence. 49 C.F.R. § 1114.21(a). As noted above, IDOT has already filed its comments on the Application. Moreover, even assuming that IDOT might have had a basis to file a reply to comments on or by the March 13, 2008 deadline for replies, it served its discovery too late to require responses in time for use in such a reply.³ In any event, the deadline for replies has come and gone and IDOT has no right to a further filing on the merits of this proceeding.⁴ It appears instead that IDOT is continuing to press its request for the production of documents by Applicants not for use in this proceeding, but for other purposes. Its untimely requests are therefore objectionable not only because they cannot lead to the discovery of admissible evidence, but more generally because the Board's provision for discovery under its rules and in this proceeding is intended only to facilitate the participation of parties in the Board's proceedings, and not to provide a vehicle for parties to seek information for other purposes.

³Whether the Document Request was served on February 28 or 29, 2008, the deadline for responses to that Document Request was after the March 13 deadline for reply comments.

⁴ There may be further opportunities for comments to be submitted to SEA with regard to the Draft Environmental Impact Statement, but, as the Board recently reaffirmed in this proceeding, the Board's discovery processes are not available to obtain information or documents to be used in the environmental impact process. Decision No. 8 at 3 (served Feb. 22, 2008).

APPLICANTS' PARTICULAR OBJECTIONS

The following objections are made with respect to all of the document requests, as appropriate.⁵

1. Applicants object insofar as the Production Request seeks 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.

2. Applicants object insofar as the Production Request seeks the production of documents that include confidential or sensitive commercial information, including information subject to disclosure restrictions imposed by law, in other proceedings, or by contractual obligation to third parties, or 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.

3. Applicants object insofar as the Production Request is 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.

⁵ Production of information or documents does not necessarily imply that they are relevant to or admissible in this proceeding, and is not to be construed as waiving any appropriate objection.

4. Applicants object insofar as the Production Request seeks production of documents prepared in connection with, or information relating to, possible settlement of this or any other matter or controversy.

5. Applicants object insofar as the Production Request seeks 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.

6. Applicants object insofar as the Production Request seeks the production of information or documents that are reasonably obtainable by IDOT from its own files or are otherwise in its possession, custody or control.

7. Applicants object insofar as the Production Request is 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.

8. Applicants object to the Production Request, insofar as it seeks “any” or “all” information or documents “reflecting, referring or relating to” a subject, as being unreasonably broad or vague and burdensome.

9. Applicants object to the definition of “document” (Definition C) based on Fed. R. Civ. P. 34(a) to the extent that it differs from 49 C.F.R. § 1114.30(a)(1).

10. Applicants object to the Production Request insofar as it contains no time limits.

11. Applicants object insofar as the Production Request seeks the production of information subject to the attorney-client privilege, the work product doctrine and/or the joint or common interest privilege.

12. Applicants object to definitions of “CN track” because it is ambiguous as to what constitutes being “owned” by CN, *i.e.*, a controlling interest of more than 50% or something less.

13. Applicants object to the Instructions seeking detailed information regarding otherwise responsive documents not produced because they fall within the scope of a privilege. Such detailed information is not necessary, and is unduly burdensome to provide on a broad basis. It has not generally been required or provided in recent contested control cases, and there is no reason here to warrant different treatment.

APPLICANTS’ SPECIFIC RESPONSES

Document Request No. 1

All documents reflecting, referring or relating to the costs of operating and/or maintaining the CN track including, without limitation, extraordinary capital costs that may be required to maintain the CN track in the future.

Response

Applicants object insofar as the request calls for “[a]ll documents reflecting, referring or relating to” the specified subject.

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

See Application, responses to other document requests and interrogatories, Amtrak-IC Agreement (previously supplied to IDOT), Letter from E. Hunter Harrison to

Alex Kummant, President of Amtrak, March 10, 2008 (previously supplied to IDOT), Letter from E. Hunter Harrison to The Honorable Richard Durbin, February 14, 2008 (CN-29, Exhibit 3), Letter from E. Hunter Harrison to Congresswoman Melissa Bean, March 26, 2008 (filed and served on IDOT as CN-30).

No additional documents are being produced.

Document Request No. 2

Any contracts, understandings, agreements, or memoranda between the CN and Amtrak that in any way relates [sic] to the CN track.

Response

Applicants object insofar as the request calls for “[a]ny contracts, understandings, agreements or memoranda ... that in any way relate[] to” the subject.

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. 1.

No additional documents are being produced.

Document Request No. 3

Any analysis or projections regarding the annual maintenance and operation activities and costs required or recommended for the CN track after the acquisition is fully implemented.

Response

Applicants object insofar as the request calls for “[a]ny analysis or projections regarding” the specified subject. The request is objectionable because it is vague and ambiguous in failing to identify by whom the “activities and costs” are “required or recommended.”

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. 1.

No additional documents are being produced.

Document Request No. 4

Any analysis or projections regarding the cost savings to CN if CN stops using the CN track following the acquisition.

Response

Applicants object insofar as the request calls for “[a]ny analysis or projections regarding” the specified subject.

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 Nos. 1.

No additional documents are being produced.

Document Request No. 5

All documents reflecting, referring to, or relating to CN’s plans for the CN track if the proposed acquisition is approved.

Response

Applicants object insofar as the request calls for “[a]ll documents reflecting, referring to, or relating to” the specified plans.

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

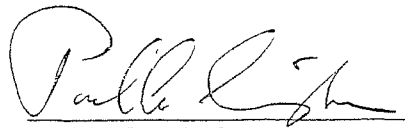
See Letter Agreement between CN and City of Chicago, Department of Transportation, dated June 14, 2003. A redacted version of this document, which has

been designated as CONFIDENTIAL under the terms of the Board's protective order may be found in Applicant's document depository (CN/EJEW 6 CO 000024).⁶

See response to Document Request No. 1.

No other documents are being produced.

Respectfully submitted,



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*Counsel for Canadian National Railway Company
and Grand Trunk Corporation*

April 18, 2008

⁶ Applicants will provide this document, and any other documents referenced in response to the Production Request that may have been designated Confidential or Highly Confidential pursuant to the Board's Protective Order (Decision No. 1, served Oct. 22, 2007), promptly upon receiving from IDOT the appropriate executed confidentiality undertakings provided for by the Protective Order.

CERTIFICATE OF SERVICE

I certify that I have, this 18th day of April 2008, served the foregoing Applicants' Response to the Illinois Department of Transportation's Request for Production of Documents 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.

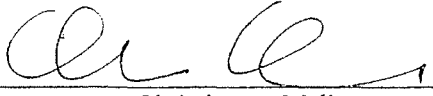

Christine A. Mellen

EXHIBIT 2

HARKINS CUNNINGHAM LLP

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March 17, 2008

BY E-MAIL AND FEDEX

Lawrence D. Parrish, Esquire
Special Assistant Chief Counsel
Illinois Department of Transportation
300 West Adams, 2nd Floor
Chicago, IL 60606

**Re: Canadian National Railway Company and Grand Trunk Corporation –
Control – EJ&E West Company (STB Finance Docket No. 35087)**

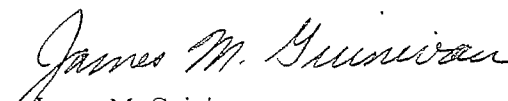
Dear Mr. Parrish:

Enclosed, in accordance with your telephone conversation this morning with Ted Kalick, CN's Senior U.S. Regulatory Counsel, and Mr. Kalick's e-mail message to you of 12:34 pm this afternoon, is a copy of the February 1, 1995, Agreement Between National Railroad Passenger Corporation and Illinois Central Railroad Company, which is responsive to Request No. 2 of the Illinois Department of Transportation's Request for Production of Documents.

Please note that this Agreement has been designated as "CONFIDENTIAL" pursuant to the Protective Order issued in this proceeding (Decision No. 1, served Oct. 22, 2007).

I understand that, after reviewing this Agreement, the Illinois Department of Transportation ("IDOT") will determine the extent to which it requires responses, if any, to other items on its Request for Production of Documents and that IDOT has agreed to extend the reply date for its Request during the interim.

Very truly yours,


James M. Guinivan

Enclosure

PHILADELPHIA

www.harkinscunningham.com

WASHINGTON

HARKINS CUNNINGHAM LLP

Attorneys at Law

Lawrence D. Parrish, Esquire

March 17, 2008

Page 2

cc: Theodore K. Kalick, Esquire

EXHIBIT 3



www.cn.ca

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February 7, 2008

Milton R. Sees
Secretary
Illinois Department of Transportation
2300 South Dirksen Parkway
Springfield, IL 62764

Joseph P. Clary, Director
Division of Public & Intermodal Transportation
Illinois Department of Transportation
300 W. Adams, 2nd Floor
Chicago, IL 60606

**Re: Canadian National Railway and Grand Trunk Corporation - Control -
EJ&E West Company (STB Finance Docket No. 35087)**

Dear Mr. Sees and Mr. Clary:

I look forward to meeting with IDOT next week to discuss CN's proposed acquisition of EJ&E West Company, including IDOT's concerns with that transaction.

In advance of our meeting, I want to address in this letter the information IDOT has stated it would like to have in order to help it formulate its position with regard to the proposed transaction. I am not aware of any written request by IDOT to CN for information, but I understand from your January 25, 2008 filing with the Surface Transportation Board that you are seeking actual and projected costs for maintaining the IC (CN) tracks between the St. Charles Airline and 95th Street in Chicago, over which Amtrak currently provides service.

The future maintenance costs for this line have been a topic of discussion between CN and Amtrak. As Amtrak officials already know, CN does not have and does not regularly develop actual or projected maintenance costs for this segment of track. We have agreed to develop this information, however, as part of our confidential negotiations with Amtrak.

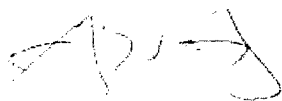
Mr. Sees & Mr. Clary
February 7, 2008
2

Determining such maintenance costs on a segmented basis can be a complex, time-consuming task. The reason CN has not undertaken this task in recent years relates directly to the nature of the current IC (CN)-Amtrak agreement, which allows the parties to avoid such an annual exercise. That agreement, which was entered into in 1995 and runs through January 31, 2010, provides for Amtrak to pay a fixed base rate for maintenance, subject to escalation in accordance with indices. During a period in which Amtrak's share of maintenance costs is expected to be relatively stable, this form of agreement can benefit both parties. It provides Amtrak with predictable maintenance charges, and, more importantly to the present point, it allows both Amtrak and CN to avoid the need to go through the difficult task of determining and allocating base and incremental maintenance costs each year.

I understand IDOT's interest in the potential cost to the State of Illinois of future Amtrak service (including likely changes in Amtrak's own direct costs unrelated to CN), and I trust IDOT will continue to discuss that subject with Amtrak. For its part, CN has committed to work with Amtrak on an extension of its current agreement should it remain on the line for a period of time after January 31, 2010, including the development of related costs.

Again, I look forward to our meeting next week.

Sincerely yours,

A handwritten signature in dark ink, appearing to read "George Weber", with a stylized flourish at the end.

cc: George Weber (IDOT)