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FOR



Illinois Department of Transportation

Office of Chief Counsel

300 West Adams Street / 2nd Floor / Chicago, Illinois / 60606

May 8, 2008

Anne K. Quinlan
Acting Secretary
Surface Transportation Board
395 E. Street, SW
Washington, DC 20423-0001

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

Dear Secretary Quinlan:

Attached is a copy of our Motion to Compel Discovery from Canadian National Railway Company and Grand Trunk Railroad (Canadian National), which we are herewith filing electronically with the Surface Transportation Board. Please be advised that we are simultaneously serving a copy of this Motion on Paul Cunningham, Esq., attorney for Canadian National, via e-mail and regular mail.

Very truly yours,
DEPARTMENT OF TRANSPORTATION

Lawrence D. Parrish RAK

Lawrence D. Parrish
Special Assistant Chief Counsel

Enclosure

CC: Paul A. Cunningham, Esq., Harkins Cunningham LLP
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Joseph P. Clary, Esq.
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Richard A. Kabaker, Esq.

Surface Transportation Board
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SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 35087

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

**ILLINOIS DEPARTMENT OF TRANSPORTATION'S
MOTION TO COMPEL DISCOVERY
FROM THE CANADIAN NATIONAL
RAILWAY COMPANY AND GRAND TRUNK RAILROAD**

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SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 35087

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

ILLINOIS DEPARTMENT OF TRANSPORTATION'S MOTION TO COMPEL DISCOVERY FROM THE CANADIAN NATIONAL RAILWAY COMPANY AND GRAND TRUNK RAILROAD

Pursuant to 49 CFR Sec. 1114.31, the Illinois Department of Transportation (IDOT) moves to compel full, substantive responses by the CANADIAN NATIONAL RAILWAY COMPANY and GRAND TRUNK RAILROAD (collectively "CN") to the Request for Production of Documents served upon CN on February 29, 2008. IDOT seeks information regarding the cost of maintaining the tracks, equipment, bridges, viaducts, and grade crossings along a segment of railroad track known as the St. Charles Airline, in Chicago. Such information is critical to the public interest for this simple reason: the cost of maintaining the tracks and structures could make it *economically infeasible* for Amtrak to continue rail passenger service between Chicago and Carbondale.¹ CN refuses to tender such information. CN loosely justifies its action by asserting that it has reached an "agreement" with Amtrak regarding prospective service, and that all of IDOT's concerns are thus "resolved." CN's assertions grossly misstate the facts. CN has not reached an "agreement" with Amtrak regarding prospective service. The public's interest has *not* been served. CN's strategy (seeking an acquisition while withholding vital information) must be rejected for what it is: an attempt to sell a "pig in a poke."

¹ As a result of annual contributions in the amount of \$6.2 million per year from the State of Illinois, the number of passenger trains between Chicago and Carbondale went from 4 to 6 from SFY 2006 to SFY 2007. From SFY 2004 to SFY 2008, ridership increased by 85%, up to 250,000 passengers per year.

Statement of Facts

On February 29, 2008, IDOT filed its Request for Production of Documents against CN. At CN's request, IDOT agreed to allow an extension of the response date to Friday, April 18, 2008. The agreement to extend the filing date was based on CN's representation that it was in negotiation with Amtrak regarding issues related to the St. Charles Airline and expected to have an agreement soon. By March 27, 2008, no agreement had been reached and demand was made by IDOT for a full and formal response to the Request for Production.

On April 18, CN filed its response. In its response, CN asserts that it has reached an "agreement" with Amtrak, such that IDOT's concerns have been resolved. These assertions do not comport with the actual facts. To set the record straight, IDOT responds to CN's misstatements as follows:

1. Under the proposed acquisition, Amtrak will not be able to continue its service between Chicago and Carbondale absent a significant but unknown financial contribution from the State of Illinois, particularly to maintain the track and equipment along the approximately 11 mile segment of track known as St. Charles Airline (hereinafter called the "St. Charles Airline").
2. To ascertain the scope of the potential impact on the State of Illinois and the public, IDOT has asked CN to provide information regarding the cost of maintaining the track and equipment on the St. Charles Airline.
3. In the face of IDOT's request for information concerning the actual costs of maintaining the St. Charles Airline, CN blithely claims that it has "now agreed to the conditions sought by Amtrak." CN further asserts that the issue of maintenance "has been resolved" to the satisfaction of IDOT and Amtrak.

4. In point of fact, the issue of maintenance has not been resolved to the satisfaction of the parties. As of the date of this filing, IDOT was advised by Amtrak that Amtrak is in discussions with CN regarding the St. Charles Airline, but that no resolution or agreement of any nature regarding this issue has been reached. The simple fact of the matter is that CN has not reached a binding agreement with Amtrak regarding the maintenance of the St. Charles Airline; nor has CN provided IDOT with any meaningful assurances to that effect.²
5. There is not now nor has there ever been an agreement which addresses the issues raised by IDOT and Amtrak.³
6. On page 1 of its Response to IDOT's Request for Production, CN claims that IDOT agreed that CN did not have to provide a full response to IDOT's production request, but could instead provide IDOT with a copy of the current operating agreement between CN and Amtrak (executed in 1995). IDOT never agreed to anything less than a full response to the Production Request.
7. Indeed, the 1995 current operating agreement between CN and Amtrak requires that Amtrak pay a slight and indeterminate portion of the costs of maintaining the St. Charles Airline. The document itself is useless in terms of identifying the full costs of maintaining the equipment and track. Indeed, CN is the only possible source, of this information.

² CN relies on a letter to Amtrak, dated March 10, 2008, as proof of the asserted "agreement." While the letter might be construed as an offer, it does not constitute an enforceable agreement: it has not been executed or accepted by Amtrak; it lacks mutuality of consideration; and it fails to confirm that CN will take full responsibility for maintaining the St. Charles Airline. The fact that there is no written agreement between CN and Amtrak and/or IDOT belies CN's assertion that all issues raised by IDOT and Amtrak have been resolved.

³ The only "agreement" between CN and Amtrak is the current 1995 agreement between the parties, governing current operations. IIDOT agreed to an extension of the filing date for the response to the production request based on CN's representation that a new "agreement" between these two parties was imminent. Said "agreement" did not materialize.

8. The response provided by CN (a copy of the 1995 Amtrak–CN Agreement regarding current service) is not responsive to IDOT’s Request #2, which seeks production of “[a]ny analysis you have prepared of the increased annual maintenance activities or maintenance costs required for the CN track after the acquisition is fully implemented.”

**The Acquisition will Impose Significant Expense on the Public, Including:
The Cost of Maintaining the St. Charles Airline,
The Possible Elimination of Chicago-Carbondale Rail Passenger Service,
And a Likely Increase in Highway Use, Maintenance, and Pollution**

Under the proposed acquisition, CN is not committed to maintain the St. Charles Airline after its 1995 agreement with Amtrak expires on January 31, 2010. CN has confirmed this fact in its filing with the Board.⁴ The consequences of this proposed acquisition will be dire for the State of Illinois: Illinois would have to absorb the cost of maintaining the St. Charles Airline, absorb the cost of maintaining a theoretical (but impractical) alternative route, or see the likely elimination of Chicago-Carbondale rail passenger service.

The St. Charles Airline is located entirely in an urban region with varied terrain. It includes not only the track itself, but also a number of bridges, overpasses, grade crossings, and signals. The fact that any of these bridges or other structures do need or will need attention raises fundamental questions of safety. CN is the only party who knows the condition of the track (including the bridges, overpasses, grade crossings, and signal structures), and the cost of maintaining them.

CN suggests that it has no obligation to provide discovery (other than to provide a copy of the 1995 CN-Amtrak agreement and selected correspondence regarding its future intent)

⁴ On page 222 of its application, CN states that once it ceases operations on the St. Charles Air Line, the only “remaining regular user” of the route would be Amtrak. CN also states that it will seek to “formally abandon” the St. Charles Air Line, presumably when its contract with Amtrak expires in 2010.

regarding the cost of operating and maintaining the St. Charles Airline track and alternatives routes. As explained above, CN's refusal to produce the requested information is justified by false assertions. Moreover, it fails to take into account the keen interest that the public has in identifying those future costs that the public will have to bear as a result of the acquisition.⁵

IDOT is concerned about the potentially enormous impact that the acquisition will have on the public's financial resources and its surface transportation system. This concern was expressed in IDOT's Statement of Opposition filed February 15, 2008. For at least four reasons, IDOT's requests are wholly reasonable. First, the cost of maintaining the St. Charles Airline will be borne by IDOT and Amtrak – ultimately, a public expense. Second, in the unlikely event that Amtrak identifies a practical alternative to the St. Charles Airline, one that does not unduly decrease ridership due to greater inconvenience, the cost of maintaining these new arrangements will be borne by IDOT and Amtrak – another public expense.⁶ Third, in the event that the State of Illinois cannot contribute the likely significant amount of monies needed to maintain the St. Charles Airline or the theoretical alternative route, Illinois will see an elimination of Chicago-Carbondale rail passenger service – a third public expense. Fourth, the possible elimination of rail service will result in greater wear and tear of state highways, greater highway congestion,

⁵ CN either has or can obtain the requested information. It is inconceivable that a very large and sophisticated railroad is prepared to enter into this transaction without having done a cost-benefit analysis, which would include the current and projected costs of maintaining the St. Charles Airline.

⁶ CN's application asserts that the trains could simply move to a 5 mile segment of Norfolk Southern (NS) track on their approach into Chicago's Union Station (See Application page 222). In its February 6 filing of comments on the draft scope of the Environmental Impact Study, the Environmental Law & Policy Center stated that CN's simplistic solution "blatantly ignores the fact that key intersection improvements at Grand Crossing, and five miles of additional track capacity north of Grand Crossing, would need to be planned, engineered, funded and built to make this routing a realistic plan." CN states on page 222 of the application that moving the Amtrak trains to the NS line has "long been planned in connection with the CREATE" program. However (and as already pointed out by the Environmental Law & Policy Center) what CN does not state is this: unlike the other Class I railroads, CN has not yet contributed to its CREATE projects, including Grand Crossing (estimated at \$75 million). Without major improvements such as this, Amtrak's six daily passenger trains between Chicago and Carbondale have nowhere to go. Their disappearance would displace more than 250,000 riders per year, forcing them into cars.

and greater air pollution – additional expenses to be borne by the public. In any event, there is no question that the public interest will be affected by the proposed transaction. Accordingly, the public interest will best be served by the full disclosure of information regarding the potential short term and long term costs that will be borne by the public as a result of the acquisition.

Six Amtrak passenger trains each day use the St. Charles Air Line track. Without the track, these trains, which serve key central and southern Illinois communities like Champaign and Effingham, will have no suitable route into and out of downtown Chicago. IDOT and the Board must have the information 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.

Conclusion

For all the reasons set forth above, IDOT respectfully requests that the Board grant its Motion to Compel. IDOT further requests that if the Board sees fit to grant the application, the Board require, as a condition, that CN maintain the St. Charles Airline for passenger service, according to applicable Federal Railroad Authority standards.

Respectfully Submitted

Illinois Department of Transportation

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