

WINSTON & STRAWN LLP

101 CALIFORNIA STREET
SAN FRANCISCO, CALIFORNIA 94

Per Vicki:
no need to send out to STB because
its already entered A PART OF PUBLIC
Record.
cc JOHN/CONF/MAK JRH 2/1/08

WINSTON & STRAWN LLP

Hon. Anne K. Quinlan, Acting Secretary
January 22, 2008
Page 2

Sincerely,

A handwritten signature in dark ink, appearing to read "Eric L. Hirschhorn", written in a cursive style.

Eric L. Hirschhorn

Enclosures

cc: All parties of record

Hon. Anne K. Quinlan, Acting Secretary
January 22, 2008
Page 3

bc: Jim Holland
Jerry Ducay
George F. Mahoney III
James R. Thompson
John Fehrenbach

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 35087

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

VILLAGE OF FRANKFORT'S
MOTION TO COMPEL DISCOVERY FROM
ELGIN, JOLIET AND EASTERN RAILWAY COMPANY
AND
EJ&E WEST COMPANY



ORDER
JAN 22 2008
Part of
Public Record

Pursuant to 49 C.F.R. § 1114.31, the Village of Frankfort, Illinois ("Frankfort") hereby 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 by Frankfort.

Facts

The Applicants in this proceeding are Canadian National Railway Corporation ("CN") and Grand Trunk Corporation. The Applicants seek to acquire EJ&E. CN avers that the primary reason for the acquisition is to "provid[e] CN with a continuous rail route around Chicago, under CN's ownership, that would connect the five CN lines that presently radiate from the City. This would increase CN's operational flexibility for traffic moving from, to and across the Chicago terminal." Application at 22.

The transaction also would effect a massive increase in rail traffic through areas along the EJ&E. *See* Application at 247. Frankfort is among them. *Id.* Even by CN's admission, which Frankfort suspects is substantially understated, rail traffic through Frankfort will rise from six to twenty-eight trains a day, with a 542 percent increase in tonnage and a sevenfold increase in hazmat carloads. *Id.*

Frankfort accordingly is examining whether the proposed transaction meets the requirements of 49 U.S.C. § 11324, whether the adverse environmental effects of the proposed transaction counsel rejection of the application for that reason, and, if the answer to both of the preceding questions is "No," what mitigation of the adverse environmental effects upon Frankfort would be appropriate.

Parties such as Frankfort will have the right to file comments in the "economic" portion of this proceeding, 72 Fed. Reg. 67622, 67627 (Nov. 29, 2007), on the proposed scope of the Environmental Impact Statement ("EIS") in the "environmental" portion of the proceeding, 72 Fed. Reg. 72819, 72820 (Dec. 21, 2007), and on the draft EIS, *id.* To exercise its rights effectively, Frankfort needs information about such matters as projected rail traffic, noise, vibration, pollution, effects on non-rail traffic, and safety issues. The Application does not provide sufficient information about these areas, and Frankfort is entitled to discover the non-privileged information in the Applicants' possession regarding these issues.

On December 27, 2007, Frankfort served on EJ&E a First Request for Production of Documents (the "Document Request") and a First Set of Interrogatories (the "Interrogatories") (Exhibits 1 and 2 hereto). The Document Request contains eighteen requests and there are twenty interrogatories. Similar requests were served on the Applicants on December 21, 2007.

Briefly stated, Frankfort's requests seek information about such topics as:

- Air pollutants emanating from trains and from motor vehicles waiting to cross blocked rail crossings. Document Requests 4, 10, and 11; Interrogatories 4, 10, and 11.
- Anticipated noise from trains (in motion or idling), rail construction, vibration, and synergies of these sources, particularly in respect of noise sensitive receptors. Document Requests 5, 6, 10, and 11; Interrogatories 5, 6, 10, and 11.
- Effects of the transaction on property values (economic, market, aesthetic or otherwise). Document Request 7; Interrogatory 7.
- Safety issues in the vicinity of Frankfort, including grade crossing issues. Document Request 8; Interrogatory 8.
- Delays of traffic (motor vehicle, bicycle, and pedestrian) due to blocked grade crossings in the vicinity of Frankfort. Document Request 9; Interrogatory 9.
- Potential for mitigation of the foregoing problems. Document Requests 12, 13, 17, and 18; Interrogatories 12, 13, 17, and 18.
- Anticipated construction in the vicinity of Frankfort in connection with the proposed transaction. Document Requests 14 and 15; Interrogatories 14 and 15.
- Projections for rail traffic volume following the acquisition, and in particular following the very brief period (thorough 2010) addressed in the Application. Document Requests 1, 10, and 11; Interrogatories 1, 10, and 11. Projections for rail traffic volume following the acquisition, and in particular following the very brief period (thorough 2010) addressed in the Application. Document Requests 1, 10, and 11; Interrogatories 1, 10, and 11. The Application's projections cover only *diverted, existing* traffic on the CN and the EJ&E, and apparently only for a

two year period. Amazingly, the Applicants claim that the transaction will result in “[n]o quantifiable traffic gains from trucks or from rail traffic not presently handled in part by CN, EJ&E, or both carriers.” Application at 209. Frankfort believes that this ignores substantial anticipated gains in the years following the transaction, especially once CN’s crack sales force begins peddling its new, quicker route around Chicago. Evidence of CN’s traffic expectations—even if speculative—is highly relevant to *both* aspects of the proceeding.

Shortly after serving the discovery requests, counsel for Frankfort executed and delivered to counsel for EJ&E the undertakings prescribed by the Board’s protective order in this proceeding. Counsel for Frankfort shortly will file executed copies of these undertakings with the Board.

EJ&E responded formally on January 11, 2008, interposing responses and objections to *all* of Frankfort’s requests and providing *no* substantive answer to any request. Letter from John A. Vuono, counsel for EJ&E, to Eric L. Hirschhorn, counsel for Frankfort (Jan. 11, 2008) (“Vuono Letter”) (Exhibit 3 hereto). The Vuono Letter takes the position that EJ&E is not a party to this proceeding and hence is not subject to discovery. *Id.* at 1. Mr. Vuono added that if EJ&E were determined to be a party, EJ&E “hereby incorporate[s] by reference and adopt[s] Applicants’ legal responses/objections to the Discovery Requests.” *Id.* at 2.

Aside from boilerplate objections on grounds of burden and relevance, the Applicants’ principal objection is that “Frankfort 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.” Applicants’ Responses and Objections to the Village of Frankfort’s First Discovery Requests (“CN Response”) (Exhibit 4 hereto), at 1.

Counsel for Frankfort have reviewed the documents in Applicants' document depository. For the most part, those documents are not responsive to the Frankfort requests to the Applicants or to EJ&E, or are so general as to be of little or no assistance to Frankfort. The depository documents do not obviate the need for the discovery sought by Frankfort.

Discussion

I. EJ&E is a party to this proceeding and accordingly is subject to discovery.

EJ&E contends that it is not a party to this proceeding and hence is not subject to discovery. Vuono Letter at 1 (citing 49 C.F.R. § 1101.2(d)). But EJ&E *is* a party to the proceeding. The Elgin, Joliet and Eastern Railway has filed a notice of exemption in this proceeding (Exhibit 5 hereto). The first words of that filing are "Elgin, Joliet and Eastern Railway . . . hereby files this Verified Notice of Exemption based on a corporate family transaction involving EJ&E West Company ("EJ&EW"), a non-carrier subsidiary of EJ&E, pursuant to 49 C.F.R. § 1180.2(d)(3)."

Under the Board's rules, a party is "a complainant, defendant, *applicant*, respondent, protestant, intervener, or *petitioner* in any proceeding, or other person[] permitted or directed by the Board to participate in a proceeding." 49 C.F.R. § 1101.2(d) (2006) (emphasis added). By way of demonstrating who is *not* a "party," this rule goes on to state that the term "does not include persons merely signing certificates of support or witnesses at oral hearings or in modified procedure proceedings, unless they are otherwise a party to the proceeding." *Id.* Under this definition, and as illustrated by the narrowness of the stated exception, the Elgin, Joliet and Eastern Railway is a party to this proceeding.

The Board's discovery rules authorize parties to propound interrogatories and requests for document production to other parties. 49 C.F.R. §§ 1114.26(a) (2006) (interrogatories); *id.* §

1114.30(a). Accordingly, EJ&E's objection on this ground is specious and does not justify its refusal to respond to Frankfort's discovery requests.

II. The Board's rules authorize discovery regarding the environmental aspects of this proceeding.

This proceeding comprises two processes. One process analyzes the proposed transactions under the standards of the Interstate Commerce Act, 49 U.S.C. § 11324(d) (2000), while the other analyzes them under the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4332 (2000), and certain regulations issued under the Federal Railroad Safety Act ("FRSA"), 49 C.F.R. pt. 244 (2006); *see* 49 C.F.R. pt. 1106 (2006) (Safety Integration Plans). Each process is a part of the "proceeding." *See, e.g.*, 72 Fed. Reg. 72819 (2007) (noting that the Board "will prepare an EIS for *this proceeding*" (emphasis added)); *id.* at 72820 (noting that "*this Proceeding*" has "two parallel but distinct processes," namely the economic and environmental processes (emphasis in original)). The Board has noted, moreover, that it will take the results of the environmental process into account "in reaching its decision in *this case*," *Id.* (emphasis added).

Under the Board's rules, discovery is available "regarding any matter, not privileged, which is relevant to the subject matter involved in *a proceeding* other than an informal proceeding." 49 C.F.R. § 1114.21(a)(1) (2006) (emphasis added).¹ The discovery rules apply "to *all* types of [STB] proceedings," *id.* § 1100.2 (emphasis added), and are to be "construed liberally to secure just, speedy and inexpensive determination of the issues presented," *id.* § 1100.3. *See Consolidated Rail Corp. v. United States*, 812 F.2d 1444, 1464-65 (3rd Cir. 1987) (Becker, J., concurring & dissenting) (underscoring breadth of these discovery rules). Although

¹ This proceeding, which is occurring under 49 C.F.R. parts 1180, 1105, and 1106, is not an informal proceeding. *Cf.* 49 C.F.R. pt. 1110 (2006) (informal rulemaking proceedings); *id.* pt. 1118 (informal proceedings before employee boards); *id.* pt. 1130 (informal complaints).

a special rule takes precedence over a general one, 49 C.F.R. § 1100.2 (2006), the Board's rules for the environmental portion of a proceeding contain no suggestion that discovery is unavailable, *id.* pt. 1105. As Judge Becker so aptly put it, "49 C.F.R. § 1100.2 requires application of [the discovery] procedures even without explicit incorporation." *Consolidated Rail*, 812 F. 2d at 1464 n. 16 (Becker, J., concurring & dissenting).

EJ&E has incorporated CN's objections by reference in EJ&E's objections. Vuono Letter at 2. CN and EJ&E contend that "[t]he Board's legal position in these cases [is] that discovery is not available to address issues covered in its environmental process." Response at 7. Aside from some citations to such general discussions as the Board's third-party contracting policy for environmental work, CN Response at 7 n. 5 (citing *Policy Statement on Use of Third-Party Contracting in Preparation of Environmental Documentation*, 5 S.T.B. 467 (2001)), CN and EJ&E rely for this proposition on a single STB decision, *id.* at 7 & n. 4 (citing *Burlington N. Santa Fe Corp.—Control—Washington Cent. R.R.*, 1996 STB LEXIS 266, STB Finance Docket No. 32974 (served Sept. 20, 1996)).

Upon examination, however, the decision cannot bear the weight that CN and EJ&E place upon it. Citing only the *Burlington Northern* ruling, CN (and by adoption, EJ&E) state that the unavailability of discovery "is consistent with prior Board authority." Response at 7. But the basis for that decision, which denied a motion to compel production of traffic projections by applicant railroads, was that the information *already had been made available*, not only to the Board but *to the movants as well*:

[A]s applicants note, the Board's staff has already obtained all available environmental information during the environmental review process. Applicants indicate further that *the Cities have had, and will continue to have, access to that information.*

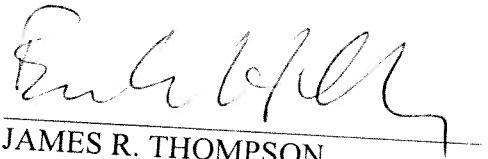
Burlington Northern, 1996 STB LEXIS 266, at *7.

Thus, neither the rules themselves nor the Board precedent cited by CN and EJ&E detract from the availability of discovery regarding the environmental aspects of a control proceeding.² Moreover, Frankfort's need for the information sought in order to exercise its rights intelligently and effectively has been established.

Conclusion

Accordingly, for the reasons set forth above, the motion should be granted in all respects, and EJ&E should be ordered to respond fully and promptly to Frankfort's discovery requests. Moreover, EJ&E should be required to pay Frankfort's reasonable expenses, including attorneys' fees, occasioned by EJ&E's refusal to respond to Frankfort's discovery requests. *See* 49 C.F.R. § 1114.31(d) (2006).

Respectfully submitted,



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Attorneys for the Village of Frankfort, Illinois

January 22, 2008

² CN and EJ&E also rely on several Federal Energy Regulatory Commission decisions. Response at 7 n. 6. FERC's discovery regulations, however, apply only "'in proceedings set for hearing under subpart E'" of part 385 of the FERC regulations. *In re Transcontinental Gas Pipe Line Corp.*, 119 F.E.R.C. ¶ 61,039, at 61,137, 2007 FERC LEXIS 658, **11 (quoting 18 C.F.R. § 385.401(a) (2006)). The STB's discovery rules, by contrast, apply in all STB proceedings except informal proceedings (of which this is not one).

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of January 2008, a copy of the foregoing Motion to Compel Discovery From Applicants was served on all parties of record in this proceeding by first class mail, postage prepaid. A copy also was served by overnight courier upon counsel for EJ&E.



Eric L. Hirschhorn

1

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 35087

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

VILLAGE OF FRANKFORT'S
FIRST REQUEST TO
ELGIN, JOLIET AND EASTERN RAILWAY COMPANY
AND EJ&E WEST COMPANY
FOR PRODUCTION OF DOCUMENTS

Pursuant to the Surface Transportation Board's Decision No. 2 in this proceeding (served November 27, 2007) and 49 C.F.R. § 1114.30, the Village of Frankfort, Illinois ("Frankfort") hereby propounds its first request for production of documents to Elgin, Joliet and Eastern Railway Company and EJ&E West Company. The requested documents should be made available for inspection and copying at the offices of Winston & Strawn LLP, 1700 K Street, NW, 12th Floor, Washington DC 20006, no later than January 11, 2008.

Definitions and Instructions

The following definitions and instructions apply to the requests herein:

1. The term "and" also implies "or" and vice-versa.
2. The term "any" includes "all" and vice-versa.
3. The term "Application" means the Railroad Control Application filed in this proceeding on or about October 30, 2007.

4. The term "communication" means the transmittal of information, in the form of facts, ideas, inquiries, or otherwise.
5. The term "concerning" means referring to, describing, evidencing, or constituting.
6. The term "document" has the meaning set out in Rule 34(a) of the Federal Rules of Civil Procedure.
7. The term "each" includes "all" and vice-versa.
8. When referring to documents, to "identify" means to give, to the extent known, the type of document, general subject matter, date of the document, and all author(s), addressee(s), and recipients of the document.
9. A request for a document includes all drafts of that document and all copies of that document that differ from one another (e.g., by dint of having handwritten notations or other such different qualities).
10. The term "parties" includes the applicants and all other persons who have entered an appearance or given notice of intent to participate in the within proceeding. Where applicable, the term also means the officers, directors, employees, partners, corporate parents, subsidiaries, and affiliates of such persons.
11. The term "person" means any natural person and any business, legal, or government entity or association.
12. The term "respondent" means the party responding to the discovery request.
13. A reference in the singular implies the plural as well, and vice-versa.

14. The term "vicinity of Frankfort" means the geographic area that includes (a) the Village of Frankfort, Illinois, and (b) the area extending along the existing or proposed rail line(s) and siding(s) or associated rights-of-way for three miles from the outer boundaries of the Village of Frankfort, IL and one mile on either side of such right-of-way.

15. This is a continuing request and should be supplemented in a timely manner if you learn that your disclosures or responses are incomplete or incorrect.

Requests

1. All documents that identify, discuss, or include projections or estimates of rail traffic in the vicinity of Frankfort, for any time period subsequent to that specifically addressed by Attachment A-2 to Exhibit 15 to the Application, including but not limited to (a) the number, length, speed, timing, and frequency of trains, (b) gross tonnage, (c) net tonnage, (d) the amount of time trains will spend on sidings and lines at one or more grade crossings, and amount of time of stoppage of motor vehicle, bicycle, and pedestrian traffic at each grade crossing, and (e) the proportion of trains that will need to pull over onto a siding in or through the vicinity of Frankfort.

2. All documents that identify, discuss, or include a schedule, or projected or estimated schedule, for rail traffic in the vicinity of Frankfort.

3. All documents that identify, discuss, or include upgrades or improvements made during the past three years to the railroad tracks and crossings in the vicinity of Frankfort, including the nature, dates and costs thereof.

4. All documents that identify, discuss, or include projections, estimates, or evaluations of the nature, extent, quantity, frequency, aerial distribution, and dispersion of air pollutants emitted or released from locomotives and open rolling stock, including but not limited to projections or estimates of locomotives in motion or idling, and from motor vehicles waiting to cross any grade crossing, in the vicinity of Frankfort, for any time period.

5. All documents that identify, discuss, or include measurements, projections, estimates, or evaluations of the nature, extent, quantity, decibel level, 24-hour Average Day-Night Sound Level ("DNL" or " L_{dn} "), intensity, frequency, aerial distribution, and dispersion of noise (including but not limited to wayside noise—locomotive engine and wheel/rail noise—and horn noise) generated by or resulting from (a) trains in motion or idling, (b) noise from rail line, siding, and right-of-way construction, rehabilitation, and maintenance, (c) vibration generated by or resulting from any of the foregoing, and (d) synergies of any of the foregoing, in the vicinity of Frankfort, for any time period.

6. All documents that identify, discuss, or include measurements, projections, estimates, or evaluations of noise sensitive receptors that potentially would be exposed to noise referenced in Request No. 5 above, the DNL and L_{dn} levels thereof, and the underlying assumptions, methodologies, formulas, data, calculations, projections, estimates, and nighttime penalty of such DNL or L_{dn} levels and any other noise levels, in the vicinity of Frankfort, for any time period.

7. All documents that identify, discuss, or include any information, study, data, correspondence, or memorandum relating to potential impacts of the transactions and estimated increased rail traffic envisaged in this proceeding (including all the sub-numbers thereof) on the

economic, market, aesthetic, or other values of properties abutting or located within one mile of the rail line, siding, and right-of-way, in the vicinity of Frankfort or elsewhere.

8. All documents that identify, discuss, or otherwise relate to traffic or other safety issues relating to the vicinity of Frankfort, including grade crossings and grade separations, for any time period.

9. All documents that identify, discuss, or include projections or estimates of motor vehicle, bicycle, or pedestrian traffic in the vicinity of Frankfort, including but not limited to (a) projections or estimates of the number and frequency of motor vehicles, bicycles, and pedestrians crossing and/or waiting to cross any grade crossing in the vicinity of Frankfort, for any time period, and (b) the length of time waiting to cross the existing or proposed railroad tracks in the vicinity of Frankfort.

10. All documents that identify, discuss, or include any information, study, data, correspondence, or memorandum relating to potential impacts on the environment of the emissions or releases referred to in Request No. 4 above, the noise referred to in Request Nos. 5 and 6 above, or the projected or estimated rail traffic in or through the vicinity of Frankfort referred to in Request No. 1 and 2 above.

11. All documents that identify, discuss, or include any information, study, data, correspondence, or memorandum relating to potential impacts on human health or welfare of the emissions or releases referred to in Request No. 4 above, the noise referred to in Requests No. 5 and 6 above, or the projected or estimated rail traffic in or through the vicinity of Frankfort referred to in Requests No. 1 and 2 above.

12. All documents that identify, discuss, or include any information, study, data, correspondence, or memorandum relating to potential measures to mitigate the potential impacts referred to in Requests No. 1 through 11 above.

13. All documents that identify, discuss, or include any projection or estimate of the costs of measures to mitigate the potential impacts referred to in Request No. 12 above.

14. All documents that identify, discuss, or describe any staging areas, storage yards, security facilities, and other infrastructure and facilities anticipated or needed to support (a) the rail line and sidings that would be constructed, maintained or operated in or through the vicinity of Frankfort, at any time, and (b) the infrastructure and facilities needed to be modified, closed, or removed to support the rail line and sidings or the construction and operation thereof, in or through the vicinity of Frankfort, at any time.

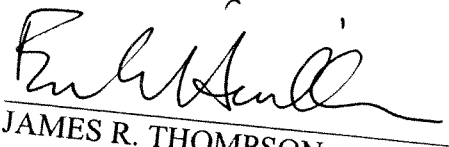
15. All documents that identify, discuss, or include any information, study, data, correspondence, or memorandum relating to potential impacts to the environment or human health or welfare of the construction, operation, modification, closure, or removal of the infrastructure and facilities referred to in Request No. 14 above, and potential measures to mitigate such impacts.

16. All documents created in the five years preceding the date of your response that identify, discuss, or include any information, study, data, correspondence, or memorandum relating to potential measures taken, implemented, or promised by, or imposed upon, each respondent to mitigate potential or actual impacts of increased rail traffic in situations or proceedings other than the instant proceeding.

17. All documents that identify, discuss, or include any information, study, data, correspondence, or memorandum relating to potential measures taken or to be taken, implemented or to be implemented, promised by, requested of, agreed to by, or imposed upon, each respondent or any related entity to mitigate, or related to, potential or actual impacts of increased rail traffic in connection with the Application or the instant proceeding.

18. All documents that identify, discuss, or include any projection or estimate of the costs of measures referred to in Request No. 17 above.

Respectfully submitted,



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815-730-9500

Attorneys for the Village of Frankfort, Illinois

December 26, 2007

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of December 2007, a copy of the foregoing Request for Production of Documents was served by first class mail, postage prepaid, on:

Secretary of Transportation
1200 New Jersey Ave., SE
Washington DC 20590

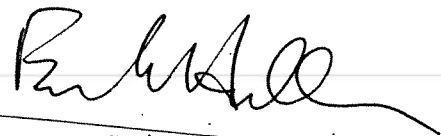
Attorney General of the United States
c/o Assistant Attorney General
Antitrust Division, Room 3109
Department of Justice
Washington DC 20530

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and upon each party listed in the service list for this proceeding as currently appearing on the web site of the Surface Transportation Board.



Eric L. Hirschhorn

2

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 35087

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

VILLAGE OF FRANKFORT'S
FIRST SET OF INTERROGATORIES TO
ELGIN, JOLIET AND EASTERN RAILWAY COMPANY
AND EJ&E WEST COMPANY

Pursuant to the Surface Transportation Board's Decision No. 2 in this proceeding (served November 27, 2007) and 49 C.F.R. § 1114.26, the Village of Frankfort, Illinois ("Frankfort") hereby propounds its first set of interrogatories to Elgin, Joliet and Eastern Railway Company and EJ&E West Company. The within interrogatories should be answered, under oath, no later than January 11, 2008.

Definitions and Instructions

The following definitions and instructions apply to the interrogatories herein:

1. The term "and" also implies "or" and vice-versa.
2. The term "any" includes "all" and vice-versa.
3. The term "Application" means the Railroad Control Application filed in this proceeding on or about October 30, 2007.

4. The term "communication" means the transmittal of information, in the form of facts, ideas, inquiries, or otherwise.
5. The term "concerning" means referring to, describing, evidencing, or constituting.
6. The term "document" has the meaning set out in Rule 34(a) of the Federal Rules of Civil Procedure.
7. The term "each" includes "all" and vice-versa.
8. When referring to a person, to "identify" means to give, to the extent known, the person's full name, present address (or, if present address unknown, last known address), and, when referring to a natural person, the present (or, if present is unknown, last known) place of employment. Once a person has been identified, only the name of that person need be listed in response to subsequent discovery requesting identification of such person.
9. The term "parties" includes the applicants and all other persons who have entered an appearance or given notice of intent to participate in the within proceeding. Where applicable, the term also means the officers, directors, employees, partners, corporate parents, subsidiaries, and affiliates of such persons.
10. The term "person" means any natural person and any business, legal, or government entity or association.
11. The term "respondent" means the party responding to the discovery request.
12. A reference in the singular implies the plural as well, and vice-versa.

13. The term "vicinity of Frankfort" means the geographic area that includes (a) the Village of Frankfort, Illinois, and (b) the area extending along the existing or proposed rail line(s) and siding(s) or associated rights-of-way for three miles from the outer boundaries of the Village of Frankfort, IL and one mile on either side of such right-of-way.

14. The term "you" means the party or person responding to this discovery request, including its officers, employees, and agents.

15. This is a continuing request and should be supplemented in a timely manner if you learn that your disclosures or responses are incomplete or incorrect.

Interrogatories

1. Identify the individual employee or agent of each respondent most knowledgeable about projections or estimates of rail traffic in the vicinity of Frankfort, including but not limited to (a) the number, length, speed, timing, and frequency of trains, (b) gross tonnage, (c) net tonnage, (d) the amount of time trains will spend on sidings and lines at one or more grade crossings, and amount of time of stoppage of motor vehicle, bicycle, and pedestrian traffic at each grade crossing, and (e) the proportion of trains that will need to pull over onto a siding in or through the vicinity of Frankfort.

2. Identify the individual employee or agent of each respondent most knowledgeable about any schedule, or projected or estimated schedule, for rail traffic in the vicinity of Frankfort.

3. Identify the individual employee or agent of each respondent most knowledgeable about upgrades or improvements, in the five years preceding your response to this interrogatory,

to the railroad tracks and crossings in the vicinity of Frankfort, including the nature, dates and costs thereof.

4. Identify the individual employee or agent of each respondent most knowledgeable about projections, estimates, or evaluations of the nature, extent, quantity, frequency, aerial distribution, and dispersion of air pollutants emitted or released from locomotives and open rolling stock, including but not limited to projections or estimates for locomotives in motion or idling, and for motor vehicles waiting to cross one or more grade crossings, in the vicinity of Frankfort, for any past, present and future time period.

5. Identify the individual employee or agent of each respondent most knowledgeable about any measurements, projections, estimates, or evaluations of the nature, extent, quantity, decibel level, 24-hour Average Day-Night Sound Level ("DNL" or " L_{dn} "), intensity, frequency, aerial distribution, and dispersion of noise (including but not limited to wayside noise—locomotive engines and wheel/rail noise—and horn noise) generated by or resulting from (a) trains in motion or idling, (b) noise from rail line, siding, and right-of-way construction, rehabilitation, and maintenance, (c) vibration generated by or resulting from any of the foregoing, and (d) synergies of any of the foregoing, in the vicinity of Frankfort, for any time period.

6. Identify the individual employee or agent of each respondent most knowledgeable about any measurements, projections, estimates, or evaluations of noise sensitive receptors that potentially would be exposed to noise referenced in Interrogatory No. 5 above, the DNL and L_{dn} levels thereof, and the underlying assumptions, methodologies, formulas, data, calculations,

projections, estimates, and nighttime penalty of such DNL or L_{dn} levels and any other noise levels, in the vicinity of Frankfort, for any time period.

7. Identify the individual employee or agent of each respondent most knowledgeable about any information, study, data, correspondence, or memorandum relating to potential impacts of the transactions and estimated increased rail traffic envisaged in this proceeding (including all the sub-numbers thereof) on the economic, market, aesthetic, or other values of properties abutting or located within one mile of the rail line, siding, and right-of-way, in the vicinity of Frankfort or elsewhere.

8. Identify the individual employee or agent of each respondent most knowledgeable about traffic or other safety issues relating to the vicinity of Frankfort, including grade crossings and grade separations, for any time period.

9. Identify the individual employee or agent of each respondent most knowledgeable about any projections or estimates of motor vehicle, bicycle, or pedestrian traffic in the vicinity of Frankfort, including but not limited to (a) projections or estimates of the number and frequency of motor vehicles, bicycles, and pedestrians crossing and/or waiting to cross any grade crossing in the vicinity of Frankfort, for any time period, and (b) the length of time waiting to cross the existing or proposed railroad tracks in the vicinity of Frankfort.

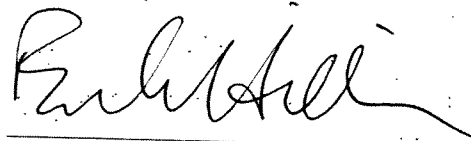
10. Identify the individual employee or agent of each respondent most knowledgeable about any information, study, data, correspondence, or memorandum relating to potential impacts on the environment of the emissions or releases referred to in Interrogatory No. 4 above, the noise referred to in Interrogatory Nos. 5 and 6 above, or the projected or estimated rail traffic in or through the vicinity of Frankfort referred to in Interrogatory Nos. 1 and 2 above.

11. Identify the individual employee or agent of each respondent most knowledgeable about any information, study, data, correspondence, or memorandum relating to potential impacts on human health or welfare of the emissions or releases referred to in Interrogatory No. 4 above, the noise referred to in Interrogatory Nos. 5 and 6 above, or the projected or estimated rail traffic in or through the vicinity of Frankfort referred to in Interrogatory Nos. 1 and 2 above.
12. Identify the individual employee or agent of each respondent most knowledgeable about information, study, data, correspondence, or memorandum relating to potential measures to mitigate the potential impacts referred to in Interrogatory Nos. 1 through 11 above.
13. Identify the individual employee or agent of each respondent most knowledgeable about projection or estimate of the costs of measures to mitigate the potential impacts referred to in Interrogatory No. 12 above.
14. Identify the individual employee or agent of each respondent most knowledgeable about (a) staging areas, storage yards, security facilities, and other infrastructure and facilities anticipated or needed to support the rail line and sidings that would be constructed, maintained or operated in or through the vicinity of Frankfort, at any time, and (b) the infrastructure and facilities needed to be modified, closed, or removed to support the rail line and sidings or the construction and operation thereof, in or through the vicinity of Frankfort, at any time.
15. Identify the individual employee or agent of each respondent most knowledgeable about information, study, data, correspondence, or memorandum relating to potential impacts to the environment or human health or welfare of the construction, operation, modification, closure, or removal of the infrastructure and facilities referred to in Interrogatory No. 14 above, and potential measures to mitigate such impacts.

16. Identify the individual employee or agent of each respondent most knowledgeable about information, study, data, correspondence, or memorandum relating to potential measures taken, implemented, or promised by, or imposed upon, each respondent to mitigate potential or actual impacts of increased rail traffic in situations or proceedings (other than the instant proceeding) that were pending at any time during the five years preceding the date of your response.
17. Identify the individual employee or agent of each respondent most knowledgeable about information, study, data, correspondence, or memorandum relating to potential measures taken or to be taken, implemented or to be implemented, promised by, requested of, agreed to by, or imposed upon, each respondent or any related entity to mitigate, or related to, potential or actual impacts of increased rail traffic in connection with the Application or this proceeding.
18. Identify the individual employee or agent of each respondent most knowledgeable about projection or estimate of the costs of measures referred to in Interrogatory No. 17 above.
19. Identify each individual and organization that created, contributed to, reviewed, commented on, edited, or approved each of the responses to the foregoing.
20. Identify each individual and organization that created, contributed to, reviewed, commented on, edited, or approved each document responsive to Frankfort's First Request for Production of Documents.

GEORGE F. MAHONEY III
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Joliet, Illinois 60435
815-730-9500

Respectfully submitted,



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JOHN FEHRENBACH
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1700 K Street, NW
Washington DC 20006
202-282-5000

Attorneys for the Village of Frankfort, Illinois

December 26, 2007

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of December 2007, a copy of the foregoing First Interrogatories to Applicants was served by first class mail, postage prepaid, on:

Secretary of Transportation
1200 New Jersey Ave., SE
Washington DC 20590

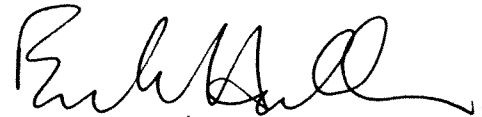
Attorney General of the United States
c/o Assistant Attorney General
Antitrust Division, Room 3109
Department of Justice
Washington DC 20530

John A. Vuono
Vuono & Gray, LLC
310 Grant Street, Suite 2310
Pittsburgh PA 15219

Richard J. Munsch
Elgin, Joliet and Eastern Railway Company
600 Grant Street
Pittsburgh PA 15219

Paul A. Cunningham
Harkins, Cunningham LLP
1700 K Street NW, Suite 400
Washington DC 20006-3804

and upon each party listed in the service list for this proceeding as currently appearing on the web site of the Surface Transportation Board.



Eric L. Hirschhorn

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412-471-1800*

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412-471-4477*

January 11, 2008

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

Eric L. Hirschhorn, Esq.
James R. Thompson, Esq.
John Fehrenbach, Esq.
Winston & Strawn LLP
1700 K Street, N.W.
Washington, DC 20006-3817

**BY FACSIMILE
202-262-5100
(ORIGINAL BY FEDERAL EXPRESS)**

Gentlemen:

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

We were served with the First Request for Production of Documents and First Set of Interrogatories of the Village of Frankfort, IL ("Frankfort") on December 27, 2007 (jointly, "Discovery Requests"). The Discovery Requests reference the above control proceeding and docket number. We note that virtually identical Discovery Requests were served on Canadian National Railway Company ("CN") and Grand Trunk Corporation ("GTC") (jointly, "Applicants"), the Applicants in the above proceeding.

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. The Applicants have filed responses/objections to Frankfort's Discovery Requests in their capacity as Applicants in the proceeding.

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

Page Two
January 11, 2008

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)

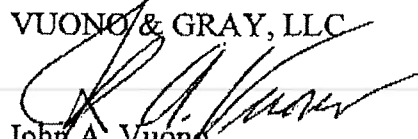
Neither EJ&E or EJ&EW are included within the aforesaid definition and therefore cannot be considered parties to the proceeding.

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 Frankfort'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 Frankfort's Discovery Requests, they hereby incorporate by reference and adopt Applicants' legal arguments and to the extent relevant to EJ&E and EJ&EW Applicants' responses/objections to the Discovery Requests.

Sincerely yours,

VUONO & GRAY, LLC


John A. Vuono

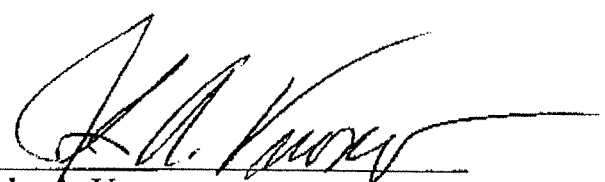
CW/59539

cc: Known Parties of Record

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing response of EJ&E and EJ&EW to Frankfort'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 11th day of January, 2008.



John A. Vuono

/59539

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January 8, 2008

BY HAND

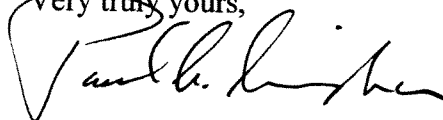
Eric L. Hirschhorn
Winston & Strawn LLP
1700 K Street, N.W.
Washington, DC 20006-3817
202.282.5700

**Re: Canadian National Railway and Grand Trunk Corporation – Control –
Elgin, Joliet & Eastern West Company (STB Finance Docket No. 35087)**

Dear Eric:

Enclosed is a copy of Applicants' responses to the Village of Frankfort's discovery requests. Thank you for agreeing to the one-day extension. CN's position will not come as a surprise in view of its position concerning the Village of Barrington's requests. However, if you have some particular matters of concern, we would be willing to discuss them and to see if we can accommodate your client's interests.

Very truly yours,



Paul A. Cunningham

Enclosure

PHILADELPHIA

www.harkinscunningham.com

WASHINGTON

**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 THE VILLAGE OF FRANKFORT'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, Applicants hereby make these combined objections and responses to the first request for production of documents and first set of interrogatories served on Applicants by the Village of Frankfort ("Frankfort") on December 21, 2007, collectively referred to as the "Discovery Requests."

APPLICANTS' OBJECTIONS: BACKGROUND

Frankfort has served burdensome Discovery Requests. These requests overlook the fact that Frankfort 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 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.

Frankfort 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 Frankfort’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, Frankfort assesses CN’s proposed acquisition of EJ&EW primarily as a threat to the environment and quality of life of its residents. Frankfort is also evidently concerned about such matters as increased traffic over existing EJ&E train lines and at grade crossings.

Frankfort’s concerns about the proposed Transaction relate almost entirely to its potential effects on the immediate suburban/exurban environment of Frankfort, through part of which the EJ&E rail line being acquired by CN runs. The EJ&E rail line has passed through what is now the Village of Frankfort since before there was a Village of Frankfort. Indeed, according to Frankfort’s website, the town took its original name from the name of the railroad station (“Frankfort Station”) created when EJ&E’s predecessor built a line through the village in 1855. *See* <http://www.villageoffrankfort.com/About%20Us/index.php>. For over 150 years, everyone living in or moving to Frankfort has known that there was a freight rail line

running through downtown Frankfort, and through its “thriving commercial and industrial corridor.” See <http://www.villageoffrankfort.com/>.

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 the Village of Frankfort is only one. In fact, Applicants have already received burdensome, differing discovery requests from several such entities.

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 Frankfort 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 the Vicinity of Frankfort. See, e.g., Document Request Nos. 4 (air quality), 5-6 (noise), 8-9 (traffic and safety), 10 (air quality, noise, traffic and safety), 11 (impacts on environment and human health and welfare generally).¹ Those subjects, while having no bearing on

¹ In addition, Document Request No. 7 seeks documents regarding potential impacts “on the economic, market, aesthetic, or other values of properties” near the rail line “in the vicinity of Frankfort or elsewhere.” The impact of the Transaction on property values is not relevant either to the Board’s decision under 49 U.S.C. § 11324(d) or to the environmental analysis of the Transaction which the Board is conducting pursuant to NEPA.

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

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).

environmental questions arising under NEPA.³ This fact, however, does not mean that parties -- be they private individuals, railroads, other businesses, or state or municipal governments, such as Frankfort -- 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 should be examined and assessed in the [environmental impact statement ("EIS")]."
Scoping Notice at 2, 4. If Frankfort (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

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.

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 DEIS. If Frankfort 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 the DEIS and FEIS, including all comments from the public on environmental issues and SEA's environmental analysis and recommendations for mitigation, into account in making its final decision on the Transaction.

In taking these steps, which include repeated and extensive opportunities for comments from Frankfort 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 Frankfort 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 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 Frankfort is, of course, free to participate in that public phase as its interests may warrant. What Frankfort may not do is arrogate to itself a significant part of SEA’s role in

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).

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/nepa.html>.

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, Frankfort’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. Frankfort’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 Scoping Notice in this proceeding on December 21, the same day that Frankfort served its Discovery Requests,⁷ makes clear that Frankfort 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 Frankfort’s Discovery Requests.

Frankfort has propounded burdensome Discovery Requests that are overly broad even for a major proceeding, 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.

Frankfort’s continued pursuit of these wide-ranging requests suggests that one purpose is to burden Applicants (and hence the Board) with time-consuming discovery that could (1) delay the approval process, (2) put pressure on Applicants to change their

⁷ While Frankfort and its counsel may not have been aware of the Scoping Notice when they served its discovery requests, Frankfort has not withdrawn or limited its requests in light of that Notice, nor of CN’s Responses and Objections (served Jan. 3, 2008) to the similarly flawed and overreaching Village of Barrington requests.

proposed plans, (3) burden or delay the Board's approval of the Transaction such that the deadline for the parties to close cannot be met, and/or (4) lead either the Seller or CN to decide not to close and finalize the Transaction because of the added risks, uncertainties, and likely costs.⁸

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

APPLICANTS' GENERAL RESPONSES

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

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

⁸ That purpose is also suggested by the timing of Frankfort's requests. Frankfort had weeks to prepare its burdensome Discovery Requests after the Application was filed on October 30, 2007. However, neither Frankfort nor its counsel has examined CN's work papers, and Frankfort 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 three weeks later (Friday, December 21), only days before the Christmas holiday period, so that CN's nominal time to respond included two weekends and three federal holidays, such that it had only 10-11 working days to develop a response in a holiday period traditionally honored in the rail industry.

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. Frankfort's interrogatories do not themselves seek information about the proposed Transaction or its effects on competition, transportation, or other matters. Rather they seek identification of individuals "most knowledgeable" about a wide range of subjects normally addressed in the EIS process. Such information is typically sought in discovery to identify potential candidates for depositions and has no other apparent relevance. However, as noted above, Frankfort is not entitled to take such depositions in

connection with issues addressed in the EIS process. Additional specific objections are stated below and may be noted at the beginning of the response to each interrogatory or request.

2. 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 Frankfort 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.
11. Applicants object to Definition and Instruction 6 insofar as it seeks to apply the Federal Rules of Civil Procedure concerning discovery in federal courts to the scope of document production in an STB proceeding that is subject to the rules of the STB. *See* 49 C.F.R. § 1114.30(a)(1).

12. Many of Frankfort's requests are framed in terms of "the Village of Frankfort" or "the vicinity of the Village of Frankfort," defined in Definition and Instruction 13 (apparently solely for these discovery requests) as "the geographic area that includes (a) the Village of Frankfort, Illinois, and (b) the area extending along the existing or proposed rail line(s) and siding(s) or associated rights-of-way for three miles from the outer boundaries of the Village of Frankfort, IL and one mile on either side of such right-of-way." Applicants' analyses and other documents that might be embraced by the broad terms of Frankfort's requests would not likely be framed in those terms, but rather would likely use other descriptors such as railroad mileposts and other designations that would not necessarily correspond to Frankfort's idiosyncratic definition. This means that time-consuming and burdensome review and analysis may be required to determine whether particular documents might be responsive. This central definition is made particularly problematic by the fact that the boundaries of Frankfort are irregular, making it especially difficult to know what is encompassed by the defined "vicinity of the Village of Frankfort." Such a definition makes searching for documents referring to or involving that area an unreasonably burdensome task, particularly given the schedule and the fact that the types of environmental effects the requests seek to address are already being explored through the Board's environmental process.

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.

DOCUMENT REQUESTS

Document Request No. 1

All documents that identify, discuss, or include projections or estimates of rail traffic in the vicinity of Frankfort, for any time period subsequent to that specifically addressed by Attachment A-2 to Exhibit 15 to the Application, including but not limited to (a) the number, length, speed, timing, and frequency of trains, (b) gross tonnage, (c) net tonnage, (d) the amount of time trains will spend on sidings and lines at one or more grade crossings, and amount of time of stoppage of motor vehicle, bicycle, and pedestrian traffic at each grade crossing, and (e) the proportion of trains that will need to pull over onto a siding in or through the vicinity of Frankfort.

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 Application, Applicants' work papers, and Applicants' Safety Integration Plan ("SIP") which has been placed in Applicants' depository. The requested information about projected or estimated rail traffic is insufficiently relevant to proper subjects of discovery, if at all, to warrant the burden of responding further.

Document Request No. 2

All documents that identify, discuss, or include a schedule, or projected or estimated schedule, of rail traffic in the vicinity of Frankfort.

Response

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

Current schedules of EJ&E trains moving in the vicinity of Frankfort are in the Applicants' depository as work papers (CN/EJEW 5 CO 151-52). Applicants' trains do not currently run through Frankfort. CN has not created a post-implementation schedule, but further information regarding train details is available in the work papers. *See*

CN/EJEW 5 CO 100003, EJE_STB_OpPlan.mdb, tbl_TSP_X1, tbl_X1_Trains_via_EJE, and other tables in the EJE_STB_OpPlan.mdb database. These work papers show which trains are projected to operate daily as scheduled trains, and which as bulk or unit trains.

Document Request No. 3

All documents that identify, discuss, or include upgrades or improvements made during the past three years to the railroad tracks and crossings in the vicinity of Frankfort, including the nature, dates and costs thereof.

Response

The requested information about prior improvements, which would have been made by parties other than Applicants, is insufficiently relevant, if at all, to warrant the burden of responding.

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

No documents are being produced.

Document Request No. 4

All documents that identify, discuss, or include projections, estimates, or evaluations of the nature, extent, quantity, frequency, aerial distribution, and dispersion of air pollutants emitted or released from locomotives and open rolling stock, including but not limited to projections or estimates of locomotives in motion or idling, and from motor vehicles waiting to cross any grade crossing, in the vicinity of Frankfort, for any time period.

Response

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

No documents are being produced.

Document Request No. 5

All documents that identify, discuss, or include measurements, projections, estimates, or evaluations of the nature, extent, quantity, decibel level, 24-hour Average Day-Night

Sound Level ("DNL" or "Ldn"), intensity, frequency, aerial distribution, and dispersion of noise (including but not limited to wayside noise—locomotive engine and wheel/rail noise—and horn noise) generated by or resulting from (a) trains in motion or idling, (b) noise from rail line, siding, and right-of-way construction, rehabilitation, and maintenance, (c) vibration generated by or resulting from any of the foregoing, and (d) synergies of any of the foregoing, in the vicinity of Frankfort, for any time period.

Response

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

No documents are being produced.

Document Request No. 6

All documents that identify, discuss, or include measurements, projections, estimates, or evaluations of noise sensitive receptors that potentially would be exposed to noise referenced in Request No. 5 above, the DNL and Ldn levels thereof, and the underlying assumptions, methodologies, formulas, data, calculations, projections, estimates, and nighttime penalty of such DNL or Ldn levels and any other noise levels, in the vicinity of Frankfort, for any time period.

Response

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

No documents are being produced.

Document Request No. 7

All documents that identify, discuss, or include any information, study, data, correspondence, or memorandum relating to potential impacts of the transactions and estimated increased rail traffic envisaged in this proceeding (including all the sub-numbers thereof) on the economic, market, aesthetic, or other values of properties abutting or located within one mile of the rail line, siding, and right-of-way, in the vicinity of Frankfort or elsewhere.

Response

Document Request No. 7 is vague and unreasonably burdensome in seeking documents regarding potential impacts "on the economic, market, aesthetic, or other

values of properties” near the rail line “in the vicinity of Frankfort or elsewhere.” The impact of the Transaction on property values is not relevant either to the Board’s decision under 49 U.S.C. § 11324(d) or to the environmental analysis of the Transaction which the Board is conducting pursuant to NEPA.

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

No documents are being produced.

Document Request No. 8

All documents that identify, discuss, or otherwise relate to traffic or other safety issues relating to the vicinity of Frankfort, including grade crossings and grade separations, for any time period.

Response

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

No documents are being produced.

Document Request No. 9

All documents that identify, discuss, or include projections or estimates of motor vehicle, bicycle, or pedestrian traffic in the vicinity of Frankfort, including but not limited to (a) projections or estimates of the number and frequency of motor vehicles, bicycles, and pedestrians crossing and/or waiting to cross any grade crossing in the vicinity of Frankfort, for any time period, and (b) the length of time waiting to cross the existing or proposed railroad tracks in the vicinity of Frankfort.

Response

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

No documents are being produced.

Document Request No. 10

All documents that identify, discuss, or include any information, study, data, correspondence, or memorandum relating to potential impacts on the environment of the emissions or releases referred to in Request No. 4 above, the noise referred to in Request Nos. 5 and 6 above, or the projected or estimated rail traffic in or through the vicinity of Frankfort referred to in Request No. 1 and 2 above.

Response

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

No documents are being produced.

Document Request No. 11

All documents that identify, discuss, or include any information, study, data, correspondence, or memorandum relating to potential impacts on human health or welfare of the emissions or releases referred to in Request No. 4 above, the noise referred to in Requests No. 5 and 6 above, or the projected or estimated rail traffic in or through the vicinity of Frankfort referred to in Requests No. 1 and 2 above.

Response

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

No documents are being produced.

Document Request No. 12

All documents that identify, discuss, or include any information, study, data, correspondence, or memorandum relating to potential measures to mitigate the potential impacts referred to in Requests No. 1 through 11 above.

Response

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

No documents are being produced.

Document Request No. 13

All documents that identify, discuss, or include any projection or estimate of the costs of measures to mitigate the potential impacts referred to in Request No. 12 above.

Response

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

No documents are being produced.

Document Request No. 14

All documents that identify, discuss, or describe any staging areas, storage yards, security facilities, and other infrastructure and facilities anticipated or needed to support (a) the rail line and sidings that would be constructed, maintained or operated in or through the vicinity of Frankfort, at any time, and (b) the infrastructure and facilities needed to be modified, closed, or removed to support the rail line and sidings or the construction and operation thereof, in or through the vicinity of Frankfort, at any time.

Response

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

No documents are being produced.

Document Request No. 15

All documents that identify, discuss, or include any information, study, data, correspondence, or memorandum relating to potential impacts to the environment or human health or welfare of the construction, operation, modification, closure, or removal of the infrastructure and facilities referred to in Request No. 14 above, and potential measures to mitigate such impacts.

Response

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

No documents are being produced.

Document Request No. 16

All documents created in the five years preceding the date of your response that identify, discuss, or include any information, study, data, correspondence, or memorandum relating to potential measures taken, implemented, or promised by, or imposed upon, Applicants to mitigate potential or actual impacts of increased rail traffic in situations or proceedings other than the instant proceeding.

Response

The request is objectionable insofar as it may call for documents subject to the settlement privilege.

The request is objectionable insofar as it seeks information relating to “situations or proceedings other than the instant proceeding” on grounds of burden and lack of relevance.

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

No documents are being produced.

Document Request No. 17

All documents that identify, discuss, or include any information, study, data, correspondence, or memorandum relating to potential measures taken or to be taken, implemented or to be implemented, promised by, requested of, agreed to by, or imposed upon, Applicants or any related entity to mitigate, or related to, potential or actual impacts of increased rail traffic in connection with the Application or the instant proceeding.

Response

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

No documents are being produced.

Document Request No. 18

All documents that identify, discuss, or include any projection or estimate of the costs of measures referred to in Request No. 17 above.

Response

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

No documents are being produced.

INTERROGATORIES

Interrogatory No. 1

Identify the individual employee or agent of respondent most knowledgeable about projections or estimates of rail traffic in the vicinity of Frankfort, including but not limited to (a) the number, length, speed, timing, and frequency of trains, (b) gross tonnage, (c) net tonnage, (d) the amount of time trains will spend on sidings and lines at one or more grade crossings, and amount of time of stoppage of motor vehicle, bicycle, and pedestrian traffic at each grade crossing, and (e) the proportion of trains that will need to pull over onto a siding in or through the vicinity of Frankfort.

Response

The interrogatory is objectionable in that it seeks identification of an individual employee or agent knowledgeable about a specified subject evidently for purposes of deposing that person, but such a deposition about the stated subject is not authorized in this proceeding. The interrogatory is also objectionable insofar as it seeks work product.

Interrogatory No. 2

Identify the individual employee or agent of respondent most knowledgeable about any schedule, or projected or estimated schedule, for rail traffic in the vicinity of Frankfort.

Response

See response to Interrogatory No. 1.

Interrogatory No. 3

Identify the individual employee or agent of respondent most knowledgeable about upgrades or improvements, in the five years preceding your response to this interrogatory, to the railroad tracks and crossings in the vicinity of Frankfort, including the nature, dates and costs thereof.

Response

See response to Interrogatory No. 1.

Interrogatory No. 4

Identify the individual employee or agent of respondent most knowledgeable about projections, estimates, or evaluations of the nature, extent, quantity, frequency, aerial distribution, and dispersion of air pollutants emitted or released from locomotives and open rolling stock, including but not limited to projections or estimates for locomotives in motion or idling, and for motor vehicles waiting to cross one or more grade crossings, in the vicinity of Frankfort, for any past, present and future time period.

Response

See response to Interrogatory No. 1.

Interrogatory No. 5

Identify the individual employee or agent of respondent most knowledgeable about any measurements, projections, estimates, or evaluations of the nature, extent, quantity, decibel level, 24-hour Average Day-Night Sound Level ("DNL" or "Ldn"), intensity, frequency, aerial distribution, and dispersion of noise (including but not limited to wayside noise—locomotive engines and wheel/rail noise—and horn noise) generated by or resulting from (a) trains in motion or idling, (b) noise from rail line, siding, and right-of-way construction, rehabilitation, and maintenance, (c) vibration generated by or resulting from any of the foregoing, and (d) synergies of any of the foregoing, in the vicinity of Frankfort, for any time period.

Response

See response to Interrogatory No. 1.

Interrogatory No. 6

Identify the individual employee or agent of respondent most knowledgeable about any measurements, projections, estimates, or evaluations of noise sensitive receptors that potentially would be exposed to noise referenced in Interrogatory No. 5 above, the DNL and Ldn levels thereof, and the underlying assumptions, methodologies, formulas, data,

calculations, projections, estimates, and nighttime penalty of such DNL or Ldn levels and any other noise levels, in the vicinity of Frankfort, for any time period.

Response

See response to Interrogatory No. 1.

Interrogatory No. 7

Identify the individual employee or agent of respondent most knowledgeable about any information, study, data, correspondence, or memorandum relating to potential impacts of the transactions and estimated increased rail traffic envisaged in this proceeding (including all the sub-numbers thereof) on the economic, market, aesthetic, or other values of properties abutting or located within one mile of the rail line, siding, and right-of-way, in the vicinity of Frankfort or elsewhere.

Response

See response to Interrogatory No. 1.

Interrogatory No. 8

Identify the individual employee or agent of respondent most knowledgeable about traffic or other safety issues relating to the vicinity of Frankfort, including grade crossings and grade separations, for any time period.

Response

See response to Interrogatory No. 1.

Interrogatory No. 9

Identify the individual employee or agent of respondent most knowledgeable about any projections or estimates of motor vehicle, bicycle, or pedestrian traffic in the vicinity of Frankfort, including but not limited to (a) projections or estimates of the number and frequency of motor vehicles, bicycles, and pedestrians crossing and/or waiting to cross any grade crossing in the vicinity of Frankfort, for any time period, and (b) the length of time waiting to cross the existing or proposed railroad tracks in the vicinity of Frankfort.

Response

See response to Interrogatory No. 1.

Interrogatory No. 10

Identify the individual employee or agent of respondent most knowledgeable about any information, study, data, correspondence, or memorandum relating to potential impacts on the environment of the emissions or releases referred to in Interrogatory No. 4 above, the noise referred to in Interrogatory Nos. 5 and 6 above, or the projected or estimated rail traffic in or through the vicinity of Frankfort referred to in Interrogatory Nos. 1 and 2 above.

Response

See response to Interrogatory No. 1.

Interrogatory No. 11

Identify the individual employee or agent of respondent most knowledgeable about any information, study, data, correspondence, or memorandum relating to potential impacts on human health or welfare of the emissions or releases referred to in Interrogatory No. 4 above, the noise referred to in Interrogatory Nos. 5 and 6 above, or the projected or estimated rail traffic in or through the vicinity of Frankfort referred to in Interrogatory Nos. 1 and 2 above.

Response

See response to Interrogatory No. 1.

Interrogatory No. 12

Identify the individual employee or agent of respondent most knowledgeable about information, study, data, correspondence, or memorandum relating to potential measures to mitigate the potential impacts referred to in Interrogatory Nos. 1 through 11 above.

Response

See response to Interrogatory No. 1.

Interrogatory No. 13

Identify the individual employee or agent of respondent most knowledgeable about projection or estimate of the costs of measures to mitigate the potential impacts referred to in Interrogatory No. 12 above.

Response

See response to Interrogatory No. 1.

Interrogatory No. 14

Identify the individual employee or agent of respondent most knowledgeable about (a) staging areas, storage yards, security facilities, and other infrastructure and facilities anticipated or needed to support the rail line and sidings that would be constructed, maintained or operated in or through the vicinity of Frankfort, at any time, and (b) the infrastructure and facilities needed to be modified, closed, or removed to support the rail line and sidings or the construction and operation thereof, in or through the vicinity of Frankfort, at any time.

Response

See response to Interrogatory No. 1.

Interrogatory No. 15

Identify the individual employee or agent of respondent most knowledgeable about information, study, data, correspondence, or memorandum relating to potential impacts to the environment or human health or welfare of the construction, operation, modification, closure, or removal of the infrastructure and facilities referred to in Interrogatory No. 14 above, and potential measures to mitigate such impacts.

Response

See response to Interrogatory No. 1.

Interrogatory No. 16

Identify the individual employee or agent of respondent most knowledgeable about information, study, data, correspondence, or memorandum relating to potential measures taken, implemented, or promised by, or imposed upon, Applicants to mitigate potential or actual impacts of increased rail traffic in situations or proceedings (other than the instant proceeding) that were pending at any time during the five years preceding the date of your response.

Response

See response to Interrogatory No. 1.

Interrogatory No. 17

Identify the individual employee or agent of respondent most knowledgeable about information, study, data, correspondence, or memorandum relating to potential measures taken or to be taken, implemented or to be implemented, promised by, requested of, agreed to by, or imposed upon, Applicants or any related entity to mitigate, or related to,

potential or actual impacts of increased rail traffic in connection with the Application or this proceeding.

Response

See response to Interrogatory No. 1.

Interrogatory No. 18

Identify the individual employee or agent of respondent most knowledgeable about projection or estimate of the costs of measures referred to in Interrogatory No. 17 above.

Response

See response to Interrogatory No. 1.

Interrogatory No. 19

Identify each individual and organization that created, contributed to, reviewed, commented on, edited, or approved each of the responses to the foregoing.

Response

See response to Interrogatory No. 1. The interrogatory is also objectionable insofar as it seeks information protected by the attorney client and/or work product privilege, and the information sought is not relevant to any issue that is a proper subject of discovery in this proceeding.

Interrogatory No. 20

Identify each individual and organization that created, contributed to, reviewed, commented on, edited, or approved each document responsive to Frankfort's First Request for Production of Documents.

Response

See response to Interrogatory Nos. 1 and 19

Respectfully submitted,



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

January 8, 2008

CERTIFICATE OF SERVICE

I certify that I have, this 8th day of January, 2008, served the foregoing Applicants' Responses and Objections to the Village of Frankfort'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.


Christine Mellen

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220600

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB FINANCE DOCKET NO. 35087 (Sub-No. 1)
ELGIN, JOLIET AND EASTERN RAILWAY COMPANY
—CORPORATE FAMILY EXEMPTION—
EJ&E WEST COMPANY

VERIFIED NOTICE OF EXEMPTION
PURSUANT TO 49 U. S.C. §10502(a) AND
THE REGULATIONS AT 49 C.F.R. §1180.2(d)(3)

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OCT 30 2007
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Public Record

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FILED
OCT 30 2007
SURFACE
TRANSPORTATION BOARD

Attorneys for
Elgin, Joliet and Eastern Railway Company
and EJ&E West Company

Date: October 26, 2007

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EXHIBITS

- Exhibit 1** Map
- Exhibit 2** Agreement

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

**STB FINANCE DOCKET NO. 35087 (Sub-No. 1)
ELGIN, JOLIET AND EASTERN RAILWAY COMPANY
--CORPORATE FAMILY EXEMPTION--
EJ&E WEST COMPANY**

**VERIFIED NOTICE OF EXEMPTION
PURSUANT TO 49 U. S.C. §10502(a) AND
THE REGULATIONS AT 49 C.F.R. §1180.2(d)(3)**

Elgin, Joliet and Eastern Railway ("EJ&E") hereby files this Verified Notice of Exemption based on a corporate family transaction involving EJ&E West Company ("EJ&EW"), a non-carrier subsidiary of EJ&E, pursuant to 49 C.F.R. §1180.2(d)(3).

I. SUMMARY

The exemption noticed herein would permit EJ&E to transfer certain of its rail assets, as described in more detail in Section IV.1., herein, to EJ&EW, which would thereupon become a rail common carrier. Thereafter, pursuant to a Railroad Control Application ("Application") being filed concurrently herewith in STB Finance Docket No. 30587, Canadian National Railway Company ("CNR"), through its wholly-owned

U.S. subsidiary Grand Trunk Corporation ("GTC"), would acquire all of the stock of EJ&E ("the Control Transaction"). Thus, the proposed exempt transfer of assets from EJ&E to EJ&EW is an initial step to facilitate the control transaction under 49 U.S.C. §11323 described in the Application.

II. DESCRIPTION OF PARTIES

EJ&E is a wholly-owned indirect subsidiary of United States Steel Corporation (formerly USX Corporation) ("USS"), a non-carrier. USS owns all of the issued and outstanding stock of Transtar, Inc. ("Transtar"), a non-carrier holding company which owns all of the issued and outstanding stock of seven common carrier railroads, including EJ&E ("the Transtar Railroads"). The common control of the Transtar Railroads by USS was approved by the STB in prior exemption proceedings. *See USX Corporation – Control Exemption – Transtar Inc.*, STB Finance Docket No. 33942 (served Nov. 30, 2000); *United States Steel Corporation – Acquisition of Control Exemption – Delray Connecting Railroad Company*, STB Finance Docket No. 34311 (served Feb. 19, 2003); *Transtar, Inc -Continuance in Control Exemption-Delray Connecting Railroad Company*, STB Finance Docket No. 34767 (served November 1, 2005); *United States Steel Corporation – Acquisition of Control Exemption – Texas & Northern Railway Company*, STB Finance Docket No. 35027 (served May 25, 2007); and *Transtar, Inc.-Control Exemption-Texas & Northern Railway Company*, STB Finance Docket No. 35070 (served August 8, 2007)

EJ&E is a Class II rail common carrier that was founded on December 4, 1988. It was originally incorporated under the general laws of the States of Illinois and Indiana and is presently a Delaware corporation.

EJ&E operates in northeastern Illinois and northwestern Indiana over 198 track miles consisting primarily of an arc around Chicago extending from Waukegan, IL southward to Joliet, IL, then in an easterly direction to Gary, IN. and then northwest to South Chicago along Lake Michigan. EJ&E provides rail service to approximately 100 customers, including steel mills, coal utilities, plastics and chemical producers, steel processors, distribution centers and scrap processors.

EJ&EW is an Illinois corporation formed on August 16, 2007 and is a wholly-owned non-carrier subsidiary of EJ&E.

III. GOVERNING LAW AND REGULATIONS

Pursuant to 49 U.S.C. §10502(a), the STB must exempt a transaction which is otherwise subject to its jurisdiction whenever it finds that the application of its jurisdiction:

“(1) is not necessary to carry out the transportation policy of section 10101 of this title; and

“(2) either --

“(A) the transaction or service is of limited scope; or

“(B) the application in whole or in part of the provision is not needed to protect shippers from the abuse of market power.”

Pursuant to these statutory provisions, the Board has promulgated detailed regulations concerning railroad acquisitions and certain other transactions. Specifically, transactions proposed under 49 U.S.C. §11323 involving more than one common carrier railroad are classified into one of four categories, namely "*major, significant, minor and exempt*". 49 C.F.R. §1180.2.

The regulations provide that a transaction is "exempt" if it falls within one of eight described categories. 49 C.F.R. §1180.2(d). The category applicable to the present transaction is the corporate family exemption set forth at 49 C.F.R. §1180.2(d)(3).

With respect to transactions which fall within any one of the exempt categories, the regulations provide that the STB has found that those transactions meet the *per se* exemption requirements of 49 U.S.C. §10502(a), specifically that the STB's prior review and approval of the transactions are not necessary to carry out the rail transportation policy of 49 U.S.C. §10101 and are of limited scope or unnecessary to protect shippers from market abuse. 49 C.F.R. §1180.2(d).

IV. REQUIRED INFORMATION

The following is the information required by 49 C.F.R. §1180.4(g) to qualify for an exemption under 49 C.F.R. §1180.2(d), including the intra-corporate family transaction that is the basis for this exemption notice:

1. Description of Proposed Transaction (49 C.F.R. §1180.6(a)(1)(i)).

Before CNR and GTC acquire control of EJ&EW, EJ&E intends to transfer all of its land, rail, and related assets located west of the centerline of Buchanan Street in Gary, IN (together with the real property and related fixtures associated with the hump and Dixie leads located east of Buchanan Street) to EJ&EW, which upon completion of the transfers would become a rail common carrier. EJ&E would retain its land, rail, and related assets east of the centerline (other than the real property and related fixtures associated with the hump and Dixie leads). These transfers and the assets involved are more precisely described in the Stock Purchase Agreement dated as of September 25, 2007, between GTC and EJ&E, which is attached to the Application as Exhibit 2.

It is anticipated that, after CNR and GTC acquire control of EJ&EW, EJ&E will change its name to Gary Railway Company and EJ&EW will assume the Elgin, Joliet and Eastern Railway Company name.

**2. Names of Parties, Legal Counsel and Contact Information
(49 C.F.R. §1180.6(a)(1)(i)).**

2.1 Parties.

Elgin, Joliet & Eastern Railway Company
600 Grant Street, 18th Floor
Pittsburgh, PA 15219
(412) 433-4046

EJ&E West Company
600 Grant Street, 18th Floor
Pittsburgh, PA 15219
(412) 433-4046

2.2 Legal Counsel.

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Pittsburgh, PA 15219
Telephone: (412) 471-1800
Facsimile: (412) 471-4477
E-Mail: jvuono@vuonogray.com

**3. Proposed Time Schedule for Consummation
(49 C.F.R. §1180.6(a)(1)(ii)).**

EJ&E intends to consummate the transaction with EJ&EW immediately before CNR and GTC acquire control of EJ&EW, which consummation would not occur until after approval of the Control Transaction by the STB.¹ Nevertheless, EJ&E requests the STB to permit the exemption to take effect without stay in order to permit the negotiation, in advance of consummation of the Control Transaction, of implementing

¹ As this transfer would be followed immediately by the Board approved acquisition of EJ&EW by CN and GTC, this transfer would itself have no effect on service levels, operations, or competition.

agreements pursuant to *New York Dock – Control – Brooklyn Eastern District Terminal*, 360 I.C.C. 60, *aff'd sub nom New York Dock Ry. v. United States*, 609 F.2d 83 (2d Cir. 1979) (“*New York Dock*”).

4. **Purpose of the Transaction (49 C.F.R. §1180.6(a)(1)(iii)).**

The intra-corporate family transfer of assets would allow EJ&E to segregate into a separate corporate entity (EJ&EW) the rail properties to be acquired by GTC, facilitating the Control Transaction described in the primary Application.

5. **List of States in Which Applicant Carrier's Property is Located (49 C.F.R. §1180.6(a)(5)).**

The portions of EJ&E's rail line to be transferred to EJ&EW are situated in the States of Illinois and Indiana.

6. **Carrier's Operating Map (49 C.F.R. §1180.6(a)(6)).**

There is attached as Exhibit 1 hereto a railroad operating map of the area served by EJ&E, showing the lines of EJ&E to be transferred to EJ&EW, the lines to be retained by EJ&E, short line connections, other rails lines in the territory and the principal geographic points in the involved region.

7. **Agreement (49 C.F.R. §1180.6(a)(7)(ii)).**

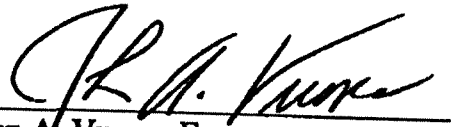
The Stock Purchase Agreement dated as of September 25, 2007 between GTC and EJ&E is attached as Exhibit 2 to the Application, filed simultaneously herewith, and is incorporated herein by reference.

8. Level of Labor Protection (49 C.F.R. §1180.4(g)(1)(i)).

EJ&E acknowledges that the transaction will be subject to the employee protective conditions and other procedures adopted in *New York Dock*.

Respectfully submitted,

By: _____


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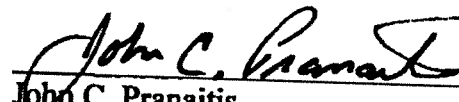
Date: October 26, 2007

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VERIFICATION

John C. Pranaitis, under penalty of perjury, deposes and says that he is the President of Transtar, Inc.; that he is authorized to file this Verification to the Notice of Exemption on behalf of Elgin, Joliet and Eastern Railway Company and EJ&E West Company; that he knows the contents thereof; and that the facts therein are true as stated to the best of his knowledge, information and belief.

Signed this 23rd day of October, 2007.



John C. Pranaitis

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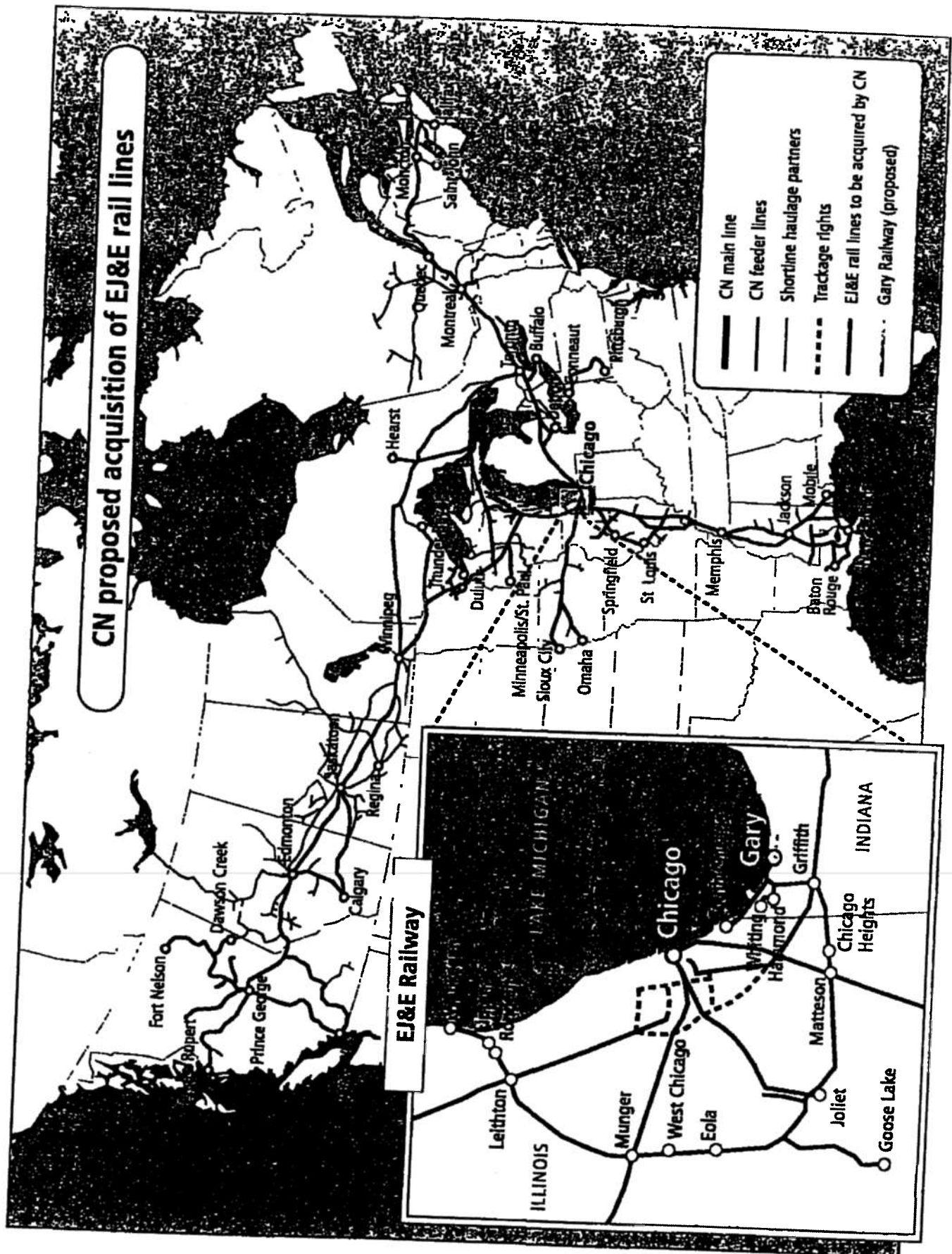


EXHIBIT 2

AGREEMENT

**(See Exhibit 2 of Railroad Control Application in
STB Finance Docket No. 35087)**