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February 8, 2008

BY E-FILING

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

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

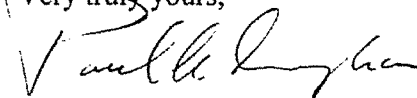
Dear Ms. Quinlan:

Enclosed for filing in the above-referenced docket please find the Reply of Applicants and Elgin, Joliet and Eastern Railway Company to the Village of Frankfort's Motions to Compel Discovery.

Surface Transportation Board
CN-EJ&E EIS - FD-35087
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Very truly yours,



Paul A. Cunningham

Counsel for Canadian National Railway Company
and Grand Trunk Corporation

Enclosure

HDR
cc: All parties of record

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 35087

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

**REPLY OF APPLICANTS, ELGIN, JOLIET AND EASTERN RAILWAY
COMPANY, AND EJ&E WEST COMPANY TO THE VILLAGE OF
FRANKFORT'S MOTIONS TO COMPEL DISCOVERY**

Background and Summary

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

The Village of Frankfort ("Village"), located in Will County, Illinois,² has filed substantially identical motions seeking to compel Applicants ("App. Motion") and EJ&E ("EJ&E Motion") to respond to interrogatories and document requests that the Village

¹ Unless otherwise indicated, abbreviated references used herein have the same meaning as those set forth in the Table of Abbreviations in the Application (CN-2 at 8-11). Where this reply refers to discovery requests directed to, discovery responses by, or motions to compel responses by "EJ&E," the reference also extends to EJ&EW.

² Will County served its own discovery requests on Applicants and EJ&E covering many of the same subjects, purporting to incorporate Frankfort's argument concerning environmental discovery. Will County moved to compel further answers to its separate discovery requests first from EJ&E, and just this week from Applicants. EJ&E and Will County have been able to resolve their disagreements about these requests voluntarily, and EJ&E understands that Will County has or will today file a notice of withdrawal for its motion to compel responses from EJ&E. CN's response herein will necessarily respond to Will County's arguments to the extent they rely upon Frankfort. As Will County's motion against CN was just recently filed and did not seek expedition, CN reserves the right to respond further to that motion as may be necessary.

served on Applicants on December 21, 2007 (App. Motion Exhs. 1 and 2), and on EJ&E on December 26, 2007 (EJ&E Motion Exhs. 1 and 2). Applicants and EJ&E responded to the Village's discovery by explaining that the requested discovery was not proper as to either of them insofar as it was directed to environmental issues, as was largely the case (App. Motion Exhs. 3 and 4; EJ&E Motion Exh. 4).³ EJ&E also explained that the discovery was not proper as to it because it is not a "party" to the application proceeding, to which Frankfort's discovery was directed (EJ&E Motion Exh. 3). Despite their objections, Applicants provided responses to numerous of the Village's document requests (*e.g.*, App. Motion Exh. 3 at 14-21).⁴

In an effort to resolve the discovery dispute voluntarily, Applicants' agreed, at the Village's request, to respond further to four discovery requests chosen by the Village, and did so on January 24, 2008 (App. Motion Exh. 4), hopeful that doing so would resolve these discovery disputes and obviate the need to burden the Board with them. Nevertheless, the Village has now moved to compel further responses by Applicants, evidently to all of its document requests and all of its interrogatories, even, apparently, those requests to which Applicants had responded despite their objections.

The Village complains that unspecified documents produced by Applicants are "of little assistance" or "little or no assistance" to Frankfort (EJ&E Motion at 5).⁵

³ EJ&E incorporated by reference Applicants' responses and objections to the similar discovery served on them by the Village (EJ&E Motion Exh. 3).

⁴ Apart from Applicants' general "environmental" objection to the Village's discovery, the Village has not taken issue with any of the other specific objections Applicants asserted with respect to particular requests.

⁵ Unless otherwise indicated, page references are made for convenience to the version of the motion filed against EJ&E, as it includes, in addition to the identical argument about improper discovery, an argument applicable only to EJ&E.

However, the Village cites no authority for its novel premise that the sufficiency of a discovery response is measured by the degree of its utility to the requesting party.

The Village's characterization of the Transaction in its Motions reflects its narrow perspective on this proceeding. The Village describes the Transaction as effecting "a massive increase in rail traffic" over the EJ&E line which for some 150 years has run through relatively lightly populated suburban areas such as the Village (*id.* at 2).⁶ This view wholly ignores that increases in traffic will be matched by corresponding decreases in rail traffic through much more densely populated areas in and around Chicago, which are likely to benefit many more people.

The Village also complains that the same lightly populated area around the Village will face an increase in hazmat carloads that now move through much more densely populated areas (*id.* at 2). Yet, where practicable and efficient, such routing may reduce the overall risks of transporting hazmats.

The Village's parochial perspective on discovery is similarly evident in another sense. The Village seeks to obtain various extensive data concerning possible environmental effects of the Transaction on "the vicinity of Frankfort." This is an artificial area defined by the Village solely for this discovery as extending three miles beyond the irregular boundaries of the Village, which straddles about 12 miles of EJ&E track.⁷ Such data would be burdensome or impossible to obtain and, in any event, would not readily permit any relevant comparisons with the environmental effects on the scores

⁶ <http://www.villageoffrankfort.com/About%20Us/index.php>.

⁷ "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." App. Motion Exh 1 at 3 ¶ 15, App. Motion Exh.2 at 3 ¶ 13, EJ&E Motion Exh. 1 at 3 ¶ 14, EJ&E Motion Exh.2 at 3 ¶ 13.

of communities also straddling or proximate to the balance of the 105 or more miles of the main EJ&E line between Leithton and Gary, or the approximately 140 miles of CN lines also directly affected by the Transaction. While that insular perspective for the Village may be understandable, it is not one that the Board should adopt, endorse, or encourage.

If the Village were entitled to such discovery, others potentially affected by similar or other environmental impacts could equally claim such entitlement, and assessments that are fundamentally the responsibility of the Board and its specialized, knowledgeable staff, the Section on Environmental Analysis (“SEA”), would be faced with overlapping, duplicative, one-sided inquiries, resulting in a highly inefficient and burdensome process for the required fact gathering, analysis, and assessment by SEA.

The Village says it is examining whether the Transaction meets the “economic” requirements of 49 U.S.C. § 11324 (p. 2), but it does not ever refer to those “economic” requirements that are at the heart of the proceeding under that provision, nor to how its discovery requests might bear on them.

As a result of the Village’s casual approach to discovery – taking several weeks to serve its requests, deferring the filing of its motion to compel, and failing even to seek expedited treatment, the issues concerning its requests can be deemed academic. The Village has filed its comments on the Application and is not entitled to make any further filing under the Board’s schedule.

Finally, the Village errs in seeking discovery from EJ&E, which is not an applicant or other relevant party subject to discovery under the Board’s rules.

I. THE VILLAGE ERRS IN CONCLUDING THAT DISCOVERY IS AVAILABLE TO IT REGARDING THE ENVIRONMENTAL ASPECTS OF THIS PROCEEDING.

In response to separate burdensome discovery requests from other villages or municipalities focused on environmental issues, Applicants' discovery responses elaborated upon several legal objections to such discovery. *See, e.g.*, Applicants' Responses and Objections to the Village of Frankfort's First Discovery Requests ("Applicants' Response"), attached as Exhibit 4 to the Village's Motion. EJ&E adopted those objections. EJ&E Motion Exh. 3.⁸

The Village's Motion correctly notes that the Board's control proceeding "comprises two processes" (p. 6), which Applicants addressed in their objections to the Village's discovery (App. Motion Exh. 3 at 3-8). The primary process is the control proceeding under the ICC Termination Act of 1995 ("ICCTA"), which focuses on the "economic" issues (p. 6), and in which the parties proceed in a litigation mode. In parallel with that proceeding there is a distinct "environmental" process under the National Environmental Policy Act, 42 U.S.C. §§ 4321 et seq., in which the inquiries are framed and developed by the Board's specialized staff, SEA, with input from members of the public as commenters, not as litigants.⁹ The differing roles of SEA (and its third-party consultants) and the public are addressed at length in the Board's Statement of

⁸ Applicants made similar objections to similar requests for information or documents relating to environmental issues that were served by the Village of Barrington (which did not file a motion to compel) and by Will County (which, as noted in footnote 2, above, filed separate motions to compel against EJ&E and more recently Applicants, but is today withdrawing its motion as to EJ&E). Although EJ&E and Will County have now worked out their differences, in EJ&E's formal response to Will County it adopted Applicants' position as to the impropriety of discovery concerning environmental matters, and also took the same position as it did with respect to Frankfort about EJ&E not being a party.

⁹ A Citizen's Guide to NEPA: Having Your Voice Heard (Dec. 2007), recently issued by the Council on Environmental Quality, makes no reference to discovery as being part of the NEPA process for review of environmental issues.

Policy issued in 2001 and its December 21 Scoping Notice in this proceeding, each of which make no reference to discovery.

Applicants' Response to the Village's discovery also discussed pertinent Board decisions (App. Motion Exh. 3 at 3-7). While the Village purports to address the case law relied upon by Applicants and EJ&E, it seriously misstates their legal position. With respect to case law supporting their position that the Village is not entitled to discovery to address environmental issues in the environmental impact statement ("EIS") process, the Village asserts that "CN and EJ&E rely ... on a single STB decision," citing Applicants' Response at 7 & n.4, which cited *Burlington N. Santa Fe Corp. – Control – Washington Cent. R.R.*, STB Finance Docket No. 32974 (STB served Sept. 20, 1996) (p. 7). In the next paragraph, the Village repeats that CN cited "only the *Burlington Northern* ruling" for the proposition that discovery is not available for the environmental review process (*id.*; emphasis added).

These assertions by the Village are wrong and patently misleading. Applicants' position, adopted by EJ&E, relied upon other Board precedents which are even more compelling and more recent than *Burlington Northern*. One was *Ill. Cent. R.R. – Construction & Operation Exemption – In E. Baton Rouge Parish, LA*, STB Finance Docket No. 33877 (STB served Aug. 21, 2001), where the Board affirmed denial of Kansas City Southern's motion to compel. Another was *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), in which the Board made clear that environmental issues are addressed in an informal process not subject to the rules and limitations governing consideration of the "economic" issues in a litigated control

proceeding, and in which SEA, rather than the parties, is responsible for developing the record on which the Board will decide environmental questions under NEPA (*id.* at 4-5).

As Applicants explained (Applicants' Response at 4; footnote omitted):

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.

Applicants also cited the Board's Scoping Notice in this proceeding, which was issued before the Village served its discovery requests, and which explains that "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" – as is plainly so with the Village – "then the appropriate forum is SEA's environmental review process." Applicants' Response at 4 n.2 (quoting Notice; emphasis added).

As Applicants further explained in their discovery objections, the position taken by the Board in its past decisions is consistent with the positions taken by the Federal Energy Regulatory Commission ("FERC") when faced with similar regulatory and environmental issues. Applicants' Response at 7 n.6.¹⁰

¹⁰ Applicants cited, as examples, several recent FERC decisions: *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).

The Village also tries to claim an absolute right to environmental discovery in the Board's rules. It cites 49 C.F.R. § 1100.2, providing that if there is a "conflict or inconsistency" a special rule will govern over the general rules set forth in parts 1100-1129 (Motions pp. 6-7). The Village asserts that there is no conflict with part 1105, setting forth "Procedures for Implementation of Environmental Laws," because those rules do not explicitly say discovery is not available (*id.*). But the decisions cited above are flatly inconsistent with the Village's reading of the rules.

The Village also invokes the general provision of the discovery rules that discovery is available "in a proceeding other than an informal proceeding" (49 C.F.R. § 1114.21(a)) (Motion at 6), and baldly asserts that this proceeding "is not an informal proceeding" (*id.* at 6 n.1, 8 n.2). As a matter of administrative law and precedent, the Village is wrong. The rule cited by the Village goes on to explain that "informal proceedings are those not required to be determined on the record after hearing and include informal complaints [and all proceedings assigned for initial disposition to employee boards under §1011.6]." 49 C.F.R. § 1114.21(a). The narrow category of proceedings that are "required to be determined on the record after the hearing" are generally called "formal" proceedings, and they do not include control proceedings such as this.¹¹

¹¹ See generally *United Transp. Union-III. Legislative Bd. v. ICC*, 52 F.2d 1074, 1080 n.10 (D.C. Cir. 1995): "The Commission acknowledged that neither § 10901 nor § 11343 [now 11323, governing control proceedings] requires a determination on the record after opportunity for an agency hearing" (citing *Norfolk & W. Ry -- Petition for Declaratory Order -- Lease of Line in Cook & Will Counties, IL, to Commuter Rail Div.*, 9 I.C.C.2d 1155, 1158 (1993)); cf. *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742 (1972) (holding that requirement of former section 1(14) of ICA (now 49 U.S.C. § 11122) requiring certain car service rules to be made "after hearing" was not equivalent to requirement that they be made "on the record after opportunity for an agency hearing" for purposes of § 553 of APA, and that APA provisions applicable to formal rulemaking need not be followed).

Under ICCTA, moreover, a proceeding such as this one relating to a transaction involving one or more Class I railroads “shall not be considered an adjudication required by statute to be determined on the record after opportunity for an agency hearing, for the purposes of [the Administrative Procedure Act (“APA”)].” 49 U.S.C. § 11324(f)(1).

In short, this is an “informal” proceeding for purposes of the APA, ICCTA, and the Board’s rules. Discovery is available in such a proceeding only to the extent that the Board allows it by order. In Decision No. 2, the Board specifically provided for discovery in this proceeding (Decision No. 2 at 13). However, the Board did not order or otherwise indicate that discovery was available with respect to the environmental review discussed separately in the next separate section of Decision No. 2. Nor did it so indicate in its Scoping Notice. It is illogical and unreasonable to assume that the Board intended that its reference to the availability of discovery was meant to overturn, *sub silentio*, the Board’s precedents regarding use of its discovery procedures in the separate environmental process.

The Village also tries to rely upon the separate opinion of a partially dissenting panel member in *Consolidated Rail Corp. v. United States*, 812 F.2d 1444 (3d Cir. 1987), concerning application of the ICC discovery rules as they then existed in the different context of railroad rate cases (Motion at 6, 7).¹² That separate opinion of a single judge concerning a different subject is not precedent, and in any event does not aid the Village’s argument here.

¹² The Board revised the discovery rules in 1996 after Congress created the Board to replace the ICC, but the changes do not aid the Village.

However, there is one point in Judge Becker's separate opinion in *Comrail* that is instructive in this different context. He cautioned against "fishing expeditions" and warned that, "[i]n view of the short deadlines for deciding rail cases (49 U.S.C. 10327), complainant must make its discovery requests as soon as possible" after discovery could begin "and must focus its requests as narrowly as possible." *Id.* at 1464. The Village did not heed that advice in that, having had nearly a month to study the Application before it was accepted, it did not make its discovery requests "as soon as possible" after the Board allowed discovery in Decision No. 2 on November 26, waiting nearly another month thereafter, and it certainly did not "focus its requests as narrowly as possible."

II. THE VILLAGE HAS NO LEGITIMATE NEED FOR THE DISCOVERY IT SEEKS

In moving to compel, apart from citing to a number of environmental filings that, as explained at length above, are not a legitimate basis for discovery, the Village vaguely refers to its right to file comments in the "economic" portion of the proceeding. Motion at 2. The Village, however, has already filed its comments in opposition to the Application (FRKF-4, served Jan. 28, 2008), and it has no further legitimate need or basis for the burdensome discovery it seeks.

First, it would be an abuse of the Board's processes and contrary to Decision No. 2 if the Village's intention is to use the board's provision for responses on March 13 as a vehicle to modify or supplement its prior comments.¹³ Likewise, it is an abuse of the Board's processes for the Village to seek discovery for that purpose.

¹³ Doing so would be particularly inappropriate here inasmuch as the Village filed its comments on January 28, without even purporting to reserve a right to supplement its comments with the fruits of any later discovery responses.

Second, the Village cannot seriously maintain that it has a need for extensive discovery against Applicants and EJ&E for purposes of a valid reply on March 13, 2008. It served its discovery without knowing what the January 28 comments would say; neither Applicants nor EJ&E filed comments on January 28 comments; and the Village has identified no other filings as to which it has basis for responding on March 13 or a need for discovery from Applicants.

In short, Frankfort has no legitimate need for the discovery it seeks. Its discovery requests can serve no valid purpose relating to the proceeding concerning economic issues which are the subject of the parties January 28 and March 13 filings and, as discussed at length above, such discovery requests are improper for the purposes of developing environmental comments.

III. EJ&E IS NOT SUBJECT TO DISCOVERY AS A “PARTY” IN THE APPLICATION PROCEEDING.

The Village complains that the Application “does not provide sufficient information about” a variety of environmental subjects (p. 2), and that it needs discovery of “information in the Applicants’ possession regarding these issues” (*id.*). However, that is not a basis for imposing discovery burdens on EJ&E, which is not an “applicant,” even assuming it is a “party” (which it is not) EJ&E has not been responsible for preparing the Application or assessing the various environmental issues the Village identifies (pp. 3-4). The Village cites no basis for subjecting EJ&E, the seller, to the burden of searching for and producing information bearing on environmental issues that EJ&E had no duty to assess and will not be the one responsible for dealing with or ameliorating.

In any event, the Village's argument about EJ&E's status is without merit. The Village does not contend that EJ&E is an "applicant," evidently recognizing that the only "applicants" are the two parties who filed the Application (CN and GTW). Nor can or does the Village contend that EJ&E is a "petitioner" in any relevant sense. Indeed, no pertinent petition has been filed by any party. Nor does EJ&E fall within any of the other categories the Board's rules recognize: "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)). With good reason, the Village has not identified which category it contends EJ&E falls within, nor why.

The Village relies essentially on the fact that EJ&E filed a "Notice of Exemption" as to a "corporate family transaction" concerning a non-carrier subsidiary of EJ&E (EJ&EW), which will be a vehicle for the sale of most of the EJ&E line to Applicants (p. 5). But such class exemption notices do not start proceedings; they merely indicate that, under prior Board determinations in adopting exemptions of a class of transactions, no proceedings are necessary.¹⁴ Moreover, even if they did initiate proceedings, this exemption proceeding concluded, for all practical purposes, upon the effective date of the exemption. Most importantly, the discovery the Village seeks from EJ&E was not directed at and has no bearing on the merits of the exemption.

In sum, EJ&E is not a party and is not obliged to respond to the Village's discovery.¹⁵

¹⁴ Of the papers filed with the Application, EJ&E was a signatory only of the Notice of Exemption.

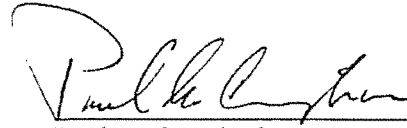
¹⁵ Applicants and EJ&E hereby incorporate such further arguments on this point as are made in Section II of the Elgin, Joliet & Eastern Railway Company and EJ&E West Company Reply to

Conclusion

In sum, the Village is wrong in contending that it is entitled to use the Board's discovery process to seek information relating to environmental issues. Those issues, as distinguished from the economic issues that are addressed in the main control proceeding, are properly addressed in the Board's separate EIS process. In addition, the Village is not entitled to make any filing concerning the control proceeding in which it could use the fruits of any discovery relating to other economic rather than environmental issues. Finally, EJ&E is not a "party" or otherwise subject to the discovery that the Village served upon it.

The Board should deny the Village's Motions to Compel as to Applicants and
EJ&E.

Respectfully submitted,



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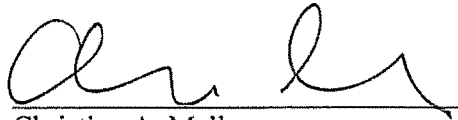
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*Counsel for Applicants Canadian
National Railway Company and
Grand Trunk Corporation*

February 8, 2008

CERTIFICATE OF SERVICE

I certify that I have this 8th day of February, 2008, served copies of the Reply of Applicants and Elgin, Joliet and Eastern Railway Company to the Village of Frankfort's Motions to Compel Discovery (designated as CN-22), upon all known parties of record in this proceeding by first-class mail or a more expeditious method.



Christine A. Mellen