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17 May 2004  
by Federal Express

Hon. Vernon Williams  
Secretary  
Surface Transportation Board  
1925 K Street, NW  
Washington, D.C. 20423-0001

210949

ENTERED  
Office of Proceedings

Re: AB 290 (Sub-no. 168X)  
Norfolk and Western -- Exemption --  
between Kokomo and Rochester in  
Howard, et al. Counties, IN

MAY 18 2004

Part of  
Public Record

Reply to Petitions for Reconsideration

Dear Mr. Williams:

I enclose herewith the original verified statement (i.e., original signature) of Mr. Richard Vonnegut, which was Exhibit A to the Reply previously filed on behalf of Indiana Trails Fund, Inc. The copies filed with the original Reply were based on a fax transmission of this original. Inasmuch as copies have already been supplied, only the original is submitted herewith.

By my signature below, I certify service on 17 May 2004 of the enclosed petition by U.S. Mail, postage pre-paid, first class upon Nels Ackerson, Sommer Barnard Ackerson, 1666 K Street, N.W., Suite 1010, Washington, D.C. 20006-1217 (counsel for Friend, et al.); Donald J. Tribbett, Starr Austen et al, 201 South Third Street, Logansport, IN 46947; James R. Paschall, Law Department, Norfolk Southern Corporation, Three Commercial Place, Norfolk, Virginia, 23510-9241.

Very truly

  
Charles H. Montange  
for Indiana Trails Fund, Inc.

Encl.

cc. Counsel (as indicated) (w/encl.)

BEFORE THE SURFACE TRANSPORTATION BOARD

Norfolk and Western Railway Co. -- )  
Abandonment Exemption -- ) AB 290 (Sub-no. 168)  
between Kokomo and Rochester )  
in Howard, et al. Counties, IN )



Verified Statement  
of  
Richard Vonnegut

I, Richard Vonnegut, make this Verified Statement for use in the above-captioned proceeding.

1. My name is Richard Vonnegut. I am the president and a member of the board of directors of the Indiana Trails Fund, Inc. ("ITF"). ITF is an Indiana non-profit corporation qualified under § 501(c)(3) of the Internal Revenue Code. ITF works with conservation, recreation and transportation organizations to preserve existing transportation corridors and to acquire new transportation corridors with a focus on recreational and commuting trails in the State of Indiana. I am not an attorney. I have personal knowledge of the facts stated herein.

2. Although I was also involved, Mr. Howard Cohen, then a member of the ITF board and an attorney, was principally responsible for negotiation of a railbanking agreement with respect to the Norfolk Southern (NS) line at issue in this proceeding. We refer to the railbanked portion of the line as the Nickel Plate Trail. A copy of the August 31, 1998 railbanking agreement which Mr. Cohen signed on behalf of ITF is attached as Appendix 1. Both Mr. Cohen and I repeatedly and consistently made NS aware of ITF's desire to railbank under 16 U.S.C. § 1247(d). As the contract indicates, NS agreed to railbank MP I-58.5 (near Kokomo) to MP I-72.7 (Peru), and MP I-75.5 (near Peru) to MP I-95.6 (near Rochester). NS has clarified to ITF that NS intended to retain MP I-57.2 to I-58.5 as active track to serve a possible shipper and in fact leased same to CERA for that purpose, later selling it to CERA for that purpose. Thus, ITF did not believe that the southern end of the Nickel Plate Trail as railbanked would be separated from the interstate rail system, and such was not the intent of the parties to the best of my knowledge. I recently confirmed that track remains in place on MP I-57.2 to MP I-58.5 (I visually inspected the connection on April 28, 2004), and ITF can find no order authorizing its abandonment, other than the order upon which NS informed us it did not act at any point. As to the northern end of the line (I-72.7 at Peru), the distance between the railbanked trail and the active mainline is de minimis. It is my understanding that a connection can be made.

3. Upon reviewing the March 30 and April 19 petitions filed by Friend, et al., I noted that Friend, et al., alleged that there was a gap between the interstate rail network and MP 75.5 and 95.6. There is no gap. The railbanked corridor from MP 75.5 to MP 95.6 directly interconnects with Fulton County Railroad at MP 95.6. I spoke with the President of Wilson Grain, which ships on the Fulton County Railroad, and which I understand may own or be affiliated with Fulton County Railroad. He assured me that the Railroad was not abandoned. Indeed, he asked me why anyone would think it abandoned since it is in use for rail shipments. My review of valuation section maps indicates that MP 95.6 is roughly at a road intersection. MP 95.6 to MP 75.5 is south of the road, and visually the Fulton County Railroad trackage is in place north of the road. The claim that MP 75.5 to 95.6 is somehow "severed" from the interstate rail network has no basis.

4. ITF had applied to railbank the entire rail corridor prior to STB's May 14, 1996 order, and Norfolk Southern had consented to negotiate railbanking prior to STB's May 14, 1996 order. That order included a railbanking trail use authorization (NITU) for MP 57.2 to 74.2, but I now know it provided that the parties should re-apply for a NITU for MP 74.2 to 95.6 once trackage rights had been discontinued and notice of such was supplied to ITF. To the best of my knowledge, it was purely a housekeeping oversight that Norfolk Southern and ITF did not re-apply for a NITU once the trackage rights were discontinued. However, our consistent intent to railbank is manifest by our written contract entered into on August 31, 1998, and the deeds dated January 21, 1999 invoking 16 U.S.C. § 1247(d).

5. In my review of the April 19, 2004 petition, I observed that Friend, et al. claim that ITF is not complying with the requirements of 16 U.S.C. § 1247(d) with respect to MP 75.5 to MP 95.6. ITF has paid and is paying all property taxes due and owing on MP 75.5 to MP 95.6 (as well as MP 58.5 to MP 72.7) and is not in arrears. ITF maintains liability insurance to cover any claims for legal liability for accidents on the railbanked railroad corridor. ITF also has all management responsibility for the railroad corridor, and is managing the railroad corridor. I note that Friend, et al rely on an affidavit by attorney Tribbett and that in paragraph 5 of his affidavit, he makes various claims about what he allegedly "learned" in a deposition of me which he did not complete, and which I have neither seen nor had an opportunity to correct. I wish to respond as follows, on an item by item basis to the subparts of his paragraph 5:

- a) ITF was formed to promote trails, and the purpose stated by Tribbett is one of the ways to promote trails.
- b) Correct.

c) The board of directors is self-nominating, as is the case in many non-profits for reasons of efficiency and economy. The articles of incorporation, by-laws, Indiana statutes, and the board determine who decides what for ITF.

d) ITF entered into a contract with NS and subsequently received three quitclaim deeds bearing on the Nickel Plate Trail.

e) Wrong. ITF acknowledges responsibility to address drainage issues, but to my knowledge has done nothing that alters drainage and has otherwise sought to maintain proper drainage.

f) Wrong. ITF has maintained security consistent with the security maintained in similar situations, including by the shortline railroad industry generally, to the best of my knowledge and belief. Tribbett is correct that we have put up signs. We have also installed some gates.

g) ITF denies that it is responsible for crossings when the crossings are the responsibility of another, as is so often the case on a railroad corridor. Private parties who desire crossings are not eleemosynary organizations, and ITF as a 501(c)(3) organization and an Indiana non-profit is legally prohibited from donating goods and services to private parties without consideration when the donations do not further our purpose. If neither NS nor ITF had responsibility for a crossing, then for ITF to assume the responsibility would be an improper and unlawful donation of our assets. Having said all this, we have in general honored private crossings, and we do not charge people seeking crossing rights. We reserve the right to insist that all crossings be constructed compatible with standards set by ITF or assigns for the Nickel Plate Trail.

h) Tribbett is wrong if he intends to represent that ITF denies that it is responsible for reasonable weed control. Tribbett is right if he means that ITF denies being aware of any unaddressed weed control problems. It is often the case on rail corridors that a weed problem arises primarily from the adjacent property owner, not the railroad.

i) Irrelevant. ITF relies on volunteers, and is being assisted by other organizations (e.g., Nickel Plate Trail, Inc. and Friends of Nickel Plate Trail). There is no requirement for a budget to my knowledge and ITF has viewed a budget of the sort Mr. Tribbett conjures as unnecessary overhead.

j) Because ITF relies on volunteers, ITF has not had to spend money on weed control or trash pick-up. This is hardly unusual, nor does it mean that ITF is ignoring those issues.

k) Wrong. ITF has placed gates and continues to place gates to minimize or to eliminate motorized access. We have also closed some sections of the trail temporarily to address alleged trespass problems. I have to confess that I am currently unable to corroborate any trespass by pedestrians or bicyclists on adjoining properties. We also have placed "no trespass" signs.

l) It is true that I thought we already had a NITU for

the whole line, rather than a NITU for the southern part and an STB order retaining jurisdiction to order a NITU for the remainder. I certainly believed and continue to believe that whatever federal jurisdiction is required is present. I certainly would not wish to be understood to say that our claim against Mr. Hoover for trespass lacks merit absent a NITU because that would be a legal opinion, and I am not a lawyer or otherwise qualified to offer up such an opinion. The lawyers affiliated with Rails to Trails Conservancy and the lawyer preparing our Reply to the pending Petitions point out case law that what they call "private railbanking" has been accepted where ICC or STB lacks jurisdiction and the line has not yet been abandoned.

6. As I recall attorney Tribbett's questions at the deposition, he asked whether ITF intended to comply with alleged requirements of Indiana Code 8-4.5. ITF (like all other Indiana trail groups to my knowledge) construes IC 8-4.5 requirements only to be applicable to a state agency when and if the agency applies for funding under a special state trail funding program set up in IC 8-4.5. There are extensive requirements for cost estimates and so forth in the event one seeks such funding. ITF in any event has not sought such funding, and does not plan to do so at this time, because the state deficit has resulted in no funds currently being available. Thus providing the various cost estimates would be useless. Moreover, ITF relies largely on volunteers, and our costs are therefore quite low. Indeed, we helped start Nickel Plate Trail, Inc., another Indiana non-profit corporation, to serve as a local organization for trail supporters and community organizations wishing to assist in managing the trail, and ultimately to acquire the trail from ITF as railbanker/manager. Nickel Plate Trail, Inc. and City of Peru have submitted grant applications for major trail construction in Peru and south of Peru. To my knowledge, no government has complained to ITF about the trail, that we have had only one complaint concerning our management of the trail (a weed control issue, which we dealt with). We are seeking to develop the property which we acquired from Norfolk Southern for trail purposes.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on 6 May 2004.  
Richard Vomegitt

Appendix 1: August 31, 1998 railbanking agreement  
from files of Mr. Cohen

Appendix 1

**CONTRACT OF PURCHASE AND SALE**

This Contract of Purchase and Sale (hereinafter "Agreement"), dated the 31<sup>st</sup> day of August, 1998, between NORFOLK AND WESTERN RAILWAY COMPANY, a Virginia corporation, hereinafter called "Seller"; and

INDIANA TRAILS FUND, INC., an Indiana nonprofit corporation, hereinafter called "Purchaser";

**WITNESSETH:**

1. Seller agrees to sell to Purchaser and Purchaser agrees to purchase from Seller, subject to the terms and conditions hereinafter set forth, the land and improvements of Seller in Howard, Miami and Fulton Counties, Indiana, consisting of approximately 34.3 miles of abandoned right of way, more or less, from Milepost I-58.5 at or near Kokomo to Milepost I-72.7 at or near Peru and from Milepost I-75.5 at or near Peru to Milepost I-95.6 at or near Rochester, being the same property as will be railbanked by Seller in STB proceeding AB-290 (Sub-No. 168X), together with (i) all servitudes, easements, appurtenances and hereditaments appertaining thereto, and (ii) all improvements, structures, landscaping, and appurtenances situated thereon (hereinafter collectively referred to as "Premises"). At closing, the Seller shall also deliver to Purchaser the original valuation maps, charts, drawings and available surveys pertaining to the Premises.
2. The purchase price for said Premises is FORTY-FIVE THOUSAND AND NO/100 DOLLARS (\$45,000.00).
3. The earnest money to bind this Agreement, receipt of which is hereby acknowledged, is FOUR THOUSAND FIVE HUNDRED AND NO/100 DOLLARS (\$4,500.00), which amount shall be credited toward the total price at closing. The earnest money may be retained by Seller if Purchaser, through no fault of Seller, shall fail to close in accordance with the terms of this Agreement. The parties acknowledge that it is impossible to estimate more precisely the damages which might be suffered by Seller upon Purchaser's default. Seller's retention of said earnest money together with all interest thereon is not intended as a penalty, but as full liquidated damages. It is expressly understood and agreed that this Agreement is predicated upon Seller's receipt of a Certificate of Abandonment or similar authorization from the Surface Transportation Board that permits Seller to discontinue rail services on the Premises, and in the event such authorization is not obtained, this Agreement will be terminated and the earnest money promptly refunded to Purchaser. Seller will promptly advise Purchaser of all developments with respect to such authorization.
4. At closing, the Seller shall convey the Premises to Purchaser by quitclaim deed, under Section 8(d) of the National Trails Acts, 16 U.S.C. § 1247(d), reserving an easement for rail and cross tie removal, subject to the following:

- (a) General real estate taxes for the year of closing and subsequent years not yet due and payable;
- (b) Applicable zoning laws and regulations; and
- (c) All easements, conditions, reservations, leases, licenses and restrictions as may appear of record or be apparent by an inspection of the Premises.

5. (a) The Purchaser shall have thirty (30) days after the date of this Agreement to examine title to the Premises and to furnish Seller with a written statement of objections affecting the marketability of said title. Seller shall have thirty (30) days after receipt of such objections to satisfy them. If Seller does not satisfy such objections within the prescribed time, then, at Purchaser's option evidenced by written notice to Seller, Purchaser may either (i) terminate this Agreement, or (ii) waive any or all objections not cured by Seller and proceed to close hereunder without diminution in price. In the event this Agreement is terminated, Purchaser shall be entitled to a refund of the earnest money, without interest, and neither party shall be liable to the other for damages on account of the termination. Marketable title as used herein shall mean title which a title insurance company licensed to do business in the State of Indiana will insure at its regular rates subject only to standard exceptions and those stated in paragraph 4 of this Agreement.

(b) Seller expressly covenants that before closing it will secure whatever releases are required to free the Premises from all mortgages. If for any reason Seller is unable to secure said releases, this Agreement shall terminate and Seller shall return the earnest money to Purchaser without interest, and neither party shall be liable to the other for damages.

6. The closing shall be held at a mutually agreed upon location and time within one hundred-twenty (120) days of the date of this Agreement. At closing:

- (a) Seller shall deliver to Purchaser the duly executed and acknowledged deed conveying the Premises to Purchaser as provided in paragraph 4 hereof and a deed or deeds of release to release the lien of any mortgage or trust that may apply to the Premises.
- (b) Purchaser shall pay to Seller the purchase price specified in paragraph 2 herein for the purchase of said Premises, said payment to be made at closing in cash or by certified or cashier's check or by wire transfer.
- (c) General real estate taxes for the then current year relating to said Premises and rents, if any, shall be prorated as of the closing date and shall be so adjusted at closing. If the closing shall occur before the tax rate is fixed for the then current year, the apportionment of taxes shall be upon the basis of the tax rate for the next preceding year applied to the latest

assessed valuations. All special taxes or assessments due subsequent to the closing date shall be paid by Purchaser.

- (d) Possession shall be delivered at closing.
- (e) Seller shall pay for the deed preparation, transfer taxes and Seller's attorney's fees.
- (f) Purchaser shall pay for all other closing costs, taxes, filing fees and Purchaser's attorney's fees.
- (g) Purchaser and Seller will execute all documents required by Indiana law, including a Sales Disclosure Form.

7. (a) Purchaser and its employees and agents shall, until the sale contemplated herein has been completed or this Agreement has been terminated or has expired by limitation, have the right and permission, after the date of this Agreement, to enter upon said Premises or on any part thereof at all reasonable times for the purpose of inspecting, examining, surveying, making soil tests, borings, percolation tests and other necessary tests for engineering and planning for development and determination of surface, sub-surface and topographic conditions; PROVIDED, HOWEVER, and notwithstanding any other provision of this Agreement, Purchaser agrees to indemnify and hold Seller (which word, for the purposes of this paragraph 7.(a), shall be deemed to include any corporation controlling, controlled by or under common control with Seller, together with the officers, employees, agents and servants of any of them) harmless from and against any claims or liability for injuries to (including death of) persons or damage to or loss of property, real or personal, or expense in any manner connected with said undertakings hereunder and at Seller's option to defend any lawsuit brought against said Seller on account of any such claims and to pay any judgment against Seller resulting from any suit, whether or not any such claim, demand or suit purports to arise from the negligence of Seller or otherwise, and Purchaser shall also indemnify and hold harmless Seller from and against loss or damage occasioned by such entry, including, without limitation, any mechanic's liens or claims that may be filed or asserted against said property of Seller by contractors, sub-contractors or materialmen performing such work for the Purchaser.

(b) If, as a result of Purchaser's inspection as provided above or any other determination or analysis of the Premises by Purchaser, Purchaser discovers any geotechnical conditions concerning the Premises which render it unsuitable for Purchaser's purposes or reveal the existence of toxic/hazardous chemicals and waste substances, or the presence of asbestos, in such quantities as to give rise to possible liability under federal, state or local environmental laws and regulations, Purchaser shall have ninety (90) days after the date of this Agreement to furnish Seller with a written statement of said geotechnical conditions affecting the suitability of the Premises for Purchaser's purposes or which give rise to possible liability under federal, state or local environmental laws and regulations. Seller shall have thirty (30) days, after receipt of such

notice, to remedy such conditions, but shall be under no obligation so to do, and if Seller fails to remedy such conditions within the prescribed time, then, at Purchaser's option evidenced by written notice to Seller, Purchaser may either (i) terminate this Agreement, or (ii) waive any or all objections not cured by Seller and proceed to close hereunder without diminution in price. In the event this Agreement is terminated, Purchaser shall be entitled to a refund of the earnest money, without interest, and neither party shall be liable to the other for damages on account of the termination.

8. Purchaser and Seller each represent that no real estate commissions are due and owing to any party with respect to this transaction. Both parties hereby agree to indemnify and save harmless the other from and against any and all claims or liability for real estate commissions arising out of this transaction attributable to the indemnifying party.

9. In the event the conveyance contemplated hereunder shall constitute a subdivision, and if as a prerequisite to the recording of such conveyance it shall become necessary to comply with applicable subdivision ordinances and regulations, Purchaser agrees that it will, with reasonable diligence, arrange and pay for the filing of any necessary plat with the appropriate authorities. Purchaser will assume the entire cost of whatever streets, sewers, and utilities are required in connection with such subdivision, and will do all other acts and file such other papers as may be necessary to obtain any and all required approvals thereof. Seller agrees to execute such documents and plats as are reasonably necessary to accomplish such subdivision. All costs, expenses and attorney's fees incurred in complying with any such subdivision ordinances and regulations, including, without limitation, dedication and installation of streets, sewers, and utilities, shall be borne solely by Purchaser and Purchaser agrees that Purchaser will indemnify and save Seller harmless from any and all claims, demands, suits, costs or expenses arising or in any way growing out of any failure by Purchaser to fully comply with such subdivision ordinances and regulations.

10. This Agreement may not be assigned by Purchaser to any other party without the written consent of Seller, which consent may be withheld for any reason, except in the case of an assignment to an entity of which Purchaser has a controlling interest or is the general partner, or a governmental unit or an assignee that a governmental unit has asked Purchaser to assign this Agreement to, subject to the requirements of the National Trails Acts, such consent shall not be unreasonably withheld. Seller expressly reserves the right to assign or delegate all or any part of Seller's rights and duties hereunder with respect to all or any portion of the Premises to one or more third parties, including a qualified intermediary as defined by Treasury Regulation Section 1.1031 (K)-1(g) (4).

11. (a) Purchaser agrees to purchase the Premises "as is" and acknowledges that Seller has not made any express or implied representation or warranty with respect to the condition or suitability of the Premises, including, but not limited to, the condition of the soil, the presence of hazardous materials, substances, wastes or other environmentally regulated substances, or other contaminants in the soil or improvements -- whether known or unknown

(referred to herein as "contamination of the Premises") and other physical characteristics. Purchaser shall perform at its own expense and rely solely upon its own independent investigation concerning the physical condition of the Premises (including, but not limited to, an environmental assessment) and compliance of the Premises with any applicable law and regulations.

(b) Seller has not and does not hereby make any express or implied representation or warranty or give any indemnification of any kind to Purchaser concerning the Premises, its condition or suitability or its compliance with any statute, ordinance or regulation, including, but not limited to, those relating to the environment. Purchaser acknowledges that neither Seller nor any of its agents or representatives have made, and Seller is not liable for, or bound in any manner by, any express or implied warranties, guarantees, promises, statements, inducements, representations or information pertaining to the Premises or any part thereof, the physical condition, size, zoning, income potential, expenses or operation thereof, the uses that can be made of the same or in any manner or thing with respect thereof, including, without limitation, any existing or prospective leasing or occupancy of all or any part thereof.

(c) Purchaser hereby agrees that, following its purchase of the Premises, Purchaser will protect, indemnify and hold harmless Seller from and against any and all damages, penalties, fines, claims, demands, causes of action, liens, suits, liabilities, costs (including, without limitation, cleanup and remedial action costs), judgments, and expenses (including, without limitation, attorney's and experts' fees and expenses) of every kind and nature suffered by, incurred by (whether voluntarily or by court or administrative order or direction) or asserted against Seller or Purchaser as a direct or indirect result of any hazardous materials, substances, wastes or other environmentally regulated substances located on, in or under the Premises and introduced after the closing.

12. If, at any time prior to the closing hereunder, any action or proceeding is filed under which the Premises, or a substantial portion thereof, may be taken pursuant to any law, ordinance or regulation or by condemnation or the right of eminent domain, then, at the option of either Seller or Purchaser, (a) this Agreement shall be terminated and the earnest money, without interest, shall be returned to Purchaser or (b) this Agreement shall remain in full force and effect and Seller, at the time of closing hereunder, shall transfer and assign to Purchaser all of Seller's right, title and interest in any proceeds received or which may be received by the taking, or a sale in lieu thereof, said option to be exercisable by either party by delivering to the other written notice of such exercise on or before the thirtieth day following the day on which the respective party receives notice that such suit has been filed.

13. Before closing, Purchaser will not place any advertising or promotional signs on said Premises or on any of Seller's other property without the written consent of Seller.

14. This Agreement embodies the entire agreement between the parties and cannot be varied except by the written agreement of the parties. No representation, promise, or inducement

not included in this Agreement shall be binding upon the parties hereto.

15. Time is of the essence of this Agreement.

16. Any notice required or permitted to be delivered hereunder shall be deemed to be delivered, whether or not actually received, when deposited in the United States Postal Service, postage prepaid, registered or certified mail, return receipt requested, addressed to Seller or Purchaser, as the case may be, at the address set forth below.

Seller:

Purchaser:

Mr. C. V. Baker, Director  
Real Estate and Contract Services  
Norfolk Southern Corporation  
One Georgia Center, Suite 1702  
600 West Peachtree Street, NW  
Atlanta, GA 30308-3603

Indiana Trails Fund, Inc.  
47 South Pennsylvania Street  
P. O. Box 402  
Indianapolis, IN 46206-0402

With copy to:

With copy to:

Kimber M. Culpepper, Esq.  
Real Estate Counsel  
Real Estate and Contract Services  
Norfolk Southern Corporation  
One Georgia Center, Suite 1702  
600 West Peachtree Street, NW  
Atlanta, GA 30308-3603

Howard R. Cohen, Esq.  
Locke Reynolds Boyd & Weisell  
1000 Capital Center South  
201 North Illinois Street  
Indianapolis, IN 46204

17. All the terms and conditions of this Agreement are hereby made binding on the successors and permitted assigns of both parties hereto.

18. This Agreement shall be governed by and construed in accordance with the laws of the State of Indiana.

19. This Agreement shall not be effective or binding until fully executed by the parties hereto.

20. This Agreement will survive closing.

21. If any provision of this Agreement is held by a court of competent jurisdiction to be invalid, void or unenforceable, the remainder of the provisions of this Agreement shall remain in full force and effect and shall in no way be affected, impaired or invalidated.

22. Words of any gender used in this Agreement shall be held and construed to include any other gender, and words in the singular number shall be held to include the plural, and vice versa, unless the context requires otherwise.

EXECUTED in duplicate, each part being an original, as of the day and year set forth above.

NORFOLK AND WESTERN RAILWAY COMPANY

By

*Handwritten signature*

Real Estate Manager

INDIANA TRAILS FUND, INC.

By

*Handwritten signature*

Director

KMC:swm  
1006321.cps/3-24-98  
Revised 8-11-98  
NSSALEK2.w61