

Before The  
Surface Transportation Board

2/5 781



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Finance Docket No. 33388 (Sub-No. 100)

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CSX CORPORATION AND CSX TRANSPORTATION, INC.  
NORFOLK SOUTHERN CORPORATION AND  
NORFOLK SOUTHERN RAILWAY COMPANY  
— CONTROL AND OPERATING LEASES/AGREEMENTS —  
CONRAIL INC. AND CONSOLIDATED RAIL CORPORATION

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**MOTION OF NORFOLK SOUTHERN CORPORATION AND NORFOLK  
SOUTHERN RAILROAD COMPANY FOR PROTECTIVE ORDER**

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Norfolk Southern Corporation and Norfolk Southern Railway Company (collectively, "NS") hereby move the Board to enter a protective order pursuant to 49 C.F.R. § 1114.21(c) quashing the discovery requests served by Petitioners Bridgewater Resources, Inc. and ECDC Environmental L.L.C. ("collectively, BRI") on NS on or about January 20, 2006, or, in the alternative, staying all discovery pending the Board's decision on NS's motion to dismiss BRI's "Petition For Clarification Or In The Alternative For Supplemental Order – North Jersey Shared Assets Area."<sup>1</sup> A copy of BRI's discovery requests are attached to this motion as Exhibit 1.

BRI has filed a Petition requesting that the Board "clarify that BRI's waste transfer facility located near Port Reading Jct. in Bridgewater Township, Somerset County, NJ ("BRI Facility") is within the NJSAA and/or that switching service between

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<sup>1</sup> NS has simultaneously filed its motion to dismiss BRI's Petition.

the BRI Facility and CSXT's Manville Yard can be performed by Conrail pursuant to the North Jersey Shared Assets Area Operating Agreement." BRI Pet. at 1. Alternatively, to the extent the Board determines that the BRI Facility is not within the NJSAA, BRI requests that the Board "issue a supplemental order allowing Conrail to perform switching service between the BRI Facility and CSXT's Manville Yard." Id. BRI has served NS and Conrail with various interrogatories and document requests in conjunction with its Petition. See Exhibit 1.

For the reasons set forth below, NS moves the Board to quash BRI's discovery requests or, in the alternative, to stay all discovery pending the Board's decision on NS's motion to dismiss the Petition.

**I. BRI HAS INITIATED AN INFORMAL PROCEEDING AND THEREFORE DISCOVERY IS NOT AVAILABLE UNDER 49 C.F.R. § 1114.21(a).**

The Board's regulations provide: "Parties may obtain discovery under this subpart regarding any matter, not privileged, which is relevant to the subject matter involved in a proceeding *other than an informal proceeding*. For the purpose of this subchapter, informal proceedings are those not required to be determined on the record after hearing . . ." 49 C.F.R. § 1114.21(a) (emphasis added). BRI's Petition provides no basis for concluding that the relief it seeks requires a proceeding required to be determined on the record after hearing, or otherwise requires a formal proceeding.

The Board's classification of proceedings in 49 C.F.R. § 1002.2(f), which describes various "Formal Proceedings" in Part V and "Informal Proceedings" in Part VI, also supports the conclusion that what BRI seeks is an informal proceeding. BRI's Petition is styled as a "Petition for Clarification or in the Alternative For Supplemental

Order.” Although, BRI’s Petition does not appear to fit squarely within any of the specific types of proceedings listed in section 1002.2(f), the type of proceeding that appears to best describe the Petition and the relief sought is one for “STB adjudicatory services not otherwise covered,” which is in the Part VI list of “Informal Proceedings.” 49 C.F.R. § 1002.2(f), Part VI(88). Significantly, BRI submitted its Petition along with a \$200 filing fee, which is the fee for a proceeding seeking “STB adjudicatory services not otherwise covered.” See Exhibit 2. Thus, it seems that BRI filed its Petition expecting to initiate an *informal* proceeding. Accordingly, discovery should not be available.

**II. BRI’S PETITION PRESENTS LEGAL QUESTIONS RATHER THAN FACTUAL QUESTIONS AND THEREFORE DISCOVERY WOULD NOT AID THE BOARD IN ITS DECISION.**

NS has filed a motion to dismiss BRI’s Petition on the basis that the requested relief is contrary to the express terms of Transaction Agreement approved by the Board in Finance Docket No. 33388. As discussed more fully in NS’s motion to dismiss, the sole basis for BRI’s Petition is the opinion of one consultant whose conclusions are unsupported. Thus, the Petition presents essentially a legal question rather than a factual question: whether a consultant’s unsupported opinion about the boundary of the New Jersey Shared Assets Area (“NJSAA”) can overcome the express terms of the Transaction Agreement and the map of which it is a part. NS submits that the Transaction Agreement is clear and conclusive on the issue raised by BRI; that is, BRI’s waste transfer facility is simply not in the NJSAA as defined in the Transaction Agreement and as approved by the Board. If the Board agrees, BRI’s discovery requests become moot.

Likewise, the alternative relief requested by BRI – a supplemental order allowing Conrail to perform switching service between the BRI Facility and CSXT’s Manville Yard – raises questions not of fact but of law and administrative policy: whether BRI should be granted competitive access to another railroad in the absence of any claim or showing of the circumstances specified in 49 C.F.R. Part 1144 and the Board’s precedents.

**III. EVEN IF THE BOARD WERE TO CONCLUDE THAT BRI IS ENTITLED TO DISCOVERY, IT SHOULD STAY DISCOVERY PENDING THE BOARD’S DECISION ON THE MOTION TO DISMISS.**

For the reasons stated above, the Board should deny BRI’s discovery requests altogether. Alternatively, should the Board decide that BRI is entitled to discovery, NS submits that the Board should stay discovery until it renders a decision on NS’s motion to dismiss. The Board has stayed discovery under similar circumstances. In Zoneskip, Inc. v. United Parcel Service, Inc., Docket No. 40519, 1991 MCC LEXIS 62 at \*6 (May 28, 1991), the Interstate Commerce Commission (“ICC”) stayed action on the complainant’s discovery motions and deferred all action in the proceeding until it had issued a decision on the respondents’ motion to dismiss. The ICC stated:

The motion to dismiss entered by UPS raises significant concerns about both the substantive and procedural soundness of the complaint and questions about the potential scope of this case. These concerns must be addressed and resolved before we can adequately assess the proper procedural direction of this case and render an informed decision about the pending discovery motions . . . [D]ispositive action on the pending motion to dismiss ‘ . . . may well preclude or substantially lessen the need for broad-based discovery’ . . . Our action on the pending UPS motion to dismiss, regardless of our ultimate resolution of the matter, may determine the appropriate scope of discovery, if any, and the appropriate procedures for conducting this proceeding.

As in Zoneskip, there is at least a serious question about the substantive soundness of BRI's Petition inasmuch as the Transaction Agreement makes clear that the BRI Facility is not within the NJSAA and BRI has not offered a legitimate basis for abrogating the express terms of the Transaction Agreement.

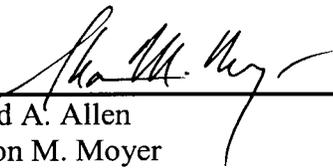
More recently, the Board has ordered that procedural issues including discovery be held in abeyance pending the Board's decision on whether to institute a show cause proceeding. See Paducah & Louisville Ry., Inc. – Control Exemption – Paducah & Illinois Railroad Co., Finance Docket No. 33362, 1999 STB LEXIS 407, at \*2 (July 8, 1999). The Board stated: “[A]ll procedural matters in this case proceeding were held in abeyance pending our decision whether to institute the requested show-cause proceeding. Both discovery and rebuttal statements become relevant only if we agree to institute the requested proceeding and establish a procedural schedule.” Likewise, if BRI's Petition is substantively deficient, as NS contends that it is in its motion to dismiss, then it follows that the Board should stay discovery because it would be mooted by the dismissal of the complaint.

With respect to the specific discovery requests, BRI has requested a substantial amount of information and documents related to a complex transaction completed several years ago. For a large company like NS, responding to that request is likely to be time consuming and require many man hours of work. Moreover, NS would likely object on relevancy and other grounds to the many of BRI's requests. Rather than engaging BRI and the Board in such disputes now, NS submits it would make more sense to hold discovery in abeyance in light of NS's motion to dismiss.

For the foregoing reasons, NS respectfully requests the Board to issue a protective order in this case quashing BRI's discovery requests or, in the alternative, staying discovery until the Board issues an decision on NS's motion to dismiss.

Respectfully submitted,

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*Attorneys for Norfolk Southern Corporation and  
Norfolk Southern Railway Company*

February 9, 2006

## CERTIFICATE OF SERVICE

I certify that on February 9, 2006, a true copy of "Norfolk Southern's Motion For Protective Order" was served by first class mail, postage pre-paid, or express mail upon:

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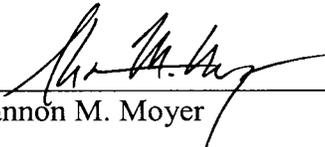
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No. 33388 on April 16, 1997. Their outside counsel and consultants have signed the “Undertaking-Highly Confidential Material” appended to the Protective Order, and their in-house employees who have a need to review materials designated as “Confidential” will sign the Undertaking-Confidential Material” appended to the Protective Order prior to reviewing any such materials.

**I.**  
**DEFINITIONS AND INSTRUCTIONS**

1. “BRI facility” means the rail-served waste transfer facility owned and operated by BRI located north of Port Reading Junction and south of Bound Brook Junction in Bridgewater Township, Somerset County, NJ.
2. “Communications” means communications by any means or medium, including but not limited to conversation, telephone conversation, meeting discussion, facsimile, e-mail or other electronic transmission, correspondence, memorandum and pleading.
3. “Conrail” means Conrail Inc. and Consolidated Rail Corporation, their present or former employees, agents, counsel, officers, directors, divisions, departments, predecessors and their subsidiaries, or any of them, and all other persons acting (or who have acted) on their behalf.
4. “CSX” means CSX Corporation, CSX Transportation, Inc., New York Central Lines LLC (“NYC”), their present or former employees, agents, counsel, officers, directors, advisors, consultants, divisions, departments, predecessors (including

but not limited to Conrail) and their subsidiaries, or any of them, and all other persons acting (or who have acted) on their behalf.

5. "Document(s)" means all writings or visual displays of any kind, whether generated by hand or mechanical means, including, without limitation, photographs, lists, memoranda, reports, notes, letters, phone logs, e-mails, contracts, drafts, workpapers, computer printouts, computer tapes, telecopies, telegrams, newsletters, notations, books, affidavits, statements (whether or not verified), speeches, summaries, opinions, studies, analyses, evaluations, statistical records, proposals, treatments, outlines, any electronic or mechanical records or representations (including physical things such as, but not limited to, computer disks), and all other materials of any tangible medium or expression, in NS's or Conrail's current or prior possession, custody or control. A draft or non-identical copy is a separate document within the meaning of this term.

6. "Final System Plan" means the Final System Plan defined in 45 U.S.C. § 702(8) and published by the United States Railway Association pursuant to 45 U.S.C. §§ 716 and 717.

7. "Identify," when referring to a document, means to give, to the extent known, the (i) type of document; (ii) general subject matter; (iii) date of the document; and (iv) author(s), addressee(s) or recipient(s).

8. "Identify," when referring to information, means to list or produce documents containing the specified information.

9. "NJSAA" means the North Jersey Shared Assets Area as described in the Surface Transportation Board's Decision No. 89 in the Conrail control proceeding (*CSX Corp., et al. – Control – Conrail Inc., et al.*, 3 S.T.B. 196 (1998)).

10. "NS means Norfolk Southern Corporation, Norfolk Southern Railway Company, Pennsylvania Lines LLC ("PRR"), their present or former employees, agents, counsel, officers, directors, advisors, consultants, divisions, departments, predecessors (including but not limited to Conrail) and their subsidiaries, or any of them, and all other persons acting (or who have acted) on their behalf.

11. "Person" means natural persons, corporations, institutions, partnerships, firms, joint ventures, associations, political subdivisions or other legal entities, as the case may be.

12. "Reading Connector" means the deactivated track or line of railroad, a/k/a the Reading Company New York Branch, a/k/a the Raritan Valley Connecting Track, and identified as Line Code 0326, that extended between a point of connection with the former Conrail Reading Line (now known as the Trenton Line) at or near Manville, NJ and a point of connection with the former Conrail (now NJ Transit) Raritan Valley Line at or near Bound Brook Junction, NJ.

13. "Related," "related to," and "relating to" mean and include making a statement discussing, describing, referring to, reflecting, explaining, analyzing, or in any way pertaining to, in whole or in part, the subject matter of the Interrogatory or Request.

14. "Split Date" means June 1, 1999, the date when the division of assets of Conrail by NS and CSX took place.

15. "And," "or," and/or "each" shall be construed in the disjunctive or conjunctive as necessary in order to bring within the scope of each Interrogatory or Request all responsive information or documents which otherwise might be construed as outside the scope of the Interrogatory or Request. All use of the masculine gender shall be deemed to include the feminine.

16. Unless a different time period is specified or otherwise implicated, (e.g., by reference to the Final System Plan), these discovery requests cover the period from and after January 1, 1994.

17. Unless otherwise expressly indicated, NS and Conrail are each requested to respond separately to each interrogatory and document production request.

18. If, in response to these requests, NS or Conrail produces documents in computer-readable format, for each computer file supplied provide:

- a. The name and description of the source database or other file from which the records in the computer file were selected;
- b. A description of how the records in the file produced were selected;
- c. The name, title and location of the individual (or contractor) responsible for developing the data responsive to the request;
- d. Each computer program (in native software and text file) and intermediate file used in deriving the files produced; and
- e. Any decoders needed to read or interpret the data in the file.

19. If an answer or the production of any responsive document is withheld under 49 C.F.R. § 1114.30(a)(1) on the basis of a claimed privilege or attorney work product, then for each such answer or document, provide the following information: its date, type (*e.g.*, letter, meeting, notes, memo, *etc.*), author (note if author is an attorney), addressee(s)/recipient(s) (note if addressee(s) or recipient(s) is an attorney), general subject matter, and basis for withholding the information. If the production of any requested document is withheld for claimed grounds other than privilege or attorney work product, state with specificity the basis for such withholding.

20. If a responsive document was, but is no longer in NS's or Conrail's possession, custody or control, describe what disposition was made of it.

21. In the event NS or Conrail objects to producing any documents on grounds that it does not maintain the information described in the form or format requested by BRI/ECDC, please produce the documents which contain such information in whatever form or format NS or Conrail does maintain such information.

## II. INTERROGATORIES

### Interrogatory No. 1:

Please identify the boundaries of the NJSAA in the vicinity of Port Reading Junction/Manville, Somerset County, NJ, including but not limited to a description of all tracks, yards, facilities, signals, signal and/or interlocking circuits, communications facilities and right-of-way or other land that are located within the NJSAA in the Port Reading Junction/Manville area.

**Interrogatory No. 2:**

Please indicate the point on the Lehigh Line (including the Royce Running Track) west of the switch connection between the Lehigh Line and the Trenton Line at Port Reading Jct. where Conrail's track and facilities maintenance obligation ends and NS's track and facilities maintenance obligation begins.

**Interrogatory No. 3:**

Please describe all shipper/receiver facilities for which switching service is (a) authorized to be provided and (b) actually provided by NS and/or Conrail from Manville Yard, including in each instance the name and location of the industry or facility involved and the rail carrier that performs the switching service

**Interrogatory No. 4:**

Please describe the present status and disposition of the Reading Connector, including but not limited to:

- a. The status and/or disposition of the line under the Final System Plan;
- b. Whether authority was sought and obtained from the ICC, STB or other governmental authority to abandon or discontinue service on the Reading Connector or any part thereof; and if so, the docket number, the date when the abandonment or discontinuance authority became final, and the date when the abandonment or discontinuance authority was exercised; and
- c. Whether the Reading Connector or any part thereof (including the underlying right-of-way) was sold or leased to another person(s), and if so, the date of the sale or lease, the name of the person(s) to which the property was sold or leased, and the specific property sold or leased.

**Interrogatory No. 5:**

Please describe (a) the date(s) when the private rail spur serving the BRI facility was completed and connected to the track known as the Royce Running Track constituting part of the former Conrail Lehigh Line in the vicinity of Port Reading Junction, and (b) whether (and the extent to which) any railroad property underlying or adjacent to the Royce Running Track (or any other track constituting part of or situated adjacent to the former Conrail Lehigh Line) was sold or leased to BRI or any other person (and if to another person, the name of such person).

**Interrogatory No. 6:**

Please describe the location of the line segment identified as the "GSA Lead" and described as extending from "NS Lehigh Line Conn." to "CSX Trenton Line" in the list of CRC Retained Assets on page 102 of Volume 8B of the Railroad Control Application in STB Finance Docket No. 33388, and what this line segment is used for.

**Interrogatory No. 7 (to Conrail only):**

Please state whether Conrail has provided switching service from within the NJCAA to any shipping or receiving facility that is local to NS or CSX under the Shared Assets Area Operating Agreement for North Jersey and/or any other agreements implementing the Conrail control transaction approved by the Board in Decision No. 89 in Finance Docket No. 33388 subsequent to the Split Date. If the answer to this question is affirmative, please identify (a) each facility to or from which switching service has been provided, including its location and the name of the shipper or receiver involved,

(b) the traffic switched, and (c) the name of the yard(s) or other points to or from which Conrail delivered or received the traffic to/from NS or CSX.

**Interrogatory No. 8:**

Please describe any communications with NJ Transit related to the possible restoration of commuter rail service between West Trenton, NJ and a connection with NJ Transit's Raritan Valley Line near Bound Brook Junction, NJ, including but not limited to communications related to: (a) the construction of an at-grade railroad crossing of a restored Reading Connector or other NJ Transit track(s) and the former Conrail Lehigh Line in the vicinity of Port Reading Junction; (b) the construction of a flyover or overpass that would carry a restored Reading Connector or other NJ Transit track(s) over the former Conrail Lehigh Line in the vicinity of Port Reading Junction; and (c) the future provision of rail freight service to the BRI facility.

**III.**  
**DOCUMENT PRODUCTION REQUESTS**

**Request for Production No. 1:**

Please produce all documents related to the establishment of the boundaries of the NJSAA in the vicinity of Port Reading Junction/Manville, NJ.

**Request for Production No. 2:**

Please produce all documents defining the boundaries of the NJSAA in the vicinity of Port Reading Junction/Manville, NJ, including but not limited to the following:

- a. color-coded maps or schematics showing railroad lines in New Jersey north of Trenton prepared and/or used by CSX, NS and/or

Conrail in connection with CSX's and NS's agreement to divide the assets of Conrail and establish the NJSAA;

- b. maps, schematics or other documents identifying the specific cut points establishing the limits of the NJSAA in the vicinity of Port Reading Junction/Manville, NJ;
- c. maps, schematics or other documents identifying (1) the rail lines in the vicinity of Port Reading Jct./Manville/Bound Brook Jct., NJ but located outside the limits of the NJSAA that are subject to any form of trackage or operating rights, and (2) which carrier(s) have such rights over which specific lines;
- d. maps, schematics or other documents identifying customer rail shipping and receiving facilities located within the NJSAA in the vicinity of Bound Brook, Bound Brook Junction, Port Reading Junction and Manville, NJ; and
- e. maps, schematics or other documents identifying which rail carrier(s) would have and/or have had the ability to physically serve each customer rail shipping and receiving facility identified in response to (d) above (including without limitation the BRI facility) after the Split Date.

**Request for Production No. 3:**

Please produce all documents related to the sale, lease, abandonment or other disposition of:

- a. the Reading Connector or any part thereof (including but not limited to treatment or disposition thereof under the Final System Plan); and
- b. the line(s) of railroad or track(s) described in Interrogatory No. 5 above, including but not limited to a deed from Conrail to Joseph Horner dated on or about August 24, 1995.

**Request for Production No. 4:**

Please produce all documents related to any communications described in your answer to Interrogatory No. 8 above.

**Request for Production No. 5:**

Please produce a copy of the current Local Movement Guidelines as described in Sections 1(aa) and 3(a)(v) of the Applicants' Shared Assets Area Operating Agreement for North Jersey.

**Request for Production No. 6:**

Please produce copies of the current track charts or condensed profiles for the portion of the Lehigh Line and related trackage (including but not limited to the Royce Running Track and the Royce Spur) located between the approach signals for the interlocking at Port Reading Jct.

**Request for Production No. 7:**

Please produce copies of property or valuation maps showing the current property ownerships, rights-of-way and leaseholds for the railroad-owned portion of the Lehigh Line and related trackage described in Request for Production No. 6 above.

BRIDGEWATER RESOURCES, INC.  
and ECDC ENVIRONMENTAL, L.L.C.

OF COUNSEL:

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Dated: January 20, 2006

Their Attorneys

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BY HAND DELIVERY

The Honorable Vernon A. Williams  
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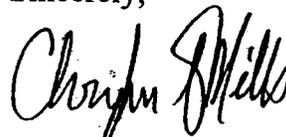
Re: Finance Docket No. 33388 (Sub-No. 100)  
CSX Corporation, et al.— Control and Operating Leases/Agreements  
— Conrail Inc., et al. (Petition for Supplemental Order)

Dear Secretary Williams:

Enclosed for filing in the above-referenced proceeding are the original and ten copies of Bridgewater Resources, Inc.'s and ECDC Environmental, L.L.C.'s Petition for Clarification Or In the Alternative for Supplemental Order – North Jersey Shared Assets Area. Also enclosed are a check for \$200.00 to cover the filing fee for the Petition, and a CD containing the text of the Petition including the supporting Verified Statement of Paul H. Reistrup in WordPerfect 8.0 format.

Kindly acknowledge receipt of these materials by date-stamping and returning the enclosed extra copy of this letter to our messenger.

Sincerely,



Christopher A. Mills

CAM:dmb  
Enclosures

cc: David M. Konschnik (STB Office of Proceedings)  
Service List per Certificate of Service