

STB

FD

33388

(Sub 10

9-11-97

D

181920

181920

# STEPTOE & JOHNSON LLP

ATTORNEYS AT LAW

1330 CONNECTICUT AVENUE, N.W.  
WASHINGTON, D.C. 20036-1795

PHOENIX, ARIZONA  
TWO RENAISSANCE SQUARE

TELEPHONE: (602) 257-5200  
FACSIMILE: (602) 257-5299  
DAVID H. COBURN  
(202) 429-8063

(202) 429-3000

FACSIMILE: (202) 429-3902

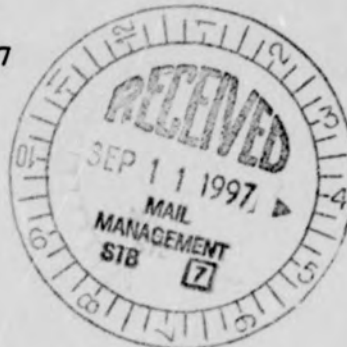
TELEX: 89-2503

STEPTOE & JOHNSON INTERNATIONAL  
AFFILIATE IN MOSCOW, RUSSIA

TELEPHONE: (011-7-501) 258-5250  
FACSIMILE: (011-7-501) 258-5251

September 11, 1997

The Honorable Vernon A. Williams  
Secretary  
Surface Transportation Board  
1925 K Street, N.W.  
Washington, D.C. 20423



Re: Finance Docket No. 33388, (Sub No. 1)  
CSX Transportation, Inc. -- Construction  
and Operation Exemption - Connection  
Track at Crestline, OH

Dear Secretary Williams:

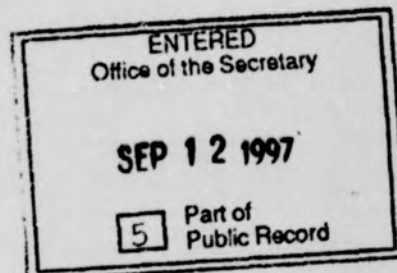
Enclosed please find an original and 25 copies of CSX-24, CSX's Reply to Allied Rail Union's Petition to Stay Verified Notice of Exemption. A diskette in word perfect format has also be enclosed.

Kindly date stamp the enclosed additional copy of this document at the time of filing and return it to our messenger.

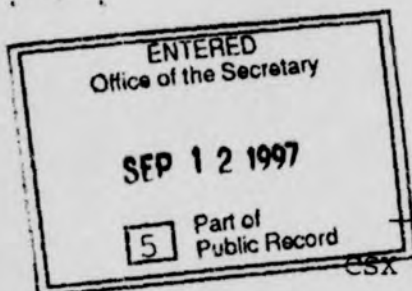
Respectfully yours,

David H. Coburn

Enclosures



181920



BEFORE THE  
SURFACE TRANSPORTATION BOARD



CSX CORPORATION AND CSX TRANSPORTATION, INC.  
NORFOLK SOUTHERN CORPORATION AND  
NORFOLK SOUTHERN RAILWAY COMPANY --  
CONTROL AND OPERATING LEASES/AGREEMENTS -- STB [7]  
CONRAIL INC. AND CONSOLIDATED RAIL CORPORATION

STB FINANCE DOCKET NO. 33388 (Sub No. 1)

CSX TRANSPORTATION, INC. - CONSTRUCTION AND OPERATION  
EXEMPTION - CONNECTION TRACK AT CRESTLINE, OH

**CSX'S REPLY TO  
ALLIED RAIL UNIONS' PETITION TO STAY  
VERIFIED NOTICE OF EXEMPTION FOR CONSTRUCTION  
OF CONNECTING TRACK AT CRESTLINE, OHIO**

CSX Corporation and CSX Transportation, Inc. ("CSX") hereby reply to the August 22, 1997 petition to stay the Verified Notice of Exemption for construction of a connection at Crestline, Ohio filed by the Allied Rail Unions ("ARU"). That Petition should be rejected because it is untimely and, if it is accepted for filing, it should be denied because it is entirely without merit.

**BACKGROUND**

On May 2, 1997, Applicants<sup>1</sup> filed petitions (CSX-1) and (NS-1) seeking waiver of the related applications rule with respect to petitions and notices to be filed for seven construction projects related to the proposed acquisition of control of Conrail and allocation of the use of its assets. The

<sup>1</sup> Applicants are CSX, Norfolk Southern Corporation and Norfolk Southern Railway Company ("NS") and Conrail Inc. and Consolidated Rail Corporation ("Conrail").

subject of these petitions and notices was the construction of connections that are designed to link the CSX and NS systems with the Conrail system and facilitate the ability of CSX to compete with NS, and vice-versa, on the first day following any Board approval of the overall transaction. As the waiver petitions explained, these connecting track projects are essential to the ability of CSX and NS to compete with one another because, absent construction of the connections, each railroad would confront serious physical barriers in contrast to the other railroad on certain vital routes.

Over the objections of ARU, among others, the Board granted the waiver petitions in Decision No. 9 to allow the Applicants to seek exemption for the construction of the connections separate from consideration of the overall transaction, subject to the completion of environmental review of the impacts of the construction of each of the connections.<sup>2</sup> The Board recognized that, "It is understandable that applicants want to be prepared to engage in effective, vigorous competition immediately following consummation of the control authorization that they intend to seek in the primary application." The Board also recognized that in constructing the connections prior to the grant, if any, of the control application, the Applicants were assuming the financial risk that that application might not be granted.

---

<sup>2</sup> Operations over the connection could commence, however, only following the completion of the environmental review process for the entire transaction.

On June 23, 1997, concurrent with the filing of the Primary Application, CSX and Conrail filed a Verified Notice of Exemption under the class exemption provided by 49 C.F.R. 1150.36 with respect to the construction on existing railroad right of way of a connection between two Conrail lines at Crestline, Ohio. By notice served July 11, 1997 in this Sub No. 1 proceeding, the Board provided public notice of the filing of the Verified Notice of Exemption and stated that the exemption would become effective on September 19, 1997, unless stayed. The July 11 notice also provided, consistent with the deadlines established in the class exemption rules, that "Petitions to stay the effective date of this notice on any grounds must be filed by July 21, 1997."<sup>3</sup>

#### **REPLY ARGUMENT**

ARU's Petition to Stay the Verified Notice of Exemption was filed on August 22, 1997, over one month after the date for filing such petitions ordered by the July 11 notice issued in this sub docket. ARU offers no excuse for missing this fixed deadline by over one month and has filed no motion seeking relief from the July 21 deadline. ARU's delay in filing its Petition is unjustifiable, particularly in view of the Board's recognition of the legitimate need to undertake this and other "first day" construction projects as quickly as the regulatory process will permit in order to facilitate CSX's ability to compete with NS

---

<sup>3</sup> The Board also made the commencement of construction subject to the completion of environmental review and required the submission of a Preliminary Draft Environmental Analysis.



upon Board approval, if any, of the Primary Application. For that reason alone, the Petition should be summarily rejected.

Were the Board inclined to accept the ARU Petition for filing, however, it should find that the ARU Petition is devoid of merit and deny the requested stay. ARU appears to argue that CSX cannot make use of the section 1150.36 class exemption procedure for the construction of connecting track on rail right of way because CSX does not own the right of way between the two Conrail lines on which the connection is to be constructed. What this argument overlooks (among other things) is that ownership of the right of way on which the construction is to occur is not an essential, or even relevant, element to the right to invoke the section 1150.36 class exemption for construction of connecting tracks. Rather, the notice exemption procedure provided for by that section applies if the construction project is to take place "within existing rail rights-of-way, or on land owned by connecting railroads" -- which is precisely the case with the project at issue. See 49 C.F.R. 1150.36(a).

The class exemption is based on the indisputable proposition that construction that occurs entirely on rail property does not generally give rise to issues warranting regulatory consideration. See Ex Part No. 392 (Sub No. 2), Class Exemption for the Construction of Connecting Track Under 49 U.S.C. 10901, 1996 W.L. 316448 (served June 13, 1996) (finding that construction of connecting tracks is consistent with a variety of Rail Transportation Policy goals and generally of limited scope, thus meeting the criteria for exemption in 49

U.S.C. 10502).<sup>4</sup> Whether CSX owns the right of way over which the Crestline connection is to be built is simply not relevant to its ability to invoke the class exemption relied upon here.

Further, wholly apart from the fact that the class exemption is applicable, regulation of the construction of the Crestline connection under section 10901 is not necessary to carry out the rail transportation policy because that connection will, if the Primary Application is granted, plainly facilitate the efficient operation of the national rail system, enhancing the orderly, safe and competitive transportation of freight by rail.<sup>5</sup> Exemption of the construction of the Crestline connection at this time is important, because it will allow competitive rail operations to begin immediately upon approval, if any, of the Primary Application. And there can be no legitimate doubt that this 1,507 foot connection project is of "limited scope," thus satisfying the other test of exemption under section 10502.

ARU also suggests that the Verified Notice demonstrates that CSX is exercising unlawful control of Conrail. This

---

<sup>4</sup> In adopting the class exemption, the Board found that exempting the construction of connecting track serves the 49 U.S.C. 10101 rail transportation goals to, e.g., "minimize the need for Federal regulatory control over the rail transportation system," "provide for expeditious handling and resolution of all proceedings," "ensure the development and continuation of a sound rail transportation system," "ensure effective competition and coordination between rail carriers and other modes," and "encourage and promote energy conservation."

<sup>5</sup> Further, operations over the connections will be considered together with the primary application. Certainly, the mere construction of a connection over which operations cannot yet begin does not warrant full regulatory review.

assertion, which is simply wrong, is offered without coherent explanation. The Verified Notice of Exemption filed in this subdocket does not implicate any control issues. As stated in its May 2, 1997 Petition for Waiver, construction of this and other connections "would be entirely at CSX's expense." (CSX-1 at 11.) Further, each carrier has made its own independent assessment of the benefits to it of constructing the Crestline connection and each has agreed to the project based on those benefits. In these circumstances, there is no basis for implying that one carrier controls the other.<sup>6</sup>

ARU's concerns about Board prejudgment of the Primary Application are also far afield. The Board has already addressed these concerns in Decision No. 9. Thus, no expanded discussion of this issue is necessary here. The Board has made very clear that its action on this relatively minor (in scale) project will not have any bearing on its determination of whether the transaction contemplated in the Primary Application is in the public interest.

---

<sup>6</sup> Indeed, in its extensive (and unfounded) petition for declaratory order regarding its claim that CSX and NS have attained unlawful control of Conrail (ARU-5), ARU never suggested that the filing of the Verified Notice of Exemption with respect to the Crestline connection implicates any control issues.



CONCLUSION

For all of the above reasons, the Verified Notice of Exemption should not be stayed.

Respectfully submitted,

*Dennis G. Lyons*  
DENNIS G. LYONS  
JEFFREY A. BURT  
DREW A. HARKER  
JODI DANIS  
Arnold & Porter  
555 12th Street, N.W.  
Washington, D.C. 20004-1202  
(202) 942-5000

MARK G. ARON  
PETER J. SHUDTZ  
CSX CORPORATION  
One James Center  
East Cary Street  
Richmond, VA 23129  
(804) 782-1400

P. MICHAEL GIFTOS  
PAUL R. HITCHCOCK  
CSX Transportation, Inc.  
500 Water Street  
Speed Code J-120  
Jacksonville, FL 32202  
(904) 359-3100

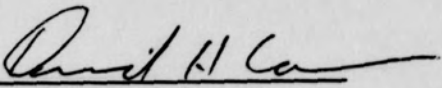
SAMUEL M. SIPE, JR.  
TIMOTHY M. WALSH  
DAVID H. COBURN  
STEPTOE & JOHNSON LLP, N.W.  
1330 Connecticut Avenue, N.W.  
Washington, D.C. 20036-1795  
(202) 429-3000

Counsel for CSX Corporation  
and CXS Transportation, Inc.

CERTIFICATE OF SERVICE

I, David H. Coburn, certify that on September 11, 1997, I have caused to be served by first-class mail, postage prepaid, or by more expeditious means, a true and correct copy of the foregoing CSX-24, CSX's Reply to Allied Rail Union's Petition to Stay Verified Notice of Exemption, on all parties that have appeared in STB Finance Docket No. 33388 and by hand delivery on the following:

The Honorable Jacob Leventhal  
Administrative Law Judge  
Federal Energy Commission  
Office of Hearings  
825 North Capitol Street, N.E.  
Washington, D.C. 20426

  
David H. Coburn

Dated: September 11, 1997

STB

FD

33388

(Sub 1)

7-14-97

D

180611



# Ohio Rail Development Commission

50 West Broad Street, Suite 1510 • Columbus, Ohio 43215 • 614.644.0306 phone • 614.728.4520 fax

July 7, 1997

Office of the Secretary  
Case Control Branch  
ATTN: STB Finance Docket No. 33388  
Surface Transportation Board  
1925 K Street, N.W., Washington, D.C. 20423-0001



**RE: STB Finance Docket No. 33388**  
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

The Ohio Rail Development Commission (ORDC) requests to be on the service list for all information impacting Ohio, including Petitions for Exemption, Sub- NO. 1, Sub-No. 3, Sub-No. 4, and Sub-No. 7.

Twenty-five copies of this request and a formatted diskette in WordPerfect 6.1 accompany this letter. You may serve us at the following address:

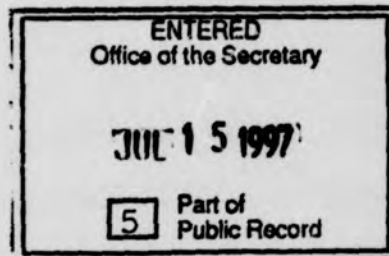
Thomas M. O'Leary, Executive Director  
Ohio Rail Development Commission  
50 W. Broad Street, 15th Floor  
Columbus, OH 43215.

If you have any questions you may contact me or Lou Jannazo at 614-644-0306. Thank you very much.

Respectfully,

*Thomas M. O'Leary*  
Thomas M. O'Leary  
Executive Director

TMO/LJ/LN  
enclosures



## Certificate of Service

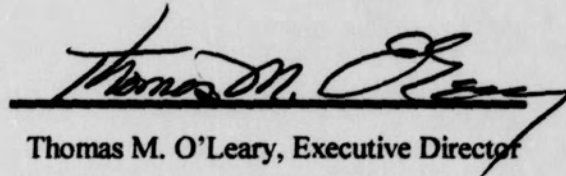
I, Thomas M. O'Leary, hereby certify that the following persons were served the attached letter by first class mail:

Administrative Law Judge Jacob Leventhal  
Federal Energy Regulatory Commission  
888 First St., N.E. Suite 11F  
Washington, D.C. 20426

Dennis G. Lyons, Esq.  
Arnold & Porter  
555 12th St., N.W.  
Washington, D.C. 20004-1202

Richard A. Allen, Esq.  
Zuckert Scoutt & Rasenberger, LLP  
Suite 600, 888 Seventeenth St., N.W.  
Washington, D.C. 20006-3939

Paul A. Cunningham, Esq.  
Harkins Cunningham  
Suite 600, 1300 Nineteenth St., N.W.  
Washington, D.C. 20036



Thomas M. O'Leary, Executive Director



STB

FD

33388

(Sub

1)

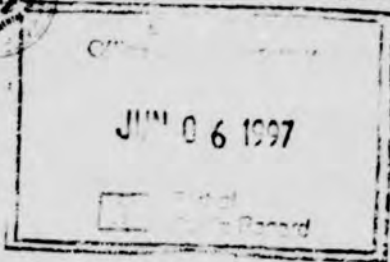
6-4-97

D

180565

180565

EXECUTIVE OFFICE OF THE PRESIDENT  
COUNCIL ON ENVIRONMENTAL QUALITY  
WASHINGTON, D.C. 20503



June 4, 1997

D



Office of the Secretary  
Case Control Unit  
ATTN: STB Finance Docket No. 33388 - Sub 2  
Surface Transportation Board  
1925 K Street, N.W.  
Washington, D.C. 20423

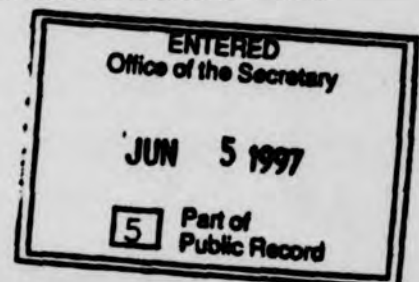
Dear Office of the Secretary,

The following comments are in response to the Surface Transportation Board's request for comments regarding the CSX-1 and NS-1 waiver petitions filed in connection with the proposed merger between CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company.

CSX and Norfolk (Applicants) requested waivers of the requirements of 49 C.F.R. 1180.4(c)(2)(vi) for seven connections so that construction of these connections could be begin immediately and be completed by the time the Surface Transportation Board (Board) issued a decision on the "primary application," the decision to approve the proposed merger and allow operation. In its Notice of Proposed Rulemaking (NPR), the Board indicated that it would be inclined to allow these waivers, given the Applicants' understanding that the Board's decision on the waivers in no way affected its decision on the primary application. In other words, the Board suggested it would be willing to allow construction of these connections, at the Applicants' own risk, reserving judgment on the primary application until a later time. If, at that time, the Board decides not to approve the primary application, all construction completed will have been in vain, and any costs associated with that construction would be born entirely by the Applicants.

The Council on Environmental Quality (CEQ) advises the Board against bifurcating the decisions in this way. It appears that the decision to grant the proposed waivers (waiver decision) and the decision on the primary application (operation decision) are "connected actions," two phases of a single overall action - the approval of a merger. Therefore, these two decisions should be assessed at the same time so that the environmental impacts of operating these rail lines, augmented by the new connections, can be properly evaluated. In reaching this conclusion, CEQ relies on its own regulations implementing the National Environmental Policy Act and on relevant case law, as discussed below.

Recycled Paper



### CEQ Regulations

CEQ regulations at 40 C.F.R. sec. 1508.25(a)(1) state that when actions are "closely related," they "should be discussed in the same impact statement." "Connected actions" are further defined as those that "(i) Automatically trigger other actions which may require environmental impact statements. (ii) Cannot or will not proceed unless other actions are taken previously or simultaneously. (iii) Are interdependent parts of a larger action and depend on the larger action for their justification." 40 C.F.R. sec. 1508.25(a)(1)(i)-(iii). According to the Board's NPR, if the Board granted the proposed waivers, the Board would still conduct an "environmental review" before allowing construction. Further, the Board would also conduct a separate "environmental review process" with regard to the operation decision. While the construction decision does not actually "trigger" the operation decision, the latter necessarily follows the former and both will require environmental analysis eventually. Because the Applicants have requested the waivers so that they can complete the proposed construction by the time the operation decision is made, it seems implicit that if the Board grants the proposed waivers, it will not take action on the operation decision until that construction is complete, or at least not until it is approved. If this is the case, the operation decision will not proceed until the construction decision has been made. Further, there is nothing in the NPR to indicate that the Applicant's have any other use for the connections. Therefore, the Applicants are necessarily dependent on the final operation decision to justify the construction of the connections. As the above analysis demonstrates, the Board's proposed construction and operation decisions fall within CEQ's definition of "connected actions" and thus, should be discussed in the same environmental impact statement in accordance with 49 C.F.R. sec. 1508.25(a)(1).

In addition, bifurcation of these related decisions appears to conflict with 40 C.F.R. sec. 1506.1(c)(3) which prohibits agencies from taking actions that will "prejudice the ultimate decision" in a programmatic EIS. The regulation defines an action that prejudices the ultimate decision as one that "tends to determine subsequent development or limit alternatives." 40 C.F.R. sec. 1506.1(c)(3). Although the proposed merger does not involve a programmatic EIS, the bifurcation of the proposed waiver and operation decisions compromises the spirit of sec. 1506(c)(3). If the Board grants the proposed waiver and subsequently approves the construction, the likelihood that the Board will deny the merger application tends to decrease, thereby possibly foreclosing that alternative when the operation decision is made. Further, given that the construction of the connections seems to be of paramount importance to the Applicants, the decision to grant the waiver may prejudice the decision to approve the construction long before the Board resolves the operation decision. In this light, it seems that the proposed waiver may in fact tend to determine subsequent development by prejudicing the decision to approve construction. These potential results are exactly the type that section 1506.1(c)(3) attempts to avoid.

### Case Law

Courts have recognized the need to prepare a comprehensive EIS when actions are functionally or economically related in order to prevent projects from being improperly segmented. In Swain v. Brinegar, 542 F. 2d 364 (7th Cir. 1976), the Seventh Circuit Court of

Appeals noted two distinct problems associated with segmentation of highway projects. As the court put it, "First, the project can be divided into small segments; although the individual environmental impact might be slight, the cumulative consequences could be devastating. Second, the location of the first segment may determine where the continuation of that roadway is to be built." 542 F. 2d at 368. In the latter case, the EIS on the continuation would be nothing more than a "formal task" because the placement decision would have been made. *Id.* at 368-369. These are the same concerns addressed by the CEQ regulations, discussed above. "Connected actions" should be evaluated together in order to avoid segmented or piecemeal environmental analysis, and actions that prejudice ultimate decisions are prohibited in order to avoid reducing EIS analysis to mere "formal tasks."

In Swain, petitioners argued that an EIS which focused only on a fifteen mile segment of a forty-two mile highway project was inadequate and that a proper EIS should address impacts of the entire forty-two mile highway. The court applied three factors for determining the proper scope of related projects: "1) Does the proposed segment have a substantial utility independent of future expansion? 2) Would its construction foreclose significant alternative routes or locations for an extension from the segment? 3) If, as here, the proposed segment is part of a larger plan, has that plan become concrete enough to make it highly probable that the entire plan will be carried out in the near future?" 542 F. 2d at 369. The court concluded that 1) the fifteen mile segment had no independent utility because it was part of a larger highway, 2) once complete, the fifteen mile segment would effectively limit the choices for building any further expansion, and 3) the larger highway project was an ongoing one which would eventually connect to other similar projects that were also currently underway. *Id.* at 370. In the eyes of the court, the fifteen and forty-two segments were really just two components of one enterprise. *Id.* The three-part test established by Swain established the so-called "independent utility" test and provided the basis for decisions in later highway segmentation cases.<sup>1</sup> The Fifth Circuit Court of Appeals has stated this "independent utility" test quite succinctly, saying, "If proceeding with one project will, because of functional or economic dependence, foreclose options or irretrievably commit resources to future projects, the environmental consequences of the project should be evaluated together." Fritiofson v. Alexander, 772 F. 2d 1225, 1241, n. 10 (5th Cir. 1985).

Although this "independent utility" test has been applied primarily to highway cases, which have their own unique characteristics, much of the language used by the courts is analogous to the proposed merger. These applications involve actions that are functionally and economically interdependent because 1) the Applicants appear to view the construction of the connections as critical to the success of the merger and 2) if approved, the connections will become part of the overall railroad merger that is to be evaluated in the operation decision. Viewing the operation and waiver decisions as related decisions, the question becomes 1) whether the waiver (and subsequent proposed construction) has substantial utility independent of the ability to operate the

---

<sup>1</sup> See e.g., Piedmont Heights Civic Club, Inc. v. Moreland, 637 F. 2d 430 (5th Cir. 1981); Coalition on Sensible Transportation, Inc. v. Dole, 826 F. 2d 60 (D.C. Cir. 1987).



railway; 2) whether granting the waiver (along with approving the construction) would foreclose significant alternatives to allowing operation when the operation decision is ultimately made; 3) whether the proposed merger has become concrete enough to make it highly probable that the merger will be carried out.

First, as to independent utility, the NPR does not indicate whether the Applicants will have any use for the connections outside the context of the proposed merger. Second, although the Board states that its decision to grant the waivers would not in any way constitute approval of, or even consideration of, the operation decision, the addition of seven new facilities changes the dynamic of the operation decision because the addition of the completed connections changes the information on which the Board will rely in making the operation decision. In short, the addition of the new connections, which the Board must take into account when making its operation decision, seems to make it more highly probable that the proposed operation and merger (the larger action) will be carried out.

Following Swain, other courts have focused primarily on the independent utility prong of the three-part test used in Swain. In Thomas v. Peterson, 753 F. 2d 754 (9th Cir. 1985), the Ninth Circuit Court of Appeals held that a Forest Service EIS on a logging road was required to include analysis of the timber sales that would follow from the construction of that road. As the court stated, "it is clear that the timber sales cannot proceed without the road, and the road would not be built but for the contemplated timber sales." 753 F. 2d at 758. Therefore, the road and timber sales were "connected actions," inextricably intertwined. *Id.* As the court stated, "an EIS must cover subsequent stages when 'the dependency is such that it would be irrational, or at least unwise, to undertake the first phase if subsequent phases were not also undertaken.'" *Id.*, quoting Trout Unlimited v. Morton, 509 F. 2d 1276 (9th Cir. 1974). Finally, formally acknowledging the "independent utility" test, the court said that "the phrase 'independent utility' means utility such that the agency might reasonably consider constructing only the segment in question." *Id.* at 760. In Thomas, the court did not think it would be reasonable for the Forest Service to build a logging road and then not use it for logging.

It appears as though the same reasoning set forth in Thomas is applicable here. It could certainly be seen to be equally inefficient for the Board to grant the waiver, approve the construction, and then deny the primary operation application, conducting separate and cumulative environmental analyses along the way. Consequently, the Board's decision to grant the waiver (and subsequent approval of construction) has the potential to make the approval of the merger more probable. That the Applicants are willing to risk the Board's eventual disapproval of the merger does not remove the interdependence of these individual decisions.

In summary, CEQ believes that the Surface Transportation Board would be well advised, for purposes of compliance with NEPA, to consider analysis of the proposed construction and operation together. We would be happy to discuss this matter further if it would be helpful.



Sincerely,

*Dinah Bear*

Dinah Bear  
General Counsel

STB

FD

33388

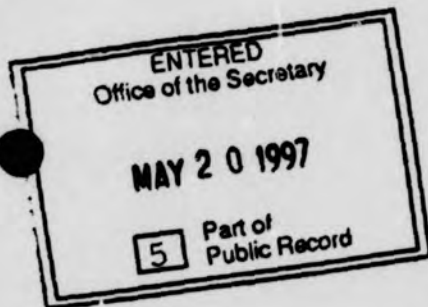
(Sub

1

5-20-97

D

180544



BEFORE THE  
SURFACE TRANSPORTATION BOARD

Finance Docket No. 33388-  
*Swt*



CSX Corporation and CSX Transportation, Inc.,  
Norfolk Southern Corp. and Norfolk  
Southern Ry. Co.--Control and Operating  
Leases/Agreements--Conrail Inc.  
and Consolidated Rail Corporation  
Transfer of Railroad Line by Norfolk  
Southern Railway Company to CSX Transportation, Inc.

**ALLIED RAIL UNIONS' REQUEST FOR LEAVE TO FILE  
REPLY IN OPPOSITION TO PETITION FOR WAIVER  
OR CLARIFICATION OF RAILROAD CONSOLIDATION PROCEDURES  
AND REPLY IN OPPOSITION TO PETITIONS FOR WAIVER  
OF 49 CFR §1180.4(c)(2)(vi)**

INTRODUCTION

On May 2, 1997, Applicants, CSX Corp. and its subsidiaries ("CSX"), and Norfolk Southern Corp. and its subsidiary ("NSC"), filed a petition for waiver or clarification of various aspects of the filing requirements applicable to their effort to acquire control of the Consolidated Rail Corp. ("Conrail") under the Boards' Railroad Consolidation Procedures. The Allied Rail Unions ("ARU")<sup>1</sup> oppose this petition for waiver/clarification

<sup>1</sup> American Train Dispatchers Department/ATD; Brotherhood of Locomotive Engineers; Brotherhood of Maintenance of Way Employees; Brotherhood of Railroad Signalmen; Hotel Employees and Restaurant Employees International Union; International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers; International Brotherhood of Electrical Workers; The National Conference of Firemen & Oilers/SEIU; and Sheet Metal Workers' International Association.

With respect to the request that the Board authorize the Applicants to "use November 1996 to create the base line for rail carrier employees covered by collective bargaining agreements" in developing their statements as to the impact on the CSX/NS acquisition of control/division of Conrail ("Transaction") on employees of the carriers involved. Petition for Waiver or Clarification (CSX/NS-10) at 23. The ARU opposes this request of the Applicants because it would be highly prejudicial to employees of the railroads involved, especially those represented by the Brotherhood of Maintenance of Way Employees ("BMWE").

The ARU recognizes that the Board's rules ordinarily do not permit replies to petitions for waivers (49 C.F.R. §1180.4(f)(3)), however, as is apparent from the arguments set forth below and the attached declarations, a grant of the requested waiver with respect to the base line for employment figures would have such a significant impact on railroad employees that they should be allowed to submit this reply.

As is shown in the declarations of various BMWE General Chairmen that are attached hereto, many maintenance of way jobs begin in late winter and end in the late fall, so late fall and early winter are low points in maintenance of way employment. Among the reasons that the employment figures in the maintenance of way craft are low in November are furloughs because of weather conditions, furloughs because the programmed work of large

production gangs often ends in late fall, and furloughs because maintenance of way budgets tend to run out at the end of the calendar year. See Declarations of J. D. Knight ¶4, Jed Dodd ¶4 and Perry Geller ¶4.<sup>2</sup> This means that November employment figures are typically significantly lower for the maintenance of way craft than figures for the rest of the year; employment figures for November are therefore not reflective of the actual number of employees working in the craft during the year. Consequently, use of November 1996 as a base year would result in an understatement of the difference between employment prior to the transaction and projected employment after the Transaction. *Id.*

The ARU notes that Applicants have stated (CSX/NS-10) that use of November 1996 figures would result in "figures which would not be affected by seasonal fluctuations", thereby suggesting that their request is motivated by a desire to provide accurate employment numbers. However, they have failed to acknowledge that the fluctuations that they cite involve a reduction in the statement of maintenance of way employment and an actual undercount of maintenance of way employees for the base line

---

<sup>2</sup> Copies of the Knight, Dodd and Geller declarations are attached hereto as Attachments A, B and C. Because these individuals were away from their offices last week, the ARU is providing photocopies of the declarations which were signed by Messrs. Knight, Dodd and Geller. The signed originals will be filed with the Board as soon as they are received by ARU's counsel.



calculation. Consequently, the figures produced with such a base line will not be more accurate; they will be below actual employment levels and thus inaccurate.

Applicants have asserted that the ICC granted "analogous requests from applicants wishing to deviate from the base year requirements set out in the regulations" CSX/NS-10 at 23 n.23, citing *Illinois Central Corp--Common Control--Illinois Central R.R. Co.*, F.D. No. 32556 (Served October 17, 1994); and *Illinois Central Corp--Control--Midsouth Corp.*, F.D. No. 31801 (served February 22, 1991). However, as the Applicants' discussion of those cases demonstrates, the requests in those cases did not involve employee impact statements. Furthermore, neither decision authorized the use of data from a single month as a base line for any information (one case involved use of a split year rather than a full calendar year, and the other allowed substitution of data from a prior year where data from the specified base line year was unavailable). Moreover, it does not appear that the requests of the applicants in those cases had the type of substantive impact on the data involved as would the request of the Applicants here. Although Applicants carefully used the word "analogous" rather than the word "similar" to describe the relationship between this case and the cases on which they rely, it is apparent that the word that best describes that relationship is "different".

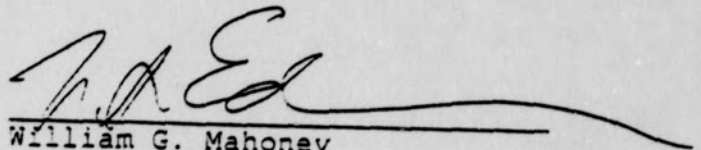
The understatement of employee impact which would result from the waiver/clarification sought in CSX/NS-10 would be prejudicial to BMW members because it would allow CSX and NS to minimize the impact of the Transaction on employees. Knight Declaration ¶5, Dodd Declaration ¶5 and Geller Declaration ¶5. Additionally, use of November figures for a base line suggests that workers who are furloughed in the fall are not actually affected by the Transaction because they are not counted in the employee impact statement. This could adversely affect BMW members in post-Transaction employee protection proceedings. *Id.* In this regard, it is especially troubling that Applicants have suggested that use of November 1996 figures would be more accurate than some other base line figures.

The ARU further submits that if the Board believes that it is appropriate to use a single month as its base line for setting forth the impacts of the Transaction on employees, the Board should designate July of 1996 as the base line. As the BMW General Chairmen explain, Knight Declaration ¶6, Dodd Declaration ¶6, Geller Declaration ¶6, use of July 1996 employment figures would insure that all employees who have an employment relationship with the involved carriers are counted in the employee impact statement, and that employees who may be furloughed in November are not at a disadvantage in connection with post-Transaction employee protective proceedings.

CONCLUSION

For all the foregoing reasons, the ARU should be granted leave to file this reply and the Board should deny the CSX/NS petition for waiver or clarification of the filing requirements applicable to their effort to acquire control of Conrail with respect to the use November 1996 as a base line for the statements as to the impact of the Transaction on employees of the carriers involved.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read 'W. G. Mahoney', is written over a horizontal line.

William G. Mahoney  
Richard S. Edelman  
L. Pat Wynns  
HIGHSAW, MAHONEY & CLARKE, P.C.  
1050 17<sup>th</sup> Street, N.W., Ste. 210  
Washington, D.C. 20036  
(202) 296-3500

Date: May 20, 1997

CERTIFICATE OF SERVICE

I hereby certify that I have caused to be served one copy of Allied Rail Unions; Request For Leave To File Reply In Opposition To Petition For Waiver Or Clarification Of Railroad Consolidation Procedures And Reply In Opposition To Petitions For Waiver Of 49 CFR \$1180.4(c)(2)(vi), by hand delivery to the offices of the following:

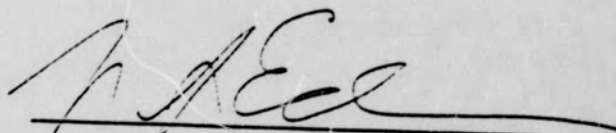
Richard A. Allen  
ZUCKERT, SCOUTT ET AL.  
888 17th Street, N.W.  
Suite 600  
Washington, D.C. 20006-3939

Paul A. Cunningham  
HARKINS CUNNINGHAM  
1300 19th Street, N.W.  
Suite 600  
Washington, D.C. 20036

Dennis G. Lyons  
ARNOLD & ORTER  
555 12<sup>th</sup> Street, N.W.  
Washington, D.C. 20004-1202

and by first-class mail, postage prepaid, to the offices of the parties on the attached list.

Dated at Washington, D.C. this 20<sup>th</sup> day of May, 1997.

  
Richard S. Edelman

• **ATTACHMENT A**



BEFORE THE  
SURFACE TRANSPORTATION BOARD

Finance Docket No. 33388

CSX Corporation and CSX Transportation, Inc.,  
Norfolk Southern Corp. and Norfolk  
Southern Ry. Co.--Control and Operating  
Leases/Agreements--Conrail Inc.  
and Consolidated Rail Corporation  
Transfer of Railroad Line by Norfolk  
Southern Railway Company to CSX Transportation, Inc.

DECLARATION OF J. D. KNIGHT

I, J. D. Knight, declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the following is true and correct and based on personal knowledge.

1. I am a General Chairman of the Brotherhood of Maintenance of Way Employees ("BMWE") and my responsibilities include negotiation and administration of contracts between BMWE and CSX Transportation, Inc. ("CSXT") on the former Seaboard Airline Railroad properties of CSXT. I am also Chairman of the CSXT General Chairmen's Association, an association of the General Chairmen and other International Officers of the unions which represent employees employed by CSXT in various crafts and classes.

2. I am familiar with changes in employment on CSXT because I am responsible for enforcing the seniority rights of BMWE members and for insuring CSXT compliance with the layoff,

-2-

recall and bidding and assignment provisions of BMW agreements with CSXT.

3. I understand that CSX and NS have petitioned the Board for a waiver/clarification of the Board's railroad consolidation procedures under which they would "use November 1996 to create the base line for rail carrier employees covered by collective bargaining agreements" in developing their statements as to the impact on the CSX/NS acquisition of control/division of Conrail ("Transaction").

4. Granting the CSX/NS request would be highly prejudicial to BMW members and other railroad employees. Many maintenance of way jobs in particular are seasonal in nature and late fall and early winter are low points in maintenance of way employment. Some employees are furloughed because of the impact of the weather on their jobs; some employees are furloughed because they work in large productions gangs whose work is programmed to begin in late winter and end in late fall, and some employees are furloughed simply because the carrier's budget for maintenance of way work runs out at the end of the calendar year. Consequently use of November 1996 as a base year would result in an understatement of the difference between employment prior to the transaction and projected employment after the Transaction.

5. The understatement of employee impact which would result from the waiver/clarification sought by NS and CSX would be prejudicial to BMW members in two respects. First, it would

-3-

allow CSX and NS to minimize the impact of the Transaction on employees. Second, use of November figures for a base line suggests that seasonal workers are not actually affected by the Transaction; this could adversely affect BMW members in post-Transaction employee protection proceedings.

6. If the Board believes that it is appropriate to use a single month as its base line for setting forth the impacts of the Transaction on employees, the Board should designate July of 1996 as the base line. Use of July 1996 employment figures would insure that all employees who have an employment relationship with the involved carriers are counted in the employee impact statement, and that seasonal employees are not at a disadvantage in connection with post-Transaction employee protective proceedings.

I declare under penalty of perjury that the foregoing is true and correct.

May 16, 97  
Date

James D. Knight  
James D. Knight

• **ATTACHMENT B**

BEFORE THE  
SURFACE TRANSPORTATION BOARD

Finance Docket No. 33388

CSX Corporation and CSX Transportation, Inc.,  
Norfolk Southern Corp. and Norfolk  
Southern Ry. Co.--Control and Operating  
Leases/Agreements--Conrail Inc.  
and Consolidated Rail Corporation  
Transfer of Railroad Line by Norfolk  
Southern Railway Company to CSX Transportation, Inc.

DECLARATION OF JED DODD

I, Jed Dodd, declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the following is true and correct and based on personal knowledge.

1. I am a General Chairman of the Brotherhood of Maintenance of Way Employees ("BMWE") and my responsibilities include negotiation and administration of contracts between BMWE and the Consolidated Rail Corp. ("Conrail") on the portions of Conrail within the jurisdiction of the BMWE Pennsylvania Federation.

2. I am familiar with changes in employment on Conrail because I am responsible for enforcing the seniority rights of BMWE members and for insuring Conrail compliance with the layoff, recall and bidding and assignment provisions of BMWE agreements with Conrail.

3. I understand that CSX and NS have petitioned the Board



-2-

for a waiver/clarification of the Board's railroad consolidation procedures under which they would "use November 1996 to create the base line for rail carrier employees covered by collective bargaining agreements" in developing their statements as to the impact on the CSX/NS acquisition of control/division of Conrail ("Transaction").

4. Granting the CSX/NS request would be highly prejudicial to ~~BMW~~ members and other railroad employees. Many maintenance of way jobs in particular are seasonal in nature and late fall and early winter are low points in maintenance of way employment. Some employees are furloughed because of the impact of the weather on their jobs; some employees are furloughed because they work in large productions gangs whose work is programmed to begin in late winter and end in late fall, and some employees are furloughed simply because the carrier's budget for maintenance of way work runs out at the end of the calendar year. Consequently use of November 1996 as a base year would result in an understatement of the difference between employment prior to the Transaction and projected employment after the Transaction.

5. The understatement of employee impact which would result from the waiver/clarification sought by NS and CSX would be prejudicial to ~~BMW~~ members in two respects. First, it would allow CSX and NS to minimize the impact of the Transaction on employees. Second, use of November figures for a base line suggests that seasonal workers are not actually affected by the

-3-

Transaction; this could adversely affect BMW members in post-Transaction employee protection proceedings.

6. If the Board believes that it is appropriate to use a single month as its base line for setting forth the impacts of the Transaction on employees, the Board should designate July of 1996 as the base line. Use of July 1996 employment figures would insure that all employees who have an employment relationship with the involved carriers are counted in the employee impact statement, and that seasonal employees are not at a disadvantage in connection with post-Transaction employee protective proceedings.

I declare under penalty of perjury that the foregoing is true and correct.

May 19, 1997  
Date

Jed Dodd  
Jed Dodd

• **ATTACHMENT C**

BEFORE THE  
SURFACE TRANSPORTATION BOARD

Finance Docket No. 33388

CSX Corporation and CSX Transportation, Inc.,  
Norfolk Southern Corp. and Norfolk  
Southern Ry. Co.--Control and Operating  
Leases/Agreements--Conrail Inc.  
and Consolidated Rail Corporation  
Transfer of Railroad Line by Norfolk  
Southern Railway Company to CSX Transportation, Inc.

DECLARATION OF PERRY GELLER

I, Perry Geller, declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the following is true and correct and based on personal knowledge.

1. I am a General Chairman of the Brotherhood of Maintenance of Way Employees ("BMWE") and my responsibilities include negotiation and administration of contracts between BMWE and the Consolidated Rail Corp. ("Conrail") on the portions of Conrail within the jurisdiction of the BMWE Conrail Federation.

2. I am familiar with changes in employment on Conrail because I am responsible for enforcing the seniority rights of BMWE members and for insuring Conrail compliance with the layoff, recall and bidding and assignment provisions of BMWE agreements with Conrail.

3. I understand that CSX and NS have petitioned the Board for a waiver/clarification of the Board's railroad consolidation

-2-

procedures under which they would "use November 1996 to create the base line for rail carrier employees covered by collective bargaining agreements" in developing their statements as to the impact on the CSX/NS acquisition of control/division of Conrail ("Transaction").

4. Granting the CSX/NS request would be highly prejudicial to BMW members and other railroad employees. Many maintenance of way jobs in particular are seasonal in nature and late fall and early winter are low points in maintenance of way employment. Some employees are furloughed because of the impact of the weather on their jobs; some employees are furloughed because they work in large productions gangs whose work is programmed to begin in late winter and end in late fall, and some employees are furloughed simply because the carrier's budget for maintenance of way work runs out at the end of the calendar year. Consequently use of November 1996 as a base year would result in an understatement of the difference between employment prior to the Transaction and projected employment after the Transaction.

5. The understatement of employee impact which would result from the waiver/clarification sought by NS and CSX would be prejudicial to BMW members in two respects. First, it would allow CSX and NS to minimize the impact of the Transaction on employees. Second, use of November figures for a base line suggests that seasonal workers are not actually affected by the Transaction; this could adversely affect BMW members in post-



-3-

Transaction employee protection proceedings.

6. If the Board believes that it is appropriate to use a single month as its base line for setting forth the impacts of the Transaction on employees, the Board should designate July of 1996 as the base line. Use of July 1996 employment figures would insure that all employees who have an employment relationship with the involved carriers are counted in the employee impact statement, and that seasonal employees are not at a disadvantage in connection with post-Transaction employee protective proceedings.

I declare under penalty of perjury that the foregoing is true and correct.

5-19-97

Date

Perry Geller Sr.  
Perry Geller

Richard A. Allen  
ZUCKERT, SCOUTT ET AL.  
888 17th Street, N.W.  
Suite 600  
Washington, D.C. 20006-3939 US

Michael D. Billiel  
Antitrust Division  
U.S. Department of Justice  
325 Seventh Street, N.W.  
Suite 500  
Washington, D.C. 20530

Charles M. Chadwick  
Maryland Midland Railway, Inc.  
P. O. Box 1000  
Union Bridge, MD 21791-0568

Paul D. DeMariano  
President & Chief Executive Officer  
The Port of Philadelphia & Camden, Inc.  
3460 North Delaware, Suite 200  
Philadelphia, PA 19134

Daniel R. Elliott, III  
United Transportation Union  
14600 Detroit Avenue  
Cleveland, OH 44107

Robert J. Hermann  
Atlantic City Electric Company  
6801 Black Horse Pike  
Egg Harbor Township, NJ 08234

Erika Z. Jones  
MAYER, BROWN & PLATT  
2000 Pennsylvania Ave., N.W.  
Suite 6500  
Washington, D.C. 20006

Dennis G. Lyons  
ARNOLD & ORTER  
555 12th Street, N.W.  
Washington, D.C. 20004-1202 US

Michael Mattia  
Director, Risk Management  
Institute of Scrap Recycling Industries, Inc.  
1325 G Street, N.W.  
Washington, D.C. 20005

Michael F. McBride  
LUF LAMB GREEN & MACRAE, L.L.P.  
1800 Connecticut Avenue, N.W.  
Suite 1200  
Washington, D.C. 20009

J. R. Barbee, General Chairman  
United Transportation Union  
General Committee of Adjustment, GO-898  
Post Office Box 9599  
Knoxville, TN 37940

Teresa M. Brennan, Esq.  
Pennsylvania Power & Light Company  
Two North Ninth Street  
Allentown, PA 18101-1179

Nicole E. Clark  
WACHTELL, LIPTON, ROSEN & KATZ  
51 West 52nd Street  
New York, NY 10019-6150 US

Nicholas J. DiMichael  
John K. Maser III  
Jeffrey O. Moreno  
Frederic L. Wood  
Donelan, Cleary, Wood & Maser, P.C.  
1100 New York Avenue, N.W. Suite 750  
Washington, D.C. 20005-3934

Edward D. Greenberg  
GALLAND, KHARASCH, MORSE & GARFINKLE  
1054 Thirty-First Street, N.W.  
Washington, D.C. 20007-4492

Eric M. Hocky  
GOLLATZ, GRIFFIN, EWING  
213 West Miner Street  
West Chester, PA 19381-0796

Grayson G. Kelly  
Special Deputy Attorney General  
NC Department of Justice  
1 S. Wilmington Street  
Raleigh, NC 27611

Stephen A. MacIsaac  
Deputy County Attorney  
Prince William County  
One County Complex Court  
Prince William, VA 22192

Neal M. Mayer  
Paul D. Coleman  
HOPPEL MAYER & COLEMAN  
1000 Connecticut Avenue, N.W., Suite 400  
Washington, D.C. 20036-5302 US

Jeffrey R. Moreland  
Richard E. Weicher  
The Burlington Northern & Santa Fe Ry. Company  
1700 East Golf Road  
Schaumburg, IL 60173

Janice G. Barber  
Michael E. Roper  
The Burlington Northern & Santa Fe Ry. Company  
3800 Continental Plaza  
777 Main Street  
Fort Worth, TX 76102-5384

William A. Bon, General Counsel  
Brotherhood of Maintenance of Way Employees  
26555 Evergreen Road, Suite 200  
Southfield, MI 48076

Paul A. Cunningham  
HARKINS CUNNINGHAM  
1300 19th Street, N.W.  
Suite 600  
Washington, D.C. 20036

Paul M. Donovan  
LAROE, WINN, ETAL  
3506 Idaho Avenue, N.W.  
Washington, D.C. 20016

Donald F. Griffin  
Brotherhood of Maintenance of Way Employees  
400 North Capitol Street, N.W.  
Suite 852  
Washington, D.C. 20001 US

Doreen C. Johnson  
Chief, Antitrust Section  
Ohio Attorney General's Office  
30 E. Broad Street, 16th Floor  
Columbus, OH 43215

David D. King  
Secretary Treasurer  
Beaufort And Morehead Railroad Company  
P. O. Box 25201  
Raleigh, NC 27611-5201

Robert E. Martinez  
VA Secretary of Transportation  
P. O. Box 1475  
Richmond, VA 23218

George W. Mayo, Jr.  
Eric Von Salzen  
Thomas B. Leary  
HOGAN & HARTSON  
555 Thirteenth Street, N.W.  
Washington, D.C. 20004-1161

Karl Morell  
BALL JANIK & NOVACK  
1455 F Street, N.W.  
Suite 225  
Washington, D.C. 20005

Andrew M. Muller, Jr.  
P. O. Box 218  
Port Clinton, PA 19549

Robert E. Murray  
President and Chief Executive Officer  
The Ohio Valley Coal Company  
29525 Chagrin Boulevard, Suite 111  
Pepper Pike, OH 44122

John Will Ongman  
Marc D. Machlin  
Michelle J. Morris  
PEPPER, HAMILTON & SCHEETZ L. L. P.  
1300 19<sup>th</sup> Street, N.W.  
Washington, D.C. 20036

L. John Osborn  
Sonnenschein Nath & Rosenthal  
1301 K Street, N.W.  
Suite 600  
Washington, D.C. 20005 US

Frank R. Pickell, General Chairman  
United Transportation Union  
General Committee of Adjustment (C&T)  
Conrail West & South/Norfolk Southern Ry. Co.  
6797 North High Street, Suite 108  
Worthington, OH 43085

Larry R. Pruden  
Transportation Communications International Union  
3 Research Place  
Rockville, MD 20850 US

John T. Reed, General Chairman  
United Transportation Union  
General Committee of Adjustment B&O  
7785 Baymeadows Way, #109  
Jacksonville, FL 32256

Arvid E. Roach II  
J. Michael Hemmer  
Michael L. Rosenthal  
COVINGTON & BURLING  
1201 Pennsylvania Avenue, N.W.  
P. O. Box 7566  
Washington, D.C. 20044

R. K. Sargent, General Chairman  
United Transportation Union  
General Committee of Adjustment  
CSX-Chesapeake & Ohio-Proper (GO-201)  
1319 Chestnut Street  
Kenova, WV 25530

John L. Sarratt  
Kilpatrick Stockton LLP  
4101 Lake Boone Trail  
Raleigh, NC 27607

Scott M. Saylor  
North Carolina Railroad Company  
3200 Atlantic Avenue  
Suite 110  
Raleigh, NC 27604

Richard J. Schiefelbein  
Woodharbor Associates  
7801 Woodharbor Drive  
Fort Worth, TX 76179

Kevin M. Sheys  
OPPENHEIMER WOLFF, ET AL.  
1020 Nineteenth Street, N.W.  
Suite 400  
Washington, D.C. 20036-6105

Kenneth E. Siegel  
American Trucking Association  
2200 Mill Road  
Alexandria, VA 22314-4677

Patrick B. Simmons  
director of the Rail Division  
NC Department of Transportation  
1 S. Wilmington Street, Room 557  
Raleigh, NC 27611

C. J. A. Spitulnik  
HOPKINS & SUTTER  
888 16<sup>th</sup> Street, N.W.  
Washington, D.C. 20006

K. D. Sturgis  
Assistant Attorney General  
NC Department of Justice  
P. O. Box 629  
Raleigh, NC 27602

Daniel J. Sweeney  
John M. Cutler, Jr.  
McCarthy, Sweeney & Harkaway, P.C.  
1750 Pennsylvania Avenue, N.W.  
Washington, D.C. 20006

Robert G. Szabo  
V. NESS FELDMAN  
1050 Thomas Jefferson Street, N.W.  
Seventh Floor  
Washington, D.C. 20007

Marcella M. Szei  
Vice President-Legal Services  
Canadian Pacific Railway Company  
Gulf Canada Square  
401 Ninth Avenue, S.W., Suite 500  
Calgary, Alberta T2P 4Z4  
CANADA

K. N. Thompson, General Chairman  
United Transportation Union  
General Committee of Adjustment  
Norfolk Southern-N&W-Wabash  
11017-F Gravois Industrial Plaza  
St. Louis, MO 63128

Debra L. Willen  
GUERRIERI, EDMOND, ET AL.  
1331 F Street, N.W.  
4<sup>th</sup> Floor  
Washington, D.C. 20001

R. L. Young  
American Electric Power  
P. O. Box 700  
Lancaster, OH 43130

STB

FD

33388

(Sub 1)

5-6-97

D

180558

BRICKFIELD  
BURCHETTE  
RITTS, PC

180558

D

WASHINGTON, D.C.  
AUSTIN, TEXAS

May 6, 1997



**HAND DELIVERED**

The Hon. Vernon A. Williams  
Secretary  
Surface Transportation Board  
1925 K Street, N.W.  
Washington, DC 20423-0001

Re: Finance Docket No. 33388 - *sub 1*

Dear Secretary Williams:

On behalf of Steel Dynamics, Inc. ("SDI"), please find enclosed for filing an original and twenty-five copies of:

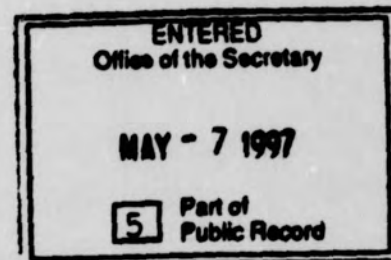
- Reply of Steel Dynamics, Inc. to the Petition for Waiver Filed by NS (SDI-3).

A copy of the pleadings is provided on the enclosed 3.5" diskette in WordPerfect 5.1 for DOS format. The document has been served in accordance with Decision No. 2. Please do not hesitate to contact me if you have any questions or concerns.

Thank you for your cooperation in this matter.

Very truly yours,

Christopher C. O'Hara





BEFORE THE  
SURFACE TRANSPORTATION BOARD

---

FINANCE DOCKET NO. 33388

---



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 --  
Transfer of Railroad Line by Norfolk Southern Railway Company  
To CSX Transportation, Inc.

---

**REPLY OF STEEL DYNAMICS, INC.  
TO THE PETITION FOR WAIVER FILED BY NS  
(SDI-3)**

Peter J.P. Brickfield  
Peter J. Mattheis  
Christopher C. O'Hara  
Brickfield, Burchette & Ritts, P.C.  
1025 Thomas Jefferson Street, NW  
Eighth Floor, West Tower  
Washington, DC 20007

Telephone: (202) 342-0800  
Facsimile: (202) 342-0807

BEFORE THE  
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 33388

**REPLY OF STEEL DYNAMICS, INC.  
TO THE PETITION FOR WAIVER FILED BY NS  
(SDI-3)<sup>1</sup>**

Steel Dynamics, Inc. ("SDI"), by its attorneys, files this reply to the petition for waiver filed by NS:<sup>2</sup>

1. NS has submitted an "out of the ordinary" proposal seeking a waiver from the mandate of 49 C.F.R. § 1180.4(c)(2)(vi) requiring the concurrent filing of applications to construct certain interconnections located at Alexandria, Indiana, Colsan/Bucyrus, Ohio, and Sidney, Illinois. All three of the proposed interconnections address predicted rail traffic patterns in light of the proposed multiple transfers of midwestern lines. SDI believes that the proposed interconnections are intimately intertwined with significant issues involved in Docket No. 33388 and in the newly created sub-docket addressing the transfer of the Fort Wayne Line. SDI believes that creating separate dockets for these interconnections, as NS has proposed, will not be an efficient use of the Board's resources and will not allow for an in depth examination of the complex issues involved in the midwest region.

2. The Board addressed the Fort Wayne Line in Decision No. 4 and noted astutely that that: "[t]he division of CRC's assets does not inherently require that anything be done with

---

<sup>1</sup> SDI-1 was its Entry of Appearance. SDI-2 was its Comments on the Proposed Procedural Schedule.

<sup>2</sup> Although the Board's rules do not allow for replies to petitions for waiver, the Board has considered such replies. *See, e.g.*, Decision No. 2, 62 Fed. Reg. 19,391-92 (1997).

respect to [NS's Fort Wayne Line]." NS and CSX both have existing Chicago-bound lines located in northeast Indiana. The proposed transfer of NS's Fort Wayne Line to CRC or a newly-created subsidiary in exchange for CRC's "Streator line," thereby making NS's line available to be transferred to CSX, is designed to disguise the fact the acquisition of Conrail will create a duplicative line. NS's acquisition of CRC's line would create duplicative Chicago-bound lines only about 25 miles apart, running through Waterloo and Fort Wayne. Transferring the Fort Wayne Line to CSX does not resolve the duplicative line issue, as CSX currently has a line running from northeast Indiana to Chicago.

3. SDI believes that, after analysis of the application, the Board will determine that a duplicative line is created by the acquisition of Conrail and will require divestiture of one of the lines. The Board should resist NS's attempt to force premature resolution of complex issues and to compromise the Board's authority to review the proposed interconnections in the context of the primary control application.

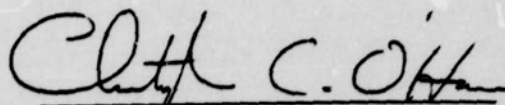
4. As an additional note, 49 C.F.R. § 1180.4 (f)(2) of the Board's rules require that petitions for waiver be filed at least 45 days prior to the filing of the application. NS has not sought waiver of this requirement. NS's petition was filed on May 2, 1997. SDI respectfully asks the Board to clarify that the Applicants not be permitted to file their application before June 16, 1997, irrespective of whether the Board grants the waiver.

WHEREFORE, SDI respectfully requests that the Board:

- (1) Require NS to file all proposed construction applications or exemptions with the primary control application in the main docket or in the sub-docket; and,
- (2) Establish June 16, 1997, as the earliest date on which the application can be filed.

Respectfully submitted,

BRICKFIELD, BURCHETTE & RITTS, P.C.



Peter J.P. Brickfield

Peter J. Mattheis

Christopher C. O'Hara

Brickfield, Burchette & Ritts, P.C.

1025 Thomas Jefferson Street, NW

Eighth Floor, West Tower

Washington, DC 20007

Telephone: (202) 342-0800

Facsimile: (202) 342-0807

Date: May 6, 1997

**Certificate of Service**

**Finance Docket No. 33388**

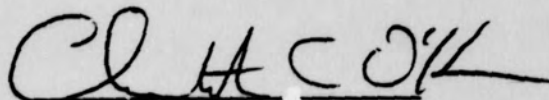
In accordance with Decision No. 2 in this docket, I hereby certify that on May 6, 1997, a copy of the attached document was sent by United States mail, first class, postage prepaid to:

The Hon. Jacob Leventhal  
Administrative Law Judge  
Federal Energy Regulatory Commission  
888 First Street, N.E.  
Suite 11F  
Washington, DC 20426

Dennis G. Lyons, Esq.  
Arnold & Porter  
555 12th Street, N.W.  
Washington, DC 20004-1202

Richard A. Allen, Esq.  
Zuckert, Scoutt & Rasenberger, L.L.P.  
888 Seventeenth Street, N.W.  
Washington, DC 20006-3939

Paul A. Cunningham, Esq.  
Harkins Cunningham  
Suite 600  
1300 Nineteenth Street, N.W.  
Washington, DC 20036

  
Christopher C/O'Hara



STB

FD

33388

(Sub 1)

5-16-97

D

180551

180551

# AMERICAN TRUCKING ASSOCIATIONS

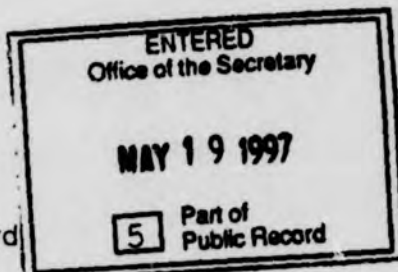


2200 Mill Road • Alexandria, VA 22314-4677

Tel. (703) 838-1857  
Fax (703) 683-3226Kenneth E. Siegel  
Deputy General Counsel

May 16, 1997

Office of the Secretary  
Case Control Unit  
Surface Transportation Board  
1925 K Street, N.W.  
Washington, D.C. 20423-0001



Attn: STB Finance Docket No. 33388 - SUM

Dear Secretary:

Enclosed for filing are this original and twenty-five copies of the comments of the American Trucking Associations, Inc. ("ATA") in response to the Board's Notice of petitions filed by applicants seeking waiver of otherwise applicable requirements for seven construction projects and to the Board's request for comments, published in the *Federal Register* May 13, 1997 (62 FR 26352). Also submitted is a 3 1/2" computer disk containing ATA's filing in Wordperfect 5.1 format.

The ATA is the national trade association of the trucking industry. We are a federation of over 36,000 member companies and represent an industry that employs over nine million people, providing one of every ten civilian jobs. ATA's direct membership includes nearly 4,200 carriers, affiliated associations in every state, and 13 specialized national associations, including the ATA Intermodal Conference -- the only national association representing exclusively the interests of the intermodal highway drayage haulers. We represent motor carriers who are some of the largest rail shippers.

Petitioners have asked the Board to waive certain otherwise applicable requirements respecting seven "gap closing" construction projects. ATA has expressed its intent to take a position on the primary application, which we will do only after the formal application is filed with the Board. However, we urge the Office of the Secretary Board to deny the requested waivers and to reserve judgement on this matter until the primary filing has been made and reviewed by all parties. ATA considers that such a waiver granted now is inconsistent with guaranteeing a full and fair hearing of the primary application.

May 16, 1997

Page 2

Board to deny the requested waivers and to reserve judgement on this matter until the primary filing has been made and reviewed by all parties. ATA considers that such a waiver granted now is inconsistent with guaranteeing a full and fair hearing of the primary application.

The Board's request for comment affirms that existing regulation provides that, in cases such as this, applicants would normally seek authority to construct new rail lines as part of their primary application. Although requests for a waiver of this rule may be granted "for good cause shown," we believe that the burden of proof should be very high indeed.

Despite any assertion by the Board to the contrary, it is inevitable that approval of these waivers would be understood by the public as signaling tacit support for the primary application. By approving the waiver, the Board could inadvertently stifle the full public debate that will provide essential input to the Board's own deliberations.

Adherence to the Board's basic regulation in these matters is, therefore, important in order to safeguard its objectivity, particularly to prevent any appearance of having undermined the opportunity for all parties to obtain a full and impartial hearing.

Applicants have argued that, if the primary application is approved, denial of the waiver would delay the ability of CSX Corporation ("CSX") and Norfolk Southern ("NS") immediately to compete with each other in providing certain anticipated service offerings. Accelerating the opportunity of the applicants to realize maximum immediate advantage from an acquisition should not be a consideration of the Board at this juncture. The applicant's argument does not constitute "good cause" for approval of the waiver.

The applicants are proposing massive changes to the competitive environment for freight transportation in the United States, which would presumably bring them substantial financial reward. In this matter, accelerated approval by the Board of the new rail projects raises a number of other important matters:

- Approval of the waiver would impose on motor carriers and many other parties an unreasonable burden of time and expense that would be altogether unnecessary if the primary application is denied. Although the applicants are willing to make a speculative investment up front, other parties should not be forced to do so. For example, extensive state and

May 16, 1997  
Page 3

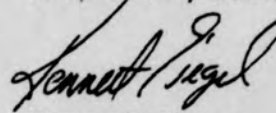
local participation in Office of the Secretary assessing the environmental impact of the new routes will require public participation and expense that need not be incurred at all if the primary application is denied.

- To evaluate the impact of the underlying application, interested parties would now be forced to deal with key issues in incremental installments, thus imposing further, unreasonable expense to evaluate a complex proposal.
- In the absence of approval of the primary application, in what manner and to what extent would the existence of the seven new rail connections impact the competitive balance among CSX, NS, Conrail, and other rails in the East Coast service area?
- Would approval of the waiver to assist CSX and NS in getting the benefits of the proposed acquisition "out of the starting blocks" create an unlevel playing field? Would it adversely effect carriers who do not have the benefit of making early competitive investments based upon proprietary information now available only to the applicants?
- Approval of the waiver could foreclose development of additional line concessions and other options for rail competition that would serve the public interest.

The CSX and NS request for waiver is filed in conjunction with a recent application by the same parties to reduce by 30 percent the time allotted for review of the primary application by the Board. Taken together, these two requests invite a rush to judgement that the Board has compelling reasons to reject.

This is a very important matter that justifies proceeding at the cautious and deliberate pace established by the Board's standard procedure for such matters. ATA would therefore urge the Board to reject the CSX Corporation and Norfolk Southern waiver request.

Respectfully submitted,

  
Kenneth Siegel

Attachment and Enclosures

CERTIFICATE OF SERVICE

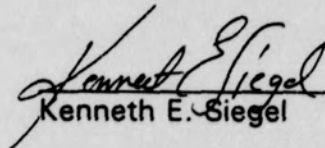
I hereby certify that on this 16th day of May, 1997, I have served a copy of the foregoing response upon the parties listed below and on the attached list:

Dennis G. Lyons, Esq.  
Arnold & Porter  
555 12th Street, N.W.  
Washington, D.C. 20004-1202

Richard A. Allen  
Zuckert, Scoutt, & Rasenberger  
888 Seventeenth Street, N.W.  
Washington, D.C. 20006-3939

Paul A. Cunningham, Esq.  
Harkins, Cunningham  
Suite 600  
13000 Nineteenth Street, N.W.  
Washington, D.C. 20036

Jacob Leventhal  
Administrative Law Judge  
F.E.R.C.  
888 First Street, N.E.  
Suite 11F  
Washington, D.C. 20426

  
Kenneth E. Siegel

Attachment