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 been 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
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\(^1\) 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

\(^1\) 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. 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.

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2 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."

**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

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3 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). 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. 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

4 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."

5 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 sub docket 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.6

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.

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6 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,

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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

Dated: September 11, 1997

David H. Coburn
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
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

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Thomas M. O’Leary, Executive Director
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.
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

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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. 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

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1 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.

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Sincerely,

Dinah Bear
General Counsel
BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 3338-

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")¹ oppose this petition for waiver/clarification

¹ American Train Dispatchers Department/BLE; 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 gage 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. 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

1 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 BMWE 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 BMWE 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 BMWE General Chairman 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,

William G. Mahoney
Richard S. Edelman
L. Pat Wynns
HIGHSAW, MAHONEY & CLARKE, P.C.
1050 17th Street, N.W., Ste. 210
Washington, D.C. 20036
(202) 296-8500

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.
988 17th Street, N.W.
Suite 600
Washington, D.C. 20006-3939

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

Dennis G. Lyons
ARNOLD & ORTER
555 12th 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 20th day of May, 1997.

[Signature]

Richard S. Edelman
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 Employes ("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,
recall and bidding and assignment provisions of BMWE 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 BMWE 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 BMWE 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 BMWE 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.

[Signature]

Date: May 13, 97

James D. Knight
ATTACHMENT B
BETORE 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
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 BME 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 BME 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 BMWZ 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

[Signature]

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 Employes ("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
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 BMWE 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 BMWE 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 BMWE 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.

5-19-97
Date

Perry Geller
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 2

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

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

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

2 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. Matthcis
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, Scoultt & 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
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.
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
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

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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

Attachment

Kenneth E. Siegel