

STB

FD

33388 (SUB69)

11-02-99

D

195984

195984

ARNOLD & PORTER

555 TWELFTH STREET, N.W.
WASHINGTON, D.C. 20004-1206

(202) 942-5000
FACSIMILE: (202) 1-42-5999

November 2, 1999

NEW YORK
DENVER
LOS ANGELES
LONDON

DENNIS G. LYONS
(202) 942-5858

ENTERED
Office of the Secretary

NOV 02 1999

Part of
Public Record



BY HAND DELIVERY

The Honorable Vernon A. Williams
Secretary, Surface Transportation Board
Mercury Building, Room 700
1925 K Street, N.W.
Washington, D.C. 20423

Re: **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 (Sub-No. 69)**

Dear Secretary Williams:

This letter refers to the "Canadian Pacific Parties' Petition to Enforce Trackage and Switching Rights Imposed by the Board," filed on July 27, 1999 (CP-32), and to our letters, written on behalf of CSX Corporation and CSX Transportation, Inc. (collectively, "CSX"), dated September 17 and September 20, 1999, requesting (with the Canadian Pacific Parties' ("CP's") concurrence) that the Board abstain from a decision on CP's Petition through and including November 1, 1999, to give the parties an opportunity to reach a mutually agreed-upon private resolution of the matters set forth in CP's Petition.

The Board, in Decision No. 132, served September 22, 1999, granted the request of the parties in that regard.

The parties have diligently endeavored to reach a mutually agreeable resolution and believe that they are close to reaching one. However, certain matters remain unresolved. The parties believe it would be useful to continue negotiations with a view toward reaching resolution and that this would be facilitated if the Board extended the period of time within which the Board would refrain from deciding CP's Petition.

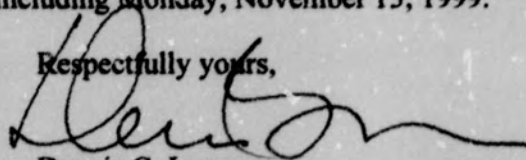
Accordingly, we have been authorized on behalf of CP to advise the Board that CP concurs with CSX in requesting that the Board extend the period of time within which

ARNOLD & PORTER

Hon. Vernon A. Williams
November 2, 1999
Page 2

it will abstain from rendering a decision with respect to the CP Petition for an additional period of two weeks, that is, through and including Monday, November 15, 1999.

Respectfully yours,



Dennis G. Lyons
*Counsel for CSX Corporation
and CSX Transportation, Inc.*

cc:

Counsel for Canadian Pacific Parties
Counsel for New York State
Department of Transportation
Counsel for New York City
Economic Development Corporation

STB

FD

33388 (Sub 69)

8-16-99

D

195369

1/3

195369

ARNOLD & PORTER

555 TWELFTH STREET, N.W.
WASHINGTON, D.C. 20004-1206

(202) 942-5000
FACSIMILE: (202) 942-5999

DENNIS G. LYONS
(202) 942-5858

NEW YORK
DENVER
LOS ANGELES
LONDON

August 16, 1999

The Honorable Vernon A. Williams
Secretary, Surface Transportation Board
Mercury Building, Room 700
1925 K Street, N.W.
Washington, D.C. 20423

ENTERED
Office of the Secretary

AUG 17 1999

Part of
Public Record



Re: **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 (Sub-No. 69)**

Dear Secretary Williams:

Enclosed are an original and twenty-five (25) copies of CSX-184, "Reply of CSX Corporation and CSX Transportation, Inc. to 'Canadian Pacific Parties' Petition to Enforce Trackage and Switching Rights Imposed by the Board" (CP-32), for filing in the above-referenced docket.

Because CSX-184 and one of the Verified Statements attached to it contain Highly Confidential information, two versions of CSX-184, with their Verified Statements, are being filed, each complete, and with the Highly Confidential version of CSX-184 and its Verified Statements being submitted in a separate, sealed and appropriately labeled package.

The Reply contains an executed certificate of service; the Highly Confidential version will be served only on those counsel that have executed the undertaking under the Protective Order.

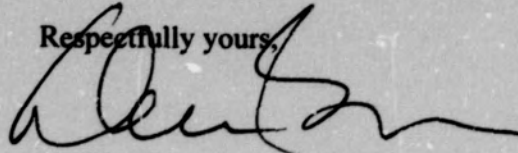
Please note that a 3.5-inch diskette containing a WordPerfect 5.1 formatted copy of the public version of CSX-184 and the Verified Statements. Also enclosed is a separate 3.5-inch diskette containing the Highly Confidential Version of CSX-184 and the one Verified Statement (of Mr. John Scheeter), which contains Highly Confidential material.

ARNOLD & PORTER

The Hon. Vernon A. Williams
August 16, 1999
Page 2

Thank you for your assistance in this matter. Please contact me if you have any questions.

Respectfully yours,

A handwritten signature in black ink, appearing to read "Dennis G. Lyons", written over the closing "Respectfully yours,".

Dennis G. Lyons
*Counsel for CSX Corporation
and CSX Transportation, Inc.*

Enclosures
via hand delivery

cc: All Parties Shown on the
Certificate of Service

195369

ENTERED
Office of the Secretary

AUG 17 1999

Part of
Public Record

CSX-184

PUBLIC VERSION

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**

STB Finance Docket No. 33388 (Sub-No. 69)

**RESPONSIVE APPLICATION — STATE OF NEW YORK, BY AND THROUGH ITS
DEPARTMENT OF TRANSPORTATION, AND
THE NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION**

**Reply of CSX Corporation and CSX Transportation, Inc.
to Canadian Pacific Parties' Petition to Enforce Trackage
and Switching Rights Imposed by the Board**

CSX Corporation and CSX Transportation, Inc. (collectively, "CSX") submit this
Reply to the "Canadian Pacific Parties' Petition to Enforce Trackage and Switching
Rights Imposed by the Board" (CP-32), filed on July 27, 1999 (the "Petition").

ORIGINAL

INTRODUCTION AND SUMMARY¹

The Canadian Pacific Parties ("CP") seek two things in the Petition. *First*, they want the right to deliver and pick up freight shipments in Harlem River Yard ("HRY") in movements of their own locomotives, cars and crews, rather than through switching for their account by CSX, and indeed to run trains in and out of that Yard. *Second*, they want to have access to and use a private transloading facility located in the Hunts Point Terminal ("HPT") which is subleased to CSX and operated for the account of a CSX affiliate by a contractor. CP claims both of these rights as a matter of existing right, saying that they were awarded to CP by the Board in Decision No. 109, served December 18, 1998, and/or in Decision No. 123, served May 20, 1999.

It is entirely clear, however, that under the two decisions just cited, CP has neither of the two rights it claims. Its movements of freight traffic in the Bronx and Queens to and from shippers located in those boroughs are to be handled through Oak Point Yard, via CSX switch, at the per-car rate prescribed by the Board. And nothing in the Board's decisions gives CP any rights to access and use any facilities owned by CSX or leased to it,² except those rights specifically granted in the two decisions. While the Board has

¹ This Reply is submitted in a Highly Confidential Version and in a Public Version. Double square brackets ([...]) indicate Highly Confidential matter and single brackets ([...]) indicate Confidential matter (or the place where the material in question would appear).

² Or owned by or leased to New York Central Lines LLC ("NYC"), over whose properties in New York City CSX has the exclusive right of operation under agreements approved and authorized by the Board. See Decision No. 89 in Docket No. 33388, served July 23, 1998, at 174, ¶ 7.

enforced the condition it attached in Decision No. 89 by giving CP trackage rights to serve New York City shippers without limit as to commodities or as to origin or destination on CP's system, the grants of authority have been precise. The only properties and facilities of CSX to which CP has direct access (for appropriate fees) under those decisions are the CSX rail lines "East of the Hudson," over which CP has overhead trackage rights to and from Oak Point Yard, as established in Decision No. 109; limited rights to access Oak Point Yard in connection with those overhead movements or with respect to interchange with the New York & Atlantic ("NYA"); and access to the interchange facilities with the NYA at Fresh Pond Jct. in Queens. Those rights are extensive, and they are burdensome on CSX, but they have their limits.

While styled a "Petition to Enforce," CP's Petition is in substance a petition that the Board, using its oversight powers, grant CP additional rights; and, to the extent that they involve using CSX's property, that those rights be "for free." But CP does not make any attempt to invoke the Board's oversight jurisdiction or to provide any basis for the Board to take such extraordinary action under it. CP's Petition was filed only two weeks after the commencement of CP's trackage-rights service from Schenectady to Oak Point Yard,³ at a time when that service appears to be in what might fairly be called its

³ The commencement of trackage rights operations was held up until July 13, 1999, as a result of CP's delay in filing the Notice of Exemption related thereto (in Finance Docket No. 33771) and the necessity thereafter of the running of the waiting period required by the Mendocino decision with respect to labor protection. Cf. 49 U.S.C. § 11326.

infancy.⁴ Moreover, the existing limitations on the considerable rights of CP, deliberately imposed by the Board, are sound from an operational standpoint and/or reflect choices made by CP in the course of the proceedings before the Board that were resolved in Decisions Nos. 109 and 123.

STATEMENT OF FACTS

1. *The Yards and Terminals in Question.* — In Decision No. 109, the Board implemented its Decision No. 89 by granting CP overhead trackage rights via a single access route between Schenectady, NY, and CSX's Oak Point Yard in the Bronx, via the Hudson Line, with interchange rights with the NYA at Fresh Pond Jct. in Queens, and the right to serve, via CSX switch, all shippers accessible by rail from Oak Point Yard in the Bronx and Queens.⁵ The trackage rights granted involving NYC/CSX ownership started at Schenectady and ended in Poughkeepsie, NY, and also ran between HRY and Oak Point Yard, and between Oak Point Yard and Fresh Pond Jct., for the purposes of interchange. The intermediate tracks constituting the historic Hudson Line (starting at

⁴ According to CSX's records, in the seven-day period ending on the date of CP's Petition, CP operated a grand total of 28 loaded cars down the Hudson Line to Oak Point Yard. Ratcliffe V.S. at 2.

⁵ NYA was also given trackage rights to effect interchange with CP at Oak Point Yard; or interchange with NYA could be effected at Fresh Pond Jct. directly by CP or via CSX switch.

Poughkeepsie and running south to the Bronx) are leased to or owned by, and are operated and heavily used by commuter authorities.⁶ Ratcliffe V.S. at 2.

Until last October, Conrail freight train operations to and from Oak Point Yard involved movements on those commuter lines all the way from Poughkeepsie over the Hudson Line to its connection with the Harlem Line at "MO," and thence north to a point on the Harlem Line known as Melrose. At Melrose, freight trains entered the Port Morris Connection, an all-freight line, and from there went to Oak Point Yard. The portion of the route between MO and Melrose involved a line heavily used by commuter trains.⁷ Ratcliffe V.S. at 3. However, in October 1998, the "Oak Point Link," built by and owned by the State of New York, was completed and opened for business. The Oak Point Link is a new line of railroad extending approximately 10,000 feet between the connection with Metro-North at Highbridge in the Bronx and HRY. It is a single-track line without passing sidings, and accordingly trains cannot meet or pass on it. The length of the track

⁶ CP has taken the position that the commuter authorities in question are competent validly to grant it trackage rights and has not sought or obtained any trackage rights from NYC or CSX. CP's failure to obtain such rights is not an issue in the present matter.

As indicated throughout, we draw on the Reply Verified Statements of Lawrence L. Ratcliffe ("Ratcliffe V.S.") and John Scheeter ("Scheeter V.S.").

⁷ There are three rail lines which pass through the Bronx that are used by commuter trains serving Grand Central Terminal in Manhattan. These are the Hudson Line, which runs essentially to the north generally close to the eastern bank of the Hudson River to Poughkeepsie; the Harlem Line, which runs to the east of the Hudson Line into the suburban counties of New York State; and the Shore Line, which runs in a northeasterly direction to points in southwestern Connecticut along the north shore of Long Island Sound. The MO to Melrose segment is used by Harlem Line trains and Shore Line trains; the Shore Line thereafter diverges from the Harlem Line north of Melrose, at Woodlawn. Ratcliffe V.S. at 3.

and lack of passing sidings significantly restrict capacity on the Oak Point Link. The Oak Point Link is devoted exclusively to freight movements. It is a small step toward establishing a physical separation between freight and passenger movements on the crowded Greater New York rail lines. The Oak Point Link frees the road freight train movements from interference by the commuter trains on the Harlem and Shore Lines, although it does nothing with respect to freight movement conflicts with the Hudson Line commuter services. Both CSX and CP have trackage rights over the Oak Point Link. CSX is responsible for the dispatching on the Oak Point Link and for maintaining the track. Ratcliffe V.S. at 3-4.

HRV, a facility of approximately 92 acres at the southern tip of the Bronx, is accessible from the Oak Point Link. HRV is situated to the west of Oak Point Yard, and an entrance to HRV is approximately 3,400 feet from the entrance to Oak Point Yard. HRV is a privately-owned shipper-oriented industrial yard, built on land owned by New York State and leased to a corporation named Harlem River Yard Ventures, Inc., a private enterprise. There are various shippers and facilities located in HRV. An intermodal terminal, privately owned by interests other than the overall HRV lessee, is located in HRV, but it accounts for a minority of the space available in HRV. Before the completion of the Oak Point Link, HRV existed as a shipper-oriented industrial yard, but was accessible only from the northeast by an industrial lead coming from Oak Point Yard, which is now owned by NYC and operated by CSX. This lead from Oak Point Yard to HRV, like the Oak Point Link itself, is single-tracked without passing sidings.

That lead is the only practical rail access to HRY from Oak Point Yard. Ratcliffe V.S. at 4-5.

HPT is located in the Bronx to the east of Oak Point Yard. HPT covers about 110 acres. HPT is accessed from Oak Point Yard by a northeast movement followed by a southeast move into the terminal. These moves are made entirely on NYC/CSX freight-only tracks. Ratcliffe V.S. at 5. HPT is owned by the City of New York but is leased to the Hunts Point Terminal Produce Cooperative Association (the "Co-op"), a cooperative association whose members are approximately 100 wholesalers in the fresh fruit, vegetable and produce trades. Most of the space in the HPT complex is devoted to the warehouses and other facilities of members of the Co-op, generally long, narrow sheds and buildings with railroad side tracks alongside. These shipper facilities are accessible to CP by CSX switch to any shipper who wishes to do business with CP. The HPT is also served by trucks, both for long haul inbound movements of merchandise and for local drayage and delivery. Scheeter V.S. at 2.

In another area of HPT apart from the members' facilities, under a license from the Co-op granted to CSX's predecessor, Conrail, [] four side tracks and adjacent ground are held by CSX. Originally the "Big Apple Bulk Transfer Facility," and now a CSX TransFlo facility, is operated by a contractor, Bulkmatic Transport Company ("Bulkmatic") there for the account of a CSX subsidiary named Bulk Intermodal

Distribution Services, Inc., which does business under the trade name "CSX TransFlo."⁸

At this transloading facility, there are scales for weighing trucks (both empty and loaded), lights on poles, fencing, an office trailer and space for parking trucks. Scheeter V.S. at 2.

While it could be used for other commodities subject to the terms of the license (which permits any non-hazardous commodity to be handled), at the present time, the CSX TransFlo transload facility at HPT is being used solely for the receipt, temporary storage and transshipment of flour. The customers are generally the mills, rather than the ultimate users of the flour (bakeries, etc.). Often the flour is shipped by the mill to the transloading facility without any specification or indication of the ultimate user. The mill thereafter gives instructions to CSX TransFlo's agent to draw a certain quantity of the flour from that being kept in storage for the mill's account in the railcars at the CSX TransFlo facility and deliver that quantity to a particular user. Under arrangements made between CSX TransFlo's agent and that user, the maximum transfer price under which is controlled by CSX TransFlo, the flour is delivered to the user by truck. The users are typically local bakeries in the Greater New York area. None of them maintains any physical presence at the CSX TransFlo facility. Scheeter V.S. at 3-4.

2. *The Board's Pertinent Decisions.* — An examination of what is wrong with CP's position involves looking at the two Board decisions already mentioned.

⁸ CSX TransFlo operates bulk transfer facilities at approximately six dozen locations on CSX lines in the United States and Canada. Scheeter V.S. at 2.

Decision No. 109 (Served December 18, 1998). — Following the failure of CSX and CP to reach agreement on the terms of CP's Board-mandated access to the Bronx and Queens through haulage or trackage rights, the Board launched, in Decision No. 102 served November 20, 1998, an expedited proceeding to fix the terms of those rights, under which each of CP and CSX would make simultaneous opening proposals and would make simultaneous replies ten days later.

CP's proposal (CP-24) was distinguished by the breadth of its requested rights and the narrowness of its willingness to pay for them. CP sought three separate access routes in the Albany area to get onto the Hudson Line, passing through most of CSX's infrastructure there; CP sought access to all shippers along those access routes, according to the Trackage Rights Agreement it proposed (a request later disavowed by it as an unfortunate mistake, in CP-26); CP sought local access rights to shippers and industries between Albany and New York City; CP sought the right to use all of CSX's facilities in the Bronx and Queens; and CP sought the right to have CSX switch it within the Bronx and Queens or, alternatively, the right to go anywhere reachable by rail in those boroughs with CP's own locomotives, cars and crews. For all this, CP wanted to pay only a trackage rights fee of 29¢ a car-mile for mileage on CSX's own track and a cost-based, capped switching charge if it made use of CSX's switching services; nothing else was to be paid for the access to all of CSX's facilities in the Bronx and Queens.

For its part, CSX took the view (CSX-167) that CP should access the Hudson Line through a single access route; that CP should have no local service rights north of

the Bronx; and that CP should be afforded access to all of CSX's facilities in the Bronx and Queens, which would be declared a terminal area, with CP to pay 50 percent of the cost of facilities and operations in the terminal area (including an interest rental for properties owned by NYC/CSX) with CSX to act as terminal operator. CP's reply (CP-25) flatly rejected the cost-sharing proposal of CSX to establish the rail facilities in the Bronx and Queens, formerly held by Conrail, as a joint terminal area.⁹

The CSX proposal was evidently too rich for CP's blood. CP wanted to do New York City on the cheap. The Board appeared to notice this and took account of CP's aversion to paying. The Board thus was very careful to see to it that (a) whenever CP was allowed to use a CSX service or facility, CP was to pay appropriate compensation to for it and (b) where CP was not paying for a CSX service or facility, it was not to use that service or facility. See Decision No. 109 at 6-8. Thus, (a) while CP could use its trackage rights to interchange directly with NYA at Fresh Pond Jct., CP was required to enter into suitable compensation arrangements with CSX for the use of interchange facilities at Fresh Pond Jct.; (b) if NYA used trackage rights from Fresh Pond Jct. to Oak Point for the interchange, in addition to the trackage rights fee, there would have to be "suitable compensation arrangements with CSX for this use of the Oak Point Yard"; and

⁹ At page 7 of Decision No. 109, the Board noted that CSX had agreed "to CP's request for access to all yards, terminals, other facilities and shippers, present and future, located in the Bronx and Queens." But this was conditioned on CP bearing one-half of the full ownership costs of all of the track and facilities.

(c) as to any other CSX facilities not identified by the Board as available for use by CP,¹⁰ CP would not have "physical access to . . . those facilities" and would not be charged for them. Decision No. 109 at 8.¹¹

So the Board, in the light of CP's unwillingness to enter into a joint terminal arrangement covering all of the Bronx and Queens, declined to impose any such arrangements. The Board said CP wanted to be provided with "traditional switching services where this would be the most efficient means of engaging in local service." *Id.* at 7. CP also wanted the option of providing direct service to customers "so as to discipline the quality of switching services provided to CP by CSX." *Id.* CP did not propose suitable (or any) compensation for the direct access. CP only proposed to compensate CSX for the "limited use by CP of Oak Point Yard" in connection with switching. Noting that CP had not proposed to pay anything for this privilege,¹² the Board denied CP's request for that direct access. *Id.* at 7. Thus, having provided CP

¹⁰ None were specifically identified as unavailable but clearly the transload facility would be one of them.

¹¹ The Board said:

As an initial matter, CP does not need, and we are not providing it with, physical access to, and use and control of, all of these facilities.

Decision No. 109 at 8.

In a "Reply" to the Petition (NYS-36/NYC-24), filed August 13, 1999, the State of New York and the New York City Economic Development Corp. refer to CSX's rejected offer as if it were what the Board ordered — rather than what the Board ordered! See NYS-36/NYC-24 at 7.

¹² "CP has not proposed suitable compensation arrangements that would become necessary if it were to make more extensive use of CSX's New York City track and terminal areas, as would be required if CP were to provide direct service to customers and facilities in the Bronx and Queens." Decision No. 109 at 7.

shippers in the Bronx and Queens" through a CSX switch on a per-car compensation basis "including the use of Oak Point Yard if necessary to efficiently perform this switching service." *Id.* at 7.

The Board in this fashion confined CP's rights to what it was willing to pay for, the overhead trackage rights and the use of switching services and the use of Oak Point Yard as necessary to effect switching.¹³ Nothing was said to suggest that CP would have access to any facilities other than Oak Point Yard or Fresh Pond Jct. operated by CSX, and indeed, as quoted above, those other facilities were neither to be used by CP nor paid for by it. *Id.* at 8. Moreover, there was no express access or right of use given CP to any "facilities" at all, other than the Oak Point Yard and Fresh Pond Jct. facilities; it was given access only to "shippers." "Shippers" are industries and other businesses located on a railroad's lines from which freight is picked up or delivered at those locations. Railroad proprietary facilities are not "shippers"; they are part of, or adjuncts to, the railroad's business. It is traditional on the part of railroads owning facilities to restrict their use to those shippers doing business with the railroad. CSX views the CSX TransFlo facilities as such private facilities. *Scheeter V.S.* at 5. As to HPT, nothing was

¹³ The CSX TransFlo facility is, of course, NYC/CSX's property. While HRY is not CSX's property, it can be reached by CP from CP's "landing point" at Oak Point Yard only over the lead track, the property of NYC/CSX, between Oak Point Yard and that yard. The Board did not contemplate that CP would be making direct use of that single-line track without passing facilities other than by running line-haul trains over it between Oak Point Yard and the Albany area.

[

.]

said in Decision No. 109 about access to it, although CP had made an issue of that access.

See CP-25 at 11.

So the only uses of CSX's property and services contemplated by Decision No. 109 were (i) the use of specified portions of the Chicago Line and the Hudson Line main line tracks and the NYC/CSX lead tracks between HRY and Oak Point Yard in order to exercise its overhead trackage rights to and from Oak Point Yard; (ii) limited use of Oak Point Yard to have the necessary switching movements done (performed as a service by CSX) and to effect interchange with NYA (the latter for an additional fee); (iii) the conscription of CSX to perform (for a separate fee) switching services for CP to all rail-accessed shippers within the Bronx and Queens; and (iv) switching by CSX to and from Fresh Pond Jct., and use of the interchange facilities at Fresh Pond Jct. (the latter for an additional fee). For all of these uses and services, a fee was either prescribed or was ordered by the Board to be worked out between the parties (except that the incidental use of Oak Point Yard in connection with switching movements was a part of the per-car switching charge). Other facilities and services were not to be paid for since they were not ordered to be available.

Decision No. 123 (Served May 20, 1999). — On the table at the time of this Decision were some issues as to CP's access similar to those now raised. The principal issues before the Board, to be sure, were issues concerning the level of trackage

rights compensation, raised by both sides in Petitions for Reconsideration.¹⁴ However, despite the clear message that CP's access was granted only to "shippers" and that by CSX switch, CP's Petition for Reconsideration and Clarification, filed January 7, 1999, insisted.

... that the Board state expressly that CP is entitled to direct access to all existing and future rail facilities and customers in the Bronx and Queens, including any facility CP may acquire or construct there, subject to payment of mutually agreeable compensation; this includes CP's entitlement to direct access to the Harlem River Yard ... to pick up, deliver and store cars and serve customers using the yard, provided CP negotiates an arrangement with the yard's third-party operator. (CP-28 at 4-5)

The last four paragraphs on page 14 of this Decision are pertinent to the Board's disposition of these CP requests and succinctly dispose of them — and dispose of those same requests' repetition in the Petition. In the third last paragraph, the Board says that since CSX does not own the HRY, CP is free to work out whatever arrangements it can with the State of New York, which owns the facility. The Board, however, in the very next sentence, made it plain that "this does not obviate the necessity for CP's traffic to move through the Oak Point Yard."¹⁵ The Board reaffirmed that it had granted "CP no

¹⁴ Although no issue concerning the initial level of switching movement charges was raised by CP's Petition for Reconsideration and Clarification (CP-28) — CP proposed \$250 a car and CSX and the Board accepted it in Decision No. 109 — the Board *sua sponte* lowered the initial level of switching movement compensation. See CP-28 and Decision No. 123 at 13.

¹⁵ In their "Reply," the State of New York and the New York City Economic Development Corp. quote the preceding sentence without quoting or even discussing this sentence. See NYS-36/NYC-24 at 5.

direct access to shippers in the Bronx and Queens;¹⁶ we granted CP only trackage rights to and from Oak Point Yard," plus the right to have CSX switch CP. "If CSX provides a switching service in connection with these movements, it is entitled to compensation," said the Board. In the last paragraph on page 14, after using the word "facility" in a couple of places to discuss what CP claims and what CSX says that CP had not been given, the Board finishes by saying that all it has done is to give "CP physical access to Oak Point Yard, from which it may serve New York area shippers, through reciprocal switching" at a prescribed per-car switching fee.

From this all, it clearly appears that (i) CP cannot, using its own crews and equipment, have access to any of the shippers in HRY, although it can go there to provide service (*i.e.*, on a CSX switch) if it has made arrangements with the HRY owner or operator; (ii) CP's traffic is to "move through Oak Point Yard"; (iii) CP is entitled to be switched by CSX to the Fresh Pond Jct. interchange point or to any shipper located in the Bronx or Queens; but (iv) CP has no right to make use of other CSX facilities other than Oak Point Yard and Fresh Pond Jct. (and those only for the purposes mentioned).

¹⁶ CP contends (Pet. at 11) that the Board's language that CP may, without CSX's consent, make arrangements with the operator of HRY for various things, such as "pickup" and "delivery" means that the Board was saying that once these arrangements were made, they trumped the Board's requirements that CP's pick-up and delivery access to local shippers be through CSX switch. The point seems to escape CP that HRY is a private facility and that for CP to use it, albeit through CSX switch, to pick up and deliver cars to CP's customers, CP requires the consent of the property owner or operator and the payment of any required compensation by CP to the owner or operator. As the Board pointed out, the fact that CP had made those arrangements and presumably agreed to make any appropriate payments the operator requested, does not mean that it could make the pickups and deliveries itself, notwithstanding the Board's limitation that these be made through a CSX switch.

DISCUSSION

I. DIRECT CP ACCESS TO HRY AND THE RIGHT TO RUN TRAINS OUT OF IT

The history and text of the Board's prior decisions in this case make it plain that CP has no right of direct access to shippers in the Bronx and Queens to deliver or pick up cars in connection with revenue movements. That was the express decision of the Board in Decision No. 109; CP persisted and asked the Board about it in the specific context of HRY in its Petition for Reconsideration and Clarification; and the Board, spelling its decision out very carefully, repeated in Decision No. 123 what it had already said. CP's assertion of a claim of right under the Board's decisions to have direct access to shippers to pick up and deliver traffic to them is accordingly without merit. Moreover, its assertion of a Board-granted right to run its trains in and out of HRY is flatly contrary to the Board's recent reminder, in Decision No. 123 at 14, that CP's rights to make use of HRY, granted by the Yard's operator, do "not obviate the necessity for CP's traffic to move through the Oak Point Yard." Nor is CP's assertion consistent with the Board's repeated statement that CP's trackage rights are "overhead" to Oak Point Yard. Decision No. 109 at 7; Decision No. 123 at 14.

On the operational level, the claim (Pet. at 11-12; Gilmore V.S. at 3-4) that the requirement of a CSX switch involves "backhaul" is mere rhetoric; the two Yards, Oak Point and HRY, are 3,400 feet apart. The movement to the Albany area is about 130 miles. While Oak Point is a short distance east of HRY, the operation would be

essentially the same if the physical positions of the two yards were reversed. Ratcliffe V.S. at 5.

While no serious assertion has been made by CP that the Board should use its oversight powers to revisit its twice-made decision that required CSX switching,¹⁶ that decision is eminently sound. The Board expressly noted that it might use its oversight powers, if circumstances changed, to reexamine its decision to afford CP only one access route in the Albany area to the Hudson Line, if CP's "traffic volume were to increase substantially." Decision No. 109 at 7 n.11. No such statement was made with respect to the question of CP direct access as opposed to switching access to customers in the Bronx and Queens. It is well known that conditions in the railroad system in New York City are congested and crowded. The Oak Point Link removed one source of congestion by providing freight trains an alternative to the crowded line between MO and Melrose, carrying the commuter trains on the Harlem and Shore Lines, but the road freight trains still share track with 100 or more daily commuter trains on the Hudson Line, which is less than two miles away from HRY at the northwest end of the Oak Point Link. Both the Oak Point Link and the industrial lead between HRY and Oak Point Yard are single

¹⁶ A half-hearted effort is made (Pet. at 3 n.3) to treat the Petition alternatively as a "petition to reopen" pursuant to 49 C.F.R. § 1115.4. The assertion is made that such reopening is warranted by "new evidence" and "substantially changed circumstances," presumably occurring since the May 20, 1999 decision. The only basis given for the existence of "new evidence" and "substantially changed circumstances" is said to be the "parties' inability to reach agreement on necessary terms," that is, that the two parties take different views as to what the Board's decisions mean. In other words, all that we have on CP's part is an assertion of existing rights under the Board's orders.

tracked without passing sidings. To be sure, those two connecting links themselves are restricted to freight, and there are no commuter trains on them. But the fact remains, while the Oak Point Link is so restricted, the Link is only 10,000 feet long. If a train were to stop on the Oak Point Link to pick up or to set off cars at HRY the route would be blocked. Such a blockage would potentially generate delay to other train moves and may back up the operation so as to intrude onto the line that is shared with the commuter trains. Therefore, avoiding, or at least minimizing on a selective basis, road freight trains stopping at HRY is the best way to avoid congestion in the area from road train movements. That problem can only become worse if freight traffic volumes increase. Ratcliffe V.S. at 5-6.

Moreover, HRY is essentially an industrial, shipper-oriented facility and is not well-suited for the building up and breaking down of trains. Thus, the building or breaking up of road trains in HRY is not efficient and would cause congestion in the yard, including the line which runs through it. This is less of a problem with intermodal trains, since the terminal processes they go through are quite different from merchandise trains; intermodal cars are placed on an appropriate loading track as trains and are loaded or unloaded by cranes. Ratcliffe V.S. at 6.

For CP directly to serve industrial shippers by picking up or dropping off cars from road trains in HRY would mean the simultaneous working of two railroads with their separate switching movements inside HRY. Since HRY is not well-suited to be a classification yard, the individual cuts of cars would have to be brought down from Oak

Point Yard in a series of single movements, thereby causing congestion on the single-tracked industrial lead connecting the two facilities, or the breaking up of trains or longer cuts would have to be effected in the unsuitable HRY. Having two operators engage in either of those two activities is a recipe for congestion.¹⁷ Ratcliffe V.S. at 7.

CP makes much of certain provisions of the "Terms and Conditions" in which its present trackage rights to operate on NYC/CSX have been memorialized. See Pet. at 13-17. Those "Terms and Conditions" were submitted to the Board by CP in its "Notice of Exemption" docket, Finance Docket No. 33771. In addition to providing the rights granted CP by the Board in the two pertinent decisions, CSX (although not required to do so) agreed, in those "Terms and Conditions," on a temporary basis, to permit CP directly to provide service within HRY in certain sorts of movements. CP wants "more," and, apparently employing the cynical maxim that "no good deed goes unpunished," charges that CSX's temporary and specially crafted partial waiver of the requirement that all local movements within the Bronx involving CP traffic take place through CSX switching, is a reimposition of the commodity limitations that the Board expressly forbade in the East-of-the-Hudson grant of trackage rights ordered in Decision No. 89. See Ordering Paragraph No. 28 at p. 177; Pet. at 15.

¹⁷ Another consideration to be noted is that having CSX perform all or a part of the switching to and from HRY will provide more consistent and efficient service to the HRY industries and will reduce congestion and switching problems inherent with shared switching operations. Indeed, across the industry the examples are legion where two railroads have agreed to a single railroad company switching for both carriers in order to improve customer service, to improve operating efficiency, and to reduce congestion. Ratcliffe V.S. at 7.

But since CSX could have stood on the Board's orders and refused to accommodate CP at all by refusing to permit any direct access to shippers in HRY, it was within CSX's rights to waive the switching requirement in some cases and not in others. NYC and CSX are the owner and operator of Oak Point Yard; they are the owner and operator of the lead between that yard and HRY; and CSX has been charged with the responsibility for dispatching the Oak Point Link. CSX has a considerable stake in the proper operation of all of the facilities mentioned. If CSX believes that a particular CP direct movement at a particular time does not jeopardize the fluid and efficient operation of these facilities for which it has responsibility, and permits that direct movement, CSX should be able to permit it, and CP should hardly complain. *Cf. Ratcliffe V.S. at 8.*

The fact that CSX waives a restriction in some cases and thus permits its main line, its yard and its lead track to be used in connection with purposes beyond those required by the Board does not mean that it must agree to do so in all cases. The waiver permits CP, on a temporary basis, to serve intermodal shippers at HRY directly and without CSX switching by picking up and delivering blocks of "Intermodal Traffic," which is defined as "conventional containers on flat cars or trailers on flat cars carrying commodities other than municipal solid waste." Terms and Conditions at 6.¹⁸ Similar temporary rights are granted to run entire trains of such Intermodal Traffic in and out of

¹⁸ The "Terms and Conditions" are attached to CP's Petition. They are subject to a Protective Order (not applicable to the parties) sought and obtained by CP and are presented in a confidential attachment to the Petition. However, the pertinent passages have been quoted by CP in its Petition (at 6-8), which is a public document and accordingly are discussed herein.

the intermodal terminal at HRY. *Id.* It is, however, provided that the temporary permission does not include “‘Roadrailleurs’ or similar ‘non-conventional’ equipment.”¹⁹ In the Terms and Conditions, it is agreed that “the parties agree CSXT will control the operations of all freight trains using the Oak Point Link, either to access Harlem River Yard or to make through movements between MNCR and Oak Point Link. CSXT will maintain fluidity and operating efficiency over the Oak Point Link track by requiring trains to operate within established schedules, keeping main line and running tracks clear, and following other local procedures developed from time to time to support efficient use of the Oak Point Link.” *Id.* at 6-7.²⁰ The permitted CP direct movements in question, CSX currently believes, will not disrupt that fluidity, subject to CSX dispatching; other

¹⁹ The provision in question is intended to avoid any interpretation that intermodal movements include anything other than trailer-on-flat-car (TOFC) or container-on-flat-car (COFC), such as transload materials of bulk commodities; CP once successfully argued to an arbitrator in a case between CP and Conrail some years ago that without such an exclusion, a reference to intermodal traffic included bulk commodity transloading traffic! Avoiding a repetition of that interpretation was the objective. *See Ratcliffe V.S.* at 8-9.

²⁰ A preamble to the temporary arrangement says that:

The parties have considered litigating the issue [of whether CP may, using its own locomotives, cars and crews, pick up and deliver cars in revenue service to and from shippers located in HRY] before the STB, but for their own independent reasons, have agreed to the following temporary arrangement (Terms and Conditions at 6)

It is also provided that:

If CPR, for any reason desires to seek an interpretation from the STB regarding the rights granted to CPR relating to Harlem River Yard in Orders 89, 109 and 123, then CPR may seek such an interpretation and CSXT shall continue the temporary arrangements described in this Article 3(b) [that is, the arrangements discussed in the text] until such time as the STB issues its decision interpreting those orders. (*Id.* at 7)

CP, of course, is seeking that interpretation through its Petition.

movements (or those movements at other times) might, and the additional control of CSX switching would be necessary. *Ratcliffe V.S.* at 9.

A partial waiver by CSX of its right to insist that all the CP movements other than line-haul movements to and from Oak Point Yard be made by CSX switch could as a theoretical matter, we submit, be made arbitrarily. But that issue need not be reached since the existing waiver is well designed and does have an important and rational basis. CSX was willing to grant the temporary waiver because the amount of intermodal traffic at the moment is not so large as to pose congestion issues,²¹ and CSX recognizes that these movements are time-sensitive. It should be noted that "blocks" of Intermodal Traffic, or such entire intermodal trains, are what is covered by the waiver; as developed above, those sorts of movements do not have the potential for congestion that the receipt and breaking down or building up of entire merchandise trains in HRY would have, and the amount of switching movements within HRY is minimized in the case of intermodal movements, as are the number of trips between that facility and Oak Point Yard via the industrial lead that connects them. It should be noted that an intermodal facility has been established at HRY. Thus, the time sensitiveness of the traffic, the relatively small volumes at the present time, and the handling characteristics of intermodal blocks and trains, all join to establish the reasonableness of the temporary waiver that CSX has granted. *Cf. Ratcliffe V.S.* at 9-10.

²¹ CP recognizes that over time the volume of this and other traffic generated at HRY will increase. *See Labarbera V.S.* at 3.

CP complains that the terms of the temporary authorization are not broad enough to include "solid waste" or "trash" rail movements, but the fact is that those movements are less time-sensitive. They do not involve inventories of consumer goods, just-in-time parts, or UPS deliveries. Those movements, given the potential volumes of solid waste that will be involved as local landfills close, will take place in longer trains and present the dangers of congestion of Oak Point Link and protrusion into the Hudson Line at the north end of the Oak Point Link. Ratcliffe V.S. at 10.

In any event, CSX, which is charged with the dispatching of trains over the Oak Point Link and has been entrusted by the Board to provide switching services to CP, has consented to waive a portion of the restrictions on CP, which otherwise has not been authorized by the Board directly to serve shippers in the Bronx and Queens. If CSX had not done this, the Board's prohibition against CP traffic movements using the trackage rights except to go overhead to and from Oak Point Yard would remain in full force and effect. It is, we suggest, not an imposition of any commodity restrictions but a simple recognition that the whole includes the sum of its parts that is involved here.²² What cannot be handled direct by CP may be handled by CSX switch for CP.

²² If the Board believes it inappropriate for CSX in effect to "waive" the requirement that CP use its switching services on all movements of revenue traffic within the Bronx and Queens other than movements between the Albany area and Oak Point Yard and movements to and from the NYA at Fresh Pond Jct., CSX would, of course, revoke the waiver. But the waiver process seems to be an appropriate one, since if the two freight rail carriers serving the Bronx agree that at a particular time it is not necessary that certain CP moves take place via CSX switching, why should it be insisted upon?

The remaining hobgoblins envisioned by CP with respect to the limited temporary waiver by CSX appear to be imaginary. CP claims that only double-stack intermodal cars are "conventional" and not single-stack intermodal cars, and claims that it has been subjected to a sort of "Catch 22." CP says that since double-stack intermodal trains will not clear the Hudson Line and since single-stack are not "conventional," CP cannot take any advantage of the waiver. Pet. at 13-14; Gilmore V.S. at 4-6. That is nonsense. The restriction in question is to "conventional containers" on "flat cars," not to "conventional flat cars." Single-stack COFC — and TOFC — on flat cars are clearly conventional and permitted and presumably would be the way in which CP would prefer to operate.²³ In fact the language of the Terms and Conditions expressly allows operation of trailers on flat cars over the trackage rights. This is a case of CP "interpreting" the parties' agreement in a way that causes it harm in order to generate a forensic issue. The reasons why the restriction to "conventional containers" was inserted are discussed in note 19, above. The bottom line is that the temporary waiver granted will permit certain particularly time-sensitive traffic, namely, intermodal traffic in its ordinary meaning, to be moved by CP itself to and from HRY in its trains between the Albany area and the Bronx. Cf. Ratcliffe V.S. at 10-11.

²³ CSX interprets "conventional containers" as including conventional trailer-on-flat-car Intermodal Traffic, as well as conventional container-on-flat-car Intermodal Traffic. The agreement does restrict "'Roadrailleurs' or similar 'non-conventional' equipment." CP has shown no interest to CSX in running Roadrailleurs or in discussing what equipment would be deemed "similar" to them and, hence, "non-conventional." Ratcliffe V.S. at 10-11. Moreover, even if the temporary waiver was not applicable to some particular sort of equipment, that equipment could still be used by CP, but the movement would have to be subject to CSX switch, which the Board in fact contemplated could and would be the case with all of CP's traffic.

II. "ACCESS" TO THE CSX TRANSFLO FACILITY AT HPT

CP insinuates that CSX has denied it all access to customers at HPT. Pet. at 17; Labarbera V.S. at 2. That insinuation is manifestly false.²⁵ It is the fact that, via CSX switch, CP can serve any of the approximately 100 members of the Co-op that have established facilities in HPT, and whose facilities take up the major portion of that facility. Scheeter V.S. at 2. What CP cannot do is serve a proprietary transloading facility which CSX and its affiliate, CSX TransFlo, have established at their separate location in HPT. As noted by the Board in Decision No. 109 at 8, CSX proposed that CP have access and use of all terminal facilities within the Bronx and Queens. CP was, however, unwilling to pay for that access. The Board accordingly said that "CP does not need, and we are not providing it with, physical access to, and use and control of, all of these facilities." The transloading facility is not a "shipper"; there is no "shipper" permanently resident where that facility sits. A contractor, Bulkmatic, operates the facility as CSX's agent, and makes deliveries by truck to the users of the bulk materials stored at the facility.

The facility does involve railroad tracks, which leads CP to argue that it should have access to the tracks. But having tracks is a common characteristic of railroad facilities used in connection with rail operations (repair shops, locomotive storage

²⁵ In NYS-36/NYC-24 (at 7-8), the State of New York and the New York City Economic Development Corp. accept this false insinuation as gospel and proceed to demolish a straw man. They never address the only issue, relating to the CSX TransFlo facility.

facilities, classification yards, etc.); railcars are not all-terrain vehicles. The facility is a classic proprietary railroad facility, like a classification yard; like such a yard, it involves tracks in its functions. CP claims (Pet. at 17) that if the transloading facility is a "facility," so are the rest of CSX's tracks in the Bronx and Queens so that the logical outcome of CSX's position is that it need not switch for CP at all since that would involve the use of CSX's "facilities." The argument is essentially a play on words; the Board itself made it plain, in Decision No. 109 at 8, that there were CSX "facilities" to which CP would have no access, but that CP was entitled to access, via CSX switch, to all rail-served shippers in the Bronx and Queens. The clear meaning and common sense of the situation is that the CSX TransFlo operation is a "facility," not a "shipper." It is a method whereby CSX's line-haul shippers are facilitated in selling their product to users who are not served by rail.

CP frames its demand as seeking "access" to CSX's tracks; but quite clearly CP wishes to use CSX TransFlo's operation, including CSX's subleased property. CP would have it that it is merely asking the Board to order CSX to switch cars moving in CP's account to the tracks where the CSX Big Apple TransFlo facility is located. But CP's Mr. Labarbera makes it plain that CP wants to use these same CSX tracks for bulk transfer purposes. Labarbera V.S. at 2. Exactly what this means, we are not told. Are CSX TransFlo and its contractor to be conscripted to work for CP's shippers? Or will there be a compulsory joint tenancy with CP operating itself, through a contractor; either the CSX TransFlo contractor under a separate contract or a different contract? As the

Scheeter Verified Statement points out (at 4), there are difficulties both ways. In either event, third parties having no relationship to CSX's shippers will enter upon CSX's property with trucks and engage in the transfer of bulk commodities. For now, it is flour (and maybe later, plastics), but no limitation is suggested. Who is responsible for the safety of operations? What happens if inventory in railcars comes up short or is contaminated? What if some action by CP or its contractor causes CSX to be in violation of its contracts with the Co-op? With a high degree of irresponsibility, CP has expressed no thoughts on these issues; it has not even offered to pay for what it asks for (other than the switching charge). But what CP is seeking is considerably more than switching access. It involves a degree of interaction between competitors that goes well beyond what is conventional in the railroad industry, and there is no good reason to impose it.

CP is not without its options if it wishes to have the benefit of a transload facility in the Bronx or Queens. The options will, to be sure, involve some initiative on CP's part, and it may be required to pay some money for them by way of capital expenditure and operating costs. Indeed, CSX understands that CP has set up a transload facility in HRY. *Labarbera V.S.* at 3. CSX will switch CP's cars to and from there.²⁶ CP says that

²⁶ CSX understands that Bulkomatic is serving as CP's agent in the operation of this facility in HRY, and CSX has no objection to this, so long as Bulkomatic does not use CSX's facilities to serve CP.

Mr. Randy Leaders, an officer of ConAgra, a leading agricultural products company and miller, has furnished a Verified Statement objecting to the handling of a shipment of flour, which, apparently to create a test case, CP encouraged ConAgra to attempt to ship via CP to the CSX TransFlo facility in HPT. CSX clearly expressed its intended refusal to switch a CP shipment to a CSX private facility in a letter to Mr. Leaders. See the Verified Statement of Thomas C. Owen, Jr., Exhibit A. ConAgra and CP persisted in sending the car. Mr. Leaders complains of a one-

Footnote continued on next page

flour is more like fruits, vegetables and produce and is best handled at HPT. *Id.* CP's belief that it would be a good thing to have its shippers' flour handled in the same terminal where fruits and vegetables are handled has a certain orderliness and symmetry to it, but that symmetry does not seem to justify an invasion of private property or to relieve CP from the responsibility of putting together its own facility if it wants to have one. Anyhow, CP also wants to handle "plastics" at the CSX TransFlo facility (Pet. at 18) which takes us out of the food kingdom. CP's arguments seem specious.

Presumably if CP offered consideration to the Co-op at a level which made a sublease or license of space at HPT to CP more economically advantageous to the Co-op than other uses for the land in question, the Co-op would grant CP such a sublease or license. That is, of course, the basis on which CSX must deal with the Co-op. Or if CP had some problem in using either of HRY and HPT, CP could find space elsewhere in the Bronx, arrange for side tracks to it, and require CSX to switch CP's cars there. While, as usual, CP has not made any offer in its filing to pay CSX anything for its use of the CSX TransFlo facility, CSX has the right to restrict the use of its facilities in the Bronx, except those expressly made subject to CP's use by the Board in its decisions, to its own use and

Footnote continued from previous page

day delay in moving the shipment so that it could be handled by CP at "Oak Point Yard," which Mr. Leaders locates in "Northern New Jersey," rather than the Bronx. In fact, CSX switched the shipment, on CP's instructions, to the new CP transloading facility in HRY. The one-day delay was occasioned by the fact that CP had not advised CSX of the presence of CP's new transloading facility in HRY, information which CSX believes that a party using switching services owes to its switching carrier if it expects prompt service. Certain other statements made in Mr. Leaders' V.S. are put in context in the Owen V.S.

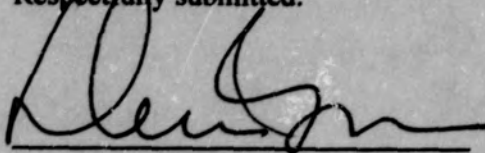
those of its shippers, whether another carrier offers to pay or not. CP can respond with an initiative of its own and, quite certainly, exclude CSX shipments from CP's own facility while receiving switching services to the CP facility, price-controlled by the Board, from CSX.

Accordingly, under a free enterprise system, if CP wishes to compete by providing transloading services to its customers, it ought to rent some space and set up a facility. These facilities are complex in management, but the physical requirements are not exotic, and CSX has put up over six dozen of them throughout its territory. CP seems to have put together such a facility, but expresses some unhappiness about its HRY facility. There is no reason for CP to insist on using someone else's property simply because it prefers that party's location rather than finding one itself. It is an interesting characteristic of the rail facilities in the Bronx that a number of them are publicly owned and leased to private businesses independent of the railroads, a condition which seems to favor open entry into the business of supplying transloading and other services accessory to rail movements. Given all these facts, there is certainly nothing in the situation requiring the exercise of any oversight powers of the Board, let alone justifying a claim that CP already has any right to access and use the CSX TransFlo transload facility.

CONCLUSION

For the reasons stated, CP's Petition should be denied.

Respectfully submitted.



Dennis G. Lyons
Richard L. Rosen
Sharon L. Taylor
ARNOLD & PORTER
555 Twelfth Street, N.W.
Washington, D.C. 20004-1202
(202) 942-5000

Samuel M. Sipe, Jr.
David H. Coburn
STEPTOE & JOHNSON LLP
1330 Connecticut Ave., N.W.
Washington, D.C. 20036-1795
(202) 429-3000

Mark G. Aron
Peter J. Shudtz
CSX CORPORATION
One James Center
901 East Cary Street
Richmond, VA 23129
(804) 782-1400

F. Michael Giftos
Paul R. Hitchcock
CSX TRANSPORTATION, INC.
One James Center
500 Water Street
Speed Code J-120
Jacksonville, FL 32202
(904) 359-3100

*Counsel for CSX Corporation and
CSX Transportation, Inc.*

August 16, 1999

**REPLY VERIFIED STATEMENT OF
LAWRENCE L. RATCLIFFE**

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 33388

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

**REPLY VERIFIED STATEMENT OF
LAWRENCE L. RATCLIFFE**

My name is Lawrence L. Ratcliffe. I am employed by CSX Transportation, Inc. ("CSXT") as General Manager – Intercarrier Agreements. My business address is 2001 Market Street, Philadelphia, Pennsylvania 19101. From 1982 until December 31, 1998, I was employed by Consolidated Rail Corporation ("Conrail"). My positions at Conrail included Senior Operations Improvement Analyst; Regional Superintendent – Industrial Engineering; Director, Transportation/Customer Service; General Superintendent – Contracts; and Assistant General Manager – Network Operations. I make this Verified Statement in connection with CSXT's and CSX Corporation's (collectively, "CSX") reply to a Petition for Enforcement filed by Canadian Pacific and its subsidiaries (collectively, "CP") on July 27, 1999 (the "Petition").

The Petition relates to CP's trackage rights service East of the Hudson between the Albany area and the Bronx. In the trackage rights mandated by the Board, CP was granted overhead trackage rights over one access route between Schenectady, NY, and

Oak Point Yard in the Bronx, via the Hudson Line, with interchange rights with the NYA at Fresh Pond Jct. in Queens, and the right to serve, via CSX switch, all shippers accessible by rail from Oak Point Yard in the Bronx and Queens. NYA was also given trackage rights to effect interchange with CP at Oak Point Yard; or interchange with NYA could be effected at Fresh Pond Jct. directly by CP or via CSX switch. The trackage rights granted involving NYC/CSX ownership started at Schenectady and ended in Poughkeepsie, NY, and also ran between the Harlem River Yard ("HRY") and Oak Point Yard, CSX's main yard in the Bronx. The trackage rights also extended between Oak Point Yard and Fresh Pond Jct., for the purposes of permitting CP to interchange with the NYA. The intermediate tracks constituting the historic Hudson Line (from Poughkeepsie and running south to the Oak Point Link in the Bronx) are operated by and heavily used by, a commuter authority. The final piece of the CP trackage rights route is the Oak Point Link which is owned by the State of New York and extends from connection with the Hudson Line near Highbridge, in the Bronx, to the NYC/CSX property line east of HRY near 132nd Street.

CP started its use of the trackage rights on July 13, 1999 and its trackage rights service appears to be in its infancy. According to CSX's records, in the seven-day period ending on the date of CP's Petition, CP operated a grand total of 28 loaded cars down the Hudson Line to Oak Point Yard.

I have been asked to provide some background concerning rail operations and yards in the Bronx which may be pertinent to CP's Petition.

There are three rail lines which pass through the Bronx that are used by commuter trains serving Grand Central Terminal in Manhattan. There are the Hudson Line, which runs essentially to the north, generally close to the eastern bank of the Hudson River, to Poughkeepsie; the Harlem Line, which runs to the east of the Hudson Line into the suburban counties of New York State; and the Shore Line, which runs in a northeasterly direction to points in southwestern Connecticut along the north shore of Long Island Sound.

Until last October, Conrail road freight train operations to and from Oak Point Yard involved movements on those commuter lines all the way from Poughkeepsie over the Hudson Line to its connection with the Harlem Line at "MO," and thence north to a point on the Harlem Line known as Melrose. The MO to Melrose segment is used by Harlem Line trains and Shore Line trains, which thereafter diverge from the Harlem Line north of Melrose at Woodlawn. At Melrose, road freight trains entered the Port Morris Connection, an all-freight Conrail line (now NYC/CSX line), and from there went to Oak Point Yard. The portion of the route between MO and Melrose involved a line heavily used by commuter trains. However, in October 1998, the "Oak Point Link," built by and owned by the State of New York, was completed and opened for business. The Oak Point Link is a new line of railroad extending approximately 10,000 feet between the connection with Metro-North at Highbridge and HRY. It is a single-track line without passing sidings, and accordingly trains cannot meet or pass on it. The length of the track and the lack of passing sidings significantly restrict capacity on the Oak Point Link. The Oak Point Link is devoted exclusively to freight movements. It is a small step toward

establishing a physical separation between freight and passenger movements on the crowded Greater New York rail lines. The Oak Point Link frees the road freight train movements from interference by the commuter trains on the Harlem and Shore Lines, although it does nothing with respect to freight movement conflicts with the Hudson Line commuter services. Both CSX and CP have trackage rights over the Oak Point Link. CSX is responsible for the dispatching on the Oak Point Link and for maintaining the track.

HRV, a facility of approximately 92 acres at the southern tip of the Bronx, is accessible from the Oak Point Link. HRV is situated to the west of Oak Point Yard, and the eastern entrance to HRV is approximately 3,400 feet from the entrance to Oak Point Yard. HRV is a privately-owned, shipper-oriented industrial yard, built on land owned by New York State and leased to a corporation named Harlem River Yard Ventures, Inc., a private enterprise. There are various shippers and other facilities located in HRV. An intermodal terminal, privately owned by interests other than the overall HRV lessee, is located in HRV, but it accounts for a minority of the space available in HRV. Before the completion of the Oak Point Link, HRV existed as a shipper-oriented industrial yard, but was accessible only from the northeast by an industrial lead coming from Oak Point Yard. HRV continues to be accessible from Oak Point Yard on that lead track, which is now owned by NYC and operated by CSX. That lead from Oak Point Yard to HRV, like the Oak Point Link itself, is single-tracked without passing sidings. That is the only practical rail access to HRV from Oak Point Yard.

The Hunts Point Terminal ("HPT"), which like HRY is involved in CP's Petition, is located in the Bronx to the east of Oak Point Yard. HPT covers about 110 acres. HPT is accessed from Oak Point Yard by a northeast movement followed by a southeast move into the terminal. These moves are made entirely on NYC/CSX freight-only tracks.

I have been asked to comment on certain statements made in CP's Petition concerning operations involving HRY and concerning the "Terms and Conditions" of CP's trackage rights, a document which I was involved in negotiating and drafting.

On the operational level, the claim made by CP that the Board's requirement of a CSX switch for traffic picked up in or delivered to HRY involves "backhaul" seems to me to be simply rhetorical; the two Yards, Oak Point and HRY, are 3,400 feet apart. The movement from the Bronx to the Albany area is about 130 miles. While Oak Point is a short distance east of HRY, the operation would be essentially the same if the physical positions of the two yards were reversed.

As to the general wisdom of the Board's approach in granting overhead trackage rights to Oak Point Yard and requiring a CSX switch for CP's movements of traffic to and from shippers, the Board's decision seems quite sound to me. It is well known that conditions in the railroad system in New York City are congested and crowded. The Oak Point Link removed one source of congestion by removing the road freight trains from the crowded line between MO and Melrose, which carries the commuter trains on the Harlem and Shore Lines, but the road freight trains still share track with the 100 or more daily commuter trains on the Hudson Line which is less than two miles away from HRY

at the northwest end of the Oak Point Link. Both the Oak Point Link and the industrial lead between HRY and Oak Point Yard are single track without passing sidings. To be sure, these two connecting links themselves are restricted to freight, and there are no commuter trains on them. But the fact remains, while the Oak Point Link is so restricted, the Link is only 10,000 feet long. If a train were to stop on the Oak Point Link to pick up or to set off cars at HRY the route would be blocked. Such a blockage would potentially generate delay to other train moves and may back up the operation so as to intrude onto the line that is shared with the commuter trains. Therefore, avoiding, or at least minimizing on a selective basis, road freight trains stopping at HRY is the best way to avoid congestion in the area from road train movements. That problem can only become worse if freight traffic volumes increase.

Moreover, HRY is essentially an industrial, shipper-oriented facility and is not well-suited for the building up and breaking down of trains. Thus, the building or breaking up of road trains in HRY is not efficient and would cause congestion in the yard, including the line which runs through it. This is less of a problem with intermodal trains, since the terminal processes they go through are quite different from merchandise trains; intermodal cars are placed on an appropriate loading track as trains and are loaded or unloaded by cranes.

For CP directly to serve industrial shippers by picking up or dropping off cars from road trains in HRY would mean the simultaneous working of two railroads with their separate switching movements inside HRY. Since HRY is not well-suited to be a

classification yard, the individual Point Yard in separate movements, tracked industrial lead connections would have to be effected either of those two activities.

Another consideration is switching to and from HRY and HRY industries and will require switching operations. Indeed, the railroads have agreed to a plan to improve customer service, to

That is not to say that pickup and delivery to and from has provided for just that on addition to providing the right CSX (although I believe it is "Conditions," on a temporary basis in certain sorts of movements decision — to waive the switch and CSX are the owner and of the lead between that yard

lual cuts of cars would have to be brought down from Oak
pents, thereby causing additional congestion on the single-
ting the two facilities, or the breaking up of trains or longer
d in the unsuitable HRY. Having two operators engage in
s a recipe for congestion.

to be noted is that having CSX perform all or a part of the
will provide more consistent and efficient service to the
ice congestion and switching problems inherent with shared
(, across the industry the examples are legion where two
gle railroad company switching for both carriers in order to
improve operating efficiency, and to reduce congestion.

in no circumstances should CP be permitted to attempt
om Bronx shippers with its own equipment and crews. CSX
a carefully designed basis in the "Terms and Conditions." In
its granted CP by the Board in the two pertinent decisions,
as not required to do so) agreed, in those "Terms and
basis, to permit CP directly to provide service within HRY
s. It was, in my view, within CSX's rights — and a sound
tching requirement in some cases and not in others. NYC
operator of Oak Point Yard; they are the owner and operator
d and HRY; and CSX has been charged with the

responsibility for dispatching the Oak Point Link. CSX has a considerable stake in the proper operation of all of the facilities mentioned and in the smooth interface of them with the HRY. If CSX believes that a particular CP direct movement at a particular time does not jeopardize the fluid and efficient operation of these facilities for which it has responsibility, it should be able to permit it.

The waiver granted in the Terms and Conditions permits CP, on a temporary basis, to serve intermodal shippers at HRY directly and without CSX switching by picking up and delivering blocks of "Intermodal Traffic," which is defined as "conventional containers on flat cars or trailers on flat cars carrying commodities other than municipal solid waste." Similar temporary rights are granted to run entire trains of such Intermodal Traffic in and out of the intermodal terminal at HRY. It is, however, provided that the temporary permission does not include "'Roadrailleurs' or similar 'non-conventional' equipment." The provision in question is intended to avoid any interpretation that intermodal movements include anything other than trailer-on-flat-car (TOFC) or container-on-flat-car (COFC), such as transload movements of bulk commodities. In a case involving D&H (CP's predecessor) and Conrail some years ago that I remember an arbitrator accepted D&H's arguments and held that without such an exclusion, a reference to intermodal traffic included bulk commodity transloading traffic. Such is not the intent here and so the Terms and Conditions were drafted to avoid such an interpretation at HRY.

In the Terms and Conditions, it is agreed that "the parties agree CSXT will control the operations of all freight trains using the Oak Point Link, either to access Harlem River Yard or to make through movements between MNCR and Oak Point Link. CSXT will maintain fluidity and operating efficiency over the Oak Point Link track by requiring trains to operate within established schedules, keeping main line and running tracks clear, and following other local procedures developed from time to time to support efficient use of the Oak Point Link." The CP direct movements in question that are permitted in the "Terms and Conditions," CSX currently believes, will not disrupt that fluidity, subject to CSX dispatching; other movements (or those movements at other times) might disrupt the fluidity of operations and so the provision of CSX switching is necessary.

In my view, the waiver granted in the "Terms and Conditions" is well-designed. CSX was willing to grant the temporary waiver because the amount of Intermodal Traffic (as defined in the Terms and Conditions) at the moment is not so large as to pose congestion issues, and CSX recognizes that these movements are time-sensitive. It should be noted that "blocks" of Intermodal Traffic, or such entire intermodal trains, are what is covered by the waiver; as I have discussed above, those sorts of movements do not have nearly the potential for congestion that the receipt and breaking down or building up of entire merchandise trains in HRY would have, and the amount of switching movements within HRY is minimized, as are the number of trips between that facility and Oak Point Yard via the industrial lead that connects them. Thus, the combination of the time sensitiveness of the traffic, the relatively small volumes at the

present time, and the handling characteristics of intermodal blocks and trains all join to establish the reasonableness of the temporary waiver that CSX has granted.

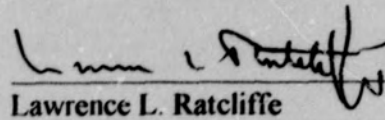
CP complains that the terms of the temporary authorization are not broad enough to include "solid waste" or "trash" rail movements, but the fact is that those movements are less time-sensitive. Those movements, given the potential volumes of solid waste that will be involved as local area landfills close, could well take place in longer trains and present the dangers of congestion of Oak Point Link and protrusion into the commuter-ridden Hudson Line at the northwest end of the Oak Point Link.

CP expresses some strange views about the meaning of the Terms and Conditions. CP claims that only double-stack intermodal cars are "conventional" and not single-stack intermodal cars. Using CP's logic, since double-stack intermodal trains will not clear the Hudson Line and since single-stack are not "conventional," CP cannot take any advantage of the waiver whatsoever. There is no basis for that notion. The restriction in question is to "conventional containers" on "flat cars," not to "conventional flat cars." Single-stack COFC — and trailers-on-flat-cars — are clearly conventional and permitted and presumably would be the way in which CP would prefer to operate. In fact the language of the Terms and Conditions expressly allows operation of trailers on flat cars over the trackage rights. CSX interprets the language of the Terms and Conditions as permitting CP to operate conventional trailer-on-flat-car Intermodal Traffic, as well as conventional container-on-flat-car Intermodal Traffic. The "Terms and Conditions" do restrict "'Roadrainers' or similar 'non-conventional' equipment." CP has shown no

interest to CSX in running Roadrainers or in discussing what equipment would be deemed "similar" to them and, hence, "non-conventional." Moreover, even if the temporary waiver was not applicable to some particular sort of equipment, that equipment could still be used by CP, but the movement would have to be subject to CSX switch, which the Board in fact contemplated could and would be the case with all of CP's traffic. The temporary waiver granted will permit certain particularly time-sensitive traffic to be moved by CP itself to and from HRY in its trains between the Albany area and the Bronx.

VERIFICATION

I, Lawrence L. Ratcliffe, declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this statement. Executed on August 12, 1999.



Lawrence L. Ratcliffe

**REPLY VERIFIED STATEMENT OF
JOHN SCHEETER**

[PUBLIC VERSION]

PUBLIC VERSION

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

**FINANCE DOCKET NO. 33388
(Sub-No. 69)**

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

**REPLY VERIFIED STATEMENT OF
JOHN SCHEETER**

My name is John Scheeter. I am President and General Manager of Bulk Intermodal Distribution Services, Inc. ("BIDS"), an affiliate of CSX Corporation. I have been employed by BIDS since 1994. My prior positions with the CSX companies have included Field Service Engineer and Manager of Thru Bulk Service for CSX Transportation, Inc. ("CSXT") and Director of Operations for CSX Corporation. I have responsibility for the operations at CSX *TransFlo*, a trade name of BIDS. CSX *TransFlo* manages and markets over 130 transloading locations on CSXT or connecting lines throughout the eastern United States and Canada, including a number of facilities acquired in the division of Conrail's routes and assets which took place on June 1, 1999.

One of the transloading facilities CSXT acquired in the division of Conrail is located at the Hunts Point Terminal ("HPT") in the Borough of the Bronx in the City of New York. HPT is located to the northeast of CSXT's Oak Point Yard. My understanding is that HPT is owned by the City of New York, but it is leased to, and operated by, the Hunts Point Terminal Produce Cooperative Association (the "Co-op"), which is a cooperative association whose members are approximately 100 wholesalers in the fresh fruit, vegetable and produce trade. Most of the space at HPT is devoted to the warehouses and other facilities of the members of the Co-op and support for those facilities. Those facilities are generally long, narrow sheds and other buildings with railroad tracks alongside. HPT and these facilities of the Co-op members are accessible by way of a CSXT line from Oak Point Yard. HPT is also served by trucks, both for long-haul inbound movements of merchandise and for local drayage and delivery.

As noted above, a CSX *TransFlo* facility is also located in HPT. The facility at HPT, like about six dozen other CSX *TransFlo* locations, is actively managed with a resident operator. The facility in HPT was originally a Conrail facility known as the "Big Apple Bulk Transfer Facility." It holds, under a license from the Co-op granted to Conrail, four sidetracks and adjacent ground. Bulkmatic Transport Company ("Bulkmatic"), which serves as an agent for CSX, operates this facility as CSX's agent under a contract. At the facility, there are scales for weighing trucks (both empty and loaded), lights on poles, space

for parking trucks, fencing and an office trailer. [[

.]]

The proper management of the four tracks licensed to CSX is an important part of the operation of the facility. There are no storage facilities at the transloading facility apart from the railroad cars themselves, and the incoming materials are stored in the rail cars in which they arrive until transloading occurs. In order to manage the use of the track space properly on the four sidetracks, the facility is given advance notice, sometimes as much as five days in advance, that a car or cars of material will be coming to it on a specified day. This is done through internal CSX communication systems under established CSX practices.

The CSX *TransFlo* facility at HPT could, under the arrangements with the Co-op, be used for any nonhazardous materials, food-related or not. However, at the present time, the facility is being used solely for the receipt, temporary storage and transshipment of flour. The customers are generally the mills, rather than the end users of the flour (such as bakeries). Often the flour is shipped by the mill to the facility without any indication of the user. In those cases, the mill will thereafter give instructions to CSX *TransFlo*'s agent to draw a certain quantity of the flour that is being kept in storage in the cars for the mill's account and to deliver that quantity to a particular user. Under arrangements made by Bulkmatic, CSX *TransFlo*'s agent, and the user, the maximum transfer price of which is controlled by CSX *TransFlo*, the flour is delivered to the user by truck when those delivery

instructions have been given. None of the users, who are typically bakeries in the Greater New York area, maintains any physical presence at the transload facility.

A transloading facility requires careful management and involves handling a shipper's product in a way, which is more complex than a simple line-haul movement. There are increased risks of contamination (most obviously of edible products, but also presented by oil and other industrial bulk commodities), there is the need for measurement and the possibility of shortage and the possibility of loss. Issues of responsibility and liability are presented on all these accounts.

CSX *TransFlo* is willing to confront these issues in its operations for CSXT line-haul shippers, but sees no reason why it should face them for another rail carrier's shippers. Quite clearly, CP wants more than to "access" the tracks that are part of our facility. In effect, it wants to use our transload facilities. It is not clear whether it wants to use them under the operation of CSX *TransFlo* and its contract arrangements with Bulkomatic or whether it wants to use them as a sort of joint tenant with CSX, using CSX's contractor under separate arrangements or another contractor. Either arrangement poses problems of management responsibility and liability, more aggravated if there were two separate operations, but still present if there is only one operation but that that single operation had to handle CP's customers' bulk merchandise. It seems to me that if CP wishes to have a transloading operation in the Bronx, it ought to continue the arrangements it has made in the

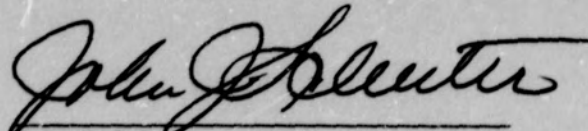
Harlem River Yard or make alternative arrangements there, in HPT, or elsewhere in the Bronx wherever railroad sidetracks can be laid.

Starting up a transloading facility requires some capital, but the physical requirements are relatively simple. They involve railroad sidetracks of appropriate number and length for the business to be landed, a truck scale, some modest office facilities, parking space for vehicles and electric and communications connections. If work is to be done at night, illumination (lights on poles) would be involved. This assumes that the trucks coming to the facility are self-loaders, which is the case with the current flour operation at the CSX *TransFlo* facility in HPT. There is additional space at HPT where another facility similar to ours could be established, but, as with the CSX *TransFlo* facility, the terms would have to be attractive enough to the Co-op to persuade it to license such an operation rather than to use the space for some other function.

CSX views the CSX *TransFlo* facilities throughout CSX's system as proprietary to CSX, and maintains that the facilities exist for the purpose of serving CSX line-haul shippers. This service to the long-haul shippers gives them an opportunity to market their product to buyers who are not served by rail, including those who buy in comparatively small quantities. CSX views the service as an adjunct to its rail transportation service and an extension of its role in its shippers' logistics chains.

VERIFICATION

I, John J. Scheeter, declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this statement. Executed on August 13, 1999



John J. Scheeter

**VERIFIED STATEMENT OF
THOMAS C. OWEN**

VERIFIED STATEMENT

OF

Thomas C. Owen, Jr.

Assistant Vice President - Agricultural Products

My name is Thomas C. Owen, Jr. I am Assistant Vice President Agricultural Products for CSX Transportation, Inc. (CSXT). I am responsible for the marketing and sales of rail transportation services to CSXT's agricultural commodities customers. Flour is one of the commodities within my group's jurisdiction.

In this verified statement I would like to address two subjects:

- CSXT's clear communication to ConAgra of its position that the CSX Big Apple TransFlo Terminal located within the Hunts Point Terminal in the Bronx would not be available for use by Canadian Pacific in connection with linehaul transportation that did not involve CSXT.
- The nature of, and reason for, the fifty-mile radius restriction contained in the volume commitment paragraph of the draft transportation contract offered to ConAgra as CSXT competed with CP for ConAgra's linehaul business into the Bronx.

Use of the TransFlo Terminal.

From the earliest time that CSXT became aware of CP's representations to ConAgra that CP would be able to use the Big Apple Terminal, CSXT has made its position very clear. When this matter first came to my attention, through CSXT's National Account Manager, Michael DeHaven, I directed him to contact ConAgra immediately and to explain that CSXT would not switch cars to that facility if they had not moved in CSXT line haul service.

Mr. DeHaven reported back to me that ConAgra continued to indicate that CP was taking the position that CP would be able to access and use the facility. Accordingly, I spoke directly with Mr. Lynn Myers of ConAgra on June 17, 1999. I explained that CSXT's affiliate, CSX TransFlo, makes the bulk transfer facility available as a service to CSXT customers as an adjunct to our linehaul rail transportation service. I explained that CP would have to establish its own facilities in the New York City area and that we recognized that CP was a bona fide competitor for ConAgra's business. I followed up that conversation with a letter to insure that there would be no risk of miscommunication. I attach a copy of that letter to my verified statement as Exhibit A.

In that conversation on June 17, Mr. Myers explained to me that they intended to "test" CSXT's position by consigning a car via CP to the CSX TransFlo Terminal despite our indications that it would not be placed and that CP did not have the right to use the terminal. I expressed my hope that ConAgra would not try to force its way into the terminal with a confrontational approach. I specifically encouraged Mr. Myers to make sure that CP had

alternative arrangements in place to transload any cars that ConAgra might ship to "test" CSXT's position.

ConAgra is an important CSXT customer and we value their business. We at CSXT did everything we could to ensure that ConAgra understood our position clearly.

The fifty-mile radius provision.

I understand that CP has made much of what it characterizes as an effort to prevent ConAgra from using other bulk transfer facilities within a fifty-mile radius of the CSX Big Apple TransFlo Terminal. This is a gross distortion of what CSXT proposed to ConAgra (and which ConAgra never accepted).

In fact, the fifty-mile radius provision which CSXT proposed in a draft contract offered to ConAgra is a standard (if you will, "boilerplate") provision of CSXT transportation contracts which involve use of a bulk transfer facility.

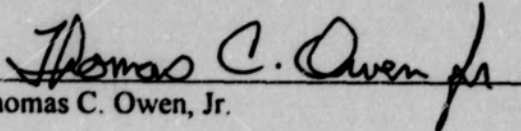
Under most contract arrangements, CSXT offers a reduced rate in exchange for certain volume commitments. Oftentimes these volume commitments do not take the form of a specified number of cars or tons, but rather only commit the customer to ship ninety-five percent of its transportation requirements between a specified origin and a destination via CSXT. (This enables the railroad to offer a volume discount without committing the customer to transport materials or commodities which it has not sold.)

Since CSX TransFlo facilities are used only by CSXT customers, if one were to write a transportation contract which only required a customer to ship ninety-five percent of its volume between an origin and a particular CSX TransFlo facility, the customer would not be precluded from shipping traffic from that origin to a competing carrier's bulk transfer facility within ready trucking distance of the end users who could be served from the CSX facility. The volume commitment provision would be meaningless. I am informed that several years ago, a CSXT transportation contract was written in just such a fashion and the customer did exactly that. CSXT ended up handling some smaller part of the customer's freight at a reduced rate based on a percentage volume commitment and the remainder went to a competitor. It is my understanding that this incident caused CSXT to revise its standard language so as to insure that it was getting the benefit of its bargain – a commitment of ninety-five percent of the customer's requirements for transportation between an origin and a particular end market. The fifty-mile radius provision simply serves to define the parties' intent. Mr. Leaders' verified statement, which refers to the CSXT proposal (paragraph 12) is correct, but needs to be understood in the proper context. Any suggestion by Canadian Pacific that there was something nefarious in CSXT's contract language as proposed to ConAgra is a serious distortion of the commercial function of the contract clause.

VERIFICATION

I, Thomas C. Owen, Jr., declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this statement.

Executed on August 13 1999.


Thomas C. Owen, Jr.

June 17, 1999

Mr. Lynn Myers
Executive Vice President
ConAgra Flour Milling Company
P.O. Box 3500
Omaha, NE 68102

Dear Lynn:

This will confirm our phone conversation today in which I urged you, in the strongest possible terms, not to attempt to "test" CSXT's position that its affiliate's bulk transfer facility, CSX TransFlo, in the Bronx, NY is available only for service to CSXT line-haul customers.

We have repeatedly advised our customers--and the CP-- that this terminal is leased by CSX TransFlo and is available only to CSXT customers. An affiliated bulk transfer terminal such as this is not a "customer" to which the STB granted CP switching access. Rather, it is a CSX-affiliated company's facility, operated as an adjunct to CSXT's rail transportation service to CSXT's customers. Apparently, CP is encouraging you to test that position by attempting to force your traffic into the terminal. I again urge you not to route your traffic in a way that, in effect, seeks services that CP will not be able to provide to you.

If, despite my urgings, ConAgra insists on tendering freight for transportation consigned to this terminal, CSXT will return the cars to CP for CP to take to the nearest transfer facility with which it has suitable arrangements. This kind of "exception" handling inevitably delays cars in even typical operating circumstances. With the issues CSXT is addressing in the Conrail integration process, I cannot predict what will happen to these cars which you are insisting on misrouting.

I want to make it clear that CSXT is perfectly willing to switch CP traffic in the Bronx/Queens area to any bulk transfer facility which CP establishes a relationship with. In such a case, all responsibility for transfer of the product would be with CP and liability for loss and contamination would be solely CP's as well.

CSXT values your business and wants to accommodate your reasonable commercial needs. However, making available an affiliated company's facilities designed to support the marketing of CSXT's services is neither practical nor good business. I hope we can continue to work together to develop ConAgra's CSXT line haul business to the New York area.

Yours truly,

[/s/ Thomas C. Owen, Jr.]

CERTIFICATE OF SERVICE

I, Dennis G. Lyons, certify that on August 16, 1999, I have caused to be served a true and correct copy of the foregoing CSX-184, "Reply of CSX Corporation and CSX Transportation, Inc. to 'Canadian Pacific Parties' Petition to Enforce Trackage and Switching Rights Imposed by the Board" (CP-32), to the following parties, by first-class mail, postage prepaid, or by more expeditious means:

Marcella M. Szel, Esq.
Timothy G. Mulcahy, Esq.
CANADIAN PACIFIC RAILWAY COMPANY
Gulf Canada Square, Suite 500
401 Ninth Avenue, S.W.
Calgary, Alberta T2P 4Z4
CANADA

and

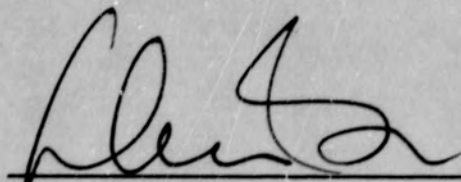
George Mayo, Jr., Esq.
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004-1109
Counsel for Canadian Pacific Parties

Charles A. Spitulnik, Esq.
HOPKINS & SUTTER
888 Sixteenth Street, N.W.
Washington, D.C. 20006
*Counsel for New York Department of Transportation
and New York City Economic Development Corporation*

Kelvin J. Dowd, Esq.
SLOVER & LOFTUS
1224 Seventeenth Street, N.W.
Washington, D.C. 20036
Counsel for New York Department of Transportation

Richard G. Slattery, Esq.
AMTRAK LAW DEPARTMENT
60 Massachusetts Avenue, N.E.
Washington, D.C. 20002
Counsel for Amtrak

There are two versions of CSX-184, one Highly Confidential and the other Public. The Public Version is being served on all of the above-listed counsel. The Highly Confidential Version is being served solely on those counsel who have executed, to the knowledge of the undersigned, the Highly Confidential undertaking under the Protective Order in this matter.



DENNIS G. LYONS

STB

FD

33388

(Sub 69)

8-16-99

D

195369

2/3

195360

SLOVER & LOFTUS

ATTORNEYS AT LAW

1224 SEVENTEENTH STREET, N. W.
WASHINGTON, D. C. 20036ENTERED
Office of the Secretary

AUG 16 1999

TELEPHONE:
(202) 347-7170Part of
Public RecordFAX:
(202) 347-3610

WRITER'S E-MAIL:

kjd@sloverandloftus.com

WILLIAM L. SLOVER
C. MICHAEL LOFTUS
DONALD G. AVERY
JOHN H. LE SEUR
KELVIN J. DOWD
ROBERT D. ROSENBERG
CHRISTOPHER A. MILLS
FRANK J. PERGOLITZI
ANDREW B. KOLESAR III
PETER A. PFOHL
DANIEL M. JAFFE

August 13, 1999

VIA HAND DELIVERYThe Honorable Vernon A. Williams
Secretary
Surface Transportation Board
Case Control Branch
ATTN: STB Finance Docket 33388
1925 K Street, N.W.
Washington, D.C. 20423-0001

Re: F.D. No. 33388, CSX Corporation, Et Al. -- Control and Operating Leases/Agreements -- Conrail Inc., Et Al., and F.D. No. 33388 (Sub-No. 69), The State of New York, By and Through its Department of Transportation -- Trackage Rights Over Lines of Consolidated Rail Corporation

Dear Secretary Williams:

Enclosed for filing in the referenced proceeding please find an original and 25 copies of the Reply Of The State Of New York and the New York City Economic Development Corporation in Support of Petition to Enforce Trackage and Switching Rights, together with a WordPerfect 8.0 diskette containing the pleading.

Thank you for your attention to this matter.

Sincerely,

Kelvin J. Dowd
An Attorney for the
State of New YorkKJD\cbh
Enclosures

195360

ENTERED
Office of the Secretary

AUG 16 1999

Part of
Public Record

BEFORE THE
SURFACE TRANSPORTATION BOARD



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

Finance Docket No. 33388

RESPONSIVE APPLICATION -- STATE
OF NEW YORK, BY AND THROUGH ITS
DEPARTMENT OF TRANSPORTATION,
AND THE NEW YORK CITY ECONOMIC
DEVELOPMENT CORPORATION

Finance Docket No. 33388
(Sub-No. 69)

REPLY OF THE STATE OF NEW YORK AND THE NEW
YORK CITY ECONOMIC DEVELOPMENT CORPORATION
IN SUPPORT OF PETITION TO ENFORCE
TRACKAGE AND SWITCHING RIGHTS

Charles A. Spitulnik
Rachel Danish Campbell
Hopkins & Sutter
888 Sixteenth Street, NW
Washington, D.C. 20006
(202) 835-8000

Attorneys for the New York
City Economic Development
Corporation

Eliot Spitzer
Attorney General of the
State of New York
Harry First
Chief, Antitrust Bureau
George R. Mesires
Assistant Attorney General
120 Broadway, Suite 2601
New York, New York 10271

William L. Slover
Kelvin J. Dowd
Peter A. Pfohl
Slover & Loftus
1224 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 347-7170

Dated: August 13, 1999

Attorneys for the State of New York

**BEFORE THE
SURFACE TRANSPORTATION BOARD**



CSX CORPORATION AND CSX)	
TRANSPORTATION, INC., NORFOLK)	
SOUTHERN CORPORATION AND)	Finance Docket No. 33388
NORFOLK SOUTHERN RAILWAY)	
COMPANY -- CONTROL AND OPERATING)	
LEASES/AGREEMENTS -- CONRAIL, INC.)	
CONSOLIDATED RAIL CORPORATION)	

RESPONSIVE APPLICATION -- STATE)	
OF NEW YORK, BY AND THROUGH ITS)	Finance Docket No. 33388
DEPARTMENT OF TRANSPORTATION,)	(Sub-No. 69)
AND THE NEW YORK CITY ECONOMIC)	
DEVELOPMENT CORPORATION)	

**REPLY OF THE STATE OF NEW YORK AND THE NEW YORK CITY
ECONOMIC DEVELOPMENT CORPORATION IN
SUPPORT OF PETITION TO ENFORCE
TRACKAGE AND SWITCHING RIGHTS**

The State of New York, acting by and through the New York State Department of Transportation ("New York") and the New York City Economic Development Corporation ("NYCEDC"), pursuant to 49 C.F.R. Part 1104.13(a), hereby reply to the Petition To Enforce Trackage and Switching Rights Imposed By the Board ("Petition") filed by the Canadian Pacific Parties¹ on or about July 27, 1999. For the reasons set forth herein, New York and

¹"Canadian Pacific Parties" or "CP" refer collectively to Canadian Pacific Railway Company, Delaware & Hudson Railway Company, Inc., Soo Line Railroad Company and St. Lawrence & Hudson Railway Company Limited.

NYCEDC support the relief sought by the Petition, and urge that it be granted.

INTRODUCTION

In its Decision approving the acquisition and division of Consolidated Rail Corporation ("Conrail") between CSX Transportation, Inc. ("CSX") and Norfolk Southern Corporation, the Board imposed conditions sought by New York and NYCEDC in a Joint Responsive Application, requiring CSX to grant CP unrestricted trackage or haulage rights over the Conrail line between Albany and Fresh Pond Junction, New York (the "Hudson Line"). See Decision No. 89 at 177. The Board found this condition mandated by the public interest in restoration of "a modicum of the competition that was lost in the financial crisis that led to the formation of Conrail." Id. at 83. Because CSX and CP were unable to reach agreement on the terms to govern CP access to the Hudson Line within the time originally allotted, the Board imposed various implementing terms (including trackage rights and switching service compensation) in its subsequent Decision No. 109 and Decision No. 123, served December 18, 1998 and May 20, 1999, respectively.

CP commenced operations over the Hudson Line on July 12, 1999. At present, CP provides line-haul service between Albany and Oak Point Yard in the Bronx (located on the east side

of the Harlem River), and reaches other shippers in the New York City terminal area through switching service provided by CSX. CP line-haul service takes place over former Conrail trackage between Albany and Poughkeepsie, and between Mott Haven Junction and Oak Point Yard, pursuant to the Board's prescribed terms. The service also involves operations over two (2) other segments of the Hudson Line owned (directly or indirectly) by New York, through bilateral agreements negotiated by CP with New York and/or its appropriate subdivisions. These segments are a 75-mile line controlled by Metro North Commuter Railroad between Poughkeepsie and Mott Haven Junction,² and the Oak Point Link -- a short, elevated bypass track that connects Mott Haven Junction with the east side of the Harlem River (and the Hudson Line) at Harlem River Yard.³

While CP service to New York City shippers via the Hudson Line is underway, CP points to two (2) new obstacles that have been interposed by CSX which would prevent CP from fully implementing the Board's Hudson Line conditions, to the detriment of the intended recipients of dual carrier service. According to

²Finance Docket No. 33775, Delaware & Hudson Railway Company, Inc. -- Trackage Rights Exemption -- Metro North Commuter Railroad Co., Notice of Exemption served July 21, 1999.

³Finance Docket No. 33776, Delaware & Hudson Railway Company, Inc. -- Trackage Rights Exemption -- New York State Department of Transportation, Notice of Exemption served July 21, 1999.

CP, CSX has (1) blocked CP access to Harlem River Yard by refusing to dispatch most CP trains into and out of the yard; and (2) refused to switch cars for CP's account to and from the Hunts Point Market Terminal, a major produce distribution facility served via Oak Point Yard. See Petition at 3. CP seeks a Board order affirming CP's right to use Harlem River Yard subject to its negotiation of an acceptable agreement with New York (which owns the yard); and clarifying that CP's prescribed right of access "to all shippers in the Bronx and Queens" includes the produce distributors and other shippers that use the Hunts Point Terminal. Id.; citing Decision No. 109 at 7.

New York and NYCEDC respectfully submit that CP's Petition is meritorious and in full accord with the Board's prior orders respecting the Hudson Line. New York and NYCEDC urge that the Petition be granted.

ARGUMENT

A. CP Should Have Unimpaired
Access to Harlem River Yard

Harlem River Yard is situated on the Hudson Line south of Oak Point Yard, on the east bank of the Harlem River. The yard is owned by New York, and is managed by Harlem River Yard Ventures (HRYV), a contractor/lessee. It is accessible via the Oak Point Link, which also is owned by New York.

CP and CSX each operate over the Oak Point Link pursuant to nearly-identical license agreements with New York. Their rights are co-equal, though CSX dispatches trains over the Link in the interests of operational convenience and order. Only CSX presently operates trains in the Harlem River Yard, as successor to a non-exclusive lease granted to Conrail in 1996. (See the Verified Statement of John F. Guinan, attached hereto). As the Board noted in Decision No. 123, however, HRYV "has advised CP of its willingness to lease one and perhaps more tracks for car storage and switching." Id. at 14.

Earlier in this proceeding, CP asked the Board to clarify CP's right to use the Harlem River Yard without interference by CSX. The Board's response was succinct:

No clarification is necessary with regard to the first item, use of the Harlem River Yard. CSX does not own the Harlem River Yard. CP is free to work out whatever arrangements it can with the State of New York, which owns the facility. Our intervention in that process is not appropriate, or even within our authority.

Decision No. 123 at 14. As Mr. Guinan testifies, New York (through HRYV) is prepared to grant and intends CP to have full access to the Harlem River Yard, for pick-up and delivery of freight without restriction as to scope or commodity. See V.S. Guinan at 2. As recited in CP's Petition, however, CSX seeks to restrict CP's direct access to the yard to a narrow range of freight and equipment, and otherwise require CP to include a CSX

switch to or from Oak Point Yard in every other CP movement to or from the Harlem River Yard. See Petition at 5-8, 12. These restrictions add both time and cost to the service that CP can offer affected shippers, and would impair its ability to compete effectively. Id. at 12-14.

New York and NYCEDC agree with the Board's ruling in Decision No. 123 that CP's rights to access and use the Harlem River Yard should be the exclusive province of a negotiated agreement between CP and New York. Once granted, those rights should be fully exercisable according to their terms, without outside interference either through direct obstruction or indirectly through dispatching procedures or other means. Based upon CP's Petition, however, it is necessary for the Board to reaffirm its ruling once again, and clarify that the Hudson Line condition's mandate for CP access "not restricted as to commodity or geographic scope"⁴ is not to be eroded or compromised through implementing rules or practices. See Petition at 16-17.

B. CP Access to the Hunts Point Market and
Terminal Should Be Reaffirmed by the Board

The pro-competitive condition imposed by the Board in Decision No. 89 directed CSX to grant CP trackage or haulage rights "not restricted as to commodity or geographic scope," to serve all shippers in the greater New York City metropolitan area

⁴Decision No. 89 at 83.

accessible via the Hudson Line. Id. at 83. Later, in Decision No. 109, the Board further specified that "CP will be permitted to access all shippers in the Bronx and Queens via a [] per car switch performed by CSX, including the use of Oak Point Yard as necessary to efficiently perform this switching service." Id. at 7. No exceptions were carved from this broad mandate, to which CSX itself acquiesced in its proposal for implementation of the Hudson Line condition. Id.

The Hunts Point Terminal, accessed by rail through Oak Point Yard, serves produce shippers and distributors based in the Bronx and Queens, as well as other New York City boroughs and adjacent regions. Owned by the City of New York with loading tracks leased to CSX, the Terminal and its constituents fall squarely within the scope of the Board's condition and prior orders. As CP describes, however, a dispute has arisen over CP access to the Terminal and its shippers via CSX switching. See Petition at 17. New York and NYCEDC support CP's request that the Board clarify that the Hunts Point shippers are within the class of rail customers who are intended beneficiaries of the Hudson Line conditions.

The New York/NYCEDC Joint Responsive Application specifically included Bronx produce shippers among those intended to be served by the competitive rail alternative advanced by New York and NYCEDC and ultimately approved by the Board. See NYS-

11/NYC-10 at 8-9; Decision No. 89 at 314. The cause of Hunts Point Market shippers and distributors was advocated even more specifically in New York's Comments, which included testimony by Hunts Point Market Traffic Committee Chairman Stephen D'Arrigo as to the adverse impact of the original Conrail division plan on his company and other Hunts Point shippers, and the effectiveness of the relief sought in the Joint Responsive Application to ameliorate that harm. See NYS-10, V.S. D'Arrigo at 2-4; Argument at 15, 19-20. Plainly, this major staging point for Hudson Line rail traffic is within the ambit of "all yards, terminals, other facilities and shippers, present and future, located in the Bronx and Queens," to which CP has been granted access by the Board. See Decision No. 109 at 7.

CONCLUSION

For the reasons set forth herein, and based upon the evidence and argument previously presented by New York and NYCEDC in these proceedings, CP's Petition to Enforce Trackage and Switching Rights should be granted.

Respectfully submitted,

THE NEW YORK CITY
ECONOMIC DEVELOPMENT CORPORATION

THE STATE OF NEW YORK BY AND
THROUGH ITS DEPARTMENT OF
TRANSPORTATION

Charles A. Spitulnik *Charles A. Spitulnik*
Rachel Danish Campbell *by RD*
Hopkins & Sutter
888 Sixteenth Street, NW
Washington, D.C. 20006
(202) 835-8000

Attorneys and Practitioners

David Spitzer
Attorney General
Harry First
Chief, Antitrust Bureau
George R. Mesires
Assistant Attorney General
120 Broadway, Suite 2601
New York, New York 10271

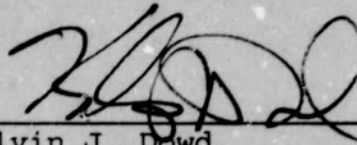
William L. Slover
Kelvin J. Dowd *KJ Dowd*
Peter A. Pfohl *P A Pfohl*
Slover & Loftus
1224 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 347-7170

Dated: August 13, 1999

Attorneys and Practitioners

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of August, 1999, I caused copies of the foregoing Reply of The State of New York and the New York City Economic Development Corporation In Support of Petition to Enforce Trackage and Switching Rights to be served upon counsel for CSX and CP by hand delivery, and upon all other parties requesting service hereof by first-class mail, postage prepaid.

A handwritten signature in dark ink, appearing to read 'Kelvin J. Dowd', is written over a horizontal line.

Kelvin J. Dowd

**VERIFIED STATEMENT
OF
JOHN F. GUINAN**

My name is John F. Guinan. I am Assistant Commissioner for Passenger and Freight Transportation of the New York State Department of Transportation. I have submitted testimony previously in this proceeding, on behalf of the State of New York. I am making this Statement in order to provide the Board with certain information regarding current and intended future rail freight operations within the Harlem River Yard in the Bronx.

Harlem River Yard is located south of Oak Point Yard on the former Conrail line known as the Hudson Line. It is owned by New York, and managed by a contractor -- Harlem River Yard Ventures (HRYV) -- under an agreement with the State. In 1996, HRYV entered into an agreement with Consolidated Rail Corporation, giving Conrail certain rights with respect to the use of the yard. Recently, CSX Transportation, Inc. succeeded to Conrail's operating rights. A copy of the agreement is attached to my Statement as Exhibit ____ (JFG-2). As the agreement shows, Conrail's (now CSX's) rights to use of the Harlem River Yard are non-exclusive.

Under conditions granted by the Board at the behest of New York and the New York City Economic Development Corporation,

Canadian Pacific Railway recently commenced rail operations over the Hudson Line between Albany and Oak Point Yard. In this service, CP operates over the Oak Point Link, an elevated rail line traversing the Harlem River that is owned by New York. The east end of the Link connects to Harlem River Yard.

With New York's support, HRYV has offered CP use rights on a par with those currently enjoyed by CSX. It is New York's intent and expectation that consistent with the goals of the Board's Hudson Line conditions, CP and CSX will have full use of the Harlem River Yard on a co-equal competitive basis, for the ultimate benefit of all New York City shippers and receivers.

Contract Number _____

THIS AGREEMENT, made and effective as of APRIL 30
1996, by and between CONSOLIDATED RAIL CORPORATION, Two Commerce
Square, 2000 Market Street, Philadelphia, Pennsylvania 19101-1400,
("Conrail"), and Harlem River Yard Ventures, Inc.
c/o Rotterdam Ventures, Inc.
Bldg. 6 East Road
Rotterdam Industrial Park
Schenectady, NY 12306
("HRYV")

WHEREAS, Harlem River Yard Ventures, has requested track facilities at Harlem River Transportation and Distribution Center, County of Bronx, State of New York, described as follows:
Existing tracks located at Mile Post 0.6 on the Freemont Secondary, Line Code 4219, and extending in a southwesterly direction with lengths totalling 24,800 feet as shown on Exhibit "A" dated March 1996, last revised None, attached as "Exhibit A," such track facilities and the underlying right-of-way being collectively referred to as the "Sidetrack."

NOW, THEREFORE, the parties, intending to be legally bound, agree as follows:

Section 1. Term

1.1 This Agreement shall continue in force until terminated by either party, with or without cause, on sixty (60) days prior written noticed to the other party. In the event Conrail is unable to locate HRYV, such notice may be posted on or near the Sidetrack and this Agreement shall terminate 30 days after such posting. Any obligation assumed and any liability which may have risen or been incurred prior to such termination by either party shall survive termination of the Agreement.

1.2 Upon termination of this Agreement, Conrail shall have the right to enter upon property leased to or owned, controlled or maintained by HRYV and remove any and all material owned by Conrail.

1.3 HRYV hereby grants to Conrail the right of passage over the Sidetrack for the purpose of providing rail service to the intermodal terminal and the tenants and occupants in the Harlem River Transportation and Distribution Center.

Section 2. Construction and Maintenance

2.1 HRYV, at its sole cost and expense, shall:

(i) erect and maintain fences and highway-railroad grade crossing protection devices that may be required by public authorities with respect to that portion of the Sidetrack owned or maintained by HRYV.

(ii) maintain, replace, renew, and remove the Sidetrack as follows:

Those portions of the Sidetrack 18,510 feet in length marked with ---RR--- Type C on Exhibit "A", shall be maintained by the HRYV.

All maintenance shall be to a minimum of Federal Railroad Administration Class I track standards.

2.2. (i) As to portions of Sidetrack marked with ===== Type B on Exhibit "A" parties agree that responsibility for maintenance of such portion shall be addressed outside the scope of this agreement and is a matter that Conrail and the State of New York will resolve.

2.3. The parties recognize that some public authorities may not have jurisdiction over HRYV as to clearances, bridges or highway-railroad crossings affecting the Sidetrack and such bodies may direct Conrail, as a result of jurisdiction over Conrail to take actions regarding such matters. Any reasonable expense incurred by Conrail in complying with such directions shall be billed to HRYV which shall reimburse Conrail. This Section 2.3 shall survive termination of this Agreement.

Section 3. Ownership

The rail, ties, and fittings in the Sidetrack shall be owned as follows:

That portion of the Sidetrack marked with ~~TTTT~~ Type A on Exhibit "A", shall have title and ownership vested in Conrail. Those portions of the Sidetrack marked with ---RR--- Type C and Type B ~~TTTT~~ on Exhibit "A" shall have title and ownership vested in the State of New York and are leased by HRYV.

Section 4. Use

4.1 Conrail shall have the right to use the Sidetrack, but may not unreasonably interfere with the use thereof by HRYV.

4.2 Conrail shall not permit use of the Sidetrack by any other person or firm without the prior written consent of HRYV. Conrail may construct and use additional switch connections on that portion of the Sidetrack on Conrail's property.

4.3 The parties shall comply with (i) all applicable federal, state, and local laws, rules, regulations or orders pertaining to shipments originating or terminating on the Sidetrack, and (ii) Conrail's Engineering and Operating Criteria for Industrial Sidings.

4.4 HRYV shall not grant any rights to establish vehicular or pedestrian grade crossings over the Sidetrack without the prior written consent of Conrail. Such consent shall not be unreasonably withheld. Conrail hereby approves the grade crossings to be constructed over the Sidetrack as described on Exhibit "A".

4.5 Conrail may enter upon HRYV's property at any time for the purpose of inspecting, repairing or operating over the Sidetrack, but Conrail shall have no duty to engage in such activities except as otherwise herein provided.

4.6 At no time shall Conrail store rail cars for any extended period of time on any of the referenced side tracks.

Section 5. Changes

HRV shall not make any changes in the Sidetrack without the prior written consent of Conrail. Such consent shall not be unreasonably withheld. Changes in the Sidetrack necessary to comply with the requirements of a public authority shall, following receipt of 60 days written notice from Conrail, be made at HRYV's sole expense. If Conrail incurs any reasonable expense in connection with any such change, such expense shall be billed to HRYV which shall reimburse Conrail. If such change is solely for the benefit of Conrail, Conrail will bear the expense thereof.

Section 6. Clearances

6.1 HRYV shall not construct or permit any tenant or licensee to construct any obstruction over the Sidetrack less than the then applicable statutory limit or 22'0" above top of rail, whichever is

greater, or alongside thereof less than the statutory limit or 8'6" from center of track, whichever is greater, then applicable with the necessary additional clearances on curves, without the prior written approval, which consent shall not be unreasonably withheld, of Conrail and any public authority having jurisdiction.

6.2 The minimum clearances specified in Section 6.1 may be changed by Conrail to meet applicable legal requirements and HRYV shall, to the extent reasonably practical under the circumstances, at its sole expense, following receipt of 30 days written notice from Conrail, make such changes in the Sidetrack owned by HRYV as may be necessary. HRYV shall have the right to appeal. Conrail shall be solely responsible for changes in the Sidetrack owned by Conrail.

Section 7. Liability

7.1 Except as otherwise provided in Section 7.2, responsibility for claims as between parties shall be borne as follows:

- (i) Conrail shall be responsible for Claims arising from its negligence and for its failure to comply with its obligations under this Agreement.
- (ii) HRYV shall be responsible for Claims arising from its negligence and for its failure to comply with its obligations under this Agreement.
- (iii) The parties shall share equal responsibility for all Claims arising from their joint or concurring negligence in such proportions as they may agree upon or as may be judicially determined.

(iv) Each party shall be responsible for Claims arising from the presence of trespassers, vandals or other unauthorized persons on the portion of the Sidetrack leased to or owned, controlled or maintained by it.

(v) For the purposes of this Section 7.1, there shall be a rebuttable presumption that damage caused to equipment owned by, leased to or on the account of Conrail while such equipment is in the sole possession and control of HRYV was caused by the negligence of HRYV.

7.2 HRYV should be responsible for Claims arising from any non-standard conditions as such non-standard conditions are listed in Section 6.1 hereof, now or hereafter existing, irrespective of any negligence on the part of Conrail, including without limitation the following: None noted at this time.

7.3 The negligence of any tenant, invitee, licensee or grantee of HRYV other than Conrail, its agents and contractors occurring on property leased to or owned, controlled or maintained by HRYV shall be deemed the negligence of HRYV; provided, however, if there shall be a separate written agreement between Conrail and any tenant or licensee of HRYV, or written agreement for the benefit of Conrail, and a copy furnished to Conrail, containing protections for Conrail with respect to the negligent acts of such tenant or licensee similar to those contained in this section, then the negligence of any such tenant or licensee shall not be deemed the negligence of HRYV.

7.4 Except as otherwise provided in Section 7.1, the party which is responsible shall release the other party from all responsibility for such Claims and shall defend, indemnify, protect, and save harmless the other party and its directors, officers, agents, and employees from and against all such Claims. HRYV waives any constitutional, statutory or decisional immunity which would invalidate HRYV's obligation to indemnify Conrail with

respect to Claims asserted by employees of HRYV.

7.5 The word "Claims" as used in this Section 7 shall mean all claims, liabilities, demands, actions at law and equity, judgments, settlements, losses, damages, and expenses of every character for any injury to or death of any person or persons, for any damage to or loss of destruction of property of any kind, and for any damage to the environment, caused by, arising out of or occurring in connection with the construction, use, maintenance, replacement, presence or removal of the Sidetrack.

Section 8. Discontinuance

Conrail shall not be responsible for any loss or damage sustained by HRYV in consequence of any temporary or permanent elimination of the Sidetrack, or service thereover, due to circumstances beyond Conrail's reasonable control. Conrail may suspend rail service in the event HRYV breaches any of the covenants of this Agreement, but HRYV shall be given 60 days notice and an opportunity to cure such breach, and HRYV shall have the right to cure such breach or take reasonable action to cure such breach within that 60 days, or if such breach is not reasonably susceptible of cure within such 60 days but HRYV commences curing its breach within such 60 days, HRYV shall have such additional time as shall be reasonable under the circumstances within which to cure such breach. If HRYV fails to do so, such suspension shall take effect and shall continue until the breach is remedied.

Section 9. Payment

9.1 All monies due and owing under this Agreement shall be paid by the applicable party within 30 days after receipt of bills. The records of HRYV relating to payments due under this Agreement shall be open at all reasonable times for inspection by Conrail. The records of Conrail relating to payments due on this Agreement,

shall be open at all reasonable times for inspection by HRYV.

9.2 Except for payment required by Section 2.2, all bills by Conrail shall include direct labor and material costs, together with Conrail standard surcharges for fringe benefits, overhead, material handling costs and equipment rentals at rates specified by Conrail's Vice President and Controller.

9.3 If Conrail performs any work or satisfies any responsibility or liability which under this Agreement HRYV is obligated to perform or satisfy, HRYV shall reimburse Conrail for all costs and expenses in accordance with this Section. It is agreed that Conrail will do no work which is the responsibility of HRYV, except in an emergency, without first obtaining the approval of HRYV.

Section 10. General Provisions

10.1 A determination that any part of this Agreement is invalid shall not affect the validity or enforceability of any other part of this Agreement.

10.2 This Agreement shall be governed by the law of the State in which the Sidetrack is located.

10.3 As used in this Agreement, the words "Conrail", "HRYV", and "party" shall include the respective successors and assigns of Conrail and/or HRYV, as appropriate.

10.4 This Agreement is for the exclusive benefit of the parties and the licensees, grantees and tenants of HRYV and not for the benefit of any other party.

10.5 Section headings are inserted for convenience only and shall not affect the construction or interpretation of this Agreement.

10.6 This Agreement contains the entire agreement of the parties and supersedes any prior written or oral understandings, agreements or representations.

10.7 This Agreement may not be amended, waived or discharged except by an instrument in writing signed by the parties.

10.8 All words, terms, and phrases used in this Agreement shall be construed in accordance with their generally applicable meaning in the railroad industry.

10.9 Except as otherwise provided in this Agreement, all notices to be sent from one party to the other shall be in writing and hand delivered or mailed by United States certified mail, postage prepaid. Notices directed to Conrail shall be addressed to Senior Vice President-Operations, Consolidated Rail Corporation, Two Commerce Square, 2001 Market St., Philadelphia, PA., 19101-1400. Notices directed to HRYV shall be sent to the address listed for HRYV in the preamble of this Agreement.

IN WITNESS WHEREOF, the parties have caused this Agreement to be duly executed as of the date first above written.

WITNESS:

CONSOLIDATED RAIL CORPORATION

Smaydon

BY:

[Signature]

WITNESS:

HARLEM RIVER YARD VENTURES, INC.

Beverly Anderson

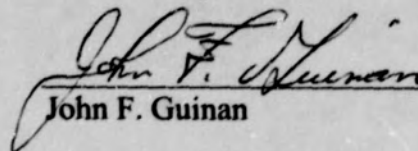
BY:

[Signature]

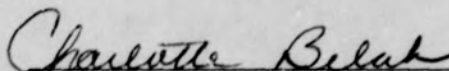
VERIFICATION

State of New York)
)
) ss:
)
County of Albany)

John F. Guinan, being duly sworn, deposes and says that
he has read the foregoing Verified Statement, knows the contents
thereof, and that the same are true as stated to the best of his
knowledge, information and belief.


John F. Guinan

Subscribed and sworn to
before me this 9
day of August, 1999.


Notary Public

My Commission Expires: 1-31-2001

CHARLOTTE BELAK
Notary Public, State of New York
No. 4812518
Qualified in Rensselaer County
Commission Expires 1-31-2001

HOGAN & HARTSON
LLP.

GEORGE W. MAYO, JR.
PARTNER
(202) 637-5579
GWMAYO@HHLAW.COM

July 27, 1999



BY HAND DELIVERY

The Honorable Vernon A. Williams
Secretary, Surface Transportation Board
Case Control Branch
ATTN: STB Finance Docket No. 33388
Surface Transportation Board
1925 K Street, N.W.
Washington, DC 20423-0001

ENTERED
Office of the Secretary

JUL 28 1999

Part of
Public Record

Re: 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

Finance Docket No. 33388 (Sub No. 69), Responsive
Application -- State of New York, By and Through Its
Department of Transportation, and The New York City Economic
Development Corporation

Dear Secretary Williams:

Enclosed for filing in the above-referenced dockets are an
original and twenty-five copies of Canadian Pacific Parties' Petition
To Enforce Trackage and Switching Rights Imposed by the Board (CP-32).
Also enclosed is a 3.5-inch diskette, formatted for WordPerfect 7.0,
containing the pleading.

Thank you for your assistance.

Sincerely,

George W. Mayo, Jr. (h.s.v.s.)

George W. Mayo, Jr.
Attorney for Canadian Pacific Railway
Company, Delaware and Hudson Railway
Company, Inc., Soo Line Railroad
Company, and St. Lawrence & Hudson
Railway Company Limited

GWM:jms

Enclosures

cc: Counsel for Parties Required To Be Served

BRUSSELS BUDAPEST LONDON MOSCOW PARIS* PRAGUE* WARSAW

BALTIMORE, MD COLORADO SPRINGS, CO DENVER, CO LOS ANGELES, CA MCLEAN, VA NEW YORK, NY ROCKVILLE, MD

\\DC - 66673/1 - 0377213.30

*Affiliated Office

195098

CP-32

BEFORE THE
SURFACE TRANSPORTATION BOARD

ENTERED
Office of the Secretary

JUL 28 1999

Finance Docket No. 33388



Part of
Public Record

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

STB Finance Docket No. 33388 (Sub-No. 69)

RESPONSIVE APPLICATION--STATE OF NEW YORK,
BY AND THROUGH ITS DEPARTMENT OF TRANSPORTATION,
AND THE NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION

CANADIAN PACIFIC PARTIES'
PETITION TO ENFORCE TRackage AND SWITCHING
RIGHTS IMPOSED BY THE BOARD

MARCELLA M. SZEL
TIMOTHY G. MULCAHY
CANADIAN PACIFIC RAILWAY COMPANY
Suite 500
Gulf Canada Square
401 Ninth Avenue, S.W.
Calgary, Alberta T2P 4Z4
CANADA
(403) 319-7474

GEORGE W. MAYO, JR.
ERIC VON SALZEN
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004-1109
(202) 637-5600

Attorneys for Canadian Pacific
Railway Company, Delaware and
Hudson Railway Company Inc., Soo
Line Corp., and St. Lawrence &
Hudson Railway Company Limited

July 27, 1999

TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION	1
BACKGROUND TO PETITION	4
ARGUMENT	10
1. CP Should Be Permitted Efficiently To Utilize Harlem River Yard	10
2. Via CSX Switching, CP Is Entitled To Access All Shippers Served through the Hunts Point Terminal ...	17
CONCLUSION	19
Attachment A (Trackage Rights Agreement)	
Attachment B (Switching Agreement)	
Enforcement Verified Statement of Paul D. Gilmore	
Enforcement Verified Statement of Mario LaBarbera	
Verified Statement of Randy R. Leaders	

BEFORE THE
SURFACE TRANSPORTATION BOARD

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

STB Finance Docket No. 33388 (Sub-No. 69)

RESPONSIVE APPLICATION--STATE OF NEW YORK,
BY AND THROUGH ITS DEPARTMENT OF TRANSPORTATION,
AND THE NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION

**CANADIAN PACIFIC PARTIES'
PETITION TO ENFORCE TRACKAGE AND SWITCHING
RIGHTS IMPOSED BY THE BOARD**

INTRODUCTION

Pursuant to 49 C.F.R. §§ 1115.4 and 1117.1 and the
Board's retention of ongoing jurisdiction in this matter, the
Canadian Pacific Parties 1/ hereby petition for enforcement of

1/ "Canadian Pacific Parties" or "CP" refer collectively to
Canadian Pacific Railway Company, Delaware and Hudson Railway
Company Inc., Soo Line Railroad Company and St. Lawrence & Hudson
Railway Company Limited.

the trackage and switching rights imposed by the Board in Decision Nos. 109 and 123 of this proceeding.

On July 12, 1999, CP commenced its "east-of-the-Hudson" trackage rights operations, but was compelled to do so pursuant to incomplete trackage rights and switching agreements with CSX. 2/ The agreements are incomplete because CSX has refused to include provisions allowing CP to exercise two important rights that the Board granted in its earlier rulings. These rights -- which CSX appears committed to curtailing and which CP here seeks

2/ CSX Corporation and CSX Transportation, Inc. are collectively referred to as "CSX". CSX is operating the subject east-of-the-Hudson line pursuant to an operating agreement with New York Central Lines LLC ("NYC"), which acquired the line from Consolidated Rail Corporation ("Conrail"). NYC is also a party to the incomplete trackage and switching agreements entered into by CP and CSX.

CP has also negotiated a trackage rights agreement with Metro-North Commuter Railway Company, Inc. ("Metro-North") (a notice of exemption was filed in Finance Docket No. 33775) in regard to those segments of the east-of-the-Hudson line between approximately milepost 6.6 and milepost 75.8, and an agreement with the State of New York (a notice of exemption was filed in Finance Docket No. 33776) in regard to the Oak Point Link component of that line.

to enforce -- are of critical importance to CP's ability to afford competitive rail service to the New York area. 3/

Specifically, CP is asking the Board to enter an order enforcing its earlier decisions to the effect that: (1) with respect to Harlem River Yard, "CP is free to work out whatever arrangements it can with the State of New York which owns the facility" (Decision No. 123 at 14), and that CSX may not interfere with such right by refusing to allow the dispatch of CP trains into and out of Harlem River Yard when required by CP as part of its normal train operations using the Oak Point Link (also owned by the State of New York); and (2) pursuant to CP's right "to access all shippers in the Bronx and Queens via a [\$128.10] switch performed by CSX" (Decision No. 109 p. 7; see Decision 123 at 13), CP is entitled to access to shippers served by means of the tracks CSX has leased within the Hunts Point

3/ Although CP believes that a petition to enforce is the appropriate vehicle to seek relief in these circumstances, if the Board prefers to treat this petition as a petition to reopen pursuant to 49 C.F.R. § 1115.4, such reopening is warranted by new evidence and substantially changed circumstances. The parties' inability to reach agreement on necessary terms satisfies both standards.

Terminal area of the Bronx and which are used for bulk transfer purposes.

BACKGROUND TO PETITION

In Decision No. 89, the Board agreed with the various New York parties that shippers east of the Hudson should have the same advantages of two-carrier rail competition as shippers west of the Hudson would have following consummation of the CSX/NS acquisition of Conrail. Id. at 79. The Board ordered CSX to negotiate with CP either a haulage or trackage rights agreement over the east-of-the-Hudson line "not restricted as to commodity or geographic scope." Id. at 83.

Because the parties were unable to reach agreement, it ultimately fell to the Board to establish the terms that would govern CP's trackage rights operations over the east-of-the-Hudson line. In Decision No. 109, the Board explained the "[t]he purpose of our east-of-the-Hudson condition is to restore to New York City some of the rail competition that was lost when Conrail was created." In awarding east-of-the-Hudson trackage rights to CP, the Board's focus was on "enhancing the competitive presence of a second carrier for New York City traffic" and to achieve this result, placing CP in a position "to efficiently provide service to shippers within New York City." Id. at 6. Consistent

with this objective, the Board ruled that "CP will be permitted to access all shippers in the Bronx and Queens" via a CSX switch, and "use of Oak Point Yard as necessary to efficiently perform this switching service." Id. at 7.

Following the parties' petitions for reconsideration and clarification on various issues, the Board entered Decision No. 123 which addressed, among other things, CP's request for clarification related to its proposed Harlem River Yard operations. As discussed in greater detail below, the Board ruled that CP was free to work out whatever arrangement it wished with the third-party operator of the Harlem River Yard, and held that CP would owe CSX no switching charge for traffic that was not switched by CSX (because it did not use CSX's Oak Point Yard). Id. at 14.

When CP attempted to negotiate a trackage rights agreement and a switching agreement with CSX to implement the Board's decisions, CSX sought to block CP's use of the Harlem River Yard for pick-up and set-out of cars while in route between Albany and Oak Point Yard, and for the origination and

termination of unit trains. 4/ CSX further refused to allow CP switching access to shippers served through the CSX trackage within the Hunts Point Terminal (located in the Bronx) employed for bulk transfer purposes. Because CP was committed to instituting its already delayed trackage rights on July 12, 5/ it entered into agreements with CSX which left these matters unresolved, on the understanding that it would submit them to the Board for resolution.

The trackage rights agreement (pp. 6-7) entered into between the parties provides as follows in regard to the Harlem River Yard: 6/

The parties do not agree on the
correct interpretation of the Orders of

4/ Even though CSX owns neither Harlem River Yard nor the Oak Point Link (in fact it is a co-permittee with CP), it has the physical ability to deny CP access to those facilities because it effectively controls the dispatching of those lines.

5/ CP had originally intended to institute its trackage rights operation on June 21, the first business date after those rights became effective pursuant to Decision No. 123. Because CSX had not given appropriate labor notices in regard to the trackage rights, CP had to delay its initiation of trackage rights operations until CSX had exhausted its notice obligations.

6/ CP is submitting a copy of the trackage rights agreement (filed under seal pursuant to the protective order in this proceeding) as Attachment A hereto.

the STB (viz. Decisions No. 89, 109 and 123) insofar as they relate to the Harlem River Yard. CPR maintains that those Decisions grant it the right to operate directly between milepost 160 and Harlem River Yard. CSXT maintains that those Decisions grant CPR the right to operate only in a direct, continuous movement between milepost 160 and Oak Point Yard, without any right for CPR to operate into Harlem River Yard, and that CSXT is required to switch cars between Oak Point Yard and Harlem River Yard on CPR's behalf. The parties have considered litigating the issue before the STB but, for their own independent reasons, have agreed to the following temporary arrangement:

CPR shall have the right of temporary access to Harlem River Yard to pick up and/or set off blocks of Intermodal Traffic (defined as conventional containers on flat cars or trailers on flat cars carrying commodities other than municipal solid waste, not to include Roadrailer or similar "non-conventional" equipment), or to run entire intermodal trains into or out of the terminal.

Regarding access to Harlem River yard from the Oak Point Link track, the parties agree CSXT will control the operations of all freight trains using the Oak Point Link, either to access Harlem River Yard or to make through movements between MNCR [Metro-North Commuter Railroad] and Oak Point Yard. CSXT will maintain fluidity and operating efficiency over the Oak Point Link track by requiring trains to operate within established schedules, keeping main line and running tracks

clear, and following other local procedures developed from time to time to support efficient use of the Oak Point Link. 1/

With respect to CP's right of switching access to shippers served through the Hunts Point Terminal, the parties' switching agreement affords CP broad switching access to customers in the Bronx and Queens with no exception for Hunts Point Terminal shippers. 2/ Nonetheless, CSX unilaterally takes the position that CP's rights do not extend to such access, and it refuses to switch CP traffic to the CSX bulk transfer tracks at Hunts Point Terminal.

CP seeks to obtain enforcement of its rights both at Harlem River Yard and at the CSX bulk transfer tracks in the Hunts Point Terminal area as rapidly as possible. CSX is clearly taking competitive advantage of the CSX-caused delays CP has experienced in initiating its trackage rights operations, and can

1/ As explained below, the restrictions on the types of traffic CP can handle out of Harlem River Yard under this temporary arrangement are quite significant, and largely nullify the rights purportedly granted.

2/ A copy of the switching agreement (filed under seal pursuant to the protective order in this proceeding) is being submitted as Attachment B hereto.

be expected to do the same in regard to the two issues presented in this petition until such time as they are resolved by the Board.

For example, CSX has refused to provide switching services from Oak Point Yard to the CSX bulk transfer tracks at the Hunts Point Terminal for ConAgra cars (containing flour) moved by CP under its east-of-the-Hudson trackage rights. CSX advised ConAgra that it would only deliver shipments to the Hunts Point Terminal that were routed via CSX. In its negotiations with ConAgra over potential handling of this traffic, CSX proposed that ConAgra agree not to utilize any other bulk transfer facility within 50 miles of New York City. ConAgra declined, explaining that it could not agree to such a restriction since it would interfere with ConAgra's ability to use any of the three Norfolk Southern Railway Company ("NS") transfer facilities in the New York City area for shipments from NS origins. Then, when opting to use CP competitive service in lieu of CSX east-of-the-Hudson service, ConAgra found that it would be denied access to the Hunts Point Terminal on which it places extensive reliance in serving its customers. See Verified Statement of Randy R. Leaders (appended).

CSX's efforts to lock up major parts of the New York City market before CP can provide an effective competitive response are fundamentally at odds with the Board's intention to afford New York City shippers with a competitive alternative to CSX rail service on the east side of the Hudson. CP urges the Board, through this proceeding, to afford CP with the level competitive playing field intended by the Board as expeditiously as possible.

ARGUMENT

**1. CP Should Be Permitted Efficiently
To Utilize Harlem River Yard**

In Decision No. 123 (at 14), the Board noted the following in regard to CP's request for clarification related to its use of Harlem River Yard:

CP had sought the right to use this yard for pickup, delivery, storage and any other purpose (subject to agreement with the yard's third-party operator). CSX had expressed its agreement with this proposal. The operator of the yard (who has leased it from New York State) has advised CP of its willingness to lease one and perhaps more tracks for car storage and switching.

The Board held that CP was "free to work out whatever arrangements it can with the State of New York, which owns the

facility," and that its "intervention in that process is not appropriate, or even within our authority." Id.

The Board went on to rule that it was not obviating the "necessity for CP's traffic to move through the Oak Point Yard," that it was not granting CP "direct access to shippers in the Bronx and Queens," and that it granted CP trackage rights to and from Oak Point Yard and reciprocal switching to permit CP to use that interchange point to receive and deliver traffic to all parts of the Bronx and Queens. Id. The Board then elaborated that "[i]f CSX provides a switching service in connection with these movements, it is entitled to compensation," and that "[i]f it provides no such service, then no compensation is required." Id.

Taken together, the Board's rulings clearly allow CP to use Harlem River Yard for "pickup, delivery, storage and any other purpose ([pursuant] to agreement with the yard's third-party operator)," and as to traffic handled by CP through its use of the yard, CP would owe CSX no switching charge because CSX would "provide[] no [switching] service." Thus, for example, CP is not required to have traffic originating in Harlem River Yard backhauled to Oak Point Yard via a CSX switch; nor is it required to have traffic terminating in Harlem River Yard pass through the

yard and move to Oak Point Yard, only then to have it switched back to Harlem River Yard by CSX.

The Board's rulings do not require CP to bear the operational inefficiencies and additional costs that would be associated with this type of backhaul operation via Oak Point Yard. It is particularly appropriate that the traffic handled via Harlem River Yard not be subjected to this type of backhauling. That traffic is typically time-sensitive, thin-margin intermodal traffic that can ill afford the delays attendant to handling through Oak Point Yard and the costs of an entirely unnecessary CSX switch. 2/ See Enforcement Verified Statement of Paul D. Gilmore ("Gilmore E.V.S.") (appended).

2/ For example, it makes no operating or commercial sense to require a CP intermodal shipment inbound to Harlem River Yard to pass through that yard and go to the Oak Point Yard, there be subjected to the delays of reclassification by CSX, and then be switched by CSX at a charge of \$128.10 per car back to the same Harlem River Yard that the shipment had passed by hours earlier. Given CSX's complaint that the switching charge being paid by CP is inadequate (see CSX-169 at 15-17), logic would suggest that CSX should want to minimize the extent of its switching activity for CP. Yet CSX is nonetheless insistent that Harlem River Yard traffic be needlessly switched through Oak Point Yard. Obviously, CSX regards its interests to be advanced through maximizing the amount of switching it does of the Harlem River Yard traffic, both in terms of undercutting CP's ability to serve

[Footnote continued]

Under the incomplete trackage rights agreement entered into by the parties, CSX agrees to allow CP to use Harlem River Yard temporarily to pick up and set off blocks of intermodal traffic and to run intermodal trains in and out of the yard so long as conventional containers on flat cars or trailers on flat cars are used, the commodities carried are other than solid municipal waste, and the equipment used is neither Roadrailer or similar "non-conventional" equipment. As explained by CP's Mr. Gilmore in his accompanying verified statement, the exceptions effectively render these "rights" meaningless.

First, although CSX's temporary use arrangement would permit CP to directly access Harlem River Yard using double-stack equipment, such equipment cannot operate over the east-of-the-Hudson line because it cannot clear parts of the Metro-North trackage, and so the right to use this equipment into and out of the Harlem River Yard is, as CSX knows, meaningless. CP has always planned to handle intermodal traffic originating and

[Footnote continued]

that traffic competitively and in generating switching revenue for itself.

terminating at Harlem River Yard as part of its "short-haul intermodal" service, which moves in specially designed flat cars (double stacks are not used). ^{10/} These flat cars are "non-conventional" equipment under CSX's definition. Hence, CSX would bar CP from directly accessing the Harlem River Yard with this equipment, and would instead would require CP to route all Harlem River Yard traffic using this equipment through the Oak Point Yard.

Second, CSX's limitations would prohibit CP from employing Roadrailer equipment in exercising its direct access rights to Harlem River Yard. Rather, under CSX's scheme, shipments in this equipment -- like shipments in the "non-conventional" intermodal flatcars -- would have to move through Oak Point Yard using a CSX switch. This would preclude the possibility of CP moving Roadrailers to or from New York City in cooperation with Norfolk Southern, and would therefore deny the New York City market possible competitive alternatives.

Third, under CSX's temporary use authority, shipments of municipal solid waste -- one of the significant markets CP

^{10/} See CP-28, Gilmore Reconsideration V.S. at 2.

plans to develop using the Harlem River Yard -- cannot be handled by CP on a direct basis, but rather must employ a CSX switch and move through Oak Point Yard.

These artificial limitations would impair CP's ability to compete with CSX just as effectively as the commodity restrictions contained in the original settlement agreement between CP and CSX. The City and State of New York argued that the commodity restrictions meant that the CP/CSX settlement would not provide the competition that was needed east of the Hudson River, and the Board agreed. In granting CP commercial access to the New York market via the east side of the Hudson, the Board intended to eliminate such artificial constraints on CP's ability to provide competitive rail service. See Decision No. 89 at 83.

Yet through the terms that CSX seeks to dictate for the trackage rights and switching agreements, CSX is attempting to reintroduce the discredited commodity restrictions and thus defeat the Board's purpose in granting trackage rights to CP. If CP were required to handle Harlem River Yard traffic through Oak Point Yard, the concomitant delays and associated CSX switching charge would materially impair CP's ability to compete with CSX for this traffic. That reduction in competition is clearly the objective that CSX is seeking to achieve.

It is particularly objectionable that CSX is attempting to achieve its anticompetitive goals by narrowly limiting CP's direct access to the Harlem River Yard where CSX does not even own the line CP would use to obtain that access. The Oak Point Link is owned by the State of New York. CSX operates over the Oak Point Link pursuant to a permit granted by the State, just as CP does. Nothing in the permit grants CSX exclusive use of the Oak Point Link. Indeed, CSX's rights on the line are identical to those granted to CP. Compare NYC-23/NYS-32, Guinan Supp. V.S., Ex. __ (JFG-02) (Conrail/CSX permit), with Finance Docket No. 33776 (notice of exemption regarding CP trackage rights permit). Yet CSX is attempting to use New York State's own rail line to undercut the procompetitive objectives the State sought to achieve in pursuing the CP east-of-the-Hudson trackage rights in the first place.

Plainly, there is no valid justification for CSX's efforts to hobble CP's ability to be an effective competitor for Harlem River Yard traffic by requiring that that traffic inefficiently and at critical additional expense be routed through the Oak Point Yard. CP urges the Board to enforce its prior rulings and direct CSX to allow CP to use Harlem River Yard

in accordance with its agreement with the yard's operator, so that CP can move traffic directly in and out of the yard.

2. Via CSX Switching, CP Is Entitled To Access All Shippers Served through the Hunts Point Terminal

The Board's decisions in this proceeding granted CP "access to all shippers in the Bronx and Queens" via CSX switching. Decision No. 109 at 7; accord, Decision No. 123 at 14-15. The decisions made no exception for shippers served through the CSX trackage located at the Hunts Point Terminal used for bulk transfer purposes. These tracks lie within the Bronx, and shippers served by them clearly fall within the scope of the rights awarded to CP. See Gilmore E.V.S., Ex. 1 (a map which shows the location of the Hunts Point Terminal in the Bronx).

CSX is taking the position that CP can have no access to these shippers, because the CSX bulk transfer tracks constitute a "CSX facility" that is somehow off limits to CP. CSX's argument, taken to its logical extreme, would mean that CP could have access to no shippers in the Bronx and Queens, because that access can only be obtained through use of CSX facilities. Clearly, the Board granted access to CP via CSX switching to Hunts Point Terminal shippers, like all other Bronx and Queens shippers.

The Hunts Point Terminal is owned by the City of New York and leased to the Hunts Point Co-op. The Co-op, which is made up of fresh fruit and vegetable wholesalers, has in turn leased four tracks to CSX (Conrail was the pre-merger lessee). CSX uses the tracks as a bulk transfer point where cars are spotted either for off-loading onto trucks, or for loading from trucks onto the cars. CSX contracts with a company called Bulkmatic to perform the off-loading and on-loading service. See Enforcement Verified Statement of Mario LaBarbera ("LaBarbera E.V.S.") (appended).

The Hunts Point Terminal is a major source of east-of-the-Hudson traffic, serving a broad range of shippers that require transloading from rail to truck and vice-versa. CP needs switching access to the CSX bulk transfer trackage at Hunts Point Terminal to serve not only ConAgra (whose flour traffic CP is already handling), but also shippers of such commodities as plastics, sweeteners, and other bulk-type movements. See Gilmore E.V.S. (appended). Bulkmatic has advised CP that it is prepared to perform the same services for CP that it is performing for CSX. See LaBarbera E.V.S. (appended).

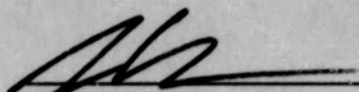
To permit CP to be an effective competitor for movement of traffic served through the Hunts Point Terminal, CP urges the

Board to enforce its earlier decisions so that CP is given access via switching to CSX's bulk transfer trackage in that terminal.

CONCLUSION

For the reasons set forth above, CP's petition for enforcement should be granted.

Respectfully submitted,



MARCELLA M. SZEL
TIMOTHY G. MULCAHY
CANADIAN PACIFIC RAILWAY COMPANY
Suite 500, Gulf Canada Square
401 Ninth Avenue, S.W.
Calgary, Alberta T2P 4Z4
CANADA
(403) 319-7474

GEORGE W. MAYO, JR.
ERIC VON SALZEN
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004-1109
(202) 637-5600

Attorneys for Canadian Pacific
Railway Company, Delaware and
Hudson Railway Company, Inc., Soo
Line Railroad Company, and
St. Lawrence & Hudson Railway
Company Limited

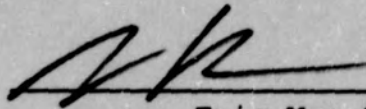
July 27, 1999

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of July, 1999, I served by the means indicated below a copy of the foregoing Canadian Pacific Parties' Petition To Enforce Trackage and Switching Rights Imposed by the Board on the following:

Counsel for CSX, NYCEDC and NYDOT
(by hand)

Counsel for all parties requesting a copy
(by first-class mail or by hand where requested)



Eric Von Salzen

ATTACHMENT A

Attachment A, the east-of-the-Hudson trackage rights agreement between CSX and CP, contains confidential information and is being filed with the Board under seal pursuant to the protective order in this proceeding

ATTACHMENT B

Attachment B, the Oak Point Yard switching agreement between CSX and CP, contains confidential information and is being filed with the Board under seal pursuant to the protective order in this proceeding

**ENFORCEMENT VERIFIED STATEMENT OF
PAUL D. GILMORE**

**ENFORCEMENT VERIFIED STATEMENT OF
PAUL D. GILMORE**

My name is Paul D. Gilmore. I am Vice President Eastern Operations of the Canadian Pacific Railway Company ("CPR"). 1/ I submitted two verified statements in the opening phase of this proceeding, one in the reply phase, and two in the reconsideration phase. In this enforcement verified statement, I address two issues: (1) the operating inefficiencies associated with CSX's position that CP must utilize CSX switching via the Oak Point Yard in order to access the privately operated Harlem River Yard, a position which ignores the fact that CP trains pass the Harlem River Yard en route to and from the Oak Point Yard and the related fact that operating convenience and cost effective service to shippers mandate that CP should use the Harlem River Yard for direct pick-up and set-out of cars as well as the origination and termination of trains where appropriate; and (2) the adverse competitive consequences associated with CSX's position that CP cannot access (via CSX switching) shippers in

1/ This statement is being submitted on behalf of CPR, Delaware and Hudson Railway Company, Inc. ("D&H"), Soo Line Railroad Company, and St. Lawrence & Hudson Railway Company Limited (collectively, including CPR, referred to as "Canadian Pacific Parties" or "CP"). I continue to use in this statement the abbreviated terms, such as CSX and east-of-the-Hudson line, defined in my earlier verified statements.

the Hunts Point Market area of the Bronx, as well as the illogic of CSX's position in light of the Board's decision granting CP access to all shippers in the Bronx and Queens.

I. CP Should Not Have To Use CSX Oak Point Yard-Based Switching in Order To Access the Harlem River Yard

As shown on Exhibit 1 hereto, the Harlem River Yard is located adjacent to New York State's Oak Point Link (over which CP has obtained trackage rights by agreement with the State of New York); thus, to obtain access to the yard, CP does not have to utilize any CSX trackage. A CP train that terminates at Oak Point Yard passes by the Harlem River Yard shortly before it arrives at the Oak Point Yard; similarly, a CP train originating at Oak Point Yard passes by the Harlem River Yard shortly after departing the Oak Point Yard.

CSX has no ownership interest in the Harlem River Yard, which is owned by the State of New York and leased to a third-party operator; similarly, CSX has no ownership interest in the Oak Point Link, the line which provides access to the Harlem River Yard and which like the Yard is owned by the State of New York. But CSX controls CP's access to the Harlem River Yard because it effectively controls dispatching of movements over the Oak Point Link.

The Harlem River Yard plays a critically important role in CP's ability to develop a competitive east-of-the-Hudson service. First, CP expects it to be a major origination and termination point for intermodal traffic, and anticipates among other things handling "short-haul intermodal" traffic (using specially designed CP equipment) and Roadrailer traffic through the yard; CP also plans to compete with CSX for the handling of substantial waste movements that originate at the yard. Second, the yard will be used by CP for storage of locomotives and cars.

In order to compete effectively for traffic movements that originate or terminate at Harlem River Yard, CP must be able to handle those movements directly from the yard. Thus, for example, where a CP train is terminating at Oak Point Yard, it must be able to set-out cars destined for Harlem River Yard as it passes by the yard using the Oak Point Link. Similarly, where an entire train originates at Harlem River Yard, CP must be able to move that train from the yard along the east-of-the-Hudson line to Schenectady.

As an operational matter, it makes no sense to require CP to route all of its Harlem River Yard traffic through Oak Point Yard in circumstances where CP's operating rights take it directly by Harlem River Yard. Back-hauling traffic via CSX switching to and from Harlem River Yard so that all CP traffic is

handled at Oak Point Yard adds an unjustifiable layer of inefficiency and costs to CP's operations, and threatens the competitive effectiveness of those operations. Moreover, it adds unnecessary congestion to the Oak Point Yard, which CSX complains is already congested.

It is particularly inappropriate to subject the CP traffic handled via Harlem River Yard to the type of backhauling insisted upon by CSX. That traffic is typically time-sensitive, thin-margin intermodal traffic that cannot afford the delays associated with handling through Oak Point Yard and the costs of an entirely unnecessary CSX switch.

Under the east-of-the-Hudson trackage rights agreement entered into between CSX and CP, CSX agrees to allow CP to use Harlem River Yard temporarily to pick up and set off blocks of intermodal traffic and to run intermodal trains in and out of the yard so long as conventional containers on flat cars or trailers on flat cars are used, the commodities carried are other than solid municipal waste, and the equipment used is neither Roadrailer or similar "non-conventional" equipment. The exceptions established by CSX effectively nullify the rights CSX purports to grant.

First, although CSX's temporary use arrangement would permit CP to directly access Harlem River Yard using double-stack

equipment, such equipment cannot operate over the east-of-Hudson line because it cannot clear parts of the Metro-North trackage and so the right to use this equipment into and out of the Harlem River Yard is, as CSX knows, meaningless. CP has always planned to handle intermodal traffic originating and terminating at Harlem River Yard as part of its "short-haul intermodal" service, which moves in specially designed flat cars (double stacks are not used). These flat cars are "non-conventional" equipment under CSX's definition. Hence, CSX would bar CP from directly accessing the Harlem River Yard with this equipment, and would instead require CP to route all Harlem River Yard traffic using this equipment through the Oak Point Yard.

Second, CSX's limitations would prohibit CP from employing Roadrailer equipment in exercising its direct access rights to Harlem River Yard. Rather, under CSX's scheme, shipments in this equipment -- like shipments in the "non-conventional" intermodal flatcars -- would have to move through Oak Point Yard using a CSX switch. This would preclude the possibility of CP moving Roadrailers to or from New York City in cooperation with Norfolk Southern, and would therefore deny the New York City market possible competitive alternatives.

Third, under CSX's temporary use authority, shipments of municipal solid waste -- one of the significant markets CP

plans to develop using the Harlem River Yard -- cannot be handled by CP on a direct basis, but rather must employ a CSX switch and move through Oak Point Yard.

These limitations effectively undercut CP's ability to compete with CSX for traffic served through the Harlem River Yard. There should be no limitations on CP's use of the Harlem River Yard. Rather, CP should be permitted to use Harlem River Yard (subject to the agreement of the yard's operator) to pick-up and set-out cars, to originate and terminate trains, and for any other purpose, and should not be shackled to the inefficiencies and costs of having to utilize of Oak Point Yard for every movement.

II. CP Should Be Permitted To Utilize CSX Switching To Access Shippers in the Hunts Point Market Area

CSX is taking the position that shippers served through the Hunts Point Terminal are off limits to CP. Disregarding the fact that the terminal is within the Bronx and that the Board granted CP access to all shippers in the Bronx through use of CSX switching, CSX nonetheless asserts that the terminal is somehow different from the rest of the Bronx. In fact, there is no difference. CP's right of access extends to all CSX rail

facilities in the Bronx, and the Hunts Point Terminal is no different from the rest of those facilities. 2/

Contrary to the Board's decisions, CSX is attempting to be the exclusive provider of rail service to all shippers served through the Hunts Point Terminal. These shippers include not only Conagra (whose traffic CP is already handling, but CSX is refusing to switch into the terminal), but also shippers of other bulk-type commodities such as plastics and sweeteners. The volume of traffic handled through the terminal is quite substantial. CP is anxious to compete for this traffic.

CP urges the Board, consistent with its earlier decisions, to require CSX to extend to CP access to the Hunts Point Terminal, using CSX switching to achieve such access.

2/ As shown in Exhibit 1 hereto, the Hunts Point Terminal is in the Bronx and but one of a network of CSX rail facilities serving shippers in that borough.

VERIFICATION

I, Paul D. Gilmore, declare under penalty of perjury
that the foregoing is true and correct to the best of my
knowledge and belief. Further, I certify that I am qualified
and authorized to file this verified statement.

Executed on July 19, 1999.

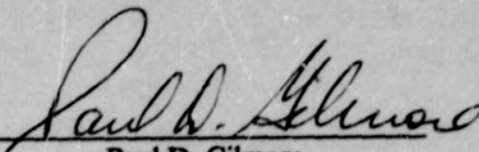
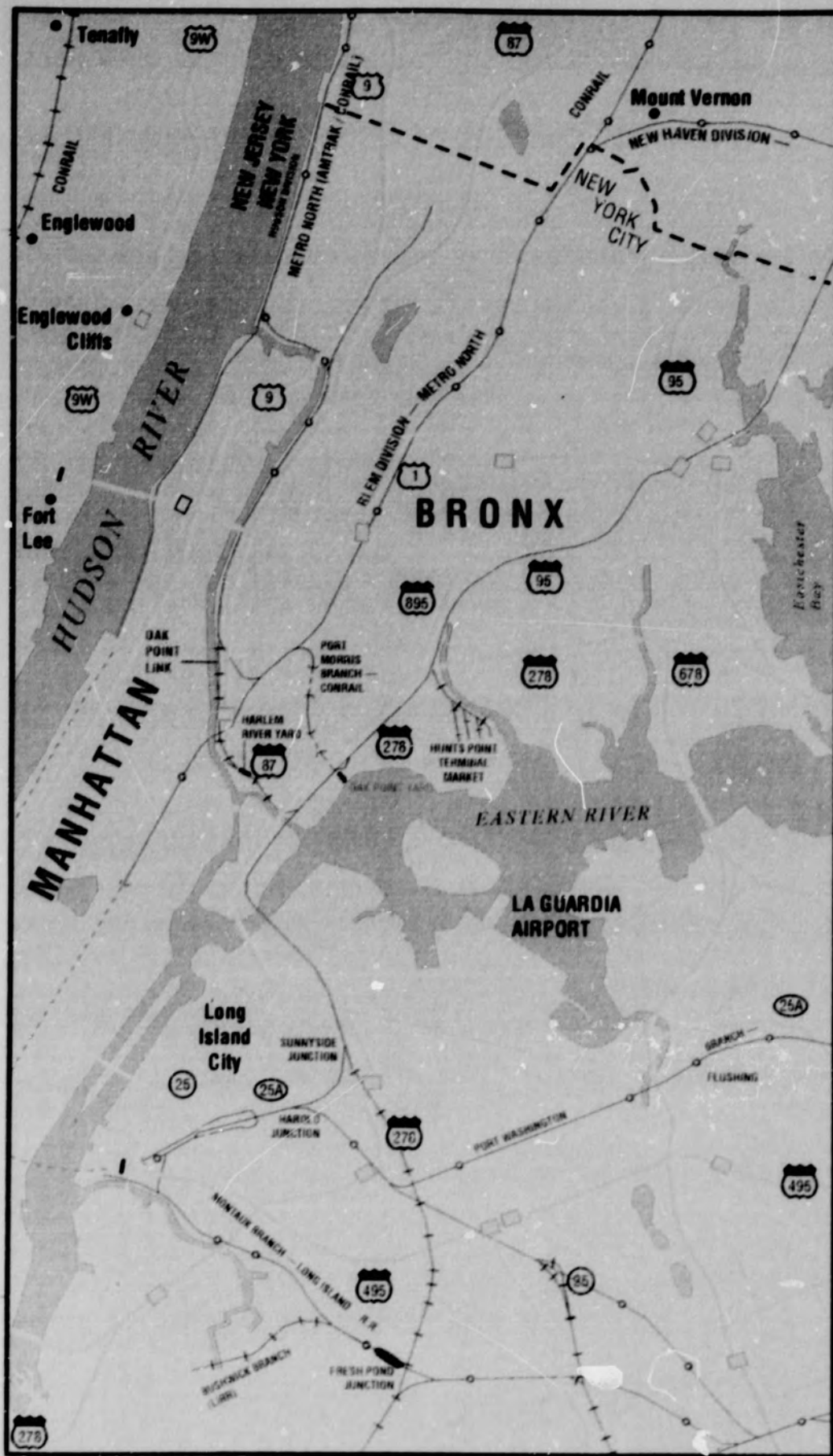

Paul D. Gilmore

EXHIBIT 1



**ENFORCEMENT VERIFIED STATEMENT OF
MARIO LABARBERA**

STB

FD

33388

(Sub 69)

8-16-99

D

195369

3/3

**ENFORCEMENT VERIFIED STATEMENT OF
MARIO LABARBERA**

My name is Mario LaBarbera. I am currently Director - Asset Management of the Canadian Pacific Railway Company ("CPR"), a position I have held since January 1999. 1/ Before joining CPR, I held a variety of positions with Consolidated Rail Corporation ("Conrail"), beginning in 1984, including Special Accounts Manager (Montreal), Project Coordinator (Philadelphia), Area Manager - Industrial Development (Selkirk, NY), Manager - Canadian Development (Montreal), Manager - Canadian Sales and Development (Montreal), and Manager - Canadian Sales (Montreal).

As a result of my job responsibilities at Conrail, I am familiar with the northeastern United States markets that CP seeks to serve through its "east of the Hudson" trackage rights.

I understand that CSX has been required by the Surface Transportation Board to provide CP with switching access to

1/ This statement is being submitted on behalf of CPR, Delaware and Hudson Railway Company, Inc. ("D&H"), Soo Line Railroad Company, and St. Lawrence & Hudson Railway Company Limited (collectively, including CPR, referred to as "Canadian Pacific Parties" or "CP"). I use in this statement the same abbreviated terms, such as CSX and east-of-the-Hudson line, are employed in the accompanying Enforcement Verified Statement of Paul D. Gilmore.

shippers in the Bronx and Queens in order to improve rail competition in that area. I further understand that CSX has refused to switch CP traffic (through the Oak Point Yard) that either originates or terminates at the Hunts Point Terminal in the Bronx. In connection with my current job responsibilities at CP, I have become familiar with the nature of CSX's rail operations in the Hunts Point Terminal area.

The Hunts Point Terminal is owned by the City of New York and is located in the Bronx. The terminal area has been leased by the City to the Hunts Point Co-op, which is made up of fresh fruit and vegetable wholesalers. The Co-op has in turn licensed four tracks to CSX (actually, the license ran to Conrail, and now CSX has succeeded to it). CSX uses these four tracks as a bulk transfer point. Cars are spotted on the tracks for off-loading of their contents onto trucks. CSX contracts with a company called Bulkmatic to perform the actual offloading and onloading service.

CP is handling traffic for the ConAgra Flour Milling Company which it has attracted away from CSX and which, when handled by CSX, has used the CSX Hunts Point Terminal tracks for bulk transfer onto trucks. Now that CP is moving this traffic, CP wants to use these same CSX tracks for bulk transfer purposes.


Bulkmatic has indicated to CP that it is prepared to perform the same services for CP that it is now performing for CSX. But CSX is refusing to switch the CP ConAgra cars to the CSX Hunts Point Terminal tracks. CSX has made it clear that this refusal will extend to any traffic CP wishes to originate or terminate at CSX's Hunts Point Terminal track.

This refusal has forced CP to make alternative arrangements on a temporary emergency basis. CP's ConAgra cars are switched by CSX to the Harlem River Yard, and CP has entered into a temporary arrangement with Bulkmatic to off-load the cars onto trucks there. This arrangement has been significantly less efficient than using the CSX Hunts Point Terminal tracks for bulk transfer purposes and is not a viable long-term option, for several reasons. The primary focus of CP's operations at Harlem River Yard is intended to be intermodal business and the transfer of municipal waste to containers. Once this intermodal and municipal waste business is fully developed, there will be insufficient capacity at Harlem River Yard for the bulk transfer business. Moreover, Hunts point is a food products and food grade terminal, whereas Harlem River Yard is oriented toward non-food products.

Given that, as I understand it, the Board granted CP the right to access all CSX facilities in the Bronx via CSX switch, there is no valid reason for CSX to refuse to switch CP's cars to and from CSX's Hunts Point Yard tracks.

VERIFICATION

I, Mario LaBarbera, declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief. Further, I certify that I am qualified and authorized to file this verified statement. Executed on July 27, 1999.


Mario LaBarbera

**VERIFIED STATEMENT OF
RANDY R. LEADERS**

Before the
SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 33388 (Sub-No. 69)

RESPONSIVE APPLICATION- STATE OF NEW YORK,
BY AND THROUGH ITS DEPARTMENT OF TRANSPORTATION,
AND THE NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION

VERIFIED STATEMENT

OF

RANDY R. LEADERS

1. My name is Randy R. Leaders and my business address is ConAgra Grain Processing Companies, Nine ConAgra Drive, Omaha, Nebraska, 68102-5009.
2. I am Director of Transportation for ConAgra Flour Milling Company ("ConAgra").
3. I make this declaration based on personal knowledge gained in the performance of my duties and records maintained by ConAgra in the ordinary course of business.
4. ConAgra is one of the Nation's largest producers and suppliers of flour. Our customers include commercial bakers.

5. Many commercial bakers prefer to receive flour by truck. In some instances, they prefer truck delivery because receiving flour in truckload quantities enables them to minimize inventory costs. In some instances bakers simply do not have the necessary facilities to receive rail cars.

6. In order to be able to provide responsive, timely and cost effective services to our customers we rely heavily on bulk transfer facilities that transfer flour from rail cars to trucks.

7. A bulk transfer facility on which we rely extensively in serving our customers, in the New York metropolitan area is located at Hunts Point in the Borough of Bronx.

8. The Hunts Point bulk transfer facility ("Hunts Point Terminal") is operated by Bulkmatic. Until June 1, 1999 it was served by Conrail. Since that date, it is served by CSX Transportation, Inc. ("CSXT").

9. Because of the importance of the Hunts Point Terminal to our ability to serve our customers in the New York metropolitan area, we followed with interest the above-captioned proceeding and were pleased when the Board granted to Canadian Pacific Railway Company ("CP") trackage rights to serve facilities in the Bronx.

10. Early in June we negotiated rates with CP for the delivery of a multiple carload shipment of flour to the Hunts Point Terminal.

11. CSXT informed us on June 17, 1999 that it would not deliver our flour to the Hunts Point Terminal. CSXT informed us that it has leased the Hunts Point Terminal which makes it a CSXT facility rather than a "customer" facility subject to CP trackage rights.

12. CSXT informed us that it will deliver carload shipments to the Hunts Point Terminal *only* if they are routed via CSXT. In attempting to negotiate competitive rates via CSXT, they proposed that we agree not to utilize any other transfer facility within 50 miles of

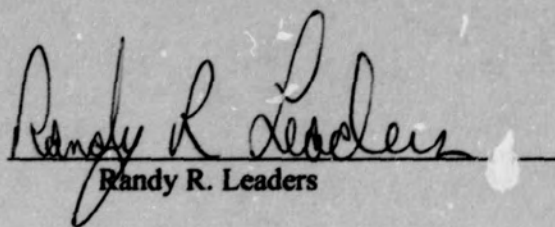
New York City. We advised CSXT that we could not agree to such a restriction since it would, among other things, interfere with our ability to use any of the three Norfolk Southern Railway Company ("NS") transfer facilities in the New York City area for shipments from NS origins.

13. On June 1, 1999 we made a shipment to the Hunts Point Terminal via CP. Upon arrival in the Bronx, CSXT refused to allow the shipments to be unloaded. CP had to take the shipment to the Oak Point Yard in Northern New Jersey thereby adding one additional day of transit time.

14. The inability to route CP cars through the Hunts Point Terminal or to obtain competitive rates from CSXT without agreeing to a restriction against using any other bulk transfer facility within 50 miles of New York City is seriously interfering with our ability to serve our customers in the New York metropolitan area.

VERIFICATION

I, Randy R. Leaders, verify under penalty of perjury that the foregoing Verified Statement is true and correct to the best of my knowledge and belief. Further, I certify that I am qualified and authorized to file this Verified Statement.


Randy R. Leaders

Executed: July 19, 1999

STB

FD

33388

(Sub 69)

12-18-98

D

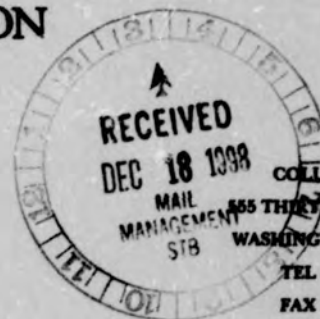
192754

12754

HOGAN & HARTSON
L.L.P.

December 18, 1998

GEORGE W. MAYO, JR.
PARTNER
DIRECT DIAL (202) 637-5679



COLUMBIA SQUARE
555 THIRTEENTH STREET, NW
WASHINGTON, DC 20004-1109
TEL (202) 637-5600
FAX (202) 637-5910

BY HAND DELIVERY

The Honorable Vernon A. Williams
Secretary, Surface Transportation Board
Case Control Branch
ATTN: STB Finance Docket No. 33388
Surface Transportation Board
1925 K Street, N.W.
Washington, DC 20423-0001

**Re: 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**

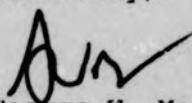
**Finance Docket No. 33388 (Sub No. 69), Responsive
Application -- State of New York, By and Through Its
Department of Transportation, and The New York City Economic
Development Corporation**

Dear Secretary Williams:

Enclosed for filing in the above-referenced dockets are an original and twenty-five copies of Canadian Pacific Parties' Reply in Opposition to CSX Motion To Strike Verified Statement of Joseph J. Plaistow. Also enclosed is a 3.5-inch diskette formatted for WordPerfect 7.0, containing the pleading.

Thank you for your assistance.

Sincerely,


George W. Mayo, Jr.
Attorney for Canadian Pacific
Railway Company, Delaware and
Hudson Railway Company, Inc.,
Soo Line Railroad Company, and
St. Lawrence & Hudson Railway
Company Limited

GWM:jms
Enclosures
cc: Counsel for Parties Required To Be Served

BRUSSELS LONDON MOSCOW PARIS* PRAGUE WARSAW

BALTIMORE, MD BETHESDA, MD COLORADO SPRINGS, CO DENVER, CO McLEAN, VA

\\\\DC - 66673/1 - 0377213.18

*Affiliated Office

192754

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



STB Finance Docket No. 33388 (Sub-No. 69)

ENTERED
Office of the Secretary

RESPONSIVE APPLICATION--STATE OF NEW YORK,
BY AND THROUGH ITS DEPARTMENT OF TRANSPORTATION,
AND THE NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION

DEC 18 1998

Part of
Public Record

**CANADIAN PACIFIC PARTIES' REPLY
IN OPPOSITION TO CSX MOTION TO STRIKE
VERIFIED STATEMENT OF JOSEPH J. PLAISTOW**

MARCELLA M. SZEL
TIMOTHY G. MULCAHY
CANADIAN PACIFIC RAILWAY COMPANY
Suite 500
Gulf Canada Square
401 Ninth Avenue, S.W.
Calgary, Alberta T2P 4Z4
CANADA
(403) 319-7474

GEORGE W. MAYO, JR.
ERIC VON SALZEN
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004-1109
(202) 637-5600

Attorneys for Canadian Pacific Railway
Company, Delaware and Hudson Railway
Company Inc., Soo Line Corp., and St.
Lawrence & Hudson Railway Company
Limited

December 18, 1998

BEFORE THE
SURFACE TRANSPORTATION BOARD

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

STB Finance Docket No. 3338 (Sub-No. 69)

RESPONSIVE APPLICATION--STATE OF NEW YORK,
BY AND THROUGH ITS DEPARTMENT OF TRANSPORTATION,
AND THE NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION

**CANADIAN PACIFIC PARTIES' REPLY
IN OPPOSITION TO CSX MOTION TO STRIKE
VERIFIED STATEMENT OF JOSEPH J. PLAISTCW**

Citing no authority, CSX 1/ has moved to strike a portion of a verified statement submitted by the Canadian Pacific Parties 2/ in their reply evidence and argument (CP-25), on the ground that the evidence is allegedly "improper rebuttal and should have been presented in [CP's] opening filing in this matter" CSX-170 at 1. CSX's motion should be denied.

1/ CSX Corporation and CSX Transportation, Inc. are collectively referred to as "CSX".

2/ "Canadian Pacific Parties" or "CP" refer collectively to Canadian Pacific Railway Company, Delaware and Hudson Railway Company Inc., Soo Line Railroad Company, and St. Lawrence & Hudson Railway Company Limited.

The testimony in question properly responded to CSX's contention, made in its opening submission, that trackage rights compensation should be based on "condemnation" principles (see CSX-167 at 14-20).

DISCUSSION

In its Decision No. 102, the Board put the parties on notice that it "intended to resolve [the terms to govern CP's east-of-the-Hudson rights] in a timely manner and to ensure that the Board's important condition is implemented as envisioned" Decision No. 102 at 2. To that end it adopted "a procedural schedule with shorter time frames than those advanced by the parties" Id. That schedule called for CSX and CP to submit "their proposed agreements with relevant evidence and argument on or before November 30, 1998 [the fifth business day after the service date of the Decision], and . . . simultaneous responses . . . by December 10, 1998." Id.

CP took the Board's directions to heart and filed an opening submission that focused primarily on what CP perceived to be the major area of dispute between the parties: The nature of the rights that CP needed in order to compete effectively with CSX in the east-of-the-Hudson market. In light of the applicable time limits, CP did not develop an elaborate compensation proposal, but instead urged the Board to adopt a trackage rights fee and a switching charge -- respectively, 29 cents per car mile

and up to \$250 per car -- that CSX had already accepted under analogous circumstances in this case. CP-24 at 14-16.

In contrast, CSX chose not to propose any specific trackage rights fee or switching charge for CP's east-of-the-Hudson operations. Instead, it advanced a methodology and procedure by which those amounts might be determined. Under the CSX methodology, "condemnation" principles like those employed in terminal trackage rights cases would be governing; the procedure advocated by CSX would involve a drawn out process starting with property appraisals, followed by arbitration of disputes, and culminating in Board review of any arbitration decision. CSX-167 at 14-20; Potter V.S., Ex. 1 at 5-7, 14, Ex. 2 at 7, 24-25. 3/ Ignoring the Board's desire to achieve a "timely" resolution of the compensation issue, CSX opted to argue for delay, endorsing a methodology and procedure in the abstract, rather than advancing hard numbers.

In its reply, CP responded to the CSX compensation proposal by demonstrating that it has no place in this proceeding. As explained by CP, the condemnation methodology advocated by CSX is entirely inappropriate where conventional trackage rights are imposed, as here, as of a merger condition. In such a setting, if negotiated charges like those endorsed in

3/ See also CSX-169 at 13-14 (discussing arbitration and Board review).

CP's opening submission are not adopted, then trackage rights compensation should be set in adherence to the standards established by the Board in the SSW Compensation cases. 4/ CP developed these points with both legal analysis and expert testimony.

The expert testimony, provided through the Reply Verified Statement of Joseph J. Plaistow, explained that the CSX compensation proposal is inconsistent with Board practice and industry precedent. It also utilized the governing SSW Compensation methodology to show that application of the methodology does not require the kind of drawn out process proposed by CSX, and produces results that affirm the appropriateness of the compensation initially proposed by CP.

Specifically, Mr. Plaistow observed that CSX's proposal "is in clear violation of the Board's [SSW Compensation] decisions because it bears no relationship to usage." Plaistow R.V.S. at 16. Mr. Plaistow applied the "SSW Compensation Formula", which the Board has used to establish trackage rights fees in comparable situations (Plaistow R.V.S. at 4-5), and calculated that an "SSW" rate for the east-of-the-Hudson trackage

4/ St. Louis Southwestern Ry. Compensation -- Trackage Rights, 1 I.C.C.2d 776 (1984), 4 I.C.C.2d (1987), 5 I.C.C.2d 525 (1989), 8 I.C.C.2d 80 (1991), 8 I.C.C.2d 213 (1991), aff'd without opinion, 978 F.2d 745 (D.C. Cir. 1992), cert. denied, 508 U.S. 951 (1993) (the "SSW Compensation cases").

rights would be \$0.27 per car mile, which is actually lower than rate proposed by CP. Plaistow R.V.S. at 12. Mr. Plaistow also showed that the rate proposed by CP is comparable to rates agreed on by CSX and many other railroads. Id.

Additionally, Mr. Plaistow demonstrated that CSX's "joint facility" charge based on "condemnation" principles was inappropriate here, because CP would not be afforded the rights of an owner of a joint facility. Plaistow R.V.S. at 16-18.

CP is not attempting to assume the role of a co-landlord of these properties. CP is attempting to be a tenant on CSX's properties while paying its fair share of the related costs and providing the additional compensation called for in the Board's Decision No. 89.

Id. at 18 (citing the SSW Compensation cases). Therefore, the correct approach to compensation would be to use a switching charge to compensate CSX for providing switching services to CP in certain New York City facilities. Mr. Plaistow examined CSX's own switching charges at a variety of locations and found that the fee proposed by CP, \$250 per car, is widely used and would generously cover CSX's costs. Id. at 13-15.

As the foregoing references make clear, Mr. Plaistow's testimony responds directly to CSX's proposal for trackage rights fees and "joint facilities" charges. Having no choice, CSX concedes that Mr. Plaistow's testimony "criticizes the formula CSX proposed in its opening submission," and that to this extent

the testimony "is, of course, legitimate rebuttal" and should not be stricken. CSX-170 at 5 n.3. It is only when Mr. Plaistow quantifies his methodological opposition that CSX has an objection; numbers, CSX seems to argue, are forbidden.

Having advanced the argument, CSX cannot support the distinction. Just as Mr. Plaistow, in reply to CSX's opening case, may explain why the compensation methodology advanced by CSX is invalid and out of step with the properly applicable SSW Compensation methodology, he may also apply the SSW Compensation methodology to show that it produces reasonable results by way of further demonstrating his point. 5/

Of course, Mr. Plaistow's testimony also lends support to the fees and charges that CP proposed, even though CP based its proposals on different sources than Mr. Plaistow used. See CP-24 at 14-16. That fact, however, does not make the evidence inadmissible; it is entirely appropriate that, in the context of responding to an opponent's opening evidence, a party rely on reply evidence which simultaneously demonstrates the error in its

5/ In fact, all of Mr. Plaistow's testimony forms part of his criticism of CSX's compensation proposals. Thus, Mr. Plaistow explains that his examination of the CSX proposals in Part IV (to which CSX does not object) of his verified statement builds on the analyses in Part III (to which CSX appears to object). Plaistow R.V.S. at 3.

opponent's position while confirming the correctness of its own. 6/

In sum, Mr. Plaistow's testimony constitutes appropriate reply evidence. CSX's baseless motion to strike is in reality a last-ditch effort to salvage its strategy of avoiding a near-term Board resolution of the compensation issue. CSX appears committed to debating compensation in concept rather than reducing concept to reality. No doubt this is because CSX realizes that, if its condemnation methodology were ever employed to calculate trackage rights and switching charges, the resulting figures would be so high that CP could never pay them and remain competitive with CSX.

As noted at the outset of this submission, the Board here established an expedited procedural schedule with the objective of achieving an "expeditious resolution of this

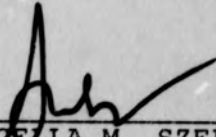
6/ As the Board observed in denying a CSX motion to strike in Potomac Elec. Power Co. v. CSX Transp. Co., STB Docket No. 41989, 1997 WL 728420, *2 (S.T.B. served Nov. 24, 1997) (emphasis added), "the proponent [of a position is not required] to anticipate in its opening evidence every possible defense or criticism Rather, on rebuttal [here, reply] the proponent may respond to the defenses and criticisms raised by introducing evidence to bolster its initial assumptions." Furthermore, the Board's predecessor stated in National Railroad Passenger Corp. -- Application under Section 402(a) of the Rail Passenger Service Act for an Order Fixing Just Compensation, Finance Docket No. 32467, 1995 WL 67109, *1, (I.C.C. served Feb. 17, 1995) that "it would serve no purpose to exclude relevant evidence that completes or clarifies the record and is useful to render a decision in this case."

matter." Decision No. 102 at 2. To accomplish that objective, the Board should now adopt the trackage rights and switching charges proposed by CP in its opening submission, and reject CSX's inapposite condemnation methodology and protracted procedure for application of that methodology.

CONCLUSION

For the reasons forth above, the Board should deny CSX's motion to strike Mr. Plaistow's reply verified statement.

Respectfully submitted,



MARCELLA M. SZEL
TIMOTHY G. MULCAHY
CANADIAN PACIFIC RAILWAY COMPANY
Suite 500, Gulf Canada Square
401 Ninth Avenue, S.W.
Calgary, Alberta T2P 4Z4
CANADA
(403) 319-7474

GEORGE W. MAYO, JR.
ERIC VON SALZEN
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004-1109
(202) 637-5600

Attorneys for Canadian Pacific
Railway Company, Delaware and
Hudson Railway Company, Inc., Soo
Line Railroad Company, and
St. Lawrence & Hudson Railway
Company Limited

December 18, 1998

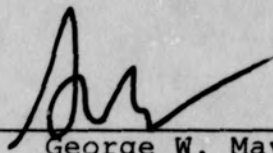
. . .

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of December, 1998, I served by the means indicated below a copy of the foregoing Canadian Pacific Parties' Reply in Opposition to CSX Motion To Strike Verified Statement of Joseph J. Plaistow on the following:

Counsel for CSX, NYCEDC and NYDOT
(by hand)

Counsel for all parties requesting a copy
(by first-class mail or by hand where requested)



George W. Mayo, Jr.

STB FD 33388 (Sub 69) 12-18-98 D 192747

192747

CSX-171

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



ENTERED
Office of the Secretary
DEC 18 1998
Part of
Public Record

STB Finance Docket No. 33388
(Sub-No. 69)

RESPONSIVE APPLICATION – STATE OF NEW YORK, BY AND THROUGH ITS
DEPARTMENT OF TRANSPORTATION, AND
THE NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION

**Reply of CSX Corporation and CSX Transportation, Inc.
to Canadian Pacific Parties' Motion to Clarify Scope of Rights Sought**

Samuel J. Sipe, Jr.
David H. Coburn
STEPTOE & JOHNSON LLP
1330 Connecticut Ave., N.W.
Washington, D.C. 20036-1795
(202) 429-3000

Mark G. Aron
Peter J. Shudtz
CSX CORPORATION
One James Center
901 East Cary Street
Richmond, VA 23129
(804) 782-1400

Dennis G. Lyons
Sharon L. Taylor
ARNOLD & PORTER
555 Twelfth Street, N.W.
Washington, D.C. 20004-1202
(202) 942-5000

P. Michael Giftos
Paul R. Hitchcock
CSX TRANSPORTATION, INC.
One James Center
500 Water Street
Speed Code J-120
Jacksonville, FL 32202
(904) 359-3100

*Counsel for CSX Corporation and
CSX Transportation, Inc.*

December 18, 1998

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

STB Finance Docket No. 33388
(Sub-No. 69)

RESPONSIVE APPLICATION – STATE OF NEW YORK, BY AND THROUGH ITS
DEPARTMENT OF TRANSPORTATION, AND
THE NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION

**Reply of CSX Corporation and CSX Transportation, Inc.
to Canadian Pacific Parties' Motion to Clarify Scope of Rights Sought**

CSX Corporation and CSX Transportation, Inc. (collectively, "CSX") submit this
reply to the "Motion to Clarify Scope of Rights Sought" filed on December 15, 1998
(CP-26), by the Canadian Pacific Parties (collectively, "CP").

BACKGROUND

On November 20, 1998, the Board launched the present proceeding ordering that
CSX and CP make opening filings on November 30, 1998, and reply filings on
December 10, 1998, concerning the trackage or other rights they deemed appropriate to

permit CP to serve New York City direct by the present Conrail "Hudson Line," east of that River, to the Bronx and Queens, and the terms and conditions related to such rights.

On November 30, 1998, CP made its initial filing (CP-24). The Conrail tracks to be allocated to NYC and to be operated by CSX over which CP demanded trackage rights were set forth by metes and bounds on pages A-1 to A-3, an Appendix to the form of Trackage Rights Agreement, which was Attachment A to CP-24. Four separate routes were requested. The first three all had their end point Metro-North's ownership of the Hudson Line at Poughkeepsie; each had a different starting point and covered a considerable portion of the prospective CSX lines West of the Hudson in the Greater Albany area. The amount of description of the routes that was devoted to the routes that were West of the Hudson far exceeded the description of the routes East of the Hudson. See pages A-1 and A-2. The fourth line described certain routes within the City of New York. All four routes were described as the "Subject Trackage." There was no suggestion that the "Subject Trackage" came in two different flavors.

One page later, on page A-4, it was provided that "CPR shall have the right to serve all shippers on or served directly by the Subject Trackage, including without limitation the right to perform local freight service thereon."

There was not a word in the entire filing, CP-24, that indicated that this language meant anything else than what it said: that local service rights were claimed on all of the "Subject Trackage," regardless of where it was.

On the same page, A-4, it was provided that the right was to be granted CP "to utilize all yards and facilities located on the Subject Trackage."

Again, no indication was given in the filing that anything other than what was said was meant and that the right "to utilize all yards and facilities" (with no extra charge) was to be limited in any way, such as to refer to just certain of the yards and facilities or to just certain of the "Subject Trackage."

Ten days later, CP filed its "Reply Evidence and Argument," CP-25. This filing contained as its Attachment A, a "Comparative Analysis of CP and CSX Proposed Agreements," ("Comparative Analysis") which presumably was written by someone who had studied the two rival documents. The analysis protested the geographic extent of the rights that CSX proposed to grant as being "too narrow." CP-25, Attachment A at 2. The complaint was that "[i]t omits routes 1 (generally Schenectady to Poughkeepsie) and 3 (Selkirk area rights) that CP is seeking on the north end of the east-of-the-Hudson line." On the next page, page 3, CP deplored the fact that CSX's proposal, apart from granting local access throughout the Bronx and Queens, prevented CP "from using the subject trackage for switching, storage or servicing of cars or equipment, the making or breaking up of trains, and service to an industry, whereas CP's draft gives CP these rights." The "subject trackage" included what the analysis called the "Selkirk area rights" and the other two access routes, Nos. 1 and 3.

Nothing was said to the effect that "those rights" were sought for only a portion of the "Subject Trackage." The Comparative Analysis went on to urge that CP's language be adopted as to shipper and other access on all the "Subject Trackage" "consistent with the full-service nature of the trackage rights it seeks." *Id.* at 3. No limitation on the extent of the "full-service nature" was indicated, either in the Comparative Analysis or anywhere else in the voluminous CP-25 filing.

Labeling CSX's conclusion that CP meant what it said about the "Subject Trackage" as a "strained reading" (CP-26 at 3), CP now says that it never meant anything like that and that it disclaims any intention to serve local shippers otherwise than "on the east side of the Hudson (and branch lines extending therefrom)" (*id.*) (whether this last parenthetical includes branches extending west of the Hudson, like the Selkirk Branch, we are not told). It is claimed that CSX's interpretation of the CP Trackage Rights Agreement (which had been apparently crafted by experienced railroaders and reviewed by a premiere Washington law firm) to mean what it said was an effort to create a "red herring." (*Id.*)

In an effort to make the victim the villain, CP says that "CP believes that CSX understands CP's intentions [not to claim what the draft Agreement said] from the negotiations between the parties" and that "the draft agreement language CP proposed manifests those intentions." CP-26 at 3. That draft, of course, does not manifest those intentions, as we have shown, but exactly the opposite. Moreover, the notion that filings with the Board reflect negotiating positions and that those positions can be relied upon as glosses on the texts of proposals made to the Board is naive. Parties opposing applications

before the Board and trying to obtain something from the Board thereby routinely take positions in their filings that they would not have the brass to make in a negotiation, and CSX believed that that was the case here. The aggressive nature of CP's claims with respect to CSX's property was consistent with the rest of its filing. While we might accept CP's representation that this is not a case of the hand caught in the cookie jar, CSX cannot accept the notion that this was a case of a red herring.

DISCUSSION

It seems appropriate, now that CP has disclaimed some of the gross overreachings in its earlier filings, to point out to the Board that many other gross overreachings still remain and are not wiped clean by CP-26. To cite a few examples:

1. Triple Access On Someone Else's Properties, Rather Than Using CP's Own. -- The requested local service rights, and presumably the yard and terminal rights, and the rights to park trains and cars wherever they please throughout the triple network of access routes on NYC/CSX West-of-the-Hudson property have apparently disappeared.¹ However, CP's request for the three simultaneous access routes remains. Why three rather than one is not apparent, given CP's own connectivity in its Albany area assets.

¹ We trust that the "right" to park trains and cars on the access routes has been foresworn; CP's statement is not as clear as one would like. This "right" is, however, still asserted on the Hudson Line. See item 2, below.

As was pointed out in CSX's earlier filings (Downing V.S. in CSX-167; Downing R.V.S. in CSX-169), severe congestion problems and interference with CSX's operations were posed by CP's use of the three routes. CP admits (CP-26 at 3) that it still wants to carry out the "run-around" movement in Selkirk Yard, described and denounced in the Downing V.S. in CSX-167. Very significantly, CP also makes clear (CP-26 at 3) its intent to run trains through Selkirk Yard on two of the three "access" routes it demands. The attached Verified Statement of Mr. Downing indicates the operating burden to which that Yard is already subject and to which the CP trains will further contribute.

There is no need for CP to run any trains through Selkirk Yard, despite its demand in CP-26 that it be permitted to do so on two of its three "access" routes. The prior filings by CSX have pointed out that there are other ways in which CP can access the Hudson Line mainly using its own property and without extensive use of NYC/CSX's property. The one that seems most desirable is the route identified in the Downing R.V.S. in CSX-169, pages 7-8, which permits a crossing of the Hudson River by means of the Livingston Avenue Bridge and a direct connection to the Hudson Line.² This route is regularly used by CP to serve Troy, NY. It takes CP over the Livingston Avenue Bridge at "CP 145" by means of an existing connection, and was authorized by the ICC in 1963, in a decision in

² Another route was initially suggested in CSX-167, in the Downing V.S. presented there. It did involve some pecuniary expenditure on the part of CP, and CP did not respond to it in its reply filing, apparently being unwilling to make the expenditures necessary to construct the connections, although they appeared relatively modest compared to the opportunity to serve New York City directly. So we focus on a route which would not interfere with Conrail/CSX's principal freight lines and major terminal operations and which requires no new connections and over which CP already operates.

Finance Docket No. 22282, served June 6, 1963. Access to this access route from the Kenwood Yard, to the South, is described in Downing R.V.S. in CSX-169, as cited above.

This access route can also be reached by trains of CP moving over another route, off the CP North-South main line. This is clearly shown in Gilmore's Exhibit 2 in Cⁿ 24, a schematic map of CP's routes in the Greater Albany area. The connection at Ballston to the CP line to Mechanicville can be accessed by trains coming and going either from and to the North (Montreal over the Rouses Point Line) or to and from Binghamton and Buffalo (on the lines going south and west). From Ballston, the movement can go to Mechanicville and from there south along the Colonie Main Line, to the intersection with the present Conrail Chicago Line, used by Amtrak also, where there is the same connection with the Conrail Chicago Line described in the Downing R.V.S. in CSX-169. As described in that Reply Verified Statement, the line then goes to Rensselaer over the Livingston Avenue Bridge and from there to Stuyvesant on the Hudson Line. A map with better scale and direction than the schematic map presented by Gilmore is already present in the record, being the map presented in the pocket of CSX/NS-25, Vol. 8B, Albany inset. A blown up copy of that map, with the lines in question marked, is appended as Exhibit A hereto. We expect that at least part of this route will soon be in excellent condition since the line from Mechanicville to Ballston will be used in the proposed NS/CP/Guilford service to Boston, MA and other points in Massachusetts contemplated by NS. See McClellan V.S., CSX/NS-18, Vol. 1 at 522, 528-30.

This form of access for CP is direct and efficient; it is near CP's Kenwood Yard; it is accessible from its major Mohawk Yard on the CP North-South Line; it is accessible, as the schematic maps in the Gilmore V.S. demonstrate, to CP trains moving in all directions; and it will involve no interference with CSX's yards, patrons or service. There is no need for CP to have three access routes, since the single access route to which CP already has rights is accessible from both of the CP yards in the Greater Albany area and from its route network in the area.

With CP's plethora of alternative paths to this access route in the Albany area, it is mystifying why CP does not want to use its own properties wherever possible but insists on maximizing intrusions into the property and operations of NYC/CSX. CSX earlier understood this to be caused by CP's desire to serve the Albany shippers on the "access" lines, but that has now been foresworn. Presumably it is related to the fact that CP wishes to use CSX's routes at an arbitrary figure of 29¢ per car mile, quite clearly below an appropriate rental even as based on the Board's preliminary and understated analysis reflected in Decision No. 89 at 141 (46¢ per car mile for Conrail lines), rather than maintain its own properties in order to bring them up to an appropriate condition to handle the access.³

³ For example, a portion of the CP line between Delanson and "VO" (Gilmore Exhibit 3, CP-24) is apparently out of service and was the subject of an unsuccessful abandonment proposal by CP in 1995. See the ICC's order in Docket AB No. 156 Sub-No. 20X, served March 2, 1995. While not essential to the alternative route we propose, CP's network in the area would be even more efficient if it restored this line to service.

CP's Motion to Clarify thus points up the issues on the "access" route alternatives.

The Board has two straightforward decisions to make:

(a) Should CP be given trackage rights over three different CSX/Conrail routes West of the Hudson, or should a single route that will enable CP to handle all traffic in and out of the City of New York be authorized?

(b) Should that route be the route that CP already has – and which it uses today – or should CSX be forced to allow CP to operate into the most critical yard it is acquiring in the Transaction?

2. Using The NYC/CSX Main Line To Park And Store CP's Cars And

Equipment. -- CP claimed this right generally in its original filing; perhaps it has now receded from it West of the Hudson – it does not expressly say. But it still claims that right East of the Hudson. Why the main Hudson Line should be used in this fashion is never explained, although the claim has not been withdrawn and in fact has been reaffirmed by CP in CP-25, Comparative Analysis at 3. See Potter R.V.S. at 12-13, CSX-169. CP insists that this strange and oppressive right is inherent in "full-service" trackage rights. Comparative Analysis at 3. The impact of CP exercising that parking and storage right on CSX's operations on the main lines involved is obvious.

3. Free Ride On Improvements. – If CSX makes additions and improvements, such as at Oak Point Yard and in the interchange facilities at Fresh Pond Junction, where they may well be needed, or elsewhere, CP gets the use of them without additional charge. Potter R.V.S. at 13-14, CSX-169. CP has not disclaimed that this is its position.

4. Grant Of Trackage Rights To NY&A. – CP arrogates to itself the right to give NY&A trackage rights in Queens and the Bronx. Potter R.V.S. at 14, CSX-169. CP has not disclaimed that this is its position.

5. Special Sale On Tracks; Pay Half The Price Of A Track And Own A Full Track! -- If an additional freight-only track were to be built, presumably between Poughkeepsie and Rensselaer for the exclusive use of the freight railways, CP gets ownership of one of the two freight-only tracks by paying half the cost of the new construction, thereby giving CSX the use of one freight-only track at the cost of having paid for one and one-half tracks (the existing Conrail freight-only track and one-half of the new one), and CP gets ownership of one track by paying for one-half of a track. See Potter R.V.S. at 14-15, CSX-169. CP has not disclaimed that this is its position.

* * * * *

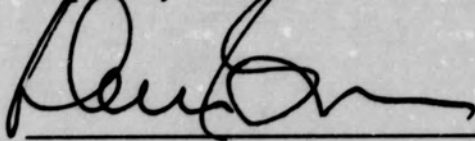
While CP has disclaimed some of the more prominent excesses in its proposal, the excesses that remain are still overreaching. Both those identified above and others particularly going to its efforts to get the use of CSX's routes and services on the cheap still remain. CP's silence in CP-26 indicates that CP has not had any second thoughts about these other extraordinary requests.

Samuel M. Sipe, Jr.
David H. Coburn
STEPTOE & JOHNSON LLP
1330 Connecticut Ave., N.W.
Washington, D.C. 20036-1795
(202) 429-3000

Mark G. Aron
Peter J. Shudtz
CSX CORPORATION
One James Center
901 East Cary Street
Richmond, VA 23129
(804) 782-1400

December 18, 1998

Respectfully submitted.



Dennis G. Lyons
Sharon L. Taylor
ARNOLD & PORTER
555 Twelfth Street, N.W.
Washington, D.C. 20004-1202
(202) 942-5000

P. Michael Giftos
Paul R. Hitchcock
CSX TRANSPORTATION, INC.
One James Center
500 Water Street
Speed Code J-120
Jacksonville, FL 32202
(904) 359-3100

*Counsel for CSX Corporation and
CSX Transportation, Inc.*

CONRAIL/CSX = RED
CP/DTH = GREEN



**BEFORE THE
SURFACE TRANSPORTATION BOARD**

**FINANCE DOCKET NO. 33388
(Sub-No. 69)**

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

**VERIFIED STATEMENT OF
R.R. DOWNING**

My name is R. R. Downing and I am General Manager-Service Delivery for Conrail's Albany Division, a position that I assumed in June, 1996. I began my railroad career with Conrail in 1977 in Philadelphia and since that time have held a variety of positions in Conrail's Transportation Department. In my current position, I have responsibility for transportation matters on Conrail's Albany Division which includes, among much else, the line between Selkirk Yard on the one hand and Oak Point Yard and Fresh Pond Junction in New York City on the other.

I have provided Verified Statements earlier in connection with this matter, including a Reply Verified Statement which described the operational problems and commercial implications resulting from the CP proposal to operate over three different access routes to reach the Hudson Line in connection with CP's service to the Bronx and Queens. I now understand that CP has disclaimed any right to access the shippers, industries and other

commercial facilities on those access lines. However, I understand that CP still asserts that it should receive the right "to pass through the [Selkirk] yard so as to connect efficiently with CP's line at 'VO'." I also understand that CP is persisting in seeking the right, as part of one of its three access routes, to use Selkirk Yard "for a forward and reverse movement of a CP train originating or terminating in CP's Kenwood Yard"

As to the latter of the claimed "rights," my Reply Verified Statement discussed the operational difficulties and burden on the Selkirk Yard involved in that sort of "run around" movement in the yard. The potential for delay and congestion, both in terms of entering the yard and in terms of effecting the "run around," are substantial. Under the best of circumstances, as my Reply Verified Statement indicated, the run around move itself would average around two hours, with the CP train sitting idle and occupying one track in the Yard and requiring a second track for the locomotive movement, and the movement in and out of the Yard otherwise interfering with this major terminal operation.

The purpose of this statement, however, is to give the reader a view of the daily activities in the Selkirk Yard, through which, on two of the three access movements proposed by CP, it proposes to move its trains.

Selkirk Yard handles 22 intermodal trains made up in other locations each day. All these trains stop for a crew change in Selkirk Yard, and six of them are^r scheduled to be switched in the Yard. In addition, six automotive trains are handled in the Yard each day,

four of which are switched in the Yard. In addition, the Yard assembles 22 outbound line-haul trains and two local trains each day and receives approximately the same number of trains.

Approximately 2,600 cars are classified in the Yard each day.

A total of approximately 1,000 employees work at Selkirk Yard.

These figures are the current figures for the Conrail operation. After the Split Date, we anticipate that the demands on the Yard will become progressively greater.

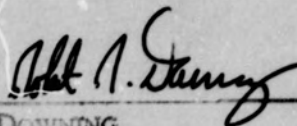
My earlier statements identify alternative routes of access, essentially using CP's existing owned line structure and existing rights on other lines in the Albany area, for it to access the Hudson Line without using Selkirk Yard. As discussed in my Reply Verified Statement, one of these routes has long been in use by CP to cross over to the east side of the Hudson River by means of the Livingston Avenue Bridge for CP traffic going to and coming from Troy, NY. The route is being used daily for Amtrak's trains heading west of Albany (albeit at only half the volume of its use of the Hudson Line) and for Conrail local movements. Importantly, this route is much less congested than the Selkirk Branch, and CP's use of this route from its existing connection at "CP 145" would not interfere with Conrail/CSX's principal freight lines and terminal operations. That access route can be reached easily from either CP's Kenwood Yard (approximately one mile south of the CP 145 connection) or from its Canadian and Freight Main Lines, running north-south (on

which its major Mohawk Yard is located) via the line to Mechanicville and the Colonie Main Line. In my judgment, there is no reason or necessity for CP to use the Conrail/CSX facilities for access to the Hudson Line, let alone any necessity to run trains through Selkirk Yard.

VERIFICATION

I, R.R. Downing, declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this statement.

Executed on December 17, 1998.

A handwritten signature in dark ink, appearing to read "R. R. Downing", is written over a horizontal line.

R. R. DOWNING

CERTIFICATE OF SERVICE

I, Dennis G. Lyons, certify that on December 18, 1998, I have caused to be served a true and correct copy of the foregoing CSX-171, "Reply of CSX Corporation and CSX Transportation, Inc. to Canadian Pacific Parties' Motion to Clarify Scope of Rights Sought," to the following parties, by first-class mail, postage prepaid, or by more expeditious means:

George Mayo, Jr., Esq.
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004-1109
*Counsel for Canadian Pacific Railway Company,
Delaware and Hudson Railway Company, Inc.,
Soo Line Railroad Company and
St. Lawrence & Hudson Railway Company Limited*

Charles A. Spitulnik, Esq.
HOPKINS & SUTTER
888 Sixteenth Street, N.W.
Washington, D.C. 20006
*Counsel for New York Department of Transportation
and New York City Economic Development Corporation*

Kelvin J. Dowd, Esq.
SLOVER & LOFTUS
1224 Seventeenth Street, N.W.
Washington, D.C. 20036
Counsel for New York Department of Transportation

L. John Osborn, Esq.
SONNENSCHN NATH & ROSENTHAL
1301 K Street, N.W.
Suite 600 East Tower
Washington, D.C. 20005
Counsel for Canadian National Railway Company

Edward D. Greenberg, Esq.
GALLAND, KHARASCH & GARFINKLE, P.C.
1054 Thirty-First Street, N.W.
Washington, D.C. 20007-4492
Counsel for Providence and Worcester Railroad Company

Walter E. Zullig, Jr., Esq.
METRO-NORTH RAILROAD
347 Madison Avenue
New York, NY 10017-3739
Counsel for Metro-North Commuter Railroad Company

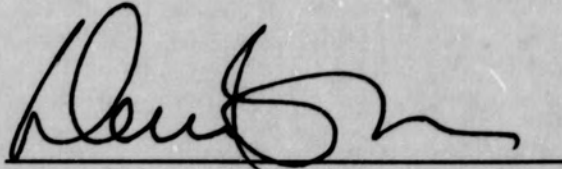
Paul Samuel Smith, Esq.
U.S. DEPARTMENT OF TRANSPORTATION
400 Seventh Street, S.W., Room 4102 C-30
Washington, D.C. 20590
Counsel for U.S. Department of Transportation

Louis E. Gitomer, Esq.
BALL JANIK LLP
1455 F Street, N.W., Suite 225
Washington, D.C. 20005
Counsel for APL Limited

Edward J. Rodriguez, Esq.
HOUSATONIC RAILROAD COMPANY, INC.
Post Office Box 298
67 Main Street
Centerbrook, CT 06409
Counsel for Housatonic Railroad Company, Inc.

Mark H. Sidman, Esq.
WEINER, BRODSKY, SIDMAN & KIDER, P.C.
1350 New York Avenue, N.W., Suite 800
Washington, D.C. 20005-4797
Counsel for New York & Atlantic Railway

Richard G. Slattery, Esq.
AMTRAK LAW DEPARTMENT
60 Massachusetts Avenue, N.E.
Washington, D.C. 20002
Counsel for Amtrak



DENNIS G. LYONS

STB FD 33388 (Sub 69) 12-10-98 D 192605

192605

HOPKINS & SUTTER

(A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS)

RETURNED
Office of the Secretary

888 SIXTEENTH STREET, N. W., WASHINGTON, D.C. 20006-4103 (202) 835-8000

FAX (202) 835-8136

INTERNET <http://www.hopsut.com>

DEC 11 1998

**Part of
Public Record**

CHICAGO OFFICE THREE FIRST NATIONAL PLAZA 60602-4209
DETROIT OFFICE 2800 LIVERNOIS SUITE 220 TROY, MI 48063-1220

CHARLES A. SPITULNIK
(202) 835-8196
Direct Fax: (202) 835-8136
E-Mail: CSpitulnik@hopsut.com

December 10, 1998

Hon. Vernon A. Williams, Secretary
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: *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, Finance Docket No. 33388 (Sub-No. 69)*

Dear Sir:

Enclosed are an original and twenty-five (25) copies of the Joint Reply of the New York City Economic Development Corporation and New York State, By and Through Its Department of Transportation, To Opening Submissions of Canadian Pacific Parties and CSX Corporation and CSX Transportation, Inc. An additional copy is enclosed for file stamp and return with our messenger. Please note that a copy of this filing is also enclosed on a 3.5 inch diskette in MicroSoft Word format.

Sincerely,

A handwritten signature in dark ink, appearing to read "Charles A. Spitulnik".

Charles A. Spitulnik

Enclosures

Before the
Surface Transportation Board
Washington, D.C.

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



Finance Docket No. 33388 (Sub-No. 69)

RESPONSIVE APPLICATION - STATE OF NEW YORK, BY AND THROUGH ITS
DEPARTMENT OF TRANSPORTATION, AND THE NEW YORK CITY ECONOMIC
DEVELOPMENT CORPORATION

**JOINT REPLY OF
THE NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION AND
THE STATE OF NEW YORK, BY AND THROUGH ITS
DEPARTMENT OF TRANSPORTATION,
TO OPENING SUBMISSIONS OF CANADIAN PACIFIC PARTIES AND CSX
CORPORATION AND CSX TRANSPORTATION, INC.**

The New York City Economic Development Corporation ("NYCELC" or
"the City") and the State of New York, by and through its Department of
Transportation ("NYS" or "the State"), hereby submit their Joint Reply to the
Canadian Pacific Parties' Opening Evidence and Argument (CP-24) and the
Submission of CSX Corporation and CSX Transportation, Inc. As to the Rights
to be Granted to Canadian Pacific Railway Company and Affiliates with Respect

to Line of Railroad Between Selkirk (Near Albany), N.Y., and Fresh Pond Jct. (in Queens) (CSX-167), both filed on November 30, 1998.

INTRODUCTION

In Decision No. 89, this Board ordered that the Canadian Pacific Railway Company and its affiliates ("CP") be granted trackage or haulage rights unlimited as to commodity or geographic scope,¹ that is, full service rights, on the line along the east side of the Hudson River between Albany, Selkirk and Fresh Pond (the "Hudson Line"). CSX Corporation and CSX Transportation, Inc. (jointly "CSX") have misapprehended the scope and meaning of that mandate. In its opening submission (CSX-167), CSX presents an arrangement that provides for unrestricted rights only within the boroughs of New York City and overhead rights along the remainder of the Hudson Line. Its compensation proposal also misstates the nature of the rights CP will receive, the relationship between CSX and CP that will exist upon implementation of the agreement, and the Board's precedent concerning compensation for trackage rights tenants who achieve those rights as a condition of approval of a transaction subject to 49 U.S.C. §11324. In essence, CSX attempts to recraft the Board's order in Decision No. 89, seeking to accomplish through this pleading what it failed to do when it did not seek reopening or reconsideration of Ordering Paragraph 28 in Decision No. 89. As a result, CSX's opening submission does not address the issues this Board must now address due to CSX's and CP's inability to

¹ The Board's order refers to either haulage or trackage rights. Both CP and CSX have elected to propose trackage rights arrangements. As a result, NYS/NYCEDC will focus in this Joint Reply on issues related to trackage rights agreements only.

reach an agreement pursuant to Ordering Paragraph No. 28 in Decision No. 89.

The Canadian Pacific Parties (jointly, "CP"), on the other hand, have presented in CP-24 a proposal that is consistent with Decision No. 89. The Board agreed with the request of NYCEDC and the State that a competitive option for shippers on the east side of the Hudson River be afforded. The service CP plans to provide will be available to all shippers on the line between Selkirk and Fresh Pond. The compensation it proposes to pay to CSX will allow it to compete effectively with CSX and is consistent with Board precedent in this and prior rail consolidation cases.

Understanding the differences between the two proposals, and why CSX's falls so wide of the mark, requires a brief review: of the concerns expressed by NYCEDC and NYS regarding the proposal submitted by CSX and Norfolk Southern Corporation and its affiliate Norfolk Southern Railway Company (jointly, "NS") to divide the assets of Conrail in the first instance; of the remedy proposed by NYCEDC and NYS; and of the relief ultimately granted in Decision No. 89.

The quest for an effective alternative for shippers on the east side of the Hudson began out of a recognition that the allocation of resources of Conrail proposed by CSX and NS had created an imbalance. Verified Statement of the Honorable George E. Pataki and the Honorable Rudolph Guiliani at 2 ("V.S. Pataki/Guiliani"), which is attached hereto as Attachment 1. Shippers in one segment of the market -- Northern New Jersey -- would receive access to direct rail competitive options. Shippers in the other segment -- all those on

the east side of the Hudson River and of New York Harbor -- had only one. The proposed transaction created an unacceptable competitive imbalance.² Through Comments and a Joint Responsive Application, NYCEDC and NYS called upon the Board: (1) to protect and enhance rail competition in various geographic regions, including the east-of-Hudson counties south of Albany; (2) to promote the interests of intercity and commuter passenger service; and (3) to generally safeguard the rights and interests evidenced by the hundreds of millions of dollars in State and City rail infrastructure investment made over the past 25 years (V.S. Pataki/Guiliani at 2). To fulfill this goal, NYCEDC and NYS sought the following in their Joint Responsive Application:

1. Full service trackage rights in favor of a rail carrier other than Conrail or CSX, to be designated jointly by New York and NYCEDC, over the lines of Conrail between points of connection with D&H at CP-160 near Schenectady, New York and Selkirk Yard near Selkirk, New York, and CP-75 near Poughkeepsie, New York, together with sufficient rights on tracks within the Selkirk Yard to permit the efficient interchange of freight with D&H; and
2. Full service trackage rights in favor of a rail carrier other than Conrail or CSX, to be designated jointly by New York and NYCEDC, over the lines of Conrail between the point of Conrail ownership at Mott Haven Junction ("MO"), New York and the point of connection with the lines of the Long Island railroad near Fresh Pond ("MONT"), New York, via the Harlem River Yard.

² The Board correctly noted that this single-service-option for east-of-the-Hudson shippers arose out of the creation of Conrail. Decision No. 89 at 83. However, it was the proposed NS-CSX allocation of Conrail's resources that created the competitive imbalance that NYCEDC and NYS sought to remedy as a condition of the Board's approval of the proposed transaction.

Joint Responsive Application of the State of New York and the New York City Economic Development Corporation, filed October 21, 1997, NYS-11, NYC-10 at 5.

The request was explicitly designed to provide shippers located east of the Hudson and south of Albany, NY, with direct service via a second direct rail carrier and to avoid the unworkable alternative suggested by CSX and NS to rely on motor carriage to move all traffic from this eastern segment of the greater New York market to the CSX and NS intermodal terminals in northern New Jersey. Specifying the extent of the rights, NYCEDC and the State stated in the Joint Responsive Application that the trackage rights they proposed:

. . . would have a positive effect on competition by extending the benefits of dual rail service which the Primary Applicants are proposing to introduce to Northern New Jersey and the western environs of the New York metropolitan area and the Hudson River Valley, to New York City proper, Long Island, and the eastern portion of the Hudson River Valley south of Albany.

NYS-11/NYC-10 at 10 (emphasis added).

The intended scope of the requested access rights was further underscored both in discovery responses and in the joint NYCEDC/NYS rebuttal testimony. CSX's interrogatories to the State requested information on "important" industries or shippers on the east-of-Hudson line that the State "believe[s] the Trackage Rights Carrier will provide with local train service." See *First Set of Interrogatories and Requests for Production of Documents of CSX Corporation and CSX Transportation, Inc. (CSX-71)*, November 5, 1997 (Interrogatory No. 6). The responses made clear that all shippers with access to

the Hudson Line were intended beneficiaries of the requested conditions, detailing that the traffic that might be handled by the Trackage Rights carrier included "inbound wood pulp and paper manufacturing raw materials shipments from origins in Canada, New York, Pennsylvania and the Southeastern U.S., for delivery to Fort Orange Paper Company at Castleton-on-Hudson, New York," *Responses of the State of New York to CSX's First Set of Interrogatories and Requests for Production of Documents (NYS-15)*, November 20, 1997, at 9.³

Finally, in their Joint Rebuttal, NYS/NYCEDC further clarified that they were specifically seeking competitive rail access for all shippers along the Hudson Line:

[t]he requested trackage rights would allow the competing carrier to serve all shippers and distribution centers located between the NY&A interchange at Fresh Pond, New York, and the CP/D&H interchanges at Selkirk and Schenectady, New York. Affording these shippers - along with current and prospective NY&A shippers - competitive access to CP (and thereby NS) plainly will expand their horizons beyond sole reliance on CSX, a point underscored by CSX's opposition to New York and NYCEDC's Joint Responsive Application.

Joint Rebuttal Statement of the State of New York and the New York City Economic Development Corporation, NYS-24/NYC-17 at 37 (emphasis added).

³ Fort Orange Paper Company is located on the east-of-Hudson line north of New York City. Fort Orange also submitted its own comments in this proceeding supporting as a condition on the transaction, NYS/NYCEDC's requested full east-of-Hudson trackage rights condition, as the only means of ending its captivity to Conrail (and, post transaction, CSX) rail service. See *Comments of the Fort Orange Paper Company Supporting the State of New York (FOPC-5)*, December 15, 1997.

In Decision No. 89, the Board conditioned approval of the transaction on the east-of-Hudson trackage rights requested by NYS/NYCEDC. In Ordering Paragraph No. 28, mandates the following:

CSX must attempt to negotiate, with CP, an agreement pursuant to which CSX will grant CP either haulage rights unrestricted as to commodity and geographic scope, or trackage rights unrestricted as to commodity and geographic scope, over the east-of-the-Hudson Conrail line that runs between Selkirk (near Albany) and Fresh Pond (in Queens), under terms agreeable to CSX and CP, taking into account the investment that needs to continue to be made to the line. If CSX and CP have not reached an agreement by October 21, 1998, we will initiate a proceeding addressing this matter. CSX and CP should advise us, no later than October 21, 1998, whether they have or have not reached an agreement.

Decision No. 89, at 177.

In Decision No. 89, the Board recognized the legitimacy of the interests of east-of-the-Hudson shippers and the merits of the NYCEDC/NYS case. The Board explained that the private settlement agreement previously reached between CSX and CP, which addressed certain Hudson Line concerns, was insufficient to satisfy the State's needs in the area of intramodal competition. The Board determined that the "numerous restrictions significantly limit the movements to which this privately negotiated haulage agreement would apply," and that a more intensive pro-competitive condition was required. Decision No. 83, at 83. The remedy required, according to the Board, was one that provided unrestricted competition on the Hudson Line consistent with the proposal of NYS and NYCEDC.

We have carefully balanced the needs of the competing parties here, and strongly believe that we must forcefully use this opportunity to restore a modicum of the competition that was lost in the financial crisis that led to the formation of Conrail. .

..

Therefore, we will impose a condition requiring CSX to negotiate an agreement with CP to permit either haulage rights, not restricted as to commodity or geographic scope, or similarly unrestricted trackage rights, over the east-of-the-Hudson line from Fresh Pond to Selkirk (near Albany), under terms agreeable to the parties, taking into account the investment that continues to be required for the line. . . .

Decision No. 89, at 83 (emphasis added).

As the Board noted in Decision No. 102, negotiations between CSX and CP over terms to govern CP's east-of-the-Hudson operations failed to produce agreements. On November 30, therefore, CP and CSX submitted competing proposals for implementation of the east-of-the-Hudson condition. CP's trackage rights plan would allow it to serve shippers, yards and railroad interchanges between three (3) designated points of connection in the Albany area and Fresh Pond, without restriction and on other terms consistent with the relief requested by NYCEDC and the State. *Id.* The terms proposed by CP - including the fees that CP would pay to use the portion of the Hudson Line owned by Conrail -- are essentially identical to the terms that CSX and NS already agreed to for the trackage rights that they granted to one another as part of their Conrail plan. See CP-24 at 13-16, Attachment A. In contrast, CSX has proposed an arrangement which precludes CP from serving shippers or interchanges north of The Bronx, and requires CP to pay much higher trackage

rights fees than CSX and NS are charging one another. See CSX-167 at 9, 10, 17.

While NYCEDC and the State did not endorse a particular candidate to be the recipient of the trackage rights, NYS and NYCEDC do not disagree with the Board's selection of CP as the operator of those rights. CP's proposal appears designed to comply fully with the conditions described in Ordering Paragraph No. 20. in Decision No. 89. For the reasons set forth below, CP's plan presents the better alternative and should be adopted by the Board.⁴

ARGUMENT

I. THE ARRANGEMENT PROPOSED BY CSX DOES NOT COMPLY WITH THE MANDATE OF THE BOARD IN DECISION NO. 89

A. CSX's Proposal Continues to Limit the Geographic Scope of CP's Rights

Decision No. 89 instructed CSX to grant CP trackage or haulage rights that are "unrestricted as to commodity and geographic scope." Decision No. 89 at 177. This was a direct response to criticisms leveled by NYS and NYCEDC against the October 20, 1997 CP-CSX Settlement Agreement. In particular, the New York parties noted that "[t]he agreement purports to cover only movements...from Albany/Selkirk to New York City and Long Island. Service to intermediate points and shippers -- such as Fort Orange Paper Company -- apparently is excluded from the arrangement." See NYS-24/NYS-17 at 32. The

⁴ The importance of this matter is underscored by the accompanying Joint Statement of New York Governor George Pataki and New York City Mayor Rudolph Guiliani, in which these leaders voice their support for the CP plan as best suited to offset the public interest in providing inter-railroad competition to shippers in the east Hudson Valley, New York City and or Long Island. V.S. Pataki/Guiliani at 2-3.

Board agreed, stating that the CP-CSX settlement agreement contained "numerous [] restrictions [that] significantly limit the movements to which this privately negotiated haulage agreement would apply." *Id.* at 83.

CSX claims that its new proposal satisfies the Board's directive in Ordering Paragraph No. 28. Unfortunately, it does not. The proposal includes the same geographic scope restrictions that prompted NYS/NYCEDC's earlier objections. *E.g.*, CSX-167 at 4. CSX has proposed two separate implementing agreements: (1) a "Terminal Joint Facilities Agreement" for the New York City area, which CSX claims will permit CP unlimited access to points within the area's boundaries in Queens and The Bronx; and (2) a trackage rights agreement offering CP overhead rights on the Hudson Line from Albany to New York City's northern limits. Rather than implementing the Board's order for unrestricted access, however, rail customers and connecting carriers located north of New York City and outside the designated terminal area would be denied access to CP rail service. *See* CSX-167 at 10-11. CSX would remain the sole rail carrier serving points between Albany/Selkirk and The Bronx.

CSX's exclusion of shippers and carrier interchanges north of The Bronx from the benefits of competitive CP rail service compels rejection of that plan.⁵ The record developed in this proceeding demonstrates that full competitive access to all shippers served via the Hudson Line, as well as to connections with regional carriers such as the Housatonic Railroad at Beacon, New York,

⁵ New York and NYCEDC will defer to CP on the question whether CSX's proposed terminal arrangement within the New York City limits is adequate to provide practical and effective access to all shippers and stations within the

was central to the relief sought by New York and NYCEDC. *E.g.*, NYS-11/NYC-10 at 5, 7, 10.

The Board agreed, as manifested by Ordering Paragraph No. 28, which states that CP's access should be unrestricted as to commodity or geographic scope. There are no exceptions or "overhead service only" stipulations, and the Board's discussion of the condition stresses a lack of restrictions. Indeed, in response to the request by Fort Orange Paper Company that its facilities be opened to dual carrier service as a condition of approval of the Conrail division plan, the Board specifically referred Fort Orange to its east-of-the-Hudson condition:

. . . [W]e have imposed a condition that may help to permit either haulage or trackage rights, not restricted as to commodity or geographic scope, over the east-of-the-Hudson line from Fresh Pond to Selkirk (near Albany).

Decision No. 89 at 116. CSX's proposal for implementation of Condition No. 28 flies in the face of this directive.

In argument and through its witnesses Potter and Downing, CSX attempts to justify its geographic scope restrictions. According to CSX, restricting CP's access north of The Bronx is appropriate (despite the Board's mandate to the contrary) because (1) prior to 1968, shippers north of New York City allegedly had access to only one carrier; (2) local service by a second carrier is inconsistent with operating conditions on the Metro-North Commuter Railroad segment between Poughkeepsie and Mott Haven Junction; and (3) only about 20% of the traffic moving over the Hudson Line originates or

New York City limits and -- via the New York & Atlantic Railway -- on Long Island.

terminates north of The Bronx. See CSX-167 at 10-11; V.S. Potter at 14; V.S. Downing at 3. None of these excuses has merit.

Rail competition east of the Hudson River in the decades before Conrail was created was discussed in earlier phases of this proceeding by the State's witness Robert Banks, among others, who testified as to the prevalence of rail shipper options throughout New York State and, in particular, in the eastern counties south of Albany. See, e.g., *Comments of the State of New York*, NYS-10, V.S. Banks at 2-5. Regardless of the number of carriers operating east of the Hudson prior to 1986 or 1976, or precisely when which carriers provided what service, the Board's Ordering Paragraph No. 28 is unambiguous in its mandate that CP's rights be "unrestricted" as to geographic scope or commodity. CSX's "understanding" as to the "preexisting state of competition, prior to the 1968 creation of the Penn Central Railroad"⁶ is irrelevant to the plain meaning of the subject order, and properly cannot qualify the scope of that order.

The record likewise contradicts CSX's claim that operating restrictions on that portion of the Hudson Line that is under the control of Metro-North make it "preferable" that shippers north of The Bronx receive service from only a single carrier. Then-President of Metro-North Donald Nelson testified in support of NYS/NYCEDC's Joint Responsive Application that the portion of the Poughkeepsie-Mott Haven Junction segment most prone to congestion would be bypassed entirely by freight trains using the new Oak Point Link, and that the current freight operating "window" in effect on the segment could be

expanded. See NYS-11/NYC-10, V.S. Nelson at 5-8. He concluded that the segment "easily and safely could handle a second freight operator moving an additional 6 to 8 scheduled freight trains each day," *Id.* The Board accepted Mr. Nelson's testimony on this issue. See Decision No. 89 at 83, n. 130. CSX's Metro-North operating "window" claim is further undermined by the fact that the two of the largest current Hudson Line shippers north of The Bronx -- Fort Orange Paper Company and ADM Corp. -- are located just south of Albany and well north of Poughkeepsie, and would not even use the Metro-North segment for most, if not all, of their inbound and outbound traffic.

Finally, CSX's suggestion that excluding CP from access north of The Bronx is acceptable because "only" 20% of current Hudson Line traffic originates or terminates there reflects a skewed perception of the purpose of the condition described in Ordering Paragraph No. 28. NYS and NYCEDC did not seek-- and the Board presumably did not grant -- dual rail service east of the Hudson River primarily for the benefit of CP. Rather, the relief was and is intended to protect and enhance the interests of shippers and communities along the Hudson Line, including those in the counties north of New York City. See, e.g., NYS-24/NYC-17 at 37. There is no basis in precedent, in fact, or in the record in this case to insinuate that shippers north of New York City are any less deserving of competitive rail service, or are somehow economically unimportant such that their interests may be ignored.

In sum, CSX's November 30 proposal contravenes the Board's plain admonition in Ordering Paragraph No. 28 that CP's Hudson Line trackage

⁶ CSX-167 at 10.

rights must be "unrestricted as to commodity and geographic scope" For this reason, it should be rejected.

B. The CSX Compensation Proposal Is Based on Faulty Premises and Would Create Excessive Cost to CP.

Though CSX couches its proposal as a two agreement scenario, it proffers a compensation formula that effectively would price CP out of the market. Notwithstanding CSX's description of a terminal trackage rights and a separate overhead trackage rights agreement, this is a straightforward trackage rights arrangement, imposed as a condition of the Board's approval of a transaction pursuant to 49 U.S.C. §11324. As a result, the compensation arrangements for trackage rights tenants that the Board has approved in Decision No. 89 should apply here as well. CSX, however, seeks much higher (though unquantified⁷) payments, based upon the dual claims that it is granting CP co-owner status, and that Ordering paragraph No. 28 amounts to a "taking" of CSX's property, justifying "condemnation-style" compensation. See CSX-167 at 15-19. CSX is wrong on both counts.

CSX's claim that CP is being granted co-owner status on the Hudson Line is belied by the terms of the agreements it offers. (CSX-167, V.S. Potter, Exhibits 1 and 2). CSX on its own creates a "terminal area" within the Boroughs of Bronx and Queens, then assumes that this makes the trackage rights that CP is to acquire under Decision No. 89 "terminal trackage rights". CSX then asserts, without explanation, that it is giving 50% of the affected

⁷ The lack of any quantification of its formula by CSX prevents CP, NYCEDC/NYS and the Board from fairly evaluating whether CP would be able to compete effectively on the terms proposed.

property to CP. As a result, claims CSX, CP must be required to pay 50% of the capital cost. CSX-167 at 15. To CSX, 50% of the property is defined as the right to access shippers on an equal basis with CSX and to use up to 50% of the capacity of the facility should demand strain resources. CSX-167, V.S. Potter at 13. However, CP's 50% of the property includes 0% of the right to further alienate any property interest; CSX retains the other 100%. *Id.* CP's 50% ownership includes 0% of the right to dispatch, manage operations, vote, switch for its own account or other indicia of ownership; CSX retains the remaining 100%. *Id.*, Exhibit 2, Art. 4. CP's 50% of the property includes the right to purchase up to 100% of the property at an amount equal to 100% of its market value if CSX no longer wishes to operate there, but otherwise guarantees no equity interest whatsoever. *Id.*, Exhibit 1, §11; Exhibit 2, Art. 17. Simply stated, the true status afforded CP under the relevant agreements is that of a trackage rights tenant and switching service customer, not a "co-owner."

CXS's argument that "condemnation-style compensation" is warranted by virtue of the fact that Ordering Paragraph No. 28 amounts to a constitutional "taking" of CSX's property likewise lacks merit. It is well-settled that Board-imposed conditions on approvals of permissive transactions are not acts of condemnation. Because parties to a consolidation or other transaction governed by 49 U.S.C. § 11323 retain the option not to consummate their deal if the condition is unacceptable, no "taking" occurs:

The statute, at 49 U.S.C. 11343 (now 11323), confers jurisdiction to approve trackage rights agreements. That authority, however, is permissive.

Under the statute an agreement by the carriers is essential to approval and the consummation. The commission does have the power to impose trackage rights, even where no agreement has been filed with the application, as a condition to a rail consolidation. Louisville and Nashville Railroad Co., v. United States, 369 F.Supp. 621 (D.C. Ky. 1973) affirmed 414 U.S. 1105. This power to condition approval, however, does not absolve the requirement that an agreement must be reached. The transaction is still dependent upon an agreement. If all the carriers involved do not accept the condition imposed by the Commission, they need not consummate the transaction.

Boston and Maine Corporation, Debtor Trackage Rights Over Consolidated Rail Corporation Between Rotterdam Junction, NY, and Buffalo, NY, 360 I.C.C. 239, 241 (1979); *See also Guilford Transportation Industries, Inc. - Control - Boston and Maine Corporation*, 5 I.C.C. 2d 202, 206 (1988).

To be sure, the Board and its predecessor have indicated that compensation under the standard referenced in 49 U.S.C. § 11103(a) might be appropriate where conditions were imposed on and would burden a party whose own actions did not give rise to the need for the condition.⁸ CSX, however, cannot wrap itself in this mantle. *See CSX-167* at 17-189. The record shows that the conditions requested by NYCEDC and NYS, and granted by the Board in Ordering Paragraph No. 28, arose directly out of actions taken by CSX and NS in their plan to divide Conrail; specifically, their creation of a competitive service area west of the Hudson River while leaving the eastern sector with only CSX providing rail service. *See e.g., NYS-24/NYC-17* at 16-22;

⁸ *See, e.g., F.D. No. 32760, Union Pacific Corporation, et al. - Control and Merger - Southern Pacific Rail Corporation, et al*, Decision No. 47, served September 10, 1996 at 16.

cf., Decision No. 89 at 314. CSX simply does not fall within the "innocent party" exception to standard trackage rights compensation principles for conditions imposed in rail consolidation cases.

Similarly, CSX's claim that it should be paid for use of portions of the Hudson Line which Conrail does not own and CSX will not control⁹ must be rejected. As John F. Guinan, Assistant Commissioner for Passenger and Transportation of the New York State Department of Transportation explains in his accompanying Supplemental Verified Statement ("S.V.S. Guinan") (Attachment 2), CSX has no right to payment for CP's use of the newly completed Oak Point Link because Conrail (and now CSX) has neither an ownership interest in nor an exclusive right to operate over the line. Mr. Guinan explains as follows:

CSX should not be entitled to any payment related to CP operations over the Oak Point Link. As the terms of the Conrail permit (JFG-02) plainly show, that carrier (1) has no ownership or other investment in the Link; (2) pays nothing to the State for use of the Link; and (3) does not have exclusive freight service rights over the Link. All CP needs to operate over that line is a permit from the State, akin to that granted to Conrail which is to be assumed by CSX. Inasmuch as Conrail/CSX's non-exclusive freight rights over the Oak Point Link will not be reduced or devalued by a grant of similar rights to CP, there is no basis on which CP should be required to compensate CSX for use of that line.

S.V.S Guinan at 3. Because the State built and solely controls the Oak Point Link, it is the State alone - and not CSX - that has the right to seek compensation from CP.

⁹ See CSX-167, V.S. Potter at 14.

Richard K. Bernard, Vice President and General Counsel of Metro-North Commuter Railroad Company, explains that for essentially the same reasons (i.e., no ownership interest or exclusive operating rights) CSX is entitled to no compensation for CP's use of that portion of the Hudson Line between Poughkeepsie (CP 75.8) and the Oak Point Line (CP 6.6), which is under the control of Metro-North. Verified Statement of Richard K. Bernard ("V.S. Bernard") (Attachment 3) at 4. "Simply put, Metro-North is the only party with a right to payment for CP's use of the Poughkeepsie - Mott Haven Junction segment." *Id.*

In contrast to the approach proposed by CSX, the appropriate way to determine the compensation that CP should pay CSX for use of its facilities on the Hudson Line comes from Decision No. 89. That is, the Board should apply the rate that CSX and NS agreed to pay each other for operation via trackage rights over "each other's track for through movements and to access certain shippers' facilities. These agreements provide that the tenant carrier (NS or CSX) will pay the landlord carrier (CSX or NS) trackage rights compensation of 29 cents per car-mile anywhere on their respective systems where trackage rights are proposed." Decision No. 89 at 140. This agreed upon level of compensation will allow CP to compete effectively, which is the goal of the relief sought by NYCEDC and the State, and granted by the Board in Ordering Paragraph No. 28.

As the Board explained in Decision No. 89 in response to a shipper's challenge to the 29 cent per car rate:

Applicants do not explain how they developed their agreed upon level of 29 cents per car mile; they note only that the fee is based on existing trackage rights fees negotiated between NS and CSX. We obtained a similar result (of 29 cents) using the method employed by applicants in restating IP&L's 16 cent proposal and applying CSX's 1995 URCS total costs. Further, using the same method, we developed Conrail and NS costs of 46 cents and 40 cents per car-mile, respectively. ²¹⁵

The broadly applicable trackage rights fee of 29 cents is consistent with the relevant costs of CSX, the lowest cost of the three railroads at 29 cents per car-mile.

Id. at 141 (footnote omitted).

The same approach is warranted with respect to switching that may be required in New York City for CP's account. CP does not propose to do this work itself, and has offered that the Board apply the \$250 per car switch charge that was approved for general application across the Conrail system as part of the NIT League settlement. Decision No. 89 at 57-58. There is no need to create an expectation that CP will be using all of the terminal facilities in New York at a level of 50% of capacity, or that 50% of the traffic volume moving through those facilities will be CP's. CP wants to compete, not become a joint facility owner. All that is needed is for CP to be able to operate on the Hudson Line via trackage rights on reasonable terms. Since CSX has already accepted as reasonable the switching arrangement proffered by CP, the Board has accepted these terms as reasonable.

The Board has recognized that the 29 cents will compensate CSX for the cost of trackage rights operations on its system, and that \$250 per car is a reasonable and competitive switching charge. NS and CSX can compete with each other at this rate, and CP can compete with CSX at this rate. The Board

should reject CSX's proposal because it presents a high risk of preventing CP from effectively competing in this market. While that is CSX's goal, it is not the Board's, the City's or the State's, and is plainly inconsistent with the public interest. CSX's proposed compensation formulation must be disregarded.

C. The Trackage Rights Condition Does not Supersede
The October, 1997 CP-CSX Settlement Agreement

Finally, there is no support in law or applicable precedent for the notion advanced by CSX that the Board should "terminate the rights granted to CP" under its October 20, 1997 Settlement Agreement with CSXT in light of the expanded access awarded CP in Condition No. 28. See CSX-167 at 22. While that settlement properly was found to be inadequate insofar as the promotion of effective east of the Hudson competition was concerned,¹⁰ it also includes terms directed at other traffic and other regions that in no sense are "inconsistent with and superfluous to"¹¹ a grant of unrestricted trackage rights over the Hudson Line.

In Decision No. 89, the Board both imposed the Hudson Line Condition and ordered CSX to "adhere to its agreements with CN and CP that provide for lower switching fees in the Buffalo area and increased access to these carriers for cross-border, truck-competitive traffic." *Id.* at 178 (Ordering Paragraph No. 32). Consistent with the Board's action in prior rail mergers, impositions such as Ordering Paragraph No. 28 were complementary to, or expansions of, conditions and terms already agreed to voluntarily by the Applicants. There is no suggestion in Decision No. 89 that they should be construed as substitutes

¹⁰ See Decision No. 89 at 82-83.

for these arrangements. *See, e.g., supra* at 145-46, 153.¹² Particularly as to those aspects of CP's October 20, 1997 Settlement Agreement that are not directed to service east-of-the-Hudson River, there is nothing illogical or inequitable about requiring CSX to comply both with Ordering paragraph No. 28 and the unrelated terms of the Settlement Agreement.¹³

II. THE CP PROPOSAL IS CONSISTENT WITH DECISION NO. 89.

While NYCEDC and the State did not endorse any particular candidate to be the operator of the east-of-the-Hudson trackage rights sought in this proceeding, they do not object to the selection of CP. Now, having reviewed the proposal put forth by CP in CP-24, NYCEDC and the State are content to rely on CP to provide the service mandated by the Board.

The CP proposal meets the criteria established by the Board. CP proposes to serve shippers along the entire length of the line, and to effect interchange with carriers along the line, as contemplated in the Board's order requiring "trackage rights unrestricted as to commodity or geographic scope." It has the approval of Metro-North, the passenger operator that also owns a substantial segment of the line between Selkirk and Fresh Pond. Just as Metro-North confirmed the availability of sufficient capacity on the line in the earlier phase of this proceeding, Mr. Bernard's Verified Statement reaffirms the

¹¹ CSXT-167 at 21.

¹² Such rulings always produce results "inconsistent with" the settlement agreements (CSX-167 at 21), in that the applicant carrier is required to grant greater or additional trackage or other pro-competitive rights than it originally had planned.

¹³ CSX effectively acknowledges that CP's benefiting from Condition No. 28 through no affirmative action of its own to promote it is not a violation of the terms of the earlier settlement. *See* CSX-167 at 21.

conclusion of Metro-North's prior President Donald Nelson (NYS-11, October 21, 1997, V.S. Nelson at 7-8) and expert witness Walter H. Schuchmann that "the Metro-North portion of the Hudson Line had adequate available capacity to support operations by a second freight carrier" V. S. Bernard at 2. It has proposed an agreement that is standard in the industry and that includes basic terms that CSX has demonstrated are acceptable to it by agreeing to those same terms with NS.

CP states that the compensation it proposes will allow it "to compete effectively with CSX on terms consistent with those that govern the various applicant trackage rights agreements approved in this proceeding." CP-24 at 16. To avoid interfering with CSX operations in New York City, it proposes to request CSX to conduct switching services for all shippers serving the Oak Point Yard or at any other rail facility in the Bronx. The rate it proposes to pay for this service is \$250 per car, consistent with the agreement among CSX, NS and the NIT League. CP-24 at 15.

NYCEDC and the State view the compensation proposed by CP as reasonable in view of the Board's decision to accept this figure as compensatory to CSX for trackage rights operation by its competitor NS across its system. CP did not seek this access in the first instance and, absent an ability to agree with CSX, is relying on the best evidence available of compensation to CSX for its cost of allowing a trackage rights tenant onto the line, that is, CSX's own agreement.

CP raises the possibility that CSX might argue that it has exclusive contractual rights to provide freight service over the newly constructed Oak

Point Link or the passenger lines owned by Metro-North. See CP-24 at 2 n.1. If this point arises, CP is correct that this is an appropriate place for the Board to exercise the preemption authority granted in 49 U.S.C. § 11321(a). These trackage rights meets all of the criteria of §11321. The trackage rights agreement is a transaction approved by the Board "under this sub-chapter." If those agreements would otherwise prevent CP (or any other trackage rights operator) from fulfilling the Board's objective of establishing independent, competitive rail service on the east side of the Hudson, then preemption of those agreements is "necessary to let that rail carrier . . . carry out the transaction." The precedent at this Board, as affirmed by reviewing Courts, is firmly established that agreements that impede implementation of a transaction stand in the same position as duly enacted laws and regulations when faced with the Board's broad preemption powers. *Norfolk & Western Ry. Co. v. American Trail Dispatchers Ass'n*, 449 U.S. 117 (1991).

CONCLUSION

NYCEDC and the State entered this proceeding with the hope of providing shippers on the east side of the Hudson River with viable direct rail competitive service options similar to those that would be available to their competitors in New Jersey and on the west side of the River. In Decision No. 89, the Board recognized the validity of that request and began steps to implement a condition that would achieve the City's and the State's goal. The City and the State hoped that CSX and CP would be able to reach an agreement on their own, without further STB intervention. Now that it is clear that this can not occur, the Board should take steps to require that CP's ability

to maintain competitive operations at competitive prices will provide the competitive balance that is necessary to shippers and receivers on the east side of the Hudson River. The CP proposal for full service trackage rights answers the needs as defined by the Board. Acceptance of CSX's proposal would frustrate the Board's and the New York parties' stated objective.

WHEREFORE, and in view of all of the foregoing, NYCEDC and the State hereby respectfully request this Board to accept the proposal of CP for full service trackage rights over the line east of the Hudson between Selkirk and Fresh Pond.

Dated: December 10, 1998

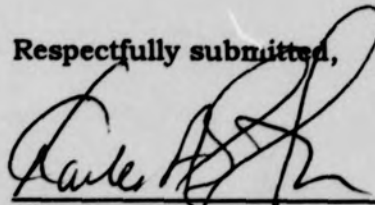
STATE OF NEW YORK BY AND
THROUGH ITS DEPARTMENT
OF TRANSPORTATION

Dennis C. Vacco
Attorney General of the
State of New York
Stephen D. Houck
Assistant Attorney General
George R. Mesires
Assistant Attorney General
120 Broadway, Suite 2601
New York, New York 10721

William L Slover
Kelvin J. Dowd
Peter A. Pfohl
SLOVER & LOFTUS
1224 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 347-7170

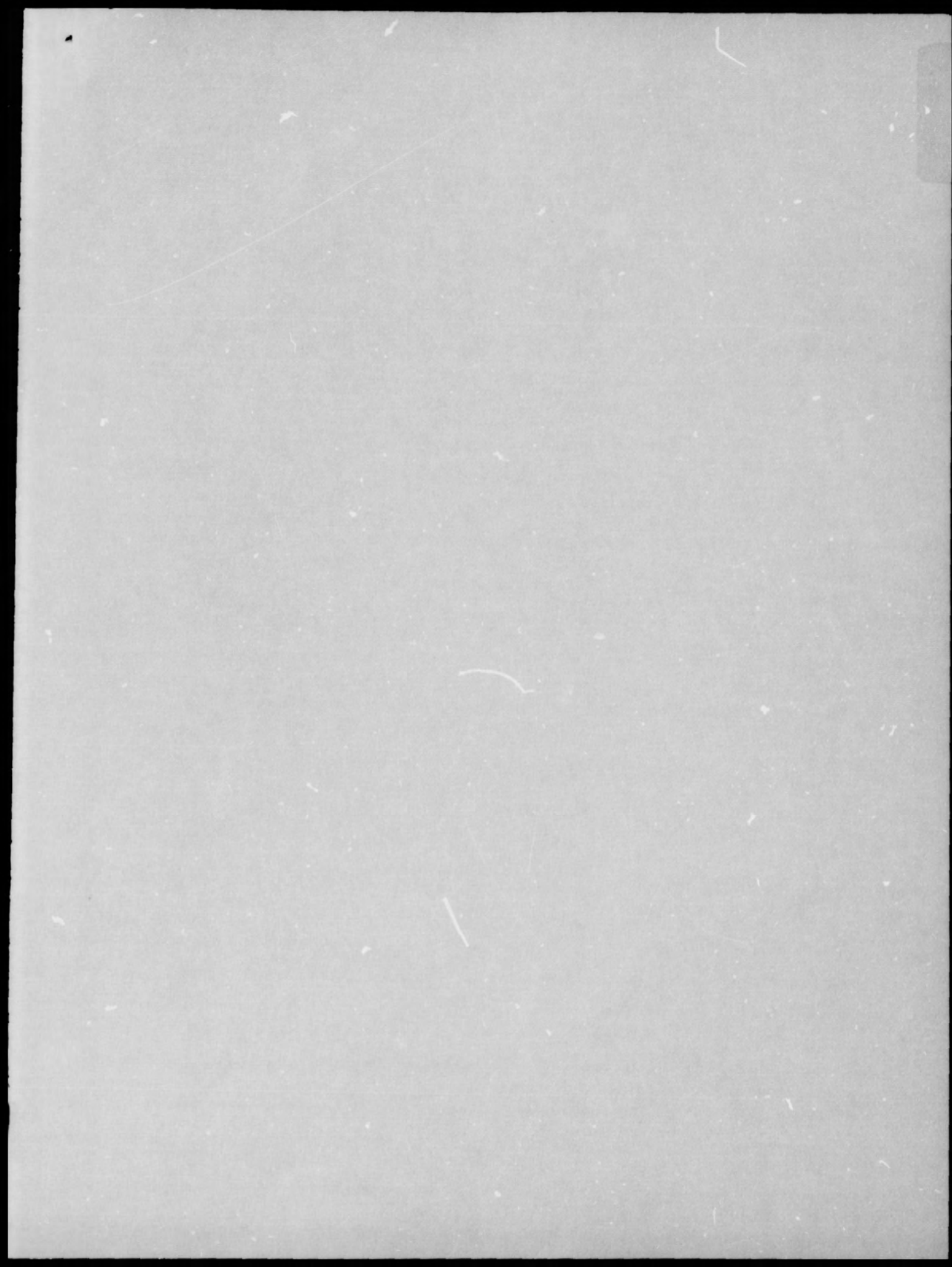
Counsel for the State of New York

Respectfully submitted,



Charles A. Spitulnik
Rachel Danish Campbell
HOPKINS & SUTTER
888 Sixteenth Street, NW
Washington, D.C. 20006
(202) 835-8000

Counsel for New York City
Economic Development
Corporation



**JOINT STATEMENT
OF
THE HONORABLE GEORGE E. PATAKI
AND
THE HONORABLE RUDOLPH GUILIANI**

We are George E. Pataki and Rudolph Guiliani, Governor of the State of New York and Mayor of the City of New York, respectively. We are offering this Joint Statement in support of the plan submitted by Canadian Pacific Railway (CP) to bring competitive rail service to New York shippers, consumers and communities east of the Hudson River in the counties south of Albany. The CP plan was filed in this proceeding on November 30, 1998.

New York State, by and through its Department of Transportation, and New York City, by and through the New York City Economic Development Corporation, have actively participated in this important proceeding since CSX Corporation and Norfolk Southern Corporation first presented their proposal for the division of Conrail in the spring of 1997. Their application, involving 2,000 miles of Conrail owned and operated track throughout New York serving all major cities and the Ports of New York and New Jersey, was and is of enormous direct economic importance to the New York businesses, consumers, commuters and inter-city rail passengers who depend upon efficient and low-cost rail service. The maintenance of a well-coordinated and competitive freight rail system is a particular imperative for New York businesses who compete locally, nationally, and internationally in the provision and sale of raw materials, products and finished goods. Whether it be the movement of fruit and produce to Long Island, finished goods and products or municipal waste from in and around the City, or grain, wood pulp and other raw materials to Hudson Valley enterprises like ADM and Fort Orange Paper, a competitive and efficient rail transportation system is a significant component of

New York's economic well-being.

After careful consideration, including extensive internal study and public input on the transaction's impact, the State and City concluded that improvements to the original CSX/NS Conrail division plan were necessary. While the transaction offered the promise of enhanced efficiencies and service for many New York shippers who have been beholden to the Conrail monopoly since the 1970s, certain core inadequacies in the application needed to be addressed. Through Comments and a Joint Responsive Application, the State and City called upon the Board to protect and enhance rail competition in various geographic regions, including the east-of-Hudson counties south of Albany; promote the interests of inter-city and commuter passenger service; and generally safeguard the rights and interests advanced by the hundreds of millions of dollars in State and City rail infrastructure investment made over the past 25 years. The State and City also supported various public and private constituent rail user interests that will be impacted by the transaction.

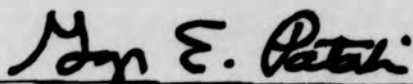
In its final decision approving the proposed Conrail division, the Board included a number of conditions responsive to the concerns raised by the State and City. Prominent among these was an order requiring CSX to grant CP full access trackage or haulage rights to serve shippers and receivers accessible to the Hudson Line, which runs east of the Hudson River from Albany to Fresh Pond Junction in Queens. Under the division plan put forward by CSX and NS, freight service over the Hudson Line would have been controlled solely by CSX.

We commend the Board for its action imposing the pro-competitive east-of-Hudson condition, which was requested by the State and City in their Joint Responsive Application as a Means of restoring the benefits of inter-railroad competition to shippers in the east Hudson Valley, in New York City, and on Long Island. We understand that the Board initially ordered

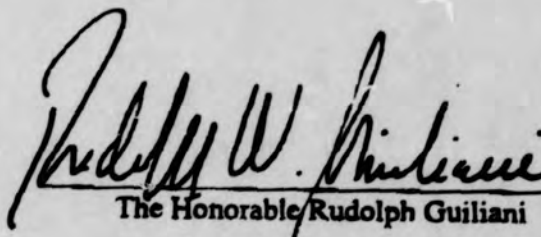
CP and CSX to attempt to negotiate an agreement as to the precise economic and operational terms that would govern CP's exercise of the prescribed rights. Since no agreement could be reached between these parties, however, it now rests with the Board to set the applicable terms and conditions.

On November 30, CP and CSX submitted competing proposals for implementation of the east-of-Hudson condition. We understand that CP's trackage rights plan would allow that carrier to serve all shippers, yards and railroad interchanges between Albany and Fresh Pond, without restriction. We understand further that the terms proposed by CP -- including the fees that CP would pay to use CSX's portion of the line -- are essentially identical to the terms that CSX and NS already agreed to for the trackage rights that they granted to one another as part of their Conrail plan. In contrast, CSX has proposed an arrangement which would preclude CP from service shippers or interchanges north of The Bronx, and would require CP to pay much higher trackage rights fees than CSX and NS are charging one another.

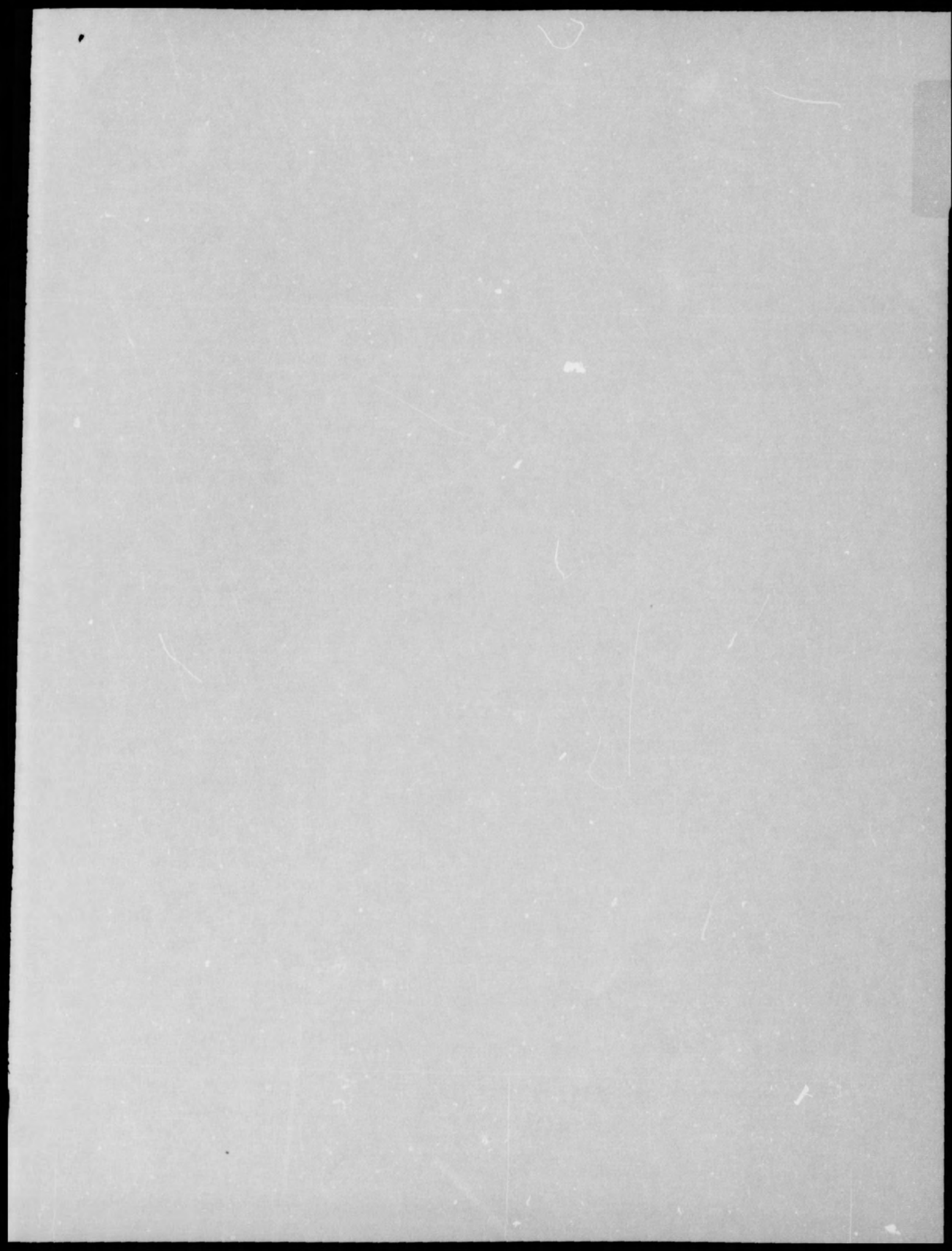
On behalf of the New York citizens, communities and businesses that we represent and serve, we urge the Board to select CP's plan as the better alternative. CSX's proposal, by comparison, is uneconomic and would arbitrarily and unnecessarily exclude some shippers from the benefits of competition. Effective rail competition for all east-of-Hudson shippers at the lowest reasonable cost was the central goal of the Joint Responsive Application, and is most consistent with the Board's own mandate in its final decision in this case.



The Honorable George E. Pataki



The Honorable Rudolph Giuliani



**SUPPLEMENTAL VERIFIED STATEMENT
OF
JOHN F. GUINAN**

My name is John F. Guinan, and I am Assistant Commissioner for Passenger and Freight Transportation of the New York State Department of Transportation. I previously submitted a Verified Statement and a Rebuttal Verified Statement in this proceeding, which addressed the need for enhanced rail freight service and inter-railroad competition throughout the region east of the Hudson River from Albany to New York City and Long Island. This important public interest was admirably served by the condition included in the Board's July 23, 1998 Decision approving the division of Conrail, which requires CSXT to provide Canadian Pacific Railway with unrestricted trackage or haulage rights over the Hudson Line between Albany and Fresh Pond Junction, NY.

Because CSXT and CP were not able to reach agreement on the terms to govern CP's competitive access to the Hudson Line, the matter now must be decided by the Board. To that end, on November 30, 1998 CP and CSX each submitted a proposal for CP trackage rights in fulfillment of the Board's east-of-Hudson condition. We have reviewed these submissions and, as discussed in detail in the preceding Response, New York supports adoption of the CP plan as more consistent with the needs of the affected

shipping public. The primary purpose of my Supplemental Statement, however, is to address an aspect of the CSXT submission which, if left without comment, could leave a false impression as to certain relevant facts.

CP and CSXT's trackage rights plans each contemplate CP operations over the Oak Point Link, a new rail line segment built by the State of New York to enable freight trains to bypass multiple commuter rail lines in the vicinity of The Bronx and Oak Point Yard. Conrail began operations over this line segment last month under a permit issued by the State, a copy of which is attached to my Statement as Exhibit ____ (JFG-02).

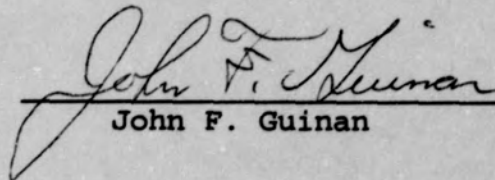
CSXT's November 30, 1998 submission includes a Verified Statement by Mr. Steven A. Potter, who addresses various aspects of CSXT's limited trackage rights proposal. At pages 13-15 of his Statement, Mr. Potter discusses the compensation that he believes CP should be required to pay CSXT, which he says should include a cost of capital return component based on the "fair market value of ... the freight rights on the portion [of the Hudson Line] owned by the passenger authorities" (V.S. Potter at 14). Though unstated, it appears that Mr. Potter is including the freight rights over the Oak Point Link that CSXT would inherit from Conrail as part of the "value" that should be reflected in the CP payment.

The reasons why New York believes the Board should reject CSXT's proposal (including its trackage rights compensation formula) in favor of CP's are explained in detail in our Response. Regardless of how the issue of compensation is resolved, however, CSXT should not be entitled to any payment related to CP operations over the Oak Point Link. As the terms of the Conrail permit (JFG-02) plainly show, that carrier (1) has no ownership or other investment in the Link; (2) pays nothing to the State for use of the Link; and (3) does not have exclusive freight service rights over the Link. All CP needs to operate over that line is a permit from the State, akin to that granted to Conrail which is to be assumed by CSXT. Inasmuch as Conrail/CSXT's non-exclusive freight rights over the Oak Point Link will not be reduced or devalued by a grant of similar rights to CP, there is no basis on which CP should be required to compensate CSXT for use of that line.

Verification

State of New York)
)
) ss:
)
County of Albany)

John F. Guinan, being duly sworn, deposes and says that he has read the foregoing Statement, knows the contents thereof, and that the same are true as stated to the best of his knowledge, information and belief.


John F. Guinan

Sworn and subscribed before me
this 4TH day of DECEMBER, 1998.


Notary Public

EDWIN C. METCHICK
Notary Public, State of New York
No. 4798827
Qualified in Albany County
Commission Expires

My Commission expires: 11/30/99

NEW YORK STATE DEPARTMENT OF TRANSPORTATION
REAL ESTATE DIVISION
PERMIT FOR USE OF STATE-OWNED PROPERTY (Airspace Occupant)

P.I.N. S935.65 Permit Account No. X1050 Property Location South Bronx Oak Point Link - 10,000 feet of railroad track from 800 feet north of the north end of the track support structure south to Harlem River Yard then east 6,000 feet along an easement through the Harlem River Yard to the North-eastern end of the easement at the Harlem River Yard property line at East 132nd Street between Walnut and Willow Streets. The Premises are located in the Bronx County in the City of New York. The Map and Parcel Numbers that make up the Premises appear below.

MAP	PARCEL	VESTING DATE	BLOCK	LOT	ADMISSION
1	1	10/21/80	2202	20	Fee
2	2	9/28/80	2202	5	Fee
3	3	9/28/80	2202	12	Fee
4	4	9/28/80	2202	120	Fee
5	5	9/28/80	2202	120	Permanent Easement
6-1	6	9/18/83	2202	2	Fee
7	7	10/9/74	Rueb's Bldg.		Fee
8	8	10/2/74	Rueb's Bldg.		Fee
9	9	10/6/80	2202	101	Fee
10	10	9/28/80	2202	2	Fee
11	11	10/28/80	2202	48	Permanent Easement
12-1	12	10/6/80	2204	20	Fee
13-1	13	10/6/80	2204	25	Permanent Easement
14-1	14	9/15/80	2204	2	Fee
15	15	9/18/80	3rd Ave.		Permanent Easement
16	16	9/18/80	Rueb's Bldg.		Permanent Easement
17	17	9/18/80	E 140th St.		Permanent Easement
18	18	9/18/80	E 140th St.		Permanent Easement
19	19	9/18/80	E 130th St.		Permanent Easement
20	20	9/18/80	Park Ave.		Fee
21	21	9/18/80	Linden Ave.		Permanent Easement
22	22	9/25/80	2202	10	Fee
23	23	9/28/80	2202	10	Fee
24	24	10/6/80	2202	10	Permanent Easement
25	25	10/27/80	2202	20	Fee
26	26	10/28/80	2202	100	Fee
27	27	10/28/80	2202	40	Permanent Easement
28	28	11/2/80	2202	2	Fee
29	29	11/2/80	2204	2	Fee
30	30	10/28/80	2202	120	Fee
31	31	10/28/80	Park Ave.		Fee
32	32	10/28/80	2202	100	Fee
33	33	4/26/84	2202	2	Fee
34	34	4/26/84	2202	2	Permanent Easement
35	35	4/26/84	2204	2	Permanent Easement
36	36	4/26/84	2202	120	Permanent Easement
37	37	4/26/84	2202	100	Permanent Easement
38	38	4/26/84	2202	100	Permanent Easement
39	39	4/26/84	2204	1	Permanent Easement

The Map and Parcel Numbers that make up the Premises shown on the previous page, including the Easement rights that are incorporated by reference in the Lease Agreement between NEW YORK STATE DEPARTMENT OF TRANSPORTATION and HARLEM RIVER YARD VENTURES, INC., (Appendix B) and further recorded in a deed to Conrail dated October 24, 1978 and recorded November 16, 1978 on Reel 376 of Deeds page 666 (Appendix C). These Premises (including the related Easements) comprise the line of railroad connecting the Metro-North Commuter Railroad property (over which Conrail holds certain rights) in the vicinity of High Bridge with the Conrail-owned property at the east end of Harlem River Yard.

THIS PERMIT, made this 2nd day of October 1998, but effective on or about the 11th day of October, 1998, the date of final approval of completed work as evidenced by exchange of correspondence between the parties. The PERMIT is between the:

Consolidated Rail Corporation
C/O John J. Paylor, Associate General Counsel
2001 Market Street
P.O. Box 41416
Philadelphia, PA 19101-1416

hereinafter referred to as "Permittee", and the COMMISSIONER OF TRANSPORTATION FOR THE PEOPLE OF THE STATE OF NEW YORK, hereinafter referred to as "the State",

WITNESSETH:

WHEREAS the State is the owner of the above identified property, hereinafter referred to as "property" or "premises"; and

WHEREAS, Highway and Transportation Law authorizes the State to enter into permits; and

WHEREAS the Permittee wishes to use and occupy said property;

NOW, THEREFORE, the State hereby grants this PERMIT to the Permittee, subject to the following covenants and conditions:

1. The property covered by this PERMIT shall be used only for the purpose of:

The through and local trackage rights to operate common and contract carrier rail service over the Oak Point Link from the Hudson Line through the Harlem River Yard Intermodal Terminal to and from the Conrail owned property at the east end of Harlem River Yard and for no other purpose whatsoever. The Permittee, at its expense, shall file for and diligently pursue all necessary Surface Transportation Board ("Board") approvals or exemptions to conduct common carrier operations on the Oak Point Link.

2. The fee to be charged shall be: \$1.00 (waived) beginning on the effective date of this PERMIT as first written above.

3. The Permittee understands and agrees that the fee set forth in provision 2 may be updated. The State will provide the Permittee at least thirty (30) days prior notice of any fee change. If the Permittee disagrees with the proposed change and the parties are not able to agree upon a new fee, then either party may submit the matter before the Board under 49 C. F. R. Part 1108.1 et seq. The parties agree to be bound by the determination(s) made by the arbitrator(s) under this provision. Following any discontinuance of the Permittee's operations as authorized by the Board, the Permittee shall immediately vacate the premises.

4. Permittee, at the Permittee's expense and for the term of the PERMIT, shall furnish and show evidence of General Liability Insurance coverage issues by an insurance carrier licensed to do business in the State of New York for the protection of the State of New York and Permittee against any claims, suits, demands or judgments by reason of bodily injury, including death, and for any claims resulting in property damage arising out of operations covered by this PERMIT. Such General Liability Insurance shall name the People of the State of New York as an additional insured. Permittee will be required to carry insurance of the following kinds and amounts:

a. Public Liability Insurance is provided for a limit of not less than \$10,000,000. Single Limit. Bodily Injury and/or Property Damage combined, for damages arising out of bodily injuries to or death of all persons in any one occurrence and for damage to or destruction of property, including the loss of use thereof, in any one occurrence.

b. Protective Public Liability Insurance is provided for a limit of not less than \$10,000,000. Single Limit. Bodily Injury and/or Property Damage combined, for damages arising out of bodily injuries to or death of all persons in any one occurrence and for damage to or destruction of property, including the loss of use thereof, in any one occurrence.

c. Motor Vehicle Liability Insurance is provided as required by the Motor Vehicle Laws of the State of New York to bear license plates.

d. Railroad Protective Public Liability Insurance is provided for a limit of not less than \$2,000,000. Single Limit. Bodily Injury and/or Property Damage combined, for damages arising out of bodily injuries to or death of all persons in any one occurrence and for damage to or destruction of property, including the loss of use thereof, in any one occurrence. Such insurance shall be furnished with an aggregate of not less than \$6,000,000 for damages as a result of more than one occurrence.

Approval of this PERMIT shall be contingent upon receipt, by the State, of evidence of insurance coverage or evidence that the Permittee is self insured.

The Permittee will furnish the State with a (30) thirty day(s) prior written notice of any cancellation or change in the policy conditions. If the insurance is canceled, lapses, or is modified in a manner that reduces the level

of coverage, and the Permittee fails to reinstate insurance (or in the case of modification, the required level of coverage) within five (5) business days after notification of the cancellation, lapse or modification is received by the State, the PERMIT shall be voidable at the sole option of the State. In such event, the Permittee shall file for and diligently pursue, at its expense, all necessary Board authority or exemption to cease operations over the Oak Point Link, and upon securing same, shall vacate the Oak Point Link forthwith.

5. Consistent with the apportioned responsibilities assumed under Section 20 of this Agreement, Permittee, at its expense, shall be responsible for all repairs, improvements or maintenance work of any kind on the Oak Point Link, and at all times shall maintain the track in a condition at least adequate to meet Federal Railroad Administration Class 2 standards. From time to time, the State may inspect the track to determine whether same is in good repair in accordance with this Provision. The Permittee shall ensure that no unsafe, hazardous, unsanitary, or defective conditions exist on the track.

6. Permittee hereby agrees to admit State representatives and prospective purchasers or other potential permittees to examine these premises during reasonable business hours.

7. Permittee shall not place or store, or allow others to place or store, any flammable, explosive hazardous, toxic or corrosive materials of any description, garbage or any materials commonly referred to as "junk" within the PERMIT area, except fuel kept in the ordinary course of rail operations. Failure to comply with this provision may result in a ten (10) days written notice of cancellation of the PERMIT in accordance with Provision 12 of the PERMIT. The Permittee is responsible for the removal of these materials. Nothing in this provision shall be construed in limitation of Permittee's responsibility as a carrier (including such activities as are customarily incidental thereto) nor is this provision intended to supersede any rule or regulation of the Federal Railroad Administration.

8. All arrangements of services for utilities, removal of garbage, rubbish, litter, snow and ice will be made by the Permittee at the Permittee's expense, unless hereafter specified. The State shall have no responsibility to provide any services not specifically set forth in writing herein. Permittee is responsible for keeping and maintaining the premises in a safe and clean condition, for the regular and prompt removal of garbage, rubbish, litter, snow and ice.

9. The parties shall perform their duties in compliance with any and all applicable local, State and Federal laws, ordinances, codes, rules and regulations affecting the use of the property. Neither the State nor Permittee shall conduct or allow any use or activity on the premises inconsistent with law and shall not conduct or allow any use or activity on the premises which may require a permit or other approval by a government agency without having lawfully obtained such permit or approval.

10. The parties acknowledge that this instrument is not a lease but is merely a PERMIT to occupy and use, and therefore a landlord-tenant relationship is not hereby created; and further, that since this is not a lease, Section 5-321 of the General Obligations Law does not apply to this PERMIT to the extent permitted by law.

11. The State shall have no responsibility whatever for the loss or destruction of any improvements made by the Permittee or for personal property stored or being used on the premises.

12. This PERMIT shall remain in effect for an initial base term of two (2) years from the date hereof. Thereafter, the term of this PERMIT shall be automatically extended for successive two (2) year periods, unless notice of cancellation is given by either party not less than thirty (30) days prior to the end of the base term or any subsequent extended term. Actual termination of this PERMIT shall be subject to prior approval of the discontinuance of service over the Oak Point Link by the Board or its successor as required by law. In the event that the State gives notice of termination, the Permittee, at its expense, shall promptly file for and diligently pursue necessary Board approvals (or exemptions) to discontinue service.

13. The State acknowledges that the Permittee is a party to a Railroad Control Application before the Board (Finance Docket Number 33388). CSX Transportation, Incorporated, will succeed to the Permittee's interest in the premises. However, Permittee shall not sublet the premises nor assign or transfer the PERMIT to any other parties in part or in whole without the prior written consent of the State. Failure to comply with this provision may result in ten (10) days written notice of cancellation of the PERMIT. Cancellation by the State will not occur without prior abandonment or discontinuance authority from the Board or its successor. In the event that the State gives notice of termination, the Permittee, at its expense, shall promptly file for and obtain necessary Board approvals (or exemptions) to discontinue service. Following such authorized abandonment or discontinuance of the Permittee's operations, the Permittee shall be required to immediately vacate the premises. Nothing in this provision shall be construed to limit or deny access to any additional carrier as may be required pursuant to any decision or condition imposed by the Board in Finance Docket Number 33388.

14. It is understood and agreed by and between the parties that the Permittee will not be entitled to any relocation benefits provided under State and Federal law.

15. Permittee agrees and understands that the State is under no obligation to sell the property to the Permittee and that no commitment, express or implied, is made by the State to give the Permittee any preemptive right of purchase.

16. In accordance with Article 15 of the Executive Law (also known as the Human Rights Law) and all other State and Federal statutory and constitutional non-discrimination provisions, the Permittee will not discriminate against any employee or applicant for employment because of race, creed, color, sex, national origin, age, disability or marital status. Neither shall the Permittee discriminate in the use of this premises or any access thereto if such premises is used as a public accommodation or in connection with a public service.

17. Permittee hereby agrees to indemnify and save harmless the State from any claim or loss including legal expenses by reason of the use or misuse of the premises under this PERMIT and/or from any claim or loss by reason of any accident or damage to any person or property being on said premises, caused by Permittee, its employees or agents.

18. If any of the provisions of this PERMIT are held invalid, such invalidity shall not affect or impair other provisions herein which can be given effect without the invalid provisions, and to this end the provisions of this PERMIT are severable.

19. The Permittee will provide or will cause to be provided common and contract carrier rail freight service over the completed Oak Point Link, in a careful and proper manner and comply with and conform to or caused to be complied with and conformed to all applicable Federal, State and Local laws, ordinances and regulations in any way relating to the use, rail service or maintenance thereof. The State shall be under no obligation to subsidize and the Permittee shall not claim or apply or subsidization of such service.

20. The State acknowledges that it is responsible for the maintenance of the Structure of the Oak Point Link. For the purposes of this Section, the Structure includes the piers, pier caps, beams, deck, railing and fencing that form the structure of the Oak Point Link. The State is also responsible for the maintenance of the fendering system designed to protect the structure from collision with waterborne traffic. The State shall retain responsibility for the maintenance of the embedded rail fasteners on the Structure. The Permittee shall only be responsible for the maintenance of the rail (including resilient pads and plates) on the structure and the track (including rail, ties, ballast and conventional rail anchors and/or fasteners) on the at-grade sections. The Permittee will notify the State of any wreck or derailment. If any engine, car or other equipment is wrecked or derailed on the Oak Point Link, the Permittee will without unnecessary delay remove or rerail the engine, car or other equipment. The Permittee shall only be responsible for the cost of any damage caused by its negligence or by the negligence of its sub-permittees. The Permittee shall not be responsible for damage to the rail, track and Structure as defined herein caused by the State, any other permittee of the State or any other third parties other than the Permittee or its sub-permittees.

21. The Permittee shall allow the at-grade pedestrian crossing that services a waterborne ferry for Yankee Stadium to continue to function. The Permittee may require that the ferry service operators provide the Permittee with a schedule of proposed uses in advance of any proposed use. The Permittee may also regulate the use of this crossing to allow for safe common carrier rail freight operations over the Oak Point Link.

22. With respect to occupancies customarily involving pipe, wire, crossings at grade and other like activities, the State shall grant all non-rail related occupancies of the property, subject to securing Permittee's approval, which shall not be unreasonably withheld, that such use will not interfere with rail operations. Similarly, the Permittee shall grant all rail related occupancies of the property, subject to securing State's approval, which shall not be unreasonably withheld, that such use will not interfere with State's operations. Revenue, cost and expenses shall be for the account of the granting party. Any occupancies granted by Permittee shall provide for their termination upon the termination or assignment of this PERMIT. Any occupancy granted by either party hereto shall provide for insurance or other appropriate indemnity protecting the State and Permittee from and against any loss or damage associated with grantee's use or occupancy of the premises or as a consequence of Permittee's rail operations thereon.

ACCEPTANCE:

In consideration of the granting of the permit, the undersigned accepts all of the above terms, conditions and provisions.

Soc. Sec. No. _____

Signed _____

Fed. I.D. No. _____

CONSOLIDATED RAIL CORP.

COUNTY OF _____, SS:

FOR INDIVIDUAL ACKNOWLEDGEMENTS

On the _____ day of _____, 19____, before me personally came

to me known to be the individual(s) described in and who executed the foregoing instrument and acknowledged that they executed the same.

(Notary Public)

COMMONWEALTH OF PENNSYLVANIA)

COUNTY OF PHILADELPHIA) SS:

FOR CORPORATION ACKNOWLEDGEMENTS

On the 12th day of October, 1998, before me personally came

R. Paul Carey

to me known, who, being duly sworn, did depose and say that ~~XXXXXX~~

his business address is 2001 Market Street, 12-B

In Philadelphia, PA

that he ~~is~~ is the General Manager - Contracts of Consolidated Rail Corporation the corporation described in and which executed the foregoing instrument; that they signed their name thereto by order of the Board of Directors of said corporation.

NOTARIAL SEAL

TINA M. SCANLON, Notary Public

City of Philadelphia, Phila. County

My Commission Expires Sept 18, 2000

Tina M. Scanlon
(Notary Public)

RECOMMENDED:

Sharon K. Cussendorf
Regional Real Estate Officer

Date 10/9/98

APPROVED: Commissioner of Transportation for the People of the State of New York

By

Richard J. Morris
Director, Real Estate Division

Date 10/9/98

APPENDIX A

STANDARD CLAUSES FOR ALL NEW YORK STATE CONTRACTS

The parties to the attached contract, license, lease, amendment or other agreement of any kind (hereinafter, "the contract" or "this contract") agree to be bound by the following clauses which are hereby made a part of the contract (the word "Contractor" herein refers to any party other than the State, whether a contractor, licensor, licensee, lessor, lessee or any other party):

1. **EXECUTORY CLAUSE.** In accordance with Section 41 of the State Finance Law, the State shall have no liability under this contract to the Contractor or to anyone else beyond funds appropriated and available for this contract.

2. **NON-ASSIGNMENT CLAUSE.** In accordance with Section 138 of the State Finance Law, this contract may not be assigned by the Contractor or its right, title or interest therein assigned, transferred, conveyed, sublet or otherwise disposed of without the previous consent, in writing, of the State and any attempts to assign the contract without the State's written consent are null and void. The Contractor may, however, assign its right to receive payment without the State's prior written consent unless this contract concerns Certificates of Participation pursuant to Article 5-A of the State Finance Law.

3. **COMPTROLLER'S APPROVAL.** In accordance with Section 112 of the State Finance Law (or, if this contract is with the State University or City University of New York, Section 355 or Section 8218 of the Education Law), if this contract exceeds \$5,000 (\$20,000 for certain S.U.N.Y. and C.U.N.Y. contracts), or if this is an amendment for any amount to a contract which, as so amended, exceeds said statutory amount, or if, by this contract, the State agrees to give something other than money, it shall not be valid, effective or binding upon the State until it has been approved by the State Comptroller and filed in his office.

4. **WORKERS' COMPENSATION BENEFITS.** In accordance with Section 142 of the State Finance Law, this contract shall be void and of no force and effect unless the Contractor shall provide and maintain coverage during the life of this contract for the benefit of such employees as are required to be covered by the provisions of the Workers' Compensation Law.

5. **NON-DISCRIMINATION REQUIREMENTS.** In accordance with Article 15 of the Executive Law (also known as the Human Rights Law) and all other State and Federal statutory and constitutional non-discrimination provisions, the Contractor will not discriminate against any employee or applicant for employment because of race, creed, color, sex, national origin, age, disability or marital status. Furthermore, in accordance with Section 220-e of the Labor Law, if this is a contract for the construction, alteration or repair of any public building or public work or for the manufacture, sale or distribution of materials, equipment or supplies, and to the extent that this contract shall be performed within the State of New York, Contractor agrees that neither it nor its subcontractors shall, by reason of race, creed, color, disability, sex or national origin: (a) discriminate in hiring against any New York State citizen who is qualified and available to perform the work; or (b) discriminate against or intimidate any employee hired for the performance of work under this contract. If this is a building service contract as defined in Section 230 of the Labor Law, then, in accordance with Section 239 thereof, Contractor agrees that neither it nor its subcontractors shall, by reason of race, creed, color, national origin, age, sex or disability: (a) discriminate in hiring against any New York State citizen who is qualified and available to perform the work; or (b) discriminate against or intimidate any employee hired for the performance of work under this contract. Contractor is subject to fines of \$50.00 per person per day for any violation of Section 220-e or Section 239 as well as possible termination of this contract and forfeiture of all moneys due hereunder for a second or subsequent violation.

6. **WAGE AND HOURS PROVISIONS.** If this is a public work contract covered by Article 8 of the Labor Law or a building service contract covered by Article 9 thereof, neither Contractor's employees nor the employees of its subcontractors may be required or permitted to work more than the number of hours or days stated in said statutes, except as otherwise provided in the Labor Law and as set forth in prevailing wage and supplement schedules issued by the State Labor Department. Furthermore, Contractor and its subcontractors must pay at least the prevailing wage rate and pay or provide the prevailing supplements, including the premium rates for overtime pay, as determined by the State Labor Department in accordance with the Labor Law.

7. **NON-COLLUSIVE BIDDING REQUIREMENT.** In accordance with Section 139-d of the State Finance Law, if this contract was awarded based upon the submission of bids, Contractor warrants, under penalty of perjury, that its bid was arrived at independently and without collusion aimed at restricting competition. Contractor further warrants that at the time Contractor submitted its bid, an authorized and responsible person executed and delivered to the State a non-collusive bidding certification on Contractor's behalf.

8. **INTERNATIONAL BOYCOTT PROHIBITION.** In accordance with Section 220-f of the Labor Law and Section 139-h of the State Finance Law, if this contract exceeds \$5,000, the Contractor agrees, as a material condition of the contract, that neither the Contractor nor any substantially owned or affiliated person, firm, partnership or corporation has participated, is participating, or shall participate in an international boycott in violation of the federal Export Administration Act of 1979 (50 USC App. Sections 2401 et seq.) or regulations thereunder. If such Contractor, or any of the aforesaid affiliates of Contractor, is convicted or is otherwise found to have violated said laws or regulations upon the final determination of the United States Commerce Department or any other appropriate agency of the United States subsequent to the contract's execution, such contract, amendment or modification thereto shall be rendered forfeit and void. The Contractor shall so notify the State Comptroller within five (5) business days of such conviction, determination or disposition of appeal (2 NYCRR 105.4)

9. **SET-OFF RIGHTS.** The State shall have all of its common law equitable and statutory rights of set-off. These rights shall include, but not be limited to, the State's option to withhold for the purposes of set-off any moneys due to the Contractor under this contract up to any amounts due and owing to the State with regard to this contract, any other contract with any State department or agency, including any contract for a term commencing prior to the term of this contract, plus any amounts due and owing to the State for any other reason including, without limitation, tax delinquencies, fee delinquencies or monetary penalties relative thereto. The State shall exercise its set-off rights in accordance with normal State practices including, in cases of set-off pursuant to an audit, the finalization of such audit by the State agency, its representatives, or the State Comptroller.

10. **RECORDS.** The Contractor shall establish and maintain complete and accurate books, records, documents, accounts and other evidence directly pertinent to performance under this contract (hereinafter, collectively "the Records"). The Records must be kept for the balance of the calendar year in which they were made and for six (6) additional years thereafter. The State Comptroller, the Attorney General and any other person or entity authorized to conduct an examination, as well as the agency or agencies involved in this contract, shall have access to the Records during normal business hours at an office of the Contractor within the State of New York or, if no such office is available, at a mutually agreeable and reasonable venue within the State, for the term specified above for the purposes of inspection, auditing and copying. The State shall take reasonable steps to protect from public disclosure any of the Records which are exempt from disclosure under Section 87 of the Public Officers Law (the "Statute") provided that: (i) the Contractor shall timely inform an appropriate State official, in writing, that said records should not be disclosed; and (ii) said records shall be sufficiently identified; and (iii) designation of said records as exempt under the Statute is reasonable. Nothing contained herein shall diminish, or in any way adversely affect, the State's right to discovery in any pending or future litigation.

11. **IDENTIFYING INFORMATION AND PRIVACY NOTIFICATION:**

(a) **FEDERAL EMPLOYER IDENTIFICATION NUMBER and/or FEDERAL SOCIAL SECURITY NUMBER.**

All invoices or New York State standard vouchers submitted for payment for the sale of goods or services or the lease of real or personal property to a New York State agency must include the payee's identification number, i.e., the seller's or lessor's identification number. The number is either the payee's Federal employer identification number or Federal social security number, or both such numbers when the payee has both such numbers. Failure to include this number or numbers may delay payment. Where the payee does not have such number or numbers, the payee, on his invoice or New York State standard voucher, must give the reason or reasons why the payee does not have such number or numbers.

(b) **PRIVACY NOTIFICATION.**

(1) The authority to request the above personal information from a seller of goods or services or a lessor of real or personal property, and the authority to maintain such information, is found in Section 5 of the State Tax Law. Disclosure of this information by the seller or lessor to the State is mandatory. The principal purpose for which the information is collected is to enable the State to identify individuals, businesses and others who have been delinquent in filing tax returns or may have understated their tax liabilities and to generally identify persons affected by the taxes administered by the Commissioner of Taxation and Finance. The information will be used for tax administration purposes and for any other purpose authorized by law.

(2) The personal information is requested by the purchasing unit of the agency contracting to purchase the goods or services or lease the real or personal property covered by this contract or lease. The information is maintained in New York State's Central Accounting System by the Director of State Accounts, Office of the State Comptroller, AESOB, Albany, New York 12236.

12. EQUAL EMPLOYMENT OPPORTUNITIES FOR MINORITIES AND WOMEN: In accordance with Section 312 of the Executive Law, if this contract is: (i) a written agreement or purchase order instrument providing for a total expenditure in excess of \$25,000.00, whereby a contracting agency is committed to expend or does expend funds in return for labor, services, supplies, equipment, materials or any combination of the foregoing, to be performed for, or rendered or furnished to the contracting agency; or (ii) a written agreement in excess of \$100,000.00 whereby a contracting agency is committed to expend or does expend funds for the acquisition, construction, demolition, replacement, major repair or renovation of real property and improvements thereon; or (iii) a written agreement in excess of \$100,000.00 whereby the owner of a State assisted housing project is committed to expend or does expend funds for the acquisition, construction, demolition, replacement, major repair or renovation of real property and improvements thereon for such project, then:

(a) The contractor will not discriminate against employees or applicants for employment because of race, creed, color, national origin, sex, age, disability or marital status, and will undertake or continue existing programs of affirmative action to ensure that minority group members and women are afforded equal employment opportunities without discrimination. Affirmative action shall mean recruitment, employment, job assignment, promotion, upgradings, demotion, transfer, layoff, or termination and rates of pay or other forms of compensation;

(b) at the request of the contracting agency, the Contractor shall request each employment agency, labor union, or authorized representative of workers with which it has a collective bargaining or other agreement or understanding, to furnish a written statement that such employment agency, labor union or representative will not discriminate on the basis of race, creed, color, national origin, sex, age, disability or marital status and that such union or representative will affirmatively cooperate in the implementation of the contractor's obligations herein; and

(c) the Contractor shall state, in all solicitations or advertisements for employees, that, in the performance of the State contract, all qualified applicants will be afforded equal employment opportunities without discrimination because of race, creed, color, national origin, sex, age, disability or marital status.

Contractor will include the provisions of "a", "b" and "c", above, in every subcontract over \$25,000.00 for the construction, demolition, replacement, major repair, renovation, planning or design of real property and improvements thereon (the "Work") except where the Work is for the beneficial use of the Contractor. Section 312 does not apply to: (i) work, goods or services unrelated to this contract; or (ii) employment outside New York State; or (iii) banking services, insurance policies or the sale of securities. The State shall consider compliance by a contractor or subcontractor with the requirements of any federal law concerning equal employment opportunity which effectuates the purpose of this section. The contracting agency shall determine whether the imposition of the requirements of the provisions hereof duplicate or conflict with any such federal law and if such duplication or conflict exists, the contracting agency shall waive the applicability of Section 312 to the extent of such duplication or conflict. Contractor will comply with all duly promulgated and lawful rules and regulations of the Governor's Office of Minority and Women's Business Development pertaining hereto.

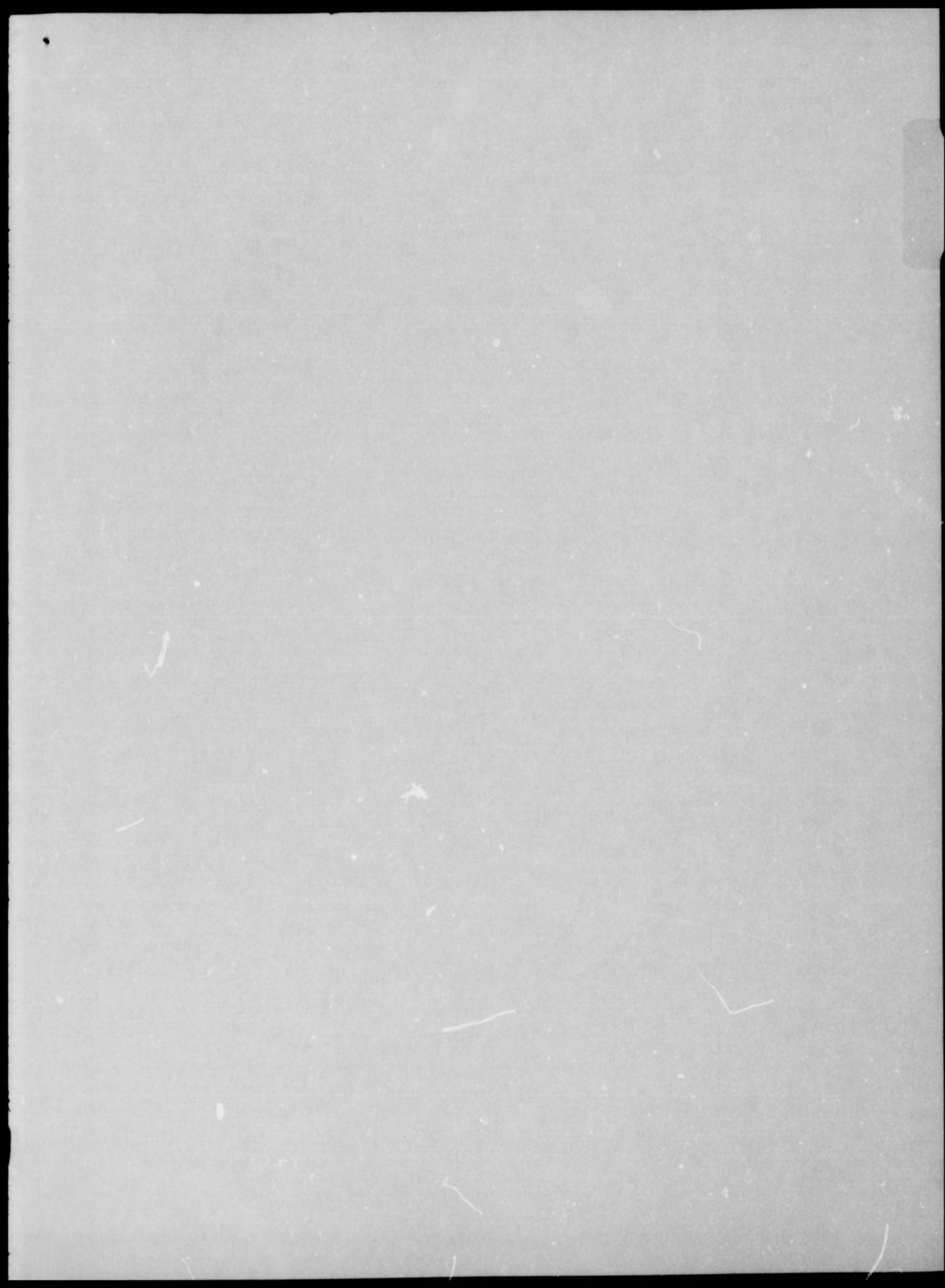
13. CONFLICTING TERMS. In the event of a conflict between the terms of the contract (including any and all attachments thereto and amendments thereof) and the terms of this Appendix A, the terms of this Appendix A shall control.

14. GOVERNING LAW. This contract shall be governed by the laws of the State of New York except where the Federal supremacy clause requires otherwise.

15. LATE PAYMENT. Timeliness of payment and any interest to be paid to Contractor for late payment shall be governed by Article XI-A of the State Finance Law to the extent required by law.

16. NO ARBITRATION. Disputes involving this contract, including the breach or alleged breach thereof, may not be submitted to binding arbitration (except where statutorily authorized) but must, instead, be heard in a court of competent jurisdiction of the State of New York.

17. SERVICE OF PROCESS. In addition to the methods of service allowed by the State Civil Practice Law & Rules ("CPLR"), Contractor hereby consents to service of process upon it be registered or certified mail, return receipt requested. Service hereunder shall be complete upon Contractor's actual receipt of process or upon the State's receipt of the return thereof by the United States Postal Service as refused or undeliverable. Contractor must promptly notify the State, in writing, of each and every change of address to which service of process can be made. Service by the State to the last known address shall be sufficient. Contractor will have thirty (30) calendar days after service hereunder is complete in which to respond.



**VERIFIED STATEMENT
OF
RICHARD K. BERNARD**

My name is Richard K. Bernard, and my business address is 347 Madison Avenue, New York, New York 10017. I am Vice President and General Counsel of Metro-North Commuter Railroad Company ("Metro-North"). I am making this Statement in support of the State of New York's Response to competing plans submitted to the Board on November 30, 1998 by Canadian Pacific Railway ("CP") and CSX Transportation, Inc. ("CSXT"). The subject of each plan is the terms that would govern the exercise of trackage rights by CP over the so-called Hudson Line, which runs between Albany and Fresh Pond Junction, New York.

Rail Freight service over the Hudson Line presently is provided by Consolidated Rail Corporation ("Conrail"). Under the plan for the division of Conrail put forward in 1997 by CSXT and Norfolk Southern Corporation, CSXT would take over Conrail's operations on the line. In its July 23, 1998 Decision in this proceeding, this Board conditioned approval of that division plan on CSXT granting unrestricted trackage or haulage rights over the Hudson Line, for the purpose of promoting competitive rail service for shippers east of the Hudson River from Albany south.

As explained in an earlier Verified Statement submitted in this proceeding by Metro-North's then-President, Donald N.

Nelson, Metro-North controls and operates passenger service over a segment of the Hudson Line between Milepost 75.8 near Poughkeepsie and Milepost 6.6 in The Bronx, where the line connects with the new, New York State-owned Oak Point Link. Metro-North controls the line pursuant to a long-term lease from the segment's owner, American Premier Underwriters, Inc. (a Penn Central successor). Conrail operates over the Metro-North segment using trackage rights granted by Metro-North in an agreement dated as of January 1, 1983, a copy of which already appears in the record in this case as Exhibit ____ (DNN-02).

Supported by expert testimony from New York witness Walter H. Schuchmann, Mr. Nelson confirmed that the Metro-North portion of the Hudson Line had adequate available capacity to support operations by a second freight carrier, as eventually contemplated by the Board's July 23 condition concerning CP. See NYS-11, October 21, 1997, V.S. Nelson at 7-8. He also confirmed Metro-North's willingness to negotiate a trackage rights agreement with such a carrier similar to that in effect with Conrail, toward the goal of promoting competitive rail freight service east of the Hudson River (Id. at 9).

Following issuance of the Board's July 23 Decision, Metro-North representatives met with their CP counterparts to discuss terms on which Metro-North would grant CP trackage rights

over the segment between Poughkeepsie and Milepost 6.6. These negotiations are continuing, and we expect to reach a mutually satisfactory agreement in the near future.

We have reviewed the alternative trackage rights plans submitted by CP and CSXT on November 30. Metro-North agrees with New York State that the CP proposal is more faithful to the terms of the Board's east-of-Hudson condition, and to the goals and interests of the parties that requested that condition. The principal purpose of my Statement, however, is to highlight and address two (2) elements of CSXT's proposal which either explicitly or implicitly misrepresent the nature and extent of Conrail's current -- and CSXT's future -- rights over Metro-North's portion of the Hudson Line.

The Verified Statement of CSXT Witness Steven Potter addresses, among other things, the compensation that CSXT believes CP should pay for the right to operate over the Hudson Line (V.S. Potter at 13-15). Included in the amounts that CSXT claims it should receive is an "interest rental" calculated on the basis of the cost of capital invested by CSXT in the Line. Witness Potter defines this investment as "the fair market value of the joint facility assets, in this case, the owned portion of the Hudson Line and the freight rights on the portion owned by the passenger authorities" Id. at 14 (emphasis mine). As I

read this statement, CSXT is suggesting that CP should pay CSXT for the right to operate over the portion of the Hudson Line leased, controlled and maintained by Metro-North, namely the Poughkeepsie-Mott Haven Junction segment.

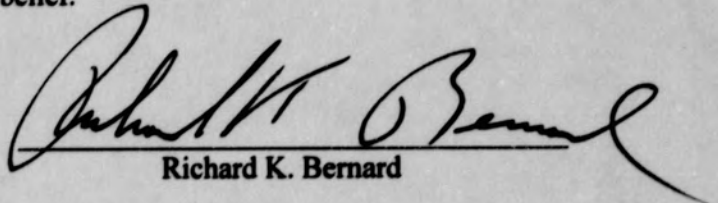
I will leave to others the question whether CSXT's compensation formula has any merit as a general matter. As to the portion of the Hudson Line controlled by Metro-North, however, CSXT has no basis to claim a right to be paid for CP's use. The 1983 Trackage Rights Agreement with Conrail (Exhibit ____ (DNN-02)) clearly establishes that the rights CSXT will have over Metro-North's line are non-exclusive, and extend to freight operations only (i.e., CSXT will have no ownership or equity interest whatsoever). As Mr. Nelson confirmed in his earlier and unchallenged testimony, Metro-North -- not Conrail or CSXT -- is the ultimate arbiter when it comes to freight operations over the Poughkeepsie-Mott Haven Junction portion of the Hudson Line. The empowerment of CP to operate over that segment will not diminish or conflict with CSXT's co-existent rights, nor will CSXT be providing CP with any right or interest for which CSXT would be entitled to be compensated. Simply put, Metro-North is the only party with a right to payment for CP's use of the Poughkeepsie-Mott Haven Junction segment.

In a similar vein, the draft trackage rights agreement included in the CSXT proposal as Exhibit 2 to Mr. Potter's Statement assumes a degree of CSXT control over the management of the Poughkeepsie-Mott Haven Junction segment that is not at all consistent with the governing contracts and associated rights. At various points, CSXT asserts that it will control dispatching, management, communications and safety compliance on the "Subject Trackage," which is defined to include the entire Hudson Line, and that CSXT retains "the exclusive right to grant to other persons rights of any nature in the Subject Trackage." See V.S. Potter, Exhibit 2, Arts. 1, 2(a), 4 and 7. However, over one-half of the "Subject Trackage" is under Metro-North control; CSXT itself will be operating via trackage rights under an agreement that vests Metro-North -- not CSXT -- with control over operating rules, management, maintenance, dispatching, and additional third party use. See Exhibit ____ (DNN-02), Sections 2.01, 3.02, 3.05, 4.01. As with compensation, CP's necessary contracting partner for operating procedures, management and rules respecting the Poughkeepsie-Mott Haven Junction line segment is Metro-North, exclusively.

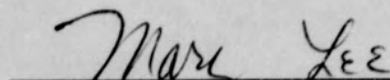
Verification

State of New York)
) ss.:
County of New York)

Richard K. Bernard, being duly sworn, deposes and says that he has read the foregoing Statement, knows the contents thereof, and that the same are true as stated to the best of his knowledge, information and belief.


Richard K. Bernard

Sworn and subscribed before me
this 7th day of December, 1998.



Notary Public

MARY LEE
Notary Public State of New York
No. 41-4925381
Qualified in Queens County
Commission Expires 4/4/2000

My Commission expires: 4/4/2000

CERTIFICATE OF SERVICE

I hereby certify that on December 10, 1998, a copy of the Joint Reply of the New York City Economic Development Corporation and the State of New York, By and Through Its Department of Transportation, To Opening Submissions of Canadian Pacific Parties and CSX Corporation and CSX Transportation, Inc. (NYC-23/NYS-32) was served by hand delivery upon the following:

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

Richard A. Allen
John V. Edwards
Zuckert, Scoutt & Rasenberger, L.L.P.
888 Seventeenth Street, N.W., Suite 600
Washington, D.C. 20006-3939

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

Samuel M. Sipe, Jr.
Steptoe & Johnson L.L.P.
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036-1795

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

George W. Mayo, Jr.
Hogan & Hartson, L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004-1109

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

and by first class mail, postage pre-paid upon the following:

John D. Heffner
Rea, Cross & Auchincloss
Suite 570, 1707 L Street, N.W.
Washington, D.C. 20036

Louis E. Gitomer
Ball Janik LLP
1455 F Street, N.W., Suite 225
Washington, D.C. 20005-1004

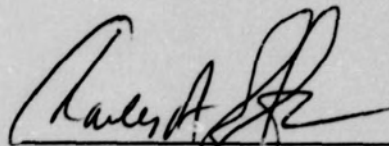
Paul Samuel Smith
Senior Trial Counsel
U.S. Department of Transportation
400 Seventh Street, S.W.
Room 4102 C-30
Washington, D.C. 20590

Edward D. Greenberg
Galland, Kharasch & Garfinkle, P.C.
Canal Square
1054 Thirty-First Street, N.W.
Washington, D.C. 20007-4492

and by overnight delivery to the following:

Edward J. Rodriguez
Housatonic Railroad Company, Inc.
P. O. Box 298
67 Main Street
Centerbrook, CT 06409

Walter E. Zullig, Jr.
Special Counsel
Metro-North Railroad
347 Madison Avenue
New York, NY 10017-3739



Charles A. Spaulnik

STB

FD

33388

(Sub 69)

12-10-98

D

192604

192604

ORIGINAL

FOPC-7

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

ENTERED
Office of the Secretary

DEC 11 1998 STB Finance Docket No. 33388 (Sub-No. 69)

Part of
Public Record

RESPONSIVE APPLICATION --
STATE OF NEW YORK, BY AND THROUGH ITS
DEPARTMENT OF TRANSPORTATION, AND
THE NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION

Comments of the Fort Orange Paper Company
Regarding the Scope of Proposed
Trackage Rights on the Hudson Division

John D. Haffner
Rea, Cross & Auchincloss
1707 L Street, N.W.
Suite 570
Washington, DC 20036
(202) 785-3700

Counsel for Fort Orange Paper
Company

DATED: December 10, 1998

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

STB Finance Docket No. 33388 (Sub-No. 69)

RESPONSIVE APPLICATION --
STATE OF NEW YORK, BY AND THROUGH ITS
DEPARTMENT OF TRANSPORTATION, AND
THE NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION

**Comments of the Fort Orange Paper Company
Regarding the Scope of Proposed
Trackage Rights on the Hudson Division**

I.

BACKGROUND

In Decision No. 102 ("Decision No. 102"), served November 20, 1998, in the above-captioned proceeding, the Board set December 10, 1998, as the deadline for affected parties¹ to

¹ The Board's order identifies Canadian Pacific Railway and its affiliates ("CP"), CSX Transportation ("CSX"), the New

file responses to the simultaneous proposals submitted on November 30, 1998, by CP and CSX addressing the scope of haulage or trackage rights over the east of the Hudson Conrail line² between Selkirk and Fresh Pond, NY. Fort Orange Paper Company ("FOPC") submits its comments supporting the positions taken by CP as well as the NYCEDC and the NYDOT³ regarding these rights.

In Decision No. 89 ("Decision No. 89") served July 23, 1998, originally approving the application by CSX and Norfolk Southern Corporation ("NS") and their respective affiliates to acquire control of, divide, and operate Consolidated Rail Corporation ("Conrail") and its assets, the Board granted in part and denied in part the New York parties' responsive application seeking the imposition of trackage rights for a second competitive rail carrier on the Hudson Division. As pertinent in Decision No. 89, the Board stated unequivocally:

Therefore, we will impose a condition requiring CSX to negotiate an agreement with CP to permit either haulage rights not restricted as to commodity and geographic scope, or similarly unrestricted trackage rights over the east-of-the-Hudson line from Fresh Pond to Selkirk (near Albany), under terms agreeable to the parties, taking into account the investment that continues

York City Economic Development Corporation ("NYCEDC"), and the New York Department of Transportation ("NYDOT") as affected parties; however, it does not preclude other parties from submitting comments. As a rail shipper on the subject rail line, a party to these proceedings, and a witness previously supporting CP's position, FOPC has a significant economic interest in the outcome of this proceeding, and a right to participate here.

² FOPC will refer to this line by its common name, "the Hudson Division."

³ Collectively identified here as "the New York parties."

to be required for the line. If the parties have not reached agreement within 60 days of the effective date of this decision, we will initiate a proceeding to determine just how the needs of the New York parties are to be addressed.

See, Decision No. 89 at 83 and ordering paragraph 28 at 177.

Pursuant to that directive, CP approached CSX during the Summer of 1998 to initiate those negotiations. While FOPC has no direct knowledge of what transpired during those discussions, it understands that the parties were unable to reach any agreement. Moreover, FOPC believes that CSX's insistence that the rights granted by the Board did not permit CP to serve intermediate local customers such as itself or interchange with intermediate connecting railroads such as the Housatonic Railroad Company, Inc., were a major point of disagreement. Accordingly, on November 10, 1998, CP (with endorsements by the New York parties) asked the Board to initiate a proceeding addressing this matter. After considering procedural schedules proposed by CSX, CP, and the New York parties, the Board in Decision No. 102 set the November 30, 1998, deadline for opening evidence and argument and the December 10, 1998, deadline for responses.

II.

ARGUMENT

The issue before the Board is very simple. In ordering CSX to give CP "unrestricted" haulage or trackage rights, did the Board intend to grant CP the right to serve local industries at

intermediate points, as CP, the law, and logic would dictate? Or did the Board merely intend that these "unrestricted" rights provide overhead access to customers and interchanges located in New York City and on Long Island, as CSX would have us believe.

After going to great lengths to recite relevant portions of the Decision No. 89, including characterizations of the rights granted as "unrestricted" or "without restraint,"⁴ it is nothing short of amazing that CSX still interprets the decision language as precluding CP from providing local service to intermediate points on the Hudson Division. The fact that CSX even acknowledges and appears to accept the underlying premise for the grant of unrestricted rights to CP to address the competitive shortcomings of the establishment of Conrail ("we must forcefully use this opportunity to restore a modicum of competition that was lost in the financial crisis that led to the formation of Conrail")⁵ makes CSX's position even more astounding.

As best FOPC can fathom, CSX's adamant opposition to CP's local service rights appears to stem from the following propositions. First, CSX argues that because the "state of competition" on the Hudson Division that existed prior to the creation of the Penn Central Railroad did not provide shippers on

⁴ See, for example references at pages 4, 5, 6, 7, 9, 10 of the Opening Submission of CSX, et al, dated November 30, 1998, hereafter cited as CSX Opening Submission.

⁵ Portion of Decision No. 89 quoted at p. 3 of CSX's Opening Submission.

that line with direct second carrier access there is no basis for the Board to impose such relief today. CSX's argument fails to recognize major differences that have developed over three decades in railroad industry structure, marketing practices and regulatory policy. In 1968, the railroad industry was heavily regulated and railroads tended to compete more on the basis of service, than price. The American railroad system consisted of several dozen class I railroads. The fact that a customer was physically "captive" to one railroad did not limit its ability to obtain competitive connections or access to other sources or markets via other railroads. It could always obtain rates or switching arrangements giving it access to other carriers and routings, with the Interstate Commerce Commission available to settle disputes in an objective manner.

Once the absorption of Conrail into CSX and NS is complete, the American rail system will consist of only two major railroad "duopolies" east of the Chicago-New Orleans "axis" and two major "duopolies" west of that axis as well as several smaller class I railroad "niche" carriers. In many markets such as the "east of the Hudson" region, one carrier has a rail service monopoly. Moreover, these "duopolies" seek the longest possible haul of interline traffic on their own system rather than interchanging it with a potential competitor regardless of efficiencies or shipper routing instructions.⁶ While Section

⁶ Conrail's practice of longhauling interline traffic is documented in cases such as Delaware & Hudson Railway Co. v. Consolidated Rail Corp., 902 F.2d 174 (2d Cir. 1990).

10742 of the I.C.C. Termination Act purports to require railroads to interchange with each other, the rates that might apply to such a "forced" connection might not be economical. Indeed, as FOPC witness Daniel Luizzi has recently testified in his statement attached to CP's Opening Evidence and Argument, difficulties obtaining attractive joint rates between Conrail and Canadian Railroads have in the past denied FOPC access to Canadian product sources or markets or forced FOPC to use trucks. Daniel Luizzi V.S. at 3. FOPC is very concerned that the lack of a "friendly connection" to both NS and CP could drive up its freight rates and adversely affect its rail service. Although the Board is available to resolve shipper railroad disputes just as the I.C.C. was available in the past, there is substantial sentiment that the Board's procedures are too complex and expensive for small companies to use and its decisions have tended to favor larger carriers over smaller ones and carriers over their customers. In short, the status of rail competition today is not what it was in or prior to 1968, even on the Hudson Division.

Second, and contrary to the Board's own findings noted by CSX earlier in its Opening Submission,⁷ CSX continues to hide behind alleged "capacity" issues as a pretext for maintaining Conrail's local rail service monopoly to intermediate points. In deciding to grant CP rights "unrestricted as to commodity and geographic scope," the Board appears to have relied heavily on

⁷ At page 4.

testimony provided by then Metro-North Commuter Railroad President Donald Nelson and admissions by CSX official Orrison. Decision No. 89, at 83, footnote 130. The fact that the Board found adequate capacity for a second carrier on the more congested portion of the Hudson Division south of Poughkeepsie owned by Metro-North Commuter Railroad parent the Metropolitan Transportation Authority makes a finding of ample capacity north of Poughkeepsie even more compelling. To the extent the Board has not already taken official notice of the physical characteristics of the northern segment of the Hudson Line, it is a double track reverse signalled high speed (up to 110 mph) line with up to 11 daily Amtrak roundtrip passenger trains, no commuter trains, a single daily Conrail manifest freight roundtrip, a less than daily local freight train, and occasional extra freight trains. The only freight service on the segment immediately south of Rensselaer serving FOPC's plant consists of one twice weekly local freight train. Moreover, while the southern portion of the Hudson Division does have certain time of day limitations for freight service, those limitations do not apply to the northern part of the line. Finally, the fact that - in CSX's own words -- there are "relatively few shippers"* on the portion of the Hudson Division north of the New York City city limits severely undermines its position that capacity restraints forbid granting CP rights to provide local service.

* Verified Statement of CSX witness Steven A. Potter at p. 14, contained in CSX's Opening Submission.

Because the amount of local intermediate traffic is modest, it should be more, not less, operationally feasible for two carriers to provide local service at intermediate points on the Hudson Division.

Third, CSX's no local service argument flies in the face of the plain language of Decision No. 89. Interpreting that decision in the manner most favorable to CSX -- that the "unrestricted" rights only convey competitive access for customers in New York City and on Long Island -- CSX's position might have at least a little credence but for the following statement which appears at page 116 of the decision:

[W]e have imposed a condition that may help FOPC, requiring CSX to negotiate an agreement with CP to permit either haulage or trackage rights, not restricted as to commodity or geographic scope, over the east-of-the-Hudson line...

Surely, the Board would not have made that statement if it only intended to grant CP overhead rights to New York City. Limiting CP's rights to overhead traffic would do not nothing to help FOPC's needs.

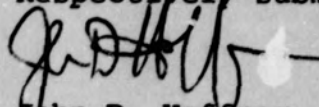
III.

CONCLUSION

The Board acted properly in Decision No. 89 when it granted CP unrestricted full service rights to operate over the Hudson Division. FOPC urges the Board to act promptly to grant the relief requested by CP and the New York parties, stating clearly for CSX's benefit that the rights ordered in Decision No.

89 explicitly allow CP to provide full service including the right of access to all current and future shippers at intermediate points, the right to interchange with all carriers on the line, and the right to use all yards and facilities on the line.

Respectively submitted,



John D. Heffner
Rea, Cross & Auchincloss
1707 L Street, N.W.
Suite 570
Washington, DC 20036
(202) 785-3700

Counsel for Fort Orange Paper
Company

DATED: December 10, 1998

CERTIFICATE OF SERVICE

I hereby certify that I have this 10th day of December, 1998 served the foregoing document by first-class mail, postage prepaid upon the following parties:

Marcella M. Szel
Timothy G. Mulcahy
Canadian Pacific Railway Company
Suite 500
Gulf Canada Square
401 Ninth Avenue, S.W.
Calgary, Alberta T2P 4Z4

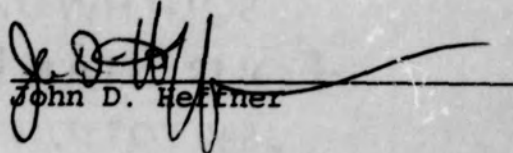
Dennis G. Lyons, Esq.
Arnold & Porter
555 Twelfth Street, N.W.
Washington, DC 20004-1206

Charles A. Spitulnik, Esq.
Hopkins & Sutter
888 Sixteenth Street, N.W.
Washington, DC 20006-4103

George W. Mayo, Jr., Esq.
Hogan & Hartson L.L.P.
555 13th Street, NW
Washington, DC 20004

Kelvin J. Dowd, Esq.
Slover & Loftus
1224 17th Street, NW
Washington, DC 20036

Edward J. Rodriguez
PO Box 298
Centerbrook, CT 06409


John D. Heffner

STB

FD

33388

(Sub 69)

12-10-98

D

192603

JUDICIARY COMMITTEE
SUBCOMMITTEES:

RANKING MEMBER
COMMERCIAL AND
ADMINISTRATIVE LAW
CONSTITUTION

TRANSPORTATION AND
INFRASTRUCTURE COMMITTEE

SUBCOMMITTEES:
RAILROADS
SURFACE TRANSPORTATION
REGIONAL WHIP

Congress of the United States
House of Representatives
Washington, DC 20515

JERROLD NADLER
8TH DISTRICT, NEW YORK

REPLY TO:

☐ WASHINGTON OFFICE:
2448 RAYBURN BUILDING
WASHINGTON, DC 20515
(202) 225-5635

☐ DISTRICT OFFICE:
11 BEACH STREET
SUITE 910
NEW YORK, NY 10013
(212) 334-3207

☐ DISTRICT OFFICE:
532 NEPTUNE AVENUE
BROOKLYN, NY 11224
(718) 373-3198

E-mail: jerrold.nadler@mail.house.gov
Web: <http://www.house.gov/nadler/>

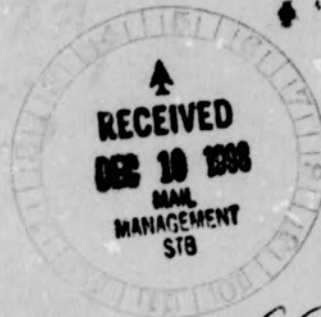
ENTERED
Office of the Secretary

DEC 11 1998

December 10, 1998

Part of
Public Record

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, Suite 700
Washington, D.C. 20423-0001



Dear Secretary Williams:

FD-33388 Sub 69

Enclosed for filing please find an original and 25 copies of our (Jerrold Nadler Et. Al.) Comments concerning the dispute resolution requested by CSX and CP, concerning docket #33388. Additionally you will find a 3.5" disk containing the text of the letter.

If you have any question please feel free to contact me.

Thank you.

Sincerely,

Jerrold Nadler
Jerrold Nadler
Member of Congress

JUDICIARY COMMITTEE

SUBCOMMITTEES:

RANKING MEMBER
COMMERCIAL AND
ADMINISTRATIVE LAW
CONSTITUTION

TRANSPORTATION AND
INFRASTRUCTURE COMMITTEE

SUBCOMMITTEES:

RAILROADS
SURFACE TRANSPORTATION

REGIONAL WHIP

Congress of the United States
House of Representatives
Washington, DC 20515



JERROLD NADLER
8TH DISTRICT, NEW YORK

REPLY TO:

☐ WASHINGTON OFFICE:
2448 RAYBURN BUILDING
WASHINGTON, DC 20515
(202) 225-5635

☐ DISTRICT OFFICE:
11 BEACH STREET
SUITE 910
NEW YORK, NY 10013
(212) 334-3201

☐ DISTRICT OFFICE:
532 NEPTUNE AVENUE
BROOKLYN, NY 11224
(718) 373-3198

E-mail: jerrold.nadler@mail.house.gov
Web: <http://www.house.gov/nadler/>

Certificate of Service

I, Brett Heimov, certify that on December 10, 1998, I have caused to be served by mail a true and correct copy of the attached brief on all parties that have appeared in STB Finance Docket no. 33388.

A handwritten signature in dark ink, appearing to read "Brett Heimov", written over a horizontal line.

Brett Heimov

Dated: December 10, 1998

Congress of the United States

Washington, DC 20515

December 9, 1998

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
Case Control Branch
1925 K Street, N.W.
Washington, D.C. 20423-0001

RECEIVED
DEC 10 1998
MAIL
MANAGEMENT
STB

Re: F.D. 33388, CSX corporation, Et Al. -- Control and Operating
Leases/Agreements -- Conrail Inc., Et Al., and F.D. 33388 (Sub-No. 69),
The State of New York By and Through Its Department of Transportation
-- Trackage Rights Over Lines of Consolidated Rail Corporation

Dear Secretary Williams:

On behalf of the 24 member New York-Connecticut Congressional Delegation we are writing with regard to letters filed by the Canadian Pacific Railway Company, et al (CP) and by CSX Corporation (CSX) and those of the Providence and Worcester Railway (P&W) confirming that these various parties interested in East of the Hudson service have been unable to enter into an agreement facilitating the Board's order relating to such service. In addition to the Board's directive that CSX and CP work out the details of CP providing direct service to New York City from the west, the Board had requested that CSX negotiate with P&W for service north of New York. The Board further directed CSX work with governmental agencies east of the Hudson to correct the chronic lack of rail service east of the Hudson River. In light of CSX's inability to reach agreement with either CP or P&W, it is our belief that without direct intervention by the STB there may be no meaningful remedies to the lack of service east of the Hudson River.

We note, however, that part of the problem faced by these carriers, assuming that negotiations were carried out in good faith, is that the Conrail assets in question, the Hudson Line, the Oak Point Yard, the New York Connecting Railroad and Fresh Pond Yard, will be pushed to their capacity with two carriers, let alone three or four, as dictated by the Board's order. A thrust of the Congressional Delegation's petition was to extend Norfolk Southern and CSX service by all carriers onto non-Conrail lines which are now used little, but which lead to other terminals or terminal lands which are still available to accommodate these carriers presently contemplated, or short-term future activities. By limiting the relief afforded to CP, for instance, to access Conrail assets alone, the Board sends that service to Fresh Pond, the smallest terminal facility in the region still in service. This decision could cause serious capacity problems for both CSX and CP. Granting CP, P&W and CSX terminal trackage rights on the Bay Ridge Line to 65th Street, as the

Congressional Delegation urged in our petition, would solve capacity problems in the short term and would redirect responsibility from the Board to the City of New York, which must lease a still unused City-built facility to a competent operator who would serve all carriers having access.

CSX has proposed not to correct the physical plant problem but to allow CSX to choose its east of Hudson competitor. We urge the Board not to modify its directive. The problem is not the identity of the carrier, but the capacity of the facilities. Indeed, CSX, by making this request, rather than addressing a legitimate problem with the Board's order, seeks to subvert the order so as to allow CSX to designate another less capable carrier in lieu of CP to operate on these lines. CP has the financial resources to enter this market and to compete with CSX and move goods to the West. Any other carrier which could provide such service, with the exception of Norfolk Southern, would be either a short line or a regional line, which would in all cases be dealing with either an isolated operation or one which would not mesh logically with the overall system. The sole reason such a carrier would not tax the capacity of the system as much as CP is that such a carrier's service could not fulfill the region's needs. If the CSX motion for modification were granted, CSX would not have a real competitor and the Board's clear intention to address the east of Hudson lack of competition problems would be defeated.

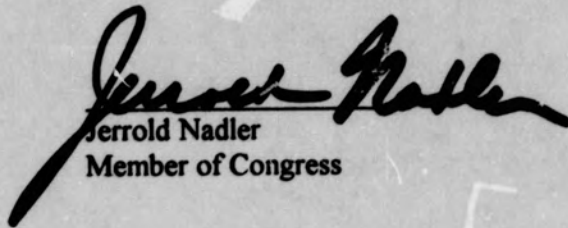
It would seem that CP and P&W are more willing to facilitate improved service in this region to the west and east respectively, than is CSX at this time. CP should be granted full trackage rights to Fresh Pond on tracks and rights being conveyed to CSX. P&W should be granted similar rights from New Haven to Fresh Pond and the terms of both sets of rights should be dictated by the STB. CSX, Norfolk Southern, CP and P&W should also be granted terminal trackage rights to 65th Street Yard on the Brooklyn Waterfront. The provisions for compensation to CSX and to New York and Atlantic should be fair. The Board, however, must pay close attention to any provisions relating to dispatching on these lines so that line owners cannot exclude other carrier services or render them effectively inoperable due to the lack of track or terminal access. We suggest close monitoring of this situation. It is our hope that, with competition, CSX's view of this vast market will change. We hope that CSX will increase its services and will also seek direct access to 65th Street and the Brooklyn waterfront, which should also be granted to it, but not to the exclusion of Norfolk Southern.

The present situation, however, strongly suggests that total reliance on voluntary action by private carriers to solve the tremendous problems relating to rail service east of the Hudson is inadequate. We urge the Board to take a proactive role and give CSX and all carriers in the region specifically mandated tasks, the sum of which will provide rail service to the region in a manner which gives area shippers the option of using the rail mode where logic dictates for the foreseeable future. Should CSX or Norfolk Southern fail to act, the Board must take action on its own to make these assets useful to the rail industry and the regional and national economy. It must be remembered that without a rail alternative all freight must go by highway, making regional environmental quality goals mandated by law unachievable. The Board cannot ignore its Clean Air Act responsibilities

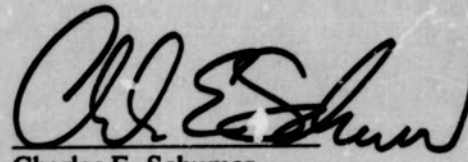
or defer that responsibility to the voluntary acts of private parties. This is particularly true where, as here, these private parties have been unable to abide by the Board's single mandated action directed at achieving competition east of the Hudson.

Thank you for your attention to these comments.

Sincerely,



Jerrold Nadler
Member of Congress



Charles E. Schumer
Member of Congress