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GEORGE W. MAYO, JR.

PARTNER

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November 4, 1999

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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

196005

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

196006

Dear Secretary Williams:

Enclosed for filing in the above-referenced dockets are an original and twenty-five copies of the "Joint Motion of Canadian Pacific Parties, CSX Corporation, and CSX Transportation, Inc. To Dismiss Without Prejudice Canadian Pacific Parties' Petition To Enforce Trackage and Switching Rights Imposed by the Board". 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 BUDAPEST LONDON MOSCOW PARIS\* PRAGUE\* WARSAW

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

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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

**JOINT MOTION OF CANADIAN PACIFIC PARTIES, CSX CORPORATION, AND CSX  
TRANSPORTATION, INC. TO DISMISS WITHOUT PREJUDICE  
CANADIAN PACIFIC PARTIES' PETITION TO ENFORCE TRACKAGE AND  
SWITCHING RIGHTS IMPOSED BY THE BOARD**

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November 4, 1999

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

---

**JOINT MOTION OF CANADIAN PACIFIC PARTIES, CSX CORPORATION, AND  
CSX TRANSPORTATION, INC. TO DISMISS WITHOUT PREJUDICE  
CANADIAN PACIFIC PARTIES' PETITION TO ENFORCE TRackage AND  
SWITCHING RIGHTS IMPOSED BY THE BOARD**

The Canadian Pacific Parties 1/ and CSX 2/ hereby move  
to dismiss without prejudice "Canadian Pacific Parties' Petition  
To Enforce Trackage and Switching Rights Imposed by the Board"  
(CP-31), filed on July 27, 1999.

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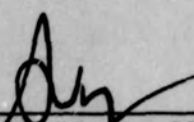
1/ "Canadian Pacific Parties" or "CP" refer collectively to  
Canadian Pacific Railway Company, Delaware and Hudson Railway  
Company Inc., Soo Line Railroad Company and St. Lawrence & Hudson  
Railway Company Limited.

2/ "CSX" refers collectively to CSX Corporation and CSX  
Transportation, Inc.



CP and CSX have reached a settlement agreement that resolves the issues presented in the petition, and that provides among other things that the parties shall jointly seek dismissal of the petition without prejudice. Accordingly, CP and CSX request the Board to dismiss CP's petition, and to do so without prejudice.

Respectfully submitted,



---

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CSX Transportation, Inc.

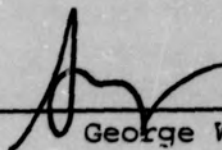
November 4, 1999

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of November, 1999, I served by the means indicated below a copy of the foregoing Joint Motion of Canadian Pacific Parties, CSX Corporation, and CSX Transportation, Inc. To Dismiss Without Prejudice Canadian Pacific Parties' Petition To Enforce Trackage And Switching Rights Imposed by the Board:

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) 12-23-98 I 192807



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BEFORE THE  
SURFACE TRANSPORTATION BOARD

FOPC-8



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

Fort Orange Paper Company's  
Motion to Clarify "unrestricted"  
East-of-the-Hudson Trackage Rights  
Granted Canadian Pacific Railway

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Counsel for Fort Orange  
Paper Company

DATED: December 23, 1998

ORIGINAL

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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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

---

**Fort Orange Paper Company's  
Motion to Clarify "unrestricted"  
East-of-the-Hudson Trackage Rights  
Granted Canadian Pacific Railway**

I.  
INTRODUCTION

On December 18, 1998, the Board served a decision ("Decision No. 109") addressing the simultaneous proposals filed November 30, 1998, by Canadian Pacific Railway Company and its

affiliates ("CP") and CSX Transportation ("CSX") involving the "unrestricted" trackage or haulage rights previously granted CP by the Board in Decision No. 89.<sup>1</sup> These rights were purportedly imposed on behalf of the State of New York and the New York Department of Transportation and the New York City Economic Development Corporation.<sup>2</sup> As relevant here, the Board subsequently determined that the "unrestricted" rights "will be limited to overhead traffic between Albany and New York City, and local access to industries situated between these points will not be permitted." Decision No. 109 at 6. Fort Orange Paper Company ("FOPC")<sup>3</sup> hereby moves for leave for the Board to clarify or explain its ruling in Decision No. 109 in light of its previous, inconsistent statement in Decision No. 89 that the conditions granted "may help [Fort Orange]." <sup>4</sup>

#### BACKGROUND

In Decision No. 89, originally approving the application by CSX and Norfolk Southern Corporation ("NS") and their respective affiliates to acquire control of, divide, and

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<sup>1</sup> Served July 23, 1998.

<sup>2</sup> Hereafter identified as the "New York Parties."

<sup>3</sup> FOPC is an on-line "east-of-the-Hudson" local rail shipper located on Consolidated Rail Corporation's ("Conrail") Hudson Division at Castleton, NY. By now the Board is well acquainted from previous filings with FOPC and its rail transportation needs. Information about FOPC will only be repeated as necessary for the Board's understanding.

<sup>4</sup>

Decision No. 89 at 116.

operate Conrail and its assets, the Board granted in part and denied in part a responsive application filed by the New York Parties seeking the imposition of trackage rights for a second competitive rail carrier on the Hudson Division.<sup>5</sup> 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 [emphasis supplied] as to commodity and geographic scope, or similarly unrestricted [emphasis supplied] 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. 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. As to FOPC, the Board also stated in a short section discussing its interest:

As explained above in the section entitled East Of The Hudson, we 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 from Fresh Pond to Selkirk (near Albany). Furthermore, the extensive 5-year oversight and monitoring process that we will be undertaking is responsive to FOPC's concerns.

Decision No. 89 at 116.

Pursuant to the Board's directive in paragraph 28, CP approached CSX during the Summer of 1998 to initiate those

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<sup>5</sup> FOPC refers to the Conrail line on the east side of the Hudson River as the Hudson Division, the name customarily given it by Conrail and the Penn Central and New York Central Railroads.



negotiations. Apparently, the parties were unable to reach agreement on certain key points including, among others, the right to serve local intermediate customers, the right to interchange with connecting railroads at intermediate points, and compensation arrangements. Accordingly, on November 10, 1998, CP (with endorsements by the New York Parties) asked the Board to initiate a proceeding addressing the scope of the rights. 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. FOPC, the New York Parties, and the Housatonic Railroad each submitted comments supporting the position taken by CP regarding these rights.<sup>6</sup>

## II.

### ARGUMENT

As FOPC noted in FOPC-7, 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 urges and 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. For the Board to accept CSX's strained interpretation of the Board's language in Decision No.

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<sup>6</sup> FOPC's December 10, 1998, comments were identified as FOPC-7.

89 -- that CP's "unrestricted" rights are limited just to overhead traffic -- renders useless its previous offer of "help" to FOPC by requiring the parties to negotiate unrestricted rights. How can a grant restricted to overhead rights to New York City help a customer located just south of Rensselaer?

FOPC has searched the four corners of Decision No. 109 to learn how the Board came to reverse its previously enlightened ruling on "east-of-the-Hudson" trackage or haulage rights, originally purporting to make them "unrestricted" as to commodity and geographic scope. Although the Board apparently received and presumably read FOPC witness Luizzi's testimony submitted as part of CP's November 30 filing (CP-25) and its own December 10 comments (FOPC-7), the only reference to FOPC in Decision No. 109 is found at footnote 2 on page 2. The decision does not explain how a ruling limiting the Board's prior grant of "unrestricted" trackage or haulage rights to CP would continue to help FOPC.

In its effort to divine the Board's rationale behind its change of heart and mind, FOPC re-examined CSX's November 30 and December 10 filings. The former pleading makes only a passing reference to the local trackage rights issue and does not identify FOPC. The latter pleading does discuss the local trackage rights issue at some length and identifies FOPC in a footnote on pages 23 and 24. Accepting for the moment CSX's explanation of the facts, the basis for the phrase "[u]nrestricted as to commodity and geographic scope" apparently

stems from some effort by CSX to relax restrictions contained in settlement agreements negotiated between CP and CSX in 1997-8. CSX would have the public believe that the Board's use of the term "unrestricted" was to cure the limitations contained in those settlement agreements, rather than any intent to provide true railroad competition for local service at intermediate points on the Hudson Division. Perhaps CSX is right in its assertions that the Board accepted this view in Decision No. 89 but we may never know absent a clear explanation by the Board. The Board has not bothered to share with interested parties and the public its intentions here. While FOPC strongly disagrees with the Board's decision to limit those "unrestricted" rights as to local service, the least it could and should have done would have been to provide an articulate and rationale explanation of its change of heart and mind. It owes the public just such an explanation as part of its obligation under the Administrative Procedure Act to engage in rational decision making and to articulate clearly the basis for any changes in its decisions.

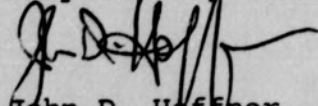
### III.

#### CONCLUSION

The Board acted properly in Decision No. 89 when it granted CP "unrestricted" full service rights to operate over the Hudson Division. Its apparent change of heart and mind reflected by its retraction in Decision No. 109 requires a full and complete explanation. FOPC respectfully requests that the Board

reconsider its ruling in Decision No. 109 to allow CP to provide local service at intermediate points between Albany and New York City. But, as a minimum, the Board owes the public an explanation of its change in position.

Respectively submitted,



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(202) 785-3700

Counsel for Fort Orange  
Paper Company

DATED: December 23, 1998



CERTIFICATE OF SERVICE

I hereby certify that I have this 23rd day of December, 1998 served the foregoing document by first-class mail, postage prepaid upon the following parties:

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Timothy G. Mulcahy  
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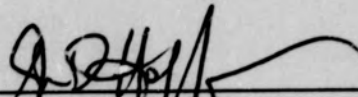
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STB FD 33388 (Sub 69) 12-18-98 I 192746

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December 18, 1998

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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:

Enclosed are an original and twenty-five (25) copies of each of CSX-171, "Reply of CSX Corporation and CSX Transportation, Inc. to Canadian Pacific Parties' Motion to Clarify Scope of Rights Sought," and CSX-172, "Motion of CSX Corporation and CSX Transportation, Inc. to Strike in Part the Comments of Housatonic Railroad Company, Inc. Relating to Scope of Proposed CP Trackage Rights on Hudson Line (HRRC-14)," for filing in the above-referenced docket.

Please note that a 3.5-inch diskette containing a WordPerfect 5.1 formatted copy of these two documents is also enclosed.

Kindly date stamp the enclosed additional two copies of this letter and one copy each of CSX-171 and CSX-172 at the time of filing and return them to our messenger.

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

Respectfully yours

A handwritten signature in dark ink, appearing to read "Dennis G. Lyons".

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

Enclosures  
via hand delivery

cc: All Parties to the Service List  
in Sub-No. 69

192746

CSX-172

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

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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

**Motion of CSX Corporation and CSX Transportation, Inc.  
to Strike in Part Comments of Housatonic Railroad Company, Inc.  
Relating to Scope of Proposed CP Trackage Rights on Hudson Line  
(HRRC-14)**

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*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

**Motion of CSX Corporation and CSX Transportation, Inc.  
to Strike in Part Comments of Housatonic Railroad Company, Inc.  
Relating to Scope of Proposed CP Trackage Rights on Hudson Line  
(HRRC-14)**

CSX Corporation and CSX Transportation, Inc. (collectively, "CSX") hereby move that the "Comments of Housatonic Railroad Company, Inc. relating to Scope of Proposed CP Trackage Rights on Hudson Line" (HRRC-14) be stricken except insofar as they simply constitute an endorsement of CP's position.

**BACKGROUND**

On November 20, 1998, the Board launched an expedited proceeding to determine the rights to be granted the Canadian Pacific companies (collectively, "CP") to serve New York City directly via the present Conrail Hudson Line, to the Bronx and Queens, and the

terms and conditions of such rights. CSX and CP were to make opening filings on November 30, 1998, and they and other interested parties were to make filings responsive to the earlier filings on December 10, 1998. CP and CSX made their opening filings and reply filings and several other parties made reply filings under the Board's schedule.

Housatonic Railroad Company, Inc. ("Housatonic") on or about December 10, 1998, made a filing of reply comments, HRRC-14, which was received by CSX on December 14, 1998. The filing generally expressed support for the very broad local rights sought by CP, and while we disagree with CP's position we obviously cannot and do not object to Housatonic's expression of its support for CP.

However, Housatonic's filing, which is extremely discursive and is not supported by any verified statement or any references to orders of the Board or its predecessor on material matters other than the Board's earlier orders in this case, apparently seeks to broaden the issues in this case from where they stood after the initial November 30, 1998 filings. Among other things, the Housatonic reply asserts the existence of various rights that Housatonic is said to have (some of them said to be dormant but capable of restoration to life) without evidence that it has such rights, and asks that these rights be made applicable to its dealings with CP, as well as with CSX as Conrail's successor.

Some of those assertions include the following:

1. In HRRC-14 at 8, Housatonic claims "contract carrier rights" to serve portions of Conrail's Harlem Line, and "to revive common carrier status" on that Conrail line, as far

south as White Plains, NY. In this context, Housatonic also states that the "CP condition" ought to be "applied to benefit this HRRC service area," that is, apparently on the Harlem Line. It is unclear whether this is a suggestion that CP be given rights over the Harlem Line, an issue which clearly is not in the case, whether it is an attempt to induce the Board to recite the contentions of Housatonic in a way that suggests that revivable common carrier rights in some form exist, or whether it is simply an expression of support for CP's position.

2. Housatonic claims that it connects with the Hudson Line at Beacon, NY (HRRC-14 at 3), but despite the supposed "connection" apparently does not want to use it and to effect interchange with CP "either on an existing Maybrook line side track or one a new side track to be constructed." While the Housatonic filing avoids saying so, it is CSX's understanding that (a) there currently is no service by Housatonic on the Maybrook Line to Beacon and apparently no current service on that line west of the Connecticut-New York State line; (b) there is no interchange between Conrail and Housatonic at Beacon, their only current interchange point being at Pittsfield, MA; (c) Housatonic sold the pertinent portions of the Maybrook Line to Metro-North, which apparently is stockpiling the segment for possible commuter use; and (d) there is a physical connection at Beacon between the Hudson Line and the Maybrook Line but no practical facility for interchange, the nearest siding being 12 miles away. Under these circumstances and given the fact that the issue was raised in a reply filing, any meaningful discussion of the specifics of a Beacon interchange seems currently impossible. No map or sketch of any new proposed construction is supplied, and there is no suggestion of compliance with any pertinent environmental

requirements.<sup>1</sup> Issues as to where interchange should be had, if the Board grants CP's request, and how that interchange should be authorized, injected by Housatonic in its "reply," are premature.

3. In a closely related passage, Housatonic asserts that "HRRC now has the right to interchange traffic with all freight carriers on the Hudson Line" (HRRC-14 at 4). But the only claimed source of that alleged authority is a quote from a document, not dated or supplied, said to have been uttered by Metro-North Commuter Railroad ("Metro-North"). See id. at 4 n.3. While Metro-North may have authority to grant freight rights on the Maybrook Line, as set forth in CSX-169 at 17-20 Conrail and CSX deny that Metro-North has any authority to grant freight rights to anyone respecting the portion of the Hudson Line from Poughkeepsie southward held by Metro-North under a long-term lease. See also Exhibits A-1, A-2, and A-3 to CSX-169. Conrail and CSX have never said that Metro-North had the right to grant additional freight rights on the Hudson Line – since it never "granted" anything to Conrail in the first place, Conrail's predecessor having reserved the entirety of those rights.<sup>2</sup> Whether Housatonic has the rights in question and what they mean *vis-à-vis* the Hudson Line was not an issue raised by the November 30 filings. On this point also, to the extent that Housatonic's views go beyond the issues joined between CP and

---

<sup>1</sup> CSX's position is that CP's rights should be overhead to the New York City line and are for the purpose of reaching and serving the City, and that, accordingly, there should be no right of interchange between it and Housatonic.

<sup>2</sup> The discussion at CSX/NS-176 at 124 n.11, cited in HRRC-14 at 5 n.5, makes no such concession.



CSX, they should be stricken since they broaden the issues and CSX has no right of reply to them.

### **DISCUSSION**

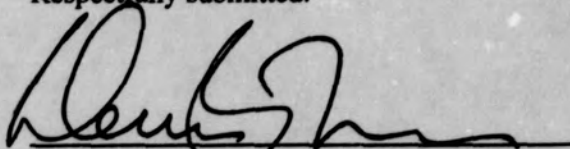
The Housatonic filing, to the extent it goes beyond an expression of support for the CP filing, apparently seeks via a reply filing to interject additional issues into this expedited case. If Housatonic wishes to pursue those issues and they are ripe, they should be pursued in a separate proceeding. At the present time, there is no interchange between the Hudson Line as operated by Conrail and the Housatonic at Beacon. If there is to be an interchange connection between those lines and if an interchange service between any of the operators there is to be introduced, Conrail and CSX deny that Metro-North has any power to grant freight rights on the Hudson Line within the confines of Metro-North's long-term leasehold or elsewhere. While CSX has consented to the Board's imposition of an override permitting CP's overhead trackage rights on the Metro-North segment, it should be evident that Metro-North has no powers to grant rights to determine how the Board's Ordering Paragraph No. 28 should be implemented. Similarly, the rights of anyone on the Harlem Line are no part of this proceeding because, ambitious as it may have been, the CP November 30, 1998 filing (CP-24) sought no rights on the Harlem Line.

### **CONCLUSION**

The Housatonic filing (HRRC-14) should be stricken or otherwise disregarded insofar as it goes beyond a generalized support for the CP filing. The Board should make no

pronouncements as to the existence of interchange at Beacon or with respect to the rights of any rail carrier with respect to the Harlem Line.

Respectfully submitted.



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

December 18, 1998

## **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-172, "Motion of CSX Corporation and CSX Transportation, Inc. to Strike in Part Comments of Housatonic Railroad Company, Inc. Relating to Scope of Proposed CP Trackage Rights on Hudson Line," to the following parties, by first-class mail, postage prepaid, or by more expeditious means:

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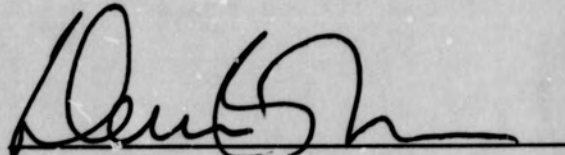
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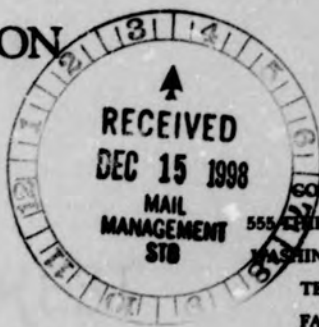
DENNIS G. LYONS

STB      FD      33388      (Sub 69)      12-15-99      I      192718

192718

**HOGAN & HARTSON  
LLP.**

December 15, 1998



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

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

I

**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' Motion To Clarify Scope of Rights Sought. Also enclosed is a 3.5-inch diskette, formatted for WordPerfect 7.0, containing the pleading.

Thank you for your assistance.

Sincerely,

**ENTERED  
Office of the Secretary**

**DEC 16 1998**

**Part of  
Public Record**

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

192718

CP-26

BEFORE THE  
SURFACE TRANSPORTATION BOARD

Finance Docket No. 33388

CSX CORPORATION AND CSX TRANSPORTATION,  
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'**  
**MOTION TO CLARIFY SCOPE OF RIGHTS SOUGHT**

ENTERED  
Office of the Secretary

DEC 16 1998

Part of  
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December 15, 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. 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'**  
**MOTION TO CLARIFY SCOPE OF RIGHTS SOUGHT**

The Canadian Pacific Parties 1/ hereby move for leave to clarify the scope of the full-service trackage rights CP seeks over the CSX 2/ "east-of-the-Hudson" line between Schenectady/Albany, NY, and Fresh Pond Junction, NY.

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

2/ CSX Corporation and CSX Transportation, Inc. are collectively referred to as "CSX". CSX will operate the subject east-of-the-Hudson line pursuant to an operating agreement with New York Central Lines LLC ("NYC"), which will acquire the line from Consolidated Rail Corporation ("Conrail").

CSX claims that CP has "stealthily" "buried" in its proposed trackage rights agreement "an undisclosed but fairly evident" plan by CP to "aggrandize its properties (by conscripting NYC/CSX's properties) in the Greater Albany area." CSX-169 at 3-5. See also, id. at 23-27, Potter R.V.S. at 10, Vest R.V.S. at 4-9. There is no such hidden plan, and CSX's claims are simply a red herring intended to divert the Board's attention from the real issue in this proceeding: CSX's plan to limit CP's use of the Hudson Line so severely, and impose such an excessive charge for that use, that CP could not compete effectively.

In light of CSX's claims, it is important that CP clarify the scope of the rights it is seeking so as to make clear that CP is not engaged in the west-of-the-Hudson "grabs" (CSX-169 at 5) alleged by CSX. Specifically, on the north end of the east-of-the-Hudson line, CP is only seeking full-service access to facilities and shippers on the east side of the Hudson (and branch lines extending therefrom). As described in the Verified Statement of Paul D. Gilmore Concerning Operating Matters, at 4-5, filed with CP's Opening Evidence and Argument (CP-24), CP has proposed three routings to connect the east-of-the-Hudson line to CP's existing rail system in order to provide "efficient routings" between New York markets and markets served by CP. With respect to trackage west of the Hudson, which comprise the

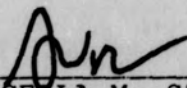
routes CP has labeled 1 through 3, CP is only seeking overhead access.

CP does not seek any access to the West Albany Yard, and the only access CP seeks as to Selkirk Yard is (a) the right, as part of CP Route 2, to pass through the yard so as to connect efficiently with CP's line at "VO", and (b) the right, as part of CP Route 3, to use the yard for a forward and reverse movement of a CP train originating or terminating in CP's Kenwood Yard, as well as the right for this train to move through Selkirk Yard.

CP believes that CSX understands CP's intentions from the negotiations between the parties, and that the draft agreement language CP proposed manifests those intentions. CSX has had to resort to a strained reading of the proposed language in order to claim that CP is seeking rights broader than those described above. In any event, the CSX reading is not consistent with CP's intent.

For the reasons set forth above, CP urges that the Board grant its motion to clarify the scope of the rights sought by CP in this proceeding.

Respectfully submitted,



---

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December 15, 1998

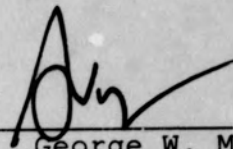


CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of December, 1998, I served by the means indicated below a copy of the foregoing Canadian Pacific Parties' To Clarify Scope of Rights Sought 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) 12-15-98 I 192705

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December 15, 1998  
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The Honorable Vernon A. Williams  
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1925 K Street, N.W.  
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DEC 15 1998  
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)**

I

Dear Secretary Williams:

Enclosed are an original and twenty-five (25) copies of CSX-170, "Motion of CSX Corporation and CSX Transportation, Inc. to Strike the Verified Statement of Joseph J. Plaistow Contained in 'Canadian Pacific Parties' Reply Evidence and Argument," for filing in the above-referenced docket.

Please note that a 3.5-inch diskette containing a WordPerfect 5.1 formatted copy of this filing is also enclosed.

Kindly date stamp the enclosed additional copy of this letter and CSX-170 at the time of filing and return them to our messenger.

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

Respectfully yours,

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

Enclosures  
via hand delivery

cc: All Parties to the Service List  
in Sub-No. 69

CSX-170

**SURFACE TRANSPORTATION BOARD**

**FINANCE DOCKET NO. 33388**



ENTERED  
Office of the Secretary

DEC 15 1998

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**

**Motion of CSX Corporation and CSX Transportation, Inc. to  
Strike the Verified Statement of Joseph J. Plaistow  
Contained in "Canadian Pacific Parties' Reply Evidence and Argument"  
(CP-25)**

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**December 15, 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**

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**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**

---

**Motion of CSX Corporation and CSX Transportation, Inc. to  
Strike the Verified Statement of Joseph J. Plaistow  
Contained in “Canadian Pacific Parties’ Reply Evidence and Argument”  
(CP-25)**

CSX Corporation and CSX Transportation, Inc. (collectively, “CSX”) respectfully move the Board to strike (to the extent specified herein) the Verified Statement of Joseph J. Plaistow, presented in “Canadian Pacific Parties’ Reply Evidence and Argument” (CP-25) on the grounds that it is improper rebuttal and should have been presented in the opening filing in this matter, that is, in CP-24 filed on November 30, 1998.

## BACKGROUND

By its Decision No. 102, served November 20, 1998, the Board launched an expedited proceeding, to determine the rights, and the terms of the rights, that were to be awarded to Canadian Pacific Railway Company and its affiliates (collectively, "CP") pursuant to the Board's Ordering Paragraph No. 28 in Decision No. 89, served July 23, 1998. The Board ordered simultaneous proposals from CP and CSX due November 30, 1998, and "simultaneous responses" due December 10, 1998.

In its proposal, CSX-167, filed on November 30, 1998, CSX took the position that, given Decision No. 89, trackage rights should be granted and that the trackage rights fee ought to be set through the formula traditionally imposed by the Board where it compels such rights. Compensation would be calculated to include an interest rental providing a fair return on the value of the routes in question and the "below the wheel" costs of ownership, operation, and maintenance of the lines in question (plus any special costs to the owner attributable peculiarly to the tenant's use of the line). This was to be determined by agreement between the parties or, failing agreement, by arbitration, and to be modified from time to time as changes in cost occurred. In that way, the costs to CSX and CP, who were to compete on the route in question, would be equalized. See CSX-167 at 14-20. Since CSX was not proposing a specific "per car mile" number as a starting point, no cost analysis was presented by CSX. CSX proposed that actual costs be determined by the process just mentioned after the Board had passed on the formula for compensation, and resolved any disputes as to what items of cost should be considered or as to whether equalization of costs

was to be effected at all. Similarly, CSX believed that CP would want to use the terminal facilities to be owned by NYC and operated by CSX in the Bronx and Queens and to have CSX switch for CP there. Accordingly, CSX proposed a similar basis of compensation as to those services.

In its simultaneous opening filing (CP-24), CP spent only one-half a page (CP-24 at 14 (second paragraph))<sup>1</sup> proposing and analyzing its proposal as to trackage rights compensation. CP's proposal was that CP "pay CSX the same 29 cents per car mile rate that CSX and NS pay each other pursuant to the trackage rights grants [reciprocally and voluntarily] provided for in the primary application," most of which were provided in order to cure "2 to 1" situations. As to terminal services, the position of CP was more baroque; it wanted terminal services from CSX – not just in the Bronx and Queens, as it turned out, but also at Albany – but generally it did not want to pay for them. It would pay for switching services, but wanted to pay, not their cost (including an interest rental for facilities) but the lower of cost or \$250 a car. CP-24 at 15-16.<sup>2</sup>

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<sup>1</sup> The entire paragraph reads as follows:

Specifically, CP proposes that it pay CSX the same 29 cents per car mile rate that CSX and NS pay each other pursuant to the trackage rights grants provided for in the primary application. This charge, which CSX has determined to be suitably compensable both in circumstances where it is a trackage rights tenant and a trackage rights landlord, affords an appropriate benchmark for the trackage rights fee CP should pay CSX. Just as the 29 cents per car mile allows CSX and NS to be effective competitors with one another over those lines where they will operate under trackage rights, so also the charge will allow CP to be an effective competitor with CSX on the east-of-the-Hudson line.

<sup>2</sup> Again, the \$250 cap was taken from historical voluntary and reciprocal arrangements, or those made for settlement purposes in the Primary Application or during its prosecution.

In both the case of the 29¢ per car mile trackage rights and the switching cap, the issue of relationship to CSX's costs on the Conrail lines and as to the terminal actions being allocated to it was not explored by CP either in argument or in any verified statement in CP-24. The only substantive verified statement presented by CP, by Paul Gilmore, mainly dealt with the three "access" routes that CP sought in the Greater Albany area. Nothing resembling a cost study was submitted, since obviously the proposal made by CP was to borrow some other numbers used for other purposes, rather than to contend that 29¢ per car mile or the \$250 number was an appropriate cost-based figure in the circumstances in question.

In CSX's rebuttal filing (CSX-169), CSX criticized the absence of cost justification, under the Board's precedents, for the 29¢ per car mile figure or \$250 cap on switching, and restated its original position. *Id.* at 7-15; *id.* at Potter R.V.S. at 5-9. No reply to any cost justification attempted by CP was supplied by CSX, since no cost justification had been attempted by CP.

In its December 10, 1998 reply filing (CP-25), filed simultaneously with the reply of CSX, for the first time CP attempted a cost justification, purportedly based on the Board's precedents in such matters. CP claimed that a verified statement sponsored by Mr. Joseph J. Plaistow "shows that the trackage rights fee and switching charge proposed by CP are reasonable and in accordance with Board precedents." CP-25 at 21. Mr. Plaistow's statement covered 20 pages of text and 33 pages of statistical and tabular material, some of it under a "Highly Confidential" designation.



Since this study was submitted in the second round of a two-round simultaneous filing procedure, and was not submitted in the original filing where it should have been so that a reply could have been given to it, it is improper rebuttal and should be stricken.

#### ARGUMENT

It is obvious that the Plaistow study should be stricken insofar as it discusses particular cost levels, and attempts to prove that the 29¢ per car mile figure and \$250 cap on switching charges are in agreement with the Board's established methods for fixing the amount of contested trackage rights fees and switching charges.<sup>3</sup> Mr. Plaistow's cost study ought to have been presented in the opening filing by CP on November 30, 1998, so that responsive criticism of it, which it richly deserves,<sup>4</sup> could have been made. But this is not the place to criticize the Plaistow methodology; that should await the arbitration and Board review, under the Board's usual procedures.

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<sup>3</sup> To some lesser extent, the Plaistow R.V.S. criticizes the formulae CSX proposed in its opening submission. That is, of course, legitimate rebuttal (though we disagree with it) and we do not ask that it be stricken. However, the material that is, as CP puts it, designed to demonstrate that the trackage rights fee and switching charge proposed by CP is are "reasonable and in accordance with Board precedents," should be stricken. Likewise, we do not seek to have stricken, although we oppose, the arguments made by CP (CP-25 at 16 n.18) and NYC/NYS (NYC-23/NYS-32 at 15-16) to the effect that the Board can impose whatever levels of charges it pleases, since if CSX does not like them, it does not have to consummate the transaction. The problem, among other things, is that CSX has already consummated the control of Conrail on the assumption that the Board would follow its precedents in implementing Ordering Paragraph No. 28.

<sup>4</sup> On a cursory review, it appears to make some of the same methodological errors made by Crowley (Decision No. 89 at 64 n.97), does not follow the principles followed in SSW Compensation, capitalizes the earning power of the line by using a selective mixture of CP's costs and CSX's costs, and treats the line as an historic CSX line rather than a Conrail line. As a consequence, a number much lower than even the Board's admittedly understated figure of 46¢ (*id.* at 141 and n.215) is produced.

CP originally presented the 29¢ and \$250 figures as its proposal, supported by no other justification than the simplistic argument that CSX had agreed to these charges in other situations and in other contexts. CP made no attempt whatsoever to justify the proposed figures under the Board's precedents governing costs and interest rental. CP's subsequent step of seeking to justify its proposed charges on that basis is an unfair tactic which the Board ought not to countenance. No harm would be done to CP by striking Mr. Plaistow's evidence; the Board can look to its precedents and establish a formula for the compensation CSX is entitled to receive for the rights the Board is granting. If Mr. Plaistow's views are submitted to the arbitrator (if the parties do not agree) and his version of the fair costs and return is correct, presumably the arbitrator, or the Board on review of the arbitrator's decision, will agree with him. While we do not think this likely, presumably CP does or it would not have submitted Mr. Plaistow's belated report.

#### CONCLUSION

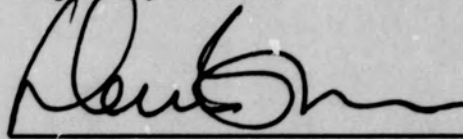
For the reasons stated, the Reply Verified Statement of Joseph J. Plaistow should be stricken to the extent set forth above.

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December 15, 1998

Respectfully submitted.



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## **CERTIFICATE OF SERVICE**

I, Dennis G. Lyons, certify that on December 15, 1998, I have caused to be served a true and correct copy of the foregoing CSX-170, "Motion of CSX Corporation and CSX Transportation, Inc. to Strike the Verified Statement of Joseph J. Plaistow Contained in 'Canadian Pacific Parties' Reply Evidence and Argument' (CP-25)," to the following parties, by first-class mail, postage prepaid, or by more expeditious means:

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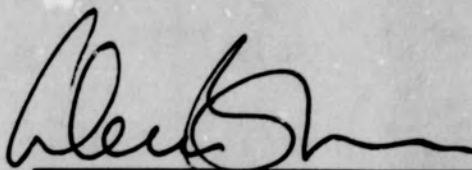
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A handwritten signature in dark ink, appearing to read 'Dennis G. Lyons', is written over a horizontal line.

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