STB FD-33388 (SUB 91) 04/28/03 D 207704

207704

April 28, 2003

By Hand

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

RE: STB Finance Docket No. 33388(Sub-No. 91)
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 (General Oversight)

Dear Secretary Williams:

Enclosed please find an original and twenty (25) copies of the Status Report and Request to Establish Deadline of Cargill, Incorporated.

Also, enclosed is one additional copy of the pleading for stamp and return. Kindly date-stamp the additional copy for return to this office by messenger.

If you have any questions, please do not hesitate to call. My direct dial number is (202) 263-4107.

Sincerely,

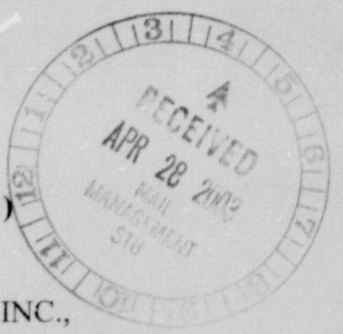
Jeffrey O. Moreno
Attorney for Cargill, Incorporated

cc: Mr. Jeffrey Johnson
Mr. Ron Hunter

207704

CARG-7

BEFORE THE
SURFACE TRANSPORTATION BOARD



STB FINANCE DOCKET NO. 33388 (SUB-NO. 91)

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

[GENERAL OVERSIGHT]

STATUS REPORT AND
REQUEST TO ESTABLISH DEADLINE
OF CARGILL, INCORPORATED

Cargill, Incorporated ("Cargill") hereby submits this Status Report and Request to Establish Deadline in the above-captioned proceeding.

In Comments filed on August 5, 2002, Cargill raised concerns that recent developments involving the fees charged by CSX to NS to preserve two-carrier access at Sidney, Ohio are inconsistent with the merger decision by not adequately protecting Cargill's shipments of agricultural products from Sidney, Ohio to NS-served destinations, effectively negating the protections that both carriers assured Cargill, as a 2-to-1 shipper at Sidney, would preserve two-carrier competition post-merger. At the request of CSX and NS, and without objection from Cargill, the Board extended the time for filing Reply Comments to Cargill until September 25, 2002, in order to allow the parties to reach a negotiated resolution of Cargill's concerns. See Decision No. 9 (served Sept. 13, 2002).

CSX and NS separately filed comments on September 25th, stating that CSX had sent a written proposal to Cargill, which was copied to NS, on the preceding day, September 24, 2002. Both railroads expressed hope that a negotiated resolution could be reached, although NS expressed some preliminary concerns regarding CSX's proposal.

The CSX proposal offered four alternative solutions to Cargill. After carefully considering each option, Cargill concluded that only the first option would implement the solution approved by the Board in the merger decision, by providing a cost-based interchange rate of $60 at Sidney. Cargill communicated this fact to CSX and NS, which initiated discussions to address the operating details of that option. Although Cargill was hopeful that these details would be addressed to everyone's mutual satisfaction in a prompt and timely manner, in its last Status Report on October 4, 2002, Cargill asked the Board to retain jurisdiction over this matter until such time as Cargill notified the Board that a final resolution had been reached. The Board agreed.

It has been nearly seven months since Cargill expressed optimism that CSX and NS would finalize an operational plan to implement the 2-to-1 solution that they originally proposed in their 1997 application for control of Conrail. As of this filing, however, no agreement exists between CSX and NS, and neither carrier can give Cargill a time frame for completion.

This extended period of uncertainty is detrimental to Cargill and it brings into question the carriers' commitment to follow through on their promises in the Conrail control application. Although NS has continued to absorb CSX's higher switching charges at Sidney while the negotiations continue, it is unclear how long NS will do so. Moreover, CSX has little incentive

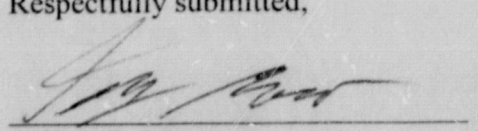
to alter the status quo, since the current arrangement assures it of higher revenues. Nevertheless, responsibility for the delay appears to lie equally with NS and CSX.

The current operating arrangement between CSX and NS also is detrimental to the efficiency of Cargill's operations. Currently, east-bound traffic out of Cargill's Sidney, Ohio facility to NS destinations must first move 100 miles west on CSX to Anderson and Indianapolis, Indiana for classification. Then the traffic retraces this 100 mile path back to Sidney and beyond to Marion, Ohio for interchange with NS. This detour is repeated on the empty return haul for a grand total of 400 excess rail miles. This 400-mile detour to the west unnecessarily increases the cycle times for Cargill's private fleet of rail cars. As a consequence, Cargill incurs higher product inventory costs and must maintain a larger fleet of rail cars.

Cargill does not know the precise reasons for the seven month delay in developing an operating plan to implement the Sidney, Ohio switching arrangement originally set forth in the Conrail control application. The carriers have not shared drafts of their operating agreement with Cargill, nor have they provided much explanation regarding the matters that are in dispute. Cargill no longer gives credence to repeated assurances that CSX and NS are close to agreement. This situation should not be permitted to continue indefinitely.

Therefore, Cargill requests the Board to establish a deadline of Friday, May 30, 2003 for CSX and NS to submit a final agreement to Cargill and the Board for the switching of Cargill's Sidney, Ohio traffic that is consistent with their commitments in the Conrail control application.

Respectfully submitted,



Jeffrey O. Moreno
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(202) 331-8800

Attorney for Cargill, Incorporated

April 28, 2003

CERTIFICATE OF SERVICE

I, Pamela D. Plummer, a secretary at the law firm of Thompson Hine LLP, do hereby certify that on this 28th day of April, 2003, a copy of the Status Report and Request to Establish Deadline of Cargill, Incorporated was served by first-class mail, postage prepaid, or more expedited method to the following:

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

Pamela D. Plummer

***by hand**

STB FD-33388 (SUB 91) 07/09/03 D 208331

FD 33388 Sub 91

TROUTMAN SANDERS LLP

ATTORNEYS AT LAW
A LIMITED LIABILITY PARTNERSHIP

208331

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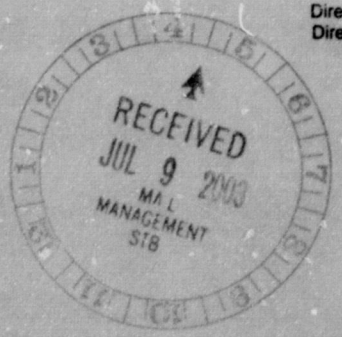
July 9, 2003



Honorable Vernon A. Williams
Office of the Secretary
Surface Transportation Board
1925 K Street, NW
Washington, DC 20423-0001

RE: **Change of Counsel/Change of Address**

Dear Secretary Williams:

Effective **Monday, July 14, 2003**, William A. Mullins and David C. Reeves will join the law firm of:

Baker & Miller PLLC
915 Fifteenth Street, NW
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Washington, DC 20005-2318
TEL: (202) 637-9499
FAX: (202) 637-9394
wmullins@bakerandmiller.com
dreeves@bakerandmiller.com

ENTERED
Office of Proceedings
JUL 09 2003
Part of
Public Record

Please update the Board's records to substitute Baker & Miller PLLC as counsel of record for all proceedings included on the enclosed list, and to reflect that Troutman Sanders LLP will no longer be counsel of record for clients represented by Messrs. Mullins and Reeves as noted on the enclosed list of proceedings in which either or both have entered an appearance. However, with respect to Finance Docket No. 33388 and 33388 (Sub No. 91), Baker and Miller should be shown as counsel of record for Gateway Western Railway Company and Troutman Sanders LLP should remain as counsel of record for New York State Electric and Gas.

Copies of any STB notices, pleadings or other correspondence related to these proceedings after July 11, 2003 should be sent to the attention of Messrs. Mullins or Reeves at Baker & Miller PLLC (at the address listed above).

All known parties of record in the proceedings listed on the enclosure have been sent a copy of this change of counsel/change of address notification.

Sincerely yours,

William A. Mullins and David C. Reeves

Enclosure

Change of Counsel/Change of Address Notification
for
William A. Mullins and David C. Reeves

Effective Monday, July 14, 2003

Baker & Miller PLLC
915 Fifteenth Street, NW
Suite 1000
Washington, DC 20005-2318

TEL: (202) 637-9499
FAX: (202) 637-9394

Docket No. Ex Parte No. or Finance Docket No.	List of Proceedings Before the STB
Docket No. AB-468 (Sub-No. 5X)	Paducah & Louisville Railway, Inc. - Abandonment Exemption - In McCracken County, KY
F.D. No. 34342	Kansas City Southern - Control - The Kansas City Southern Railway Company, Gateway Eastern Railway Company, And The Texas Mexican Railway Company
F.D. No. 34335	Keokuk Junction Railway Company - Feeder Railroad Development Application - Line Of Toledo, Peoria & Western Railway Corporation Between La Harpe And Hollis, IL
F.D. No. 34178	Dakota, Minnesota & Eastern Railroad Corporation And Cedar American Rail Holdings, Inc. - Control - Iowa, Chicago & Eastern Railroad Company
F.D. No. 34177	Iowa, Chicago & Eastern Railroad Company - Acquisition And Operation Exemption - Lines Of I&M Rail Link, LLC
F.D. No. 34015	Waterloo Railway Company - Acquisition Exemption - Bangor and Aroostook Railroad Company and Van Buren Bridge Company
F.D. No. 34014	Canadian National Railway Company - Trackage Rights Exemption - Bangor and Aroostook Railroad Company and Van Buren Bridge Company
F.D. No. 33740 and F.D. No. 33740 (Sub-No. 1)	The Burlington Northern and Santa Fe Railway Company - Petition For Declaration Or Prescription Of Crossing, Trackage Or Joint Use Rights and For Determination Of Compensation and Other Terms
F.D. 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
F.D. No. 33388 (Sub-No. 91)	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 (General Oversight)
F.D. No. 32760	Union Pacific Corporation, Union Pacific Railroad Company and Missouri Pacific Railroad Company - Control and Merger - Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp. and The Denver and Rio Grande Western Railroad Company
F.D. No. 32760 (Sub-No. 21)	Union Pacific Corporation, Union Pacific Railroad Company and Missouri Pacific Railroad Company - Control and Merger - Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp. and The Denver and Rio Grande Western Railroad Company - Oversight
F.D. No. 32760 (Sub-Nos. 26 - 32)	Union Pacific Corporation, Union Pacific Railroad Company and Missouri Pacific Railroad Company - Control and Merger - Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp. and The Denver and Rio Grande Western Railroad Company

JAMES E. McGREEVEY
GOVERNOR

JACK LETTIERE
COMMISSIONER

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DEPARTMENT OF TRANSPORTATION
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609-530-3535

July 14, 2003

208366

VIA HAND DELIVERY

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

Re: Finance Docket No. 33388 (Sub-No. 91)

Dear Secretary Williams:

I am Commissioner of Transportation for the State of New Jersey. The Northern New Jersey region is the freight distribution platform for 18 million consumers in the New York/New Jersey/Connecticut metro area and a major freight port of entry for large parts of North America. Northern New Jersey has experienced dramatic growth in freight traffic over the last several years and the growth trend will continue for many years to come. NJDOT has a genuine interest in ensuring that the North Jersey Shared Assets Area ("NJSAA") thrives and provides all the public benefits anticipated and described in the Application to acquire control of Conrail filed by Norfolk Southern Railway Company ("NS") and CSX Transportation ("CSX") and approved by the Surface Transportation Board.

NJDOT has significant concerns about the current gap between the promise and the reality of the NJSAA.

In their Application, CSX and NS anticipated many public benefits as a result of the NJSAA:

- CSX and NS claimed that NJSAA shippers would "benefit from extended single-line routing opportunities, improved service and increased competition..." (CSX/NS-119 at 22.)
- CSX and NS indicated that they would "compete vigorously for traffic in the NJSAA." (Id. at 8.)
- CSX and NS said the NJSAA Operating Plan took into account "increases in traffic from both truck-to-rail diversions resulting from the more efficient rail service made available by the transaction and traffic growth from new marketing opportunities made available by the transaction." (Id. at 141.)
- NS indicated that it would institute new intermodal and Triple Crown operations that would improve services to and from Northern New Jersey and provide a viable alternative to trucks in several service lanes. (Id. at 44.)
- CSX and NS indicated that both railroads would "invest heavily in capital improvements to their respective systems in order to assure that they have the necessary facilities to compete effectively" in the NJSAA market. (Id. at 9.)

Unfortunately, the public benefits anticipated by CSX and NS have not come to fruition. The NJSAA has not resulted in the promised pro-competitive effects. Many shippers have seen no increased competition, despite attempts by shippers and shortlines to facilitate competition.

NS has not used facilities in North Jersey to offer attractive and more competitive single-line services to domestic shippers. NS has opted-out of rail service in the NJSAA. NS has openly marketed its rail facilities outside of the NJSAA and has informed shippers of the higher cost of all-rail moves into and out of the NJSAA as compared to truck-rail moves. NS marketing efforts have increased truck traffic in Northern New Jersey.

CSX and NS agreed to provide and implement economic development plans to promote the development of rail traffic within the Port Authority of New York and New Jersey's Port District, which covers virtually all of the NJSAA. CSX and NS have yet to develop these economic development plans.

I have informed NS and CSX of NJDOT's concerns regarding the NJSAA. NS and CSX do not share NJDOT's view of the gap between the promise and the reality of the NJSAA, but they have agreed to meet and confer with NJDOT over the next several months to discuss our concerns. Because of their agreement to meet, and our shared desire to resolve our differences outside of the Board process, NJDOT does not now seek any Board-imposed changes with respect to the NJSAA. However, if our discussions with NS and CSX are not fruitful, NJDOT will seek Board-imposed changes with respect to the NJSAA. I am pleased that the Board intends to continue general oversight for the full 5-year term. The Board's continued oversight will facilitate resolution of NJDOT's concerns through negotiations.

Respectfully submitted,

Jack Lettiere

Jack Lettiere
Commissioner of Transportation

cc: Parties of Record

208369

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 33388 (Sub-No. 91)

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

General Oversight

COMMENTS OF
NATIONAL LIME AND STONE COMPANY

Pursuant to the Surface Transportation Board's (Board) November 5, 2002 General Oversight Decision No. 10, National Lime and Stone Company (National) hereby submits these comments on the status of Condition No. 43 to the Conrail Transaction, as ordered by the Board in Decision No. 89 of the Conrail proceeding and modified in Decision No. 96.

I. Background

In Decision No. 89, the Board imposed on CSX Transportation, Inc. (CSX) and Norfolk Southern Railway Company (NS) Condition No. 43, which states that CSX and NS "must adhere to their offer to provide single-line service for all existing movements of aggregates, provided they are tendered in unit-trains or blocks of 40 cars or more[.]" In Decision No. 96, the Board held that Condition No. 43 would include a 5-year term from Day 1 (June 1, 1999), such that the condition would end on June 1, 2004. The Board stated: "Nonetheless, because of the uniqueness of these shippers, and because we do not as yet have any firm projections of the inefficiencies the relief we have crafted will impose on the nation's rail system and the public

interest, we will permit these shippers the opportunity, during the course of our oversight of this transaction, to keep us appraised of their need for continued single-line service as measured against the costs and inefficiencies this would impose on CSX and NS." STB Finance Docket No. 33388, Decision No. 96, October 19, 1998, page 9.

In the first such annual review, National submitted a verified statement and a renewed request for an extension of the 5-year term of Condition No. 43. The Board stated that there had been "little opportunity to test NL&S' claim that loss of single-line service will result in severe harm to it. Thus, NL&S provides no basis for modifying the 5-year term of the condition as it requests." STB Finance Docket No 33388 (Sub-No. 91), Decision No. 5, February 2, 2001, page 16.

II. Comments

Throughout the past four years, National has relied on the service obtained through operation of Condition No. 43 to move limestone aggregate from National's Bucyrus quarry to its sales yard in Wooster. The service is provided by CSX, which has the right pursuant to Condition No. 43 to operate on NS track near Bucyrus. As National explained in the first annual oversight proceeding, National invested over $12 million at its Bucyrus and Wooster facilities. These investments were predicated on National's ability to ship aggregates from its Bucyrus quarry to its Wooster sales yard using Conrail single-line service. The value of these investments would be severely diminished if National were unable to ship its aggregate products to these locations by means of single-line rail service.

During the four-year term of Condition No. 43, National has shipped approximately 225,000 tons per year of aggregate from its Bucyrus quarry to its Wooster sales yards. Sales from Wooster based on these shipments have generated approximately $2.5 million per year in

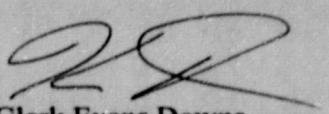
revenues for National. Although these volumes have been depressed by the downturn in the economy, National anticipates that, as the economy regains strength, this traditional business will recover such that shipments of approximately 350,000 tons per year from Bucyrus to Wooster will be needed. In addition, through the integrated operations of its Bucyrus quarry and its Wooster sales yard, National is positioned to bid on three substantial new projects (two paving agreements and a highway relocation) from Wooster, which would require additional shipments of aggregates from Bucyrus to Wooster of approximately 650,000 tons per year over the next three years. Such integrated operations are impossible without the service National currently obtains from CSX pursuant to Condition No. 43.

National and CSX are negotiating a new service agreement to replace the service National presently receives under the auspices of Condition No. 43. CSX has represented that it is willing to continue providing such service to National. However, these negotiations with CSX are not yet complete, and the agreement of NS has not yet been obtained.

Based on the status of these discussions with CSX, National is hopeful that it will reach an agreement preserving adequate rail service and reasonable pricing between Bucyrus and Wooster. Nevertheless, National takes this opportunity to stress, once again, that this service and pricing is essential to National's business and operations and to enable National to compete effectively in the markets served by the Wooster sales yard. Termination of Condition No. 43 would impose a material economic hardship on National that is a direct result of the Conrail Transaction. As the Board recognized, joint-line service is inherently more costly than and inferior in quality to single-line service. Moreover, CSX and NS have not presented a scintilla of evidence that National's high-volume, single-line movement of aggregates from Bucyrus to Wooster imposes an operational burden on the railroads.

Rather than seek continuation of Condition No. 43 at this time, National believes that the appropriate step is for the parties to complete the negotiation of a business arrangement to replace Condition No. 43. However, to the extent that no such agreement can be reached prior to the expiration of Condition No. 43, National intends to request that the Commission issue a supplemental order pursuant to 49 U.S.C. 11327 revising Condition No. 43 so that the Condition would continue beyond its current 5-year term. *See Canadian National/Illinois Central Oversight*, STB Finance Docket No. 33556 (Sub-No. 4), Decision No. 3 (STB served Nov. 7, 2001), slip op. at 4 ("we have authority independent of the formal oversight process to enforce or revise merger conditions as warranted upon request or on our own initiative"); *Canadian National/Illinois Central Oversight*, STB Finance Docket No. 33556 (Sub-No. 4), Decision No. 4 (STB served Dec. 27, 2001).

Respectfully submitted,



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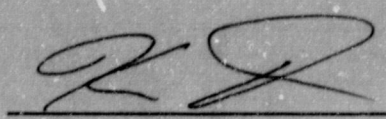
Counsel for
NATIONAL LIME & STONE COMPANY

July 14, 2003

CERTIFICATE OF SERVICE

I certify that I will cause today to be served a conformed copy of the foregoing "Comments of National Lime and Stone Company" by first class mail, properly addressed with postage prepaid, or more expeditious manner of delivery, upon all parties of record in Finance Docket No. 33388 (Sub-No. 91).

Dated at Washington, D.C., this 14th day of July, 2003.



Kenneth B. Driver

NORTH JERSEY TRANSPORTATION PLANNING AUTHORITY, INC.

One Newark Center, 17th floor, Newark, NJ 07102
(973) 639-8400 • fax (973) 639-1953 • www.njtpa.org

Theodore J. Narozanick, Chairman
Joel S. Weiner, Executive Director

208384

July 14, 2003

VIA HAND DELIVERY

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

Re: Finance Docket No. 33388 (Sub-No. 91), CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company—Control and Operation Leases/Agreements—Conrail Inc. and Consolidated Rail Corporation [General Oversight]

Dear Secretary Williams:

We are officers of the North Jersey Transportation Planning Authority (NJTPA), which is the Metropolitan Planning Organization for the northern thirteen counties of the State of New Jersey. The NJTPA is the fourth largest MPO in the U.S. encompassing the most densely populated area of the most densely populated state in the country. The NJTPA is responsible for planning and allocating federal transportation funds for the maintenance and upgrade of transportation infrastructure within our region. Our jurisdiction covers the entire area of the northern zone of the New Jersey Conrail Shared Assets Operator (NJ-CSAO) in New Jersey, which is owned and operated by CSX Transportation and Norfolk Southern Railway, Inc.

Northern New Jersey has some of the largest and most complex rail infrastructure east of Chicago. This infrastructure includes 20 rail yards, including some of the largest intermodal yards on the Atlantic seaboard, and 189 route miles of track. It has the largest port facilities on the Atlantic Coast of the U.S.—the Port of New York and New Jersey. These facilities guarantee that northern New Jersey is the distribution platform for the New York/New Jersey/Connecticut metro market of 18 million people as well as the entry point for overseas cargo destined to nearly all consumer markets in North America.

We write to inform the Board that the Board of Trustees of the NJTPA concurs with the views and concerns expressed in a July 14, 2003 letter conveyed to the Surface Transportation Board by the Commissioner of the New Jersey Department of Transportation (NJDOT), John F. Lettiere. These concerns relate to the apparent lack of progress by CSX Transportation and Norfolk Southern Railway in living up to promises made in respect to the operations of the CSAO as part of the Conrail merger agreement (Finance Docket 33388).

In particular, our concerns include the following:

- Northern New Jersey is an air quality non-attainment zone, as is the entire state. Commitments made by CSX and NS to divert truck traffic to rail, as cited by Commissioner Lettiere, have not been fulfilled, resulting in increased pollution in the State of New Jersey and the NJTPA region. One factor adding to this pollution is the apparent operational decision and policy by NS to encourage rail customers to off-load New Jersey-bound traffic outside of the NJCSAO area in Pennsylvania and possibly other locations. The result has been a significant increase of goods trucked into and out of the state.
- The increased truck traffic resulting from this off-loading traffic before it reaches the state by rail as well as other policies to encourage New Jersey rail business to relocate to areas outside of the NJCSAO area have added to already severe congestion levels on key highway facilities in northern New Jersey. In addition, this increasingly heavy truck traffic resulting from diversions of New Jersey bound rail traffic results in deteriorated roadways, bridges and other important infrastructure in New Jersey, and raises safety concerns when this diverted truck traffic uses local roads and highways.
- Neither CSX nor NS railroads have developed an adequate economic development plan as promised pursuant to an agreement under the Conrail transaction with the Port Authority of New York and New Jersey within the Port District, which includes most the CSAO area. This limits the jobs and economic benefits for the region that were expected as a result of the Conrail merger.
- Freight traffic in northern New Jersey is expected to experience huge growth in coming years. Port container volume will double in ten to twenty years and then double again within forty to sixty years (reference.: Port Authority of New York and New Jersey Port Master Plan; Comprehensive Port Improvement Plan; U.S. Army Corps of Engineers Harbor Navigation Study; NJDOT's Portway Extensions Concept Development Study). Mini-landbridge rail traffic from the West Coast destined to the major consumer markets of our service region is also expected to grow. Given these growth projections, the region will experience choking congestion on its transportation systems and will suffer serious economic and environmental injury without a strong effort by CSX, NS and CSAO to increase rail's share of the traffic.
- CSAO's corporate structure does not allow it to market services, quote rates, engage in economic development, or operate as a profit center. A

reorganization of the CSAO's corporate structure could aid in fulfilling some of the promises held out by the Conrail/CSX/NS merger. Providing these services, which are not allowed today by the shared ownership, could aid the NJTPA region and the State of New Jersey to move more traffic by rail, and lessening congestion on its highways.

- The current operational structure of CSAO is such that each railroad has veto power over investments to improve or provide new rail infrastructure to serve rail customers.

We want to see the Conrail Shared Assets Operator prosper as an operating entity, which will only accrue to the benefit of its owners—CSX and NS.

We urge the Board to continue its oversight over the CSAO and other relevant New Jersey Conrail merger agreements over the next year. This will allow a period of time for the Commissioner of NJDOT and CSX, NS and CSAO railroads to conduct negotiations to resolve serious outstanding issues related to operations of CSAO following the Conrail merger. Should these negotiations fail to produce acceptable changes in the current operations and policies of CSX, NS and CSAO, the NJTPA respectfully reserves the right to seek Board intervention to change the conditions under which CSAO operates in our region and in the State of New Jersey under Finance Docket 33388.

Respectfully,

Theodore J. Narozanick
Chairman of the Board of Trustees
NJTPA

Peter Palmer
Vice Chairman, NJTPA;
Chairman, NJTPA Freight
Initiatives Committee

208470

NORTH JERSEY TRANSPORTATION PLANNING AUTHORITY, INC.

One Newark Center, 17th floor, Newark, NJ 07102
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Theodore J. Narozanick, Chairman
Joel S. Weiner, Executive Director

July 16, 2003

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

Re: Finance Docket No. 33388 (Sub-No. 91), CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company—Control and Operation Leases/Agreements—Conrail Inc. and Consolidated Rail Corporation [General Oversight]

CERTIFICATE OF SERVICE

This notice is to certify that a copy of a letter prepared by officers of the North Jersey Transportation Planning Authority (NJTPA) has been sent to each Party of Record of the Conrail/CSX/NS Transaction (Surface Transportation Board Finance Docket 33888—Sub-No.91).

The NJTPA is a TEA-21 sponsored Metropolitan Planning Organization for the northern thirteen counties of New Jersey.

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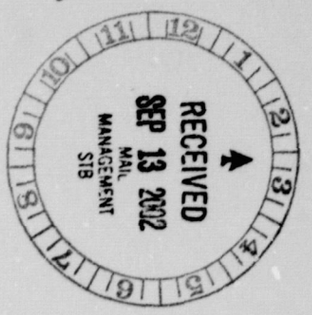

September 13, 2002

BY HAND DELIVERY

Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

Re: CSX Corp. *et al.* – Control and Operating Leases/Agreements – Conrail Inc. *et al.*, Finance Docket No. 33388 (Sub-No. 91) (General Oversight)
EXPEDITED CONSIDERATION REQUESTED

Dear Secretary Williams:

Enclosed for filing in the above-referenced proceeding on behalf of CSX Corporation, CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company are the original and 25 copies of CSX/NS-2, CSX's and NS' request for extension of time with respect to the comments of Cargill, Inc. Also enclosed is a 3.5-inch computer disk containing the text of CSX/NS-1 in WordPerfect 5.0 format.

Kindly date-stamp the enclosed additional 4 copies of CSX/NS-2 and return them to our messenger.

Sincerely,

Scott M. Zimmerman

Enclosures

cc: All parties of record

EXPEDITED CONSIDERATION REQUESTED

CSX/NS-2

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB FINANCE DOCKET NO. 33388 (SUB-NO. 91)

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 (GENERAL OVERSIGHT)

UNOPPOSED REQUEST OF CSX AND NORFOLK SOUTHERN FOR EXTENSION OF TIME WITH RESPECT TO THE COMMENTS OF CARGILL, INC.

Richard A. Allen
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Counsel for Applicants
CSX Corporation and CSX Transportation, Inc.

Dated: September 13, 2002

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 33388 (Sub-No. 91)

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 (GENERAL OVERSIGHT)

UNOPPOSED REQUEST OF CSX AND NORFOLK SOUTHERN FOR EXTENSION OF TIME WITH RESPECT TO THE COMMENTS OF CARGILL, INC.

CSX Corporation and CSX Transportation, Inc. (collectively "CSX"), and Norfolk Southern Corporation and Norfolk Southern Railway Company (collectively "NS") hereby request a further extension of time, to and including Wednesday, September 25, 2002, to respond to the comments submitted by Cargill, Incorporated ("Cargill") (CARG-5) on August 5, 2002.[1] Counsel for Cargill has indicated that Cargill consents to this request.

As previously indicated (*see* CSX/NS-1 at 3), the carriers have engaged in ongoing discussions between themselves and with Cargill in an effort to resolve the concerns expressed in Cargill's comments. Although a final resolution has yet to be reached, the carriers believe that the requested additional brief extension will facilitate that resolution.

---

[1] Previously, the carriers requested, and the Board granted, a 21-day extension of time to September 16, 2002. *See* CSX/NS-1 and Decision No. 8 (served August 26, 2002).

CONCLUSION

CSX and NS respectfully ask the Board to grant them an extension to and including Wednesday, September 25, 2002, within which to reply to the Cargill Comments.

Respectfully submitted,

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

Dated: September 13, 2002

CERTIFICATE OF SERVICE

I certify that on this 13th day of September, 2002, a copy of the foregoing "Unopposed Request Of CSX And Norfolk Southern For Extension of Time With Respect To The Comments Of Cargill, Inc." was served by hand delivery on the below-named counsel for Cargill, Inc.:

Jeffrey O. Moreno
Thompson Hine LLP
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Washington, D.C. 20036

and on all other parties of record in Finance Docket No. 33388 (Sub-No. 91) by first-class mail, postage prepaid, or more expedited method.

Scott M. Zimmerman

STB FD-33388 (SUB 91) 9-13-02 D 206195

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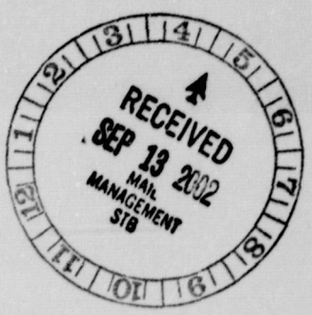
September 13, 2002



BY HAND DELIVERY

Vernon A. Williams
Secretary
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1925 K Street, N.W.
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Re: CSX Corp. *et al.* – Control and Operating Leases/Agreements – Conrail Inc. *et al.*, Finance Docket No. 33388 (Sub-No. 91) (General Oversight)
EXPEDITED CONSIDERATION REQUESTED

Dear Secretary Williams:

Enclosed for filing in the above-referenced proceeding on behalf of CSX Corporation, CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company are the original and 25 copies of CSX/NS-2, CSX's and NS' request for extension of time with respect to the comments of Cargill, Inc. Also enclosed is a 3.5-inch computer disk containing the text of CSX/NS-1 in WordPerfect 5.0 format.

Kindly date-stamp the enclosed additional 4 copies of CSX/NS-2 and return them to our messenger.

ENTERED
Office of Proceedings
SEP 13 2002
Part of
Public Record

Sincerely,

Scott M. Zimmerman

Enclosures

cc: All parties of record

EXPEDITED CONSIDERATION REQUESTED

CSX/NS-2

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB FINANCE DOCKET NO. 33388 (SUB-NO. 91)

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 (GENERAL OVERSIGHT)

UNOPPOSED REQUEST OF CSX AND NORFOLK SOUTHERN FOR EXTENSION OF TIME WITH RESPECT TO THE COMMENTS OF CARGILL, INC.

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Dated: September 13, 2002

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 33388 (Sub-No. 91)

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 (GENERAL OVERSIGHT)

UNOPPOSED REQUEST OF CSX AND NORFOLK SOUTHERN FOR EXTENSION OF TIME WITH RESPECT TO THE COMMENTS OF CARGILL, INC.

CSX Corporation and CSX Transportation, Inc. (collectively "CSX"), and Norfolk Southern Corporation and Norfolk Southern Railway Company (collectively "NS") hereby request a further extension of time, to and including Wednesday, September 25, 2002, to respond to the comments submitted by Cargill, Incorporated ("Cargill") (CARG-5) on August 5, 2002.[1] Counsel for Cargill has indicated that Cargill consents to this request.

As previously indicated (*see* CSX/NS-1 at 3), the carriers have engaged in ongoing discussions between themselves and with Cargill in an effort to resolve the concerns expressed in Cargill's comments. Although a final resolution has yet to be reached, the carriers believe that the requested additional brief extension will facilitate that resolution.

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[1] Previously, the carriers requested, and the Board granted, a 21-day extension of time to September 16, 2002. *See* CSX/NS-1 and Decision No. 8 (served August 26, 2002).

CONCLUSION

CSX and NS respectfully ask the Board to grant them an extension to and including Wednesday, September 25, 2002, within which to reply to the Cargill Comments.

Respectfully submitted,

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Counsel for Applicants CSX Corporation and CSX Transportation, Inc.

Dated: September 13, 2002

CERTIFICATE OF SERVICE

I certify that on this 13th day of September, 2002, a copy of the foregoing "Unopposed Request Of CSX And Norfolk Southern For Extension of Time With Respect To The Comments Of Cargill, Inc." was served by hand delivery on the below-named counsel for Cargill, Inc.:

Jeffrey O. Moreno
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and on all other parties of record in Finance Docket No. 33388 (Sub-No. 91) by first-class mail, postage prepaid, or more expedited method.

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From: Scott M. Zimmerman

Date: September 13, 2002 Number of Pages (Including This Sheet): 6

Please deliver immediately to:

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MESSAGE

Courtesy copy.

33044
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SERVICE DATE - LATE RELEASE SEPTEMBER 13, 2002

SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 33388 (Sub-No. 91)

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

[GENERAL OVERSIGHT]

Decision No. 9

Decided: September 13, 2002

In Decision No. 8 (served August 26, 2002), the deadline for filing replies to the comments previously filed by Cargill, Incorporated (Cargill), was extended to September 16, 2002.

On September 13, 2002, CSX Corporation and CSX Transportation, Inc. (collectively, CSX) and Norfolk Southern Corporation and Norfolk Southern Railway Company (collectively, NS) jointly filed a request for an additional extension, to September 25, 2002, of the deadline for filing replies to the Cargill comments. CSX and NS advise that they have been engaged in discussions with Cargill in an effort to resolve the concerns expressed in Cargill's comments and, although they have not yet reached a final resolution, they believe that the requested additional extension will facilitate that resolution. CSX and NS add that counsel for Cargill has indicated that Cargill consents to their request.

The request for an additional extension of the reply deadline is reasonable and will therefore be granted.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The deadline for filing replies to the Cargill comments is extended to September 25, 2002.

2. This decision is effective on the date of service.

By the Board, Vernon A. Williams, Secretary.

Vernon A. Williams
Secretary

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August 26, 2002

BY HAND DELIVERY

206101

Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

Re: CSX Corp. *et al.* – Control and Operating Leases/Agreements – Conrail Inc. *et al.*, Finance Docket No. 33388 (Sub-No. 91) (General Oversight)
EXPEDITED CONSIDERATION REQUESTED

Dear Secretary Williams:

Enclosed for filing in the above-referenced proceeding on behalf of CSX Corporation, CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company are the original and 25 copies of CSX/NS-1, CSX's and NS' request for extension of time with respect to the comments of Cargill, Inc. Also enclosed is a 3.5-inch computer disk containing the text of CSX/NS-1 in WordPerfect 5.0 format.

Kindly date-stamp the enclosed additional 4 copies of CSX/NS-1 and return them to our messenger.

Sincerely,

Scott M. Zimmerman

Enclosures

cc: All parties of record

EXPEDITED CONSIDERATION REQUESTED

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB FINANCE DOCKET NO. 33388 (SUB-NO. 91)

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 (GENERAL OVERSIGHT)

REQUEST FOR EXTENSION OF TIME WITH RESPECT TO THE COMMENTS OF CARGILL, INCORPORATED, OF CSX CORPORATION, CSX TRANSPORTATION, INC., NORFOLK SOUTHERN CORPORATION AND NORFOLK SOUTHERN RAILWAY COMPANY

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Counsel for Applicants
CSX Corporation and CSX Transportation, Inc.

Dated: August 26, 2002

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 33388 (Sub-No. 91)

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 (GENERAL OVERSIGHT)

REQUEST FOR EXTENSION OF TIME WITH RESPECT TO THE COMMENTS OF CARGILL, INCORPORATED, OF CSX CORPORATION, CSX TRANSPORTATION, INC., NORFOLK SOUTHERN CORPORATION AND NORFOLK SOUTHERN RAILWAY COMPANY

CSX Corporation and CSX Transportation, Inc. (collectively "CSX"), and Norfolk Southern Corporation and Norfolk Southern Railway Company (collectively "NS") hereby request an extension of time of 21 days, to and including Monday, September 16, 2002, to respond to the comments submitted by Cargill, Incorporated ("Cargill") (CARG-5) on August 5, 2002.[1]

CSX and NS view Cargill as an important and valued customer, and have been involved in conferences with one another in an effort to satisfy the concerns expressed by Cargill in its comments. These discussions are ongoing.

CSX and NS also are mindful that the Board, on an issue such as this, would prefer that the parties reach a negotiated resolution.

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[1] CSX and NS take no exception to Cargill's filing out of time.

Although CSX and NS originally believed they could respond to Cargill's comments within 20 days, on August 26, 2002, they are not yet in a position to make a proposal to Cargill. The carriers believe, however, that the requested extension will permit them to advance their discussions and ultimately arrive at a negotiated resolution that is acceptable to all parties involved.

CONCLUSION

CSX and NS respectfully ask the Board to grant them an extension of 21 days, or through and including Monday, September 16, 2002, within which to reply to the Cargill Comments.

Respectfully submitted,

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Counsel for Applicants
CSX Corporation and CSX Transportation, Inc.

Dated: August 26, 2002

CERTIFICATE OF SERVICE

I certify that on this 26th day of August, 2002, a copy of the foregoing "Request for Extension of Time With Respect to the Comments of Cargill, Incorporated, of CSX Corporation, CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company" was served by hand delivery and facsimile on the below-named counsel for Cargill, Inc.:

Jeffrey O. Moreno
Thompson Hine LLP
1920 N Street, NW
Suite 800
Washington, D.C. 20036

and on all other parties of record in Finance Docket No. 33388 (Sub-No. 91) by first-class mail, postage prepaid, or more expedited method.

Scott M. Zimmerman

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August 7, 2002

BY HAND DELIVERY

205999

Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

Re: CSX Corp. *et al.* – Control and Operating Leases/Agreements – Conrail Inc. *et al.*, Finance Docket No. 33388 (Sub-No. 91) (General Oversight)

Dear Secretary Williams:

Enclosed for filing in the above-referenced proceeding are the original and 25 copies of NS-9, the "Reply Of Norfolk Southern Corporation And Norfolk Southern Railway Company." Also enclosed is a 3.5-inch computer disk containing the text of NS-9 in WordPerfect 5.0 format.

Kindly date-stamp the enclosed additional 3 copies of NS-9 and return them to our messenger.

Sincerely,

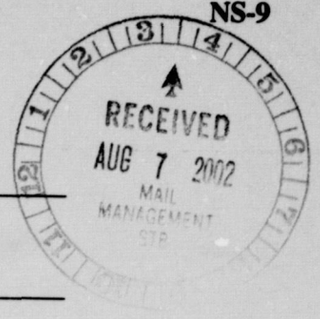
Scott M. Zimmerman

Enclosures

cc: All parties of record

205999

NS-9



BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET No. 33388 (Sub-No. 91)

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

(GENERAL OVERSIGHT)

REPLY OF NORFOLK SOUTHERN CORPORATION AND NORFOLK SOUTHERN RAILWAY COMPANY

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Date: August 7, 2002

BEFOPE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET No. 33388 (Sub-No. 91)

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

(GENERAL OVERSIGHT)

REPLY OF NORFOLK SOUTHERN CORPORATION AND NORFOLK SOUTHERN RAILWAY COMPANY

Norfolk Southern Corporation and Norfolk Southern Railway Company (collectively, "NS") hereby reply to the comments submitted by various parties in the third annual round of the Conrail general oversight proceeding.

This reply addresses the submissions of the following eleven parties: (1) the American Chemistry Council, (2) the City of Cleveland, (3) Congressman Dennis J. Kucinich, (4) Indianapolis Power & Light Company, (5) the New York City Economic Development Corporation, (6) the Port Authority of New York and New Jersey, (7) PPG Industries, Inc.,

(8) SEDA-COG Joint Rail Authority, (9) the State of Maryland, (10) the U.S. Department of Transportation, and (11) the Wheeling & Lake Erie Railway Company.[1]

None of these parties ask the Board to impose any new conditions, and the comments provide no basis to suggest that any new relief or other action by the Board is necessary. We will briefly discuss each party's comments in turn. Because the question of the need for ongoing formal oversight is a common issue touched on by most of the commentors (and raised by the Board in its decision served June 11, 2002), NS will discuss that issue separately at the end.

American Chemistry Council

ACC asks that Board oversight of the transaction continue for the original five-year period, based on alleged "potential" threats to future competition and service in the Shared Assets Areas, particularly in North Jersey and South Jersey/Philadelphia. ACC, however, raises no specific issues requiring Board intervention and seeks no relief from the Board now.

Operations in the Shared Assets Areas remain generally smooth and within normal operating parameters. Norfolk Southern is, of course, well aware of its obligations under Decision No. 89 and its legal obligations generally, and will continue to conduct its business,

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[1] Late in the afternoon of August 5, 2002, Cargill, Incorporated served a set of comments along with a separate motion for leave to file those comments out of time. NS does not oppose Cargill's motion for leave to file. However, due to the very short time between receipt of Cargill's comments and the deadline for filing this reply, NS has not had a reasonable opportunity to review and respond to Cargill's submission here. NS therefore respectfully requests that if the Board accepts Cargill's comments it permit NS to respond separately to Cargill, as appropriate, on or before August 25, 2002, consistent with the 20-day period generally permitted for responses to pleadings under 49 C.F.R. § 1104.13(a).

including its operations within the Shared Assets Areas, in compliance with both. As for the question of continuing the formal oversight proceeding, that issue is addressed further below.

City of Cleveland

Cleveland's comments pertain solely to CSX, and NS therefore need not respond further to them.

Congressman Dennis J. Kucinich

Congressman Kucinich states that in general, he is "pleased" with the progress of issues affecting communities in his district, and particularly notes his approval of NS' efforts in Bay Village, Rocky River, Lakewood, Olmsted Falls and Olmsted Township. He raises no specific issues with respect to NS.

NS will continue to seek to work cooperatively with local officials on issues affecting the communities through which NS operates.

Indianapolis Power & Light Company

Although IP&L summarily asserts that the "concerns" it expressed in the first two rounds of oversight are "genuine and continuing," IP&L provides no new evidence or argument and requests no new relief regarding those "concerns." There is, therefore, nothing to which NS need reply, and no basis for the Board to impose any further conditions for IP&L's benefit.

As for the continuation of oversight, IP&L contends that the Board could forego the remaining two years of formal oversight, but "only if the Board indicates its willingness to entertain comments from parties at any time who assert that their circumstances require relief and are the result, in whole or in part, of this transaction as modified and approved by the Board." Additionally, IP&L seems to assert that, if formal oversight is discontinued, the Board should create a separate, and lenient, standard of review as to any subsequent requests for relief by any party, such as IP&L itself, that the Board had specifically "invited to return," and should waive any filing fee that otherwise would apply to any future request for relief.

NS responds more fully below to the general question of whether the formal oversight proceeding should continue. We note here only that, if the Board does decide to end the formal oversight process now, there is no basis for doing so in a way that gives any party or class of parties preferential standing vis-a-vis other parties for airing future concerns with the Board or a more lenient legal standard for obtaining future relief than that afforded to all parties generally under the Board's governing statutes, regulations and precedents.

New York City Economic Development Corporation

NYCEDC's comments are focused primarily on its request that the Board continue to require CSX and NS to monitor and report quarterly on the origins, destinations and routings for truck traffic at their intermodal terminals in Northern New Jersey and Massachusetts, a reporting requirement imposed by the Board in Decision No. 89 as part of the general

oversight process[2] to permit the Board to determine whether the transaction "has led to substantially increased truck traffic over the George Washington Bridge." *Decision No. 89* at 177, 3 S.T.B. at 388, Ordering Paragraph No. 22. In any event, NYCEDC does not ask the Board to take any action or impose any affirmative relief except simply to request that oversight continue.

NS addresses the general issue of oversight below. As for the George Washington Bridge surveys, NS merely observes that, because they were initiated as part of the general oversight proceeding and for a specific, limited purpose, those reports should be continued only if the Board continues the formal oversight process, and even then only if the Board concludes that the reports continue to serve the specific transaction-related purpose for which it imposed the requirement.

Port Authority of New York and New Jersey

The Port Authority states that it "is pleased that many of the service problems that initially plagued the NJSAA have been resolved," but also remarks that "[l]ocalized service problems still exist from time to time, and the carriers remain woefully short of capital to make investments in the NJSAA." The Port Authority says that its continuing efforts to seek public funds for rail investments have been hampered by the September 11 attacks, but that it "expects to re-energize its efforts to provide public sector funds."

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[2] NYCEDC questions whether the quarterly reporting requirement was imposed as a component of the general oversight proceeding or as part of the operational monitoring separately required in Decision No. 89. Decision No. 89 indicates it is the former. *See Decision No. 89* at 82 and 161, 3 S.T.B. at 282 and 366.

The Port Authority does not allege any problems calling for Board intervention nor seek any relief from the Board, except to assert that continuing oversight is needed. NS continues to invest in the North Jersey Shared Assets Area and the other SAAs, as described in NS' Third General Oversight Report (including, among other things, the ongoing Northern Branch project in the NJSAA). *See* NS-8 at 16. Additionally, as noted above in response to ACC, operations in the Shared Assets Areas remain within normal operating parameters. NS will continue to work to ensure smooth and reliable service in the SAAs and resolve any service issues as they arise.

PPG Industries, Inc.

PPG states that after initial post-Split difficulties, both CSX and NS "have strived to improve operations and should be commended for their efforts." PPG notes that "service has become more consistent," although it does not "always" meet pre-transaction levels.

In its brief comments, PPG raises no competitive concerns and seeks no specific relief from the Board, except to request that the oversight proceeding continue so that the carriers' service can be evaluated "after a sustained period of strong economic activity." Continuation of oversight is addressed generally below.

SEDA-COG Joint Rail Authority

The SEDA-COG Joint Rail Authority ("SEDA-COG"), owner of certain lines of railroad operated by the North Shore Railroad Company and its affiliates (collectively, "North Shore"), submits a verified statement by its Executive Director, Jeffrey K. Stover, along with

a "Joint Statement of Shippers" endorsed by certain shippers located on lines operated by North Shore, and a "Joint Statement of Rail Line Owners" by two other entities that own other rail lines operated by one of the North Shore affiliates.

Mr. Stover notes that NS' "transition problems have been resolved or they are being managed to the extent that they no longer present serious problems for [SEDA-COG]. For this reason [SEDA-COG] would support discontinuance of further oversight reporting requirements for NS." Mr. Stover also notes that "[n]ot all of our previously expressed concerns relating to service expectations arising out of pre-acquisition commitments have been resolved at this point," but that SEDA-COG is hopeful that "on-going efforts" among the parties "will produce long-term solutions." SEDA-COG therefore does not request any intervention or relief by the Board.

In the "Joint Statement of Shippers," various shippers assert concerns about what they understand to be the terms of a trackage rights agreement entered into between NS and North Shore in 2001, which implemented a June 10, 1997 agreement between NS and North Shore's President, Richard Robey. Even so, however, the shippers request no intervention or relief from the Board, but rather express support for further discussion among the parties. In the brief "Joint Statement of Rail Line Owners," the signing rail owners join the comments filed by SEDA-COG and support the shippers' comments regarding changes to the 2001 NS/North Shore trackage rights agreement; like the shippers, the rail owners advocate further discussions among the parties to resolve their concerns and do not request Board intervention.

Because neither SEDA-COG, the shippers, nor the other rail owners ask the Board to intervene or impose any relief, a lengthy reply is unnecessary, but a few brief comments are in

order. First, NS values its relationship with all of the involved entities — SEDA-COG, North Shore, the other rail line owners, and the shipper community. Indeed, NS is more than willing to continue discussing these issues with SEDA-COG, and to talk individually with any shipper or other party that asks us to do so.

Second, we simply note here that the June 10, 1997 settlement agreement (which, we assume, is what SEDA-COG alludes to in referring to NS' "interchange commitments" and "pre-acquisition commitments"), and the 2001 trackage rights agreement that implements it, are agreements between NS and *North Shore*; neither SEDA-COG, the other two line owners, nor any shipper are parties to either one. Indeed, neither SEDA-COG, the other two line owners nor the commenting shippers participated as parties in the underlying Conrail control proceeding.[3]

Thus, as the Board itself has already found in this proceeding, it is North Shore that is the real party in interest here. *See Decision No. 5* at 22 (served February 2, 2001). North Shore filed no comments in this round of oversight, nor, to NS' knowledge, has it raised with the Board in any other forum any problems with the trackage rights agreement it voluntarily entered into with NS.

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[3] Thus, the shippers' assertion ("Joint Shippers Statement" at 1) that "based on the [June 1997] settlement, SEDA-COG and various shippers also supported the transaction," is misleading. NS did not enter into a settlement with SEDA-COG, the other line owners, or the commenting shippers, and none of those parties filed statements of support for the transaction, whether "based on" the settlement with North Shore, or in exchange for any "commitments" to them by NS, or otherwise.

The State of Maryland

Maryland notes that NS has not completed various anticipated capital infrastructure improvements, and also asserts that NS (and CSX) have not fulfilled "numerous representations" made to the State.

Maryland does not ask the Board to impose any substantive relief, but rather notes that its Department of Transportation "has continued to work with both CSX and NS" to achieve the benefits for the State anticipated during the control proceeding, and requests that the oversight process continue for the full five-year period.

Over the past year, NS personnel have continued to work with Port and Maryland officials to keep the Port of Baltimore competitive and to increase NS' business in Maryland. We have expanded our premium transcontinental and regional intermodal offerings to include Baltimore as an origin and a destination on specialty services. Further, we continue to work with the Port to develop the benefits from the development of Rutherford Yard.

As NS reported last year, certain contemplated infrastructure improvement projects have not been implemented, primarily because of higher than anticipated costs. NS, however, has continued to discuss these projects with Maryland officials and will continue to work with the State in this regard.

Additionally, NS personnel are participating, in conjunction with CSX, Amtrak, FRA and Maryland, in the so-called *Baltimore Study;* and in conjunction with CSX, Amtrak, Delaware, Maryland, New Jersey, Pennsylvania and Virginia, in the *Mid-Atlantic Rail Operating Study* (MAROPS). These parallel efforts are addressing ways to increase rail capacity and performance in the mid-Atlantic rail corridor, including to/from the City and Port

of Baltimore and the Delmarva Peninsula. NS has been a financial supporter of the MAROPS effort and continues to provide in-kind resources and professional advice to both efforts. NS officials also recently participated in a "Rail Summit on the Delmarva," the goal of which is to provide a forum for the three Delmarva states (Delaware, Maryland, and Virginia), railroads, and community interests to work together on rail infrastructure and operations issues of regional importance and promote economic growth on the Delmarva Peninsula to support continued investment in the regional railroad infrastructure.

U.S. Department of Transportation

As in past years, DOT indicates that it will submit its substantive oversight comments in reply after reviewing the comments of other parties, and therefore presently takes no position on any of the substantive issues in the proceeding, including whether formal oversight should end earlier than originally contemplated. Accordingly, NS respectfully reserves the right, as in the past, to submit a response to DOT's reply comments as appropriate.

DOT does, however, discuss the safety aspects of the transaction, including FRA's periodic reports to the Board. It notes that the fourth FRA report will be submitted "in the very near future;" that report will "conclude the formal safety oversight of this transaction and its aftermath," and will "confirm that the Applicants have successfully completed the safe integration of Conrail for all practical purposes." The only "noteworthy concern" involves the "apparent decline in capital investment by both railroads, which is important to long-term safety."

As demonstrated by NS' recent receipt of its 13th consecutive Harriman Award for being the safest Class I railroad, safety is Norfolk Southern's first priority, and NS will continue to provide the necessary resources and dedicate itself every day to demonstrating its ongoing commitment to safety.

Wheeling & Lake Erie Railway Company

In its comments, W&LE does not dispute NS' discussion of the status of negotiations between the parties, and, like NS, does not ask the Board to step in to impose any final arrangement. Thus, no action by the Board in that regard is necessary or warranted. Wheeling merely asks that formal oversight of the state of affairs between W&LE and NS continue for the full five-year period originally contemplated or until NS and W&LE reach a final agreement.

Regarding continued formal oversight, contrary to W&LE's assertion (*see* W&LE Comments at 2) that NS "is of the same viewpoint" as W&LE, NS' reference, in its June 3, 2002 general oversight report, to the possibility of seeking relief from the Board at some point in the future does not mean that NS agrees it is necessary to continue the Sub-No. 91 oversight proceeding. To that issue we now turn.

CONTINUATION OF THE FORMAL GENERAL OVERSIGHT PROCEEDING

In a decision served June 11, 2002, the Board invited comment on whether the formal oversight proceeding should be continued or discontinued. As discussed above, many of the

commenting parties (but not all) have asked that the oversight proceeding continue for the originally-contemplated five-year period.

NS believes that the record of the oversight process to date indicates that discontinuing the formal Sub-No. 91 proceeding now would not prejudice any party. In contrast to the scores of parties that formally participated in the original control proceeding (and thousands more whose support statements were included in the control application), participation in the oversight proceeding has been extraordinarily light; indeed, only fourteen different parties submitted comments in the second and third years of oversight *combined*. Moreover, in the first two years of oversight, no party presented any dispute requiring the Board to intervene and impose any additional conditions; this year no party even *proposes* any new condition, and only one party – Cargill – asks the Board to act affirmatively to protect it from alleged transaction-related harm.[4] Further, there are no ongoing issues or disputes of note with respect to any of the general issues that the Board in Decision No. 89 said the general oversight proceeding was to cover. *See Decision No. 89, slip op.* at 160-161, 3 S.T.B. at 365-66.

Most of the parties that request continued formal oversight do so generally because, they assert, circumstances *might* develop in the future requiring Board attention or intervention. NS acknowledges the need to ensure that the Board remain available to interested parties who may believe that Board intervention is warranted to address legitimate, transaction-related issues that might arise in the future. But continuing the formal Sub-No. 91 proceeding, with its annual reporting and comment schedule, is not necessary for that purpose. In Decision

[4] As noted above, because Cargill's comments were submitted very recently, NS will respond separately to those comments at a later date.

No. 89, the Board expressly reserved to itself jurisdiction over Finance Docket No. 33388 for five years in order to, if necessary, "impose additional conditions and/or to take other action if, and to the extent, we determine it is necessary to impose additional conditions and/or to take other action to address harms caused by the CSX/NS/CR transaction." *Decision No. 89, slip op.* at 173-74, 3 S.T.B. at 385. There is no reason, therefore, why the Board cannot terminate the formal Sub-No. 91 proceeding, with its annual reporting requirement and comment schedule, while at the same time making clear that its 5-year oversight *jurisdiction* under Decision No. 89 continues, so as to permit parties to come before it with transaction-related issues on an as-needed basis.[5]

While a separate, formal proceeding like Sub-No. 91 may be useful in soliciting, marshalling and collectively airing and resolving issues if there is a demonstrated, ongoing and significant volume of problems or issues requiring active Board intervention, the record of this proceeding shows that that is simply not the case here. The Board's ongoing oversight authority, and the mechanisms that already exist apart from this formal proceeding, are fully sufficient to afford parties an avenue of redress on an as-needed basis with regard to any perceived transaction-related issue that may arise in the future. NS submits, however, that continuing the Sub-No. 91 proceeding, with its annual schedule of reports, comments, and replies, is not necessary.

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[5] Although NS will respond separately to the substance of the comments raised by Cargill, we note here that, with respect to the issue of continuing the Sub-No. 91 proceeding, Cargill's comments do not suggest, and provide no basis for concluding, that the proceeding needs to be continued. Terminating the formal proceeding would not prevent parties from coming to the Board on an as-needed basis under the Board's reserved oversight jurisdiction, and the absence of a formal proceeding may, in fact, permit and encourage them to refrain from doing so unless and until private resolution has been fully explored first.

CONCLUSION

NS' implementation of the Conrail transaction is proceeding steadily and satisfactorily, and none of the commenting parties seek new conditions from the Board. Further, the record shows that the formal Sub-No. 91 oversight proceeding and its reporting requirements are no longer necessary, and termination now will not prejudice any party.

Respectfully submitted,

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August 7, 2002

CERTIFICATE OF SERVICE

I certify that on August 7, 2002 a true copy of NS-9 was served by first class U.S. Mail, postage prepaid, or by more expeditious means, upon all known parties of record in Finance Docket No. 33388 (Sub-No. 91).

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August 7, 2002

205997

VIA HAND-DELIVERY

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

Re: Docket No. 42069, Duke Energy Corporation
vs. Norfolk Southern Railway Company

Dear Secretary Williams:

Enclosed for filing in the above-referenced proceeding please find an original and ten copies of the parties' Joint Petition to Re-Establish Procedural Schedule.

The parties respectfully request that the Board expedite its consideration of the enclosed Petition.

Thank you for your attention to this matter.

Sincerely,

Karen Hassell Herren

KHH/jck
Enclosures

cc: David M. Konschnik (Office of Proceedings)
G. Paul Moates, Esq. (Counsel for NS)

STB FD-33388 (SUB 91) 8-7-02 D 205996

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205996

August 7, 2002

BY HAND

The Honorable Vernon A. Williams, Secretary
Surface Transportation Board
Office of the Secretary
1925 K Street, NW
Washington, DC 20423-0001

Re: STB Finance Docket No. 33388 (Sub-No. 91)
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 (General Oversight)

Dear Secretary Williams:

Enclosed are an original and twenty-five (25) copies of CSX-10, the "Reply Comments of Applicants CSX Corporation and CSX Transportation, Inc., to Comments Made on Their Third Submission" 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 additional copy of this letter and the "Reply Comments" at the time of filing and return them to our messenger.

Thank you for your assistance in this matter. Please contact the undersigned at (202) 942-5858 if you have any questions.

Respectfully yours,

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

rjm
Enclosures

205996

CSX-10

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB FINANCE DOCKET NO. 33388 (SUB-NO. 91)

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 (GENERAL OVERSIGHT)

REPLY COMMENTS OF APPLICANTS CSX CORPORATION AND CSX TRANSPORTATION, INC., TO COMMENTS MADE ON THEIR THIRD SUBMISSION

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

Dated: August 7, 2002

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BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 33388 (Sub-No. 91)

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 (GENERAL OVERSIGHT)

REPLY COMMENTS OF APPLICANTS
CSX CORPORATION AND CSX TRANSPORTATION, INC.,
TO COMMENTS MADE ON THEIR THIRD SUBMISSION

INTRODUCTION

CSX Corporation and CSX Transportation, Inc. (collectively "CSX"), submit the following reply comments to the comments submitted by the public in the current (2002) round of this proceeding.

In this third round of formal oversight, only eleven timely comments were received. Only three shippers[1] and one shipper organization, and one smaller freight railroad filed public comments. The remaining comments, including initial

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[1] IP&L only commented that it saw no purpose in further formal oversight. We count the SEDA-COG Joint Rail Authority ("SEDA") comment as a shipper comment since it is joined in by a number of shippers. Like IP&L, they support the termination of formal oversight proceedings. They ask for no other action from the Board. PPG, the third shipper, seeks continuation of oversight but asks no other relief from the Board. *See* parts 4, 8 and 10, below.

comments from the U.S. Department of Transportation ("DOT"), were filed by governmental officials or bodies or nonprofit corporations affiliated with them.[2]

Interestingly, almost all of the commenters address only a single issue: whether these annual exchanges of formal reports, comments and reply comments should continue. The comments on that issue were in response to the Board's Decision No. 7, served June 11, 2002, which invited parties commenting in this round of formal oversight to address whether the formal oversight process should continue. The Board had also made it plain that commenters also "may address all aspects of applicants' progress in implementing the Conrail transaction" — the usual subject of such comments in an annual formal oversight proceeding. *Id.* at 2. Very few did.

The formal oversight process for the Conrail Transaction has consisted of several steps, which have been followed each year. First, relatively lengthy reports are filed by each of the two railroads and their parent companies which acquired and divided the use of the Conrail assets between them. Those reports have covered generally the implementation of the Conrail Transaction and certain specific topics required by the Board.[3] Second, those reports are made the subject of comments from the general public, which are generally filed within 45 days. To

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[2] Cargill, Incorporated ("Cargill"), on August 5, 2002, sought leave to file comments 19 days out of time. (CARG–4 and 5.) CSX will not reply at this time to Cargill, having just received their comments, but will respond in due course.

[3] *See* Decision No. 89 in Finance Dkt. No. 33388, served July 23, 1998 ("Decision No. 89") at 20-21 (slip opinion), 3 S.T.B. 196, 217. We hereinafter cite Decision No. 89 first to the slip opinion page and then to the page in 3 S.T.B.

assist the general public in making comments, the railroads must make available on demand by those who have executed the appropriate protective order, 100% waybill information for the 12-month period ending at approximately the time the railroads' reports are filed. Third, after the public comments are filed, reply comments, generally by the railroads, but occasionally by others, are filed, with about three weeks allotted for that. While generally not provided for, further comments on the reply comments are often made, and the Board has been liberal in permitting these extra comments to be filed and in considering and analyzing them. Finally, the Board completes the process by issuing one or more decisions granting or denying specific relief sought by commenters and generally giving its views on the matters discussed in the reports and the comments.

In 2000, the first year of the process, 32 parties filed comments, 20 of them coming from shippers or freight railroads. Many of these sought specific regulatory action by the Board in terms of conditions or otherwise. In 2001, the number of commenters declined precipitously. Moreover, no party asked for the waybill tapes from either railroad in the second or the current third round of comments.

In the current round (apart from the expression of concern by some commenters that the formal oversight procedure should continue)[4] only one party

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[4] On the other hand, two commenters expressed the view that it should be discontinued; a third also recognized the difference between the Board's five-year retention of oversight jurisdiction and the particular exercise of that authority through formal proceedings.

(Congressman Kucinich) has discussed in any concrete detail a matter in which Board involvement was suggested to be part of a solution.[5]

To CSX this reduced activity suggests that formal oversight reporting has served its intended purpose and could be discontinued at this juncture. At the beginning of the consummation phase, this reporting and the operational monitoring afforded the interested public with timely and responsive data and resolution processes. Now with sustained improvements to service and the successful completion of so many of the implementation projects, it appears to CSX that the public, the Board and the Applicants would best be served by the elimination of this annual reporting mechanism.

In this regard, we note that the operational monitoring reporting requirements, to which the Applicants were subjected starting with the Control Date in August 1998 and further from the Split Date on June 1, 1999, was terminated by the Board in a communication from the Director of the Office of Compliance and Enforcement, issued and made public on June 17, 2002.

All of the commenters who oppose the suspension of the formal oversight procedure seem to confuse the formal oversight procedure with the Board's retained oversight powers over the Conrail Transaction. The formal oversight procedure is one, but hardly the only one, of the exercises, or potential exercises, of the powers reserved by the Board in Decision No. 89, at 173-74; 3 S.T.B.

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[5] And in that one case, the only relief requested was for the Board to inquire whether there was some eligibility for environmental mitigation in one community based on recent circumstances. *See* part 7, below.

at 385. Given the misconceptions of the commentors, it is worthwhile to quote the Board's reservation of powers: "The Board expressly reserves jurisdiction over the STB Finance Docket No. 33388 proceeding and all embraced proceedings in order to implement the 5-year oversight condition imposed in this decision and, if necessary, to impose additional conditions and/or to take other action if, and to the extent, we determine it is necessary to impose additional conditions and/or to take other action to address harms caused by the CSX/NS/CR transaction," *id.* at 173-74; 3 S.T.B. at 385. *See also id.* at 20-21; 3 S.T.B. at 217.

If the formal oversight procedure required by the Board for the past three years is discontinued, the Board's above-described powers will still remain in full force and effect pursuant to their terms. These powers can be exercised by the Board either on formal petition, on informal request to the Board, or on the Board's own motion. In almost all cases, this year's commenters have brought no specific requests before the Board. If commenters should have grievances that are appropriate for the Board to address, the Board can address those grievances under the five-year reservation of jurisdiction. Nothing the commenters have said justifies the continuation of the formal oversight proceedings as such The commenters simply want the Board to continue to be available to address concerns that may arise in the future. The Board can do that without the formal oversight process.

In earlier cases where annual formal oversight proceedings have been terminated, it has been the Board's practice to fully retain jurisdiction. In 2001, the Board terminated the requirement for annual formal oversight reports and

comments with respect to the Canadian National-Illinois Central transaction, but made it plain that it was retaining its five-year jurisdiction and powers under other merger conditions and the governing statute. The Board said, in its summary, that:

> We are therefore [because there were no significant problems] concluding our formal oversight process in the CN/IC merger proceeding. We remain available, however, to enforce the conditions we imposed on the merger, as needed. Thus, the conclusion of the formal oversight process does not preclude any party from invoking our continuing jurisdiction to address merger-related concerns arising out of our conditions.

Canadian National Railway Company, et al. – Control – Illinois Central Corporation, et al., Finance Docket No. 33556 (Sub-No. 4), Decision No. 4, served December 27, 2001 at 1.

At greater length, the Board made the following observation:

> Although we are concluding our formal oversight process for the CN/IC merger, we continue to have authority to enforce the conditions we imposed on the merger. Under 49 U.S.C. 11327, we have continuing authority to enter supplemental orders and to modify decisions entered in merger and control proceedings under 49 U.S.C. 11323, and the conclusion of the formal oversight process does not preclude any party from invoking our jurisdiction to address any merger-related concerns arising out of our conditions. *See, e.g., Union Pacific Corp.—Control & Merger—Southern Pacific Rail Corp.*, STB Finance Docket No. 32760 (Sub-No. 21), Decision No. 1 (STB served May 7, 1997), slip op. at 3 n.3; *CN/IC Oversight*, Decision No. 3 (STB served Nov. 7, 2001), slip op. at 4 ("we have authority independent of the formal oversight process to enforce or

revise merger conditions as warranted upon request or on our own initiative."). (Footnote omitted.) *Id.* at 4.[6]

The commenters who oppose termination of the formal oversight proceedings ignore these basic distinctions between the reservation of authority and a particular mode of exercising it noted by the Board.

* * * * *

We will discuss briefly the comments of the eleven commenters.

1. **New York City Economic Development Corporation ("NYCEDC") (NYC-4)**. — NYCEDC states that it has continued its dialogue with both CSX and NS concerning the implementation of the Conrail Transaction, notes that the railroads serving the New York City and the East of the Hudson market are willing to discuss service enhancements, and looks forward to continuing to work with the railroads to achieve further enhancement. NYC-4 at 1-2. (Indeed, three CSX filings to date have provided a history of enhancements of East of the Hudson service following the Split Date. CSX-1 at 88-94, CSX-4 at 66-71, CSX-9 at 44.)

NYCEDC, however, then errs by claiming that if the formal annual oversight is discontinued, there will be no forum left so that "a public agency or shipper" could ask the Board "to step in" and address concerns associated with the Transaction. NYC-4 at 2. For the reasons stated above, that is not so. The

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[6] A five-year oversight reservation of jurisdiction had been imposed in the Decision authorizing the CN-IC transaction. Decision No. 37, Finance Docket No. 33556, served May 25, 1999, Ordering Paragraph No. 1, at 36.

five-year retention of jurisdiction will remain in full force and effect and can be called upon as appropriate by any concerned entity.

NYCEDC also expresses concern that either the termination of the operational monitoring requirements, which occurred on June 17, 2002,[7] or the proposed termination of the formal oversight procedure, might bring an end to the survey of origination, destination and routing by motor carriers serving Northern New Jersey and Massachusetts in conjunction with intermodal movements by rail, popularly called the "George Washington Bridge Survey." The Board ordered that survey in Condition No. 22, Decision No. 89 at 177, 3 S.T.B. at 388, and the background is found at Decision No. 89 at 81-82, 3 S.T.B. at 282. Under Condition No. 22, the survey is performed on a quarterly basis. The survey commenced on January 1, 1999, prior to the "split" and has continued thereafter. The most recent report, filed July 26, 2002, covers the period of March through May 2002.

Neither the termination of the operational monitoring nor the termination of the formal oversight procedure would affect Condition No. 22, in CSX's view. The issue of how long the George Washington Bridge Survey is to last is an entirely separate issue. Condition No. 22 does not prescribe any particular termination date. Presumably the survey was not to continue forever. It clearly

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[7] *See* p. 4, above.

is limited at the outside to the five years of Board retention of jurisdiction,[8] but how long it is to last presents a separate issue for the Board.

In CSX's view, the Board should give attention to relieving the railroads' burden of collecting the survey data. The survey is not used by the railroads in their marketing or operational functions. According to NYCEDC (NYC-4 at 2-3), the data is obtained from the railroads on a continuing basis for the use of NYCEDC and other public authorities for planning purposes. The purpose of Condition No. 22 was not, as we read it, to assist in transportation planning, but to determine the extent to which the transaction would increase drayage over the George Washington Bridge (as opposed to the Tappan Zee Bridge), thereby possibly raising health issues (mainly as to the Bronx), as raised by Representative Nadler and a group of his congressional colleagues: "The Nadler Delegation is concerned about the impacts on air quality of additional drayage across the George Washington Bridge." Decision No. 89 at 81; 3 S.T.B. at 282. There was an issue as to how much of an increase the Transaction would cause, and the study was designed to resolve that issue. Decision No. 89 at 81-82, 3 S.T.B. at 282.

The purpose of the survey has been fulfilled, with five months' experience prior to the Split Date and thirty-six months thereafter. As the Board knows, the survey has not shown any adverse trends concerning its original purpose, and no one has contended that any such trends have been shown.

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[8] "[T]his matter will be specifically included in the 5-year oversight condition that we are imposing." Decision No. 89 at 82, 3 S.T.B. at 282.

NYCEDC now suggests a new purpose for the survey — transportation planning in the Greater New York area. While such planning is laudable, public agencies like the Port Authority and NYCEDC are currently engaged in it and perform or commission surveys pertinent to their planning needs. There is no reason why the railroads should be conscripted for this purpose, and CSX suggests that the time is ripe to relieve them of it.[9]

2. **American Chemistry Council ("ACC") (ACC-3)**. — Here again, the only relief requested is that the Board continue to have the annual formal oversight procedures for the entirety of the five-year retained oversight period. Like NYCEDC, ACC confuses the period of reservation of oversight authority (the authority to add additional conditions to those imposed in Decision No. 89) with the number of iterations of the annual formal report and comment oversight procedure. ACC makes the point that the Applicants' original proposal, based on the NITL settlement, was for a three-year oversight retention period, but that the Board instead imposed a five-year period of retained oversight authority. ACC-3 at 1-3. That certainly is the case; but, as CSX understands it, no one is proposing to change the five-year retention of authority that the Board provided for in Decision No. 89. The only proposal is to suspend the annual procedures of reports, comments and reply comments, in the formal oversight proceedings.

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[9] NYCEDC ends with a brief statement that "[n]ot all" of the representations that CSX and NS made on the record during the Conrail proceeding have been honored. NYC-4 at 3. No specifics whatsoever are furnished, and accordingly, CSX is not in a position to respond.

ACC, which should understand quite well the difference between retained jurisdiction and formal oversight proceedings, seems unable to let go of the annual exchange of comments. So eager is it to hold on that it grossly overstates the implications of suspension of the annual procedures of reports, comments and reply comments. ACC falls back on a series of "what ifs" as it urges the Board to keep the annual reports.[10] CSX appreciates the interest of shippers in the Shared Assets Areas, and understands their concern over ongoing operations there. But, with respect, those concerns and interests do not justify keeping the annual reports from the two applicants and the rounds of comments and replies.

Decision No. 89 imposed numerous conditions on the Applicants that are protective of the basic and fundamental structures of the Shared Assets Areas. Among them are Condition No. 6, "No change or modification shall be made in the terms and conditions approved in the authorized application without the prior approval of the Board"; No. 19, "Applicants must adhere to all of the representations they made during the course of this proceeding, whether or not such representations are specifically referenced in this decision"; No. 20, "Applicants must adhere to all of the terms of the NITL agreement, subject to the modifications made in this decision"; and others. Terminating the annual formal

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[10] The only concrete change mentioned appears to be the transfer of Conrail police functions to CSX and NS, reported at NS-8 at 18-19. ACC finds no fault with this rearrangement of labor responsibilities; if in some unimaginable way this action infringed on the rights of ACC or its members, they would not be without their remedies before the Board, whether annual reports were still being required from the Applicants or not under the present subdocket.

reports, comments and reply comments procedure will suspend none of these basic conditions. The conditions we have quoted are permanent unless modified by the Board in an open formal procedure. Statutory provisions, such as 49 U.S.C. § 11323(a), also provide protection. It should go without saying that, were CSX and NS to propose changes relating to the Shared Assets Areas that either conflicted with a condition imposed on the transaction, or that rose to the level of requiring Board approval under the governing statute, the two carriers would be obligated to bring the matter to the Board's attention and the legitimate interests of shippers would be well protected.[11]

3. **Port Authority of New York and New Jersey ("Port Authority") (NY/NJ-3)**. — The Port Authority's comments provide a brief history of the activities of the Port Authority in the Conrail Transaction and in the present formal oversight proceeding. NY/NJ-3 at 1-4. The comments review the conditions sought by the Port Authority during the 1997-98 proceedings, which were accepted by the Applicants, providing for information exchanges and consultation of various sorts between the Applicants — CSX, NS and Conrail — and the Port Authority. The Port Authority presents a brief history of the initial difficulties experienced in the Transaction in the areas served by the Port Authority, despite the fact that the Applicants "have labored mightily to improve service." *Id.* at 4. Next, the Port

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[11] We also note that although the Board has lifted most of the operating report obligations, it has continued reports on the Shared Assets Areas operations. *See* the letter from the Director of the Office of Compliance and Enforcement referred to at page 4, above.

Authority expresses pleasure that "many of the service problems that initially plagued the NJSAA (North Jersey Shared Assets Areas) have been resolved," although "[l]ocalized service problems still exist from time to time, and the carriers remain woefully short of capital to make investments in the NJSAA." *Id.* at 4. The Port Authority briefly discusses its efforts to seek public sector funding to provide additional infrastructure in the area, observing, however, that these efforts have been hampered by the events of September 11, 2001. *Id.* Pursuant to arrangements agreed to by CSX and NS, the Port Authority states that it obtains information from the carriers which may be useful in a revived effort to obtain public funding. *Id.*

The Port Authority also questions whether annual formal oversight proceedings should continue, describing the issue as "the need for continued oversight." *Id.* Again, this confuses a formal oversight proceeding with the Board's continued five-year retention of oversight authority over the Transaction, and, indeed, its continuing powers to enforce the merger conditions. The Port Authority proffers two reasons in support of continued annual oversight: In the first place, it says that traffic volumes moving through the Port Authority on its own "on-dock ExpressRail facility are reaching record levels on a regular basis," with, in one sample period, an increase of 27.8% over the corresponding period in 2001. *Id.* at 4-5. Given present economic conditions, one would think that such a statistic would indicate the success of the Conrail Transaction in bringing competitive rail service to the North Jersey Area from two major railroads; but

without explanation, the Port Authority cites this as a reason for continued annual formal oversight proceedings.

As its second reason, the Port Authority very briefly echoes ACC's comments, saying that "the Port Authority, and other parties, have heard persistent rumors that the carriers might seek to fundamentally alter the nature of operations within the NJSAA." *Id.* at 5. The Port Authority gives no specifics. Its comments, however, seem to argue that unless the Board continues the annual formal oversight proceedings, the railroads could make major changes in the Shared Assets Area without Board consideration or approval. Our discussion of ACC's comments in part 2 above answered that assertion, pointing to the continuing five-year oversight of the Board that will survive any termination of the annual formal report and comment filings, the various permanent conditions imposed by the Board on the Transaction, and the statute administered by the Board itself. The very arrangements for the sharing of information between the two carriers and the Port Authority discussed in the Port Authority's comments are, as the comments indicate, in place, so the Port Authority would not seem to be dependent on an annual report to the STB to obtain pertinent information.[12] The Port Authority's comments do not make a case for the continuation of the formal

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[12] The Port Authority's conditions, in paragraph 5 (quoted at NY/NJ-3 at 3), give the Port Authority standing to seek relief from the Board "during such time as the Board maintains oversight following approval of the transaction." CSX construes this as applying to the five-year period, not to the period of existence of formal oversight proceedings.

oversight procedures, only for the retention of powers that in any event will be retained.

4. **Indianapolis Power & Light ("IPL") (undesignated)**. — IPL seeks no relief from the Board, contenting itself with its efforts to overturn the Board's Decision No. 6, which IPL is pursuing in the United States Court of Appeals for the District of Columbia Circuit.

IPL does support the Board's suggestion that the formal oversight procedures be terminated. CSX agrees, but not for the reasons given by IPL.

5. **State of Maryland ("Maryland") (MD-4)**. — The State of Maryland, through its Department of Transportation ("MDOT"), suggests that the Board continue the formal oversight proceeding for five years because not all the representations made by CSX and NS to the State during the Conrail proceeding have been fulfilled at present. MDOT does not, however, ask the Board to involve itself in any particular matter, and reports that it "has continued to work with both CSX and NS to achieve the benefits for the State" of the Conrail Transaction. Our discussion of the distinction between retention of oversight jurisdiction and continuation of the formal oversight proceeding is addressed above and need not be repeated here.

With respect to CSX, MDOT addresses only one specific issue — MARC service. MDOT acknowledges the "marked improvement" during the past year in MARC service on the Camden Line, but complains of "a continuing intermittent problem on the Brunswick line." Although intermittent problems occur in any

ongoing operation, CSX believes that overall it has improved the Brunswick service and has addressed intermittent problems as they arise.

The "Brunswick" service includes MARC's service to Brunswick, MD, Frederick, MD, and Martinsburg, WV. On-time performance for the Brunswick service averaged 94% for the period January 1, 2002 through May 31, 2002. The average for this period would have been even higher — 96% — but for one day in May when bad weather caused significant delays on the line. CSX does not believe that intermittent delays, caused largely by bad weather, provide any basis for regulation by the Board. Contributing to the overall Brunswick service and capacity picture is MARC's new Frederick service (six trains per day which operate on this line between Union Station and Point of Rocks, MD where the line to Frederick connects). This new service, which commenced on December 17, 2001, has been very popular with Maryland residents. Also, service and safety will benefit from the substantial capital improvement project presently underway on the line, which is described in our June 3, 2002 submission.

CSX will continue to work with MDOT with respect to the ongoing implementation of its 1997 settlement with the State, as well as with regard to other transportation issues of interest to MDOT and CSX as they arise.

6. **City of Cleveland ("Cleveland") (undesignated)**. — The City of Cleveland similarly requests that the Board continue the formal oversight proceeding because, it asserts, CSX has not yet fulfilled its obligations to Cleveland. CSX respectfully disagrees with both the general assertion that the formal oversight proceeding is required to ensure the success of the ongoing

consultations between Cleveland and CSX, and with the specific complaints regarding (1) CSX approval of the noise walls to be built by Cleveland and (2) the details of the provision of train count data for the Short Line.

Concerning the noise walls, Cleveland claims (at 5) that CSX has "failed to approve plans for noise walls that were delivered to CSXT in August 2000." In fact, the "plans" that were delivered by the City to CSX in August 2000 were only preliminary plans, on which CSX did offer its comments. CSX first received detailed noise wall plans in May 2001. CSX engineers promptly reviewed those plans and commenced a series of written and verbal communications on the plans with the City's contractor. Revised plans, reflecting CSX's concerns, were forwarded by the City's contractor to CSX in late December 2001. As reported to the Board in several CSX quarterly community status reports, CSX conditionally approved these final designs subject to the completion of various agreements with respect to the construction of the walls, described next.

Simultaneous with the review of the noise wall plans, the parties engaged in negotiations with respect to a license agreement that would permit the construction of the noise walls on CSX property and a warranty agreement that would extend to CSX the benefits of warranties that the City would obtain from its contractor and one of its suppliers. Both parties understood that completion of these agreements, both of which raised numerous unique issues, was a necessary precondition to construction of the noise walls. Those negotiations were successfully concluded in June 2002. CSX submitted copies of these agreements executed by CSX to

Cleveland's attorney on June 27, 2002. Cleveland executed the agreements on July 25, 2002, and the agreements are accordingly now in effect.

During the course of discussion of the license and warranty agreements, the City requested that CSX provide written approval of the City's final noise wall designs. CSX forwarded a draft of such an approval letter to the City's attorney on June 12, 2002. Following discussions with the City's attorney, CSX revised that written approval letter to meet the City's concerns and a final, executed letter was dispatched to the City on July 23, 2002. CSX believes that it has worked with the City of Cleveland diligently and in good faith throughout this process. In any event, CSX understands that the City is now ready to seek bids on a contract to construct the noise walls. These negotiations have been successfully concluded and there is no need for any intervention by the Board.

The City also contends (at 6) that it "determined that a much greater amount of train traffic was occurring on the CSXT Short Line than CSXT had represented" and that "CSXT agreed to provide Cleveland with train count data on an ongoing basis" but has not yet done so. We do not believe that Cleveland's discussion of this issue offers a complete picture. The Lakeshore Line Study that CSX provided to Cleveland in March 2001 demonstrated, with train count data, that CSX was not in fact operating more trains on the Short Line than had been projected in CSX's operating plan filed in the Conrail transaction. Nonetheless, Cleveland has requested that CSX provide additional Short Line train counts on a continuing basis, information that the City acknowledges CSX is under no present obligation to provide.

CSX has offered voluntarily to conduct such train counts for a period of time as part of an overall understanding on several matters. However, the City and CSX have not reached agreement on an overall understanding, and the City has not pursued this matter further with CSX in recent months. Should the City wish to resume consultations on this matter, CSX remains prepared to discuss an arrangement under which train count data would be provided.

Consistent with the Board's policy favoring negotiated solutions, CSX fully expects that this issue can be resolved through negotiation. CSX understands that Cleveland may present specific issues to the Board for its resolution, whether or not the formal oversight proceeding is continued, in the event that the parties cannot resolve this issue through negotiation. This issue does not warrant the continuation of the formal oversight process.

7. **Congressman Dennis Kucinich ("Congressman") (undesignated)**. — Congressman Kucinich wrote to express his pleasure with the efforts of CSX and NS in Bay Village, Rocky River, Lakewood, Olmsted Falls, Olmsted Township and Berea, Ohio. With respect to Brooklyn, Ohio, Congressman Kucinich reported that he had received complaints from residents and elected officials regarding noise impacts to residences on one street in Brooklyn. The Congressman asked the Board and CSX to work with his office and the City of Brooklyn to determine whether these homes may be eligible for noise mitigation under the criteria of the Final Environmental Impact Statement, as approved in Decision No. 89.

The residents of Brooklyn have previously expressed their disappointment to Congressman Kucinich that they were not eligible for noise mitigation under the Board's criteria, and CSX has previously worked with Congressman Kucinich's office to respond to this concern. CSX is not aware of any material change in facts or circumstances during the past year. CSX is prepared to consult with Congressman Kucinich's office and to report to the Board on those consultations, as it has done in the past, regarding these most recent communications from his constituents in Brooklyn.

8. **SEDA-COG Joint Rail Authority ("SEDA") (undesignated)**. — These comments by a municipal authority in Pennsylvania interested in the preservation of rail service in seven Pennsylvania counties address issues which relate to NS rather than CSX, and CSX assumes that they will be discussed by NS in its Reply Comments.

However, with respect to the issue of the continuation of formal oversight proceedings, we note that the verified statement of Jeffery Stover, forming the major portion of the SEDA comments, affirmatively "support[s] discontinuance of further oversight reporting requirements for NS" [its only major connecting railroad; SEDA has never commented on CSX]. *See* Stover V.S. at 2. Mr. Stover's statement indicates that, unlike many of the other commentors, he appreciates the difference between suspending formal oversight reporting and comment procedures and terminating the five-year reservation of authority. *See also* the attached "Joint Statement of Shippers" at 3 (noting that conditions remain in force "whether or not the formal oversight proceeding is continued").

9. **Wheeling & Lake Erie Railway Company ("W&LE") (undesignated)**. — W&LE has filed a brief letter as its comments and they simply address an issue that W&LE has with NS to which we assume NS will make a response. As to the continuation of formal oversight, W&LE recognizes the difference between conducting a formal oversight procedure with response and comments every year and the retention of oversight authority for the full five years, that the Board effected in Decision No. 89. This distinction is discussed at length in the Introduction to these Reply Comments. The number and nature of ongoing issues that have been identified is so small as not to justify the continuation of the formal procedures.

10. **PPG Industries, Inc. ("PPG") (undesignated)**. — PPG, through its Manager of Logistics Services, has filed a brief comment. The comment states that "PPG remains concerned about the future quality of its rail service" and asks that the Board "continue its general oversight of the Conrail transaction over the initial 5-year period." The concern is that if the economy expands, and with it the use of rail service, there may be operational and service problems.

The comments, once again, appear to reflect the error made by other commenters requesting that formal oversight proceedings continue, in that it confuses the cessation of the formal procedures with a sort of abandonment of the shippers by the Board. Nothing of the sort is under consideration, as we develop above. The Board's powers will be the same whether or not the Board suspends the annual formal oversight procedures this year. Moreover, the PPG comments appear to be in the area of operating oversight, and the letter from the Director of

the Office of Compliance and Enforcement, made public on June 17, 2002, makes plain that the Board is retaining its powers with respect to the monitoring of rail operations.

11. **U.S. Department of Transportation ("DOT") (DOT-5)**. — Except for a discussion of safety, as to which the comments give a preview of the FRA's Fourth and Final Report, DOT reserves its comments until it has seen the comments of other parties commenting in the July 17 round of comments (*i.e.*, the comments discussed above).

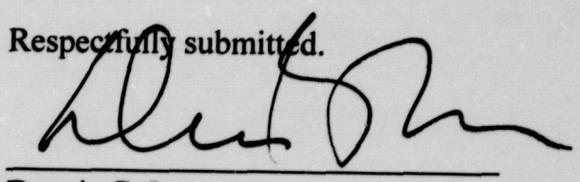
As to safety, the DOT says that its Fourth Report "will confirm that the Applicants have successfully completed the safe integration of Conrail for all practical purposes." DOT-5 at 4. It is terminating its formal safety study of the Transaction. *Id.* at 5. DOT mentions in passing some concerns over the level of CSX and NS capital investments. There is little to be said in response except that CSX believes that it is expending its available capital prudently, with its first priority being the maintenance of a safe operating network. Railroading is an industry with tremendous capital requirements, and it is clear that the long-term future of the industry depends on the ability of every railroad, not just CSX and NS, to achieve adequate revenue levels.

CONCLUSION

After three years of operations, the Conrail Transaction has clearly justified the Board's finding that the Transaction is in the public interest. No commenter this year seeks any substantive action from the Board. While preserving its

five-year retention of authority — and all the permanent conditions the Board has imposed — the Board should suspend the formal oversight annual rounds of report and comment.

Respectfully submitted.



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Dated: August 7, 2002

CERTIFICATE OF SERVICE

The undersigned counsel for CSX Corporation and CSX Transportation, Inc. hereby certifies that on this 7th day of August, 2002, a copy of the foregoing "Reply Comments of Applicants CSX Corporation and CSX Transportation, Inc., to Comments Made on Their Third Submission" were served on all parties of record by first-class mail, postage prepaid, or more expedited method.

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STB FD-33388 (SUB 91) 8-7-02 D 205995

U.S. Department of Transportation

General Counsel

400 Seventh St., S.W.
Washington, D.C. 20590

205995

August 7, 2002

Vernon A. Williams, Secretary
Surface Transportation Board
Suite 700
1925 K Street, N.W.
Washington, D.C. 20423-0001

Re: Fin. Dkt. No. 33388 (Sub-No. 91)

Dear Secretary Williams:

Enclosed herewith are the original and ten copies of the Reply Comments of the United States Department of Transportation in the above-referenced proceeding. Also enclosed is a computer diskette of this document, saved in Word Perfect for Windows. I have also included an additional copy of the Department's comments that I request be date-stamped and returned with the messenger.

Sincerely,

Dale C. Andrews
Deputy Assistant General Counsel
for Litigation

Enclosures

DOT-6

Before the
Surface Transportation Board
Washington, D.C.

CSX Corp. and CSX Transportation, Inc., Norfolk Southern Corp. and Norfolk Southern Railway Co. -- Control and Operating Leases/ Agreements -- Conrail, Inc. and Consolidated Rail Corp. (GENERAL OVERSIGHT)	)	Fin. Dkt. No. 33388 (Sub- No. 91)

Reply Comments of the
United States Department of Transportation

Introduction

The Surface Transportation Board ("STB" or "Board") instituted this proceeding to implement the oversight condition it imposed in Finance Docket No. 33388, the acquisition and division of Consolidated Rail Corporation ("Conrail") by CSX Transportation, Inc. ("CSX") and the Norfolk Southern Railway Co. ("NS") (collectively, "Applicants"). Decision No. 1, served February 9, 2000. The proceeding focuses upon "the progress of implementation" of the transaction, and the efficacy of the conditions imposed by the Board. Id. at 1.

The United States Department of Transportation ("DOT" or "Department") in its initial comments offered its views on the subject of safety. DOT-5 (filed July 17, 2002). DOT there informed the Board that the Federal Railroad Administration was satisfied that the Applicants had safely implemented this transaction, and that it would henceforth oversee the safety of these carriers' operations pursuant to its normal processes. Our initial comments also indicated that, consistent with past practice, we would review the

submissions of interested parties before presenting more substantive comments on other issues for the record. Id. The initial comments of other parties have overwhelmingly focused on the question of whether this oversight proceeding should continue through its scheduled five year term or be ended early. Virtually all of these commenters have reported some remaining commitments or conditions that they believe the Applicants have yet to fulfill. They therefore urge the STB to continue its oversight. The Department agrees that a modified form of continued oversight is warranted.

The Record

The Applicants this year have submitted annual "progress reports" that, by and large, present an optimistic picture of the implementation of this transaction and their compliance with the conditions imposed by the Board. CSX indicates that its rail network is operating "at or near record performance levels," that it has significantly enhanced safety, and that it is pursuing many commercial opportunities made possible by the acquisition and division of Conrail. CSX-9 at 1, 4, 56. CSX also states that the STB's conditions "have generally continued to work well" and that it has complied with them "to the best of [its] ability." Id. at 56.

NS, too, reports that its overall system enjoys improving performance metrics, that it has undertaken many service enhancements and expansions, and that it remains vigorous in the pursuit of safety. NS-8 at 5-9, 21. NS also asserts that it continues to comply with the Board's conditions, and that it has "diligently worked" to satisfy environmental mitigation measures and the settlement agreements it has entered into. Id. at 36, 46.

Shippers, small railroads, and communities have also submitted initial comments. There is a common thread that runs through most of them: that the Applicants have made considerable progress, but that they have not completely fulfilled conditions imposed by the Board, the terms of settlement agreements, and other representations made during the course of the proceeding. *See, e.g.*, Comments of the City of Cleveland at 4-7 (noise mitigation project unfinished and route diversion study delayed); American Chemistry Council at 2-5 (potential service and competitive problems arising in the Shared Asset Area of New Jersey); Port Authority of New York and New Jersey (same); New York City Economic Development Corporation at 2-3 (intermodal traffic reports still needed and representations not all met); State of Maryland at 2 (terms of "letter agreement" not satisfied); Comments of SEDA-COG Joint Rail Authority (expectations arising out of NS commitments not met). [1] All of these parties believe that continued oversight by the Board is necessary to ensure the completion of obligations either undertaken by, or imposed upon, the Applicants as a condition of approval. [2]

Discussion

It is perhaps possible that the Applicants in their reply comments will be able to demonstrate that they have indeed satisfied the conditions and representations noted by these parties, or that they will expressly commit to fulfilling these as binding obligations,

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[1]/ Joint groups of shippers and small railroad owners offer a variation on this theme. Both groups express a concern that a settlement entered into last year between NS and another small carrier (the North Shore Railroad Company) is inconsistent with the terms of a settlement endorsed by the Board. *See* Joint Statement of Shippers and Joint Statement of Rail Line Owners.

[2]/ Indianapolis Power & Light ("IPL") believes the STB could dispense with the remainder of the scheduled oversight period only if it announces its willingness to continue to entertain claims by parties that they have been adversely affected by this transaction. Comments of IPL.

or that the Board did not actually intend to require satisfaction of all these claims as conditions for its approval of the transaction. But even were any of these to be the case, the Department believes that the purposes of this proceeding and the record of continuing concern compiled herein support a continuing modified oversight by the Board.

The Board does not impose conditions on railroad consolidations lightly. Conditions are only prescribed when they ameliorate or eliminate a transaction's harmful effects on the public interest, and when they satisfy other criteria as well. CSX Corp., et al. -- Control -- Conrail Inc., et al., 3 S.T.B. 196, 277-78 (1998) ("Conrail Decision"). Some conditions are crafted by the Board itself; others arise out of settlement agreements entered into between one or more merging carriers and other parties and adopted (with or without modification) by the STB. The Board's decision approving this transaction references both types of conditions and other varieties as well. [3]

Once imposed, fulfillment of conditions, whatever their origin or nature, is important, for it is only through compliance that a transaction warrants approval as being "consistent with the public interest." 49 U.S.C. § 11324(c). The Board's underlying decision in this case acknowledges as much by requiring the Applicants to adhere to a host of conditions, settlement agreements, and representations. For example, the STB directed the Applicants to "comply with all of the conditions imposed in this decision, whether or not such conditions are specifically referenced" in the ordering paragraphs.

---

[3]/ *See* Conrail Decision at 251-56 (discussing an agreement between the Applicants and the National Industrial Transportation League) and at 357, 520 (Appendix K), 607 (Appendix Q, Condition 51) (noting settlement agreements between the Applicants and various communities). Particularly in the environmental context, the STB in this case encouraged private settlements as acceptable alternatives to conditions specified in the Environmental Impact Statement. Id. at 357.

Conrail Decision at 387, ordering paragraph 16. [4] The Applicants must also "adhere to all of the representations they made during the course of this proceeding, whether or not such representations are specifically referenced in this decision." Id. at 388, ordering paragraph 20. [5] In addition, the Applicants must satisfy the terms of specific settlement agreements with listed parties. Id. at 388-89, ordering paragraphs 20, 21, 32, and 607-08 (Appendix Q, Condition 51).

Conditions, settlements, and representations embraced within these provisions are thus clearly imbued with the public interest. As such, it is only proper that the Board continue to exercise its authority to ensure that they are satisfied. The Department believes that the task now before the Board is to identify the extent to which the claims made by the above-named parties come within the contemplation of its decision in this case. We also note that even arrangements entered into between the Applicants and other parties that do not rise to this level and that affect only private interests may nonetheless represent an enforceable bargain. In such cases private contract law provides the appropriate recourse.

This record also supports a continuation of some form of oversight. The oversight condition was established, *inter alia*, to monitor the "workings" of the Board's conditions and the Applicants' "adherence to the various representations that they have made on the record." Conrail Decision at 365-66. Conditions that remain unfulfilled suggest the possibility of continuing harm to the public interest. The STB also deemed the

---

[4]/ The environmental conditions include both those crafted by the STB and agreements negotiated by the Applicants. Conrail Decision, Appendix Q, Condition 51.

[5]/ Some representations are specifically listed, such as those concerning access to certain Conrail lines and capital improvements in the region of Buffalo, New York. Id. at 388-89, ordering paragraphs 26, 35.

intramodal competition introduced in the Shared Asset Areas to be "the most important public benefit" of this transaction. Id. at 333. Finally, the Board confirmed that it would be address "unforeseen harms caused by the transaction" that were brought to its attention during the oversight period. [6] Id. at 365.

But there is less justification to continue the very broad oversight fashioned four years ago. Now, more than three years after the actual division of Conrail by the Applicants, even the parties registering some concern agree that CSX and NS have made very substantial progress in implementing the conditions attached to this most complex of transactions.

The Department accordingly proposes that the Applicants be relieved of the necessity to continue to prepare comprehensive progress reports on an annual basis. DOT recommends instead that CSX and NS continue to submit reports tailored to any of the specific claims raised in this record that the Board determines must be satisfied. We also suggest that the STB inquire into changes in the competitive status between the Applicants in the Shared Asset Areas of New Jersey, and clarify that during the next two years "unforeseen harms" may be brought to its attention for possible remedial action. In this fashion the very valid purposes of this proceeding may be served without unnecessarily burdening the Applicants.

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[6]/ For example, for the first time of which DOT is aware, it is possible that another community (Brooklyn, Ohio) may qualify for mitigation measures because of greater than anticipated rail traffic. *See* Comments of Congressman Dennis J. Cucinich.

Conclusion

The Applicants have clearly completed a great many of the steps and conditions necessary to a successful implementation of their transaction. Just as clearly, however, it is apparent that some issues remain outstanding. The Board should determine whether, and to what extent, CSX and NS have complied with all the conditions imposed on their transaction, and take appropriate steps to ensure that unfulfilled conditions are satisfied. The STB should also inquire into changes in the competitive status between the Applicants in the Shared Asset Areas of New Jersey. Finally, the Department urges the Board to indicate its willingness to entertain claims of unforeseen harms arising from this transaction. Tailored to this more narrow focus, DOT recommends that the oversight proceeding continue.

Respectfully submitted,

KIRK K. VAN TINE
General Counsel

August 7, 2002

CERTIFICATE OF SERVICE

I hereby certify that on this date I caused a copy of the Reply Comments of the United States Department of Transportation in STB Finance Docket No. 33388 (Sub-No. 91) to be served by first class mail, postage prepaid, upon Applicants and all parties filing Initial Comments in this proceeding.

Dale C. Andrews

August 7, 2002

STB FD-33388 (SUB 91) 8-5-02 D 205981

THOMPSON HINE

BRUSSELS CINCINNATI CLEVELAND COLUMBUS DAYTON WASHINGTON, D.C.

August 5, 2002

By Hand

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

RE: STB Finance Docket No. 33388(Sub-No. 91)
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 (General Oversight)

Dear Secretary Williams:

205982

Enclosed please find an original and twenty (25) copies of The Motion to File Comments Out Of Time, Comments of Cargill, Incorporated, Verified Statement of Paul Hammes and an Exhibit 1 to be filed in the above-referenced docket.

205980 205981

Also, enclosed is one additional copy of each pleading for stamp and return. Kindly date-stamp the additional copy for return to this office by messenger.

If you have any questions, please do not hesitate to call. My direct dial number is (202) 263-4107.

Sincerely,

Jeff Moreno/pdp

Jeffrey O. Moreno
Attorney for Gargill, Incorporated

cc: Mr. Jeffrey Johnson
Mr. Ron Hunter

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AUG 06 2002

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Public Record

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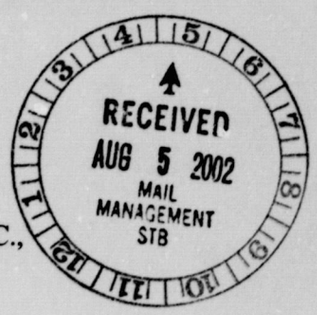
CARG-4

BEFORE THE
SURFACE TRANSPORTATION BOARD



STB FINANCE DOCKET NO. 33388 (SUB-NO. 91)

205982

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

[GENERAL OVERSIGHT]

MOTION TO FILE COMMENTS OUT OF TIME

Cargill, Incorporated ("Cargill") hereby submits this "Motion to File Comments Out of Time" in the above-captioned proceeding. Contemporaneous with this Motion, Cargill has submitted its Comments and the Verified Statement of Paul Hammes. In Decision No. 6, served on December 13, 2001, the Board ordered CSX and NS to file progress reports in this third annual oversight proceeding by June 3, 2002; directed interested parties to submit comments by July 17, 2002; and directed CSX and NS to file Replies by August 7, 2002. Thus, Cargill's Comments were due on July 17, 2002 pursuant to that Decision.

Cargill desires to file Comments regarding its soybean processing and refining facility, located in Sidney, Ohio. CSX and NS designated Sidney as a 2-to-1 point in their merger application and listed Cargill as a 2-to-1 shipper. Cargill is concerned that recent developments involving the fees charged by CSX to NS to preserve two carrier access at Sidney are inconsistent with the merger decision and do not adequately protecting Cargill's shipments of agricultural products from Sidney to NS-served destinations.

Cargill was first alerted to this potential issue in a July 12, 2002 teleconference with NS, during which NS expressed some concerns about the future economic viability of the existing interchange operations with CSX. These concerns took greater shape on July 18, 2002 when NS publicly announced a rate increase on soybean meal shipments of $450 per car in railroad-owned cars and $480 per car in private cars. This rate increase was published one day after comments were due in this proceeding, which thus precluded Cargill from submitting timely comments under the procedural schedule in Decision No. 6.

Cargill's comments relate to on-going direct harm caused by the loss of two carrier competition as a consequence of the Conrail merger transaction. The remedies adopted by CSX and NS to protect 2-to-1 shippers are now being thwarted only three years after the split date. Due to the important issue raised by Cargill's comments and the very recent revelation of the facts giving rise to this issue, Cargill has demonstrated just cause for accepting its late-filed comments.

WHEREFORE, Cargill respectfully requests the Board to accept for filing in this proceeding both its Comments and the Verified Statement of Paul Hammes.

Respectfully submitted,

Jeffrey O. Moreno
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1920 N Street, N.W., Suite 800
Washington, D.C. 20036
(202) 331-8800

Attorneys for Cargill, Incorporated

August 5, 2002

CERTIFICATE OF SERVICE

I, Pamela D. Plummer, a secretary at the law firm of Thompson Hine LLP, do hereby certify that on this 5th day of August, 2002, a copy of the foregoing Motion to File Comments Out Of Time, was served by first-class mail, postage prepaid, or more expedited method to the following:

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

Pamela D. Plummer

***by hand**

CARG-5

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB FINANCE DOCKET NO. 33388 (SUB-NO. 91)

205980

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

[GENERAL OVERSIGHT]

COMMENTS OF CARGILL, INCORPORATED

Cargill, Incorporated ("Cargill") hereby submits these Comments in the above-captioned proceeding. As part of its Comments, Cargill also submits the attached Verified Statement of Paul Hammes, the Assistant Vice President of Cargill AgHorizon's United States ("Hammes V.S."). Because Decision No. 6, served December 13, 2001, directed interested parties to submit comments by July 18, 2002, Cargill has submitted a "Motion to File Comments Out of Time" contemporaneous with these Comments. Cargill is concerned that recent developments involving the fees charged by CSX to NS to preserve two-carrier access at Sidney are inconsistent with the merger decision by not adequately protecting Cargill's shipments of agricultural products from Sidney, Ohio to NS-served destinations. Such actions will negate the protections that both carriers assured Cargill, as a 2-to-1 shipper at Sidney, and would preserve two-carrier competition post-merger.

Cargill operates a soybean processing and refining facility at Sidney, Ohio. Hammes V.S. at 1. Prior to the acquisition and division of Conrail by and between CSX and NS, Cargill's

facility was located near the intersection of a Conrail east-west line and a CSX north-south line. Id. Conrail served the facility directly, and CSX had access via a reciprocal switch for a charge of $205 per car. Id. As part of the Conrail transaction, CSX acquired the Conrail line, thus becoming the only carrier serving Sidney, Ohio.

CSX and NS designated Sidney a 2-to-1 point in their merger application and listed Cargill as a 2-to-1 shipper. See Verified Statement of James W. McClellan, CSX/NS-18, Vol. 1 at 546 and 549. In order to preserve two carrier competition at Sidney, they entered into a trackage rights agreement and a switching agreement to give NS access to Sidney shippers over approximately 33 miles of CSX track extending north from Sidney to Lima, Ohio. See CSX/NS-25, Vol. 8B, at 543-50; CSX/NS-25, Vol. 8C, at 616-3[illegible] respectively. After the division of Conrail, however, CSX and NS concluded that these agreements did not establish a convenient interchange at Sidney. Therefore, a new interchange was established at Marion, Ohio, approximately 60 miles east of Sidney on the former Conrail line. Hammes V.S. at 2. Since the merger, Cargill has accessed NS under the agreement establishing the Marion interchange, at rates that Cargill believes were competitive to those offered by Conrail pre-merger. Id.

Cargill only recently learned that the interchange fee charged by CSX to NS was an initial price that was subject to retroactive adjustment once the railroads completed an actual cost analysis. Id. Although that analysis was to have been completed shortly after the merger, it was not completed until a month ago. Id. The initial fee was based on an estimated cost of $200 per car, but the recently completed analysis attributes a cost of over $600 per car. Id. That cost is adjusted annually by the RCAF-U. Id. As a consequence of this increase, NS has announced a rate increase of $450 per railroad owned car and $480 per private car on soybean meal from

Sidney, effective October 1, 2002. Id. at 3, Exhibit 1. This rate increase was announced the very day after comments were due in this oversight proceeding.

CSX's costs are based upon an interchange operation that leaves Cargill in a worse position than it was under Conrail. Before Cargill's shipments move 60 miles east to Marion, Ohio, CSX hauls the shipments nearly 100 miles west to Anderson and Indianapolis, Indiana for classification. Id. at 2. Then the shipments retrace their path 100 miles east back to Sidney and then beyond to Marion for interchange with NS. Id. By contrast, with Conrail, Cargill had access to a second carrier via a short reciprocal switch at Sidney. Id. at 3.

It is not enough for CSX simply to preserve two-carrier access at Sidney. Such access should be on an economic basis that is at least comparable to the service provided by the displaced carrier. Cargill should not have to pay the cost of a 200-mile round-trip haul that CSX requires for its own convenience, particularly when that journey was not necessary to access a second carrier when Cargill was served by Conrail.

Cargill also appears to be worse off than it would be under the original trackage rights and switching agreements that CSX and NS entered into for the protection of 2-to-1 shippers. The trackage rights agreement charged NS 29¢ per car-mile over a 33 mile route, which would be less than $20 per car on a round-trip haul. CSX/NS-25, Vol. 8B at 544. Although the switching charge is not enumerated in the switching agreement, it would be difficult for CSX to justify a charge greater than the $205 reciprocal switch charge that Conrail assessed Cargill pre-merger. CSX/NS-25, Vol. 8C at 620. Even considering annual adjustments to the original trackage rights and switching fees, the per car charge for access to NS should be far below the $600 cost used by CSX to calculate its interchange fee to NS. The NS interchange was moved to

Marion, Ohio for the railroads' operating convenience and NS represented to Cargill that the cost of switching Cargill's Sidney facility would be no greater than it had been under Conrail. Hammes V.S. at 2. Cargill should not have to pay a rate that reflects costs that are greater than those that would have been incurred under the agreements that CSX and NS presented as part of their merger application.

Ironically, Cargill, an acknowledged 2-to1 shipper, also is worse off than shippers who are protected by the Settlement Agreement between CSX/NS and The National Industrial Transportation League ("NITL Agreement"). Section III.C. of the NITL Agreement required NS and CSX to keep open most Conrail reciprocal switch locations for ten years and capped the reciprocal switch charges between CSX and NS at $250 per car for a period of five years. CSX/NS-176, Vol. 1, at 773. But, those provisions do not apply to points where NS and CSX had entered into agreements intended to address 2-to-1 points. Id. As a consequence, the cap may not protect Cargill because Sidney, Ohio was a 2-to-1 point and CSX/NS had entered into trackage rights and switching agreements to address the situation.[1] Therefore, Cargill's rate to access a second carrier, NS, will soon be more than double the reciprocal switch charge under the NITL Agreement and three times the reciprocal switch charge it paid to Conrail.

The recently announced NS rate increases for soybean meal from Sidney will cause Cargill substantial competitive harm. Pre-merger, most of Cargill's customers were on Conrail lines in Pennsylvania and New York. Hammes V.S. at 1, note 1. As a result, most rail moves were in single line service via Conrail. However, on those movements to non-Conrail

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[1] Since the trackage rights and switching agreements in the merger application were never implemented at Sidney, and the Marion interchange agreement was not part of the merger application that was subject to public review and comment, Cargill indeed may be protected by the NITL Agreement, in which case CSX must provide reciprocal switching to Cargill at Sidney pursuant to the rates in that Agreement.

destinations, Cargill could access CSX via reciprocal switch for only $205 per car. Id. at 1. Most of Cargill's former Conrail direct customers are on lines acquired by NS in the merger. Id., note 1. Although Cargill was to have had access to NS via switching at Sidney, the relocation of the interchange to Marion, 60 miles to the east, along with the preceding 200 mile round trip move west on CSX before heading to Marion, effectively has converted those single line moves to two carrier movements, for which CSX now seeks to charge an additional $450 per car. Id. at 3.

The resulting rate increases by NS, which pass through CSX's costs to Cargill, will render Cargill non-competitive in the soybean meal market to NS destinations. Cargill expects NS to announce similar rate increases for other agricultural products from Sidney in the near future that will cause Cargill additional competitive harm. Cargill, therefore, is not in the same, or even a similar, competitive position under CSX as it was under Conrail. The safeguards proposed by NS and CSX in their merger application are not protecting Cargill, nor are the conditions imposed by the Board. Cargill asks the Board to take note of these facts and to take sufficient oversight action to ensure that Cargill is protected as a 2-to-1 shipper in the Conrail merger.

Respectfully submitted,

Jeffrey O. Moreno
THOMPSON HINE LLP
1920 N Street, N.W., Suite 800
Washington, D.C. 20036
(202) 331-8800

Attorneys for Cargill, Incorporated

August 5, 2002

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB FINANCE DOCKET NO. 33388 (SUB-NO. 91)

205981

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

[GENERAL OVERSIGHT]

Verified Statement of Paul Hammes

My name is Paul Hammes and I am the Assistant Vice President, Cargill AgHorizon's United States, of Cargill, Incorporated ("Cargill"). I am submitting this Verified Statement in support of Cargill's Comments in the above-captioned proceeding.

Cargill operates a soybean processing and refining plant at Sidney, Ohio, which was a designated 2-to-1 point by CSX and Norfolk Southern ("Applicants") in the Conrail Merger Application. Prior to the merger, Cargill was rail-served directly by Conrail along its east-west line running between Indianapolis, Indiana and Cleveland, Ohio. CSX also operated a nearby north-south line running between Cincinnati and Toledo, Ohio. Cargill had access to CSX at Sidney via a reciprocal switch for a charge of $205 per car. As a result of the merger, CSX acquired the Conrail line, thus becoming the only carrier serving Sidney.[1]

---

[1] Prior to the merger, most of Cargill's soybean meal also moved in single-line hauls via Conrail to Conrail destinations in Pennsylvania and New York. As a result of the merger,

In order to preserve two carrier access at Sidney, CSX entered into a trackage rights agreement and a switching agreement that gave NS access to Sidney shippers over approximately 33 miles of CSX track extending north from Sidney to Lima, Ohio. However, because these trackage rights did not provide convenient interchange capability at Sidney, CSX and NS subsequently determined that a better interchange would be at Marion, Ohio, on the former Conrail line approximately 60 miles east of Sidney. At that time, both Walt Trollinger and Tom Lindsey of NS, gave Cargill verbal commitments that the costs of switching Cargill's Sidney facility would be no greater than they had been under Conrail. Since the merger, Cargill has accessed NS via the Marion interchange at rates that were competitive with Conrail's pre-merger rates.

I recently learned that the interchange fees charged by CSX to NS were initial prices that were subject to retroactive adjustment once the railroads completed an actual cost analysis. Although that analysis was supposed to have been completed shortly after the merger, NS has informed me that it was not completed until a month ago. The costs attributed to Sidney in the initial fee totaled approximately $200 per car, but the analysis attributed costs over $600 per car and adjusted those costs by the RCAF-U, thereafter. It appears that CSX's costs, however, are based upon hauling Cargill's shipments West nearly 100 miles or more to Anderson and Indianapolis, Indiana for classification, before they return east back to Marion, Ohio for interchange with NS, passing Sidney en route.

---

however, Norfolk Southern acquired most of the Conrail lines serving the destinations. Thus, in addition to being a 2-to-1 location, Cargill's Sidney moves also effectively became 1-to-2 carrier hauls.

On July 12, 2002, Pat Simonic of NS telephoned me with concerns about the Marion interchange. NS had been accruing internal charges on Cargill's moves at a much lower cost than the recently revised costs that exceed $600 per car. Since NS cannot afford to absorb the difference between those costs and the initial rate, NS will now include that difference in Cargill's rates from Sidney to NS destinations. This was confirmed on July 18, 2002 when NS publicly announced a rate increase on soybean meal from Sidney, effective October 1, 2002, of $450 per railroad owned car and $480 per private car. See Exhibit 1, attached hereto. I have every reason to believe that this rate increase on soybean meal will be followed very soon by similar increases in NS' rail rates for other agricultural commodities from Sidney.

This rate increase for Sidney will render Cargill non-competitive in the soybean meal market for NS destinations. Similar rate increases on other agricultural commodities will have the same effect. Cargill is not in a comparable competitive position with CSX as it was under Conrail. Under Conrail, Cargill had access to two carriers via a short reciprocal switch at a rate of only $205 per car. In addition, Cargill had single line service to most of its soybean meal customers. Beginning October 1, 2002, Cargill can only reach most of its customers on a NS direct haul that includes CSX interchange costs that are $450 per car greater. This is a major harm to Cargill that is attributable directly to the Conrail merger transaction and, more importantly, to the failure of CSX and NS to adhere to the very agreements that were intended to protect Cargill as a 2-to-1 shipper at Sidney and were approved by the Board for that purpose.

8

Verification

I, Paul Hammes, verify under penalty of perjury, under the laws of the United States, that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Verified Statement. Executed on this 2nd day of August, 2002

Paul S. Hammes

Paul Hammes

EXHBIT 1

Moonen, Angie /hdqt

From: tami.alexander@nscorp.com
Sent: Thursday, July 18, 2002 1:22 PM
Subject: NS Announce Soybean Meal increase

Norfolk Southern announces that it will take an increase on soybean meal rates as follows, effective October 1, 2002:

Commodity: Soybean meal, hulls & hull pellets (STCCs 20-923-14, -16 & -17)

Rate Authorities: NSRQ 4975, NSRQ 52162, NSRQ 53246 & NSRQ 53480

Increase Amount: $30 per car on private cars only for all origins except Sidney, OH. For Sidney, OH, the increase will be $450 per car on railroad cars and $480 per car on private cars.

Other Changes: Rate are spread from origin to origin using Ft. Wayne or Bellevue, OH, as a base. Due to a calculating error the last time NSRQ 4975 and NSRQ 54236 were issued, the rates need to be readjusted back to the standard spreads. This should result in a minimal rate difference.

If you have any questions or comments, please call (540) 985-6028 or e-mail Tami Alexander.

Thank you for your continued patronage,
Tami Alexander
Product Manager
Norfolk Southern Corp.

CERTIFICATE OF SERVICE

I, Pamela D. Plummer, a secretary at the law firm of Thompson Hine LLP, do hereby certify that on this 5th day of August, 2002, a copy of the Comments of Cargill, Incorporated, Verified Statement of Paul Hammes and an Exhibit 1 was served by first-class mail, postage prepaid, or more expedited method to the following:

Henry D. Light
James A. Squires
George A. Aspatore
Greg E. Summy
John V. Edwards
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(202) 736-8000

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

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Carolyn D. Clayton
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Washington, D.C. 20036-1795

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

Pamela D. Plummer

*by hand

STB FD-33388 (SUB 91) 8-5-02 D 205980

August 5, 2002

By Hand

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

RE: STB Finance Docket No. 33388(Sub-No. 91)
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 (General Oversight)

Dear Secretary Williams:

205982

Enclosed please find an original and twenty (25) copies of The Motion to File Comments Out Of Time, Comments of Cargill, Incorporated, Verified Statement of Paul Hammes and an Exhibit 1 to be filed in the above-referenced docket.

205980 205981

Also, enclosed is one additional copy of each pleading for stamp and return. Kindly date-stamp the additional copy for return to this office by messenger.

If you have any questions, please do not hesitate to call. My direct dial number is (202) 263-4107.

Sincerely,

Jeff Moreno/pdp

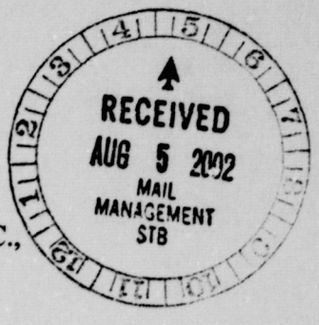
Jeffrey O. Moreno
Attorney for Gargill, Incorporated

cc: Mr. Jeffrey Johnson
Mr. Ron Hunter

ENTERED
Office of Proceedings
AUG 06 2002
Part of
Public Record

CARG-4

BEFORE THE
SURFACE TRANSPORTATION BOARD



STB FINANCE DOCKET NO. 33388 (SUB-NO. 91)

205982

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

[GENERAL OVERSIGHT]

MOTION TO FILE COMMENTS OUT OF TIME

Cargill, Incorporated ("Cargill") hereby submits this "Motion to File Comments Out of Time" in the above-captioned proceeding. Contemporaneous with this Motion, Cargill has submitted its Comments and the Verified Statement of Paul Hammes. In Decision No. 6, served on December 13, 2001, the Board ordered CSX and NS to file progress reports in this third annual oversight proceeding by June 3, 2002; directed interested parties to submit comments by July 17, 2002; and directed CSX and NS to file Replies by August 7, 2002. Thus, Cargill's Comments were due on July 17, 2002 pursuant to that Decision.

Cargill desires to file Comments regarding its soybean processing and refining facility, located in Sidney, Ohio. CSX and NS designated Sidney as a 2-to-1 point in their merger application and listed Cargill as a 2-to-1 shipper. Cargill is concerned that recent developments involving the fees charged by CSX to NS to preserve two carrier access at Sidney are inconsistent with the merger decision and do not adequately protecting Cargill's shipments of agricultural products from Sidney to NS-served destinations.

Cargill was first alerted to this potential issue in a July 12, 2002 teleconference with NS, during which NS expressed some concerns about the future economic viability of the existing interchange operations with CSX. These concerns took greater shape on July 18, 2002 when NS publicly announced a rate increase on soybean meal shipments of $450 per car in railroad-owned cars and $480 per car in private cars. This rate increase was published one day after comments were due in this proceeding, which thus precluded Cargill from submitting timely comments under the procedural schedule in Decision No. 6.

Cargill's comments relate to on-going direct harm caused by the loss of two carrier competition as a consequence of the Conrail merger transaction. The remedies adopted by CSX and NS to protect 2-to-1 shippers are now being thwarted only three years after the split date. Due to the important issue raised by Cargill's comments and the very recent revelation of the facts giving rise to this issue, Cargill has demonstrated just cause for accepting its late-filed comments.

WHEREFORE, Cargill respectfully requests the Board to accept for filing in this proceeding both its Comments and the Verified Statement of Paul Hammes.

Respectfully submitted,

Jeffrey O. Moreno
THOMPSON HINE LLP
1920 N Street, N.W., Suite 800
Washington, D.C. 20036
(202) 331-8800

Attorneys for Cargill, Incorporated

August 5, 2002

CERTIFICATE OF SERVICE

I, Pamela D. Plummer, a secretary at the law firm of Thompson Hine LLP, do hereby certify that on this 5th day of August, 2002, a copy of the foregoing Motion to File Comments Out Of Time, was served by first-class mail, postage prepaid, or more expedited method to the following:

Henry D. Light
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Attorneys for Norfolk Southern Corporation and Norfolk Southern Railway Company

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*Samuel M. Sipe, Jr.
David H. Coburn
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1330 Connecticut Avenue, N.W.
Washington, D.C. 20036-1795

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

Pamela D. Plummer

***by hand**

CARG-5

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB FINANCE DOCKET NO. 33388 (SUB-NO. 91)

205980

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

[GENERAL OVERSIGHT]

COMMENTS OF CARGILL, INCORPORATED

Cargill, Incorporated ("Cargill") hereby submits these Comments in the above-captioned proceeding. As part of its Comments, Cargill also submits the attached Verified Statement of Paul Hammes, the Assistant Vice President of Cargill AgHorizon's United States ("Hammes V.S."). Because Decision No. 6, served December 13, 2001, directed interested parties to submit comments by July 18, 2002, Cargill has submitted a "Motion to File Comments Out of Time" contemporaneous with these Comments. Cargill is concerned that recent developments involving the fees charged by CSX to NS to preserve two-carrier access at Sidney are inconsistent with the merger decision by not adequately protecting Cargill's shipments of agricultural products from Sidney, Ohio to NS-served destinations. Such actions will negate the protections that both carriers assured Cargill, as a 2-to-1 shipper at Sidney, and would preserve two-carrier competition post-merger.

Cargill operates a soybean processing and refining facility at Sidney, Ohio. Hammes V.S. at 1. Prior to the acquisition and division of Conrail by and between CSX and NS, Cargill's

facility was located near the intersection of a Conrail east-west line and a CSX north-south line. Id. Conrail served the facility directly, and CSX had access via a reciprocal switch for a charge of $205 per car. Id. As part of the Conrail transaction, CSX acquired the Conrail line, thus becoming the only carrier serving Sidney, Ohio.

CSX and NS designated Sidney a 2-to-1 point in their merger application and listed Cargill as a 2-to-1 shipper. See Verified Statement of James W. McClellan, CSX/NS-18, Vol. 1 at 546 and 549. In order to preserve two carrier competition at Sidney, they entered into a trackage rights agreement and a switching agreement to give NS access to Sidney shippers over approximately 33 miles of CSX track extending north from Sidney to Lima, Ohio. See CSX/NS-25, Vol. 8B, at 543-50; CSX/NS-25, Vol. 8C, at 616-30 respectively. After the division of Conrail, however, CSX and NS concluded that these agreements did not establish a convenient interchange at Sidney. Therefore, a new interchange was established at Marion, Ohio, approximately 60 miles east of Sidney on the former Conrail line. Hammes V.S. at 2. Since the merger, Cargill has accessed NS under the agreement establishing the Marion interchange, at rates that Cargill believes were competitive to those offered by Conrail pre-merger. Id.

Cargill only recently learned that the interchange fee charged by CSX to NS was an initial price that was subject to retroactive adjustment once the railroads completed an actual cost analysis. Id. Although that analysis was to have been completed shortly after the merger, it was not completed until a month ago. Id. The initial fee was based on an estimated cost of $200 per car, but the recently completed analysis attributes a cost of over $600 per car. Id. That cost is adjusted annually by the RCAF-U. Id. As a consequence of this increase, NS has announced a rate increase of $450 per railroad owned car and $480 per private car on soybean meal from

Sidney, effective October 1, 2002. Id. at 3, Exhibit 1. This rate increase was announced the very day after comments were due in this oversight proceeding.

CSX's costs are based upon an interchange operation that leaves Cargill in a worse position than it was under Conrail. Before Cargill's shipments move 60 miles east to Marion, Ohio, CSX hauls the shipments nearly 100 miles west to Anderson and Indianapolis, Indiana for classification. Id. at 2. Then the shipments retrace their path 100 miles east back to Sidney and then beyond to Marion for interchange with NS. Id. By contrast, with Conrail, Cargill had access to a second carrier via a short reciprocal switch at Sidney. Id. at 3.

It is not enough for CSX simply to preserve two-carrier access at Sidney. Such access should be on an economic basis that is at least comparable to the service provided by the displaced carrier. Cargill should not have to pay the cost of a 200-mile round-trip haul that CSX requires for its own convenience, particularly when that journey was not necessary to access a second carrier when Cargill was served by Conrail.

Cargill also appears to be worse off than it would be under the original trackage rights and switching agreements that CSX and NS entered into for the protection of 2-to-1 shippers. The trackage rights agreement charged NS 29¢ per car-mile over a 33 mile route, which would be less than $20 per car on a round-trip haul. CSX/NS-25, Vol. 8B at 544. Although the switching charge is not enumerated in the switching agreement, it would be difficult for CSX to justify a charge greater than the $205 reciprocal switch charge that Conrail assessed Cargill pre-merger. CSX/NS-25, Vol. 8C at 620. Even considering annual adjustments to the original trackage rights and switching fees, the per car charge for access to NS should be far below the $600 cost used by CSX to calculate its interchange fee to NS. The NS interchange was moved to

Marion, Ohio for the railroads' operating convenience and NS represented to Cargill that the cost of switching Cargill's Sidney facility would be no greater than it had been under Conrail. Hammes V.S. at 2. Cargill should not have to pay a rate that reflects costs that are greater than those that would have been incurred under the agreements that CSX and NS presented as part of their merger application.

Ironically, Cargill, an acknowledged 2-to1 shipper, also is worse off than shippers who are protected by the Settlement Agreement between CSX/NS and The National Industrial Transportation League ("NITL Agreement"). Section III.C. of the NITL Agreement required NS and CSX to keep open most Conrail reciprocal switch locations for ten years and capped the reciprocal switch charges between CSX and NS at $250 per car for a period of five years. CSX/NS-176, Vol. 1, at 773. But, those provisions do not apply to points where NS and CSX had entered into agreements intended to address 2-to-1 points. Id. As a consequence, the cap may not protect Cargill because Sidney, Ohio was a 2-to-1 point and CSX/NS had entered into trackage rights and switching agreements to address the situation.[1] Therefore, Cargill's rate to access a second carrier, NS, will soon be more than double the reciprocal switch charge under the NITL Agreement and three times the reciprocal switch charge it paid to Conrail.

The recently announced NS rate increases for soybean meal from Sidney will cause Cargill substantial competitive harm. Pre-merger, most of Cargill's customers were on Conrail lines in Pennsylvania and New York. Hammes V.S. at 1, note 1. As a result, most rail moves were in single line service via Conrail. However, on those movements to non-Conrail

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[1] Since the trackage rights and switching agreements in the merger application were never implemented at Sidney, and the Marion interchange agreement was not part of the merger application that was subject to public review and comment, Cargill indeed may be protected by the NITL Agreement, in which case CSX must provide reciprocal switching to Cargill at Sidney pursuant to the rates in that Agreement.

destinations, Cargill could access CSX via reciprocal switch for only $205 per car. Id. at 1. Most of Cargill's former Conrail direct customers are on lines acquired by NS in the merger. Id., note 1. Although Cargill was to have had access to NS via switching at Sidney, the relocation of the interchange to Marion, 60 miles to the east, along with the preceding 200 mile round trip move west on CSX before heading to Marion, effectively has converted those single line moves to two carrier movements, for which CSX now seeks to charge an additional $450 per car. Id. at 3.

The resulting rate increases by NS, which pass through CSX's costs to Cargill, will render Cargill non-competitive in the soybean meal market to NS destinations. Cargill expects NS to announce similar rate increases for other agricultural products from Sidney in the near future that will cause Cargill additional competitive harm. Cargill, therefore, is not in the same, or even a similar, competitive position under CSX as it was under Conrail. The safeguards proposed by NS and CSX in their merger application are not protecting Cargill, nor are the conditions imposed by the Board. Cargill asks the Board to take note of these facts and to take sufficient oversight action to ensure that Cargill is protected as a 2-to-1 shipper in the Conrail merger.

Respectfully submitted,

Jeffrey O. Moreno
THOMPSON HINE LLP
1920 N Street, N.W., Suite 800
Washington, D.C. 20036
(202) 331-8800

Attorneys for Cargill, Incorporated

August 5, 2002

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB FINANCE DOCKET NO. 33388 (SUB-NO. 91)

205981

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

[GENERAL OVERSIGHT]

Verified Statement of Paul Hammes

My name is Paul Hammes and I am the Assistant Vice President, Cargill AgHorizon's United States, of Cargill, Incorporated ("Cargill"). I am submitting this Verified Statement in support of Cargill's Comments in the above-captioned proceeding.

Cargill operates a soybean processing and refining plant at Sidney, Ohio, which was a designated 2-to-1 point by CSX and Norfolk Southern ("Applicants") in the Conrail Merger Application. Prior to the merger, Cargill was rail-served directly by Conrail along its east-west line running between Indianapolis, Indiana and Cleveland, Ohio. CSX also operated a nearby north-south line running between Cincinnati and Toledo, Ohio. Cargill had access to CSX at Sidney via a reciprocal switch for a charge of $205 per car. As a result of the merger, CSX acquired the Conrail line, thus becoming the only carrier serving Sidney.[1]

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however, Norfolk Southern acquired most of the Conrail lines serving the destinations. Thus, in addition to being a 2-to-1 location, Cargill's Sidney moves also effectively became 1-to-2 carrier hauls.

On July 12, 2002, Pat Simonic of NS telephoned me with concerns about the Marion interchange. NS had been accruing internal charges on Cargill's moves at a much lower cost than the recently revised costs that exceed $600 per car. Since NS cannot afford to absorb the difference between those costs and the initial rate, NS will now include that difference in Cargill's rates from Sidney to NS destinations. This was confirmed on July 18, 2002 when NS publicly announced a rate increase on soybean meal from Sidney, effective October 1, 2002, of $450 per railroad owned car and $480 per private car. See Exhibit 1, attached hereto. I have every reason to believe that this rate increase on soybean meal will be followed very soon by similar increases in NS' rail rates for other agricultural commodities from Sidney.

This rate increase for Sidney will render Cargill non-competitive in the soybean meal market for NS destinations. Similar rate increases on other agricultural commodities will have the same effect. Cargill is not in a comparable competitive position with CSX as it was under Conrail. Under Conrail, Cargill had access to two carriers via a short reciprocal switch at a rate of only $205 per car. In addition, Cargill had single line service to most of its soybean meal customers. Beginning October 1, 2002, Cargill can only reach most of its customers on a NS direct haul that includes CSX interchange costs that are $450 per car greater. This is a major harm to Cargill that is attributable directly to the Conrail merger transaction and, more importantly, to the failure of CSX and NS to adhere to the very agreements that were intended to protect Cargill as a 2-to-1 shipper at Sidney and were approved by the Board for that purpose.

87

Verification

I, Paul Hammes, verify under penalty of perjury, under the laws of the United States, that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Verified Statement. Executed on this 2nd day of August, 2002

Paul S. Hammes

Paul Hammes

EXHBIT 1

Moonen, Angie /hdqt

From: tami.alexander@nscorp.com
Sent: Thursday, July 18, 2002 1:22 PM
Subject: NS Announce Soybean Meal increase

Norfolk Southern announces that it will take an increase on soybean meal rates as follows, effective October 1, 2002:

Commodity: Soybean meal, hulls & hull pellets (STCCs 20-923-14, -16 & -17)

Rate Authorities: NSRQ 4975, NSRQ 52162, NSRQ 53246 & NSRQ 53480

Increase Amount: $30 per car on private cars only for all origins except Sidney, OH. For Sidney, OH, the increase will be $450 per car on railroad cars and $480 per car on private cars.

Other Changes: Rate are spread from origin to origin using Ft. Wayne or Bellevue, OH, as a base. Due to a calculating error the last time NSRQ 4975 and NSRQ 54236 were issued, the rates need to be readjusted back to the standard spreads. This should result in a minimal rate difference.

If you have any questions or comments, please call (540) 985-6028 or e-mail Tami Alexander.

Thank you for your continued patronage,
Tami Alexander
Product Manager
Norfolk Southern Corp.

CERTIFICATE OF SERVICE

I, Pamela D. Plummer, a secretary at the law firm of Thompson Hine LLP, do hereby certify that on this 5th day of August, 2002, a copy of the Comments of Cargill, Incorporated, Verified Statement of Paul Hammes and an Exhibit 1 was served by first-class mail, postage prepaid, or more expedited method to the following:

Henry D. Light
James A. Squires
George A. Aspatore
Greg E. Summy
John V. Edwards
NORFOLK SOUTHERN CORPORATION
Three Commercial Place
Norfolk, Virginia 23510-2191
(757) 629-2838

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(202) 298-8660

*Constance A. Sadler
SIDLEY AUSTIN BROWN & WOOD
1501 K Street, N.W.
Washington, D.C. 200005
(202) 736-8000

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

Of Counsel:

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Peter J. Shudtz
CSX CORPORATION
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Mary Gabrielle Sprague
Sharon L. Taylor
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CSX TRANSPORTATION, INC.
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*Samuel M. Sipe, Jr.
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Carolyn D. Clayton
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Counsel for Applicants
***CSX Corporation** and*
CSX Transportation, Inc.

Pamela D. Plummer

by hand

STB FD-33388 (SUB 91) 12-4-01 D 204000

ARNOLD & PORTER

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CSX-8

October 31, 2001

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BY HAND

The Honorable Vernon A. Williams, Secretary
Surface Transportation Board
Office of the Secretary
1925 K Street, NW
Washington, DC 20423-0001

Re: STB Finance Docket No. 33388 (Sub-No. 91)
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 (General Oversight)

Dear Secretary Williams:

We have received the letter of Michael F. McBride, Esq., counsel for Indianapolis Power & Light Company, dated October 24, 2001, to the Board, relating to the above matter. CSX Corporation and CSX Transportation, Inc. (collectively, "CSX"), believe that, given the extensive prior submissions on this matter, only one of the points in the IP&L letter needs response.

As set forth in the Verified Statement of John E. Haselden, filed with CSX-6 on September 12, 2001 (as of September 11, 2001), INRD and IP&L had then agreed "that there should be no further disclosure of the details of their contract negotiations to the Board" in this proceeding. Haselden V.S. at 2. The October 24, 2001, letter from Mr. McBride stating that: "The agreement, by the way, is only for some of the coal to Stout, a fact not mentioned by CSX" appears to CSX to be a violation of the agreement just mentioned. That agreement was the reason the definitive agreement between the parties was not described in any detail in CSX-7, just as the agreement in principle had not been so described in CSX-6.

The tendentious and belittling language in the October 24, 2001, letter that the contract is "only" for "some" of Stout's requirements is an attempt to create a misleading impression as to the extent of the commitments made by the parties to the contract. CSX would like to bring the facts about the commitment of IP&L and INRD to the attention of the Board; but CSX, however, respecting the wishes of INRD that it not describe the details of those commitments, will not do so in this letter. If the Board wishes to see the agreement and judge for itself the extent of the commitment, CSX would have no objection to submitting it under "Highly Confidential" status pursuant to the Protective Order.

Twenty-five copies of this letter and a WordPerfect diskette containing the text of this letter are being filed herewith. Kindly date-stamp the enclosed additional copies of this letter at the time of filing and return them to our messenger.

Thank you for your assistance in this matter. Please contact the undersigned at (202) 942-5858 if you have any questions.

Respectfully yours,

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

rjm
Enclosures

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BEIJING

WRITER'S DIRECT DIAL:
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October 24, 2001

VIA HAND DELIVERY

Mr. Vernon A. Williams, Secretary
Surface Transportation Board
1925 K Street, N.W., Seventh Floor
Washington, D.C. 20423

Re: Finance Docket No. 33388 (Sub-No. 91), CSX Corporation, et al., (General Oversight)

Dear Secretary Williams:

We are in receipt of CSX-7, a letter from counsel for CSX Corporation and CSX Transportation, Inc. ("CSX"), with respect to an agreement between our client, Indianapolis Power & Light Company ("IPL") and The Indiana Rail Road Company ("INRD"), with respect to coal transportation at IPL's Stout Plant. CSX's letter merits two brief points in reply.

First, if CSX-7 is to be accepted into evidence, CSX's earlier objection to receipt of IPL's August 22, 2001 Response to CSX's and NS's August 6, 2001 Replies should not be granted. CSX should not be heard to object to IPL's August 22, 2001 submission, yet continue to make subsequent submissions of its own.

Second, in any event, CSX-7, like CSX's September 12, 2001 submission on the merits, "misses the point," to paraphrase CSX-6. The issue is not whether CSX and IPL have entered into an agreement for transportation of some of the coal needed at the Stout Plant. The agreement, by the way, is only for some of the coal to Stout, a fact not mentioned by CSX. The

issue, rather, is whether Indiana Southern Railroad Company ("Indiana Southern") and NS jointly are able to be an effective competitor to INRD at Stout for coal from southern Indiana, as Indiana Southern and Conrail jointly were able to do. IPL's evidence showed undisputedly that Indian Southern and NS jointly are not able to effectively compete under the terms of the remedy afforded IPL; CSX has offered no evidence to prove otherwise.

Respectfully submitted,

Michael F. McBride

Michael F. McBride
Bruce W. Neely

Attorneys for Indianapolis Power & Light Company

cc (via facsimile): Richard A. Allen, Esq.
Michael P. Harmonis, Esq.
Dennis G. Lyons, Esq.
Karl Morrell, Esq.
Paul Samuel Smith, Esq.

STB FD-33388 (SUB 91) 8-27-01 D 203263

203263

ARNOLD & PORTER

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Office of the Secretary

AUG 27 2001

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Washington, DC 20004-1206

August 27, 2001

BY HAND

The Honorable Vernon A. Williams, Secretary
Surface Transportation Board
Office of the Secretary
1925 K Street, NW
Washington, DC 20423-0001

Re: STB Finance Docket No. 33388 (Sub-No. 91)
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 (General Oversight)

Dear Secretary Williams:

We received today as service upon CSX Corporation and CSX Transportation, Inc. (collectively "CSX"), by the U.S. Mail, a set of filings by Indianapolis Power & Light Company ("IP&L") in the above matter. They consisted of documents marked "Expedited Consideration Requested," apparently filed with the Board on August 22, 2001, styled "Motion of Indianapolis Power & Light Company to File a Response to August 6, 2001 Replies of CSX and Norfolk Southern to IP&L's July 16, 2001 Comments," and "Response of Indianapolis Power & Light Company." Despite the alleged need for expedition and the established practice of CSX and IP&L in this matter to serve one another by hand, those documents were, as noted, served on us by U.S. Mail and took five days to reach us. They appear to be an attempt by IP&L to avoid the provision of 49 C.F.R. § 1104.13(c) which says that "a reply to a reply is not permitted."

Notwithstanding the belated receipt of these documents, CSX will reply to the Motion for Leave to File, as permitted by 49 C.F.R. §1104.13(a), on or before September 11, 2001, which is 20 days after the IP&L documents in question were filed with the Board.

A diskette containing a copy of this letter in appropriate WordPerfect format is also presented herewith.

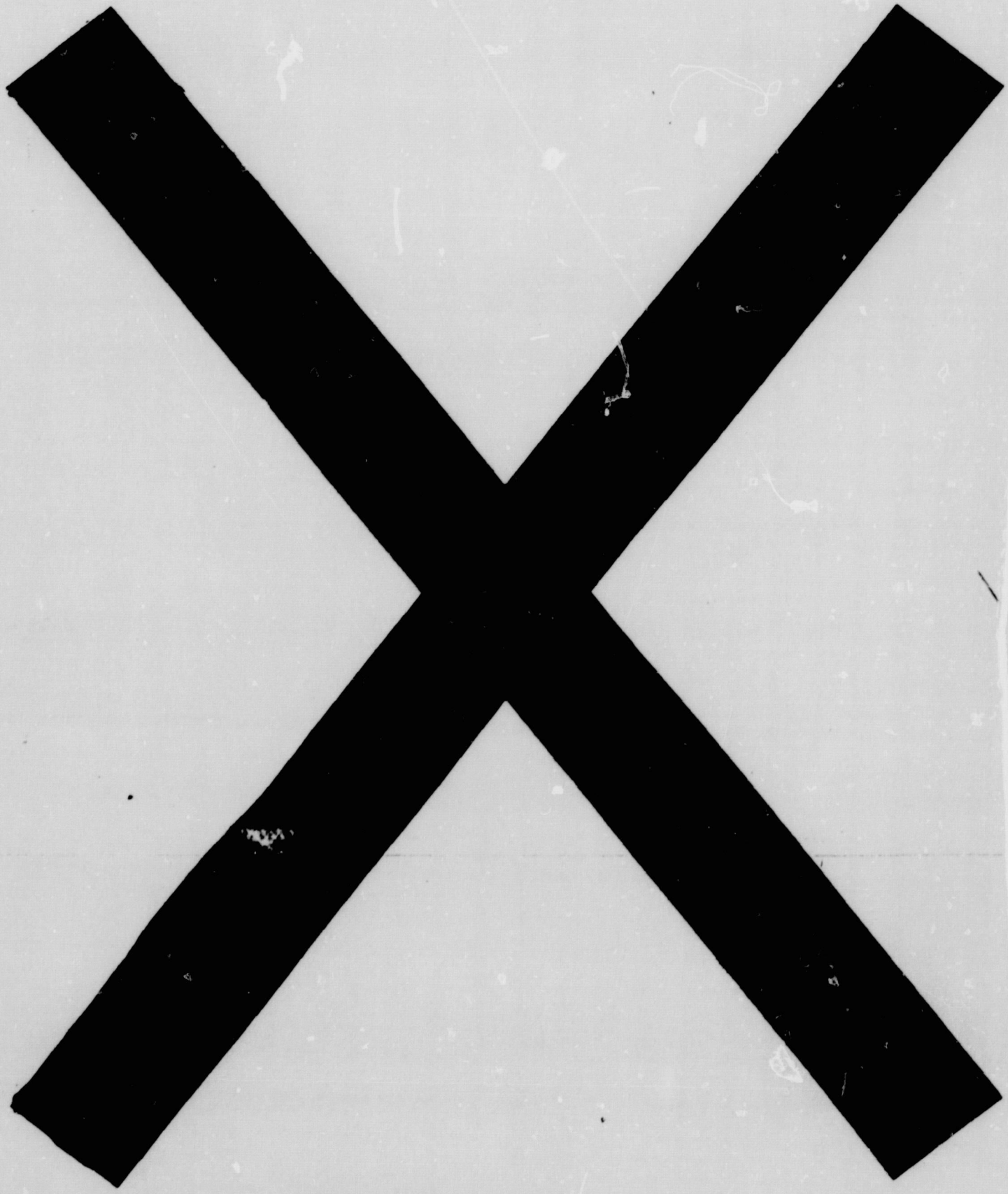
Kindly date-stamp the enclosed additional copies of this letter at the time of filing and return them to our messenger.

Thank you for your assistance in this matter. Please contact the undersigned at (202) 942-5858 if you have any questions.

Respectfully yours,

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

rjm
Enclosure
cc Richard A. Allen, Esq.
Michael P. Harmonis, Esq.
Michael F. McBride, Esq.
Karl Morrell, Esq.
Paul Samuel Smith, Esq.



203217

LeBoeuf, Lamb, Greene & MacRae
L.L.P.

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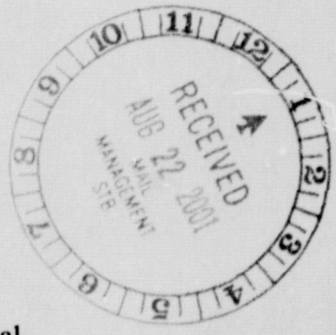
EXPEDITED CONSIDERATION REQUESTED

August 22, 2001



VIA HAND DELIVERY

Mr. Vernon A. Williams, Secretary
Surface Transportation Board
1925 K Street, N.W., Seventh Floor
Washington, D.C. 20423

Re: Finance Docket No. 33388 (Sub-No. 91), CSX Corporation, et al.,
(General Oversight)

Dear Secretary Williams:

Enclosed for filing in the above-referenced proceeding are an original and 25 copies each of a Motion and Response of Indianapolis Power & Light Company to August 6, 2001 Replies of CSX and Norfolk Southern to IPL's July 16, 2001 Comments. A diskette containing the contents of those documents in WordPerfect format is also enclosed. Please date stamp and return the three additional copies via our courier.

ENTERED
Office of the Secretary

AUG 22 2001

Part of
Public Record

Respectfully submitted,

Michael F. McBride

Michael F. McBride
Bruce W. Neely

Attorneys for Indianapolis Power & Light Company

cc(w/encl.): Richard A. Allen, Esq.
Michael P. Harmonis, Esq.
Dennis G. Lyons, Esq.
Karl Morrell, Esq.
Paul Samuel Smith, Esq.

203217

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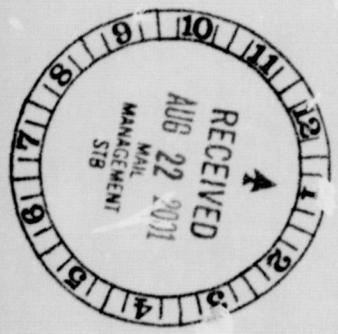

UNITED STATES OF AMERICA
SURFACE TRANSPORTATION BOARD

Finance Docket No. 33388 (Sub-No. 91)

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

(GENERAL OVERSIGHT)

RESPONSE OF INDIANAPOLIS POWER & LIGHT COMPANY TO AUGUST 6, 2001 REPLIES OF CSX CORPORATION AND CSX TRANSPORTATION, INC. AND OF NORFOLK SOUTHERN CORPORATION AND NORFOLK SOUTHERN RAILWAY COMPANY TO JULY 16, 2001 COMMENTS OF INDIANAPOLIS POWER & LIGHT COMPANY

Michael F. McBride
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Attorneys for Indianapolis Power & Light Company

August 22, 2001

UNITED STATES OF AMERICA
SURFACE TRANSPORTATION BOARD

Finance Docket No. 33388 (Sub-No. 91)

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

(GENERAL OVERSIGHT)

RESPONSE OF INDIANAPOLIS POWER & LIGHT COMPANY TO AUGUST 6, 2001 REPLIES OF CSX CORPORATION AND CSX TRANSPORTATION, INC. AND OF NORFOLK SOUTHERN CORPORATION AND NORFOLK SOUTHERN RAILWAY COMPANY TO JULY 16, 2001 COMMENTS OF INDIANAPOLIS POWER & LIGHT COMPANY

Indianapolis Power & Light Company ("IPL") hereby submits its Response to the Reply of CSX Corporation and CSX and CSX Transportation, Inc. (collectively, "CSX"), and the Reply of Norfolk Southern Corporation and Norfolk Southern Railway Company ("NS"). Both CSX and NS (jointly, "Applicants") make essentially the same irrelevant reply to IPL"s comments, i.e., that the issue is whether CSX's "appendage," The Indiana Rail Road Company ("INRD"), is offering IPL reasonable or sufficiently "competitive" rates to IPL. That is not the issue; the real issue is whether NS is able to provide "efficient and competitive" service to IPL as a substitute for the competition that Conrail offered IPL before CSX acquired its lines in Indianapolis.

In Decision No. 89, the Board required CSX and NS to permit NS to interchange with Indiana Southern Railroad Company ("Indiana Southern") "to approximate more closely pre-

transaction market conditions." Decision No. 89 at 116-17, 177. Those "pre-transaction" conditions included the ability for IPL to move coal from southern Indiana to its Stout Plant using Indiana Southern and Conrail. The Board's condition was, essentially, to put NS into the shoes of Conrail, with the intent that NS would serve as an "efficient and competitive" check on the pricing power of the sole railroad that Decision No. 89 left to serve IPL in Indianapolis -- CSX (and its appendage, INRD). Decision No. 96 at 14.

Of course, Conrail had rail lines in the Indianapolis market while NS's closest lines are 60 miles away, in Lafayette, Indiana. Because of that, and because of different work rules for NS and Indiana Southern, IPL has consistently questioned whether the remedy the Board imposed in Decision No. 89 was either efficient or competitive. Previously, the Board has concluded that IPL's concerns with the Board's "direct access" remedy were "speculation" and "premature," not that they were incorrect. Now, though, the Board can readily see that NS's 2001 rate offer to IPL

There is a standard way to determine whether a potential supplier (such as NS) provides a competitive check on the pricing power of the firm in the market, a method used by the Department of Justice ("DOJ"), the Federal Trade Commission ("FTC"), the Federal Energy Regulatory Commission ("FERC"), and the courts. That method is to determine whether the potential supplier (such as NS) can sell in the market at a price that is within some percentage of the firm in the market. The Horizontal Merger Guidelines used by DOJ and the FTC establishes 5% as the benchmark for determining whether the potential can compete in the market, thus

restraining the incumbent firm's ability to raise prices by 5%.[1] The FERC's merger rules also use 5% in assessing mergers.[2] The courts have endorsed this approach. Indeed, in affirming the Board's determination that Koch Industries is market-dominant, the Court noted that "the amount by which Koch increased its rates here -- an average of 20% -- is well above the standard usually employed to signal a substantial degree of market power." CF Industries, Inc. v. STB, ___ F.3d ___, No. 00-1209 (D.C. Cir., July 27, 2001), at *7 (paginated according to FindLaw printout)(citations omitted).

The rates NS has offered IPL are

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[1] Horizontal Merger Guidelines, § 1.1 (U.S. Dep't. of Justice & Fed. Trade Comm'n rev. ed. 1997), reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,104, available at http://www.ftc.gov/bc/docs/horizmer.htm. The Guidelines add that the 5% standard "is not a tolerance level for price increases."

[2] Regulation to be codified in 18 C.F.R. § 33.3(c)(4), reprinted in I FERC stats. & Reg. (CCH).

The direct-access condition the Board imposed to substitute NS for Conrail to approximate the competitive conditions that existed before the transaction to restrain that power is simply not effective.[5]

[5] CSX engages in a completely unsupported attack on Indiana Southern, suggesting it is the problem with the joint rates offered by NS. But CSX has no evidence to support the assertion (CSX-5, Vol. II, at II-17 to -18) and concludes by assuming that Indiana Southern is not the problem. Id. at II-19. One must have evidence to support an argument on which the Board can rely, and CSX has none. Moreover, NS, which would know, makes no such claim. Even if it were true, and IPL believes it is not, it would be a problem inherent in the remedy prescribed, which the Board would be obliged to remedy.

NS is not a potential "competitive" supplier to IPL, or substitute for the competition Conrail provided, and no reasonable person could content that it is. That is the issue. The Board should not inject itself into the negotiations with INRD because the circumstances with INRD service to IPL have not changed as a result of the Conrail acquisition and merger; those involving Conrail have, and it is that change that has an effect on the INRD negotiations.

Three other points raised by CSX warrant brief responses. CSX argues that its tariff is a "paper rate" and that if IPL even tried to rely on the rate it would be re-thought very quickly. CSX-5, Vol. II, at II-20. But in 1998 CSX represented to the Board that it would publish that tariff to replace Conrail's tariff (albeit with RCAF(U) adjustments, not RCAF(A), CSX-180 at 11 & n.14; see Exhibit 6 to CSX's Reply, at "Note"[6] and CSX is required to adhere to its representations to the Board by ordering paragraph 19 of Decision No. 89. CSX's admission, however, proves it has no intention of substituting itself for Conrail in Indianapolis, its mantra during the original Finance Docket No. 33388 proceeding, let alone adhering to its representation to the Board. Clearly, the publication of the CSX tariff was just a tactical move by CSX, not a real "holding out," which the Board should not countenance.

Moreover, CSX admits that it has not taken RCAF(U) increases, but could have. CSX-5, Vol. I, at 31 & n.32; Vol. II, at II-20 & n.26. Conrail's tariff applied the RCAF(A) to IPL's rates,

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[6] In relevant part, CSX's representation to the Board stated (see Exhibit 6 to CSX-5, Vol.II in this proceeding): "This tariff is, in essence, a republication of Conrail's Freight Publication CR 4611 in effect as of the expiration date of May 31, 1999. In footnote 14 on page 11 of Document CSX-180 in STB Finance Docket No. 33388 (Conrail Acquisition Proceeding) CSXT States: 'From CSX's perspective, as of the Split Date, it intends to adopt Conrail's published tariff rate as it pertains to the switching necessary for ISRR to access the Stout Plant (and the related divisional arrangements) and to maintain the same for the foreseeable future....'" Exhibit 6 to CSX-5, Vol. II, in this proceeding.

thereby further demonstrating that CSX's admitted ability to take more than an 8% increase (CSX-5, Vol. II at II-19) in IPL's rates shows that NS is not providing effective competition compared to what Conrail provided, under the standards set forth above and in the CF Industries case, which is the relevant comparison. What INRD and IPL are now arguing simply has no bearing on whether NS is an adequate substitute for Conrail. Surely, the mere fact that NS and IPL are continuing to communicate proves nothing about NS's competitiveness. Compare NS Comments at 9 & n.2.

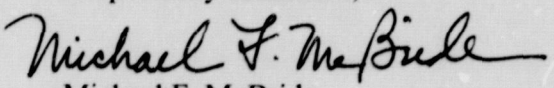
Finally, CSX attacks IPL for its supposed change of position on the efficacy of a "build out," the other remedy the Board provided at Stout. CSX -5, Vol. I, at 38-40; Vol. II, at II-28 to -31. There is no change of position. While IPL continues to believe that a "build out" is feasible, there is no question, and never has been, that the construction of a multi-million dollar "build out," whether the Board relies on IPL's projected costs or CSX's, would provide less of a competitive threat than Conrail did, because it is undisputed that IPL used Indiana Southern/Conrail service as its alternative, not the "build out," historically as its competition with INRD. There is also no question that it is less expensive for IPL to rely on direct access than to "build out." Moreover, CSX cannot, and therefore did not, deny that Board approval of a proposed "build-out" is dependent on the outcome of the STB's environmental review and Board approval of a "build-out" petition, neither of which can be presumed. It therefore follows that IPL has not changed its position on the possibility of a "build-out," and CSX had no cause to attack IPL in its Reply on that point.

Conclusion

NS cannot provide "efficient and competitive" service to IPL as a substitute for IPL's loss of competition from Conrail, based on NS's lack of presence in Indianapolis

The issue is whether NS is an adequate substitute for Conrail, not the details of the ongoing negotiations between INRD and IPL. Therefore, as set forth in IPL's July 16, 2001 Comments, Indiana Southern should be given direct access to IPL's Stout Plant and to the Perry K Plant for deliveries of Southern Indiana coal, because it is the only carrier which can provide such "efficient and competitive" service.

Respectfully submitted,



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(202) 986-8102 (Facsimile)

Attorneys for Indianapolis Power & Light Company

Dated: August 22, 2001

UNITED STATES OF AMERICA
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 33388 (SUB-NO. 91)

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

(GENERAL OVERSIGHT)

CERTIFICATE OF SERVICE

I hereby certify that I have served this 22nd day of August 2001, a copy of the foregoing Motion and Response of Indianapolis Power & Light Company, by first-class mail, postage prepaid, or by more expeditious means, upon the following:

Office of the Secretary
Case Control Unit
Attn.: STB Finance Dkt. 33388
(Sub-No. 91)
Surface Transportation Board
Mercury Building
1925 K Street, N.W.
Washington, DC 20423-0001

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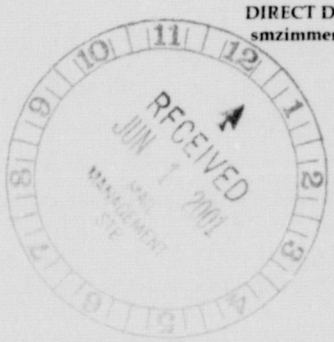


June 1, 2001

BY HAND DELIVERY

Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

Re: CSX Corp. *et al.* – Control and Operating Leases/Agreements – Conrail Inc. *et al.*, Finance Docket No. 33388 (Sub-No. 91) (General Oversight)

Dear Secretary Williams:

Enclosed for filing in the above-referenced proceeding are the original and 25 copies of NS-5, the "Second General Oversight Report Of Norfolk Southern Corporation and Norfolk Southern Railway Company." Also enclosed is a 3.5-inch computer disk containing the text of NS-5 in WordPerfect 5.0 format.

Kindly date-stamp the enclosed additional 5 copies of NS-5 and return them to our messenger.

Sincerely,

Scott M. Zimmerman

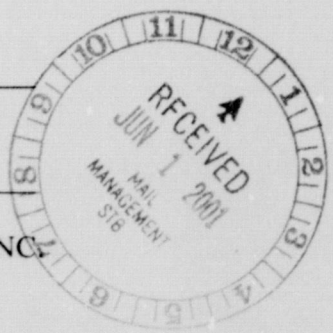
Enclosures

cc: All parties of record

20245

NS-5

BEFORE THE
SURFACE TRANSPORTATION BOARD



FINANCE DOCKET No. 33388 (Sub-No. 91)

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

(GENERAL OVERSIGHT)

SECOND GENERAL OVERSIGHT REPORT OF NORFOLK SOUTHERN CORPORATION AND NORFOLK SOUTHERN RAILWAY COMPANY

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Date: June 1, 2001

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BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET No. 33388 (Sub-No. 91)

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

(GENERAL OVERSIGHT)

SECOND GENERAL OVERSIGHT REPORT OF NORFOLK SOUTHERN CORPORATION AND NORFOLK SOUTHERN RAILWAY COMPANY

Pursuant to Decision No. 5 in Finance Docket No. 33388 (Sub-No. 91) (served February 2, 2001) ("Decision No. 5"), Norfolk Southern Corporation and Norfolk Southern Railway Company (collectively, "NS") hereby submit their second comprehensive report on implementation of the Conrail control transaction (the "Transaction") authorized by the Board in Decision No. 89 in Finance Docket No. 33388 (served July 23, 1998) ("Decision No. 89").

INTRODUCTION

In Decision No. 89, the Board approved, with conditions, acquisition of control of Conrail Inc. and Consolidated Rail Corporation (collectively, "Conrail") by (a) NS and (b) CSX Corporation and CSX Transportation, Inc. (collectively, "CSX"), and the division of the operation of a portion of the assets of Conrail by and between NS and CSX. The Board's decision was affirmed in all respects on judicial review by the United States Court of Appeals for

the Second Circuit on April 25, 2001. *Erie-Niagara Rail Steering Committee v. Surface Transportation Board*, Nos. 98-4285 *et al.*, (2d Cir. filed April 25, 2001).

In approving the Transaction, the Board, among other things, retained general oversight of the Transaction for five years to permit it to assess the progress of the Transaction's implementation and the effects of the various conditions the Board imposed. NS and CSX consummated the division and began the separate operation of those assets on June 1, 1999 (sometimes referred to here as "Day One" or "Split Date").

Decision No. 5, served February 2, 2001, completed the first annual round of the Conrail general oversight proceeding. It focused on events during the first year following Split Date. In the first paragraph of Decision No. 5, the Board summarized its conclusions as follows:

> [W]e find that CSX and NS have substantially resolved their transitional service problems, and that the conditions we imposed are working as intended. No problems related to increased market power have been demonstrated. CSX and NS have made significant progress in implementing various environmental conditions and settlement agreements, although negotiations to resolve various environmental conditions continue.

Events during the second year following Split Date (June 1, 2000-May 31, 2001) continue to show that NS and CSX have overcome initial service problems, that the conditions imposed by the Board are working as intended and that NS and CSX are continuing to comply with those conditions.

Like NS' first oversight report, filed on June 1, 2000 ("First Report"), this report is divided into two main parts. The first part discusses a number of broad issues pertaining to implementation of the Conrail Transaction during the second year following Split Date.[1] The

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[1] These issues relate to general matters that the Board in its decisions in this proceeding has indicated an interest in monitoring or as to which parties have expressed concern but have not requested specific conditions or relief.

second part consists of a point-by-point discussion of specific continuing conditions imposed on NS (or both Applicants) or directly affecting NS.[2] NS, however, will not reiterate its compliance, described in its First Report, with one-time conditions imposed by the Board.

I. IMPLEMENTATION OVERVIEW

A. In General

The two years since Split Date have been a challenging period for NS. The combination of initial difficulties encountered in implementing the Conrail Transaction, large increases in fuel costs and the general economic slowdown have required NS to take a number of major actions to return the company to its long-term pattern of growth and profitability. These have included reducing its dividend for the first time in NS' history (by 70 percent), cutting its management work force by nearly 25 percent and initiating a number of other restructuring steps. NS' 10-Q report for the first quarter of 2001 shows some of the positive results of these actions.

Despite these challenges, implementation of the Conrail Transaction has continued to proceed satisfactorily during the second year after Split Date. As discussed below, service on the Conrail system operated by NS has improved steadily since our First Report a year ago. NS has continued to make substantial capital investments in the Conrail system. The high priority NS has always placed on safety is reflected in its unprecedented receipt, in May 2001, of a twelfth consecutive E.H. Harriman Gold Medal. There have been no complaints filed, and none are pending, against any of NS' rates. In sum, while it is still too early to assess the full effects, NS believes that the experience to date has begun to show some of the projected benefits of the Transaction.

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[2] Conditions that pertain solely to CSX and do not directly affect NS are not addressed in this report.

We are beginning to realize some of the marketing benefits of the Transaction. Because of increased single line service, operating efficiencies and industrial development opportunities created by the Transaction, we are seeing new or improved traffic flows. Examples include the following:

- Establishment of new grain traffic between origins on the pre-Transaction NS to destinations on the former Conrail, including New York, Pennsylvania, New Jersey and the Delmarva Peninsula.
- Development of extended single line movements of paper between Southeastern paper mills and Northeastern receivers.
- Single line routing of auto parts from former Conrail-served suppliers to plants located on the old NS has been consolidated.
- More than 1,000 truckloads of a South Carolina shipper's traffic going into the former Conrail territory have been converted to rail.
- NS' pioneering JIT Rail boxcar service for auto parts has been expanded to Dayton, Ohio, a market NS could not serve prior to the Transaction.
- Approximately 3,000 new carloads per year of traffic have developed as a result of establishing a rail-barge transfer facility at a former Conrail location to move pig iron to a facility on the pre-Transaction NS.
- Utilities have gained the opportunity to source coal from non-traditional origins (*e.g.* Pittsburgh Seam coal for utilities on the old NS and Central Appalachian coal for utilities on the former Conrail). With the current tight supply of coal, new origins have become increasingly attractive to utilities. Numerous utilities have taken advantage of these new sources of coal.

- Mines on the former Conrail Deepwater to Elmore line have benefited from NS investments in the line and single line access to NS-served utilities as well as our export facility at Lamberts Point.
- New single line service has reduced cycle time for private equipment owned by several utilities.
- Significant industrial development activity has occurred. In the former Conrail territory now operated by NS, new or expanded facilities include a roofing shingle plant, plastic liner plant, plastic bottle plant, paper distribution facility, corrugated board plant, steel processing plant, expansion of a printing plant and petroleum refinery, and reopening a closed steel mill and a sweeteners terminal.
- NS' new Rutherford Yard near Harrisburg, PA has increased the efficiency of east-west intermodal moves and has decreased the number of cross-town drayage moves in Chicago.
- Thousands of truckloads of traffic have been take off of highways in the southeastern United States and placed onto rail as a result of a new BNSF-NS joint marketing effort.

The Conrail Transaction also has resulted in a marked increase in rail-to-rail competition, as well as a significant increase in our ability to compete against other modes. Our customers have been reaping the benefits of this enhanced competition since before Day One and continue to do so.

The reduced revenues resulting from increased competition, the large capital expenditures we have made in recent years, the increased price of diesel fuel, the decline in the export coal market and a general softening in the economy pose financial challenges. NS recognizes that it needs to do more to cut costs and increase revenues so that it can earn sufficient returns to allow it to continue to make the enormous capital investments necessary to

maintain its system and provide the services required by its customers. NS has overcome the initial implementation difficulties, but much remains to be done before NS can say that all the anticipated benefits of the Conrail Transaction have been realized.

B. Capital Improvement and Investments In Infrastructure

The NS Operating Plan submitted in STB Finance Docket No. 33388 estimated the need for over $500 million in construction and upgrade projects related to the Conrail Transaction. *See* CSX/NS-20 (Volume 3B) (NS Operating Plan) at 267 *et seq.* NS began reporting the progress of these projects as of the Control Date (when NS and CSX were authorized by Decision No. 89 to exercise control over Conrail) as part of its operational monitoring report that it submits monthly to the STB.

In the First Report, we reported that NS had completed 35 construction projects related to the Transaction and was working on 12 others. Particularly noteworthy projects included the Rutherford, PA intermodal facility, which began operating in August 2000, and the rebuilding of the Bison Yard in Buffalo, NY. We explained that some of the projects listed were in addition to, or expanded versions of, the projects described in the Operating Plan; NS determined after Split Date to undertake these added or expanded projects as a result of new traffic flows and other experience gained. NS also decided based on post-Split Date experience to defer completion of eight other projects described in the Operating Plan.

Since the First Report, NS has completed construction of seven of the 12 projects then in progress and completed the design phase of two others. All of the projects relating to the Transaction and their status (as of April 30, 2001) are listed in the following chart:[3]

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[3] If status of project phase is blank, work on that part of the project has not yet begun.

Location		Project	Dept	Phase	Status
Alexandria	IN	Construct track connection	Track	Design	Complete
		Estimated Completion Date: Complete		Grading	Complete
				Const	Complete
			Signal	Design	Complete
				Const	Complete
Allentown -	PA	Traffic Control System	Signal	Design	**Note 2**
Reading	PA			Const	
Angola	NY	Upgrade existing siding, construct new siding	Track	Design	Complete
		Estimated Completion Date: Complete		Grading	Complete
				Const	Complete
			Bridge	Design	Complete
				Const	Complete
			Signal	Design	Complete
				Const	Complete
Ashtabula	OH	Construct connection track	Track	Design	Complete
		Estimated Completion Date: Complete		Const	Complete
			Signal	Const	Complete
Attica	IN	Extend siding 4, 580 track feet	Track	Design	Complete
		Estimated Completion Date: Complete		Grading	Complete
				Const	Complete
			Signal	Design	Complete
				Const	Complete
Boundbrook	NJ	Extend siding 15,000 track feet	Track	Design	**Note 2**
		Estimated Completion Date: **Undetermined**		Grading	
				Const	
			Signal	Design	
				Const	
Bristol	VA	Extend siding 14,255 track feet	Track	Design	Complete
		Estimated Completion Date: Complete		Grading	Complete
				Const	Complete
			Bridge	Design	Complete
				Const	Complete
			Signal	Design	Complete
				Const	Complete
Bucyrus	OH	Construct track connection	Land		Complete
		Estimated Completion Date: Complete	Track	Design	Complete
				Grading	Complete
				Const	Complete
			Signal	Design	Complete
				Const	Complete
Buffalo -	NY	Traffic control system and remove pole line.	Signal	Design	Complete

Location		Project	Dept	Phase	Status
Cleveland	OH	Estimated Completion Date: Complete		Const	Complete
Buffalo	NY	Rehabilitate tracks in sub-leased BPRR yard Estimated Completion Date: Complete	Track	Const	Complete
Buffalo	NY	Construct connection to BPRR yard Estimated Completion Date: Complete	Track	Design	Complete
				Grading	Complete
				Const	Complete
			Signal	Design	Complete
				Const	Complete
Buffalo	NY	Reconstruct portion of Bison Yard Estimated Completion Date: Complete	Track	Design	Complete
				Grading	Complete
				Const	Complete
			Signal	Design	Complete
				Const	Complete
Butler	IN	Construct track connection Estimated Completion Date: Undetermined	Track	Design	**Note 2**
				Grading	
				Const	
			Signal	Design	
				Const	
Chicago	IL	Expand and improve 47th St Yard Intermodal Terminal Estimated Completion Date: **Complete**	Track	Design	Complete
				Grade/Pave	**Complete**
Cloggsville	OH	Track Rehabilitation Estimated Completion Date: Complete	Track	Design	Complete
				Const	Complete
Cloggsville	OH	Construct second main	Track	Design	Complete
				Grading	**Complete**
				Const	**Complete**
			Bridge	Design	Complete
				Const	**Complete**
			Signal	Design	Complete
				Const	**Complete**
Columbus	OH	Construct track connection Estimated Completion Date: Complete	Track	Design	Complete
				Grading	Complete
				Const	Complete
			Signal	Design	Complete
				Const	Complete
Crockett	VA	Construct 9,100 foot new siding Estimated Completion Date: Complete	Land		Complete
			Track	Design	Complete
				Grading	Complete
				Const	Complete
			Bridge	Design	Complete
				Const	Complete
			Signal	Design	Complete

Location		Project	Dept	Phase	Status
				Const	Complete
Croxton	NJ	Expand and improve intermodal terminal	Track	Design	Complete
		Estimated Completion Date: Complete		Grade	Complete
E-Rail	NJ	Expand and improve intermodal terminal	Track	Design	**Complete**
				Grade/Pave	**In progress**
Erie	PA	Erie Track Realign Project	Track	Design	**Complete**
		Estimated Completion Date: **4Q01**		Grading	**In progress**
				Const	**In progress**
			Signal	Design	Complete
				Const	**In progress**
Flemington	NJ	Construct 12,500 foot siding	Track	Design	**Note 2**
		Estimated Completion Date: Undetermined		Grading	
				Const	
			Signal	Design	
				Const	
Hadley Jct (Ft Wayne)	IN	Double tracking	Track	Design	**Note 2**
		Estimated Completion Date: Undetermined		Grading	
				Const	
			Signal	Design	
				Const	
Hagerstown Sec (Greencastle)	PA	Construct siding	Track	Design	Complete
		Estimated Completion Date: Complete		Grading	Complete
				Const	Complete
			Signal	Design	Complete
				Const	Complete
Hagerstown Sec	PA	Traffic Control	Signal	Design	Complete
				Const	**Complete**
Harrisburg	PA	Construct double track	Land		**Complete**
			Track	Design	Complete
				Grading	**Complete**
				Const	**Complete**
			Signal	Design	Complete
				Const	**Complete**

Location		Project	Dept	Phase	Status
Harrisburg (Rutherford)	PA	Construct intermodal terminal Estimated Completion Date: **Complete**	Track	Design Grade/Pave	Complete **Complete**
Harrisburg - Reading	PA PA	Traffic Control System and remove pole line Estimated Completion Date: **3Q01**	Signal	Design Const	Complete In progress
KD Tower - Cumberland Falls	KY KY	Extending double track 40,120 feet Estimated Completion Date: Complete	Track	Design Grading Const	Complete Complete Complete
			Signal	Design Const	Complete Complete
Knoxville - Chattanooga	TN TN	Double Stack Clearances Estimated Completion Date: Complete	Track	Design Const	Complete Complete
			Bridge	Design	Complete
Marshfield	IN	Upgrade and extend siding 7,908 feet Estimated Completion Date: Complete	Land Track	Design Grading Const	Complete Complete Complete Complete
			Bridge	Design Const	Complete Complete
			Signal	Design Const	Complete Complete
Oak Harbor	OH	Construct track connection Estimated Completion Date: Complete	Land Track	Design Grading Const	Complete Complete Complete Complete
			Signal	Design Const	Complete Complete
Pattenburg	NJ	Clearance-9 Bridges Estimated Completion Date: Complete	Bridge	Design Const	Complete Complete
Pattenburg	NJ	Siding Extensions Estimated Completion Date: Complete	Track	Design Grading Const	Complete Complete Complete
			Signal	Design Const	Complete Complete
Pattenburg	NJ	Tunnel Clearance Estimated Completion Date: Complete	Bridge	Design Const	Complete Complete
Philadelphia	PA	Construct crossover - Zoo Estimated Completion Date: Undetermined	Track	Design Grading Const	**Note 2**
			Signal	Design Const	
Piney Flats	TN	Extend siding 6,510 feet Estimated Completion Date: Complete	Land Track	Design	Complete Complete

Location		Project	Dept	Phase	Status
				Grading	Complete
				Const	Complete
			Signal	Design	Complete
				Const	Complete
Port Reading	NJ	Chemical Coast Clearance Projects	Track	Design	Complete
		Estimated Completion Date: Complete		Const	Complete
			Bridge	Design	Complete
				Const	Complete
Rader	TN	Extend siding 5,189 feet	Land		Complete
		Estimated Completion Date: Complete	Track	Design	Complete
				Grading	Complete
				Const	Complete
			Bridge	Design	Complete
				Const	Complete
			Signal	Design	Complete
				Const	Complete
Reading -	PA	Traffic Control System and remove pole line	Signal	Design	**Note 2**
Philadelphia	PA			Const	
Riverton Jct -	VA	Clearance projects	Bridge	Design	Complete
Roanoke	VA	Estimated Completion Date: Complete		Const	Complete
Sandusky	OH	Construct Triple Crown Terminal	Track	Design	Complete
(Bellevue)		Estimated Completion Date: Complete		Grade/Pave	Complete
			Building	Const	Complete
Sandusky-	OH	Double Track: S 13.60 - S 26.00	Track	Design	Complete
Columbus		Estimated Completion Date: Complete		Grading	Complete
				Const	Complete
			Signal	Design	Complete
				Const	Complete
Sandusky-	OH	Double Track: S 78.10 - S 88.40	Land		**Complete**
Columbus			Track	Design	Complete
				Grading	**Complete**
				Const	**Complete**
			Signal	Design	**Complete**
				Const	**Complete**
Sandusky-	OH	Double Track: S 88.30 - S 95.60	Land		**Complete**
Columbus		Estimated Completion Date: **Complete**	Track	Design	Complete
				Grading	Complete
				Const	**Complete**
			Signal	Design	Complete
				Const	Complete
Sidney	IL	Construct track connection	Track	Design	Complete

Note 2: Project on hold pending evaluation of revised traffic requirements.

A number of significant capital projects also were completed by Conrail in the Shared Asset Areas in the year 2000. They include:

- Installation of 7.1 miles of welded rail, primarily in Oak Island Classification Yard and Pavonia Receiving Yard ($1.9 million).
- Installation of 37,500 ties for the purpose of improving yard conditions in all three Shared Asset Areas ($2 million).
- Installation of new yard control systems for Pavonia Hump Classification Yard ($800,000).
- Establishment of remote control of Milwaukee Junction Tower with the Mt. Laurel Dispatcher ($200,000).
- Addition of two new tracks at Bayline Yard in Newark, NJ ($1.1 million).

Moreover, Conrail anticipates that some $20 million in capital initiatives will be completed in 2001.

C. Service/Operational Monitoring

In the First Report, we reported that service on the NS system had steadily improved since October 1999 as reflected by three important measures of service – average train speed, total cars on line, and average dwell time.[4] And, as noted earlier, the Board found in Decision No. 5 that "CSX and NS have substantially resolved their transitional operational and service

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[4] We also noted that service and operational issues are not encompassed within the general oversight proceeding (*see* Decision No. 89, *slip op.* at 161) but have been closely monitored by the Board as a result of the operational monitoring conditions the Board imposed in Decision No. 89, the periodic reporting requirements set forth at pages 162-165 of that decision and the close and frequent communications the Board's staff maintains with Applicants on operational and service issues.

problems and . . . are in the process of successfully integrating from an operational perspective their respective portions of Conrail." Decision No. 5, *slip op.* at 10-11. Since the First Report, each of the same three measures of service — average train speed, total cars on line, and average dwell time — has remained within an acceptable range. Because these measures are geared to fluidity, it is not surprising that the metrics are in an acceptable range given the fluidity of the NS system.

D. Labor

In the First Report, we reported that, prior to Split Date, Applicants had entered into 18 implementing agreements with all of the labor organizations representing their hourly employees, in compliance with the *New York Dock* conditions imposed in Decision No. 89. We also advised that, in compliance with Ordering Paragraph 27 of Decision No. 89, an NS Labor Management Task Force had met with labor organizations that had responded to NS' invitation to meet for the purpose of "promoting labor-management dialogue concerning implementation and safety issues."

No labor organization filed comments in the first annual oversight proceeding. There have been a few disputes regarding labor protective conditions that have been arbitrated. In addition, numerous employees received displacement allowances and many claims have not yet been resolved. One organization, the Brotherhood of Maintenance of Way Employes ("BMWE"), petitioned the Board to overturn one of the arbitration decisions (by William E.Fredenberger, Jr.) establishing one of the implementing agreements (which the parties subsequently incorporated into a voluntary agreement) on the ground of the arbitrator's conviction for unrelated offenses. The Board denied that petition by decision served January 26, 2001, and the union is seeking judicial review.

Also, a group of unions and the Commonwealth of Pennsylvania filed a petition with the Board on March 28, 2001 protesting NS' announced decision to close the Hollidaysburg, PA car repair shops on or about September 1, 2001. The petition claims that the closure will breach representations NS made in the control proceeding and asks the Board to order NS to continue operating the shops and to spend an additional $4 million on the shops. On May 21, 2001, the Board issued an order directing NS to submit by June 11, 2001 a pleading showing "why the Board should not order NS to cancel its proposed shut-down of its Hollidaysburg Car Shops."

On Consolidated Rail Corporation ("Conrail"), there have been few disputes regarding labor protective conditions. A total of 493 employees have been certified as entitled to *New York Dock* displacement allowances, with approximately 148 displacement allowances being paid each month. Claims for displacement allowances have been submitted under the *New York Dock* protective conditions on behalf of employees represented by several labor organizations. Discussions of these claims are ongoing. Two organizations, the BMWE and TWU, have requested arbitration, but to date the parties are still in discussion over these claims.

E. Relationship with Shortlines

NS is continuing to work with its shortline connections in a spirit of cooperation. NS believes that its relations with shortlines are good, and there have been few disputes. NS' compliance with specific conditions imposed with respect to particular shortlines will be discussed in Part II.

F. Relations with Amtrak and Other Passenger Authorities

Four passenger operations operate over Conrail lines that NS now operates: Metro-North Commuter Railroad Company ("Metro-North"), New Jersey Department of Transportation/New Jersey Transit Corporation ("NJT"), Southeastern Pennsylvania Transportation Authority ("SEPTA") and Amtrak. NS has agreements with all of these passenger interests.

NS has continued to have good working relations with the passenger authorities, and no major problems have arisen in the second year after Split Date.

The only passenger railroad that filed comments regarding concerns about NS in the first annual oversight round was Metro-North, which questioned the assignability to NS and CSX of Conrail's rights under a 1983 contract between Conrail and Metro-North. Metro-North asked the Board in any event to modify that contract, which extends until at least December 31, 2002, and also asked the Board to order NS to convey the Port Jervis-Suffern line to Metro-North. In Decision No. 5, the Board reaffirmed that Decision No. 89 had resulted in the assignment of all Conrail's contractual and operating rights to NS and CSX, refused to modify the Conrail/Metro-North contract, and declined again to order conveyance of the Port Jervis-Suffern line. Decision No. 5 at 20-21. The Board also expressed its anticipation that Metro-North would agree to pay almost $500,000 in then-outstanding trackage and maintenance fees to NS required by the contract, which Metro-North had declined to pay, and encouraged NS and Metro-North to negotiate "a long-term contract that provides for continued commuter service in this region." *Id.*

Metro-North has paid NS the amount due under the contract, and NS and Metro-North have had discussions regarding a long-term contract to replace the existing contract, but no agreement has yet been reached.

G. Safety Implementation

In its First Report, NS described in detail the steps it had undertaken, in compliance with Environmental Conditions 49(A) and 49(B), to carry out the Safety Integration Plans ("SIPS") submitted to the Board in December 1997 and the Memorandum of Understanding between the Board and the Federal Railroad Administration ("FRA") dated May 19, 1998. At that time, NS reported that as of its most recent safety integration meeting with FRA on April 5, 2000, NS had

satisfactorily completed all but six of the 65 safety implementation items that it had originally identified.

As the Board noted in Decision No. 5 at 11, the Department of Transportation ("DOT") filed comments in the first annual oversight proceeding that described NS' and CSX's overall safety record since Split Date as "excellent."

Since the filing of the First Report, the FRA and NS conducted formal Safety Integration Plan Accountability ("SIPA") meetings in June and September of 2000, and a "final" meeting on February 7, 2001. Although the FRA reserves the right to reopen the SIPA process during the oversight period, it concluded that a comparison of NS' safety record before and after Split Date warranted termination of the SIPA process. In particular, the FRA determined that the IT/Hazmat issues that were deemed to be a significant problem immediately after June 1, 1999 had been resolved. In addition, all of the items in the NS' SIPA worksheet were either completed or represented on-going activities, such as a pilot project for testing Positive Train Control, that no longer required constant FRA oversight.

The careful implementation of NS systems and safety initiatives on the new Northern Region was discussed in the First Report at 22-23. That work continues. NS has remained the safest Class I railroad (as reflected by the receipt of NS' twelfth consecutive E.H. Harriman Gold Medal) due, in part, to its constant efforts to remind employees that "all injuries can be prevented." Recent examples of these efforts include the following:

- Over 14,000 train and engine service employees, dispatchers and field personnel over the entire system participated in eight-hour safety workshops during the 4th Quarter 2000. Training classes were co-conducted by craft and management employees.

Modules included Crew Resource Management ("CRM") and "SOFA" (Switching Operations Fatality Analysis) training.[5]

- Safety training workshops for mechanical and engineering department employees carried over into the 1st Quarter, 2001 throughout the NS system.
- Form NS-1, "Rules for Equipment Operation and Handling" was implemented on December 1, 2000, replacing former Conrail EC-99.
- NS has adopted throughout the NS system the former Conrail rule of "3-Step Protection" for the prevention of movement of equipment without an engineer.
- NS implemented its automated dispatcher bulletin system on the Northern Region, replacing the former bulletin order system in October, 2000.
- Critical Incident Response Training is ongoing on Northern Region divisions.
- Engineering, Transportation and Mechanical Departments continue to receive monthly distributions of safety training videos, posters and safety statistical information for use in employee contacts, and posting on safety bulletin boards.

H. Impact on Chicago Switching District.

As reported in the First Report, Chicago continues to work well from an operational perspective. The Conrail Transaction has had no material adverse effect on Chicago operations or on the status of IHB as a neutral switch operator. No complaints about then-current Chicago operations or about IHB were raised in the first annual oversight round.

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[5] NS was a leader in adoption of a joint (labor/management/FRA) rail industry campaign to prevent fatalities during switching operations, commonly referred to as "SOFA." Labor/management initiatives included the distribution of a formal SOFA Declaration, a "lifesaver" video and the SOFA training referenced above.

I. Effects of the Transaction on Jurisdictional Thresholds and Revenue Adequacy.

Decision No. 89 discussed at length the arguments of some parties that NS and CSX had paid an excessive price for the Conrail stock (what those parties termed an "acquisition premium") and the requests of these parties for conditions that would have prohibited Applicants from using their costs of acquiring the Conrail stock in calculating jurisdictional thresholds under 49 U.S.C. § 10707(d)(1)(A) or in calculating revenue adequacy. The conditions these parties requested would have required instead the use of predecessor (*i.e.*, Conrail's) historic book value for those purposes. The Board rejected their arguments and declined to impose the requested conditions, but said it would continue to assess in the oversight proceedings the effect of the Transaction on the jurisdictional threshold applicable to rate reasonableness cases and on the Board's revenue adequacy determination.

In its decision affirming Decision No. 89, the Second Circuit squarely upheld the Board's analysis of this issue. The court noted that the Board's use of acquisition costs to value rail assets is consistent with Generally Accepted Accounting Principles ("GAAP") and was upheld in *Association of American Railroads v. ICC*, 978 F.2d 737 (D.C. Cir. 1992). The court stated:

> We agree with the STB's view that *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591 (1944), is inapplicable here. . . . [T]he STB determined that the railroad industry is not a heavily regulated industry and that "[g]iven that very few rail shippers are captive shippers whose rates ever require regulatory intervention, paying too much for property in hopes of extracting increased rents would be a self-defeating strategy in the rail industry." This conclusion is reasonable and entitled to deference.

Erie-Niagara, *slip op.* at 13.

In the First Report, NS described in detail the actual methods of accounting, required by GAAP, that it was employing with respect to the costs and carrying values related to the lines operated by NS in the Conrail Transaction. NS continues to employ those methods.

In Decision No. 5, the Board, after noting that only one commenter had raised any issue as to the matter,[6] concluded that there is "no evidence on this record that the 'acquisition premium' or any aspect of purchase accounting rules played any role in pricing decisions made by NS or CSX." Decision No. 5 at 18. It observed that rate changes put into effect by those carriers appeared to reflect current market conditions, including the recent significant rises in diesel fuel costs, and had nothing to do with the purchase price of Conrail. *Id.* The Board also pointed out that a calculation of the 180%-of-variable cost jurisdictional threshold under the Uniform Rail Costing System ("URCS") depends on movement-specific data, rather than on overall system calculations.[7] No shipper had introduced evidence on the record showing how the calculation of this threshold under URCS had been affected with respect to any movement of significance to the shipper. *Id.* at 18, n. 35. The Board noted there was currently no active rate case before the Board in which the jurisdictional threshold for any CSX or NS movement is implicated. *Id.* at 18-19.

The circumstances found by the Board remain the same as far as NS is concerned. NS is currently not subject to any rate case involving movements pertinent to the Conrail Transaction. NS understands that the Board will continue to monitor this issue, but NS believes that the

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[6] That issue was raised by the Ohio Rail Development Commission, essentially in passing, without detail.

[7] Although the determination of "revenue adequacy" is a system-wide concept, the First Report explained (NS-1 at 29-30) that no purchase accounting adjustments to the value of NS' assets in its accounts and Form R-1 were called for with respect to the former Conrail routes operated by NS, which continue to be owned by Conrail and its subsidiary, PRR. Moreover, for purpose of calculating NS' net investment basis, the value of the property leased by NS is included in NS' Schedule 250 at the lessor's (Conrail in this case) historic net book value (historic book value less accumulated depreciation.) As noted in the First Report, this results in a lower net investment base, and thus a higher degree of revenue adequacy, than would be the case if those assets had been acquired by NS and written up in value to reflect their acquisition cost.

Board's Decision No. 89 finding is correct: The application of GAAP to NS' accounts in connection with the Conrail Transaction will not have a material effect upon the statutory threshold for rate regulation or on the determination of revenue adequacy.

J. Buffalo-Area Infrastructure

In its decision served February 2, 2001 in the Buffalo Area Infrastructure Proceeding, Finance Docket No. 33388 (Sub-No. 93), the Board found that NS and CSX "have invested substantial amounts on infrastructure to improve rail service in the immediate Buffalo area and in the rail network connected to it. CSX and NS have also worked closely with local groups and business interests to identify additional projects involving upgrades in capital improvements and to take appropriate actions. We commend CSX and NS for their cooperative actions in this regard and urge them to continue those efforts in the future." Decision at 5.

In that decision, the Board discontinued that proceeding as a separate proceeding, but said it would continue to monitor Applicants' actions for improving rail service in the Buffalo area and directed them to continue "to provide updates on the Buffalo area infrastructure, as well as related cooperative actions with other entities in the Buffalo area, as part of their respective annual progress reports to be filed in the Conrail General Oversight proceeding." Decision at 6.

NS continues to have ongoing discussions with Canadian National Railway Company ("CN"), South Buffalo Railway Company ("SB"), and Canadian Pacific Railway Company ("CP"), as well as a variety of New York state and local interests, concerning operations and infrastructure, and although many of these discussions do not specifically address the matters covered by the Buffalo Area Infrastructure proceeding, the discussions address matters of system-wide, as well as local, operational interest. NS continues to work, in a variety of ways and forums, to achieve New York State property tax reform as well as public funding for the efforts described by NS in the joint CSX/NS report submitted in that proceeding.

II. REVIEW OF OTHER SPECIFIC CONDITIONS IMPOSED BY THE BOARD

We address below NS' compliance with specific ongoing conditions imposed in Decision No. 89.[8]

A. Adherence to the NITL Agreement, as Modified.

The Board ordered Applicants to adhere to all of the terms of the NITL settlement agreement, subject to the modifications ordered by the Board in Decision No. 89. Decision No. 89, Ordering Paragraph 20. NS continues to be in compliance with all of the terms of the NITL agreement as modified by the Board; the major continuing elements of the agreement, as modified, are described and discussed below:

(a) *Conrail Transaction Council.* Pursuant to the NITL agreement, CSX and NS created the Conrail Transaction Council. The Council's membership includes, in addition to the Applicants and NITL, many other organizations representing affected rail users, including the American Chemistry Council (formerly CMA), the Society of the Plastics Industry, Inc., the Intermodal Association of North America, the American Iron and Steel Institute, the Transportation Intermediaries Association, the National Grain and Feed Association, Edison Electric Institute, the American Forest and Paper Products Association, the Institute of Scrap Recycling Industries, the American Automobile Manufactures Association, and The Fertilizer Institute.

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[8] In the First Report, NS advised that it had complied with a number of one-time conditions imposed by Decision No. 89; specifically:

1. Notifications to the Board (Ordering paragraphs 2, 3 and 4).
2. Contract termination or substitution options (Ordering Paragraph 10).
3. Discussion with the Port of Wilmington (Ordering Paragraph 25).
4. Transfer of Buffalo Creek trackage rights (Ordering Paragraph 34).
5. Transfer of Keensburg-Carol trackage rights (Ordering Paragraph 42).

Between its inception in early 1998 and the end of 2000, the Council met more than 25 times. The matters discussed included the carriers' metrics and every major implementation activity, as well as many relatively minor ones. NS strongly believes that the Council and its meetings greatly assisted NS and CSX in implementing the Transaction.

At the Council's most recent meeting, on December 5, 2000, members of the Council (not including the Applicants) proposed that its regular monthly meetings be discontinued and that further meetings be convened only as needed to deal with specific subjects. The proposal was adopted without objection. The Council still exists, but has not had occasion to meet since its meeting in December.

(b) *Interline service.* The NITL agreement provides that, with respect to Conrail customers on routes over which at least 50 cars were shipped in single-line Conrail service in the year prior to the Control Date, and where service would become joint-line CSX-NS service after the Split Date, on request of the customer, NS and CSX will, for three years, maintain the Conrail rate subject to RCAF-U adjustment, and "work with that shipper to provide fair and reasonable joint-line service." Disagreements over routing or interchange points may be submitted to binding arbitration. NS continues to be in compliance with this provision. No shipper has requested arbitration of routing or interchange point issues.[9]

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[9] In the first annual oversight round, ISG Resources, Inc. described service difficulties following Split Date and the rerouting of its traffic to an alternate, multi-carrier movement; that rerouting was facilitated by NS' grant of a temporary waiver of NS' contractual blocking provision pertaining to Reading Blue Mountain & Northern Railroad (RBMN), permitting RBMN to participate in the alternate movement. In Decision No. 5 in this proceeding the Board declined to award ISG an open-ended extension of that waiver, which is now set to expire on June 30, 2001. The Board said, however, that it expected NS to "extend the waiver of the RBMN blocking provision if it continues to be unable to provide satisfactory service itself." Decision No. 5 at 24. NS is in active discussions with the parties about this matter.

The Board in Decision No. 89 expanded this provision to cover situations in which a Class III carrier could provide through service connecting solely with Conrail pre-Transaction, but post-Transaction must provide a three-carrier connecting service with both CSX and NS. To date, such protection has not been requested.

(c) *Gateways.* The NITL agreement provides that "NS and CSX anticipate that all major interchanges with other carriers will remain open as long as they are economically efficient." NS continues to comply with this condition.

(d) *Facilities within Shared Assets Areas.* The NITL agreement provides that during the term of the Shared Assets Areas Operating Agreements, any new or existing facility within the three SAAs (other than an "Operator Facility") shall be open to both CSX and NS to the extent and as provided in those Agreements, and construes those Agreements as generally providing that both CSX and NS shall have access to existing and new customer-owned facilities in the SAAs, that both CSX and NS may invest in joint facilities in the SAAs in order to gain access to such facilities, and that either NS or CSX may solely develop facilities that it will own or control and exclusively access. The Board in Decision No. 89 emphasized that during the term of the Shared Assets Area Operating Agreements, all existing and new customer-owned facilities within the SAAs may be served by both CSX and NS. Decision No. 89, *slip op.* at 58. NS continues to comply with this condition.

(e) *Board oversight and reporting.* The NITL agreement sought STB oversight for three years; the Board expanded its oversight to five years. The agreement also provided for quarterly reporting by NS and CSX and development by CSX, NS and the Conrail Transaction Council of objective, measurable standards to be used in the quarterly reports.

As reported in the First Report, NS, CSX, and the Conrail Transaction Council developed the following performance metrics to monitor performance: cars on line by owner and by type; average train speed by traffic mix; average terminal dwell time at specific terminals; and average days on line for empty and loaded cars. In addition to these measures, the Association of American Railroads requested that NS and CSX report bill of lading timeliness. To enable the public to better monitor service, NS and CSX report all of these metrics on a weekly basis, rather than a quarterly basis. Updated metrics continue to be posted on each railroad's website as well as the AAR's website every Wednesday.

(f) *Reciprocal switching.* The NITL agreement provides that NS or CSX, as the case may be, will keep open to reciprocal switching for ten years any point at which Conrail provided reciprocal switching and also that for five years, reciprocal switching charges between NS and CSX at those points will not exceed $250 per car, subject to annual RCAF-U adjustment. Further, at all other points and/or with all other carriers, switching rates are to be limited to existing rates plus RCAF-U adjustment or a negotiated amount not to exceed the existing rate plus RCAF-U adjustment.

The Board expanded these provisions in Decision No. 89 to require, where feasible, preservation of switching agreements in both directions – NS and CSX over Conrail and Conrail over NS and CSX – under the same terms provided in the NITL agreement. The Board also mandated preservation of switching arrangements and rate accommodations in cases in which shortline railroads paid switching charges to Conrail pre-Transaction. Decision No. 89, *slip op.* at 57. NS continues to comply with this provision of the NITL agreement, as expanded by the Board.

B. Adherence To Other Settlement Agreements.

The Board specifically required NS and CSX to adhere to the terms of settlement agreements entered into with Amtrak, the Southern Tier West Regional Planning and Development Board, the United Transportation Union, the Empire State Passengers Association, and the City of Indianapolis. Decision No. 89, Ordering Paragraph 21. NS is not a party to the latter two agreements.

The parties to the settlement with the Southern Tier West Regional Planning and Development Board have complied with that agreement by making the underlying real estate transfer contemplated by that agreement. Subsequent to that transfer, the line was subleased to the Western New York & Pennsylvania Railroad. *See* STB Finance Docket No. 34017, *Western New York & Pennsylvania Railroad, LLC -- Lease and Operation Exemption -- Norfolk Southern Railway Company and Pennsylvania Lines LLC,* decision served April 30, 2001.

NS continues to comply with the terms of its settlement agreements with Amtrak and UTU as well.

C. Intermodal truck traffic monitoring.

The Board required applicants to monitor the origins, destinations and routings for truck traffic at their intermodal terminals in Northern New Jersey and Massachusetts so as to permit the Board to determine whether the Transaction has led to substantially increased traffic over the George Washington Bridge, and to report their findings quarterly. Decision No. 89, Ordering Paragraph 22. NS has submitted seven reports including data surveyed from its intermodal terminal in Croxton, NJ covering the period from January 1, 1999 through March 31, 2001, and

is continuing to monitor truck traffic at Croxton.[10] NS expects to file in early July its report for the months of April, May and June, 2001.

D. Indianapolis Power & Light.

The Board required applicants to allow IP&L to choose between service to its Stout plant provided directly by NS or via switching by the Indiana Rail Road Company ("INRD"), to allow creation of an interchange at MP 6.0 on the Petersburg Subdivision of Indiana Southern Railroad ("ISRR") for traffic moving to or from the Stout or Perry K plants, and to provide conditional rights for either NS or ISRR to serve any build-out to the Indianapolis Belt Line. Decision No. 89, Ordering Paragraph 23.

To implement this condition, NS and INRD entered into a trackage rights agreement that will permit NS to serve the Stout plant directly via trackage rights. Also, in response to IP&L's concerns that MP 6.0 would not be an efficient interchange point, NS, CSX and ISRR agreed to permit NS and ISRR to interchange at Crawford Yard in Indianapolis. In addition, NS, CSX and INRD have agreed that NS may, in lieu of serving the Stout plant directly via trackage rights, serve the plant using switching services on terms that the parties have agreed to.

To date, it continues to be the case that NS has not moved coal to the Stout plant. NS understands that the parent company of IP&L, IPALCO Enterprises, Inc., recently merged with a subsidiary of the AES Corporation. AES/IP&L and NS have discussed NS service to IP&L, and NS expects that that dialogue will continue. NS understands, however, that a large portion of Stout's coal continues to move under a contract with INRD.

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[10] Because of data collection problems, reports were not filed for the last two quarters of 2000. The Board granted NS' request for a waiver of the requirements for those quarters. NS also has been serving copies of its quarterly filings upon a representative of the New York State Economic Development Commission.

E. CSX access to the Monongahela.

The Board directed that the Applicants adhere to their representation that although NS will have operational control of Conrail's MGA lines, CSX will have equal access to all current and future facilities located on or accessed from those lines. Decision No. 89, Ordering Paragraph 26. As reported in the First Report, commercial access to the Monongahela and operation on the Monongahela is covered by the Monongahela Usage Agreement and an operating plan and accounting plan which provide assurance of commercial access to CSX on a fair and equal basis. Planning for the scheduling of train pickups continues to occur weekly and monthly, and is coordinated daily through frequent communication.

F. Nonexpansion of paper barriers.

Decision No. 89 provided that, with respect to any shortline that operates over lines formerly operated over by CSX, NS, or Conrail (or any of their predecessors), and that, in connection with such operations, is subject to a "blocking" provision, CSX and NS, as appropriate, must enter into an arrangement that has the effect of providing that the reach of such blocking provision is not expanded as a result of the CSX/NS/CR Transaction. Decision No. 89, Ordering Paragraph 39. To date, no shortline has requested that NS enter into any formal agreement memorializing this provision.

G. Ann Arbor Railroad's contract with Chrysler.

Decision No. 89 provides that CSX and NS must take no action that would undermine or interfere with the ability of the Ann Arbor Railroad "to provide quality interline service" under its new contract with Chrysler. Decision No. 89, Ordering Paragraph 40. NS continues to comply with this condition, and Ann Arbor Railroad has not raised with NS any complaints or concerns in this regard.

H. Wyandot Dolomite and National Lime and Stone ("NL&S").

Decision No. 89, in Ordering Paragraph 43, imposed certain conditions to mitigate the effects of the Transaction of two shippers of aggregates in Ohio, Wyandot Dolomite and National Lime and Stone ("NL&S"), which would be receiving joint-line service on shipments that Conrail handled in single-line service before the Transaction. Specifically, the Board required NS and CSX to make arrangements to permit one of them to provide single-line service for movements tendered in unit trains of 40 or more cars for five years. NS and CSX have been complying with this condition.

NL&S and Wyandot petitioned for judicial review of Decision No. 89, contending that the condition imposed by the Board provided them insufficient relief. The Second Circuit in *Erie-Niagara* rejected their contention, stating: "The STB's decision to deny more extensive remedies at this time was not an abuse of discretion." *Erie-Niagara, slip op.* at 26.

I. NS access to Joseph Smith & Sons ("JS&S").

Pursuant to Decision No. 89, Ordering Paragraph 44, NS shall have access to any new line constructed by JS&S or NS, or by any entity other than CSX, between the JS&S facility at Capital Heights, Maryland, and any line over which NS has trackage rights. It continues to be NS' understanding that, to date, no build-out from the JS&S facility has been constructed.

J. Wheeling & Lake Erie Railway Co.

In Decision No. 89, the Board required Applicants to: (a) grant W&LE access to Toledo, with connections to the Ann Arbor Railroad and other railroads at Toledo, (b) extend W&LE's lease at, and trackage rights access to, NS' Huron Dock on Lake Erie, and (c) grant W&LE overhead haulage or trackage rights to Lima, OH, with a connection to Indiana & Ohio Railway

Company at Lima.[11] The Board subsequently clarified these conditions. *See* Decision No. 107 in Finance Docket No. 33388 (served December 9, 1998).

In the first year of this general oversight proceeding, both NS and W&LE reported that, although they had been negotiating the terms of the Huron Dock lease and W&LE's access to Toledo, the parties had not yet reached agreement. Both agreed that the parties were continuing to negotiate and did not yet deem it necessary to return to the STB for guidance.

NS has exercised the authority granted to it as part of the Board's approval of the Transaction to discontinue operations over the Maumee River Bridge, which W&LE uses to reach Lang Yard (and CN) and Ann Arbor. *See* Decision No. 89 at 181 (Ordering Paragraph No. 71). At this time, NS continues to provide the bridge tender for W&LE's use of the bridge. Further, NS continues to provide W&LE access between Bellevue and Toledo, albeit under the terms of a temporary "detour" agreement pending final resolution of certain trackage rights issues. Huron Dock is no longer an active dock for W&LE, and NS has offered to relieve W&LE of any continued obligation under a renewed lease (even as the ultimate term of that renewal has yet to be determined). The parties continue to work with each other and discuss matters in good faith, and NS does not yet see the need to call upon the Board to resolve any issues.

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[11] The Board went on to provide: "Further, applicants and W&LE must attempt to negotiate an agreement concerning mutually beneficial arrangements, including allowing W&LE to provide service to aggregates shippers or to serve shippers along CSX's line between Benwood and Brooklyn Junction, WV, and inform us of any such arrangements reached." Decision No. 89, Ordering Paragraph 68. As compliance with this condition is solely within the province of CSX, NS will not comment on it further.

K. Environmental Conditions

In the June 1, 2000 First General Oversight Report, NS summarized the status of its compliance with the environmental conditions ("Environmental Conditions") described in Appendix Q of Decision No. 89. In Decision No. 5, the Board found: "The pleadings submitted in the first annual round of the Conrail general oversight proceeding (including the quarterly environmental status reports) establish that CSX and NS are making good faith efforts to comply with the extensive environmental mitigating conditions we imposed when we approved the Conrail transaction." Decision No. 5 at 28.

In this Second Report, NS updates the First Report to describe the further compliance achieved in the last year with respect to those Environmental Conditions that were not complete as of May 31, 2000. Where NS noted in the First Report that it had completed implementation of a given Environmental Condition, no additional reference is made to that Environmental Condition in this Second Report.

Throughout the oversight period, NS has provided monthly reports to the Board's Section of Environmental Analysis (SEA) documenting the status of NS' compliance with the various Environmental Conditions. In addition, beginning in October 2000, NS has prepared quarterly community outreach reports on the status of consultations between Norfolk Southern and certain communities in Ohio, Indiana and New York, as well as with the Ohio Rail Development Commission.

The third quarterly community outreach report is being submitted to the Board today, and, as in the past, copies of each community-specific outreach report are also being provided to the respective community. The outreach reports are intended primarily to keep the Board and the communities apprised as to the status and resolution of environmental and safety issues of local concern (many not Conrail Transaction-related or otherwise not subject to the Board's

jurisdiction) that have been or will be addressed by NS with the communities. The quarterly outreach reports provide summary descriptions of these consultations to inform the Board of the breadth of issues addressed by NS and the communities through ongoing consultations.

Among the actions implemented by NS since the First Report in furtherance of the environmental conditions established by the Board under Decision No. 89 are the completion of the Cloggsville and Vermilion Connections in Ohio and the rerouting of train traffic to take advantage of those new connections, completion of at-grade crossing safety improvements pursuant to Environmental Condition 8(A) or Negotiated Agreements with communities subject to Environmental Condition 51 and construction of a new NS mainline in Lafayette, Indiana to remove rail traffic from a busy downtown area.

In Decision No. 5 in this proceeding, the Board indicated that NS should in its next quarterly community outreach status report address the train traffic issue raised in a November 13, 2000 letter from the City of Olmsted Falls, Ohio. NS provided the City with information on the volume of NS' rail traffic through Olmsted Falls in a letter dated December 21, 2000. The information indicated the absence of a significant overall change in the levels in pre- and post-Transaction rail traffic in Olmsted Falls. While relatively brief train count snapshots are of course of only limited value in assessing traffic levels because of fluctuations in shipper demands, seasonal impacts, necessary operational adjustments and other common variables that require a longer view, we nevertheless note that, since the beginning of 2001, rail traffic through Olmsted Falls has averaged approximately five trains per day less than the figure appearing in NS' 1997 operating plan.

1. Environmental Condition 4(D) (Safety: Hazardous Materials Transport)

NS certified compliance with Environmental Condition 4(D) for all NS rail line segments subject to Environmental Condition 4(D) by letter to Secretary Williams dated August 18, 2000.

2. Environmental Condition 8(A) (Safety: Highway/Rail At-Grade Crossings)

To date, NS has submitted eleven quarterly reports to Secretary Williams summarizing the completion status of the upgraded improvements to the NS at-grade crossings subject to Environmental Condition 8(A). The most recent quarterly report was submitted May 11, 2001.

NS certified completion of the following at-grade crossing safety upgrades specified in Environmental Condition 8(A) by letter to Secretary Williams dated August 18, 2000:

- TR 145, Ivesdale, Illinois (FRA 479957T)
- CR 172, West Point, Indiana (FRA 484323G)
- CR 250 W, Peru, Indiana (FRA 484209G)
- Washington St./CR 100 E, Burrows, Indiana (FRA 484246J)
- Meridian Line, New Waverly, Indiana (FRA 484248X)
- Criswall, Mechanicsburg, Pennsylvania (FRA 592295C)
- Encks Mill Road, Mechanicsburg, Pennsylvania (FRA 592320H)
- Alleman, Marion, Pennsylvania (FRA 535151U)
- Hayes Rd., Milner, Pennsylvania (FRA 535163N)

NS and the Indiana Department of Transportation (INDOT) entered into a Negotiated Agreement, approved by INDOT on September 15, 1999, to modify the grade crossing improvement to be installed at the Anthony Boulevard at-grade crossing in Fort Wayne, Indiana. In Decision No. 160 (served June 21, 2000), the Board approved the Negotiated Agreement between NS and INDOT and amended Environmental Condition 8(A) and Environmental Condition 51 to incorporate the Negotiated Agreement between NS and INDOT pertaining to Anthony Boulevard. NS, INDOT and the Tippecanoe County Board of Commissioners entered into a Negotiated Agreement, signed by NS and INDOT on August 12, 1999 and approved by the Tippecanoe County Board of Commissioners on September 8, 1999, to modify the grade-crossing improvement at the CR 400 South at-grade crossing in West Point, Indiana to provide for closure of the CR 400 South grade crossing. In Decision No. 161 (served June 28, 2000), the Board approved the Negotiated Agreement among NS, INDOT and the Tippecanoe County Board of Commissioners and amended Environmental Condition 8(A) and Environmental Condition 51 to incorporate the Negotiated Agreement among NS, INDOT and the Tippecanoe County Board of Commissioners pertaining to the closure of the CR 400 South grade crossing in West Point, Indiana.

NS and the Ohio Rail Development Commission (ORDC) entered into a Negotiated Agreement dated October 17, 2000 modifying their February 10, 1999 Rail Corridor Safety Agreement with respect to the at-grade crossings at York Street and Kilbourne Street in Bellevue, Ohio and Hopley Avenue in Bucyrus, Ohio. In Decision No. 175 (served November 16, 2000), the Board amended Environmental Condition 8(A) and Environmental Condition 51 to incorporate the modifications

included in the October 17, 2000 Negotiated Agreement between NS and the ORDC with respect to those three at-grade crossings in Ohio. As contemplated by the Negotiated Agreement, closure of the York Street at-grade crossing is pending with the ORDC, power switches were installed by NS at the Kilbourne Street at-grade crossing and became operational on March 5, 2001 and no action is required by NS with respect to the Hopley Street at-grade crossing.

In Decision No. 168 (served August 22, 2000), the Board granted NS' request for an extension until February 22, 2001 to certify completion of the upgrade under Environmental Condition 8(A) with respect to the Encks Mill Road at-grade crossing in Mechanicsburg, Pennsylvania. NS certified completion of the upgrade to the Encks Mill Road grade crossing by letter to Secretary Williams on February 22, 2001. In Decision No. 156 (served May 24, 2000), the Board extended the date for completion of the requirements of Environmental Condition 8(A) for the Lucas Road at-grade crossing in Erie, Pennsylvania until August 22, 2001. NS certified completion of the Lucas Road at-grade crossing in its February 22, 2001 letter to Secretary Williams.

In Decision No. 153 (served May 31, 2000), the Board granted an extension of the date for completion of the Environmental Condition 8(A) requirement for the Loomis Street at-grade crossing in Ripley, New York until August 22, 2001. Similarly, the Board in Decision No. 157 (served May 31, 2000) granted an extension until August 22, 2001 for the completion of the Environmental Condition 8(A) requirement for the York Road/SR 74 at-grade crossing in Mechanicsburg, Pennsylvania. In Decision No. 154 (served May 31, 2000), the Board granted an extension until August 22, 2001 for completion of the Environmental Condition 8(A) requirement for the SR 7 at-grade

crossing in Berryville, Virginia. NS is awaiting state closure and safety mechanism selection decisions with respect to the Loomis Street, Ripley, New York and York Road/SR74, Mechanicsburg, Pennsylvania at-grade crossings. The grade crossing improvement project at SR 7 in Berryville, Virginia is under construction and NS expects to complete the work by August 22, 2001.

In Decision No. 155 (served May 31, 2000), the Board approved a request by NS, as sought by the Guilford Township Supervisors, for an extension of time in which to install flashing lights at the Guilford Springs Road at-grade crossing in Guilford Springs, Pennsylvania. Pursuant to Decision No. 155, the period was extended to August 22, 2001 or, alternatively, 6 months following completion of the construction by Guilford Township of the relocated Guilford Springs Road and the NS grade crossing. NS advises the Board that the construction project has not yet been completed.

3. Environmental Condition 11 (Noise)

In Decision No. 167 (served August 22, 2000), the Board granted a one-year extension of time, until August 22, 2001, for completion of compliance by NS with Environmental Condition 11.

Since the First Report was submitted, NS has entered into several more Negotiated Agreements with the following responsible local governments pursuant to Environmental Condition 11:

- Town of Stanley, Virginia
- Town of Elkton, Virginia
- Town of Luray, Virginia

- Town of Grottoes, Virginia
- Town of Gauley Bridge, West Virginia
- Nicholas County, West Virginia

Pursuant to Decisions No. 177 (served December 5, 2000), No. 178 (served December 14, 2000), No. 183 (served March 30, 2001) and No. 185 (served April 20, 2001) respectively, the Board has amended Environmental Condition 11 and Environmental Condition 51 to incorporate the Negotiated Agreements with the Towns of Stanley, Elkton, Luray and Grottoes, Virginia. NS has recently submitted to Secretary Williams the May 2, 2001 Negotiated Agreement with the Town of Gauley Bridge, West Virginia and the May 24, 2001 Negotiated Agreement with Nicholas County, West Virginia. Board issuance of orders is pending.

Negotiations pertaining to wayside noise mitigation are ongoing between NS and several other responsible local governments in Virginia and West Virginia for those NS line segment areas identified under Environmental Condition 11. In addition, in those areas where NS has been informed by the responsible local government that they wish NS to pursue Environmental Condition 11 discussions with individual property owners, NS will soon begin to contact the relevant sensitive noise receptors identified by the Board in Decision No. 89.

4. Environmental Condition 21(i) (Four City Consortium, IN)

In compliance with Environmental Condition 21(i), NS continues to attend meetings scheduled by representatives of the Four City Consortium (FCC) with

representatives of CSX and the Indiana Harbor Belt Railroad. The most recent meetings were convened on August 4, 2000 at the Calumet Operations Center, on October 19, 2000 at the East Chicago Marina and on February 28, 2001 in Hammond at the Lake County Convention/Visitor Bureau. NS has continued to submit monthly status reports to the FCC pursuant to Environmental Condition 21(i), with the most recent report submitted on May 21, 2001. NS also responded in January 2001 to a letter from the FCC submitted to Chairman Morgan in the context of the Conrail general oversight proceeding, summarizing the measures NS has taken to address the Conrail-related and other concerns of the FCC.

In addition, NS and the City of Hammond have in the last several months exchanged correspondence in an attempt to settle a pending federal court litigation matter that is not before the Board in the Conrail transaction proceedings.

Infrastructure improvements and operational adjustments undertaken by NS, CSX and the IHP have greatly alleviated traffic congestion in the FCC area. Measures beyond those imposed by the Board under Decision No. 89 which have been completed by NS or are currently underway include joint NS/IHB installation of power switches on the northeast wye at Osborn to permit the switches to be operated via remote control by IHB dispatchers; conversion of the Hohman interlocking to a remote operation system; installation of a direct intercom system between the NS Cummins Bridge Operator and the IHB Dispatcher; issuance of special instructions to NS crews regarding blocked crossings in Hammond; rerouting of traffic from the Nickel Plate Line to the Lake Front Line; and updating of signals between State Line and Calumet Yard to permit trains to run at maximum track speed and reduce the potential for blocked crossings.

5. Environmental Condition 25 (Ashtabula, OH)

NS and the City of Ashtabula, Ohio entered into a Negotiated Agreement to resolve the real-tin e train location monitoring system issues under Environmental Condition 25. In Decision No. 179 (served February 9, 2001), the Board amended Environmental Condition 25 and Environmental Condition 51 to approve the Negotiated Agreement between NS and the City of Ashtabula pertaining to Environmental Condition 25. NS has since satisfied the terms of the Negotiated Agreement.

6. Environmental Condition 26(A) (Cleveland Area, OH)

NS completed construction of the Cloggsville Connection and provided notice to the City of Cleveland in August 2000 that trains were being routed over the new connection.

7. Environmental Condition 26(C) (Cleveland Area, OH)

Design and assessment work on the train detection devices is ongoing and is expected to be completed in 2001.

8. Environmental Condition 28 (Conneaut, OH)

NS and the City of Conneaut, Ohio entered into a Negotiated Agreement to resolve the real-time train location monitoring system issues under Environmental Condition 28. In Decision No. 180 (served February 9, 2001), the Board amended Environmental Condition 28 and Environmental Condition 51 to approve the Negotiated

Agreement between NS and the City of Conneaut pertaining to Environmental Condition 28. NS has since satisfied the terms of the Negotiated Agreement.

9. Environmental Condition 31(A) (Fostoria, OH)

A real-time train monitoring system was installed in the City of Fostoria, Ohio in December 2000 in accordance with Environmental Condition 31(A).

10. Environmental Condition 36(B) (Oak Harbor, OH)

NS and the Village of Oak Harbor entered into a Negotiated Agreement dated May 15, 2001 to resolve the real-time train location monitoring issues under Environmental Condition 36(B). NS has submitted that agreement to Secretary Williams and Board issuance of an order is pending.

11. Environmental Condition 42(A) (Erie, PA)

NS and the City of Erie, Pennsylvania entered into a Negotiated Agreement dated June 9, 2000 to modify their April 9, 1998 Memorandum of Understanding concerning the relocation of NS traffic from 19th Street onto new tracks in the CSX right-of-way in Erie. In Decision No. 173 (served October 31, 2000), the Board amended Environmental Condition 51 to incorporate the amendments to the April 9, 1998 Memorandum of Understanding contained in the June 9, 2000 Negotiated Agreement between NS and the City of Erie. Project construction is expected to be completed in 2001.

12. Environmental Condition 49(A) and (B) (Safety Integration)

NS submitted additional Safety Integration Plan (SIP) Accountability Worksheets to the Federal Railroad Administration (FRA) under Environmental Condition 49(A) on June 15, 2000, September 20, 2000 and February 7, 2001. NS continued to submit monthly reports to the FRA on safety-related conditions, in accordance with Environmental Condition 49(B). On August 28, 2000, NS submitted comments on the Third Biannual Report to the STB (January – June 2000). NS participated in the final SIP oversight meeting with the FRA on February 7, 2001. In addition, NS submitted comments for the fourth and final Biannual Report to the STB (July – December 2000) and is awaiting receipt of a review draft from the FRA.

13. Environmental Condition 51 (Negotiated Agreements)

As noted in the First Report, NS has entered into a number of Negotiated Agreements with governmental bodies or organizations. Nearly all of the Negotiated Agreements have been incorporated by the Board under Environmental Condition 51. A few Negotiated Agreements have only recently been submitted to Secretary Williams by NS and issuance of an order by the Board is pending.

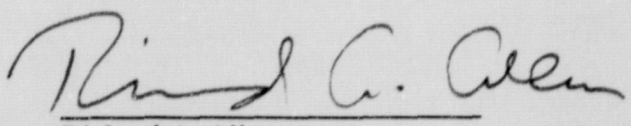
Over the course of the year since the First Report, NS has continued to address the outstanding requirements of the Negotiated Agreements that have been incorporated by the Board under Environmental Condition 51, including, *inter alia*, participation in community meetings, periodic reporting on specific operations issues and implementation of various mitigation measures required under the terms of the Negotiated Agreements. Modifications to the Negotiated Agreements have been adopted by the signatories in

some instances and are noted under the discussion of the relevant individual Environmental Conditions above.

CONCLUSION

Although NS has faced a number of challenges over the past two years, the service difficulties that NS encountered in the first months following Split Date have been resolved and NS has taken and is continuing to take steps necessary to streamline its operations, improve efficiency and restore the company's long-term growth and profitability. NS has continued to comply with the conditions imposed by the Board, and the record of the past year indicates that those conditions are working as intended and no further conditions are warranted.

Respectfully submitted,



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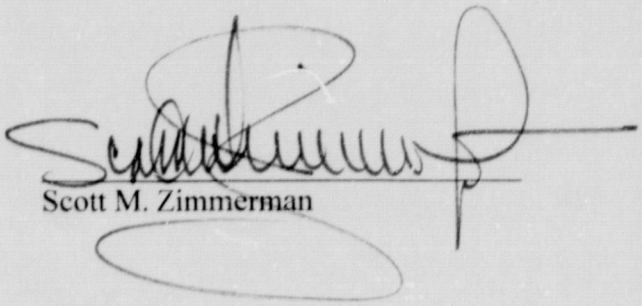
CERTIFICATE OF SERVICE

I certify that on June 1, 2001 a true copy of NS-5 was served by first class U.S. Mail, postage prepaid, or by more expeditious means, upon all known parties of record in Finance Docket No. 33388 (Sub-No. 91).



Scott M. Zimmerman