STB FD-33388 (SUB 91) 8-6-01 D 203075

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August 6, 2001

BY HAND

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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-6, 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-6 in WordPerfect 5.0 format.

Kindly date-stamp the enclosed additional 5 copies of NS-6 and return them to our messenger.

Sincerely,

Richard A. Allen

Richard A. Allen

Enclosures

cc: All parties of record

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Office of the Secretary

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Public Record

203075

NS-6

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 6, 2001

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

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 reply to the comments submitted by various parties in the second annual round of the Conrail general oversight proceeding.

NS and CSX filed their second oversight reports on June 1, 2001. Only seven parties have filed comments responding to those reports: The U.S. Department of Transportation "DOT"); the State of Maryland; Indianapolis Power & Light Company ("IP&L"); the National Railroad Passenger Corporation ("Amtrak"); the New York City Economic Development Corporation ("NYCEDC"); Resources Warehousing & Consolidation Services, Inc. ("RWCSI"); and the City of Cleveland.

United States Department of Transportation

DOT states that it intends to file a more substantive review on August 6, 2001, after reviewing the submissions of others. With respect to safety, DOT reports that the Federal Railroad Administration's fourth and final report on the implementation of the Safety Integration Plans "will confirm that the operations of the Applicants have stabilized from a safety perspective, and that they have successfully completed the safe integration of Conrail." DOT-3 at 3.

The State of Maryland

The State of Maryland asserts that NS and CSX have not fulfilled all of the undertakings set forth in letter agreements with each carrier dated September 24, 1997. Maryland does not specify in which respects it believes NS and CSX have not fulfilled the agreements, but asks the Board to require them "to explain the progress they are making on the initiatives to which they agreed in the September 24, 1997 Letter Agreements with the State."

NS believes it is generally in compliance with its agreement with Maryland. That agreement covers four areas. First, it recites that NS' Operating Plan would include various infrastructure investments and service improvements that will benefit the State of Maryland, to be implemented "as soon as practicable within the three-year planning horizon of the Operating Plan." Second, it provides that NS will work with Maryland and the Port of Baltimore to keep the Port competitive. Third, it provides that "NS will work to increase its business in Maryland as the best assurance of providing rail employment in the State of Maryland." Fourth, it provides that NS "will work with Maryland commuter agencies to accommodate current services and honor all operating agreements, including those with MTA, that NS will inherit after STB approval."

NS has worked with Maryland and the Port of Baltimore to keep the Port competitive. When the Port was a leading candidate to become the hub port for Maersk/Sealand, NS agreed to specific marketing and operating conditions designed to make the Port attractive. At the State's request, NS even agreed to grant CSX access to a key NS service area in order to improve the Port's chances. While the Port was ultimately not successful, NS worked hard to help the State in its efforts.

The agreement specifically provides that NS would "enter into discussions with the Canton Railroad Company (CTN) and other Maryland short line railroads concerning proposals that would enhance operations, improve customer service, be beneficial to the railroads involved, and not be inconsistent with NS' labor agreements or employee relations." Soon after Split Date, NS joined with Canton Railroad and several others to reconfigure track and operations in the Canton area of Baltimore. That effort has resulted in substantial benefits to all involved, some far in excess of that originally contemplated.

NS has also worked hard to increase its business in Maryland. For example, NS grew its intermodal business in Maryland by over 14 percent on an annual basis between Split Date and June 2001, partly as a result of introducing a new Baltimore-Detroit intermodal service and a new Baltimore-West Coast run-through intermodal service with Burlington Northern Santa Fe Railroad. This increase and new services represent a significant achievement.

NS has also worked with the State with regard to economic developments and preserving rail infrastructure. Since Split Date, NS marketing, industrial development and strategic planning personnel have met regularly with State and Port of Baltimore officials to discuss issues related to expanded business opportunities in Maryland. When a dilapidated but critical branch line on the Eastern Shore was threatened with abandonment, NS worked with the State and area businesses to save the line from abandonment.

Certain infrastructure investments and service improvements discussed in the Operating Plan that would benefit Maryland have not yet been implemented, namely: 1) improving clearances on Amtrak's Northeast Corridor ("NEC") route to enable NS to provide 20'2" double stack intermodal service between Baltimore and Harrisburg, PA; 2) rail infrastructure improvements in the city of Baltimore (an expanded intermodal facility; a new RoadRailer facility; and a new automotive distribution facility); and 3) new services to and from those facilities.

NS has discussed these projects on numerous occasions with Maryland officials and has explained the problems associated with them. The two principal issues related to accomplishing these projects are the much higher than anticipated cost of clearing the NEC double-stack route and the development of markets that would justify the required investment. Clearing the NEC route for double-stack cars has proven substantially more difficult and expensive than projected at the time of the Conrail proceeding. The project is conservatively estimated at ten times the $8.5 cost million then contemplated in the Conrail control application.

The Operating Plan contemplated the standard 20'2" double stack clearances, but Amtrak has informed NS that it will require 21'6" clearances, largely because of the proximity of overhead electric wires needed to power passenger trains. Nearly 30 clearance projects would be required between Baltimore and Perryville, MD alone under the 21'6" standard. Further, clearance projects often can be most economically accomplished by lowering the track under a clearance obstacle. This is much more problematic in high-speed passenger territory, such as the

NEC. The basic difficulty is that lowering track to avoid an overhead obstacle creates a "vertical curve" (or dip) in the track surface. Where top speeds are limited to sixty mph -- as is the case on most NS intermodal routes -- the extent of track lowering is limited and is economically feasible. But on the NEC, where track has to be maintained for top speeds exceeding 125 mph, vertical curves must be gradual and more precise. Therefore, the cost of undercutting is more expensive because of the longer distances that track must be undercut and the more exacting engineering standards that Amtrak requires. An additional problem adds to the difficulty of justifying the cost of the clearance project: NS has been unable to negotiate through freight train operations on the NEC other than on an *ad hoc* basis between the hours of 10:00 p.m. and 6:00 a.m.

NS has informed Maryland officials that it will work with the State on this project but that, given the very large unanticipated cost, NS is not in a position to shoulder the entire financial burden. Some Maryland officials have expressed a desire to find sources of public funds in order to make this happen. However, officials agree with NS that there needs to be more information and details, especially on what the costs will be. On that point, we have been working with Maryland to develop a process to better understand the costs and benefits of securing double stack service on the NEC. Recently, NS joined with Maryland to support efforts by Senator Mukulski to obtain federal funds to do a comprehensive study to determine the costs for the project. Moreover, NS, CSX, Amtrak and five mid-Atlantic states, including Maryland, are participating in a study to develop a short-term rail investment program for the mid-Atlantic transportation corridor that will eliminate choke points and increase rail-freight capacity. Both Maryland and NS have identified the height restriction on the NEC as one choke point that needs to be eliminated.

With regard to the expansion of the intermodal, RoadRailer or automotive distribution facilities in Baltimore, no new business has developed in the area that would justify the expense. To date, NS has not been able to develop these markets as it anticipated, and the growth that NS has developed can be handled at NS' existing facilities. As noted, NS personnel have been meeting regularly with State officials to develop this and other business in the State, and we believe the State is fully aware of our efforts in this regard.

Indianapolis Power & Light Company

In Decision No. 89, the Board imposed a condition requiring 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.

In this second annual oversight proceeding, IP&L continues to seek additional conditions beyond the condition the Board imposed in Decision No. 89. These are the same additional conditions it sought unsuccessfully in the first annual oversight proceeding, namely, the right to receive direct service from ISRR (via trackage rights over CSX and INRD) at both IP&L Stout and Perry K plants for delivery of southern-Indiana origin coal. The Board denied that request in Decision No. 3, served November 30, 2000. IP&L appealed that decision to the United States Court of Appeals for the District of Columbia Circuit, and on July 26, 2001, that court granted the motions of NS and CSX, supported by the Board, to summarily affirm the Board's decision and deny IP&L's appeal. *Indianapolis Power & Light Co. v. STB*, D.C. Cir. No. 01-1005 (July 26, 2001).

IP&L now contends that new evidence proves "that NS is incapable of providing 'efficient and competitive' service to IPL" (emphasis in original) pursuant to the condition the Board imposed in Decision No. 189. IP&L Comments at 1. This new evidence consists of a proposal NS recently submitted to IP&L to transport coal in joint-line service with ISRR from four Indiana mines to the Stout plant. Ex. 1 to IP&L Comments. IP&L contends that the rates contained in NS' proposal are higher than, and therefore not "competitive" with, the rates that INRD has been charging IP&L for delivering Indiana-origin coal to the Stout plant.

IP&L's contention is groundless for several reasons. First, when competing parties offer different rates for providing a service, under IP&L's arguments only one of those rates could qualify as being "competitive" – namely, the lowest one. That position is plainly incorrect. One party's rate or service does not have to match or beat another party's in order to be "competitive" with the latter. The condition the Board imposed in Decision No. 89 was not imposed to guarantee IP&L that NS would provide IP&L lower rates than INRD. It was imposed to provide IP&L with a competitive alternative that would serve as a restraint upon the service and rates provided by CSX and INRD. NS does not know what rates and service terms (if any) CSX and INRD have offered IP&L, but it believes its proposal should be competitive with any rates for service comparable to the service NS has proposed to provide. In any event, whatever NS's proposal may have been, NS submits that the condition imposed by the Board has served its intended function of providing a competitive alternative that has served as a restraint on the rates and service provided by CSX and INRD .[1]

Second, IP&L's arguments rest on inappropriate comparisons. IP&L appears to be comparing the proposal NS made, which is for a three-year contract for service from four mines to the Stout plant commencing January 1, 2002, to the terms under an existing contract that IP&L negotiated years ago with INRD. Clearly, however, the only relevant comparison would be with whatever terms INRD might be offering today for service comparable to the service and the service period proposed by NS.[2] IP&L, however, has not provided any such terms to NS or the Board.

IP&L also cites a letter dated June 11, 2001 from IP&L's Dennis Dininger to NS Director Utility Coal North, Douglas Evans, (IP&L Exhibit 2), which stated:

> [W]e call your attention to the CSX Tariff rates, published to replace the Conrail Tariff rates for coal from southern Indiana originated by Indiana Southern. As of June 1, 1999, they were $3.16 or $3.17 from certain of the mines; NS will have to at least match those rates for its request to be worthy of further consideration.

IP&L's comments cite the same tariff rates in contending that the rates NS proposed are not competitive. IP&L Comments at 4.

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1 Contrary to the suggestion of IP&L, the decisions of the court and the Board in *CF Industries, Inc. v. STB*, D.C. Cir. No. 00-1209 (July 27, 2001), *affirming CF Industries, Inc. v. Koch Pipeline Co.*, STB No. 41685 (served May 9, 2000), cited by IP&L in a letter to the Board dated July 30, 2001, do not hold that a comparison of particular rate and service proposals made by carriers at one point in time would be sufficient to determine the level of competition in a market. In any event, to the extent such proposals would be at all probative of the issue, it is not the proposal of NS, but rather the proposals of CSX and INRD for the same service that would indicate whether NS' presence in the market was serving as an effective competitive restraint. IP&L has not disclosed any CSX or INRD proposals to NS or to the Board, however.

IP&L's comments and Mr. Dininger's letter, however, both overlook the fact that the $3.16 and $3.17 rates they insist NS match "to be worthy of further consideration" were tariff rates in effect two years ago that applied only to movements from two particular mines. This particular tariff also contains much higher rates to three other mines – rates not mentioned in Mr. Dininger's letter. IP&L also does not mention that those rates were subject to quarterly RCAF-U adjustments and that the adjusted rates would be considerably higher on January 1, 2002, the date on which the service proposed by NS would commence. IP&L also does not mention that NS proposed rates for service from four mines, only two of which were the subject of the CSX tariff.

Furthermore, the additional condition IP&L claims to be needed to remedy the alleged lack of competition provided by NS is direct service by ISRR to the Stout plant. NS' proposals are for joint-line ISRR/NS service, as to which ISRR would provide all but a relatively short part of the haul. The NS proposals, therefore, are largely driven by the revenue needs of ISRR – the very carrier that IP&L seeks to have serve the Stout plant directly – that ISRR communicated to NS.

IP&L also renews its request that ISRR also be permitted to serve IP&L's Perry K plant. In Decision No. 89 (at p. 116), the Board correctly determined that Perry K was previously served only by Conrail and that the Transaction therefore "will not create new market power." IP&L has not shown that this determination was incorrect.

In sum, IP&L has not shown that additional conditions concerning its plants in Indianapolis are warranted.

(...continued)

[2] It is NS' understanding that, at least as of May 2001, IP&L and INRD were in the process of (continued...)

National Railroad Passenger Corporation (NRPC-3)

Amtrak's comments express no complaints but merely comment on two matters: on-time performance and restoration of the Shellpot Connection in Wilmington, Delaware. As to on-time performance, Amtrak states: "On NS, on-time performance on lines that NS acquired from Conrail has also been somewhat lower than pre-acquisition levels during the past year. Amtrak, NS and CSX have continued to work cooperatively to address the on-time performance problems that remain, and performance on both railroads has improved." NRPC-3 at 2. NS will continue to work cooperatively with Amtrak to address on-time performance issues. NS also understands that Amtrak will recommend that the current STB on time reporting requirements be suspended as to NS.

Amtrak notes that the NS Operating Plan projected increased freight operations through Wilmington and expressed the intention to restore a former Conrail bypass around Wilmington known as the Shellpot Connection in order to accommodate the increased traffic. Amtrak correctly noted that the additional traffic NS anticipated has not yet materialized and there has thus been no need to restore the Shellpot Connection. It also notes that NS is seeking public funding in connection with the restoration of the connection and expresses Amtrak's hope that those efforts will be successful.

New York City Economic Development Corporation (NYC-3)

Most of NYCEDC's comments pertain to CSX, and NS will not comment on them. The only comment pertinent also to NS is NYCEDC's suggestion that NS and CSX change the days of the week on which they perform their surveys of the origins and destinations of trucks using

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(...continued)
negotiating a new coal transportation contract.

the railroads' intermodal terminals in New Jersey. Inasmuch as NS understands the purpose of these surveys is to determine whether the Transaction has resulted in a change in the level of truck traffic over the George Washington Bridge, changing the day the surveys are taken would seem to work against that purpose, not promote it.

Resources Warehousing & Consolidation Services, Inc. (RWCS-2)

RWCSI's comments pertain solely to CSX, and NS will not respond to them.

City of Cleveland

Cleveland's comments also pertain solely to CSX, and NS will not respond to them.

CONCLUSION

NS submits that the handful of comments filed by other parties in this second annual oversight proceeding reflect that: (1) despite significant business and economic challenges facing NS, implementation of the Conrail transaction has been generally successful; (2) no significant problems arising from the implementation remain; (3) the conditions imposed by the Board have been working as intended; and (4) no further conditions are warranted.

Respectfully submitted,

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August 6, 2001

CERTIFICATE OF SERVICE

I certify that on August 6, 2001 a true copy of NS-6 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).

Richard A. Allen

STB FD-33388 (SUB 91) 8-6-01 D 203074

203074

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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:

Enclosed are the originals and twenty five (25) copies of CSX-5, the "Reply Comments of Applicants CSX Corporation and CSX Transportation, Inc., to Comments Made on Their Second Annual Submission" for filing in the above-referenced docket. The Reply Comments are being submitted in two versions: the first one is "Volume I – Public Version," and the second is "Volume II – Highly Confidential Supplement."

Volume II is submitted in a separate package or packages marked as "Highly Confidential – Subject to Protective Order."

A Certificate of Service will be found in Volume I.

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

The original executed Verified Statement of John E. Haselden has been delayed due to a problem with the courier service. Mr. Haselden has in the meantime provided a faxed copy of his Verified Statement, and his statement is being filed in that form herewith. We will submit his original manually signed verified statement when received.

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

ARNOLD & PORTER

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
cc All Parties of Record (Volume I)

203074

PUBLIC VOLUME

CSX-5

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 SECOND ANNUAL SUBMISSION

VOLUME I – PUBLIC VOLUME

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CSX Transportation,

Dated: August 6, 2001

PUBLIC VOLUME

TABLE OF CONTENTS

PUBLIC VOLUME

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 SECOND ANNUAL SUBMISSION

VOLUME I – PUBLIC VOLUME[1]

CSX Corporation and CSX Transportation, Inc. (collectively "CSX"; "CSXC" and "CSXT" individually, respectively) filed their Second Annual Submission in this oversight proceeding on June 1, 2001 (CSX-4). That submission made the point that the initial difficulties of the integration of the Conrail allocated assets to CSXT's system had been overcome, and that CSXT's rail operations are today, as indicated by various metrics, at some of the highest levels ever experienced. The submission further made the point that CSX and its

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1 A "Highly Confidential Supplement" (Volume II) including the full text of Part VI "Indianapolis Power & Light," certain Highly Confidential Exhibits, and the Verified Statements of Henry Rupert and John E. Haselden, is being filed separately, under seal.

various constituencies were now in a position to make the most of the expanded service opportunities created by the Conrail transaction. CSX-4 at 4-10, 92.[2]

Pursuant to the Board's Decision No. 5 in this proceeding, served February 2, 2001, all interested parties and the public were afforded the right to comment on the CSX filing. Comments were due by July 16, 2001.

The response to the invitation for comments indicates that CSX's evaluation of the current state of the integration of its Conrail allocated assets into its system is correct. Only seven interests filed comments, as compared with several dozen last year. Five of the commenters are governmental entities or agencies: the United States Department of Transportation ("DOT"), the State of Maryland, through its Department of Transportation ("MDDOT"), the City of Cleveland, Amtrak, and the New York City Economic Development Corporation ("NYCEDC"). There are two filings from the private sector, one by the shipper Indianapolis Power & Light ("IP&L") and the other by a party that has disclaimed any status as a shipper, Resources Warehousing & Consolidation Services, Inc. ("RWCS"). The Board has seen somewhat similar filings from these two interests in the Oversight proceedings last year, and before.

Two of the governmental filers have quite positive things to say. DOT reports favorably upon the safety aspects of the implementation, observing that: "The devotion of resources by all parties and the continued cooperation among

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[2] Citations not otherwise denoted to STB decisions and filings made prior to January 1, 2000, are to Finance Docket No. 33388, and made after January 1, 2000, are to Finance Docket No. 33388 (Sub-No. 91).

all concerned attests to the rigor of the processes and to a shared commitment to safety." DOT-3 at 3. As a consequence, said DOT, the forthcoming fourth report of FRA, covering the period from June 2000 through March 2001, is to be the last FRA report on implementation of the Safety Integration Plans, since the Applicant railroads "have successfully completed the safe integration of Conrail." *Id.* NYCEDC, while expressing the hope that even more could be done, said that it is "gratified by the efforts that CSX and CP have made to enhance service offerings to shippers in the City." NYC-3 at 4. Certainly the very large expansion of CSX's traffic "East of the Hudson," reported in the June 1, 2001, filing (CSX-4 at 70-71) bears this out. CSX is pleased to have those observations from these commenters.

The remainder of these Reply Comments will be devoted to a discussion of the substantive comments made by six of the seven commenters.[3]

I. AMTRAK

CSX acknowledges the Comments filed by the National Railroad Passenger Corporation (Amtrak). Amtrak seeks no relief from the Board. CSX will continue to work cooperatively with Amtrak with respect to on-time performance and other issues.

II. CITY OF CLEVELAND, OHIO

The City of Cleveland expresses its view that CSX is not in compliance with the terms of the June 4, 1998 Settlement Agreement with Cleveland, but seeks no

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[3] DOT, apart from its very welcome review of the safety picture, states that it will await the comments of other parties (now in hand) and will make any further substantive comments in its reply comments on August 6.

relief from the Board. CSX respectfully disagrees; CSX has fulfilled, or is in the process of timely fulfilling, all the commitments it made in its Settlement Agreement with Cleveland, as it has done with respect to the settlements it entered into with others in connection with the Conrail Transaction. Cleveland has expressed its preference for continued discussions with CSX, and CSX will continue to work cooperatively with Cleveland to implement fully the June 4, 1998 Settlement Agreement, which the Board imposed as a condition in its Decision No. 89, served July 23, 1998. CSX understands that if all implementation issues are not resolved through these negotiations, Cleveland may, at some time in the future, present specific issues to the Board for its resolution. CSX will address any such unresolved issues if and when that occurs.

III. STATE OF MARYLAND

The State of Maryland, through its Department of Transportation, states that "clear progress" has been made in the CSX-MARC working relationship and concurs with CSX's positive report on MARC in its Second Submission. MDDOT also admonishes CSX and NS to fulfill the commitments they made in 1997, but does not seek the Board's intervention with respect to any particular issue. CSXT will continue to work with MDDOT 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 MDDOT and CSX as they arise.

IV. NYCEDC

NYCEDC correctly notes that it raised an issue in last year's oversight comments about the adequacy and usefulness of the information supplied by

CSX (and NS) with respect to the George Washington Bridge Truck Study required pursuant to Ordering Paragraph No. 22 in Decision No. 89 (which requires that Applicants monitor origins, destinations and routings for traffic at their terminals in Northern New Jersey and Massachusetts so that the Board can ascertain whether the transaction has led to substantially increased traffic on the George Washington Bridge).[4] NYCEDC states that since that time the railroads "have begun providing more extensive and regular information to NYCEDC." In fact, as it offered to do following NYCEDC's submission last year, CSX has been supplying to NYCEDC the same regular intermodal traffic reports that it has been filing with the STB since it began the surveys required by Ordering Paragraph No. 22.

NYCEDC now suggests that the reports could be improved if, instead of surveying truck traffic using the intermodal terminals on Wednesdays, the surveys were conducted on Sundays and/or Thursdays of each week. NYC-3 at 3. It bases this proposed change in survey practices on its understanding that a larger volume of intermodal trains are unloaded on those days, thereby allowing the survey to "capture an accurate picture of traffic volumes" and "provide information that is more useful to the survey's audience." *Id.*

NYCEDC's proposal, clearly well intentioned, is however based on a misunderstanding of the relevant facts and, more fundamentally, of the parameters and purposes of the survey itself. First, it is simply not true that there is more

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[4] See Decision No. 89 at 177.

intermodal traffic on Sunday than on Wednesday. In fact, Sunday traffic is typically very light. Second, while Thursday may be a modestly heavier traffic day than Wednesday, CSX also conducts its surveys on Fridays, a day with generally heavier traffic volumes than either Wednesday or Thursday. Third, changing the surveyed days in midstream, as NYCEDC proposes, would introduce a new variable and thus reduce the value of the information gathered to date.

Moreover, the primary purpose of the surveys is not to ascertain some absolute level of traffic volumes, but to allow an assessment of the impacts of the transaction on George Washington Bridge traffic. The surveys do so by indicating intermodal traffic origins, destinations and routings, thereby allowing the Board to determine whether the mix of traffic handled at the intermodal terminals in New Jersey and Massachusetts is such that a greater amount of traffic is likely crossing the George Washington Bridge as a result of the Conrail transaction. The Board of course can make that assessment just as well with traffic surveyed on Wednesdays and Fridays as it could be with traffic surveyed on any other days of the week.[5]

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[5] NYCEDC also, in its comments, makes its position clear on two matters on which CSX commented in its June 1 submission. *See* NYC-3 at 3-4. As to the first matter, concerning whether in fact CSX bid on the invitation to serve as operator of facilities at the 65th Street Yard in Brooklyn, it is the case, as in fact CSX acknowledged (CSX-4 at 76), that CSX ultimately chose not to bid. CSX, however, had earlier submitted a proposal to be operator of a transload facility there, which was later made a part of the larger project on which CSX did not bid. On the second, as to the method of financing of the possible tunnel under New York Harbor currently under study, CSX notes NYCEDC's statement that all possibilities of funding remain under consideration, and moreover, is pleased by NYCEDC's statement that it "acknowledges and appreciates CSX's active and continuing participation in this study...." NYC-3 at 4.

V. RESOURCES WAREHOUSING & CONSOLIDATION SERVICES, INC.

RWCS has had a long dialogue with the Board and with CSX and, unfortunately, has not until now made it quite plain what it is that it wants. What it wants is something that CSX never promised, and is under no duty to provide, to RWCS.

In Decision No. 89, served July 23, 1998, the Board had the following to say about RWCS:

> RWCS is a freight forwarder that operates out of warehouse and terminal facilities located in North Bergen, NJ, that are, and will continue to be, exclusively served by the New York Susquehanna & Western Railroad (NYS&W), owned by the Delaware Otsego Corporation. In response to RWCS' request that it be afforded equal access to CSX and NS, applicants have stated that RWCS "will be able to connect to NS via Passaic Junction off the Southern Tier on the Conrail lines to be allocated to NS; and to CSX via a connection to be built from North Bergen to Little Ferry." CSX/NS-176 at 168. On brief, RWCS indicates that, while it accepts applicants' statement that it will be provided the dual access it seeks, it is nonetheless concerned that CSX and NS "have in fact purchased NYS&W and are the co-owners." RWCS-4 at 4. RWCS requests that we impose a condition to ensure that the North Bergen-Little Ferry connection is built and that applicants take no steps to restrict its opportunity for access to each of their systems. We will require applicants to hold to the representations they have made to RWCS. (Decision No. 89 at 123; footnotes omitted.)

The Board was thus under the impression that RWCS was a freight forwarder and presumably had, in that capacity, cargo to submit for shipment. It turns out, however, that RWCS is not a shipper; in fact, it vehemently denies that it is a shipper – it has no cargo to submit for shipment to CSXT or to the NYS&W, which is the only carrier physically serving it.

As to the "commitments" made to RWCS of which the Board spoke, the only commitments that were made in the course of the proceeding before the Board which led to the Board's analysis and disposition just quoted were the following, contained in the Rebuttal Verified Statement of CSX's witness John W. Orrison at 128 (CSX/NS-177, Vol. 2A, at 599).[6] These commitments simply cover the issue whether there would be a physical ability for CSX to participate in movements tendered for shipment by shippers at the intermodal facilities located at RWCS's property:

> **Resources Warehousing & Consolidation Services (RWCS)** has intermodal facilities located on the southern terminus of a north/south rail line owned and operated by the New York Susquehanna & Western Railroad (NYS&W). While RWCS can be served directly now, and in the future, only by NYS&W, the CSX and NS Operating Plans will provide RWCS with the dual access it seeks. NYS&W will be able to connect to NS via the Passaic Junction off the Southern Tier on the Conrail lines allocated for use by NS, and to CSX via a connection to be built from Bergen to Little Ferry.

The connection between CSX and NYS&W at Little Ferry just mentioned was in fact built.

By the first round (year 2000) of General Oversight filings, it started to become evident that, unlike a freight forwarder, RWCS did not have cargo itself

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[6] A similar statement was made in the narrative of the joint rebuttal, CSX/NS-176, Vol. 1, at 167-68, as cited by the Board:

> RWCS will be provided the dual access it seeks. Orrison RVS at 128. It can only be served now, and in the future, by NYS&W. It will be able to connect to NS via Passaic Junction off the Southern Tier on the Conrail lines allocated to NS; and to CSX via a connection to be built from North Bergen to Little Ferry. Id. at 128.

to tender to CSXT or its connections, and that only its customers had such cargo. CSX brought the following to the Board's attention in its August 3, 2000, reply to the comments made by RWCS at that time that CSX had not lived up to its commitments:

> **<u>Resources Warehousing and Consolidation Services ("RWC")</u>**. —RWC operates a small private intermodal terminal in North Bergen, NJ, on the New York, Susquehanna & Western Railroad ("NYSW") and provides container yard and warehousing services for international ocean carriers. *See* Decision [No. 89] at 123. It complains that it does not have competitive intermodal service from CSX despite representations that such service would be established post Split. RWC also complains that CSX has refused to meet to discuss service issues.
>
> CSX understands that the primary international ocean carrier customer utilizing RWC is Hanjin which routes its Chicago/North Jersey traffic via NS connecting to NYSW. CSX understands that Hanjin utilizes NS's Landers Yard intermodal terminal in Chicago and has a service contract with NS.
>
> The fact is that RWC does have access to intermodal service provided by CSX Intermodal, Inc. ("CSXI") with rail transportation by CSXT, for its business. To the extent that RWC has container or trailer business and wishes to utilize that intermodal service, it can easily access any of the CSXI terminals at Little Ferry, North Bergen and Kearny, all quite close to it in Northern New Jersey. As to direct intermodal service at RWC's own facility, CSX notes that the RWC facility is a local station on NYSW. Therefore any direct service involving CSX must be routed interline via NYSW and CSX. CSX has met with NYSW to arrange post-merger joint-line intermodal service to the RWC facility. Indeed, as a result of those arrangements, a service proposal was made by CSX to Hanjin for direct service in conjunction with NYSW to the RWC facility. However, this proposal was declined and Hanjin retained its existing service route via NS and NYSW. CSX is willing to work with other ocean carriers or other customers of RWC along with NYSW to consider future opportunities for direct service to the RWC facility.

CSX-2 at 9-10.

Following that, in Decision No. 5 in the present proceeding, the Board said the following:

> RWCS . . . claims that it has been denied the access to competitive intermodal service by both CSX and NS that it was promised by applicants. RWCS already has the access to both carriers that it was promised, in each instance via an interline arrangement with the shortline, NYS&W. RWCS complains, however, that, although NS now serves RWCS' North Bergen facilities, CSX does not. CSX, however, does stand ready to serve RWCS' North Bergen facilities; the problem here is not with CSX but with RWCS' shippers, which (at least to date) have preferred to tender their traffic to NS. Unless RWCS' shippers switch their traffic from an NS/NYS&W routing to a CSX/NYS&W routing, CSX will not be able to participate in these joint movements, even though CSX service is available. Thus, RWCS has provided no basis for relief. (Decision No. 5, served Feb. 2, 2001, at 18.)

The Board thus pointed to the critical factor: RWCS seemed to have no cargo to ship; CSX was very willing to carry the cargo of RWCS's customers tendered at the RWCS facility to CSX's connection NYS&W, but RWCS's principal customer unfortunately preferred NS service, possibly because it used NS facilities at the other end of the rail move, in Chicago. CSX's commitments to RWCS have only been to give cargo consigned by shippers to or from its facility access to the CSX system, via interchange with NYS&W, the only rail carrier physically serving the facility. CSX remains willing to do that.

The obligation of carriage owed by railroads is to shippers, and to the extent that RWCS was a shipper (which RWCS firmly denies that it is), or to the extent that entities had cargo which they wished to have transported to and from the

RWCS facility, CSX made it plain that it would serve them. The case of the attempt to sell Hanjin NYS&W/CSXT joint service from the RWCS facility, discussed by CSX and the Board in last year's Oversight proceedings, is a clear example of this.

Rail carriers do indeed have certain duties to serve shippers – and service to shippers is the lifeblood of CSXT's business. But railroads undertook no obligations to promote the business of entities which want to sell ancillary services to shippers (such as warehousing and terminal facilities). Railroads, of course, may choose to promote the business of other service providers if they find it advantageous, but CSX has never promised to do so in this situation. It has endeavored to work with the major ocean carrier client of RWCS, and would be glad to provide a service plan to any other such customers interested in offering cargo at the RWCS facility.

It now is evident, however that that is not what RWCS wants. That is made crystal clear by the correspondence of Mr. Frank Folise with Mr. Allen Peck of CSX Intermodal and Mr. Melvin Clemens of the Board, contained in RWCS's present filing with the Board. RWCS wants CSX to establish a set of intermodal rates and services in the abstract to be applicable with respect to movements to and from the RWCS facility, without regard to the identity of the shipper, the particular destination point, the frequency and volume of service, *etc.* That is not anything that CSX has ever promised to do. RWCS cites the requirements in the Board's Decision No. 89 requiring applicants to fulfill the promises they make in their presentation to the Board. But RWCS does not quote any promises at all, and what was in fact promised is quoted by us above and is something entirely different.

CSX maintains terminals in a number of places in Northern New Jersey to which RWCS can take its clients' intermodal cargo, the most convenient to RWCS being Little Ferry and Kearny. Alternatively, CSX will participate in movements of RWCS's clients' cargo in connection with NYS&W if they are to be shipped from the RWCS facility itself. No other promises or assurances were given to RWCS.[7]

VI. INDIANAPOLIS POWER & LIGHT COMPANY[8]

IP&L's Comments represent the latest chapter in its continuing attempt to enlarge the generous relief which the Board granted it in 1998, in Decision No. 89. These efforts have involved extensive litigation leading to numerous decisions of the Board and to two proceedings in the United States Courts of Appeals, both of which resulted in decisions against IP&L.

IP&L's comments also represent an extraordinary attempt by IP&L to impeach arguments which it itself made before the Board in 1997-98 in obtaining

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[7] In its comments (RWCS-2 at 2), RWCS says that CSX and NS "own" NYS&W. That is not so. As a matter of clarification, CSX and NS each have ownership interests in certain securities of NYS&W's parent company and are entitled to elect one director each to the seven-person board of directors of that parent. Neither the securities holdings nor the board seats constitute control of NYS&W.

[8] This section of the CSX Reply Comments has been redacted to remove Highly Confidential material. The unredacted version appears in Volume II, the Highly Confidential Supplement, which is being filed under seal.

the relief that it did get from the Board. Indeed, IP&L now impeaches the principal basis of the Board's 1998 finding, which was induced by IP&L's evidence and arguments, that the Stout Plant of IP&L constituted a "two-to-one" situation, deserving special relief from the Board.

Most pertinently, the IP&L comments also involve an attempt by IP&L to describe the present state of the bidding before IP&L to replace its 1996 Contract with INRD. But IP&L tries to do that without saying a word as to the bid made by INRD. That bid makes it plain that no diminution in competitive pressure has occurred as a result of the Conrail Transaction, as conditioned to date by the Board. ****. No further conditions are needed.

Finally, in an extraordinarily illogical proposal, IP&L says that because it is dissatisfied with the bid for movements by ISRR and NS into Stout, with ISRR performing by far the greater amount of the movements, the remedy ought to be to give ISRR rights to move over someone else's property in order to perform the entirety of the movements! The absurdity of such an argument needs little further elaboration.

1. <u>The Stout Plant and Its Coal Sources</u>. — The present controversy, as have most of the post-1998 IP&L controversies, involves IP&L's Stout Plant in Indianapolis. The Stout Plant was, prior to the acquisition of Conrail by CSX and NS and the "split" of its routes between them, served physically by only one rail carrier, INRD. INRD was and is a shortline which serves coal mines in Southern Indiana, about 110 miles from Indianapolis. It was and is an 89% owned subsidiary of CSX. Another shortline, Indiana Southern Railroad ("ISRR") (a spin-off of a Conrail line in the early 1990s some years prior to the Conrail Transaction) also serves mines in that area and operates a line of railroad from them to Indianapolis. While the ISRR line comes quite close to the Stout Plant, it has no physical access to Stout. The historic lines of Conrail also came close to Stout, but did not reach it. The nearness of those two railroads' lines to Stout presented the possibility of a "build-out" or "build-in" (collectively a "build-out") of tracks from the Stout Plant to ISRR or Conrail.

The needs for coal at the Stout Plant generally vary from year to year, but range from somewhat over one million to two million tons. Those needs have in recent years been supplied by coal from Southern Indiana mines.

In 1987, at a time when the line which is now the main portion of ISRR's line into Indianapolis was still part of Conrail, Conrail and IP&L had a rate case before the ICC. The case was settled by Conrail's entering into a rail transportation contract with IP&L. The contract (the "Conrail Contract") provided coal rates, subject to escalation, to IP&L from various Southern Indiana origins to various destinations, including Stout.[9] The Conrail Contract was later amended on several occasions to add ISRR and INRD, as parties (apparently, in INRD's case, to provide an assurance, during the life of the Conrail Contract, that entry into the

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[9] Copies of the original Conrail Contract and amendments that appear pertinent are attached to the Highly Confidential Supplement as Exhibits 1 and 2 since the contain extensive confidential material. The background of the Contract just summarized appears in its recitals.

Stout Plant would be available over INRD in connection with the Conrail/ISRR arrangements). The contract had an expiration date of January 31, 1998, which was amended at the end of 1997 to March 31, 1998.[10] The rates provided for in the Conrail Contract ****. By reason of the Conrail Contract, some constraint (how much seems questionable as we develop later) over the pricing by INRD of its line-haul movement of coal from Southern Indiana into Stout was provided through what came to be a three-carrier movement, ISRR/CR/INRD.

With INRD under the constraint of a potential build-out to enter Stout directly,[11] and under such constraints that the three-carrier "ISRR/Conrail/INRD Switch" movement into Stout may have presented, INRD and IP&L in the summer of 1996 entered into a rail transportation contract for a long term. Under it IP&L committed ****% of its coal requirements each year at the Stout Plant to single-line or other line-haul movements by INRD from points in Southern Indiana.[12] The contract gave IP&L an option to buy any of the rest of Stout's needs over and above the ****% that was committed, at the same price. To accommodate other transportation sources that might supply that ****, however, during the length

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[10] At the end of the Conrail Contract, Conrail was required to publish a tariff for movements similar to those covered by the contract ****.

[11] Depending on whether the build-out was to the ISRR line or Conrail segment, the build-out would have permitted single-line service (ISRR) or two-carrier service (ISRR/CR).

[12] Some of the contract movements were of coal from mines in Southern Indiana served by Canadian Pacific's Soo Line ("CP") and not by INRD; CP had no line to Indianapolis, so these moves involved interchange with CP with INRD in Southern Indiana and an INRD line haul into Stout.

of the 1996 Contract INRD had to switch for them into Stout at ****. The 1996 Contract became open to renegotiation and/or termination earlier this year.

A copy of the contract (the "1996 Contract") is attached as Exhibit 3 to the Highly Confidential Supplement, but is not attached to this Volume. The transportation rates provided for in the contract were (and are) highly confidential.[13] The 1996 Contract provided for movements from a number of Southern Indiana origins to Stout. A principal origination point, where a number of mines served both by INRD and ISRR are located, was Switz City, IN. The contract rate in the 1996 Contract for movements from Switz City to the Stout Plant was $****. A number of other origins in Southern Indiana were also specified, and the rate for those was $****. ****. A provision for fuel adjustment was included in the contract, but it was hedged about by various restrictions and thresholds, and as a result, there has been no fuel escalation to the present date. 1996 Contract, Ex. 3, Art. VIII (p.9) (rates); Art. IX (p. 10) (price adjustment).[14]

That state of affairs evidenced by the 1996 Contract reflected the competitive situation with respect to coal transportation from Southern Indiana to Stout prior to the events which led up to the Conrail Transaction. INRD had a single-line movement into Stout from the mines it served in Southern Indiana, and it was the only rail carrier that served Stout directly; ISRR, another railroad

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[13] The rates provided were on the basis of ****, in equipment provided by the shipper at no cost to the railroad.

[14] The 1996 Contract could also be used in connection with coal originated at mines served by CP in Southern Indiana; ****.

with access to Southern Indiana mines (including some which were also served by INRD), was physically close to Stout and connected with Conrail; and Conrail itself was physically close to Stout. With the backdrop of the geographical factors suggesting the feasibility of a build-out, both physically and economically, INRD had joined in limited-time arrangements which made possible a three-carrier route via ISRR, Conrail, and a switch by INRD itself, for Southern Indiana coal to get into Stout. Notwithstanding that, and despite the fact that prior to the 1996 Contract, according to IP&L's own witness,[15] ISRR had delivered large quantities of coal to Stout under a three-carrier arrangement, the price and terms offered by INRD in 1996 were apparently so superior to those of ISRR/Conrail that IP&L was willing to **** for a period of at least **** years.

2. <u>The Positions Before the Board in the Conrail Case</u>. — After a bidding war in the Fall of 1996 and the Winter of 1996-97, CSX and NS agreed to acquire Conrail jointly and split the operation of its routes between themselves. An Application for the Board's authorization of this was filed in June 1997. The public submissions before the Board in connection with the Conrail Transaction involved some attempted overreaching by IP&L (and by ISRR), but some of the contentions made by IP&L were found by the Board to be well grounded, based

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[15] Michael A. Weaver, Manager of Fuel Supply for IP&L, in a V.S. supporting ISRR's Rebuttal in support of its Responsive Application to serve Stout direct, appearing in ISRR-9, filed Jan. 14, 1998, at 12.

on IP&L's testimony before the Board; and so the Board imposed several conditions to benefit IP&L.

One of IP&L's positions was a grandiose one: just like Northern New Jersey, Southern New Jersey and Detroit, IP&L said that Indianapolis should be made a Shared Assets Area. IP&L-3, filed Oct. 21, 1997, at 13-18. As a more restrained fallback, IP&L's presentation next stated that "Both Perry K[16] and Stout Should Be Treated as 'Two to One' Destinations, and In Any Event IPL Should Be Found to be Able to Build-Out to Conrail From the Stout Plant." Caption to Part III of IP&L-3 at 18. In furtherance of this argument, IP&L urged that "NS must be granted fully effective trackage rights that enable it to serve shippers directly, including through build-outs. NS must therefore have direct access to the Stout and Perry K plants." *Id.* at 19. IP&L criticized the position of the Applicants that "NS would not have the right to serve shippers' 'build-ins' or 'build-outs.'" *Id.* at 20.

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[16] Perry K is the other, smaller, generating plant of IP&L in Indianapolis. Apparently it has been, or is in the process of being, converted to burn gas rather than coal. In any event, the Board considered IP&L's arguments, held that the Conrail Transaction made Perry K better off competitively than it was before and ordered no relief. Decision No. 89 at 116. A half-hearted request for further conditions to benefit Perry K is attempted in the IP&L Comments (p. 4 n.2, Highly Confidential Version only). But no serious argument is made on behalf of Perry K, and it is an *a fortiori* case from the discussion herein of Stout. Historically, the coal transportation resource for Perry K has been ISRR. *See* Decision No. 125 at 9, served May 20, 1999.

3. **IP&L Presents Extensive Proof of Feasibility of a Build-Out**. — All these arguments were based on the theory that a build-out to permit another carrier in addition to INRD to serve Stout was physically and economically possible. The difficulty that IP&L faced in its campaign to obtain dual carrier service at Stout was that Stout, on the face of it, was not a 2-to-1 location. Only one carrier served it before the Conrail Transaction (INRD). After the Conrail Transaction it would be served by only one rail carrier (INRD). In order to demonstrate that a build-out was feasible, IP&L submitted the testimony of a number of witnesses. An overall presentation by Michael A. Weaver, the Manager of Fuel Supply of IP&L (and a trained Civil Engineer), urged that:

> The Board should permit IP&L's Stout Plant to be served by NS directly if a build-in or build-out from the belt is feasible since IPL has the right today. The accompanying testimony of John E. Porter and Larry Anacker demonstrate that such a build-out, if financed by IPL, would cost between approximately $****, at most, and is entirely feasible along the route shown in the map accompanying Mr. Porter's testimony." Weaver V.S. at 11-12, Ex. 1 to IP&L-3, filed Oct. 21, 1997.

Mr. Porter was a professional land surveyor and had, in fact, done railroad design, estimating and construction management work for CSX for 19 years. He presented a cost estimate, including a costings sheet which estimated costs in 15 subcategories and six major categories, plus an estimate of right-of-way acquisition costs, based on Mr. Anacker's Verified Statement. Mr. Porter's testimony was that the build-out was feasible. Ex. 2 to IP&L-3.

For his part, Mr. Anacker, a supervisor in the Real Estate Division of IP&L, with over 20 years of real estate experience, provided his estimates as to the parcels of real estate that would have to be acquired and the ranges of costs to acquire them. He presented testimony concerning comparable purchases in and around Indianapolis to support his opinion, which was incorporated into Mr. Porter's costing sheet. Ex. 3 to IP&L-3.

In addition to these verified statements supporting the feasibility of a build-out, IP&L provided the testimony of Thomas D. Crowley, President of L. E. Peabody & Associates, a transportation consultant well known to the Board. Mr. Crowley made some points concerning the future of coal supply to IP&L, pointing out that as the phasings of the Clean Air Act were to progress, "alternatives to the current high-sulfur coal will need to be implemented. Other Clean Air Act requirements or environmental restrictions may oblige IP&L to change coal suppliers even before Phase II becomes effective." Crowley V.S., Ex. 4 to IP&L-3, at 3.

In this regard, Mr. Crowley discussed the build-out option and made it plain that: "The build-out/build-in option can serve as a competitive check on existing coal movements originating in Southern Indiana and as a competitive check of the acquisition of compliance coals from the west." *Id.* at 8.

As far as here pertinent, and putting to one side IP&L's request for a proliferation of Shared Assets Areas (rejected in all cases by the Board),[17] that

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[17] *See* Decision No. 89, served July 23, 1998, at 70-71.

was IP&L's case: recognition of the build-out option and substitution of NS for Conrail with some sort of economic, or possibly physical, access to Stout. IP&L stressed the build-out alternative and said that the build-out should involve a build-out to NS. IP&L asked that NS be given direct access to Stout, in addition to a finding and order of the Board recognizing and preserving the build-out alternative.[18] IP&L's case involved looking to NS as its "second" carrier of choice, not ISRR. Presumably this was because of NS's much larger system and its ability to receive coal shipments from the West at its Kansas City interchange as well as at the Mississippi River gateways. No reliance on ISRR was expressed by IP&L in IP&L-3, its October 1997 major evidentiary filing in the case.[19]

CSX's position in rebuttal was that INRD was not a two-to-one situation at all and that no conditions were warranted. Said CSX: Stout was served solely by INRD before the Conrail Transaction and would be solely served by it thereafter. Certain contractual arrangements which had been entered into involving INRD

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[18] Since a build-out to the Conrail would, after the transaction, simply lead IP&L into track then allocated to CSX, implementation of the build-out would have to involve the grant of trackage rights to permit the carrier in question — NS or ISRR — to access the point to which the build-out was to be made. That form of relief where the feasibility of the build-out has been demonstrated was granted by the Board here. Decision No. 89, at 117 n.180. A build-out to ISRR could also be selected rather than NS, and the necessary trackage rights would be given to ISRR, the Board ordered. *Id.*

[19] For its part, ISRR sought trackage rights directly into Stout, through a Responsive Application. ISRR-4, filed Oct. 21, 1997. Opportunistically as ever, IP&L later supported that additional access (why not?), and loaned ISRR some rebuttal witnesses to help it. The Board denied ISRR's application. Decision No. 89 at 181.

to permit Conrail (and hence its connections) to reach Stout through low-cost switching arrangements over INRD existed, but these were limited in time and the longest of them would expire no later than the year 2001.[20] CSX would inherit the burden of those agreements, but they were time-limited; accordingly, they furnished no basis for giving NS access on a permanent basis to Stout. CSX/NS-176, Vol. 1, filed Dec. 15, 1997, at 54-55. On the ability to effect a build-out from Stout to ISRR or to the Conrail line, CSX denied that there was any feasibility. *Id.* at 55.[21]

IP&L, on brief (IP&L-11, filed Feb. 23, 1998), asserted the same arguments that it had before. It staunchly defended the build-out's feasibility, citing not only the presentation it had made itself, but incorporating and putting forward presentations that had been made by ISRR in the January 1998 Rebuttal it had presented in support of its Responsive Application. Said IP&L (IP&L-11 at 21-22):

> In any event, a build-out to Conrail from the Stout Plant is feasible. In IP&L-3 (filed October 21, 1997), we demonstrated the feasibility of a build-out to the "Conrail Stub." <u>See</u> IP&L-3, IP&L Exhibit Nos. 1, 2, 3 and 4. Also, Mr. Michael A. Weaver, Manager of Fuel Supply at IPL, described two other feasible build-out options from Stout to Conrail. <u>See</u> ISRR-9, Weaver V.S. at 20.

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[20] This was a provision in the 1996 Contract that required INRD to maintain a cheap switching rate at Stout for the life of that contract. *See* Ex. 3, Article VIII.B, p. 9.

[21] CSX argued that trucks supplied competition at Stout, CSX/NS-176, Vol. 1, at 55-56, but the Board did not accept that contention.

CSX Witnesses Kuhn and Vaninetti criticize the cost estimate of the build-out proposed by IPL Witness Porter and argue that his estimate should have included additional expenses, which would not even double the costs of the build-out. See CSX/NS-177, Rebuttal, Vol. 2A, Kuhn V.S., pp. P-310-11. Even including Mr. Kuhn's additional costs, Mr. Weaver testified that the "build-out" from Stout to Conrail is feasible. See ISRR-9, Weaver V.S. at 19-22. Mr. Weaver explained:

> [i]f the Stout Plant were to operate for only 20 more years, the total costs claimed by Mr. Kuhn would be distributed over the costs of shipping approximately 30 million tons of coal (20 years times 1.5 million tons per year), and would amount to **** when the construction costs are amortized over the remaining life of the Stout Plant. The Stout Plant is likely to operate for more than 20 years, because it is now so hard to site new powerplants, and yet demand for electricity continues to grow. Mr. Kuhn's extra costs would also be offset by elimination of the $**** switching charge imposed by Indiana Rail Road (approximately $****) which would no longer be necessary (and which could also increase when the current IP&L/INRD Contract expires in about 2002).

Id. at 20-21.

Mr. Thomas E. Crowley, President, L. E. Peabody & Associates, Inc., analyzed IPL Witness Porters's and CSX Witness Kuhn's estimated build-out costs and determined that the cost to exercise the build-out option ****. ISRR-9, Crowley V.S. at 28-29. Under either cost estimate, Mr. Crowley opined that the costs of the build-out are "considerably reasonable." Id.

Furthermore, Dr. Peter A. Woodward, testifying on behalf of the Department of Justice, stated that Mr. Porter's proposed build-out was feasible even if its actual costs were three times Mr. Porter s estimated cost. See ISRR-9, Weaver V.S., Attachment 8.[[22]]

4. The Board Grants IP&L's Wishes. — So, according to IP&L and Weaver, its Manager of Fuel Supply, the build-out was feasible even at twice (approximately Kuhn's estimate)[23] or three times the cost IP&L had estimated! Given this evidence, the Board's decision rejected CSX's contention that a build-out from Stout was not feasible. It credited the extensive testimony in IP&L's filings and/or endorsed by it (and indeed made by IP&L's own witnesses) in support of the ISRR filing. The Board held that the build-out appeared feasible and granted the necessary contingent trackage rights to access such a build-out, either to the old Conrail line or to ISRR. Decision No. 89 at 117 n.180. The Board said that "we agree with DOJ and IP&L that the most likely primary cause of competitive pressure at Stout today is the threat of a build-out to Conrail." *Id.* at 117.

It would have been reasonable (and legally sufficient) for the Board to have stopped right there. Yet the Board went farther. Looking to the soon-to-expire switching arrangements, and despite the fact that future outcomes of negotiations

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22 The Department of Justice also supported giving NS trackage rights into Stout. DOJ-2, filed Feb. 23, 1998, at 9-14. No support was given by the Justice Department to the responsive application filed by ISRR to enter Stout directly.

23 Kuhn estimated at minimum an additional $**** in costs over those estimated by the IP&L witnesses.

were entirely unpredictable,[24] the Board took the extraordinary step of ordering access by NS, both direct physical access and compulsory switching by INRD – at IP&L's choice. Although the Board was of the view that the "primary competitive pressure at Stout" was the build-out possibility which the Board was preserving, the Board imposed a further condition to "approximate" the "pre-transaction marketing conditions" provided by the time-limited arrangements involving Conrail, as follows:

> To remedy IP&L's potential loss of rail competition, we will allow the Stout plant to be served directly by NS (rather than restricting NS to accessing Stout via CSX switching at Hawthorne Yard) or INRD switching at Stout, as selected by IP&L. Further, to approximate more closely pre-transaction market conditions, applicants shall amend their agreements to permit NS to interchange with ISRR at its existing milepost 6 for movements to Stout and Perry K. *Id.* at 117 (footnotes omitted).[25]

Thus, the standard the Board was applying was the "approximation of pre-transaction marketing conditions." The last major test of those conditions had occurred in 1996, when INRD won the 1996 Contract, firm for ****% of Stout's requirements, and with IP&L having an option to have more than ****% moved on the same basis.

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[24] The Board quite correctly said that "whether IP&L would continue to be able to obtain favorable switching terms after the transaction is disputed."

[25] The interchange point was thereafter changed, by mutual consent. *See* Decision No. 115, served Feb. 8, 1999.

5. <u>IP&L Wants Even More</u>. — The Board is well familiar with, and we will not describe in any depth, the efforts of IP&L to obtain even additional competitive options to those the Board had given it in Decision No. 89. IP&L came into the Conrail case with its Stout Plant solely served by INRD, with a build-out possibility which it contended was completely feasible, and with a time-limited joint-line move with three-carrier involvement to Stout (via ISRR, Conrail and an INRD switch). Under these conditions, it had nonetheless very recently negotiated a long-term commitment to INRD of ****% of its requirements at Stout. After the transaction, IP&L had direct access from two carriers, INRD and NS. With that access, it could obtain coal from the Southern Indiana mines from all the sources served by INRD and all of the sources served by ISRR, which would be a friendly connection to NS (as long as ISRR had no hope of a grant of the right to serve Stout direct itself); NS, like Conrail, could not itself furnish economic line-haul moves from coal sources in Southern Indiana to Indianapolis. With the prospect of increasing environmental difficulties with the use of Southern Indiana coal, a prospect identified by Crowley, its own witness, IP&L had access to essentially every coal mine in the United States; it had access to all of the mines on NS and CSX (each expanded to include the Conrail lines), and their shortline connections throughout the Eastern United States, and, via the Mississippi River interchange points of CSX and NS, and NS's Kansas City interchange point, IP&L had access to coal from all the mines in the Western United States.

That was not enough for IP&L, and it began a process of disclaiming any value in the tools it had received from the Board as a result of the presentation that it had made, over opposition from CSX, in the Conrail proceedings.

The first step of this repudiation of the validity of IP&L's own case by IP&L was aimed at the role of NS. As Part 2 of the above account shows, a keystone in IP&L's case before the Board was the role that NS would play. By January 1999, however, although the locations of NS's lines, facilities and operations after the Conrail Transaction had been plainly spelled out in the 1997 Application, IP&L claimed to have come to the realization that NS's route structure and array of yards and other facilities were not adequate to permit it properly and economically to serve IP&L, although they were located exactly where the Application and its operating plan said that they would be. IP&L's early contentions in this regard were rejected by the Board in Decision No. 125, served May 20, 1999. There followed in court a combination belated attack on the Board's basic decision in No. 89 (dismissed by the Court as hopelessly out of time) and a denial on the merits of IP&L's appeal to the Second Circuit regarding Decision No. 125. Docket No. 98-4285(L), 2d Cir., April 25, 2001.

A further attempt was made by IP&L, as the Board knows, to obtain a further award, access by yet a third carrier, ISRR, to Stout — in the year 2000's round of the General Oversight process. The Board held that no case had been put forward by IP&L to show that the bountiful rights already given it were inadequate to replicate the pre-transaction competitive picture. Decision No. 3, served Nov. 30, 2000, at 6-7, 9. IP&L's appeal from that decision was summarily rejected by the United States Court of Appeals for the District of Columbia Circuit. Docket No. 01-1005, D.C. Cir., Order of July 26, 2001, granting motions for summary affirmance.

6. **IP&L Analyzes Part of the Present Bidding Process but Leaves Out the Most Important Part.** — We now come to the year 2001. IP&L is in the middle of its processes to obtain a new long-term coal contract to replace the 1996 Contract. It and the railroads are proceeding under the usual arrangements of confidentiality that prevail as to such matters, and accordingly, much of the text that follows will appear only in the Highly Confidential Version.

IP&L is now attacking both of the forms of relief that it obtained in litigation from the Board for Stout. It attacks NS's ability to transport coal to it at reasonably competitive rates, in this case coal from the Southern Indiana mines in a joint movement with ISRR providing the line-haul. ISRR has a conflict of interests; it would be the beneficiary if the Board were to grant IP&L's request that ISRR be given direct access to Stout; ISRR could offer single-line service from all ISRR's Southern Indiana origins! We do not know whether or to what extent ISRR has risen above this conflict of interest. IP&L expects us to believe that ISRR has given up its prospects of obtaining direct access to Stout and is putting out its best efforts to provide NS with a sharp-pencil requirements number for its part — in mileage, the overwhelming part — of the movement.[26] IP&L

[26] ISRR will be remembered for having compared NS movements to Stout to "transporting coal to Stout by wheel barrel" (*sic*). ISRR-13, filed April 9, 1999, at 4.

says that the ISRR/NS prices are out of line and do not afford any competitive constraint to INRD. Apparently as a consequence for ISRR's participation in a bid which IP&L found unsatisfactory, the Board is to award ISRR direct access to Stout.

On the face of them, the ISRR/NS rates look like prices that most coal-using generators of electric energy throughout the United States would be very pleased to have for themselves.[27] But here are the NS/ISRR prices, and let us assume that they reflect an effort by ISRR to give its best numbers; now, the question is, what shall we compare them with?

Curiously, IP&L compares them only with the existing CSX Tariff on coal movements from various mines in the Southern Indiana region.[28] The CSX Tariff is, in essence, a republication of the Conrail Tariff.[29] The actual tariff (the one appended to IP&L's submission was thereafter revised) provides that there will be no escalation of the prices, so that the prices were the old Conrail prices. If RCAF(U) escalation were applied to them, or if they were to be subjected to a fuel

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[27] According to the Energy Information Administration of the U.S. Department of Energy, in their "Energy Policy Act Transportation Rate Study: Final Report on Coal Transportation," published October 2000, in 1997, the latest year reported on, the average transportation rate per ton for all coal moving under contract shipments by rail was $11.02 in then-current dollars. By sulfur content, prices ranged from $12.29 per ton for low-sulfur coal to $5.95 for high-sulfur coal. *Id.* at 83. The average for "Medium Sulfur B," Stout's type of coal in 1997 (*id.* at 68), was $8.59. *Id.* at 83.

[28] The actual CSX Tariff is attached as Exhibit 6 to Volume II.

[29] The last Conrail Tariff before Split Date (the date CSX and NS began operating the former Conrail routes) is attached as Exhibit 7 to Volume II.

surcharge, given the well-known increase in prices of fuel since mid-1999, they would be somewhat higher. Application of the RCAF(U) formula to the rates in the CSX Tariff would increase the rates by approximately 8.66%.[30] The prices quoted by NS/ISRR are current prices. The best **** of NS/ISRR is ****; instead of a comparison with $3.17 in the Conrail Tariff, we get an escalated rate of $3.44. The NS/ISRR rate is **** the adjusted CSX Tariff rate.

So while there will still be some gap between the prices bid by NS/ISRR and the CSX Tariff, it will not be as substantial as IP&L says.

The real question, however, is why are these particular comparisons being made? IP&L has shown no present desire to use the CSX (former Conrail) tariff. CSX put the tariff forward in June 1998 with a provision for no escalation in the Conrail/INRD portions of the move for five years and, subject to RCAF(U) adjustment thereafter, to be maintained for 20 years, as a proffer. CSX-152, filed June 1, 1998, at 2-3 and Ex. 1. This was an effort to reach a settlement with IP&L or to have the Board impose that settlement as a condition on CSX to resolve the IP&L Stout issues. IP&L did not accept the proffer and the Board did not impose it as a condition. As far as movements to Stout are concerned, the CSX Tariff rate is a "paper rate"; there have been no movements under it to Stout. V.S. Rupert

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[30] Because of the movement of the index from RCAF(U) 0.993 to 1.079, from Split Date (June 1, 1999) to the present.

para. 4; V.S. Haselden para. 8.[31] Given the rejection of the 1998 proffer, there is no reason why the tariff cannot be amended.[32]

Apparently recognizing that the CSX Tariff is purely a "paper rate" to Stout and would be rethought very quickly if anyone attempted to make real-world use of it for moves to Stout, IP&L is apparently using it as a surrogate for the prices under the 1996 Contract between INRD and IP&L. IP&L told NS (IP&L Comments, Ex. 2) and tells us that the CSX Tariff prices are ****. Why does IP&L use the CSX Tariff as a point of comparison, instead of the more obvious comparison, the prices under the INRD 1996 Contract themselves? The answer seems clear enough. IP&L does not want to get into the subject of the INRD contract itself,[33] because that in turn raises the subject of, what are the terms of renewal or replacement to that contract that INRD is now proposing? All we have is silence from IP&L on that subject.

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[31] Indeed, there were almost no movements to Stout under the Conrail Tariff or other arrangements for Conrail to have switching access to Stout following the effectiveness of the 1996 Contract. V.S. Haselden, para. 8.

[32] It appears that the present version of the CSX Tariff may have been published in error; it appears to implement the rejected proffer that was made in 1998 rather than the statement that CSX made in 1999 that the Conrail Tariff would be republished by CSX but with RCAF(U) adjustment.

[33] While IP&L was quite proper in not telling NS's Mr. Evans, in the letter of June 11, 2001, which is Exhibit 2 to IP&L's Comments, about the INRD contract prices or INRD's new proposal, there was no reason for IP&L not to give that information to the Board under its sealed Highly Confidential filing.

7. **<u>INRD's Bid Demonstrates That No More Conditions Are Needed</u>.** — In fact, INRD has made a very attractive new contract proposal to IP&L which IP&L has not mentioned at all. The reason IP&L has not mentioned it is clear enough: ****. The new offer seems clearly constrained by the possibility of a build-out and the prospect of a movement for delivery by NS, Conrail's successor in the alternative movement from ISRR coal sources. Indeed, NS, unlike Conrail, is permitted physically to enter Stout. Those were the very same factors constraining the INRD pricing in 1996, and the bid indicates that the same constraints (with NS substituted for Conrail and its access improved) are working just as well now.

Let us compare the details of the INRD bid with those under the 1996 Contract. That is the real touchstone in the case; what is INRD's pricing behavior, given present circumstances; have the Board's conditions "approximate[d] pre-transaction market conditions"? Decision No. 89 at 117.

The details of the current INRD bid are presented in the Verified Statement of John E. Haselden, INRD's Director of Marketing. Two alternative forms of service are presented. A new, innovative "Express Service," which will create efficiencies and reduce the number of train sets which IP&L must employ for movements to and from Stout, is made available. It is discussed in paras. 3 and 4 of the Haselden V.S. "Standard Service" is also available. The Standard Service will be essentially comparable to the present-day service provided to IP&L. *Id.*, para. 5.

For these forms of service, from mine origins at ****, in unit trains of approximately ****, the "Express" rate is $****, ****. For the Standard Service, the rate will be ****. Since according to the RCAF(U) index, the adjustment from July 1, 1996, to July 1, 2001, is 10.9%,[34] a price so indexed which was $**** in July 1996 would equate to $**** in July 2001. ****.

Because the provision of Express Service involves a substantial capital expenditure, a cost-sharing proposal has been made by INRD to IP&L. Under it, two alternatives are available, as proposed by INRD, to be elected by IP&L. ****. V.S. Haselden at 7.

As noted above, adjusting the prices for Standard Service by the conventional index, ****, which was negotiated under the benchmark constraints which the Board's conditions were designed to maintain. The Express Service, with the **** increment (providing for a **** locations) would, ****, as well as a savings in the equipment to be furnished by IP&L.[35]

The INRD proposal contemplates a ****-year term with ****.

Similar options would be available with respect to coal from Southern Indiana sources that are local to CP. These include Farmersburg, IN, the Kindill 3 Mine near Dugger, IN, and the Davco siding near Odon, IN. The Express Service rates from those points, in run-through trains with INRD providing the power, would be ****. The only current service involves interchange, and INRD does

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[34] Opening RCAF(U) is 0.973, ending is 1.079.

[35] IP&L also has the ****.

not know the CP rate for the movement from origin to interchange point, nor does INRD know what CP's new bid might be for that segment movement. These matters are presumably well known to IP&L. ****. *See* V.S. Haselden, para. 6.

Standard Service involving CP origins would not be a run-through service; the price for INRD's part of the movement would be $****. Like the rates from Switz City, when inflation is taken into account, ****.

INRD is proposing a commitment of ****% of the annual requirements at Stout, which it believes is fairly comparable to the ****% commitment required under the 1996 Contract given the excellent pricing and service options. ****. So the above remains a proposal and should not be considered a done deal.

****. The fact that the NS/ISRR bid is higher than the INRD bid tells us no more than we are told by the fact that the 1996 Contract of INRD was so good that it made IP&L willing to give a ****% commitment to INRD, even though in the period immediately before the effectiveness of the 1996 Contract, a substantial amount of coal had been delivered to Stout on the three-carrier movement ISRR/CR/INRD. There was competition in each case, but INRD clearly had the better price. The Board's conditions have worked; INRD's pricing ****. The "pre-transaction marketing conditions" have been well replicated.

In this regard, the history of the multicarrier contract involving ISRR, Conrail and INRD, which was executed in 1987, became effective in 1988, and ran until 1998, discussed above, together with other pricing by ISRR and Conrail pre-acquisition, is instructive. The rates in private cars under that contract from **** to destination at Stout, including absorption of the INRD switch charge (and later with participation by INRD in the contract) was originally $****. That figure was subject to escalation from October 1, 1987.[36] The Conrail Contract did not, however, impose any obligation on IP&L to use the rates that were expressed in it; it accordingly must have operated essentially as a ceiling. Apparently, Conrail (with its connections) from time to time offered lower prices and indeed, lower prices were reflected in the Conrail Tariff published after the Conrail Contract expired.

Regardless of the rates that Conrail and its connections offered, from time to time, however, the net effect of the independent Conrail's historic presence as a constraint on INRD pricing has to be considered in the light of the following facts: (a) IP&L was willing in 1996 to provide a commitment of at least **** years to INRD to carry ****% of the coal needed at Stout, and (b) that although ****% of Stout's requirements — a fraction amounting to about **** tons a year — was available to be served by Conrail movements in conjunction with connections such as ISRR, only two trains (with about 10,000 tons in total) moved under any arrangements with Conrail during the entire period from the effective date of the 1996 Contract until the separate operations of Conrail came to an end

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[36] Escalation under the Contrail Contract was under the predecessor of RCAF(U) inasmuch as RCAF(A) was not introduced until 1989. *See* Railroad Cost Recovery Procedures, 5 I.C.C. 2d 434 (1989), *aff'd sub nom. Edison Electric Institute v. ICC*, 969 F.2d 1221 (D.C. Cir. 1992). In the ten-year period from January 1988 to 1990, the RCAF(U) Index rose 27.1%.

on Split Date. V.S. Haselden, para. 8.[37] The effectiveness of the historic Conrail's pricing and service with its connections as a constraint appears to be considerably limited. The NS/ISRR bids appear to be an adequate replacement today for the old Conrail Contract, indeed, apparently for any better price which Conrail and connections may have bid when it lost the bidding in 1996.

The acid test of these comparisons as to Stout, and the only serious issue presented, is not what Conrail or NS offered at any given time, but what effect their presence (and that of their connections) and what effect the other constraint (the build-out possibility), had on INRD's pricing. INRD was the only carrier offering a single-line movement into Stout from any of the mines in Southern Indiana. The discussion of these alternative prices by other parties (including those who have served Stout) is interesting, but the significant point is that essentially the same constraints that were in place in July 1996, an appropriate benchmark point before even the first Conrail deal with CSX was signed, are still in effect ****. The NS/ISRR bid may well be as competitive as the old three-carrier Conrail Contract price. Perhaps the NS/ISRR pricing will be even better once the Board disabuses ISRR of the notion that it might receive direct access to Stout.[38]

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[37] Both of these moves were in 1998. There have been no Stout moves under the CSX Tariff. V.S. Rupert, para. 4; V.S. Haselden, para. 8.

[38] The bidding process employed by IP&L with NS seems to have the flavor of forensic preparation rather than of commercial negotiation about it. In Mr. Dininger's letter to Mr. Evans (*see* IP&L Comments, Ex. 2), Mr. Evans is told in effect not to bother to come back unless NS can match the "paper rate" which CSX put out, containing pricing that was essentially obsolete. To IP&L,

Footnote continued on next page

Once again, it appears that IP&L is crying without being hurt. It has received a bid from INRD which is ****. The presence of NS as successor to Conrail for joint movements involving ISRR is providing some constraint, and it appears likely that the build-out possibility is providing more, as indeed the Board found in Decision No. 89 in 1998. While IP&L would likely want an even better deal than the one it got in 1996 and an even better deal than the present INRD proposal, it has no license to employ the Board to assist it in getting a better deal than it is being offered. That was not the purpose of the Board's decision in 1998; the objective was not to tilt the playing field away from INRD, but to replicate the position that IP&L's Stout plant had in 1996 — the "pre-transaction marketing conditions." Nothing in the present line of the bidding indicates that what the Board has done has failed. INRD is still the low bidder, ****.[39]

Footnote continued from previous page

a bid is not "competitive" ****. IP&L has a distorted notion of what "competitive constraints" mean.

[39] In a letter to the Board dated July 30, 2001, IP&L cites as authority a decision of the United States Court of Appeals for the District of Columbia Circuit in *CF Industries, Inc. v. STB,* No. 00-1209, decided July 27, 2001. The decision, which affirmed a decision of the Board in a pipeline rate case (Docket No. 41685, served May 9, 2000), has very little to do with the present case. *CF Industries* involved a tariff rate increase by a pipeline carrier. The increase was held by the Board to result in an unreasonable rate. The issue at hand involved a comparison of the earlier and later rates of the carrier in question. Here, based on ****. The issue is not whether the INRD rates quoted are unreasonable — there is no suggestion that they are — the only question is whether the constraints operating at the present time are a fair approximation or equivalent of those operating in 1996.

8. **IP&L's Attack on the Decision It Obtained From the Board Should Not Be Tolerated.** — As noted above, IP&L in this filing for the first time attacked the primary supporting pillar of its original case — the case that it successfully presented before the Board in 1997-98. It has attacked the case it made with respect to the feasibility of a build-out option.

The Board found, agreeing "with DOJ and IP&L that the most likely primary cause of competitive pressure at Stout today [that is, under the old independent Conrail] is the threat of a build-out to Conrail, which appears feasible."

Says IPL now:

> Logically, of course, direct access would be far superior to a build-out or build-in, because IPL showed the build-out would cost about $8 million, and CSX claimed it would cost as much as $25 million, <u>if it could be built</u>. Moreover, the Board cannot assume that it would approve the build-out, because as the Board knows, approval is subject to environmental review. The "Build-out" in question would be a difficult one, given the buildings along the likely route, the need to cross Eagle Creek with a bridge, and given that there is a busy intersection at Kentucky Avenue that would need to be crossed (with the need to receive approval to install different traffic control there). IP&L Comments, filed July 16, 2001, at 5-6 (Public); 6 (H.C.).

All those issues were before the Board in 1998 and it held that a build-out appeared feasible. The Board did not accept CSX's claim as to the cost,[40] nor did it express any questions as to whether the build-out could be built. CSX's

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[40] IP&L contended that even if CSX's claims as to the costs were correct, the build-out was still economically feasible. *See* Part 3, above.

attack was essentially that the cost would made construction uneconomic, not that it was physically impossible. Those assertions were refuted. As to the rest of the objections, they are without merit or were disposed of in 1998. Eagle Creek and Kentucky Avenue in 1997 and 1998 were exactly where they are now, and IP&L has presented no evidence of major new building construction in the area. The Board would pass on the environmental issues with an Environmental Assessment or, if required, an Environmental Impact Statement. IP&L foresaw no insurmountable environmental obstacles then and there is no reason to believe that any have arisen in the last few years.

More fundamentally, the attack by IP&L on the remedy that it itself supported should not be countenanced. Tribunals that have adjudicated an issue do not permit parties who have successfully obtained a result they asked for from them, absent a change in circumstances, to make such attacks. The recent Supreme Court case of *New Hampshire v. Maine*, U.S., No. 130 Orig., 69 U.S.L.W. 4393, decided May 29, 2001, is an example of that. In that case, the Supreme Court denied New Hampshire the right to have its case heard on the merits where, in a prior case which was settled, it had participated in a stipulation to the Court that was inconsistent with the position it sought to take in the new case. We have an *a fortiori* issue here since the existence of feasibility was a matter actually tried before the Board, not merely stipulated to. The present attack by IP&L is thus an attack on the primary reason why the Board gave IP&L any relief at all as to Stout.

It seems quite clear that IP&L's loss of appetite for the build-out option is caused by the excellent pricing which INRD has extended to it in its bid. IP&L

presumably feels that the INRD bid is so low that there is no point in actually performing a build-out and incurring the necessary capital costs, since the advantages, if any, that would be gained from the pricing of an alternative bid for single-line service from ISRR would be not worth it. Instead, IP&L is attempting to get that ISRR single-line service from the Board without making any investment at all, except for lawyers' fees. IP&L seeks to invade INRD's property to obtain a competitive constraint which is greater than what existed in 1996. That would go well beyond the purposes of the merger conditions, and in the long run, like all schemes for forced access to rail lines unrelated to the effects of mergers, would be harmful to the health of the railroad industry and contrary to the philosophy of the Staggers Act.

* * * * *

It is impossible to say that giving ISRR direct access to Stout, and thereby turning Stout from the physically solely-served point that it was prior to the Conrail Transaction into one having direct physical access by three railroads (INRD, NS and ISRR) is necessary to replicate the competitive presences and constraints that existed in 1996 before the Conrail Transaction. The state of play in the current negotiations between INRD and IP&L belies that. ****. The proposal to make an intrusive award of trackage rights to ISRR for participating in the ISRR/NS bid rejected by IP&L is on its face contradictory – if not laughable. What we have here in IP&L's comments is a potentially self-destructive sort of opportunism, to create a set of competitive options that go even further than the Board already has gone in making Stout's situation better than it was in 1996.

In the long run, that sort of proposal, and any support from the Board by yielding to such opportunistic claims, will prevent the railroads from having the capital necessary to provide innovative service options like those INRD has proposed here, with the "Express Service" proposal which solves some of the basic delivery problems at Stout and reduces the number of train sets (to be furnished by the shipper) that must be employed. The playing field has been tilted far enough toward IP&L, and it would be fundamentally wrong to go any further.

VII. CONCLUSION

The comments received by the Board on CSX's General Oversight report filed June 1, 2001, confirm the conclusions of that report. With respect to those commenters who have requested action by the Board, none of the requested relief is necessary or appropriate. The conditions imposed by the Board in approving the Conrail Transaction with respect to CSX's operation of the lines and properties of Conrail allocated to it, and other matters concerning CSX, are working appropriately to fulfill their purposes and no further conditions are warranted.

Respectfully submitted.

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Dated: August 6, 2001

CERTIFICATE OF SERVICE

The undersigned counsel for CSX Corporation and CSX Transportation, Inc., hereby certifies that on this 6th day of August, 2001, a copy of the foregoing "Reply Comments of Applicants CSX Corporation and CSX Transportation, Inc., To Comments Made on Their Second Annual Submission (Volume I – Public Volume)" was served on all parties of record by first-class mail, postage prepaid, or more expedited method.

I further certify that a copy of "Volume II – Highly Confidential Supplement" was that day served by hand on Michael F. McBride, Esq., counsel for Indianapolis Power & Light Company, and will be furnished on request to outside counsel for other parties of record who certify that they have executed the Highly Confidential Undertaking under the Protective Order applicable to this matter.

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STB FD-33388 (SUB 91) 8-6-01 D 203065

203065

U.S. Department of Transportation
Office of the Secretary of Transportation

GENERAL COUNSEL

400 Seventh St., S.W.
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August 6, 2001

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 twenty-five copies of the Reply Comments of the United States Department of Transportation in the above-referenced proceeding. There is also a computer diskette of this document, convertible into Word Perfect. I have included as well an additional copy of the Department's comments that I request be date-stamped and returned with the messenger.

Respectfully submitted,

Paul Samuel Smith

Paul Samuel Smith
Senior Trial Attorney

Enclosures

cc: Parties of Record

203065

DOT-4

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 some preliminary observations as well as its views on the subject of safety. DOT-3 (filed July 16, 2001). Our initial comments also indicated that, consistent with past practice, we would review the submissions of other parties before presenting more substantive comments for the record. Id. We have now completed this process and our reply comments follow. [1]

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[1]/ DOT has not been able to obtain the initial submissions of all of the parties reported to have made comments. We therefore offer no views as to issues not specifically addressed herein.

<u>The Record</u>

There have been relatively few comments submitted in this oversight period. No party has continued to complain about one of the major subjects of last year's oversight: merger-related service disruptions. It therefore appears that the Applicants may have managed to overcome their initial difficulties and that at this point they are providing rail service at levels that are at least acceptable to most of their shippers. No party of which DOT is aware has contended that the transaction has resulted in reduced competition or that there are environmental or community impacts that have not been addressed. It is noteworthy that the alteration of the rail system in the East brought about by the underlying transaction has not produced evidence of at least some discontent with regard to these matters. This apparent absence is a hopeful sign. Because this transaction wrought such fundamental changes, however, the Board should clearly indicate its intention to continue to monitor developments and to invite submissions from affected parties.

The issue that has attracted the most attention concerns statements NS made with respect to Conrail facilities it acquired in Holidaysburg, Pennsylvania. [2] DOT offers no comment on that particular subject, but we do generally address below the import of written representations made on the record by merger applicants and other parties.

The only other comments of which the Department is aware were filed by Indianapolis Power and Light Company ("IPL") and the New York City Economic Development Corporation ("NYCEDC"). With respect to the former, the Board found that the underlying transaction threatened IPL with a loss of competition and imposed a two-fold remedy: preservation of a build-out option and access by NS over the lines of a subsidiary of CSX. Decision No. 89 at 117. IPL has now averred that the latter remedy is not effective. Comments of IPL, *passim*. The Department supported only preservation of the build-out option for IPL. Brief of DOT (filed February 23, 1998) at 32. Consequently, we offer no comment on the efficacy of the other condition at issue.

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[2]/ *See, e.g.*, Comments of the Association of American Railroads, National Industrial Transportation League, AES Eastern Energy Services, and The Fertilizer Institute.

With respect to NYCEDC, that party reports that CSX and NS have provided helpful information during the past twelve months, that CSX has made certain misstatements concerning revitalization of rail service in and around New York City, and that it continues to work with CSX and the Canadian Pacific railroad to make progress on this subject. Comments of NYCEDC at 2-4. The Department is gratified that there is apparent progress on this exceedingly difficult problem. We commend the parties for their good faith efforts and encourage them to continue to explore potential solutions.

Commitments and Representations

A controversy has arisen in this proceeding that concerns the commitments or representations railroad merger applicants make. DOT takes no position either on the statements made by CSX or NS that are the focus of this controversy or on whether they actually rise to the level of commitments. [3] The Department is concerned, however, both that such disputes are taking place and that they may continue or their number grow in future cases. This outcome could only produce uncertainty and discourage participants in rail consolidation cases from attempting to resolve their differences privately. DOT generally shares the STB's viewpoint that negotiations between individual parties is the best approach for parties to follow in resolving their differences. [4] Accordingly, we wish to offer some basic views on the nature and import of written representations made by railroad merger applicants and other parties that are intended to become part of the record. [5]

3/ By far the largest amount of attention has focused on written and verbal statements made by NS with respect to the Holidaysburg (Pennsylvania) Car Shops in order to gain support for the acquisition and division of Conrail. Indeed, this subject has spawned its own decisions and procedures. Decision Nos. 186 and 188 (served May 21 and June 8, respectively). More recently the State of Maryland has identified a different set of commitments allegedly undertaken by CSX in order to secure support for the same transaction. MD-3. In each of these cases concerns have been expressed as to whether the respective railroads are living up to the commitments they may have made during the regulatory process.

4/ *But cf.* DOT-3 filed July 25, 2001, in Finance Docket No. 34000 regarding the settlement reached between the Applicants in that case and Great Lakes Transportation, LLC.

5/ Verbal statements, unless contemporaneously recorded in some formal way (such as by stenographer), are generally less certain and more susceptible of misunderstanding, and their reliability and significance in the record is much diminished. Transcripts of depositions, just like verified statements, may prove helpful in interpreting the existence and extent of written representations.

There are at least two types of commitments that generally arise in the context of rail merger proceedings. The first are those contained in the application documents themselves or in pleadings submitted by merger applicants throughout the regulatory process. The second are those included in a formal settlement agreement advanced by the merger applicants and one or more other parties and then filed with the STB with a request that they become a condition of approval. [6] Our comments address only these types of representations.

Written representations of both types are intended by the applicant carriers to be relied upon by the STB and interested parties. They *must* be, for the regulatory process requires as much for the creation of a meaningful record. This is clearly the case for affirmative statements contained in applications themselves (*see* 49 C.F.R. §§ 1180.6, 1180.8), and it can be no less true for commitments made by merger applicants in subsequent pleadings. The same applies to commitments contained in settlement agreements submitted for the Board's consideration and approval. [7] The reliance necessarily induced by these statements as a general matter requires that they should be met.

There is an additional reason to treat commitments contained in settlement agreements in this way: They comprise a bargain struck by the signatory parties. In order to reach settlement, the parties have presumably negotiated a mutually agreeable way to proceed, and the result may or may not include conditions or qualifications to the promises they have exchanged. These undertakings, of whatever nature (*e.g.,* whether to invest certain sums, limit the number of rail operations, withdraw prior statements from

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6/ An example of the former type is the representation made by the Canadian National Railway ("CN") when, in seeking to merge with the Illinois Central Railroad Co. ("IC"), it promised to maintain the Chicago gateway to address concerns of North Dakota agricultural shippers. See Finance Docket No. 33556, Decision No. 37 (served May 21, 1999) (slip opinion) at 37. An example of the latter type is the settlement agreement entered into between Union Pacific and Burlington Northern Santa Fe in Finance Docket No. 32760; *See* Decision No. 44 (served August 12, 1996) (slip opinion) at 145. The Department does not herein address any other type of alleged representations, written or otherwise.

7/ *I.e.,* they immediately become part of the record and thus their reliability is paramount. Moreover, those that are adopted as a condition of approval are endowed with additional legal significance, including protection from otherwise applicable laws. 49 U.S.C. §§ 11321.

the record, etc.), are contractual in character. This suggests an additional basis beyond reliance by third parties and regulatory integrity to hold the parties to the terms of the statements to which they have agreed: By exchanging promises to which they attach value, the signatories to these compacts have an expectational interest that the promises will be kept. This takes place in the context of a regulatory proceeding, which introduces additional considerations, but to the extent the public interest does not require modification of the terms of the arrangement, and the Board adopts a settlement as a condition of approval, there should be a strong presumption that the parties will be held to their agreement.

It is possible, of course, that in a given case the written commitments of these types may themselves be imprecise, or expressed in terms of using "best efforts" to accomplish an agreed result. But the greater the specificity of the terms and the fewer the express qualifications, the more clear is the promise and the duty to deliver. Parties that do not (or in the process of negotiating, cannot) condition the express undertakings in their settlements should be expected to follow through on the terms actually agreed upon. Having had the opportunity to negotiate for themselves whatever flexibility they could during the process leading up to the settlement, they should not afterwards look to the Board to relieve them from the performance of that which they agreed to perform. [8] Requiring parties to fulfill their commitments is hardly, as some have contended, micromanagement by the STB. It is precisely the opposite: it leaves the parties in the positions in which they placed themselves.

Finally, the Department does not mean that these kinds of statements are immutable. We recognize that circumstances do sometimes change so that parties that have made commitments approved by the Board as conditions may want to modify those commitments. However, it is our view that such terms may only be altered in the same way as other conditions. Because the representations at issue have been deemed in the public interest and they have been relied upon by the STB and others, they may not be

---

[8]/ The parties to settlements whose terms the Board modifies in the public interest, of course, must adhere to the STB's changes rather than to their original agreement. *See, e.g.*, the settlement agreement initially submitted by the Applicants and the Burlington Northern Santa Fe Railway Co. in Finance Docket No. 32760.

changed simply on the decision of a merger applicant or even on the agreement of the signatory parties. Other interested parties may offer their own comments and the Board must determine whether to change what is, after all, a condition of approval.

Conclusion

The still-evolving effects of this transaction call for continued oversight. Thus the Board should be prepared to address long-term impacts that may not yet have emerged from this far-reaching transaction. Nonetheless, at this point CSX and NS seem to have recovered from their original missteps and there is no record of adverse competitive or other effects. The Department believes that as a general matter railroad merger applicants and parties to settlement agreements submitted for the Board's approval must abide by the terms of their commitments contained in such documents. DOT looks forward to continuing to participate in this oversight process.

Respectfully submitted,

Rosalind A Knapp

ROSALIND A. KNAPP
Acting General Counsel

August 3, 2001

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 upon all Parties of Record by first class mail, postage prepaid.

Paul Samuel Smith

August 6, 2001

STB FD-33388 (SUB 91) 7-30-01 D 203032

203032

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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:

The undersigned filed Comments for Indianapolis Power & Light Company ("IPL") in the above-referenced proceedings on July 16, 2001. In those Comments (at 2), it was noted that IPL's Petition for Review of the Board's Decision No. 3 issued in the above-referenced proceeding was pending in the D.C. Circuit. This is to advise the Board and the parties of two subsequent developments.

The D.C. Circuit has now issued an order and judgment in Case No. 01-1005, concluding that the Board's Decision No. 3 was not arbitrary, capricious, an abuse of discretion, or otherwise contrary to law (copy enclosed). Earlier, as the Board knows, the Second Circuit concluded that IPL's interests would be best addressed in the above-referenced "oversight" proceeding.

In IPL's view, the matters that the Board concluded were "speculation" in Decision No. 125, served May 20, 1999 in Finance Docket No. 33388, or as to which the Board concluded in Decision No. 3 that IPL should continue to pursue with Norfolk Southern, are not "speculative" and have been pursued to the maximum extent that IPL is capable of doing, as explained in IPL's Comments filed July 16, 2001. In particular, IPL has provided all necessary volume and frequency information to NS, and has received clearly uncompetitive rates in response. When IPL so informed NS, and gave it a further opportunity to provide "best and final" rates (the commercial means by which such matters are concluded, one way or the other), NS did not respond, even though IPL told NS it required a response by June 21, 2001. Accordingly, there is nothing more that IPL can do to secure "efficient and competitive" service, as the Board held IPL was entitled from NS (Decision No. 96 at 14), without the Board's assistance.

Given that the Board assured IPL and the D.C. Circuit that IPL could continue to seek relief from the Board in the "oversight" process (Decision No. 125 at 5; May 21, 2001 Response in D.C. Cir. No. 01-1005 at 9-10 (IPL's Petition is "premature," and "IPL retains administrative remedies to address any inadequacies n those conditions as they arise")), and given that the Second Circuit so concluded as well, IPL believes that the D.C. Circuit's decision leads to only one conclusion: that IPL is entitled to a decision on the merits of its evidence, as presented in its July 16, 2001 Comments, in this proceeding.

The other development is that, on July 27, 2001, in Case No. 00-1209, et al. CF Industries, Inc. v. STB, the D.C. Circuit affirmed another decision of the Board. In that opinion, the Court (in Section II) made clear that rates 5-10 percent above a prior, competitive level, and certainly 18 percent higher, demonstrate the absence of effective competition. That decision is certainly applicable to IPL's facts as presented in its July 16, 2001 Comments.

Respectfully submitted,

Michael F. McBride

Michael F. McBride
Bruce W. Neely

Attorneys for Indianapolis Power & Light Company

cc(w/encl.): Richard A. Allen, Esq.
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Dennis G. Lyons, Esq.
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Paul Samuel Smith, Esq.

No. 01-1005 **September Term, 2000**

Filed On:

UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT
FILED JUL 26 2001
CLERK

Indianapolis Power & Light Company,
Petitioner

v.

Surface Transportation Board and United States of America,
Respondents

CSX Transportation, Inc., et al.,
Intervenors

BEFORE: Ginsburg, Chief Judge; Henderson and Rogers, Circuit Judges

ORDER

Upon consideration of the motions for summary affirmance, the response thereto, and the reply; the motion to strike the motions for summary affirmance, the oppositions thereto, and the reply; and the motion to establish the initial briefing schedule and oral argument date (styled as a motion to "Further Govern Proceedings"), and the responses thereto, it is

ORDERED that the motion to strike be denied. The motions for summary affirmance were timely filed in accordance with this court's April 12, 2001 order directing the parties to file motions to govern further proceedings within 30 days of the United States Court of Appeals for the Second Circuit's disposition of Erie-Niagara Rail Steering Committee v. STB, No. 98-4285. It is

FURTHER ORDERED that the motions for summary affirmance be granted. The merits of the parties' positions are so clear as to warrant summary action. See Cascade Broadcasting Group, Ltd. v. FCC, 822 F.2d 1172, 1174 (D.C. Cir. 1987) (per curiam); Walker v. Washington, 627 F.2d 541, 545 (D.C. Cir.) (per curiam), cert. denied, 449 U.S. 994 (1980). Petitioner has not demonstrated that the decision of the Surface Transportation Board from which review is sought is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. See GTE Service Corp. v. FCC, 205 F.3d 416, 421 (D.C. Cir. 2000); Pappas v. FCC, 807 F.2d 1019, 1023 (D.C. Cir. 1986). It is

FURTHER ORDERED that the motion to establish the initial briefing schedule and oral argument date be dismissed as moot.

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of a timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

DHG
KLH
JWR

STB FD-33388 (SUB 91) 7-16-01 D 202892

202892

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Hon. Vernon A. Williams
Surface Transportation Board
Office of the Secretary
Case Control Unit
Attn: STB Finance Docket No. 33388 (Sub-No. 91)
1925 K Street, N.W.
Washington, D.C. 20423-0001

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

Dear Sir:

I am enclosing for filing the original and twenty-five (25) copies of the Comments of the New York City Economic Development Corporation in this proceeding. I am also enclosing a 3.5 inch diskette with this document.

In addition, I am enclosing one additional copy of this document which I ask that you date stamp and return to our messenger.

Sincerely,

Charles A. Spitulnik

Charles A. Spitulnik

cc: Julia Farr, Esquire
All parties of record in F. D. No. 33388 (Sub-No. 91)

NYC – 3

Before the
SURFACE TRANSPORTATION BOARD
Washington, D.C.

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 THE NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION

The New York City Economic Development Corporation ("NYCEDC") hereby submits its Comments[1] on Second Submission by Applicants CSX Corporation and CSX Transportation, Inc. (collectively, "CSX") (CSX-4) and the Second General Oversight Report of Norfolk Southern Corporation and Norfolk Southern Railway Company (collectively, "NS") (NS-5) on June 1, 2001[2].

INTRODUCTION

NYCEDC, together with New York State, has emphasized continuously in this proceeding, the importance of ensuring a competitive balance for rail transportation services in New York City and the surrounding region. Their Responsive Application[3] sought to bring the

[1] NYCEDC has labeled this document "NYC-3". Previous documents submitted by NYCEDC in this Oversight Docket have not been assigned document numbers. However, based on NYCEDC having made two previous filings in this proceeding, a Motion for Extension of Time on July 13, 2000, and Comments on July 19, 2000, this document is assigned "NYC-3").
[2] CSX and NS are collectively referred to in these Comments as "Applicants".
[3] F. D. No. 33388 (Sub-No. 69), *Responsive Application - - State of New York, By and Through Its Department of Transportation and the New York City Economic Development Corporation*

benefits of two railroad service to shippers on the east side of the Hudson River similar to the benefit that shippers on the New Jersey side of the River were slated to enjoy by virtue of creation of the Shared Assets operation.[4] Access for New York City shippers to direct rail service by more than one railroad remains a basic tenet of NYCEDC's approach to transportation issues. As carriers continue assessing merger strategies and potential partners in light of the new rules recently published in Ex Parte 582 (Sub-No.1), *Major Rail Consolidation Procedures* (Service Date June 11, 2001), NYCEDC remains focused on the importance of direct rail competition on both sides of the Hudson River to the City's economic future.

In these Comments, NYCEDC reports on the carriers' response to the one of the issues raised during the Oversight proceeding last year, and addresses issues that have arisen since its last submissions in this proceeding.

COMMENTS

(1) RESPONSE TO ISSUES RAISED IN THE OVERSIGHT COMMENTS LAST YEAR.

In last year's Comments NYCEDC raised an issue with respect to the Applicants' reporting about intermodal traffic to and from the New Jersey yards across the George Washington Bridge. Specifically, NYCEDC stated that Applicants reports about intermodal traffic to and from the northern New Jersey Shared Assets area were seriously inadequate and did not provide the level of useful information to the City that is required to address the air quality and highway and bridge congestion issues that were raised during the review of the transaction. Since that time, NS and CSX have begun providing more extensive and regular information to NYCEDC. However, the studies could provide even better information to

[4] *See* Joint Responsive Application of the State of New York and NYCEDC (NYS-11/NYC-10), filed in the F. D. No. 33388 on October 21, 1997, at 7-9, 10-11 and attached testimony.

interested parties if they were modified slightly. To the best of NYCEDC's knowledge, the truck surveys are taken on Wednesday each week. However, NYCEDC understands that a larger volume of intermodal trains are unloaded on Sunday and Thursday each week, meaning that the survey does not capture an accurate picture of the traffic volumes. Changing the day of the week on which the surveys are taken could provide information that is more useful to the survey's audience.

(2) THE CARRIERS' JUNE 1 SUBMISSIONS DO NOT PAINT A COMPLETELY ACCURATE PICTURE.

a. CSX Chose Not To Follow the Process for Obtaining Rights to Operate at the 65th Street Yard, and Should Not Lay That Decision at NYCEDC's Feet.

CSX creates the impression in its Second Submission that NYCEDC made an affirmative decision to award a contract to operate the transload facility at 65th Street Yard in Brooklyn to CP rather than to CSX. *See* CSX-4 at 69. This is not true.[5]

As a public agency, NYCEDC must award contracts on the basis of a competitive procurement unless there is an overriding need and justification for a sole-source. When CSX asked NYCEDC personnel to award a sole-source contract for this facility, there was no justification for such an award and NYCEDC personnel declined. As a result, when CSX in its turn declined to participate in the bidding for the right to operate this facility, NYCEDC had no choice but to award it to one of the several other entities that did participate. CP won this contract based on criteria spelled out in the procurement documents. Again, the record must be clear that CSX made the choice not to seek the right to operate there, and that no action of NYCEDC or any other agency of the City prevented the carrier from securing that contract.

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[5] In fact, a subsequent statement in CSX's Submission confirms that this impression is not accurate. When discussing this facility later in the Submission, CSX relates its conclusion that "the economics did not support an investment on CSXT's part for such an undertaking at this time." CSX-4 at 76.

b. <u>The NYCEDC Major Investment Study Of A Cross Harbor Tunnel Does Not Focus Solely On Rail Use Of That Tunnel.</u>

NYCEDC acknowledges and appreciates CSX's active and continuing participation in this study of a possible tunnel under New York Harbor. However, the discussion of this study and its future funding includes one factual misstateme .. CSX states that "the cost of the tunnel itself (estimated at $1 billion for a single-track tunnel) would be borne by the freight railroads." CSX-4 at 75. Neither NYCEDC nor any other agency has yet made a final determination as to the source of funding for that project. In fact, all possibilities remain under consideration. The City and its potential partners in this project are looking at public and private sourc :s of funding, and at contributions from other potential users such as electric transmission lines or telecommunication facilities. Other creative funding ideas have emerged, such as imposition of a surcharge on trucks crossing the George Washington Bridge. The only definite statement that can be made at this time about this tunnel is what has <u>not</u> been decided, that is, it has <u>not</u> been decided that the freight railroads alone will bear the costs of the tunnel.

CONCLUSION

Overall, NYCEDC is gratified by the efforts that CSX and CP have made to enhance service offerings to shippers in the City. Certainly, NYCEDC believes that more could be done by both carriers to fulfill the promise of the operating arrangements approved on Decision No. 89 and subsequently for the New York City metropolitan region. Good faith attempts to address the City's concerns continue, however, and NYCEDC looks forward to working with both carriers to bring further service enhancements that will attract more traffic to rail and away from the trucks that clog the City's streets and bridges. Improving service offerings and quality can only enhance the attractiveness of New York City to commercial enterprises tha. benefit from the availability of multiple competitive, direct rail service offerings.

Dated: July 16, 2001

Respectfully submitted,

Charles A. Spitulnik
McLeod, Watkinson & Miller
One Massachusetts Avenue, N.W.
Suite 800
Washington, D.C. 20006
(202) 842-2345

Counsel for the New York City
Economic Development Corporation

VERIFICATION

I , Alice Cheng, Vice President, verify under penalty of perjury that the facts recited in the foregoing COMMENTS OF THE NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION are true and correct.

Alice Cheng

SUBSCRIBED AND SWORN TO
BEFORE ME THIS 13th DAY OF
JULY , 2001.

Judith A. Capolongo
~~Notary Public~~ Commissioner of Deeds

My Commission Expires: 10/23/2001

JUDITH A. CAPOLONGO
Commissioner of Deeds, City of New York
No. 5-1425
Cert. Filed in New York County
Commission Expires October 23, 2001

CERTIFICATE OF SERVICE

I hereby certify that I have this day caused to be served a copy of the foregoing Comments of the New York City Economic Development Corporation to be served by hand delivery upon: Dennis G. Lyons, Esquire, Arnold & Porter, 555 12th Street, N.W., Washington, D.C. 20004-1202, and Richard A. Allen, Esquire, Zuckert, Scoutt & Rasenberger, LLP, 888 17th Street, N.W., Washington, D.C. 20006-3939, and by first class mail upon all other parties of record on the service list in Finance Docket No. 33388.

Dated this 16th day of July, 2001.

Charles A. Spitulnik

STB FD-33388 (SUB 91) 7-16-01 D 202893

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Mr. Vernon A. Williams, Secretary
Surface Transportation Board
1925 K Street, N.W., 7th Floor
Washington, DC 20423

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

D

Dear Secretary Williams:

Enclosed for filing in the above-referenced proceeding are an original and 25 copies of both the Highly Confidential and Public versions of the "Comments of Indianapolis Power & Light Company" ("IPL"). A diskette containing its contents in WordPerfect format is also enclosed. Please date stamp and return the three additional copies via our courier.

Respectfully submitted,

Michael F. McBride

Michael F. McBride

Attorney for Indianapolis Power & Light Company

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

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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 INDIANAPOLIS POWER & LIGHT COMPANY

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Attorneys for Indianapolis Power & Light Company

Due Date: July 16, 2001
Dated: July 16, 2001

COMMENTS OF INDIANAPOLIS POWER & LIGHT COMPANY

Introduction

Indianapolis Power & Light Company ("IPL") hereby submits its Comments on the June 1, 2001 Reports of CSX Corporation and CSX Transportation, Inc. (collectively, "CSX") and Norfolk Southern Corporation and Norfolk Southern Railway Company ("NS").

As the Board knows, IPL's concerns with the Conrail acquisition by CSX and NS, and its division between them, have been the subject of extensive prior pleadings and decisions by the Board. See, e.g., Decision Nos. 89 (at 116-17, 177), 96 (at 14-15, 35), 115 and 125 in Finance Docket No. 33388; see also Decision Nos. 2 and 3 in this proceeding.[1] Suffice it to say, as the Reports of CSX and NS show, IPL was provided with two remedies at its Stout Plant in Indianapolis. One remedy was direct access by NS to the Stout Plant over the lines of CSX subsidiary The Indiana Rail Road ("INRD"). The other was that IPL had the right to "build out" to the former Conrail Belt line, over which it would be entitled to direct access from either NS or Indiana Southern Railroad Company ("ISRD").

Argument

New Evidence and Changed Circumstances. Not wishing to burden the Board or the record with repetitious arguments, we will be brief. There is, however, new evidence that now proves, beyond a shadow of a doubt, that NS is incapable of providing the "efficient and competitive" service to IPL that the Board quite rightly held to be required. Decision No. 96 at 14 (emphasis added). Although the Board concluded in Decision No. 125, served May 20, 1999, that IPL's request for additional relief at that time was premature, because there had been no

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[1] We refer to some of these Decisions herein by Decision number, without repeating the Docket Number in which the Decision was issued.

experience with NS service since the Conrail "split" had not occurred as of that time, it did invite IPL to seek further relief in the "oversight" proceedings if need be, and the Second Circuit denied IPL's petition for review of Decision No. 125 on that basis, not on the merits. Erie-Niagara Rail Steering Committee, et al. v. STB, 247 F.3d 437 (2nd Cir. 2001). Accordingly, it is clear that IPL has a right to additional relief in this proceeding if the evidence justifies that result.

Prior Litigation. As the Board knows, IPL participated actively in the first "oversight" proceeding under this docket number, conducted in 2000-01. In fact, the Board issued Decision Nos. 2 and 3 in that "oversight" proceeding devoted solely to matters involving IPL. In Decision No. 3, the Board denied further relief to IPL, again at that time, concluding that IPL had not effectively invoked either of the remedies the Board provided in Decision Nos. 89 and 96. Decision No. 3 is under review in the United States Court of Appeals for the District of Columbia Circuit, No. 01-1005.

NS Response to IPL's Request. With respect to the direct-access condition, the Board concluded that IPL should provide NS with information about the amount of coal that NS could carry and the frequency that NS would carry whatever amount it carried. IPL did so. Decision No. 3 at 7. NS has now responded (Exhibit No. 1), quoting rates

IPL's Response. IPL responded to Exhibit No. 1 by sending NS a further letter (Exhibit No. 2)

IPL also informed NS that, if it did not receive a response to Exhibit No. 2, IPL would assume that NS could not compete for IPL's business at the Stout Plant and would be forced to take other steps to protect its interests. NS replied

NS responded with rates

<u>IPL Should Now Receive Direct Service from Indiana Southern</u>. IPL is entitled to relief because its direct-access remedy for Indiana Southern-origin coal in interchange with NS has not and cannot produce a competitive rate. IPL has done all that it could by requesting rates in joint service with Indiana Southern from NS, by specifying volumes and frequencies, and

The only solution is to allow Indiana Southern to serve the Stout Plant directly, because it clearly could offer competitive service

Build-Out Remedy. IPL should not, indeed must not, be required to invoke its other remedy, the "build out," to get "efficient and competitive" service. The Board did not so provide in Decision No. 89; the two remedies were not provided in the alternative. If the Board intended to require that in Decision No. 3 in this proceeding, it was clearly wrong, for that is, effectively, a way to negate the direct-access remedy, instead of making it "efficient and competitive."[3] Yet, IPL was held by the Board to be entitled to an "efficient and competitive" direct-access remedy, in Decision Nos. 89 and 96.

It has always been clear that direct access was the far more competitive remedy than a "build-in" or "build-out," although the "build-out" remedy was also always available to IPL. The proof is historical, as well as logical; IPL relied on Indiana Southern/Conrail service as its alternative to INRD service until, and even after, it entered into its contract with INRD in 1996, not the threat of a "build-out." That was the evidence before the Board that led it to award the direct-access remedy, because the "favorable switching charge" Conrail had for that service allowed it to compete, as the Board found. Decision No. 89 at 116-17; Decision No. 96 at 14

Logically, of course, direct access would be far superior to a build-out or build-in, because IPL showed the build-out would cost about $8 million, and CSX claimed it would cost as much as

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[3] The contention that IPL is required to invoke its "build out" remedy before seeking relief under its "direct access" remedy, if adhered to by the Board, would lead to the illogical conclusion that IPL was in a worse position after receiving two remedies than if the Board had only awarded it the direct-access remedy, for under the latter scenario it would be unarguable that IPL would be entitled to relief if the direct-access remedy were not "efficient and competitive." To put IPL in a worse position because it was entitled to two remedies to replace the competition it lost cannot be defended.

$25 million, <u>if it could be built</u>. Moreover, the Board cannot assume that it would approve the build-out, because as the Board knows, approval is subject to environmental review. The "build-out" in question would be a difficult one, given the buildings along the likely route, the need to cross Eagle Creek with a bridge, and given that there is a busy intersection at Kentucky Avenue that would need to be crossed (with the need to receive approval to install different traffic control there). But the point is, to say to IPL, as the Board seems to have said in Decision No. 3, words to the effect that "if you can't use the direct access remedy, go use the 'build-out' remedy before coming to this Board for relief," is simply illogical. IPL was entitled to <u>both</u> remedies, and the Board's approach effectively limited it to the "build-out" remedy. If that were to be IPL's only remedy, the Board would not have awarded it the direct-access remedy as well.

<u>Conclusion</u>

IPL hereby seeks direct access to its Stout Plant for Indiana Southern Railroad, and should not have to first construct its "build-out" remedy to get direct access, because IPL was entitled to an "efficient and competitive" direct-access remedy

Respectfully submitted,

Michael F. McBride

Michael F. McBride
Bruce W. Neely
LeBoeuf, Lamb, Greene & MacRae, L.L.P.
1875 Connecticut Avenue, N.W., Suite 1200
Washington, D.C. 20009-5728
(202) 986-8000 (Telephone)
(202) 986-8102 (Facsimile)

Attorneys for Indianapolis Power & Light Company

Due Date: July 16, 2001
Dated: July 16, 2001

MATERIAL
REDACTED

MATERIAL
REDACTED

CSX

TRANSPORTATION

TARIFF CSXT COBU-4

(FORMERLY FREIGHT PUBLICATION CR 4611)

CONTAINING

LOCAL AND JOINT RATES APPLYING

ON

BITUMINOUS COAL (STCC 11 212)

FROM INDIANA POINTS

TO INDIANAPOLIS, IN

Always show the Tariff Number as the authority for all shipments made using the prices contained herein.

ISSUED AUGUST 10, 1999	EFFECTIVE AS OF JUNE 1, 1999

CSX TRANSPORTATION

Coal Marketing

500 Water Street

JACKSONVILLE, FL 32202

CSX TRANSPORTATION
TARIFF CSXT-COBU-4
(formerly CR 4611)

RATES ARE APPLICABLE ONLY VIA ROUTES SHOWN BELOW
RATES IN DOLLARS PER NET TON EXCEPT AS NOTED

ITEM 100

ORIGIN	DESTINATION	RATES (See Notes 1,2,3 and 4) Column 1	Column 2	ROUTE
INDIANA	**INDIANA**			
Hawthorne Mine	Indianapolis	4.07	3.63	CSXT
Lynnville Mine	Indianapolis	5.74	4.84	CSXT
Miller Creek Mine	Indianapolis	3.63	3.17	CSXT
Triad Mine	Indianapolis	(a)349.00	(a)316.00	CSXT
Kindill #1 or #2	Indianapolis	5.74	4.84	AWW-Oakland City Jct, IN-CSXT

Column 1 - Applies in Railroad Owned Cars.
Column 2 - Applies in Private Cars.

Note 1 - Destination of Indianapolis can represent either of IP&L's Perry K Plant or E.W. Stout Plant. CSXT will absorb $42.00/car switching at E.W. Stout (INRD). Additional switching charges are unabsorbed by CSXT.
Note 2 - Minimum train size is 50 cars on all shipments.
Note 3 - IP&L owned Private equipment shall be provided free to carriers.
Note 4 - Shipments shall be made in Open Top Hopper Cars only

(a) Rates in dollars per car

Note: 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, subject to RCAF(U) adjustments." Accordingly, the rates herein will be adjusted quarterly by the amount of the percent change, quarter to quarter in the forecasted RCAF-U determined by the Surface Transportation Board. However, the rates will never be adjusted below the rates in this tariff COBU-4 effective June 1, 1999.

From: "Dean W Alger" <dalger@ipalco.com>
To: <mfmcbrid@llgm.com>
Date: Tue, Jun 26, 2001 3:50 PM
Subject: RE: Norfolk Southern Rate Proposal for Indianapolis Power &Light 's Stout Plant

FYI
---------------------- Forwarded by Dean W Alger/IPALCO on 06/26/2001 02:47 PM

"Evans, Doug" <drevans2@nscorp.com> on 06/25/2001 10:27:06 AM

To: Dennis C Dininger/IPALCO@IPALCO

cc: Dean W Alger/IPALCO@IPALCO, "Listwak, Ron" <ralistwa@nscorp.com>, "Edwards, John, V" <John.Edwards@nscorp.com>

Subject: RE: Norfolk Southern Rate Proposal for Indianapolis Power & Light 's Stout Plant

Dennis,

Thanks. I did receive the tariff and appreciate the help. As information,
I have been working with the Indiana Southern and am hopeful about giving
you a revised proposal shortly.

Enjoy your vacation.

Doug Evans

-----Original Message-----
From: Dennis C Dininger [mailto:ddininger@ipalco.com]
Sent: Friday, June 22, 2001 10:11 PM
To: drevans2@nscorp.com

Cc: dalger@ipalco.com
Subject: RE: Norfolk Southern Rate Proposal for Indianapolis
Power &
Light 's Stout Plant

Doug,
I faxed to you the CSX tariff, as you requested, before lunch
today. If you
did
not receive it, please reply as soon as possible. I will be on
vacation
next
week, but will be checking my voicemail and email periodically.
Please
contact
Dean Alger at 317-261-8102 if you need immediate attention.
Thanks for your interest in our business,
Dennis Dininger

CC: "Lundy Kiger" <lkiger@ipalco.com>, "Greg J Daeger"
<gdaeger@ipalco.com>, "Roy Holmes" <rholmes@ipalco.com>

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 16th day of July 2001, a copy of the foregoing "Comments 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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888 Seventeenth Street, N.W.
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Ball Janik, L.L.P.
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Dennis G. Lyons, Esq.
Arnold & Porter
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Washington, DC 20004-1202

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U.S. Department of Justice
Antitrust Division
325 7th Street, N.W., Suite 500
Washington, DC 20530

Paul Samuel Smith, Esq. (C-30)
U.S. Department of Transportation
400 7th Street, S.W.
Washington, DC 20590

Michael F. McBride

Michael F. McBride

STB FD-33388 (SUB 91) 7-16-01 D 202891

202891

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KATHRYN A. KLEIMAN
OF COUNSEL
(*Admitted in Virginia only)

ROBERT RANDALL GREEN
LAURA L. PHELPS
GOVERNMENT RELATIONS

STEPHEN FRERICHS
ECONOMIST

D

July 16, 2001

ENTERED
Office of the Secretary

JUL 17 2001

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Public Record

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JUL 16 2001
MAIL
MANAGEMENT
STB

Hon. Vernon A. Williams
Surface Transportation Board
Office of the Secretary
Case Control Unit
Attn: STB Finance Docket No. 33388 (Sub-No. 91)
1925 K Street, N.W.
Washington, D.C. 20423-0001

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

Dear Sir:

I am enclosing for filing the original and twenty-five (25) copies of the Comments of the State of Maryland in this proceeding. I am also enclosing a 3.5 inch diskette with this document.

In addition, I am enclosing one additional copy of this document which I ask that you date stamp and return to our messenger.

Sincerely,

Charles A. Spitulnik

cc: Julia Farr, Esquire
All parties of record in F. D. No. 33388 (Sub-No. 91)

MD-3

RECEIVED
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MAIL
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STB

Before the
SURFACE TRANSPORTATION BOARD
Washington, D.C.

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
THE STATE OF MARYLAND

The State of Maryland, by and through its Department of Transportation ("MDOT") hereby submits its Comments[1] on the Second Submission by Applicants CSX Corporation and CSX Transportation, Inc. (collectively, "CSX") (CSX-4) and the Second General Oversight Report of Norfolk Southern Corporation and Norfolk Southern Railway Company (collectively, "NS") (NS-5) on June 1, 2001[2].

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[1] MDOT has labeled this document "MD-3". Previous documents submitted by the State of Maryland in this Oversight Docket have not been assigned document numbers. However, based on the State having made two previous filings in this proceeding, the Letter/Comments of John D. Porcari, Secretary of Transportation of the State of Maryland on July 14, 2000, and a Certificate of Service of those Comments on July 26, 2000, this document is assigned "MD-3".
[2] CSX and NS are collectively referred to in these Comments as "Applicants".

The State supported the approval of the division of Conrail between NS and CSX based on representations and commitments that both Applicants made to the Governor in letter agreements dated September 24, 1997, signed by David Goode, Chairman, President and Chief Executive Officer of NS, and John W. Snow, Chairman and Chief Executive Officer of CSX, respectively[3]. Copies of those letter agreements were submitted to this Board with the Letter of Hon. John Porcari, filed in this proceeding on July 14, 2000, and were part of the record in the proceedings that led to the issuance of Decision No. 89 on July 23, 1998. As a result, the State will not reproduce them here. Nor will the State replicate the list of disappointments, submitted last year, that result from the Applicants' inability or unwillingness to honor the commitments they made to the State in order to win its support for their transaction.

In its approval of the division of Conrail between NS and CSX, this Board specifically required Applicants to "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." F.D. No. 33388, *CSX Corporation et al., - - Control And Operating Leases/Agreements - - Conrail, Inc, et al.,* Decision No. 89 (Service Date July 23, 1998) Ordering Paragraph 19 at 176.

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[3] In Decision No. 5, issued in this Oversight Proceeding on February 1, 2001, this Board reveals a misapprehension about the reasons that the State of Maryland elected to support this transaction. In the discussion of the State's submission last year, the Board stated that "MDOT is not correct in its assessment that the operating plans filed by CSX and NS were "commitments" to achieve proposed service and infrastructure improvements within 3 years after the implementation date that must be enforced without variation." *Decision No. 5* at 24. The State does not rely on the operating plans but on the letters signed by the chief executive officers of the two companies. The Letter Agreement with CSX, signed by Mr. Snow, specifically refers to "commitments" by CSX. The Letter Agreement with NS, while not including that same specific language, is quite clear that NS intends to take the actions outlined in that letter "as soon as is practicable within the three year planning horizon of the Operating Plan." The Board's view of statements like CSX's and NS's as anything less than the commitments the parties intended them to be will serve only to undercut the willingness of parties to future merger

. . .Footnote continued on next page

NS and CSX know what they have promised to do, and in some circumstances are talking with the State about implementation of those promises. When they are unable to deliver, they in some cases review with the State their rationale for their statement that business levels do not justify taking the promised actions. In this Oversight Proceeding, this Board should hold the Applicants accountable for the promises they made and require them to explain the progress they are making on the initiatives to which they agreed in the September 24, 1997 Letter Agreements with the State. If the Applicants are unable or unwilling to undertake those initiatives, they should explain why, just as NS has been required to do with respect to the Hollidaysburg, PA, shop.

One area in which clear progress has been made has been in the CSX-MARC working relationship. CSX has described in its Second Submission the status of that arrangement and the State does not disagree with any of the statements made there. Like any other relationship, railroad operations or otherwise, the quality of this one has fluctuated, with the negatives occurring sometimes due to poor dispatching decisions, sometime due to traffic congestion and for a variety of other reasons. It remains true, however, that on-time performance has improved. As CSX notes, the State has agreed to contribute a substantial amount of capital to two lines MARC and CSX share, and both parties hope that the resulting infrastructure enhancements will improve CSX's ability to comply with its commitments to MARC.

The State, in 1997, honored its promise to the Applicants by supporting their transaction. Now, the State is waiting and hoping that the Applicants will fully honor their commitments. The State hopes as well that this Board will hold the Applicants to their promises and

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proceedings to enter into agreements to resolve issues or concerns raised by proposed merger transactions.

representations, as Ordering Paragraph 19 indicated would occur, so that the State, its residents and its shippers, can receive the benefit of the bargain struck with CSX and NS in 1997.

Dated: July 16, 2001

Respectfully submitted,

Charles A. Spitulnik
McLeod, Watkinson & Miller
One Massachusetts Avenue, N.W.
Suite 800
Washington, D.C. 20006
(202) 842-2345

Counsel for the State of Maryland

CERTIFICATE OF SERVICE

I hereby certify that I have this day caused to be served a copy of the foregoing Comments of the State of Maryland (MD-3) to be served by hand delivery upon: Dennis G. Lyons, Esquire, Arnold & Porter, 555 12th Street, N.W., Washington, D.C. 20004-1202; and Richard A. Allen, Esquire, Zuckert, Scoutt & Rasenberger, LLP, 888 17th Street, N.W., Washington, D.C. 20006-3939, and by first class mail upon all other parties of record on the service list in Finance Docket No. 33388 (Sub-No. 91).

Dated this 16th day of July, 2001.

Charles A. Spitulnik

STB FD-33388 (SUB 91) 7-16-01 D 202890

202890

NRPC-3

BEFORE THE
SURFACE TRANSPORTATION BOARD

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

CSX CORPORATION AND CSX TRANSPORTATION, INC.
NORFOLK SOUTHERN CORPORATION AND
NORFOLK SOUTHERN RALWAY COMPANY –
CONTROL AND OPERATING AGREEMENTS –
CONRAIL, INC. AND CONSOLIDATED RAIL CORPORATION

D

(GENERAL OVERSIGHT)

AMTRAK'S COMMENTS

The National Railroad Passenger Corporation ("Amtrak") submits the following comments on the second general oversight reports of NS and CSX.

Amtrak On-Time Performance

Pursuant to monitoring conditions imposed by the Board in Decision No. 89, Amtrak, NS and CSX have been filing joint quarterly reports with the Board's Office of Compliance and Enforcement regarding the on-time performance of Amtrak's trains on NS and CSX lines since the implementation of the Conrail acquisition. Data are currently being compiled for the quarterly report covering the period through June 30, 2001, which will be filed with the Board later this month. In light of the regular filing of these reports, Amtrak sees no need to submit additional data or information regarding on-time performance in this proceeding.

As indicated in CSX's submission (CSX Report, pp. 44-45), while the on-time performance of Amtrak trains on ex-Conrail lines operated by CSX has generally been good during the past year, on-time performance on certain routes on CSX's pre-Conrail system has remained below (and in a few cases, significantly below) Conrail's performance during the year preceding the implementation of the Conrail acquisition. On NS, on-time performance on lines that NS acquired from Conrail has also been somewhat lower than pre-Conrail acquisition levels during the past year. Amtrak, NS and CSX have continued to work cooperatively to address the on-time performance problems that remain, and performance on both railroads has improved.[1]

Infrastructure Improvements on NS to Accommodate Increased Traffic

NS's status report on capital improvements required to accommodate projected merger-related increases in traffic (NS Report, pp. 7-12) makes no mention of the restoration of the Shellpot Connection in Wilmington, Delaware. The Shellpot Connection is an NS-owned, freight-only, bypass route around Wilmington that allows freight trains travelling over the Amtrak-owned Northeast Corridor to avoid operating through the middle of Amtrak's Wilmington train station. More than 100 Amtrak trains and commuter trains (operated by SEPTA for the Delaware Department of Transportation) serve Wilmington each weekday. Most of the SEPTA trains originate or terminate at the Wilmington station, and lay over between runs on the same track that is

[1] While the Sunset Limited, which operates over CSX between Orlando and New Orleans, is among the trains that have experienced improved on-time performance, the improvement in this train's performance has not, unfortunately, been as significant as the figures cited in CSX's filing would suggest. As indicated in Amtrak's May 25, 2001 quarterly report to the Board, the improved performance of the Sunset Limited during the first quarter of this year that CSX notes was achieved on a schedule that is more than two hours slower than the schedule that was in effect during most of 2000, the period to which CSX compares the train's more recent performance.

used for virtually all freight train movements through the station. The portion of the Northeast Corridor through the city of Wilmington is constructed on an aging elevated structure that would require significant investment to accommodate increased freight traffic.

After Conrail discontinued through freight train service on the Northeast Corridor in the late 1980s, it severed the Shellpot Connection to avoid having to make repairs to the Shellpot Bridge. Thereafter, Conrail utilized Amtrak's Northeast Corridor for the limited local freight train service that it continued to operate through Wilmington.

Primarily as a result of NS's plans to reinstitute through freight service over the Northeast Corridor, the merger application projected that the number of freight trains operating through Wilmington would increase from 2.3 to 10.5 trains per day.[2] In order to accommodate these additional freight trains while "avoid[ing] additional freight movements on the Northeast Corridor at Wilmington, DE", NS represented in its operating plan that it would repair the Shellpot Bridge and restore the Shellpot Connection.[3]

The additional freight traffic that NS projected over the Northeast Corridor has yet to materialize. Thus, there has been no need to date for NS to fulfill its commitment to restore the Shellpot Connection. However, restoration of that connection will, of course, be necessary if NS's plans to increase freight traffic through Wilmington ultimately come to fruition. While the restoration of the Shellpot Connection would not benefit Amtrak, freight shippers in Delaware would benefit from the improved access to the port of

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[2] Final Environmental Impact Statement, Vol. 6D, Attachment T-1, p. 24.
[3] NS/CSX Application, Vol. 3-B, NS/CSX-20, Exhibit 13-NS, p. 210.

Wilmington and other Wilmington-area facilities that would result from this project. Amtrak understands that NS is seeking public funding to cover costs associated with the restoration of the Shellpot Connection, and hopes that NS's efforts will be successful.

Richard G. Slattery
NATIONAL RAILROAD PASSENGER CORPORATION
60 Massachusetts Ave., N.E.
Washington, D.C. 20002
(202) 906-3987

Attorney for National Railroad Passenger Corporation (Amtrak)

Dated: July 16, 2001

CERTIFICATE OF SERVICE

I hereby certify that, on this 16th day of July, 2001, I caused to be served Amtrak's Comments by first class mail, postage prepaid, upon all parties of record in this proceeding.

Richard G. Slattery

STB FD-33388 (SUB 91) 7-16-01 D 202889

202889

ORIGINAL

U.S. Department of Transportation
Office of the Secretary of Transportation

GENERAL COUNSEL

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

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Office of the Secretary

JUL 17 2001

Part of
Public Record

July 16, 2001

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

D

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

Dear Secretary Williams:

Enclosed herewith are the original and twenty-five copies of the Initial Comments of the United States Department of Transportation in the above-referenced proceeding. There is also a computer diskette of this document, convertible into Word Perfect. I have included as well an additional copy of the Department's comments that I request be date-stamped and returned with the messenger.

Respectfully submitted,

Paul Samuel Smith

Paul Samuel Smith
Senior Trial Attorney

Enclosures

cc: Parties of Record

202889

ORIGINAL

DOT-3

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/	)	Fin. Dkt. No. 33388 (Sub- No. 91)
Agreements -- Conrail, Inc. and Consolidated	)	
Rail Corp. (GENERAL OVERSIGHT)	)	

Initial Comments of the
United States Department of Transportation

Introduction

This proceeding implements the oversight condition imposed by the Surface Transportation Board ("STB" or "Board") in Finance Docket No. 33388, concerning the acquisition and division of Consolidated Rail Corporation ("Conrail") by CSX Transportation, Inc. ("CSX") and the Norfolk Southern Railway Company ("NS") (collectively, "Applicants"). General Oversight Decision No. 1, served February 9, 2000. The purpose of this and similar proceedings is to determine whether the Applicants are complying with the conditions originally imposed and whether those conditions are serving to address the harms otherwise resulting from the transaction at issue. Id., slip opinion at 2. At the end of the first year of oversight, the Board concluded that CSX and NS had "substantially resolved" post-implementation service problems, and that the original conditions were "working as intended." General Oversight Decision No. 5, served February 2, 2001. The STB also found that there was no evidence that the Applicants were exercising increased market power, and that the Applicants were working to implement various environmental conditions. Id. The United States Department of Transportation ("DOT" or "Department") continues to be very interested in the ongoing results of this unique transaction, as well as in the efficacy of the STB's conditions.

To evaluate a rail consolidation, the Department in virtually every case since the passage of the Staggers Act has assessed the information, evidence, and arguments presented by other private and public parties before expressing its own position on the merits. We have followed this approach in post-merger oversight proceedings as well, because at the initial comment stage the record consists only of reports submitted by the merging carriers (here, CSX-4 and NS-5), and does not yet reflect the input of shippers, communities, or other parties directly affected by these carriers' post-acquisition operations. *See* DOT-1, filed herein on July 14, 2000. Accordingly, DOT intends to file more substantive views on August 6 in its reply comments, once we have reviewed the initial submissions of others.

With one exception, therefore, the Department offers only preliminary observations at this time, and we do so below. That exception is safety, which is susceptible of different treatment since DOT, through the Federal Railroad Administration ("FRA"), is already aware first-hand of the Applicants' safety activities over the past twelve months.

Safety

Experience gained from the safety problems that occurred in the aftermath of the UP/SP merger and the complicated nature of the underlying transaction in this case gave rise to the first Safety Integration Plan ("SIP") to be employed in a rail consolidation proceeding. Fin. Dkt. No. 33388, Decision No. 52, served November 3, 1997. In the present proceeding FRA worked closely with CSX and NS and their employees to produce a detailed, step-by-step process designed to ensure that the carriers would maintain the highest levels of safety while carrying out the acquisition and division of Conrail. Since then FRA has carefully monitored that process, and modified it as necessary. *See* Decision No. 89, served July 23, 1998, at 419. The Applicants both report that they have maintained or improved upon their safety records, and that they have virtually completed their obligations set forth in the SIP. *See* CSX-4 at 31-36; NS-5 at 16-17.

FRA has reported periodically to the Board on the implementation of the SIP. Its first report, covering the period from the date the transaction was approved (July 23, 1998) through April of 1999, was submitted on May 4, 1999. [1] FRA's second report, dated June 23, 2000, covered the period from May through December of 1999. [2] The third FRA report encompassed the time from January through May of 2000; it was submitted on August 30, 2000. [3] FRA is now in the final stages of preparing its fourth report, which will address the period from June of 2000 through March of 2001.

During all this time FRA met with the Applicants (and the operator of their Shared Asset Areas, CRCX) on a quarterly basis to evaluate the ongoing implementation of the SIP and to make adjustments as necessary. The devotion of resources by all parties and the continued cooperation among all concerned attest to the rigor of this process and to a shared commitment to safety. The result is that systemic safety shortfalls identified during the integration process over this time (*e.g.*, information technology deficiencies, hazardous materials documentation defects, and operating procedures problems) have received additional attention and have been satisfactorily resolved.

Consequently, FRA's fourth report will be its final one in this case. That report will confirm that the operations of the Applicants have stabilized from a safety perspective, and that they have successfully completed the safe integration of Conrail. FRA will continue to scrutinize the safety of operations on CSX and NS, both separately and in the Shared Asset Areas, according to the normal Safety Assurance and Compliance Program applicable to the industry at large. [4] FRA will also work carefully with the railroads and their employees to address any problems that develop. We will

---

[1]/ Conrail Merger Surveillance: NS, CSX and CSAO SIP/Safety Update, FRA, May 4, 1999.

[2]/ Conrail Merger Surveillance: NS, CSXT and CRCX Second Safety Integration Plan/Safety Update, FRA, June 23, 2000.

[3]/ Conrail Merger Surveillance: NS, CSXT and CRCX Third Safety Integration Plan/Safety Update, FRA, August 30, 2000.

[4]/ This program is a collaborative effort in which FRA and a railroad both work to identify and resolve the root causes of safety problems across the carrier's entire network.

keep the Board informed as appropriate.

Preliminary Observations

Both CSX and NS have reported favorable results in the second year following the "Split Date" on which they began operating their respective portions of Conrail (June 1, 1999). They have addressed general subjects, including marketing efforts, relations with shippers and passenger railroads, and labor negotiations. CSX and NS have also discussed in detail the specific conditions tailored to the situations that each of them face with individual shippers, communities, and others. CSX-4 and NS-5, *passim*.

Both report that the transaction has allowed them to reap new business, that their capital projects have proceeded apace, that they work cooperatively with Amtrak and commuter rail authorities, and that their service has improved steadily. *See* NS-5 at 3-13, 15-16; CSX-4 at 4-14, 18, 42-50. The Applicants continue to support the Board's finding that the price paid for Conrail has neither had an adverse effect on rates nor resulted in different regulatory treatment to the detriment of shippers. Id. at 20 and 19-22, respectively. Similarly, NS and CSX assert that they are in complete or virtually complete compliance with every condition entered by the STB. Id. at 26-41 and 60-91, respectively. They also agree that the projected benefits of the transaction have begun to appear, although "much remains to be done." NS-5 at 3, 6; CSX-4 at 10. Finally, they each conclude that the Board's conditions have worked well, and that there is no basis to adjust these conditions or to craft new ones. NS-5 at 3, 42; CSX-4 at 92.

The Department trusts that this is the case. We will await further development of the record through the submissions of other interested parties before hazarding an assessment of the results of the acquisition and division of Conrail at this stage. Those submissions may reflect a different view of events in the roughly two years that have transpired since the Split Date. But even if other commenters support the Applicants' reports, the significant service deterioration that took place in the first year following the Split Date precluded any experience with "normal" operations until just this past twelve months. *See* DOT-1 at 5. DOT therefore believes that at this point it is possible to offer only preliminary judgments about the effects of this, the most complicated railroad transaction since the Staggers Act. It is simply not feasible to reach any long-term conclusions about the full implications of this massive reorientation of the rail systems in the East after so short a time. Any assessment of its full implications must await the gathering of more experience.

Conclusion

The Department commends the Board for its active exercise of oversight authority. The Conrail division and acquisition transformed the railroad structure of the eastern United States. The full consequences of that transaction are likely still developing and we cannot now judge its lasting impacts. Accordingly, it is only appropriate at this stage to reach preliminary judgments about whether the conditions imposed have appropriately addressed its impacts. The Department intends to remain an active participant in this proceeding in order to monitor the still-emerging results of this transaction.

Respectfully submitted,

Rosalind A Knapp

Rosalind A. Knapp
ACTING GENERAL COUNSEL

July 16, 2001

CERTIFICATE OF SERVICE

I hereby certify that I have on this day caused to be served on all Parties of Record by first-class mail, postage prepaid, a copy of the foregoing Initial Comments of the United States Department of Transportation filed in Finance Docket No. 33388 (Sub-No. 91).

Paul Samuel Smith

Paul Samuel Smith

July 16, 2001

STB FD-33388 (SUB 91) 7-16-01 D 202888

202888

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ATTORNEYS AT LAW

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Cleveland
•
Columbus
•
Cincinnati

July 13, 2001

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STB

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Office of the Secretary

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Part of
Public Record

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

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

Gentlemen:

Enclosed for filing please find an original and 25 copies of Comments Submitted by The City of Cleveland, Ohio regarding Second Submission by Applicants CSX Corporation and CSX Transportation, Inc. in the captioned matter. I am also enclosing one additional copy, and I ask that you time stamp that copy and return same to me in the enclosed, self-addressed, postage paid envelope.

Thank you for your attention to this matter.

Sincerely,

Craig S. Miller

208/mss/1087076.1
20369-033
Enclosures
cc: Cornel P. Carter, Law Director
Richard F. Horvath, Esq.
Mr. Christopher P. Warren

202888

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 SUBMITTED BY
THE CITY OF CLEVELAND, OHIO

RE:
SECOND SUBMISSION BY APPLICANTS CSX CORPORATION AND CSX TRANSPORTATION, INC.

Craig S. Miller
ULMER & BERNE LLP
Bond Court Building
1300 East Ninth Street, Suite 900
Cleveland, Ohio 44114-1583
(216) 621-8400

and

Cornell P. Carter
Director of Law
Richard F. Horvath, Esq.
Chief Corporate Counsel
Room 106 – City Hall
601 Lakeside Avenue
Cleveland, Ohio 44104
(216) 664-2800

Counsel for the City of Cleveland, Ohio

Dated: July __, 2001

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 SUBMITTED BY
THE CITY OF CLEVELAND, OHIO

RE:
SECOND SUBMISSION BY APPLICANTS CSX CORPORATION AND CSX TRANSPORTATION, INC.

The City of Cleveland, Ohio ("Cleveland"), respectfully submits the following comments in response to the Second Submission by Applicants CSX Corporation and CSX Transportation, Inc. (collectively "CSX") provided pursuant to the Board's Decision No. 5 served February 2, 2001 in the above-captioned matter.

Cleveland's comments are directed in particular toward CSX's statements under the heading "Environmental Condition 51 [Negotiated Agreements]" at page 90 of the Second Submission:

> CSX is in compliance with the terms of its Negotiated Agreements.
>
> In our First Submission, we noted that CSXT had not yet provided the City of Cleveland with the study provided for in paragraph11 of the June 4, 1998 Agreement relating to the feasibility of operating two additional trains over the

Lakeshore Line, CSXT provided that study to Cleveland on March 5, 2001. A number of matters addressed in the June 4, 1998 Agreement involve ongoing consultation between CSXT and Cleveland, such as the construction of noise walls, expenditure of funds for fencing and landscaping, and marketing of surplus properties. During the course of these consultations, some disagreements have arisen between the parties. CSXT and Cleveland are continuing to work together in good faith to resolve these issues as they arise.

For the record, it has been — and remains — Cleveland's position that CSXT is not in compliance with the terms of the June 4, 1998 Settlement Agreement (the "Negotiated Agreement") between CSX and Cleveland in a number of respects. Cleveland and CSX have been involved in various negotiations from December 2000 to the present in an effort to resolve the issues related to CSX's failure to comply with terms of the Negotiated Agreement. Those discussions are ongoing at this time but have not, as of this date, fully resolved the issues.

The issue of noncompliance with the Negotiated Agreement is also relevant to footnote 57 at page 33 of the Order of the Board issued in February 2001, wherein the Board stated as follows:

> CSX has suggested that we might "wish to consider whether a longer interval between cycles than one year is appropriate." CSX-2 at 90. At the present time, we think it best that this general oversight proceeding be conducted on an annual basis.

Cleveland urges the Board to maintain this position and retain the current one-year cycle for oversight, given the need for ongoing enforcement of the Negotiated Agreement.

Respectfully submitted,

Craig S. Miller
ULMER & BERNE LLP
Bond Court Building
1300 East Ninth Street, Suite 900
Cleveland, Ohio 44114-1583
(216) 621-8400

and

Cornell P. Carter
Director of Law
Richard F. Horvath, Esq.
Chief Corporate Counsel
Room 106 – City Hall
601 Lakeside Avenue
Cleveland, Ohio 44104
(216) 664-2800

Counsel for the City of Cleveland, Ohio

VERIFICATION

STATE OF OHIO)
) SS:
CITY OF CLEVELAND)

I, COLLETTE APPOLITO-JACKSON, being duly sworn, depose and say that I am qualified and authorized to file this Verification, and that I have read the foregoing submittal by the City of Cleveland, know the factual contents thereof, and that the factual statements contained therein are true as stated to the best of my knowledge, information and belief.

Collette Appolito Jackson
COLLETTE APPOLITO-JACKSON

Subscribed and sworn to before me
this 13 day of July, 2001.

Notary Public

My Commission expires:
Alicia Torres
Commission Expires
June 6, 2005

CERTIFICATE OF SERVICE

I hereby certify that on July 13, 2001, a copy of the foregoing Comments Submitted by the City of Cleveland, Ohio was served by first class mail, postage prepaid, upon the counsel for Applicant CSX.

Craig S. Miller
ULMER & BERNE LLP
Bond Court Building
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(216) 621-8400

and

Cornell P. Carter
Director of Law
Richard F. Horvath, Esq.
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Counsel for the City of Cleveland, Ohio

1086818.1
20369-0033

STB FD-33388 (SUB 91) 7-13-01 D 202873

202873

(RWCS-2)

UNITED STATES OF AMERICA

BEFORE THE
SURFACE TRANSPORTATION BOARD

RECEIVED
JUL 13 2001
MAIL MANAGEMENT
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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)

**COMMENTS
OF
RESOURCES WAREHOUSING & CONSOLIDATION SERVICES INC.
IN
RESPONSE TO SECOND SUBMISSION BY APPLICANTS
CSX COPORATION AND CSX TRANSPORTATION, INC.**

Paul H. Lamboley
1717 N Streeet, N.W.
Washington, D.C. 20036
(T) 202.955.6450
(F) 202.955.9444

Counsel for Resources Warehousing
& Consolidation Services, Inc.

A. INTEREST.

Resources Warehousing & Consolidation Services Inc. (RWCS) has offices, warehouses and terminal facilities located at 2200 Secaucus Road, North Bergen, NJ.

RWCS provides warehousing, consolidation, and intermodal services for international trade customers from warehouse and terminal facilities privately owned and operated by RWCS.

Located on the southern terminus of a north-south rail line owned and served by the New York Susquehanna & Western (NYSW), a carrier jointly owned by applicants CSX and NS, the RWCS facility lies between the North Bergen and Croxton Terminals within the North Jersey Shared Asset Area (SAA).

RWCS participated as a party of record (POR) in the initial application proceedings, generally supporting the proposed merger, but expressing concern that it might be denied equal access to intermodal service from both NS and CSX following the merger. RWCS also participated in the first General Oversight proceedings, Sub-No. 91.

B. BACKGROUND

1. Decision No. 89 - Control Approval (July 23, 1998)

Relying upon Applicants' representations that post-merger RWCS would in fact enjoy equal access to intermodal service from both NS and CSX at its facility in the SAA, the Board in Decision No. 89 held: "We will require applicants to hold to the representations they have made to RWCS". Decision No. 89, p. 123.

This is consistent with the Board's earlier statement: "We think it appropriate to note and to emphasize, that CSX and NS will be required to adhere to all of the representations made on the record during the course of this proceeding, whether or not such representations are specifically referenced in this decision." Decision No. 89, p.17, n. 26.

Finally, in the Ordering Paragraphs, the Board expressly provided that:

> "16. Applicants must comply with all of the conditions imposed in this decision, whether or not such conditions are specifically referenced in these ordering paragraphs, and
>
> 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."

Decision No. 89, p.176

The "representations" regarding RWCS were relied upon and are "conditions" obligating the applicants. The "representation conditions" in Decision No. 89 are deemed binding and enforceable. See e.g. Decision No.186, served May 21, 2001.

2. Decision No. 5 - General Oversight (Sub-No.91) (February 21, 2001)

Complaining in its first post-merger General Oversight comments that CSX was not providing service to its North Bergen terminal facility as promised, RWCS was denied relief based on the Board's conclusions that, although "CSX does stand ready to serve RWCS' North Bergen facilities; the problem here is not with CSX but with RWCS' shippers which (at least to date) have preferred to tender their traffic to NS", and "unless RWCS' shippers switch their traffic" routing, "CSX will not be able to participate, even though CSX service is available." Decision No. 5, p.18.

C. CURRENT PROBLEM

In its Second (annual) Submission in General Oversight, CSX does not mention RWCS.

However, just as before, RWCS again complains that it does not have access to competitive intermodal service from CSX because CSX refuses to quote rates for such service despite the present ability and feasibility of doing so. Consequently, RWCS is prevented from marketing intermodal service from its North Bergen terminal via CSX.

In response to CSX's first oversight submissions, RWCS initiated requests that CSX meet to establish mutually satisfactory intermodal service arrangements for service from the RWCS facility.

Since the first general oversight, RWCS has been constructively engaged in efforts to obtain rail service opportunities and commitments form CSX in order to market RWCS' present intermodal facility as well as its planned expansion. RWCS has been frustrated in this effort by CSX's refusal to quote rates, other than for the single "shipper specific" circumstance last year. With correspondence unavailing, RWCS intiated contact with the STB's Office of Compliance and Enforcement.

Copies of relevant correspondence are attached hereto chronologically as Exhibit A and made apart hereof.

Apparently relying on General Oversight Decision No. 5, CSX seems to believe its willingness to quote a "shipper specific" rate at one time, but not to quote service rates for RWCS at any other time, satisfies its continuing obligation to make competitive intermodal service available to RWCS' facility. The fatal flaw in the CSX logic is that the absence of rate quotes effectively precludes RWCS from commercially marketing CSX service for its terminal, thereby denying the availability of service via CSX. By refusing to quote rates, CSX creates a self-fulfilling prophesy that "RWCS shippers do not route traffic via CSX". Without CSX rate quotes, RWCS' customers have no basis to route via CSX, or to even chose between CSX and NS.

RWCS contends that Decision No. 5 neither contemplates nor authorizes CSX's refusal to provide rate quotes to RWCS for competitive service to its facility. If it does, RWCS respectfully submits Decision No. 5 would be error in direct conflict with the access representations and conditions imposed in Decision No. 89. The fact that CSX, on one occasion, offered a "shipper specific" rate quote for traffic ultimately lost to NS, does not justify CSX's subsequent refusal to provide rate quotes for service to RWCS' facility and customers. Rather, the opposite is true, rate quotes must continue. Critically, the availablilty of rates is the availability of service. No rates means no service.

In truth, last year's experience as well as this year's, evidence that CSX is simply not willing to engage in competitive rate and service activity in the SAA as it relates to RWCS and NS. It is also evident that in refusing to quote rates for service to RWCS, CSX prefers its own terminal facilities from which to provide service to RWCS' customers. It is precisely the concern for this discriminatory bias that the applicants' representations target and the "representation conditions" seek to mitigate.

CSX's refusal to provide rate quotes to RWCS is strikingly similar to the problems experienced by small to medium size intermodal marketing companies (IMCs) under qualifying criteria of volume, credit and other requirements imposed by CSX and other Class I carriers that effectively curtail their marketing of intermodal service to shippers. In this case, it is not the IMC criteria, rather its is CSX's refusal to quote rates to RWCS that restricts marketing intermdal service via CSX. All of this occurring when "intermdal" is posited as one of the keystones in the post-merger business development plans of the applicants.

Intermodal service is not restricted to carrier/shipper arrangements. While carriers may prefer such two-party arrangements, intemodal service has traditionally included "wholesale" arrangements with third parties such as IMCs or terminal operators such as RWCS, who in turn "retail" the service to shippers for carriers.

Finally, although long deregulated by exemption, intermodal service remains a matter for the Board's attention in the context of post-merger oversight proceedings. It is especially true where, as here, RWCS is a private terminal operator competing with the carriers' own terminals in the SAA. Access to competitive service as promised remains a problem in this case for RWCS.

D. REQUEST FOR RELIEF

In this second annual post-merger General Oversight, RWCS requests that upon reevaluation of RWCS' circumstances, the Board require CSX to adhere to its prior representation and take the necessary steps to quote rates for intermodal service to the RWCS facility, thereby providing the opportunity for competitive rail service for customers in RWCS' present and future facilities.

In sum, RWCS requests that the Board enforce the "representation conditions" imposed in Decison No, 89 so that CSX's promise of equal access to both NS and CSX intermodal service is implemented for RWCS' facilites in the North Jersey Shared Assets Area.

Granting relief to RWCS is consistent with the remedial purposes of the "representation conditions" to provide access to competitve intermodal rail service for RWCS imposed in this case under applicable merger guidelines, as well as with the Board's public policy, interest and benefit considerations recently adopted for future mergers in Ex Parte No.582, Major Rail Consolidation Procedures. See Decision served June 11, 2001, revisions to section 1180.1, subparagraphs variously discussed at pp 14-44.

Dated: 07.12.01

Paul H. Lamboley

Counsel for Resources Warehousing
& Consolidation Services, Inc.

COPIES

OF

RELEVANT CORRESPONDENCE

EXHIBIT A

PAUL H. LAMBOLEY
1350 EYE STREET, N.W.
SUITE 200
WASHINGTON, D.C. 20005-3324

TEL 202.312.8000
FAX 202.312.8100

DIRECT 202.312.8220

August 25, 2000

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

Re: STB F.D. 33388 (Sub-No. 91) CSX/NS Conrail Acquisition (General Oversight)
Comments of Resources Warehousing & Consolidation Services, Inc. (RWCS-1)

Dear Dennis:

After review of the CSX Reply (CSX-2) to the comments of Resources Warehousing & Consolidation Services, Inc. (RWCS-1), Resources desires to avail itself of the apparent offer to provide rail service between its North Bergen terminal and Chicago via NYS&W/CSXT.

To that end, Resources requests that CSXT quote specific rates and routes for rail service to move intermodal traffic between Resources Terminal and Chicago utilizing existing rail lines directly serving its North Bergen facility, rather than utilizing motor carrier drayage to/from CSXI terminals pre/post rail transport.

It is my information that CSX responsiveness to prior requests for such services has not been very forthcoming. Not only does the requested service remove trucks from congested New Jersey roads, it is precisely what the Applicants' represented to the Board and the Board accepted in response to Resources' post-acquisition concerns; i.e., that Resources would have access to direct rail service at its facility from both CSX and NS, and that neither would discriminate in favor of their owned facilities. See Decision No. 89, pp. 123, 297.

Absent having CSXT rate/route Quotations, Resources is obviously unable to fully market its services or those of CSXT. It places an unnecessary constraint on Resources' market activity.

Please forward this request to the appropriate CSXT people. As this is a business matter, CSXT may chose to respond directly to Frank Folise at Resources, who will be pleased to receive and discuss any CSXT proposal(s). Thank you.

Very truly yours,

Paul H. Lamboley

cc: Frank V. Folise

PAUL H. LAMBOLEY
1350 EYE STREET, N.W.
SUITE 200
WASHINGTON, D.C. 20005-3324

TEL 202.312.8000
FAX 202.312.8100

DIRECT 202.312.8220

September 18, 2000

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

Re: STB F.D. No. 33388 (Sub-No. 91) CSX/NS Conrail Acquisition (General Oversight)
Resources Warehousing & Consolidation Services, Inc. (RWCS)

Dear Dennis:

In response to CSX comments and in an effort to facilitate resolution of difficulties Resources Warehousing & Consolidation Services (Resources) is experiencing in obtaining intermodal rail service directly from its North Bergen terminal to Chicago by CSX, on August 25, I wrote to request that CSX provide Resources with quotes for specific rates and routes.

To date I have received no reply. Resources' Frank Folise reports that no direct contact has been attempted by CSX which had been suggested.

After review of my August letter, a copy of which is attached for easy reference, and CSX' position on this matter, I would appreciate your views on future service expectations.

If there are any questions, please do not hesitate to contact me. Thank you.

Very truly yours,

Paul H. Lamboley

enc.

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DENNIS G. LYONS
(202) 942-5858

September 22, 2000

Paul H. Lamboley, Esq.
1350 Eye Street, NW, Suite 200
Washington, DC 20005-3324

Re: STB F.D, No. 33388 (Sub-No. 91)
<u>CSX/NS Conrail Acquisition (General Oversight)</u>
Resources Warehousing & Consolidation Services, Inc. (RWCS)

Dear Paul:

Thank you for your letter of September 18, 2000, subject as above, and the attachment, a copy of your earlier letter on the same subject, dated August 25, 2000.

I promptly forwarded your earlier letter to CSX's operating headquarters in Jacksonville with the suggestion that they look into the matter and be in direct contact with your client. As you said in your earlier letter, "this is a business matter," and accordingly, I believe it is best handled through business channels, which indeed your letter of August 25 suggested.

Your last letter invites me to express my "views on future service expectations" of your client. My understanding is, as was set forth in CSX's filing of August 3, 2000, in the above sub-docket (CSX-2 at 9-10), that CSX does not have direct access to your client's facility, it being a local station on the New York, Susquehanna and Western. Apart from that and the other statements appearing at those pages, I have to say that I am not an operating officer of CSX, but only its outside legal counsel as to such matters as they may entrust to me. I will leave the matter of service and service expectations to the business people of the client.

With kind regards.

Sincerely yours,

Dennis G. Lyons

rjm

CSX INTERMODAL

BELLSOUTH TOWER
301 WEST BAY STREET
JACKSONVILLE, FLORIDA 32202-4404

October 16, 2000

Mr. Frank Folise
Resources Warehousing & Consolidation Services, Inc.
2200 Secaucus Road
North Bergen, NJ 07047

Dear Mr. Folise:

I have received a copy of Paul Lamboley's letter to Dennis Lyons requesting rates for intermodal rail service between the Resource's North Bergen terminal and Chicago routed via the NYS&W / CSXT.

In order to appropriately consider this request, we will need detailed information about the rail service being requested. The following is needed to enable development of the appropriate operating plan and pricing for this business:

1. Westbound destination in Chicago.
2. Eastbound origin in Chicago.
3. Expected annual volume westbound and eastbound.
4. Shipping frequency – days of week.
5. Commodities and shipment weight.
6. Shipment type – domestic or international.
7. Expected seasonality.
8. Type and size of trailers or containers used.
9. Name of entity supplying rail trailers/containers?
10. Name and address of shipper and receiver.
11. Name and address of the company who will be responsible for freight charges.

In addition to the above, you should also provide any other information or operational requirements which you believe will assist in developing the required service.

Once we have the information requested, we will work with the NYS&W to develop the appropriate operating plan and interline pricing. In the meantime, if you would like to ship via CSXI direct by tendering intermodal containers/trailers to us at our Kearny Facility, we would welcome the buisness. I am enclosing our rules directory (Directory 1) as well as brochures describing CSXI's service offerings. Please give me a call if I can answer any questions about the enclosed materials.

Sincerely,

Al Peck

Alan Peck

Vice President,
Pricing and Contracts
c: Walter Rich, NYS&W

NY TEL: 212-594-7448
NJ TEL: 201-348-6300

FAX: 201-348-6262
TELEX: 64-5857

RESOURCES
WAREHOUSING & CONSOLIDATION SERVICES, INC.

WAREHOUSE & OFFICES:
2200 SECAUCUS ROAD
NO. BERGEN, NEW JERSEY 07047

MAILING ADDRESS:
P.O. BOX 1067
SECAUCUS, NEW JERSEY 07096-1067

October 25, 2000

CSX Intermodal
Bellsouth Tower
301 West Bay Street
Jacksonville, FL 32202-4434

Attn: Mr. Alan Peck

Dear Mr. Peck:

Thank you for your letter of October 16th. I would like to bring to your attention, first, we are not a shipper, never have claimed to be a shipper, nor do we claim that we control any cargo. We are a terminal operator with the capability of handling double stacked trains, and we have been doing this for the past 13 years.

I bring to your attention that under your agreement between the Norfolk Southern and your good selves in the purchase of Conrail, it was clearly stated that if you received permission to buy Conrail, you would serve the Resources facility. Notwithstanding several attempts by ocean carriers, third parties, the N.Y.S.W. and myself, to develop rates and services, we have met with a complete blank wall.

I might also point out to you that your position to date has been we can bring our intermodal cargo to your South Kearny terminal. You are well aware that we are not a shipper, therefore, we have no cargo to bring to South Kearny.

In addition, I bring to your attention for people to be interested in Resources, it is not a case of the chicken or the egg. We must have a service and rates in order that we can offer this to potential customers. It is not practical for us to say we have no rates, no service, therefore, your interest in Resources can only be developed if you contact the CSX Railroad and then you refuse to provide them with any rates or services.

The question here is the CSX sincere that they are willing to serve the Resources intermodal facility? I am sure you know you are servicing in conjunction with the N.Y.S.W., the Resources terminal area for lumber. Therefore, I find it strange that you are willing to work with the N.Y.S.W. to Resources for lumber but will not discuss with us rates and services for intermodal cargo. Perhaps I am missing something?

If the CSX is sincere and willing to cooperate and offer rates and services for intermodal business, then it seems to me the questions outlined in your letter become superfluous and appears to me that you have put another obstacle in place. If you really do not want to serve the Resources facility for intermodal cargo, then you should have the decency to stand by your convictions and state same. On the other hand, if you are really interested in serving the Resources facility, it seems to me the best thing to do would be is to sit down with us and of course, the N.Y.S.W. Railroad in order that we can collectively together put a program in place thereby giving the ocean carriers and other interested parties an option of where they would like to have their cargo delivered to.

I am sure you realize there is limited capacity in the New Jersey area for the international container business. Resources has the luxury of a considerable amount of land at its disposition, and we would be pleased to work with the CSX and Norfolk Southern Railroad, I might add in defense of the Norfolk Southern Railroad, they have stood by their commitment to the S.T.B. to serve the Resources facility. I wish that your company would also be willing to stand by their commitment to the S.T.B. and the public at large.

I would appreciate if you would be so kind enough at your earliest convenience, to contact the writer and set up a meeting between the CSX, the N.Y.S.W., and Resources

I remain,

Very truly yours,

Frank V. Folise

Frank V. Folise

C: W. Rich (N.Y.S.W.)
P. Lamboley, Esq.

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RESOURCES
WAREHOUSING & CONSOLIDATION SERVICES, INC.

WAREHOUSE & OFFICES:
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MAILING ADDRESS:
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SECAUCUS, NEW JERSEY 07096-1067

February 13, 2001

Surface Transportation Board
1925 K Street, NW, Suite 780
Washington, DC 20423 0001

Attn: Melvin F. Clemens, Jr.
Director, Office of Compliance and Enforcement

Re: STB F.D. No. 33888 CSX/NS Conrail Acquisition

Dear Mr. Clemens:

I am writing to you in regards to a conversation with Paul Lamboley concerning rail service into Resources terminal. I would like to take this opportunity to inform you of Resources modus operandi. Resources has been operating as a rail terminal since 1988, and we are presently handling rail shipments for the account of Hanjin Container Line and Senator Steamship Line. These are international shipments coming to the West Coast of the United States and railed via Chicago to Resources by the Norfolk Southern Railroad.

Resources Warehouse, in this connection, is purely a terminal operator and provides services to whomever wishes to use our facility to provide the loading and unloading, and other terminal functions, such as, storing of full containers, empty containers, etc.

Resources, at no time, states that it has any cargo under their control. We are simply a terminal performing service on behalf of the customer.

When Norfolk Southern and CSX purchased Conrail, it was made very clear in the STB ruling that both Norfolk Southern and CSX Railroads would serve our terminal. This was not something new or vague; since both agreed to serve Resources.

I am attaching, for your ready reference, Mr. Lamboley's comments to the STB, filed July 14, 2000, outlining Resources position. I am also enclosing letters from Mr. Lamboley to Dennis Lyons of Norfolk Southern requesting that CSX provide rail services and rates to its terminal, and Mr. Dennis Lyons reply.

I am also enclosing a letter from Mr. Alan Peck, Vice President of CSX, to the undersigned dated October 16, 2000, acknowledging that he received Mr. Lamboley's letter, and asking me to give him specific answers to eleven questions. As you can see from this letter, it is clear that he is writing to Resources as a shipper. We have never contended to be a shipper, and at this writing, do not contend to be a shipper. We are a terminal operator.

I am enclosing a copy of my letter dated October 25, 2000, in response to Mr. Peck's letter of the 16th, which clearly outlines what Resources offers to its potential customers. I clearly state that I found it somewhat strange that in one regard that CSX claims they have no direct service to Resources, yet, they have daily service to Resources for automobiles and lumber. At the same time, CSX refuses to offer any rates or services requested by Resources. We have been informed by potential customers that they have requested rates and services from CSX to Resources terminal and they also have no response.

I also wish to bring to your attention that the N.Y.S.W. Railroad, on several occasions, has requested rates and services for intermodal cargo from the CSX Railroad to/from the Resources terminal and to date, they have had no reply.

As you are aware, both railroads stated to the STB in order to get approval of the Conrail break-up that they would serve Resources. It is obvious from the exchange of letters between Mr. Lamboley and CSX, the writer's letters to the CSX, and responses and lack of responses, that CSX has no intention of offering rates and services to the Resources terminal. I believe this is a violation of the agreement they gave for approval of the purchase of Conrail. We are asking simply that the Railroads give Resources rates and services as they do to their terminals in order that we can offer potential clients a competitive service to that they may receive at rail owned and operated facilities.

In addition, we believe by the use of a privately operated terminal, having land capacity, which is an extremely precious commodity in the North Bergen/New York area, that we would be offering both railroads a benefit if they would be willing to work with us.

Looking forward to hearing from you, and should you have any questions in this regard, please do not hesitate to contact me.

Regards,

Frank V. Folise

Frank V. Folise
President

FVF/aw

Enclosures

CERTIFICATE OF SERVICE

I certify that on the 12th day of July 2001, copies of the foregoing Comments of Resources Warehouse & Consolidation Services, Inc. (RWCS-2) in response to the Second Submission of the Applicants CSX Corporation and CSX Transportation, Inc. (CSX-4) were served upon counsel for the applicant parties in accordance with Decision No. 5 in this proceeding, via first class mail, postage prepaid.

STB FD-33388 (SUB 91) 8-28-00 D 199606

196606

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August 28, 2000

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Room 700
Washington, DC 20423-0001

ENTERED
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Re: Finance Docket No. 33388, CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company -- Control and Operating Leases/Agreements -- Conrail, Inc. and Consolidated Rail Corporation (Sub-No. ~~19~~) 91

Dear Secretary Williams:

Acting on behalf of all of the participating Ohio State agencies, The Ohio Rail Development Commission ("ORDC") has reviewed the August 11, 2000, submission by CSX Corporation and CSX Transportation, Inc. ("CSX") and Norfolk Southern Corporation and Norfolk Southern Railway Company ("NS"), assertedly in response to the Reply Statement of the U.S. Department of Transportation ("DOT") in the Conrail General Oversight proceeding ("Oversight Proceeding"). ORDC takes strong exception to assertions that there is no basis for the Board to consider any further environmental conditions or studies in the Oversight Proceeding and that there is no need to revise environmental guidelines in Ex Parte 582 (Sub-No.1).

As a direct result of the division of Conrail many Ohio communities are faced with substantial problems of blocked grade crossings delaying vehicle traffic and protracted separation of adversely affected residents, schools and businesses from fire, emergency and police services. Since the environmental conditions adopted by the Board quickly proved to be inadequate to meet these serious problems, Ohio found it necessary to establish and implement its Railroad Grade Separation Program which is intended to mitigate serious long term impacts of increased rail traffic now affecting Ohio communities.[1]

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[1] Crossings for separation projects under the program are expected to have more than 30 trains per day and more than 1,000 vehicles a day.

Frankly, Ohio is appalled by assertions in NS' Reply Statement that the Board should not concern itself with serious transaction relation problems that are by no means resolved. At this juncture, the fact that Ohio felt compelled to establish a $200 Million grade separation program as a direct result of the division of Conrail lines should demonstrate the urgent need for the Board to investigate the adequacy of environmental conditions adopted under existing criteria and to consider environmental issues in Ex Parte 582 (Sub-No. 1) as urged by DOT, Ohio and other participants in that proceeding.

Similarly NS urges the Board not to concern itself with the absence of competitive rail service at the Port of Toledo as a result of its disinterest in activating the trackage rights which would enable NS to serve that facility. Ohio disagrees. Unavailability of a competitive alternative for the Port is by no means a trivial matter. (See attached article entitled: "Access, an Ohio Imperative", by James E. Seney, Executive Director, Ohio Rail Development Commission)

Ohio invites representatives of the Board to participate in evaluating Transaction related projects for consideration under Ohio's Railroad Grade Separation Programs and to investigate the absence of competitive service alternatives at the Port of Toledo.

ORDC will very much appreciate the Board's consideration of these comments particularly in view of the extraordinary nature of the August 11 submission on behalf of CSX and NS.

Respectfully submitted,

Keith G. O'Brien
Counsel for:
Ohio Rail Development Commission
Attorney General for the State of Ohio
Public Utilities Commission of Ohio
Ohio Emergency Management Agency

cc: James E. Seney
Constance A. Sadler, Esq.
Dennis G. Lyons, Esq.
Richard A. Allen, Esq.

Access, an Ohio Imperative
by: James E. Seney

Access is as fundamental to America as ice cream and apple pie. Access is an important element of our democracy and capitalism, and access is essential for the practice of sound economic development.

Democracy cannot flourish without equal access to our justice, legislative, and public education processes. Governor Bob Taft recently demonstrated his concerns over this issue by encouraging state attorneys to provide pro bono legal assistance to disadvantaged Ohioans. Business and industry need access to capital and consumer markets and a strong, well-educated labor force. Government leaders tout access to the "information highway," and those of us in the economic development business know the value of access to our highway, rail, waterway and airport systems. Transportation IS economic development, and real estate without it is worthless.

Successful economic development is dependent upon efficient deployment of our transportation assets, not only within a given mode, but also across the various modes on a global basis. The better the interaction among the modes, the better the transportation system becomes.

Technology and transportation have brought about an ability for industry to decentralize, thus bringing to rural areas access to job and investment opportunities and forcing urban areas to become more competitive. Access to transportation systems is, now truly, a statewide economic development issue for Ohio. Access to globally linked supply chains by all modes is critical to our future in the world economy.

There is, of course, an inherent difficulty with the issue of access within the railroad community. Private property rights is one of them, and asset evaluation is another. That is, the financial community places significant value upon the amount of business a railroad "controls" that is not subject to "competition"; therefore, it becomes imperative for the economic development community to recognize these issues as we try to achieve an increase in multi-modal competitive access. We must communicate our statewide economic development goals very openly with the rail community and attempt to achieve a common framework within which we can both work and then use as many traditional solutions as possible for achieving success.

An example of a possible approach to the access issue is the potential for a short rail move (30 - 50 miles) out of the Ports of Cleveland and Toledo, where overseas shipments are moved on water. However, the landside move is by truck, not rail; it takes about 800 truck moves to unload a lake freighter. Introducing shortline rail into this move would make the port move more competitive and increase the capacity of the transportation system, and because we are dealing with overseas cargos, it doesn't open the ports to domestic or Canadian competition that could affect a railroad's evaluation. A similar scenario exists on the Ohio River system.

Access to global logistics systems is too great and necessary an issue in Ohio's future development to remain static. We must work closely with our rail partners as we continue transition from the "old economy" to the "new global economy," based on reasonable competitive multi-modal access to transportation systems. Positioning Ohio as a great global location for commerce depends on moving information, money, people, and cargo on a global basis at a competitive cost. By offering a multi-modal transportation marketplace, we gain an advantage over the rest of the world.

STB FD-33388 (SUB 91) 8-23-00 D 199576

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August 23, 2000

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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-3, the Reply of Applicants CSX Corporation and CSX Transportation, Inc., to Formal and Informal Motions of Reading Blue Mountain & Northern Railroad Company, Buffalo & Pittsburgh Railroad, Inc., Rochester & Southern, Inc., and Indianapolis Power & Light Company for Leave to File Rebuttal, for filing in the above-referenced docket. A certificate of service is included.

Please note that the enclosed 3.5-inch diskette contains a WordPerfect 5.1 formatted copy of this filing.

Kindly date-stamp the enclosed additional copy of this letter and the Reply 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 or Sharon L. Taylor at (202) 942-5175 if you have any questions.

Respectfully yours,

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

rjm
Enclosures
cc All Parties of Record
David M. Konschnik, Esq.
Julia M. Farr, Esq.

199576

CSX-3

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 OF APPLICANTS
CSX CORPORATION AND CSX TRANSPORTATION, INC.,
TO FORMAL AND INFORMAL MOTIONS OF
READING BLUE MOUNTAIN & NORTHERN RAILROAD COMPANY,
BUFFALO & PITTSBURGH RAILROAD, INC.,
ROCHESTER & SOUTHERN, INC., AND
INDIANAPOLIS POWER & LIGHT COMPANY
FOR LEAVE TO FILE REBUTTAL

Pursuant to 49 C.F.R. § 1104.13(a), Applicants CSX Corporation and CSX Transportation, Inc. (collectively "CSX") file this reply to the formal Motions for Leave to File Rebuttal of Reading Blue Mountain & Northern Railroad Company (RBMN-4), filed August 11, 2000, and of Buffalo & Pittsburgh Railroad, Inc., and Rochester & Southern, Inc. (BPRR-3/RSR-3), filed August 15, 2000 (collectively the "Shortline Movants") and to the informal Motion for Leave to File Rebuttal by Indianapolis Power & Light Company ("IPL"), filed in letter form on August 14, 2000 (undesignated).

CSX has no specific interest in the substance of the relief sought in this matter by the Shortline Movants; the substantive relief they seek is entirely directed against NS.[1] While the substantive relief sought by IPL in this matter does concern CSX, the particular issue on which rebuttal is sought by IPL – the authenticity of certain letters from NS's William E. Clark to IPL's Michael A. Weaver – is one on which CSX has no knowledge whatsoever, since the letters in question were private correspondence between NS and its potential customer IPL, are none of CSX's business, and were quite properly designated as "Highly Confidential" in NS's filing of August 3, 2000 (NS-2A).

CSX, rather, wishes to express its views as to the general appropriateness of permitting "rebuttal" with respect to Reply Comments by the Applicants in the present General Oversight proceedings. As CSX developed in CSX-2, at 4, a number of the commenting parties, apparently including those seeking leave to file rebuttals, have a mistaken view of the nature of these proceedings. The purpose of the proceedings, as CSX understands it, is not to offer a standing tribunal for adjudication of day-to-day operating issues or to offer a continuing petition for reconsideration of issues already determined. Rather, as the Board made plain in its Decision served February 9, 2000, launching the General Oversight proceedings, the proceedings were to be informal: they were launched with an invitation to receive "information from interested parties as to both the status of implementation and the effects of the various conditions we imposed." *Id.* at 3. The Applicants were

[1] Abbreviations and acronyms used in our Reply Comments (CSX-2), filed August 3, 2000, are employed herein.

required to file reports by June 1, 2000, which were to contain "in-depth analyses of implementation of the transaction and of the working of the various conditions." *Id.* Interested parties were to submit, by July 14, 2000, "any comments respecting the progress of implementation of the Conrail transaction and of the workings of the various conditions we imposed." *Id.* Replies to comments were to be "submitted by August 3, 2000."[2] The purpose of all this was to assist the Board, in connection with its retention of oversight jurisdiction, to exercise that jurisdiction in an informed way. *See* Decision served February 9, 2000, at 2. No provision for rebuttal comments following the replies made by the Applicants was provided for by the Board.

The picture is one of a set of comments for the information of the Board in the exercise of its public responsibilities, ra her than a stereotyped litigating procedure with Petitions and replies aimed at private interests. The continuation of filings beyond those contemplated by the Board in an effort to obtain the private objectives of the "commenters" seems inappropriate.

Paradoxically, the moving parties, in their quest for private relief in this oversight proceeding, seek a level of process that the Board's established procedures would not even permit in the case of a formal petition for relief in any

---

[2] CSX interprets the reference to the August 3 "replies" as relating to replies by the Applicants. Nonetheless, DOT undertook to file "reply comments" on August 3, 2000. Since CSX viewed the Board's intent as giving the Applicants the right of last reply, a brief letter of reply to the DOT "reply comments" was filed on August 11, 2000, by CSX and NS. Indeed, since it does appear that the Board's intent is to give the Applicants the last word, the grant of the Motions could well lead to a further proliferation of filings in what was intended to be a relatively simple and practical proceeding.

context. Upon the filing of such a petition, the petitioner has no right of rebuttal; rather, only the respondent or respondents have a right of reply, and the Board's rules prohibit any reply thereto on the part of the petitioner. *See* 49 C.F.R. § 1104.13(c). Clearly, in the present proceedings, which are for the information of the Board, the carefully crafted procedures, which do not contemplate rebuttals and the protraction of proceedings which they entail, should be maintained.

CONCLUSION

For the reasons stated, the Board should discourage the proliferation of formal, trial-type procedures in this General Oversight proceeding, and enforce the intent of the Decision which launched it, and accordingly should deny the motions for leave to file rebuttals.

Respectfully submitted.

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

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Paul R. Hitchcock
CSX TRANSPORTATION, INC.
500 Water Street
Jacksonville, FL 32202

Dated: August 23, 2000

CERTIFICATE OF SERVICE

The undersigned counsel for CSX Corporation and CSX Transportation, Inc. hereby certifies that on this 23rd day of August, 2000, copies of the foregoing "Reply of Applicants CSX Corporation and CSX Transportation, Inc., to Formal and Informal Motions of Reading Blue Mountain & Northern Railroad Company, Buffalo & Pittsburgh Railroad, Inc., Rochester & Southern, Inc., and Indianapolis Power & Light Company for Leave to File Rebuttal" were served on all parties of record by first-class mail, postage prepaid, or more expedited method.

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Counsel for CSX Corporation and CSX Transportation, Inc.

STB FD-33388 (SUB 91) 8-22-00 D 199567

199567

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August 22, 2000

BY HAND DELIVERY

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The Honorable 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-3, "Norfolk Southern's Opposition To RBMN-4 Or, In The Alternative, NS's Response To RBMN-5 And Motion For Leave To File." Also enclosed is a computer disk containing the text of NS-3 in WordPerfect 5.1 format.

Please acknowledge receipt of this filing by date-stamping the additional three enclosed copies of NS-3 and returning them to our messenger.

Many thanks for your assistance.

Sincerely,

Scott M. Zimmerman

Enclosures

cc (w/ enc.): All parties of record in
Finance Docket No. 33388 (Sub-No. 91)

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ORIGINAL

NS-3

BEFORE THE
SURFACE TRANSPORTATION BOARD

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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)

NORFOLK SOUTHERN'S OPPOSITION TO RBMN-4 OR, IN THE ALTERNATIVE, NS'S RESPONSE TO RBMN-5 AND MOTION FOR LEAVE TO FILE

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Attorneys for Norfolk Southern Corporation and Norfolk Southern Railway Company

Date: August 22, 2000

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)

**NORFOLK SOUTHERN'S OPPOSITION TO RBMN-4
OR, IN THE ALTERNATIVE,
NS'S RESPONSE TO RBMN-5 AND MOTION FOR LEAVE TO FILE**

Norfolk Southern Corporation and Norfolk Southern Railway Company (collectively, "NS") hereby respond to two recent filings by the Reading Blue Mountain & Northern Railroad Company ("RBMN"): RBMN-4, RBMN's motion for leave to file a rebuttal, and RBMN-5, the rebuttal itself.

NS opposes RBMN's motion for leave to file, and urges the Board to deny that motion and to strike RBMN-5. RBMN's filing violates the Board's rule prohibiting replies to replies and also violates the procedural schedule specifically established for this proceeding. RBMN has demonstrated no valid basis for departing from the Board's regulations and the procedural schedule the Board deliberately established here.

If, however, the Board chooses to accept the RBMN-5 filing, NS hereby asks the Board to accept for filing NS's response to RBMN-5, as set forth in detail below beginning at page 5.

Under the schedule the Board has found to be appropriate in general oversight proceedings, the applicant carriers are given the opportunity to close the record by replying to comments submitted by other parties. NS submits that, if the Board accepts RBMN-5, it is appropriate for the Board to accept and consider NS's response to those comments, in the interest of preserving that intended process, preventing RBMN from usurping unto itself the right to close the comments, and giving NS the opportunity to respond to RBMN's unwarranted comments and criticisms.

NS's OPPOSITION TO THE RBMN-4 MOTION

RBMN, having fully availed itself of the opportunity to file comments in this proceeding on July 14, 2000, and having further filed reply comments on August 3, 2000, now seeks to submit yet a third set of substantive comments – more than contemplated even for the applicants themselves under the procedural schedule – this time replying to NS's August 3, 2000 reply. RBMN's submission violates the Board's rule at 49 CFR § 1104.13(c) prohibiting replies to replies and violates the procedural schedule the Board established in this proceeding and therefore should be struck from the record. See, e.g., Trans Alaska Pipeline System (Rate Filings), No. 36611 and Trans Alaska Pipeline System (Rules and Regulations), Investigation and Suspension Docket No. 9164, 355 I.C.C. 80, 86 (1977) (denying leave to file a reply to a reply because "[n]either the special procedure adopted in this case nor our rules of practice contemplate replies to replies.") RBMN has had more than ample opportunity to make its views known to the Board and does not need another.

Further, RBMN has shown no valid reason to depart from the regulations and the procedural schedule. It claims, first, that its reply to a reply would serve to "supplement the record" and provide a "complete and factually correct" record for the Board to review. RBMN-4 at 2. By definition, of course, every unauthorized pleading could be said to "supplement the record," or to further "complete" the record; but that is not a reason to permit RBMN to proceed beyond the point at which the Board determined the record should close and be deemed "complete." And RBMN has had plenty of opportunity to put before the Board what it believes are the relevant facts.

Next, RBMN asserts that "[r]eliance on the NS Reply," without giving RBMN the last word, would be "unjust" because

> (i) NS has distorted the effect of approval of the CSX/NS/Conrail transaction on the pertinent RBMN-Conrail contract by quoting selectively from its terms in an effort to portray RBMN's concerns as a routine contract dispute rather than a request to the Board to grant relief to ameliorate harms resulting from the transaction, (ii) perhaps most critically for present purposes, totally ignores the anticompetitive effect of its conduct in seeking to enforce literal compliance with the contract's provisions, and (iii) misstates the facts when it erroneously asserts that, if the relief sought by RBMN were granted, "RBMN and CP would simply get more money at the expense of NS."

RBMN-4 at 3. Boiled down to their essence, these objections amount to nothing more than a complaint that NS in its Reply presented NS's side of the story, not RBMN's. Of course it did. But again, that is not a reason to waive the rules and extend the procedural schedule to give RBMN the last word. RBMN has had more than ample opportunity to present its views (incorrect as they are) to the Board in any manner it chose.

RBMN next simply asserts, without more, that it should be given the last word because it has asked for affirmative relief. Id. at 3-4. When the Board set the procedural schedule, however, it was well aware that the general oversight proceeding could involve requests for additional conditions. See, e.g., Decision No. 1, slip op. at 2 (the Board retained oversight jurisdiction, in part, to "impose additional conditions and/or to take other action if, and to the extent, we determined that it was necessary to address harms caused by the Conrail transaction"). Nevertheless, the Board deliberately set the procedural schedule that it did, consistent with the schedule set earlier in the UP/SP case. The Board certainly could have, if it had chosen to, set a procedural schedule that distinguished between parties that request affirmative relief and those that do not, but it chose not to, and RBMN gives no valid reason for departing now, for its sole benefit, from the schedule the Board set.

RBMN cites several previous STB or ICC decisions in support of its request, see id. at 2-3, but they do not support the relief RBMN seeks. First, NS's Reply was addressed to matters raised in RBMN's comments, and did not introduce new evidence or new argument such that a further rebuttal by RBMN is warranted. Additionally, it is not necessary to give RBMN yet a third opportunity for comment in the name of developing "an adequate record."

Finally, contrary to RBMN's claim that the relief it seeks would not prejudice any party or delay the proceeding, see id. at 3 and 4, granting RBMN's motion would, in fact, do b[illegible]f those things. Granting RBMN's request would open the door to a further stream of pleadings by any number of other parties, which in turn would generate yet more requests to respond to those pleadings, on and on for an indeterminate period of time, thus resulting in a de facto open-ended extension of the record in the first oversight round. This would, of course, unavoidably delay the Board's consideration of that record and the issuance of any Board decision addressing that record. That added delay would prejudice NS and CSX in that it would indefinitely extend the period of uncertainty regarding any action the Board might take in response to the comments in the first round. Granting RBMN's request thus would hinder, rather than help, the "just, speedy and inexpensive determination of the issues," see RBMN-4 at 3.

For the foregoing reasons, NS respectfully requests the Board to deny the RBMN-4 motion and strike RBMN-5 from the record.

NS's RESPONSE TO RBMN-5 AND MOTION FOR LEAVE TO FILE

Should, however, the Board accept the RBMN-5 filing, NS hereby asks the Board to permit it to respond and to accept the following comments. Permitting NS to respond, we submit, is necessary to preserve the applicants' right, which the Board intended as reflected in the procedural schedule it set, to close the discussion on substantive comments submitted by other parties. If the RBMN-5 comments are accepted, NS therefore submits the following observations for the Board's consideration.

A. Introduction.

In the main control proceeding, the Board, responding to the concerns of RBMN, imposed a condition on the Conrail transaction limiting the scope of the "blocking provision" in the contract between RBMN and Conrail for the sale of the central portion of the Lehigh Line (hereafter, the "Lehigh contract") to destinations on NS that were formerly Conrail destinations. See Decision No. 89, slip op. at 77. In its June 1, 2000 general oversight report, NS reported that it is complying with that condition. See NS-1 at 40-41. In its July 14, 2000 comments, however, RBMN renews its request for further relief that it requested in the control proceeding but that the Board rejected – namely, elimination of the blocking provision altogether.

That relief was unwarranted at the time of the main control proceeding and remains unwarranted now. Under well-established principles that have been recited over and over in this proceeding and that the Board has specifically endorsed in connection with the Conrail transaction, conditions are not to be imposed except to remedy a transaction-related harm, the principle harms being a "significant loss of competition or the loss by another rail carrier of the ability to provide essential services." Decision No. 89, slip op. at 78. RBMN has not alleged, must less demonstrated, that any additional conditions are justified by any transaction-related harm and has failed to demonstrate, in particular, any loss in competition or loss of its ability to provide essential services. Because NS is complying with the condition the Board imposed for the benefit of RBMN, and because RBMN's comments, including its "rebuttal" comments in RBMN-5, fail to justify the need for additional relief under the Board's well-established standards, NS submits that the Board should decline to impose the additional conditions RBMN seeks.

With those general principles in mind, we now turn to a discussion of the specific points raised in RBMN's rebuttal filing.

B. RBMN's Arguments Regarding the Lehigh Contract's Integration Clause and Anti-Assignment Clause Are Without Merit.

First, RBMN criticizes NS for somehow misleading the Board by not quoting all of the integration clause of the Lehigh contract. RBMN-5 at 2. To the contrary, the additional language cited by RBMN merely reaffirms that the provision says what NS said it says. NS's point, in brief, is this: RBMN has claimed that certain unwritten "understandings" formed part of the basis of the consideration for the sale by Conrail of the central section of the Lehigh Line to RBMN. Specifically, RBMN asserts that it paid a "substantial sum" for the Lehigh Line "because of the other benefits it would receive," which included, among others, $800,000 per year in CP trackage rights fees and a supposed promise by Conrail to sell to RBMN the northern and southern segments of the Lehigh Line. RBMN-2 at 5-6 (emphasis added). NS's Reply pointed out, however, that this supposed "consideration" for the Lehigh Line sale was not written into the Lehigh contract. The contract's integration clause, moreover, provides that the written contract represents the entire understanding of the parties with respect to the transactions contemplated thereby (i.e., with respect to the Lehigh Line sale). The integration clause thus makes perfectly clear that if, as RBMN claims, a guaranteed level of CP trackage rights fees and a subsequent sale of other line segments by Conrail to RBMN were really part of the consideration for entering into the Lehigh contract – the "transaction" to which the integration clause pertains – those guarantees could have, would have, and should have been written into that contract. But they were not. The unwritten "benefits" that RBMN imagined, or assumed, it would receive were not, in fact, part of the consideration for the Lehigh Line deal, as the Lehigh contract makes plain. The Conrail transaction thus has not impaired any "benefit" (read: "consideration") for which RBMN bargained and its request for relief is without merit.

RBMN next segues into an apparent attempt to renew its previous belated (and unsuccessful) challenge to the Board's override of the anti-assignment clause of the Lehigh contract, asserting that RBMN never could have anticipated the Conrail transaction and did not consent to the assignment of the contract to NS. RBMN-2 at 3. Although not entirely clear, the upshot of RBMN's argument appears to be that it is entitled to relief simply because the Board overrode the antiassignment clause of the Lehigh contract without RBMN's consent in furtherance of a transaction RBMN did not contemplate. But there is no basis in law for RBMN's argument. Moreover, RBMN's argument of the point comes too late. The Board directly and clearly in Decision No. 96 held that the antiassignment clause of the Lehigh contract was overridden and rejected RBMN's attempt to belatedly raise that issue, having not raised it earlier. Decision No. 96, slip op. at 19-20. RBMN apparently now seeks, even more belatedly, to relitigate that issue now. There is no basis to do so.

C. RBMN's Assertions Regarding The Relative Merits Of The New CP Routing and the Relief RBMN Seeks Are Without Merit.

RBMN further asserts that the creation of a new route available to CP, which CP has chosen to use, is not a "public benefit," and that, on the other hand, the relief RBMN seeks is in the public interest. RBMN-5 at 3-5. It starts by asserting that, in entering into the Lehigh contract, RBMN "accepted the risk" that CP traffic on the Lehigh Line would decrease, but it did not accept the risk that traffic would be "diverted." Id. at 4. That argument, first, is nothing more than semantic game-playing; a diversion of traffic off of a particular rail line necessarily results in a decrease in traffic on the line compared with the level of traffic before the diversion. A "decrease" in traffic and a "diversion" of traffic are not two separate species; rather, the latter is one possible cause, among others, of the former. Second, RBMN's fundamental point is simply wrong: By failing to provide in the Lehigh contract for a guaranteed level of trackage rights traffic (or negotiating separately with CP for such a guarantee before entering into the Lehigh contract), RBMN did indeed accept the risk that the trackage rights fees it claims to have anticipated would not materialize, or at least would not continue indefinitely, regardless of the reason. RBMN is well aware that the only constant in the business world is change; the rail industry changes, the competitive landscape changes, economic conditions change. Of course RBMN cannot predict specific future events with certainty; no one can, and no one is expected to. RBMN, however, certainly is sophisticated enough to know that if, in negotiating a contract, it wishes to rely, for example, on a guaranteed income stream as consideration for entering into the contract, it needs to provide for such a guarantee, particularly when the contract by its terms says that it represents the entire understanding of the parties concerning that transaction. If RBMN wanted to guarantee that, as consideration for its purchase of the Lehigh Line, it would receive in perpetuity the $800,000 per year in CP trackage rights fees that it assumed it would receive, or that Conrail at some later time would sell RBMN additional segments of the line, it should have negotiated such guarantees and reduced them to writing. It did not.

Moreover, despite RBMN's assertion that it is "difficult" to see any benefit in the creation of CP's new route, RBMN-5 at 4, the fact is that a new route has been created that did not exist before and that would not have been created but for the Conrail transaction. Moreover, traffic is flowing over that route, thus demonstrating that it is, indeed, a competitive routing that CP has determined is better suited to serving its customers' needs than the route previously available.

RBMN claims that the relief it seeks would be beneficial. See RBMN-5 at 5. But that is not the issue, and does not meet the standard for imposing additional conditions. As discussed in the Introduction above, conditions are not to be imposed except to remedy a transaction-related harm such as a significant loss of competition or the loss by another rail carrier of the ability to provide essential services. RBMN has not alleged, must less demonstrated, that the relief it seeks is justified by a loss in competition or loss of its ability to provide essential services. Indeed, the fact is that, specifically as it pertains to RBMN, the transaction has resulted in increased competitive opportunities. RBMN's access to CP, for example, is greater than it was before the transaction, and RBMN itself has publicly acknowledged these new opportunities. In a press release dated April 27, 1999, RBMN applauds the impending implementation of the Conrail transaction. It notes that "[a]s a result of the Norfolk Southern/CSXT merger of Conrail, the Surface Transportation Board (the Federal regulatory agency of the U.S. railroads) in order to insure competition, has allowed the Reading and Northern [sic] to interchange with Canadian Pacific at Reading PA and in the near future, Scranton, PA. This will afford all R&N customers an option which did not exist for 23 years: the ability to price rail freight rates via two different railroads allowing the rail customer to choose the railroad company that offers the best rate, service, etc." See Exhibit A hereto. As RBMN itself admits, the Conrail transaction has increased competition, not decreased it. Granting RBMN additional relief, when by its own admission it is already in a better competitive posture than before the transaction, is clearly not warranted.

Nor is there any merit to RBMN's request for relief based on a claimed loss of "bottom line dollars" that "impacts on its ability to maintain the Lehigh line and level of service provided to customers on the line and adversely affects the public interest." RBMN-5 at 4. Again, this complaint does not meet the test that is necessary for imposing new conditions; RBMN does not demonstrate, or even allege, a loss of competition or an inability to provide essential rail service. And in any event, RBMN's previous statements to the press and public appear not to support its claim. In a press release dated November 21, 1999 (nearly six months after the Split Date) RBMN announced the "ongoing improvement" being made to the Lehigh Line, and noted that "[t]hese improvements are being made to provide extra capacity and flexibility to handle increasing Canadian Pacific and Norfolk Southern traffic." See Exhibit B hereto. Moreover, in an Associated Press story dated September 17, 1999 (Exhibit C hereto), RBMN President Andrew Muller is said to expect "to haul 25,000 carloads" of various commodities "next year" (i.e., in 2000); this represents a 79 percent increase over the 14,000 carloadings that Mr. Muller told the Board in the main proceeding RBMN handled in 1996. See RBMN-5 (Control Proceeding), filed October 21, 1997, Muller VS at 2.

D. The "Blocking Provision" Of The Lehigh Contract Has Not Been Expanded; NS Has Complied With The Board's Condition. RBMN's Real Complaint Is That The Lehigh Contract Is Being Applied As Written, and RBMN Wishes It Had Negotiated With Conrail Differently.

RBMN's assertion that NS somehow has "admitted" that it has violated the condition regarding non-expansion of paper barriers (RBMN-5 at 5-6) is flat wrong. NS has "admitted" no such thing, and in fact reported to the Board, correctly, that it is complying with that condition. See NS-1 at 40-41. RBMN's argument in this regard in its July 14, 2000 comments (RBMN-2) is incorrect. As we understand it (although the argument is not entirely clear) RBMN appears to argue that the "additional consideration" figures set forth in the Lehigh contract were calculated so as to match the level of Conrail's net contribution from traffic that was moving over the line at the time of the sale. Post-Split, RBMN's argument seems to go, there are now optional routings which, because of NS's pro-competitive settlement with CP, NS can participate in for which its net contribution is less than Conrail's was. This means, according to RBMN, that the blocking provision has somehow been "expanded" as a result of the Conrail transaction because it applies to moves for which (RBMN believes) NS's net contribution is less than Conrail's would have been and less than the additional consideration amounts of the blocking provision. RBMN-2 at 10-11.

RBMN is wrong for several reasons. First, RBMN's present explanation of how the blocking provision has been "expanded" was not raised in RBMN's initial comments to the Board in the main proceeding, and does not comport with RBMN's complaint in the main proceeding about potential expansion of the blocking provision. In the main proceeding, RBMN noted that the blocking provision applied to any traffic that originated, terminated or otherwise moved over the Lehigh Line and that could "commercially be interchanged" with Conrail. See RBMN-5 (Control Proceeding) at 7. RBMN feared that the geographic scope of the territory to which the blocking provision would apply would expand as a result of the transaction because the geographic reach of the combined NS/Conrail system would be greater (and thus the territory encompassing traffic that could be "commercially interchanged" with NS would be greater) than the reach of the Conrail system prior to the transaction. See id. at 7; Muller VS at 7 (arguing that "[a]lthough Conrail can 'commercially handle' traffic off of the Lehigh Division to many points in the northeast and midwest, the Conrail lines that will become part of the NS system greatly expand the potential reach of the restriction to many areas of the midwest, southwest, and southeast"). RBMN did not raise the argument it now asserts regarding the level of the additional consideration provision and the asserted net contribution levels of NS vis-à-vis Conrail. As an initial matter, therefore, RBMN should not be heard to raise a new argument now that it did not raise in its initial comments in the main proceeding.

Further, RBMN's current dissertation on relative contribution levels and the level of the additional consideration in the Lehigh contract does not comport with the Board's understanding of what an "expansion" of a blocking provision is or what it sought to prohibit in Decision No. 89. In prohibiting the expansion of paper barriers in Decision No. 89, the Board responded to the argument that RBMN made at the time, which, as just discussed, pertained to expansion of the geographic reach of those barriers. The Board noted that "RBMN is concerned that the blocking provision in its contract will make it prohibitively expensive for it to connect with another carrier to reach all points that could be served by NS, which is taking over the Conrail lines that now connect with RBMN." Decision No. 89, slip op. at 77. The Board therefore addressed RBMN's concern by "restricting the blocking provision to destinations on NS that were formerly Conrail destinations." Id. The Board thus made clear that so limiting the geographic territory covered by the blocking provision is what it meant by limiting the expansion of those provisions.[1] The relief the Board imposed had nothing whatsoever to do with, and was not intended to have anything to do with, analyzing the level of the additional consideration amount, or whether that amount comported with Conrail's net contribution, or how NS's net contribution levels might compare to Conrail's. Quite simply, NS is complying with the condition the Board imposed, RBMN's current argument to the contrary notwithstanding.

Indeed, RBMN's own evidence shows that its current argument is baseless on the merits. First, the additional consideration amounts in the Lehigh contract are flat amounts; the contract, by its terms, does not tie those amounts to the supposed level of Conrail's net contribution, and does not provide any mechanism for changing the additional consideration amounts if Conrail's net contribution amounts were to change. See RBMN-2, Michel VS, Appendix C.[2] If, as RBMN argues, the additional consideration amount was supposed to reflect Conrail's net contribution amount, and thus vary with it, the contract would have and should have said so and provided for such a mechanism, but it does not. The fact of the matter, rather, is that the additional consideration provisions of the contract are being applied just as the contract provides. Indeed, RBMN admits that its real complaint is that NS is "seeking to enforce literal compliance with the contract's provisions," RBMN-5 at 3 – in other words, seeking simply to enforce the contract as written. See also RBMN-2, Michel VS at 17 (complaining about "[t]he effect of the enforcement of the additional consideration penalties as written." (emphasis added)). RBMN

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[1] Moreover, as NS stated in its June 1, 2000 general oversight report, it is complying with the Board's order. NS noted that it "recognizes that the Board restricted the blocking provision applicable to RBMN to destinations on NS that were formerly Conrail destinations; NS has interpreted, and will continue to interpret, that blocking provision accordingly." NS-1 at 40-41.

[2] The actual additional consideration charges set forth in that Appendix are designated Highly Confidential.

further admits that the problem it describes was not caused by the Conrail transaction, but rather stems from the fact that, in retrospect, RBMN wishes it had negotiated the blocking provision differently with Conrail in the beginning. See RBMN-2, Michel VS at 15-16 (complaining that RBMN should have negotiated with Conrail a time limit to the blocking provision and a mechanism for reevaluating changes in Conrail's profit levels). The fact that, in retrospect, RBMN wishes it had negotiated differently with Conrail years ago has nothing to do with the NS/CSX/Conrail transaction, and is not a transaction-related "harm" to be remedied by the imposition of conditions that RBMN previously has requested and the Board previously has denied.

E. NS's Reply Properly Pointed Out The Possible Employment-Related Bias Of RBMN's Witness.

Finally, as to NS's alleged "personal attacks" on RBMN's witnesses (see RBMN-5 at 6-8). The only so-called "personal attack" that RBMN alleges in NS's Reply is NS's observation that the comments of RBMN's Executive Vice President, Wayne Michel, must be viewed in the light not of an impartial observer, but as the high-ranking executive of RBMN that he is. That is not a "personal attack"; it is a fair acknowledgement of the very valid principle that "where you stand depends upon where you sit." As an RBMN official, Mr. Michel's job is to advance the interests of his employer. NS does not assert or imply here, nor did it in its Reply, that there is anything particularly insidious about that; indeed, it is to be expected. But it is fair to point out, as NS did in its Reply, that Mr. Michel's comments must be viewed not in the context of an impartial "industry consultant," which he apparently is not with respect to RBMN, but as its Executive Vice President, which he apparently is.[3]

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[3] We say "apparently" because RBMN's pleadings are not entirely clear with respect to representing Mr. Michel's position. On the first page of its filing, RBMN prominently describes (continued...)

CONCLUSION

For the foregoing reasons, NS respectfully requests the Board to deny the RBMN-4 motion and strike from the record RBMN-5. If, however, the Board declines to do so, NS asks the Board to accept for consideration the foregoing comments in response to RBMN-5, and, for the reasons NS suggests, to deny RBMN's request for imposition of additional conditions.

Respectfully submitted,

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(...continued)
Mr. Michel merely as a "consultant to the industry," RBMN-5 at 1, and later as "having been retained as a consultant to RBMN," RBMN-5 at 7 – descriptions presumably intended to give Mr. Michel an air of impartiality. In the third sentence of the third paragraph of Mr. Michel's verified statement, however, Mr. Michel acknowledges that he is, in fact, now an Executive Vice President of RBMN – a position in which, naturally, he would be expected to advocate and advance the position of his employer. He also states that he continues "to act as a consultant working with other shortlines and in other industries."

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of August, 2000, I caused to be served a true and correct copy of the foregoing NS-3 by first-class mail, postage prepaid, or by more expeditious means, on all parties of record in Finance Docket No. 33388 (Sub-No. 91).

Scott M. Zimmerman

EXHIBIT A

READING AND NORTHERN RAILROAD COMPANY

The Reading & Northern Railroad - Serving Our Customers and the Environment

Home About Directory History Services Map & Interchanges Roster Photos Passenger Excursions News Sales & Disposition
How To Do Business With Us Real Estate Coal Producers Mechanical Dept Train Watch Employment Opps Merchandise Links

Reading & Northern News

COMPETITIVE RAIL SERVICE RETURNS TO THE NORTHEAST DIRECTLY BENEFITTING READING & NORTHERN CUSTOMERS

For the first time since Conrail was created in 1976, rail shippers and receivers on the Reading and Northern will have access to more than one Class 1 railroad.

In an effort to salvage the bankrupt railroads of the Northeast United States, Congress formed Consolidated Railroads, or Conrail, which created a near-monopoly to most rail users.

In other words, if you desired to secure a freight rate to ship via rail, you had a lone source to provide a rate. If you found that rate unsatisfactory, you had no other option. It would be likened to pricing an automobile for purchase and having the same model for the same price at every car dealer you visited.

As a result of the Norfolk Southern/CSXT merger of Conrail, the Surface Transportation Board (the Federal regulatory agency of the U.S. railroads) in order to insure competition, has allowed the Reading and Northern to interchange with the Canadian Pacific at Reading PA and in the near future, Scranton PA.

This will afford all R&N customers an option which did not exist for 23 years: the ability to price rail freight rates via two different railroads allowing the rail customer to choose the railroad company that offers the best rate, service, etc.

If you would like more information about this exiciting opportunity, please call the Reading & Northern Railroad at 610-562-2100 and ask for a marketing team member.

Last Modified on April 27, 1999
Web Site Designed by Christopher Muller

EXHIBIT B

READING AND NORTHERN RAILROAD COMPANY

The Reading & Northern Railroad - Serving Our Customers and the Environment

Reading & Northern News

Lehigh Line Improvements

Ongoing improvement of the Lehigh Line No 1 track will continue on with the addition of another 3600 crossties and a planned installation of TCS between Lehighton and M & H Junction in the year 2000.

These improvements are being made to provide extra capacity and flexibility to handle increasing Canadian Pacific and Norfolk Southern traffic.

Last Modified on November 21, 1999

2ND STORY of Focus printed in FULL format.

EXHIBIT C

The Associated Press State & Local Wire

September 17, 1999, Friday, PM cycle

SECTION: State and Regional

LENGTH: 903 words

HEADLINE: 'Short lines' are a renaissance for railroads

BYLINE: PETER DURANTINE, Associated Press Writer

DATELINE: PORT CLINTON, Pa.

BODY:

The Reading Blue Mountain & Northern Railroad, the largest carrier in the country of anthracite coal, is branching out, and it's busier than ever.

Reading Blue Mountain has, like other short lines, benefitted from a combination of the sale of unwanted branch lines by big railroads, an industrial expansion, tenacity and luck.

"I've always liked trains since I was a kid, but I like money more," said Andrew Muller, Reading Blue Mountain's president.

A former commodities trader whose success at investing enabled him to retire before he turned 40, Muller became a railroad man 16 years ago, hauling 80 carloads of freight a year along 13 miles of track between Reading and the northern Berks County town of Hamburg.

Today, he owns 314 miles of track that branch out through the coal region, reaching Pottsville, Scranton and Hazelton. Next year, he expects to haul 25,000 carloads of coal, corn, sand, plastic and steel.

"We move pretty much anything you buy," Muller said.

Once home to one of the world's mightiest railroads - the Pennsylvania Railroad - the state today has 70 short lines based or operating within its borders, more than any other state.

With Conrail's absorption by Norfolk Southern and CXS, more than one-third of the nation's freight rail traffic now goes through Pennsylvania, helping to boost the success of short lines.

The burgeoning industry is the railroad's "renaissance" that began in 1980 when Congress, through the Staggers Act, made it easier for big railroads to sell unwanted lines to small operators, said Alice Saylor of the American Short Line and Regional Railroad Association.

"Pennsylvania was a big focus of this restructuring," she said.

Today, Pennsylvania probably has the strongest regional short lines, said Phillip McFarren, president of Keystone State Railroad Association.

"Many of those regional systems are $ 25 to $ 30 million dollars in annual volume," he said.

Short lines have grown rapidly the last six years in Pennsylvania because of the industrial expansion that followed along some of the lines that Conrail and CSX divested, McFarren said.

Nationwide, there are about 550 short lines, according to the Federal Railroad Administration. Some railroads have no more than 10 miles of track, but conglomerates such as RailTex in San Antonio, Texas, own many short lines including some in Pennsylvania, said FRA spokesman Warren Flatau.

Short-line railroads, while more familiar to outsiders as a piece of property in the Monopoly board game, are not new. Big industries such as Bethlehem Steel have always run small railroads to move raw material into the factory and finished products out to the main line carriers.

The new short lines operate branches the big railroads found unprofitable. They maintain or control 29 percent of the track in the country today and had total revenues of $ 3.2 billion in 1998, Saylor said.

However, operations were not always so profitable. Muller said he lost millions of dollars at Reading Blue Mountain before he finally started to make a profit in 1994.

"The early '80s were really tough," he said. "The railroads didn't know how to handle the Staggers Act. . . I spent my whole time in the '80s trying to teach Conrail how to deal with short lines."

Short lines are a pickup and delivery service, carrying freight from manufactures and other businesses to main lines run by a "class 1" such as Norfolk Southern, CSX and Canadian Pacific, to name a few.

Unlike big railroads, Saylor said, short lines have small administrative staffs and contract out marketing, legal and other departments or consolidate them.

"We even have in some cases where the president of the short line operates the train," she said. "It's a real sort of hands on type of operation with short lines. They are the entrepreneurs of the industry."

North Shore Railroad in Northumberland County opened in 1984 on one line. Over the next 12 years, said president Richard Robey, the company would pick up other railroads as Conrail disposed of unwanted branches. The company now has eight short lines on 250 miles of track across the state's northeast.

Unlike Reading Blue Mountain, North Shore does not own any of its track. Robey leases them from the owners, which are municipal authorities. "We are a public-private operation," he said.

Robey owns the 17 locomotives and leases the rail cars and equipment to run the railroads. He employs 55 people who disperse into 14 train crews.

"My investment is minimal," Robey said.

North Shore's eight railroads hauled 32,781 carloads for 80 customers last year, he said.

The Ridge administration, which has given millions of dollars in grants for short lines to improve tracks and equipment, promotes the railroads as a means of reducing truck traffic. But there is a limit to what a train can move.

At Heinz Pet Products in Bloomsburg, spokesman Dave Park said North Shore does "a good job" hauling off scrap metal. But Heinz does not use the train to move finished products.

"We rely more on trucks just because there's more of our vendors that rely on trucks," Park said.

Reading Blue Mountain serves more than 100 customers in eight counties, but Muller said 35 percent of his business is hauling coal for export around the world.

"The short line is very customer oriented," Muller said. "It almost never happens, but the customer could call me at home at night."

LANGUAGE: ENGLISH

LOAD-DATE: September 17, 1999

STB FD-33388 (SUB 91) 8-16-00 D 199515

199515

BPRR-4
RSR-4

D

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)

REBUTTAL OF BUFFALO & PITTSBURGH RAILROAD, INC. AND ROCHESTER & SOUTHERN, INC.

Buffalo & Pittsburgh Railroad, Inc. ("B&P") and Rochester & Southern, Inc. ("R&S") filed timely comments with the Board in this General Oversight Proceeding. BPRR-2/RSR-2. After pointing to persistent service deficiencies on NS that precluded R&S customers from receiving competitive rail service of the same quality that existed prior to consummation of the CSX/NS/CR[1] transaction, R&S requested the Board to impose an additional condition pursuant to the jurisdiction the Board retained in this proceeding. Specifically, B&P and R&S requested that the Board require NS to grant R&S approximately 54 miles of overhead trackage rights over NS's Southern Tier Line between Silver Springs and B&P's Buffalo Creek Yard.

NS filed its Reply (NS-2) to B&P and R&S (as well as to other commenting

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[1] "Conrail" or "CR" refers to Conrail, Inc. and Consolidated Rail Corporation and their wholly owned subsidiaries. "CSX" refers to CSX Corporation and CSX Transportation, Inc. and their wholly owned subsidiaries . "NS" refers to Norfolk Southern Corporation and Norfolk Southern Railway Company ("NSR") and their wholly owned subsidiaries.

parties) on August 3, 2000. The NS Reply does not challenge the factual basis of the R&S request,[2] but argues that R&S's position is inconsistent with an agreement between NS and Genesee and Wyoming, Inc. ("GWI"), the parent of B&P and R&S; that the B&P/R&S concerns are matters for operational monitoring rather than oversight by the Board; that there is no need to worry since NS has instituted a new Buffalo-Springs "haulage service" (which began just prior to the filing of the B&P/R&S Comments herein); and that, in any event, R&S does not really need a competitive route involving NS's Southern Tier line since an alternative CSX route is available. B&P and R&S have requested leave to file this Rebuttal so that the Board will have a complete record in reaching a just resolution of the issues.

1. The requested condition would not contravene an agreement between GWI and NS.

The relief now sought by B&P and R&S is not inconsistent with a 1997 letter agreement between NS and GWI under which, in return for certain promises by NS, GWI agreed "to actively support the Conrail acquisition." A copy of the letter agreement is being submitted herewith as a separate Highly Confidential Appendix A. The letter agreement between the parties obligated the GWI carriers "to actively support the Conrail acquisition," and they did so. The agreement does not obligate GWI to remain quiescent post-acquisition in the face of acts and omissions by NS that defeat the best efforts of GWI's carriers to provide competitive service. In effect, NS is saying that the Board has no right to oversee implementation of an acquisition transaction with respect to any party who agreed not to oppose the acquisition, irrespective of

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[2] NS, however, without verification, asserts new facts dealing with the purported scope of an agreement, potential infrastructure improvements at Silver Spring, the addition of a new Buffalo-Silver Springs train, and the alleged economic consequences of the condition requested by R&S.

whether the applicant performs as represented in its acquisition application. But an agreement to support consummation of a transaction as proposed on paper does not deprive the Board of jurisdiction to oversee whether the acquisition has been implemented as proposed. In any event, NS has failed to follow through on its commitments under the agreement — NS was to attempt to negotiate a relocation of its main line in Erie followed by use of its best efforts to build a direct connection with GWI's Allegheny and Eastern Railroad ("A&E"); and NS was to perform haulage between R&S and B&P and the Canadian carriers in Buffalo. It has not done so.

Prior to approval of the transaction, and thereafter, NS marketing and sales personnel indicated to R&S and its customers NS's willingness to provide direct interchange service at Silver Springs using trains moving to and from Buffalo. When Split Date arrived, however, NS in fact had no plan whatsoever to provide any service to Silver Springs. Only after calls from R&S did service begin on a once per week basis, and the service was out of Corning, not direct from Buffalo. It is only "recently" that NS began to offer service three times per week directly from Buffalo to Silver Springs.[3]

Requiring applicants to live up to the service plans and promises made during the application process, and allowing carriers and their customers that are adversely affected to participate in an oversight proceeding when they do not, will not undermine the Board's policy in favor of settlement agreements.

2. **The relief here sought, and the basis for it, are within the scope of this oversight proceeding.**

NS attacks the propriety of GWI's use of this oversight proceeding to complain of

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[3] This service is discussed more fully in Section 3 below.

NS service deficiencies that have impaired R&S's efforts to provide competitive service to its customers. NS apparently has the quaint theory that "service difficulties" are unrelated to competition. The very essence of the B&P/R&S complaint at this point is that they are unable to compete for traffic as effectively as they could before the transaction because of service delays that have persisted for over a year after consummation of the Conrail split, and because of NS's unwillingness or inability to rectify the service deficiencies, its failure to provide the service it promised, and its refusal to allow R&S to operate over NS's Southern Tier line.

Also, the scope of the oversight proceeding is not so narrowly limited as NS would have it. In ordering oversight, the Board stated:

> Our oversight process will be broadly based. As part of that process, we will monitor situations involving the relationship of shortline railroads to their Class I connections and to other Class I railroads. ... If problems do arise after approval and consummation of the transaction, involving these and other matters, our oversight condition should provide a fully effective mechanism for quickly identifying and resolving them.

CSX/NS/CR Dec. No. at 160-161. The Board also stated that, "where conditions are warranted to protect the interests of particular shortlines, or shortlines in general, from the adverse impacts of this transaction, we will impose them as appropriate." *CSX/NS/CR Dec. No.* at 76. The Board specifically invited the shortline associations and their members "to participate in the oversight that we will be conducting." *CSX/NS/CR Dec. No.* at 77.

3. **The new NS Buffalo-Springs train is not an effective remedy for the operating problems at Silver Springs.**

NS notes that it "*recently* instituted a new *haulage* service for R&S service between Silver Springs and Buffalo." NS-2 at 9 (emphasis added). First, the service implemented by NS is *not* haulage service; rather the new service is local service offered by NS to handle traffic that is moving between NS and LAL. This service is not handling any traffic to or from R&S customers, nor is it handling any of the traffic currently being handled for R&S in CP haulage trains for interchange with B&P and the Canadian carriers in Buffalo. This new NS service merely substitutes for the once a week service NS was providing for LAL traffic out of Corning, and will not eliminate any of the problems described by R&S in its Comments of having three carriers operating at Silver Springs instead of the two that operated there before the Split Date. On the other hand, the R&S proposal would substitute R&S trackage rights service for the CP haulage service eliminating a carrier at Silver Springs while not adding another carrier to the Southern Tier. Additionally, the R&S trackage rights train could handle the NS/LAL traffic which would both reduce the carriers operating at Silver Springs to one, and reduce the traffic on the Southern Tier by elimination of the NS local train.

Further, it is important to note that NS began the new service just shortly before comments were due in this proceeding, over 13 months after Split Date. This service was started by NS only after the months of complete failure on NS's part to propose any solution to the problems R&S was experiencing and NS management's repeated rejection of R&S's suggestions to fix the problems with R&S trackage rights. Moreover, given NS reluctance to start this service, and given the financial burdens and challenges facing NS as a result of the Conrail transaction, B&P and R&S have concerns that NS's efforts to reduce operating costs will result in the early elimination of this service.[4] NS has delayed a solution long enough, and R&S's

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[4] It is amazing to B&P and R&S that NS in the face of its continuing operating difficulties would want to tie up its crews and locomotives on this low volume service.

customers should not be forced to wait any longer.

4. Prospective infrastructure changes at Silver Springs will not cure interchange obstacles at that location.

NS intimates that there is room at Silver Springs for additional interchange tracks and infrastructure improvements. NS-2 at 9. In fact, this is not the case. As described in its Comments, R&S expects a significant increase in salt and agricultural product traffic that will not be able to be handled through Silver Springs under the current arrangements with three carriers operating at Silver Springs. There is no room for additional interchange tracks where R&S connects with the Southern Tier line.

The proposed infrastructure project referred to by NS will not address this problem. The project is for the acquisition of property to allow for R&S to construct a connection that will allow for a progressive move to/from Buffalo, and allow for the more efficient handling of the unit coal trains currently moving from NS to the R&S. Additionally, while the application has been made, no funds have been allocated nor approved, and construction would be two years away at the earliest.

5. NS's argument that a single CSX outlet for R&S/LAL traffic suffices is frivolous.

One of the reasons advanced by NS for rejecting the B&P/R&S request can only be described as incredible. NS argues that R&S and LAL really do not need to use the NS route to and from Buffalo because they have the alternative CSX Water Level Route via Genesee Yard.[5] In other words, NS says R&S and LAL and their shippers really do not need competition.

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[5] NS also points to the alternative R&S/CP haulage arrangement via Silver Springs. However, it is the failure of this service post-Split Date that prompted the B&P/R&S request in the first place. BPRR-2/RSR-2, Collins V.S. at 2-4.

Prior to the CSX/NS/CR transaction R&S's customers had the alternatives of using an R&S/Conrail Water Level route or an R&S/CP haulage route via Silver Springs over the Southern Tier. The transaction was supposed to improve routing alternatives for R&S customers by introducing routing with NS via Silver Springs rather than Buffalo. Indeed, one of the major selling points of this transaction was the introduction of additional competition. *CSX/NS/CR Dec. No. 89* at 34. Thus, NS is suggesting that R&S's shippers instead of getting additional competitive routings as promised should be satisfied with less alternatives than they had prior to the transaction.[6]

NS's suggestion not only is contrary to the procompetitive claims of NS when it was enlisting the Board's approval of the acquisition transaction, but frustrates realization of the very purpose of the condition giving LAL rights in Genesee Yard so it could reach NS via the R&S. *CSX/NS/CR Dec. No. 89* at 180 (ordering paragraph 56). At this stage, B&P and R&S will not attempt to a more detailed rebuttal of an obviously frivolous contention, and tr t that the Board will not countenance such disregard for the reasons advanced for approval of the transaction or of a condition it has imposed.

6. The requested condition would neither benefit R&S economically nor harm NS's operations.

Perhaps sensing the futility of its reasoning responding to the B&P/R&S request, NS attacks their motivation arguing that the trackage rights sought by R&S "would give R&S more of an economic piece of this traffic." This is not so. All of the R&S traffic that moves

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[6] R&S's customers are well aware of their alternatives. The problems that have been created at Silver Springs as a result of the transaction, have in fact led R&S's customers to re-route traffic to the CSX alternative, and more significantly to truck.

between Silver Springs and Buffalo currently moves in haulage trains. (Both before and after Split Date, the haulage trains have been operated by CP.) Under these arrangements, the traffic stays in the account of R&S, and R&S is entitled to all of the revenue for that portion of the move. Under the B&P/R&S proposal, this will not change; the only change would be the identity of the carrier that handles the traffic with R&S handling the traffic itself, and bearing its cost, instead of paying a haulage fee to another carrier.

This change would not cause additional operating hardships as suggested by NS. NS-2 at 11. In fact, the R&S service proposed would substitute for the CP haulage, would not add any burden to NS facilities, would eliminate some moves by CP in Buffalo, and provide operating efficiencies for NS.[7] BPRR-2/RSR-2, Collins V.S. at 7-8.

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7 This could include the handling of the NS/LAL traffic as described in Section 3 above.

Conclusion

For the foregoing reasons, B&P and R&S ask that the Board exercise its retained jurisdiction and order NS to grant R&S the trackage rights it has requested.

Respectfully submitted,

ERIC M. HOCKY
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(610) 692-9116

Dated: August 15, 2000

Attorneys for Buffalo & Pittsburgh Railroad, Inc. and Rochester & Southern Railroad, Inc.

VERIFICATION

I, David J. Collins, President of Buffalo & Pittsburgh Railroad, Inc. and of Rochester & Southern Railroad, Inc., verify under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file the foregoing document.

Executed on August 15, 2000.

David J. Collins

APPENDIX A

[The document comprising this Appendix is Highly Confidential

and is being submitted separately.]

STB FD-33388 (SUB 91) 8-14-00 D 199500

199500

RBMN-5

BEFORE THE
SURFACE TRANSPORTATION BOARD
STB FINANCE DOCKET NO. 33388 (Sub-No. 91)

D

**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)

**REBUTTAL OF
READING BLUE MOUNTAIN & NORTHERN
RAILROAD COMPANY**

In accordance with the procedures established in *Sub-No. 91, Dec. No. 1*, Reading Blue Mountain & Northern Railroad Company ("RBMN") and other parties filed comments with the Board in this General Oversight Proceeding. RBMN's Comments (RBMN-2) included requests for the Board to impose additional conditions and to enforce a condition previously imposed, such requests being specifically embraced within the Board's retained jurisdiction over the CSX/NS/CR[1] transaction. RBMN's comments and requests were based on the detailed Verified Statements of Wayne Michel (formerly of Conrail and now a consultant to the industry) and Andrew Muller (RBMN's President).

NS filed its Reply (NS-2) to RBMN (as well as to other commenting parties) on August 3, 2000. With respect to RBMN, NS chooses to focus its attack on the messengers

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[1] "Conrail" or "CR" refers to Conrail, Inc. and Consolidated Rail Corporation and their wholly owned subsidiaries. "CSX" refers to CSX Corporation and CSX Transportation, Inc. and their wholly owned subsidiaries . "NS" refers to Norfolk Southern Corporation and Norfolk Southern Railway Company ("NSR") and their wholly owned subsidiaries.

rather than the message. NS offers little but innuendo to contradict any of the factual premises presented by RBMN to justify the relief it is seeking.[2] RBMN requested leave to file this Rebuttal in order to address the errors that permeate NS's reply.

1. The Board has the power to grant the requested relief to address harms from the changes that resulted from the transaction.

NS claims that RBMN's Comments read like a contract complaint and that the Board therefore should not address the issues in this oversight proceeding. NS-2 at 59. However, NS ignores that the changes in circumstances that have altered the economic bargain underlying the RBMN's Lehigh sale agreement with Conrail, as well as the nullification of the no-assignment provision of the contract, are a result of the approval of the CSX/NS/CR transaction granted by the Board, and the Board clearly has the power to impose conditions to ameliorate adverse consequences of its actions.

NS also claims RBMN should not be heard to complain that NS is not living up to the understandings that Conrail and RBMN had on a variety of matters. NS relies on the fact that RBMN signed a written agreement to purchase the Lehigh Line that sets forth "the entire understanding of the parties." NS misleadingly does not quote the entire phrase, which limits the clause to the transactions contemplated by the agreement (the sale of the Lehigh Line and the Conrail EXPRESS and other commercial relationships relating to operation of the line).[3] The split of Conrail's assets between NS and CSX, especially in the form resulting from the approved

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[2] NS's Reply as it relates to RBMN is not supported by any verified statements.

[3] The full clause provides that the agreement sets forth the "entire understanding of the parties hereto *with respect to the transactions contemplated hereby*..." (Emphasis added.)

transaction, was certainly not within the contemplation of RBMN, and probably not of Conrail. NS also fails to inform the Board that, while RBMN signed an agreement with *Conrail* that set forth arrangements with its existing partner, RBMN did *not* agree that the same terms should necessarily apply to a party other than Conrail. The same agreement that NS cites provides that "neither Conrail nor [RBMN] may assign, pledge, encumber, or transfer this Agreement, or any interest herein, without the prior consent of the other party hereto."[4] RBMN has never consented to the assignment t[5]o NS; rather, the Board generally overrode all anti-assignment clauses. *See CSX/NS/CR Dec. No. 89* at 17.[6] That action and the approval of the NS/CSX acquisitions fundamentally changed the RBMN-Conrail agreement contrary to its terms and altered the competitive environment in a manner that could not have been contemplated by RBMN. This is not a question of RBMN trying to change the terms of its purchase agreement to pay less than it agreed, but rather of preventing RBMN from paying too much based on what it is now receiving. Michel V.S. at 11.

2. Diversion of CP's traffic off of the Lehigh Line is not a public benefit.

Perhaps the biggest change economically has been the steps NS took to divert the CP trackage rights traffic off of RBMN's Lehigh Line. NS claims its actions were in the public

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[4] The entirety of both the section cited by NS and the non-assignment section cited by RBMN are attached hereto as Exhibit A.

[5] References to "Michel V.S." are to the Verified Statement of Wayne A. Michel filed in support of RBMN-2.

[6] Although sale agreements were not specifically mentioned in the types of contracts being overridden, the Board later confirmed that RBMN's clause was overridden. *CSX/NS/CR Dec. No. 96* at 19.

interest because it created an alternative routing, and that in any event RBMN had no guarantee that the traffic would continue. However, CP did not have a practicable alternative routing when RBMN contracted with Conrail. While it is true that RBMN accepted the risk that CP traffic would decrease, in fact the CP traffic has not decreased. Rather, it has been diverted. The risk that its partner would divert the traffic for its own gain was not accepted, and with Conrail it never would have happened. RBMN-2 at 6-7; Michel V.S. at 26-27.

Moreover, while CP now has a different route for moving traffic between the Southern Tier in New York and Philadelphia, it is difficult to see the public benefit. NS has not said that the new route is shorter or faster or that shippers will receive lower prices. Cars will continue to move in CP through trains and the change in routes will in fact be invisible to shippers. The only change will be that CP is using its own line that was improved in part with NS dollars, and RBMN is losing trackage rights revenue. As RBMN explained, this loss of bottom line dollars impacts on its ability to maintain the Lehigh line and level of service provided to customers on the line and adversely affects the public interest. Michel V.S. at 26-27.

3. The conditions requested by RBMN are in the public interest.

NS claims that the conditions RBMN requested are not in the "public interest" because RBMN did not claim that customers will experience lower rates. Without support, NS claims: "In fact, RBMN (and CP) would extract the maximum price they could charge for the move. RBMN and CP simply would get more money at the expense of NS." NS-2 at 61. First, it is certainly unclear that NS would lose any money on the "fixed divisions traffic." As noted by RBMN (and not disputed by NS), NS only receives approximately $140 gross revenue per car, and for that must switch the car in Harrisburg and Reading (or Harrisburg, Allentown and Lehighton), and move the car over its main line track between Harrisburg and the point of interchange with RBMN. Michel V.S. at 16-17. Secondly, rates are subject to the constraints of competition from trucks and other railroads, and it is unclear whether rates will be affected.

NS implies that the mere creation of new routes is in the public interest. NS-2 at 61. However, if the new routes are inefficient or cost too much, this is not the case. It is only to the extent new *competitive* routings are established that the public will benefit. RBMN's relief will permit new routings that can be used.

What RBMN can say is that customers will have shorter, more efficient routes, *i.e.*, that service will be faster and more reliable. Improved, more reliable service can also be provided on one-to-two routes. This is clear from the history of the fly ash traffic currently moving between CP and RBMN. *See* Michel V.S. at 22-24; ISGR-2. Certainly, NS would not deny that improved service is a public benefit. *See CSX/NS/CR Dec. No. 89* at 34 (public benefits include "cost reductions, cost savings and service improvements")

Thus, when the facts are viewed in their true light, it is little wonder that NS chose to rely on glib argument rather than verified factual statements.

4. NS does not deny that the impact of the blocking provisions have been expanded.

The Board conditioned its approval of the transaction by requiring CSX and NS to agree that the effect of any blocking provision would not be expanded as a result of the transaction. *CSX/NS/CR Dec. No. 89* at 178, ¶ 39. Nowhere does NS even attempt to deny RBMN's claim that the impact of its contractual restrictions has expanded, at least in the context of fixed division and one-to-two traffic. Thus, the Board should accept this as an admitted violation of the condition and grant RBMN the relief requested.

5. NS's personal attacks on RBMN's witnesses are unwarranted and unfounded.

Rather than refute RBMN's comments and request for conditions, NS spends most of its reply to RBMN (3 of the 4 pages) criticizing RBMN's President and Executive Vice President who provided supportive testimony. Mr. Muller is criticized for entering into the Lehigh sale agreement based on a six-year course of dealings with Conrail and its personnel, and for not having every understanding with Conrail put in writing.[7] However, no testimony is presented to contradict any of these understandings.

The NS approach seems to focus on attacking the integrity of its perceived opponents. Even before Split Date, Mr. Muller was personally criticized in a letter sent to Mr. Muller by an NS vice president (and copied to a number of Pennsylvania elected officials). Although NS apologized some 8 months later,[8] this methodology of dealing with RBMN is not the way to build shortline relations, despite NS's bravado in making its unsubstantiated offer to compare its record of dealing with shortlines to other Class I railroads.

NS is also critical of the testimony of Mr. Michel, asserting that his "current perspective, however, could be equally influenced by his present position as an employee of RBMN," and inferring that his position on the relevant issues is different now than it was at

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[7] RBMN will certainly take the NS Reply as an instruction on how RBMN should deal with NS, and it will insist that all understandings are put into writing.

[8] The original letter dated February 26, 1999, and the September 24, 1999 follow-up, are attached hereto as Exhibit B.

Conrail. NS-2 at 60.[9] However, a reading of Mr. Michel's verified statement makes it clear that his views have not changed. Rather, as explained by Mr. Michel, it is the railroad landscape that has changed as a result of the CSX/NS/Conrail transaction designed by NS and CSX and approved by the Board.

Mr. Michel *is* clearly in a unique position to describe the Conrail perspective in working with shortlines and in designing and entering into the Lehigh sale agreement with RBMN. Since he was at Conrail at the time and working on these matters, his views on the additional consideration language and trackage rights restrictions, how they were designed and what they were designed to do, are significant. NS has not presented any testimony to demonstrate that any of what Mr. Michel stated is anything other than absolutely correct. Indeed, NS called on him, both before the Split Date while he was at Conrail, and thereafter including as recently as in May, 2000, to discuss the Conrail sales agreements and the EXPRESS program.

Mr. Michel, now that he has been retained as a consultant to RBMN to work on relations with NS and other Class I carriers, is also in the position to be able to comment on how the commercial relationships changed after the Split Date, and how the contractual restrictions are no longer operating the way they were designed to operate. It is because of these changes that

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[9] As described in his Verified Statement, while at the ICC, Mr. Michel worked on the report that examined and ultimately recommended against the sale of Conrail to NS. When he went to Conrail three months later, NS similarly took the opportunity to attack in the press his credibility and that of the report. The ICC responded in support of the report and the work of Mr. Michel and the dozen or so analysts who had worked on it. In fact, Mr. Michel recused himself from all matters involving Conrail as soon as he was approached for employment.

Mr. Michel believes the restrictions should be removed; it is not because of the change in where he works.[10]

The Board should focus on the substance of what RBMN has presented and on the lack of contradictory evidence presented by NS, and should not be diverted by NS's gratuitous impugning of RBMN's witnesses.

Conclusion

For the foregoing reasons and the reasons set forth in its initial Comments, RBMN requests that the Board grant the relief described in its initial Comments.

Respectfully submitted,

Eric M. Hocky

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(610) 692-9116

Dated: August 11, 2000

Attorneys for Reading Blue Mountain & Northern Railroad Company

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[10] Indeed, he stated that no charges would be necessary if Conrail were still RBMN's connecting carrier. Michel V.S. at 32-33.

VERIFICATION

I, Wayne A. Michel, Executive Vice President of Reading Blue Mountain and Northern Railroad Company, verify under penalty of perjury that the foregoing Rebuttal is true and correct. Further, I certify that I am qualified and authorized to file the foregoing document.

Executed on August 11, 2000.

Wayne A. Michel

Wayne A. Michel

EXHIBIT A

Closing, pursuant to section 4.1.2.(e) or section 6.1., is not acceptable to Purchaser. Purchaser's election not to terminate this Agreement pursuant to this provision shall constitute an acceptance of any modifications of a representation made by Conrail pursuant to this Agreement, and shall foreclose Purchaser from asserting any rights or seeking any redress which is inconsistent with the modified representation.

12.3.3. By Conrail only, if (i) a condition imposed on the transaction by the STB is not acceptable to Conrail and Conrail gives the notice required by Section 4.1.1.(c), or (ii) Conrail reasonably believes that Closing would result in a disruption, strike or other work stoppage on or over all or any part of its system.

12.4. Entire Agreement; Amendment. This Agreement and the Appendices hereto set forth the entire understanding of the parties hereto with respect to the transactions contemplated hereby and may not be amended except by written instrument executed by the parties. Any previous agreements or understandings between the parties regarding the subject matter hereof are merged into and superseded by this Agreement.

12.5. Survival of Terms. All representations (as modified pursuant to the provisions hereof), warranties, covenants, terms, conditions, stipulations, and provisions of this Agreement shall survive Closing and be binding upon and inure to the benefit of, and be enforceable by, the Parties, and their successors and assigns.

12.6. Assignment.

12.6.1. Except as provided in this section, neither Conrail nor Purchaser may assign, pledge, encumber, or transfer this Agreement, or any interest herein, without the prior written consent of the other party hereto.

12.6.2. Conrail may, prior to Closing, assign or transfer all or any portion of its rights and interests pursuant to this Agreement, and its equitable interests in and to the Property, to a Qualified Intermediary, provided that no such assignment or transfer shall prevent performance by Conrail of its obligations hereunder, including the obligations to close in accordance with the provisions of this Agreement, or affect Conrail's representations and warranties herein or the allocation of liability hereunder, or the rights and interests to be acquired by Purchaser at Closing. Such Qualified Intermediary may, after Closing, reassign all or any part of such rights and interests back to Conrail.

12.6.3. Purchaser may from time to time assign to an Operator the provisions of sections 5, 9, 10 and 11 by providing notice to Conrail giving the name and business contact of the Operator, provided the proposed Operator has completed a Train II SPLC Junction Table Update Request and has been assigned AAR alpha and numeric reporting marks. No such assignment shall release Purchaser from any obligation, duty or liability undertaken in this Agreement, including those contained in sections 5, 9, 10 and 11, or increase the duties or obligations of Conrail in any manner. Purchaser may not make a partial or multiple assignment of the aforesaid provisions, and only one party, either Purchaser or a single Operator designated by it, shall at any one time have and exercise the rights of Purchaser pursuant to said sections.

12.7. <u>Beneficiaries</u>. Except as specifically otherwise provided herein, this

Agreement is intended for the sole benefit of the parties hereto. Nothing in this Agreement is intended to or may be construed to give any person, firm, corporation, or other entity, other than the parties hereto, any rights pursuant to any provision or term hereof, and all provisions and terms of this Agreement are and shall be for the sole and exclusive benefit of the parties to this Agreement.

12.8. Governing Law. This Agreement and the rights and obligations accruing hereunder shall be construed and enforced in accordance with the laws of the United States and the Commonwealth of Pennsylvania.

12.9. Appendices. All appendices referred to in this Agreement are intended to be, and are hereby, specifically made a part of this Agreement.

12.10. Waiver. No waiver by either party of any failure of or refusal by the other party to comply with any obligation under this Agreement shall be deemed a waiver of any other or subsequent failure or refusal so to comply.

12.11. Time, Tender. Time shall be of the essence of this Agreement. Formal tender of deed and purchase money is hereby waived.

12.12. Broker. Purchaser and Conrail each represent to the other that it has not dealt with any broker in connection with the transaction contemplated by this Agreement. Each party hereto shall assume and indemnify the other from any obligation arising from or in connection with any action by any broker or other party alleging that such broker or other party is entitled to a commission or other compensation, on the basis that it has dealt with such party for the sale or purchase of the Property.

EXHIBIT B

MAR 0 3 HARRISBURG

NS NORFOLK SOUTHERN

Norfolk Southern Corporation
Corporate Affairs
Two Commerce Square Corporate Affairs
2001 Market Street, Suite 24
Philadelphia, PA 19103

H. Craig Lewis
Vice President

215-209-4284 Phone
215-209-4286 Fax

February 26, 1999

Mr. Andrew Muller, Jr.
Chairman and C.E.O.
Reading Blue Mountain and Northern Railroad
P.O. Box 218
Port Clinton, PA 19549

Dear Andy:

I am informed that you are renewing your efforts, through members of the Pennsylvania Legislature, to purchase or otherwise acquire access and use of the abandoned railroad bridge across the Lehigh gorge which is now a part of the State Park System.

Norfolk Southern Corporation vigorously opposes your acquisition proposal and takes strong issue with the justifications you allege to support your request.

We view your efforts as nothing less than a bald attempt to circumvent the clear, written agreements you made with Conrail when you purchased your railroad segments from them. We note that you have made other repeated attempts to avoid or invalidate the agreement during the Conrail acquisition process. These efforts have been rejected or dismissed at every level.

Norfolk Southern has reached out to you on numerous occasions across the last eighteen months to explore opportunities to increase rail business and promote economic development in Pennsylvania. You have been extended new opportunities to interact with the Canadian Pacific, new business at a flour mill in Northeastern Pennsylvania, significant investments from Norfolk Southern of time and work product from our Industrial Development and Engineering personnel, and market development meetings with our Shortline and Coal Marketing staffs; the most recent being last week.

I recite these Norfolk Southern efforts to develop new business opportunities with you to underscore the preposterousness of your allegations to Legislators that there are lots of new anthracite coal marketing prospects that will immediately blossom if only they will help you shed the yoke of this big, bad railroad. Andy, you know this is pure fiction and, I believe, it is the reason you have refused to accept the offer I have made, more than a half-dozen times, through Legislators, administration officials, other Norfolk Southern personnel and personally, to meet and have a full, open discussion about what we can all do through our railroads to promote new opportunities for Pennsylvania's industries. I renew that offer.

I regret that you continue to engage in activities that appear to be intended, principally, to promote your individual interests. Norfolk Southern believes there are tremendous opportunities to promote increased rail freight for all carriers in the Commonwealth as well as economic development throughout the State. We encourage and welcome your efforts in that regard.

Sincerely,

Cc: Senator Roger A. Madigan
Senator J. Barry Stout
Senator James J. Rhoades
Senator Edwin G. Holl
Senator Raphael J. Musto
Representative Richard A. Geist
Representative Joseph W. Battisto
Representative Keith R. McCall
Secretary Bradley Mallory
Secretary John C. Oliver III
Deputy Secretary Elizabeth Voras
Senior Counselor Pat Solano

R. F. Timmons
J. H. Friedmann
G. W. Schafer III

NORFOLK SOUTHERN

Norfolk Southern Corporation
Corporate Affairs
2 Commerce Square, 24th Floor
2001 Market Street
Philadelphia, PA 19103
215 209-4285

H. Craig Lewis
Vice President

215-209-4284 Phone
215-209-4286 Fax

September 24, 1999

Mr. Andy Muller, Jr., Chairman and CEO
Reading Blue Mountain and Northern Railroad
1 Railroad Boulevard
P.O. Box 218
Port Clinton, PA 19549

Dear Andy:

I am very pleased with the evolution of the Norfolk Southern and Reading Blue Mountain and Northern relationship over the past eight months. As I have watched developments in your region, I am convinced that we have bridged the difficult communication and trust issues that got in the way of our business relationship. It was most unfortunate that a better start at working together did not occur two years ago. To the extent that we at Norfolk Southern contributed to this lack of understanding, we truly regret it. As the new Class I railroad in the Commonwealth, understanding your issues and concerns as we developed our operating plans and projects could have reduced confusion and resentment. Very fundamentally, this is a textbook example of both personal and professional communication failures.

That are behind us, the contacts and meetings that have occurred during the past few months among Norfolk Southern personnel from Shortline Marketing, Law, Public Affairs, Coal Marketing and Merchandise Marketing and your management and marketing team at Reading Blue Mountain and Northern have made great strides that will benefit both our companies in the years to come. We are pleased and encouraged by these efforts. The foundation has been laid for cooperation and expanded customer service in Northeastern Pennsylvania that is going to be very productive as both railroads garner additional customers. I applaud your efforts at building this new partnership with Norfolk Southern and look forward to working closely with you in the future as we provide timely service to business and industry throughout the State.

Sincerely,

Craig

H. Craig Lewis
Vice President Corporate Affairs

bcc: R. F. Timmons
D. A. DiLeo

STB FD-33388 (SUB 91) 8-14-00 D 199498

199498

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Mr. Vernon A. Williams, Secretary
Surface Transportation Board
1925 K Street, N.W., 7th Floor
Washington, DC 20423

Re: Finance Docket No. 33388 (Sub-No. 91),
<u>CSX Corporation, et al. ("Oversight")</u>

Dear Secretary Williams:

Enclosed is a letter from my client, Indianapolis Power & Light Company ("IPL"), to me, which it has asked me to forward to you for filing in the above-referenced proceeding. The letter responds to factual statements by Mr. William Clark, a witness on behalf of Norfolk Southern ("NS") in this proceeding, about IPL, which IPL demonstrates are not correct.

Good cause exists to permit this filing, because NS has made an argument -- that it sent to IPL and that IPL received (see NS-2, August 3, 2000 Reply at 27-29; Clark V.S. at 3) -- two letters, dated February 7, 2000 and May 17, 2000, **that were never received by IPL, and, based on circumstantial evidence, were never even sent by NS.** IPL could not have anticipated, in its July 14, 2000 Response herein, that NS would claim to have sent IPL letters that IPL never received. Moreover, even if the letters were sent, if NS intended to rely on those letters as a reason why IPL's remedy at its Stout Plant was working satisfactorily and did not need to be altered, it should have included them in its June 1, 2000 Report herein so that IPL could have responded accordingly on July 14, 2000, since it knew from prior pleadings here and in the Second Circuit that IPL was asserting that the remedy was not effective. Moreover, Mr. Clark asserted that IPL "never provided us the information we requested" (Clark V.S. at 2), but IPL did provide NS with its terms, as Mr. Weaver's enclosed letter explains, and NS did provide its June 30, 1999 rate quotes to IPL based on that information. Unless IPL is now permitted to set the record straight, its credibility will have been challenged without the opportunity for IPL to defend itself.

Mr. Clark claims to have sent his letters of February 7, 2000 and May 17, 2000 to IPL, but Mr. Weaver, the supposed addressee, swears that IPL never received them, and that he (Mr. Weaver) has no recollection of receiving them. Moreover, there are other indications that the letters dated February 7, 2000 and May 17, 2000 were never sent. For one thing, the letters are unsigned, whereas Mr. Clark's June 30, 1999 letter (attached to IPL's July 14, 2000 filing as Attachment C) is signed. Moreover, Mr. Weaver has a distinct recollection of calling Mr. Clark several times to ask him to respond to IPL's letters, but Mr. Clark did not return those calls. Mr. Clark did meet with IPL, as both sides agree, but at the meeting on February 17, 2000, Mr. Weaver clearly recalls asking Mr. Clark why he had not responded to IPL's October 4, 1999 or January 31, 2000 letters, and Mr. Clark apologized, saying he would "get his letter out" or words to that effect. That clearly shows Mr. Clark never sent the letter dated February 7, 2000. Moreover, if he had, when Mr. Clark got Mr. Weaver's letter of May 16, 2000 (which he admits he did), which letter indicates that IPL never got a response from NS to its October 4, 1999 or January 31, 2000 letters, Mr. Clark would have sent Mr. Weaver another copy of his February 7, 2000 letter. That also proves that the February 7, 2000 letter was never sent. It would seem logical that, if NS had ever responded to IPL's October 4, 1999 or January 31, 2000 letters, the May 17, 2000 NS letter would say so, but it does not.

Finally, the February 7, 2000 and May 17, 2000 letters have nothing typed under the word "Sincerely" at the end, whereas Mr. Clark's June 30, 1999 letter has his name typed and three "CCs" shown on the letter. It therefore appears that what Mr. Clark claims are letters NS sent to IPL are, in fact, merely drafts that were not sent. Indeed, the May 17, 2000 letter says "Please excuse the delay in getting back to you" and "As I mentioned in our last meeting," indicating that NS did **not** send its letters to IPL, but rather dealt with IPL orally after sending its first and only letter on June 30, 1999.

For all of these reasons, I ask the Board to include Mr. Weaver's letter and this letter in the record of this proceeding, and to conclude that NS never provided IPL a response in writing to its letters of October 4, 1999, January 31, 2000, and May 16, 2000. If the Board so concludes, that should support a conclusion that it is IPL, and not NS, which has presented a correct history of the discussions between the two companies. In any event, both Mr. Weaver and I stand behind the filing made on behalf of IPL on July 14, 2000 in the above-referenced proceeding, **in all respects**.

We are enclosing 25 copies of this letter along with a diskette containing its contents in WordPerfect format for filing herein. Please date stamp and return the three additional copies via our courier.

Respectfully submitted,

Michael F. McBride

Michael F. McBride

Attorney for Indianapolis Power & Light Company

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

IPL

INDIANAPOLIS POWER & LIGHT COMPANY

August 11, 2000

Michael F. McBride, Esq.
LeBoeuf, Lamb, Greene & MacRae, L.L.P.
1875 Connecticut Avenue, N.W.
Suite 1200
Washington, DC 20009-5728

Dear Mike:

This letter is intended for filing at the Surface Transportation Board in the Conrail "Oversight" proceeding, Finance Docket No. 33388 (Sub-No. 91).

I have reviewed Mr. William Clark's Verified Statement filed on behalf of Norfolk Southern in that proceeding, and want you to inform the STB that it contains serious factual errors. I have not seen the letters Mr. Clark refers to of February 7, 2000 and May 17, 2000 because NS designated them as "Highly Confidential." However, unlike IPL's letters to Mr. Clark, which Mr. Clark clearly received, **IPL did not receive Mr. Clark's letters dated February 7, 2000 and May 17, 2000, despite his claims that we did.** A thorough search of our files has been made, and those letters are not in our files. Also, I was the supposed addressee of those letters but I have no recollection of having seen them.

I asked you if the February 7, 2000 and May 17, 2000 letters were signed, and you said they were not. I note that, in contrast, Mr. Clark's letter to IPL of June 30, 1999 was signed, and is included in IPL's filing of July 14, 2000. I called Mr. Clark on at least three occasions to ask that he respond to IPL's letters, copies of which are included in IPL's July 14, 2000 filing, but he did not. Moreover, when I met with Mr. Clark on February 17, 2000, well after he claims to have sent me his February 7, 2000 letter, I asked him when he was going to respond to our January 31, 2000 letter, and he apologized and said he would "get it out" or words to that effect. I conclude that he had not sent his letter to me as of February 17, 2000, despite his Verified Statement.

Lastly, when NS received my letter of May 16, 2000 (which was faxed to it), Mr. Clark could have sent me his February 7, 2000 letter again, if in fact it had been sent previously, but he did not. That also shows he did not send the February 7, 2000 letter to me, as does the text of my May 16, 2000 letter, which noted that IPL had not received responses from NS to its letters of October 4, 1999, or January 31, 2000.

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I therefore reiterate that IPL never received a response in writing from NS to IPL's letters of October 4, 1999, January 31, 2000, and May 16, 2000, as I stated in my Verified Statement. The only responses from NS were oral, from Mr. Clark, and I again reiterate that my characterization of those statement by Mr. Clark are true and correct.

Finally, contrary to Mr. Clark's claims, IPL did provide NS, in 1998, with information about such things as place of interchange, delivery point(s), that the coal might go to our Stout Plant or via CSX to our Perry K Plant, the minimum capacity of the cars, and that the trains would have 50 cars among other information. See letters dated June 9, 1998 and November 19, 1998 (attached). It was obviously enough information for NS to provide rates and terms on June 30, 1999, as Conrail had done by tariff, without knowing total volumes. The June 9, 1998 letter authorized NS to have access to IPL's contract with Conrail, which contained other information Mr. Clark claims he desired but that IPL supposedly did not provide. As this history shows, we did provide the information.

I am qualified to make this statement. Sworn to under penalty of perjury on the date above written.

Very truly yours,

Michael A. Weaver

Michael A. Weaver
Manager, Fuel Supply

IPL

INDIANAPOLIS POWER & LIGHT COMPANY

November 19, 1998

Mr. William Clark
Norfolk Southern Corporation
Three Westbrook Corporate Center
Suite 440
Westchester, IL 60154-5730

Dear Mr. Clark:

On June 9, 1998, Indianapolis Power & Light Company's Washington counsel requested rates and services applicable to transportation of unit coal trains of 5,000 tons.

The interchange point of the trains would be the ISRR interchange in Indianapolis. The train(s) would then be delivered to E.W. Stout Station directly or to CSX for delivery to C.C. Perry K Station. Minimum marked capacity of the bottom dump cars is 196,000 pounds. The service should also include movement of empty and home shop cars from the generating station(s) to the ISRR interchange.

Due to the timetable dictated by the STB on determining the ISRR interchange and the rapidly approaching split date, it is imperative that expeditious action be taken on the rate and service request.

Thank you for your attention on this matter.

Sincerely,

Michael A. Weaver

Michael A. Weaver
Manager, Fuel Supply

/at
cc: D. W. Knight

[redacted]

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June 9, 1998

Via Facsimile and First-Class Mail

Richard A. Allen, Esq.
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1330 Connecticut Ave., N.W.
Washington, DC 20036

Re: CSX Corp./Norfolk Southern Corp. -- Control and Operating Leases/Agreement -- Conrail; Finance Docket No. 33388

Gentlemen:

Given that the Board yesterday allowed each of your clients access to Indianapolis Power & Light Company's Stout Plant, and given that Applicants deem IPL's Perry K Plant a "2 to 1" facility and thus presumably the Board's July 23 Decision will treat it as such, it is appropriate for each of your clients to have access to IPL's Conrail Contract (ICC-CR-C-4553), and you are hereby authorized to inform them that they are permitted to have access to that Contract.

IPL's senior management urgently desires to know the rates and service that will apply to the transportation of unit trains of 5000 tons of coal, in IPL cars, to both Stout and Perry K in order to determine the feasibility of the Board's decision. In the circumstances, please ask your respective clients to treat this as a matter of the highest priority and inform them that IPL requires a response as soon as possible, but in any event, no later than Monday, June 29, 1998. IPL needs this information promptly because it is now in the process of making decisions about fuel purchases for next year. If it does not hear from either of your clients, IPL will conclude that your client(s) cannot compete under the Board's decision or are not serious about competing for IPL's business.

Sincerely,

Brenda Durham for Michael F. McBride

Michael F. McBride
Attorney for Indianapolis Power & Light Company

STB FD-33388 (SUB 91) 8-11-00 D 199488

199488

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August 11, 2000

By Hand Delivery—Original and 25 Copies
The Honorable Vernon A. Williams
Secretary, Surface Transportation Board
Room 700
1925 K Street, N.W.
Washington, D.C. 20423

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

Dear Secretary Williams:

CSX Corporation and CSX Transportation, Inc. (CSX) and Norfolk Southern Corporation and Norfolk Southern Railway Company (NS) have reviewed the August 3, 2000 Reply submitted by the U.S. Department of Transportation (DOT) in the Conrail General Oversight proceeding (the Oversight Proceeding). We take this opportunity jointly to address certain issues that the DOT reply raises with regard to service issues and the Board's environmental review process.

We agree with DOT's statement that "transitional problems call for, at best, transitional remedies." As noted by DOT, many of the service issues raised by interested parties in the Oversight Proceeding relate to temporary problems that either have been or will be addressed by CSX and NS. This is, of course, consistent with the Board's long-standing practice of handling service-related matters informally through the Section of Compliance and Enforcement's operational monitoring process.

Much the same can be said with regard to transitional environmental impacts. Local environmental impacts are being addressed through compliance with the detailed and numerous Environmental Conditions imposed by the Board in its decision approving the Conrail Transaction, through implementation of the various negotiated agreements between the railroads and local communities and, importantly, through continued consultations with the local communities. CSX and NS are conferring with communities to understand their unique concerns, to inform the communities of the steps the railroads can take to mitigate certain impacts, to explain the railroads' operational and safety needs and to develop workable strategies to improve local conditions where practicable. CSX and NS submit that their continuing efforts in this regard, as described in their June 1, 2000 First General Oversight Reports and their August 3, 2000 Replies, underscore that there is no basis for the Board to consider any further mandatory environmental conditions or studies in this case.

CSX and NS agree with the Board's conclusion in its pending review of rail merger rules, Ex Parte 582 (Sub-No. 1), that there is no need to revise the STB environmental guidelines applicable in such proceedings. That conclusion is no less valid in the Conrail Transaction. The Board's existing environmental review rules and practices allow for a detailed assessment of a proposed transaction based on a wealth of data. These rules and practices encourage negotiated solutions to local environmental impacts related to a proposed transaction. The Board's procedures strike an appropriate balance between the need to protect against overall adverse environmental impacts and the applicants' need for finality to make a reasoned judgment as to whether to proceed with the conditioned transaction, a balance required for the sound administration of the National Environmental Policy Act. As the Board recognized in Decision No. 96 of this docket, the STB's established practice permits rail carriers to react to changing commercial, operational and economic conditions, recognizing the fundamental role shipper demands play in determining rail traffic. The alternative would open the door to a never-ending review process that is not consistent with those critical elements of the Board's environmental review approach or with negotiated solutions.

We appreciate the Board's consideration of our position.

Respectfully submitted,

Constance A. Sadler

Constance A. Sadler
On behalf of CSX Corporation
and CSX Transportation, Inc. and
Norfolk Southern Corporation and Norfolk
Southern Railway Company

cc: Peter J. Shudtz
Dennis G. Lyons
David H. Coburn
J. Gary Lane
Richard A. Allen