

STB

FD-33388

(SUB 91)

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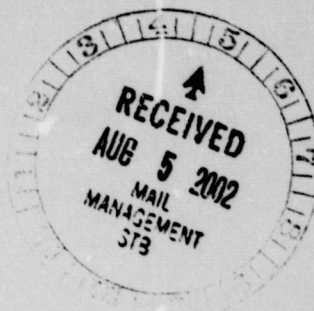


BRUSSELS CINCINNATI CLEVELAND COLUMBUS DAYTON WASHINGTON, D.C.

August 5, 2002

*By Hand*

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



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

Dear Secretary Williams:

205982

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

205980

205981

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

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

Sincerely,

*Jeff Moreno/pdp*  
Jeffrey O. Moreno  
Attorney for Gargill, Incorporated

cc: Mr. Jeffrey Johnson  
Mr. Ron Hunter

ENTERED  
Office of Proceedings

AUG 06 2002

Part of  
Public Record

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CARG-4

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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

205982

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



[GENERAL OVERSIGHT]  
\_\_\_\_\_

**MOTION TO FILE COMMENTS OUT OF TIME**

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

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

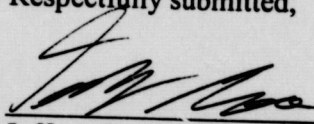


Cargill was first alerted to this potential issue in a July 12, 2002 teleconference with NS, during which NS expressed some concerns about the future economic viability of the existing interchange operations with CSX. These concerns took greater shape on July 18, 2002 when NS publicly announced a rate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

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

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

Respectfully submitted,



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

*Attorneys for Cargill, Incorporated*

August 5, 2002



**CERTIFICATE OF SERVICE**

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

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Of Counsel:

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

Pamela D. Plummer  
Pamela D. Plummer

\*by hand

CARG-5

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

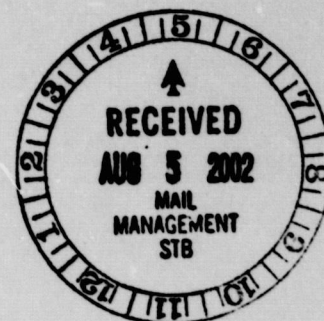
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**STB FINANCE DOCKET NO. 33388 (SUB-NO. 91)**

205980

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

\_\_\_\_\_  
[GENERAL OVERSIGHT]

**COMMENTS OF CARGILL, INCORPORATED**



**ENTERED  
Office of Proceedings**

**AUG 06 2002**

**Part of  
Public Record**

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

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



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

CSX and NS designated Sidney a 2-to-1 point in their merger application and listed Cargill as a 2-to-1 shipper. See Verified Statement of James W. McClellan, CSX/NS-18, Vol. 1 at 546 and 549. In order to preserve two carrier competition at Sidney, they entered into a trackage rights agreement and a switching agreement to give NS access to Sidney shippers over approximately 33 miles of CSX track extending north from Sidney to Lima, Ohio. See CSX/NS-25, Vol. 8B, at 543-50; CSX/NS-25, Vol. 8C, at 616-39, respectively. After the division of Conrail, however, CSX and NS concluded that these agreements did not establish a convenient interchange at Sidney. Therefore, a new interchange was established at Marion, Ohio, approximately 60 miles east of Sidney on the former Conrail line. Hammes V.S. at 2. Since the merger, Cargill has accessed NS under the agreement establishing the Marion interchange, at rates that Cargill believes were competitive to those offered by Conrail pre-merger. Id.

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

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

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

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

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



Marion, Ohio for the railroads' operating convenience and NS represented to Cargill that the cost of switching Cargill's Sidney facility would be no greater than it had been under Conrail.

Hammes V.S. at 2. Cargill should not have to pay a rate that reflects costs that are greater than those that would have been incurred under the agreements that CSX and NS presented as part of their merger application.

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

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

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

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

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

Respectfully submitted,



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

*Attorneys for Cargill, Incorporated*

August 5, 2002



**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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

*205981*  
**CSX CORPORATION AND CSX TRANSPORTATION, INC.,  
NORFOLK SOUTHERN CORPORATION AND  
NORFOLK SOUTHERN RAILWAY COMPANY  
— CONTROL AND OPERATING LEASES/AGREEMENTS —  
CONRAIL INC. AND CONSOLIDATED RAIL CORPORATION**

**[GENERAL OVERSIGHT]**

**Verified Statement of Paul Hammes**



**ENTERED  
Office of Proceedings**

**AUG 06 2002**

**Part of  
Public Record**

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

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

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

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

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

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

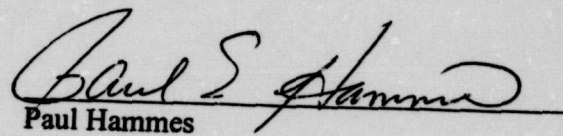


On July 12, 2002, Pat Simonic of NS telephoned me with concerns about the Marion interchange. NS had been accruing internal charges on Cargill's moves at a much lower cost than the recently revised costs that exceed \$600 per car. Since NS cannot afford to absorb the difference between those costs and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

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

**Verification**

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

  
Paul Hammes



**EXHIBIT 1**

Mooney, Angie /hdqt

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

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

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

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

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

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

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

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



. . . . .

**CERTIFICATE OF SERVICE**

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

Henry D. Light  
James A. Squires  
George A. Aspatore  
Greg E. Summy  
John V. Edwards  
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*Attorneys for Norfolk Southern Corporation  
and Norfolk Southern Railway Company*

Of Counsel:

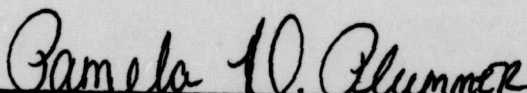
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*Counsel for Applicants  
CSX Corporation and  
CSX Transportation, Inc.*

  
Pamela D. Plummer

\*by hand

STB

FD-33388

( SUB 91 )

8-22-01

I

203216



# LEBOEUF, LAMB, GREENE & MACRAE L.L.P.

A LIMITED LIABILITY PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

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EXPEDITED CONSIDERATION REQUESTED

August 22, 2001

**VIA HAND DELIVERY**

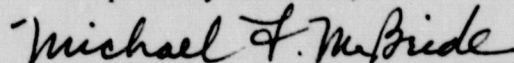
Mr. Vernon A. Williams, Secretary  
Surface Transportation Board  
1925 K Street, N.W., Seventh Floor  
Washington, D.C. 20423

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

Dear Secretary Williams:

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

Respectfully submitted,



Michael F. McBride  
Bruce W. Neely

Attorneys for Indianapolis Power & Light  
Company

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

LONDON  
(A LONDON-BASED  
MULTINATIONAL PARTNERSHIP)

PARIS

BRUSSELS

MOSCOW

RIYADH  
(AFFILIATED OFFICE)

TASHKENT

BISHKEK

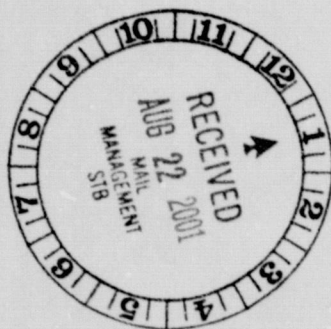
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BEIJING

ENTERED  
Office of the Secretary

AUG 22 2001

Part of  
Public Record

**EXPEDITED CONSIDERATION REQUESTED**

UNITED STATES OF AMERICA  
SURFACE TRANSPORTATION BOARD

ENTERED  
Office of the Secretary

AUG 22 2001

Part of  
Public Record

\_\_\_\_\_  
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)

\_\_\_\_\_

**MOTION OF INDIANAPOLIS POWER & LIGHT COMPANY  
TO FILE A RESPONSE TO AUGUST 6, 2001 REPLIES  
OF CSX AND NORFOLK SOUTHERN  
TO IPL'S JULY 16, 2001 COMMENTS**

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Attorneys for Indianapolis Power & Light  
Company

August 22, 2001



UNITED STATES OF AMERICA  
SURFACE TRANSPORTATION BOARD

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

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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)

---

**MOTION OF INDIANAPOLIS POWER & LIGHT COMPANY  
TO FILE A RESPONSE TO AUGUST 6, 2001 REPLIES OF CSX AND  
NORFOLK SOUTHERN TO IPL'S JULY 16, 2001 COMMENTS**

Indianapolis Power & Light Company ("IPL") hereby moves for leave to file a brief Response to the Replies of CSX Corporation and CSX Transportation, Inc. ("CSX") and Norfolk Southern Corporation and Norfolk Southern Railway Company ("NS"), filed August 6, 2001. As grounds for this Motion, IPL states:

1. Most importantly, CSX and NS made arguments in their August 6, 2001 Replies which were not anticipated by IPL, nor could they have been. Accordingly, IPL should be allowed to respond to them, because those arguments were not addressed in IPL's July 16, 2001 Comments. The arguments include: that IPL should have presented the substance of its ongoing negotiations with The Indiana Rail Road Company, rather than to analyze whether NS is able to provide "efficient and competitive" service as a substitute for Conrail's competitive service to IPL; whether CSX could change "very quickly" its tariff, which it represented to the Board it would publish, but which it now, for the first time, claims is a "paper rate," thus abrogating its

representation to the Board; whether Indiana Southern has a conflict of interest in trying to defeat NS's ability to compete, and whether IPL has altered its position on the efficacy of a "build-out" at the Stout Plant, among other arguments. Each of these arguments is new to this proceeding, and was unanticipated by IPL, and therefore in the circumstances IPL should have a right to file its accompanying Response.

2. Moreover, CSX has not completely or accurately summarized the ongoing negotiations between IPL and The Indiana Rail Road Company, CSX's "appendage" (to use the Board's word), and the Board should certainly have accurate information before it if it is to rely on those ongoing negotiations. IPL vigorously asserts that it should not rely on them, for they are not the issue in determining whether NS can provide "efficient and competitive" service to replace Conrail, but having only a one-sided view of those negotiations is surely not appropriate.

2.. Given the decisions of the Second Circuit in Erie-Niagara Rail Steering Committee v. STB, 247 F.3d 437 (2nd Cir. 2001) and of the D.C. Circuit in Indianapolis Power & Light Co. v. STB, No. 01-1005 (D.C. Cir., July 26, 2001)(unpublished), it is clear that this is the only proceeding in which IPL may get relief, if further relief is warranted. The STB itself so informed each Court of Appeals in its pleadings in those cases, and urged each Court to treat IPL's arguments as "premature" in light of IPL's right to obtain relief in this "Oversight" proceeding.

3. The Board may be of the view that IPL has the burden of proof under the Administrative Procedure Act, 5 U.S.C. § 553, as the "proponent of the rule or order," and if so IPL should have the last word on the merits before the Board rules.<sup>1</sup>

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<sup>1</sup> Given that the Board has previously held that IPL was entitled to competitive remedies in the underlying proceeding, and given the Board's duty under 49 U.S.C. § 11324 to ensure that the transaction does not harm rail-to-rail competition or the public interest, it may be that IPL does not have the burden of proof, Scenic Hudson Preservation Conference v. FPC, 354 F.2d (continued...)



4. No harm will come to any party if IPL is granted leave to file its Response, because there is no need for further pleadings concerning it, doing so would merely allow IPL to be heard on issues it was not heard on before, and the filing of the Response should not delay the proceeding. Even if it caused a slight delay, that would be more than outweighed by the fundamental fairness leave to file would afford IPL, so that it might have a right to be heard on new issues (whether or not it has the burden of proof), and because any delay in providing IPL an "efficient and competitive" remedy harms only IPL, not CSX or NS.

Conclusion

For the foregoing reasons, IPL should be granted leave to file the accompanying Response to CSX's and NS's August 6, 2001 Replies.

Respectfully submitted,

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Company

August 22, 2001

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<sup>1</sup>(...continued)

608, 620 (2d Cir. 1965)("[agency's role as a representative of the public interest] does not permit [the agency] to act as an umpire blandly calling the balls and strikes for adversaries appearing before it; the right of the public must receive active and affirmative protection at the hands of the [agency]". The burden-of-proof issue may not need not be decided definitively here, in light of IPL's other reasons for being allowed leave to file this Response, but IPL does believe that it has sustained its burden to be entitled to an "efficient and competitive" remedy previously, if it had one.

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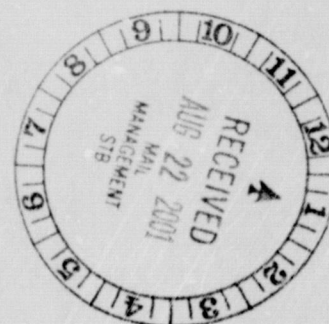
**VIA HAND DELIVERY**

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

ENTERED  
Office of the Secretary

AUG 22 2001

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Public Record



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

Dear Secretary Williams:

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

Respectfully submitted,

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Bruce W. Neely

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