

STB FD-33388 (SUB 91) 8-29-00 I 199613

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August 29, 2000

BY HAND DELIVERY

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

Please acknowledge receipt of this filing by date-stamping the additional three enclosed copies of NS-4 and returning them to our messenger.

Many thanks for your assistance.

ENTERED
Office of the Secretary

AUG 29 2000

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Public Record

Sincerely,

Scott M. Zimmerman

Enclosures

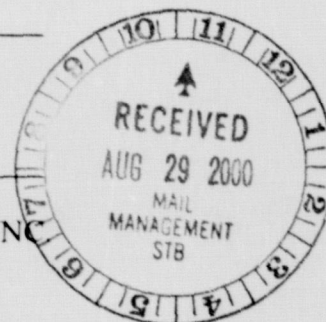
cc (w/ enc.): All parties of record in
Finance Docket No. 33388 (Sub-No. 91)

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 BPRR-3/RSR-3
OR, IN THE ALTERNATIVE,
NS'S RESPONSE TO BPRR-4/RSR-4 AND MOTION FOR LEAVE TO FILE**

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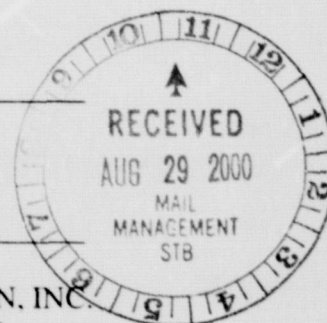
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*Attorneys for Norfolk Southern Corporation
and Norfolk Southern Railway Company*

Date: August 29, 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 BPRR-3/RSR-3
OR, IN THE ALTERNATIVE,
NS'S RESPONSE TO BPRR-4/RSR-4 AND MOTION FOR LEAVE TO FILE**

Norfolk Southern Corporation and Norfolk Southern Railway Company (collectively, "NS") hereby respond to two recent filings submitted jointly by the Buffalo & Pittsburgh Railroad, Inc. ("BPRR") and Rochester & Southern Railroad, Inc. ("RSR"): BPRR-3, the railroads' motion for leave to file a rebuttal, and BPRR-4, the rebuttal itself.¹

NS opposes BPRR-3 and urges the Board to deny that motion and to strike BPRR-4. The submission of BPRR-4 violates the Board's rule prohibiting replies to replies and the procedural schedule specifically established for this proceeding, and BPRR/RSR provide no valid basis for departing from the Board's regulations and the procedural schedule.

¹ We refer to the BPRR/RSR pleadings only by their BPRR designation, and refer to BPRR and RSR collectively as BPRR/RSR.

If, however, the Board chooses to accept the BPRR-4, NS hereby asks the Board to accept for filing NS's response to BPRR-4, as set forth in detail below beginning at page 4. 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 BPRR-4, 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 BPRR/RSR from usurping unto themselves the right to close the comments, and giving NS the opportunity to respond to their comments and criticisms.

NS's OPPOSITION TO THE BPRR-3 MOTION

The BPRR-3 motion for leave to file closely resembles a similar motion previously filed by Reading Blue Mountain & Northern Railroad ("RBMN"), to which NS previously has responded. See NS-3.² The reasons for denying the BPRR-3 motion are largely the same as set forth in NS-3, and they need not be repeated verbatim here, but a brief reiteration is in order.

BPRR-3 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). BPRR/RSR's claim that their reply to a reply would serve to "supplement the record" and provide a "complete and factually correct" record for the Board to review, BPRR-3 at 2, is merely makeweight, as every unauthorized pleading could be said, by definition, to "supplement the record," or to further "complete" the record. But the fact

² BPRR, RSR, and RBMN are all represented by the same outside counsel.

is that BPRR and RSR have had a full opportunity to provide the Board with their comments pursuant to the existing procedural schedule and do not need more.

BPRR/RSR assert that NS in its August 3, 2000 reply raised “a number of new factual issues” and summarily conclude that it would be “unjust” not to permit a rebuttal. BPRR-3 at 3-4. In its reply, NS responded to the arguments made by BPRR and RSR in their July 14, 2000 comments, discussing matters that demonstrate why the relief they seek is unwarranted. That is the function of a reply. BPRR/RSR, however, apparently are under the misimpression that any statement or argument made in NS’s reply that does not simply parrot what NS said in its June 1, 2000 oversight report is somehow a “new factual issue” entitling them to respond. Under that view, the only kind of reply that would not merit a further rebuttal would be one that simply repeated what the replying party had said before – an empty exercise. NS was entitled to, and did, reply to BPRR/RSR’s comments in a substantive way. That does not mean that every point raised in NS’s reply is a “new factual issue” entitling BPRR/RSR to get in the last word contrary to the procedural schedule.

As did RBMN, BPRR/RSR further assert that they should be given the last word because they have asked for affirmative relief. Id. at 4. But the Board’s procedural schedule does not distinguish between parties that request additional conditions and those that do not. BPRR/RSR seek, solely for themselves, a procedural windfall that the Board deliberately did not provide and for which there is no good reason now.

Finally, granting the motion would, contrary to BPRR/RSR’s claim, see BPRR-3 at 4, both delay the proceedings and prejudice NS (and CSX), for the reasons NS previously has stated. See NS-3 at 4.

NS therefore respectfully requests the Board to deny the BPRR-3 motion and strike BPRR-4 from the record.

NS's RESPONSE TO BPRR-4 AND MOTION FOR LEAVE TO FILE

Should, however, the Board accept the BPRR-4 filing, NS hereby asks the Board to permit it to respond and to accept the following comments, in order 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 BPRR-4 comments are accepted, NS submits the following observations for the Board's consideration.

A. Overview.

Following principles that the Board, and before it, the ICC, have long applied in railroad control proceedings, the Board in Decision No. 89 held that it is not appropriate to impose conditions on a transaction 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.

Further, in establishing this general oversight proceeding, the Board made clear that service issues and matters related to the Board's ongoing operational monitoring were not appropriate subjects of the oversight proceeding. See Decision No. 1, slip op. at 3. Moreover, the Department of Transportation was entirely correct when it noted, referring to temporary post-transaction congestion and service difficulties, that "transitional problems call for, at best, transitional remedies." DOT-2 at 3. In sum, it is not appropriate to impose conditions on a transaction that do not address competitive harms wrought by the structure of the transaction.

Temporary service difficulties, while not to be taken lightly, are nevertheless different, and do not call for the imposition of permanent conditions.³

The position argued by BPRR/RSR violates the foregoing principles. By their own admission, BPRR/RSR's complaint arises entirely from asserted service difficulties and congestion. See, e.g., BPRR-4 at 9 (requested trackage rights sought as a remedy for an alleged "serious service disruption"); see also BPRR-2, Collins VS, *passim*. Service difficulties and congestion are temporary problems that the carriers should be permitted to work to resolve.

BPRR/RSR do not demonstrate any loss in ability to provide essential services and do not demonstrate that the Conrail transaction has caused a loss in competitive options. Indeed, the fact is that, not only has RSR not lost any competitive options, it is in a much better position as a result of the transaction.⁴ RSR now is able to interchange with the Livonia, Avon & Lakeville Railroad ("LAL") at Genesee Junction Yard. Before the Conrail transaction, RSR and LAL did not have right to interchange with each other. This additional option is a direct result of the Conrail transaction. See Decision No. 89, slip op. at 102-103. Moreover, RSR has retained all of the service options it had prior to the transaction and now has the option of direct interchange with NS at Silver Springs. Under the Board's previously-stated principles, imposition of

³ The distinction between temporary service difficulties and transaction-related structural competitive harms is not a "quaint theory" of Norfolk Southern, see BPRR-4 at 4, but a well-established principle recognized by the Board and the Department of Transportation.

⁴ BPRR/RSR spend a full page waxing indignant over what they describe as NS's "incredible" and "frivolous" assertion in its Reply that they and their shippers "really do not need competition." See BPRR-4 at 6-7. That, of course, is simply BPRR/RSR's pejorative characterization and not at all what NS said. In its Reply, NS properly pointed out (see NS-2 at 9-10), as it does here, that competitive routing options are available, reinforcing the point that the transaction has not caused any decrease in RSR's competitive options.

additional conditions – particularly intrusive ones like the granting of trackage rights⁵ – is not warranted.

With the foregoing in mind, following are NS's comments regarding various factual assertions in BPRR-4.

B. NS Is Complying With Its Contractual Commitments.

BPRR/RSR assert that NS has "failed to follow through on its commitments" under the letter agreement between NS and BPRR/RSR's parent, Genesee & Wyoming, Inc., with respect to (1) establishing a connection with the Allegheny & Eastern Railroad ("A&E") and (2) providing haulage for RSR between Silver Springs and other carriers in Buffalo. BPRR-4 at 3.⁶

Those assertions are simply not true. First, with respect to A&E: The letter agreement provides that "[I]f NS is successful in negotiating a relocation of its main line in Erie, NS will use its best efforts to build a connection in Erie which would allow for a direct interchange with

⁵ Granting RSR and BPRR the ability to directly link with each other via RSR trackage rights over the NS-operated Southern Tier also would violate the principle that conditions are not to be imposed that would put its proponent in a better position than it occupied before the transaction. See Burlington Northern, Inc. and Burlington Northern R.R. — Control and Merger — Santa Fe Pacific Corp. & Atchison, Topeka & Santa Fe Ry., Finance Docket No. 32549, Decision served August 23, 1995, slip op. at 55-56.

⁶ BPRR/RSR seek to take advantage of operational start-up difficulties to renounce their commitment, made through their parent company, to support the transaction without seeking conditions. See BPRR-4 at 2-3. NS does not assert, of course, that BPRR/RSR cannot raise with the Board their concerns about operational and service issues, or that any such problems should not be addressed and resolved. But there is a significant difference between temporary service issues and structural competitive harms caused by the transaction. To the extent that there are service and operational issues that need to be ironed out, there is a mechanism for bringing those matters to the Board's attention and for working out those issues among the affected parties. It is not appropriate, however, for BPRR/RSR to use those claims as a basis for backing away from their settlement commitment and seeking to impose on the transaction permanent conditions that are appropriate only to remedy structural competitive harms, particularly when it is plain, as it is here, that the transaction has improved, not harmed, BPRR/RSR's competitive options. Indeed, if BPRR/RSR can thus (continued...)

A&E.” BPRR/RSR assert that NS “has not done so.” BPRR-4 at 3. In fact, NS has just concluded, on August 3, 2000, the agreements covering the relocation of its main line in Erie, and the physical relocation has not yet been completed. Until that time, NS’s obligation to use its best efforts to build a connection to A&E obviously had not matured.⁷ BPRR/RSR’s accusation that NS has failed to follow through on this obligation is baseless.

Similarly, BPRR/RSR’s assertion that NS has not followed through on its commitment to perform haulage for RSR between Silver Springs and Buffalo is without foundation. NS has established service between Buffalo and Silver Springs three days per week.⁸ Although that service largely consists of direct interchange traffic, NS remains willing and able to perform haulage (at the rate specified in the settlement agreement) for RSR between Silver Springs and Buffalo should RSR request it.

C. BPRR/RSR’s Comments Regarding Silver Springs Infrastructure Do Not Support Their Trackage Rights Request.

BPRR/RSR assert that the existing Silver Springs infrastructure is inadequate to support a “significant increase in salt and agricultural product traffic” that they expect to develop in the

(...continued)

renounce the agreement their parent negotiated with NS, then it is fair for NS to reconsider whether it can reclaim the consideration NS gave for that negotiated agreement.

⁷ Indeed, one of the Erie relocation agreements that NS negotiated with CSX specifically provides that CSX must permit NS and A&E direct interchange in OD yard under a to-be-negotiated NS/CSX/A&E agreement providing for the same, should NS and A&E wish to do so.

⁸ BPRR/RSR complain that this service began only relatively recently. See BPRR-4 at 5. Although it is true that following the Split Date it took some time for initial startup difficulties to be overcome and service to be put into place, the fact that it may not have been in place on the Split Date does not argue for imposition of new conditions now. If anything, this demonstrates NS’s point that service and operational issues do not justify imposition of new, permanent conditions on the transaction, but rather should be worked out by the railroads, and that given that opportunity, NS is, in fact, making those adjustments.

future. They also assert that the proposed infrastructure improvement NS discussed in its Reply “will not address this problem.” BPRR-4 at 6.

First, BPRR/RSR’s complaint is not a transaction-related harm. The capacity of the Silver Springs infrastructure is the same now as it was before the transaction. Whether that infrastructure is adequate to support new business that BPRR/RSR anticipate might develop from the opening of a new salt mine and a new plant opening, see BPRR-2 at 7, has nothing to do with the NS/CSX/Conrail transaction, and thus does not warrant imposing new conditions. Second, BPRR/RSR admit that, as NS said in its reply, the anticipated connection to be constructed at Silver Springs would, in fact, “smooth operations at Silver Springs,” NS-2 at 9, in that it would “allow for the more efficient handling of the unit coal trains currently moving from NS to the R&S.” BPRR-4 at 6. It also would allow for more efficient handling of unit trains of salt. As NS reported to the New York Department of Transportation regarding this project (after close consultation with RSR regarding the NS submission to the New York DOT), the new connection would “facilitate progressive movements of traffic” from NS to RSR, which “would allow [RSR] to expeditiously deliver rail service to customers at Rochester . . . as well as provide viable rail competition.”⁹

BPRR/RSR argue that the allegedly inadequate infrastructure at Silver Springs is actually a transaction-related harm because there are now three carriers operating at Silver Springs (RSR, CP and NS) whereas before the transaction, there were two (RSR and CP). See BPRR-4 at 6; BPRR-2, Collins VS at 7 n.10. But RSR fails to note that before the transaction, Conrail had access to Silver Springs as well. The number of carriers with access to Silver Springs has not

⁹ This language was developed jointly with RSR, and NS understood that this language was to be submitted as well by RSR to NYDOT.

changed; before the transaction it was three (RSR, CP and Conrail), and now it is three (RSR, CP and NS). RSR also fails to mention that, while NS has added service between Buffalo and Silver Springs three days per week, CP's service has decreased from five days per week to three; thus, much of the volume of operations Silver Springs has merely shifted from one carrier to another. Finally, the fact that Conrail's access to Silver Springs would shift to NS was known from the day the Conrail control application was submitted to the Board in June of 1997. As NS pointed out in its reply, see NS-2 at 10, any concerns that BPRR/RSR now have about the capacity of Silver Springs to handle that access could have been raised during the main control proceeding or during GWI's settlement discussions with NS concerning that proceeding. But those concerns were not raised in the main proceeding or in the settlement agreement, and BPRR/RSR should not be permitted belatedly to raise them now.

Interchange issues are worked through on a daily basis in our industry; one example, in fact, involves a large, new (post-transaction) coal move to an RSR destination. The traffic moves via Silver Springs and what makes it work is an agreed-upon run-through of NS power (with a change of RSR crews for NS crews at Silver Springs). While NS will continue to work with RSR on improving interchange (just as it does with other connections whenever there are interchange issues), it is important to note that part of the "problem" BPRR/RSR raise derives from several thousand cars of new agricultural business which prior to the Conrail transaction never would have moved over RSR because the destination is on LAL, to which RSR now connects only because of the transaction.

D. RSR Trackage Rights Over The Southern Tier Will Not Solve The Problem Complained Of.

BPRR/RSR propose adding two RSR trains per day to the Southern Tier. See BPRR-2, Collins VS at 7. Although not explicitly stated, BPRR/RSR appear to argue that the trackage

rights are necessary as a substitute for CP haulage deficiencies arising out of congestion on the Southern Tier. To the extent the problems arise from congestion due to NS's start-up difficulties, they are temporary and should not require a permanent grant of trackage rights; moreover, any congestion on the Southern Tier would affect RSR just as much as it affects CP now. To the extent the problems are not congestion-related but rather result from perceived inadequacies in CP service, this has nothing to do with the Conrail transaction and justifies no conditions. BPRR/RSR ignore the fact that any congestion that they now complain of on the Southern Tier would affect RSR trains just as much as it affects other users of the line, and indeed, their trains would add to it. Although BPRR/RSR complain of "severe operating problems" on the Southern Tier and in Buffalo, see id. at 2, they nevertheless propose to add their own trains to the line and in the Buffalo terminal.

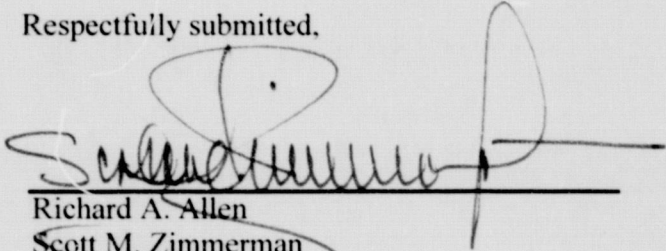
The real underlying motivation for the trackage rights BPRR/RSR seek apparently is to use the general oversight proceeding to directly link, over the Southern Tier, the lines of BPRR, RSR, and the Genesee and Wyoming Railroad Company, all members of the Genesee & Wyoming "family," so as to be better positioned to seek certain rail traffic that BPRR/RSR anticipate will develop in the future. See BPRR-2 at 4, n.2. Their desire to further improve their system, using NS-operated assets, in the pursuit of future traffic, while understandable, is not, however, a transaction-related competitive harm for which a trackage rights condition should be imposed.

CONCLUSION

For the foregoing reasons, NS respectfully requests the Board to deny the BPRR-3 motion and strike from the record BPRR-4. If, however, the Board declines to do so, NS asks

the Board to accept for consideration the foregoing comments in response to BPRR-4 and for the reasons NS suggests, to deny the BPRR/RSR request for imposition of additional conditions.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Scott M. Zimmerman", is written over a horizontal line. The signature is stylized with a large, looping initial "S" and a long, sweeping horizontal stroke at the end.

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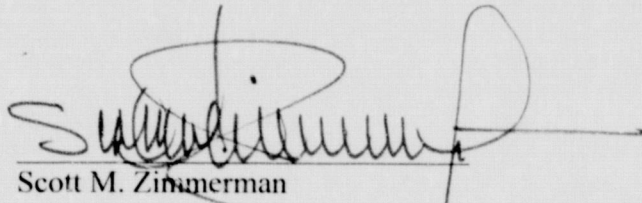
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*Attorneys for Norfolk Southern Corporation
and Norfolk Southern Railway Company*


Date: August 29, 2000

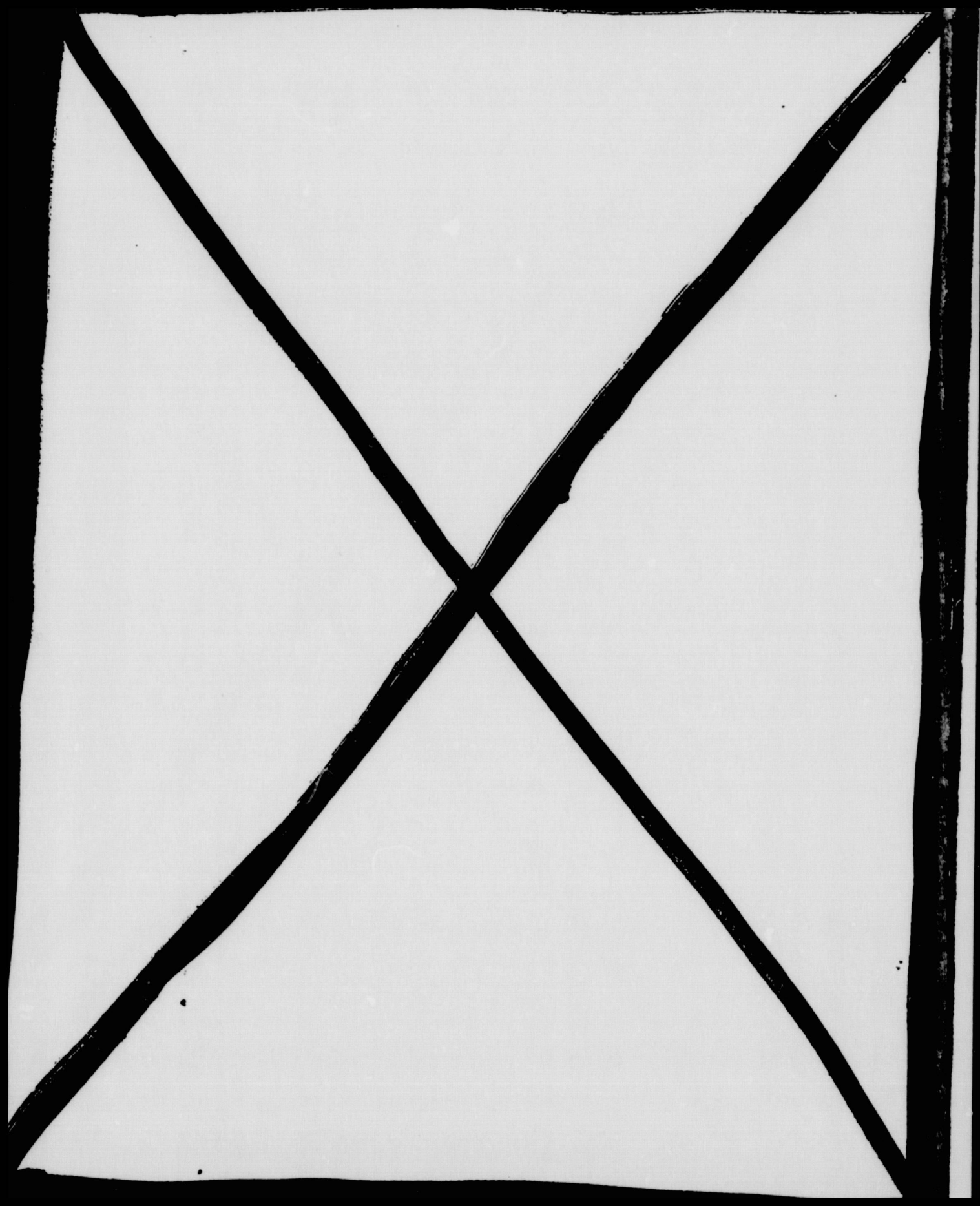
CERTIFICATE OF SERVICE

I certify that on August 29, 2000, a copy of NS-4, "Norfolk Southern's Opposition To BPRR-3/RSR-3 Or, In The Alternative, NS's Response To BPRR-4/RSR-4 And Motion For Leave To File," was served by first class U.S. mail, postage prepaid, or by more expeditious means, upon each party of record in Finance Docket No. 33388 (Sub-No. 91).



Scott M. Zimmerman





STB FD-33388 (SUB 91) 8-16-00 I 199514

199514

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August 15, 2000

ERIC M. HOCKY
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By FEDEX

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, DC 20423-0001

Re: STB Finance Docket No. 33388 (Sub-No. 91)
CSX and Norfolk Southern-Control and
Operating Leases-Conrail (General Oversight)
Motion (BPRR-3/RSR-3) and Rebuttal (BPRR-4/RSR-4)

Dear Sir or Madam:

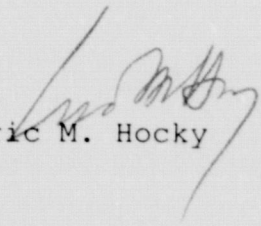
Enclosed for filing in the above referenced proceeding are an original and 25 copies of Motion of Buffalo & Pittsburgh Railroad, Inc. and Rochester & Southern, Inc. For Leave to File Rebuttal (BPRR-3/RSR-3) with the attached Rebuttal of Buffalo & Pittsburgh Railroad, Inc. and Rochester & Southern, Inc. (BPRR-4/RSR-4), along with a diskette containing the documents in a format (WordPerfect 6/7/8) that can be converted by, and into, WordPerfect 7.0. Also, enclosed are the original and 25 copies of the Highly Confidential Appendix to BPRR-4/RSR-4 which should not be made part of the public record.

Please time stamp the extra copy of this letter to indicate receipt, and return it to me in the stamped self-addressed

Surface Transportation Board
August 15, 2000
Page 2

envelope provided for your convenience.

Very truly yours,



Eric M. Hocky

Enclosures

cc: Dennis G. Lyons, Esq. (by FedEx)
Richard A. Allen, Esq. (by FedEx)
All parties of record in Sub-No. 91

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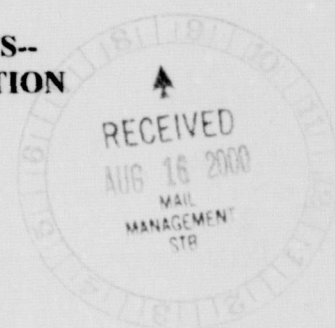
BPRR-3
RSR-3

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)

**MOTION OF
BUFFALO & PITTSBURGH RAILROAD, INC. AND
ROCHESTER & SOUTHERN RAILROAD, INC.
FOR LEAVE TO
FILE REBUTTAL**



Buffalo & Pittsburgh Railroad, Inc. ("B&P") and Rochester & Southern Railroad, Inc. ("R&S") are filing this motion to request that the Board allow them to file a rebuttal to the Reply (NS-2) filed by Norfolk Southern ("NS") in this sub-docket on August 3, 2000.

The Board, by order served February 9, 2000, instituted this sub-docket to implement the five year oversight condition imposed on the approval of the CSX/NS/Conrail transactions in STB Finance Docket No. 33388. *Sub-No. 91, Dec. No. 1*. The procedural schedule adopted by the Board required NS and CSX to file progress reports by June 1, 2000. Other parties were then given until July 14, 2000, to file "comments respecting the progress of implementation of the Conrail transaction and the workings of the various conditions we imposed." *Sub-No. 91, Dec. No. 1* at 3. Replies were required to be filed by August 3, 2000.

There is no deadline for the Board to issue its decision with respect to these initial filings.

In Decision No. 1 in this sub-docket, the Board also noted that it had "retained jurisdiction to impose additional conditions and/or take other action if, and to the extent, we determined that it was necessary to address harms caused by the Conrail transaction." *Sub-No. 91, Dec. No. 1* at 2. Accordingly, B&P and R&S, in their Comments (BPRR-2/RSR-2), addressed how the implementation of the transaction has affected them and their customers. They included in their Comments a request for an additional condition -- 54 miles of overhead trackage rights for R&S between Silver Springs and Buffalo, New York. NS filed its reply (NS-2) on August 3, 2000, responding, *inter alia*, to the comments of B&P/R&S and to the condition they requested. B&P and R&S are filing this motion seeking leave to file the attached rebuttal so that the Board will have a complete and factually correct record on which to evaluate the condition that has been requested.

In general, a "reply to a reply" is not permitted under the Board's rules. 49 C.F.R. 1104.13(c). However, because the rebuttal would serve to supplement the record, the Board should not consider this rebuttal as a "reply to a reply." Even if the Board were to consider this rebuttal to be such a reply, the Board has the authority to allow it under 49 C.F.R. 1100.3 (rules liberally construed to secure just, speedy and inexpensive determination of the issues presented), or under its waiver authority under 49 C.F.R. 1110.9.

The Board and its predecessor have previously granted relief to permit a reply to an argument presented for the first time in a reply (*FMC Wyoming Corp. et al. v. Union Pacific R. Co.*, STB Docket No. 42022, STB LEXIS 156, served March 11, 1999); and to allow surrebuttal to rebut new evidence in a rebuttal statement (*Ashley Creek Phosphate o. v. Chevron*

Pipeline Co., et al., ICC No. 40131 (Sub No. 1), 1995 ICC LEXIS 90, served April 21, 1995).

Where it is necessary to develop an adequate record and no prejudice is shown, the ICC found that liberal construction of the rules permit the filing of a reply to a reply. *See Gateway Western Ry. Co.--Construction Exemption--St. Claire County, IL.*, ICC F.D. No. 32158, 1993 ICC LEXIS 88, served May 4, 1993. *See also Huron Valley Steel Corp. v. CSX Trans. et al.* ICC No. 40385, 1992 ICC LEXIS 214, served October 6, 1992 (reply allowed when it would not broaden issues, prejudice any party, or delay the proceeding, but would help secure a just, speedy and inexpensive determination of the issues); and *Delaware & Hudson Ry.--Lease and Trackage Rights Exemption--Springfield Terminal Ry.. Co., et al.*, ICC F.D. No. 30968, 1989 ICC LEXIS 310. October 23, 1989 (a liberal construction of the ICC's rules was in order to secure a just resolution of the issues). For similar reasons, the Board should accept the Rebuttal (BPRR-4/RSR-4) attached hereto.

In its Reply, NS raises a number of new factual issues including that the request for an additional condition breaches what it terms a "settlement agreement" reached by NS and Genesee and Wyoming, Inc. ("GWI", the parent of B&P and R&S), that NS has instituted a new "haulage" service, that R&S is planning infrastructure improvements that will resolve the interchange problems in Silver Springs, and that R&S is asking for this condition solely to obtain a bigger division of the rate. NS-2 at 8-11. It would be unjust to allow these bald assertions¹ without giving B&P and R&S the opportunity to respond and explain why the requested condition does not breach any NS-GWI agreement, why neither NS's new service (which is not

¹ The section of the NS Reply that is responsive to the B&P/R&S Comments is neither verified nor accompanied by verified statements.

haulage) or the proposed project (if it is ever funded) will not solve the interchange problems in Silver Springs, and how R&S will receive the same freight revenue regardless of whether the condition is granted. B&P and R&S also want the opportunity to respond to NS's ridiculous assertion that R&S and its customers do not need relief because they have an alternative route via CSX.

In the usual case, the party seeking relief is given the opportunity to have the last word in responding to those who oppose the relief. For example, in this oversight proceeding, NS and CSX have been given the opportunity to respond to those who commented on their initial reports. In this instance, because B&P and R&S have requested that the Board impose an additional condition and that the Board preserve the benefits of the condition imposed in favor of LAL, they should be given the opportunity to rebut the NS Reply. The proposed rebuttal will not broaden the issues before the Board, but will provide the Board with a complete record for making its decision.

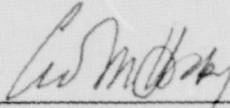
Since there is no deadline for the Board to act (and this is a 5 year oversight proceeding), the filing of this rebuttal will not delay the proceeding.² B&P and R&S are filing this motion and the rebuttal less than two weeks after NS's Reply was filed.³ In any event, only B&P and R&S would be prejudiced by any delay since they are the ones seeking to change the status quo.

² Even if the Board decided to delay the decision on RBMN's request, that would not preclude the Board from issuing a decision addressing the comments and requests of other parties in this proceeding.

³ This is well less than the 20 days generally allowed under 49 C.F.R. 1104.13(a) for the filing of opposition evidence.

For the foregoing reasons, B&P and R&S request that the Board accept the attached Rebuttal for filing in this General Oversight Proceeding.

Respectfully submitted,



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Dated: August 15, 2000

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

CERTIFICATE OF SERVICE

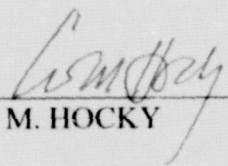
I hereby certify that on this date a copy of the foregoing Comments of Buffalo & Pittsburgh Railroad, Inc. and Rochester & Southern Railroad, Inc. was served by FEDEX on the following persons specified in Decision No. 1:

Dennis G. Lyons, Esq.
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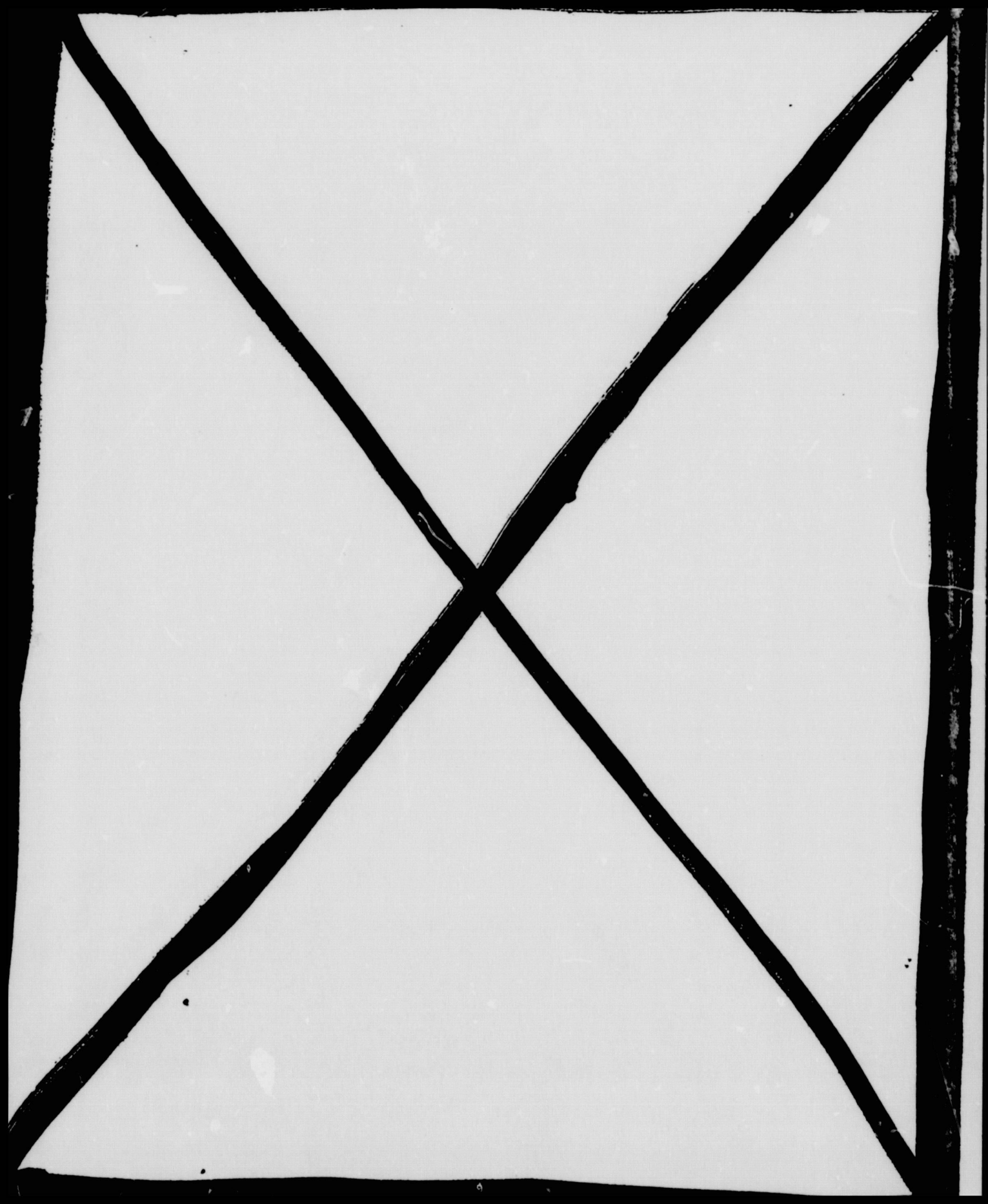
Richard A. Allen, Esq.
Zuckert, Scoutt & Rasenberger, LLP
888 17th Street, N.W.
Washington, DC 20006-3939

and by mail on all other parties of record in this General Oversight Proceeding (Sub-No. 91).

Dated: August 15, 2000



ERIC M. HOCKY



STB FD-33388 (SUB 91) 8-14-00 I 199499

199499

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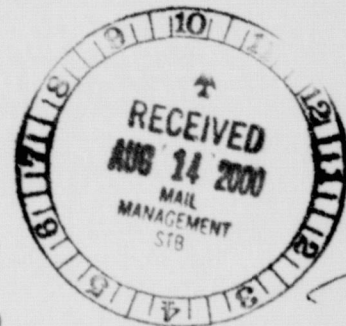
ERIC M. HOCKY
emhocky@ggelaw.com

ENTERED
Office of the Secretary

AUG 15 2000

Part of
Public Record

August 11, 2000



By FEDEX

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, DC 20423-0001

Re: STB Finance Docket No. 33388 (Sub-No. 91)
CSX and Norfolk Southern-Control and
Operating Leases-Conrail (General Oversight)
Motion (RBMN-4) and Rebuttal (RBMN-5)

Dear Sir or Madam:

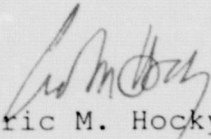
Enclosed for filing in the above referenced proceeding are an original and 25 copies of each of Motion of Reading Blue Mountain & Northern Railroad Company For Leave to File Rebuttal (RBMN-4) with the attached Rebuttal of Reading Blue Mountain & Northern Railroad Company (RBMN-5), along with a diskette containing the documents in a format (WordPerfect 6/7/8) that can be converted by, and into, WordPerfect 7.0.

Please time stamp the extra copy of this letter to indicate receipt, and return it to me in the stamped self-addressed

Surface Transportation Board
August 11, 2000
Page 2

envelope provided for your convenience.

Very truly yours,



Eric M. Hocky

Enclosures

cc: Dennis G. Lyons, Esq.
Richard A. Allen, Esq.
All parties of record in Sub-No. 91

199499

RBMN-4

ENTERED
Office of the Secretary

AUG 15 2000

Part of
Public Record

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)

**MOTION OF
READING BLUE MOUNTAIN & NORTHERN
RAILROAD COMPANY
FOR LEAVE TO
FILE REBUTTAL**

One of the conditions imposed on the approval of the transactions in STB Finance Docket No. 33388 was a five year general oversight proceeding. *CSX/NS/CR Dec. No. 89*. The Board, by order served February 9, 2000, instituted this sub-docket to implement that condition. *Sub-No. 91, Dec. No. 1*. The Board established a procedural schedule that required NS and CSX to file progress reports by June 1, 2000. Other parties were then given until July 14, 2000, to file "comments respecting the progress of implementation of the Conrail transaction and the workings of the various conditions we imposed." *Sub-No. 91, Dec. No. 1* at 3. Replies were required to be filed by August 3, 2000. The Board did not establish a deadline for making a ruling in this proceeding.

In instituting the oversight proceeding, the Board also noted that it had "retained jurisdiction to impose additional conditions and/or take other action if, and to the extent, we

determined that it was necessary to address harms caused by the Conrail transaction.” *Sub-No. 91, Dec. No. 1* at 2. However, the schedule outlined by the Board did not specifically address how requests for conditions should be presented or how they would be handled.

In accordance with *Sub-No. 91, Dec. No. 1*, RBMN filed comments (RBMN-2) on July 14, 2000. RBMN included a request for additional conditions in its comments. RBMN also filed a reply (RBMN-3) to the comments of other parties on August 3, 2000. NS filed its reply (NS-2) on August 3, 2000. In NS-2, NS replies to, *inter alia*, RBMN’s comments and its request for additional conditions. RBMN is now filing this motion seeking leave to file the attached rebuttal so that the Board will have a complete and factually correct record on which to evaluate the relief RBMN has requested.

Because the rebuttal would serve to supplement the record, the Board should not consider this rebuttal a “reply to a reply” which is generally not permitted under 49 C.F.R. 1104.13(c). However, even if the Board were to consider this rebuttal to be such a reply, the Board should allow it for good cause shown under 49 C.F.R. 1100.3 (rules liberally construed to secure just, speedy and inexpensive determination of the issues presented), or under its waiver authority under 49 C.F.R. 1110.9.

The ICC or STB has previously granted relief to permit a reply to an argument presented for the first time in a reply (*FMC Wyoming Corp. et al. v. Union Pacific R. Co.*, STB Docket No. 42022, STB LEXIS 156, served March 11, 1999); and to allow surrebuttal to rebut new evidence in a rebuttal statement (*Ashley Creek Phosphate Co. v. Chevron Pipeline Co., et al.*, ICC No. 40131 (Sub No. 1), 1995 ICC LEXIS 90, served April 21, 1995). Where it is necessary to develop an adequate record and no prejudice is shown, the ICC found that liberal construction

of the rules permit the filing of a reply to a reply. *See Gateway Western Ry. Co.--Construction Exemption--St. Claire County, IL.*, ICC F.D. No. 32158, 1993 ICC LEXIS 88, served May 4, 1993. *See also Huron Valley Steel Corp. v. CSX Trans. et al.* ICC No. 40385, 1992 ICC LEXIS 214, served October 6, 1992 (reply allowed when it would not broaden issues, prejudice any party, or delay the proceeding, but would help secure a just, speedy and inexpensive determination of the issues); and *Delaware & Hudson Ry.--Lease and Trackage Rights Exemption--Springfield Terminal Ry.. Co., et al.*, ICC F.D. No. 30968, 1989 ICC LEXIS 310. October 23, 1989 (a liberal construction of the ICC's rules was in order to secure a just resolution of the issues). For similar reasons, the Board should accept the Rebuttal (RBMN-5) attached hereto.

Reliance on the NS Reply to resolve the present issues would be unjust in that (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." NS-2 at 61.

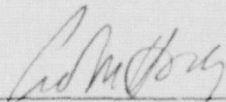
In the usual case, the party seeking relief is given the opportunity to have the last word in responding to those who oppose the relief. For example, in this oversight proceeding, NS and CSX have been given the opportunity to respond to those who commented on their initial

report. In this instance, because RBMN has asked for affirmative relief in the form of additional conditions and enforcement of existing conditions, it should be given the opportunity to rebut the NS response. Allowing RBMN to present its rebuttal will not broaden the issues before the Board, but will provide the Board with a complete record for making its decision.

Since there is no deadline for the Board to act (and this is a 5 year oversight proceeding), the filing of this rebuttal will not delay the proceeding.¹ RBMN is filing this motion and the rebuttal only 11 days after NS's Reply, well less than the 20 days generally allowed under 49 C.F.R. 1104.13(a) for the filing of opposition evidence. In any event, RBMN is the only party that would be prejudiced by any delay since it is seeking to change the status quo that NS is seeking to maintain.

For the foregoing reasons, RBMN requests that the Board accept the attached Rebuttal for filing in this General Oversight Proceeding.

Respectfully submitted,



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P.O. Box 796
West Chester, PA 19381-0796
(610) 692-9116

Dated: August 11, 2000

Attorneys for Reading Blue Mountain &
Northern Railroad Company

¹ Even if the Board decided to delay the decision on RBMN's request, that would not preclude the Board from issuing a decision addressing the comments and requests of other parties in this proceeding.

CERTIFICATE OF SERVICE

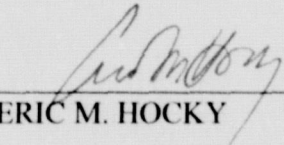
I hereby certify that on this date a copy of the foregoing Motion of Reading Blue Mountain & Northern Railroad Company was served by Federal Express on the following persons specified in Decision No. 1:

Dennis G. Lyons, Esq.
Arnold & Porter
555 12th Street, N.W.
Washington, DC 20004-1202

Richard A. Allen, Esq.
Zuckert, Scoutt & Rasenberger, LLP
888 17th Street, N.W.
Washington, DC 20006-3939

and by first class mail on each other known party of record in Sub-No. 91.

Dated: August 11, 2000



ERIC M. HOCKY

