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## EXHIBIT INDEX

Exhibit  
Number

Description

Page

- |         |   |  |
|---------|---|--|
| (a)(41) | Text of Advertisement appearing in newspapers commencing November 13, 1996. |  |
| (a)(42) | Press Release issued by Parent on November 13, 1996.                        |  |

## **TO CONRAIL SHAREHOLDERS:**

**Norfolk Southern's offer is 18% higher.**

CSX is offering inferior value - \$93.14 per share, which is about \$17 per share less than Norfolk Southern's offer.\*

**It's a \$110 all-cash offer for all shares.**

CSX is trying to coerce Conrail shareholders with its inferior, front-end loaded proposal.

**It protects shareholders' rights.**

CSX is tendering now for only 19.9% of the Conrail shares, and then will use those shares to try to swing the vote to "opt out" of the Pennsylvania law protecting shareholders' rights.

**It's free of market risks.**

CSX wants Conrail shareholders to bear significant market risk. You would have to wait until the back-end merger, which is subject to conditions and could take a year or longer, to receive 60% of the consideration. This would be paid in CSX stock, with no downside protection if the stock declines in price.

**It's free of regulatory risks.**

CSX wants Conrail shareholders to take significant regulatory risk. You would have to wait for Surface Transportation Board approval (if it comes) before receiving 60% of your consideration.

**It doesn't include any sweetheart deals.**

CSX is giving Conrail's CEO a 5-year contract with a more than 50% jump in his base salary, and a guarantee that he will be the next Chairman and CEO of CSX.

\* Based on the closing price of CSX common stock on November 11, 1996.

***Now Ask yourself, who's making the "hostile" offer:  
Norfolk Southern or CSX?***

**Here's How You Can Help Yourself and Protect Your Conrail Investment:**

- **Vote NO on Norfolk Southern's GOLD proxy card on Conrail's proposals to "opt out" of Pennsylvania's Fair Value Statute and to adjourn the special meeting.**
- **Tender into Norfolk Southern's superior offer.**
- **Write to the Conrail Board and ask it why:**
  - **It wants Conrail to pay \$580 million in breakup fees--\$6.35 per share -- to protect CSX's inferior offer.**
  - **It doesn't take actions to remove its own roadblocks to the Norfolk Southern offer.**
  - **It is trying to force the inferior CSX deal on Conrail's shareholders.**

**[Graphic: Box with checkmark above the words "VOTE NO"]**

**[Norfolk Southern Logo]**

**Important: If you have any questions, please call our solicitor, Georgeson & Company Inc. toll free at 1-800-223-2064. Banks and brokers call 212-440-9800.**

**November 13, 1996**



**FOR IMMEDIATE RELEASE**

November 13, 1996

Media Contact: Robert Fort  
(757) 629-2714

**NORFOLK SOUTHERN SAYS CONRAIL DIRECTORS  
CONTINUE TO IGNORE FIDUCIARY DUTY**

NORFOLK, VA -- Norfolk Southern Corporation (NYSE:NSC) issued the following statement in response to the decision by the Conrail board to continue to support the substantially lower offer of CSX Corporation (NYSE:CSX):

"We are not surprised that the Conrail board, given its actions in recent weeks, stubbornly continues to refuse to give Conrail shareholders the opportunity to accept what is clearly a better offer.

"The Conrail board continues to ignore its fiduciary duty to shareholders. The CSX proposal is not a 'strategic combination,' but a strategy to subvert the intent of state law and coerce Conrail shareholders into accepting an inadequate offer for their shares.

"The CSX proposal is not free of conditions -- it requires Conrail shareholders to wait an indeterminant length of time for regulatory approval of the merger for an unknown return on 60 percent of the shares outstanding. The only meaningful conditions on Norfolk Southern's offer are those imposed by the Conrail Board of Directors.

"We would again strongly urge all Conrail shareholders to reject a deal that:

- offers \$17 per share, or \$1.5 billion less than Norfolk Southern;
- transfers the risk of regulatory approval to Conrail shareholders;
- attempts to coerce shareholders into accepting the offer through a discriminatory, front-end loaded structure;
- with no economic justification, establishes significant financial obstacles to a superior alternative offer.

"The self-serving actions of the Conrail board and management should be viewed with concern not only by Conrail shareholders and other Conrail constituencies, but by all investors. We believe that ultimately a combination of Norfolk Southern and Conrail will prove not only a better offer, but also a better railroad."

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World Wide Web Site - <http://www.nscorp.com>

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**SECURITIES AND EXCHANGE COMMISSION**

Washington, D.C. 20549

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**SCHEDULE 14D-1**

(Amendment No. 9)

Tender Offer Statement Pursuant to Section 14(d)(1)  
of the Securities Exchange Act of 1934

---

**Conrail Inc.**

(Name of Subject Company)

**Norfolk Southern Corporation  
Atlantic Acquisition Corporation**

(Bidders)

Common Stock, par value \$1.00 per share  
(Including the associated Common Stock Purchase Rights)  
(Title of Class of Securities)

208368 10 0

(CUSIP Number of Class of Securities)

Series A ESOP Convertible Junior  
Preferred Stock, without par value  
(Including the associated Common Stock Purchase Rights)  
(Title of Class of Securities)

Not Available

(CUSIP Number of Class of Securities)

---

**James C. Bishop, Jr.  
Executive Vice President-Law  
Norfolk Southern Corporation  
Three Commercial Place  
Norfolk, Virginia 23510-2191  
Telephone: (757) 629-2750**

(Name, Address and Telephone Number of Person Authorized  
to Receive Notices and Communications on Behalf of Bidder)

---

with a copy to:  
**Randall H. Doud, Esq.  
Skadden, Arps, Slate, Meagher & Flom LLP  
919 Third Avenue  
New York, New York 10022  
Telephone: (212) 735-3000**

---

This Amendment No. 9 amends the Tender Offer Statement on Schedule 14D-1 filed on October 24, 1996, as amended (the "Schedule 14D-1"), by Norfolk Southern Corporation, a Virginia corporation ("Parent"), and its wholly owned subsidiary, Atlantic Acquisition Corporation, a Pennsylvania corporation ("Purchaser"), relating to Purchaser's offer to purchase all outstanding shares of (i) Common Stock, par value \$1.00 per share (the "Common Shares"), and (ii) Series A ESOP Convertible Junior Preferred Stock, without par value (the "ESOP Preferred Shares" and, together with the Common Shares, the "Shares"), of Conrail Inc. (the "Company"), including, in each case, the associated Common Stock Purchase Rights, upon the terms and subject to the conditions set forth in the Offer to Purchase, dated October 24, 1996 (the "Offer to Purchase"), as amended and supplemented by the Supplement thereto, dated November 8, 1996 (the "Supplement"), and in the revised Letter of Transmittal (which, together with any amendments or supplements thereto, constitute the "Offer"). Unless otherwise defined herein, all capitalized terms used herein shall have the respective meanings given such terms in the Offer to Purchase, the Supplement or the Schedule 14D-1.

**Item 4. Source and Amount of Funds or Other Consideration.**

Item 4 is hereby amended to add the following:

(a) On November 15, 1996, Parent announced that it had received commitment letters from banks for more than enough funds to complete its proposed acquisition of the Company. Receipt by Parent of such commitments satisfies the Financing Condition to the Offer.

**Item 11. Material to be Filed as Exhibits.**

Item 11 is hereby amended to add the following:

(a)(43) Press Release issued by Parent on November 15, 1996.

**SIGNATURE**

After due inquiry and to the best of its knowledge and belief, the undersigned certifies that the information set forth in this statement is true, complete and correct.

November 15, 1996

**NORFOLK SOUTHERN CORPORATION**

By: /s/ JAMES C. BISHOP, JR.

Name: James C. Bishop, Jr.

Title: Executive Vice President-Law

**ATLANTIC ACQUISITION CORPORATION**

By: /s/ JAMES C. BISHOP, JR.

Name: James C. Bishop, Jr.

Title: Vice President and General Counsel



## EXHIBIT INDEX

Exhibit  
Number

Description

Page

(a)(43)

Press Release issued by Parent on November 15, 1996.



**FOR IMMEDIATE RELEASE**

**November 15, 1996**

**Media Contact: Robert Fort  
(757) 629-2714**

**NS Satisfies Financing Condition in Amended Conrail Tender Offer**

NORFOLK, VA. – Norfolk Southern Corporation (NYSE: NSC) today announced that it has received from banking institutions commitments for more than enough funds to support fully its \$110 per-share cash offer for all of the outstanding common shares and Series A ESOP convertible junior preferred shares of Conrail Inc. (NYSE: CRR) and subsequent merger with Conrail.

Accordingly, the financing condition to Norfolk Southern's amended tender offer has been satisfied.

"This is a solid vote of confidence from the financial community in the superiority of our offer and in the strength of a combined Norfolk Southern-Conrail," said David R. Goode, chairman, president and chief executive officer. "We will continue to do all that is necessary to allow Conrail shareholders to benefit from our offer."

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World Wide Web Site - <http://www.nscorp.com>

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**SECURITIES AND EXCHANGE COMMISSION**

Washington, D.C. 20549

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**SCHEDULE 14D-1**

(Amendment No. 10)

**Tender Offer Statement Pursuant to Section 14(d)(1)  
of the Securities Exchange Act of 1934**

---

**Comail Inc.**

(Name of Subject Company)

**Norfolk Southern Corporation  
Atlantic Acquisition Corporation**

(Bidders)

**Common Stock, par value \$1.00 per share  
(Including the associated Common Stock Purchase Rights)  
(Title of Class of Securities)**

**208368 10 0**

(CUSIP Number of Class of Securities)

**Series A ESOP Convertible Junior  
Preferred Stock, without par value  
(Including the associated Common Stock Purchase Rights)  
(Title of Class of Securities)**

**Not Available**

(CUSIP Number of Class of Securities)

---

**James C. Bishop, Jr.  
Executive Vice President-Law  
Norfolk Southern Corporation  
Three Commercial Place  
Norfolk, Virginia 23510-2191  
Telephone: (757) 629-2750**

(Name, Address and Telephone Number of Person Authorized  
to Receive Notices and Communications on Behalf of Bidder)

---

with a copy to:  
**Randall H. Doud, Esq.  
Skadden, Arps, Slate, Meagher & Flom LLP  
919 Third Avenue  
New York, New York 10022  
Telephone: (212) 735-3000**

---

This Amendment No. 10 amends the Tender Offer Statement on Schedule 14D-1 filed on October 24, 1996, as amended (the "Schedule 14D-1"), by Norfolk Southern Corporation, a Virginia corporation ("Parent"), and its wholly owned subsidiary, Atlantic Acquisition Corporation, a Pennsylvania corporation ("Purchaser"), relating to Purchaser's offer to purchase all outstanding shares of (i) Common Stock, par value \$1.00 per share (the "Common Shares"), and (ii) Series A ESOP Convertible Junior Preferred Stock, without par value (the "ESOP Preferred Shares" and, together with the Common Shares, the "Shares"), of Conrail Inc. (the "Company"), including, in each case, the associated Common Stock Purchase Rights, upon the terms and subject to the conditions set forth in the Offer to Purchase, dated October 24, 1996 (the "Offer to Purchase"), as amended and supplemented by the Supplement thereto, dated November 8, 1996 (the "Supplement"), and in the revised Letter of Transmittal (which, together with any amendments or supplements thereto, constitute the "Offer"). Unless otherwise defined herein, all capitalized terms used herein shall have the respective meanings given such terms in the Offer to Purchase, the Supplement or the Schedule 14D-1.

**Item 5. Purpose of the Tender Offer and Plans or Proposals of the Bidder.**

Item 5 is hereby amended and supplemented by the following:

On November 15, 1996, an editorial written by David R. Goode, Chairman, President and Chief Executive Officer of Parent (the "Editorial") was published in the Journal of Commerce. The Editorial discussed, among other things, Parent's analysis of the perceived competitive benefits of the Offer and the Proposed Merger as compared with the Proposed CSX Transaction. In addition, Parent indicated its willingness to sell certain of its New York/New Jersey rail assets to preserve competition. A copy of the text of the Editorial is filed as an exhibit hereto.

**Item 7. Contracts, Arrangements, Understandings or Relationships With Respect to the Subject Company's Securities.**

Item 7 is hereby amended and supplemented by the following:

On November 18, 1996, the staff of the STB issued an informal, nonbinding opinion to the effect that the Voting Trust Agreement, as proposed by Parent to be modified to delete the "proportional voting" provision modelled on CSX's proposed voting trust agreement, is consistent with the policies of the STB against unauthorized acquisitions of control of a regulated carrier. In the same opinion, the staff of the STB reaffirmed its November 1, 1996 informal, nonbinding opinion concerning the Voting Trust Agreement as originally proposed and rejected various arguments submitted by the Company requesting the staff to rescind such November 1 opinion. On this basis, Purchaser expects that the Voting Trust Approval Condition will be satisfied.

On the basis of a confirmation from the Premerger Office of the FTC that the Offer and the Proposed Merger are not subject to, or are exempt from, the HSR Act, Purchaser also expects that the HSR Condition will be satisfied.

**Item 11. Material to be Filed as Exhibits.**

Item 11 is hereby amended and supplemented by the following:

(a)(44) Text of Editorial published on November 15, 1996.

(a)(45) Text of Advertisement appearing in newspapers commencing November 18, 1996.

## SIGNATURE

After due inquiry and to the best of its knowledge and belief, the undersigned certifies that the information set forth in this statement is true, complete and correct.

November 18, 1996

### NORFOLK SOUTHERN CORPORATION

By: /s/ JAMES C. BISHOP, JR.

Name: James C. Bishop, Jr.

Title: Executive Vice President-Law

### ATLANTIC ACQUISITION CORPORATION

By: /s/ JAMES C. BISHOP, JR.

Name: James C. Bishop, Jr.

Title: Vice President and General Counsel



## EXHIBIT INDEX

<u>Exhibit Number</u>	<u>Description</u>	<u>Page</u>
(a)(44)	Text of Editorial published on November 15, 1996.	
(a)(45)	Text of Advertisement appearing in newspapers commencing November 18, 1996.	



**Rail Mergers: Norfolk Southern should join Conrail**  
by David R. Goode

In war, it makes little sense to achieve victory or peace if, in the process, you have "made a desert," as one victim of the expansion-minded Roman Empire observed.

The same is true in business, especially in the railroad business. Mergers that do not promote healthy competition hurt the producers and shippers of raw and manufactured goods, as well as the eventual consumers of those products.

With this in mind, it is easy to see why Norfolk Southern's bid to purchase Conrail is superior to that of CSX's. Our bid encourages balanced rail competition, while CSX's ignores the issue. Consider these fundamentals:

Competition requires rail systems of comparable size and scope. Railroading is a network business with increasing economies of scale. In a global economy, significantly smaller competitors can be handicapped. Today, Norfolk Southern and CSX are roughly at parity, one with 45% and the other with 55% of their combined business. A CSX-Conrail combination would produce a lopsided 70-30 disparity, while an NS-Conrail combination would be closer to a more balanced 60-40 split (which we are willing to work to reduce even further).

Competition requires that the largest markets be served by two railroads. Shippers want to move traffic between points A and Z -- not from A to B. If one railroad has the biggest markets to itself, shippers will have to use that railroad. A quick look at the railroad map reveals that NS has fewer routes and markets that overlap Conrail than does CSX. An NS-Conrail combination would give more

markets the benefits of competing rail service.

Competition requires that railroads own their own routes. Trackage rights can work as shortcuts and in other special situations, and NS uses them when appropriate. But a railroad that owns its own lines has the incentive to make the investment in maintenance that is essential to providing safe, efficient and competitive service. When NS acquires Conrail, we will offer to sell CSX a line into New York/New Jersey, preserving real competition in one of the world's largest markets.

Competition requires effective terminal access. It doesn't do any good to ride the train if you can't get off. That's why railroads need access to yards and intermodal and multimodal terminals in order to be competitive.

NS acknowledges every railroad's need to buy, build, operate and access its own terminal facilities.

Competition is not free. Indeed, it is weakened when less than fair value is paid for assets. Norfolk Southern's all-cash offer of \$100 a share easily exceeds CSX's cash and stock offer valued at less than \$90 a share. Our competitors will have to pay fair price for any assets they acquire from us, based on a formula that factors in revenues and reflects the costs of the acquisition to NS.

Norfolk Southern's focus on the competitive issues relating to Conrail is not altruistic. As the nation's most efficient railroad year-in and year-out, we support balanced competition because we know we will perform well in such an environment.

Balanced competition will benefit our customers, our shareholders, our employees and the communities we serve. Balanced competition won't create a

Roman desert -- but rather an oasis in which everyone can thrive.

[ADVERTISEMENT]

**TO CONRAIL CONSTITUENCIES:**

**You Don't Have to Be  
a Conrail Shareholder to Benefit  
from Norfolk Southern's Offer**

**A Norfolk Southern/Conrail Combination  
Will Be Better for All of Conrail's Constituencies**

**Better for Pennsylvania and Philadelphia:**

**PHILADELPHIA JOBS:** Norfolk Southern is committed to maintaining a major operating presence in Philadelphia. Don't be fooled by CSX's offer to keep Conrail headquarters in Philadelphia.

CSX's headquarters in Richmond, VA employs under 200 people, and a Philadelphia headquarters under CSX ownership would require no more jobs and perhaps fewer. CSX has made no guarantees regarding the other Philadelphia-based Conrail jobs -- they could go to Jacksonville, Florida, where CSX's operations are centralized. If Conrail will negotiate, Norfolk Southern will consider Philadelphia as a site for a real headquarters.

**PHILADELPHIA NAVY BASE:** Norfolk Southern has made public plans for a multimodal rail-highway facility at the dormant Philadelphia Navy Base. Norfolk Southern's CEO, David R. Goode, already discussed this opportunity with Philadelphia's Mayor Rendell.

**ALTOONA AND HOLLIDAYSBURG SHOPS:** Norfolk Southern is committed to continuing to operate Conrail's Hollidaysburg Car Shop and its Juniata Locomotive Shop at Altoona, and will promote employment there. Norfolk Southern will aggressively pursue work from other equipment owners to increase the work handled by these two shops.



What has CSX promised? Nothing. And, don't forget that CSX's locomotive shops at Cumberland, Maryland, are less than 70 miles from Conrail's Altoona and Hollidaysburg shops.

#### **Better For Shippers:**

**EFFICIENT AND SAFE:** Norfolk Southern is the safest, most efficient major railroad in the country. That means service you can trust at a competitive price.

**BALANCED COMPETITION:** A Norfolk Southern/Conrail merger will promote balanced competition, and a choice of rail carriers.

A CSX/Conrail merger would perpetuate the rail monopoly in New York and extend that Class 1 rail monopoly into a new "no-competition zone" extending from eastern Ohio to the Atlantic coast.

**INNOVATION:** Norfolk Southern created the innovative Triple Crown intermodal network, which pioneered RoadRailer [with Trademark Symbol] technology, and invested in the Northeast to raise clearances for efficient double-stack intermodal service. Auto companies trust Norfolk Southern to help redefine their distribution systems, and Conrail customers can enjoy the benefits of these innovations. CSX promised new intermodal service, but their main routes to the Northeast won't even clear double-stack railcars -- Norfolk Southern's routes already do.

#### **Better For Employees:**

**COMPLEMENTARY FIT:** Norfolk Southern's tracks and facilities extend and complement Conrail's, with minimal overlap -- resulting in maximum opportunity for maintaining employment.

On the other hand, CSX and Conrail are parallel from Ohio to Philadelphia and elsewhere, too. For example, Conrail and CSX would control almost all rail transportation to the vital Pittsburgh industrial center.

**SAFETY:** Norfolk Southern has been certified as the safest major railroad in the country for the past seven years. Behind these statistics are safer working



conditions and dedicated employees with fewer injuries. For Norfolk Southern, the safety of our employees and our communities is our number one priority.

**HEALTHY PENSION FUNDS:** Norfolk Southern and Conrail can both boast overfunded pension funds, ensuring peace of mind for retirees. CSX's claim to fame is its recent recognition as one of the "Top 50 Companies with the Largest Underfunded Pension Liability"<sup>1</sup>. CSX could merge its anemic fund with Conrail's, thereby using money accumulated for Conrail employees to fund CSX's promises to its own employees.

**Better for Shareholders:**

**MORE CASH:** Norfolk Southern is offering \$110 cash per share for 100% of Conrail's shares. This is significantly greater than CSX's cash/stock offer, which has a blended value of \$93.42 per share.<sup>2</sup>

**NO EQUITY RISK:** Norfolk Southern will pay cash for 100% of Conrail's shares. CSX's offer forces shareholders to bear a continued equity risk for 60% of Conrail shares.

**NO REGULATORY RISK:** Norfolk Southern will assume the risks of regulatory delay; Conrail shareholders won't have to. CSX would make Conrail shareholders carry the entire risk of regulatory delay or disapproval on the 60% back-end of Conrail shares.

**When and How Has Conrail Weighed These Benefits?**

- Conrail refuses to talk to Norfolk Southern.
- Conrail refuses to let constituencies consider for themselves a Norfolk Southern transaction.

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<sup>1</sup> Pension Benefit Guaranty Corporation: News Release 96-16, 12/6/95

<sup>2</sup> Based on the closing sale price of CSX common stock on November 15, 1996

- Conrail is blocking all its constituencies from receiving the greater benefits of a merger with Norfolk Southern.

**Please join the many Conrail shareholders who are demanding  
that the Conrail Board stop putting its own interests  
ahead of everyone else's.**

**[Norfolk Southern Logo]**

**Important:** If you have any questions, please call our solicitor, Georgeson & Company Inc. toll free at 1 800-223-2064.  
Banks and brokers call 212-440-9800.

November 18, 1996

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**SECURITIES AND EXCHANGE COMMISSION**

Washington, D.C. 20549

---

**SCHEDULE 14D-1**

(Amendment No. 11)

**Tender Offer Statement Pursuant to Section 14(d)(1)  
of the Securities Exchange Act of 1934**

---

**Conrail Inc.**

(Name of Subject Company)

**Norfolk Southern Corporation  
Atlantic Acquisition Corporation**

(Bidders)

**Common Stock, par value \$1.00 per share  
(Including the associated Common Stock Purchase Rights)  
(Title of Class of Securities)**

**208368 10 0**

(CUSIP Number of Class of Securities)

**Series A ESOP Convertible Junior  
Preferred Stock, without par value  
(Including the associated Common Stock Purchase Rights)  
(Title of Class of Securities)**

**Not Available**

(CUSIP Number of Class of Securities)

---

**James C. Bishop, Jr.  
Executive Vice President-Law  
Norfolk Southern Corporation  
Three Commercial Place  
Norfolk, Virginia 23510-2191  
Telephone: (757) 629-2750**

(Name, Address and Telephone Number of Person Authorized  
to Receive Notices and Communications on Behalf of Bidder)

---

with a copy to:  
**Randall H. Doud, Esq.  
Skadden, Arps, Slate, Meagher & Flom LLP  
919 Third Avenue  
New York, New York 10022  
Telephone: (212) 735-3000**

---

This Amendment No. 11 amends the Tender Offer Statement on Schedule 14D-1 filed on October 24, 1996, as amended (the "Schedule 14D-1"), by Norfolk Southern Corporation, a Virginia corporation ("Parent"), and its wholly owned subsidiary, Atlantic Acquisition Corporation, a Pennsylvania corporation ("Purchaser"), relating to Purchaser's offer to purchase all outstanding shares of (i) Common Stock, par value \$1.00 per share (the "Common Shares"), and (ii) Series A ESOP Convertible Junior Preferred Stock, without par value (the "ESOP Preferred Shares" and, together with the Common Shares, the "Shares"), of Conrail Inc. (the "Company"), including, in each case, the associated Common Stock Purchase Rights, upon the terms and subject to the conditions set forth in the Offer to Purchase, dated October 24, 1996 (the "Offer to Purchase"), as amended and supplemented by the Supplement thereto, dated November 8, 1996 (the "Supplement"), and in the revised Letter of Transmittal (which, together with any amendments or supplements thereto, constitute the "Offer"). Unless otherwise defined herein, all capitalized terms used herein shall have the respective meanings given such terms in the Offer to Purchase, the Supplement or the Schedule 14D-1.

**Item 10. Additional Information.**

Item 10 is hereby amended and supplemented by the following:

(e) On November 15, 1996, Plaintiffs filed a Motion for Leave to Supplement and Amend the Complaint in which they seek the court's permission to file their Second Amended Complaint for Declaratory and Injunctive Relief (the "Second Amended Complaint"). In the Second Amended Complaint, Plaintiffs update the description of counts contained in their earlier complaints and add certain additional allegations of disclosure and fiduciary duty violations relating to such updated description of events. In particular, *inter alia*, the Second Amended Complaint includes allegations (i) concerning the coercive front-end loaded, two-tier structure of the Proposed CSX Transaction (and the fundamental unfairness thereof), and (ii) concerning material misrepresentations and omissions by Defendants in connection with the supplement to CSX's Offer to Purchase and with the Company Board's Schedule 14D-9 statements relating to the Proposed CSX Transaction and Parent's Offer and Proposed Merger.

**Item 11. Material to be Filed as Exhibits.**

Item 11 is hereby amended and supplemented by the following:

- (g)(3) Motion for Leave to Supplement and Amend the Complaint, including as an exhibit thereto, Plaintiff's Second Amended Complaint filed by Parent, Purchaser and Kathryn B. McQuade against the Company, CSX *et al.* (dated November 15, 1996, United States District Court for the Eastern District of Pennsylvania).



## SIGNATURE

After due inquiry and to the best of its knowledge and belief, the undersigned certifies that the information set forth in this statement is true, complete and correct.

November 19, 1996

### NORFOLK SOUTHERN CORPORATION

By: /s/ JAMES C. BISHOP, JR.

Name: James C. Bishop, Jr.

Title: Executive Vice President-Law

### ATLANTIC ACQUISITION CORPORATION

By: /s/ JAMES C. BISHOP, JR.

Name: James C. Bishop, Jr.

Title: Vice President and General Counsel



## EXHIBIT INDEX

<u>Exhibit Number</u>	<u>Description</u>	<u>Page</u>
(g)(3)	Motion for Leave to Supplement and Amend the Complaint, including as an exhibit thereto, Plaintiff's Second Amended Complaint filed by Parent, Purchaser and Kathryn B. McQuade against the Company, CSX <i>et al.</i> (dated November 15, 1996, United States District Court for the Eastern District of Pennsylvania).	

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

----- x  
NORFOLK SOUTHERN CORPORATION, a :  
Virginia Corporation, ATLANTIC :  
ACQUISITION CORPORATION, A Penn- :  
sylvania corporation AND KATHRYN :  
B. MCQUADE, :  
 :  
Plaintiffs, :  
 :  
-v- : C.A. No. 96-CV-7167  
 :  
CONRAIL INC. a Pennsylvania Cor- :  
poration, DAVID M. LEVAN, H. FUR- :  
LONG BALDWIN, DANIEL B. BURKE, :  
ROGER S. HILLAS, CLAUDE S. :  
BRINEGAR, KATHLEEN FOLEY :  
FELDSTEIN, DAVID B. LEWIS, JOHN :  
C. MAROUS, DAVID H. SWANSON, E. :  
BRADLEY JONES, AND RAYMOND T. :  
SCHULER AND CSX CORPORATION, :  
 :  
Defendants, :  
 :  
----- x

**PLAINTIFF'S MOTION FOR LEAVE  
TO SUPPLEMENT AND AMEND THE COMPLAINT**

Pursuant to Rules 15(a) and 15(d) of the Federal Rules of Civil Procedure, plaintiffs, by and their attorneys, respectfully move for leave of Court to file Plaintiff's Second Amended Complaint for Declaratory and Injunctive Relief.

In support of their motion, plaintiffs rely upon

the accompanying memorandum of law.

Respectfully Submitted:

---

Mary A. McLaughlin  
I.D. No. 24923  
George G. Gordon  
I.D. No. 63072  
Dechert, Price & Rhoads  
4000 E. 11 Atlantic Tower  
1717 Arch Street  
Philadelphia, PA 19103  
(215) 994-4000  
Attorneys for Plaintiffs

Of Counsel:

Steven J. Rothschild  
SKADDEN, ARPS, SLATE, MEAGHER & FLOM  
One Rodney Square  
P.O. Box 636  
Wilmington, DE 19899  
(302) 651-3000

DATED: November 11, 1996

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

----- -X  
NORFOLK SOUTHERN CORPORATION, :  
a Virginia corporation, :  
ATLANTIC ACQUISITION CORPORATION, :  
a Pennsylvania corporation, and :  
KATHRYN B. McQUADE, :  
:   
Plaintiffs, :  
: C.A. No. 96-CV-7167  
-against- :  
:   
CONRAIL INC., :  
a Pennsylvania corporation, :  
DAVID M. LEVAN, H. FURLONG BALDWIN, :  
DANIEL B. BURKE, ROGER S. HILLAS, :  
CLAUDE S. BRINEGAR, KATHLEEN FOLEY :  
FELDSTEIN, DAVID B. LEWIS, JOHN C. :  
MAROUS, DAVID H. SWANSON, E. :  
BRADLEY JONES, RAYMOND T. :  
SCHULER and CSX CORPORATION, :  
:   
Defendants. :  
----- -X

SECOND AMENDED COMPLAINT FOR  
DECLARATORY AND INJUNCTIVE RELIEF



Plaintiffs, by their undersigned attorneys, as and for their Second Amended Complaint, allege upon knowledge with respect to themselves and their own acts, and upon information and belief as to all other matters, as follows:

Nature of the Action

1. This action arises from the attempt by defendants Conrail Inc. ("Conrail"), its directors (the "Director Defendants"), and CSX Corporation ("CSX") to coerce, mislead and fraudulently manipulate Conrail's shareholders to swiftly deliver control of Conrail to CSX and to forestall any competing higher bid for Conrail by plaintiff Norfolk Southern Corporation ("NS"). Although defendants have attempted to create the impression that NS's superior \$110 per share all-cash offer for all of Conrail's stock is a "non-bid" or a "phantom offer," in reality the only obstacles to the availability of the \$110 per share offered by NS are illegal actions and ultra vires agreements by defendants. The ultimate purpose of this action is to establish the illegality of such actions and agreements so that NS may proceed to provide superior value to Conrail's shareholders and a superior transaction to Conrail and all of its constituencies.

2. Additionally, plaintiffs will seek interim injunctive relief to maintain the status quo and ensure that Conrail shareholders will not be coerced, misled and fraudulently manipulated by defendants' illegal conduct to deliver control over Conrail to CSX before the Court can finally determine the issues raised in this action.

3. The event that set this controversy in motion was the unexpected announcement that CSX would take over Conrail. In a surprise move on October 15, 1996, defendants Conrail and CSX announced a deal to rapidly transfer control of Conrail to CSX and foreclose any other bids for Conrail (the "CSX Transaction"). The CSX Transaction is to be accomplished through a complicated multi-tier structure involving a coercive front-end loaded cash tender offer, a lock-up stock option and, following required regulatory approvals or exemptions, a back-end merger in which Conrail shareholders will receive stock and, under certain circumstances, cash. The original CSX Transaction had a blended value of slightly more than \$85 per Conrail share as of October 29, 1996. The currently proposed CSX Transaction has a blended value of approximately \$93 per Conrail share, still \$17 per share less than the NS Proposal. In aggregate, the CSX

Transaction offers Conrail's shareholders \$1.5 billion less than does the NS Proposal. Integral to the inferior CSX Transaction are executive succession and compensation guarantees for Conrail management and board composition covenants effectively ensuring Conrail directors of continued board seats.

4. Because plaintiff NS believes that a business combination between Conrail and NS would yield benefits to both companies and their constituencies far superior to any benefits offered by the proposed Conrail/CSX combination, NS on October 23, 1996 announced its intention to commence, through its wholly-owned subsidiary, plaintiff Atlantic Acquisition Corporation ("AAC") a cash tender offer (the "NS Offer") for all shares of Conrail stock at \$100 per share, to be followed by a cash merger at the same price (the "Proposed Merger," and together with the NS Offer, the "NS Proposal"). The following day, on October 24, 1996, the NS Offer commenced. On November 8, 1996, NS increased its offer to \$110 in cash per Conrail share.

5. At the heart of this controversy is the assertion by defendants, both expressly and through their conduct, that the Director Defendants, as directors of a

Pennsylvania corporation, have virtually no fiduciary duties. While it is true that Pennsylvania statutory law provides directors of Pennsylvania corporations with wide discretion in responding to acquisition proposals, defendants here have gone far beyond what even Pennsylvania law permits. As a result, this battle for control of Conrail presents the most audacious array of lock-up devices ever attempted:

- The Poison Pill Lock-In. The CSX Merger Agreement exempts the CSX Transaction from Conrail's Poison Pill Plan, and purports to prohibit the Conrail Board from redeeming, amending or otherwise taking any further action with respect to the Plan. Under the terms of the Poison Pill Plan, the Conrail directors would have lost their power to make the poison pill inapplicable to any acquisition transaction other than the CSX Transaction on November 7, unless CSX agreed to let them postpone that date. Thus, the Poison Pill Lock-In threatened to lock-up Conrail, even from friendly transactions, until the year 2005, when the poison pill rights expire. Put simply, the CSX Merger Agreement purported to require Conrail to swallow its own poison pill. Only after plaintiffs applied for a temporary restraining order did the Conrail board request CSX's permission to postpone the Distribution Date. Although it had no obligation to do so, CSX permitted the postponement. Adoption of this provision placed Conrail in serious jeopardy and at the mercy of CSX, which had no obligation to act in Conrail's best interests. Conrail remains at CSX's mercy due to the Poison Pill Lock-In. The Poison Pill Lock-



in is ultra vires under Pennsylvania law and constitutes a complete abdication and breach of the Conrail directors' duties of loyalty and care.

- The 270-Day Lock-Out. The CSX Merger Agreement audaciously and unashamedly purported to prohibit Conrail's directors from withdrawing their recommendation that Conrail's shareholders accept and approve the CSX Transaction and from terminating the CSX Merger Agreement, even if their fiduciary duties require them to do so, for a period of 180 days from execution of the agreement. On November 6, Conrail and CSX announced that they had agreed to extend the lock-out period from 180 days to 270 days. Put simply, Conrail's directors have agreed to take a nine-month leave of absence during what may be the most critical six months in Conrail's history. The 270-Day Lock-Out is ultra vires under Pennsylvania law and constitutes a complete abdication and breach of the Conrail directors' duties of loyalty and care.
- The Stock Option Lock-Up And The \$300 Million Break-Up Fee. The CSX Merger Agreement provides, in essence, that Conrail must pay CSX a \$300 million windfall if the CSX Merger Agreement is terminated and Conrail is acquired by another company. Further, a Stock Option Agreement granted by Conrail to CSX threatens over \$275 million in dilution costs to any competing bidder for Conrail. This lock-up option is particularly onerous because the higher the competing bid, the greater the dilution it threatens.
- The Continuing Director Amendments To Conrail's Poison Pill Plan. Recognizing that Pennsylvania law permits shareholders of Pennsylvania corporations to elect a new board of directors if they disagree with an

incumbent board's decisions concerning acquisition offers, the Conrail Board altered the Conrail Poison Pill Plan in September 1995 to deprive Conrail's shareholders of the ability to elect new directors fully empowered to act to render the poison pill ineffective or inapplicable to a transaction they deem to be in the corporation's best interests. This amendment to the Conrail Poison Pill Plan is ultra vires under Pennsylvania law and Conrail's Charter and By-Laws, and constitutes an impermissible interference in the stockholder franchise and a breach of the Conrail directors' duty of loyalty.

At bottom, what defendants have attempted here is to litter the playing field with illegal, ultra vires apparent impediments to competing acquisition proposals, and then coerce Conrail shareholders to swiftly deliver control of Conrail to CSX before the illegality of such impediments can be determined and revealed.

6. Accordingly, by this action, plaintiffs NS, AAC, and Kathryn B. McQuade, a Conrail shareholder, seek emergency relief against defendants' illegal attempt to lock-up the rapid sale of control of Conrail to CSX through their scheme of coercion, deception and fraudulent manipulation, in violation of the federal securities laws, Pennsylvania statutory law, and the fiduciary duties of the Director Defendants. In addition, to facilitate the NS Proposal, plaintiffs seek certain declaratory relief with respect to replacement of Conrail's Board of Directors at Conrail's next annual meeting of shareholders.

#### Jurisdiction and Venue

7. This Court has jurisdiction over this complaint pursuant to 28 U.S.C. §§ 1331 and 1367.

8. Venue is proper in this District pursuant to 28 U.S.C. § 1391.

#### The Parties

9. Plaintiff NS is a Virginia corporation with its principal place of business in Norfolk, Virginia. NS is a holding company operating rail and motor transportation services through its subsidiaries. As of December 31, 1995, NS's railroads operated more than 14,500 miles of road in the states of Alabama, Florida, Georgia,

Illinois, Indiana, Iowa, Kentucky, Louisiana, Maryland, Michigan, Mississippi, Missouri, New York, North Carolina, Ohio, Pennsylvania, South Carolina, Tennessee, Virginia and West Virginia, and the Province of Ontario, Canada. The lines of NS's railroads reach most of the larger industrial and trading centers in the Southeast and Midwest, with the exception of those in Central and Southern Florida. In the fiscal year ended December 31, 1995, NS had net income of \$712.7 million on total transportation operating revenues of \$4.668 billion. According to the New York Times, NS "is considered by many analysts to be the nation's best-run railroad." NS is the beneficial owner of 100 shares of common stock of Conrail.

10. Plaintiff AAC is a Pennsylvania corporation. The entire equity interest in AAC is owned by NS. AAC was organized by NS for the purpose of acquiring the entire equity interest in Conrail.

11. Plaintiff Kathryn B. McQuade is and has been, at all times relevant to this action, the owner of Conrail common stock.

12. Defendant Conrail is a Pennsylvania corporation with its principal place of business in Philadelphia, Pennsylvania. Conrail is the major freight railroad



serving America's Northeast-Midwest region, operating over a rail network of approximately 11,000 route miles. Conrail's common stock is widely held and trades on the New York Stock Exchange. During the year ended December 31, 1995, Conrail had net income of \$264 million on revenues of \$3.68 billion. On the day prior to announcement of the CSX Transaction, the closing per share price of Conrail common stock was \$71.

13. Defendant David M. LeVan is President, Chief Executive Officer, and Chairman of Conrail's Board of Directors. Defendants H. Furlong Baldwin, Daniel B. Burke, Roger S. Hillas, Claude S. Brinegar, Kathleen Foley Feldstein, David B. Lewis, John C. Marous, David H. Swanson, E. Bradley Jones, and Raymond T. Schuler are the remaining directors of Conrail. The foregoing individual directors of Conrail owe fiduciary duties to Conrail and its stockholders, including plaintiffs.

14. Defendant CSX is a Virginia corporation with its principal place of business in Richmond, Virginia. CSX is a transportation company providing rail, intermodal, ocean container-shipping, barging, trucking and contract logistic services. CSX's rail transportation operations serve the southeastern and midwestern United States.

#### Factual Background

##### The Offer

15. In response to the surprise October 15 announcement of the CSX Transaction, on October 23, 1996, NS announced its intention to commence a public tender offer for all shares of Conrail common stock at a price of \$100 cash per share. NS further announced that it intends, as soon as practicable following the closing of the NS Offer, to acquire the entire equity interest in Conrail by causing it to merge with AAC in the Proposed Merger. In the Proposed Merger as originally proposed, Conrail common stock not tendered and accepted in the NS Offer would have been converted into the right to receive \$100 in cash per share. On October 24, 1996, NS, through AAC, commenced the NS Offer. The NS Offer and the Proposed Merger represented a 40.8% premium over the closing market price of Conrail stock on October 14, 1996, the day prior to announcement of

the CSX Transaction.

16. In a letter delivered on October 23, 1996 to the Defendant Directors, NS stated that it was flexible as to all aspects of the NS Proposal and expressed its eagerness to negotiate a friendly merger with Conrail. The letter indicated, in particular, that while the NS Proposal is a proposal to acquire the entire equity interest in Conrail for cash, NS is willing to discuss, if the Conrail board so desires, including a substantial equity component to the consideration to be paid in a negotiated transaction so that current Conrail shareholders could have a continuing interest in the combined NS/Conrail enterprise.

The Current Crisis: In a Surprise Move  
Intended To Foreclose Competing Bids,  
Conrail and CSX Announce On October 15  
That Conrail Has Essentially Granted CSX  
A Lock-Up Over Control Of The Company

17. After many months of maintaining that Conrail was not for sale, on October 16, 1996, the Conrail Board announced an abrupt about-face: Conrail would be sold to CSX in a multiple-step transaction designed to swiftly transfer effective, if not absolute, voting control over Conrail to a voting trustee who would be contractually required to vote to approve CSX's acquisition of the entire equity interest in Conrail through a follow-up stock merger.



18. The current crisis is the impending expiration of CSX's highly coercive front-end loaded tender offer for up to 19.9% of Conrail's shares. If CSX and Conrail succeed through this classic hostile takeover tactic in coercing Conrail's shareholders to cede nearly 20% of Conrail's voting power to CSX, defendants will have gained an overwhelming advantage in the vote of Conrail's shareholders on the Charter Amendment, now slated for mid-December. If the Charter Amendment is approved, defendants will pursue yet another front-end loaded tender offer which will deliver effective control over Conrail to CSX and foreclose all other bids. Thus, consummation of the first-step tender offer on November 20 would create a domino effect leading to the forced sale of control of Conrail to the low bidder.

Defendants Were Well Aware That  
A Superior Competing Acquisition  
Proposal By NS was Inevitable

19. For a number of years, certain members of senior management of NS, including David R. Goode, Chairman and Chief Executive Officer of NS, have spoken numerous times with senior management of Conrail, including former Conrail Chairman and Chief Executive Officer, James A. Hagen, and current Conrail Chairman and Chief Executive

Officer, defendant David W. LeVan, concerning a possible business combination between NS and Conrail. Ultimately, Conrail management encouraged such discussions prior to Mr. Hagen's retirement as Chief Executive Officer of Conrail. Conrail discontinued such discussions in September 1994, when the Conrail Board elected Mr. LeVan as Conrail's President and Chief Operating Officer as a step toward ultimately installing him as Chief Executive Officer and Chairman upon Mr. Hagen's departure.

20. Prior to 1994, senior management of NS and Conrail discussed, from time to time, opportunities for business cooperation between the companies, and, in some of those discussions, the general concept of a business combination. While the companies determined to proceed with certain business cooperation opportunities, including the Triple Crown Services joint venture, no decisions were reached concerning a business combination at that time.

21. In March of 1994, Mr. Hagen approached Mr. Goode to suggest that under the current regulatory environment, Conrail management now believed that a business combination between Conrail and NS could be accomplished, and that the companies should commence discussion of such a transaction. Mr. Goode agreed to schedule a meeting

between legal counsel for NS and Conrail for the purpose of discussing regulatory issues. Following that meeting, Mr. Goode met with Mr. Hagen to discuss in general terms an acquisition of Conrail by NS. Thereafter, during the period from April through August 1994, management and senior financial advisors of the respective companies met on numerous occasions to negotiate the terms of a combination of Conrail and NS. The parties entered into a confidentiality agreement on August 17, 1994. During these discussions, Mr. Hagen and other representatives of Conrail pressed for a premium price to reflect the acquisition of control over Conrail by NS. Initially, NS pressed instead for a stock-for-stock merger of equals in which no control premium would be paid to Conrail shareholders. Conrail management insisted on a control premium, however, and ultimately the negotiations turned toward a premium stock-for-stock acquisition of Conrail.

22. By early September 1994, the negotiations were in an advanced stage. NS had proposed an exchange ratio of 1-to-1, but Conrail management was still pressing for a higher premium. In a meeting in Philadelphia on September 23, 1994, Mr. Goode increased the proposed exchange ratio to 1.1-to-1, and left the door open to an

even higher ratio. Mr. Hagen then told Mr. Goode that they could not reach agreement because the Conrail board had determined to remain independent and to pursue a stand-alone policy. The meeting then concluded.



23. The 1.1-to-1 exchange ratio proposed by Mr. Goode in September of 1994 reflected a substantial premium over the market price of Conrail stock at that time. If one applies that ratio to NS's stock price on October 14, 1996 -- the day the Conrail Board approved the CSX Transaction -- it implies a per share acquisition price for Conrail of over \$101. Thus, there can be no question that Mr. LeVan, if not Conrail's Board, was well aware that NS would likely be willing and able to offer more -- to Conrail's shareholders, rather than management, that is -- than CSX could offer for an acquisition of Conrail.

Defendant LeVan Actively Misleads NS  
Management In Order To Permit Him To  
Lock Up The Sale of Conrail to CSX

24. During the period following September of 1994, Mr. Goode from time to time had conversations with Mr. LeVan. During virtually all of these conversations, Mr. Goode expressed NS's strong interest in negotiating an acquisition of Conrail. Mr. LeVan responded that Conrail wished to remain independent. Nonetheless, Mr. Goode was led to believe that if and when the Conrail Board determined to pursue a sale of the company, it would do so through a process in which NS would have an opportunity to bid.

25. At its September 24, 1996 meeting, the NS Board reviewed its strategic alternatives and determined that NS should press for an acquisition of Conrail. Accordingly, Mr. Goode again contacted Mr. LeVan to (i) reiterate NS's strong interest in acquiring Conrail and (ii) request a meeting at which he could present a concrete proposal. Mr. LeVan responded that the Conrail board would be holding a strategic planning meeting that month and that he and Mr. Goode would be back in contact after that meeting. Mr. Goode emphasized that he wished to communicate NS's position so that Conrail's Board would be aware of it during the strategic planning meeting. Mr. LeVan stated that it was unnecessary for Mr. Goode to do so. At that point, the conversation concluded.

26. Following September 24, Mr. LeVan did not contact Mr. Goode. Finally, on Friday, October 4, 1996, Mr. Goode telephoned Mr. LeVan. Mr. Goode again reiterated NS's strong interest in making a proposal to acquire Conrail. Mr. LeVan responded that the Conrail Board would be meeting on October 16, 1996, and assumed that he and Mr. Hagen would contact Mr. Goode following that meeting. Mr. Goode again stated that NS wanted to make a proposal so that the Conrail Board would be aware of it. Mr. LeVan stated that it was unnecessary to do so.

CSX's Chairman Snow Contributes  
To LeVan's Deception

27. Several days prior to October 15, CSX's Chairman, John W. Snow, publicly stated that he did not expect to see any major business combinations in the railroad industry for several years. On October 16, 1996, the New York Times reported that "less than a week ago, Mr. Snow told Wall Street analysts that he did not expect another big merger in the industry (in the next few years)."

On the Day Before the Purportedly  
Scheduled Meeting of Conrail's Board,  
Defendants Announce the CSX Transaction

28. To NS's surprise and dismay, on October 15,

1996, Conrail and CSX announced that they had entered into a definitive merger agreement (the "CSX Merger Agreement") pursuant to which control of Conrail would be swiftly sold to CSX and then a merger would be consummated following required regulatory approvals. As of the close of business on October 29, 1996, the blended value of the original CSX Transaction was slightly more than \$85 per Conrail share. The CSX Transaction includes a break-up fee of \$300 million and a lock-up stock option agreement threatening substantial dilution to any rival bidder for control of Conrail. Integral to the CSX Transaction are covenants substantially increasing Mr. LeVan's compensation and guaranteeing that he will succeed John W. Snow, CSX's Chairman and Chief Executive Officer, as the combined company's CEO and Chairman.

CSX Admits That The Conrail Board  
Approved The CSX Transaction Rapidly.

29. On October 16, 1996, the New York Times reported that CSX's Snow on October 15, 1996, had stated that the multi-billion dollar sale of Conrail in the CSX Transaction "came together rapidly in the last two weeks." The Wall Street Journal reported on October 16 that Mr. Snow stated that negotiations concerning the CSX Transac-



tion had gone "very quickly," and "much faster than he and Mr. LeVan had anticipated." On October 24, 1996, the Wall Street Journal observed that "[i]n reaching its agreement with CSX, Conrail didn't solicit other bids ... and appeared to complete the accord at breakneck speed."

30. Thus, Conrail's board approved the CSX Transaction rapidly without a good faith and reasonable investigation. Given the nature of the CSX Transaction, with its draconian and preclusive lock-up mechanisms, the Conrail Board's rapid approval of the deal constitutes reckless and grossly negligent conduct.

CSX's Snow Implies That the CSX Transaction Is a Fait Accompli and States That Conrail's Directors Have Almost No Fiduciary Duties

31. On October 16, 1996, Mr. Goode met in Washington, D.C. with Mr. Snow to discuss the CSX Transaction and certain regulatory issues that its consummation would raise. Mr. Snow advised Mr. Goode during that meeting that Conrail's counsel and investment bankers had ensured that the CSX Transaction would be "bulletproof," implying that the sale of control of Conrail to CSX is now a fait accompli. Mr. Snow added that the "Pennsylvania statute," referring to Pennsylvania's Business Corporation Law, was "great" and that Conrail's directors have almost no fiduciary duties. Mr. Snow's comments were intended to discourage NS from making a competing offer for control of Conrail and to suggest that NS had no choice but to negotiate with CSX for access to such portions of Conrail's rail system as would be necessary to address the regulatory

concerns that would be raised by consummation of the CSX Transaction. After Mr. Snow told Mr. Goode what CSX was willing to offer to NS in this regard, the meeting concluded.

NS Responds With A  
Superior Offer For Conrail

32. On October 22, the NS Board met to review its strategic options in light of the announcement of the CSX Transaction. Because the NS Board believes that a combination of NS and Conrail would offer compelling benefits to both companies, their shareholders and their other constituencies, it determined that NS should make a competing bid for Conrail. On October 23, 1996, NS publicly announced its intention to commence a cash tender offer for all shares of Conrail stock for \$100 per share, to be followed, after required regulatory approvals, by a cash merger at the same price. On October 24, 1996, NS, through AAC, commenced the NS Offer.

CSX Tells The Market That NS's Superior  
Proposal To Acquire Conrail Is Not Real

33. CSX responded to the NS Proposal by attempting to lead the market to believe that the superior NS Proposal does not represent a real, viable and actually available alternative to the CSX Transaction. On October

24, 1996, the Wall Street Journal reported:

CSX issued a harshly worded statement last night that called Norfolk's move a "nonbid" that would face inevitable delays and be subject to numerous conditions. It said the Norfolk bid couldn't be approved without Conrail's board, and notes that merger pact [with CSX] prohibited Conrail from terminating its pact until mid-April. It said the present value of the Norfolk bid was under \$90 a share because of the minimum six-month delay....

On the same day, the New York Times reported that "a source close to CSX" characterized the NS Proposal as "a phantom offer."



34. These statements are an integral part of defendants' scheme to coerce, mislead and manipulate Conrail's shareholders to rapidly deliver control of Conrail to CSX by creating the false impression that the NS Proposal is not a viable and actually available alternative.

CSX Lures NS Into Settlement Discussions, Then  
Falsely Claims That NS Initiated The Talks In  
Order to Destabilize The Market For Conrail Shares

35. During the weekend of November 2 and November 3, representatives of NS and CSX met. The meetings were held at the suggestion of CSX, ostensibly for the purpose of exploring a settlement of the litigation between NS and CSX and a resolution of issues raised by their respective offers to acquire Conrail. CSX represented to NS that Conrail was aware of these meetings. NS participated in the meetings consistent with its announced position favoring a balanced competition structure for Eastern railroad service.

36. On the morning of November 4, 1996, however, CSX issued a false and misleading press release in which it claimed (i) that NS had initiated the discussions and (2) that the subject matter of the discussions was which pieces of Conrail NS would purchase from CSX once CSX had

purchased Conrail in its entirety. In fact, CSX had initiated the talks, as stated above, and the talks involved both an acquisition by NS of Conrail and an acquisition by CSX of Conrail, and what assets the non-acquiring party would ultimately receive.

37. CSX, with Conrail's knowing participation, issued its false and misleading press release for the purpose of manipulating and destabilizing the market for Conrail stock by creating the false perception that NS was not committed to its \$100 per share bid to acquire Conrail.

38. The CSX press release had its intended effect. On the morning of November 4, Conrail's stock price dived from \$95 $\frac{1}{4}$  to as low as \$87 per share on heavy volume.

39. Later that morning, NS issued its own press release, explaining that it was CSX that initiated the talks with NS, that NS remained committed to its offer to acquire Conrail for \$100 per share, and that the financing condition to its offer had been satisfied.

40. Following NS's announcement, Conrail's stock price returned to levels at which it had traded prior to CSX's false and misleading press release. Conrail stock closed the day down \$1-5/8, at \$93-5/8.

41. CSX's manipulative tactics are not surprising, given CSX's previous willingness to employ disinformation against the financial markets. As noted above, CSX's Snow had told analysts days prior to announcement of the CSX Transaction that he believed that a major rail merger was unlikely in the near future. On November 6, the Wall Street Journal reported:

[S]ome...analysts think they will have trouble trusting CSX in the future. Two weeks before the announcement of a CSX-Conrail combination, Mr. Snow told analysts that further rail mergers may be inevitable, but not imminent, citing the backlash against Union Pacific Corp's \$3.9 billion takeover of Southern Rail Corp.

"I took that to mean that CSX certainly wouldn't be leading an acquisition attempt soon, and that was a sensible plan of action" said Anthony Hatch, an analyst at Norwest Securities Corp. "I found their subsequent merger announcement to be startling to say the least."

Defendants Are Forced To Amend The Conrail  
Poison Pill To Avert A Near Disaster.

42. As noted above and explained more fully below, the Poison Pill Lock-In feature of the CSX Merger Agreement purports to prevent the Conrail board from taking action with respect to the Conrail Poison Pill without CSX's consent. Yet, due to commencement of the NS Offer, such action was required in order to prevent a "Distribution Date" from occurring on November 7, 1996. If the

Distribution Date had been permitted to occur, then Conrail would have been incapable of engaging in a business combination other than the CSX Transaction as originally agreed to on November 14, 1996, until the year 2005.

43. Conrail's directors had thus placed Conrail in grave strategic jeopardy by agreeing to the Poison Pill Lock-In provision. Essentially, the Conrail board had placed itself at CSX's mercy, with CSX having no obligation to act other than in its own best interests. What is worse, the Conrail directors were completely unaware that they had done so until NS pointed the problem out to counsel for Conrail and Conrail was forced to call a special board meeting to address the matter. Thus, in their haste to approve and lock up the CSX Transaction, Conrail's directors acted with extreme recklessness.

44. Because Conrail refused to give assurances to plaintiffs that its Board would take action to postpone the Distribution Date (which it could do only with CSX's consent), NS was forced to file a motion for a temporary restraining order. The Court scheduled a hearing on the motion for noon on November 4, 1996.

45. Just hours prior to the scheduled hearing, the Conrail directors met for the purpose of extricating



Conrail from the grave jeopardy into which their reckless conduct had placed it. The Conrail directors adopted a resolution postponing the "Distribution Date" of the Conrail Poison Pill until the tenth business day following the date on which any person acquired 10% or more of Conrail's stock. Although it had no obligation to do so, CSX assented to this postponement. As a result, the Court denied NS's application for a temporary restraining order as moot.

Defendants Announce That They Have Restructured The  
CSX Transaction By Substantially Front-End Loading  
The Cash Tender Offers In Order To Stampede Share-  
holders Into Effectively Foreclosing The NS Proposal

46. On November 5, 1996, the Conrail board met. The results of that meeting were announced on November 6, 1996. In that announcement, defendants disclosed that the cash tender offers contemplated by the CSX Transaction had been substantially front-end loaded. That is, the cash price offered to Conrail shareholders in the initial CSX cash tender offers was increased from \$92.50 per share to \$110 per share, while the stock consideration to be paid in the follow-up merger remains the same 1.85619 shares of CSX stock for each Conrail share. Based upon the closing sale price of CSX stock on November 7, 1996, 1.85619 shares were worth approximately \$82.14.

47. Defendants also announced that the timing of the steps toward completion of the CSX Transaction had been changed. The special meeting of Conrail shareholders for the purpose of voting on the Charter Amendment, originally scheduled for November 14, was postponed until an indefinite date that defendants have stated will likely fall in December 1996. Further, the expiration date of the CSX Offer was extended from midnight on November 15 to

midnight of November 20, 1996.

48. Accordingly, defendants plan to close a first tender offer for 19.9% of Conrail's shares on November 20, prior to the vote on the Charter Amendment. If the Charter Amendment is approved, defendants will proceed with a second tender offer, after which CSX will have acquired 40% of Conrail's stock, constituting effective control and foreclosing the NS Proposal as an alternative for Conrail's shareholders.

49. Both the front-end loaded structure of the CSX Offer and the perceived risk that the NS Proposal will not be consummated due to the draconian defensive measures adopted by the defendants exerts tremendous coercive pressure upon Conrail shareholders to tender their shares to CSX. Defendants intend to use this coercion to force Conrail shareholders to deliver a nearly 20% voting block of Conrail shares to CSX. CSX will then use this block as an overwhelming advantage in the proxy contest regarding the Charter Amendment.

50. A November 10, 1996 Philadelphia Inquirer article summed up the coercive situation created by defendants succinctly:

[Conrail shareholders] face a daunting dilemma,

which was deliberately constructed for them by CSX's attorneys and investment bankers. They can either tender their stock to CSX -- that is, offer it up to CSX for sale -- by Nov. 20, or hold back and risk getting a lower price if [CSX] ends up the successful bidder for Conrail.

51. In their Schedule 14D-9 disclosures, defendants admit the coercive design and effect of the revised CSX Transaction:

Shareholders should also be aware that shareholders may decide to tender their Shares to CSX in the CSX Offer and the Second CSX Offer, if applicable (even if they believe that the Proposed Norfolk Transactions, if they could be effected, would have a higher value to shareholders than the CSX Transactions), because shareholders may conclude that sufficient Shares will be tendered by other shareholders and that failure to tender will result in the non-tendering shareholders receiving only CSX shares which, based on current market prices, have a per Share value that is significantly less than the \$110 per Share being offered in the CSX Offer and the Second CSX Offer, if applicable, may succeed regardless of the perceived relative values of the CSX Transactions and the Proposed Norfolk Transactions.

52. CSX and Conrail issued a joint press release on November 6 to announce the revised CSX Transaction. In that press release, defendants made several false and misleading statements calculated to affect the decision making of investors with respect to the CSX Offer and the NS Offer.

53. For instance, defendants stated in the press



release that Conrail's "board of directors carefully considered the relative merits of a merger with Norfolk Southern rather than with CSX." However, review of the fairness opinion letters from Lazard Freres & Co. and Morgan Stanley attached to Amendment No. 4 to Conrail's Schedule 14D-9 with respect to the CSX Offer reveals that this representation is false. Both Lazard Freres and Morgan Stanley included a specific caveat to their letters to Conrail's board:

[A]t your request, in rendering our opinion, we did not address the relative merits of the [CSX Transaction], the [NS Offer] and any alternative potential transactions.

Even were shareholders to discover this caveat, the stark contrast between it and the contrary statement in the joint press release will no doubt leave shareholders wondering just what the truth is.

54. The joint press release also quotes CSX Chairman Snow as claiming that CSX and Conrail have conveniently discovered an additional \$180 million of synergies that "will be realized through the" CSX Transaction, over and above the \$550 million in anticipated savings originally claimed. This claim of "newly discovered" synergies is material to investors' decisions with respect to the CSX Offer and the NS Offer because the claim bears directly upon the value of the follow-up stock merger consideration offered by CSX. The sudden discovery of such additional synergies is highly suspect, since the announcement coincides with an increase in the cash offered in the front end of the CSX Transaction, which increase would otherwise be expected to negatively impact the value of the back end merger. Making matters worse, defendants have failed to disclose any details of or support for these claimed "newly discovered" synergies.

NS Raises Its All Cash Offer For All  
of Conrail's Shares to \$110 Per Share

55. On November 8, 1996, NS announced that it had raised its offer to acquire all of Conrail's outstanding shares to \$110 cash per share. This represents, on a per share basis, a nearly \$17 per share margin over

the November 8 blended value of the CSX Transaction of approximately \$93 per share. In the aggregate, CSX's offer amounts to approximately \$8.5 billion, while NS's Proposal is \$10 billion cash on the barrel. Thus, the challenged conduct of defendants threatens a massive \$1.5 billion loss to Conrail's shareholders.

Unable To Persuade CSX To Improve The Financial Terms Of The CSX Transaction, The Conrail Board Is Forced To Reaffirm Its Support For The Inferior CSX Deal And To Reject NS's Improved Superior Bid

56. On November 12, 1996, the Conrail Board met. Upon information and belief, the topics discussed by the Conrail board at that meeting were (i) whether a revision of the CSX Transaction could be negotiated that would improve its financial terms for Conrail shareholders and (ii) what response should be made to NS's improved offer of \$110 per Conrail share.

57. Apparently, Conrail was unable to negotiate an improvement in the financial consideration offered to Conrail shareholders in the CSX Transaction. Nevertheless, because of the 270-day lockout provision in the CSX Merger Agreement, the Conrail board was forced to maintain its recommendation that shareholders tender their shares to CSX and support the CSX Transaction and to recommend that shareholders reject the superior NS bid of \$110 per share.

#### The CSX Transaction

58. Consistent with Mr. Snow's remarks, discussed above, that Conrail's advisers had ensured that the CSX Transaction is "bullet-proof" and that Conrail's directors have almost no fiduciary duties, the CSX Merger Agreement contains draconian "lock-up" provisions which are unprecedented. These provisions are designed to foreclose success by any competing bidder for Conrail and to protect the lucrative compensation increase and executive succession deal promised to defendant LeVan by CSX.

#### The Poison Pill Lock-In

59. The CSX Merger Agreement purports to bind the Conrail board not to take any action with respect to the Conrail Poison Pill to facilitate any offer to acquire Conrail other than the CSX Transaction. At the same time,



the Conrail board has amended the Conrail Poison Pill to facilitate the CSX Transaction.

60. Because of certain unusual provisions to the Conrail Poison Pill Plan -- which provisions, as noted below, not only were not disclosed in the Schedule 14D-1 filed with the Securities and Exchange Commission or in the Offer to Purchase circulated to Conrail's stockholders by CSX, or in the Schedule 14D-9 circulated to Conrail's shareholders by Conrail, but were in fact affirmatively misdescribed in CSX's Schedule 14D-1 and Offer to Purchase -- the provision in the CSX Merger Agreement barring the Conrail Board from taking action with respect to the Conrail Poison Pill threatened grave, imminent and irreparable harm to Conrail and all of its constituencies.

61. The problem was that on November 7, 1996, a "Distribution Date", as that term is defined in the Conrail Poison Pill Plan, would have occurred. Once that were to happen, the "Rights" issued under the Plan would no longer be redeemable by the Conrail Board, and the Plan would no longer be capable of amendment to facilitate any takeover or merger proposal. Put simply, once the Distribution Date occurs, Conrail's directors would have no control over the Conrail Poison Pill's dilative effect on

an acquiror. Because of the draconian effects of the poison pill dilution on a takeover bidder, no bidder other than CSX would be able to acquire Conrail until the poison pill rights expire in the year 2005, regardless of whether such other bidder offers a transaction that is better for Conrail and its legitimate constituencies than the CSX Transaction. Further, not even CSX would be able to acquire Conrail in a transaction other than the CSX Transaction. In other words, if Conrail were not acquired by CSX in the CSX Transaction for the level of cash and stock originally offered by CSX, then it appears that Conrail would not have been capable of being acquired until at least 2005. In essence, as a result of the Poison Pill Lock-In, Conrail was about to swallow its own poison pill.

62. Poison Pills -- typically referred to as "shareholders rights plans" by the corporations which adopt them -- are normally designed to make an unsolicited acquisition prohibitively expensive to an acquiror by diluting the value and proportional voting power of the shares acquired.

63. Under such a plan, stockholders receive a dividend of originally uncertificated, unexercisable rights. The rights become exercisable and certificated on

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the so-called "Distribution Date," which under the Conrail Poison Pill Plan was until recently defined as the earlier of 10 days following public announcement that a person or group has acquired beneficial ownership of 10% or more of Conrail's stock or 10 days following the commencement of a tender offer that would result in 10% or greater ownership of Conrail stock by the bidder. On the Distribution Date, the corporation would issue certificates evidencing the rights, each of which would allow the holder to purchase a share of stock at a set price. Initially, the exercise price of poison pill rights is set very substantially above market to ensure that the rights will not be exercised. Once rights certificates were issued, the rights could trade separately from the associated shares of stock.

64. The provisions of a poison pill plan that cause the dilution to an acquiror's position in the corporation are called the "flip-in" and "flip-over" provisions. Poison pill rights typically "flip in" when, among other things, a person or group obtains some specified percentage of the corporation's stock; in the Conrail Poison Pill plan, 10% is the "flip-in" level. Upon "flipping in," each right would entitle the holder to receive common stock of Conrail having a value of twice the



exercise price of the right. That is, each right would permit the holder to purchase newly issued common stock of Conrail at half price (specifically, \$410 worth of Conrail stock for \$205). The person or group acquiring the 10% or greater ownership, however, would be ineligible to exercise such rights. In this way, a poison pill plan dilutes the acquiror's equity and voting position. Poison pill rights "flip over" if the corporation engages in a merger in which it is not the surviving entity. Holders of rights, other than the acquiror, would then have the right to buy stock of the surviving entity at half price, again diluting the acquiror's position. The Conrail Poison Pill Plan contains both a "flip-in" provision and a "flip-over" provision.

65. So long as corporate directors retain the power ultimately to eliminate the anti-takeover effects of a poison pill plan in the event that they conclude that a particular acquisition would be in the best interests of the corporation, a poison pill plan can be used to promote legitimate corporate interests. Thus, typical poison pill plans reserve power in a corporation's board of directors to redeem the rights in toto for a nominal payment, or to amend the poison pill plan, for instance, to exempt a particular transaction or acquiror from the dilutive

effects of the plan.

66. The Conrail Poison Pill Plan contains provisions for redemption and amendment. However, an unusual aspect of the Conrail Poison Pill Plan is that the power of Conrail's directors to redeem the rights or amend the plan to exempt a particular transaction or bidder terminates on the Distribution Date. While the Conrail Poison Pill Plan gives Conrail directors the power to effectively postpone the Distribution Date, the CSX Merger Agreement purports to bind them contractually not to do so. Thus, the Distribution Date under Conrail's Poison Pill Plan would have occurred on November 7, 1996 -- ten business days after the date when NS commenced the Offer -- and Conrail's directors had entered into an agreement which purports to tie their hands so that they could do nothing to prevent it.

67. Ironically, the specific provisions of the CSX Merger Agreement which purport to prevent the Conrail directors from postponing the Distribution Date are the very same sections which require Conrail to exempt the CSX Transaction from the Conrail Poison Pill -- Sections 3.1(n) and 5.13. Section 3.1(n) provides, in pertinent part:

Green Rights Agreement and By-laws. (A) The

Green Rights Agreement has been amended (the "Green Rights Plan Amendment") to (i) render the Green Rights Agreement inapplicable to the Offer, the Merger and the other transactions contemplated by this Agreement and the Option Agreements and (ii) ensure that (y) neither White nor any of its wholly owned subsidiaries is an Acquiring Person (as defined in the Green Rights Agreement) pursuant to the Green Rights Agreement and (z) a Shares Acquisition Date, Distribution Date or Trigger Event (in each case as defined in the Green Rights Agreement) does not occur by reason of the approval, execution or delivery of this Agreement, and the Green Stock Option Agreement, the consummation of the Offer, the Merger or the consummation of the other transactions contemplated by this Agreement and the Green Stock Option Agreement, and the Green Rights Agreement may not be further amended by Green without the prior consent of White in its sole discretion. (emphasis added)

Section 5.13 provides, in pertinent part:

The Board of Directors of Green shall take all further action (in addition to that referred to in Section 3.1(n)) reasonably requested in writing by White (including redeeming the Green Rights immediately prior to the Effective Time or amending the Green Rights Agreement) in order to render the Green Rights inapplicable to the Offer, the Merger and the other transactions contemplated by this Agreement and the Green Stock Option Agreement. Except as provided above with respect to the Offer, the Merger and the other transactions contemplated by this Agreement and the Green Stock Option Agreement, the Board of Directors of Green shall not (a) amend the Green Rights Agreement or (b) take any action with respect to, or make any determination under, the Green Rights Agreement, including a redemption of the Green Rights or any action to facilitate a Takeover Proposal in respect of Green.

68. Thus, although under the Conrail Poison Pill Plan the Conrail Board is empowered to "determine[] by action ... prior to such time as any person becomes an Acquiring Person" that the Distribution Date will occur on a date later than November 7, the Conrail board had contractually purported to bind itself not to do so.

69. If the Distribution Date had been permitted to occur, Conrail, its shareholders, and its other constituents would have faced catastrophic irreparable injury. If the Distribution Date occurs and then the CSX Transaction does not occur for any number of reasons -- for instance, because (i) the Conrail shareholders do not tender sufficient shares in the CSX offer, (ii) the Conrail shareholders do not approve the CSX merger, (iii) the merger does not receive required regulatory approvals, or (iv) CSX exercises one of the conditions to its obligation to complete its offer -- Conrail would be essentially incapable of being acquired or engaging in a business combination until 2005. This would be so regardless of the benefits and strategic advantages of any business combination which might otherwise be available to Conrail. In the present environment of consolidation in the railroad industry, such a disability would plainly be a serious



irremediable disadvantage to Conrail, its shareholders and all of its constituencies.

70. As a result of plaintiffs' demand that the Distribution Date be postponed and of their motion for a temporary restraining order, the Conrail board met on November 4, hours prior to the scheduled hearing on plaintiffs' motion, and, with the required permission of CSX, extended the Distribution Date until ten days after any person acquires 10% or more of Conrail's shares. As a result, the Court denied plaintiffs' motion as moot.

#### The 270-Day Lock-Out

71. Setting aside the Poison Pill Lock-In, the CSX Merger Agreement also contains an unprecedented provision purporting to bind Conrail's directors not to terminate the CSX Merger Agreement for 270 days regardless of whether their fiduciary duties require them to do so. The pertinent provisions appear in Section 4.2 of the CSX Merger Agreement. Under that section, Conrail covenants not to solicit, initiate or encourage other takeover proposals, or to provide information to any party interested in making a takeover proposal. The CSX Merger Agreement builds in an exception to this prohibition -- it provides that prior to the earlier of the closing of the

CSX Offer and Conrail shareholder approval of the CSX Merger, or after 270 days from the date of the CSX Merger Agreement, if the Conrail board determines upon advice of counsel that its fiduciary duties require it to do so, Conrail may provide information to and engage in negotiations with another bidder. Thus, the drafters of the CSX Merger Agreement -- no doubt counsel for Conrail and CSX -- recognize that there are circumstances in which Conrail's directors would be required by their fiduciary duties to consider a competing acquisition bid.

72. However, despite the recognition in the CSX Merger Agreement that the fiduciary duties of the Conrail Board may require it to do so, Section 4.2(b) of the agreement (the "270-Day Lock-Out") purports to prohibit the Conrail Board from withdrawing its recommendations that Conrail shareholders tender their shares in the CSX Offer and approve the CSX Merger for a period of 270 days from the date of the CSX Merger Agreement. Likewise, it prohibits the Conrail Board from terminating the CSX Merger Agreement, even if the Conrail Board's fiduciary duties require it to do so, for the same 270-day period.

73. Thus, despite the plain contemplation of circumstances under which the Conrail Board's fiduciary

duties would require it to entertain competing offers and act to protect Conrail and its constituencies by (i) withdrawing its recommendation that Conrail shareholders approve the CSX Transaction and (ii) terminating the CSX Merger Agreement, Conrail's Board has seen fit to disable itself contractually from doing so.

74. As with the Poison Pill Lock-In, this "270-Day Lock-Out" provision amounts to a complete abdication of the duty of Conrail's directors to act in the best interests of the corporation. With the 270-day Lock-Out, the Conrail directors have determined to take a nine-month leave of absence despite their apparent recognition that their fiduciary duties could require them to act during this critical time.

75. The effect of this provision is to lock out competing superior proposals to acquire Conrail for at least nine months, thus giving the CSX Transaction an unfair time value advantage over other offers and adding to the coercive effects of the CSX Transaction.

76. Because it purports to restrict or limit the exercise of the fiduciary duties of the Conrail directors, the 270-Day Lock-Out provision of the CSX Merger Agreement is ultra vires, void and unenforceable. Further, by agreeing to the 270-Day Lock-Out as part of the CSX Merger Agreement, the Conrail directors breached their fiduciary duties of loyalty and care.

#### Rapid Transfer of Control

77. The CSX Transaction is structured to include (i) a first-step cash tender offer for up to 19.9% of Conrail's stock, (ii) an amendment to Conrail's charter to opt out of coverage under Subchapter 25E of Pennsylvania's Business Corporation Law (the "Charter Amendment"), which requires any person acquiring control of over 20% or more of the corporation's voting power to acquire all other shares of the corporation for a "fair price," as defined in the statute, in cash, (iii) following such amendment, an acquisition of additional shares which, in combination with other shares already acquired, would constitute at least 40% and up to approximately 50% of Conrail's stock, and (iv) following required regulatory approvals, consummation of a follow-up stock-for-stock merger.

78. Thus, once the Charter Amendment is ap-



proved, CSX will be in a position to acquire either effective or absolute control over Conrail. Conrail admits that the CSX Transaction contemplates a sale of control of Conrail. In its preliminary proxy materials filed with the Securities and Exchange Commission, Conrail stated that if CSX acquires 40% of Conrail's stock, approval of the merger will be "virtually certain." CSX could do so either by increasing the number of shares it will purchase by tender offer, or, if tenders are insufficient, by accepting all tendered shares and exercising the Stock Option. CSX could obtain "approximately 50 percent" of Conrail's shares by purchasing 40% pursuant to tender offer and by exercising the Stock Option, in which event shareholder approval of the CSX Merger will be, according to Conrail's preliminary proxy statement, "certain."

79. The swiftness with which the CSX Transaction is designed to transfer control over Conrail to CSX can only be viewed as an attempt to lock up the CSX Transaction and benefits it provides to Conrail management, despite the fact that a better deal, financially and otherwise, is available for Conrail, its shareholders, and its other legitimate constituencies.

The Charter Amendment

80. Conrail's Preliminary Proxy Materials for the November 14, 1996 Special Meeting set forth the resolution to be voted upon by Conrail's shareholders as follows:

An amendment (the "Amendment") of the Articles of Incorporation of Conrail is hereby approved and adopted, by which, upon the effectiveness of such amendment Article Ten thereof will be amended and restated in its entirety as follows: Subchapter E, Subchapter G and Subchapter H of Chapter 25 of the Pennsylvania Business Corporation Law of 1988, as amended, shall not be applicable to the Corporation; and further, that the Board of Directors of Conrail, in its discretion, shall be authorized to direct certain executive officers of Conrail to file or not to file the Articles of Amendment to Conrail's Articles of Incorporation reflecting such Amendment or to terminate the Articles of Amendment prior to their effective date, if the Board determines such action to be in the best interests of Conrail.

81. Further, the preliminary proxy materials state that

Pursuant to the Merger Agreement and in order to facilitate the transactions contemplated thereby, if the [Charter Amendment] is approved, Conrail would be required to file the Amendment with the Pennsylvania Department of State so as to permit the acquisition by CSX of in excess of 20% of the shares, such filing to be made and effective immediately prior to such acquisition. If CSX is not in a position to make such acquisition (because, for example, shares have not been tendered to CSX, Conrail is not required to make such filing, (although approval of the [Charter Amendment] will authorize Conrail to do so) and Conrail does not currently intend to make such filing unless it is required under the Merger Agreement to permit CSX to acquire in excess of 20% of the Shares.

The \$300 Million Breakup Fee

82. The CSX Merger Agreement provides for a \$300 million break-up fee. This fee would be triggered if the CSX Merger Agreement were terminated following a competing takeover proposal.

83. This breakup fee is disproportionately large, constituting over 3.5% of the aggregate value of the CSX Transaction. The breakup fee unreasonably tilts the playing field in favor of the CSX Transaction -- a transaction that the defendant directors knew, or reasonably should have known, at the time they approved the CSX Transaction, provided less value and other benefits to Conrail and its constituencies than would a transaction with NS.

The Lock-Up Stock Option

84. Concurrently with the CSX Merger Agreement, Conrail and CSX entered into an option agreement (the "Stock Option Agreement") pursuant to which Conrail granted to CSX an option, exercisable in certain events, to purchase 15,955,477 shares of Conrail common stock at an exercise price of \$92.50 per share, subject to adjustment.

85. If, during the time that the option under the Stock Option Agreement is exercisable, Conrail enters into an agreement pursuant to which all of its outstanding common shares are to be purchased for or converted into, in whole or in part, cash, in exchange for cancellation of the Option, CSX shall receive an amount in cash equal to the difference (if positive) between the closing market price per Conrail common share on the day immediately prior to



the consummation of such transaction and the purchase price. In the event (i) Conrail enters into an agreement to consolidate with, merge into, or sell substantially all of its assets to any person, other than CSX or a direct or indirect subsidiary thereof, and Conrail is not the surviving corporation, or (ii) Conrail allows any person, other than CSX or a direct or indirect subsidiary thereof, to merge into or consolidate with Conrail in a series of transactions in which the Conrail common shares or other securities of Conrail represent less than 50% of the outstanding voting securities of the merged corporation, then the option will be adjusted, exchanged, or converted into options with identical terms as those described in the Stock Option Agreement, appropriately adjusted for such transaction.

86. CSX and Conrail also entered into a similar option agreement, pursuant to which CSX granted to Conrail an option, exercisable only in certain events, to purchase 43,090,773 shares of CSX Common Stock at an exercise price of \$64.82 per share.

87. The exercise price of the option under the Stock Option Agreement is \$92.50 per share. The Stock Option Agreement contemplates that 15,955,477 authorized

but unissued Conrail shares would be issued upon its exercise. Thus, for each dollar above \$92.50 that is offered by a competing bidder for Conrail, such as NS, the competing acquiror would suffer \$15,955,477 in dilution. Moreover, there is no cap to the potential dilution. At NS's original offer of \$100 per share, the dilution attributable to the Stock Option would have been \$119,666,077.50. At a hypothetical offering price of \$101 per share, the dilution would total \$135,621,554.50. At NS's current bid of \$110 per share, the dilution would total \$279,220,847.50. Thus, NS's 10% increase in its offer resulted in a more than doubling of such dilution costs. This lock-up structure serves no legitimate corporate purpose, as it imposes increasingly severe dilution penalties the higher the competing bid!

88. At the current \$110 per share level of NS's bid, the sum of the \$300 million break-up fee and Stock Option dilution of \$279,220,847.50 constitutes nearly 6.8% of the CSX Transaction's \$8.5 billion value. This is an unreasonable impediment to NS's offer. Moreover, because these provisions were not necessary to induce an offer that is in Conrail's best interests, but rather were adopted to lock up a deal providing Conrail's management with personal benefits while selling Conrail to the low bidder, their adoption constituted a plain breach of the Director Defendants' fiduciary duty of loyalty.

Selective Discriminatory  
Treatment of Competing Bids

89. Finally, the Conrail board has breached its fiduciary duties by selectively (i) rendering Conrail's Poison Pill Plan inapplicable to the CSX Transaction, (ii) approving the CSX Transaction and thus exempting it from the 5-year merger moratorium under Pennsylvania's Business Combination Statute, and (iii), as noted above, purporting to approve the Charter Amendment in favor of CSX only.

90. While Pennsylvania law does not require directors to amend or redeem poison pill rights or to take action rendering anti-takeover provisions inapplicable, the

law is silent with respect to the duties of directors once they have determined to do so. Once directors have determined to render poison pill rights and anti-takeover statutes inapplicable to a change of control transaction, their fundamental fiduciary duties of care and loyalty require them to take such actions fairly and equitably, in good faith, after due investigation and deliberation, and only for the purpose of fostering the best interests of the corporation, and not to protect selfish personal interests of management.



91. Thus, Conrail's directors are required to act evenhandedly, redeeming the poison pill rights and rendering anti-takeover statutes inapplicable only to permit the best competing control transaction to prevail. Directors cannot take such selective and discriminatory defensive action to favor corporate executives' personal interests over those of the corporation, its shareholders, and other legitimate constituencies.

#### LeVan's Deal

92. As an integral part of the CSX Transaction, CSX, Conrail and defendant LeVan have entered into an employment agreement dated as of October 14, 1996 (the "LeVan Employment Agreement"), covering a period of five-years from the effective date of any merger between CSX and Conrail. The LeVan Employment Agreement provides that Mr. LeVan will serve as Chief Operating Officer and President of the combined CSX/Conrail company, and as Chief Executive Officer and President of the railroad businesses of Conrail and CSX, for two years from the effective date of a merger between CSX and Conrail (the "First Employment Segment"). Additionally, Mr. LeVan will serve as Chief Executive Officer of the combined CSX/Conrail company for a period of two years beginning immediately after the First Employment

Segment (the "Second Employment Segment"). During the period commencing immediately after the Second Employment Segment, or, if earlier, upon the termination of Mr. Snow's status as Chairman of the Board (the "Third Employment Segment"), Mr. LeVan will additionally serve as Chairman of the Board of the combined CSX/Conrail company.

93. Defendant LeVan received a base salary from Conrail of \$514,519 and a bonus of \$24,759 during 1995. The LeVan Employment Agreement ensures substantially enhanced compensation for defendant LeVan. It provides that during the First Employment Segment, Mr. LeVan shall receive annual base compensation at least equal to 90% of the amount received by the Chief Executive Officer of CSX, but not less than \$810,000, together with bonus and other incentive compensation at least equal to 90% of the amount received by the Chief Executive Officer of CSX. During 1995, Mr. Snow received a base salary of \$895,698 and a bonus having a cash value of \$1,687,500. Thus, if Mr. Snow's salary and bonus were to equal Mr. Snow's 1995 salary and bonus, the LeVan Employment Agreement would provide LeVan with a salary of \$810,000 and a bonus of \$1,518,750 in the First Employment Period. During the Second and Third Employment Segments, Mr. LeVan will

receive compensation in an amount no less than that received by the Chief Executive Officer during the First Employment Segment, but not less than \$900,000.

94. If CSX terminates Mr. LeVan's employment for a reason other than cause or disability or Mr. LeVan terminates employment for good reason (as those terms are defined in the LeVan Employment Agreement), Mr. LeVan will be entitled to significant lump sum cash payments based on his compensation during the five year term of the employment agreement, continued employee welfare benefits for the longer of three years or the number of years remaining in the employment agreement; and the immediate vesting of outstanding stock-based awards.

#### Defendants' Campaign Of Misinformation

95. On October 15, 1996, Conrail and CSX issued press releases announcing the CSX Transaction, and Conrail published and filed preliminary proxy materials with the SEC. On October 16, 1996, CSX filed and published its Schedule 14D-1 Tender Offer Statement and Conrail filed its Schedule 14D-9 Solicitation/Recommendation Statement. These communications to Conrail's shareholders reflect a scheme by defendants to coerce, mislead and fraudulently manipulate such share-

holders to swiftly deliver control of Conrail to CSX and effectively frustrate any competing higher bid.

96. Conrail's Preliminary Proxy Statement contains the following misrepresentations of fact:

(a) Conrail states that "certain provisions of Pennsylvania law effectively preclude ... CSX from purchasing 20% or more" of Conrail's shares in the CSX Offer "or in any other manner (except the [CSX] Merger." This statement is false. The provisions of Pennsylvania law to which Conrail is referring are those of Subchapter 25E of the Pennsylvania Business Corporation Law. This law does not "effectively preclude" CSX from purchasing 20% or more of Conrail's stock other than through the CSX Merger. Rather, it simply requires a purchaser of 20% or more of Conrail's voting stock to pay a fair price in cash, on demand, to the holders of the remaining 80% of the shares. The real reason that CSX will not purchase 20% or more of Conrail's voting stock absent the Charter Amendment is that, unlike NS, CSX is unable or unwilling to pay a fair price in cash for 100% of Conrail's stock.

(b) Conrail states that its "Board of



Directors believes that Conrail shareholders should have the opportunity to receive cash in the near-term for 40% of [Conrail's] shares," and that "[t]he Board of Directors believes it is in the best interests of shareholders that they have the opportunity to receive cash for 40% of their shares in the near term." These statements are false. First of all, the Conrail Board believes that Conrail shareholders should have the opportunity to receive cash in the near-term for 40% of Conrail's shares only if such transaction will swiftly deliver effective control of Conrail to CSX. Second, the Conrail Board of Directors does not believe that such swift transfer of control to CSX is in the best interests of Conrail shareholders; rather, the Conrail Board of Directors believes that swift transfer of effective control over Conrail to CSX through the CSX Offer will lock up the CSX Transaction and preclude Conrail shareholders from any opportunity to receive the highest reasonably available price in a sale of control of Conrail.

97. CSX's Schedule 14D-1 contains the following misrepresentations of fact:

(a) CSX states that:

At any time prior to the announcement by [Conrail] or an Acquiring Person that an Acquiring Person has become such, [Conrail] may redeem the [Conrail Poison Pill Plan] rights ....

This statement is false. In fact, the Conrail Poison Pill rights are redeemable any time prior to the Distribution Date. After the Distribution Date, they cannot be redeemed. CSX further states that:

The terms of the [Conrail Poison Pill] rights may be amended by the [Conrail Board] without the consent of the holders of the Rights ... to make any other provision with respect to the Rights which [Conrail] may deem desirable; provided that from and after such time as Acquiring Person becomes such, the Rights may not be amended in any manner which would adversely affect the interests of holders of Rights.

This statement is also false. The Conrail Board's power to freely amend the poison pill rights terminates on the Distribution Date, not the date when someone becomes an Acquiring Person.

(b) CSX states that the "purpose of the [CSX] Offer is for [CSX] . . . to acquire a significant equity interest in [Conrail] as the first step

in a business combination of [CSX] and [Conrail]." This statement is false. The purpose of the CSX Offer is to swiftly transfer effective control over Conrail to CSX in order to lock up the CSX Transaction and foreclose the acquisition of Conrail by any competing higher bidder.

(c) CSX states that "the Pennsylvania Control Transaction Law effectively precludes [CSX, through its acquisition subsidiary] from purchasing 20% or more of Conrail's shares pursuant to the [CSX] Offer." This statement is false. The provisions of Pennsylvania law to which Conrail is referring are those of Subchapter 25E of the Pennsylvania Business Corporation Law. This law does not "effectively preclude" CSX from purchasing 20% or more of Conrail's stock other than through the CSX Merger. Rather, it simply requires a purchaser of 20% or more of Conrail's voting stock to pay a fair price in cash, on demand, to the holders of the remaining 80% of the shares. The real reason that CSX will not purchase 20% or more of Conrail's voting stock absent the Charter Amendment is that, unlike NS, CSX is unable or unwilling to pay a fair price in cash for 100% of

Conrail's stock.

98. Conrail's Schedule 14D-9 states that "the [CSX Transaction] . . . is being structured as a true merger-of-equals transaction." This statement is false.

The CSX Transaction is being structured as a rapid, locked-up sale of control of Conrail to CSX involving a significant, albeit inadequate, control premium.

99. Each of the Conrail Preliminary Proxy Statement, the CSX Schedule 14D-1 and the Conrail Schedule 14D-9 omit to disclose the following material facts, the disclosure of which are necessary to make the statements made in such documents not misleading:

(a) That the Conrail Board will lose its power to redeem or freely amend the Conrail Poison Pill Plan rights on the "Distribution Date."

(b) That both Conrail (and its senior management) and CSX (and its senior management) knew (i) that NS was keenly interested in acquiring Conrail, (ii) that NS has the financial capacity and resources to pay a higher price for Conrail than CSX could, and (iii) that a financially superior competing bid for Conrail by NS was inevitable.

(c) That Conrail management led NS to



believe that if and when the Conrail Board determined to sell Conrail, it would do so through a process in which NS would be given the opportunity to bid, and that in the several weeks prior to the announcement of the CSX Transaction, defendant LeVan on two occasions prevented Mr. Goode from presenting an acquisition proposal to Conrail by stating to him that making such a proposal would be unnecessary and that Mr. LeVan would contact Mr. Goode concerning NS's interest in acquiring Conrail following (i) the Conrail Board's strategic planning meeting scheduled for September 1996 and (ii) a meeting of the Conrail Board purportedly scheduled for October 16, 1996.

(d) That in September of 1994, NS had proposed a stock-for-stock acquisition of Conrail at an exchange ratio of 1.1 shares of NS stock for each share of Conrail stock, which ratio, if applied to the price of NS stock on the day before announcement of the CSX Transaction, October 14, 1996, implied a bid by NS worth over \$101 per Conrail share.

(e) That the CSX Transaction was structured to swiftly transfer effective, if not absolute voting control over Conrail to CSX, and to prevent any other

bidders from acquiring Conrail for a higher price.

(f) That although Conrail obtained opinions from Morgan Stanley and Lazard Freres that the consideration to be received by Conrail stockholders in the CSX Transaction was "fair" to such shareholders from a financial point of view, Conrail's Board did not ask its investment bankers whether the CSX Transaction consideration was adequate, from a financial point of view, in the context of a sale of control of Conrail such as the CSX Transaction.

(g) That although in arriving at their "fairness" opinions, both Morgan Stanley and Lazard Freres purport to have considered the level of consideration paid in comparable transactions, both investment bankers failed to consider the most closely comparable transaction -- NS's September 1994 merger proposal, which as noted above, would imply a price per Conrail share in excess of \$101.

(h) That, if asked to do so, Conrail's investment bankers would be unable to opine in good faith that the consideration offered in the CSX Transaction is adequate to Conrail's shareholders from a financial point of view.

(i) That Conrail's Board failed to seek a fairness opinion from its investment bankers concerning the \$300 million breakup fee included in the CSX Transaction.

(j) That Conrail's Board failed to seek a fairness opinion from its investment bankers concerning the Stock Option Agreement granted by Conrail to CSX in connection with the CSX Transaction.

(k) That the Stock Option Agreement is structured so as to impose increasingly severe dilution costs on a competing bidder for control of Conrail for progressively higher acquisition bids.

(l) That the Conrail Board intends to withhold the filing of the Charter Amendment following its approval by Conrail's stockholders if the effectiveness of such amendment would facilitate any bid for Conrail other than the CSX Transaction.

(m) That the Charter Amendment and/or its submission to a vote of the Conrail shareholders is illegal and ultra vires under Pennsylvania law.

(n) That the Conrail Board's discriminatory (i) use of the Charter Amendment, (ii) amendment of the Conrail Poison Pill and (iii) action exempting the

CSX Transaction from Pennsylvania's Business Combination Statute, all to facilitate the CSX Transaction and to preclude competing financially superior offers for control of Conrail, constitute a breach of the Director Defendants' fiduciary duty of loyalty.

(o) That Conrail's Board failed to conduct a reasonable, good faith investigation of all reasonably available material information prior to approving the CSX transaction and related agreements, including the lock-up Stock Option Agreement.

(p) That in recommending that Conrail's shareholders tender their shares to CSX in the CSX Offer, Conrail's Board did not conclude that doing so would be in the best interests of Conrail's shareholders.

(q) That in recommending that Conrail's shareholders approve the Charter Amendment, the Conrail Board did not conclude that doing so would be in the best interests of Conrail's shareholders.

(r) That in recommending that Conrail shareholders tender their shares to CSX in the CSX Offer, primary weight was given by the Conrail Board to interests of persons and/or groups other than



Conrail's shareholders.

(s) That in recommending that Conrail shareholders tender their shares to CSX in the CSX Offer, primary weight was given to the personal interests of defendant LeVan in increasing his compensation and succeeding Mr. Snow as Chairman and Chief Executive Officer of the combined CSX/Conrail company.

(t) That the Continuing Director Requirement in Conrail's Poison Pill (described below in paragraphs 80 through 88, adopted by Conrail's board in September 1995 and publicly disclosed at that time, is illegal and ultra vires under Pennsylvania law and therefore is void and unenforceable.

(u) That, in deciding to pursue a transaction with CSX, the Conrail Board relied on an internal management analysis that was based on public information as opposed to analysis by Conrail's financial advisers.

100. In connection with the defendants' announcement of the Revised CSX Transaction on November 6, 1996 and the Conrail Board's Schedule 14D-9 recommendation against the NS Offer, defendants issued several false and

misleading statements:

(a) In their joint press release dated November 6, 1996, defendants:

(i) stated that the Conrail Board carefully considered the relative merits of the CSX Transaction and the NS Proposal, when in fact they specifically directed their financial advisors not to do so in rendering their fairness opinions; and

(ii) claim that they have discovered additional synergies of \$180 million that "will be realized" in connection with the CSX Transaction, yet omitted disclosure in the press release or in any disclosure materials of any support or explanation of how and why these claimed additional synergies were suddenly discovered at or about the time of announcement of the increase in the cash component of the CSX Transaction.

(b) In CSX's Schedule 14D-1, Amendment No. 4, defendant CSX, with Conrail's knowing and active participation:

(i) states that the NS Proposal is a "nonbid," when in fact it is a bona fide superior offer that is available to Conrail shareholders if the

Conrail board were to properly observe its fiduciary duties and recognize that the purported contractual prohibitions against doing so contained in the CSX Merger Agreement are illegal and unenforceable;

(ii) states falsely that Norfolk Southern initiated discussions with CSX during the weekend of November 2 and 3, when in fact CSX initiated those talks;

(iii) states that the November 2 and 3 talks concerned sales of Conrail assets to NS after an acquisition of Conrail by CSX, while in fact such discussions also included scenarios in which NS would acquire Conrail and then sell certain Conrail assets to CSX;

(iv) state that the Conrail board "carefully considered" the relative merits of a merger with Norfolk Southern rather than with CSX, while in fact Conrail's financial advisors were instructed not to do so in rendering their fairness opinions;

(v) fails to disclose the basis for and analysis, if any, underlying the "discovery" of an additional \$180 million in CSX/Conrail merger synergies.

(c) In Conrail's Schedule 14D-9 with respect to the NS Offer, defendant Conrail, with CSX's knowing and active participation:

(i) stated that Conrail's board of directors "unanimously recommends" that Conrail shareholders not tender their shares into the NS Offer while failing to disclose that the directors were bound by contract, under the CSX Merger Agreement, to make such recommendation, that such contractual obligation is void under Pennsylvania law, and what effect the unenforceability of such contractual obligation, if considered by the Conrail board, would have upon their recommendation;

(ii) stated that Conrail's board of directors "unanimously recommends" that Conrail shareholders who desire to receive cash for their shares tender their shares in the CSX Offer, while failing to disclose that the CSX Merger Agreement bound the directors contractually to make such recommendation, that such contractual obligation is void under Pennsylvania law, and what effect the unenforceability of such contractual obligation, if considered by the Conrail board, would have upon their



recommendation;

(iii) failed to disclose that in negotiating the revised terms of the CSX Transaction, Conrail could have demanded, in consideration for agreeing to the revised terms, that its board of directors be released from the poison pill lock-in and 180-day lock-out provisions, that Conrail management and Conrail's advisors failed to so inform the Conrail board, and that instead, management unilaterally determined to negotiate an increase in the lock-out provision from 180 days to 270 days;

(iv) failed to disclose the basis for and analysis underlying the defendants "discovery" of \$180 million in new CSX/Conrail merger synergies.

(v) failed to disclose the basis for the opinions of Conrail's investment bankers that the CSX Transaction was "fair" to shareholders from a financial perspective.

(vi) stated that, in rendering their fairness opinions to the Conrail Board, Conrail's financial advisers did not address the relative merits of the CSX and Norfolk Southern transactions, while failing to disclose that in fact Conrail's financial advisers

provided Conrail with advice concerning the relative merits of the CSX and Norfolk Southern tender offers.

(vii) failed to disclose the substance of its financial advisers' advice concerning the relative merits of the CSX and Norfolk Southern transactions.

(d) In Conrail's Schedule 14D-9, Amendment No. 4, with respect to the CSX Offer, defendant Conrail, with CSX's knowing and active participation:

(i) stated that Conrail's board of directors "unanimously recommends" that Conrail shareholders not tender their shares into the NS Offer while failing to disclose that the directors were bound by contract, under the CSX Merger Agreement, to make such recommendation, that such contractual obligation is void under Pennsylvania law, and what effect the unenforceability of such contractual obligation, if considered by the Conrail board, would have upon their recommendation;

(ii) stated that Conrail's board of directors "unanimously recommends" that Conrail shareholders who desire to receive cash for their shares tender their shares in the CSX Offer, while

failing to disclose that the CSX Merger Agreement bound the directors contractually to make such recommendation, that such contractual obligation is void under Pennsylvania law, and what effect the unenforceability of such contractual obligation, if considered by the Conrail board, would have upon their recommendation;

(iii) failed to disclose that in negotiating the revised terms of the CSX Transaction, Conrail could have demanded, in consideration for agreeing to the revised terms, that its board of directors be released from the poison pill lock-in and 180-day lock-out provisions, that Conrail management and Conrail's advisors failed to so inform the Conrail board, and that instead, management unilaterally determined to negotiate an increase in the lock-out provision from 180 days to 270 days;

(iv) failed to disclose the basis for and analysis, if any, underlying the defendants "discovery" of \$180 million in new CSX/Conrail merger synergies.

(v) failed to disclose the basis for the opinions of Conrail's investment bankers that

the CSX Transaction was "fair" to shareholders from a financial perspective.

(vi) stated that, in rendering their fairness opinions to the Conrail Board, Conrail's financial advisers did not address the relative merits of the CSX and Norfolk Southern transactions, while failing to disclose that in fact Conrail's financial advisers provided Conrail with advice concerning the relative merits of the CSX and Norfolk Southern tender offers.

(vii) failed to disclose the substance of its financial advisers' advice concerning the relative merits of the CSX and Norfolk Southern transactions.



101. Each of the misrepresentations and omitted facts detailed above are material to the decisions of Conrail's shareholders concerning whether to vote in favor of the Charter Amendment and whether, in response to the CSX Offer, to hold, sell to the market, or tender their shares, because such misrepresentations and omitted facts bear upon (i) the good faith of the Conrail directors in recommending that Conrail shareholders approve the Charter Amendment and tender their shares in the CSX Offer, (ii) whether taking such actions are in the best interests of Conrail shareholders, (iii) whether the CSX Offer represents financially adequate consideration for the sale of control of Conrail and/or (iv) whether the economically superior NS Proposal is a viable, available alternative to the CSX Transaction. Absent adequate corrective disclosure by the defendants, these material misrepresentations and omissions threaten to coerce, mislead, and fraudulently manipulate Conrail shareholders to approve the Charter Amendment and deliver control of Conrail to CSX in the CSX Offer, in the belief that the NS Proposal is not an available alternative.

Conrail's Directors Attempt To Override  
Fundamental Principles of Corporate Democracy  
By Imposing A Continuing Directors

#### Requirement in Conrail's Poison Pill

102. As noted above, Conrail's directors have long known that it was an attractive business combination candidate to other railroad companies, including NS.

103. Neither Conrail management nor its Board, however, had any intention to give up their control over Conrail, unless the acquiror was willing to enter into board composition, executive succession, and compensation and benefit arrangements satisfying the personal interests of Conrail management and the defendant directors, such as the arrangements provided for in the CSX Transaction. They were aware, however, that through a proxy contest, they could be replaced by directors who would be receptive to a change in control of Conrail regardless of defendants' personal interests. Accordingly, on September 20, 1995, the Conrail directors attempted to eliminate the threat to their continued incumbency posed by the free exercise of Conrail's stockholders' franchise. They drastically altered Conrail's existing Poison Pill Plan, by adopting a "Continuing Director" limitation to the Board's power to redeem the rights issued pursuant to the Rights Plan (the "Continuing Director Requirement").

104. Prior to adoption of the Continuing Direc-

tor Requirement, the Conrail Poison Pill Plan was a typical "flip-in, flip-over" plan, designed to make an unsolicited acquisition of Conrail prohibitively expensive to an acquiror, and reserving power in Conrail's duly elected board of directors to render the dilative effects of the rights ineffective by redeeming or amending them.

105. The September 20, 1995 adoption of the Continuing Director Requirement changed this reservation of power. It added an additional requirement for amendment of the plan or redemption of the rights. For such action to be effective, at least two members of the Board must be "Continuing Directors," and the action must be approved by a majority of such "Continuing Directors." "Continuing Directors" are defined as members of the Conrail Board as of September 20, 1995, i.e., the incumbents, or their hand-picked successors.

106. By adopting the Continuing Director Requirement, the Director Defendants intentionally and deliberately have attempted to destroy the right of stockholders of Conrail to replace them with new directors who would have the power to redeem the rights or amend the Rights Agreement in the event that such new directors deemed such action to be in the best interests

of the company. That is, instead of vesting the power to accept or reject an acquisition in the duly elected Board of Directors of Conrail, the Rights Plan, as amended, destroys the power of a duly elected Board to act in connection with acquisition offers, unless such Board happens to consist of the current incumbents or their hand-picked successors. Thus, the Continuing Director Requirement is the ultimate entrenchment device.

107. The Continuing Director Requirement is invalid per se under Pennsylvania statutory law, in that it purports to limit the discretion of future Boards of Conrail. Pennsylvania law requires that any such limitation on Board discretion be set forth in a By-Law adopted by the stockholders. See Pa. BCL § 1721. Thus, the Director Defendants were without power to adopt such a provision unilaterally by amending the Rights Agreement.

108. Additionally, the Continuing Director Requirement is invalid under Conrail's By-Laws and Articles of Incorporation. Under Section 3.5 of Conrail's By-Laws, the power to direct the management of the business and affairs of Conrail is broadly vested in its duly elected board of directors. Insofar as the Continuing Director Requirement purports to restrict the power of



Conrail's duly elected board of directors to redeem the rights or amend the plan, it conflicts with Section 3.5 of Conrail's By-Laws and is therefore of no force or effect. Article Eleven of Conrail's Articles of Incorporation permits Conrail's entire board to be removed without cause by stockholder vote. Read together with Section 3.5 of Conrail's By-Laws, Article Eleven enables Conrail's stockholders to replace the entire incumbent board with a new board fully empowered to direct the management of Conrail's business and affairs, and, specifically, to redeem the rights or amend the plan. Insofar as the Continuing Director Requirement purports to render such action impossible, it conflicts with Conrail's Articles of Incorporation and is therefore of no force or effect.

109. Furthermore, the adoption of the Continuing Director Requirement constituted a breach of the Director Defendants' fiduciary duty of loyalty. There existed no justification for the directors to attempt to negate the right of stockholders to elect a new Board in the event the stockholders disagree with the incumbent Board's policies, including their response to an acquisition proposal.

110. Moreover, while the Director Defendants disclosed the adoption of the Continuing Director Requirement, they have failed to disclose its illegality and the illegality of their conduct in adopting it. If they are not required to make corrective disclosures, defendants will permit the disclosure of the Continuing Director Requirement's adoption to distort stockholder choice in connection with the CSX Offer, the Special Meeting, and (if they have not successfully locked up voting control of Conrail by then) in the next annual election of directors. The Director Defendants' conduct is thus fraudulent, in that they have failed to act fairly and honestly toward the Conrail stockholders, and intended to preserve their incumbency and that of current management, to the detriment of Conrail's stockholders and other constituencies. Accordingly, such action should be declared void and of no force or effect. Furthermore, adequate corrective disclosure should be required.

Conrail's Charter Permits The Removal  
and Replacement of Its Entire Board of  
Directors At Its Next Annual Meeting

111. As noted above, plaintiff NS intends to facilitate the NS Proposal, if necessary, by replacing

the Conrail board at Conrail's next annual meeting.

Conrail's next annual meeting is scheduled to be held on May 21, 1997 (according to Conrail's April 3, 1996 Proxy Statement, as filed with the Securities and Exchange Commission).

112. The Director Defendants adopted the Continuing Director Requirement in part because they recognized that under Conrail's Articles, its entire Board, even though staggered, may be removed without cause at Conrail's next annual meeting.

113. Section 3.1 of Conrail's By-Laws provides that the Conrail Board shall consist of 13 directors, but presently there are only 11. The Conrail Board is classified into three classes. Each class of directors serves for a term of three years, which terms are staggered.

114. Article 11 of Conrail's Articles of Incorporation provides that:

The entire Board of Directors, or a class of the Board where the Board is classified with respect to the power to elect directors, or any individual director may be removed from office without assigning any cause by vote of stockholders entitled to cast at least a majority of the votes which all stockholders would be entitled to cast at any annual election of directors or of such class of directors.

115. Under the plain language of Article 11, the entire Conrail Board, or any one or more of Conrail's directors, may be removed without cause by a majority vote of the Conrail stockholders entitled to vote at the annual meeting. Plaintiffs anticipate, however, that defendants will argue that under Article 11, only one class may be removed at each annual meeting. Accordingly, plaintiffs seek a declaratory judgment that pursuant to Article 11, the entire Conrail Board, or any one or more of Conrail's directors, may be removed without cause at Conrail's next annual meeting.

#### Declaratory Relief

116. The Court may grant the declaratory relief sought herein pursuant to 28 U.S.C. § 2201. The Director Defendants' adoption of the CSX Transaction (with its discriminatory Charter Amendment poison pill, and state anti-takeover statute treatment and draconian lock-up provisions) as well as their earlier adoption of the Continuing Director Requirement, clearly demonstrate their bad faith entrenchment motivation and, in light of the NS Proposal, that there is a substantial controversy between the parties. Indeed, given the NS Proposal, the adverse legal interests of the parties are real and immediate.



Defendants can be expected to vigorously oppose each judicial declaration sought by plaintiffs, in order to maintain their incumbency and defeat the NS Proposal -- despite the benefits it would provide to Conrail's stockholders and other constituencies.

117. The granting of the requested declaratory relief will serve the public interest by affording relief from uncertainty and by avoiding delay and will conserve judicial resources by avoiding piecemeal litigation.

#### Irreparable Injury

118. The Director Defendants' adoption of the CSX Transaction (with its discriminatory Charter Amendment, poison pill and state antitakeover statute treatment and draconian lock-up provisions), their adoption of the revised CSX Transaction with its highly coercive, multi-tier, front end loaded structure, as well as their earlier adoption of the Continuing Director Requirement threaten to deny Conrail's stockholders of their right to exercise their corporate franchise without manipulation, coercion or false and misleading disclosures and to deprive them of a unique opportunity to receive maximum value for their stock. The resulting injury to plaintiffs and all of Conrail's stockholders would not be adequately compensable in money damages and would constitute irreparable harm.

#### Derivative Allegations

119. Plaintiffs bring each of the causes of action reflected in Counts One through Seven and Fourteen

and Fifteen below individually and directly. Alternatively, to the extent required by law, plaintiffs bring such causes of action derivatively on behalf of Conrail.

120. No demand has been made on Conrail's Board of Directors to prosecute the claims set forth herein since, for the reasons set forth below, any such demand would have been a vain and useless act since the Director Defendants constitute the entire Board of Directors of Conrail and have engaged in fraudulent conduct to further their personal interests in entrenchment and have ratified defendant LeVan's self-dealing conduct:

a. The Director Defendants have acted fraudulently by pursuing defendants' campaign of misinformation, described above, in order to coerce, mislead, and manipulate Conrail shareholders to swiftly deliver control of Conrail to the low bidder.

b. The form of resolution by which the shareholders are being asked to approve the Charter Amendment is illegal and ultra vires in that it purports to authorize the Conrail Board to discriminatorily withhold filing the certificate of amendment even after shareholder approval. Thus, its

submission to the shareholders is illegal and ultra vires and, therefore, not subject to the protections of the business judgment rule.

c. The Conrail directors' selective amendment of the Conrail poison pill and discriminatory preferential treatment of the CSX Transaction under the Pennsylvania Business Combination Statute were motivated by their personal interest in entrenchment, constituting a breach of their fiduciary duty of loyalty and rendering the business judgment rule inapplicable.

d. The Director Defendants' adoption of the breakup fee and stock option lock-ups in favor of CSX was motivated by their personal interest in entrenchment, constituting a breach of their duty of loyalty and rendering the business judgment rule inapplicable.

e. The Continuing Director Requirement is illegal and ultra vires under Pennsylvania statutory law and under Conrail's charter and by-laws, rendering the business judgment rule inapplicable to its adoption by the Director Defendants.

f. In adopting the Continuing Director



Requirement, each of the Defendant Directors has failed to act fairly and honestly toward Conrail and its stockholders, insofar as by doing so the Defendant Directors, to preserve their own incumbency, have purported to eliminate the stockholders' fundamental franchise right to elect directors who would be receptive to a sale of control of Conrail to the highest bidder. There is no reason to think that, having adopted this ultimate in entrenchment devices, the Director Defendants would take action that would eliminate it.

g. Additionally, the Director Defendants have acted fraudulently, in that they intentionally have failed to disclose the plain illegality of their conduct.

h. There exists no reasonable prospect that the Director Defendants would take action to invalidate the Continuing Director Requirement. First, pursuant to Pennsylvania statute, their fiduciary duties purportedly do not require them to amend the Rights Plan in any way. Second, given their dishonest and fraudulent entrenchment motivation, the Director Defendants would certainly not

commence legal proceedings to invalidate the Continuing Director Requirement.

121. Plaintiffs are currently beneficial owners of Conrail common stock. Plaintiffs' challenge to the CSX Transaction (including the coercive front end loaded tender offer, the illegal Charter Amendment, discriminatory treatment, and lock-ups) and to the Continuing Director Requirement presents a strong prima facie case, insofar as the Director Defendants have deliberately and intentionally, without justification, acted to foreclose free choice by Conrail's shareholders. If this action were not maintained, serious injustice would result, in that defendants would be permitted illegally and in pursuit of personal, rather than proper corporate interests to deprive Conrail stockholders of free choice and a unique opportunity to maximize the value of their investments through the NS Proposal, and to deprive plaintiff NS of a unique acquisition opportunity.

122. This action is not a collusive one to confer jurisdiction on a Court of the United States that it would not otherwise have.

COUNT ONE  
(Breach of Fiduciary Duty with  
Respect to the Charter Amendment)

123. Plaintiffs repeat and reallege each of the foregoing allegations as if fully set forth in this paragraph.

124. The Conrail directors were and are obligated by their fiduciary duties of due care and loyalty, to act in the best interests of the corporation.

125. In conjunction with the proposed merger, the Conrail board of directors has approved, and recommended that the shareholders approve, an amendment to Conrail's Charter. The amendment is required to allow a third party to acquire more than 20% of Conrail's stock.

126. The Conrail directors have publicly stated their intention to file the amendment only if the requisite number of shares are tendered to CSX.

127. By adopting the illegal Charter Amendment and then discriminately applying it to benefit themselves, the Conrail directors have breached their fiduciary duties of care and loyalty.

128. Plaintiffs have no adequate remedy at law.

COUNT TWO  
(Breach of Fiduciary Duty  
With Respect to the Poison Pill)

129. Plaintiffs repeat and reallege each of the foregoing allegations as if fully set forth in this paragraph.

130. The Conrail board of directors adopted its Poison Pill Plan with the ostensible purpose of protecting its shareholders against the consummation of unfair acquisition proposals that may fail to maximize shareholder value.

131. The Conrail Board has announced its intention to merge with CSX, and the Conrail Board has also sought to exempt CSX from the provisions of the Poison Pill.

132. Additionally, the Conrail Board has committed itself to not pursue any competing offer for the Company.

133. By selectively and discriminately determining to exempt CSX, and only CSX, from the Poison Pill provisions, to the detriment to Conrail's shareholders, the Conrail directors have breached their fiduciary duties of care and loyalty.



134. Plaintiffs have no adequate remedy at law.

COUNT THREE  
(Breach of Fiduciary Duty  
with Respect to the Pennsylvania  
Business Combinations Statute)

135. Plaintiffs repeat and reallege each of the foregoing allegations as if fully set forth in this paragraph.

136. By approving the CSX Offer prior to its consummation, the Director Defendants have rendered the Pennsylvania Business Combinations Statute, subchapter 25F of the Pennsylvania Business Corporation Law, and, particularly, its five-year ban on mergers with substantial stockholders, inapplicable to the CSX Transaction, while it remains as an impediment to competing higher acquisition offers such as the NS Proposal.

137. By selectively and discriminately exempting the CSX Transaction from the five-year merger ban, for the purpose of facilitating a transaction that will provide substantial personal benefits to Conrail management while delivering Conrail to the low bidder, the Director Defendants have breached their fiduciary duties of care and loyalty.

138. Plaintiffs have no adequate remedy at law.

COUNT FOUR

(Declaratory Judgment Against All  
Defendants That the Poison Pill  
Lock-In is Void Under Pennsylvania Law)

139. Plaintiffs repeat and reallege each of the foregoing allegations as if fully set forth in this paragraph.

140. By purporting to bind Conrail and its directors not to amend or take any action with respect to the Conrail Poison Pill Plan without CSX's consent, the CSX Merger Agreement purports to restrict the managerial discretion of Conrail's directors.

141. Under Pennsylvania law, agreements restricting the managerial discretion of the board of directors are permissible only in statutory close corporations. Conrail is not a statutory close corporation.

142. No statute countenances Conrail's and the Director Defendants' adoption of the Poison Pill Lock-In terms of the CSX Merger Agreement. No Conrail By-Law adopted by the Conrail shareholders provides that Conrail's directors may contractually abdicate their fiduciary duties and managerial powers and responsibilities with respect to the Conrail Poison Pill Plan.

143. Plaintiffs have no adequate remedy at law.

COUNT FIVE

(Against the Defendant Directors  
for Breach of Fiduciary Duty with  
Respect to the Poison Pill Lock-In)

144. Plaintiffs repeat and reallege each of the foregoing allegations as if fully set forth in this paragraph.

145. By entering into the Poison Pill Lock-In provisions of the CSX Merger Agreement, the Director Defendants purported to relinquish their power to act in the best interests of Conrail in connection with proposed acquisitions of Conrail.

146. Thus, by entering into the CSX Transaction with its poison pill lock-in provisions, the Director Defendants have intentionally, in violation of their duty of loyalty, completely abdicated their fiduciary duties and responsibilities.

147. Absent prompt injunctive relief, plaintiffs, as well as Conrail and all of its legitimate constituencies, face imminent irreparable harm.

148. Plaintiffs have no adequate remedy at law.

COUNT SIX  
(Declaratory Judgment Against All  
Defendants That the 270-Day Lock-Out  
is Void Under Pennsylvania Law)

149. Plaintiffs repeat and reallege each of the foregoing allegations as if fully set forth in this paragraph.

150. By purporting to bind Conrail and its directors from acting to protect the interests of Conrail, its shareholders and its other legitimate constituencies by withdrawing its recommendation that Conrail's shareholders accept the CSX Offer and approve the CSX Merger even when the fiduciary duties of Conrail's directors would require them to do so, the 270-Day Lock-Out provision of the CSX Merger Agreement purports to restrict the managerial discretion of Conrail's directors.

151. By purporting to prohibit Conrail's directors from terminating the CSX Merger Agreement when their fiduciary duties would require them to do so, the 270-Day Lock-Out provision of the CSX Merger Agreement purports to restrict the managerial discretion of Conrail's directors.

152. Under Pennsylvania law, agreements re-



stricting the managerial discretion of the board of directors are permissible only in statutory close corporations. Conrail is not a statutory close corporation.

153. No statute countenances Conrail's and the Director Defendants' adoption of the 270-Day Lock-Out terms of the CSX Merger Agreement. No Conrail By-Law adopted by the Conrail shareholders provides that Conrail's directors may contractually abdicate their fiduciary duties and managerial powers and responsibilities.

154. Unless the 270-Day Lock-Out provision is declared ultra vires and void and defendants are enjoined from taking any action enforcing it, Conrail and its legitimate constituencies face irreparable harm.

155. Plaintiffs have no adequate remedy at law.

COUNT SEVEN

(Against the Defendant Directors  
for Breach of Fiduciary Duty with  
Respect to the 270-Day Lock-Out)

156. Plaintiffs repeat and reallege each of the foregoing allegations as if fully set forth in this paragraph.

157. By entering into the 270-Day Lock-Out provision of the CSX Merger Agreement, the Director

Defendants purported to relinquish their power to act in the best interest of Conrail in connection with proposed acquisitions of Conrail.

158. Thus, by entering into the 270-Day Lock-Out provision, the Conrail directors have abdicated their fiduciary duties, in violation of their duties of loyalty and care.

159. Plaintiffs have no adequate remedy at law.

COUNT EIGHT  
(Breach of Fiduciary Duty with  
Respect to the Lock-Up Provisions)

160. Plaintiffs repeat and reallege each of the foregoing allegations as if fully set forth in this paragraph.

161. In conjunction with the CSX Merger Agreement, the Conrail Board has agreed to termination fees of \$300 million and to the lock-up Stock Option Agreement.

162. These provisions confer no benefit upon Conrail's shareholders and in fact operate and are intended to operate to impede or foreclose further bidding for Conrail.

163. The Conrail directors have adopted these provisions without regard to what is in the best interest of the Company and its shareholders, in violation of

their fiduciary duties.

164. Plaintiffs have no adequate remedy at law.

COUNT NINE

(Declaratory Relief Against  
Conrail and Director Defendants That  
The Continuing Director Requirement  
Is Void Under Pennsylvania Law)

165. Plaintiffs repeat and reallege each of the foregoing allegations as if fully set forth in this paragraph.

166. Under Pennsylvania law, the business and affairs of a Pennsylvania corporation are to be managed under the direction of the Board of Directors unless otherwise provided by statute or in a By-Law adopted by the stockholders. Pa. BCL § 1721.

167. Under Pennsylvania law, agreements restricting the managerial discretion of directors are permissible only in statutory close corporations.

168. No statute countenances Conrail's and the current Board's adoption of the Continuing Director Requirement. No Conrail By-Law adopted by the Conrail stockholders provides that the current Board may limit a future Board's management and direction of Conrail. Conrail is not a statutory close corporation.

169. Adoption of the Continuing Director Re-

quirement constitutes an unlawful attempt by the Director Defendants to limit the discretion of a future Board of Directors with respect to the management of Conrail. In particular, under the Continuing Director Requirement, a duly elected Board of Directors that includes less than two continuing directors would be unable to redeem or modify Conrail's Poison Pill even upon determining that to do so would be in Conrail's best interests.

170. Plaintiffs seek a declaration that the Continuing Director Requirement is contrary to Pennsylvania statute and, therefore, null and void.



171. Plaintiffs have no adequate remedy at law.

COUNT TEN

(Declaratory Relief Against Conrail  
and The Director Defendants That  
The Continuing Director Requirement  
Is Void Under Conrail's Articles  
of Incorporation And By-Laws)

172. Plaintiffs repeat and reallege each of the foregoing allegations as if fully set forth in this paragraph.

173. Under Section 3.5 of Conrail's By-Laws,

The business and affairs of the Corporation shall be managed under the direction of the Board which may exercise all such powers of the Corporation and do all such lawful acts and things as are not by statute or by the Articles or by these By-Laws directed or required to be exercised and done by the shareholders.

174. Pursuant to Section 1505 of the Pennsylvania Business Corporation Law, the By-Laws of a Pennsylvania corporation operate as regulations among the shareholders and affect contracts and other dealings between the corporation and the stockholders and among the stockholders as they relate to the corporation. Accordingly, the Rights Plan and the rights issued thereunder are subject to and affected by Conrail's By-Laws.

175. Insofar as it purports to remove from the duly elected board of Conrail the power to redeem the

rights or amend the Rights Plan, the Continuing Director Requirement directly conflicts with Section 3.5 of Conrail's By-Laws, and is therefore void and unenforceable.

176. Article Eleven of Conrail's Articles of Incorporation provides that Conrail's entire board may be removed without cause by vote of a majority of the stockholders who would be entitled to vote in the election of directors. Read together with Section 3.5 of Conrail's By-Laws, Article Eleven enables the stockholders to replace the entire incumbent board with a new board with all powers of the incumbent board, including the power to redeem the rights or to amend the Rights Agreement. The Continuing Director Requirement purports to prevent the stockholders from doing so, and is therefore void and unenforceable.

177. Plaintiffs have no adequate remedy at law.

COUNT ELEVEN

(Declaratory Relief Against Conrail  
and The Director Defendants That Adoption  
of the Continuing Director Requirement  
Constituted A Breach of the Duty of Loyalty)

178. Plaintiffs repeat and reallege each of the foregoing allegations as if fully set forth in this paragraph.

179. Adoption of the Continuing Director Requirement constituted a breach of the duty of loyalty on the part of the Director Defendants. Such adoption was the result of bad faith entrenchment motivation rather than a belief that the action was in the best interests of Conrail. In adopting the Continuing Director Requirement, the Director Defendants have purported to circumvent the Conrail stockholders' fundamental franchise rights, and thus have failed to act honestly and fairly toward Conrail and its stockholders. Moreover, the Director Defendants adopted the Continuing Director Requirement without first conducting a reasonable investigation.

180. The Continuing Director Requirement not only impedes acquisition of Conrail stock in the NS Offer, it also impedes any proxy solicitation in support

of the NS Proposal because Conrail stockholders will, unless the provision is invalidated, believe that the nominees of plaintiffs will be powerless to redeem the Poison Pill rights in the event they conclude that redemption is in the best interests of the corporation. Thus, stockholders may believe that voting in favor of plaintiffs' nominees would be futile. The Director Defendants intended their actions to cause Conrail's stockholders to hold such belief.

181. Plaintiffs seek a declaration that the Director Defendants' adoption of the Continuing Director Requirement was in violation of their fiduciary duties and, thus, null, void and unenforceable.

182. Plaintiffs have no adequate remedy at law.

COUNT TWELVE  
(Against Conrail And The Director  
Defendants For Actionable Coercion)

183. Plaintiffs repeat and reallege each of the foregoing allegations as if fully set forth in this paragraph.

184. The Director Defendants owe fiduciary duties of care and loyalty to Conrail. Furthermore, Conrail and the Director Defendants, insofar as they undertake to seek and recommend action by Conrail's



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shareholders, for example with respect to the Charter Amendment, the CSX Offer or the NS Offer, stand in a relationship of trust and confidence vis a vis Conrail's shareholders, and accordingly have a fiduciary obligation of good faith and fairness to such shareholders in seeking or recommending such action. Furthermore, shareholders are entitled to injunctive relief against fundamental unfairness pursuant to PBCL § 1105.

185. Conrail and its directors are seeking the approval by Conrail's shareholders of the Charter Amendment and are recommending such approval.

186. Conrail and its directors are seeking the tender by Conrail's shareholders of their shares into the CSX Offer and are recommending such tender.

187. In seeking such action and making such recommendations, Conrail and its directors have sought to create the impression among the Conrail shareholders that the NS Proposal is not a financially superior, viable, and actually available alternative to the CSX Transaction. This impression, however, is false. The only obstacles to the NS Proposal are the ultra vires, illegal impediments constructed by defendants, including the Poison Pill Lock-In, the 270-Day Lock-Out, and the con-

tinuing director provisions of the Conrail Poison Pill Plan.

188. The purpose for which defendants' seek to create this impression is to coerce Conrail shareholders into delivering control over Conrail swiftly to CSX. Furthermore, the effect of this false impression is to coerce Conrail shareholders into delivering control over Conrail to CSX.

189. This coercion of the Conrail shareholders constitutes a breach of the fiduciary relation of trust and confidence owed by the Corporation and its directors to shareholders from whom they seek action and to whom they recommend the action sought. Moreover, this coercion, as well as the intense structural coercion imposed by the revised CSX Transaction's highly front end loaded first step tender offer, constitutes fundamental unfairness to Conrail shareholders.

190. The conduct of defendants Conrail and its directors is designed to, and will, if not enjoined, wrongfully induce Conrail's shareholders to sell their shares to CSX in the CSX Offer not for reasons related to the economic merits of the sale, but rather because the illegal conduct of defendants has created the appearance

that the financially (and otherwise) superior NS Proposal is not available to them, and that the CSX Transaction is the only opportunity available to them to realize premium value on their investment in Conrail.

191. Plaintiffs have no adequate remedy at law.

COUNT THIRTEEN  
(Against CSX For Aiding And Abetting)

192. Plaintiffs repeat and reallege each of the foregoing allegations as if fully set forth in this paragraph.

193. Defendant CSX, through its agents, was aware of and knowingly and actively participated in the illegal conduct and breaches of fiduciary duty committed by Conrail and the Director Defendants and set forth in Counts One through Eight and Twelve of this complaint.

194. CSX's knowing and active participation in such conduct has harmed plaintiffs and threatens irreparable harm to plaintiffs if not enjoined.



195. Plaintiffs have no adequate remedy at law.

COUNT FOURTEEN

(Declaratory and Injunctive Relief Against  
Conrail and the Director Defendants for  
Violation of Section 14(a) of the Exchange Act  
and Rule 14a-9 Promulgated Thereunder)

196. Plaintiffs repeat and reallege each of the foregoing allegations as if fully set forth in this paragraph.

197. Section 14(a) of the Exchange Act provides that it is unlawful to use the mails or any means or instrumentality of interstate commerce to solicit proxies in contravention of any rule promulgated by the SEC.  
15 U.S.C. § 78n(a).

198. Rule 14a-9 provides in pertinent part:  
"No solicitation subject to this regulation shall be made by means of any ... communication, written or oral, containing any statement which, at the time, and in light of the circumstances under which it is made, is false and misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading...."

17 C.F.R. § 240.14a-9.

199. Conrail's Preliminary Proxy Statement contains the misrepresentations detailed in paragraph 96

above. It also omits to disclose the material facts detailed in paragraph 99 above.

200. Moreover, each of the false and misleading statements and omissions made by defendants and alleged in this Complaint were made under circumstances that should be expected to result in the granting or withholding of proxies in the vote on the Charter Amendment, and was intended to have such result.

201. Unless defendants are required by this Court to make corrective disclosures, Conrail's stockholders will be deprived of their federal right to exercise meaningfully their voting franchise.

202. The defendants' false and misleading statements and omissions described above are essential links in defendants' effort to deprive Conrail's shareholders of their ability to exercise choice concerning their investment in Conrail and their voting franchise.

203. Plaintiffs have no adequate remedy at law.

COUNT FIFTEEN  
(Against Defendant CSX For Violation  
Of Section 14(d) Of The Exchange Act  
And Rules Promulgated Thereunder)

204. Plaintiffs repeat and reallege each of the foregoing allegations as if fully set forth in this paragraph.

205. Section 14(d) provides in pertinent part:

"It shall be unlawful for any person, directly or indirectly by use of the mails or by any means or instrumentality of interstate commerce ... to make a tender offer for ... any class of any equity security which is registered pursuant to section 78l of this title, ... if, after consummation thereof, such person would, directly or indirectly, be the beneficial owner of more than 5 per centum of such class, unless at the time copies of the offer, request or invitation are first published, sent or given to security holders such person has filed with the Commission a statement containing such of the information specified in section 78m(d) of this title, and such additional information as the Commission may by rules and regulations prosecute ...." 15 U.S.C. § 78n(d).

206. On October 16, 1996, defendant CSX filed

with the SEC its Schedule 14D-1 pursuant to Section 14(d).

207. CSX's Schedule 14D-1 contains each of the false and misleading material misrepresentations of fact detailed in paragraph 97 above. Furthermore, CSX's Schedule 14D-1 omits disclosure of the material facts detailed in paragraph 99 above. Additionally, CSX's Amendment No. 4 to its Schedule 14D-1 contains the misstatements and/or omissions alleged in paragraphs 100(a) and (b) above. As a consequence of the foregoing, CSX has violated, and unless enjoined will continue to violate, Section 14(d) of the Exchange Act and the rules and regulations promulgated thereunder.

208. CSX made the material misrepresentations and omissions described above intentionally and knowingly, for the purpose of fraudulently coercing, misleading and manipulating Conrail's shareholders to tender their shares into the CSX Offer.



209. Plaintiffs have no adequate remedy at law.

COUNT SIXTEEN  
(Against Defendant Conrail For Violation  
Of Section 14(d) Of The Exchange Act  
And Rules Promulgated Thereunder)

210. Plaintiffs repeat and reallege each of the foregoing allegations as if fully set forth in this paragraph.

211. Section 14(d)(4) provides in pertinent part: "Any solicitation or recommendation to the holders of [securities for which a tender offer has been made] to accept or reject a tender offer or request or invitation for tender shall be made in accordance with such rules and regulations as the [SEC] may prescribe as necessary or appropriate in the public interest of investors." Rule 14d-9 provides in pertinent part: "No solicitation or recommendation to security holders shall be made by [the subject company] with respect to a tender offer for such securities unless as soon as practicable on the date such solicitation or recommendation is first published or sent or given to security holders such person ... file[s] with the [SEC] eight copies of a Tender Offer Solicitation/Recommendation Statement on Schedule 14D-9."

212. On October 16, 1996, Conrail (i) published

its board of directors' recommendation that Conrail shareholders tender their shares in the CSX Offer and (ii) filed with the SEC its Schedule 14D-9.

213. Conrail's Schedule 14D-9 contains each of the false and misleading material misrepresentations detailed in paragraph 98 above. Further, Conrail's Schedule 14D-9 omits disclosure of the material facts detailed in paragraph 99 above. Additionally, Conrail's Amendment No. 4 to its Schedule 14D-9 with respect to the CSX Offer and its Schedule 14D-9 with respect to the NS Offer contain the misstatements and/or omissions alleged in paragraphs 100 (a), (c) and (d) above. As a consequence of the foregoing, Conrail has violated, and unless enjoined will continue to violate, Section 14(d) of the Exchange Act and the rules and regulations promulgated thereunder.

214. Conrail made the material misrepresentations and omissions described above intentionally and knowingly, for the purpose of fraudulently coercing, misleading and manipulating Conrail's shareholders to tender their shares into the CSX Offer.

215. Plaintiffs have no adequate remedy at law.

COUNT SEVENTEEN

(Against Conrail and CSX for Violation  
of Section 14(e) of the Exchange Act  
and Rules Promulgated Thereunder)

216. Plaintiffs repeat and reallege each of the foregoing allegations as if fully set forth in this paragraph.

217. Section 14(e) provides in pertinent part:

"It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices in connection with any tender offer . . . or any solicitation of security holders in opposition to or in favor of any such offer . . . ." Defendants have violated and threaten to continue to violate Section 14(e).

218. The CSX Schedule 14D-1 constitutes a communication made under circumstances reasonably calculated to result in the procurement of tenders from Conrail shareholders in favor of the CSX Offer.

219. The Conrail Schedule 14D-9 and Proxy

Statement constitute communications made under circumstances reasonably calculated to result in the procurement of tenders from Conrail shareholders in favor of the CSX Offer.

220. The CSX Schedule 14D-1 contains the false and misleading material misrepresentations detailed in paragraph 97 above. The CSX Schedule 14D-1 omits disclosure of the material facts detailed in paragraph 99 above. Additionally, Amendment No. 4 to such Schedule contains the misstatements and/or omissions alleged in paragraphs 100(a) and (b) above.

221. The Conrail Schedule 14D-9 contains the false and misleading material misrepresentations detailed in paragraph 98 above. The Conrail Schedule 14D-9 omits disclosure of the material facts detailed in paragraph 99 above. Additionally, Amendment No. 4 to such Schedule contains the misstatements and/or omissions alleged in paragraphs 100(a) and (d) above. Also, Conrail's Schedule 14D-9 with respect to the NS Offer contains the misstatements and/or omissions alleged in paragraphs 100(a) and (c) above.

222. The Conrail Proxy Statement contains the false and misleading material misrepresentations detailed



in paragraph 96 above. The Conrail Proxy Statement omits disclosure of the material facts detailed in paragraph 99 above.

223. These omitted facts are material to the decisions of Conrail shareholders to hold, sell to market, or tender their shares in the CSX tender offer.

224. The defendants intentionally and knowingly made the material misrepresentations and omissions described above, for the purpose of coercing, misleading, and manipulating Conrail shareholders to swiftly transfer control over Conrail to CSX by tendering their shares in the CSX Tender Offer.

225. Absent declaratory and injunctive relief requiring adequate corrective disclosure, plaintiffs, as well as all of Conrail's shareholders, will be irreparably harmed. Conrail shareholders will be coerced by defendants' fraudulent and manipulative conduct to sell Conrail to the low bidder. Plaintiffs NS and AAC will be deprived of the unique opportunity to acquire and combine businesses with Conrail.

226. Plaintiffs have no adequate remedy at law.

COUNT EIGHTEEN

(Against Defendants Conrail and CSX  
For Civil Conspiracy To Violate  
Section 14 Of The Exchange Act  
And Rules Promulgated Thereunder)

227. Plaintiffs repeat and reallege each of the foregoing allegations as if fully set forth in this paragraph.

228. Defendants Conrail and CSX conspired and agreed to conduct the campaign of misinformation described in paragraphs 95 through 101 above for the purpose of coercing, misleading and manipulating Conrail shareholders to swiftly transfer control over Conrail to CSX. As set forth in Counts Fourteen through Seventeen above, which are incorporated by reference herein, the defendants' campaign of misinformation is violative of Section 14 of the Exchange Act and the rules and regulations promulgated thereunder.

229. Plaintiffs have no adequate remedy at law.

COUNT NINETEEN  
(Against Conrail for  
Estoppel/Detrimental Reliance)

230. Plaintiffs repeat and reallege each of the foregoing allegations as if fully set forth in this paragraph.

231. By his actions, silence and statements during the period from September 1994 to October 15, 1996, and particularly by his statements to Mr. Goode in September and October of 1996 (as detailed above in paragraphs 24 through 26, defendant LeVan, purporting to act on behalf of Conrail and its Board of Directors and with apparent authority to so act, led Mr. Goode to believe that Conrail's Board was not interested in a sale of the company and that if and when the Conrail Board decided to pursue such a sale, it would let NS know and give NS an opportunity to bid.

232. Prior to October 15, 1996, NS had justifiably relied on Mr. LeVan's false statements and representations in refraining from making a proposal to Conrail's Board or initiating a tender offer of its own for Conrail shares.

233. Mr. LeVan and Conrail knew or should have

known that their actions, silence, statements and representations to NS would induce NS to believe that Conrail's board was not interested in selling the company and that NS would be given an opportunity to bid if Conrail's Board decided that Conrail would be sold.

234. Mr. LeVan and Conrail knew or should have known that NS would rely upon their actions, silence, statements and representations to its detriment in refraining from making a proposal to Conrail's Board or initiating a tender offer of its own for Conrail shares.

235. NS did in fact rely upon LeVan's and Conrail's actions, silence, statements and representations to its detriment in refraining from making a proposal to Conrail's Board or initiating a tender offer of its own for Conrail shares.

236. Conrail and its Board are estopped from effectuating a sale of the company without giving NS an adequate opportunity to present its competing tender offer to the Conrail Board of Directors and Conrail shareholders. Similarly, any provision in the CSX Merger Agreement that would impede directors' or shareholders' ability to approve a competing tender offer or takeover proposal, such as that made by NS, is null and void.



237. By virtue of NS's justifiable reliance on Conrail's and Mr. LeVan's actions, silence and statements, it has suffered and will continue to suffer irreparable harm.

238. Plaintiffs have no adequate remedy at law.

COUNT TWENTY  
(Unlawful And Ultra Vires Amendment  
of Conrail's Articles of Incorporation)

239. Plaintiffs repeat and reallege each of the foregoing allegations as if fully set forth in this paragraph.

240. The Conrail Board of Directors is attempting to freeze out any competing tender offers and lock up the CSX deal, to the detriment of shareholders, by improperly maneuvering to "opt-out" of the "anti-takeover" provisions of the Pennsylvania Business Corporation Law in a discriminatory fashion. This procedure distorts and subverts the provisions of the Pennsylvania statute.

241. At the special meeting of Conrail shareholders, such shareholders will be asked to approve the following amendment to Conrail's Articles of Incorporation, which has already been approved by the Conrail Board of Directors: "Subchapter E, Subchapter G and Subchapter H of Chapter 25 of the Pennsylvania Business

Corporation Law of 1988, as amended, shall not be applicable to the Corporation."

242. The Director Defendants are also asking for authorization to exercise discretion in deciding whether or not to file the Charter Amendment. According to the proposed proxy materials, the defendant directors only intend to file the Charter Amendment if CSX is in a position to purchase more than 20% of Conrail's shares. Consequently, in effect, the Charter Amendment becomes a "deal specific" opt-out.

243. The PBCL does not allow for such a discriminatory application of an opt-out provision. Section 2541(a) of the PBCL provides that Subchapter 25E will not apply to corporations that have amended their articles of incorporation to state that the Subchapter does not apply. Section 1914 of the PBCL provides that an articles amendment "shall be adopted" if it received the affirmative vote of a majority of shareholders entitled to vote on the amendment. While section 1914 also provides that the amendment need not be deemed to be adopted unless it has been approved by the directors, that approval has already been given.

244. Conrail's Board is trying to distort and

subvert the provisions of the Pennsylvania statute by keeping a shareholder-approved opt-out from taking effect unless the CSX deal is moving forward. The PBCL is quite clear -- it allows corporations to exercise general, not selective, opt-outs. Therefore, any action taken at the November 14, 1996 shareholder meeting would be a nullity.

245. If the November 14, 1996 shareholder meeting is allowed to take place and the amendment is passed, NS will suffer irreparable harm.

246. Plaintiffs have no adequate remedy at law.

COUNT TWENTY-ONE

(Declaratory Judgment Against Conrail and the Director Defendants That the Entire Conrail Board, Or Any One or More of Conrail's Directors, Can Be Removed Without Cause)

247. Plaintiffs repeat and reallege each of the foregoing allegations as if fully set forth in this paragraph.

248. Plaintiffs intend, if necessary to facilitate the NS Proposal, to solicit proxies to be used at Conrail's next annual meeting to remove Conrail's current Board of Directors.

249. There is presently a controversy among Conrail, the Director Defendants and the plaintiffs as to whether the entire Conrail Board, or any one or more of

Conrail's directors, may be removed without cause at the annual meeting by a vote of the majority of Conrail stockholders entitled to cast a vote at the Annual Meeting.

250. Plaintiffs seek a declaration that Article 11 of Conrail's Articles of Incorporation permits the removal of the entire Conrail Board, or any one or more of Conrail's directors, without cause by a majority vote of the Conrail stockholders entitled to cast a vote at an annual election.

251. Plaintiffs have no adequate remedy at law.

WHEREFORE, plaintiffs respectfully request that this Court enter judgment against all defendants, and all persons in active concert or participation with them, as follows:

A. Declaring that:

(a) defendants have violated Sections 14(a), 14(d) and 14(e) of the Exchange Act and the rules and regulations promulgated thereunder;

(b) defendants' use of the Charter Amendment is violative of Pennsylvania statutory law and their fiduciary duties;

(c) defendants' discriminatory use of



Conrail's Poison Pill Plan violates the director defendants' fiduciary duties;

(d) the termination fees and stock option agreements granted by Conrail to CSX are violative of the defendants' fiduciary duties;

(e) the Continuing Director Requirement of Conrail's Poison Pill Plan is ultra vires and illegal under Pennsylvania Law and Conrail's Articles of Incorporation and Bylaws; and is illegal because its adoption constitutes a breach of the defendants' fiduciary duties;

(f) Conrail's entire staggered board or any one or more of its directors, can be removed without cause at Conrail's next annual meeting of stockholders;

(g) the defendants have engaged in a civil conspiracy to violate Section 14 of the Exchange Act and the rules and regulations promulgated thereunder;

(h) the Poison Pill Lock-In provisions in the CSX Merger Agreement are ultra vires and, therefore, void under Pennsylvania Law;

(i) the 270-Day Lock-Out provision in the CSX Merger Agreement is ultra vires under Pennsylvania law and, therefore, void;

(j) the Director Defendants, by approving

the CSX Merger Agreement, breached their fiduciary duties of care and loyalty; and

(k) the coercive nature of the CSX Transaction constitutes fundamental unfairness to Conrail's shareholders.

B. Preliminarily and permanently enjoining the defendants, their directors, officers, partners, employees, agents, subsidiaries and affiliates, and all other persons acting in concert with or on behalf of the defendants directly or indirectly, from:

(a) commencing or continuing a tender offer for shares of Conrail stock or other Conrail securities or accepting shares for payment in connection with such tender offer;

(b) seeking the approval by Conrail's stockholders of the Charter Amendment, or, in the event it has been approved by Conrail's stockholders, from taking any steps to make the Charter Amendment effective;

(c) taking any action to redeem rights issued pursuant to Conrail's Poison Pill Plan or render the rights plan inapplicable as to any offer by CSX without, at the same time, taking such action as to NS's outstanding offer;

(d) taking any action to enforce the Continuing Director Requirement of Conrail's Poison Pill Plan;

(e) taking any action to enforce the termination fee or stock option agreement granted to CSX by Conrail;

(f) failing to take such action as is necessary to exempt the NS Proposal from the provisions of the Pennsylvania Business Combination Statute;

(g) holding the Conrail special meeting until all necessary corrective disclosures have been made and adequately disseminated to Conrail's stockholders;

(h) taking any action to enforce the Poison Pill Lock-In and/or the 180-Day Lock-Out provisions of the CSX Merger Agreement;

(i) failing to take such action as is necessary to ensure that a Distribution Date does not occur under the terms of the Conrail Poison Pill Plan; and

(j) failing to take any action required by the fiduciary duties of the Director Defendants.

C. Granting compensatory damages for all incidental injuries suffered as a result of defendants'

unlawful conduct.

D. Awarding plaintiffs the costs and disbursements of this action, including attorneys' fees.

E. Granting plaintiffs such other and further relief as the court deems just and proper.

Respectfully submitted:

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Mary A. McLaughlin  
George G. Gordon  
Dechert, Price & Rhoads  
4000 Bell Atlantic Tower  
1717 Arch Street  
Philadelphia, PA 19103  
(215) 994-4000  
Attorneys for Plaintiffs

Of Counsel:

Steven J. Rothschild  
SKADDEN, ARPS, SLATE, MEAGHER & FLOM  
One Rodney Square  
P.O. Box 636  
Wilmington, DE 19899  
(302) 651-3000

DATED: November 15, 1996



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**SECURITIES AND EXCHANGE COMMISSION**

Washington, D.C. 20549

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**SCHEDULE 14D-1**

(Amendment No. 12)

Tender Offer Statement Pursuant to Section 14(d)(1)  
of the Securities Exchange Act of 1934

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**Conrail Inc.**

(Name of Subject Company)

**Norfolk Southern Corporation  
Atlantic Acquisition Corporation**

(Bidders)

Common Stock, par value \$1.00 per share  
(Including the associated Common Stock Purchase Rights)  
(Title of Class of Securities)

208368 15 0

(CUSIP Number of Class of Securities)

Series A ESOP Convertible Junior  
Preferred Stock, without par value  
(Including the associated Common Stock Purchase Rights)  
(Title of Class of Securities)

Not Available

(CUSIP Number of Class of Securities)

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James C. Bishop, Jr.  
Executive Vice President-Law  
Norfolk Southern Corporation  
Three Commercial Place  
Norfolk, Virginia 23510-2191  
Telephone: (757) 629-2750

(Name, Address and Telephone Number of Person Authorized  
to Receive Notices and Communications on Behalf of Bidder)

---

with a copy to:  
Randall H. Doud, Esq.  
Skadden, Arps, Slate, Meagher & Flom LLP  
919 Third Avenue  
New York, New York 10022  
Telephone: (212) 735-3000

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This Amendment No. 12 amends the Tender Offer Statement on Schedule 14D-1 filed on October 24, 1996, as amended (the "Schedule 14D-1"), by Norfolk Southern Corporation, a Virginia corporation ("Parent"), and its wholly owned subsidiary, Atlantic Acquisition Corporation, a Pennsylvania corporation ("Purchaser"), relating to Purchaser's offer to purchase all outstanding shares of (i) Common Stock, par value \$1.00 per share (the "Common Shares"), and (ii) Series A ESOP Convertible Junior Preferred Stock, without par value (the "ESOP Preferred Shares" and, together with the Common Shares, the "Shares"), of Conrail Inc. (the "Company"), including, in each case, the associated Common Stock Purchase Rights, upon the terms and subject to the conditions set forth in the Offer to Purchase, dated October 24, 1996 (the "Offer to Purchase"), as amended and supplemented by the Supplement thereto, dated November 8, 1996 (the "Supplement"), and in the revised Letter of Transmittal (which, together with any amendments or supplements thereto, constitute the "Offer"). Unless otherwise defined herein, all capitalized terms used herein shall have the respective meanings given such terms in the Offer to Purchase, the Supplement or the Schedule 14D-1.

**Item 10. Additional Information.**

Item 10 is hereby amended and supplemented by the following:

(e) On November 19, 1996, the District Court issued an oral ruling denying Plaintiffs' motion for preliminary injunctive relief after two days of hearings. After the ruling, Plaintiffs asked the District Court for an injunction pending appeal which was denied. On the same date, Plaintiffs filed an emergency motion for an injunction pending appeal and a motion seeking an expedited appeal to the United States Court of Appeals for the Third Circuit (the "Third Circuit"). On November 20, 1996, the Third Circuit denied Plaintiffs' motion for an injunction pending appeal.

**Item 11. Material to be Filed as Exhibits.**

Item 11 is hereby amended and supplemented by the following:

(a)(46) Press Release issued by Parent on November 19, 1996.

## SIGNATURE

After due inquiry and to the best of its knowledge and belief, the undersigned certifies that the information set forth in this statement is true, complete and correct.

November 20, 1996

### NORFOLK SOUTHERN CORPORATION

By: /s/ JAMES C. BISHOP, JR.  
Name: James C. Bishop, Jr.  
Title: Executive Vice President-Law

### ATLANTIC ACQUISITION CORPORATION

By: /s/ JAMES C. BISHOP, JR.  
Name: James C. Bishop, Jr.  
Title: Vice President and General Counsel

## EXHIBIT INDEX

Exhibit  
Number

Description

Page

(a)(46)

Press Release issued by Parent on November 19, 1996.



**FOR IMMEDIATE RELEASE**

**November 19, 1996**

Media Contact: Robert Fort  
(757) 629-2714 or  
(757) 463-3276

**NORFOLK SOUTHERN TO APPEAL DECISION  
IN EFFORT TO BLOCK CSX OFFER FOR CONRAIL**

NORFOLK, VA -- Norfolk Southern Corporation (NYSE: NSC) today issued the following statement in response to the decision by U.S. District Judge Donald W. VanArtsdalen in Philadelphia denying Norfolk Southern's request for a preliminary injunction against CSX's tender offer for Conrail shares:

"Norfolk Southern will appeal the ruling to the Third Circuit Court of Appeals in Philadelphia. The District Court's decision will not lessen our commitment to providing Conrail shareholders with the opportunity to receive promptly \$110 per share in cash for all of their shares.

"We continue to believe that Conrail and CSX are subverting the intent of Pennsylvania law by preventing Conrail shareholders from even considering Norfolk Southern's clearly superior offer -- an offer worth at least \$15 more per share than the proposed CSX-Conrail deal.

"Throughout two days of testimony before the District Court, there was no dispute that Norfolk Southern's offer was financially superior to CSX's. Besides being better for shareholders, a Norfolk Southern-Conrail combination will be better for other constituents whose interests are affected -- better for employees, for shippers, for suppliers and for communities."

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World Wide Web Site - <http://www.nscorp.com>

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**SECURITIES AND EXCHANGE COMMISSION**

Washington, D.C. 20549

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**SCHEDULE 14D-1**

(Amendment No. 13)

**Tender Offer Statement Pursuant to Section 14(d)(1)  
of the Securities Exchange Act of 1934**

---

**Conrail Inc.**

(Name of Subject Company)

**Norfolk Southern Corporation  
Atlantic Acquisition Corporation**

(Bidders)

**Common Stock, par value \$1.00 per share  
(Including the associated Common Stock Purchase Rights)  
(Title of Class of Securities)**

**208368 10 0**

(CUSIP Number of Class of Securities)

**Series A ESOP Convertible Junior  
Preferred Stock, without par value  
(Including the associated Common Stock Purchase Rights)  
(Title of Class of Securities)**

**Not Available**

(CUSIP Number of Class of Securities)

---

**James C. Bishop, Jr.  
Executive Vice President-Law  
Norfolk Southern Corporation  
Three Commercial Place  
Norfolk, Virginia 23510-2191  
Telephone: (757) 629-2750**

(Name, Address and Telephone Number of Person Authorized  
to Receive Notices and Communications on Behalf of Bidder)

---

with a copy to:  
**Randall H. Doud, Esq.  
Skadden, Arps, Slate, Meagher & Flom LLP  
919 Third Avenue  
New York, New York 10022  
Telephone: (212) 735-3000**

---

This Amendment No. 13 amends the Tender Offer Statement on Schedule 14D-1 filed on October 24, 1996, as amended (the "Schedule 14D-1"), by Norfolk Southern Corporation, a Virginia corporation ("Parent"), and its wholly owned subsidiary, Atlantic Acquisition Corporation, a Pennsylvania corporation ("Purchaser"), relating to Purchaser's offer to purchase all outstanding shares of (i) Common Stock, par value \$1.00 per share (the "Common Shares"), and (ii) Series A ESOP Convertible Junior Preferred Stock, without par value (the "ESOP Preferred Shares" and, together with the Common Shares, the "Shares"), of Conrail Inc. (the "Company"), including, in each case, the associated Common Stock Purchase Rights, upon the terms and subject to the conditions set forth in the Offer to Purchase, dated October 24, 1996 (the "Offer to Purchase"), as amended and supplemented by the Supplement thereto, dated November 8, 1996 (the "Supplement"), and in the revised Letter of Transmittal (which, together with any amendments or supplements thereto, constitute the "Offer"). Unless otherwise defined herein, all capitalized terms used herein shall have the respective meanings given such terms in the Offer to Purchase, the Supplement or the Schedule 14D-1.

**Item 5. Purpose of the Tender Offer and Plans or Proposals of the Bidder.**

Item 5 is hereby amended and supplemented by the following:

(e) On November 21, 1996, CSX announced that 76,629,202 Shares had been tendered pursuant to the CSX Offer, and that Green Acquisition Corp., a wholly owned subsidiary of CSX, had accepted for payment 17,860,124 Shares, representing 19.9% of the Company's outstanding Shares. According to CSX, the preliminary proration factor in the CSX Offer was 23% for all Shares tendered. The CSX Offer expired at midnight, New York City time, on Wednesday, November 20, 1996.

**Item 10. Additional Information.**

Item 10 is hereby amended and supplemented by the following:

(e) In view of CSX's purchase of 19.9% of the Shares, Parent announced that no purpose would be served by seeking expedited review by the Third Circuit of the decision not to enjoin the CSX Offer. While the closing of the CSX Offer has made the need for an expedited review unnecessary, Parent continues to pursue on the merits its lawsuit against the Company and CSX.

(f) On November 21, 1996, Parent and Purchaser announced that they were extending the expiration date of the Offer to 12:00 midnight, New York City time, on Monday, December 16, 1996, unless the Offer is further extended. As of the afternoon of November 21, 1996, approximately 1.4 million Shares, or approximately 1.6% of the outstanding Shares, had been tendered pursuant to the Offer.

**Item 11. Material to be Filed as Exhibits.**

Item 11 is hereby amended and supplemented by the following:

(a)(47) Press Release issued by Parent on November 21, 1996.

- (g)(4) Emergency Motion for an Injunction Pending Appeal filed by Parent, Purchaser and Kathryn B. McQuade against the Company, CSX et. al. (dated November 19, 1996, United States Court Appeals for the Third Circuit.
- (g)(5) Motion for an Expedited Appeal filed by Parent, Purchaser and Kathryn B. McQuade against the Company, CSX et. al. (dated November 19, 1996, United States Court Appeals for the Third Circuit.



**SIGNATURE**

After due inquiry and to the best of its knowledge and belief, the undersigned certifies that the information set forth in this statement is true, complete and correct.

November 21, 1996

**NORFOLK SOUTHERN CORPORATION**

By: /s/ JAMES C. BISHOP, JR.

Name: James C. Bishop, Jr.

Title: Executive Vice President-Law

**ATLANTIC ACQUISITION CORPORATION**

By: /s/ JAMES C. BISHOP, JR.

Name: James C. Bishop, Jr.

Title: Vice President and General Counsel

## EXHIBIT INDEX

<u>Exhibit Number</u>	<u>Description</u>	<u>Page</u>
(a)(47)	Press Release issued by Parent on November 21, 1996.	
(g)(4)	Emergency Motion for an Injunction Pending Appeal filed by Parent, Purchaser and Kathryn B. McQuade against the Company, CSX <u>et. al.</u> (dated November 19, 1996, United States Court Appeals for the Third Circuit.	
(g)(5)	Motion for an Expedited Appeal filed by Parent, Purchaser and Kathryn B. McQuade against the Company, CSX <u>et. al.</u> (dated November 19, 1996, United States Court Appeals for the Third Circuit.	

**FOR IMMEDIATE RELEASE**

**November 21, 1996**

Media Contact: Robert Fort  
(757) 629-2714

**NS EXTENDS CONRAIL TENDER OFFER**

NORFOLK, VA - Norfolk Southern Corporation (NYSE: NSC) today announced that it is extending its previously announced tender offer for shares of Conrail. The tender offer has been extended through 12:00 midnight, New York City time, on Monday, December 16, 1996. Norfolk Southern continues to offer \$110 cash per share for all shares of Conrail. According to the depositary for the Norfolk Southern tender offer, approximately 1.4 million Conrail shares had been tendered and not withdrawn pursuant to Norfolk Southern's offer as of the afternoon of November 21.

Regarding the announcement concerning CSX's purchase today of Conrail shares under the CSX offer, Norfolk Southern said the response to the CSX offer clearly demonstrates that most holders of Conrail stock want \$110 cash per share, the price Norfolk Southern continues to offer. Unfortunately for Conrail stockholders, CSX is willing to make this payment only for up to 40 percent of the outstanding shares.

-- MORE --

To preserve their opportunity to receive the best price for all their shares, Conrail stockholders need to vote against Conrail's proposal to opt out of the Pennsylvania fair value statute. Norfolk Southern intends to take every step necessary to convince Conrail stockholders to vote against the opt-out proposal.

In view of CSX's purchase of 19.9% of the Conrail shares, Norfolk Southern indicated that no purpose would be served by seeking expedited review by the Third Circuit Court of Appeals of the decision not to enjoin CSX's purchase. While the closing of the CSX offer has made the need for an expedited review unnecessary, Norfolk Southern continues to pursue on the merits its lawsuit against Conrail and CSX.

Based on advice received from federal regulatory agencies, Norfolk Southern confirmed that the two regulatory conditions to its offer have been satisfied. As a result, the only major conditions that remain to be satisfied are those requiring action by Conrail's board of directors.

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World Wide Web Site - <http://www.nscorp.com>



IN THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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NO. \_\_\_\_\_

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NORFOLK SOUTHERN CORPORATION, a Virginia corporation,  
ATLANTIC ACQUISITION CORPORATION, a Pennsylvania  
corporation AND KATHRYN B. McQUADE,  
Appellants

v.

CONRAIL INC., a Pennsylvania corporation, DAVID M. LEVAN,  
H. FURLONG BALDWIN, DANIEL B. BURKE, ROGER S. HILLAS,  
CLAUDE S. BRINEGAR, KATHLEEN FOLEY FELDSTEIN, DAVID B. LEWIS,  
JOHN C. MAROUS, DAVID H. SWANSON, E. BRADLEY JONES,  
AND RAYMOND T. SCHULER AND CSX CORPORATION,  
Appellees

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On Appeal from the United States District Court for the Eastern  
District of Pennsylvania  
Civil Action No. 96-CV-7167

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APPELLANTS' EMERGENCY MOTION FOR AN INJUNCTION PENDING APPEAL

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DECHERT PRICE & RHOADS  
Mary A. McLaughlin  
George G. Gordon  
4000 Bell Atlantic Tower  
1717 Arch Street  
Philadelphia, PA 19103-2703  
(215) 994-4000  
(215) 994-2222 Facsimile

OF COUNSEL:

SKADDEN, ARPS, SLATE, MEAGHER  
& FLOM  
Steven J. Rothschild  
One Rodney Square  
P.O. Box 636  
Wilmington, DE 19801  
(302) 651-3000  
(302) 651-3001 Facsimile

Pursuant to Federal Rule of Appellate Procedure 8(a) and on the grounds set forth herein, appellants Norfolk Southern Corporation ("Norfolk"), Atlantic Acquisition Corporation and Kathryn B. McQuade (collectively, "appellants") hereby move this Court for an injunction pending resolution of their appeal of the November 19, 1996 Order of the United States District Court for the Eastern District of Pennsylvania denying Plaintiffs' Motion for a Preliminary Injunction.

#### **PRELIMINARY STATEMENT**

By the end of the day tomorrow, Wednesday, November 20, 1996, Conrail's fate will be sealed. Unless this Court acts to maintain the status quo, CSX's tender offer for 19.9% of Conrail's shares will close on that date. If that is allowed to happen, Conrail's and CSX's collusive scheme to lock up control of Conrail, and to disenfranchise Conrail shareholders, will have succeeded. Consequently, appellants respectfully request that this Court issue an injunction maintaining the status quo pending the resolution of their appeal of the District Court's November 19, 1996 Order denying Plaintiffs' Motion for a Preliminary Injunction.

#### **I. THE ORIGINAL CONRAIL-CSX TRANSACTION**

After maintaining for months that Conrail was not for sale (and repeatedly dissuading Norfolk from making an offer for Conrail shares), on October 15, 1996 Conrail announced a surprise merger agreement between CSX and Conrail (the "CSX Transaction").

Central to the CSX Transaction were covenants substantially increasing the compensation of Conrail's CEO, David LeVan, and guaranteeing that Mr. LeVan would succeed John Snow as CEO and Chairman of CSX, the surviving company. Moreover, also integral to the CSX Transaction were an unprecedented array of defensive provisions designed to enhance the coercive effect of the CSX Transaction and through which the Conrail directors effectively abdicated their fiduciary duties.

The CSX Transaction was structured as a coercive, multi-tiered, front-end loaded tender offer. The original merger agreement provided that CSX would purchase 40% of Conrail stock via a tender offer for \$92.50 a share. Conrail also granted CSX options to purchase an additional 15,955,477 shares of common stock that would, in combination with the 40% purchased through the tender offer, bring its holdings to 50% of Conrail stock. Once that happens, according to Conrail's own preliminary proxy materials, "approval of the merger by the Conrail shareholders would be certain."

In the proposed merger, the remaining Conrail shares will be exchanged for shares of CSX stock at a rate of 1.85619 CSX shares for each share of Conrail stock. This back-end exchange of stock is currently worth only \$82.37 per share using the closing price of CSX stock as of November 15, 1996. The large disparity between the consideration offered in the front-end tender offer and that offered in the back-end merger is intentionally designed to coerce shareholders to tender their

shares in the front-end tender offer, thereby locking up approval of the merger.

Conrail and CSX hope that shareholders' fear of having to accept the less valuable CSX stock in the back-end merger will create a "stampede" effect, allowing CSX (1) to obtain 40% of the shares in the front-end tender offer; (2) then to exercise its stock option to bring its holdings to almost 50% of Conrail's shares; and (3) finally to force the remaining shareholders to accept the less generous exchange of stock in the merger.

Indeed, Professor John E. Coffee of Columbia University School of Law testified that he had "not seen a disparity this great in any tender offer in well over a decade." (Hrg. Tr. at 68)<sup>1</sup>

One problem, however, prevents Conrail and CSX from getting away with this coercive scheme. Subchapter 25E of the Pennsylvania Business Corporation Law ("PBCL") provides that any person acquiring voting power over 20% or more of a corporation's voting shares must acquire any additional shares tendered for a "fair price", which is defined in the statute as not less than the highest price per share paid by the acquiring person within 90 days before obtaining control over 20% of the voting shares plus an increment representing the proportionate value of any control premium. In other words, if CSX acquired 20% or more of Conrail's shares for \$110 (its current tender offer), it would

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<sup>1</sup> Professor Coffee further testified that CSX's offer was so coercive "that it's a practical certainty that all shareholders will tender." (Hrg. Tr. at 69) The selected excerpts from the hearing transcript cited herein are attached as Exhibit A.



have to purchase 100% of Conrail's shares, if tendered, for at least \$110. A corporation may amend its articles of incorporation to "opt-out" of Subchapter 25E. To date, Conrail has not done so.

To avoid this problem, the CSX Transaction was originally structured as follows: (1) a first step cash tender offer for up to 19.9% of Conrail's stock (originally scheduled to close on November 15); (2) a "Charter Amendment" to Conrail's articles of incorporation to opt-out of Subchapter 25E (originally scheduled to be voted on at a shareholders meeting scheduled for November 14, the day before the first stage of the CSX tender offer was to close); (3) an acquisition of additional shares which would represent, in combination with the shares already purchased, at least 40%, and possibly up to 50%, of Conrail's stock; and (4) consummation of the merger following appropriate regulatory approvals.

The CSX Transaction also contained an unprecedented array of defensive provisions designed to enhance the coercive effect of the CSX tender offer and to freeze out competing tender offers, including:

- a provision which prevents Conrail's board from terminating the CSX Transaction or approving a competing transaction for 180 days from the date of the merger agreement, regardless of whether its fiduciary duty would require it to do so.
- a provision prohibiting the Conrail board from exempting any other competing bidder from the Conrail poison pill plan without CSX's approval.
- a lock-up stock option to purchase 15,955,477 shares of Conrail common stock for \$92.50 which

has a virtually unlimited dilution effect on a competing bidder. Under the current \$110 per share Norfolk tender offer, the dilution attributable to the option would be approximately \$280 million.

- a \$300 million breakup fee if the CSX merger agreement is terminated following a competing takeover proposal. In conjunction with the lock-up stock option, this breakup fee would currently add \$580 million to the cost of the most recent Norfolk tender offer.

Through these provisions, the Conrail board has effectively delegated its fiduciary duties to CSX - a party who "has the strongest conflict in the entire world with the shareholders." (Hrg. Tr. at 79[Coffee Testimony]) Indeed, Furlong Baldwin, a Conrail director, candidly testified that he believes his "responsibility is to [the CSX] merger agreement." (Hrg. Tr. at 239) Moreover, these provisions enhance the coercive effect of the CSX tender offer by creating the appearance that no competing offer could be viable.

Despite these impediments to a Norfolk-Conrail transaction, Norfolk decided to offer Conrail shareholders a better deal. On October 23, 1996, Norfolk announced an all cash tender offer for Conrail stock at \$100 per share. This tender offer was worth approximately \$15 per share more than the original CSX offer, which had a blended value of slightly more than \$85.00 per share as of October 29, 1996.

## **II. THE REVISED CONRAIL-CSX TRANSACTION**

In response to Norfolk's financially superior tender offer, Conrail and CSX amended their merger agreement to further pressure Conrail shareholders to tender their shares into the

first step of the CSX offer (the "Amended CSX Transaction"). CSX increased the first stage of its tender offer to \$110, but did not increase or guarantee the value of the back-end consideration, thereby exacerbating the coercive nature of its offer. Under the Amended CSX Transaction, CSX will acquire only 40% of the Conrail shares for \$110; the remaining 60% of Conrail would be exchanged for CSX stock worth only \$82.37 as of November 15, 1996. The amendment also extended by three months the period of time during which the directors cannot withdraw their support of the CSX Transaction or approve another transaction (the "270-Day Lock-Out Provision"). The amended time period now runs until July 12, 1996.

Conrail and CSX also changed the timing of the CSX Transaction to increase its coercive effect. The first stage of the CSX tender offer will now close on November 20, 1996. The new record date for the shareholders meeting to consider the Charter Amendment is December 5, 1996 (with the meeting to take place in "mid-December"). In short, CSX and Conrail are now trying to stampede Conrail's shareholders into selling a substantial block of Conrail stock through an illegally coercive tender offer before the vote on the Charter Amendment. That stock would then be voted as a block in favor of the Charter Amendment -- effectively stuffing the ballot box in connection with CSX's and Conrail's effort to have Conrail shareholders opt-out of the protections provided to them by Subchapter 25E.

On November 7, 1996, one day after CSX and Conrail announced the Amended CSX Transaction, Norfolk increased its all cash tender offer for all Conrail shares to \$110 per share. According to the November 8, 1996 edition of The Wall Street Journal, Norfolk's "increased bid has a value of nearly \$17 a share more than CSX's." In other words, Norfolk's all cash \$110 per share tender offer is worth approximately \$1.5 billion more to Conrail shareholders than the Amended CSX Transaction. Yet without an injunction pending appeal, Conrail shareholders will effectively be deprived of the opportunity to accept Norfolk's financially superior offer.

#### PROCEDURAL HISTORY

On October 23, 1996, appellants filed an action in the United States District Court for the Eastern District of Pennsylvania challenging the coercive provisions of the CSX Transaction. Pursuant to the briefing schedule suggested by the Court, appellants served their Opening Memorandum of Law in Support of Their Motion for a Preliminary Injunction on November 11, 1996 and filed their Motion for a Preliminary Injunction and supporting papers on November 13, 1996. After a hearing on November 18-19, 1996, the District Court denied appellants' Motion. Appellants immediately filed a Notice of Appeal, a Motion for Expedited Appeal, and this Emergency Motion for an Injunction Pending Appeal.



## ARGUMENT

### I. THE APPLICABLE LEGAL STANDARDS.

A federal court may issue an injunction or a stay pending appeal in order "to prevent irreparable injury to the parties or to the public resulting from the premature enforcement of a determination which may later be found to have been wrong." Scripps-Howard Radio, Inc. v. Federal Communications Commission, 316 U.S. 4, 9 (1942); see also Fed. R. App. P. 8(a). For an injunction to issue, a court must weigh four factors: (1) the applicants' likelihood of success on the merits of their appeal; (2) whether the applicants will be irreparably injured absent an injunction; (3) whether issuance of an injunction will substantially injure the other parties interested in the procedure; and (4) where the public interest lies. See Republic of the Philippines v. Westinghouse Elec. Corp., 949 F.2d 653, 658 (3d Cir. 1991).

No single factor is controlling. If one factor weighs heavily in favor of an injunction, a lesser showing is needed for the others. In particular, when irreparable harm is clearly demonstrated, a lesser showing of success on the merits is required for an injunction to issue. See e.g. Ohio v. Nuclear Regulatory Commission, 812 F.2d 288, 290 (6<sup>th</sup> Cir. 1987) ("The probability of success that must be demonstrated is inversely proportional to the degree of irreparable injury the plaintiff will suffer absent an injunction"). Where -- as here -- a case involves matters of first impression or unsettled law, several

courts have recognized that it is particularly appropriate to focus more on the harm that will be suffered by the applicants if the injunction is denied and less on the issue of success on appeal. First Amendment Coalition v. Judicial Inquiry and Review Bd., 584 F. Supp. 635, 638 (E.D. Pa. 1984) (Pollak, J.) (holding that, because the case involved "essentially untested constitutional analysis" and there was "no single authoritative decision" on point, if a "reasonable possibility" of success on appeal could be shown, "the equities would then shift strongly towards granting a stay" under F.R.C.P. 62(c)), vac. on other grounds, 784 F.2d 467 (3d. Cir. 1986); see also U.S. v. Eleven Vehicles, 1995 WL 635332 at \*3 (E.D. Pa. Oct. 24, 1995); Republic Industries v. Central Pennsylvania Teamsters Pension Fund, 537 F. Supp. 1036, 1037 (E.D. Pa. 1982) (stay granted where appeal was "non-frivolous").

As explained below, if this Court does not grant injunctive relief pending resolution of this appeal, Conrail's shareholders will suffer catastrophic and irreparable harm. Moreover, even though appellants are entitled to a lower standard with respect to the likelihood of success on appeal, they do not need it. Appellants have a strong likelihood of success on the merits of their appeal and the remaining factors of the harm to other parties and the public interest also weigh in favor of an injunction.

II. IF THE COURT DOES NOT ENJOIN CSX'S TENDER OFFER FROM CLOSING  
PENDING APPEAL, CONRAIL'S FATE WILL BE SEALED

If this Court does not issue an injunction to maintain the status quo pending appeal, the irreparable harm to appellants is plain. Courts have recognized that a plaintiff is irreparably harmed if he loses the opportunity to acquire the object of his acquisition bid as a result of illegal conduct by defendants. See A. Copeland Enters., Inc. v. Guste, 706 F. Supp. 1283, 1293 (W.D. Tex. 1989); Asarco, Inc. v. M.R.H. Homes A Court, 611 F. Supp. 468, 480 (D.N.J. 1985); West Point-Pepperell, Inc. v. Farley, Inc., 711 F. Supp. 1088, 1095 (N.D.Ga. 1988); Buckhorn, Inc. v. Ropak Corp., 656 F. Supp. 209, 235-36 (S.D. Ohio), aff'd mem., 815 F.2d 76 (6<sup>th</sup> Cir. 1987). Moreover, the irreparable harm to Conrail's shareholders that flows from the lack of an opportunity to exercise choice free from coercion must be given substantial weight. See Conoco, Inc. v. Seagram Co., 517 F. Supp. 1299, 1303 (S.D.N.Y. 1981) ("The Directors are free to continue by proper legal means to express to the shareholders their objection and hostility to the [offeror's] proposal, but they are not free to deny them their right to pass upon this offer or any other offer for the purchase of their shares"); see also, Amalgamated Sugar Co. LLC v. NL Indus., 644 F. Supp. 1229, 1239 (S.D.N.Y. 1986); Buckhorn, 656 F. Supp. at 235-36.

Here, the CSX Transaction and the Amended CSX Transaction were designed specifically to stampede shareholders into tendering their shares to CSX in the front-end tender offer, which now closes on Wednesday, November 20, 1996. Without an

injunction pending appeal, CSX and Conrail will have succeeded in the first stage of their coercive scheme. Indeed, if CSX acquires the 19.9% of Conrail shares sought in the tender offer (which is likely given the coercive nature of the offer),<sup>2</sup> it will set in motion an irreversible process that will result in CSX locking up control of Conrail swiftly and without the chance for shareholders to have a meaningful say.

For example, once CSX owns 19.9% of Conrail's stock, Norfolk will be foreclosed from entering into a "business combination" with Conrail for five years under Subchapter 25F of the PBCL. That provision of the PBCL prevents a company from entering into a "business combination" for five years with a shareholder that owns 20% or more of its shares. Thus, even if Norfolk's tender offer were successful and it obtained more than 20% of Conrail's shares, it could not merge with Conrail unless:

(i) the Conrail Board approved Norfolk's proposed business combination;

(ii) the business combination received the approval of the holders of all of Conrail's outstanding shares not owned by Norfolk; or

(iii) Norfolk owned 80% of the Conrail shares, and the business combination received the approval of the holders of a majority of the shares not owned by Norfolk (and Norfolk complies with certain fair price provisions).

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<sup>2</sup> See Hrg. Tr. at 67 (Professor Coffee testified that "It is an empirical certainty that a 20 percent partial tender offer will be oversubscribed").



As a practical matter, however, once the CSX tender offer closes, these exceptions are unavailable to Norfolk. The first exception is precluded by the CSX Transaction -- the merger agreement, as amended, forbids the Conrail board from approving a business combination with anyone but CSX for 270 days. In addition, if CSX obtains 19.9% of the outstanding Conrail shares through its coercive tender offer, the second and third exceptions will be mathematically impossible.

Moreover, if the CSX tender offer closes, CSX and Conrail will have successfully manipulated the outcome of the upcoming vote on the Charter Amendment in their favor. If the Charter Amendment passes (which is highly likely when at least 20% of the shares will already be committed to vote in favor of the Amendment), CSX will launch a second tender offer for 20.1% of the remaining Conrail shares. At that point, shareholders' only choice will be to tender into the front-end of the CSX offer or risk getting stuck with the less valuable back-end exchange of stock. Conrail has conceded in its proxy materials that shareholder approval of the proposed CSX-Conrail merger is "certain" once CSX obtains 40% of the outstanding shares and exercises its lock-up stock option.

Thus, on Wednesday November 20, Conrail's fate will be effectively sealed. Once the CSX tender offer closes, it will be too late to "unscramble the eggs." Conrail and CSX will have succeeded in their scheme to deny shareholders any meaningful say

in determining Conrail's fate and to lock-up CSX's control of Conrail.

### **III. APPELLANTS HAVE A STRONG LIKELIHOOD OF SUCCESS ON APPEAL**

An injunction pending appeal is compelled not only by the plain irreparable harm that appellants will suffer if the status quo is not maintained pending appeal, but by appellants' strong likelihood of success on appeal as well. The CSX Transaction is unprecedented in terms of the array of defensive provisions employed to coerce shareholders into acting contrary to their best interests. Professor Coffee testified that he has "never seen a transaction that has the cumulative amount of obstacles in terms of their total effect." (Hrg. Tr. at 83.) Through these defensive provisions, the Conrail board has abdicated its fiduciary duties in an effort to "bulletproof" the CSX Transaction. Moreover, Conrail and its Board have acted to mislead and coerce shareholders into tendering their shares to CSX.

#### **A. Conrail's Directors Have Abdicated Their Fiduciary Duties**

The PBCL requires that the "business and affairs of every [Pennsylvania] Corporation shall be managed under the direction of, a board of directors." PBCL § 1721. The PBCL also makes clear that the directors of a Pennsylvania corporation must act with due care and in good faith. Here, the Conrail Board has refused to direct the management of the affairs of Conrail and has contractually bound itself to allow CSX to have the final

word on certain critical matters - without regard to what may be in the best interests of Conrail, its shareholders or its other constituencies. As noted above, Mr. Baldwin testified that his responsibility was to adhere to the CSX merger agreement, and that, because of the merger agreement, Conrail could not sign an agreement with Norfolk even if it was better for Conrail's constituencies. (Hrg. Tr. at 236, 243)

For example, the 270-Day Lock-Out provision purports to bind Conrail's directors not to terminate the CSX Transaction for 270 days regardless of the circumstances. Moreover, the CSX merger agreement also purports to bind the Conrail board not to take any action with respect to the Conrail poison pill plan to facilitate any offer to acquire Conrail other than the CSX Transaction. Through these provisions the Conrail directors have ceded to CSX their authority and ability to consider and pursue other acquisition proposals. In short, Conrail's directors gave up their ability to use their own best judgment on matters critical to Conrail's shareholders. As Professor Coffee explained:

Until the merger agreement is unwound with the consent of CSX or the 270-day period expires the Conrail directors are not in a position to live up to their own fiduciary duties even if they wanted to.

(Hrg. Tr. at 86, 87)

Neither Conrail nor CSX can point to a single case giving the Conrail's directors the right to abdicate their fiduciary duties under Pennsylvania law. Indeed, case law from Pennsylvania and across the country makes clear that directors

cannot delegate away those duties that lie at the heart of the management of the corporation. See e.g., Neal v. Neumann Medical Center, 667 A.2d 479, 483 (Pa. Commw. Ct. 1995) ("Certainly, if enforcement of the bylaws provision providing for the mandatory advancement of defense expenses would conflict with the directors' fiduciary duties in this case, then it is of no moment whether the enforcement is pursuant to a contract separate from the bylaws or pursuant to the bylaws themselves"); Paramount Communications Inc., v. OVC Network Inc., 637 A.2d 34, 51 (Del. 1994) ("To the extent that a contract, or a provision thereof, purports to require a board to act or not act in such a fashion as to limit the exercise of fiduciary duties, it is invalid and unenforceable").<sup>3</sup>

Moreover, Conrail's directors have abdicated their fiduciary duties with little, if any, investigation or under-

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<sup>3</sup> See also, Jewel Cos. v. Pay Less Drug Stores Northwest, Inc., 741 F.2d 1555, 1560 n.5 (9<sup>th</sup> Cir. 1984) (noting that a number of courts have declared unlawful attempts to curtail the board's traditional management function by contract); ConAgra, Inc. v. Cargill Inc., 382 N.W.2d 576, 587 (Neb. 1986) (noting that directors cannot enter into agreements to violate their fiduciary obligations); Great W. Producers Co-op. v. Great W. United Corp., 613 P.2d 873, 878 (Colo. 1980) (holding that where a decision lies 'at the heart' of the directors' corporate management duties, the directors may not lawfully agree to abrogate their duty to exercise independent judgment with respect to that decision); Abercrombie v. Davies, 123 A.2d 893, 899 (Del. Ch. 1956) (declaring that the court would not give legal sanction to agreements which have the effect of removing from directors their duty to use their own best judgment on management matters); Chapin v. Benwood Foundation, Inc., 402 A.2d 1205, 1210 (Del. Ch. 1979), aff'd sub nom., Harrison v. Chapin, 415 A.2d 1068 (Del. 1980) (directors may not delegate to others those duties which lay at the heart of the management of the corporation).



standing of what they were doing. For example, Mr. Baldwin testified that:

- He did not read the Norfolk offer (Hrg. Tr. at 196)
- He did not read the CSX offer to purchase (Id.)
- He did not ask whether Conrail's Board would be free to accept a deal that was "twice as good" as the CSX offer. (Id. at 207.)

Mr. Baldwin also appeared to lack a basic understanding of some of the key elements of the CSX Transaction, such as the fact that the CSX merger agreement exempted CSX from the poison pill. (Id. at 222-23.)

**B. Conrail and CSX Have Acted To Coerce Conrail Shareholders Into Tendering Their Shares To CSX**

Not only have the Conrail directors abdicated their fiduciary duties, but they (along with CSX) have acted affirmatively to coerce Conrail shareholders into tendering their shares to CSX. Indeed, Conrail, in Amendment No. 4 to its Schedule 14D-9, acknowledges that because of the coercive nature of the CSX Transaction "the Offer and the Second CSX Offer, if applicable, may succeed regardless of the perceived relative values of the CSX Transactions and the Proposed Norfolk Transactions." That admission is truly remarkable.

No Pennsylvania authority holds that a target company's board of directors can coerce its shareholders into acting against their own interests. Indeed, Subchapter 25E of the PBCL was designed to avoid precisely the type of coercion being

practiced by Conrail and CSX.<sup>4</sup> According to the Pennsylvania Corporation Law and Practice treatise:

Specifically, the control transaction provisions of the 1988 BCL [in Subchapter 25E] protect shareholders of registered corporations against two-tier front end loaded tender offers, tender offers for fewer than all of the outstanding shares and tender offers with a non-cash component for common stock by forcing the acquiror to pay fair value in cash to all demanding shareholders regardless of the stated terms of the offer.

John W. McLamb, Jr. and Wendy C. Shiba, Pennsylvania Corporation Law and Practice, § 10.14(b) at 551 (1993 Supp.) (Prentice Hall & Business).

Here, however, the CSX and the Conrail board seek to stand Subchapter 25E on its head. They are attempting to coerce shareholders into opting out of Subchapter 25E -- which was specifically designed to protect shareholders from precisely this type of coercive multi-tiered tender offer -- so that they can force through a back end merger where the consideration to be received has a value of \$82. The gross disparity between the \$110 per share consideration in the first CSX tender offer and the \$82 per share value of the CSX back-end merger would lead any rational shareholder to tender their shares in the first tender offer, thereby giving CSX a "leg-up" in the vote on the proposed Charter Amendment opting out of Subchapter 25E. In short, CSX and Conrail are trying to use the protections of PBCL, which were designed as a shield to be used for the benefit of shareholders,

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<sup>4</sup> Also, § 1105 of the PBCL specifically contemplates that a shareholder may obtain injunctive relief if the operation of any plan would result in fundamental unfairness to the shareholder.

as a sword against shareholders in CSX's effort to lock-up swift control of the company.

This coercive effect of the CSX tender offer is enhanced by draconian defensive provisions, including the 270-Day Lock-Out provision, the \$300 million break-up fee and the lock-up stock option (which has a current dilution effect of \$280 million). These provisions were specifically designed to make Conrail shareholders believe that any competing bid, including Norfolk's, is effectively unavailable. Thus, Conrail shareholders would be left with the perception that they have only one rational choice - to tender their shares to CSX.<sup>5</sup>

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<sup>5</sup> Conrail and CSX have argued that Norfolk and Kathryn McQuade lack standing to bring their shareholder derivative claims. Their arguments are meritless. First, CSX and Conrail rely heavily on § 1717 of the PBCL in support of their argument that Norfolk and Ms. McQuade do not have standing to bring fiduciary duty claims because they are beneficial, not record, shareholders. Section 1717, however, simply requires that breach of fiduciary duty claims be brought as derivative claims, not as direct claims. It does not govern who can bring derivative claims. See Hrg. Tr. at 90 (Professor Coffee noted that § 1717 was designed to reverse "the Revlon rule that permits a bidder to bring a direct action, instead relegating him to a derivative action.") The question of who can bring derivative claims is governed by § 1782 of the PBCL, which clearly allows such claims to be brought by beneficial owners.

Second, Conrail and CSX argue that Norfolk cannot adequately represent the interests of shareholders because it is a competing bidder. Here, however, Norfolk is seeking to open up the bidding process. Numerous federal courts have recognized that, in such a situation, the interests of a bidder plainly coincide with those of shareholders. See Granada Investments, Inc. v. DWG Corp., 717 F. Supp. 533, 538 (N.D. Ohio 1989) ("Both Granada and the other shareholders share an interest in preventing DWG's directors from locking up control of DWG."); Air Line Pilots Ass'n v. UAL Corp., 717 F. Supp. 575, 579 (N.D. Ill. 1989) (Offeror "like other shareholders is interested in maximizing the value of his shares and ensuring that management does not block potentially (continued...)

IV. THE LACK OF HARM TO DEFENDANTS AND THE PUBLIC INTEREST ALSO WARRANT AN INJUNCTION PENDING APPEAL

The remaining two factors to be considered by the Court in granting a preliminary injunction, harm to other parties and the public interest, also mandate the granting of an injunction here.

First, Conrail and CSX will suffer no harm if CSX is prohibited from purchasing shares of Conrail until the appeal is resolved. Indeed, CSX itself has delayed the closing of the first stage tender offer once already. Another short delay will cause no harm. Moreover, appellants have filed a Motion for an Expedited Appeal and are willing to work toward a swift resolution to this appeal.

Second, Norfolk's \$110 offer is clearly better for Conrail's shareholders and other constituencies than the CSX offer. It is in the public's best interests to insure that directors of Pennsylvania corporations cannot coerce shareholders into accepting proposals that are in the interests of management

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<sup>5</sup>(...continued)  
profitable offers in breach of their fiduciary duty."); Shamrock Associates v. Horizon Corp., 632 F. Supp. 566, 571 (S.D.N.Y. 1986) (Potential acquirer's "interest corresponds with that of Horizon's other unaffiliated shareholders who, no doubt, desire competitive bidding for their shares."); c.f. MacAndrews & Forbes Holding, Inc. v. Revlon, Inc., 1885 WL 21129 (Del. Ch. Ct., Oct. 9, 1985) (Offeror's derivative suit seeks to "secur[e] for itself and for all other shareholders the ability to bargain in the marketplace."). As Professor Coffee testified, Norfolk and the Conrail shareholders "are not in conflict and they have a common interest in trying to eliminate the takeover barriers that prevent there from being a consideration by shareholders either of the voting decision or of other decisions." (Hrg. Tr. at 190.)



as opposed to the interests of the corporation and its constituencies.

**THE RELIEF REQUESTED**

Accordingly, for the reasons set forth above, appellants request that this Court enter an injunction pending appeal and order that, pending final resolution of this appeal:

(a) Defendant CSX, any subsidiary, affiliate or parent of CSX, or any person or entity acting on behalf of CSX may not accept shares for payment pursuant to a tender offer for shares of Conrail Common Stock and Series A ESOP Convertible Junior Preferred Stock (the "CSX Offer");

(b) Defendants may not take any action toward consummation of the Agreement and Plan of Merger by and among Conrail, Inc., Green Acquisition Corp. and CSX Corp., as amended (the "CSX Merger Agreement"), including, without limitation, the consummation of the CSX Offer; and

(c) Defendant Conrail, Inc. or its Board of Directors may not count or give effect to votes of Conrail shares acquired by CSX or a CSX subsidiary in the CSX Offer or otherwise in the yet-to-be scheduled vote of Conrail's shareholders on the amendment to Conrail's Articles of Incorporation to opt-out of Subchapter 25E of the PBCL.

Respectfully submitted,

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Mary A. McLaughlin  
George G. Gordon  
Dechert Price & Rhoads  
4000 Bell Atlantic Tower  
1717 Arch Street  
Philadelphia, PA 19103  
(215) 994-4000  
(215) 994-2222 (facsimile)  
Attorneys for Appellants

Of counsel:  
Skadden, Arps, Slate, Meagher & Flom  
Steven J. Rothschild  
R. Michael Lindsey  
One Rodney Square  
P.O. Box 636  
Wilmington, DE 19899  
(302) 651-3000  
Dated: November 19, 1996

IN THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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NO. \_\_\_\_\_

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NORFOLK SOUTHERN CORPORATION, a Virginia corporation,  
ATLANTIC ACQUISITION CORPORATION, a Pennsylvania  
corporation AND KATHRYN B. McQUADE,  
Appellants

v.

CONRAIL INC., a Pennsylvania corporation, DAVID M. LFVAN,  
H. FURLONG BALDWIN, DANIEL B. BURKE, ROGER S. HILLAS,  
CLAUDE S. BRINEGAR, KATHLEEN FOLEY FELDSTEIN, DAVID B. LEWIS,  
JOHN C. MAROUS, DAVID H. SWANSON, E. BRADLEY JONES,  
AND RAYMOND T. SCHULER AND CSX CORPORATION,  
Appellees

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On Appeal from the United States District Court for the Eastern  
District of Pennsylvania  
Civil Action No. 96-CV-7167

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**APPELLANTS' MOTION FOR AN EXPEDITED APPEAL**

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**DECHERT PRICE & RHOADS**

Mary A. McLaughlin  
George G. Gordon  
4000 Bell Atlantic Tower  
1717 Arch Street  
Philadelphia, PA 19103-2703  
(215) 994-4000  
(215) 994-2222 Facsimile

**OF COUNSEL:**

**SKADDEN, ARPS, SLATE, MEAGHER  
& FLOM**

Steven J. Rothschild  
One Rodney Square  
P.O. Box 636  
Wilmington, DE 19801  
(302) 651-3000  
(302) 651-3001 Facsimile

**APPELLANTS' MOTION FOR AN EXPEDITED APPEAL**

Appellants Norfolk Southern Corporation ("Norfolk"), Atlantic Acquisition Corporation, and Kathryn B. McQuade hereby move for an expedited appeal from the November 19, 1996 Order of the United States District Court for the Eastern District of Pennsylvania denying Plaintiffs' Motion for a Preliminary Injunction.

**GROUND'S FOR EXPEDITED APPEAL**

At issue in this appeal are the rights of Conrail shareholders to choose the fate of the company that they own and the ability of Conrail's Board to abdicate its duties to those shareholders and Conrail's other constituencies. Norfolk and defendant CSX have made competing tender offers for shares of defendant Conrail. Norfolk's all cash \$110 tender offer is worth approximately \$1.5 billion more to shareholders than CSX's coercive, multi-tiered, front-end loaded tender offer. CSX and Conrail's board, however, have conspired to handicap the Norfolk offer and to coerce shareholders into tendering their shares to CSX. If the first stage of the CSX tender offer is allowed to close on November 20, 1996 and the impediments to the Norfolk Southern offer remain, Conrail's fate will be sealed.

In support of this Motion, appellants incorporate their Emergency Motion For An Injunction Pending Appeal (the "Emergency Motion") filed today. As the Emergency Motion demonstrates, this



appeal is extremely time sensitive.

**PROPOSED BRIEFING SCHEDULE**

Appellants respectfully request that this Court set the following briefing schedule if this Motion is granted:

(1) Brief for the appellant and the appendix to be served and filed within two (2) days of the Court's Order granting this motion;

(2) Brief for the appellees to be served and filed within two (2) days of service of the appellants' brief; and

(3) Reply brief for the appellants to be served and filed within two (2) days of service of the appellees' brief.

Appellants also respectfully request that oral argument be scheduled as soon as practicable after completion of the briefing.

CONCLUSION

For the foregoing reasons, appellants respectfully request that the Court adopt and order the proposed expedited briefing schedule.

Respectfully submitted,

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Mary A. McLaughlin  
George G. Gordon  
Dechert Price & Rhoads  
4000 Bell Atlantic Tower  
1717 Arch Street  
Philadelphia, PA 19103  
(215) 994-4000  
(215) 994-2222 (facsimile)  
Attorneys for Appellants

Of counsel:  
Skadden, Arps, Slate, Meagher & Flom  
Steven J. Rothschild  
One Rodney Square  
P.O. Box 636  
Wilmington, DE 19899  
(302) 651-3000

Dated: November 19, 1996

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**SECURITIES AND EXCHANGE COMMISSION**

Washington, D.C. 20549

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**SCHEDULE 14D-1**

(Amendment No. 14)

**Tender Offer Statement Pursuant to Section 14(d)(1)  
of the Securities Exchange Act of 1934**

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**Conrail Inc.**

(Name of Subject Company)

**Norfolk Southern Corporation  
Atlantic Acquisition Corporation**

(Bidders)

**Common Stock, par value \$1.00 per share  
(Including the associated Common Stock Purchase Rights)  
(Title of Class of Securities)**

**208368 10 0**

(CUSIP Number of Class of Securities)

**Series A ESOP Convertible Junior  
Preferred Stock, without par value  
(Including the associated Common Stock Purchase Rights)  
(Title of Class of Securities)**

**Not Available**

(CUSIP Number of Class of Securities)

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**James C. Bishop, Jr.  
Executive Vice President-Law  
Norfolk Southern Corporation  
Three Commercial Place  
Norfolk, Virginia 23510-2191  
Telephone: (757) 629-2750**

(Name, Address and Telephone Number of Person Authorized  
to Receive Notices and Communications on Behalf of Bidder)

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with a copy to:  
**Randall H. Doud, Esq.  
Skadden, Arps, Slate, Meagher & Flom LLP  
919 Third Avenue  
New York, New York 10022  
Telephone: (212) 735-3000**

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This Amendment No. 14 amends the Tender Offer Statement on Schedule 14D-1 filed on October 24, 1996, as amended (the "Schedule 14D-1"), by Norfolk Southern Corporation, a Virginia corporation ("Parent"), and its wholly owned subsidiary, Atlantic Acquisition Corporation, a Pennsylvania corporation ("Purchaser"), relating to Purchaser's offer to purchase all outstanding shares of (i) Common Stock, par value \$1.00 per share (the "Common Shares"), and (ii) Series A ESOP Convertible Junior Preferred Stock, without par value (the "ESOP Preferred Shares" and, together with the Common Shares, the "Shares"), of Conrail Inc. (the "Company"), including, in each case, the associated Common Stock Purchase Rights, upon the terms and subject to the conditions set forth in the Offer to Purchase, dated October 24, 1996 (the "Offer to Purchase"), as amended and supplemented by the Supplement thereto, dated November 8, 1996 (the "Supplement"), and in the revised Letter of Transmittal (which, together with any amendments or supplements thereto, constitute the "Offer"). Unless otherwise defined herein, all capitalized terms used herein shall have the respective meanings given such terms in the Offer to Purchase, the Supplement or the Schedule 14D-1.

**Item 11. Material to be Filed as Exhibits.**

Item 11 is hereby amended and supplemented by the following:

- (a)(48) Text of Advertisement appearing in newspapers commencing December 4, 1996.
- (a)(49) Text of Presentation made to certain shareholders of the Company commencing December 4, 1996.



**SIGNATURE**

After due inquiry and to the best of its knowledge and belief, the undersigned certifies that the information set forth in this statement is true, complete and correct.

Dated: December 4, 1996

**NORFOLK SOUTHERN CORPORATION**

By: /s/ JAMES C. BISHOP, JR.  
Name: James C. Bishop, Jr.  
Title: Executive Vice President-Law

**ATLANTIC ACQUISITION CORPORATION**

By: /s/ JAMES C. BISHOP, JR.  
Name: James C. Bishop, Jr.  
Title: Vice President and General Counsel

## EXHIBIT INDEX

<u>Exhibit Number</u>	<u>Description</u>	<u>Page</u>
(a)(48)	Text of Advertisement appearing in newspapers commencing December 4, 1996.	
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