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October 2, 2001



BY HAND

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

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

Dear Secretary Williams:

I enclose herewith for filing in the above-referenced docket an original and 25 copies of NS-87, Norfolk Southern's Opposition to the Joint Motion for Stay. A 3-1/2" computer disk of NS-87 in Wordperfect 5.1 format, which is capable of being read by Wordperfect for Windows 7.0 is also enclosed.

Sincerely,

Richard A. Allen

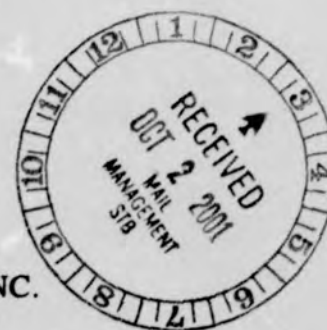
Enclosures

cc: All parties of record in Finance Docket No. 33388

20345

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 33388



ENTERED
Office of the Secretary

OCT 02 2001

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

NORFOLK SOUTHERN'S OPPOSITION TO THE JOINT MOTION FOR STAY

Norfolk Southern Corporation and Norfolk Southern Railway Company (collectively, "NS") oppose the joint motion by the Commonwealth of Pennsylvania and various rail labor unions for a stay pending judicial review of the Board's Decision No. 198 in this proceeding, served September 19, 2001.¹

The joint motion falls far short of establishing the kind of extraordinary circumstances that would warrant the issuance of the stay the movants seek.² In considering such motions,

¹ The joint motion for stay was filed on September 27, 2001 and the Board's Secretary directed all parties to respond by October 2, 2001. On October 2, 2001, movants filed an "Amended Joint Motion" making certain changes to the original motion. This Opposition responds to the motion for stay as amended.

² Although, by its terms, the motion requests a stay of Decision No. 198, it appears that what movants really desire is not a stay of Decision No. 198, but an injunction prohibiting NS from closing the Hollidaysburg Car Shops ("Shops") until the conclusion of judicial review. Prior to the Board's Decision No. 198, there was no Board decision or other legal obstacle preventing NS from closing the Shops. The purpose of the movants' original Joint Petition was to obtain such a decision, but they were unsuccessful. Staying an order that declines to block the closing would not block the closing. Indeed, by seeking a stay of the

(continued on next page...)

the Board and its predecessor, the Interstate Commerce Commission, have consistently held that granting a stay is an extraordinary remedy that should rarely be granted. As the Board stated in *Canadian Pacific Limited, et al.—Purchase and Trackage Rights—Delaware & Hudson Railway Company (Arbitration Review)*, Finance Docket No. 31700 (Sub-No. 13), served November 6, 1998:

The standards governing disposition of a petition for stay are: (1) whether petitioner is likely to prevail on the merits on appeal; (2) whether petitioner will be irreparably harmed in the absence of a stay; (3) whether issuance of a stay would substantially harm other parties; and (4) whether issuance of a stay is in the public interest. *Washington Metropolitan Area Transit Comm. v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977); and *Virginia Petroleum Jobbers Association v. FPC*, 259 F.2d 921 (D.C. Cir. 1951). A stay of an agency action pending judicial review is an extraordinary action that should not be taken except in the most unusual situations. *Middlewest Motor Freight Bureau v. United States*, 443 F.2d 212, 242 (8th Cir. 1970). The party seeking stay or injunctive relief carries the burden of persuasion on all of the elements required for extraordinary relief such as a stay. *Canal Authority of Fla. v. Callaway*, 489 F.2d 567, 573 (5th Cir. 1974). Because this showing is difficult, such relief is rarely granted.

Id. at 1-2. Or, as the ICC stated in *Consolidated Rail Corporation—Abandonment—Between Corry and Meadville in Erie and Crawford Counties, Pa.*, Docket No. AB-167 (Sub-No. 1139) (served October 5, 1995), “a stay pending judicial review is a ‘rare event’ and depends on a demonstration that the administrative process has ‘backfired.’” Slip op. at 26 (quoting *Busboom Grain Co. v. ICC*, 830 F.2d 74, 75 (7th Cir. 1987)).

(...continued from previous page)

decision, movants are literally requesting that NS be allowed to close the Shops and to do so without the requirement of enhanced labor protection ordered in the Board's decision. Whether considered as a request for a stay of Decision No. 198 or as an injunction pending judicial review, the standards are the same, and the motion falls far short of showing that either is warranted.

The Board and the ICC have consistently held that each of the four listed factors governing the disposition of a stay must be satisfied before a stay pending judicial review may be granted. *See, e.g., Burlington Northern Inc. and Burlington Northern R. Co. – Control and Merger – Santa Fe Pacific Corp. and The Atchison, Topeka and Santa Fe Ry. Co., Finance Docket No. 32549, Decision No. 41, 1995 ICC LEXIS 249 (served Sept. 21, 1995); Wilmington Terminal Railroad, Inc. – Purchase and Lease – CSX Transportation, Inc. Lines Between Savannah and Rhine, and Vidalia and Macon, GA, Finance Docket No. 31530, 1990 ICC LEXIS 233 (served July 27, 1990); Union Pacific Railroad Company – Abandonment in Fremont and Teton Counties, ID, Docket No. AB-33 (Sub-No. 56), 1990 ICC LEXIS 107 (served April 9, 1990); National Railroad Passenger Corporation – Conveyance of Boston and Maine Corporation Interests – In Connecticut River Line in Vermont and New Hampshire; Central Vermont Railway, Inc. – Petition for Exemption – Acquisition and Operation of Certain Interests in Rail Lines from the National Railroad Passenger Corporation, Finance Docket No. 31250; Finance Docket No. 31259, 1988 ICC LEXIS 258 (served August 18, 1998); Boxcar Car Hire and Car Service, Ex Parte No. 346 (Sub-No. 19), 1986 ICC LEXIS 111 (served Oct. 14, 1986); Petition of Greyhound Lines, Inc. for Review of a Decision of the Railroad Commission of Texas pursuant to 49 U.S.C. 11501, No. MC-C-10893, 1984 MCC LEXIS 445 (served August 10, 1984).*

Although the STB and ICC decisions have consistently required a showing of all four factors before a stay may be issued, including “a likelihood of prevailing on the merits,” movants contend that they need not make the latter showing, but need only show that they have raised “questions going to the merits so serious, substantial, difficult and doubtful, as to make

them a fair ground for litigation and thus for more deliberative investigation," citing *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d at 844. Joint Motion at 2-3. We have found no STB or ICC decision applying this standard. But even if this standard were applicable, movants have not met it.

As to the specific standards the Board has applied to motions for stay, movants, first, have failed to show a likelihood of prevailing on the merits. Decision No. 198 speaks for itself. There is no need to parse the decision in detail to know that the outcome of the Board's decision not to prohibit NS from closing the Shops is correct and was fully supported by abundant evidence in the record. Whatever arguments movants might devise respecting the Board's opinion, the likelihood that a reviewing court would hold that the Board's basic decision not to prevent closing of the Shops was contrary to law, an abuse of discretion or unsupported by substantial evidence is exceedingly small.

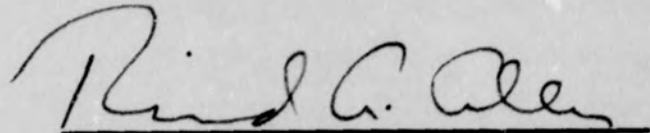
Moreover, movants fail to show that a stay will not substantially harm other parties or that granting a stay would be in the public interest. We will not repeat the details of arguments made in previous filings, but we have shown that NS will suffer substantial harm if it is precluded from closing the Shops. Movants argue that "the harm to NS would only be temporary" (Joint Motion at 8), but they do not deny that it would be substantial. Furthermore, the Board itself found in Decision No. 198 that, "if we were to require [the Shops] to be kept open, it could mean that other NS car facilities would have to be idled or shut down and employees at those facilities relocated to Hollidaysburg and elsewhere." Decision No. 198 at 7. The public interest would not be served by adversely affecting

employees and facilities in other communities in order to force the continued operation of the Hollidaysburg Car Shops.

CONCLUSION

Because it is clear that movants have not met at least three of the four prerequisites for issuance of a stay or injunction pending judicial review, the movants are not entitled to the requested injunction.

Respectfully submitted,



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*Attorneys for Norfolk Southern Corporation
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October 2, 2001

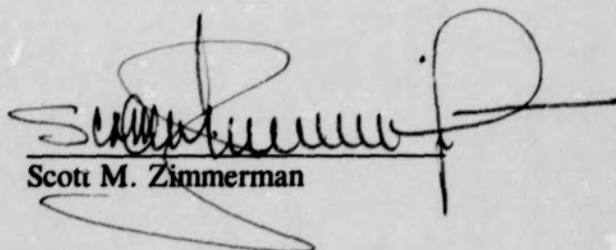
CERTIFICATE OF SERVICE

I certify that on October 2, 2001, a true copy of NS-87, Norfolk Southern's Opposition To The Joint Motion For Stay, was served by hand delivery upon:

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Scott N. Stone
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I further certify that the foregoing pleading has been served on October 2, 2001, or will be served on October 3, 2001, by first class U.S. Mail, postage prepaid, or more expeditious means, upon all other known parties of record in Finance Docket No. 33388.



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May 28, 1998

B

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

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

Dear Secretary Williams:

Enclosed are the original and 25 copies of the Opposition of APL Limited and Eastman
Kodak Company to the Motion of Applicants for Amendment of the Protective Order. A 3.5-
inch diskette with the file name apl.23 in Word 6.0 format is also enclosed.

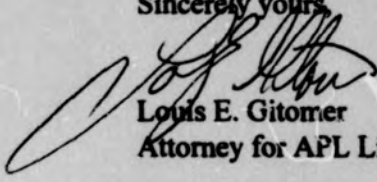
Please time and date stamp the extra copy of this letter and pleading. Thank you for your
assistance. If you have any questions, please call me.

Sincerely yours,

ENTERED
Office of the Secretary

MAY 29 1998

Part of
Public Record


Louis E. Gitomer
Attorney for APL Limited

ORIGINAL

APL-23/EKC-7

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 33388



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

**OPPOSITION OF APL LIMITED AND EASTMAN KODAK COMPANY TO MOTION
OF APPLICANTS FOR AMENDMENT OF THE PROTECTIVE ORDER**

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**Attorneys for:
APL LIMITED**

Dated: May 28, 1998

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Office of the Secretary**

MAY 29 1998

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Public Record**

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 33388



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

**OPPOSITION OF APL LIMITED AND EASTMAN KODAK COMPANY TO MOTION
OF APPLICANTS FOR AMENDMENT OF THE PROTECTIVE ORDER**

Pursuant to 49 CFR § 1115.1(c), as modified by Decision No. 6, APL Limited ("APL") and Eastman Kodak Company ("Kodak") oppose the Motion of Applicants for Amendment of the Protective Order (the "Motion" or "CSX/NS-206").¹ APL and Kodak urge the Surface Transportation Board (the "Board") to deny the Motion, or, in the alternative, to hold the Motion in abeyance until after the Board's public voting conference currently scheduled for June 8, 1998.

APL has sought to negotiate with Applicants since before the Application was filed. Indeed, subject to an appropriate confidentiality agreement, APL and Kodak are still willing to share their Rail Transportation Contracts individually with CSX and with NS in an effort to successfully negotiate the succession of CSX and/or NS to their Rail Transportation Contracts with Conrail. CSX has rebuffed APL's efforts because it claims that it is bound by Section

¹ "Applicants" include CSX Corporation and CSX Transportation, Inc. (both referred to as "CSX"), Norfolk Southern Corporation and Norfolk Southern Railway Company (both referred to as "NS"), and Conrail Inc. and Consolidated Rail Corporation (both referred to as "Conrail").

2.2(c) of the Transaction Agreement which prohibits the renegotiation of Rail Transportation Contracts.

The gist of the Motion is that:

Applicants request that the Protective Order be amended specifically to authorize NS and CSX personnel to gain access to information relating to transportation contracts in effect between Conrail and Conrail customers, and the service provided by Conrail thereunder, for certain limited and specific purposes if and when the Board indicates a decision to approve the Transaction, either with or without conditions, at the voting conference, now scheduled for June 8, 1998. The purpose of the request is to permit NS and CSX to move forward as quickly as possible with the lengthy process first of allocating the performance of those contracts between them as specified in the Transaction Agreement and then of putting the contract information into their information systems to ensure the best possible accuracy and service in routing, billing and handling the traffic of the customer when the Transaction is consummated. (footnote omitted).

Motion at 1-2.

APL and Kodak believe that it would be inappropriate for the Board to grant Applicants' Motion prior to ruling on the proposed transaction. There are five problems with the Motion.²

First, if in indicating approval of the Application, the Board disapproves or modifies Section 2.2(c) of the Transaction Agreement, then CSX and NS would not each need access to every term of every Rail Transportation Contract. A different type of access or more limited access to Rail Transportation Contracts may be all that is necessary.

² We note that other railroads that are parties to Rail Transportation Contracts may also be concerned with revealing the confidential information contained in Rail Transportation Contracts to CSX and NS without their input.

Second, the Board may not grant Applicants' request that the Board override the consent to assignment clauses in the Rail Transportation Contracts. If the consent to assignment clauses remain in effect, then Customers could terminate Rail Transportation Contracts or request CSX and NS separately to negotiate for the assignment of the Rail Transportation Contract.

Third, allowing CSX and NS access to Conrail's Rail Transportation Contracts on June 9, 1998, or at any time prior to the service of a written decision would constrain the Customers' due process rights once the Board's written decision was issued. As APL and Kodak understand the current law, requests for stay and appeals of the Board's decision at a public voting conference are not permitted; they must wait for the written decision. Hence, if a Rail Transportation Contract were disclosed to third parties on June 9, 1998, or at any time prior to the service of a written decision, the Customer's right to seek a stay and file an appeal would be meaningless because the irreparable harm would have already occurred.

Fourth, the Rail Transportation Contract may contain a confidentiality provision that prohibits Conrail from disclosing the contents of the Rail Transportation Contract without the consent of the other party to the Rail Transportation Contract. It is clear beyond question that the Board has no authority over a Rail Transportation Contract and no jurisdiction over the non-railroad party. Hence, even if the Board were to provide otherwise in the Protective Order, Conrail could not provide the Rail Transportation Contract to CSX and NS within the terms of the Rail Transportation Contract without the consent of the Customer.

Finally, the proposed amendment to the Protective Order is sparse at best. It does not even contain the protection set forth in ¶ 8 of the Protective Order requiring reading of the

Protective Order and signing of a confidentiality undertaking. There is no detailed mechanism to protect this highly confidential and most sensitive information. There is no roster of the people who will have access to each Rail Transportation Contract. More protection must be built into proposed ¶ 19 of the Protective Order before the Board entertains this unusual request.

The Board must view this request for pre-consummation authority very carefully, as its predecessor, the Interstate Commerce Commission (the "ICC") did in denying two requests for pre-consummation authority. The ICC turned down a request to mandate labor negotiations and arbitration in *Santa Fe Southern Pacific Corporation-Control-Southern Pacific Transportation Company*, ICC Finance Docket No. 30400, Decision No. 21, served December 16, 1985 (not printed). In denying another request for pre-consummation authority, the ICC said:

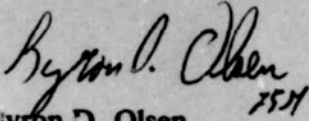
While we recognize applicants' interest in implementing their merger promptly, if approved, we conclude that the risks of an abuse of confidential and sensitive information to lessen competition, deliberate or inadvertent, outweigh the benefits to the public of the alleged savings of resources.

Santa Fe Southern Pacific Corporation-Control-Southern Pacific Transportation Company,

ICC Finance Docket No. 30400, Decision No. 22, served January 16, 1986 (not printed). The same risks exist here.

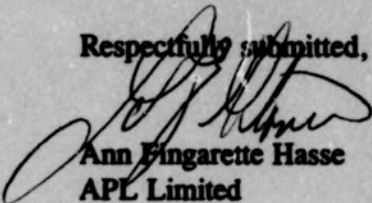
CONCLUSION

For the reasons set forth above, the Board should deny the Motion, or, in the alternative, hold the Motion in abeyance until after the Board's public voting conference currently scheduled for June 8, 1998.


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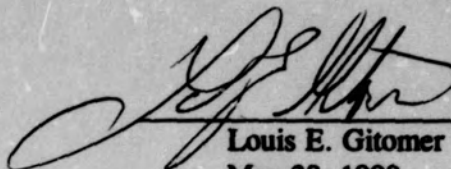
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Attorneys for:
APL LIMITED

Dated: May 28, 1998

CERTIFICATE OF SERVICE

I hereby certify that I have caused the Opposition of APL Limited and Eastman Kodak Company in APL-23/EKC-7 to be served by hand on Applicants' representatives in this proceeding and by first class mail, postage pre-paid on all other parties on the service list in STB Finance Docket No. 33388.



Louis E. Gitomer
May 28, 1998

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ORIGINAL

APL-22/EKC-6

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 33388

B



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

**OPPOSITION OF APL LIMITED AND EASTMAN KODAK COMPANY TO MOTION
OF APPLICANTS CSX CORPORATION AND CSX TRANSPORTATION, INC. FOR
LEAVE TO FILE VERIFIED STATEMENT OF MICHAEL C. SANDIFER
CONCERNING STUDY OF INCIDENCE OF ANTIASSIGNMENT CLAUSES IN
CONRAIL RAIL TRANSPORTATION CONTRACTS**

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Dated: May 20, 1998

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Attorney for Eastman Kodak Company

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 33388



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

**OPPOSITION OF APL LIMITED AND EASTMAN KODAK COMPANY TO MOTION
OF APPLICANTS CSX CORPORATION AND CSX TRANSPORTATION, INC. FOR
LEAVE TO FILE VERIFIED STATEMENT OF MICHAEL C. SANDIFER
CONCERNING STUDY OF INCIDENCE OF ANTIASSIGNMENT CLAUSES IN
CONRAIL RAIL TRANSPORTATION CONTRACTS**

Pursuant to 49 CFR § 1115.1(c), as modified by Decision No. 6, APL Limited ("APL") and Eastman Kodak Company ("Kodak"), jointly referred to as "Opponents," oppose the Motion of Applicants CSX Corporation and CSX Transportation, Inc. for Leave to File Verified Statement of Michael C. Sandifer Concerning Study of Incidence of Antiassignment Clauses in Conrail Rail Transportation Contracts (the "Motion" or "CSX-147"). Opponents urge the Surface Transportation Board (the "Board") to deny the Motion and reject the verified statement of Michael C. Sandifer (the "Verified Statement" or "CSX-148").

On May 15, 1998, CSX Corporation and CSX Transportation, Inc. ("CSX") filed the Motion seeking to introduce CSX-148 as evidence to demonstrate the number of Rail Transportation Contracts between Consolidated Rail Corporation ("Conrail") and its shippers

containing consent to assignment clauses.¹ The CSX Motion is in blatant disregard for the procedural schedule adopted by the Board in Decision No. 6 at the request of Applicants,² which required Applicants to file their case-in-chief with the Application on June 23, 1997 (See 49 CFR 1180.4(c)(3)) and to file their "[r]esponse to comments, protests, requested conditions, and other opposition arguments and evidence [and] [r]ebuttal in support of primary application...." on December 15, 1997, not May 15, 1998. The Motion must be denied and the Verified Statement rejected for so blatantly disregarding the procedural schedule. The Interstate Commerce Commission (the "Commission") prohibited a party from changing the scope of a proceeding through the submission of new evidence as a result of an inadequate initial presentation of evidence. *Chrysler De Mexico, S.A. v. Penn Central Transportation Co.*, 353 I.C.C. 512, 515-516 (1977).

CSX mistakenly claims that the issue of "consent to assignment clauses" was not raised until the filing briefs on February 23, 1998. Applicants raised this issue when they filed their application on June 23, 1997. Of the eight items addressed in The Prayer for Relief concerning the joint acquisition of control of Conrail, Applicants specifically requested the Board to override consent to assignment clauses in "Existing Transportation Contracts". Railroad Control Application, Volume 1, pages 102-103, item (c), CSX/NS-18, filed June 23,

¹ It is interesting to note that the Motion was filed only by CSX, and that neither Conrail nor Norfolk Southern Corporation and Norfolk Southern Railway Company (both "NS"), CSX's co-applicants, joined in the Motion. Conrail, CSX and NS will jointly be referred to as "Applicants."

² In CSX/NS-4, Applicants proposed a single round of briefs, which was adopted by the Board. CSX must take responsibility for the procedural schedule which did not permit the filing of reply briefs, and, therefore, CSX has no basis to complain that it was deprived of the opportunity to address an issue that it now realizes it did not adequately discuss in its brief.

1997.³ In comments required to be filed by October 21, 1997, the issue of overriding assignment clauses in Rail Transportation Contracts was raised by Kodak (EKC-2, at 5⁴), the Chemical Manufacturers Association and The Society of the Plastics Industry, Inc. (CMA-10, at 23 and 35-36), and the National Industrial Transportation League ("NITL"), U.S. Clay Producers Traffic Association, Inc., and The Fertilizer Institute (NITL-7, at 38).

With respect to Kodak, CSX sought discovery on the issue of consent to assignment clauses in CSX-41, on October 27, 1997 (*See* Attachment E). Kodak responded to the discovery request on November 13, 1997, in EKC-3 (*See* Attachment F), where Kodak amplified its position more than three months before the February 23, 1998 briefing date.

Applicants again addressed the issue of consent to assignment clauses in Applicants' Rebuttal, Volume 1 of 3, pages 94-96 and 101-105, filed December 15, 1997.⁵

³ On May 11, 1998, in Ex Parte No. 575, *Review of Rail Access and Competition Issues*, the Association of American Railroads wrote to the Board stating: "It is apparent to the industry from the frustrations being expressed by shippers to us, to the Board, and to Congress that we have not been listening carefully enough to our customers. The ... AAR and its member carriers are committed to undertaking this dialogue in an effort to improve communications between railroad officials and their customers ..." Refusing to discuss Rail Transportation Contracts between Conrail and its shippers, and instead seeking government intervention to override consent to assignment clauses in Rail Transportation Contracts is a far cry from undertaking a dialogue and improving communications.

⁴ There, Kodak clearly set forth its position on the consent to assignment issue. After quoting from the clauses in its own Rail Transportation Contract with Conrail, Kodak made clear its objection to nullifying or disabling contractual rights under these provisions, stating that "The Board has no authority to violate the sanctity of a private contract and nullify the consent to assignment clause." Kodak pointed out in EKC-2 that the Application was clearly asking the Board to do just that.

⁵ In APL's brief, filed on February 23, 1998, APL did indeed discuss the Assignment Clause in its Rail Transportation Contract specifically for the first time because Applicants, in their Rebuttal, had put APL's Transportation Service Agreement into the record. On Rebuttal, CSX did not stress that APL did not rely on its consent to assignment clause. CSX barely mentioned it as a footnote that was part of an 802 page volume which was one of seven rebuttal volumes filed by Applicants. CSX/NS-176, at 190.

Prior to filing its brief, and in response to Applicants' rebuttal, APL sought discovery of the number of Rail Transportation Contracts in effect on December 15, 1997, those which would remain in effect after August 22, 1998, and on other dates (APL-12, Attachment A), in order to ascertain how many Rail Transportation Contracts would actually be affected by Section 2.2(c). Applicants objected to this discovery request on the grounds that APL could file no more evidence, that the request was beyond the scope of Applicants' rebuttal, and that it required a special study (CSX/NS-196, Attachment B). APL moved to compel discovery (APL-16, Attachment C) and Applicants opposed (CSX/NS-199, Attachment D). On February 5, 1998 Judge Leventhal denied APL-16. Therefore, the only record evidence before the Board of any Rail Transportation Contract affected by Section 2.2(c) is APL's.⁶ Applicants' Rebuttal, Volume 3D of 3, pages 205-259.

Yet, CSX now appears on May 15, 1998 with a lengthy study in hand, claiming that it did not previously present evidence on consent to assignment clauses because they were not an issue until briefs were filed.⁷ By asking the Board to accept this study into evidence, CSX is asking the Board to violate due process and to adopt a double standard for compliance with the very procedural schedule proposed by CSX a year ago, urged by Applicants in opposition to discovery and other parties seeking to late-file evidence (See CSX-142, NS-65, CSX-144, and CSX/NS- 205), and strictly adhered to by the Board. See Decision Nos. 76, 77, and 79, which uniformly deny the late filing of evidence that was available and could have been filed according to the schedule. According to Decision No. 76, five months "is much to late."

⁶ One other unexpired Rail Transportation Contract of record terminates at the end of 1998. The evidence submitted for that Rail Transportation Contract does not detail the origin and destination so the effect of Section 2.2(c) cannot be determined. CSX/NS-178 at 355.

⁷ CSX does not argue that it could not have prepared and presented this study in a timely fashion.

Clearly this evidence was available to CSX and could have been filed, if CSX had chosen to do so. Nor has CSX shown "extraordinary or compelling reasons", as required by Decision No. 77, to allow its Motion to be granted. The Board should see through this transparent attempt by CSX to introduce untimely evidence and deny the Motion and reject CSX-148.

CSX claims that there is "good cause why the study was not made earlier and no prejudice will attend its receipt now." CSX has not demonstrated good cause, merely its own oversight. The consent to assignment clauses have been in issue since the filing of the Application, and have been raised by parties throughout the proceeding before briefs were filed, as demonstrated above. Moreover, NS has not joined the Motion, a clear indication that the reasons given by CSX are not really valid.

The claim that there will be no prejudice to the other parties is ludicrous on its face. There is no way to test the validity of the study, unless the Board postpones the proceeding.⁸ And such testing is clearly called for. For example, the universe of contracts reviewed by Mr. Sandifer varies substantially from the 3,362 contracts that Conrail claimed existed when it filed Form 10-K with the Securities and Exchange Commission on March 19, 1997 (*See Railroad Control Application, Volume 7A of 8, page 272, CSX/NS-24, filed June 23, 1997*). That fact alone requires discovery on the Verified Statement.

CSX also states that "the study set forth in the Sandifer V.S. is neutral and, indeed, mechanical." It is difficult to believe that a study performed by an employee of counsel for

⁸ Since it took CSX over two months to perform the study, APL believes that at least a two month period to review over 800 contracts, depose Mr. Sandifer (and whoever gave Mr. Sandifer his instructions), as well as review all other Conrail Rail Transportation Contracts is required. APL does not object to delaying the oral argument in this proceeding until August 3 and 4, and all other deadlines accordingly. If the evidence sought to be presented by CSX is as important as CSX claims, CSX should not object to this brief delay.

CSX would be neutral. The Board cannot accept such a claim on its face unless it is tested. Moreover, this study is anything but "mechanical". Mr. Sandifer engaged in the analysis and interpretation of clauses of Rail Transportation Contracts. There is no evidence that Mr. Sandifer has any familiarity with Rail Transportation Contracts. Moreover, the rules followed by Mr. Sandifer in making his "mechanical" judgments have not been presented. Nor has the person or persons who developed those rules. In sum, there is no proof that the Verified Statement is "neutral" or "mechanical", much less valid.

CSX avers that there are no opinions presented in the CSX-148. On the contrary, Mr. Sandifer's analysis of each contract is an opinion. Moreover, CSX took the opportunity of using the Motion to argue issues which it overlooked or ignored on brief. In essence CSX is attempting to file a responsive brief, which none of the other parties have sought to do. CSX should not be permitted to use a study of dubious value to argue issues that it ignored or missed when it filed its brief.

CSX claims that it will argue that not overriding consent to assignment clauses would create "enormous disruptions on or after the 'Closing Date'".⁹ In making this claim, CSX ignores two critical issues not addressed by the Verified Statement: (1) how many of the Rail Transportation Contracts containing consent to assignment clauses will terminate before the Closing Date; and (2) how many of the Rail Transportation Contracts containing consent to

⁹ The actual effect will not be disruptions on or after the Closing Date (whatever date that may be), but only the possible delay of the Closing Date. Indeed, Applicants will have from June 8 until the Closing Date to negotiate the allocation of traffic with shippers that have Rail Transportation Contracts, if the proposed transaction is approved. CSX ignores the fact that until the Rail Transportation Contracts are allocated between CSX and NS, the Closing Date cannot occur, and hence disruptions cannot occur. Moreover, NS believes that it can act to allocate the Rail Transportation Contracts without Section 2.2(c) and without delaying the Closing Date. See APL-18 at 26.

assignment clauses are for service between points that will be solely served by CSX or by NS. These are critical issues because those Rail Transportation Contracts with consent to assignment clauses: (1) that terminate before the Closing Date are irrelevant because they will not exist when CSX and NS start their operations and thus will be unaffected by either the overriding of the consent to assignment clauses or by Section 2.2(c); and (2) where the shipper has no option but to use one railroad are also not relevant because, as a practical matter, the shipper will have no choice but to agree to assign its Rail Transportation Contract to that railroad.¹⁰

When one eliminates those Rail Transportation Contracts which expire prior to the Closing Date and those Rail Transportation Contracts which involve only points solely served by CSX or NS, it is very likely -- although of course we do not know because there is no evidence -- that the universe of Rail Transportation Contracts actually affected by Section 2.2(c) and the overriding of the consent to assignment clauses will be very very small. Indeed, so far, the **only** entire Rail Transportation Contract in evidence before the Board which is affected by Section 2.2(c) or the overriding of consent to assignment clauses is the APL Rail Transportation Contract, not the 821 contracts referred to in CSX-148.¹¹ The fact is that CSX is requesting the Board to accept a late and virtually meaningless study.

¹⁰ If a shipper with a Rail Transportation Contract will only be able to be served by CSX or NS after the Closing Date, there appears to be very little incentive to invoke the consent to assignment clause. After declaring the contract in breach and terminating the contract, in order to continue to receive service the shipper would have to either: (1) rely on a different mode of transportation; or (2) use rail service subject to common carrier rates and service instead of the more specific, and, most likely, more favorable contract service. Such a course of action does not make sense economically.

¹¹ The consent to assignment clause and the term of the Rail Transportation Contract between Conrail and Kodak are also in the record before the Board.

CSX claims that it is imperative for the Board to have evidence on the issue of consent to assignment clauses. If it is imperative to have evidence on this issue, then it is equally imperative to have evidence on the terms of all of the Conrail Rail Transportation Contracts and evidence on whether the Rail Transportation Contracts involve only single points or whether dual points are at issue as well.¹²

In its motion, CSX floats the idea that public policy requires the overriding of boilerplate consent to assignment clauses. This is really reaching for the bottom of the barrel. Merely because a contract term has been generally agreed to by parties and standard language has been developed to express the concept does not mean that it is any less material to the contracting parties than non-boilerplate provisions. To deprive contracting parties of an important right -- the right to decide with whom to do business -- on the basis of unexplained "public policy" would pervert public policy. Indeed, if the standard for disapproving contract terms were the "boilerplate" nature of the language in the agreement, then nearly all of the terms of the CSX-NS agreements and voting trust would meet this new and ridiculous test and would have to be disapproved on public policy grounds.

CSX refers to the NITL Settlement as the basis for stating that opposition to Section 2.2(c) was "hardly universal" among shippers. However, again, CSX has successfully halted any attempt to gain evidence regarding the Settlement to present to the Board. APL tried to obtain evidence on the Rail Transportation Contract issues in that Settlement, but was rebuffed by CSX (See Attachments A-D). Perhaps the reason that CSX was unwilling to engage in such discovery is that in fact few Rail Transportation Contracts will be affected by Section 2.2(c) or

¹² The introduction of evidence at a late stage in a proceeding where the other party has no opportunity to reply is violative of the Commission's Rules and all notions of due process. *San Antonio, TX v. Burlington Northern, Inc.*, 362 I.C.C. 161, 164-165 (1979).

by the overriding of the consent to assignment clauses. But we do not know, since CSX has successfully defeated all attempts to get this information through discovery.

The Board has ruled against CSX in a similar situation when it said:

Apparently, after the close of the evidentiary record, CSXT concluded that it was not as "burdensome" or "oppressive" as it had thought to compute the exact amount of refunds given to particular traffic To accept that evidence, we would have to either deprive [the shipper] of the opportunity to respond, or reopen discovery, reopen the record, and allow the parties to relitigate the case. We will not do so. It is unfair gamesmanship and an abuse of the administrative process for a party to withhold information during discovery and then introduce that information, after the record has closed....

Potomac Electric Power Co. v. CSX Transportation, Inc., STB Docket No. 41989, served November 24, 1997.

CONCLUSION

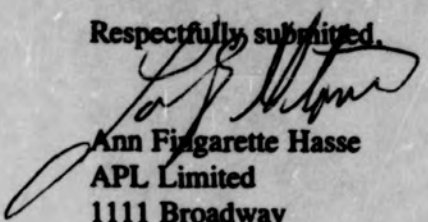
There is no question that CSX-147 and CSX-148 have been filed late. CSX knows it filed CSX-147 and CSX-148 late and contrary to the schedule that it proposed, CSX has also opposed the filing of any late evidence by any other party or person.

CSX has not given the Board a valid, much less any compelling and extraordinary reason for late filing. CSX knew of the existence of this issue when it filed the Application, and knew

that it had the burden of proof. The issue was also raised in parties' Comments, during discovery, and even in Applicants' rebuttal. The result of CSX's failure to address the issue to its satisfaction on rebuttal and brief should not be visited upon the other parties to this proceeding who have diligently adhered to the stringent time frames proposed by CSX and enforced by the Board. Those parties should not be denied due process.

The Board should deny the Motion and reject the Verified Statement for the reasons set forth above.

Respectfully submitted,

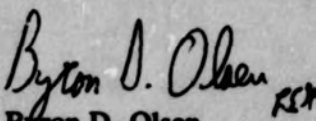


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Dated: May 20, 1998

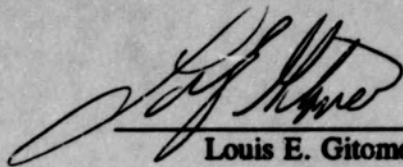


Byron D. Olsen
Felhaber, Larson, Fenlon & Vogt, P.A.
601 Second Avenue South, Suite 4200
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(612) 373-8512

Attorney for Eastman Kodak Company

CERTIFICATE OF SERVICE

I hereby certify that I have caused the Opposition of APL Limited and Eastman Kodak Company in APL-22/EKC-5 to be served by hand on Applicants' representatives in this proceeding and by first class mail, postage pre-paid on all other parties on the service list in STB Finance Docket No. 33388.

A handwritten signature in dark ink, appearing to read "Louis E. Gitomer", is written over a horizontal line.

Louis E. Gitomer
May 20, 1998

ATTACHMENT A

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 33388

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

**APL LIMITED'S SECOND SET OF INTERROGATORIES AND DOCUMENT REQUESTS
TO CSX CORPORATION, CSX TRANSPORTATION, INC., NORFOLK SOUTHERN
CORPORATION, NORFOLK SOUTHERN RAILWAY COMPANY, CONRAIL INC., AND
CONSOLIDATED RAIL CORPORATION**

Pursuant to 49 C.F.R. §§ 1114.21, .26, and .27, APL Limited ("APL") submits its Second Set of Interrogatories and Document Requests to CSX Corporation and CSX Transportation, Inc. (both referred to as "CSX"), Norfolk Southern Corporation and Norfolk Southern Railway Company (both referred to as "NS"), and Conrail Inc., and Consolidated Rail Corporation (both referred to as "Conrail") in connection with the application filed by CSX, NS, and Conrail (all three referred to as "Applicants") in this proceeding on June 23, 1997, and the reply filed on December 15, 1997 by CSX and NS. Applicants should contact the undersigned promptly to discuss any objections or questions regarding these requests with a view to resolving any disputes or issues of interpretation informally and expeditiously.

APL requests that Applicants respond to the following Interrogatories and Document Requests in compliance with 49 C.F.R. Part 1114 and in accordance with the following Definitions and Instructions. The responses to these discovery requests should be served on APL through their undersigned attorneys at the addresses below, as soon as possible, and in no event later than 15 days from the date of service. However, if Applicants object entirely to an Interrogatory or Document Request, and do not intend to provide any substantive answer in response thereto absent an order compelling such answer, Applicants shall serve such objection on the undersigned counsel within five business days of the service hereof in accordance with § 16 of the Discovery Guidelines.

DEFINITIONS AND INSTRUCTIONS

1. "APL" shall mean APL Limited, and any related companies, and/or any of their subsidiaries or affiliates.
2. "CSX" shall mean CSX Corporation and CSX Transportation, Inc., and any departments, subsidiaries, affiliates, or related companies, its present and former employees, agents, officers, directors, advisors, consultants, divisions, and all other persons or entities acting on its behalf.
3. "NS" shall mean Norfolk Southern Corporation and Norfolk Southern Railway Company, and any departments, subsidiaries, affiliates, or related companies, its present and former employees, agents, officers, directors, advisors, consultants, divisions, and all other persons or entities acting on its behalf.

4. "Conrail" shall mean Conrail, Inc., Consolidated Rail Corporation, and CRR Holdings LLC.

5. "Applicants" shall mean CSX, NS, and Conrail.

6. "STB" shall mean the Surface Transportation Board.

7. "The Transaction Agreement" shall mean the Transaction Agreement by and among CSX, NS, and Conrail dated as of June 10, 1997 filed with the STB in Volume 8B of CSX/NS-25.

8. "Transportation Contracts" shall have the meaning given it by Applicants in The Transaction Agreement on page 23 of Volume 8B of CSX/NS-25.

9. "Regulated Traffic Contracts" shall have the meaning given to it by Conrail Inc., in Form 10-K filed with the Securities and Exchange Commission for the Fiscal Year ended December 31, 1996 on page 12, which is included in CSX/NS-24, Volume 7A at page 272.

10. "Intermodal Traffic" shall have the meaning given to it by Conrail Inc., in Form 10-K filed with the Securities and Exchange Commission for the Fiscal Year ended December 31, 1996 on page 7, which is included in CSX/NS-24, Volume 7A at page 266.

11. "Revenues" shall have the meaning given to it by Conrail Inc., in Form 10-K filed with the Securities and Exchange Commission for the Fiscal Year ended December 31, 1996 on page 29, which is included in CSX/NS-24, Volume 7A at page 289.

12. "Unit" shall have the meaning given to it by Conrail Inc., in Form 10-K filed with the Securities and Exchange Commission for the Fiscal Year ended December 31, 1996 on page 5, which is included in CSX/NS-24, Volume 7A at page 265.

13. "Closing Date" shall have the meaning given to it by Applicants in section II. C. of the Agreement between the National Industrial Transportation League, Norfolk Southern, and CSX, dated as of December 12, 1997, and included in CSX/NS-176 on pages 771-772.

14. "Person" shall mean and include natural persons, partnerships, corporations, and all other forms of organization or association.

15. "Document" or any variation thereof is used in its broadest sense and shall mean any writing, drawing, graph, chart, photograph, tape, phono-record, magnetic disc, compact disc, or other data compilation from which information can be obtained, translated, if necessary through devices into reasonably usable form, and includes, but is not limited to, correspondence, telegrams, cables, telex messages, minutes, reports, studies, specifications, order forms, bills of sale, leases, recordings of telephone or other conversations, or of interviews, conferences or other meetings, affidavits, statements, journals, statistical records, financial statements, accounting records, desk calendars, appointment books, diaries, lists, tabulations, summaries, computer printouts, photographs, maps, or any other items of a similar nature, including all originals, drafts, and non-identical copies.

16. The terms "relate" or "relating to" are to be used in their broadest sense and shall mean to refer to, discuss, involve, reflect, deal with, consist of, represent, constitute, emanate from, be directed at, or in any way to pertain to, in whole or in part, the subject.

17. The singular shall include the plural and vice versa, and the conjunctive shall include the disjunctive and vice versa in order to give these interrogatories and requests for admission the broadest scope.

18. To "identify" or to "describe" a document means to state the following:

- a. The full name of the person who prepared it and his last known address;
- b. The full name of the person who signed it or over whose name it was issued and his last known address;
- c. The full name of each person to whom it was addressed or distributed and his last known address;
- d. The nature and substance of the document with sufficient particularity to enable it to be identified;
- e. Title and number of pages;
- f. Its date or, if it bears no date, the date or approximate date when it was prepared;
- g. Whether any other documents were attached to or included with such documents; and
- h. Its physical location and the name and address of its custodian.

19. To "identify" a person when used with respect to a natural person means to state the person's full name, home and business addresses and telephone numbers, employer and job position at the present time and at the time to which the interrogatory relates, and whether the person is ill, disabled, incompetent, or deceased. To identify a person where the person to be identified is anything other than a natural person means to state its full name, the kind of legal entity which it is, its present or last known address, and its chief executive officer.

20. "Identify," "describe," or any variation thereof, when used with respect to a conversation, meeting, or oral discussion, shall mean stating and describing the date and location of such conversation, meeting, or oral discussion, the name of each person who was present at or who participated in such conversation, meeting, or oral discussion, and the manner in which the conversation, meeting, or oral discussion was conducted (e.g., face-to-face conversation, telephone, etc.)

21. "Identify" means to describe or explain when used in any other context.

22. The answers to these interrogatories and document requests shall include such information and documents as are within Applicants' custody, possession, or control, or are within the custody, possession, or control of any of Applicants' consultants, accountants, attorneys, or other agents, or which are otherwise available to Applicants. In responding to these interrogatories and requests for admissions, Applicants are specifically instructed to review the personal files, records, notes, correspondence, daily calendars, and telephone logs or records of all persons who have knowledge of the information inquired about in each request.

23. If the answers or portions of answers to these interrogatories are supplied upon information and belief rather than upon actual knowledge, Applicants should so state and specifically describe or identify the source or sources of such information and belief.

24. Each interrogatory should be answered separately and fully in writing. The answers to these interrogatories should include, but not be limited to, an identification of each

person having knowledge of the information provided in the answer, and of all documents (including calculations) and communications relating to that information.

25. If Applicants object to any interrogatory or document request, Applicants must state in writing the reason for the objection.

26. These interrogatories and document requests are continuing in nature and should be amended and supplemented immediately if at any time any of the following occurs:

- a. Applicants determine that their original answers to these interrogatories or document requests as of the time they were filed, for whatever reason, were incorrect;
- b. new developments occur (such as the retaining of an expert, etc.) which, if Applicants' answers were being filed as of the time of these new developments, would have to be disclosed in those answers;
- c. new information is developed (such as the identification of additional witnesses or additional documents) which, if known at the time of the filing of the original answers, would have been required to have been disclosed in such answers.

27. Unless otherwise specified, the time period covered by these interrogatories and document requests is January 1, 1995, to the date of Applicants' responses.

28. Each interrogatory and document request herein stands independent of each and every other interrogatory and document request. No interrogatory or document request

modifies, limits, or relates to any other interrogatory or document request unless specifically stated in the interrogatory or document request.

29. If any request herein cannot be complied with in full, it shall be complied with to the extent possible with an explanation as to why full compliance is not possible.

INTERROGATORIES

1. Identify the number of Conrail's Transportation Contracts, the annual number of Units subject to those Transportation Contracts, and the annual Revenues from those Transportation Contracts:

- (a) in effect on December 15, 1997;
- (b) that will expire on or before August 22, 1998;
- (c) that will expire by the Closing Date;
- (d) that will expire within six months after the Closing Date; and
- (e) that relate to intermodal traffic.

2. Identify the number of Conrail's Regulated Traffic Contracts, the annual number of Units subject to those Regulated Traffic Contracts, and the annual Revenues from those Regulated Traffic Contracts:

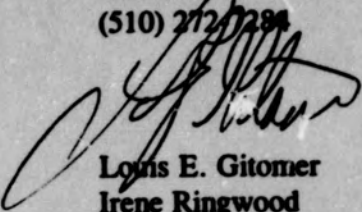
- (a) in effect on December 15, 1997;
- (b) that will expire on or before August 22, 1998;
- (c) that will expire by the Closing Date;
- (d) that will expire within six months after the Closing Date; and
- (e) that relate to intermodal traffic.

DOCUMENT REQUESTS

1. Produce all documents related to CSX's acquisition of the South Kearny intermodal terminal referred to in CSX/NS-25 at page 85, Schedule 1, Item 1(C)(10).

Respectfully submitted,

Ann Fingarette Hasse
APL Limited
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(510) 272-7284



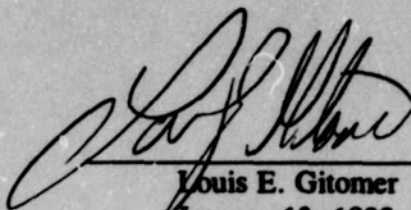
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Attorneys for:
APL LIMITED

Dated: January 13, 1998

CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing document to be served by facsimile on all parties to the Highly Confidential and Confidential Restricted Service List in STB Finance Docket No. 33338.

A handwritten signature in dark ink, appearing to read "Louis E. Gitomer", is written over a horizontal line.

Louis E. Gitomer
January 13, 1998

ATTACHMENT B

CSX/NS-196

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 33388

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

**APPLICANTS' INITIAL OBJECTIONS TO
APL LIMITED'S SECOND SET OF INTERROGATORIES
AND DOCUMENT REQUESTS TO APPLICANTS**

Applicants hereby submit their initial objections to APL Limited's ("APL") Second Set of Interrogatories and Document Requests to Applicants (APL-12), served January 13, 1998.¹ These initial objections are filed pursuant to Paragraph 16 of the Discovery Guidelines adopted in Decision No. 10, served June 27, 1997, which provides that "[a] responding party shall, within five business days after receipt of service, serve a response stating all its objections to any discovery request as to which the responding party has then decided that it will be providing no affirmative response. . . ."

On October 21, 1997, APL filed Comments and Requests for Conditions in this proceeding. See APL-4. Prior to submitting its October 21 filing, APL had a full, fair

¹ "Applicants" refers collectively to CSX Corporation and CSX Transportation, Inc. (collectively referred to as "CSX"), Norfolk Southern Corporation and Norfolk Southern Railway Company (collectively referred to as "NS") and Conrail Inc. and Consolidated Rail Corporation (collectively referred to as "Conrail").

and adequate opportunity to serve discovery in the initial discovery period in this proceeding (June 23, 1997 to October 21, 1997). APL did, in fact, participate in discovery. See, e.g., APL-2, APL-3. Subsequent to the filing of Applicants' Rebuttal, however, APL served additional interrogatories and an additional document request on Applicants. See APL-12.

On January 8, 1998, the Honorable Jacob Leventhal, Administrative Law Judge, denied the requests for additional written discovery by two commenting parties in this proceeding.² See Transcript of January 8, 1998, Discovery Conference at 128-31. Judge Leventhal ruled that commenting parties are not entitled to additional written discovery since the "schedule does not permit the commenters to file rebuttal testimony." Id. Applicants, therefore, object to APL's filing of additional written discovery at this time.

However, if Applicants are required to respond to written discovery at this late date in the procedural schedule, Applicants have the following further general objections to APL-12:

1. Applicants object to production of documents or information that are beyond the scope of Applicants' Rebuttal, filed December 15, 1997.
2. Applicants object to production of documents or information subject to the attorney-client privilege, the work product doctrine and/or the joint or common interest privilege.
3. Applicants object to production of documents prepared in connection with, or information relating to, possible settlement of this or any other matter.

² Appeals filed January 13, 1998. See EFM-13; ENRS-13.

4. Applicants object to production of readily available public documents or information, including but not limited to documents on public file at the Surface Transportation Board ("STB"), the Securities and Exchange Commission, or any other government agency or court, or that have appeared in newspapers or other public media.

5. Applicants object to the production of draft verified statements and documents related thereto, in accordance with past practice in railroad control proceedings.

6. Applicants object to the production of information or documents that are as readily obtainable by the requester from its own files.

7. Applicants object to the production of information or documents that contain confidential or sensitive commercial information, including information subject to disclosure restrictions imposed by law, in other proceedings, or by contractual obligation to third parties, and that is of insufficient materiality to warrant production here even under a protective order.

8. Applicants object to the requests to the extent they seek documents or information in a form not maintained by Applicants in the regular course of business or not readily available in the form requested, on the ground that such documents or information could only be developed, if at all, through unduly burdensome and oppressive special studies, which are not ordinarily required and which Applicants object to performing.

9. Applicants object to the interrogatories and requests as overbroad and unduly burdensome to the extent that they seek information or documents for periods prior to January 1, 1995.

10. CSX, NS and Conrail each objects to any interrogatories or document requests that seek information regarding current or future operations on, or any other plans or activities relating to, or employment on, rail lines or properties other than those that each of them currently owns or operates, or with respect to future operations over, Conrail line segments that CSX or NS, respectively, will operate at the relevant future time. The best source of information with respect to such matters is the rail carrier that owns or operates the line or property in question, or will do so at the relevant future time.

11. Applicants object to the requests insofar as they seek "all documents relating to" the matters specified, as overbroad and unduly burdensome.

To the extent not presented above, Applicants reserve the right to answer or further object to each and every specific discovery request, definition, and instruction set forth in APL-12 in the event that these initial objections are overruled.

Respectfully submitted,

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J. Gary Lane
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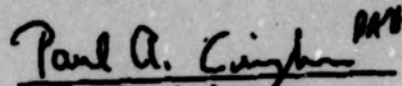
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1300 Nineteenth Street, N.W.
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Washington, D.C. 20036

Counsel for Conrail Inc. and
Consolidated Rail Incorporated

Dated: January 21, 1998

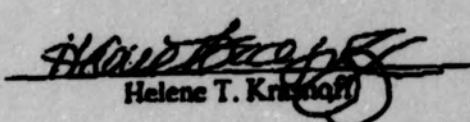
CERTIFICATE OF SERVICE

I, Helene T. Krasnoff, certify that on January 21, 1998, I caused to be served by facsimile service a true and correct copy of the foregoing CSX/NS-196, Applicants' Initial Objections to APL Limited's Second Set of Interrogatories and Document Requests to Applicants, to:

Louis E. Gitomer
Ball Janik LLP
1455 F Street, N.W.
Suite 225
Washington, D.C. 20005

Phone: (202) 638-3307
Fax: (202) 783-6947

and on all parties on the Restricted Service List in STB Finance Docket No. 33388, in all cases by facsimile transmission.


Helene T. Krasnoff

ATTACHMENT C

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 33388

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

APL LIMITED'S MOTION TO COMPEL DISCOVERY RESPONSES
AND REQUEST FOR A DISCOVERY CONFERENCE

On January 13, 1998, APL Limited ("APL") served APL Limited's Second Set of Interrogatories and Document Requests to CSX Corporation, CSX Transportation, Inc., Norfolk Southern Corporation, Norfolk Southern Railway Company, Conrail Inc., and Consolidated Rail Corporation, APL-12 ("APL's Discovery Request"). A copy of APL's Discovery Request is attached as Exhibit 1.¹

On January 21, 1998, Applicants² served Applicants' Initial Objections to APL Limited's Second Set of Interrogatories and Document Requests to Applicants, CSX/NS-196 ("Applicants' Objections"). A copy of Applicants' Objections is attached as Exhibit 2. Applicants rely on Judge Leventhal's January 8, 1998 Discovery Conference decision where

¹ The Exhibits to this motion have either already been furnished to the Restricted Service List or are publicly available. They are only attached to the motion being furnished to Administrative Law Judge Jacob Leventhal ("Judge Leventhal").

² Applicants refer to CSX Corporation, CSX Transportation, Inc. (both referred to as "CSX"), Norfolk Southern Corporation, Norfolk Southern Railway Company (both referred to as "NS"), Conrail Inc., and Consolidated Rail Corporation (both referred to as "Conrail").

he "ruled that commenting parties are not entitled to additional written discovery since the 'schedule does not permit the commenters to file rebuttal testimony.'" Applicants' Objections at 2, and Transcript of January 8, 1998 Discovery Conference at 128-131. Based on Judge Leventhal's ruling, which is on appeal to the entire Surface Transportation Board (the "Board"), Applicants "object to APL's filing of additional written discovery at this time." Applicants' Objections at 2. Applicants then go on to make 11 general objections, which are not relevant to APL's Discovery Request, and which will be addressed later.

APL requests Judge Leventhal to schedule a hearing on this motion for January 29, 1998, and to order Applicants to respond to APL's Discovery Request.

APL'S RIGHT TO FILE DISCOVERY

APL's Discovery Request is aimed at two specific issues: (1) Section II. C. Specification of Transportation Contract: Movement Responsibilities. of the Agreement Between the National Industrial Transportation League, Norfolk Southern, and CSX (the "NITL Settlement"), see pages 771-772 of Applicants' Rebuttal, Volume 1, CSX/NS-176; and (2) CSX's unrelenting attack on APL's continued use of the South Kearny, NJ intermodal terminal ("APINY"), see pages 187-199 of Applicants' Rebuttal, Volume 1, CSX/NS-176. Neither issue was raised by Applicants prior to the time that APL filed its response in APL-4 on October 21, 1997. Hence, APL could not have sought discovery, and there was no reason for APL to seek discovery of matters that were not relevant to the proposed transaction prior to October 21. Now that Applicants have placed these matters in issue, APL is entitled to test

Applicants' evidence. Any evidence resulting from discovery will not be APL evidence, but the Applicants' evidence, adduced through discovery.

THE NITL SETTLEMENT IS NEW

The NITL Settlement was filed as part of Applicants' Rebuttal on December 15, 1997, after APL filed its response on October 21, 1997. No witness was offered to support the NITL Settlement. See Letter from Mr. Harker dated January 22, 1998, Exhibit 3. NITL submitted a Supplement to Comments and Request for Conditions, NITL-11, at 2, on January 13, 1998 to "explain ... why the [a]greement is in the public interest." Again, no witness was offered to support the settlement. The Comments of CMA and SPI on the NITL Agreement, CMA-18/SPI-12, were filed on December 23, 1997 without a witness, and Applicants' Rebuttal to CMA was filed on January 14, 1998, again without any witness supporting Applicants' position. APL believes that the Board is entitled to, and indeed is required to have some evidence, at least on the contract issue of Section II.C., before it can make an intelligent decision on the NITL Settlement. APL is seeking that evidence from Applicants through APL's Discovery Request. APL is not proposing to offer its own evidence.

Applicants claim that the NITL Settlement resolves certain issues "as to the efficient, careful and safe implementation of the Transaction and various commercial and operational concerns...." Applicants' Rebuttal, Volume 1, page 25. Applicants also state that the NITL Settlement "provides a 'safety valve' if the shipper is dissatisfied with the service provided...." Rebuttal of CSX Corporation, CSX Transportation, Inc., Norfolk Southern Corporation, and Norfolk Southern Railway Company to Comments of Chemical

Manufacturers Association and the Society of the Plastics Industry on the National Industrial Transportation League Settlement Agreement, CSX/NS-190, dated January 14, 1998 ("Applicants' Rebuttal to CMA"), at 11.

APL's Discovery Request seeks information about the number of contracts, revenue from contracts, and units under contract that may be affected by the NITL Settlement. APL believes that substantially all of Conrail's Transportation Contracts will expire between December 15, 1997, and the time when the provisions of the NITL Settlement concerning Transportation Contracts can first be invoked so that the actual impact of Section II. C. of the NITL Settlement will be minimal.

The Closing Date will be no earlier than October 1, 1998. See Transcript of L.I. Prillaman dated January 13, 1998, at 8-9 (the "Prillaman TR"), attached as Exhibit 4. Hence Section II. C. will take effect at the earliest on April 1, 1999.³ The issue which APL wants to address is that, if Section II. C. of the NITL Settlement provides any relief, which is itself a doubtful proposition, then it provides relief for such a minuscule number of contract shippers as to be of little value. CSX has said that parties are free to argue that Applicants' rebuttal provides insufficient or incomplete bases for Applicants' conclusions. CSX's Appeal from Decision of Presiding Administrative Law Judge Ordering Applicants to Make Rebuttal

³ As APL understands Section II. C., April 1, 1999 will be the earliest date that a contract shipper can request arbitration. After April 1, an arbitrator must be selected followed by the 30 arbitration period. If an arbitrator is selected immediately, the limited relief of Section II. C. may be available to shippers with contracts still in effect on May 1, 1999. It is APL's belief that between the December 12, 1997 date of the NITL Settlement and May 1, 1999, nearly all of the Transportation Contracts between Conrail and its shippers will have expired.

Witnesses Available for Deposition by Commenting Parties, CSX-137, dated January 13, 1998. Yet, when a party presented only argument about Applicants' conclusions, Applicants stated "CMA/SPI provide no evidence on this...." Applicants Rebuttal to CMA, at 13. APL's Discovery Request is intended to avoid Applicants' "Catch-22" and to present Applicants' own evidence to the Board on this issue. Specifically, APL wants to provide Applicants' evidence to the Board as to the number of contracts affected by Section II.C.

APL attempted to obtain this information from Mr. Prillaman when he was deposed which was before APL's Discovery Request was filed. However, Mr. Prillaman stated that he did not have any information about the number of, revenue of, or volume of the Conrail Transportation Contracts, and that he did not believe that CSX had the information. Prillaman TR at 19-20 and 27-28, Exhibit 4. Hence, since APL cannot obtain this information through deposition, it must use other discovery methods to test the NITL Settlement.

APL is not seeking specific individual Transportation Contract information. APL simply wants to know how many contracts, the annual revenue, and the volume of all contracts that Conrail had on December 15, 1997, and how many will terminate at benchmark dates. This information will help the Board determine if Section II. C. of the NITL Settlement has any value.

APINY BECAME AN ISSUE AFTER APL FILED ITS RESPONSE ON OCTOBER 21

APL is also seeking documents relating to the allocation of APINY, which is within the North Jersey Shared Asset Area ("NJSAA"), to CSX. APINY stands out like communist Cuba in the blue Caribbean on the map picturing the allocation of assets between CSX and NS

in the NJSAA, where APINY is in CSX red and the remainder of the NJSAA is shared blue.⁴

APL wants to understand the reason why CSX is concerned about APL's lease of APINY.

CSX expressed no concern about acquiring APINY in the Primary Application, so APL had no basis to believe that CSX had any concerns. The first clue that APL had that its lease of

APINY might be an issue was when the lease was requested in discovery.⁵ APL objected.⁶

CSX filed a motion to Compel.⁷ APL and CSX negotiated a settlement whereby APL would provide the lease informally only for the use of counsel and consultants for CSX and NS.⁸

⁴ Map accompanying Volume 8B of the Application, CSX/NS 25.

⁵ Document Request Numbers 3 and 4 of the First Set of Interrogatories and Requests for Production of Documents by CSX Corporation, CSX Transportation, Inc., Norfolk Southern Corporation, and Norfolk Southern Railway Company to APL Limited, CSX/NS-122, served October 31, 1997, Exhibit 5.

⁶ APL Limited's Initial Objections to the First Set of Interrogatories and Requests for Production of Documents by CSX Corporation, CSX Transportation, Inc., Norfolk Southern Corporation, and Norfolk Southern Railway Company to APL Limited, APL-5, served November 7, 1997, Exhibit 6.

⁷ CSX' Motion to Compel Discovery Responses from APL Limited, and Request for a Discovery Conference, CSX-104, served November 10, 1997, Exhibit 7 (without APL-5 as an attachment).

⁸ See attached letters from Mr. Norton dated November 11, 1997, Exhibit 8, and from Mr. Harker dated November 12, 1997, Exhibit 9. APL believed that the lease would be analyzed and at most, a highly confidential argument would be made concerning the lease. Instead, APL was greatly dismayed when it found that Applicants had submitted this highly confidential document in the Appendix to Applicants' Rebuttal. If APL had known that its lease (and its Transportation Contract with Conrail) were to be included in a filing, even a highly confidential filing, APL would never have informally provided these documents to Applicants. Indeed, the whole purpose of the informal agreement was to assure APL that these two documents were not seen by anyone other than CSX and NS counsel. In fact, the Transportation Contract is even more commercially sensitive than the waybill masking factors which the Board did not require Applicants to produce. APL continues to study this matter to determine whether there has been a breach of the Protective Order or the agreement to provide this information informally to Applicants. Regardless, APL is now aware that in dealing with Applicants and highly sensitive commercial information, APL must be vigilant to the point of paranoia to protect its information and interests.

On rebuttal, CSX, for the first time, raised concerns about its investment in the APINY terminal if it is not allocated APL traffic. APL now seeks to determine the bases and the validity of the assumptions underlying the allocation of APINY to CSX, instead of leaving it as part of the NJSA.

RESPONSES TO SPECIFIC OBJECTIONS

1. APL has not requested any documents beyond the scope of Applicants' Rebuttal. The documents relate directly to Applicants arguments concerning APINY.
2. APL is not requesting any documents subject to a proper privilege.
3. APL is not requesting documents prepared in connection with settlement of this matter.
4. APL is not seeking the production of any public documents.
5. APL is not seeking any draft verified statements or documents.
6. APL is not seeking any information that is within APL's own files.
7. To the extent the documents sought by APL are confidential, they can be protected by being designated highly confidential.
8. APL does not seek documents of information not in a form maintained by Applicants.
9. APL is not seeking information for periods prior to January 1, 1995.
10. APL is seeking information relating only to CSX, F.S, or Conrail operations.

11. The documents related to the decision of CSX to be allocated APINY instead of leaving it as part of the NJSAA should be a discrete number of documents which will not be unduly burdensome nor is this an overbroad request.

CONCLUSION

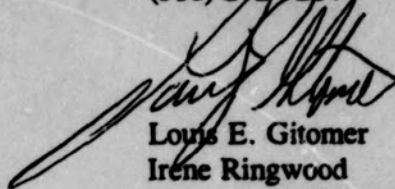
The Interstate Commerce Commission always allowed the testing of evidence through discovery (which included interrogatories, document production, admissions, and depositions) and cross-examination. The testing of evidence through discovery, be it interrogatories, document production, admissions, or depositions, must also be allowed here. This is not the evil surrebuttal which Applicants appear to fear,⁹ but a testing of its witnesses. APL does not intend to file surrebuttal, but is interested in helping to develop an accurate record for the Board.

⁹ The irony of NITL's January 13, 1998 filing in support of Applicants should not be ignored since it is so glaringly inconsistent with CSX's position here.

APL requests Judge Leventhal to schedule a hearing on this motion for January 29, 1998, and to order Applicants to respond to APL's Discovery Request

Respectfully submitted,

Ann Fingarette Hasse
APL Limited
1111 Broadway
Oakland, CA 94607-5500
(510) 272-7284



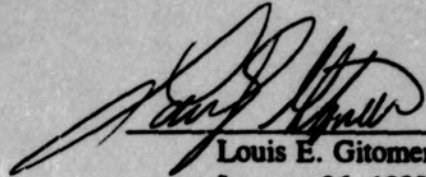
Louis E. Gitomer
Irene Ringwood
BALL JANIK LLP
1455 F Street, N.W., Suite 225
Washington, D.C. 20005
(202) 466-6530

Attorneys for:
APL LIMITED

Dated: January 26, 1998

CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing document to be served by facsimile on all parties to the Highly Confidential and Confidential Restricted Service List in STB Finance Docket No. 33388.



Louis E. Gitomer
January 26, 1998

EXHIBIT 1

EXHIBIT 2

EXHIBIT 3

DREW A. HARKER
(202) 842-9022

ARNOLD & PORTER

855 TWELFTH STREET, N.W.
WASHINGTON, D.C. 20004-1202

(202) 842-5000
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NEW YORK
DENVER
LOS ANGELES
LONDON

January 22, 1998

VIA TELECOPY

Louis E. Gitomer, Esq.
Ball Janik, LLP
1455 F Street, N.W.
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Washington, D.C. 20005

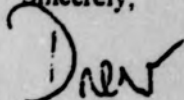
Re: Finance Docket No. 33388,
CSX Corporation and CSX Transportation, Inc.
Norfolk Southern Corporation and Norfolk
Southern Railway Company -- Control and
Operating Leases/Agreements -- Conrail Inc.
and Consolidated Rail Corporation

Dear Lou:

This is in response to your letter of January 20, 1998 requesting copies of the workpapers respecting Section II.B.2.b. of Applicants' Rebuttal, Narrative, CSX/NS-176, titled "Conrail Rail Transportation Contracts." While the Narrative is not testimony or otherwise an evidentiary filing, and therefore no workpaper requirement pertains to Section II.B.2.b, the underlying document on which that section relies is the NITL Settlement Agreement already included in CSX/NS-176 at pages HC-768 through HC-776.

Please do not hesitate to let me know if you have any additional questions.

Sincerely,



Drew A. Harker

EXHIBIT 4

1 A. Those dates have not been determined and
2 will depend on some varying things such as getting
3 the necessary labor agreements together, having
4 information technology in place, and also the
5 operating plan to our best and fullest knowledge
6 ready to go. And at that time, we believe that it
7 would be the appropriate time to begin with the
8 closing date.

9 Q. How about the control date? Will that
10 require the implementing agreements and the
11 information systems?

12 A. No, that's legislative. I mean, that --
13 I'm sorry? Control date occurs automatically.
14 That's August 23rd or August 22nd.

15 Q. August 22nd. And some time after August
16 22nd would be the closing date?

17 A. Yes.

18 Q. Do you have a feel for that in days, weeks,
19 months?

20 A. We -- we have for discussion purposes
21 continued to talk about September 1. More
22 realistically, it will be beyond September 1, but

1 we certainly hope not too far beyond that. And
2 that's --

3 Q. So you're talking about nine days to get
4 the implementing agreements?

5 A. Well, that is why I say it's obvious that
6 September 1 is more of a theoretical date. We
7 still -- we, Norfolk Southern, are still hoping for
8 an October 1 implementation date. But all of that
9 depends, again, on the variables that I previously
10 mentioned.

11 Q. Okay. How about the transition period
12 which you've talked about in your statement. Do
13 you have any idea about when that would begin; how
14 long that would last?

15 A. Transition -- by my definition, transition
16 starts on closing date.

17 Q. Okay.

18 A. And closing date -- closing date could be a
19 month, could be six months or on out.

20 Q. I understand. I understand. And the
21 transition period would last how long?

22 A. Again, personally, the transition date I do

1 A. No.

2 Q. Okay. You've said that -- well, confirm
3 for me that you've said it's very important to know
4 exactly what traffic is going to be carried when
5 you're planning railroad operations?

6 A. Yes, yes.

7 Q. Then could you tell me how credible a plan
8 of operation would be if it's not based on the
9 exact traffic to be carried?

10 MR. ALLEN: How credible?

11 MR. GITOMER: Yes.

12 MR. ALLEN: I don't understand that.

13 THE WITNESS: I guess the credibility would
14 vary with the volume of omissions. I mean, it's
15 how good your knowledge is.

16 BY MR. GITOMER:?

17 Q. How good do you think your knowledge is of
18 Conrail's traffic?

19 A. Not very good.

20 Q. Okay. Do you have any idea of how much
21 Conrail's traffic moves under transportation
22 contracts?

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JS

20

1 A. No.

2 Q. Neither volume, revenue, or units?

3 A. There has been something in total units,
4 but that doesn't necessarily -- if it doesn't have
5 volume requirements, it's not necessarily a
6 contract in a respect of going forward.

7 Q. But you expect to obtain all of this
8 information or to be able to obtain this
9 information on the control date?

10 A. That's correct.

11 Q. And then will you prioritize your review of
12 the contracts or just start at number one and go to
13 number whatever, or start alphabetically, or will
14 you perhaps prioritize based on traffic volume or
15 some other factor?

16 A. I'm not sure that we have a priority
17 definition yet, but we certainly would take the
18 total volumes and determine as the agreement
19 suggests, that we would presume that we would not
20 split the traffic with a particular customer -- for
21 a particular customer, of a particular customer --
22 but would divide it as equally as possible.

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1 if they were opened on the control date to be ready
2 to operate by the closing date?

3 A. Yes.

4 Q. I asked you about your knowledge of the
5 Conrail transportation contracts before, and I just
6 want to verify that your answer would be the same
7 if I asked you how many transportation contracts
8 Conrail has. Your answer would be that you don't
9 know?

10 A. That's correct.

11 Q. And that would be the same answer as far as
12 how many would expire by August 22nd, and then how
13 many would expire by the closing date, and how many
14 would expire within six months of the closing
15 date?

16 MR. ALLEN: What's your question?

17 BY MR. GITOMER:

18 Q. My question is is your answer still that
19 you don't know those numbers of the Conrail
20 contracts?

21 A. That's correct.

22 Q. Okay. Does anybody at Norfolk Southern

1 have this information?

2 A. Not to my knowledge, no.

3 Q. And do you know whether anyone at CSX would
4 have this information?

5 A. Not to my knowledge.

6 Q. Now, if NS were allocated 100 percent of
7 APL's traffic, would you still be required to
8 allocate revenues and expenses with CSX on that
9 traffic on a 50/50 basis?

10 A. If it were from the shared area?

11 Q. From the shared areas.

12 A. That is correct, yes. That is correct.

13 Q. What do you think about that? Does that
14 give you an incentive to handle that traffic? A
15 disincentive?

16 A. Well, I think that would be a contract
17 allocation.

18 MR. ALLEN: Well, let's break your question
19 down. You said, "What do you think about it?"
20 Well, specifically, you want to ask him?

21 BY MR. GITOMER:

22 Q. Okay. You're doing 100 percent the work,

EXHIBIT 5

CSX/NS-122

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 33388

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

THE FIRST SET OF INTERROGATORIES
AND REQUESTS FOR PRODUCTION OF DOCUMENTS
BY CSX CORPORATION, CSX TRANSPORTATION, INC.,
NORFOLK SOUTHERN CORPORATION AND
NORFOLK SOUTHERN RAILWAY COMPANY TO APL LIMITED

Pursuant to 49 C.F.R. §§ 1114.26 and 1114.30, and the Discovery Guidelines entered in this proceeding on June 27, 1997, see Decisions Nos. 10 and 20, CSX Corporation, CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company^{1/} direct the following interrogatories and documents requests to APL Limited ("APL" or "Responding Party").

Responses should be served as soon as possible, and in no event later than 15 days from the date of service hereof. However, if APL objects entirely to an Interrogatory or Document Request and does not intend to provide any substantive answer or document production in response thereto absent an order compelling such answer or production, APL

^{1/} CSX Corporation, CSX Transportation, Inc., Norfolk Southern Corporation, Norfolk Southern Railway Company, Conrail Inc., and Consolidated Rail Corporation are collectively referred to as "Applicants".

shall serve such objection upon Applicants' counsel within five (5) business days of service hereof in accordance with § 16 of the Discovery Guidelines.

DEFINITIONS

1. "Applicant" or "Applicants" means CSX Corporation, CSX Transportation, Inc., Norfolk Southern Corporation, Norfolk Southern Railway Company, Conrail Inc., and Consolidated Rail Corporation.
2. "Board" means the Surface Transportation Board.
3. "Conrail" is a collective reference to Conrail Inc. and Consolidated Rail Corporation.
4. "CSX" is a collective reference to CSX Corporation, CSX Transportation, Inc. and CSX Intermodal, Inc.
5. "Document" means any writings or other compilations of information, whether handwritten, typewritten, printed, recorded, or produced or reproduced by any other process, including but not limited to intra- or inter-company communications, business records, agreements, contracts, correspondence, memoranda, studies, projections, summaries or records of conversations, reports, photographs, maps, tape recordings, all stored electronic data that may be retrievable or machine-readable, produced in reasonably useable form, including any descriptions, indices, or other interpretative materials necessary or useful to access the stored information, statistical or financial statements, graphs, charts or other data compilations, diagrams, agenda, minutes or records or summaries of conferences, statements of policy, lists of persons attending meetings or conferences, opinions or reports or

summaries of negotiations or investigations, opinions or reports of consultants, and press releases. Furthermore, the term "document" includes both original versions and copies that differ in any respect from original versions and both documents in the possession, custody, or control of APL and documents in the possession, custody, or control of consultants or others that have assisted APL in connection with any issue raised in these discovery requests.

6. "Identify," when used in relation to an individual, corporation, partnership or other entity, means to state the name, address and telephone number thereof. "Identify," when used in relation to a document, means to

- (a) State the nature of the document (e.g., letter, memorandum, etc.);
- (b) State the author, each addressee, each recipient, date, number of pages, and title of the document; and
- (c) Provide a brief description of the contents of the document.

7. "NS" is a collective reference to Norfolk Southern Corporation and Norfolk Southern Railway Company.

8. "Produce" means to make legible, complete, and exact copies of responsive documents, which are to be sent via overnight courier or hand-delivered to Drew Harker of Arnold & Porter at the address set forth below.

9. "Person" means any natural person, any business entity (whether partnership, association, cooperative, proprietorship, or corporation), in any governmental entity, department, administration, agency, bureau or political subdivision thereof.

10. "Proceeding" means the STB proceeding and Finance Docket No. 33388 and sub-dockets thereof.

(Boston)" discussed in the last paragraph on page 15 of the Verified Statement of Timothy J. Rhein.

2. With respect to the statement on page 16 of the Verified Statement of Timothy J. Rhein that section 2.2(c) "does not provide sufficient protections to APL in a contractual setting where its principal competitor, CSXT, also becomes an essential service provider for APL":

(a) Identify and describe the contractual provisions which APL would propose to provide such "sufficient protections."

(b) Identify any drafts, studies or other Documents relating to such contractual "sufficient protections."

3. With respect to the statement at page 13 of the Verified Statement of Alan C. Courtney that "We have many ideas to preserve APL's existing rights and still allow Applicants to pursue their division of Conrail":

(a) Describe and identify all such ideas.

(b) Have any such ideas been communicated to NS or CSX?

(c) If the answer to item (b) of this Interrogatory is in the affirmative, identify any such communications.

4. As to any discussions or attempts that APL may have made to discuss any or all of the anticipated problems with the performance of services for APL by NS and

CSX discussed in APL's "Response and Request for Conditions" (APL-4) or any of the verified statements contained therein (apart from APL's desire to renegotiate price):

(a) Describe such discussions or attempts to discuss by stating the date of such discussions or attempt, the company with which the person who was contacted in connection with such attempt was affiliated, the name of such person, and the method of such contact (telephone call, letter, meeting, etc.), and the anticipated problem with performance of services discussed or attempted to be discussed.

(b) State the substance of the discussion or the communication making such attempt.

(c) Identify any Document relating to such discussion or making such attempt to discuss or otherwise relating to such an attempt.

5. During the course of dealings between Conrail and APL under the contractual arrangements between them, are there occasions when APL requests the performance, within the time period of the contract, of a new service not provided for under the contract?

DOCUMENT REQUESTS

1. Produce the Transportation Agreement dated June 1, 1988 discussed on page 17 of the Verified Statement of Timothy J. Rhein.

2. Produce all amendments, modifications, and adjustments made to the Transportation Agreement required to be produced in response to Document Request No. 1, whether entered into before or after January 1, 1995.

3. Produce all leases with APL concerning the South Kearney yard discussed in the final paragraph on page 15 of the Verified Statement of Timothy J. Rhein, whether entered into before or after January 1, 1995.

4. Produce all amendments or modifications to the leases required to be produced in response to Document Request No. 3, whether entered into before or after January 1, 1995.

5. Produce all contracts between APL and third party ocean carriers ("TPI") for the transportation of the TPI's containers, whether entered into before or after January 1, 1995. For ease of reference, these contracts are discussed in the Verified Statement of Timothy J. Rhein on pages 20-22.

6. Produce all studies of the "500 to 750 mile second-morning truck market" or the feasibility of APL to serve this market as discussed in the first and third paragraphs on page 14 of the Verified Statement of Alan C. Courtney.

7. Produce all Documents identified in response to Interrogatories Nos. 1-5.

INSTRUCTIONS

1. If APL cannot answer any part of any interrogatory in full, after exercising due diligence to secure the information to do so, APL should so state an answer to the extent possible, specifying APL's inability to answer the remainder and stating whatever information or knowledge APL has of each unanswered part.

2. Where interrogatories seek information as to the existence or content of any document or study, producing, or furnishing a copy of the document or study will be accepted as an adequate response to the interrogatory.

3. Unless specified otherwise in a particular interrogatory or document request, these discovery requests seek information and documents dating from January 1, 1995 and extending through the date on which the responses are made. These Discovery Requests are continuing in nature and APL is under a duty to supplement or correct any responses that are incomplete or incorrect in accordance with 49 C.F.R. § 1114.29.

4. References to the plural shall include the singular and vice-versa. Terms such as "and," "or," and "including" shall be construed in an inclusive manner, in the disjunctive or conjunctive as necessary, in order to bring into the scope of each interrogatory or document request all information which might otherwise be construed as outside the scope of the request.

INTERROGATORIES

1. Identify all of the "significant capital investments for handling APL's contractual volume commitments at Syracuse, Morrisville, Harrisburg, and Beacon Park

8. On page 4 of his verified statement, Timothy J. Rhein states that "implicit in Applicants' present plans is a very high probability of service collapse post-acquisition, particularly for intermodal traffic in the congested New York-New Jersey area." Produce all analysis, reports, studies and other Documents that serve as the basis for this statement or that discuss the likelihood of such collapse.

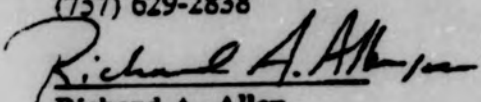
9. Produce all Documents relating to the negotiation of the Transportation Agreement, dated June 1, 1988, and any amendments, modifications or adjustments to such Agreement

10. On pages 19 through 22 of his verified statement, Timothy J. Rhein discusses the competition that APL faces from CSX Intermodal, Inc. ("CSXI") and Sea-Land Service, Inc. ("Sea-Land"). Produce all analysis, reports, studies, and other Documents that discuss CSXI and Sea-Land as competitors of APL.

11. Produce all Documents that discuss APL's relationship with CSX Transportation, Inc. after the transaction is approved.

Respectfully submitted,

James C. Bishop, Jr.
William C. Wooldridge
J. Gary Lane
James L. Howe III
Robert J. Cooney
George A. Aspatore
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(757) 629-2838

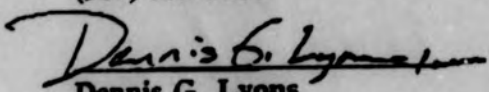

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Washington, D.C. 20036
(202) 429-3000

Counsel for CSX Corporation
and CSX Transportation, Inc.

Dated: October 31, 1997

CERTIFICATE OF SERVICE

I, John V. Edwards, certify that on October 31, 1997 I caused to be served by facsimile service, a true and correct copy of the foregoing CSX/NS-122, The First Set of Interrogatories and Requests for Production of Documents by CSX Corporation, CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company to APL Limited on all parties that have submitted to the Applicants a Request to be Placed on the Restricted Service List in STB Finance Docket No. 33388.



John V. Edwards

Dated: October 31, 1997

EXHIBIT 6

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 33388

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

APL LIMITED'S INITIAL OBJECTIONS TO THE FIRST SET OF INTERROGATORIES
AND REQUESTS FOR PRODUCTION OF DOCUMENTS BY CSX CORPORATION,
CSX TRANSPORTATION, INC., NORFOLK SOUTHERN CORPORATION AND
NORFOLK SOUTHERN RAILWAY COMPANY TO APL LIMITED

APL Limited ("APL") submits its initial objections to the First Set of Interrogatories and Requests for Production of Documents of CSX Corporation, CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company ("Applicants") to APL Limited served on October 31, 1997 (the "Applicants' Discovery Request").

These initial objections are filed pursuant to Paragraph 16 of the Discovery Guidelines adopted by Decision No. 10, served June 27, 1997, which provide that "[a] responding party shall, within five business days after receipt of service, serve a response stating all its objections to any discovery request as to which the responding party has then decided that it will be providing no affirmative response...." APL reserves the right to answer or object to each and every discovery request, definition and instruction set forth in Applicants' Discovery Request within the time frames set forth in Paragraph 16 of the Discovery Guidelines.

STB

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Interrogatory No. 3

With Respect to the statement at page 13 of the Verified Statement of Alan C. Courtney that "We have many ideas to preserve APL's existing rights and still allow Applicants to pursue their division of Conrail":

- (a) Describe and identify all such ideas.
- (b) Have any such ideas been communicated to NS or CSX?
- (c) If the answer to item (b) of this Interrogatory is in the affirmative, identify any such communications.

APL objects to Interrogatory No. 3 (b) and (c) on the basis that Applicants are requesting APL to provide information concerning discussions between Applicants and APL. Applicants have access to this information from their own personnel. Applicants should not be permitted to shift the burden of searching for and compiling this information to APL when it is just as easily available to Applicants. Throughout this proceeding, Applicants have objected "to the production of, and [are] not producing, information or documents that are as readily obtainable by the requester from its own files." *See e.g.* CSX-39, at 3, number 5; and NS-35, at 3, number 5. This objection applies equally as well to Interrogatory No. 3 (b) and (c) of Applicants' Discovery Request. APL also objects to Interrogatory No. 3 (b) and (c) as requesting the production of information relating to the possible settlement of this matter.

Interrogatory No. 4

As to any discussions or attempts that APL may have made to discuss any or all of the anticipated problems with the performance of services for APL by NS and CSX discussed in APL's "Response and Request for Conditions" (APL-4) or any of the verified statements contained therein (apart from APL's desire to renegotiate price):

- (a) Describe such discussions or attempts to discuss by stating the date of such discussions or attempt, the company with which the person who was contacted in connection with such attempt was affiliated, the name of such person, and the method of such contact (telephone call, letter, meeting, etc.), and the anticipated problem with performance of services discussed or attempted to be discussed.
- (b) State the substance of the discussion or the communication making such attempt.
- (c) Identify any Document relating to such discussion or making such attempt to discuss or otherwise relating to such an attempt.

APL objects to Interrogatory No. 4 on the basis that Applicants are requesting APL to provide information concerning discussions between Applicants and APL. Applicants have access to this information from their own personnel. Applicants should not be permitted to shift the burden of searching for and compiling this information to APL when it is just as easily available to Applicants. Throughout this proceeding, Applicants have objected "to the production of, and [are] not producing, information or documents that are as readily obtainable by the requester from its own files." *See e.g.* CSX-39, at 3, number 5; and NS-35, at 3, number 5. This objection applies equally as well to Interrogatory No. 4 of Applicants' Discovery Request. APL also objects to Interrogatory No. 4 as requesting the production of information relating to the possible settlement of this matter.

Document Request No. 3

Produce all leases with APL concerning the South Kearny yard discussed in the final paragraph on page 15 of the Verified Statement of Timothy J. Rhein, whether entered into before or after January 1, 1995.

APL objects to Document Request No. 3 as requesting the production of documents which contain confidential or sensitive commercial information, including information subject to disclosure restrictions imposed by contractual obligations to third parties.

Document Request No. 4

Produce all amendments or modifications to the leases required to be produced in response to Document Request No. 3, whether entered into before or after January 1, 1995.

APL objects to Document Request No. 4 as requesting the production of documents which contain confidential or sensitive commercial information, including information subject to disclosure restrictions imposed by contractual obligations to third parties.

Document Request No. 5

Produce all contracts between APL and third party ocean carriers ("TPI") for the transportation of the TPI's containers, whether entered into before or after January 1, 1995. For ease of reference, these contracts are discussed in the Verified Statement of Timothy J. Rhein on pages 20-22.

APL objects to Document Request No. 5 as requesting documents that are neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. The information requested is not and could not be, used by the Board to determine whether the transaction meets the statutory criteria for approval. As an example, APL does not understand

how arrangements with third party ocean carriers for slot sharing on APL's vessels could possibly be relevant to the Board's criteria. Moreover, Mr. Rhein's verified statement on pages 20-22 does not discuss or even refer to contracts between TPIs and APL, but does discuss the Transportation Agreement with Consolidated Rail Corporation. APL further objects to Document Request No. 5 as unduly vague and over broad in that it does not define the term "all contracts between APL and third party ocean carriers ("TPI") for the transportation of the TPI's containers," a term that is susceptible to more than one meaning. APL also objects to Document Request No. 5 as unduly burdensome to the extent that it seeks documents for periods prior to January 1, 1995, the date that Applicants have deemed the cut-off date for relevant discovery. APL also objects to Document Request No. 5 as requesting documents which contain confidential or sensitive commercial information, including information subject to disclosure restrictions imposed by contractual obligations to third parties.

Document Request No. 7

Produce all documents identified in response to Interrogatories Nos. 1-5.

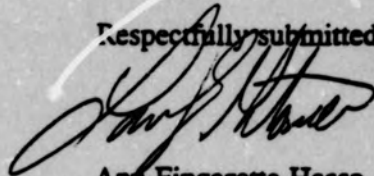
APL has objected to responding to Interrogatory Nos. 3(b) and (c) and 4. To the extent that Document Request No. 7 refers to Interrogatory Nos. 3(b) and (c) and 4, APL objects to Document Request No. 7. See objections to Interrogatory Nos. 3(b) and (c) and 4.

Document Request No. 9

Produce all Documents relating to the negotiation of the Transportation Agreement, dated June 1, 1988, and any amendments, modifications or supplements to such Agreement.

APL objects to Document Request No. 9 as requesting documents that are neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. The information requested is not and could not be, used by the Board to determine whether the transaction meets the statutory criteria for approval. Moreover, the Transportation Agreement as amended, which APL is producing, speaks for itself and supersedes all prior negotiations. APL also objects to Document Request No. 9 as over broad and unduly burdensome to the extent that it seeks documents for periods prior to January 1, 1995, the date that Applicants have deemed the cut-off date for relevant discovery.

Respectfully submitted,



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APL Limited
1111 Broadway
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(510) 272-7284

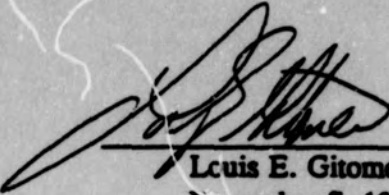
Louis E. Gitomer
Irene Ringwood
BALL JANIK LLP
1455 F Street, N.W., Suite 225
Washington, D.C. 20005
(202) 466-6530

Attorneys for:
APL LIMITED

Dated: November 7, 1997

CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing document to be served by facsimile on all parties to the Highly Confidential and Confidential Restricted Service List in STB Finance Docket No. 33388.



Louis E. Gitomer

November 7, 1997

EXHIBIT 7

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 33388

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

CSX'S MOTION TO COMPEL DISCOVERY
RESPONSES FROM APL LIMITED, AND
REQUEST FOR A DISCOVERY CONFERENCE

On October 31, 1997, CSX¹ and NS² served their First Set of Interrogatories and Requests For Production of Documents to APL Limited ("First Discovery Request"). The First Discovery Request was limited to five (5) Interrogatories and eleven (11) Document Requests.

On November 7, 1997, APL Limited ("APL") served its Initial Objections to the First Discovery Request, stating that it would be "providing no affirmative response" to two of the interrogatories and five of the

¹ "CSX" refers collectively to CSX Corporation and CSX Transportation, Inc. ("CSXT").

² "NS" refers collectively to Norfolk Southern Corporation and Norfolk Southern Railway Company.

document requests.³ A copy of APL's Initial Objections, which include the underlying discovery requests is attached.

APL's objections are not well taken and CSX requests that Your Honor order APL to fully respond to each interrogatory and document request, to the extent requested herein.

1. Interrogatory Nos. 3(b) and (c) and 4

Interrogatory Nos. 3(b) and (c) and 4 request information on the extent to which APL has communicated with CSX and NS about the perceived effect on APL of the transaction. APL objects to these interrogatories principally on the basis that CSX and NS already have the information requested. APL does not contend that the information sought is irrelevant or production of it would be burdensome.

While CSX and/or NS would by necessity have been a party to the communications covered by these interrogatories, to the extent that they occurred, it is

³ Document Request No. 7 requires production of all documents identified in response to Interrogatory Nos. 1 through 5. CSX understands that APL only objects to Document Request No. 7 to the extent that it requires production of documents required to be identified in response to Interrogatory Nos. 3(b) & (c) and 4, the two interrogatories objected to by APL. CSX assumes that APL will produce all responsive documents identified in response to Interrogatory Nos. 1 and 2, the only other interrogatories that requested APL to identify documents.

an entirely proper and well accepted practice in discovery for a party to seek information from the other party on the substance of communications between the two. Moreover, Your Honor has ordered the Primary Applicants on a number of occasions to produce information during discovery despite the fact that the requesting party already had the information in question. See e.g. Decision No. 11, requiring production of bids, proposals, and other documents already in the possession of requestor. It would be unfair to adapt a different rule now and there is no basis to do so.

APL also indicates that the "information relate[s] to possible settlement of the matter" as another basis for its objection. However, all that CSX and NS requested in these interrogatories was information on the extent to which APL communicated certain ideas to the Primary Applicants, none of which on their face appear to relate to settlement. Moreover, APL does not indicate how the information requested relates to any settlement discussions that may have occurred between the Primary Applicants and APL.

2. Document Request Nos. 3 and 4

Pursuant to discussions today among counsel for CSX, NS, Conrail, and APL, we believe that this issue has been resolved, by CSX and NS agreeing to withdraw

these requests under certain circumstances. However, if the issue turns out not to be resolved, CSX reserves the right to raise it at the discovery conference requested below.

3. Document Request No. 5

APL objects to Document Request No. 5 which requests production of all contracts between APL and third party ocean carriers ("TPI"). APL's principal argument is that the request seeks information which is not relevant to the proceeding. However in his Verified Statement, Timothy J. Rhein, President and Chief Executive Officer of APL, offers a lengthy description of the development of the relationship between APL and the TPIs. According to Mr. Rhein, APL was able to develop these relationships only because of its special cooperative relationship with Conrail, which would not be possible to establish with CSXT. Because CSXT is affiliated with a competitor of APL for this TPI business, APL argues that it would not be able to reach agreement with the TPIs if CSXT was APL's rail carrier. This is one of the reasons that APL offers for asking authority from the Board to renegotiate Conrail's existing contract with CSX and NS. On this basis, CSX and NS should be permitted to review the contracts between the TPI's and APL.

APL also objects to Document Request No. 5 in toto on the basis that the documents requested contain "confidential or sensitive commercial information." The Primary Applicants have previously objected to the release of documents that contained highly proprietary information but were ordered by Your Honor and the Board to produce such documents. See Decision Nos. 26 and 32. In affirming Your Honor's decision to require the Primary Applicants to produce such information, the Board quoted with approval the following language from Decision No. 26, issued by Your Honor:

The [Primary] Applicants do raise a serious claim as to the highly confidential commercial sensitivity of the information they are required to produce. The Protective Order in effect in this proceeding should suffice to allay [Primary] Applicants' concerns. Violation of the Protective Order would be a serious offense and could lead to significant consequences.

Decision No. 32 at 4.

Decision No. 32 provides Your Honor ample authority to order production of the APL-TPI contracts.

4. Document Request No. 7

APL objects to Document Request No. 7 to the extent that it requires production of documents identified in response to Interrogatories 3(b) and (c)

and (4). CSX's argument above as to these two interrogatories also applies to Document Request No. 7.

5. Document Request No. 9

Finally, APL objects to Document Request No. 9 principally on the basis that the information requested is not relevant. The purpose of this request is to obtain the documents made contemporaneously with the negotiation of APL's Transportation Agreement with Conrail and any amendments, modifications, or adjustments thereto. Throughout APL's October 21, 1997 Response and Request for Conditions, APL claims that, because Conrail was not a competitor of APL when APL negotiated the Transportation Agreement, it viewed Conrail as a "cooperating partner," and, as a result "much was left unsaid." Verified Statement of Alan C. Courtney at 11. As a result of this attitude, APL claims that the Transportation Agreement is not suitable for assignment to CSX. CSX and NS are entitled to obtain documents prepared at the time the Transportation Agreement was negotiated to determine to what extent such attitude is reflected in the underlying documentation.

* * *

For the foregoing reasons, CSX requests that Your Honor order APL to provide answers to each of the

interrogatories and document requests contained in the First Discovery Request, to the extent requested herein.

CSX also respectfully requests a discovery conference for November 13, 1997 for oral argument on this motion.

Respectfully submitted,

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Counsel for CSX Corporation
and CSX Transportation, Inc.

Dated: November 10, 1997

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(202) 429-3000

Counsel for CSX Corporation
and CSX Transportation, Inc.

Dated: November 10, 1997

CERTIFICATE OF SERVICE

I, Drew A. Harker, certify that on November 10, 1997 I caused to be served by facsimile service a true and correct copy of the foregoing CSX-104, CSX's Motion to Compel Discovery Responses from APL Limited, and Request for a Discovery Conference on the Restricted Service List in STB Finance Docket No. 33388.

Drew A. Harker

Drew A. Harker

EXHIBIT 8

HARKINS CUNNINGHAM

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1800 ONE COMMERCE SQUARE
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PHILADELPHIA, PA 19103-7042
215 581-6700
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November 11, 1997

VIA FACSIMILE

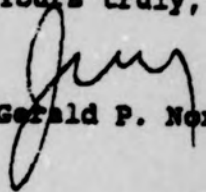
Louis E. Gitomer
Ball Janik, LLP
Suite 225
1455 F Street, N.W.
Washington, D.C. 20005

Re: Finance Docket No. 33388, CSX Corporation and CSX Transportation, Inc. Norfolk Southern Corporation and Norfolk Southern Railway Company -- Control and Operating Leases/Agreements -- Conrail Inc. and Consolidated Rail Corporation -- Sale of Railroad Line by Norfolk Southern Railway Company to CSX Transportation, Inc.

Dear Lou:

This is to confirm that Conrail has consented to APL's production of a copy of the lease agreement between Conrail and APL dated as of June 1, 1988, on an informal discovery basis to counsel for CSX and NS, for use only by them and their outside consultants, on the understanding that the document would be marked and treated as Highly Confidential under the Protective Order and would not be placed in a document depository.

Yours truly,


Gerald P. Norton

cc: John Enright (Conrail)
John Edwards
Drew Harker

EXHIBIT 9

ARNOLD & PORTER

555 TWELFTH STREET, N.W.
WASHINGTON, D.C. 20004-1202(202) 942-5000
FACSIMILE: (202) 942-8888DREW A. HARKER
(202) 942-5022NEW YORK
DENVER
LOS ANGELES
LONDON

November 12, 1997

VIA FACSIMILELouis E. Gitomer, Esq.
Ball Janik LLP
1455 F Street, N.W., Suite 225
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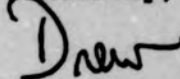
Dear Lou:

John Edwards on behalf of NS, and Jerry Norton on behalf of Conrail have authorized me to write to confirm the result of our discussion on November 10, 1997. CSX and NS agree to withdraw Document Request Nos. 1 through 4 on condition that APL provide the documents covered by those requests informally without any redactions. CSX and NS understand that APL will provide the documents under the Highly Confidential designation used in this proceeding. In addition, CSX and NS understand that APL only agreed to furnish the documents covered by Document Request Nos. 3 and 4, the Kearny Yard lease and any amendments thereto, upon Conrail, or counsel for Conrail acting on Conrail's behalf, furnishing its consent to such release. As Mr. Norton supplied such consent yesterday, APL will furnish the documents to us by no later than Friday, November 14.

APL agrees that to the extent the documents are not provided by Friday, CSX and NS may withdraw their retraction of these document requests, without prejudice to the original production schedule.

Please let me know if the above does not reflect your understanding of our agreement.

Sincerely,

Drew Harker
Counsel for CSX Corporation
and CSX Transportation, Inc.cc: John Edwards
Gerald Norton

ATTACHMENT D

CSX/NS-199

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 33388

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

**APPLICANTS' OPPOSITION TO
APL LIMITED'S MOTION TO COMPEL
DISCOVERY RESPONSES**

Applicants¹ hereby reply to the January 26, 1998 Motion to Compel Discovery Responses of APL Limited ("APL"). Because Your Honor has already ruled that parties that filed comments, such as APL, are not entitled to further written discovery, and because the issues on which APL seeks discovery have been present from the beginning of the proceeding and do not justify at this late stage any deviation from Your Honor's previous ruling, APL's motion should be denied.

¹ "Applicants" refers collectively to CSX Corporation and CSX Transportation, Inc. (collectively "CSX"), Norfolk Southern Corporation and Norfolk Southern Railway Company (collectively "NS"), and Conrail Inc. and Consolidated Rail Corporation (collectively "Conrail").

I. BACKGROUND

On October 21, 1997, APL filed its Response and Requests for Conditions in this proceeding. APL did not file a Responsive or Inconsistent Application such that it would be permitted to file any rebuttal in support of its October 21, 1997 filing.

Prior to submitting its October 21 filing, APL had a full, fair and adequate opportunity to serve discovery in the initial discovery period in this proceeding (June 23, 1998 to October 6, 1997). APL did, in fact, actively participate in written discovery, *see*, e.g. APL-2, APL-3, as well as depositions.

On December 15, 1997, Applicants filed their Rebuttal (CSX/NS-176), in which Applicants made various arguments in response to APL's October 21 Response and Requests for Conditions. On January 13, 1998, after NS offered to make him available, APL took the deposition of L.I. Prillaman, who had submitted a rebuttal verified statement regarding the allocation of Conrail's Transportation Contracts. On that same day, APL served APL Limited's Second Set of Interrogatories and Document Requests to Applicants (APL-12) ("APL Second Discovery Request"), consisting of nearly a dozen interrogatories (including subparts) designed to elicit information regarding Conrail's Transportation Contracts and Regulated Traffic Contracts, as well as a document request seeking all documents related to CSX's acquisition of the South Kearny intermodal terminal.

On January 21, 1998, Applicants served Objections to APL-12 (CSX/NS-196), and, on January 26, 1998, APL moved to compel (APL-16).

II. ARGUMENT

APL's motion to compel is nothing more than a thinly veiled attempt to reargue Your Honor's January 8, 1998 decision, restricting the right of commenters, such as APL, to written discovery. In that decision, Your Honor denied the requests of two commenting parties, Eighty-Four Mining Company, Inc. ("EFM") and Erie Niagara Rail Steering Committee ("ENRS"), for additional written discovery, holding that commenting parties are not entitled to additional written discovery because, at this stage in the proceeding, "written replies to discovery cannot have a reasonable use." January 8, 1998, Discovery Conference Transcript ("Transcript") at 130. APL cites no authority in support of or reason why Your Honor should grant its extraordinary request and reverse the earlier ruling, which was made after complete briefing and oral argument by all interested parties.²

APL acknowledges that Applicants' objections to APL's Second Discovery Request are based primarily on Your Honor's January 8 ruling. APL, however, attempts to distinguish its requested discovery from the discovery sought by EFM and ENRS, but there is no such distinction. APL argues that it "is entitled to test Applicants' evidence," because the discovery it has served seeks to explore issues that were not raised by Applicants prior to their October 21 filing, and therefore "APL could not have sought

² Applicants briefed extensively the issue of a commenter's right to take discovery at this stage in the proceeding, including written discovery, in response to EFM's and ENRS' motions to compel. See CSX/NS-188, Applicants' Opposition to the State of New York's, Erie-Niagara Rail Steering Committee's and Eighty-Four Mining Company, Inc.'s Requests to Compel Production of Discovery. The arguments made by Applicants in that brief apply with equal force here and are hereby incorporated by reference.

[this] discovery . . . prior to October 21." APL-16 at 2. This same argument, however, was advanced by EFM and ENRS in nearly identical terms in the January 8, 1998 oral argument regarding their requests to compel written discovery. See Transcript at 24 ("[I]t's clear that [the agreement] was not signed . . . until two days after our comments were filed. . . . So we were precluded from any opportunity to comment on the effect of that agreement before we filed our comments on the 21st"); and at 26 ("What we do want to do is test the basis for the statements that their witnesses offer in the rebuttal."). Your Honor found these arguments unavailing, however, and denied EFM's and ENRS' requests for written discovery. Id. at 128. The argument has no more merit in this context than in the earlier one.

APL's suggestion that its discovery request seeks new evidence that could not have been sought prior to October 6, 1997-- the cut off for discovery by commenters -- is plainly wrong. The extent to which existing Conrail rail transportation contracts would be subject to Section 2.2(c) of the Transaction Agreement (which was included in the Application (CSX/NS-25, Volume 8B at 25-29)), the effect of Section 2.2(c) on these contracts, and the status of the South Kearny terminal (which was discussed in the Application (id. at 85)) have been issues in the case since the Applicants filed their Application in June 1997.³ Indeed, APL sought discovery on these topics. See APL-3. *Not true*

There is no basis now to grant APL the right to take further discovery.

³ There is no basis for APL's suggestion (p.7, n.8) that Applicants were not entitled to submit to the Board the APL-Conrail lease made available by APL.

In an effort to avoid the Board's clear and unambiguous prohibition on the submission of rebuttal evidence by commenting parties, see Decision No. 6 at 13 ("Parties filing inconsistent and/or responsive applications have a right to file rebuttal evidence, while parties simply commenting, protesting, or requesting conditions do not." cites omitted), APL states that it seeks "not the evil rebuttal which Applicants appear to fear, but a testing of its witnesses." APL-16 at 8.⁴ Similar attempts by EFM and ENRS to draw tortured, and ultimately meaningless, distinctions between different kinds of evidence and evidentiary filings were properly rejected by Your Honor. See Transcript at 27 (Describing the type of evidence EFM sought as "impeachment" evidence, not "rebuttal" evidence). APL has offered no basis for a different outcome in its case.

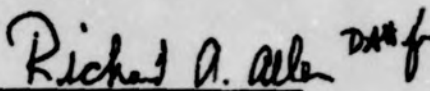
Realizing that Your Honor's January 8 ruling plainly prohibits APL's written discovery requests, it lamely argues that its discovery will not result in filing "APL evidence, but the Applicants' evidence . . ." APL-16 at 3. APL does not explain the distinction that it is making, but APL's intent is clear. APL obviously plans to introduce new evidence into the record using Applicants' written responses. This is exactly what Your Honor's earlier ruling and Decision No. 6 prohibits.

⁴ APL's motion to compel overlooks the fact that it had ample opportunity to "test" NS rebuttal witness Prillaman at his January 13 deposition. Thus, APL already has had the opportunity for cross-examination of Applicants' rebuttal witnesses, which Your Honor's January 8 ruling permitted.

For these reasons,⁵ APL's motion to compel production should be denied.

Respectfully submitted,

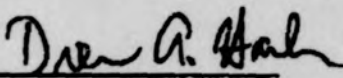
James C. Bishop, Jr.
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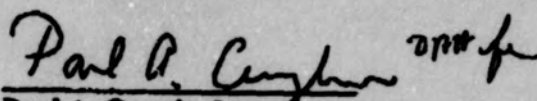
⁵ Applicants assume that Your Honor's January 8 ruling, which is the law of the case, will control disposition of APL's motion to compel. If there is a need to hear argument on Applicants' General Objections to APL's Second Discovery Request, Applicants will be prepared to do so at the hearing.

Counsel for Norfolk Southern
Corporation and Norfolk Southern
Railway Company

(202) 429-3000

Counsel for CSX Corporation and
CSX Transportation, Inc.

Timothy T. O'Toole
Constance L. Abrams
Consolidated Rail Corporation
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(215) 209-2000

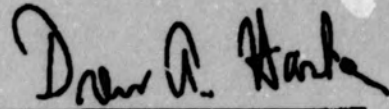

Paul A. Cunningham
Gerald P. Norton
Harkins Cunningham
Suite 600
1300 19th Street, N.W.
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(202) 973-7600

Counsel for Conrail Inc. and
Consolidated Rail Corporation

Dated: January 28, 1998

CERTIFICATE OF SERVICE

I, Drew A. Harker, certify that on January 28, 1998, I caused to be served by facsimile service a true and correct copy of the foregoing CSX/NS-199, Applicants' Opposition to APL Limited's Motion to Compel Discovery Responses on all parties that have submitted to the Applicants a request to be placed on the restricted service list in STB Finance No. 33388.



Drew A. Harker

January 28, 1998

ATTACHMENT E

CSX-41

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 33388

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

CSX CORPORATION AND
CSX TRANSPORTATION, INC.'S
FIRST SET OF INTERROGATORIES AND REQUESTS
FOR PRODUCTION OF DOCUMENTS TO
EASTMAN KODAK COMPANY

Pursuant to 49 C.F.R. §§ 1114.26 and 1114.30, and the Discovery Guidelines entered in this proceeding on June 27, 1997, see Decisions Nos. 10 and 20, CSX Corporation and CSX Transportation, Inc., direct the following interrogatories and document requests to Eastman Kodak Company ("Responding Party" or "EKC").

Responses should be served as soon as possible, and in no event later than 15 days from the date of service hereof. However, if EKC objects entirely to an Interrogatory or Document Request and does not intend to provide any substantive answer or document production in response thereto absent an order compelling such answer or production, EKC shall serve such objection upon Applicants' counsel within five (5) days of service hereof in accordance with ¶ 16 of the Discovery Guidelines.

(4)

*Request contract
from shippers*

DEFINITIONS

1. "Applicant" or "Applicants" means CSX Corporation, CSX Transportation, Inc., Norfolk Southern Corporation, Norfolk Southern Railway Company, Conrail, Inc., and Consolidated Rail Corporation.
2. "Board" means the Surface Transportation Board.
3. "Document" means any writings or other compilations of information, whether handwritten, typewritten, printed, recorded, or produced or reproduced by any other process, including but not limited to intra- or inter-company communications, business records, agreements, contracts, correspondence, memoranda, studies, projections, summaries or records of conversations, reports, photographs, maps, tape recordings, all stored electronic data that may be retrievable or machine-readable, produced in reasonably usable form, including any descriptions, indices, or other interpretative materials necessary or useful to access the stored information, statistical or financial statements, graphs, charts or other data compilations, diagrams, agendas, minutes or records or summaries of conferences, statements of policy, lists of persons attending meetings or conferences, opinions or reports or summaries of negotiations or investigations, opinions or reports of consultants, and press releases. Furthermore, the term "document" includes both original versions and copies that differ in any respect from original versions, and both documents in the possession, custody, or control of Responding Party and documents in the possession, custody, or control of consultants or others that have assisted Responding Party in connection with any issue raised in these discovery requests.
4. "Identify," when used in relation to an individual, corporation, partnership or other entity, means to state the name, address and telephone number thereof. "Identify," when used in relation to a document, means to

- (a) state the nature of the document (e.g., letter, memorandum, etc.);
- (b) state the author, each addressee, each recipient, date, number of pages, and title of the document; and
- (c) provide a brief description of the contents of the document.

5. "Produce" means to make legible, complete, and exact copies of responsive documents, which are to be sent via overnight courier or hand-delivered to Drew A. Harker of Arnold & Porter at the address set forth below.

6. "Person" means any natural person, any business entity (whether partnership, association, limited liability company, cooperative, proprietorship, corporation or other entity), and any governmental entity, department, administration, agency, bureau or political subdivision thereof.

7. "Proceeding" means the STB proceeding Finance Docket No. 33388 and sub-dockets thereof.

INSTRUCTIONS

1. If Responding Party cannot answer any part of any interrogatory in full, after exercising due diligence to secure the information to do so, Responding Party should so state an answer to the extent possible, specifying Responding Party's inability to answer the remainder and stating whatever information or knowledge Responding Party has of each unanswered part.

2. Where interrogatories request identification or seek information as to the existence or content of any document or study, producing, or furnishing a copy of the document or study will be accepted as an adequate response to the interrogatory.

3. Unless specified otherwise in a particular interrogatory or document request, these discovery requests seek information and documents dating from January 1, 1995, and extending through the date on which the responses are made. These Discovery Requests are continuing in nature and Responding Party is under a duty to supplement or correct any responses that are incomplete or incorrect in accordance with 49 C.F.R. § 1114.29.

4. References to the plural shall include the singular and vice versa. Terms such as "and," "or," and "including" shall be construed in an inclusive manner, in the disjunctive or conjunctive as necessary, in order to bring into the scope of each interrogatory or document request all information which might otherwise be construed as outside the scope of the request.

INTERROGATORIES

1. Identify all Documents forming a part of the "transportation contract with Conrail for the transportation of coal to Kodak Park in Rochester, NY," referred to in the first sentence of the third paragraph on page 2 of the Verified Statement of Linda L. Kelley dated October 17, 1997 (the "Verified Statement"), and elsewhere in the Verified Statement, including, without limitation, any amendments thereto. Such Documents should be identified regardless of whether they were created before or after January 1, 1995.

2. Identify all Documents, whether created before or after January 1, 1995, that support or in any other way relate to the assertion at pages 5 and 6 of the Verified Statement "that certain provisions of the coal transportation contract, including the ones cited above, were entered into advisedly, and with the anticipation that there was a major probability that further changes were ahead for

the eastern railroad system. Kodak wanted the right to reexamine its competitive options should that happen."

3. Identify all Documents, whether created before or after January 1, 1995, that support or in any other way relate to the statement on page 6 of the Verified Statement that: "The consent to assignment and sale provisions were put in for the express purpose of giving Kodak options in just this situation."

REQUESTS FOR PRODUCTION OF DOCUMENTS

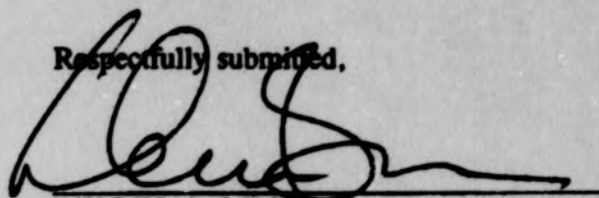
1. Produce all documents identified, or which should be identified, in response to Interrogatory No. 1.

2. Produce all documents identified, or which should be identified, in response to Interrogatory No. 2.

3. Produce all documents identified, or which should be identified, in response to Interrogatory No. 3.

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PETER J. SHUDTZ
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901 East Cary Street
Richmond, VA 23129
(804) 782-1400

Respectfully submitted,



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(202) 942-5000

**P. MICHAEL GIFTOS
PAUL R. HITCHCOCK**
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Speed Code J-120
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**SAMUEL M. SIPE, JR.
TIMOTHY M. WALSH**
Steptoe & Johnson LLP
1330 Connecticut Avenue, N.W.
Washington, DC 20036-1795
(202) 429-3000

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

October 27, 1997

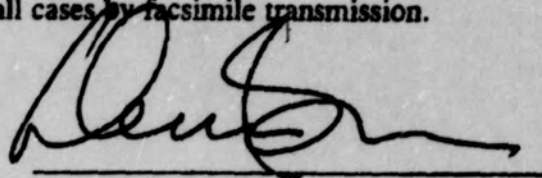
CERTIFICATE OF SERVICE

I, Dennis G. Lyons, certify that on October 27, 1997, I have caused to be served a true and correct copy of the foregoing CSX-41, CSX Corporation and CSX Transportation, Inc.'s First Set of Interrogatories and Requests for Production of Documents to Eastman Kodak Company, to

Byron D. Olsen
Felhaber, Larson, Fenlon & Vogt, P.A.
4200 First Bank Place
601 Second Avenue South
Minneapolis, MN 55402

PHONE: 612-373-8512
FAX: 612-338-4608

counsel for Eastman Kodak Company; and on all parties on the Restricted Service list in Finance Docket No. 33388, in all cases by facsimile transmission.



ATTACHMENT F

EKC-3

(4)

Produce contract

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 33388

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

EASTMAN KODAK COMPANY RESPONSE TO
FIRST SET OF INTERROGATORIES AND
REQUEST FOR PRODUCTION OF DOCUMENTS
SERVED BY CSX CORPORATION
CSX TRANSPORTATION, INC.

Following are responses on behalf of Eastman Kodak Company ("Kodak") to Interrogatories and Document Production Requests served upon counsel for Kodak on October 28, 1997.

Interrogatories

INTERROGATORY NO. 1: Identify all Documents forming a part of the "transportation contract with Conrail for the transportation of coal to Kodak Park in Rochester, NY," referred to in the first sentence of the third paragraph on page 2 of the Verified Statement of Linda L. Kelley dated October 17, 1997 (the "Verified Statement"), and elsewhere in the Verified Statement, including, without limitation, any amendments thereto. Such Documents should be identified regardless of whether they were created before or after January 1, 1995.

ANSWER: The transportation contract with Conrail for the transportation of coal to Kodak Park in Rochester, NY is complete with its attachments and without reference to any other documents. The contract is composed of the rail contract itself, consisting of 16 pages and identified as "Rail Transportation Contract Pursuant to Tariff ICC-CR-C-11174", and several addenda bearing varying dates and naming rates from various origins. Some provisions of the contract relevant to my Verified Statement were set forth in full in that statement, specifically Contract Sections 15 and 16. Other sections referred to without reference to a section number are being

furnished in response to the document production request. Kodak feels that further disclosure of the terms of the contract is neither relevant under the confidentiality provision in the contract, nor under the limitations found in Title 49 United States Code, Section 11904. Certain portions were disclosed because of an exception in the confidentiality provision authorizing disclosure of contents that may be required by the ICC or other regulatory authority. However, most of the remaining provisions of the document deal with highly confidential rate and service information, and thus have not been included in Kodak's document production response. This is information which is extremely commercially sensitive, and protected from disclosure under standards adopted by the Board for this proceeding. Applicant Conrail, of course, has the complete contract in its possession. While Kodak feels no further contract disclosure is permissible, it will consider Conrail's views with respect to further disclosure.

INTERROGATORY NO. 2: Identify all Documents, whether created before or after January 1, 1995, that support or in any other way relate to the assertion at pages 5 and 6 of the Verified Statement "that certain provisions of the coal transportation contract, including the ones cited above, were entered into advisedly, and with the anticipation that there was a major probability that further changes were ahead for the eastern railroad system. Kodak wanted the right to reexamine its competitive options should that happen."

ANSWER: Correspondence with Conrail and internal Kodak correspondence in August and September, 1992.

INTERROGATORY NO. 3: Identify all Documents, whether created before or after January 1, 1995, that support or in any other way relate to the statement on page 6 of the Verified Statement that: "The consent to assignment and sale provisions were put in for the express purpose of giving Kodak options in just this situation."

ANSWER: Documents responsive to this Interrogatory are included in the documents provided in response to Interrogatory No. 2.

Requests for Production of Documents

1. Produce all documents identified, or which should be identified, in response to Interrogatory No. 1.

RESPONSE: See Answer to Interrogatory No. 1. Portions of the contract are being furnished to counsel for CSX Corporation and CSX Transportation, Inc.

2. Produce all documents identified, or which should be identified, in response to Interrogatory No. 2.

RESPONSE: Copies of documents which are responsive to Interrogatory No. 2 are being supplied to counsel for CSX Corporation and CSX Transportation, Inc.

3. Produce all documents identified, or which should be identified, in response to Interrogatory No. 3.

RESPONSE: Documents responsive to Request are included in the documents provided in response to document request no. 2.

Dated: November 13, 1997

By: /s/
Linda L. Kelley
Manager of Inbound Transportation,
Rail & Bulk
Eastman Kodak Company
2400 Mount. Read Boulevard
Rochester, NY 14650-3061

Byron D. Olsen
Felhaber, Larson, Fenlon & Vogt, P.A.
4200 First Bank Place
601 Second Avenue South
Minneapolis, MN 55402
612/373-8512

Attorneys for Eastman Kodak Company

VERIFICATION

STATE OF NEW YORK)
) ss.
COUNTY OF MONROE)

Linda L. Kelley, being duly sworn, deposes and says that she has read the foregoing Answers to Interrogatories and Responses to Request for Production of Documents, knows the facts asserted therein to be true, and that the same are true as stated.

Dated: November 13, 1997

/s/
Linda L. Kelley

Subscribed and sworn to before me
this 13th day of November, 1997.

/s/ Sabine Taylor
Notary Public of State of New York
County of Monroe
No. 01TA5069548
My Commission Expires: 11/25/98

STB

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187651 B

PATTON BOGGS, L.L.P.
2550 M STREET, N.W.
WASHINGTON, D.C. 20037-1350
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WRITER'S DIRECT DIAL
(202) 457-6315
ENTERED
Office of the Secretary

187651

MAY 21 1998

May 20, 1998



Part of
Public Record

By Hand

The Honorable Vernon A. Williams, Secretary
Surface Transportation Board
1925 K Street, N.W. Suite 700
Washington, DC 20036

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

Dear Secretary Williams:

Enclosed for filing in this docket are the original and 25 copies of CMA-20, the Opposition of the Chemical Manufacturers Association and The Society of the Plastics Industry, Inc. to CSX's Motion to Submit Study of Anti-Assignment Clauses. Also enclosed is a computer disk containing a copy of the filings in WordPerfect 6.0.

Please acknowledge receipt of these papers by date-stamping the enclosed duplicate copy and returning it with our messenger. Thank you.

Sincerely,

Scott N. Stone

Enclosures

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 33388



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

OPPOSITION OF THE CHEMICAL MANUFACTURERS ASSOCIATION
AND THE SOCIETY OF THE PLASTICS INDUSTRY, INC. TO
CSX'S MOTION TO SUBMIT STUDY OF ANTI-ASSIGNMENT CLAUSES

The Chemical Manufacturers Association ("CMA") and The Society of the Plastics Industry, Inc. ("SPI") hereby oppose CSX-147, the CSX's motion to submit new evidence on the incidence of anti-assignment clauses in Conrail contracts.

CSX has provided no good reason for being permitted to late-file this evidence. CSX seems to suggest that filing the evidence is warranted by the fact that various parties including CMA and SPI¹ have taken positions against the Applicants' request to override anti-assignment

¹ CSX incorrectly represents that CMA/SPI do not take a position on anti-assignment clauses. The entire thrust of the CMA/SPI position on contracts in their comments, CMA-10 at 35-36, is that shippers (regardless of the presence or absence of anti-assignment clauses) should have the ability to select service from either CSX or NS, or reopen contracts, rather than having the new service be decided unilaterally by NS and CSX, whose split of Conrail will result in new service patterns. Obviously, that position is the exact opposite of CSX's and NS's position that they should be able to allocate which carrier serves the shipper even where anti-assignment clauses would otherwise require contract reopening. CSX cannot credibly maintain that it did not understand CMA/SPI's position against voiding anti-assignment clauses.

clauses and that some of those arguments "became clear" only with the filing of briefs in February 1998. The fact is, however, that it is CSX that bears the burden of attempting to justify, both legally and factually, its request to override anti-assignment clauses. CSX has had that burden since filing the application in this case, and it has cited no reason why it could not have attempted to meet that burden sooner.²

Acceptance of the filing would seriously prejudice parties, including CMA and SPI, who are not in a position in the short time remaining before oral argument to conduct the discovery that would be necessary to analyze and probe the methodology and conclusions of CSX's proffered witness. Even if such discovery were possible, CSX should not be permitted to force parties interested in this issue to devote their brief oral argument time to a detailed rebuttal of CSX's contract study, or to seek leave to submit additional written comments and argument. In the event of further substantive filings, of course, the current schedule for oral argument and the voting conference would have to be adjusted.

Perhaps anticipating that the Board will reject the late-filing of this evidence, CSX takes the opportunity in CSX-147 to outline its arguments on the merits of the proffered evidence. The general theme of these arguments is that because anti-assignment clauses are so prevalent, they should be disregarded by the Board as "common" and "banal" boilerplate that "do not represent individual bargaining."³ But if CSX's study shows anything, it is that (1) shippers usually insist on anti-assignment clauses but that (2) the clauses take a great variety of forms, confirming that the individual bargaining between Conrail and shippers has produced a variety of results.

² The fact that CSX and NS devoted a full twelve pages of their rebuttal filing to the issue of anti-assignment clauses shows that this was already by then a well-developed issue. CSX/NS-176 at 94-105.

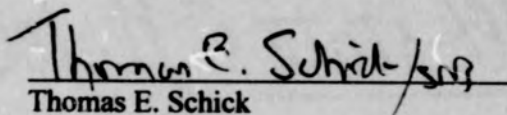
³ CSX-147 at 7th and 8th (unnumbered) pages.

Significantly, 20 of the contracts cited in CSX's study (at 5-6) require consent to assignment except where the assignment is to a successor by merger, consolidation, sale, etc. The remainder do not. Plainly, parties know how to provide for what they want in contracts, including whether or not anti-assignment clauses should be effective in the case of mergers or acquisitions.

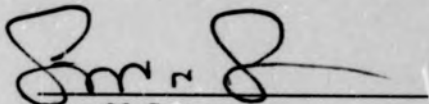
Should the Board, absent any inquiry into the reasons why individual parties did or did not agree to various contract terms, decide to adopt a presumption concerning such clauses, it should adopt the ordinary and logical presumption that parties intend to agree on what their contracts say they have agreed on, and that just because parties did not adopt novel language to express their intentions does not mean that they did not negotiate, or at least scrutinize, each clause before signing the contract.

The Board should therefore deny CSX's motion to submit the proffered study.

Respectfully submitted,



Thomas E. Schick
Counsel
Chemical Manufacturers Association
1300 Wilson Boulevard
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(703) 741-5172



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Patton Boggs, L.L.P.
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Counsel for Chemical Manufacturers
Association

Martin W. Bercovici /SNE

Martin W. Bercovici
Keller and Heckman, L.L.P.
1001 G Street, N.W.
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Washington, DC 20001
(202) 434-4144

Dated: May 20, 1998

Counsel for The Society of the Plastics
Industry, Inc.

CERTIFICATE OF SERVICE

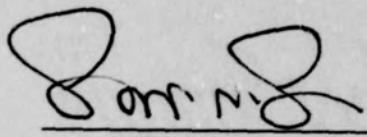
I hereby certify that I have, in accordance with the Board's Decisions in this proceeding, served copies of the foregoing by first class mail upon all parties of record and by hand upon the following:

Administrative Law Judge Jacob Leventhal
Federal Energy Regulatory Commission
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Washington, DC 20426

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 5/20/18

Scott N. Stone

STB

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187390

187390

WEINER, BRODSKY, SIDMAN & KIDER

ATTORNEYS AT LAW

PROFESSIONAL CORPORATION

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WASHINGTON, D.C. 20005-4797

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Office of the Secretary

MAY 05 1998

Part of
Public Record

May 5, 1998



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MICHAEL W. KARDASH
MITCHEL H. KIDER
SUSAN L. KORYTKOWSKI
SHERRI L. LEDNER
TODD A. NEWMAN
MARK H. SIDMAN
RUGENIA SILVER
JOHN D. SOCKNAT
HARVEY E. WEINER
ROSE MICHELE WEINRYB
JOSEPH F. YENOUSKAS

*NOT ADMITTED IN D.C.

BY HAND

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

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NYAR No. 6

Re: STB Finance Docket No. 33388, CSX Corp. and CSX Transp., Inc.,
Norfolk Southern Corp. and Norfolk Southern Ry. Co. -- Control and
Operating Leases/Agreements -- Conrail Inc. and Consolidated Rail Corp.

Dear Secretary Williams:

On April 9, 1998, New York & Atlantic Railway ("NYAR") timely filed its request with the Surface Transportation Board (the "Board") to reserve 5 minutes to participate in the oral argument in the above-referenced proceeding. NYAR hereby responds (the "Response") to the letter filed with the Board on April 24, 1998, regarding the allocation of time for oral argument in this proceeding. In their April 24, 1998, letter, certain parties ("Proposers") to this proceeding proposed a plan whereby six hours for oral argument are divided among most, but not all of the asserted 65 parties who had indicated an interest in participating in oral argument. NYAR objects to this proposal in so far as it fails to provide NYAR with any time for oral argument.

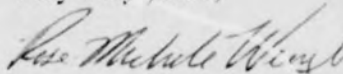
Congressman Jerrold Nadler and 23 other Members of Congress representing the States of New York and Connecticut (the "Congressional Delegation") filed an Intervention Petition, dated October 8, 1997, in which the Congressional Delegation requested, among other things, that approval of the primary application be conditioned on the forced inclusion into a joint facility operation of the Bay Ridge Line, a rail line over which NYAR has exclusive freight operating rights. On December 15, 1998, in accordance with the procedural schedule, NYAR responded to the Intervention Petition. In addition, on March 19, 1998, NYAR filed a reply to the brief of the Congressional Delegation, in order to address certain factual inaccuracies concerning NYAR that appeared for the first time in the brief.

Apparently NYAR has been excluded from the proposed allocation of time because it did not file a brief in this proceeding. NYAR, however, as shown above, has been an active participant in this proceeding. Board and Commission decisions allocating time for oral argument for the Union Pacific/Southern Pacific merger¹ and the Burlington Northern/Santa Fe Pacific merger² make no reference to brief submission as a prerequisite to participation in oral argument. In addition, if the Proposers are correct and members of Congress, such as the Congressional Delegation, will be allocated additional time to appear in this proceeding, the absence of NYAR from oral argument may result in an incomplete and unbalanced factual record.

Although NYAR recognizes that there is only a limited amount of time for oral argument, the forced inclusion of the Bay Ridge Line will have a direct and substantial impact on NYAR's rail operations. NYAR, therefore, respectfully reiterates its April 9, 1998, request for five minutes of oral argument to address the Congressional Delegations' proposed condition regarding the Bay Ridge Line.

Enclosed for filing in this proceeding are 25 copies of this Response. Please acknowledge receipt of this letter by date-stamping the enclosed acknowledgment copy and returning it to our messenger.

Very truly yours,



Rose-Michele Weinryb

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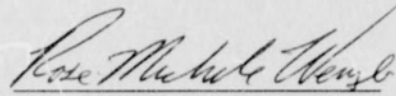
¹ *Union Pacific Corporation, Union Pacific Railroad Company, and Missouri Pacific Railroad Company -- Control and Merger -- Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCL Corp., and the Denver and Rio Grande Western Railroad Company*, Finance Docket No. 32760, (not printed), 1996 STB LEXIS 333, served June 19, 1996.

² *Burlington Northern Inc. and Burlington Northern Railroad Company -- Control and Merger -- Santa Fe Pacific Corporation and the Atchison, Topeka and Santa Fe Railway Company*, Finance Docket No. 32549, (not printed), 1995 ICC LEXIS 173, served July 5, 1995.

CERTIFICATE OF SERVICE

I hereby certify that on May 5, 1998, a copy of the foregoing Response of New York & Atlantic Railway was served by first-class mail, postage prepaid on:

- (i) Parties of Record
- (ii) Judge Jacob Leventhal
Federal Energy Regulatory Commission
888 First Street, NE., Suite 11F
Washington, DC 20006-3939
- (iii) Honorable Janet Reno
Attorney General of the United States
Department of Justice
950 Pennsylvania Avenue, N.W.
Room 4440
Washington, D.C. 20530-0001
- (iv) U.S. Secretary of Transportation
Department of Transportation
400 7th Street, S.W.
Washington, D.C. 20590


Rose-Michele Weinryb, Esq.