STB FD 33388 12-23-97 C 28766

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SEC

SERVICE DATE - DECEMBER 29, 1997

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

Decision No. 60

Dated: December 23, 1997

NOTICE TO THE PARTIES:

On December 12, 1997, the Board served the Draft Environmental Impact Statement in this proceeding. This is to notify persons who received a copy of the draft EIS that two dates in the procedural schedule were incorrect. In the Tables in the Executive Summary (Table ES-1, pp. ES-7 to ES-8) and in Chapter 1 (Table 1-1, p. 1-9), the dates for filing rebuttals in support of Inconsistent and Responsive Applications and for submitting briefs are incorrect. The correct due dates are: (1) **January 14, 1998** for filing of rebuttals in support of Inconsistent and Responsive Applications and (2) **February 23, 1998** for all parties to submit briefs.

Additionally, we wish to clarify that the Draft EIS is comprised of a separate Executive Summary and six volumes of text. These six volumes are divided into nine separate books.

Finally, please note that when following the instructions for how and where to file comments, you should include "Room 715" in the address to avoid any delays.

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SERVICE DATE - LATE RELEASE DECEMBER 19, 1997

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

Decision No. 59

Decided: December 19, 1997

On December 10, 1997, Centerior Energy Corporation (CEC) filed a petition for leave to supplement its comments filed in this proceeding on October 21, 1997.[1] CEC indicates that CSX and NS[2] have recently entered into a settlement agreement with one of its coal suppliers and that the agreement allegedly has a serious, adverse impact on CEC. CEC asks us to grant the request and accept its supplemental comments into the record.

Applicants replied on December 15, 1997. Although applicants contend that CEC's supplemental comments are without merit and are based on a misunderstanding of the agreement, they do not oppose the request to file additional comments. If we grant CEC's petition, however, applicants request a 21-day period in which to file any rebuttal comments or evidence.

In correspondence (designated CEC-16) filed December 17, 1997, CEC opposes applicants' rebuttal request on the ground that applicants have already commented on the terms of the agreement. We will grant CEC's petition for leave to supplement its comments. Despite CEC's urging to the contrary, we will also allow applicants to file a rebuttal on or before

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[1] CEC designated the confidential, unredacted version of its petition as CEC-14, while the public, redacted version is designated as CEC-15. CEC tendered its supplemental comments with its petition.

[2] CSX refers to CSX Corporation and CSX Transportation, Inc. NS refers to Norfolk Southern Corporation and Norfolk Southern Railway Company. In this proceeding, CSX and NS seek approval and authorization under 49 U.S.C. 11323-25 for: (1) the acquisition of control of Conrail Inc., and Consolidated Rail Corporation (Conrail); and (2) the division of Conrail's assets by and between CSX and NS. CSX and NS are referred to as applicants for the purposes of this decision.

December 30, 1997. This would give applicants until 11 days after the date of service of this decision, or 20 days after the filing date of CEC's petition, to respond.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. CEC's petition for leave to file supplemental comments is granted. The supplemental comments of CEC are accepted into the record.

2. Applicants' rebuttal comments or evidence will be due on December 30, 1997.

3. This decision is effective on its service date.

By the Board, Chairman Morgan and Vice Chairman Owen.

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SERVICE DATE - LATE RELEASE DECEMBER 5, 1997

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

Decision No. 58

Decided: December 5, 1997

On November 24, 1997, CSX and NS[1] filed an appeal (designated as CSX/NS-171) requesting that we reverse discovery rulings issued by Administrative Law Judge Jacob Leventhal on November 20, 1997. In his discovery decision, Judge Leventhal denied applicants' motion to compel certain responsive applicants (respondents) to produce information relative to the conditions they seek in this proceeding. Applicants contend that Judge Leventhal's discovery rulings are erroneous and result in manifest injustice by denying access to information relevant and necessary to prepare their rebuttal filing. Respondents replied to the appeal on December 1, 1997.

BACKGROUND

Respondents Illinois Central Railroad Company (ICR) and Wisconsin Central, Ltd. (WCL) filed responsive applications on October 21, 1997. A separate responsive application was filed jointly by Transtar, Inc. (Transtar), and respondents Elgin, Joliet and Eastern Railway (EJE) and I&M Rail Link, LLC (IMRL). In each instance, the responsive applications seek divestiture or acquisition of track or property to redress adverse competitive impacts allegedly

[1] CSX refers to CSX Corporation and CSX Transportation, Inc. NS refers to Norfolk Southern Corporation and Norfolk Southern Railway Company. In this proceeding, CSX and NS seek approval and authorization under 49 U.S.C. 11323-25 for: (1) the acquisition of control of Conrail Inc., and Consolidated Rail Corporation (Conrail); and (2) the division of Conrail's assets by and between CSX and NS. Conrail did not join in the appeal by CSX and NS that is under consideration here. CSX and NS are referred to as applicants for the purposes of this decision.

resulting from the sought approval of the primary application.[2] On November 5 and 6, 1997, CSX and NS served respondents with interrogatories and document requests to determine the relationship between the relief sought and the proposed transaction. In the case of EJE and IMRL, applicants sought information with respect to the timing of discussions regarding IMRL's joinder with EJE in their responsive application.

Respondents, all represented by the same counsel, objected to applicants' interrogatories and document requests on the ground that the information sought is not relevant nor reasonably calculated to lead to the discovery of admissible evidence. WCL also objected on the ground that the discovery requests sought information already within CSX's possession, custody, or control. CSX and NS subsequently filed a motion to compel (See CSX/NS-163), seeking an appropriate discovery order from Judge Leventhal. At the discovery oral argument, Judge Leventhal denied the motion to compel as it related to all of applicants' discovery requests, finding that the information sought was not relevant to the merits of the responsive applications.[3]

DISCUSSION AND CONCLUSIONS

On appeal, applicants indicate that, in previous rail merger proceedings, when the Board, or its predecessor, the Interstate Commerce Commission, was asked to apply its conditioning authority, the agency has repeatedly cited the principle that conditions will not be imposed to remedy problems that existed before the merger at hand. Because there must be a nexus between the merger and the alleged harm that the proposed condition would remedy, applicants argue that it is entirely appropriate for them to inquire about conditions as they existed prior to the transaction. According to CSX and NS, Judge Leventhal's denial of the motion to compel limited their ability to obtain evidence that would determine whether respondents' alleged problems are in fact merger-related or, as applicants will evidently assert, predate the proposed acquisition of Conrail. With respect to discovery directed to EJE and IMRL, applicants maintain

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[2] ICR and WCL seek Board orders compelling CSX to sell, respectively: (1) approximately 2 miles of track from Leewood to Aulon in Memphis, TN, to ICR; and (2) the Altenheim Subdivision of the Baltimore & Ohio Chicago Terminal Railroad to WCL. Transtar, EJE, and IMRL seek to acquire Conrail's 51% stock ownership in the Indiana Harbor Belt Railroad Company.

[3] See discovery conference transcript, November 20, 1997, at 135 (denying the motion to compel with respect to EJE), at 155 (denying the motion to compel with respect to IMRL), at 198 (denying the motion with respect to WCL), and at 211 (denying the motion with respect to ICR). NS does not join in the appeal insofar as it relates to the Judge's decision with respect to ICR.

that, because IMRL had not previously appeared in the proceeding, inquiry into the time period involved in the carriers' negotiations over IMRL's participation is relevant to a determination of how much advance thought and planning went into their responsive application. Applicants indicate that their requests regarding timing are similar to questions asked repeatedly of CSX and NS witnesses during discovery without objection.

Respondents contend that applicants failed to meet the strict standards that would justify overturning the Judge's discovery decision. Respondents indicate that, to the extent applicants believe the harms described by ICR and WCL previously existed, applicants have asked, and ICR and WCL have answered, numerous interrogatories designed to elicit evidence of those past conditions. In regard to information about past purchase offers and inquiries, respondents state that, by definition, applicants already possess the evidence they seek. Respondents maintain that, accordingly, denial of discovery related to past purchase offers will not deny applicants the opportunity to conduct discovery to determine whether the competitive harms predate the proposed transaction. With regard to the discovery sought from EJE and IMRL, respondents maintain that information relative to the timing of discussions has no bearing on whether the condition requested is designed to address an anticompetitive effect of the proposed transaction.

Appeals from discovery decisions issued by the Administrative Law Judge will be granted only "in exceptional circumstances to correct a clear error of judgment or to prevent manifest injustice." 49 CFR 1115.1(c). Appeals from discovery orders "are not favored," id., and the standards for prevailing on such appeals are "stringent." See Decision No. 17, slip op. at 2 (July 31, 1997).

It is apparent that applicants have not been denied the opportunity to conduct discovery in the areas they are concerned with here. Applicants have asked and ICR and WCL have answered a number of interrogatories designed to adduce evidence as to whether the competitive harms described by ICR and WCL in their responsive applications predate the proposed transaction. Respondents objected to some, but not all, of applicants' discovery requests related to IMRL's agreement with EJE. Judge Leventhal exercised his discretion in denying discovery as to these additional requests by applicants. Judge Leventhal's denial of discovery is not a clear error of judgment, nor does it constitute manifest injustice. The appeal (CSX/NS-171) will be denied.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The CSX/NS-171 appeal of Judge Leventhal's discovery order is denied.

2. This decision is effective on its service date.

By the Board, Chairman Morgan and Vice Chairman Owen.

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JACKSON MS 39205 US

WILLIAM P HERNAN JR GENERAL CHAIRMAN
P O BOX 180
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THOMAS M O'LEARY
OHIO RAIL DEVELOPMENT COMMISSION
50 W BROAD STREET 15TH FLOOR
COLUMBUS OH 43215 US

DOREEN C JOHNSON, CHIEF ANTITRUST SECTION
OHIO ATTY GENERAL OFFICE
30 E BROAD STREET 16TH FLOOR
COLUMBUS OH 43215 US

JAMES R JACOBS
JACOBS INDUSTRIES
2 QUARRY LANE
STONY RIDGE OH 43463 US

ROBERT E GREENLESE
TOLEDO-LUCAS COUNTY PORT AUTHORITY
1 MARITIME PLAZA SUITE 700
TOLEDO OH 43604 US

RON MARQUARDT
LOCAL UNION 1810 UMWA
R D #2
RAYLAND OH 43943 US

CHARLES S HESSE, PRESIDENT
CHARLES HESSE ASSOCIATES
8270 STONEY BROOK DRIVE
CHAGRIN FALLS OH 44023 US

ANITA R BRINDZA
THE ONE FIFTEEN HUNDRED BUILDING
11500 FRANKLIN BLVD SUITE 104
CLEVELAND OH 44102 US

CHRISTOPHER C MCCRACKEN
ULMER & BERNE LLP
1300 EAST NINTH STREET SUITE 900
CLEVELAND OH 44114 US

JAY WESTBROOK
CITY HALL RM 216
601 LAKESIDE AV NE
CLEVELAND OH 44114 US

DAVID J MATTY
CITY OF ROCKY RIVER
21012 HILLIARD ROAD
ROCKY RIVER OH 44116-3398 US

C D WINEBRENNER
GENERAL CHAIRPERSON UTU
27801 EUCLID AV RM 200
EUCLID OH 44132 US

SYLVIA R. CHINN-LEVY
NEFCO
969 COPLEY ROAD
AKRON OH 44320 US

D G STRUNK JR
GENERAL CHAIRPERSON UTU
817 KILBOURNE STREET
BELLEVUE OH 44811 US

BRAD F HUSTON
CYPRUS AMAX COAL SALES CORP
400 TECHNECENTER DRIVE STE 320
MILFORD OH 45150 US

ROBERT EDWARDS
EASTERN TRANSPORT AND LOGISTICS
1109 LANETTE DRIVE
CINCINNATI OH 45230 US

MICHAEL P. FERRO
MILLENNIUM PETROCHEMICALS, INC.
11500 NORTHLAKE DRIVE
CINCINNATI OH 45249 US

F RONALDS WALKER
CITIZENS GAS & COKE UTILITY
2020 N MERIDIAN STREET
INDIANAPOLIS IN 46202-1393 US

J PATRICK LATZ
HEAVY LIFT CARGO SYSTEM
PO BOX 51451
INDIANAPOLIS IN 46251-0451 US

DENISE L SEJNA CITY ATTORNEY
CITY OF HAMMOND
5925 CALUMET AV
HAMMOND IN 46320 US

CARL FELLER
DEKALB AGRA INC
P. O. BOX 127
4743 COUNTY ROAD 28
WATERLOO IN 46793-0127 US

DAVID ROLOFF
GOLDSTEIN & ROLOFF
526 SUPERIOR AVENUE EAST SUITE 1440
CLEVELAND OH 44114 US

MICHAEL J GARRIGAN
BP CHEMICALS INC
4440 WARRENSVILLE CTR RD
CLEVELAND OH 44128 US

GARY A EBERT
CITY OF BAY VILLAGE
350 DOVER CENTER ROAD
BAY VILLAGE OH 44140 US

CHARLES E ALLENBAUGH JR
EAST OHIO STONE COMPANY
2000 W BESSON ST
ALLIANCE OH 44601 US

RICHARD E. KERTH, TRANS. MGR.
CHAMPION INTERNAT'L CORP
101 KNIGHTSBRIDGE DRIVE
HAMILTON OH 45020-0001 US

FAY D DUPUIS
CITY OF CINCINNATI
801 PLUM STREET
CINCINNATI OH 45202 US

HONORABLE ROB PORTMAN
U. S. HOUSE OF REPRESENTATIVES
8044 MONTGOMERY ROAD, ROOM 540
CINCINNATI OH 45236 US

THOMAS R RYDMAN PRESIDENT
INDIAN CREEK RAILROAD COMPANY
3905 W 600 NORTH
ANDERSON IN 46011 US

LARRY D MACKLIN
INDIANA DIVISION OF HISTORIC PRESERVATION
402 W WASHINGTON STREET RM 274
INDIANAPOLIS IN 46204 US

MICHAEL CONNELLY
CITY OF EAST CHICAGO
4525 INDIANAPOLIS BLVD
EAST CHICAGO IN 46312 US

HAMILTON L CARMOUCHE, CORPORATION COUNSEL
CITY OF GARY
401 BROADWAY 4TH FLOOR
GARY IN 46402 US

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CENTRAL RAILROAD COMPANY OF INDIANAPOLIS
PO BOX 554
KOKOMO IN 46903-0554 US

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BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
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SOUTHFIELD MI 48076 US

JAMES E SHEPHERD
TUSCOLA & SAGINAW BAY
PO BOX 550
OWOSSO MI 48867-0550 US

HON JOHN ENGLER
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P O BOX 30050
LANSING MI 48933 US

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601 SECOND AVENUE SOUTH 4200 FIRST BANK PLACE
MINNEAPOLIS MN 55402-4302 US

JEFFREY R. MORELAND
THE BURLINGTON NORTHERN SANTA FE CORPORATION
1700 EAST GOLF ROAD
SCHAUMBURG IL 60173 US

RICHARD A GAVRIL
16700 GENTRY LANE NO 104
TINLEY PARK IL 60477 US

THOMAS J HEALEY
OPPENHEIMER, WOLFF, ETAL
180 N STETSON AV 2 PRUDENTIAL PL
CHICAGO IL 60601 US

KEVIN BRUBAKER
ENVIRONMENTAL LAW AND POLICY CENTER OF THE MI
203 NORTH LASALLE ST, SUITE 1390
CHICAGO IL 60601 US

EILEEN CAREY
CITY OF CHICAGO CITY HALL RM 700
121 NORTH LASALLE STREET
CHICAGO IL 60602 US

EDWARD C MCCARTHY
INLAND STEEL INDUSTRIES INC
30 WEST MONROE STREET
CHICAGO IL 60603 US

MARK H. SIDMAN
LOUISVILLE & INDIANA RAILROAD COMPANY
53 W. JACKSON BOULEVARD, STE 350
CHICAGO IL 60604 US

SHELDON A ZABEL
SCHIFF HARDIN & WAITE
7200 SEARS TOWER
CHICAGO IL 60606 US

NIGOLE HARVEY
THE DOW CHEMICAL COMPANY
2020 DOW CENTER
MIDLAND MI 48674 US

LARRY B. KARNES
TRANSPORTATION BUILDING
PO BOX 30050
425 WEST OTTAWA
LANSING MI 48909 US

T SCOTT BANNISTER
T SCOTT BANNISTER AND ASSOCIATES
1300 DES MOINES BLDG 405 SIXTH AVENUE
DES MOINES IA 50309 US

LEO J WASESCHA
GOLD MEDAL DIVISON - GENERAL MILLS OPERATION
P.O.BOX 1113
NUMBER ONE GENERAL MILLS BULEVARD
MINNEAPOLIS MN 55440 US

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P. O.BOX 1123
7601 WEST 79TH STREET
BRIDGEVIEW IL 60455 US

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CHICAGO IL 60601 US

WILLIAM C SIPPEL
OPPENHEIMER WOLFF & DONNELLY
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CHICAGO IL 60601 US

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IL ASSISTANT ATTORNEY GENERAL
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CHICAGO IL 60601 US

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EARL L NEAL AND ASSOCIATES
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CHICAGO IL 60602 US

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INDIANA HARBOR BELT RR
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CHICAGO IL 60604 US

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MDCO CONSULTANTS, INC.
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CHICAGO IL 60605 US

THOMAS F. MCFARLAND, JR.
MCFARLAND & HERMAN
20 NORTH WACKER DRIVE, SUITE 1330
CHICAGO IL 60606-3101 US

SCOTT BERNSTEIN
CENTER FOR NEIGHBORHOOD TECHNOLOGY
2125 WST NORTH AVENUE
CHICAGO IL 60647 US

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UNITED TRANSPORTATION UNION
1400-20TH STREET
GRANITE CITY IL 62040 US

LYNN HISER
A E STALEY MANUFACTURING COMPANY
2200 E ELDORADO STREET
DECATUR IL 62525 US

SCOTT A RONEY
ARCHER DANIELS MIDLAND COMPANY
P O BOX 1470
4666 FARIES PARKWAY
DECATUR IL 62525 US

K. N. THOMPSON
UTU, GENERAL CHAIRPERSON
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ST LOUIS MO 63128 US

R A GRICE
GENERAL CHAIRPERSON UTU
11017-F GRAVOIS INDUSTRIAL PLAZA
ST LOUIS MO 63128 US

IAN MUIR
BUNGE CORPORATION
P O BOX 28500
ST LOUIS MO 63146 US

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217 SE 4TH ST 2ND FLOOR
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MIKE SPAHIS
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DALLAS TX 75206 US

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OXYCHEM
P O BOX 809050
DALLAS TX 75380 US

RICHARD J SCHIEFELBEIN
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W DAVID TIDHOLM
HUTCHESON & GRUNDY
1200 SMITH STREET #3300
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HOUSTON TX 77024 US

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2801 POST OAK BLVD
HOUSTON TX 77056 US

STEVE M COULTER
EXXON COMPANY USA
PO BOX 3272
HOUSTON TX 77253-3272 US

MONTY L PARKER
CMC STEEL GROUP
P O BOX 911
SEGUIN TX 78156 US

STEPHEN M UTHOFF
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LONG BEACH CA 90802 US

J D FITZGERALD
UTU, GENERAL CHAIRPERSON
400 E EVERGREEN BLVD STE 217
VANCOUVER WA 98660-3264 US

Records: 354

STB FD 33388 12-5-97 C 28680

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SEC

SERVICE DATE - DECEMBER 5, 1997

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

Decision No. 57

Decided: December 3, 1997

NOTICE TO THE PARTIES:

The service list in this proceeding was issued on August 19, 1997 (Decision No. 21),[1] and was compiled from the notices of intent to participate submitted in accordance with the procedural schedule set forth in Decision No. 6, served May 30, 1997. Subsequently, the Board received timely filed additions and corrections to the service list, and also motions/requests for leave to late-file notices of intent to participate, and late-filed corrections. On October 7, 1997, a Notice to the Parties (Decision No. 43), was served in this proceeding, and the final service list, which incorporated the additions, deletions, and revisions that were received, was attached as an Appendix to the Notice.

Since issuance of the final service list on October 7, 1997, the Board continues to receive late-filed additions/corrections to the service list, and a petition for leave to intervene, which are described, as follows:

Late-filed Motions/Requests for Leave to Late-file a Notice of Intent to Participate. The Board has received motions/requests for leave to late-file a notice of intent to participate in this proceeding from the following parties: (1) John M. Cutler, Jr., counsel for Orange and Rockland Utilities, Inc., received October 8, 1997; (2) Richard F. Friedman, Earl L. Neal & Associates, attorneys for the Illinois International Port District (the Port of Chicago), received

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[1] In a Notice to the Parties served September 8, 1997 (Decision No. 27), the Board advised that the address for Robert J. Cooper, shown on the service list attached to Decision No. 21, was incorrect and provided the correct address.

October 21, 1997. These motions are granted, and the names will be added to the service list representing the entities, as herein noted.

Late-filed Additions to the Service List/Notices of Appearance. On October 21, 1997, the Board received letters from Robert A. Wimbish of the law firm, Rea, Cross & Auchincloss, stating that his name should be added to the service list as representing the Toledo-Lucas County Port Authority (TLCPA) and Wyandot Dolomite, Inc. (Wyandot). He filed the notices of appearance late because his firm was just recently retained to represent these entities. TLCPA and Wyandot will be added to the service list as entities represented by Mr. Wimbish. (Mr. Wimbish is already on the service list representing other parties.)

Clarification of Appearance. By letter received October 9, 1997, Keith G. O'Brien, of the law firm Rea, Cross & Auchincloss, requested a clarification of appearance on behalf of the Ohio Rail Development Commission and the Public Utilities Commission of Ohio to include the Attorney General's Office of the State of Ohio. Accordingly, the Attorney General's Office of the State of Ohio will be added to the service list as being represented by Mr. O'Brien.

Clarification/Substitution of Counsel. The service list issued by the Board on August 19, 1997 (Decision No. 21), showed Edward J. Fishman, Oppenheimer Wolff & Donnelly, Washington, D.C., as a Party of Record representing several entities. Because another member of the law firm, Kevin M. Sheys, has been signing most of the filings submitted to the Board, counsel has confirmed that Mr. Sheys' name should be substituted for Mr. Fishman's name on the service list. Because Mr. Fishman has already received copies of previous filings from Parties of Record, it is not necessary to send copies of previous filings to Mr. Sheys. However, **future filings** must be served on Mr. Sheys.

On December 2, 1997, the Board received a letter from Clark Evans Downs of the law firm Jones, Day, Reavis & Pogue, requesting that his name be substituted as a Party of Record representing National Lime & Stone Company (NLSC), in lieu of John C. Gordon. NLSC's initial filing in this proceeding, a notice of intent to participate, was made by Mr. Gordon, and Mr. Gordon's name is shown on the August 19, 1997 service list as a Party of Record representing NLSC. Subsequently, Mr. Downs' law firm was asked to represent NLSC with respect to this proceeding. In accordance with Mr. Downs' request, his name will be added to the service list as a Party of Record representing NLSC, and Mr. Gordon's name will be deleted from the service list.

Clarification of Status as an Active Party of Record. By letter received November 13, 1997, Thomas F. McFarland, Jr., of the law firm McFarland & Herman, notified the Board that he is serving on all Parties of Record copies of comments dated October 21, 1997, on behalf of

the Eight State Rail Preservation Group (Eight State). Those comments were previously filed with the Board and were served on counsel for applicants but copies of the comments inadvertently were not sent to all Parties of Record at that time. By serving the comments on all parties, Eight State intends to clarify its status as an active Party of Record, represented by Mr. McFarland. Therefore, Eight State will be added to the service list as an entity represented by Mr. McFarland. (Mr. McFarland is already on the service list representing another party.)

Notices of Withdrawal of Counsel/Parties of Record. On October 14, 1997, the Board was notified by Sandra L. Nunn to remove her name as a Party of Record. Her client, Southwest Ohio Regional Transit Authority, has decided not to paticipate further in this case. Ms. Nunn's name will be deleted from the service list.

On October 23, 1997. the Board was notified that Delmarva Power & Light Company (Delmarva) was withdrawing as a Party of Record in this proceeding. A Notice of Withdrawal of Counsel for Delmarva was filed by Michael F. McBride. Delmarva will be deleted from the service list as being represented by Mr. McBride. (Mr. McBride is shown on the service list as representing other parties.)

Withdrawal from Proceeding. By letter dated and received October 20, 1997, Nicholas J. DiMichael, of the law firm Donelan, Cleary, Wood & Maser, P.C., notified the Board that the following entities are withdrawing from this proceeding: Anker Energy Corporation; Buffalo Coal Company; Evergreen Mining Company; Maryland Coal Association; Mettiki Coal Corporation; PBS Coals, Inc.; Tri-State Coal Association; and Venture Coal Sales. (West Virginia Coals, Inc., is not withdrawing from this proceeding, and adopts the acronym "WVCI" for any future filings.) Mr. DiMichael will continue to represent WVCI.

By letter received November 13, 1997, Jack Walter, Director, Corporate Affairs, WCI Steel, Inc. (WCI), notified the Board that WCI is withdrawing from this proceeding as a Party of Record. Therefore, Mr. Walter's name will be deleted from the service list as a Party of Record representing WCI.

On November 19, 1997, the Board received a letter from Nels Ackerson of The Ackerson Group, requesting that his name be withdrawn as a Party of Record in this proceeding representing the National Association of Reversionary Property Owners and Landowners (NARPO). Mr. Ackerson has also confirmed that NARPO is no longer a party to this proceeding. Accordingly, Mr. Ackerson's name will be deleted from the service list as a Party of Record representing NARPO.

Removal of Name from the Service List. On November 13, 1997, the Board received a letter from Mitchell M. Kraus, General Counsel, Transportation Communications International Union (TCU), requesting the Board to delete the name of Larry R. Pruden, Assistant General Counsel, TCU, from the service list in this proceeding as a Party of Record because Mr. Pruden is no longer employed by TCU. Mr. Pruden's name will, therefore, be deleted from the service list. (Mr. Kraus is already on the service list as a Party of Record representing TCU and other parties.)

Intervention Petition filed by Members of the U.S. House of Representatives. On October 17, 1997, an intervention petition was filed by The Honorable Jerrold Nadler, Member of Congress, 8th Congressional District, New York, and 23 other Members of Congress[2] (intervenors) and John F. McHugh, McHugh & Sherman, Esqs., attorneys for the intervenors, for inclusion of a cross-harbor float operation across New York Harbor, the Bay Ridge Line of the Long Island Railroad, the New York connecting railroad, Oak PointYard, Harlem River Yard, the New York Terminal Produce Market, 65th Street Yard and Fresh Pond Junction in the joint facilities railroad proposed by the Norfolk Southern Corporation, Norfolk Southern Railway Company, CSX Corporation, and CSX Transportation, Inc., as a condition of the acquisition requested. The intervenors are elected representatives of the people of the States of New York and Connecticut in the House of Representatives of the United States. The petition for leave to intervene in this proceeding is granted. Accordingly, Congressman Nadler and Mr. McHugh will be added to the service list as "Parties of Record," and the other Members of Congress who signed the intervention petition will be added to the service list as "Members of Congress."

The final service list incorporates the additions, deletions, and revisions shown in the Appendix attached to this Notice. All Parties of Record who have filed pleadings in this proceeding must, within 5 days of the service date of this Notice, serve a copy of those pleadings on the designated Parties of Record that are **added** to the service list, and submit an original and 10 copies of a certificate of service to the Secretary of the Board indicating that service has been accomplished.

All future filings must each have a certificate of service indicating that all Parties of Record have been properly served with a copy of the filing. **Parties are reminded that, in**

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[2] The intervention petition was also signed by the following Members of the U.S. House of Representatives, The Honorable: Christopher Shays, Charles Rangel, Ben Gilman, Barbara Kennelly, Nancy Johnson, Charles Schumer, Rosa DeLauro, Michael Forbes, Sam Gejdenson, Nita Lowey, Major Owens, Thomas Manton, Maurice Hinchey, Ed Towns, Carolyn B. Maloney, Nydia M.Velazquez, Floyd Flake, Gary Ackerman, Eliot L. Engel, Louise M. Slaughter, John LaFalce, Michael McNulty, and James Maloney.

addition to submitting an original and 25 paper copies of each document filed with the Board, parties are also requested to submit, on diskettes (3.5-inch IBM-compatible floppies formatted for WordPerfect 7.0 or formatted so that they can be converted into WordPerfect 7.0) or compact discs, one electronic copy of each such document. (See Decision No. 12, served July 23, 1997, and published that day in the Federal Register at 62 FR 39577).

Vernon A. Williams
Secretary

APPENDIX

THE FOLLOWING NAMES SHOULD BE **ADDED** TO THE SERVICE LIST AS **PARTIES OF RECORD**:

PARTY OF RECORD
John M.Cutler, Jr.
McCarthy, Sweeney & Harkaway, P.C.
Suite 1105
1750 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Represents: Orange and Rockland Utilities, Inc.

PARTY OF RECORD
Clark Evans Downs
Jones, Day, Reavis & Pogue
1450 G Street, N.W.
Washington, D.C. 20005-2088

Represents: National Lime & Stone Company

PARTY OF RECORD
Richard F. Friedman
Earl L. Neal & Associates
3600 East 95th Street
Chicago, IL 60617-5193

Represents: Illinois International Port District (the Port of Chicago)

PARTY OF RECORD
John F. McHugh
McHugh & Sherman, Esqs.
20 Exchange Place
New York, NY 10005

Represents: The Honorable Jerrold Nadler, The Honorable Christopher Shays, The Honorable Charles Rangel, The Honorable Ben Gilman, The Honorable Barbara Kennelly, The Honorable Nancy Johnson, The Honorable Charles Schumer, The Honorable Rosa DeLauro, The Honorable Michael Forbes, The Honorable Sam Gejdenson, The Honorable Nita Lowey, The Honorable Major Owens, The Honorable Thomas Manton, The Honorable Maurice Hinchey, The Honorable Ed Towns, The Honorable Carolyn B. Maloney, The Honorable Nydia M. Velazquez, The Honorable Floyd Flake, The Honorable Gary Ackerman, The Honorable Eliot L. Engel, The Honorable Louise M. Slaughter, The Honorable John LaFalce, The Honorable Michael McNulty, and The Honorable James Maloney, Members of the U.S. House of Representatives.

PARTY OF RECORD
The Honorable Jerrold Nadler
U.S. House of Representatives
Washington, D.C. 20515

PARTY OF RECORD
Kevin M. Sheys
Oppenheimer Wolff & Donnelly
1020 Nineteenth Street, N.W., Suite 400
Washington, D.C. 20036-6105

Represents: Livonia, Avon and Lakeville Railroad Corporation and Vermont Railway, Inc.
New Jersey Department of Transportation
New Jersey Transit Corporation
Northern Virginia Transportation Commission
Potomac and Rappahannock Transportation Commission
R. J. Corman Railroad Company/Western Ohio Line (R. J. Corman Parties)

THE FOLLOWING NAMES SHOULD BE **ADDED** TO THE SERVICE LIST AS **MEMBERS OF CONGRESS**:

MEMBER OF CONGRESS
The Honorable Gary Ackerman
U.S. House of Representatives
Washington, D.C. 20515

MEMBER OF CONGRESS
The Honorable Rosa DeLauro
U.S. House of Representatives
Washington, D.C. 20515

MEMBER OF CONGRESS
The Honorable Eliot L. Engel
U.S. House of Representatives
Washington, D.C. 20515

MEMBER OF CONGRESS
The Honorable Floyd Flake
U.S. House of Representatives
Washington, D.C. 20515

MEMBER OF CONGRESS
The Honorable Michael Forbes
U.S. House of Representatives
Washington, D.C. 20515

MEMBER OF CONGRESS
The Honorable Sam Gejdenson
U.S. House of Representatives
Washington, D.C. 20515

MEMBER OF CONGRESS
The Honorable Ben Gilman
U.S. House of Representatives
Washington, D.C. 20515

MEMBER OF CONGRESS
The Honorable Maurice Hinchey
U.S. House of Representatives
Washington, D.C. 20515

MEMBER OF CONGRESS
The Honorable Nancy Johnson
U.S. House of Representatives
Washington, D.C. 20515

MEMBR OF CONGRESS
The Honorable Barbara Kennelly
U.S. House of Representatives
Washington, D.C. 20515

MEMBER OF CONGRESS
The Honorable John LaFalce
U.S. House of Representatives
Washington, D.C. 20515

MEMBER OF CONGRESS
The Honorable Nita Lowey
U.S. House of Representatives
Washington, D.C. 20515

MEMBER OF CONGRESS
The Honorable Carolyn B. Maloney
U.S. House of Representatives
Washington, D.C. 20515

MEMBER OF CONGRESS
The Honorable James Maloney
U.S. House of Representatives
Washington, D.C. 20515

MEMBER OF CONGRESS
The Honorable Thomas Manton
U.S. House of Representatives
Washington, D.C. 20515

MEMBER OF CONGRESS
The Honorable Michael McNulty
U.S. House of Representatives
Washington, D.C. 20515

MEMBER OF CONGRESS
The Honorable Major Owens
U.S. House of Representatives
Washington, D.C. 20515

MEMBER OF CONGRESS
The Honorable Charles Rangel
U.S. House of Representatives
Washington, D.C. 20515

MEMBER OF CONGRESS
The Honorable Christopher Shays
U.S. House of Representatives
Washington, D.C. 20515

MEMBER OF CONGRESS
The Honorable Charles Schumer
U.S. House of Representatives
Washington, D.C. 20515

MEMBER OF CONGRESS
The Honorable Louise M. Slaughter
U.S. House of Representatives
Washington, D.C. 20515

MEMBER OF CONGRESS
The Honorable Ed Towns
U.S. House of Representatives
Washington, D.C. 20515

MEMBER OF CONGRESS
The Honorable Nydia M. Velazquez
U.S. House of Representatives
Washington, D.C. 20515

THE FOLLOWING NAMES SHOULD BE **DELETED** FROM THE SERVICE LIST AS **PARTIES OF RECORD**:

Nels Ackerson
The Ackerson Group
1275 Pennsylvania Avenue, N.W., Suite 1100
Washington, D.C. 20004-2417

Represents: National Association of Reversionary Property Owners and Landowners

Edward J. Fishman
Oppenheimer Wolff & Donnelly
1020 Nineteenth Street, N.W., Suite 400
Washington, D.C. 20036-6105

John C. Gordon
National Lime & Stone Company
P.O. Box 120
Findlay, OH 45840

Represents: National Lime & Stone Company

Sandra L. Nunn
Frost & Jacobs LLP
2500 PNC Center
201 East Fifth Street
Cincinnati, OH 45202-4182

Represents: Southwest Ohio Regional Transit Authority

Larry R. Pruden
Transportation Communications International Union
3 Research Place
Rockville, MD 20850

Jack Walter
Director, Corporate Affairs
WCI Steel, Inc.
1040 Pine Ave., S.E.
Warren, OH 44483-6528

Represents: WCI Steel, Inc.

THE FOLLOWING PARTIES OF RECORD ARE ALREADY SHOWN ON THE SERVICE LIST BUT HAVE ADVISED THE BOARD OF ADDITIONS/DELETIONS CONCERNING THEIR REPRESENTED ENTITIES. PLEASE ADD OR DELETE THE ENTITIES, AS SHOWN BELOW. **(REVISIONS ARE SHOWN IN BOLD AND UNDERSCORED).**

PARTY OF RECORD
Nicholas J. DiMichael
Donelan, Cleary, Wood & Maser, P.C.
1100 New York Avenue, N.W., Suite 750
Washington, D.C. 20005-3934

Represents: West Virginia Coals, Inc.
[Anker Energy Corporation, Buffalo Coal Co., Inc., Evergreen Mining Company, Maryland Coal Association, Mettiki Coal Corporation, PBS Coals, Inc., Tri-State Coal Association, and Venture Coal Sales]
(Please delete these entities/withdrawing from the proceeding).

PARTY OF RECORD
Michael F. McBride
LeBoeuf, Lamb, Greene & MacRae, L.L.P.
1875 Connecticut Avenue, N.W., Suite 1200
Washington, D.C. 20009-5728

Represents: American Electric Power
Atlantic City Electric Company
The Fertilizer Institute
The Ohio Valley Coal Company and affiliated party The American Coal Sales Company
Indianapolis Power & Light Company

Ohio Mining and Reclamation Association
[Delmarva Power & Light Company] (Please delete this entity/withdrawing from the proceeding).

PARTY OF RECORD
Thomas F. McFarland, Jr.
McFarland & Herman
20 North Wacker Drive, Suite 1330
Chicago, IL 60606-2902

Represents: Kokomo Grain Co., Inc.
Eight State Rail Preservation Group (Please add)

PARTY OF RECORD
Keith G. O'Brien
Rea, Cross and Auchincloss
1920 N Street, N.W., Suite 420
Washington, D.C. 20036

Represents: Ohio Rail Development Commission
Public Utilities Commission of Ohio
Office of the Attorney General, State of Ohio (Please add)
Redland Ohio, Inc.

PARTY OF RECORD
Robert A. Wimbish
Rea, Cross & Auchincloss
1920 N Street, N.W., Suite 420
Washington, D.C. 20036

Represents: Connecticut Central Railroad
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SERVICE DATE - NOVEMBER 28, 1997

SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 33388

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

Decision No. 56

Decided: November 26, 1997

This decision addresses the petition by Steel Warehouse Company, Inc. (SW), filed on November 20, 1997, for leave to file comments out of time.[1] Applicants[2] replied in opposition to SW's petition. See CSX/NS-166, filed on November 21, 1997.

Numerous responsive applications, comments, protests, and requests for conditions were filed with us on or before the October 21, 1997 due date for such filings. In its petition, SW indicates that it did not file comments by October 21, 1997, as required by our procedural schedule established in Decision No. 6,[3] because it believed at the time that its interests would not be adversely affected by the proposed acquisition of Conrail. Also, as a small company, SW hoped to avoid the cost of submitting formal comments. SW states, however, that after the due date for comments passed, it discovered that it would be substantially disadvantaged by the loss

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[1] SW tendered its comments (SW-2) simultaneously with its petition for leave (SW-3).

[2] "Applicants" refers 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). In this proceeding, applicants seek approval and authorization under 49 U.S.C. 11323-25 for: (1) the acquisition by CSX and NS of control of Conrail; and (2) the division of Conrail's assets by and between CSX and NS.

[3] See Decision No. 6, served May 30, 1997, and published that day in the Federal Register at 62 FR 29387.

of competitive rail service, as described more fully in its tendered comments.[4] SW asserts that we previously granted similar requests to late-file comments in this proceeding and that, because applicants have until December 15, 1997, to respond to comments, applicants will not be prejudiced by our granting SW's petition and accepting its comments.

Applicants argue that SW has made no showing that it was prevented in any way from participating in this proceeding or following our established procedures. According to applicants, SW failed to mention that switching carriers have access to its plant and that therefore SW does not qualify as a shipper whose rail options would decline from two carriers to one carrier. Applicants submit that, even if SW's contentions are true regarding NS's refusal to negotiate and the carrier's imposition of service terms (claims that NS states are not true), SW had sufficient time to prepare and submit comments by the October 21 deadline. Applicants also contend that SW's request, filed nearly 1 month after the due date for comments, is untimely and that, contrary to SW's claim, applicants would be prejudiced by such a delayed filing.

SW's request will be denied. SW's petition and comments, filed almost 1 month after the established deadline, is much too late to be accepted into the record. Although we have granted previous extensions to file comments in this proceeding,[5] the requests were made on or before the comment due date and our extensions were limited to only 10 days. We recognize that declining to accept this late-filed pleading might appear harsh, but SW's reasons for asking us to accept the pleading are by no means exceptional or compelling. Moreover, were we to accept the pleading at this late date, the meaning of deadlines in the proceeding would be much diminished and management of the proceeding would be seriously undermined.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

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[4] SW indicates in its comments that, because NS will acquire Conrail's rail line serving its facilities at South Bend, IN, SW will lose the competitive service provided by its current access to both carriers. According to SW, NS is unwilling to negotiate and has imposed significantly less favorable terms on its future rail service to SW's plant. To remedy SW's claimed loss of competitive rail service, SW asks us to require NS to grant trackage rights to Chicago SouthShore & South Bend Railroad Company between SW's South Bend plant and Chicago, IL.

[5] See Decision No. 50, served October 24, 1997.

It is ordered:

1. The petition in SW-3 for leave to file comments out of time is denied. The comments in SW-2 are rejected.

2. This decision is effective on its service date.

By the Board, Chairman Morgan and Vice Chairman Owen.

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SERVICE DATE - NOVEMBER 20, 1997

SURFACE TRANSPORTATION BOARD

DECISION

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

STB Finance Docket No. 33388 (Sub-No. 35)

RESPONSIVE APPLICATION--NEW YORK STATE ELECTRIC AND GAS CORPORATION

STB Finance Docket No. 33388 (Sub-No. 36)

RESPONSIVE APPLICATION--ELGIN, JOLIET & EASTERN RAILWAY COMPANY, TRANSTAR, INC., AND I & M RAIL LINK, LLC

STB Finance Docket No. 33388 (Sub-No. 39)

RESPONSIVE APPLICATION--LIVONIA, AVON & LAKEVILLE RAILROAD CORPORATION

STB Finance Docket No. 33388 (Sub-No. 59)

RESPONSIVE APPLICATION--WISCONSIN CENTRAL LTD.

STB Finance Docket No. 33388 (Sub-No. 61)

RESPONSIVE APPLICATION--BESSEMER AND LAKE ERIE RAILROAD COMPANY

STB Finance Docket No. 33388 (Sub-No. 62)

RESPONSIVE APPLICATION--ILLINOIS CENTRAL RAILROAD COMPANY

STB Finance Docket No. 33388 (Sub-No. 63)

RESPONSIVE APPLICATION--R.J. CORMAN RAILROAD COMPANY/WESTERN OHIO LINE

STB Finance Docket No. 33388 (Sub-No. 69)

RESPONSIVE APPLICATION--STATE OF NEW YORK, BY AND THROUGH ITS DEPARTMENT OF TRANSPORTATION, AND THE NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION

STB Finance Docket No. 33388 (Sub-No. 72)

RESPONSIVE APPLICATION--THE BELVIDERE & DELAWARE RIVER RAILWAY AND THE BLACK RIVER & WESTERN RAILROAD

STB Finance Docket No. 33388 (Sub-No. 75)

RESPONSIVE APPLICATION--NEW ENGLAND CENTRAL RAILROAD, INC.

STB Finance Docket No. 33388 (Sub-No. 76)

RESPONSIVE APPLICATION--INDIANA SOUTHERN RAILROAD, INC.

STB Finance Docket No. 33388 (Sub-No. 77)

RESPONSIVE APPLICATION--INDIANA & OHIO RAILWAY COMPANY

STB Finance Docket No. 33388 (Sub-No. 78)

RESPONSIVE APPLICATION--ANN ARBOR ACQUISITION CORPORATION, D/B/A ANN ARBOR RAILROAD

STB Finance Docket No. 33388 (Sub-No. 80)

RESPONSIVE APPLICATION--WHEELING & LAKE ERIE RAILWAY COMPANY

STB Finance Docket No. 33388 (Sub-No. 81)

RESPONSIVE APPLICATION--CANADIAN NATIONAL RAILWAY COMPANY AND GRAND TRUNK WESTERN RAILROAD INCORPORATED

STB Finance Docket No. 33388 (Sub-No. 83)

GRAND TRUNK WESTERN RAILROAD INCORPORATED--CONSTRUCTION AND OPERATION EXEMPTION--CONNECTING TRACKS AT TRENTON, MI

DECISION NO. 54

AGENCY: Surface Transportation Board.

ACTION: Decision No. 54; Notice of Acceptance of Responsive Applications and Related Filing.

SUMMARY: The Board is accepting for consideration the responsive applications filed: by New York State Electric and Gas Corporation (NYSEG) in STB Finance Docket No. 33388 (Sub-No. 35); jointly by Elgin, Joliet & Eastern Railway Company, Transtar, Inc., and I & M Rail Link, LLC in STB Finance Docket No. 33388 (Sub-No. 36);[1] by Livonia, Avon & Lakeville Railroad Corporation (LAL) in STB Finance Docket No. 33388 (Sub-No. 39); by Wisconsin Central Ltd. (WCL) in STB Finance Docket No. 33388 (Sub-No. 59); by Bessemer and Lake Erie Railroad Company (BLE) in STB Finance Docket No. 33388 (Sub-No. 61); by Illinois Central Railroad Company (IC) in STB Finance Docket No. 33388 (Sub-No. 62); by R.J. Corman Railroad Company/Western Ohio Line (RJCW) in STB Finance Docket No. 33388 (Sub-No. 63); jointly by (i) the State of New York, acting by and through its Department of Transportation (NYDOT), and (ii) the New York City Economic Development Corporation (NYCEDC) in STB Finance Docket No. 33388 (Sub-No. 69);[2] jointly by the Belvidere & Delaware River Railway (BDRV) and the Black River & Western Railroad (BRW) in STB Finance Docket No. 33388 (Sub-No. 72); by New England Central Railroad, Inc. (NECR), in STB Finance Docket No. 33388 (Sub-No. 75); by Indiana Southern Railroad, Inc. (ISRR), in STB Finance Docket No. 33388 (Sub-No. 76); by Indiana & Ohio Railway Company (IORY) in STB Finance Docket No. 33388 (Sub-No. 77); by Ann Arbor Acquisition Corporation, d/b/a Ann Arbor Railroad (AA), in STB Finance Docket No. 33388 (Sub-No. 78); by Wheeling & Lake Erie Railway Company (W&LE) in STB Finance Docket No. 33388 (Sub-No. 80); and jointly by Canadian National Railway Company (CN) and Grand Trunk Western Railroad Incorporated (GTW) in STB Finance Docket No. 33388 (Sub-No. 81). The Board is also accepting for consideration the notice of exemption filed by GTW in STB Finance Docket No. 33388 (Sub-No. 83). The responsive applications filed in STB Finance Docket No. 33388 (Sub-Nos. 35, 36,

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[1] Elgin, Joliet & Eastern Railway Company and Transtar, Inc. are referred to collectively as EJE. I & M Rail Link, LLC is referred to as IMRL.

[2] The responsive application filed jointly by NYDOT and NYCEDC purports to be filed both in STB Finance Docket No. 33388 (Sub-No. 69) (this being the sub-number docket reserved by NYDOT) and in STB Finance Docket No. 33388 (Sub-No. 54) (this being the sub-number docket reserved by NYCEDC). Although there are two responsive applicants there is only one responsive application, and we will treat this single application as if it had been filed in STB Finance Docket No. 33388 (Sub-No. 69) only.

39, 59, 61, 62, 63, 69, 72, 75, 76, 77, 78, 80, and 81) are responsive to the primary application filed June 23, 1997, in STB Finance Docket No. 33388 by CSX Corporation (CSXC), CSX Transportation, Inc. (CSXT), Norfolk Southern Corporation (NSC), Norfolk Southern Railway Company (NSR), Conrail Inc. (CRR), and Consolidated Rail Corporation (CRC).[3] The notice of exemption filed in STB Finance Docket No. 33388 (Sub-No. 83) is related to the responsive application filed in STB Finance Docket No. 33388 (Sub-No. 81).[4]

DATES: The effective date of this decision is November 20, 1997. Comments regarding the responsive filings must be filed with the Board by December 15, 1997. Rebuttal in support of these responsive filings must be filed with the Board by January 14, 1998. Briefs (not to exceed 50 pages) must be filed with the Board by February 23, 1998.

ADDRESSES: An original and 25 copies of all comments referring to STB Finance Docket No. 33388 (Sub-No. 35), STB Finance Docket No. 33388 (Sub-No. 36), STB Finance Docket No. 33388 (Sub-No. 39), STB Finance Docket No. 33388 (Sub-No. 59), STB Finance Docket No. 33388 (Sub-No. 61), STB Finance Docket No. 33388 (Sub-No. 62), STB Finance Docket No. 33388 (Sub-No. 63), STB Finance Docket No. 33388 (Sub-No. 69), STB Finance Docket No. 33388 (Sub-No. 72), STB Finance Docket No. 33388 (Sub-No. 75), STB Finance Docket No. 33388 (Sub-No. 76), STB Finance Docket No. 33388 (Sub-No. 77), STB Finance Docket No. 33388 (Sub-No. 78), STB Finance Docket No. 33388 (Sub-No. 80), STB Finance Docket No. 33388 (Sub-No. 81), and/or STB Finance Docket No. 33388 (Sub-No. 83) must be filed with the Surface Transportation Board, Office of the Secretary, Case Control Unit, ATTN.: STB Finance Docket No. 33388, 1925 K Street, N.W., Washington, DC 20423-0001.[5]

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[3] CSXC and CSXT, and their wholly owned subsidiaries, are referred to collectively as CSX. NSC and NSR, and their wholly owned subsidiaries, are referred to collectively as NS. CRR and CRC, and their wholly owned subsidiaries, are referred to collectively as Conrail or CR. CSX, NS, and Conrail are referred to collectively as the primary applicants.

[4] The responsive applications filed in STB Finance Docket No. 33388 (Sub-Nos. 35, 36, 39, 59, 61, 62, 63, 69, 72, 75, 76, 77, 78, 80, and 81) and the notice of exemption filed in STB Finance Docket No. 33388 (Sub-No. 83) are hereinafter referred to collectively as the "responsive filings."

[5] In order for a document to be considered a formal filing, the Board must receive an original and 25 copies of the document, which must show that it has been properly served on all other parties of record. Documents transmitted by facsimile (FAX) will not be considered formal filings and are not encouraged because they will result in unnecessarily burdensome, duplicative processing in what has already become a voluminous record.

In addition to submitting an original and 25 paper copies of each document filed with the Board, parties are also requested to submit one electronic copy of each such document. Further details respecting such electronic submissions are provided below.

In addition, one copy of each document filed in these proceedings must be served on: the U.S. Secretary of Transportation; the U.S. Attorney General; Administrative Law Judge Jacob Leventhal, Federal Energy Regulatory Commission, 888 First Street, N.E., Suite 11F, Washington, DC 20426; Dennis G. Lyons, Esq., Arnold & Porter, 555 12th Street, N.W., Washington, DC 20004-1202 (representing primary applicants CSXC and CSXT); Richard A. Allen, Esq., Zuckert, Scoutt & Rasenberger, LLP, Suite 600, 888 Seventeenth Street, N.W., Washington, DC 20006-3939 (representing primary applicants NSC and NSR); and Paul A. Cunningham, Esq., Harkins Cunningham, Suite 600, 1300 Nineteenth Street, N.W., Washington, DC 20036 (representing primary applicants CRR and CRC).

In addition, one copy of all comments filed in these proceedings must be served on the appropriate responsive applicant's representative: William A. Mullins, Esq., Troutman Sanders LLP, 1300 I Street, N.W., Suite 500 East, Washington, D.C. 20005-3314 (representing NYSEG); Thomas J. Litwiler, Esq., Oppenheimer Wolff & Donnelly, Two Prudential Plaza, 45th Floor, 180 North Stetson Avenue, Chicago, IL 60601-6710 (representing EJE, IMRL, BLE, IC, and WCL); Kevin M. Sheys, Esq., Oppenheimer Wolff & Donnelly, 1020 Nineteenth Street, N.W., Suite 400, Washington, DC 20036-6200 (representing LAL and RJCW); William L. Slover, Esq., Slover & Loftus, 1224 Seventeenth Street, NW, Washington, DC 20036-3003 (representing NYDOT); Charles A. Spitulnik, Esq., Hopkins & Sutter, 888 Sixteenth Street, NW, Washington, DC 20006 (representing NYCEDC); Peter A. Greene, Esq., Thompson Hine & Flory LLP, 1920 N Street, N.W., Suite 800, Washington, DC 20036 (representing BDRV and BRW); Karl Morell, Esq., Ball Janik LLP, Suite 225, 1455 F Street, N.W., Washington, DC 20005 (representing NECR, ISRR, IORY, and AA); Charles H. White, Jr., Esq., Galland, Kharasch & Gerfinkle, P.C., 1054 Thirty-First Street, N.W., Washington, DC 20007-4492 (representing W&LE); and L. John Osborn, Sonnenschein Nath & Rosenthal, 1301 K Street, N.W., Suite 600 East, Washington, DC 20005 (representing CN and GTW).

In addition, one copy of all documents filed in these proceedings must be served on all other persons designated parties of record on the Board's service list in STB Finance Docket No. 33388. See the service list attached to Decision No. 21 (served August 19, 1997), as modified in Decision No. 27 (served September 8, 1997), and as further modified in Decision No. 43 (served October 7, 1997).[6]

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[6] Members of the United States Congress and Governors are not parties of record and therefore need not be served with copies of filings, unless any such Member or Governor is designated as a party of record. See Decision No. 12 (served July 23, 1997, and published that

(continued...)

FOR FURTHER INFORMATION CONTACT: Julia M. Farr, (202) 565-1613. [TDD for the hearing impaired: (202) 565-1695.]

SUPPLEMENTARY INFORMATION. In the primary application filed with the Board on June 23, 1997, primary applicants CSXC, CSXT, NSC, NSR, CRR, and CRC seek approval and authorization under 49 U.S.C. 11321-25 for: (1) the acquisition by CSX and NS of control of Conrail; and (2) the division of the assets of Conrail by and between CSX and NS. In various related filings also filed June 23, 1997, the primary applicants seek related relief contingent upon approval of the primary application. In Decision No. 12, the Board accepted for consideration the primary application and the various related filings, and directed that responsive applications be filed by October 21, 1997.

RESPONSIVE FILINGS: CONDITIONS REQUESTED. In STB Finance Docket No. 33388 (Sub-No. 35), NYSEG seeks: (1) on behalf of NSR,[7] or a third-party carrier suitable to NYSEG, trackage rights over the CRC lines between Buffalo, NY, and NYSEG's Kintigh Station; specifically, from the Niagara Branch MP 19.0 (CP-21)[8] to the Tuscarora Wye, for approximately 4,200 feet, to Lockport Branch MP 69.6 (CP-69) to the connection with Somerset Railroad Corporation at Lockport Branch MP 58.8 (CP-59) (a total distance of approximately 11.2 miles);[9] or (2) on behalf of CSXT, or a third-party carrier suitable to NYSEG, trackage rights over the CRC lines between Buffalo, NY, and NYSEG's Milliken, Goudey, and Greenidge plants; specifically, from Chicago Line MP 1.7 (CP-DRAW) over the Bison Running Track to

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[6](...continued)
day in the Federal Register at 62 FR 39577), slip op. at 19, 62 FR at 39588.

[7] If exercised by NSR, modification of NSR's trackage rights over CSXT and New York Central Lines LLC (NYC), as shown on pp. 220-52 and 329-35 of Volume 8B of the primary application, would also be required to eliminate any restrictions contained therein that would prevent transportation to NYSEG's Kintigh Station, including, but not confined to, limitations against interchanging with, or operating over, property of Somerset Railroad Corporation.

[8] Milepost is abbreviated MP. Control point is abbreviated CP.

[9] If exercised by a third-party carrier, these rights would include full access over: The Chicago Line between CP-2 and FW Tower (CP-437) and the Belt Line Branch owned by NYC and operated by CSX between the connection at FW Tower (CP-437), Buffalo, NY, at or near MP 0.0, and the connection with the Niagara Branch (CP-1) at or near MP 7.2, and the Niagara Branch operated by CSX between the connection with the Belt Line Branch, at or near MP 7.5, "and to" Tuscarora Wye to CP-69 at MP 69.6 of the Lockport Branch to MP 58.8 (CP-59) and connection track to MP 0.0 of the Somerset Railroad Corporation. This would cover a total distance of approximately 33.2 miles.

Southern Tier Line MP 419.8 to Binghamton MP 215.3 including Binghamton Running Track and #4 Yard Track with connections to: Vestal Industrial Track; on Vestal Industrial Track from MP 192.3 to MP 195.4; and connections to Lehigh Secondary at Southern Tier MP 255.2, Lehigh Secondary Track MP 269.5 to 271.6 and connection to Ithaca Secondary; Ithaca Secondary from MP 271.6 to the end of line at Milliken Station MP 321.0; connections to Corning Secondary at Southern Tier Line MP 290.1 and 290.8, Corning Secondary from MP 70.6 (CP-Glass) and MP 70.9 (GP - Gibson/CP-Corning) to MP 0 (CP-335), including sidings, runarounds, and passing tracks (a total distance of approximately 333.4 miles).

In STB Finance Docket No. 33388 (Sub-No. 36), EJE and IMRL seek to acquire, and thereafter to divide into two equal parts, CRC's 51% stock ownership of the Indiana Harbor Belt Railroad Company (IHB).

In STB Finance Docket No. 33388 (Sub-No. 39), LAL seeks to acquire ownership of or trackage rights on approximately 1.0 route mile of trackage constituting CRC's Genesee Junction yard in Chili, NY.

In STB Finance Docket No. 33388 (Sub-No. 59), WCL seeks to acquire from The Baltimore & Ohio Chicago Terminal Railroad Company (B&OCT, a wholly owned CSX subsidiary) a portion of B&OCT's Altenheim Subdivision, including rail line, side track, yard trackage, and associated right-of-way and appurtenances, beginning at a connection between WCL and B&OCT trackage at B&OCT MP 37.4 at Madison Street, Forest Park, IL, and extending to a point of connection with Union Pacific Railroad Company (UPRR) and Conrail's Panhandle Line in the vicinity of Rockwell Street, Chicago, IL.

In STB Finance Docket No. 33388 (Sub-No. 61), BLE seeks overhead trackage rights over: (1) CRC's Mon Line between the connection with BLE (Union Railroad Company, a BLE affiliate) at Pittsburgh (Duquesne), PA, and CRC's Shire Oaks Yard in Shire Oaks, PA (a distance of approximately 14 miles); and/or (2) CSXT's line (formerly the Pittsburgh & Lake Erie Railroad Company) between the connection with BLE (Union Railroad Company) at Bessemer (Pittsburgh), PA, and CSXT's Newell Interchange Yard near Brownsville, PA (a distance of approximately 40 miles). The overhead trackage rights sought by BLE would be restricted to the transportation of coal originating at current or future mines on the former Monongahela Railway Company lines and destined to the P&C Dock at Conneaut, OH, for movement beyond.

In STB Finance Docket No. 33388 (Sub-No. 62), IC seeks to acquire CSXT's Leewood-Aulon Line in Memphis, TN, which extends between CSXT MP F-371.4 (IC MP 387.9) at Leewood and CSXT MP F-373.4 (IC MP 390.0) at Aulon, a distance of approximately 2 miles.

In STB Finance Docket No. 33388 (Sub-No. 63), RJCW seeks to acquire ownership of or trackage rights on Conrail's line of railroad between approximately MP 54.4 and approximately MP 52.1 in Lima, OH.

In STB Finance Docket No. 33388 (Sub-No. 69), NYDOT and NYCEDC seek: (1) full service trackage rights in favor of a rail carrier other than Conrail or CSX, to be designated jointly by NYDOT and NYCEDC, over the lines of Conrail between points of connection with the Delaware & Hudson Railway (D&H) at CP-160 near Schenectady, NY, and Selkirk Yard near Selkirk, NY, on the one hand, and, on the other, CP-75 near Poughkeepsie, NY, together with sufficient rights on tracks within Selkirk Yard to permit the efficient interchange of freight with D&H; (2) full service trackage rights in favor of a rail carrier other than Conrail or CSX, to be designated jointly by NYDOT and NYCEDC, over the lines of Conrail between the point of Conrail ownership at Mott Haven Junction ("MO"), NY, and the point of connection with the lines of the Long Island Railroad near Fresh Pond ("MONT"), NY, via the Harlem River Yard; and (3) to the extent necessary to permit uninterrupted rail freight transportation between CP-160 and/or Selkirk Yard, on the one hand, and, on the other, Fresh Pond, a declaration that, pursuant to 49 U.S.C. 11321(a), Metro-North Commuter Railroad Company, a subsidiary of the Metropolitan Transportation Authority of the State of New York, may grant unrestricted trackage rights over the lines between CP-75 and Mott Haven Junction to a rail carrier other than Conrail or CSX, notwithstanding any provisions of any agreements which purport to limit or prohibit such a grant.

In STB Finance Docket No. 33388 (Sub-No. 72), BDRV and BRW seek: (1) removal of the restriction on certain D&H trackage rights that prevents interchange between D&H and BDRV at Phillipsburg, NJ, and between D&H and BRW at Three Bridges, NJ; (2) a grant of overhead trackage rights to BDRV over lines to be acquired by NS from Phillipsburg, NJ, to Manville, NJ (a distance of 40 miles), or to some other operationally feasible point at which BDRV and CSXT can interchange traffic; (3) a grant of overhead trackage rights to BRW over lines to be acquired by NS from Three Bridges, NJ, to Manville, NJ (a distance of 13 miles), or to some other operationally feasible point at which BRW and CSXT can interchange traffic; and (4) a grant of overhead trackage rights to BDRV and BRW over lines to be acquired by NS between the BDRV-NS connection at Phillipsburg, NJ, and the BRW-NS connection at Three Bridges, NJ (a distance of 29 miles).

In STB Finance Docket No. 33388 (Sub-No. 75), NECR seeks "limited trackage rights": (1) between Palmer, MA, and West Springfield, MA, a distance of 18 miles, over the CRC line to be acquired by CSXT; (2) between West Springfield, MA, on the one hand, and, on the other, Albany, Selkirk, and Mechanicville, NY, a distance of 98 miles, over the CRC line to be acquired by CSXT; and (3) between Albany, NY, and the New Jersey/New York Shared Assets

Area,[10] a distance of 140 miles, over the CRC line located on the west side of the Hudson River that is to be acquired by CSXT.[11]

In STB Finance Docket No. 33388 (Sub-No. 76), ISRR seeks: (1) overhead trackage rights in Indianapolis, IN, between MP 6.0 on ISRR's Petersburg Subdivision and Indianapolis Power & Light's Perry K facility, over the CRC line to be acquired by CSXT; (2) overhead trackage rights in Indianapolis, IN, between MP 6.0 on ISRR's Petersburg Subdivision and Indianapolis Power & Light's Stout facility located on the line of the Indiana Rail Road Company (INRD), over a segment of the CRC line to be acquired by CSXT and a segment of the INRD line; (3) local trackage rights over CRC's lines in Indianapolis, IN, including the Indianapolis Belt Line, to be acquired by CSXT (ISRR seeks trackage rights over all CRC lines in Indianapolis needed to access the 2-to-1 shippers located in Indianapolis); (4) local trackage rights between Indianapolis and Shelbyville, IN, a distance of 27 miles, over the CRC line to be acquired by CSXT; (5) local trackage rights between Indianapolis and Crawfordsville, IN, a distance of 44 miles, over the CRC line to be acquired by CSXT; and (6) local trackage rights between Indianapolis and Muncie, IN, a distance of 55 miles, over the CRC line to be acquired by CSXT.[12]

In STB Finance Docket No. 33388 (Sub-No. 77), IORY seeks: (1) overhead trackage rights over CSXT between East Norwood, OH, and Washington Court House, OH, a distance of 65 miles, with the right to connect at Midland City with IORY's Greenfield branch; (2) local trackage rights between Monroe, OH, and Middletown, OH, a distance of 5 miles, over the CRC line to be acquired by NSR (with the right to connect at Middletown with CSXT and IORY's existing trackage rights through Middletown over the CRC line between Springfield and Cincinnati); (3) local trackage rights between Sidney, OH, and Quincy, OH, a distance of 10 miles, over the CRC line to be acquired by CSXT; (4) local trackage rights between Sharronville, OH, and Columbus, OH, a distance of 125 miles, over the CRC line to be acquired by NSR; (5) local trackage rights between Quincy, OH, and Marion, OH, a distance of 52 miles, over the CRC line to be acquired by CSXT; (6) local trackage rights between Lima, OH, and Fort Wayne,

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[10] The "New Jersey/New York Shared Assets Area" is apparently the area that applicants refer to as the North Jersey Shared Assets Area.

[11] NECR's use of the term "limited trackage rights" is intended to include: (a) the right to operate trains over the lines described in the text; and (b) the right to interchange with all carriers, including shortlines, at all junctions on the lines thus described.

[12] ISRR's use of the term "local trackage rights" is intended to include: (a) the right to operate trains over the lines described in the text; (b) the right to interchange with all carriers, including shortlines, at all junctions on the lines thus described; and (c) the right to serve all shippers, sidings, and team tracks located on the lines thus described.

IN, a distance of 59 miles, over the CRC line to be acquired by CSXT; (7) local trackage rights over CRC's Erie track in Lima, OH; and (8) local trackage rights between Quincy, OH, and Marysville, OH, over the CRC line to be acquired by CSXT.[13]

In STB Finance Docket No. 33388 (Sub-No. 78), AA seeks: (1) "limited trackage rights" between Toledo, OH, and Chicago, IL, via Elkhart, IN, a distance of 230 miles, over the CRC line to be acquired by NS; and (2) a condition permitting AA to interchange traffic with CP Rail System at Ann Arbor, MI.[14]

In STB Finance Docket No. 33388 (Sub-No. 80), W&LE seeks: (1) haulage and trackage rights to Chicago, IL, including access to Belt Railway of Chicago and rights for interchange with all carriers, specifically including WCL;[15] (2) haulage and trackage rights from Bellevue, OH, to Toledo, OH, a distance of 54 miles, for an interchange with the Ann Arbor Railroad, Canadian National, and the Indiana & Ohio Railroad (also including access to British Petroleum for movement of coke to Cressup, WV); (3) haulage and trackage rights to Erie, PA, with the right to interchange with other railroads; (4) the right "to lease to own" CRC's Randall Secondary from Cleveland, MP 2.5, to Mantua, MP 27.5; (5) the right "to lease to own" the Huron Branch (Shinrock to Huron) and Huron dock on Lake Erie; (6) haulage and trackage rights on CSX from Penwood to Brooklyn Junction and its yard facilities for commercial access to PPG and Bayer; (7) access on the Conrail Fort Wayne Line to the National Stone quarry near Bucyrus, via the Spore Industrial Track, a distance of 6.2 miles from CP Colsan, MP 200.5, on the Fort Wayne Line (access to the Fort Wayne line would be from the W&LE at CP Orr, MP 124, and from a point near Fairhope at MP 97.8); (8) trackage rights on the NS Sandusky District from Chatfield, OH, to Colsan, OH (for a junction with the Conrail Fort Wayne Line and access to the Spore Industrial Track); (9) access (apparently via trackage rights) to a stone quarry located on the Northern Ohio Railway at Maple Grove, via a junction on the NS Fostoria District at MP 269.4; (10) access (apparently via trackage rights over, among other lines, the former Conrail Akron Secondary) to the stone terminals in the Macedonia, Twinsburg, and Ravenna areas; (11) access, via haulage and trackage rights, to Wheeling Pittsburgh Steel at Allenport, PA; and (12) access,

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[13] IORY's use of the term "local trackage rights" is intended to include: (a) the right to operate trains over the lines described in the text; (b) the right to interchange with all carriers, including shortlines, at all junctions on the lines thus described; and (c) the right to serve all shippers, sidings, and team tracks located on the lines thus described.

[14] AA's use of the term "limited trackage rights" is intended to include: (a) the right to operate trains over the line described in the text; and (b) the right to interchange with all carriers, including shortlines, at all junctions on the line thus described.

[15] These rights would apparently run between Chicago, on the west, and Carey and/or Bellevue, OH, on the east.

via haulage and trackage rights on the CSX New Castle Subdivision, to the Ohio Edison Power plant at Niles, OH, and to Erie, PA, for interchange to the Buffalo & Pittsburgh. W&LE also requests that provision be made for an inclusion proceeding in the event that W&LE fails during a post-merger oversight period.[16]

In STB Finance Docket No. 33388 (Sub-No. 81), CN and GTW seek trackage rights over the Conrail northbound mainline between approximately MP 16.5 and MP 18.0 at Trenton, MI, a distance of approximately 1.5 miles, for the purpose of serving Detroit Edison's Trenton Channel power plant.

In STB Finance Docket No. 33388 (Sub-No. 83), GTW has filed a notice of exemption under 49 CFR 1150.36 to construct and operate, at Trenton, MI, a connection between the Conrail northbound mainline and the GTW Shoreline Subdivision.

RESPONSIVE FILINGS ACCEPTED. Because the responsive applications filed by NYSEG, EJE/IMRL, LAL, WCL, BLE, IC, RJCW, NYDOT/NYCEDC, BDRV/BRW, NECR, ISRR, IORY, AA, W&LE, and CN/GTW, and also the notice of exemption filed by GTW, are in substantial compliance with the applicable regulations, we are accepting for consideration such responsive applications and such notice of exemption.[17]

PUBLIC INSPECTION. The responsive filings are available for inspection in the Docket File Reading Room (Room 755) at the offices of the Surface Transportation Board, 1925 K Street, N.W., in Washington, DC. The responsive filing made by any particular responsive applicant may also be obtained upon request from that applicant's representative named above.

PROCEEDINGS CONSOLIDATED. The responsive filings in STB Finance Docket No. 33388 (Sub-Nos. 35, 36, 39, 59, 61, 62, 63, 69, 72, 75, 76, 77, 78, 80, 81, and 83) are consolidated for disposition with the primary application in STB Finance Docket No. 33388 (and all embraced proceedings).

COMMENTS MAY BE SUBMITTED. Interested persons may participate formally by submitting written comments regarding any or all of these responsive filings, subject to the filing and service requirements specified above. Such comments (referred to as "Response[s]" in the procedural schedule, see Decision No. 12, slip op. at 26, 62 FR at 39591) must be filed with the

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[16] Various additional W&LE condition requests are scattered throughout the verified statements submitted by W&LE witnesses in the WLE-4 pleading filed October 21, 1997.

[17] We reserve the right to require the filing of supplemental information from any responsive applicant or any other party or individual, if necessary to complete the record in this matter. See Decision No. 12, slip op. at 18 n.29, 62 FR at 39587 n.29.

Board by December 15, 1997. Comments must include the following: the commenter's position in support of or in opposition to the transaction proposed in the responsive filing; any and all evidence, including verified statements, in support of or in opposition to such proposed transaction; and specific reasons why approval of such proposed transaction would or would not be in the public interest.

REQUESTS FOR AFFIRMATIVE RELIEF WILL NOT BE ACCEPTED. Because the responsive applications accepted for consideration in this decision contain proposed conditions to approval of the primary application in STB Finance Docket No. 33388, the Board will entertain no requests for affirmative relief with respect to these responsive applications. Parties may only participate in direct support of or in direct opposition to these responsive applications as filed.

PLEADINGS NOT TREATED AS RESPONSIVE APPLICATIONS. A pleading styled as a "responsive application" was filed on October 21, 1997, in a sub-number docket (Sub-No. 74) under the STB Finance Docket No. 33388 lead docket by Congressman Dennis J. Kucinich. While titled as a responsive application, this pleading does not address the criteria for such applications as required under 49 CFR part 1180. Rather, this pleading constitutes a comment on, and a request for conditions with respect to, the CSX/NS/CR primary application, and we will treat it as such and will docket this pleading in the STB Finance Docket No. 33388 lead docket..

Certain additional pleadings styled as "responsive applications" were filed in the STB Finance Docket No. 33388 lead docket on or about October 21, 1997, by: Jacobs Industries Ltd.; the State of Delaware Department of Transportation; ASHTA Chemicals Inc.; Southern Tier West Regional Planning and Development Board; and Resources Warehousing & Consolidation Services, Inc. Because these pleadings also do not satisfy the 49 CFR part 1180 requirements applicable to responsive applications, we will treat these pleadings as comments on, and/or requests for conditions with respect to, the CSX/NS/CR primary application.

ADDITIONAL PLEADINGS TREATED AS FILED IN LEAD DOCKET. Certain additional pleadings filed on or about October 21, 1997, though not labeled "responsive applications," were filed in various sub-number dockets under the STB Finance Docket No. 33388 lead docket by: Northern Virginia Transportation Commission and Potomac and Rappahannock Transportation Commission (in Sub-No. 37); New Jersey Department of Transportation and New Jersey Transit Corporation (in Sub-No. 38); the Rhode Island Department of Transportation (in Sub-No. 42); Buffalo & Pittsburgh Railroad, Inc., Allegheny & Eastern Railroad, Inc., Rochester & Southern Railroad, Inc., and Pittsburgh & Shawmut Railroad, Inc. (in Sub-Nos. 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, and 56); the Eastern Shore Railroad, Inc. (in Sub-No. 57); Louisville & Indiana Railroad Company (in Sub-No. 64); Housatonic Railroad Company, Inc. (in Sub-No. 70); the Canadian Pacific Railway Company, Delaware and Hudson Railway Company, Inc., Soo Line Railroad Company, and St. Lawrence

& Hudson Railway Company Limited (in Sub-No. 85); and the Commonwealth of Massachusetts (in Sub-No. 86). Because these pleadings contain comments on, and/or requests for conditions with respect to, the CSX/NS/CR primary application, they will be docketed in, and they will be treated as having been filed in, the STB Finance Docket No. 33388 lead docket.

ELECTRONIC SUBMISSIONS. In addition to submitting an original and 25 paper copies of each document filed with the Board, parties are also requested to submit, on diskettes (3.5-inch IBM-compatible floppies) or compact discs, one electronic copy of each such document. Textual materials must be in, or be convertible by and into, WordPerfect 7.0. Spreadsheets must be in, or be convertible by and into, Lotus 1-2-3 Version 7.[18] Each diskette or compact disc should be clearly labeled with the identification acronym and number of the corresponding paper document, see 49 CFR 1180.4(a)(2), and a copy of such diskette or compact disc should be provided to any other party upon request. The data contained on the diskettes and compact discs submitted to the Board will be subject to the protective order applicable to this proceeding,[19] and will be for the exclusive use of Board employees reviewing substantive and/or procedural matters in this proceeding. The flexibility provided by such computer data will facilitate timely review by the Board and its staff.[20]

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The responsive applications in STB Finance Docket No. 33388 (Sub-Nos. 35, 36, 39, 59, 61, 62, 63, 69, 72, 75, 76, 77, 78, 80, and 81), and the notice of exemption in STB Finance

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[18] Parties intending to submit spreadsheets in formats other than Lotus 1-2-3 Version 7 may wish to consult with our staff regarding such submissions. Some (though not all) spreadsheets prepared in other formats, though perhaps not convertible by and into Lotus 1-2-3 Version 7, may nevertheless be useable by our staff. For further information, contact Julia M. Farr, (202) 565-1613.

[19] The protective order governing this proceeding was entered in Decision No. 1 (served April 16, 1997), and has been modified, in minor respects, in Decision Nos. 4, 15, 22, and 46 (served May 2, 1997, August 1, 1997, August 21, 1997, and October 17, 1997, respectively).

[20] The electronic submission requirements set forth in this decision supersede, for the purposes of this proceeding, the otherwise applicable electronic submission requirements set forth in our regulations. See 49 CFR 1104.3(a), as amended in Expedited Procedures for Processing Rail Rate Reasonableness, Exemption and Revocation Proceedings, STB Ex Parte No. 527, 61 FR 52710, 52711 (Oct. 8, 1996), 61 FR 58490, 58491 (Nov. 15, 1996).

Docket No. 33388 (Sub-No. 83), are accepted for consideration, and are consolidated for disposition with the primary application in STB Finance Docket No. 33388 (and all embraced proceedings).

2. The parties shall comply with all provisions as stated above.

3. This decision is effective on November 20, 1997.

Decided: November 12, 1997.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams

Vernon A. Williams
Secretary

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SERVICE DATE - LATE RELEASE NOVEMBER 20, 1997

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

Decision No. 55

Decided: November 20, 1997

This decision addresses four motions (CSX/NS-148, 149, 150, and 151) filed by CSX and NS[1] to treat various responsive applications, filed October 21, 1997, as comments, protests, or requests for conditions. Numerous comments, protests, and requests for conditions were filed with us on or before the October 21, 1997, due date for such filings. A number of responsive applications were also filed on that due date. By the above-referenced motions filed November 10, 1997, applicants CSX and NS ask us to designate as comments the following pleadings filed as responsive applications: New York State Electric and Gas Corporation (NYSEG-14); State of New York and New York City Economic Development Corporation (NYS-11/NYC-10); Jacobs Industries Ltd. (Jacobs); ASHTA Chemicals Inc. (ASHT-11); U.S. Congressman Dennis H. Kucinich; Southern Tier West Regional Planning and Development Board (STW-2); and Stark Development Board, Inc. (SDB-4).[2]

Applicants indicate that the parties referred to in their motions are not rail carriers and do not seek authority from the Board to act on their own behalf. Applicants argue that, because a responsive application seeks affirmative relief on behalf of the entity requesting such relief, the identified parties do not qualify as responsive applicants and the conditions they seek are not

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[1] CSX Corporation (CSXC) and CSX Transportation, Inc. (CSXT) are referred to collectively as CSX. Norfolk Southern Corporation (NSC) and Norfolk Southern Railway Company (NSR) are referred to collectively as NS. Conrail Inc. (CRI) and Consolidated Rail Corporation (CRC) are referred to collectively as Conrail. Conrail did not join in the motions by CSX and NS that are under consideration here. CSX and NS are referred to as applicants for the purposes of this decision.

[2] The motion in CSX/NS-148 is jointly directed to NYSEG-14, NYS-11/NYC-10, Jacobs, and ASHT-11, while CSX/NS-149, 150, and 151 are separately addressed to the filing by Congressman Kucinich, STW-2, and SDB-4, respectively.

properly the subject of responsive applications. According to the applicants, allowing the entities seeking trackage rights in favor of third parties to pursue responsive applications would result in administrative duplication and inefficiency and would be unfair to parties that elected to file comments. CSX and NS assert that "confusion" arising from Board precedent permitting noncarriers to file responsive applications requires us to revisit and overrule the precedent. Applicants also maintain that the submissions in STW-2 and SDB-4 and by Congressman Kucinich and Jacobs fail to comply with our procedural requirements applicable to the filing of responsive applications.

New York State Electric and Gas Corporation, the State of New York, acting by and through its Department of Transportation, and the New York City Economic Development Corporation (jointly NY parties) replied in opposition to the motion in CSX/NS-148. The NY parties contend that applicants' motion is both untimely and contrary to Board precedent that permits noncarriers such as themselves to seek the prescription of trackage rights in favor of a third-party nominee. They also argue that the relief sought by applicants is an attempt to secure procedural advantage by denying them the right to close the evidentiary record on their applications for affirmative relief. In addition, the Southern Tier West Regional Planning and Development Board (STW) has late-filed a reply in opposition to the motion in CSX/NS-150. STW also argues that applicants' motion is untimely and unfounded and that its STW-2 submission complies with the informational requirements of 49 CFR part 1180.[3]

DISCUSSION AND CONCLUSIONS

The motion in CSX/NS-148 will be denied with respect to New York State Electric and Gas Corporation (NYSEG-14) and the State of New York and New York City Economic Development Corporation (NYS-11/NYC-10). Our regulations governing railroad control proceedings define a responsive application as one seeking "affirmative relief either as a condition to or in lieu of the approval of the primary application," including requests for "trackage rights, purchases, construction * * * etc.". 49 CFR 1180.3(h). Nothing in our rules restricts responsive applications for trackage rights to rail carriers, or to a party that "seeks authority for itself to act * * * ". CSX/NS-148 at 5 (emphasis in original). Indeed, the ability of noncarrier parties such as NYSEG and the NY parties to seek the prescription of trackage rights in favor of a nominee is well-established within the rail merger/control context. See 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, SPCSL Corp., and The Denver and Rio

[3] We will accept STW's reply (STW-3) into the record, because doing so will not prejudice any party or cause any delay.

Grande Western Railroad Company, Finance Docket No. 32760, Decision No. 44 (STB served Aug. 6, 1996) slip op. at 232-33; and 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, Decision No. 38 (ICC served Aug. 23, 1995) slip op. at 26 n.34. The responsive applications in NYSEG-14 and NYS-11/NYC-10 comport with our applicable rules and precedent.

Applicants' motions, however, will be granted with respect to the filings by Congressman Kucinich and Jacobs and in ASHT-11, STW-2 and SDB-4. In contrast to NYSEG-14 and NYS-11/NYC-10 it is apparent that these filings do not comply with our procedural and informational requirements applicable to responsive applications, nor have waivers been sought with respect to such requirements. Pursuant to 49 CFR 1180.4(d)(4), a responsive application must comply as fully as possible with appropriate Board regulations, as if it were a free standing primary application. STW and the other parties mentioned above have complied with virtually none of the informational requirements of 49 CFR part 1180. Accordingly, the submissions by Congressman Kucinich and Jacobs and those in ASHT-11, STW-2, and SDB-4, will be treated as comments and requests for conditions.[4]

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. STW-3 is accepted into the record.

2. The motion in CSX/NS-148 is denied with respect to New York State Electric and Gas Corporation (NYSEG-14) and the State of New York and New York City Economic Development Corporation (NYS-11/NYC-10). The motions in CSX/NS-148, 149, 150, and 151 are granted in all other respects. The filings by Congressman Kucinich and Jacobs and the filings in ASHT-11, STW-2, and SDB-4, will be considered comments and requests for conditions.

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[4] See also our discussion in STB Finance Docket No. 33388, Decision No. 54, served and published in the Federal Register on November 20, 1997.

3. This decision is effective on its service date.

By the Board, Chairman Morgan and Vice Chairman Owen.

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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

Decision No. 53

Decided: November 7, 1997

On October 21, 1997, Transtar, Inc., Elgin, Joliet and Eastern Railway Company, and Wisconsin Central Ltd. (referred to collectively as appellants) filed an appeal (designated "EJE-11/WC-11" and referred to herein as EJE-11) requesting that we reverse a discovery order issued by Administrative Law Judge Jacob Leventhal on October 16, 1997. After a hearing on the matter, Judge Leventhal concluded that the 51% stock ownership interest in the Indiana Harbor Belt Railroad Company (IHB) held by Consolidated Rail Corporation (Conrail) did not give Conrail control of the IHB, as that term is used in 49 CFR 1114.30.[1] Appellants ask us to overturn the judge's finding, and compel Conrail to produce information currently within the possession or custody of IHB.

IHB, one of three terminal carriers in Chicago, is owned 51% by Conrail and 49% by Soo Line Railroad Company, d/b/a Canadian Pacific Railway (CP/Soo). Appellants indicate that, subsequent to approval of the primary application, applicants[2] propose that CSX will assume management and dispatching control over the IHB. To determine the impact of the CSX/NS/Conrail transaction on IHB, appellants seek from Conrail information relative to IHB's

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[1] Our discovery rule at 49 CFR 1114.30(a)(1) provides that, in responding to a request to produce documents, a party must produce "any tangible things which are in the possession, custody, or control of the party on whom the request is served * * * ."

[2] CSX Corporation (CSXC) and CSX Transportation, Inc. (CSXT) are referred to collectively as CSX. Norfolk Southern Corporation (NSC) and Norfolk Southern Railway Company (NSR) are referred to collectively as NS. Conrail Inc. (CRI) and Consolidated Rail Corporation (CRC) are referred to collectively as Conrail. CSX, NS, and Conrail are referred to collectively as applicants.

operations, including IHB's contracts with shippers, 100% IHB traffic tapes, density charts, IHB's current timetable, current slow order and track speed documents, yard diagrams, and signal system information. Applicants objected to eight of the ten discovery requests, alleging that Conrail does not exercise control over IHB.

Appellants argue that information regarding IHB's operation is critical to determining the impact of the CSX/NS/Conrail transaction on shippers who depend on IHB for neutral switching services. Appellants contend that, even though Conrail permits IHB to operate independently, Conrail has the ability to control IHB and to acquire documents from IHB. According to appellants, the issue here is not whether Conrail actually wields its controlling powers, but whether Conrail has such powers. Appellants indicate that IHB's president, secretary, and treasurer are all Conrail employees, who work out of Conrail's headquarters in Philadelphia, PA. Appellants cite Winston Network, Inc. v. IHB, 944 F.2d 1351, 1354 (7th Cir. 1991), to support their position.

Appellants refer to other indicia of the relationship between IHB and Conrail: three IHB directors with offices in Philadelphia; IHB executive meetings conducted by telephone from Philadelphia; IHB payments to Conrail for IHB officers' salaries and for administration of IHB pension programs, procurement, insurance, property taxes, and corporate tax and property accounting; IHB bank accounts and certificates of deposit in Philadelphia; and IHB corporate seal, articles of incorporation, bylaws, and board of directors' minutes in Philadelphia. Appellants contend that the following Board decisions recognize Conrail's controlling interest in IHB: Decision No. 12, served July 23, 1997, slip op. at 8 (NS and CSX will be "parties controlling the controlling shareholder in the Indiana Harbor Belt Railway . . ."); Rio Grande Ind., Inc.--Pur. & Track.--Soo Line R. Co., 6 I.C.C.2d 854, 863 n.9 (1990) ("Conrail now owns, and will continue to own a 51 percent controlling interest in IHB"); and Indiana Harbor Belt Railroad Company--Acquisition of Line of Chicago And Western Indiana Railroad Company--Exemption from 49 U.S.C. 11343, Finance Docket No. 31148 (ICC served Sept. 22, 1988) slip op. at 2 ("Conrail, which controls IHB . . .").

Applicants reply that the appeal is moot because appellants concede that they cannot use the documents, and that it is premature because Judge Leventhal has not had an opportunity to rule on all objections raised to appellants' discovery requests. According to applicants, appellants have not remotely met our stringent standard for reversing discovery rulings because

they have not shown that the requests meet the tests of relevance, need, burden, and confidentiality. Nor, applicants maintain, have appellants shown that the judge would have committed reversible error if he had concluded that those standards had not been met. Applicants maintain that discovery is sought from the wrong party and that the requests should have been addressed to IHB itself, which is a separately represented party of record in this proceeding. Applicants argue that, given the particular circumstances of the Conrail/IHB relationship, neither IHB nor IHB documents should be deemed within Conrail's control merely because of Conrail's 51% ownership of IHB stock.

DISCUSSION AND CONCLUSIONS

Appeals from discovery decisions issued by Judge Leventhal will be granted only "in exceptional circumstances to correct a clear error of judgment or to prevent manifest injustice." 49 CFR 1115.1(c). See Decision No. 6, slip op. at 7, 62 FR 29387, 29390 (May 30, 1997). Judge Leventhal's finding that Conrail's 51% ownership of IHB's outstanding stock does not provide Conrail with "control" over IHB, as that term is used in 49 CFR 1114.30, constitutes neither a clear error of judgment nor manifest injustice. Because Judge Leventhal's conclusion is supported by the evidence of record, the appeal will be denied.

Appellants seek commercially sensitive, competitive and confidential material, including all IHB contracts with shippers and 100% IHB traffic tapes.[3] We recently stated the governing standards for such discovery requests in Decision Nos. 34 and 42:

> [T]he standard against which the relevance of commercially sensitive information is judged is necessarily higher than the standard against which the relevance of less sensitive information is judged. Disclosure of extraordinarily sensitive information should not be required without a careful balancing of the seeking party's need for the information, and its ability to generate comparable information from other sources, against the likelihood of harm to the disclosing party. See Decision No. 34, slip op. at 2 n.9; Decision No. 42, slip op. at 8.

Appellants fail to demonstrate that they require the IHB information from applicants. The documents and information that appellants seek are the property, and within the control, of IHB. IHB has been a party of record in this proceeding since June 27, 1997, a status noted in our Decision No. 21, served August 19, 1997, at 12. Because the information sought by appellants

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[3] With the exception of its shipper contracts and traffic tapes, IHB voluntarily tendered to appellants the other operating information they sought through discovery. See applicants' reply, Exh. C.

relates exclusively to IHB, appellants could have made timely requests to IHB for discovery months ago. IHB could then have voiced its own concerns about relevance, burden, and confidentiality, and the parties could have explored alternative means of providing relevant information that was requested. However, appellants made no timely attempt to secure this discovery from IHB. Absent a showing that these documents would have been unavailable upon timely discovery to IHB, appellants have failed to show that they need to obtain them from or through applicants. Indeed, appellants have not demonstrated any substantial need for the particular documents, and certainly not the compelling need required to justify discovery of sensitive documents such as shipper contracts and traffic tapes.

Appellants also fail to demonstrate that Judge Leventhal's substantive finding was erroneous. IHB operates a separate railroad with over 800 employees from its offices in Hammond, IN. Its labor agreements are separate from those governing Conrail employees, and are separately negotiated by IHB. Its day-to-day operations are under the direction and control of a general manager who is an IHB employee. IHB operates as a switching carrier for most major railroads operating from and to the Chicago area. The commercial relationships of Conrail and IHB as interconnecting railroads are governed by agreements negotiated at arm's length, as they are with other railroads with whom IHB connects. Conrail does not dictate to or unilaterally exercise dominion over IHB.

IHB is a railroad operated independently of the applicants. Conrail owns 51% of IHB's common stock. The remaining 49% is owned by CP/Soo. CP/Soo competes with Conrail, CSX, and NS, and is a party of record in this proceeding. As CP/Soo's counsel stated at the discovery conference, CP/Soo agrees that discovery of IHB documents and personnel cannot be made through Conrail. Transcript at 8-9, 53-55. Appellants omit any reference to CP/Soo's position, which was a factor in Judge Leventhal's decision. Thus, in denying appellants' discovery request, the judge expressly considered CP/Soo's interest in IHB as well as CP/Soo's opposition to appellants' current discovery request. Transcript at 57. In these circumstances, appellants have failed to make the requisite showing for overturning Judge Leventhal's decision.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The EJE-11 appeal from Judge Leventhal's October 16, 1997 order is denied.

2. This decision is effective on its service date.

By the Board, Chairman Morgan and Vice Chairman Owen.

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SERVICE DATE - LATE RELEASE NOVEMBER 3, 1997

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

Decision No. 52

Decided: November 3, 1997

As requested by the United States Department of Transportation (DOT) in its filing on October 21, 1997, in this proceeding (DOT-3) at pages 4-6, we have decided to require Applicants[1] to prepare Safety Integration Plans (SIPs) that address the concerns set forth in the verified statement of Edward R. English included with DOT's submission. That verified statement and Applicants' SIPs will be made a part of the environmental record and dealt with through the environmental review process. This is consistent with the Board's practice of treating safety matters in its environmental review of the proposals that come before it. We anticipate that DOT, as well as other interested parties, will analyze the Applicants' SIPs and give us the benefit of their views on the adequacy of Applicants' plans.

Specifically, we will require Applicants to file these SIPs with the Board 30 days from the date of service of this decision. These SIPs will be incorporated as a separate section of the Draft Environmental Impact Statement (EIS) to facilitate participation by commenters desiring to address only the adequacy of Applicants' SIPs. To accommodate inclusion of this material in the Draft EIS, and because of the late receipt of information necessary to prepare a sufficiently complete Draft EIS (e.g., receipt of the Errata and Supplemental Environmental Report approximately 9 weeks after the filing of the Application and Environmental Report), service of

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[1] CSX Corporation (CSXC) and CSX Transportation, Inc. (CSXT) are referred to collectively as CSX. Norfolk Southern Corporation (NSC) and Norfolk Southern Railway Company (NSR) are referred to collectively as NS. Conrail Inc. (CRI) and Consolidated Rail Corporation (CRC) are referred to collectively as Conrail. CSX, NS, and Conrail are referred to collectively as Applicants.

the Draft EIS, which had been scheduled for November will not occur until the latter part of December. The 45 day period for comment on the Draft EIS will commence upon the service of the Draft EIS. We anticipate that the comment period will end in early February. Given the additional time required to issue the Draft EIS with the SIPs, we must extend the time accordingly for our Section of Environmental Analysis (SEA) to complete the EIS process and to ensure that the Board has adequate time to consider fully the environmental record in arriving at its decision in this proceeding. As a result, the Final EIS, which had been scheduled for service in early April 1998, will now be served in May of 1998.

These changes, in turn, will require the following modifications to our overall schedule for processing the applications as set forth in Decision Nos. 6 and 12 in this proceeding.[2] Oral argument will now be held on June 4, 1998, to be followed by a voting conference on June 8, 1998. Our final written decision will be served on Thursday, July 23, 1998. The remainder of the current procedural schedule, including the date for filing the parties' briefs will not be affected.

We recognize that our decision today results in extending the previously established schedule by 45 days. However, we have concluded that this delay is necessary to permit us to give safety concerns full consideration as warranted by this proceeding.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Applicants CSX and NS, and Conrail, to the extent it will be responsible for operation in the Shared Assets Areas, shall file Safety Integration Plans in conformity with the request of the United States Department of Transportation in DOT-3 in this proceeding, as more

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[2] Served on May 30, 1997, and on July 23, 1997, respectively.

specifically detailed in the verified statement of Edward R. English, within 30 days of the date of service of this order.

2. Responses to Applicants' SIPs shall be made as comments to the Draft EIS, which will be served by the end of the year. Comments on the Draft EIS will be due 45 days from the date of service of that document.

3. Oral Argument will be held on June 4, 1998.

4. The Board will hold a voting conference on June 8, 1998.

5. The final written decision will be served on July 23, 1998.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams

Vernon A. Williams

Secretary

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

Decision No. 51

Decided: October 30, 1997

This decision addresses the ACE-17 motion in limine[1] filed October 9, 1997, by movants,[2] and the reply filed October 15, 1997, by applicants.[3] In their motion in limine, movants ask us to issue an order limiting applicants' presentation of evidence in rebuttal to the comments and evidence that movants intend to file in this proceeding. Movants request an order imposing limitations on the scope of applicants' rebuttal in response to limitations that movants allege were imposed on them during the discovery process.

BACKGROUND

On July 3, 1997, movants served on applicants certain discovery requests asking for virtually all documents concerning coal shipments and coal rate negotiations by applicants for the years 1978 through the present. Applicants objected to the document requests, claiming that they were overbroad, burdensome, and not likely to lead to the discovery of admissible evidence. In Decision No. 11, served July 18, 1997, Judge Leventhal determined that at least some of the documents were relevant, but limited discovery to: (a) a certain number of years for each applicant; (b) Conrail-served destinations only; and (c) information related only to movants' plants. Movants appealed the judge's decision. In Decision No. 17, served August 1, 1997, we affirmed Judge Leventhal's limits on discovery, finding that the information and documents sought by movants, but excluded by Judge Leventhal, would not assist us in our decision in this proceeding.

In their second set of interrogatories and document requests, served September 4, 1997, movants asked applicants to produce their revenue masking factors applicable to the so-called "1% Waybill Samples" filed with the Board for the years 1978 through the present. Over applicants' objections, Judge Leventhal required the production of revenue masking factors for

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[1] A motion in limine is usually made before or after the beginning of a jury trial for a protective order against prejudicial questions and statements. The purpose of the motion is to avoid injection of irrelevant, inadmissible or prejudicial matters into the trial. Black's Law Dictionary 914 (5th ed. 1979). Movants designated the motion in limine as "ACE, et al.-17," but it is referred to herein as ACE-17.

[2] Atlantic City Electric Company, American Electric Power, Delmarva Power and Light Company, and Indianapolis Power and Light Company are referred to collectively as movants. A fifth party, The Ohio Valley Coal Company, participated with movants in prior discovery proceedings, but has not joined in the motion considered here.

[3] CSX Corporation (CSXC) and CSX Transportation, Inc. (CSXT) are referred to collectively as CSX. Norfolk Southern Corporation (NSC) and Norfolk Southern Railway Company (NSR) are referred to collectively as NS. Conrail Inc. (CRI) and Consolidated Rail Corporation (CRC) are referred to collectively as Conrail. CSX, NS, and Conrail are referred to collectively as applicants.

the years applicants were required to divulge with respect to movants' first discovery request. However, in Decision No. 42, served October 3, 1997, we reversed the judge's decision and denied the discovery request, finding that the disclosure of the masking factors would undermine our policies with respect to the confidentiality of the Waybill Samples. See Decision No. 42, slip op. at 7. We also found that the information sought by movants was not shown to be relevant to any legitimate issue in the proceeding. Id.

Although movants disagree with our rulings on the two discovery requests, they contend that applicants' rebuttal submission should be limited in the manner, and to the extent, their discovery requests were restricted in Decision Nos. 11, 17, and 42. Movants specifically request that applicants not be allowed to introduce, in their rebuttal in support of the application, any documentary evidence or information that movants were precluded from examining as a result of the limitations imposed by Judge Leventhal or by us.

Movants argue that a limitation of this sort will not harm applicants because applicants have argued that the information and documents excluded by Judge Leventhal or by us are not relevant to the issues in this proceeding. According to movants, such an order would place the same limitation on applicants that was imposed on them and will preserve procedural due process in the proceeding. Movants contend that a Board order is warranted now to give the parties appropriate notice of the scope of the evidentiary foundation for coal rate issues, the so-called acquisition premium, and jurisdictional threshold matters, so that the parties may prepare their pleadings accordingly. Movants maintain that granting their relief is also appropriate because it would relieve them of the allegedly inadequate alternative of moving to strike evidence that permeates applicants' rebuttal and is impossible to ignore or extricate.

Applicants oppose the motion in limine. Applicants contend that movants seek to prevent us from considering potentially probative evidence simply because movants have filed an overly broad discovery request. Applicants argue that granting movants' motion would encourage in the future unreasonably broad discovery requests, the denial of which could be used by a requester to limit the introduction of evidence by the other party. According to applicants, rather than adopting movants' position, which would preclude the introduction of evidence before its probative value or prejudicial effect could be determined, we should delay any such ruling until comments and supporting evidence, and any rebuttal filings, are considered. Applicants believe that there is no reason that such an approach would not adequately protect the interests of all parties to this proceeding.

DISCUSSION AND CONCLUSIONS

The motion in limine will be denied. So far as we are aware, there is no precedent for granting, or even considering, a motion in limine in Board proceedings. Federal district courts have the ability to exclude evidence in limine pursuant to their power to manage trials, particularly jury trials. Luce v. United States, 469 U.S. 38, 41 n.4 (1984). The use of the motion in limine in federal courts takes two forms. See 21 Wright & Graham, Federal Practice and Procedure: Evidence §5037 (1997). The first of these forms, which Wright and Graham call the "prophylactic motion," is specifically authorized by Federal Rule of Evidence 103(c) and relates

to jury trials only. See id.; Fed. R. Evid. 103(c).[4] This sort of prophylactic use of preventing evidence from being heard by a jury is not relevant in a bench trial or, as here, in a regulatory proceeding.

The other recognized use of a motion in limine is to "procure a definitive ruling on the admissibility of evidence at the outset of the trial." See 21 Wright & Graham, supra. However, this proceeding is not a trial. Such use is not specifically authorized by either the Federal Rules of Civil Procedure or the Federal Rules of Evidence. Id. Even when motions in limine are used by courts for this purpose, they have recognized that "[m]otions in limine are disfavored"[5] and evidence should be excluded "only when evidence is clearly inadmissible on all potential grounds."[6] When discussing motions in limine, courts have repeatedly stated that evidentiary rulings should be deferred until there is a more concrete evidentiary record, so that questions of foundation, relevancy and potential prejudice may be resolved in proper context." Id.[7]

In fact, this approach was taken by the Southern District of New York in a case cited by movants in support of their motion. See ACE-17 at 4; Wagschal v. Sea Ins. Co. Ltd., 861 F. Supp. 263, 265 (S.D.N.Y. 1994). In Wagschal, the court actually denied a motion in limine, stating that:

> "[i]t is difficult for the court to weigh the probative prejudicial balance before the commencement of a trial" (quoting East Coast Novelty Co. v. City of New York, 842 F. Supp. 117, 119 (S.D.N.Y. 1994). This motion in limine is therefore denied * * * with leave to renew the motion at such time as the precise use of the evidence and any prejudice resulting therefrom is made clear.

As noted above, motions in limine are generally disfavored, particularly in proceedings tried without a jury, and are typically considered only after extensive pretrial proceedings in which the contentions of the parties have been spelled out in substantial detail. At the time movants filed their motion, there has been little or no indication of the positions that the various

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[4] Our Rules of Practice expressly permit us to consider probative evidence that otherwise would be inadmissible in a jury trial. 49 CFR 1114.1. Moreover, the Supreme Court has made clear that the rules on exclusion of evidence in a jury trial do not apply in administrative proceedings. See Opp Cotton Mills v. Administrator, 312 U.S. 126, 155 (1941) ("[I]t has long been settled that the technical rules for the exclusion of evidence applicable in jury trials do not apply to proceedings before federal administrative agencies in the absence of a statutory requirement that such rules are to be observed."). See also ICC v. Louisville & Nashville R.R. Co., 227 U.S. 88, 93 (1913) ("The Commission is an administrative body and, even where it acts in a quasi-judicial capacity, it is not limited by the strict rules, as to admissibility of evidence, which prevail in suits between private parties.").

[5] See McClain v. Anchor Packing Co., 1996 WL 164385, *1 (N.D. Ill. 1996) (granting in part and denying in part a motion in limine in a jury trial).

[6] See Hawthorne Partners v. AT&T Technologies, Inc., 831 F. Supp. 1398, 1400 (N.D. Ill. 1983).

[7] See also Jonasson v. Lutheran Child and Family Services, 115 F.3d 436, 440 (7th Cir. 1997) ("Some evidentiary submissions, however, cannot be evaluated accurately or sufficiently by the trial judge in such a procedural environment. In these instances, it is necessary to defer ruling until during trial"); United States v. Rusin, 889 F. Supp. 1036, 1038 (N.D. Ill. 1995) (citing Hawthorne); Roberts v. Charter Nat'l Life Ins. Co., 105 F.R.D. 492, 493 (S.D. Fla. 1985) ("When these rulings are made at the time the exhibit is offered in evidence, the trial judge has the benefit of full development of all relevant facts constituting the introductory predicate for admission of the item or statement. Motions in limine rarely provide this factual background.").

opposing parties in this case, including movants, may take. Movants are, in effect, asking us to rule on the motion without full knowledge of what issues and supporting evidence are actually in dispute in this proceeding.[8] Thus, until we review the comments of the parties and applicants file their rebuttal to movants' position, it would be premature and inappropriate to foreclose applicants in the way sought by movants.

To the extent that movants believe that they have been unfairly prejudiced by the use of evidence by applicants in their rebuttal filing, movants may file a motion to strike after the rebuttal is filed. This will permit us to make a determination with the benefit of all of the facts before us. See, e.g., Ashley Creek Phosphate Co. v. Chevron Pipe Line Co., No. 40131 (Sub-No. 1) (STB served Oct. 30, 1996) (denying motion to strike surrebuttal materials); Union Pacific RR. Co.–Aban.–Wallace Branch, ID, 9 I.C.C.2d 496, 497 (1993) (granting motion to strike new evidence); International Brotherhood of Electrical Workers, 9 I.C.C.2d 1241, 1244 (1993) (denying motion to strike, but accepting movant's petition to reopen into the record); CSX Transportation, Inc.–Abandonment–In Jasper County, SC, Docket No. AB-55 (Sub-No. 469) (ICC served Dec. 10, 1993) (denying motion to strike railroad's real estate appraisal). There is no indication that these procedures have not fairly protected the interests of all parties in past proceedings or that it would be inappropriate under the circumstances of the present proceeding.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The ACE-17 motion in limine is denied.

2. This decision is effective on its service date.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams

Vernon A. Williams
Secretary

[8] While it is true that responsive applications, comments, and requests for conditions were filed on October 21, 1997, movants' submission is one of many that have been filed. We have just begun our review of those voluminous pleadings. Moreover, we have not yet determined whether those filings, including movants', are acceptable under our consolidation rules.

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SEC

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

Decision No. 50

Decided: October 24, 1997

Under the procedural schedule governing this proceeding, all responsive (including inconsistent) applications, all comments, protests, requests for conditions, and any other opposition evidence and argument were due by October 21, 1997. See Decision No. 6, served May 30, 1997, slip op. at 9; Decision No. 12, served July 23, 1997, slip op. at 26. The Board has received requests for extensions of the filing time from the Commonwealth of Massachusetts (Massachusetts) and the Ann Arbor Railroad (Ann Arbor).

By letter dated October 21, 1997, Massachusetts states that it intends to file comments in this proceeding. Massachusetts states that it has been in active negotiations with CSX Corporation and CSX Transportation, Inc., on substantive issues, and has reached agreement in most areas, but that several points remain to be resolved. Massachusetts requests an extension of time of not more than 10 days to complete the filing with the Board.

By letter (designated AA-4) dated October 21, 1997, Ann Arbor requests a two week extension to November 4, 1997, to file comments, requests for conditions and a responsive application. Ann Arbor requests this extension to allow it more time while it is negotiating a settlement with applicants. Ann Arbor states that this extension is needed because it is a Class III railroad with limited resources, and was unable to dedicate the resources necessary to prepare comments, requests for conditions, and a responsive application while in the process of negotiations with applicants.

By reply dated October 23, 1997 (CSX/NS-117), applicants replied in opposition to Ann Arbor's extension request. Applicants state that while negotiations between Norfolk Southern Corporation and Norfolk Southern Railway Company (collectively, NS) and Ann Arbor only recently concluded, the extent of the negotiations was not more intensive than negotiations NS had with other parties during that same time period, none of whom has requested an extension. Applicants also note that they have 55 days to file rebuttal to the scores of submissions that have been filed and that a 14-day extension significantly reduces applicants' time to analyze and prepare responses to Ann Arbor's comments, responsive application, and any supporting evidence. Applicants further state that granting the requested extension will prejudice their ability to timely put in place their plans for preparing the most thorough and responsive rebuttal filing.

The extension requests, though belated, are reasonable if they are limited to 10 days. Therefore, we will grant a 10-day extension (to October 31, 1997) for the filing of the requested pleadings by Massachusetts and Ann Arbor. No further extensions are contemplated.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Massachusetts and Ann Arbor have until October 31, 1997, to file the pleadings that were due on October 21, 1997.[1]

2. This decision is effective on the date of service.

By the Board, Vernon A. Williams, Secretary.

Vernon A. Williams
Secretary

[1] The pleadings due on October 31, 1997, must be filed with the Board by **5:00 p.m. on October 31, 1997**.

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SERVICE DATE - OCTOBER 23, 1997

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STB Finance Docket No. 33388

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NORFOLK SOUTHERN CORPORATION AND
NORFOLK SOUTHERN RAILWAY COMPANY
–CONTROL AND OPERATING LEASES/AGREEMENTS–
CONRAIL INC. AND CONSOLIDATED RAIL CORPORATION

Decision No. 41

Decided: October 21, 1997

In Decision No. 33 in this proceeding, served September 17, 1997, we granted the petition for waiver or clarification filed by New Jersey Transit Corporation (NJT). In doing so, we agreed with NJT that it was not required to file a responsive application for the commuter rail operating rights that it intends to seek as conditions to the transaction proposed by applicants[1] because those operating rights would not ordinarily require our authorization. However, we also found that, because NJT's anticipated conditions could raise environmental issues, NJT must file, by October 1, 1997, either: (1) a verified statement that the proposed operations will have no significant environmental impact; or (2) an environmental report containing detailed environmental information regarding the proposed operations. We advised NJT to consult with our Section of Environmental Analysis (SEA) as early as possible regarding the appropriate environmental documentation.

On October 1, 1997, NJT filed a verified statement of its manager of environmental services, Steven M. Jurow, and a petition for clarification of Decision No. 33.[2] NJT indicates the Jurow verified statement explains that each of NJT's proposed passenger rail projects would require extensive environmental review under either federal or state law as a prerequisite to construction and operation. In view of this prospective environmental review, NJT asserts that we do not need to conduct additional environmental review of its proposed commuter operations. NJT asks us to confirm that the Jurow verified statement comports with the intent of Decision No. 33, by providing SEA with requisite information to facilitate the environmental review process.

Applicants argue that NJT's clarification request should be denied because NJT failed to comply with Decision No. 33. Applicants contend that the alternative environmental review processes described in the Jurow verified statement would not apply if NJT chose not to accept federal funds for its passenger operations or, in the case of environmental oversight by the state, if NJT's proposed operations occurred over existing railroad facilities. Applicants question the relevance or justification for NJT's proposed conditions and maintain that we would ignore our environmental review responsibilities if we granted NJT's clarification request.

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[1] "Applicants" refers to CSX Corporation, CSX Transportation, Inc. (collectively with their wholly owned subsidiaries, CSX), Norfolk Southern Corporation, Norfolk Southern Railway Company (collectively with their wholly owned subsidiaries, NS), Conrail Inc., and Consolidated Rail Corporation (collectively, Conrail). By application filed June 23, 1997, applicants seek approval and authorization under 49 U.S.C. 11323-25 for: (1) the acquisition by CSX and NS of control of Conrail, and (2) the division of Conrail's assets by and between CSX and NS.

[2] NJT's verified statement and petition for clarification are designated, respectively, NJT-5 and NJT-6.

DISCUSSION AND CONCLUSIONS

To allow us to fulfill our responsibilities under the National Environmental Policy Act (NEPA) and other environmental laws, we require responsive applicants to submit certain environmental information before, or at the time, they submit their applications. See Decision No. 6, slip op. at 3-4, 62 FR at 29388-89. Accordingly, to facilitate the environmental review process, responsive applicants must file either (1) a verified statement that the inconsistent or responsive application will have no significant environmental impact, or (2) a responsive environmental report that contains detailed environmental information regarding the inconsistent or responsive application.[3] Although we found in Decision No. 33 that NJT need not file a responsive application, we required that it make a comparable environmental submission as if it were a responsive applicant so that we could comply with NEPA and related laws.

NJT's requested clarification will be denied. We believe that, if we were to grant NJT's request, we would, as applicants argue, lack the information we need to meet our environmental review responsibilities. Moreover, we cannot defer environmental review of a proposed condition because conditions are self-executing, not permissive. Therefore, we will provide NJT 10 days from the service date of this decision to file an environmental submission (either a verified statement that the proposed operations will have no significant environmental impact or an environmental report containing detailed environmental information regarding the proposed operations) as if it were a responsive applicant. If NJT does not provide adequate environmental information, it will be impossible for us to complete the appropriate underlying environmental review of NJT's requested conditions.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. NJT's petition for clarification is denied. Within 10 days from service of this decision, NJT must file an environmental submission (either a verified statement that the proposed operations will have no significant environmental impact or an environmental report containing detailed environmental information regarding the proposed operations).

2. The request (ASHT-8) by ASHTA Chemicals Inc., for a 5-day extension of time to file its verified statement of no significant impact, is granted.

3. This decision is effective on the date of service.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams

Vernon A. Williams
Secretary

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[3] In a request filed October 2, 1997, prospective responsive applicant ASHTA Chemicals Inc., seeks an extension of time to October 6, 1997, to file a verified statement of no significant impact. This request will be granted.

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